ZONING — JUDICIAL REVIEW OF ZONING — D.C. COURT OF APPEALS DETERMINES A NEW DEVELOPMENT IS INCONSISTENT WITH CITY'S COMPREHENSIVE PLAN. — *Durant v. District of Columbia Zoning Commission*, 139 A.3d 880 (D.C. 2016).

Municipalities are often required to zone "in accordance with a comprehensive plan"[1] — and Washington, D.C., is no exception.[2] Courts, when asked to weigh in on zoning matters, are often reluctant to overturn a city's zoning decisions for inconsistency with the comprehensive plan.[3] Recently, in *Durant v. District of Columbia Zoning Commission*[4] (*Durant III*), the D.C. Court of Appeals apparently rejected this deferential approach and set aside the Zoning Commission's decision to approve a proposed development.[5] The court's holding in *Durant III* has received sharp criticism from the District's development community, which has warned of the potential chilling effect this case could have on future construction.[6] However, this reaction reflects an unnecessarily cynical view. Here the court found the Commission's logic deeply flawed. Understood as an outlier rather than a change in the relevant standard of review, this decision should have little impact on most future cases and can serve as both a guide to future litigants in D.C. on how best to approach comprehensive plan interpretation and a case study for others interested in the role the judiciary plays in local land use decisions.

Created in 1984, the D.C. Comprehensive Plan (the Plan) establishes "a broad framework intended to guide the future land use planning

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[1] Charles M. Haar, *"In Accordance with a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1156 (1955) (quoting ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (1926)); *see also id.* at 1155–56 (tracing the history of the statutory basis for comprehensive plans to model legislation written by the Department of Commerce in the 1920s).

[2] *See* D.C. CODE § 6-641.02 (2016); *see also* Durant v. D.C. Zoning Comm'n (*Durant I*), 65 A.3d 1161, 1166 (D.C. 2013) ("The Zoning Commission has . . . the principal responsibility for assuring that . . . regulations are not inconsistent with the Comprehensive Plan.").

[3] *See* Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449, 461–62 (describing how "quasi-judicial" land use determinations are granted judicial deference within the confines of some legislative policies like a zoning code or comprehensive plan).

[4] 139 A.3d 880 (D.C. 2016).

[5] *See id.* at 881.

[6] *See, e.g.*, David Alpert, *A Court Ruling on a Brookland Development Could Imperil Future Housing near Metro Stations*, GREATER GREATER WASH. (June 2, 2016), http://greatergreaterwashington.org/post/31000/acourtrulingonabrooklanddevelopmentcouldimperilfuturehousingnearmetrostations [https://perma.cc/7LLC-BRQP] (arguing that the decision could give development opponents "new ammunition" in the fight against new construction in their neighborhoods).

decisions for the District."[7] The Plan contains several subcomponents, including the Future Land Use Map (FLUM), which spatially depicts the policies outlined in the Plan's written component — categorizing parcels of land as low, moderate, medium, or high density.[8] Although the FLUM is often referenced separately, it is nonetheless part of the Plan and "carries the same legal weight as the Plan document itself."[9]

In November 2010, 901 Monroe Street, LLC (the Applicant), sought approval from the D.C. Zoning Commission for a new, six-story planned unit development (PUD) on a parcel of land in the city's Brookland neighborhood.[10] The proposed building had a maximum height of approximately sixty feet and a floor-area ratio (FAR) of 3.31.[11] The Commission held public hearings on the proposed development throughout early 2012.[12] During these hearings, a group of neighboring residents (the Petitioners) objected to the development.[13] They argued, in part, that the proposal was inconsistent with the Plan and the associated FLUM.[14] Despite the neighbors' opposition, the Commission approved the proposed PUD, noting support from other neighborhood groups as well as the D.C. Office of Planning.[15]

The Petitioners appealed. On May 16, 2013, the D.C. Court of Appeals remanded the case to the Commission for "supplemental findings."[16] The court stated that, "notwithstanding its overall careful evaluation of the proposal,"[17] the Commission had not appropriately considered the Petitioners' claim — namely, whether the development conflicted with the Plan's stated goals for the neighborhood.[18] On remand, the Commission reexamined the proposed development and, in

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[7] Wis.–Newark Neighborhood Coal. v. D.C. Zoning Comm'n, 33 A.3d 382, 394 (D.C. 2011) (quoting Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment, 550 A.2d 331, 337 (D.C. 1988)); *see also Tenley & Cleveland Park*, 550 A.2d at 336.

