goulston&storrs
counsellors at law

Paul A. Tummonds, Jr.
ptummonds@goulstonstorrs.com
202-721-1157 Tel

April 23, 2018

VIA IZIS

Chairman Anthony Hood
District of Columbia Zoning Commission
441 4th Street NW, Suite 200
Washington, DC 20001

Re: Z.C. Case No. 14-18A – Response of Mid-City Financial Corporation (the "**Applicant**") to Brookland Manor/Brentwood Village Residents Association Motion for Reconsideration

Dear Chairman Hood and Members of the Commission:

On April 16, 2018, the Brookland Manor/Brentwood Village Residents Association ("**Association**") filed a Motion for Reconsideration ("**Motion**") of the Zoning Commission's written decision in Z.C. Case No. 14-18A. While the title of the Association's motion is a request for reconsideration, the bulk of the motion appears to be a request for rehearing. The Applicant hereby files this response to the Association's Motion for Reconsideration and requests that the Zoning Commission deny this motion for reconsideration as the Association merely raises arguments that it previously raised during the public hearing process and that the Commission determined were not within the scope of its authority to review in a First-Stage PUD Modification and Second-Stage PUD application. In regard to the motion for rehearing, the Association has not satisfied the requirements of Subtitle Z § 700.7, so the request should be denied.

The Commission's Order in this case appropriately identified and addressed the Zoning Commission's scope and authority in granting a modification of a First-Stage PUD Order and the granting of approval of a Second-Stage PUD Order. Z.C. Order No. 14-18A stated:

> 4. The scope of the Commission's decision in judging the Applicant's modification to the first stage order is "limited to the impact of the modification on the subject of the original application." (11-Z DCMR § 704.4.) The Commission is not permitted to revisit the decisions it made in its original decision. (*Id.*) The Commission interprets this to mean that unless an issue is related to the impact of the modification, or the detailed site plan review to determine compliance with the first-stage approval it is outside of the scope of the Commission's review of the Application.
>
> . . . Likewise, the Applicant did not request any changes to the Project's benefits and amenities package, including its proffered affordable housing commitments. The

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EXHIBIT NO.196

> issues raised by the opponents related to the sufficiency of the Project's affordable housing benefits, potential displacement as a potential adverse effect of the PUD, family accommodations and treatment of families with senior residents, subsidy for residents who are DCHA Section 8 HCV holders, and the Project's consistency with the Comprehensive Plan, are not related to the impact of the modifications and/or additional relief sought by the Application. The issues were decided in the First-Stage Order, and the Commission by rule is not permitted to revisit them. (Z.C. Order No. 14-18A, Conclusion of Law ¶ 4, p. 49-50.)

The Association's motion for reconsideration asks that the Zoning Commission "reconsider and reverse its order" approving the Second-Stage PUD application based on issues that the Commission has deemed are outside its authority. The Association's motion for reconsideration does not address the Commission's clear and correct determination in Conclusion of Law ¶ 4 noted above. There is no reason for the Zoning Commission to reconsider its previous determination on these issues. Therefore, the motion for reconsideration should be denied.

The Association's motion for rehearing is not based on new evidence or evidence that was not reasonably available at the time of the Commission's public hearing on this matter as is required by rule. (11-Z DCMR § 700.7.) Instead, the Association's basis for the motion for rehearing is based entirely on a procedural decision by the United States District Court that addressed issues related to the certification of a potential class of plaintiffs. It was not a decision on the merits of a claim that a federal Fair Housing Act ("**FHA**") violation occurred. The federal court's decision neither is itself evidence relevant to the instant zoning proceeding nor includes new evidence relevant to the Commission's proceeding that was not reasonably available at the time of the public hearing on this matter. The Association's motion fails to state how the information from the District Court case "could not have reasonably been presented" at the original hearing in this case. Moreover, the Association is asking the Commission to rehear the case to allow additional information on a series of issues that the Zoning Commission has deemed are not relevant to this First-Stage PUD Modification and Second-Stage PUD application. Therefore, the motion for rehearing should also be denied.

