



ADVISORY NEIGHBORHOOD COMMISSION 3E

TENLEYTOWN AMERICAN UNIVERSITY PARK FRIENDSHIP HEIGHTS
CHEVY CHASE WAKEFIELD FORT GAINES
c/o Lisner-Louise-Dickson-Hurt Home 5425 Western Avenue, NW Washington, DC 20015
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BY E-MAIL

July 29, 2016

Karl A. Racine
Attorney General
District of Columbia
Office of Attorney General
441 4th Street, NW
Washington, DC 20001

RE: Request for Legal Opinion

Dear Mr. Racine:

I write to you, with the assent of my fellow Commissioners at ANC 3E, to seek legal advice pursuant to DC Code § 1-309.12 (d)(3)(A).

Valor Development (“Valor”) seeks to build a mixed-use building (“Project”) on Record Lot 9 in Square 1499 (“Lot 9”). We understand that an earlier “density swap” reduced the size of what can be built on Lot 9 as a matter of right. Valor concedes that the Project’s scale exceeds that currently permitted as of right on Lot 9, and proposes to use the design review established by new zoning regulations to seek transfer of density from an adjoining lot to enable it to build the Project. Valor describes the foregoing in more detail in a memorandum, “Valor Development 4330 48th Street NW Zoning Memo,” (“Zoning Memo”) attached hereto and incorporated into this request letter. An attorney for a group opposed to the Project wrote a response to the Zoning Memo,¹ which is also attached hereto and incorporated into this request letter.

Opponents of the Project disagree with Valor about what may be built as a matter of right on Lot 9 and whether Valor may use the design review process to seek permission from the Zoning Commission (“ZC”) to transfer sufficient density from an adjoining lot to enable Valor to build the Project.

The Commissioners of ANC 3E believe an opinion from the Office of Attorney General regarding the answer to the following two question (with subparts) would serve the public interest.

¹ Donahoe to Repp, 7/13/16

1. Absent any zoning relief, what is the largest project Valor could build on Lot 9 as a matter of right, including without limitation the maximum height permissible, maximum residential Floor Area Ratio ("FAR") / Gross Floor Area ("GFA") available, and maximum commercial FAR / GFA available. For avoidance of doubt, absent any zoning relief, could Valor build a 50 foot high residential building, with an additional penthouse of less than 15 feet, on a 36,000 sq ft footprint? Please address whether, and if so to what extent, the holding in *Durant v. DC Zoning Commission*, No. 15-AA-979 (DC May 26, 2016), affects the answer to the forgoing questions.
2. May Valor use the design review process to seek permission from the ZC to transfer of density from an adjoining parcel to its parcel, where but for such a transfer of density Valor would require relief from existing density limits to build a particular project? Is there any other legal impediment that would prevent the ZC, if it chose to in its sound discretion, from permitting Valor through the design review process to build the Project it describes in the Zoning Memo?

ANC 3E expects next to address Valor's proposed project at the ANC's regular meeting on September 8, 2016. Accordingly, we respectfully urge OAG to send us its opinion regarding the foregoing questions before then, if at all possible.

Thank you in advance, and please do not hesitate to contact me with any questions or requests for further information.

Jonathan Bender
Chairperson, ANC 3E

CC: Matthew Le Grant
Sheldon Repp
Joe Bous
Will Lansing

VALOR DEVELOPMENT

4330 48TH STREET NW ZONING MEMO

The purpose of this memorandum is to:

1.) provide an abbreviated zoning history on the development of the former AU Law and Superfresh/Fresh and Greens grocery store buildings that currently reside on Record Lot 9 in Square 1499 (“Lot 9”) as it relates to the allocation of residential and nonresidential floor area ratio (FAR);

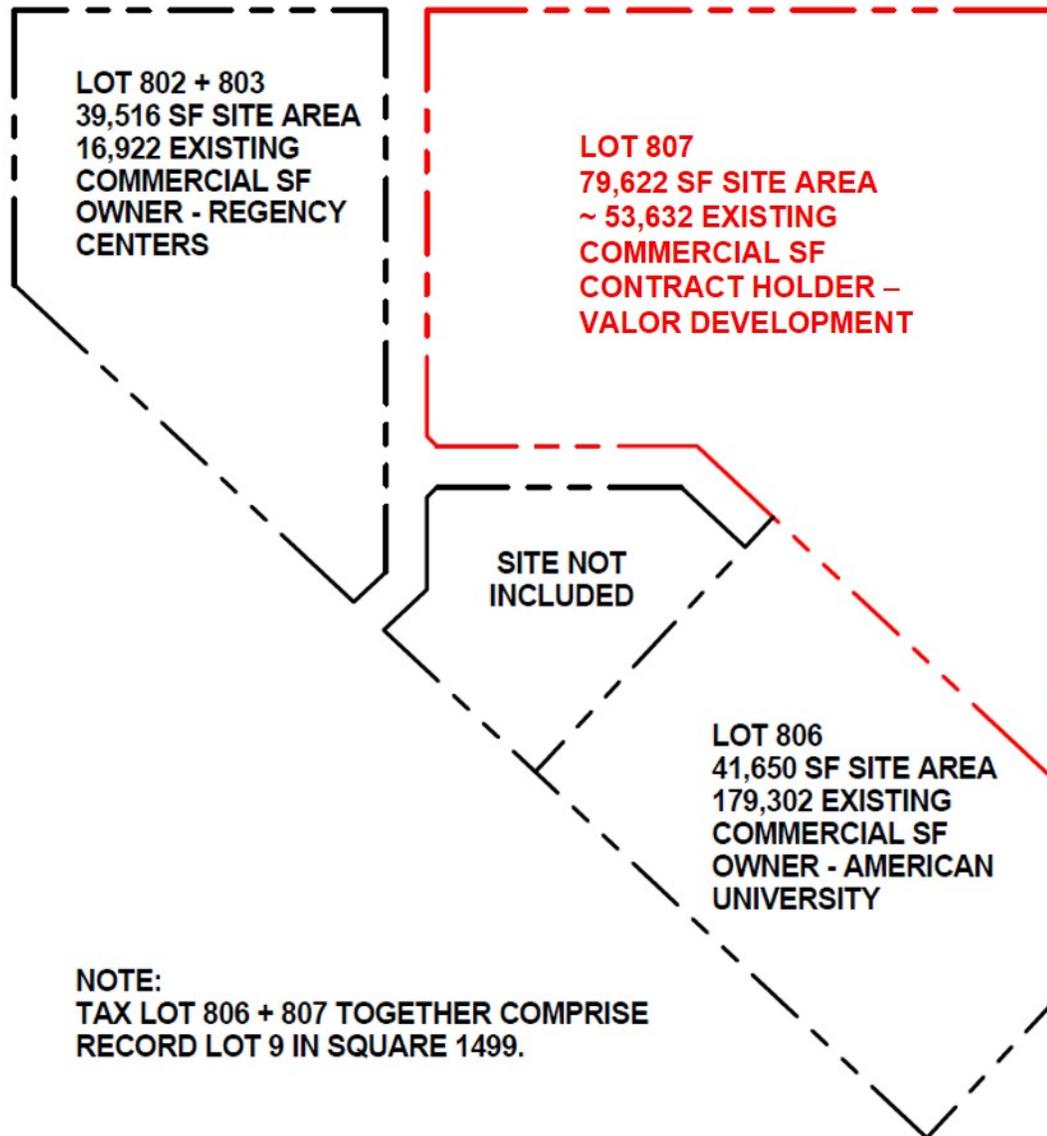
2.) clarify what can be developed on the former grocery store site as a matter-of-right under the 2016 Zoning Regulations (“ZR16”), and to demonstrate that under matter-of-right zoning the development of a new full-service grocery store on Lot 9 is not possible given the lack of available nonresidential FAR; and

