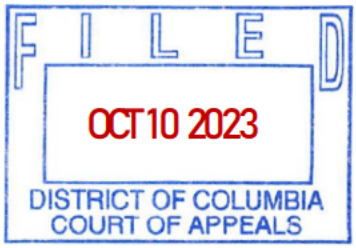
DISTRICT OF COLUMBIA COURT OF APPEALS



No. 20-AA-0451

CITIZENS FOR RESPONSIBLE DEVELOPMENT, *et al.*, PETITIONERS

V.

DISTRICT OF COLUMBIA ZONING COMMISSION, RESPONDENT,

AND

VALOR DEVELOPMENT, LLC, INTERVENOR.

Petition for Review of an Order
of the District of Columbia Zoning Commission
(2010-ZC-000019)

(Argued January 13, 2022 Decided October 10, 2023)

Before BECKWITH and EASTERLY, *Associate Judges*, and THOMPSON,* *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: The D.C. Zoning Commission approved intervenor Valor Development's application for a Planned Unit Development (PUD) in Northwest D.C. Petitioners—three neighborhood groups and an abutting property owner—challenge the Commission's order, arguing primarily that the proposed PUD would be inconsistent with the District's Comprehensive Plan. We affirm.

* Judge Thompson was an Associate Judge at the time of submission. Her status changed to Senior Judge on February 18, 2022.

I.

"The PUD process is a flexible zoning scheme that allows for the development of large areas as a single unit." *Barry Farm Tenants & Allies Ass'n v. D.C. Zoning Comm'n*, 182 A.3d 1214, 1219 (D.C. 2018) (cleaned up). Through this process, the Commission may grant exceptions to otherwise applicable zoning regulations, such as building-height and density regulations. 11-X D.C.M.R. § 300.1. In analyzing a PUD application, the Commission must weigh "the public benefits and project amenities offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case." *Id*. § 304.3. The Commission must also determine whether the PUD is consistent with the Comprehensive Plan, which is the District's "broad framework intended to guide the future land use planning decisions." *Cummins v. D.C. Zoning Comm'n*, 229 A.3d 768, 771 (D.C. 2020).

Valor submitted its PUD application to the Commission in 2019. The proposed PUD is located in the American University (AU) Park/Spring Valley neighborhood of Northwest D.C., with Yuma Street to the north, Massachusetts Avenue to the south, and 48th Street to the east. It is in the Mixed-Use (MU) 4 zone, which permits both residential and retail use as a matter of right and is intended to provide for "moderate-density, mixed-use development," including housing as well as shopping and business centers.

The PUD includes two record lots, each of which consists of two Assessment and Taxation (A&T) lots. Record Lot 9 contains A&T Lot 807, or the "Valor Lot," as well as A&T Lot 806, the AU Building Lot. The proposed development on the Valor Lot called for demolition of existing buildings on the lot and construction of a mixed-use building that would include a grocery store, five three-story townhouses, and 219 residential units—30 of which would be affordable housing units. The entirely commercial AU Building Lot, which housed the former AU law school building, would remain unchanged in the project. Record Lot 1, the Massachusetts Avenue Parking Shops (MAPS) site, would also remain unchanged. The MAPS site, consisting of A&T Lots 802 and 803, had been designated a D.C. historic landmark and was on the National Register of Historic Places.

It is undisputed that developing this land as a PUD would give Valor, the developer, two primary benefits that it would not have if it was limited to matter-of-right development. First, it would provide more square footage for the Valor Lot. The proposed project would transfer 50,115 square feet of unused density from the

MAPS site to the Valor Lot. Because of this density transfer—a feature of the PUD density aggregation provisions, 11-X D.C.M.R. § 303.2—more "gross floor area" would be available for development of the Valor Lot. That is, the density transfer permits a building that is about 50,000 square feet larger than it would otherwise be. Second, developing as a PUD would provide for more nonresidential use. Because the Valor Lot shares a record lot with the (entirely commercial) AU Building Lot, Valor would be limited under the matter-of-right zoning provisions to significantly less retail space—about 2,606 square feet as opposed to the 18,000 square feet under the PUD.

