

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION**

ZONING COMMISSION ORDER NO. _____

Z.C. CASE NO. 06-31

**John Akridge Development Company
Consolidated Planned Unit Development and
Related Zoning Map Amendment for Square 1657
_____, 2007**

Pursuant to notice, public hearings were held by the Zoning Commission (“Commission”) for the District of Columbia on March 8, 2007 and April 12, 2007. At those hearing sessions, the Commission considered the application from John Akridge Development Company (“Akridge”) on behalf of 5220 Wisconsin, LLC (collectively, the “Applicant”). The Applicant requested consolidated review and approval of a Planned Unit Development (“PUD”) and related Zoning Map Amendment under Chapter 24 of the District of Columbia Municipal Regulations (“DCMR”), Title 11, Zoning Regulations. The public hearings were conducted in accordance with the contested-case provisions of the Zoning Regulations, 11 DCMR § 3022.

FINDINGS OF FACT

1. This case concerns an application from John Akridge Development Company seeking consolidated review and approval of a PUD as well as a related zoning map amendment and additional zoning flexibility. The application, filed on June 19, 2006, requested approval of the development of a new apartment house with between 55 and 70 units with a gross floor area of approximately 118,125 square feet, including approximately 13,200 square feet of ground-floor retail, a total floor area ratio (“FAR”) of 5.25, and a height of 79 feet. The application also sought the rezoning of the project site at 5220 Wisconsin Avenue, N.W. -- which consists of Lots 810, 811 and 812 in Square 1657 -- to C-2-B from R-5-B. Accompanying the filing was a set of detailed architectural plans, drawings and site photographs.
2. On September 6, 2006, the Friendship Neighborhood Association (“FNA”) submitted petitions to the Commission signed by more 500 residents living very close to 5220 Wisconsin Avenue, N.W., on both the east and west sides of Wisconsin Avenue. Petition signers opposed heights and densities at 5220 Wisconsin Avenue, N.W. that exceed the existing matter-of-right zoning limits specified for the R-5-B zoning category. This petition effort is described in greater detail in paragraph 33 below.
3. The Applicant filed a Prehearing Submission on November 13, 2006. In response to matters raised by the Commission and the Office of Planning (“OP”), this document provided supplemental information regarding the design of the project, including certain revised architectural plans and drawings, supplied additional detail about some of the proposed project amenities and public benefits, addressed certain traffic and loading-dock issues, and incorporated a draft construction-management plan.

4. On February 15, 2007, the Applicant filed a Modified Prehearing Submission in which it updated the information on three of its proposed project amenities and public benefits, sought the flexibility to narrow the range of residential units to between 60 and 70 and specified that it would provide in the building no more than 1.2 parking spaces per apartment unit. The submission also contained further refinements to the project design, depicted in a full set of revised architectural drawings. In addition, the Applicant sought to demonstrate the consistency of its proposed project with the pending Comprehensive Plan.
5. On March 8, 2007, the Applicant filed: (a) a picture of the materials to be used on the building's exterior; (b) commitments regarding the uses of the retail space on the project's ground floor; (c) a memorandum from O.R. George & Associates, the Applicant's traffic expert, updating and correcting its previously filed traffic analysis; and (d) a copy of its Power Point presentation at the March 8, 2007 public hearing.
6. On April 2, 2007, the Applicant provided additional information about the financial security backing for the LEED ("Leadership in Energy and Environmental Design") certification proffered as a public benefit/project amenity as well as a report from O.R. George & Associates revising its original Traffic Impact Study and addressing questions subsequently raised.
7. Then-Ward 3 Councilmember Kathy Patterson wrote in support of Akridge's PUD application in a December 28, 2006 letter. She said the project merited approval in part because its location would encourage use of public transportation and the building's shape and design would "make an effort to offer a transition to the adjacent lower density residential area and respect nearby homes." She stated that the commitment to LEED certification will bring environmental benefits, and that the building also would enhance the economic vitality of Wisconsin Avenue. Ms. Patterson took particular note, though, of the Applicant's amenities package, especially its plan to make contributions to three neighborhood organizations and Akridge's decision to set aside six or seven units for affordable housing.
8. Mary M. Cheh, the current Ward 3 Councilmember, listed similar reasons in expressing her support for Akridge's PUD application in a January 23, 2007 letter, stating that the project would be a "green" building, would be designed to blend with and help enhance surrounding development, would include six to seven affordable housing units, and that Akridge would improve the appearance of the Pepco substation and provide contributions to the community.
9. As noted below, the credits that Akridge will be claiming to obtain LEED certification do not provide substantial environmental benefits, and with 100 percent lot occupancy, the project is less environmentally sensitive than a matter-of-right building. In addition, the project has heights, density and massing which is not sensitive to development in the area, and does not serve as an appropriate transition to the low-density neighborhood. As discussed below, with the exception of the cash contributions, the benefits cited in these two letters are not superior to what would be expected with matter-of-right development. Given that Ms. Patterson and Ms. Cheh based their support for this project on an inaccurate description of the project, the conclusions included in these letters must be discounted.
10. In a March 29, 2007 letter, Councilmember At-Large Kwame R. Brown urged the Commission to reject Akridge's PUD application. For starters, he argued, the project is "not consistent with the revised Comprehensive Plan or the Future Land Use Map." He noted as well that the building "breaks the buffer zone mandated by the Comprehensive Plan" and that it

would have “serious adverse effects on traffic, parking, and the safety and quality of life of nearby residents” Mr. Brown also said that his decision to oppose the application reflected Akridge’s refusal “to work cooperatively with the ANC [Advisory Neighborhood Commission 3E] and the neighboring community to make any significant changes [in the project] in response to community concerns” and the fact that the “project does not have the support of the community.”

11. Councilmember At-Large Phil Mendelson maintained in an April 12, 2007 letter that Akridge’s PUD application should be modified. Mr. Mendelson warned that how the Commission decides this case will have an “inevitable effect” and a “precedential impact” on the development of land adjacent to the project site. In this regard, Mr. Mendelson questioned the appropriateness of the building’s height and density. The councilmember also argued that the concept of smart growth, while “compelling,” is not ‘relevant’ to the decisionmaking process since the Zoning Regulations require commissioners to “judge each PUD application on its merits, particular to the site.”

12. At a public meeting on February 8, 2007, ANC 3E, which includes the project site within its boundaries, passed by a 4-1 vote a strongly worded, detailed resolution opposing Akridge’s PUD application. Echoing many of the arguments that persuaded ANC 3E at a June 8, 2006 public meeting to oppose unanimously a Commission set-down of the application, the resolution concluded that the proposed building is “inappropriate for this site, inconsistent with the scale and character of the adjoining area, and inconsistent with the Comprehensive Plan.” The resolution determined in addition that the project would have a “negative impact on the neighboring community,” particularly in terms of its precedent-setting effect on the development of nearby sites. ANC 3E’s resolution also cited a third reason for opposing the application -- namely, that “Akridge did not consult with the community in the development of its amenities package and that many of the claimed amenities and benefits are of negligible or little value.”

13. Expanding on one of the themes of its resolution opposing the Akridge project, ANC 3E, in an April 9, 2007 filing, highlighted the neighborhood-preservation tilt of the revised Comprehensive Plan by providing nine pages of quotations from that document.

14. In a March 7, 2007 letter, the Board of Directors of the Coalition to Stop Tenleytown Overdevelopment (“CSTO”) -- an organization that reflects the views of more than 300 residents in the Friendship Heights-Tenleytown area -- expressed its strong opposition to the Akridge project in its present form. The board argued that the proposed building is “too tall, too dense and occupies 100% of the lot” and, thus, does not relate to the surrounding low-rise buildings. It also asserted that the project would place “unacceptable additional stress on an already overtaxed infrastructure.” In closing, the group noted that “Akridge has consistently demonstrated an unwillingness to adapt [its] proposal in any way to respond to community concerns.”

15. By a 21-0-0 vote, Tenleytown Neighbors Association, Inc., a group with almost 200 members, passed a resolution at its March 1, 2007 meeting “strongly endor[s]” the ANC 3E resolution that opposed the Akridge application. This result was conveyed in a March 8, 2007 letter to the Commission.

16. As of April 23, 2007, a total of 229 individuals had expressed their opposition to the Akridge project in letters to the Commission. Several common themes ran through almost all of these often strongly worded letters. One was that the planned building is totally out of scale with

nearby single-family and semi-detached houses and garden apartments. It is too tall and too dense for its location in what is designed to be a buffer between Friendship Heights' commercial core and its residential neighborhoods, these writers asserted. Another common message was that the Akridge project would exacerbate existing neighborhood traffic and parking problems, produce even more overcrowding at the local elementary school and otherwise strain Friendship Heights' already challenged infrastructure. In short, this group of opponents argued, the quality of life of existing residents would be degraded significantly.

17. The Commission granted party-in-opposition status to Friendship Neighborhood Association, an unincorporated nonprofit association organized under D.C. Law 13-231. FNA was founded to educate and inform Friendship Heights residents about development issues. FNA has 600 supporters, the vast majority of whom live in the immediate vicinity of 5220 Wisconsin Avenue, N.W. These neighbors oppose a building at that location that exceeds the height and density allowed as a matter-of-right for the current R-5-B zoning. FNA has not expressed opposition to development at 5220 Wisconsin Avenue, N.W. with reasonable height, density and lot occupancy, and it has consistently stated that it does not oppose neighborhood-serving, ground-floor retail at that location accompanied by adequate parking for retail customers.

18. The Commission granted party-in-support status to Ward 3 Vision ("W3V"). In its application for party status, W3V described itself as an "active group of residents partnering with the Coalition for Smarter Growth (a 501 c3 organization) to ensure that new development happens in a positive way for our community." The group claims to be comprised of several hundred residents.

Description of Site

19. The subject site, 5220 Wisconsin Avenue, N.W., consists of Lots 810, 811 and 812 in Square 1657 and encompasses approximately 22,500 square feet (0.5163 acres) of land. At present, the site is zoned R-5-B. It currently is improved with a used-car dealership and repair bay as well as a flower shop.

20. The project site is square in shape, measuring 150 feet on each side, and fronting on Wisconsin Avenue. There is a Pepco substation south of the site. The Washington Metropolitan Area Transit Authority's ("WMATA's") Western Bus Garage is north and west of the site. There is a 20-foot alley west of the site. The elevation of this alley is approximately 8'7" lower than the elevation on Wisconsin Avenue. Directly across Wisconsin Avenue from the site is a two-story retail development. A group of two-story garden apartments is diagonally across the alley from the site; another alley separates them from the Western Bus Garage. The rear yard of the closest garden apartment is located 20 feet from the project site, which Akridge proposes to build to its full (100 percent) lot occupancy.

21. The property currently is zoned R-5-B. It contains 22,500 square feet (0.5163 acres) of land and thus does not qualify for a PUD under the minimum land requirements for an R-5-B zone, which is one acre. The minimum land area in a PUD case can be reduced by up to 50 percent if the Commission finds that "the development is of exceptional merit and in the best interest of the city or the country." 11 DCMR § 2401.2(a). The Applicant did not request a waiver of the one acre minimum land area required for PUDs in an R-5-B District under Section 2401.2 of the Zoning Regulations, claiming that the project met the minimum area requirement as computed

for the proposed C-2-B zone. The Applicant did not address the minimum land requirement for this site in the existing R-5-B zone.

22. The Generalized Land Use Map of the Comprehensive Plan designates this site in the low-density commercial land use category.

23. The Future Land Use Map of the pending Comprehensive Plan designates this site in the mixed-use category: low-density commercial/medium-density residential/local public facilities. The text of the pending Comprehensive Plan states that the corresponding zoning districts for low-density commercial designation are generally C-1 and C-2-A [pending Comprehensive Plan § 224.11], and that the corresponding zoning districts for the medium-density residential designation are generally R-5-B and R-5-C. [Section 224.8]

24. Considering the zoning categories that are consistent with these designations, the Commission finds that:

a. The limits for matter-of-right development in C-1 and C-2-A districts are heights of 40 feet and 50 feet, respectively, and FARs of 1.0 and 2.5, respectively, with nonresidential uses limited in C-2-A. The lot occupancy for residential development in a C-1 or C-2-A district is limited to 60 percent. With a PUD, the limits in C-2-A are increased to a height of 65 feet and an FAR of 3.0. In a C-1 district, the height and density limits are not increased with a PUD.

b. The limits for matter-of-right development in R-5-B and R-5-C districts are heights of 50 feet and 60 feet, and an FARs of 1.8 and 3.0, respectively. The lot occupancy is limited to 60 percent and 75 percent, respectively. With a PUD, the limits in R-5-B and R-5-C districts are increased to a height of 60 feet and 75 feet, and an FAR of 3.0 and 4.0, respectively. The maximum lot occupancy with a PUD is unchanged.

25. The zoning category requested by Akridge is far more intense than the zoning categories associated with the designation of low-density commercial/medium-density residential/local public facilities on the Future Land Use Map of the pending Comprehensive Plan.

26. The requested height, density and lot occupancy are all far more intense than the heights, densities and lot occupancies associated with the designation of low-density commercial/medium-density residential/local public facilities on the Future Land Use Map of the pending Comprehensive Plan.

27. The Generalized Policy Map of the pending Comprehensive Plan shows that the site is outside the Friendship Heights regional center, which lies to the north of the subject site.

Description of the Parties

28. Applicant John Akridge Development Company, a privately owned company founded in 1974, specializes in the development of Class A office buildings, generally in the range of 170,000 to 400,000 square feet with ground-floor retail, in the Washington, D.C. market. It established 5220 Wisconsin, LLC to develop the subject property site. The proposed building represents Akridge's initial foray into residential development. Its only other Washington-based project with a residential component is the mixed-use Gallery Place, which has 192 condominium apartments.

29. Party-in-opposition Friendship Neighborhood Association is a community-based unincorporated nonprofit association whose 600 supporters mostly live in the 15-block area surrounding 5220 Wisconsin Avenue.

30. Party-in-support Ward 3 Vision is a group of residents who have partnered with and who receive funding from the Coalition for Smarter Growth. W3V claims to speak for several hundred “smart-growth” advocates. W3V claims as members anyone who has sent W3V an e-mail, including individuals who oppose this Application. The group appears to have no more than 10 to 12 active participants, few of whom apparently live in the neighborhoods immediately adjacent to the project site.

Pre-Hearing and Post-Hearing Filings

31. In a preliminary report, dated September 1, 2006, the Office of Planning analyzed the Applicant’s request. OP requested additional information from the Applicant about several of the proposed amenities. While OP supported changes necessary to include retail uses at this site, OP also questioned whether additional retail space at this location could rise to the level of a public benefit. In the tabulations presented, OP determined the relief the Applicant was requesting was based on the limitations for a PUD with the requested map amendment to C-2-B, rather than on a comparison with the limitations for matter-of-right development in an R-5-B zone. The analysis of the Comprehensive Plan consisted only of a listing of several policies, but without any analysis of whether the project is more likely to advance those policies than matter-of-right development, and that analysis omitted many of the Ward 3 policies that are critical to a review of development in Friendship Heights.

32. On September 7, 2006, FNA filed a review of the Office of Planning Setdown Report, finding that: (a) neither OP nor the Applicant had provided the tabulations that are necessary to compare the project with development allowed on that site as a matter-of-right; (b) OP failed to compare the project with matter-of-right development, but instead compared it to the non-conforming existing use; (c) OP failed to consider the designation of that site as low-density commercial on the Generalized Land Use Map of the Comprehensive Plan; (d) OP failed to take into account the themes of the Ward 3 element of controlling development and protecting neighborhoods, and the provisions of the Comprehensive Plan to limit heights and densities in the regional center to those that are appropriate to the scale and function of adjoining communities; (e) OP failed to accurately describe ANC 3E’s opposition to the set-down of this Application, and the reasons for that opposition as stated in ANC 3E’s resolution; (f) OP failed to accurately describe the reasons for Friendship Neighborhood Association’s opposition to set-down of this Application, as presented to OP staff prior to their submission of the Set-down Report; and (g) OP failed to mention the petition with over 500 signatures submitted by FNA, a petition that was discussed in FNA’s meeting with OP staff prior to their submission of this Report.

33. On September 6, 2006, FNA submitted to the Commission petitions demonstrating that the overwhelming majority of people living in the approximately 15 blocks surrounding 5220 Wisconsin Avenue, on both the east and west sides of Wisconsin Avenue, oppose the heights and densities sought by Akridge in its PUD application for that site. A total of 548 adult respondents living in the 442 residences surrounding the site, and comprising the petition area, were contacted. No effort was made to exclude anyone living in the petition area. Initially, 91 percent of the residents (501 people) signed the petition. Just 4 percent of residents (22 people)

supported the height and density proposed by Akridge. The remaining residents were either undecided about the issue or uninterested. The precise language of the FNA-sponsored petition was as follows:

In response to the Akridge proposal to develop 5220 Wisconsin Avenue, NW beyond the matter-of-right limits specified for the site's current zoning designation (i.e., R-5-B), we, the undersigned, oppose any proposal for the site that incorporates heights and densities exceeding the existing matter-of-right zoning limits specified for the R-5-B zoning category established by the District of Columbia.

