ANC 6C Planning, Zoning, and Economic Development Committee Report

ANC 6C Commission Meeting: July 11, 2018

PZE Meeting Date: July 5, 2018 6:30 pm

Meeting Location: Northeast Library
7th & D Streets NE

Committee Attendees: Mark Eckenwiler (Chair)
Bobbi Krengel
Chris Mitchell
Lauren Oswalt
Dru Tallant

Other Commissioners Present: n/a

**Agenda Items**

1. **Discussion of pending Council legislation** – On July 12, the Council’s Committee of the Whole will hold a hearing on Bill 22-683, the Substandard Construction Relief Amendment Act of 2018 and Bill 22-684, the Blighted Property Redevelopment Amendment Act of 2018. ([Revised hearing notice](#))

2. **Proposed changes to zoning rules of measurement for basements/cellars and building height (ZC 17-18)** ([Case file](#))
Agenda Item #1: Discussion and Recommendations

Discussion of pending Council legislation – On July 12, the Council’s Committee of the Whole will hold a hearing on Bill 22-683, the Substandard Construction Relief Amendment Act of 2018 and Bill 22-684, the Blighted Property Redevelopment Amendment Act of 2018.

Motion To recommend testimony in support (with numerous suggested revisions) (carried 5-0)

Key Discussion Points:

1. Bill 22-683 would amend D.C. Official Code § 6-1406, the statute prescribing civil and criminal penalties for violations of the Construction Codes.

2. New subsection 6-1406(e)(1) would require the finder of fact—typically an Office of Administrative Hearings judge—to order a violator to a) repair resulting damage done to an adjacent property or b) pay restitution at the discretion of the adjacent property’s owner.

3. New subsection (e)(2) makes clear that such an award does not prevent the aggrieved owner from pursuing a civil action for relief against the violator. At the same time, it bars double recovery by requiring that the amount of any resulting judgment be reduced by the value of any restitution or repairs made by the violator.

4. PZE members voiced unanimous support for the bill, but they—along with a local resident in attendance—expressed concerns about the lack of detail concerning the mechanics of restitution, especially where the violator proves uncooperative or has a disagreement with the owner of the damaged property. Specific areas of concern included
   
   a. the process by which damage would be proven (and by whom);
   
   b. the lack of clarity over the time and manner of the adjacent owner’s notification of, and involvement in, the proceedings;

   c. the process for resolving disputes or noncompliance;

   d. retroactive application; and

   e. the issue of LLCs and bankruptcy as a means of avoiding liability.

5. Bill 22-684 would allow the Mayor—in practice, DCRA—to declare a vacant building not “blighted vacant” in certain circumstances even if doorways, windows, and other openings are not secured with permanent materials. Specifically, DCRA could avoid a “blighted vacant” finding if a) the owner installs temporary measures (such as plywood covering) and b) submits a building permit application promising to replace those measures with permanent features.
6. Here, too, PZE members supported the bill, but noted that it overlooks other potential bases for a “blighted vacant” finding that should not be ignored by DCRA even if windows and other openings are secured. Members offered alternative language addressing this oversight and correcting other technical deficiencies in the bill.

7. A copy of draft testimony embodying the PZE recommendations is attached to this report.
Agenda Item #2: Discussion and Recommendations

Proposed changes to zoning rules of measurement for basements/cellars and building height (ZC 17-18)

Motion  To recommend overall support with suggested revisions  
(carried 5-0)

Key Discussion Points:

1. The PZE reviewed an earlier version of these amendments in January 2018, with a recommendation for testimony at the planned hearing general support, but raising a few questions. ZC 17-18 is now back with revised text for public comment before the Zoning Commission takes a vote.

2. As before, the PZE supports several of the core changes, and suggests changes simply to clarify the meaning of several proposals. Included in the motion were the following:

   a. At end of proposed A 301.15, add “and not substantially changed after filing.”  
      (This text appears at the end of existing A 301.14.)

   b. Also, edit A 301.4 so that “Except as provided in Subtitle A §§ 301.9 through 301.13” instead reads “Except as provided in Subtitle A §§ 301.9 through 301.15”.

   c. Revise text in definition of “Areaway” from “guard that includes window wells and passageways” to “guard, such as a passageway”. (The proposed revision—“guard and passageways”—produces ungrammatical and confusing text.)

   d. Endorse revised def'ns of cellar and basement.

   e. Revise the second item, (b), under the definition of “Exceptions to Grade” from

            An areaway that provides direct access to an entrance and projects no more than five feet (5 ft.) from the building face; excluding associated stairs or ramps

      to

            An areaway that provides direct access to an entrance and, excluding associated stairs or ramps, projects no more than five feet (5 ft.) from the building face

   f. Endorse expansion of “Natural Grade” lookback period to 5 years from 2.
Mr. Chairman and Members of the Committee,

ANC 6C writes to state its support for the overall objectives of Bills 22-683 and 22-684. As detailed below, we believe each bill would benefit from changes to address issues left unresolved and/or to tailor the text more narrowly to the issues under consideration.

