

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



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 15-18A
Z.C. Case No. 15-18A
Initio, LP
(PUD Minor Modification @ Square 1194, Lot 811)
September 11, 2017**

Pursuant to notice, the Zoning Commission for the District of Columbia (“Commission”) held a public meeting on September 11, 2017 to consider an application by Initio, LP (“Applicant”) for a minor modification of consolidated planned unit development (“PUD”) by approved by Z.C. Order No. 15-18 for the parcel located at 2715 Pennsylvania Avenue, N.W., and more particularly identified as Square 1194, Lot 811 (“Property”). The minor modification request was made pursuant to Subtitle Z, Chapter 7, Title 11 of the District of Columbia Municipal Regulations (“DCMR”). For the reasons stated below, the Commission hereby approves the application.

FINDINGS OF FACT

A. The Applications, Parties, Hearing, and Post-Hearing Filings

1. Pursuant to Z.C. Order No. 15-18, dated January 30, 2017, and effective March 10, 2017 (“Order”), the Commission approved an application for consolidated review of a PUD and a related Zoning Map amendment from the C-2-A Zone District/unzoned to the W-2 Zone District for the Property in order to permit the redevelopment of the Property with a mixed-use building that has a restaurant on the ground floor and a four-story apartment house with seven residential units above. The proposed building will have a height of 60 feet and density of a 3.5 floor area ratio (“FAR”).
2. As a result of the PUD-related map amendment, the Property was rezoned to W-2. Pursuant to § 2401.1(c) of the 1958 Zoning Regulations, a PUD in the W-2 District must occupy a minimum land area of 15,000 square feet, except § 2401.2 authorizes the Commission to waive not more than 50% of the minimum area requirement, provided:
 - (a) The Commission shall find after public hearing that the development is of exceptional merit and in the best interest of the city or country; and
 - (b) The Commission shall find one of the following:

- (1) If the development is to be located outside the Central Employment Area, at least 80% of the gross floor area of the development shall be used exclusively for dwelling units and uses accessory thereto; or
 - (2) If the development is to be located in a portion of the Central Employment area which is in an HR Overlay District, the development shall contain a minimum 2.0 FAR devoted to hotel or apartment house use.
3. A full 50% waiver of the requirement under § 2401.2 would result in a minimum required land area of 7,500 square feet; and with only 7,413 square feet of land area, the Property would not meet that requirement. Therefore, the application also included a request for a waiver from the limits of § 2401.2.
4. In support of its waiver request, the Applicant noted that the Commission adopted a replacement version of Title 11 DCMR (“2016 Regulations”) that would become effective on September 6, 2016. The 2016 Regulations would continue to require the same minimum land area for this PUD, but at the time of the application, the yet-to-be effective Subtitle X § 301.2 permitted the Commission to waive an unlimited percentage of this requirement. Although the provision did not apply to this application, the Applicant argued that the rationale that prompted the Commission’s decision to adopt it applied equally to the instant case. At its public meeting on April 11, 2016, the Commission decided to set down this application for a hearing without deciding whether the 50% limitation should be waived, but instead determined that the Applicant must present its case for the waiver at the public hearing, while also demonstrating that the prerequisites of Subtitle X § 301.2 have been met.
5. The public hearing on the application was held on July 21, 2016. The parties to the case were the Applicant and ANC 2E.
6. Larry Hargrove of the Committee of 100 on the Federal City (“Committee of 100”) testified at the public hearing, and the Committee of 100 also submitted a letter into the record. (Ex. 42.) The Committee’s comments related to the adopted, but not yet effective Subtitle X § 301.2, which would have permitted the Commission to fully waive the minimum lot area requirements for PUDs. Mr. Hargrove asserted that the rule adopted was different from the text proposed in the Notice of Proposed Rulemaking and therefore should not be considered of relevance. The Committee of 100 also asserted that the Commission could not waive its own rule limiting the percentage of land area that could be waived to 50% of the required minimum land area.
7. After the hearing on July 21, 2016, but before the effective date of the 2016 Zoning Regulations, the Commission issued Z.C. Order No. 08-06E, which among other things, amended Subtitle X § 301.2 to reinstate the 50% land waiver limit. The Commission concluded that it would be better to hold a specific public meeting on

whether to allow unlimited land area waivers, and therefore agreed to set down for hearing Z.C. Case 08-06F, which proposed a full land area waiver.

8. On September 6, 2016, the 2016 Zoning Regulations became effective, together with changes to the existing zone names. Among those changes was the re-designation of the W-2 zone as MU-13. However, because the application was not subject to ZR16, that change did not affect the W-2 map amendment sought for this PUD.
9. The application was first scheduled for proposed action on September 12, 2016, but was removed from the agenda. On September 26, 2016, and again on October 17, 2016, the Commission, recognizing the potential significance of Z.C. Case No. 08-06F, deferred taking proposed action until it decided that case.
10. At its public meeting on December 19, 2016, the Commission took final action to approve Z.C. Case No. 08-06F, including amendments to Subtitle X § 301. The amendments, as adopted, differed from the amendments originally advertised. The Commission amended Subtitle X § 301.2 to retain the 50% limitation for some zone districts, while for others, including the MU-13 zone, it added new subsection, Subtitle X § 301.3 to allow for more than a 50% waiver, but not to less than 5,000 square feet. In both instances, the Commission would have to find after a public hearing that: (i) the development is of exceptional merit and is in the best interests of the District of Columbia or the country; and (ii) if the development is to be located outside the Central Employment Area, at least 80% of the gross floor area of the development shall be used exclusively for dwelling units and uses accessory thereto.
11. Had the PUD application been filed after September 6, 2016, the Property would have been rezoned to MU-13, and it would have been eligible for a minimum land waiver to 7,413 square feet pursuant to Subtitle X §301.3.
12. The Commission concluded that although new Subtitle X § 301.3 did not "technically" apply to the PUD because it was filed under the previous regulations, the rationale that prompted the Commission to adopt it are equally relevant to the Commission's determination of this request. Since the Commission determined that an MU-13 property of less than 15,000 square feet is eligible to request a land waiver to not less than 5,000 square feet, the Commission determined that the PUD should be similarly eligible. For that reason, and the other reasons set forth in Z.C. Order No. 15-18, the Commission concluded the application met the requirements for a waiver under both § 2402.2 and the new Subtitle X § 301.3, and the Commission waived the 50% limitation of the former and granted a land area waiver to 7,413 square feet.

B. Appeal of ZC Order No. 15-18

13. The Committee of 100 filed a Petition for Review of Z.C. Order No. 15-18 with the D.C. Court of Appeals on April 3, 2017. Since that time, the Applicant has been in contact with representatives of the Committee of 100, and has confirmed that the bases of the appeal are: (i) the Commission's purported retroactive application of its rules to grant the PUD an exception to the minimum lot area requirement of 7,500 square feet based upon application of ZR16 regulations, even though the application was evaluated under the 1958 Zoning Regulations; and (ii) the Commission's purported disregard of the plain language of § 2401.2 limiting waivers to 50% of the minimum area requirement.¹
14. During the course of the discussions, it became clear to the parties that, if the Commission were to modify the approval such that the minimum area requirements were evaluated under ZR16 and vacate those portions of the Order dealing with the waiver under the 1958 Zoning Regulations, the bases for the appeal would be resolved, and that the appeal could be dismissed.² The parties specifically note that as a result of Z.C. Order No. 08-06F, the minimum lot area for a PUD in the MU-13 zone can be reduced to 5,000 square feet. (*See* 11 DCMR Subtitle X §§ 301.1 and 301.3.)

C. Modification Request

15. On August 29, 2017, the Applicant filed an application with the Commission seeking a technical correction or minor modification to Z.C. Order No. 15-18 to apply the minimum land area requirements in Subtitle X § 301.1 to the PUD; to waive the minimum land area requirement pursuant to Subtitle X § 301.3; and vacate those portions of the Order dealing with the waiver under the 1958 Zoning Regulations.
16. Under ZR16, the W-2 Zone District was converted to the MU-13 zone. For purposes of the PUD minimum land area requirements, the MU-13 zone is in Zone Group 6, which has a minimum land area requirement of 15,000 square feet. (Subtitle X § 301.1.)

¹ The Commission did neither of these things, and continues to believe in the validity of the waiver granted in the Order.

² The Applicant had the option to file the PUD under the 1958 Zoning Regulations or ZR16, but not pick and choose rules/standards from both sets of regulations to apply to the project. Because of the issue raised on appeal by the Committee of 100, and because the Applicant demonstrated compliance for the waiver of the minimum land area requirements under both sets of regulations at the time of the original PUD approval, the Commission finds it appropriate to apply the requirements of Subtitle X §§ 301.1 and 301.13 of ZR16 to the PUD in accordance with its inherent authority to waive its administrative rules.

17. Pursuant to Subtitle X § 301.3, the Commission may waive the minimum area requirement to no less than 5,000 square feet for applications in Zone Group 6, provided the Commission shall find after the public hearing that the development is of exceptional merit and is in the best interest of the District of Columbia or the country and one (1) of the following:
 - (a) The development is identified in an approved Small Area Plan and will be generally not inconsistent with the Small Area Plan;
 - (b) The development will be constructed or operated by the District of Columbia or federal government and serves a compelling government interest; or
 - (c) If the development is to be located outside the Central Employment Area, at least 80% of the gross floor area of the development shall be used exclusively for dwelling units and uses accessory thereto.
18. As previously stated in Finding of Fact No. 38 of the Order, the Commission finds that the PUD meets the requirements for a waiver under Subtitle X § 301.3. The standard of review and the Applicant's rationale for the required waiver is the same as when the PUD was originally approved. Further, the Applicant does not propose any changes to the approved PUD plans with this modification request.
19. The Commission, at its public meeting on December 12, 1017, determined that this application was properly a minor modification within the meaning of 11-Z DCMR § 703.2, and that no public hearing was necessary pursuant to 11-Z DCMR § 703.1.
20. In satisfaction of 11-Z DCMR § 703.13, the Applicant provided a Certificate of Service, which noted that ANC 2E was served with the application.
21. OP submitted a report on September 5, 2017. (Ex. 4.) The OP report stated that it "... does not oppose the proposed modification." OP also stated that it "...does not consider this to be setting a precedent for any other case, and [] does not oppose the minor modification for this specific case only."

CONCLUSIONS OF LAW

1. Pursuant to 11-Z DCMR § 703.1, the Commission, in the interest of efficiency, is authorized to make minor modifications to final orders and plans without a public hearing. A minor modification "is one that does not change the material facts upon which the Commission based is original approval of the application or petition." (11-Z DCMR § 703.2.)
2. The Commission concludes that the modification requested and as described in the above Findings of Fact, is a minor modification and therefore can be granted without a public hearing.

3. Pursuant to this modification, the relief granted to the Applicant rests within the four corners of Subtitle X § 301.3 and does not resort to granting relief beyond the plain meaning of any regulation.
4. The 2016 Regulations govern modifications to PUDs initially determined under the 1958 Regulations.
5. As a result of this minor modification, the Property is eligible for a land waiver to not less than 5,000 square feet, pursuant to Subtitle X § 301.3. The Commission finds that the development is of exceptional merit and is in the best interests of the District of Columbia or the country and, being, located outside the Central Employment Area, at least 80% of the gross floor area of the development shall be used exclusively for dwelling units and uses accessory thereto.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of a minor modification to the PUD approved in Z.C. Case No. 15-18 as follows:

1. Findings of Fact Nos. 37 and 38 in Z.C. Order No. 15-18 though not erroneous are hereby vacated.
2. Conclusion of Law No. 4 in Z.C. Order No. 15-18 though not erroneous is hereby vacated.
3. The PUD is subject to the minimum area requirements in Subtitle X § 301.1, which requires a minimum land area for the PUD of 15,000 square feet.
4. The Property is granted a waiver to have a minimum lot area of 7,413 square feet, pursuant to Subtitle X § 301.3, because the Commission finds that the development is of exceptional merit and is in the best interest of the District of Columbia, and 80% of the gross floor area of the development is used exclusively for dwelling units and uses accessory thereto.

The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. 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 identify or expression, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, genetic information, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.


On September 11, 2017, upon the motion of Vice Chairman Miller, as seconded by Commissioner Shapiro, the Zoning Commission took **FINAL ACTION** to **APPROVE** the application by a vote

of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on February 2, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING