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

REPLY BRIEF OF PETITIONERS AND INTERVENOR EASTERN MARKET METRO COMMUNITY ASSOCIATION

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In its brief, Intervenor Stanton-EastBanc LLC attempts to paper over the deficiencies in the Zoning Commission's order by variously accusing Petitioners and Intervenor Eastern Market Metro Community Association (collectively, "Petitioners") of "twisting … the facts," "fail[ing] to understand the applicable legal standards," and even being "consumed by their zeal". Int. Br. at 2, 16, 24. In each instance, however, it is Stanton-EastBanc that misrepresents the factual record or misconstrues the legal issues. Further, despite Stanton-EastBanc's extensive citation to its own prior submissions, an applicant's assertions cannot take the place of the factual findings and legal conclusions the Commission must adopt before approving a Planned Unit Development ("PUD"). Consequently, nothing in Stanton-EastBanc's brief remedies the errors and omissions in the Commission's order. The order should be vacated, and this case should be remanded to the Commission for further proceedings.

ARGUMENT

I. PETITIONERS AND EMMCA HAVE STANDING TO PURSUE THIS APPEAL.

Stanton-EastBanc prefaces its brief with a *pro forma* challenge to Petitioners' standing. Under the District of Columbia Administrative Procedure Act ("DCAPA"), "any person … adversely affected or aggrieved by an order … of … an agency in a contested case may seek judicial review." *Miller v. District of Columbia BZA*, 948 A.2d 571, 574 (D.C. 2008) (quoting D.C. Code § 2-510 (2001)). To establish standing under the DCAPA, a party must allege:

> (1) that the challenged action has caused [her] injury in fact, (2) that the interest sought to be protected … is arguably within the zone of interests protected under the statute or constitutional guarantee in question … and (3) that no clear legislative intent to withhold judicial review is apparent.

Id. (quoting *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 421 (D.C. 1983)). Petitioners have standing because they satisfy each of these requirements.

Stanton-EastBanc argues that Petitioners have not sufficiently "explained" the nature of

their legal injury because "close proximity to a project alone" is insufficient to demonstrate a cognizable harm. Int. Br. at 16 (citing *York Apartments Tenants Ass'n. v. D.C. Zoning Commission*, 856 A.2d 1079, 1085 (D.C 2004) ("*YATA*"). According to Stanton-EastBanc, Petitioners "simply do not like" the PUD, and their only interest is that it be "done their way." Int. Br. at 2, 18. Stanton-EastBanc does not cite any support for these assertions, however, and it cannot, because the premise of Stanton-EastBanc's challenge is false: Petitioners do not rely on their close proximity to the PUD alone to establish legal injury. Rather, as their brief plainly states, Petitioners "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." Pet. Br. at 1-2.

A. Petitioners Satisfy All Three Elements Necessary to Establish Standing.

Petitioners' interest is easily confirmed by reference to their submissions to the Commission. For example, Petitioner Wendy Blair, who lives on 8th Street directly facing the Hine School site, objected to the PUD on the ground that it is "too tall," "towers over the neighborhood," and is "too large in scale [for] an historic district." JA 861-62. Further, Petitioner Blair wrote:

> The current Hine school affords nearly half its city-block-sized lot to open space, available to the public for uses and for views of the market. The proposed development has almost no public space, and what there is is owned by the developer – so that by definition is not open space. JA 862.

Several more Petitioners echoed and elaborated upon these concerns. For example, Marcelle Wahba and Derek Fargawi, who also live on 8th Street directly facing the Hine School site, wrote:

> We continue to oppose the proposed development due to its excessive overall height, density and lack of open public space and its failure to preserve the current space level for the Capitol Hill Flea Market. … The height dwarfs houses across the street and

> throughout the historic neighborhood. The immense size and height of the entire block-sized development exceeds reasonable limits for new construction within an historic neighborhood. … JA 863-66.

Petitioner Marcella Hilt wrote:

> We have a huge, oversized development threatening to ruin Capitol Hill and our lovely historic district. Not only is it looming over our neighborhood, it threatens to reduce our weekend market at Eastern Market. The project does not provide enough space for the current number of vendors. …
>
> The entire building completely dominates not only the surrounding area, but everything else in our historic neighborhood. It is completely out-of-scale to the neighborhood. JA 893.

