

Washington, DC Zoning Regulations Administrative Processes Study



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ACKNOWLEDGMENTS



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Part 1 Introduction

The Zoning Regulations¹ are, in many ways, an instruction manual for building neighborhoods, sites, and buildings. A wide variety of audiences uses this instruction manual. Investors use the Zoning Regulations to identify development opportunities that will yield an optimal rate of return. Architects and engineers use the Zoning Regulations to determine how to comply with the law. Citizens use the Zoning Regulations to protect their neighborhoods from inappropriate intrusions. These stakeholders come from many backgrounds – from those who engage in land development on a day to day basis, to persons who engage the ordinance on an intermittent basis when applications are filed that affect them.

Like most states, the District’s zoning legislation establishes rules for amending and administering the Zoning Regulations. However, the District’s institutional background is unique. Understanding the legislative complexities and institutional framework is important to understanding how to reform the technical and legal infrastructure.

This report is organized in several parts. Part 1 discusses the institutional framework of zoning in the District. Part 2 describes the types of actions taken by the Zoning Commission and Board of Zoning Adjustment, along with how those actions compare to national practice and the criteria discussed above for improving land use decisionmaking. Part 3 discusses the procedural steps the Zoning Commission and Board of Zoning Adjustment follow in their procedures. Part 4 discusses construction code issues. These are the ministerial (building permit and certificate of occupancy) processes used by DCRA and its relationship to the Zoning Commission and Board of Zoning Adjustment. Part 5 concludes with suggestions for improving the process that the Zoning Commission and Board of Zoning Adjustment can consider.

Institutional Framework

The decisions of a zoning body or official must find their basis in organic law (which provides their authority to act), and regulations that implement their authority. Unlike zoning in other states, the District’s Zoning Regulations are subject to enabling legislation that was adopted by Congress (the Zoning Act). In addition, several unique federal agencies or officials - such as the National Capital Planning Commission (NCPC), the Commission on Fine Arts (CFA), and the Architect of the Capitol (AOC), participate in land use decisions in the District. Because the District is the seat of the Federal government, the Federal government has representation on the District’s zoning administrative bodies. In addition, a Federal agency (NCPC) reviews the District’s zoning cases with regard to how these impact Federal interests². This makes zoning in the District unique as compared to any other local government in the Nation.

In 1973, Congress adopted the Home Rule Act³ which grants the District of Columbia partial home rule and delegates legislative powers to the local government⁴. The

self-governing aspects of the Home Rule Act are contained in Titles III and IV, known as the District Charter, which operates like a state constitution⁵. Except where specifically limited in the Home Rule Act, the District's legislative power extends to all rightful subjects of legislation within the District consistent with the Constitution and the Home Rule Act⁶. The legislative power granted to the District by the Home Rule Act is vested in the Council⁷.

In 1995, 22 years after the advent of home rule, Congress found that the District government was in the midst of a fiscal emergency, mismanagement, and failing to deliver effective or efficient services to residents⁸. In response, Congress established what was popularly known as the Control Board in the District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub.L. No. 104-8, § 2(a)(1), (2) & (4), 109 Stat. 97, 98 (1995) (FRMAA). Composed of five members appointed by the President of the United States, the Control Board had wide-ranging powers to improve the District government's operations. In 1996, Congress amended the FRMAA creating the District of Columbia Financial Responsibility and Management Assistance Authority -- the official name of the Control Board -- to strengthen the Control Board. Under § 207(d), it was given the ability to issue binding orders, rules, and regulations to the same extent as the Mayor or the head of any department or agency of the District government⁹. The Control Board's mission extended beyond financial management, and also addressed regulatory issues. This led the Zoning Commission to approve significant amendments to the District's zoning procedures which are discussed in greater detail below.

Zoning legislation in the District differs from most local governments because, in the District, legislative zoning powers are vested in the Zoning Commission. The power to zone is legislative, and the Zoning Commission is a quasi-legislative body¹⁰. The Zoning Commission also performs administrative functions, such as the approval of Planned Unit Developments (PUDs) and campus plans. Its rules of procedure are codified in Chapter 30 of the Zoning Regulations.

The Board of Zoning Adjustment (BZA) is a quasi-judicial body established by statute (D.C. Official Code § 6-641.07). Administrative decisions include special exceptions, variances and appeals from decisions of the Zoning Administrator and any agent of DC government relating to zoning issues. The BZA is a familiar body. These boards (sometimes referred to as Boards of Adjustment, Zoning Boards of Appeals, or similar names) are created in nearly every state, and have been a feature of American land use decision making since the 1922 Standard Zoning Enabling Act. Unlike the Zoning Commission, the BZA has no legislative authority. Its purpose is to administer the Zoning Regulations adopted by the Zoning Commission.

Ministerial and enforcement decisions include "building certifications" and permits. These decisions are made "over the permit counter" without a public hearing. These are handled by the Office of the Zoning Administrator at the Department of Consumer and Regulatory Affairs (DCRA). DCRA handles building permits and certificates of oc-

cupancy. The Zoning Administrator is the first level to administer, interpret, and enforce the Zoning Regulations. As part of this function, the Zoning Administrator determines whether the activities authorized by the building permit or certificate of occupancy comply with the Zoning Regulations¹¹. The Zoning Administrator writes zoning compliance letters that answer questions about zoning districts and zoning regulation compliance information on specific structures¹². The Zoning Administrator may appear before the Board of Zoning Adjustment when it denies, revokes, or renders an interpretation of the zoning standards.

The Office of Zoning also has ministerial and administrative functions. For example, the Office of Zoning provides the “Official Zoning Certification” as to the district map designation¹³. This provides an official determination about which zoning district applies to a property. However, it does not indicate whether a use or development proposal is permitted in the district. In addition, a determination of district status by DCRA (as opposed to the Office of Zoning) would not have official status.

The District’s Advisory Neighborhood Commissions (ANCs) are a unique entity. The elected ANCs advise the District government on matters of public policy and review and make recommendations concerning zoning changes, variances, public improvements, licenses, and permits of significance to neighborhood planning and development. The ANCs are also involved in the District’s Comprehensive Planning process. There are 37 ANCs across the city (see ANC website at <http://anc.dc.gov/anc/site/default.asp>). They are further subdivided into 323 Single-Member Districts (SMDs).

ANCs are entitled to notice of proposed zoning changes, variances, public improvements, licenses, or “permits of significance” to neighborhood planning and development within their area (D.C. Official Code § 1-207.38(d)). ANCs have automatic party status for contested cases before the Zoning Commission and cases before the BZA (11 DCMR §§ 3099.1, 3199.1; *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423, 429-30 (D.C. 2006)). This includes not only zoning changes and various policy issues as designated in the D.C. Official Code¹⁴, but also planned unit developments¹⁵, applications for air space development¹⁶, Zoning Commission approvals under the Capitol Gateway and Southeast Federal Center overlay districts¹⁷, appeals, variances, and special exceptions. By statute, the Zoning Commission or BZA must give “great weight” in their deliberations to “[t]he issues and concerns raised in the recommendations of” an ANC. D.C. Official Code § 1-309.10(d)(3)(A); *Spring Valley-Wesley Heights Citizens Ass’n v. District of Columbia Zoning Com’n*, 856 A.2d 1174 (D.C. 2004); *Foggy Bottom Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 791 A.2d 64, 76 (D.C. 2002). The “great weight” requirement requires a written report from the ANC, acknowledgment of the ANC as the source of the recommendations, and explicit reference to each of the ANC’s issues and concerns (D.C. Official Code § 1-309.10(d)(3)(A)). The Zoning Commission or BZA must articulate specific findings and conclusions with respect to each issue and concern raised by the ANC on the record (D.C. Official Code § 1-309.10(d)(3)(B)).

In the District, federal agencies are extensively involved in the zoning process. Key agen-

cies include NCPC, the National Park Service (NPS), and the AOC. NCPC is the federal government's planning agency, which reviews federal project design and federal capital improvements¹⁸. NCPC has a representative on the BZA, but not on the Zoning Commission. Both the NPS and the AOC have a representative on the Zoning Commission. The Zoning Act establishes a mandatory 30-day referral to the NCPC from the Zoning Commission¹⁹. The Zoning Commission must deposit all zoning regulations, maps, or amendments with the NCPC²⁰.

The Zoning Regulations

From the viewpoint of an applicant and the general public, the principal legal document is the Zoning Regulations. The District Zoning Regulations are codified as Title 11 of the District of Columbia Municipal Regulations (DCMR)²¹. The text of the Zoning Regulations is adopted through formal rulemaking by the Zoning Commission. The Zoning Regulations control the permitted uses, dimensions (such as permitted height, setbacks, and floor area), and design of new development or redevelopment in the District. The Zoning Regulations impose restrictions on land uses by district, and establish dimensional standards. It also creates procedures to follow when changing zoning rules, changing map designations, or applying for permits or approvals such as special exceptions, planned unit developments, or building permits. However, external sources and decisions have an influence on how the Zoning Regulations are applied and interpreted. These sources include Zoning Commission and BZA orders, court decisions, other statutes, and the Comprehensive Plan.

The Zoning Regulations govern both ministerial and discretionary actions with respect to zoning. Ministerial actions are routine, nondiscretionary zoning ordinance implementation matters carried out by the staff, including issuance of permits for permitted uses²². They do not require a public hearing. A discretionary action requires the decisionmaking entity to exercise judgment in finding facts and applying the law to the facts. The Zoning Commission adopts the text of the Zoning Regulations through formal rulemaking – a discretionary act. Other discretionary actions that involve contested case procedures include:

- Zoning Commission orders related to PUDs, map amendments, air right developments, campus plans, and design review cases; and
- BZA orders related to special exceptions, variances, and appeals.

Ministerial actions by the Office of Zoning include zoning certifications. The issuance of building permits and certificates of occupancy by DCRA are also ministerial functions.

These contested case and ministerial decisions apply the Zoning Regulations to particular situations. The Zoning Commission and BZA's interpretation of their own rules is entitled to deference by the courts (*Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423, 429 (D.C. 2006); *Watergate West, Inc. v. District of Columbia*

Board of Zoning Adjustment, 815 A.2d 762, 765 (D.C.2003); *Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1258, 1262 (D.C.2000)). As a result, the interpretation adds meaning to the rules. The full reach and meaning of a zoning rule, therefore, requires familiarity with how decisionmaking entities, such as the Zoning Commission and BZA, have applied it.

District case law can also add meaning to a zoning rule. A court decision can affirm or deny the Zoning Commission or BZA's interpretation of a rule. If a proper challenge is asserted, a court can also invalidate a rule, wholly or partially, on grounds of statutory authority or the impairment of constitutional rights. Contested case proceedings are reviewable in the District of Columbia Court of Appeals²³. Rulemaking is reviewable in the District of Columbia Superior Court²⁴.

Like most zoning ordinances, the Zoning Regulations contain numerous references to external statutes or regulations. These statutes or regulations can serve several purposes. First, they can extend protections to particular types of uses or situations. One example of this is the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 U.S.C. §§ 2000bb et seq.), which protects religious assemblies and specifically applies to zoning (42 U.S.C § 2000cc to 2000cc-5). Second, external laws can provide an extra, and sometimes more detailed, set of regulations to a particular use or situation. In those cases, a zoning rule may rely on definitions or other content that is furnished by that rule. Finally, the external regulation may provide an additional set of standards that are triggered by the development process. A prime example is the building code (known in the District as the Construction Code and codified at 12 DCMR). If key terms or concepts are defined differently in these codes, both sets of regulations can become confusing for applicants and administrators.

The Comprehensive Plan is an important reference document for the Zoning Regulations. The Comprehensive Plan is the statement of the District's basic policies for growth and development. Ideally, zoning rules are advised by the Comprehensive Plan's policies. Legally, the Zoning Act mandates that Zoning Regulations cannot be "inconsistent" with the Plan (D.C. Official Code § 6-641.02). Even without a direct legal consistency mandate, the Comprehensive Plan adds legitimacy to the Zoning Regulations and provides a basis for interpreting the rules.

The Comprehensive Plan consists of "District Elements", prepared by the District of Columbia, and "Federal Elements", prepared by the NCPC. The District Elements are codified at 10 DCMR. The District Elements were formerly organized into 11 citywide elements and eight ward plans. The new Comprehensive Plan differs significantly from the former Comprehensive Plan in that it no longer contains separate Ward Plans, has new sections, and includes graphics and data that were not in the Comprehensive Plan in the past. The Mayor may submit amendments to the Comprehensive Plan at any time to the Council for its review and approval.

Procedural Rules

The Zoning Commission has inherent authority to adopt rules of procedure²⁵. For the Board of Zoning Adjustment, the Zoning Act provides that the Zoning Commission adopts “general” rules²⁶ that govern procedures of the Board of Zoning Adjustment. The Board of Zoning Adjustment may adopt “supplemental” rules subject to approval by the Zoning Commission (D.C. Official Code § 6-641.07(c)). The terms “general” and “supplemental” are not defined in the D.C. Official Code. This provides the Zoning Commission and BZA the opportunity to decide the parameters of what constitutes a general versus a supplemental rule. This would suggest that the bare procedural requirements could be included in one chapter of the Zoning Regulations, with a specific chapter relating to very specific applications of those requirements. For example, the Zoning Regulations could require contested case procedures for special exceptions, while the supplemental rules could specify the procedures for initiating applications, setting down the hearing, taking evidence, rendering a decision, and party notification.

In the past, zoning procedures were governed by Rules of Practice and Procedure Before the Zoning Commission of the District of Columbia²⁷. These provided for two types of proceedings:

1. “Contested case” proceedings (Part II, Id. § 2.1 et seq.). These included “Rules of Practice and Procedure for Map Amendments” that were adopted in response to court decisions that had ruled that landowner-initiated map amendment proceedings were considered rulemaking rather than contested cases²⁸; and
2. “Rulemaking” proceedings (Part III, Id. § 3.1 et seq.)²⁹.

As late as 1999, the BZA operated under Supplemental Rules of Practice and Procedure³⁰. In 1997, the Control Board initiated a reform of the District’s zoning procedures. This led to rulemaking in 1999 which became the present procedural rules now found in Chapters 30-31 of the Zoning Regulations³¹. This was a comprehensive process that involved a significant amount of study, input from both local and national experts, and a number of deliberate policy decisions about how the District’s zoning processes are run. Accordingly, any revisions to the procedures should carefully consider their historical underpinnings.

Initial Assessment

What criteria should dictate the need for changes to the District’s procedures? A report on administrative procedures by a leading national law firm suggested the following (see *Robinson & Coles et al.*, 1998):

- Provide clear rules that tell parties and interested stakeholders when, where, and how to participate;

- Protect the due process rights of participants;
- Allow public participation in land use decision making;
- Promote decisions that are consistent with the District’s land use policies;
- Provide adequate notice to affected parties;
- Provide an opportunity for affected parties to be heard;
- Develop a good factual record;
- Provide decisions that are based on the record;
- Provide consistent decisions;
- Provide certainty;
- Provide an unbiased decision; and
- Provide finality.

In general, the District’s zoning rules of procedure meet these criteria. They are **significantly more thorough than those followed by zoning agencies in other states**. In most states, zoning agencies are given the authority to adopt their own rules of procedure. In practice, few zoning agencies have written rules of procedure, or very simplistic rules that omit the details of identifying parties, running a hearing, making a record, rendering decisions, and conducting post-hearing procedures. Most zoning procedures ignore details such as service of papers, party intervention, and discovery. As a consequence, questions that are raised about these issues are left to the zoning body’s discretion, and the procedures have the appearance of brevity and simplicity. These details are addressed specifically in the District’s Zoning Regulations.

Compared to other jurisdictions, the District’s rules are clear, promote public participation and due process, provide adequate notice, and decisions on the record. The sheer volume of publicly accessible recordkeeping is impressive, with written orders and transcripts available online. The participation of ANCs and rules allowing party status facilitate a longstanding tradition of public input into land use decisions. In addition, orders and decisions on land use decisions such as map amendments, special exceptions and variances make frequent and detailed reference to the City’s Comprehensive Plan and planning policies.

Despite their strengths, the District of Columbia’s Zoning Regulations procedures provide some challenges. First, they are very complex. This complexity is a response to the thorough way that the procedures respond to due process and statutory mandates, and the thorough manner in which procedural steps are addressed. However, this complexity is very daunting to lay persons. Lay persons can participate in the process as appointed agency officials, applicants, parties, or as individuals in support or in opposition. These stakeholders need a basic understanding of the procedures. If they participate only on a temporary or casual basis, lay participants have little time to learn the details of administrative procedure. However, there are ways to make the procedures easier to understand so that public input is encouraged, important testimony is received, and hearings proceed in an orderly manner. These are discussed later in this report.

