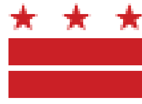
GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-18A(1)
Z.C. Case No. 14-18A
Mid-City Financial Corporation
(Second-Stage Approval for a PUD and Modification of an Approved First-Stage PUD @ Square 3953, Lots 1-3)
ORDER DENYING MOTION FOR RECONSIDERATION
April 30, 2018

By Z.C. Order No. 14-18A effective as of April 13, 2018 (the "Second-Stage Order"), the Zoning Commission for the District of Columbia ("Commission") granted the application of Mid-City Financial Corporation ("Applicant") for second-stage approval of a planned unit development ("PUD") and modification of an approved first-stage PUD and related Zoning Map amendment (collectively, the "Second-Stage PUD"). The property that is the subject of the Second-Stage PUD includes Lots 1-3 in Square 3953 (the "Property") of the Brookland Manor apartment complex in the Brentwood neighborhood of Ward 5. As part of the approved first-stage PUD in Z.C. Order No. 14-18, the Property was rezoned to the R-5-B zone district.[1]

<u>Procedural History of the Second-Stage PUD Proceeding</u>

The Brookland Manor/Brentwood Village Residents Association ("Association") was a party to the Second-Stage PUD proceeding before this Commission.

The Commission held the original public hearing on the Second-Stage PUD application on February 23, 2017, and the hearing was continued to March 16, 2017. (Exhibit ["Ex."] 193 ¶¶ 14, 20.) The Association made post-hearing filings on April 18, 2017 and again on May 3, 2017. (Ex. 183,187.)

The Commission approved the Second-Stage PUD by vote on May 22, 2017. The Second-Stage Order became final effective upon publication in the *D.C. Register*. (11-Z DCMR § 604.9.)

On April 16, 2018, the Association filed a request (the "Motion") that the Commission reconsider the Second-Stage Order and hold further hearings on the Second-Stage PUD application. (Ex. 195.)

[1] These zone districts were renamed as of September 6, 2016, but these re-designations did not impact the Commission's analysis of the motion that is the subject of this Order or the Second-Stage Order. A typographical error in Finding of Fact ("FF") ¶ 2 and n.1 of the Order recites that the Zoning Map amendment changed the designation to the Property the R-5-A zone district. The correct zoning designation for the Property is R-5-B, and all such references in the Second-Stage Order to the R-5-A zone district should be understood to refer to the R-5-B zone district, as noted elsewhere in the Second-Stage Order. (*See* FF ¶ 46 and Conclusions of Law ¶ 4.)

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ZONING COMMISSION
District of Columbia
CASE NO.14-18A
EXHIBIT NO.198

On April 23, 2018, the Applicant filed a response asking the Commission to deny the Motion (the "Response") pursuant to Subtitle Z § 700.8 of the Commission's Rules of Practice and Procedure. (Ex. 196.)

At a regularly-scheduled public meeting on April 30, 2018, the Commission considered the Motion and the Response. The Motion was denied.

Rules of Procedure Pertaining to a Motion for Reconsideration or Rehearing

Pursuant to Subtitle Z § 700.6, a motion for reconsideration or rehearing must state with specificity the respect in which the final order is claimed to be erroneous, the grounds of the motion, and the relief sought. The Commission may not grant a request for rehearing unless new evidence is submitted that could not reasonably have been presented at the original hearing. (11-Z DCMR § 700.7.)

The Association's Motion – Discussion of Evidence Pertaining to Displacement

The Motion presents what the Association asserts is new evidence that was not available at the time of the public hearing on the Second-Stage PUD. The Association also argues that the Commission erred in certain of its findings and conclusions in the Second-Stage Order regarding displacement. The Association states that the Applicant's overall redevelopment "has resulted in the displacement of residents who resided at Brookland Manor previously, and will continue to result in the displacement of current Brookland Manor residents." (Ex. 195 at 2.) The Association's purported evidence of past and future displacement are each taken in turn below.

Evidence of Past Displacement

In support of its assertion of evidence of past displacement, the Association points to a Memorandum Opinion (the "Opinion"), filed on February 12, 2018 in an ongoing proceeding in the United States District Court for the District of Columbia.[2] The Opinion arises out of litigation filed on behalf of Brookland Manor residents, which litigation is in relation to the Applicant's proposed overall redevelopment of Brookland Manor and in which the Association alleges such redevelopment fails to further fair housing and has a discriminatory impact on families.

The Commission is not persuaded that the Opinion contains any new evidence, unavailable at the time of the Public Hearing, showing that the Second-Stage PUD that is the subject of the instant proceeding "has resulted in the displacement of residents who resided at Brookland Manor previously." Similarly, the Commission is not persuaded that the Association has provided any evidence that the specifically cited findings or conclusions in the Second-Stage Order are erroneous, for the following reasons.

- As the Applicant notes, the Opinion itself very clearly states that "Indeed, Ms. Borum [the plaintiff resident of Brookland Manor] does not point to a single individual who has been displaced due to the proposed redevelopment since [the Applicant] submitted their First Stage PUD to the [Commission]." (Ex. 196 at 2; Ex. 195 at Exhibit A at 10.) This

[2] *Borum v. Brentwood Village, LLC*, No. 16-1723 (RC) (D.D.C. 2018).

statement in the Opinion undercuts any claim by the Association that the Opinion contains evidence of any past displacement unknown at the time of the public hearing and post-hearing submissions.[3]

- The Association does not state with any specificity whether the ongoing federal District Court litigation is pertinent to the Second-Stage PUD, and the Association points to nothing in the Opinion that relates to the proceeding at hand. The factual information presented in the Motion—e.g., pertaining to "118 families (totaling 543 people) in three-, four-, and five-bedroom apartments at Brookland Manor", the composition of such families, and the 64 overall three-bedroom units approved under the first-stage PUD—whether individually or taken together lacks any reference or relevance to the instant Second-Stage PUD proceeding. The displacement claims alleged and the factual information presented in the Motion appear to pertain to the overall redevelopment of Brookland Manor, which claims and information was thoroughly addressed in the first-stage proceeding. The Commission is by regulation time-barred from revisiting claims relating to displacement arising out of the Commission's approval of the first-stage PUD unless expressly implicated in the proposed Second-Stage PUD. None of the purportedly new information implicates the Second-Stage PUD, and the Commission declines to now re-open the findings or conclusions in its November 2015 first-stage order related to unit mix or putative displacement impacts, which order was not appealed or challenged.

- Moreover, the Association points to factual information referenced in the Opinion, which information the Association notes is dated "as of January 2017." (Ex. 195 at 2.) This purportedly new evidence is dated one month prior to the February 2017 public hearing on the instant application. The Association makes no attempt to explain why it did not attempt to present the January 2017 information to the Commission the following month or in its multiple post-hearing submissions filed two and three months thereafter.

<u>Evidence of Future Displacement</u>

Similarly, the Commission does not find any evidence that the Second-Stage PUD "will continue to result in the displacement of current Brookland Manor residents." This issue was addressed thoroughly during the Second-Stage PUD proceedings and convincingly rebutted by the Applicant. The Commission notes that it thoroughly, and with concern about potential impacts on current residents, investigated the Association's claims that the Applicant's distribution of affordable units in the "senior building" (or "Building B" as defined in the Second-Stage Order) would somehow lead to the displacement or disruption of current Brookland Manor resident extended families on account of the Second-Stage PUD unit mix or other possible displacement impacts. (*See* Ex. 193 at FF ¶¶ 100-102.) The Commission requested post-hearing briefings on this topic specifically. (*Id.* ¶¶ 80, 81(n)-(t).) However, the Commission found that although there was initial confusion on this topic, it did not believe that any displacement of current Brookland

[3] Indeed, the Association's April 18, 2017 post-hearing statement raises allegations of evictions by the Applicant of residents of Brookland Manor. These allegations were before the Commission in its deliberations on the Second-Stage PUD application. (*See* Ex. 193 at FF ¶ 103.)

Manor residents would result from the Second-Stage PUD, finding in the alternative that any displacement that did occur would be acceptable in light of the public benefits.

