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Office of Zoning

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MEMORANDUM

TO: Arnold R. Finlayson, Administrator
Office of Documents and Administrative Issuance

FROM: Sharon S. Schellin
Senior Zoning Specialist

DATE: December 30, 2003

SUBJECT: Publication for the Office of Zoning

Please publish the following in the D.C. Register on January 9, 2004:

1. Notice of Final Rulemaking & Corrected Order No. 03-14-A (Z.C. Case No. 03-14).

These rulemaking is also provided on the enclosed 3.5" diskette.

Received By

12-30-03
Date

Attachments

ZONING COMMISSION
District of Columbia
Case 03-14
Exhibit 8

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ZONING COMMISSION
District of Columbia
CASE NO.03-14
EXHIBIT NO.8

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
CORRECTED* ORDER NO. 03-14-A
Z.C. Case No. 03-14
(Text Amendment – 11 DCMR § 3202.5(a))
July 31, 2003

The Zoning Commission (the "Commission") for the District of Columbia, pursuant to the authority set forth in § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Official Code § 6-641.01) (2001 Ed.) and 11 DCMR § 3030 (Consent Calendar), hereby gives notice of the adoption of an amendment to § 3202.5(a) of the Zoning Regulations (11 DCMR). The amendment inserts language inadvertently omitted from the most recent published version of Title 11 and restates language inadvertently repealed.

Because these actions are technical in nature, no hearing is required, pursuant to 11 DCMR § 3030. No changes were made to the text of the proposed rules, as published together with a notice of proposed rulemaking in the *D.C. Register* on May 16, 2003, at 50 DCR 3875. The Commission took final action to adopt the amendment at a public meeting on July 31, 2003. This final rulemaking is effective upon publication of this notice in the *D.C. Register.*

The commission initiated this rulemaking in response to a petition filed by Advisory Neighborhood Commission ("ANC") 3Fwith the Zoning Commission on March 26, 2003.

ANC 3F. By letter dated March 26, 2003, ANC 3F indicated that, at a duly-noticed public meeting, with a quorum present, the ANC voted to approve submission of the petition. By letter dated June 2, 2003, ANC 3F indicated that at a duly-noticed public meeting, with a quorum present, the ANC voted to support the proposed rulemaking, which differed slightly from the text advocated in their March 26, 2003 petition.

Proposed Rulemaking. At a special public meeting on April 28, 2003, the Commission took proposed action to approve proposed rulemaking, which was published in the *D.C. Register* on May 16, 2003, at 50 DCR 3875.

Section 3202.5 governs the way in which a building permit is processed when the Commission is considering rezoning a particular property. The following is a discussion of the history of this

* Correction made to footnote on page 5. The Final Rulemaking was published on October 17, 2003, at 50 DCR 8826.

section and an explanation as to why a correction is needed to the text as it appears in the February 2003 edition of Title 11.

The Original 1958 Rule

The 1958 Zoning Regulations established that any application for a building permit filed before the effective date of the regulations "may be processed and any work to be authorized thereby may be carried to completion in accordance the zoning regulations in effect on the date such applications are filed" (§ 8103.6), provided that the application is accompanied by drawings, and plans (§§ 8103.6 and 8103.2). Those drawing and plans must include information necessary to determine compliance with the regulations (§ 8102.2).

When the Zoning Regulations were recodified, the provisions were renumbered 11 DCMR §§ 3202.2 and 3202.5. The text of § 3202.2 in the current version of Title 11 is unchanged from the 1958 text and indicates what a building permit application must contain. However, the text of § 3202.5 was eventually repealed. The current version of § 3202.5 was once § 3202.6. As will be explained, it was this repeal and renumbering that has engendered much of the confusion surrounding how the current version of § 3202.5 should read.

For ease of understanding, the repealed version of § 3202.5 will be referred to as "former § 3202.5" and the current version will be referred to as "renumbered § 3202.5".

The benchmark for the purposes of this discussion is January 5, 1987. Prior to that date, there was no set down rule and no § 3202.6. There was only former § 3202.5, which read as follows:

> 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.

