Law Offices
HOLLAND & KNIGHT LLP

2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

202-955-3000
FAX 202-955-5564
www.hklaw.com

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Lisa L. Jackson, Esquire
202-419-2559

lljacksolaw.com

February 11, 2002

RECEIVED
D.C. OFFICE OF ZONING
2002 FEB 11 AM 11: 22

HAND DELIVERY
District of Columbia
Board of Zoning Adjustment
441 4th Street, NW
Room 220
Washington, DC 20001
ATTN: Richard S. Nero

Re: BZA Order No. 16546, Application of Potomac Electric Power Company for a Request for a Modification of Approved Plans

Dear Members of the Board:

Enclosed please find a check in the amount of $560, the filing fee for the above-requested modification, which is 20% of the original filing fee.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Lisa L. Jackson

WAS1 #1057565 v1

BZA
Case No. 16546
Exhibit No. 31

Board of Zoning Adjustment
District of Columbia
CASE NO.16546
EXHIBIT NO.31

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NORMAN M. GLASGOW, JR.
202-419-2460

Internet Address:
nglasgow@hklaw.com

RECEIVED
D.C. OFFICE OF ZONING
2002 FEB -8 PM 2:45

February 8, 2002

District of Columbia
Board of Zoning Adjustment
441 4th Street, NW
Room 220
Washington, DC 20001

Re: BZA Order No. 16546, Application of Potomac Electric Power Company for a Request for a Modification of Approved Plans

Dear Members of the Board of Zoning Adjustment:

Pursuant to § 3129.2 of Title 11 of the District of Columbia Municipal Regulations (the "Zoning Regulations"), the Applicant in the above-referenced matter, the Potomac Electric Power Company ("PEPCO") respectfully requests that the Board of Zoning Adjustment ("BZA" or "Board") approve a modification to the architectural plans approved by the Board in BZA Order No. 16546 dated March 21, 1999. The Applicant also requests that the Board, pursuant to its authority under § 3101.6, waive the requirement of § 3129.3 of the Regulations, which requires that a request for a modification of approved plans be made not later than six (6) months after the final date of the written order approving the application.

I. Modification Request

a. Background: Several years ago, PEPCO began a focused and phased building program in order to allow it to fulfill its growing administrative space needs. A primary focus of this building program was to retain PEPCO's employment base in the District of Columbia and to expand that base to areas both within and outside Downtown Washington. As its first priority, PEPCO decided to construct a new administrative headquarters in the Edison Office Building at 701 - 9th Street, N.W. PEPCO also decided to explore the potential relocation of a smaller portion of its administrative operations to a 79 acre site it owns at 3400 Benning Road, N.E. The Benning Road site also contains an operational facility,

which PEPCO is continuing to operate and maintain while further consideration of the administration building is undertaken. When constructed, the new Benning Road administrative building will bring approximately 700 PEPCO employees to the area around the facility.

In 1999, PEPCO submitted a plan to the BZA requesting approval of special exception and variance relief for the Benning Road site that was necessitated by the existence of the operational facility and substandard soil conditions on the site. By order dated March 21, 1999, in BZA Application No. 16546, the Board approved PEPCO's plan and granted the requested special exception and variance relief. (*See* Exhibit A)

Planning for the administrative headquarters at 701 - 9th Street has been underway since the late 1990s. Given its implications for the District of Columbia employment base, that project was a major priority for PEPCO and the District of Columbia. The development of the site involved many complex development issues and quickly became all-consuming for PEPCO's real estate development and management team. The building was just recently completed and PEPCO employees moved into the building in late 2001.

With the first phase of its building program completed, PEPCO's focus is now squarely on finalizing the plans for and reaching construction decisions on the Benning Road administrative facility.

b. Basis for Modification Request: When PEPCO submitted its plans for the Benning Road facility to the BZA in 1999, it also included a fairly typical landscaping plan focused on providing attractive green space area around the edges of the building and surface parking lot. In the process of refining the building program, PEPCO now seeks to establish a building services area on the north side of the building. To accommodate this area, a planned row of trees will be removed from the northwest corner and replaced to the east of the building service area, and the planned employee courtyard area will be reconfigured. Despite the proposed changes, PEPCO will provide roughly the same amount of landscaping albeit in a different configuration. (*See* Exhibit B).