3.) describe how Valor Development’s proposal will leverage the unused density of the historic Spring Valley Shopping Center (the “SVSC”) site in order to provide a high-quality mixed-use project consisting of two residential buildings, one containing a new full-service grocery store, a highly desired neighborhood-serving use, within the applicable height and density limits of the C-2-A (MU-4) zone district (the “Valor Project”).¹

The Valor Project will be located on the northern portion of Lot 9, with the existing AU Law building located on the southern portion. The Valor Project and the AU Law Building will each reside on a separate existing assessment and taxation (“A&T”) lot within Record Lot 9,

¹ The C-2-A zone district is the current zoning classification of all properties referred to in this memorandum, and is a classification that derives from the 1958 Zoning Regulations. On September 6, 2016, the 2016 Zoning Regulations (“ZR16”) will go into effect, and the zoning classification for the properties referred to in this memorandum will become “MU-4.” Notwithstanding this change in classification, there is no change to the maximum FAR that is permitted as a matter-of-right.

with the AU Law building located on A&T Lot 806 (“Lot 806”), and the Valor Development project located on A&T Lot 807 (“Lot 807”). Each A&T lot is owned separately, with Lot 806 currently owned by American University, and Lot 807 currently owned by Paul S. Burka Apex Real Estate / Paul Burka. Valor Development is currently the contract purchaser of Lot 807.



Lots 806 and 807 were created at the time the AU Law building was constructed. This allowed the AU Law building to be “over built” as to FAR on Lot 806 since it remained within

the overall FAR that was permitted on underlying Lot 9. More specifically, when the AU Law building was constructed, the C-2-A zoning in effect at the time allowed a maximum FAR of 2.0, all of which could be devoted to nonresidential use. Based upon the overall 121,272 square foot (“sf”) land area of Lot 9 (Lot 806 = 41,650 sf and Lot 807 = 79,622 sf), this meant a total of 242,544 square feet of GFA could be constructed on Lot 9. This overall amount of GFA was available to allocate among Lots 806 and 807 in any manner so long as the overall FAR on Lot 9 did not exceed 2.0. Ultimately 179,302 GFA was allocated to Lot 806 for purposes of constructing the AU Law Building, and 63,242 GFA was allocated to Lot 807. According to District of Columbia records, Lot 807 was eventually developed with approximately 53,632 GFA for the vacant grocery store and other retail uses.

Subsequent to the construction of the AU Law building and former grocery store building, the C-2-A zoning regulations were amended to allow a maximum overall FAR of 2.5 on Lot 9, of which only 1.5 FAR could be devoted to nonresidential uses. Consequently, as a result of the amendment, although the overall amount of GFA permitted on Lot 9 increased from 242,544 sf to 303,180 sf, the permitted amount of nonresidential GFA actually decreased from 242,544 to 181,908, or by 60,636 sf. As noted above, 179,302 GFA was previously allocated to Lot 806 for purposes of constructing the AU Law Building. Thus, as a result of the amendment to the C-2-A zoning regulations and the prior allocation of GFA to the AU Law building, the remaining GFA available for use on Lot 807 equaled 123,878 GFA, of which only 2,606 GFA could be devoted to nonresidential uses, which is insufficient to provide a new full-service grocery store.

Under the C-2-A zoning in effect today, and under the MU-4 zoning that will apply when ZR16 goes into effect on September 6, 2016, a maximum 3.0 FAR is permitted on Lot 9, which

includes the 20% additional density (0.5 FAR) provided for by the existing Inclusionary Zoning (IZ) regulations. However, despite this increase the 1.5 FAR limit on nonresidential uses remains. Accordingly, under the 3.0 FAR maximum, a total of 363,816 GFA can be achieved on Lot 9, with the maximum permitted nonresidential held constant at 181,908 GFA. After factoring in for the GFA allocated to the existing AU Law building, there remains up to 184,514 GFA that can be constructed on Lot 807 as a matter-of-right, of which still only 2,606 GFA can be devoted to nonresidential uses.

