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**Testimony before the Committee of the Whole regarding
the Department of Consumer and Regulatory Affairs
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Thank you for the opportunity to submit some ideas about ways to improve the performance of DCRA. I am testifying in my individual capacity as an ANC Commissioner, and not on behalf of ANC3D as a whole.

My focus today is on DCRA's compliance and enforcement program which is totally inadequate and an embarrassment to this City. This important component of DCRA's mission starved for resources. It depends heavily on citizens' tips to determine its targets for enforcement, and as a result builders know they have very little chance of getting caught if they cheat. Even when they are caught, a slap on the wrist is the usual punishment and their outrageous behavior on past projects has no effect on their ability to get new permits in the future. If the DC police operated under such a strategy, we would all be demanding reform.

What good does it do for DCRA to issue detailed permits based on a building code that is as thick as an old Sears catalog if these provisions are not enforced? Following these requirements to the letter costs builders a lot of money and some obviously have concluded, why spend it if you know you won't be caught? Enforcement at DCRA has been consigned to a closet while the Department rolls out shiny new programs that allow the permits to be issued faster and faster. There's nothing wrong with faster permitting, but it needs to be accompanied by a more nimble enforcement program—which it isn't.

As you know, DCRA's motto is "Safe and Simple". It sounds great until you look closely to see how DCRA has implemented it. Here's my interpretation:

DCRA's Motto: As Implemented

Safe and **SIMPLE**

DCRA is definitely listening to those stakeholders who want permitting to be SIMPLE. Those who want buildings to be SAFE are not being effectively heard and as a result the Department is a “paper tiger” when it comes to compliance and enforcement.

How do we restore the balance between making permitting SIMPLE and making us all SAFE?

It is not that complicated. A reorganization of the Department may be a good idea, but reorganizations are highly disruptive and the just-introduced reorganization bill sets some long timelines for the hoped-for improvements. IN THE MEANTIME, there are many things the Council can do to restore the balance and make our buildings SAFE. I suggest nine of them in this testimony.

The details are in the Attachments to this testimony, but here’s a summary:

1. Include ANC Commissioners as Reviewers of Draft Permits (Attachment 1)

Errors do occur in granting permits and they can be costly and hard to remediate. Why are ANC Commissioners the one major group in the DC Government that is excluded from permitting process? ANC Commissioners are the eyes and ears of the District Government at the neighborhood level and can play a key role to prevent errors in issued permits. ANC Commissioners should no longer be shut out of the permitting process. If we can review public spaced applications, we can review building permits.

2. Authorize ANC Commissioners to Submit Legally Sufficient Evidence of Violations of Building Code, Zoning, and Stop Work Orders (Attachment 2)

Builders in the District today know that it is unlikely that they will be caught and penalized for violations of the building code, zoning regulations, and Stop Work orders. DCRA simply doesn’t have enough inspectors to be out looking for violations. What kind of crime enforcement would we have if police officers weren’t patrolling our neighborhoods. DCRA needs more eyes and ears, and ANC Commissioners, tipped off by their constituents, can document violations and report them using a citizen affidavit. Such an affidavit, if authorized by the Council, could obviate the need for an inspector to observe the violation and be presented as evidence in an administrative hearing. ANC Commissioners are protected by statute from liability for any mistakes they might inadvertently make.

3. Require a Residential Certificate of Occupancy (Attachment 3)

Currently, the Zoning Administrator and DCRA enforcers have little or no leverage to bring a recalcitrant residential builder into compliance when he violates the building code or zoning regulations. The Zoning Administrator can request the builder to submit his plans to come into compliance, but if the builder fails to do so, the Zoning Administrator has little or no leverage to make him do so. The situation is quite different with commercial properties because DCRA can withhold the certificate of occupancy and this gives the Department very strong leverage over the builder. We need a residential certificate of occupancy requirement in those cases of construction that is so major that the occupants need to move out of the house before the construction begins.

4. Allow DCRA to pierce the Corporate Veil of Limited Liability Corporations and thereby Sanction Repeated Violators of City Laws (Attachment 4)

It is well known that there are some “bad apples” among those who design, construct, and operate buildings in DC. Yet, nothing seems to happen to these people, apparently because these individuals can form a separate LLC for each project and thereby hide their identify and prevent DCRA from imposing sanctions because of multiple violations across properties. In addition, it is not clear that DCRA has the sanction authority to deal with such multiple violations. The Council can fix these problems.

5. Benchmark DCRA against Similar Agencies Across the Country (Attachment 5)

DCRA states proudly that it does 50,000 inspections a year. Is this a high (good) number? Compared to what? Without any comparisons to other cities, adjusted for similar population, number of permits issued a year, etc., how does the Council or the public know whether DCRA is doing a good job or a terrible job? The solution is for the Council to direct the DC Auditor to do a benchmarking study of other “DCRA’s” across the country to assess DCRA’s performance in both giving permits and in ensuring compliance with them in order to allow the Council to set realistic goals for the Department, provide sufficient funding to achieve them, and conduct active oversight.

6. Place all of DCRA’s permit drawings and applications on line (Attachment 6)

The builders have the drawings; DCRA has the drawings, but the public does not. Some years ago I understand that the Council gave DCRA funds to put all of these drawings and applications on line. Instead they have worked to make tracking of permit applications on line by builders easy, but have not allowed citizens and ANC Commissioners to see quickly what was permitted and then observe whether the builder is conforming to the drawings. Yes, one can ask DCRA for them, but that takes days, and sometimes one must submit a FOIA request. We need transparency for the public if there is going to be accountability for both the builders and DCRA.

7. Establish an Ombudsman for DCRA to help constituents (Attachment 7)

It is very hard to get DCRA to do what they are required to do, including enforce the regulations. Who does one call, what information is needed, and what if DCRA is not responsive? To constituents, DCRA is one big “black hole.” The solution is to establish an Ombudsman function either within DCRA or outside it whose job it would be to arm the constituent with the knowledge of what is needed to convince DCRA to take a (different) action and how to push the issue forward through the Department. In the most egregious cases, the Ombudsman would actively help the constitute push the matter forward with DCRA and, where the Ombudsman runs into a brick wall, to elevate the matter within the Department. The Ombudsman should report once a year to the Council on what he has done, what he is finding out about how the Department REALLY functions and what suggestions he might have for improvements.

8. Provide information to ANC Commissioners and Constituents about Compliance and Enforcement on the DCRA webpage (Attachment 8)

If a constituent or an ANC Commissioner wants to know about how to get a permit, the DCRA website is just full of information for them. However, if the same constituent and ANC Commissioner wants to know how to get builders or owners within his neighborhood to comply with the building and zoning regulations, they are out of luck. In the Attachment that I previously provided to the Department, I lay out topics that a page within the DCRA website devoted to Compliance could contain. This is a simple way for DCRA to better informed constituents who can then serve as the eyes and ears on the street that DCRA now so desperately lacks.

9. Increase the DCRA's budget for compliance and enforcement (Attachment 9)

DCRA is spending most of its new resources on the shiny new programs for making permits simple and faster to get. This imbalance needs to be corrected. Compliance and enforcement needs significantly increased earmarked resources which will allow the Department to implement a much more effective strategy to incentivize voluntary compliance and then sanction those who choose to cheat instead. Hopefully the Council will not adopt an attitude that it won't devote more resources to compliance until the Department improves its performance in this area. That would be self-defeating.

Thank you for your consideration of these ideas for improving DCRA's performance and the satisfaction of its stakeholders who are not seeking permits but rather who want them enforced. The Council needs to help these stakeholders be heard!

Attachment 1

Include ANC Commissioners as Reviewers of Draft Permits

The Problem:

Once a building permit is issued, a builder has an expectation that he can rely on that permit and begin his operations. If an error is found later, the builder might sustain serious financial damage if he has to correct the error. Yet, the error may present substantial public health risks or undermine neighborhood-specific requirements. For this reason, preventing errors in the issuance of permits should receive a high priority within DCRA. However, ANC Commissioners are excluded from review of permits, while other DC agencies/resources are not.

