

Government of the District of Columbia
Office of Zoning



Z C CASE NO 05-38A

DEC 31 2008

As Secretary to the Commission, I hereby certify that on _____ copies of this Z C Order No 05-38A were mailed first class, postage prepaid or sent by inter-office government mail to the following

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ATTESTED BY

Sharon S Schellin
Secretary to the Zoning Commission
Office of Zoning

ZONING COMMISSION
District of Columbia

CASE NO

05-38A

EXHIBIT NO

28

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO 05-38A

Z C Case No 05-38A

Modification to a Consolidated Planned Unit Development
(Marina View Trustee, LLC)

December 8, 2008

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held a public hearing on September 29, 2008, to consider an application from Marina View Trustee, LLC ("Applicant") seeking approval of a modification request of an approved planned unit development ("PUD") and related Zoning Map Amendment for Lots 50 and 853 in Square 499 (the "Property"). The original PUD Order was approved in Z C Case No 05-38 (which became effective on October 26, 2007). The public hearing was conducted in accordance with the provisions of 11 DCMR § 3022.

At its public meeting on October 20, 2008, the Commission took proposed action by a vote of 3-0-2 to approve the modification application.

The proposed action of the Commission was referred to the National Capital Planning Commission ("NCPC") pursuant to § 492 of the District Charter. The NCPC Executive Director, through a Delegated Action dated November 6, 2008, found that the proposed modification of the PUD would not be inconsistent with the Comprehensive Plan nor would it have any adverse impact on any federal interest.

The Commission took final action to approve the application on December 8, 2008, by a vote of 3-0-2.

FINDINGS OF FACT

PROCEDURAL HISTORY

- 1 By Z C Order No 05-38, which became final and effective on October 26, 2007 through its publication in the *D C Register* (the "Order"), the Commission approved a PUD for the Property. The Applicant recorded the PUD covenant in the land records on March 18, 2008. Two existing structures, designed by I M Pei, occupy the Property (the "Pei Towers"). Surface parking lots occupy the northern and southern ends of the Property. The Order approved the construction of two new residential buildings to be constructed on the existing surface parking lots, with ground floor retail uses in the new south building along M Street. A mixture of rental and for-sale units were anticipated in the

- PUD The Order also approved a large green space in the center of the Property (the “Great Lawn”) and two new “vest pocket” parks located between the Pe1 Towers and the new residential buildings. On the east end of the Great Lawn, an amenities building (“Amenities Building”) with fitness facilities, recreation space, and a large swimming pool with lap lanes was approved. Financial contributions to Jefferson Middle School, Amidon Elementary School, and Bowen Elementary School were part of the original community amenities package. The Property was rezoned from R-5-D to C-3-C in conjunction with the PUD (Exhibit 3)
- 2 On June 5, 2008, the Applicant filed a request for a modification of the PUD with the Commission, pursuant to its consent calendar provisions. The Applicant requested modifications to the project, which included (i) refinements of some of the façade and roof structures of the various buildings, (ii) removal of the for-sale residential component, (iii) relocation of a pool from inside the Amenities Building to outside adjacent to the Great Lawn, (iv) an increase in the maximum number of units in the project to 580 (an increase of less than 2%) and (v) modifications to the community amenities package. On June 24, 2008, the Applicant filed a supplemental submission with the Commission that included a chart outlining the conditions of the Order that will be modified with the approval of the modification application (Exhibits 1, 7)
 - 3 At the Commission’s July 14, 2008 public meeting, the Commission removed the minor modification request from its consent calendar, and instead set it down for a public hearing. The Commission noted that the hearing would be limited to evaluating only the proposed modifications (Transcript of Z C Public Meeting, July 14, 2008, pp 141, 142) The public hearing was subsequently scheduled for September 29, 2008
 - 4 Tiber Island Cooperative Homes, Inc (“Tiber Island”) and Paul Greenberg submitted a request for party status dated September 12, 2008. The letter stated that Mr. Greenberg is a cooperative owner of Tiber Island, and that the PUD is located within 200 feet of Tiber Island. In the September 12, 2008 submission, Tiber Island and Paul Greenberg also requested that the Commission dismiss or deny the modification request since an appeal of Z C Order No 05-38 is pending with the D C Court of Appeals (Exhibit 15)
 - 5 On September 22, 2008, the Applicant filed its opposition to the request for party status of Tiber Island and Paul Greenberg. The Applicant noted that the requests of Tiber Island and Paul Greenberg failed to provide any factual basis for how they are uniquely affected by the proposed modifications, other than they are located within 200 feet of the PUD site. In its September 22, 2008, submission to the Commission, the Applicant also filed its opposition to the assertion that the public hearing on the modifications application must be dismissed or denied while an appeal of the Order is pending with the D C Court of Appeals. The Applicant noted that Tiber Island’s assertion that the Order is not final is clearly incorrect as evidenced by the clear and unambiguous language of the Zoning Regulations and the District of Columbia’s Administrative Procedures Act (“APA”) (Exhibit 17)

