ADVISORY NEIGHBORHOOD COMMISSION 3-C
GOVERNMENT OF THE DISTRICT OF COLUMBIA

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16604

OFFICE OF ZONING DISTRICT OF COLUMBIA
'00 SEP 25 P5:01

MOTION FOR RECONSIDERATION OF THE BOARD'S RULING FROM THE BENCH THAT IT LACKS JURISDICTION TO CONSIDER THE APPLICATION OF THE COMPREHENSIVE PLAN TO THIS CASE AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PROCEDURAL HISTORY

1. The Sikh Cultural Society applied for a building permit to construct a temple at 3801 Massachusetts Avenue, NW in November 1996.
2. Building Permit Number B425220 (Building Permit) was issued to the Sikh Cultural Society on July 16, 1999.
3. No notice of the application for the Building Permit was provided to Advisory Neighborhood Commission 3C(ANC 3C) prior to the issuance of the permit.
4. ANC 3C passed a resolution at its April 24, 2000 meeting requesting that all permits for this project be suspended to allow the Department of Consumer and Regulatory Affairs (DCRA) to comply with notice requirements, to give the public an opportunity to understand the plans, and to provide an opportunity for ANC 3C and others to work with the developer.
5. The Director of DCRA notified the ANC by a letter dated May 11, 2000 that he had reviewed the project and ordered his staff to issue a stop work order and refer this project to the Board of Zoning Adjustment (BZA).
6. DCRA issued a stop work order on May 26, 2000.
7. The Fairview Neighborhood Association filed an appeal of the Building Permit with the BZA on June 12, 2000.
8. The stop work order expired on or before June 26, 2000.
9. At its public meeting on June 19, 2000, ANC 3C unanimously passed a

BZA
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Exhibit No. 38

Board of Zoning Adjustment
District of Columbia
CASE NO.16604
EXHIBIT NO.38

FINDINGS OF FACT

1. The site for which the Building Permit was issued is located at 3801 Massachusetts Avenue, N.W., Washington, D.C.
2. 3801 Massachusetts is located within an R-1-B District.
3. The proposed temple for which the Building Permit was issued (hereinafter "proposed temple") fronts Massachusetts Avenue, N.W.
4. The west side of the proposed temple abuts 38th Street, N.W.
5. All the homes on 38th Street are set back at least 25 feet from the street. [Tr.32 (Boote), 37 (Mann)]
6. The side yard on 38th Street for the proposed temple is 10 feet. [Tr.32 (Boote), 74 (Bello)]
7. The District of Columbia intends to build a sidewalk along the 38th Street side of the proposed temple. [Tr. 32 (Boote), 103 (Singh)]
8. The western wall of the proposed temple will be so close to the sidewalk that pedestrians will bump their elbows on the wall as they walk by it. [Tr. 32 (Boote), 110 (Miller)]
9. The Building Permit allows the proposed temple to be built with a setback on 38th Street that is in front of the façade line for all the buildings on the residential street by at least 15 feet.
10. The proposed temple will have an adverse impact on the residential neighborhood in which it will be situated as a result of the drastic setback difference between the side of the proposed temple and the homes on 38th Street. [Tr. 109-111 (Miller) 38 (Mann)]
11. The proposed temple will have even more of an adverse impact on the residential neighborhood in which it will be situated by the additional feature of its height - substantially taller than the buildings surrounding it [Tr.38 (Mann), 41 (White), 44-45 (Hosky)]
12. The Zoning Administrator did not consider the Ward 3 goals of the Comprehensive Plan in determining whether to issue the Building Permit.
13. Tenley and Cleveland Park Emergency Committee v. District of Columbia was decided by the District of Columbia Court of Appeals on November 17, 1988.
14. Section 112.6 of the existing Comprehensive Plan, that requires, inter alia, that the Zoning Administrator and the BZA, in issuing or processing a building permit, evaluate the proposal in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Plan Maps was added to the Comprehensive Plan by D.C. Law 10-193, the Comprehensive Plan Amendments Act of 1994, effective October 6, 1994.
15. The Comprehensive Plan was most recently amended in 1999. (All references to the Comprehensive Plan in this pleading will be to the Plan as most recently amended - the Comprehensive Amendment Act of 1999, D.C. Act 12-609 codified at 46 D.C. Reg. 1441 et seq. (February 19, 1999)).

resolution requesting that the BZA schedule an expedited hearing on the appeal and stay the building permit until the appeal was heard and an order issued.

