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October 31, 2023

VIA E-MAIL

Mr. Adam Bossi
Montgomery County Planning Department
2425 Reedie Drive, 14th Floor
Wheaton, Maryland 20902

RE: 4861 Battery Lane, Sketch Plan No. 320230070

Dear Mr. Bossi,

As you know, our firm represents Investors Battery Lane I, LLC (the “Applicant”) in connection with the above-referenced Sketch Plan, which is currently scheduled for a public hearing before the Montgomery County Planning Board (“Planning Board”) on November 16, 2023. The Sketch Plan proposes to redevelop the existing, aged garden apartments on the property located at 4861 Battery Lane in Bethesda (the “Property”), with a new multi-family building that will provide underground parking, residential amenities, and associated site improvements for residents and the public (the “Project”). Whereas the existing building contains 84 units and is built at a density well below the current zoning, the proposed building will provide up to 480,000 square feet of residential space with up to 453 dwelling units, including 15% (*i.e.*, 68) Moderately Priced Dwelling Units (“MPDUs”). In this way, the Project represents a significant advancement towards the County’s overall housing goals and, given that there currently are no designated MPDUs in the existing garden apartments, it specifically advances affordable housing objectives.

In response to Staff’s inquiry about existing rents, as our prior agency comment response submission indicated, those rents are above not only MPDU levels but also above the 80% AMI level. More specifically, as reflected in the attached page from the *Bethesda Downtown Plan* (the “Sector Plan”), rents for the 84 existing units are between 80% and 100% of AMI. By contrast, the redevelopment will provide 68 units that are locked in at MPDU rents.

We are in receipt of the October 30, 2023 agency recommendation letter from the Montgomery County Department of Housing and Community Affairs (“DHCA”) for the Project. The DHCA letter requests that the Applicant “explore other means to provide more affordable units when the plan returns for Site Plan approval” and, depending on the findings of such explorations, to “either

preserve the existing units by providing additional affordable units for households earning up to 80 percent of area median income or provide more than 15 percent MPDUs.” However, we believe that the proposed 68 MPDUs will adequately serve affordable housing objectives, and will do so better than the 84 existing units at the current market rental rates. Please note as follows:

1. *The Sector Plan provides for redevelopment of the property as proposed.* The Sector Plan rezoned the property to CR-1.5, C-0.5, R-1.5, H-120 “to promote enhanced redevelopment opportunities to foster a quality mix of housing options.” (Sector Plan, at Page 129). Redevelopment will provide 68 MPDUs, locked in at MPDU rents for 99 years while also adding important market rate housing consistent with the Sector Plan.
2. *There is no applicable legal requirement to provide more than 15% MPDUs.* The DHCA letter relies on an erroneous interpretation of the Montgomery County Zoning Ordinance (“Zoning Ordinance”) to suggest that the Zoning Ordinance calls for more than 15% MPDUs for development in the Bethesda Overlay Zone (“BOZ”). More specifically, the DHCA letter states that Section 59.4.9.2.C.3.d.i. of the Zoning Ordinance only allows public benefit points to be provided “for providing more than 15% of the residential units” as MPDUs.

This provision applies only to those situations where an optional method of development project in the BOZ specifically elects to request public benefit points for MPDUs from the Diversity of Uses and Activities public benefit category in Zoning Ordinance Section 4.7.2.D. That category – Diversity of Uses and Activities – generally allows the Planning Board to award public benefit points for providing more than 12.5% MPDUs (*i.e.*, the minimum amount required by Chapter 25A of the County Code (the “MPDU Ordinance”). Because other provisions of the Zoning Ordinance require projects in the BOZ to provide at least 15% MPDUs, Section 59.4.9.2.C.3.d.i. simply modifies the category’s general requirements for BOZ projects, to increase the minimum threshold for which points can be awarded to more than 15%. (See Zoning Ordinance Section 59.4.9.2.C.3.a.)

In other words, the referenced provision does not require development in the BOZ to provide more than 15% MPDUs. It only adjusts the minimum threshold at which MPDUs must be provided in the BOZ, in order to obtain public benefit points for MPDUs. This stands in contrast to certain other public benefits points that the BOZ requires to implement Sector Plan priorities, such as public benefit points for Energy Conservation and Generation if a project is located in the BOZ High Performance Area. (See Zoning Ordinance Section 59.4.9.2.C.4.c.)

