

**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**

BRIEF OF APPELLANT

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October 23, 2012

PETITIONER'S CERTIFICATE AS TO PARTIES, AMICI AND COUNSEL

Pursuant to D.C. App. R. 28(a)(2), Petitioner D.C. Library Renaissance Project/West End Library Advisory Group hereby submits the following Certificate as to Parties, Amici and Counsel.

Parties and Amici Before the Zoning Commission. EastBanc-W.D.C. Partners (Holland & Knight, LLP) was the Applicant. Additional parties included the D.C. Library Renaissance Project/West End Library Advisory Group (pro se); Advisory Neighborhood Commission 2a (pro se); The Residences at Ritz Carlton and Howard Biel (pro se); Kenneth Wnuck (pro se); West End Flats Condominium Association (pro se); and the Gibson Condominium Association (pro se). There were no *amici curiae* in the proceedings before the Zoning Commission.

Parties and Amici Before this Court. The Petitioner is D.C. Library Renaissance Project/West End Library Advisory Group (Oliver B. Hall, Esq.). The Respondent is the District of Columbia Zoning Commission (Donna Murasky, Esq. and Todd S. Kim, Esq.). EastBanc-W.D.C. Partners (Deborah B. Baum, Esq. and Alison B. Rosseau, Esq.) intervened on behalf of Respondent.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Order entered by the Zoning Commission on March 26, 2012, which approved the application of Intervenor EastBanc-W.D.C. Partners, LLC for a planned unit development, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

Whether the Zoning Commission's Order is unsupported by substantial evidence in the record?

STATEMENT OF THE CASE

This case arises from the Council of the District of Columbia's ("Council") second attempt to convey three lots of prime real estate owned by the public to a private developer, EastBanc-W.D.C Partners, LLC ("EastBanc"), without compensation for their fair market value. The lots are centrally located in the District's West End neighborhood. Two lots are on the north side of L Street N.W., between 23rd and 24th Streets, which is where EastBanc proposes to build the Planned Unit Development ("PUD") under review here, and the third is on the northeast corner of M and 23rd Streets N.W. (collectively, "the Property").

At present, the two lots on L Street are home to the West End Public Library (the "Library") and a Metropolitan Police Department Special Operations Division (the "Police Department"). The third lot is home to the West End Fire Station (the "Fire Station"). Each of these public facilities is fully operational, and the Library is open to the public six days a week.

The Council first attempted to convey the Property to EastBanc in July 2007, by means of emergency legislation enacted without public notice, which gave EastBanc an exclusive right to purchase and develop the Property in a no-bid, non-competitive negotiation with then-Mayor Adrian Fenty's office. *See Council to Cancel Sale of Library, Fire Station*, THE WASHINGTON TIMES (Sept. 25, 2007). Once the deal was disclosed, however, the Council rescinded the legislation amid widespread public protest. *See id.* The District's present deal with EastBanc commenced with an ostensibly competitive bidding process, when the Office of the Deputy Mayor for Planning and Economic Development ("ODMPED") issued a Solicitation for Offers ("Solicitation"), but that process still resulted in a giveaway of the Property to EastBanc. Under the terms of the proposed PUD, the District is to convey the Property to EastBanc, together with

the rights to develop it, but EastBanc will not pay the District one cent in compensation.

The District of Columbia Zoning Commission (the “Commission”) nonetheless approved the proposed PUD by its order dated March 26, 2012 (the “Order”). JA 2.

STATEMENT OF FACTS

The Public Property to Be Conveyed to EastBanc

The three lots of public property to be conveyed to EastBanc in connection with the proposed PUD are identified as Lots 836 and 837 in Square 37, where the Library and Police Station reside, respectively, and Lot 8222 in Square 50, where the Fire Station resides. JA 2. Lot 836 is approximately 15,950 square feet. JA 2. Lot 837 is approximately 18,948 square feet. JA 2. Lot 8222 is approximately 16,260 square feet. JA 2.

Lots 836 and 837 are designated as Mixed-Use High-Density Residential/Medium-Density Commercial on the District of Columbia Comprehensive Plan Future Land Use Map (“Land Use Map”). Both lots are zoned R-5-B. JA 2. Under R-5-B zoning, developments built on the lots are subject to a maximum height of 50 feet and a maximum Floor Area Ratio (“FAR”) of 1.8. JA 12. The maximum lot occupancy is 60 percent. JA 12

Lot 8222 is is zoned Commercial Residential (“CR”). Under CR zoning, developments built on the lot are subject to a maximum height of 90 feet and a maximum FAR of 6.0 for residential use and 3.0 for other permitted uses. The maximum lot occupancy is 75 percent.

