

Government of the District of Columbia

ZONING COMMISSION



ZONING COMMISSION ORDER NO. 601-A
Case No. 88-24M/77-16F
(PUD Modification - Rafferty)
May 13, 1991

PRELIMINARY ORDER ON REMAND

A. Procedural Background

1. Pursuant to notice, a public hearing of the Zoning Commission for the District of Columbia was held on November 3 and 17, 1988, to consider the application of Angene G. Rafferty and Joseph P. Rafferty for modification to the architectural plans of a previously approved Planned Unit Development (PUD), pursuant to Chapter 24 of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. The public hearing was conducted in accordance with the provisions of Section 3022 of that title. By Zoning Commission Order No. 601, which became final on February 10, 1989, the Commission denied the application. Applicant thereafter filed a timely petition for review by the District of Columbia Court of Appeals.
2. This application is before the Commission pursuant to the decision of the District of Columbia Court of Appeals, which remanded the case to the Commission for further proceedings consistent with the opinion of the court dated December 3, 1990.
3. The Court directed the Zoning Commission to express its views, through the entry of findings of fact and conclusions of law, on several issues.
4. The issues that the Court directed the Commission to address are the following:
 - a. Have the actions of the District estopped affected residents from enforcing their rights under the zoning laws?
 - b. Would it be more appropriate for the estoppel claim of the Raffertys to be presented in an appeal from the revocation of the building permit?

- c. Have the Raffertys preserved the issue of laches for consideration by the Commission?
 - d. Are the objections of the opponents barred by the doctrine of laches?
 - e. What did the Raffertys know about the PUD restrictions?
 - f. When did they know it?
 - g. What should the Raffertys have known about the PUD restrictions?
 - h. When should the Raffertys have known what they should have known?
 - i. Did ANC 3D violate notice requirements or conduct its meeting unfairly?
 - j. Is the decision of the Zoning Commission inconsistent with the Comprehensive Plan?
5. By letter dated January 29, 1991, the Commission requested the applicants and other parties to submit in writing their positions about the procedure by which the Commission should resolve the issues.
6. By various letters, the applicants and the parties in opposition have submitted their positions. By memorandum dated May 10, 1991, the Executive Director of the Zoning Secretariat submitted a recommendation to the Commission. At the meeting of the Commission on May 13, 1991, the Executive Director further discussed the recommendation. He also recommended that the Commission add a conclusion that the District of Columbia Court of Appeals had disposed of the issue raised by applicants about the alleged failure to mail notice to ANC 3E. The Commission has considered the submissions of parties and the recommendation of the Executive Director, and sets forth its findings of fact and conclusions of law in Part B of this Order.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Have the actions of the District estopped affected residents from enforcing their rights under the zoning laws?

v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122 (1990), all parties should recognize that it would very likely be unproductive to view the laches defense as being substantially viable. In Beins, the Court of Appeals held that laches was not shown by filing an appeal one month after appellants had actual knowledge of rescission of a stop-work order. The Commission urges the parties to concentrate their attention on estoppel issues.

4. a. What did the Raffertys know about the restrictions?
- b. When did they know it?
- c. What should the Raffertys have known about the PUD restrictions?
- d. When should the Raffertys have known what they should have known?

The Raffertys were specifically aware of the PUD covenant, and that the plans approved by the Zoning Commission and Board of Zoning Adjustment continued in full force and effect. (11/17/90 Tr., P. 28; Ex. 21). Recognizing that this actual knowledge is a substantial component of the knowledge that was available to be known about the PUD restrictions, the Commission nonetheless concludes that a further hearing on these and other estoppel issues is necessary.

Although the estoppel issues were before the Commission at the time of the hearing in 1988, they were not then the primary focus of concern that they have now become. Further, only two members of the current Commission heard the case.

5. Did ANC 3D violate notice requirements or conduct its meeting unfairly?

No further submission is necessary on this issue. Even if the Zoning Commission were to conclude that ANC 3D arrived at its statement of issues and concerns by a process that was flawed, the issues and concerns were themselves entirely reasonable ones, and this Commission was reasonably charged with the obligation to address them explicitly in its consideration of the application. That is, the degree of substantive merit that was embodied in these issues and concerns is not reasonably

discounted because of procedural problems, nor are the merits illuminated by a collateral inquiry into the process of the ANC. To state the matter somewhat differently, even if the process of the ANC were tainted, the issues and concerns are not thereby contaminated. Their relevance and persuasive force must stand or fall on their own.

