

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING
Z.C. Case No. 20-11
(Text Amendment – Subtitles Y and Z of Title 11 DCMR)
(Emergency Virtual Public Meeting Procedures)
May 11, 2020

The Zoning Commission for the District of Columbia (Commission), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01 (2018 Repl.)), and pursuant to § 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2016 Repl.)), hereby gives notice of its amendment on an emergency basis, as well as its intent to amend on a permanent basis, the following provisions of Title 11 of the District of Columbia Municipal Regulations (Zoning Regulations of 2016, the “Zoning Regulations,” to which all references are made unless otherwise specified):

Subtitle Y, Board of Zoning Adjustment Rules of Practice and Procedure

Chapter 1, Administration

§§ 103.12 and 103.13 – rules for virtual public hearings and meetings

Chapter 2, Public Participation

§§ 206.3 and 206.7 – electronic submission of comments and exhibits required at least 24 hours prior to the start of the public hearing or meeting

Chapter 4, Pre-Hearing and Hearing Procedures: Contested Cases

§§ 401.4 and 401.6 – updated ANC notice and posting requirements for expedited review applications

Subtitle Z, Zoning Commission Rules of Practice and Procedure

Chapter 1, Administration

§§ 103.12 and 103.13 – rules for virtual public hearings and meetings

Chapter 2, Public Participation

§§ 206.3 and 206.7 – electronic submission of comments and exhibits required at least 24 hours prior to the start of the public hearing or meeting

On May 11, 2020, the Office of Zoning (OZ) filed a petition to the Commission proposing these amendments to clarify the procedural rules for virtual public hearings and meeting due to the suspension of in-person public hearings and meetings caused by the ongoing COVID-19 pandemic and resulting modifications of District government operations. OZ requested that the Commission:

- Set the petition down for a public hearing;
- Consider taking emergency action to adopt the text amendment; and
- Authorize an immediate publication of proposed rulemaking for the text amendment.

The Commission concludes that taking emergency action to adopt the proposed text amendment is necessary for the “immediate preservation of the public ... welfare,” as authorized by § 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c) (2012 Repl.)), in order to allow the continuation of public hearings and meetings despite the suspension of in-person public hearings and meetings due to the ongoing COVID-19 pandemic, with the attendant risk to the District’s economic condition.

At its May 11, 2020, public meeting, the Commission asked for OZ to work with the Office of the Attorney General to revise the proposed text to clarify the rules for virtual submission of oral testimony and exhibits at a public hearing and voted to grant OZ's request, as modified pursuant to the Commission's request, to:

- Take emergency action to adopt the text amendment;
- Set the petition down for a public hearing; and
- Authorize an immediate publication of proposed rulemaking for the text amendment.

Emergency & Proposed Action

VOTE (May 11, 2020): **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to **APPROVE**)

Emergency Action

The emergency rule is effective as of the Commission's May 11, 2020, vote and will expire on September 8, 2020, which is the one hundred-twentieth (120th) day after the adoption of this rule, or upon publication of a Notice of Final Rulemaking in the *D.C. Register* that supersedes this emergency rule, whichever occurs first.

Proposed Action

The Commission hereby also gives notice of its intent to adopt on a permanent basis the following text amendment to the Zoning Regulations in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with Sharon Schellin, Secretary to the Zoning Commission, Office of Zoning, through the Interactive Zoning Information System (IZIS) at <https://app.dcoz.dc.gov/Login.aspx>; however, written statements may also be submitted by mail to 441 4th Street, N.W., Suite 200-S, Washington, D.C. 20001; by e-mail to zcsubmissions@dc.gov; or by fax to (202) 727-6072. Ms. Schellin may be contacted by telephone at (202) 727-6311 or by email at Sharon.Schellin@dc.gov. Copies of this proposed rulemaking action may be obtained at cost by writing to the above address.

The complete record in the case, including the OP report and the transcript of the public meeting, can be viewed online at the Office of Zoning website, through the Interactive Zoning Information System (IZIS), at <https://app.dcoz.dc.gov/Content/Search/Search.aspx>.

EMERGENCY / PROPOSED TEXT AMENDMENT

The following amendments to the Zoning Regulations are adopted on an emergency basis, and are proposed for the Commission's final consideration (additions are shown in **bold** and underlined text and deletions are shown in **bold** and ~~striketrough~~ text):

I. Amendments to Subtitle Y, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE

Section 103, MEETINGS AND HEARINGS, of Chapter 1, ADMINISTRATION, of Subtitle Y, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended by revising § 103.12 and by adding a new § 103.13, to read as follows:

103.12 If the time and place of resumption is publicly announced when a postponement, continuance, or adjournment is ordered, no further notice shall be required. For the purposes of this section, the form of the public announcement **shall be on the website of the Office of Zoning and** may **be include** a sign placed at the entrance to the Board's hearing room.