c. The Request is a Minor Modification that Does Not Change the Material Facts the Board Relied Upon in Approving the Application: Consistent with § 3129.7 of the Regulations, the requested changes to the approved landscaping plan do not in any way change the material facts relied upon by the Board in approving the application. As mentioned above, the original application involved a request for a variance from the height and story limitations of the C-M-1 District, and a special exception from roof structure setback requirements. The

basis for the height and story limitation variances was the size of the site and the fact that the existing operational facility on the site and the substandard soil conditions limited the building envelope for the administration building. Those same factors dictated a design for the building that could not accommodate compliance with the roof structure setback requirements. The location of the landscaping was not an element of any of the factors the Board considered in granting the application. The proposed landscaping will be solely for the benefit of the administration building -- which will be located in the middle of the 79 acre site -- rather than for the benefit of surrounding properties in the neighborhood. Thus, the factors the Board relied upon in granting the original application, including the effect of the application on neighboring properties, are wholly unrelated to the Applicant's request for a modification of its landscaping plan.

II. Waiver Request

Pursuant to Section 3101.6 of the Regulations, the Board may waive any of the provisions of the Board's Rules of Practice and Procedure, if in the judgment of the Board, the waiver is for a good cause and will not prejudice the rights of any party and is not otherwise prohibited by law. PEPCO asserts that waiver of the limitation in the present case is in fact necessary as a result of a discrepancy in time periods created by the Zoning Commission when it amended the provisions of the Zoning Regulations involving time limits on Board Action. Section 3130 of the Regulations currently provides that an application for a building permit may be filed up to two years after the date of an order. (*See* Order No. 810, included as Exhibit C). Prior to that amendment, the Regulations provided that orders of the Board were effective for no more than six months without the filing of a building permit. As testified to by the chairperson of the Board at that time, such an extension of the effectiveness of the Board's orders from six months to two years "did not appear to provide an opportunity for abuse of the process but provided applicants with ample time to proceed to the permitting process.

In approving the extension of effectiveness of the Board's order (§ 3130 of the Regulations), the Commission did not revise the time period for filing for modification of approved plans (§ 3129.3), even though these provisions provided for the same period when originally included in the Zoning Regulations. This has resulted in a situation where a party is granted two years to file for a building permit but only six months to request modifications. PEPCO suggests that the very same rationale for extending the effective date of the Board's order applies to this request for modification. The inconsistency of the regulations between the time within which an Applicant must file for a modification of plans and the time within which a building permit may be applied for, prejudices the ability of PEPCO to

develop a building plan that most efficiently meets its needs at the time it is ready to move forward with construction.

PEPCO further submits that its delay in seeking a modification of the plans for the Benning Road site resulted from the necessity for all of PEPCO's real estate development and management team to focus its attention on the development of the administrative headquarters site, which was an important project for both PEPCO and the District of Columbia. In addition, in the days since September 11, 2001, PEPCO, like many other utility companies, has focused its efforts -- including those of its real estate managers -- on ensuring the security of all its facilities, further extending the process of refining the plans for the Benning Road administration building. Finally, as the requested change will only affect the internal operations of the building, the rights of parties to the original proceeding will not be at all affected.

III. Conclusion

PEPCO is seeking a minor modification of plans for the Benning Road administration building pursuant to § 3129.3 in order to allow for more efficient operation of the building. The requested change will primarily involve a change to the landscaping layout but the amount of landscaping provided will be roughly the same. A waiver of the requirement of § 3129.3 pursuant to 3101.6 of the Regulations is warranted because PEPCO's efforts to complete construction of its administrative headquarters at 701 - 9th Street, N.W., a major priority for both PEPCO and the District of Columbia, necessarily occupied the attention of PEPCO's real estate development and management team. In addition, the inconsistency of the Zoning Regulations regarding the time period within which a modification must be requested and building permit must be filed, limits the amount of flexibility PEPCO or any applicant has to make changes to its proposed building plan in the allowable time period for filing a building permit. For all of the foregoing reasons, PEPCO respectfully requests that the Board grant its request for a modification of plans, and for a waiver from the requirement a modification of plans be filed within six months from the date of the final order approving an application.

Sincerely,

Norman M. Glasgow, Jr.

Lisa L. Jackson

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Application No. 16546 of Potomac Electric Power Company, pursuant to 11 DCMR 3103.2 for a variance from the height requirement (Subsection 840.1), and 3104.1 for a special exception from the roof structure setback requirement (Subsection 411.11) for the construction of a five-story office building in a C-M-1 District at premises 3400 Benning Road, N.E. (Parcel 169/114).

HEARING DATE: February 9, 2000
DECISION DATE: February 9, 2000 (Bench Decision)

SUMMARY ORDER

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, by mail to Advisory Neighborhood Commission (ANC) 7D and to owners of property within 200 feet of the site.

