

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 2nd Street SW LLC
(Modification of Significance of Design Review @
Lot 10 in Square 613 [2100 First Street, S.W.])
July 27, 2020

Pursuant to notice, at its December 16, 2019, public hearing, as continued to its June 22, 2020, public hearing¹, the Zoning Commission for the District of Columbia (the “Commission”) considered the application (the “Application”) of 2100 2nd Street, SW, LLC (the “Applicant”) for:

- A modification of significance pursuant to Subtitle Z § 704 of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations [“Zoning Regulations of 2016”], to which all subsequent citations refer unless otherwise specified) to the design review approval granted 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, S.W. (the “Property”); and
- A temporary lodging use by special exception pursuant to Subtitle C §§ 1102.4 and 1102.5 and Subtitle X, Chapter 9, as authorized for a design review pursuant to Subtitle X §§ 603 and 604, in addition to the residential and retail uses approved by the Original Order.

The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z. For the reasons stated below, the Commission **APPROVES** the Application.

FINDINGS OF FACT

I. BACKGROUND

PRIOR APPROVALS

1. Pursuant to the Original Order, effective on October 12, 2018, the Commission granted 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”).

¹ The Application was originally scheduled to be heard at the Commission’s December 16, 2019 public hearing. The hearing was subsequently continued to April 6, 2020, to allow the Commission to consider the Office of Planning’s text amendment in Z.C. Case 20-01 that would affect the Application. The public hearing was subsequently postponed and rescheduled for June 22, 2020, as a virtual hearing due to the state of emergency declared for the District in response to the COVID-19 Pandemic on March 11, 2020. (Mayor’s Order 2020-045.)

2. In Z.C. Order No. 17-05A, effective on November 9, 2018, the Commission approved a modification of the Approved Project to modify the plans approved by the Original Order.

NOTICE

3. On May 14, 2020, the Office of Zoning (“OZ”) sent the notice of the June 22, 2020, virtual public hearing to: (Exhibit [“Ex.”] 22.)
 - The affected Advisory Neighborhood Commissions (“ANC”) 6D, the “affected ANC,” pursuant to Subtitle Z § 101.8;
 - The affected ANC Single Member District (“SMD”) 6D05;
 - The Office of the ANCs;
 - The Office of Planning (“OP”);
 - The District Department of Transportation (“DDOT”);
 - The Department of Energy and Environment (“DOEE”);
 - The Department of Consumer and Regulatory Affairs (“DCRA”);
 - The District of Columbia Housing Authority (“DCHA”);
 - The Council of the District of Columbia (“DC Council”); and
 - Property owners within 200 feet of the Property (“200-Footers”).
4. OZ also published notice of the June 22, 2020 virtual public hearing in the *D.C. Register* (67 DCR 5339) as well as through the calendar on OZ’s website. (Ex. 20.)

PARTIES

5. The only party to Z.C Case No. 17-05 other than the Applicant was ANC 6D.
6. The Applicant served the Application on ANC 6D and the 200-Footers on August 19, 2019, as attested by the Certificate of Service filed with the Application. (Ex. 1D.)
7. The Applicant served the Revised Application, as defined below, on ANC 6D on February 19, 2020, as attested by a Certificate of Service. (Ex. 15.)

II. THE APPLICATION

PROJECT DESCRIPTION

8. The Application proposed to add a temporary lodging use in a portion of the Approved Project in order to use approximately 150 of the 480 proposed residential units for a temporary lodging use during the lease-up phase of the Approved Project. The Applicant has partnered with WhyHotel, a hospitality management company specializing in this form of “turn-key, pop-up hotel,” to operate the lodging use during the initial two-year lease-up period.

RELIEF REQUESTED

9. The Applicant initially requested variance relief to permit the temporary lodging use (the “Original Application”), but subsequently withdrew this relief and replaced it with a request for special exception relief under Subtitle C § 1102.5, which permits certain uses, including lodging, as special exception uses within the 100-year floodplain (the “Revised

Application") that the Commission adopted after the Application was filed pursuant to Z.C. Order No. 20-01. (Ex. 1-1E, 9, 15-15B.)

