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Office of Zoning
441 4th Street NW, Suite 210
Washington, DC 20001

Re: Z.C. Case No. 14-13
DCBIA Comments regarding Rooftop Penthouse Text Amendments

The D C Building Industry Association ("DCBIA") offers the following comments to the proposed Rooftop Penthouse Regulations under consideration in Z C Case No 14-13. Generally, DCBIA supports the proposed text amendments for two reasons: the amendments will permit greater use of rooftop structures for recreational and common space uses, and the amendments will allow for increases in residential and commercial retail and office space, and the associated increase in housing units and tax revenue.

DCBIA's specific comments and recommendations follow the format of the Office of Planning's report to the Zoning Commission dated October 27, 2014 (the "OP Report"), and are as follows:

1. Definitions (§ 199)

DCBIA supports the Office of Planning's recommendation in the OP Report ("OP Recommendation") regarding the new and modified definitions to provide for clarity and consistency with the Height Act.

2. Setback Requirements for a Penthouse (§§ 400.7(b), 530.5(b), 630.4(b), 770.6(b), 840.3(b), 930.3(b))

DCBIA supports the Alternative Text for the above-referenced sections set forth in the Notice of Public Hearing published in the *D C Register* on September 19, 2014 ("Notice of Public Hearing"). DCBIA believes that the Alternative Text provides clarity as to the definition of exterior wall for zoning purposes which has hereinbefore been subject only to interpretation by the Zoning Administrator. However, for purposes of the

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CASE NO. 14-13
EXHIBIT NO. 15

Height Act, the term "exterior wall" has consistently been interpreted to mean a wall abutting a public street *See, e g*, Zoning Commission Case No. 93-9C This distinction should be maintained

DCBIA does not support the additional OP Recommendation, which requires set backs for properties abutting a historic building. The definition of exterior wall for zoning purposes should not be impacted by the historic status of an abutting property The Historic Preservation law and regulations govern the rights and obligations of a historic property Zoning should not expand the reach of those laws and regulations to non-historic properties

3. Permitted Penthouse Height (§§ 400.7(c) & (d), 530.5(c), 630.4(c), 770.6(d) & (e), 840.3(c), 930.3(c) & (d), 2906.2)

DCBIA supports the Proposed Text for the above-referenced sections in the Notice of Public Hearing, which will permit a height of 20 feet for uses other than one-family dwellings or flats, consistent with the Height Act The additional height will provide flexibility to accommodate more efficient and sustainable technologies

4. Permitted Number of Stories (§ 411.18)

DCBIA generally supports the Proposed Text for § 411 18 in the Notice of Public Hearing, which will permit penthouses to achieve a height of two stories when otherwise not in conflict with the Height Act This will permit mechanical equipment to be located above potential residential and commercial uses and further facilitate the intent of the proposed amendments

DCBIA recommends that Section 411 18(c) be deleted and a new section be added to state as follows

Only one story of a penthouse may be used for occupiable space above the height limit established by The Height Act

This revision would allow two stories to be permitted above the height limit established by the Height Act so long as only one story is devoted to occupiable space. This revision would provide the required consistency with the Height Act but would permit more flexibility for portions of the penthouse that would not otherwise be limited to one story based on the Height Act.

5. Solar Panels on Top of a Penthouse Roof (§§ 400.7(e), 530.5(e), 630.4(e), 770.6(f), 840.3(d), 930.3(e), 2906.5)

DCBIA supports OP's Recommendation to allow solar panels on a penthouse roof subject to certain setback requirements. In addition to solar panels, DCBIA requests that the Zoning Commission permit green roof systems on top of penthouses to allow property owners further opportunities to achieve compliance with the new Green Area Ratio requirements and otherwise increase the sustainability of buildings. Although locating green roof systems on the penthouse roofs is currently interpreted to be consistent with the Zoning Regulations, the Commission should amend the regulations to formally authorize it.

6. Uses Permitted within a Penthouse (§§ 411.1 & 411.2)

DCBIA supports the Proposed Text for §§ 411.1 and 411.2 in the Notice of Public Hearing, which provides that any use permitted within the zone in which the penthouse is located is a permitted use for a penthouse. However, DCBIA does not support the limitation referenced in the OP Report and identified for public comment in the Notice of Public Hearing which would permit certain uses only by special exception. Permitted uses within the penthouse will have no additional impact on nearby properties than those permitted uses within the building. To the extent that a permitted use extends to outdoor space on the roof, potential adverse impacts should be governed in the same manner as currently provided for outdoor uses on the ground floor or any other level of outdoor space.

