

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

BZA 19207

**Appellant ANC 6C's Memorandum of Law
In Opposition to Motion to Dismiss**

Respondent DCRA has moved to dismiss this appeal on the grounds that it is allegedly moot. ANC 6C vigorously opposes the motion and urges that it be denied.

Section 105.6 of Title 12A, DCMR, provides the exhaustive list of legally acceptable means by which a construction permit may be rendered null and void.¹ They are as follows:

1. **Summary revocations:** Under section 105.6.1.1, a permit may be summarily revoked in only two circumstances. The first, under subparagraph (2), involves correction of an administrative or clerical error within five days of issuance, and requires a formal written Notice of Revocation² served under section 105.6.3. Section 105.6.1.1 states that “the permit holder shall promptly surrender the permit for cancellation,” and is the only provision which refers to “surrender” of a permit.

The second type of summary revocation, under section 105.6.1.1(1), may occur only

[w]hen the permit holder has been cited under 12 DCMR A § 115 for one or more violations of the Construction Codes which, by the determination of the code official, threaten the health and safety of the public in the District of Columbia, and when the permit holder fails to restore safety or otherwise remedy the situation under the terms and conditions of the code official's order and within the time period specified

12A DCMR § 105.6.3. This type of revocation “shall take effect on the date ordered by the code official.”

2. **Other revocations:** Revocations on the basis of other grounds listed in section 105.6.1, 105.6.2, and 105.6.4-7 – which include false statements in an application (.1) and permits issued on the basis of incorrect information (.6) – are not final, but instead merely proposed actions. See § 105.6.1

Although respondent DCRA claims that the permits at issue in this appeal are no longer valid, it is wholly unclear what mechanism it relied on. In a January 20, 2016 email to the undersigned, DCRA Director Melinda Bolling asserted to the undersigned that “[t]he property owner surrendered the permit.” When advised that “surrender” under the regulations relates only to correction of an administrative or clerical error within five days of issuance—not the circumstances of this case—and asked to identify the legal basis for DCRA's purported action, Director Bolling declined to do so.

¹ Companion provisions elsewhere in the same chapter govern the issuance of permits. While Title 11 of DCMR does address permit issuance (to the extent that it sets forth necessary, but not sufficient, conditions), it confers no authority to cancel, revoke, rescind, withdraw, or otherwise nullify a construction permit.

² DCRA often styles these documents as a “Notice to Revoke.”

Conversely, DCRA's online PIVS database bears a notation that the two permits at issue were "withdrawn," a term which appears nowhere in the text of section 105. Furthermore, Appellant is aware of no Notice of Revocation having been issued in this case, and in fact has been led to believe by DCRA officials that no such Notice of Revocation exists. If it does exist, DCRA should be required to produce it.

The regulations that govern permits set forth clear, highly specific rules on the procedures for revoking permits. Appellant is unaware of any provision granting DCRA or its officials plenary authority to invent new mechanisms beyond those explicitly enumerated in the law. Accordingly, if DCRA fails to abide by those enumerated methods, its "revocation"—or however DCRA attempts to characterize its actions—**has no legal effect**.

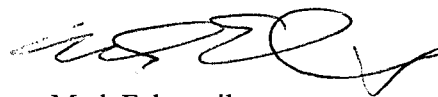
That appears to be what has happened in this case. DCRA is unable to identify the specific legal authority under which the permits in question were revoked, and instead asks this Board to accept on faith that its actions were nevertheless legally sound. The Board should reject that invitation and conclude instead that the permits remain valid and the "revocations" legally indefensible. To do otherwise would be to assume that DCRA may, out of thin air, invent new permit cancellation procedures that would withstand legal challenge.

A further reason to doubt the mootness of this appeal is that DCRA's official position, as communicated to the Council of DC, is that "[t]he Code Official may restore a permit ... if the permit has been ... surrendered." DCRA Response to FY15-16 Performance Oversight Hearing Questions at 39 (Response to Question 65).³ DCRA is therefore estopped from arguing that the surrender of a permit, which it claims to be able to revive for any reason or none at all, renders an appeal of that permit moot.

As set out in detail in ANC 6C's initial Statement on Appeal, it was DCRA's wholesale failure to obey the law as written that led to the issuance of these permits in the place (and its obstinate refusal thereafter to follow the law and cure that failure that necessitated the filing of this appeal). The Board should not condone further lawlessness by DCRA.

For all of these reasons, ANC 6C urges the Board to deny the motion to dismiss.

Respectfully submitted,



Mark Eckenwiler
Commissioner, ANC 6C04
(as authorized representative
for ANC 6C)

³ This document is available online at http://dccouncil.us/files/user_uploads/budget_responses/DCRAFY1516PerfRevQuestions.pdf#page=39.