

Written Code Interpretation: Applicability of the Small Zone Lot Parking Exemption to Buildings that Existed on March 23, 2017

Approved by:



Tina Axelrad, Zoning Administrator

Date: June 5, 2019

APPLICABLE DENVER ZONING CODE SECTIONS:

Section 12.4.6.1.A.2: Code Interpretations, Purpose and Applicability

Section 10.4.5.1.A: Vehicle Parking Exemptions – Pre-Existing Small Zone Lots

Section 10.4.5.1.A.3.a: Pre-Existing Small Zone Lots – Reuse of Existing Buildings on Small Zone Lots

Division 13.3 Definition: Start of Construction

Also:

Council Bill 16-0498, Moratorium on Use of Zoning Parking Exemption on Small Zone Lots

Council Bill, 17-0161, Amendment to Denver Zoning Code to Revise Parking Exemption for Pre-Existing Small Zone Lots

Request for Denver Zoning Code (“DZC”) Interpretation

Does a project on a Small Zone Lot with an approved Site Development Plan enjoy the same rights to the Pre-Existing Small Zone Lot Parking Exemption as those buildings on Small Zone Lots that “existed” on March 23, 2017, where either Start of Construction of the project occurred, or a complete application for mandatory Site Development Plan concept plan review was submitted, as of March 23, 2017?

Final Small Zone Lot Parking Exemption Interpretation:

The word “existed” (as modifying the word “building”) for purposes of applying the Small Zone Lot parking exemption to the reuse of existing buildings on Small Zone Lots contained in DZC

§10.4.5.1.A.3.a.i, shall mean:

1. A building on a Small Zone Lot for which a Certificate of Occupancy per the Denver Building Code was issued on or before March 23, 2017; or
2. A building on a Small Zone Lot for which a Site Development Plan (“SDP”) was approved and recorded on or before August 26, 2016, and where Start of Construction of the subject building occurred on or before the SDP’s expiration date per DZC, Section 12.4.3.6.C; or
3. A building on a Small Zone Lot for which:
 - a. A complete application for mandatory SDP concept plan review was submitted to the City on or before August 26, 2016, where such application used the Prior Small Lot Parking Exemption, and
 - b. The City subsequently approved a SDP consistent with the original concept plan and where the applicant requested and/or the city acknowledged in writing, the continued application of the Prior Small Lot Parking Exemption, and

- c. Start of Construction of the subject building occurred on or before the SDP's expiration date per DZC, Section 12.4.3.6.C.

For purposes of this code interpretation, the term "Start of Construction" shall have the meaning found in DZC, Article 13, Division 13.3, Definitions of Words, Terms & Phrases.

Code Interpretation - Analysis Under DZC, Section 12.4.6 – Code Interpretations and Determinations of Unlisted Uses

Code Interpretation Request

This memo documents the Zoning Administrator's interpretation under the Denver Zoning Code ("DZC") of the word "existed," in DZC, Section 10.4.5.1.A.3.a.i., addressing the reuse of existing buildings on Small Zone Lots for the Pre-Existing Small Zone Lot parking exemption, as such final code interpretation is stated on page 1 of this document (the "Parking Exemption Interpretation").

Initiation of Code Interpretation Request

On April 15, 2019, Foster Graham Milstein & Calisher, LLP ("FGMC"), representing 1570/1578 Humboldt St, LLC and 135 Adams Street, LLC regarding the real property located at 1570 & 1578 Humboldt Street and 135 Adams Street in Denver, requested this formal code interpretation. A private party with an interest in real property may initiate a request for a code interpretation, where the use of the private party's real property may be affected by the code interpretation¹. I find that the initiation of the request by FGMC, representing private parties with an interest in real property that will be affected by this code interpretation, is proper.

