

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 03-12T/03-13T

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

Capper Carrollsburg Venture, LLC and the District of Columbia Housing Authority –
(PUD Time Extension @ Square 769, Lot 22)
September 12, 2016

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (the "Commission") was held on September 12, 2016. At the meeting, the Commission approved a request on behalf of Capper Carrollsburg Venture, LLC and the District of Columbia Housing Authority ("DCHA") (collectively the "Applicant") for a six-month extension of the time period in which to begin construction of the approved residential building on Square 769N (the "Residential Building"), which was preliminarily approved pursuant to Z.C. Order No. 03-12/03-13, and which received final approval pursuant to Z.C. Order No. 03-12G/03-13G, and was extended pursuant to Z.C. Order Nos. 03-12L/03-13L and 03-12P/03-13P. For the reasons stated below, the Commission hereby approves the extension request.

FINDINGS OF FACT

1. Pursuant to Z.C. Order No. 03-12/03-13, dated February 6, 2004 and effective on October 8, 2004, the Commission granted preliminary and consolidated approval of a Planned Unit Development ("PUD") for property located in the southeast quadrant of Washington, DC and generally bounded by Virginia Avenue to the north, 7th Street to the east, M Street to the south, and 2nd Street to the west. The property consists of approximately 927,000 square feet of land area, and the approved PUD includes a maximum of 1,747 residential units, 708,302 square feet of office space, 51,000 square feet of retail space, 1,780 off-street parking spaces, and a community center building.
2. Pursuant to Z.C. Order No. 03-12G/03-13G, dated June 8, 2009 and effective on August 14, 2009, the Commission granted second stage approval for the Residential Building on Square 769N. The Commission approved the Residential Building to have approximately 181,420 square feet of gross floor area, a maximum height of 110 feet, a minimum of 34 affordable dwelling units, and a minimum of 152 off-street parking spaces in the garage. Pursuant to Z.C. Order Nos. 03-12L/03-13L and 03-12P/03-13P, the Commission granted extensions for approval of the Residential Building, such that a building permit was required to be filed no later than August 14, 2015, with construction to begin no later than August 14, 2016.

3. By letter dated August 11, 2016, the Applicant filed a request for a six-month extension of the time period in which to begin construction of the Residential Building, such that construction must begin no later than February 14, 2017. The Applicant also requested a waiver from 11-Z DCMR § 705.5, since the Commission had already granted two extension approvals for the Residential Building.
4. Other than the Applicant, the only parties to the case were Advisory Neighborhood Commission ("ANC") 6B and ANC 6D. On August 11, 2016, the Applicant submitted a Certificate of Service indicating that the extension request was served on ANCs 6B and 6D.
5. The extension request was filed pursuant to 11- Z § DCMR § 705.2(c), which authorizes the grant of a PUD extension due to the inability to obtain sufficient project financing despite diligent good faith efforts, because of changes in economic and market conditions beyond the applicant's reasonable control. Subtitle Z § 705.2(c)(2) also authorizes the grant of a PUD extension due to an inability to secure all required governmental agency approvals because of delays in the governmental agency approval process that are beyond the applicant's reasonable control. In this case, the Applicant submitted evidence that it has been unable to begin construction of the Residential Building based on the factors set forth in both 11-Z DCMR § 705.2(c)(1) and (2).
6. Inability to Close on All Project Financing (11-Z DCMR § 705.2(c)(1)). The Applicant provided evidence that, despite its diligent, good faith efforts, it was unable to move forward with construction of the Residential Building prior to August 14, 2016, due to an inability to obtain complete project financing. The Residential Building is a public-private partnership between Capper Carrollsburg Venture, LLC and DCHA. The residential component of the overall project includes 80% of the units at market rate and 20% of the units reserved for households earning as little as 0% of the Area Median Income ("AMI"). Financing and ultimate delivery of the Residential Building utilizes best practices for mixed-income housing and unique and complex financing structures, including traditional nine percent Low Income Housing Tax Credits, Housing Production Trust Fund financing, market rate senior debt, and EB-5 preferred equity. Thus, financing the project requires coordination and approvals by the United States Department of Housing and Urban Development, DCHA, and multiple lenders and equity sources.
7. Financial closing for the Residential Building is scheduled for September 16, 2016. With respect to the project's affordable housing component, the Applicant indicated that by the time of the Commission's September 12th meeting, it will have secured a Letter of Commitment with the Department of Housing and Community Development, a Letter of Commitment for construction debt with Citibank, and a Letter of Commitment for tax credit equity with The Richman Group. With respect to the market rate component, the Applicant indicated that by the time of the Commission's meeting, it will have secured a Letter of Commitment for construction debt with Citibank, and executed a Memorandum of