Financial support from residents living in the petition area but who did not previously sign was later obtained, increasing the support for the petition from 91 percent to 92 percent by the time of the March 8, 2007, Commission hearing. The petition area boundaries are: Jenifer Street from Western Avenue to 41st Street, to the north; Fessenden Street from River Road to Wisconsin Avenue, to the south; 42nd Street from Fessenden Street to Garrison Street, Harrison Street from 42nd Street to 41st Street and Jenifer Street to Harrison Street, up to, but not including, 41st Street to the east; and River Road from Western Avenue to Fessenden Street and Western Avenue from River Road to Jenifer Street, to the west.

34. In its May 10, 2007 rebuttal, Akridge asserts that FNA's petition does not accurately portray the overwhelming community opposition to the Akridge project because some people were visited on more than one occasion to sign the petition. Indeed, Akridge goes even further and states that FNA volunteers who circulated petitions pressured their neighbors into signing them after they had initially chosen not to sign. Not only are Akridge's statements hearsay, but it identified no purportedly pressured petition signers and provided no supporting or corroborating facts or testimony – all this despite the fact that petitions with more than 500 signatures were in the Commission's public file for more than seven months before the record in this case closed. Moreover, the fact that someone may have visited an individual on more than one occasion can mean many things, including that a spouse or other resident was not home at the time or that those at home did not have time, wanted to think about it, or asked the requester to return.

35. The petition is not the only evidence of overwhelming community opposition to the Akridge project. During the April 12, 2007 hearing, FNA summarized in convenient fashion the positions expressed by those who submitted letters into the record of this case. Of those who wrote letters and who lived closest to the project, 84 percent (189 people) wrote in opposition. Although W3V claimed that it represented the majority of the community, cross examination of W3V spokesperson Tom Quinn revealed that W3V had not consulted with the people who signed up for that group's own e-mail alerts – the people he testified constituted W3V's membership.

36. Evaluating this issue by the appearance of witnesses who testified in support and in opposition to the project does not change the result here. In all, 13 individuals testified in favor of the project. One additional resident presented the W3V case. In contrast, 20 individuals and two organizations testified in opposition to the project. In addition, 6 residents participated in the ANC and FNA presentations. Moreover, those who remained to testify in opposition had to sit through several hours of hearing before they had their chance to express their views. The last of the opponents did not complete his testimony until approximately 11:30 p.m. The fact that

these 20 people waited patiently for so many hours is a testament to the strength of their convictions.

37. Along these same lines, it bears repeating ANC 3E voted 4 to 1 to oppose the Application in this case. Not only does the Commission give great weight to the ANC's strongly held views, but those commissioners were themselves elected and have a good sense of the views of their constituents.

38. The Commission must take into account the views of the community. In our role, we balance the community benefits against the concerns raised by the project. If we were to ignore the community, we would be second-guessing the very people who best understand the situation. Also, the record in this case does not indicate that the community is unreasonably or staunchly opposed to development on this site. Indeed, there is nothing in the record to suggest that residents want to see this site remain as it exists today. At its regular monthly meeting on September 11, 2006, the Commission reviewed the Applicant's request, considered the Office of Planning's Preliminary Report, and set down this matter for a contested public hearing.

39. In the months leading up to Akridge's June 19, 2006 Commission application, company representatives participated in three community meetings to brief residents about its plans for 5220 Wisconsin Avenue and, ostensibly, to solicit input and feedback. Akridge unveiled its aggressive development proposal on February 9, 2006 at a regularly scheduled ANC 3E meeting. It then hosted a pair of neighbor forums on March 16, 2006 and April 25, 2006. At each of these three sessions, numerous residents questioned or criticized various aspects of the project, including the building's planned height, FAR and lot occupancy, the elimination of the existing buffer zone and its impact on traffic and parking. Throughout these public meetings and in other exchanges with concerned residents (such as e-mails and a private meeting with the Board of Directors of the Coalition to Stop Tenleytown Overdevelopment), Akridge officials remained inflexible, dismissing out-of-hand the legitimate issues raised by neighbors or just ignoring them. As a result, the only changes made to the original project design were a different facade and the relocation of the building's massing. The overall 79-foot height, 5.25 FAR and 100 percent occupancy remained unchanged throughout the community meeting and Commission process. None of the fundamental problems identified by residents were addressed even tangentially.

40. Given Akridge's unyielding stand, ANC 3E commissioners tried to step in as facilitators, making multiple attempts to persuade the developer to work directly with community groups opposed to the proposed project in the hope of achieving compromises acceptable to both sides. "We were met with resistance at every request and are of the firm belief that the community meetings which were held were done so the applicant could claim community outreach and input," the commissioners reported in an August 17, 2006 letter to Ellen McCarthy, then the Office of Planning director. They also highlighted in the previously cited ANC 3E resolutions opposing the Akridge proposal that the company's refusal to consult with concerned residents extended to the development of its amenities package. In that regard, the commissioners pointedly noted, Akridge refused ANC 3E's repeated requests to conduct discussions about the amenities package at a regularly scheduled ANC meeting so that these supposed community benefits could be publicly vetted.

41. The Office of Planning issued its final report on February 26, 2007. It requested a clarification of the construction management plan and a condition that prior to issuance of a certificate of occupancy, the Applicant submit a financial instrument guaranteeing LEED

certification. OP also noted that a First Source Employment Agreement and a goal for Local, Small or Disadvantaged Business Enterprise participation typically are included in an amenities package, and were not offered by the Applicant. In addition, OP concluded that the inclusion of retail space on this site does not rise to the level of an amenity. As with the Set-down Report, OP's analysis was based on an evaluation of the zoning relief requested from a PUD in a C-2-B zone. OP added a review of the pending Comprehensive Plan. This review consisted of a list of excerpts, without explanation, including some excerpts that point to inconsistencies between the proposal development and the pending Comprehensive Plan. OP's evaluation of consistency with the Future Land Use Map of the pending Comprehensive Plan consisted simply of noting that the building is seven stories, and that one of the criteria for medium-density residential designations is a building of four to seven stories. OP did not consider the full description of that category.

42. On April 2, 2007, the Office of Planning submitted a Post-Hearing Report which included the text of the "Green Building Act of 2006," noting that the Act did not require LEED certification for privately financed residential buildings and, thus, would not be applicable to 5220 Wisconsin Avenue. Based on this, OP stated that it considered the proffered LEED certification to be an amenity. In this Post-Hearing Report, OP did not review the Applicant's submission listing the credits that it was targeting to determine whether the project would actually be more environmentally sensitive than matter-of-right development on that site.

Permitted Development under Current and Proposed Zoning

43. The subject site is zoned R-5-B. The R-5 Districts are subdivided into R-5-A, R-5-B, R-5-C, R-5-D, and R-5-E Districts. In R-5-A Districts, only a low height and density shall be permitted; in R-5-B, a moderate height and density shall be permitted; in R-5-C, a medium height and density shall be permitted; and in R-5-D and R-5-E, a relatively high height and medium-high density shall be permitted. [11 DCMR § 350.2]

44. The R-5-B District permits matter-of-right development of rowhouses, flats and apartments to a maximum FAR of 1.8, a maximum lot occupancy of 60 percent, and a maximum height of 50 feet. These requirements can be relaxed under the PUD process such that FAR can be increased to 3.0 and the maximum height to 60 feet.

45. The C-2 Districts, or community business centers, are subdivided into C-2-A, C-2-B and C-2-C Districts. The C-2-A District is designed to provide facilities for shopping and business needs, housing, and mixed uses for large segments of the District of Columbia outside of the central core. [11 DCMR § 720.2] The C-2-B District is designated to serve commercial and residential functions similar to the C-2-A District, but with high-density residential and mixed uses. [11 DCMR § 720.6]

46. The C-2-A District permits matter-of-right development of buildings that are entirely residential or a mixture of commercial and residential uses, to a maximum FAR of 2.5, of which no more than 1.5 can be for nonresidential uses, a maximum height of 50 feet, and a maximum lot occupancy for any building or portion of a building devoted to a residential use of 60 percent. [11 DCMR §§ 720.8, 771.2, 770.1, and 772.1] These requirements can be relaxed under the PUD process such that the FAR can be increased to 3.0, of which no more than 2.0 can be nonresidential, and the maximum height to 65 feet. [11 DCMR §§ 2405.1-2405.2]

47. The C-2-B District permits matter-of-right development of buildings that are entirely residential or a mixture of commercial and residential uses, to a maximum FAR of 3.5, of which no more than 1.5 can be for nonresidential uses, a maximum height of 65 feet, and a maximum lot occupancy for any building or portion of a building devoted to a residential use of 80 percent. [11 DCMR §§ 720.8, 771.2, 770.1, and 772.1] These requirements can be relaxed under the PUD process such that the FAR can be increased to 6.0, of which no more than 2.0 can be non-residential, and the maximum height to 90 feet. [11 DCMR §§ 2405.1-2405.2]

Minimum Area Requirement for a PUD

48. For the R-5-B District, the minimum area requirement for a PUD under section 2401.1 is one acre. “The Commission may waive not more than fifty percent (50%) of the minimum area requirement provided: (a) The Commission shall find after a public hearing that the development is of exceptional merit and in the best interest of the city and the country, and (b) The Commission shall find one of the following: (1) the development is to be located outside the Central Employment Area, at least eighty percent (80%) of the gross floor area of the development shall be used exclusively for dwelling units and uses accessory thereto; or (2) If the development is to be located in a portion of the Central Employment Area which is in an HR Overlay District, the development shall contain a minimum floor area ratio of 2.0 devoted to hotel or apartment house use.” Section 2401.2.

49. The site is 22,500 square feet in area, considerably smaller than the minimum area requirement for a PUD in an R-5-B district. The Applicant did not request a waiver of the minimum area requirement, and the Applicant did not present any evidence to address whether the project is of exceptional merit and in the best interest of the city and the country.

50. The Commission finds that the site does not meet the minimum area requirement for a PUD under section 2401.1, and that the Applicant did not demonstrate that the project would qualify for a waiver of the minimum area requirement under section 2401.2.

Zoning Commission Hearings

51. Under the PUD process as set forth in the Zoning Regulations, the Commission has the authority to consider this application as a one-stage PUD. The Commission may impose development conditions, guidelines and standards that may exceed or be less than the matter-of-right standards for height, FAR, lot occupancy, parking and loading, and yards and courts.

52. The Commission hearing was conducted on two nights, March 8, 2007, and April 12, 2007.

a. On March 8, 2007, testifying on behalf of the proposal were Matthew Klein, the president of Akridge Real Estate Services, and David Tuchmann, a development manager with Akridge and the project manager of 5220 Wisconsin Avenue NW. Eric Colbert, an architect, Osborne George and Ian Banks, experts in traffic engineering and design, and Steven E. Sher of Holland & Knight, LLP, an expert in urban planning, testified on behalf of the Applicant. Mr. Colbert, Mr. Osborne, Mr. Banks and Mr. Sher were all qualified as experts. Eric Smart, a real estate economist, and Larry Demaree, an expert in retail and retail leasing, were also qualified as experts but did not present any testimony. Mr. Demaree has an ownership interest in the project.

b. On March 8, 2007, testifying on behalf of the District Department of Transportation (“DDOT”), was Ken Laden, Associate Director for Transportation Policy and Planning.

- c. On March 8, 2007, Matt Jesick of the Office of Planning also testified in favor of the proposal.
- d. On April 12, 2007, Carolyn Sherman, ANC 3E SMD 03, and Lucy Eldridge, ANC 3E SMD 04, testified in opposition to the proposal. ANC 3E submitted copies of its 45-slide PowerPoint presentation on the same date.
- e. On April 12, 2007, Tom Quinn, a resident of 41st Street, testified on behalf of Ward 3 Vision, a party in support of the Application.
- f. On April 12, 2007, Jim McCarthy, Reed Fawell, John Wheeler, Mark Davidson, Allison Barnard Feeney, Susan Kimmel, Tad Baldwin, Ellen Bass, Ellen McCarthy, Stephanie Hellerman, Jim Sefcik, Leslie Debinsky and Ellen Jones (13 people) testified as individuals in support of the proposal. In addition, Cheryl Cort, representing the Coalition for Smarter Growth, and Ward Orem, representing the Lisner-Louise-Dickson-Hurt Home, testified as organizations in support of the proposal.
- g. On April 12, 2007, testimony against Akridge's Application by the party in opposition, FNA, was given by David Frankel, Marilyn Simon, George Oberlander, Joe Mehra, Alta Mainer and William Vigdor. George Oberlander was qualified as an expert witness on planning, and Joe Mehra was qualified as an expert witness on transportation.
- h. On April 17, 2007, FNA submitted copies of the 64-slide PowerPoint slide presentation that accompanied the oral testimony of Mr. Frankel, Ms. Simon, Mr. Oberlander, Mr. Mehra, Ms. Mainer and Mr. Vigdor during the April 12, 2007 hearing. In addition to that PowerPoint presentation, FNA made several additional filings in the Commission record of this case. On March 5, 2007, FNA submitted its Preliminary Response to the Office of Planning's Final Hearing Report. On March 8, 2007, FNA submitted WMATA's Metro Core Capacity Study. On March 12, 2007, FNA submitted the written statements of its two experts, Messrs. Oberlander and Mehra. On April 12, 2007, FNA submitted its Response to Planning Reports of the Applicant and Office of Planning. That same day, it also filed the Testimony of Joe Mehra, P.E., in Opposition to the Akridge Application. On May 3, 2007, FNA filed its Supplemental Filing Concerning the Applicant's LEED Certification "Amenity" Argument and Concerning Existing Retail Available to Friendship Heights Residents. The following is a partial listing of the issues FNA raised in these filings:
- i. The Project is inconsistent with the current Comprehensive Plan, as it clearly is inconsistent with the low-density commercial designation on the Generalized Land Use Map, and with many of the policies and themes of the citywide elements of the Comprehensive Plan and Ward 3 Element that are most relevant to the evaluation of a project on this site.
 - ii. The Project is inconsistent with the pending Comprehensive Plan, as it is clearly inconsistent with the low-density commercial/medium density residential/local public facilities designation on the Future Land Use Map, and with many of the policies and themes of the citywide elements and the Rock Creek West element that are most relevant to the evaluation of a project on this site.
 - iii. The Project is outside the Friendship Heights regional center, and is out of proportion to other development outside the regional center and has a height and density that is

inappropriate to the scale and function of development in that portion of the Wisconsin Avenue and the scale and function of development in the adjoining communities. While the Project is located outside the regional center in an area designated as a buffer between the regional center and the low-density neighborhood, its height and density would rank it among the most intense development in the area, including the development in the regional center.

- iv. The 100 percent lot occupancy sought by the Applicant reduces the access to light and air, and is the source of many negative impacts on the adjoining neighborhoods.
- v. The Applicant and OP understate the impact that this project would have on the adjoining communities. Some of these impacts include increased strain on an already strained infrastructure, including increased traffic on major road and increased cut-through traffic in the neighborhoods, increased demand for already scarce on-street parking, further overcrowding in the area schools, and a design that will create unsafe pedestrian conditions on Harrison Street and congestion and unsafe conditions on Harrison Street and in the alley.
- vi. The amenities proffered by the Applicant are inadequate, and in many instances are less attractive than would be associated with matter-of-right development on this site. In evaluating these amenities, OP failed to consider the amount of flexibility that the Applicant was requesting above matter-of-right limits for the current zoning category, and OP failed to compare the amenities proffer to what would likely be associated with matter-of-right development, and instead compared them with the existing non-conforming use.
- vii. For example, the Applicant's project will not be the first LEED certified residential building in the District. Moreover, many of the features that the Applicant has listed to obtain the lowest level of LEED certification would also likely be included in any matter-of-right building on the same site. In fact, this project would be less sensitive to the environment than a matter-of-right building at the same site. Therefore, LEED certification cannot be considered a benefit or amenity.
- viii. The site does not meet the minimum lot size requirement for a PUD in an R-5-B zone, and the Applicant did not request a waiver of that requirement. Further, had a waiver been requested, it is clear that this project cannot qualify as being of “exceptional merit.”
- ix. Friendship Heights, D.C. residents already have among the richest array of retail shopping and service providers available as compared to other parts of the District.
- x. The two track Metrorail system has limited core capacity. As this core capacity is reached, options for moving Friendship Heights residents to their jobs will be limited and will likely result in much greater motor vehicle traffic than exists today.
 - i. On April 12, 2007, Michael Enders, Andra Tamburro, Vera Sky, Louis Wolf, Janet Bachman, Frederic Burk, Bruce Lowrey, Barry Berman, Joe Carlson, Greg Pickens, Noam Stopak, Lyle Brenneman, Gina Mirigliano, Kathleen Dell, Robert Schwartzberg, Paul Fekete, Lisa Newman, Hazel Rebold, Alma Gates and Robert Elliott (20 people) testified as individuals against the proposal. Many of the individuals testifying in opposition zeroed in on Friendship

Heights' already strained infrastructure, such as the traffic-carrying capacity of its streets, the cut-through traffic on residential streets, the lack of parking for residents, overcrowding at Janney Elementary School, the slow response time for fire and EMS vehicles, and capacity constraints of Metrorail. As nearby resident Janet Bachman succinctly stated in her testimony: "My concern is with our capacity to absorb very significant new development, all of it clustered within a few blocks, without causing major permanent disruption to the very characteristics that have made Friendship Heights a successful, family-oriented neighborhood. New development should improve, not damage a neighborhood." A number of people also took issue with the excessive height, density and lot occupancy of the building Akridge has proposed for what is supposed to be a buffer zone between the Friendship Heights commercial core and the residential neighborhood. A third recurring subject in the opposition testimony was that zoning regulations, particularly those applicable to PUDs, no longer seem to matter. Some people went further, talking about the corrupting influence of the PUD process or describing amenity proffers as akin to bribes.

j. Also testifying against the Akridge Application were Barbara Zartman, representing the Committee of 100 on the Federal City, and John Ritchotte on behalf of Tenleytown Neighbors Association, Inc.

Existing Zoning and the Comprehensive Plan

53. The Akridge site is one of the most intensively zoned residential sites in the Tenleytown-Friendship Heights corridor. Other residential sites in the Tenleytown-Friendship Heights corridor are the WMATA Western Bus Garage on Wisconsin Avenue below Jenifer Street (zoned R-5-B), and the northeast quadrant of Square 1661 that contains the Courts of Chevy Chase townhomes (zoned R-5-D through a PUD, but PUD approved and built within R-5-B standards for height and density).

54. Apart from project-specific reviews, the Office of Planning has never studied the cumulative impact of development to date on the neighborhood. Mr. Oberlander testified that the 1973 Friendship Heights Sectional Development Plan was effectively a Small Area Plan and is effectively the Small Area Plan in place for the core commercial and residential area of Friendship Heights, D.C.

55. OP, in its February 26, 2007 Report, dismisses the 1973 Friendship Heights Sectional Development Plan by noting that while it was adopted by the National Capital Planning Commission, it was not adopted by the City Council. However, Mr. Oberlander testified that the Commission did make the zoning map changes based on the NCPC plan, and moreover, before Home Rule, there was no need or requirement for the Council to approve an NCPC-adopted Sectional Development Plan. At the time it was approved by the NCPC, the NCPC served as both the City Planning Commission and the Federal Planning Commission. Council approval or adoption of the Comprehensive Plan and/or any amendments only became necessary with the passage of the Home Rule Act.

56. The 1973 Friendship Heights Sectional Development Plan bases future intensification of development on the actual peak hour(s) capacity of the street and Metrorail systems. [Zoning Order 87, Statement of Reasons, Application, Exhibit H]

57. Subsequent to the area-wide rezoning based on the Friendship Heights Sectional Development Plan, the Commission approved several large-scale Planned Unit Developments

along Wisconsin Avenue, which allowed for greater density than was contemplated in the Plan. These include Chevy Chase Pavilion, Chevy Chase Plaza on Square 1661, and Chase Point at 5401 Western Avenue.

58. The Akridge site is in the R-5-B zone, which is designed to buffer the lower residential densities from the higher commercial and office densities. Zoning Commission Order 87 and Statement of Reasons [Application, Exhibit H] rezones the Akridge site and others to R-5-B, and describes the entire area rezoned as a buffer area. The Statement of Reasons defines the following objective: “Rezoning certain areas on the periphery of the plan area to medium density residential in order to provide a buffer between the high density and mixed use portions of the plan area and the surrounding low density residential community.” The Friendship Heights Sectional Development Plan, Zoning Order 87 and the Statement of Reasons all clearly establish the entire area zoned R-5-B as the buffer, and not just a portion of the sites within that area.

59. The Friendship Heights Sectional Development Plan and Zoning Order 87 map C-2-B zoning further to the north, in the Friendship Heights planned core or center. The small area plan did not envision expanding that intensification of use south of that core.

60. Mr. Oberlander testified that the Commission rezoned this site on the recommendation of the National Capital Planning Commission, based on the work of the Interagency Task Force on Friendship Heights, that it be part of “moderate density residential development around the edges of the [Friendship Heights commercial] core area to provide a compatible transition in order to protect the surrounding low-density residential area.” Mr. Oberlander testified that this is a sound planning principle and that Akridge’s request to rezone this single site, dismantle this transition zone and convert it to high-density use, and then deem the adjoining parcel of land the new “transition zone” has no grounding in the history of zoning of the Akridge site or in the sound planning principles that are applicable to it.

61. As Mr. Oberlander testified, the 1974 planning and zoning efforts serve as a predictable guide that provide the Friendship Heights neighborhood with a framework to assess the compatibility of new development. As Mr. Enders, Ms. Sky, Mr. Burk, Mr. Ritchotte, Mr. Stopak, Ms. Gates and others testified, any new development should respect the history, character, values and scale of the residential neighborhoods, and integrate new development with these residential neighborhoods. For instance, Mr. Enders, who has lived in one of the garden apartments on the 4300 block of Harrison Street for 15 years, rhetorically but pointedly, asked the Commission: “How would you like a seven-story building next to your two-story residence? What would that do to your neighborhood of two-story residences?”

62. The Applicant testified that the “proposed height is consistent with other heights in the vicinity, and not out-of-scale with what should be expected along a major arterial street within 300 feet of entrance to Metrorail station.” [Sher, Outline of Testimony, March 8, 2007, p. 11.]

63. Mr. Carlson, Ms. Mirigliano, Mr. Fekete and Ms. Rebold were among those individuals who testified that, from the neighborhood perspective, the Akridge site is part of an essential transition zone between high-density commercial uses on Wisconsin Avenue and the low-density residential and commercial uses to the west and south of the site, as reflected in all planning documents and zoning decisions since 1974. Mr. Carlson specifically noted that when he and his wife decided to buy their house on the corner of 44th and Harrison Streets, they were “comforted

by the fact that the zoning laws buffered us from the nearby congestion. The building heights and densities stepped up in a rational way to the nearby Friendship Heights Metro station.”

64. The Applicant submitted a written statement that enumerated elements of the Comprehensive Plan and that concluded that the project is not inconsistent with the Comprehensive Plan. [Sher, Outline of Testimony, March 8, 2007, pp. 15-20] In the same written statement, the Applicant also submitted a list of quotes from the pending Comprehensive Plan. [Sher, Outline, pp. 21-42]. The report does not provide an explanation as to how the project is consistent with these quotes, and, in fact, the project is clearly inconsistent with a number of the excerpts that were included in the report.

65. With little analysis or application to the project as proposed, the Applicant claims summarily that the project is not inconsistent with the Economic Development, Housing element, Environmental Protection element, Transportation element, Urban Design element, Land Use, Ward 3 Economic Development element, Ward 3 Housing element, Ward 3 Environment element, Ward 3 Transportation element, Ward 3 Urban Design, and Ward 3 Land Use element. As set forth below, the project is inconsistent with these elements of the Comprehensive Plan.

66. Mr. Oberlander testified that while there are several policies that support some aspects of the project, there are specific policies in the Ward 3 more detailed portion of the Comprehensive Plan that the project clearly violates and that those policies should serve as guidance for the Commission. These policies include:

- a. A major theme is “protecting the Ward’s residential neighborhoods.” Section 1400.2;
- b. “Residents seek to ensure that stability is maintained. Accordingly, no significant land use changes have been indicated... , and it is a major theme of this ward plan to protect and maintain the low-density, high quality character of the ward.” Section 1400.2(b)(1);
- c. “Ward 3, its residents, businesses, and institutional establishments are significant contributors to the District’s total economy. While the people of the ward recognize ... this contribution, their single greatest concern is the possibility of unrestrained development diminishing the quality of life. ... The last (2) decades have witnessed major redevelopment in Friendship Heights, Tenley Circle ... Major redevelopment is often accompanied by undesirable effects, particularly increased traffic. This presents problems ... and has spillover effects penetrating nearby residential neighborhoods.” Section 1400.2(b)(1);
- d. Section 1400.2(b)(3)(B) also calls for conditions that “Strong residential areas are maintained... Without such areas, many organizations may prefer to locate outside the District”;
- e. “While new housing is needed, all development proposals must be evaluated to avoid adverse impacts on neighborhood stability, traffic, parking and environmental quality.” Section 1402.2(h); and
- f. “Land use and future development must be carefully controlled to protect the existing scale and low density character and to enhance ... other qualities of the ward.” Section 1406.2(d)

67. Mr. Oberlander testified that these specific Comprehensive Plan policies, as well as the designations on the Comprehensive Plan maps, speak to the fact that the project’s height, density and lot occupancy, its location diagonally across a 20-foot public alley and viewed from the back windows of two-story apartments, are not in character with the nearby and immediately

adjoining residential neighborhood to the southwest of the Akridge site. Mr. Oberlander also noted that the Akridge site is within 300 feet of single-family homes.

68. The Commission finds that the project is inconsistent with the Comprehensive Plan. Among other things, the Comprehensive Plan provides:

- a. that infill development must not compromise the integrity of stable neighborhoods and adequate infrastructure capacity should be ensured as growth occurs. The residential character of neighborhoods must be protected, maintained and improved;
- b. for Metrorail stations that are located close to low density areas, building heights should "step down" as needed to avoid dramatic contrasts in height and scale between the station area and nearby residential streets and yards;
- c. for the preservation of single family neighborhoods and calls for the protection and conservation of the District's low density neighborhoods, while ensuring that their zoning reflects their established low density character;
- d. for managing new commercial development so that it does not create unreasonable and unexpected traffic, parking, litter, shadows, view obstruction, odor, noise, and vibration impacts on surrounding residential areas; and
- e. that new commercial development adjacent to lower density residential areas provides effective physical buffers to avoid adverse effects.

These types of provisions, along with the specific policies in the Ward 3 element of the current Comprehensive Plan and the Rock Creek West element of the pending Comprehensive Plan, are most relevant to the evaluation of development at this site, and far outweigh the more generalized, non-neighborhood specific provisions of the Comprehensive Plan.

69. The Applicant also claims that the project is not inconsistent with the Generalized Land Use Map and Land Use Policy Map of the Comprehensive Plan. In the Application, the Applicant notes that the site is in the low-density commercial category, "and is adjacent to the mixed-use medium density commercial and medium density residential, which is in keeping with the proposal set forth in this PUD application." [Application, page 27.]

70. The Akridge site is, in fact, in the low-density commercial category, and the proposed project is, in fact, a far more intense use than is consistent with that category.

71. The Commission notes that the Akridge site, in fact, is not adjacent to the mixed-use medium-density commercial and medium-density residential category, but is adjacent to other sites in the low-density commercial category and in the low-density residential category. However, even if a site with a low-density commercial designation was adjacent to an area with a more intense designation on the Generalized Land Use Map, the low-density designation for that site cannot be intensified based simply on proximity to sites with more intense designations.

72. The Applicant states that the project is consistent with the Land Use Policy Map inasmuch as it claims that the project is in the Housing Opportunity Area ("HOA") and the regional center.

73. The Comprehensive Plan designates Friendship Heights as a regional center. While the Comprehensive Plan does not map the Friendship Heights regional center, the regional center is mapped in the pending Comprehensive Plan. The Opponent testified that the Akridge site lies outside the Friendship Heights regional center as mapped in the pending Comprehensive Plan.

74. However, even if the Akridge site was in the regional center, the Comprehensive Plan clearly establishes a policy to “maintain heights and densities established and proposed regional centers which are appropriate to the scale and function of development in adjoining communities.” [Section 1108.1(h)] The Comprehensive Plan also establishes a policy to “permit the District’s two (2) established regional centers, Georgetown and Friendship Heights, to develop and evolve in ways which are compatible with other land use policies, including those for maintaining stable neighborhoods, mitigating environmental impacts, and reducing traffic congestion.” [Section 1108.1(f)] Similar policies are included in the pending Comprehensive Plan.

75. The Commission finds that the Akridge site lies outside the regional center.

76. The Commission further finds that the designation of a regional center relates to the types of commercial functions located in that area, as described in section 1107, and does not imply that the heights and densities in the regional center are higher than those in other commercial areas.

77. The Comprehensive Plan designates the Tenleytown and Friendship Heights Metrorail stations as Housing Opportunity Areas. The HOA is not mapped in the Comprehensive Plan Policies Map, and Mr. Oberlander testified that the HOA does not extend to or include the Akridge site.

78. However, even if the Housing Opportunity Area did extend to the Akridge site, inclusion in the HOA would not justify the requested zoning change, or the requested increase in height, density or lot occupancy. The goal of HOAs is simply to create more housing than is presently available within the HOA – *i.e.*, to increase actual density vis-à-vis present uses. The Comprehensive Plan contains no statement that current residential zoning is an impediment to creating new housing, nor that upzoning residential land is the preferred tool to create new housing. The Opponent testified that matter-of-right development under current zoning can accommodate as many of 1,800 new housing units in the Friendship Heights area, and concluded that current zoning in the Friendship Heights area is not an impediment to creating new housing.

79. The Comprehensive Plan also lists aspects of Housing Opportunity Areas that make them ripe to support additional housing units and suggests that methods to achieve additional housing include new development on “vacant or poorly used land,” “surplus property sites,” “sites that exhibit potential for successful joint public and private initiatives,” and “areas where development can be used to improve neighborhood quality.” [DC Comprehensive Plan, § 118.7.] There is no mention of upzoning or rezoning residential land in these provisions of the Comprehensive Plan.

80. The Akridge site currently has no housing units. Under existing zoning, matter-of-right development would allow development of a 40,500 square foot residential building. This level of residential development would add a very significant amount of new housing. Such development, although outside the Housing Opportunity Area, would contribute significantly toward the increased housing envisioned by the designation of the Friendship Heights Metrorail station as a HOA, and is in full accord with the Comprehensive Plan and the HOA provisions, especially given the strained infrastructure at the core of Friendship Heights.

81. The Commission finds that the site is outside the Housing Opportunity Area, and further that, if the site were in the HOA, the requested increase in density would not be necessary for the creation of more housing in this area.

Pending Comprehensive Plan

82. In the Pre-Hearing Submission, the Applicant asserts that the project is consistent with the Future Land Use Map of the pending Comprehensive Plan. The Applicant notes that the Akridge site is in the Low-Density Commercial/Medium-Density Residential/Local Public Facilities category of the Future Land Use Map. The Applicant produces an excerpt of part of the definitions of these category designations, stating: “As indicated therein, the Medium-Density Residential designation defines neighborhoods or areas where mid-rise (i.e., four to seven stories) apartment buildings are the predominant use. The Low-Density Commercial designation defines shopping and service areas that are generally low in scale and character and can include areas that are small business districts or large business districts.” Based on these excerpts, the Applicant concludes that the project is consistent with the designation on the Future Land Use Map.

83. In the Closing Statement, the Applicant states that C-2-B is consistent with the designation in the Future Land Use Map. In doing so, the Applicant relies on only part of the description of the medium-density residential designation, characterizing the development as mid-rise (4-7 stories).

84. The Opponent points out that the Applicant has ignored the more complete description of the designations on the Future Land Use Map. Those more complete descriptions include the zoning categories which are generally consistent with each designation, C-1 and C-2-A for low-density commercial and R-5-B and R-5-C for medium-density residential.

a. 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 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. Section 224.11

b. Medium-Density Residential: This designation is used to define neighborhoods or areas where mid-rise (4-7 stories) apartment buildings are the predominant use. Pockets of low and moderate-density housing may exist within these areas. The Medium-Density Residential designation also may apply to taller residential buildings surrounded by large areas of permanent open space. The R-5-B and R-5-C Zone districts are generally consistent with the Medium-Density designation, although other zones may apply. Section 224.8

85. The Opponent notes that it is the combination of the number of stories, density and lot occupancy that describes the intensity of use, and that the heights, density and lot occupancy for the zoning categories that are consistent with low-density commercial and medium-density residential are all far lower than the height, density and lot occupancy of the proposed project.

86. The Opponent also notes that C-2-B zoning, when applied to a residential project, is described as high-density residential, not medium-density residential, as the site is designated on the Future Land Use Map. Ellen McCarthy, in a letter dated March 8, 2007, Exhibit 209, writes: “As the Zoning Regulations state: ‘The C-2-B District is designated to serve commercial and residential functions similar to the C-2-A District, but with high-density residential and mixed uses.’ (720.6).” The Opponent maintains that C-2-B corresponds to a designation for high-

density residential and mixed uses, and therefore is inconsistent with the designation of medium-density residential and low-density commercial uses.