Authority for Code Interpretation

The DZC provides a procedure whereby an interpretation of DZC's provisions may be requested regarding (1) interpretations of terms, words, and phrases not otherwise defined in DZC; and (2) interpretations of Code provisions when additional clarity is required to apply such provisions to a specific case or to guide general application of DZC (a "Code Interpretation").² DZC grants the Zoning Administrator the authority to make final decisions regarding all Code Interpretations.³

History of the Small Zone Lot Parking Exemption⁴

The Moratorium

On August 25, 2016, the Denver City Council (the "Council"), passed Council Bill No. CB16-0498 providing for a moratorium prohibiting the use of the Denver Zoning Code's pre-existing small zone lot parking exemption for certain projects for a period of approximately seven (7) months (the "Moratorium Bill"). Specifically, the Moratorium Bill prohibited "the issuance of, or approval of applications for, zoning permits for construction or change in use submitted on or after the effective date of the ordinance if such applications sought to use the Pre-Existing Small Zone Lot Parking Exemption provided in Section 10.4.5.1.A of DZC."⁵ The Moratorium Bill, however, specifically did not apply to "complete applications for a mandatory concept review pursuant to Section 12.3.2.2 of the Denver Zoning Code, which are

¹ DZC §12.4.6.3.A.6.

² DZC § 12.4.6.1.A.

³ DZC § 12.4.6.2.

⁴ The following history of the Small Zone Lot Parking Exemption was supplied by FGMC in support of its April 15, 2019, request for a code interpretation. The Zoning Administrator does not dispute this history, and finds it to be an accurate statement of the Small Zone Lot parking exemption's legislative history.

⁵ Council Bill No. CB16-0498, Section 1.

submitted in advance of a required site development plan per Section 12.4.3.3 of the Denver Zoning Code and accepted by Community Planning and Development on or before the effective date of this ordinance.⁶ CB16-0498 became effective on August 26, 2016 (the “Moratorium Date”) and provided for an expiration date of “the earlier of March 31, 2017 or the effective date of any text amendment to Section 10.4.5.1.A of the Denver Zoning Code.”⁷

The Text Amendment

On May 1, 2017, the Council passed Council Bill No. CB17-0161, which was “For an ordinance amending the Denver Zoning Code to revise parking exemptions for pre-existing small zone lots” (the “Text Amendment”). In the Text Amendment’s enacting ordinance recitals, Council recognized “the challenges of developing pre-existing small zone lots in Mixed Use Commercial Zone Districts” and recognized that “mandating minimum parking requirements on small zone lots may encourage assembly of small zone lots into larger scale developments that are inconsistent with this traditional pattern of development.”⁸

The stated intent of the Text Amendment was to “[e]ncourage the preservation of pre-existing Small Zone Lots through exempted vehicle parking requirements to facilitate the reuse of existing buildings and/or the redevelopment of Small Zone Lots.”⁹ The Text Amendment identified a “Small Zone Lot” as a zone lot in a mixed use commercial zone district that “is currently equal to or smaller than 6,250 square feet and that was equal to or smaller than 6,250 square feet on June 25, 2010.”¹⁰

The Text Amendment amended the small lot parking exemptions to provide as follows for the Reuse of Existing Buildings on Small Zone Lots: “(i) If a building (1) is located on a Small Zone Lot and (2) existed on March 23, 2017, then all uses in such building, including any modifications, alterations, and expansions shall be exempt from providing vehicle parking. (ii) Any building located on a Small Zone Lot that is voluntarily demolished shall not be considered an existing building. ‘Voluntary demolished’ (sic) shall have the same meaning as the term ‘Demolition, Voluntary’ defined in Article 13.”¹¹

Prior to the Text Amendment, DZC §10.4.5.1.A simply exempted all Small Zone Lots in Mixed Use Commercial Zone Districts from providing vehicle parking. The Text Amendment changed the DZC to place additional restrictions on the applicability of the small zone lot parking exemption based, in part, on the “existence” of a building on the zone lot on a certain date. However, the enacting ordinance for the Text Amendment also stated that “if requested by an applicant, a pending formal site development plan application may be processed *under the provisions of the Denver Zoning Code concerning the small lot parking exemption prior to the adoption of this ordinance*, if CPD received a complete application for a mandatory concept review pursuant to Section 12.3.2.2 of the Denver Zoning, which was submitted in advance of a required site development plan per Section 12.4.3.3, on or before August 26, 2016, and such application sought to use the Prior Small Lot Parking Exemption (emphasis added).”¹²

⁶ Council Bill No. CB16-0498, Section 2.

⁷ Council Bill No. CB16-0498, Section 4.

