

Government of the District of Columbia

ZONING COMMISSION



ZONING COMMISSION ORDER NO. 588

CASE NO. 87-2

(Vesting of Construction and Occupancy Permits)

September 15, 1988

The Zoning Commission for the District of Columbia initiated this case to consider various issues which deal with the vesting of rights to develop and use land in the District of Columbia. The general issue has become of particular importance in light of the statutory requirement that the text and map of the Zoning Regulations not be inconsistent with the Comprehensive Plan, and the adoption in 1985 of the Land Use Element of the Comprehensive Plan. On January 18, 1988, the Commission issued its first final order in this case. The scope of that order was limited to the filing requirements for an application for a building permit to operate to vest construction rights. This order addresses the remaining issues.

Hearings in this case were held on June 11, 1987, and January 7, 1988.

The issues to be addressed are fairly summarized in the two public hearing notices. Those issues are whether the Commission should amend the Zoning Regulations as follows:

1. adopt provisions which would restrict the vesting of occupancy rights, that is uses, when a map or text amendment case is pending before the Commission;
2. adopt provisions which would restrict the vesting of construction rights when a text amendment case is pending before the Commission;
3. adopt provisions which would assure that a use or development would not be vested if it is inconsistent with, albeit more restrictive than, rezoning which is being considered by the Commission to implement the Comprehensive Plan;
4. adopt a provision which would require the Commission to make certain findings before any limitation on vesting of construction or occupancy

rights would operate in connection with a particular Commission case;

5. adopt a provision which would authorize the Commission to exempt a particular case from triggering application of a limitation on vesting of rights;
6. provide that the limitation on the vesting of rights would not apply to an amendment proposed by a property owner pursuant to 11 DCMR 102.2(a);
7. provide that the act which vests construction or occupancy rights be an act which occurs at an earlier or later point than the filing of an application for a building permit or certificate of occupancy;
8. provide that the limitation on the vesting of rights would operate immediately upon a decision by the Commission to hold a hearing, at the start of the next day, or retroactively;
9. adopt a provision which would allow a building permit to be issued to remedy a problem which results from an emergency, when there is a danger to life;
10. adopt a provision which would allow the Board of Zoning Adjustment to grant relief by special exception when the case before the Zoning Commission would not be resolved within nine months;
11. substitute the phrase "the effective date of these regulations or any amendment thereto", for the date "May 12, 1958" wherever it appears in sections 3202 and 3203;
12. make any change to the Rules of Practice and Procedure before the Zoning Commission which would be necessary in conformity with the above proposed amendments to Title 11;
13. amend 11 DCMR 3202.5 to provide that the right to construct a building or other structure would not vest until a permit to construct the building or structure has been validly issued, and the permit holder has completed a substantial degree of construction under the permit, and in good faith reliance thereon;
14. adopt a provision which would require an applicant for a construction permit to give notice of the

filing of the application to the Advisory Neighborhood Commission in which the proposed structure would be located, if the area, height, bulk, or other characteristics of the proposed structure are significant; and

15. adopt a provision to establish a procedure and fee by which the District would grant a reservation of a vested right to construct a building or other structure before the filing of an application for the permit to construct the building or structure.

The Commission also invited the submission of views on other issues which any interested person believed to be reasonably related to the proposed amendments. In its notice of the January 7, 1988 hearing, the Commission stated that it also would consider the adoption of amendments which persons who participate in the hearing recommend as alternatives to the amendments identified as issues numbered 13 through 15.

There was substantial participation in the public hearings and through submission of written comments by civic and community groups, Advisory Neighborhood Commissions, representatives of developers, and other interested organizations and individuals. The views which were expressed ranged from favoring maximum stability and certainty in the development process to favoring maximum protection of the goals and policies of the Comprehensive Plan.

At the regular monthly meeting on August 3, 1987, the Zoning Commission first considered proposed action in this case. Its preliminary decision at that time was as follows:

1. Adopt provisions which would restrict the vesting of occupancy rights when a map amendment case is pending before the Commission; such provisions would have amended 11 DCMR 3203, by adding thereto a provision analogous to 11 DCMR 3202.6; the rationale for this amendment would be to regulate the establishment of new uses in the same manner as is new construction;
2. Not adopt a provision to restrict the vesting of occupancy or construction rights during the pendency of a text amendment case before the Commission; the reason for not adopting this rule is that text amendments, which are ordinarily considered for general application throughout the District, are inherently more complex than map amendment rulemaking cases, which ordinarily apply to a relatively smaller area; this is generally so, even though it is the case that text amendments are involved in certain map amendments, such

as those which involve overlay provisions; the greater complexity renders it administratively impractical to restrict development and business activity while such cases are pending; moreover, it is inherently more difficult to project the approximate ultimate decision in such cases;

3. Not adopt a provision such as proposal numbered 3; there was no support for such a rule from any participant, and its rationale is not consistent with the general principal that the Zoning Regulations in the District permit development to less than the full allowable scale;
4. Not adopt provisions such as proposals numbered 4 or 5; the Commission concluded that it would be more reasonable to adhere to a rule of general applicability, and to address any special circumstances by emergency rulemaking;
5. Adopt a provision such as proposal numbered 6; it is not unusual for a PUD proposal to contain elements which are in part more restrictive than the extant zone classification, and the Commission concluded that it would not be reasonable to limit any interim construction to the limits which are proposed in a PUD;
6. Not to adopt a provision such as proposals numbered 7 or 8; the Commission determined that in these respects the extant provisions, based upon the amendments adopted in Z.C. Case No. 86-22, provided a sound, balanced scheme;
7. Adopt a provision such as proposal numbered 9, to allow a building permit to be issued to remedy a life-threatening emergency situation, but not to permit any additional height or bulk;
8. Not to adopt a provision for special exception relief when the case pending before the Zoning Commission is not resolved within nine months; such a provision would be of marginal value, yet would entail further complication of the decision-making process for the Zoning Commission and Board of Zoning Adjustment;
9. Adopt proposal numbered 11 to conform Title 11, DCMR, to the original intention of the Zoning Commission in adoption of the 1958 Zoning Regulations;
10. Not to amend 11 DCMR, Chapter 30, as no need for such amendments was evident.

At the meeting on August 3, 1987, the Commission discussed two other issues which were identified during the course of the Commission's consideration of this case: (1) a proposal to establish a "reservation" system to allow developers to establish a vested right to build before filing an application for a building permit; and (2) the administrative practice of allowing the filing of construction plans for review by the Zoning Division, and treating that filing as the act which vests construction rights, even though it occurs before the filing of an application for a building permit.

The Commission requested the Office of Planning to review this latter issue with the Department of Consumer and Regulatory Affairs, and to report to the Commission. It took no action at that time on adoption of a "reservation" system.

At the October 13, 1987 meeting, the Commission received the report of the Executive Director, and adopted an emergency rule to amend 11 DCMR 3202.5(a), governing the filing requirements for an application for a building permit. The emergency amendment was effected by Zoning Commission Order No. 546. The Commission also set the January 13, 1988 hearing date to consider this issue and the other issues identified as proposed amendments numbered 13 through 15 on pages 2 and 3 above. The Commission resolved the issue which was the subject of emergency rulemaking by final action which was effected by Zoning Commission Order No. 562, effective February 12, 1988.

The Commission considered the remaining issues at the public meeting on February 8, 1988. It took proposed action at that time to amend the Zoning Regulations as follows:

1. Establish the issuance of a building permit or certificate of occupancy as the events which vest construction and use rights, respectively.
2. Provide an exception to the foregoing, to apply to occupancy rights in connection with construction; if a use is designated at the time of application for an issuance of a building permit, the issuance of such a building permit would vest occupancy rights.
3. In the case of construction rights which have vested before an amendment to the Zoning Regulations which would be more restrictive than the vesting permit, require the developer to begin construction within a time frame that is consistent with the District of Columbia Building Code; the Executive Director of the Zoning Secretariat was directed to determine the

appropriate length of time to include in a notice of proposed rulemaking.

4. Repeal 11 DCMR 3202.6.
5. Establish at the time of final action an effective date, or dates, for the amendments.
6. Not to adopt a "reservation" system.

The Commission's reasons for the proposed action are as follows:

Because there is inherently a degree of uncertainty in the development and use of land, and in the quasi-legislative process, it is reasonable to recognize and accept that uncertainty. On balance, it is preferable that new structures and uses of land be in conformity with the Zoning Regulations which are in effect when the new structures and uses are authorized. Title 11, Chapter 20, provides generous rights to continue nonconforming uses and structures. It is not reasonable also to provide overly generous rights to establish brand new nonconforming uses and structures. Rules which vest rights at the time an application is filed encourage speculative haste to establish those rights.

The Commission also determined to adopt a new provision to require construction to begin within a reasonable period, consistent with the Building Code.

The Commission proposed to allow occupancy rights to vest at the time of issuance of a building permit which designates the proposed occupancy. A developer should not be placed in the position of building a structure for a particular authorized use, and have it determined after construction that the designated use is no longer permitted.

The Commission also proposed to repeal the rule which limits construction rights during Commission rulemaking proceedings to consider amendments of the zone district classification of land.

