

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-19A
Z.C. CASE NO. 14-19A
M Street Development Group, LLC
(PUD Time Extension @ Square 772, Lots 803-804)
November 19, 2018

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (“Commission”) was held on November 19, 2018. At the meeting, the Commission approved a request from M Street Development Group, LLC (“Applicant”) for a two-year extension of the time period in which to begin construction of the approved building located at Square 772, Lots 803 and 804) (“Property”). The Commission considered the application pursuant to Subtitle Z, Chapter 7 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations (“DCMR”).

FINDINGS OF FACT

1. Pursuant to Z.C. Order No. 14-19, dated September 21, 2015, and effective on November 20, 2015, the Commission approved a consolidated planned unit development (“PUD”) and a related Zoning Map amendment from the from the C-M-1 Zone District to the C-3-C Zone District for the Property.¹ The Property is bounded by N Street, N.E. to the north, 4th Street, N.E. to the east, M Street, N.E. to the south, and 3rd Street, N.E. to the west.
2. The approved PUD was for a mixed-use building consisting of approximately 408,496 square feet of gross floor area devoted to residential use (416 residential units, plus or minus 10%) and approximately 10,302 square feet of gross floor area devoted to retail use (“Project”).
3. Pursuant to Z.C. Order No. 14-19, Decision No. D(2), the Applicant was required to file a building permit application for the Project by November 20, 2017, and was required to commence construction of the Project by November 20, 2018.

¹ At the time that Z.C. Order No. 14-19 was issued, the Property was known as Lots 1, 2, 6, 7, 19, 801, and 802 in Square 772. In 2017, new tax lots were assigned to the Property, which is now known as Lots 803 and 804 in Square 772.

The original PUD was approved under the 1958 Zoning Regulations (“ZR58”). On September 6, 2016, the provisions of ZR58 were repealed and replaced with the 2016 Zoning Regulations.

4. The Applicant filed a building permit application for the Project on August 24, 2016, thus meeting the first condition of Decision No. D(2). However, due to delay related to the Property's environmental contamination and ongoing remediation, the Applicant was unable to begin construction by November 20, 2018.
5. On October 9, 2018, the Applicant filed a request for a two-year extension of the time period in which to begin construction of the Project, such that construction would be required to begin no later than November 20, 2020.
6. The Applicant's request for a two-year time extension was supported by evidence describing the Property's history of gasoline station use and resultant soil contamination on a portion of the Property that had not yet been fully remediated. The Applicant submitted a detailed history of the remediation work, including the following:
 - a. The Applicant negotiated a Corrective Action Plan ("CAP") with BP Oil Company, the responsible party for completing soil remediation measures, ("BP") to establish a remediation plan for the Property. The CAP was required to be approved by the Department of Energy and the Environment ("DOEE") before issuance of a building permit or commencement of construction. The extension application described the extensive negotiations with BP and DOEE that were involved in establishing the CAP;
 - b. On July 29, 2016, BP submitted the proposed CAP to DOEE, which was ultimately not approved despite the Applicant's best efforts to finalize its terms and coordinate with BP and DOEE. Following feedback, BP submitted a revised CAP, which incorporated DOEE's suggestions and which DOEE approved on January 5, 2017;
 - c. From May to December, 2016, the Applicant engaged in negotiations with BP to establish field procedures under the proposed CAP for remediating contaminated soil and/or groundwater during construction of the PUD. The Applicant engaged environmental consultants and counsel at that time and prepared a draft Coordination Agreement, but was unable to reach a final agreement with BP due to BP's position that an existing access agreement was sufficiently detailed to guide the remediation work in the field while under construction;
 - d. Following the initial PUD approval, the Applicant solicited and compiled bids from subcontractors with construction pricing, which the Applicant incorporated into its financial models. On September 9, 2016, the Applicant issued the numbers to its prospective construction lender;
 - e. On March 6-10, 2017, contaminated soil was excavated and removed from the contaminated portion of the Property in accordance with the DOEE-approved CAP, and on March 19, 2017, a Soil Excavation Summary Report of Observations was

issued. The Applicant reviewed the report with DOEE, and DOEE indicated that it was satisfied with the results;

- f. Due to the time for DOEE to approve the CAP and for BP to complete the excavation work required by the CAP, the construction pricing that the Applicant's general contractor previously issued on September 9, 2016 could no longer be relied upon. Once the construction pricing was lost, the Applicant had to take the Project back out into the marketplace to be re-priced;
 - g. On June 28, 2017, the project was re-priced in the subcontractor market, which resulted in an almost \$7.2 million increase. Based on this change, the Applicant spent additional time exploring potential options for value engineering the Project. Losing the construction pricing also placed the capital structure and related project financing at risk. As a result, the Applicant's previously-identified capital partner that had spent many months reviewing the Project's budget, design, and market studies, determined that it was not able to adequately finance the Project;
 - h. In the first quarter of 2018 the Applicant identified and reached an agreement with a replacement capital partner and subsequently worked through an on-boarding process that included sharing the budget and pro-forma, negotiating design work, and undertaking market studies; and
 - i. During this time an environmental services firm studied and issued recommendations for a protective soil barrier to be installed over the contaminated portion of the Property, as recommended in the CAP. However, the Applicant's efforts to design and install the most effective system were still ongoing as of the date that the extension application was filed, as a result of evolving technologies.
7. In its application materials, the Applicant indicated that the Project was back in debt markets to obtain construction financing, and that the Applicant was reviewing financing term sheets from local construction lenders. The application also explained that once the Applicant identifies a construction lender, the general contractor will be able to obtain final construction pricing so that the Applicant can make final preparations to commence construction of the Project. Based on the foregoing, the Applicant indicated that construction of the approved Project would be able to commence well in advance of November, 2020.
8. Outside of the Applicant's financing and environmental efforts, the Applicant also described how it continued to pursue permits for the approved Project as follows:
- a. A raze permit was issued on July 17, 2016, and was re-filed in August, 2018 pursuant to the expired DOH Vector Clearance and DDOT Occupancy Permit;
 - b. A sheeting permit was issued on October 17, 2017, followed by approval of a six-month extension that extended the permit to April 18, 2019;

