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481234	Submitted to ODAI	Notices, Opinions	Zoning Commission Notice of Final Rulemaking & Order No. 10-07 (Text Amendment - Additional Flexibility for Eating & Drinking Establishments within the ARTS Overlay District)	8/20/2010 Vol. 37-34	8/16/2010 14:39:41
491127	Submitted to ODAI	Final Rulemaking	Zoning Commission Notice of Final Rulemaking & Order No. 10-07 (Text Amendment - Additional Flexibility for Eating & Drinking Establishments within the ARTS Overlay District)	8/20/2010 Vol. 37-34	8/16/2010 14:37:42
13-750	Unconfirmed	Notices, Opinions	Board of Zoning Adjustment Summary Order No. 18014	1/22/2010 Vol. 37-14	1/27/2010 22:14:19

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ZONING COMMISSION
District of Columbia

CASE NO. 10-07

EXHIBIT NO. 22

ZONING COMMISSION
District of Columbia
CASE NO. 10-07
EXHIBIT NO. 22

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 10-07
Z.C. Case No. 10-07
Text Amendment - Additional Flexibility for Eating and Drinking Establishments
within the ARTS Overlay District
July 29, 2010

The Zoning Commission for the District of Columbia (the "Commission") pursuant to the authority set forth in section 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.01) hereby gives notice that it took final rulemaking action to adopt amendments to sections 1901, 1906, and 2522 of the Zoning Regulations (Title 11 DCMR). A Notice of Proposed Rulemaking was published in the *D.C. Register* on May 7, 2010, at 57 DCR 4005. Minor revisions were made to the proposed text in response to comments received, as will be explained below. The amendments will become effective upon the publication of this notice in the *D.C. Register*.

Description of Amendments

The rules amend §1901.6, which had prohibited eating and drinking establishments from occupying more than 25% of the linear foot frontage within the ARTS Overlay District. Special exception relief could be sought to permit the establishment or expansion of a use that would exceed the cap.

The amendment changes the 25% overlay-wide cap to a 50% cap that is applied to each individual Overlay square fronting 14th or U Street, N.W. and clarifies that this limit applies only to ground floor frontage. The street frontages to be used in this calculation are listed in a chart. The area of any public right-of-way within a square was excluded.

Because the term "eating and drinking establishments" could be interpreted as only encompassing establishments that sell both food and alcoholic beverages, the introductory text of § 1901.6 was amended to separately refer to eating establishments, drinking establishments, and eating and drinking establishments, which thereafter are referred to collectively as "eating/drinking establishments."

In response to a comment received, the Commission added a new § 1906.7 to specify that occupancy rights vest at the time that a building permit is issued. This is similar to the occupancy vesting provided for in § 3203.11, but whereas that provision protects against post-building permit revisions to Title 11, new § 1906.7 protects against post-building permit increases in street frontage occupied by eating and drinking establishments authorized by subsequently issued building permits or certificates of occupancy. The Commission also agreed with the suggestion to amend § 2522.1 to allow the Zoning Administrator ("ZA") to permit up to a two percent deviation from the linear frontage limitation.

The Commission also amended § 1906.1. That provision authorizes the Board of Zoning Adjustment (“BZA”) to grant relief from any Overlay provision. The amendment expressly disallows relief from the 50% cap, leaving only the grant of a variance available. The subsection was also amended to specify that the BZA, when considering whether to grant a special exception from the remaining Overlay provisions, should apply the criteria stated in paragraphs (c) or (d) -- concerning architectural concept and vehicular access -- only if the criteria are relevant to the relief sought.

Background

In 2009, Advisory Neighborhood Commission (“ANC”) 2F formed an Uptown ARTS Overlay Review Committee, which included representatives from ANCs 1B and 2B, each of which encompass a portion of the ARTS Overlay, and various local citizen and business groups and organizations. In September of 2009, the Committee released its Uptown ARTS Overlay Report and Recommendations (the “ANC Report”).

Among the recommendations of the report is “a text amendment to enable enforcement of the new limit (40-50%) on the frontage (per square) of eating and drinking uses to begin in early 2010 in the Uptown Arts District.” (p. 2.) This recommendation results from the Committee’s finding that “it is now overkill to reserve 75% of the frontage on 14th and U streets for non-restaurant and bar uses.” (p. 15.) The report goes on to indicate that if the cap were increased to the extent recommended “it would be inappropriate for a special exception procedure to be able to take this level above 50%.” The Committee therefore expressed its “strong view that the level of 50% should be viewed as an absolute maximum, above which increases in restaurant/bar frontage should not be permitted.” (p. 15.)