For example, the OP Report notes that some uses could be more likely to create objectionable conditions in the evening/night hours, such as a nightclub, bar or restaurant. This outdoor use, however, will be governed by a variety of other regulations to control its impacts. Section 1003 of Title 23 (Alcoholic Beverages) of the District of Columbia Municipal Regulations ("DCMR") states that a licensee under an on-premises retailer's license may not serve alcoholic beverages on outdoor private space without obtaining a summer garden endorsement for outdoor privately owned space. Therefore, outdoor service of alcohol for a restaurant or bar will require review and approval by the Alcoholic Beverage Control Board, and will be subject to monitoring and enforcement by the Alcoholic Beverage Regulation Administration. Chapters 27, 28 and 29 of Title 20 (Environment) of the DCMR govern noise to ensure that ambient noise levels are not detrimental to life, health and enjoyment of one's property. Thus, noncompliance with those regulations will result in a civil infraction. Accordingly, DCBIA supports

allowing uses permitted as a matter of right in the underlying zone with no requirement for further zoning review

7. Enclosing Walls of a Penthouse (§ 411.6)

DCBIA supports the OP Recommendation and revised alternative regarding Section 411.6, which proposes to remove the current requirement for all roof structures to be constructed to an equal height, and to permit up to three separate heights one height for habitable enclosed space, one height for enclosed non-habitable (mechanical) space, and one height for unenclosed mechanical equipment screen walls. Deleting the current requirement for an equal height will provide additional flexibility to balance design concerns about roof structure visibility with the reality that some rooftop equipment, such as elevators, require more height. This additional flexibility will be particularly important with the expansion of rooftop uses to include residential and commercial uses that will likely not require the full height of elevator overrides and specialized mechanical equipment. DCBIA also supports the Proposed Text in the Notice of Public Hearing to delete the requirement that the walls be "vertical."

8. Permitted Penthouse Size or Area (§ 411.8 & 411.9)

DCBIA supports the Proposed Text for the above-referenced sections in the Notice of Public Hearing.

9. Floor Area Ratio (FAR) (§ 411.8)

DCBIA supports the Proposed Text for § 411.8 in the Notice of Public Hearing, which retains the current provision that penthouse gross floor area does not count towards the permitted FAR for the building. If the Zoning Commission determines that an option should be available for penthouse gross floor area to count within the permitted FAR for the building, then such area within the penthouse that counts within the FAR for the building should not be subject to the Housing Linkage or Inclusionary Zoning provisions, except as otherwise required as a matter of right. DCBIA does not support requiring penthouse gross floor area to count within the FAR for the building in all cases.

DCBIA also supports the intent of proposed Section 411.19, although DCBIA recommends that Sections 411.8 and 411.19 be combined into a single section because they essentially say the same thing. DCBIA proposes that the language of Section 411.8 be clarified as follows and Section 411.19 be deleted.

Section 411.8 Gross floor area within a penthouse shall not be included in the calculation of a building's FAR, and there otherwise shall be no limitation on the amount of gross floor area that may be occupied by a penthouse, although penthouse residential gross floor area GFA devoted to residential units is subject to the Inclusionary Zoning set-aside provisions of Chapter 26 and the construction of penthouse non-residential gross floor area GFA in excess of 1,000 square feet (1,000 s f) triggers the affordable housing production requirements as set forth in § 414.

10. Special Exception Review Criteria for Penthouse Regulation Relief (§ 411.11)

DCBIA supports the Proposed Text for § 411.11 in the Notice of Public Hearing, which retains the review criteria for special exception relief from specified penthouse regulations. By listing specific examples of "operating difficulties," the Alternative Text in the Notice of Public Hearing may have the unintended consequence of limiting what otherwise might constitute "operating difficulties". The Board of Zoning Adjustment should have discretion to evaluate the criteria on a case-by-case basis to determine if operating difficulties have been shown, beyond the limited list currently proposed in the Alternative Text

In addition, DCBIA recommends that the Office of Planning review the Proposed Text for § 411.11. There is no explanation in the Notice of Public Hearing or in the OP Report why the existing reference to Section 400.7 has been eliminated from the provisions from which special exception relief may be obtained. If the intent is not to permit special exception relief for roof structure setback in the residential zones, DCBIA would ask for additional information to explain the basis for such change, and an opportunity to comment

11. Process for Amending an Approved PUD Or Design Review Project (§ 411.20)

DCBIA supports the Proposed Text for § 411.20 in the Notice of Public Hearing, which provides for a consent calendar minor modification approval process to obtain a modification for approved PUDs or Design Review projects for use of the penthouse in those instances when the exterior design of the penthouse is modified in order to permit such use. However, for those cases in which no change is proposed to the exterior design or to the size of the penthouse, DCBIA recommends that the Zoning Administrator be permitted to approve administratively the expanded use to the penthouse so long as the property owner evidences compliance with the requirements of Section 414 and/or Chapter 26

