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200128	Submitted to ODAI	Notices, Opinions	Zoning Commission Order No. 02-38B (Waterfront Associates, LLC & the District of Columbia)	3/19/2010 Vol 57/12	3/15/2010 14:51:21
200031	Submitted to ODAI	Notices, Opinions	Zoning Commission Order No. 06-02A (Petworth Holdings, LLC)	3/19/2010 Vol 57/12	3/15/2010 14:50:25

ZONING COMMISSION
District of Columbia
CASE NO. 02-38B
EXHIBIT NO. 5

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**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 02-38B**

Z.C. Case No. 02-38B

(Two-Year Time Extension for PUD at 401 M Street, S.W.)

**Waterfront Associates LLC and the District of Columbia – Square 542, Lot 89
September 14, 2009**

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (the "Commission") was held on September 14, 2009. At the meeting, the Commission approved in part a request from Waterfront Associates and the District of Columbia (collectively, the "Applicant") for a time extension for an approved consolidated planned unit development ("PUD") and related map amendment for property consisting of Record Lot 89¹ in Square 542 (the "Property"), pursuant to Chapters 1 and 24 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR").

FINDINGS OF FACT

1. By Zoning Commission Order No. 02-38A ("Order No. 02-38A"), the Commission approved a modification to a first-stage PUD ("First-Stage PUD"), a second-stage PUD ("Second-Stage PUD") and a related Zoning Map amendment for the Property. The First-Stage PUD provides for the development of eight buildings including residential, office and ground-floor retail uses and includes significant open spaces as well as the re-opening of the 4th Street right-of-way. The Second-Stage PUD includes the four buildings through the center of the Property and their adjacent open spaces. These four buildings include the East and West 4th Street Office Buildings with ground-floor retail space including a Safeway grocery store flanking the east and west side of 4th Street and the East and West Residential Towers which have a continuous open space connecting them to 4th Street. Order No. 02-38B became effective upon its publication in the *D.C. Register* ("DCR") on January 25, 2008.
2. Condition No. 28 of Order No. 02-38A approved the Second-Stage PUD for a period of two years from the effective date of the order, which was January 25, 2008. Within such time, the Applicant was required to file for a building permit as specified in 11 DCMR § 2409.1. Construction must begin within three years of the effective date of the Order.
3. Condition No. 29 of Order No. 02-38A provides that the approval for the First-Stage PUD is valid for a period of five years from the effective date of the order (i.e., January 25, 2008). Accordingly, by January 25, 2013, the second-stage PUD application(s) for the Northwest Building, the Northeast Building, and the West M Street Building must be filed. These second-stage applications may be submitted individually, at the same time, or in any combination thereof. The timeframe for filing the second-stage PUD application for the East M Street Building is separate and is based upon the date that Safeway vacates the premises.

¹ Record Lot 89 in Square 542 has been divided into Lots 822 through Lot 834 for assessment and taxation purposes.

4. The Applicant applied for building permits for the East and West 4th Street Office Buildings, and the building permits were both issued on July 17, 2008. Construction commenced in September 2008.
5. By letter dated and received by the Commission on August 4, 2009, the Applicant filed a request to extend the validity of the Second-Stage PUD approval for the East and West Residential Towers for a period of two years. The request, if approved, would require that an application for a building permit for the East and West Residential Towers must be filed no later than January 25, 2012, and construction must start no later than January 25, 2013. The Applicant's request was supported by exhibits showing the progress of the project thus far and an affidavit from the Applicant's project manager setting forth details of the Applicant's inability to obtain project financing at this time, as discussed in Finding Nos. 6 and 7.
6. The Applicant submitted evidence that the project has experienced delay beyond the Applicant's control. The Applicant moved forward with the office component of the project, including financing, leasing, and construction. Immediately thereafter, the real estate market suffered a major crisis. Banks froze lending for residential projects or ceased lending operations entirely due to the uncertainty in market conditions and the softening of the housing market.
7. Despite these events, as indicated by the evidence in the record, the Applicant made preparations to move forward with the residential component of the project. Specifically, the Applicant completed interior demolition and abatement. In December 2007, the Applicant signed a letter of intent to sell the residential buildings to a residential developer. The sale did not go forward because the potential purchaser could not secure financing or the required equity needed to close the transaction, despite additional efforts by the Applicant. Currently, the Applicant cannot move the residential portion of the project forward during the approval period due to the lack of financing available in the market for residential projects following its diligent, good faith efforts, because of changes in the economic and market conditions, which are beyond the Applicant's control.
8. In the same letter, the Applicant also requested a two-year extension of the overall timeframe for filing of the second-stage PUD applications for the Northwest Building, Northeast Building, and the West M Street Building due to the delay in construction of the East and West Residential Towers. The request, if approved, would require that the second-stage PUD applications for the Northwest Building, Northeast Building, and the West M Street Building must be filed no later than January 25, 2015. The Applicant cited evidence relating to the need to maintain the phasing of the project and the timeframes needed to bring the various aspects of the project to market.

