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ZC Case No. 01-28TE
PUD Modification and Time Extension
200 K Street N.E.

District of Columbia
01-28TE
88

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APPLICANT'S STATEMENT IN SUPPORT OF THE EXTENSION OF TIME

Submitted to the Zoning Commission of the District of Columbia
November 8, 2005

I. Introduction.

The Applicant, 200 K Street LP ("Applicant") has applied for a one-year extension of the validity of the Planned Unit Development ("PUD") originally approved by the Zoning Commission ("Commission" or "ZC") by Order No. 783, effective October 27, 1995 ("the 1995 Order"), and subsequently extended in two-year increments by Order No. 783-A, effective May 22, 1998 and Order No. 783-B, effective January 21, 2000. The Applicant has simultaneously applied for a PUD Modification. The combined application was designated by the Office of Zoning as Case No. 01-28TE, PUD Modification and Time Extension, 200 K Street N.E.

The Commission on March 14, 2005 voted unanimously to set the case down for a single public hearing which was subsequently scheduled for October 3, 2005. At that time, the Commission convened the hearing, approved a request by Advisory Neighborhood Commission 6C to postpone further proceedings, and set the date of November 17, 2005 for a continuation of the hearing.

Also at the October 3rd hearing, Chairman Carol Mitten announced that the November 17th proceedings will be conducted, first, as a hearing on the Applicant's request for an extension

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of time,[1] and the Commission then will vote on whether to grant the extension of time. If the vote is favorable, the Commission then will take testimony on the Applicant's proposed PUD Modification. The Applicant submits this memorandum in support of the request for a one-year extension of time.

II. Statement of the Case.

The 1995 Order approving the PUD provided that it "shall be valid for a period of two years from the effective date of this Order," with a building permit application to be filed within that period and construction to begin "within three years of the effective date of this Order." The Order took effect October 27, 1995, meaning that October 27, 1997 was the deadline for a building permit application and October 17, 1998 was the deadline for construction to begin. On October 23, 1997, the Applicant applied for a two-year extension, stating:

> "I have, during the past two years, been seeking and negotiating with various persons and companies to fulfill the requirements contained within my PUD application. Because of my inability at present to have in hand a commitment from a mortgage lender to fund this project, I am seeking an extension for an additional two years on the above case."

The Commission considered the application without a hearing and voted 4-0 on April 13, 1998 to grant a two-year extension – to October 27, 1999 for the building permit application and to October 27, 2000 for construction to begin. ZC Order No. 783-A stated: "The Commission determined that an extension of the validity of the PUD is reasonable and would not adversely affect any party. The Commission believes the Applicant has made reasonable efforts to obtain financing for the project."

On October 25, 1999, the Applicant applied for a second two-year extension, stating:

> "....the Applicant has been working diligently with government and private entities to attract a tenant to the project. While strong interest has developed over this period and we feel we are close to landing a tenant, the fact of the matter is that we have not secured one to date. The lack of a tenant has made it extremely difficult to secure financing."

[1] We note that the Commission's vote to set the case down was for a hearing on the modification, with no reference to a hearing on the extension of time. In moving set-down approval, Chairman Mitten stated: "Well, we have a recommendation for a set down from the Office of Planning for Case No. 01-28 for the PUD modification, and I would so move." *(Emphasis added.)* Transcript, ZC Public Meeting, March 14, 2005, p. 159.

On December 13, 1999, the Commission considered the application without a hearing and voted 4-0-1 (with then-Member Franklin abstaining) to grant a two-year extension until October 27, 2001 for the building permit application and October 27, 2002 for construction to begin. ZC Order No. 783-B stated: "The Commission determined that an extension of the validity of the PUD is reasonable and would not adversely affect any party. The Commission believes that the Applicant has made reasonable efforts to locating a tenant."

On October 25, 2001, the Applicant applied for another two-year extension (subsequently amended to seek only a one-year extension). The application letter stated that the Applicant "is close to breaking ground on the residential phase of the PUD" but remains "engaged in sensitive negotiations" to secure a major tenant for the office component. The timely filing of the application had the effect of stopping the clock on the expiration of ZC Order No. 783-B.[2]

The Applicant then engaged in a series of discussions with the Office of Planning ("OP"), resulting in OP's recommendation that the PUD should be extended for one year, rather than two years, and that the Applicant should also apply for PUD Modification in order to provide an opportunity for full ZC and public review of the Applicant's proposed PUD revisions. The OP Report to the Commission, dated May 3, 2002, stated:

> "The Office of Planning concludes that a PUD modification is necessary, given the substantial changes in the design, height, number and type of residential units. OP is supportive of most of the changes made in the extension request and anticipates being supportive of the project at any modification hearing..... If the Zoning Commission should decide to approve the application as a PUD extension, then OP recommends that it be extended for a period of one year."

The Applicant accepted the OP recommendations and filed a PUD Modification application on June 27, 2002. In a revised application submitted May 14, 2004, the Applicant requested consideration of the PUD Modification as a Consolidated PUD for Phase 1 development and as a Preliminary (Stage I) PUD for Phase 2 development.

During the pendency of the application, the Applicant has worked with OP, Advisory Neighborhood Commission 6C, which represents the area where the project is located, and other

[2] This is well-established in ZC cases, as evidenced most recently by the statements of Assistant Attorney General Alan Bergstein in response to Chairman Mitten's questions during the Commission's May 9, 2005, set-down proceeding in Case No. 02-51A. Referring to an expired PUD, for which a time-extension application is pending, Mr. Bergstein said: "...(E)ven though this has expired, it stays in place as a bridge. It doesn't mean that they can go forward with the PUD. But it allows them to keep it in place, so that they can, in essence, request a modification." (Transcript, ZC Public Meeting, May 9, 2005, pp. 57-58)

community organizations to further refine the proposed development and the amenities package and respond to OP and community concerns and requests.

The PUD Modification now before the Commission for a decision is contained in the Applicant's submission of September 13, 2005 with the amendments submitted September 29, 2005, as requested by OP.

The ANC 6C Planning and Zoning Committee has twice voted to support the time extension and modification application in its present form, at its public meetings on September 7 and November 2, 2005. The full ANC is scheduled to vote on its Planning and Zoning Committee recommendations at the full ANC meeting on November 9, 2005.

Regarding the extension of time, the Applicant requests an extension of the PUD, with the proposed modifications, for one year beyond the effective date of a ZC Order of approval, during which time a Consolidated PUD (Phase 1) building permit application must be filed with the Department of Consumer and Regulatory Affairs and a Final (Stage II) PUD application must be filed with the Zoning Commission.

The Applicant also agrees to establish a Consolidated PUD (Phase 1) construction start date within one year beyond the effective date of a ZC Order of approval, subject to timely D.C. Government action on necessary alley-closing legislation and a Consolidated PUD (Phase 1) building permit.

If a ZC Order of approval takes effect in early January 2006, this would have the effect of maintaining the validity of the PUD for approximately 11 years (including stop-the-clock time). As discussed further below, this is not an unusual length of time for large and complex PUD projects that originated during the recession-era periods of the 1980s and 1990s.

III. The Zoning Regulations Standards for ZC Approval of PUD Extensions of Time.

The Zoning Regulations, at 11 DCMR §§ 2408.10 and 2408.11, establish the burden of proof applicants must meet to qualify for approval of PUD extensions of time. The applicant must first demonstrate that:

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;" (§2408.10 (a));

B. "There is no substantial change in any of the 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;" (§2408.10 (b)); and

C. "The applicant demonstrates with substantial evidence that there is good cause for such extension, as provided in § 2408.11." (§2408.10 (c)).

To establish "good cause" for the approval of an extension of time, the Applicant may cite and provide substantial evidence of one or more of the following conditions:

A. "An inability of the applicant 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;" (§2408.11(a))

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" (§2408.11(b))

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." (§2408.11(c))

We submit that the Applicant meets the burden of proof set forth in § 2408.10, including the submission of "substantial evidence" demonstrating "an inability to obtain sufficient project financing for the PUD" until the present time, as set forth in §2408.11(a).

IV. "The Applicant has served the extension request on all parties to the application." (§ 2408.10(a))

The only party to the case (other than the Applicant) is ANC 6C. The Applicant timely served ANC 6C with copies of the initial application of October 25, 2001 and subsequent submissions. Service was accomplished by first-class mail, postage prepaid, to the ANC 6C address of record for the original application and submissions filed up to June 9, 2005.

