

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Zoning Commission**



**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
ZONING COMMISSION ORDER NO. 17-05B  
Z.C. Case No. 17-05B  
2100 2<sup>nd</sup> Street SW LLC  
Modification of Significance of Design Review  
@ 2121 First Street SW (Lot 10 in Square 613)  
July 27, 2020**

Pursuant to notice, the Zoning Commission for the District of Columbia (the “Commission”) held a public hearing on June 22, 2020, to consider the application (the “Application”) of 2100 2<sup>nd</sup> Street SW LLC (the “Applicant”) for a Modification of Significance to the approved uses of the RiverPoint project originally approved by Z.C. Order No. 17-05 (the “Original Order”), as modified by Z.C. Order No. 17-05A, for Lot 10 in Square 613, with a street address of 2121 First Street SW (the “Property”). The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z of Title 11 of the District of Columbia Municipal Regulations (Zoning Regulations of 2016, the “Zoning Regulations”, to which all subsequent citations refer unless otherwise specified). For the reasons stated below, the Commission **APPROVES** the Application.

**FINDINGS OF FACT**

**Background**

1. Pursuant to the Original Order, the Commission granted the Applicant Design Review approval for the conversion of the former headquarters of the United States Coast Guard into a mixed-used residential building with ground floor retail (the “Approved Project”).
2. In Z.C. Order No. 17-05A the Commission approved a modification of the Approved Project to modify the originally approved plans.<sup>1</sup>

**Notice**

3. On August 19, 2019, the Applicant mailed a Notice of Intent to file an application for a Modification of Significance to all property owners within 200 feet of the Property and Advisory Neighborhood Commission (“ANC”) 6D, the “affected ANC” per Subtitle Z, Section 101.8. (Exhibit (“Ex”) 1D)

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<sup>1</sup> There is another Modification of Consequence (Z.C. Case No. 17-05C) that the Commission voted to approve at a previous meeting but for which the Order has not been issued. This Application has no effect on that modification.

4. On October 4, 2019, the Applicant filed an application for a Modification of Significance to allow temporary lodging use at the Property, as well as for a use variance for the temporary use within the 100-year floodplain (the “Modification”). (Ex. 1)
5. A public hearing was scheduled for December 16, 2019. Pursuant to Subtitle Z, Section 402.1, the Office of Zoning (“OZ”) published the Notice of Public Hearing on October 17, 2019 (Ex. 5, 6, 7). Pursuant to Subtitle Z, Section 402.3, the Applicant posted notice of the hearing on the property on November 5, 2019, and maintained such notice in accordance with the Zoning Regulations. (Ex. 8, 12)
6. On December 16, 2019, the Zoning Commission convened for a public hearing on the Application. After opening the hearing for the Application, the Commission went into a closed public meeting and then returned and requested that the Office of Planning (“OP”) consider proposing an amendment the Zoning Regulations regarding the prohibition of lodging in the flood plain. OP agreed and, consequently, the Commission requested that the hearing be continued. The Office of Zoning rescheduled the public hearing for the Application to April 6, 2020.
7. On January 3, 2020, OP filed Case No. 20-01 to amend Subtitle C, Chapter 1100 of the Zoning Regulations to remove the prohibition on lodging uses within the 100-year floodplain and instead requiring a special exception for such use. A public hearing was held on May 7, 2020 to consider the proposed text amendment and the Zoning Commission voted to approve it on May 7, 2020. Z.C. Order No. 20-01 was issued on June 26, 2020.
8. Per the requirements of 11-C DCMR § 1102.5(b), as approved in Z.C. Order No. 20-01, OZ referred the Application to the Department of Energy and Environment (“DOEE”), the Metropolitan Police Department (“MPD”), Fire and Emergency Medical Services (“FEMS”), and the DC Homeland Security & Emergency Management Agency (“HSEMA”) on February 26, 2020. (Ex. 16)
9. As a result of the public health emergency declared by Mayor’s Order 2020-046, the Mayor adjusted the District Government’s operating status, and the public hearing for the Application was delayed and rescheduled for June 22, 2020.
10. Pursuant to Subtitle Z, Section 402.1, OZ published the Notice of Virtual Public Hearing for the new hearing date on May 14, 2020 (Ex. 20, 21, 22.) Pursuant to Subtitle Z, Section 402.3, the Applicant posted notice of the hearing on the Property on May 20, 2020, and maintained such notice in accordance with the Zoning Regulations. (Ex. 24, 25.) The Applicant did request a waiver of the posting requirements to (1) post the Property seven (7) days after the required date, and (2) waive the notarization requirements for the postings. (Ex. 23, 25).<sup>2</sup>

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<sup>2</sup> The Applicant noted both the posting delay and the notarization waiver were due to the ongoing COVID-19 pandemic and its impact on the ability to post the Property and obtain notarizations.

## **Parties**

11. The only party to the Z.C Case No. 17-05 other than the Applicant was ANC 6D.

## **The Property**

12. The Property is 115,479 square feet in size and occupies the entirety of Square 613. (Ex. 1)
13. The Property is located within the 100-year floodplain. (Ex. 1)

## **The Application**

14. The Applicant requested a Modification of Significance to the Original Order to allow temporary lodging use at the Property. While initially requested as a variance, the Application was later updated to request a special exception per the text amendment approved in Case No. 20-01. The Applicant proposes to bring WhyHotel to the Property. WhyHotel is a hospitality management company that makes use of otherwise vacant apartments by operating “turn-key, pop-up hotels” out of the vacancy of newly built, large scale apartment buildings during the lease-up phase. WhyHotel will operate a temporary lodging use at the Property during the initial leasing period for the Approved Project. (Ex. 1)
15. The temporary lodging use will make the retail and residential uses approved in the Approved Project more viable by activating the Property during the critical lease-up phase and providing customer base for the retail.
16. The Application included the terms for the WhyHotel’s operation at the Property. WhyHotel will only operate at the Property for up to two years during the project’s lease up. It will utilize 150 of the 480 residential units, thus allowing the apartments to lease up simultaneously with its operation. The units on the 4th and 5th floors (with the exception of Inclusionary Zoning units) will be dedicated to the WhyHotel; the remainder of the units will remain allocated for residential use. As the Approved Project’s demands for residents increases, those units reserved for the WhyHotel will revert to residential use on a unit-by-unit basis for lease to a residential tenant. WhyHotel guests will have access to building amenity spaces including the exercise room, rooftop pool, and lounge areas, as well as space in the garage. (Ex 1.)
17. Lodging use is generally permitted and an encouraged use in the CG-5 Zone.
18. The temporary lodging use does not impact the Approved Project’s design approved by the Original Order. (Ex. 1)
19. On November 26, 2019, the Applicant submitted a prehearing submission, including updates regarding government agency and community outreach, confirming that the temporary lodging use meets the parking, loading, and bicycle parking requirements, and confirming its witnesses for the public hearing. (Ex. 9)

20. The Prehearing Submission also included a commitment from WhyHotel in response to comments it heard from the community when it presented its application to the ANC. In an effort to provide the ANC 6D community a meaningful benefit from the requested relief, WhyHotel agreed to provide residents of ANC 6D a discount on rooms. It also agreed to coordinate WhyHotel Career Days with the ANC with an objective to hire its employees from within ANC 6D. (Ex. 9)
21. On February 19, 2020, and in response to the newly stipulated requirements published in Order No. 20-01, the Applicant submitted a supplemental submission detailing how the Application meets the special exception requirements. The Applicant explained that the Department of Energy and Environment (“DOEE”) reviewed and approved its detailed flood proofing plan and granted the Approved Project a Code Modification based on the flood proofing plan. The Applicant provided pertinent details of the flood proofing plan in satisfaction of 11-C DCMR §1102.5(a), including information on the boundaries and flood elevations for the Property, and a description of the Approved Project’s flood resistant design features, an evacuation plan. Importantly, the plan confirmed that the temporary lodging use would not result in any adverse impact to the health or safety of the occupants or users. (Ex. 15, 15A, 15B)

