

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning



MEMORANDUM

To: Office of Documents and Administrative Issuance (via-email)
From: Sharon S. Schellin *S3*
Secretary to the Zoning Commission
Date: June 22, 2009
Re: Publication for the Office of Zoning

Please publish the following in the *D.C. Register* on June 26, 2009:

1. Z.C. Order No. 03-12I/03-13I (Case No. 03-12I/03-13I).

Attachment

ZONING COMMISSION
District of Columbia
CASE NO. *0312/03-13I*
EXHIBIT NO. *21*

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

ZONING COMMISSION ORDER NO. 03-12I/03-13I

Z.C. Case No. 03-12I/03-13I

Capper/Carrollsbury Venture, LLC and the D.C. Housing Authority

**(Application for Extension of Time for First-Stage Approval and Overall Phasing of PUD
and Extension of Time to File a Building Permit for Community Center)**

April 27, 2009

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held a public hearing on March 19, 2009, to consider an application from Capper Carrollsbury Venture, LLC and the District of Columbia Housing Authority ("DCHA") (collectively, the "Applicant"), for an extension of the first-stage approval and phasing of the overall planned unit development ("PUD"), as well as an extension of the time period in which to file a building permit for the construction of the community center in Square 881W. The Commission considered the extension request pursuant to Chapters 24 and 30 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR"). The public hearing was conducted in accordance with the provisions of 11 DCMR § 3022. For the reasons stated below, the Commission hereby approves extensions of the both the first-stage approval and the time for building the community center. The Commission determined that this extension request was properly before it under the provisions of § 2408.10 of the Zoning Regulations.

FINDINGS OF FACT

Background and Prior Capper Carrollsbury Approvals

1. Pursuant to Order No. 03-12/03-13, effective October 8, 2004, the Commission granted preliminary approval of the PUD for the following properties: Square 737, those portions of Lot 814 and Reservation 17A that lie south of the southern right-of-way line of I Street extended; Square 799, Lots 20, 27, 28, 29, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 803, 805, 807, 808, 809, 816, 818, 819, 825, 826, and 827; Square 800, Lots 25, 26, 27, and 28; Square 824, Lots 37, 38, and 39; Square N853, Lot 809; Square 880, Lot 24; Square W881, that part of Lot 800 within 132 feet of 5th Street; Square 882, Lot 76; and all of Squares 739, 767, 768, 769, 797, 798, 825, and S825.
2. The Commission also granted consolidated approval of the PUD for the following properties: Square 824, Lots 37, 38, and 39; Square S825, Lots 31, 32, and 33; Square 880, Lot 24; and all of Squares 797, 798, and 825. The Commission also granted a PUD-related map amendment to rezone the following properties from R-5-B to CR upon completion of the second-stage approval of the PUD: Square 769, that portion lying more than 145 feet from the northern right-of-way line of M Street (including a portion of Reservation 17D); Square 882, that portion lying south of the midpoint of the Square; and all of Squares 767 and 768 (including Reservations 17B and C).
3. The Commission has approved a number of applications since issuing Order No. 03-12/03-13 in order to implement the redevelopment, including:

- Order No. 03-12B/03-13B approving a minor modification to allow for construction of the multi-family building in Square 825S to a height of 48 feet, 3¾ inches;
- Order No. 03-12A/03-13A granting second-stage approval for Lots 44, 45, 46, 47, 48, 49, and 50 in Square 799; Lots 20, 25, 26, 27, 28, 816, 818, 819, and 820 in Square 800; and Square 881W and modifying portions of the parking requirements for the consolidated PUD approval;
- Order No. 03-12C/03-13C granting second-stage approval for parts of Lots 18, 20, and 21 in Square 769 to construct an office building, and Order No. 03-12F/03-13F approving a modification to increase the building's measured building height from 110 feet to 130 feet, and to increase the gross floor area of the building from 207,785 square feet to 234,182 square feet;
- Order No. 03-12D/03-13D approving a minor modification to change the designation of the multi-family building in Square 825S such that it is not required to be exclusively senior housing and requiring off-site parking; and
- Order No. 03-12E/03-13E approving a minor modification to allow for Squares 767, 768, and 882 to be used as temporary surface parking lot accessory to the new Nationals ballpark for a period of no more than five years.