We also note that there are no other provisions in the Zoning Ordinance or the MPDU Ordinance requiring the provision of more than 15% MPDUs, nor are there any provisions there requiring the preservation of existing housing represented to be “naturally occurring affordable housing” or “market-rate affordable housing.” Moreover, the MPDU Ordinance actually establishes an upper limit on the percentage of MPDUs that can be required in connection with implementing a master plan. Per Section 25A-5(f), the County Council may establish a higher base requirement for MPDUs as part of a master plan approval, but only up to 15% of the total number of dwelling units or residential floor area at a location.

Additional Sector Plan recommendations for affordable housing should not be interpreted in a manner that allows this maximum limitation in the MPDU Ordinance to be circumvented.

3. *The Project responds to the recommendations of the Sector Plan by providing 15% MPDUs.* The Sector Plan generally recommends that "most of the existing market-rate affordable housing in the [Battery Lane] District should be retained to ensure a variety of housing types and allow retention of lower-cost housing," and recommends that the retention of market-rate affordable housing in existing or replacement units is the highest priority for public benefit points. Those are recommendations, however, not requirements. For the subject Property, the Sector Plan expressly recommends rezoning to CR-1.5, C-0.5, R-1.5, with a height of 120 feet, "to promote enhanced redevelopment opportunities to foster a quality mix of housing options." (Sector Plan, at Page 129).

Furthermore, even though the Sector Plan supports the preservation of market-rate affordable housing for public benefit points, the Zoning Ordinance allows applicants to select their public benefit points from the Zoning Ordinance's defined categories so long as they achieve the number of points required (for the Project, 100 points). While there are limited exceptions for certain point categories that the Zoning Ordinance mandates for some BOZ projects (*e.g.*, for Energy Conservation and Generation in the High Performance Area, as noted above), the provision of additional MPDUs is not a required category. Had the County wanted to preclude redevelopment of the Property with market rate housing and 15% MPDUs, it would not have rezoned the property and provided the designated height option, and had it wanted to require other affordable housing there instead of market rate with 15% MPDUs, it could have done so.

There are no fixed rate affordable units on the property today. In contrast, the Project will facilitate the provision of 68 MPDUs on the Property for the first time, replacing existing, aged market-rate units with new units that will be constructed to modern standards and required to satisfy MPDU levels for 99 years. By redeveloping the Property with significantly more units than exist today and ensuring that 15% of them – *i.e.*, 68 units – will be set aside as MPDUs to replace the Project's existing 84 units, the Project, as proposed, will dramatically advance the Sector Plan's recommendations.

4. *The Planning Board has previously found that the provision of 15% MPDUs in the Battery Lane District substantially conforms with the Sector Plan.* As noted above, the proposed redevelopment of this property, with 15% MPDUs, is entirely compliant with the requirements of the MPDU Ordinance and the Zoning Ordinance, and meets the recommendations of the Sector Plan. Moreover, the Plan as submitted, is entirely consistent with the Planning Board's approval just last year of 4901 Battery Lane (Sketch Plan No. 320220040, Preliminary Plan 120220100 and Site Plan 820220160). In that case, the Planning Board found that the 4901 Battery Lane project's provision of 15% MPDUs satisfied applicable MPDU Ordinance requirements; the applicable use standards, development standards, and general requirements of the Zoning Ordinance; and otherwise substantially conformed with the Sector Plan's recommendations.

We would note that the Planning Department has worked extensively with the Applicant and its consultants over the past several months to refine the proposed Sketch Plan, so as to ensure that – by the time of Site Plan – the future development will be well positioned to address applicable Zoning Ordinance and County Code requirements, applicable recommendations of the Sector Plan and its associated Design Guidelines, and other applicable County plans and policies. We believe that these efforts have improved the Sketch Plan over its prior iterations, and represent a reasonable balancing of many sometimes competing objectives. However, requiring additional MPDUs in the Project threatens this balance and, potentially, will complicate its viability. For these reasons, we must respectfully object.

We appreciate your consideration of the Applicant's position, and we are prepared to discuss further should you have further questions.

Respectfully submitted,
Lerch, Early & Brewer, Chtd.



