Advisory Neighborhood Commission 2A

"Serving the Foggy Bottom and West End communities of Washington, D.C."

March 2, 2017

Chairman Phil Mendelson
Chair, Committee of the Whole
Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 504
Washington, DC 20004
pmendelson@dccouncil.us

RE: DC Council Committee of the Whole Public Oversight Roundtable Regarding the Department of Consumer and Regulatory Affairs

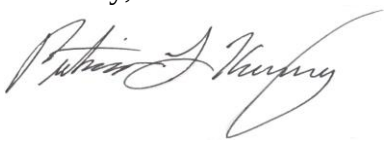
Dear Chairman Mendelson,

At its regular meeting on February 15, 2017, Advisory Neighborhood Commission 2A (**"ANC 2A" or "Commission"**) considered the above-referenced matter. With seven of eight commissioners present, a quorum at a duly-noticed public meeting, the Commission voted unanimously **(7-0-0)**, after a motion made by Commissioner Kennedy and seconded by Commissioner Zhurbinskiy, to adopt the attached testimony to deliver for the Committee of the Whole's public oversight roundtable regarding the Department of Consumer and Regulatory Affairs (DCRA).

Commissioner Patrick Kennedy (2A01@anc.dc.gov) is the Commission's representative in this matter.

ON BEHALF OF THE COMMISSION.

Sincerely,



Patrick Kennedy
Chairperson

CC: Councilmember Jack Evans, Ward 2
Sherri Kimbel, Director of Constituent Services, Councilmember Jack Evans

DC Council Committee of the Whole Public Oversight Roundtable Regarding the Department of Consumer and Regulatory Affairs

Testimony by ANC 2A

Chairman Mendelson and Members of the Committee of the Whole,

Thank you for the opportunity to provide comments on possible oversight opportunities for the committee with respect to the Department of Consumer and Regulatory Affairs. Since many others will offer testimony on a range of possible, open-ended responses to this topic prompt, we will keep our written comments targeted toward a specific office within DCRA that is very important but comparatively little scrutinized: that of the Zoning Administrator.

The Zoning Administrator has considerable authority to impact the course of development in the District of Columbia by lending his or her interpretation of the zoning regulations and specific zoning orders to questions brought by applicants and other interested parties seeking sanction or denial of a development action.

Although the Zoning Administrator is bound to "interpret" the relevant governing documents in considering a request, we have found that even the slightest bit of ambiguity in a zoning order or zoning regulation can give the Zoning Administrator an opening to interpret a situation as favorably as possible to the party making the request – even when such interpretations would not hold up to broader scrutiny.

The flaws in this process are illustrated by two successful ANC 2A appeals of Zoning Administrator determinations that were undertaken in the last three years, reflected in Board of Zoning Adjustment (BZA) cases 18793 and 19023.

In the former case, the ANC appealed a Zoning Administrator determination that a sign erected by a hotel proprietor on the exterior of the building was permitted under the Planned Unit Development (PUD) order governing the case – relying on a vague drawing rather than the plain language of the zoning order which proscribed such installations. In the latter case, the ANC appealed a determination which sanctioned a hotel proprietor's installation of a sidewalk café in an R-5-E zone where commercial adjuncts "visible" from public space are prohibited.

In each case, the BZA sided overwhelmingly with the position of the ANC (in the former case, 5-0; in the latter, 4-1). Based on our experience with these two cases, we offer several observations on procedural shortcomings that – if cured – we believe would benefit all parties in these matters by providing a clear, reliable, and fair standard for Zoning Administrator interpretations.

To be clear, our comments are not directed at any individual Zoning Administrator, past or present; we believe that this is a process flaw that goes far beyond any individual, and

that the resources currently made available to the Zoning Administrator are perhaps not sufficient to guarantee careful review of all matters which come before him.

1. **Lack of Notice:** Determinations of the Zoning Administrator are not noticed in any way that could reasonably be expected to reach members of the public who were not clued in to their impending release. They are posted on an obscure sub-page of the DCRA website, and in our Commission's experience, they are not always accessible even after the date on which they have allegedly been posted. A draft version of Councilmember Bonds' omnibus ANC bill last year would have required that personalized notice be given by the Zoning Administrator to an ANC when a property within that ANC is the subject of a determination letter, but this provision was dropped from the final bill. As such, the process remains as opaque as always.

   This notice flaw is the keystone to all further problems with the process. Because appellants have an ambiguous 60-day window to appeal Zoning Administrator determination letters, it is in the interest of those who have receivable favorable determinations to start the "clock" on the 60 days as quickly as possible, and so they will often seek to have this 60 days begin from when a determination letter is allegedly posted with no notice to this obscure web page.