While it is not necessary for the Zoning Commission to consider the implications of the District Court's decision on the certification of a class of potential class action plaintiffs in denying the motion for rehearing, the Applicant believes that it is important for the Zoning Commission to be made aware of the following inaccuracies in the Association's motion:

- The Association's motion states, "The Association maintains their position that the Applicant's redevelopment plan has resulted in the displacement of residents who resided at Brookland Manor…." (Motion at 2.) However, the District Court determined "Indeed, Ms. Borum [resident plaintiff] does not point to a single individual who has been displaced due to the proposed redevelopment since Defendants submitted their First Stage PUD to the Zoning Commission." Memorandum Opinion at 10, *Borum v. Brentwood Village, LLC*, No. 16-1723 (RC) (D.D.C Feb. 18, 2018), attached as Exhibit A.

- The Association's Motion also alleged, "the Applicant's overall redevelopment plan calls for an overall reduction in affordability from 535 deeply affordable units that currently exist on the property." (Motion at 3.) This statement is inconsistent with the written record as: i) not all of the 535 units are online and some are instead used for management purposes; and ii) there are, and have always been, market rate residents on the property. The deeply affordable units are being replaced one-for-one. All other units are "market units" of which there will be numerous opportunities for current market (including voucher holder) residents to choose from in future phases of the RIA development.

- The Association's motion concludes that it is "essential" for the Zoning Commission to determine FHA compliance. (*Id.*) This is an interesting claim, as the resident plaintiffs in the civil litigation have – since the inception of that litigation – argued that the Zoning Commission is not the proper forum for determining FHA claims.

  Please see attached relevant excerpts from Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, *Borum v. Brentwood Village, LLC*, No. 16-1723 (RC) (D.D.C. Sept. 29, 2016) ("**Residents' Motion**") in which the resident plaintiffs argued strongly that, "the Zoning Commission is not a competent body to decide [FHA] discrimination claims." (*Id.* at 11, attached as Exhibit B.) The Residents' Motion goes on to state that "Indeed, review of the Zoning Commission's governing statute states that it is granted authority only 'to regulate the location, height, bulk, number of stores 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.'" (*Id.* at 12.)(quoting D.C. Code in arguing that "The Zoning Commission has NO COMPETENCY to Rule on Plaintiffs' Claims.")(emphasis added). The federal court agreed with the resident plaintiffs that the Zoning Commission does not have authority to hear FHA claims. *See* Order Denying Defendants' Motion to Dismiss; Denying Plaintiffs' Motion for a Preliminary Injunction at 19-20, *Borum v. Brentwood Village, LLC*, No. 16-1723 (RC) (D.D.C Nov. 21, 2016), attached as Exhibit C.

For the reasons noted above, the Applicant requests that the Zoning Commission deny the Association's request for reconsideration/rehearing at the earliest possible date.

Sincerely,

Paul A. Tummonds, Jr.

David A. Lewis

Enclosures

Certificate of Service

The undersigned hereby certifies that copies of the foregoing document will be delivered by e-mail or first-class mail to the following addresses on April 23, 2018.

Maxine Brown-Roberts (*via e-mail*)
Office of Planning
1100 4th Street, SW, Suite 650E
Washington, DC 20024

Anna Chamberlain (*via e-mail*)
District Department of Transportation
55 M Street, SE, Fourth Floor
Washington, DC 20003

Regina James, ANC 5C05 (*via first-class mail*)
1363 Adams Street, NE
Washington, DC 20018

LaMonica Jeffrey, ANC 5C06 (*via first-class mail*)
2413 14th Street NE
Washington, DC 20018

ANC 5C (*via first-class mail*)
PO Box 91902
Washington, DC 20090

ANC 5B (*via first-class mail*)
1920 Irving Street, NE
Washington, DC 20018

Brookland Manor Residents Association (*via e-mail*)
c/o William R. Merrifield, Jr.
Washington Legal Clinic for the Homeless
1200 U Street, NW, Third Floor
Washington, DC 20009

