

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING¹

Z.C. Case No. 17-03

Office of Planning

(Text Amendments to Subtitles A, Sections 301.5(a) & 301.7
(re: processing of building permit applications filed prior
to a Zoning Commission vote to setdown a map amendment or that
are authorized by a Zoning Commission or Board of Zoning Adjustment
contested case order))

December 3, 2018

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 (2012 Rep1.)), hereby gives notice of its adoption of amendments to Subtitle A (Authority and Applicability), of Title 11 (Zoning Regulations of 2016) of the District of Columbia Municipal Regulations (DCMR).

Subtitle A, § 301.5 governs how building permit applications are processed when a map amendment to rezone the site is pending before the Commission. The crucial date is the date upon which the Commission votes to set down the case for a hearing (Setdown Date).

Paragraph 301.5(a) provides that building permit applications filed on or before the Setdown Date that are sufficiently complete to permit processing without substantial change or deviation are processed in accordance with Subtitle A § 301.4. Subsection 301.4 is the general vesting rule and provides that construction rights are vested as of the day a building permit is issued. Thus, a building permit application that is filed before the Setdown Date is processed in accordance with its existing zone designation unless the proposed map amendment is adopted while the application is still in process, in which case the new designation applies. Since this is always the case, § 301.5(a) is not a vesting rule.

Paragraph 301.5(b), which is not being amended, is an exception to the general vesting rule because it requires that building permit applications filed after the Setdown Date and being processed while the map amendment case is still pending, must be processed in accordance with whichever is the most restrictive, either the zone classification being considered for the site or, the site's current zone classification. If the map amendment takes effect before a permit is issued, the

¹ For Office of Zoning tracking purposes only, this Notice of Final Rulemaking shall also be known as Z.C. Order No. 17-03.

application becomes subject to the adopted designation. Paragraph 301.5(b) is known as the “Setdown Rule”.

Subtitle A § 301.7 is also an exception to the general vesting rule because it vests construction rights for building permits authorized by the Board of Zoning Adjustment (BZA) as of the date of the BZA vote approving the application. The adopted amendments would extend this vesting to building permits authorized by Commission contested case orders. The amendments also clarify that the vesting is limited to the extent the proposed building or structure is depicted on the plans approved by the Commission or BZA.

The Commission is aware that building permit applicants have sometimes attempted to convince the Zoning Administrator that the BZA or the Commission has approved zoning relief not expressly stated in an order, because the approved plans show other areas where such relief is needed. To remedy this, the adopted rules provide that no BZA or Commission order is deemed to include relief from any zoning regulation unless such relief was expressly requested by the applicant and expressly granted in the order. A similar provision already exists for planned unit developments, 11-X DCMR § 310.1.

On October 22, 2018, upon the motion of Chairman Hood, as seconded by Commissioner Shapiro, the Zoning Commission took Proposed Action to authorize a notice of proposed rulemaking by a vote of 5-0-0 (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

A Notice of Proposed Rulemaking for this case was published in the *D.C. Register* on November 2, 2018, at 65 DCR 012170. In response, the Commission received comments from Advisory Neighborhood Commission (“ANC”) 6C and from the law firm of Holland & Knight.

As to the ANC, its comment indicated that on November 14, 2018, at a duly noticed and regularly scheduled monthly meeting, with a quorum of five out of six commissioners and the public present, the commissioners voted 5-0 to adopt the positions set out in its letter. As such, 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) (2016 Repl.)) to give great weight to the issues and concerns raised the ANC’s written comments.

The ANC expressed two concerns with respect to the proposed amendments to § 301.5(a). First, the ANC objected to adding the phrase “and under review.” after the phrase “is officially accepted as being complete.” The ANC noted that the Commission has occasionally adopted provisions shielding building applications from the rules that became effective while the application was still pending. (*See* 11 DCMR §§ 301.9 through 301.15.) Each of these provisions establishes a date by which such applications must have been “filed by and accepted as complete.” Those dates are July 17, 2014, February 1, 2015, June 26, 2015, November 19, 2015, March 27, 2017, and August 17, 2018. Since none of these provisions includes the phrase “and under review” the ANC is concerned that any building permits still pending will be vested before review begins.

Second, the ANC addresses the proposed amendment in § 301.5 (a)(2), which identifies the circumstances when a protected building permit application would lose its protection and become

subject to the Setdown Rule. One such circumstance is if an application is amended to deviate from the submitted plans. The rule allows for exceptions, including an exception for deviations that “increase the extent to which the proposed structure complies with matter of right standards under the existing zone designation.” The ANC is concerned that this will encourage applicants to file applications containing careless or even intentional zoning violations because they could be cured with no penalty.

