Case Nos. 13-AA-366 – 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, et al.

Intervenors.

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

BRIEF OF PETITIONERS AND INTERVENOR EASTERN MARKET METRO COMMUNITY ASSOCIATION

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PETITIONERS' CERTIFICATE AS TO PARTIES, AMICI AND COUNSEL

Pursuant to D.C. App. R. 28(a)(2), Petitioners Christopher Howell, et al. and Intervenor Eastern Market Metro Community Association hereby submits the following Certificate as to Parties, Amici and Counsel.

Parties and Amici Before the Zoning Commission. Stanton-EastBanc LLC was the Applicant, represented by Greenstein DeLorme & Luchs, P.C. Additional parties included: 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 Donna Murasky. Stanton-EastBanc LLC intervened on behalf of Respondent, and is represented by Greenstein DeLorme & Luchs, P.C..

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Zoning Commission ("Commission") approved an application for a Planned Unit Development ("PUD") to be located directly across from Eastern Market, in the heart of the Capitol Hill Historic District, and a related map amendment to accommodate the increased height and density of the proposed development. Rising 7 stories and 94.5 feet at its tallest, the PUD will be more than twice as tall and more than twice as dense as the maximum height and density permitted under the current zoning in this Neighborhood Conservation Area. It will tower over the two- and three-story row houses and low-rise commercial buildings surrounding it. The PUD will also substantially decrease the open public space in the community, and privatize an entire block of C Street. These and other adverse effects could be avoided, without diminishing the proffered benefits and amenities, if the PUD were designed to a scale and density consistent with the existing neighborhood, as required by law. The issue presented for review is:

> Whether the Commission's decision to approve the PUD and related map amendment, despite its excessive size, density and incompatibility with the character of the historic neighborhood where it will be located, is arbitrary, capricious, or otherwise contrary to law?

STATEMENT OF THE CASE

Petitioners are 13 residents of the Eastern Market neighborhood of Capitol Hill, who live next to or nearby the site of the proposed PUD. They have lived in the community for years or even decades, while raising children, pursuing careers, and in some cases, retiring. They chose to make their home in Eastern Market because they cherish its unique character, which combines the familiarity, warmth and charm of a small town with the historic beauty and significance of the nation's capital. In this case, they seek to protect their community from the irrevocable harm it will sustain if the PUD is permitted in its present form, including the harm to the historic

character of their neighborhood.

Petitioners are joined in this appeal by Intervenor Eastern Market Metro Community Association ("EMMCA," and collectively with Petitioners, "Petitioners"). EMMCA was a party to the proceedings before the Commission. EMMCA's purpose is "to promote the civic interests and enhance the quality of life of residents of the District of Columbia, especially within the neighborhood surrounding the Eastern Market Metro," and specifically includes "preserving the historic, architectural and aesthetic value of property and objects within the Eastern Market Metro neighborhood."

Petitioners do not oppose redevelopment of the Hine School site, where the PUD is to be located. On the contrary, they support it. Since 2008, when initial discussions for redevelopment of the site began, they have actively participated in the process, and supported a variety of proposals for reasonable, mixed use residential and commercial developments that would be compatible with the scale and character of the existing neighborhood. What Petitioners oppose is the PUD in its present form, which violates both the letter and the spirit of the Zoning Regulations, the District of Columbia Comprehensive Plan and other applicable laws. Thus, joined by hundreds of their neighbors who submitted letters or signed community-group appeals opposing the PUD, Petitioners raised their concerns before the Commission.

Chief among the issues Petitioners raised is the obvious incompatibility of the PUD's scale and density with the established character and prevailing development pattern of their community. Despite the extreme disparity between the height of the PUD and the surrounding buildings and homes, however, the Commission almost ignored the issue entirely, summarily concluding that "A PUD related C-2-B zoning for the site would not be inconsistent with the

Comprehensive Plan." JA 43. On that basis alone, the Commission approved a PUD with heights and densities at least double that of the surrounding properties.

The Commission's treatment of Petitioners' arguments relating to the Comprehensive Plan and other contested issues was similarly perfunctory. For example, in opposing the contemplated privatization of an entire block of C Street, Petitioners relied on the Comprehensive Plan directive that public property should be retained under public control. The Commission flatly rejected that objection, based on the false assertion that the privatization of a public street "does not implicate any of the standards for granting a PUD." JA 56. And with respect to the PUD's incompatibility with the established character of the surrounding neighborhood, the Commission reached a conclusion bordering on incoherent: "Although the overall design is contemporary, the Project enhances the character of the Capitol Hill Historic District." JA 32. In keeping with this pattern, the Commission summarily dispensed with Petitioners' objection that the PUD would cut the size of the Flea Market by more than half. "The Commission finds the layout of the Flea Market to be acceptable for purposes of the PUD Application," it concluded. JA 55.

Finally, Petitioners raised multiple objections to the "affordable housing" provisions contained in the PUD application, and their deviation from the mandatory requirements imposed by the District's Inclusionary Zoning ("IZ") regulations. For example, Petitioners opposed Stanton-EastBanc's proposal to segregate the vast majority of affordable housing units in the North Building, which is designed with considerably fewer amenities and substantially smaller unit sizes. Even more problematic – and in apparent violation of the IZ regulations – the segregated affordable housing units expire in 40 years, at which point they become market-rate

units. Thus, while the PUD might delay the outcome, it directly contravenes the general policies of the IZ regulations, including "ensuring the benefits of economic integration for the residents of the District." 11 DCMR 2600.3(e). The Commission nonetheless lauded the North Building for its unspecified "noteworthy amenities," without even addressing the inevitable consequences of expiring affordability, which will be felt especially keenly by the seniors on fixed-incomes who may be turned out of their homes in 40 years. JA 54.