- 6 At the September 29, 2008 public hearing, the Commission denied the request for party status of Tiber Island and Paul Greenberg based on the failure to provide evidence of the satisfaction of 11 DCMR § 3022 3, particularly 11 DCMR § 3022 3(f)(5) In addition, the Commission denied the request to dismiss or deny the modification request for reasons explained in the conclusions of law below Therefore, the Commission proceeded with the public hearing (Transcript of Z C Public Hearing, September 29, 2008, pp 9, 11)
- 7 At the close of the September 29, 2008 public hearing, the Commission requested additional information regarding the Applicant's benefits and amenities package, specifically whether the Applicant would consider increasing its monetary proffer to renovate the Town Center West Park and more information on the former proffer to provide a discount to residents interested in buying a condominium in the project (Transcript of Z C Public Hearing, September 29, 2008, pp 56-59)
- 8 The Applicant filed its post-hearing submission on October 14, 2008, sufficiently addressing each of the issues raised by the Commission Specifically, the Applicant agreed to reserve an additional \$71,500 in contingency funds to guarantee the renovation of the Town Center West Park The Applicant will use the additional funds to complete the proposed work in the event the \$178,500 reserved for renovating the Town Center West Park is not sufficient, increasing the contribution potentially to a total of \$250,000 The Applicant capped the contribution for the renovation of the Town Center West Park at \$250,000 (Exhibit 24)

PUD MODIFICATION APPLICATION

- 9 The proposed modifications to the façades and roof structures of the existing and proposed buildings, and the relocation of the pool from inside the Amenities Building are the result of further study of the mechanical systems in the existing Pei Buildings, refinements of the façade treatments for all of the buildings, and additional thought regarding the proposed use of the Amenities Building
 - The modification application proposed a new façade treatment for the east elevations of the new south and north residential towers and the east and west elevations of the Amenities Building The east elevation façades of these buildings face the new service road/alley separating the project from the Waterside Mall development On the new south and north residential towers, the Applicant is reducing the number of balconies (replacing with bay windows) and extending glass bays, distinguishing the east façade from the other elevations All of the residential units on the east side of these buildings will still have a balcony facing either K Street, M Street, or the courtyards shared with the Pei Buildings The Applicant will continue to use the same quality materials on the east façade as it is using on the other elevations of the buildings

