

Government of the District of Columbia

ZONING COMMISSION



ZONING COMMISSION ORDER NO. 770
Case No. 94-10
(Text Amendment - 11 DCMR 3104.5, BZA Tolling)
March 20, 1995

The Zoning Commission for the District of Columbia initiated this case in response to an application filed by the law firm of Wilkes, Artis, Hedrick and Lane on behalf of Ann T. Cullen, requesting the Commission to amend the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. Amendments to the text of the Zoning Regulations are authorized pursuant to the Zoning Act [Act of June 20, 1938, 52 Stat. 797, as amended, D.C. Code Ann. Section 5-413 (1994)].

The application was filed on May 4, 1994, and requested the Zoning Commission to add a new Subsection 3104.5. Section 3104 of the Zoning Regulations specifies the time limits by which applicants before the BZA must proceed under approvals granted by the BZA. The section now provides that upon approval of an application by the BZA for construction or alteration of a building, for the approval to remain valid, plans must be filed within six months of the order, permits must be issued within six months after filing and construction must start within six months after the issuance of the permit. A similar six month time frame applies to the establishment of uses not otherwise requiring a building permit.

The applicant offered two alternative versions of the new subsection, both of which have the effect of providing that the effectiveness of an order of the Board of Zoning Adjustment (BZA) would be tolled while an appeal of that order was pending in court. Tolling of BZA orders has occurred, at least since 1977, based on a valid opinion of the Corporation Counsel and consistent application of that opinion by the District government.

The opinion of the Corporation Counsel addressed the issue of whether the filing of a petition for review operated to toll the running of the six month period within which a successful applicant must apply for a building permit. The memorandum concluded that "the running of the six-month period for applying for a permit under a BZA decision is tolled by the filing and pendency of: (a) a motion for reconsideration, re-hearing or re-argument, ... or (b) a petition for judicial review. In the event that an applicant should apply for and be granted a permit, but defer or suspend taking action thereunder, the six-month period for beginning construction would similarly be tolled."

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The applicant requested that the Commission set the matter for a public hearing and also to put the amendment into effect on an emergency basis, as provided for in the Administrative Procedure Act (D.C. Code Ann. §1-1506(c) (1992)). The basis for the request was that the Commission should legislatively confirm the longstanding interpretation to prevent the loss of rights for the applicant and others who might be similarly situated.

The Office of the Corporation Counsel, by memorandum dated June 2, 1994, supported the proposed text amendment and advised that "prompt action is necessary to avoid the inadvertent loss of rights." The Office of Planning, by memorandum received on June 3, 1994, recommended that the case be scheduled for a public hearing, and favored the simpler wording of the second alternative proposed by the applicant. The OP stated that it did not find a basis for emergency action, that the current conditions did not rise to the level of action required for the "immediate preservation of the public peace, health, safety, welfare, or morals."

On June 13, 1994, at its regular monthly meeting, the Commission considered the applicant's request and the recommendations of the Office of the Corporation Counsel and OP. The Commission determined that no sufficient basis had been shown to support action on an emergency basis. The Commission authorized the scheduling of a public hearing on an expedited basis, and waived certain provisions of the Rules of Practice and Procedure to proceed with a hearing.

Pursuant to notice, a public hearing was held by the Zoning Commission on July 28, 1994, to consider the proposed amendment to the regulations. The hearing session was conducted in accordance with the provisions of 11 DCMR 3021.

At the hearing session, the Commission heard the testimony of the Office of Planning (OP), Advisory Neighborhood Commissions and 16 witnesses which included representatives from law firms, various citizens groups, building associations, historic preservation and restoration associations, nonprofit organizations and interested citizens. Fourteen witnesses testified in opposition to the proposed amendment, and two witnesses testified in support of the proposal.

OP, by memorandum dated July 18, 1994 and by testimony at the public hearing, agreed with the applicant and the Office of Corporation Counsel's (OCC) opinion that stated "The law --- should not require the performance of useless acts. Beneficiaries of Board orders cannot reasonably be expected to build, alter, or use property while authorizing limits remain under the cloud of petitions for review. A requirement that applicants file piles of paper -- often at considerable expense -- that they cannot possibly

use, is a useless act." The OP recommended that the Commission adopt a text amendment that would legislate the practice of tolling the time limits of BZA orders pending the outcome of appeals. The OP also recommended the second version of the applicant's alternative wording of a proposed Subsection 3104.5 which states as follows:

"In the event an appeal is filed in a court of competent jurisdiction from an order of the Board, the time limitations of Section 3104 shall run from the decision date of the Court's final determination of the appeal. Unless stayed by the Board or a court of competent jurisdiction, an applicant or appellant may proceed pursuant to the order of the Board prior to such final determination."