The site of this application is located within the jurisdiction of ANC 7D. ANC 7D, which is automatically a party to this application, filed a written statement, dated January 19, 2000, of issues and concerns in support of the application (Exhibit 19). The Board also received a letter of support from ANC 7C.

As directed by 11 DCMR 3119.2, the Board required the Applicant to satisfy the burden of proving the elements which are necessary to establish the case for a variance and a special exception from the strict application of the requirements of 11 DCMR Subsections 840.1 and 411.11. No person or entity appearing as a party to this case testified in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR 3103.2, that there exists an exceptional or extraordinary situation or condition related to the property which creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

The Board further concludes that the Applicant has met the burden of proof, pursuant to 3104.1, that the requested relief can be granted in harmony with the general purpose and intent of the Zoning Regulations and Map, and will not tend to affect adversely the use of neighboring property. It is therefore **ORDERED** that this application be **GRANTED** subject to the following **CONDITIONS:**

1. The Applicant will (a) advocate, along with ANC 7D, for adequate and safe access to and from the roadways near the PEPCO plant; (b) support and partner with ANC 7D before and during the upcoming DPW activities to repair the Kenilworth Avenue bridge at Burroughs Avenue; (c) support community needs related to the proposed roadway construction along the Kenilworth Avenue corridor – Benning Road, Kenilworth Avenue, Kenilworth Terrace and Foote Street.

2. The Applicant will provide adequate notice to the community and directly to ANC 7D about employment opportunities that may become available at the PEPCO Benning Road site and at its other facilities.

3. The Applicant will sponsor, through ANC 7D, a community-based learning project to help educate the children within the boundaries of ANC 7D on issues involving environmental concerns and problems.

4. Landscaping for the site will be as identified on Exhibit No. 27 of the record.

Pursuant to 11 DCMR 3101.6, the Board has determined to waive the requirement of 11 DCMR 3125.3 that findings of fact and conclusions of law accompany the order of the Board. The waiver will not prejudice the rights of any party, and is appropriate in this case.

VOTE: 4-0-0 (Robert Sockwell, Anne M. Renshaw, Anthony J. Hood and Sheila Cross Reid to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: MAR 21 2000

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO SUBSECTION 3125.6".

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

BAB/3-16-00

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

BZA APPLICATION NO. 16546

As Director of the Office of Zoning, I hereby certify and attest that on MAR 21 2000 a copy of the order entered on that date in this matter was mailed first class, postage prepaid, to each party who appeared and participated in the public hearing concerning the matter, and who is listed below:

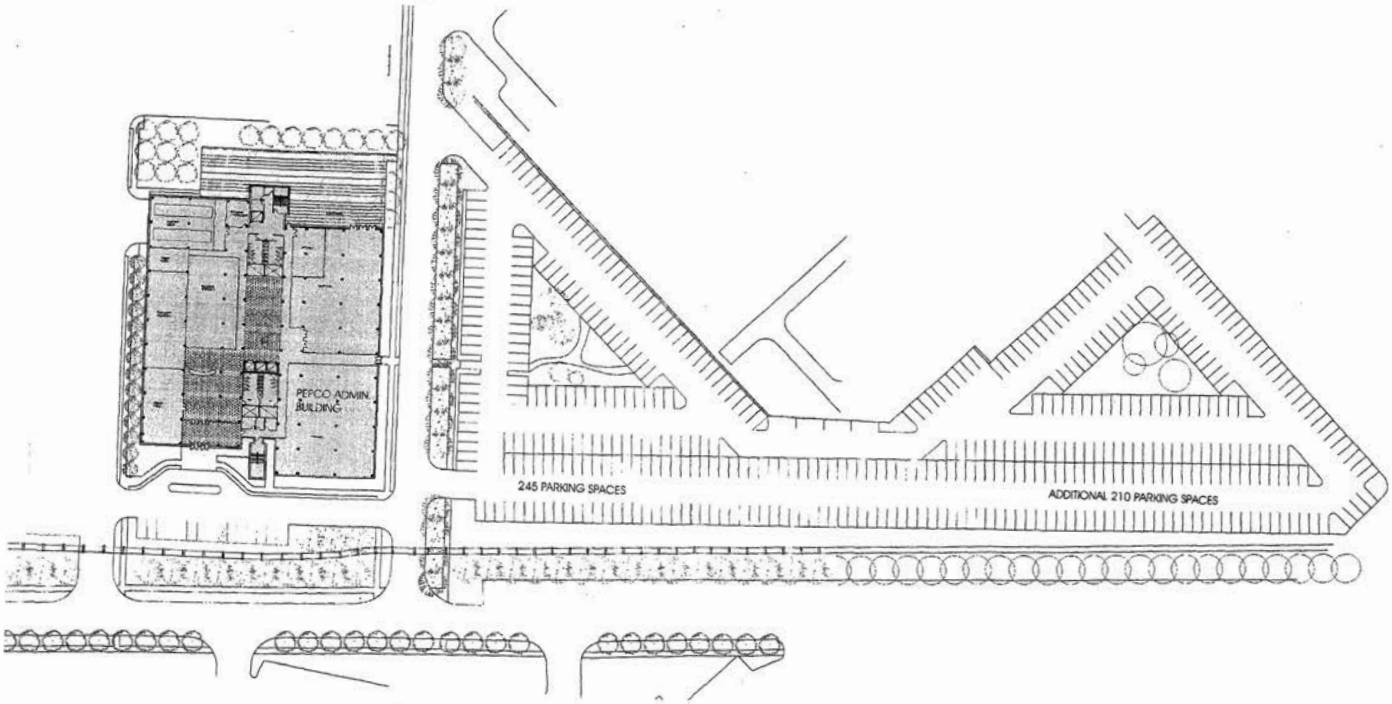
Norman M. Glasgow, Jr.
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W., Suite 1100
Washington, DC 20006

