

Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Norman M. Glasgow, Jr.
202.419.2460
norman.glasgowjr@hklaw.com

April 30, 2018

VIA IZIS AND HAND DELIVERY

Zoning Commission for the
District of Columbia
441 4th Street, N.W., Suite 210-S
Washington, DC 20001

**Re: Request for a Two-Year Extension of Time to Begin Construction of Approved Consolidated Planned Unit Development
1600 North Capitol Street, NW (Square 3100, Lot 48)
Z.C. Order Nos. 06-04C, 06-04E and 06-04F**

Dear Members of the Zoning Commission:

On behalf of Florida & Q Street, LLC (the “Applicant”), this letter serves as a request for a two-year extension of the time period in which to begin construction of the approved planned unit development (“PUD”) at 1600 North Capitol Street, NW (Square 3100, Lot 48) (the “Property”). This request, if approved, would require construction of the PUD to begin no later than June 15, 2020.

The subject application is filed pursuant to Subtitle Z, Chapter 700 of the 2016 Zoning Regulations (“11 DCMR”) for good cause shown herein. A completed Application Form 106 and a letter from the Applicant authorizing Holland & Knight LLP to file and process the application are included herewith as Exhibits A and B, respectively. A check in the amount of \$520.00 made payable to the D.C. Treasurer for the requisite filing fee pursuant to 11-Z DCMR § 1600.10 is also enclosed.

I. INTRODUCTION

A. Factual Background

The Property has a land area of approximately 18,984 square feet and is located in the northwest quadrant of the District at the intersection of Q Street, Florida Avenue, and North Capitol Street. The Property extends approximately 150 feet north along North Capitol Street and is currently unimproved, but was previously the site for many years as a gas station. Pursuant to Z.C. Order No. 06-04, dated January 8, 2007, effective June 15, 2007 (Exhibit C), the Zoning Commission approved a consolidated PUD and a related Zoning Map amendment for the Property to enable the development of a new mixed-use building. Pursuant to Z.C. Order Nos. 06-04C and 06-04E

(Exhibits D and E, respectively), the Zoning Commission approved modifications to the PUD. Pursuant to Z.C. Order Nos. 06-04A, 06-04B, and 06-04D (Exhibits F, G, and H, respectively), the Zoning Commission approved extensions for the time in which the Applicant was required to file a building permit application. Pursuant to Z.C. Order No. 06-04F (Exhibit I), the Zoning Commission approved an extension for the time in which the Applicant was required to begin construction, such that construction is required to begin no later than June 15, 2018.

The approved PUD, as modified by Z.C. Order Nos. 06-04C and 06-04E, involves construction of a mixed-use development having a total gross floor area of approximately 85,428 square feet. Approximately 84,306 square feet will be devoted to residential use, providing between 85 and 95 dwelling units, and approximately 4,998 square feet of floor area will be devoted to retail use in the cellar. The PUD will have a maximum density of 4.5 floor area ratio (“FAR”) and a maximum building height of 72’-4 1/2” (not including penthouses). The PUD will include 41 parking spaces located on one level of underground parking accessed from Florida Avenue.

The Applicant filed a building permit application for the PUD on June 11, 2015, which vested the PUD extension approved in Z.C. Order No. 06-04D. However, due to the extensive history of environmental contamination at the Site, the Applicant’s recent assumption of “Responsible Party” status for clean-up activities, and the outstanding environmental approvals needed, the Applicant is unable to begin construction of the PUD by June 15, 2018. Thus, the Applicant requests a two-year time extension such that construction of the PUD must begin no later than June 15, 2020.

B. Jurisdiction of the Zoning Commission

Pursuant to 11-Z DCMR § 705.2, the Zoning Commission is authorized to extend the time periods set forth in 11-Z DCMR § 702.2 (two year requirement to file a building permit application) and 11-Z DCMR § 702.3 (three year requirement to begin construction), provided the following conditions 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 Commission based its original approval of the application that would undermine the Commission’s justification for approving the original application; and
- c. The applicant demonstrates with substantial evidence that there is good cause for such extension, as provided in 11-Z DCMR § 705.2(c).

The sole substantive criterion for determining whether a PUD should be extended is whether there exists “good cause shown.” The Zoning Regulations define “good cause shown” in 11-Z DCMR § 705.2(c) as evidence of one or more of the following:

1. An inability to obtain sufficient project financing for the development, following an applicant’s diligent good faith efforts to obtain such financing, because of changes in economic and market conditions beyond the applicant’s reasonable control;

2. An inability to secure all required governmental agency approvals for a development by the expiration date of the order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control; or
3. The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control that renders the applicant unable to comply with the time limits of the order.

In submitting this application, the Applicant also requests a waiver from 11-Z DCMR § 705.5, which provides that an "applicant with an approved PUD may request no more than two (2) extensions. The second request for an extension may be approved for no more than one (1) year." In this case, the original PUD was approved under the 1958 Zoning Regulations, which did not limit the permitted number of extensions for a PUD. However, as detailed in this submission, the Applicant is unable to move forward with beginning construction by June 15, 2018, due to the existence of environmental contamination of the Property, which is still being evaluated and remediated, and which process must be complete before construction can occur. Also, while environmental remediation is occurring, the Applicant cannot reasonably obtain financing for the project. Thus, despite the Applicant's diligent, good faith efforts to expedite the environmental review process as quickly as possible, it has been unable to secure all required governmental approvals that are required to begin construction. As a result, the Applicant requests that the Commission approve this extension request for a period of two years to provide additional time to complete the environmental review and remediation process, receive environmental permits/approvals, and begin construction of the approved PUD.

II. COMPLIANCE WITH STANDARDS FOR EXTENDING PUD VALIDITY

A. Extension Request Served on All Parties

Other than the Applicant, the only other party to the case was Advisory Neighborhood Commission ("ANC") 5E. As indicated in the Certificate of Service attached hereto, the Applicant served this request for an extension of time on ANC 5E, thus providing the required time period to respond.

B. No Substantial Change in Material Facts

There has been no substantial change in any of the material facts upon which the Zoning Commission based its approval of the PUD in Z.C. Order Nos. 06-04C and 06-04E. The Applicant remains committed to moving forward with developing the project as approved and complying with the conditions and obligations imposed as part of the PUD approval.

C. Good Cause Shown

Pursuant to 11-Z DCMR § 705.2(c)(2), the Commission is authorized to grant an extension of PUD validity for projects where the applicant demonstrates with substantial evidence that there is a condition or factor beyond the applicant's reasonable control that renders the applicant unable to comply with the time limits of the PUD order. As indicated in the affidavit of Eyob Mamo,

attached hereto as Exhibit J, the Applicant has taken many steps to move forward with the project. However, the Applicant is experiencing delay due to environmental contamination at the Property, which is beyond the Applicant's reasonable control and prevents the Applicant from complying with the time limits set forth in Z.C. Order No. 06-04F as follows:

1. Until 2003, the Property was owned and operated by Exxon Mobil ("Exxon") as a gas station. On July 28, 2003, Exxon sold the Property to Five Q, LLC. At the time of the sale, Exxon remained the "Responsible Party" for an ongoing spill case (LUST Case No. 94-016), which identified Exxon as being responsible for the cleanup of the Property and achieving a "No Further Action" ("NFA") designation by the District Department of Energy and the Environment ("DOEE").
2. On January 18, 2011, DOEE issued a NFA letter to Exxon (Exhibit A to the affidavit). The letter stated that no further remedial action is necessary unless the residually contaminated soil is removed, disturbed, or excavated, in which case Exxon would be required to report to DOEE for further direction and guidance prior to commencement of work. The letter indicated that Exxon remained the Responsible Party for any previously incurred or future liability due to residual contamination left in place.
3. On June 16, 2016, the Applicant purchased the Property from Five Q, LLC. Recognizing that the NFA was conditional based on the soil staying in place, the Applicant decided to enter into the Voluntary Remediation Action Program ("VRAP") with DOEE to implement a Voluntary Remedial Action Plan ("VRAP Plan") to remediate the Property using a risk-based approach for the development of a residential building, and to assume Responsible Party status for all historic contamination at the Property. Although it is highly unusual for a private property owner to take on the Responsible Party status for a property, the Applicant saw no other way but to take this action so that the PUD could move forward as approved.
4. On March 12, 2017, the Applicant met with DOEE to discuss the VRAP process. DOEE was receptive to the idea and appreciated the Applicant's offer to assume Responsible Party status.
5. On May 16, 2017, pursuant to DOEE's guidance, the Applicant submitted a VRAP application to DOEE for redevelopment of the Property (Exhibit B to the affidavit). The VRAP application confirmed that the Applicant would be required to perform assessment and remediation work and take corrective action in place of the previous Responsible Party.
6. By letter dated May 30, 2017 (Exhibit C to the affidavit), DOEE approved the Applicant's VRAP application and granted Responsible Party status to the Applicant, contingent upon submission of the following:
 - a. A Certificate of Financial Responsibility;
 - b. A detailed VRAP Plan explaining the proposed technologies that would be used to remediate residential contamination to levels that are protective of human health and the environment;
 - c. A site-specific quality assurance/quality control plan for the activities to be carried out during implementation of the remedial approach; and

- d. A site-specific Health and Safety Plan addressing federal Occupational Safety and Health Administration regulations.
7. On June 26, 2017, the Applicant submitted to DOEE all of the documents requested in DOEE's May 30, 2017 letter, including the VRAP Plan (Exhibit D to the affidavit).¹
8. On August 17, 2017, DOEE requested revisions to the VRAP Plan (clarify that monitoring well construction and locations will be proposed to DOEE before installation; clarify that any over excavation will be proposed to DOEE before completion; and change the attainment sampling from two quarters to four quarters) (Exhibit E to the affidavit).
9. On August 22, 2017, the Applicant submitted the revised VRAP Plan to DOEE (Exhibit F to the affidavit).²
10. On September 6, 2017, DOEE approved the VRAP Plan (Exhibit G to the affidavit) and the transfer of Responsible Party status for the Property from Exxon to the Applicant (Exhibit H).

As indicated in the affidavit (Exhibit J), now that DOEE has finally approved the VRAP Plan, there are certain items that need to be completed before excavation for the approved building's foundation can begin, including designing engineering controls (e.g. vapor barrier and sub-slab system) and identifying the remedial exaction area to ensure full compliance with the VRAP Plan. So far, the Applicant has taken the following steps to begin this process:

1. The Applicant, through a vapor mitigation specialist at Kleinfelder, an engineering and science consulting firm, is currently completing a study on the design of an active sub-slab depressurization system based on the existing foundation plans and known groundwater conditions. The study is required as it is critical to determine compatibility with the foundation plans already on file with the District; and
2. The Applicant has finalized a work plan/schedule with Kleinfelder to complete pre-excavation sampling activities as required in the approved VRAP Plan. The samples will be used to dictate the final design of the remedial excavation as well as engineering controls. The designs need to be submitted to DOEE for approval prior to construction. The Applicant notes that it cannot install the engineering controls until after the excavation is complete. The controls are then installed beneath the foundation.

The Applicant anticipates that finalizing the above-stated items will take an additional 6-12 months, as they require field work and DOEE approval. Once these items are complete, an additional 6-12 months are needed to update the foundation and construction plans and work with the District to obtain building permits that take into account the VRAP Plan approved after the original building permit application was filed. The specific VRAP Plan activities are as follows:

¹ The VRAP Plan attached as Exhibit D to the affidavit is an excerpt only, as the entire document is longer than 100 pages including the appendix. The cover letter, cover page/signatures, and table of contents are attached. The Applicant can provide a copy of entire VRAP Plan if requested by the Commission.

² The revised VRAP Plan attached as Exhibit F to the affidavit is an excerpt only, as the entire document is longer than 100 pages including the appendix. The cover letter, cover page/signatures, and table of contents are attached. The Applicant can provide a copy of the entire revised VRAP Plan if requested by the Commission.

