

# Government of the District of Columbia

## ZONING COMMISSION



ZONING COMMISSION ORDER NO. 793-A  
Case No. 95-17  
(Text Amendment- 11 DCMR 3101, BZA Notice)  
April 8, 1996

The Zoning Commission for the District of Columbia initiated this case in response to a petition by the District of Columbia Office of Zoning (OZ) requesting the Commission to consider and adopt, on an emergency basis, an appropriate amendment to the Zoning Regulations, pursuant to Section 102 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, et al.(1981)).

By memoranda dated October 16, 1995 and October 23, 1995, the OZ requested the Commission to adopt, on an emergency basis, an amendment to the Zoning Regulations to allow the Board of Zoning Adjustment (BZA) to waive the requirement to publish notice of its hearings in the D.C. Register under circumstances where good cause exists, where the remaining forms of notice in Subsection 3101.6 have been accomplished, and where the waiver will not prejudice the rights of any party.

In its report to the Commission, the Office of Zoning indicated that Subsection 3101.6 of the Zoning Regulations require that notice of a hearing before the Board of Zoning Adjustment be published in the D.C. Register at least 40 days in advance of the hearing; that the BZA may not waive the specific requirements of the Zoning Regulations; and that no copy of the D.C. Register has appeared since the November 3, 1995 edition. Additionally, the report indicated that the BZA had public hearings scheduled for at least three dates that would have to be canceled if the proposed rules are not enacted on an emergency basis.

At its public meeting on December 11, 1995, the Zoning Commission adopted the amendment on an emergency basis and authorized the scheduling of a public hearing to determine whether the amendment should be adopted on a permanent basis.

By Order No. 793, the Zoning Commission adopted the proposed amendment to Subsection 3101.6 on an emergency basis. In determining that an emergency existed, the Commission reviewed the information in the OZ reports, and questioned the staff about

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pending BZA hearings and whether there were indications that the D.C. Register would resume timely publication in the near future.

The Commission noted that if it did not take emergency action, the BZA would have to cancel hearings for at least three scheduled sessions or approximately 24 applications. The Commission also noted that the wait for a public hearing would be extremely long for those applicants who were scheduled for hearings during the three sessions that would have to be canceled. The Commission determined that the best interest of the District of Columbia would be served by allowing the hearing process of the BZA to proceed in an orderly and timely manner. The Commission also noted that the BZA gives notice of its public hearings by other means that provide broader notice than publication in the D.C. Register, such as, posting of large signs; written notice to Advisory Neighborhood Commissions (ANCs) and property owners within 200 feet of the property that is the subject of the hearing; and posting of the notice in the Office of Zoning.

Pursuant to notice, a public hearing was held by the Commission on February 26, 1996. At that hearing session, the Commission considered the OZ petition to permanently amend the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. The public hearing was conducted in accordance with the provisions of 11 DCMR 3021.

The amendment proposed for permanent adoption was contained in the notice of public hearing and in Zoning Commission Emergency Order No. 793, published in the D.C. Register on December 22, 1995 (January 19, 1996). Additionally, the amendment was contained in the emergency and proposed rulemaking that was published in the D.C. Register on December 29, 1995 (January 22, 1996).

By report dated February 16, 1996 and by testimony at the public hearing, OZ recommended final adoption of the text amendment previously enacted by the Commission as emergency rulemaking and as advertised for the public hearing and as proposed rules in this case.

OZ indicated that the D.C. Register has continued to be published late; that the BZA would have had to cancel all hearings between December 1995 and February 1996 had the Commission not put the emergency rulemaking in place; that, so far, the waiver would be needed for hearings scheduled for March 1996; that the good cause issue would relate to the failure of the D.C. Register to be published timely; that the BZA would continue to send its notices of public hearing on time for publication 40 days in advance of its hearing dates; and that the BZA has only had to waive number of

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days that the publication is short of the 40 days required, and not the publication of the notices altogether.

By memorandum dated February 12, 1996 and by testimony presented at the public hearing, the Office of Planning (OP) recommended approval of the text amendment. The OP memorandum and testimony reiterated the information presented by OZ.

