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October 9, 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 Two-Year Extension of Time to Begin Construction
Square 772, Lots 803 and 804
Z.C. Order No. 14-19**

Dear Members of the Zoning Commission:

On behalf of M Street Development Group, 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 building located at Square 772, Lots 803 and 804 (the “Property”). The building was approved as a consolidated planned unit development (“PUD”) with a related Zoning Map amendment pursuant to Z.C. Order No. 14-19. This request, if approved, would require construction of the building to begin no later than November 20, 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 attached hereto 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

Pursuant to Z.C. Order No. 14-19, dated September 21, 2015, and effective on November 20, 2015 (Exhibit C), the Zoning Commission approved a consolidated PUD a related Zoning Map

amendment from the from the C-M-1 District to the C-3-C District for the Property.¹ The Property is bounded by N Street, NE to the north, 4th Street, NE to the east, M Street, NE to the south, and 3rd Street, NE to the west.

The approved PUD was for a mixed-use building consisting of approximately 408,496 square feet of gross floor area devoted to residential use (416 residential units, plus or minus 10%) and approximately 10,302 square feet of gross floor area devoted to retail use. The Applicant filed a building permit application for the building on August 24, 2016, thus meeting the first condition in Decision No. D(2). However, due to continued delay related to the Property's environmental contamination and remediation measures, the Applicant requests a two year time extension such that construction of the approved PUD must begin no later than November 20, 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

¹ At the time that Z.C. Order No. 14-19 was issued, the Property was known as Lots 1, 2, 6, 7, 19, 801, and 802 in Square 772. In 2017, new tax lots were assigned to the Property, which is now known as Lots 803 and 804 in Square 772.

The original PUD was approved under the 1958 Zoning Regulations. On September 6, 2016, the provisions of ZR58 were repealed and replaced with the 2016 Zoning Regulations. Under the 2016 Zoning Regulations, the approved C-3-C District converts to the MU-9 District.

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.

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") 6C. As indicated in the Certificate of Service attached hereto, the Applicant served this request for an extension of time on ANC 6C, 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 No. 14-19. The Applicant remains committed to moving forward with developing the building and fully 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)(3), the Commission is authorized to grant an extension of PUD validity for projects where the applicant demonstrates with substantial evidence "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." This application satisfies the criteria of 11-Z DCMR § 705.2(c)(3) and thus meets the requirements for an extension of the validity of the PUD.

As set forth in the affidavit of Berkeley M. Shervin, attached hereto as Exhibit D (the "Affidavit"), on August 24, 2016, the Applicant filed a building permit application for the PUD, thus satisfying the first condition of Decision No. D(2) (Permit No. B1612326) (Exhibit A of the Affidavit). Following submission of the building permit application, the Applicant has worked diligently to move forward with construction of the approved project but has experienced significant delay due to ongoing negotiations with BP Oil Company ("BP"), the responsible party for completing soil remediation measures on the southeastern portion of the Property, which was a former Amoco gas station (the "BP Site"). The contamination on the BP Site, remediation measures, the requirement to obtain regulatory approval from DOEE prior to the commencement of any work on the Property, and related negotiations have delayed the Applicant's efforts to commence construction prior to November 20, 2018.

A detailed history of all remediation work on the BP Site is included in the report prepared by GES, Inc. attached as Exhibit B to the Affidavit. In addition, the Applicant has undertaken the following work on the BP Site following approval of the PUD:

