

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
Z.C. ORDER NO. NO. 15-27B(1)
Z.C. Case No. 15-27B
Carr Properties OC, LLC
(Modification of Significance to Approved Consolidated PUD @ Square 3587, Lot 833)
July 27, 2020

Pursuant to notice, at its virtual public meeting held on July 6, 2020, the Zoning Commission for the District of Columbia (the “Commission”) considered an application (the “Application”) from Carr Properties OC, LLC (the “Applicant”) for:

- A modification of significance to Z.C. Order No. 15-27 (the “Original Order”), which approved a consolidated planned unit development (“PUD”) for property including Lot 833 in Square 3587 (the “Building C1 Site”) to make minor design refinements to the Building C1 penthouse and to grant a special exception pursuant to Subtitle C § 1500.3(c) of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations, Zoning Regulations of 2016, to which all subsequent citations refer unless otherwise specified) to permit nightclub, bar, cocktail lounge, and restaurant uses (“penthouse bar/restaurant uses”) in the penthouse of Building C1; and
- A second-stage PUD, with a related modification of significance of the Original Order that granted a first-stage PUD for property that included Lot 834 in Square 3587 (the “Building C2 Site”), including a special exception pursuant to Subtitle C § 1500.3(c) to permit penthouse bar/restaurant uses, to construct Building C2.

The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z. For the reasons stated below, the Commission **APPROVES** the Application as it relates to the first request stated above for the modification of significance for the Building C1 Site.¹

FINDINGS OF FACT

NOTICE

1. On May 13, 2020, the Office of Zoning (“OZ”) sent notice of the virtual² public hearing to: (Exhibit [“Ex.”] 23.)
 - Advisory Neighborhood Commission (“ANC”) 5D, the “affected ANC” pursuant to Subtitle Z § 101.8;

¹ A separate order (Z.C. Order No. 15-27B(2)) will authorize the second-stage PUD and modification to the approved first-stage PUD for the Building C2 Site.

² The hearing was originally scheduled and noticed for April 23, 2020; however, because of the COVID-19 pandemic, OZ suspended all public hearings and the hearing did not occur as originally scheduled. (Ex. 17.)

- ANC Commissioner for Single Member District 5D01 in which the Property is located;
 - The Office of Planning (“OP”);
 - The District Department of Transportation (“DDOT”);
 - The Department of Energy and Environment (“DOEE”);
 - The D.C. Housing Authority (“DCHA”);
 - The Council of the District of Columbia (“DC Council”); and
 - Property owners within 200 feet of the Building C1 and C2 Sites.
2. OZ also published notice of the July 6, 2020, public hearing in the *D.C. Register* on May 22, 2020 (67 DCR 5331), as well as through the calendar on OZ’s website. (Ex. 22.)

PARTIES

3. The only parties in the Original Order other than the Applicant and ANC 5D, both automatic parties per Subtitle Z § 403.5, were 1250 4th St Edens, LLC and Union Market Apartments, LLC (collectively, the “Parties in Support”).
4. The Applicant served notice of the Application on the Parties in Support, as part of the service to abutting owners, on September 14, 2018, as evidenced by the Certificate of Service included with the Application. (Ex. 2G.)
5. The Parties in Support did not file any response to the Application.
6. The Commission received no requests for party status.

PRIOR APPROVALS

7. Pursuant to the Original Order, the Commission approved:
- A consolidated PUD (the “Approved Consolidated PUD”); and
 - A first-stage PUD (the “Approved First-Stage PUD,” and collectively with the consolidated PUD, the “Approved Overall PUD”); together with
 - A related Zoning Map amendment from the C-M-1 Zone District (current PDR-1 zone) to the C-3-C Zone District (current MU-9 zone) for property now known as Lots 833-835 and 838-840 in Square 3587 (the “Overall PUD Site”).³
8. The Original Order authorized the Approved Overall PUD to develop the Overall PUD Site with four buildings known as Buildings A through D containing a range of residential, retail, office, and hotel uses, to be constructed in two phases:
- Phase I/Consolidated PUD – Including:

³ At the time the Original Order was approved the Overall PUD Site was known as Lots 805, 814, and 817, which were Assessment and Taxation (“A&T”) lots located within Record Lot 6. The remaining portion of Record Lot 6 is known as A&T Lot 819 and is owned by the District. Lot 819 is not included within the Overall PUD Site. However, the Original Order approved significant improvements to Lot 819 that will be undertaken by the Applicant as part of development of the Overall PUD. (See Original Order, footnote 3.) Following approval of the Original Order, new A&T lots were created for the Overall PUD Site, such that the Overall PUD Site is now known as Lots 833-835 and 838-840. A new survey was also prepared and confirmed that the PUD Site area is 208,671 square feet, excluding Lot 819.