87. In its Closing Statement, the Applicant also quoted the testimony of Ms. McCarthy, testifying as an individual, in which she stated: “C-2-B, C-3-A, or C-3-B, all would be matter-of-right, would be consistent with a medium-density designation.” The pending Comprehensive Plan includes the following language in the definition of the medium-density commercial designation: “Medium-Density Commercial: This designation is used to define shopping and service areas that are somewhat more intense in scale and character than the moderate-density commercial areas. . . . The corresponding Zone districts are generally C-2-B, C-2-C, C-3-A, and C-3-B, although other districts may apply. 224.13”

88. While Ms. McCarthy is correct in stating that the C-2-B zoning category is the lowest zoning category that is listed as being consistent with the medium-density commercial designation on the Future Land Use Map, the commercial designation for this site is low-density commercial, not medium-density commercial, and is two full designations less intense than medium-density commercial. The site is also designated for medium-density residential, which corresponds to zoning categories with heights, densities and lot occupancies far lower than those sought by the Applicant.

89. In the Rebuttal, the Applicant states that the designation on the Future Land Use Map for some other locations is moderate-density residential/low-density commercial, and that there is no evidence in the record that the current zoning, C-2-A, is inconsistent with that designation. Based on that observation, the Applicant concludes that since the designation for this site is medium-density residential/low-density commercial, that a higher zoning category should be consistent with this site. This interpretation is not consistent with the clear language of the pending Comprehensive Plan. The pending Comprehensive Plan is clear in indicating that the same zoning category can be consistent with a number of different designations on the Future Land Use Map:

Some zone districts may be compatible with more than one Comprehensive Plan Future Land Use Map designation. As an example, the existing C-2-A zone is consistent with both the Low Density Commercial and the Moderate Density Commercial designation, depending on the prevailing character of the area and the adjacent uses. A correspondence table indicating which zones are “clearly consistent”, “potentially consistent” and “inconsistent” with the Comprehensive Plan categories should be prepared to assist in Comprehensive Plan implementation and future zoning actions (see Action LU-4.3B). [Pending Comprehensive Plan, 224.24(f)]

In the example included in the pending Comprehensive Plan, moderate-density residential is consistent with R-5-B, and medium-density residential is consistent with both R-5-B and R-5-C. Low-density commercial is consistent with C-1 and C-2-A, but moderate-density commercial is consistent with C-2-A, as well as C-2-B and C-3-A.

In addition, more than one zoning category is consistent with each designation, and in the discussion of how to interpret the Future Land Use Map of the pending Comprehensive Plan, the following guidance is provided:

The designation of an area with a particular land use category does not necessarily mean that the most intense zoning district described in the land use definitions is automatically permitted. . . . For example, there are at least three zone districts corresponding to “Low Density Residential” and three zone districts corresponding to “Moderate Density Residential.” Multiple zones should continue to be used to distinguish the different types of low- or moderate-density residential development which may occur within each area.” [Pending Comprehensive Plan, 224.24(e)]

90. The Commission finds that consistency between the C-2-A zoning category and moderate-density residential/low-density commercial in no way implies that C-2-B is the appropriate zoning category for an area designated as medium-density residential/low-density commercial.

91. In the Rebuttal, the Applicant also states that the PUD would be consistent with the designation on the Generalized Land Use Map, Main Street Mixed Use Corridor. While the land use for the PUD is consistent with the uses listed in this designation, the Opponent has not questioned whether it is appropriate to have a mixed-use project on this site, and supports development of a residential building with ground-floor retail, as is also consistent with the Generalized Land Use Map. The designation as a Main Street Mixed Use Corridor does not address the intensity of development, which is at issue in the case. Development of a mixed-use building with a height of no more than 50 feet, a lot occupancy of 60 percent and an appropriate FAR would also be consistent with the Generalized Land Use Map.

92. The Commission finds that the intensity of use proposed is inconsistent with the designation of low-density commercial/medium-density residential/local public facilities on the Future Land Use Map of the pending Comprehensive Plan.

93. The Commission further finds that the requested map amendment to C-2-B is inconsistent with the designation for this site on the Future Land Use Map of the pending Comprehensive Plan.

94. Mr. Sher, in his testimony, submitted, without explanation, a list of excerpts from the pending Comprehensive Plan, and asserted that the proposed project is not inconsistent with the pending Comprehensive Plan.

95. Mr. Oberlander pointed out that there are several policies in the pending plan that deal with scale and height in the corridor, noting that the scale and height of development in the corridor should reflect the proximity to single-family homes.

96. The Commission finds that the project is inconsistent with the designation on the maps of the pending Comprehensive Plan, and that the project is inconsistent with critical policies in the Rock Creek West element of the pending Comprehensive Plan.

97. Mr. Oberlander testified that approval of this Application would constitute spot zoning.

98. Mr. Sher testified that “On lot occupancy, lot occupancy is basically a requirement of the regulations as it relates to the development on this property for the benefit of this property. It’s not for the benefit of an adjoining property. It’s not for the benefit of somebody else across the street looking at this property. Lot occupancy is intended to suggest that there be some I’ll loosely call it breathing space around the building that’s created on this property.” [Transcript, March 8, p. 67] Mr. Sher further testified that “The rear yard too is for the benefit of the

development on this lot. You don't provide rear yard so that your neighbor's got extra space between his building and yours. You provide rear yard because your building requires some setback." [Transcript, March 8, p. 69.]

99. Mr. Oberlander testified that this is correct only to the extent that the property in the rear yards and side yards is owned by the property owner, but Mr. Sher is incorrect in his interpretation of the purpose of these lot occupancy limits and rear and side yard requirements. Mr. Oberlander cited Section 101.1:

In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the public health, safety, morals, convenience, and general welfare to provide adequate light and air.

100. Mr. Oberlander testified that those spaces provide adequate light and air for the immediate property and the adjoining properties, and there are places for landscaping and trees which would benefit the neighbors, not just the individual property. He noted that the cited provision was crafted to prevent undue concentration of population and overcrowding of land.

101. The Commission finds that the underlying purpose of the lot occupancy and side and rear yard requirements is not to protect the property owner, but to provide adequate light and air for the property and for other properties. The elimination of the rear yard and the 100 percent lot occupancy requested by the Applicant negatively impact the light and air for the surrounding properties, and are major factors contributing to many of the problems arising from the conflicting uses of the alley.

102. Ms. Tamburro testified that while she opposes the Akridge proposal, she supports growth, transit-oriented development and residential development within height, density and lot occupancy limits of the current zoning. Similar testimony was presented by Mr. Frankel, Mr. Brenneman, Ms. Mirigliano, Ms. Dell, and Ms. Rebold.

103. Mr. Frankel's testimony included photographs depicting how the Friendship Heights commercial core has the highest heights and densities and how those heights and densities decline as one moves southward on Wisconsin Avenue towards the Akridge site and westward and eastward into the adjoining single-family residential neighborhoods. In effect, this can be viewed much like a pyramid, with the apex at the corner of Wisconsin and Western Avenues and the base or lower heights and densities as one moves south, west and east from that point.

Requirements for Approval of a PUD

104. Section 2403.3 of the Zoning Regulations requires that "the impact of the project on the surrounding area and the operation of city services and facilities shall not be found to be unacceptable, but shall instead be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project."

105. The Applicant claims that the impact of the project will not be unacceptable on the surrounding area or upon the operation of District services and facilities, and further claims that it will have a positive impact on and enliven the immediate area. It maintains that the design complements the immediate area and that its massing and scale are sensitive and responsive to surrounding developments. The Applicant claims that the project is appropriate in-fill development, and has sufficient density to qualify as transit-oriented development. The Applicant cites an award from the Smart Growth Alliance, whose criteria look only at whether

the project has a sufficiently high density, at least 25 units per acre, and does not consider whether the proposed density, 140 units per acre, is too high relative to the surrounding development and the available infrastructure. The Applicant also claims, relying on the report prepared by O.R. George & Associates, that there will be no unacceptable impact of the project on traffic. [Application, pp. 16-17] In addition, Mr. Sher testified that the project is new residential construction in an area designated as a Housing Opportunity Area and main street mixed-use corridor, and that the proposed height is consistent with other heights in the vicinity. [Sher, Outline of Testimony, March 8, 2007, p. 11.]

106. Section 2403.9 of the Zoning Regulations enumerates ten “evaluation standards” that must be proven by the proponent of a PUD. In a typical PUD application, a project may qualify for approval by being “particularly strong” in only one or a few of the categories in section 2403.9, as well as “acceptable” in all proffered categories and “superior in many.” 11 DCMR § 2403.10.

107. The Zoning Regulations require that the public benefits and amenities must fully justify the “flexibility” (additional height and density) requested over current zoning.

108. The Zoning Regulations require that the project must not be inconsistent with the Comprehensive Plan. Section 2400.4.

109. The Applicant described its amenity package to include:

- a. On-site housing, providing 31,500 square feet more than permitted as a matter-of-right, and affordable housing, 6,800 square feet of housing affordable to households making no more than 80 percent of Area Median Income;
- b. Funding for additional affordable housing units, a contribution toward operating costs of four existing units for fifteen years at the Lisner-Louise-Dickson-Hurt Home;
- c. Enhancements to the façade of the Pepco substation;
- d. Environmental features and LEED certification, including two car-sharing spaces in alley;
- e. Improvements to the Janney Elementary School;
- f. IONA Senior Services--contribution to increase bus service 15 to 20 hours a week for one year;
- g. Streetscape and sidewalk improvements;
- h. Friendship Heights Transportation Management Coordinator--\$40,000 payment to DDOT to fund a contractor to identify and address transportation issues;
- i. Retail space;
- j. Building massing and façade design;
- k. LSDBE and DOES agreements; and
- l. A Construction Management Plan.

110. Mr. Sher, in his testimony, presented a table that compared the claimed benefits and amenities associated with this project to the flexibility that the developer is asking. This chart considered only the development incentives and flexibility from the matter-of-right limits for a

C-2-B district. In the Applicant's rebuttal, Applicant again submitted a chart comparing the amenities offered to the flexibility over matter-of-right limits for a C-2-B district. For example, the Applicant characterized the project as requesting an increase in FAR of 1.75, corresponding to 39,375 square feet, rather than the actual request of an increase in FAR of 3.45, corresponding to an increase of 66,625 square feet. The chart presented by the Applicant does not provide the required tabulation of development incentives and flexibility from the matter-of-right limits for the current zoning district, R-5-B.

111. Given that the public benefits and amenities must fully justify the flexibility requested over current matter-of-right zoning limits, the comparison presented in that table does not provide the appropriate basis for determining whether the project meets this requirement.

112. Section 2403.9(a): Urban design, architecture, landscaping, or creation or preservation of open spaces.

a. The Applicant has proposed to use pavers instead of standard D.C. sidewalk on the 150 feet of Wisconsin Avenue street frontage as well as the 100 feet of Wisconsin Avenue street frontage at the Pepco substation to the south. The Applicant states that this is an amenity since the sidewalk currently is in disrepair.

b. However, since the sidewalk will need to be replaced following construction, and since installation of an attractive sidewalk is something that would be done under matter-of-right development of this site in order to attract prospective purchasers and retail tenants, this cannot be considered an amenity.

c. The goal of urban design in this area of stable character is stated in section 711.1 of the Comprehensive Plan: "The areas of stable character objectives are to maintain those areas of the District that have a positive physical image and to provide that new development and renovation within or adjacent to these areas is complementary in scale and character." Therefore, evaluation of urban design requires looking at development on properties that surround the subject site. Clockwise from the east:

i. To the east, across Wisconsin Avenue, is two-story retail approximately, 26 feet in height; and a low-density residential neighborhood, zoned R-2, lies behind the two-story retail.

ii. To the south are a one-story PEPCO substation and a two-story bank.

iii. To the southwest, across a 15-foot alley (paralleling Harrison Street) and a 20-foot alley (from the Applicant's site to Harrison Street), there is a row of two story garden apartments approximately 26 feet in height. The closest garden apartment rear yard is 20 feet from the Akridge site. This means that the paved alley that will accommodate all of the project's truck and auto traffic, serves as the sole buffer from that rear yard to the Applicant's proposed project, which the Applicant proposes to build out to its lot line.

iv. To the west and north, there is the WMATA Western Bus Garage. These portions of the Western Bus Garage are zoned R-5-B and are part of the same residential buffer zone that the Akridge site lies in.

v. The Friendship Heights regional center, mapped in the revised Comprehensive Plan, lies to the north of the Wisconsin Avenue-facing portion of the WMATA Bus Garage and the subject site. In the Friendship Heights regional center, there is more intense

development. This includes Mazza Gallerie, which is 60 feet in height, 5225 Wisconsin Avenue, 64 feet in height, which was built prior to its site being downzoned, and Chevy Chase Plaza, Friendship Centre and Chevy Chase Pavilion on Square 1661. Chevy Chase Pavilion has a height of 100 feet, and Chevy Chase Plaza has a height of 90 feet. The other buildings in the Friendship Heights regional center have heights of 60 feet or less. Friendship Centre (54 feet), Lord & Taylor (43 feet), Boeymonger (56.5 feet), Mazza Gallerie (60 feet) and 4400 Jenifer Street (4 stories) all have heights that are significantly less than the height requested in this Application.

vi. The site is located approximately 300 feet south of a secondary, limited capacity, elevator only entrance to the Friendship Heights stop on Metrorail's Red Line.

vii. The proposed PUD lies outside the regional center. The heights of most of the other buildings outside the regional center are lower than the heights of the buildings in the regional center, and the proposed height of the Akridge PUD is significantly higher than all the other buildings outside the regional center. Outside the regional center, there are two buildings--FOX TV (56 feet) at Harrison Street and 5100 Wisconsin Avenue (Rodman's) (59 feet) at Garrison Street--that are over 50 feet. The Amalgamated Transit Union building at Garrison Street is 50 feet in height. Other buildings, which, like the Akridge site, lie outside the regional center, are significantly lower, with many of those buildings approximately 25 feet in height.

viii. Developments in the Friendship Heights regional center have densities that are below the FAR of 5.25 requested in this Application. Chevy Chase Pavilion and Chevy Chase Plaza, both on Square 1661, have the highest FAR, with FARs of 5.175 and 5.15, respectively. Other projects in the regional center have significantly lower FARs: The FAR of Mazza Gallerie is less than 3.0, Boeymonger has an FAR of 3.5, and other projects in the regional center have FARs that are 2.5 or less.

ix. New developments in Montgomery County, just north of the regional center in Friendship Heights, D.C., have densities far below the FAR requested in this Application. The Chevy Chase Center has an FAR of 1.123. Wisconsin Place, a mixed use development on the Hecht's site, will have an FAR of 3.17, and the approved plan for the GEICO site will have an FAR of 1.38.

x. Other developments, which, like the Akridge site, lie to the south of the Friendship Heights regional center, have FARs far below the 5.25 requested by Akridge. These range from 0.56 for the retail development across Wisconsin Avenue from the Akridge site, to 0.90 for the garden apartments southwest of the Akridge site, to 2.5 for the Amalgamated Transit Union Building.

In short, a comparison of the height and density proposed by the Applicant with the heights and densities of the buildings which, like the subject site, lie south of the regional center, clearly shows that the proposed project does not complement the surrounding development.

d. Testimony concerning the significant negative impact to the immediate neighborhood was presented at the April 12, 2007 hearing by many, including ANC 3E Commissioner Sherman, Mr. Frankel, Ms. Simon, Ms. Mainer, Mr. Vigdor, Mr. Enders, Mr. Burk, Mr. Wolf, Ms. Bachman, Mr. Carlson, Ms. Mirigliano, Mr. Fekete and Ms. Rebold.

e. The Applicant claims its proposal is appropriate urban design in the context of existing nearby buildings. In making this claim, the Applicant relies on testimony and submissions which relate mainly to compatibility of this project with three PUD developments existing on Square 1661. The Applicant claims that its own request is similar in nature to those projects.

f. The Opponent has noted that:

i. Unlike the subject site, all the Square 1661 PUDs are in the regional center.

ii. The project is taller than all but two buildings in the area, and has an FAR greater than any building in the area, including the PUDs on Square 1661.

g. The Commission concludes that the Applicant's characterization of the surrounding area is inaccurate and misleading. The subject site is outside the regional center, and it is not comparable to the developments in the regional center. Rather, this site is the continuation of a transitional band between the higher density to the north and the low-density two-story residential areas to the southwest and the low-density commercial area along Wisconsin Avenue to the south.

h. The Commission finds that the massive size of the development proposed for this site would be inconsistent with the essential transitional/buffer function of this site as it relates to the immediate area and as required for good urban planning.

i. The Commission finds that the proposed development lacks the "compatibility and sensitivity to the scale of existing buildings, maintenance of environmental quality, integration of new development with existing area or neighborhood character" required for good urban planning and stated in the Comprehensive Plan for Ward 3, §1406.1(d).

j. The Opponent believes the height, density and lot occupancy of the proposed development would have a severe negative impact on the nearby areas. The proposed building has a stated height of 79 feet, and given the change in elevation and lot occupancy appears massive as viewed from the nearby residences.

i. The view when looking due north from a window in one of the garden apartments is by no means the only view of importance to the residents. Contrary to the statements made by the Applicant's architect, the project will be visible from the apartments and from the yards behind the apartments, and will dominate the views from those residences.

ii. Indeed, given the Applicant's 100 percent lot occupancy proposal, the rear yard of the closest garden apartment will be just 20 feet from the Applicant's building. The paved 20 foot wide alley between the Applicant's site and Harrison Street is the planned entry/exit for all truck and auto traffic into and out of the site. Thus, residents of the nearest garden apartment seeking to enjoy their rear yard would be "buffered" from the Applicant's project only by the 20 foot wide alley that will accommodate all vehicular traffic. The Applicant's garage entry, loading area and structure would be 20 feet from that garden apartment's rear yard.

k. The Commission finds that the proposal is very significantly taller and very significantly more dense than its surroundings. When the development is reviewed in context and in relation to the existing and approved developments for the area, the building is inappropriately large, incompatible in scale and character, and intrusive to the residential neighborhood to the east and

south. This proposal does not represent good urban planning.