Several additional criteria should be added to reflect the District’s unique situation:

- **History.** The District’s zoning administrative regulations may seem complicated, but they are the result of extensive discussion and deliberation. While the rules do not solve every problem and can always be improved, any suggestions for change should not lightly disregard deliberate policy decisions and trade-offs that followed extensive discussion.
- **Consistency.** The Zoning Commission and BZA have similar administrative procedures for contested cases. However, some of the procedures differ. Some of the differences are based on legal or practical considerations. For example, only the Zoning Commission has rulemaking procedures because the BZA has no rulemaking authority. For example, the Zoning Commission has a separate set-down process, while the BZA does not. The Zoning Commission requires 14 days notice if the record in a contested case is reopened, while the BZA requires 10 days. Appendix A includes a side by side summary of the BZA and Zoning Commission procedures, along with commentary about where the procedures differ and how they might be better coordinated.
- **Efficiency.** Many techniques that expand process – such as notice, additional proceedings to determine party status, and the like – can lengthen the process. This can create permitting delays, increase staff time required for processing, and expand the Zoning Commission and BZA’s workload.
- **Cost.** All of the efficiency considerations listed above can increase the costs associated with the public hearing process.
- **Comity.** The District works in a regulatory environment that involves the participation of many layers of government. The District’s federal presence is recognized in the Zoning Act by membership on the Zoning Commission and the BZA. In addition, unifying the procedures might also require intruding on an agency’s authority. For example, the BZA or Zoning Commission could prefer to retain some procedures that differ from the other body’s simply because they are familiar with the process, and could resist attempts to unilaterally revise their process.
- **Informality.** Zoning procedures frequently involve lay participants, or interested persons who become involved in zoning and planning issues when these issues affect their neighborhoods. These lay participants may not be professional planners or attorneys. In American jurisprudence, zoning hearing procedures are unique in their informality. Courts recognize that participants and decision-makers in zoning procedures have a “grass roots” nature that usually involve heavy input from lay persons. Many courts expressly provide that the formal rules of civil procedure or evidence do not apply to zoning proceedings, and all that is required is the observance of the “fundamental rules of evidence.”³² Thirty-seven years ago, the Federal District Court for the District of Columbia observed the following in considering a challenge to a zoning map amendment:

There is also a wide variance in the types of hearings required by the respective statutes. The zoning law contemplates situations that directly affect the interests of local property owners, singly and en masse, and a type of hearing that frequently involves (such as here) direct participation by the property owners themselves in local citizen protest-type appearances to demonstrate community sentiment. Such hearings could be characterized as being of the grass roots type. One of their features is that they provide for a face-to-face encounter between the official who is to decide and the citizens whose rights are to be determined.

On the other hand, hearings in the federal agencies are more formal. They are usually fully transcribed and reported, involve the presentation of evidence in judicial type proceedings by counsel, and other representatives of the interested parties, who are in a large number of cases frequently corporations who in turn represent many thousands of shareholders. There are of course many federal hearings in which the individuals involved directly participate but their issues, formality, recording procedures, and the degree to which the interested parties are represented completely by counsel, distinguish them generally from the local grass roots-direct confrontation hearings.³³

This statement reveals that the courts in the District recognize not only that zoning procedures are less formal than court proceedings, but also less formal than agency proceedings at the federal level. The detailed regulations used by District or federal agencies can provide models for dealing with specific issues related to party status, building and maintaining a record, and similar administrative issues. However, the Zoning Commission and BZA are not bound by the formalities that normally bind court or agency proceedings.



Part 2 Types of Zoning Actions

This study involves an analysis of the strengths and weaknesses of the Zoning procedures that are codified in Chapters 1, 30, 31, and 32. Compared to most jurisdictions, the procedures are complex and lengthy. Much of the length and complexity is due to statutory requirements, the sophistication and engagement of the general public in the process, and the need to protect due process rights.

Understanding the nature of the procedures and who is in charge of them is important to developing an effective technical and legal infrastructure. The major distinction in land use law in the District is between **rulemaking** and **contested** cases. In the District, most land use decisions are considered legislative in nature unless the Zoning Regulations provide otherwise³⁴. In addition, the exceptions to this rule are narrow³⁵. According to the Court of Appeals, only special exceptions, variances, and PUDs are considered exceptions to this rule³⁶. These decisions do not involve broad questions of public policy, but narrow questions of administrative application of specific statutory criteria to the facts relating to a particular parcel of property³⁷.

The most important distinction between rulemaking and contested cases is that rulemaking involves the development of policy, while contested cases are adjudicatory and involve the application of policy or criteria to specific situations. Rulemaking is quasi-legislative, and does not involve the trial-type due process protections that are found in a contested case³⁸.

The distinction between rulemaking and contested cases is summarized in the following table:

Rulemaking (Zoning Regulations § 3010.4)	Contested Cases (Zoning Regulations § 3010.2)
Rulemaking cases are cases that are legislative in nature and cases in which the issues to be resolved at the public hearing may affect large numbers of persons or property or the public in general.	Contested cases are adjudicatory in nature; present issues for resolution at a public hearing that potentially will affect a relatively small number of persons or properties; and involve primarily questions of fact applicable to a small number of persons or properties, while broader issues of public policy are secondary concerns.

Rulemaking versus Contested Cases in the District ³⁹	Rulemaking	Contested Cases
Establishes broad public policy	✓	
Applies specific criteria		✓
District-wide regulations, large land area, or a large number of properties	✓	
Specific applicant*		✓
Notice is required by due process		✓
Notice may be required by statute, but is not required by due process	✓	
Decisionmaking entity has wide discretion to make a decision	✓	✓
Notice required by statute or regulations	✓	✓
Due process or trial type protections at hearings (e.g., right to cross-examine, sworn testimony, etc.)		✓
Decision must be based on substantial competent evidence in record		✓
Note: * The APA allows an individual to petition the Zoning Commission to accept a rulemaking. However, the rulemaking itself is considered to have broad public policy implications rather than simply affecting the applicant. This distinguishes a petitioned rulemaking from a typical contested case, such as an application for a Special Exception submitted by a property owner.		

The following table summarizes the types of proceedings that are conducted by the Zoning Commission and BZA, and whether they are considered rulemaking or contested cases⁴²:

Type of Proceeding	Agency	Rulemaking	Contested Cases
Text amendment	ZC	✓	
Map amendment	ZC	✓	✓
PUD	ZC		✓
Air space development	ZC		✓
Capital Gateway or Southeast Federal Center ZC actions	ZC		✓
Appeals	BZA		✓
Variances	BZA-ZC	*	✓
Special Exceptions	BZA-ZC	*	✓
Interpretations of Zoning Regulations	BZA		✓

Note: * The Zoning Commission can grant special exceptions for PUDs (Zoning Regulations §§ 2405.7, 2405.8) and campus plans (§ 3035). In approving a PUD, the Zoning Commission may grant modifications from normally applicable zoning standards (§ 2400.5).

A discussion of the specific processes listed in Chapters 30-31 of the Zoning Regulations are described below:

Text Amendment

Description	This is a change to the text of the Zoning Regulations. This could change a development standard, a process, a definition, or any other written material in the regulations. This typically involves broad changes in policy, and tends to affect all or a large number of property owners rather than a single applicant.
Type of Proceeding	Rulemaking ⁴³
Approving Agency	Zoning Commission

Map amendment – Contested Case

Description	A change to the zoning classification of specific property and usually initiated by those property owners. This typically affects a fairly small area, and does not involve general matters of public policy.
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Type of ProceedingContested case⁴⁴**Approving Agency**

Zoning Commission

Discussion

In the District, the courts have characterized project-specific map amendments as rulemaking⁴⁵. However, Chapter 30 characterizes a landowner-initiated map amendment as a contested case⁴⁶. Therefore, the decision to apply contested case protections to rezoning cases is the choice of the Zoning Commission⁴⁷. Therefore, the Zoning Commission could revise the Zoning Regulations to designate any landowner-initiated map amendment as a rulemaking proceeding. The Zoning Commission currently has discretion to determine whether any case is to be classified as contested or a rulemaking (Zoning Regulations § 3010.7).

While the most states treat landowner-initiated map amendments as legislative (rulemaking) decisions, there is somewhat of a trend to classify the decisions as quasi-judicial⁴⁸. States that treat landowner-initiated rezoning as quasi-judicial distinguish the adoption of a zoning ordinance (or an amendment to the text of the zoning ordinance) and a rezoning (also known as a zoning amendment) which classifies a particular tract of land. This is commonly known as the “Fasano doctrine,” named after the Supreme Court of Oregon’s 1973 decision in the case of *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P.2d 23 (1973). Whether a landowner-initiated map amendment is considered legislative or quasi-judicial has a number of ramifications, including the method and scope of judicial review, the availability of an initiative/referendum, the application of sunshine laws and the application of immunities. See generally, Shortlidge, *The Fasano Doctrine: Land Use Decisions As Quasi-Judicial Acts*, Chapter 3, PROCEEDINGS OF THE 1984 SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN (MATTHEW BENDER & CO., 1985). With regard to procedure, quasi-judicial protections give parties at a map amendment hearing an opportunity to be heard, an opportunity to present and rebut evidence, a tribunal which is impartial in the matter — i.e., having had no pre-hearing or ex parte contacts concerning the question at issue — and to a record made and adequate findings executed⁴⁹.

An advantage of the rulemaking approach is that the Zoning Commission not only follows the majority rule, but it also has more control over the conduct of the proceedings, its ability to hear evidence, and its ability to engage in fact finding. A disadvantage is that the public might resist the loss of the procedural due process protections available with a contested case proceeding. While the Zoning Commission could choose, in individual cases, to afford these protections, it would no longer be guaranteed by the Zoning Regulations.

Map Amendment – Rulemaking

Description	This usually involves a large scale zoning map revision. This is typically initiated by a change in planning policies or other global policy initiatives, rather than by a single property owner's request.
Type of Proceeding	Rulemaking
Approving Agency	Zoning Commission
Discussion	<p>The difference between map revisions that involve only rulemaking, versus those that require a contested case, can involve some line drawing. As is discussed above, map amendments that do not meet the specific criteria set out in § 3010.2(b) are normally considered rulemaking. In other words, a map amendment is subject to rule-making procedures if –</p> <ul style="list-style-type: none"> • It is initiated by the public sector to initiate broad land use policy, or • It affects a large number of properties. <p>Of course, the Zoning Commission could choose to apply contested case procedures to map amendment procedures that are not landowner-initiated or that affect more than a single property or contiguous properties. Under Zoning Regulations § 3010.7, the Zoning Commission has the discretion to designate a case as contested or a rulemaking.</p>

Planned Unit Development (PUD)

Description	The PUD procedures are spelled out in Chapter 24 of the Zoning Regulations and are not addressed specifically here. PUDs are normally initiated by property owners for a specific project, and may involve both a related map change and specific conditions of approval. As such, they have many elements of adjudication. However, because they involve a change in regulations – e.g, the zoning map classifications and the regulations that apply to a property – they could be designated in the Zoning Regulations as a rulemaking. However, the Zoning Regulations consider PUDs as contested cases ⁵⁰ .
Type of Proceeding	Contested case ⁵¹
Approving Agency	Zoning Commission

Air Space Development

Description	Requests for renting or using the space above or below streets and alleys in the District of Columbia, under specified conditions, are referred to the Zoning Commission by the Building and Land Regulation Administration housed at DCRA. The Zoning Commission processes these using the same process as it does for map amendments ⁵² .
Type of Proceeding	Contested Case
Approving Agency	Zoning Commission

Capital Gateway or Southeast Federal Center Zoning Commission Actions (chapters 16 and 18)

Description	Specific lots or subdistricts in these districts require Zoning Commission design review, including uses, buildings, and structures, or any proposed exterior renovation to any existing buildings or structures that would result in an alteration of the exterior design. This requires the Zoning Commission to administer the special exception criteria that are normally assigned to the BZA, along with additional criteria that are spelled out in the district regulations.
Type of Proceeding	Contested Case
Approving Agency	Zoning Commission

Appeals

Description	<p>A request filed with the BZA to correct a decision by the Zoning Administrator or other officials applying the Zoning Regulations, where the applicant believes that their decision was erroneous.</p> <p><i>Note: if the Zoning Administrator imposes a civil penalty for violating the Zoning Regulations, the applicant may appeal the civil penalty to an Administrative Law Judge (ALJ) under the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985.³³</i></p>
Type of Proceeding	Contested Case
Approving Agency	Board of Zoning Adjustment

Discussion

Appeals afford the BZA wide discretion to resolve land use disputes. The Zoning Act's grant of authority is similar to the wording found in most conventional zoning enabling statutes.

However, there is some overlap with the Board's appeals authority and the appeal of civil infractions to an ALJ. This is discussed in greater detail later in the report.

Variations

Description

The BZA can relieve compliance with provisions of the Zoning Regulations that create "peculiar and exceptional practical difficulties to or exceptional and undue hardship" to a property⁵⁴. This is governed by the tests established by the Zoning Act, which are generally consistent with zoning variance statutes in most states. Procedurally, variances are handled like appeals. Substantively, however, the tests for granting a variance are significantly narrower than appeals.

Type of Proceeding

Contested Case

Approving Agency

Board of Zoning Adjustment

Note: The Zoning Commission may grant modifications for PUDs. While these provide relief from the underlying district regulations, they are not technically considered variances. Instead, they are modifications.

The Zoning Act has an unusual provision that reserves to the Zoning Commission the ability to provide for appeals to it from the BZA.⁵⁵ The Zoning Commission has reserved this power in the context of campus development plan special exceptions (see discussion below). In addition, the Zoning Commission retains sua sponte review authority for any decision of the BZA.⁵⁶ The Zoning Commission rarely uses this authority. In cases where the Zoning Commission does not review an administrative action of the BZA and it disagrees with the BZA's interpretation of regulation, it can change the regulation through its rulemaking powers.

Special Exceptions

Description	A special exception provides discretionary authority to review a use or situation that warrants case-by-case review and conditions. Like most zoning enabling statutes, the D.C. Official Code gives the BZA the authority to grant special exceptions. ⁵⁷ The Zoning Commission has reserved the authority to decide special exceptions for campus development plans. ⁵⁸
Type of Proceeding	Contested Case
Approving Agency	Board of Zoning Adjustment <i>Note: The Zoning Commission may grant special exceptions for PUDs, campus plans, etc. See also the discussion of sua sponte review, above.)</i>

Interpretations

Description	The entities or officials who administer the Zoning Regulations must, at times, interpret the regulations. However, applicants can appeal interpretations by staff, such as the DCRA, to the BZA.
Type of Proceeding	Any case or land use decision (e.g., issuance of building permits).
Approving Agency	Agencies can interpret their own rules, so the Zoning Commission, BZA, and Zoning Administrator all engage in interpretation in the course of administering those parts of the Zoning Regulations over which they have jurisdiction. ⁵⁹
Discussion	<p>Interpretation issues normally arise as part of a contested case proceeding or the normal permitting process. Some local governments have specific applications and procedures for an administrative interpretation.⁶⁰</p> <p>On occasion, different officials or entities will interpret a regulation differently. For example, the Zoning Administrator and the BZA might have different ideas about whether a particular business that is not expressly listed as a permitted use is permitted in a zoning district. In that case, the Zoning Administrator interprets the Zoning Regulations when it decides to approve or deny a building permit or certificate of occupancy. The applicant or a neighbor can appeal that decision to the BZA. On appeal, the BZA has final administrative responsibility to interpret the Zoning Regulations.⁶¹</p>



Part 3 Agency Processes and Considerations

This section addresses the major issues relating to the Zoning Commission and BZA's procedures. A number of issues were identified during the Zoning Commission's public round tables, stakeholder discussions, and staff discussions. The analysis begins with several basic issues, and then proceeds with issues that were identified for each step in the process. These steps progress from the filing of an application to post-hearing procedures. Part 4 addresses issues relating to the Construction Code, which would typically arise either for development that has completed the hearing process and is now ripe for a building permit application, or for existing structures that are applying for a structural modification or a change in use.

Technical Enhancements – how does the public access the procedures?

A basic issue that is central to our study, as well as the Zoning Regulation Reengineering tasks that were completed in November 2007, is how the public interfaces the regulations. Members of the general public have complained that the Zoning Regulations, in general, are complicated and difficult to understand. This is a common complaint with zoning, but a difficult one to resolve with regard to highly technical issues such as procedural issues.

At present, the general public can access the procedures through the DCMR. The DCMR is out of date, and does not reflect current rulemaking over the past several years. In addition, members of the general public can find regulatory materials difficult to read and understand. The Office of Zoning has addressed part of the problem by compiling an unofficial set of Zoning Regulations that reflect current rulemaking. However, materials that supplement the regulations can provide a useful tool to assist the general public in understanding how the procedures work. New tools that the Office of Zoning or the Zoning Commission could consider are as follows:

Administrative Manual or Handbook. One tool to assist the public is an administrative manual or handbook. A handbook would not replace the Zoning Regulations or change any rules, but instead would include rules that explain how the rules work. An advantage to using handbooks is that they do not require formal rulemaking. The procedures can change quickly and without the expense of a public hearing. If this approach is chosen, the procedures should be made easily accessible on the Office of Zoning's website. In many local governments, the rules of procedure are not codified and are not available with the balance of the Zoning Regulations. This can result in surprises for applicants, parties, and other stakeholders; delays associated with lack of familiarity with procedures; and potential due process issues.

Summary of Administrative Manual or Handbook Approach	
What is an administrative manual or handbook?	<ul style="list-style-type: none"> ✓ External, supplementary materials that explain the administrative rules in plain English, with flowcharts and other graphical materials. ✓ Does not replace the rules codified in Chapters 30-31 of the DCMR.
What are the advantages of an administrative manual or handbook?	<ul style="list-style-type: none"> ✓ No formal rulemaking is required ✓ Can be revised quickly and easily ✓ Not tied to ODAI's official codification ✓ Can produce in a variety of formats ✓ Can provide an official interpretation by Office of Zoning, Zoning Commission or BZA about how a procedure works
What are the disadvantages of an administrative manual or handbook?	<ul style="list-style-type: none"> ✓ Potential for inconsistencies with adopted rules ✓ Unclear legal status

Develop process flow charts. Process flow charts that are part of the regulations can help the reader understand the regulatory language. The Office of Zoning has developed for its internal use flow charts of its administrative and technical processes. These flow charts show not only the major steps in the approval process, but also a number of internal processes. For the regulatory language, the process flow charts do not require this level of detail. A summary of the major steps is all the reader needs in order to gain a better understanding of the process, and a significant level of detail could be confusing.