**Bill 22-683**

Bill 22-683 would amend D.C. Official Code § 6-1406, the statute prescribing civil and criminal penalties for violations of the Construction Codes.

New subsection 6-1406(e)(1) would require the finder of fact—typically an Office of Administrative Hearings judge—to order a violator to a) repair resulting damage done to an adjacent property or b) pay restitution at the discretion of the adjacent property’s owner.

New subsection (e)(2) makes clear that such an award does not prevent the aggrieved owner from pursuing a civil action for relief against the violator. At the same time, it bars double recovery by requiring that the amount of any resulting judgment be reduced by the value of any restitution or repairs made by the violator.

ANC 6C supports the goal of Bill 22-683, which is to streamline the process for making the owner of a damaged adjacent property whole, potentially saving that owner the trouble and expense of pursuing private litigation.

The bill does not, however, resolve several important issues likely to arise. These include

- **Manner of proving physical damage to adjacent property:** The parties to an OAH proceeding concerning a Construction Codes violation are DCRA and the

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1 ANC 6C authorized this testimony at its duly noticed, regularly scheduled monthly meeting on July 11, 2018, with a quorum of 6 out of 6 commissioners and the public present, by a vote of 6-0.
violator, but not any aggrieved third party. The owner of a damaged adjacent property is not, so far as we are aware, legally entitled to notice of these proceedings, nor are such third parties granted standing to participate.

Thus, it is unclear whether the injured next-door owner would even be aware of an OAH case, let alone participate in it. And it is likewise unclear to us whether DCRA would, on its own, have the information or motivation necessary to prove physical damage to the adjacent property.

- **Time and manner of the adjacent property owner’s notification and involvement:** It is unclear when and how the injured next-door owner would become aware of any award under section 6-1406(e)(1) and thus know of his or her entitlement to repair or restitution.

- **Noncompliant violators and disputes with aggrieved parties:** If a violator fails (or simply refuses) to make the neighbor whole, what is the mechanism for enforcing the OAH award? Would an injured property owner have standing to re-open the OAH proceeding, even without DCRA’s assistance or support? Similarly, suppose the violator and injured owner disagree over the quality of any repairs made or, alternatively, over the amount of restitution due. (Absent direct involvement by the adjacent owner in the OAH proceedings before the award, the OAH judge would only be able to order restitution in the abstract and not in a specific amount.) Would the aggrieved neighbor be able to litigate such issues before the original OAH judge? If not, by what mechanism would the award be enforced (other than by DCRA, whose motivation may be lacking)?

- **Retroactivity:** Would this bill affect only those violations that take place after the law’s effective date, or would it also apply to any open, unresolved OAH case pending at the time the law takes effect?

- **The LLC problem:** If the violator is an LLC that subsequently dissolves or declares bankruptcy, what would the impact be on any award to the adjacent property owner?

**Bill 22-683**

Bill 22-684 would allow the Mayor—in practice, DCRA—to declare a vacant building not “blighted vacant” in certain circumstances even if doorways, windows, and other openings are not secured with permanent materials. Specifically, DCRA could avoid a “blighted vacant” finding if a) the owner installs temporary measures (such as plywood covering) and b) submits a building permit application promising to replace those measures with permanent features.
Based on testimony from earlier Council hearings, we understand the concern to be that contractors often wish to delay installation of permanent replacement doors and windows until after demolition and heavy construction phases are complete—and that waiting to do so unfairly subjects such properties to a “blighted vacant” finding by DCRA. See D.C. Official Code § 42-3131.05(1)(B)(ii) & (iii)(I).

ANC 6C agrees with the spirit of this bill, which would allow such construction to proceed in an appropriate sequence without the owner having to risk incurring the punitive 10% “blighted vacant” tax rate. However, we believe the language would benefit from a number of narrowing and clarifying amendments.

First, the bill overlooks the fact that a building may qualify as “blighted vacant” even if it is properly sealed with temporary or permanent doors, windows, etc. For instance, a building may be declared “blighted vacant” because of graffiti or loose bricks/rotting wood features that may pose a safety hazard. See § 42-3131.05(1)(B)(iii)(II). Under the language of the bill, DCRA could simply ignore such other violations when determining “blighted vacant” status so long as door and window openings are boarded shut.

Second, the bill refers simply to “openings … secured by boards” (line 37) without requiring that such temporary measures be “weather-tight” and effectively protect “against entry by birds, vermin, and trespassers.”

Last, the bill uses the term “renovation” (line 39) in reference to the required permit application. We believe it would be clearer to refer simply to the scope of work contemplated by the requested permit.

Accordingly, ANC 6C recommends that the text at lines 36-39 of the bill be replaced with the following:

(C) The Mayor may, for purposes of determining whether a vacant building is a blighted vacant building, consider doors, windows, areaways, and other openings to be adequately secured by boards or other non-permanent measures if

(i) all such openings are weather-tight and secured against entry by birds, vermin, and trespassers, and

(ii) the owner submits a building permit application certifying that these non-permanent measures will be replaced with permanent materials as part of the scope of work.

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We thank you for the opportunity to provide testimony and welcome any questions the Committee may have.