

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 17-17
Z.C. Case No. 17-17
(Advisory Neighborhood Commission 8A
Zoning Map Amendment @ Square 5564, Lot 812 from PDR-1 to RA-2)
May 14, 2018

The Zoning Commission for the District of Columbia (Zoning Commission), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.01 (2012 Repl.)), hereby gives notice of its adoption of an amendment to the Zoning Map to rezone Square 5564, Lot 812 from the PDR-1 zone to the RA-2 zone consistent with the Future Land Use Map (FLUM) of the Comprehensive Plan, which identifies the subject property for moderate density residential use.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on March 30, 2018, at 65 DCR 003420.

In response, the Commission received a comment in opposition from PAL DC Storage, LLC, the owner of the property that is the subject of the petition (Owner). The Owner essentially reiterates the same arguments made in its Statement in Opposition to Map Amendment, Exhibit 33, all of which were previously rejected by the Commission for the reasons stated below.

The Owner first states that it opposes to the Map Amendment, because it “downzones a single piece of property.” The Owner identifies no basis for its belief that the Commission can only rezone multiple properties. Instead, the rule is that the Commission can rezone a single property if it does not constitute spot zoning, which the proposed rezoning decidedly would not. (*See Daro Realty, Inc. v. D.C. Zoning Comm'n*, 581 A.2d 295, 299 (D.C. 1990).)

The Owner claims that the Map Amendment requires a fact-specific inquiry regarding consistency with the Comprehensive Plan and therefore the proceeding should have been handled as a contested case. The District of Columbia Court of Appeals has recognized that the question of whether a proceeding is a contested case or rulemaking depends respectively upon whether the facts to be adduced are adjudicative or legislative. To understand that distinction the Court of Appeals quoted the following formulation by Professor Davis:

Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are

roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion. (1 K. Davis, *Administrative Law* s 7.02 at 413 (1958))

(*Chevy Chase Citizens Ass'n v. D.C. Council*, 327 A.2d 310, 314 (D.C. 1974).)

Notwithstanding the best efforts of the Owner to make it otherwise, the analysis and resolution of the Comprehensive Plan policies related to this petition do not involve “who did what, where, when, how, why, with what motive or intent,” but only the determination of “general facts.” Such as where the property is located; how is it zoned; what is its FLUM designation; is its zoning consistent with that designation and if not what zone district(s) would be; what uses are currently permitted under its existing and proposed zones; are there countervailing Comprehensive Plan policies and if so, can the policies be reconciled with the FLUM, and if not which set of policies should be given greater weight and why? (*Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d. 1016, 1027 (2016).)

Ironically, the Owner, whose counsel repeatedly tried to interject project-specific information into the record, now complains that others did so as well, thereby turning the proceeding into a contested case. The Owner fails to mention that the Chair at the beginning of the hearing noted that the record included such irrelevant information and reminded the audience that:

We're here to talk about a policy question. We're here to talk about a rezoning, changing the zoning, not about any project, who wants to do what, who didn't do what. We're not here for that. ... if you want to waste your three minutes, that's [permitted under] our regulation. Now if you want to do that, you can do that but let's talk about the map amendment. Let's stay on it. In other words, let's stay on course.

(Transcript March 19, 2018 Hearing at 9.)

Even if some witnesses chose not to “stay on course,” the Commission did, and disregarded all project-specific information when deciding this matter. The hearing was properly conducted as a rulemaking.

The Owner also points to the Petitioner’s purported intent of stopping its proposed project as a basis for denying the petition. Map amendments are often sought in response to a potential development, either to allow or stop it, but neither intent is relevant to its merits.¹ The only intent of which the Commission is concerned, is the intent of the Comprehensive Plan.

Finally, the Commission disagrees with the Owner that the map amendment is inconsistent with the District’s Comprehensive Plan, but finds exactly the opposite. Every Future Land Use Map

¹ The decision of the Commission to hear a map amendment does not affect the processing of building permits applications filed before that decision was made. Unless and until a notice of final rulemaking is published giving effect to the map amendment, any such application is processed under the existing zone designation of the property. (11-A DCMR § 305.1(a).)

has shown this property as designated for moderate-density residential use, a use that is prohibited in a PDR zone. The FLUM “visually depicts the policies reflected in the Land Use Element.” (10–A DCMR § 225.1 (2016), *Durant v. D.C. Zoning Comm’n*, 139 A.3d 880, 882 (D.C. 2016).) Thus, to the extent that other policies in the Land Use Element suggest that this property should retain its PDR zoning, the longstanding FLUM vision for this specific property overrides such general considerations.

The Owner cites Policy LU-3.1.4: Rezoning of Industrial Areas, which would “allow the rezoning of industrial land for non-industrial purposes only when the land can no longer viably support industrial or PDR activities or *is located such that industry cannot co-exist adequately with adjacent existing uses.*” (10-A DCMR § 314.10 (Emphasis Added.)) First, no Comprehensive Plan policy can be interpreted as imposing even a conditional ban on the Commission’s ability to rezone a property, for that would be an impermissible intrusion by the Council into zoning. Second, this policy would only be applicable to properties with a mixed-use designation where a mix of commercial and PDR uses is encouraged, but not to a property such as this, that the FLUM designates exclusively for residential uses. In considering whether to retain PDR zoning on this or any other site, the Commission must consider all possible PDR uses, including industrial. It requires no adjudicative facts for the Commission to conclude that, any industrial use of the property “cannot co-exist adequately” with the residentially zoned and developed properties that surround it on three sides.

Having again found the Owner’s arguments unpersuasive, and finding instead that the proposed amendment is needed for the Zoning Map to be not inconsistent with the Comprehensive Plan, the Commission took final action at a public meeting on May 14, 2018 to amend the Zoning Map as proposed.

The amendments shall become effective upon publication of this notice in the *D.C. Register*.

The Zoning Map of the District of Columbia is amended as follows:

SQUARE	LOT	Map Amendment
5564	812	PDR-1 to RA-2

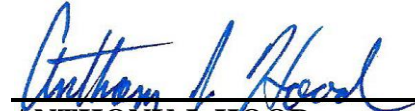
On March 19, 2018, upon the motion of Vice Chairman Miller, as seconded by Commissioner Turnbull, the Zoning Commission took **PROPOSED ACTION** to **APPROVE** the application at the conclusion of its public hearing by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Michael G. Turnbull, and Peter G. May to approve).

On May 14, 2018, upon the motion of Vice Chairman Miller, as seconded by Commissioner May, the Zoning Commission took **FINAL ACTION** to **APPROVE** this application at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Michael G. Turnbull, and Peter G. May to approve; Peter A. Shapiro, not present, not voting).


In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is on June 15, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION

 for

SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

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The full text of this Zoning Commission Order is published in the “Final Rulemaking” section of this edition of the *D.C. Register*.