David A. Lewis

Exhibit A

[Attached behind]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADRIANN BORUM, *et al.*,	:		
	:		
Plaintiffs,	:	Civil Action No.:	16-1723 (RC)
	:		
v.	:	Re Document No.:	43
	:		
BRENTWOOD VILLAGE, LLC, *et al.*,	:		
	:		
Defendants.	:		

MEMORANDUM OPINION

GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; GRANTING PLAINTIFFS' MOTION FOR THE APPOINTMENT OF CLASS COUNSEL

I. INTRODUCTION

Plaintiff Adriann Borum seeks to represent a putative class of residents of her apartment complex, Brookland Manor, whom she alleges are at risk of being displaced should Defendants proceed with their plans to redevelop the complex, or who have already been displaced in anticipation of the redevelopment.[1] The planned redevelopment will eliminate four- and five-bedroom apartments in the complex, and will reduce the number of three-bedroom apartments as well. This policy, Ms. Borum claims, will have a disparate impact on hundreds of residents based on their familial status in violation of the Fair Housing Act ("FHA") and the D.C. Human Rights Act ("DCHRA"). Additionally, Ms. Borum claims that Defendants have made discriminatory

[1] One of Ms. Borum's original co-plaintiffs and the second named representative of the putative class, Lorretta Holloman, voluntarily dismissed her claims against Defendants on November 22, 2017. ECF No. 55, 56. Ms. Borum's other co-plaintiff, ONE DC, is a community organization "comprised of members who include tenants of affordable housing properties that are seeking to avoid displacement, preserve affordable housing, ensure fair housing, and further equitable development in D.C." Compl. ¶ 108, ECF No. 2. The Court found that ONE DC has organizational standing to bring suit in its prior Memorandum Opinion. *See Borum v. Brentwood Village, LLC*, 218 F. Supp. 3d 1, 19–20 (D.D.C. 2016).

When deciding whether to certify subclasses, district courts must ensure that each subclass satisfies the requirements of Rule 23. *See D.L. v. District of Columbia*, 713 F.3d 120, 129 (D.C. Cir. 2013). Ms. Borum's briefing paid a great deal of attention to residents of Brookland Manor who she worries are at risk of being displaced by the elimination of four- and five-bedroom apartments and the reduction in the number of three-bedroom apartments. However, her briefing paid very little attention to those residents who have purportedly already been displaced by Defendants' redevelopment plans. Indeed, Ms. Borum does not point to a single individual who has been displaced due to the proposed redevelopment since Defendants submitted their First Stage PUD to the Zoning Commission. As such, Ms. Borum has given no indication of how many former residents of Brookland Manor have been displaced, preventing the Court from performing any sort of numerosity analysis for that group. A class representative "must be prepared to prove that there are in fact sufficiently numerous parties" to satisfy Rule 23(a)(1)'s numerosity requirement. *Wal-Mart*, 564 U.S. at 350. Ms. Borum has not done so here. Because Ms. Borum has not met her burden under Rule 23(a)(1), residents who have been displaced cannot be certified as their own subclass.

Ms. Borum would also like to include in her class individuals who are currently at risk of being displaced, and are then displaced during the pendency of this litigation, so that they might recover money damages just like former residents who have already been displaced. Compl. ¶ 123. However, by definition, none of these individuals exist yet. Because these individuals do not yet exist, and indeed may never exist, if, for example, Plaintiffs succeed in securing an injunction that allows the entire class to remain on the property, this subgroup cannot satisfy Rule 23(a)'s numerosity requirement either.

Exhibit B

[Attached behind]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADRIANN BORUM, *et al.*,

Plaintiffs,

v.

BRENTWOOD VILLAGE, LLC, *et al.*,

Defendants.