- The southern portion of Building A (“Building A1”);
 - Building B; and
 - The southern portion of Building C (“Building C1”); and
 - Phase II/First-Stage PUD – Including:
 - The northern portion of Building A (“Building A2”);
 - The northern portion of Building C (“Building C2”); and
 - Building D.
9. The Approved Consolidated PUD authorized Building C1 to be developed with:
 - A maximum building height of 130 feet;
 - Approximately 217,558 square feet of gross floor area (“GFA”) devoted to office use;
 - Amenity space in the penthouse for the office use;
 - Approximately 10,563 square feet of GFA devoted to retail use; and
 - 138 on-site parking spaces.
 10. The Original Order (Decision No. A(7)) granted flexibility from the following requirements as development incentives for Building C as a whole:
 - Loading berth size requirements;
 - Rear yard depth requirements; and
 - Building lot control requirements.
 11. Pursuant to Z.C. Order 15-27A, effective March 20, 2020, the Commission approved a second-stage PUD for Building A2.
 12. Pursuant to Z.C. Order No. 15-27D⁴, effective February 21, 2020, the Commission approved a modification of consequence to the Original Order to revise the design and massing of Building C1’s penthouse.

THE APPLICATION

1. As related to Building C1, the Application, filed on March 22, 2019, requested approval for:
 - Minor design modifications to the penthouse; and
 - A special exception pursuant to Subtitle C § 1500.3(c) to permit penthouse bar/restaurant uses.
 The Application proposed:
 - That the habitable penthouse space would occupy approximately 5,646 square feet;
 - That the shape and location of the penthouse space would generally remain the same as originally approved; and
 - No changes to the exterior of the penthouse. (Ex. 2C.)
2. On December 19, 2019, the Applicant modified the Application to remove the requested minor design modifications to Building C1’s penthouse since the Commission had approved the proposed design modifications in Z.C. Case No. 15-27D. (Ex. 11.) The Applicant

⁴ The Applicant withdrew its application in Z.C. Case No. 15-27C.

therefore requested that with regard to Building C1, the Commission set down for a public hearing only the requested special exception for the penthouse bar/restaurant uses for Building C1, since no further changes were proposed to the design of Building C1's penthouse.

APPLICANT'S JUSTIFICATION

3. The Application asserted that the proposed penthouse bar/restaurant uses met the special exception standards of Subtitle C § 1500.3 and Subtitle X § 901.2 because they would not tend to affect adversely the use of neighboring property and would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map.
4. The Application stated that during the week the penthouse would primarily be used as office amenity space as previously approved in the Original Order. The special exception would permit the Applicant to rent out the penthouse space to third parties for events not otherwise associated with the office use, which could include uses and/or events that fall within the "nightclub, bar, cocktail lounge, and restaurant" use categories as defined in the Zoning Regulations.
5. The Application provided evidence that the nightclub, bar, cocktail lounge, and restaurant uses proposed for the penthouse would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and would not tend to affect adversely the use of neighboring property because the requested special exception would:
 - Permit office tenants to take advantage of the penthouse space for informal gatherings for the majority of the week, and give the Applicant the ability to host outside third-party events on the evenings and weekends;
 - Create a unique and enjoyable space at the top of the Union Market neighborhood, overlooking the city, and would not create any adverse effects;
 - Be consistent with the goals of the penthouse regulations to generate an affordable housing contribution; and
 - Be located in penthouse structures that comply with all height, bulk, and setback standards set forth in Subtitle C § 1500.
6. The Application provided evidence that the proposed nightclub, bar, cocktail lounge, and restaurant uses met the special exception standards because the proposed use would not tend to affect adversely the use of neighboring property since:
 - The Approved Overall PUD authorized Building C to be surrounded on all sides by streets or alleys, with no portion of Building C directly abutting any residential properties (although the Overall PUD Site and much of its surroundings are presently vacant or under construction);
 - Building C1 is an office building without any residential tenants;
 - The proposed penthouse bar/restaurant use would likely not cause additional vehicular trips driving to the Building C1 Site to access the rooftop since the majority of the patrons visiting the proposed penthouse nightclub, bar, cocktail lounge, or restaurant uses would be residents or visitors of the Approved Overall PUD and/or the Union Market neighborhood; and

- Any additional vehicular traffic caused by the proposed penthouse bar/restaurant use could be accommodated in Building C1, which provides more than the minimum number of on-site vehicle parking spaces required by the Zoning Regulations.