Petitioner Mary Cole wrote:

> While I support the development of the site, I object to the height, density, loss of green space and, especially, the encroachment of commercial activity on a residential neighborhood. ... If the developers have their way, they will put a major bank of retail outlets within 40 feet of my front yard. JA 895-96.

Petitioner Christopher Howell wrote:

> The current plan [is] some fifty percent taller and, occupying an entire city block, is almost infinitely greater in mass (width, depth, height) than any other structure on the Pennsylvania Avenue commercial corridor or, for that matter, in the entire Capitol Hill Historic District. This structure would visually overwhelm its surroundings, would create an urban canyon on Seventh Street, would eliminate any sense of openness, and would needlessly, but forever, destroy the priceless and historic ambiance of the Eastern Market. JA 902.

Petitioner Nancy Sturm wrote:

> We **support mixed-use development of the site.** ... However, we believe the **density, height, square footage, and intensity of uses** proposed by Stanton EastBanc are **incompatible with the values of the Capitol Hill Historic District** and specifically the Eastern Market Neighborhood. JA 1140 (emphasis original).

Thus, contrary to Stanton-EastBanc's unsupported assertions, the record confirms that Petitioners oppose the PUD not because it does not comport with their personal preferences, but because its height and size are grossly excessive for the Capitol Hill Historic District. As such, the PUD threatens to transform the historic character of Petitioners' community, by planting a city-block-

sized development in its midst, which is contemporary in design, and more than twice as tall as any building surrounding it. Petitioners' interest in preventing this threatened harm is the basis for their standing to pursue this appeal.

This Court has long recognized that "threats to the use and enjoyment of an aesthetic resource may constitute an injury in fact." *Dupont Circle*, 455 A.2d at 421 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)); *see also YATA*, 856 A.2d at 1085. The "asserted clash of [a project's] proposed design with the character of [an] historic district" thus constitutes a cognizable injury to residents of the district, and their "interest in preserving the integrity of the historical neighborhood" is sufficient to confer standing on them. *Dupont Circle*, 455 A.2d at 421-22. That is precisely the injury and interest Petitioners assert in this case. Petitioners therefore satisfy the "injury in fact" requirement.[1]

Moreover, the foregoing demonstrates that Stanton-EastBanc's reliance on *YATA* is misplaced, and its assertion that Petitioners only raise "generalized grievances" is incorrect. Int. Br. at 16-18. *YATA* differs from the instant case because the petitioner asserted no injury arising from the challenged PUD modification, except that it might affect what the petitioner's members "see and hear out their windows, as well as the livability of their neighborhood." *YATA*, 856 A.2d at 1085. Such assertions, the Court found, only established the petitioner's "close proximity" to the PUD, but did not show any "concrete and specific threat or injury." *Id.* In this case, by contrast, the record is replete with evidence demonstrating the PUD will interfere with

1 Stanton-EastBanc professes confusion over which Petitioners live "next to" the PUD, and which live "nearby". Int. Br. at 16. As the record confirms, the following Petitioners live next to or directly facing the PUD: Wendy Blair (316 8th Street SE), JA 861; Mary Cole (800 D Street SE), JA 895, 1045; Derek Farwagi (318 8th Street SE), JA 865; Carol Press (217 8th Street SE); and Marcelle Wahba (318 8th Street SE), JA 863. In addition, the following Petitioners live in the immediate vicinity: Christin Engelhardt (312 5th Street SE); Jane Fisher (814 Constitution Avenue, SE), JA 898, 1049; Mary Fraker (401 Seward Square SE), Administrative Record ("AR") Ex. 251, 345, 429; Marcella Hilt (219 10th Street SE), JA 893, 1048; Christopher Howell (16 7th Street SE), JA 901, 905, 915, 1152; Michele Rivard 31 7th Street NE); Nancy Sturm (306 10th Street SE), JA 914, 1140; and Inez Sletta (418 Independence Avenue SE), AR Ex. 234, 349, 419.