Copies of all submissions filed on June 9, 2005 and thereafter were served on ANC 6C through combinations of first-class mail, facsimile and e-mail delivery, Federal Express, and hand-delivery by the Applicant's agent. Certificates of Service are on file in the records of the

Office of Zoning. In addition, a complete set of Applicant submissions of September 13th through September 29th was hand-delivered by the Applicant's agent to seven of the ANC 6C Commissioners members at their home addresses on October 7 and 8, 2005 and to the remaining two Commissioners by Federal Express on October 10, 2005.

V. "There is no substantial change in any of the 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." (§ 2408.10(b))

A. Analysis of Section 2408.10(b)).

For a PUD extension of time to qualify for approval, Section 2408.10(b) requires the Commission to make a determination regarding the three elements contained in this section, all of which relate to the Commission's justification for approving the original PUD.

First, the Commission must determine whether there has been a substantial change in the facts upon which the original decision was based.

Second, if the Commission determines that there has been a substantial change, it must then determine whether the substantial change is in a material fact.

Third, if the Commission determines that there has been a substantial change, and that the substantial change is in a material fact, it must then determine whether the substantial change in the material fact specifically undermines the Commission's justification for its original approval.

Thus, to disqualify a time-extension request under Section 2408.10(b), the Commission must find that there has been a substantial change in a material fact, and that such change undermines the Commission's justification for approving the original PUD.

Sections 2408.10-2408.12 were adopted by the Commission on January 13, 1997 by Order No. 810, effective February 14, 1997, as text amendments to the Zoning Regulations. The Commission chose not to include definitions of the terms "substantial", "material fact", and "undermine" in these text amendments or elsewhere in the Zoning Regulations. ZC Order No. 810 provides scant guidance regarding the Commission's intended interpretation of these terms. Moreover, we have found no discussion of the Commission's intended interpretations in our

review of ZC Orders in 31 PUD cases involving time extensions.[3] Thus, we have turned to D.C. case law for guidance and the Zoning Commission's own regulations that "Words not defined in this section shall have the meanings given in *Webster's Unabridged Dictionary.*" 11 DCMR §199.2(g)

1. The meaning of the "substantial change" test.

A fair and reasonable reading of section 2408.10(b) does not permit the Commission to be influenced by minor or moderate changes in the facts. To merit Commission consideration, the change must be substantial. In an administrative "show cause" context, the "substantial" standard is often used when determining whether the evidentiary burden has been met (i.e., "substantial evidence"). When evaluating whether a change meets the "substantial" standard (i.e., "substantial change"), the definition of "substantial" as is used in the evidentiary context can reasonably be applied.

In *Foggy Bottom Association v. District of Columbia Zoning Commission,* 639 A.2d 578, "substantial evidence" is defined as "'more than a mere scintilla,' or 'such evidence as reasonable minds might accept as adequate to support the conclusion.'" By implication, a "substantial change" would then be defined as such relevant change as reasonable minds might accept as adequate to support the conclusion.

As defined in *Webster's Third New International Dictionary, Unabridged ("Webster's),* "substantial" means "constituting substance", "being of moment", "important, essential," "of or relating to the main part of something", **synonymous with "massive"**. *(Emphasis added.)*

2. The meaning of the "material fact" test.

The second test, if the Commission finds the existence of a substantial change in the facts, is whether the substantial change is in one or more of the material facts upon which the

[3] In ZC Order No. 496-E, *PUD and Map Amendment @ 1717 Rhode Island Avenue, NW-St. Matthews,* decided July 13, 1998, the Commission determined, "The change in project developer is not a substantial change in a material fact upon which the Zoning Commission based its original PUD approval." The Commission was able to make this determination without discussing the intent of the terms "substantial change" and "material fact", because it found that "(n)one of the material facts relied upon by the Commission in approving the PUD or any of the extensions had to do with who was the project's developer."

Commission based its original approval of the PUD. For some guidance, we may look to the statutory definition of "material fact" as it applies to the duties of real estate brokers. In that context, D.C. Official Code §42-1702(7B), defines a "material fact" as "information that, if known, would be likely to induce a reasonable person to enter into or not enter into or consummate a real estate transaction."

In addition, *Webster's* defines "material" as meaning "being of real importance or great consequence", "essential", "relevant, pertinent", "requiring serious consideration by reason of having a certain or probable bearing on the proper determination of a law case or on the effect of an instrument or on some similar unsettled matter (a *material* fact), (a *material* piece of evidence)."

In the context of Section 2408.10(b), we submit that a "material" fact is a fact that is such an essential element of the foundation of the original PUD approval that any "substantial" change in it would lead a reasonable person to change his/her position. By the plain language of §2408.10(b), a "material fact" weighing against a time extension is a fact that "undermines" the Commission's justification for approving the original PUD. *(Emphasis added.)*

3. The meaning of the "undermines" test.

The third test, if the Commission finds the existence of a substantial change in a material fact, is whether such change in a material fact undermines the Commission's justifications for approving the original PUD. The word "undermine" is defined in *Webster's* as "to excavate the earth beneath", "to wash away supporting material from under", "to subvert or weaken insidiously or secretly", and "to weaken or ruin by degrees". *(Emphasis added.)*

This is the linchpin of the three tests established by Section 2408.10(b). To be disqualifying, any substantial change in a material fact must "wash away", "subvert or weaken", or "ruin by degrees" the Commission's factual foundation and justifications for approving the original PUD. In short, it must have the impact of clearly contradicting or running counter to the Commission's reasons for approving the original PUD.

B. Substantial changes in material facts in the instant case.

In the ten years since the Commission's approval of the 1995 Order, the Applicant acknowledges that there have been changes in the facts of this case, and that some are substantial changes in material facts. However, ***none*** of the substantial changes in material facts ***undermines*** "the Commission's justification for approving the original PUD".

To the contrary, the substantial changes in material facts ***enhance and support*** the Commission's justification for approving the original PUD and foster the objectives of the PUD process, the Comprehensive Plan as it exists today, and contemporary District planning and land use policies and goals. Considering all of the elements upon which the Commission based its original decision – the Comprehensive Plan including the Ward 6 Plan, the desires of the ANC and other community organizations, the project design, and the amenities package – we submit that the Applicant meets the burden of proof set forth in Section 2408.10(b), and the other applicable provisions of the Zoning Regulations.

In the table that follows, we have identified the material facts for which there have been substantial changes since approval of the ZC 1995 Order.[4] We then discuss how these substantial changes in material facts enhance and support, rather than undermine, the Commission's justifications for approving the original PUD.

[4] For a line-by-line comparison of the Applicant's PUD Modification with the 1995 ZC Order, ***see*** the narrative portion of the Applicant's *Final Pre-Hearing Supplemental Submission,* September 13, 2005, pp. 11-14. ***See also***, *Site Tabulations & Building Calculations,* (corrected copy), submitted October 3, 2005.

Material Facts Upon Which ZC Based Its 1995 PUD Approval	Substantial Changes in Material Facts
Project consists of two high-rise structures – a 15-story, 130-foot residential building on the east side of the site, and a 12-story, 130-foot office building on the west side of the site (Square 749)	PUD Modification proposes: ▪ Eliminating office use and developing an entirely residential project with ground-level retail ▪ Reducing the height of the east-side building to a maximum of 10 stories and 90 feet, stepping down to seven stories and 65 feet on the northeast corner ▪ Revising the west-side building to include 15 stories within the same 130-foot height previously approved ▪ Restructuring the west-side building proposal as a Preliminary (Stage I) PUD, with complete designs to be presented to the Commission and the community as a Final (Stage II) PUD application
Minimum of 230 residential units to be provided	Approximately 702 residential units to be provided
Site was split-zoned as C-M-1 and M. ZC approved re-zoning of entire site as C-3-C.	By ZC Order No. 821 (Case No. 95-14/93-8, Map Amendments-Union Station Area Rezoning, effective September 26, 1997), the Commission rezoned the M portion of Square 749 to C-M-3 and rezoned the C-M-1 portion to C-2-B. The Map Amendments reflected the Commission's decision to phase out industrial uses – and encourage commercial and residential uses – in the areas surrounding Union Station. Applicant seeks no change in the portion now zoned C-2-B. For the portion now zoned C-M-1, the Applicant requests Commission re-affirmation of the previous approval of rezoning to C-3-C.
Amenities package included: ▪ A 15,000-sf vocational training facility, ▪ A 5,000-sf business training school, ▪ A 40,000-sf supermarket (Other amenities incorporated in the ZC 1995 Order continue to be proffered without substantial change.)	Vocational training school, business training school, and supermarket eliminated due to lack of development feasibility. New amenities presently proffered: ▪ Approximately 78 housing units designated as affordable at 80% of AMI (11.07% of residential gsf) ▪ Green roof ▪ Double-height ground-floor retail

C. How the substantial changes in material facts enhance, rather than undermine, the Commission's justifications for approving the original PUD.