STATEMENT OF FACTS

The Proposed Map Amendment and Its Incompatibility with the Scale and Character of the Existing Community

The PUD is to be located on Lot 801 in Square 901 (the "Property"), directly across from Eastern Market in the heart of the Capitol Hill Historic District, less than half a mile from the United States Capitol. JA 1. It is bounded by Pennsylvania Avenue, S.E. and a small portion of D Street, S.E. on the south, an east-west public alley on the north, 7th Street, S.E., on the west, and 8th Street, S.E., on the east. JA 2. The Property is currently owned by the District of Columbia, and a portion of it is improved with the Hine Junior High School building, which will be razed and replaced with the PUD. JA 22.

On the District of Columbia Comprehensive Plan's Future Land Use Map ("FLUM"), the Property is designated as Mixed-Use Moderate-Density Residential/Moderate-Density Commercial. JA 2. The Moderate Density Residential designation is used to define the District's row house neighborhoods, as well as its low-rise garden apartment complexes, and may also apply to areas characterized by a mix of single family homes, 2-4 unit buildings, row houses, and low-rise apartment buildings. *See* 10 DCMR § 225.4. The Moderate Density Commercial designation is used to define shopping and service areas that are somewhat more intense in scale

and character than the low-density commercial areas, and is predominantly characterized by retail, office, and service businesses. *See* 10 DCMR § 225.9. Buildings in such areas "generally do not exceed five stories in height." *Id.* (emphasis added).

The lots adjacent to the Property to the east and northeast, including those facing the Property directly across 8th Street, are all zoned R-4 and consist of two and three-story historic row houses. JA 868. The lots facing the Property on the 7th Street side are similar in scale, also consisting of two and three-story buildings. These lots are zoned C-2-A, within the Capitol Hill Commercial (CHC) Overlay zone, and include ground floor retail with office or residential use on the floors above. JA 868. The historic Eastern Market is located to the northwest of the Property, also zoned C-2-A. To the south, on the other side of Pennsylvania Avenue, is the Eastern Market Metro Station, and beyond that the 8th Street Barracks Row area. JA 868. Not a single lot for more than a half mile surrounding the Property is zoned C-2-B.

The PUD and related map amendment would rezone the Property from R-4 to C-2-B PUD. JA 23. Property zoned R-4 is designed to include areas "developed primarily with row dwellings," some of which may have been converted to dwellings for two or more families. 11 DCMR § 330.1 Buildings in R-4 zones are limited to a maximum height of 40 feet and 3 stories, with a maximum Floor to Area Ratio ("FAR") of 1.8. *See* 11 DCMR §§ 400.1, 402.2, 402.4. The C-2-B zone, by contrast, is intended to accommodate "high-density residential and mixed uses." 11 DCMR § 720.6. A PUD located in a C-2-B zone therefore may be as tall as 90 feet, with an FAR of 6.0. *See* 11 DCMR §§ 2405.1, 2405.2.

In addition to being within the Capitol Hill Historic District, the Property is also designated as a Neighborhood Conservation Area on the District of Columbia Comprehensive

Plan's Generalized Policy Map. JA 44. The goal of such a designation is to "conserve and enhance existing neighborhoods." JA 44. Thus, while "limited development and redevelopment opportunities" may be available, "they are small in scale." JA 44 (emphasis added). Further, any new development should be "compatible with the existing scale and architectural character" of the community. JA 44 (emphasis added).

The Proposed PUD and Its Incompatibility with the Scale and Character of the Existing Community

The PUD would raze the Hine School building currently located on the Property and replace it with two separate buildings, a large "South Building" and a smaller "North Building". JA 24. The development also would include the 700 block of C Street, S.E., which the District is to convey to Stanton-EastBanc, subject to an easement for public use, the terms of which have not been disclosed. JA 24, 29. The development will be a mixed-use residential, office, and retail project of approximately 461,946 square feet of gross floor area. JA 23.

At its tallest, the South Building will be 7 stories and 94.5 feet, which is the maximum height permitted for a PUD in a C-2-B zone, plus an additional 5 feet in flexibility permitted pursuant to 11 DCMR § 2405.3. JA 21, 23, 25. The North Building will be 4 stories, and is said to "step down" to 3 stories where it faces 7th Street and 8th Street, but the actual height of the building in feet is not specified. JA 25. The PUD will have an overall density of 3.9 FAR. JA 17. Thus, the PUD will be more than twice as tall, and more than twice as dense, as the maximum height and density permitted under the current zoning of the Property. *See* 11 DCMR §§ 400.1, 402.2, 402.4.

The PUD will also significantly reduce or eliminate the public benefits and amenities residents of the community currently enjoy. Perhaps most significant, the Property is currently

public, and provides extensive open space for residents and visitors to enjoy, which will be replaced with a private development that towers over the surrounding homes and businesses on 7th Street and 8th Street, and provides benefits and amenities mainly for the residents – not the general public. This is reflected in the fact that the "Public Plaza" proffered in support of the PUD actually represents a sharp reduction in the size of the current public plaza it will replace. JA 36. This plaza is home to the Flea Market – one of the central attractions of the Eastern Market community – which will be reduced to less than half its current size.[1] JA 7, 21. The PUD will also introduce retail outlets to D Street, forever altering the residential character of the immediate vicinity, including 8th Street, which crosses D Street. JA 37.

By contrast with the drastic transformation the PUD will impose on the scale and character of the surrounding community, many of the proffered public benefits and amenities are negligible. With respect to historic preservation, for example, Stanton-EastBanc concedes that its PUD is "contemporary" in design, but suggests it will nonetheless enhance the historic character of the neighborhood by virtue of the light fixtures it employs, as well as the brick sidewalks. JA 32. Other amenities proffered as "a benefit to the Capitol Hill community" border on vaporous – the "streetscapes," for example, are said to "accentuate the residential nature of 8th Street," in spite of the introduction of retail on D Street at 8th Street, where it has never before existed. JA 34.