Zoning Commission Order No. 517, January 5, 1987

In Order No. 516, January 5, 1987, the Commission promulgated § 3202.6, which provided that applications for a building permit filed on or before the date that the Commission makes a decision to hold a hearing on a new zoning designation would still be processed under the designation in effect (§ 3202.6(a)), but that applications filed after the decision to hold a hearing on a new zoning designation would be processed in accordance with the proposed designation or the designation in effect, whichever is more restrictive (§ 3202.6(b)). This is commonly referred to as the "set down rule".

As promulgated, this new § 3202.6 read:

> 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 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. . .

Zoning Commission Order No. 562, January 19, 1988

In Order No. 562, January 19, 1988, the Commission added language to former § 3202.5(a) that required that the application be accompanied by "any fee" 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." Because new § 3202.6(a) incorporated the requirements of former § 3202.5, the language applied to the set down rule as well. The amendment resulted from building permit applications being treated as "vested" under existing zoning even though "the applicant ha[d] not filed a complete application, or paid the fee which is required for the processing of the application." Order No. 562.

After that rulemaking, the above-referenced subsections should have read as follows (added language shown in bold):

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 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) 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 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. . .

Zoning Commission Order No. 588, September 15, 1988

In Order No. 588, September 15, 1988, the Commission, after rejecting requests to repeal all of § 3202.6, redrafted § 3202.4, repealed former § 3202.5, and renumbered § 3202.6 as § 3202.5. The Order does not explain why former § 3202.5 was repealed. One possible explanation is that the provision only applied to applications filed before May 12, 1958, and that it was unlikely that there were applications still pending after thirty years.

However, in repealing former § 3202.5, the Commission unfortunately overlooked the fact that the newly renumbered § 3202.5(a) still cross-referenced the repealed provision. Thus, the Commission inadvertently[1] eliminated the prerequisites to vesting it had added just nine months before.

As a result of this rulemaking, § 3202.4 and renumbered § 3202.5, should have read as follows (repealed language indicated by strike out and added language shown in bold):

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

[1] The petitioners point out, after reading the orders and listening to the tapes of the related **public meetings**, that the provision was repealed without discussion.

~~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) 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~~**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 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 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. . .

Errors in the 1991, 1994, and 1995 Editions of Title 11

No substantive amendments to the above provisions have been made since this last amendment. Nevertheless, the versions of § 3202.5(a) that appeared in the 1991, 1994, and 1995 editions of Title 11 all contained the text of the former § 3202.5(a), rather than the text of the renumbered § 3202.5(a). The published language is shown in **bold underline**, the language that should have been published is shown in ***bold italic***.

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 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;*** **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;**

2003 Edition of Title 11

The 2003 edition of Title 11 reads (with incorrectly deleted language indicated by strikeout and incorrectly substituted language indicated in bold), in relevant part:

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 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;~~

(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 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. . .

As in the prior editions of Title 11, the 2003 edition leaves out the language regarding the processing of the application filed on or before the date that the Commission decides to set down a proposed rezoning for hearing. Apart from being inaccurate, the published text largely duplicates language that immediately precedes it and is entirely redundant.

Final Rulemaking

In consideration of the above discussion, the Zoning Commission concludes that the text of 11 DCMR § 3202.5 (a) as it appears in the February 2003 edition of the Zoning Regulations should be corrected and, therefore, **APPROVES** an amendment to Title 11 (DCMR) so that subsection (a) will read 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. 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 and information that are required to permit complete review of the entire application under any applicable District of Columbia regulations;

Vote of April 28, 2003

Vote of the Zoning Commission taken at the special public meeting held on April 28, 2003, to **APPROVE** the proposed text amendment: 5-0-0 (Carol J. Mitten, Anthony J. Hood, James H. Hannaham, and John G. Parsons to approve; Peter G. May to approve by absentee vote).

Vote of July 31, 2003

The Zoning Commission at its public meeting held on July 31, 2003, **ADOPTED** this order by a vote of 4-0-1 (Carol J. Mitten, Anthony J. Hood, John G. Parsons, and James H. Hannaham to adopt; Peter G. May, having not participated in the case, not voting).

In accordance with the provisions of 11 DCMR § 3028.9, this order shall become effective upon publication in the *D.C. Register*; that is on _____.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
CORRECTED ORDER NO. 03-14-A
Z.C. Case No. 03-14
(Text Amendment – 11 DCMR § 3202.5(a))
July 31, 2003

The full text of this Zoning Commission Order is published in the "Final Rulemaking" section of this edition of the *D.C. Register.*