Proposed Solution:

Direct that ANC Commissioners be invited to participate in the review of any plans in their SMD going through building permit review, just as they are currently invited to review Public Space Applications. ANC Commissioners should be notified of such plans just as they are now informed of Public Space Applications in their SMD and could participate, or not, as they saw fit depending on the circumstances of a particular project and its importance to the neighborhood.

Rationale:

Why are ANC Commissioners the one major group in DC Government which is excluded from permitting process? ANC Commissioners are the eyes and ears of the District Government at the neighborhood level and can play a key role to prevent errors in issued permits. In contrast to DCRA reviewers, Commissioners are often familiar with the property in question, and may know the builder from previous projects and ways in which they may cut corners. As an example, a builder might list a wall as “existing” but in fact it is to be a new wall, subject to all of the appropriate restrictions. Commissioners can be especially diligent in making sure that key building code provisions related to health, safety, and neighborhood-specific requirements (zone restrictions) are followed.

Currently, ANC Commissioners often get involved in construction issues because their constituents demand it, but usually only after the permit has been issued and concerns are raised. Chasing the error after construction begins is often not successful in getting the error corrected. This after-the-fact review process results in great neighborhood frustration and allows violations of building code and zoning regulations to stay in place even though they would not have been allowed in the first place if brought to the attention of DCRA by Commissioners during the permitting process.

With 300 ANC Commissioners across the city and many projects approved every day, it is likely that only a small percentage of the projects would be of sufficient interest to constituents to warrant a Commissioner’s time and effort to give comments on a project. However, where they do, their comments can be reviewed and taken into account along with those of other reviewers. The permits are likely to be enhanced as a result, with little or no cost or time delay to DCRA. In addition, some of the after-the-fact anger at DCRA and ANC Commissioners by neighbors will be avoided. Preventing problems from occurring in the first place makes a lot more sense than trying to correct them after they have been made. ANC Commissioners are in a unique position to spot problems ahead of time and thereby to be part of the team to help DCRA permit reviewers.

Attachment 2

Authorize ANC Commissioners to Submit Legally Sufficient Evidence of Violations of Building Code, Zoning, and Stop Work Orders

The Problem:

DCRA's compliance strategy for illegal construction and zoning violations has two major weaknesses: (1) the strategy relies primarily on the receipt of citizen complaints and (2) a DCRA inspector must observe the violation in person, and because there are too few of them, they are often late and/or the builder can hide what he has been doing from the inspector. As a result DCRA's enforcement program is rightly described as a "paper tiger." Without adequate enforcement, voluntary compliance—the heart of any compliance program—is not incentivized.

Proposed Solution:

Write specifically into the building code provisions specific to ANC Commissioners that are similar to those for ordinary citizens under the Trash Collection Noise Law, DC Law 17-259 and the new Leaf Blower Regulation Law which was enacted last Council session. This would allow Commissioners to file affidavits (including photos and video, as appropriate) of violations of stop work orders or illegal construction or zoning regulation violations. These affidavits would, under the new provision, be designated as acceptable as legitimate evidence in an administrative hearing on a violation. After making themselves available for cross examinations, these Commissioner witnesses could prove to be sufficient evidence to prove a violation.

Rationale:

Builders in the District today can reasonably assume that it is unlikely that they will be caught and penalized for violations of the building code, zoning regulations, and Stop Work orders. Except for the occasional one-time blitzes run last year by DCRA, the Department does not have an aggressive presence in the field where they looking for potential violations. Instead, DCRA depends on citizen complaints to identify potential targets. Alerted by citizens, Commissioners can learn how to verify a number of alleged violations, including a builder's ignoring a Stop Work Order or violating the setback requirements. Under the law, Commissioners are protected from liability, so they would be protected legally from retaliation by builders.

DCRA needs to make better use of the numerous eyes and ears of ordinary citizens who are geographically located in proximity to the worksite and can alert their ANC Commissioner to witness the violation. Commissioners' sworn testimony, bolstered perhaps by time-stamped photos and videos, would, in many cases, providing convincing proof of a violation—if their testimony were accepted as evidence in the administrative hearing. DCRA already employs this method of ensuring compliance for the noise from private trash trucks. Now with the ubiquitous presence of cameras associated with mobile phones, DCRA can empower Commissioners' eyes and ears not just to file a complaint, but also to help prove actual violations.

