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February 27, 2009

By Hand Delivery

Mr. Anthony Hood, Chairman
D.C. Zoning Commission
441 4th Street, N.W.
Second Floor
Washington, DC 20001

RECEIVED
D.C. OFFICE OF ZONING
2009 FEB 27 PM 2:03

Re: Zoning Commission Case No. 09-01 (Text amendments to permit time extensions for Board of Zoning Adjustment (“BZA”) Orders and to clarify procedures for modification of approved plans) – Petition to adopt an emergency rulemaking and additional language for text amendment

Dear Chairman Hood and Members of the Commission:

On behalf of Dakota Points, LLC, and Dakota Square, LLC (collectively, the “Property Owners”), the owners of 5543-5575 South Dakota Avenue, N.E. (Lot 22 in Square 3760), and 300-320 Riggs Road, NE (Lot 52 in Square 3748), respectively, we hereby submit this letter as a petition to adopt an emergency rulemaking and add language to the text amendment in the above-referenced Zoning Commission Case under D.C. Code § 1-1501 et seq. (the “DC Administrative Procedures Act”) and 11 DCMR § 3011.7. The Property Owners were the applicants in BZA Case Nos.

ZONING COMMISSION
District of Columbia
CASE NO. 09-01
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EXHIBIT NO. 2
ZONING COMMISSION
District of Columbia
CASE NO. 09-01
EXHIBIT NO. 4

17600 and 17606, both of which were approved for relief by the BZA and will expire if Zoning Commission Case No. 09-01 is not adopted as an emergency rulemaking.

Zoning Commission Case No. 09-01 is a text amendment to 11 DCMR §§ 3129 and 3130, which: (i) would permit the BZA to grant a time extension to a BZA Order to allow more time to file such plans (and bring the powers of the BZA into conformance with the powers of the Zoning Commission with respect to granting authority to extend its orders by two years for just cause shown), and (ii) would make the time to request minor modifications to approved plans the same as the two year period allowed to file plans for a building permit with the Department of Consumer and Regulatory Affairs (“DCRA”) (see the Office of Planning Report attached as Exhibit A). The amendments would also establish a procedure through which the BZA would be able to consider other modifications to its Orders. Zoning Commission Case No. 09-01 is currently scheduled for hearing on March 30, 2009 (See the Public Hearing Notice attached as Exhibit B).

Although we greatly appreciate the filing of Zoning Commission Case No. 09-01 and the work of the Office of Planning (“OP”) and the Office of the Attorney General (“OAG”) related thereto, we believe that this case should be adopted and processed as an emergency rulemaking. Under D.C. Code § 1-1501 et seq., the Commission is an “independent agency”. As a result, under the DC Administrative Procedures Act, the Commission may adopt “a rule [...] necessary for the immediate

preservation of the public peace, health, safety, welfare, or morals.” Such an emergency rulemaking is necessary to preserve the public welfare in the instant case. The expiration of the BZA orders is not only afflicting the Property Owners’ property¹. As the result of unfortunate economic circumstances, many projects throughout the City have not been able to achieve financing in order to submit their building permit applications and therefore, will lose their entitlements if the rulemaking is not adopted as emergency. As a result of limited financing, these projects have not been able to pay for the construction drawings necessary to obtain a building permit from DCRA or to reapply to the BZA for a modification to their BZA Orders. The following is a brief list of the projects for which the BZA Orders will likely expire prior to the effectively date of Zoning Commission Case No. 09-01 if it is not adopted as an emergency rulemaking²:

<u>BZA Order</u>	<u>Applicant</u>	<u>Address (Square and Lot)</u>	<u>Final Order Date</u>
17600	Dakota Square, LLC	300–320 Riggs Road, N.E. (Square 3748, Lot 52)	March 21, 2007
17606	Dakota Points, LLC	5553–5575 South Dakota	May 9, 2007

¹ However, the Property Owners’ projects are part of an area-wide development which includes a property governed by a Land Disposition and Development Agreement (“LDA”) with the District of Columbia, recently finalized by the District of Columbia and an affiliate of the Property Owners. If the Property Owners’ BZA Orders expire, it will likely impact the entire area-wide development.

² Note that there will be even more cases needing to apply for modifications to their BZA Orders to extend those Orders after July 2009 to ensure that their entitlements are valid for such Orders that expire after July 2009.

