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Government of the District of Columbia
Advisory Neighborhood Commission 3F
North Cleveland Park ▪ Forest Hills ▪ Tenleytown

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26 March 2003

Zoning Commissioners
441 4th Street, NW – Suite 200
Washington, DC 20001
ATTN: Alberto Bastida, Secretary to the Zoning Commission

Re: Case No. 87-2
PETITION OF ANC 3F FOR EMERGENCY TEXT AMENDMENT IN CASE NO. 87-2 TO CORRECT AN ERROR AND MISCODIFICATION IN THE DCMR, TITLE 11, SECTION 3202.5(a) [February 2003 edition]

Dear Zoning Commissioners:

Attached please find a Petition for Emergency Text Amendment to correct the recently-released February 2003 edition of Title 11 (Zoning Regulations) with respect to Section 3202.5(a), a portion of the "set down" rule. The new edition, released March 14, 2003, significantly alters the codified text that has appeared for the last 12 years in Title 11 on which ANCs and others have relied and is liable to cause great mischief. ANC 3F requests that the Zoning Commission act quickly to restore the traditional text.

Submission of this Petition was approved by ANC 3F by a vote of 7-0-0 at a duly noticed public meeting with a quorum present on March 17, 2003.

Respectfully submitted,

David J. Bardin, Secretary, ANC 3F

Attachment
Petition (seven pages)
Appendix thereto (10 pages)
Attachments thereto

ZONING COMMISSION
District of Columbia
Case 03-14
Exhibit 1

ZONING COMMISSION
District of Columbia
CASE NO.03-14
EXHIBIT NO.1

original

Doc 03-01

Before the Zoning Commission for the District of Columbia

PETITION OF ANC 3F FOR EMERGENCY TEXT AMENDMENT IN CASE NO. 87-2 TO CORRECT AN ERROR AND MISCODIFICATION IN THE DCMR, TITLE 11, SECTION 3202.5(a) [February 2003 edition]

Pursuant to 11 DCMR §§ 3010 and 3030, Advisory Neighborhood Commission (ANC) 3F asks the Zoning Commission (ZC) to restore quickly the "vesting" and "set down" rule as adopted in 1986, 1987, and 1988 and codified in the D.C. Municipal Regulations (DCMR) Title 11 (Zoning Regulations) since 1991.[1/] The February 2003 edition of Title 11, released March 14 by the D.C. Office of Documents and Administrative Issuances, exposes an inadvertent ambiguity as to § 3202.5(a) and selects an interpretation of this Commission's past rulemaking that threatens ZC processes for adopting a new overlay or amending existing zoning. The 2003 edition of Title 11 demands immediate correction because it turns § 3202.5(a) – relied upon for 12 years – into a disappearing act: Now you see it and then – "poof!" – gone.

PETITION

ANC 3F petitions the ZC to place on the Consent Calendar and adopt an Emergency Rule in order to state § 3202.5(a) unmistakably in conformity with the terms, provisions, bases, and purposes of ZC Orders being codified by restoring the previous DCMR versions of Title 11 in 1991, 1994, and 1995, as follows:

> **"(a) The application shall be accompanied by any fee that is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans or information that are required to permit complete review of the entire application under any applicable District of Columbia regulations."**

instead of the newly-released, February 2003 edition which prescribes:

> "(a) If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application and completion of the work shall be governed by § 3202.4;"

The difference is quite important. It involves incompatible interpretations of the ZC's shorthand when it approved Order No. 588 on September 15, 1988, and published a Notice of Final Rulemaking, 36 DCR 653 (Jan. 20, 1989), to implement its Order. Unlike the longstanding, sensible interpretation, the February 2003 re-interpretation conflicts with the ZC's manifest intent in 1988 and will cause great mischief unless promptly corrected by the ZC.

1/ The Appendix summarizes development of "vesting" and "set down" rules in Case Nos. 86-22 and 87-2. The Attachment provides copies of pertinent ZC Orders and D.C. Register (DCR) Notices.

ISSUE OF INTERPRETATION AND ITS IMPORTANCE

Fifteen years ago, the ZC redesignated 11 DCMR § 3202.6 as 11 DCMR § 3202.5 and "repealed" § 3202.5 (perhaps inadvertently). That meant § 3202.6(a) would become § 3202.5(a). The text of that subsection (a) read (as it had since 1986):

> "(a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-sections 3202.4 and 3202.5;"

But the ZC *did not delete* the phrase "and 3202.5" – subsection (a) of which the ZC had recently expanded in order to suppport § 3202.6.

Three editions of DCMR Title 11 interpreted the ZC's actions as incorporating the *substance* of these adjunct provisions into § 3202.6(a) *itself* – in place of the earlier cross-reference – and then renumbering the subsections. That sensibly resulted in the § 3202.5(a) that this Petition would restore. The February 2003 edition, however, interprets the ZC's silence in 1988 as if it had repealed the phrase "and 3202.5" – even though nowhere did the ZC do that.

Substantively, the result is that this February 2003 miscodification eliminates four important features of the traditional § 3202.5(a), namely, that:

1. applications be accompanied by any fee that is required;

2. applications include contents required by §3202.2[2/] (referencing § 3202.4[3/] instead);

[2/] Section 3202.2 (as amended by the editorial changes in 2000) provides:
"To determine compliance with provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary:
(a) Scaled drawings showing the following:
(1) Exact shape, topography, and dimensions of the lot to be built upon;
(2) Plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures;
(3) Parking and loading plans and basis for computation of those plans; and
(4) Other information necessary to determine compliance with this title; and
(b) An official building plat, in duplicate, prepared by the Surveyor of the District of Columbia, upon which the applicant shall indicate in ink and to the same scale dimensions of:
(1) All existing and proposed structures;
(2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities; and
(3) Other information necessary to determine compliance with the provisions of this title."

[3/] Section 3202.4 provides: "Any construction authorized by a 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 work within two (2) 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."

3. the contents (required by §3202.2) be "sufficiently complete to permit processing without substantial change or deviation;"[4/] and

4. the contents also include "any other plans or information that are required to permit complete review of the entire application under any applicable District of Columbia regulations" (for example, storm water management plans, prescribed under 21 DCMR Chapter 5, are commonly "applicable" in addition to plans and information prescribed by the Zoning Regulations).

In short, the February 2003 Title 11 would render § 3202.5(a) spineless, toothless, and close to meaningless.

DISCUSSION

From 1958 to 1987, § 3202.5(a) (or its predecessor, § 8103.61) required that building permit applications be "accompanied by the plans and other information" required by certain zoning regulations and be "sufficiently complete to permit processing without substantial change or deviation." So the language codified in the April 1987 edition of DCMR Title 11 read as follows: "(a) The applications shall be accompanied by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation".

The ZC in its Emergency Order No. 546 (Case No. 87-2), issued on October 13, 1987, and effective for a period not to exceed 120 days (or through February 10, 1988), amended 11 DCMR § 3202.5(a) to read as follows:

(a) The application shall be accompanied by any fee which is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations.[5/]

The ZC added those provisions 15 years ago because "current provisions of the Zoning Regulations ... allow a developer to apply for and be granted a permit to construct a building ... allowed by the Zoning Regulations which are in effect at the time the permit application is filed; and ... [t]hese provisions have been administratively applied to so operate *even if the applicant has not*

[4/] The concept that an application must be "sufficiently complete to permit processing without substantial change or deviation" has been in the zoning regulations since 1958 as to all building permits. It also appears in subsections that govern set down and vesting in cases of construction permits sought under a order from the Board of Zoning Adjustment (BZA), 11 DCMR § 3202.6 (current subsection) and in cases involving certificates of occupancy, 11 DCMR 3203.7 and 3203.9. The latter were adopted by the ZC shortly *after* its supposed "repeal" of § 3202.5 -- further evidence that the ZC would not consciously have repealed § 3202.5.

[5/] 34 DCR 6801 (Oct. 23, 1987).

filed a complete application, or paid the fee which is required for the processing of the application".[6/]

That same language was adopted in ZC Order No. 562 (Case No. 87-2) on January 19, 1988, effective February 5, 1988, thereby making § 3202.5(a) permanent. Notice of Final Rulemaking, 35 DCR 790 (Feb. 5, 1988), explained, 35 DCR 881 (Feb. 5, 1988).[7/] The ZC then turned to other issues in Case No. 87-2.

On February 5, 1988, the ZC decided to propose a substantial expansion of the vesting rule (sought by some interests and opposed by others) by amending § 3202.4 to require *issuance* of a building permit (not just filing of a complete application); and the ZC decided to couple that proposed expansion with a proposed deletion of §§ 3202.5 and 3202.6 (combined) as no longer needed. The Chair of the ZC had stressed, on February 8, 1988, just before the ZC's vote to issue a new NOPR, that these proposals were, "*All part of the same bundle.*" The new Notice of Proposed Rulemaking (NOPR), 35 DCR 3891 (May 20, 1988), which listed limited expansion of the vesting rule as item 1., and put forth a *package* proposal as item 2:

"2. Repeal subsections 3202.5 and 3202.6." 35 DCR 3891 (May 20, 1988).

That provoked spirited defense of the "set down" rule by some groups and the Office of Planning. So the ZC decided, on September 15, 1988, to leave well enough alone and let the set down rule stand. It decided *against* its proposed "bundle" -- as the "Basis and Purpose" Document reflects. 36 DCR 741 (Jan. 20, 1989), ZC Order No. 588. Yet the Notice of Final Rulemaking seemed to unbundle the bundle, stating: "2. Repeal subsection 3202.5" and "Redesignate subsections 3202.6, ..." as 3202.5 without any explanation or support in the "Basis and Purpose" Document.[8/]

[6/] ZC Emergency Order No. 546, October 13, 1987, at page 2 (emphasis added). Commissioners Williams, Bennett, Parsons voted to adopt; Commissioner Mathews opposed by proxy; Commissioner White not present, not voting.

[7/] The ZC explained that these changes responded to concerns by ANC 3C (about a previous version of § 3202.5(a) resembling the new edition of Title 11) that:

> "The regulations should be clear as to what act constitutes the filing of a building permit application under the proposed regulation: merely the filing of appropriate forms, or the filing of substantially complete and final plans together with the payment of application fees? These different acts occur on different dates and the ANC recommends that the latter action constitute the meaning of 'application.'"

35 DCR 881 (Feb. 5, 1988), ZC Order No. 562, January 19, 1988, at page 1. Commissioners Mathews, Williams, Parsons voted to approve; Commissioner White to approve by proxy; Commissioner Bennett not present, not voting.

[8/] The ZC follows a salutary practice of publishing its reasons for rulemaking actions (a practice that is informative to the zoning commissioners, agency staff members, and outside stakeholders) even if not required in every instance. Courts have required such statements by the ZC in a few cases, in order to determine whether rulemaking assertedly taken to "promote the ... general welfare of the District of Columbia" (DC Code § 1-6-641.01) was arbitrary and capricious. *Shenk v. Zoning Comm'sn of DC*, 440 F.2d 295, 297 (DC Cir 1971); *Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'sn of DC*, 477 F.2d 402, 407 (DC Cir 1973); *Ruppert v. Washington*,

Nor did the ZC discuss how to interpret repeal and renumbering.