The Current Application, Parties, and Hearing

4. On July 3, 2008, the Applicant filed an application seeking, among other things, an extension of the first-stage approval and overall phasing of the PUD and an extension of the period in which to file a building permit application and to commence construction on the community center in Square 881W, as well as a number of modifications to the conditions of the first-stage approval.
5. At its public meeting on September 8, 2008, the Commission instructed the Applicant to file a separate application for each of the requested actions being sought by the Applicant.
6. On September 18, 2008, the Applicant submitted separate application materials for: (1) second-stage review and approval of a PUD and modifications for property located in Squares 769 and 882 (Case No. 03-12G/03-13G); (2) approval to modify conditions of the first-stage approval related to remaining portions of the overall PUD to be developed in Squares 739, 767, and 768, and conditions relating to the number of parking spaces required for the multifamily building in Square 825S (Case No. 03-12H/03-13H); and (3) an extension of time for the validity of the first-stage PUD approval, and additional time to file a building permit application and commence construction of the community center in Square 881W (Case No. 03-12I/03-13I).

7. At is public meeting on October 20, 2008, the Commission voted to schedule a public hearing on all three applications.
8. On December 5, 2008, the Applicant submitted a letter to the Commission providing additional information on the requested extensions.
9. On March 10, 2009, DCHA submitted a letter to the Commission stating that it was unable to issue the bonds necessary to finance the infrastructure and community center in the development and requesting an extension of the first-stage PUD and the construction of the community center. DCHA indicated that the issuance of a Payment in Lieu of Taxes ("PILOT") bond is directly dependent on the development activity on the Capper Carrollsburg site, access to the capital markets and sufficient real estate tax revenues to pay debt service on the bonds. DCHA further indicated that the present economic downturn has dramatically impacted each of these components preventing DCHA from moving forward with the PILOT bond issuance at this time. Specifically:
 - the capital markets have been hard hit in this economic downturn. The mergers, consolidations, bankruptcies, and restructuring of key players in the capital markets have made access to capital for public infrastructure needs more difficult. According to DCHA's investment advisors, the market should see steady improvement this year which would then permit the Capper PILOT to become viable in either the first or second quarter of 2010;
 - the key to issuing a sizable PILOT bond lies in the construction of commercial properties at the site;
 - softening of the real estate market, generally, has impacted DCHA's ability to issue a PILOT bond. Faced with an increase in the vacancy rate for commercial space in the near Southeast quadrant of the District, DCHA's development partners have decided not to move forward with the commercial components without having first identified anchor tenants for the buildings. Although the first taxable residential component closed its financing in May 2008, there has been a dramatic downturn in the Low Income Housing Tax Credit market, the principal financing vehicle for the public housing units. Therefore, without relief in this area, construction of future residential components might be in jeopardy of slowing down considerably; and
 - equally important, access to financing from private lenders has become more difficult and more expensive. Moreover, government resources previously relied upon as gap financing such as Housing Production Trust funds, HOME, or CIP funds have been reduced considerably and the demand for such funds far exceeds the availability of such funds.

10. After proper notice, the Commission held a combined public hearing on the applications on March 19, 2009. The parties to the case were the Applicant, Advisory Neighborhood Commission ("ANC") 6D, the ANC within which the property is located, and ANC 6B, the adjacent ANC.
11. Three principal witnesses testified on the extension request on behalf of the Applicant at the March 19, 2009 public hearing, including David Cortiella, on behalf of the DCHA; Dan McCabe, on behalf of Capper Carrollsburg Venture, LLC; and Steven E. Sher, Director of Zoning and Land Use Services, Holland & Knight LLP, as an expert in land use and zoning. Based upon his professional experience, as evidenced by the resume submitted for the record, Mr. Sher was qualified by the Commission as an expert in his field.
12. The Office of Planning (OP") testified at the public hearing in support of the extension request.
13. ANC 6D submitted a letter and resolution (Exhibit 7) indicating that at a duly noticed public meeting on March 9, 2009, at which a quorum was present, ANC 6D voted 5-1-1 to support the application to extend the first-stage approval and phasing of the overall PUD, but only on the condition that the Commission require the Applicant to file a building permit application for the community center building in Square 881W by January 1, 2010, to commence construction of the community center by January 1, 2011, complete construction of the community center by July 1, 2012, and commit to provide 50 parking spaces at 600 L Street, S.E. for certified health care workers who care for seniors in 900 5th Street, S.E. and 410 M Street, S.E. until construction commences on 600 L Street, S.E.
14. ANC 6B submitted a letter (Exhibit 5) indicating that at its regularly called and properly noticed meeting on February 10, 2009, with a quorum present, ANC 6B voted unanimously (8-0) to support the time extension for the PUD to 2013, but opposed further delay in the construction of the community center building in Square 881W.
15. Kenan Jarboe, an ANC 6B Commissioner, testified at the public hearing in his individual capacity, and indicated that the ANC opposed the applications, but would remove its opposition if the Applicant agreed to construct the community center at the same time as the residential units.
16. Robert Siegel, an ANC 6D Commissioner, testified at the public hearing in his individual capacity, and indicated that he opposed the requested extension of time to start construction of the community center building, but supported the requested extension for the remaining portions of the development.

