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Committee of the Whole: Hearing on Illegal Construction November 7, 2019

Council Members: I am Chuck Elkins, Chair of ANC3D. Today I am testifying on my own behalf.

Committee staff asked me to describe some recent instances of illegal construction in our neighborhood.

In the attached Example #1 (Attachment #1) you will see that I reported suspected illegal construction on October 11th and was told the inspection would take place the next day. I called on October 25th to check to see what happened. DCRA had lost my original complaint, and we had to start all over again. Then it took them 3 more working days to get to the site—an unacceptable 13 working days.

Example #2 (Attachment #2) is more complicated because it involves both Zoning Administrator and the Illegal Construction Hotline. But if you focus on the middle column dealing with the Hotline, you will see that I reported the possible illegal construction on September 16th. It took from September 16th until October 29th (31 business days) to get an inspector on site. Even that October 29th inspection is suspect, based on photos that we have now submitted to DCRA and asked for a new inspection.

In summary, the Illegal Construction hotline system is:

- Unreliable
- Very slow in getting inspectors out to the site in order to catch the violator in the act.
- Provides no feedback to the person making the complaint.
- Leaves the complaining citizen wondering whether he actually saw what he thought he saw or that the inspector just didn't do a good job.

While I am very supportive of Director Chrappah, he heads a very complex Department that does not have a coherent illegal construction strategy or the resources to implement it.

Last year I testified on the budget, asking you to add 50 more inspectors to the Agency. You chose not to do so, keeping the enforcement budget essentially the same. We can't keep starving the enforcement program and still expect better results.

But in the meantime:

1. ANC Commissioners can help fill the inspector gap by reviewing draft permits and submitting legally sufficient citizen affidavits in lieu of DCRA inspectors. See Attachments 3 and 4.
2. ANC Commissioners should receive the same notice as neighbors about planned construction.
3. DC should adopt the same policy as Montgomery County, Maryland and require the applicant to post a notice on the property as soon as someone applies for a permit, instead of just after the permit is issued and the contractor is off and running.
4. Posted permits should be READABLE from the street, not just VISIBLE from the street as now allowed. See Attachment 5.
5. We need all permits filed on line and the drawings made available to ANC Commissioners and citizens. See Attachment 6.
6. We should prevent builders from filing multiple permits in order to avoid permit requirements. See Attachment 7.
7. We need a requirement for a Certificate of Occupancy for major residential construction. See Attachment 8.
8. Commissioners and citizens need case workers assigned to particularly egregious or complicated cases and an ombudsman at DCRA who will help us work our way through what is sometimes a recalcitrant agency. See Attachment 9.

Illegal construction is a serious matter and needs to be prevented. It can result in damage to neighbors, danger to those who eventually occupy the structure, and can force honest contractors out of the market.

Delays in getting the inspectors on site can be very harmful because it is too easy for a contractor to cover up his violation if he has time. In addition, DCRA has proven very reluctant to force a contractor to tear up something that he has already built, even if did it illegally.

The Council can play a vital role in bringing about these needed reforms. I hope that you will add my suggestions in your current bills.

Attachment 1: Illegal Construction

Wesley Heights Recent Example #1

(Committee staff knows the address)

Date of call	Action by Illegal Construction Hotline
October 11th	I called Illegal Construction Hotline to report possible construction without a permit. Told saw no permit on file and inspection would happen next day (10/12)
October 15th	Was told inspection would take place next day (10/16)
October 25th	Told nothing on file from original report. Told inspection will be scheduled for October 29 th
November 5th	Inspection took place on October 30 th . Inspector found that there was a retaining wall permit and that there was no violation.

Attachment 2: Illegal Construction

Wesley Heights Recent Example #2

Date of call/action	Action by Illegal Construction Hotline	Action by Zoning Administrator's Office
Past History over many years		Working with Zoning Administrator to bring property into compliance with zoning regulations
September 16	I reported possible illegal construction (exceeding ~\$8,000 permit) to Illegal Construction Hotline. Not related to zoning issues	
September 20 th	Inspector unable to gain entrance; rescheduled to September 24 th	
October 3 rd		Zoning Administrator's office makes on-site inspection related to zoning matter. Does not see any exceedance of permit.
October 10 th	No report on file regarding 9/24 inspection by illegal construction staff; Hotline will ask inspector to complete the record.	
October 11 th	Same response; will ask inspector	
October 15 th	Same response	
October 15 th	I called the inspector and left word for him to call me. He never called	
October 23 rd		Zoning office sends report of its inspection for zoning purposes and also reports on illegal construction complaint. Closes the illegal construction aspect of case
October 24 th	the case. No response to the protest.	I protest the closing of the illegal construction portion of case
October 25 th	Told inspection rescheduled for October 29 th	

November 5th	Told that inspector reported no violation	
November 5th	I submitted photos that show apparent major construction work far beyond what could be done for \$8,000 and under existing permit.	

Include ANC Commissioners as Reviewers of Draft Building Permits

The Problem:

Once a building permit is issued, a builder has an expectation that he can rely on that permit and begin construction. 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, knowledgeable ANC Commissioners are excluded from review of draft permits, while other DC agencies/resources are not. Instead, ANC Commissioners and their constituents are forced to “chase the horse after it is out of the barn.”

Proposed Solution:

Direct that ANC Commissioners be invited to participate in the review of any draft 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 allowed to participate, or not, as they saw fit, depending on the circumstances of a particular project and its importance to the neighborhood. A significant improvement in the process would be to adopt the Montgomery County requirement for an application for a permit post a notice at the property as soon as he applies for the permit, thereby given ANC Commissioners and the public even earlier notice of forthcoming permitting actions.

Rationale:

Why are ANC Commissioners the one major group in DC Government which is excluded from permit review process? ANC Commissioners are the eyes and ears of the District Government at the neighborhood level and can play a key role in preventing 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 have cut corners in the past. As a simple 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 while the plans were still in draft and the permit under review.

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 are of such importance, Commissioners’ 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. There would be no need to allow additional time to ANC Commissioners’ review. In addition, some of the after-the-fact anger at DCRA and ANC Commissioners by neighbors will be avoided.

Attachment 3

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 should be part of the team that helps DCRA review permits.

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 to trigger inspections and (2) a DCRA inspector must observe the violation in person. Because there are too few inspectors, 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 authority for 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, thereby eliminating the need for a DCRA inspector to observe the violation in person.

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 worksites 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, which it is not currently. 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

Attachment 4

secrecy on their sites. Citizens often have a “bird’s eye view” of construction that DCRA does not have. 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 evidence would be a major improvement in DCRA’s compliance strategy and would greatly extend the Department’s enforcement reach.

Require Permits to be Readable and Understood from the Street

The Problem:

Currently, builders are required to post their permits so that they are “visible” from the street. To meet the letter of the law, they can post them on the door of the old structure or a tree, but then surround the property with a fence or other obstructions so that no one can get near enough to the permit safely to read it. In addition, even when the permit is readable, the description of the scope of the project is often so scant that no reader is in a position to determine whether the builder is exceeding the scope of his permit. This situation limits the ability of citizens to help DCRA ensure that their permits are being followed.

Proposed Solution:

Require builders to post their permits so that they can be safely read from accessible public space. In addition, revise the permit notice form to require a full explanation of the scope of the project, and not just a title.

Rationale:

Notoriously, DCRA depends primarily on complaints from citizens to trigger inspections. However, ironically, DCRA makes it very hard for citizens to know enough about a project to spot violations. One case of this is the content of the permit notice form and the permissive language that allows builders effectively to hide the permit from scrutiny.

