Case No. 12-AA-1183

In the
District of Columbia Court of Appeals

DC Library Renaissance Project/
West End Library Advisory Group,

Petitioner,

v.

District of Columbia Zoning Commission,

Respondent,

and

EastBanc -W.D.C. Partners,

Intervenor.

Petition for Review of Zoning Commission Order Nos. 11-12 & 11-12A

REPLY BRIEF OF APPELLANT

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December 24, 2012

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Petitioner District of Columbia Library Renaissance Project/West End Library Advisory Group ("DCLRP") respectfully submits this Reply to the Brief for Intervenor ("Int. Br.") submitted by EastBanc-W.D.C. Partners, LLC.

ARGUMENT

I. DCLRP Has Associational Standing in This Matter Because the Proposed PUD Will Cause Its Members a Cognizable Injury-In-Fact, Including Their Loss of Use and Enjoyment of the Library.

EastBanc's contention that DCLRP lacks standing to pursue this appeal misrepresents the facts and misstates the law. As the Commission correctly concluded, DCLRP has associational standing because the proposed planned unit development ("PUD") will cause its members a concrete and particular injury, including their loss of use and enjoyment of the Library. Further, contrary to EastBanc's assertion, there is substantial evidence in the record to support that finding. EastBanc simply fails to address it. EastBanc is also wrong, as a matter of law, that DCLRP's objections to the proposed PUD constitute "generalized grievances" simply because they may implicate "city-wide" concerns. As the Supreme Court has made clear, a concrete and particular injury is cognizable even if it is widely shared. EastBanc's claim that DCLRP lacks standing thus has no merit, and the Court should deny its request that this appeal be dismissed.

A. DCLRP Has Associational Standing.

DCLRP has associational standing to pursue this appeal because the proposed PUD will deny its members their "use and enjoyment" of the Library, which is a quintessentially cognizable injury-in-fact. *See York Apartments Tenants Ass'n. v. D.C. Zoning Commission*, 856 A.2d 1079, 1085 (D.C 2004) ("*YATA*"). As this Court has recognized, "an association has standing to bring suit on behalf of its members when:

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

Friends of Tilden Park v. District of Columbia, 806 A.2d 1201 (D.C. 2002) (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Here, there is no dispute that the second and third prong are satisfied. Protecting a freestanding public library from being torn down and replaced by a mixed-use private development (albeit one housing a library on the ground floor) is directly related to DCLRP's mission to "protect and promote the public interest in the Public Library of the District of Columbia." JA 155. Further, individual DCLRP members need not participate in this proceeding. Consequently, DCLRP has standing provided any of its members otherwise would have individual standing – and they would.

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

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

Id. (quoting *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 421 (D.C. 1983)). As set forth *infra* at Part I.B, the Commission correctly found the proposed PUD will cause DCLRP members an injury in fact, and there is substantial evidence in the record to support that finding. Further, the interests DCLRP seeks to protect, including the preservation of public assets and the protection of affordable housing, fall squarely within the zone of interests the Zoning

Regulations protect. *See* 11 DCMR § 101.1 (specifying that regulations were adopted to promote "the public health, safety, morals, convenience, order, prosperity, and general welfare," including land uses favorable to "protection of property, civic activity, and recreational, educational, and cultural opportunities"). Finally, no clear legislative intent to withhold judicial review is evident here. On the contrary, both the DCAPA and the rules of this Court expressly grant DCLRP the right to pursue this appeal. *See* D.C. Code § 2-510; D.C. R. App. P. 15.

Accordingly, DCLRP has associational standing to pursue this appeal as a party "adversely affected or aggrieved" by the Commission's decision to approve the proposed PUD. D.C. Code § 2-510; *see Federal Election Comm'n. v. Akin*, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly").

B. EastBanc's Challenge to DCLRP's Standing Rests on a Premise That Is Demonstrably False.

EastBanc challenges DCLRP's standing on only one ground: it claims DCLRP fails to establish an "injury-in-fact" because DCLRP's objections to the proposed PUD constitute "impermissible, generalized grievances". Int. Br. at 23-27. As a threshold matter, however, the premise of this claim is demonstrably false. According to EastBanc, DCLRP has not shown "any of the personal, specific injuries" necessary to establish standing, nor that the proposed PUD will cause DCLRP members "*any* injury" whatsoever. Int. Br. at 23, 26 (emphasis original). That is incorrect. DCLRP submitted ample evidence showing its members are West End residents and regular patrons of the Library who will suffer the requisite injury. EastBanc simply fails to address it.

Instead, EastBanc attempts to support its challenge to DCLRP's standing by focusing exclusively on DCLRP's original request for party status, which it attacks as "conclusory" and

lacking in "specifics". Int. Br. at 26. But even if that were true – and it is not – EastBanc completely ignores the wealth of evidence DCLRP submitted in support of that request. Perhaps most significant, DCLRP members submitted letters providing detailed information regarding their use and enjoyment of the Library – providing, in other words, the very "specifics" EastBanc claims DCLRP did not provide. JA 340. In addition, testimony shows DCLRP members asked DCLRP to represent them in this matter, to raise concerns that otherwise would be ignored. JA 336, 339, 340. Finally, the record is replete with evidence demonstrating that DCLRP and its members have long used and enjoyed the Library and made valuable contributions to its protection and improvement. Such evidence includes the following: in 2007, DCLRP and its members were instrumental in convincing the DC Council to rescind the emergency legislation that would have conveyed the Library, Fire Station and Police Station parcels to EastBanc in a no-bid, non-competitive contract negotiation, JA 335; in 2008, DCLRP held "visioning sessions" to alert community members of the proposal to "dispose" of the Library, and produced a report outlining community members' concerns and interests, JA 337-38; throughout the process culminating in the proposed PUD, DCLRP members attended Advisory Neighborhood Committee ("ANC") meetings, and met with the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") and EastBanc to discuss community members' concerns and interests, JA 338; and DMPED formally recognized DCLRP as a "key stakeholder" in this matter, JA 336.

As the foregoing evidence demonstrates, few organizations or individuals, if any, could plausibly claim to be more directly involved with (and beneficial to) the Library than DCLRP and its members. The record thus contains "substantial evidence" to support the Commission's

finding that DCLRP members will be injured by their loss of use and enjoyment of the Library. *See Hotel Tabard Inn v. D.C. Dept. of Consumer & Regulatory Affairs*, 747 A.2d 1168, 1174 (D.C. 2000). And while standing is a question of law the Court reviews *de novo*, such "underlying factual determinations are reviewed for clear error." *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 729 (D.C. 2011) (citation omitted). Consequently, EastBanc manifestly fails to provide grounds for the Court to overrule the Commission's finding that the proposed PUD will cause DCRLP members an injury-in-fact, because EastBanc never even attempts to address the evidence supporting it. EastBanc's challenge to DCLRP's standing should be rejected on that basis alone.

C. EastBanc Incorrectly Equates Widespread But Concrete and Particular Injuries With Generalized Grievances.

EastBanc's challenge to DCLRP's standing also should be rejected because EastBanc is wrong, as a matter of law, that DCLRP raises "impermissible, generalized grievances" in this matter. Int. Br. at 23. Contrary to EastBanc's supposition, an injury can be concrete and particular for standing purposes, but also widely shared. Thus, while EastBanc finds it "inconceivable" that DCLRP has standing to raise certain issues that may be "city-wide" in scope, Int. Br. at 27, that is only because EastBanc misconceives the proper focus of the inquiry.

As the Supreme Court has made clear, "where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Akin*, 524 U.S. at 25 (citation omitted). Consequently, "it does not matter how many persons have been injured by the challenged action," provided a party can "show that the action injures him in a concrete and personal way." *Massachusetts v. E.P.A.*, 127 S.Ct. 1438, 1453 (2007) (citation omitted). To determine whether an asserted injury constitutes a "generalized grievance," therefore, the critical inquiry is not how widespread the

harm may be, but whether it is "of an abstract and indefinite nature – for example, harm to the 'common concern for obedience to law.'" *Akin*, 524 U.S. at 23 (citation omitted).

EastBanc's attempt to analogize this case to the "generalized grievance" cases on which it relies ignores this critical distinction. Unlike the petitioners in those cases, DCLRP does not rely on an abstract or indefinite interest as the basis for its standing. On the contrary, as set forth *supra* at Part I.A & B, DCLRP satisfies the "injury-in-fact" requirement because it asserts "an injury to a cognizable interest" – loss of use and enjoyment of the Library – and also that its members are "among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). EastBanc itself concedes this point. Int. Br. at 12 (acknowledging that DCLRP members will be "immediately affected" by the proposed PUD). DCLRP's injury is therefore nothing like those asserted in the "general grievance" cases EastBanc cites. *E.g.*, *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (finding taxpayer lacked standing to assert claim absent a "personal stake in the outcome" that was not common to every other taxpayer).

