

# Holland & Knight

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January 26, 2021

## **VIA IZIS**

Zoning Commission  
of the District of Columbia  
441 4<sup>th</sup> Street, NW - Suite 210  
Washington, DC 20001

**Re: Applicant's Update on Voluntary (Non-IZ) Affordable Housing  
Z.C. Case No. 20-14 - Design Review  
5 M Street, SW (Square 649, Lots 43, 44, 45, and 48)**

Dear Members of the Zoning Commission:

On behalf of VNO South Capitol LLC and Three Lots in Square 649 LLC (together, the "Applicant"), we hereby provide the following update regarding the Applicant's commitment to provide voluntary, non-Inclusionary Zoning ("IZ") affordable housing units ("Non-IZ Affordable Units") within the proposed residential project located in the D-5 zone district at the above-referenced property.

At the January 14, 2021, public meeting, the Commission acknowledged that including a condition in an order approving this design review application is not legally within the Commission's purview and that such position is consistent with the Zoning Commission's past orders in design review cases. The Commission, however, asked the Office of the Attorney General ("OAG") to ensure that the language in the draft Order fully evidenced the Applicant's commitment to provide 19 Non-IZ Affordable Units for the life of the project.

The Applicant notes that the draft order, in the record at Exhibit 65A, provides specific statements relating to the Applicant's commitment to provide the Non-IZ Affordable Housing, which the Applicant believes are consistent with the Commission's request. Those statements specifically include the following: Finding of Fact ("FF") Nos. 32-34 (setting forth the commitment for the Non-IZ Affordable Units); Finding of Fact No. 99(a) (reiterating the commitment in response to the ANC's request); and Conclusion of Law Nos. 15(b) and 24(d) (further discussing the commitment).

Through its discussions with OAG, the Applicant has voluntarily agreed to go a step further to memorialize this commitment outside of the design review process. Specifically, the Applicant

**ZONING COMMISSION**  
District of Columbia  
CASE NO.20-14  
EXHIBIT NO.68A

has agreed to record a Declaration of Covenant for Non-Inclusionary Zoning Affordable Units (“Declaration”) in the District of Columbia Land Records prior to issuance of the final Order approving the application. The Declaration that will be executed and recorded is attached hereto. This Declaration sets forth the specific terms of the Applicant’s commitment for the Non-IZ Affordable Units and ensures that the commitment runs with the land and binds subsequent land owners for the life of the project. The Declaration also includes a commitment that one three-bedroom unit will be provided as a Non-IZ Affordable Unit, which was specifically requested by the Office of Planning in its supplemental post-hearing submission (Ex. 66).

Accordingly, the Applicant proposes that the following new Conclusion of Law be added between Conclusion of Law Nos. 16 and 17 in the Applicant’s draft Order (Ex. 65A):

***Non-IZ Affordable Units.** The Commission concludes that the Project fully satisfies the affordable housing requirements under the IZ regulations applicable to the Property, and that the provision of any additional affordable housing over the minimum IZ required is outside of the Commission’s purview for the D-5 zoned Property being reviewed under the Design Review regulations of 11-I DCMR § 616, 11-I DCMR, Chapter 7, and 11-X DCMR § 901.2. However, as part of its engagement with the community and ANC, the Applicant agreed voluntarily to provide 19 Non-IZ Affordable Units and to memorialize this commitment through recordation of a Declaration of Covenant for Non-Inclusionary Zoning Affordable Units in the Land Records of the District of Columbia, which has occurred prior to the issuance of this Order approving the Application.*

*Accordingly, as to the ANC’s request to incorporate affordable housing above the minimum required by the IZ regulations, the Commission believes that it would be inappropriate to include this as a condition to its approval. 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. Because the ANC’s request for affordable housing above the minimum required by IZ goes beyond the scope of the Commission’s review of this Application, the Commission declines to include the Applicant’s commitment as a condition to the Order.*

The Applicant appreciates the Commission’s continued consideration of this application and its final review at the January 28, 2021, public meeting.

Sincerely,

HOLLAND & KNIGHT, LLP



Christine M. Shiker.



Jessica R. Bloomfield

cc: Certificate of Service  
Joel Lawson, Office of Planning (via email, with attachment)  
Steve Cochran, Office of Planning (via email, with attachment)  
Anna Chamberlin, DDOT (via email, with attachment)  
Aaron Zimmerman, DDOT (via email, with attachment)  
Andy Litsky, ANC 6D04 (via email at 6D04@anc.dc.gov, with attachment)  
Fredrica Kramer, ANC 6D05 (via email at 6d05@anc.dc.gov, with attachment)  
Max Tondro, Office of the Attorney General (via email, with attachment)  
Jacob Ritting, Office of the Attorney General (via email, with attachment)

**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2021, a copy of this letter was served on the following by email:

Ms. Jennifer Steingasser  
[jennifer.steingasser@dc.gov](mailto:jennifer.steingasser@dc.gov)

Via Email

Advisory Neighborhood Commission 6D  
[6d@anc.dc.gov](mailto:6d@anc.dc.gov)

Via Email

Mary Carolyn Brown  
*Counsel for 1101 South Capitol, LLC*  
[cbrown@BrownLaw.law](mailto:cbrown@BrownLaw.law)

Via Email

  
Jessica R. Bloomfield

**DECLARATION OF COVENANT FOR  
NON-INCLUSIONARY ZONING AFFORDABLE UNITS**

**THIS DECLARATION OF COVENANT FOR NON-INCLUSIONARY ZONING AFFORDABLE UNITS (“Declaration”)** is made as of this \_\_\_ day of \_\_\_\_\_, 2021, by **JBGS/1101 SOUTH CAPITOL, L.L.C.**, a Delaware limited liability company, successor by name change to **VNO SOUTH CAPITOL L.L.C.**, and **SOUTH CAPITOL L.L.C.**, a Delaware limited liability company, successor by name change to **THREE LOTS IN SQUARE 649 L.L.C.** (together, “Declarant”), for the benefit of the **DISTRICT OF COLUMBIA**, a municipal corporation (“District”).

**RECITALS:**

A. JBGS/1101 South Capitol, L.L.C. is the current owner of certain real property in the District of Columbia known as Lot 48 in Square 649 (“JBGS Property”) and more particularly described in Exhibit A-1.

B. South Capitol L.L.C. is the current owner of certain real property in the District of Columbia known as Lots 43, 44 and 45 in Square 649 (“South Capitol Property”) and more particularly described in Exhibit A-2. The JBGS Property and the South Capitol Property are together referred to herein as the “Property.”

C. The Property is comprised of approximately 75,656 square feet of land area and is located in the D-5 Zone District and within the M and South Capitol Streets Sub-Area of the Zoning Regulations of the District of Columbia (Title 11 of the District of Columbia Municipal Regulations) (“Zoning Regulations”).

D. On June 22, 2020, Declarant submitted an application to the Zoning Commission of the District of Columbia (“Zoning Commission”) for the mandatory design review of a mixed-use development project to be located at the Property (“Project”), known as Z.C. Case No. 20-14.

E. As part of its review of Z.C. Case No. 20-14, the Zoning Commission acknowledged that: (i) pursuant to Subtitle I § 539.2 of the Zoning Regulations, development of property located in the D-5 Zone District, other than penthouse habitable space consistent with Subtitle C §§ 1001.2(a)(3) and 1500.11, is not subject to the requirements or bonuses of the Inclusionary Zoning (“IZ”) affordable housing requirements of Subtitle C, Chapter 10 of the Zoning Regulations (“IZ Regulations”); and (ii) the provision of affordable housing beyond the minimum amount required by the IZ Regulations is outside of the Commission’s purview in a design review case, which for the Property is limited to the standards set forth in Subtitle I § 616, Subtitle I, Chapter 7, and Subtitle X § 901.2 of the Zoning Regulations.

F. As part of its discussions regarding development of the Project with the community and the affected Advisory Neighborhood Commission, Declarant agreed to voluntarily provide 19 non-required and non-IZ affordable housing units within the Project (“Non-IZ Affordable Units”), which would not be subject to the IZ Regulations.

G. In order to memorialize the Declarant's voluntary commitment to provide the Non-IZ Affordable Units in the Project, Declarant hereby enters into this Declaration of Covenant for Non-Inclusionary Zoning Affordable Units.

**NOW, THEREFORE,** Declarant hereby declares that so long as the Property is developed in accordance with the architectural plans and elevations approved in Z.C. Case No. 20-14 (the "Approved Plans"), then the Property shall be held, sold, conveyed, occupied and used subject to all of the terms and provisions hereinafter set forth.