		Avenue, N.E. (Parcel 137/86)	
17556	Murillo/Malnati Group	2816–2822 Connecticut Avenue, N.W. (Square 2107, Lots 56, 57, 75, 76)	May 22, 2007
17540, 17541	Capitol Hill Day School	210 South Carolina Avenue, S.E. (Square 765, Lot 803)	June 11, 2007

In addition, our research indicates that there are several more BZA Orders that will expire – or could expire and would need to file for new BZA approvals – prior to the effective date of Zoning Commission Case No. 09-01, if it is not adopted as emergency. Based on further research, attached as Exhibit C is a list of additional BZA Orders for which building permits have been filed and therefore are likely to expire prior to July 2009.

Further, under 11 DCMR § 3011.7, the Commission may expedite cases “regarding which the Office of Planning report and comments at the meeting suggest that: (1) The case has substantial merit in the public interest; (2) The issues in the case are relatively straight forward, and few if any modifications to the proposal are likely to be necessary; and (3) Little or no opposition has yet appeared, and the concerns at this preliminary stage [setdown] appear to be capable of resolution in an expedited

process.” The request to expedite Zoning Commission Case No. 09-01 as an emergency rulemaking satisfies all of the above factors.³

First, as stated above, the case has substantial merit in the public interest. Secondly, the issues in the case are relatively straightforward, as noted by the Commission in the setdown meeting on January 12, 2009, and the text amendment is unlikely to require significant modifications beyond those proposed in this letter. Since the Zoning Regulations already contain similar provisions allowing the Zoning Commission to extend its Orders for two years, the proposed case should be largely non-controversial. Further, much of the rulemaking’s proposed language is the result of technical amendments or practical updates to the Zoning Regulations. Third, no opposition has appeared to Zoning Commission Case No. 09-01 and we strongly believe that no such concerns will surface. Any issues that do arise will be able to be resolved in an expedited manner.

As part of our request for an emergency adoption of Zoning Commission Case No. 09-01, we would also like to request that additional language be inserted in the revisions to 11 DCMR §§ 3129 and 3130 stating that: (i) any applicant who files a petition or motion to extend their BZA Order with the BZA prior to such Order’s

³ Further, under 11 DCMR § 3020.1(k), the presiding officer of the Zoning Commission has the authority to take any action authorized by the Zoning Regulations or necessary under Chapter 30. As a result, the Zoning Commission may consider petitions from affected property owners to modify cases currently on its docket into expedited, or emergency, rulemakings, such as this.

expiration date shall toll such expiration date upon the date of filing until the BZA rules on the petition or motion pursuant to 11 DCMR § 3130, and (ii) that the proposed amendments under Zoning Commission Case No. 09-01 shall apply to all BZA Orders in effect as of setdown (on January 12, 2009). Our proposed language is as follows:

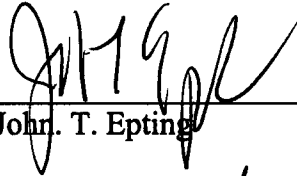
“3130.8 The filing of a petition for extension to a BZA Order by an applicant detailing good cause for delayed construction under such BZA Order shall toll the expiration date of such Order on the date that the petition is filed.

“3130.9 The provisions of this Section shall apply to all Board Orders in effect as of the date of setdown of Zoning Commission Case No. 09-01 on January 12, 2009.”

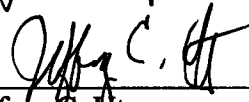
If the Commission does not agree that the emergency adoption of the rulemaking and the additional language outlined above is appropriate, in the alternative, we request an abbreviated comment period for Zoning Commission Case No. 09-01 and the inclusion of our proposed change to 11 DCMR § 3130. Moving up the effective date of Zoning Commission Order No. 09-01, if approved by the Commission, could have a beneficial effect on several properties, although it would still greatly impair many more projects.

We would be happy to produce any other information or evidence in support of the above letter.