### **Reports on and Responses to the Application**

22. OP submitted an initial report dated December 6, 2019, recommending approval of the Modification of Significance and the use variance for lodging use (the “Initial OP Report”). (Ex. 10) The Initial OP Report noted that DOEE stated it had previously approved the floodplain plans and would not provide additional comments, and the District Department of Transportation (“DDOT”) had no issues with the Modification. (Ex. 10)
23. OP submitted a supplemental report on March 27, 2020, continuing to recommend approval of the Modification of Significance, now as a special exception, subject to a two-year limitation on the temporary WhyHotel use (the “Supplemental OP Report”). (Ex. 19) The Supplemental OP Report also included comments from the Department of Housing and Community Development (“DHCD”) noting that the proposed use would not impact the Inclusionary Zoning units, stating that it did not object to the Application, and mentioned DHCD would always welcome additional affordable units. The Supplemental OP Report again indicated DDOT had no issue with the Modification. (Ex. 19)
24. FEMS submitted comments on March 11, 2020, noting they had no objection to the Modification. (Ex. 17)
25. DOEE submitted a report dated June 19, 2020, recommending that the Commission permit the lodging use at the Property, provided all lodging units were above the design flood elevation (the “DOEE Report”). (Ex. 26) The Applicant confirmed all units were above the design flood elevation. (6/22 Transcript (“Tr.”) at 10)
26. ANC 6D submitted a written report dated December 11, 2020, stating that at its duly noticed public meeting on April 13, 2020, at which a quorum was present, ANC 6D voted to oppose the Application (the “ANC Report”). (Ex. 11.) On March 23, 2020, and again on June 22,

2020, ANC 6D submitted testimony from Gail Fast, the chairperson of ANC 6D (the “ANC Testimony”) (Ex. 18, 28). The ANC Report and the ANC Testimony registered the ANC’s objection to the Modification because the temporary lodging use would not provide a benefit to the community, the Modification was not consistent with the original residential approval for the Approved Project, and the Approved Project overall did not provide enough affordable housing. (Ex. 11, 18, 28) The ANC Testimony also raised concerns about the lodging use at the Property in relation to other lodging uses within the ANC. (Ex. 18, 28)

### **Public Hearing**

27. The Commission held a public hearing on the Modification on June 22, 2020. Jason Fudin testified on behalf of WhyHotel. As a preliminary matter, the Commission granted the Applicant’s request for a waiver of the posting requirements.
28. OP recommended approval of the Application to the Commission at the hearing. (6/22 Tr. at 26-27)
29. Commissioner Fast testified on behalf of ANC 6D in opposition to the Modification. Commissioner Fast objected to the Modification and argued that the temporary lodging use would not provide a benefit to the community, the Modification was not consistent with the original residential approval for the project, and the project overall did not provide enough affordable housing. (6/22 Tr. at 27-32). Commissioner Fast also noted that she did not find the proposed benefit of a 15% discount to the community to be sufficient enough to be a meaningful benefit to ANC 6D residents. (6/22 Tr. at 34)
30. At the close of the hearing, the Commission closed the record for the Application, with the exception of the request for responses from the Applicant and the ANC regarding benefits of the Modification. The Office of Zoning set the Modification for a decision at the Zoning Commission’s July 29, 2020 public meeting.

### **Post-Hearing Submissions**

31. On July 6, 2020, the Applicant submitted a post-hearing submission responding to the Commission’s request for additional consideration of the ANC’s comments. The Applicant noted that while benefits are not a consideration in a design review case, it wanted to respond to the ANC’s concern that the discount was not affordable for ANC 6D residents. Therefore, the Applicant proposed a revised neighborhood discount condition, offering 50% off of room rates for a limited number of rooms for ANC 6D residents, depending on WhyHotel’s operating size. (Ex. 29)
32. On July 14, 2020, the ANC submitted a final report in opposition (the “ANC Final Report”), noting their continued objection to the Modification on the grounds that (1) the Modification is not in concert with the Approved Project’s residential use; (2) Buzzard Point has other units that have started coming online, lessening the need for the WhyHotel use; and (3) objecting to the revised benefit because it came from WhyHotel and not the Applicant (Ex. 30)

## CONCLUSIONS OF LAW

### Modification of Significance Approval

1. Subtitle Z, Section 704 authorizes the Commission to review and approve Modifications of Significance to final orders of the Zoning Commission.
2. Subtitle Z, Section 703.5 defines a Modification of Significance as a “modification to a contested case order or the approved plans of greater significance than a modification of consequence.” Subtitle Z, Section 703.6 includes “change in use” and “additional relief or flexibility” as examples of a Modification of Significance.
3. As set forth in Subtitle Z, Section 703.5, Modifications of Significance require a public hearing. Pursuant to Subtitle Z, Section 704.4, the scope of the hearing is limited to the impact of the modification on the subject of the original application.
4. The Commission concludes that the Applicant has satisfied the requirement of Subtitle Z, Section 703.13 to serve the Modification on all parties to the original proceeding, in this case ANC 6D.
5. The Commission concludes that the application qualifies as a Modification of Significance within the meaning of Subtitle Z Sections 703.5 and 703.6, as a request to add a temporary new use and request additional special exception relief.

