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October 16, 2017

VIA EMAIL

Zoning Commission for the
District of Columbia
441 4th Street, N.W., Suite 210
Washington, DC 20001

Re: **Applicant's Opposition to Union Market Neighbor's Motion to Reconsider Order and Reopen the Record in Z.C. Case No. 15-27**

Dear Members of the Commission:

On behalf of KF Morse, LLC (the "Applicant"), we hereby oppose the "Motion to Reconsider Order & reopen record to include mitigation conditions. Request to collaborate on amending order per dcmr" (the "Motion") filed by Ilaf Ayyash of Union Market Neighbors ("UNM") on October 13, 2017, and included as Exhibit 80 of the record, asking that the Zoning Commission reopen the record in Z.C. Case No. 15-27 and reconsider the issuance of Z.C. Order No. 15-27, which became final and effective on July 21, 2017.

A. Motion to Reopen the Record

Form 153 is entitled "Request to accept an Untimely Filing or to Reopen the Record." However, the narrative included in the justification does not address any of the standards for reopening the record. As such, the Motion should be denied because it does not meet the requirements of Subtitle Z § 602.6 of the Zoning Regulations. Specifically, Subtitle Z § 602.6 states the following:

Any supplemental material received by the Commission after the close of the record that bears upon the substance of the application or petition shall be returned by the Director and not accepted into the files of the Commission. However, if the materials are accompanied by a separate request to re-open the record, the request shall be accepted and presented to the Commission for consideration. *The request must demonstrate good cause and the lack of prejudice to any party.* Such requests may be granted by the presiding officer and, if granted, the supplemental materials shall be entered into the record

See Subtitle Z § 602.6 (emphasis added). In this case, UMN did not submit any evidence demonstrating "good cause" to justify reopening the record. Moreover, reopening the record would

prejudice the Applicant by allowing a non-party to file additional materials in the record after the application was thoroughly reviewed and supported by the D.C. Office of Planning (“OP”), the District Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 5D, and the Zoning Commission. In addition, Z.C. Order No. 15-27 was appealed to the D.C. Court of Appeals by UMN on August 21, 2017, after it became final and effective on July 21, 2017. Thus, reopening the record in this case on the basis of this pleading with the opposition of the Applicant, three and a half months after the Order became final, and during the pendency of the appeal, would prejudice the Applicant.

B. Motion for Reconsideration

The Motion should also be denied because it does not meet the requirements of Subtitle Z § 700 of the Zoning Regulations. Specifically, Subtitle Z § 700.3 states the following:

A motion for reconsideration, rehearing, or re-argument of a final order in a contested case under Subtitle Z § 201.2 may be filed by a party within ten (10) days of the order having become final. The motion shall be served upon all other parties.

See Subtitle Z § 700.3 (emphasis added). In this case, UMN was not a party in Z.C. Case No. 15-27 and did not participate in the Zoning Commission proceedings at all. The Zoning Commission has repeatedly stated the importance of Subtitle Z § 700.3 (and its predecessor 11 DCMR § 3029.5 of the 1958 Zoning Regulations). *See, e.g.* Z.C. Order No. 11-24, p. 3, denying a motion for reconsideration filed by a non-party and reiterating that “only the existence of ‘extraordinary circumstances’ would justify the waiver of the requirement that only a party may file a motion for reconsideration, such as when no notice of a hearing is given;” *see also* Z.C. Order No. 16-07(1), p. 2, stating that the motion for reconsideration filed by the non-party made “no effort to explain why it as a non-party should be able to file a motion for reconsideration, but instead expresses concerns over impacts of the application that it could have presented during the hearing had it chose to participate.”

In addition, on June 17, 2016, UMN submitted a similar motion for reconsideration of Z.C. Order No. 15-22, which approved a PUD and Zoning Map amendment for property located at 301 Florida Avenue, NE, which is directly across Florida Avenue from the subject property. The Zoning Commission denied UMN’s motion in that case due to being a non-party that did not participate in the underlying case. Thus, UMN was on full notice that it needed to participate in the Zoning Commission public process, even as a non-party, in order to have its concerns addressed by the Zoning Commission.

Furthermore, the actions of UMN are particularly puzzling in this case since it filed an appeal of Z.C. Order No. 15-27 to the DC Court of Appeals on August 21, 2017.

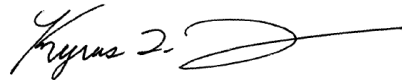
In addition, Subtitle Z § 700.3 provides that a “motion for reconsideration, rehearing, or re-argument of a final order in a contested case under Subtitle Z § 201.2 may be filed by a party within ten (10) days of the order having become final.” Subtitle Z § 700.3 (emphasis added). In this case, Z.C. Order No. 15-27 was served on July 27, 2017, and became final and effective upon publication in the *D.C. Register* on July 21, 2017. Thus, pursuant to Subtitle Z § 700.3, the Motion

must have been filed by August 7, 2017 at the latest. However, the Motion was filed on October 13, 2017, which is 84 days past the filing deadline in Subtitle Z § 700.3. Therefore, the Zoning Commission should also deny the Motion for being filed untimely.

Assuming UNM is requesting a waiver from Subtitle Z § 700.3 to permit the filing of the Motion despite the fact that it was not a party, and is being filed 84 days past the time the regulations require, UMN has not presented any “good cause” for waiving the party requirement. Pursuant to its authority in Subtitle Z § 101.9, the Zoning Commission may, for good cause shown, waive any of the provisions of Subtitle Z if, in the judgement of the Zoning Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. However, UMN has not presented any basis to justify waiving Subtitle Z § 700.3. Moreover, granting a waiver from Subtitle Z § 700.3 in this case to accept the Motion would prejudice the Applicant by reopening the record after the application was reviewed and supported by OP, DDOT, ANC 5D, and the Zoning Commission; after the record has been closed for months; after the order has been issued in this case; and after UMN has already filed an appeal with the D.C. Court of Appeals challenging the issuance of Z.C. Order 15-27.

Based on the foregoing, the Motion for Reconsideration should be denied because (i) UMN was not a party in the underlying Zoning Commission case; (ii) UMN filed the Motion significantly more than ten days after Z.C. Order No. 15-27 became final; and (iii) UMN did not show any good cause for waiving the requirements of Subtitle Z § 700.3.

Sincerely,



Kyrus L. Freeman
Jessica R. Bloomfield

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, a copy of the Applicant's Opposition to the Motion to Reopen the Record in Z.C. Case No. 15-27 was served by email to the following:

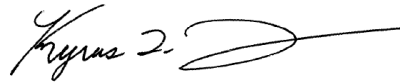
Advisory Neighborhood Commission 5D
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