

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 14-11D
Z.C. Case No. 14-11D
(Text Amendment – 11 DCMR)
(Subtitle A § 301, Vesting Provision for Z.C. Case No. 14-11B)
October 30, 2017

The Zoning Commission for the District of Columbia (Commission), pursuant to the authority set forth in § 1 of the Zoning Act of 1938, approved June 20, 1938, as amended (52 Stat. 797; D.C. Official Code § 6-641.01 (2012 Repl.)), hereby gives notice of the adoption of an amendment to § 301 of Subtitle A (AUTHORITY AND APPLICABILITY) of Title 11 (Zoning Regulation of 2016), of the District of Columbia Municipal Regulations (DCMR). Subtitle A contains administrative regulations (*See* 11 DCMR § 200.3) and, therefore, this amendment is not considered to be an amendment to the text of the Zoning Regulations and no referral to the National Capital Planning Commission (NCPC) is required. (*See* 11-Z DCMR § 603.1(b).)

This amendment is an exception to 11-A DCMR § § 301.4. That provision vests development rights based upon the Zoning Regulations in place on the date a building permit is issued. The exemption applies to building permit applications that proposed construction of a rear wall of an attached or semi-detached building that would extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on an adjoining property, if the application was filed and accepted as complete by the Department of Consumer and Regulatory Affairs on or before March 27, 2017 and not substantially changed after filing. Such construction became unlawful on April 28, 2017 as a result of the Commission's March 28, 2017 vote to adopt amendments proposed in Z.C. Case No. 14-11B (Case 14-11B Prohibition).

As of May 12, 2017, there were at least twenty (20) applications filed on or before March 27, 2017, which proposed rear additions that were now subject to the Case 14-11B Prohibition, and thirteen (13) remained pending as of September 14, 2017. Several had already received zoning clearance. Compliance with the Case 14-11B Prohibition would require extensive and costly re-design or obtaining a special exception, either of which cause delays. In response, the Commission adopted this amendment on an emergency basis on May 22, 2017, and re-adopted it September 14, 2017. The permanent adoption of the rule will allow any of the twenty (20) applications that remain pending to continue to be processed notwithstanding the Case 14-11B Prohibition and provides a permanent explanation as to how these structures were permitted. Other than these twenty (20) applications, the adoption of this rule does not relieve any other building permit application from compliance with the Case 14-11B Prohibition.

At the time it adopted the first emergency, the Commission also authorized the publication of a notice of proposed rulemaking and the advertisement of a public hearing. A notice of emergency and proposed rulemaking was published in the June 16, 2017 edition of the *D.C. Register* at 64 DCR 5735, along with notice that a public hearing would be held on September 14, 2017.

Written comments in support of the proposed rule were received from Cunningham Quill Architects, PLLC; Ian and Allison Milne; Fowler Architects; Stephen and Ann Reiling; Heliocentric, LLC; Maher Kalijian; Tara Guelig and Yuri Horwitz; and Lerch Early Brewer on behalf of Giuseppe Farrugio. No comments in opposition were submitted. Generally, the comments expressed concern about the loss of time and money associated with rear addition projects where a special exception would now be necessary absent the adoption of a vesting provision for the Case 14-11B Prohibition. Lerch Early Brewer's comments on behalf of Giuseppe Farrugio requested broader amendment language to allow projects to vest if a significant project milestone was achieved or a land use government approval obtained on or before March 27, 2017.

Through a letter dated September 7, 2017, the Chair of Advisory Neighborhood Commission (ANC) 6C advised the Commission that on July 12, 2017, at a duly noticed, regularly scheduled monthly meeting and with a quorum present, the ANC voted 6-0 to submit a letter stating its strong opposition to Z.C. Case No. 14-11D. The ANC identified one major issue and concern. The ANC has a pending appeal before the Board of Zoning Adjustment (BZA) involving construction authorized through a building permit that was filed and accepted as complete before March 27, 2017 and issued March 31, 2017. The structure includes a rear addition that exceeds the size disallowed by the Case 14-11D Prohibition, but since that prohibition was not in effect on March 31, 2017, construction of the rear addition was matter of right as of building permit issuance. In its appeal, the ANC is alleging zoning violations unrelated to the rear addition. The ANC is concerned that if it prevails on the appeal, and the owner submits new plans that address the errors it alleges, the project will be vested as to the non-compliant rear addition because of the proposed amendment. The original permit application was filed and accepted as complete prior to the March 27, 2017 vesting date of the proposed amendment. If the non-compliant rear addition is vested, there would be no requirement for the owner to obtain special exception approval to build it. The ANC stated that "[s]uch a result would be grossly unfair to the abutting property owners, whose situation is exactly the type Order 14-11B sought to address."