William E. Wright, Chairperson
Advisory Neighborhood Commission 7D
P.O. Box 64052
5140 Nannie Helen Burroughs Avenue
Third Floor
Washington, D.C. 20019

Mary L. Gaffney, Chairperson
Advisory Neighborhood Commission 7C
328 62nd Street, N.E., #201
Washington, D.C. 20019

Michael Johnson, Zoning Administrator
Building & Land Regulation Administration
Dept. of Consumer and Regulatory Affairs
941 North Capitol Street, NE, Suite 2000
Washington, DC 20009

ATTESTED BY: Jerrily Kress
JERRILY R. KRESS, FAIA
Director

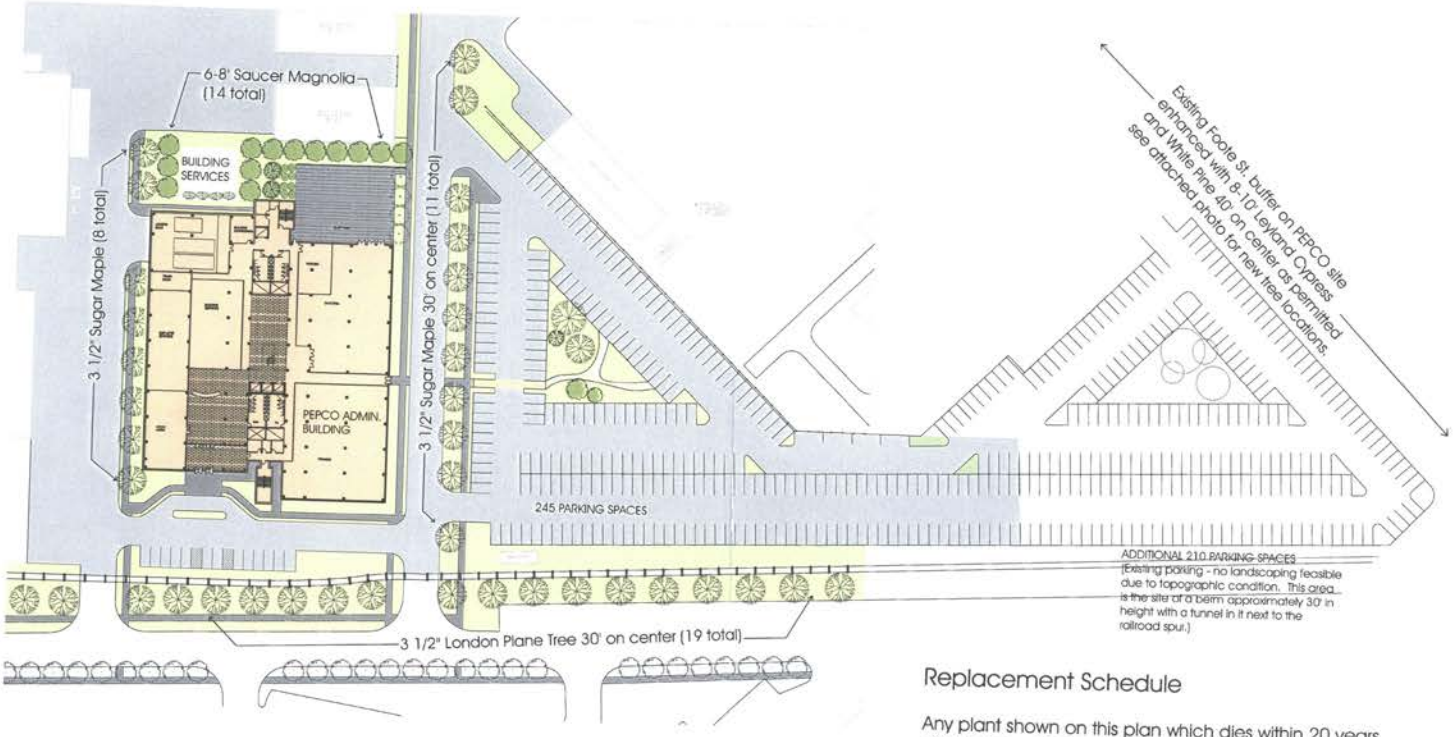


SITE PLAN SCALE: 1/32" = 1'-0"

PEPCO ADMINISTRATION BUILDING BENNING ROAD FACILITY, WASHIINGTON D.C.

KCP-SHG

A SmithGroup Company



Replacement Schedule

Any plant shown on this plan which dies within 20 years of the date of BZA approval will be replaced by the property owner.

LANDSCAPE PLAN

SCALE: 1/32" = 1'-0"

PEPCO ADMINISTRATION BUILDING BENNING ROAD FACILITY, WASHIINGTON D.C.

SmithGroup

Archdiocese of Washington
02324/02

Government of the District of Columbia
ZONING COMMISSION

Exhibit C

ZONING COMMISSION ORDER NO. 810
Case No. 95-14/93-8
(Text Amendments - "Good Cause" and Miscellaneous Amendments,
Sections 2408, 3104 and 3331)
January 13, 1997

The Zoning Commission for the District of Columbia initiated this case in response to a petition from the Office of Zoning in conjunction with the Office of the Corporation Counsel, requesting the Commission to amend the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning. Amendments to the text of the Zoning Regulations are authorized pursuant to the Zoning Act [Act of June 20, 1938, 52 Stat. 797, as amended, D.C. Code Ann. Section 5-413 (1981)].

The petition filed on October 16, 1995 and supplemented on October 23, 1995, requested the Zoning Commission to adopt amendments to Section 2408 that would provide clear guidelines for defining "good cause" for extending the validity of orders/decisions in planned unit development (PUD) cases, and would provide for the circumstances under which an extension request would require a public hearing. The proposed amendments to Section 3104 would extend the time limit on Board of Zoning Adjustment (BZA) action; and the proposed amendments to Section 3331 would allow for service of BZA orders by first class mail.

