

Inter governmental
Draft

**Memorandum of Understanding and
Statement of Land Use Review Process
for development of the Armed Forces Retirement Home-Washington site**
among
the National Capital Planning Commission
the Office of Planning of District of Columbia
and the U.S. Armed Forces Retirement Home

1. Authorities and Overview. The U.S. Armed Forces Retirement Home (AFRH) was established as an independent federal agency in 1991 under P.L. 101-510. One of AFRH's facilities, the Armed Forces Retirement Home-Washington (AFRH-W or "the site"), is located on federal land in the District of Columbia. Under 40 USC § 8722(a), (b), and (d), the National Capital Planning Commission (NCPC) advises on and/or approves master plans and construction on federal land in the National Capital Area. The Office of Planning ("OP") has been delegated most of the Mayor's Charter function as the "central planning agency for the District", D.C. Code § 1-204.23 (2001). In addition, OP is responsible for giving advice to the Zoning Commission for the District of Columbia ("Zoning Commission") and its recommendations must be afforded "great weight", D.C. Official Code § 6-623.04.

The District of Columbia Zoning Commission establishes zoning in the District of Columbia pursuant to D.C. Code §6-641.01 *et seq.*, except in those circumstances where the "location, height, bulk, number of stories, and size of federal public buildings [and certain District government buildings] ... are subject to the approval of the [National Capital Planning Commission]." 40 U.S.C. § 8722 (d) and (e); D.C. Code §§ 2-1004 & 6-641.15 The Zoning Regulations are set forth in the District of Columbia Municipal Regulations (DCMR) at 11 DCMR §100 *et seq.* The Regulations include and incorporate the zoning map. Under section 492 of the Home Rule Act, changes in zoning maps must be submitted to NCPC after a hearing thereon for a period of review. D.C. Official Code § 6-641.05 (a) (2001) and 40 U.S.C. § 8724.

As to ground-leased construction, NCPC is of the view that because the land is federal, construction is subject to NCPC "in lieu of zoning" authority under 40 USC §8722(d), and is not subject to DC zoning, and that a long-term lease does not constitute a sale of land; and the Office of the Attorney General for the District of Columbia is of the view that because the improvements to be constructed will not be owned or used by the federal government, such improvements are not federal public buildings and are subject to DC zoning. The goal of this Memorandum of Understanding (MOU) is to establish a process for development at the AFRH-W site in Washington, D.C. that satisfies both NCPC and DC, that is streamlined, and that provides a basis for issuance and enforcement of land use planning, requirements, and controls, and building codes. To meet its "in lieu of zoning" requirements, NCPC must have submitted to it a land use plan, and the applicant must provide information that meets applicable historic preservation and NEPA requirements; the NCPC staff must review that plan; and the plan must be submitted to the NCPC Commission for approval. To meet DC zoning and building code requirements, a petition to zone the land must be filed with and approved by the Zoning

Commission, subject to the NCPC review and comment process described above. OP may initiate such a petition through the filing and presentation of a report with and before the Zoning Commission. The goal of the process set forth here is a working hybrid approach appropriate to the unique circumstances of essentially private development on federal land at the AFRH-W site.

AFRH is working with the U.S. General Services Administration (GSA) under the Economy Act to plan for reasonable development and open space at the AFRH-W to protect AFRH and provide a reliable source of income for AFRH's operations and capital expenses. AFRH, with GSA's assistance, is developing a Master Plan that will provide for long-term lease of portions of the property for appropriate private development in accordance with authority under 24 USC §411(e)(3). The Master Plan may also provide for sale of portions of the property. The Master Plan, submitted to NCPC in draft form on February 2, 2006, contemplates a mixed-use development of portions of its site with a potential range of uses encompassing residential, office, research and development, institutional, medical, retail and embassies. Most of the uses proposed for development will not be constructed by AFRH but by private sector and/or institutional entities. Development of these uses will generate revenue for AFRH, which will be deposited into the AFRH Trust Fund and used to continue AFRH's operation and ensure the ongoing provision of services to retired military personnel. NCPC approved comments on the draft Master Plan on February 2, 2006.

