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November 17, 2005

Ms. Carol Mitten, Chair
DC Zoning Commission
441 4th Street, N.W.
Washington, DC 20001

Dear Chairman Mitten:

ANC 2B requests leave to file this brief out of time. A faxed copy is being sent at 3:50 p.m. whereas the filing time is 3:00 p.m. Counsel reviewed the regulations for an early filing deadline and having found none assumed that 5:00 p.m. would be acceptable. It is with great apologies that Counsel avers he missed the Chair's mention of it at the end of the September 29 hearing.

**Brief of ANC 2B, party in ZC Case No. 02-51A
opposing an extension of time for
PUD at 1616 Rhode Island Ave, N.W. (Square 182, Lot 82)**

Extension of time is entirely within the discretion of the Zoning Commission

Every extension is a new decision that must be analyzed and considered on its own. More importantly, the extension of time of a PUD is entirely within the discretion of the Zoning Commission.

The Commission may extend the time periods set forth in §§ 2408.8 and 2408.9 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval. 11 DCMR § 2408.10. (emphasis supplied)

Accordingly, even if applicant provides the requisite justification, the Zoning Commission is under no compulsion to grant the extension. Here, the passage of time

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and the adoption of the Dupont Circle Overlay Zone could be valid reasons for the Commission to refuse to grant the extension.

Grant of an extension would violate the clear mandate of the DCOZ

All modifications to approved PUDs, other than "minor" modifications, are to be treated as second-stage applications. *Foggy Bottom Association v. District of Columbia Zoning Commission*, 639 A.2d 578 (DC 1994)

Thus, the Commission must hold a public hearing on an application for a major PUD modification, which application must be in accord with "the intent and purpose of the Zoning Regulations, the PUD process, and the preliminary approval." *Id.*

§2403.4 provides that

The Commission shall find that the proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.

"High density office development at 110 feet and 8.5 FAR is not in accord with the intent of the Dupont Circle Overlay District which was adopted in January, 1992. Square 182 was included in the list of squares to which the regulations applied. § 1501.3

The introduction of the Dupont Circle Overlay Zone regulations states as follows:

The Dupont Circle area is a unique resource to the District of Columbia that must be preserved and enhanced. Strong protections are needed to retain its low scale, predominately residential character, independent small retail businesses, human scale streetscapes, and historic character, given the high-density development pressures caused by the proximity of the central Employment Area and Dupont Circle Metrorail Station. §1501.1 (11 DCMR § 1501.1)

The regulations recite the purpose of the Dupont Circle Overlay Zone which is to

- a) Require a scale of development consistent with the nature and character of the Dupont Circle area in height and bulk; and to ensure a general compatibility in the scale of new buildings with older, low scale buildings by restricting the maximum permitted height and floor area ratio of new buildings to that of the underlying zone; ...
- b) n/a
- c) Enhance the residential character of the area by ... controlling the scale, location, and density of commercial and residential development;
- d) Ensure compatibility of development with the Comprehensive Plan; ...

The underlying zone of the property is SP-2, which has a height limitation of 90 feet and an FAR of 6.0. §§ 530.1, 531.1 Only 3.5 of the 6.0 FAR may be for non-

residential uses. § 531.1 Moreover, the DCOZ requires that FAR and height remain at the matter-of-right limitations, not the more liberal limits permitted for PUDs. § 1503.1 The property was considered to be a buffer between the high density commercial use of downtown and the residential area of Dupont Circle. This was reconfirmed in subsequent zoning actions by the Zoning Commission.

The Dupont Circle Overlay Zone was adopted after careful review of the planning data and recommendations of the Office of Planning and numerous community groups. To hold that that decision should, once again, after 14 years, be superseded by a developer's desire to have yet a sixth extension is both illogical and violative of the spirit of community planning. Any obligation the District may have had to give a developer a reasonable opportunity to market the site has been long dissipated. Moreover, it has been 17 years since the original PUD was adopted in 1989.

Finally, given the intensity of other office and hotel development in the neighborhood, granting this PUD will unnecessarily compromise the plan for Dupont Circle and specifically this SP-2 Zone. The proposed use of this site for high-density offices will increase the density of the underlying SP buffer zone and further shift it out of the realm of "mixed use" and towards full commercial use.

Grand of an extension would violate the intent of the Ward 2 Comprehensive Plan

While the applicant correctly points out that this property is in the Central Employment Area and job-generating development is to be encouraged as a general proposition, he fails to take account of the specific goals and actions promoted by the Plan for Ward 2 in general and the Dupont Circle neighborhood in particular. When the Comprehensive Plan calls for office development in Ward 2, it is primarily in the Development Opportunities Areas of Mount Vernon Square, Buzzard Point and North Capitol Street. §1328.1 The PUD site is not in those areas.

