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May 16, 2012

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VIA HAND DELIVERY

D.C. Zoning Commission
Office of Zoning
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: Z.C. Case No. 11-03
Southwest Waterfront First Stage PUD
Applicant's Opposition to Motion for Minor Modification of Order

Dear Commissioners:

On behalf of Hoffman-Struever Waterfront, LLC, we oppose the motion of Harbour Square Owners, Inc. ("Harbour Square") for a minor modification to Z.C. Order No. 11-03. The proposed modification is improper in that Harbour Square lacks standing to make such a motion, it is not minor, it is untimely, and the substance of the motion is irrelevant to the Zoning Commission proceedings. Therefore, the motion should be denied.

1. *Harbour Square Does Not Have Standing to Modify the PUD*

Harbour Square does not have standing to request a minor modification to the Planned Unit Development ("PUD"). Only a party to a PUD may seek a modification to a PUD order. Section 3030.3 of the Zoning Commission's regulations provides that "[a]ny party to a proceeding before the Commission, or the Commission upon its own motion, may request that a matter be placed on the Consent Calendar." (Emphasis added). The Consent Calendar is specifically designed for minor modifications.

While Harbour Square participated in the proceedings, it did so as a "person" and not as a party. In fact, Harbour Square's request for party status was denied. See Z.C. Order No. 11-03, December 16, 2011, at 2 (Finding No. 5); see also Zoning Commission Transcript in Z.C. Case No. 11-03 ("Tr."), July 18, 2011, at 22-23 (relevant excerpts from the transcript are attached). Consequently, because it was not a party to the proceeding, it does not have standing to request a minor modification under section 3030.3 of the Commission's regulations.

ZONING COMMISSION
District of Columbia
CASE NO. 11-03
EXHIBIT NO. 122

It is important to note that Harbour Square actually testified in *support* of the PUD. Tr. at 264 ("We have chosen and decided to support this project through the majority of the board members and many of our residents."). The support was based on the extensive meetings and discussions between the Applicant and Harbour Square to mitigate the impacts of construction on Pier 4, which resulted in a reduction in the height of the Pier 4 building to 45 feet with eight-foot setbacks on either side. Tr. at 152, 264-65. While Harbour Square expressed a preference for no building on Pier 4, it nevertheless supported the project as presented in the plans and ultimately approved by the Commission. *Id.*; Z.C. Order 11-03, at 33 (Cond. A.3).

2. *Harbour Square's Motion is Not "Minor"*

Even if Harbour Square did have standing to file its motion, its request cannot be characterized as "minor." Only "modifications of little or no importance or consequence" are deemed to be minor. 11 DCMR § 3030. Here, Harbour Square is effectively asking the Commission to reopen the record, accept new evidence and *overturn* its Stage One approval with respect to Pier 4. It has asked the Commission allow for reconsideration of "whether the proposed townhouses could or should be constructed on Pier 4." This can hardly be characterized as having "little or no importance or consequence." Rather, it would "unwind" the finality of the Commission's decision with respect to Pier 4 and would leave unsettled the very development plan envisioned by the Applicant for that portion of the PUD site. Such a modification would inject fundamental uncertainty in the approval process and potentially disrupt the entire purpose of a Stage One PUD.

The PUD regulations are designed so that an applicant can rely on the Stage One approval with confidence when it proceeds with specific plans for its Second Stage PUD applications. For that reason, the Zoning Regulations provide that the Commission "*shall grant*" approval of a second stage PUD if "the Commission finds the application to be in accordance with the intent and purpose of the Zoning Regulations, the PUD process and the first stage approval, the Commission shall grant approval to the second-stage application including any guidelines, conditions and standards that are necessary to carry out the Commission's decision." 11 DCMR 2408.6. We do not believe it was the intent of the Commission, in issuing its 47-page order for this Stage One PUD, that its approval of the various development parcels, open spaces and piers could subsequently be rendered meaningless by the filing of a modification motion by a non-party.

Significantly, only a property owner can authorize the filing of an application for a major modification to a PUD. Zoning Commission Form 105, *Application for Modification of a Previously Approved Planned Unit Development*, requires the signature of all owners of property that is the subject of the PUD. Here, Harbour Square did not obtain – or even seek – the consent of the District of Columbia in filing this PUD modification request. Harbour Square's motion should be denied on this basis, as well.

