February 4, 2022

VIA IZIS

Zoning Commission
of the District of Columbia
441 4th Street, NW - Suite 210
Washington, DC 20001

Re: Failure to Follow Proper Rulemaking Procedure in Z.C. Case No. 19-14A

Dear Members of the Zoning Commission:

The Land Use Section of the Office of the Attorney General ("**OAG-LU**") respectfully objects to the procedure adopted by the Zoning Commission (the "**Commission**") at its January 13, 2022, public meeting to revise the Commission's previous amendment of the Zoning Regulations (Title 11 of the DCMR, Zoning Regulations of 2016, to which all references are made unless otherwise specified) in Z.C. Case No. 19-14 by revising Subtitle E § 5201.2 and Subtitle F § 5201.2. OAG-LU believes that the Commission's action was inconsistent with the requirements for:

- a public hearing for all amendments of the Zoning Regulations as required by the Zoning Act (D.C. Code 6-641.01.03); and
- the notice and comment period of for rulemakings under the District's Administrative Procedures Act (D.C. Code 2-501, *et seq.*; "**DCAPA**") and associated regulations (Title 1, Chapter 3, of the DCMR).

OAG-LU asserts that the Commission's revisions substantively change the current text of these subsections of the Zoning Regulations as detailed below and therefore require both a public hearing and a full rulemaking with proper notice, not the "technical correction" proposed by the Office of Planning ("**OP**") as a consent calendar item with the only notice provided on the Commission's meeting agenda on the Office of Zoning website for less than 10 days prior to the Commission's meeting.

The Commission's revisions remove a prepositional phrase ("with one (1) principal dwelling unit") that limited the application of Subtitle E § 5201.2 and Subtitle F § 5201.2 in authorizing special exception relief from certain zoning requirements. The Commission's revisions significantly expand the types of structures eligible for special exception relief – structures that would otherwise have to obtain a more stringent variance. A variance is an act or condition not permitted by the Zoning Regulations, it therefore has a higher legal bar than a special exception, which is an authorized act provided the Board of Zoning Adjustment determines any resulting impacts on neighboring properties are mitigated. The result of the Commission's revisions is a relaxation of the limits on building accessory structures for a large number of buildings – as the OP request for the revisions (Ex. 22) recognizes:

"The language in § E-5201.2 and § F-5201.2 [that OP proposed be deleted] *has the effect of eliminating the special exception path for a property owner of a flat within the RF or RA zones, and for a property owner of a flat or apartment building in the RA zones who wishes to construct a new accessory structure or enlarge an existing accessory structure."*

Despite this substantive change, the OP request asserts that the prepositional phrase can be removed as a "technical correction" without notice and comment because the addition of the prepositional phrase to these subsections was "not the intent of the provisions." Yet the OP request did not cite any evidence in the record of Z.C. Case No. 19-14 to support this contention.

To the contrary, OAG-LU asserts that the record of Z.C. Case No. 19-14 shows that this prepositional phrase was included throughout the case and that it is not clear that the Commission did not intend to apply it to Subtitle E § 5201.2 and Subtitle F § 5201.2:

- OP's petition/setdown report initiating Z.C. Case No. 19-14 (Ex. 2) proposed to move this existing prepositional phrase from § 5201.2 of Subtitle D to §§ 5201.1 of Subtitles D and E;
- the Notice of Public Hearing (Ex. 4) in Z.C. Case No. 19-14 moved this prepositional phrase only to Subtitle D § 5201.1 and not to Subtitle E;
- the Notice of Proposed Rulemaking (Ex. 15), (published in the April 3, 2020, *D.C. Register*) ("**NOPR**") added this prepositional phrase to Subtitle D § 5201.2, Subtitle E § 5201.2, and Subtitle F § 5201.2; and
- no comments were filed by OP or the public in response to the NOPR and the Notice of Final Rulemaking (Ex. 16), (published in the July 3, 2020, *D.C. Register*) ("**NOFR**") replicated the text of the NOPR, including this prepositional phrase in Subtitle D §§ 5201.1 and 5201.2, Subtitle E § 5201.2, and Subtitle F § 5201.2.