Public Hearing Testimony

7. At the July 6, 2020, virtual public hearing, the Applicant proffered John Crump of Smithgroup, Erwin Andres of Gorove/Slade Associates, Lauren Brandes of Oculus, and Shane Dettman of Holland & Knight as expert witnesses in architecture, transportation planning, landscape architecture, and land use planning, respectively. The Commission granted expert status to all four. (Ex. 15B.)
8. The Applicant rested on the existing case record and did not provide a formal presentation other than to give a general overview of the Application. However, the Applicant responded to questions posed by the Commission. None of the Commission’s questions related to the proposed change in use for the penthouse in Building C1 but rather focused on Building C2.
9. The Applicant stated that it intended to provide approximately \$200,000 to the Housing Production Trust Fund (“HPTF”) as a result of the penthouse habitable space in Building C1. (July 6, 2020 Public Hearing Transcript at 24.)

RESPONSES TO THE APPLICATION

OFFICE OF PLANNING REPORTS AND TESTIMONY

10. In addition to testimony at the public hearing, OP submitted a total of two reports concerning the Application as it concerns Building C1:
 - A January 3, 2020, report recommending that the Commission set down the Building C1 components of the Application for a public hearing (the “Supplemental OP Setdown Report”); and (Ex. 12.)
 - A June 26, 2020, prehearing report recommending approval of the Application (the “OP Hearing Report”). (Ex. 28.)

The Supplemental OP Setdown Report

11. The OP Supplemental Setdown Report noted that the Commission, in its December 9, 2019, decision to set down the Application for a public hearing, only addressed the Building C2 components of the Application and did not include the proposed penthouse bar/restaurant uses for Building C1.
12. The Supplemental OP Setdown Report recommended also setting down the requested special exception for the penthouse bar/restaurant uses in the Building C1 penthouse as part of the Application because OP believed that the proposed penthouse bar/restaurant uses:
 - Met the special exception standards of Subtitle X § 901.2;
 - Would be consistent with the Approved Overall PUD to create an active, mixed-use development; and

- Would generate an affordable housing contribution of \$203,599 to the HPTF as required by the proposed habitable penthouse space.

The OP Hearing Report

13. The OP Hearing Report recommended approval of the requested special exception “with flexibility to rent out the penthouse space to third parties for events not associated with the office use, which could include uses that fall within the ‘nightclub, bar, cocktail lounge or restaurant’ use category” because the proposed penthouse bar/restaurant uses in Building C1:
 - “Would be in harmony with the intent of the approved PUD to create an active, mixed use development that would attract residents and tourists and bring greater vitality to Florida Avenue Market”;
 - Were permitted within the underlying zone and would generate an affordable housing contribution; and
 - Would not adversely affect the use of neighboring property due to its location on top of a 130-foot building and the substantial separations between Building C1 and nearby residential buildings.
14. The OP Hearing Report stated that it solicited comments from DHCD and DOEE on the Application, and that the Applicant met separately with DDOT to address transportation concerns. The OP Hearing Report included a chart summarizing the comments from the Commission at setdown and from OP and the other District agencies, and the Applicant’s responses thereto. (Ex. 28 at 3-7.)

OP Public Hearing Testimony

15. At the public hearing, OP testified in support of the Application and otherwise rested on the record of its previously submitted to the case record.

DDOT REPORT

16. DDOT submitted a June 22, 2020 report (the “DDOT Report”) stating it had no objection to the Application subject to conditions that applied solely to Building C2. (Ex. 27.) Although the DDOT Report primarily discussed Building C2, it recognized that the “Applicant also requests a Modification to an Approved Consolidated PUD for neighboring Building C1 to allow for a restaurant, night-club, or cocktail lounge on the penthouse level.” (Ex. 27 at 1.)
17. At the public hearing, DDOT testified in support of the Application and otherwise rested on the record.

ANC 5D

18. The ANC submitted an August 12, 2019, letter (the “ANC Report”) stating that at its regularly scheduled June 11, 2019, meeting, with a quorum of commissioners and the public present, ANC 5D voted to support the Application for a modification to Building C1’s penthouse based on the ANC’s determination that the proposed penthouse bar/restaurant

uses in Building C1 would not create any adverse impacts to the neighborhood and would generate a contribution to the HPTF for affordable housing. (Ex. 18.)

19. The ANC did not attend or testify at the public hearing.

OTHER RESPONSES

20. The Parties in Support did not file a response to the Application or testify at the Public Hearing, and no other written responses were received. No individuals or organizations filed written responses to the Application or testified at the public hearing.

