Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL
DISTRICT BUILDING
WASHINGTON, D. C. 20004

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ZONING COMMISSION
District of Columbia
CASE NO.03-26
EXHIBIT NO.20C

D.C.-44
May 1967

Memorandum • Government of the District of Columbia

Department.

TO: Steven E. Sher
Executive Director
Zoning Secretariat

Agency, Office: OCC:KKMcK

FROM: Judith W. Rogers
Corporation Counsel

Date: AUG 6 1979

SUBJECT: Zoning Commission Case No. 78-21

This is in response to your memorandum of June 28, 1979 in which you requested a legal opinion for the Zoning Commission on certain questions pertaining to the applicability of D.C. Law 2-144, the Historic Landmark and Historic District Protection Act of 1978, to the above referenced case. As indicated in your memorandum this case is an application for approval of a one-step planned unit development, under subsection 7501.6 of the former PUD regulations for a 118 foot high density office/retail building in the C-3-B District. The specific questions are: 1) whether the zoning review of a planned unit development should precede the historic preservation review of the project; and 2) which action should take priority if two different designs or sets of plans were approved by the Zoning Commission and the Mayor's Agent under D.C. Law 2-144.

Under Article 75 of the Zoning Regulations, the Zoning Commission is authorized to grant increases in building height, and F.A.R. and variations on yard and court requirement in individual cases. In approving a proposed PUD application the Zoning Commission approves a designated plan and may include guidelines, standards or conditions and limitations on the proposed development. These conditions and limitations relate to the use, size, type and location of buildings and structures. Under a PUD, therefore, the Zoning Commission sets the maximum zoning requirements in terms of height and F.A.R. for the specific site included in the application.

In reviewing new construction under D.C. Law 2-144, the Mayor or his designated agent makes a finding on the design of a proposed building "after due consideration of the Zoning laws and regulations (Section 8(f)). It seems clear, therefore, that the law anticipates that the zoning for a particular site be set prior to review by the Mayor's Agent. Moreover the "Rules of Procedure Pursuant to D.C. La

2-144", (26 D.C.R. 263 July 20, 1979), in subsections 2.2 and 2.3, which set forth the submission requirements for an "Application" and an "Application for Preliminary Review", require approval of the plans for new construction by the Zoning Administrator.

However, although the Mayor's Agent for D.C. Law 2-144 must take the Zoning Regulations for a particular site into consideration, he is not bound to approve a proposed building which fills the maximum zoning envelope. Pursuant to §8(f) of the act, the Mayor's Agent must make a finding concerning the compatibility of the design of a proposed building and the character of the historic district in which or the character of the historic landmark on the site of which the building is to be built. Design is defined in Section 3(d) of the act as "exterior architectural features including height, appearance, texture, color, and nature of materials." Inherent in a review of height is the authority to find that a proposed building height, although allowed by the Zoning Regulations, is incompatible with the building's setting. The authority of the Mayor's Agent to approve a lower height is supported by D.C. Code §5-424 which provides that in the event a conflict with the Zoning Regulations and other laws or municipal regulations the more restrictive provisions shall govern.

Although it is my opinion that historic preservation review should normally follow review by the Zoning Commission, several practical difficulties may arise. Under the one-step PUD process, the applicant cannot get a building permit unless the plans conform to those approved by the Zoning Commission as modified by any guidelines, conditions or standards imposed by the Commission and unless the applicant has recorded a covenant binding him to construct on and use the property only in accordance with the Zoning Commission order. (Subsections 7501.671 and 7501.672) However, the applicant may only get a building permit if his plans are also approved by the Mayor's Agent under D.C. Law 2-144. If the proposed structure as approved by the Mayor's Agent exceeds the required zoning for the site, yet is less than the size building approved by the Zoning Commission in the PUD process, the applicant must reapply to the Zoning Commission if he finds the conditions imposed by the Commission to be too onerous. This cumbersome procedure may be eliminated by use of section 2.5(f) of the regulations for D.C. Law 2-144, which provides a procedure for review of the conceptual design of new buildings by the Historic Preservation Review Board and report prior to Zoning approval. This procedure would permit an applicant to get historic preservation review of his design prior to the preparation of detailed plans for submission to the Zoning Commission.

Consideration of these problems leads to your next question. If two different designs are approved by the Mayor's Agent under D.C. Law 2-144 and the Zoning Commission under Article 75, it is my opinion that the Mayor's Agent has final authority over those aspects of design which are subject to his approval. D.C. Law 2-144 is a specific piece of legislation enacted for the particular purpose, among others, of assuring that new construction in an historic district or on the site of an historic landmark is compatible with the character of the historic district or historic landmark. In accord with this purpose, the law gives the Mayor or his designated agent specific design review authority. Article 75 of the Zoning Regulations, on the other hand, was promulgated under the general zoning enabling act (D.C. Code §5-412 et seq.) which authorizes the Zoning Commission to generally regulate "the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the use of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes . . ." (D.C. Code §5-413).

It is an accepted principle of statutory construction, that a specific law concerning the same subject matter prevails over a more general provision. Castaneda-Gonzalez v. INS, 183 U.S. App. D.C. 396, 564 F.2d 417(1977) Sanker v. United States, 374 A.2d 304 (1977). In the case of any conflict the specific design review authority of the Mayor's Agent under D.C. Law 2-144 would supercede the authority of the Zoning Commission pursuant to Zoning Regulation adopted under a more general law. Therefore, it is my opinion that the Mayor's Agent has final authority over the design of new construction in historic districts or on the site of historic landmarks.