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BY ELECTRONIC AND U.S. MAIL

Eric Kitchen
Code Enforcement Officer
City of Kingston
420 Broadway
Kingston, NY 12401

Re: **Request for Zoning Interpretation
Kingstonian Project**

Dear Mr. Kitchen:

This office represents KingstonCitizens.org. We write in regard to the zoning interpretation you have been asked to issue to determine whether the Kingstonian project is subject to the affordable housing requirements in the Mixed-Use Overlay District (MUOD).

KingstonCitizens.org is a non-partisan, grassroots, volunteer organization. Its purpose in commenting is to advocate for fair and proper application of the City's zoning code, in accordance with the group's ongoing advocacy for equitable housing, historic preservation and environmental protection to benefit the Kingston community. Particularly for a project that is receiving significant public funding, it is vitally important to ensure that the project truly benefits the community.

In response to the applicant's recent submittal, we respectfully ask that you expand your interpretation to determine whether the zoning code authorizes new construction of residential uses at the proposed Kingstonian location. As this letter will show, it does not.

In his August 28, 2019 letter, the applicant's attorney argued that the Kingstonian was not subject to affordable housing requirements because the project "is not adaptively reusing any buildings," and "affordable housing guidelines do not apply to new construction within the Mixed Use Overlay District." This raises the question of whether new construction of residential uses is authorized by the MUOD. The applicant does not cite any section of the code that would allow such new construction of housing, and indeed there is none.

Accordingly, we ask you to issue a determination that the Kingstonian project, as currently proposed, does not conform to the zoning code.

The zoning code designates certain permitted uses, and new construction of housing is not allowed at this location.

Only uses allowed by the zoning code may be established on a site. The code emphasizes: “Any uses not specifically permitted shall be deemed to be prohibited.”¹ Because this site is located in the Central Commercial (C-2) district and the MUOD, the only allowed uses are those specified in those districts’ regulations.

For the C-2 district, the zoning code identifies certain uses that are permitted by right,² certain uses that are permitted by special use permit,³ and a limited number of accessory uses.⁴ While some of the uses proposed by the Kingstonian project are included among the allowed uses, such as hotel and retail, residential housing is not permitted.

The MUOD is an overlay, adding a second set of regulations on top of the districts that it spans. As we explain below, the MUOD only provides for residential uses through adaptive reuse of existing buildings. It does not add an option to construct new housing on sites not already zoned for residential uses.

Since neither the C-2 nor MUOD regulations allows for new construction of housing, it is not an allowed use at the proposed Kingstonian site.

The MUOD only permits establishment of residential units through adaptive reuse.

Read as a whole, the entire function of the MUOD is to encourage adaptive reuse of outdated buildings for housing and to thereby increase the vibrancy of designated neighborhoods. The resulting housing is required to include affordable units.

Only one part of the MUOD section specifically authorizes uses. Paragraph 405-27.1(D) reads:

The following uses are subject to the issuance of a special permit by the Planning Board in accordance with the provisions of § 405-32 of this chapter:

¹ Zoning Code § 405-7(F). The applicant’s urging of a permissive view of zoning harkens back to a decades-old case involving a heavy industrial zone. *C. De Masco Scrap Iron & Metal Corp. v Zirk*, 62 AD2d 92 (2d Dept 1978), *aff’d*, 46 NY2d 864 (1979). There, the zoning stated: “In ‘H’ Industrial District, buildings and premises may be used for any purpose whatsoever not in conflict with any ordinance of the town. . .” 62 AD2d at 97. The Court reasoned that it must “read this ordinance, as we read all statutes or ordinances, in the light of its expressed or apparent purpose.” *Id.* at 97-98. Sensibly, the Court held that the code’s intent was to permit uses that were not expressly prohibited. In contrast, the City of Kingston’s zoning code, like most modern zoning codes, clearly states that uses are by default prohibited unless the code permits them.

² Zoning Code § 405-17(B).

³ Zoning Code § 405-17(C).

⁴ Zoning Code § 405-17(D).