At the public hearing on September 14, 2017, the Commission heard testimony from persons in support of and in opposition to the permanent adoption of the rule. The written testimony of the Committee of 100 on the Federal City (Committee) opposed the amendment's vesting provision because they considered it to be inconsistent with the Commission's intent when it adopted the Case 14-11B Prohibition to stop the proliferation of unsightly "pop-back" structures throughout the District. Laura Richards, in her testimony on behalf of the Committee, further stated that if the purpose of the rules was to vest the 20 applicants with pending applications, the emergency rule addressed that issue and that there was no need for a permanent rule.

Lynn Grosso's written and oral testimony expressed concern about the amendment's possible effect on projects where building permits had been applied for prior to March 27, 2017, but not pursued, thereby creating an indefinite vesting. In Ms. Grosso's case, her neighbor filed a building permit involving a rear addition that she believes has been pending since January 2016, but is not being pursued. She therefore suggested revising the proposed amendment so that vesting would apply only to building permit applications filed on or within six months prior to March 27, 2017. Ms. Grosso further urged the Commission to clarify the terms "filed and accepted as complete" and "not substantially changed after filing".

The Commission also heard oral testimony from Leonard and Sheryl Bennett, who filed for building permits on March 31, 2017, four days after the March 27, 2017 vesting date. Mr. Bennett explained that they purchased their property in June 2016 with the intent to renovate, but because the property was located in a historic district their renovation plans were required to go through historic preservation and that process was not completed until early 2017. Thereafter, they revised their plans to comply with the recommendation received and therefore were not able to file for a building permit until four days after the vesting date had passed. The Bennetts did not indicate the date that the application was accepted as complete by DCRA or whether it has been modified.

At the conclusion of the hearing, the Commission requested the Office of Planning (OP) to submit a supplemental report concerning the length of time an application for building permit can be dormant in the Department of Consumer and Regulatory Affairs' system and still be considered active. Through a Supplemental Report dated October 5, 2017, OP advised the Commission that an application for building permit is deemed abandoned 180 days after the filing date unless such application has been pursued in good faith or a permit has been issued.

At its public meeting on October 16, 2017, the Commission discussed the Department of Consumer and Regulatory Affairs' response and voted to refer the case to NCPC, which as explained above was unnecessary. Upon recognizing that such review was not needed, the case was placed on the agenda for the Commission's October 30, 2017 public meeting.

At the public meeting on October 30, 2017, the Commission took final action to adopt the amendment without making changes to the text.

In response to the written comments and testimony, the Commission declined to expand the vesting to include significant project milestones achieved or land use governmental approvals obtained on or before March 27, 2017 because its limited intent was to assure that only 20 applications reached building permit based on the date it took final action in Z.C. Case No. 14-11B. An expansion of the vesting to land use governmental approvals would address the circumstance faced by the Bennetts, who apparently received conceptual historic preservation review approval in January of this year and would be vested under the expansion suggested. Though the Commission is sympathetic for the couple's predicament, moving the vesting date to March 31, 2017, the date the Bennett filed their application, may not prove helpful to their circumstances because it is the date the application is accepted as complete that vests the project not the date the application is filed. The Commission does not know what date the Bennetts'

application was accepted as complete. As noted, March 27, 2017 was chosen because that was the date the Commission took final action on Z.C. Case No. 14-11B. This is consistent with the Commission's past practice of choosing early vesting dates based on its actions (setdown or final action vote), and not the needs of a particular project. Applying for a special exception may add some delay and cost, but that burden is relatively modest when compared to the need for the Case 14-11B Prohibition to be consistently enforced.