Petitioners' use and enjoyment of their historic neighborhood and its amenities, including its open public spaces and weekend market. *See supra* at 2-3. *YATA* is therefore inapposite. Further, such interference is not a generalized grievance, because it "will not fall indiscriminately upon every citizen," but rather will be "felt directly" only by Petitioners and others who use and enjoy the amenities of the Capitol Hill Historic District. This Court reached the same conclusion in a recent case in which the petitioner's standing was challenged on similar grounds. *See D.C. Library Renaissance Project v. D.C. Zoning Comm'n. ("DCLRP")*, No. 12-AA-1183 (August 8, 2013). In that case, the Court held that the petitioner had standing, and expressly rejected the assertion that its claims were only generalized grievances. *See id.* at 6-22. The Court should reach the same holding with respect to the standing of Petitioners in this case.[2]

Stanton-EastBanc does not dispute that Petitioners satisfy the second and third requirements, and little discussion is needed to show they do. With respect to the "zone of interests" requirement, the broad purpose of the zoning regulations is to promote "public health, safety, morals, convenience, order, prosperity, and general welfare" through, *inter alia*, the "use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and cultural opportunities" 11 DCMR § 101.1. Petitioners' claims – that the Commission erroneously weighed the public benefits and amenities proffered in support of the PUD; that the height and size of the PUD is inconsistent with the Comprehensive Plan and other zoning provisions; and that the PUD violates the Inclusionary Zoning regulations – expressly seek to protect Petitioners' interest in the use of the Hine School site in a manner that promotes "civic activity, and recreational, educational, and cultural opportunities." *Id.* Further, Petitioners' claims are intended to protect the "character" of the Capitol Hill Historic District,

2 On the merits, the Court's decision in *DCLRP* contains several clear and substantial errors that require correction, due to the exceptional importance of the questions raised, as set forth in the petitioner's Petition for Rehearing En Banc, to be filed pursuant to D.C. R. App. P. 35(c) and 40.

and they challenge the PUD's "suitability" for that district. 11 DCMR § 101.2(a), (b). Consequently, Petitioners' claims fall squarely within the zone of interests protected by the zoning regulations. *See generally Clarke v. Securities Indus. Ass'n.*, 479 U.S. 388, 399-400 (1987) ("zone of interests" requirement is not "especially demanding," and a party need not be the intended beneficiary of a statute in order to satisfy the requirement).

As to the third element of standing, there is no evidence of legislative intent to withhold judicial review under the DCAPA. On the contrary, the statutory language permitting any person "adversely affected or aggrieved" by an agency order to seek judicial review demonstrates a legislative intent "to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Federal Election Comm'n. v. Akins*, 524 U.S. 11, 19 (1998). Petitioners therefore satisfy all three requirements necessary for standing to pursue this appeal. *See Dupont Circle*, 455 A.2d at 421.

B. EMMCA Also Has Standing to Pursue This Appeal.

For the same reasons identified above, EMMCA – which was a party to the proceedings before the Zoning Commission – also has standing. An association has standing to bring suit on behalf of its members where:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.

Friends of Tilden Park, Inc. v. District of Columbia, 806 A.2d 1201, 1207 (D.C. 2002) (quoting *Hunt v. Washington State Apple Adver. Comm'n.*, 432 U.S. 333. 343 (1977). EMMCA's members have standing because several of them are named Petitioners, including Wendy Blair, Mary Cole, Derek Farwagi, Mary Fraker, Marcella Hilt, Nancy Sturm and Marcelle Wahba. *See* AR 126 at 2-3. Further, the interests Petitioners seek to protect in this appeal fall squarely within EMMCA's

mission of "preserving the historic, architectural and aesthetic value of property and objects within the Eastern Market Metro neighborhood." Finally, although several EMMCA members are participating in this appeal, neither the claims asserted nor the relief requested – remand to the Commission for further proceedings – requires their individual participation. EMMCA therefore has standing to pursue this appeal. *See Friends of Tilden Park*, 806 A.2d at 1207.

II. REMAND IS REQUIRED BECAUSE THE COMMISSION IMPROPERLY DECIDED THIS CASE ON AN INCOMPLETE RECORD.

A. Stanton-EastBanc Does Not Dispute That It Failed to Submit Documents on Which Its PUD Application Explicitly Relies.

Stanton-EastBanc pointedly insists that it must "set the facts straight" before addressing the Commission's error in deciding this case on an incomplete record, Int. Br. at 19, but it does not actually dispute any of the facts set forth in Petitioners' brief. Specifically, Stanton-EastBanc does not dispute that its PUD application expressly states that: 1) Stanton-EastBanc entered into the Land Disposition Development Agreement ("LDDA") with the District "for the disposition, ground lease and development of the Property," JA 77; 2) the PUD is intended to "accommodate the public policy objectives" specified in the LDDA, JA 75; and 3) the map amendment Stanton-EastBanc requests is necessary, in part, to "implement the LDDA." JA 107. Stanton-EastBanc also does not dispute that the Commission expressly cited both the LDDA and the affordable housing covenant ("Covenant"), JA 32-33, 54, nor that Stanton-EastBanc failed to submit both documents into the record. JA 73.