The Comprehensive Plan also deplors "the continuing erosion of residential use by office use ..." in the Dupont Circle Neighborhood Ring. §1361.1 Specifically, it calls for actions in support of the land use objectives such as maintaining the area between Connecticut Avenue and 15th Street and between Massachusetts and Florida Avenues as a "residential area to promote the ... expansion of current residential uses, and discourage the expansion of commercial uses ..." § 1327.1 (a)(2)

The property is designated as high-density commercial on the Land Use Element Map of the Comprehensive Plan (2001). However, the Zoning Commission never moved to rezone the property to bring it into consistency with the Comprehensive Plan. The reason for this oversight is not clear but it is not that the PUD rezoning of the property to C-4 made such a move unnecessary. Previous Zoning Commission actions belie this defense. Notwithstanding the fact that in 1997 pursuant to ZC Order No. 830, the Zoning Commission approved a PUD which rezoned R-4 and C-2-A property in Square 623 to C-3-C, the Zoning Commission nevertheless changed the underlying zone to C-3-C as part of a zoning consistency effort in February, 2000, under ZC Case No 96-12Z.

Applicant has not met the burden of showing no substantial changes

§ 2408.10(b) provides that the Zoning Commission may grant an extension if it determines that

There is no substantial change in any of the material facts upon which the Commission based its original PUD approval that would undermine the Commission's justification for approving the original PUD."

Rhode Island Associates has not even mentioned this burden, let alone demonstrated how it complies. There has been no evidence cited for the proposition that there has been "no substantial change".

Indeed, in ZC Order No. 910-A, Case No. 98-17F/01-31TE, (copy attached) Florida Rock was denied an extension of their PUD for an office building in the Southeast partially because other zoning changes were being considered. The Commission noted that a proposed overlay "would alter the matter of right development allowed on the PUD site."¹

There were other changes in the material facts on which the Commission had based its approval. Among the underlying changes were these events which are not substantially different from the case before us:

- A. A target tenant chose a different site.
- B. Planning efforts nearby had "raised awareness of the potential for a mix of commercial, recreational, and residential uses."
- C. Improvements in private housing market and the climate for market-rate housing had improved.
- D. There was other office development nearby

The Zoning Commission concluded that there had been "substantial changes that undermined the Commission's justification for approving the PUD originally" at 4

See also Order No. 664-C, Case No. 98-02M/97-12M/94-17C/91-19M/89-19C, July 31, 2003 (Washington Development Group) (partial copy attached) for a reiteration of the tests for an extension. In that case, the Zoning Commission took note of OP's testimony that

¹ The Comprehensive Plan Generalized Land Use Map calls for a mix of medium-high density commercial, high-density residential, and production and employment use of the PUD site. The Commission is presently considering the final proposals in Case No. 96-3/89-1 to establish an overlay zone in the Buzzard Point-Capitol Gateway area. If adopted, the underlying zoning of both the PUD site and the amenity site would change from M to BP/W-2. The overlay would alter the matter-of-right development allowed on the PUD site, including requiring a setback of 75 feet along the waterfront, and allowing review of projects along the waterfront, with proposed projects becoming subject to design-related standards. At 3.

there have been substantial changes in the materials facts (e.g. development patterns and planning policies) upon which the Commission based its original 1990 approval of the PUD that would undermine the Commission's justification for approving the original PUD. OP noted that residential construction now surrounds the PUD site, hotel use no longer suffers from poor market conditions, and that the residential component to the PUD is too small. OP also asserted that the configuration of the PUD is inconsistent with the current policies and goals of connecting development in the Downtown East section of the city to the Downtown core. At 6

In the instant case, if the applicable set of justifications is pegged at the adoption of the last modification, the assumptions on which the Commission approved a conversion to a hotel, such as market forces, have changed dramatically, as demonstrated by the fact that applicant has had no success in attracting a hotel and seeks to abandon that course. If it should be pegged to the original approval in 1989, clearly the adoption of the Dupont Circle Overlay Zone in 1992 is a "substantial change" that has "undermined the Commission's justification for approving the PUD originally. It dictates a scale of development far different from that contemplated. For instance, it mandates only 6.0 FAR of which only 3.5 may be for non-residential use.

In addition, there have been other changes since the PUD was first approved in 1989. The following commercial projects have been built nearby:

1. St. Matthews Court at 17th and Rhode Island.
2. The former Governor's House Hotel, on the northeast corner of 17th & R.I., across the street from the subject site, has permission to expand.
3. National Association of Home Builders at 15th and Massachusetts completed a large expansion.
4. A 10 story apt. building was built on the northeast corner of 15th & Massachusetts.
5. A high-rise hotel was constructed on the north side of the 1400 block of Massachusetts Ave.
6. The Solar Building is under construction.
7. National Geographic at 17th and M has expanded into a new building.
8. The former Washington Post parking garage on M is being torn down to build at 15th and M.

Applicant has not shown good cause for the extension

Applicant has not met its burden of demonstrating with substantial evidence that there is good cause for an extension. §2408.10 (c).

Applicant must demonstrate with substantial evidence one or more of the following criteria:

- (a) An inability to obtain sufficient project financing for the PUD, following 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 ...
- (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

Applicant, somewhat off-handedly, states that since the modification of the PUD, "the Partnership has attempted to attract a hotel to the site to no avail." There is no detail of the measures undertaken to define the user market, enlist the aid of brokers, advertise in appropriate journals, etc. In the absence of such a showing, the Commission must reject the request.

In ZC Order No. 573, Case No. 87-18M/86-1C, May 23, 1988, (copy attached) Boston Properties sought a modification to its mixed-use PUD to convert office use to residential use on one site but at the same time remove residential requirements from another site which would then be developed for non-residential uses. In denying the modification and extension, the Commission was persuaded significantly by ANC 2A's views that the latter site was more suited to residential development and concluded that approval would not enhance and promote the mixed use character of the neighborhood and would encourage excessive non-residential development in an area which the Plan designates for a mix of residential and non-residential development. At 8

They also noted that the increased value of the site for office development far outweighed the meager amenities proffered.

