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Reforms for the Board of Zoning Adjustment

Resolved, ANC 1D advises the Council of the District of Columbia to bring about the following six headline propositions and changes to the Board of Zoning Adjustment (BZA).

This resolution of advice is also addressed to the Zoning Commission and to the Board of Zoning Adjustment. The Why section below is an equal part of this six-part statement of the heading, and its many points should be answered in particularity.

1. Expand membership on the BZA, and increase the compensation for non-government employees who serve as members to \$40 an hour while working at the BZA office on BZA business. At least two members of the BZA should be selected for staggered four year terms. Require the BZA to schedule at least nine hearings a year at night.
2. Subject the BZA procedures to review by the Zoning Commission, with complaints from ANCs concerning patterns of behavior to be considered immediately. Complaints concerning any or all board members should be allowed by any hearing participant directly to the Zoning Commission after sincere mediation. Make BZA board members subject to the DC code on Employee Behavior which requires avoidance of any bias, or appearance of bias.
3. Require the BZA to emulate the following better practices of the Historic Preservation Review Board, the Alcoholic Beverage Control Board, and the Public Service Commission: (1) Institute staff services that can expedite most cases, clarify the issues, alternatives, interest groups, and consequences before a BZA Hearing; (2) Make cases arising subject to staff analysis and recommendation, as is done by the Historic Preservation Review Board; (3) Require that impacted Advisory Neighborhood Commissions be notified, as soon as the Board, or its staff, becomes aware of an issue.
4. Require that transcription services include quality control checks by a third party, and that transcripts be available normally within a week. Require responses to cases by the various parties no sooner than ten full business days after the transcript becomes available to all.
5. Change the District Code and laws supporting BZA to emphasize that the role of the BZA is to assure that Zoning Administrator decisions consider as paramount the stated intents of the Zoning code. Require the Zoning Administrator to make a signed statement that, on rational balance, the intents are served without overly focusing on the details of law. Any amount of judgment or discretion must be noted, and reference made to the evidence-based arguments for those; these at least should trigger notice to the affected ANCs. Require provision of transparent and responsible documentation for all reports and recommendations given by other parties, and that these be easily available by web searches, except perhaps for a few exceptions to preserve some privacy or security concerns, concerns which can be met by signed confidentiality statements by parties like

ANCs with direct interest. Require that the BZA assure that all operations are with “clean hands” – that no laws are broken, and specifically that impacted ANCs have been notified as soon as possible, and their resolutions addressed within the framework of settled law. Repudiate the DCRA's argument that the Zoning Administrator's judgments must be given Great Weight requiring the BZA to just accept them.

6. Prohibit the determination of BZA policies on the basis of prior BZA rulings, unless the policies are published and confirmed by the DC Council.

Why: The provisions of part 1 would allow ordinary DC citizens to serve, and broaden the perspective of the Board. Broadening the backgrounds of board members would allow the BZA to better focus on the intents of the Zoning laws and their broad impact on DC, and avoid devolving into narrow focus on particular code items while not attending to the larger intents and their impacts. It should assist the BZA to recall that it is quasi-judicial, and not an arena purely for legalities. Few of DC population can conveniently take off from their jobs during the day. Again, this restricts the services of the BZA to a small group whose lives afford them this flexibility.

Concerning part 2, it is now possible for board members to argue their bias with no recourse except for the very slow and expensive application to the Court of Appeals. The BZA can and does use its bias to shut down lines of argument members disagree with, even before they are expanded. This is contrary to many US Supreme Court rulings that state that arguments must be allowed, without censorship, unless they disrupt the administration of justice. Thus, the BZA seems to be explicitly operating against established law.

Furthermore, the BZA can, and does, exercise pervasive bias in discriminating against statements of fact or observations of consequence by those who have not been credentialed or certified as general experts. The BZA then can dismiss almost any evidence with this bias. This pattern, when it occurs, creates a two-class society - experts and commoners. It relieves experts and the Board from dealing with the substance of evidence, or evidence-based arguments. In particular, it allows the BZA to dismiss evidence presented by an ANC in its resolutions, despite the BZA's legal responsibility to accord these deference and Great Weight. The BZA can, and does, exercise pervasive bias against ANCs when it accords the Zoning Administrator deference and Great Weight, and uses this to dismiss the contents of ANCs.

The following points overlap part six of the above resolution heading: The Zoning Code does not provide any basis for according the Zoning Administrator any deference or Great Weight. To do so as a policy would require submission of a code change for approval to the DC Council. On the contrary, the DC Charter, an Executive Order, and the ANC Act along with settled law requires the BZA to give deference and Great Weight to every ANC point in particularity and from the perspective of the ANC. This pattern needs immediate correction by the Zoning Commission because it is directly contrary to law.

Concerning part 3: If there are objections, then a staff mediator can operate to assure that there is full good-faith due-diligence in explaining reasons, uncovering documentation, and reasonable outreach to those whose interests may be substantially affected. The mediator should have the staff resources so that an independent inspector can look into the issues, in much the same way as now done by the Alcohol Beverage Control Board. When an ANC or non-profit civic group has concerns, then the mediator can operate much like the consumer relations staff does for the Public Service Commission, and further can apply the services of BZA staff attorneys to clarify points of law. The full rigors of discovery would be inappropriate for a mediator of a only quasi-judicial body, so the sanction for participation in collegiality would be the report of the mediator to the full BZA with a report on what issues are incompletely addressed and potentially significant information is still lacking. The BZA should be allowed by law to take note of these uncertainties in their balancing out their alternative decisions.

The analytic staff in the Office of Planning that now advises the BZA should be transferred to the BZA. This will help assure that the interests of justice based on an unbiased and full consideration of the situation can be reached, and the intents of the Zoning Code and other laws, appeals court rulings, and the policies of all agencies considered.

One of the functions of the mediator is to assure that there is sufficient clarity about the law and information so that many of the intents of Maryland's Montgomery County Office of the Peoples' Council (MMC OPC) are service, but within the framework of alternative dispute resolution without the adversarial aspect of the PSC's OPC.

Other independent boards and commissions in DC have adopted innovations to address well-known deficiencies in the processes of justice. Many of these deficiencies apply to all similar boards almost everywhere, and the BZA should start to adapt innovations well proven both from DC and elsewhere.

Concerning parts 5 and 6: Justice, even quasi-justice, is served only when there is not prior bias. The BZA is not a cadet branch of Superior Court, and even then American juris-prudential practice only accords precedents to duly passed law and Appeals Court rulings. The Administrative Procedures law requires any government body that wishes to apply policies to submit them to the DC Council for ratification or amendment. To allow the BZA to set precedents corrodes these essential constraints against a potentially rogue board.

Worse, it establishes a situation where anyone expecting a fair hearing must spend many tens of thousands of dollars to hire an attorney who has mastered a jungle of uncodified prior cases. This – like many other BZA practices of the BZA and its like in DC and elsewhere – puts fair hearings out of affordability or reach of most of the people of DC.

Passed by 4 to 0 vote at the legally noticed, public meeting of ANC1D on April 19, 2011, with a quorum present. Voting "yes": Commissioners McKay, Romero-Castillo, Edwards, Terrell.