

Before the Zoning Commission for the District of Columbia
Form 153 – Request to Accept an Untimely Filing or to Reopen the Record

CASE No.: ZC 15-18A – Initio LP

We, The Committee of 100 on the Federal City, hereby request the following relief:

Accept an untimely filing of a nonparty's request for reconsideration.

x Reopen the record to accept the request for reconsideration.


POINTS AND AUTHORITIES

Reopen the Record: Please state each and every reason you believe the ZC or BZA should grant your request to reopen the record, including relevant references to the Zoning Regulations or Map. The documents that you are requesting the record to be reopened for must be submitted separately from this form (see instructions). No substantive information is to be included on this form.

Please see Points and Authorities on Attachment A.

I/we certify that the above information is true and correct to the best of my/or knowledge, information and belief. Any person(s) using a fictitious name or address and/or knowingly making any false statement on this application/petition is in violation of D.C. Law and subject to a fine of not more than \$1,000 or 180 days imprisonment or both. (D.C. Official Code § 22-2405).

Date: May 11, 2017

Signature: 
for the Committee of 100

Name: Committee of 100 on the Federal City

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**Attachment A -- Points and Authorities in Support of Committee of 100's
Request for Reconsideration as a Nonparty in ZC 15-18A, Initio LP**

Request by a nonparty

The relief sought by the Committee of 100 on the Federal City ("C100") is a request by a nonparty for reconsideration of a modified final decision by the Zoning Commission, *Initio LP*, ZC 15-18A. C100 appealed from the Zoning Commission's earlier decision in this case, *Initio, LP* ZC 15-18. The appeal is *Committee of 100 v. D.C. Zoning Commission and Initio, LP*, DCCA 17 AA 0034. The appeal has been stayed by agreement of the parties.

On August 29, 2017, Initio submitted a request for minor modifications to the final order in ZC 15-18, stating its belief that if those modifications were made, C100 would withdraw its appeal. Initio submitted a draft order containing with its request. ZC 15-18A, Record Exh. 1. That draft order, if issued, would have led to the withdrawal of our appeal.

On February 2, 2012, the Commission issued its final order in ZC 15-18A, which differs in two critical respects from the proposed draft order. Specifically, the Commission vacated Findings of Fact Nos. 37 and 38 and held that those findings are "not erroneous." The Commission also vacated Conclusion of law No. 4 and held that it is "not erroneous." The "not erroneous" language is not contained in the draft order contained in the record. C100 based its appeal in substantial part on the contention that those findings of fact and that conclusion of law are indeed erroneous. Vacating those provisions, while asserting their validity, achieves nothing.

Argument. An administrative agency is bound by its rules and cannot exceed its authority. In ruling on Initio's application for a PUD, the Commission was bound to follow the applicable zoning rules, in this case the provision of the 1958 Regulations requiring a lot size no smaller than 7500 square feet. The rule is unambiguous. It establishes a generally applicable 15,000-square foot minimum, up to 50 percent of which may be waived under certain conditions.

The Commission may exercise its discretion as to the appropriate lot size for a given project between 15,000 and 7500 square feet, but its discretion stops there.

The authority cited by the Commission for granting relief is inapposite. The Commission rested its grant of relief on *Blagden Alley Ass'n v. D.C. Zoning Comm'n*, 590 A.2d 139, 146 (D.C. 1991). That case acknowledges an agency's authority to engage in rulemaking through adjudication to resolve issues that are not addressed directly in an agency's rules, or to resolve ambiguities so long as the agency clearly explains its action and demonstrates how its action is consistent with its regulations. It neither confers nor acknowledges an agency's authority simply to ignore the plain meaning of its validly promulgated legislative rules and thus affords no support for the Commission's waiver.

After ignoring § 2401, the Commission applied § X-301 of the 2016 Regulations despite unambiguous language stating that the new rules did not apply to pending cases initiated under the 1958 rules.

The Commission's order in 15-18 had implications reaching far beyond this particular application or PUD cases in general. During its deliberations, the Commission repeatedly claimed broad authority to waive any of its rules. By asserting the continuing vitality of Blagden Alley as broad waiver authority in its modified order in 15-18A, the Commission continues its error. The Commission's expansive view of its waiver authority means that individuals coming before the Commission, as C100 members often do, cannot appear with confidence as to what rules will apply. The modified order also will embolden others to seek waivers from any rule that they find inconvenient. The zoning regulations will cease to perform their principal function of providing certainty and predictability as to the use of real property.

For the foregoing reasons, C100 asks the Commission to reconsider its Order in 15-18A to delete the "not erroneous" language as discussed above.

Respectfully submitted,



Laura M. Richards, *for the*
Committee of 100

Certificate of Service

I hereby certify that a copy of the foregoing Request to Accept an Untimely Filing or Reopen the Record was served on the following persons by email on the 12th day of February 2018.

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