1. Incorporation of Recitals. The above recitals are incorporated herein by this reference as if fully restated herein and are a material part hereof.
2. Effective Date. This Declaration shall take effect on the date it is recorded among the Land Records ("Effective Date").
3. Non-IZ Affordable Housing. For the life of the Project, the 19 Non-IZ Affordable Units, which are not subject to the IZ Regulations, shall be provided in the Project as follows:
  - a. The Non-IZ Affordable Units shall be reserved for households earning equal to or less than 60% of the Median Family Income;
  - b. The proportion of studio and one-bedroom Non-IZ Affordable Units shall not exceed the proportion of studio and one-bedroom market rate units, provided that one three-bedroom unit shall be provided as a Non-IZ Affordable Unit;
  - c. The Non-IZ Affordable Units shall have comparable exterior design, materials, and finishes to the market rate units;
  - d. The Non-IZ Affordable Units shall have comparable interior amenities such as finishes and appliances as the market rate units;
  - e. The Non-IZ Affordable Units shall not be overly concentrated on any floor of the Project; and
  - f. The Non-IZ Affordable Units shall not be located in cellar space.
4. Termination. This Declaration shall only be terminated with written consent of the District of Columbia; provided, however, that the Declaration shall automatically terminate if the Property is not developed with the Project as approved by Z.C. Order No. 20-14, as may be extended or modified by the Zoning Commission, and in such case written consent of the District of Columbia shall not be required to terminate this Declaration.
5. Enforcement. The District has the right to specifically enforce the covenants contained in this Declaration.
6. Governing Law. This Declaration is intended to be performed in the District of Columbia and shall be construed and enforced in accordance with the internal laws thereof without regard to principles of conflicts of laws.

7. Section Headings. The paragraph headings contained in this Declaration are for convenience only and shall in no way enlarge or limit the scope or meaning of the various and several paragraphs hereof.
8. Counterparts. This Declaration may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall be deemed one and the same agreement.
9. Binding Effect. The terms and conditions of this Declaration shall (i) be binding upon, and shall inure to the benefit of, the Declarant's respective heirs, legal representatives, successors and assigns; and (ii) constitute a covenant running with the land, binding upon and inuring to the benefit of all parties owning or having any interest in the Property.

[signatures on following page]

**IN WITNESS WHEREOF**, this Declaration has been executed by JBGS/1101 South Capitol, L.L.C., the owner of Lot 48 in Square 649, as of the date first above written.

**JBGS/1101 SOUTH CAPITOL L.L.C.;**

**JBGS/1101 SOUTH CAPITOL L.L.C.,**  
a Delaware limited liability company

By: \_\_\_\_\_

Name:

Title:

\_\_\_\_\_) )  
\_\_\_\_\_) ss:  
\_\_\_\_\_) )

**BEFORE ME**, a Notary Public in and for the jurisdiction aforesaid, personally appeared this date \_\_\_\_\_, personally well known (or satisfactorily proven) to me to be the person whose name is subscribed to the foregoing Declaration, who, being by me first duly sworn, did depose and state that he is the \_\_\_\_\_ of JBGS/1101 South Capitol, L.L.C., a Delaware limited liability company, which entity is a party to the foregoing Declaration, and that the said \_\_\_\_\_, being duly authorized so to do, executed said Declaration on behalf of said entity and acknowledged the same as its free act and deed for the uses and purposes therein contained.

**WITNESS** my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_ 2021.

\_\_\_\_\_  
Notary Public  
[ Notarial Seal ]

My Commission Expires:



**IN WITNESS WHEREOF**, this Declaration has been executed by South Capitol, L.L.C., the owner of Lots 43, 44 and 45 in Square 649, as of the date first above written.

**SOUTH CAPITOL, L.L.C.:**

**SOUTH CAPITOL, L.L.C.,**  
a Delaware limited liability company

By: \_\_\_\_\_

Name:

Title:

\_\_\_\_\_) )  
\_\_\_\_\_) ss:  
\_\_\_\_\_)

**BEFORE ME**, a Notary Public in and for the jurisdiction aforesaid, personally appeared this date \_\_\_\_\_, personally well known (or satisfactorily proven) to me to be the person whose name is subscribed to the foregoing Declaration, who, being by me first duly sworn, did depose and state that he is the \_\_\_\_\_ of South Capitol, L.L.C., a Delaware limited liability company, which entity is a party to the foregoing Declaration, and that the said \_\_\_\_\_, being duly authorized so to do, executed said Declaration on behalf of said entity and acknowledged the same as its free act and deed for the uses and purposes therein contained.

**WITNESS** my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_ 2021.

\_\_\_\_\_  
Notary Public  
[ Notarial Seal ]

My Commission Expires:

**EXHIBIT A-1**

**LEGAL DESCRIPTION OF THE JBGS PROPERTY**

All that certain lot or parcel of land located and being in the City of Washington in the District of Columbia and being more particularly described as follows:

Lot numbered Forty-eight (48) in Square numbered Six Hundred Forty-nine (649), as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 176 at folio 69.

**EXHIBIT A-2**

**LEGAL DESCRIPTION OF THE SOUTH CAPITOL PROPERTY**

All those certain lots or parcels of land located and being in the City of Washington in the District of Columbia and being more particularly described as follows:

Lots numbered Forty-three (43), Forty-four (44) and Forty-five (45) in Square numbered Six Hundred Forty-nine (649) in the subdivision made by the District of Columbia Redevelopment Land Agency, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 141 at folio 94