

July 20, 2010

VIA PDF

Chairman Anthony Hood
D.C. Zoning Commission
441 4th Street NW, Suite 210S
Washington, DC 20001

Re: **Additional Comments and Changes to the Proposed Amendments to the
ARTS Overlay in Zoning Commission Case No. 10-07**

RECEIVED
J.C. OFFICE OF ZONING
2010 JUL 20 AM 11:07

Dear Chairman Hood:

Two important issues are likely to arise out of the proposed amendments if they are adopted as written. I request that the Commission review these issues and adopt the minor two changes proposed below before taking final action in this case.

1. Zoning Administrator Flexibility

The proposed amendments should incorporate 2% flexibility for the Zoning Administrator. Proposed text for this provision is attached. The Zoning Administrator should have the ability to exceed the 50% per-block limit on eating and drinking establishments by up to 2% when an individual situation warrants it. This flexibility will help avoid the need to file de minimus variance cases with the BZA. We are aware of at least one situation where a business owner will have to file a BZA application for a variance because the property, which is just slightly wider than the lots in the square, would exceed the 50% per-block rule by the miniscule amount of less than two feet. Allowing the Zoning Administrator 2% flexibility on a per-block basis would help avoid the need for variance relief situations like this by providing some much needed minor flexibility. This flexibility would be rarely used yet would save the BZA from the burden of variance cases for minimal frontage amounts. In most cases where an eating and drinking establishment seeks to open, the block frontage taken by that establishment would result in total frontage well below 50% or well above 50% (and thus not allowed). Only very few blocks would have a situation where additional frontage for an eating and drinking establishment would bring the block to within 2% above the 50% limit because of the width of most buildings relative to the block length is large. Therefore, the 2% Zoning Administrator flexibility would be applicable in only a few unusual situations.

ZONING COMMISSION
District of Columbia

CASE NO. 10-07

2. Building Permit Vests Right to Eating/Drinking Establishment

The proposed amendments should also incorporate a change so that an eating and drinking establishment is an entitled use in the ARTS Overlay upon issuance of a building permit. The proposed change is attached. This change addresses an important issue under the proposed 50% per-block rule. For a given block in the ARTS Overlay, a business owner may obtain a building permit for an eating and drinking establishment at a location that would not currently exceed the 50% limit. The planned eating and drinking establishment does not have a right to a certificate of occupancy for this use during construction. However, if that frontage does not "count" as restaurant frontage while it is under construction, another business owner could obtain a certificate of occupancy for an eating and drinking establishment for a different site in the same block. Combined, these two sites could exceed 50% of the frontage for the block, so only one would be permitted. Without protection at the building permit stage, the first business owner would have invested significant time and money in plans, build-out, equipment, and furnishings, only to be denied the opportunity to use the space as an eating and drinking establishment because another business owner was first able to obtain a certificate of occupancy without any construction. This proposal protects business owners against intervening factors but does not change the fact that a certificate of occupancy also gives a business owner the right to an eating and drinking establishment when no building permit was necessary.

Under this proposed change, the issuance of a building permit for use as an eating and drinking establishment would insure that the business owner could, in good faith, invest in the build-out and subsequently obtain a certificate of occupancy. This change would provide greater certainty to business owners and would allow the Zoning Administrator to more easily track eating and drinking establishments. Guaranteeing the right to the eating and drinking establishment makes most sense at the building permit stage because the Zoning Administrator would be able to definitively inform the business owner whether her proposed eating and drinking establishment will be able to obtain a certificate of occupancy. Also, the Zoning Administrator would be able limit eating and drinking establishments before they are constructed because he would be forced to constantly monitor his inventory. Furthermore, this change may help the District avoid lawsuits arising out of a restaurant being constructed pursuant to a building but subsequently not allowed to obtain a certificate of occupancy.

I urge the Commission to consider these issues and to adopt the proposed changes before taking final action in this case. Should you or your staff have any questions, please contact me.