Rather than disputing any of the foregoing facts, which it cannot do, Stanton-EastBanc contends that it had no obligation to submit the LDDA and Covenant, because the Commission did not rely on the "substance" of these documents. Int. Br. at 20. That is incorrect. As an initial matter, Stanton-EastBanc disregards the express statutory language assigning it the "burden of

proof to justify the granting" of its PUD application. 11 DCMR § 2403.2. Because Stanton-EastBanc's application explicitly states that the PUD is intended to "accommodate the public policy objectives" specified in the LDDA, JA 75, and that the map amendment is necessary to "implement the LDDA," JA 107, Stanton-EastBanc was required to submit both the LDDA and the Covenant the LDDA obliges Stanton-EastBanc to execute. *See* 11 DCMR § 2403.2. In failing to do so, Stanton-EastBanc undermined Petitioners' "right to a contested case proceeding" by denying them any "opportunity to examine" the documents on which its application explicitly relies and "comment on any perceived deficiencies." *Blagden Alley Assoc. v. D.C. Zoning Comm'n.*, 590 A.2d 139, 148 (D.C. 1991). As this Court has repeatedly held, an applicant's failure to submit a covenant setting forth terms applicable to a proffered public benefit is an error that requires remand. *Id.* (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 an effort to avoid this line of precedent, Stanton-EastBanc first asserts that "the Commission's Order itself" – and not the Covenant – "establishes SEB's affordable housing obligations." Int. Br. at 20. In *Blagden Alley*, however, the Court expressly rejected this asserted justification for an applicant's failure to submit an applicable covenant. "Even if [the applicant] is correct," the Court reasoned, "the Commission has nonetheless chosen to rely on a covenant to ensure that the housing amenities will continue to serve their intended function." *Blagden Alley*, 590 A.2d at 148. The Court thus concluded that remand was necessary, with instructions that the missing covenant be made part of the record. *See id.*

The rationale of *Blagden Alley* applies here with even greater force, because the Commission's order leaves considerable ambiguity as to the extent of Stanton-EastBanc's

affordable housing obligations. As Stanton-EastBanc concedes, the ultimate disposition of the affordable units in the North Building is "unknown" – at least to Petitioners and other parties opposing the PUD – but only because Stanton-EastBanc failed to submit the Covenant. Int. Br. at 47. Thus, while Stanton-EastBanc implies that the North Building ultimately "will be subject to the Inclusionary Zoning requirements," Int. Br. at 47, the Commission made no such finding. Indeed, only Stanton-EastBanc knows whether the Covenant so provides, and Stanton-EastBanc has shielded that document from scrutiny.

Stanton-EastBanc next attempts to distinguish *Blagden Alley*, by asserting that the Court "expressly recognized that producing a covenant was not required where it was reviewed or administered by" another agency. Int. Br. at 21 (citing *Blagden Alley*, 590 A.2d. at 148 n.18) (emphasis original). That is incorrect. Instead, the Court merely observed that a certain covenant that applied to the development in that case must be "satisfactory" to other agencies. *Blagden Alley*, 590 A.2d. at 148 n.18. The Court did not recognize, however – "expressly" or otherwise – that such a finding would permit the Commission to rely on the covenant even if it were not submitted into the record. *See id.*

Finally, Stanton-EastBanc asserts that the Court should not address the Commission's error in permitting Stanton-EastBanc to withhold documents on which its PUD application relies, because Petitioners "did not raise" this argument before the Commission. Int. Br. at 21-22. This too is incorrect. In their submissions to the Commission, Petitioners repeatedly and explicitly objected to Stanton-EastBanc's failure to disclose the basic terms governing its acquisition of the Hine School property, and specifically framed these objections within the context of their argument that the public benefits and amenities Stanton-EastBanc proffers in supported of its PUD are insufficient to warrant the zoning flexibility it requests. For example, Petitioner Wendy

Blair objected to the PUD on the ground that:

> Citizens own this public land, and yet citizens have not been told what developer paid for the so-called "North parcel" (which will include the reopened C Street) which is now or soon will become private land.
>
> Citizens who now own the South parcel (the rest of the Hine property) have little idea of the true price developer is paying for it in its 99-year lease. We do know that the District of Columbia has been in the process of selling off public land at shockingly low prices, subsidizing enormous developer profits on the backs of taxpayers.

