

November 6, 2006

Zoning Commission of the District of Columbia
One Judiciary Square – Suite 210 South
441 Fourth Street, NW
Washington, D.C. 20001

Re: ZC Case 05-02 (Residential Recreation Space)

Honorable Members of the Commission:

The law firm of Holland & Knight LLP has participated in numerous cases before the Board of Zoning Adjustment seeking and consistently earning relief from residential recreation space (“RRS”) requirements. The provisions apply to most mixed use zones, including –

- Special Purpose (“SP”) zones (§ 533)
- Mixed Use Commercial-Residential (“CR”) zones (§ 635)
- Commercial (“C”) zones (§ 773)

The only mixed use zone where RRS provisions never applied is the Waterfront (“W”) zone.

RRS provisions also appear in two “overlay” zone districts, specifically –

- Downtown Development overlay zone (§§ 1706.4(f) and 1706.5(f))
- Southeast Federal Center overlay zone (§ 1803.2)

The Zoning Commission has already given the topic considerable examination, including a public hearing June 27, 2005. Later that year, on September 15, the Zoning Commission concluded, from the record of the case, that the regulations should be repealed by a vote of 5-0, specifically noting the arguments made to that effect during the course of the hearing by Lindsley Williams but being aware of a substantial body of testimony from others expressing similar sentiments. (Attached please find a copy of portions of the Transcript of your September 15 public meeting.)

Since the initial case had been advertised in a way that proposed modification of existing provisions, but not repeal, the Commission properly determined that a further hearing was required. Those following the case to that point, then expected such a Notice and hearing to follow shortly. Instead, the Office of Planning filed a report March 3, 2006 providing both for possible repeal but also suggesting, in the alternative, modifications to the provisions already in

ZONING COMMISSION
District of Columbia
District of Columbia
CASE NO. 05-02
EXHIBIT NO. 40

effect. The Commission agreed to hear the case as recommended by the Office of Planning, thus allowing for either repeal or modification of the existing rules.

This firm, on behalf of past, existing, and prospective clients recommends complete repeal. We do so for the following reasons:

- The existing regulations were never well thought out, with the possible exception of the provisions in the DD and SEFC overlays substantially reducing RRS requirements of the underlying base zone districts. We cannot find, for example, any "Statement or Reasons" or other explanation of why the percentages vary from 5 percent to as much as 20 percent.
- The existing regulations were established prior to the adoption of policies to encourage housing in both "downtown" and throughout the District of Columbia. RRS adds costs to such development.
- At the time the provisions were adopted for the broad *base* zone districts, very little residential space was being established in them, so the impact of the regulations in terms of the space to be set aside for the common areas required was not relevant.
- Contemporary planning principles suggest that residential buildings be sited in areas where residents will become a part of the surrounding community, finding adequate means to secure groceries and household supplies along with opportunities for culture and recreation. Buildings providing amenities that serve only their own residents are more "self centered" than those whose residents participate in and utilize the adjacent community to meet their needs and enjoy its assets.
- While one can wonder why the regulation never applied to apartment houses in higher-density apartment zones (R-5-B and more permissive, for example), there is substantial information to the effect that "market" factors result in nearly all new apartment buildings providing a range of amenities to their residents in the form of exercise rooms, meeting rooms, swimming pools and outdoor areas for either passive or active recreational pursuits. While the nature and degree of these vary from one project to the next, "the market" delivers amenities that substantially meet the residents' expectations and there is no evidence to suggest that market expectations and behavior need to be corrected by zoning regulations.

If the Commission agrees with the conclusion that there is no public need for any regulatory requirement to provide residential recreation space, we oppose the idea advanced by the Office of Planning that ties that requirement to anything else to which it is not related, in this situation the provision of inclusionary housing ("IZ"). If the Zoning Commission can find a need, which we cannot, to require RRS, then it surely must find that the need will not disappear if affordable housing is provided. If there is no demonstrated public purpose for requiring RRS, then surely there can be no legitimate basis for "swapping" it for something having no nexus to it. In that light, the proposed exclusions are fundamentally "arbitrary and capricious," thus failing the

requirements of the District of Columbia Administrative Procedures Act and quite possibly failing fundamental Constitutional standards for the protection of private property rights.

As to the proposed changes to roof structures, we support the change advertised. We also suggest that the "roof structure" provision be expanded from that advertised, but in the spirit of the hearing, to enhance the use of rooftops and areas inside areas already allowed for roof structures for communal purposes in apartment buildings.

The text advertised amends the existing language at the end of § 411 as follows:

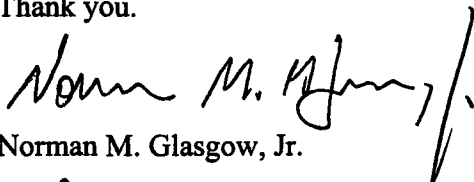
... and, when not in conflict with An Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 [*corrected date, full citation omitted*], penthouses for storage and toilets incidental and accessory to roof swimming pools or recreation space shall be subject to conditions and variable floor area ratio credit specified in this section.

We suggest the following instead:

... and, when not in conflict with An Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 [*corrected date, full citation omitted*], for **apartment buildings**, penthouses for (a) storage, and toilets, showers and lavatories incidental and accessory to roof swimming pools or communal recreation space on that roof; and (b) other enclosed areas, within the area permitted as a roof structure, for recreational uses accessory to communal rooftop recreation space shall be subject to conditions and variable floor area ratio credit specified in this section.

The suggested language serves to expand the range of allowed accessory bathing facilities to ones that are appropriate to swimming pools as well as to allow communal recreational use to limits already allowed for mechanical functions when there are other recreational uses on some open portions of the roof.