- The elevation on the east side of the Amenities Building has been refined to include more brick and less glass area. The west elevation of the Amenities Building has been adjusted to reflect the revised interior layout of the building (including the removal of the pool), but remains true to the intent of the approved PUD design.
- The Applicant is retaining the existing layout of units in the South Pei Building by eliminating the additional elevator which was originally approved. The Applicant has eliminated recreation space on the rooftops of the Pei Buildings, due to the restriction on access to the roof and has increased the area of the green roof. The project continues to feature an abundance of outdoor recreation space. Based on further study of the necessary mechanical structures for the new north and south residential towers, the Applicant has made minor adjustments to the roof structures on the new buildings creating a more refined treatment of the roof structures, recreational spaces, and the green roof areas.
- The Applicant is moving the pool from inside the Amenities Building to the outside of the Amenities Building, adjacent to the Great Lawn. Based on feedback from residents of Marina View Towers and experience with other projects, the Applicant believes that an outdoor pool better complements the social aspect of the Great Lawn and is more beneficial to the tenants during the summer than an indoor pool. The District of Columbia State Historic Preservation Officer has indicated that he has no objection to this proposed modification.
- Based on further study of the lobbies of the Pei Buildings, the Applicant has decided to maintain the lobby plan configuration similar to that which was originally designed. The Applicant will install 10' X 10' glass panels on the ground floor of the Pei Buildings to more closely follow Mr. Pei's original design. The District of Columbia State Historic Preservation Officer has indicated that he has no objection to this proposed modification.
- The maximum number of units provided in the project will increase to 580, which is within the Zoning Administrator's authority to approve pursuant to 11 DCMR § 2409.6(b). However, the Applicant is requesting that the Commission approve up to 580 residential units for this project. The Applicant is not requesting an increase in the number of parking spaces originally approved (556 residential spaces, eight retail spaces, and five spaces for a car-sharing service). The Applicant will continue to make one bike parking space available for each residential unit (Exhibit 1).

- 10 The approved PUD contemplated a for-sale condominium component to the project. The Applicant noted that given the current state of the residential condominium market in the District of Columbia, the Applicant does not believe a condominium project is financially viable at this time. The modification application requests permission from the Commission to replace the for-sale component of the project with rental units at this time, while still reserving the possibility of selling condominium units in the future, as a condominium regime has been established for this project. During the initial PUD application, the Applicant engaged in an extensive dialogue process with the Marina View Towers tenants in order to provide those tenants with a variety of residential options. The Applicant addressed the needs of the tenants by providing three programs (i) a condominium discount purchase program, (ii) a rental discount program, or (iii) a financial compensation program. As a result of the removal of the for-sale component of the project, the Applicant is not able to provide the condominium discount purchase program. Representatives of the Applicant have addressed the issue of the removal of the condominium discount program with the Marina View Towers Tenants Association and the Tenants Association is supportive of the proposed minor modification application. There were ultimately 19 Marina View Towers tenants that chose to participate in the condominium discount purchase program. All of those tenants agreed to participate in the rental discount program or the financial compensation program (Exhibit 1).
- 11 The condominium discount purchase program was initially valued at \$3,240,000, based on a condominium sales price of \$425/per square foot offered to the Marina View Towers residents. However, the Applicant noted that this valuation was based on an estimated market rate condominium value of \$525/square foot. At the time of the public hearing the estimated market rate condominium value was only approximately \$450/square foot. Using the same factors as the original calculation of the value of the condominium discount purchase program with the new discount of \$25 per square foot, results in a total value of only \$810,000 (648 s f (average unit size) X \$25 (discount price per s f) X 50 (estimated number of participants in the program) compared to \$3,240,000. If the calculation is based on the actual number of Marina View Towers residents that opted to enter into that program, the value is only \$307,800 (648 X \$25 X 19) (Exhibit 1).
- 12 The Applicant proposed the following new community amenities as part of the modification application
- Town Center West Park The original PUD approval required that the Applicant engage the original designers of the Town Center West Park, Wallace Roberts & Todd ("WRT"), to assess the current condition of the park and recommend steps to utilize the park as a true community amenity. WRT prepared the required study and it was submitted to the Commission on January 7, 2008.