9. The Applicant served a copy of the request on all parties (including Advisory Neighborhood Commission ("ANC") 6D, Tiber Island Cooperative Homes, Inc., and Carrollsburg Square Condominium Association) on August 4, 2009. None of the parties responded to the application.
10. Because the Applicant demonstrated good cause with substantial evidence pursuant to Section 2408.11(a) of the Zoning Regulations, the Commission finds that the request for the two-year time extension of the Second-Stage PUD should be granted.
11. The Commission finds that the requested extension for the First-Stage PUD need not be granted at this time given the amount of time still to pass before the expiration date of that approval period. The Commission finds that the Applicant may file an application for an extension of time for the First-Stage PUD, in whole or in part, at such time in the future as the Applicant deems necessary.

CONCLUSIONS OF LAW

1. The Commission may extend the validity of a PUD for good cause shown upon a request made before the expiration of the approval, provided: (a) the request is served on all parties to the application by the applicant, and all parties are allowed 30 days to respond; (b) there is no substantial change in any material fact upon which the Commission based its original approval of the PUD that would undermine the Commission's justification for approving the original PUD; and (c) the applicant demonstrates with substantial evidence that there is good cause for such extension as provided in § 2408.11. (11 DCMR § 2408.10.) Section 2408.11 provides the following criteria for good cause shown: (a) an inability to obtain sufficient project financing for the PUD, following an applicant's diligent good faith efforts to obtain such financing, because of changes in economic and market conditions beyond the applicant's reasonable control; (b) an inability to secure all required governmental agency approvals for a PUD by the expiration date of the PUD order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control; or (c) the existence of pending litigation or such other condition or factor beyond the applicant's reasonable control which renders the applicant unable to comply with the time limits of the PUD order.
2. The Commission concludes that the application complied with the notice requirements of 11 DCMR § 2408.10(a) by serving all parties with a copy of the application and allowing them 30 days to respond.
3. The Commission concludes there has been no substantial change in any material fact that would undermine the Commission's justification for approving the original PUD.

4. The Commission is required under D.C. Official Code § 1-309.10(d) to give great weight to the affected ANC's recommendations. The ANC did not respond to the application.
5. The Commission finds that the Applicant presented substantial evidence of good cause for the extension based on the criteria established by 11 DMCR § 2408.11(a). Specifically, the Applicant has been unable to obtain sufficient project financing for the East and West Residential Towers in the Second-Stage PUD, following the Applicant's diligent good faith efforts, because of changes in economic and market conditions beyond the Applicant's reasonable control.
6. Section 2408.12 of the Zoning Regulations provides that the Commission must 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 concerning any of the criteria set forth in § 2408.11.
7. The Commission concludes a hearing is not necessary for this request since there are not any material factual conflicts generated by the parties concerning any of the criteria set forth in § 2408.11 of the Zoning Regulations.
8. The Commission concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.

DECISION

In consideration of the Findings of Fact and Conclusions of Law herein, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the application for a two-year time extension of the Second-Stage PUD approved in Zoning Commission Case No. 02-38B. The Second-Stage PUD approved by the Commission shall be valid until January 25, 2012, within which time an application shall be filed for a building permit, as specified in § 2409.1 of the Zoning Regulations. Construction must commence no later than January 25, 2013.

The Commission does not approve the request for a two-year time extension of the First-Stage PUD approved in Zoning Commission No. 02-38A. The Applicant may file a request for an extension of time for the First-Stage PUD, in whole or in part, at such time in the future as the Applicant deems necessary.

The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., ("Act") the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identify or expression, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, genetic

information, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action. The failure or refusal of the Applicants to comply shall furnish grounds for the denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

On September 14, 2009, upon the motion made by Konrad W. Schlater, as seconded by Michael G. Turnbull, the Zoning Commission approved this application at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Konrad W. Schlater, Peter G. May, and Michael G. Turnbull to approve, William W. Keating, III to approve by absentee vote).

In accordance with the provisions of 11 DCMR § 3028.8, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on March 19, 2010.