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City of Hudson Planning Board

**Re: Recommendation in relation to proposed Local Law No. 5 of 2018, "A Local Law Amending the City Zoning Law with Regard to Conditional Uses in the R-2 and R-2H Zoning Districts"**

To the Members of the City of Hudson Planning Board:

I just became aware that the Planning Board apparently will be discussing the Common Council's request for a recommendation on the above-referenced proposed law at the August 9th Planning Board meeting. In relation to that, I would like to offer the following observations.

To begin, I think the proposed law has several serious problems. Some are mainly technical, and some are substantive that go to the very essence of the purpose of zoning. Depending on how the technical issues are resolved, different substantive problems come to the fore.

## I. First: the ambiguities and uncertain effects of the law.

In the first place, the law is ambiguous on two crucial points: when this law is invoked, 1) does a non-conforming use remain a non-conforming use or does a non-conforming use become transformed into a conditional (and therefore conforming) use, and 2) does the geographic area in which the currently non-conforming use is allowed to be carried on increase (possibly onto an adjacent parcel)?

If enacted, the Zoning Code would read as follows (I address the proposed changes to Section 325-8(B.) and 325-9(B.) together, as they are identical except for numbering the new paragraph (4) in one case and (5) in the other):

> **B.** Conditional uses. The following conditional uses are permitted, subject to the approval of the Planning Board in accordance with Article **VIII** hereof:
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> (4) or (5). With respect to any building or portion thereof, the use of which is currently a non-conforming use within the zoning district, said non-conforming building or portion thereof may be renovated, replaced, and/or expanded ("renovated building"), provided:"
>
> [Several conditions follow]

What, exactly, is the "conditional use" that is to be permitted? Paragraphs (4)/(5) do not actually describe anything that constitutes a "use." They describe a construction project. But a building or a modification of a building is different from the use that may occur on the premises. Indeed, a building can house multiple uses simultaneously. Despite this, in the guise of a conditional use permit,[1] the text establishes nothing more than that certain **buildings**—those that house non-conforming uses—may be "renovated, replaced, and/or expanded."[2] There is nothing in the text of the proposed law that provides that the currently non-conforming **use** of the premises is to be deemed a conditional use. That may be the intent, but that is not what it says.

Furthermore, the five sub-paragraphs (a) through (e) mention the underlying non-conforming **use** only once: in (a) as a precondition for qualifying to avail oneself of this law. The remainder of the sub-paragraphs deal only with the **building** that houses the non-conforming use. They neither provide for the expansion of the non-conforming use itself nor impose mitigation requirements upon such non-conforming use. The provisions of the law are simply not made applicable to the use itself.

That regulating or expanding the *building* does not include or imply regulating or expanding the scope of the *use* is confirmed by section 325-29(A.) and (B.), which expressly distinguish between "non-conforming use of buildings" and "building which houses [] a non-conforming use," and separately regulate them. The proposed law, as written, would seemingly supersede the provision in 325-29(B.) that prohibits altering or enlarging a building which houses a non-conforming use, but contains nothing that would supersede the provision in 325-29(A.) that prohibits the enlargement or extension of the non-conforming use of a building. Against the backdrop of 325-29, the enactment of this law as written would seem to allow the expansion of the building, but would not allow the expansion of the area in which the non-conforming use can be carried on.

Based upon the new provisions' placement in the Zoning Code, it appears that what are now non-conforming uses are probably intended to be transformed into conforming conditional uses, but the actual text does not appear to accomplish that. Rather, the law appears only to allow the **building** that houses the non-conforming use to be expanded, without concurrently allowing an expansion of the non-conforming use or changing the status of the non-conforming use to a conditional use.

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[1] A building or a modification of a building is not a use, and the physical work of a renovation or construction project is not the proper subject for a conditional use permit. Rather, the ongoing use of the land or building is the proper subject for a conditional use permit. In short, one needs a conditional use permit for what one *does*, not what one *builds*. A conditional use permit for renovation or expansion of a *building* is rather off the mark.

