

# Government of the District of Columbia

## ZONING COMMISSION



ZONING COMMISSION ORDER NO. 516  
Case No. 86-22  
(Vesting of Construction Rights - Text Amendment)  
January 5, 1987

Pursuant to notice, the Zoning Commission for the District of Columbia held a public hearing in this case on December 1, 1986. The hearing was conducted as a rulemaking proceeding pursuant to 11 DCMR section 3021 (1986).

The Zoning Commission proposed these amendments, as provided by 11 DCMR section 102.2(b), for the primary purpose of developing a reasonable alternative to consideration of a series of requests for emergency amendments of the zoning map to implement the Comprehensive Plan for the National Capital. Specifically, the Commission adopted emergency rules to amend the Zoning Regulations, and proposed permanent amendments thereto, during the course of a special public meeting of the Commission, held on September 22, 1986, to address proposed amendments to the zoning map to downzone, that is, to reduce the scale of permitted development and number of permitted uses, in certain area along Wisconsin Avenue, N.W. At that meeting, the Commission considered a petition and recommendations that it adopt proposed amendments to the zoning map by emergency action. For the reasons set forth herein, the Commission concluded that amendments to 11 DCMR section 3202 (1986) would reasonably and effectively preserve the integrity of the Comprehensive Plan, and of Zoning Commission action to implement the Plan,

The broader context for this action remains essentially as is set forth in Zoning Commission Order No. 503, entered in this case on September 22, 1986. 33 DCR 6225 (1986). As revised to reflect the public hearing and other proceedings held in this case after September 22, 1986, that context is set forth below,

The District of Columbia Comprehensive Plan Act of 1984, B.C. Law 5-76, became effective April 10, 1984; and the District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984, D.C. Law 5 - L87, became effective March 16, 1985. The Executive and Legislative branches of the District of Columbia government have invested

substantial time and effort to prepare, adopt, and implement the Comprehensive Plan. Section 2 of the Zoning Act, as amended, D.C. Code Section 5-414, (1981) requires that the text and map of the Zoning Regulations not be inconsistent with the Comprehensive Plan,

Analysis of the Comprehensive Plan demonstrates that the Zoning Commission, together with the District of Columbia Office of Planning, will be required to invest very substantial time and effort to address a variety of serious and complex issues, in order to assure compliance with the "not inconsistent with" requirement. This effort is inherently incapable of being hurried, if it is to be conducted in a reasonable, prudent, and businesslike way, and in accord with the requirements of due process,

The Zoning Commission has recently held hearings in Zoning Commission cases 86-12 (Reed-Cooke Map Amendment) and 86-17, to consider whether to amend the zone district classification of substantial land areas, to the end of assuring compliance with the 'not inconsistent with' requirement. These two cases represent only a few of those that will be needed to address that issue,

Indeed, the Office of Planning has submitted memoranda to the Zoning Commission, dated October 3, 1986, and, most recently, December 23, 1986, setting forth approximately fifteen additional major area map amendments which it will recommend the Commission consider in 1987.

Based upon the substantial level of community interest in cases 86-12 and 86-17, the Commission anticipates that many of these prospective cases will also generate substantial interest. Further, since community groups urged the Commission to effect map amendments by emergency action in both cases, 86-12 and 86-17, the Commission may also reasonably anticipate similar requests in the other prospective cases. Such requests are also to be expected as a natural effect of the Council's adoption of the District elements of the Comprehensive Plan. That is, further requests for emergency action would almost certainly be urged as the "only" means by which this Commission could assure the maximum impact of prospective amendments to the zoning maps to implement current policy, as reflected in the Comprehensive Plan.

As they stood before the emergency rulemaking on September 22, 1986, the vesting provisions of the Zoning Regulations provided a means by which development which would be inconsistent with the Comprehensive Plan could be approved, completed, and remain as a nonconforming structure or use, or both, notwithstanding such inconsistency. Those provisions allowed a developer to apply for and be granted a permit to construct a building of the size and density

allowed by the Zoning Regulations in effect at the time the permit application was filed, Further, those provisions so operated even if, in a proceeding that was pending before the Zoning Commission when the application was filed, the Commission was considering a proposed reduction in the permitted size, density, or range of uses at the site, and thereafter took timely action to reduce that size, density, or range of uses. Thus, inherent in those vesting provisions was a substantial risk that a developer, knowing that the Zoning Commission had scheduled a hearing to consider an amendment of the zone district classification of a site, could abrogate or significantly abridge the effectiveness of the proposed amendment,

In fact, on the afternoon of September 22, 1986, when the Zoning Commission was meeting to consider, in part, recommended emergency downzoning of land along parts of Wisconsin Avenue, an application some described as preemptive was filed, to construct an office building at 4620 Wisconsin Avenue, N.W., of a larger scale than would have been be allowed in the proposed C-2-A zone district.