At its regular public meeting on October 23, 1995, the Commission authorized a public hearing on the petition and incorporated the record from Z.C. Case No. 93-8 which contains the Office of Zoning's first attempt to address the issues surrounding what constitutes "good cause" for granting an extension of the validity of a PUD.

The public hearing in this case was properly noticed for January 11, 1996. The January 11th hearing session was canceled because of inclement weather. Pursuant to further notice, a re-scheduled public hearing was held on March 25, 1996. The hearing session was conducted in accordance with the provisions of 11 DCMR 3021.

At that hearing session, the Commission heard the presentation of the Office of Zoning (OZ) and the Office of Planning (OP), the testimony of the chairperson of the Board of Zoning Adjustment, and eight witnesses, including representatives from law firms, various community groups and interested citizens. Four witnesses testified in opposition to the proposed amendments, and four witnesses testified in support of the proposal, three of whom proposed modifications.

By memorandum dated March 20, 1996, and by testimony at the public hearing, the Office of Zoning recommended adoption of the text amendments related to good cause as used in Subsection 2408.10; the adoption of longer time limits for Board action pursuant to Section 3104; and adoption of the text proposal to authorize service of Board orders by regular mail.

The Office of Zoning noted that the amendment to Subsection 2408.10 was necessitated by the Commission's need for clear guidelines about good cause for granting extensions of the validity of its PUD orders/decisions, and in part, because of the Court of Appeals decision in the case of the Hotel Tabard Inn vs. District of Columbia Zoning Commission. In that case, the Court noted that the Commission had indicated that it would put rules in place to govern good cause for the extension of the validity of its PUD orders/decisions.

The Office of Zoning provided the Commission with background information about the decline of the office market, and noted that during this time the Commission began to receive requests for extensions of the validity of PUD orders/decisions from developers who were unable to proceed with construction because of market conditions.

The Office of Planning by report dated March 21, 1996 and by testimony presented at the public hearing, recommended approval of the proposed amendments with modifications. The OP recommended modifications in two areas of the proposal. The OP recommended that the provision which reads "No substantial change in any of the material facts upon which the Zoning Commission based its original approval of the planned unit development" be reworded by deleting the "No" and moved from the Subsection which provides the specific criteria for an extension, to the Subsection indicating when a public hearing would be required. The Commission noted that when it set the case for hearing, it moved the paragraph in question to the Subsection which sets forth the initial requirements for the Commission's consideration in PUD extension requests. The OP recommendation was based on the text in the Supplemental Report of the Office of Zoning and not the text that the Commission actually set for hearing.

OP's second recommendation was that the time limit on Board of Zoning Adjustment action be increased to one year, but allow for the BZA to grant an additional year if the applicant makes an acceptable argument. The Office of Planning recommended approval of the other portions of the proposal as advertised for public hearing.

The chairperson of the Board of Zoning Adjustment presented testimony on behalf of the Board of Zoning Adjustment supporting an increase of the time limit on Board action, and supporting the proposal to serve Board orders by first class mail. She noted that the proposal to increase the effectiveness of the Board's orders to no more than two years did not appear to provide an opportunity for abuse of the process but provided applicants with ample time to proceed to the permitting process. She noted that applicants before the Board are more frequently ready to go forward before the Board's orders are issued rather than wanting or needing a delay. She indicated that those applicants who return for reapproval tend to be small businesses, nonprofits, participants in restrictive public-private ventures and other applicants comparatively lacking in market power. She stated that the proposal would benefit those who are most in need of the relief.

As to the proposal regarding the change from certified to first class mail, the chairperson indicated that the change could not be implemented soon enough. She stated that certified mail has become burdensome. It particularly burdens ANCs, who do not have staff or commissioners who can get to the post offices to retrieve the certified mail.

Advisory Neighborhood Commission 2E requested that a copy of its report for Z.C. Case No. 95-17 be placed in the record of this case. The report did not comment on the proposal in this case.

Advisory Neighborhood Commission 2A submitted a resolution in opposition to the proposal. The issues and concerns raised by ANC 2A are summarized as follows:

1. The comment period of seven days to review and comment by all parties is too short and should be extended to at least 30 days.

2. The proposal provides for a public hearing only if there is a material factual conflict. This denies the ANCs the opportunity to submit new information such as a change in circumstances in the neighborhood since the PUD was originally approved.

Testimony in support of the proposed amendments with modifications was presented by the Committee of 100 on the Federal City; the law firm of Wilkes, Artis, Hedrick and Lane on behalf of the Archdiocese of Washington; and the law firm of Robins, Kaplin, Miller and Ciresi on behalf of the Dupont Circle Citizens Association. The salient issues raised at the hearing and in post-hearing submissions, and the Commission's disposition of them are summarized as follows:

1. The proposed terms defining good cause are too lenient and are likely to result in unrealistic projects where financing never materializes, and developers lose interest or go out of business. Even if the project is not abandoned, when the developer is ready to proceed after five to seven years, additional hearings are required because the project will likely require substantial modification. The Commission believes that its proposed rules permit additional hearings where substantial changes in relevant facts or policies have occurred. The Commission notes that its current regulations provide for hearings where major PUD modifications are proposed.

2. The response period of seven days is too short given that many organizations only meet once a month, and there would need to be time to get a report to the Commission even after a meeting and vote. All PUD extension requests should be advertised in the D.C. Register for a period of 30 days, in addition to serving all the parties. The Commission agrees that the proposed response time of seven days is too short and that 30 days is appropriate. However, the Commission believes that parties to the original PUD application should be served, and there is no need to publish the PUD request in the D.C. Register.

3. The proposed rules suffer from lack of reasonable definition and are inconsistent with the nature of the proof required to obtain the initial PUD approval. The Commission believes that its proposed rules clearly define good cause for extensions and do not allow for a rehearing on the initial PUD.