Advisory Neighborhood Commission 3C, by resolution dated July 25, 1994, argued that a BZA approval that was tolled would be stale by the time an applicant could proceed after a court decision. The ANC noted that public policies could change in the interim and that the Regulations should not allow projects to proceed which might be incompatible with new regulations. The ANC further noted that the tolling problem could be avoided by an applicant merely filing permit applications or by requesting a stay from the BZA or the court.

Advisory Neighborhood Commission 2E, by statement received on July 25, 1994, opposed the application. The ANC argued that an applicant should not be allowed to proceed while a case was in pending in court, that either the approval should remain in effect and the time periods run or the approval be stayed and no action could occur.

Advisory Neighborhood Commission 2A, by the statement of its Vice Chairman, opposed the text amendment. The ANC was concerned that the courts and other officials would be reluctant to deal honestly with a case if a building had been constructed. The ANC argued that the proposed amendment would take away existing safeguards and appropriate review mechanisms.

Advisory Neighborhood Commission 1D, by report dated September 29, 1994, was concerned that the amendment would allow a property owner to delay implementation of a BZA decision indefinitely if a court challenge was filed. The ANC was also concerned that conditions might change during the time a case was pending, including changes in the Comprehensive Plan or the Zoning Regulations. The ANC further suggested that the change in the regulations not be made retroactive.

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In response to the issues and concerns of the ANCs which participated, and in responding to issues raised in the record, the Commission believes that the proposed amendment should be adopted for the following reasons:

1. The proposed amendment codifies and confirms the consistent practice of the District government for many years. In the absence of compelling arguments to the contrary, the Commission favors stability and structure in government and the consistent application of rules and procedures.
2. Fairness favors tolling, for the reasons advanced by the Corporation Counsel and the applicant. It is contrary to the basic principles of law to allow an opponent to an application approved by the BZA to file an appeal of the BZA decision with the Court of Appeals, thus placing a cloud over the ability of the successful applicant to proceed, and then, if not prevailing in court, to later claim that the decision was stale. It is inequitable and unfair for an opponent to frustrate the process and prevent an applicant from going forward by merely filing a petition for review.
3. A decision of the BZA must be presumed to be valid. The BZA acts in a conscientious and proper manner as it hears and decides cases. Accordingly, the Regulations should protect the integrity of the BZA process and proceed on the basis that a BZA order is properly entered, and that rights and obligations which flow from that decision should be protected and preserved.
4. The Commission and the BZA have consistently applied the law in effect on the date that decisions are made. The courts are also required to apply the law in effect at the time that the court's decision is rendered, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.
5. The argument that the effect of a BZA order should be stayed upon the filing of an appeal turns the current practice and legal theory up-side-down. A BZA decision must be presumed to be valid. An automatic stay places the burden on an applicant who has been successful to request the Board or a court to lift that stay if the applicant wants to proceed. The burden of seeking further administrative or judicial relief should not be switched from the person challenging a BZA decision to the one who, as the recipient of the BZA's approval, is a third party in an appeal proceeding.

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6. The Commission is not persuaded by the assertion that the District may not take action to enforce a BZA decision following reversal of a prior decision by the courts. The District has allowed time for applicants to seek further relief before seeking to enforce the Regulations. However, uses have been terminated when a BZA decision was overturned. In addition, the courts have not been reluctant to order all or portions of a structure removed. As to the one specific example cited where it has been alleged that the regulations were not enforced, the Commission will request further explanation from the Department of Consumer and Regulatory Affairs.
7. The issues of increasing the time for a which a BZA order is valid or alternatively allowing the BZA to grant extensions of orders are not part of the text amendment before the Commission. Those issues were not identified in the notice and are not within the scope of the advertised text. Additionally, changing the regulations to allow a greater time period or to allow extensions does not address the fundamental question that the text amendment raises.

Having discussed, considered and resolved the issues and concerns of the ANCs, the Commission determined that it has accorded the ANCs the "great weight" to which they are entitled.

A notice of proposed rulemaking was published in the D.C. Register on December 9, 1994. The comments received raised no issues which have not previously been addressed.

The Zoning Commission believes that its decision to approve the text amendment set forth herein is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act and is not inconsistent with the Comprehensive Plan for the National Capital.

The proposed decision to approve the text amendment was referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. The NCPC, by report dated February 2, 1995, found that the proposed amendment 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 consideration of the reasons set forth herein, the Zoning Commission for the District of Columbia hereby orders approval of the following amendment to the Zoning Regulations, to create a new Subsection 3104.5 to read as follows:

