Dear Ms. Stern:

We write to provide our views on DCRA’s pending Construction Codes rulemaking.

Section 103.5 (Access to Public Records)

Under existing regulations (12-A DCMR § 103.5), ANC commissioners are exempt from having to pay fees to DCRA for research and copying related to FOIA requests:

Public Access to Records. In accordance with procedures established by the code official, official records of the Department shall be available for public inspection at all appropriate times pursuant to the Freedom of Information Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code §§ 2-531 et seq. (2012 Repl.)). Pursuant to D.C. Official Code § 2-532 (2012 Repl.), the Department may collect a fee in accordance with 1 DCMR § 408 for researching and copying any requested documents, except that Advisory Neighborhood Commissioners shall not be required to pay this fee.

(Emphasis added.)

This language was imposed on DCRA by the Council in 2004 (D.C. Law 15-205, § 1223, 51 DCR 8441). ANC 6C believes that DCRA may not administratively delete language inserted into the regulation through Council legislation.

In addition, we respectfully note that the text of the new proposed regulation, which provides only that records must be “available for inspection and copying,” does not conform to DCRA’s broader obligations under D.C. Official Code § 2-536(a)(8A). That statute requires DCRA to

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1 On October 10, 2018, at a duly noticed regularly scheduled monthly meeting, with a quorum of five out of six commissioners and the public present, ANC 6C voted 5-0 to adopt the positions set forth in this letter.
make available (at no charge via a public website) “[a]ll pending applications for building permits and authorized building permits, including the permit file.” DCRA is not now, and never has been, in compliance with this statutory obligation.

**Recommendations:**

1. **Retain the fee exemption for ANC commissioners.**

2. **Conform section 103.5 to the requirements of D.C. Official Code § 2-536(a)(8A).**

**Section 105.1.3 (Authorized Work Hours)**

Both the current regulation (section 105.1.3) and the new proposed regulation prohibit work on “legal holidays.” Unfortunately, the D.C. Official Code provides conflicting definitions for what qualifies as a legal holiday, and it is unclear which one applies to 12-A DCMR.


Section 28-2701, by contrast, defines these eleven days, plus certain other days (and half-days), as “holidays in the District for all purposes”:

- New Year’s Day, January 1; Dr. Martin Luther King, Jr.’s Birthday, the third Monday in January; Washington’s Birthday, the third Monday in February; District of Columbia Emancipation Day, April 16; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veteran’s Day, November 11; Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25; every Saturday, after twelve o’clock noon; any day appointed by the President of the United States as a day of public feasting or thanksgiving; and the day of the inauguration of the President, in every fourth year.

(Emphasis added.)

A further problem is that under current DCRA practice, no information about permissible work days/hours appears on the face of a permit. Owners and workers are often unaware of the restrictions, and MPD officers are often unfamiliar with the rules and unwilling to take enforcement action (such as making arrests or issuing cease-and-desist orders to those performing work outside authorized hours).

Finally, the proposed new regulation would exempt certain concrete-pouring activity from the days/hours restrictions. This activity is invariably noisy, and therefore highly disruptive in residential areas or near residences. The current process continues to work well, with contractors typically receiving permission after engaging with the local ANC; a blanket exemption is unnecessary and a predictable source of future problems.
Recommendations:

1. Either list all holidays explicitly in the regulation or provide a cross-reference to the statutory definition (or other source) enumerating all relevant holidays.

2. Insert language at the end of this subsection requiring legal work days/hours to be displayed on the face of each permit, along with supplemental language, as follows:

   All permits shall display the legal days and hours for performing construction activity, along with a list of legal holidays (or a concise URL to a website enumerating those holidays). This notice shall also state that the Metropolitan Police Department is authorized to enforce against work performed outside legal hours. All such text shall appear on the face of the permit in type at least as large as that showing the address of the property.

3. Delete the blanket exemption for certain concrete-pouring activities.

Section 105.4.1.1 (After-Hours Permits)

The proposed regulation modifies the current regulation (section 105.1.3) in several respects.

First, it requires ANC approval for the permit. While this is a step in the right direction, the timing of permit applications often does not allow for a full ANC vote. A more workable standard would be to require the support of the commissioner(s) for the affected single-member district(s) (or, where a seat is vacant, the support of the relevant ANC Chair or the Chair’s designee).