NCPC, DC and AFRH seek a land use review process for the private development and use components of the AFRH project with adequate opportunities for comment and input by those agencies and the local community. In addition, all parties want to assure that each part of the development at the AFRH is subject to a single, clear, set of land use and building code standards. AFRH seeks a predictable land use review process for those entities that may be involved in developing the site. All parties seek a process that is certain and uncomplicated. Particularly because the neighbors and local Advisory Neighborhood Commissions (ANCs) have expressed concerns about the extent of proposed development, NCPC, DC and AFRH want to involve the community in review of land use plan approvals.

2. The hybrid process for this unique circumstance. The process set forth in this MOU is developed solely for the unique circumstances here, where there is federal land and substantial private development for traditionally non-federal uses. It applies only to the land and uses that are privately developed for private purposes on this federal site ("the Development"), and not to the federal buildings or federal uses at the AFRH-W site. It recognizes NCPC's important role in reviewing and approving Master Plans for federal agencies and federal land, and DC's role in providing zoning for private development. It also provides a basis for enforcement to assure that land use requirements and building codes are effectively enforced. This unique hybrid planning-zoning process is not intrusive for the developer or AFRH because the AFRH Master Plan will be approved by NCPC and the approved Master Plan will be used by the District of Columbia Office of Planning like a small area plan in order to recommend zoning for Zoning Commission consideration and adoption.

3. Cooperation. NCPC and OP staffs and AFRH will continue to work together cooperatively on the land use and neighborhood planning issues for AFRH-W. This cooperation will continue

throughout the planning and development process, and, as specified more fully below, to any revisions and amendments to plans, for the site.

4. NCPC's substantive requirements for Master Plan approval. NCPC's statutory obligations include development of a Comprehensive Plan for the National Capital Area. Its review of master plans and construction projects includes assurance of master plan and project consistency with the Comprehensive Plan including promotion of local economic development, protection of the federal interest, historic preservation, and facilitation of efficient transportation systems. For the AFRH-W Master Plan review, as with all master plan reviews, NCPC applies its Master Plan Submission Requirements (most recently amended in 1994) and related policies including its Environmental and Historic Preservation Policies and Procedures and its Procedures for Intergovernmental Cooperation in Federal Planning. These procedures are updated periodically. Documents setting forth the procedures are all available on the NCPC website. NCPC encourages applicants to submit a draft as well as a final master plan.

5. The AFRH-W Master Plan will be subject to the NCPC review and approval process. AFRH will submit to NCPC for review the materials required for master plan review and approval for the Development. The parties note that AFRH submitted its draft Master Plan to NCPC and NCPC approved comments on that plan by Commission Action on February 2, 2006. In addition, once NCPC approves the "final" initial Master Plan for the site, AFRH will submit to NCPC for master plan review any changes to the approved Master Plan, including any request for special exception, zoning variance, PUD, modifications, or changes in land use, made by any person or entity; any such proposed changes will be treated under this MOU as a proposed amendment to the Master Plan that requires NCPC review and approval and submission to OP and the Zoning Commission (including the ordinary process whereby NCPC reviews Zoning Commission actions) as specified in this MOU for the "final" initial Master Plan for the Development.

6. Office of Planning recommendation and Zoning Commission action. After NCPC approves a Master Plan for the site, OP will treat the Plan like a small area plan. It will also consider the Master Plan approved by NCPC, and any amendments thereto that NCPC approves, as supplemental guidance of the District of Columbia elements of the Comprehensive Plan, and notes that, pursuant to § 492 of the District Charter, zoning cannot be inconsistent with the Comprehensive Plan. OP will develop proposed zoning in conformance with the approved Master Plan, and will petition the Zoning Commission to schedule the case for a hearing within 30 days after NCPC's action to approve the final Master Plan. The petition will include no text, other than the description of the map amendments needed to permit matter of right development under the approved master plan, unless NCPC requests otherwise. OP will work diligently to assure that the time between the filing of the petition and the publication of a notice of final rulemaking giving effect to the mapping of the master plan site will not exceed 5 months. A copy of the schedule provided by OP upon which this timeframe is based is attached. [NOTE – GSA has questions about this flow chart].