10. Work commenced on the site on June 26, 2000.
11. The BZA scheduled the above-referenced case on an expedited basis and held a public hearing on September 13, 2000.
12. The subject of the September 13, 2000 hearing was an appeal of the Zoning Administrator's issuance of a building permit, issued on July 16, 1999, to permit the construction of a Temple in an R-1-B District.

SUMMARY OF HEARING WITH RESPECT TO THE ISSUE OF THE APPLICATION OF THE COMPREHENSIVE PLAN TO THIS CASE

1. Assistant Corporation Counsel Venita Ray argued that the Board of Zoning Appeals (Board) does not have jurisdiction over the issue of whether or not the issuance of the building permit violated the Comprehensive Plan on the grounds that that issue is a matter for the Zoning Commission and not the Board. [Tr. 17]
2. Assistant Corporation Counsel Venita Ray cited the case of Tenley and Cleveland Park Emergency Committee and the Zoning Commission's statute as authority. [Tr. 18]
3. Assistant Corporation Counsel Alan Bergstein advised the Board without citing any specific authority that the Zoning Administrator is not bound by the Comprehensive Plan when issuing a building permit. [Tr. 24]
4. The Board ruled 4-1 as a preliminary matter upon the motion of the Chairman that it would not consider the application of the Comprehensive Plan to this case. [Tr. 26-27]
5. The parties were not informed prior to the hearing that the issue of the jurisdiction of this Board to consider the application of the Comprehensive Plan to this case would be considered as a preliminary matter to be disposed of in this manner.
6. The attorney for the appellant Fairview Neighborhood Association objected to any decision not to consider the Comprehensive plan. [Tr. 25]
7. ANC 3C Chair Ruthanne Miller testified that the regulations should not be interpreted inconsistently with the Comprehensive Plan and that the Comprehensive Plan should not be ignored. [Tr. 111]
8. ANC 3C Chair Ruthanne Miller also stated with respect to the issue of the Comprehensive Plan that "the Commission is concerned that the Zoning Administrator's interpretation and application of the zoning regulations governing height and setback limitations in an R-1 District will result in the construction of a building that is out of scale and character with the rest of the neighborhood immediately surrounding it, to the serious detriment of fundamental objectives of zoning policy in the District of Columbia and the Ward 3 Plan in the Comprehensive Plan (i.e. preventing the overcrowding of land and preserving light and air)." [Tr. 112-113]

CONCLUSIONS OF LAW

1. Section 112 of the Comprehensive Amendment Act of 1999, entitled **INTERPRETATION OF THE DISTRICT ELEMENTS,** sets forth the Manner in which the District Elements of the Comprehensive Plan, as amended, are to be interpreted and applied.

2. 10 DCMR 112.6 specifically directs that "[t]he zoning impact of the District elements of the plan is not limited to areas where amendments to the Zoning Regulations are required to eliminate inconsistencies between the Plan and zoning."

3. Pursuant to that direction, 10 DCMR Section 112.6 (c) specifically states:

   > In issuing or processing any building or construction permit or any Certificate of Occupancy, the Zoning Administrator, the Board of Zoning Adjustment, and the Zoning Commission shall evaluate the proposal in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Plan Maps. (emphasis added.)

4. The provisions governing the interpretation and application of the District Elements relied upon by the Court of Appeals in Tenley and Cleveland Park Emergency Committee v. District of Columbia, 550 A.2d 331 (D.C. 1988), were amended by the Council since that decision. D.C. Law 10-193, the Comprehensive Plan Amendments Act of 1994, effective October 6, 1994; D.C. Act 12-609 codified at 46 D.C. Reg. 1441 et seq. (February 19, 1999.)