1. The Commission finds that the architecture is not exceptional or superior within the meaning of the applicable regulations. There is no demonstration that the architecture is somehow superior to what could be accomplished under matter-of-right zoning.

113. Section 2403.9(b): Site planning, and efficient and economical land utilization.

a. The Applicant claims that it has responded to community concerns with changes in the massing and façade design. It states that half the project is seven stories tall and the remainder is five stories or less. It further states that the project “steps down in height to a low point of three stories on the southwest corner near the existing two-level garden apartments on Harrison Street.” The Applicant further claims that the structure will have the presence of a five-story building on Wisconsin Avenue. [Application, p. 25]

b. The Opponent points out that the portion of the building that is described as three stories on the southwest corner is actually four stories, given the change in elevation on the site, and that the height of the building on the southwest corner of the site is actually 45 feet, measured from the alley.

c. The Opponent also notes that the building will not have the presence of a five-story building on Wisconsin Avenue, that the 79-foot-tall portion of the building extends four feet into the sidewalk at the north end of the building, and that the maximum set-back for the 79-foot-tall portion of the building is 30 feet.

d. Given that the building would have 100 percent lot occupancy, the description of having only half the building with a height of 79 feet means that half the site will have a building of 79 feet and half the site will have a building of five stories, 58 feet, or less. Given that maximum lot occupancy for this site is 60 percent, the claim that the 79-foot-tall portion of the building covers only 50 percent of the lot cannot be interpreted as demonstrating that massing of the building has shown sensitivity to the concerns expressed by the community.

e. The ANC presented an example of a project, a residential building with ground-floor retail, that would have 60 percent lot occupancy and a maximum height of 50 feet. That example provided open space at ground level, and it had a human scale on Wisconsin Avenue that related well to the development in that area. The example presented by the ANC also provided for an appropriate stepdown to the garden apartments and low-density neighborhood. Moreover, it was appropriate as part of the buffer, outside the regional center, between the higher heights and densities to the north and the low-density residential neighborhoods and the neighborhood-serving commercial development to the south.

f. In the Applicant’s Rebuttal Statement, pp. 9-10, Mr. Sher writes: “However, there is nothing to suggest that, even if the building met the eighty percent lot occupancy requirement at the ground floor, the remaining twenty percent of the lot would be devoted to green space. The Regulations do not require green space and the likelihood is that the garage would continue to fill up the entire lot below grade and the space above it would be paved.”

g. The ANC had presented an example with 60 percent lot occupancy, the maximum allowed under the R-5-B or C-2-A districts, not 80 percent, as is used in Mr. Sher’s example. More importantly, the ANC did not assume that the entire area outside the footprint of the building would be green space, but that it was reasonable to believe that the developer of an

upscale building with 60 percent lot occupancy at this location would have significant green space, and certainly open space, in order to make the building attractive to potential purchasers and residents.

h. Moreover, one cannot assume that the presence of an underground garage under the entire site means that there would be no green space above it. In fact, there is an example of a PUD in Friendship Heights with green space over an underground garage. In Zoning Commission Case 02-17, 5401 Western Avenue PUD, the project included an underground garage under the entire Washington Clinic site. In that case, the Applicant offered a landscaped open space as an amenity: “A distinct massing form . . . and a curved façade will frame the publicly-accessible green lawn. The landscaped southeast “green” will open up to public space along Military Road. The green space, representing approximately 24,700 square feet (more than a half-acre) of open space, will . . . create an attractive passive recreation area.” In that case, the Commission found that “the Project’s provision of open green space is a public benefit and project amenity.”

i. The Commission finds that the massing of the building is not exceptional or superior, and that the massing of the building is inferior to what would likely be accomplished within the matter-of-right limits of current zoning.

114. 2403.9(c): Effective and safe vehicular and pedestrian access; transportation management measures, connections to public transit service, and other measures to mitigate adverse traffic impacts.

a. The Applicant submits that its project will not impact adversely on traffic and congestion based on the submission of its expert, O.R. George. The Commission refers to this as the Traffic Impact Study (“TIS”).

b. DDOT concurs that there is no adverse impact on the surrounding transportation network. DDOT’s conclusions rest solely on the Applicant’s TIS. DDOT has neither collected its own data at this site nor conducted an independent traffic analysis. In addition, DDOT’s concurrence in the Applicant’s TIS must be accorded little, if any, weight. The record demonstrates that DDOT approved the Applicant’s TIS (on February 27, 2007) well before FNA’s expert traffic witness, Joe Mehra, highlighted glaring errors in the TIS (on March 8, 2007) and before O.R. George presented its embarrassing “mea culpa” corrections (at the March 8, 2007 Commission hearing). Thus, for example, DDOT did not catch such basic errors as O.R. George’s failure to account for any truck or bus traffic on Wisconsin Avenue or any pedestrians crossing Wisconsin Avenue and Harrison Street. DDOT also failed to catch the fact that O.R. George assumed three northbound travel lanes during the weekday AM peak hour, when in reality, the northbound shoulder is available for parking during the AM peak. Similarly, DDOT failed to catch the fact that O.R. George assumed there were three southbound travel lanes during the weekday PM peak hour, when in reality, the southbound shoulder is available for parking during the PM peak. These are all obvious but important errors that O.R. George presented to DDOT (and to the Commission) and that DDOT failed to uncover.

c. The Office of Planning also concurs that there is no adverse impact from the project, resting solely upon the TIS. Like DDOT, OP has not collected its own data or conducted an independent traffic analysis.

d. Thus, this apparent three-legged stool rests solely on the Applicant’s TIS. If the

Commission rejects the TIS or if the evidentiary weight afforded to it by the Commission is less than other, more credible evidence, the Applicant has failed to meet its burden.

e. The Commission concludes that the Applicant's TIS fails to meet its burden and the Commission concludes that the evidence of adverse impacts on traffic in the area is greater than the evidence supporting the Applicant.

115. Section 2403.3 requires the Applicant to demonstrate that "[t]he impact of the project on the surrounding area ... shall not be found to be unacceptable, but shall instead be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project."

a. The pending Comprehensive Plan contains policies designed to protect neighborhoods from adverse impacts. For example, Policy LU-2.3.3 "Mitigation of Commercial Development Impacts" states that it is a policy of the Comprehensive Plan to:

Manage new commercial development so that it does not result in unreasonable and unexpected traffic, parking, litter, shadows, view obstruction, odor, noise, and vibration impacts, on surrounding residential areas. Before commercial development is approved, establish requirements for traffic and noise control, parking and loading management, building design, hours of operation, and other measures as needed to avoid such adverse effects. [pending Comprehensive Plan, 311.4, page 1-58.]

b. The Applicant concedes that the Commission must review the impact on the community to approve its application.

c. Accordingly, the Office of Planning, after a thorough review leading up to the passage of the new Comprehensive Plan, has concluded that there is congestion on Wisconsin Avenue.

d. The Friendship Heights Transportation Study ("FHTS"), cited by the Applicant's traffic consultant, also concluded that traffic in Friendship Heights at the intersections relevant to this review is unacceptable.

e. DDOT in its March 8, 2007 testimony concluded that there are traffic concerns in Friendship Heights. DDOT also concluded that traffic and parking congestion in Friendship Heights is of such concern and unlikely to be solved that it needed a \$40,000 amenity to assist it with its mission to help resolve the problems. As described by DDOT (in its February 7, 2007 submission), this amenity will be used

to provide funding to hire a contractor to develop and implement programs to minimize vehicular traffic in the neighborhood. . . . The potential scope of work will address the management of current parking and traffic challenges that have been identified by DDOT and the community. It is estimated that the proposed contribution of \$40,000 will fund 10 hours per week for a period of one – two years, with the consultant maintaining a presence in the community for much of that time.

The record does not address several aspects of this amenity. For example, it does not set out the part time contractor's proposed skill level and professional experience. Will this person have an educational and professional background in transportation issues or will he or she have minimal skill levels? It also does not specify the geographic area in which the part time

contractor will work. Does the scope of work include traffic issues in Friendship Heights, Maryland that impact on Friendship Heights, DC? How far north, south, east and west of the Applicant's site will the part time contractor work? Where will the part time contractor be stationed so stakeholders can find him or her? What types of activities will the part time contractor engage in? Will he or she count vehicles, collect accident data, call in illegal speeding, illegal turns, illegal traffic on one-way alleys, illegal truck traffic on residential streets and vehicles that jump road barriers? Who will this person report to? What will be the performance and evaluative criteria by which to measure this person's success or failure? Will DDOT be taking baseline measurements to help evaluate success or failure? And, if so, what will those criteria be? Unfortunately, none of these issues has been addressed in the record of this case.

f. The Applicant also effectively conceded the point by arguing that there are existing problems with traffic in Friendship Heights.

g. William Vigdor testified on April 12, 2007 about the poorly performing intersections and queuing on Wisconsin Avenue near the project.

h. Lisa Friedman filed a letter with the Commission indicating the same.

i. The Applicant's own TIS supports the conclusion that there are traffic concerns in Friendship Heights. Many nearby side street approaches to upper Wisconsin Avenue have Levels of Service D, E and F. In its rebuttal memorandum, dated May 10, 2007, O.R. George concedes that it has evaluated the entire signalized intersections and not the individual side street approaches used by nearby residents. Thus, O.R. George does not dispute Mr. Mehra's conclusion in his April 12, 2007 report that the combination of traffic generated by the Applicant's project with increased background traffic will result in a cumulative delay of approximately 10 hours during the PM peak hour for the eastbound Harrison Street traffic at Wisconsin Avenue. This is based on a per vehicle increase of from 159 seconds of delay to 316 second of delay at this single approach to Wisconsin Avenue. O.R. George's rebuttal memorandum also does not dispute Mr. Mehra's conclusion that: "The levels of service analysis using corrected data and assumptions results in LOS E on Harrison Street eastbound at Wisconsin Avenue during the PM peak hour."

j. The Commission finds that Levels of Service D, E and F are unacceptable and leads the Commission to conclude that the Applicant must demonstrate significant mitigation, especially in light of the adverse impacts that we find below.

116. The only record evidence demonstrating that congestion in Friendship Heights might be tolerable is based on the TIS. For the reasons the Commission states below, the TIS cannot be accorded sufficient weight to overcome this concern.

a. The Commission's initial concern with the TIS is its scope. The TIS reached its conclusions after studying only three intersections (Harrison at Wisconsin; Ingomar at Wisconsin; and Jenifer at Wisconsin). The Applicant submitted its study to DDOT, but there is nothing in the record suggesting that DDOT approved or endorsed the scope of the TIS.

b. Even if DDOT had approved the scope, the Commission does not. The project is designed to shift all traffic generated from Wisconsin Avenue to Harrison Street. This includes the intersection at Harrison Street and 44th Street and the one-way alley that runs between the 4300

block of Garrison Street and the 4300 block of Harrison Street (just east of and parallel to the 5100 block of 44th Street). This intersection and this alley are both less than one block from the project as well as on the same side of Wisconsin. Since at least the spring of 2006, the Applicant was on notice of traffic concerns at this intersection and alley. The record shows that motor vehicles near this intersection jump the barrier and travel into the residential neighborhood. *See, e.g.,* Alta Mainer testimony. The record further shows that vehicles frequently drive illegally southbound on the one-way alley from Harrison Street to Garrison Street, putting cut-through traffic into the residential neighborhood. *See* Letter of Mr. Frankel to Zoning Commission, dated April 10, 2007. The Commission concludes that a proper study would involve at least those intersections and alleys that are within one block of the surrounding neighborhood.

i. Rather than arguing that DDOT has approved the scope, the Applicant argues that no other applicant has been required to study a side street. But the Applicant provides no support for that questionable proposition. The Commission finds that applicants have indeed provided such studies. One such example was the Dorchester House Associates, LLC (Z.C. Case No. 04-36), where side streets near the project were studied.

ii. But even if this is unprecedented, it simply makes no sense for the Applicant to rely on studies of only one major thoroughfare (Wisconsin Avenue) when its building is designed to push traffic onto an entirely different and narrow neighborhood street (Harrison Street) and then argued that the impact on that street and adjoining alley need not be considered by the Commission in the face of overwhelming testimony and letters by residents raising precisely those traffic concerns.

(a) Throughout this process, the Applicant has sought to obtain a great deal of credit for engaging with the community. While its level of engagement is hotly contested and the Commission makes no findings here, we do note that O.R. George stated in its report that it expanded its TIS to account for community concerns. Yet the community raised this issue, and the record is clear that the Applicant did not address it.

(b) Mr. Mehra, the Opponent's traffic expert, testified that the O.R. George TIS is incomplete in several important respects. The TIS did not include an analysis of the main entrance/exit from the project site, the alley, and Harrison Street. Similarly, the intersection of 44th Street and Harrison Street was not analyzed, although it is the only other access route available to the project site. Moreover, the Applicant's project includes 13,200 square feet of proposed retail space, which generally has peak traffic on Saturday – yet O.R. George did not analyze the Saturday traffic data it collected. Indeed, Mr. Mehra testified that O.R. George's traffic study of the Washington Clinic PUD application to the Commission – which initially included a proposal for thousands of square feet of retail – conducted a Saturday analysis. *See* Zoning Case No. 2-17.

(c) The failure to study this surrounding area is one of several concerns the Commission has with the TIS. This narrow scope, in light of other flaws, exacerbates the Commission's concern with the impact of this project on traffic in the neighborhood.

c. Another issue of scope is the failure of the Applicant to measure weekend peak traffic.

i. Mr. Mehra testified at the April 12, 2007 hearing that the reason why O.R. George came to his conclusion that weekend afternoon traffic along upper Wisconsin Avenue was generally performing at better Levels of Service than experienced on weekday afternoon periods was because O.R. George assumed that Wisconsin Avenue has six travel lanes on Saturdays when, in fact, it has only four travel lanes. The two shoulder lanes are used for parking on weekends. In other words, O.R. George assumed, incorrectly, that there is 50 percent more road capacity than actually exists. This fact alone can easily explain why O.R. George was able to conclude that weekend afternoon traffic along upper Wisconsin Avenue is acceptable in the face of the testimony of long term Friendship Heights residents who stated unequivocally that Wisconsin Avenue is frequently gridlocked on weekend afternoons.

ii. Mr. Mehra also testified that O.R. George assumed that there are no trucks or buses on Wisconsin Avenue on Saturdays and that there are no pedestrians crossing Wisconsin Avenue or Harrison Street on Saturdays during peak hours. Clearly, these assumptions by O.R. George are incorrect and, if corrected, would have to impact adversely on his conclusion.

iii. O.R. George collected the raw Saturday traffic data, but there is no indication in anything the Applicant has filed with the Commission that O.R. George analyzed that same data.

iv. If the Saturday peak hour traffic data are irrelevant, the Commission needs to ask why the Applicant collected and submitted them, without analysis, as within the proper scope in the first instance. The Commission simply cannot understand why an applicant would propose a scope of project and then not provide the necessary detail or result.

v. O.R. George made no effort to correct these errors and omissions in his May 10, 2007 rebuttal memorandum. Instead, O.R. George simply argued that 13,200 square feet of retail is inconsequential when compared with other existing Friendship Heights retail and stated, without any support, that a project of this scale “would be expected to have an even more minimal impact on the study area intersections on the weekends than it would during the week.” The problem, of course, is that given O.R. George’s mea culpa acknowledging many significant errors, what he might expect in terms of impact might well be far less than what the actual analysis reveals.

d. Contrary to all the evidence, the TIS concludes that traffic in Friendship Heights has declined since 2003. This conclusion rests on actual observations of traffic traveling through intersections and analyzed in accord with Institute of Transportation Engineers (“ITE”) methods. The conclusion, however, is not based on actual observations of the duration with which cars queue at each of the intersections. Rather, queuing is based on an assumption that cars “platoon” to stop lights. That is, groups of cars go from one light to another in platoons.

i. The Applicant’s consultant, O.R. George, did not base this assumption on actual observations. In his May 10, 2007 rebuttal memorandum, O.R. George stated that he “determined the conservative arrival type factor of 5 [out of a maximum of 6] would be appropriate” for characterizing the appropriate arrival type factor. A “5” implies that over 80 percent of the traffic in both directions arrives at the start of the green phase. However, he does not explain how he made this determination or why it is appropriate other than to report that he was informed by DDOT that in 2005 the Wisconsin Avenue traffic signal system was retimed to provide the most favorable progression along the avenue. This explanation begs the question of how much platooning is occurring now (and will occur in the future with increased traffic). O.R.