The comments from Holland and Knight reiterate points made in its hearing testimony and propose an amendment to the general vesting provision stated at 11-A DCMR§ 301.4 to move the construction rights vesting date from the date of permit issuance to the date that the building permit application is officially accepted as being complete and under review. The comments suggest it is illogical to vest non-matter of right projects on the date of a BZA vote, while delaying the vesting of matter of right projects until permit issuance. The comments indicate that considerable time and money is spent preparing plans filed as part of a building permit application and that such expenditures should not be put at risk by delaying vesting until that date of permit issuance.

On December 3, 2018, upon the motion of Chairman Hood, as seconded by Commissioner Shapiro, the Zoning Commission took Final Action to adopt the amendments as proposed at its public meeting by a vote of 4-0-1 (Anthony J. Hood, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve; and Robert E. Miller to approve by absentee ballot).

Prior to taking final action the Commission discussed the comments received from ANC 6C and Holland and Knight.

As to the ANC concern over the inclusion of the “under review” phrase, the Commission gave that phrase considerable attention during the hearing and was convinced by DCRA and Office of Planning representatives that adding that phrase would allow the Zoning Administrator to better pinpoint the precise date of vesting. Whether that phrase should be added to provisions with vesting dates ranging from July 2014 to August of this year goes beyond the scope of this proceeding, and therefore would require a new advertisement and hearing. The Commission wishes to proceed with the amendments before it.

The ANC also asserts that the deviation permitted by § 301.5 (a)(2)(B) would encourage the filing of applications containing careless or even intentional zoning violations because they could be cured with no penalty. The Commission disagrees and finds that the proposed language clearly encompasses only deviations to already compliant plans because such deviations must “increase the extent to which the proposed structure complies.” For this reason, the Commission finds the ANC’s advice to be unpersuasive.

As to the Holland and Knight comments, the submission concedes its proposed amendment to 11-A DCMR § 301.4 exceeds the scope of this case and, as just stated, the Commission does not wish to delay adoption of the amendments that were advertised and heard.

The following amendments to the text of Title 11 DCMR (Zoning Regulations of 2016) are adopted:

Section 301, BUILDING PERMITS, of Chapter 3, ADMINISTRATION AND ENFORCEMENT, of Subtitle A, AUTHORITY AND APPLICABILITY, is amended as follows:

Subparagraph (a) of subsection 301.5 is amended and new subparagraphs (a)(1) and (a)(2) are added as follows:

301.5 If an application for a type of building permit enumerated in Subtitle A § 301.6 is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone 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 one (1) of the building permit applications listed in Subtitle A § 301.6 is officially accepted as being complete and under review by the Department of Consumer and Regulatory Affairs 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 the property's existing zoning classification pursuant to Subtitle A § 301.4. However, if no building permit has been issued prior to the date that the zoning map amendment becomes effective, the building permit application shall be processed in accordance with the adopted zoning map amendment. The building permit application shall:

- (1) Be accompanied by any fee that is required, and by the plans and other information required by Subtitle A § 301.2, 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; and
- (2) Be sufficiently complete to permit processing without changing the proposed use or increasing the intensity of the use, and without deviations from submitted plans, except for plan deviations that:
 - (A) Address the requirements of the Construction Codes (12 DCMR); or
 - (B) Increase the extent to which the proposed structure complies with matter of right standards under the existing zone designation, such as by:
 - (i) Reducing lot occupancy, gross floor area, building height, penthouse height, the number of stories or number of units; or

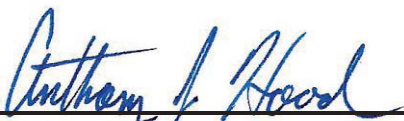
- (ii) Increasing the size of yards or other setbacks from property lines.

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Subsection 301.7 is amended as follows:

301.7 All applications for building permits authorized by orders of the Board of Zoning Adjustment, or authorized by orders of the Zoning Commission in a contested case, may be processed in accordance with the Zoning Regulations and Zoning Map in effect on the date the vote was taken to approve the Board or Commission application, to the extent the proposed building or structure is depicted on any plans approved by the Board or Commission. No Board of Zoning Adjustment or Zoning Commission order shall be deemed to include relief from any zoning regulation unless such relief was expressly requested by the applicant and expressly granted in the order

The amendments shall become effective upon publication of this notice in the *D.C. Register*; that is on January 4, 2019.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

² The use of this and other ellipses indicate that other provisions exist in the subsection being amended and that the omission of the provisions does not signify an intent to repeal.