Provide a uniform procedures chapter. This approach involves a rulemaking that would bring the existing processes (PUD, map amendment, special exceptions, and variances) into a single chapter in the Zoning Regulations that describes how hearings are run and how to obtain land use approvals. This would consolidate the processes followed by the Zoning Commission and BZA, but not separate processes that are beyond their jurisdiction (such as building permits). The chapter would include general, introductory sections that describe the various types of procedures (rulemaking, contested cases, and ministerial permits), completeness review procedures, the conduct of hearings, and how party status is determined. Sections for individual types of land use approvals (e.g., map amendments, variances, special exceptions, appeals, PUDs, and contested text amendments) would include a uniform organizational theme. This would include applicability, how applications are received, advisory comments, hearing procedures, reapplication procedures, and the scope of the permit (i.e., what the permit allows the applicant to do). The San Antonio Unified Development Code (described in the Benchmarking Study) follows this approach.

As an alternative, the Zoning Regulations could include the current approach, which has

separate chapters for the Zoning Commission and BZA procedures that include a consistent format. The Zoning Commission and BZA would update the chapters to eliminate inconsistencies and to resolve the issues identified in Appendix A and throughout this report. This approach assures the BZA that they would have input on their own procedures and a uniform procedures chapter would also rely heavily on BZA input for its own processes.

An assessment of the current processes that are used in the Zoning Regulations and potential enhancements, using the criteria discussed in Part 1 of this report, is as follows:

Factor	Discussion
Clear rules	The procedural regulations are very complex but also fairly clear. External enhancements could assist the public by explaining, in plain English, how the procedures work. This would not change rules, but makes the adopted rules clearer.
Due process protected	The regulatory complexity can appear daunting to the lay reader. However, it also answers many questions that are left open in other jurisdictions. External enhancements, such as a handbook, could improve public access to administrative materials.
Allow public participation	The regulatory complexity can seem intimidating to lay or infrequent users. A clearer explanation of the rules and external enhancements could facilitate public engagement.
History	In 1999, some rules changed; the Zoning Commission reviewed and approved these changes to the rules in accord with suggestions from the Control Board.
Consistency between ZC/BZA rules	The rules share a common basic format, which improves their internal consistency. There are subtle differences that are explained in Appendix A.
Efficiency	Making needed materials available along with an explanation of informal processes helps administrators and applicants navigate the process.
Cost	Developing, printing and distributing a handbook would involve some cost to the District.
Informality	The regulatory structure has a very formal presentation.

Initiating Review and Pre-Hearing Considerations

Eligible Applicants for Text Amendments

The Zoning Regulations provide that the following “may” propose text or map amendments:

- “(a) The owner of property for which amendments are proposed;*
- (b) The Zoning Commission;*
- (c) The National Capital Planning Commission;*

- (d) *The D.C. Office of Planning;*
 (e) *The Department of Housing and Community Development; or*
 (f) *Any other department of the District or federal government.”⁶²*

The Administrative Procedures Act (APA) provides that any interested person may petition an agency to initiate rulemaking⁶³. Therefore, if the Zoning Regulations limit the persons who can propose an amendment, they would appear to conflict with the APA. This is an open issue, as the Zoning Regulations authorize certain entities to propose amendments to the Zoning Regulations, but does not state that other persons are precluded from initiating rulemaking procedures. Certainly, a person can use the APA as an independent vehicle to petition the Zoning Commission to initiate an amendment. In practice, the Office of Zoning indicates that citizens’ groups and similar entities have initiated cases for overlays and other amendments.

The text or map initiation language listed above is very common in local zoning regulations (except, of course, for the reference to Federal and District entities). It does not appear that this is a pressing issue. However, a cross-reference to the APA in this section would clarify the issue. In addition, I would recommend that this language be recodified at Article 30 along with the other rules pertaining to rulemaking.

Motions Practice

Because zoning procedures are generally informal, it is rare for local zoning agencies to have a motions practice. Zoning procedures in most states are based on the 1926 Standard State Zoning Enabling Act (SZA). These procedures have been criticized by national experts because they do not designate who has standing in agency proceedings, how the issues the agency must decide are identified, how hearings are conducted, and how the agency makes decisions.⁶⁴

Some state level land use agencies, such as the Oregon Land Use Board of Appeals (LUBA), Florida Land and Water Adjudicatory Commission, and Vermont Natural Resources Board - Land Use Panel, provide for petitions, cross-petitions, and answers in their rules of procedure.⁶⁵ A motions practice would:

- ✓ designate the types of motions that may be filed, and by whom;
- ✓ designate where and how motions are served;
- ✓ require parties to file specific requests for relief or agency action, party status, or continuances;
- ✓ limit the amount of time for responding to a motion;
- ✓ provide for, and limit, rebuttals and surrebuttals to affidavits or other testimony; and
- ✓ determine who rules on the motions and when. For example, the presiding officer can rule on procedural motions, with others disposed of at the hearing.⁶⁶

The Zoning Commission and BZA already have a limited motions practice. The rules of procedure require motions for the following:

Motion or Request Type	ZC Procedures ^g	BZA Procedures
Motion to correct a transcript, along with motions in opposition. ⁶⁷	✓	✓**
Request to designate a case as a contested case or a rulemaking. ⁶⁸	✓	
Motions to consolidate applications or petitions for hearing. ⁶⁹	✓	✓
Motions to amend (these are not described in the Zoning Regulations). ⁷⁰	✓	✓
Motion for reconsideration, rehearing or re-argument in a contested case, including the contents of the motion and time limits for answers in opposition or support. ⁷¹	✓	✓
Motion to reopen hearing. ⁷²		✓
Request to place a matter on the Zoning Commission's consent calendar. ⁷³	✓	
Note: ** While there is not a corresponding explicit BZA rule to match that for the Zoning Commission, the BZA does hear motions to correct transcripts.		

Motions for reconsideration, rehearing, and (in the Zoning Commission) reargument include requirements for when the motion can be served, service on other parties, what the motion contains, answering the motion, and the grounds for granting the motion. Other motions are simply referred to in the Zoning Regulations without any definition, description or requirements.

The Zoning Commission and BZA procedures do not address motions practice at the beginning of a hearing. There is no procedure to formally answer a petition or an application, responding to answers, or intervening to establish party status (this issue is discussed separately, below). The procedures include some detail about the contents of an application or an appeal. However, they provide little guidance about how an appeal is answered.

Some land use agencies hold a pre-hearing conference before the formal hearing. The Zoning Commission's set-down procedure appears to serve some of the purposes of agency pre-hearing conferences. A pre-hearing conference could accomplish the following⁷⁴:

- ✓ Matters that the agency can consider without taking evidence;
- ✓ Admissions of fact and of the genuineness of documents;
- ✓ Requests for documents;
- ✓ Admitting evidence;

- ✓ Limiting the number of witnesses;
- ✓ Reducing oral testimony to exhibit form;
- ✓ Setting the procedure at the hearing; and
- ✓ Providing for electronic media as a basis for exchange of briefs, hearing transcripts, and exhibits in addition to the official record copy.

The principal advantages and disadvantages of a pre-hearing or more detailed motions practice are:

Summary of Motions Practice Approach	
What is a motions practice?	These are precise rules about the types of motions that can be filed, the amount of time to respond to a motion, the form of the motion, and the form and content of motions. The Office of Zoning could prepare model motions as it does with findings of fact and conclusions of law.
What are the advantages of a motions practice?	<ul style="list-style-type: none"> ✓ Refines the issues before the hearing commences. ✓ Avoids surprises by parties attempting to present irrelevant or unanticipated evidence. ✓ Provides a predictable and consistent format for submissions to the reviewing agency, which can make reviewing the recorder quicker and more efficient. ✓ Can filter out commentary or input that is irrelevant or not helpful to reaching a proper decision.
What are the disadvantages of a motions practice?	<ul style="list-style-type: none"> ✓ Increases complexity of regulations and procedures. ✓ Can limit flexibility. Without a motions practice, responses and suggestions are provided in a variety of forms. ✓ Can result in surprise. For example, lay persons who attempt to answer an application or appeal might be precluded from doing so because they missed a motions deadline, or did not submit the motion in the prescribed format. Persons who are used to participation in zoning processes on a more informal level might not understand why their submittals are not taken by the agency. ✓ Potential for delay, as cases that proceed quickly under the current rules would have to await the filing of required motions.

Self-Certification

The BZA rules allow attorneys and architects to certify that an applicant is entitled to apply for a variance or special exception without filing “the zoning memorandum” required by the application forms.⁷⁵ The regulations contain no definition or predicate language that explains what the “zoning memorandum” is. Form 135 from the Office of Zoning

states:

“The undersigned agent and owner acknowledge that they are assuming the risk that the owner may require additional or different zoning relief from that which is self-certified in order to obtain, for the above-referenced project, any building permit, certificate of occupancy, or other administrative determination based upon the Zoning Regulations and Map. Any approval of the application by the Board of Zoning Adjustment does not constitute a Board finding that the relief sought is the relief required to obtain such permit, certification, or determination.”

In other words, the BZA only grants the relief that the applicant requests through the certification. It has been suggested that the regulations should indicate that the BZA will only grant the relief suggested in the self-certification form. This suggestion would clarify these regulations. However, this section, which governs pre-hearing procedures for variances and special exceptions, should include additional provisions that explain the process and what it is designed to accomplish. This includes:

1. An **applicability** section that establishes that the section applies to variance and special exception applications.
2. An **initiation** section that requires the applicant to file an application with the Office of Zoning.
3. A **processing** section that establishes a general rule that the Zoning Administrator will file a memorandum relating to the nature of the relief sought by the applicant, and that the application is not processed until the memorandum is filed. At that point, the self-certification language has context.
4. In order to provide clarity, the regulations could stipulate that the BZA will **only consider the relief requested** in the application, and that the Zoning Administrator may later determine that a building permit or certificate of occupancy must be denied due to other issues with the Zoning Regulations. In other words, if a proposed structure encroaches on both the side and rear setbacks, but the applicant applies only for a rear setback, the BZA may grant the rear setback. However, it is likely that the Zoning Administrator will then deny the building permit because of the side setback encroachment. Therefore, it is incumbent on applicants to seek all relief needed in order to avoid delays in permitting.

In lieu of further rulemaking or to spare the Zoning Regulations further length, this stipulation could simply be included in Office of Zoning Forms 120, 121, and 135. The Office of Zoning’s consultant believes that the language in the self-certification form already states this. However, the Office of Zoning could streamline the language to add clarity.

Party Status

Some members of the general public, and in particular community groups, have requested a formal determination of party status before the substantive hearing begins. Under the contested case rules for the Zoning Commission and the BZA, parties must request party status at least 14 days before the hearing. The rules require specific information requesting the rationale for granting party status⁷⁶. However, there is no separate, pre-hearing determination of party status. In practice, party status is not granted until the hearing occurs.

The rationale for a formal, pre-hearing party status determination is that it would inform the community group in advance of whether it needs to go to the time and expense of preparing a case. Applicants would also have advance notice as to who will participate as a party, thereby avoiding surprises. There is also confusion about the difference between parties, intervenors, and the ability to provide testimony without having party status.

There was interest expressed at public roundtables held last summer in achieving either automatic party status or using a relaxed standard to grant party status to nonprofits with citywide planning and zoning interests (for example, the Committee of 100). According to those that advocated for this enhanced party status, this would give these entities greater opportunity to participate in the hearings and to seek review of government body decisions by receiving notice of hearing dates and orders, access to filings, and the ability to provide testimony and cross-examine witnesses. (Examples of criteria for standing are listed in the paragraph titled “Criteria for Standing,” below.) On the other hand, these parties can already participate as persons who appear in opposition to or support of a party, and can appeal if they demonstrate that they are aggrieved by the decision. What a rule could accomplish is allowing nonprofits to bypass the usual tests for standing, such as a reduction in property values or a similar tangible interest. On the other hand, inviting more parties to participation can lengthen and complicate the hearing and decisionmaking process.

As with motions practice, local zoning boards and commissions rarely have rules for obtaining formal party status. In some states, persons who want to obtain party status enter an appearance on forms provided by the agency.⁷⁷ Courts have ruled that zoning agencies cannot arbitrarily and unreasonably deny party status to proposed intervenors. For example, in *Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*⁷⁸, the court ruled that it was improper to deny party status to residents surrounding a proposed processing facility where the Board had not clearly ruled on the criteria for intervention early in the process. However, denial of party status does not defeat review of an agency’s decision. Under the Administrative Procedures Act, D.C. Official Code § 2-510(a), “persons” who are not parties are entitled to seek judicial review of agency orders and decisions.⁷⁹

Some state and federal agency regulations provide for discovery. This is rarely done

with local zoning agencies. Testimony tends to be informal, and responding to discovery requests could become burdensome and expensive for lay participants. Because this has not been identified as an issue, it is not addressed in this report.

Options for addressing pre-hearing party status include:

- **Motions Practice.** The District currently provides forms and time limits to establish party status.⁸⁰ The District could augment these submittal requirements by establishing at least a limited motions practice. This is already partially addressed by the Zoning Regulations, which have standards and guidance on how to establish party status. The issue raised at the Zoning Roundtables was when party status is determined. At the roundtables, representatives from nonprofit organizations that had sought to be intervenors suggested that it would be useful if a party status determination was made prior to the hearing so that they would know sufficiently in advance if they would be putting on a full case, with cross-examination, so as to allow these prospective intervenor organizations to plan if, and when, to hire counsel and prepare their case prior to the hearing. A motion practice allows potential intervenors (i.e., persons or groups who support or oppose an application) to determine whether to invest in counsel to put on a full case, or simply to provide testimony, before the hearing occurs. This issue can be resolved by forms and time limits without the need for a full-blown motions practice. The advantage of a motions practice is that attorneys are familiar with basic motions procedures, and it limits the potential for surprise by requiring parties to frame their positions in advance of the hearing. The disadvantage is that the general public is typically unaware with the technicalities of formal motions (such as petitions for relief, answers, motions to intervene, motions to strike, etc.) and may lose their opportunity to participate when they miss deadlines or are technically noncompliant with required filing.
- **Pre-Hearing Determination.** Some agencies expressly provide that proposed intervenors must submit requests for intervention. Proposed intervenors may move to intervene within a designated time period after notice of the hearing is published⁸¹, a designated time after the application or appeal is filed⁸², or a designated time period before the hearing is scheduled to commence.⁸³ The notice of hearing could also designate the time period for filing a request for intervention.⁸⁴ The rules can also provide for filing answers to the request for intervention, and replies to the answers.⁸⁵ If the parties do not stipulate to intervention, the Zoning Commission or BZA can make a pre-hearing determination of party status.⁸⁶ This can be delegated to the presiding officer⁸⁷, a designated member of the commission or board, or staff.
- **Criteria for Standing.** The criteria for standing are presently stated in general terms. Instead of using numeric standards (such as distance from the site), the criteria are broad and discretionary. For example, persons requesting party status must show that they are “more significantly, distinctively, or uniquely affected in character or kind by the proposed zoning action than those of other persons in the general public.”⁸⁸ The rules could add specific criteria - such as all persons within a des-

ignated distance from the site - as an alternative to or supplement to the existing standing rules. For example, property owners within 200 feet of the site would have standing without having to show compliance with the general standing criteria.⁸⁹ This gives neighbors assurance that they have standing without having to prove actual harm. The downside is that adding parties automatically could lengthen the hearing process, reduce administrative efficiency, and increase staff time and resources needed to prepare orders. This is because the Zoning Commission / BZA and staff will have a larger volume of comments and submittals to sort through and evaluate. In addition, filing and disposing of motions could delay administrative processes. This does not mean that a more deliberative process is contrary to the public interest, but rather that it will prolong decisionmaking and the public costs associated with hearings.

While the Zoning Regulations' standing criteria are general, they go beyond most zoning regulations by addressing the issue of party standing in the first place. Zoning procedures in most jurisdictions fail to address standing issues at all. While standards for intervention are rarely included in zoning procedures, federal and state agencies address the issue frequently. Some agencies distinguish by right from discretionary intervention. For example, where persons cannot demonstrate that they meet the general standing criteria listed above, the Zoning Commission or BZA could grant intervention where the intervenor's participation will assist in developing a sound record, is conducive to the public interest, has unique interests in the proceeding, or is affected by the outcome.⁹⁰ The agency weighs against intervention the availability of other means to protect the proposed intervenor's interests, the extent to which the proposed intervenor's interests are represented by existing parties, whether intervention would prejudice the adjudication of the rights of the original parties, and the extent to which their participation will inappropriately broaden the issues or delay the proceeding.⁹¹

- **Public Interest or Amicus Participation.** The Zoning Regulations currently allow the Zoning Commission / BZA broad discretion to grant or deny party status. Additional standards could expand the ability of public interest or non-profit groups with no direct financial or property interest in the proceeding to gain party status. Typically, these groups would not have party status unless the rules granted them party status. Some land use agencies expressly allow "amicus" status for parties that identify a legal or policy issue that needs to be resolved by the hearing.⁹² Amicus parties may have limited participation rights, such as filing briefs and presenting oral argument on the issue(s).⁹³ Examples of standards are discussed in "Criteria for Standing," above.
- **Determination by Commission, Board Member, or Zoning Staff.** The rules could delegate to the Chair, Vice-Chair, members, or zoning staff the authority to make party status determinations. This allows the determinations to be made quickly, without requiring a full vote of the committee. The full Commission or Board could reconsider the approval or denial of party status. The District could provide addi-

tional compensation to Commission or Board members for the extra time associated with this task.

Clean Hands

Some Roundtable participants asked for “Clean Hands” procedures for zoning permits. A Clean Hands rule would preclude or restrict the processing of permits for applicants that have existing zoning violations. Clean Hands requirements can create incentives for bringing existing violations into compliance, and stop new violations from occurring. The District has an existing Clean Hands law for business licensing.⁹⁴ This prohibits the issuance or reissuance of a license or permit to any applicant who owes the District more than \$100 in outstanding fines, penalties, or interest. The applicant may avoid the permit ban if the fines are appealed. The District is implementing an interagency computer system to certify compliance.⁹⁵

There are potentially several different types of Clean Hands rules throughout the nation:

1. Rules that prohibit the intake of permits where the applicant has violations on other properties (“**off-site violations**”). Off-site violations create difficult enforcement issues. First, applicants can file under a different entity, requiring the Zoning Administrator or other staff to determine whether the entities are sufficiently connected to affect the current application. Second, violations can range from major violations that significantly affect the surrounding neighborhood, to minor violations that can easily occur through oversight. Treating all violations in the same manner might create unnecessary delays for applicants who are proceeding in good faith. Finally, in some states the state land use statutes do not permit the denial of land use applications for reasons unrelated to the specific permit, such as violations on other properties.⁹⁶
2. Rules that prohibit the processing of new permits, or applications to expand existing permitted activities, where there are violations relating to the existing permit (“**on-site violations**”). In the District, this situation arises most commonly with special exceptions for campus development plans. Existing campus development plan approvals may have a number of conditions, ranging from enrollment caps to construction of parking facilities, building design, and traffic controls. Some permit violations could have major impacts on surrounding neighborhoods, while others might simply amount to minor violations or conditions that require some time to implement. In *Temple University v Zoning Bd. of Adjustment*,⁹⁷ the court ruled that a special permit application to construct a school dormitory could not be denied on the basis of isolated incidents of misconduct by persons not clearly identified as students, or solely because the applicant committed isolated and minor violations of the conditions of a previous permit. Violations that are a single factor that evidences the intensification of a site in a way that violates discretionary zoning standards can provide a basis for disapproval.⁹⁸ In other words, if the agency retains unlimited or legislative discretion to deny the application, a prior violation could warrant denial.⁹⁹

The author's research did not uncover any cases or statutes in the District that address the legality of enforcement.¹⁰⁰ The following discussion assumes that enforcement of on-site violations in the District is legal, and is based on the following general principles and policy issues that apply in most jurisdictions:

1. In most states, a zoning commission or board of adjustment must have authority in the local zoning regulations in order to deny approval based on a previous violation. However, for **discretionary actions** such as a map amendment, PUD, or special exception, the District could consider writing conditions for future contested case orders without engaging new rulemaking. The Zoning Commission or BZA are likely to be on safer ground if they are relying on authority granted in the Zoning Regulations rather than discretionary authority that does not reference existing violations. This assumes that the Zoning Act authorizes this type of legislation. It does not expressly authorize it, although it arguably is allowed as a function of existing delegated authority.
2. For **ministerial permits**, such as building permits or certificates of occupancy, authority must be delegated in the regulations. The Zoning Commission can adopt the requirements as part of the Zoning Regulations,¹⁰¹ while the Mayor and Council could also adopt similar requirements as part of the Construction Code. Because the Zoning Administrator cannot issue building permits unless they "fully conform" to the Zoning Regulations,¹⁰² the permitting agency could arguably withhold new building permits where an existing development violates permit conditions.
3. The regulations should address whether the conditions have been **resolved** and render the project in compliance with existing orders, or whether there is an ongoing violation. It is difficult to justify withholding future permits simply due to past violations that are now resolved, as the Zoning Act includes fines and remedies for resolving those violations.
4. **Monitoring** is an important component of enforcing clean hands requirements. The BZA has used annual reporting to the Board by the local ANC as a way to enforce conditions.¹⁰³ One applicant proposed and agreed to a condition to establish a community liaison committee to address community concerns related to its use, with representatives of the ANC, a citizens association, owners of property abutting the subject property, and other interested persons.¹⁰⁴ While these techniques may still require further action by DCRA or others to enforce a condition, it is a useful way to encourage applicants to pay attention to them, and to bring violations to the attention of enforcement agencies.
5. Any text amendment or condition of approval should distinguish **major and minor conditions** or violations. These types of conditions would have different monitoring requirements and penalties for violation.

6. **Staged approval** is a justifiable way to enforce regulations, including past violations. The Zoning Regulations and conditions of approval can establish a permitting sequence along with time limits for submitting subsequent permits, such as building permits or certificates of occupancy. The conditions for later approval could range from affidavits that the use is in compliance, to a subsequent hearing and verification by the Zoning Commission or BZA that the use remains in compliance as a condition of applying for ministerial permits.
7. A Clean Hands requirement is **distinguishable from an order that contemplates future violations**. For example, some BZA orders provide that a special exception becomes invalid if the applicant pays a fine or is found to violate the conditions.¹⁰⁵ This becomes a condition of approval that can result in revocation, civil infractions, and injunctive relief if the violation continues.

Hearing Procedures

Deliberations

The Sunshine Act¹⁰⁶ provides:

All meetings (including hearings) of any department, agency, board, or commission of the District government, including meetings of the Council of the District of Columbia, at which official action of any kind is taken shall be open to the public.

In addition, the Zoning Act requires BZA and, implicitly, the Zoning Commission meetings to be open to the public.¹⁰⁷ In *Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*,¹⁰⁸ the District of Columbia Court of Appeals held that hearings of the Board must be public, but that the **deliberations of the Board after the hearing is completed may be in private**. This is consistent with the rule in most states with similar legislation, which permits deliberation and preparation of formal written decisions in private.¹⁰⁹ As the Dupont court recognized, executive session allows a “frank exchange of views” among the board members, and is consistent with how other judicial and quasi-judicial bodies make decisions.

This does not mean that the Board is required to deliberate in executive session. It can certainly choose to continue deliberating in open meetings, as is its current practice. **District policy encourages public participation and access to public information.** In addition, most zoning boards choose to deliberate in public. In practice, zoning boards often weigh facts that are undisputed, which minimizes the need to weigh the credibility of witnesses away from the public eye.¹¹⁰ Deliberating in the open can increase public confidence in the decisions and reduce the likelihood of arbitrary and capricious behavior.¹¹¹ In addition, zoning boards and commissions sometimes find that they need the input of the applicant or other parties during deliberations. This opportunity is lost if

the deliberation occurs in a closed session.¹¹²

Grounds for Appeal

The BZA regulations provide that an appeal must be filed within 60 days from notice or knowledge of the administrative decision or 10 days from completion of a structure's roof.¹¹³ The regulations do not expressly require the appellant to state the grounds for appeal. Instead, the appeal must be filed on a form provided by the BZA.¹¹⁴ This form – Form 125 – requires the appellant to:

“... submit in specific detail each and every exception they have to the administrative decision. Details should state the allegations of error in the administrative decision – “why it was an error” and reference the relevant Sections of the Title 11 DCMR Zoning Regulations and/or Map. It shall be typewritten or printed and attached to Form 125 Appeal. A detailed statement at the time of filing explaining how the appellant intends on proving their case.”

Appellants often have difficulty obtaining copies of plans and documents from various agencies that are needed to formulate a complete application for appeal. Generally, appellants have tried to obtain these copies of plans and documents from the agency that granted the permit in order to review them prior to filing an appeal. As new facts are discovered during the hearing process, the parties subject to the appeal (known as appellees) may resist expanding the grounds for appeal. Once additional grounds are discovered, the appeals' deadline may have elapsed. Because the deadline is jurisdictional, the BZA would lack authority to consider the appeal after the deadline expires.

From the viewpoint of an appellee who is proceeding in good faith and answering an appeal, the additional proceeding can result in additional time and expense. Requiring a statement of grounds for appeal should avoid surprise to applicants, or unnecessary delay arising from grounds that could have been raised from the outset. In addition, the process should give both applicants and appellants a final decision within a reasonable period of time.

Potential revisions to the appeal process should provide neighborhoods the ability to assert grounds for appeal within a reasonable period of time, avoid surprise, and allow the proceedings to terminate. Not surprisingly, few zoning agency rules address this issue. However, the court system frequently addresses this issue. Federal Rules of Civil Procedure, Rule 15, allows pleadings to be amended by right or by leave of court. Pleadings may be amended by right before being served with a responsive pleading, or within 20 days after serving the pleading where no responsive pleading is required. After that time, a party may amend its pleading only with the other party's written consent or the court's leave. The rules provide that leave to amend should “freely give leave when justice so requires.” This type of procedure is familiar to attorneys, and gives the BZA the discretionary authority to review each case on its merits.

In addition, the BZA could consider a rule that requires appellants and appellees to provide all applicable plans and materials for the record when faced with an appeal. If the appellant fails to furnish the plans or materials, the BZA could grant an extension of time to file additional grounds for appeal or to continue the proceeding. This creates an incentive for appellants to disclose relevant information at the outset of the hearing in order to avoid delay.

Consent Calendar

The Zoning Commission's consent calendar procedure is limited to minor modifications and technical corrections that are of little or no importance or consequence.¹¹⁵ Most agencies with legislative or rulemaking authority have a consent calendar or consent agenda procedure for a much wider variety of minor items. This could include final orders or other actions that require no further discretionary review. A consent agenda procedure should include a process for placing items on the agenda, an opportunity to pull an item for further discussion, and approval of all consent agenda items at once.

The BZA could also include a consent calendar procedure. Because most of their cases are contested cases, a consent calendar procedure runs the risk of violating the due process rights of parties who are denied the opportunity to comment where the case is resolved without a full hearing. So long as parties have adequate notice and the opportunity to request that the BZA pull the case and hear it, there is little risk of a due process violation. However, this process is rarely used with variances, appeals, and special exceptions that typically require some fact finding and potential off-site impacts.

Continuances

Parties sometimes request the continuation of a hearing from its noticed hearing date. The current practice is for the presiding officer for the Zoning Commission and BZA to appear at a hearing in order to continue it in cases where there is insufficient time in which to readvertise.¹¹⁶ The rules do not expressly provide that the presiding officer must do this. The rules currently provide:

Zoning Commission	Board of Zoning Appeals
<p>11 DCMR § 3020.1 The presiding officer shall have authority to: (a) Regulate the course of the hearing; ... (d) Dispose of procedural requests or similar matters, including motions to amend and to order hearings reopened; ...</p>	<p>11 DCMR § 3117.3 The presiding officer at a hearing shall have the authority to: (a) Regulate the course of the hearing; ... (e) Except as required under § 3117.5 [governing extension of time to present case], dispose of procedural requests or similar matters (including motions to amend and to order hearings reopened) ... (h) Subject to § 3105.11, adjourn a hearing and establish the date when the hearing will be continued;...”</p>
<p>11 DCMR § 3005.8 Unless all parties to a hearing agree otherwise, or unless the Commission orders otherwise, the Commission shall not postpone or continue a public hearing on a contested case for a period in excess of thirty (30) days from the date of the granting of such postponement or continuance.</p>	<p>11 DCMR § 3105.11 Unless all parties to a hearing before the Board agree otherwise, or unless the Board orders otherwise, the Board shall not postpone or continue a hearing for a period in excess of thirty (30) days from the date of such postponement or continuance or until the next available scheduled hearing date, whichever is earlier.</p>
<p>11 DCMR § 3005.9 If the time and place of resumption is publicly announced when a postponement, continuance, or adjournment is ordered, no further notice shall be required.</p>	<p>11 DCMR § 3105.12 Meetings and hearings shall be held at such time and place as the Board or the presiding officer may designate.</p>
<p>11 DCMR § 3015.11 If a failure of notice under § 3015.3 [notice provision for contested cases] is alleged and proven, the Commission may consider all the surrounding circumstances, including the extent of actual notice received by the public from all sources, attendance at the public hearing, and the nature and extent of the proposed construction and use under the application, if approved. On the basis of these considerations, the Commission may determine whether the public hearing will be postponed, continued, or held as scheduled.</p>	<p>11 DCMR § 3105.13 Meetings and hearings may be adjourned from time to time. If the time and place of resumption is publicly announced when the adjournment is ordered, no further notice shall be required.</p>

Agency practice is that the presiding officer appears at the hearing to announce the continuance on the record. This avoids the need to re-advertise the hearing. However, it requires additional attendance time for the presiding commissioners and requires staff to remain after hours. It is not as much of an issue for the BZA because they meet during normal business hours, and typically have more than one case on their docket.

While requiring the presiding officer to appear specifically to personally announce the continued hearing date is inconvenient and inefficient, the hearing date must be announced in order to respect due process rights and to ensure that any decision is valid. Parties have a due process right to reasonable notice of a hearing, and inadequate notice can void action taken at the hearing. In addition, lay participants at hearings sometimes complain that applicants represented by attorneys or other zoning professionals attempt to wear them down by constantly continuing a hearing, eventually resulting in a loss of interest or motivation to attend the hearing. Whether this is a serious issue is debatable, as frequent continuances would also cause the applicants delay. At the same time, the procedures should include safeguards that ensure that continuances do not prejudice the rights of parties to the hearing.

Notices should be cost-effective, avoiding a drain on public resources. Electronic notification can serve this function, but at present may not reach all affected parties. While modern techniques for notice include electronic notice such as email or internet postings, parties or persons who do not use the internet or read the paper might not find out about the continued hearing without some type of personal attention.

Another issue is one of delegation. It is not clear under the Zoning Act how a continued hearing can be noticed. The Zoning Act expressly authorizes the continuation of public hearings for text amendments where the time and place of the adjourned meeting is “publicly announced.”¹¹⁷ No specific notice for contested cases proceedings is prescribed for either the Zoning Commission or BZA, although these are subject to the District’s Administrative Procedures Act (APA). The APA does not specifically address the logistics of providing notice of adjourned hearing dates.¹¹⁸

To balance the issues of due process and efficiency, the Zoning Commission and BZA could adopt continuance procedures that:

1. Require a party who requests a continuance to pay for additional notice; and
2. Delegate a staff person, or a commission or board member, to announce the continuation to persons who show up on the day of the original hearing. It is not clear from the Zoning Act that a person must physically announce the continuation. However, not providing a personal announcement could create an appearance of unfairness; and
3. Require posting of continued meeting dates at the hearing room; and
4. Provide mail or electronic notice to all parties to the hearing; and
5. Provide a maximum number or time period for continuations without the consent of all parties to the hearing.

Expert Testimony

Expert testimony can play an important role in administrative zoning decisions:

“While agencies are not always bound to accept expert testimony over lay testimony, see Marjorie Webster Jun. C., I. v. District of Col. B. of Z. A., D.C.App., 309 A.2d 314, 319 (1973), the opinions of qualified experts are not to be lightly disregarded and the probative value of lay opinions is often doubtful. See, e. g., Goldstein v. Zoning Board of Review, City of Warwick, 101 R.I. 728, 227 A.2d 195 (R.I. 1967). In any event, some indication in the findings as to the reasons for rejecting the expert testimony in favor of that of lay witnesses was certainly required if judicial review is to be meaningful.”

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In the District, expert testimony usually comes up with architectural expertise, as well as traffic and shadow studies. It has been suggested that the Zoning Commission and BZA rules require a proffer or voir dire for expert witness testimony, as in court proceedings. Under current practice, proffers of qualifications of experts occur at both Zoning Commission and BZA hearings.

The Zoning Commission and BZA rules already address the submission of expert testimony. Parties may disclose expert witnesses, and the presiding officer may rule on their qualifications.¹²⁰ A formal proceeding may add more formality to the proceedings than is needed. Not surprisingly, this issue is rarely addressed in local zoning procedures. However, the Zoning Regulations could include the following provisions governing expert testimony:

1. A restatement of the law as to the weight of expert testimony. For example, the hearing procedures could provide that opinion evidence of lay persons is admissible but may not be given weight.¹²¹
2. Require or allow prefiled expert testimony through a technical report that provides a full explanation of the basis for the views set forth in the report. This would include data, tables, protocols, computations, formulae, and any other information necessary for verification of the views set forth, as well as a bibliography of reports, studies and other documents relied upon.¹²² While this is included in at least one state level land use agency procedure, it is not clear that this would add anything to how the District’s procedures presently work.

While the Zoning Commission and BZA could consider these changes, along with some formal procedure to certify experts, it is not clear how these would improve the current process.

Concluding and Terminating Review

Dismissal and Withdrawal

The Zoning Commission allows withdrawal of an application before advertisement, or af-

ter that time with consent of the Commission. The BZA allows withdrawal of an appeal or application at any time. It has been suggested that the rules require leave to withdraw as well as leaving the rules as is. It is not clear what would be gained by requiring leave to withdraw, since a claim cannot be prosecuted unless there is a live application. Otherwise, the applicant is not technically in front of the Board or Commission.

The BZA's withdrawal rules are permissive. This has the advantage of administrative convenience, because it spares the Office of Zoning staff and agencies the task of writing and publishing orders for projects that will not move forward. The disadvantage is that applicants sometimes try to frustrate or wear down opposition by withdrawing an application, and then refiling when the controversy subsides.¹²³ Both the Zoning Commission and BZA rules prohibit reconsideration of withdrawn applications within a designated time period, which tends to control this practice.

It has also been suggested that failure to appear at a hearing should result in dismissal of an application. This rule would promote efficiency and reduce costs by clearing each agency's docket of dormant applications.

Effective Date

Zoning Commission orders take effect on publication, while BZA orders are effective at service. Unifying the rules would make the rules easier to administer. If effective at service, the orders would take effect earlier as there is a 2 week time lag between transmittal to the Office of Documents (ODAI) and publication. While the Office of Documents pays for publication and the orders become searchable, a uniform effective date makes sense. The orders will be published regardless of when they become effective, and an earlier effective date is generally more beneficial to the affected parties. In addition, the affected parties will have notice of the order before they are published.

Post-Decision Issues

Modifications

The BZA regulations allow requests for a "modification" to be filed for any appeal, special exception, or variance.¹²⁴ The modification request must be filed within 6 months of a final order.¹²⁵ The Zoning Commission can modify any rulemaking or order on its consent calendar, if the proposed modification is of "little importance or consequence."¹²⁶ There are four major issues with the modification procedures. These are described below, along with suggestions for changing or revising the regulations.

