

# Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564  
Holland & Knight LLP | [www.hklaw.com](http://www.hklaw.com)

Kyrus L. Freeman  
202.862.5978  
kyrus.freeman@hklaw.com

Jessica R. Bloomfield  
202.469.5272  
Jessica.bloomfield@hklaw.com

November 20, 2018

## **VIA Z.C. SUBMISSIONS**

Zoning Commission for the  
District of Columbia  
441 4th Street, N.W., Suite 210S  
Washington, D.C. 20001

**Re: Z.C. Case No. 08-07C  
Second-Stage PUD @ Square 5784 (“Building 4”)  
Applicant’s Opposition to and Motion to Strike “CARE Motion to Reconsider Order”**

Dear Members of the Commission:

On behalf of Four Points, LLC (the “Applicant”), and for the reasons stated below, we oppose the “CARE Motion to Reconsider Order – ZC Case No. 08-07C” (the “Motion”) filed by Aristotle Theresa on behalf of CARE. The Motion is dated October 22, 2018, but was served on counsel for the Applicant on November 13, 2018.

The Motion requests that the Zoning Commission reconsider Z.C. Order No. 08-07C, which granted a second-stage planned unit development (“PUD”) to develop Square 5784, Lots 899, 900, and 1101 (the “Site”) with a new office building and ground floor retail (“Building 4”). The Motion also requests that the Commission hold a new public hearing so that CARE can apply for party status.

**1. The Motion should be denied because it does not meet the requirements of 11-Z DCMR § 700**

**A. CARE was not a party to the underlying case**

The Motion should be denied because it does not meet the clear requirements of 11-Z DCMR § 700.3, which states that “[a] motion for reconsideration, rehearing, or re-argument of a final order in a contested case under Subtitle Z § 201.2 **may be filed by a party** within ten (10) days of the order having become final. The motion shall be served upon all other parties” (emphasis added).

In this case, CARE was not a party to Z.C. Case No. 08-07C and therefore the Motion should be denied since it does not meet the requirement of 11-Z DCMR § 700.3.

The Zoning Commission has repeatedly stated the importance of 11-Z DCMR § 700.3 (and its predecessor 11 DCMR § 3029.5 of the 1958 Zoning Regulations). *See, e.g.* Z.C. Order No. 11-24, p. 3 (denying a motion for reconsideration filed by a non-party and reiterating that “only the existence of ‘extraordinary circumstances’ would justify the waiver of the requirement that only a party may file a motion for reconsideration, such as when no notice of a hearing is given”); Z.C. Order No. 16-07(1), p. 2 (stating that the motion for reconsideration filed by the non-party made “no effort to explain why it as a non-party should be able to file a motion for reconsideration, but instead expresses concerns over impacts of the application that it could have presented during the hearing had it chose to participate”); and Z.C. Order No. 15-29(1) (noting that a “speculative assertion... does not furnish good cause for waiving the Party Status Requirement, or for that matter, granting a motion for reconsideration”). Moreover, on November 19, 2019, the Commission denied CARE’s request for reconsideration of Z.C. Order No. 08-07D, noting that “the Commission’s rules provide that only parties may request reconsideration” and that it was not a rule that the Commission was “ready to waive.” *See* video of November 19, 2018 Zoning Commission Public Meeting.

Given that CARE was not a party in Z.C. Case Nos. 08-07 or 08-07C, the Motion does not meet the party requirement of 11-Z DCMR § 700.3 and thus should be denied.