Conclusion

For the above reasons, ANC 2B requests that the Zoning Commission deny applicant's request for an extension and modification.

Respectfully submitted



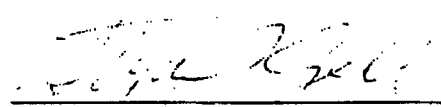
Stephen N. Gell

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2005, a copy of the foregoing **Brief of ANC 2B, party in ZC Case No. 02-51A opposing an extension of time for PUD at 1616 Rhode Island Ave, N.W.** was delivered to:

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Government of the District of Columbia
ZONING COMMISSION



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 910-A
Case No. 98-17F/01-31TE
(Second-Stage Planned Unit Development and Map Amendment
at 100 Potomac Avenue, S.E. – Florida Rock Properties, Inc.)
May 13, 2002

This Decision and Order arises out of a motion by Florida Rock Properties, Inc. ("applicant") for an extension to the validity of the planned unit development ("PUD") approved in Zoning Commission Order No. 910 pursuant to chapter 24 of the Zoning Regulations. At its public meeting on May 13, 2002, the Commission took action to deny the requested extension.

Procedural History

On November 9, 2001, the applicant filed a motion to extend the validity of the order approving the PUD by two years. Pursuant to Z.C. Order No. 910, the validity of the PUD approval would otherwise expire November 26, 2001. In an effort to show good cause for the extension, as required by 11 DCMR § 2408.10, the applicant asserted that construction of buildings has not yet occurred on the PUD site despite diligent and good faith efforts on the part of the applicant.

The Office of Planning ("OP") recommended approval of the request for a two-year extension to give the applicant time to find a tenant for the project, to modify the project design to meet the needs of the tenant, and to address OP's concerns regarding the approved PUD. The OP report indicated that, following extensive discussions between the applicant and OP, the applicant agreed not to build the PUD as currently designed but to seek the Commission's approval of a PUD modification, if the Commission first granted the motion for an extension of time.

A letter was received from Ward 6 Councilmember Sharon Ambrose urging the Commission to grant the requested extension in light of the applicant's continuing commitment to the development and the time and interest invested in the project by many parties during the Commission's consideration of the second stage of the PUD.

Findings of Fact

1. The applicant is the owner of the PUD site, located at 100 Potomac Avenue, S.E. (Square 707, Lots 800-802; Square 708, Lot 806; and Square 708E, Lots 807-808). A related amenity site is located nearby on Square 664E.

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2. A second-stage PUD and associated map amendment, from M to C-3-C, were approved by the Commission by Z.C. Order No. 910. The order became effective November 26, 1999, and was valid for two years after the effective date.
3. The PUD site, which is currently operated as a gravel yard, is located adjacent to the Frederick Douglass Bridge (also known as the South Capitol Street Bridge), contains approximately 253,502 square feet of land area and has more than 800 linear feet of frontage on the Anacostia River. The approved PUD permits approximately 1.5 million square feet of prospective commercial development.
4. The applicant stated that the project has not proceeded, despite its diligent and good faith efforts, primarily because the applicant was not selected as a finalist in the process to select a site for a new headquarters facility for the U.S. Department of Transportation. In light of the need for a new marketing strategy to identify one or more large users for the PUD, and to locate financing for the project based on the change in marketing strategy, the applicant has been unable to prepare the appropriate documents required to file an application for a building permit or to obtain the necessary financing commitments to permit the commencement of construction of the project. The applicant noted that its money and effort have been committed to accomplish some of the tasks described in Z.C. Order No. 910, especially with respect to construction of a bulkhead along the Anacostia River waterfront portion of the PUD site and preparation of covenants pertaining to the PUD site and to the amenity site. The applicant states that these factors constitute good cause for an extension of time to construct the approved PUD.
5. The applicant asserts that there have been no substantive changes since the PUD was approved that would undermine the Commission's original approval pursuant to 11 DCMR § 2408.10(b).
6. The Commission credits OP's conclusion that there have been changes to the material facts upon which the Commission based its decision to approve the PUD, including that:
 - (a) DOT, which had been a target tenant for the PUD project, has selected a different headquarters site, and thus the PUD design would likely need to be changed to accommodate a number of smaller tenants;
 - (b) The Anacostia Waterfront Initiative, currently underway, has raised awareness of the potential for a mix of commercial, recreational, and residential uses in near Southeast and along the Anacostia River waterfront;
 - (c) The market for private housing in central Washington and on Capitol Hill has improved dramatically;
 - (d) NAVSEA has moved approximately 5,000 employees into the Washington Navy Yard;

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- (e) Four new office buildings have been constructed along M Street to accommodate contractors associated with NAVSEA;
 - (f) Funding has been approved for the expansion of the Marine Barracks and the extensive Arthur Capper HOPE VI housing development, thereby removing a serious obstacle to market-rate housing development on the PUD site;
 - (g) The Board of Zoning Adjustment has approved construction of a mixed-use building at New Jersey Avenue and L Street, S.E. that is slated to include 400 apartments and 200 hotel rooms;
 - (h) The Earth Conservation Corps – one of the intended beneficiaries of the approved PUD – now has two facilities in the vicinity of the proposed third facility on the amenity site; and
 - (i) Recent federal legislation allows private-market participation in the development of the nearby Southeast Federal Center site with a mix of residential and office uses, and the General Services Administration is currently seeking private-sector development consulting services in furtherance of that goal.
7. The Comprehensive Plan Generalized Land Use Map calls for a mix of medium-high density commercial, high-density residential, and production and employment use for the PUD site. The Commission is presently considering the final proposals in Case No. 96-3/89-1 to establish an overlay zone in the Buzzard Point-Capitol Gateway area. If adopted, the underlying zoning of both the PUD site and the amenity site would change from M to BP/W-2. The overlay would alter the matter-of-right development allowed on the PUD site, including requiring a setback of 75 feet along the waterfront, and allowing review of projects along the waterfront, with proposed projects becoming subject to design-related standards.

Conclusions of Law

The applicant is seeking to extend the validity of a planned unit development approved by the Commission in 1999. Generally, a PUD approved by the Commission is valid for two years, during which time an application must be filed for a building permit. 11 DCMR § 2408.8. The Commission may elect to extend that deadline, if there is no substantial change in any material fact upon which the Commission based its original approval of the PUD that would undermine its justification for approving the original PUD, and if the applicant demonstrates with substantial evidence that there is good cause for an extension. 11 DCMR § 2408.10. In order to show good cause, an applicant must demonstrate, with substantial evidence, that certain criteria exist, including an inability to obtain sufficient project financing for the PUD, following an applicant's diligent, good faith efforts to obtain financing, because of changes in economic and market conditions beyond the applicant's reasonable control. 11 DCMR § 2408.11(a).

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Notwithstanding an applicant's satisfaction of the applicable criteria for a showing of good cause, the Zoning Regulations do not compel the Commission to grant an extension. Rather, 11 DCMR § 2408.10 provides that the Commission "may extend the periods" (emphasis added) specified in §§ 2408.8 and 2408.9 to apply for a building permit and start construction, respectively. Even if an applicant can demonstrate good cause pursuant to 11 DCMR § 2408.11, other factors may warrant denial of a requested extension based solely upon the Commission's exercise of its discretion. The Commission concludes that there is no need to discuss whether the applicant has demonstrated good cause for an extension because, in this case, the applicant's construction of the approved PUD, as designed, would be inconsistent with the "orderly development of the District of Columbia" in light of substantial changes that have occurred in the material facts since the original approval of the PUD. D.C. Official Code § 6-641.01.

The applicant states that no application has yet been filed for a building permit primarily because the PUD was not selected as the site for DOT headquarters. The loss of a very large potential tenant required a change in marketing strategy to identify one or more other large users for the PUD and caused delays in obtaining financing commitments needed before construction of the PUD could be undertaken. The applicant asserts that no substantive changes since the PUD was approved have occurred that would undermine the Commission's original approval of the project.

The Commission does not concur with the applicant's assessment of changed circumstances, and instead concludes that there have been substantial changes in material facts upon which the Commission based its approval of the PUD that undermine the Commission's justification for approving the PUD originally. The substantially changed circumstances surrounding the PUD militate against extension of the validity of the PUD approval.

OP's report enumerates numerous changes since the Commission originally approved the PUD, and OP has entered into discussions with the applicant regarding how the PUD can be modified to respond to those changes. As a result of the material changes in the circumstances surrounding the PUD, the Commission concludes that the underlying premise relied upon in originally granting approval of the PUD has changed. Significantly, the loss of a very large potential tenant, which the PUD was designed to attract, undermines the justification for the PUD's original building size and design. Absent a very large tenant such as DOT, the PUD design would likely require modification to accommodate a number of smaller tenants, reflecting a change from the original purpose of the PUD.

In addition, the Commission based its approval of the PUD in part on the applicant's statements that the PUD site had locational advantages that made it suitable for development for a federal agency or other large organizations for a headquarter facility. *See* Z.C. Order No. 910, Finding No. 60. The PUD was then considered important in encouraging federal agencies to remain in the District of Columbia and to locate in the Southeast quadrant, as well as in inducing private-sector companies to relocate from competing suburban markets to the District of Columbia. *See* Z.C. Order No. 910, Finding No. 61. Because the applicant now expects to redesign the project for a number of small users, the loss of DOT as the target user and the absence of other prospective "large, major headquarters type organizations" is a substantial change of a material

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fact relied upon by the Commission in approving the PUD that undermines the Commission's justification for approving the original PUD.

Recent regulatory changes, especially the further development of the proposed Buzzard Point-Capitol Gateway overlay ("BP overlay") and the Anacostia Waterfront Initiative, further undermine the justification for approval of the PUD as originally designed. The zoning amendments raise concerns with respect to the height and setbacks of the PUD, as well as with certain design elements such as the pedestrian passageway. The Commission previously found that the PUD was generally consistent with the height, bulk, and setback requirements of the proposed BP overlay. *See* Order No. 910, Findings No. 17, 58. However, the Buzzard Point-Capitol Gateway overlay, which has not yet been finally adopted, now includes some provisions not anticipated when the PUD was originally adopted, including greater setbacks along the Anacostia River waterfront and a design review process.

There have also been significant changes in market conditions since the PUD was approved, which affect the Commission's justification for approving the PUD with respect to economic feasibility and viability of new development at the PUD site. The market for new development in the vicinity of the PUD site has changed dramatically, as new employces have moved into the Washington Navy Yard, spurring office development along M Street, and as areas of the District, including central Washington and Capitol Hill, have become increasingly attractive for residential development.

Part of the rationale for approval of the PUD was that a new project constructed at the PUD site would stimulate redevelopment of the Buzzard Point-Capitol Gateway area. The Commission then concluded that the PUD "promises to spur economic development in a Development Opportunity Area and the Central Employment Area as identified in the Comprehensive Plan." *See* Order No. 910, Findings No. 17 and 72 and Conclusion No. 4. However, as the likelihood of development of a mix of commercial, recreational, and residential uses along the Anacostia waterfront has increased due to recent changes in market conditions, there is less need for a "pioneer" project such as the approved PUD to spur desired redevelopment in the Buzzard Point-Capitol Gateway area.

The prevalence of other development activity in the vicinity of the PUD site undermines the justification for approving the PUD to "act as a pioneer and catalyst for mixed-use redevelopment" and a means to spur economic development that would not occur absent the PUD. *See* Z.C. Order No. 910, Findings No. 72 and Conclusion No. 4. The recent changes in market conditions also undermine the justification for approving the original PUD with respect to the applicant's assertions regarding the economic infeasibility of other types of development, including residential uses, at the PUD site, as well as the economic benefits to the District of Columbia associated with the PUD project relative to matter-of-right development.

The Commission concludes that substantial changes have occurred in the material facts upon which the Commission based its original approval of the PUD that undermine the Commission's justification for approving the original PUD. Accordingly, it is **ORDERED** that the Motion for

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**Extension of Time to extend the validity of the PUD approved in Z.C. Order No. 910 is
DENIED.**

**VOTE: 3-2-0 (Carol J. Mitten, James Hannaham, and John G. Parsons voting to
deny the motion; Anthony J. Hood, if favor of the motion and Peter G.
May, by absentee vote, in favor of the motion.)**

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Carol J. Mitten
Chairman
Zoning Commission



Jerrily R. Kress, FAIA
Director
Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION ORDER NO. 664-C
Case No. 98-02M/97-12M/94-17C/91-19M/89-19C
(Washington Development Group – Modification)
July 31, 2003

This Decision and Order arises out of a request by Washington Development Group, Inc. ("WDG" or "Applicant"), for a time extension of its planned unit development ("PUD") approved in Zoning Commission Order Nos. 664, 664-A, and 664-B.

At its July 31, 2003, public meeting, the Zoning Commission for the District of Columbia ("Commission") denied the Applicant's request for an extension, having been unable to find that there had been "no substantial change in any of the material facts upon which the Commission based its original PUD approval that would undermine the Commission's justification for approving the original PUD", as required by 11 DCMR § 2408.10(b).

Procedural History

The property that is the subject of this application, located in the air-rights parcel above the Center Leg of the Interstate 395 Freeway, is owned by the District of Columbia. The Applicant and the District of Columbia entered into a lease of the property. The lease is dated December 28, 1990.

A PUD in the air-rights parcel was first approved by the Zoning Commission in Case No. 89-19C, Order No. 664, dated June 11, 1990. The approved PUD consisted, essentially, of a deck over Interstate 395 south of Massachusetts Avenue, N.W. and north of E Street, N.W. There were to be three (3) office buildings, an apartment building, a hotel, and a retail pavilion. The PUD was modified in Case No. 91-19M, by Order No. 664-A, dated June 8, 1992, which permitted the addition of an atrium connecting the two (2) office buildings nearest Massachusetts Avenue, the elimination of one floor for each of those office buildings, the addition of an auditorium, and the reconfiguration of open space on the deck. This modification request was motivated by the Applicant's efforts to secure a lease of office space to the Securities and Exchange Commission.

In 1995, the Applicant filed an application to extend the validity of the modified PUD approved by Order No. 664-A. This time extension request, Z.C. Case No. 94-17C, was approved by Order No. 664-B, dated July 10, 1995, and was to expire two (2) years after the date it was published in the *D.C. Register*, that is, on September 1, 1997.

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PUD does not connect development in the Downtown East section of the city to the Downtown core nor does it add significant housing, retail, or arts use. Therefore, the Commission finds that the PUD is no longer compatible with the current goals and policies of the District of Columbia.

5. OP, ANC 6A, and ANC 2C supported the first extension of this PUD (ZC Order No. 664-B). OP, in its report, did not support this application for an extension. Counsel for ANC 6C, the ANC now representing the area in which the subject property is located, submitted a letter in opposition. The letter did not indicate that it was adopted at a duly-noticed public meeting and, therefore, is not entitled to great weight. ANC 2C, who was sent the notice of the status hearing, did not submit anything for this case.