After all, *just prior* to the ZC's action, sub-section 3202.6(a) read:

> "(a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-sections 3202.4 and 3202.5;"

After § 3202.6 was renumbered § 3202.5, what became of the phrase "3202.4 and 3202.5" in § 3202.6(a)? Had the ZC intended to repeal the end of that phrase – "and 3202.5"? If so, why had it not *explicitly done so as an amendment to that subsection (a)* of former 3202.6?

Surely, there is no evidence – mechanical or thoughtful – that the ZC meant by the mere act of *re-numbering* 3202.6 to delete the *substance* of any reference to sub-section "3202.5" *previously incorporated by cross-reference into the body of sub-section 3202.6(a).*[9/]

The next edition of DCMR Title 11, dated September 1991 (page 32-2), chose the reasonable solution: It codified § 3202.5 in harmony with the ZC's manifest intent, preserving subsection (a), which had been adopted as an adjunct to § 3202.6, to read: "(a) The application shall be accompanied by any fee which is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations".[10/]

Two subsequent editions of DCMR Title 11 did the same (February 1994 and July 1995).

The "publication of any document in ... the [DCMR], or the [DCR] creates a rebuttable presumption: (1) That it was duly issued, prescribed, adopted, or enacted; and (2) That all requirements of subchapter III of the District of Columbia Administrative Act have been complied with." Act of Oct. 21, 1968, P.L. 90-614, title III, § 311, as added Mar. 6, 1979, D.C. Law 2-153, § 4, 25 DCR 6960; D.C. Code § 2-561 (2002 pocket part).

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366 FSupp 683, 685 (DC DC 1973). Here, the ZC published *no reason whatever* for an action to repeal § 3202.5(a) alone; at the very same time the ZC explained why it not would not act after all on the "bundle." A rational conclusion would either not read item 2 in the final rulemaking literally or see it as an inadvertent error in wording.

9/ See Appendix for further discussion of this Case No. 87-2. Exhibit No. 144, the last exhibit in the present file of the Case, is the ZC's NOPR press release proposing the text of § 3202.5(a) that was made permanent in 1988. Its numbering sequence shows that it was placed there after one more round of rulemaking in that Case, but before recodification in the September 1991 edition of DCMR Title 11

10/ This first codification of DCMR Title 11 after that of April 1987 (quoted above) merged former §§ 3202.5 and 3202.6 into a single § 3202.5. It dropped § 3202.5(b), which long antedated (and was not integral to) the 1986/87set down rule, but preserved § 3202.5(a) which the ZC had rewritten in 1987/1988 as an adjunct to and in support of that set down rule.

Since the publication of § 3202.5(a) in the September 1991 edition of Title 11 no reported court case has rebutted, undermined, or even questioned the presumption; and we know of no unreported decision of any court, this ZC, or the Board of Zoning Adjustment that calls into question the presumption as applied to § 3202.5(a). Publicly-available files of the DC Office of Documents disclose no challenge to past DCMR codifications – not by law firms nor by any other interest.

In the year 2000, the ZC proposed and adopted editorial amendments to Title 11, including §3202.5(a), in Case No. 00-14. NOPR: 47 DCR 8335, 8575 (Oct. 20, 2000); approved, 47 DCR 9741 (Dec. 8, 2000). The amendments to §3202.5(a) twice changed the word "which" to "that" following the words "fee" and "information". Therefore, the language of §3202.5(a) after December 8, 2000 was as follows:

> (a) The application shall be accompanied by any fee that is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans or information that are required to permit complete review of the entire application under any applicable District of Columbia regulations.

However, the February 2003 publication of Title 11 DCMR (at page 32-3) includes the following language for §3202.5(a): "(a) If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application and completion of the work shall be governed by § 3202.4;"

Editorially, that changes subparagraph (a) to eliminate all of the words in the ZC's 2000 amendment and all of underlying text dating back to 1991. Substantively, this February 2003 language eliminates four important features of § 3202.5(a), as discussed above. As a result, the interpetation selected by the February 2003 Title 11 would enfeeble § 3202.5(a).

The ZC was clear in its 1987 and 1988 orders as to the filing requirements in § 3202.5(a) regarding the items that must be filed with a building permit application for the application to vest. The February 2003 language substantially changes the language adopted by the ZC in 1987 and 1988 and amended in 2000.

The ZC has made no change in § 3202.5(a) since December 8, 2000.

Changes to § 3202.5(a) as published in the February 2003 Title 11of DCMR are unjustified, and the language set forth there is incorrect and contrary to decisions of the ZC. If the ZC accidentally published a notice that garbled its intentions as to § 3202.5(a), that accident should be cured right away. At all events, it is important to correct § 3202.5(a) as soon as possible.

CONCLUSION

For these reasons, to preserve public confidence in the Zoning Regulations of the District of Columbia, and to prevent great mischief, the Zoning Commission should interpret its prior action, consistently with its manifest intent, and restore § 3202.5(a) by the quickest and most forceful means available – in Case No. 87-2 – to read as follows:

> **(a) The application shall be accompanied by any fee that is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans or information that are required to permit complete review of the entire application under any applicable District of Columbia regulations.**

If the ZC has any reason to reexamine the merits of its 1987/88 decisions, that should happen later, in a distinct and separate rulemaking.

Submission of this Petition was approved by ANC 3F by a vote of 7-0-0 at a duly noticed public meeting with a quorum present on March 17, 2003.

Respectfully submitted,

Cathy Wiss, Chair

David J. Bardin, Secretary

Appendix: Review of History since 1958

Attachments: Pertinent ZC Orders and Notices in Case Nos. 86-22 and 87-2

APPENDIX: Review of History since 1958

1958 Zoning Regulations	
Case No. 86-22	
ZC Public Meeting	September 22,1986
ZC Emergency Order No. 503 (adopted September 22, 1986)	
Notice of Emergency and Proposed Rulemaking	33 DCR 6225 (Oct. 10, 1986)
ZC Order No. 516 (adopted January 5, 1987)	
Notice of Final Rulemaking	34 DCR 433 (Jan. 16, 1987)
Basis and Purpose Document	34 DCR 625 (Jan. 23, 1987)
DCMR Title 11 (April 1987), pages 32-1 through 32-5	
Case No. 87-2:	
ZC Notice of Proposed Rulemaking	34 DCR 1514 (Feb. 27, 1987)
Public Hearing	June 11, 1987
ZC Public Meeting	August 3, 1987
ZC Public Meeting	October 13, 1987
ZC Emergency Order No. 546 (adopted October 13, 1987)	
Notice of Emergency and Proposed Rulemaking	34 DCR 6801 (Oct. 23, 1987)
ZC Notice of Public Hearing (adopted November 16, 1987)	34 DCR 7630 (Nov. 27, 1987)
Public Hearing	January 7, 1988
ZC Public Meeting	January 19, 1988
ZC Order No. 562 (adopted January 19, 1988)	
Notice of Final Rulemaking	35 DCR 790 (Feb. 5, 1988)
Basis and Purpose Document	35 DCR 881 (Feb. 5, 1988)
ZC Public Meeting	February 8, 1988
ZC Notice of Proposed Rulemaking	35 DCR 3891 (May 20, 1988)
ZC Public Meeting	September 15, 1988
ZC Order No. 588 (adopted September 15, 1988)	
Notice of Final Rulemaking	36 DCR 653 (Jan. 20, 1989)
Basis and Purpose Document	36 DCR 741 (Jan. 20, 1989)
ZC Notice of Proposed Rulemaking	36 DCR 6377 (Sept. 8, 1989)
ZC Order No. 636 (adopted October 16, 1989)	
Notice of Final Rulemaking	36 DCR 7827 (Nov. 10, 1989)
Basis and Purpose Document	36 DCR 7868 (Nov. 10, 1989)
DCMR Title 11 (September 1991), page 32-3	
DCMR Title 11 (February 1994), page 32-3	
DCMR Title 11 (July 1995), page 32-3	

1958 Zoning Regulations

During 1986, 1987, and 1988 the ZC modified a "vesting" rule that dated back in significant respects to the Zoning Regulations of the District of Columbia effective May 12, 1958 (1958 Regulations). Article 81 (Administration and Enforcement) of the 1958 Regulations included Section 8103 - Building Permits and Section 8104 - Certificates of Occupancy.

- Sub-sections 8103.2, 8103.21, and 8103.22 were almost identical with the present 3202.2(a) and (b) concerning plans and other information to accompany applications.

- Sub-sections 8103.5, 8103.6, 8103.7 covered ground similar to that now in 3202.5, 3202.6.

Subsections 8103.5 and 8103.6 provided:

> **8103.5** All work authorized by a building permit issued before the effective date of these regulations may be carried to completion in accordance with the terms of such permit.
>
> **8103.6** All applications for building permits filed before the effective date of these regulations may be processed and any work to be authorized thereby may be carried to completion in accordance with the zoning regulations in effect on the date such applications are filed, provided:
>
> **8103.61** Such applications are accompanied by the plans and other information required by paragraph 8103.2 sufficiently complete to permit processing without substantial change or deviation,
>
> **8103.62** Any approved building permit shall be taken out within six months after the effective date of these regulations; and
>
> **8103.63** All work authorized by such building permit is carried to completion in accordance with the terms of the permit.

The ZC subsequently renumbered Article 81 and its sections as Chapter 32.

Case No. 86-22

The ZC reviewed these provisions in Case No. 86-22 and amended them. First, the ZC adopted Emergency Order No. 503, entered September 22 , 1986, and published with a NOPR in 33 DCR 6225 (October 10, 1986). The Emergency Order would be effective for 120 days, until January 19, 1987. The ZC held a public hearing on December 1, 1986.

Thereafter, at its special public meeting on January 5, 1987, the ZC approved Order No. 516 and published a Notice of Final Rulemaking at 33 DCR 433 (Jan. 16, 1987) and its Basis and Purpose Document at 33 DCR 625 (Jan. 23, 1987). The Notice of Final Rulemaking inserted a new sub-section 3202.6, the "set down" rule:

> "If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of the work pursuant to a permit, shall be governed as follows:
>
> (a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-sections 3202.4 and 3202.5; and
>
> (b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by a permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the

final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site.

(c) For purposes of paragraph (b) of this sub-section, the phrase 'zone district classification being considered for the site' shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification of the site that is in effect on the date the application is filed."

ZC Order No. 516 was adopted by a vote of 5-0 (Commissioners Mathews, Williams, Bennett, and Parsons to adopt, Commissioner White to adopt by absentee vote) effective on publication in the D.C. Register – on January 16, 1987.

When Order No. 516 was adopted, the phrase "governed by sub-sections 3202.4 and 3202.5" in § 3202.6 referred to the versions of those sub-sections which dated back to the 1958 Regulations.