Please note that I have reviewed the proposed changes with Andrea Doughty, Chair of the ANC 2F ARTS Overlay Committee. As shown in the attached email, Ms. Doughty fully supports these proposed changes.

Sincerely,



Allison C. Prince

1901 USE PROVISIONS

- 1901.1 Retail and service uses listed in § 1907 and arts and arts-related uses listed in § 1908 shall occupy no less than fifty percent (50%) of the ground level of each building on a lot that fronts on 14th Street, U Street, or 7th Street; or on Florida Avenue between 7th and 9th Streets; provided, this requirement shall not apply to a building located on a lot less than fifty feet (50 ft.) in width, measured along the property line that abuts the public street, if the building is used as an apartment house, multiple dwelling, or hotel.
- 1901.2 A hotel shall be a permitted use; provided, no other hotel is located within five hundred feet (500 ft.).
- 1901.3 No drive-through accessory to any use shall be permitted.
- 1901.4 A use that exists on the February 23, 1990, having a certificate of occupancy for a use first permitted in a C-M District, shall be permitted to expand if approved by the Board of Zoning Adjustment as a special exception, subject to the requirements of § 3104 and the following conditions:
- (a) There shall be no outdoor storage of materials, nor any outdoor processing, fabricating, or repairs;
 - (b) There shall be adequate off-street parking for trucks and other service vehicles;
 - (c) The use shall not create objectionable effects on the character of the neighborhood because of its operations, traffic, or other conditions; and
 - (d) The Board may impose requirements that apply to the design, appearance, or screening of the site or any other requirement that it deems necessary to protect neighboring or adjacent property.
- 1901.5 Required parking spaces may be shared by time of day with other uses specified in this subsection to meet all or a portion of the parking requirement for the uses on a lot; provided:
- (a) The eligible evening uses shall be restaurant, legitimate theater, movie theater, dinner theater, or cabaret;
 - (b) The eligible daytime uses shall be office use and the arts uses and arts-related uses listed in § 1908, with the exception of the evening uses listed in paragraph (a) of this subsection; and
 - (c) The respective property owners shall execute an agreement that identifies the designated parking spaces and provides that use of the spaces for permitted daytime uses shall cease at no later than 6:00 p.m., Monday through Saturday, and shall be available for parking by the specified evening uses as agreed to by the parties involved. This agreement shall be filed with the Zoning Administrator to be maintained as part of the certificate of occupancy file on each affected property.
- 1901.6 Eating and drinking establishments shall occupy no more than twenty-five percent (25%) of the linear foot frontage within the ARTS Overlay District, as measured along the lots fronting on 14th Street and U Street, N.W.
- 1901.7 A building permit for use as an eating and drinking establishment issued in accordance with § 3202 authorizes the subsequent issuance of a certificate of occupancy for an eating and drinking establishment, provided that the Zoning Administrator has determined that the use complies with § 1901.6 at the time the building permit is issued and that all work has been completed in accordance with the building permit.**

2522 MINOR FLEXIBILITY BY ZONING ADMINISTRATOR'S RULING

2522.1 The Zoning Administrator is authorized to permit the following deviations, if the Zoning Administrator determines that the deviation or deviations will not impair the purpose of the otherwise applicable regulations:

- (a) Deviations not to exceed two percent (2%) of the area requirements governing minimum lot area, percentage of lot occupancy, and areas of courts and roof structures;
- (b) Deviations not to exceed the greater of two percent (2%) or twelve (12) inches of the linear requirements governing minimum lot width;
- ~~(c) Deviations not to exceed two percent (2%) of the linear frontage limitation for eating and drinking establishments in § 1901.6;** and~~
- (c) Deviations not to exceed the greater of ten percent (10%) or twelve (12) inches of the linear requirements governing rear yard, side yard, and minimum dimensions of the court and court niche and roof structure setback requirements, provided that all deviations of roof structure setback requirements comply with the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official Code §§ 6 601.01 to 6-601.09 (2001) (formerly codified at D.C. Code §§ 5-401 to 5-409 (1994 Repl. & Supp. 1999))).