JA 861-62 (emphasis original). Similarly, Petitioner Christopher Howell wrote that the viability of a PUD that would be "truly compatible with and complimentary to" the Capitol Hill Historic District "depends, of course, upon the terms of the deal between our city and the developer." JA 902. "If our city has made the terms so onerous that the only path to a fair profit is the massive, incompatible model now proposed," Petitioner Howell reasoned, "our city leaders should reconsider those terms." JA 902. Petitioner Howell expanded on this analysis in a detailed submission, which expressly concluded that the PUD is not "of sufficient value to the community," and that "the benefits and amenities offered by the applicant" – including the reopening of C Street and the affordable housing units provided – are insufficient. JA 907-08.

The foregoing submissions refute Stanton-EastBanc's assertion that Petitioners "did not raise" their argument that the Commission erred by disregarding the terms of the LDDA in connection with its analysis of the public benefits and amenities proffered in support of the PUD. Int. Br. at 21-22. And while Stanton-EastBanc insists that the Commission did not "rely" on the LDDA, but addressed it only in response to the argument that Stanton-EastBanc had used a "bait and switch tactic," Int. Br. at 21-22, that only demonstrates the Commission's error in disregarding an argument Petitioners squarely raised in the proceedings below, and which they now raise on appeal. Contrary to Stanton-EastBanc's suggestion, Petitioners did not deprive the Commission of "its right to consider the matter, make a ruling, and state the reasons for its

action." Int. Br. at 21 (quoting *Watergate East Comm. Against Hotel Conversion v. D.C. Zoning Comm'n.*, 953 A.2d 1036, 1044 (D.C. 2008)). Rather, the Commission failed to address this contested issue, because it erroneously adopted, verbatim, Stanton-EastBanc's proposed finding that the terms of the LDDA are "irrelevant" to its analysis. *Compare* JA 54 ¶¶ 144-145 *with* AR Ex. 463 ¶ 99.

B. The Commission's Error in Deciding This Case on an Incomplete Record Was Prejudicial.

Despite its assertions that the LDDA provides both the "public policy" basis for its PUD application, JA 75, and the alleged need for its requested map amendment, JA 107, Stanton-EastBanc insists that the LDDA is "irrelevant" to the Commission's analysis of the PUD. Int. Br. at 23. According to Stanton-EastBanc, Petitioners' argument that the Commission erred by disregarding the terms of the LDDA "misunderstands the Commission's role in a PUD proceeding." Int. Br. at 22. It is Stanton-EastBanc, however, that misconceives the issue.

As a threshold matter, Stanton-EastBanc's assertions regarding the proper definition and scope of the statutory terms "development incentives" and "adverse effects" are almost entirely unsupported. Int. Br. 22-24; *see* 11 DCMR § 2403.8. Stanton-EastBanc cites only one case in its entire discussion of these terms, Int. Br. at 23 (citing *Cathedral Park Condo. Comm. v. D.C. Zoning Comm'n.*, 743 A.2d 1231, 1247 (D.C. 2000), but nothing in *Cathedral Park* supports the crabbed construction Stanton-EastBanc urges the Court to adopt here. On the contrary, Section 2403.8 explicitly states that these terms should be construed "according to the specific circumstances of the case." 11 DCMR § 2403.8. In this case, where Stanton-EastBanc explicitly states that its PUD is intended to implement the objectives of the LDDA, it is plainly proper for the Commission to consider any development incentives granted to the developer through that agreement.

Moreover, Stanton-EastBanc's assertions regarding the proper construction of Section 2403.8 miss the point. The issue before the Court is only whether the Commission erred by concluding that the LDDA is completely "irrelevant" to its analysis of the PUD, and it did. JA 54. Specifically, the Commission found that "the Applicant" – Stanton-EastBanc – would provide 46 affordable housing units, JA 33, and also that "the Applicant will reintroduce the currently closed portion of C Street," which will be "privately constructed, repaired and maintained." JA 36. Under the terms of the LDDA, however, District taxpayers must pay for these public benefits – not Stanton-EastBanc. *See* Pet. Br. Ex. A. The foregoing findings are therefore misleading and inaccurate insofar as they credit Stanton-EastBanc with providing public benefits for which District taxpayers are paying, without acknowledging this fact. Whether the value District taxpayers contribute to the PUD is characterized as a "development incentive," an "adverse effect" or something else entirely, it is not "irrelevant" to the Commission's analysis.

