

CITY OF BALTIMORE

SHEILA DIXON, Mayor



DEPARTMENT OF LAW

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101 City Hall  
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September 30, 2009

The Honorable President and  
Members of the Baltimore  
City Council  
c/o Karen Randle, Executive Secretary  
409 City Hall  
Baltimore, MD 21202

RE: City Council Bill 09-0387 –Zoning-Conditional Uses-  
Suspension, Revocation etc.

Dear President and Members

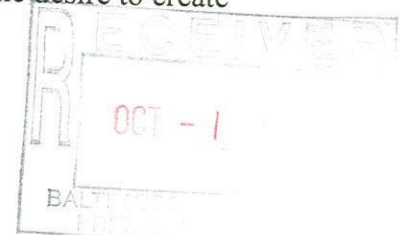
You have requested the advice of the Law Department of City Council Bill 09-0387, entitled “Zoning – Conditional Uses – Suspension, Revocation, etc.”. There are three principal changes proposed to be made in this bill to Title 14 of the Baltimore City Zoning Code (the “Zoning Code”), which regulates conditional uses.

- 1) As a part of the approval of a conditional use, the Board of Municipal and Zoning Appeals (the “Board”) or the City Council (as the case may be) would have authority to place a time limit upon the grant of a conditional use or to require an applicant to apply to the Board for the renewal of a conditional use (the “renewal provisions”);
- 2) Conditional uses would automatically lapse if discontinued for at least two years and would thereafter require a new application for their reestablishment (the “abandonment provisions”); and
- 3) The Board would be given authority to suspend, revoke, or schedule for corrective action a conditional use as a result of an uncorrected violation of any condition, restriction, or limitation that was made part of that use’s original grant (the “revocation provisions”).

A) Introduction:

The City’s zoning authority is derived from Art. 66B of the Annotated Code of Maryland. We believe that authority to enact provisions relating to the renewal and/or revocation of conditional uses exists in three places. First, § 2.10 (a) authorizes the City to provide by ordinance for the enforcement of its zoning regulations. The renewal and revocation provisions in this bill clearly relate to and were prompted by the desire to create

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an effective enforcement tool with regard to violations of the conditions imposed in the grant of a conditional use.

Second, § 2.08(c)(1)(i) gives the Board the power to hear and decide appeals when it is alleged that an administrative official committed error in the enforcement of the City's zoning regulations. If the bill is amended, as we suggest below, to provide that the Zoning Administrator is responsible for initially making a determination with regard to the renewal or revocation of a conditional use with a right of appeal to the Board as set forth under Subtitle 2 of Title 17 of the Zoning Code, authority for such a procedure will clearly fit within this provision.

Third, § 2.08(c)(1)(ii) authorizes the Board to "hear and decide special exceptions." The term "special exception" and "conditional use" have been found to be interchangeable. People's Counsel for Baltimore County v. Loyola College, 406 Md. 54, 72, FN 19 (2008). We believe that the authority to hear and decide conditional uses would embrace the authority to consider the renewal or revocation of such uses.

In its current form, this bill purports to give authority for the initial decision relating to the renewal or revocation of a conditional use to the Board. The Board's authority stems from Article 66B § 2.08 of the Md. Annotated Code. § 2.08 (d) and (h) make clear that the Board's decisions are made in an appellate capacity as a review of the decision of an administrative official. The City's Charter, Article VII, §§ 84-87, also confirms that the Board acts as an appellate body with regard to decisions first made by administrative officers.<sup>1</sup> We believe that if the City Council desires to create a process relating to the renewal or revocation of conditional uses, this process should begin with a decision by the City's Zoning Administrator which may then be reviewed by the Board if an appeal is properly and timely noted under existing §§ 17-201 and 17-202 of the Zoning Code.

Our specific comments with regard to each of the three proposed provisions – renewal, abandonment, and revocation – are set forth below.

B) The Renewal Provisions:

The bill proposes to add a new subsection (c) to § 14-103 of the Zoning Code whereby the Board and the City Council would be authorized, in setting conditions in the grant of a conditional use, to place a time limit on that use or to require an applicant to seek renewal of the use after a certain time period. If renewal is required, an application would

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<sup>1</sup> Although § 2-110 of the Zoning Code gives the Board jurisdiction to hear and decide applications for conditional uses and variances, these matters are actually forwarded to the Board as appeals from the Zoning Administrator's initial denial of an application for a use permit (where such a permit would first require the grant of the conditional use or variance).



have to be submitted to the Board to determine whether the conditions, restrictions, and limitations imposed in the grant of the use were adhered to. If the Board finds that an applicant has substantially or repeatedly violated a condition, restriction, or limitation imposed in the use, it would have to deny renewal.

Although, as noted above, we believe that authority does exist under Art. 66B to create a process whereby an application for the renewal of a conditional use after a set time is required, we have numerous concerns with regard to the way in which this is proposed to be done. First, although it is clear from the bill that an application for renewal must be denied if there is a finding that a substantial or repeated violation of a condition in the grant of the use has occurred, it is unclear what the Board is required to do if such a finding is not made.

Second, the phrase "substantial or repeated violation", as used in proposed §14-103 (c) (3), in and of itself, may not provide sufficient clarity as to when the Board must deny an application for renewal. For instance, the operator of a conditional use for live entertainment might repeatedly violate a curfew restriction with regard to this use by a few minutes. If such a finding were made, the Board would be required to deny renewal despite the fact that the violation committed was minor. It may therefore make sense to change this to "substantial and repeated violation".

Third, we believe that the possibility that the Board or the City Council might place an absolute time limitation on the grant of a conditional use without even the right to seek renewal could, depending on the nature of the use, interfere with significant investment-backed expectations of the property owner in establishing the use in the first place.

Fourth, the mechanics relating to the procedure for renewal as set forth in proposed § 14-103 (c) are left unclear. For instance, will the Board or the Zoning Administrator be responsible for issuing notices prior to the time by which a renewal application must be made? If the owner or operator of a property fails to timely submit such an application for renewal, does this mean that the use has lapsed, is automatically void, and that the opportunity to seek a renewal is thereafter foreclosed? Is the Board or the Council empowered to require successive renewal applications or is the authority to require a renewal application limited to one time only?

In addition, the renewal provisions may be seen as duplicative of the revocation provisions in that when a condition in the grant of a conditional use is being violated and the operator has not corrected the violation in response to an effort by the Zoning Administrator to informally resolve the matter, there would already be authority to revoke the grant of the use. If the intention behind inclusion of the renewal provisions is to create an enforcement mechanism for instances where there has been a significant violation of a restriction imposed in the grant of a conditional use, it would seem that the revocation



provisions are a more direct tool to achieve this end. Finally, as noted above, we believe that the Board should act in an appellate capacity with regard to renewal decisions and that these matters should first be presented to the Zoning Administrator with a right of appeal to the Board. The Planning Commission has recommended deletion of the provisions regarding renewal of conditional uses. The Law Department agrees with that recommendation as the revocation process seems to provide the enforcement mechanism necessary to achieve the City Council's purpose.

C) The Abandonment Provisions:

The bill proposes to add a new § 14-104 to the Zoning Code providing: a) that, unless extended by the Board, a conditional use automatically lapses and is void if not exercised within 12 months of its grant; and b) that if a conditional use is discontinued for a continuous period of at least 2 years, the conditional use automatically lapses and is void, and a new authorization must be obtained for the use to be reestablished.

Subsection (a) is simply a repetition of language that already exists within the Zoning Code under §§ 2-602 through 2-604, and, as such, makes no substantive change to the Zoning Code's treatment of conditional uses. Subsection (b) would alter the way in which conditional uses are dealt with by providing for the automatic abandonment of such uses upon discontinuation for a 2-year period of time. We believe that such a provision is within the authority of the Mayor and City Council to enact. We do, however, recommend that the term "approval" as used in new § 14-404 (and elsewhere within this proposed legislation) be replaced with the term "authorization" to conform to the language already used in §§ 2-602 and 2-603 of the Zoning Code.

D) The Revocation Provisions:

This bill would also create a new Subtitle 5 relating to the possible suspension, revocation or modification of conditional uses when the restrictions or conditions imposed in the grant of such uses are violated (the "revocation provisions").

Under proposed § 14-501, the revocation provisions, unless otherwise expressly stated, would apply to all conditional uses approved under Title 14, whether by the Board or the City Council. We recommend that this be amended to clarify whether it is the City Council's intention that the revocation provisions apply retroactively to conditional uses, approved prior to the effective date of this bill.