1. Prior to implementation of the VRAP Plan, pre-excavation soil borings are required to characterize soils for disposal within the limits of the building foundation and to vertically delineate soil impacts for the remedial excavation. To do so, the Property will be divided into a 50-foot by 50-foot grid with one soil boring advanced in each grid section. Soil samples will be collected from five feet below grade to the boring termination depths of approximately 30 to 35 feet below grade. The remedial excavation design will be determined following evaluation of pre-excavation soil boring data and will be submitted to DOEE for approval prior to completion of work.
2. Prior to implementation of the VRAP Plan, a project-specific vapor barrier needs to be designed and approved by DOEE. The results from the pre-exaction soil samples will be utilized while selecting the appropriate vapor barrier design.
3. Prior to implementation of the VRAP Plan, a project-specific sub-slab depressurization system needs to be designed and approved by DOEE.

As a result of this lengthy process and the inability to secure all required governmental approvals to date, the Applicant is unable to begin construction within the time limit set forth in Z.C. Order No. 06-04F. Accordingly, based on the substantial evidence provided herein and attached hereto, this request for an extension of the time period of an order satisfies the criteria for good cause shown as set forth in 11-Z DCMR § 705.2(c)(2).

III. NO HEARING NECESSARY

Subtitle Z § 705.7 of the Zoning Regulations provides:

The Commission shall hold a public hearing on a request for an extension of the validity of an application approval only if, in the determination of the Commission, there is a material factual conflict that has been generated by the parties to the proceeding concerning any of the criteria in Subtitle Z § 705.2. The hearing shall be limited to the specific and relevant evidentiary issues in dispute.

A hearing is not necessary for this request because there are no material factual conflicts generated concerning any of the criteria set forth in 11-Z DCMR § 705.2. The only other party to this case was ANC 5E, to whom the Applicant has served a copy of this request. There is no dispute that the Applicant is unable to obtain the required building permit to begin construction by June 15, 2018. Thus, there cannot be any material factual conflicts generated concerning any of the criteria by which the Zoning Commission is required to consider this request.

IV. COMMUNITY SUPPORT

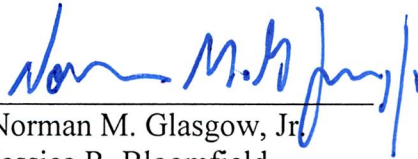
The Site is located within the boundaries of ANC 5E, which is familiar with this case due to the prior PUD approvals, modifications, and extensions. The Applicant will continue to work with the ANC on the subject extension request and will provide an update prior to the Commission's decision on this case.

V. CONCLUSION

In light of this demonstration of good cause and for the reasons stated herein and in the attached exhibits, the Applicant respectfully requests that the Commission approve the requested two-year extension of time to begin construction of the PUD, such that construction must begin no later than June 15, 2020. Finally, no hearing is necessary as there are no material factual issues in question.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Norman M. Glasgow, Jr.
Jessica R. Bloomfield

Attachments

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, a copy of the foregoing application for an extension of time to begin construction was served on the following by email, with hard copies sent on May 1, 2018.

Mr. Joel Lawson
D.C. Office of Planning
1100 4th Street, SW
Washington, DC 20024
joel.lawson@dc.gov

Via Email and Hand Delivery

Ms. Karen Thomas
D.C. Office of Planning
1100 4th Street, SW
Washington, DC 20024
karen.thomas@dc.gov

Via Email and Hand Delivery

Advisory Neighborhood Commission 5E
5E@anc.dc.gov

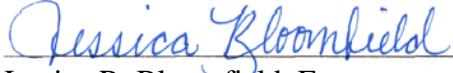
Via Email

Commissioner Katherine McClelland
ANC 5E06
413 Richardson Pl NW
Washington, DC 20001

Via U.S. Mail

Commissioner Bradley Ashton Thomas
ANC 5E, Chair
107 P Street NW
Washington, DC 20001

Via U.S. Mail


Jessica R. Bloomfield, Esq.
Holland & Knight LLP