Understanding for EB-5 preferred equity with Live in America, LLC. Of the \$14 million in EB-5 preferred equity, \$12.5 million is already secured and placed in escrow.

8. The Applicant indicated that the building permit authorizing construction of the Residential Building had not been issued by the date of filing this application. Issuance of a letter from the Department of Consumer and Regulatory Affairs (“DCRA”) confirming that the final building permit is available pending permit fee payment is a condition to closing for financing for the Residential Building. Once the building permit is issued and the Applicant closes on financing, the Applicant will be able to mobilize its construction team to break ground and begin construction of the Residential Building immediately.
9. Thus, despite the Applicant’s efforts, an additional six months is necessary to provide time for the Applicant to receive the final building permit, which will then enable the Applicant to close on the remaining financing and to commence construction.
10. Inability to Secure All Required Governmental Agency Approvals (11-Z DCMR § 705.2(c)(2)). The Applicant provided evidence of its inability to secure all required governmental agency approvals because of delays in the governmental agency approval process that are beyond the Applicant’s reasonable control. Since approval of the previous time extensions, the Applicant has worked diligently to move forward with development of the Residential Building. The Applicant submitted all of the required building permit application materials prior to August 14, 2015, as required by Z.C. Order No. 03-12P/03-13P. However, the Applicant has not yet begun construction due to the extensive and lengthy processes involved in obtaining the required building permits from DCRA and the scope of work necessary in order to address all permitting comments and requirements. Further, the stormwater management requirements for the Residential Building are unique and require much more review and coordination than traditional stormwater management agreements with the Department of Energy and the Environment (“DOEE”). Moreover, the overall development of Square 769 includes many innovative financing approaches for providing a very high level of affordable public housing (20% of units) serving the lowest income households (as low as 0% of the AMI) alongside market rate units.
11. The Applicant submitted evidence that it has taken many steps to move forward with construction of the Residential Building. As set forth in the affidavit of Victoria Davis, the Applicant has already submitted the following permit applications: (Exhibit [“Ex.”] 1F)
 - a. On July 15, 2015, the Applicant submitted the project building plans for Architectural/Structural, Mechanical, Plumbing, Electrical, Elevator, Fire and Life Safety IBTS for Third Party Review. IBTS’s approval letter was issued December 30, 2105;
 - b. On August 1, 2015, the Applicant submitted a building permit application to DCRA (Permit No. B1606323), which received approval from DC Water, Structural, and the District Department of Transportation (“DDOT”) for the Traffic Control Plan.

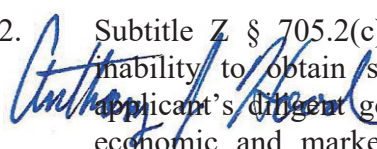
Comments were received from Green Review on July 15, 2016, and from Zoning on August 5, 2016. DOEE is presently undergoing its stormwater review;

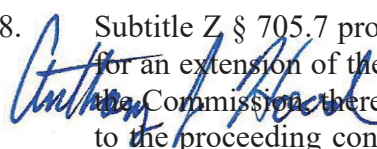
- c. On November 10, 2015, the Applicant attended a DDOT Preliminary Design Review Meeting for the design and construction of permanent public space infrastructure;
 - d. On July 22, 2016, the Applicant submitted a sheeting and shoring permit application to DCRA and DC Water (Permit No. SH1600067), which is presently under review with both agencies; and
 - e. DDOT approved a Public Space Occupancy Permit (Permit No. PA10326184), effective August 8, 2016, granting approval to install fencing, erosion and sediment control measures, and construction entrances.
12. In addition to submitting permit applications, the Applicant has also engaged and executed proposals with the following consultants for development of the Residential Building:
- a. Third party plan review services for the design of the Residential Building in accordance with DCMR Title 12 Construction Code and standards (IBTS), dated 02/06/15;
 - b. Civil engineering, surveying and permitting (VIKA Capitol), dated 03/04/2015;
 - c. Landscape architecture (Studio 39), dated 05/16/2015;
 - d. Architecture for Schematic Design, Design Development Documents, Bid Set Construction Documents, Final Construction Documents, Construction Administration, and Construction Observation services (Lessard Design), dated 10/05/2015;
 - e. Mechanical, electrical and plumbing (Jordan & Skala Engineers under the oversight of Lessard Design), dated 10/05/2015;
 - f. Structural engineering (Tadger Cohen Edelson under the oversight of Lessard Design), dated 10/5/2015;
 - g. Interior Design for Schematic Design, Design Development, Construction Documents, Construction Observation, Furniture Procurement and Installation services (Hartman Design Group), dated 11/13/2015;
 - h. Environmental Site Assessment Phase I and II (ECS), dated 05/05/2014 and 05/10/2016, respectively;

- i. Preparation of engineering shop drawings for sheeting and underpinning (Steele Foundation), dated 6/10/2016;
 - j. Preparation of engineering shop drawings for the design, fabrication and installation of deep well dewatering system (Moretrench), dated 06/21/2016; and
 - k. Green building and energy modeling (Jordan & Skala Engineers, under the oversight of Lessard Design), dated 6/27/2016.
13. The Applicant also indicated that it has taken extensive environmental and geotechnical analysis, including commissioning the following consultants to produce the following reports:
- a. ECS issued a Phase 1 Environmental Site Assessment (“ESA”) Report, dated 05/28/2014, and an additional Phase 1 ESA Report on 03/09/2016;
 - b. ECS issued a Report of Subsurface Exploration and Geotechnical Engineering Analysis for the project dated 04/17/2015; and
 - c. ECS issued a Phase II ESA Report dated 07/07/2016.
14. The Applicant also selected Bozzuto Construction Company for preconstruction services and has negotiated the Gross Maximum Price Contract, which will be executed at the time of the overall project closing.
15. The Applicant indicated its commitment to moving forward with construction of the Residential Building. The Applicant has already invested more than \$1.8 million for legal, architectural, engineering, financing, permitting, and other consulting fees, and has committed another \$725,000.00 of funding to complete pre-development work and prepare for construction. Thus, there is no financial incentive for the Applicant to not move forward with this application as planned.
16. The Office of Planning ("OP") submitted a report dated September 2, 2016 (Ex. 4), indicating that the Applicant met the standards of 11-Z § DCMR § 705. The OP report asserted that the Applicant demonstrated that construction of the Residential Building is imminent, awaiting only the finalization of certain stormwater agreements that will enable the closing of the remaining financing commitments. The OP report also found that the requested waiver of the two-extension limit set forth in Subtitle Z § 705.5 was reasonable.
17. The Single Member District Commissioner for ANC 6D07 submitted a letter dated September 7, 2016, which indicated support for the application. (Ex. 5.)