The Commission's justifications are set forth in several portions of the 1995 Order. These justifications/reasons are quoted below, followed by our arguments regarding how the substantial changes in material facts enhance and support the justifications stated by the Commission.

ZC 1995 Order, Findings of Fact – Numbers 36, 37, and 38:

> "**36.** The Commission believes that the proposal's consistency with the Comprehensive Plan meets the goals and objections (sic) of the plan relative to the provision of a medium-high density commercial project on the site. The Commission also believes the proposed 230 residential units would add to the housing stock in the area and help buffer the existing residential neighborhood from the proposed commercial development. The Commission believes the project's commercial component could provide an economic stimulus for the area, acting as a catalyst for future commercial development to the immediate north and east of the site."
>
> "**37.** The Commission concurs with the applicant that the mixed-use project is appropriate for the site and is not inconsistent with the Comprehensive Plan."
>
> "**38.** The Commission finds that the applicant has met the requirements of 11 DCMR Chapter 24 (Planned Unit Development Procedures) and has satisfied the intent and purpose thereof."

Applicant's Argument:

In the 1995 Order, the Commission correctly determined that the 1995 PUD was "not inconsistent" with the Comprehensive Plan, particularly the provisions allowing medium-high density commercial use at the PUD site. The Applicant's PUD Modification proposal is ***far more consistent*** with the Comprehensive Plan and its specific provisions addressing land uses in the vicinity of the PUD site.[5]

Although the Comprehensive Plan's Ward Plan for Ward 6 designates the Union Station area for office development, mixed residential/commercial development, institutional development, and other appropriate development, these provisions must be read in the context of other Ward 6 planning policies and actions set forth in the Comprehensive Plan. Chief among

[5] The Comprehensive Plan in effect at the time of the ZC 1995 Order was D.C. Law 10-193, the "Comprehensive Plan Amendments Act of 1994", effective October 6, 1994. The Comprehensive Plan in effect today is D.C. Law 12-275, the "Comprehensive Plan Amendment Act of 1998", effective April 27, 1999. The Ward Plan for Ward 6 is virtually identical in both versions. The Commission, in ZC Orders 783-A and 783-B, approving previous extensions of time in this case, determined that "the Comprehensive Plan designation....(has) remained the same since the Commission's approval."

"OP noted that the office arrived at six summary goals...as follows:

"1. Stabilize the boundary between continuing economic development activity near the railroad tracks and the adjacent residential neighborhood.

"2. Protect a great majority of existing dwellings in residential areas from conversion to commercial or demolition and redevelopment for commercial projects, so as to maintain the area's housing supply, number of residents, and residential character.

"3. Allow a mixture of industrial and commercial uses at medium high density near the railroad tracks north of K Street in order to continue to provide business and job opportunities.

"4. Encourage a mixture of residential and commercial uses at moderate to medium density at various locations.

"5. Maintain the existing scale of the residential neighborhood and of the building stock in most of the area.

"6. Establish suitable intermediate step-down building heights at the edges of the intensive commercial development."

The Map Amendments adopted by ZC Order No. 821 included rezoning the PUD site from C-M-1 and M to C-M-3 and C-2-B. The effect was to open up the eastern portion of the PUD site for new residential development – prohibited in C-M-1 zone districts, and permitted in C-2-B zone districts. The M zone district permits a FAR of 6.0 and a height of 90 feet, the same as the C-M-3 zone district. The C-M-1 zone district permits a FAR of 3.0 and a height of 40 feet, while the C-2-B zone district permits a FAR of 3.5 and height of 65 feet. The change in zoning from the original approval to the current proposal therefore does not undermine the Commission's justification for approving the PUD as a balance of development incentives is still maintained.

In light of the facts set forth above, the Applicant submits that the "substantial changes in material facts" enhance and support, rather than undermine, the Commission's Findings-of-Fact justifications for approving the original PUD. The elimination of office use and development of an entirely residential project with ground-floor retail goes beyond the minimum PUD standard of being "not inconsistent" with the Comprehensive Plan; it specifically and materially fulfills the Comprehensive Plan's Ward 6 policies and prescribed actions to create more housing, stimulate private housing investment, and protect existing residential neighborhoods from commercial encroachment in the Union Station area. In addition, the introduction of the affordable housing amenity promotes all of the aforementioned housing policies and actions, plus the specific Comprehensive Plan action of "promot(ing) preservation and enhancement of low- and moderate-income housing development opportunities."

ZC 1995 Order, Conclusions of Law – Numbers 2-7:

> "**2.** The development of this PUD carries out the purposes of Chapter 24 to encourage the development of the subject site, because control of the use and site plan are essential to ensure compatibility with the neighborhood.
>
> "**3.** The development of this PUD is compatible with city-wide goals, plans, and programs and is sensitive to environmental protection and energy conservation.
>
> "**4.** The approval of this application is not inconsistent with the Comprehensive Plan of the District of Columbia."
>
> "**5.** The approval of this application is consistent with the purposes of the Zoning Act."
>
> "**6.** The proposed application can be approved with conditions which ensure that the development will not have an adverse effect on the surrounding community, but will enhance the neighborhood and ensure neighborhood stability."
>
> "**7.** The approval of this application will promote orderly development in conformity with the entirety of the District of Columbia zoning plan, as embodied in the Zoning Regulations and Map of the District of Columbia."

Applicant's Argument:

We submit that there isn't anything about the substantial changes in material facts in the PUD Modification that undermines the Commission justifications set forth in the Conclusions of Law listed above. The PUD process of Chapter 24 is used even more effectively than before in guaranteeing "control and use of the site plan ....to ensure compatibility with the neighborhood" because, pursuant to the PUD Modification, the Applicant will return to the Commission and the community with a Final (Stage II) PUD application for Phase 2 development at the site.

The development is now even more "compatible with city-wide goals" than in 1995 because the conversion from office to residential use and the provision of affordable housing fosters the city's goals of creating more housing, and assuring that affordable housing is included in all residential PUD projects. The current plan includes a proffer to dedicate over 10% of the PUD's total gross residential floor area (not just the bonus density) to housing that is affordable to households making no more than 80% of the Area Median Income. As noted in the Office of Planning report, this represents the largest percentage that a private developer has ever offered for a PUD that does not include government land. Additionally, the modified PUD proposal has reduced the traffic impact on the surrounding neighborhood from what was anticipated in the original approval.

The development is even more "sensitive to environmental protection and energy conservation" than in 1995 because the PUD Modification plan includes green roof technology.

Moreover, its approval "will promote orderly development" in greater consistency with the Zoning Regulations and the Zoning Map than in 1995 because the PUD Modification requests rezoning of only the C-M-3 portion of the site, leaving the C-2-B portion as is. The subject square is designated by the Comprehensive Plan for a mix of medium to high density commercial and industrial uses. The Zoning Commission determined that it was appropriate to place the entire subject square in a commercial zone district in conjunction with the original PUD. Residential uses are permitted in all commercial zone districts as a matter of right.

While the current proposal does deviate from the original PUD approval, the overall parameters of the findings made by the Commission in 1995 remain the same. The site, land area are the same as in the original approval. The height of the Phase 2 building is the same, while the height of the Phase 1 building has been reduced. The maximum floor area ratio is slightly higher, but within the limits allowed by the Zoning Regulations. The original approval required a minimum of 588 parking spaces; the current proposal includes 702 parking spaces. Both the original approval and the current proposal are for mixed-use developments. The current proposal has modified the proportion of the project devoted to residential uses, eliminating office but maintaining retail space. While the current proposal has responded to market conditions and city goals, its general parameters remain consistent with what was originally approved by the Commission. Finally, as in 1995, it can be approved with conditions set by the Commission to prevent adverse effects on the neighborhood.

VI. "The Applicant demonstrates with substantial evidence that there is good cause for such extension, as provided in §2408.11." (§2408.10(c))

Section 2408.11 sets forth three circumstances, any one of which may be cited with substantial evidence to demonstrate "good cause" for an extension. The Applicant cites subsection (c): "An inability of the applicant to obtain sufficient project financing for the PUD, following an applicant's diligent good faith efforts to obtain such financing, because of economic and market conditions beyond the applicant's reasonable control."