12. Affordable Housing Linkage for the Provision of Habitable Penthouse Space on Non-Residential Buildings (§ 414)

DCBIA supports the Proposed Text of § 414 13 in the Notice of Public Hearing, which generally provides for a 50% charge for commercial FAR at the penthouse level. This amount of housing linkage provides for a modest incentive for a developer to proceed with construction of the additional space. The Alternative Text for Section § 414 13 does not provide sufficient economic incentive to proceed with using the penthouse space, and DCBIA does not support such text. A detailed economic analysis prepared by Bolan Smart Associates was submitted by DCBIA to the Zoning Commission on October 31, 2014, and which is in the record at Exhibit 9.

DCBIA supports the Alternative Text for § 414.2 in the Notice of Public Hearing, which defines "penthouse non-residential gross floor area." This text exempts several types of uses, including general communal space, within a building from the housing linkage requirements. Although we understand the Commission's desire to produce additional affordable housing within the District as an offset for additional commercial space that is gained through the amendments, we also strongly believe that such set aside requirements should not apply to recreational space and other common areas available to all occupants of the building.

13. Inclusionary Zoning for the Provision of Habitable Penthouse Space on Non-Residential Buildings (Chapter 26)

DCBIA supports the Proposed Text of §§ 2603 1 and 2603.2 in the Notice of Public Hearing, which applies the existing Inclusionary Zoning formula to residential units located at the penthouse level. Applying the existing Inclusionary Zoning formula for additional residential rooftop FAR provides some incentive for a developer to proceed with construction of the residential penthouse space. The Alternative Text for Chapter 26 does not provide sufficient economic incentive to proceed with using the penthouse space, and DCBIA does not support such text. A detailed economic analysis prepared by Bolan Smart Associates was submitted by DCBIA to the Zoning Commission on October 31, 2014, and which is in the record at Exhibit 9.

As noted above, DCBIA supports the Alternative Text for § 414 2 in the Notice of Public Hearing, which defines "penthouse non-residential gross floor area." As indicated, DCBIA strongly believes that the Inclusionary

Zoning set aside requirements should not apply to residential recreational space and other common areas available to all residents of the building

14. Parking (§§ 537.2, 777.2, 639.2, 845.2, 936.2)

DCBIA supports the OP Recommendation that parking spaces be required for additional residential units in a penthouse. DCBIA also agrees with the OP Recommendation that no additional parking is needed for communal recreation space, conference rooms or other amenity spaces. In addition, mechanical spaces should not count towards parking requirements.

Penthouse Considerations (§ 411.16)

DCBIA supports the OP Recommendation to add safety railings to the list of items not considered to be penthouses. Furthermore, § 411.16 currently only identifies “gooseneck exhaust ducts serving kitchen and toilet ventilating systems” as structures not considered to be penthouses. The current interpretation of this provision applies to only exempt “skinny” air intake louvers and exhaust systems. Modern equipment typically does not qualify as “skinny” (Although the equipment is typically less than 4 feet height, it is often as wide as it is tall). Modernizing the definition to capture louvers and other equipment required for air intake and exhaust systems will provide greater flexibility locate such systems away from active rooftop recreation space and, if necessary, on penthouse roofs. Code requirements and best practices generally require placement of these structures at the highest point and above any level occupied and used by people, yet the Zoning Regulations require the placement of the exhaust systems at the roof level and therefore at the level of human occupancy and activity.

Therefore, DCBIA recommends the following revisions to Section 411.16

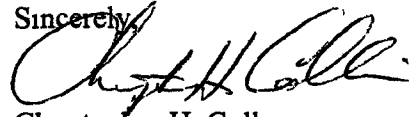
For the purposes of this section, green roof systems, skylights, gooseneck intake and exhaust louvers and ducts serving air handling, kitchen and toilet ventilating systems, safety railings required by the construction code, and plumbing vent stacks shall not be considered as penthouses, and shall be permitted to be located above the height of the penthouse, provided that such equipment is less than four feet in height and is set back a distance at least equal to its height from all penthouse walls

Anthony Hood, Chairperson
November 6, 2014
Page 8

Conclusion

We appreciate the opportunity to comment on the proposed amendments, and we look forward to the Commission's consideration of these recommendations

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher H. Collins". The signature is fluid and cursive, with a large initial "C" and "H".

Christopher H Collins
DCBIA Counsel

CHC/ljs
cc Jennifer Steingasser, Office of Planning