Issue	Discussion/Suggestion
<p>1. The modification requests apply to “plans”¹²⁷ and not to the language of the order itself</p>	<p>Suggestion: expand applicability as suggested. This would expand the scope of modifications to include not only the dimensional and design criteria reflected in plans, but also to any type of written condition¹²⁸. Note that this still extends the reach of modifications only to minor situations as discussed in 4, below. The modification language lacks a purpose statement or specific approval criteria. Expanding the applicability section to include both plans and orders would improve flexibility and efficiency. In practice, the BZA and Zoning Commission have looked to the Comprehensive Plan and other land use policies in approving modifications. Limiting modifications to minor situations should avoid significant adverse effects on neighborhoods. . The current Zoning Commission (for the consent calendar) and BZA regulations are limited to minor modifications.¹²⁹</p>
<p>2. The 6-month time limit is unrealistic and is repeatedly waived by the Board. It is also inconsistent with the 2- year time limit in 11 DCMR § 3130.1 to apply for a building permit.</p>	<p>Suggestion: expand the modification time limit to match the 2-year period for original approvals. In other jurisdictions, this procedure is used to “fix” minor details or items that were overlooked during the approval process, without incurring the public and private expense of a new hearing. Regardless of whether 6 months is a realistic time period for applicants, there is no sound reason to preclude corrective action while the permit remains active.</p>

Issue	Discussion/Suggestion
<p>3. Modification requests must be served on all parties.¹³⁰ The Zoning Commission provides 7 days for a response, while the BZA procedures provide for 10 days. Both procedures provide that the modification is approved only on the basis of the written request, plans, and comments from the parties.¹³¹ No hearing is required.</p>	<p>Suggestion: the existing procedure offers a streamlined process for truly minor items, while preserving due process and review by interested parties. Ideally, the procedures and time limits should be unified – which is the prerogative of both the Zoning Commission and BZA.</p> <p>The District could offer a major modification procedure, which would require a hearing. This would further streamline the permitting process, while preserving the opportunity for neighborhood review. Conversely, neighborhood groups could see the process as a way for applicants to secure a “second bite at the apple” without engaging full review. In addition, the public hearing processes involve additional expense to the agencies and the affected public.</p>
<p>4. The modification criteria are unclear. The Zoning Commission allows modifications that are “of little or no importance or consequence.” At the BZA, modifications are “limited to minor modifications that do not change the material facts the Board relied upon its approving the application.”¹³²</p>	<p>Suggestions:</p> <ul style="list-style-type: none"> • The modification criteria could include a list of items that are considered minor. In many jurisdictions, this is based on the number or amount of dwelling units or intensity – e.g., no more than a 2-5% increase in dwelling units, 3 feet or 1 story in height, no decrease in open space or natural resources, no decrease in affordable housing or project amenities, etc. Because there is no purpose statement for the procedure, it is difficult to fashion specific criteria without further public discussion with the Zoning Commission and BZA. • In addition to the “safe harbor” criteria, the general criteria could be retained to provide for unusual situations.



Part 4 Construction Code Issues

This Part highlights potential issues that should be addressed in the Zoning Regulation review process that deal with inconsistencies between Chapters 32 of the District's Zoning Regulations (11 DCMR) and Chapter 1 of the Construction Code (12 DCMR). This is based on a review of these chapters, review of the Zoning Commission Roundtable testimony, and conversations with various city officials and stakeholders about conflicts and inconsistencies.

The Construction Code controls:

- construction, alteration, addition, repair, removal, demolition, use, location, movement, enlargement, occupancy, and maintenance of all buildings and structures
- appurtenances attached to buildings or structures
- signs that advertise devices and premises

The Construction Code applies to existing or proposed buildings and structures.

The Zoning Regulations control and regulate the height, bulk, number of stories, and size of buildings and other structures, the open spaces around them, the use of the buildings, structures, and land in the District.

The two sets of regulations should work together and avoid overlap, confusion, or conflicts as they are used and administered. This section of the memorandum outlines areas that need further clarification to make sure that Chapter 32 of the District's Zoning Regulations and Chapter 1 of the Construction Code are not working at cross purposes.

Overlap and Codification

There is some overlap between the Construction Code and the Zoning Regulations. However, each set of regulations is adopted and administered by a different entity. The District Council adopts the Construction Codes,¹³³ while the Zoning Commission adopts the Zoning Regulations. The Zoning Commission, BZA, and Office of Zoning are involved in administering and interpreting the Zoning Regulations. However, the Department of Consumer and Regulatory Affairs (DCRA) administers the Construction Code and enforces the Zoning Regulations.

Examples of overlap include height measurement, definitions, and the issuance of permits. If one set of standards fails to address an aspect of a topic while the other does, different interpretations can occur. This lack of consistency can lead to confusion in the administration of such regulations. An example is demonstrated in the administration of Certificates of Occupancy and its corresponding regulations.

The Construction Code and the Zoning Regulations both address Certificates of Occu-

pancy: the Construction Code in section 110A of 12 DCMR and the Zoning Regulations in Chapter 32 of 11 DCMR. Both regulations note who must apply, when a certificate is required, and length of certificate validity. However, only the Construction Code speaks to who may revoke a certificate of occupancy. Section 105.1 authorizes the Director of the Department of Consumer and Regulatory Affairs to revoke a certificate of occupancy. The Zoning Regulations do not address revocation. For readers who are unfamiliar with the Construction Code, this leaves open the question of who has the authority and under which circumstances a Certificate of Occupancy may be revoked.

A second general area of overlap and potential conflict between the Zoning Regulations and the Construction Code involves submittal requirements for building permits. Both the Zoning Regulations¹³⁴ and Construction Code¹³⁵ include zoning compliance submittal requirements for building permits.

The following alternatives could clarify the regulations:

- Amend the Zoning Regulations to cross-reference the procedures for revocation that appear in the Construction Code. This could occur whether or not procedural or substantive requirements are removed from the Zoning Regulations.
- Codify all substantive requirements for certificates of occupancy in the Construction Code. This is beyond the control of the Office of Zoning or Zoning Commission. The Zoning Commission could eliminate formal requirements that appear in the Zoning Regulations, using cross-references to address situations that require a formal certificate of occupancy. The advantage of this procedure is that all of the certificate of occupancy regulations would be assembled in a single document. In addition, the Construction Code is administered by the DCRA. Assembling the certificate of occupancy procedures there provides a convenient point of reference for DCRA personnel. A disadvantage is that this relies on the Construction Code to resolve zoning issues. The Zoning Commission could lose control over certificate of occupancy requirements that are unique to land use issues, as opposed to construction issues. If building permit requirements are codified in the Construction Code, there is a fear that the BZA would lose jurisdiction over building permit actions that involve the Zoning Regulations (this issue is discussed below). Thus, a better approach might be to coordinate the submittal requirements for building permits and certificates of occupancy in the Zoning Regulations with those in the Construction Code. This would clarify that noncompliance is a zoning violation that is enforceable under the Zoning Regulations.

Zoning Certification

The Office of Zoning offers a zoning certification service. The zoning certification provides authentication of the zoning classification of a property for due diligence purposes.¹³⁶ A zoning certification is used as a means of gaining official written (notarized)

recognition of zoning from the District of Columbia government.

There is no formal “zoning certification” process established in the Zoning Regulations.¹³⁷ However, the Zoning Regulations provide that the zoning map atlases are on file in the Office of Zoning.¹³⁸ The Director of the Office of Zoning certifies each page of the zoning map atlases as correct.¹³⁹ Unfortunately, some property owners use the unofficial information on the DCRA website to determine their property’s zoning classification. This may have incorrect information. When applications or appeals are filed, the Office of Zoning is put in the position of having to clarify that that the DCRA website is not the official zoning.

This issue cannot be resolved through regulation by the Zoning Commission, because it involves the independent functions of another agency. The District’s 1982 Reorganization Plan assigns to DCRA the authority to provide public information about zoning code requirements. The Office of Zoning can work with the Zoning Administrator to provide appropriate caveats in any letter pertaining to a property’s zoning classification. The caveat should indicate the basis for the Zoning Administrator’s statements that the determination is not official and that the applicant should receive a map certification from the Office of Zoning. In addition, the Office of Zoning could approach the DCRA with a **Memorandum of Understanding (MOU)** that would spell out each agency’s responsibilities – i.e., map certification with Office of Zoning and zoning compliance with DCRA. To a large extent, this meeting between the agencies has already been accomplished, although not reduced to a written MOU.

Vested Rights & Provisional Certificates of Occupancy

Vested rights involve a difficult balance between the rights of property owners and those of the community. This doctrine – along with a related concept known as “equitable estoppel”¹⁴⁰ – establishes the point in the permitting process where applicants can rely on regulations or permits in place, and avoid compliance with new regulations that would alter their existing plans.¹⁴¹ In order to establish vested rights under either analysis, the landowner in most states must prove the following:

1. That *governmental actions* have been taken which authorize a particular course of action by the developer (e.g., what development permits have been issued and what do those permits authorize?) Generally, a building permit or some other type of final approval is required before vested rights will accrue.
2. That the landowner has *relied* on such permits (e.g., how much money has the landowner spent in reliance on the permit?).
3. That the reliance on the governmental act was reasonable and in *good faith* (e.g., did the landowner proceed as a matter of course or simply to receive an approval

prior to the effective date of a pending regulation in order to escape its purview?).¹⁴²

The District of Columbia appears to follow the majority rule.¹⁴³

Vested rights may also be conferred by statute. For example, Colorado’s statutory vested right process allows a local government to enter into a development agreement to vest development property rights.¹⁴⁴ The creation of a long term development agreement, as opposed to the straight vesting of property rights for a three year period, must be warranted in light of “the size and phasing of development, economic cycles, and market conditions.” Vesting is based upon the local government’s approval of a “site specific development plan.” The Colorado statute suggests that a site specific development plan (SSDP) may include any of the following (C.R.S. § 24-68-102(4)):

- PUD plan;
- subdivision plat;
- specially planned area;
- planned building group;
- general submission plan;
- preliminary or general development plan;
- conditional or special use plan; or
- development agreement.

Other states have adopted “development agreement” legislation that allow property owners to enter into regulatory contracts that “lock in” their development rights, and in exchange provide benefits or amenities that are not typically provided under the normal zoning procedures.¹⁴⁵ This is similar to the use of conditions to a zoning change, such as a Planned Unit Development (PUD). However, the conditions are written in the form of an agreement between the local government and the applicant, and normally provide that the project is not subject to regulatory changes for a given period of time. The time period for this “regulatory freeze” normally ranges from 3-10 years, but some local governments have approved regulatory freezes for as long as 20-30 years.¹⁴⁶

An important threshold consideration in vested rights claims is the point in the approval process to which the development has proceeded. There are 3 basic approaches to this rule, with the District of Columbia court following the approach used in a majority of the states:

1. **Building Permit.** Most states do not allow vesting to occur before issuance of a building permit, which is normally the last discretionary act that occurs prior to construction.¹⁴⁷
2. **Some states** (e.g., Florida, South Carolina) require substantial expenditures in reliance on a permit, but will find vested rights earlier in the process – such as at subdivision plat or site plan approval.

3. **“Bright line” rule.** Several states (e.g., Washington and Utah) follow a “bright line” rule where rights vest if the proposed development meets the zoning requirements in existence at the time of application.¹⁴⁸ This rule typically applies to building permit, site plan, or subdivision approval.
4. **First step.** The most aggressive rule is the Texas permitting statute, which locks in regulations when the applicant files the original application for a permit – including the first permit in a series of permits - for review for any purpose.¹⁴⁹

Under a related concept known as the “pending ordinance doctrine,” vested rights are overcome if a municipality takes active steps to change its zoning and land use restrictions. A developer who proceeds with a project despite knowledge of a change in regulation that would affect his (or her) project may not rely on equitable estoppel to avoid the application of legislation subsequently adopted. Actual or constructive notice of a change in applicable regulations defeats a claim of equitable estoppel. This also applies to “pending” legislation which may affect the project.¹⁵⁰ In most states, an ordinance is considered pending, and knowledge of such is imputed to the developer, when the governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning.¹⁵¹

The District’s Zoning Regulations establish a rule that combines relatively late vesting with the pending ordinance doctrine (11 DCMR § 3202.5). Section 3202.5 provides that vesting occurs at building permit issuance, does not require evidence of substantial expenditures, and establishes a pending ordinance condition. This rule was adopted in 1988, after what appeared to be substantial discussion and public input, and amended for clarification in 2003 by Zoning Commission Order No. 3-14. Under the 3202 rule, the vesting steps are as follows:

1. If the application is **filed** on or before the case is set down, it is vested IF it is complete. If the application is incomplete, it is not vested (§ 3202.5(a)). If the permit was **issued** before the set-down date, it is vested if construction begins within 2 years of issuance. Under 12 DCMR § 105.5, construction must begin with 1 year of permit issuance, subject to up to 3 6-month extensions (or 2.5 years).
2. If the application is filed after set-down, it is subject to either the final decision or the “most restrictive” district (§ 3202.5(b)). These regulations codify the “pending ordinance doctrine” discussed above. The pending ordinance regulations do not address what happens when the permit is issued before the set down date, but does not occur on a timely basis. In that scenario, the District could choose to either apply the pending ordinance rule or to continue vesting. If the rules allow vesting, it is advisable to include a time limit to avoid obsolete construction.
3. Once a BZA order is issued, the applicant may rely on that order when proceeding to building permit (§ 3202.6). That section states, in pertinent part, that “[A]ll applications for building permits authorized by orders of the [BZA] may be pro-

cessed in accordance with the Zoning Regulations in effect on the date those orders are promulgated...”. However, the language of the provision could leave it open to questions of interpretation and could be reviewed for clarification when this entire section is reviewed. Some of the issues that could be clarified include: what effect, for instance, is there when the BZA order is from an appeal case and not from an application for either a variance or special exception and when is the order deemed “promulgated” for determining the date from which to measure. Also, use of the term “may” leaves open a question as to what other version of the Zoning Regulations could be applied and who makes that determination, assuming the rest of the provision’s conditions are met.

These rules allow vesting to occur earlier than it would have if there were no rule and vesting issues were left to the courts. Absent a rule, mere issuance of a permit would not confer vesting. In that case, an applicant would need BOTH a permit AND substantial expenditures in reliance on the permit. This is similar to the “bright line” rule in that there is a date certain, without proof of substantial expenditures, at which vesting occurs. However, unlike the case in those states, vesting requires more than an application. It requires permit issuance and that construction begins within a date certain.

In deciding how to address vested rights issues, the District has the following alternatives:

1. **Keep the existing regulations intact.** The regulations do not appear unduly restrictive, nor do they lock in regulations earlier than the case in most jurisdictions. And, they seem to have followed substantial public debate – albeit around 20 years ago. Of course, the language could be modified and illustrated for clarity. A matrix that graphically displays the relationships between building permit application, building permit issuance, and set down would make the result clearer for applicants.
2. **Revise the existing approach.** Revise the existing approach to move the vesting point earlier or later in the process. For example, vesting could be moved to the point of application if construction begins within 30 months, which is the maximum time period available under DCRA’s current rules. Or, vesting could change to the point at which construction begins, rather than the point at which the permit is issued. If vesting is moved to this point, applicants could still argue that they have established common law vesting by incurring substantial expenditures in reliance on the permit. While the courts may apply the rule in many states (such as Maryland) that vesting requires the commencement of construction, District law is not absolutely clear on this point.
3. **Replace a bright-line rule with an appeals process.** This type of process would allow property owners to demonstrate that they have committed substantial expenditures, and city officials to demonstrate that new regulations outweigh private interests, at a contested case hearing. The advantage of this process is that it is flexible. It protects landowners who have proceeded diligently and in good faith, and not

those with speculative permits. It may also allow the application of new regulations that have a strong relationship to public health and safety, which would otherwise be vested today. The downside is that it is potentially administratively burdensome, and provides uncertainty for applicants.

4. **Establish a certification process.** Property owners would have a limited time period after a new regulation is adopted to file a certification that they are legally nonconforming or vested. Property owners who do not certify in a timely manner lose their nonconforming or vested status. This approach allows both the Office of Zoning and applicants to obtain a ministerial determination of vested status. A downside is the potentially large number of certifications that the Office of Zoning or Zoning Administrator would need to process.

