

Kennedy-Warren/Comprehensive Plan Analysis

A. Introduction

There are two critical elements of the District of Columbia Court of Appeals (“Court”) decisions in the Kennedy–Warren Apartments Planned Unit Development (“PUD”) case that are pertinent to the Comprehensive Plan (“Plan”) analysis of the 2950 Tilden Street PUD. These two elements are:

- (1) The primacy of the Land Use Element of the Comprehensive Plan (including the Land Use Map) over the provisions of the Ward 3 Element of the Plan; and
- (2) The balance between Plan’s policy to encourage infill development near Metrorail stations and the protection of “green space” adjacent to apartment buildings.

B. Summary of Analysis

The Court in the Kennedy-Warren case specifically, and emphatically, held that the Land Use Element of the Plan trumps other provisions of the Plan when there is a conflict. The Court held that, in cases like the Kennedy-Warren and the 2950 Tilden PUD, where the Land Use Map unambiguously identifies a subject property as appropriate for a high density residential use, that designation outweighs a variety of other general policies and guidelines in the Ward 3 Element. “To the extent that there is residual tension between the cited Ward 3 Element sections and the Land Use Element, the Plan explicitly authorizes the Commission to resolve the tension in favor of the Land Use Element”. Cathedral Park Condominium Committee v. District of Columbia Zoning Commission, 743 A. 2d 1231, 1240 (D.C. 2000). As the record clearly shows in the instant case, the Generalized Land Use Map designates the 2950 Tilden PUD property as

appropriate for high density residential use and, as outlined in the Office of Planning (“OP”) Report (Exhibit 74 of the record) and in testimony delivered at the public hearing by representatives of OP, the PUD fulfills numerous other goals of the Plan which far outweigh provisions of the Ward 3 Element cited by the Tilden Street Coalition as grounds for denial.

In addition, the Court in the Kennedy-Warren case held that the Plan was intended only to “protect” green space that contributes to the integrity of the site upon which the green space is located. Therefore, in cases such as the K-W PUD and the Tilden PUD, where the “green space” does not “contribute” to the integrity of the site, infill does not violate the relevant sections of the Ward 3 Element. Further, in cases such as the K-W PUD and the Tilden PUD, proximity of the sites to two Metrorail stations allows the Commission to rely on the fact that the Ward 3 Element encourages housing near Metrorail stations to grant such PUD applications.

C. The Kennedy-Warren Apartments (“K-W”) PUD

1. Background

Like the 2950 Tilden PUD application, the K-W owner proposed a PUD and a zoning map change in order to build an apartment building on vacant land. Like the Tilden property, the K-W land was designated appropriate for “high density” residential use on the Generalized Land Use Map of the Plan. As in the Tilden case, opponents to the K-W PUD complained that the PUD would create adverse traffic and parking problems, violate a series of provisions of the Ward 3 Element of the Plan, be of a height and density that was not in character with the area and that the proffered benefits and amenities were not sufficient. The Zoning Commission approved the PUD and Map Amendment (Zoning Commission Order No. 831). The Opponents

petitioned for a review in the Court and the Court ultimately sustained the Zoning Commission's decision.¹ The project has subsequently been built.

2. The Court's Analysis and Decision

The Court noted that all zoning in the District of Columbia must "not be inconsistent with the comprehensive plan for the nation's capital (D.C. Code § 5-414 (1994)). In addition, the Zoning Regulations require that the Zoning Commission find that a proposed PUD not be inconsistent with the Plan. 11 DCMR § 2403.4". Id at 1239. The Court also recognized that the provisions of the Plan "should be studied and executed in concert with each other and should be interpreted broadly." Id at 1239.