CONCLUSIONS OF LAW

Chapter 24 of the Zoning Regulations sets forth the time limits for all final PUD approvals (i.e. a consolidated PUD or the second stage of a two-stage PUD). Within two (2) years of final approval of a PUD, an application for a building permit must be filed, unless this time is extended by the Commission. The decision to extend the time for filing a building permit is entirely within the discretion of the Commission. 11 DCMR §§ 2408.8. An extension can be granted only if there is, "no substantial change in any of the material facts upon which the Commission based its original PUD approval that would undermine the Commission's justification for approving the original PUD." 11 DCMR § 2408.10(b). In addition, in order to grant a PUD extension request, the Applicant must demonstrate with substantial evidence that there is good cause for such an extension. 11 DCMR 2408.10(c). If either of these criteria is not met, the Commission has no choice but to deny the application for an extension.

As stated in Finding of Fact No. 3, and as concluded by the Office of Planning and ANC 6A, to whom the Commission must give great weight, significant and substantial changes have occurred in the area surrounding the subject property since 1990, the date of the original approval, and in 1992, the date of the last approved modification. Therefore, the facts the Commission relied upon in approving the PUD have changed substantially such that the Commission's justifications for approving the PUD are undermined. Thus, the Commission must deny the request for an extension of the PUD.

The Commission did not reach the issue of whether there was good cause for the extension in this case, having found that the requirement established in 11 DCMR § 2408.10(b) was not met.

DECISION

For the reasons stated above, the Commission concludes that the applicant has not met the burden for extending the period of approval for a planned unit development as outlined in 11 DCMR § 2408.10. It is hereby **ORDERED** that the applicant's request for an extension of the period of approval for the planned unit development is **DENIED**.

Vote taken at its July 31, 2003, decision meeting: 5-0-0 (Carol J. Mitten, Anthony J. Hood, John G. Parsons, James H. Hannaham, and Peter G. May, to deny).

Government of the District of Columbia
ZONING COMMISSION



ZONING COMMISSION ORDER NO. 573
Case No. 87-18M/86-1C
May 23, 1988
(Boston Properties Square 35 and Square 24 - PUD's)

Pursuant to notice, the District of Columbia Zoning Commission held public hearings on September 10, 1987, and February 1, 1988 to consider the application of Boston Properties for consolidated review and approval of a Planned Unit Development (PUD), pursuant to Chapter 24 of the Zoning Regulations of the District of Columbia, DCMR Title 11, Zoning. The public hearings were conducted in accordance with provisions of Chapter 6 of the Rules of Practice and Procedure before the Zoning Commission. The record in this case incorporates the records in Z.C. Case No. 87-18C and 86-1C.

FINDINGS OF FACT

1. By Z.C. Order No. 512, dated December 8, 1986, in Z.C. Case No. 86-1C the Zoning Commission approved a mixed use PUD for Lot 802 in Square 35.
2. Application 86-1C, which was filed on February 6, 1986, had requested consolidated review and approval of a PUD and related change of zoning for lot 802 in Square 35 from R-5-B to CR.
3. Z.C. Order No. 512 approved a 6 story, mixed use residential and office building, containing 45,626 square feet of office space, up to 44 dwelling units, and underground parking for 99 cars. The building had a height of 65 feet, FAR of 4.05 (1.87 FAR for office use and 2.18 for residential use) and a lot occupancy of 74.98.
4. The modification that is being sought in this case, that is 87-18M/86-1C, requests that the approved 1.87 FAR of office use, pursuant to Z.C. Order No. 512, be converted to residential use. This, in effect, would yield an "all residential" building for lot 802 in Square 35, at 2301 N Street, N.W.
5. In March 1987, Boston Properties filed an application

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to develop an 8-story commercial office building on lot 110 in Square 24 @ 25th and N Streets, N.W., with below-grade parking for 130 cars and an amenities package, including the establishment of a \$2.2 million fund for use by the People's Involvement Corporation (PIC) for the production of low and moderate income housing in other areas of the District of Columbia and a \$50,000 contribution to the D.C. Department of Recreation for improvements to Francis Recreation Center.

6. The CR District permits matter-of-right residential, commercial, and certain light industrial development to a maximum height of ninety-feet, a maximum FAR of 6.0 for residential and 3.0 for all other permitted uses, and a maximum lot occupancy of seventy-five (75) percent for residential uses. By covenant entered into August 27, 1984, the owner of lot 110 (then designated as Area B of lot 107, Square 24) transferred all but 223.4 square feet of the potential non-residential gross floor area of lot 110 to the adjacent site. This is essentially 0.0 in terms of FAR. Pursuant to 11 DCMR 2403.10, 1.0 non-residential FAR would be attainable pursuant to the development guidelines of the PUD process, as applicable to the CR District.
7. On September 10, 1987, the Zoning Commission held a public hearing on the application. The applicant and its witnesses testified that the Square 24 site is well-suited to offices, but not to residential development because of market conditions, site configuration and location. The applicant also described the search for potential sites for the development of housing under the linkage program and described the selected sites.
8. The Office of Planning, by memorandum dated August 27, 1987, recommended approval of the March 1987 application.
9. Advisory Neighborhood Commission (ANC) 2A, by letter dated September 3, 1987, opposed the application. ANC 2A believes that the proposal disregards the Comprehensive Plan designation of the area for mixed use, does not comply with the goals of the draft Ward 2 Plan, includes a housing proposal that does not qualify as linkage, ignores an earlier agreement to construct housing on the Square 24 Site, will exacerbate traffic congestion and does not enhance the neighborhood or provide amenities superior to those which could be achieved under matter-of-right development. ANC 2A further believes that the Square 24 Site is an attractive site for residential development.

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10. The Square 24 Site is between Georgetown to the west and the Central Employment Area to the east.
11. At the end of Boston Properties' presentation of its case, the Commission indicated that, to fulfill the goals of the CR Zone, housing should be produced on or near the site and the Commission requested that Boston Properties rethink its housing linkage proposal. The Commission also expressed concern about the height and FAR of the proposed building. A motion to deny the application was made and seconded. Before the Commission voted on the motion to deny the application, counsel for Boston Properties requested an opportunity to submit a revised proposal that would address the concerns which the Commission had expressed. After restudying various development options, Boston Properties concluded that residential or mixed-use development of the site remained infeasible, but developed an alternative development proposal.
12. On February 1, 1988, the Zoning Commission held a public hearing on the revised application. Mr. Robert E. Burke, the applicant's representative, testified that the revised proposal involves the co-development of a commercial office building on the Square 24 Site and a residential apartment building on the Square 35 Site. Applicant contends that this proposal fulfills the mixed-use goals of the CR Zone, maximizes the number of housing units produced, and provides significant amenities in the West End.
13. Mr. Richard Giegengack, of Skidmore, Owings & Merrill, recognized by the Commission as an expert in architecture and urban design, described the office building. The building would be the fifth element of the six-phase U.S. News & World Report complex.
14. The co-development proposal provides two alternatives for the development of the Square 24 Site. Both alternatives involve reducing the height and FAR of the building from the original proposal. Alternative A is a 7-story office building containing 128,362 gross square feet and underground parking for 130 cars. The height of the building has been reduced to 79 feet and the FAR to 5.23. Alternative B is a 6-story office building containing 109,522 gross square feet and a minimum of 113 underground parking spaces. The height has been reduced to 75 feet and the FAR to 4.46.
15. Mr. Giegengack testified that the seven-story alternative is the preferred architectural massing and urban design solution, because it provides a more gradual transition between the adjacent eight and six-story office buildings and a stronger mass at the corner of N and 25th Streets.

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16. The revised plan for the development of the Square 35 Site was described by Mr. Alan Lockman, recognized by the Commission as an expert in architecture and urban design. It provides for a 7-story apartment building with a minimum of 101 dwelling units and 103 underground parking spaces. The all-residential building has a height of 65 feet, FAR of 4.26 and a lot occupancy of 71.4 percent.
17. The co-development proposal includes the amenities package described below. In addition, if the seven-story alternative is approved for the office building, the amenities will also include a cash contribution of \$300,000 to the People's Involvement Corporation for the development of low-and-moderate-income housing in the District of Columbia. The amenities package includes:
 - a. The extension of 24th Street along its present center line, terminating in a cul-de-sac at the edge of the park with entrances to the school and the residential apartment building on the Square 35 Site (valued at approximately \$77,000);
 - b. Additional pathways and lighting, extensive grading and landscaping to the area within Rock Creek Park that is currently used as a gravel parking lot, construction of other improvements within the park and perpetual maintenance of a portion of the park (valued at approximately \$141,000);
 - c. Resurfacing the two easternmost existing tennis courts, repaving the existing basketball court and installing new backboards (valued at approximately \$15,000);
 - d. Repaving the badly deteriorated Francis Junior High School parking lots and regrading and landscaping the area west of the school (valued at approximately \$64,000);
 - e. An initial financial grant of \$10,000 and additional annual grant of \$5,000 - \$10,000 to the D.C. Board of Education for educational programs or physical improvements at Francis Junior High School (valued at approximately \$60,000);
 - f. Lease payments to the D.C. Board of Education for the use of its property for the 24th Street extension (valued at approximately \$50,000);
 - g. Replacement of existing cherry trees that will be affected by construction activities with new trees of the same caliper, to be located in the triangular parcel of land east of 23rd Street

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behind the existing residential buildings and, subject to National Park Service approval, in Rock Creek Park (valued at approximately \$10,000);

- h. Streetscape improvements along N, 22nd and 23rd Streets, including new sidewalks, installation of an additional decorative light pole, repair of existing block paving and construction of architectural elements (valued at approximately \$35,000);
 - i. Participation in a rideshare program;
 - j. Participation in the District's First Source Employment Program;
 - k. MBOC commitments with the goal of awarding 25-35 percent of construction and management contracts to minority businesses;
 - l. Off-hours use of the office garage parking facilities by local residents;
 - m. Addition of more off-street parking spaces than required by the Zoning Regulations;
 - n. Creation of approximately 465 permanent jobs and 100 temporary construction jobs;
 - o. Increased tax revenues for the District of Columbia of approximately \$1,000,000 annually;
 - p. Cash contribution of \$300,000.00 to the People's Involvement Corporation for the development of low-and moderate-income housing in the District of Columbia;
 - q. Creation, in conjunction with the Washington Sculptors Group, of an outdoor sculpture garden with 4 to 6 pieces of sculpture at the entrance to the office building and development of a program at Francis Junior High School to involve the students in the creation of the sculpture; and
 - r. The production of 53 additional apartment units on the Square 35 Site to contribute to the West End and the District of Columbia, and which can only be produced if subsidized by the development of an office building on the Square 24 Site (subsidy valued at approximately \$1,961,418).
18. The District of Columbia Office of Planning (OP), by memorandum dated January 22 and February 17, 1988, and by testimony presented at the public hearing,

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recommended approval of the application, and stated its preference for Alternative A, the seven-story office building. OP believes that under either alternative the use and design of the office building will complement surrounding uses and structures. OP supports the cash contribution to PIC and does not believe that the donation is housing "linkage." The housing linkage in this case involves the development of housing on Square 35. OP concurs with the findings of the applicant's transportation analysis that no adverse traffic conditions are expected to impact on Francis Junior High School. OP believes that the project furthers the goals and objectives of the Comprehensive Plan. The modification to Order No. 512 will result in a gain in housing in the West End and the cash contribution to PIC will result in the production of low-and moderate-income housing, a city-wide benefit.