B. CARE does not meet the standards of 11-Z DCMR § 101.9 for waiving the party requirement

Pursuant to its authority in 11-Z DCMR § 101.9, the Commission may, for good cause shown, waive any of the provisions of Subtitle Z if, in the judgement of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

In this case, CARE has not demonstrated any good cause for waiving the party requirement, and granting a waiver from 11-Z DCMR § 700.3 to permit the filing of the Motion will prejudice the Applicant. CARE argues that the party requirement should be waived in this case essentially for two reasons:

First, CARE argues that “[t]he good cause shown in this matter is that the 08-07C is derivative of a case [08-07] filed over 10 years ago when there was no ANC for the single member district for the site where the time extension has been requested. Therefore, community members were vastly under the impression that the development had been approved and there was nothing that could be done to contest. While a time extension was granted for the fourth order issued in the project, it was too late. The people that would have opposed, did not, because they saw no point.” *See* Motion, pp. 1-2.

Second, CARE argues that “[m]oreover, and perhaps more importantly, after closing of the record on October 4th, 2018 news released that the Reunion Square development would be receiving 60 million dollars in Tax Increment Financing. (Exhibit A). Since this is new information made available only after the hearing this motion for reconsideration should be granted.” *See* Motion, p. 2.

However, both of these arguments are flawed and do not rise to the level of establishing good cause to waive the party status requirement.

CARE's arguments regarding the lack of adequate ANC representation and an apparent belief by unidentified community members that they could not participate in Z.C. Case No. 08-07C are not supported by the record. In fact, the ANC and other community organizations and individuals actively participated in the public hearing process for Building 4. *See, e.g.* testimony presented by Single Member District ("SMD") Commissioner Greta Fuller (ANC 8A06) at the July 26, 2018 public hearing; testimony presented by the Executive Director of the Anacostia Coordinating Council ("ACC") at the July 26, 2018 public hearing; ANC resolution in unanimous support of the application, dated September 14, 2018, submitted to the case record (Ex. 46); signed ANC community benefits agreement ("CBA"), dated September 14, 2018, submitted to the case record (Ex. 46A); ACC letter in support of the application, dated August 4, 2018, submitted to the case record (Ex. 45B); and letters of support from the Anacostia Economic Development Corporation, Anacostia Playhouse, ARCH Development Corporation, Check It Enterprises, Community College Prep Academy, Historic Anacostia Block Association, Menkiti Group, and Stockbridge Consulting (Ex. 29-36).

In addition, the Applicant presented and described the application at ANC 8A's public meetings on September 4 and September 14, 2018, and at an ANC Executive Committee meeting on August 20, 2018. The Applicant also presented the project to the ACC on July 24 and August 2, 2018, with approximately 200 community members in attendance between the two meetings. *See Exhibit 45B.* Finally, notice of the application being filed was published in the DC Register on March 30, 2018; notice of the application being scheduled for a public hearing was published in the DC Register on June 8, 2018, and was mailed to owners of property within 200 feet of the Site on May 31, 2018; and the Site was posted with signs describing the application and advertising the public hearing date on June 12, 2018, which signs were maintained up until the public hearing. *See Ex. 8, 14, 17, 18, 26.* All notice given for the application was done in accordance with the Zoning Regulations, and each notice clearly indicates how to participate in the public hearing process.

Thus, CARE's assertion that the party requirement should be waived now because of alleged inadequate ANC representation ten years ago, or a belief that individuals could not participate in the current application, is unfounded given the active participation of ANC 8A and other community groups in the Commission's review and approval of the second-stage PUD for Building 4.

The introduction of proposed Tax Increment Financing ("TIF") legislation also does not rise to "good cause" to waive the party status requirement. First, the merits of a TIF are solely within the authority of the D.C. Council, not the Zoning Commission. So, any discussion and debate about the proposed TIF should occur before the D.C. Council, not the Zoning Commission. In fact, the D.C. Council held a public hearing regarding the proposed TIF legislation on November 14, 2018, and heard arguments from both proponents and opponents of the legislation (including Mr. Theresa). Based on this testimony and District priorities, the D.C. Council will determine how best to move forward with the TIF, which is solely within their legislative power. Second, the TIF legislation has only been introduced and not yet approved, so in addition to being beyond the scope

of the Zoning Commission's review of second-stage PUDs, any hearing by the Zoning Commission about a TIF would also be premature and speculative.