### Consistent with the Original Order

6. The Commission concludes that the Modification is generally consistent with the Original Order’s approval for retail and residential use. The WhyHotel lodging use proposed is temporary in nature and is meant to help activate the retail and residential use of the Approved Project. The Commission credits the submissions and testimony of the Applicant that due to the Property’s remoteness and size, the lease-up period will be challenging to generate activity to sustain the retail and residential uses. Moreover, the Commission notes that lodging is an encouraged use in the CG-5 Zone.
7. The Commission notes that OP, DDOT, DOEE, FEMS, and DHCD all supported or raised no objection to the Modification, and OP noted it was consistent with the intent of Original Order.
8. The Commission acknowledges that the ANC does not believe the Modification is consistent with the Original Order’s approval of a residential project. However, the Commission disagrees. Because the proposed lodging use is limited to 1/3 of the total residential units and, most importantly, is temporary and limited to no more than two years, the Commission does not find this use inconsistent with the Original Order.
9. The Commission also acknowledges the ANC’s point that the Modification would present competition to the other lodging uses within ANC 6D. However, the Commission again disagrees. Given WhyHotel’s unique business model, the Property’s isolated location in comparison to the rest of the ANC, and the limited duration of the lodging

use, the Commission does not find this point persuasive enough to prevent approval of the Modification. Additionally, the Commission does not find potential competition with other hotels relevant to its consideration of the Modification. Finally, WhyHotel is a local company with a history of ties to the District.

10. The Commission finds that the Modification will generate addition tax revenue for the District due to WhyHotel’s requirement to pay lodging taxes for its lodging use. Additionally, WhyHotel will generate additional jobs in this community, and WhyHotel has committed to trying to recruit employees from within ANC 6D.

#### Consistent with the Comprehensive Plan

11. The Commission concludes that the Modification is not inconsistent with the Future Land Use Map designations of the Property for Mixed Use: Medium Density Residential/Medium Density Commercial use.
12. Additionally, the Commission further concludes the Modification is not inconsistent with the Citywide Elements of the Comprehensive Plan, which specifically promote uses that activate the waterfront spaces through uses that bring people to the water.
13. Finally, the Commission concludes the Modification is not inconsistent with the Area Element because the Modification is intended to help vitalize the new waterfront neighborhood and diversifies the uses in the Buzzard Point neighborhood.

#### Special Exception Approval

14. The Commission concludes that the Modification provided the required analysis of the Property’s location in the floodplain and the proposed floodproofing plan related to the lodging use.
15. The Commission credits the DOEE Report and its recommendation of approval because the Modification met the required floodproofing standards.
16. The Commission concludes that the Modification for temporary lodging use meets the required special exception criteria for lodging use within the 100-year floodplain.

#### “Great Weight” to the Recommendations of OP

17. Pursuant to § 13(d) 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 (2001)) and Subtitle Z § 405.8, the Commission must give “great weight” to the recommendations of OP. *Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016)
18. The Commission finds persuasive OP’s recommendation that the Commission approve the Modification and therefore concurs in that judgment.