JUSTIFICATION FOR RELIEF

10. The Applicant asserted that it meets the requirements of Subtitle C §§ 1102.4 and 1102.5 to permit lodging uses in the 100-year floodplain as a special exception from the waterfront use standards by providing the following:
 - The required site plan; (Ex. 15A.)
 - The flood resistant design measures for the Approved Project, which include the provision of Aqua Fence perimeter barrier system; and (Ex. 15A.)
 - The evacuation plan, consisting of the Flood Emergency Action Plan ("EAP") and the Flood Emergency Operations and Maintenance Plan ("O&M Plan"), together with a graphical representation. (Ex. 15A, 15B.) The EAP and O&M Plan, which DOEE had approved, described the protocol for monitoring flood warnings and implementing procedures for notifying staff, residents, and temporary guests within the various uses of the building of an impending flood, for initiating deployment of Aqua Fence barrier system, and for initiating evacuation of the Approved Project. The EAP and O&M Plan expressly incorporated the Application's proposed lodging use, which would be located above the 500-year floodplain on the fourth and fifth floors.
11. The Application asserted that it met the general special exception requirements of Subtitle X, Chapter 9, to be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and to not adversely affect the use of neighboring properties because
 - The Application's purpose is to ensure the overall success of the Approved Project and would not redefine its intent; and
 - The Application's proposed lodging use:
 - Is consistent with the general purpose and intent of both the Commission's approval in the Original Order and the CG-5 zone;
 - Would not result in adverse impacts to the surrounding neighborhood but instead would help develop interest in the area by avoiding significant vacancies in the Approved Project, bringing people to the area and so supporting the long-term success of both the Approved Project and of the surrounding community; and
 - Would not utilize any of the Inclusionary Zoning ("IZ") units proposed by the Approved Project, nor would it affect the timeline of their availability.
12. The Applicant testified at the June 22, 2020, public hearing that although the Application as a design review did not require any public benefits, that the Applicant had agreed to extend the hotel employee discount to ANC 6D residents and to participate in a career day sponsored by ANC 6D to hire from the neighborhood. (Transcript of the June 22, 2020 Public Hearing at 15.)

III. RESPONSES TO THE APPLICATION

OZ

13. Pursuant to Subtitle C § 1102.5(b), OZ referred the Revised Application to the relevant District agencies – DOEE, the Metropolitan Police Department (“MPD”), the D.C. Fire and Emergency Medical Service Department (“FEMS”), and the D.C. Homeland Security and Emergency Management Agency (“HSEMA”) – on February 26, 2020. (Ex. 16.)

OP

14. OP submitted two reports to the record analyzing the Application:

- A December 6, 2019, report that recommended approval of the Original Application for variance relief; and (Ex. 10.)
- A March 27, 2020, report (the “Supplemental OP Report”) that recommended approval of the Revised Application for special exception relief. (Ex. 19.)

15. The Supplemental OP Report recommended approval of the Revised Application, subject to the Applicant’s proposed two-year term based on the following conclusions:

- The Revised Application included all of the information required by Subtitle C § 1102.5;
- The temporary use of approximately 30% of the residential units would “not result in substantial detriment to the public good, but would rather help to activate the area and help to promote viable retail as the residential building leases up”; and
- The Revised Application would be consistent with the Approved Project and the goals of the CG-5 zone and would not negatively impact the Zoning Regulations.

16. The Supplemental OP Report included the following responses from the District Department of Housing and Community Development (“DHCD”) and DDOT:

- DHCD submitted the following comments:
 - *DHCD understands the proposed temporary lodging use will have no impact on the already identified IZ units (stemming from new GFA and penthouse habitable space), in particular all the required IZ units will be available in the initial lease up phase and will not be delayed by this temporary use;*
 - *DHCD recommends full disclosure to the IZ and market rate tenants of the temporary lodging use;*
 - *DHCD does not object to the Modification of Significance, we do however want to recognize that the temporary lodging use is expressly a means to establish a higher rent market where one currently does not exist and would welcome IZ units in addition to those originally required so that a greater measure of affordability is retained as the market develops; and*
- DDOT stated that it had no issues with the Application.