Due to its severe impact on the community, the PUD generated substantial controversy and community opposition, as demonstrated by ANC 6B proceedings. Many community members, believing the PUD was inevitable and fearful that any alternative would be worse,

1 Stanton-EastBanc has agreed to conduct a "tabletop logistics exercise covering the setup, layout, and take down of the flea market," JA 21, but will only do so at some point "prior to construction," JA 36, when it will be too late to impose the modifications necessary to accommodate the current Flea Market.

eventually decided to support the project after Stanton-EastBanc agreed to enter into a binding Memorandum of Agreement. JA 5, 50. Thus, in a sharply divided 6-4 vote, the ANC ultimately supported the PUD. JA 50.

Stanton-EastBanc's Failure to Disclose Extent to Which District Taxpayers Are Subsidizing Benefits and Amenities Proffered in Support of PUD

Stanton-EastBanc does proffer more substantial public benefits and amenities in support of its PUD application, but it failed to disclose the extent to which District taxpayers are subsidizing them. Among the more substantial public benefits the Commission credited Stanton-EastBanc with providing, for example, are the 46 affordable housing units the PUD is to include. JA 33. The Commission further found a public benefit in that Stanton-EastBanc would "reintroduce the currently closed portion of C Street between 7th and 8th Streets," and that this portion of the street "will be privately constructed, repaired and maintained but subject to an easement" for public use. JA 29. What Stanton-EastBanc failed to disclose, however, is that District taxpayers are obligated to pay for these proffered benefits pursuant to the Land Disposition and Development Agreement ("LDDA") it executed with the District, through the Deputy Mayor's Office for Economic Development ("DMPED"), for the lease and purchase of the Property.

DMPED entered into the LDDA with Stanton-EastBanc pursuant to District of Columbia Council Resolution 18-555, the Hine Junior High School Disposition Approval Resolution of 2010 (the "Resolution"). The Resolution incorporates a Term Sheet, as well as a Fiscal Impact Statement prepared by the District's Chief Financial Officer ("FIS").[2] According to the FIS,

2 The Resolution, Term Sheet and FIS are attached as Exhibit A. These documents are properly subject to judicial notice as "laws, statutes, and other matters of public record." *Bostic v. District of Columbia*, 906 A.2d 327, 332 (D.C. 2006); *see Gaither v. District of Columbia*, 333 A.2d 57, 59-60 (D.C. 1975) ("such a rule is self-evident under our system of jurisprudence); *see also Robert Siegel, Inc. v. District of Columbia*, 892 A. 2d 387, 395 n.11 (D.C. 2006) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1)

"based on information provided by DMPED":

> deductions will be taken out of all Developer payments to the District for the property based on the Developer's cost of providing District-mandated affordable housing, demolition of existing structures, environment remediation, construction of the 700 block of C Street, S.E., and any other related public improvements as required by the PUD.

Ex. A. In other words, under the LDDA, District taxpayers – and not Stanton-EastBanc – are to pay for the affordable housing units and the construction of C Street (both of which Stanton-EastBanc will own), as well as "any other related public improvements...required by the PUD. *See id.* To the best of Petitioners' knowledge, none of these facts were disclosed during the Commission proceedings.

Furthermore, according to the Term Sheet, Stanton-EastBanc will take ownership of the North Parcel of the Property in fee simple for an estimated price of $800,000, and it will lease the South Parcel for 99 years, with an option to renew for another 99 years, for an estimated price of $21 million. *See* Ex. A. The FIS concludes, by contrast, that the proposed disposition of the Property will "result in a reduction of District real property assets of approximately $44,672,920." *See* Ex. A. The LDDA therefore appears to convey ownership or control of the Property to Stanton-EastBanc at a price drastically reduced from its fair market value. *See id.* (citing appraisal of Property in its "As Is" condition – prior to the significant increase in value resulting from the upzoning from R-4 to C-2-B – at $34 million).

STANDARD OF REVIEW

The decision of the Commission must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it is unsupported by substantial evidence in the record." *Cathedral Park Condo. Comm. v. District of Columbia Zoning*

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generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

Comm'n., 743 A.2d 1231, 1239 (D.C. 2000). That standard is satisfied where: 1) the Commission failed to make a finding on a material contested issue of fact; 2) one or more of the Commission's findings are not supported by substantial evidence in the record; or 3) the Commission's conclusions of law do not follow rationally from its findings. *See id.*

"Substantial evidence is more than a mere scintilla." *Watergate East Comm. Against Hotel Conversion v. D.C. Zoning Comm'n.*, 953 A.2d 1036, 1043 (D.C. 2008) (citation omitted). Rather, the substantial evidence test requires that: 1) the agency make written findings of "basic facts" on all material contested issues; 2) these findings, taken together, rationally lead to conclusions of law ("ultimate facts") which, under the governing statute, are legally sufficient to support the agency's decision; and 3) each basic finding be supported by evidence sufficient to convince reasonable minds of its adequacy. *See Citizens Assoc. of Georgetown, Inc. v. D.C. Zoning Comm'n.*, 402 A.2d 36, 42 (D.C. 1979).

Although the Court will defer to the agency's interpretation of the statute and regulations it administers, no such deference is accorded where the interpretation is "unreasonable or in contravention of the language or legislative history of the statute and/or regulations." *Cathedral Park Condo. Comm.*, 743 A.2d at 1239. Finally, in cases where the agency adopts one party's proposed findings of fact and conclusions of law verbatim, "a stricter review of the record is in order." *Watergate East Comm.*, 953 A.2d at 1043.

ARGUMENT

I. The Commission Improperly Decided This Case on an Incomplete Record, Based on Evidence Stanton-EastBanc Failed to Submit.