Valor Development could, as a matter-of-right, construct on its portion of Lot 9 an all-residential project containing up to 184,514 GFA, which, after including penthouse habitable space, below-grade/cellar areas, and permitted projections into public space, would result in approximately 230 dwelling units. However, such a project could not include the new full-service grocery store, which is highly desired by the community, due to the lack of available nonresidential GFA on Lot 9 resulting from the prior allocation to the AU Law building.

As currently conceived, the Valor Project would contain approximately 282,000 GFA, consisting of approximately 255,000 GFA of residential use, and approximately 27,000 GFA of grocery store and other retail use. After including penthouse habitable space, below-grade/cellar areas, and permitted projections into public space, the Valor Project would result in approximately 230 dwelling units and approximately 60,000 total sf of grocery store and other retail use. Thus, as can be seen the Valor Project would result in the same approximate number of dwelling units as the matter-of-right project described above, and compared to what currently exists, only increase the total amount of retail space on Lot 807 by approximately 6,368 sf.

Transferring a portion of the unused density from the historic SVSC site to the Valor Project is what makes the proposed grocery store possible. As discussed below, despite the

transfer of density, the combined density of the Valor Project and the SVSC will be within the FAR permitted in the C-2-A (MU-4) zone district, as will the combined density of the Valor Project, SVSC, and the AU Law building.

Through the ZR16 design review process (the “Design Review Process”), Valor Development will transfer unused FAR from the historic SVSC site, which is located on Lots 802 and 803, to construct the Valor Project on Lot 807. The Design Review Process can be used voluntarily by property owners in exchange for flexibility in bulk, design, and site placement provided there is no increase in density and no map amendment, and so long as all the property included in the project is contiguous, or separated only by a public street, alley, or right-of-way.

The property included in the Design Review Process application will include Lots 802, 803 and 807, which have a combined land area of 119,138 sf. Based upon the maximum permitted FAR of 3.0 (1.5 FAR nonresidential), this results in a total allowable density of 357,414 GFA, of which no more than 178,707 GFA can be devoted to nonresidential uses. Combined, the Valor Project and the SVSC consist of approximately 298,922 GFA, of which approximately 43,922 GFA is devoted to nonresidential uses (16,922 GFA of which already exists on the SVSC site). This equates to an overall FAR of 2.51, and a nonresidential FAR of 0.37, both well below the maximum permitted 3.0 FAR (1.5 FAR nonresidential). While the existing AU Law building will not be part of the Design Review Process application, the combined FAR of the Valor Project, SVSC, and the AU Law building will also remain within the maximum limits permitted in the C-2-A (MU-4) zone district. Specifically, based upon the combined land area of Lots 802, 803, 806, and 807 (approximately 160,788 sf) the resulting FAR would be 2.97 (1.38 FAR nonresidential).

The ZR16 Design Review Process is a public process, that involves a public hearing held by the Zoning Commission of the District of Columbia, with an opportunity for community and ANC participation. Similar to the Planned Unit Development (“PUD”) process, the issues and concerns of the ANC are also afforded “great weight.” In addition to “unlocking” nonresidential FAR from the historic SVSC site in order to allow construction of the new full-service grocery store as part of the Valor Project, as discussed below, the Design Review Process will also allow Valor Development to construct a project that is superior to what can currently be constructed on Lot 807 as a matter-of-right.

The two buildings proposed under the Valor Project will have maximum heights of approximately 50 feet and 46 feet, as measured from the top of the curb along 48th Street at the midpoint of the front of each building, which is within the maximum height of 50 feet permitted in the C-2-A (MU-4) zone district. In addition, the proposed buildings will provide substantial setbacks along both 48th Street and Yuma Street frontages to reduce the height of the buildings at the property line.

In addition to building height, there are several other areas where the proposed Valor Project does not fully utilize the development potential afforded under ZR16. For instance, while the Valor Project is permitted up to 0.4 FAR of penthouse habitable space on Lot 807, or approximately 31,849 GFA, the proposed penthouse habitable space will only be approximately 20,000 GFA. Additionally, the penthouses will have substantial setbacks to further minimize the height of the building, and be sensitive to the adjacent neighborhood. Finally, the proposed design is also well below the 75% lot occupancy allowed as a matter-of-right on Lot 807 as a result of the considerable setbacks and open space that will be provided.