In consideration of the approval of the modification application, the Applicant will pay for and undertake the renovations for the Town Center West Park

outlined in the WRT study, up to a value of \$250,000 (\$178,500 for the proposed work with contingency funds of up to \$71,500) This work will be completed prior to the issuance of a certificate of occupancy for the new South Tower

- Shuttle-Bug Proposal The Applicant will make a financial contribution of \$50,000 to the Deputy Mayor for Planning and Economic Development s (“DMPED”) Shuttle-Bug proposal The purpose of the Shuttle-Bug is to provide a safe and effective transportation system around the “SuperBlock” (which is bound by 4th, M, K, and 6th Streets, S W) while construction activity occurs on the Marina View, Waterfront Associates, and Town Center East properties
- Reallocation of Financial Contributions Due to Closure of Bowen Elementary School Based on discussions with the ANC 6D Commissioners, the Applicant agreed to reallocate the \$17,000 financial contribution that was originally intended for Bowen Elementary School, as that School closed on June 30, 2008 Jefferson Middle School will receive \$22,000 for enhancement of the school’s computer and technological development capabilities, Amidon Elementary School will receive \$22,000 for renovation of its library, and the Friends of the Southwest Library will receive \$22,000 for expansion of the resource collection The contributions to Jefferson Middle School and Amidon Elementary School will be made to the Student Funds of each school (Exhibits 1, 24)

GOVERNMENT REPORTS

- 13 In its September 19, 2008 report, the Office of Planning (“OP”) noted that it was not opposed to the changes to the design of the buildings or landscape and recommended their approval In regard to the amenity items, OP noted that ‘a determination by the Commission of an appropriate valuation for the original package which the Commission used to weigh its decision for approval of the PUD, is needed to determine the adequacy of replacement items If the Commission accepts the Applicant s determination of the valuation of the original amenity package as outlined in its modification request, then the proposed modifications to the package appear to represent a generally acceptable replacement package, (Exhibit 16)

ADVISORY NEIGHBORHOOD COMMISSION REPORT

- 14 On June 9, 2008, Advisory Neighborhood Commission (“ANC”) 6D voted 5-1-1 to support the modification application The ANC noted that

The changes proposed by the Applicant follow the high standards of their earlier plans The ANC feels that the changes in the building’s façades and roofs, the moving of the pool to the outside, and the changes in the lobbies of the Pei buildings will not significantly change the project’s design We understand the

market conditions that have lead the Applicant to eliminate, for now, the “for sale” units in the project, but believe that the arrangement worked out with the current tenants is satisfactory

We also believe that modifications made to the community benefits agreement that is a part of the PUD will enhance the project’s relevance for the Southwest community The restoration of the charming West Town Center Park will be a tremendous asset, and our local schools and the Friends of the Southwest Library will benefit more substantially from the Applicant’s contributions We are particularly pleased that the Applicant has offered a contribution toward the establishment of the Shuttle Bug, a proposed bus that will transport local residents around the major construction now taking place north of M Street (Exhibit 20)

PERSONS IN OPPOSITION

- 15 Michael McGovern provided letters from Tiber Island and Paul Greenberg evidencing his authority to represent them before the Commission at the public hearing (Exhibits 21, 22) At the public hearing, Mr McGovern testified that Tiber Island and Paul Greenberg should have been awarded party status in this case because they were property owners within 200 feet of the Property and because they had been awarded party status in a similar case In addition, Mr McGovern testified that the Commission should not approve this modification application while the appeal of the Order is still pending before the D C Court of Appeals (Transcript of Z C Public Hearing, September 29, 2008, pp 44-51)

CONCLUSIONS OF LAW

1 Requests for Party Status

The Commission does not find the fact that Tiber Island and Mr Greenberg live within 200 feet of the Property alone is sufficient to satisfy the requirements for party status Tiber Island and Mr Greenberg failed to provide any further information as to how their interests would likely be more significantly, distinctively, or uniquely affected in character or kind than those of other persons in the general public Therefore, the Commission concludes that Tiber Island and Paul Greenberg failed to satisfy the requirements for party status enumerated in 11 DCMR § 3022 3(f)(5) The Commission notes that this decision is consistent with its decision to deny Tiber Island and Mr Greenberg party status in Z C Case No 05-38 that the Applicant seeks to modify through this case