George ignores this question.

ii. The Opposition traffic expert, Mr. Mehra, testified that it was an error for O.R. George to change the arrival type factor of “3” from his original study to an arrival type factor of “5” in his corrected report. Mr. Mehra testified that an arrival type factor of “5” is not acceptable just because the signals have been coordinated. He then quoted from the Highway Capacity Manual:

The arrival type is best observed in the field. . . . The arrival type should be determined as accurately as possible because it will have a significant impact on delay estimates and LOS determinations.

Mr. Mehra’s field observations show 30 to 50 percent of the traffic arriving at the green phase. This supports O.R. George’s original characterization of the arrival type as a “3.” This “5” versus “3” arrival type is significant because correcting the observation to a “3” results in a reduction of the Level of Service on Wisconsin Avenue at Harrison Street from a Level of Service “C” to a Level of Service “D.”

iii. The Commission finds that O.R. George’s original characterization of the arrival type factor as a “3” was accurate and he has not provided a reasonable justification for improving the arrival factor to a “5” as he has done in his corrected report. The Commission further finds that the Level of Service on Wisconsin Avenue at Harrison Street is LOS “D”.

iv. Mr. Vigdor testified about actual queuing as part of the Opposition case and his testimony supports the conclusions reached by Mr. Mehra.

v. Also, the Commission has accepted several PUDs in this neighborhood. And as noted before, the concern about traffic in Friendship Heights is growing.

vi. Not only is the Applicant’s declining traffic conclusion contrary to the evidence, but the model is based on flawed assumptions.

- (a) The Applicant has submitted at least different TISs, thereby creating a constantly moving target. The first TIS was submitted by the Applicant to DDOT sometime prior to DDOT’s February 27, 2007 letter to the Commission. As DDOT noted in its analysis of that report, it determined that the trip generation rate of the project should be higher by using a 50 percent reduction of transit use and by adding projected PM peak hour trips to the retail use. While DDOT stated that these discrepancies are not large, this only highlights the many serious flaws in that TIS that DDOT failed to uncover. As noted previously, and for example, the Applicant failed to include heavy vehicles, buses or pedestrians in its study..
- (b) The Applicant’s revised March 7, 2007 TIS included the platooning assumption that was omitted from the original submission.
- (c) The revised March 7 study, however:
 - (i) Did not account for proper pedestrian traffic;
 - (ii) Did not account for bicycle traffic;
 - (iii) Did not account for bus traffic on Wisconsin Avenue;

- (iv) Erroneously ignored or counted 200 u-turns on Harrison Street;
 - (v) Erroneously assumed a significantly greater capacity of Wisconsin Avenue by failing to note that the parking lane was unavailable during peak hours; and
 - (vi) Grossly underestimated the proper background traffic growth.
- (d) A revised or rebuttal study was submitted on March 29, 2007. As Mr. Mehra testified on April 12, 2007:
- (i) Pedestrian and bicycle traffic were not included and there is no discussion why it was not included;
 - (ii) Bus traffic was not included;
 - (iii) U-turns were not corrected;
 - (iv) Parking was not corrected;
 - (v) With respect to background development, the Applicant re-submitted a message from the Maryland-National Capital Park and Planning Commission. Yet, the Applicant relied on DDOT's FHTS for other purposes and the FHTS also included background development that was far greater than that relied upon by O.R. George.
 - (vi) Mr. Mehra testified about the additional background traffic. For one project, Wisconsin Place, Mr. Mehra testified that the project will have 433 residential units rather than 150 as O.R. George assumed.
 - (vii) The Applicant simply re-submitted the Maryland-National Capital Park and Planning Commission information to show the background development and does not attempt to explain which number is more reliable. The Applicant bears the burden and simply re-submitting other information without explaining the difference does not satisfy its burden.
 - (viii) We therefore conclude that the Applicant has understated the background traffic growth.
- i. The Commission therefore concludes that Levels of Service around the project are unacceptable.
 - ii. The Commission now must turn to the Applicant's next argument. That is, the project has no adverse impact on existing conditions.
 - (1) As indicated above, the Applicant cannot satisfy its burden with respect to the local neighborhood because it did not study the area.
 - (2) Ms. Mainer testified as to conditions in the neighborhood and the degree to which they have degenerated.
 - (3) Mr. Vigdor testified about the increasing congestion and the emergency vehicles using the neighborhood to avoid congestion on Wisconsin Avenue.
 - (4) Almost all of the individuals who testified against the Akridge project based their opposition at least in part on the negative impact the project would have on

traffic, pedestrian safety and parking in the area surrounding 5220 Wisconsin Avenue. As people like Ms. Mainer, Mr. Wolf, Ms. Bachman, Mr. Berman, Mr. Brenneman, Ms. Mirigliano and Ms. Newman testified, traffic already is so heavy on Wisconsin Avenue and other nearby arterials that drivers, particularly Maryland commuters, attempt to bypass this congestion by cutting through the residential streets of Friendship Heights, often with little regard for the speed limit or stop signs. The addition of the Akridge project to the development occurring a few blocks away in Friendship Heights, Maryland will exacerbate existing traffic problems and push even more vehicles onto residential streets, these opponents warned. Consequently, the quality of life of existing residents, as well as their safety, will be further compromised. Moreover, many of the same opponents testified that on-street parking for people who live near the project site – already problematic – will become increasingly difficult as current residents compete with new building residents, employees, visitors, guests, shoppers and service providers for scarce parking spaces.

- (5) Opponents presented photographs depicting some of their traffic concerns. Mr. Schwartzberg testified specifically on existing parking congestion and showed the Commission photographs depicting the serious situation that existing residents already face. Ms. Mainer presented a photograph taken after a light snowfall depicting tire tracks demonstrating how cars drive over the “barrier” that divides the 4300 and 4400 blocks of Harrison Street.
 - (6) Mr. Frankel’s letter explaining the concern with the increase in illegal southbound vehicle traffic on the one way alley between the 4300 block of Harrison Street and the 4300 block of Garrison Street. Mr. Frankel specifically asked the Applicant and its traffic expert to study this alley as part of its TIS. He was initially told it would be studied but, apparently, it never was. During cross-examination, O.R. George testified that despite the fact that eastbound traffic on Harrison Street could be backed up at the LOS E or F intersection and seeking alternative routes, he did not study this nearby alley because he was not required to do so. *See* Hearing Transcript at 207:17 to 210:16 (March 8, 2007).
 - (7) The letter by the so-called “Closest Residents” also addressed cut-through traffic.
 - (8) While not directly applicable, the Applicant’s conclusion that Harrison Street (eastbound) at Wisconsin Avenue and Jenifer Street (eastbound) at Wisconsin Avenue – which O.R. George has conceded both have a Level of Service of “F” – bolster this evidence.
- iii. In addition to these existing conditions and the inferences that the Commission draws therefrom, the Applicant’s own TIS shows 24 cars per peak hour will be contributed to this intersection. Even with the mitigation of removing seven parking spots (which might not actually be implemented), Mr. Mehra testified that this only maintains the poor conditions, at LOS E. If the local parking is not removed, this intersection will operate at LOS F.
- (1) Since LOS E and F are the worst of all grades, the Commission cannot find any evidence supporting the Applicant’s position that its project will not make matters

worse.

(2) Also, the TIS assumes that no trucks will be on Harrison Street after the project is built. The Commission rejects that assumption.

(a) The project proposes 13,200 square feet of retail and a three bay loading area for the express purpose of moving trucks in and out of the property and onto Harrison Street.

(b) The project itself will bring trucks or other heavy vehicles that, according to the Applicant's consultant, are not now on Harrison Street. Adding trucks, which are likely to be at the Harrison Street intersection on a daily basis (including garbage trucks, delivery trucks, moving trucks and service provider trucks), can only make the intersection operate at a level that is even less than its currently degraded level of operation.

(c) Given existing conditions, the impact on traffic can only become worse, making the already unacceptable intolerable.

b. The Applicant lists the following "transportation mitigation features" to alleviate congestion and traffic in the area:

i. Dedication of two parking spaces to car-sharing programs such as Zipcar or Flexcar, with one car likely to be a hybrid model.

(1) These parking spaces are located in the alley behind the building. A customer arriving by Metro to use these cars would be required to walk around the block, well over 900 feet, more than 1/6 mile, past the back of the Pepco substation and Akridge loading docks, into the dead-end alley to reach these spaces.

(2) The location of these spaces behind the Akridge building would reduce the likelihood that a car-sharing company would contract for other locations in Friendship Heights that might be more appealing to pedestrians.

(3) The Applicant does not make it clear, but the rental income derived from a car-sharing company that accrues to the project owners reduces the weight this mitigation effect and amenity will be afforded by the Commission.

ii. Dedication of three spaces for visitors of residents.

(1) Three visitor spaces are totally inadequate for a building of this size. Even DDOT testified to this effect during the March 8, 2007 hearing. Visitors of residents will be competing with neighborhood residents, guests, service providers and retail customers for the scarce on-street parking in the neighborhood, particularly on nights and weekends.

iii. Validation of parking for retail patrons

(1) The Applicant has not provided enough detail to determine whether the parking validation will cover parking costs, and allow sufficient time such that retail patrons are likely to use on-site parking, rather than on-street parking in the neighborhood.

(2) In addition, the provision of parking validation for retail patrons is likely to be

necessary in order to appeal to potential retail tenants.

iv. Commitment to a parking ratio of 1.2 spaces per residential unit.

c. The Applicant claims that the proposal to provide a parking ratio of 1.2 spaces per residential unit is an amenity inasmuch as the Zoning Regulations require one parking space for every three units and one space per 750 square feet of retail in excess of 3,000 square feet.

i. The Opponent claims that the proposed parking ratio does not constitute an amenity inasmuch as it is not superior to that required in recent Commission Orders for the area. Moreover, it is not sufficient parking given automobile ownership statistics for the area, and it is not superior to that which would be required to make these units marketable.

ii. The Opponent notes that, for the current zoning, R-5-B, the Zoning Regulations require one parking space for every two apartments.

iii. The Opponent also notes that the Applicant has ignored recent Commission Orders for comparable sites:

(1) For the Tenley Hill PUD [Z.C. Order No. 904, Case No. 98-21C, September 13, 1999], near the Tenleytown Metrorail station, the Commission required at least one space per unit with a provision for additional guest parking: “The project shall provide approximately 75 parking spaces on two below-grade levels and a loading berth as shown in the plans. The project will include approximately 52 parking spaces on the B-1 parking level and approximately 23 parking spaces on the upper parking level. There shall be at least a 1:1 ratio of parking spaces to units in the residential portion of the project. The use of the commercial portion of the parking garage by residents of the project and their guests shall be in accordance with the Commercial Parking Level Management Plan, as shown in Exhibit 51 of the record.”

(2) For the Abrams PUD [Z.C. Order No. 519, Case No. 85-20C, February 9, 1987] on Square 1661, the Commission required at least a 1:1 parking ratio, and further required that the spaces be fully accessible, not available for commercial use and prohibited rental or separate conveyance: “The applicant shall provide not less than 248 parking spaces. The applicant shall also provide at least one fully accessible parking space with each apartment unit. Such parking shall only be used by the owner or occupant of the apartment and not for commercial use. The contract of the parking space shall prohibit later rental or separate conveyance of the parking space.” [Z.C. Order No. 519, Decision, 12.]

(3) For the Miller PUD [Z.C. Order No. 528, Case No. 86-21F/85-8P, April 13, 1987], also on Square 1661, the Commission also required at least one fully accessible space per unit for the exclusive use of the owner or occupant: “The applicant shall provide at least one fully accessible parking space with each apartment unit. Such parking shall only be used by the owner or occupant of the apartment and not for commercial use. The contract of the parking space shall prohibit later rental or separate conveyance of the parking space.” [Z.C. Order No. 528, Decision, 14.] The Miller PUD was not developed, and in November

1996, McCaffery Interest, Inc. and Eakin Youngentob Associates, Inc. applied for a modification of the Miller PUD. The modification was approved [Z.C. Order No. 824]. The residential component of the project consists of 29 townhouses, the Courts of Chevy Chase. Each townhouse has two parking spaces, either a two car garage or a one-car garage and tandem space.

- (4) The Tenley Park PUD consists of six semidetached units in three buildings, one and a half blocks east of the Tenleytown Metrorail station. The Commission required significant off-street parking, three spaces per unit, in this PUD: “Each unit will include a two-car garage, and six off-street parking spaces will also be provided, as shown on the plans marked as Exhibit No. 180.” [Z.C. Order No. 921, Case No. 00-03C, November 16, 2001, Decision 6.]
- (5) For the Stonebridge PUD, Zoning Order 04-06/02-17A required 1.1 accessible spaces per unit plus four spaces in the garage for the day care center plus eight surface spaces, which would also serve as visitor parking. However, with the restriction on RPPs, the developer voluntarily increased the parking available, and the project currently has 1.4 accessible spaces per unit plus the day care and visitor parking.

iv. The Opponent asserts that the Applicant cannot support the claim that the proposed number of spaces is superior to that which would normally be available in the type of development that it proposes, and therefore cannot be considered excess parking and an additional amenity for the community.

d. The Commission concludes that, in comparison to other Commission Orders and in comparison to vehicle ownership statistics for the area closest to the Metrorail station, the proposed 1.2 spaces per unit cannot be considered an amenity and, in fact, should be considered to be inadequate. Further, the proposed number of spaces does not exceed that which would be expected in the type of development proposed.

e. Removal of three existing curb cuts and driveways along Wisconsin Avenue with all parking and loading for the project to be accessed from the alley off Harrison Street.

- i. The Applicant claims that by removing three existing curb cuts in front of its property along the west (southbound) side of Wisconsin Avenue it will free up space for five new metered parking spaces. Those metered parking spaces will not be available during weekday morning rush hours to keep traffic flowing as quickly as possible along Wisconsin Avenue.
- ii. At the same time, however, the Applicant has made a request to DDOT to remove seven unrestricted existing parking spaces on the south side of the 4300 block of Harrison Street, adjacent to Gawler’s Funeral Home. Thus, in effect, the Applicant is asking to trade seven unrestricted parking spaces for five metered parking spaces. This is actually more than a net loss of two parking spaces because the metered parking spaces along Wisconsin Avenue will not always be available. Moreover, to the extent that existing residents of the 4300 block of Harrison Street rely upon these seven unrestricted parking spaces for their own personal use, they will have fewer on-street, free parking options near their residences.

f. The Commission finds that the removal of existing curb cuts and driveways is not an amenity, and that the requirement that all vehicular access be through the alleys off Harrison Street and 44th Street negatively impacts the adjoining neighborhood by raising pedestrian safety concerns and increasing traffic on residential streets.

g. Prohibition of residents of the project from obtaining Residential Parking Permits.

i. It is appropriate for residents to be prohibited from obtaining Residential Parking Permits. However, this does not mitigate the impact that this project will have on scarce on-street parking in the neighborhood, since the project will still result in additional demand for on-street parking by visitors, guests, retail patrons, service providers and employees, as well as residents who use their vehicles during RPP hours.

ii. In order to assure compliance with this prohibition, the following conditions, based on the Stonebridge PUD modification, Zoning Commission Order 04-06/02-17A, are necessary for any project where future residents will be ineligible for residential parking permits:

The following new condition shall apply to the approval of the Project:

A. As a condition for purchasing a condominium interest in the Project or for entering into a lease to occupy a unit in the Project, each owner or tenant shall agree not to seek or obtain a residential street parking permit so long as the owner or tenant resides at the Project.

B. Each condominium owner and tenant who will reside in a unit in the Project shall disclose to the condominium board (or developer), prior to purchasing a unit or signing a lease, information about his or her motor vehicle ownership and the motor vehicle ownership of any others who will reside in the unit. Condominium owners and tenants shall disclose to the condominium board (or developer) information about any motor vehicles they acquire (*e.g.*, purchase, lease, rent or borrow) any time after purchasing or leasing their condominium units.

C. Each condominium owner or tenant shall be given a parking license agreement with the condominium association or developer pursuant to which the owner or tenant can license one or more parking spaces subject to availability of such spaces. If sufficient parking spaces are not available, Paragraph A above shall still apply in full force and effect. The owner or tenant may waive his or her right to license a space if no tenant of the unit owns a motor vehicle. The parking license agreement may assign one or more specific parking spaces per unit and shall set forth the terms and conditions of the parking requirements of the PUD, as modified. In the event that a unit is rented and the unit is subject to a parking license agreement, the lease shall state that (a) there is a particular parking space assigned to the unit, (b) the lease is subject to compliance with the parking license agreement, and (c) the monthly parking fee for the space is as stated.

D. If, following the sale of all condominium units, there are parking spaces in the garage that have not been assigned pursuant to parking license

agreements, the developer or condominium board will use commercially reasonable efforts to encourage the lease or sale of those surplus spaces.

E. In the event subsequent owners or tenants who reside in a unit own automobiles in excess of available parking spaces available under parking license agreements, Paragraph A above shall still apply in full force and effect.