As Stanton-EastBanc concedes, "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'" that would not otherwise be provided. Int. Br. at 23 (quoting *Blagden Alley*, 590 A.2d at 140 n.2) (emphasis added). The Commission, in turn, is required to evaluate "the relative value of the project amenities and public benefits offered," 11 DCMR § 2403.8, and to determine whether the proffered benefits are "a reasonable trade-off" for the map amendment and zoning flexibility the applicant requests. *Watergate East Comm.*, 953 A.2d at 1050. Here, the Commission concluded that the proffered public benefits "are a reasonable tradeoff for the zoning flexibility" Stanton-EastBanc requested, JA 58, but did not and could not address the fact that District taxpayers are paying for many of those benefits through the LDDA,

because Stanton-EastBanc failed to disclose it. Remand is therefore necessary, to permit the Commission to evaluate the PUD in light of all the relevant evidence. On remand, should the Commission find that the benefits proffered "are a reasonable tradeoff" for the zoning flexibility Stanton-EastBanc requests, even though District taxpayers are paying for those benefits through the LDDA, it must make a finding to that effect. *See Citizens Assoc. of Georgetown, Inc. v. D.C. Zoning Comm'n.*, 402 A.2d 36, 42 (D.C. 1979). Absent such a finding, the Court may not "fill the gap." *Id*.

III. THE COMMISSION'S APPROVAL OF THE PUD AND MAP AMENDMENT IS NOT SUPPORTED BY THE REQUIRED FINDINGS OF FACT AND IS INCONSISTENT WITH THE COMPREHENSIVE PLAN.

A. The Commission Failed to Address the PUD's Height and Its Incompatibility with the Scale and Character of the Historic Community Where It Will Be Located.

It hardly requires an excess of "zeal," as Stanton-EastBanc suggests, Int. Br. at 24, to maintain that the Commission must make specific findings regarding the height of a PUD before approving it. A more salient feature of a proposed development would be hard to imagine. In this case, moreover, the height of the PUD is one of the most sharply contested issues, because the PUD is to be located in the heart of the Capitol Hill Historic District, on a plot currently zoned for developments no taller than 3 stories and 40 feet, *see* 11 DCMR §§ 400.1, 402.2, 402.4, yet the PUD will be 7 stories and 94.5 feet in height. JA 21, 23, 25. The Commission was therefore required to address this contested issue, but it failed to do so. *See Citizens Assoc. of Georgetown*, 402 A.2d at 42 (agency must make written findings of "basic facts" on all material contested issues).

The Commission made not one finding specifically addressing the fact that the PUD will be 7 stories and 94.5 feet in height. Nor did the Commission make any finding specifically

addressing the fact that rezoning the property to C-2-B PUD will more than double the height and density permitted under the current R-4 zoning. *Compare* 11 DCMR §§ 400.1, 402.2, 402.4 *with* 11 DCMR §§ 2405.1, 2405.2. Finally, the Commission failed to make specific findings as to whether such increases in height and density would be appropriate in the Capitol Hill Historic District, particularly in view of the PUD's location on the Future Land Use Map ("FLUM") in an area where buildings "generally do not exceed five stories in height," 10 DCMR § 225.9, and its location in a Neighborhood Conservation Area, where new developments must be "compatible with the existing scale and architectural character" of the community. 10 DCMR § 223.5.

Despite its failure to make specific findings regarding any of the foregoing issues, the Commission concluded that the PUD and the requested map amendment from R-4 to C-2-B are "not inconsistent" with the Comprehensive Plan's land use designation for the Hine School site. JA 23. The Commission thus approved the PUD without actually addressing the issue of its height. The closest the Commission came was in its finding captioned "Project Design, Scale (including Height), and Density," which it adopted verbatim from Stanton-EastBanc's proposed findings and conclusions of law. *Compare* JA 52 ¶¶ 136-37 *with* AR Ex. 463 ¶ 96. But this finding, which purports to address the height of the PUD, does not in fact address the height of the PUD. The Commission simply disregards the fact that the PUD will be 7 stories and 94.5 feet tall, and that it will be located directly across the street from historic rowhouses that are 2 to 3 stories and no more than 40 feet in height. JA 52. The Commission's legal conclusion to approve the PUD and C-2-B map amendment is therefore unsupported by the requisite findings of "basic facts" relating to the PUD's height. *See Citizens Assoc. of Georgetown*, 402 A.2d at 42.