Under proposed § 14-502, the process for suspension or revocation would begin whenever the Zoning Administrator learns of a violation of a condition, restriction, or limitation imposed with regard to the grant of a conditional use. In such circumstance, the



Zoning Administrator must attempt to resolve the violation informally and promptly. Under proposed § 14-503, if the Zoning Administrator is unable to resolve the violation informally and promptly, he/she must issue a notice of proposed revocation, specifying the nature of the violation, and warning that, unless the violation is corrected within 30 days or such other time as specified in the notice, the matter will be referred to the Board for possible revocation of the conditional use.

Under proposed § 14-504, if the violation is not corrected within the time specified in the notice, the Zoning Administrator may forward the record of the matter to the Board and request that the Board schedule a revocation hearing. On receipt of the Zoning Administrator's request, the Board is required to promptly set the matter in for hearing. We note that according to the proposed language the Zoning Administrator would not be required to forward unresolved violations to the Board for possible revocation, but would have discretion to choose whether to do so. "May" should be changed to "shall" if it is the City Council's intention that the Zoning Administrator must refer a violation that is not corrected to the Board for revocation.

Under proposed § 14-505, if, after notice to the parties and an opportunity to be heard, the Board finds that a condition imposed in the grant of the conditional use has been violated, the Board is given discretion to take the following actions: it may revoke the conditional use; suspend the conditional use pending completion of corrective action; affirm the conditional use, subject to a schedule for corrective action with a provision for automatic termination if the schedule is not met; modify, add to, delete or amend the conditions, restrictions, or limitations imposed in the grant of the conditional use; and/or make any other decision that the Board believes ought to be made.

We have various recommendations with regard to these provisions. First, because of the appellate nature of the Board as provided for in Article 66B and the City Charter, we believe that the revocation provisions of the bill should be amended so that the Zoning Administrator is given initial authority to decide whether a violation has occurred and proceed to try to resolve the violation informally. The Planning Commission's proposed amendment to this section clarifies the role of the Zoning Administration and solves this problem.

With regard to proposed § 14-503, relating to notices of proposed revocation, this section should be amended to provide that if the Zoning Administrator is unable to informally resolve a violation of a conditional use, the Zoning Administrator has the authority to issue a notice of proposed suspension or revocation of the conditional use. We also recommend that existing § 2-105 (b) of the Zoning Code be amended to include within the Zoning Administrator's responsibilities the inspection of conditional uses to determine compliance with the conditions, restrictions or limitations imposed in their authorization

and, where a violation of the conditions, restrictions or limitations is found, the authority to issue notices suspending or revoking the conditional use.

Proposed § 14-503 (a) provides that notices relating to revocation be sent to the owners of record of the property and to the persons to whom the conditional use authorization was granted. This would be required even if the persons to whom the conditional use was granted no longer have any interest in the property. We recommend that the bill be amended to provide that such notices be sent to the owners of record of the property and to the persons to whom the conditional use authorization was granted or to the current operator of the use.

Finally, in 14-505, the Law Department agrees with the Planning Commission recommendation that 14-505(4) and (5) be deleted. Any modification of a conditional use should be accomplished by submitting a new application and not through the use of this revocation procedure. The Law Department also recommends that 14-505(2) be amended to clarify that suspension can be ordered whether or not there is pending corrective action. Finally, 14-505 should be amended to clarify that the Board shall determine if the schedule for corrective action is met or not.

Provided the bill is amended as suggested, the Law Department approves City Council Bill 09-0387 for form and legal sufficiency..

Sincerely yours,



Elena R. DiPietro  
Chief Solicitor



Adam S. Levine  
Assistant City Solicitor

cc: Honorable Rochelle "Rikki" Spector  
George Nilson, City Solicitor  
Angela Gibson, City Council Liaison  
Sandy Gutman, Chief Solicitor  
Ashlea Brown, Assistant City Solicitor  
Hilary Ruley, Assistant City Solicitor  
Minda Goldberg, Assistant City Solicitor  
Adina Amith, Assistant City Solicitor



## Amendments to City Council Bill 09-0387

1. Amend Section 2-105(b) of the Zoning Code to provide that the Zoning Administrator shall the power to “ inspect premises that have been granted a conditional use to determine compliance with the conditions, restrictions or limitations imposed in their authorization and, where a violation of the conditions, restrictions or limitations is determined to have occurred, to take action as provided in Subtitle 5, of Title 14 of the Zoning Code.”
2. On Page 4, line 7, after “granted” insert “or the current operator.”
3. On page 5, line 2, delete “pending” and after “use” insert “subject to”  
And after “action” insert “ or other condition set by the Board”
4. On Page 5, line 4 after “met” insert “as determined by the Board.”