17. Ron McBee, an ANC 6D Commissioner, testified at the public hearing in his individual capacity, and indicated that he supported the requested increase in office building height and other modifications proposed under applications 03-12G/03-13G and 03-12H/03-13H, with the exception of the request to reduce the amount of parking, and that he opposed the requested extension of time to start construction of the community center building.
18. At its public meeting on April 27, 2009, the Commission voted to approve the extension of the first-stage PUD approval as requested, and to approve an extension of the time to file a building permit for the construction of the community center in Square 881W to July 1, 2010, with construction to begin by July 1, 2011.

The Requested Extensions

19. The Commission granted preliminary and consolidated approval for the Capper/Carrollsborg redevelopment in Order No. 03-12/03-13. Pursuant to Condition No. 27 of that order, the first-stage approval expired on October 8, 2008.
20. Pursuant to Order No. 03-12A/03-13A, the Commission granted second-stage approval for portions of Squares 799 and 800 and the community center in Square 881W. Condition No. 5 of that order provided that an application for a building permit to construct the community center must be filed no later than September 18, 2008, and that the construction of the community center must commence no later than September 18, 2009.
21. Condition No. 7 of Order No. 03-12A/03-13A further provided that applications for second-stage approvals for the developments located in Squares 739, 767, 768, 769, and 882 must be filed no later than October 31, 2008.
22. The Applicant requested an extension to Condition No. 27 of Order No. 03-12/03-13 to provide that the first-stage application is valid until December 31, 2013.
23. The Applicant also requested an extension to Condition No. 7 of Order No. 03-12A/03-13A to provide that applications for second-stage approvals for the remaining developments in Squares 739, 767, and 768 must be filed no later than December 31, 2013.
24. Finally, the Applicant requested an extension of Condition No. 5 of Order No. 03-12A/03-13A to provide that a building permit application for the community center in Square 881W must be filed no later than January 1, 2011, and that construction of the community center must commence no later than January 1, 2012.

25. The Applicant's extension request was served on all parties to the original PUD application, and all of those parties were allowed 30 days to respond to the request.
26. There has been no substantial change in any of the material facts upon which the Commission based its original approval of the PUD that would undermine the Commission's justifications for that approval.
27. The Applicant has been unable to secure sufficient financing to allow the project to move forward in accordance with the deadlines established by Condition No. 27 of Order No. 03-12/03-13 and Condition Nos. 5 and 7 of Order No. 03-12A/03-13A. The inability to obtain financing is due to economic and market conditions that are beyond the Applicant's reasonable control. The Applicant has proceeded diligently with the prior phases of the redevelopment and has taken a number of actions to move the project forward since the original approval of the PUD. As a consequence of the recent economic downturn, DCHA has been unable to issue the bonds necessary to finance the construction of the community center and the infrastructure needed to serve the development. The Commission, therefore, finds that extensions are necessary to allow the PUD to move forward.

Office of Planning Report

28. By report dated August 29, 2008, OP recommended that the Commission schedule a public hearing on the applications.
29. By report dated October 10, 2008, OP indicated that the Applicant submitted the information requested by the Commission at that September 8, 2008 public meeting, and that after reviewing the additional materials, OP continued to recommend that the Commission schedule a public hearing on the applications.
30. By report dated March 9, 2009, OP recommended approval of the requested extensions. OP indicated that the Applicant has made a logical case for why the slowdown in economic activity has lengthened the amount of time needed to construct the properties needed to generate the real estate taxes necessary for the issuance of a bond for PILOT or other bond issues.

Advisory Neighborhood Commissions

33. Both ANC 6D and ANC 6B opposed the Applicant's request for an extension of time for the community center building. However, the Applicant has submitted evidence indicating that, as a result of current economic conditions, DCHA has been unable to finance construction of the community center building. Not approving extensions would result in the community center and PUD approvals expiring, which would require the Applicant to file new PUD applications and reinitiate the PUD process, thus ultimately resulting in the project being constructed much later than the Applicant

currently proposes. The Commission concurs with the ANCs that the community center is an important element of the PUD, and therefore finds that the time extension for the community center should not be as long as that proposed by the Applicant.

CONCLUSIONS OF LAW

The Commission may extend the validity of a PUD for good cause shown upon a request made before the expiration of the approval, provided: (a) the request is served on all parties 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) there is good cause shown for the extension based on the criteria established in § 2408.11. (11 DCMR § 2408.10.) The three criteria are: (a) an inability to obtain sufficient project financing for the PUD, following an applicant's diligent good-faith efforts to obtain such financing, because of changes in economic and market conditions beyond the applicant's control; (b) an inability to secure all required governmental agency approvals for a PUD by the expiration date of the PUD order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control; or (c) 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 PUD order. (11 DCMR § 2408.11.)

The Commission concludes the extensions request complied with the notice requirements of 11 DCMR § 2408.10(a) by all parties having been served with a copy of the request allowing them 30 days to respond.

The Commission is required to 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 § 2408.11, and the hearing shall be limited to the specific and relevant evidentiary issues in dispute. (11 DCMR § 2408.12.) Although there was no material factual conflict with respect to whether the Applicant met the criteria set forth in § 2408.11, the Commission nonetheless held a combined public hearing on the extension request and the other related applications on March 19, 2009.

The Commission concludes that there has been no substantial change in any material facts that would undermine the Commission's justification for approving the original PUD.

The Commission further concludes that the Applicant presented substantial evidence of good cause for the extensions based on the criteria established by 11 DCMR § 2408.11(a), the Applicant's inability to obtain sufficient project financing for the PUD, following its diligent good-faith efforts to obtain such financing, because of changes in economic and market conditions beyond its control. The Commission recognizes the difficult financial circumstances faced by the Applicant and concludes that approval of the requested extension is appropriate for

the first-stage approval and phasing of the overall planned unit development. However, reiterating the importance of the community center as an element of the approved PUD, the Commission grants a shorter extension of time than requested by the application to seek a building permit and begin construction of the community center. The Commission notes that the Applicant previously received an extension of time for seeking a building permit for the community center from the original deadline of July 1, 2005, and that the ANCs opposed approval of another extension in this proceeding.

The Commission concludes that its decision is in the best interests of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.

The approval of the time extensions is not inconsistent with the Comprehensive Plan.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained herein, the Zoning Commission for the District of Columbia hereby orders **APPROVAL** of an extension of the first-stage PUD approval and an extension of the period of time in which to file an application for a building permit to construct the community center in Square 881W, and the following conditions in prior orders related to the PUD are hereby revised to read as follows:

1. Condition No. 27 of Order No. 03-12/03-13 shall read as follows:

The second-stage approval may be requested in one or more applications. If there is to be only one second-stage application, that application shall be filed within 18 months of the effective date of this Order. If there is to be more than one second-stage application, the first second-stage application shall be filed within 18 months of the effective date of this order and that application shall include a phasing plan for the remaining applications. Approval of the first-stage application shall be valid until December 31, 2013.

2. Condition No. 5 of Order No. 03-12A/03-13A shall read as follows:

The Applicants shall file an application for a building permit for the community center no later than July 1, 2010 and shall commence construction of the community center no later than July 1, 2011.

3. Condition No. 7 of Order No. 03-12A/03-13A shall read as follows:

The second-stage approval for the remaining portions of the project in Squares 739, 767, 768, and 769, which can be filed in phases, must be filed by December 31, 2013, not including Van Ness Elementary School which will proceed at the time determined by the Board of Education and the District Government. ~~will be~~

~~filed in phases. Phase II will consist of the M Street office building, which may be built out in two (2) sub-phases, along with the residential development in Square 882. The 250 M Street office building with first floor retail in Square 769 will be Phase III of the development. Phase IV of the development will include high-rise apartments in Squares 767, 768, 769, and 739. Development of the Van Ness Elementary School will occur during Phase V of the development. The applications for final approval of Phases II through III of the development must be filed by October 31, 2008. The applications for Phase IV of the development must be filed by December 31, 2013. The order of the phases may change subject to future market demands. Phase V is not under the control of the Applicants and will proceed at the time determined by the Board of Education and the District Government.~~

The Owner 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.* (the "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 identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, 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. The failure or refusal of the Owner to comply shall furnish grounds for the denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

For the reasons stated above, the Commission concludes that the Applicant has met its burden, and it is hereby **ORDERED** that extensions are **GRANTED** as stated herein.

On April 27, 2009, upon the motion of Chairman Hood, as seconded by Vice Chairman Jeffries, the Zoning Commission **ADOPTED** the Order to extend Condition No. 27 of Order No. 03-12/03/13 and Condition No. 7 of Order No. 03-12A/03-13A at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Gregory N. Jeffries, and Peter G. May to adopt; Michael G. Turnbull to adopt by absentee ballot; William W. Keating, not having participated, not voting).

On April 27, 2009, upon the motion of Commissioner May, as seconded by Chairman Hood, the Zoning Commission **ADOPTED** the Order to extend Condition No. 5 of Order No. 03-12A/03/13A at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Gregory N. Jeffries, and Peter G. May to adopt; Michael G. Turnbull to adopt by absentee ballot; William W. Keating, not having participated, not voting).

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In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register*; that is on June 26, 2009.