[8] *Durant III*, 139 A.3d at 882.

[9] D.C. MUN. REGS. tit. 10-A, § 225.1 (2016).

[10] *Durant I*, 65 A.3d 1161, 1162–64 (D.C. 2013). The PUD zoning process is "designed to facilitate the development of well-planned residential, institutional, commercial, and mixed-use developments, industrial parks, urban renewal and community development projects, or a combination of those developments and projects in any or several zoning districts." 1330 Conn. Ave., Inc. v. D.C. Zoning Comm'n, 669 A.2d 708, 709 n.1 (D.C. 1995) (quoting D.C. MUN. REGS. tit. 11, § 2400.1 (1994)).

[11] *Durant I*, 65 A.3d at 1164. FAR is a measure of building density and "is determined by dividing the gross floor area of all buildings on a lot by the area of that lot." Foggy Bottom Ass'n v. D.C. Zoning Comm'n, 979 A.2d 1160, 1168 n.12 (D.C. 2009) (quoting D.C. MUN. REGS. tit. 11, § 199.1 (2003)). At its most permissive, the Plan only allowed for a FAR of 3.15 for this parcel of land. *See Durant III*, 139 A.3d at 884.

[12] *Durant I*, 65 A.3d at 1165.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1164–65.

[16] *Id.* at 1171.

[17] *Id.*

[18] *Id.* at 1169–71.

July 2013, reapproved the application.[19] The Petitioners appealed yet again, and the court vacated the Commission's decision, once more remanding for the Commission to address whether the proposed PUD should be considered a medium-density[20] or moderate-density[21] use.[22] On February 26, 2015, the Commission once again heard arguments on the proposed development.[23] Arguing that the development was "properly characterized as 'moderate-density'" and citing the "special care" that was taken to preserve the neighborhood's low-scale residences, the Commission voted to approve the PUD a final time.[24] Again, the Petitioners appealed.[25]

The D.C. Court of Appeals set aside the Commission's order. Writing for a three-member panel, Judge McLeese[26] began by establishing that, although the court is normally deferential to agencies with subject matter expertise, it reserved the right to overturn the Commission's action.[27] In this instance, the court determined that despite having several opportunities to provide further explanation, the Commission's rationale for approving the development was still deficient in multiple respects.[28]

First, Judge McLeese took issue with the Commission's unwillingness to engage with the precise language used in the Plan and the associated FLUM.[29] For example, the Plan characterized mid-rise buildings between four and seven stories as "generally consistent" with the medium-density land use categorization — not the moderate-density category that the FLUM proposed for this parcel of land.[30] According to the court, little in the Commission's order addressed the distinction

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19 Durant v. D.C. Zoning Comm'n (*Durant II*), 99 A.3d 253, 256 (D.C. 2014).

20 "Medium-density residential areas are 'neighborhoods or areas where mid-rise (4–7 stor[y]) apartment buildings are the predominant use.'" *Durant III*, 139 A.3d at 883 (alteration in original) (quoting D.C. MUN. REGS. tit. 10-A, § 225.5 (2016)).

21 "Moderate-density residential areas are generally 'characterized by a mix of single family homes, 2–4 unit buildings, row houses, and low-rise apartment buildings.'" *Id.* (quoting D.C. MUN. REGS. tit. 10-A, § 225.4 (2016)).

22 *Durant II*, 99 A.3d at 261. Additionally, the court mentioned two other factors that influenced its decision to remand the case to the Commission. First, the court expressed concern that the Commission's order approving the development was "an approximately 99.9% verbatim adoption of the developer's proposed order." *Id.* at 257. Second, the court noted that the Commission had not given sufficient explanation regarding how the development was consistent with one of the Plan's neighborhood-specific policies that compelled the city to exercise "special care" in protecting the low-scale residences along Brookland's 10th Street. *Id.* at 261.

23 Brief of Petitioners at 3, *Durant III*, 139 A.3d 880 (No. 15-AA-979).

24 *Id.* at 14.

25 *Id.* at 3.

26 Judge McLeese was joined by Judges Steadman and Glickman.

27 *Durant III*, 139 A.3d at 882–83.

28 *See id.* at 883–84.