Appeals from Enforcement Actions

Under the Zoning Act, the BZA is the principal appeals agency and interpreter of the Zoning Regulations. Appeals of the Zoning Administrator's decisions to grant or deny building permits or certificates of occupancy are assigned by the D.C. Official Code to the BZA.¹⁵²

Penalties have a different procedural route. Civil fines, penalties, and fees may be imposed as sanctions for any infraction of the provisions of the Zoning Act or Zoning Regulations pursuant to the civil infractions legislation (D.C. Official Code, Chapter 18 of Title 2, § 2-1801.01 et seq.).¹⁵³ Adjudication of Zoning Act infractions are processed under the civil infractions legislation. This means that fines and penalties are appealed to the Office of Administrative Hearings (OAH) which is created by the civil infractions legislation. This legislation is clear that the BZA retains jurisdiction over zoning appeals.¹⁵⁴ Subchapter III of Title 18 provides:

Except as provided in § 2-1831.16, the District of Columbia Board of Appeals and Review shall entertain and determine appeals timely filed by persons aggrieved by orders issued by hearing examiners pursuant to this chapter or by the Mayor, except that appeals involving infractions of subchapter I of Chapter 6 of Title 6, or the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment; ...¹⁵⁵

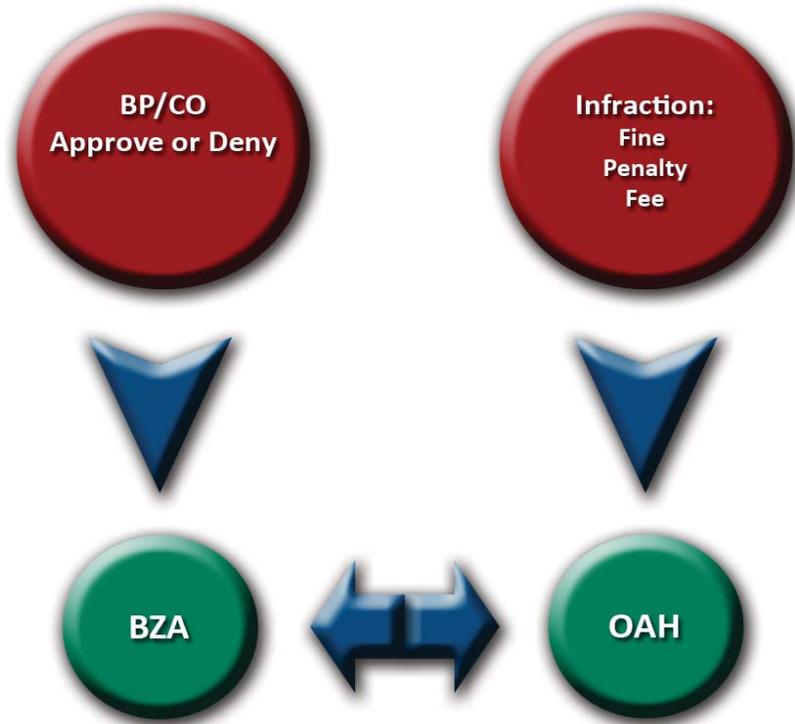


Figure 1 Appeals to BZA and Office of Administrative Hearings

As a consequence, the BZA retains jurisdiction to entertain and determine appeals from orders of Administrative Law Judges.¹⁵⁶ The BZA could also elect to refer to OAH or to be covered by OAH.¹⁵⁷

Because a zoning violation and zoning infraction can arise from the same facts, the BZA and OAH can have concurrent jurisdiction over appeals from a Notice of Infraction (NOI) or a civil infraction decision rendered by OAH. At present, a party charged with an NOI that alleges violations of the building code as well as zoning regulations can appeal to the OAH. An Administrative Law Judge (ALJ) at the OAH may adjudicate the Construction Code violation, but lacks jurisdiction over that portion of the case that involves interpretations of the Zoning Regulations. The matter of interpretation must be resolved by the BZA. In practice, the ALJ may hear the case and issue a decision, and the aggrieved party will then appeal the zoning violations to the BZA. This is a less efficient process than directing the property owner to appeal to the BZA for that part of the NOI that pertains to the Zoning Regulations, and concurrently to the OAH for those parts over which they have jurisdiction.

Potential ways to address overlapping and concurrent jurisdiction over zoning enforcement issues with the OAH may include:

1. Provide in the Zoning Regulations that the BZA may, in its discretion, accept the findings of the OAH or independently determine facts based on a resubmittal of existing evidence or new evidence.
2. Expressly provide that no order of the OAH authorizes a violation of the Zoning Regulations.
3. Direct respondents who appeal an NOI to the OAH if the claim is that the penalty is improper. This could be accomplished in the Zoning Regulations or Office of Zoning's forms and website. Notify respondents that, if they are alleging that there is no zoning violation or that the Zoning Administrator decision leading to the infraction was erroneous, this must be adjudicated by the BZA.
4. Require respondents who appeal that portion of an ALJ's Civil Infraction decision that involves or implicates the Zoning Regulations to file an appeal with the BZA. Provide that the BZA will either accept the ALJ's record or determine the facts relating to the existence of a zoning violation de novo. If the BZA, instead, chooses to require the party to appeal concurrently to the OAH and the BZA and the respondent disregards this procedure (filing with the OAH first), the BZA can either dismiss the case or provide some other consequence.
5. Consider a Memorandum of Understanding (MOU) that would govern the sequencing of appeals, transmittal of records, and similar logistics in cases where the agencies have concurrent jurisdiction. The MOU could designate the BZA as the lead government body for determining facts and rendering interpretations that relate to zoning violations.

Green Building Legislation

The Green Building Act establishes standards and sets forth the District's policies on green building and construction and directs the city to amend the construction code to incorporate these standards. Given the Act's focus on construction, it does not reference the Zoning Regulations or address the importance between the Act and the Zoning Regulations.

To facilitate green principles in District development, the Zoning Code, along with the Construction Code, must accommodate green technology to allow the District to grow sustainably. Often the advance of technology has outpaced government regulations to allow for desired accommodation. The District is no different than other large cities as its current zoning regulations that pertain to height, density, and bulk can discourage green design elements such as cisterns, green roofs, or wind turbines.

Green roofs stand as the primary example of why adjustments in zoning regulations need to be made. Green roofs are defined as a roof of a building that is partially or completely covered with vegetation and soil, or a growing medium, planted over a waterproofing membrane. The benefits of green roofs are storm-water retention, a longer lifespan than standard roofs, and a reduction of the urban heat island effect, all objectives of the Green Building Act. Zoning regulations can advance and remove hindrances to green roofs through building height and roof structure regulations that are written so as not to penalize or discourage green roofs. Building height measurements must consider height measured to green roof structures such as drainage systems, waterproofing soils, underlayments, and walking surfaces above the present measuring point. In addition, roof height limits must consider new green energy methods such as wind turbines, solar thermal collectors, and photovoltaic rays on roofs that current roof height regulations do not address and in their current state inhibit.

As the District reviews its Zoning Regulations, existing environmental and green provisions of the regulations will need to be examined and adjusted to meet the District's increased focus on reducing the impacts of the development on the environment. For example, the Planned Unit Development (PUD) zoning regulations define the "creation or preservation of open spaces" and "environmental benefits, such as stormwater runoff controls and preservation of open space or trees" as some of the public benefits a PUD applicant can provide to gain greater density. Given that green building techniques will soon be required for most construction in the District, the PUD and other provisions of the Zoning Regulations will have to be reviewed and refined to incorporate and build upon the green standards defined in the Green Building Act.



Part 5 Conclusions

The District of Columbia's Zoning Regulations establish very detailed rules of procedure. These rules address a wide variety of issues that are normally left open in local zoning regulations. They provide an admirable attempt to balance the District's high level of public interest in land use decision-making, fairness to applicants, and the web of regulatory influences that result from the federal presence.

As the District updates its Zoning Regulations, there will be pressure to increase public participation and maximize due process. This should always be a goal of land use decision-making. There will also be pressure to streamline the process, reduce delay, and make decisions more predictable. There is an inherent tension in these objectives, because increasing party participation can make proceedings inherently more difficult to run and provides more opportunities for procedural delays. Clarifying and simplifying the rules can go a long way toward striking the right balance for the District.

This report addresses a number of procedural issues that were raised during my discussions with staff and stakeholders. They range from global issues, such as party status and vested rights, to specific procedural details. Many of these issues were difficult to analyze because the procedures are much more encompassing than most local zoning regulations, and the District's unique institutional framework raises a host of unique issues. However, techniques used in other places, along with alternative ways to approach the issues, are discussed throughout the report. My hope is that these can provide a sound basis for carefully crafted procedural updates as the District reforms its Zoning Regula

Topic	ZC Ref.	BZA Ref	Discussion
Jurisdiction; Authority; Powers	--	3100	
Organization	--	3101	
General provisions	3000	3102	<p>Both have general sections that recite authority, effective date of the chapters, conflicts between general and specific provisions, and ability to seek advice from Office of Corporation Counsel (which is now the Office of the Attorney General (OAG)). Section 3000 includes additional provisions that address conflict with APA, application forms, dismissal of petitions, and waiver of procedural rules.</p> <p>Suggestions:</p> <ul style="list-style-type: none"> • Technical amendment to clarify that Corporation Counsel is now OAG. • Combine the non-conflicting provisions into a unified set of definitions and rules of interpretation. • Many of the provisions are obvious or established law anyway (e.g., specific rules supersede general rules). • This requires a discussion with BZA, but the additional provisions established by the Zoning Commission make sense for any type of administrative proceeding, and should be uniform. • §3000.3 prohibits dismissal unless the applicant fails to correct the deficiency “after due notice of deficiency and expiration of a reasonable time as fixed by the Commission...” The time limits should be set out in <i>unified rules</i>, along with a completeness review procedure.
Computation of time	3001	3110	<p>These are general rules from computation of time that are found in most statutes or rules of interpretation. They are consistent with customary practice. However, they could be moved to <i>unified rules</i> as part of rules of interpretation.</p> <p>One subtle difference is that the BZA only allows a modification of time limits with notice to all parties (§ 3110.4). The Zoning Commission rule does not have this stipulation (§ 3002.3). This rule makes sense, except in the context of general rulemaking. The rule should be revised to require party notice for contested cases. For rulemaking, allow modifications where permitted by law (e.g., consistent with Zoning Act).</p>

APPENDIX A

Comparison of Zoning Commission and Board of Zoning Adjustment Practices

Topic	ZC Ref.	BZA Ref	Discussion
Party Status	3022.3 - 3022.4	3106.2 - 3106.3	<p>These rules determine how to apply for party status and how a party status decision is made. Both require the request to be made 14 days before the schedule hearing date. Differences include:</p> <ul style="list-style-type: none"> • The Zoning Commission requires a list of witnesses with the request for party status. • The Zoning Commission rule expressly states that the Commission determines who is recognized as a party (§ 3022.4). This is implicit in the BZA rule (§ 3106.3). • Party status is not available for a rulemaking hearing (§ 3021.4). <p>Neither rule states when party status is determined. The implication is that this determination is made at the hearing, rather than in a separate, pre-hearing procedure.</p> <p>Suggestion:</p> <ul style="list-style-type: none"> • Combine into a set of unified rules. • Set out in a separate section with its own title. As written now, “party status” as a topic is buried in subsections of major headings. Because the topic is discussed widely by the name “party status,” creating a separate section titled “Party Status” would make these rules easier to find. • Allow the Zoning Commission and BZA, in their discretion, to make a pre-hearing party status determination. If no such request is made, no party status determination is needed. • Allow the applicant/appellant/ANC to stipulate as to party status and avoid a separate pre-hearing procedure.
Service of Papers, Methods and Proof of Service	3003	3111	<p>These rules discuss how papers are served on parties to a proceeding. They are substantially the same, except:</p> <ul style="list-style-type: none"> • The Zoning Commission rules expressly require proof of service (§ 3003.4), while this is implicit in the BZA regulations (§ 3111.4). • The rules on proof of service vary. The Zoning Commission rules allow a certificate of the attorney of record or person making the service (3003.5(b) – (c)). The BZA rules allow a written statement (as opposed to certificate) of the person making the service (§ 3111.4(b)). Both rules allow written acknowledgement.

Topic	ZC Ref.	BZA Ref	Discussion
Minutes and transcripts	3004	3117	<p>The Zoning Commission rules allow summary minutes for the Zoning Commission. There is no counterpart for the BZA. A similar rule might not apply to the BZA, which is an adjudicatory body. By contrast, the Zoning Commission – unlike the BZA – has rulemaking powers. In most states, rulemaking – which parallels legislative action for most zoning bodies – are recorded minutes rather than formal transcripts.</p> <p>The Zoning Commission’s rules for transcripts are more detailed than those of the BZA. Both rules require transcripts to be open for inspection and available to the parties</p> <p>(§§ 3004.5, 3004.6, 3117.9, 3117.10). The Zoning Commission rules address modifications and changes to the transcripts.</p> <p>Suggestion: because the BZA is principally an adjudicatory body that hears only contested cases such as appeals and variances, its transcript rules should be as detailed as the Zoning Commission. Or, both rules should be set out in <i>unified rules</i>.</p>
Meetings and hearings	3005	3105	<p>These rules address how hearings are scheduled, noticed, and continued. The Zoning Commission rules establish the quorum. In the BZA rules, the quorum is established in a separate rule (3101.2).</p>
Applications and petitions	3010	3112, 3113	<p>This designates how cases are initiated. The Zoning Commission rule distinguishes contested cases and rulemaking. The BZA rules are specific to appeals and applications for special exceptions or variances.</p>
Set down & Pre-Hearing Procedures	3011	3112, 3113	<p>Before hearing a case, the Zoning Commission either dismisses the case or votes to “set down” the case for a public hearing.¹⁵⁸</p> <p>The BZA does not have a formal “set down” rule. Its rules address submittal requirements and docketing of appeals and applications (variances and special exceptions).</p>

Topic	ZC Ref.	BZA Ref	Discussion
Agency reports and referrals	3012, 3011.1	3113, 3114, 3115	<p>These rules address referral to other government agencies or entities. Referral to the Office of Planning is required for Zoning Commission actions, and these rules address ANC referral.</p> <p>There is an inconsistency in how the rules handle referrals to other government agencies or entities. In some instances, particularly under the Zoning Commission's rules, the provisions state that everything is referred to OP and implicitly leave it to OP to choose to which other agencies to make referrals. Pursuant to the BZA rules, the rules expressly require the Director of OZ, in consultation with the presiding officer, to notify the agency representatives who should be present at the hearing. Some of the substantive provisions also require specific agency referrals in particular cases. At present, the Director of the Office of Zoning makes referrals to OP as well as other agencies when that is called for in the regulations. The issue arises as to what happens (or should happen) if no report is received from an agency to which a referral is made. Also, the BZA rules, unlike the Commission's rules, do not specifically require referral to OP, leading to a question: Shouldn't they?</p> <p>The NCPC reports for text or map amendments are codified out of place at § 3025.3 - 3025.4.</p> <p>Those later provisions refer to referrals of Proposed Actions. But see § 3012, which specifies other referrals to both NCPC and to U.S. Capitol Police of applications under chapters 16 and 18.</p>
Supplemental filings	3013	--	Requires additional information by the applicant prior to the hearing. This includes witness lists, reports, plans, and public benefits and amenities.
Notice of hearings	3014, 3015	3113.12, -3113.20	Prescribes the time, place and manner of providing public notice of a hearing. The Zoning Commission rules distinguish rulemaking and contested case hearings.
Evidence	3006	3119	This addresses how exhibits are offered into evidence. The rules are largely the same. The BZA rules expressly provide that evidence is taken per the APA (§ 3119.4; compare Zoning Commission rule at § 3010.8). The Zoning Commission rules include several provisos for rulemaking.
Hearing Procedures	3020, 3021, 3022	3117	Spells out the presiding officer's authority, order of proceedings at a hearing, and time limits for presenting evidence and cross-examining witnesses.

Topic	ZC Ref.	BZA Ref	Discussion
Ex parte communications	3023.1	--	<p>Prohibits off-the-record communications for contested cases. Suggestion: unify the procedures or add a parallel rule to whatever rules apply specifically to BZA that tracks what is now in chapter 30.</p> <p>Ex parte contacts are prohibited for any administrative proceeding, regardless of the forum. While this is a due process consideration for contested cases, the Zoning Commission chooses to follow it for text amendments also. The Zoning Commission could choose to codify this requirement for all cases, regardless of whether due process applies.</p>
Closing the record	3024	3121.9	<p>The Zoning Commission rule requires the record to close at the end of the hearing, and establishes procedures for reopening the record.</p> <p>The BZA allows the record to stay open for a designated period, with 7 days for response. The Director will return materials submitted after the record closes.</p>
Post-hearing procedures	3025	3124	<p>The rules allow the agencies to reopen the record and to notify parties of the date set for further hearing. The Zoning Commission rule requires 14 days notice (§ 3025.2, while the BZA requires 10 days notice.</p> <p>There does not appear to be a good reason for the difference in time; 14 days for both might be better.</p>
Findings of fact and conclusions of law	3026	3121	<p>Encourages parties to submit proposed findings of fact and conclusions of law. Requires Office of Zoning to prepare generic models of findings of fact and conclusions of law (§§ 3026.2, 3121.3). Because sample findings of fact and conclusions of law are already available from published orders, the Zoning Regulations should omit this requirement. There is nothing to prevent the Office of Zoning to provide any sample materials it chooses, without additional verbiage in the Zoning Regulations.</p> <p>Suggestion: forms and models could be compiled into an administrative handbook. The handbook would not replace the current rules, but would supplement them with external aids for navigating the hearing process.</p>
Proposed Action	3027	--	<p>Allows the Zoning Commission to take proposed action after the hearing closes. Proposed rulemaking decisions are published in the D.C. Register.</p>

Topic	ZC Ref.	BZA Ref	Discussion
Final Action	3028	3125	<p>The Zoning Commission rules address when final action is taken, and whether it must await a report from the NCPC. A written order is issued within 45 days of the vote to take final action. Final actions for rulemakings and for contested cases are published. Final actions are effective on publication in the DC Register.</p> <p>The BZA rules require formal notice of the order and findings of fact and conclusions of law to be served on all parties, the ward council member, and the affected ANC if it submitted a report. Orders become final upon filing in the record and service of the parties, but only become effective 10 days after service. During this time, the Zoning Commission may exercise sua sponte review (§ 3128).</p> <p>Both rules require contested case orders with findings of fact and conclusions of law to be served on the parties. The Zoning Commission and BZA issue summary orders in contested cases where there is no opposition. This promotes administrative efficiency and speed, and saves the District costs in staff and agency time. The Zoning Regulations could be amended to recognize this practice.</p> <p>Discussion: the rules differ as to their effective date. Zoning Commission orders become effective on publication, while BZA orders are effective on service. Unifying the rules would add clarity.</p>
Reconsideration	3029	3126 3112.11 3113.10	<p>The Zoning Commission rules prohibit reconsideration within 6 months of dismissal with prejudice or withdrawal after advertisement, or 1 year after denial.</p> <p>The BZA prohibits reconsideration within 90 days from withdrawal of an appeal or application.</p> <p>Both rules require a motion for reconsideration within 10 days of final order.</p>
Withdrawal	3029.3	3112.11, 3113.10	<p>The Zoning Commission allows withdrawal before advertisement, or after that time with consent of the Commission.</p> <p>The BZA allows withdrawal of an appeal or application at any time.</p>
Consent Calendar	3030	--	<p>This allows the Zoning Commission to consider minor modifications without a hearing, subject to notice.</p>

Topic	ZC Ref.	BZA Ref	Discussion
Modifications	3030 Consent calendar	3129	<p>The Zoning Commission can modify any rulemaking or order on its consent calendar, if the proposed modification is of "little importance or consequence."</p> <p>The BZA may modify appeals, variances, or special exceptions if a request is filed within 6 months of final order. Party notice is required.</p> <p>Applicants have 2 years to obtain a building permit.¹⁵⁹ Therefore, an applicant who wants to modify an order after the 6 month period is tied to the original order, and cannot seek a modification. The Zoning Commission should consider adjusting this time period to allow applicants to seek a modification at any point before a building permit is issued, or within a time frame that matches the period that they are eligible to seek building permits.</p>
Time Limits on Action	--	3130	Establishes a "sunshine" provision for (generally 6 months) to secure building permits, starting construction, or establishing a use.
Fees	3040 - 3045	3180 3181	Establishes fees for various agency actions. The Zoning Commission rules distinguish filing and hearing fees, and establish certain waivers and exemptions.
Definitions	3099	3199	<p>Both rules define the terms director, member, party, person, and presiding officer. The definitions vary slightly to address the different functions of each agency.</p> <p>The BZA rules define ANC, decision, and order.</p> <p>When these rules are reviewed, thought should be given to whether these definitions would stay in the procedures chapters or go into the section with the rest of the definitions.</p>
College and University uses	3036	--	While special exceptions are normally processed by the BZA, this rule requires Zoning Commission review of campus development plans and certain related actions.
Chanceries	--	3134	Establishes unique procedures for processing chanceries per the Foreign Missions Act.

Reference:

DC ST 1982 Plan 1 (from Westlaw)

District of Columbia Official Code 2001 Edition

Division I. Government of District.

Title 1. Government Organization.

Chapter 15. Reorganization of the District Since The Establishment of Home Rule.

Subchapter V.

Part A. Reorganization Plan No. 1.

(Effective July 3, 1982)

BUILDING AND ZONING REGULATION ADMINISTRATION**I. PURPOSE**

The purpose of this reorganization plan is to transfer all functions associated with the administration and enforcement of the District of Columbia building and zoning codes from the Department of Housing and Community Development to the Department of Licenses, Investigations and Inspections.

II. FUNCTIONS

The following functions are hereby transferred to the Director of the Department of Licenses, Investigations and Inspections:

- (a) To administer and enforce the statutes, codes and regulations governing the construction, conversion, repair and alteration of buildings in the District of Columbia, including all appurtenances such as walls, fences and signs, and including all equipment installed in or on buildings or structures such as electrical, elevator, plumbing, refrigeration, gas, boiler and pressure vessel equipment;
- (b) To administer and enforce the Energy Conservation Code of 1979, D.C. Law 3- 39, as it amends the building, plumbing and electrical codes;
- (c) To administer and enforce the Architectural Barriers Act of 1980, D.C. Law 3-118, as it amends the building, plumbing, electrical and elevator codes;
- (d) To administer and enforce Sections 2, 5, and 6 of D.C. Law 1-64, the D.C. Applications Insurance Implementation Act, relating to permit requirements under the flood insurance program;
- (e) To administer and enforce the zoning statutes, codes and regulations governing land use, the height, area and use of buildings, and subdivision of all private land and condominiums;
- (f) To provide technical review and comment on applications filed with the Board of Zoning Adjustment; to maintain a register of approved nonconforming uses;
- (g) To process applications to lease public space under the provisions of the Public Space Utilization Act, Public Law 90-598;
- (h) To inspect buildings and facilities for compliance with building and zoning regulations in response to applications for certificates of occupancy and/or licensing requirements;

APPENDIX B

Zoning Administrator Functions – 1982 Reorganization Plan

- (i) To recommend to appropriate officials and agencies any amendments to the zoning regulations which would resolve problems or conflicts in administration;
- (j) To recommend, in consultation with the Construction Code Advisory Committee established by Commissioner's Order 72-173 and with appropriate officials and agencies, amendments to the Construction Codes; to provide staff support to the Construction Code Advisory Committee;
- (k) To determine the compliance of new materials, appliances and systems with existing Construction Codes, based on tests by nationally accepted testing laboratories, and issue certificates of approval as appropriate;
- (l) *To make available to the public information about building and zoning code requirements;*
- (m) To maintain master files and records of approved building plans and permits.

III. TRANSFERS

All positions, personnel, property, records, and unexpended balances of appropriations, allocations, and other funds available or to be made available relating to the duties and functions herein are hereby transferred to the Department of Licenses, Investigations and Inspections.

IV. ORGANIZATION

The Director of the Department of Licenses, Investigations and Inspections is authorized to organize the personnel and property transferred herein within any organizational unit of the Department as the Director deems appropriate.

V. EFFECTIVE DATE

The provisions of this Plan shall become effective pursuant to the requirements of Section 422 (12) of Public Law 93-128, or on a date thereafter to be determined by executive order of the Mayor.

DC CODE 1982 Plan 1
(Current through September 3, 2007)

1. All capitalized references in this report to the “Zoning Regulations” refer to the District of Columbia’s Zoning Regulations codified at Title 11, DCMR, as amended. References to “zoning regulations” in small letters refer generically to the concept of a codified set of zoning rules.
2. D.C. Official Code § 6-641.05 (NCPC reviews new zoning regulations or amendments). NCPC also reviews federal buildings (§ 6-641.15), the Dean Tract building that is above the normal height limits (§ 6-601.05(h)); consults with the Council of the District of Columbia on plats that require CFA review (§ 6-611.02); has a member on the Board of Zoning Adjustment (§ 6-641.07).
3. District of Columbia Self-Government and Governmental Reorganization Act, Pub.L. No. 93-198, 87 Stat. 774 (1973).
4. D.C. Official Code § 1-201.02(a); *Atchison v. District of Columbia*, 585 A.2d 150, 155 (D.C. 1991).
5. *Atchison, supra*; *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority*, 132 F.3d 775, 328 U.S.App.D.C. 74 (D.C.Cir. 1998).
6. Section 302, D.C. Official Code § 1-204.
7. Section 404(a), D.C. Official Code § 1-227(a).
8. *Shook, supra*, citing District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub.L. No. 104-8, § 2(a)(1), (2) & (4), 109 Stat. 97, 98 (1995) (FRMAA).
9. *Shook, supra*.
10. *Citizens Ass’n of Georgetown, Inc. v. Washington*, 291 A.2d 699, 704 (D.C. 1972).
11. See DCRA website at <http://dcra.dc.gov/dcra/cwp/view,a,1342,q,637598,dcraNav,|33408|.asp>.
12. See http://dcra.dc.gov/dcra/cwp/view,a,1342,q,637710,dcraNav_GID,1691,dcraNav,%7C33408%7C,.asp.
13. The Office of Zoning’s zoning certification procedure is set out on its website at <http://www.dcoz.dcgov.org/services/zcert/zcert.shtm>. The procedure simply lists the submittal requirements and lists a date (May 20, 1994) when the “rules” became effective. However, the website does not indicate why a zoning certification is required, when it is required, or its scope.
14. See, e.g., D.C. Official § 1-207.38 (advise District government regarding planning, streets, recreation, social services programs, health, safety, and sanitation in that neighborhood commission area).
15. 11 DCMR §§ 2406.7 (notice to ANCs required 10 days before filing a change of zoning application for a PUD), 3012(a) (contested cases include PUDs). The Zoning Regulations require applicants to advise the Commission of the efforts they made to apprise the affected Advisory Neighborhood Commission and other individuals and community groups about the proposed development. 11 DCMR § 2407.7.
16. 11 DCMR § 3012(c).
17. 11 DCMR § 3012(d).
18. D.C. Official Code § 6-641.15 (federal buildings exempt from Zoning Act but are subject to NCPC approval); see NCPC website at www.ncpc.gov.
19. D.C. Official Code § 6-641.05(a); see 11 DCMR §§ 3025.3, 3028.3.
20. D.C. Official Code § 6-641.05(c).
21. The Zoning Regulations are accessible through the DCMR website or as an Adobe Portable Document File (pdf) download from the Office of Zoning’s website. The pdf download is 511 pages long.
22. *County of Lancaster, S.C. v. Mecklenburg County, N.C.*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993).
23. D.C. Official Code § 2-510; *American University In Dubai v. District of Columbia Educ. Licensure Com’n*, 930 A.2d 200, 206 (D.C. 2007); *Schneider v. District of Columbia Zoning Commission*, 383 A.2d 324 (D.C. 1978).
24. *American University In Dubai, supra.*; *U.S. v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 995 (D.C. 1994)(review of BZA decision applying Foreign Missions Act was not a contested case, and therefore not reviewable in the Court of Appeals).
25. Normally, agencies have inherent authority to establish their own procedural rules so long as they do not conflict with the applicable enabling legislation. *Brown v. District of Columbia Bd. of Zoning Adjustment*, 413 A.2d 1276, 1279 (D.C. 1980); *Ramos v. District of Columbia Dept. of Consumer and Regulatory Affairs*, 601 A.2d 1069, 1072 (D.C. 1992); *Stancil v. District of Columbia Rental Housing Com’n*, 806 A.2d 622, 625 (D.C. 2002); *PDK Labs Inc. v. Ashcroft*, 338 F.Supp.2d 1, 10 (D.D.C. 2004); *American Fruit Growers v. S. T. Runzo & Co.*, 95 F.Supp. 842, 845 (D.C.Pa. 1951). No specific provisions govern the Zoning Commission’s ability to adopt rules of procedure.
26. A more difficult issue is whether the Zoning Act designates where the rules are written. The Zoning Act does not define the term “rule.” In some instances, the Zoning Act refers to “rules” and “regulations” (which involve formal rulemaking procedures) in the disjunctive (see, e.g., D.C. Official Code §§ 6-641.09, stating “[c]ivil fines... may be imposed ... for any infraction ... of any rules or regulations issued under the authority of these sections, ...”). By contrast, the “Zoning Regulations” are referenced specifically in the Chapter (see, e.g., D.C. Official Code § 6-601.05). This would infer that the Zoning Commission could set out rules in a less formal capacity than a formal rulemaking – or “regulation” – that is codified in the DCMR. This would allow the administrative rules to be placed outside of the DCMR and the normal rulemaking processes that are followed in the balance of the Zoning Regulations. Any decision to follow this procedure should be discussed carefully with the Office of the Attorney General.
27. *Citizens Ass’n of Georgetown v. Zoning Commission of Dist. of Columbia*, 392 A.2d 1027 (D.C. 1978) (citing 20 DCRR §§ 1.1 et seq.).
28. *Palisades Citizens Ass’n, Inc. v. District of Columbia Zoning Commission*, 368 A.2d 1143 (D.C. 1977).
29. *Id.* Contested case proceedings are reviewable in the District of Columbia Court of Appeals. Rulemaking and other non-contested cases are reviewable in the District of Columbia Superior Court. *American University In Dubai, supra.*; *U.S. v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 995 (D.C. 1994)(review of BZA decision applying Foreign Missions Act was not a contested case, and therefore not reviewable in the Court of

- Appeals).
30. *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117 (D.C. 2001) (citing Supplemental Rules of Practice and Procedure at 11 D.C.M.R. § 3315.2, and dated 1985).
 31. Zoning Commission Order No. 864, Case No. 98- 19 (Text Amendments - Zoning Commission and Board of Zoning Adjustment Rules of Practice and Procedure), September 13, 1999; Final Rulemaking published at 46 DCR 7855, 7857 (October 1, 1999); as amended by Final Rulemaking published at 47 DCR 9741-43 (December 8, 2000), incorporating by reference the text of Proposed Rulemaking published at 47 DCR 8335, 8538 (October 20, 2000); and Final rulemaking published at 49 DCR 2742, 2748 (March 22, 2002).
 32. Although the rules of evidence have been greatly relaxed in administrative hearings, the fundamental rules of evidence cannot be abrogated and nullified. *State ex rel. Church's Fried Chicken, Inc. v. Board of Adjustment of City of St. Louis*, 581 S.W.2d 861 (Mo.App. 1979); *Bartholomew v. Board of Zoning Adjustment*, 307 S.W.2d 730 (Mo.App. 1957)(leading questions and other informalities permitted in zoning proceedings); *State ex rel. Horn v. Randall*, 275 S.W.2d 758 (Mo.App. 1955).
 33. *Allen v. Zoning Commission of District of Columbia*, 449 F.2d 1100, 1103, 146 U.S.App.D.C.24, 27 (D.C.Cir. 1971).
 34. "The District of Columbia Court of Appeals has generally considered administrative decisions dealing with land use control questions to involve general matters of public policy and therefore not to fall within the 'contested case' provisions. This is true even where the issue is related only to a limited land area or even to a specific parcel of land." *L'Enfant Plaza Properties, Inc. v. District of Columbia Redevelopment Land Agency*, 564 F.2d 515, 525, 184 U.S.App.D.C. 30, 40 (D.C.Cir. 1977) (changes to project redevelopment plan that affected only 2 properties were not a "contested case," citing *W. C. & A. N. Miller Development Co. v. District of Columbia Zoning Commission*, 340 A.2d 420 (D.C.App.1975) (en banc); *Chevy Chase Citizens Assn. v. District of Columbia Council*, 327 A.2d 310 (D.C.App.1974) (en banc); *Citizens Assn. of Georgetown v. Washington*, 291 A.2d 699 (D.C.App.1972)).
 35. *L'Enfant Plaza Properties, supra*.
 36. *L'Enfant Plaza Properties, supra*.
 37. *L'Enfant Plaza Properties, supra*.
 38. *Citizens Ass'n of Georgetown v. Zoning Commission of Dist. of Columbia*, 392 A.2d 1027 (D.C., 1978)(ex parte communications during rulemaking were not improper); *Ruppert v. Washington*, 366 F.Supp. 686 (D.D.C. 1973), aff'd 543 F.2d 417, 177 U.S.App.D.C. 270 (D.C.Cir. 1976) and aff'd ub. nom, *American Century Mortgage Investors v. Washington*, 543 F.2d 416, 177 U.S.App.D.C. 269 (D.C.Cir. 1976).
 39. *See D.C. Official Code § 2-502 (APA definitions) and discussion above on contested cases and rulemaking; 2 Rathkopf's The Law of Zoning and Planning § 31:19 (4th ed.)*.
 40. *Capitol Hill Restoration Soc. v. Zoning Commission*, 287 A.2d 101, 103 (D.C. 1972).
 41. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 375 U.S.App.D.C. 130 (D.C.Cir. 2007); *Save Our Schools-Southeast & Northeast v. District of Columbia Bd. of Educ.*, 2006 WL 1827654 (D.D.C. 2006). Some commentators state that notice requirements for legislative zoning decisions are used to protect due process. 2 J. Kushner, *Subdivision Law and Growth Mgmt.* § 8:6. While a state or local government may afford more due process than the law requires, the *Bi-Metallic* rule clearly does not require notification in this situation. Instead, notice is a matter of legislative grace.
 42. See 11 DCMR § 3010.2.
 43. *Dupont Circle Citizen's Ass'n v. District of Columbia Zoning Commission*, 343 A.2d 296 (D.C. 1975) (text amendment authorizing halfway houses is legislative in nature, but also noting that "Zoning Commission may not adjudicate the legal rights, duties or privileges of specific parties under the pretense of legislative action").
 44. *Rafferty v. District of Columbia Zoning Com'n*, 583 A.2d 169 (D.C. 1990); *W. C. & A. N. Miller Development Co. v. District of Columbia Zoning Commission*, 340 A.2d 420 (D.C. 1975)(denial of map amendment without a public hearing not a contested case).
 45. *Citizens Ass'n of Georgetown v. Zoning Commission of Dist. of Columbia*, 392 A.2d 1027 (D.C. 1978); *Schneider v. District of Columbia Zoning Commission*, 383 A.2d 324 (D.C. 1978); *W. C. & A. N. Miller Development Co. v. District of Columbia Zoning Commission*, 340 A.2d 420 (D.C. 1975). See also *L'Enfant Plaza Properties, Inc. v. District of Columbia Redevelopment Land Agency*, 564 F.2d 515, 525, 184 U.S.App.D.C. 30, 40 (D.C.Cir. 1977)(amendment to redevelopment plan affecting a small area not a contested case, noting that land use decisions are usually considered legislative even when they deal with specific property).
 46. 11 DCMR § 3010.2.
 47. A leading land use treatise states: "The quasi-judicial approach to rezonings also obtains in the District of Columbia. There, however, the doctrine is not court promulgated, but, rather, is the result of distinctions made under the District of Columbia's Administrative Procedure Act between, on the one hand, "rulemaking" proceedings and, on the other hand, "contested-case" proceedings." 3 Rathkopf's *The Law of Zoning and Planning* § 40:20 (4th ed. 2008). This statement is accurate except for its reference to the Administrative Procedure Act (APA). The quasi-judicial approach is a result of Chapter 30 of the Zoning Regulations, not the APA. In *Palisades Citizens Ass'n, Inc. v. District of Columbia Zoning Commission*, 368 A.2d 1143 (D.C. 1977), applying the Zoning Commission's former Rules of Practice and Procedure for Map Amendments, the Zoning Commission argued that the case was not subject to review as a contested case. The court stated: "The fact is, however, that the public hearing was deliberately conducted by the Commission as a contested case under Part II of its Rules of Practice and Procedure. It was an adjudicatory hearing and not the legislative type usual to zoning hearings. It appears that after this court's decisions in *Capitol Hill Restoration Society v. Zoning Commission*, D.C.App., 287 A.2d 101 (1972), and *Citizens Association of Georgetown, Inc. v. Washington*, D.C.App., 291 A.2d 699 (1972), the **Commission decided to promulgate a rule enabling it to conduct an adjudicatory hearing**, rather than the usual legislative