Relying primarily on *YATA*, EastBanc asserts that if the petitioner's injury in that case constituted a generalized grievance, then the same must be true of DCLRP. Int. Br. at 23-27. But *YATA* differs from the instant case in crucial respects. In *YATA*, the petitioner had no direct involvement in or connection to the challenged PUD, and asserted no injury except that as modifiied, the PUD might affect what its members "see and hear out their windows, as well as the livability of their neighborhood." *YATA*, 856 A.2d at 1085. Such assertions, the Court found, merely established the petitioner's "close proximity" to the PUD, without showing any "concrete and specific threat or injury." *Id.* In this case, by contrast, DCLRP has standing because the proposed PUD will cause its members direct injury, including their loss of use and enjoyment of

the Library.

In sum, EastBanc is incorrect that DCLRP lacks standing to pursue this appeal because it raises certain "city-wide" issues. Int. Br. at 23. *See Massachusetts*, 127 S.Ct. at 1453 ("EPA maintains that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle. We do not agree"). If that were true, no party would ever have standing to pursue claims based on widespread or widely shared harms, and the Supreme Court has expressly rejected that view. *See id.*; *see also Akin*, 524 U.S. at 25. The Court should therefore deny EastBanc's request that this appeal be dismissed.

II. EastBanc Fails to Provide Grounds to Affirm the Commission's Error in Disregarding the Value of the Public Property to Be Conveyed to EastBanc in Connection With the Proposed PUD.

EastBanc predictably urges the Court to affirm the Commission's erroneous conclusion that the value of the public Property conveyed to EastBanc in connection with the proposed PUD "is of no relevance" in this matter. JA 33. According to EastBanc, the value of the Property has "no bearing on the issues that the Commission was required to examine," and DCLRP's argument to the contrary reflects a "fundamental misunderstanding of both the role of the Commission and the PUD process." Int. Br. at 27. In fact, however, the plain terms of the Zoning Regulations make clear that the value of the Property is directly relevant to the issues the Commission was required to examine. Moreover, the only "misunderstanding" here consists of EastBanc's conspicuous choice to attack a straw man, rather than addressing the points DCLRP actually made in its opening brief.

Contrary to EastBanc's assertions, DCLRP never claimed or even implied the Commission was required to determine whether "the LDA was a fair deal or otherwise." Int. Br.

at 27. Nor did DCLRP contend that the Commission's enabling statute grants it "the authority" to make such determinations. Int. Br. at 27-28. And finally, DCLRP did not request that the Commission "essentially override the economic policy decisions of the Council and DMPED." Int. Br. at 28. EastBanc's effort to "refute" such points thus reflects nothing more than EastBanc's inability or unwillingness to address the legitimate issues raised in this appeal.

To be clear: DCLRP contends that the Commission erred by concluding that the value of the Property "is of no relevance" in this matter. That value is directly relevant to the issues the Commission was required to examine for three reasons. First, the value of the Property conveyed to EastBanc without direct payment by EastBanc constitutes a "development incentive" granted to the developer, the "relative value" of which the Commission was required to "judge, balance, and reconcile" with the value of the project amenities and benefits. 11 DCMR § 2403.8. As the LDA specifies, the District's express purpose in conveying the Property to EastBanc is to enable EastBanc to develop "a mixed use residential and commercial project…to include the New Library, the New Fire Station, affordable housing [and] market rate housing…pursuant to a planned unit development ("PUD") application to be filed and approved by the Zoning Commission." JA 248. The LDA further provides that, in exchange for EastBanc's agreement to include a library and fire station in its development, "the Deputy Mayor will support the Developer's application for a PUD." JA 248. Contrary to EastBanc's assertion, therefore, the LDA is not "an entirely separate transaction" with no relevance to the Commission's analysis. Rather, LDA is relevant because its express terms make clear that the value of the Property is a "development incentive" granted to EastBanc in connection with the PUD, which the Commission was required to "judge, balance, and reconcile" against the proffered benefits and

amenities. 11 DCMR § 2403.8.

Second, the value of the Property conveyed to EastBanc without direct payment is relevant because EastBanc proffers the Library and Fire Station as benefits and amenities of the proposed PUD, and the Commission accepted them as such. Int. Br. at 29; JA 29. Consequently, the Commission was required to weigh the "relative value" of those proffered benefits and amenities against the "development incentives requested, and any potential adverse effects" of the proposed PUD. 11 DCMR § 2403.8. As EastBanc concedes, the "relevant question" in this regard is the extent to which the proffered benefits and amenities are an "incremental result" of the PUD process. Int. Br. at 29. The value of the Property conveyed to EastBanc in connection with the proposed PUD is not an "incremental result" of the proposed PUD, however, but an inducement the District granted to EastBanc *ex ante*, in exchange for EastBanc's agreement to include a library and fire station in its development. JA 248. To determine the marginal value of the proposed PUD's benefits and amenities properly, therefore, the Commission was required to identify the value of the Property in its current "as is" condition, and to exclude the "as is" value from its calculation. In other words, the proposed PUD's benefits and amenities do not include the benefits and amenities of the Property as it currently exists.