1. Negotiated a Corrective Action Plan (“CAP”) with BP to establish the remediation plan for the Property, which must be reviewed and approved by DOEE before a building permit can be issued or any construction can commence. This included individual negotiations with BP and meetings with BP and DOEE together to review the approved PUD plans and the terms of the CAP.
2. On July 29, 2016, BP submitted the proposed CAP to DOEE, which was ultimately not acceptable to DOEE despite the Applicant’s best efforts to finalize the terms and coordinate with BP and DOEE. Following feedback, BP submitted a revised CAP to DOEE, which incorporated DOEE’s suggestions and which was ultimately approved by DOEE on January 5, 2017 (*see* Exhibits C and D to the Affidavit, which include the final approved CAP and email correspondence where DOEE approved the CAP).
3. Concurrently, from May to December, 2016, the Applicant engaged in ongoing negotiations with BP on the need for a written Coordination Agreement to establish field procedures under the proposed CAP for remediating contaminated soil and/or groundwater during construction of the PUD. The Applicant engaged environmental consultants and counsel at that time and prepared a draft Coordination Agreement. However, the Applicant was unable to reach a final agreement with BP due to BP’s position that an existing access agreement (which requires the Applicant to implement engineering controls on its Property and cooperate with BP in implementing and maintaining the controls) was sufficiently detailed to guide the remediation work in the field while under construction. A copy of the Applicant’s proposed agreement is attached as Exhibit E to the Affidavit.
4. Since approval of the PUD, the Applicant (through HITT Construction) was also soliciting and compiling bids from subcontractors with construction pricing, which the Applicant incorporated into its financial models. On September 9, 2016, the Applicant issued the numbers to its prospective construction lender.
5. On March 6-10, 2017, under the direction of BP’s environmental consultant (Antea Group) and as monitored by the Applicant’s environmental consultant (Stephen W. Saul, PG), contaminated soil was excavated and removed from the BP Site in accordance with the DOEE-approved CAP.
6. On March 19, 2017, Mr. Saul issued a Soil Excavation Summary Report of Observations (Exhibit F to the Affidavit). Upon receipt of Mr. Saul’s report the Applicant contacted DOEE to discuss the results of BP’s work and review any concerns DOEE had about the limits of the excavation. Upon review, the Applicant was advised that DOEE was satisfied with the results of the work BP had completed.
7. Due to the time it took to for DOEE to approve the CAP and complete the required excavation work required by the CAP, the construction pricing that the Applicant’s general contractor previously issued on September 9, 2016 could no longer be relied

upon. Once the construction pricing was lost, the Applicant had to take the project back out into the marketplace to be re-priced.

8. On June 28, 2017, HITT re-priced the job with the subcontractor market. The result was an almost \$7.2 million increase in the total cost. Therefore, the Applicant spent additional time exploring potential options for value engineering the project. Losing the construction pricing also placed the capital structure and related project financing at risk. As a result, the capital partner that the Applicant had identified in January, 2017 and spent many months working with on the project's budget, design, and market studies, was not able to adequately finance the project.
9. In the first quarter of 2018, the Applicant identified and reached an agreement with a replacement capital partner and subsequently worked through an on-boarding process, including sharing the budget and pro-forma, negotiating design work, and undertaking market studies.
10. During this time, ICOR, Ltd., an environmental services firm, studied and issued recommendations for a protective soil barrier designed by a certified professional geologist to be installed over the BP Site, as recommended in the CAP (*see* Exhibit G to the Affidavit). Given the intended residential use of the Property and the fact that the limits of disturbance adjoin public space, thus affecting the sheeting and shoring design, the research, evaluation and determination on a final soil barrier design is still on-going as technologies continually evolve. After the system was designed, the Applicant's general contractor advised the Applicant to research CoreFlex, a waterproofing system fully welded and sealed that can be applied to contaminated soils. Thus, the Applicant's efforts to design and install the most effective system are ongoing.

Following the unanticipated delays cited above, the Applicant's development team now has the project back on track. The Applicant is currently in debt markets to obtain construction financing and has received several financing term sheets from local construction lenders which the Applicant is in the process of reviewing. Once the Applicant identifies the construction lender, it will request the general contractor to obtain final construction pricing so that preparations for the commencement of construction can begin. Based on the foregoing, the Applicant is confident that construction of the approved PUD will be able to commence prior to November, 2020.

Outside of the Applicant's financing and environmental efforts, the Applicant has continued to pursue permits for the approved project as follows:

- a. Raze Permit R1500176: Issued July 17, 2016 (Exhibit H to the Affidavit). In August, 2018, the Applicant re-filed for the Raze Permit pursuant to the expired DOH Vector Clearance and DDOT Occupancy Permit. This permit application is currently under review.
- b. Sheeting Permit No. SH1600013: Issued October 17, 2017. A six-month extension request was approved, which extends the permit until April 18, 2019. A copy of the original permit and the extended permit are attached as Exhibit I to the Affidavit.