A threshold issue in this case is that it was improperly decided on an incomplete record. Specifically, the Commission erroneously made findings based on key pieces of evidence that

Stanton-EastBanc failed to submit. This violated Petitioners' due process rights to a fair hearing and to "conduct such cross-examination as may be required for a full and true disclosure of the facts." *Watergate East Comm.*, 953 A.2d at 1046 (citation omitted). The Commission's error was also prejudicial, because it raises "substantial doubt whether the agency would have made the same ultimate finding" with respect to approval of the PUD, but for its improper reliance on evidence outside the record. *Liberty v. D.C. Police and Firemen's Retirement and Relief Board*, 410 A.2d 191, 194 (D.C. 1979) (citing *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 466 (D.C. Cir. 1967)). The Commission therefore should be reversed based on its procedural errors alone.

A. The Commission's Reliance on Evidence Outside the Record Violated Petitioners' Due Process Rights.

The most significant piece of evidence Stanton-EastBanc failed to submit is the LDDA. In its PUD application, Stanton-EastBanc states that it entered into the LDDA with the District, through DMPED, "for the disposition, ground lease and development of the Property," JA 77, and that the PUD is intended to "accommodate the public policy objectives" specified in the LDDA. JA 75. Stanton-EastBanc also states that the map amendment it requests is necessary, in part, to "implement the LDDA". JA 107. Conspicuously, however, Stanton-EastBanc declined to submit the LDDA itself, despite attaching 11 other exhibits to its PUD application. JA 73.

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. JA 32-33. 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"). JA 33. But like the LDDA, the Covenant is also absent from the record. Stanton-EastBanc thus failed to

provide the Commission with evidence specifying the terms under which it will assume control of and develop the Property, JA 77, as well as evidence specifying the terms under which it will provide one of the primary public benefits it proffers in support of the PUD. JA 33.

As the applicant in this case, Stanton-EastBanc has the burden to prove that the PUD should be approved. *See* 11 DCMR § 2403.2. At a minimum, therefore, Stanton-EastBanc must produce the evidence on which its application relies, including the LDDA and the Covenant. Thus, by permitting Stanton-EastBanc to rely on those documents without submitting them into the record, the Commission violated Petitioners' due process rights to a fair hearing, and to conduct a meaningful cross-examination of DMPED and other individuals or entities who testified in support of the PUD. *See Cathedral Park Condo. Comm.*, 743 A.2d at 1249. As this Court has repeatedly held, remand is required where the Commission relies on a covenant designed to ensure compliance with its orders, which is not made part of the record. *See Blagden Alley Assoc. v. D.C. Zoning Comm'n.*, 590 A.2d 139, 148 (D.C. 1991) (citing *Daro Realty v. D.C. Zoning Comm'n.*, 581 A.2d 295 (D.C. 1990); *Committee of 100 on the Federal City v. D.C. Dep't of Consumer and Regulatory Affairs*, 571 A.2d 195 (D.C. 1990)).

In *Blagden Alley*, the Commission relied on a covenant to "ensure that the housing amenities will continue to serve their intended function." *Id.* (citation omitted). "Because the Commission determined that a covenant was necessary to ensure compliance," the Court reasoned,

> parties in opposition to the application (and parties in support of it) should be given an opportunity to examine the covenant and comment on any perceived deficiencies. Otherwise the right to a contested case proceeding would be undermined.

Id. Precisely the same reasoning applies in this case, because the Commission expressly relied on

the Covenant to ensure compliance with the affordable housing provisions of its order. JA 33. The rationale of *Blagden Alley* applies with even greater force here, in fact, because the Commission also relied on the missing LDDA, further undermining Petitioners' right to a contested case proceeding. *See Blagden Alley*, 590 A.2d at 148. As in *Blagden Alley*, therefore, remand is proper, with instructions that the LDDA and Covenant be made part of the record, "giving interested parties an opportunity to comment." *Id.*; *see also Washington Hospital Center v. D.C. Dept. of Employment Services*, 983 A.2d 961, 965 (2009) (remand required where exclusion of evidence is "so prejudicial as to result in an unfair hearing").

B. The Commission's Error in Relying on Evidence Outside the Record Was Prejudicial Because It Raises Substantial Doubt as to Whether the Agency Otherwise Would Have Approved the PUD.

Despite its own reliance on the LDDA, the Commission summarily rejected Petitioners' arguments relating to that document, on the ground that "the terms of the LDDA [are] irrelevant to the Commission's consideration." JA 54. This was error.[3] The terms of the LDDA are directly relevant to the Commission's evaluation of the PUD, because they demonstrate that District taxpayers are subsidizing the benefits and amenities Stanton-EastBanc proffers in support of its application. *See* Ex. A.

To determine whether a PUD application should be approved, the Commission must "judge, balance, and reconcile the relative value of the project amenities and public benefits offered" against "the degree of development incentives requested, and any potential adverse effects," based on "the specific circumstances of the case." 11 DCMR § 2403.8. The goal of this inquiry is to determine whether the proffered benefits are "a reasonable trade-off" for the map

3 This finding, like many others in the Commission's order, was adopted verbatim from the proposed findings of fact and conclusions of law submitted by Stanton-EastBanc. *See* AR Ex. 463 ¶ 99. Such findings and conclusions are therefore subject to "a stricter review of the record" than the Court normally applies. *See Watergate East Comm.*, 953 A.2d at 1046.

amendment and zoning flexibility the applicant requests. *Watergate East Comm.*, 953 A.2d at 1050. In this case, however, the Commission could not properly conduct that inquiry, because Stanton-EastBanc failed to disclose the value of the development incentives granted to it through the LDDA. *See* Ex. A.