103.13 **The Board may hold its meetings and hearings in a partially or completely online virtual mode, through video conference, teleconference, or other electronic means identified by the Board for this purpose, as authorized by, and in compliance with, the Open Meetings Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-577), subject to the following:**

- (a) A party to a case may request the Board not to hold the public hearing as an online virtual hearing but instead postpone the public hearing until the next available in-person public hearing; provided that the request includes specific reasons for the postponement and any potential accommodations that might resolve the concerns underlying the postponement request;**
- (b) The posting of the agenda for each public hearing or meeting on the website of the Office of Zoning shall be deemed to comply with the requirement of Subtitle Y § 103.6 to be "available at" the public hearing or meeting;**
- (c) Members, whether present physically or remotely, shall be counted for determination of a quorum;**
- (d) A party, witness, agency representative, or party status requestor shall be deemed to "appear" or to be "present" if available for questioning and cross-examination during the hearing by the videoconference, teleconference, or other electronic means identified by the Board;**
- (e) The Board may question parties and witnesses by videoconference, teleconference, or other electronic means identified by the Board;**
- (f) Cross-examination may be performed by videoconference, teleconference, or other electronic means identified by the Board;**

- (g) Exhibits may be offered into evidence at an online virtual public hearing; provided that:**
- (1) An exhibit is submitted to the Office of Zoning by the Interactive Zoning Information System (IZIS) or by e-mail to BZASubmissions@dc.gov prior to the start of the hearing in which the exhibit will be used; except as allowed by the Board as relevant and not prejudicial to a party;**
 - (2) Exhibits submitted by parties shall be simultaneously served by e-mail on all other parties;**
 - (3) If the Office of Zoning is unable to display the exhibits publicly during the online virtual public hearing, the Board may keep the record open for submission of the exhibits or provide other accommodations the Board deems appropriate; and**
 - (4) The Board may provide parties additional time to respond to exhibits introduced at an online virtual public hearing or other accommodations the Board deems appropriate;**
- (h) Notice of online virtual public hearings shall include instructions for participation by the videoconference, teleconference, or other electronic means identified by the Board, the details of which shall be provided on the Office of Zoning website;**
- (i) Any individual or organization representative desiring to participate in an online virtual public hearing shall sign up to testify with the Office of Zoning prior to the conclusion of public testimony at the online virtual public hearing per the instructions provided on the Office of Zoning website;**
- (j) All individuals or organization representatives signing up to testify shall perform the required oath or affirmation when signing up;**
- (k) An individual or organization representative who is unable to testify at a public hearing due to technical issues may file a request for leave to file a written version of the planned testimony to the record; provided that;**
- (1) The request includes an explanation of the technical issues that prevented the timely testimony;**
 - (2) The request is submitted to the record within the twenty-four (24) hours following the conclusion of public testimony in the hearing; and**

(3) Parties are allowed a reasonable time to respond;

(l) A party that is unable to raise a legal objection in a public hearing may file a request for leave to file a written version of the objection, explaining how the party attempted to raise an objection during the public hearing and why that attempt was unsuccessful; provided that the request is filed within twenty-four (24) hours of the conclusion of the hearing session in which the party attempted to raise the objection;

(m) The Board shall not deliberate until at least forty-eight (48) hours after the conclusion of the public hearing; and

(n) All votes shall be taken by roll call.

Subsections 206.3 and 206.7 of § 206, SUBMITTING COMMENTS OR FILING DOCUMENTS ELECTRONICALLY OR BY E-MAIL, of Chapter 2, PUBLIC PARTICIPATION, of Subtitle Y, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, are amended to read as follows:

206.3 **Other than written comments to be introduced at a public hearing,** comments may be submitted electronically through IZIS or by e-mail; except that no comments shall be submitted into the record electronically ~~after 9:00 a.m. on the day~~ **less than twenty-four (24) hours prior to the start** of the hearing **or meeting.**

206.7 **Other than exhibits to be introduced at a public hearing,** all documents to be filed electronically through IZIS or by e-mail **prior to the hearing or meeting** shall be in portable document format (PDF) and shall not be filed ~~after 9:00 a.m. on the day~~ **less than twenty-four (24) hours prior to the start** of the hearing **or meeting.**

Subsections 401.4 and 401.6 of § 401, EXPEDITED REVIEW, of Chapter 4, PRE-HEARING AND HEARING PROCEDURES: CONTESTED CASES, of Subtitle Y, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, are amended to read as follows:

401.4 Subject to the removal process described in Subtitle Y §§ 401.7 and 401.8, an eligible application that includes a waiver of hearing will be placed on an expedited review calendar and decided without hearing at the Board's next regularly scheduled session after:

(a) The completion of the public notice procedures set forth in Subtitle Y § 402; and

- (b) The completion of the affected ANC review period of thirty (30) days, **as may be extended pursuant to the Advisory Neighborhood Commission Act (D.C. Law 1-21; D.C. Official Code § 1-309.10)**, from the date it receives notice of the application, excluding Saturdays, Sundays, and holidays, plus an additional fourteen (14) days.

401.6 The public notice of an expedited review and the affected ANC notice of an application requesting expedited review shall also indicate:

- (a) The procedure for requesting the removal of the application from the expedited review calendar is as described in Subtitle Y §§ 401.7 and 401.8; and
- (b) That the only public notice of the hearing date for a removed application will be the posting of that date **in on the website of** the Office of Zoning **and may include posting on at the entrance to that office** beginning on the date that the application was removed and continuing until the date of such hearing.