The common thread apparent in the Commission's approval of PUD time extensions is the recognition that the 1990s recession had an enormous detrimental impact on real estate

development in the District. Two-thirds of the 31 PUD cases involving time extensions originated in the 1990s. Time and again, developers cited the inability to obtain project financing as "good cause" for time extensions. In the Applicant's case and in other PUD office developments, the inability to obtain a commitment from a lead tenant caused prospective lenders and investors to turn away.

Although the real estate market began to revive in the late 1990s, the revival came first to the downtown area and has only recently begun to affect the NoMa area which includes the area where the Applicant's PUD site is located. An economic analysis prepared by the consulting firm of Basile Baumann Prost & Associates concluded:

> "During the first half of the 2000s, virtually no development activity took place in the NoMa area as development activity primarily focused on prime real estate locations in downtown and NW DC. Finally in 2005, the NoMa area is now primed for significant growth and development and is becoming one of the hottest real estate 'submarkets' in the District. While in the past, the Union Station railroad tracks served as a barrier to development, the opening of the New York Avenue Metro station is further catalyzing development activity in this area with significant new residential, office and retail projects under construction and planned." ***See*** Attachment 1.

Throughout the hard economic times, the Applicant has remained committed to developing the PUD site, retaining the services of an experienced commercial brokerage firm and pursuing every reasonable avenue to try to obtain project financing. James P. Ventura, the broker retained by Ronald J. Cohen, managing principal of the Applicant entity, and Mr. Cohen describe these efforts in the enclosed affidavits. ***See*** Attachment 2.

VII. The Zoning Commission has established a 25-year record of approving applications for PUD extensions of time.

To ascertain the Commission's pattern and practice with regard to applications for PUD extensions, we examined the Commission's published orders in 31 PUD cases involving time extensions from 1980 through 2003.[7] We found **only one case** in which the Commission denied the applicant's request for a time extension, a decision it subsequently reconsidered and reversed in part.[8]

[7] Our research was based on searches and retrievals of Zoning Orders available through the Office of Zoning website.

[8] ZC Order No. 910-A, "Second-Stage Planned Unit Development and Map Amendment at 100 Potomac Avenue, S.E. – Florida Rock Properties, Inc.", decided May 13, 2002. Reconsidered and reversed in part by ZC Order No. 910-B, decided March 10. 2003.

A. The Commission has established a pattern and practice of acting on applications for PUD extensions of time without conducting public hearings specifically addressing the extension of time.

The Zoning Regulations, at § 2408.12, provide:

"The Commission shall 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 proceedings concerning any of the criteria in § 2408.11. The hearing shall be limited to the specific and relevant evidentiary issues in dispute." *(Emphasis added.)*

Section 2408.12 was promulgated by the Commission in ZC Order No. 810, effective February 14, 1997, as part of several text amendments resulting from a D.C. Court of Appeals remand directing the Commission to clarify the "good cause" provision of the time-extension regulations. "This will require the Commission to review its policies regarding 'good cause' shown and decide whether some type of hearing is required in order to effectively determine whether 'good cause' exists." *Hotel Tabard Inn et al. v. District of Columbia Zoning Commission,* 661 A.2d 150, 154 (D.C. 1995)

In ZC Order No. 810, the Commission listed issues that had been raised by those who wrote letters or testified on the proposed regulations, including the issue that "Public hearings should be required for all extension requests." Responding to this assertion, the Commission wrote: "This suggestion would treat each extension request as a *de novo* application, which would not be in the public interest." ZC Order No. 810, at p. 5, bulleted item 3.

The Commission further stated:

> "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." ZC Order No. 810, at p. 6.

The *Hotel Tabard Inn* case again reached the D. C. Court of Appeals following promulgation of Section 2408.12 and the related text amendments. The Court wrote:

> "If, in a proceeding to determine whether an effective date extension of the PUD should be granted, it becomes necessary to resolve a material factual conflict which has been generated by the parties, then this would establish the need for a limited evidentiary hearing **for the purpose of resolving the particular factual**

> **conflict,** so that an informed decision may be made upon the request for the extension of the PUD.... If there are no material factual disputes, there is no need for an evidentiary hearing on an extension request and a submission of documents, perhaps supported by oral argument, would suffice." *Hotel Tabard Inn et al. v. District of Columbia Zoning Commission,* 747 A.2d 1168, 1176

Thus, it is clear that evidentiary hearings on PUD time extension applications are reserved for those instances in which the parties to the PUD have generated a "material factual conflict" regarding the applicant's asserted "good cause" for granting the time extension. Of the 31 PUD cases we reviewed, we found only one case in which the Commission conducted an evidentiary hearing on a time-extension request – and this occurred long before Section 2408.12 was promulgated.[9] Of the time-extension applications decided since promulgation of Section 2408.12, the Commission conducted hearings only on PUD modification applications submitted simultaneously with time-extension requests.[10]

In the instant case, the only party (other than the Applicant) is ANC 6C. We know of no material factual conflict generated by the Applicant and ANC 6C with regard to the Applicant's "good cause" assertion. As noted previously,[11] the Commission set the case down as a hearing on the PUD Modification – not the time extension.

B. The Commission has established a pattern and practice of approving multiple time extensions, in conjunction with major PUD modifications, in large, complex projects.

1. Multiple time extensions are not unusual.

The Applicant has received Commission approval of two previous PUD extensions, each for two years. The pending application is for a one-year extension. Taking into account the stop-the-clock periods during the pendency of time-extension applications, the PUD has remained valid for approximately ten years. The number of extensions the Applicant has requested, and the overall length of time of PUD validity, is not unusual. As examples, we refer the Commission to

[9] Case No. 83-5M/79-14F, Hillandale Development Corporation, decided November 21, 1983, ZC Order No. 412.

[10] The Commission's practice of not holding evidentiary hearings on time-extension applications was substantiated most recently by the statement of Assistant Attorney General Alan Bergstein. Responding to a question from Chairman Mitten, Mr. Bergstein stated, "Normally, with a time extension, you don't have a hearing." Chairman Mitten responded, "Right." (ZC Transcript. p. 57)

[11] ***See*** Note 1, p. 2.

the seven cases listed below, all of which resulted in eventual development of the PUD projects.[12]

- ***Archdiocese of Washington, 1717 Rhode Island Avenue NW*** – Consolidated PUD approved November 3, 1986. ZC approved five (5) time extensions totaling approximately eleven (11) years.
- ***Miller Companies/Friendship Heights DC LP, 5333 Wisconsin Avenue NW*** – Final (Stage II) PUD approved April 13, 1987. ZC approved four (4) time extensions totaling eight (8) years, then approved a major modification which had the effect of extending the time for two (2) more years.
- ***Hadid Development Corporation/UDG New York LLC, 1001 New York Avenue NW*** – Consolidated PUD approved January 11, 1988. ZC approved eight (8) time extensions, one major modification, and one minor modification, all of which extended the PUD validity for approximately sixteen (16) years.
- ***Golub & Willco/NDH New York LLC, 901 New York Avenue NW*** – Consolidated PUD approved September 11, 1989. ZC approved five (5) time extensions totaling ten (10) years.
- ***247 Associates LP, 1312 Massachusetts Avenue NW*** – Consolidated PUD approved October 16, 1989. ZC approved three (3) time extensions totaling fourteen (14) years, plus a major modification which had the effect of extending the time for one (1) additional year. The applicant's last time extension application requested an unlimited extension of the time allowed to begin construction on the project's office-building component; ZC granted a ten(10)-year extension.
- ***488 Associates LP et al./National Academy of Sciences, 500 5th Street NW*** – Consolidated PUD approved July 9, 1990. ZC approved seven (7) time extensions totaling thirteen (13) years, plus a major modification which had the effect of extending the time by an additional six months. In one instance, the applicant requested – and the Commission approved – a five(5)-year extension. The applicant recently applied for an eighth extension of time, also requesting five (5) years, for development of an air-rights component of the PUD.

[12] ***See Attachment 3***, for the case citations.

- ***Associated General Contractors of America/George Washington University*** – Final (Stage II) PUD approved November 15, 1993. ZC approved two (2) time extensions totaling four (4) years, plus a major modification that had the effect of extending the time for an additional two (2) years.

By its decisions in these and other cases, the Commission has recognized that the approval of multiple extensions of time serves the public interest. In ZC Order No. 810, adopting the extension of time regulations, the Commission addressed this issue in rejecting a proposal to allow PUDs to be extending only once and for no more than one year. The ZC Order stated:

> "(T)he 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." ZC Order No. 810, pp. 5-6.