Not once in the entirety of its 69-page order does the Commission address "the degree of development incentives" granted to Stanton-EastBanc, as it was required to do pursuant to 11 DCMR § 2403.8. Nor does the Commission acknowledge that District taxpayers are subsidizing the proffered public benefits and amenities under the terms of the LDDA. The Commission nonetheless concludes that those same benefits and amenities "are a reasonable trade-off for the zoning flexibility." JA 58. This assertion of an "ultimate fact," unsupported by any relevant "basic facts," is precisely the sort of conclusory reasoning the Court has long held to be grounds for reversal. *See Citizens Assoc. of Georgetown, Inc.*, 402 A.2d at 42. Thus, the Court has specified, the Commission must make "one or more affirmative, written findings on each material contested issue of fact." *Id.* (quoting *Dietrich v. D.C. Bd. of Zoning Adjust.*, 293 A. 2d 470, 473 (D.C. 1972) (brackets and quotation marks omitted)).

Whether the proffered benefits and amenities are "a reasonable trade-off" for the map amendment and zoning flexibility Stanton-EastBanc requests is a contested issue of fact Petitioners raised in this case. *Watergate East Comm.*, 953 A.2d at 1050; *see, e.g.* JA 905 (Howell Letter). Consequently, the Commission may not rely on "generalized, conclusory, or incomplete findings" to resolve that issue. *Dietrich*, 293 A. 2d at 473. Rather, the Commission's "findings must support the end result in a discernible manner, and the result reached must be supported by subsidiary findings of basic facts on all material issues." *Id.* Specifically, the Commission must

make a finding as to whether Stanton-EastBanc has been granted development incentives, through the LDDA or otherwise. *See id.* If so, the Commission must weigh the value of such incentives against the proffered benefits and amenities, and make a finding as to whether the requested map amendment and zoning flexibility is nonetheless warranted. *See id.*; *see also* 11 DCMR § 2403.8. Absent such a finding, the Commission is statutorily required to modify or disapprove the PUD application. *See* 11 DCMR § 2403.1.

The Commission's failure to make the necessary subsidiary findings to support its conclusion regarding the proffered benefits and amenities thus raises "substantial doubt" as to whether it otherwise would have approved the extreme zoning changes granted in this case. *Liberty*, 410 A.2d at 194 (citing *Braniff Airways, Inc.*, 379 F.2d at 466). Because the Court cannot "fill the gap" by inferring such findings, remand is necessary. *Citizens Assoc. of Georgetown, Inc.*, 402 A.2d at 42.

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.

If there is one issue of paramount importance in this case, it is whether a map amendment from R-4 to C-2-B PUD is appropriate for the Property, despite its location in the heart of the Capitol Hill Historic District. Yet, on this crucial issue, the Commission once again made no findings of fact to support its ultimate conclusion. "The proposed C-2-B zone is not inconsistent with the Comprehensive Plan land use designation," the Commission concluded, because C-2-B is among the possible zones corresponding with land designated for mixed use moderate density residential and moderate density commercial development. JA 23. The Commission thus disposed of the issue without further analysis. The fact that a C-2-B zone is included among a range of possible designations for the Property does not establish that it is appropriate in this

case, however – much less that a C-2-B PUD is proper. It is not.

The Comprehensive Plan is replete with admonitions regarding the importance of respect for the character, height, scale, and mass of Washington's neighborhoods. But in this case, a policy set forth in the Historic Preservation Element, is both unequivocal and dispositive. It is Policy HP-2.4.6, which provides that zoning in each historic district "shall be consistent with the predominant height and density of contributing buildings in the district" (emphasis added).

The "predominant height and density" of the buildings throughout the Capitol Hill Historic District is an empirically verifiable fact. The "consistent" zoning for any commercial use is C-2-A, which imposes a maximum height of 50 feet. Indeed, C-2-A is the only commercial zoning designation found in the entire Capitol Hill Historic District. Consequently, C-2-A zoning – including its maximum height of 50 feet and maximum density of 3.0 FAR – is the only designation that is strictly consistent with the "predominant height and density" and the "preponderance of low scale row house and other structures" found throughout the Capitol Hill Historic District.

Although C-2-A and C-2-B both fall within the same general classification of "moderate-density," that fact alone is plainly insufficient to establish that the PUD is consistent with the predominant height and density of the buildings in the Capitol Hill Historic District, as required by HP-2.4.6. As the record clearly establishes, the predominant height of buildings in the area is between 40 and 50 feet – consistent with their R-4 and C-2-A zoning. Yet in this case, the Commission approved a PUD topping out at 94.5 feet, which is more than twice the height of most if not all the buildings surrounding it. In view of this gross disparity in heights, the Commission must, at a minimum, make subsidiary findings to explain, in a discernible manner,

how it reached that end result. *See Dietrich*, 293 A. 2d at 473.

By any objective standard, a massive city-block sized C-2-B PUD with a density of 3.9 FAR and heights in excess of 90 feet is grossly inconsistent with the buildings in the Capitol Hill Historic District. It therefore violates the plain terms of Policy HP-2.4.6. The Commission's complete failure to address this issue was error, and requires remand.

III. The Commission Erred By Approving the "Affordable Housing" Provisions of the PUD.

The segregation of the vast majority of the proffered affordable units into the North Building contravenes whole sections of Chapter One of the Comprehensive Plan. *See* 10 DCMR A218.310. And, the lowest income renters in the North Building will also live in a building not built with nearly the same quality of construction materials and amenities as the South Building. The DC Department of Housing and Community Development ("DCHCD") noted concerns about this segregation, as did many residents who testified at the Zoning Commission, including the testimony of several Petitioners.

A. The Proposed Disparate Treatment of Affordable Housing Units Is Contrary to Law.

Zoning Commissioners also noted concern about the disparate treatment explicitly seen in this project but ultimately chose to ignore these concerns. [4] The aforementioned facts and comments of concern by the public and Zoning Commissioners demonstrate that this project is not in line with the statutory requirements of IZ regarding comparable amenities between the market-rate units and vast majority of the proffered affordable units.[5]

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4 Agency transcript dated June 14, 2012; Page 140, starting at line 20; Commissioner Cohen inquires "I was just wondering why all of this disparate treatment of this building?"