7. Zoning as Rulemaking. Because the zoning case will be commenced through a petition, rather than an application, the case will be presumed to be a rulemaking proceeding unless the Zoning Commission, at the time it decides whether to schedule the case for hearing, decides it should be

heard and decided as a contested case. Rulemaking cases differ from contested cases in that there are no parties or cross examination and notices of final rulemaking may not be directly appealed to the District of Columbia Court of Appeals.

8. Opportunity for public involvement. NCPC, DC, and AFRH are committed to a substantial and effective public process for review and approval of the Master Plan and Development plans. To that end, all three parties have already taken a number of steps to involve the local community and solicit input. As this process moves forward, each party will assure full opportunity for public participation in the component of the process for which it is responsible. NCPC will hold at least one public hearing as part of a regularly scheduled Commission meeting. OP will hold at least one advertised public hearing in consideration of the zoning and AFRH will obtain public input through the National Environmental Policy Act and National Historic Preservation Act Section 106 processes.

10. Building Codes and Certificates of Occupancy. Once the Zoning becomes effective, applications for building permits and certificates of occupancy may be filed with and processed pursuant to applicable Building Code requirements.

11. Enforcement. Failure of AFRH or its developer to comply with the provisions of the Building Code or Zoning Regulations of the District of Columbia will subject both to enforcement, either through the issuance of stop work orders, court injunctions, or notices of civil infraction, or through the revocation of building permits and certificates of occupancy. DC and AFRH may explore whether third party inspections are mutually acceptable.

12. Expanded AFRH uses or sale of property. (a.) Construction of buildings and use of lands for the AFRH (such as expanded medical/institutional uses proposed in the February 2, 2006 draft Master Plan in Zone 2 at the site) are subject to review and approval by NCPC under the National Capital Planning Act and are not part of this MOU (see above, par. 2). In seeking such review, AFRH will follow ordinary NCPC submission policies and procedures. (b) If AFRH-W proposes to sell property to a private entity, once any sale is completed, the sold property and land use of that property is subject to DC zoning but not to NCPC review. Both NCPC and DC participate in a monthly Coordinating Committee review procedure where information exchange about proposals may occur.

13. AFRH commits that when GSA acts for or on behalf of AFRH in connection with the Development that AFRH will ensure GSA's compliance with the procedures set forth here.

14. Each signatory represents that s/he has the authority to bind the agency for whom s/he signs to the terms of this MOU.

Signatories.