Accordingly, the Zoning Commission concludes that the exercise by it of a supervisory role over the process of ANC 3D would divert the Zoning Commission from examination of the issues that are dispositive of this application, with no commensurate public benefit. The Commission expects that ANC 3D, as a public agency, recognizes the need to conduct its business fairly, and will exercise the responsibility to monitor its own conduct.

6. Is the decision of the Zoning Commission inconsistent with the Comprehensive Plan?

The Commission concludes that no further briefing, hearing, or other evidentiary submission is needed on this question. The applicable objectives and policies of the Comprehensive Plan are as follows:

- 303. 1 The objectives for elderly housing are to provide for the housing needs of elderly households and to reduce the overall cost of housing among elderly households.
- 303.2 The policies established in support of the elderly housing objectives are as follows:
 - (1) Establish as a matter of major governmental priority the production of housing for elderly households;
 - (2) Expedite public programs to stimulate housing production and housing rehabilitation in urban renewal areas and other publicly owned sites, act to complete the development of urban renewal properties designated for elderly housing, and review and simplify requirements affecting this development;

- (3) Provide zoning incentives to developers prepared to build elderly housing such as permitting additional densities in exchange for incorporating elderly housing in development projects, and give zoning preferences to mixed-use sites which include housing near appropriate Metrorail stations; and
- (4) Continue to rehabilitate and improve the District's publicly owned elderly housing units.

10 DCMR, "Planning and Development," 303.1 and 303.2 (1984). The zoning incentives that are set forth in 10 DCMR 303.2(3) have a focus that is distinctly different from the pending PUD modification, which applies only to a single one-family home. The action of the Commission, whether to approve or disapprove the pending modification, will neither support nor hinder the pursuit of the incentives.

7. The Commission will not consider further the issue of notice to ANC 3E. The District of Columbia Court of Appeals declined to address the issue about alleged failure of the Commission to give proper notice to ANC 3E. The remand by the Court does not require or urge the Commission to consider the issue. The Commission concludes that it would not be reasonable, nor necessary to prevent injustice, to enlarge the issues on remand to add this issue.

C. DECISION

1. The Commission will hold a further hearing on the issues of laches and estoppel. The hearing date will be identified after all preliminary procedural issues have been resolved
2. The applicants have stated an intention to call and subpoena witnesses to establish certain matters. The Zoning Secretariat shall refer the subpoena issue to the Office of the Corporation Counsel for advice. The Zoning Secretariat shall also request the applicants and other parties to submit the names and addresses of witnesses they propose to have testify, and to identify the ones that are willing to appear voluntarily, and the ones that are not.

Any party that seeks to compel the attendance of witnesses shall file a request that sets forth the following:

- (1) Name of the witness;
- (2) Home and business address of the witness;
- (3) Subject matter and issue to be addressed;
- (4) Why testimony is needed to establish the matter sought to be proven; and
- (5) Why it is necessary to compel testimony.

The party shall also submit a legal brief on the authority of the Commission to compel testimony, and the process that the Commission should follow to do so.

3. The Commission urges all parties to bear in mind the following observation of the District of Columbia Court of Appeals in Speyer v Barry, __A.2d__, (1991), Slip opinion, March 29, 1991, at p. 13, n. 13:

[13] The District has denounced various arguments made by the Georgetown residents as "ludicrous" or "preposterous" and, on several occasions, as "absurd." The residents have responded with epithets like "nonsensical" and "stunning," the latter term evidently not being employed in its complimentary sense. Argument by strident adjective is not helpful to the court even when it is contained in an otherwise excellent submission.

A number of the submissions in this application have also employed strident adjectives as tools of persuasion. They are no more helpful to the Commission than to the court.

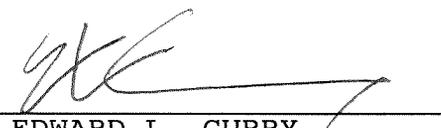
4. This order shall constitute the Commission's order to hear Case No. 88-24M/77-16F, consistent with the foregoing.

This order was revised and adopted by the Zoning Commission at its public meeting on May 13, 1991, by a vote of 4-0 (Maybelle Taylor Bennett, Tersh Boasberg, John G. Parsons,

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at its public meeting on May 13, 1991, by a vote of 4-0
(Maybelle Taylor Bennett, Tersh Boasberg, John G. Parsons,
and William Ensign to adopt; Lloyd D. Smith, not present, not
voting).


MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission


EDWARD L. CURRY
Executive Director
Zoning Secretariat

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