The Office of Planning (OP) reviewed Valor's PUD application and recommended that the Commission approve the project. OP noted that the PUD advanced several Comprehensive Plan goals with respect to land use, transportation, housing, environmental protection, urban designs, and historic preservation. It also circulated the proposed project to and invited comment from multiple D.C. agencies, none of which objected to the project.[1] The surrounding Advisory Neighborhood Commissions likewise voted in support of the PUD, noting that the grocery store would be a particularly valuable public benefit. The Commission held public hearings in October 2019 and unanimously voted to approve the PUD.

II.

"[W]e generally defer to the Commission's interpretation of the zoning regulations" due to its "statutory role and subject-matter expertise." *Durant v. D.C. Zoning Comm'n*, 65 A.3d 1161, 1166-67 (D.C. 2013). Review is limited to determining "whether findings supporting the decision are arbitrary, capricious or an abuse of discretion, and not supported by the evidence." *Wis.-Newark Neighborhood Coal. v. D.C. Zoning Comm'n*, 33 A.3d 382, 388 (D.C. 2011) (cleaned up). "[W]e must affirm the Commission's decision so long as (1) it has made findings of fact on each material contested issue; (2) there is substantial evidence in the record to support each finding; and (3) its conclusions of law follow rationally from those findings." *Durant*, 65 A.3d at 1167.

[1] The District's Department of Transportation also conducted its own assessment of the PUD and submitted a report to the Commission noting that it did not object to the project.

A.

Petitioners raise two challenges to the Zoning Commission's order. First, they argue that the PUD improperly included the MAPS site solely to increase density on the Valor Lot. They contend that the PUD process was used to "circumvent the intent and purposes of the Zoning Regulations," contrary to 11-X D.C.M.R. § 300.2, because the PUD density aggregation provisions allowed Valor to transfer development rights from the MAPS site to the Valor Lot and develop the latter more densely than would have been possible as a matter of right.

This argument rests on the premise that because the PUD process is about coordinated development of multiple properties, it is improper to include property on which no coordinated development will occur. The Commission acknowledged petitioners' argument but concluded that "the [p]roject properly aggregated the proposed [floor area ratio] across the PUD site." The Commission noted that pursuant to 11-X D.C.M.R. § 303.2, density is not evaluated lot by lot but for the PUD as a whole. It also pointed out that this court has upheld this kind of density aggregation when higher-density development occurs on one portion of the property. *E.g.*, *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1034 (D.C. 2016); *Friends of McMillan Park v. D.C. Zoning Comm'n*, 211 A.3d 139, 150 (D.C. 2019) (noting that PUDs may have development that is "densely clustered" in part of the PUD). Relying on the site's aggregated density, the Commission concluded that the project "complie[d] with the Zoning Regulations' density limits for the MU-4 zone while remaining under the maximum the matter-of-right height limits."

Petitioners acknowledge that this court has on more than one occasion upheld the Commission's approval of PUDs with a transfer of development rights from one lot that will not be developed to another lot that will. In the 1970s, for example, the Commission approved a PUD that included the site of the Heurich Mansion historic landmark. Under that PUD, no development would occur on the Heurich Mansion lot, and unused density was transferred from that lot to allow the construction of a 12-story office building on another lot in the PUD. *Dupont Circle Citizens Ass'n v. D.C. Zoning Comm'n*, 355 A.2d 550, 552-52 (D.C. 1976). This court rejected a neighborhood group's challenge to this use of the PUD density aggregation provisions. *Id.* at 557; *see also Wheatley v. D.C. Zoning Comm'n*, 229 A.3d 754, 760 (D.C. 2020) (affirming the approval of a PUD that would include development on the northern end and "historic preservation and dedication of open space" on the southern end).

