

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
KARL A. RACINE



July 26, 2019

District of Columbia Zoning Commission
441 4th Street, NW, Suite 210-S
Washington, DC 20001

**Re: The Office of the Attorney General's Opposition to CityPartners 5914, LLC's
Request for the Extension of Time of the PUD Approved by ZC Order No. 13-08**

Dear Members of the Zoning Commission:

As Attorney General for the District of Columbia, I request a waiver to file this letter in response to several incorrect legal and factual statements in CityPartners 5914, LLC's (CityPartners or Applicant) Reply to the Office of the Attorney General's (OAG) Opposition to its Request for the Extension of Time of the PUD approved by ZC Order No. 13-08. As explained in my July 1, 2019 letter to the Commission, as well as for the reasons stated below, I urge the Commission to deny CityPartner's request for an extension.

* * * *

I. The Commission has the sole discretion to deny a PUD extension.

In its reply to OAG's Opposition, CityPartners asserts that "there is no legal basis under Subtitle Z § 705.2(c) for denying the extension."¹ That is simply not the case.

Subtitle Z § 705 governs requests for extensions of time. Section 705.3 provides that "The Commission may at their sole discretion" deny, grant, or grant with conditions, a request for a time extension. Relatedly, Subtitle Z § 702.5 states that the "previous approval of an application shall not be a binding precedent on a new application," including a time extension.

The Commission's approval of a PUD is not unlimited. Subtitle Z § 702.2 establishes a two-year validity period for PUD Orders. Within those two years, an applicant must file a building permit application to prevent the expiration of the PUD. Construction must start within three years of the PUD Order. The two-year validity period ensures that either the PUD is built or that the site is freed from the obligations of complying with the PUD. The two-year period also ensures that the District is not saddled with a vacant or abandoned property whose development is stalled by an

¹ Exhibit 9, Applicant's Response Ltr. to Opposition from OAG, at 3.

applicant's failure to diligently complete the development. In this case, the Commission already granted the applicant a 50% increase in the validity period by requiring the building permit application to be filed within three, rather than the standard two, years after the effective date of the Order. Condition C.5 of the PUD Order (Z.C. Order No. 13-08).

An extension of time is the exception. Extensions should be granted when there are unusual circumstances beyond an applicant's control and no conflicting public policy interests. Where an applicant does not diligently pursue the PUD and fails to timely file a building permit application, the Commission may determine that the PUD is outdated and deny the request for an extension based upon, among other reasons, changes in the Zoning Regulations, public policies, the economic climate, and the state of development in the neighborhood. This takes into account the Commission's responsibility to balance the applicant's requested flexibility from zoning requirements with the proposed public benefits (Subtitle X § 300.1).

Subtitle Z § 705.2 requires an applicant for a time extension to demonstrate "good cause." At a minimum, an applicant must demonstrate "good cause" by establishing (i) that none of the material facts on which the Commission relied in approving the PUD has substantially changed (Subtitle Z § 705.2(b)) and (ii) that the applicant, for reasons out of its reasonable control, could not meet the time requirements of the PUD (Subtitle Z § 705.2(c)).

CityPartners cannot satisfy either requirement.

1. There have been substantial changes in the material facts supporting the approval of the original PUD:

(i) First, the neighborhood has undergone dramatic changes driven by the \$400 million investment in the adjacent St. Elizabeths East campus, which is on the opposite side of the Congress Heights Metro Station from the Property. A new developer could apply for a zoning map amendment to proceed with development at the site and provide the same or more economic benefits as CityPartners. Developments already underway nearby include:

- the \$69 million Entertainment and Sports Arena complex on Parcels 9 and 12 that opened last autumn, with a 4,200-seat arena and connected training facility;
- the \$109 million restoration and renovation of 14 historic buildings on Parcel 11 into 252 residential units at the Residences at Saint Elizabeths East that broke ground last autumn with completion by early next year; and
- the \$219 million mixed-used town square development on Parcel 15 scheduled to start construction this year, with 288 residential units, a 150-room hotel, a 200,000 square foot office building and 50,000 square feet of retail.