Second, approval would be necessary from any other ANC whose boundaries include property adjoining the work site, but “adjoining” is not defined. It is unclear, for example, whether work directly across a street dividing two ANCs would qualify.

Last, the new regulation would delete the current standard that after-hours work be necessary to prevent a threat to public safety, health, and welfare. That standard would be replaced with two separate exceptions, “emergency conditions” and “the public interest.” Neither term is defined, and each is so vague as to be a gaping loophole subject to abuse. (For example, if a contractor waits until the last minute to apply, is that an “emergency”?) These changes would effectively gut the current after-hours restrictions.

Recommendations:

1. Replace the requirement for full ANC approval with language requiring the support of the commissioner(s) for the affected single-member district(s) (or, where such a seat is vacant, the support of the relevant ANC Chair or the Chair’s designee).
2. Require additional approval from any ANC commissioner (as described in #1 above) whose SMD is within 200’ of the work site.

3. Retain the current “public safety, health, and welfare” test instead of adopting the vague and overbroad “emergency” and “public interest” exceptions.

Section 105.10.1 (Permits for Unsafe/Abandoned Premises)

The rulemaking proposes a new, more restrictive time frame for completion of permitted work at unsafe/abandoned/deteriorated properties. This is a welcome change.

Note that the language concerning extensions of such permits refers incorrectly to section 105.6.

**Recommendation:**

1. Correct the cross-reference for permit extensions from section 105.6 to section 105.11.

Section 106.2.13 (Zoning Compliance Review Data)

ANC 6C has observed repeated instances of applicants submitting fraudulent applications in which non-existent structures are depicted as an existing condition, or in which dimensions are materially falsified. (Such applicants then attempt to construct these structures, intending to circumvent lot-occupancy limits or other zoning restrictions.) A good example of such a fraudulent application is the one challenged by ANC 6C in BZA 19207, resulting in the permit’s revocation.

We have also observed numerous instances in which applicants fail to distinguish clearly between existing conditions and proposed work. DCRA reviewers have on multiple occasions approved plans despite such clear defects. A requirement to provide elevation photographs would help prevent such abuses.

**Recommendation:**

1. At the end of proposed section 106.2.13(4) concerning elevations, add the following text: “In addition, all applications proposing exterior alteration(s) or addition(s) shall include photographs clearly showing all existing elevations.”

Section 112.2 (Appeal of a Final Decision of the Code Official based on Alleged Violations of the Construction Codes)

Like current section 112.2.1, the proposed text of this section would essentially require any person—including an aggrieved owner of adjacent property—to file an OAH appeal within 10 business days.
This short time frame makes sense for appeals by a permit applicant, who possesses all the relevant information. However, it is wholly inadequate to protect the interests of an adjacent property owner, for several reasons:

- An aggrieved third party rarely receives complete drawings from a permit holder. This is especially true where relations are tense or hostile.

- As discussed above, notwithstanding its statutory obligation to make construction permit drawings and other documents (including the full permit file) available to the public online at no cost, DCRA does not do so. *(See 2016 opinion letter from DC Office of Open Government at [https://www.open-dc.gov/sites/default/files/OOG%20002_1.29.16%20AO_Redacted.pdf](https://www.open-dc.gov/sites/default/files/OOG%20002_1.29.16%20AO_Redacted.pdf) finding DCRA “woefully out of compliance” with the mandate of D.C. Official Code § 2-536(a)(8A) & (b).)*

- As a result, citizens must explicitly request documents from DCRA, a process that can take weeks or more to produce results.

- After finally receiving such documents, an adjacent owner necessarily requires additional time to review them (or retain the services of an architect or other licensed professional to do so).

**Recommendations:**

1. **Grant third parties more time to file OAH appeals.** This is consistent with the 60 days allotted for BZA appeals, which likewise often entail highly technical analysis of plans and drawings.

2. **Revise counterpart section 112.7 accordingly.** That provision allows for appeals to the Code Official within 10 days. Because it requires an appellant to submit “technical support,” far more than 10 days is needed to obtain the underlying records, analyze them, and prepare a responsive submission.

Thank you for giving great weight to the views of ANC 6C.

Sincerely,

Karen Wirt
Chair, ANC 6C