December 2, 2018

Anthony J. Hood  
Chair  
Zoning Commission  
of the District of Columbia  
441 4th Street, NW  
Suite 210-S  
Washington, DC 20001

Re: ZC 17-03 (Rulemaking concerning vesting provisions)

Dear Chairman Hood:

We write to provide our views\(^1\) on the rulemaking in ZC 17-03. As explained below, ANC 6C strongly opposes adoption of these amendments to the zoning regulations.

The rulemaking, viewed narrowly, purports to address two specific scenarios in which a significant event occurs before issuance of a building permit: a) those in which a map amendment of the site is proposed, and b) those where the BZA approves a request for relief, but the zoning regulations change before the issuance of a final order.

Unfortunately, the proposed amendments to the regulation governing the first scenario (11-A DCMR § 301.5) would have far-reaching—and damaging—implications for the interpretation of parallel subsections of section 301.

First, the change to section 301.5(a) inserts new text requiring that an application be “officially accepted as complete and under review” (emphasis added) as a condition of being vested in the map amendment scenario. However, numerous parallel vesting provisions (e.g., section 301.14, which provides an exception to the recent restriction on “pop-backs” over 10’ in RF zones) refer only to applications being “filed and accepted as complete.” See also §§ 301.9(a), 301.10(a), 301.11(a) & 301.15.

Inserting language into one subsection, but omitting it from parallel provisions, has two distinct but related consequences here. First, it suggests that “accepted as complete” and “under review” are not synonymous. Second, it strongly implies that the vesting standard under the

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\(^1\) On November 14, 2018, at a duly noticed and regularly scheduled monthly meeting, with a quorum of five out of six commissioners and the public present, this matter came before ANC 6C. The commissioners voted 5-0 to adopt the positions set out in this letter.
parallel subsections listed above is a lower one, *i.e.*, that such applications need not be “under review” to benefit from vesting.

ANC 6C is similarly troubled by the new text proposed for subsection 301.5(a)(2). On its face, that language would allow vesting even where an application later undergoes material revisions, so long as the later changes bring the application into greater conformity by correcting zoning errors.

We respectfully suggest that this standard undermines important public interests. First, it creates a perverse incentive for applicants to overreach and include zoning nonconformities in applications in the hopes that DCRA will overlook them. Even if such nonconformities were caught during review of the application, the applicant would still benefit from the proposed vesting rule. Put differently, there would be no downside to filing applications containing careless or even intentional zoning violations, as they could be cured afterward with no penalty.

The effect of this new language in section 301.5(a)(2) would not be restricted to cases involving map amendments. Several other parallel provisions of section 301 (*e.g.*, 301.14 and 301.15) condition vesting on an application not being “substantially changed” after filing. Because that phrase is not defined elsewhere in Title 11, DCRA and permit applicants will inevitably look to section 301.5(a)(2) as a description of the standard. That would extend the availability of vesting to bad-faith applications in numerous other circumstances beyond the narrow scenario addressed by section 301.5 itself.

It would be an error to dismiss these concerns are purely hypothetical. In a pending zoning appeal (BZA 19550) brought by ANC 6C, both DCRA and the property owner have repeatedly and forcefully made the following assertions:

- **That an application is “accepted as complete” by DCRA the instant the applicant submits the last application document electronically, even if that takes place at 1:51 a.m., before any DCRA employee has preliminarily vetted the application documents for facial sufficiency warranting full review.**

  Inserting “under review” only in subsection 301.5, but nowhere else in the section’s other vesting provisions, would lend strong support to this illogical reading of subsection 301.5 and other parallel provisions.

- **That an application is not “substantially changed” even where the initial permit is revised multiple times in an attempt to cure numerous material zoning defects.**

DCRA issued the original permit challenged in BZA 19550 in a remarkably hasty 7 days. ANC 6C’s initial appeal noted numerous zoning violations, including the depiction of four separate dwelling units in an RF zone with a 2-unit maximum; the illegal construction of two principal buildings on a single lot (connected by a below-grade corridor inconsistent with the requirements of subtitle B, section 309.1); and unambiguously false statements obscuring the failure to provide the minimum required percentage of pervious surface. The property owner subsequently amended the permit not once, but twice, curing some but not all of these material violations.
Both DCRA and the owner have taken the position that as long as the building envelope has not increased, there has been no “substantial change” regardless of the number or extent of modifications a) to the structures’ interior configuration or b) to cure substantial zoning violations. On this basis, DCRA and the owner claim that the original application is vested against subsequent changes in the regulations, including the 10’ “pop-back” restriction.

Adoption of proposed subsection 301.5(a)(2) would embolden DCRA to apply this same lenient standard to other vesting scenarios, and thus encourage future applicants to “roll the dice” by submitting applications for work inconsistent with Title 11.

ANC 6C is mindful that this rulemaking is at an advanced stage, and that we did not provide testimony earlier in the proceeding. We regret that oversight and apologize for raising these objections so late in the process. Having recently become aware of the proposed amendments, however, we would be remiss if we did not express grave concerns, founded in large part on our own ongoing experience litigating a vesting issue before the BZA.

In summary, we strongly oppose adoption of the proposed rulemaking and urge the Commission to further consider the potential for inadvertently over-expanding Title 11’s vesting provisions. The Commission should guard carefully against changes that make those vesting provisions—unobjectionable in principle—into a safe harbor for bad-faith applicants.

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

Sincerely,

Karen Wirt
Chair, ANC 6C