II. Amendments to Subtitle Z, ZONING COMMISSION RULES OF PRACTICE AND PROCEDURE

Section 103, MEETINGS AND HEARINGS, of Chapter 1, ADMINISTRATION, of Subtitle Z, ZONING COMMISSION RULES OF PRACTICE AND PROCEDURE, is amended by revising § 103.12 and by adding a new § 103.13, to read as follows:

103.12 If the time and place of resumption is publicly announced when a postponement, continuance, or adjournment is ordered, no further notice shall be required. For the purposes of this section, the form of the public announcement **shall be on the website of the Office of Zoning and** may **be include** a sign placed at the entrance to the Commission's hearing room.

103.13 **The Commission may hold its meetings and hearings in a partially or completely online virtual mode, through video conference, teleconference, or other electronic means identified by the Commission for this purpose, as authorized by, and in compliance with, the Open Meetings Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code § 2-577), subject to the following:**

- (a) **A party to a case may request the Commission not to hold the public hearing as an online virtual hearing but instead postpone the public hearing until the next available in-person public hearing; provided that the request includes specific reasons for the postponement and any potential accommodations that might resolve the concerns underlying the postponement request;**

- (b) The posting of the agenda for each public hearing or meeting on the website of the Office of Zoning shall be deemed to comply with the requirement of Subtitle Z § 103.6 to be “available at” the public hearing or meeting;**
- (c) Members, whether present physically or remotely, shall be counted for determination of a quorum;**
- (d) A party, witness, agency representative, or party status requestor shall be deemed to “appear” or to be “present” if available for questioning and cross-examination during the hearing by the videoconference, teleconference, or other electronic means identified by the Commission;**
- (e) The Commission may question parties and witnesses by videoconference, teleconference, or other electronic means identified by the Commission;**
- (f) Cross-examination may be performed by videoconference, teleconference, or other electronic means identified by the Commission;**
- (g) Exhibits may be offered into evidence at an online virtual public hearing; provided that:**
- (1) An exhibit is submitted to the Office of Zoning by the Interactive Zoning Information System (IZIS) or by email to ZCSubmissions@dc.gov prior to the start of the hearing in which the exhibit will be used; except as allowed by the Commission as relevant and not prejudicial to a party;**
 - (2) Exhibits submitted by parties shall be simultaneously served by email on all other parties;**
 - (3) If the Office of Zoning is unable to display the exhibits publicly during the online virtual public hearing, the Commission may keep the record open for submission of the exhibits or provide other accommodations the Commission deems appropriate; and**
 - (4) The Commission may provide parties additional time to respond to exhibits introduced at an online virtual public hearing or other accommodations the Commission deems appropriate;**

- (h) Notice of online virtual public hearings shall include instructions for participation by the videoconference, teleconference, or other electronic means identified by the Commission, the details of which shall be provided on the Office of Zoning website;**
- (i) Any individual or organization representative desiring to participate in an online virtual public hearing shall sign up to testify with the Office of Zoning prior to the conclusion of public testimony at the online virtual public hearing per the instructions provided on the Office of Zoning website;**
- (j) All individuals or organization representatives signing up to testify shall perform the required oath or affirmation when signing up;**
- (k) An individual or organization representative who is unable to testify at a public hearing due to technical issues may file a request for leave to file a written version of the planned testimony to the record; provided that:**
- (1) The request includes an explanation of the technical issues that prevented the timely testimony;**
- (2) The request is submitted to the record within the twenty-four (24) hours following the conclusion of public testimony in the hearing; and**
- (3) Parties are allowed a reasonable time to respond;**
- (l) A party that is unable to raise a legal objection in a public hearing may file a request for leave to file a written version of the objection, explaining how the party attempted to raise an objection during the public hearing and why that attempt was unsuccessful; provided that the request is filed within twenty-four (24) hours of the conclusion of the hearing session in which the party attempted to raise the objection;**
- (m) The Commission shall not deliberate until at least forty-eight (48) hours after the conclusion of the public hearing; and**
- (n) All votes shall be taken by roll call.**

Subsections 206.3 and 206.7 of § 206, SUBMITTING COMMENTS OR FILING DOCUMENTS ELECTRONICALLY OR BY E-MAIL, of Chapter 2, PUBLIC PARTICIPATION, of Subtitle Z, ZONING COMMISSION RULES OF PRACTICE AND PROCEDURE, are amended to read as follows:

206.3 Other than written comments to be introduced at a public hearing, comments may be submitted electronically through IZIS or by e-mail; except that no comments shall be submitted into the record electronically ~~after 5:00 p.m. on the day~~ less than twenty-four (24) hours prior to the start of the hearing or meeting.

206.7 Other than exhibits to be introduced at a public hearing, all documents to be filed electronically through IZIS or by e-mail prior to the hearing or meeting shall be in portable document format (PDF) and shall not be filed ~~after 9:00 a.m. on the day~~ less than twenty-four (24) hours prior to the start of the hearing or meeting.