[2] It's worth noting here that although the definitions in the Hudson Code lump them together, a "non-conforming *building*" is generally understood to be a building that fails to meet physical requirements or limitations (i.e, height, bulk, setback, lot coverage) of the district in which it is located. A" non-conforming *use*" is a use that is not permitted in the district where it takes place. The text of the proposed law refers to "said non-conforming building," but in fact, there is no "non-conforming building" involved; there is a building in which a non-conforming use is ongoing, which is not the same thing.

## II. Second: the substantive problems.

### A. Re-designating the currently existing non-conforming uses as conditional uses.

The preferred way to deal with the matter would be to convert existing non-conforming uses into permitted conditional uses, if such an approach is viable and consistent with the Comprehensive Plan. If the particular non-conforming uses that are involved here are, due to changes in circumstances since the zoning law was enacted, now appropriate for their locations and not in conflict with the Comprehensive Plan, then perhaps the permissible uses for the R-2 and R-2H districts can be updated and amended to allow them, as was done in 2016 with the RSC and RSC-2 districts. This would require a determination that such a change is in conformity with the Comprehensive Plan or adopted City planning documents. The 2016 changes involving the RSC were backed up by a documentary record that showed the changes made in 2016 were originally contemplated in earlier planning documents adopted by the City and were recommended at the time of earlier re-zoning, but were somehow left out of the earlier enacted zoning amendments. In addition, if the uses currently designated as non-conforming are re-classified within their districts as conditional uses, they should be available on an equal basis for all parties, not just specified abutting owners (see below).

### B. Allowing the expansion of non-conforming uses and continuing to designate them as non-conforming.

If the effect of the law is to expand existing non-conforming uses while continuing to designate them non-conforming uses, then the law would be seriously problematic, as it would run directly contrary to well-established and fundamental principles of zoning.

To begin, Section 2, "Legislative Findings," states a purpose that is in direct opposition to the extremely well-established principle that non-conforming uses are to be disfavored and not encouraged, and that while they may not always be summarily terminated, the ultimate zoning goal is their elimination:

> "The Common Council further finds that in order to encourage the upkeep, renovation, and continuation of non-conforming uses presently existing in the R-2 and R-2H District, it is desirable to allow for the renovation, replacement and/or expansion of currently existing non-conforming uses within [the] R-2 and R-2H District…"

To note just a few examples of the principle—the "overriding policy of zoning"—that this flagrantly violates, here are a few passages from decisions from New York's highest court, the Court of Appeals:

> "Nonconforming uses are **necessarily inconsistent** with the land-use pattern established by an existing zoning scheme. * * * Due to constitutional and fairness concerns regarding the undue financial hardship that immediate elimination of

> nonconforming uses would cause to property owners, however, courts and municipal legislators have adopted a 'grudging tolerance' of such uses (Matter of Pelham Esplanade v Board of Trustees, 77 N.Y.2d 66, 71). The law nevertheless generally views nonconforming uses as **detrimental to a zoning scheme**, and **the overriding public policy of zoning** in New York State and elsewhere is aimed at their reasonable restriction and **eventual elimination**." Matter of Toys "R" Us v. Silva, 89 N.Y.2d 411, (Court of Appeals, 1996).
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> "[T]the **overriding policy of zoning** is aimed at the ultimate **elimination** of nonconforming uses." Matter of Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278, (Court of Appeals, 1980). (All bold added.)

For the Common Council to adopt a purpose of perpetuation and continuation—not to mention *expansion to other parcels*—of non-conforming uses is utterly backward. In light of the (nearly, apparently) universally understood status of non-conforming uses within the zoning framework, it is hard to conceive of a purpose that is more directly in conflict with the fundamental purposes and established principles of zoning.

### C. Discrimination and inequitable granting of rights to use certain parcels.

Whether the law leaves existing non-conforming uses as non-conforming uses or converts them to conditional uses, the law may well be unlawful and may expose the City to litigation due to the fact that it would allow certain parcels to be put to particular uses only by an abutting landowner who operates a non-conforming use, but would *prohibit those same uses, on the very same parcel*, by any other person. The law would make the permissible uses of certain parcels within the R-2 and R-2H zones variable, depending upon **who** sought to make use of those parcels. The law grants rights to use *one* parcel in a particular way only in connection with spillover from a non-conforming use on *another* parcel:

> (c) the construction of the renovated building is completed upon the parcel **or adjacent parcel(s)** upon which the non-conforming building currently exists.