5. Section 112.6 of the existing Comprehensive Plan, that requires, inter alia, that the Zoning Administrator and the BZA, in issuing or processing a building permit, evaluate the proposal in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Plan Maps was added to the Comprehensive Plan by D.C. Law 10-193, the Comprehensive Plan Amendments Act of 1994, effective October 6, 1994 and therefore, was not considered by the Court of Appeals in Tenley and Cleveland Park Emergency Committee v. District of Columbia, supra.

6. The BZA and the Zoning Administrator must look to the current District Elements for guidance In interpreting and applying the Comprehensive Plan.

7. It is a basic tenet of statutory construction to first examine the language and interpret the words according to their plain and ordinary meaning. Tenley and Cleveland Park Emergency Committee v. District of Columbia, 550 A.2d 331, 334, citing United States v. Bailey, 495 A.2d 751, 760 (D.C. 1985); Peoples Drug Stores, Inc. v. District of Columbia, (D.C. 1983) (en banc).

8. As articulated by the District of Columbia Court of Appeals. "Our primary goal is to ascertain and give effect to the intent of the language of the legislative body that drafted the language." Tenley and Cleveland Park Emergency Committee v. District of Columbia, 550 A.2d 331, 334, citing Rosenberg v. United States, 297 A.2d. 763,765 (D.C. 1972)(quoting General Motors Acceptance Corp. v. One 1962 Chevrolet Sedan, 191 A.2d 140, 142 (D.C. 1963).

9. "Except as provided by other law or the Plan itself, the District elements are advisory." Tenley and Cleveland Park Emergency Committee v. District of Columbia, 550 A.2d 331, 338.

10. In contrast to the language in effect at the time of the Tenley decision, the language in section 10 DCMR Section 112.6 is mandatory, not advisory. Use of the word "shall" is interpreted as mandatory.

11. " Even where the words of a statute have superficial clarity, it is appropriate to undertake a review of the legislative history to aid in the ascertainment of legislative intent." Tenley and Cleveland Park Emergency Committee v. District of Columbia, supra,at 334, citing People's Counsel v. Public Service Commission, 477 A.2d. 1079, 1084 (D.C. 1984).

12. The Council Committee Report to the Comprehensive Plan and amendments is the valid source for determining the legislative intent of the Council and for providing "interpretive guides for judicial construction of the Act." Tenley and Cleveland Park Emergency Committee v. District of Columbia, supra,at 338.

13. The Committee of the Whole Report for the Comprehensive Plan Amendment Act of 1994, which added 10 DCMR Section 112, referenced above, specifically stated in its Statement of Purpose and Effect that several amendments contained in the proposed Comprehensive Plan Amendment Act:

> Clarified emphasis that the zoning impact of the Comprehensive Plan should not be limited to areas where zoning is inconsistent with the Comprehensive Plan and that other District agencies, particularly the Board of Zoning Adjustment, shall consider Comprehensive Plan policies in their decision-making processes.

(emphasis added.) REPORT OF THE COMMITTEE OF THE WHOLE ON BILL 10-212, COMPREHENSIVE PLAN AMENDMENTS ACT OF 1994 at 5 (1994). (A copy of the relevant pages of the report is attached for the Board's reference.)

14. Pursuant to the specific language of 10 DCMR Section 112, particularly Section 112.6, and the clear legislative intent set forth in the Committee

Report to the Comprehensive Plan Amendments Act of 1994, the Board of Zoning Adjustment is required as a matter of law to evaluate the building permit at issue in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Map Amendments.

15. The BZA is required to look to the District Elements of the Comprehensive Plan for general policy guidance in determining that the permit is not inconsistent with the Comprehensive Plan. National Cathedral Neighborhood Association v. District of Columbia Board of Zoning Adjustment, Slip Opinion No. 99-AA-1230 at 3 (May 10, 2000)

16. The BZA erred as a matter of law at the September 13, 2000 hearing on the building permit in ruling from the bench as a preliminary matter that it did not have jurisdiction to consider the application of the Comprehensive Plan in its proceedings.

