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November 15, 2020

Zoning Commission for the
District of Columbia
441 4th Street, NW, Suite 210S
Washington, D.C. 20001

Re: ZC Case No. 20-02 / Confirmation of Prospective Nature of Enhanced IZ

Dear Members of the Commission:

We seek confirmation that the Enhanced IZ regulations proposed in ZC Case No. 20-02 cannot be retroactively applied to Zoning Map amendments that have been previously approved by the Zoning Commission and the final written order has not yet been issued.

For your reference, I have attached the Notice of Final Rulemaking (“NOFR”) for ZC Case No. 10-08 related to special exceptions. The NOFR states that new zoning regulations can only be applied prospectively. This was explicitly stated in the NOFR to avoid future enforcement problems.

On September 14, 2020, the Zoning Commission took final action to approved ZC Case No. 19-28, a Zoning Map amendment for the Howard University property on the west side of 7th Street, NW, between S and T Streets. The final written order for this case is pending. Therefore, in order to clarify that Enhanced IZ does not apply to the Zoning Map amendment approved in ZC Case No. 19-28, we respectfully urge that the Zoning Commission confirm that Enhanced IZ is prospective in nature and, therefore, could not apply to Zoning Map amendments previously approved by the Zoning Commission, even where the final written order has not been issued.

Thank you for your considerate attention to this matter.

Sincerely,

HOLLAND & KNIGHT LLP



Leila M. Jackson Batties

Attachment (1)

Cc: Maximilian Tondro, Esq., Office of the Attorney General
Ms. Jennifer Steingasser, Office of Planning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

NOTICE OF FINAL RULEMAKING
AND

Z.C. ORDER NO. 10-08

Z.C. Case No. 10-08

(Text Amendment – 11 DCMR)

(Text amendments related to the expiration of special exception and non-conforming uses,
and the effective date of special exception uses for which a term has been established)

September 27, 2010

The Zoning Commission for the District of Columbia (the "Commission"), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 798; D.C. Official Code § 6-641.01); hereby gives notice of adoption of the following text amendments to the Zoning Regulations of the District of Columbia and to the Board of Zoning Adjustment Rules of Practice and Procedure, both codified at DCMR Title 11. A Notice of Proposed Rulemaking was published in the *D.C. Register* ("DCR") on July 30, 2010 at 57 DCR 6833. A minor change was made to the text as proposed for reasons to be explained below. The amendments shall become effective upon the publication of this notice in the *D.C. Register*.

Description of Amendments

The amendments to the Zoning Regulations (Title 11, DCMR) relate to the expiration of special exception and non-conforming uses, and the effective date of special exception uses for which a term has been established. The amendments reinforce the non-conforming use discontinuance provision of 11 DCMR § 2005, establish expiration dates for discontinued and superseded uses permitted by special exception, and provide that all special exception terms begin on the date upon which the order becomes effective.

Procedures Leading to Adoption of Amendments

On April 2, 2010, the Office of Planning submitted a memorandum that served as a petition requesting the amendments and as its required pre-hearing filing. The Zoning Commission voted to set down the proposal for hearing at its April 26, 2010 public meeting.

A public hearing was scheduled for and held on June 24, 2010, after which the Commission authorized the referral of the proposed text to the National Capital Planning Commission ("NCPC") and the publication of a Notice of Proposed Rulemaking in the *DC Register*.

ZONING COMMISSION
District of Columbia
10-08
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ZONING COMMISSION
District of Columbia
CASE NO. 10-08
EXHIBIT NO. 13

NCPC, through a delegated action dated July 8, 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. 8.)

The Notice of Proposed Rulemaking was published in the *D.C. Register* on July 30, 2010, 57 DCR 6833, for a 30-day notice and comment period. A comment was received from Thomas F. DeCaro, Jr., Esquire on behalf Mr. Koo L. Yuen. Mr. DeCaro's objections were for the most part based upon the mistaken belief that these amendment would apply retroactively. However, that is not the case.

A new zoning regulation, like any other District agency rule, can only be applied prospectively. The District's Administrative Procedure Act defines a rule to mean "the whole or any part of any ... agency's statement of general or particular applicability and *future effect*." (D.C. Official Code § 2-502 (6)(A) (emphasis added).) That means that only use change certificates of occupancy issued, or any three year period of discontinued use occurring after the rule's effective date would result in the expiration of a special exception.

However, in order to avoid future enforcement problems the Commission agreed with the Office of the Attorney General that the prospective nature of the rule should be explicitly stated.

At a properly noticed public meeting held on September 28, 2010, the Zoning Commission took final action to adopt the text amendments as follows:

Chapter 20, NONCONFORMING USES AND STRUCTURES, § 2005, DISCONTINUANCE, is amended as follows: (a) by amending § 2005.1 by striking the phrase "a period of more than three (3) years" and inserting the phrase "any period of more than three (3) years" in its place; and (b) by adding a new § 2005.2 to read as follows:

- 2005.1 Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for any period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located.

- 2005.2 This presumption may only be rebutted by objective proof of a continuing use or of affirmative steps taken to resume the use during the period of time identified by the Zoning Administrator when revoking an existing certificate of occupancy or denying an application for a replacement certificate of occupancy.

Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended by amending the title of § 3130, TIME LIMITS ON BOARD ACTION, by striking the words "BOARD ACTION" and inserting the words "THE VALIDITY OF BOARD ORDERS" in their place to read as follows:

3130 TIME LIMITS ON THE VALIDITY OF BOARD ORDERS

Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended as follows: (a) by adding a new § 3131; and (b) by adding a new section 3132 to read as follows:

3131 COMMENCEMENT OF SPECIAL EXCEPTION TERMS

3131.1 When the Board limits its approval of a special exception to a term of years, the length of that term begins on the date upon which the order became final.

3132 EXPIRATION OF SPECIAL EXCEPTION USES

3132.1 If a special exception use is established, the use will only expire if:

- (a) An expiration date is specified in the order;
- (b) The special exception use is discontinued for any reason for any period of three (3) or more years occurring after October 8, 2010; except where governmental action impedes access to the premises; or
- (c) A certificate of occupancy for a different use is issued after October 8, 2010.


3132.2 If a special exception use expires, any subsequent use shall conform to the regulations of the district in which the use is located.

3132.3 Notwithstanding § 3132.1(b), a special exception use shall not expire if there is objective proof of a continuing use or of affirmative steps taken to resume the use during the period of time identified by the Zoning Administrator when revoking an existing certificate of occupancy or denying an application for a replacement certificate of occupancy.


On June 24, 2010, upon motion of Chairman Hood, as seconded by Commissioner May, the Zoning Commission **APPROVED** the petition at the conclusion of the hearing 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, not voting).

On September 27, 2010, upon motion of Vice Chairman Schlater, as seconded by Chairman Hood, the Zoning Commission **ADOPTED** the Order at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Konrad W. Schlater, Peter G. May (absentee ballot), and Michael G. Turnbull to adopt; Greg Selfridge, having not 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 October 8, 2010.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



JAMISON L. WEINBAUM
DIRECTOR
OFFICE OF ZONING