29 *See id.*

30 *Id.* at 883 (citing D.C. MUN. REGS. tit. 10-A, §§ 225.4–225.5 (2016)).

between these definitions or explained why the medium-density category did not best fit the proposed development, which would have six stories.[31]

Second, Judge McLeese criticized the Commission's attempt to justify its decision on visual, rather than structural, grounds.[32] The Commission's order argued that despite its medium-density size, the building would better resemble moderate-density developments due to several of its architectural features.[33] Judge McLeese, however, disagreed with this reasoning, arguing instead that a building's FLUM categorization turned on objective physical characteristics like the structure's total height, number of stories, or density — not how it would *appear* to an external observer.[34]

Finally, Judge McLeese pushed back against the Commission's heavy reliance on the Plan's language stating that, within the moderate-density residential category, buildings of up to sixty-three feet and with FARs of up to 3.15 might, at times, be permitted.[35] According to the Commission, this language illustrated that buildings with a size and density similar to the proposed PUD were sometimes permissible in the Plan's moderate-density areas.[36] Judge McLeese again disagreed. Using the Commission's own words, he pointed out that the Plan and FLUM "describe neighborhoods, not buildings."[37] The fact that moderate-density neighborhoods may allow the occasional large building did not mean that those buildings were, by definition, moderate density.[38]

Judge McLeese acknowledged that the court would traditionally remand the case to the Commission and ask if the proposed development, as a *medium-density* building, met the standards for consistency with the Plan.[39] However, given that both parties opposed a third remand, the court instead chose to set aside the Commission's decision approving the building,[40] likely ending any hopes the Applicant had for moving forward with the development.

It is tempting to view the decision in *Durant III* as a shift in the level of deference granted to the Commission on questions regarding the Plan. After all, excluding the *Durant* cases, over the last twenty-

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[31] *Id.* at 883–84.

[32] *Id.* at 884.

[33] *Id.*

[34] *Id.*

[35] *See id.*; *see also* 901 Monroe St., LLC, Order No. 10-28(3), slip op. at 5 (D.C. Zoning Comm'n June 29, 2015) (citing D.C. MUN. REGS. tit. 11, § 2405.3 (2015)).

[36] *901 Monroe St.*, slip op. at 5.

[37] *Durant III*, 139 A.3d at 884 (quoting *901 Monroe St.*, slip op. at 6).

[38] *Id.*

[39] *Id.* at 884–85.

[40] *Id.* at 885.

five years the court has addressed the topic twelve times[41] and only *once* remanded for the Commission to justify how its decision was consistent with the Plan.[42] Indeed, development groups are already leveling sharp criticism against the decision, warning that this holding could have a chilling effect on future development.[43] However, such a reading overstates the reach of Judge McLeese's decision. While *Durant III* illustrates a strict, textual analysis of the Plan, it does not signal a departure from precedent that has reliably affirmed that an inconsistency with one element of the Plan does not doom a development consistent with the Plan "*as a whole*."[44] Instead, this case more narrowly indicts the Commission's rogue definition of moderate density and therefore serves both as an example for future litigants and as proof that judges can exercise deference in local land use decisions without abandoning textual fidelity.

Traditionally, the D.C. Court of Appeals has been deferential to the Commission regarding how best to interpret the Plan.[45] Although Judge McLeese's decision never explicitly addressed it, the court in *Durant I* outlined a standard of review that illustrates this deferential baseline:

> [W]e must affirm the Commission's decision so long as (1) it has made findings of fact on each material contested issue; (2) there is substantial evidence in the record to support each finding; and (3) its conclusions of law follow rationally from those findings. In other words, so long as the

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[41] *See* Howell v. D.C. Zoning Comm'n, 97 A.3d 579 (D.C. 2014); Randolph v. D.C. Zoning Comm'n, 83 A.3d 756 (D.C. 2014); D.C. Library Renaissance Project/W. End Library Advisory Grp. v. D.C. Zoning Comm'n, 73 A.3d 107 (D.C. 2013); Wis.–Newark Neighborhood Coal. v. D.C. Zoning Comm'n, 33 A.3d 382 (D.C. 2011); Foggy Bottom Ass'n v. D.C. Zoning Comm'n, 979 A.2d 1160 (D.C. 2009); Watergate E. Comm. Against Hotel Conversion to Co-op Apartments v. D.C. Zoning Comm'n, 953 A.2d 1036 (D.C. 2008); Cathedral Park Condo. Comm. v. D.C. Zoning Comm'n, 743 A.2d 1231 (D.C. 2000); 1330 Conn. Ave., Inc. v. D.C. Zoning Comm'n, 669 A.2d 708 (D.C. 1995); Rafferty v. D.C. Zoning Comm'n, 662 A.2d 191 (D.C. 1995); Hotel Tabard Inn v. D.C. Zoning Comm'n, 661 A.2d 150 (D.C. 1995); Foggy Bottom Ass'n v. D.C. Zoning Comm'n, 639 A.2d 578 (D.C. 1994); Blagden Alley Ass'n v. D.C. Zoning Comm'n, 590 A.2d 139 (D.C. 1991).