The Commission is equally sympathetic to Ms. Gross' issue, but notes that if in fact her neighbor has failed to pursue the permit in good faith since January of 2016, that application should have been deemed abandoned by DCRA. The 20 building permit applications of concern to the Commission were all active as of March 27th and therefore Ms. Gross' suggested revision is not needed. As to Ms. Gross' suggestion that the terms "filed and accepted as complete" and "not substantially changed after filing" need clarification, the Commission has already set down Z.C. Case No. 17-03 to accomplish that.

Finally, as to the Committee of 100's thoughtful testimony, the Commission does not view this limited vesting as inconsistent with its intent to require special exception approval for extensive rear additions. As the Committee notes, the rule's scope will affect a limited number of projects. As to the need for a permanent rule, the Commission cannot be certain that DCRA's review of remaining applications will be completed by the termination of the second emergency on January 12, 2018. Also, there is value in having a permanent regulatory explanation for divergences of this kind.

The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC's, which in this case are all ANC's. To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. In this instance, only ANC 6C submitted a written report, in which it stated its strong opposition to the amendment for the reasons discussed above. As noted, the ANC is concerned about a project including a rear addition that was issued a building permit prior to the effective date of the Case 14-11B Prohibition; the ANC is appealing the permit for reasons unrelated to the rear addition. The ANC is concerned that should it prevail, the property owner would still be able to build the rear addition without special exception approval because the Zoning Administrator might consider the rear addition to be vested based on the fact the building permit application was filed and accepted as of March 27, 2017. Though the Commission understands the ANC's concern, the Commission does not find the ANC's advice to be persuasive. The application for the project the ANC is appealing was filed and accepted as complete by March 27, 2017 but the project is not vested on this basis but rather because the project was issued a building permit on March 31, 2017. The ANC apparently believes that if it prevails on its appeal, the project must not be only re-designed to eliminate the zoning violations found, but must also be redesign so that its rear addition, which the ANC did not challenge, is consistent with the Case 14-11 Prohibition. As explained, the ANC is concerned that this divestment will not occur should the proposed rule be adopted. Even assuming that a rear addition vested as a result of the issuance of a building permit becomes

divested should the BZA find that other aspects of the project violate the Zoning Regulations, the mere possibility that this divestment would not occur in is not sufficient cause for not going forward with this amendment. All that will be lost is a BZA review on the rear addition. Whatever value is lost is more than made up in the certainty afforded through the permanent adopting of this rule at this time.

The amendment shall become effective upon publication of this notice in the *D.C. Register*.

Title 11 DCMR, ZONING REGULATIONS OF 2016, is amended as follows:

A new § 301.14 is added to § 301, BUILDING PERMITS, of Chapter 3, ADMINISTRATION AND ENFORCEMENT, of Title 11-A, AUTHORITY AND APPLICABILITY, to read as follows:

301.14 Notwithstanding Subtitle A § 301.4, Subtitle D §§ 306.3, 306.4, 706.3, 706.4, 1006.2, 1006.3 1206.3, and 1206.4, and Subtitle E §§ 205.4 and 205.5, a rear wall of an attached or semi-detached building may be constructed to extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on an adjoining property provided that the building permit application for such construction was filed and accepted as complete by the Department of Consumer and Regulatory Affairs on or before March 27, 2017 and not substantially changed after filing.

On May 22, 2017, upon the motion of Commissioner Turnbull, as seconded by Commissioner Shapiro, the Zoning Commission **ADOPTED** this rulemaking on an emergency basis and **AUTHORIZED** publication of a notice of proposed rulemaking and advertisement of a public hearing at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to adopt and approve)


On September 14, 2017, upon the motion of Vice Chairman Miller, as seconded by Commissioner May, the Zoning Commission **RE-ADOPTED** this rulemaking on an emergency basis at the conclusion of its public hearing by a vote of 4-0-1 (Anthony J. Hood, Robert E. Miller, Peter G. May, and Michael G. Turnbull to adopt; Peter A. Shapiro, not present, not voting).


On October 30, 2017, upon the motion of Commissioner Shapiro, as seconded by Chairman Hood, the Zoning Commission took **FINAL ACTION** to **APPROVE** this rulemaking at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Michael G. Turnbull, and Peter G. May to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is on November 24, 2017.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.


ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION


SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

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