The District’s Solicitation for Offers

In its Solicitation, ODMPED requested offers “to plan, finance, build, and operate a mixed-use project” either on Lots 0836 and 0837 on Square 37, Lot 8222 on Square 50, or on all three lots. JA 202. Offers to redevelop the lots where the Library or Fire Station stand were

required to include replacement of those facilities in their present locations, or on another site in the immediate neighborhood. JA 202. Among the specific “preferences” the Solicitation identified were “more residential housing and a workforce housing component.” JA 203. In addition, while the Solicitation contemplated the possibility that the District might convey or lease the lots at fair market value to the selected Offeror, “ground lease” rather than “fee simple transaction structures” were preferred. JA 203.

The Solicitation required potential developers to choose from development options A, B or C. JA 204-06. Option A provided for the redevelopment of Square 37, and required offers to include replacement of the Library. Option B provided for the redevelopment of Square 50, and required offers to include replacement of the Fire Station. Option C provided for the redevelopment of both Square 37 and Square 50, according to the terms specified in Option A and Option B. Each of the options provided that “a minimum of 30% of all housing units must be affordable, targeting the 30% AMI level and 60% AMI levels at 15% and 15% respectively.” JA 204-06.

The District ultimately accepted an offer from EastBanc.

The District’s Agreement to Convey the Public Property to EastBanc

On July 13, 2010, the Council enacted a resolution declaring that Lot 0836, Lot 0837 and Lot 8222 were “no longer required for public purposes,” and that “disposing” of them would be “the most expedient and cost-effective solution” to “reactivate” them. JA 195. The resolution specifically contemplated that such disposition would “provide public benefits such as affordable housing, and allow the District to leverage and utilize the value associated with the Property to construct a new West End Fire Station and a new West End Public Library.” JA 195. The

resolution also adopted the fiscal impact statement prepared by the District's Chief Financial Officer, which concludes that the proposed disposition of the three lots "would result in reduction of District real property assets of approximately \$30 million." JA 194, 225.

The Council also adopted a second resolution on July 13, 2010, which provided that the District would convey Lot 0836, Lot 0837 and Lot 8222 to EastBanc "in fee simple," except for "the air rights necessary to construct a new library to replace the existing West End Library, the air rights necessary to replace the existing West End Fire Station, and such easements, covenants, and other property rights to be reserved that are necessary or convenient for the support and operation of the new library and the new fire station." JA 198. The resolution made no provision for payment by EastBanc to the District as compensation for the property conveyed to it. Instead, it merely obligated EastBanc to include a new library and fire station as part of its development of the lots. JA 198. In addition, the resolution provided that the development "shall include affordable housing in accordance with applicable law" and the terms set forth therein. JA 198. Finally, the resolution incorporated the Chief Financial Officer's fiscal impact statement, including its conclusion that the conveyance would result in a loss of \$30 million in assets to the District. JA 199, 225.

Pursuant to the foregoing resolutions, on November 22, 2012, the District adopted a Land Disposition and Development Agreement ("LDDA") conveying the Property to EastBanc. JA 248.

EastBanc's Proposed Planned Unit Development

EastBanc's proposed PUD is a mixed-use development located on Lot 836 and Lot 837 on Square 37, as well as the adjacent Lot 855 on Square 37, which EastBanc owns or controls.

JA 2. The proposed PUD will consist of a 110-foot tall luxury condominium building housing 174 separate units with a roof-top pool, which will occupy approximately 307,953 square feet of floor area. JA 11-12. The condominium units will account for approximately 287,184 square feet of the total. JA 11-12. The ground floor of the condominium building will be divided between a new library, slated to occupy between 17,000 and 20,223 square feet of floor area, and retail space, which will occupy 10,303 square feet of floor area. JA 12. The PUD will have a FAR of 7.0. JA 12.