*** For the blocks included in the ARTS Overlay, the street frontages range from 190 to 380 feet. There is no instance where 12 inches is greater than 2%.*

Kadlecek, Cary

From: Andrea Doughty [andrea@capitalpolicies.com]
Sent: Sunday, July 18, 2010 8:27 PM
To: Prince, Allison
Cc: Kadlecek, Cary; creed@kgmrlaw.com; 'Steingasser, Jennifer (OP)'; 'Lawson, Joel (OP)'
Subject: RE: ZC Case No. 10-07: Additional Comments ... ANC 2F's response
Attachments: Whisk - Letter additional comments on ARTS overlay amendments.doc; 11-2522 amended.doc; 11-1901 amend.doc

Dear Ms. Prince:

Thank you for providing me with a copy of your draft letter to the Zoning Commission dated July 14, 2010 (attached).

In my capacity as Chair of ANC 2F's Arts Overlay Committee, and on behalf of ANC 2F, I have read your proposals regarding two minor technical "fixes" that you propose to the Zoning Commission before final action is taken on Case No. 10-07 (Proposed Amendments to the Arts Overlay regarding Eating & Drinking Establishments), specifically (1) your proposal for *de minimus* flexibility on the part of the Zoning Administrator, and (2) your proposal for vesting on issuance of the building permit.

ANC 2F's comments on your proposals are as follows:

De Minimus Flexibility

We support the proposal for section 1901.6 to be listed in section 2522.1 of the Zoning Regulations as one of those provisions of the Zoning Regulations where the Zoning Administrator is authorized to permit *de minimus* variations. We would have a mild preference for using the standard language of section 2522.1, namely "not to exceed the greater of 2 percent (2%) or twelve (12) inches", whereas your proposed text states "not to exceed two percent (2%)". Using the standard language would not, we believe, alter your proposal since it is the greater of the two measures that would be binding. But, in general, we strongly support the notion that the resources of business owners, the BZA, and the community should not be occupied with instances where minimal amounts of flexibility are required in order to meet the letter (and spirit) of the regulations. In fact, the desirability of *de minimus* flexibility accompanying the change to a variance test was an issue raised by ANC 2F last year in its report on the Arts Overlay Zoning Regulations.

Vesting on Issuance of the Building Permit

Without commenting on the specific wording of your proposed new section 1901.7 (upon which wording we defer to OP and OAG), we support your proposal that the approval of a building permit for an eating and drinking establishment should be the trigger for vesting the right to an eating/drinking establishment (provided all work is subsequently completed in accordance with the building permit), instead of the current (potentially messy) situation where that right does not vest until issuance of the certificate of occupancy. These projects require significant investment and it is in nobody's interests that business owners should be placed in a position of needing to "race" through construction (and potentially cut corners) in order to beat someone else to apply for a C of O so as to have their use vested. We suggest that the Zoning Commission may perhaps wish to consider building on your proposal by a further modification in this area, namely: in order to avoid egregious instances of property owners "hoarding" entitlements to eating and drinking uses by obtaining building permit approval (and ongoing permit extensions) without really having genuine eating/drinking projects backing those permits, that there be a requirement for a BZA hearing after a certain period of time (two years??) should the property or business owner require a further extension to the building permit and hence further extension to the vested right to a C of O for an eating/drinking establishment at that location in the Arts District.

Thank you for seeking ANC 2F's input on these two issues, and thank you for your efforts to ensure that the new regulations on eating and drinking establishments in the Arts Overlay District will be as workable and successful as possible.

Sincerely,

Andrea Doughty
Chair, ANC2F ARTS Overlay Committee
www.anc2f.org/arts
Tel. 202.319.1151

Attachment

cc: Charles Reed, Chairman, ANC 2F
Jennifer Steingasser, Deputy Director, OP
Joel Lawson, Associate Director, OP