GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Public Hearing
On
Bill 23-42, the "Substandard Construction Relief Amendment Act of 2019;"
Bill 23-333, the "Illegal Construction Repair and Mitigation Amendment Act of 2019;
and
General Conversation on Construction Code Enforcement

Testimony of
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Before the
Committee of the Whole
Chairman Phil Mendelson

John A Wilson Building
Room 500
1350 Pennsylvania Avenue, NW
Washington, DC 20004

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11:00 am

Good morning, Chairman Mendelson, Councilmembers, and staff. I am Ernest Chrappah, the Director of the Department of Consumer and Regulatory Affairs (DCRA). I am here today to testify on Bill 23-42, the "Substandard Construction Relief Amendment Act of 2019" and Bill 23-333, the "Illegal Construction Repair and Mitigation Amendment Act of 2019." The two bills offer slightly different approaches to tackling the issue of what to do when a construction project damages a neighboring property, and how best to ensure that the damaged property is repaired or that its owner is compensated for the damage. I believe this is an issue worthy of the Council's attention, and I appreciate your desire to address this issue. As a homeowner, I can empathize with the frustration people feel when their home is damaged through no fault of their own, and that all they want is a straightforward and fair way to be made whole again.

DCRA works extremely hard to ensure all construction that is ongoing, and in the planning stages, is safe and code-compliant. We also know, despite our best efforts, things sometimes can go sideways during construction projects, which results in damages to adjoining, abutting, and adjacent structures. DCRA believes that accountability is necessary and those responsible for construction that causes damage to a neighboring property should be held responsible.

My goal today is to provide some feedback related to these bills, including the implications of the bills on DCRA's current practices, as well as offer suggestions aimed at improving and clarifying the bills.

I. Current Landscape

The current business and residential development boom in the District has had many positive effects, but it has also created new challenges and hurdles. Let me take a few moments to discuss the current process when a property is damaged by a neighboring construction project. Before new construction is approved, the project contractor must apply for the necessary permits.

Part of this process includes confirming that the contractor currently has general liability insurance, which covers the costs of lawsuits brought by third parties claiming property damages or bodily harm caused by the construction project. Additionally, the contractor must put up a surety or performance bond. The amount or size of the bond is dependent on the amount or size of the proposed project. If it is a small home improvement project, like a minor patio addition, the contractor must have a surety bond for twenty-five thousand dollars ($25,000). When a project is over one hundred thousand dollars ($100,000), the contractor must have a performance or payment bond that covers one hundred percent (100%) of the portion of the original contract that does not include the costs of operation, maintenance, and finance.

The D.C. Building Code clearly states that adjoining public and private property must be protected from damage during construction, alteration, repair, demolition, or razing of a premises at the expense of the person performing the work. Prior to building permit approval by DCRA and before any construction on a project can commence, the person seeking to undertake the work, or his or her designated agent, must give thirty (30) days' notice of the proposed construction to all adjacent and adjoining property owners, via a Neighbor Notification Letter. This is an opportunity for potentially affected neighbors to flag legitimate building-related issues with the proposed construction. Any legitimate building-related issues raised by adjacent property owners must be accompanied by technically supported information and not just a desire to halt a project. If there are no building-related issues raised by the neighbors, DCRA will issue the permit. If there are issues, DCRA is authorized, but not required, to grant a reasonable extension, so the party seeking to undertake the work can resolve the issues. Ultimately, DCRA has the authority to make the final decision if there is no mutually agreed-upon resolution between the parties. As you can

see, there are already mechanisms in place to ensure that people undertaking construction work in the District are aware of their responsibility to protect neighboring premises.

Moreover, the revised Construction Codes that have undergone public comment and are currently under review by the Office of the Attorney General for legal sufficiency, further clarify and strengthen the provisions for protecting structures from damage by construction work being done on a neighboring property. In addition to providing written notification, a physical sign must be posted on the premises where the construction activity will take place. I share this with you today, because I want you and the community to know that DCRA takes this issue seriously, and is seeking further ways to protect homeowners.

II. "Substandard Construction Relief Amendment Act of 2019

Switching now to the "Substandard Construction Relief Amendment Act of 2019." This bill seeks to amend the D.C. Code penalties for violations of the Construction Code so that when a 'factfinder' determines that a violator caused physical damage to an adjoining or abutting property, the violator must either repair the damage or pay restitution to the property owner. The property owner whose home was damaged may decide whether they want the violator to repair the damage or pay restitution, and they still have the right to file a civil suit against the violator, with the amount of any civil award offset by the amount of the restitution award or the value of the repair.

DCRA recommends that if this bill moves forward, the term 'factfinder' be defined. Currently, DCRA inspectors are trained to identify Code violations and review whether the construction work matches the plans associated with the building permits. In the event that the undefined 'factfinder' in the proposed bill is a DCRA employee, it is important to note that DCRA inspectors are not qualified to attribute causation, apportion liability, or design corrective actions

in a dispute between two neighboring property owners. Moreover, our inspectors would not be able to speak to the condition of the property before any construction work commenced. All of this would put DCRA inspectors in a difficult position, especially since the agency's mission is to be a neutral, unbiased body charged with enforcing the District's Construction and Property Maintenance Codes.

III. "Illegal Construction Repair and Mitigation Amendment Act of 2019"

The "Illegal Construction Repair and Mitigation Amendment Act of 2019" presents similar issues to the previously discussed proposed legislation. In this bill, DCRA would be required to investigate and determine whether alleged damage to adjoining or abutting properties was in fact due to construction that is currently subject to a Stop Work Order. DCRA would be unable to lift the Stop Work Order until the damage has been repaired or otherwise mitigated by the property owner who is subject to the Stop Work Order. The Stop Work Order may also be lifted if the Office of Administrative Hearings decides to lift the order. It is important to note that the bill does not give the Office of Administrative Hearings the authority to enforce mitigation or repairs.

As is the case in the previous bill, this proposed legislation seems to be requiring DCRA inspectors to perform an investigation to determine the cause of the alleged damage. Our inspectors, as noted earlier, are trained to identify Code violations, but are not equipped to investigate causation.

IV. Implications and Suggestions

As previously stated, I strongly support the Council's commitment to the issue of what to do when a construction project damages a neighboring property. With that said, both of these proposed bills would put DCRA inspectors in a position to perform duties that they are not currently trained to perform. In order to take on this level of responsibility, DCRA would need to

re-train or hire an undetermined number of employees to handle these new duties, requests, and subsequent investigations.

The objective of these two bills could be accomplished by transferring these proposed new investigative functions to an independent board. This board could be comprised of experts, such as forensic engineers, who are better equipped to attribute causation, apportion liability, and/or design corrective actions in a dispute between neighboring property owners. This independent review board could also be called upon to provide expert testimony and written declarations during court proceedings. Another alternative would be to set aside funding for DCRA to hire such forensic engineers on a contractual basis to assist with relevant investigations, recommend plans to fix damaged properties, and recommend restitution amounts.

DCRA also has suggestions relating to the proposed penalties under these bills. Under the current Code, a violator may be subject to a fine not to exceed $2,000, or imprisonment up to 90 days, or both for each violation. This is in addition to any civil fines, penalties, fees, and remedies pursuant to the Civil Infractions Act. None of these sanctions are mandatory, but the proposed repair-or-restitution penalty in these bills is mandatory. We believe that the bills should be revised to make this penalty discretionary and therefore consistent with existing DCRA penalties.

Both bills are also silent as to how restitution amounts would be calculated and proven, as well as whether the District or the aggrieved property owner would be responsible for the costs associated with establishing evidence. Additionally, the mechanics of how the monetary restitution would be given to the aggrieved property owner are not sufficiently detailed in either bill.

If these bills are passed as written, there would be additional judicial proceedings that may have to be heard at OAH and then in Superior Court, since OAH's Administrative Law Judges do not have the authority to order mitigation or restitution. Also, the District may have to bear

substantial litigation costs and expert witness fees likely involved in such proceedings. We urge the Council to fully consider the budgetary implications involved.

Taking a step back, I would encourage the Council to look into something that I believe is at the heart of the overall issue but is not addressed in either bill. While the vast majority of contractors and developers play by the rules, there are some serial bad actors. To better protect District homeowners, DCRA would like to work with the Council to explore options for baring such bad actors from continuing to seek permits This tool, along with a mechanism to ensure LLCs cannot be used as an identity shield, would be an effective way of preventing known bad actors from continuing to inflict harm.

V. Conclusion

Chairman Mendelson and members of the Council, I look forward to continuing to work together on this and other issues. Thank you for the opportunity to testify on both of these bills, and for allowing me to provide what I hope are some helpful suggestions. I am happy to answer any questions you may have.