Because the location of the proposed PUD is presently zoned R-5-B, any development on the property is subject to a maximum height of 50 feet and a maximum FAR of 1.8. JA 12. EastBanc is therefore requesting that the relevant lots be re-zoned CR, which would impose a maximum height requirement of 90 feet and a maximum FAR of 6.0 for residential uses and 3.0 for other uses. JA 12. In addition, EastBanc is requesting approval of its proposed PUD, which would increase the maximum height requirement to 110 feet and the maximum FAR to 8.0, of which 4.0 may be for commercial use. JA 12-13.

In connection with the proposed PUD, EastBanc also proposes to build another residential building on Lot 8222, where the Fire Station currently exists. The ground floor will be dedicated to a new fire station, while the floors above may include “up to 52 affordable dwelling units,” but only if EastBanc determines it has sufficient funding for them after it delivers a new library and fire station. AR Ex. 4 at 11. According to EastBanc, both its costs for delivering a new library and fire station, and the value of the land conveyed to it, are “approximately \$20 million.” AR Ex. 4 at 11. Therefore, the District – not EastBanc – is obligated to provide the “gap funding to ensure that affordable units are delivered under the LDDA.” AR Ex. 4 at 11.

To maximize the profitability of its PUD, EastBanc is requesting waiver of its legal obligation to provide a specified number of “inclusionary units” for sale or rental to low or moderate income households. AR Ex. 4 at 10-11. EastBanc did not attempt to show, however, and the Commission did not find, that the absence of such relief would deny EastBanc economically viable use of its land.

STANDARD OF REVIEW

The decision of the Commission must be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it is unsupported by substantial evidence in the record.” *Cathedral Park Condo. Comm. v. District of Columbia Zoning Comm’n.*, 743 A.2d 1231, 1239 (D.C. 2000). That standard is satisfied where: 1) the Commission failed to make a finding on a material contested issue of fact; 2) one or more of the Commission’s findings are not supported by substantial evidence in the record; or 3) the Commission’s conclusions of law do not follow rationally from its findings. *See id.*

ARGUMENT

I. The Commission Erred By Failing to Consider the District’s Loss of \$30 Million in Public Property Conveyed to EastBanc at no Charge as an Adverse Effect of the Proposed PUD.

Before approving a proposed PUD, the Commission is required to make a finding that its public benefits and amenities outweigh its adverse effects. In this case, however, the Commission expressly refused to consider the value of the public property to be conveyed to EastBanc in connection with the proposed PUD, even though that transaction will result in a loss to the District of \$30 million. The Commission therefore failed to make a finding on a material contested issue of fact – whether the proffered benefits and amenities justify the District’s \$30

million loss – and its approval of the proposed PUD should be vacated on that basis alone.

A. The Commission Violated Its Mandatory Duty to Weigh the Proposed PUD’s Alleged Benefits and Amenities Against Its Adverse Financial Effects on the District.

The Commission is required to evaluate applications for PUDs according to a range of standards, including whether the alleged “‘public benefits and project amenities’ of the P.U.D. outweigh its potential adverse effects.” *Cathedral Park Condo. Comm.*, 743 A. 2d at 1237 (quoting 11 DCMR § 2403.8). Specifically, in deciding a PUD application:

the Commission shall judge balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case.

11 DCMR § 2403.8. This requirement is mandatory: the Commission “must” find that the proposed PUD satisfies the foregoing standard. *See Cathedral Park Condo. Comm.*, 743 A. 2d at 1237. If the Commission finds that a proposed PUD does not satisfy that standard, it must modify or reject the PUD application. *See* 11 DCMR § 2403.1.

In this case, the Commission directly violated its mandatory duty by declining to consider the “value of the Property” the District is to convey to EastBanc in connection with the proposed PUD. JA 33. According to the Commission, the value of the Property “is of no relevance” to its decision to approve the PUD. JA 33. That is incorrect. The District’s explicit purpose for conveying the Property to EastBanc is to “leverage and utilize the value associated with the Property” as a means of replacing the Library and Fire Station with new facilities. JA 195. By conveying the Property to EastBanc free of charge, therefore, the District is not only providing the developer with a significant development incentive, but also, it is incurring a substantial adverse effect to its finances, which must be weighed against the proposed PUD’s alleged

benefits and amenities. *See* 11 DCMR § 2403.8; *see also Watergate East Comm. v. District of Columbia Zoning Comm'n.* 953 A.2d 1036, 1046-47 (2008) (Commission properly “balance[s] the loss of existing amenities against the gains to be realized from the proposed new amenities or public benefits”) (citation omitted). As the District’s Chief Financial Officer concluded, “the proposed disposition of the property” – conveying it to EastBanc without charge – “would result in a reduction of real property assets of approximately \$30 million.” JA 225. The Commission’s refusal to consider that adverse effect was error. *See* 11 DCMR § 2403.8.