18. Because the Applicant demonstrated good cause with substantial evidence pursuant to Subtitle Z § 705.2, the Commission finds that the request for a six-month time extension to begin construction of the Residential Building should be granted.
19. Pursuant to Subtitle Z § 101.9, the Commission may, for good cause shown, waive any of the provisions of the subtitle if, in the judgment of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. The Commission also finds that the Applicant's request for a waiver of the two-extension limit set forth in Subtitle Z § 705.5 is reasonable because: (i) the Residential Building was approved prior to the adoption of the limitation and had already received two time extensions; (ii) the Applicant already filed a building permit application for the approved building; and (iii) the extension requested herein is only for six months in order to obtain the final building permit, close on financing, and begin construction. Thus, good cause exists to waive Subtitle Z § 705.5. Neither ANC 6B nor ANC 6D submitted written reports pertaining to the request, therefore the Commission has no reason to believe either ANC's rights would be prejudiced by the waiver. The Commission further concludes that no law prohibits the grant of the waiver.

CONCLUSIONS OF LAW

1. Pursuant to Subtitle Z § 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, provided: (a) the extension 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 of the material facts upon which the Commission based its original approval of the application that would undermine the Commission's justification for approving the original application; and (c) the applicant demonstrates with substantial evidence that there is good cause for such extension as provided in Subtitle Z § 705.2(c).
2.  Subtitle Z § 705.2(c) provides the following criteria for good cause shown: (1) 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; (2) 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 (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 order.
3. The Commission concludes that the Applicant complied with the notice requirements of Subtitle Z § 705.2(a) by serving all parties with a copy of the application and allowing them 30 days to respond.

4. The Commission concludes that there has been no substantial change in any of the material facts upon which the Commission based its original approval that would undermine the Commission's justification for approving the original PUD.
5. The Commission is required under D.C. Official Code § 1-309.10(d)(3)(A) to give great weight to the issues and concerns raised in the recommendations the affected ANCs. Neither ANC 6B nor ANC 6D submitted written reports. The Commission notes that by letter dated September 7, 2016, the Single Member District representative for ANC 6D07 submitted a letter supporting the six-month extension request. (Ex. 5.)
6. The Commission is required under D.C. Official Code § 6-623.04 to give great weight to OP recommendations. OP submitted a report indicating that the Applicant met the standards of Subtitle Z § 705, and therefore recommended that the Commission approve a six-month time extension. The Commission has given OP's recommendation great weight in approving this application.
7. The Commission finds that the Applicant presented substantial evidence of good cause for the extension based on the criteria established by Subtitle Z § 705.2(c). Specifically, the Applicant has been unable to obtain all project financing because some of the financing is dependent on the issuance of final building permits. However, the Applicant has demonstrated that commitments to financing have been secured and is scheduled to close on all project financing on September 16, 2016. In addition, the Applicant has been unable to secure all required government agency approvals, due largely to the fact that the stormwater management requirements for the Residential Building are unique and require more review and coordination than traditional stormwater management agreements with DOEE. The Commission therefore concludes that granting a six-year extension (i.e., until February 14, 2017) is appropriate in this case and necessary to allow the Applicant to move forward with development of the Residential Building.
8.  Subtitle Z § 705.7 provides that the Commission must hold a public hearing on a request for an extension of the validity of an application approval only if, in the determination of the Commission, there is a material factual conflict that has been generated by the parties to the proceeding concerning any of the criteria in Subtitle Z § 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 Subtitle Z § 705.2.
9. Pursuant to Subtitle Z § 705.5, the Commission grants a waiver of the two-year extension limit to allow the requested six-month extension of time to begin construction on the Residential Building.
10. 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 ZR16.

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 Z.C. Case No. 03-12T/03-13T, such that construction of the Residential Building in Square 769 must begin no later than February 14, 2017.

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. The failure or refusal of the Applicant 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.

On September 12, 2016, upon the motion made by Commissioner Turnbull, as seconded by Vice Chairman Miller, the Zoning Commission **APPROVED** the application and **ADOPTED** this Order at its public meeting by a vote of **4-0-1** (Anthony. J. Hood, Robert E. Miller, Peter G. May, and Michael G. Turnbull to approve and adopt; third Mayoral Appointee position vacant, not voting).

In accordance with the provisions of Subtitle Z § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on October 21, 2016.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING