

# Holland & Knight

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November 13, 2017

## **VIA EMAIL**

Zoning Commission for the  
District of Columbia  
441 4<sup>th</sup> Street, N.W., Suite 210  
Washington, DC 20001

Re: **Applicant's Opposition to and Motion to Strike Union Market Neighbor's Motion to Reconsider Order and Reopen the Record in Z.C. Case No. 15-27**

Dear Members of the Commission:

On behalf of KF Morse, LLC (the "Applicant"), we hereby oppose (i) the "Motion to Reconsider Order & reopen record to include mitigation conditions. Request to collaborate on amending order per dcmr" filed by Ilaf Ayyash on behalf of Union Market Neighbors ("UMN") on October 13, 2017 (Exhibit 80) (the "Original Motion"), and (ii) the "Reconsideration and Amendment of the final Order to Include Mitigation Conditions. A Request to Reopen the Record and Issue a new Order ZC 15-27" filed by UMN on November 7, 2017 with the required Certificate of Service (Exhibit 80A) (the "Amended Motion") (the Original Motion and the Amended Motion hereinafter referred to together as the "Motion"). UMN was not a party to Z.C. Case No. 15-27 and did not participate in the Zoning Commission proceedings.

The Motion requests that the Zoning Commission reopen the record in Z.C. Case No. 15-27, reconsider the issuance of Z.C. Order No. 15-27, which became final and effective on July 21, 2017, and issue a new order. The Applicant opposes UMN's request and moves to strike the materials attached to the Motion from the record.<sup>1</sup>

### **A. Motion to Reopen the Record**

Form 153 is entitled "Request to accept an Untimely Filing or to Reopen the Record." However, the narrative included in the Motion's justification does not address any of the standards for reopening a Zoning Commission case record, as set forth in Subtitle Z § 602.6 of the Zoning Regulations, and therefore the Motion should be denied. Specifically, Subtitle Z § 602.6 states the following:

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<sup>1</sup> The Applicant submitted a response in opposition to the Original Motion on October 16, 2017 (Ex. 81). This letter replaces and supersedes the Applicant's original response.

Any supplemental material received by the Commission after the close of the record that bears upon the substance of the application or petition shall be returned by the Director and not accepted into the files of the Commission. However, if the materials are accompanied by a separate request to re-open the record, the request shall be accepted and presented to the Commission for consideration. *The request must demonstrate good cause and the lack of prejudice to any party.* Such requests may be granted by the presiding officer and, if granted, the supplemental materials shall be entered into the record

See Subtitle Z § 602.6 (emphasis added). In this case, UMN did not submit any evidence demonstrating “good cause” to justify reopening the record. Instead, UMN provided new information to supplement the record after the record was closed. Reopening the record would prejudice the Applicant by allowing a non-party to file additional materials in the record after the application was thoroughly reviewed and supported by the D.C. Office of Planning (“OP”), the District Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 5D, and ultimately approved by the Zoning Commission.

In addition, UMN appealed Z.C. Order No. 15-27 to the D.C. Court of Appeals on August 21, 2017, after the Order became final and effective on July 21, 2017. Thus, reopening the record on the basis of the Motion, with opposition from the Applicant, almost four months after the Order became final, and during the pendency of the appeal, would prejudice the Applicant.

## **B. Motion for Reconsideration**

The Motion should also be denied because it does not meet the requirements of Subtitle Z § 700 of the Zoning Regulations. Specifically, Subtitle Z § 700.3 states the following:

A motion for reconsideration, rehearing, or re-argument of a final order in a contested case under Subtitle Z § 201.2 *may be filed by a party* within ten (10) days of the order having become final. The motion shall be served upon all other parties.

See Subtitle Z § 700.3 (emphasis added). In this case, UMN was not a party in Z.C. Case No. 15-27 and did not participate in the Zoning Commission proceedings at all. The Zoning Commission has repeatedly stated the importance of Subtitle Z § 700.3 (and its predecessor 11 DCMR § 3029.5 of the 1958 Zoning Regulations). See, e.g. Z.C. Order No. 11-24, p. 3, denying a motion for reconsideration filed by a non-party and reiterating that “only the existence of ‘extraordinary circumstances’ would justify the waiver of the requirement that only a party may file a motion for reconsideration, such as when no notice of a hearing is given;” see also Z.C. Order No. 16-07(1), p. 2, stating that the motion for reconsideration filed by the non-party made “no effort to explain why it as a non-party should be able to file a motion for reconsideration, but instead expresses concerns over impacts of the application that it could have presented during the hearing had it chose to participate.” The same conditions exist in this case.