Notice of proposed rulemaking was published in the D.C. Register on May 20, 1988 (35 DCR 3891), and provided for comments to be received through July 1, 1988. Because the Commission thereafter revised its schedule for consideration of final action, the Commission reopened the comment period to allow comments to be submitted through September 9, 1988.

Comments were received from a similar range of individuals and organizations, including ANCs, as are noted on page 3 of this order as having participated in the hearings.

The comments may fairly be summarized as follows:

1. Both support of and opposition to the proposed amendment that would defer the vesting of rights until the issuance of a building permit or certificate of occupancy.
2. Continued support for deferring the vesting of construction rights even further, until there has been substantial construction in good faith reliance on the permit.
3. Both support of and opposition to the proposed repeal of 11 DCMR 3202.6.
4. Opposition to the proposed amendment which was viewed as extending the time for beginning construction.

Supporters of more restrictive over-all provisions cited the importance of assuring compliance with the Comprehensive Plan, and of retaining control over development even after a permit is issued, and contended that developers could reasonably adjust to more restrictive controls over the process. It was also observed that the Commission had not given proper public hearing notice either of the proposed repeal of 11 DCMR 3202.6 or of the proposed new 11 DCMR 3202.4(a).

Supporters of more generous over-all regulations cited the inherent risk and delays in the development process, the value of development to the District, the need to minimize risk, delay and uncertainty in the process, and the potential for pressure on administrative officers of the District to delay permit approval as a way to prevent the vesting of rights.

At its meeting on September 15, 1988, the Commission considered these comments and the further views of the Office of Planning. The Commission's final action is discussed and set forth below.

The Commission does not believe that concerns expressed by the development community are well founded. The amended vesting provision remains more favorable than the majority rule which requires substantial construction. The Commission does not discern in the Comprehensive Plan that daunting degree of ambiguity that is found therein by some participants in this proceeding. The Plan provides reasonable guidance to one who approaches it to be guided by it, rather than to find the opportunities which it may present for expansive interpretation. To the extent that there is ambiguity in the Plan, it is reasonable for the District to expect caution where caution is due, rather than to license or stimulate undue boldness.

The Commission observes that one bank officer testified that a financial institution generally will not release a construction loan on a project until a valid building permit has been issued.

The Commission recognizes that the amended rule will require even-handed and timely administration, if it is not to prove correct the forecasts of delay in the permit review process. The forecasters may not themselves be entirely convinced that this is a serious prospect. No comment was accompanied by a proposed remedial provision to prevent the hypothetical mischief of intentional delay. It therefore appears that the gloomy prospect may be more welcome as a demon to scare off the amendment, than it is feared as a concern to be taken seriously and addressed.

The Commission nonetheless observes that the District government is bound to administer rules fairly, and that all who do business with the District are entitled to no less. No claim has been made to the Commission that this rightful expectation has been violated, nor should the absence of such a claim come as unexpected. It is a routine obligation of public office to resist undue pressure. The Commission has not been made aware, either in this case, or through the service of the various Commissioners or the Board of Zoning Adjustment, that this obligation is not routinely met.

With respect to the second category of comments, a requirement that the permit have been acted upon before the effective date of the amendment would go too far. At some point, there must be certainty. As it is, the development community is substantially troubled by the proposed amendment. Although the Commission is not prepared to retain the current rules which vest rights upon application, it recognizes the legitimacy of the need for a reasonable degree of certainty. The Commission will not exacerbate the process of adjustment to the approved amendments by making the vesting of rights a type of sporting event to be played with an indefinite number of extra innings. The District's issuance of a permit should fix rights in place.

The Zoning Regulations do not generally require construction to begin or uses to be established within a time certain of the issuance of a building permit or certificate of occupancy. 11 DCMR 3202.5(b), which requires by inappropriate jargon that a permit be "taken out" within six months of the effective date of the Zoning Regulations, certainly does not do so. This language suggests no more than that a permit must be timely removed from the permit office. It is not apt to impose a requirement to begin construction. Title 11 uses reasonable, sensible, and unambiguous language to impose a deadline to begin construction, where such a deadline is intended. See 11 DCMR 2406.9 and 3104.3. Also

see the analogous provisions of Title 12, DCMR (1987). Section 108.11 of that title requires an applicant to "obtain" a building permit within nine months of notification that the permit is ready for issuance. Section 111.9 sets a time limit for beginning work.

Accordingly, for the Zoning Regulations to set forth any generally applicable time limit on the initiation of construction, a time limit must be adopted anew. The proposed limit of two years is shorter than the 2½ year time limit which is available, with extensions, under 12 DCMR 111.9 (1987). The Commission also concludes that this provision is within the scope of the notice of the January 7, 1988 public hearing.