A major impact of this change in the role of citizens would likely be a substantial increase in "voluntary compliance" by builders. They would no longer have the confidence that they are working in relative secrecy on their sites. Citizens often have a "bird's eye view" of construction that DCRA does not have.

Attachment 2

Builders also know that neighbors are not always happy with construction taking place next door, so they cannot trust the neighbors to look the other way when they see the builder doing something illegal.

Of course, not every Commissioner affidavit would be useable in an administrative hearing. Some may be based on a misunderstanding of the regulations, but DCRA could train this interested cadre of Commissioners to improve their skills in this area. Of course, DCRA would need to exercise its professional judgment about the validity and adequacy of the evidence presented. However, even if some affidavits were put aside, empowering Commissioners to provide useable would be a major improvement in DCRA's compliance strategy.

Attachment 3

Require a Residential Certificate of Occupancy

The Problem:

Currently, the Zoning Administrator and DCRA enforcers have little or no leverage over a recalcitrant residential builder who violates the building code or zoning regulations in order to bring him into compliance. A famous case (within DCRA and in Wesley Heights) is 4540 Lowell Street NW in which the builder/owner has for five years defied the Zoning Administrator and refused to bring his residential building into compliance with the lot occupancy regulations. The Zoning Administrator can request the builder to submit his plans to come into compliance, but if the builder fails to do so, the Zoning Administrator has little or no leverage to make him do so. The Zoning Administrator lacks the authority to threaten or actually revoke the certificate of occupancy because no such certificate is required for residential property, in contrast to commercial properties.

Proposed Solution:

Require builders/property owners to obtain a certificate of occupancy for those residential construction projects that are extensive enough that they involve either (1) a raze or (2) a renovation major enough that the occupant cannot stay on the premises during the renovation. As part of this application for a certificate of occupancy, the builder should be required to submit a statement from a licensed third party (engineer, architect, etc.) registered with DCRA that the house, as built, conforms to the plans approved by DCRA. Allow the revocation of such certificate of occupancy for serious violations of the building code or zoning regulations where the violator repeatedly refuses to comply. Authorize fines for each day, not just on a one-time basis when the builder refuses to bring his building into compliance.

Rationale:

If residential builder/property owner were required to apply for a Certificate of Occupancy, it would accomplish two purposes: (1) it would require the builder to show at the end of the construction that he has met all the requisite requirements (a more thorough final inspection than now) and (2) it would give teeth to DCRA enforcement actions which lack force today, giving DCRA the leverage it now lacks to bring recalcitrant builders into compliance. In addition, requiring a licensed third-party to sign off on the building, as built, would greatly discourage builders/property owners from thinking that once they have a permit, they can built whatever they want.

Attachment 4

Allow DCRA to pierce the Corporate Veil of Limited Liability Corporations and thereby Sanction Repeated Violators of City Laws

The Problem:

It is well known that there are a few “bad apples” among those who design, construct, and operate buildings in DC. Yet, nothing seems to happen to these people, apparently because these individuals can form a separate LLC for each project and thereby hide their identify and prevent DCRA from imposing sanctions from multiple violations across properties. In addition, it is not clear that DCRA has the sanction authority to deal with such multiple violations.

The Solution:

Require permit applicants and corporate owners/operators of buildings to disclose to DCRA the actual owners of a LLC. Provide DCRA explicit authority to sanction builders/operators who repeatedly violation city zoning and building code laws.

Rationale:

DCRA now appears to treat each permit application as a single item with no links to previous permits where there may have been egregious violations of city laws. Much of this problem apparently can be traced to the use of multiple LLCs to hide/isolate the liability for each project. With a piercing of the corporate veil, DCRA could link these instances and by imposing sanctions, prevent future violations by these same “bad apples.” Having an explicit set of sanctions authorized by the Council would also help DCRA carry out this important function.