2. ZC approvals of major PUD modifications, in conjunction with time extensions, are not unusual.

Of the 31 cases we reviewed, 13 of them – nearly 42% – involved PUD modifications considered to be sufficiently major as to require a Commission hearing on the proposed modifications. Three cases are particularly relevant to the Commission's consideration of whether the Applicant's PUD Modification proposal makes a "substantial change in any of the 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."

In these three cases, the PUD Modifications proposed a "substantial change" in "material facts," comparable to or greater than the changes proposed by the Applicant. In all three cases, the Commission approved the PUD Modifications, thus concluding that these changes did not undermine the Commission's justification for approving the original PUD.

In the ***Associated General Contractors of America*** ("AGC") case, the original PUD approved in 1992 called for development of:

- Expansion and modernization of AGC's longtime national headquarters office building,

- Construction of substantial additional office space which AGC would lease to commercial tenants in order to generate sufficient income to allow AGC to remain headquartered in the District, and
- Construction of 55 residential apartments for rent on the open market.

George Washington University ("GWU") acquired the property in 1999 and applied for a PUD modification, which the Commission processed as a second-stage PUD application. GWU requested, and the Commission approved, modifications that:

- Converted the PUD office component from space for lease to commercial tenants to space to house the University's Elliott School of International Affairs, and
- Designated the 55 residential apartments as student housing, rather than apartments for rent on the open market.

Although the land uses remained generally the same as approved in the original PUD, "material facts" upon which the Commission based its original PUD approval were substantially changed. The PUD no longer served to enable AGC to remain headquartered in the District; it has relocated to Arlington, Virginia. The office space was no longer available for lease to commercial tenants who, if they were private-sector entities, would have contributed to the District's tax base. And, the residential apartments were no longer available for rent on the open market, helping to meet the housing needs of the general population, but were reserved for GWU students.

The PUD Modification was processed as a second-stage PUD, rather than as a companion to a time-extension application. The Commission did not require GWU to meet the time-extension burden of proof. Yet GWU gained an additional four years of PUD validity, due to the new timetable established by the order approving the second-stage PUD.

In the ***Hadid Development Corporation*** case, the original PUD approved in 1988 called for development of a 12-story, office/retail structure at 1001 New York Avenue N.W., with a housing linkage commitment to provide 60 new or rehabilitated off-site dwelling units. In August 1993, the Federal Deposit Insurance Corporation acquired the property from the National Bank of Washington in a foreclosure proceeding. Six years later, UDG New York LLC acquired the property, determined that hotel use was more feasible than office use, and submitted a PUD Modification application to convert the PUD from office to hotel use and reduce the housing linkage commitment from 60 to 25 dwelling units. While the PUD Modification application was

pending, UDG New York LLC submitted a separate request for a PUD extension to cover the gap between expiration of the existing PUD extension and the effective date of the anticipated Commission approval of the PUD Modification. The Commission approved the gap-covering time extension without discussing any aspect of the proposed PUD modification, and soon thereafter approved the PUD modification without discussing the time-extension burden of proof.

In the ***Miller Companies/Friendship Heights*** case, the final second-stage PUD approved in 1987 called for development of a mixed-use project with residential, retail, and office components. The office component was to comprise more than half of the building area. After several extensions of time, the developers applied in 1997 for a PUD Modification that would:

- Eliminate office use, and
- Change the residential component from 85 apartment units to 29 townhouses.

The Commission approved the PUD Modification which had the effect of extending the PUD validity by two years beyond its scheduled expiration date. The Commission did not address the time-extension burden of proof in the order approving the PUD Modification.

These cases illustrate the Commission's practice of approving PUD Modifications that make "substantial changes" in the "material facts" upon which the Commission has based its original PUD approvals, and often treating the PUD Modifications as separate from the time-extensions that have been requested and approved at various times since the original PUD approvals. Although the PUD Modification approval orders seldom address the time-extension burden of proof, the Commission actions have implied a finding that the substantial changes in material facts have not "undermined" the Commission's justifications for the original PUD approvals.

VIII. The Zoning Commission's approval of multiple time extensions and PUD Modifications in large, complex projects accomplishes the goals and objectives of the PUD process and serves the public interest.

The PUD process "is designed to encourage high quality developments that provide public benefits," and the "overall goal is to permit flexibility of development and other incentives....provided, that the project offers a commendable number or quality of public

benefits and that it protects and advances the public health, safety, welfare, and convenience." Zoning Regulations, 11 DCMR §§ 2400.1-2400.2.

The ***flexibility*** the PUD process provides is the key element that has allowed District developers to create innovative land uses, site plans, and building designs; required them to respond to neighborhood needs; and required them to provide public benefits and amenities. The flexibility of the PUD process also has allowed developers to ride out periods of citywide economic distress without foregoing the opportunity to develop approved PUDs, often with modifications, when the economic climate improved.

The Commission has recognized the value of PUD time extensions as an essential element of the flexibility the PUD process ensures. In considering the text amendments clarifying time-extension procedures, the Commission weighed and rejected proposals to allow only one time extension for only one year and sharply restrict the "good cause" conditions. There were proposals to allow "good cause" only for acts of God or the government. There were warnings that the proposed regulations would benefit developers to the detriment of the public, "allowing the developer to change, delay, trade or sell the benefits without ever again having to address the merits of the proposal."

Rejecting these arguments, the Commission took a balanced approach, consistent with the flexibility of the PUD process. Such arguments, the Commission wrote, "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." ZC Order No. 810, p. 5. Instead, the Commission declared that time extensions, in accordance with the regulations, are "in the public interest."

The Commission's wisdom in building flexibility into the time-extension regulations and in exercising patience and reasonableness in applying the regulations is evident in the record of successful PUD developments completed after multiple time extensions and occasional change-of-use modifications.

In the ***1001 New York Avenue NW*** case cited above, the combination of eight time extensions, a major modification, and a minor modification kept the PUD alive for 16 years. Almost from the beginning, this was a troubled project. The recession of the late 1980s dried up financing for the proposed office development. Through foreclosure, the property ended up in the possession of the FDIC, which was unable to sell the property for nearly six years. By the

time UDG New York LLC acquired the property in early 1999, the market for D.C. office space had flattened, but hotel development appeared promising. Less than a year after the Commission approved the PUD Modification allowing hotel development, the 9/11 terrorist attacks occurred, devastating the city's hotel industry and forcing UDG New York LLC to apply for another PUD time extension which the Commission approved.

Despite these many setbacks, the PUD was developed. The Embassy Suites Washington-Convention Center Hotel opened this year. Before completion, the property was assessed at $20.8 million for property tax purposes, a valuation that is sure to increase now that the hotel has been completed and opened for business.

Another example is the ***901 New York Avenue NW*** office tower, delayed by years of financial difficulties, kept alive by five PUD time extensions covering a full decade, and finally constructed in 2004. Today, the property is assessed at nearly $182 million, and the owners paid property taxes of $2.4 million in 2005.

The ***247 Associates LP's Franklin Square North*** office/retail building at 13th and L Streets NW was finally completed in 2003, after receiving Commission approval of three time extensions, including one extension for ten years. Today, the property is assessed at $55.8 million, and the owners paid property taxes of nearly $1 million in 2005.

These examples illustrate the wisdom of Commission approvals of multiple PUD time extensions in large, complex development projects. The Commission's patience in extending PUD validity and construction start dates has, in the majority of cases, made it possible for PUD developments to be completed consistent with the Commission's justifications for approving the original PUDs.

IX. Conclusion.

Based upon the arguments and evidence set forth above and in previous submissions in this case, the Applicant has met the burden of proof established in the Zoning Regulations for the requested extension of time. There is no substantial change in any of the 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. We have identified the substantial changes in material facts that apply in this case and have demonstrated that they enhance and support, rather than undermine, the Commission's justifications for approving the original PUD.

The Applicant has demonstrated with substantial evidence that there is "good cause" for approving the time extension because of an inability to obtain sufficient project financing for the original PUD despite the Applicant's diligent efforts and due to circumstances beyond the Applicant's control.

We have shown that the Commission's patience in approving multiple PUD time extensions in large, complex projects has served the public interest by ensuring development of many projects that are yielding substantial benefits to the city in terms of jobs, tax revenues, expansion of needed services and facilities, and the delivery of the amenities required by the PUD orders.

For the reasons set forth above, we submit that the Applicant's request for a PUD time extension should be granted.