- type, when a zoning application pertains to a relatively small piece of property and few ‘parties.’ In conducting a Part II trial-type hearing in this proceeding the Commission apparently was influenced by the fact that here there was only one parcel of land involved and one owner as an applicant. In any event, the Commission concluded that the applicant should be granted an adjudicatory hearing, presumably because the proceeding had elements resembling those in Capitol Hill Restoration Society, supra.” (emphasis added)
48. See 7 ROHAN, ZONING & LAND USE CONTROLS, § 50.01[1][a].
 49. *Fasano v. Board of County Commissioners*, supra, 507 P.2d at 30. See also, Comment, *Zoning Amendments — The Product of Judicial Or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972) (cited by the Fasano court).
 50. See, 11 DCMR §§ 2407.5, 2408.5.
 51. *Rafferty v. District of Columbia Zoning Com’n*, 583 A.2d 169 (D.C. 1990).
 52. See description at <http://dcoz.dc.gov/services/zoning/commish.shtm#development>.
 53. D.C. Official Code § 2-1801.01 et seq.
 54. D.C. Official Code § 6-641.07(g)(3).
 55. D.C. Official Code § 6-641.07(i).
 56. 11 DCMR § 3128.
 57. D.C. Official Code § 6-641.07(d).
 58. 11 DCMR § 3104.4.
 59. *Foggy Bottom Ass’n v. District of Columbia Zoning Com’n*, 639 A.2d 578 (D.C. 1994)(upholding Zoning Commission’s interpretation of PUD regulations).
 60. 5 Anderson’s Am. Law. Zoning § 37:17 (4th ed.)(application for interpretation of a zoning ordinance).
 61. *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423, 432 (D.C. 2006); *Murray v. District of Columbia BZA*, 572 A.2d 1055, 1058 (D.C.1990); see D.C. Official Code § 6-641.07(g)(4) (2001) (empowering the BZA to “reverse or affirm, wholly or partly, or ... modify” any order or decision appealed from, or to “make such order as may be necessary to carry out its decision”).
 62. 11 DCMR § 102.2.
 63. D.C. Official Code § 2-505(b).
 64. Mandelker, “Model Legislation for Land Use Decisions,” 35 Urb. Law. 635 (2003).
 65. Oregon Administrative Rules (OAR) §§ 661-010-0030, 661-010-0035, 661-010-0065 (at http://arcweb.sos.state.or.us/rules/OARS_600/OAR_661/661_010.html); Florida Administrative Rules (FAR) chapter 42-2, at <https://www.flrules.org/gateway/ChapterHome.asp?Chapter=42-2>; State of Vermont Natural Resources Board - Land Use Panel Act 250 Rules (Effective October 3, 2007).
 66. FAR § 42-2.016.
 67. 11 DCMR §§ 3004.9 - 3004.11.
 68. 11 DCMR § 3010.7.
 69. 11 DCMR §§ 3020.1(e), 3117.3(e).
 70. 11 DCMR §§ 3021.1(d); 3117.3(e).
 71. 11 DCMR §§ 3029.5 - 3029.9, 3126.2 - 3126.6. Note: the BZA regulations do not mention “reargument.”
 72. 11 DCMR § 3117.3(e).
 73. 11 DCMR § 3030.3.
 74. 14 C.F.R. § 302.22.
 75. 11 DCMR § 3113.2.
 76. 11 DCMR §§ 3022.3, 3106.2. Contrary to at least one statement at the Roundtable, the submittal requirements and tests for party status are uniform for the Zoning Commission and BZA. Testimony of Federation of Citizens Association of the District of Columbia Before the Zoning Commission Zoning Commission Roundtable (June 21, 2007), at 3. The real concern appears to be when a party status determination is made.
 77. Pennsylvania Department of Community and Economic Development. *The Zoning Hearing Board* (Planning Series #6, 10th ed., Aug. 2001), at 7.
 78. 634 A.2d 1234 (D.C. 1993).
 79. *York Apartments Tenants Ass’n v. District of Columbia Zoning Com’n*, 856 A.2d 1079 (D.C. 2004).
 80. 11 DCMR §§ 3022.3, 3106.2 and see Form 120 (application for variance or special exception), Form 121 (Applicant’s burden of proof for variance or special exception), Form 125 (appeal), Form 150 (motion), and Form 300 (Complaint Of Non-Compliance With Condition(S) Of A Board of Zoning Adjustment / Zoning Commission Order).
 81. 10 C.F.R. § 2.309(b).
 82. 12 C.F.R. § 907.11(a); 47 C.F.R. § 1.223; OAR § 661-010-0050(2).
 83. 14 C.F.R. § 302.20(c)(2). The Vermont Act 250 regulations provide that a request for party status must be filed before an initial prehearing conference or at the commencement of the hearing, whichever occurs first, unless the agency directs otherwise.
 84. 10 C.F.R. §§ 2.309(b), 590.303(a); New York State Department of Environmental Conservation Permit Hearing Procedures, § 624.5, at <http://www.dec.ny.gov/regs/4483.html?showprintstyles>.
 85. 10 C.F.R. § 2.309(h); 10 C.F.R. § 590.303(e).
 86. 10 C.F.R. § 2.309(i).
 87. 10 C.F.R. § 2.309(i).
 88. 11 D.C.M.R. § 3022.3(f)5.
 89. The benefits to be gained from allowing additional by-right parties would have to be balanced against the impact on administrative efficiency with regard to holding hearings with a potentially far greater number of parties. It is not clear that taking this step would be useful or necessary. Currently, property owners within 200 feet of the applicant’s property are provided personal notice of the application, thereby protecting those property owners’

rights to intervene, but they still have to apply for party status. Nonetheless, the criteria for standing favor those in close in proximity to the applicant's property.

90. 10 C.F.R. § 2.309(e); 14 C.F.R. § 302.20(a).
91. 10 C.F.R. § 2.309(e); 12 C.F.R. § 907.11(b).
92. NYS Dept. of Environmental Conservation, § 624.5(d)(2); OAR § 661-010-005 (Oregon LUBA).
93. NYS Dept. of Environmental Conservation, § 624.5(e)(2).
94. D.C. Official Code § 47-2861 et seq.
95. D.C. Official Code § 47-2866.
96. "Prior violations or prospective violations of a town by-law are not a legally tenable ground for denial of a submission that on its face complies with applicable law." *Fafard v. Conservation Com'n of Reading*, 41 Mass.App. Ct. 565, 672 N.E.2d 21 (Mass.App.Ct. 1996)(citing *Dowd v. Board of Appeals of Dover*, 5 Mass.App.Ct. 148, 157, 360 N.E.2d 640 (1977); *Fitzsimonds v. Bd. of Appeals of Chatham*, 21 Mass.App.Ct. 53, 57, 484 N.E.2d 113 (1985); *Solar v. Zoning Bd. of Appeals of Lincoln*, 33 Mass.App.Ct. 398, 402, 600 N.E.2d 187 (1992)); *Klein v. Colonial Pipeline Co.*, 55 Md.App. 324, 462 A.2d 546, cert. denied, 297 Md. 418 (1983) (Board of Zoning Adjustment could not deny conditional use permit based on applicants' violation of prior permit, which improperly transformed zoning application proceedings into an enforcement process); *Baird v. County of Contra Costa*, 32 Cal.App.4th 1464, 38 Cal.Rptr.2d 93 (Cal.App. 1995) (prior violations of a conditional use permit were not germane to a new application). See also regulations that condition permit issuance on payment of taxes. *Builders League of South Jersey, Inc. v. Borough of Pine Hill*, 286 N.J.Super. 348, 669 A.2d 279 (N.J.Super.A.D. 1996)(statute permitting municipality to require payment of delinquent property taxes as condition to issuance of license or permit did not authorize requirement to pay past-due real estate taxes as condition for issuance of building permit); *Sussex Woodlands, Inc. v. Mayor and Council of West Milford Tp.*, 109 N.J.Super. 432, 263 A.2d 502 (N.J.Super.L. 1970) (invalidating subdivision regulation that required certification that property taxes were paid with the application for plat approval); compare *Acqua Development Corp. v. Township of Holmdel*, 287 N.J.Super. 578, 671 A.2d 636 (N.J.Super. 1995) (upholding ordinance authorizing zoning officer to deny zoning permit to applicants owing property taxes on properties in question).
97. 414 Pa 191, 199 A2d 415 (1964).
98. *Texstar Const. Corp. v. Board of Appeals of Dedham*, 26 Mass.App.Ct. 977, 528 N.E.2d 1186 (Mass.App.Ct.), *rev. denied*, 403 Mass. 1105, 531 N.E.2d 1274 (1988).
99. *4M Club, Inc. v. Andrews*, 11 A.D.2d 720, 204 N.Y.S.2d 610 (N.Y.A.D. 1960)(upholding denial of permit application for swimming pool that was predicated on prior violations on grounds that the action was legislative and not subject to standards, reversing lower court decision holding that prior violations could not furnish a basis for denial.)
100. This is based on several word searches of national zoning cases and treatises. Additional, more extensive, research might uncover cases or statutes that address the District's ability to enforce onsite violations.
101. See D.C. Official Code § 6-641.09 (building inspector cannot issue building permit unless it conforms to regulations adopted under the "sections" of "this subchapter," relating to zoning regulations).
102. D.C. Official Code § 6-641.09.
103. BZA Application 17081 for St. Patrick's Episcopal Day School, order dated October 7, 2004.
104. BZA Application No. 16852 of Washington Psychoanalytic Society/St. Patrick's Protestant Episcopal Church, order dated March 25, 2003.
105. BZA Application 16852-A for St. Patrick's Episcopal Day School, order dated March 25, 2003 ("The special exception shall be valid except that this Order shall terminate and require modification upon a finding by the Board that the Applicant has either admitted violating, paid a fine for violating, or has been found by the Department of Consumer and Regulatory Affairs, after hearing, to have violated the same condition on three or more occasions within five years.").
106. D.C. Official Code § 1-207.42.
107. D.C. Official Code § 6-641.07(c).
108. 364 A.2d 610, 613-14 (D.C. 1976); see also *Jordan v. District of Columbia*, 362 A.2d 114 (D.C.App. 1976).
109. 83 Am. Jur. 2d Zoning and Planning § 705.
110. M. Brough, *A Unified Development Ordinance* (American Planning Association, 1985), at 24.
111. *Id.*
112. *Id.*
113. 11 DCMR § 3112(a), (b).
114. 11 DCMR § 3312.5.
115. 11 DCMR § 3030.
116. 11 DCMR §§ 3005.9, 3105.13.
117. D.C. Official Code §§ 6-641.03, 6-641.05.
118. See D.C. Official Code § 2-509 (requiring that parties have "reasonable notice" of a hearing).
119. *Washington Ethical Soc. v. District of Columbia Bd. of Zoning Adjustment*, 421 A.2d 14, 17 (D.C. 1980).
120. 11 DCMR §§ 3013.1(c), 3020.1(i), 3112.10, 3113.8, 3117.3(j). In practice, any member or a consensus of the Zoning Commission members can accept the proffer of qualifications. If the Zoning Commission wants to continue the current practice, it makes sense to amend the rules to reflect this practice. Without authority in the Zoning Regulations, a party could challenge the authority of a member or the full Zoning Commission to make this determination in lieu of the presiding officer.
121. Mason County (Washington) Hearing Examiner, Rules Of Practice And Procedure, § 2.14.
122. New York State Department of Environmental Conservation Permit Hearing Procedures, § 624.7.
123. Pennsylvania Department of Community and Economic Development. *The Zoning Hearing Board* (Planning Series

- #6, 10th ed., Aug. 2001), at 11.
124. 11DCMR § 3129.1.
125. 11DCMR § 3129.3.
126. 11 DCMR §§ 3030.1 – 3030.2.
127. 11DCMR § 3129.2.
128. While the regulations limit modifications to “plans,” the fees regulations are not limited to plans but instead refer to the “approved PUD.” The Zoning Regulations should be amended to resolve this inconsistency. 11 DCMR § 3040.4.
129. 11 DCMR §§ 3030.1, 3129.7.
130. 11DCMR §§ 3030.6, 3129.4 .
131. 11DCMR § 3129.5.
132. 11DCMR § 3129.7.
133. D.C. Official Code § 6-1402.
134. 11 DCMR § 3202.2.
135. 12 DCMR § 106.1.11.
136. <http://dcoz.dc.gov/faqs/faq.asp#87>.
137. The only mention of zoning certification is § 3045.1(a), which establishes the fee for certification.
138. 11 DCMR § 106.2; see also §§ 1543.4 (Office of Zoning maintains map of residential front yard setbacks); 1700.1 (DD Overlay District); 1706.2 (map of Housing Priority Area).
139. 11 DCMR § 106.3.
140. Vested rights issues arise in the context of two separate analytical frameworks: (1) a vested rights analysis, which involves property rights obtained by a landowner pursuant to a permit or a lawful nonconforming use, and (2) an equitable estoppel analysis, which involves equitable relief against a local government based upon representations it has made to a developer. In *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507 (Del.Ch., Dec 16, 1988), the court distinguished between the two doctrines as follows: “On a theoretical level, these two doctrines are distinct in that they have different conceptual roots. The estoppel doctrine derives from equity, and focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct. The vested rights doctrine reflects principles of property and constitutional law, and focuses on whether the owner’s reliance upon an existing zoning classification is so substantial as to constitute a vested right that cannot be abrogated by government regulation. *Allen v. City and County of Honolulu*, Haw.Supr., 571 P.2d 328, 329 (1977).” Despite these theoretical distinctions, the two doctrines have been applied interchangeably to reach the same result in similar factual situations. *Miller v. Board of Adjustment of Dewey Beach, supra*, 521 A.2d [642 (1986)] at 645.
141. D. Callies & R. Freilich, *Cases and Materials on Land Use* (West Publishing Co., 1986), at 178.
142. D. Callies & R. Freilich, at 198-99; 4 Rathkopf’s *The Law of Zoning and Planning* § 50.03 (Matthew-Bender, 1986)).
143. *Hilton Hotels Corp. v. District of Columbia Bd. of Zoning Adjustment*, 435 A.2d 1062 (D.C. 1981); *Scholtz Partnership v. District of Columbia Rental Accommodations Comm’n*, 427 A.2d 905, 918 (D.C.1981) (“[a] vested right must be more than a mere expectation based on the anticipated application of existing law”); *Aquino v. Tobriner*, 298 F.2d 674, 112 U.S.App.D.C. 13 (1961) (purchase of land and demolition of buildings did not vest rights). In *Speyer v. Barry*, 588 A.2d 1147 (D.C. 1991), the court recited the following rule from Maryland – which follows the late vesting principle: “Familiar equitable principles, however, provide some protection to those who have substantially changed their position in reliance on existing zoning regulations. See, e.g. *Steuart Petroleum Co. v. Board of County Comm’rs*, 276 Md. 435, 347 A.2d 854 (1975). As the court stated in *Steuart Petroleum*, (quoting 2 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 57-6, 57-7 (3d ed. 1972)),

[t]he majority rule, which can be synthesized from the multitudinous decisions in this area, may be stated as follows: A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, [footnote omitted] he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations.

- 276 Md. at 442, 347 A.2d at 859. Cf. *Rafferty v. District of Columbia Zoning Comm’n*, 583 A.2d 169, 174-76 (D.C.1990) (estoppel and laches); Annotation: Zoning: Building in Course of Construction as Establishing Valid Nonconforming Use or Vested Right to Complete Construction for Intended Use, 89 A.L.R.3d 1051, 1058 (1979 & Supp.1990), and authorities there collected.”
144. C.R.S. § 24-68-104(2). See also N.C.G.S. § 160A 385.1.
145. Ariz. Rev. Stat. Ann. § 9-500.05, 48.701 et seq.; Cal. Gov’t Code §§ 65864-65869.5; Colo. Rev. Stat. § 24-68-101 et seq.; Hawaii Rev. Stat. § 46-121 et seq.; Fla. Rev. Stat. § 163.3220 - 163.3247; Minn. Stat. Ann. § 462.358(3c); N.J. Rev. Stat. § 40.55-D et seq.; N.C.G.S. § 160A 400.20, and Nev. Rev. Stat. § 278.0201 - 278.0207; see generally *Delaney, Development Agreements, The Road from Prohibition to “Let’s Make a Deal!”*, 1992 INST. ON PLANNING, ZONING & EMINENT DOMAIN, ch. 2 (Matthew-Bender, 1992); *Taub, Development Agreements*, 42 LAND USE L. & ZONING DIG. 3 (Dec. 1990).
146. *Gernalnes v. City of Greenwood Village*, 583 F.Supp. 830 (D. Colo. 1984) (23-year freeze in annexation agreement).
147. Some courts are “almost ritualistic in requiring both a building permit and a reliance thereon before declaring rights to have vested.” Schwartz, *Asserting Vested Rights in Colorado*, 12 COLO. LAW. 1199 (1983).
148. *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980).

APPENDIX C

End Notes

149. V.T.C.A., Local Government Code § 245.002.
150. *Sherman v. Reavis*, 257 S.E.2d 735, 737 (S.C. 1979) (city not estopped from refusing to issue building permit where developer conceded that the permit was sought in anticipation of and in an effort to circumvent the pending ordinance).
151. *Id.*
152. D.C. Official Code § 6-641.07.
153. D.C. Official Code § 6-641.09.
154. D.C. Official Code § 2-1831.03 (jurisdiction of the Office and agency authority to review cases) does not list the BZA as an agency from which OAH adjudications lie.
155. D.C. Official Code § 2-1803.01.
156. D.C. Official Code § 2-1831.16(b).
157. D.C. Official Code § 2-1831.03.
158. In practice, the Zoning Commission may choose not to set down, but instead allow the applicant to resubmit for set down. While its authority to do this is probably implicit in its discretionary authority to set down or to dismiss a case, the Zoning Regulations could list this option to notify applicants and potential parties of how the Zoning Commission might proceed.
159. 11 DCMR § 3202.4(a).

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