

BEFORE THE DISTRICT OF COLUMBIA ZONING COMMISSION

CASE 17-17 -- ANC 8A

STATEMENT OF ADVISORY NEIGHBORHOOD COMMISSION 8A

IN SUPPORT OF ITS PETITION TO REZONE 1401 22nd Street SE

and

IN OPPOSITION TO OWNER'S REQUEST TO HEAR

THIS MATTER AS A CONTESTED CASE

1. Introduction

Advisory Neighborhood Commission 8A (ANC 8A) petitions to rezone 1401 22nd Street SE, Square 5564, Lot 0812, from PDR-1 (low-impact production, distributions and repair) to RA-2 (moderate density residential), as called for on the Future Land Use Map (FLUM). Property owner PAL DC Storage, LLC (PAL) opposes the petition and asks the Commission to convert the scheduled rulemaking hearing to a contested case proceeding. ANC 8A asks the Commission to deny PAL's request for a contested case and to rezone Lot 0812 to moderate-density residential.

2. Background

Lot 0812¹ is a half-acre, irregularly shaped, vacant lot in the Fairlawn neighborhood of Southeast Washington, DC, near the intersection of Pennsylvania and Minnesota avenues. See Fig. A, attached. It formerly housed an ornamental iron business, which ceased operating some years ago. See Fig. B, showing the vacant building before its demolition. For decades, the site has been surrounded by low-density residential uses, mostly single-family houses, a few almost 100 years old. A good deal of new housing has been built during the past decade and additional

¹ The property in question is designated as Lot 0812 on D.C. Zoning maps and as Lot 0066 in D.C. tax records and on an Office of Planning map.

housing is under construction within 2 to 3 blocks of the site. Lot 0812 is one block from Orr Elementary School; a new Orr school currently is under construction on the same site as the existing school. The properties immediately surrounding Lot 0812 are zoned RA-2 and designated moderate-density residential on the FLUM.

ANC 8A on September 27, 2017 submitted a petition to rezone Lot 0812 to RA-2 in order to bring it into conformity with the FLUM, with the adjacent zoning and with the reality of the surrounding built neighborhood. The D.C. Office of Planning filed a report supporting the request and the Commission voted at its October 16, 2017 meeting to set down the case for a hearing, which was scheduled for February 15, 2018. On February 6, PAL filed a request to postpone the hearing, stating that PAL first learned of the rezoning petition in January 2018 and that PAL wanted to meet with the community. The postponement was granted over ANC 8A's objections, which questioned the plausibility of PAL's claim of ignorance. An acrimonious meeting between PAL and the community took place on March 14, 2018.

The following day, PAL filed its request for a contested case, in which it contends that a such a proceeding is appropriate because it involves a single piece of property and a single owner. Apart from the untimeliness of the request, it is contrary to applicable precedents. On the merits of this matter, PAL argues that rezoning the property to residential is inconsistent with the Comprehensive Plan.

3. This case should be heard as a rulemaking proceeding.

a. *Judicial guidance.* The question of how the hearing should be conducted is properly guided by *Citizens Association of Georgetown, Inc. v. D.C. Zoning Commission*, 402 A.2d 36 (1979), in which the D.C. Court of Appeals held that "[t]o constitute illegal spot zoning, the Commission's action (1) must pertain to a single parcel or a limited area ordinarily for the benefit

of a particular property owner or specially interested party *and* (2) must be inconsistent with the city's comprehensive plan." 402 A.2d at 39-40 (emphasis added).² In this case, the rezoning is requested by an elected public body for the benefit of the entire Fairlawn community, especially those living in close proximity to the site. Second, the requesting rezoning will bring the zoning into conformity with the Comprehensive Plan. Neither prong of the spot zoning test is satisfied and the Commission may conduct this proceeding as a rulemaking, although it is not compelled to do so. See *Schneider v. D.C. Zoning Commission*, 383 A.2d 324, 325, 326 (1978) (eschewing a "bright line" test for determining which zoning procedure should be used in a given case). *Schneider* involved rezoning a number of Dupont Circle properties and was heard as a rulemaking.

PAL misconstrues the Court's analysis in another case it relies on, when it states that "the Court ... not[ed] that rulemaking cases are generally for 'administrative functions,' and that 'no hearing is expressly or implicitly required by any other law.'" PAL's Statement in Opposition at 4, quoting *Capitol Hill Restoration Society v. Zoning Commission*, 298 A.2d 101, 103-104 (1972). The Court said that no hearing is expressly required for inspections, tests and similar

² In *Citizens Association of Georgetown*, the Court upheld a map amendment that upzoned a one-owner parcel to allow expansion of a supermarket. The Court found that while the first element of the spot zoning test had been met -- the action benefited a particular property owner -- the second element failed in part because no comprehensive plan had been enacted. 402 A.2d at 40. In the absence of a comprehensive plan, the Court assessed the sufficiency of the Commission's fact-based determination that the upzoning was consistent with the character of the neighborhood.

administrative functions. *Id.* It is axiomatic that rulemaking cases require a hearing, albeit not a full-blow adjudicatory hearing.³

In a case such as this, where the Commission is asked to execute clearly stated policies that have been enacted in the Comprehensive Plan, the Commission may use rulemaking procedures without regard to the number of owners involved. The petitioner does not seek discretionary relief *from* the zoning regulations, such as occurs when a variance, special exception or planned unit development is requested. Those types of matters call for a contested case proceeding because the departure from strict applications of the regulations may result in adverse impact to identifiable individuals. Where the legislature, through enactment of the

³ The Court in Capitol Hill Restoration Society explained:

In the instant case, the Commission argues that zoning is a legislative function.... " Thus, we must determine whether the particular proceeding in the instant case was a "contested case" within the meaning of the APA. A "contested case" is defined in [the] D.C.Code ... as: [A] proceeding before the Commissioner, the Council, or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this Chapter), or by constitutional right, to be determined after a hearing before the Commissioner or the Council or before an agency. . . .

The following statement appears in the House Report:

The definition of "contested case" has been drafted so as to exclude administrative functions traditionally nonsusceptible to application of the process of adjudication, such as inspections, tests, elections, etc., and where generally no hearing is expressly or implicitly required by any other law.

298 A.2d at 103-04.

Comprehensive Plan and FLUM, mandates a change in use, the legislature permissibly exercises its authority to reallocate rights and expectations of property owners. Bluntly, the D.C. City Council creates "winners and losers." When the Commission acts within the letter of the Plan and the FLUM, as it is asked to do here, it may act through a rulemaking irrespective of the number of owners involved because the Council has enacted into law foreseeable adverse impacts.

b. PAL, Inc.'s request is untimely and prejudicial to ANC 8A. Apart from legal authority militating in favor of a rulemaking hearing, PAL, Inc.'s request should be denied as untimely. This case originally was scheduled to be heard on February 15. PAL sought a postponement, stating its desire to meet with the community, although PAL had had ample opportunity to seek a meeting and had not done so. Over ANC 8A's vigorous objection, the Commission ordered a postponement. PAL made no attempt to reach out to the community for at least two weeks. Shortly before a scheduled ANC meeting, PAL contacted Commissioner Holly Muhammad, ANC 8A01, and demanded to be included on the agenda, PAL was informed that the agenda had been set and notices had gone out. A hastily scheduled meeting was convened on March 14, which required re-flyering the neighborhood. The meeting was attended by the owner's representative, its attorney, its newly retained traffic consultant and its project manager. After insisting on meeting with the community, PAL had nothing to say. The owner's representative was silent. The traffic consultant attempted to show that continuing the PDR use would result in less traffic than a residential use.

Throughout the meeting PAL's attorney insisted that its building permits are vested, that it will proceed with plans for a five-story self-storage building, and that there is nothing the community can do about it. Near the end of the meeting, PAL announced its view that the

rezoning is inconsistent with the Comprehensive Plan. The following day it filed its request for a contested case proceeding.

It is apparent that PAL sought the postponement solely in order to buy time to prepare for a contested case and then to spring it on the petitioner at the last minute. ANC 8A was prepared for a rulemaking case. If the Zoning Commission decides to hear this matter as a contested case, then ANC 8A must be afforded an opportunity to retain experts and to expand its presentation. In such an event, ANC 8A also will ask the Commission to order preparation of a shadow study. ANC 8A will insist on presenting its expanded case at a public hearing, as PAL, Inc. will have had the opportunity to do.⁰

Based on the law and the equities of the circumstances, PAL's request for a contested case proceeding must be denied.