Petitioners seek to distinguish these cases on the ground that there was a "legally cognizable benefit" conferred on the landmark that, in their view, is not present here. But the Commission found such a benefit here, too. Historic preservation is one category of benefit to be considered in determining whether a PUD offers "a commendable number or quality of meaningful public benefits." 11-X D.C.M.R. § 300.1(b). The Commission found that the PUD "will result in a public benefit by helping to protect the historic MAPS by permanently reducing the amount of future development that could take place on the MAPS Site." Even accepting petitioners' argument that each undeveloped lot in a PUD needs to benefit from inclusion in the PUD, the Commission determined that this requirement was met here and we see no basis to set that conclusion aside.

Ultimately, the Commission reasonably concluded, based on substantial evidence in the record, that developing the land as a PUD would be superior to what could be developed as a matter of right with respect to housing, sustainability, urban design, and historic preservation. In the circumstances here, we will not second-guess this conclusion. *See Union Mkt. Neighbors v. D.C. Zoning Comm'n*, 197 A.3d 1063, 1067 (D.C. 2018) (noting that the court plays a "limited role" in reviewing the Commission's orders and that "[i]t is decidedly not this court's role to 'reassess the merits of the decision'" (quoting *Wash. Canoe Club v. D.C. Zoning Comm'n*, 889 A.2d 995, 998 (D.C. 2005))).

B.

Finally, petitioners argue that we should reverse the order approving the PUD because the Commission's improper calculation of the building height ran afoul of the zoning regulations. Subtitle B of the D.C. Zoning Regulations permits a property owner of a building that fronts more than one street to choose which street is to be considered the front of the building from which the "building height measuring point" is calculated, 11-B D.C.M.R. § 307.5, unless the selected street frontage was subject to an artificial embankment, *id*. § 307.7. Valor selected the 48th Street frontage as the front of the building for this purpose, but petitioners claim that 48th Street is subject to an artificial embankment and thus, per 11-B D.C.M.R. § 307.7(c), the building must be measured from Yuma Street.

The Zoning Regulations prohibit measuring a proposed building's height from the street frontage if the "curb grade has been artificially changed by a bridge, viaduct, embankment, ramp, abutment, excavation, tunnel, or other type of artificial elevation or depression." 11-B D.C.M.R. § 307.7. In this case, to determine whether

there was an artificial embankment, the Commission focused on whether the curb grade had changed since the street's construction. To the extent petitioners contend that the Commission did not consider whether the grade was changed to construct the street, this argument fails. We are not persuaded that the Commission's interpretation of § 307.7 to require an artificial change to an preexisting curb grade—that is, that the curb itself must already exist before it can be subject to an artificial embankment—was erroneous. *See 1330 Conn. Ave., Inc. v. D.C. Zoning Comm'n*, 669 A.2d 708, 714 (D.C. 1995) ("This court defers to the interpretation by the agency of its own regulations 'unless plainly erroneous or inconsistent with the regulations.'" (quoting *Smith v. D.C. Bd. of Zoning Adjustment*, 342 A.2d 356, 360 (D.C. 1975))).

To the extent petitioners argue that the Commission erred in finding that the grade had not changed since the street's construction, the record contains ample evidence to support the Commission's conclusion. Valor presented the testimony of Brad Glatfelter, who examined historic topographical maps of 48th Street dating back to 1900 and concluded that 48th Street's curb grade had not been changed "since the street's construction." Valor also presented additional maps going back 75 years confirming that the street's elevation had not changed within that period. While Petitioners acknowledge that Valor demonstrated the elevation had not changed in the past 75 years, they contend that the older topographical maps are at too high a scale to determine whether the grade changed. But Petitioners point to no evidence suggesting that the grade had, in fact, ever changed or that the graphs were so inaccurate that the Commission should not have relied on them.[2]

Valor presented substantial evidence that supports the Commission's determination that 48th Street was not subject to an artificial embankment. Thus, the Commission reasonably concluded that the proposed building's height could be properly measured from 48th Street.

III.

For the foregoing reasons, the order of the Zoning Commission is affirmed.

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[2] Petitioners highlight inconsistencies in Valor's witnesses' measurements to suggest the maps are unreliable, but even the largest discrepancy (three feet) would not place the building out of matter-of-right limits for 48th Street.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies emailed to:

Presiding Administrative Law Judge

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