Robert R. Harris, Esq.

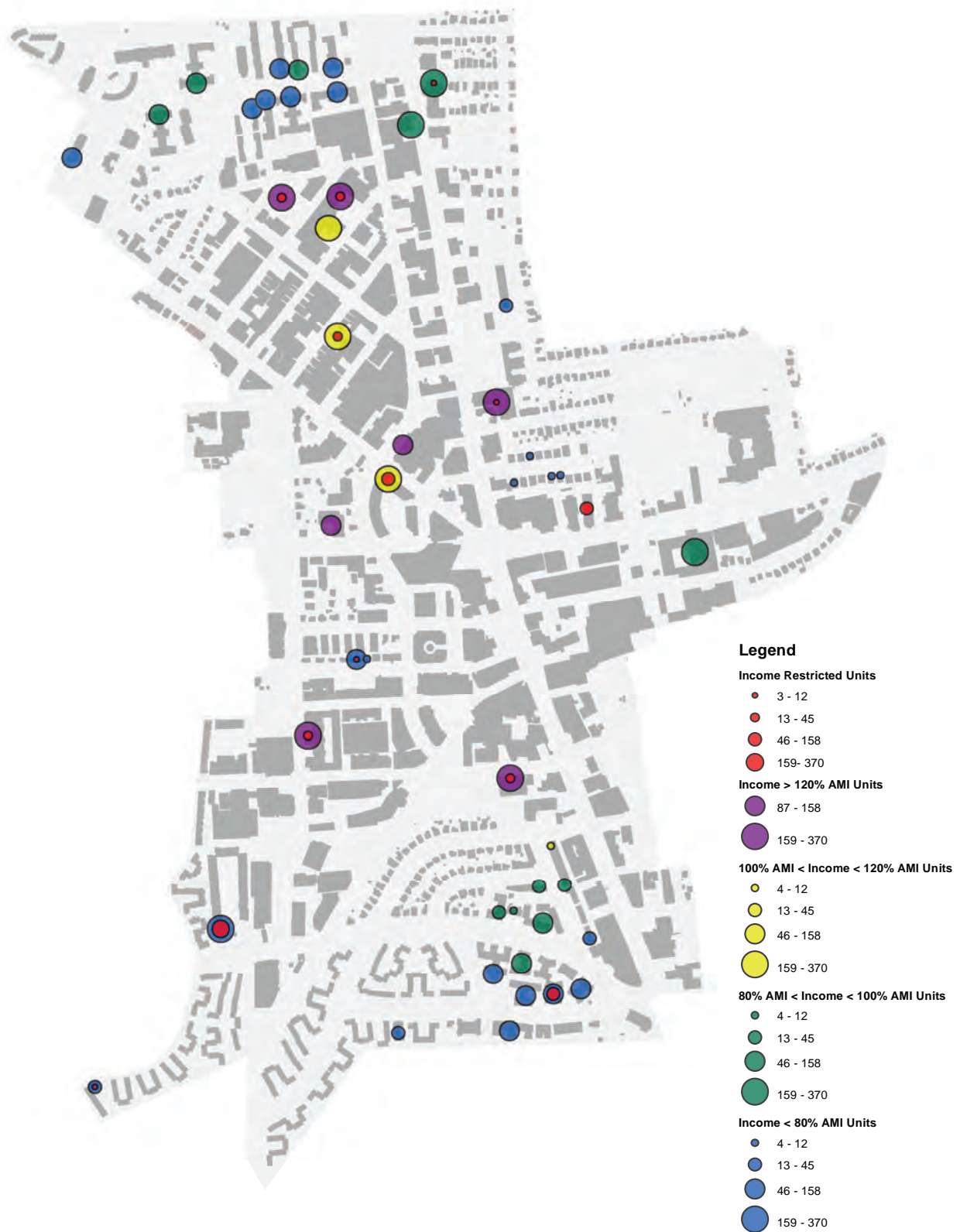


Christopher M. Ruhlen, Esq.

w/ Enclosures

cc: Ms. Stephanie Dickel
Mr. Michael Miller
Mr. Andrew Kossow

Figure 2.07: 2014 Affordable Market-Rate and Rent-Restricted Rental Units



Source: 2014 DHCA Rental Housing Survey