⁸ Council Bill No. CB17-0161.

⁹ DZC § 10.4.5.1.A.1.

¹⁰ DZC § 10.4.5.1.A.2.

¹¹ DZC § 10.4.5.1.3.a.

¹² Council Bill No. CB17-0161, Section 6(b). This specific section of the enacting ordinance was an amendment from the floor brought by City Councilperson Jolon Clark at the ordinance’s first reading on May 1, 2017, and was the subject of much discussion on the record, which assists in the interpretation of how the Text Amendment should apply to buildings that “existed” on March 23, 2017. See further discussion below.

Ambiguity in DZC – Justification for Code Interpretation

The DZC, as amended by the Text Amendment, allows an existing building on a Small Zone Lot to change its use, and to modify, alter or expand the building, while maintaining its small zone lot parking exemption, if and only if the building “existed” on the Small Zone Lot on March 23, 2017. The DZC does not provide a definition of “existed” in this context.

The enacting ordinance for the Text Amendment also allows Site Development Plans (“SDPs”) to utilize the Small Lot Parking Exemption as it existed prior to the Text Amendment, if a complete application for the concept review of the same SDP was submitted for on or before August 26, 2016.

The interplay of (1) the Text Amendment enacting ordinance Section 6(b) that allows already-submitted SDP concept plans to proceed to permitting and construction using the previous, more-inclusive Small Lot Parking Exemption, and (2) the Text Amendment change to DZC §10.4.5.1.A.3.a.i. that exempts all uses in a building that “existed” on March 23, 2017 from providing vehicle parking, results in ambiguity in how the enacting ordinance combined with the actual Text Amendment change applies to the following development scenarios:

1. As of August 26, 2016, a project had a *pending concept plan review* with the City [meets Text Amendment enacting ordinance Section 6(b) threshold], and on March 23, 2017, the project building is under construction on the Small Zone Lot, but has not yet completed construction – i.e., no Certificate of Occupancy.
2. As of August 26, 2016, a project had a *pending concept plan review* with the City [meets Text Amendment enacting ordinance Section 6(b) threshold], and on March 23, 2017, the SDP for the project building, which is consistent in all material respects with the previous concept plan, has been submitted but is still pending final city approval.
3. As of August 26, 2016, a project had an *approved Site Development Plan* [meets Text Amendment enacting ordinance Section 6(b) threshold], and on March 23, 2017, the project building is under construction on the Small Zone Lot, but has not yet completed construction – i.e., no Certificate of Occupancy.

The buildings in the above development scenarios can clearly meet the threshold criteria in the Text Amendment enacting ordinance Section 6(b) – they were part of a complete application for *concept* SDP plan review on or before August 25, 2016; however, it is not clear whether, in any of the scenarios, the subject buildings “existed” on March 23, 2017, such that future uses of the building can enjoy the parking exemption granted by DZC Section 10.4.5.1.A.3.a.i. Since, DZC does not define “existed,” an ambiguity in the DZC results, which is a proper subject for this code interpretation.

The Parking Exemption Interpretation

Interpretation of the Definition of “Existed”

Code §12.4.6.3.F. provides five (5) general rules for the Zoning Administrator to use when making a Code Interpretation, one of which applies to definitions of words and phrases. When making an interpretation regarding the definition of a word or phrase, the Zoning Administrator shall first employ the definitions contained in Article 13.¹³ As stated above, DZC provides no definition of “existed.” If

¹³ DZC § 12.4.6.3.F.1.

there is no definition in Article 13, the Zoning Administrator shall next apply the plain meaning of a word or phrase.¹⁴ The Merriam-Webster online dictionary defines “exist” as “to have real being whether material or spiritual”.¹⁵

If the word or phrase is subject to differing interpretations, the Zoning Administrator is instructed to apply the meaning first assigned by the D.R.M.C, as applicable, and then by a dictionary in general use.¹⁶ In this case, however, the word “exist” or “existed” is not subject to differing interpretations. However, even if it were, there has been no meaning assigned to it by the D.R.M.C., therefore, the Merriam-Webster definition should apply. The Merriam-Webster definition, however, provides no parameters as to the required completeness of the object, such as a building, for it to have “real material being.” Therefore, the intent of the DZC and Council’s intent in adopting the Text Amendment are critical to determine how the changes to the Small Zone Lot Parking Exemption were intended to be applied to situations such as the two development scenarios described above.