3. Minor Modification to the Order is Improper and Untimely

Although styled as a motion for a minor modification to Z.C. Order No. 11-03, Harbour Square's motion is effectively asking the Zoning Commission to reconsider its decision. On page 3 of its pleading, Harbour Square requests the Commission to reverse the finality of its decision allowing the construction of townhouses on Pier 4 ("we are simply requesting that the Commission keep its *options open* as to Pier 4 issues.")(emphasis added). See Harbour Square Request for Minor Modification, May 8, 2012, at 3. Such requests for reconsideration of the Commission's decision, however, must be made within ten days of the order having become final. 11 DCMR § 3029.5. This request comes four and a half months too late.¹

Harbour Square suggests that it is simply seeking clarity with respect to the siting of the proposed townhouses on Pier 4. *Id.* Yet, there is no ambiguity in the Commission's order. As Harbour Square acknowledges, the Commission's order requires the Applicant to develop the Planned Unit Development ("PUD") in accordance with the master plan submitted to the record and supplemented by drawings dated July 8, 2011, marked as Exhibit 38 to the record. Those approved drawings clearly show a townhouse development at 45 feet in height on Pier 4, which was fully discussed by the Commission at the hearing. Tr., July 18, 2011, at 212-14.

4. Environmental Approvals are Not Prerequisites for Zoning Commission Action

Finally, even if the Zoning Commission were to reach the substantive issue raised in Harbour Square's motion, there is no basis to rescind the development plan for Pier 4 based on environmental issues raised by the U.S. Army Corps of Engineers. As the D.C. Court of Appeals has held, the Zoning Commission does not need to consider whether an environmental impact statement should be prepared prior to taking action on a Stage One PUD. See *Foggy Bottom Association v. District of Columbia Zoning Comm'n*, 979 A.2d 1160, 1165 (D.C. 2009)(PUD order did not result in a license or permit to implicate requirements of D.C. Environmental Procedures Act). In rendering its decision, the Court noted that federal courts had reached similar conclusions when applying the requirements of the National Environmental Policy Act. *Id.* at 1166.

¹ Harbour Square claims it could not file its motion any earlier because the basis for it – a letter from the Army Corps of Engineers dated August 30, 2011 – did not become available until January 2012. This argument is a red herring. Harbour Square's professed preference for no townhouses on Pier 4 (notwithstanding its support for the PUD) predates the issuance of the Army Corps letter and could have formed the basis for a timely request for reconsideration. It simply chose not to pursue that route. The Applicant would be unfairly prejudiced if Harbour Square – or any other person or party for that matter – were permitted to derail the PUD process and the approved order through such tardy filings.

Here, the applicant's project is undergoing an environmental assessment as part of its federal permit application before the U.S. Army Corps of Engineers. Development of Pier 4, the segment of the PUD affected by this permit, can only proceed once the permit is issued. It is one of several parallel processes that this PUD must undergo and is not unlike any other entitlement process for a PUD where, for example, separate approvals from the Commission of Fine Arts, the Mayor's Agent for Historic Preservation or other governmental agencies might be required. The sequencing of these review processes often overlaps and there is no requirement that one review take place prior to another.²

It would be fundamentally unfair to an applicant if any person could unilaterally decide that one agency had priority over another and disrupt the sequencing of entitlement reviews by insisting that environmental considerations had to be completed prior to review and approval of a PUD. This Commission has already determined that environmental review does not need to be completed before taking action on a PUD. *Foggy Bottom Association*, 979 A.2d at 1165. Consequently, there is no reason for the Commission to modify its approval of the Pier 4 development as set forth in the Stage One approval of the Southwest Waterfront in Z.C. Order No. 11-03 and Harbour Square's motion should be denied.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Norman M. Glasgow, Jr.
Mary Carolyn Brown

Attachment

² See, for example, *N Street Follies v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584 (D.C. 2008)(Historic Preservation Review Board action on proposed development was not prerequisite to Board of Zoning Adjustment taking action on zoning application for same property).