Thank you.


Norman M. Glasgow, Jr.


Lindsley Williams
Consultant in Land Use, Planning, and Zoning

Attachment

cc: Office of Planning

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GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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REGULAR PUBLIC MEETING
1188th MEETING SESSION (16th of 2005)

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THURSDAY

SEPTEMBER 15, 2005

+ + + + +

The Regular Public Meeting of the District of Columbia Zoning Commission convened in the Former Council Chamber, First Floor, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 6:30 p.m., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice Chairperson
KEVIN HILDEBRAND	Commissioner (AOC)
GREGORY JEFFRIES	Commissioner
JOHN G. PARSONS	Commissioner (NPS)

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN Acting Secretary

OFFICE OF PLANNING STAFF PRESENT:

ELLEN MCCARTHY
MAXINE BROWN-ROBERTS
STEVEN COCHRAN
JOEL LAWSON
JENNIFER STEINGASSER

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.

This transcript constitutes the minutes
from the regular public meeting held on September 15,
2005.

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1 herself.

2 CHAIRPERSON MITTEN: Thank you, Mr. Hood.

3 The next case for proposed action is Case
4 No. 05-02, which is everyone's favorite, Residential
5 Recreation Space.

6 So we received an additional submission
7 from Lindsley Williams that was very thorough, and we
8 have a supplement report from the Office of Planning,
9 and I will let Mr. Parsons --

10 COMMISSIONER PARSONS: Madam Chairman, I
11 recall this residential recreation space case many,
12 many years ago, and it was in a time where the kind of
13 amenities that are now taken for granted in apartment
14 complexes were hard to find, and the purpose of the
15 Commission was to influence that, insist upon it.

16 I think that time has past, and I find Mr.
17 Williams' arguments to abandon this very persuasive as
18 an obsolete and somewhat burdensome provision in our
19 regulations. So that's where I'm coming from tonight,
20 is to say let the marketplace take care of this
21 particular need in our city.

22 CHAIRPERSON MITTEN: Others?

23 VICE CHAIRPERSON HOOD: Madam Chair, I
24 would find myself in agreement with Commissioner
25 Parsons, and I think Mr. Williams has done an

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1 excellent job of laying out the issues for us and,
2 like I said, let the market drive it. Thank you.

3 CHAIRPERSON MITTEN: Mr. Jeffries?

4 COMMISSIONER JEFFRIES: Yes. I, too,
5 agree with Commissioner Parsons. I do believe that it
6 is somewhat obsolete and really not reflective of
7 current market conditions and so forth, and I, too,
8 would like to see it removed altogether.

9 CHAIRPERSON MITTEN: Mr. Hildebrand?

10 COMMISSIONER HILDEBRAND: The only thing
11 I would like to say is that I don't disagree that the
12 regulation needs to be revisited, but my concern is
13 that, if we eliminate it altogether, development
14 throughout the entire city will not rise to the same
15 level of market driven amenity space that might exist
16 in the central corridor area. I just caution us to
17 move carefully on that, in that regard.

18 CHAIRPERSON MITTEN: I agree with what Mr.
19 Parsons said. I think that we had some very
20 persuasive testimony, and we have all sat on BZA cases
21 where we've just had a parade of BZA cases where
22 people have sought relief from this and sought to
23 relief to varying degrees.

24 I think that, if there is a problem -- I
25 mean, keep in mind, this only relates to mixed use

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1 zones. It doesn't relate to residential zones. So
2 there's this disparity that I don't think is
3 necessarily reflective of the resources that are made
4 available in different neighborhoods for public
5 recreation.

6 I appreciate the caution that the Office
7 of Planning was attempting to exercise before making
8 such a dramatic change, but we've just -- I think we
9 have been influenced by not only the case itself but
10 our experience on the BZA, and we do have a definite
11 sense of what is being introduced in response to
12 market desires in apartment buildings around the city.

13 I think we are ready to abandon this, but
14 I have been advised that we can't take such a vote
15 based on what was advertised. So we will have to
16 readvertise and have another hearing on that subject,
17 and perhaps we will hear things from folks who feel
18 strongly for retention of some degree of residential
19 recreation space, but we'll find out.

20 COMMISSIONER PARSONS: So I would move
21 that we set down a new case. I guess it would have to
22 be a new case.

23 MR. BERGSTEIN: You really don't. It's
24 really just -- You can do it either way, but it could
25 just be another proposal, an alternative proposal from

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1 this case to simply repeal all provisions requiring
2 residential space.

3 COMMISSIONER PARSONS: Well, that's
4 exactly what I had in mind. So moved.

5 CHAIRPERSON MITTEN: Okay. Second? Okay,
6 Mr. Hood, go ahead.

7 VICE CHAIRPERSON HOOD: I'll second it.

8 CHAIRPERSON MITTEN: Thank you. So we
9 have a motion to set down a proposal that would repeal
10 all provisions related to residential recreation space
11 requirements in the mixed use zones, and is there any
12 further discussion?

13 All those in favor, please say Aye. Mrs.
14 Schellin, we have a unanimous vote.

15 ACTING SECRETARY SCHELLIN: Staff would
16 record the vote five to zero to zero for a further
17 hearing in Case No. 05-02 as stated, Commissioner
18 Parsons moving, Commissioner Hood seconding,
19 Commissioners Hildebrand, Jeffries and Mitten in
20 favor.

21 CHAIRPERSON MITTEN: Thank you. Last case
22 for Proposed Action is Case No. 04-35, which is the
23 Salvation Army PUD. I would open it up for
24 discussion.

25 We did receive -- Before I do that, we did

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