2 Motion to Dismiss

Tiber Island and Mr Greenberg, through their September 12, 2008 letter also stated their belief that the Commission could not consider the modification request until after the Court of Appeals had ruled on their appeal of Z C Order No 05-38 Although this statement was not presented as a motion to the Commission, and the Commission would not consider a motion unless it was made by a party, the Commission nonetheless states its position on the issue as if it were a properly presented motion to dismiss the modification application

The Zoning Regulations clearly enumerate when a written order becomes effective and final in § 3028 9, which states

[a] written order setting forth a final action shall become final and effective upon publication in the *DC Register*, unless the Commission specifies a later effective date An amendment to the Zoning Map approved in connection with an application for a planned unit development shall, however, become effective only upon completion of the process required by Chapter 24 of this title, and upon filing with the District of Columbia a covenant ensuring compliance with the approved plans

Both of the prerequisites to establishing that Z C Order No 05-38 is final and effective have been met The Order was published in the *D C Register* on October 26, 2007 at 54 *DCR* 10419 The PUD covenant was recorded in the land records on March 18, 2008 The Order is, therefore, final and effective The filing of a petition for review of Z C Order 05 38 did not change the status of the Order

Section 11(a) of the District of Columbia Administrative Procedures Act, effective October 21, 1968 (82 Stat 1209, D C Official Code § 2-510(a)) is clear that the “[f]iling of a petition for review shall not in itself stay enforcement of the order or decision of the Mayor or agency as the case may be” The District of Columbia Court of Appeals stated “[t]he plain language of D C Code Section 1-1510(a)¹ could not be clearer It states without any ambiguity, that the filing of a petition for review in this court ‘shall not’ operate to stay the effect of an agency’s order” *French v D C Board of Zoning Adjustment* 658 A 2d 1023, 1030-1031 (D C 1995)

Tiber Island has not filed with the Court a motion to stay the effectiveness of Z C Order No 05-38 More importantly, the Court has not granted such a stay Accordingly, Z C Order No 05-38 is final and effective and there is no impediment to the Zoning Commission making a decision on the modification application

¹ This section was later re codified as D C Official Code § 2 510(a)

3 The Merits

Upon consideration of the record, the Commission concludes that the proposed modification is consistent with the intent of the previously approved PUD in Z C Order No 05-38. Further, the Commission concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purposes of the Zoning Regulations. The Commission concludes that the Applicant is not receiving a great financial windfall by removing the condominium discount purchase program. The additional financial contributions for the Shuttle-Bug, the renovation and rehabilitation of the Town Center West Park, and the retention of the condominium discount purchase program for the 19 persons that signed up for the original program are significant amenities for the PUD that counter-balance the elimination of the discount program.

Approval of the modification is not inconsistent with the Comprehensive Plan. The modified PUD will continue to create new residential units, including workforce affordable housing, retain existing residents, and provide retail opportunities in place of existing surface parking lots. In accordance with D C Official Code §1-309 10(d), the Commission must give great weight to the issues and concerns of the affected ANC. ANC 6D voted to support the modification application.

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) to give great weight to OP recommendations (as reflected in ¶ 13 above). OP recommended approval of the modification request and the Commission concurs in its recommendation.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of the application for modification of the approved PUD. Condition Nos 1, 2, 4, 5, 6, and 13 of Z C Order No 05-38 are revised to read as follows (all other conditions remain in effect)

- 1 The PUD project shall be developed in accordance with the plans and materials submitted by the Applicant marked as Exhibits 2, 20, 21, 26, 32, 53, 54, 55, 56, and 69 of the record in Z C Case No 05-38 and Exhibit 1 in Z C Case No 05-38A, as modified by the guidelines, conditions and standards of this order.
- 2 The Applicant will make the following financial contributions, prior to the issuance of a building permit for the new south building on the Property.

- Jefferson Middle School The Applicant will make a financial contribution of \$22,000 to Jefferson Junior High School to be used for enhancement of the school's computer and technological development capabilities
 - Amidon Elementary School The Applicant will make a financial contribution of \$22,000 to Amidon Elementary School for renovation of its library
 - Friends of the Southwest Library The Applicant will make a financial contribution of \$22,000 to the Friends of the Southwest Library to be used to expand their resource collection
 - Study of the Potential Renovation of the Town Center West Park The Applicant will engage the original designers of this park (Wallace Roberts Todd) to assess the current condition of the park and recommend steps to utilize the park as a true community amenity at a cost of \$15,000 The Applicant will pay for and undertake the renovations for the Town Center West Park outlined in the WRT study, up to a value of \$250,000 (\$178,500 for the proposed work with contingency funds of up to \$71,500) This work will be completed prior to the issuance of a certificate of occupancy for the new south residential tower
 - Shuttle-Bug Proposal The Applicant will make a financial contribution of \$50,000 to the DMPED Shuttle-Bug proposal as described in paragraph 12 in the Findings of Fact
- 4 If condominiums are ultimately sold in the project, the 19 tenants that chose to participate in the condominium discount purchase program will have an opportunity to return to Marina View within three years of the date of the first sale of a condominium unit and purchase a condominium unit at a 20% discount
- 5 Prior to the issuance of a certificate of occupancy for the new south residential tower, the Applicant will establish a program providing existing Marina View Towers tenants the opportunity to rent a newly renovated apartment in the project at no additional cost The monthly rental rate for the tenant will increase only in connection with the annual consumer price index increases provided the tenant chooses to stay in a similarly sized unit
- 6 Prior to the issuance of a certificate of occupancy for the new south residential tower the Applicant shall establish a transportation demand management program that will include the following
- Coordination with a local car-sharing vehicle service to reserve five parking spaces for residents and visitors of this project,
 - Provide a one-time membership fee subsidy of \$35 per residential unit for residents to join a local car-sharing service,


- Providing all new residents upon move-in, a complimentary Smart Trip card with \$20 Metro fare to encourage the use of mass transit,
 - Providing an on-site business center to provide residents access to a copier, facsimile machine, and internet services,
 - Providing a secure bicycle storage space for each residential unit, and
 - Designating a member of building management as a point of contact who is responsible for coordinating and implementing transportation demand management incentives
- 13 The PUD shall be valid for a period of two (2) years from the effective date of this Order. Within such time, an application must be filed for a building permit for the construction or renovation of one of the residential buildings as specified in 11 DCMR §§ 2404.8 and 2409.1, the filing of the building permit application will vest the Zoning Commission Order. An application for the final building permit completing the development of the approved PUD project must be filed within seven (7) years of the issuance of the final certificate of occupancy for the first building.

For the reasons stated above, the Commission concludes that the applicant has met the burden, it is hereby **ORDERED** that the application be **GRANTED**.


On October 20, 2008, the Zoning Commission **APPROVED** the application by a vote of **3-0-2** (Peter G. May, Michael G. Turnbull, and Anthony J. Hood to approve, Gregory N. Jeffries, not having participated, not voting, Curtis L. Etherly, Jr., not present, not voting).

The Order was **ADOPTED** by the Zoning Commission at its public meeting on December 8, 2008 by a vote of **3-0-2** (Anthony J. Hood, Michael G. Turnbull, and Peter G. May to adopt, Gregory N. Jeffries, not having participated, not voting, the third Mayoral appointee position vacant not voting).

In accordance with the provisions of 11 DCMR 3028, this Order shall become final and effective upon publication in the D.C. Register on JAN 2 2009



ANTHONY J HOOD
CHAIRMAN
ZONING COMMISSION



RICHARD S. NERO, JR
ACTING DIRECTOR
OFFICE OF ZONING