The Parking Exemption Interpretation Satisfies the General Review Criteria for All Code Interpretations - Code §12.4.6.4

DZC provides that the Zoning Administrator shall make a Code Interpretation “upon finding that the interpretation or determination is: (1) consistent with the intent of this Code; and (2) consistent with the intent of the subject Neighborhood Context and zone district(s), and with the intent of any specific Code provision(s) at issue.”¹⁷

Consistency with the Intent of the Denver Zoning Code

The purpose of the Denver Zoning Code is to “implement Denver’s Comprehensive Plan and guide orderly development of the City that preserves and promotes the public health, safety, prosperity, and welfare of its inhabitants.”¹⁸ To achieve its purpose, the intent of the Denver Zoning Code is to strike a balance between conservation and development, to achieve design excellence in the built environment, and to guide Denver toward a prosperous and sustainable future.¹⁹ Specifically, DZC is intended to guide Denver’s prosperous and sustainable future by “[p]roviding clear regulations and processes that result in predictable, efficient, and coordinated review processes.”²⁰

This requested Code Interpretation satisfies the intent of DZC because it clarifies an ambiguity in DZC that will provide clear regulations and processes regarding the general applicability of the Small Zone Lot parking exemption to Small Zone Lots in the City. This clarification provides predictable, efficient and coordinated future review processes for all similarly-situated properties.

Consistency with the Intent of the Subject Neighborhood Context and Zone District and with the Intent of any Specific Code Provision at Issue

DZC provides that the Urban Center Context and each of the subject “C” zone districts are “intended to enhance the convenience, ease and enjoyment of transit, walking, shopping and public gathering” within the city’s neighborhoods and commercial streets.²¹

¹⁴ *Id.*

¹⁵ Definition of the word “Exist”, Merriam-Wester’s Online Dictionary, <https://www.merriam-webster.com/dictionary/exist>, last accessed on March 8, 2019.

¹⁶ DZC § 12.4.6.3.F.1.

¹⁷ DZC § 12.4.6.4.A.

¹⁸ DZC § 1.1.1.

¹⁹ DZC § 1.1.2.

²⁰ DZC § 1.1.2.K.

²¹ DZC § 7.2.2.1.B; DZC § 7.2.4.1.B.

Other DZC neighborhood contexts (Suburban, Urban, General, Industrial, Campus, and Master-Planned) and their respective families of Mixed-Use Commercial Zone Districts, have similar context and zone district intent language that seeks to encourage pedestrian-scaled and pedestrian-friendly patterns of existing and new development, and particularly in the “MX” and “MS” zone districts, similar zone district general intent to “enhance the convenience and ease of walking, shopping and public gathering within and around the city’s neighborhoods.”

The Small Zone Lot parking exemption furthers the intent of the Mixed Use Commercial Zone Districts by encouraging the maintenance of traditional small lot patterns that foster development in a manner that enhances the convenience, ease and enjoyment of transit, walking, shopping and public gathering. Without the Small Zone Lot parking exemption, development in these zone districts could become larger in scale, and inconsistent with traditional patterns or new patterns desired.

City Council also expressed detailed intent regarding the May 1, 2017, floor amendment to the Text Amendment’s enacting ordinance (what became Section 6(b) of the enacting ordinance) to allow projects that had submitted a complete application for SPD *concept plan review* prior to the Moratorium Date (August 25, 2016) to continue to play by the rules in place when they made their submittal (but only if the project applicant requested the prior rules continue to apply to any subsequent SDP application). The rules in place pre-Text Amendment included the right to change the use of a building, and/or modify, alter or expand a building, without losing the Small Zone Lot parking exemption. Since Council clearly intended *concept plans* to proceed through the time and expense of subsequent formal site development plan review and permitting while retaining the full benefits of the pre-Text Amendment Small Zone Lot parking exemption, interpreting the Text Amendment and the enacting ordinance to give the same benefit to post-concept *SDP plans* that had already gone through the time and expense of formal development review is consistent with Council’s stated intent to let “pipeline” projects play by the rules in place when they made their submittal.