Respectfully submitted,



John. T. Epting



Jeffrey C. Utz

cc: Jennifer Steingasser
Joe Carrol

EXHIBIT A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING

★ ★ ★



RECEIVED
D.C. OFFICE OF ZONING

2008 DEC 23 PM 4:30

Office of the Director

MEMORANDUM

TO: District of Columbia Zoning Commission

FROM:  Jennifer Steingasser, Deputy Director

DATE: December 22, 2008

SUBJECT: Zoning Commission Case No. 09-01
**Time Extensions for Board of Zoning Adjustment Orders
Setdown Report and Prehearing Statement**

PETITION

The Office of Planning requests the Zoning Commission amend §§ 3129 and 3130 of Title 11 DCMR and include new provisions, §§ 3129.7, 3129.8, 3130.6 and 3130.7. OP has recently received feedback from applicants with approved Board of Zoning Adjustment (BZA, or "the Board") orders concerning delays in project financing and construction due to the current economic climate, leading to BZA orders expiring before a project is able to proceed to permit. Therefore, the proposal is intended to extend the time period of issued Board orders for good cause, given the current economic circumstances.

This report also serves as a pre-hearing statement.

RECOMMENDATION

The Office of Planning recommends that this case be **set down** for a public hearing.

PROPOSED TEXT AMENDMENTS

The Office of Planning recommends the following amendments to ~~chapter 31 of Title 11 DCMR~~ ^{ZONING COMMISSION} ~~chapter 31 of Title 11 DCMR~~ ^{chapter 31 of Title 11 DCMR}:

11 3130 TIME LIMITS ON BOARD ACTION

CASE NO. 09-01

Amend

EXHIBIT NO. 1

3130.1 No order of the Board authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, or one (1) year for an Electronic Facility, unless, within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit, except as permitted in §§ 3130.6.

ADD

3130.6 The Board may grant one extension of the time periods in §§ 3130.1 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval; provided, that the Board determines that the following requirements are met:

- (a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;**
- (b) There is no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application; and**
- (c) The applicant demonstrates that there is good cause for such extension, with substantial evidence of one or more of the following criteria:**
 - (1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;**
 - (2) An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control; or**
 - (3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.**
- (d) No extension granted by the Board shall be valid for a period longer than the original approval.**

OP also recommends the following amendments to Section 3129 to reflect consistency, with two new provisions § 3129.7 and § 3129.8 added for procedural clarity. Section 3129 is proposed to be amended as follows:

11-3129. MODIFICATION OF APPROVED PLANS.

3129.1 This section applies to all appeals and applications filed with the Board under this chapter; provided, however, this section only applies to chancery applications to the extent specified in § 3134.

3129.2 The Board shall consider requests to approve minor modifications to plans approved by the Board, as set forth in §§ 3125.7 and 3231.8. The request shall be in writing, shall state specifically the modifications requested and the reasons therefore and include a copy of the plans for which approval is now

requested.

- 3129.3 A request for minor modification of plans shall be filed with the Board not later than ~~six months~~ (2) two years after the date of the final order approving the application.
- 3129.4 All requests for minor modifications of plans shall be served on all other parties to the original application at the same time as the request is filed with the Board. A party shall have ten (10) days within which to submit written comments that such party may have concerning the requested modification.
- 3129.5 A decision on a request for minor modification of plans shall be made by the Board on the basis of the written request, the plans submitted therewith, and any responses thereto from other parties to the original application.
- ~~3129.6 No member shall vote on a request for modification of plans unless the member participated in and voted on the original decision or read the record.~~
- ~~3129.7 Approval of requests for modification of approved plans shall be limited to minor modifications that do not change the material facts the Board relied upon in approving the application.~~
- 3129.6 Approval of requests for modification of approved plans shall be limited to minor modifications that do not change the material facts the Board relied upon its approving the application.
- 3129.7 A request to modify other aspects of a Board order may be made at anytime, but shall require a hearing.
- 3129.8 The scope of a hearing conducted pursuant to § 3129.8 shall be limited to impact of the modification on the subject of the original application, and shall not permit the Board to revisit its original decision.

OP recommends the petition be setdown for public hearing.

JLS/kt
Karen Thomas, Project Manager

EXHIBIT B

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PUBLIC HEARING**

TIME AND PLACE: **Monday, March 30, 2009 @ 6:30 P.M.**
 Office of Zoning Hearing Room
 441 4th Street, N.W. Suite 220-S
 Washington, D.C. 20001

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

Case No. 09-01 (Text amendments to permit time extensions for Board of Zoning Adjustment Orders and to clarify procedures for modification of approved plans)

THIS CASE IS OF INTEREST TO ALL ANCs

The Office of Planning ("OP"), in a report dated December 22, 2008, petitioned the Zoning Commission for a text amendment to 11 DCMR §§ 3129 and 3130. Section 3129 currently authorizes the Board of Zoning Adjustment ("Board" or "BZA") to consider minor modifications to plans if filed within six (6) months of an issued BZA order. The proposed amendment would make the time to request minor modifications to approved plans the same as the two year period allowed to file plans for a building permit with the Department of Consumer and Regulatory Affairs ("DCRA"). The amendment to § 3130 would permit the Board to grant a time extension to allow more time to file such plans. The amendments also establish a procedure through which the Board may consider other modifications to its orders, for example a change to conditions.

