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Via IZIS

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Zoning Commission for the
District of Columbia
441 4th Street, N.W., Suite 200-S
Washington, D.C. 20001

Re: Z.C. Case No. 04-33G – Inclusionary Zoning Amendments

Dear Commissioners:

On behalf of Kettler, Inc., we are pleased to submit these comments on the proposed text amendments to the Inclusionary Zoning provisions ("IZ") in Chapter 26 of the Zoning Regulations in the above-referenced case. Kettler is a nationally recognized, award-winning developer of both affordable and luxury multi-family apartments and condominiums in the Washington metropolitan area. Kettler has developed, acquired and renovated, or planned or zoned more than 24,000 multi-family units in garden, mid-rise, high-rise and mixed use developments. One of our most recent projects is the new 132-unit building presently under construction at 2101 Champlain Street, N.W., which includes IZ units in excess of the minimum requirement. Delivery is expected in 2017. Several other D.C. projects are in the development phase and Kettler hopes to begin construction on several of them very soon.

Kettler strongly believes in affordable housing and supports the Commission's efforts to make the IZ regulations more effective while still encouraging development. Kettler opposes, however, the IZ provisions in the newly-adopted ZR16 and the proposed IZ text amendments that will retroactively apply IZ to existing buildings with a 50 percent increase in gross floor area ("GFA"). This change will have a serious, negative impact on the provision of new housing and IZ units, and the rehabilitation of existing housing. Kettler is particularly concerned about its plans to proceed with Phase II of a rental apartment building if IZ will now apply retroactively to Phase I, which is occupied and fully operational. The Commission consistently represented to the public that IZ would not change in ZR16 and explicitly stated in the preamble to Z.C. Order No. 08-06A that the existing provisions of Chapter 26 would continue while Z.C. Case No. 04-33G is under consideration. Yet, the language and applicability of IZ were changed.

We, therefore, urge the Commission to take three actions: (i) amend ZR16 to delete the rewritten IZ provisions so the existing text of Chapter 26 will remain in force until the

Commission acts on Case No. 04-33G; (ii) revise the proposed IZ text amendments to ensure that IZ does not retroactively apply to existing residential gross floor area; and (iii) impose a six-month delay in the effective date of the IZ amendments and add vesting provisions.

Applicability of IZ Requirements Under Current Chapter 26

The current provisions of Chapter 26 provide that the IZ requirements shall apply to "[a]n existing development ... for which a new addition will increase the gross floor area of the entire development by fifty percent (50%) or more." 11 DCMR § 2602.1(c)(3). In adopting this language, the Commission consciously and deliberately did not apply IZ retroactively to existing residential buildings to ensure that older buildings would continue to be rehabilitated. The Commission determined that IZ should only apply if a property owner could also avail itself of IZ bonus density to off-set the financial burden of IZ. *See* Transcript in Z.C. Case No. 04-33, November 10, 2005, at 24-35.[1]

This has been the consistent interpretation of the Zoning Administrator since the enactment of IZ, given the inherent difficulties of retroactive application. IZ will not apply to an existing residential, even when an addition increases the residential GFA by 50 percent or more. See, for example, Zoning Administrator Determination Letter July 7, 2014.

Changes under ZR16 and New Text Amendments

Notwithstanding these concerns, the recently adopted ZR16 and the proposed alternative IZ text amendments submitted by the Office of Planning ("OP") have changed the applicability of IZ to include *any* existing building where an addition increases the GFA by 50 percent or more:

Adopted ZR16 Provision	OP Proposed Alternative Text 04-33G
Subtitle C: 1002.4: If the new gross floor area comprising ten (10) or more units [described in 11-C DCMR § 1001.2(b)] would result in an	Chapter 26: 2602.1: Except as provided in 2602.3, the requirements and incentives of this chapter shall apply to developments

[1] For example, Commission Jeffries stated that he thought that an "existing envelope of a building ... converted to residential [use] ... should be exempt from this [IZ] proposal. I think it should be *new construction or some addition* to an existing structure that might be residential." Commissioner Mitten suggested setting a threshold for addition that would "increase the overall density by 50 percent..." and not for a "marginal addition where you might be constrained and couldn't get the bonus." Commissioner Hildebrand expressed concern if IZ were applied to existing residential buildings undergoing a substantial renovation, a small condominium building that is "reaching its end of its life span and you want to go to change the mechanical system that serves the whole building and replace the roof because it's now 20 years old. *Does that suddenly mean that, you know, three people have to move out and they have to sell their units at affordable housing rates just because they're maintaining their property*?" (Emphasis added).