Third, as explained more fully *infra* at Part III, the value of the Property conveyed to EastBanc without direct payment is also relevant to the economic analysis necessary to determine whether EastBanc should be granted its requested waiver from the requirement that it include a small number of Inclusionary Zoning ("IZ") units in the proposed PUD. JA 30. EastBanc expressly states that "[a]ny requirement of affordable housing...would reduce the land value to the point where it would be impossible for EastBanc to deliver the fire station and

library without direct subsidy from the District." Int. Br. at 33. By EastBanc's own logic, therefore, the "land value" is relevant to the Commission's determination that an IZ waiver was proper.

In short, the value that a party contributes to a deal is directly relevant to an accurate determination of the value the party receives in return. Because the Commission was expressly required to make such a determination, 11 DCMR § 2403.8, it committed clear error by concluding that the value of the Property the District contributes to the proposed PUD "is of no relevance" to its analysis. JA 33. Further, EastBanc does not and cannot provide the Court any basis for affirming the Commission's decision in spite of this clear error.

Because there is no legal authority to support its position, EastBanc instead relies on a number of conclusory assertions such as, "the Commission correctly understood its own role," and the Commission "does not examine the financial circumstances" relating to a proposed PUD. Int. Br. at 28. Such assertions directly contradict the Zoning Regulations' express directive that the Commission weigh the "relative value" of a proposed PUD "according to the specific circumstances of the case." 11 DCMR § 2403.8. Under the specific circumstances of this case, the District is contributing to the proposed PUD Property its Chief Financial Officer valued at $30 million. JA 225. There is no basis for EastBanc's contention that the Commission properly disregarded that fact.

In an attempt to fashion a legal principle that might justify the Commission's error in failing to address the proposed PUD's adverse financial effects, EastBanc asserts that the Commission cannot consider any adverse effect unless there is "a nexus between the zoning concessions sought through the PUD process, and the claimed adverse effect." Int. Br. at 28. This

assertion, for which EastBanc again cites no authority, contradicts the Zoning Regulations' broad directive that the Commission weigh the relative value of a proposed PUD "according to the specific circumstances of the case." 11 DCMR § 2403.8. Even if the Court were to accept EastBanc's *ad hoc* limitation, however, such a "nexus" exists in this case for the three reasons identified above.

Finally, EastBanc's effort to distinguish *Levy v. D.C. Bd. of Zoning Adjustment*, 570 A.2d 739 (D.C. 1990), is unavailing. EastBanc contends *Levy* is "inapposite" because the Court in that case did not require the BZA to consider "the economics underlying" certain aspects of a campus plan it had erroneously disregarded, but only required the BZA to consider whether those aspects might have any "potential adverse effects." Int. Br. at 29-30. The "economics" were not relevant in *Levy*, however, because the District had not subsidized or incentivized the campus plan, and so there were no adverse financial effects to consider. *See Levy*, 570 A.2d at 751. In this case, by contrast, the District provided EastBanc with a development incentive worth an estimated $30 million, JA 225, and the Commission was required to weigh the "relative value" of that incentive against the proposed PUD's benefits and amenities. 11 DCMR § 2403.8. Therefore, just as the BZA erred in *Levy* by mistaking its "lack of authority to approve" those aspects of the campus plan it disregarded for "a lack of jurisdiction to assess [their] impact," so too the Commission erred in this case by declining to consider the adverse financial effects of the proposed PUD on the ground that it lacked authority to "second guess the calculations that led the District party to conclude this was a good deal." JA 34. The Commission is not being asked to determine whether the proposed PUD is a good deal, but only to assess its potential adverse effects "according to the specific circumstances of this case." 11 DCMR § 2403.8. One such adverse effect is "a reduction

of District real property assets of approximately $30 million," JA 225, and the Commission's complete failure to consider that adverse effect was error.