5 See DCMR Title 11 Chapter 26: Inclusionary Zoning; Particularly DCMR 11-2605.3. All inclusionary units shall be comparable in exterior design, materials, and finishes to the market-rate units; and, DCMR 11-2605.6 Inclusionary units shall not be overly concentrated on any floor of a project.

For some Commissioners, the concern about segregation of the affordable North building was ameliorated simply because the Applicant in part brought the small senior social room out of the basement and placed it on the first floor.[6]

In the Final Order, the Zoning Commission also claims satisfaction in the differences in amenities between the North and South buildings because the North Building offers "high-quality architecture and materials, superior to those typically seen in affordable housing projects."[7]

As seen by the facts of this particular project, the materials used and amenities offered in the South Building are far superior than those offered by the North Building where the time-limited affordable housing units are located. The IZ rules don't require an analysis of the affordable units with other affordable units built around the City, rather the evaluation was to be based on the comparison of affordable versus market-rate units within this specific project.

The Zoning Commission did not do a site specific comparison and is thus an error in law that can be reviewed by this Court *de novo*.

B. The Commission Improperly Relied on 'Scintilla' of Evidence to Allow the Segregation of the Vast Majority of Affordable Units.

The Zoning Commission relies on the Applicant's provision of two informal emails from their banking partners to support why the affordable units and units for seniors need to be segregated. [8]

These two informal emails state that since the North building will be financed with Low

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6 Agency transcript dated September 10, 2012; Page 141, starting at line 12; Quoting Commissioner Turnbull – "I think moving the [north building's] community room to the first floor was a big improvement. I think it's little things like that that help make this building feel more than -- I really struggled when I thought this was going to be an isolated building just standing by itself." The North Building and affordable units *will be* isolated from the South Building.

7 Zoning Commission Final Order 11-24: Page 55; Point 149

8 Zoning Commission Final Order 11-24: Page 54; Point 146

Income Housing Tax Credits, investors won't otherwise participate in the project or purchase the credits. [9]

After seeing these emails, Zoning Commissioners mistakenly resign themselves from pursuing deeper examination of the claimed need to segregate the affordable units. [10]

In the end, the Commission takes the Applicant's two emails as foundational evidence to allow segregation of the affordable housing units. However, it is clear that projects around the City have been providing mixed-income affordable and market-rate units within single buildings using LIHTC's for years as demonstrated by the LIHTC project "eligibility" requirements per DC Municipal Regulations. [11]

Further, DC's Housing Finance Administration has produced a report demonstrating that despite the improvements needed in agency coordination regarding LIHTC projects, there indeed exists a panoply of financial investment tools, vehicles, suggestions, coordination techniques, and other funding opportunities to adequately finance mixed-income projects in the District.[12]

The burden of proof was on the Applicant to show unequivocally that DC's housing and community development agencies and partner financial institutions could not develop completely mixed income buildings in this project per the Comprehensive Plan goals to "grow an inclusive City." Instead, the Applicant uses the LIHTC program to wrongfully segregate the affordable

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9 JA 1194, or in the alternative see Exhibit #455B on the agency record

10 Agency Transcript dated September 10, 2012, Page 35, starting at line 22 – CMR COHEN: "I agree about the forty six units of affordable housing. I always prefer if I have my druthers that it be in a mixed income building but I understand about the financing concerns. Had it been designed today, it might be a different project frankly, in my opinion, because I think there are a lot of investors that would be interested today in this particular neighborhood. Be that as it may, it's got forty-six units that are necessary. We have a severe crisis of affordability in this city."

11 See DCMR TITLE 10-B34 LIHTC PROGRAM; particularly DCMR 10-B3403 Eligible Projects

12 From Ideas to Action: Implementing a Mixed-Income Housing Strategy in Washington, DC, April 2009; "The District of Columbia Housing Finance Agency (HFA) requested this report to identify actions the District can take to more effectively implement its mixed-income development strategy." Specifically see pages 49 to 51 as found here >> www.dchfa.org/Portals/0/Documents/News/FromIdeasToAction.pdf

units into a building that will become entirely market-rate and privately owned by the Applicant in 40 years.

The Zoning Commission erred by relying only on two informal emails from the Applicant's banking partners to rule out creating a truly inclusive mixed-income PUD project with permanent affordibility as expected by IZ.

The Zoning Commission's conclusion that the proffered affordable housing exceeds what is required by IZ is therefore incorrect and unacceptable per PUD standards. This is an error in fact and law reviewable by this Court.

C. The Commission Erred By Disregarding the Temporary Nature of the Affordable Housing Units.

The Zoning Commission declares in the Final Order that the affordability provided by the Applicant in this PUD will set aside "29% of the units as affordable" which will "substantially exceed what the IZ program would have required."[13]

The IZ program is designed to create permanent affordability in an effort to address the affordability crisis in the District of Columbia for a sustainable long-term period.[14] [15]

The ZC's conclusion about the "29%" of the proffered affordable units does not take into account the disappearing affordability for the vast majority of the to be constructed affordable units. And because this disappearing affordability largely affects the lower income residents and seniors, this proffered benefit is greatly diminished.

Further, the idea that when the affordability for units in the North building evaporates, many seniors will face displacement and in effect this proffered benefit becomes a liability that

13 Zoning Commission Final Order 11-24: Page 40; Point 100.d.
14 See Article X from The Term of Covenants, as seen here >> http://dhcd.dc.gov/publication/inclusionary-development-covenant
15 See DCMR 11-2602.7 (b)

seriously challenges the purpose of affordability for seniors as described by the Comprehensive Plan and other City policies seeking to prevent displacement of our elders. [16] [17]

And looking at the level of affordability left in this project after only 40 years, the ZC's summary conclusion contravenes the importance of using public property to meet the longterm affordable housing goals of the District, as required by the DC Comprehensive Plan.[18]

Also, after most affordable units disappear, the units that remain represent less than 8% of the total units created which is less than what is statutorily required by the IZ laws.[19]

The Zoning Commission's conclusions regarding the affordable housing as a PUD benefit in this project is unacceptable and also in error of law and must be reviewed by the Court.