The law firm of Wilkes, Artis, Hedrick & Lane submitted comments in support of the proposed text amendment. The comments noted the consistent delay in publishing the D.C. Register since November 1995. The submission further noted that the requirement to publish notice in the D.C. Register is contained in the Zoning Regulations and cannot be waived by the BZA as can the other forms of notice contained in the Supplemental Rules of Practice and Procedure. Additionally, the proposed amendment does not deprive ANCs of notice of hearings, because the Supplemental Rules require notice to be mailed directly to ANCs. The BZA should be able to determine whether to proceed with a hearing when adequate notice has been given, even without publication in the D.C. Register.

Advisory Neighborhood Commission (ANC) 6A presented testimony in opposition to the text amendment, and indicated that the ANC was concerned that good cause was not clearly defined in the proposed amendment and that publication in the D.C. Register is important to the ANC in keeping up with zoning issues.

ANC 3C submitted a resolution to the record in opposition to the proposed amendment. The concerns and issues raised by the ANC include its reliance on the D.C. Register for its information about BZA hearings; that mailing notice of hearings to parties and posting notices in the BZA's offices are inadequate to meet the needs of volunteer, part time commissioners; community organizations and private citizens do not automatically receive copies of notices and therefore must rely on the D.C. Register; and finally that the BZA already has the authority to waive its rules and if granted this additional authority, it could find good cause to enable itself to vitiate any requirement of notice.

Testimony in opposition to the text amendment was presented at the public hearing by representatives of the Federation of Citizens Associations, the Coalition for Local Control, the Columbia Tenants Association, the Citizens Association of Georgetown, the Citizens Planning Coalition, the Residential Action Coalition and the Cloisters of Georgetown. Documents in opposition to the proposed amendment were submitted for the record of the case from the law firm of Robins, Kaplan, Miller & Ciresi on behalf of the Committee of 100 on the Federal City, Advisory Neighborhood Commission 2E, and the Stanton Park Neighborhood Association. The

opposition presented in testimony and documents is summarized as follows:

- o The public relies on notice of hearings being published in the D.C. Register;
- o The proposed amendment would curtail the public's participation in a public procedure, and would be beneficial only to the applicants;
- o Notice in the D.C. Register is part of the due process requirement;
- o The Zoning Commission does not have the authority to change regulations mandated by statute;
- o The D.C. Register had a perfect record until the problems created by the blizzard, the government shutdowns, and the fiscal crisis. The Commission has the option of acting when an emergency exists and does not need to make the proposal permanent;
- o Organizations rely on the 30-day notice in the D.C. Register. Any shorter period of time would hinder full participation in the cases before the BZA; and
- o The proposal appears to be a relief act crafted for certain zoning firms in order to keep the public in the dark, and would corrupt the zoning process.

At the conclusion of the public hearing, the Commission left the record of the case open for an additional 23 days to allow all interested persons and entities an opportunity to submit comments.

During the period that the record remained open, the Commission received comments from Advisory Neighborhood Commission 2E, the Office of Zoning, Single-member District Representatives 6A03 and 2E04, and the Foxhall Community Citizens Association.

Advisory Neighborhood Commission 2E resubmitted its comments that were previously submitted indicating the ANC's opposition based on its understanding that although the alternative forms of notification would still be in effect, some citizens and citizen organizations will miss notice given by alternative means and would therefore lose their opportunity to effectively participate in the public process.

The Office of Zoning submitted a memorandum to the record of the case showing that at the time of its writing, there were

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approximately 700 subscribers (paid and non-paid) to the D.C. Register.

Single-member District Representative 6A03 submitted comments indicating concern about the phrase "under circumstances where good cause exists." The representative stated that the phrase is extremely vague and misleading, and will provoke adverse response by all who care about their neighborhoods. Without a more accurate definition of the emergency conditions during which the D.C. Register will not be published and a clear statement of what alternative means will be used during those emergency conditions, the representative maintained that the proposed amendment would deny the rights of the citizens of the District of Columbia to be informed.

Single-member District Representative 2E04 submitted comments indicating that the justifications under which the BZA could waive timely notice by publication in the D.C. Register are incredibly vague; the proposed amendment would raise the burden on affected citizens and add pressures for further abandonment of city neighborhoods by homeowners concerned about protecting their investments in their homes.

The comments from the Foxhall Community Citizens Association mirrored those of Single-member District Representative 2E04.

The emergency and proposed decision of the Commission to approve the amendment was referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. By report dated January 25, 1996, NCPC, by delegated action of the Executive Director, concluded that there is no Federal interest in the text amendment.

A notice of emergency and proposed rulemaking was published in the D.C. Register at 42 DCR 7293 on December 29, 1995 (actually published January 22, 1996). The comment period ended on the hearing date, February 26, 1996. At the conclusion of the public hearing, the Commission left the record open for additional comments. All testimony and comments in this case have been discussed previously in this order.

On March 25, 1996 at a special public hearing, the Commission took final action in this matter after reviewing the testimony and comments submitted to the record of the case.

The Commission concurs with the position and recommendation of the Office of Zoning, the Office of Planning, and the law firm of Wilkes, Artis, Hedrick and Lane in this case. However, after

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considering its emergency action and all of the issues in this case, the Commission believes the amendment was appropriate as an emergency action, but that given the strong opposition for the community at large and the fact that the emergency appears to be over, the need for a permanent amendment is minimal.

The Commission believes that the amendment is not required as a permanent amendment at this time because the D.C. Register is being published in a timely manner. The Commission noted that such an emergency had not occurred in the 40+ years that the D.C. Register has existed, and should the D.C. Register again fail to be published in a timely manner, the Commission may again take emergency action. Additionally, the Commission noted that the requirement to publish hearing notices 40 days in advance of the hearings is a minimum requirement, and that the BZA staff should be urged to submit hearing notices to the Office of Documents and Administrative Issuances for publication in the D.C. Register in advance of the 40 days required by the Regulations.

The Commission believes that its decision to allow the emergency amendment to expire and deny permanent adoption of the amendment is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and is not inconsistent with the Comprehensive Plan for the National Capital.

The Commission has accorded "great weight" to all Advisory Neighborhood Commissions (ANCs) that participated in this case.

At its regular monthly meeting on April 8, 1996, the Commission corrected its procedure of March 25, 1996. The March 25, 1996 special public meeting minutes indicated that there was no second to the motion prior to the Commission taking its vote. Therefore, the Commission re-voted on April 8, 1996.

In consideration of the reasons set forth in this order, the Zoning Commission for the District of Columbia hereby **ORDERS DENIAL** of the pending proposed action to adopt the text amendment that is the subject of this case on a permanent basis, and **ORDERS** that the emergency amendment to the text remain in place until its expiration on April 9, 1996.

Vote of the Zoning Commission taken at its regular meeting on December 11, 1995 4-0: (William L. Ensign, John G. Parsons and Maybelle Taylor Bennett, to approve as emergency and proposed rulemaking; Jerrily R. Kress to approve by absentee vote).

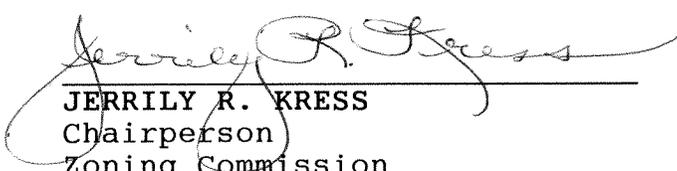
Vote of the Commission taken at the special public meeting on March 25, 1996 5-0: (Maybelle Taylor Bennett, John G. Parsons, Jerrily

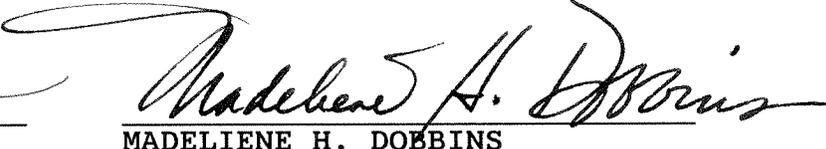
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R. Kress, Herbert M. Franklin and Howard R. Croft -- final action to deny the pending proposed action to adopt on a permanent basis and to approve the emergency amendment through its expiration date of April 9, 1996).

Vote of the Commission taken at its regular meeting on April 8, 1996 5-0: (Maybelle Taylor Bennett, Howard R. Croft, Herbert M. Franklin, John G. Parsons -- final action to deny the pending proposed action to adopt on a permanent basis and to approve the emergency amendment through its expiration date of April 9, 1996, Jerrily R. Kress in support of the motion by absentee vote).

In accordance with the provisions of 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is on JUN 21 1996.

  
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JERRILY R. KRESS  
Chairperson  
Zoning Commission

  
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MADELIENE H. DOBBINS  
Director  
Office of Zoning

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