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Board of Zoning Adjustment - Order No.

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ZONING COMMISSION
District of Columbia
CASE NO. 02-38E
ZONING COMMISSION
District of Columbia
EXHIBIT NO. 8
CASE NO. 02-38E
EXHIBIT NO. 18

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 02-38E
Z.C. CASE NO. 02-38E
Waterfront 375 M Street, LLC and Waterfront 425 M Street, LLC
(Two-Year Time Extension for First-Stage PUD
for East and West M Street Office Buildings @ Square 542, Record Lot 89)
February 23, 2015

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia ("Commission") was held on February 23, 2015. At the meeting, the Commission approved a request from Waterfront 375 M Street, LLC and Waterfront 425 M Street, LLC (collectively, the "Applicant") for a time extension for an approved first-stage planned unit development ("PUD") for property consisting of Lots 825 and 826 in Square 542, which is a portion of Record Lot 89 in Square 542 ("Property"), pursuant to Chapters 24 and 30 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR")

FINDINGS OF FACT

- 1 By Z.C. 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 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. Z.C. Order No 02-38A became effective upon its publication in the *D.C. Register* on January 25, 2008.
- 2 Condition No. 28 of Z.C. 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 property owner was required to file for a building permit as specified in 11 DCMR § 2409.1. The Applicant was required to start construction within three years of the effective date of Z.C. Order No. 02-38A.
3. Condition No. 29 of Z.C. Order No. 02-38A provided that the approval for the First-Stage PUD was 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 Office Building were required to be filed. These second-stage applications were permitted to 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 Office Building was separate and was based upon the date that Safeway vacated the premises,

which was April 15, 2010. Accordingly, the second-stage PUD application for the East M Street Office Building had to be filed by April 15, 2015.

4. Building permits for the East and West 4th Street Office Buildings were issued on or around July 17, 2008. Construction commenced in September, 2008
5. By Z C Order No 02-38B, the Commission approved a two-year extension of the Second-Stage PUD with respect to the East and West Residential Buildings. That Order required that the property owner file for a building permit no later than January 25, 2012, and commence construction by January 25, 2013. The developer of those buildings filed building permits for both the East and West Residential Buildings in advance of January 25, 2012. Construction commenced on both the East and West Residential Buildings prior to January 25, 2013
6. By Z.C. Order No 02-38C, the Commission approved an extension of the validity of the First-Stage PUD approval for the West M Street Office Building and the Northeast Building for a period of approximately two years and three months, requiring that a second-stage PUD application for the West M Street Office Building and the Northeast Building be filed no later than April 15, 2015
7. By Z C. Order No 02-38D, the Commission approved a second-stage PUD application for the Northwest Building. Condition No. 18 of Z C Order No 02-38D states that an application for a building permit must be filed for the Northwest Building no later than December 6, 2015, and construction must start by December 6, 2016. The full building permit application for the Northwest Building was filed in August, 2014, and construction commenced in January, 2015
8. By letter dated December 30, 2014, the Applicant submitted a request to the Commission for an extension of the timeframe by which it must file second-stage PUD applications for the East and West M Street Office Buildings for a period of two years.
9. The Applicant submitted evidence that it has faced great difficulty securing initial financing for the development of the East and West M Street Office Buildings. This difficulty is due to a confluence of issues that continues to limit financing and leasing opportunities for commercial office projects in the Washington, D.C. region, including, among others, the very limited market for initial financing of office buildings and requirements for substantial preleasing to obtain financing. Waterfront also presented evidence of the numerous steps it has taken to actively market the East and West M Street Office Buildings to potential tenants as well as evidence of vacancy rates which have further hindered Waterfront's ability to secure the required preleasing.

- 10 The Applicant served a copy of the request on all parties, including Advisory Neighborhood Commission 6D ("ANC 6D"), Tiber Island Cooperative Homes, Inc , and Carrollsburg Square Condominium Association on December 30, 2014
- 11 By letter dated January 13, 2015, the Applicant requested that the Commission defer consideration of the application in order to provide additional time for the Applicant to work with ANC 6D.
12. On February 11, 2015, the Applicant submitted a letter summarizing its work with ANC 6D and providing concept plans for both site maintenance and site activation during the requested extension period, including opportunities for temporary use and activation prior to construction of the East and West M Street Office Buildings.
- 13 On February 13, 2015, the Office of Planning ("OP") submitted a report supporting the application
14. On February 15, 2015, ANC 6D submitted a resolution in support of the application, based on the Applicant's work with ANC 6D and the Applicant's agreement to work with ANC 6D on-site maintenance and site activation issues
- 15 The Commission finds that the Applicant cannot move forward at this time with second-stage PUD applications for the East and West M Street Office Buildings, despite the Applicant's diligent, good faith efforts, because of changes in the economic and market conditions beyond the Applicant's control Therefore, this request for extension satisfies the sole criterion for good cause shown as set forth in § 2408 11(a) of the Zoning Regulations and the Commission finds that the request should be granted

CONCLUSIONS OF LAW

1. The Commission may extend the validity of a first-stage PUD in accordance with the standard and process for second-stage PUD extensions set forth in §§ 2408.10 through 2408 12 (11 DCMR § 2407.11.) Subsection 2408 10 provides that the Commission may extended 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 Subsection 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 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 or required pre-leasing for the East and West M Street Office Buildings, following the Applicant's diligent good faith efforts, because of changes in economic and market conditions beyond the Applicant's reasonable control.
5. Subsection 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
6. 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.
7. The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D C Law 1-21; D C. Official Code § 1-309.10(d)) to give great weight to the affected ANC's recommendations. The Commission has carefully considered ANC 6D's support for the application and has given that support great weight.
8. The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D C. Law 8-163, D.C. Official Code § 6-623.04) to give great weight to OP recommendations. The Commission has carefully considered OP's support for the project and has given that support great weight.
9. 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 for the First-Stage PUD approval of the East M Street Office Building and the West M Street Office Building approved in Z.C. Case No 02-38A and Z.C. Case No 02-38C, respectively. The First-Stage PUD for these two buildings approved by the Commission shall be valid until April 15, 2017, within which time second-stage PUD applications for both buildings shall be filed. These second-stage applications may be submitted individually or at the same time. Should the Applicant file a second-stage application for only one of the buildings within this timeframe, the first-stage approval will only expire as to the building for which no application was filed.

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 identity 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.

On February 23, 2015, upon the motion made by Chairman Hood, as seconded by Commissioner, the Zoning Commission **ADOPTED** this Order by a vote of **5-0-0** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, Peter G. May, and Michael G. Turnbull to adopt).

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 October 16, 2015.