National Capital Planning Commission

Name

Title

Date _____

The District of Columbia Office of Planning

Name

Title

Date _____

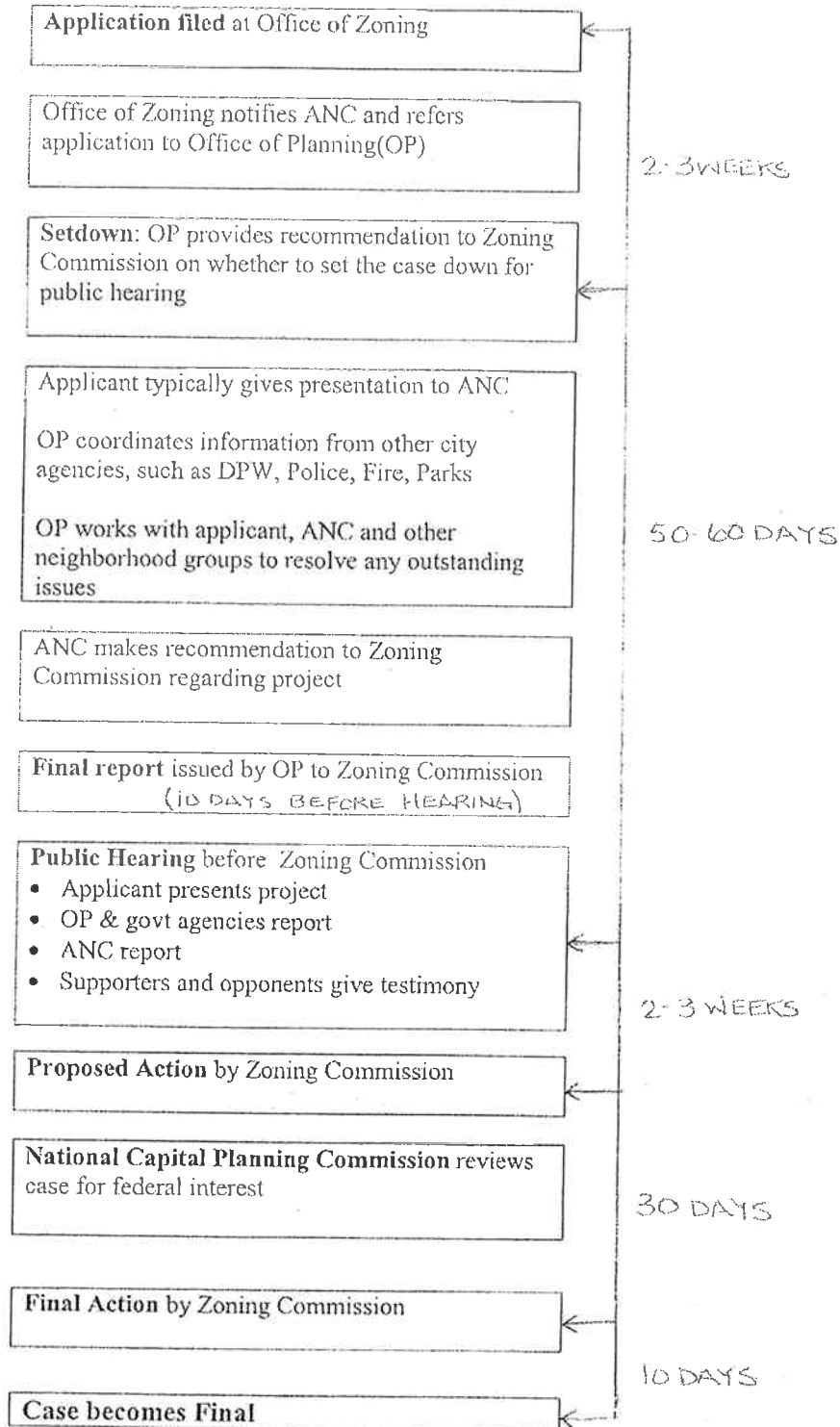
U.S. Armed Forces Retirement Home

Name

Title

Date _____

DC Rezoning Process in a Nutshell



TOTAL = 5 MONTHS

40 U.S.C.A. § 8722

▷

Formerly cited as 40 USCA § 71c, 71d

Effective: August 21, 2002

United States Code Annotated Currentness
 Title 40. Public Buildings, Property, and Works (Refs & Annos)
 Subtitle II. Public Buildings and Works
 Part D. Public Buildings, Grounds, and Parks in the District of Columbia
 ◻ Chapter 87. Physical Development of National Capital Region
 ◻ Subchapter III. Planning Process

→ § 8722. Proposed Federal and district developments and projects

(a) Agencies to use Commission as central planning agency.--Agencies of the Federal Government responsible for public developments and projects shall cooperate and correlate their efforts by using the National Capital Planning Commission as the central planning agency for federal activities in the National Capital region. To aid the Commission in carrying out this function, federal and District of Columbia governmental agencies on request of the Commission shall furnish plans, data, and records the Commission requires. The Commission on request shall furnish related plans, data, and records to federal and District of Columbia governmental agencies.