In response to this recommendation, the ZA undertook his own detailed measurements and study of 14th and U Streets, and the amount of frontage devoted to eating and drinking establishments. The ZA released general findings on April 5, 2010, noting that the Overlay was at or very near the 25% limit. Like the ANC Report, it noted that some individual blocks were well in excess of the limit (permitted, since the limit is not measured on a block-by-block basis), while others had no eating or drinking establishments at all.

During this same period of time, there were a number of existing restaurant proposals in the building permit review process that had entered into binding lease commitments and invested in the preparatory work to open a restaurant in anticipation of being within the 25% limit and therefore able to open without any zoning relief. The Office of Planning (“OP”) became concerned that enforcement of the existing and unduly restrictive cap could jeopardize economic development both within and outside the Overlay and decided to petition the Commission for a short-term and a long-term solution.

Procedures Leading to Adoption of Amendments

In a report dated April 15, 2010, OP petitioned the Commission to take emergency action to raise the existing cap to 30% and also to set down the text that became the subject of this proceeding. At its regular public meeting held April 26, 2010, the Commission set down this case for a public hearing and adopted the five percent increase to the cap on an emergency basis. The emergency amendment expires upon the publication of this notice.

By report dated May 28, 2010, OP provided a revision to the advertised text that clarified its intent without changing its substance.

Pursuant to § 13 of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10) ("ANC Act"), notice of the petition was given to ANCs 1B, 2B, and 2F. No report was submitted by ANC 1B. In a letter dated June 9, 2010, ANC 2B's Chairman Will Stevens advised the Commission that at a properly noticed meeting with a quorum present, the ANC voted 8-0 to request that the Commission modify the proposed text to remove "drinking places" and "restaurants" from the list of preferred arts uses and arts-related uses set forth at 11 DCMR § 1908.1.

The Overlay's provisions include bonus density incentives and ground floor occupancy requirements for preferred uses. ANC 2B was concerned that increasing the cap for eating and drinking establishments without also eliminating their preferred status would squeeze out other art and art-related uses. The ANC further recommended that if this new proposal could not be heard until after it was advertised, the Commission should delay this proceeding for 120 days to allow OP to submit a proposal.

As to ANC 2F, its letter of June 8, 2010 indicated that at a properly noticed meeting with a quorum present, it voted unanimously to advise the Commission to adopt OP's May 28th report. The ANC also noted that its ARTS Overlay Review Committee Report, discussed earlier, had indicated that the increase in the potential number of eating and drinking establishments was only acceptable to the community if the uses were eliminated as preferred uses. The ANC however noted that this issue was not within the scope of the hearing and that OP had represented that the preferred use issue would be reviewed as part of the ongoing Zoning Regulation Review ("ZRR") process.

A public hearing was scheduled for and held on June 10, 2010. After OP's formal presentation had ended, the Chair asked the OP representative, Joel Lawson, to respond to the ANC's concerns. Mr. Lawson indicated that the preferred use issue was a complex one that could affect other sections of the Overlay. He also noted that the issue would be reviewed as part of ZRR and therefore recommended that this case not be delayed in order to consider the same question. At its regularly scheduled meeting held June 28, 2010, the Commission voted to refer the petition, as revised in OP's May 28th report, to the National Capital Planning Commission ("NCPC") for the 30-day period of review mandated by § 492 of the District's Charter.

NCPC, through a delegated action dated June 29, 2010, found that the proposed text amendments would not adversely affect the identified federal interests, nor be inconsistent with the Comprehensive Plan for the National Capital. (Exhibit No. 18.)

In response to the Notice of Proposed Rulemaking, Allison C. Prince, Esquire, submitted a written comment¹ requesting that the Commission add provisions that would protect occupancy rights against increases in the linear street frontage of eating/drinking establishments that occur after a building permit is issued and to allow the ZA to permit a deviation of up to two percent from the cap. As noted in the earlier description of the rule, the Commission accepted these additions, which due to their minor nature did not require the publication of a second notice of proposed rulemaking.

At its properly noticed public meeting held July 26, 2010, the Commission took final action to adopt the text amendments.

Great Weight

The Commission is required under § 13(d) of the ANC Act, D.C. Official Code § 1-309.10(d), to give great weight to the issues and concerns raised in the written report of affected ANCs. The Commission is also required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04), to give great weight to OP's recommendations.

In both instances, great weight means identifying the affected ANCs and OP as the sources of the recommendations and stating why the Commission does or does not find their respective advice to be persuasive. In this docket, there is a disagreement between OP and ANC 2B as to whether these proceedings should have gone forward without also addressing the status of drinking places and restaurants as preferred uses. The Commission also notes that ANC 2F shares ANC 2B's concern, but accepted OP's assurance that the issue will be addressed as part of the ZRR.

The Commission agrees with OP that understanding the potential impact of eliminating eating/drinking establishments as preferred uses will require careful analysis. However, undertaking this analysis would have resulted in the expiration of the emergency amendment on August 24th and reinstatement of the 25% cap. The Commission took emergency action to raise the cap because its enforcement was inconsistent with the public interest. Allowing a reversion back to this control is similarly undesirable and unnecessary given the fact that the preferred use issue will be reviewed under the ZRR. For these reasons, the Commission found OP's advice to proceed with a decision on the advertised text to be persuasive and adopted the following amendments to the Zoning Regulations, Title 11 DCMR:

¹ Although the comment was received after the end of the public comment period, the Commission exercised its discretion and allowed the comment into the record. (See 11 DCMR § 3024.5.)

Chapter 19, UPTOWN ARTS-MIXED USE (ARTS) OVERLAY DISTRICT, is amended as follows: Subsection 1902.6 is amended to change the overlay-wide method of measurement to a square-by-square method (excluding any area of right-of-way), establish at 50% the maximum amount of linear foot frontage within each square fronting on 14th Street or U Street, N.W. that can be occupied by eating and drinking establishments, and clarify that this limit applies only to ground floor frontage; and add a new §1901.7, so that the provision will read as follows:

1901.6 Eating establishments, drinking establishments, or eating and drinking establishments (“eating/drinking establishments”) shall be subject to the following limitations:

- (a) No portion of an eating/drinking establishment located on the ground floor is permitted to occupy more than fifty percent (50%) of the linear frontage of each individual square, as set forth below:

14 th Street, N.W.		U Street, N.W.	
Square	Frontage (feet)	Square	Frontage (feet)
202	222.5	204	305.3
203	310.0	205	618.0
204	320.0	236	523.4
205	430.6	237	538.5
206	399.8	273	225.3
207	450.1	274	340.9
208	400.0	304	192.2
209	380.0	305	186.0
210	203.5	332	189.7
211	304.2	333	187.7
234	253.1	359	96.8
235	310.0	360	230.4
236	320.0	361	251.7
237	380.0		
238	450.0		
239	200.0		
240	391.0		

14 th Street, N.W.		U Street, N.W.	
Square	Frontage (feet)	Square	Frontage (feet)
241	450.0		
242	363.1		
242N	154.5		

- (b) An eating/drinking establishment not located on the ground (street) level of a building shall not count towards the fifty percent (50%) limit; and
- (c) An entrance to an eating/drinking establishment that is not located on the ground (street) level shall not count towards the fifty percent (50%) limit.

1901.7 A building permit granted for a use as an eating/drinking establishment issued in accordance with § 3202 authorizes the subsequent issuance of a certificate of occupancy for the specified eating/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 construction has been completed in accordance with the subject building permit.

Section 1906, SPECIAL EXCEPTIONS, § 1906.1, is amended by striking the phrase “based upon the following criteria” and inserting in its place the phrase “based upon the following criteria; except that the Board shall apply criteria (c) and (d) only if relevant to the relief sought”, so that the provision will read as follows:

1906.1 The Board of Zoning Adjustment may grant exceptions under § 3104 from any of the requirements or limits of the ARTS District other than § 1901.6 based upon the following criteria; except that the Board shall apply criteria (c) and (d) only if relevant to the relief sought:

Chapter 25, MISCELLANEOUS ZONING REQUIREMENTS, § 2522, MINOR FLEXIBILITY BY ZONING ADMINISTRATOR'S RULING, § 2521.1 is amended by adding a new paragraph (d), so that the entire provision will read as follows:

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 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))); and
- (d) Deviations not to exceed two percent (2%) of the linear frontage limitation for eating/drinking establishments in § 1901.6.

On June 28, 2010, upon motion of Chairman Hood, as seconded by Commissioner May, the Zoning Commission **APPROVED** the petition at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Konrad W. Schlater, Peter G. May, and Michael G. Turnbull to approve; third Mayoral appointee position vacant).

On July 26, 2010, upon motion of Chairman Hood, as seconded by Commissioner May, the Zoning Commission **ADOPTED** the Order at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Peter G. May, and Michael G. Turnbull to approve; Konrad W. Schlater to approve by absentee ballot; Greg M. Selfridge not having participated, not voting).

In accordance with the provisions of 11 DCMR § 3028.9, this Order shall become effective upon publication in the *D.C. Register*; that is on August 20, 2010.

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING**

AND

Z.C. ORDER NO. 10-07

Z.C. Case No. 10-07

**Text Amendment - Additional Flexibility for Eating and Drinking Establishments
within the ARTS Overlay District.)**

July 29, 2010

The full text of this Zoning Commission Order is published in the “Final Rulemaking” section of this edition of the *D.C. Register*.