4. The economic viability of a PUD should be considered during the initial approval process. Without such consideration, an applicant's claim that a project cannot secure financing or is economically not viable as proffers for a showing of "good cause" have no basis in fact from the applicant's case in chief. The Commission does not regard this evaluation as being within the purview of the Zoning Regulations and presumes that an applicant would not expend resources on obtaining an approval without a reasonable probability of obtaining sufficient financing for the proposed project.

5. Changes in material facts should be addressed as related to the good cause criteria. The Commission believes that before reviewing the good cause criteria related to a PUD extension request, there shall have been no substantial change in the material facts upon which the Commission based its original approval of the PUD.

6. The only good cause that should be considered legitimate grounds for a PUD extension is failure of city staff to process its required actions in time despite demonstrated proof from the developer about its having made every reasonable effort to discharge its responsibilities in a timely fashion. The Commission believes that market conditions beyond the control of the applicant may justify a PUD extension.

7. Because all extension orders are appealable, the Commission should enact a tolling provision to bring some finality to the process. The Commission has this suggestion under advisement in a case that is still pending.

8. The Commission's language should clearly reflect that the determination of good cause is made by the Commission. The Commission agrees.

9. Clarify the type of substantial change by adding the phrase "that would undermine the Commission's justification for approving the original PUD" to paragraph 2408.10 (b). The Commission accepts this suggestion.

10. Change the phrase "substantial change of material facts" to "a factual dispute with regard to the criteria." The Commission believes that its formulation has greater clarity.

11. Pending litigation initiated by third parties over whom the applicant has no control which renders the applicant unable to comply with the time limits of the PUD order should be considered as good cause for an extension. The Commission agrees with this suggestion.

Testimony in opposition to the proposed amendments was presented by the Residential Action Coalition, the D.C. Federation of Citizens Associations, Tabard Inn and two private citizens. Their testimony raised many of the same issues and made many of the same recommendations as the previous group. The additional issues raised and the Commission's disposition are summarized as follows:

1. The Zoning Commission routinely approves extensions without benefit of hearings or standards. The Commission does not approve extension requests without the application of appropriate standards.

2. The proposed text creates a one-sided covenant that could run perpetually with the land binding the District and its citizens to honor a developer's rights but allowing the developer to change, delay, trade or sell the benefits without ever again having to address the merits of the proposal. The Commission believes that its standards prevent this from occurring.

3. Public hearings should be required for all extension requests. This suggestion would treat each extension request as a de novo application, which would not be in the public interest.

4. The only three instances where the Commission should find good cause to grant an extension should include an act of God which prevents the applicant from proceeding, where an absolutely unique building proposal was previously approved, or where 50 percent of the financing has been raised. The Commission finds these criteria too restrictive and does not agree with this suggestion.

5. No extension should be granted if more restrictive text language regarding PUDs has been passed since the initial approval of the PUD. The Commission believes that its proposed rules adequately address instances where the Zoning Regulations have changed since the original PUD was approved.

6. An extension should be granted once for a one-year period, where a public hearing on the extension has been held and one month prior to the hearing, the record contains a set of unchanged plans, all underlying zoning requirements are lined up against what the PUD would produce – height, lot occupancy, FAR, parking, housing, retail, etc., projected revenue for matter of right and for the PUD, and a demonstration of firm financing. The Commission again finds these criteria unreasonably burdensome and does not agree with this suggestion.

The last three suggestions or recommendations are premised on the notion that there are no benefits flowing to the city and neighbors from an approved PUD, and that all the benefits of Commission action accrue only to an applicant. The Commission's review and approval of PUD applications provide an occasion for design review and flexible regulation not otherwise provided under matter of right zoning. As such, the Commission believes that its approval of a

PUD application imposes on an applicant important responsibilities for the benefit of the city and a neighborhood that would otherwise not occur and that extension of the approval for events and circumstances beyond the control of the applicant is in the public interest unless there has been a substantial change of material fact or policy that would call into question the initial approval.

In response to the issues and concerns of the ANCs, and in responding to issues raised in the record, the Commission believes the proposed amendments should be adopted for the following reasons:

1. They provide clear guidelines for defining "good cause" for extending the validity of orders/decisions in planned unit development cases, and provide the specific circumstances where an extension request would require a public hearing.

2. They adequately address the Court of Appeals concerns in the Hotel Tabard Inn vs. District of Columbia Zoning Commission case regarding the Commission's stated intent to put rules in place to govern good cause for the extension of the validity of PUD orders/decisions.

3. They provide for relief from a burdensome requirement to serve BZA orders by certified or registered mail.

4. They provide for an adequate time limit on BZA action so that applicants have a reasonable time following BZA decisions to proceed to the permitting process.