Respectfully submitted,

John Ray
D.C. Bar No. 214353
MANATT PHELPS & PHILLIPS

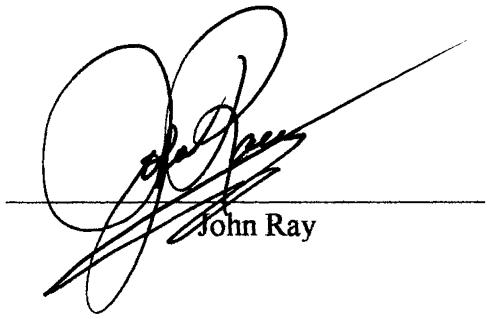
Counsel to the Applicant

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document and its attachments were served upon the following by FACSIMILE AND E-MAIL on November 8, 2005 to:

Ellen McCarthy, Director
D.C. Office of Planning
801 North Capitol Street NE, Fourth Floor
Washington, D.C. 20002

Advisory Neighborhood Commission ANC 6C
ATTN: ANC 6C-04 Commissioner Daniel Pernell
1116 3rd Street NE
Washington, D.C. 20002



John Ray

ATTACHMENT 1. Basile Baumann Prost & Associates Analysis

Basile Baumann Prost & Associates, Inc.
Public/Private Development Advisors

Nichols Center
177 Defense Highway
Annapolis, MD 21401
Phone: (410) 266-7800
Fax: (410) 266-7866

MEMORANDUM

November 7, 2005

To: Ronald J. Cohen
The Cohen Companies
Via E-mail: Rjcohen@cohencompanies.com

From: James L. Prost and David Starnes
Basile Baumann Prost & Associates, Inc.
Phone: 410-266-7800

Re: Case No. 01-28TE, PUD Modification and Time Extension – 200 K Street NE

Pursuant to your request, we hereby submit this memorandum in reference to the above PUD Modification and Time Extension for 200 K Street, NE. This memorandum presents a summary of real estate market conditions and development activity in the District of Columbia and around the NoMa (North of Massachusetts Avenue[1]) area during the period of late 1999 to the present. This is the area where the above referenced mixed use development is to be located.

Over the past few years, the District of Columbia has emerged as one of the strongest real estate markets in the country. Since 2001 over 360 development projects have been completed, valued at more than $9.7 billion with more than $24 billion in the pipeline.[2] For the first time in more than 20 years, estimates show the number of District residents is on the rise, reversing a trend of negative population growth.[3] This new demand for housing has produced one of the hottest housing markets in the country – one where apartment vacancies remain in the single digits (down to 2.5% at mid-year 2005 according to Delta Associates) and home values continue to rise.

During the past five or six years as the local real estate market has continued to gain momentum in the District, however, development activity in the Greater Downtown Area has taken place primarily in downtown, Northwest DC and, in recent years, has moved eastward to the Penn Quarter with new mixed use projects such as Gallery Place.

A survey of Greater Downtown development projects compiled by the Downtown Business Improvement District finds that of the 172 development projects completed between January 2000 and May 2005 in the Greater Downtown area, only three projects where completed in the

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[1] NoMa is roughly defined as the area east of North Capitol Street and west of the Union Station railyards stretching from G to Q streets in Northeast.
[2] *Washington, DC Neighborhood Retail Opportunities*, May 2005, Washington, DC Marketing Center.
[3] 2004 DC Marketing Center.

NoMa area where the planned Union Place development project is to be located. None of these were residential/retail projects. These completed projects in the NoMa area included two telecommunications projects in 2000 and 2001, the XM Satellite Radio headquarters located at the corner of Florida Avenue and Eckington Street, NE (completed in third quarter of 2000) and the Union Station Telecom Center located at 131 M Street, NE (completed in second quarter of 2001). The 705,000 square foot Station Place office building located at 101 F Street, NE just completed in the first quarter of 2005 was the only non-telecommunications project completed in this area.

As land becomes more scarce and real estate prices skyrocket in prime locations throughout the District, the District's development boom has only now begun to reach the portion of Northeast DC east of North Capitol Street (NoMa area) where there are now a record number of projects are under construction and planned/proposed – *18 projects as of May 2005* according to the Downtown Business Improvement District – many of which are residential/mixed use.

A major catalyst for this development has been the recent opening of the New York Avenue Metro station in the fourth quarter of 2004 which has helped spur new development activity such as the 350,000 square foot Bureau of Alcohol, Tobacco, Firearms & Explosives headquarters office located at New York and Florida Avenues NE. A few months after the opening of the New York Avenue Metro station, phase I of the 1.7 million square foot Capitol Plaza project at First and M Streets NE broke ground, a 292,000 square foot speculative office building.

Other selected examples of projects only recently under construction and/or planned within the NoMa area include:

- Senate Square Towers, a 432-unit residential project under construction at the Capital Children's museum site at 201 and 225 Eye Street, NE (Broadway Partners)
- The Landmark Lofts @ Senate Square, a 45 unit residential project under construction at 800 3rd Street NE (Abdo/Broadway Partners)
- Station Place Office Building #2, a 365,000 square foot office building under construction at 600 2nd Street, NE
- Hotel and retail at New York Avenue Metro station planned (Trammel Crow)
- 1,000 new condominiums and apartments at 60 L Street, NE (J Street Development)
- 140 new condominiums at 318 Eye Street (Broadway Partners)
- Constitution Square, 1.9 million square feet of office located at 100 M Street (Akridge)

In summary, during the first half of the 2000s, virtually no development activity took place in the NoMa area as development activity primarily focused on prime real estate locations in downtown and NW DC. Finally in 2005, the NoMa area is now primed for significant growth and development and is becoming one of the hottest real estate "submarkets" in the District. While in the past the Union Station railroad tracks served as a barrier to development, the opening of the New York Avenue Metro station is further catalyzing development activity in this area with significant new residential, office and retail projects under construction and planned.

ATTACHMENT 2. Affidavits of James P. Ventura and Ronald J. Cohen

BEFORE THE ZONING COMMISSION
OF THE DISTRICT OF COLUMBIA

ZC Case No. 01-28TE, PUD Modification and Time Extension-200 K Street N.E.

AFFIDAVIT OF JAMES P. VENTURA

DISTRICT OF COLUMBIA, ss:

Before the undersigned, an officer duly commissioned by the laws of the District of Columbia, on this 7th day of November, 2005, personally appeared the Declarant James P. Ventura, who having been first duly sworn or having duly affirmed to tell the truth, deposes and says:

1. I am a resident of 2707 Hambleton Road, Riva, MD 21140.
2. I am engaged in business as President of Ventura Commercial Mortgage. located at 2829 Bosworth Lane, Bowie, Maryland. In that capacity, I maintain regular working relationships with approximately fifty (50) lending and investment entities in order to identify the best available financing options for clients seeking financing for commercial real estate development projects.
3. I have been engaged in the mortgage brokerage business in the Washington, D.C. metropolitan area for twenty-two (22) years.
4. During my career, I have arranged financing totaling approximately $2 billion for approximately three hundred (300) development projects in the Washington, D.C. metropolitan area. This includes fifty (50) projects in the District of Columbia from 1983 to the present.
5. I have represented Ronald J. Cohen and the Cohen Companies in successfully securing and arranging development financing for projects since 1997.
6. From my experience, I can attest to Ronald J. Cohen's excellent reputation among development financing professionals. He is highly regarded as an experienced and knowledgeable developer whose projects are constructed and delivered for occupancy on schedule and yield the anticipated returns on investments.
7. On or about November 1999, Ronald J. Cohen retained my services to broker financing for the project proposed for development at 200 K Street N.E. in Washington, D.C. At

that time, the project was to be comprised of an office-building component and a residential-building component.

8. During the period of November 1999 through March 2005, I contacted the following entities regarding lending or investing funds in the 200 K Street N.E. project:
   a. Nomura,
   b. Credit First Boston,
   c. AEW,
   d. La Salle Partners, and
   e. Arbor National Commercial Mortgage.
9. 9. Each of the entities listed above declined to make loans for or invest in the 200 K Street N.E. development Given the pioneering location of this area at that time, no lender would proceed without a credit tenant with preleasing of 50% to 75% of the building. The majority of the lenders/investors would only proceed with the residential phase if the office lead tenant was secured.

Declarant affirms that he is competent under the law to give this affidavit and, unless stated otherwise, has personal knowledge of the facts stated herein.

Signature of Declarant

11/07/05
DATE

Sworn and subscribed before me this 7th day of Nov. 2005 (year and month).

My commission expires:

MARILAN V. HINDS
NOTARY PUBLIC
PRINCE GEORGE'S COUNTY
MARYLAND
My Commission Expires June 1, 2006

Notary Public [SEAL]

BEFORE THE ZONING COMMISSION
OF THE DISTRICT OF COLUMBIA

ZC Case No. 01-28TE, PUD Modification and Time Extension-200 K Street N.E.

AFFIDAVIT OF RONALD J. COHEN

DISTRICT OF COLUMBIA, ss:

Before the undersigned, an officer duly commissioned by the laws of the District of Columbia, on this 8th day of November, 2005, personally appeared the Declarant Ronald J. Cohen, who having been first duly sworn or having duly affirmed to tell the truth, deposes and says:

1. I am engaged in business in the real estate development business in the District of Columbia and the surrounding area through the entities collectively called the Cohen Companies, located at 2701 Tower Oaks Boulevard, Rockville, Maryland 20852.
2. I have been engaged in real estate development in the Washington, D.C. metropolitan area for more than thirty (30) years.
3. I am the developer of the proposed Union Place project at 200 K Street N.E., Washington, D.C.
4. In an effort to develop the office component of the Union Place project, as originally approved by the Zoning Commission, I worked diligently with government and private entities to secure a lead office tenant to satisfy the preleasing commitments required by lenders/investors before they would consider financing the development.
5. The government entities I worked to secure include the Department of Employment Services of the District of Columbia, and I responded to three separate SFOs (Solicitation of Offers) from the U.S. General Services Administration.
6. I have had listings with several commercial leasing agents from time to time, including but not limited to Coldwell Banker, Transwestern Real Estate Services, and Cassidy & Pinkard.
7. My efforts to secure office tenants were unsuccessful, in the main because of the economic and market conditions of the 1990s and also because commercial office tenants considered, and continue to consider, areas west of North Capitol Street more attractive locations for their operations.

Declarant affirms that he is competent under the law to give this affidavit and, unless stated otherwise, has personal knowledge of the facts stated herein.

Signature of Declarant

11-8-05
DATE

Sworn and subscribed before me this 8th day of Nov., 2005.

My commission expires: 10/01/09

Notary Public

[SEAL]

ATTACHMENT 3: Table of Cases

TABLE OF CASES

PUD Project	Extensions of Time
Archdiocese of Washington, Owner K & C Associates, Developer St. Matthews Cathedral 1717 Rhode Island Ave NW Construction of a 10-story commercial office building and renovation of four rowhouses Consolidated PUD approved November 3, 1986 (Order No. 496, effective January 10, 1987; valid until January 10, 1989.)	**1)** Applicant applied October 2, 1990, for an extension to allow construction to begin by April 8, 1993. (Applicant applied for a building permit before April 8, 1990.) ZC APPROVED extension – to April 8, 1993 – for construction start, despite chastising the applicant for late filing, by Order No. 496-A, adopted January 14, 1991. **2)** Applicant applied November 25, 1992, and February 23, 1993, for an additional two-year extension. OP supported. CM Evans, ANC 2B, Hotel Tabard Inn, Residential Action Coalition, General Federation of Women's Clubs opposed. ZC APPROVED extension – to April 8, 1995 – for construction start, by Order No. 496-B, adopted June 14, 1993. **3)** Applicant applied February 16, 1995, for an additional two-year extension. OP again supported. ANC 2B, Hotel Tabard Inn, and the Residential Action Coalition again opposed. ZC APPROVED extension – to April 8, 1997 – for construction start, by Order No. 496-C, adopted July 10, 1995. **4)** Applicant applied March 20, 1997, for an additional two-year extension, plus consideration of the Court's directions on remand of the Residential Action Coalition and Tabard Inn appeals. OP again supported. Residential Action Coalition again opposed. Dupont Circle Citizens Association also opposed. ZC APPROVED extension – to April 8, 1999 – for construction start, by Order No. 496-D, adopted November 10, 1997. **b)** Applicant applied February 27, 1998, for a <u>five-year</u> extension. OP again supported. Residential Action Coalition, Hotel Tabard Inn, and the Dupont Circle Citizens Association again opposed. ZC DENIED five-year extension, APPROVED three-year extension – to April 8, 2002 – for construction start, by Order No. 496-E, adopted July 13, 1998.
Miller Companies/Friendship Heights 5333 Wisconsin Avenue NW Residential/office/retail development Final (second-stage) PUD approved April 13, 1987 (Order No. 528)	**1)** Applicant applied April 6, 1990, for a two-year extension. ZC APPROVED extension – to May 8, 1992 – to start construction, by Order No. 528-A, adopted June 11, 1990. **2)** Applicant applied February 3, 1992, for an additional two-year extension. ZC APPROVED two-year extension – to May 8, 1994 – to start construction. ZC attached detailed site-maintenance and construction conditions to address neighborhood concerns. (Order No. 528-B, adopted June 8, 1992) **b)** Applicant applied March 10, 1994, for an additional two-year extension. ZC APPROVED two-year extension – to May 8, 1996 – to start construction.

PUD Project	Extensions of Time
	4) Applicant applied December 19, 1995, for an additional two-year extension. ZC APPROVED two-year extension – to May 8, 1998 – to begin construction.
Hadid Development Corp. 1001 New York Avenue NW 12-story, 130-ft office/retail building, with housing linkage provision of 60 new or rehabbed off-site housing units Consolidated PUD approved January 11, 1988 (Order No. 556) **Subsequently modified by new owners, UDG New York LLC, to develop as ....** 383-room hotel, with off-site housing reduced to 25 units **bb**	**1)** Applicant filed motion for reconsideration and amendments of the original order on May 23, 1989. ZC APPROVED project changes by Order No. 556-A, adopted September 11, 1989. Order extended PUD time period by two years, with a building permit application to be filed by October 6, 1991, and construction to begin October 6, 1992. **2)** Applicant applied June 7, 1991, for a three-year extension. ZC APPROVED extension of two years – to October 6, 1993 -- for the building permit application, and five years – to October 6, 1994 – for construction to begin, by Order No. 556-B, adopted August 5, 1991. **3)** Applicant applied October 5, 1993, for another two-year extension. ZC APPROVED two-year extension – to October 6, 1995 for building permit application and to October 6, 1996, for construction to begin, by Order No. 556-C, adopted January 10, 1994. **4)** Applicant applied August 14, 1995, for a two-year extension. ZC APPROVED two-year extension – to October 6, 1997, for building permit application, and to October 6, 1998, for construction to begin, by Order No. 556-D, adopted February 12, 1996. **5)** Applicant applied September 30, 1997, for a two-year extension. ZC APPROVED two-year extension – to October 6, 1999 for building permit application and to October 6, 2000 for construction to begin, by Order No. 556-E, adopted May 11, 1998. **6)** Applicant applied February 19, 1999, for a major modification to develop the property as a 14-story, 130-ft, 472-room hotel. Application submitted by UDG New York LLC, which acquired the property. Application reduced off-site housing commitment to 25 units. ZC APPROVED modified PUD, with building permit application to be filed by October 8, 2001, and construction to begin by October 8, 2002, by Order No. 905, adopted September 13, 1999. Applicant applied August 10, 1999, for a one-year extension of the original PUD. ZC APPROVED extension until October 6, 2000, or until Order 905 takes effect, whichever occurs first, by Order No. 556-F, adopted September 13, 1999. ZC approved the PUD modification and the time extension on the same day, with the time extension intended to prevent the original PUD from lapsing before the modified PUD took effect.