17. Pursuant to the specific language of DCMR Section 112, particularly Section 112.6, and the clear legislative intent set forth in the Committee Report to the Comprehensive Plan Amendments Act of 1994, the Zoning Administrator is required as a matter of law to evaluate the building permit at issue in conjunction with the applicable sections of the Comprehensive Plan and the Comprehensive Map Amendments.

18. 10 DCMR Section 1409.2 sets forth the objectives and policies for land use/zoning in Ward 3, including specifically:

> (b) Protect existing residential neighborhoods and enhance their qualities;
>
> (g) Correct or prevent inconsistencies between zoning and land uses designated in the Comprehensive Plan and between building permit issuances and the Comprehensive Plan;
>
> (h) Ensure that if development of institutional holdings and large estates or other parcels occurs, it is compatible with the physical character of the ward, has no adverse impact on surrounding areas and is consistent with the Comprehensive Plan.

19. 10 DCMR Section 1406.9 sets forth the objectives and policies for areas of strong architectural character and areas of stable character and includes the following design guidelines:

> (a) Height: Relate the overall height of new construction …to that of adjacent structures. As a general rule, construct new buildings to a height roughly equal to the average height of existing buildings;

(b) Scale: Relate the size and proportion of new construction to the scale of adjacent buildings New construction should maintain the scale of existing buildings, regardless of size;

(c) **Setback:** Maintain the historic façade lines of streetscapes by locating front walls of new construction in the same plane as the facades of adjacent buildings. **If exceptions are made, buildings should be set back into the lot rather than closer to the street.** Avoid violating the existing setback pattern by placing new construction in front of or behind the historic façade line.

20. The Building Permit should be revoked because the Zoning Administrator failed to consider the District Elements of the Comprehensive Plan in evaluating the permit.

21. The Building Permit is inconsistent with the Ward elements of the Comprehensive Plan set forth at Sections 1409.2 and 1406.9 because the 10foot setback on 38th Street is at least 15 feet in front of all the other buildings on the street and the side wall on 38th Street will almost abut the sidewalk.

22. The Building Permit is inconsistent with the Ward elements of the Comprehensive Plan set forth at Sections 1409.2 and 1406.9 because the side wall of the proposed temple will nearly abut the sidewalk on 38th Street.

23. The Building Permit is inconsistent with the Ward 3 elements of the Comprehensive Plan set forth at Sections 1409.2 and 1406.9 because the proposed temple will detrimentally affect the residential character of the neighborhood due to the lack of a setback that not only is much less than the neighboring homes, but is also so close to the sidewalk that it will crowd pedestrian space on the 38th Street side.

24. The Board shall give "great weight" to the written report of the ANC, as required by D.C. Code Section 1-261 (1981). 11 DCMR Section 3307.2.

PROPOSED ORDER

1. The bench decision of the Board on September 13, 2000 that the Board lacked jurisdiction to consider the Comprehensive Plan in its proceeding to consider an appeal of the Zoning Administrator's issuance of a building permit is hereby vacated on the grounds that the Comprehensive Plan, as amended in 1994 and 1999, require the BZA to consider the Plan in its proceedings.

2. Building Permit Number B42522, issued July 16, 1999, is revoked on grounds that the Zoning Administrator failed to consider whether issuance of the

permit would be inconsistent with the District Elements in the Comprehensive Plan.

3. Building Permit Number B42522, issued July 16, 1999, is revoked on grounds that issuance of the permit would be inconsistent with the District Elements set forth in Chapter 14 of the Plan, setting forth Ward 3 provisions, particularly Sections 1409.2 and 1406 governing setback and height and scale.

Respectfully submitted,

Ruthanne G. Miller

Ruthanne G. Miller, Esq.
Chair, ANC 3C