Require all permit applications to be filed on-line and made available to the public

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's digital approach to permits has been on tracking of permits instead of the making the content of permits available. 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 all permit applications to be filed on-line and made immediately available to the public. This would remove DCRA's discretion to keep these permits private.

Rationale:

Citizens need to be able to 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.

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 leveled 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 or having to correct the "mistake".

In short, mistakes are made by DCRA and builders cheat, 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 and the builders are doing.

Close the serial permit loophole

The Problem:

Currently many builders are well-versed in exploiting the regulatory loophole that allows them to apply for less of a permit than they know they will ultimately need, and then upgrade to a more complete permit at a later time with the hope of avoiding close review of the project as a whole. This raises problems of safety and compliance with regulations.

Proposed Solution:

First, when an applicant applies for an “additional” permit or an “amended” permit to supplement his initial permit, DCRA should be required to review the additional or amended permit with the same rigor as if the full set of permits had been applied for originally. Secondly, when a permit (or series of permits) exceeds a set percentage (e.g. 90%) of the allowed gross floor area, lot occupancy, or other measurable restriction, a limiting notation should be placed on the plans highlighting the need for gross floor area to be re-calculated if there are any future permits applied for relative to this building. Finally, DCRA needs to tighten the rules for the issuance of a postcard permits and impose serious sanctions when builders go beyond the terms of the permit or otherwise violate building code and zoning regulation requirements. One especially egregious behavior on the part of developers is to leave one wall standing in an otherwise razed house in order to avoid applying for a raze permit. In at least one other jurisdiction we know of, at least three walls must be left standing in order to avoid designating the construction as a raze. Changing this provision in DC would be helpful. In summary, currently, DCRA’s enforcement program does not seem to pose much of a deterrent to prevent all of these behaviors by builders.

Rationale:

One of the loopholes that Developers exploit is to plan a total raze of a building, but apply instead for a permit to renovate a building. Then, they either just later raze the entire building without changing their permit or, if they are caught, they apply for an amendment to their permit, pay a small fine, and are back building in a few days. Postcard permits are also sometimes used to start a project in the same way, even when the builder knows that the permit will not be sufficient for what he intends to do. Similarly, builders submit plans that show that some of the space as not eligible to be included in the gross floor area calculations. Then, later, they build out that space, thereby violating the gross floor area limitations.

This loophole compromises the safety of the project and its compliance with all of the building and zoning regulations. Under this loophole, builders avoid reviews or the review is truncated and the entire project is not seen at one time. Building code zoning restrictions may thereby be violated without DCRA’s knowledge or enforcement. Reviewers and neighbors are also misled about the nature of the project until it is too late for anyone to object to these violations.

Require a Residential Certificate of Occupancy

The Problem:

Currently, the Zoning Administrator and DCRA enforcement staff 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 where the builder/owner has for seven 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 a certificate of occupancy because no such certificate is required for residential property, in contrast to commercial properties where this threat is very effective according to the Zoning Administrator.

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 objectives: (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 is required now) and (2) it would give teeth to DCRA enforcement actions which lack force today, giving DCRA the leverage 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.

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 difficult to get the attention of a person within DCRA who can or will fix the problem. The problems are two-fold: apparent non-performance by DCRA employees and education for the constituent about what is reasonable to expect and how to make his case for relief.

The Solution:

Establish an Ombudsman function either within DCRA or outside it whose job is to arm 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 should help advocate for the constituent's position within DCRA and, where he/she runs into a brick wall, to elevate the matter within the Department. This function would be in contrast to the function of the current constituent relations personnel within the Department who do not see their job as influencing the way the Department treats a constituent.

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.

As a supplement to the Ombudsman, DCRA should assign "case workers" to especially egregious cases which, by their nature, cannot be solved in just a few days' time. Currently, DCRA's systems appear to allow an employee to "close" a case if he makes a response to the complaint/inquiry even if that does not solve the problem. Timeliness is highly rewarded in the system; thoroughness appears not to be.

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 instead 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.