April 1987 edition of DCMR Title 11

Title 11 DCMR published April 1987 by the DC Office of Documents included the foregoing 3202.6 and three other pertinent sub-sections, 3202.2, 3202.4 and 3202.5. Sub-section 3202.2 was simply renumbered from 8103.2 of the 1958 Regulations. The other two were renumbered and slightly edited from the 1958 Regulations: I.e., 8103.5 (edited) = 3202.4 and 8103.6 (edited) merged into 3202.5. These latter two subsections were codified as follows in April1987 (showing the changes from earlier versions of these rules by underscores and strikeouts):

3202.4 All work authorized by a building permit issued before May 12, 1958 ~~the effective date of these regulations~~ may be carried to completion in accordance with the terms of such permit.

3202.5 All applications for building permits filed before May 12, 1958 ~~the effective date of these regulations~~ may be processed and any work to be authorized thereby may be carried to completion in accordance with the zoning regulations in effect on the date such applications were ~~are~~ filed, provided, that the following requirements are met:

(a) The ~~Such~~ applications shall be ~~are~~ accompanied by the plans and other information required by § 3202.2 ~~paragraph 8103.2~~ which shall be sufficiently complete to permit processing without substantial change or deviation,

(b) Any approved building permit shall be taken out within six (6) months after May 18, 1958; ~~the effective date of these regulations;~~ and

(c) All work authorized by such building permit is carried to completion in accordance with the terms of the permit.

3202.6 If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of the work pursuant to a permit, shall be governed as follows:

(a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-sections 3202.4 and 3202.5; and

(b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by a permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site.

(c) For purposes of paragraph (b) of this sub-section, the phrase 'zone district classification being considered for the site' shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification of the site that is in effect on the date the application is filed.

Case No. 87-2

ZC Case No. 87-2 reviewed the "vesting" rule (§3202.4) and the "set down" rule (originally, § 3202.6, to which an amended § 3202.5(a) would become an adjunct). Both rules address changes in zoning. In essence, the vesting rule addresses the rights a building permit holder has acquired if the ZC later changes the zoning of the site. The set down rule addresses whether and to what extent DCRA may process permit applications during the period when a zoning change is under ZC consideration.

Case No. 87-2 lasted three years. The ZC initiated Case No. 87-2 on February 9, 1987, "to consider amending the text of Title 11 ... DCMR ... regarding the vesting of construction and occupancy rights."[11/] The ZC held two public hearings on the overall Case No. 87-2[12/] and issued

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11/ The ZC initiated a new proceeding "regarding vesting of construction and occupancy rights" and published a Notice of Filing. 34 DCR 1514 (Feb. 27, 1987). It authorized scheduling a public hearing in this Case (among others) by ZC Order No. 529, adopted April 13, 1987, and published at 34 DCR 2920 (May 1, 1987). It held that hearing on June 11, 1987. (According to subsequent summary in ZC Order No. 588 (36 DCR 741, Jan. 20, 1989) the ZC identified 15 issues to be addressed in two hearing notices.)

12/ ZC Opinion No. 588, September 15, 1988, correctly states (at page 1) that the ZC public hearings "in this case were held on June 11, 1987, and January 7, 1988"; but it erroneously refers (at page 5) to a January 13, 1988, public hearing set to consider § 3202.5(a) as adopted by the emergency rule plus three additional proposals. That erroneous reference to January 13 (instead of January 7) stems from repeating the *date stamp* on the cover of the hearing transcript in disregard of the date of hearing shown on the same cover.

several NOPRs. At several public meetings, the ZC reached preliminary decisions, some proposed actions, and three final rules.

After initiating Case No. 87-2 early in 1987, the ZC held the first of two public hearings on June 7, 1987. The ZC first considered proposed action at a regular monthly meeting on August 3, 1987. The ten preliminary decisions at that time included three that are pertinent here:

2. Not adopt a provision to restrict the vesting of occupancy or construction rights during the pendency of a text amendment case [i.e., in contrast to a map amendment case] before the ZC;

6. Not adopt a provision that would alter the vesting event or the set down date, based on the view that the amendments adopted in Case No. 86-22 provided a sound, balanced scheme;

9. Adopt a proposal to amend sections 3202 and 3203 to replace "May 18, 1958" wherever that phrase appeared, with "the effective date of these regulations or any amendment thereto", in order to conform to the original intention of the ZC in adopting the 1958 Regulations.

The ZC also discussed other issues, not raised in a NOPR, that had come up during its consideration of the case, including: "(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." Summarized at 36 DCR at 744-45 (Jan. 20, 1989).

At its meeting on October 13, 1987, the ZC approved Emergency Order No. 546, adopting an Emergency Rule and Notice of Proposed Rulemaking (NOPR). 34 DCR 6801 (Oct. 23, 1987). A Notice of Public Hearing, 34 DCR 7630 (November 27, 1987), posed the following six proposed amendment actions or issues:

1. 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.

2. Revise 11 DCMR 3202.5(a) to read as follows:

   (a) The application shall be accompanied by any fee that is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans or information that are required to permit complete review of the entire application under any applicable District of Columbia regulations.

3. 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.

4. Adopt a provision to establish a procedure and fee by which the District would grant a reservation of a vested right to construct ... before the filing of an application ...

5. The Commission will also consider the adoption of amendments which persons who participate in the hearing recommend as alternatives to the above ...

6. The Commission also invites the submission of views on other issues ... reasonably related ...

The ZC held a public hearing on January 7, 1988, and received written comments. At its special public meeting on January 19, 1988, the ZC resolved the issue which was the subject of the emergency rulemaking by adopting Order No. 562, which permanently expanded § 3202.5(a) to read, as proposed:

> (a) The application shall be accompanied by any fee that is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans or information that are required to permit complete review of the entire application under any applicable District of Columbia regulations.

This ZC expansion of § 3202.5(a), first by an emergency rule in 1987, and then permanently three months later in January 1988, automatically expanded the requirement of the set down rule, § 3202.6(a), that DCRA's processing of building permit applications "be governed by subsections 3202.4 *and 3202.5*" (emphasis added). That expansion of 3202.6(a) was *the reason for* amending 3202.5(a); indeed, that was the ZC's *only purpose.*

Having resolved the emergency rulemaking issues as to § 3202.5(a), the ZC "considered the remaining issues at a public meeting on February 8, 1988."[13/] After extensive discussion (recorded in the audio tapes of that meeting), the ZC decided to go even further: to expand § 3202.5(a) part of the way toward the "majority" or "Maryland rule" (but not quite that far) – so that only *issuance* of a building permit would vest rights prior to a change in zoning, mere filing of an application would not.

- In that context, the ZC decided to propose also repealing the "set down" rule (then § 3202.6) and the 1987/1988 version of § 3202.5(a) which is now at issue, as no longer necessary.

13/ The ZC's own description, seven months later, in Order No. 588, September 15, 1988, at page 5.

- The ZC decided it would no longer need set down and vesting provisions of 3202.5 and 3202.6, adopted in 1986, 1987, and 1988, and, as the audio tapes reflect, decided specifically that § 3202.5(a) would no longer be needed *once § 3202.6 was repealed.*

The Chair of the ZC stressed, just before the vote to issue a new NOPR, that these proposals were, "All part of the same bundle."

To that end, the ZC decided to propose six actions, including (as it later summarized [14/]):

> "4. Repeal 11 DCMR 3202.6."

But its Notice of Proposed Rulemaking published on May 20, 1988 (35 DCR 3891), expressed proposed repeal of §§ 3202.5 *and* 3202.6 as a single *package* (item 2 in the NOPR):

> "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 on which the permit is amended.
>
> "2. Repeal sub-sections 3202.5 and 3202.6.
>
> "3. Redesignate sub-sections 3202.7 and 3202.8 as 3202.5 and 3202.6, respectively, and make consistent technical amendments in the latter, so that it reads as follows:
> 3202.6 A building permit issued in accordance with sections 3202.4 or 3202.5 shall not be renewable if permitted to lapse, unless it is reprocessed in accordance with all provisions of this title."

That same NOPR also set forth proposed amendments as to certificates of occupancy and two alternative proposals for simultaneous effective dates for all six amendments and allowed proposals for different effective dates for different proposals (item 7).

There were no further public hearings – only written comments. Members of the development community supported repeal of the vesting rule, § 3202.6. Neighborhood and citizen groups opposed repeal. Comments show that § 3202.5(a) was understood to be part and parcel of the § 3202.6 vesting rule – just as set forth by item 2 of the NOPR.

[14/] The ZC's words in Order No. 588, September 15, 1988, at page 6; 36 DCR at 746 (Jan. 20, 1989).

The Office of Planning report recommended that the ZC "reinstate" § 3202.6 and attached a copy of the emergency order adopting the expansion of § 3202.5(a) at issue in this Petition because it contained the "best short summary of the rationale for proceeding in this manner."

> "The Office of Planning urges the Zoning Commission to reinstate Subsection 3202.6 or a comparable provision in view of the paramount public interest in implementing the Comprehensive Plan in a thorough, fair and orderly manner. The best short summary of the rationale for proceeding in this manner that we are aware of is Zoning Commission Order No. 546, a copy of which is attached."[15/]

At its public meeting on September 15, 1988, the ZC extensively discussed a draft (or, perhaps, alternative drafts) of what became ZC Order No. 588 (Sept 15, 1988).

The ZC decided in September 1988 not to repeal the set down rule because "the proposed repeal of 11 DCMR 3202.6 would be beyond the scope of either notice of public hearing. ... No participant in [the January, 1988] hearing treated the repeal as being at issue, or even suggested that it be considered." 36 DCR 741, 749 (Jan. 20, 1989), Order No. 588 (at page 9). But the first proposal to repeal the set down rule, § 3202.6, appeared after the January public hearing as item 2 of the May 20, 1988, NOPR, which *packaged* repeal of § 3202.6 with repeal of § 3202.5. The ZC's Basis and Purpose Document (36 DCR 741-750) rejecting repeal of § 3202.6 says not one word about repealing § 3202.5. (Nor does the discussion in the audio tapes of that meeting.)

But that Document is crystal clear (as are the tapes) that the ZC decided not to repeal § 3202.6. That means, the ZC decided not to repeal § 3202.6(a) - which incorporated the standards of § 3202.5 as governing DCRA's processing of building permit applications during a set down period.

During development of Case No. 87-2, zoning commissioners were divided whether to preserve or repeal the set down rule, then section 3202.6. They always understood that 3202.5(a) was an integral part of the set down rule. When they proposed rulemaking that would repeal the set down rule (in order to get into a position to vote one way or the other), they proposed repeal of both sections *as a package*. When they finally voted not to repeal the set down rule, they must have *thought* they were voting to leave the package intact and have *intended* to do so by adopting ZC Order No. 588.[16/]

- Order No. 588 (at page 5; 36 DCR at 745) outlined the ZC's revision of § 3202.5(a) on January 19, 1988, by its final Order No. 562, effective February 12, 1988, and indicated that the ZC "considered the *remaining issues* ... on February 8" (emphasis added);

15/ Case No. 87-2, Exhibit 107, dated June 29, 1988.

16/ The unanimous vote to approve was Commissioners Williams, Parsons, Bennett, White, with Commissioner Mathews voting by proxy.

- Order No. 588 (at page 9; 36 DCR at 749) did "not take final action to repeal 11 DCMR 3202.6" because the ZC concluded that "the proposed repeal of 11 DCMR 3202.6 would be beyond the scope of either notice of public hearing;"

- Order No. 588 consists of nine pages of narrative discussion followed by six, numbered ordering paragraphs (at pages 10 and 11), and a final page 12 recording the vote.
  - Ordering paragraph 1, some 16 lines long, amended 11 DCMR 3202.4;
  - Ordering paragraph 2 read: "2. Repeal sub-section 3202.5."
  - Ordering paragraph 3 provided for redesignating sub-section 3202.6 as 3202.5.

  See 36 DCR 653 (Jan. 20, 1989).

- No discussion in Order No. 588 explains why the ZC would decide to repeal 3202.5 at all, especially 3202.5(a) which it had finally adopted earlier that *same year*, or how a public notice that was defective regarding proposed repeal of 3202.6 (in the view of all five commissioners) could nonetheless cover repeal of 3202.5 *by the same sentence.*[17/]

- To the contrary, Order No. 588 (at page 9; 36 DCR at 749) assured readers that the ZC was responding to "the full range of comments, including those from [ANCs] 1C, 1E, 3B, 3C, 4A, and 6C received in response to the Notice of Proposed Rulemaking."

- The audio tapes of the ZC's September 15, 1988, meeting say not a word about repealing 3202.5. Discussion of a draft of Order No. 588 focused on 3202.6, with some Commissioners in favor of repeal, others opposed, but all agreeing that 3202.6 could not be repealed at that public meeting because of inadequate prior public notice.[18/] The commissioners' extensive discussions of a draft version of Order No. 588 went over paragraph after paragraph of the history and rationale for decision, in the early pages of the Order, but never touched upon the ordering paragraphs at page 10.

- The draft of proposed item 4 at page 10 of the order must have read, like the NOPR: "Repeal sub-sections 3202.5 and 3202.6." One of two things happened:
  - After the commissioners decided *not* to repeal 3202.6, a clerical misunderstanding may have struck out "and 3202.6" leaving, "Repeal 3202.5". And that misunderstanding went to the D.C. Register. 36 DCR 653 (Jan. 20, 1989).
  - Alternatively, "Repeal 3202.5" – standing alone – was understood to mean dropping it as a separate sub-section, without affecting the incorporation of the substantive standards into 3202.6(a) – since no provision of the Order repealed the incorporating language of 3202.6(a).

  In either event, *not even mechanically* did the Notice of Final Rulemaking strike the reference *in § 3202.6(a)* to the substantive standards of § 3202.5(a). So some one would have to *interpret* what the Final Notice of Rulemaking meant and intended.

17/ Order No. 588 (at 8) criticized wording in 3202.5(b) as "inappropriate jargon." 36 DCR at 748.

18/ Commissioners Bennett and Parsons opposed repeal. Commissioners Williams and Mathews (attending her last meeting and leaving before the vote) would have favored repeal. Commissioner White's position is unclear.

The ZC then conducted one more rulemaking in Case No. 87-2, concerning certificates of occupancy and other issues, during which it added §§ 3202.5(d) and (e). 36 DCR 7827 (Nov. 10, 1989). After completion of that last, final rulemaking in Case No. 87-2, the Office of Zoning included as the final exhibit in the present case file, Exhibit 144, the ZC's release announcing its rulemaking proposal in 1987 to substitute the expanded § 3202.5(a) in the vesting rule.[19/]

DCMR Title 11 (September 1991 edition)

The very next edition of Title 11 DCMR after Case No. 87-2 (dated September 1991) correctly solved the issue of what action the ZC approved on September 15, 1988, by combining the *standards* of 3202.5(a) and the text of the former 3202.6 into one, integrated 3202.5 which preserved, intact, the words of 3202.5(a). This was clearly closest to what the zoning commissioners intended to do. (Moreover, the files of the Office of Documents contain no requests by anyone in the development community or otherwise to change that integrated 3202.5(a).)

September 1991 edition of DCMR Title 11

For 12 years, three editions of the DCMR published by the DC Office of Documents taught DC citizens that the preamble and subsection (a) of 11 DCMR § 3202.5 read:

> If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of the work pursuant to the permit, shall be governed as follows:
>
> (a) The application shall be accompanied by any fee which is required, and by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans or information which are required to permit complete review of the entire application under any applicable District of Columbia regulations;

Title 11 DCMR September 1991 page 32-3, February 1994 page 32-3, July 1995 page 32-3. That was a reasonable codification of what the ZC had done. Citizens relied upon this DCMR text. And the ZC seemed to accept it, in 2000, when the ZC amended subsection (a) in two places.[20/]

[19/] The final exhibit in Case No. 87-2, after adoption of ZC Order No. 636 on October 16, 1989 (Exhibit 144), is the ZC's Notice of Public Hearing on January 7,1988, on six proposed actions, the first of which was to, "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" [the "Maryland rule"], and the second of which was to make permanent the language of 3202.5(a) previously adopted by Emergency Order No. 546. Exhibit 144 is undated. Exhibit 142 is a memo dated November 8, 1989, and Exhibit 143 is another memo dated January 5, 1990.

[20/] 47 DCR 9741 (Dec. 8, 2000) adopting editorial changes from 47 DCR 8335, 8575 (Oct. 20, 2000): "change **which** to **that** after **fee** and after **information**" in § 3202.5(a).

ATTACHMENTS TO

PETITION OF ANC 3F FOR EMERGENCY TEXT AMENDMENT IN CASE NO. 87-2 TO CORRECT AN ERROR AND MISCODIFICATION IN THE DCMR, TITLE 11, SECTION 3202.5(a) [February 2003 edition]

ZC Case No. 86-22

ZC Order No. 516 (adopted January 5, 1987)

34 DCR 433 (Jan. 16, 1987) Notice of Final Rulemaking
34 DCR 625 (Jan. 23, 1987) Basis and Purpose Document

DCMR Title 11 (April 1987), pages 32-1 through 32-5

ZC Case No. 87-2

ZC Emergency Order No. 546 (adopted October 13, 1987)

34 DCR 6801 (Oct. 23, 1987) Notice of Emergency and Proposed Rulemaking

34 DCR 7630 (Nov. 27, 1987) Notice of Public Hearing (adopted November 16, 1987)

ZC Order No. 562 (adopted January 19, 1988)

35 DCR 790 (Feb. 5, 1988) Notice of Final Rulemaking
35 DCR 881 (Feb. 5, 1988) Basis and Purpose Document

35 DCR 3891 (May 20, 1988) Notice of Proposed Rulemaking

ZC Order No. 588 (adopted September 15, 1988)

36 DCR 653 (Jan. 20, 1989) Notice of Final Rulemaking
36 DCR 741 (Jan. 20, 1989) Basis and Purpose Document

ZC Order No. 636 (adopted October 16, 1989)

36 DCR 7827 (Nov. 10, 1989) Notice of Final Rulemaking

DCMR Title 11 (September 1991), pages 32-2 through 32-6

DCMR Title 11 (February 2003), page 32-3

ZC 5K

District of Columbia Register

JAN 16 1987

ZONING COMMISSION OF THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
CASE NO. 86-22
(Vesting of Construction Rights)

The Zoning Commission of the District of Columbia, pursuant to the authority set forth in the Zoning Act (D.C. Code, Section 5-413, et seq.), having held a public hearing as required, hereby gives notice of adoption of amendments to the Distrit of Columbia Municipal Regulations Title 11 Zoning. The amendments that were adopted regulate the vesting of construction rights. Notice of proposed rulemaking was published in the D.C. Register on October 10, 1986, at 33 DCR 6225. These amendments were adopted by the Zoning Commission as a final action at its special public meeting held on January 5, 1987. The specific amendments are as follows:

1. Add a provision to regulate the processing of an application for a building permit, and the completion of work pursuant to a permit, if the application is filed when the Zoning Commission is considering a case to change the zone district classification of the site:

3202.6 If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of work pursuant to the permit, shall be governed as follows:

(a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-sections 3202.4 and 3202.5; and

(b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by the permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in

accordance with the most restrictive zone district classification being considered for the site.

(c) For purposes of paragraph (b) of this section, the phrase "zone district classification being considered for the site" shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification that is in effect on the date the application is filed.

2. Make two consistent technical changes, as follows:

Redesignate current subsections 3202.6 and 3202.7 as 3202.7 and 3202.8

And:

In subsection 3202.8, delete "or 3202.6" and insert, in lieu thereof: "3202.6, or 3202.7".

ZONING COMMISSION ORDER NO. 516
Case No. 86-22
(Vesting of Construction Rights - Text Amendment)
January 5, 1987

Pursuant to notice, the Zoning Commission for the District of Columbia held a public hearing in this case on December 1, 1986. The hearing was conducted as a rulemaking proceeding pursuant to 11 DCMR section 3021 (1986).

The Zoning Commission proposed these amendments, as provided by 11 DCMR section 102.2 (b), for the primary purpose of developing a reasonable alternative to consideration of a series of requests for emergency amendments of the zoning map to implement the Comprehensive Plan for the National Capital. Specifically, the Commission adopted emergency rules to amend the Zoning Regulations, and proposed permanent amendments thereto, during the course of a special public meeting of the Commission, held on September 22, 1986, to address proposed amendments to the zoning map to downzone, that is, to reduce the scale of permitted development and number of permitted uses, in certain area along Wisconsin Avenue, N.W. At that meeting, the Commission considered a petition and recommendations that it adopt proposed amendments to the zoning map by emergency action. For the reasons set forth herein, the Commission concluded that amendments to 11 DCMR section 3202 (1986) would reasonably and effectively preserve the integrity of the Comprehensive Plan, and of Zoning Commission action to implement the Plan.

The broader context for this action remains essentially as is set forth in Zoning Commission Order No. 503, entered in this case on September 22, 1986. 33 DCR 6225 (1986). As revised to reflect the public hearing and other proceedings held in this case after September 22, 1986, that context is set forth below.

The District of Columbia Comprehensive Plan Act of 1984, D.C. Law 5-76, became effective April 10, 1984; and the District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984, D.C. Law 5-187, became effective March 16, 1985. The Executive and Legislative branches of the District of Columbia govenment have invested

substantial time and effort to prepare, adopt, and implement the Comprehensive Plan. Section 2 of the Zoning Act, as amended, D.C. Code Section 5-414, (1981) requires that the text and map of the Zoning Regulations not be inconsistent with the Comprehensive Plan.

Analysis of the Comprehensive Plan demonstrates that the Zoning Commission, together with the District of Columbia Office of Planning, will be required to invest very substantial time and effort to address a variety of serious and complex issues, in order to assure compliance with the "not inconsistent with" requirement. This effort is inherently incapable of being hurried, if it is to be conducted in a reasonable, prudent, and businesslike way, and in accord with the requirements of due process.