F. The condominium board (or developer) shall respond in writing within fourteen (14) calendar days of receipt to all written inquiries or requests for documents concerning paragraph A to E above sent to it by the Advisory Neighborhood Commission in which the condominium is located.

h. The Commission finds that some of these commitments do not rise to the level of an amenity, but that they do provide some mitigation for the negative impact of the project.

i. The Applicant has also committed to a contribution of \$40,000 to fund a DDOT contractor, a Friendship Heights Transportation Management Coordinator, on a part-time basis for one to two years. It is unclear how this position differs from other DDOT positions, including those charged with implementing the recommendations of the Friendship Heights Transportation Study.

j. Further, the Commission finds that the proposed project will create unmitigated, significant safety hazards for pedestrians on Harrison Street. As noted previously, all traffic entering or leaving the site will be via a 20-foot-wide alley bounded on both sides by brick walls. This alley will have to accommodate residents, employees, guests, retail customers, service providers, delivery trucks, moving vans, trash trucks and car-sharing vehicles. This alley is also used daily by Pepco as its trucks service the electric substation that comprises one part of the alley. Moreover, a BB&T Bank is located at the Harrison Street entrance/exit to the alley. The driveway to the alley is used by all cars seeking to park in the bank's parking lot or access the bank's drive-thru teller station. Undoubtedly, there will be a significant amount of car, van and truck traffic using the alley and the curb cut leading to it.

k. At the same time, the sidewalk on the north side of the 4300 block of Harrison Street is used frequently by neighborhood residents walking to and from the Jenifer Street entrance to the Friendship Heights Metro stop. In addition, people seeking to access the Applicant's proposed car-sharing spaces will be walking through the alley in question. Moreover, some building residents and neighborhood residents may also use the alley when walking to or from the building's 13,200 square feet of retail. For example, if people park on Harrison Street or 44th Street and walk to the Applicant's retail shops, they may choose to exit via the building's rear and walk through the alley to return with their bags to their cars.

l. The interaction between all of the vehicle traffic using the site and the pedestrians using the nearby sidewalk and adjacent narrow alley will significantly increase the risk of injuries and even fatalities.

m. The Commission finds that effective and safe vehicular and pedestrian traffic is a major concern with this project, and that the Applicant proffered no solutions to these problems which were superior, let alone exceptional. Indeed, the proposed project may well worsen traffic safety in the area.

117. Unlike New York City, WMATA's Metrorail system is limited by its two-track configuration -- one inbound and one outbound. Breakdowns or delays on one track are frequently significant as controllers are required to "single track" trains around disabled or delayed trains.

118. The Akridge site is located approximately 300 feet south of a secondary, limited capacity, elevator only entrance to the Friendship Heights stop on Metrorail's Red Line.

119. According to WMATA's "Metro Core Capacity Study: A Perspective for Meeting Market Demand" (Dec. 20, 2001), which has been submitted into the record of this case, the Metrorail system will have exceeded its core peak-period capacity around the year 2020, just 13 years from now. The core capacity analysis assumes the use of eight-car trains, with reduced seating capacity and increased standing room (for a maximum of 120 passengers per car (or 162 percent of a seated load)), running with the minimally acceptable time intervals between trains, with minimum station off-loading and on-loading times, and with 98 percent reliability. WMATA states that the maximum number of trains per hour is 26. The core capacity analysis also assumes the construction of a pedestrian tunnel between the Farragut North and Farragut West stations to speed up transfers and reduce congestion at Metro Center.

120. In its Core Capacity Study, WMATA wrote: "It is projected that in 2020 ridership growth will have surpassed the point for any additional capability of the system to carry the peak passenger loads required to maintain market share on the Orange Line and soon after on the remaining lines. Once the system reaches the maximum carrying capacity, the only strategy available to expand capacity and continue keeping pace with demand is construction of additional Metrorail lines."

121. Tenleytown Neighbors Association's Mr. Ritchotte reinforced this assessment in his remarks to the Commission. Noting that transit-oriented development is the rationale for upzoning 5220 Wisconsin Avenue, he discussed the Red Line's severe and permanent capacity limitations and identified the repercussions of these constraints for current and future Friendship Heights passengers as well as for the metropolitan area's traffic situation. Mr. Ritchotte noted how Metrorail is like the Potomac River. Enormous "upstream" development projects, like those around the Shady Grove Metro stop, affect what occurs downstream in Friendship Heights and downtown DC. His unequivocal conclusion was that "The Red Line will not be able to provide the transit for transit-oriented development."

122. In response to this Metrorail capacity point, Akridge has solicited a letter from Nat Bottigheimer, WMATA's Acting Assistant General Manager, Department of Planning and Joint Development. Mr. Bottigheimer writes that a number of the findings of the 2001 Core Capacity Study no longer apply to current conditions and plans. He states that assuming all planned capital improvements are funded and implemented, "the system's ability to comfortably accommodate rail ridership would move out to beyond the 2025 timeframe." That is 18 years from now, rather than 13 years as previously projected. Notably, Mr. Bottigheimer did not explain which assumptions underlying the 2001 Core Capacity Study are inaccurate and how or why the projected year for achieving core capacity -- 2020 -- is no longer valid. No one from WMATA testified at either of the two Commission hearings in this case so there was no opportunity to probe these issues.

123. Many Metrorail trains that arrive at the Friendship Heights station during the morning rush period are already very crowded and offer only limited standing room. Similarly, WMATA has announced that it will remove seating in its Metrorail cars to accommodate more standing passengers. Packed trains or trains that only offer standing room are a disincentive for Friendship Heights residents to use Metrorail during peak hours. Instead, many opt for commuting via automobile and thereby add to traffic congestion. The Commission finds that as Metrorail approaches and reaches its core capacity, there will be an increase in private auto use by those commuting downtown. The limits of the Metrorail system leave little alternative.

124. Section 2403.9(d): Historic preservation of private or public structures, places or parks.

a. With regard to section 2403.9(d), the historic preservation of private structures, the Commission finds that this is not an applicable factor.

125. Section 2403.9(e): Employment and training opportunities.

a. In its February 2007 Report, OP noted that Akridge had not offered a first source employment agreement, but on the first night of the hearing, Akridge agreed to the inclusion of LSDBE and first source employment commitments in addition to the other amenities proffered. [Transcript, March 8, 2007, p. 32.]

b. The Comprehensive Plan states that: “Discretionary zoning actions, such as Planned Unit Developments, affecting Ward 3, shall . . . treat amenities such as . . . first-source employment as requirements.” [Section 1409.8(c)(3)]

c. The Commission finds that the Akridge proposal has met this requirement, but this is a requirement and will not be considered an amenity.

126. Section 2403.9(f): Housing and affordable housing.

a. The Applicant claims that “the creation of additional housing in this area of Ward 3 is a significant amenity to the community and the District.” [Application, p. 15]

- i. In justifying this amenity, the Applicant claims that the site is in a Housing Opportunity Area and a regional center.
- ii. While, as found above, the site is not in a Housing Opportunity Area, even if the HOA extended to this site, inclusion in an HOA would not justify the requested zoning change, or the requested increase in height, density or lot occupancy. The HOA designation is used to encourage the development of housing, which can be accomplished within the existing zoning limits. Certainly, a request for increased density should never serve as the amenity which justifies that request. Further, the Applicant does not consider the significant amount of housing that can be accommodated on other underdeveloped sites in the area.
- iii. While the Applicant characterizes the site as being in the regional center, the site actually lies outside the regional center. However, even if the site had been in the regional center, that would not support a claim that additional housing is an amenity that can justify the bonus density associated with the additional housing.
- iv. Further, there is very little likelihood that a building with no residential component would be pursued at this site, given the neighborhood, Office of Planning policy, the

Comprehensive Plan and city interests and policies.

b. The Applicant proposes to dedicate 12 percent of the bonus residential density to on-site affordable units to be reserved for District residents with an income less than 80 percent of the Area Median Income (“AMI”) for the metropolitan area.

- i. The Applicant proposes to dedicate 12 percent of part of the bonus density to on-site affordable units.
- ii. This site has been mapped for mandatory inclusionary zoning, and if matter-of-right development were proposed on this site under mandatory inclusionary zoning (“MIZ”), the developer would be required to dedicate 75 percent of the full bonus density to on-site affordable units.
- iii. With MIZ, for an R-5-B district, half of the affordable units would be set aside for eligible low-income households, *i.e.*, households with incomes less than 50 percent of AMI, and half of the affordable units would be set aside for eligible moderate-income households, *i.e.*, households with incomes less than 80 percent of AMI.
- iv. Thus, under MIZ, the developer would be required to set aside a larger portion of the bonus density for affordable units, and would be required to have half of those affordable units set aside for households with incomes far lower than the ones that the Applicant proposes to serve.

c. The Applicant also will make a contribution to the Lisner-Louise-Dickson-Hurt Home (the Lisner Home) to underwrite four existing units in the Community Residential Facility for 15 years.

- i. This contribution is for the operating costs related to four existing units for 15 years, and does not increase the supply of affordable housing. Thus, the contribution cannot be considered to meet the claimed objective of increasing the supply of affordable housing.

d. The Commission finds that providing housing in a residential zone cannot be considered an amenity to justify an increase in heights and density, and that requesting increased density in order to provide additional housing and commercial development cannot be considered an amenity to justify that request.

e. The Commission finds that the affordable housing amenity, as proposed, provides little or no value to the District. The percentage of the bonus density that the Applicant will be allocating for affordable housing is significantly lower than the percentage of bonus density that would be required under inclusionary zoning for a new matter-of-right project on this site. The Applicant will be allocating 12 percent of some of the bonus density, while inclusionary zoning would require an allocation of 75 percent of all of the bonus density. Further, the Applicant will be targeting only moderate income households, households with incomes up to 80 percent of AMI, while a matter-of-right development would allocate half of the affordable units to low-income households, households with incomes up to 50 percent of AMI, while the other half of the affordable units would be allocated to moderate-income households.

f. The Commission finds that the contribution to the Lisner Home does not provide additional affordable housing, as claimed by the Applicant. That contribution serves only to underwrite the operating costs of four existing units for a short period of time.

127. **Section 2403.9(g): Social services/facilities.**

- a. Akridge has not proposed to provide any social services or facilities in its proposal.

128. **Section 2403.9(h): Environmental benefits, such as storm water runoff controls and preservation of open space or trees.**

- a. The Applicant committed to applying for LEED certification under the LEED-NC v. 2.2 guidelines for new construction. The Applicant claims that this certification will result in environmental improvements that will benefit both the residents of the project and the neighbors in the surrounding community. The Applicant further states that there is evidence of environmental contamination and that in the process of construction, the Applicant will remove the contaminated soils that are excavated from the ground and the hazardous materials.

- b. At the request of the Office of Planning, on February 16, 2007, the Applicant provided more information about the credits it will target to obtain LEED certification. This filing included a report that described how the Applicant planned to qualify for each of the 28 credits targeted.

- c. The Opponent notes that, contrary to the Applicant's claims, this project would not be the first LEED-certified residential building in the District; P.N. Hoffman recently announced that its project, the Alta at Thomas Circle, is LEED certified. In addition, P.N. Hoffman Vice-President of acquisition and development, Shawn Seaman, determined that LEED certification was a good way to differentiate his company's projects from other projects in an "oversaturated" condominium market. P.N. Hoffman announced that it plans on seeking LEED certification for future projects, because it determined that it is valued by prospective purchasers.

- d. The Opponent also notes that the project does not provide environmental improvements, and, in fact, would be inferior to a development of this site under the matter-of-right provisions of the Zoning Regulations.

- e. With respect to the Applicant's commitment to remove the contaminated soils that are excavated from the ground and hazardous materials, the Opponent notes that this environmental cleanup would also be done with development of this site under the matter-of-right provisions.

- f. The Opponent also notes that many of the credits that the Applicant would claim to obtain the lowest level of LEED certification would apply to any other building on this site, including a building that was within the height, density and lot occupancy limits of existing zoning. These credits include:

- i. Sustainable Sites: Credit 1: Site selection: "Project is not prime agricultural land, lower than 5 feet above the 100 year flood plain, a habitat for a threatened or endangered species, within 100 feet of a wetland, and is not prior parkland."
- ii. Sustainable Sites: Credit 2: Development Density and Community Connectivity: "The Project site is on a previously developed site and within ½ mile of a residential neighborhood and within ½ mile of a commercial downtown."
- iii. Sustainable Sites: Credit 3: Brownfield Development: "The preliminary environmental testing indicates the presence of soil contamination. The project team will complete an ASTM E 1903-1997 Phase II Environmental Site Assessment to document the site contamination. Any environmental contaminants will be remedied

in accordance with all applicable laws.”

iv. Sustainable Sites: Credit 4.1: Alternative Transportation Public Transportation Access: “The Project site is located approximately 300 feet from the Friendship Heights Metro transit station that includes both Metrorail and Metrobus facilities.”

g. The Opponent further notes that other credits would likely be included in a building on the site within matter-of-right height, density and lot occupancy. These credits include:

i. Sustainable Sites: Credit 4.2: Alternative Transportation Bicycle Storage and Changing Rooms. Akridge is providing a bicycle storage area available to 15 percent of the unit owners and bicycle parking in the garage for retail employees, along with a shower and changing room. Akridge also claims there will be a bicycle rack for retail customers in front of the building.

(1) The Opponent notes that the shower and changing room are low-cost features that will benefit its retail tenants, as is the customer bicycle rack. The Opponent also notes that the bicycle storage area also benefits the 8 to 10 condominium purchasers who decide to purchase this space along with their unit, and other condominium residents will need to store their bicycles in their unit or in their storage space.

ii. Sustainable Sites: Credit 4.3: Alternative Transportation: Alternative Fuel Vehicles. Akridge is requesting that one of the two car-sharing vehicles, for which it is including a parking space, will use alternative fuel.

(1) The Opponent notes that this vehicle will be located in the garage, and customers who arrive by Metrorail will need to walk around the block and through a dead-end alley, past the back of the Pepco substation and Akridge loading dock to reach this vehicle.

(2) In addition, the Opponent notes that if it is anticipated that this car-sharing vehicle will appeal to prospective condominium purchasers, the developer of a smaller building on this site might request an alternative fuel vehicle. Also, the Opponent notes that if there are two car-sharing vehicles located in the alley behind the Akridge project, it is less likely that car-sharing companies will locate vehicles in other more readily accessible Friendship Heights locations.

iii. Material and Resources: Akridge is targeting three credits here for diverting 50 percent of the waste from demolition from landfill, for using 10 percent recycled materials and for getting 10 percent of its materials from within 500 miles of Washington.

(1) The Opponent notes that each of these items are things which would likely be done with any building. For example, for at least 10 percent of the materials, it probably is cost-effective to minimize transportation costs by buying products manufactured within 500 miles of the site.

h. The Opponent also notes that some of the actions that Akridge is claiming to obtain LEED certification actually highlight ways in which this project would be detrimental to the environment of the area. In particular, the Opponent points to how the Applicant’s request for 100 percent lot occupancy, along with the increased density, leads to a sacrifice of open space in

the neighborhood and contributes to the heat island effect.

i. Sustainable Sites: Credit 5.1: Reduced Site Disturbance: Protect and Restore Open Space.

- (1) The Opponent questions how Akridge can claim a credit for “restoring open space” with a project whose lot occupancy actually exceeds 100 percent. The Opponent notes that in justifying this credit, Akridge states that it will use the entire site, but “at a minimum, a 5,625 SF green roof will be provided, which exceeds the credit requirements for urban projects.”
- (2) The Opponent notes that current zoning would limit lot occupancy to 60 percent, so that for a matter-of-right building, there would be at least 9,000 square feet of space outside the footprint of the building, at least some of which would be landscaped, and much of which would provide a feeling of open space to people walking through the area.

ii. Sustainable Sites: Credit 7.1 and 7.2: Heat Island Effect: Non-roof and Roof.

- (1) Akridge claims these credits based on underground parking and the meager green and reflective roof.
- (2) The Opponent notes that, given the change in elevation on this site, a matter-of-right building would, most likely, have underground parking, accessed at ground level from the alley, which would be the most economical way to provide parking on this site. In Applicant’s Rebuttal, in considering what development would likely occur with a lower lot occupancy, Mr. Sher confirms this stating: “the likelihood is that the garage will continue to fill up the entire lot below grade.” [Applicant’s Rebuttal, Attachment 3, p. 10]
- (3) The Opponent also notes that this massive project with 100 percent lot occupancy, and its 79 foot height adds to the heat island effect, rather than reducing it.

iii. Water Efficiency: Credits 1.1 and 1.2:

- (1) Akridge claims two credits stating: “The proposed landscape design will not required [sic] a permanent irrigation system and will earn both LEED points.”
- (2) The Opponent notes that the building has 100 percent lot occupancy and therefore the “landscape” is limited to a small interior courtyard and perhaps some trees or containers in the public space. Therefore, Akridge is claiming two credits for water efficiency based on the fact that it has 100 percent lot occupancy, and thus has no landscaping to irrigate.
- (3) The Opponent asserts that the elimination of landscaping cannot be used to demonstrate that a building is environmentally sensitive, and that an environmentally sensitive building would offer landscaping.
- (4) The Opponent also notes that development within matter-of-right limits would have at most a 60 percent lot occupancy, and would likely include some open space landscaping on the site.

iv. The Opponent also notes that there are a number of credits that Akridge is targeting which would have little or no impact in advancing the goals of those credits. These credits include:

(1) Indoor Environmental Quality: Credit 4.3: Low-emitting materials: Carpet:

(a) The Opponent notes that Akridge proposes to utilize qualifying carpet only in the public and common areas, and not in the individual residential units, which means that this standard will be applied in less than 33 percent of the building.