The Commission’s error arises from a confusion regarding the scope of its jurisdiction and statutory duty in reviewing PUD applications. The Commission disregarded the value of the Property on the ground that it lacked authority to “second guess” the District’s conclusion that “this was a good deal.” JA 34. But this Court has expressly rejected such muddled reasoning. *See Levy v. District of Columbia Zoning Comm'n.*, 570 A.2d 739, 750-51 (D.C. 1990). In *Levy*, the Board of Zoning Adjustment (“BZA”) “declined to comment” on the effects of certain proposals in a campus plan it was reviewing, on the ground that it lacked jurisdiction to approve or deny the proposals. *See id.* Vacating the BZA’s decision, this Court explained that the agency “mistook its lack of authority to approve the proposals for a lack of jurisdiction to assess the impact of the proposals.” Further, the Court emphasized, “not only did the BZA have the authority to assess the impact of these proposals, the regulations affirmatively *required* it to do so,” and therefore, the agency’s conclusion to the contrary was “both incorrect and contrary to the regulatory scheme.” *Id.* at 751 (emphasis in original).

The Commission made the same error in this case as the BZA made in *Levy*. Contrary to the Commission’s assumption, it is not being asked to “second guess” the wisdom of the

District's decision to convey the Property to EastBanc at no charge. JA 34. Rather, the Commission was asked to consider the adverse effects of that conveyance, which, like the BZA in *Levy*, the Commission was not only authorized but statutorily required to do. *See Levy*, 570 A.2d at 750-51; *see also* 11 DCMR § 2403.8. By refusing to consider the District's \$30 million loss in connection with the proposed PUD, therefore, the Commission violated its mandatory statutory duty.

B. This Matter Should Be Remanded Because the Commission Failed to Make a Finding as to Whether the Alleged Benefits and Amenities of the Proposed PUD Outweigh the District's \$30 Million Loss.

Notwithstanding its refusal to consider the value of the Property the District is to convey to EastBanc at no charge, the Commission purported to make a finding that the proposed PUD “will result in superior public benefits that offset the development incentives granted.” JA 34. In the Commission's view, it was charged with the narrow task of determining “whether what is being proffered warrants the development flexibility afforded.” JA 29. Thus, the Commission concluded, “such a balance has been struck here.” JA 29.

As a threshold matter, the Commission's conclusion, offered without analysis, is facially insufficient to satisfy its statutory duty under 11 DCMR § 2403.8. Because “the function of the court in reviewing agency action is to assure that the agency has given full and reasoned consideration to all material facts and issues,” the agency must provide “the basis of its order by an articulation with reasonable clarity of its reasons for the decision.” *Foggy Bottom Ass'n. v. District of Columbia Zoning Comm'n.*, 979 A.2d 1160, 1173 (D.C. 2009) (citation omitted). In short, the agency must demonstrate “a rational connection between the facts found and the choice made.” *Id.* The Commission made no such showing here. Although the Commission cited

certain parts of the record as the basis for its conclusion, JA 29, it made no attempt to show how or why those materials demonstrate that the proposed PUD's alleged benefits "offset" its adverse effects. JA 34. Remand is therefore proper, because this Court may not "fill the gap by making its own determinations from the record." *Levy*, 570 A.2d at 746 (citation omitted).

Even if the Commission had stated a rational connection between the facts in the record and its conclusion, remand would be necessary due to the agency's failure to consider the proposed PUD's adverse financial effects. As the Court held in *Levy*, the BZA's "failure to consider the effects" of the proposals in the plan it was reviewing "rendered its findings inadequate, and legally insufficient to support the ultimate conclusions which underlie approval of the plan." *Levy*, 570 A.2d at 752. Likewise, the Commission's failure to consider the \$30 million in real property the District stands to lose in this case renders the agency's findings insufficient to support its approval of the proposed PUD. *See id.* Simply put, the Commission cannot properly "reconcile the relative value" of the proposed PUD's benefits and amenities with its adverse effects if the Commission completely disregards the adverse effects. *See* 11 DCMR § 2403.8.