(b) Consultation between agencies and Commission.--

(1) Before construction plans prepared.--To ensure the comprehensive planning and orderly development of the National Capital, a federal or District of Columbia agency, before preparing construction plans the agency originates for proposed developments and projects or before making a commitment to acquire land, to be paid for at least in part from federal or District amounts, shall advise and consult with the Commission as the agency prepares plans and programs in preliminary and successive stages that affect the plan and development of the National Capital. After receiving the plans, maps, and data, the Commission promptly shall make a preliminary report and recommendations to the agency. If the agency, after considering the report and recommendations of the Commission, does not agree, it shall advise the Commission and provide the reasons why it does not agree. The Commission then shall submit a final report. After consultation and suitable consideration of the views of the Commission, the agency may proceed to take action in accordance with its legal responsibilities and authority.

(2) Exceptions.--

(A) In general.--Paragraph (1) does not apply to projects within the Capitol grounds or to structures erected by the Department of Defense during wartime or national emergency within existing military, naval, or Air Force reservations, except that the appropriate defense agency shall consult with the Commission as to any developments which materially affect traffic or require coordinated planning of the surrounding area.

(B) Advance decisions of Commission.--The Commission shall determine in advance the type or kinds of plans, developments, projects, improvements, or acquisitions which do not need to be submitted for review by the Commission as to conformity with its plans.

(c) Additional procedure for developments and projects within environs.--

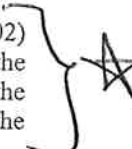
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40 U.S.C.A. § 8722

(1) **Submission to Commission.**--Within the environs, general plans showing the location, character, and extent of, and intensity of use for, proposed federal and District developments and projects involving the acquisition of land shall be submitted to the Commission for report and recommendations before a final commitment to the acquisition is made, unless the matter specifically has been approved by law.

(2) **Commission action.**--Before acting on any general plan, the Commission shall advise and consult with the appropriate planning agency having jurisdiction over the affected part of the environs. When the Commission decides that proposed developments or projects submitted to the Commission under subsection (b) involve a major change in the character or intensity of an existing use in the environs, the Commission shall advise and consult with the planning agency. The report and recommendations shall be submitted within 60 days and shall be accompanied by any reports or recommendations of the planning agency.

(3) **Working with State or local authority or agency.**--In carrying out its planning functions with respect to federal developments or projects in the environs, the Commission may work with, and make agreements with, any state or local authority or planning agency as the Commission considers necessary to have a plan or proposal adopted and carried out.

(d) **Approval of federal public buildings.**--The provisions of the Act of June 20, 1938 (ch. 534, 52 Stat. 802) shall not apply to federal public buildings. In order to ensure the orderly development of the National Capital, the location, height, bulk, number of stories, and size of federal public buildings in the District of Columbia and the provision for open space in and around federal public buildings in the District of Columbia is subject to the approval of the Commission. 

(e) **Approval of District Government buildings in central area.**--Subsection (d) is extended to include public buildings erected by any agency of the Government of the District of Columbia in the central area of the District (as defined by concurrent action of the Commission and the Council of the District of Columbia), except that the Commission shall transmit its approval or disapproval within 30 days after the day the proposal was submitted to the Commission.

CREDIT(S)

(Pub.L. 107-217, § 1, Aug. 21, 2002, 116 Stat. 1221.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2002 Acts

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|--------------------|--|--|
| 8722 (a) | 40:71d(e) . | June 6, 1924, ch. 270, § 5, as added July 19, 1952, ch. 949, § 1, 66 Stat. 787; Pub. L. 93-198, title II, § 203(d), Dec. 24, 1973, 87 Stat. 782. |
| 8722 (b) (1) | 40:71d(a) (1st sentence words before proviso, 2d | |