(2) Indoor Environmental Quality: Credit 6.1, Controlling of Systems: Lighting.

(a) The Opponent notes that Akridge is committing only to provide individual lighting control zones to meet this requirement, and that this would not be relevant for the individual residential units. It is not clear how this would differ from matter-of-right development for other parts of the project.

(3) Indoor Environmental Quality: Credit 8.2, Daylight views from 90 percent of the spaces.

(a) The Opponent notes that Akridge's consultant is not certain as to whether this project will qualify, but this is a credit that a matter-of-right building, with only 60 percent lot occupancy and no "at risk" windows, would be more likely to achieve as compared with Akridge's project with 100 percent lot occupancy and with "at risk" windows on its north and south property lines.

(4) Innovation and Design Process: 4 credits

(a) The Opponent notes that three of these credits that Akridge is targeting are ill-defined or unenforceable and of questionable value: a credit for a user education program, a credit for 10 percent water savings for low-water use appliances [which is also counted as Credit 3.1 under water efficiency], and a credit for a green housekeeping program. The Opponent notes that it is unclear how the fourth credit in this category, hiring a LEED-accredited professional, would enhance the environment.

i. In addition, the Opponent notes that the impact of additional traffic at peak hours as well as the increase in traffic circling neighboring blocks seeking free on-street parking will contribute to a cumulative delay that will result in a deterioration of air quality in the area.

j. Opponent's expert traffic witness, Joe Mehra, P.E., testified at the April 12, 2007 Commission Hearing about the impact of background traffic in combination with the Applicant's proposed project. Among other things, Mr. Mehra concluded that if this project is built as proposed, Harrison Street traffic will incur a cumulative delay of approximately ten hours during only one peak P.M. hour (or 2 minutes, 26 seconds per vehicle on Harrison Street heading eastbound towards Wisconsin Avenue). The Commission therefore finds that the Akridge project would lead to a deterioration of air quality for nearby residents.

129. In the Rebuttal, the Applicant concedes that this project would not be the first residential LEED-certified building in the District, but maintains that there are currently few LEED-

certified residential buildings, suggesting that certification “involves substantial costs, risks or other challenges.” The Applicant also notes that LEED certification would not be required for private residential buildings. The Applicant provided no rebuttal to the Opponent’s demonstration that the set of credits targeted would not result in a building that was more environmentally sensitive than a matter-of-right building on the same site, or that certain features of the building, such as the 100 percent lot occupancy, make it inferior to a matter-of-right building by increasing the heat island effect.

130. The Commission finds that the possible LEED certification of the Akridge project, as described in the Applicant’s February 16, 2007 submission, provides little or no environmental benefit and that aspects of the project will actually lead to a deterioration of the environment.

131. W3V, a party-in-support, testified that LEED certification provided important environmental benefits, and claimed that a “certified building is 25 to 30 percent more energy efficient and has lower electricity peak consumption.” W3V also cited a significant reduction in water consumption for LEED-certified buildings.

132. The consultant’s report, LEED Certification Analysis, submitted by Akridge, stated that the project anticipates only a 10.5 percent energy savings. In addition, the water savings claimed in that report were related only to the lack of landscaping and the use of low-flow showerheads and lavatory faucet aerators. Thus, the conclusions of W3V, based on the assumption that there would be a 25 to 30 percent energy savings, have no factual basis, and cannot be given consideration.

133. The Commission further finds that basic features of the project, such as 100 percent lot occupancy, have a negative effect on the environment, and would be inferior to development within matter-of-right limits with respect to environmental benefits, including the goal of preserving open spaces or trees.

134. **Section 2403.9(i): Uses of special value to the neighborhood or the District of Columbia as a whole.**

a. The Applicant has committed to certain improvements to the façade of the Pepco substation adjacent to this site.

i. The DC Commission on the Arts and Humanities will fund the costs of administering the selection, commissioning, design, creation and installation of the artwork. The District will be allocating a minimum of \$100,000 in Fiscal Year 2008, and might increase the amount of District funds to \$200,000.

ii. Given that there is a Pepco substation adjoining the site, any developer of this site, including the developer of a matter-of-right residential building, would seek to make the adjoining Pepco substation more attractive, in order to enhance the value of the units on this site.

iii. Since efforts to improve the façade of the Pepco substation would be made if the site were developed to matter-of-right limits, the improvement offered by the Applicant cannot be considered to be a superior feature to “a significantly greater extent than would likely result from development of the site under the matter-of-right provisions of this title,” and thus cannot be considered a public benefit. Section 2403.6.

b. The Commission finds that the improvements to the façade of the Pepco substation

cannot be considered an amenity.

c. The Applicant has committed to provide a contribution to the Janney Elementary School PTA for certain improvements.

i. Janney E.S. is already 96 students over its capacity. For example, the school's principal has announced a 25 percent increase in third grade class size for the 2007-08 school year. For several years, many students have been taught in "temporary" classroom trailers or "demountables" on Janney's property.

ii. By adding housing units within Janney E.S.'s boundaries, overcrowding at the school will likely be exacerbated in two ways. First, some residents of the Akridge project will have children who attend local public schools, including Janney E.S. Second, Akridge is marketing its project as one that will attract "empty-nesters" from the local community who want to remain in the neighborhood yet scale back on having to maintain larger homes. To the extent that Akridge's marketing plan is successful, this will free up those larger houses for younger families to move into the neighborhood. As new families arrive, they will also have children who attend local public schools, such as Janney E.S.

iii. Janney E.S. is in need of comprehensive renovation and expansion.

iv. The Applicant's proposed "amenities" for Janney E.S. do nothing to solve the core capacity problems at the school. To the contrary, the Applicant's project will only increase an already critical situation.

d. The Applicant has committed to contribute \$30,000 to IONA Senior Services, located at 4125 Albemarle Street, N.W., to expand the services of the IONA bus, allowing for 15 to 20 additional hours of operation for one year.

e. The Commission finds that the contribution of \$30,000 to IONA Senior Services to be a minor amenity, but notes that the amenity has a duration of just one year, while the project will have a negative impact on the surrounding neighborhood for the life of the building.

f. The Applicant claims that 13,200 square feet of retail space should be considered an amenity, and that this retail presence will reactivate the streetscape on this block. In addition, Ward 3 Vision argues that there is presently a "paucity" of retail available to residents of Friendship Heights and that this new retail will help change that situation.

i. OP supports the zoning flexibility to allow ground-floor retail on this site. FNA does not oppose the placement of ground floor neighborhood serving retail on this site so long as there is sufficient validated parking to accommodate those who will likely travel to the site by car. FNA's position is intended to protect the surrounding low density residential neighborhood.

ii. OP in its final report found the inclusion of retail space at this site did not rise to the level of an amenity. [OP Final Report, February 26, 2007, p. 13]

iii. The record in the case contains an extensive listing of some of the retail options available to Friendship Heights residents along a 1.2-mile stretch of Wisconsin Avenue from Tenleytown to Friendship Heights, Maryland. That impressive list leaves little doubt but that Friendship Heights residents have a large and varied assortment of

retail shops and restaurants available to them. Among those options are 49 restaurants, cafes and fast food establishments; 5 grocery stores (including one that is scheduled to open in 2008); 5 drug/variety stores; 9 department stores; 7 book/music/video stores; 6 stores selling housewares; 18 home furnishing stores; 5 electronics/computer stores; 25 fashion stores; 10 jewelry stores; 7 dry cleaners; 4 automotive shops/sellers; 12 dance/fitness/martial arts/yoga providers; 20 salons/spas/barbers; 11 banks and 2 hotels.

g. The Commission finds that the inclusion of retail space on this site cannot be considered an amenity.

h. The Applicant claims that it will create a Construction Management Plan including noise and work hour restrictions, a truck tire wash, and a construction traffic plan. In its November 13, 2006 submission, the Applicant included a proposed Construction Management Plan. The proposed plan was far weaker in protecting the neighborhood than any Construction Management Plan associated with a PUD in ANC 3E for the past 20 years. To the extent there is any blasting on the site, residents living within two or three blocks require special protection to ensure that no damage results to their homes and other property.

i. The Commission finds that the Construction Management Plan proffered by the Applicant is inferior to Construction Management Plans associated with other projects, and cannot be considered an amenity. Had an adequate Construction Management Plan been proffered, it would not be considered an amenity, but would be required to mitigate the impact of construction on the adjoining neighborhood.

135. Section 2403.9(j): Other public benefits and project amenities and other ways in which the proposed planned unit development substantially advances the major themes and other policies and objectives of any of the elements of the Comprehensive Plan.

a. The Applicant did not offer any additional public benefits or project amenities in this category.

136. Economic Impact:

a. Mr. Smart, the Applicant's economic expert, included a report in which he estimated \$1.9 million a year in net tax revenue generated.

b. Dr. Simon testified that it would be inappropriate to compare the tax revenue generated by the proposed development with the tax revenue generated by the current use; rather, it should be compared with matter-of-right development on that site.

c. Dr. Simon also testified that Mr. Smart made serious errors in calculating the tax revenue associated with the proposal. She testified that: (1) Mr. Smart did not base his estimate of District income taxes on District tax rates; (2) Mr. Smart did not base his estimate of real estate taxes on District real estate tax rates; (3) Mr. Smart assumed incomes at least 25 percent higher than that necessary to qualify for a mortgage on the units; (4) Mr. Smart further overstated the incomes of residents by failing to recognize the Applicant's claim that many of the residents will be empty-nesters using the equity in their previous residence toward the purchase of their unit; (5) Mr. Smart's estimate of the residents' tax deductions and tax-exempt income was unrealistically low; and (6) Mr. Smart overstated the impact on retail sales tax revenue, by assuming unrealistically high spending rates, leaving little or no income for saving or spending on tax-exempt items. Correction of these errors would result in a significantly lower estimate of

annual tax revenue. Moreover, Mr. Smart made no effort to calculate the additional costs that will accrue to DC taxpayers as a result of this project (*e.g.*, costs of educating children in DC public schools). Whatever tax revenues might result from the project should be offset by such costs.

d. Applicant’s rebuttal does not dispute any of the errors in Mr. Smart’s analysis cited by the Opponent.

e. The Comprehensive Plan states that: “Discretionary zoning actions, such as Planned Unit Developments, affecting Ward 3, shall . . . treat amenities such as tax revenue . . . as requirements.” [Section 1409.8(c)(3)]

f. The Commission finds that the economic analysis submitted by the Applicant is seriously flawed and that the Applicant has not demonstrated that the proposed development would generate significantly more annual tax revenue that would be generated by matter-of-right development with current zoning.

CONCLUSIONS OF LAW

1. At its public meeting held on _____, 2007, the Zoning Commission reviewed and considered all testimony and evidence presented in this case, including all post-hearing submissions and responses from all parties. Based on its deliberations in this case, the Commission’s conclusions of law and decision follow:

2. The Commission concludes that the Applicant did not satisfy the minimum lot size requirement for a PUD in the R-5-B zone, one acre, and the Applicant did not request a waiver of this requirement. 11 DCMR § 2401.2(a).

3. The Commission concludes that the PUD would be inconsistent with the intent of the Comprehensive Plan. The subject site is zoned R-5-B. In R-5-B, a moderate height and density are permitted [11 DCMR § 350.2]. The Akridge site was designated as R-5-B to serve as part of a transitional buffer zone between the Friendship Heights regional center and the R-2 neighborhood to the west, as well as the low-density commercial area to the south. This theme is preserved in the Comprehensive Plan, which lists the following objective:

Conserve and maintain the District’s sound, established neighborhoods through the strict application and enforcement of housing, building, and zoning codes and the maintenance of the general level of existing residential uses, densities and heights. Section 1104.1(b)

4. Akridge claims that rezoning at this site is justified because it is within a Housing Opportunity Area. The Commission concludes that the policies of the Comprehensive Plan for Ward 3 were designed to protect areas zoned for single-family homes from dense development, and that the HOA for Friendship Heights does not justify the rezoning that the Applicant requests.

5. Akridge claims that rezoning at this site is justified because the site is in a regional center. The Commission concludes that the site is not in the regional center, and further, the Comprehensive Plan is clear in stating that heights and densities in regional centers should be

maintained at levels “which are appropriate to the scale and function of development in adjoining communities.”

6. Section 2403.9 of the Zoning Regulations enumerates ten “evaluation standards” that must be proven by the Applicant. A project may qualify for approval by being “particularly strong” in only one or a few of the categories in section 2403.9, but must be “acceptable” in all proffered categories and superior in many. Section 2403.10.

a. With regard to section 2403.9(a), regarding architecture and urban design, the Commission concludes that the proposal is not exceptional or superior for the reasons stated in Finding 112, above.

b. With regard to section 2403.9(b), regarding site design and planning, the Commission concludes that the proposal is not exceptional or superior for the reasons stated in Finding 113, above.

c. With regard to section 2403.9(c), safe vehicle and pedestrian access and connections to public transportation, the Commission concludes that the proposal is not exceptional or superior for the reasons stated in Findings 114-123, above.

d. With regard to section 2403.9(d), the historic preservation of private structures, the Commission concludes that this factor is not applicable.

e. With regard to section 2403.9(e), regarding employment and training opportunities, the Commission concludes that the Ward 3 plan considers a first source employment agreement to be a requirement for discretionary zoning actions, such as PUDs, and that by offering a first source employment agreement, the Applicant has met this requirement.

f. With regard to section 2403.9(f), regarding housing and affordable housing, the Commission concludes that the proposal is not exceptional or superior for the reasons stated in Finding 126, above.

g. With regard to section 2403.9(g), regarding social services and facilities, the Commission concludes that the Applicant has provided for no such amenities in its proposal.

h. With regard to section 2403.9(h), regarding environmental benefits, the Commission concludes that the proposal is not exceptional or superior, and that, for the reasons stated in Findings 128-133, above, the project will, in fact, have a negative impact on the environment.

i. With regard to section 2403.9(i), regarding uses of special value of the project, the Commission concludes that the proposed improvement to the Janney Elementary School and the contribution to IONA Senior Services are, at most, minor amenities; that some improvement to the Pepco substation would likely be sought by any developer as part of any development on this site, and thus cannot be considered to be an amenity; that inclusion of retail space cannot be considered an amenity, since it is clear that there is not a paucity of retail space in Friendship Heights; and that the Construction Agreement proffered by the Applicant is inferior to that offered in every other PUD in the area, and thus cannot be considered an amenity.

j. With regard to the economic impact, the Commission concludes that the Applicant has not demonstrated that the project would produce significantly higher tax revenues for the District than matter-of-right development with current zoning. The Comprehensive Plan

requires a demonstration that the proposed project would produce significant additional tax revenues over matter-of-right development for all discretionary zoning actions in Ward 3. The Commission concludes that the Applicant has not met this requirement.

7. The Commission concludes that the public benefits and amenities do not justify, and are far outweighed by, the “flexibility” (additional height, density and lot occupancy) requested over current zoning.

8. The approval of this application is inconsistent with the Comprehensive Plan for the National Capital and the purposes of the Zoning Act, and the Zoning Regulations and Map of the District of Columbia.

9. The Commission accorded Advisory Neighborhood Commission 3E the great weight to which they are entitled, and concurs with ANC 3E that the project would negatively impact the Friendship Heights community.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia hereby **ORDERS** that the application for a Consolidated Planned Unit Development and map amendment from R-5-B to C-2-B for Square 1657, Lots 810, 811 and 812 be **DENIED**.

Vote of the Zoning Commission was taken at a public meeting on _____, 2007: ___ to ___ (_____, to deny; _____, opposed..)

This order was adopted by the Zoning Commission at its regular public meeting on _____, 2007, by a vote of _____ (_____ to adopt; _____, opposed).

In accordance with the provision of 11 DCMR 3028, this Order shall become final and effective upon publication in the D.C. Register, that is on _____.

Carol Mitten
Chairperson
Zoning Commission

Director,
Office of Zoning

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF FRIENDSHIP NEIGHBORHOOD ASSOCIATION** was served by e-mail and by first-class mail, postage prepaid, this ___th day of May, 2007, upon:

Christopher H. Collins, Esquire
Holland & Knight
2099 Pennsylvania Avenue, NW, Suite 100
Washington, DC 20006

Amy McVey
Chair, Advisory Neighborhood Commission 3E
4600 Albemarle St. NW
Washington, DC 20016-2036

Allie Hajian
Vice Chair, Ward 3 Vision
4504 38th Street, N.W.
Washington, DC 20016

Cornish F. Hitchcock