At its regular public meeting held January 12, 2009, the Zoning Commission setdown this case for a public hearing. The OP report served as the pre-hearing submittal for the case.

The proposed amendments to the Zoning Regulations are as follows, with addition to existing provisions shown in **bold and underlined** text, and deletions to existing provisions shown in ~~strike through~~ text:

CHAPTER 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended as follows:

1. By amending §3129, Modification of Approved Plans, to read as follows:

3129 **MODIFICATION OF APPROVED PLANS.**

- 3129.1 This section applies to all appeals and applications filed with the Board under this chapter; provided, however, this section only applies to chancery applications to the extent specified in § 3134.
- 3129.2 The Board shall consider requests to approve **minor** modifications to plans approved by the Board, as set forth in §§ 3125.7 and 3125.8. The request shall be in writing, shall state specifically the modifications requested and the reasons therefore and include a copy of the plans for which approval is now requested.
- 3129.3 A request for **minor** modification of plans shall be filed with the Board not later than ~~six months~~ **two (2) years** after the date of the final order approving the application.

Z.C. NOTICE OF PUBLIC HEARING
Z.C. CASE NO. 09-01
PAGE 2

3129.4 All requests for minor modifications of plans shall be served on all other parties to the original application at the same time as the request is filed with the Board. A party shall have ten (10) days within which to submit written comments that such party may have concerning the requested modification.

3129.5 A decision on a request for minor modification of plans shall be made by the Board on the basis of the written request, the plans submitted therewith, and any responses thereto from other parties to the original application.

~~3129.6 No member shall vote on a request for modification of plans unless the member participated in and voted on the original decision or read the record.~~

~~3129.7 Approval of requests for modification of approved plans shall be limited to minor modifications that do not change the material facts the Board relied upon in approving the application.~~

3129.6 Approval of requests for modification of approved plans shall be limited to minor modifications that do not change the material facts the Board relied upon in its approving the application.

3129.7 A request to modify other aspects of a Board order may be made at anytime, but shall require a hearing.

3129.8 The scope of a hearing conducted pursuant to § 3129.7 shall be limited to impact of the modification on the subject of the original application, and shall not permit the Board to revisit its original decision.

2. By amending § 3130, Time Limits on Board Action, as follows:

(a) By amending § 3130.1 to read as follows:

3130.1 No order of the Board authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, or one (1) year for an Electronic Equipment Facility, unless, within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit, **unless its validity is extended pursuant to § 3130.6.**

(b) By adding a new § 3130.6 to read as follows:

3130.6 Subject to § 3130.7, the Board may grant, without a hearing, one extension of the time periods in §§ 3130.1 for good cause shown upon the filing of a written request by the applicant before the expiration of the applicable period; provided, that the Board determines that the following requirements are met:

(a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;

- (b) There is no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application; and
- (c) The applicant demonstrates that there is good cause for such extension, with substantial evidence of one or more of the following criteria:
 - (1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;
 - (2) An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control;
or
 - (3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.

3130.7 A time extension granted pursuant to § 3130.6 shall not exceed two (2) years, or one (1) year for an Electronic Equipment Facility.

Proposed amendments to the Zoning Regulations and Map of the District of Columbia are authorized pursuant to the Zoning Act of June 20, 1938, (52 Stat. 797), as amended, D.C. Official Code § 6-641.01, *et seq.*

The public hearing on this case will be conducted as a rulemaking in accordance with the provisions of § 3021 of the District of Columbia Municipal Regulations, Title 11, and Zoning. Pursuant to that section, the Commission will impose time limits on testimony presented to it at the public hearing.

All individuals, organizations, or associations wishing to testify in this case should file their intention to testify in writing. Written statements, in lieu of personal appearances or oral presentations, may be submitted for inclusion in the record.