On remand, the Commission should be directed to address the material issue of contested fact it improperly disregarded in the proceedings below. Specifically, the Commission must determine whether the proposed PUD's alleged benefits and amenities are sufficient to outweigh the District's loss of \$30 million in real property assets. *See Cathedral Park Condo. Comm.*, 743 A. 2d at 1237. Further, if the Commission finds the benefits and amenities insufficient in this regard, it should be directed to modify or reject the PUD application. *See* 11 DCMR § 2403.1.

II. The Commission Erred By Waiving Inclusionary Zoning Requirements in Violation of Its Own Regulations and in Reliance on Findings That Are Not Supported By Substantial Evidence in the Record.

Despite the \$30 million Property the District is to convey EastBanc at no charge, EastBanc requested waiver of the requirement that it include a small number of “inclusionary units” in the proposed PUD, on the ground that the development otherwise would not “generate enough revenue” to support construction of a new library and fire station. JA 30. The Commission granted the waiver, reasoning that its failure to do so would result in “the loss of these important public benefits.” JA 30. In doing so, however, the Commission violated its own regulations governing inclusionary zoning, and relied on findings that are not supported by substantial evidence in the record. Therefore, the Commission’s approval of the proposed PUD should be vacated on that basis too.

A. The Commission Violated Its Own Regulations By Granting a Waiver From the Inclusionary Zoning Requirements.

The purpose of the Inclusionary Zoning (“IZ”) program is to increase the amount and expand the geographical distribution of adequate, affordable housing available in the District. *See* 11 DCMR § 2600.1. To achieve this purpose, the program seeks to “leverage private development, combined where appropriate with zoning density increases, to produce affordable housing” throughout the District. 11 DCMR § 2600.3. The program does so by requiring that developers of new multi-unit developments in certain zoning districts include a small number of IZ units affordable to low- and moderate-income households. *See* 11 DCMR § 2602.1.

Under the applicable regulations, EastBanc is required to include 14 IZ units in the proposed PUD. JA 29. The Board of Zoning Adjustment may grant a partial or full waiver from that requirement, but only “upon a showing that compliance ... would deny the applicant

economically viable use of its land.” 11 DCMR § 2606.1. Nevertheless, in this case, the Commission granted EastBanc a full waiver from the IZ requirements, without any showing that compliance would deny EastBanc economically viable use of the Property. JA 29-30, 34-35.

According to the Commission, the PUD process may be used to permit waivers from IZ requirements “if the number and quality of commendable public benefits proffered would clearly have to exceed those that would ordinarily suffice to gain PUD approval.” JA 29-30. The Commission thus appears to be attempting to announce a new standard in this case, which contradicts 11 DCMR § 2606.1, and eviscerates that provision’s requirement that waiver of IZ requirements be granted only upon a showing that an applicant would otherwise be denied the “economically viable use of its land.” 11 DCMR § 2606.1. Indeed, the Commission avers, this case “sets a benchmark in excellence for any future requests for IZ waivers through the PUD process.” JA 30. That is incorrect.

“It is axiomatic that an agency is bound by its own regulations.” *Blagden Alley Ass’n. v. District of Columbia Zoning Comm’n.*, 590 A.2d 139, 146 (D.C. 1991). Here, the Commission’s regulations clearly state that IZ requirements may be waived only upon a showing that the economic viability of an applicant’s land depends upon it. *See* 11 DCMR § 2606.1. Unless and until those regulations are amended or repealed, the Commission remains bound by them. *See Blagden Alley Ass’n.*, 590 A.2d at 146. The Commission is therefore in error insofar as it attempts to invoke the PUD process as a means to circumvent the mandatory provisions of 11 DCMR § 2606.1. As the Commission concedes, the regulations governing PUDs also require that a project be “acceptable” in the category of “housing and affordable housing.” JA 34-35 (citing 11 DCMR §§ 2403.9(f), 2403.10). The Commission’s conclusion that the proposed PUD is

acceptable, even though it provides no affordable housing, contradicts that requirement.