The Commission agrees with the ANC and others that a seven-day response time is too short for ANCs, community organizations and other parties to meaningfully respond to a PUD extension request. The Commission noted that ANCs and other community organizations often meet only once a month, and need time to give notice to the community and take a formal vote. The Commission believes that a 30-day response period is appropriate.

The Commission believes that an extension request is not an opportunity to rehear a previously approved PUD, and therefore, the appropriate time for a public hearing in an extension proceeding is where there is a material factual conflict that has been generated by the parties to the PUD concerning the good cause criteria. The Commission believes that a public hearing under these circumstances does not undermine its original approval and allows its approval process to have some degree of finality.

The Commission further believes that a PUD extension request should only be served on the parties to the original application, including the ANC, and that publication of notice in the D. C. Register is not necessary or appropriate.

The Commission believes that the amendments are appropriate and adequate, that they do not encourage land banking or maintain artificially high land values for developers. The Commission notes that the inability to obtain sufficient financing is an appropriate criteria to review when based on changes and conditions beyond the applicant's reasonable control.

Having discussed, considered and resolved the issues and concerns of the ANCs, the Commission determined that it has accorded the ANCs the "great weight" to which they are entitled.

A notice of proposed rulemaking was published in the D.C. Register on August 9, 1996. As a result of the publication of the proposed rules, the Commission received comments from the law firm of Wilkes, Artis, Hedrick & Lane on behalf of the Archdiocese of Washington and the law firm of Robins, Kaplan, Miller & Ciresi on behalf of the Dupont Circle Citizens Association. The Commission determined that no new issues were raised by the comments and believes it has addressed the issues appropriately.

The Zoning Commission believes that its decision to approve the text amendments set forth in this order is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act and is not inconsistent with the Comprehensive Plan for the National Capital.

The proposed decision to approve the text amendments was referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. The NCPC, by report dated June 27, 1996, found that the proposed amendments would not adversely affect the Federal Establishment or other Federal interests in the National capital, nor be inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth in this order, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the following amendments to the Zoning Regulations:

1. Amend 11 DCMR 2408.10 to read as follows:

2408.10 The Zoning Commission may extend the periods set forth in Subsections 2408.8 and 2408.9 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval; Provided, that the Zoning Commission determines that the following requirements are met:

(a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;

(b) There is no substantial change in any of the material facts upon which the Zoning Commission based its original approval of the planned unit development 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 Subsection 2408.11.

2. **Add a new Subsection 2408.11 to read as follows:**

2408.11 For purposes of Paragraph 2408.10(c), an extension of the validity of a planned unit development may be granted by the Zoning Commission for good cause shown if an applicant has demonstrated with substantial evidence one or more of the following criteria:

(a) An inability to obtain sufficient project financing for the planned unit 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;

(b) An inability to secure all required governmental agency approvals for a planned unit development by the expiration date of the planned unit development 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 which renders the applicant unable to comply with the time limits of the planned unit development order.

3. **Add a new Subsection 2408.12 to read as follows:**

2408.12 The Zoning Commission shall hold a public hearing on a request for an extension of the validity of a planned unit development only if, in the determination of the Commission, there is a material factual conflict that has been generated by the parties to the planned unit development concerning any of the criteria set forth in Subsection 2408.11. The hearing shall be limited to the specific and relevant evidentiary issues in dispute.

4. **Renumber existing Subsections 2408.11 through 2408.13 to 2408.13 through 2408.15.**

5. **Amend Subsection 3104.1 by deleting "six (6) months" and inserting "two (2) years."**

6. **Amend Subsection 3104.4 by deleting "six (6) months" and inserting "two (2) years."**

7. **Amend Subsection 3331.4 by deleting "registered or certified mail, return receipt requested" and inserting "first class mail, postage prepaid."**

Vote of the Zoning Commission taken at its regular meeting on May 23, 1996: 5-0 (Howard R. Croft, Maybelle Taylor Bennett, John G. Parsons, Herbert M. Franklin and Jerrily R. Kress to approve).

This order was adopted by the Zoning Commission at its public meeting on January 13, 1997 by a vote of 4-0 (Herbert M. Franklin, John G. Parsons and Maybelle Taylor Bennett to adopt, Jerrily R. Kress to adopt by absentee vote; Howard R. Croft not present not voting).

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register, that is on FEB 14 1997.

JERRILY R. KRESS
Chairperson
Zoning Commission

MADELIENE H. DOBBINS
Director
Office of Zoning

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