The Opponents contended, among other issues, that the Zoning Commission decision violated specific provisions of the Plan as articulated in the Ward 3 Element relating to the low-density character of Ward 3, the development of the "green space", and the height and scale of the new construction.

a. Density and Character of Ward 3

Similar to the 2950 Tilden PUD, the Opponents in the K-W case stated that the Zoning Commission's approval of the K-W PUD violated a number of provisions of the Ward 3 Element of the Comprehensive Plan, including: Section 1401.1(c) which states that any new development must be compatible with the predominately low and moderate density character of the Ward;

¹ In the first Court review, the Court remanded the matter to the Zoning Commission to address whether or not (a) development adjacent to landmark parks must be low density and (b) whether or not the land for the PUD contributed to the integrity of the K-W grounds. Cathedral Park Condominium Committee v. D.C. Zoning Commission, 743 A2d 1231 (D.C. 2000). After the Commission conducted further process and issued a second Order (Zoning Commission No. 831-A) dealing with the remanded issues, the Court sustained the PUD (See the Memorandum Opinion and Judgment of the District of Columbia Court of Appeals, Case No. 01-AA-83, dated January 8, 2002).

Section 1406.2(b) which states that future development must be carefully controlled to protect the existing scale and low density character of the Ward; and Section 1400.2(a)(2) which articulates that a major theme of the Ward 3 Element is to protect and maintain the low density character of the Ward.

In approving the K-W PUD, the Commission relied on the District of Columbia Generalized Land Use Map (“Map”), which the Court noted is a part of the Land Use Element. The Court found that the Map specifically includes the K-W site in the high density residential land use category. The Court describes the high density residential category as including high rise apartment buildings as the predominant use. The Court found that the land use element “unambiguously” permits a high density apartment building at the location of the PUD. *Id* at 1240. Further, the Court found that: “to the extent that there is a residual tension between the Ward 3 Element sections and the Land Use Element, the Comprehensive Plan explicitly authorizes the Commission to resolve that tension in favor of the Land Use Element. *Id* at 1240. The Court continued that since “...the land use element integrates the policies and objectives of all other District elements, it should be given greater weight than the other elements. 10 DCMR § 112.4”. *Id* at 1240.

The Court also sustained the Commission’s decision to rely “on the fact that the Ward 3 element encourages zoning flexibility for the provision of new housing, and specifically for new housing near Metrorail Stations (the Kennedy Warren is in close proximity to two of the Metrorail Stations)”. *Id* at 1240.

The 2950 Tilden PUD is in the exact legal posture as the K-W PUD. Both PUDs were proposed for vacant land designated for high density residential use on the Generalized Land Use

Map and both properties are in close proximity to two Metrorail stations. As the Court found: “These factors, in conjunction with the designation in the Map of the PUD site as high density residential satisfies us that the PUD is not inconsistent with the Plan.” Id at 1241.

b. Specific Preservation of Green Space

In the K-W case, the Opponents also argued that the Ward 3 Element of the Plan contains provisions that specifically address green space adjacent to apartment buildings. The Opponents in that case cited Section 1409.4(a)(3) of the Ward 3 Element which calls for stringent protection against infill at inappropriate locations and lists as examples of inappropriate infill locations places such as “swaths of green space fronting many apartment buildings”. However, the Court found that the Opponents’ reading of the Plan was too narrow and that other provisions of the Plan indicate that the “green space” that is intended to be “protected” is only that green space that contributes to the integrity of the site (or the structure) upon which the green space is located. Id at 1243. The Court sustained the Commission’s finding that infill on the “green space” of the K-W site, in and of itself, does not violate the Ward 3 Element if that space does not “contribute to the integrity of the site or structure”.

The “green space” of the 2950 Tilden PUD property clearly does not “contribute” to the integrity of a site or structure. It has been a separate lot for 80 years; it is not a part of a “lawn” or open space for an existing apartment building; and it is not a historic site.

c. Height and Scale

The Opponents of the K-W PUD also claimed that the building’s design did not comply with the design guidelines in 10 DCMR Section 1406.9 which calls for the height and scale of

new construction in “areas of strong architectural character and areas of stable character to be of roughly equal height the buildings in the vicinity”. Id at 1244. The Opponents complained that the K-W PUD would be significantly taller, and larger, than buildings across the street from the PUD. The Court rejected the Opponents’ position that those sections of the Comprehensive Plan were “mandates” on the Zoning Commission and found that the Zoning Commission could use its own judgment as to balance height and densities of buildings within its interpretation of the Comprehensive Plan. Id at 1245.