PUD Project	Extensions of Time
	7) Applicant applied March 24, 2000, for a minor modification to reduce the number of hotel rooms to 383 (all suites) and allow design changes required by the prospective hotel operator. ZC APPROVED modifications by Order No. 905-A, adopted April 10, 2000. The modification order had the effect of extending the PUD to April 21, 2002, for building permit application, and April 21, 2003, for construction to begin. **8)** Applicant applied February 14, 2003, for a one-year extension. ZC APPROVED an 18-month extension – to October 21, 2004 for building permit application and to October 21, 2005, for construction to begin – by Order No. 03-08, adopted April 14, 2003.
Capitol Point Riverside Associates LP 2nd and R Streets SW (Sq. 602, 8.5 acres adjacent to Fort McNair) 110-ft office/residential building with 500 residential apartments First-stage PUD approved July 6, 1989 (Orders No. 623 & 623-A) Second-stage PUD approved (Order No. 700, adopted February 10, 1992, and Order No. 700-A, adopted March 9. 1992) Orders allowed the applicant 12 years – until March 27, 2004 – to complete the development.	**1)** Applicant applied February 2, 1994, for a two-year extension. ZC APPROVED two-year extension – to March 27, 1996, for building permit application and to March 27, 1997, for construction start, by Order No. 700-B, adopted May 9, 1994. **2)** Applicant applied March 26, 1996, for two-year extension. ZC APPROVED two-year extension – to March 27, 1998, for building permit application and to March 27, 1999, for construction start, by Order No. 700-C, adopted July 1, 1996. **3)** Applicant applied March 25, 1998, for a two-year extension. ZC APPROVED two-year extension – to March 27, 2000, for building permit application and to March 27, 2001, for construction start, by Order No. 700-D, adopted April 12, 1999. **4)** Applicant applied March 27, 2000, for a two-year extension. ZC APPROVED one-year extension – to March 27, 2001, for building permit application and to March 27, 2002, for construction start, by Order No. 700-E, adopted June 12, 2000.
Jerome Golub Realty & Willco Construction Co. 901 New York Avenue NW 130-ft office/retail building Consolidated PUD approved September 11, 1989 (Order No. 629)	Applicant applied March 9, 1990, for design modifications. ZC APPROVED by Order No. 629-A, adopted June 11, 1990. No change in PUD time; building permit application due by October 13, 1991, and construction to begin by October 13, 1992. **1)** Applicant applied March 19, 1991, for a two-year extension. ZC APPROVED two-year extension – to October 13, 1993, for building permit application and to October 13, 1994, for construction start, by Order No. 629-B, adopted May 13, 1991. **2)** Applicant applied July 19, 1993, for a three-year extension. ZC APPROVED two-year extension – to October 13, 1995, for building permit

PUD Project	Extensions of Time
	application and to October 13, 1996, for construction start, by Order No. 629-C, adopted October 18, 1993. **3)** Applicant applied April 11, 1995, for a two-year extension. ZC APPROVED two-year extension – to October 13, 1997, for building permit application and to October 13, 1998, for construction start, by Order No. 629-D, adopted August 7, 1995. **4)** Applicant applied August 6, 1997, for a ten-year extension. ZC APPROVED two-year extension – to October 13, 1999, for building permit application and to October 13, 2000, for construction start, by Order No. 629-E, adopted January 12, 1998. **5)**Applicant applied March 12, 1999, for a two-year extension. ZC APPROVED a two-year extension – to October 13, 2001, for building permit application and to October 13, 2002, for construction start, by Order No. 629-F, adopted May 10, 1999. Applicant (now NDH New York LLC) applied September 16, 1999, for a PUD modification and zone change to C-4. ZC APPROVED modification and rezoning, by Order No. 920, adopted April 10, 2000. There was no change in the PUD deadlines. b
247 Associates LP 1312 Massachusetts Avenue NW (Parcel A – 90-ft residential building) 1301 L Street NW (Parcel B – 130-ft, 12-story office building with ground-floor retail) Consolidated PUD approved October 16, 1989 (Order No. 637)	**1)** Applicant applied May 30, 1991, for a two-year extension. ZC APPROVED two-year extension – to November 10, 1993, for building permit application and to November 10, 1994, for construction start, by Order No. 637-A, adopted August 5, 1991. **2)** Applicant applied July 22, 1993, for two-year extension (during the pendency of a PUD modification application filed January 7, 1993). ZC APPROVED one-year extension – to November 10, 1994, for building permit application and to November 10, 1995, for construction start, by Order No. 637-B, adopted November 15, 1993. **3)** Applicant applied January 7, 1993, for PUD modification to allow renovation of existing Parcel A building, rather than demolition and new construction, reduction of residential units from 134 to a minimum of 75, and two-phase development with the Parcel A residential building to be developed first. ZC APPROVED the modifications, by Order No. 637-C, adopted December 13, 1993. (Order No. 637-D, adopted April 11, 1994, approved façade materials.) Order 637-C set new PUD timetable, with one-year deadline (February 18, 1995) for Parcel A building permit application, and 5 ½-year deadline (August 18, 2005) for Parcel B building permit application. **4)** Applicant applied July 9, 1996, for unlimited extension of time to complete construction of the Parcel B office building; amended application filed August 19, 1996, requesting 10-year extension.

PUD Project	Extensions of Time
	ZC APPROVED Parcel B extension, providing that the Applicant "may file an application for a building permit to construct the office building within ten years after the supervising construction architect has certified to the Zoning Administrator that the apartment building has been 'closed-in'...." (Roof, windows, exterior façade substantially in place.) Parcel A apartment building was "closed in" and construction completed at some point before July 1996.
488 Associates LP, the Salvation Army, the Fraternal Order of Police, and John W. and Vinard Parris 500 5th Street N.W. 120-ft, 10-story office/retail building Consolidated PUD approved July 9, 1990 (Order No. 668)	**1)** Applicant applied October 3, 1990, for a minor modification and a time extension. ZC APPROVED the minor modification by Order No. 668-A, adopted November 19, 1990. ZC APPROVED two-year extension – to July 27, 1994, for building permit application and to July 27, 1995, for construction start, by Order No. 668-B, adopted August 5, 1991. **2)** Applicant applied November 24, 1993, for a two-year extension. ZC APPROVED two-year extension – to July 27, 1996, for building permit application and to July 27, 1997, for construction start, by Order No. 668-C, adopted March 14, 1994 **3)** Applicant applied March 10, 1994, for a major modification and a map amendment to allow, as an alternative development, the addition of Lots 833 and 842 (site of a DC Fire Station, where the Applicant obtained air rights) to the PUD, and enlargement of the project by 137,000 sf of building area – a 40% increase. ZC APPROVED the major modification by Order No. 668-D, adopted November 14, 1994. The Order took effect December 9, 1994, requiring a building permit application for the Modification alternative by December 9, 1996, and construction start by December 9, 1997. **4)** Applicant applied September 21, 1995, for two-year extensions of the original PUD and the PUD Modification. ZC APPROVED a two-year extension of the original PUD – to July 27, 1998, for a building permit application, and to July 27, 1999, for construction start – and a two-year extension of the PUD Modification – to December 9, 1998, for a building permit application, and to December 9, 1999, for construction start, by Order No. 668-E, adopted February 12, 1996. **5)** Applicant applied September 17, 1997, for <u>five-year</u> extensions of the original PUD and the PUD Modification. ZC APPROVED <u>two-year</u> extensions. The original PUD was extended to July 27, 2000, for a building permit application, and to July 27, 2001, for construction start. The PUD Modification was extended to December 9, 2000, for a building permit application, and to December 9, 2001, for construction start. (Order No. 688-F, adopted February 9, 1998. **6)** Applicant (now the National Academy of Sciences, successor-in-interest to the original applicant) applied December 6, 2000, for a <u>five-year</u> extension of the PUD Modification alternative (air rights development over the Fire Station). ZC APPROVED <u>five-year extension</u> – to December 9, 2005, for building permit

PUD Project	Extensions of Time
	application, and to December 9, 2005, for construction start, by Order No. 668-G, adopted February 12, 2001. **7)** Applicant applied November 19, 2001, for a "minor modification" to allow use of part or all of the previously-designated retail space (about 2% of the total project) as an interactive science museum. ZC considered the application on the Consent Calendar and did not hold a hearing. ZC APPROVED the minor modification by Order No. 668-H, adopted February 11, 2002. **8)** Applicant applied October 11, 2005, for a five-year extension of the PUD Modification (air rights development over the Fire Station). APPLICATION PENDING.
Associated General Contractors of America (AGC) 1957 E Street NW AGC headquarters office building plus office space for lease to others and 55 residential apartments. Office leasing was intended to provide a sufficient return to enable AGC to remain headquartered in the District. First-stage PUD approved July 13, 1992 (Order No. 720) Final (second-stage) PUD approved November 15, 1993 (Order No. 746)	**1)** Applicant applied November 13, 1995, for a two-year extension. ZC APPROVED two-year extension – to December 10, 1997, for building permit application, and to December 10, 1998, for construction start, by Order No. 746-A, adopted March 11, 1996. **2)** Applicant applied December 9, 1997, for a two-year extension. ZC APPROVED two-year extension – to December 10, 1999, for building permit application, and to December 10, 2000, for construction start, by Order No. 746-B, adopted February 8, 1999. **3)** Applicant (now George Washington University, which bought the property in 1999) applied August 31, 2001, for a PUD modification to be processed as a second-stage PUD. GWU had applied for and received a building permit under the original PUD. The West End Citizens Association appealed issuance of the permit to the BZA, which ruled against GWU and overturned the permit. GWU then applied for the PUD modification to include academic uses in space previously designated for commercial office use, and to use the residential portion for student apartments. ZC APPROVED the modifications by Order No. 746-C, adopted June 10, 2002, effective August 16, 2002.