Case No. 1:16-cv-01723-RC

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

September 29, 2016

impose administrative exhaustion requirements on claims brought by non-government employees). Thus, Plaintiffs have the right to challenge Defendants' discriminatory actions through a judicial proceeding, and this Court is undoubtedly a court of "competent jurisdiction" given this claim's pendent nature. *See* 28 U.S.C. § 1367(a).[7]

The case that Defendants primarily rely upon to argue that exhaustion is required, *Auger v. D.C. Bd. of Appeals & Review*, 477 A.2d 196 (D.C. 1984), is inapposite. *Auger* did not relate to claims brought under the DCHRA, and *Auger*'s extremely limited holding was that the plaintiff had to pursue an administrative appeals process related to the issuance of a permit before bringing a declaratory judgment action because the initial permit revocation procedure did not trigger the "contested case" jurisdiction of D.C. courts. *Id.* at 203, 205-06. Here, Defendants affirmatively state that the Zoning Commission's PUD proceeding is a "contested case," Defs.' Mot. to Dismiss at 20, making judicial review available without administrative exhaustion even if Plaintiffs' claims were construed as an appeal from the Zoning Commission's order, which they are not.

2. The Zoning Commission Has No Competency to Rule on Plaintiffs' Claims

Even if some other administrative proceedings could theoretically be given preclusive effect to later FHA claims, the Zoning Commission's decision should not be given such effect here because the Zoning Commission is not a competent body to decide discrimination claims. Indeed, review of the Zoning Commission's governing statute states that it is granted authority only "to regulate the location, height, bulk, number of stories and size of buildings and other

[7] Insofar as Defendants are attempting to argue that Plaintiffs' action is untimely, this argument fails. Plaintiffs do not appeal from the Zoning Commission's order. Therefore, the thirty-day appeal deadline for the D.C. Court of Appeals, *see* D.C. App. R. 15(a)(2), has no application to this case.

structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes." D.C. Code. § 6-641.01; *see also Watergate E. Comm. Against Hotel Conversion to Co-op Apartments v. D.C. Zoning Comm'n*, 953 A.2d 1036, 1043 n.6 (D.C. 2008) (finding that the Zoning Commission's authority is circumscribed to the powers listed in § 6-641.01). Unsurprisingly, the Zoning Commission has no mandate to resolve claims of unlawful discrimination arising under either the FHA or the DCHRA. *See, e.g., Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 61 (D.D.C. 2002) (finding that D.C. agencies that regulate the insurance industry lacked competency to adequately address FHA claims about discriminatory lending practices); *Barnes Found. v. Twp. of Lower Merion*, 927 F. Supp. 874, 879 (E.D. Pa. 1996) ("A local zoning proceeding is an insufficient forum to raise federal civil rights claims . . . ."). And, even if the Zoning Commission were to consider the claim, its governing statute does not imbue it with the authority to provide injunctive relief or damages to redress Plaintiffs' harm. *See Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986) (finding that administrative exhaustion does not apply where the agency could not grant full relief).

3. Issue and Claim Preclusion Do Not Apply

Defendants argue that *res judicata* bars Plaintiffs from bringing their discriminatory impact claims due to the Zoning Commission's order. Again, this argument misconceives the nature of Plaintiffs' claim. Plaintiffs are suing to protect their federally protected right to fair housing opportunities from harm caused directly by Defendants' redevelopment. They are not asserting any claim that was, or could have been, considered by the Zoning Commission in its stage-one PUD proceeding.

Exhibit C

[Attached behind]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADRIANN BORUM, *et al.*,	:	
	:	
Plaintiffs,	:	Civil Action No.: 16-1723 (RC)
	:	
v.	:	Re Documents No.: 3, 16
	:	
BRENTWOOD VILLAGE, LLC, *et al.*,	:	
	:	
Defendants.	:	

ORDER

DENYING DEFENDANTS' MOTION TO DISMISS; DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

For the reasons stated in the Court's Memorandum Opinion separately and contemporaneously issued, Defendants' Motion to Dismiss (ECF No. 16) is **DENIED**, and Plaintiffs' Motion for a Preliminary Injunction (ECF No. 3) is **DENIED**. It is hereby:

ORDERED that Defendant's Motion to Dismiss (ECF No. 16) is **DENIED**; and it is

FURTHER ORDERED that Plaintiffs' Motion for a Preliminary Injunction (ECF No. 3) is **DENIED**. It is

FURTHER ORDERED that, within 7 days of any changes to Defendants' proposed redevelopment schedule that might make displacement of their tenants more imminent as compared to the schedule set forth in their exhibits submitted in connection with this case, Defendants shall report such changes to the Court and Plaintiffs. It is

FURTHER ORDERED that the parties shall meet and confer and submit a joint report in accordance with Local Civil Rule 16.3 by December 5, 2016.

1. Exhaustion

Defendants argue that because Plaintiffs knew about the Zoning Commission proceedings but did not choose to challenge the proposed redevelopment, both their FHA and DCHRA claims are barred by the doctrines of exhaustion and preclusion. *See* Defs.' Mem. in Supp. of Mot. to Dismiss, at 18–19. The Court will address Defendants' argument starting with an analysis of the FHA before moving to the DCHRA.

a. Fair Housing Act

Although Defendants do not bifurcate their analysis of exhaustion, the Court will begin with federal law. In support of their exhaustion argument, Defendants invoke *Auger v. D.C. Board of Appeals & Review*, a District of Columbia Court of Appeals case, where the plaintiff sought review "of his administrative appeal from the District of Columbia's imminent enforcement of an order revoking his permit for a neon sign atop his hotel" and a preliminary injunction prohibiting authorities from removing the sign. *See* 477 A.2d 196, 199 (D.C. 1984). In *Auger*, the plaintiff did not administratively appeal his case, despite notice and an opportunity to do so. *See id.* at 206. As a result of the plaintiff's failure to exhaust, the District of Columbia courts did not have jurisdiction over the action. *See id.* at 207. Defendants further note that parties alleging injury from a Zoning Commission order can appeal their case to the D.C. Court of Appeals. *See D.C. Library Renaissance Project/W. End Library Advisory Grp. v. D.C. Zoning Comm'n*, 73 A.3d 107, 119 (D.C. 2013); *see also York Apartments Tenants Ass'n v. D.C. Zoning Comm'n*, 856 A.2d 1079, 1081 (D.C. 2004).

Under 42 U.S.C. § 3613(a)(1)(A), "[a]n aggrieved person may commence a civil action in a[] . . . court . . . to obtain appropriate relief with respect to . . . [a] discriminatory housing practice or breach." Thus, a plaintiff filing under § 3613 "may proceed directly into federal

court, deferring neither to the Secretary of Housing and Urban Development nor to state administrative and judicial processes." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 125 (1979). Congress "carefully chose[] language" allowing immediate judicial recourse to individuals "directly victimized by a discriminatory housing practice." *Id.* at 125–26. The fact that Plaintiffs had District of Columbia administrative remedies available is irrelevant. As Plaintiffs argue, to require individuals seeking relief from an imminent violation of their federal rights to proceed through state-level administrative or judicial avenues would defeat the purpose—as evinced from the "carefully chosen language" of the statute—of the remedy that Congress provided. *See id.* at 125. The FHA "would be seriously undercut if Section 812 actions were conditioned upon prior exhaustion of state administrative remedies." *Huntington Branch, N.A.A.C.P. v. Town of Huntington, N.Y.*, 689 F.2d 391, 393 n.3 (2d Cir. 1982) (analyzing state-level administrative zoning remedies). Defendants cite cases analyzing the processes governing appeals of unfavorable District of Columbia zoning restrictions generally—but not in the context of the violation of federal rights. *See Auger*, 477 A.2d at 200 (appeal of the denial of a permit to place a neon sign atop the plaintiff's hotel); *Capitol Hill Restoration Soc. v. Zoning Comm'n*, 287 A.2d 101, 102 (D.C. 1972) (appeal of a zoning application to build an office building); *C. Library Renaissance Project/W. End Library Advisory Grp.*, 73 A.3d at 111 (appealing "certain zoning requirements"); *York Apartments Tenants Ass'n*, 856 A.2d at 1081 (appealing an application to modify a PUD on procedural grounds). Because Plaintiffs seek relief from alleged discrimination, Defendants' cases are inapposite and Plaintiffs' FHA claims are not barred for failure to exhaust.