OAG-LU asserts that the Commission failed to provide the public with adequate notice of the proposed revisions – since the NOFR included the amendments to Subtitle D § 5201.2, Subtitle E § 5201.2, and Subtitle F § 5201.2, there was no reasonable expectation by the public that additional substantive changes would occur as the rulemaking was completed. Even if the Commission's revisions had been proposed in the NOFR instead of over a year later, OAG-LU asserts that these revisions require a revised NOPR be issued first to provide an additional notice and comment period because since removing this prepositional phrase changes the substantive meaning of the text published in the NOPR and so would constitute a "substantive alteration" under 1 DCMR 310.6 requiring an additional notice and comment period.

OAG-LU notes that the Commission published two errata in Z.C. Case No. 19-14 after the publication of the NOFR, but asserts that these errata did not change the substance of these subsections because:

- the first errata corrected an erroneous cross-reference (Errata, Ex. 19, published in the September 25, 2020, *D.C. Register*); and
- the second errata added a term ("new building") missing in the conforming amendments in Z.C. Case No. 19-14 to paragraph (d) that implemented the preceding paragraph (c) of Subtitle D § 5201.4, Subtitle E § 5201.4, and Subtitle F § 5201.4 (2nd Errata, Ex. 21, published in the May 7, 2021, *D.C. Register*).

Both errata included an explanation justifying their categorization as errata that retained the substantive meaning and application of the text published in the NOFR and so did not constitute a "substantial alteration" of the text published in the NOFR because the errata fell within the exemptions laid out in 1 DCMR 310.6 that implements the DCAPA:

- a re-arrangement or renumbering of portions of the NOPR's text;
- a re-wording of the NOPR's text to correct errors in format or style; or
- re-wording of the NOPR's text to clarify the intent of the rule affected by the published text provided that **it would not substantially change the intent, meaning, or application of the NOPR's text** (emphasis added).

In contrast, the Commission's revisions' remove the current limitation on special exception relief for new or enlarged accessory structures to residential buildings with only one principal dwelling unit and so allow multifamily buildings to qualify for the special exception. If that was the intent of OP and the Commission, the prepositional phrase should have been removed from Subtitle E § 5201.2 and Subtitle F § 5201.2 in the NOPR before publication.

OAG-LU's concern is that the Commission appears to not recognize that changes to the text of the NOPR and NOFR must comply with the rulemaking process governed by the DCAPA, as well as with the public hearing requirement for amendments to the Zoning Regulations imposed by the Zoning Act. These revisions substantively change the text proposed for public comment in the NOPR as well as the final text adopted by the NOFR in Z.C. Case No. 19-14. The DCAPA requires that the public have notice of proposed changes and an opportunity to comment before changes become effective and does not permit additional substantive changes to be added long after the final rules have been published. Although these revisions may not be contrary to OP's original intent in proposing the amendments, and of the Commission in adopting these amendments in in Z.C. Case No. 19-14, the fact remains that these revisions substantively change the meaning and applicability of the Zoning Regulations as contained in the NOFR. Furthermore, OAG-LU is particularly concerned that the process of legal reviews by OP and the Commission appear to have missed this significant departure from the rulemaking requirements – and if left unchallenged may establish a practice for future amendments of the Zoning Regulations contrary to the requirements of the DCAPA, including amendments that may have a larger impact.

<u>Commission's proposed amendment</u>:

Subtitle E § 5201.2 For a new or enlarged accessory structure to a residential building ~~**with one (1) principal dwelling unit**~~ on a non-alley lot, the Board of Zoning Adjustment may grant relief from the following development standards as a special exception, subject to the provisions of this section and the general special exception criteria at Subtitle X, Chapter 9:

(a) Lot occupancy under Subtitle E § 5003 up to a maximum of seventy percent (70%) for all new and existing structures on the lot;
(b) Yards, including alley centerline setback;
(c) Courts; and
(d) Pervious surface.

Subtitle F § 5201.2 For a new or enlarged accessory structure to a residential building ~~**with one (1) principal dwelling unit**~~ on a non-alley lot, the Board of Zoning Adjustment may grant relief from the following development standards as a

special exception, subject to the provisions of this section and the general special exception criteria at Subtitle X, Chapter 9:

(a) Lot occupancy up to a maximum of seventy percent (70%) for all new and existing structures on the lot;
(b) Yards, including alley centerline setback;
(c) Courts; and
(d) Green Area Ratio.

We respectfully request the Zoning Commission address this issue as a correspondence item at its next public meeting and take action to rescind the "technical correction" and follow the proper rulemaking procedures.

Respectively submitted,

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Attachments
cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2022, a copy of the foregoing application was served on the following by email.

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