[42] *See Blagden Alley*, 590 A.2d at 146–47.

[43] *See* Alpert, *supra* note 6; *cf.* Michael Neibauer, *Mid-City Scales Back Massive Northeast D.C. Project by 20 Percent*, WASH. BUS. J. (Apr. 27, 2015, 11:38 AM), http://www.bizjournals.com/washington/breaking_ground/2015/04/mid-city-scales-back-massive-northeast-d-c-project.html [https://perma.cc/KT52-GE3F].

[44] *Durant I*, 65 A.3d 1161, 1168 (D.C. 2013) (emphasis added); *see also, e.g.*, *D.C. Library Renaissance Project*, 73 A.3d at 126 ("[T]he Commission may balance competing priorities in order to evaluate whether a project would be inconsistent with the Plan as a whole.").

[45] *Durant I*, 65 A.3d at 1166–67 ("Because of the Commission's statutory role and subject-matter expertise, we generally defer to the Commission's interpretation of the zoning regulations and their relationship to the Plan.").

> Commission makes adequate findings, we will not "substitute [our] judgment for that of the [agency]."[46]

In the rare case where the court departed from the Commission's decision, the court took issue not with the Commission's evidence (prong two of the standard of review) or rationale (prong three), but with the Commission's failure to satisfy the basic requirements of the test's first prong — supplying factual findings to support its assertion that a development comported with the Plan. In *Blagden Alley Association v. District of Columbia Zoning Commission*,[47] the court departed from a Commission decision approving a mixed-use PUD.[48] The petitioner argued that the development's office space was inconsistent with Plan language prioritizing residential units.[49] The court, however, did not hold that the development was inconsistent. Instead, the court's primary criticism was that the Commission provided "no explanation for [its] conclusion."[50] According to the court, if the Commission could show on remand that, despite the inconsistencies, the development was compatible with the Plan as a whole, then the development would likely clear the hurdle necessary for approval.[51]

In this regard, *Durant III* is a noteworthy addition to the court's past Plan decisions. Unlike *Blagden*, *Durant III* turned on the test's more subjective third prong: despite providing sufficient findings of fact supporting its conclusion that the development constituted a moderate-density use,[52] the Commission never convinced the court that those findings and conclusion were logically connected. However, viewed through a different lens, the *Durant III* decision does not represent a departure from the deferential approach that characterized the court's earlier opinions. Notably, *Durant III* came down to a single component of the Plan — whether the development was consistent with the FLUM's requirement that the space remain "moderate density." But past cases have rarely rested on such narrow grounds. Instead, the court has traditionally been amenable to interpretations that

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[46] *Id.* at 1167 (second and third alterations in original) (citations omitted) (quoting *Watergate*, 953 A.2d at 1043).

[47] 590 A.2d 139.

[48] *See id.* at 139–40.

[49] *Id.* at 146–47.

[50] *Id.* at 147.

[51] *Id.*

[52] In *Durant I*, the court lauded the Commission for how thoroughly it evaluated and explained this question of Plan consistency. *See Durant I*, 65 A.3d 1161, 1168–69 n.12 (D.C. 2013) ("Over the course of the proceedings, the Commission paid close attention to the question whether the proposal was consistent with the Comprehensive Plan. . . . Then, in its forty-four page final order, the Commission made ninety-five separate findings of fact and fifteen discrete conclusions of law. Far from displaying a 'cavalier' attitude toward its duties, the Commission demonstrated its careful and impartial consideration of the evidence and the views of all concerned.").

comport with the Plan in its entirety, even if those interpretations were contrary to some of the Plan's individual subcomponents.

For example, in 2004 the Commission approved the conversion of the Watergate Hotel into apartments.[53] Looking at the text of the Plan *as a whole*, the court determined that the Commission's decision was "not inconsistent with the [Plan's] regulations."[54] The court could reach this decision because the Commission did not grapple with the Plan on textual grounds. When confronted with a clause that compelled the government to encourage hotel preservation, the Commission tacitly conceded that the development was inconsistent with this requirement. Instead, the Commission asserted the Plan's parallel push for new housing was more important than the "imperative to 'encourage' existing hotels."[55] This idea that the Plan is a document of competing priorities resonated with the court and provided the means of remaining faithful to the text of the document without abrogating the Commission's longstanding interpretive authority.

By contrast, the Commission in the *Durant* cases did not give the court that flexibility. Instead of approaching the question the way that the Commission did in *Watergate* — admitting that the development was actually medium density, but arguing that it still advanced the Plan's priorities as a whole — the Applicant marshaled a narrower definitional argument, contending that the Commission was able to determine that the development was most appropriately characterized as moderate density.[56] This definitional strategy carried through to *Durant III*, where the Applicant devoted much of its argument to fitting the building's architectural specifications into the FLUM's narrow definition of moderate density.[57] The court, nonetheless, was unpersuaded. For this reason, the court's final decision should not be viewed as a departure from its traditional level of deference, but as an outlier, driven by the Commission's curious analytical posture in this case.

By framing the issue as a narrow definitional question, as opposed to a broader point of competing priorities, the developer and the Commission left the court little room to be deferential while remaining faithful to the text of the Plan. In his opinion, Judge McLeese appeared to leave open the possibility that if the Commission had deter-

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[53] Watergate E. Comm. Against Hotel Conversion to Co-op Apartments v. D.C. Zoning Comm'n, 953 A.2d 1036, 1041 (D.C. 2008).

[54] *Id.* at 1048.

[55] Brief for Intervenor BRE Watergate, L.L.C. at 25, *Watergate*, 953 A.2d 1036 (No. 04-AA-1056), 2005 WL 6225371, at *25.

[56] Brief for Intervenor at 25, *Durant II*, 99 A.3d 253 (D.C. 2014) (No. 13-AA-1309) ("Given the Commission's subject matter expertise . . . it is within the Commission's discretion to determine when a PUD is moderate density . . . .").

[57] *See* Brief of Intervenor at 6–13, *Durant III*, 139 A.3d 880 (No. 15-AA-979).

mined the development was in fact *medium* density, it could have still rationally concluded that the building satisfied enough of the Plan's other stated priorities to be consistent with the Plan as a whole.[58]

Moving forward, *Durant III* should shape the way developers, mayoral agencies, and future litigants in D.C. approach questions of Plan interpretation. Instead of shying away from construction proposals that are inconsistent with the Plan's FLUM, the development community should acknowledge those inconsistencies in future developments and embrace them so long as the developments fulfill others of the Plan's stated priorities. Additionally, this case serves as an example of how the judiciary can cabin local government decisions without entirely abandoning judicial deference. Numerous scholars have illustrated the challenges posed by unfettered local authority over land use.[59] Many, openly critical of the deference our judiciary grants local policymakers, have instead advocated that a higher authority, such as Congress, take the reins and exert more control over the country's land use policy.[60] While this criticism is valuable, *Durant III* teaches a crucial lesson — that despite its deferential perspective, our judiciary is still bound to enforce the text of the laws it applies. This textual constraint demands that our judges be more than rubber stamps for local actors. The constraint holds local agencies accountable to the laws they purport to implement and, coupled with tools like due process protections,[61] has the potential to preserve our tradition of robust judicial oversight without entirely abrogating local autonomy.

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[58] *See Durant III*, 139 A.3d at 884–85 (suggesting that, on remand, the Commission could have determined that "a medium-density use would be permissible and appropriate under the circumstances").

[59] *See, e.g.*, Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 452 (1990) ("The contingency of local authority, the linkage of location to wealth, class, race and status and the parochial nature of local political activity are obscured by the nostalgia for the polis . . . ."); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 719–20 (2008) ("[T]here is a growing belief that excessive reliance upon local governments to regulate land use has not only failed to achieve satisfactory results, but has also created problems such as exclusionary zoning, fiscal zoning, environmental degradation, and conflicting land uses at municipal borders." (footnotes omitted)).

[60] *Cf.* Sullivan & Richter, *supra* note 3, at 451 (lamenting the limited possibility of congressional action on land use matters).

[61] *See generally* Richard K. Norton, *Who Decides, How, and Why? Planning for the Judicial Review of Local Legislative Zoning Decisions*, 43 URB. LAW. 1085, 1095–101 (2011) (describing how judicial due process protections have historically affected local zoning decisions).