The Commission's experience in this initial phase of the process of implementation of the Comprehensive Plan evidences the need for the action that the Commission effects in this order. The ongoing process through which the Zoning Commission will be considering action which may reduce development potential is a process that inherently and inevitably creates an incentive for a prospective developer to expedite preparations, to the end of securing approval to construct a building of a size and density which may later be precluded.,

The functional integrity of the Comprehensive Plan is of paramount public importance, in that the public interest in maintaining and ensuring the Comprehensive Plan's functional integrity is overwhelmingly superior to any private interest in building to the maximum scale permitted under extant limitations.

The Commission has considered, and rejects at this time, the alternatives which have been recommended by some persons participating in the case,

On the one hand, the Commission has been urged to adopt no amendment, on the grounds that the Commission has no authority to adopt the proposed rule, that it is excessively burdensome, and that it is not needed.

The basic need for the rule has clearly been demonstrated to the Commission, and is set out above, The repeated consideration of emergency downzonings is not an acceptable alternative. Emergency rulemaking is not intended to become the primary means to resolve issues, and

should not be lightly undertaken. The proposed rule will permit more orderly proceedings by the Commission.

The Commission is satisfied that it has the authority to adopt the proposed rule. The vesting rule in effect up to September 22, 1986 was adopted by the Commission in 1958. That rule was substantially more favorable to owners and developers of land than the general rule which would otherwise apply under general principles of law, and of zoning law in particular. In most jurisdictions in the United States, the right to construct a building that would be barred by an amendment to the Zoning Regulations does not vest unless a building permit has been issued, and some work has been carried out under the authority of the permit. Thus, the vesting rule in effect up to September 22, 1986 operated as a savings clause to mitigate the arguably strict operation of the majority rule, and thereby to allow development of land to proceed with greater predictability. The proposed rule modifies the operation of the savings clause, but does not alter or eliminate its central elements, and those elements remain favorable to development. Nor does the proposed rule abolish the savings clause, as the Commission would indisputably have authority to do. The Commission believes that the proposed rule will retain stability and predictability in the regulatory framework for the development of land in the District.

The rule will impose no unreasonable burden. The development of land in the District of Columbia is clearly beneficial to the District, but development cannot be rendered free from uncertainty and chance, the substantially better portion of which are completely external to the zoning process. Moreover, the Comprehensive Plan itself stands as substantial notice of the District's policy goals for land use,

The Commission can not overlook a degree of inconsistency between certain positions taken before the Commission in this case and in case 86-17. In that case, the point was urged that nonconforming structures which are created by map amendments become difficult to insure or to re-finance. In this case, the Commission is urged not to reduce the current right to construct new nonconforming structures, which, the Commission presumes, are intended to be insured and financed. The Commission does not accept the contention that a diminution in this "right" is an excessive burden.

The Commission also rejects the contention that the proposed rule would be invalid, because its future operation would be "to down-zone areas without having notice, without having a hearing and without meeting the APA requirements." Rut this is not so, either literally or in substance. In

future cases, when the Commission has decided to have a hearing to consider an amendment to the zoning map, the zoning map will, plainly, not be amended by operation of the rule. The zoning map will be amended, if at all, only at the conclusion of the complete process, including public notice and a public hearing, which is required by law. Nor would the proposed rule operate in substance as a map amendment. The proposed rule will operate, as do many other provisions in the text of the Zoning Regulations, to govern the way that development rights apply under certain circumstances.

On the other hand, the Commission has been urged to establish an event which occurs earlier in the course of a map amendment case, such as the filing of a petition for an amendment, as the event that triggers the operation of the proposed rule. On balance, the Commission believes that the more reasonable milestone for that purpose is the proposed one, the decision by the Commission to have a public hearing. That decision is the event that represents the Commission's determination that a case has sufficient merit to conduct a hearing and to undertake the substantial administrative effort involved in the hearing process. In addition, the adoption of an earlier milestone would go beyond the scope of the public notice and proposed rulemaking.

The Commission recognizes that further deliberation on the proposed rule would be reasonable, to consider certain narrow issues that would allow the Commission to refine the proposed rule. The Commission is prepared to consider those issues in further proceedings. At this stage, the Commission is confronted by the expiration of the emergency rule, as of January 19, 1987. The Commission is persuaded that final adoption of the proposed rule at this time is fair, reasonable, and necessary.

This case does not affect the neighborhood of any ANC in a way which is different from the way it affects the District as a whole. Thus, in this case it is subject to doubt that any ANC is entitled to great weight. The Commission will address ANC views as follows. ANC 3C submitted written views recommending adoption of the text changes essentially as proposed, but urging changes to: (1) ensure that the Zoning Commission acts promptly to decide to hold a hearing on an application; (2) to clarify the act which constitutes the filing of an application for a building permit; and (3) to apply the proposed rule to a building permit application filed on the same date that the Commission decides to hold a hearing. ANC 3E also filed written views, recommending adoption of the proposed rule, but also urging an earlier triggering event, and suggesting that the restriction on construction apply as soon as the

Zoning Commission receives a petition to consider a map amendment,

All of the changes urged by ANCs 3C and 3E are beyond the scope of the notices of proposed rulemaking and public hearing. They can not be adopted at this point. Nonetheless, the Commission has expressed above its reasons for adoption of the Commission's decision to have a public hearing as the triggering event for application of the proposed rule.

Notice of proposed rulemaking appeared in the D.C. Register on October 10, 1986. The final rule which the Commission adopts in this Order is identical to the proposed rule, with the sole exception of the addition of a clarifying phrase at the end of paragraph (b) of sub-section 3202.6, and the addition of paragraph (c) to that sub-section. This clarification is not substantive, as it is consistent with the Commission's understanding of the language of the proposed rule,

The proposed action of the Zoning Commission to amend the Zoning Regulations was referred to the National Capital Planning Commission (NCPC), under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. NCPC, by report dated December 23, 1986, found that the proposed amendment would have had relatively limited, if any, effect on the Federal Establishment or other Federal interests in the National Capital, and would not be inconsistent with the Comprehensive Plan for the National Capital.

The Zoning Commission believes that the proposed amendments to the Zoning Regulations are in the best interest of the District of Columbia, are consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and are not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby orders APPROVAL of amendments to the Zoning Regulations regarding the vesting of construction rights. The specific amendments to DCMR Title 11 (the Zoning Regulations) are as follows:

1. Add a provision to regulate the processing of an application for a building permit, and the completion of work pursuant to a permit, if the application is filed when the Zoning Commission is considering a case to change the zone district classification of the site:
- 3202.6 If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider amendment of the zone

district classification of the site of the proposed construction, the processing of the application, and the completion of work pursuant to a permit, shall be governed as follows:

- (a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-sections 3202.4 and 3202.5; and
- (b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by a permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site,
- (c) For purposes of paragraph (b) of this sub-section, the phrase "zone district classification being considered for the site" shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification of the site that is in effect on the date the application is filed.

2. Make consistent technical changes, as follows:

Redesignate current sub-sections 3202.6 and 3202.7 as 3202.7 and 3202.8.

And:

In sub-section 3202.8, delete "or 3202.6" and insert, in lieu thereof: "3202.6, or 3202.7".

This order was adopted by the Commission at the special public meeting on January 5, 1987, by a vote of 5-0 (Patricia N. Mathews, Lindsley Williams, Maybelle T. Bennett, and John G. Parsons to adopt, and George M. White to adopt by absentee vote.

Z.C. ORDER NO. 516  
CASE NC. 86-22  
PAGE 8

In accordance with 11 DCMR section 3028, this order is final and will take effect upon publication in the D.C. Register, that is, on January 16, 1987.



PATRICIA N. MATHEWS  
Chairperson  
Zoning Commission



EDWARD L. CURRY  
Acting Executive Director  
Zoning Secretariat

zcorder516/EB12