DRAFT

Mrs. Maybelle T. Bennett
Chairperson
District of Columbia Zoning
Commission
Room 11
District Building
1350 Pennsylvania Avenue, N.W
Washington, D.C. 20009

BY HAND

Re: Zoning Commission Case No. 86-3
Rules - Pre-hearing Submission

Dear Mrs. Bennett:

On January 6, 1989 the Zoning Commission published proposed amendments to the rules governing pre-hearing submissions in cases before the Commission. 36 D.C. Register 197 et seq. (Jan. 6, 1989). The Commission invited submission of written comments by February 6, 1989. The Zoning and Land Use Committee of the D.C. Bar Section on Real Estate, Housing and Land Use submits the following comments for the Commission's consideration.

The new rules contemplate certain changes in the materials that an applicant must file with the Commission before a notice of public hearing will be published. The Committee believes that fairness requires the Commission to establish a comparable requirement for others admitted as parties to proceedings before the Commission, particularly "contested cases" conducted under Section 3022. 11 DCMR (Zoning) §3022 (1987). In such cases, the Commission works hard to make a reasoned decision on the merits of an application. To achieve that goal requires careful, searching examination of the evidence and thoughtful consideration of the arguments advanced by all parties to a case. Trial by surprise is no more appropriate in administrative proceedings than it is in civil litigation. Yet, in litigation, discovery rules are designed to elicit all relevant evidence in advance

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of trial. The Committee submits that, in order to assure even-handed exploration of the issues involved in a given case, the applicant must have a reasonable opportunity to learn and prepare to respond to evidence and arguments advanced by party opponents. The right to cross-examine adverse witnesses necessarily implies a right to conduct meaningful cross-examination. See D.C. Code §1-1509(b) (1981 ed., 1987). The ability to conduct meaningful cross-examination, particularly of experts, can be effectively denied if an applicant does not have reasonable access to reports and other documentary evidence before the hearing begins.

The proposed rules do not address the imbalance in evidentiary disclosure that prevails under existing procedure. Existing Section 3013.1 and the proposed revision thereof both require an applicant to disclose virtually its entire case before a public hearing is even noticed. The pre-hearing filing requirements imposed on other parties by Section 3022.3, however, do not require a comparable degree of disclosure about the substance of an opponent's case. The Commission has already recognized that there is an imbalance and has established additional pre-hearing filing requirements in some instances. See, for example, Notice of Public Hearing in Case No 88-23(C)(Salvation Army), 35 D.C. Reg. 8767, 8769 (Dec. 16, 1988).

The proposed rulemaking offers an opportunity to squarely address the issue of balanced disclosure. The Committee respectfully submits that a change in the pre-hearing disclosure rules is warranted. A reasonable solution would be to codify the practice of imposing additional filing requirements previously imposed on a case-by-case basis as part of Section 3022, and to expand the scope of such disclosure to include the reports of expert witnesses and "additional information, reports, or other materials" that the party "may wish to introduce" at the hearing. See proposed Section 3013.1(b).

Thank you for your consideration of these comments.

Sincerely,

Michael A. Cain
Chair, Zoning and Land Use
Committee

MAC:yh