Therefore, issuing a code interpretation that applies the term “existed” to include buildings on Small Zone Lots that were subject to either pending SPD concept plan review, or to already approved formal SDPs, as of August 25, 2016, furthers the intent for the Neighborhood Contexts, the subject zone districts, and to the legislative intent put forth by Council Code in amending DZC §10.4.5.1.A.

Council Support for the Requested Interpretation

The Parking Exemption Interpretation is supported by the Council’s intent behind the Text Amendment. Specifically, as discussed above, Section 6(b) of the Text Amendment’s enacting ordinance shows that it was Council’s intent to provide flexibility for SDPs that were submitted for conceptual review before the Moratorium Date to be processed under the old version of DZC (again, provided the applicant expressly requested the prior Small Lot Parking Exemption to apply).

Council’s discussion during its hearing on May 1, 2017 expands on this intent. During the hearing, Council discussed the fact that there were several projects “in the pipeline” that could be unintentionally adversely affected by the Bill.²² Council expressed a strong desire to provide flexibility to projects in the pipeline, particularly stating that the intent was always to allow them to continue progressing, not to continue to progress and then have the rules changed on them.²³ Council discussed the fact that their latest amendment to the Text Amendment enacting ordinance, which added Section 6(b), was because they clearly intended that projects should remain under the rules in effect when they applied, and that the version of the Text Amendment enacting ordinance without Section 6(b) failed to

²² Discussion from Council Hearing on May 1, 2017.

²³ Discussion from Council Hearing on May 1, 2017.

make that clear.²⁴ It is clear from Council’s hearing discussion that Council’s intent was that Section 6(b) would fix the ambiguity for all projects already in the pipeline.

While Council’s intent was clear to not change the rules for projects that had been submitted by the Moratorium Date at the time the Text Amendment was enacted, Council unfortunately left an ambiguity in the Text Amendment regarding what constitutes a building that “existed” on March 23, 2017. This ambiguity could unintentionally thwart Council’s intent to “not change the rules” not only as to SDP’s that were “in the pipeline,” but also as to certain already-approved SDPs, which the Council had no idea could be adversely affected by the Text Amendment.

Conclusion - Final Small Zone Lot Parking Exemption Code Interpretation

For the foregoing reasons, an unintended ambiguity exists in the DZC as to the definition of the word “existed” as contained in DZC, Section 10.4.5.1.A.3.a.i., addressing the reuse of existing buildings on Small Zone Lots for the Small Zone Lot parking exemption. Based on the analysis above, the word “existed” (as modifying the word “building”) for purposes of applying the Small Zone Lot parking exemption to the reuse of existing buildings on Small Zone Lots contained in DZC §10.4.5.1.A.3.a.i, shall mean:

1. A building on a Small Zone Lot for which a Certificate of Occupancy per the Denver Building Code was issued on or before March 23, 2017; or
2. A building on a Small Zone Lot for which a Site Development Plan (“SDP”) was approved and recorded on or before August 26, 2016, and where Start of Construction of the subject building occurred on or before the SDP’s expiration date per DZC, Section 12.4.3.6.C; or
3. A building on a Small Zone Lot for which:
 - a. A complete application for mandatory SDP concept plan review was submitted to the City on or before August 26, 2016, where such application used the Prior Small Lot Parking Exemption, and
 - b. The City subsequently approved a SDP consistent with the original concept plan and where the applicant requested and/or the city acknowledged in writing, the continued application of the Prior Small Lot Parking Exemption, and
 - c. Start of Construction of the subject building occurred on or before the SDP’s expiration date per DZC, Section 12.4.3.6.C.

For purposes of this code interpretation, the term “Start of Construction” shall have the meaning found in DZC, Article 13, Division 13.3, Definitions of Words, Terms & Phrases.

This code interpretation is a final decision of the Zoning Administrator and may be appealed to the Denver Zoning Board of Adjustment within 15 days from the date of this interpretation according to Denver Zoning Code, Section 12.4.8, Appeal of Administrative Decision.

²⁴ Discussion from Council Hearing on May 1, 2017.