

West End Citizens Association

Washington, D.C.

Boundaries: 15th Street on the East • Potomac Park on the South
Rock Creek and the Potomac on the West • N Street on the North

February 13, 2024

Mr. Anthony Hood, Chairman
Zoning Commission
441-4th Street, N.W. – Suite 210
Washington, DC 20001

Re: Opposition to ZC Case No. 22-25, OP – 2/2/24 NPRM: Text Amendments to
Subtitles C, I, X, Y & Z (Downtown Zones & ZC Rules for Practice & Procedure)

Dear Chairman Hood and Members of the Zoning Commission:

I am submitting this comment letter on ZC Case No. 22-25 on behalf of the West End Citizens Association (WECA), one of the oldest citizens associations in DC. On May 19, 2023, WECA Secretary-Treasurer Barbara Kahlow submitted a comment letter (ZC No. 22-25, Case Documents, Exhibit 32) as an individual on an earlier version of proposed Text Amendments in this case. Her comments focused on the Office of Planning's (OP) proposed regulatory changes to certain subsections in the Board of Zoning Adjustment (BZA) and Zoning Commission (ZC) rules for practice and procedure in Subpart Z for the Zoning Commission and Subpart Y for the BZA. This letter will expand on these comments and also comment on additional provisions.

The WECA has grave concerns about the further revised proposed text amendment language which will unfairly not require public hearings on all non-minor proposed modifications to zoning Orders in contested cases.

This letter will address each section in order of the proposed text instead of in order of importance.

- pp. 1, 4, 5 & 12, without clarity – the stated NPRM (Notice of Proposed Rulemaking) objective -- “to create new and consistent rules” (p. 1, Setdown), “to clarify the standards for determining” (p. 4, Subpart Z), “The Commission concludes that the proposed amendments achieve the goal of clarifying and correcting the rules to make them clearer and more consistent” (p. 12, Proposed Action)
 - Comment: The stated NPRM objective is clearly not met and, in fact, results in multiple cases of unclear and sometimes ambiguous text. For example, the WECA agrees with the p. 5 statement by previous commenters that “The description of a modification without a hearing is vague. All types of modifications (except for technical corrections and truly minor modifications) should require a public hearing.”

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- pp. 4 & 47, bars responses to draft orders – “Add language to Subtitle Z §703.17 to allow the applicant or any other party to submit a draft order in a modification without hearing case and **bar responses to draft orders**” (p. 4, Subtitle Z, emphasis added) and §703.17 “If the Commission approves the request for modification without hearing, the applicant shall, and any other party may, submit a draft order within 14 days after action is taken. **No responses to draft orders shall be accepted. This prohibition shall not be waived**” (p. 47, emphasis added)
 - Comment: The prohibition on responses by non-Applicant Parties is unfair, especially if the Applicant’s draft order omits or distorts key information in a contested case.
- p. 7, align with currently ambiguous Modification of Consequence – “Under Subtitle Z §703.6, OP/OZ recommended that the definition of a ‘modification without hearing’ be corrected to more accurately align with the current Zoning Regulations’ definition of a modification of consequence” (p. 7, OP/OZ Responses)
 - Comment: Since the current regulatory definition of a modification of consequence is definitely unclear, such alignment makes no sense.
- p. 19, allow modification of an application during the public hearing for good cause – “§300.17 Upon motion by the applicant and **for good cause** shown, the Board may elect to waive Subtitle Y §§300.15 and 300.16 and permit modification of the application at the public hearing” (p. 19, §300, Application Requirements: Special Exception and Variance, emphasis added)
 - Comment: This irregularity could be unfair to non-Applicant Parties who have not had an opportunity to review a not-previously-presented modification since §300.16 requires all modifications to be presented 30 days before a hearing. Furthermore, the standard **for good cause** lacks clarity like the purported definition of **modification without a hearing** and does not foster the objective of consistency in application, one of the stated objectives for these amendments.
- pp. 21-22 and p. 44-45, definition of a modification without hearing – “§703.7 “For the purposes of this section, a modification without hearing is a **modification in which the impact may be understood without witness testimony, including, but not limited to a proposed change to a condition by the Board in a final order ... Determination that a modification can be approved without witness testimony is within the Board’s discretion**” (pp. 21-22, Sec. 703, Consent Calendar – Technical Corrections to Final

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Orders and Modifications without hearings to Orders and Plans, emphases added) and “§703.6, pp. 44-45 [same language as on pp. 21-22 for §703.7]

- Comment: In a Contested Case, the Parties to the case are entitled to a public hearing on any non-trivial proposed change to a condition in a final order. After the Parties are served with a request for a modification without hearing as prescribed in the revised §703.11, if one of the opposing Parties responds in opposition as specified in the revised §703.12, the Party's request for a hearing should be honored. Specifically, the application should be automatically removed from the consent calendar and the Applicant directed to file a request for modification with hearing, as set forth in §704.

The distinction between a modification with or without hearing is set forth in §703.7. It provides a standardless definition of what distinguishes the two, other than the subjective judgment of the Commission on whether the impact of the modification can be "understood" without witness testimony. This is followed by "included but not limited to" exemplars that do not define or limit the Commission's discretionary judgment, or otherwise cure the vagueness of the purported dividing line.

These problems are readily solved by having the request for a modification without hearing tied simply to whether a Party to the contested case requests a hearing in its timely response under §703.13. If there is no such timely request, the application can readily proceed to expeditious Commission review under §703.17, which leaves intact the Commission's ability to decide in its discretion whether a hearing is or is not necessary. At the same time, a Party's properly filed objection to proceeding without a hearing will ensure that the Party to a contested case is afforded adequate due process protection before a Commission decision is made on whether to grant the modification in light of matters presented at the hearing, the scope of which will be appropriately limited, as provided in §704.6, on objections to the modification being requested.

- p. 47-48, §705.8, Time Extensions – “In the event of an appeal in a court of competent jurisdiction from an order of the Commission, the time limitations of Subtitle Z §§702.1, 702.2 and 702.3 shall run from the decision date of the court’s final determination of the appeal. Unless stayed by the Commission or a court of competent jurisdiction, an applicant may proceed pursuant to the order of the Commission prior to any such final determination.”
 - Comment: The WECA believes that Applicants should be advised to proceed at their own risk during a Party’s appeal to the DC Court of Appeals in case the court

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remands the case to the Zoning Commission or vacates the zoning order in its entirety.

Thank you for your consideration of the WECA's comments.

Sincerely,

/s/

Sara Maddux

President