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205249	Confirmed	Notices, Opinions	Board of Zoning Adjustment Summary Order Case No. 18037	3/26/2010 Vol 57:13	3/19/2010 17:33:57
205754	Confirmed	Notices, Opinions	Board of Zoning Adjustment Summary Order Case No. 17975	3/26/2010 Vol 57:13	3/19/2010 17:33:13
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ZONING COMMISSION
District of Columbia

CASE NO. 06-45A

EXHIBIT NO. 11 ZONING COMMISSION
District of Columbia
CASE NO.06-45A
EXHIBIT NO.11

ZONING COMMISSION OF THE DISTRICT OF COLUMBIA

ZONING COMMISSION ORDER NO. 06-45A

Z.C. CASE NO. 06-45A

(Minor Modification and Time Extension of Approved Planned Unit Development for Consolidated PUD and Related Map Amendment – Highlands Addition)

November 23, 2009

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (the “Commission”) was held on November 23, 2009. At the meeting, the Commission approved an application from the District of Columbia Housing Authority and the associated private developer team, CEMI-NMI Highlands, LLC, (the “Applicant”) for a three-year extension and minor modifications to an approved planned unit development (“PUD”) for property identified as Lots 78 and 80 in Square 6123, Lots 20-25 and 972 in Square 6125, and Lots 65-69 and 72 in Square 6126 located in the Washington Highlands neighborhood of Southeast Washington, pursuant to Chapters 1 and 24 of the District of Columbia Zoning Regulations (“the Application”). The Commission determined that the Application was properly before it under the provisions of §§ 2409.9, 2408.10, and 3030 of the Zoning Regulations.

FINDINGS OF FACT

1. By Zoning Commission Order No. 06-45 dated July 30, 2007 (“PUD Order”), the Commission approved a PUD and related map amendment for multiple properties in Square 6123, 6125, and 6126. The Order approved the construction of a large community redevelopment project that comprises a total of 138 new residences, including 18 triple-stacked flats, 95 single-family townhouses, and 24 semi-detached units and one single-family detached unit. The Order required 30% of the dwelling units to be rental units affordable to households having 60% or less of Area Median Income (“AMI”), and the remaining units (108) to be for sale. The approval became effective upon the publication of Zoning Commission Order No. 06-45 in the December 28, 2007 edition of the *D.C. Register*. Pursuant to § 2408.8, the PUD would be valid until December 28, 2009, within which time an application must be filed for a building permit.
2. The requested time extension stems from the very difficult site conditions which increased original cost estimates and necessitated that the Department of Housing and Community Development (“DHCD”) pursue a federal subsidy. Because of unforeseen issues related to the site’s topography, the initial cost estimates for the infrastructure improvements have proven insufficient, creating a budget gap for the project. DHCD is providing some subsidy to the development but is unable to close the budget gap, in part because of the economic downturn and the resulting decrease in District resources. In order to fill this funding gap, the Applicant has decided to pursue federal funding through the HOPE VI financing program. The additional time is needed for the District to apply for federal HOPE VI funding.
3. The Application also requested a minor modification to the original PUD Order to allow a change in the tenure mix. The original PUD Order required the Applicant to provide 30 rental units and 108 home-ownership units. The Applicants seeks to modify this to 46

rental units and 92 homeownership units. As a result, 16 of the units approved as homeownership units will become rental units. All 46 of the rental units will be reserved for and made affordable to households having 60% or less of AML. The reason for this change is that DHCD plans to expand the redevelopment area to include all of the Highland Addition project rather than simply the unimproved PUD parcel. The additional land, which comprises the balance of the Highland project, contains a total of 118 distressed public housing units. These additional units will be included in the HOPE VI application, but are not included in the PUD. The Application asserts that with these additional units, DCHD needs to modify the tenure mix on the PUD site to achieve a balanced development overall. The Application asserts that this minor modification will assure a good mix of market and subsidized/rental and homeownership units dispersed throughout the overall Highlands development.

4. There was no opposition to the extension or the modification. Advisory Neighborhood Commission ("ANC") 8E was served by the Applicant with the Application. The ANC submitted a written report in support of the modification on November 18, 2009.
5. The Office of Planning ("OP") submitted a report dated November 13, 2009 in support of the Application. OP's report stated there were no substantial changes 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. OP reports that the granting of the extension, together with the approval of the minor modification, will allow the Applicant to pursue HOPE VI and additional financing for the project.

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 substantial evidence of good cause for the extension based on the criteria established in § 2408.11. (11 DCMR § 2408.10.) The three criteria for good cause 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 Application complied with the notice requirements of 11 DCMR § 2408.10(a) by serving all parties with a copy of the Application on November 2, 2009. The only party to the Application, ANC 8E, provided comments to the Commission on November 18,

2009 prior to the expiration of the 30-day period so the running of the full 30 day period is unnecessary. 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.

The Commission concludes the Applicant presented substantial evidence of good cause for the extension based on the criteria established by 11 DCMR § 2408.11(c), the existence of a 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. The Applicant experienced unforeseen site development costs, creating a budget gap for the project. Because of a change in economic conditions, the District government was unable to provide additional funding to close the budget gap. As a result, the Applicant is applying for a federal subsidy and unable to comply with the time limits of the original PUD Order. For these reasons, the Commission finds that the Applicant has satisfied the requirements on 11 DCMR § 2408.11(c).

The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (DC Law 8-163. D.C. Official Code §6-623.04), to give great weight to OP recommendations. OP recommended approval of the modification and time extension request and the Commission concurs in its recommendation.

Upon consideration of the record in this Application, the Commission finds that the proposed minor modification is consistent with the intent of the previously approved Zoning Commission Order No. 06-45. The Commission concurs with the Applicant that approving the Modification Application is appropriate and not inconsistent with the intent of 11 DCMR §§ 2409.9 and 3030. The Commission further 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 and Zoning Act.

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 minor modification and a three-year time extension of an approved PUD. The approval of this modification is subject to the following condition which replaces Condition 4 in Z.C. Order 06-45:

- (4) Forty-six (46) of the dwelling units will be rental units affordable to households earning 60 percent or less of Area Median Income. The remaining ninety-two (92) units will be homeownership units.

The approval of the time extension is as follows:

The final PUD approved by the Commission shall be valid until December 28, 2012, within which time an application shall be filed for a building permit, as specified in § 2409.1. Construction shall start no later than December 28, 2013. If either of these two events does

not occur when required and no further request for an extension is made and granted, the PUD approval shall expire.

This time limit replaces Condition 12 of Z.C. Order No. 06-45.

All other provisions and conditions of Z.C. Order No. 06-45 remain in effect.

On November 23, 2009, upon the motion of Commissioner May, as seconded by Commissioner Schlater, 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 W. 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 March 26, 2010.