

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning



MEMORANDUM

To: Office of Documents and Administrative Issuance (via-email)
From: Sharon S. Schellin
Secretary to the Zoning Commission
Date: August 24, 2009
Re: Publication for the Office of Zoning

Please publish the following in the *D.C. Register* on August 28, 2009:

1. Z.C. Order No. 05-17C/05-324C (Case No. 05-17C/05-32C);
2. Z.C. Order No. 06-29A (Case No. 06-29A);
- ✓ 3. Z.C. Order No. 06-31B (Case No. 06-31B); and
4. Z.C. Order No. 06-43A (Case No. 06-43A).

Attachment

ZONING COMMISSION
District of Columbia

CASE NO. 06-31B
EXHIBIT NO. 9

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 06-31B
Z.C. Case No. 06-31B
(Two-Year Time Extension for PUD at 5220 Wisconsin Avenue, N.W.)
John Akridge Development Company – Square 1657, Lots 810, 811, and 812
July 27, 2009

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (the "Commission") was held on July 27, 2009. At the meeting, the Commission approved a request from the John Akridge Development Company (the "Applicant") for a time extension for an approved consolidated planned unit development ("PUD") and related map amendment for property consisting of Lots 810, 811, and 812 in Square 1657 (the "Property"), pursuant to Chapters 1 and 24 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR").

FINDINGS OF FACT

1. By Zoning Commission Order No. 06-31 ("Order No. 06-31"), the Commission approved a consolidated PUD and related zoning map amendment from the R-5-B Zone District to the C-2-B Zone District for the Property. The approved PUD authorized construction of a residential building with ground floor retail, having a maximum density of 5.25 FAR and containing between 60 and 70 residential units. The project will have a maximum height of 79 feet, with step downs in height on the Wisconsin Avenue frontage and at the rear as shown on the approved plans. The project will provide 1.2 parking spaces per residential unit plus 15 retail parking spaces, three residential visitor spaces and two car-sharing spaces, all in a below-ground parking garage. The project includes streetscape improvements and a variety of public benefits and project amenities. Order No. 06-31 became effective upon its publication in the *D.C. Register* ("DCR") on October 26, 2007.
2. By Zoning Commission Order No. 06-31A ("Order No. 06-31A"), the Commission approved modifications to Order No. 06-31, clarifying the commitments made by the Applicant, upon motion for reconsideration filed by Advisory Neighborhood Commission 3E ("ANC 3E"). Order No. 06-31A became effective upon its publication in the *D.C. Register* on January 4, 2008.
3. On November 21, 2007, Friendship Neighborhood Association ("FNA"), a party to the original PUD application, filed a petition for review requesting the D.C. Court of Appeals to review and set aside Order No. 06-31. On February 5, 2008, FNA filed a petition for review requesting the D.C. Court of Appeals to review and set aside Order No. 06-31A. The Applicant intervened in both of these cases, and the Court of Appeals consolidated the cases. FNA, along with the other parties to the court case, filed a Consent Motion to Dismiss Petitions for Review on May 28, 2008. By order dated June 2, 2008, the D.C. Court of Appeals dismissed the petitions for review.
4. Section 2408.13 of the Zoning Regulations states that in the event an appeal is filed, the time limitations of §§ 2408.8 and 2408.9 shall run from the decision date of the court's

final determination of the appeal. Based on the dismissal date of the appeal of June 2, 2008, the Applicant must file for a building permit by June 2, 2010, and begin construction by June 2, 2011.

5. By letter dated and received by the Commission on June 19, 2009, the Applicant filed a request to extend the validity of the PUD approval for a period of two years. The request, if approved, would require that an application for a building permit must be filed no later than June 2, 2012, and construction must be started no later than June 2, 2013. The Applicant's request was supported by an affidavit from the Applicant's project manager setting forth details of the Applicant's inability to obtain project financing at this time, as discussed in Finding Nos. 6 and 7.
6. The Applicant submitted evidence that the project has experienced delay beyond the Applicant's control. While the Applicant's intent was to move forward with the project as quickly as possible after approval, the Applicant was unable to do so due to the pending legal appeals. Just a few months after the appeals were dismissed, the real estate market suffered a major crisis. Banks froze lending for residential projects or ceased lending operations entirely due to the uncertainty in market conditions and the softening of the housing market.
7. Despite these events, as indicated by the evidence in the record, the Applicant worked diligently to secure financing for the project. The Applicant held numerous discussions with providers of equity and debt and found that lending institutions were reluctant to consider financing a condominium project, no matter the location, size, or level of competition. The Applicant found that the difficulties in the credit markets were further aggravated by the oversupply of new residential units at a time where demand had significantly decreased. Furthermore, while the Applicant reported some decreases in estimated construction costs, those decreases were not sufficient to establish acceptable financial pro formas nor did those cost decreases persuade financial institutions to lend money for residential projects. Accordingly, the Applicant was unable to obtain sufficient project financing to move this project forward on its original timetable, following its diligent, good faith efforts, because of changes in the economic and market conditions, which are beyond the Applicant's control.
8. The Applicant served a copy of the request on all parties (including ANC 3E, FNA, and Ward 3 Vision) on June 19, 2009. By letter filed on July 10, 2009, Ward 3 Vision indicated its support of the requested extension. FNA did not submit a response.
9. On July 17, 2009, ANC 3E submitted a resolution requesting that the Commission deny the extension application. ANC 3E requested that the Applicant work with the ANC to develop a process to insure that certain financial benefits approved as part of the PUD are tailored to address the highest priority needs of the public schools in the area, senior services, and enhancing the atmosphere in the corridor at the time of delivery and to insure that the real

value (i.e., as compared to the nominal value) of those benefits is not eroded by the time extension. ANC 3E's opposition was not based on any evidence or argument that the Applicant failed to show good cause for the requested extension as provided for in § 2408.11.

10. On July 21, 2009, the Applicant responded to ANC 3E's resolution stating that the amenities and benefits package had been approved by the Commission in Order No. 06-31, that the amenities which were the focus of the ANC's concern were only a portion of that overall package, that the extension process was not intended to be an opportunity to rehear a previously approved PUD, and that there was no change in a material fact that would call into question the original approval.
11. The Commission finds that there has not been a substantial change in the material facts since the original approval of the PUD and finds that the essential elements of the PUD have not changed. Specifically, the possible changes related to the approved amenities and benefits noted by ANC 3E in its resolution do not constitute substantial changes in material facts. In addition, the Commission finds that it is not required under the extension standard to re-evaluate the relative value of the amenities and benefits originally approved in the PUD. Furthermore, the Commission finds that if changes are required because some portion of the approved amenities and benefits cannot be executed or accomplished, such changes will be reviewed through a separate process initiated by the Applicant, not as part of an extension application. It is undisputed that the current economic climate caused by conditions beyond the Applicant's control is preventing the Applicant from obtaining needed project financing. Because the Applicant demonstrated good cause with substantial evidence pursuant to § 2408.11(a) of the Zoning Regulations, the Commission finds that the request for the two-year time extension should be granted.

CONCLUSIONS OF LAW

1. 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 to the application by the applicant, and all parties are allowed 30 days to respond; (b) there is no substantial change in any material fact 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 that there is good cause for such extension as provided in § 2408.11. (11 DCMR § 2408.10.) Section 2408.11 provides the following criteria for good cause shown: (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 reasonable 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 or factor beyond the applicant's reasonable control which renders the applicant unable to comply with the time limits of the PUD order.

2. The Commission concludes that the application complied with the notice requirements of 11 DCMR § 2408.10(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 fact that would undermine the Commission's justification for approving the original PUD. The Commission concludes that the changes noted by ANC 3E do not rise to the level of substantial changes in material facts.
4. The Commission is required under D.C. Code § 1-309.10(d) (2001) to give great weight to the affected ANC's recommendations. The Commission has carefully considered ANC 3E's recommendations and has responded to or addressed each of its issues and concerns and stated why it did not find the ANC's advice persuasive.
5. The Commission finds that the Applicant presented substantial evidence of good cause for the extension based on the criteria established by 11 DCMR § 2408.11(a). Specifically, the Applicant has been unable to obtain sufficient project financing for the PUD, following the Applicant's diligent good faith efforts, because of changes in economic and market conditions beyond the Applicant's reasonable control.
6. Section 2408.12 of the Zoning Regulations provides that 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 § 2408.11.
7. The Commission concludes 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 § 2408.11 of the Zoning Regulations.
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 time extension of the PUD approved in Zoning Commission Case No. 06-31.

1. The final PUD approved by the Commission shall be valid until June 2, 2012, within which time an application shall be filed for a building permit, as specified in § 2409.1 of the Zoning Regulations. Construction must commence no later than June 2, 2013.
2. 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 identity 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 Applicants 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 July 27, 2009, upon the motion made by Chairman Hood, as seconded by Vice Chairman Keating, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of **5-0-0** (Anthony J. Hood, William W. Keating, III, Konrad S. Schlater, Peter G. May, and Michael G. Turnbull to adopt).

In accordance with the provisions of 11 DCMR §3028.8, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on August 28, 2009.