## **“Great Weight” to the Written Report of the ANC**

19. Pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) and Subtitle Z §406.2, the Commission must give “great weight” to the issues and concerns raised in the written report of the affected ANC. To satisfy this great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. *Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016) The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978).
20. The Commission credits the ANC’s testimony and the issues raised in the ANC Report, the ANC Testimony, the ANC Final Report, as well as Commissioner Fast’s comments at the hearing. The Commission disagrees with the ANC that the temporary lodging use is not in concert with the Original Order and that the temporary lodging use may cause issues with other lodging uses within the ANC for the reasons stated above.
21. The Commission notes the ANC’s objections to the Approved Project’s affordable housing. However, the Commission rejects this objection for two reasons: (1) the Modification does not alter the Approved Project’s Inclusionary Zoning units, and therefore it is not within the Commission’s review of the Modification; and (2) enhanced affordable housing and other benefits and amenities are not part of the Commission’s consideration of design review cases. The Commission’s authority in this case is limited to whether the Applicant has met the design review and special exception tests required by the Zoning Regulations with respect to the Modification, and any conditions of approval should be intended to mitigate identified adverse effects related to that review. Because these comments and requests go beyond the scope of the Commission’s review of this application, the Commission declines to include them as conditions of this Order.
22. The Commission also acknowledges the ANC’s argument that the WhyHotel use is no longer necessary to promote the residential use because other residential units in Buzzard Point are being leased, diminishing the isolation and remoteness of the Approved Project. However, this point is not a reason to deny the Application. Specifically, the Property remains geographically remote given that it is located at the southern tip of Buzzard Point. Additionally, given the size of the Approved Project, support for the retail and residential uses is appropriate even if there are other active buildings in the neighborhood. Additionally, while the Commission notes the Applicant addressed the Property’s remoteness in the Application, such remoteness is not required for the lodging use’s special exception approval, as detailed above.
23. Finally, the Commission finds that the Applicant has been responsive to the ANC’s concerns regarding the benefits proffered related to the WhyHotel use with the revised proposed neighborhood discount condition. While generally benefits are outside of the



Commission's scope of review of this application, the Commission includes them as conditions due to the Applicant's voluntary commitment to them. Additionally, while the ANC objects to the benefits being provided from WhyHotel instead of the Applicant directly, the Commission does not agree for two reasons: (1) the Modification only includes the addition of the WhyHotel use, and therefore the Application is only related to the WhyHotel use, not the underlying Approved Project; and (2) as discussed above, benefits are not a relevant consideration for the Commission in a design review case.

### **DECISION**

In consideration of the case record and the Findings of Fact and Conclusions of Law herein, the Commission concludes that the Applicant has satisfied its burden of proof and therefore **APPROVES** the Application's request for a Modification of Significance to modify Z.C. Order No. 17-05, as modified by Z.C. Order No. 17-05A, to add temporary lodging use to the Approved Project, subject to the following conditions and provisions:

The conditions in Z.C. Order No. 17-05/17-05A, remain unchanged and in effect, except that the below Condition 13 is added for the temporary WhyHotel use (deletions shown in **bold** and ~~strikethrough~~ text; additions in **bold** and underlined text):

**13. Temporary WhyHotel Use. WhyHotel is permitted to operate as a temporary lodging use at the Property for up to two (2) years from the issuance of WhyHotel's first Certificate of Occupancy at the Property; provided that this two-year limitation shall not be renewed, and subject to the following conditions:**

- a. **Neighborhood Discounts: WhyHotel will offer a limited number of units to ANC 6D residents at a 50% discount rate, a significant discount on the hotel room rates. This benefit will only be implemented if WhyHotel begins operating transient stays (less than 30 day stays) at the Property. If WhyHotel is operating between 25-75 units for transient stays, there will be two (2) one-bedroom units available for this benefit. If WhyHotel is operating over 75 units for transient stays, there will be a total of three one-bedroom (3) units available for this benefit. In order to allow as many residents as possible to take advantage of this benefit, each ANC 6D household will be limited to a one-time use of this benefit for up to a four-night stay.**
- b. **WhyHotel Career Days: WhyHotel will host two WhyHotel Career Days to recruit the onsite, full-time employees for the proposed WhyHotel at Riverpoint. WhyHotel commits to hosting both Career Days in ANC 6D. WhyHotel will also coordinate with ANC 6D to best target members of the community to attend these Career Days.**

**VOTE (July 27, 2020):** - - - ([ZCM making motion], [ZCM seconding motion], Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to **APPROVE**).

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 17-05B shall become final and effective upon publication in the *DC Register*; that is, on \_\_\_\_\_, 2020.

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**ANTHONY J. HOOD**  
**CHAIRMAN**  
**ZONING COMMISSION**

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**SARA A. BARDIN**  
**DIRECTOR**  
**OFFICE OF ZONING**

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.