- c. A foundation permit was issued on July 18, 2017, followed by approval of a six-month extension that extended the permit to January 18, 2019; and
 - d. A building permit application was filed on August 24, 2016, and the Applicant sent comment responses to the permit expeditor on September 26, 2018.
9. The application also stated that the Applicant engaged WDG Architecture in the summer of 2015 to complete construction drawings for the Project. By December 18, 2015, the design document architectural drawing set was complete; by February 2, 2016, 50% of the construction drawing set was complete; by March 9, 2016, the foundation to grade drawings were complete; by July 15, 2016, the permit/construction bid set was complete; and by May 19, 2017, the construction drawings were 100% complete.
10. The Applicant also indicated that as of the time of filing the extension application, it had already undertaken the following actions required to move forward with redevelopment of the Property:
 - a. Executed a First Source Employee Agreement with the District's Department of Employment Services on August 30, 2016;
 - b. Completed extensive geotechnical due diligence in August, 2016;
 - c. Submitted an initial service application to Washington Gas regarding utility distribution systems on April 1, 2016;
 - d. Submitted an initial service application to Pepco regarding utility distribution on November 24, 2014;
 - e. Submitted water and sewer plans to DC Water in 2016, and posted \$350,330 in cash for water and sewer pipe inspection deposits on August 18, 2016; and
 - f. Engaged a general contractor and underwent two rounds of construction bidding with subcontractors.
11. Other than the Applicant, the only party to this case was Advisory Neighborhood Commission ("ANC") 6C. As indicated on the Certificate of Service included in Exhibit 1, the Applicant served the PUD extension request on ANC 6C on October 9, 2018.
12. The Office of Planning ("OP") submitted a report to the record (Ex. 5) dated November 9, 2018, recommending that the Commission approve the two-year extension request. OP indicated that the Applicant demonstrated good cause for the extension request due to environmental remediation negotiations with BP, which led to significant construction price increases and the need for renegotiation of financing agreements. OP also acknowledged that remediation negotiations and subsequent revisions to remediation techniques delayed consideration by District agencies, and that while plan revisions were made in time to

complete construction drawings and file for a building permit within two years of the effective date of Z.C. Order No. 14-19, it was not possible for the Applicant to secure all environmental-related reviews and sign-offs from District agencies in time to begin construction by November 20, 2018.

13. Because the Applicant demonstrated good cause with substantial evidence pursuant to 11-Z DCMR § 705.2(c) of the Zoning Regulations, the Commission finds that the request for the two-year time extension should be granted.

CONCLUSIONS OF LAW

1. Pursuant to 11-Z DCMR § 705.2, the Commission may extend the validity of a PUD for good cause shown upon a request made before the expiration of the approval, documenting the following:
 - a. The request is served on all parties to the application by the applicant, and all parties are allowed 30 days to respond;
 - b. There is no substantial change in any material facts upon which the Commission based its original approval of the PUD that would undermine the Commission's justification for approving the original PUD; and
 - c. The applicant demonstrates with substantial evidence one or more of the following criteria:
 - i. An inability to obtain sufficient project financing for the development, following an applicant's diligent good faith efforts to obtain such financing, because of changes in economic and market conditions beyond the applicant's reasonable control;
 - ii. An inability to secure all required governmental agency approvals for a development by the expiration date of the order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control; or
 - iii. The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control that renders the applicant unable to comply with the time limits of the order.
2. The Commission concludes that the Applicant complied with the notice requirements of 11-Z DCMR § 702.2(a) by serving all parties with a copy of the application and allowing them 30 days to respond.
3. The Commission concludes there has been no substantial change in any material facts that would undermine the Commission's justification for approving the original PUD.

4. The Commission also concludes that the Applicant presented substantial evidence of good cause for the extension based on the criteria established by 11-Z DCMR § 705.2(c). Specifically, the Applicant provided substantial evidence that there are significant environmental constraints at the Property that are beyond the Applicant's reasonable control and which prevented the Applicant from beginning construction of the Project by November 20, 2018.
5. The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give great weight to the affected ANC's recommendations. In this case, ANC 6C received notice of the application and was given 30 days to respond. However, ANC 6C did not submit a report on the application, and therefore there is nothing to which the Commission can give great weight.
6. The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2001)), to give great weight to OP recommendations. The Commission has carefully considered the OP's recommendation in support of the application and agrees that approval of the requested two-year time extension is warranted.
7. Pursuant to 11-Z DCMR § 705.7, the Commission must hold a public hearing on a request for an extension of the validity of a PUD only if, in the determination of the Commission, there is a material factual conflict that has been generated by the parties to the PUD concerning any of the criteria set forth in 11-Z DCMR § 705.2. The Commission concludes that a hearing is not necessary for this request since there are not any material factual conflicts generated by the parties concerning any of the criteria set forth in 11-Z DCMR § 705.2.
8. The Commission concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.

DECISION

In consideration of the Findings of Fact and Conclusions of Law herein, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the application for a two-year extension of the time period in which to begin construction of the Project located at Square 772, Lots 803 and 804, such that construction must begin by November 20, 2020.

The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., ("Act") the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identify or expression, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, genetic

information, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

On November 19, 2018, upon the motion of Chairman Hood, as seconded by Commissioner Turnbull, the Zoning Commission **APPROVED** the application at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on December 28, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING