

Zoning Commission of the District of Columbia
Case No. 08-06A
Submission of John Lawrence Hargrove
and Ann Hughes Hargrove
on
Procedures for determination of uses and “use groups”
(Subtitles B, C and others)
September 12, 2014

We believe the Commission should carefully and skeptically consider the wisdom of the proposed new scheme, set out in Ch. 2 of subtitle B, Ch. 2 of Subtitle C and in specific provisions in the R, RF RA and P zones, for providing permissible uses in the various zone districts. OP’s approach is to do away with many dozens of specific , sometimes quaintly obsolescent uses in favor of a much smaller list of general *categories* of permissible uses, or “use groups”, set out in subtitle B. When a property owner seeks a permit for a specific activity x on lot y, the Zoning Administrator (ZA) would determine which, if any, of the “use groups” activity x falls within.¹ There are several problems with this perhaps superficially attractive and simpler scheme.

First, it is not simpler, because it does not do away with the longer (and presumably indefinitely expandable) list of specific uses: the proposed subtitle B already sets out a list of several dozen specific permissible uses in the form of examples listed under each general category or “use group”. So in fact what the proposed scheme does is merely add another conceptual layer – the “use groups” -- to a longer list of specific activities that is functionally identical to the list of uses permitted in the present code.

Second, from the point of view of end users of the code, it is not at all clear that inserting the list of general categories serves any useful purpose, and in fact it may render the permitting system more prone to controversy and dispute. Property owners need – and expect – a certain minimum of precision, certainty and predictability from the regulations on their face. A code that lists all the permitted specific uses, with the ZA in the position of interpreting those specific use provisions to see whether an applicant’s proposed activity fits, will probably pass muster. But the more general the concept that an official decision-maker is empowered to apply, the greater that official’s discretion, and the greater the likelihood that the end user will feel his or her interests have been arbitrarily thwarted and that the decision should be challenged. And that

¹ C-201.4. “The Zoning Administrator shall determine the category or categories for a use, based on consistency with B Chapter 2.”

feeling of grievance may well be exacerbated by the sense that the system in which the challenge must be prosecuted is to some extent already stacked against the challenger, since in practice the BZA can be expected to accord the ZA a measure of deference, and by law the Court of Appeals must very substantially defer to the BZA. It is in the interest of all concerned to devise a system that will minimize disputes and avoid this sort of outcome to the greatest extent possible.

As to the property owner's need for certainty and predictability, over time it is to be expected that the list of specific uses that the ZA has determined to fit within a "use group" will grow. But as the proposal now stands, that list will be found only in the files (and head) of each successive Zoning Administrator and in DCRA's permitting records – effectively unknowable to the property owner and of even less use in determining his or her rights than the uncodified decisions of the Board of Zoning Adjustment..

Finally, the scheme needs re-thinking because of the extent to which it would shift the Commission's legislative function to a single official – the Zoning Administrator. In some of the land use subtitles (notably, for the R, RF, RA and P zones) the ZA is given authority to determine that "uses", "use groups" or "use categories" (the language is not uniform for these subtitles – and if nothing else this discrepancy must be fixed) that were not previously permitted for those zone districts are henceforth allowed, on the basis of a fairly vacuous "compatibility" criterion. Conservatively interpreted, this language presumably does not authorize the ZA to invent new use categories – a delegation to that extent we think would surely run afoul of the Home Rules Charter. But at a minimum it would authorize the ZA to add, to a zone's permitted-use list, a presently recognized use group or category, as well as a specific *use* whether or not already recognized in the code. This further enlarges the ZA's discretion and increases the attendant uncertainty that the property owner must contend with.

A zoning code does three basic jobs: it divides the town into zones, it provides rules regarding what a property owner can build on a lot in each zone, and it determines what use can be made of the lot and building if any. In DC this Commission is the legislature that writes the code. Nothing is closer to the heart of a zoning code than establishing permitted uses and specifying *where* they are permitted, and this job should be done by the legislature – this Commission – through normal legislative process with all the procedural safeguards that that may imply. While under the current proposals the Commission will of course retain the authority and ability to do this, in practical effect, a substantial piece of this legislative function will be performed by the Zoning Administrator. We think that is at least very bad policy and possibly legally questionable.

We believe a better system would be one in which

(1) the general categories are retained if at all only as a convenient way of organizing specific use provisions in the code,

(2) a longer list of specific uses is prepared for inclusion in the re-write (beginning with the several dozen example uses that are already listed under the various use groups, and the substantial number of specific uses mentioned only in the land use subtitles but not mentioned in Subtitle B),

(3) the ZA's authority to add uses or use groups is pared back or eliminated and all subtitles are treated alike in this respect, and

(4) in the future the Commission does its legislative job whenever the question of creating a new permitted use is raised.