Without revisiting its previous findings, the Commission notes that the subject Property is currently vacant, and upon completion of the development approved in the instant proceeding, "there will be 800 units on the entire property, a more than adequate amount of housing to accommodate current residents." (*Id.* ¶¶ 100(c), 110). The Association has presented no evidence, new or otherwise, suggesting that the amount of housing available on the overall property during or upon completion of the development of the project approved in the Second-Stage PUD will be insufficient to house the number of current residents.

Accordingly, after scrutinizing the Motion and the purportedly new information contained therein regarding past and future displacement of Brookland Manor residents, the Commission finds no reasonable basis for concluding that the Second-Stage Order is at all erroneous and finds no examples of new evidence that could not reasonably have been presented at the original hearing. The Commission declines to revisit the conclusions cited in the Motion.

<u>The Association's Motion – Discussion of Evidence Pertaining to Federal Fair Housing Act Violations</u>

In addition to allegations of new evidence regarding past and future displacement of current residents, the Association urges the Commission to reconsider the Second-Stage PUD in light of the federal Fair Housing Act ("FHA"). The Commission again declines.

<u>Federal Fair Housing Act</u>

The Association asks the Commission to reconsider its findings that it cannot consider FHA compliance when evaluating a PUD. The Commission takes notice of a recent holding of the District of Columbia Court of Appeals that in at least some instances the Commission may consider obligations set forth in federal law.[4] However, the Commission has determined that it does not have the capacity to adjudicate specific or even generalized FHA claims. A federal district court seems to have agreed with the Commission on this point.[5]

This does not mean that the Commission is powerless to consider the effects of its actions that implicate policy objectives governed by the FHA. Quite the contrary, the Commission has broad authority under the Zoning Regulations, its own Rules of Procedure and Practice, and the Comprehensive Plan to consider the effects of its actions on the "health, safety, and welfare" of District residents and other protected interests as urged by the Association. Similarly, the Commission can and does consider the impacts of projects with regard to the promotion of mixed-income housing, affordable housing production, housing for families, the protection of

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[4] *Barry Farm Tenants and Allies Assoc. v. Zoning Comm'n.*, No. 15-AA-1000 at 33-34 (D.C. Apr. 26, 2018) (holding that the Commission's conclusion that it did not have jurisdiction under the federal Uniform Relocation Act was erroneous and remanding for reconsideration of local policies addressing relocation).

[5] In a federal court order in the above-referenced civil litigation involving the Applicant and certain residents of Brookland Manor, the court noted that "there is no indication that the [Commission] could be considered a "competent" "court" for purposes of reviewing FHA claims." (Ex. 196 at Exhibit C at 20.)

existing affordable rental housing, and anti-displacement practices. Within the realm of District law and viewed through the lens of the Commission's unique expertise in land use regulation and zoning, the Commission's power overlaps with the aims of the FHA. Indeed, the Commission made specific findings on these several topics in the Second-Stage Order. (Ex. 193 at FF ¶¶ 70, 104(b).)

<u>District Human Rights Act ("HRA")</u>

The Association's urging to re-examine the Second-Stage PUD for compliance with the FHA is undercut by its own assertion that the FHA and the HRA "run directly parallel" to each other and that "the protections contained in [the HRA] mirror those of the [FHA] with respect to the prohibition against familial status discrimination." (Ex. 195 at 3.) The Commission points out that it has imposed a specific condition in the Second-Stage Order regarding the HRA:

> In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 *et seq.*, ("Act") the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, <u>*familial status, family responsibilities*</u>, matriculation, political affiliation, genetic information, disability, source of income, or <u>*place of residence*</u> or business. Sexual harassment is a form of sex discrimination, which is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

(Ex. 193 at Decision ¶ II.D.4.) (Emphasis added.) Accordingly, to the extent the Association believes the FHA and HRA "parallel" or "mirror" each other, such overlap is subject to an express condition of the Second-Stage Order.

<u>The Association's Allegations of Error</u>

In the Motion, the Association raises the following allegations of error on the part of the Commission:

- The Association implies that all 535 units in existence today at Brookland Manor are "deeply affordable units." (Ex. 195 at 3.) The Applicant has presented substantial evidence that only 373 of the existing units are income-restricted "affordable units." Some are occupied by management and others by market-rate tenants. The Applicant has acknowledged that there are in addition to those 373 affordable units, some units occupied by income-restricted residents through the use of vouchers. But such vouchers are personal to the residents and transferable from one property to another. As articulated in detail in the Second-Stage Order, the voucher-holder-occupied units and the 373 affordable units are not equivalent. Moreover, the overall amount and level of affordable housing in the RIA redevelopment was settled as part of the first-stage PUD. The overall affordable unit count issue is not timely or properly raised for the Commission now to reconsider.

- The Association argues that the Second-Stage PUD's provision of affordable housing "cannot be considered a public benefit." The Commission's procedures say precisely otherwise. (*See* 11-X DCMR §§ 305.2 and 305.5(g).) The Applicant is replacing the existing 373 affordable units with 373 new construction affordable units. An applicant as part of a generic PUD is under no obligation to provide affordable housing beyond what is required under the Zoning Regulations' inclusionary zoning requirements. (*See id.* § 305.11.) Affordable housing in excess of the requirement amount is by definition a public benefit and not a requirement of a PUD. The Commission declines to consider, as the Association advances, whether § 300.1 of Subtitle X imposes additional affordable housing requirements given the actual affordable housing proffered by the Applicant as part of the first-stage PUD and in the instant Second-Stage PUD. The Applicant's construction of 373 affordable units, given the level of affordability, is a public benefit because the Applicant is under no obligation otherwise to provide such units. The Second-Stage PUD's affordable housing contributes to and is in accordance with that public benefit.

- The Commission previously made findings on the Second-Stage PUD's protection of the public health, safety, welfare and convenience and declines to revisit them here seeing no evidence of error in such earlier findings. (*See, e.g.*, Ex. 193 at FF ¶¶ 70, 73.)

- The Association again raises the issue of the decision to eliminate all five-bedroom units at Brookland Manor. As noted above, that issue was squarely addressed in the first-stage proceeding, was not before the Commission in the instant proceeding, was not timely appealed or challenged, and the Commission is time-barred by regulation from reconsidering it here.

- The Association states, incorrectly, that "all four bedroom units" have been "eliminate[d]." (Ex. 195 at 3.) The first-stage PUD includes four-bedroom townhouse units. (Ex. 193 at FF ¶ 81(s).) Nonetheless, as with the five-bedroom units, this issue has been resolved for more than two years, was not timely appealed or challenged, and is not properly before the Commission now.

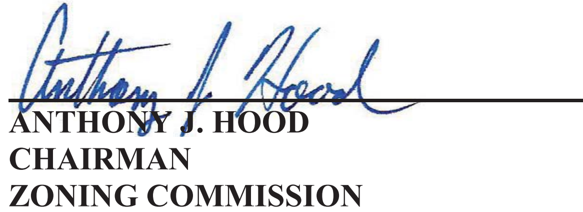
- The Association alleges, without elaboration, that the Commission has run afoul of the Housing Element of the Comprehensive Plan. The Commission considered these policies in detail, devoting three pages of the Second-Stage Order to its analysis of the Second-Stage PUD in light of the Housing Element. (Ex. 193 at FF ¶ 104(b).) The Commission has considered the Second-Stage PUD in light of the affordable housing, family housing, and displacement objectives of the Housing Element along with numerous other policy objectives of the Comprehensive Plan and determined that the Second-Stage PUD is not inconsistent with these objectives nor with the Comprehensive Plan as a whole. (*Id.*) The Commission sees no reason to reconsider this conclusion.

For the above-stated reasons, the Commission finds no new evidence not reasonably available at the time of the original public hearing on the instant application and no clear error in the Second-Stage PUD. Accordingly, the Motion is **DENIED**.

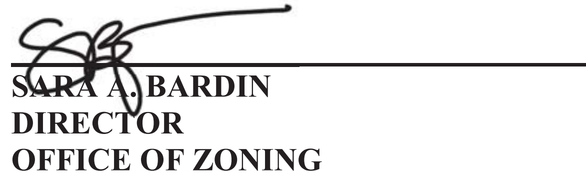
On April 30, 2018, upon the motion of Chairman Hood, as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **DENY** the Motion by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, and Michael G. Turnbull to approve; Peter G. May, not present, not voting).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on May 25, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION
A majority of the Commission members approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
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