4. The Comprehensive Plan Requires Rezoning Lot 0812 to residential.

The Office of Planning Report contains a thorough analysis of the Comprehensive Plan policies mandating rezoning of this area to residential. ANC 8A concurs with and adopts the Office's analysis of the Plan. We reiterate the principal provisions, contained in the Far Northeast/Southeast Area Element, which are:

FNS-1.1.1: *Conserving of Low Density Neighborhoods*: Recognize the value and importance of Far Northeast and Southeast's stable single family neighborhoods to the character of the local community and to the entire District of Columbia. Ensure that the Comprehensive Plan and zoning designations for these neighborhoods reflect and protect the existing low-density land use pattern while allowing for infill development that is compatible with neighborhood character. 10-A DCMR 1708.2

FNS-1.1.7: *Row House Neighborhoods In the Fairlawn and Twining neighborhoods.* Encourage infill housing constructed in the architectural style and materials compatible with the brick row houses and semi-detached homes that predominate in these areas. New development in these neighborhoods should be consistent with prevailing densities. 10-A DCMR 1708.8

FNS-1.2.2: *Connecting to the River* Link the neighborhoods of Far Northeast and Southeast to the Anacostia River through trail, path, transit, and road improvements. Provide new amenities and facilities in the waterfront parks that meet the needs of Far Northeast and Southeast residents. 10-A DCMR 1709.2

In addition to these substantive relevant policies in the FNS Element, petitioner draws the Commission's attention to procedural guidance in the Implementation Element, which expressly call for rezoning property where an outdated zoning classification is in conflict with policies in the Comprehensive Plan and maps. ANC 8A notes in particular:

IM-1.3.2: *Zone Map Consistency:* Regularly review and update the District's land use controls and building codes to eliminate obsolete regulations and develop new regulations that address emerging issues, land uses, building types, and technologies. 10-A DCMR 2504.3.

IM-1.3.4: Consistent with the Home Rule Charter, ensure that the Zone Map is not inconsistent with the Comprehensive Plan Future Land Use Map. Make appropriate revisions to the Zone Map to improve its alignment with the Future Land Use Map and to eliminate clear inconsistencies. 10-A DCMR 2504.4.

Lot 0812 should have been rezoned several years ago, certainly no later than the last amendment cycle to the Comprehensive Plan.

5. The land use policies relied on by PAL, Inc. do not support its bid to maintain the existing zoning.

The Comprehensive Plan acknowledges the District's shrinking pool of industrial land and contains policies to conserve it under certain conditions, i.e., “in areas that are well buffered from residential uses (and other sensitive uses such as schools), easily accessed from major roads and railroads, and characterized by existing concentrations of PDR and industrial uses.” LU-3.1.3, 10A DCMR 314.9. Although PAL asserts that this policy applies to its site, nothing could be further from the truth. Lot 0812 is surrounded on three sides by residentially zoned properties; it immediately abuts a single family house on the south; on the west, it is separated by an alley from tightly configured single-family homes. The alley is used as a playground by neighborhood youth. Orr Elementary School is one block away.

Because of narrow, one-way streets and irregular street grids, the site is not easily accessed. Persons coming from Pennsylvania Avenue, the principal nearby thoroughfare, must:

turn right onto Fairlawn Avenue

turn right onto 22nd Street, a narrow street lined with single-family homes;

make a sharply acute right-turn onto (narrow) Young Street, by Orr Elementary School;

turn right again into an alley;

follow the alley to the site entrance.

A more relevant Land Use Element policy is LU-3.1.4: Rezoning of Industrial Areas, which provides:

Allow the rezoning of industrial land for non-industrial purposes only when the land can no longer viably support industrial or PDR activities or is located such that industry cannot co-exist adequately with adjacent existing uses. Examples include land in the immediate vicinity of Metrorail stations, sites within historic districts, *and small sites in the midst of stable residential neighborhoods*. In the event such rezoning results in the displacement of active uses, assist these uses in relocating to designated PDR areas.

10-A DCMR 314.10 (emphasis added). That is precisely what the Plan provides for this site.

Moreover, it is open to question whether any industrial use on the site will be able to comply with the transitional setback and buffering regulations in Subtitle J of the Zoning Code, especially J 207.2(b)

The following required setbacks shall be provided on a lot in a PDR zone subject to the following conditions: a) A twenty-five foot (25 ft.) setback shall be provided from each lot line that is directly abutting a lot in a residential zone or developed with a residential use; (b) A twenty-five foot (25 ft.) setback shall be provided from each lot line that is abutting an alley that serves as the zone boundary line between a PDR zone and a residential zone. The depth of setback shall be measured from property line of the PDR-zoned lot;

Although PAL, Inc. notes that "[t]here is a public alley to the west of the Property that provides a buffer with residences along Fairlawn Avenue," PAL Statement at 11, the zoning regulations are more stringent, requiring, in addition to the 25-foot setback noted above, an opaque wood or stone barrier fronted by extensive landscaping. Subtitle J 207.3 - 207.6.

Even the industrial land study upon which PAL, Inc. places so much emphasis does not help its argument because it recommends discontinuing PDR zoning on the site in Fairlawn because of the proximity of residential uses.⁴ Below is an excerpt from page 153 of the study, which is in the record at Tab A to PAL's Statement.

Sub-Area	Total Acres	PDR Opportunities	PDR Constraints	Suitable for Continued PDR Use?	If Yes, Private or Public Use?	Recommendation	Policy Map & Area Number
CSX2 – Anacostia Fairlawn	75.86	<ul style="list-style-type: none"> • Good railroad and highway access 	<ul style="list-style-type: none"> • Long, linear, narrow – absence of deep lots • Almost all CSX/I-295 right of way – very limited buildable area 	<ul style="list-style-type: none"> • No 		<ul style="list-style-type: none"> • Consider land use change to mixed-use – allow existing PDR users to remain in place 	<ul style="list-style-type: none"> • Map 4.4 Area 13

This is a study, begun in 2005 and completed in 2007, that examines a number of industrial parcels throughout the District, including one labeled CSX-2/Anacostia Fairlawn.

PAL declares that CSX-2 parcel includes Lot 0812, although the maps referred to in the study that would provide certainty on this point are not provided. Assuming for the sake of argument that Lot 0812 does in fact lie within CSX-2, petitioner asks the Commission to find persuasive the study's determination that PDR uses are no longer suitable there. Though the study suggested allowing *existing* PDR uses to remain in place, industrial activity on Lot 0812 ceased before the study was written. The study recommended rezoning CSX-2 to mixed-use; the Council rejected that recommendation, at least as far as Lot 0812 is concerned, when it amended the Comprehensive Plan *after* the industrial lands study was issued and designated Lot 0812 as

⁴ INDUSTRIAL LAND IN A POST-INDUSTRIAL CITY District of Columbia Industrial Land Use Study: A Detailed Investigation of Industrial Land in the District of Columbia and role of Production, Distribution and Repair Industries in the District Economy.

residential. The study was used in drafting Plan amendments. See LU-3.1, 10-A DCMR 3,1,4 ("The recommendations of this study are incorporated in the policies and actions below."). The study's recommendations have been subsumed in the Plan and it has limited independent vitality. The Ward 5 industrial land study submitted by PAL is irrelevant because it addresses facts and circumstances peculiar to another quadrant of the city.

6. PAL assumed any risk of economic injury.

PAL's claims concerning economic hardship it will encounter if the rezoning is approved are misplaced in a rulemaking proceeding. If the Commission converts this to a contested case, ANC 8A intends to present countervailing evidence to PAL's highly speculative claims of potential loss.

More important, PAL assumed the risk of downzoning when it bought the property. PAL contends it was surprised by the rezoning petition and by the presence of any neighborhood opposition. However, the community intent to seek rezoning has been under discussion since at least 2016. It was raised on the public record in proceedings before the Public Space Committee (DDOT Tracking No. 202701) in a letter from the Fairlawn Citizens Association dated May 24, 2016 and in an ANC resolution dated June 6, 2016. The ANC initially approached the Office of Planning requesting an emergency change of zoning on March 9, 2017. The zoning changed was under discussion in the public arena long before the ANC's formal request was filed in September 2017.

PAL knew or should have known long before January 2018 about the community's pursuit of rezoning. It states that it bought the property in August 2017,⁵ at which point it acquired the owner's duty of due diligence. The property proposed to be rezoned changed hands

⁵According to DC tax records, PAL paid \$4.3 million for the property.

more than once during the past two years before being acquired by PAL. ANC 8A is not in a position to know if changes in the owner of record reflected changes in the real party in interest or whether there was privity between parties to the various transactions. However, ANC8A has dealt with one individual who purported to be or to represent the owner before and after PAL's acquisition date. If there was privity between Palatine and prior owners, PAL should have known about the rezoning through them; and if PAL was an arms-length purchaser, its seller should have disclosed the material fact of the community's pursuit of rezoning. Notice of the rezoning was published in the December 8, 2017 issue of the D.C. Register and the property was duly posted. Finally, a cursory look at the FLUM and the Comprehensive Plan would have put PAL on notice that rezoning could happen at any time.

Until PAL builds its anticipated storage facility, any losses arising from its operation are a matter of speculation. The provisions of the Comprehensive Plan are existent, concrete and specific, and should be executed.

Conclusion

For all of the foregoing reasons, petitioner ANC 8A asks the Commission to grant its petition to rezone Lot 0812 and to deny PAL's request for a contested hearing.

Submitted,



Laura M. Richards

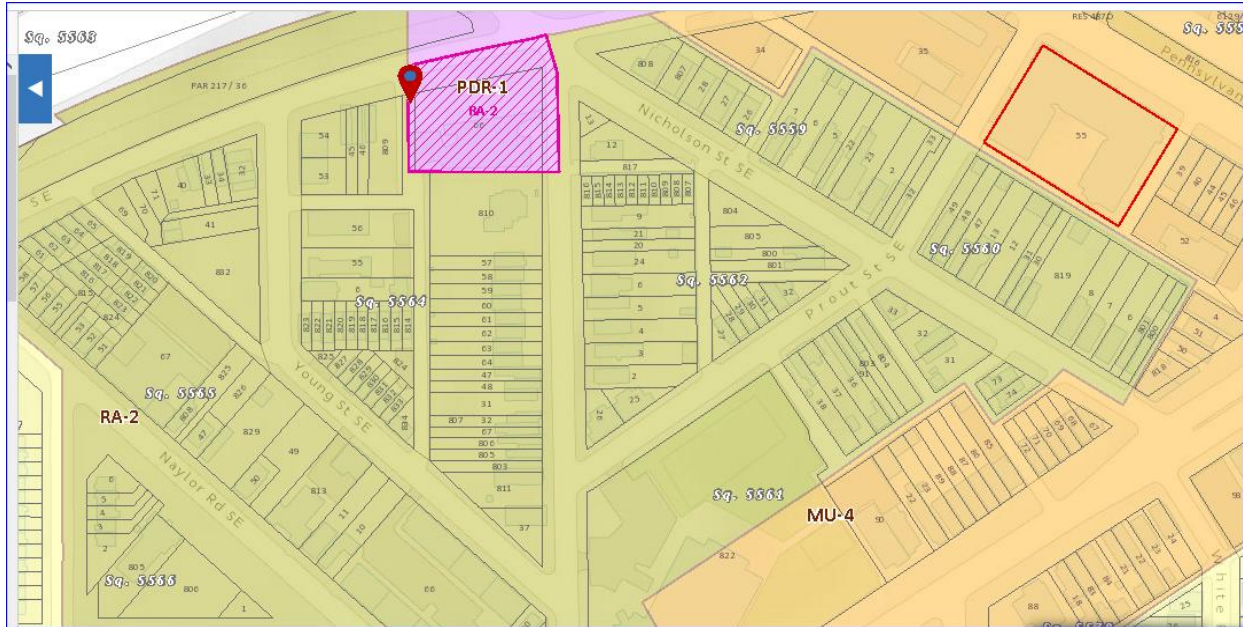
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Figure A. Excerpt from DC Zoning Map



5564 0812 08/19/2004

Figure B. The vacant wrong iron business building before its demolition.