ANC 6D

17. ANC 6D submitted two reports responding to the Application, both presenting the decisions from duly noticed public meetings at which quorums were present:

- A written report dated December 10, 2019, stating that the ANC voted to oppose the Original Application at its December 9, 2019 meeting (the “First ANC Report”); and (Ex. 11.)
- A written report dated July 14, 2020, stating that the ANC voted to oppose the Revised Application at its July 13, 2020 meeting (the “Second ANC Report,” and collectively with the First ANC Report, the “ANC Reports”). (Ex. 30.)

18. The ANC Reports asserted that the Applicant had not sufficiently demonstrated that the proposed modification was “in concert” with the Commission’s approval in the Original Order for a residential rental apartment building.

19. The Second ANC Report stated its concerns that:

- The Applicant was not proposing any benefits or changes to the Approved Project that “could balance this significant change to a project that has already been reviewed and approved by the ANC and the Zoning Commission;” and
- The lodging use would reduce the availability of apartment units and thereby inflate rental prices for the residential units.

20. ANC 6D Chair, Gail Fast, whom the ANC Reports designated to represent the ANC’s position, submitted written testimony to the record that reiterated the ANC Reports and asserted that the Applicant should proffer additional community benefits, particularly addressing the economic and housing issues, in order to mitigate the Application’s proposed modification. (Ex. 18, 28.)

DOEE

21. DOEE submitted a report in response to the Revised Application that: (Ex. 26.)

- Noted that the building would need to continue to comply with the previously approved floodplain management requirements; and
- Stated that DOEE approved the proposed lodging use provided it be located at or above the design flood elevation (14 feet NAVD88) in accordance with Title 20 DCMR § 3104.2(2).

DC FIRE AND EMS (“FEMS”)

22. FEMS submitted a letter in response to OZ’s referral stating that it had reviewed the Revised Application and had no objection to the proposed lodging use. (Ex. 17.)

OTHER AGENCIES

23. MPD and HSEMA did not respond to OZ’s referral of the Application.

CONCLUSIONS OF LAW

1. The Commission is authorized to hold hearings on modifications of significance, provided that, pursuant to Subtitle Z § 704.1, the hearing “shall be limited to the impact of the modification on the subject of the original application, and shall not permit the Commission to revisit its original decision.”

2. Subtitle Z § 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.”
3. Subtitle Z § 703.6 includes “additional relief or flexibility from the zoning regulations not previously approved” as an example of a modifications of significance.
4. The Commission concludes that the Application meets the definition of a modification of significance as a request to add additional relief from the zoning regulations in the form of the special exception from the floodplain uses.
5. The Commission concludes that the Application is consistent with the Approved Project, as authorized by the Original Order, as modified by Z.C. Order No. 17-05A, because the lodging use will be temporary, will only utilize a portion of the residential units, and will not utilize any of the approved IZ units.
6. Subtitle Z § 603.3 authorizes the Commission to consider an application for a special exception as part of a Design Review approval provided the Commission evaluates the application against the applicable special exception criteria, in this case the specific criteria of Subtitle C § 1102.4 and 1102.5 and the general criteria of Subtitle X, Chapter 9.
7. The Commission concludes that the Application has demonstrated that it meets the special exception requirements of Subtitle C § 1102.5 to permit a lodging use in the floodplain, as detailed below.

Subtitle C § 1102.5(a)(1) - *A site plan showing the one hundred (100)-year floodplain boundaries and base flood elevations for the property that is certified by a registered professional engineer, architect, landscape architect, or other qualified person.*

8. The Applicant submitted this site plan. (Ex. 15A.)

Subtitle C § 1102.5(a)(2) - *A description of how the project has been designed to meet applicable flood resistant design and construction standards that is certified by a registered professional engineer, architect, landscape architect, or other qualified person.*

Subtitle C § 1102.5(a)(3) - *An evacuation plan that describes the manner in which the property would be safely evacuated before or during the course of a one-hundred (100)-year flood event.*

Subtitle C § 1102.5(a)(4) - *A description of how the proposed use would not result in any adverse impacts to the health or safety for the project’s occupants or users due to the proposed use’s location in the floodplain.*

9. The Commission concludes that the Application meets these criteria and will “not result in any adverse impacts to the health or safety for the project’s occupants or users” because:
 - The Application provided sufficient documentation, including the EAP and O&M Plan approved by DOEE, of the floodproofing designs for the Approved Project and of the

procedures and policies in place to alert building residents and guests of flood hazards and to effectuate an efficient and safe evacuation of the building in the event of a flood;

- The Application will only provide the lodging use at or above the design flood elevation required by DOEE (14 feet NAVD88); and
- The Approved Project, as revised by this Order, would continue to be subject to the DOEE-approved floodplain management plans.

