



MEMORANDUM

TO: Zoning Commission for the District of Columbia

FROM: Jennifer Steingasser, Deputy Director for Development Review & Historical Preservation

DATE: June 14, 2010

SUBJECT: **Zoning Commission Case 10-08 - Public Hearing Report** - Zoning text amendments related to the expiration of special exception and non-conforming uses, and the effective date of special exception uses for which a term has been established.

I. RECOMMENDATION

OP recommends approval of the following text amendments to Title 11 DCRA, ZONING (all proposed new text is shown in **bold font**):

- A. To reinforce the non-conforming use discontinuance provision, Chapter 20 NONCONFORMING USES AND STRUCTURES is amended as follows:
- In § 2005.1 by striking the phrase ‘a period of more than three (3) years’ and inserting the phrase “any period of more than three (3) years” in its place, so that the provision will read:
2005.1 Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for any period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located.
 - By adding a new § 2005.2 to read as follows:
2005.2 This presumption may only be rebutted by objective proof of a continuing use or of affirmative steps taken to resume the use during the period of time identified by the Zoning Administrator when revoking an existing certificate of occupancy or denying an application for a replacement certificate of occupancy.
- B. To establish expiration dates for discontinued and superseded uses permitted by special exception, Chapter 30, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE is amended as follows:
- By adding the phrase “THE VALIDITY” to the title of Section 3130 as that it reads as follows:
“TIME LIMITS ON **THE VALIDITY** OF BOARD ORDERS”; and
 - By adding a new section 3131 to read as follows:
3131 COMMENCEMENT OF SPECIAL EXCEPTION TERMS
3131.1 When the Board limits its approval of a special exception to a term of years, the length of that term begins on the date upon which the order became final.
- C. To provide that all special exception terms begin on the date upon which the order becomes effective, Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE is amended as follows:

- By adding a new section 3132 to read as follows:

3132 EXPIRATION OF SPECIAL EXCEPTION USES.

3132.1 If a special exception use is established, the use will only expire if:

- (a) **An expiration date is specified in the order;**
- (b) **The special exception use is discontinued for any reason for any period of three (3) or more years; except where governmental action impedes access to the premises; or**
- (c) **A certificate of occupancy for a different use is issued.**

3132.2 If a special exception use expires, any subsequent use shall conform to the regulations of the district in which the use is located.

3132.3 Notwithstanding § 3132.1 (b), a special exception use shall not expire if objective proof is provided of a continuing use or affirmative steps taken to resume the use during the period of time identified by the Zoning Administrator when revoking an existing certificate of occupancy or denying an application for a replacement certificate of occupancy.

II. BACKGROUND

At its April 12, 2010 public meeting, the Zoning Commission set down this text amendment request for a public hearing. The amendments are intended to address three separate but related modifications to the zoning regulations. Two were requested by the Zoning Administrator and relate to recent Board of Zoning Adjustment (BZA) decisions regarding the expiration of non-conforming and special exception uses. A third was identified by the Office of Zoning, and relates to the effective date of a special exception term, in cases where one has been established in an order.

III. ANALYSIS

A. Non-conforming Use Discontinuance Provision of § 2005:

The Zoning Administrator (ZA) requested that the Office of Planning (OP) bring forward a text amendment to clarify when a non-conforming use is considered discontinued. §2005.1 currently states that a non-conforming use that has ceased operation for three or more years is no longer “grandfathered” or permitted to be reinstated without BZA approval. In a recent BZA case which involved a use that had been discontinued for more than three years, the BZA upheld that the use had not been completely abandoned because the owner attempted to market the space and paid delinquent water bills after the certificate of occupancy (C of O) had expired for three years. The BZA approved the request to allow the non-conforming use to be reinstated. The recommended text amendment is intended to provide greater certainty and specificity regarding the standard for determining when a use is discontinued.

B. Effective Date of Special Exception Use Term Limits:

The Office of Zoning has requested a text amendment to specify the date upon which a term limit for a special exception use commences. In some cases, the BZA establishes in the order how many years the approved use may continue before it is discontinued or required to return to the BZA for a new approval. This is particularly common with special exception uses such as child or adult care centers, parking lots, and other uses where there are conditions of approval related to minimizing or mitigating potential neighborhood impact, and the BZA wishes to require ongoing adherence to and monitoring of those conditions. The recommended text amendment is intended to provide specificity regarding the exact date that the term commences, and therefore when it expires.

C. Expiration dates for discontinued and superseded uses permitted by special exception:

Many uses in various zones are permitted only by special exception, requiring BZA review of the proposed use against criteria outlined in the zoning regulations, mainly to address potential external impacts. The intent is to try to ensure that these uses are compatible with the current neighborhood characteristics, and would not tend to adversely affect the use of neighboring properties. The ZA requested a text amendment to establish conditions for the expiration of old special exception permissions.

A recent appeal before the BZA highlighted an interpretation that approved special exception uses, other than those with an established term limit, remain permitted in perpetuity, even after that use is discontinued and other conforming uses occupy the site. Specifically, the BZA granted special exception approval for the operation of a gasoline station on a property in the 1960's. The gas station operated for a number of years, then closed and the site was occupied by a variety of conforming uses and sat vacant for some time. The surrounding neighborhood also changed to some extent in the intervening years. The Zoning Administrator denied a permit for a new gas station on the site; the owner appealed this decision to the BZA which decided that the original approval for the gasoline station remained valid. The recommended text amendment is intended to clarify this by specifying that a use permitted by special exception expires if an expiration date is specified in the order; the use is discontinued for any period of three or more years; or if a certificate of occupancy for a different use is issued. The use could be reinstated on the property only with the BZA approval of a new special exception request, judging the new proposal against the guidelines established in the regulations.

IV. COMPREHENSIVE PLAN

The proposed amendments would not be inconsistent with the 2006 Comprehensive Plan. While the proposed changes are largely administrative in nature, they would generally support policy statements of the Land Use and Implementation element (Policies LU-2.2.5: Enforcement of Approval Conditions; LU-2.3.8: Non-Conforming Commercial and Industrial Uses; and Policy IM-1.5.4: Transparency in Decision-Making).

V. COMMUNITY COMMENTS

OP has received no comments from an ANC or a member of the public regarding this case.

VI. AGENCY COMMENTS

OP has received comments from no other District agency.