- (1) The conversion of existing commercial or industrial buildings, or sections of them, into residential apartments and work/live spaces of which some will be dedicated as affordable housing. Such uses will be subjected to § 405-30, Site development plan approval.
- (2) Site and building enhancements that promote a mixed-use, mixed-income, pedestrian-based neighborhood. Such uses will be subjected to § 405-30, Site development plan approval.

Subparagraph 1 allows for a specific type of adaptive reuse, involving conversion of existing structures into “residential apartments and work/live spaces.” This could permit the establishment of apartments and work/live spaces in existing buildings in the MUOD even if those uses are not otherwise allowed by the underlying zoning district.

Subparagraph 2 simply provides for “site and building enhancements.” It does not authorize any new principal uses, only physical enhancements to a building or site.

Nothing else in the MUOD text authorizes any use.

If there is any question about the type of “site and building enhancements” contemplated to “promote a mixed-use, mixed-income, pedestrian-based neighborhood” in Subparagraph 405-27.1(D)(2), the other paragraphs within the MUOD section provide clarity.

Paragraph 405-27.1(B) sets out guidelines for all projects in the MUOD, with the guidelines divided into two categories: Affordable housing and “Mixed-use, mixed-income, pedestrian-based neighborhoods.” The guidelines for both categories repeatedly refer to adaptive reuse. The guidelines for “Mixed-use, mixed-income, pedestrian-based neighborhoods” read as follows:

Mixed-use, mixed-income, pedestrian-based neighborhoods.

- (a) The adaptive reuse of buildings should encourage residential uses above retail or commercial uses.
- (b) The safety, comfort and interest of pedestrians should be integrated into the adaptive reuse site plans.

This language demonstrates that the MUOD’s intent to promote “mixed-use, mixed-income, pedestrian-based neighborhoods” was premised on adaptive reuse, with the associated building renovation and site plans aimed at an active and pedestrian-based streetscape.

Paragraph 405-27.1(G) offers additional detail. It provides “[d]evelopment standards applicable to the adaptive reuse of commercial and industrial buildings that promote a mixed-use, mixed-income, pedestrian-based neighborhood.” These standards include building elements like primary entrances facing the street and site elements like lighting, shade trees and parks. Again, this demonstrates the central requirement of adaptive reuse and the intent to enhance such reuse plans with elements that improve the streetscape and pedestrian experience.

Read as a whole, it is clear that the MUOD is premised on adaptive reuse. Accordingly, the intended function of “Site and building enhancements that promote a mixed-use, mixed-income, pedestrian-based neighborhood” in Subparagraph 405-27.1(D)(2) is to accommodate the types of physical modifications that would allow a former commercial or industrial building to become part of a neighborhood, such as creating active storefronts and adding pedestrian amenities.

It would be nonsensical to read Subparagraph 405-27.1(D)(2) as an open invitation to construct any desired new principal use, including a new housing complex. Notably the applicant has not attempted any such argument, instead assuming without any statutory support that the construction of new housing is allowed.

Conclusion

The applicant’s strenuous argument that the provisions of the MUOD do not apply to the Kingstonian raises an important question: Does the MUOD support the project at all?

The only authorization within the MUOD to establish a residential use is by converting an existing structure into apartments or live/work spaces. As the applicant agrees, that type of adaptive reuse would be subject to affordable housing requirements.

If the City of Kingston Common Council had intended for the MUOD to allow construction of new housing complexes, it would have written that into the overlay district. It did not. The Council was clearly attempting to facilitate the adaptive reuse of outdated buildings, while ensuring the resulting apartments would include affordable units. It defies logic to posit that the Council intended to simultaneously allow new construction of apartments without affordable units. Indeed, nothing in the code authorizes that use.

Because there is no authorization within the zoning code for new construction of housing at this location, we ask that you issue a determination that the project does not conform to the zoning code. The applicant would have multiple options to proceed, including pursuing a use variance or zoning change, or modifying the project to conform to the code.

Thank you for the opportunity to comment on this matter.

Sincerely,



Emily B. Svenson

cc (via email): Kevin Bryant, Esq., Corporation Council, City of Kingston
Daniel Gartenstein, Esq., Assistant Corporation Counsel, City of Kingston
Suzanne Cahill, Planning Director, City of Kingston
Michael Moriello, Esq., Counsel for Kingstonian
KingstonCitizens.org