increase of fifty percent (50%) or more in the floor area of an existing building, **IZ requirements and modifications shall apply to both the existing and the increased gross floor area.**	that: ... (c) Were in existence prior to August 14, 2009, have ten (10) or more dwelling units on a lot; or on contiguous lots, including those divided by an alley and there is an increase of fifty percent (50%) or more of its gross floor area; ...

As discussed below, both the ZR16 provisions and the proposed IZ text amendments are problematic.

Adopted ZR16 Provisions

Although the Commission did not intend to change Chapter 26 regulations as part of ZR16, the IZ provisions were nevertheless amended in a way that could have substantial negative consequences for developers and property owners.[2] As shown in the chart above, the IZ requirements under ZR16 "shall apply to both the *existing* and increased gross floor area" when an addition increases the amount of the GFA by 50 percent or more. This text will apply to any matter-of-right project that does not vest under the existing regulations by September 6, 2016.

As written, there is no exception for an existing building devoted to (i) non-residential uses; (ii) a residential condominium building already occupied or with executed sales contracts; or (iii) a residential building permitted prior to the effective date of the IZ regulations on August 14, 2009, and not undergoing any substantial rehabilitation.

Significantly, these ZR16 changes will take effect in September, regardless of the evolving text in Z.C. Case No. 04-33G. For example, a phased residential development reviewed under Large Tract Review after January 1, 2015, with only Phase I permitted prior to the ZR16 effective date, could become subject to IZ. This could have a debilitating effect on the ability to underwrite the project and proceed with subsequent phases, thereby reducing the amount of housing produced. If a condominium's GFA is increased by 50 percent or more, would existing unit owners need to sell their condos if they didn't meet the IZ income requirements? Similarly, if a rental apartment building increased its GFA by 50 percent or more,

[2] In its preamble to ZR16, the Commission stated that the new zoning "text reflects the Inclusionary Zoning (IZ) regulations as they are in the existing Chapter 26 of Title 11 DCMR." 63 *D.C. Reg. Part II* at 2470 (2016). Similar statements were made through the ZR16 hearing process. See Z.C. 06-08A Transcripts, November 4, 2013, at 50; November 12, 2013, at 17; January 1, 2014, at 45, 211; February 8, 2014, at 79; February 12, 2014, at 271; July 10, 2014 at 158; December 11, 2014 at 79-80. However, a comparison of the existing IZ regulations with ZR16 shows they did, in fact, change.

would a landlord be required to displace tenants, or be precluded from renewing leases? Even for long-term tenants? How would the owner comply with the required unit ratio and proportionality tests? How soon would the owner have to comply with all of the other IZ requirements? Clearly, such retroactive application to existing buildings would create logistical nightmares, severe financial burdens on existing tenants and individual condominium owners, and undermine the goals of housing stability and predictability in the District. It would also affect the ability to comply with the Tenant Opportunity to Purchase Act ("TOPA").

IZ Amendments Under ZC 04-33G

Similar issues arise under ZC Case No. 04-33G. While the text presently under consideration seems to suggest that it only applies retroactively to residential buildings (as opposed to office or other nonresidential uses), it does not take into account the possible displacement of existing tenants, the negative TOPA implications, the effect on condominium buildings, or whether IZ bonus density can be used to off-set the costs of a substantial rehabilitation of an existing historic building or other older structure.

Requested Zoning Commission Action

In light of the foregoing, we request the Zoning Commission to take the following action:

1. On an emergency basis, amend ZR16 to delete the IZ revisions so that current Chapter 26 remains applicable until the effective date of amendments proposed in Z.C. Case No. 04-33G.

2. Delete proposed section 2602.1(c) in Case No. 04-33G.

3. Delay the effective date of the new IZ amendments to six months after adoption and provide the same vesting provisions as set forth in ZR16 under 11-A DCMR § 102.3.

Respectfully submitted,

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cc: Kettler, Inc.