D. Tilden Street Coalition’s Arguments

The Tilden Street Coalition (“Coalition”) argues, like the K-W Opponents, that the instant PUD should be denied because it violates provisions of the Ward 3 Element of the Plan. Specifically, the Coalition states that Section 1404.3 (a)(1)(B) of the Ward 3 Element of the Plan states that “Medium and high density residential uses ... should be limited to major arterials” and, therefore, a medium density apartment building on the Tilden PUD site would be inconsistent with the Plan. This argument fails because, as the Court pointed out in the K-W PUD, the Generalized Land Use Map with regard to the Tilden site is “unambiguous” in its designation of the site as high density residential and as the Court also pointed out when there is a residual tension between the Ward 3 Element sections and the Land Use Element, the Plan explicitly authorizes the Commission to resolve that tension in favor of the Land Use Element. Id at 1240.

The Coalition cites a variety of other sections of the Ward 3 Element that are violated by the 2950 Tilden PUD application all of which are general “platitudes” about the condition of

Ward 3², and none of them override the Court's instruction that the Land Use Element of the Plan take precedence over such general statements. See *Id* at 1240. In addition, it should be noted that the proposed Tilden project provides certain features that achieve portions of the Ward 3 Element such as the provision of a green roof and other environmentally-sensitive characteristics. Further, the Tilden PUD has been designed to accommodate many of the provisions of the Ward 3 Element regarding compatibility with surrounding neighborhoods and residential characteristics since the height and massing of the proposed building have been designed to transition the property from high-density buildings on Connecticut Avenue to 3-story townhouses on Tilden Street.

Finally, the Coalition argues that the designation of the site as high density residential was a "printing" error (see Oberlander's report, page 2) or a "mistake" (see, Councilmember Phil Mendelson's letter dated January 1, 2006). This argument is so farfetched that it is ludicrous. There is no evidence whatsoever that this is the case. The Coalition would have us believe that

² George Oberlander, the Coalition's expert planner writes in his report (pages 3 and 4):

The following are additional Ward 3 specific policies that the PUD violates:

- Section 1400.2(a)(2). "Residents seek to insure the stability be maintained. Accordingly, no significant land use changes have been indicted ...and it is a major theme of this ward plan to protect and maintain the low density, high quality character of the Ward."
- Section 1409.1(b). "...The Generalized Land Use Map of the Land Use Element designates most of the ward in the low-density residential category. ..."
- Section 1409.1(e). "...The Comp. Plan and this ward plan recognize that Ward 3's commercial areas are established, and that redevelopment pressures must be strictly limited and redirected to other areas of the city...."
- Section 1409.1(h). "...The current land use character of the ward – which is reflected in the Comp. Plan without change – has created a value in the land and attracted an affluence in population that contributes substantially to the District's tax base...."
- Section 1409.2(a). "Maintain the existing land use character of the ward."
- Section 1409.2(b). "Protect existing residential neighborhoods and enhance their qualities."
- Section 1409.2(f). "Maintain and improve viable residential areas and eliminate incompatible and non-conforming land uses in or proximate to residential areas."

the property was designated in error, first in 1984 on the “blob” map; then in 1985 on the second Land Use Map; and on two subsequent maps (1998 and 1998) which underwent intense review and revisions. As OP demonstrated, it analyzed the designation and concluded that it followed sound planning principles and is consistent with similar sites in Ward 3 and the District. Contrary to the Coalition’s claim, the high density residential category on the Map was intentional and deliberate. The site is located in front of a large (9 story) apartment building (to the south); east of a 5-story apartment building; west of an Embassy complex that operates more like a small office building (30 employees) rather than a single family house; and fronts on one of the few east-west thoroughfares that cross Rock Creek Park north of downtown. It is a vacant site within a 5 minute walk of two Metrorail stations. It is a site that should be designated for a land use that has a higher density than the current R-2 zoning allows.

In any event, neither the claim of “printing” error or “mistake” is relevant. The Comprehensive Plan, as law, designates the Tilden property as high density residential and that is what is relevant to the Zoning Commission’s evaluation of this PUD.

E. Conclusion

The District of Columbia Court of Appeals has given the Zoning Commission guidance on how to interpret various, seemingly contradictory, provisions of the Comprehensive Plan. The Court gives deference to the Commission to balance the Plan’s goal and policies, but mandates that when there is a conflict between the Land Use Element and the Ward 3 Element, the Land Use Element, which includes the Generalized Land Use Map, takes precedence.