Without question, these projects significantly increase the development possibilities for the Property. The PUD was designed over six years ago, when plans for the redevelopment of the St. Elizabeths East campus were limited to the Gateway pavilion.

(ii) Second, the regulatory framework and policy preferences relating to affordable housing have changed substantially since the PUD was approved. As the Office of Planning (OP)

report notes (Exhibit 11 of the Z.C. Case No. 13-08A record), changes in the Inclusionary Zoning (IZ) regulations since the PUD approval have doubled the reduction in the maximum Median Family Income eligible for rental IZ units from the 80% MFI in the PUD Order to 60% MFI currently. The approved PUD Order provides for only 30 two-bedroom units, out of 206, and no family-sized units. Since the PUD Order, the Council has funded an assessment of the need for larger family units to be completed by the Office of Deputy Mayor for Planning and Economic Development. Furthermore, Mayor's Order 2019-036, issued on May 10, 2019, recognized the crisis of housing affordability in the District and called for OP and other agencies to promote increased density and height to allow for additional housing. The original PUD does not take any of these changes into account.

(iii) Another substantial change since the Commission approved the PUD is that the applicant, now CityPartners, no longer has clear ownership of the Property. When the initial PUD application was filed, CityPartners was a joint partner with Sanford Capital. Sanford Capital had clear title to three of the seven Congress Heights parcels. Sanford Capital had clear title because it acquired the parcels legally without violating TOPA. That is not the case for CityPartners, whose purported acquisition of the Property from Sanford is being challenged in both OAG's Receivership Case and the tenants' TOPA Case.² OAG's position is that the Commission would not have seriously contemplated the PUD if title to the Property had been under a similar threat of litigation.

2. CityPartners also failed to comply with Subtitle Z § 705.2(c) because its wrongdoing led directly to the litigation it cites to justify its request for an extension. When CityPartners acquired Congress Heights from Sanford Capital in December 2017, CityPartners may have violated the tenants' TOPA rights. CityPartners also violated a November 2017 Court Order providing the tenants with the exclusive right to negotiate a purchase of the property. Ex.1, June 19, 2018 Court Order at 5. This litigation was completely within CityPartners' "reasonable control" and therefore does not qualify under Subtitle Z § 705.2(c).

II. CityPartners misrepresents several key facts in its reply.

In its reply, CityPartners misstates at least six material facts:

1. CityPartners asserts that if the PUD expires, "the area around the Metro plaza will stay vacant and unsafe for years, with boarded up, fire-damaged buildings."³

This dire prediction has no basis in fact. It ignores the massive investment in the surrounding area, in particular the St. Elizabeths East developments on the other side of the Congress Heights Metro station. As to the Property itself, the court-appointed receiver

² OAG's Receivership Case is *D.C. v. 1309 Alabama Ave LLC et al.* (2016 CA 000162 B). The tenants' TOPA Case is *1309 Alabama Ave Tenants Assoc. v. 1309 Alabama Ave LLC et al.* (2018 CA 003477 B).

³ Exhibit 9, Applicant's Response Ltr. to Opposition from OAG, at 3.

has been charged to rehabilitate the buildings, which will occur even if the PUD expires. *See Ex. 2, July 13, 2018 Order.*

2. CityPartners suggests that the tenants will agree to work with CityPartners.

This is another statement with no support. The Congress Heights tenants have given no indication that they would work with CityPartners. Indeed, the tenants rejected the offer described by Mr. Griffis in his letter to the Commission.

3. CityPartners states that the Superior Court has ruled that CityPartners is in fact the owner of the Congress Heights Apartments.

The Court specifically declined to make such a ruling. *See Ex. 3 Transcript of the May 30, 2018 Hrg. at 17-18.* The Court noted that the ownership was contested, but for the purposes of determining responsibility for funding the Receivership to repair and maintain the Property, the Court ruled that CityPartners was the “owner of record” and therefore responsible for funding the Receivership. Additionally, the Court found that CityPartners, like its partner Sanford Capital, delayed funding the Receivership and therefore delayed repairs at the Property. “This remediation has been delayed significantly by both the previous and current owners, sometimes as a result of their failure to comply with court orders....” *Ex. 4 April 15, 2019 Order at 11.*

4. CityPartners states that the “transaction [to acquire Congress Heights] was not done in violation of a Court order....”

Not true. Not only did the court determine that CityPartners violated a November 2017 Court Order providing the tenants with the exclusive right to negotiate a purchase of the property, *Ex. 1 at 5*, the Court also determined that CityPartners and Sanford Capital may have violated the tenants’ TOPA rights. *See Ex 5. Oct. 30, 2018 Order at 5-6.*

5. CityPartners misrepresents its alleged interactions with its long-time partner Sanford Capital.

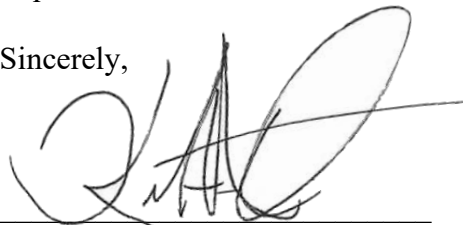
While CityPartners points to some actions it took in 2017 as to Sanford Capital, it fails to acknowledge evidence that CityPartners was fully aware that Sanford Capital was engaging in illegal housing practices by no later than January 2016, when OAG filed its Tenant Receivership Act action. CityPartners only began the process of actually divesting Sanford Capital of its ownership interest in Congress Heights in 2018, when OAG renewed its attempts to appoint a receiver.

6. Finally, Mr. Griffis alleges that OAG’s letter is a personal attack aimed directly at him. That is also not true. OAG simply wishes to provide an accurate recounting of the facts to the Commission as it renders its decision.

* * * *

For these reasons, OAG urges the Commission to exercise its sole discretion to deny CityPartners' request for a PUD extension.⁴

Sincerely,

A handwritten signature in black ink, appearing to read 'KARL A. RACINE', written over a horizontal line.

KARL A. RACINE


Attorney General for the District of Columbia

⁴ CityPartners has now agreed to a one-year extension of the PUD, which is characterized as a “compromise” “suggested” by OAG (Applicant’s Response, Exhibit 9, at 3). OAG is adamantly opposed to the PUD time extension for the reasons detailed above. However, if the Commission decides to grant an extension of the PUD, OAG asks that the extension be limited to one year instead of the two years requested, and for the limited purpose of CityPartners transferring the PUD to a new developer. One year would allow the parties time to negotiate a settlement, as CityPartners states is its intention. If at the end of one year the CityPartners has failed to transfer the PUD to a new developer, then the PUD should be terminated. However, OAG’s firm position remains that the Commission should simply deny the PUD extension.

Certificate of Service

I hereby certify that I will cause the foregoing document to be sent to the addresses below on July 29, 2019 by first class mail.

Date:



Argatonia D. Weatherington
Acting Section Chief, Housing and Community Justice Section
Public Advocacy Division
Office of the Attorney General

Jennifer Steingasser/Joel Lawson
Office of Planning 1100 4th Street, SW
Suite E650
Washington, DC 20024

Advisory Neighborhood Commission 8E
1310 Southern Avenue, SE (Room G047)
Washington, DC 20032

ANC 8E04
Commissioner Kendall Simmons
1313 Congress Street SE
Washington, DC 20032

Alabama Avenue/13th Street Tenants Coalition
c/o William R. Merrifield, Jr.
Washington Legal Clinic for the Homeless
1200 U Street, NW, Third Floor
Washington, DC 20009

CityPartners 5914, LLC
c/o Goulston & Storrs, Counsellors of Law
1999 K Street NW, Suite 500
Washington, DC 20006-1101