Attachment 5

Benchmark DCRA against Similar Agencies Across the Country

The Problem:

When asked how their productivity and enforcement record compare to those of similar agencies in cities such as Chicago or Denver, the staff has been known to answer, “DC is not Chicago {or Denver}”

This, of course, is a true statement, but is DC so unique that it can't be compared to any other jurisdiction in the country? Unlikely. For example, DCRA states proudly that it does 50,000 inspections a year. Is this a high (good) number? Compared to what? Without any comparisons to other cities, adjusted for similar population, number of permits issued a year, etc., how does the Council or the public whether DCRA is doing a good job or a terrible job?

The Solution:

Direct the DC Auditor to do a benchmarking study of other “DCRA's” across the country to assess DCRA's performance and to identify best practices that might be considered by DC. DCRA could certainly be asked to assist the DC Auditor in this benchmarking, but this task requires some independence and objectivity in order for it to be credible and therefore usable by the City Council to adjust the performance of DCRA going forward.

Rationale:

Even the proposed Department of Buildings Establishment Act of 2019 falls short in this regard. It calls for a Business Process Analysis and Reengineering Assessment, but has no explicit mandate to look outside the borders of DC for what others across the country have learned and put into practice. That bill also assigns this job to DCRA itself alone so that there is likely to be little criticism of current policies and practices and only proposals for shiny new projects to try. The business of DCRA is too important to this city to short cut this important function.

Attachment 6

Place all of DCRA's permit drawings and applications on line

The Problem:

Several years ago the Council gave DCRA money to put all of its permits on line. This has not happened. Instead, the emphasis of DCRA has been on tracking of permits instead of the substance of permits. This greatly decreases the ability of the public to hold DCRA accountable for its actions, except with regard to meeting deadlines. The substance goes ignored.

The Solution:

Require DCRA to put all of the permit documents on line so that citizens can see what decisions are being made and whether the permits comply with the building code and zoning requirements. Mistakes are made by permit writers and the sooner these mistakes are identified, the sooner they can be rectified.

Rationale:

Although DCRA declares that one can always ask for drawings or file a FOIA request, it is difficult and time consuming to get the drawings and other permit documents, so the builder has an overwhelming advantage in declaring that he is doing everything according to the permit, and the public has very little actual recourse. The playing field needs to be evened up so that those who care about health and safety have as much of a role to play as those who care about economic development. The two goals do not need to be in conflict, but the present economic incentives and DCRA policies either allow or even encourage builders to cheat, knowing it is highly unlikely they will be caught, and even if they are caught, of ever getting a serious sanction placed against them.

In short, mistakes are made by DCRA, but who would ever know it? Transparency and accountability are important and putting all the documents on line would go a long way to helping everyone see the job that DCRA is doing.

Attachment 7

Establish an Ombudsman for DCRA to help constituents

The Problem:

When one is having a hard time getting DCRA to do what they are required to do, including enforce the regulations, it is hard to get the attention of the person who can fix the problem. The problems are both education for the constituent about what is reasonable to expect and apparent non-performance by DCRA employees.

The Solution:

Establish an Ombudsman function either within DCRA or outside it (OANC?) whose job is not to convince the constituent that DCRA is doing everything it should be doing, but instead on arming the constituent with the knowledge of what is needed to convince DCRA to take a (different) action and how to push it forward through the Department. In the most egregious cases, the Ombudsman would help push the matter forward with DCRA and, where he/she runs into a brick wall, to elevate the matter within the Department. The Ombudsman should report once a year to the Council on what he has done, what he is finding out about how the Department REALLY functions and what suggestions he might have for improvements.

Rationale:

DCRA is very focused on “production” of permits and other services, and is not geared to help people when things are not going as they should. The result is great frustration on the part of constituents who feel they are getting the “run around” from DCRA staff or who believe a mistake has been made or an injustice done and they can’t get the DCRA to address the issue. The Ombudsman would be a trustworthy face of the Department who would not try to defend the agency against criticism, but help legitimate concerns get advanced to a solution within the Department. It is possible that there would need to be two Ombudsmen—one for people trying to get permits, and one for those seeking redress or enforcement.

Attachment 8

Provide information about Compliance and Enforcement on DCRA Website

Here are possible Initial Entries on a DCRA Webpage focused on Compliance (and help to ANC Commissioners and the Public)

1. Building Permits
 - a. Permit Plans
 - i. How to obtain a copy of the plans
 - ii. How to read and determine compliance re key aspects of the plans
 1. Front yard, side yard and back yard setbacks
 - a. What limits apply to specific neighborhoods?
 2. Lot occupancy
 3. Gross Floor area
 - b. Reporting possible non-compliance
 - i. Illegal Construction
 - ii. Zoning violations
 1. How distinguish between illegal construction cases and zoning violations.
 - iii. How to find out the result of a report and the subsequent inspection
 - iv. A permit thought to have been issued in violation of zoning regulations.
 - c. Compliance statistics
 - i. Illegal construction complaints over X Period
 1. Percentage found to be valid complaints by an inspector
 - ii. Zoning violation complaints over X period
 1. Percentage found to be valid by an inspector
 - iii. Number of notices of violation issued over X Period
 - iv. Number of administrative hearings over X Period

Attachment 8

- v. Number of violation determinations made by administrative hearing
 - vi. Dollars of fines levied
 - vii. Dollars of fines collected.
 - viii. Most prevalent violations found over X period
 - ix. Results of blitzes in various Wards
 - d. Who to contact for help in determining whether or not there is a violation
2. Noise Complaints
 - a. Explain the regulations in simple terms
 - b. How to schedule an inspection of a repetitive noise nuisance likely to be a violation of the ordinance
 3. High Grass complaints
 - a. Explain the program in simple terms
 - b. How to schedule a cleanup and what the likely timing will be
 4. Abandoned or neglected buildings
 - a. Explain the program in simple terms
 - b. How to schedule an inspection and what to expect in terms of possible outcomes.
 5. Special Events (such as block parties)
 - a. Explain the permit program in simple terms
 - b. How to get a permit
 - c. How to complain about a possible illegal special event
 6. Business licenses
 - a. Explain the current compliance program
 - b. How to find out whether a particular business is licensed
 - c. How to complain about a business that appears to be doing business in the District but is not licensed and the possible outcomes of such a complaint.
 7. Other

Attachment 9

Increase the Resources for Compliance within DCRA

The Problem:

Compliance lacks a vocal set of stakeholders to clamor for improvements. New resources are being devoted to the shiny new processes and techniques for granting permits, but little attention is given to ensuring compliance with these permits once they are issued. Unsafe and illegal buildings are being constructed; people are being driven out of low cost housing by landlords who can ignore DCRA's requirements. Others stay, but have to live in unsafe conditions. In short, DCRA is a "paper tiger" when it comes to enforcement/compliance efforts. There is a lot of money to be made by ignoring building, zoning, and safe housing requirements, and the developers know it and some are unscrupulous to take advantage of it.

The solution:

Increase DCRA's Compliance and Enforcement budget and staff resources. DCRA's motto has been Safe and Simple. However, almost all of the emphasis has been on the Simple part of the equation and not on the Safe part. The Compliance portion of DCRA needs both a sizeable **earmarked** budget increase but also careful oversight by the City Council.

Rationale:

It makes no sense to spend all this money issuing permits that are extensive in their requirements on builders and then not having a system by which these builders are "encouraged" to voluntarily comply and strongly sanctions when they choose not to.

DCRA's inspectors are so few that they are not out in the field looking for possible violations; instead they have time only to do what is required by the regulations and to some extent responding to complaints of illegal construction. If the police Department ran its enforcement that way, without officers on patrol, we would have a lot more crime in this city.

The Department of Buildings Establishment Act of 2019 contains some provisions that will make oversight easier by the City Council because important statistics will be kept and reported on. However, the bill is disappointing because these reforms go into effect only years from now. There is no reason why DCRA can't start collecting these statistics now and reporting them to the Council and the public. An increased budget and vigorous oversight need to begin immediately.