10. The Commission concludes that the Application meets the general special exception requirements of Subtitle X § 901.2 because:

- Lodging uses are permitted as a matter of right in the CG-5 zone and only require a special exception if located in the 100-year floodplain;
- The Application is requesting only a temporary modification to help develop the market in the surrounding neighborhood for the Approved Project's residential and retail uses, and thereby ensure the long-term success of the Approved Project; and
- The Application has provided sufficient evidence that the lodging use will not result in adverse impacts to the surrounding community.

“GREAT WEIGHT” TO THE RECOMMENDATIONS OF OP

11. The Commission must give “great weight” to the recommendations of OP 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. (*Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).)

12. The Commission finds persuasive OP's recommendation that the Commission approve the Application with a two-year time limitation with no permitted extensions and concurs in that judgment.

13. The Commission acknowledges DHCD's desire that the Application offer additional IZ units, but notes that as a design review project, the Applicant is not required to provide public benefits. As such, the Commission is not able to condition its approval of the Revised Application on the provision of additional IZ units. The Commission notes that DHCD had no objection to the Application and that the lodging use will not impact the IZ units included in the Approved Project. The Commission concurs with OP's conclusion that the temporary lodging use will not result in any significant adverse impacts to the public good.

“GREAT WEIGHT” TO THE WRITTEN REPORT OF THE ANC

14. The Commission must give “great weight” to the issues and concerns raised in a written report of the affected ANC that was approved by the full ANC at a properly noticed meeting that was open to the public 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) (2012 Repl.); *see* Subtitle Z § 406.2.) To satisfy the great weight requirement, the Commission 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) (citation omitted).)

15. The Commission acknowledges the ANC’s concern of the potential economic impacts of the proposed lodging use, but believes that the two-year term, with no exceptions, will address this concern. The Commission does not find persuasive the ANC’s requested public benefits because these do not relate directly to the special exception relief requested and are also beyond the scope of the design review process, which does not include public benefits. The Commission acknowledges the ANC’s concern that the Approved Project only required eight IZ units for 485 market-rate units but notes that this complied with the IZ provisions of the Zoning Regulations because the Approved Project was a conversion of office space to residential uses that had limited IZ requirements. The Commission did note that it hoped that OP would consider increasing the IZ requirements for office-to-residential conversions as part of OP’s pending IZ amendment. The Commission notes that the Applicant is able to enter into a private agreement with the community and the ANC regarding the provision of the contemplated community benefits, including the two referenced by the Applicant’s testimony, but that these conditions did not serve to mitigate any potential impacts of the special exception relief and were also not required by the design review regulations. For these reasons, the Commission did not find the ANC’s recommendation of denial persuasive.

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 for:

- A Modification of Significance pursuant to Subtitle Z § 704 of Z.C. Order No. 17-05, as modified by Z.C. Order No. 17-05A; and
- A special exception pursuant to Subtitle C §§ 1102.4 and 1102.5 and Subtitle X, Chapter 9, as authorized for a design review pursuant to Subtitle X §§ 603 and 604, subject to the addition of new Condition No. 13, to read as follows (deletions shown in **bold** and ~~strikethrough~~ text; additions in **bold** and underlined text). All other conditions of Z.C. Order No. 17-05, as modified by Z.C. Order No. 17-05A, remain unchanged and in effect.

13. **The Applicant shall be permitted to use up to 150 of the proposed residential units, not including the units designated for Inclusionary Zoning, at or above the DOEE-approved design flood elevation (14 NAVD88), for a temporary lodging use for a period of two years from the effective date of Z.C. Order No. 17-05B. The Applicant shall not be permitted to extend the duration of the temporary lodging use.**

VOTE (July 27, 2020): 5-0-0 (Peter A. Shapiro, Michael G. Turnbull, Robert E. Miller, Anthony J. Hood, and Peter G. May 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 *D.C. Register*; that is, on August 28, 2020.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



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.