Of secondary concern is that the benefit also is made available only to a non-conforming use that "has been established and has operated continuously for a period of greater than twenty years." This further identifies who can avail themselves of certain uses and may narrow the beneficiaries only to Scali's and Stewart's. Even the Common Council President acknowledges that this proposed law has become known as the "Stewart's proposal."

I think the fact that the effect of this proposed law would be to allow new—and currently prohibited—uses on certain parcels, but only if those new uses were to be carried out by particular neighbors, creates a high risk of running afoul of the zoning principal that only the use of the land can be regulated. The right to such use cannot be contingent upon the identity of the person or entity seeking to put the property to such use or the fact that such person owns a particular other parcel or operates a particular use.

While none of the excerpts below address a situation quite like the one raised by Hudson's proposed local law, and the applicability of the principle to the present matter isn't perfectly clear, these excerpts do state the relevant principle and give cause to think the disparate granting of land use rights may not comport with legal requirements.

> "As a fundamental principle, zoning is concerned with the use of the land, and not with the person who owns or occupies it." FGL & L Property Corp. v. City of Rye, 109 A.D.2d 814 (2nd Dept. 1985). "[S]uch ordinances may regulate and restrict the uses of property, but may not place restraints upon the users or owners of that property." Allen v. Town of North Hempstead, 103 A.D.2d 144 (2nd Dept. 1984). [There is a] "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it. (*Citations omitted.*) While it is proper for a zoning board to impose appropriate conditions and safeguards in conjunction with a change of zone or a grant of a variance or special permit (*citations omitted*), such conditions and safeguards must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it." Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102 (Court of Appeals, 1975).

A post on Gossips of Rivertown on July 17, 2018, contained the following passage: "Michael LeSawyer, whose house is situated midway between Stewart's and Scali's, the 'two historic nonconforming uses' that would benefit from the zoning amendment, complained about the inequity of the amendment: 'Stewart's can do anything they want, Scali's can do anything they want, but I can't.'" I think Mr. LeSawyer is spot on. If a parcel next to Scali's can be used for restaurant purposes, it should be permissible for anyone to use it for such purpose, not just Scali's. If a parcel next to Stewart's can be used for convenience store purposes, it should be permissible for anyone to use it for such purpose, not just Scali's. Otherwise, the law is not zoning the land; it is giving personal grants of rights to use land.

## III. Conclusion.

While the apparent discriminatory effect of this proposed law and its selective granting of rights based upon one's use and ownership *of a different parcel* is problematic, the concerns in that regard pale in comparison to those arising from the central purpose and thrust of this proposed law. To return to the most important point, at its core and in light of the fundamental principles of zoning, the proposal to allow and even "encourage" the continuation *and expansion* of non-conforming uses—*especially onto additional parcels*—is extraordinarily ill-conceived.

It is my view that this proposed law needs important revisions if it is to be enacted. In addition to making decisions on, and clarifying, the ambiguities discussed above, the "Legislative Findings" should be re-written to remove any statement of purpose to encourage, continue, or expand existing non-conforming uses. That such a statement is currently in the law is mind-boggling. If, in fact, the effect of the law would be to convert current non-conforming uses to conditional uses, then it is not even correct to say that the law is promoting the continuation or expansion of non-conforming uses; it

is instead finding that circumstances have made the subject uses appropriate for their locations and re-designating them as conditional uses.

The problems of this proposed law can perhaps be mitigated to some degree if the Comprehensive Plan and other factual grounds support re-classifying the specific non-conforming uses at issue as conditional uses and the text of the law is revised to clearly do so. But to continue to identify the uses at issue here as "non-conforming uses" and to then promote their expansion—***especially onto a new and separate parcel***—is, in my opinion, an extremely misguided course of action that is both in direct conflict with the fundamental purposes of zoning and may also open the door to unintended adverse consequences for the City. To enact a law that would do so, as the current text appears to do, would be—to put it mildly—a seriously unwise step by the City.

Sincerely,

Kenneth J. Dow