- c. Foundation Permit No. FD1600109: Issued July 18, 2017. A six-month extension was approved, which extends the permit until January 18, 2019. A copy of the original permit and the extended permit are attached as Exhibit J to the Affidavit.
- d. Building Permit Application: B1612326 filed on August 24, 2016 (Exhibit A to the Affidavit). The Applicant sent comment responses to the permit expeditor on September 26, 2018.

In addition, in the summer of 2015 the Applicant engaged WDG Architecture to complete the construction drawings for the project. The following timeline reflects WDG's work since November, 2015:

- a. December 18, 2015. Design Document architectural drawing set complete;
- b. February 2, 2016. 50% Construction Drawing set complete;
- c. March 9, 2016. Foundation to Grade drawings complete;
- d. July 15, 2016. Permit/construction bid set complete; and
- e. May 19, 2017. Construction drawings are 100% complete.

In addition, the Applicant has undertaken the following actions that are required to move forward with redevelopment of the Property:

- a. Executed a First Source Employee Agreement with the District's Department of Employment Services ("DOES") on August 30, 2016 (Exhibit K to the Affidavit).
- b. Completed extensive geotechnical due diligence in August, 2016 (Exhibit L to the Affidavit);
- c. Submitted an initial service application to Washington Gas regarding utility distribution systems for the project on April 1, 2016 (Exhibit M to the Affidavit);
- d. Submitted an initial service application to Pepco regarding utility distribution on November 24, 2014 (Exhibit N to the Affidavit).
- e. Submitted water and sewer plans to DC Water in 2016, and posted \$350,330 in cash for water and sewer pipe inspection deposits on August 18, 2016 (Exhibit O to the Affidavit);
- f. As previously cited, the Applicant engaged a general contractor, HITT Contracting, and underwent two rounds of construction bidding with subcontractors, with a third planned for late 2018.

As noted in the Affidavit, the Applicant is committed to moving forward with development of the approved PUD. To date, the Applicant has invested nearly \$5.5 million in the Property, including legal, architectural, engineering, and other consulting fees. There is no financial advantage to not redevelop the Property, and the Applicant has every incentive to do so as soon as is feasible. Accordingly, the two-year PUD extension will allow the Applicant the time needed to

complete all remaining predevelopment-related steps. The Applicant anticipates finalizing its financing and commencing construction in the within the next two years.

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 since there are not any 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 6C, to whom the Applicant has served a copy of this request. There is no dispute that there are ongoing environmental remediation measures at the Property that have prevented the Applicant from obtaining financing and proceeding with construction of the building. 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. ANC CONTACT


In addition to sending ANC 6C a copy of this application, the Applicant also discussed the extension request with ANC 6C prior to filing. The Applicant plans to present the application at a public ANC meeting prior to the Commission's decision on this application and will provide an update upon doing so.

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 a two year extension of time to begin construction of the PUD, such that construction must begin no later than November 20, 2020. No hearing is necessary as there are no material factual issues in question.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Kyrus L. Freeman
Jessica R. Bloomfield

Attachments

cc: Joel Lawson, D.C. Office of Planning (*see* Certificate of Service)
Stephen Cochran, D.C. Office of Planning (w/enclosures, via Email)
Anna Chamberlin, DDOT (w/enclosures, via Email)
Advisory Neighborhood Commission 6C (*see* Certificate of Service)
Commissioner Heather Edelman, ANC 6C06 (w/enclosures, via Email)
Commissioner Karen Wirt, ANC 6C Chair (w/enclosures, via Email)

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2018 electronic copies of the foregoing application for an extension of time to begin construction was served on the following, with hard copies delivered on October 10, 2018.

Mr. Joel Lawson
D.C. Office of Planning
1100 4th Street, SW
Washington, DC 20024

Via Email and Hand Delivery

Advisory Neighborhood Commission 6C
P.O. Box 77876
Washington, DC 20013-7787

Via U.S. Mail



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