DISTRICT OF COLUMBIA COURT OF APPEALS

DC Library Renaissance Project/ West End Library Advisory Group,	)	
Petitioner,	)	
v.	)	No. 12-AA-1183
	)	**Oral Argument Held February 14, 2013**
District of Columbia Zoning Commission,	)	
Respondent,	)	
and	)	
EastBanc-W.D.C. Partners, LLC,	)	
Intervenor.	)	

PETITION FOR REHEARING EN BANC

Pursuant to D.C. App. R. 35, Petitioner DC Library Renaissance Project/West End Library Advisory Group ("DCLRP") respectfully petitions the Court for rehearing en banc of the Panel Opinion entered on August 8, 2013. Rehearing en banc is warranted due to the exceptional importance of two questions raised in this case. Specifically:

1. In evaluating an application for a Planned Unit Development ("PUD"), may the Zoning Commission disregard the value that taxpayers pay for "public benefits" the applicant offers in support of the PUD, on the ground that such value is "irrelevant" to its analysis?

2. May the Commission waive the mandatory requirements imposed by the District's Inclusionary Zoning ("IZ") regulations, despite a PUD applicant's undisputed failure to qualify for a waiver under the express terms of the regulations, on the ground that dicta from a Commission order authorizes it to abrogate those terms?

The Panel answered both of these questions in the affirmative. DCLRP respectfully submits that this was error, which the Court should correct, because each question raises a matter of first impression, the resolution of which will establish precedent that governs all future cases involving so-called "public-private partnerships" for the development of taxpayer-owned property in the District. The decision in this case will also determine whether the District's new

IZ regulations are in fact mandatory, as their express terms unambiguously command, or whether the regulations may be waived in any future case, without regard for their substantive standards.

ARGUMENT

I. Rehearing Should Be Granted to Correct the Panel's Error in Affirming the Commission's Conclusion That the Value Taxpayers Contribute to a PUD Is "Irrelevant" to Its Analysis Under Section 2403.8.

This appeal arises from an order of the Commission approving an application for a PUD submitted by EastBanc-W.D.C. Partners, LLC ("EastBanc"). The PUD process, this Court has explained:

> is designed to give a developer greater flexibility in planning and design than may be possible under conventional zoning procedures, on condition that the developer provide present or future occupants of planned unit developments with a living or working environment and amenities superior to those that could be achieved under existing zoning. A P.U.D. applicant generally requests that a site be rezoned to allow more intensive development, in exchange for which the applicant offers to provide amenities or public benefits which would not be provided if the site were developed under matter-of-right zoning.

Blagden Alley Assoc. v. D.C. Zoning Comm'n., 590 A.2d 139, 140 n.2 (1991). Prior to approving a PUD, the Commission must "judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case." 11 DCMR § 2403.8.

Under the specific circumstances of this case, the District is to convey public property worth $30 million to EastBanc, free of charge, in exchange for EastBanc's agreement to include a new public library and fire station in its PUD. In its order approving the PUD, however, the Commission disregarded this $30 million in value, concluding it "is of no relevance" to the analysis the Commission was required to perform under Section 2403.8. JA 33. The Panel

affirmed, reasoning that the Commission properly declined to "second guess the calculations that led the District … to conclude this was a good deal," Op. at 28 (quoting Order at 33), and that the Commission "acted reasonably in interpreting its own regulation to permit it to decline to look behind that land transfer." Op. at 29. This was error.

Contrary to the Panel's conclusion, DCLRP has never suggested that the Commission was obligated to "second guess" the terms by which the District agreed to transfer its property to EastBanc. Rather, the issue is only whether the Commission erred by concluding that such value is "of no relevance" to the Commission's analysis under Section 2403.8. JA 33. The value of the property is relevant if only because that value is not a "public benefit" the proposed PUD will generate. *See* 11 DCMR § 2403.6 (defining public benefits as "superior features of a proposed PUD" that benefit the community "to a significantly greater extent" than the property in its "matter-of-right" condition). To ascertain the value of the proposed PUD's public benefits, therefore, the Commission was required to distinguish the value of the property in its "as is" condition, which is $30 million. JA 225. Thus, DCLRP does not seek to have the Court "look behind [the] land transfer," as the Panel suggests, but only to correct the Commission's error in completely disregarding a piece of evidence critical to its analysis under 11 DCMR § 2403.8 – that the value of the property in its "as is" condition is not value EastBanc's proposed PUD will generate.

The Panel declined to reach this issue, apparently reasoning that DCLRP waived it, by addressing the value that taxpayers contribute to the PUD only as an "adverse effect" for purposes of Section 2403.8. Op. at 29-30. As the Panel concedes, however, DCLRP argued "more broadly" that the Commission did not provide adequate analysis to support its findings

that the benefits of the PUD outweighed its adverse effects, and that the Commission did not establish a rational connection between the facts found and the choice made. Op. at 30-31 n.8 (citation omitted). The Panel nonetheless declined to address the issue further, reasoning that such findings are reviewed "deferentially". *Id.*

Even under the most deferential standard, however, the Commission's conclusion suffers from a glaring error. Specifically, EastBanc's own asserted costs for providing the library and fire station amount to only $21 million. JA 290-93. The appraised value of the property, however, is $30 million. JA 225. The Commission nevertheless concluded that the value of the public benefits justified approval of the PUD. At a minimum, in weighing the "relative value" of the proffered public benefits, the Commission ought to address a deficit of $9 million. Rehearing therefore should be granted, to correct the Panel's error in allowing the Commission to disregard evidence crucial to its analysis under Section 2403.8.

II. Rehearing Should Be Granted to Correct the Panel's Error in Affirming the Commission's Waiver of the IZ Regulations.

The District's newly-enacted IZ regulations are intended to promote "the production of affordable housing units throughout the District," by establishing the "minimum obligations" of property owners who request building permits for qualifying developments. 11 DCMR §§ 2600.1, 2600.3. In general, the regulations apply to new developments of 10 dwelling units or more, and require that such developments devote a certain percentage of floor space to affordable units. *See* 11 DCMR §§ 2602.1, 2603. The regulations are mandatory: they "shall apply" to qualifying developments. 11 DCMR § 2602.1. Further, the regulations provide only one basis for relief: an applicant must show the Board of Zoning Adjustment ("BZA") that compliance "would deny the applicant economically viable use of its land." 11 DCMR § 2606.1. Finally, the

regulations expressly state that "no application for a variance … may be granted" unless the BZA first denies such relief. 11 DCMR § 2606.2.

In this case, it is undisputed that the IZ regulations apply to the PUD, and that they require the inclusion of approximately 14 affordable units. JA 29. It is also undisputed that EastBanc did not make, or even attempt to make, the showing necessary to obtain relief from this requirement pursuant to Section 2606.1. Thus, the BZA neither granted nor denied such relief. The Commission nevertheless granted EastBanc's request for a waiver from the IZ requirements, in direct violation of the express prohibition set forth in Section 2606.2. JA 29.

The Commission's purported basis for granting the waiver was certain dicta contained in its order adopting the IZ regulations. JA 29-30. According to the Commission, the PUD process may "be used to permit a partial or full exemption from IZ, but only if 'the number and quality of commendable public benefits proffered would clearly have to exceed those that would ordinarily suffice to gain PUD approval.'" JA 29-30 (quoting Z.C. Order 04-33 at 7). The Panel affirmed, concluding that the Commission "reasonably interpreted the applicable statutory and regulatory provisions." Op. at 31-38. This was error.

As an initial matter, the Commission's partial quotation of Order 04-33 misconstrues its plain meaning. The order actually provides, in relevant part, as follows:

> As to planned unit developments, the Commission reaffirmed its earlier decision that a property subject to the Inclusionary Zoning program should not be automatically exempted because its construction was approved as a planned unit development under Chapter 24. The goal of the planned unit development process is to "permit flexibility of development and other incentives … provided, that the project offers a commendable number or quality of public benefits and that it protects and advances the public health, safety, welfare, and convenience" (24 DCMR § 2400.2). The Commission concluded that partial or full relief from the IZ requirements was a type of flexibility that could be granted through a PUD, but that the "number and quality of commendable public benefits" proffered would clearly have to exceed those that would ordinarily suffice to

gain PUD approval.

Z.C. Order 04-33 at 7 (emphasis added). As the emphasized language demonstrates, the intent of the above-quoted passage is to reject the assertion that every PUD should be "automatically exempted" from the IZ requirements, while merely acknowledging that "partial or full relief" is one "type of flexibility that could be granted" through the PUD process. *Id.* Thus, by relying on the latter portion alone, which it quotes out of context, the Commission inverts the plain meaning of the passage.

Even if the Commission had not misconstrued Order 04-33, the dicta on which it relies cannot abrogate the express terms of the IZ regulations. *See Mulky v. United States*, 451 A. 2d 855, 856 (D.C. 1982) ("If the statutory language is clear, it is ordinarily conclusive") (citation omitted). Yet that is what the Commission purports to do in this case. The IZ regulations provide one basis for waiver, and one basis only. *See* 11 DCMR §§ 2606.1, 2606.2. According to the Commission, however, the above-quoted dicta establishes a new "standard," JA 30, pursuant to which a PUD applicant may obtain a waiver without making the showing required by Section 2606.1. But nothing in the foregoing dicta, or elsewhere in Order 04-33, indicates an intention to repeal or otherwise limit Section 2606.1 and Section 2606.2. The Commission's conclusion to the contrary therefore should be rejected, because it "conflicts with the plain meaning" of the IZ regulations. *See Smith v. Dept. of Employment Services*, 548 A. 2d 95, 97 (D.C. 1988); *cf. Davis v. Moore*, 772 A. 2d 204, 211 ("we adhere strongly to the canon of statutory construction that repeals by implication are disfavored") (citation omitted).

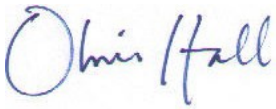
In affirming the Commission despite its clear violation of Section 2606.1 and Section 2606.2, the Panel misstated the issue to be decided. "There is no indication in the PUD

regulations that relief can be granted only with respect to certain zoning requirements," the Panel reasoned, "nor do the IZ regulations indicate that they should be treated differently in the PUD process from any other zoning requirement." Op. at 32. The issue is not whether IZ relief may be granted through the PUD process, however – clearly, it can. *See* ZC Order 04-33 at 7. The issue is what standard the Commission must apply to determine whether such relief should be granted with respect to any particular PUD. That issue must be resolved not by reference to dicta from Order 04-33, but rather based on the regulatory provisions that expressly state the conditions under which a waiver may be granted. *See* 11 DCMR §§ 2606.1, 2606.2.

The Panel acknowledged DCLRP's contention that Section 2606.1 establishes the standard governing waiver of the IZ requirements, Op. at 31, but otherwise failed to address that provision. In doing so, the Panel disregarded the Commission's error in granting a waiver in this case, and in purporting to establish a new standard for waiver of IZ requirements in PUD cases generally. The Court should grant rehearing to correct these errors.

Dated: August 22, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2013, I served a copy of the foregoing Petition for Rehearing En Banc by First Class mail, or a manner at least as expeditious, upon the following:

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