Stanton-EastBanc appears to recognize the deficiency in the Commission's reasoning, because it seeks to fill in the gaps with its own assertions. Stanton-EastBanc asserts, for example,

that "the tallest portion of the [PUD], at 94 feet six inches of building height, is appropriate" due to its location and orientation. Int. Br. at 7 n.9. But the Commission made no such finding, and it is for the Commission, not Stanton-EastBanc, to resolve this contested issue.

Similarly, Stanton-EastBanc's extensive citation to its own submissions in the proceedings below, and to those of parties who supported its PUD application, cannot take the place of the findings the Commission itself was required to make. Int. Br. at 27-32. Moreover, the materials cited suffer the same deficiency as the Commission's findings: they only address Stanton-EastBanc's purported efforts to "mitigate" the excessive height and size of the PUD, but they fail to address the antecedent issue of whether that height and size is appropriate in the first instance. JA 52. The fact remains that the Commission almost completely disregard the PUD's height, by treating it as a parenthetical issue about which it did not need to make specific findings. This was error, and requires remand.

B. The Commission Failed to Address the PUD's Inconsistency with the Comprehensive Plan.

Stanton-EastBanc attempts to shield the Commission's finding that "the Project and the proposed C-2-B zone are not inconsistent with the Comprehensive Plan" by asserting that the issue "is not properly before" the Court. Int. Br. at 32-33. According to Stanton-EastBanc, Petitioners cite only a "single Policy," and "the issue was not raised below by anyone." Int. Br. at 33-34. Stanton-EastBanc is wrong on both counts.

First, Petitioners do not cite only a single policy. As previously discussed, Petitioners rely on the the Hine School site's FLUM designation, which specifies that new developments "generally do not exceed five stories in height." 10 DCMR § 225.9. This restriction "carries the same legal weight as the Plan document itself." 10 DCMR 225.1. In keeping with its strategy of disregarding the PUD's excessive height, however, Stanton-EastBanc, like the Commission, fails

to address this clear inconsistency with the Comprehensive Plan.

Petitioners also rely on the Hine School site's designation as a Neighborhood Conservation Area under the Comprehensive Plan. *See* 10 DCMR § 223.5. Under this designation, new developments "should be compatible with the existing scale and architectural character of each area." *Id.* Once again, Stanton-EastBanc, like the Commission, disregards this requirement.

Petitioners also rely on the provision Stanton-EastBanc addresses in its brief, Policy HP-2.4.6. Int. Br. 33-36. That provision requires that "zoning for each historic district shall be consistent with the predominant height and density of the contributing buildings in the district." 10 DCMR § 1011.11. Although Policy HP-2.4.6 closely tracks the language of the provision governing Neighborhood Conservation Areas, which Stanton-EastBanc concedes is properly before the Court, Stanton-EastBanc contends that "the issue" of the PUD's inconsistency with Policy HP-2.4.6 is not properly before the Court. Int. Br. at 33. That is incorrect.

In multiple filings previously cited herein, *see supra* at 2-3, Petitioners squarely raised the issue of the PUD's inconsistency and incompatibility with the height and density of the buildings in the Capitol Hill Historic District. More specifically, Petitioner Hilt wrote:

> There are no other buildings zoned C2B in the entire Capitol Hill Historic District. That's why we who live in the area are so upset about the size of the building on Pennsylvania Ave. The entire neighborhood is R4 and C2A or CHC/C2A. As I understand it, your guidance is the Comprehensive Plan. … The difference between C2B with PUD @ 90' and a C2A PUD @ 65' is critical. It makes no sense to grant an inappropriately high zoning designation for this development. JA 1048.

Thus, the specific issue of the PUD's excessive height, and its inconsistency with the Comprehensive Plan, was raised below.

Stanton-EastBanc contends that the Court must defer to the Commission's resolution of this issue, Int. Br. at 34 (citing *Durant v. D.C. Zoning Comm'n.*, 65 A.3d 1161 (D.C. 2013), but

disregards the fact that the Commission did not in fact resolve it. As the Court observed in *Durant*, judicial deference is only warranted "where the Commission has fully addressed the applicable aspects, policies, and material issues regarding the Plan." *Durant*, 65 A.3d at 1167. Despite Stanton-EastBanc's extensive citation to its own record submissions, however, it cannot point to a single finding where the Commission actually addressed the PUD's height of 7 stories and 94.5 feet – much less a conclusion that such an excessive height is not inconsistent with the Comprehensive Plan. Consequently, the Court need not defer to findings and conclusions the Commission failed to make.