Throughout their argument on exhaustion, Defendants invoke concepts of claim preclusion and issue preclusion, so the Court will address them separately. Defendants argue

that "Plaintiffs' [indirect] challenge . . . to the Zoning Order is barred by jurisprudence on the preclusive effect of state administrative agency orders on later-filed [f]ederal claims involving matters decided in agency adjudicative proceedings." *See* Defs.' Mem. in Supp. of Mot. to Dismiss, at 24. Defendants cite to *Univ. of Tennessee v. Elliott*, a case in which the Supreme Court reasoned that it saw "no reason to suppose that Congress, in enacting the Reconstruction civil rights statutes, wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century." *See* 478 U.S. 788, 797 (1986). Even putting aside the technical requirements of claim and issue preclusion, *Elliott* is not controlling here. Unlike in that case, where there was "no reason to suppose that Congress" intended to foreclose preclusion, as noted above, Congress "carefully chose[]" to allow plaintiffs to "proceed directly into federal court" to vindicate their federal rights. *Gladstone Realtors*, 441 U.S. at 125–26. This shows that "Congress did not intend for administrative determinations . . . whether issued by [federal] or certified state agencies, to preclude aggrieved parties from seeking vindication of their rights through civil actions." *United States v. E. River Hous. Corp.*, 90 F. Supp. 3d 118, 146 (S.D.N.Y. 2015). Thus, "it would make little sense to give res judicata effect to a proceeding," *Miller v. Poretsky*, 409 F. Supp. 837, 838 (D.D.C. 1976), whether federal or state, under the FHA. *See id.*; *E. River Hous. Corp.*, 90 F. Supp. 3d at 146. Accordingly, the Zoning Commission's findings do not have preclusive effect over Plaintiffs' FHA claims.

But even if Congress did intend for state-level administrative proceedings to have preclusive effect, the Court could not give such an effect here. Both claim and issue preclusion require a ruling by "a court of competent jurisdiction." *See Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006) (claim preclusion); *Yamaha Corp. of Am. v. United States*, 961 F.2d

245, 254 (D.C. Cir. 1992) (issue preclusion). The D.C. Zoning Commission has power to "regulate the location, height, bulk, number of stories and size of buildings . . ., the percentage of lot which may be occupied, the sizes of yards . . . and other open spaces, the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes."[6] D.C. Code § 6-641.01. Although the Commission does have the power to ensure that zoning regulations are consistent with the District of Columbia's "comprehensive plan," *see Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 332 (D.C. 1988), which, according to Defendants, is "a broad framework intended to guide the future land use planning decisions for the District of Columbia," *see* Defs.' Reply to Pls.' Opp'n to Mot. to Dismiss, at 15, ECF No. 24, the Zoning Commission has no power to implement the plan. *Tenley & Cleveland Park Emergency Comm.*, 550 A.2d at 341 n.22. Because DC's "broad framework" is not comparable to the Federal FHA and Defendants do not identify any power to independently review private FHA violations,[7] there is no indication that the District of Columbia Zoning Commission could be considered a "competent" "court" for purposes of reviewing FHA claims.

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[6] Defendants contend that this is not the proper provision providing the Zoning Commission with its powers. *See* Defs.' Reply to Pls.' Opp'n to Mot. to Dismiss, at 15, ECF No. 24. They cite part (a) of D.C. Code § 6-621.01 for the proposition that the Zoning Commission has general power "[t]o protect the public health, secure the public safety, and to protect property." *See id.* However, after this clause follows: "there is created a Zoning Commission." *See* D.C. Code § 6-621.01(a). Then, part (e), which grants the Commission its power, provides that "[t]he Zoning Commission shall exercise all the powers . . . with respect to zoning . . . *as provided by law*." *See* D.C. Code § 6-621.01(e) (emphasis added). So, although part (a) outlines broad *purposes* for creating a Zoning Commission, it does not by itself grant power.

[7] In their reply memorandum, Defendants assert that a footnote of a D.C. District Court "not[ed] that the Zoning Commission may find that regulations governing community-based residential facilities are violative of the FHA." *See* Defs.' Reply to Pls.' Opp'n to Mot. to Dismiss, at 15. In fact, this is not the case, at least using any meaningful definition of the word "find." That footnote quoted the Zoning Commission as simply stating that a regulation "could