   In practice, the BZA has taken an appellant-friendly position and ruled that the 60 days begins only when an appellant could reasonably have been expected to know that a determination letter has been issued (e.g., when a resident notices that sign brackets have been installed on the outside of a building in apparent contravention of the relevant zoning order). Even despite this favorable inclination, on two occasions the ANC has had to spend significant amounts of time and taxpayer money in the form of attorney's fees to prepare arguments in the service of overcoming procedural requests from defendants to dismiss appeals on "timeliness" grounds. The ambiguity of the status quo serves no one's interests.

2. **Opportunity to Cure:** In both cases, the ANC appealed determinations that did not stand up to scrutiny before a public body that was obligated to weigh both sides of a case. The Zoning Administrator, in making his or her determination, however, only hears one side of a case: that of the party marshalling up facts that put their case in the most favorable light possible. It is no surprise, then, that the Zoning Administrator generally makes determinations that are favorable to the interests of the party making the request. This is particularly true when the requesting party retains the services of a sophisticated law firm with subject matter expertise and time available that in many cases outstrips that of the Zoning Administrator's staff on both counts.

   While one could make the argument that the ANC's two successful appeals are evidence of the virtues in the process that obviate the need for additional scrutiny at a more preliminary level, we have a different perspective. Appeals cost a

considerable amount of time and money to do right, and are often successful only after injury has taken place to the party making the appeal.

As an example, in case number 18793, the hotel proprietor erected the offending sign almost exactly three years ago after a successful entreaty to the Zoning Administrator. The BZA unanimously overturned that determination in the fall of 2014, yet an order was not issued in the case until the fall of 2016. In the meantime, the hotel proprietor has sought to sanction the sign unsuccessfully through a variety of dilatory procedural tactics directed at the Zoning Commission (ZC). On this date, the sign is still present – although its illumination functions were finally turned off approximately one month ago.

The point is that Zoning Administrator determination letters matter greatly, and even ones that don't stand up to scrutiny and are successfully appealed can nonetheless be difficult to reverse in practice. The issue is also one of equity: while our ANC has been able to prosecute appeals successfully because we budgeted to retain counsel and had significant outside financial help from other neighborhood organizations joining our appeals, ANCs in other parts of the District with different needs and different budgetary circumstances (and different amounts of community wealth) might not be able to do the same. That's to say nothing of the varying level of procedural sophistication that other volunteer commissioners have (and gain only through experience) navigating a labyrinthine, obscure bureaucratic process.

We believe that inequities and shortcomings of this setup could be cured if ANCs were a) notified of determination letters pertaining to properties within their boundaries as a matter of course; b) given a specified period of time before the determination is made final to notify the Zoning Administrator of their objection to a particular letter; and c) thereafter given an opportunity to present evidence that they believe would change his or her original determination.

If the Zoning Administrator evaluates the evidence and determines that it is not compelling enough to reverse their original decision, then ANCs and other parties would be free to appeal the decision to the BZA as they are today. In the meantime, we believe that the inclusion of this process would allow for the Zoning Administrator to correct some of the more egregiously incorrect decisions that any occupant of the office is bound to make in the course of evaluating so many different requests with so few resources to assist. Such corrections would save everyone time, money, and hassle – and this process would have the added benefit of clarifying procedurally the "60-day" conundrum alluded to earlier.

3. **Importance of Precedent:** Finally, we believe that Zoning Administrator determination letters – in the absence of a successful appeal – should be the final word on a particular question of interpretation when they are issued. Unless there is a material change in fact or circumstance, we believe that developers,

appellants, and all those who either work or do business in the District of Columbia are best served by a system whereby determination letters can be consistently relied upon for guidance in terms of what is and what is not permissible under relevant zoning regulations and orders.

In case number 19023, a Zoning Administrator determination letter issued in 2002 expressly prohibited a sidewalk café such as the one sought by the hotel owner – and improperly sanctioned by a subsequent determination letter that was successfully appealed. For years, members of the Foggy Bottom community relied on that 2002 letter as the document which governed the permissibility of a sidewalk café – which was (and is) a matter of great concern.

At the very least, if a hotel owner was to seek a sidewalk café at this site, it was understood that they would need to obtain a zoning variance to sanction such an activity – and that the burden of proof, ample public notification, and copious opportunity for community input would exist in order for such a variance to not be granted lightly.

To have a new determination letter sprung on the community with no advance warning, directly contradicting a previous order with no opportunity for community input, was surprising and very dismaying. For the sake of clarity for everyone involved or potentially involved with development in the District of Columbia, arbitrary reversals such as these that undermine the consistency and predictability of the application of zoning regulations and orders should not be sanctioned.

Thank you for your consideration of our perspective regarding the process of Zoning Administrator determination letters, as laid out above. In particular, we appreciate your engagement with the three broad points outlined. We are happy to engage with any member of the committee who is interested in exploring this topic further, and in particular, would appreciate your attention to oversight regarding this aspect of DCRA's operations moving forward.

Respectfully submitted,

ANC 2A