16 See DC Comprehensive Plan Policies: DCMR 10-A516.2; and, Policy H-4.1.2: Emphasis on Permanent Housing; and, H-2.2 Housing Conservation and Maintenance

17 Affordable Housing in the District—Where Are We Now?, By Benjamin Orr and Alice M. Rivlin, July 2011; See Page 29, Recommendation 4: The District should integrate housing for persons with special needs into all types of housing in neighborhoods throughout the city. • The city should concentrate on permanent housing solutions for special needs populations rather than building up short-term housing infrastructure; As seen here >> http://www.brookings.edu/~/media/research/files/papers/2011/7/27-dc-housing-orr -rivlin/0727_dc_housing_orr_rivlin.pdf

18 See DCMR 11-2600.1; Also See Comprehensive Plan policies: 10-A501. Housing Goal; Policy H-1.2.4: Housing Affordability on Publicly Owned Sites; Policy H-2.1.5: Long-Term Affordability Restrictions; Policy H-2.1.6: Rent Control

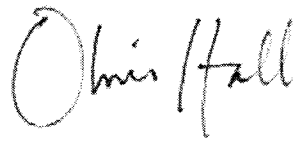
19 See DCMR 11-2600.1; DCMR 11-2603.2

CONCLUSION

For the foregoing reasons, the Commission's order should be vacated, and this matter should be remanded to the agency for further proceedings.

June 28, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June 2013, I served a copy of the foregoing Brief of Petitioner by first class mail, or a manner at least as expeditious, upon the following parties:

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EXHIBIT A

District of Columbia Council Resolution 18-555 and Incorporated Fiscal Impact Statement and Term Sheet

ENROLLED ORIGINAL

A RESOLUTION

18-555

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

July 13, 2010

To approve the disposition of District-owned real property known as Hine Junior High School, located at 310 7th Street, S.E., Lot 080, Square 0901.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Hine Junior High School Disposition Approval Resolution of 2010".

Sec. 2. Definitions.

For the purposes of this resolution, the term:

(1) "CBE Agreement" means an agreement with the District governing certain obligations of the purchaser or the developer of the property under the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*) ("CBE Act"), including the equity and development participation requirements set forth in section 2349(a) of the CBE Act (D.C. Official Code § 2-218.49(a)).

(2) "Certified Business Enterprise" means a business enterprise or joint venture certified pursuant to the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*).

(3) "Developer" means Stanton-Eastbanc Hine School Ventures, LLC, with a business address of 305 7th Street, S.E., Washington D.C., 20003. The Developer's joint venture business partners, with the same business address, are 1- Stanton Development Corporation E and 2-EastBanc, Inc.

(4) "First Source Agreement" means an agreement with the District governing certain obligations of the purchaser and the developer of the property pursuant to section 4 of the First Source Employment Agreement Act of 1984, effective June 29, 1984 (D.C. Law 5-93; D.C. Official Code § 2-219.03), and Mayor's Order 83-265 (November 9, 1983), regarding job creation and employment generated as a result of the construction on the property.

(5) "Property" means the real property known as Hine Junior High School, located at 310 7th Street, S.E., Washington, D.C., 20002, and comprises a vacant building

containing approximately 134, 208 square feet sited on 137,614 square feet of land, designated for purposes of taxation and assessment as Lot 080, Square 0901.

(6) "Purchaser" means the Developer, its successor, or one of its affiliates or assignees approved by the Mayor.

Sec. 3. Approval of disposition.

(a) Pursuant to section 1(b)(8)(C)and (F) of An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801(b)(8)(C), and (F)), the Mayor transmitted to the Council a request for approval of the disposition of the Property. The proposed method of disposition is upon subdivision into 2 parcels pursuant to PUD approval, a public sale or private sale to the bidder providing the most benefit to the District and a lease for a period greater than 20 years.

(b) The intended use of the Property is a mixed-use development containing retail, office, residential, below-grade parking, and any ancillary uses allowed under applicable law.

(c) The proposed disposition shall include the following terms and conditions:

(1) The Property shall contain affordable housing in accordance with applicable law and as described in the term sheet submitted with this resolution;

(2) The Purchaser shall enter into an agreement that requires the Purchaser to, at a minimum, contract with Certified Business Enterprises for at least 35% of the contract dollar volume of the project, and shall require at least 20% equity and 20% development participation of Certified Business Enterprises;

(3) The Purchaser shall enter into a First Source Agreement with the District regarding job creation and employment as a result of the construction on the Property; and

(4) All documents that are submitted with this resolution pursuant to section 1(b-1) of An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801(b-1)), shall be consistent with the executed Memorandum of Understanding or term sheet transmitted to the Council.

(d) The Council approves the disposition of the Property.

Sec. 4. Transmittal.

The Secretary to the Council shall transmit a copy of this resolution, upon its adoption, to the Mayor.

Sec. 5. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 6. Effective date.
This resolution shall take effect immediately.

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Vincent C. Gray** **Chairman, Council of the District of Columbia**
FROM:	**Natwar M. Gandhi** **Chief Financial Officer**
DATE:	**June 14, 2010**
SUBJECT:	**Fiscal Impact Statement – "Hine Junior High School Disposition Approval Resolution of 2010"**
REFERENCE:	**Draft Resolution as shared with the OCFO on June 5, 2010– No Number Available**

Conclusion

Funds are sufficient in the proposed FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed resolution based on the terms of the draft lease and land disposition agreements, which continue to be negotiated. The proposed disposition of property would result in a reduction of District real property assets of approximately $44,672,920.[1] Since assets are not included in the budget and financial plan, the disposition of the property will have no direct fiscal impact on the District's budget and financial plan.