III. EastBanc Fails to Provide Grounds to Affirm the Commission's Error in Waiving the Inclusionary Zoning Requirements.

EastBanc does not dispute that the Zoning Regulations require it to provide 14 units of affordable Inclusionary Zoning ("IZ") units in the proposed PUD. JA 29. EastBanc also does not dispute that the Zoning Regulations provide only one basis for a waiver of that requirement – specifically, "upon a showing that compliance...would deny the applicant the economically viable use of its land." 11 DCMR § 2606.1. And finally, EastBanc does not dispute that it made no such showing in this case. EastBanc nonetheless insists the Commission did not err in granting it a full waiver from the IZ requirements. EastBanc is incorrect.

Once again, EastBanc's attempt to redeem the Commission's error consists almost entirely of conclusory and unsupported assertions. According to EastBanc, the "record is replete with evidence" supporting the Commission's decision to grant a waiver. Int. Br. at 31. Further, EastBanc contends, such evidence "clearly satisfied all elements of the substantial evidence test." Int. Br. at 32. If that is so, however, it is far from evident from EastBanc's brief, which merely recites the Commission's findings and conclusions without citing the "evidence" on which they supposedly rely. Int. Br. at 31-34. Instead, Eastbanc primarily cites to its own prior assertions in support of its PUD application. Int. Br. at 33 (citing JA 291-92).

Further, even if the Commission accepted EastBanc's self-serving assertions at face value, EastBanc itself does not suggest they satisfy the requirement set forth in 11 DCMR § 2606.1. Instead, EastBanc contends that its proposed PUD is exempt from the mandatory provisions of the IZ regulations, despite the fact that such regulations expressly state they "shall

apply" to all developments in the District having ten or more dwelling units (with exceptions not relevant here). 11 DCMR § 2602.1. There is no merit to this contention.

The only support EastBanc can muster for its claim that the Commission properly waived the IZ requirements, despite EastBanc's failure to show it otherwise would be denied the "economically viable use of its land," 11 DCMR § 2606.1, is dicta from the Commission's order adopting the requirements. Int. Br. at 32 (citing ZC Order 04-33 at 7). But that order does not announce a new "standard" that only applies to PUD applicants, as EastBanc claims. Int. Br. at 32. Rather, the order affirms that PUDs are not to be "automatically exempted" from the IZ requirements, though "partial or full relief...[is] a type of flexibility that could be granted through a PUD." ZC Order 04-33 at 7. Moreover, notwithstanding EastBanc's misrepresentation of the order's plain meaning, the dicta on which EastBanc relies cannot be construed to amend the mandatory requirements set forth express terms in the IZ regulations. *Compare* ZC Order 04-33 at 7 *with* 11 DCMR § 2600 et seq. On the contrary, in adopting the regulations, the order reaffirms that they establish "a mandatory IZ program." ZC Order 04-33 at 8. The Commission therefore erred by disregarding such mandatory requirements.

IV. EastBanc Fails to Provide Grounds to Affirm the Commission's Error in Disregarding the Proposed PUD's Inconsistency With the Comprehensive Plan.

Returning to a familiar theme, EastBanc defends the Commission's conclusion that the proposed PUD is not inconsistent with the Comprehensive Plan on the ground that DCLRP's arguments are "directed at the LDA," and thus "wholly unrelated to the PUD." Int. Br. at 34. As set forth above, EastBanc is incorrect that the LDA is "wholly unrelated" to the Commission's analysis. Furthermore, EastBanc's assertion that the proposed PUD "promotes a number of

policies" set forth in the Comprehensive Plan is legally insufficient to show the proposed PUD is not inconsistent with those identified in DCLRP's opening brief. In. Br. at 34.

With regard to the provisions relating to the Fire Station, in particular, EastBanc contends that DCLRP is "grasping at straws" by demonstrating the inconsistency between the Commission's decision and the Comprehensive Plan. Int. Br. at 35. EastBanc makes no attempt to resolve that inconsistency, but asserts instead that DCLRP's argument is "nonsensical" because, EastBanc declares, the proposed PUD "does not include the Fire Station." Int. Br. at 35. Here, EastBanc directly contradicts its own brief, which expressly refers to "all aspects of the PUD, including the Library *and Fire Station*." Int. Br. at 30 (emphasis added). Moreover, throughout the PUD process, EastBanc has proffered the Fire Station as an amenity of the proposed PUD. It is therefore proper to include the Fire Station in an analysis of the proposed PUD's inconsistency with the Comprehensive Plan.

CONCLUSION

For the foregoing reasons, and those set forth in DCLRP's opening brief, the Commission's Order should be vacated, and this matter should be remanded to the Commission.

December 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December 2012, I served a copy of the foregoing Reply Brief of Petitioner by first class mail, or a manner at least as expeditious, upon the following parties:

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