As a fallback, Stanton-EastBanc notes that the Comprehensive Plan "contains hundreds of policies," and reiterates its belief that the Commission's "decision is entitled to deference from the Court." Int. Br. at 35-36 (emphasis original). But the fact that Comprehensive Plan provisions "do not prescribe specific uses" does not mean they may be disregarded altogether, or that the Commission may address them in conclusory fashion. Int. Br. at 35 (quoting 10 DCMR § 104.6). That is what the Commission did here, with respect to both the Future Land Use Map and the Generalized Policy Map. JA 43-44. Although Stanton-EastBanc asserts that the Commission "found the Project consistent with both," Int. Br. at 35, it can hardly say more, because the Commission did not.

Finally, while Stanton-EastBanc emphasizes that the Comprehensive Plan "should be read in its entirety," Int. Br. at 35, that does not mean the Commission may disregard a PUD's clear inconsistency with particular provisions. Here, the Commission simply failed to address the excessive height of the PUD, and its inconsistency with the Comprehensive Plan provisions on which Petitioners rely. And while deference might be proper where the Commission found it necessary to balance the Comprehensive Plan's "occasionally competing policies and goals,"

Durant, 65 A.3d at 1167, no such balancing occurred here, nor was it necessary. Remand is therefore proper, for further proceedings specifically relating to the height of the PUD, and whether it is inconsistent with the Comprehensive Plan.

IV. THE COMMISSION ERRED BY APPROVING THE AFFORDABLE HOUSING PROVISIONS OF THE PUD.

A. Petitioners Have Standing to Object to the Commission's Decision to Approve the Affordable Housing Provisions of the PUD.

Petitioners have already refuted Stanton-EastBanc's challenge to their standing to pursue this appeal, *see supra* at 1-6, and little discussion is required in response to its assertion that Petitioners specifically lack standing to challenge the Commission's decision to approve the aspects of the PUD relating to affordable housing. As the Court recognized in *DCLRP*:

> If a neighborhood organization claimed that failure to enforce compliance with the IZ regulations would harm its members' interests in a diverse neighborhood, that allegation would presumably bring the organization and its members directly within the zone of interests of the IZ regulations.

DCLRP, No. 12-AA-1183, at 13 n.4. Petitioners' challenge to the Commission's decision regarding the affordable housing aspects of the PUD stem from precisely the same interests. *See*, *e.g.* Letter of Jane Fisher (objecting to PUD's affordable housing scheme on ground that it "economically segregates" neighborhood). Petitioners therefore have standing to challenge this aspect of the Commission's decision.

B. Stanton-EastBanc Fails to Address the Commission's Errors in Approving the Affordable Housing Provisions of the PUD.

The Commission's approval of the PUD's affordable housing provisions suffers from at least two major errors, neither of which Stanton-EastBanc addresses.

First, as Stanton-EastBanc concedes, any PUD exempted from the Inclusionary Zoning requirements must nonetheless meet the requirements set forth 11 DCMR 2602.7. That provision

requires, *inter alia*, that an exempted development set aside affordable units "equal to at least the gross square footage" that otherwise would have been required, "for so long as the project exists." 11 DCMR 2602.7(a), (b). Stanton-EastBanc's PUD does not meet this requirement, because, as Stanton-EastBanc concedes, its affordable units expire after a period of forty years. Int. Br. at 47.

Second, although Stanton-EastBanc emphasizes that "over 29% of the total residential units" in the PUD will be affordable units, Int. Br. at 41, that is not the relevant criterion. Rather, Stanton-EastBanc is required to set aside affordable units "equal to the gross square footage" that would be required under the Inclusionary Zoning regulations. 11 DCMR 2602.7(a). The Commission made no finding with respect to whether the PUD complies with this requirement.

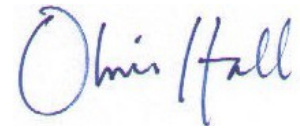
Remand is therefore necessary to address the deficiencies in the Commission's order relating to the affordable housing aspects of the PUD.

CONCLUSION

For the foregoing reasons, the Commission's Order should be vacated, and this matter should be remanded to the Commission.

August 19, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August 2013, I served a copy of the foregoing Reply Brief of Petitioner by first class mail, or a manner at least as expeditious, upon the following parties:

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