Background

The proposed legislation would authorize the Mayor to dispose of District-owned property commonly known as Hine Junior High School located at 310 7th Street, S.E. in Lot 801, Square 901. The property, approximately 137,614 square feet of land, contains the Hine Junior High School building, a 134,208 square foot vacant school building. The Mayor intends to subdivide the parcel into two, and dispose of it through a combination of a 99 year ground lease and fee simple sale to Stanton-Eastbanc Hine School Ventures, LLC[2] ("Developer"), a District of Columbia limited liability company. The property formally known as the 700 block of C Street,

[1] A third party appraisal was conducted by an appraiser hired by the Office of the Deputy Mayor for Planning and Economic Development to estimate the Fair Market Value of the property in its "As Is" *i.e.* present state of condition. The property was appraised at $34,000,000.
[2] A joint venture with Stanton Development Corporation and EastBanc, Inc.

S.E., and south to Pennsylvania Ave, S.E., would be leased, while the property north of 700 block of C Street, S.E would be sold fee simple to the Developer.

According to the draft Land Disposition Agreements (LDA),[3] the property would be redeveloped into a mixed-use development that includes two multifamily residential buildings with an estimated 35 rental units (most of which will be affordable housing) and 97 condominium units, approximately 50,000 of retail space, approximately 212,000 square feet of office space (or 100 room hotel as an alternative to an estimated 65,000 square feet of the office space), and below-grade parking.

The disposition of the property and exact details of the development are dependent upon subdividing the parcel into two parcels and the outcome of the Developer's planned Unit Development (PUD) application to the Zoning Commission that the developer anticipates submitting May 2011. Based on the Schedule of Performance, construction will begin November 2012. The purchaser was chosen through a competitive bid process initiated by the Office of the Deputy Mayor for Planning and Economic Development (DMPED).

The sales price and final lease terms for the property from the District to the Developer continue to be negotiated, and have not been included in the legislation. Based on information provided by DMPED, deductions will be taken out of all Developer payments to the District for the property based on the Developer's cost of providing District-mandated affordable housing, demolition of existing structures, environment remediation, construction of the 700 block of C Street, S.E., and any other related public improvements as required by the PUD. The Developer estimates the budget of the project to be approximately $177 million and will require no financing from the District. The assessed value of the property is $44,672,920.[4]

Financial Plan Impact

Funds are sufficient in the proposed FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed resolution. The proposed resolution would result in a reduction of District assets of approximately $44,672,920. Since assets are not included in the budget and financial plan, the disposition of the property through a long-term lease will have no direct fiscal impact on the District's budget and financial plan.

[3] Draft Land Disposition Agreement (LDA) between the District of Columbia and Stanton-Eastbanc Hine School Ventures, LLC for the lease and the sale fee simple are not final and cannot be finalized until the land disposition is approved by Council. Therefore the terms of the draft LDA reviewed by the OCFO could change after Council approval.

[4] FY 2010 Tax Assessed Value according to OTR's Real Property Tax Database, accessed June 14, 2010. https://www.taxpayerservicecenter.com

TERM SHEET
Disposition of HINE Junior High School

Date	June 10, 2010
Seller	Government of the District of Columbia, acting by and through the Deputy Mayor for Planning and Economic Development (the "**District**")
Buyer	**Stanton-Eastbanc, LLC**, a District of Columbia limited liability company, its successor, or one of its affiliates or members ("**Developer**")
Description of Real Property	Parcel of land with a street address of **310 7th Street, S.E.** in Washington, D.C., known as for tax and assessment purposes as Lot 0801 in Square 0901 (the "**Property**")
Disposition Structure	**South Parcel:** the portion of the Property south of the former C Street, S.E. will be conveyed by the District to the Developer via 99 year ground lease(s) under D.C. Code § 10-801(b)(8)(C), with a 99 year renewal option for the residential condominium building as required under D.C. Code § 42-1902.29.
	North Parcel: the portion of the Property north of the former C Street, S.E. will be conveyed by the District to the Developer in fee via special warranty deed under D.C. Code § 10-801(b)(8)(F).
	C Street, SE: the District will ground lease to the Developer under D.C. Code § 10-801(b)(8)(C) the former 700 block of C Street, S.E. to enable the Developer to reconstruct C Street, S.E. for the benefit of the South Parcel and North Parcel.
Consideration	**Ground Lease (South Parcel):** Annual ground rent shall equal 5% of the value of the property ($50 per FAR foot of development, assuming approval of the estimated square footages in the Development Program by the Zoning Commission, or approximately $21.0 million based upon the estimates in the Development Program) less deductions for the cost of providing District-mandated affordable housing, environmental remediation, and any extraordinary or off-site proffer as required by the PUD to redevelop the property. All such deductions are subject to the District's approval.
	Fee Disposition (North Parcel): $50 per FAR foot of non-affordable housing FAR approved under the PUD (estimated to total $800,000).
	Non-Monetary: Reconstruction of former C Street, S.E., Affordable Housing, community requested design upgrades to the improvements
Affordable Housing	Subject to the PUD (as defined below), it is anticipated that the North Parcel will contain a residential rental building containing approximately 35 units of which approximately 28 will be available for rent to individuals/families at 60% AMI, and approximately 5 will be available to rent to individual persons at 30% of AMI. At least 50% of these units will be age-restricted (i.e., available for lease only to persons 55 or older). The residential condominium building on the North Parcel will contain approximately 10 units available for purchase at income levels required under the *Inclusionary Zoning Implementation Amendment Act of 2006*, as codified in the D.C. Official Code §§ 6-1041.01 *et seq.* (2008 Supp.), as amended, and the