In addition, on June 17, 2016, UMN submitted a similar motion for reconsideration of Z.C. Order No. 15-22, which approved a PUD and Zoning Map amendment for property located at 301 Florida Avenue, NE, which is directly across Florida Avenue from the subject property. The

Zoning Commission denied UMN's motion in that case because it was a non-party and did not participate in the underlying case. Thus, UMN was on full notice that it needed to participate in the Zoning Commission public process, even as a non-party, in order to have its concerns addressed by the Zoning Commission.

Subtitle Z § 700.3 provides that a “motion for reconsideration, rehearing, or re-argument of a final order in a contested case under Subtitle Z § 201.2 may be filed by a party *within ten (10) days of the order having become final.*” Subtitle Z § 700.3 (emphasis added). In this case, Z.C. Order No. 15-27 was served on July 27, 2017, and became final and effective upon publication in the *D.C. Register* on July 21, 2017. Thus, pursuant to Subtitle Z § 700.3, the Motion must have been filed by August 7, 2017 at the latest. However, the Original Motion was filed on October 13, 2017, which is 68 days past the filing deadline in Subtitle Z § 700.3, and the Amended Motion was filed on November 7, 2017, which is 93 days past the filing deadline. Therefore, the Zoning Commission should also deny the Motion for being filed untimely.

Assuming UMN is requesting a waiver from Subtitle Z § 700.3 to permit the filing of the Motion, despite the fact that (i) it was not a party, and (ii) the Motion was filed significantly past the time the Zoning Regulations require, UMN has not presented any “good cause” for waiving these requirements. Pursuant to its authority in Subtitle Z § 101.9, the Zoning Commission may, for good cause shown, waive any of the provisions of Subtitle Z if, in the judgement of the Zoning Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. However, UMN has not presented any basis or information to justify waiving Subtitle Z § 700.3. Moreover, granting a waiver from Subtitle Z § 700.3 to accept the Motion would prejudice the Applicant by reopening the record after the application was reviewed and supported by OP, DDOT, ANC 5D, and the Zoning Commission; after the record has been closed for months; after the Order has been issued in this case; and after UMN filed an appeal with the D.C. Court of Appeals challenging the issuance of Z.C. Order 15-27.

### **C. Applicant's Motion to Strike the Materials Included with UMN's Motion**

The Applicant moves to strike the materials included as attachments to the Motion from the case record. Pursuant to Subtitle Z § 602.6, “supplemental information received by the Commission after the close of the record that bears upon the substance of the application or petition shall be returned by the Director and not accepted into the files of the Commission.” Moreover, Subtitle Z § 700.7 provides that “[n]o request for rehearing shall be considered by the Commission unless new evidence is submitted that could not reasonably have been presented at the original hearing.”

In this case, the Zoning Commission held a public hearing on the application on January 12, 2017, closed the record following the hearing on January 12, 2017, except to receive additional submissions from the Applicant and responses thereto by OP, DDOT, and the parties to the case, and deliberated on the application in public meetings on February 27, 2017 and March 27, 2017. UMN did not attend or participate in the public hearing, nor did UMN submit anything in the record of this case at any point between the filing of the application on October 30, 2015 and the issuance of the final Order on July 21, 2017. UMN has not submitted any new evidence that could not have been presented at the public hearing if UMN had decided to participate in the public

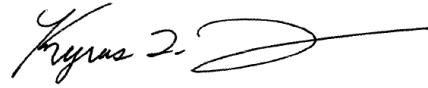
hearing process. The materials attached to the Amended Motion could have been submitted at any point during the Zoning Commission's review of the application; however, UMN decided not to participate at all in the case. Therefore, the materials submitted with the Motion should be returned and not accepted into the case record.

Furthermore, the actions of UMN are particularly puzzling in this case because UMN filed an appeal of Z.C. Order No. 15-27 to the D.C. Court of Appeals on August 21, 2017, but did not file the Original Motion until October 13, 2017, or the Amended Motion (which now seeks to add information that was not submitted during the Zoning Commission proceeding or even with the Original Motion) until November 7, 2017.

Based on the foregoing, the Motion should be denied because (i) UMN was not a party in the underlying Zoning Commission case; (ii) UMN filed the Motion significantly more than ten days after Z.C. Order No. 15-27 became final; and (iii) UMN did not show any good cause for waiving the requirements of Subtitle Z § 700.3. The Motion should also be stricken from the record because it was filed after the close of the record, bears upon the substance of the application, but could have reasonably been presented at the public hearing.

Thank you for your consideration of the Applicant's request.

Sincerely,



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Kyrus L. Freeman  
Jessica R. Bloomfield

**CERTIFICATE OF SERVICE**

I hereby certify that on November 13, 2017, a copy of the Applicant's Opposition to the Motion to Reopen the Record in Z.C. Case No. 15-27 was served by email to the following:

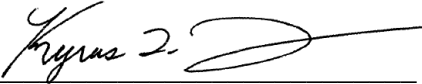
Advisory Neighborhood Commission 5D  
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5D01@anc.dc.gov

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