

Office of the Attorney General for the District of Columbia  
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1978 D.C. AG LEXIS 116

October 16, 1978

Status of various Pending BZA Applications

REQUESTBY:

Steven E. Sher  
Executive Director  
Zoning Secretariat

OPINIONBY:

Louis P. Robbins, Acting Corporation Counsel, D.C.

OPINION:

In light of the Zoning Commission's promulgation of Zoning Commission Order No. 235, on September 14, 1978, you have orally requested legal advice as to the status of various applications which are pending before the BZA. You have advised me that the applications fall into the following three categories: 1. two applications filed on September 21, 1978 and September 25, 1978, and not yet scheduled for public hearing;

2. two applications which have been advertised for hearing on October 25, 1978; and

3. one application which the BZA voted to grant on September 6, 1978, but as to which no final order has yet issued.

Zoning Commission Order No. 235 ordinarily would have become effective on September 22, 1978, but it could not then be "enforced or otherwise effectuated" because of a temporary restraining order entered on September 21, 1978, in First Baptist Church of the City of Washington v. Zoning Commission of the District of Columbia, C.A. No. 10021-78, in the Superior Court of the District of Columbia. The restraining [\*2] order expired on October 5, 1978, when Judge William C. Pryor denied the plaintiffs' motion for a preliminary injunction, except as to provisions not relevant here. It is not necessary to address here the question whether the amendments to the Zoning Regulations became effective, as such, on September 22, 1978, even though they could not then be enforced or otherwise effectuated. With respect to the pending BZA cases, nothing turns upon whether the effective date is September 22 or October 5.

The relevant provision of the Zoning Regulations is subsection 8103.6, which provides:

8103.6. All applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the zoning regulations in effect on the

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date such orders are promulgated, provided, all applications for building permits are accompanied by the plans and other information required by paragraph 8103.2 sufficiently complete to permit processing without substantial change or deviation.

This paragraph specifically controls the vesting of rights where the issuance of a building permit requires a BZA order authorizing such a permit. I am aware that, in circumstances where [\*3] such a BZA order is required, it has been the practice to file an application for a building permit before filing a BZA appeal for a special exception or variance. There is no legal objection to this practice; however, the filing of such applications cannot, in the face of subsection 8103.6, operate to vest any rights.

In accordance with the foregoing, the four BZA applications which had not proceeded by either September 22 or October 5 to the point where there was, at a minimum, a BZA decision to grant the application, should not be further processed in accordance with Zoning Regulations which are no longer in effect. This follows from the fact that the BZA decision would come too late to vest a right to proceed further.

As to the application on which a decision was rendered on September 6, 1978, subsection 8103.6 could arguably be read, literally and restrictively, to provide that no rights vest before the date of a final decision of the BZA. Such a reading could have capricious effects. The BZA decision to grant an application is the act which reflects the BZA's exercise, in fact, of its administrative authority. While due process requires that the final decision be in writing, [\*4] none of the beneficial purposes of this requirement have a rational connection with the question of when rights vest. Once the BZA has voted and decided to grant an application, it has completed the significant substantive aspect of its statutory responsibility. In light of the record and hearing, and on the basis of the extant Zoning Regulations, the BZA has met, discussed the case as necessary, reflected upon it, and voted.

The date of the voted decision is a date certain, which is one of the essential requirements to establish a time when rights vest. Various mischievous or disruptive effects could occur if a later date were to control vesting. Persons who were opposed to an application might resort to dilatory motions to bring about a delay in the entry of the final order. Conversely, an applicant who has received a favorable decision, but who is concerned with a pending change in the Zoning Regulations, could be expected to pressure the staff of the Zoning Secretariat to rush the preparation of a written order. Even apart from the above, it would be inappropriate for vesting to depend upon the actions of the staff of the Zoning Secretariat rather than actions of the staff's [\*5] superior, the BZA itself. It is the staff which has the line responsibility to prepare the written decisions which effectuate the BZA decisions. The variables which influence the rate at which any staff may work are not circumstances which reasonably should bear on the vesting of rights.

It should be presumed that the Zoning Commission did not intend, by its use of the word "promulgated", to produce the absurd result that vesting could be controlled by the BZA support staff and not by the BZA. Compare *Kotlikoff v. Township of Pennsauken*, 331 A.2d 42, 45 (N.J. L., 1974).

In accord with the foregoing, the Zoning Secretariat should prepare the final order authorized by the decision of the BZA on September 6, 1978, and a building permit may thereafter be issued in the regular course.

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