DONOHUE & STEARNS, PLC

July 13, 2016

Citizens for Responsible Development
c/o Mr. Sheldon Repp
4704 Windom Place NW
Washington, DC 20016

Re: Proposed Development by Valor Development at 4330 4⁸th Street NW
Square 1499; Lot 0807

Mr. Repp:

I wanted to write to (i) underscore the importance and relevance of *Durant v. D.C. Zoning Commission* and (ii) provide an assessment of Valor's most recent calculations.

DURANT V. D.C. ZONING COMMISSION

In *Durant v. D.C. Zoning Commission*, the D.C. Court of Appeals clearly articulated that a Planned Use Development ("PUD") application (and related map amendment) must be assessed in accordance with the Comprehensive Plan. The Comprehensive Plan incorporates the Land Use Element which is visually depicted by the Future Land Use Map ("FLUM"). Therefore, as Judge McLeese explained in the May 26, 2016 decision, PUD review necessarily must consider if the subject application is in compliance with the FLUM's designation of a particular site as low, moderate, medium or high density. The Court took a conservative view on the flexibility of the Zoning Commission.

The FLUM categorizes this parcel as Low Density Commercial, described in the Comprehensive Plan as:

"Low Density Commercial: This designation is used to define shopping and service areas that are generally low in scale and character. Retail, office, and service businesses are the predominant uses. Areas with this designation range from small business districts that draw primarily from the surrounding neighborhoods to larger business districts uses that draw from a broader market area. Their common feature is that they are comprised primarily of one- to three-story commercial buildings. The corresponding Zone districts are generally C-1 and C-2-A, although other districts may apply."

Valor is proposing a five-story building with a penthouse. This is clearly outside the scope of structure anticipated by the Comprehensive Plan and FLUM and therefore not permitted according to *Durant*. The burden is on Valor to demonstrate how the building adheres to both and we should remind the ANC of this on July 14th.

VALOR'S JULY 11, 2016 MEMORANDUM

After reviewing the memorandum circulated by Valor on July 11, 2016, the following errors and omissions remain apparent.

1. Valor does not provide any illustration of the current proposal's (as described on page 4/ paragraph 3) compliance with the Comprehensive Plan and the FLUM pursuant to *Durant*.
2. In its description of the evolution of the FAR allowance from 2.0 to 3.0, Valor does not explain why the additional FAR should not be prorated as between Lots 807 and 806. Valor allocates all of the additional FAR to Lot 807 though it utilizes the total lot area of Lot 9 which is comprised of both Lot 807 and Lot 806 to arrive at the GFA totals.
3. In its explanation of the Design Review Application ("DRA") which will utilize Lots 802, 803 and 807 (page 5/paragraph 3), Valor fails to account for the 1979 allocation to Lot 806 of 179,302 commercial GFA. Here again, Valor utilizes the lot area of Lot 807 as part of the combined land area yet fails to explain why it can do so and not reduce the resulting GFA by the 179,302 GFA.
4. Valor is proposing to utilize the DRA in order to secure additional density. Sections 600.1(c) and (e), however, explicitly state that the DRA is not available for projects that need an increase in density.

§600.1 The purpose of the design review process is to:

(c) Permit some projects to voluntarily submit themselves for design review under this chapter in exchange for flexibility because **the project is superior in design but does not need extra density;**

(e) Provide for flexibility in building bulk control, design, and site placement **without an increase in density** or a map amendment.

Section 600.5 only further clarifies that the subject proposal is not an appropriate candidate for the DRA due to the need for additional density.

§600.5 A map amendment or **an increase in density shall not be permitted as part of a design review application.**

Please do not hesitate to contact me with any questions regarding the above.

Sincerely,



Edward L. Donohue