CERTIFICATE OF SERVICE

I hereby certify that copies of this Response to the Motion for a Minor Modification were served by first class mail, postage prepaid, this 16th day of May, 2012, upon the following:

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Mary Carolyn Brown

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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PUBLIC HEARING

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=====⌋
IN THE MATTER OF: :
: Case No.
Hoffman-Struever Waterfront, : 11-03
LLC - First-Stage PUD & :
Related Map Amendment at :
Southwest Waterfront :
=====⌋

Monday,
July 18, 2011

Hearing Room 220 South
441 4th Street, N.W.
Washington, D.C.

The Public Hearing of Case No. 11-03 by the District of Columbia Zoning Commission convened at 6:30 p.m. in the Office of Zoning Hearing Room, 441 4th Street, N.W., Washington, D.C., 20001, Anthony J. Hood, Chairman, presiding.

ZONING COMMISSION MEMBERS PRESENT:

ANTHONY J. HOOD Chairman
KONRAD W. SCHLATER Vice Chairman
MICHAEL G. TURNBULL Commissioner FAIA,
(AOC)

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1 CHAIRMAN HOOD: Okay. Okay.

2 MS. SCHELLIN: They changed their
3 name now, yes.

4 CHAIRMAN HOOD: 6th Street, okay.
5 Okay. Next, we have -- the last request we
6 have is from Kay Williams for Harbor Square
7 Cooperative. And actually, I think, we
8 received a letter from them this evening
9 explaining why the filing was late.

10 I would not be in favor of
11 granting them party status. I think that the
12 submission did not really warrant for them to
13 rise to the occasion of party status. But I
14 will also note that they will be able to
15 testify when it's time for individuals to
16 testify or organizations to testify in that
17 capacity.

18 Mr. Glasgow?

19 MR. GLASGOW: No objection.

20 CHAIRMAN HOOD: Okay.

21 Commissioners, any comments? Okay. I would
22 move that we deny Kay Williams for Harbor

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1 Square Cooperative for party status with the
2 caveat that they will be able to testify when
3 we get to organizations and persons in support
4 or opposition. So that's my motion. I ask
5 for a second.

6 COMMISSIONER TURNBULL: Second.

7 CHAIRMAN HOOD: It is moved and
8 properly seconded. Any further discussion ?
9 Are you ready for the question?

10 All those in favor?

11 ALL: Aye.

12 CHAIRMAN HOOD: Not hearing any
13 opposition, Ms. Schellin, would you, please,
14 record the vote?

15 MS. SCHELLIN: Yes. Staff records
16 the vote 3-0-2 to deny party status in
17 opposition to Kay Williams for Harbor Square
18 Cooperative. Commissioner Hood moving,
19 Commissioner Turnbull seconding, Commissioner
20 Schlater in support of denial. Commissioners
21 May and Selfridge not present not voting.

22 CHAIRMAN HOOD: Okay. Let's take

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1 have resolved most of them or at least
2 provided information in areas where it was
3 more of a declarant statement than ask for
4 resolution.

5 Harbor Square is another example.

6 With Harbor Square, we worked with them to
7 get their support and worked with their
8 conditions as well.

9 In doing so, we reduced the scale
10 of our development plans for Pier 4 and we got
11 the support for that. So Harbor Square, which
12 is the closest property to Pier 4 and most
13 impacted, is supporting our development on
14 Pier 4, as we have modified per their request.

15 Riverside Condominium, Tiber
16 Island Cooperative, Washington Waterfront
17 Association, Riverside Baptist Church, Arena
18 Stage, Disabled American Veterans, Gangplank
19 Slipholders Association, Capitol Square
20 Townhomes, Southwest Neighborhood Assembly,
21 The Mandarin Oriental Hotel and Capital Yacht
22 Club have all given support or at least

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1 on if development must occur and there is a
2 list of items on there of setbacks of 10 feet
3 and 45 feet in height. And I think there are
4 some other provisions in there.

5 Prior to that, we had already
6 worked out a solution with Harbor Square
7 Association that we would reduce the height of
8 Pier 4 to 45 feet and that the setbacks on the
9 pier, and we are talking about either side,
10 would be 8 feet. And that's simply -- that
11 wasn't a negotiation. That was simply a
12 correction on our part, because the structure
13 the way it is today is 8 feet back and we
14 needed that inside, so that we could park.

15 And here, we are aligned. We want
16 to put the cars inside that pier away from
17 view and that's what the neighbors want as
18 well. So anyway, it took a lot of
19 communication and back and forth, but that
20 evolved while, I think, the ANC adopted those
21 concerns.

22 And so there was a case where I

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1 CHAIRMAN HOOD: You can hold your
2 seat.

3 MS. KRAMER: Okay.

4 CHAIRMAN HOOD: Yes.

5 MS. WILLIAMS: Good evening. My
6 name is Kay Williams and I am a current
7 resident of Harbor Square. I'm also the
8 current President of the Harbor Square
9 Homeowners Cooperative Board of Directors.

10 We have spent a lot of time as a
11 board and collectively working with the
12 developer on this project. We have chosen and
13 decided to support this project through the
14 majority of the board members and many of our
15 residents.

16 I'm not going to bore you or take
17 up time saying how many things we have gone
18 through, how many meetings to try and mitigate
19 and make things work for our residents.

20 It has been an enormous amount of
21 meetings, an enormous amount of coming to us,
22 us going to the developer and we all

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1 appreciate that.

2 The most difficult issue for us is
3 one of balance. And it is the one that we are
4 struggling the most with and it is all about
5 Pier 4.

6 We have worked with the developer.

7 They have mitigated the height. They have
8 mitigated the footprint and we appreciate
9 that. I have been very honest with everyone
10 on the team. Harbor Square would prefer that
11 there was no building on Pier 4. We like not
12 having a building on Pier 4.

13 But we saw it for the first time,
14 the first week of June, and we have been
15 working with them ever since then to try and
16 mitigate that impact.

17 We do not oppose what ANC says
18 about wishing that we had more work to do with
19 that, but we have to say, as a board, the
20 majority of the board and as many of our
21 residents, we are excited about what this is
22 doing to the southwest. We think they have

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1 Map, I look on the area around St. Augustine's
2 church and it shows it as a land use change
3 area, but the hatched area is green and white.

4 What am I supposed to make of that?

5 MR. JESICK: That is a mix of
6 parks, recreation and open space and low
7 density commercial. So I think what the plan
8 envisions is, of course, a great amount of
9 access to the waterfront there and I think
10 that is being realized in the Waterfront Park
11 that is being proposed with this application.

12 But it also doesn't rule out the
13 possibility that there would be some sort of
14 light retail there as well. I think the
15 applicant has also proposed some sort of
16 retail pavilion in that location, which I
17 think would -- has the potential to supplement
18 and even enhance the park experience.

19 VICE CHAIRMAN SCHLATER: And does
20 the Pier 4 come out of that area?

21 MR. JESICK: Pier 4, I believe,
22 does connect to that hatched area and the

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1 commercial pier as well, which would be just
2 to the north of Pier 4.

3 VICE CHAIRMAN SCHLATER: What does
4 the Office of Planning think about that Pier 4
5 proposal?

6 MR. JESICK: We do not object to
7 the residential uses on the pier, as long as
8 the applicant works with the community to
9 attempt to address their concerns. I think
10 they have reached out to impacted neighbors,
11 but we do not object to the location of the
12 residential structure on the pier.

13 VICE CHAIRMAN SCHLATER: And you
14 think it is consistent with the Comprehensive
15 Plan?

16 MR. JESICK: Yes. Commercial in
17 the Comprehensive Plan, Future Land Use Map
18 does not necessarily rule out residential. As
19 noted earlier, I believe, the Comprehensive
20 Plan framework element says that certain zones
21 will be compatible with certain land use
22 designations. Those zones, such as the C

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1 Zones also permit and, in fact, incentivize
2 residential uses.

3 VICE CHAIRMAN SCHLATER: Okay.
4 Great. Thank you very much.

5 CHAIRMAN HOOD: Commissioner
6 Turnbull?

7 COMMISSIONER TURNBULL: Yes. I
8 have two questions. One for DDOT. You
9 mentioned you wanted reports 45 days, but I
10 think we only advertise 40 days out, so I
11 don't know, how do we coordinate that?

12 I mean, there is a timing and a
13 schedule. I mean, if we don't set up our
14 schedules for 40 days, how do you -- how are
15 we going to -- I guess the applicant has got
16 to read minds or --

17 MS. STEINGASSER: I think what you
18 are referring to is the ANC notice of 40 days,
19 which is a little bit different than the
20 actual filing, because the filings come in and
21 then the notice is made. So, typically, we
22 see a little bit more than the 40 days. And I

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