The Zoning Commission has recently held hearings in Zoning Commission cases 86-12 (Reed-Cooke Map Amendment) and 86-17, to consider whether to amend the zone district classification of substantial land areas, to the end of assuring compliance with the "not inconsistent with" requirement. These two cases represent only a few of those that will be needed to address that issue.

Indeed, the Office of Planning has submitted memoranda to the Zoning Commission, dated October 3, 1986, and, most recently, December 23, 1986, setting forth approximately fifteen additional major area map amendments which it will recommend the Commission consider in 1987.

Based upon the substantial level of community interest in cases 86-12 and 86-17, the Commission anticipates that many of these prospective cases will also generate substantial interest. Further, since community groups urged the Commission to effect map amendments by emergency action in both cases, 86-12 and 86-17, the Commission may also reasonably anticipate similar requests in the other prospective cases. Such requests are also to be expected as a natural effect of the Council's adoption of the District elements of the Comprehensive Plan. That is, further requests for emergency action would almost certainly be urged as the "only" means by which this Commission could assure the maximum impact of prospective amendments to the zoning maps to implement current policy, as reflected in the Comprehensive Plan.

As they stood before the emergency rulemaking on September 22, 1986, the vesting provisions of the Zoning Regulations provided a means by which development which would be inconsistent with the Comprehensive Plan could be approved, completed, and remain as a nonconforming structure or use, or both, notwithstanding such inconsistency. Those provisions allowed a developer to apply for and be granted a permit to construct a building of the size and density

allowed by the Zoning Regulations in effect at the time the permit application was filed. Further, those provisions so operated even if, in a proceeding that was pending before the Zoning Commission when the application was filed, the Commission was considering a proposed reduction in the permitted size, density, or range of uses at the site, and thereafter took timely action to reduce that size, density, or range of uses. Thus, inherent in those vesting provisions was a substantial risk that a developer, knowing that the Zoning Commission had scheduled a hearing to consider an amendment of the zone district classification of a site, could abrogate or significantly abridge the effectiveness of the proposed amendment.

In fact, on the afternoon of September 22, 1986, when the Zoning Commission was meeting to consider, in part, recommended emergency downzoning of land along parts of Wisconsin Avenue, an application some described as preemptive was filed, to construct an office building at 4620 Wisconsin Avenue, N.W., of a larger scale than would have been be allowed in the proposed C-2-A zone district.

The Commission's experience in this initial phase of the process of implementation of the Comprehensive Plan evidences the need for the action that the Commission effects in this order. The ongoing process through which the Zoning Commission will be considering action which may reduce development potential is a process that inherently and inevitably creates an incentive for a prospective developer to expedite preparations, to the end of securing approval to construct a building of a size and density which may later be precluded.

The functional integrity of the Comprehensive Plan is of paramount public importance, in that the public interest in maintaining and ensuring the Comprehensive Plan's functional integrity is overwhelmingly superior to any private interest in building to the maximum scale permitted under extant limitations.

The Commission has considered, and rejects at this time, the alternatives which have been recommended by some persons participating in the case.

On the one hand, the Commission has been urged to adopt no amendment, on the grounds that the Commission has no authority to adopt the proposed rule, that it is excessively burdensome, and that it is not needed.

The basic need for the rule has clearly been demonstrated to the Commission, and is set out above. The repeated consideration of emergency downzonings is not an acceptable alternative. Emergency rulemaking is not intended to become the primary means to resolve issues, and

should not be lightly undertaken. The proposed rule will permit more orderly proceedings by the Commission.

The Commission is satisfied that it has the authority to adopt the proposed rule. The vesting rule in effect up to September 22, 1986 was adopted by the Commission in 1958. That rule was substantially more favorable to owners and developers of land than the general rule which would otherwise apply under general principles of law, and of zoning law in particular. In most jurisdictions in the United States, the right to construct a building that would be barred by an amendment to the Zoning Regulations does not vest unless a building permit has been issued, and some work has been carried out under the authority of the permit. Thus, the vesting rule in effect up to September 22, 1986 operated as a savings clause to mitigate the arguably strict operation of the majority rule, and thereby to allow development of land to proceed with greater predictability. The proposed rule modifies the operation of the savings clause, but does not alter or eliminate its central elements, and those elements remain favorable to development. Nor does the proposed rule abolish the savings clause, as the Commission would indisputably have authority to do. The Commission believes that the proposed rule will retain stability and predictability in the regulatory framework for the development of land in the District.

The rule will impose no unreasonable burden. The development of land in the District of Columbia is clearly beneficial to the District, but development cannot be rendered free from uncertainty and chance, the substantially better portion of which are completely external to the zoning process. Moreover, the Comprehensive Plan itself stands as substantial notice of the District's policy goals for land use.

The Commission can not overlook a degree of inconsistency between certain positions taken before the Commission in this case and in case 86-17. In that case, the point was urged that nonconforming structures which are created by map amendments become difficult to insure or to re-finance. In this case, the Commission is urged not to reduce the current right to construct new nonconforming structures, which, the Commission presumes, are intended to be insured and financed. The Commission does not accept the contention that a diminution in this "right" is an excessive burden.

The Commission also rejects the contention that the proposed rule would be invalid, because its future operation would be "to down-zone areas without having notice, without having a hearing and without meeting the APA requirements." But this is not so, either literally or in substance. In future cases, when the Commission has decided to have a

hearing to consider an amendment to the zoning map, the zoning map will, plainly, not be amended by operation of the rule. The zoning map will be amended, if at all, only at the conclusion of the complete process, including public notice and a public hearing, which is required by law. Nor would the proposed rule operate in substance as a map amendment. The proposed rule will operate, as do many other provisions in the text of the Zoning Regulations, to govern the way that development rights apply under certain circumstances.

On the other hand, the Commission has been urged to establish an event which occurs earlier in the course of a map amendment case, such as the filing of a petition for an amendment, as the event that triggers the operation of the proposed rule. On balance, the Commission believes that the more reasonable milestone for that purpose is the proposed one, the decision by the Commission to have a public hearing. That decision is the event that represents the Commission's determination that a case has sufficient merit to conduct a hearing and to undertake the substantial administrative effort involved in the hearing process. In addition, the adoption of an earlier milestone would go beyond the scope of the public notice and proposed rulemaking.

The Commission recognizes that further deliberation on the proposed rule would be reasonable, to consider certain narrow issues that would allow the Commission to refine the proposed rule. The Commission is prepared to consider those issues in further proceedings. At this stage, the Commission is confronted by the expiration of the emergency rule, as of January 19, 1987. The Commission is persuaded that final adoption of the proposed rule at this time is fair, reasonable, and necessary.

This case does not affect the neighborhood of any ANC in a way which is different from the way it affects the District as a whole. Thus, in this case it is subject to doubt that any ANC is entitled to great weight. The Commission will addresses ANC views as follows. ANC 3C submitted written views recommending adoption of the text changes essentially as proposed, but urging changes to: (1) ensure that the Zoning Commission acts promptly to decide to hold a hearing on an application; (2) to clarify the act which constitutes the filing of an application for a building permit; and (3) to apply the proposed rule to a building permit application filed on the same date that the Commission decides to hold a hearing. ANC 3E also filed written views, recommending adoption of the proposed rule, but also urging an earlier triggering event, and suggesting that the restriction on construction apply as soon as the

Zoning Commission receives a petition to consider a map amendment.

All of the changes urged by ANCs 3C and 3E are beyond the scope of the notices of proposed rulemaking and public hearing. They can not be adopted at this point. Nonetheless, the Commission has expressed above its reasons for adoption of the Commission's decision to have a public hearing as the triggering event for application of the proposed rule.

Notice of proposed rulemaking appeared in the D.C. Register on October 10, 1986. The final rule which the Commission adopts in this Order is identical to the proposed rule, with the sole exception of the addition of a clarifying phrase at the end of paragraph (b) of sub-section 3202.6, and the addition of paragraph (c) to that sub-section. This clarification is not substantive, as it is consistent with the Commission's understanding of the language of the proposed rule.

The proposed action of the Zoning Commission to amend the Zoning Regulations was referred to the National Capital Planning Commission (NCPC), under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. NCPC, by report dated December 23, 1986, found that the proposed amendment would have had relatively limited, if any, effect on the Federal Establishment or other Federal interests in the National Capital, and would not be inconsistent with the Comprehensive Plan for the National Capital.

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 the Zoning Regulations regarding the vesting of construction rights. The specific amendments are included in the notice of final rulemaking, which appears elsewhere in this issue of the D.C. Register.

This order was adopted by the Commission at the special public meeting on January 5, 1987, by a vote of 5-0 (Patricia N. Mathews, Lindsley Williams, Maybelle T. Bennett, and John G. Parsons to adopt, and George M. White to adopt by absentee vote.

In accordance with 11 DCMR section 3028, this order is final and will take effect upon publication in the D.C. Register, that is, on January 16, 1987.

DCMR 11

ZONING

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D.C. OFFICE OF DOCUMENTS

MARION BARRY, JR.
MAYOR

APRIL 1987

ALAN S. WINTER
ADMINISTRATOR OF DOCUMENTS

CHAPTER 32 ADMINISTRATION AND ENFORCEMENT

3200 GENERAL PROVISIONS

3200.1 In accordance with the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the provisions of the Zoning Regulations shall be administered and enforced by the Mayor.

3200.2 In accordance with the provisions of the Zoning Act of June 20, 1938 (52 Stat, 797), as amended, appeals to the Board of Zoning Adjustment may be taken by any person aggrieved, or organization authorized to represent that person, or by any officer or department of the District or federal government affected, by any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based in whole or part upon any Zoning Regulations or Zoning Maps adopted pursuant to the Zoning Act.

3200.3 The fee for any appeal or application made in accordance with the provisions of this chapter shall be as determined by the Mayor.

3201 PENALTIES

3201.1 As provided in the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the owner or person in charge of or maintaining any building or land, or any other person who erects, constructs, reconstructs, alters, converts, maintains, or uses any building or structure, or part of a building or structure, or land in violation of the provisions of this title shall, upon conviction for that violation, be punished by a fine of not more than one hundred dollars ($100) per day for each and every day the violation continues.

3201.2 The Corporation Counsel of the District, or any neighboring property owner or occupant who would be specially damaged by any violation of this title, may, in addition to all other remedies provided by law, institute injunction or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use; or to correct or abate a violation; or to prevent the occupancy of the buildings, structure, or land.

3202 BUILDING PERMITS

3202.1 Except as provided in §§3202.5, 3202.7, or 3202.8, a building permit shall not be issued for the proposed erection, construction, conversion, or alteration of any structure unless that structure complies with the provisions of this title.

3202.2 To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary:

(a) Scaled drawings showing the following:

(1) The exact shape, topography, and dimensions of the lot to be built upon;

(2) The plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures;

(3) The parking and loading plans and the basis for computation of those plans; and

(4) Other information necessary to determine compliance with these regulations; and

(b) An official building plat, in duplicate, prepared by the Surveyor of the District of Columbia, upon which the applicant shall indicate in ink and to the same scale dimensions of the following:

(1) All existing and proposed structures;

(2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities; and

(3) Other information necessary to determine compliance with the provisions of this title.

3202.3 Hereafter, except as provided in §2516 and the Act of Congress of June 28, 1898 (30 Stat. 520, chapter 519, §5), a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure, or for any addition to any principal structure, unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record; except buildings and structures related to a fixed right-of-way mass transit system approved by the D.C. Council. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.

3202.4 All work authorized by a building permit issued before May 12, 1958, may be carried to completion in accordance with the terms of that permit.

3202.5 All applications for building permits filed before May 12, 1958, may be processed, and any work to be authorized by the permits applied for may be carried to completion, in accordance with the Zoning Regulations in effect on the date the applications were filed; Provided, that the following requirements are met:

(a) The applications shall be accompanied by the plans and other information required by §3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation;

(b) Any approved building permit shall be taken out within six (6) months after May 12, 1958; and

(c) All work authorized by the building permit shall be carried to completion in accordance with the terms of the permit.

3202.6 If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of work pursuant to the permit, shall be governed as follows:

(a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by §3202.4 and §3202.5;

(b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by the permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site; and

(c) For purposes of paragraph (b) of this section, the phrase "zone district classification being considered for the site" shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification that is in effect on the date the application is filed.

3202 BUILDING PERMITS (Continued)

3202.7 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 date those orders are promulgated; Provided, that all applications for building permits shall be accompanied by the plans and other information required by §3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation.

3202.8 Building permits issued in accordance with §§3202.4, 3202.5, or 3202.7 reprocessed in accordance with all provisions of this title.

3203 CERTIFICATES OF OCCUPANCY

3203.1 Except as provided in §§3203.7, 3203.8, or 3203.9, no person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the D.C. Building Code (Title 12 DCMR).

3203.2 Certificates of occupancy shall not be required for separate apartments or bachelor apartments in an apartment house, tenements or apartments in a tenement house, or offices in an office building, if a certificate of occupancy is issued for the entire structure.

3203.3 Except in the case of a church, all certificates of occupancy shall be conspicuously posted in or upon the premises to which they apply so that they may be seen readily by anyone entering the premises.

3203.4 If the erection or alteration of a structure is contemplated, a certificate of occupancy for that structure shall not be issued until the erection or alteration is completed to the point of availability of occupancy for use, except as provided in §§3203.5.

3203.5 Where an alteration to a structure is required by law in order to effect compliance with regulations adopted pursuant to the "Means of Egress Law," Act of December 24, 1942, as amended, a certificate of occupancy for that structure may be issued prior to the alteration; Provided, that the use of the structure for which a certificate of occupancy is desired, if a new use, is not one that under the provisions of the "Means of Egress Law" would require a greater amount of egress or fire protection facilities than is required for the use existing prior to the alteration.

3203.6 Any certificate of occupancy issued under the terms of §§3203.4 or 3203.5 shall be subject to compliance with regulations adopted pursuant to the "Means of Egress Law" cited in §3203.5.

3203 CERTIFICATES OF OCCUPANCY (Continued)

3203.7 Any use of a structure or land, or part of any structure or land, for which a certificate of occupancy has been issued before May 12, 1958, may be continued or established in accordance with the terms of that certificate of occupancy.

3203.8 All applications for certificates of occupancy filed before May 12, 1958, may be processed, and any occupancy authorized by those certificates may be established in accordance with the Zoning Regulations in effect on the date the applications were filed; Provided, that the following requirements shall be met:

(a) The applications shall be accompanied by information sufficiently complete to permit processing without substantial change or deviation; and

(b) Any approved certificate of occupancy shall be taken out within six (6) months after May 12, 1958.

3203.9 Applications for certificates of occupancy authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date the orders were promulgated; Provided, that all applications for certificates of occupancy shall be accompanied by information sufficiently complete to permit processing without substantial change or deviation.

3203.10 Certificates of occupancy issued in accordance with §§3203.7, 3203.8, or 3203.9 shall not be renewable if permitted to lapse unless processed in accordance with all provisions of this title.

3203.11 The provisions of this section shall not be construed to prohibit the issuance of a certificate of occupancy for the use of a structure, or part of a structure, where the establishment of that use is dependent upon the erection, construction, conversion, or alteration of all or part of the structure as authorized by §§3202.5, 3202.7, or 3202.8.

3299 DEFINITIONS

3299.1 The provisions of §199 of chapter 1 of this title, and the definitions set forth in that section, shall be incorporated by reference in this section.

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 546

CASE NO. 87-2
(Vesting of Construction and Occupancy Rights)

EMERGENCY ORDER

October 13, 1987

On October 13, 1987, the Zoning Commission for the District of Columbia held a public meeting, during which it considered certain issues in Zoning Commission Case No. 87-2. In particular, the Commission considered the need to amend 11 DCMR 3202.5(a), to make it clear that a building permit application must be complete, and the required fee paid, in order for the filing of the application to vest a right to build pursuant to 11 DCMR 3202.5. For the reasons set forth in this order, the Commission decided to publish a notice of proposed rulemaking to amend 11 DCMR 3202.5(a), and to effect emergency rulemaking, as set forth herein:

Whereas, The District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1985, D.C. Law 5-187, became effective March 16, 1985; and

Whereas, Section 2 of the Zoning Act, as amended, D.C. Code § 5-414, (1981) requires that the text and map of the Zoning Regulations not be inconsistent with the Comprehensive Plan; and

Whereas, The Executive and Legislative branches of the District of Columbia government have invested substantial time and effort to prepare, adopt, and implement the Comprehensive Plan; and

Whereas, The current provisions of the Zoning Regulations of the District of Columbia allow a developer to apply for and be granted a permit to construct a building of the size and density which are allowed by the Zoning Regulations which are in effect at the time the permit application is filed; and

Whereas, These provisions have been administratively

applied to so operate even if the applicant has not filed a complete application, or paid the fee which is required for the processing of the application; and

Whereas, Analysis of the Comprehensive Plan demonstrates that the Zoning Commission, together with the District of Columbia Office of Planning, will be required to invest very substantial time and effort to address a variety of serious and complex issues, in order to assure compliance with the "not inconsistent with" requirement; and

Whereas, This effort is inherently incapable of being hurried, if it is to be conducted in a reasonable, prudent, and businesslike way, and in accord with the requirements of due process; and

Whereas, The current vesting provisions of the Zoning Regulations provide a means by which development which would be inconsistent with the Comprehensive Plan can be approved, completed, and remain as a nonconforming structure, notwithstanding such inconsistency; and

Whereas, The Zoning Commission has recently decided to hold and has commenced hearings in Zoning Commission cases numbered 86-26 and 87-6, to consider whether to amend the zone district classification of substantial land areas, to the end of assuring compliance with the "not inconsistent with" requirement; and

Whereas, These cases represent only a fraction of those which will be needed to address that issue; and

Whereas, Inherent in the current vesting provisions is a substantial risk that a developer, knowing that the Zoning Commission intends to have a hearing to consider an amendment of the zone district classification of a site, could, by the filing an incomplete or unfinished application, and without paying the required filing fee, abrogate or significantly abridge the effectiveness of the proposed amendment; and

Whereas, The functional integrity of the Comprehensive Plan is of paramount public importance; and

Whereas, The public interest in maintaining and ensuring the Comprehensive Plan's functional integrity is overwhelmingly superior to any private interest in building to the maximum scale permitted under extant limitations; and

Whereas, It is anomalous to allow the vesting of construction rights on the basis of an application which is incomplete or unfinished, and therefore is not sufficient for the issuance of a building permit; and

Whereas, The ongoing process through which the Zoning Commission is, and will be, considering action which will reduce development potential is a process which inherently and inevitably creates an incentive for a prospective developer to expedite preparations, to the end of securing approval to construct a building of a size and density which may later be precluded; and

Whereas, Section 1 of the Zoning Act (Act of June 20, 1938, 52 Stat. 797, also cited as Section 5-413 of the D.C. Code) establishes the authority of the Zoning Commission "to promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia", and

Whereas, Section 1-1506 of the District of Columbia Code authorizes the Zoning Commission to take emergency action for a period not to exceed 120 days "for the immediate preservation of public peace, health, safety, welfare, or morals";

Therefore: The Zoning Commission resolves that an emergency exists which requires the immediate amendment of the Zoning Regulations of the District of Columbia, to protect the public welfare; and

Therefore, it is hereby ordered that, effective immediately on October 13, 1987, and for a period not to exceed 120 days after October 13, 1987, that is, through February 10, 1988, 11 DCMR 3202.5(a) is amended to read as follows:

(a) The application shall be accompanied by any fee which is required, and by the plans and other information required by §3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations.

This order was adopted by the Commission at the regular public meeting on October 13, 1987, by a vote of 3-1 (Lindsley Williams, Maybelle T. Bennett, and John G. Parsons to adopt; Patricia N. Mathews, opposed, by proxy; George M. White, not present, not voting). In accordance with section 105 of the District of Columbia Administrative Procedure Act, as amended, D.C. Code, section 1-1506 (1981), this

order became effective immediately upon adoption on October 13, 1987.

LINDSLEY WILLIAMS
Chairman
Zoning Commission

EDWARD L. CURRY
Executive Director
Zoning Secretariat

ZCOrder546 BJW17

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Zoning Commission for the District of Columbia hereby gives notice of emergency and proposed rulemaking to amend Chapter 32 of Title 11, DCMR, "Zoning." The amendments clarify the requirement that an application for a building permit must be complete, and accompanied by the required fee, before the filing of the application may operate to entitle the applicant to build on the basis of the Zoning Regulations which are in effect when the application is filed. The emergency action is necessary for the immediate preservation of the public welfare, by ensuring that potential developers, having been alerted to a prospective reduction in the permitted size and density of buildings, are not able, by the filing of an incomplete or unfinished application, to abrogate or abridge the effectiveness of final actions by the Zoning Commission. The Zoning Commission has recently taken action in Zoning Commission Cases 86-12 and 86-17, to amend the zone district classification of certain areas, for the purpose, in part, of assuring that the Zoning Map not be inconsistent with the Comprehensive Plan. The Commission has scheduled and commenced hearings in Cases 86-26 and 87-6, and anticipates the scheduling of additional cases, all for the same general purpose. Only by adoption of the emergency rule can the Zoning Commission assure also that new development will be limited to a scale which the Zoning Commission determines to be not inconsistent with the Plan.

The emergency rule was adopted by the Zoning Commission on October 13, 1987, at 4:35 P.M., and took effect immediately. It will remain in effect for 120 days after October 13, 1987, that is through February 10, 1988, unless it is superseded earlier by final rulemaking. The Commission intends to take final rulemaking action in not less than 30 days after the publication of this notice in the D.C. Register. The specific amendment is to amend 11 DCMR 3202.5(a) to read as follows:

(a) The application shall be accompanied by any fee which is required, and by the plans and other information required by §3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under applicable District of Columbia regulations.

Written comments may be submitted to the Zoning Commission, through the Executive Director, Zoning Secretariat, Room 11, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. Copies of the proposed rules are available from the Zoning Secretariat (telephone: 727-6311).

DISTRICT OF COLUMBIA ZONING COMMISSION

NOTICE OF PUBLIC HEARING

Thursday, January 7, 1988 @ 1:30 P.M., District Building, Room 9, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

Case No. 87-2 (Zoning Commission, sponsor)

THIS CASE IS OF INTEREST TO ALL ADVISORY NEIGHBORHOOD COMMISSIONS

The Zoning Commission for the District of Columbia initiated action to consider proposed amendments to the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning, section 3202, which regulates building permits.

The proposed amendments which the Commission will consider are set forth or generally summarized below:

1. 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.

2. Revise 11 DCMR 3202.5(a) to read as follows:

   (a) The application shall be accompanied by any fee which is required, and by the plans and other information required by section 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under applicable District of Columbia regulations.

3. 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.

4. 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

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before the filing of an application for the permit to construct the building or structure.

5. The Commission will also consider the adoption of amendments which persons who participate in the hearing recommend as alternatives to the above amendments.

6. The Commission also invites the submission of views on other issues which any interested person believes to be reasonably related to the proposed amendments.

Proposed amendments to the text of the Zoning Regulations of the District of Columbia, are authorized pursuant to the Zoning Act (Act of June 20, 1938, 52 Stat. 797, as amended, Section 5-413 et seq., D.C. Code, 1981 Ed.).

The public hearing on this case will be conducted in accordance with the provisions of 11 DCMR 3021. Pursuant to that section, the Commission will impose time limitations on testimony presented to it at this public hearing.

All individuals, organizations, or associations who wish to testify in this case should file their intention to testify in writing with the Executive Director of the Zoning Secretariat by December 15, 1987, together with any written material which the person or entity wishes the Commission to consider. Written statements, in lieu of a personal appearance or oral presentation, may be submitted for inclusion in the record.

Information should be forwarded to the Executive Director, Office of the Zoning Secretariat, Room 11, District Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. Please include the number of the particular case and your daytime telephone number. FOR FURTHER INFORMATION, YOU MAY CONTACT THE ZONING SECRETARIAT AT 727-6311.

GEORGE M. WHITE, JOHN G. PARSONS, LINDSLEY WILLIAMS, MAYBELLE T. BENNETT AND PATRICIA N. MATHEWS -------- ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, BY EDWARD L. CURRY, EXECUTIVE DIRECTOR, ZONING SECRETARIAT.

DEPARTMENT OF PUBLIC WORKS
NOTICE OF FINAL RULEMAKING
DOCKET NO. 87-287-TS

The Director of the Department of Public Works, pursuant to the authority of Sections IV(A) and V of Reorganization Plan No. 4 of 1983, 30 DCR 6428 (December 16, 1983), effective March 2, 1984, and Mayor's Order 84-55, 31 DCR 1323 (March 16, 1984), hereby gives notice of the adoption of the following rulemaking which amends the Vehicles and Traffic Regulations (18 DCMR). Final action to adopt this rulemaking was taken on January 26, 1988 . No comments have been received and no changes have been made to the text of the proposal as published on December 4, 1987 at 34 DCR 7918. This final rulemaking will be effective when published in the D.C. Register.

Title 18 DCMR, Section 2417, SNOW EMERGENCY PARKING REGULATIONS, Subsection 2417.7, is amended by deleting the subsection in its entirety and renumbering the current subsection 2417.8 to subsection 2417.7.

ZONING COMMISSION OF THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
CASE NO. 87-2
(Vesting of Construction and Occupancy Rights II)

The Zoning Commission for the District of Columbia, pursuant to the authority set forth in the Zoning Act (D.C. Code, Section 5-413, et seq.), having held a public hearing as required, hereby gives notice of the adoption of an amendment to the District of Columbia Municipal Regulations, Title 11, Zoning. The amendment that was adopted affects the vesting of rights to use and develop land in the District of Columbia. Notice of emergency and proposed rulemaking was published in the D.C. Register on October 23, 1987 (34 DCR 6801). This amendment was adopted by the Zoning Commission as a final action at a special public meeting held on January 19, 1988. The specific amendment to 11 DCMR 3202.5(a) is as follows:

a. The application shall be accompanied by any fee which is required, and by the plans and other information required by 11 DCMR 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations.

ZONING COMMISSION ORDER NO. 562
CASE NO. 87-2
(Vesting of Construction and Occupancy Rights)
January 19, 1988

The Zoning Commission for the District of Columbia initiated this case in order to consider various issues which deal with the vesting of rights to use and develop 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. The scope of this final order is limited to the filing requirements for an application for a building permit to operate to vest construction rights.

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

During the first hearing, Advisory Neighborhood Commission (ANC) 3C expressed the following concerns about the issue which is the subject of this Order:

> The regulations should be clear as to what act constitutes the filing of a building permit application under the proposed regulation: merely the filing of appropriate forms, or the filing of substantially complete and final plans together with the payment of application fees? These different acts can occur on different dates, and this ANC recommends that the latter action constitute the meaning of "application."

Although the notice of public hearing had invited the submission of views about any issues related to the vesting question, the notice had not proposed an amendment which addressed the concern of ANC 3C. For that reason, the Zoning Commission could not adopt such a rule on a permanent basis without giving additional public hearing notice. On October 13, 1987, at its regular monthly meeting, the Commission adopted an emergency rule to amend 11 DCMR 3202.5(a), and to hold a public hearing to consider final rule-making on the amendment.

The Department of Consumer and Regulatory Affairs has reported that the proposed amendment would be "clearer and fairer to enforce than the previous vesting rule."

A concern was expressed in opposition that any alteration in a submitted application would "invite a charge that the 'no substantial change or deviation' clause had been violated." The Commission acknowledges that such a "charge" might some day be forthcoming, considering the variety, and

ever the occasional absence of merit, which characterize contentions and positions which surface around development issues. But the clause of concern is part of the pre-emergency text of 11 DCMR 3202.5(a), and is not itself proposed as a new amendment. Nor is the clause proposed to apply to the other-than-zoning plans and information which the amendment would require to be filed for purposes of vesting.

The thrust of the views of other representatives of the development community was that the emergency rule was acceptable, but should be clarified.

The Commission is persuaded that 11 DCMR 3202.5(a) should be revised to require that the permit application be complete, and the required fee paid, in order for the filing of the application to vest a right to build pursuant to 11 DCMR 3202.5. The Commission does not believe that the amendment suffers from any lack of clarity.

The Commission notes that its further consideration of other aspects of the vesting issue in this over-all case may lead to the adoption of a rule which would render paragraph 3202.5(a) partly or entirely moot. If this occurs, the Commission will act appropriately as to the paragraph. To that end, the Commission hereby reserves the authority to take further rulemaking action in this case on paragraph 3202.5(a). Nonetheless, the instant amendment is a reasonable measure and can stand on its own in the interim, even if the paragraph is repealed or further amended at a later stage of this case.

Notice of emergency and proposed rulemaking was published in the D.C. Register on October 23, 1987 (11 DCMR 6801). On December 4, 1987, the proposed amendment was transmitted to the National Capital Planning Commission (NCPC) for review and comment as required by D.C. Code sec. 5-417 (1987). By report dated December 10, 1987, NCPC found that the proposed amendment "would not adversely affect the Federal Establishment or other Federal interest in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital."

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 an amendment to 11 DCMR 3202.5(a). The amendment is set forth and included

in the notice of final rulemaking which is located elsewhere in this issue of the D.C. Register.

This order was adopted by the Commission at the special public meeting on January 19, 1988, by a vote of 4-0 (Patricia N. Mathews, Lindsley Williams, and John G. Parsons to approve, and George M. White, to approve by proxy; Maybelle T. Bennett, not present, not voting).

In accordance with 11 DCMR section 3028, this order is final and will take effect upon publication in the D.C. Register, that is, on _____.

ZONING COMMISSION OF THE DISTRICT OF COLUMBIA
NOTICE OF PROPOSED RULEMAKING
CASE NO. 87-2
(Vesting of Construction and Occupancy Rights II)

The Zoning Commission for the District of Columbia, pursuant to the authority set forth in the Zoning Act (D.C. Code, Section 5-413, et seq.), and having held a public hearing as required, hereby gives notice of its intention to amend the District of Columbia Municipal Regulations, Title 11, Zoning. The proposed amendment would affect the vesting of rights to use and develop land in the District of Columbia. The specific amendments to 11 DCMR are 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-sections 3202.5 and 3202.6.

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

   3202.6 A building permit issued in accordance with sections 3202.4 or 3202.5 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.

7. The Commission proposes to adopt one of the following alternative effective dates:

   (a) Each amendment shall become effective and operational immediately upon publication of a final Order and Notice of Final Rulemaking.

   (b) Each amendment shall become effective and operational six months after publication of Final Rulemaking and a Final Order; or

   (c) Any alternative which is within the limits of alternatives (a) and (b), including different effective dates for different amendments.

Written comments may be submitted to the Zoning Commission through the Executive Director of the Zoning Secretariat, District Building, Room 11, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. Comments must be in writing. Comments which are received after the close of business (4:45 P.M.) on July 1, 1988, will not be considered. Copies of the proposed rules are available at the Zoning Secretariat; call 727-6311.

ZONING COMMISSION OF THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
CASE NO. 87-2
(Vesting of Construction and Occupancy Rights II)

The Zoning Commission for the District of Columbia, pursuant to the authority set forth in the Zoning Act (D.C. Code, Section 5-413, et seq.), having held a public hearing as required, hereby gives notice of the adoption of an amendment to the District of Columbia Municipal Regulations, Title 11, Zoning. The amendment that was adopted affects the vesting of rights to use and develop land in the District of Columbia. Notice of proposed rulemaking was published in the D.C. Register on May 20, 1988 (35 DCR 3891). This amendment was adopted by the Zoning Commission as a final action at a public meeting held on September 15, 1988. The specific amendments to 11 DCMR 3202 and 3203 are 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.

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 2} 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). The amendments are

set forth and included in the notice of final rulemaking which is located elsewhere in this issue of the D.C. Register.

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 _____.

ZONING COMMISSION OF THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
CASE NO. 87-2
(Vesting of Construction and Occupancy Rights II - Text Amendments)

The Zoning Commission for the District of Columbia, pursuant to the authority set forth in the Zoning Act (D. C. Code, Section 5-413, et seq), having held a public hearing as required, hereby gives notice of final rulemaking to adopt amendments to the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. The final rules amend the provisions of Title 11 that apply to the vesting of construction and occupancy rights. Notice of proposed rulemaking was published in the D.C. Register on September 8, 1989. (36 DCR 6377). These amendments were adopted by the Zoning Commission as a final action at a public meeting held on October 16, 1989. The specific amendments to the Zoning Regulations are as follows:

1. Restrict the vesting of use rights, that is, the right to obtain a certificate of occupancy, when the Zoning Commission has decided to have a hearing on an amendment to the Zoning Map, unless the amendment is requested by an individual property owner, by revising 11 DCMR 3203.7 to read as follows:

3203.7 If an application for a certificate of occupancy is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed use, the processing of the application, and the establishment of the occupancy shall be governed as follows:

(a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-section 3203.8;

(b) Except as otherwise provided in sub-section 3203.11, if the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any use authorized by the certificate of occupancy may be established and maintained, only in accordance with the most restrictive provision of the zone district classifications being considered for the site, or in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding;

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(c) For purposes of paragraph (b) of this sub-section, the phrase "zone district classifications being considered for the site" shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification that is in effect on the date the application is filed;

(d) The limitation that is set forth in paragraph (b) of this sub-section shall not apply to a decision to hold a hearing on an application that is filed by an owner of property, pursuant to paragraph 102.2(a) of this title; and

(e) The limitation that is set forth in paragraph (b) of this sub-section shall not apply to an application for a certificate of occupancy that only changes the identity of the owner or occupant, and does not change a use authorized by a certificate of occupancy that was issued either before the decision to hold a hearing or pursuant to paragraph (a) of this sub-section.

2. Allow a building permit that would otherwise be precluded by 11 DCMR 3202.5 to be issued when an emergency has created a threat to the public health or safety, by adding paragraph (d) to that sub-section, to read as follows:

(d) The limitation that is set forth in paragraph (b) of this sub-section shall not prevent the issuance of a building permit that is necessary in an emergency to protect the public health or safety;

3. Provide that no limitation on the vesting of construction rights is activated by the setting of a hearing on the map amendment application of a property owner, by adding paragraph (e) to sub-section 3202.5, to read as follows:

(e) The limitation that is set forth in paragraph (b) of this sub-section shall not apply to a decision to hold a hearing on an application that is filed by an owner of property, pursuant to paragraph 102.2(a) of this title.

District of Columbia Municipal Regulations

September 1991



Title 11

ZONING

D.C. OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES

SHARON PRATT KELLY
MAYOR

ALAN S. WINTER
ADMINISTRATOR

to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use; or to correct or abate a violation; or to prevent the occupancy of the buildings, structure, or land.

SOURCE: §§8105.1 and 8105.2 of Regulations effective May 12, 1958.

3202 BUILDING PERMITS

3202.1 Except as provided in §§3202.5, 3202.7, or 3202.8, a building permit shall not be issued for the proposed erection, construction, conversion, or alteration of any structure unless that structure complies with the provisions of this title.

3202.2 To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary:

(a) Scaled drawings showing the following:

(1) The exact shape, topography, and dimensions of the lot to be built upon;

(2) The plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures;

(3) The parking and loading plans and the basis for computation of those plans; and

(4) Other information necessary to determine compliance with these regulations; and

(b) An official building plat, in duplicate, prepared by the Surveyor of the District of Columbia, upon which the applicant shall indicate in ink and to the same scale dimensions of the following:

(1) All existing and proposed structures;

(2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities; and

(3) Other information necessary to determine compliance with the provisions of this title.

3202.3 Except as provided in §2516 and the Act of Congress of June 28, 1898 (30 *Stat.* 520, chapter 519, §5), a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure, or for any addition to any principal structure, unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record; except buildings and structures related to a fixed right-of-way mass transit system approved by the Council of the District of Columbia. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.

3202.4 Any construction authorized by a 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 (2) 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.

3202.5 If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of work pursuant to the permit, shall be governed as follows:

(a) The application shall be accompanied by any fee which is required, and by the plans and other information required by §3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations;

(b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by the permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site;

(c) For purposes of paragraph (b) of this section, the phrase "zone district classification being considered for the site" shall include nay zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification that is in effect on the date the application is filed;

(d) The limitation that is set forth in paragraph (b) of this subsection shall not prevent the issuance of a building permit that is necessary in an emergency to protect the public health or safety; and

(e) The limitation that is set forth in paragraph (b) of this subsection shall not apply to a decision to hold a hearing on an application that is filed by an owner of property, pursuant to §102.2(a) of this title.

3202.6 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 date those orders are promulgated; Provided, that all applications for building permits shall be accompanied by the plans and other information required by §3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation.

3202.7 A building permit issued in accordance with §§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.

SOURCE: §§8103.1 through 8103.7 of Regulations effective May 12, 1958; as amended by Final Rulemaking published at 34 DCR 433 (January 16, 1987; by Final Rulemaking published at 35 DCR 790 (February 5, 1988); by Final Rulemaking published at 36 DCR 653 (January 20, 1989); and by Final Rulemaking published at 36 DCR 7827, 7828 (November 10, 1989).

3203 CERTIFICATES OF OCCUPANCY

3203.1 Except as provided in §§3203.7, 3203.8, or 3203.9, no person shall use any structure, land, or part of any structure or land for any purpose other than a one-family dwelling until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the D.C. Building Code (Title 12 DCMR).

3203.2 Certificates of occupancy shall not be required for separate apartments or bachelor apartments in an apartment house, tenements or apartments in a tenement house, or offices in an office building, if a certificate of occupancy is issued for the entire structure.

3203.3 Except in the case of a church, all certificates of occupancy shall be conspicuously posted in or upon the premises to which they apply so that they may be seen readily by anyone entering the premises.

3203.4 If the erection or alteration of a structure is contemplated, a certificate of occupancy for that structure shall not be issued until the erection or alteration is completed to the point of availability of occupancy for use, except as provided in §§3203.5.

3203.5 Where an alteration to a structure is required by law in order to effect compliance with regulations adopted pursuant to the "Means of Egress Law," Act of December 24, 1942, as amended, a certificate of occupancy for that structure may be issued prior to the alteration; Provided, that the use of the structure for which a certificate of occupancy is desired, if a new use, is not one that under the provisions of the "Means of Egress Law" would require a greater amount of egress or fire protection facilities than is required for the use existing prior to the alteration.

3203.6 Any certificate of occupancy issued under the terms of §§3203.4 or 3203.5 shall be subject to compliance with regulations adopted pursuant to the "Means of Egress Law" cited in §3203.5.

3203.7 If an application for a certificate of occupancy is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed use, the processing of the application, and the establishment of the occupancy shall be governed as follows:

(a) If the application is filed on or before the date on which the Zoning Commission makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by §3203.8;

(b) Except as otherwise provided in §3203.11, if the application if filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any use authorized by the certificate of occupancy may be established and maintained, only in accordance with the most restrictive provision of the zone district classifications being considered for

the site, or in accordance with the zone district classifications of the site pursuant to the final decision of the Zoning Commission in the proceeding;

(c) For purposes of paragraph (b) of this subsection, the phrase "zone district classifications being considered for the site" shall include any zone district classification that the Zoning Commission has decided to notice for adoption and the zone district classification that is in effect on the date the application is filed;

(d) The limitation that is set forth in paragraph (b) of this subsection shall not apply to a decision to hold a hearing on an application that is filed by an owner of property, pursuant to §102.2(a) of this title; and

(e) The limitation that is set forth in paragraph (b) of this subsection shall not apply to an application for a certificate of occupancy that only changes the identity of the owner or occupant, and does not change a use authorized by a certificate of occupancy that was issued either before the decision to hold a hearing or pursuant to paragraph (a) of this subsection.

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 (6) 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.

3203.9 Applications for certificates of occupancy authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date the orders were promulgated; Provided, that all applications for certificates of occupancy shall be accompanied by information sufficiently complete to permit processing without substantial change or deviation.

3203.10 Certificates of occupancy issued in accordance with §§3203.7, 3203.8, or 3203.9 shall not be renewable if permitted to lapse unless processed in accordance with all provisions of this title.

3203.11 The subsection 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 §3202 of this title;

(c) At the time of issuance of the building permit which is required by this subsection, 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 subsection is issued.

SOURCE: §§8104.1 through 8104.10 of Regulations effective May 12, 1958; as amended at 34 DCR 433 (January 16, 1987); by Final Rulemaking published at 36 DCR 653, 654 (January 20, 1989); and by Final Rulemaking published at 36 DCR 7827 (November 10, 1989).

3204 VESTING OF TRANSFERRED DEVELOPMENT RIGHTS

3204.1 Notwithstanding the provisions of §§3202.5 and 3202.6 of this title, gross floor area that is transferred pursuant to this title shall remain available for the life of the development on the receiving lot, subject to the following provisions:

(a) Within thirty (30) calendar days of the execution of the written agreement that effects the transfer, the parties to the transfer shall file a true copy of the agreement with the Zoning Administrator; and

(b) The transfer agreement shall be valid for a period of twenty-five (25) years after its execution, within which time an application shall be filed for each building permit that is required to implement the transfer.

SOURCE: Final Rulemaking published at 38 DCR 612, 646 (June 18, 1991).

3205 COMPLIANCE WITH CONDITIONS IN ORDERS

3205.1 The provisions of this section shall apply when a building permit or certificate of occupancy has been issued under the authority of an order of the Board of Zoning Adjustment or the Zoning Commission for the District of Columbia, and the order of the Board or Commission sets forth any condition to the issuance of the building permit or certificate of occupancy, or to the approval of a variance, special exception, or planned unit development.

3205.2 If the order of the Board of Zoning Adjustment or Zoning Commission conditions the issuance of a building permit or certificate of occupancy upon the recordation of a covenant, then, for purposes of §§3205.4 and 3205.5 of this section, each term and condition in the covenant shall be treated as a condition to the issuance of the building permit or the certificate of occupancy.

3205.3 If a building permit or certificate of occupancy has been issued under the authority of a decision of the Board of Zoning Adjustment to approve a special exception or variance, then for purposes of §§3205.4 and 3205.5 of this section, each condition to the approval of the special exception or variance shall be treated as a condition to the issuance of the building permit or certificate of occupancy.

3205.4 Any person who owns, controls, occupies, maintains, or uses any building, structure, or land or any part of any building, structure, or land shall at all times comply with any condition

DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS

TITLE 11

ZONING

D.C. OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES

FEBRUARY 2003

Certified and published under the authority of the
Office of Documents and Administrative Issuances

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Administrator

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Office of Documents and Administrative Issuances
441 4th Street, N.W., Suite 520 South
Washington, D.C. 20001

3202.3 Except as provided in § 2516 and § 5 of An Act To amend an Act of Congress approved March 2, 1893, entitled "An Act To provide a permanent system of highways in that part of the District of Columbia lying outside of cities, and for other purposes, approved June 28, 1898 (30 Stat. 519, 520, as amended; D.C. Official Code § 9-101.05(2001)(formerly codified at D.C. Code § 7-114 (1995 Repl.))), a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure, or for any addition to any principal structure, unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record; except buildings and structures related to a fixed right-of-way mass transit system approved by the Council of the District of Columbia. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.

3202.4 Any construction authorized by a 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 (2) 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.

3202.5 If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application and the completion of work pursuant to the permit shall be governed as follows:

(a) If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application and completion of the work shall be governed by § 3202.4;

(b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by the permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site;