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106 ZONING MAP

- 106.1 The Official Zoning Map of the District of Columbia shall be drawn on four (4) real estate atlases prepared for the District by R.H. Baist and Company, Volume 1 through 4; Provided, that the present zoning map shall remain in full force and effect until the Official Zoning Map is prepared on four (4) Baist real estate atlases as provided for in this subsection and approved by the Zoning Commission.
- 106.2 The zoning map atlases shall be on file in the Office of Zoning.
- 106.3 Each page of the zoning map atlases shall be certified as correct by the Director of the Office of Zoning. Amendments shall be initialed and dated.
- 106.4 Properties owned by the government of the United States and used for or intended to be used for a federal public building or use and properties owned by the D.C. government in the Central Area (as set forth in D.C. Code §1-2004 (1981)) shall not be included in any zone district.
- 106.5 Properties of the District of Columbia government shall be subject to zoning; Provided that:
- (a) Any governmental land or building uses that were either in existence or were substantially planned, documented and invested in prior to May 23, 1990, shall not be subject to zoning;
 - (b) With regard to the properties referenced in ¶(a) above, any change or expansion in the use of land or buildings, or any new construction or additions to buildings shall be subject to zoning; and
 - (c) District of Columbia public buildings in the Central Area shall be exempt from zoning but shall continue to require approval of the National Capital Planning Commission, pursuant to §5(c) of the Planning Act (40 U.S.C. 71d(c).
- 106.6 Properties acquired by the government of the United States and properties in the Central Area acquired by the government of the District of Columbia which are intended to be used for public building or use shall become automatically unzoned.
- 106.7 No building permit or certificate of occupancy shall be issued nor proceeding instituted before the Board of Zoning Adjustment, nor shall any property in private ownership be used for any purpose, until after the Zoning Commission has designated zoning for the property.
- 106.8 Zoning shall be designated after public hearing in the manner prescribed by the Zoning Act of June 20, 1938, D.C. Code §§5-413 *et seq.* (1981).

Memorandum

Government of the District of Columbia

TO: Raymond A. Lambert
Director, Department of
Administrative Services

Department,
Agency, Office:
OCC:CDD:LUS:P.Maszak:la

FROM: Richard L. Aguglia *RHA*
Deputy Corporation Counsel
Community Development Division

Date: February 27, 1989.

SUBJECT:

Applicability of District of Columbia Zoning Act, D.C. Code §§ 5-413 and -432 (1988) and the Zoning Regulations, 11 DCMR § 100.1 et seq. (1987) to a Privately Owned Building Leased in Its Entirety to and within the Exclusive Control of the District of Columbia (D.C.) or Federal Governments, Respectively

Pursuant to advice from the Corporation Counsel dated January 24, 1989 on the above matter, we have concluded that the plain meaning of the Zoning Act, D.C. Code §§ 5-413 and -432 (1988), and the Zoning Regulations, specifically 11 DCMR § 106.4 (1987) make it clear that only real property owned and used by either the D.C. government in the Central Area or the Federal government are exempt from compliance with zoning requirements and restrictions.

Under the Zoning Regulations, 11 DCMR § 106.4:

{P}roperties owned by the government of the United States and used for or intended to be used for a federal building or use, and properties owned by the D.C. government in the Central Area (as set forth in D.C. Code § 1-2004) and used for or intended to be used for a District of Columbia public building or use shall not be included in any zone district.

(emphasis supplied).

According to § 106.4, it is clear that building "ownership and actual or intended governmental use" by either the D.C. government in the Central Area or the Federal government are the only criteria relevant in the determination of a governmental exemption from local zoning controls. Absent any legislative history on this regulation to clarify the term

"ownership", and absent any other provisions in either the Zoning Act or Regulations which address the determination of governmental exemptions from zoning, the above language on its face is unambiguous in making either D.C. government ownership in the Central Area, or Federal ownership, not leasehold interests, a necessary pre-requisite to a zoning exemption.

While we realize that there may not have been a consistent prior administrative application of this zoning regulation, we are bound by the existing, unambiguous language of 11 DCMR § 106.4 (1987) in reaching our conclusion. We are prepared to draft a regulatory change to amend the Zoning Regulations so that a governmental real property leasehold interest may qualify for an exemption from the application of zoning controls. Of course, the Zoning Commission would have to approve such a change as it alone has jurisdiction to change those regulations.

If you have an further questions, please contact me at your convenience.

cc: Frederick D. Cooke
Eric Washington
Edward Curry

bcc: Lou Robbins