Finally, reopening the record now to allow a non-party to file documents after the application was thoroughly reviewed and supported by the Office of Planning, DDOT, ANC 8A, and eight local organizations (see organizations' support letters at Ex. 29-36), and approved by the Zoning Commission following extensive consideration of the application and deliberations at a public meeting, would be prejudicial to the Applicant. CARE requests the reopening of the record to "encourage participation from the full community and not just those that attend every ANC meeting and keep abreast of every happening with a development project that has languished for ten years." See Motion, p. 2. However, reopening the record for this purpose is not supported in the Zoning Regulations; would encourage people to not participate in the PUD application and to instead lay in wait until after an application has been approved to raise arguments that could have been addressed during the public hearing process; ignores the evidence in the record of Z.C. Case No. 08-07C that documents the issues, concerns and ultimate support raised by the community through the public review processes; and would put the Applicant (and the Zoning Commission) in the position of another hearing solely for the benefit of CARE (a non-party to the Zoning Commission case) when there was nothing that prevented CARE from participating during the public hearing process. In short, there has already been an opportunity for full participation by anyone that genuinely wanted to participate during the application process.

Accordingly, CARE has not provided any legitimate basis for waiving the party requirement of 11-Z DCMR § 700.3, and its motion should therefore be denied.

## **2. The Materials Included in the Motion Should be Stricken from the Record**

The Applicant moves to strike from the case record the materials included as attachments to the Motion. Pursuant to Subtitle Z § 602.6, "supplemental information received by the Commission after the close of the record that bears upon the substance of the application or petition shall be returned by the Director and not accepted into the files of the Commission." Moreover, Subtitle Z § 700.7 provides that "[n]o request for rehearing shall be considered by the Commission unless new evidence is submitted that could not reasonably have been presented at the original hearing."

In this case, the Zoning Commission held a public hearing on the application on August 26, 2018, closed the record at the end of the hearing except to receive additional submissions from the Applicant and the ANC, and deliberated on the application at a public meeting on September 17, 2018. CARE did not attend or participate in the public hearing, nor did CARE submit anything in the record of this case at any point between the filing of the application on March 9, 2018, and the issuance of the final Order on November 9, 2018.

CARE's motion argues that new information that bears upon the substance of the application was released after the hearing. Specifically, CARE submitted information that "the Reunion Square development would be receiving 60 million dollars in Tax Increment Financing" and claimed that the TIF "poses an adverse impact on the surrounding community" for a variety

of unsubstantiated reasons. Regardless of whether this information could have reasonably been presented at the original hearing, as described above, the merits of a TIF are solely within the authority of the D.C. Council, not the Zoning Commission. So, any information about the proposed TIF or TIFs in general should be submitted to the D.C. Council, not the Zoning Commission, so that the D.C. Council can review the information as part of its deliberations. Therefore, consistent with 11-Z DCMR § 602.6, the materials submitted with the Motion should be returned and not accepted into the case record since they were submitted after the record was closed.

Based on the foregoing, the Motion should be denied and the materials submitted with the Motion should be stricken from the record because CARE was not a party in the Zoning Commission case, CARE did not show any good cause for waiving the requirements of 11-Z DCMR § 700.3, and the materials included with the Motion were filed well after the close of the record.

Thank you for your consideration of the Applicant's request.

Sincerely,

HOLLAND & KNIGHT LLP



---

Kyrus L. Freeman  
Jessica R. Bloomfield

cc: Maxine Brown-Roberts, Office of Planning (via email)  
Advisory Neighborhood Commission 8A (via U.S. Mail)  
Commissioner Greta Fuller, ANC 8A06 (via U.S. Mail)  
Aristotle Theresa, Counsel for CARE (via Email)  
Alan Bergstein, Office of the Attorney General (via Email)