Information should be forwarded to Sharon Schellin, the Secretary of the Zoning Commission, Office of Zoning, Suite 200-S, 441 4th Street, N.W., Washington, D.C., 20001. Please include the number of this particular case and your daytime telephone number. **FOR FURTHER INFORMATION, YOU MAY CONTACT THE OFFICE OF ZONING AT (202) 727-6311.**

ANTHONY J. HOOD, GREGORY N. JEFFRIES, WILLIAM W. KEATING, III, MICHAEL G. TURNBULL, AND PETER G. MAY, ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA, BY RICHARD S. NERO, JR., ACTING DIRECTOR, AND BY SHARON SCHELLIN, SECRETARY TO THE ZONING COMMISSION.

EXHIBIT C

ADDITIONAL BZA CASES EXPIRING BY JULY 2009

BZA CASE No.	APPLICANT	PROPERTY	FINAL ORDER DATE	BUILDING PERMIT APPLICATION	SUBJECT OF RELIEF
17537	Victor Tabbs	740 13 th Street, S.E. (Square 1045, Lot 97)	July 27, 2007	No application filed.	Relief from the lot occupancy requirement to construct a three-story cellar addition.
17364	CIH/VMS Restorations LLC	2300 block of Skyland Terrace, S.E. (Square 5740, Lot 852)	March 15, 2007 ¹	No application filed.	Relief from § 353 to allow construction of row and semi-detached dwellings, and § 2116.2 to allow one parking space in each front yard.
17570	Inglebrook Group	122 15 th Street, N.E. (Square 1056, Lot 81)	March 7, 2007	No application filed.	Relief from § 330.5 (permitted uses provision) to convert a beauty salon to general office use in the R-4 District.
17578	Hartford Street LLC	2700 Hartford Street, S.E. (Square 5727, Lots 149–154)	April 4, 2007 ²	No application filed.	Relief from § 353 and § 410 to allow the construction of a new residential development (row dwellings) in the R-5-A District.
17583	1634 Associates LLC	14 th and R Streets, N.W. (Square 208, Lots 806–808) (1634–1638 14 th Street N.W., now Lot 140)	April 4, 2007	No application filed.	Relief from the residential recreation space requirements, retail use provisions and off-street parking requirements to construct a residential building with ground floor retail.
17595	O'Tilia V. Hunter	3107 20 th Street, S.E.	June 8, 2007	No application filed.	Relief from the lot area and

¹ This is an Order for Minor Modification/Clarification of Approved Plans; the initial BZA order was issued on October 13, 2005.

² A subsequent Order for Modification of Approved Plans was issued on August 1, 2008.

		(Square 5850, Lot 7)			width requirements, side yard requirements and off-street parking requirements to allow the construction of a single-family detached dwelling.
17633	Government of the Republic of Montenegro	1610 New Hampshire Avenue, N.W. (Square 134, Lot 141)	July 18, 2007	No application filed.	Chancery application to permit use of chancery in DC/SP-1 zone. [Note: This is a Notice of Final Rulemaking and Determination and Order]
17276C	Phillips Park LLC	2101 Foxhall Road, N.W. (Square 1346, Lot 822)	June 27, 2007 ³	No application filed.	Relief from § 2516 to allow the construction of a theoretical lot subdivision for 35 single-family homes.
17623	Meredith Manning	1622 Florida Avenue, N.W. (Square 174, Lot 53)	June 21, 2007	No application filed.	Relief from the lot occupancy and open court requirements to allow the addition of a rear porch to a single-family row dwelling.
17635	Mara Lisson Cuneo	507 C Street, N.E. (Square 838, Lot 804)	July 11, 2007	No application filed.	Relief from the court width requirements and nonconforming structure provision to allow a third story addition to an existing office.
17642	Jeffrey Scott Duncan	2030 37 th Street, N.W. (Square 1301, Lot 848)	July 18, 2007	No application filed.	Relief from the lot occupancy requirements, rear yard requirements and nonconforming structure requirements to allow a ground floor addition to the rear of an existing single-

³ This is a Modification of an Approved Order; the initial BZA order was issued on July 26, 2005.

					family row dwelling.
17639	ARCH Training Center Inc.	1642-1648 V Street, S.E. (Square 5777, Lot 824)	July 19, 2007	No application filed.	Relief from § 353 to allow the construction of a new apartment building in the R-5-A District.
17535	Ann Goodman	3254 O Street, N.W. (Square 1230, Lot 125)	July 2, 2007	No application filed.	Relief from the rear yard requirements to allow the addition of a covered walkway.