It appears that the proposed repeal of 11 DCMR 3202.6 would be beyond the scope of either notice of public hearing. The Commission is persuaded that the repeal is within the scope only of a broad reading of the notice of the January, 1988 hearing. No participant in that hearing treated the repeal as being at issue, or even suggested that it be considered. Rather, the proposal was the Commission's response to its experience, and to its view of the relationship of the rule to the other amendments which the Commission proposed to adopt. The Commission will not take final action to repeal 11 DCMR 3202.6 at this time.

The foregoing responds to the full range of comments, including those from Advisory Neighborhood Commissions 1C, 1E, 3B, 3C, 4A, and 6C, received in response to the Notice of Proposed Rulemaking.

By letter dated May 19, 1988, the proposed rule was referred to the National Capital Planning Commission (NCPC). By letter dated July 7, 1988, the Executive Director of NCPC, exercising delegated authority, reported his finding that the proposed text changes would not adversely affect the Federal Establishment or other Federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital. In a further report dated September 8, 1988, NCPC recommended against the repeal of 11 DCMR 3202.6, on the basis of a potential adverse effect on Federal Interest zone changes.

The Commission recognizes that its final action not to repeal 11 DCMR 3202.6 will require it to retain jurisdiction over Case No. 87-2, in order to address issues which are presented by the retention of that sub-section. Accordingly, the Commission retains jurisdiction for that purpose.

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 Title 11, DCMR (the Zoning Regulations), as follows:

1. Strike current sub-section 3202.4, and insert in its place the following:

3202.4 Any construction authorized by a building permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued, subject to the following conditions:

- (a) The permit holder shall begin construction work within two years of the date on which the permit is issued; and
- (b) Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended.

2. Repeal sub-section 3202.5.

3. Redesignate sub-sections 3202.6, 3202.7 and 3202.8 as 3202.5, 3202.6, and 3202.7 respectively, and make consistent technical amendments in the latter, so that it reads as follows:

3202.7 A building permit issued in accordance with sub-sections 3202.4 through 3202.6 shall not be renewable if permitted to lapse, unless it is reprocessed in accordance with all provisions of this title.

4. Strike current sub-section 3203.8, and insert in its place the following:

3203.8 Any use which is authorized by a certificate of occupancy may be established and continued pursuant to the terms of the certificate and the provisions of this title in effect on the date that the certificate is issued, subject to the following conditions:

- (a) The use shall be designated on the certificate of occupancy in terms

of a use classification which is established by this title;

- (b) The use shall be established within six months of the date on which the certificate is issued; and
- (c) Any amendment of the use authorized by the certificate shall comply with the provisions of this title in effect on the date that the certificate is amended.

5. Strike current sub-section 3203.11, and insert in its place the following:

3203.11 This sub-section shall govern the issuance of a certificate of occupancy for the use of a structure, or part thereof, if the establishment of the use is dependent upon the erection, construction, conversion, or alteration of the structure, or part thereof; Provided, that the following requirements are met:

- (a) The use authorized shall be designated as a proposed use at the time of application for the building permit on which the use depends;
- (b) A building permit shall be issued in compliance with section 3202 of this title;
- (c) At the time of issuance of the building permit which is required by this sub-section, the proposed use shall be designated in a provisional certificate of occupancy; and
- (d) The use designated in the provisional certificate of occupancy shall comply with all provisions of this title in effect on the date on which the building permit required by this sub-section is issued.

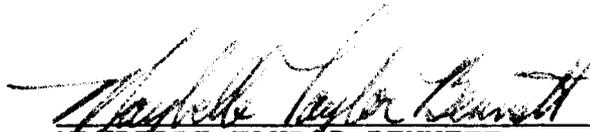
6. Technical conforming amendments shall be made to sub-sections 3202.1, 3203.10, and 3203.11, with

respect to references to other provisions of Title 11.

Vote of the Zoning Commission on proposed action on February 8, 1988: 5-0 (Lindsley Williams, Maybelle Taylor Bennett, Patricia N. Mathews, George M. White, and John G. Parsons to approve amendments to the Zoning Regulations.).

Vote of the Zoning Commission on September 15, 1988, on final action to adopt the foregoing amendments to the Zoning Regulations: 5-0 (Lindsley Williams, John G. Parsons, Maybelle Taylor Bennett, and George M. White to approve amendments to the Zoning Regulations, and to adopt this Order; Patricia N. Mathews to approve amendments and adopt this Order, by proxy vote).

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register, that is on 20 JAN 1989.



MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission



EDWARD L. CURRY
Executive Director
Zoning Secretariat