19. Advisory Neighborhood Commission (ANC) 2A, by resolution dated January 25, 1988, and testimony at the public hearing, opposed the application and expressed its issues and concerns as follows:
 - a. A residential building on the Square 24 Site would bring needed evening and weekend life to the West End and form a bridge between the housing on N Street and the housing on M and 25th Streets;
 - b. The Square 24 Site is ideally located for residential development: across from Rock Creek Park, a school, a swimming pool, tennis court, playing fields, swings and other recreational facilities;
 - c. The corner site should present no design difficulties that preclude residential development as many other corner sites in the District have been developed successfully for residential purposes;
 - d. The 147,000 square feet of office space was not included in the original plans for the block which ANC 2A supported;
 - e. The PUD benefits proffered by Boston Properties will not accrue to ANC 2A;
 - f. The result of the project will be the net loss of housing to the West End;
 - g. Most of the offered benefits should be provided by the District of Columbia Government;

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- h. Other benefits, such as landscaping, will benefit the office building occupants and merely increase the value of the office building;
 - i. The housing linkage funds will be spent outside ANC 2A, without a demonstrated nexus or a formal District of Columbia policy;
 - j. This housing linkage proposal would establish a poor precedent; and
 - k. A covenant was signed guaranteeing the development of the Square 24 Site for residential purposes.
20. Advisory Neighborhood Commission (ANC) 2B, by letter dated January 22, 1988, opposed the application and expressed its opinions as follows:
- a. The proposal violates a covenant entered into by the District with Boston Properties;
 - b. The proposal reduces the total residential stock previously agreed upon the two lots at issue; and
 - c. The proposal threatens public use of Rock Creek Park and other public areas bordering the park.
21. The site has a reasonable potential to be attractive for residential development. In this issue, the Commission is substantially more persuaded by the views of ANC 2A and other opponents than it is by the applicant.
22. The proffered support for the development of housing is not adequately directed toward the development of housing in the neighborhood of or in reasonable proximity to Square 24.
23. The proffered support for the development of housing is insubstantial, in light of the extent and value of the proposed office development
24. The applicant has requested the Commission to disregard the covenant which was signed by the applicant guaranteeing the development of the Square 24 Site for residential purpose.
25. The Commission is not persuaded that housing will not eventually be built on the Square 24 site.
26. By memorandum dated April 25, 1988, the Deputy Corporation Counsel, Community Development Division, concluded that the donation of the \$300,000 to PIC in exchange for the use of the 7th floor of office space on the Square 24 Site should not be relied upon as the sole determinant

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in approving the application, because of the absence of a reasonable beneficial connection or nexus between the proposed donation and the neighborhood in which the PUD would be located, and which would be affected by the PUD.

CONCLUSIONS OF LAW

1. Applicant has not met its burden of proof under 11 DCMR 2403.10.
2. Approval of this application would be inconsistent with the Comprehensive Plan, because it would encourage excessive non-residential development in an area which the Plan designates for a mix of residential and non-residential development.
3. Approval of the application would not be consistent with the purposes of the Zoning Act and the Zoning Map of the District of Columbia, which include stabilizing land values and improving residential and mixed use areas.
4. The project would not enhance and promote the mixed-use character of the neighborhood.
5. Approval of this application would not promote orderly development in conformity with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Map of the District of Columbia.
6. The Zoning Commission has accorded ANCs 2A and 2B "great weight" .
7. The Commission determined that the applicant did not fulfill his burden to prove the case.
8. The action of the Zoning Commission in the instant application shall have no effect on and shall not supersede the action of the Zoning Commission in Order No. 512.

DECISION

In consideration of the Findings of Fact and Conclusions of Law herein, the Zoning Commission of the District of Columbia hereby orders that this application for consolidated review and approval of a PUD for lot 110 in Square 24 and modification to an approved PUD for lot 802 in Square 35 be DENIED.

Vote of the Commission taken at the public meeting of April 11, 1988: 3-0 (Lindsley Williams, John G. Parsons, and Maybelle T. Bennett to deny; Patricia N. Mathews not present, not voting).

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This order was adopted at a special meeting held on May 19, and May 23, 1988, by a vote of 3-0 (John G. Parsons, Maybelle T. Bennett to adopt as amended; Lindsley Williams to adopt by absentee vote; Patricia N. Mathews, not present, not voting; George M. White, not voting, not having heard the case).

In accordance with 11 DCMR 3028, this Order is final and effective upon publication in the D.C. Register, specifically on 10 JUN 1988.


MAYBELLE T. BENNETT
Chairperson
Zoning Commission


EDWARD L. CURRY
Executive Director
Zoning Secretariat

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