B. The Findings on Which the Commission’s Inclusionary Zoning Waiver Relies Are Unsupported By Substantial Evidence.

The Commission purports to make a formal finding that, absent a waiver of the IZ requirements, the proposed PUD “would not generate enough revenue” to support construction of a new library and fire station. JA 30. The Commission also cites materials in the record on which that finding purportedly relies. JA 30. But even if that finding were sufficient to support waiver of IZ requirements – and it is not, *see supra* Part II.A – the Commission once again makes no attempt to demonstrate that the cited materials support its finding. It merely asserts that they do. Remand is therefore warranted, because the Commission failed to demonstrate a rational connection between the facts and its decision to waive IZ requirements in this case. *See Foggy Bottom Ass’n.*, 979 A.2d at 1173; *Levy*, 570 A.2d at 746.

Remand is also warranted because the Commission’s findings demonstrate that waiver of IZ requirements is actually improper in this case. In addition to requesting the IZ waiver, EastBanc also requested “flexibility” to include anywhere from 153 to 189 total residential units in the proposed PUD. JA 15. The Commission granted the request. JA 37. But if the proposed PUD will “generate enough revenue” whether it includes as many as 189 or as few as 153 total units, JA 30, 37, then manifestly it should be able to do so if it includes between 153 and 175 total units, plus the required 14 IZ units. The Commission certainly does not cite any evidence to contrary.

On remand, therefore, the Commission should be required to explain why it granted EastBanc a full waiver from its obligation to provide only 14 IZ units, while also granting the developer flexibility to include anywhere from 153 to 189 total units – a differential of 36 units.

If the Commission is unable to a rational basis for the discrepancy, the IZ waiver should not be granted.

III. The Commission Erred By Concluding the Proposed PUD Is Consistent With the Comprehensive Plan.

The regulations governing PUDs explicitly state that “the PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations, nor to result in action that is inconsistent with the Comprehensive Plan.” 11 DCMR § 2400.4. This Court has therefore vacated Commission orders approving proposed PUDs that appear to contravene the Comprehensive Plan. *See, e.g., Bladgen Alley Ass’n.*, 590 A.2d at 147 (remanding for determination that proposed PUD is not inconsistent with Comprehensive Plan); *Cathedral Park Condo. Comm.*, 743 A. 2d at 1241-42 (same). Remand is especially proper in this case, because the proposed PUD directly violates a crucial provision of the Comprehensive Plan.

Under the heading “Long-Term Planning for Public Facilities,” the Comprehensive Plan states:

Since land in the District is limited and is a scarce resource, the city needs to make sure that existing land devoted to community facilities is well used and retained for the long-term. This means that *land resources should generally be preserved in District ownership if a facility is found to be obsolete, in order to ensure that the city can address current and future needs. Short-term or long-term land leases to private entities are preferred to selling such properties* so that the District of Columbia can retain an adequate supply of land for the long-term future.

CDCR 10-1103.4 (emphasis added). The proposed PUD cannot be reconciled with this provision. Not only does the proposed PUD contemplate the transfer of two separate parcels of public property housing two valuable public facilities – the Library and the Fire Station – but also, the District is neither leasing nor even selling the Property, but rather is giving it away to a private developer, free of charge, in order to “leverage” its value. JA 195. If the District

continues to leverage the value of its land in this manner, it will soon have none left. The proposed PUD thus undermines the Comprehensive Plan's purpose to "retain an adequate supply of land for the long-term future." CDCR 10-1103.4.

The Commission concluded that the transfer of the Property was justified in part because EastBanc will replace the existing "outmoded" Fire Station. JA 19. Yet again, however, the Commission failed to provide any basis for its finding that the Fire Station is in fact outmoded. In this instance, the Commission did not even cite to any materials in the record. By contrast, the Comprehensive Plan establishes detailed criteria the Commission must follow:

The adequacy of existing facilities should be evaluated in part on the ability to maintain a response time of four minutes at least 90 percent of the time for emergency fire calls and eight minutes at least 90 percent of the time for emergency medical calls. Where response times exceed acceptable limits, equipment and facilities should be relocated or provided to close these gaps.

CDCR 10-114.8. Despite this clear directive, the Commission made no findings regarding response times at the Fire Station. This matter should therefore be remanded, to provide the Commission an opportunity to remedy its error.

Finally, on remand, the Commission should be directed to make findings regarding the proposed PUD's consistency with other provisions of the Comprehensive Plan, including but not limited to those governing affordable housing and workforce housing. *See* CDCR 10-504.11; CDCR 10-504.12.

CONCLUSION

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

October 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2012, I served a copy of the foregoing Brief of Petitioner by first class mail, or a manner at least as expeditious, upon the following parties:

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