CONCLUSIONS OF LAW

1. Pursuant to Subtitle X § 300.1, the purpose of the PUD process is to provide for higher quality development through flexibility in building controls, including building height and density, provided that a PUD:
 - (a) *Results in a project superior to what would result from the matter-of-right standards;*
 - (b) *Offers a commendable number or quality of meaningful public benefits; and*
 - (c) *Protects and advances the public health, safety, welfare, and convenience, and is not inconsistent with the Comprehensive Plan.*
2. Pursuant to Subtitle X § 304.4, the Commission shall evaluate a proposed PUD to determine that the proposed development:
 - (a) *Is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site;*
 - (b) *Does not result in unacceptable project impacts on the surrounding area or on the operation of city services and facilities but instead shall be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project; and*
 - (c) *Includes specific public benefits and project amenities of the proposed development that are not inconsistent with the Comprehensive Plan or with other adopted public policies and active programs related to the subject site.*
3. Subtitle Z § 704 authorizes the Commission grant modifications of significance to previously approved final orders and plans provided that the hearing “shall be limited to the impact of the modification on the subject of the original application, and shall not permit the Commission to revisit its original decision.”
4. Subtitle Z § 703.5 defines a modification of significance as “a modification to a contested case order or the approved plans of greater significance than a modification of consequence.”
5. Subtitle Z § 703.6 includes “additional relief or flexibility from the zoning regulations not previously approved” as an example of a modifications of significance.

6. The Commission concludes that the Application meets the definition of a modification of significance as a request to add addition relief from the zoning regulations in the form of the special exception for the penthouse bar/restaurant uses.
7. The Commission concludes that the Applicant satisfied the requirement of Subtitle Z § 703.13 to serve the Application on all parties to the original proceeding, in this case ANC 5D and the Parties in Support.
8. The Commission concludes that the Application is consistent with the Approved Consolidated PUD, as authorized by the Original Order and as modified by Z.C. Order No. 15-27D, because the proposed modification to allow the penthouse bar/restaurant uses for Building C1:
 - Is minor as it only relates to the use of the penthouse;
 - Does not change the exterior of the Approved Consolidated PUD; and
 - Does not change the Commission’s analysis in granting the Approved Consolidated PUD under Subtitle X § 304.4 because the Application proposed no changes affecting the Approved Consolidated PUD’s:
 - Consistency with the Comprehensive Plan;
 - Mitigation or balancing any potential adverse impacts to ensure no unacceptable impacts; or
 - Proffered public benefits.

SPECIAL EXCEPTION REVIEW

9. Subtitle X § 303.13 authorizes the Commission to grant special exception relief as part of a PUD, upon demonstration of compliance with the special exception standards of Subtitle X § 901.2 that the proposed relief:
 - Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;
 - Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and
 - Will meet such special conditions as may be specified in this title.
10. For the Application’s requested special exception relief from Subtitle C § 1500.3, there are no special conditions specified elsewhere in the Zoning Regulations.
11. The Commission concludes that the Application demonstrated compliance with the general special exception criteria that the proposed penthouse bar/restaurant uses will not tend to adversely affect the use of neighboring property and will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map because the penthouse bar/restaurant uses:
 - Would create a unique and enjoyable space at the top of the Union Market neighborhood and would not create any adverse effects;
 - Are consistent with the goals of the penthouse regulations to generate an affordable housing contribution;

- Will be located in a penthouse that complies with all height, bulk, and setback standards set forth in Subtitle C § 1500;
- Will be located in an office building without any residential tenants and will be surrounded on all sides by streets or alleys, with no portion of the building directly abutting any residential properties; and
- Will not likely cause transportation impacts because most patrons of the penthouse bar/restaurant uses will likely be residents or visitors of the Overall Approved PUD and/or the Union Market neighborhood that will not use vehicles to access the penthouse bar/restaurant uses and any additional vehicular trips to Building C1's penthouse bar/restaurant uses could be accommodated in building's parking facilities that exceed the number of parking spaces required by the Zoning Regulations.

“GREAT WEIGHT” TO THE RECOMMENDATIONS OF OP

12. The Commission must give “great weight” to the recommendations of OP pursuant to § 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 (2018 Repl.)) and Subtitle Z § 405.8. (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).)
13. The Commission finds persuasive OP’s analysis of the Application and its recommendation that the Commission approve the Application and concurs in that judgment.

“GREAT WEIGHT” TO THE WRITTEN REPORT OF THE ANC

14. The Commission must give “great weight” to the issues and concerns raised in the written report of the affected ANC pursuant to § 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) (2012 Repl.) and Subtitle Z § 406.2.) To satisfy the great weight requirement, the Commission must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).) The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” (*Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).)
15. The Commission finds the ANC Report persuasive that the Application will not create adverse impacts to the neighborhood and will generate an affordable housing contribution to the HPTF, and concurs in the ANC Report’s support of the Application.

DECISION

In consideration of the record and the Findings of Fact and Conclusions of Law herein, the Zoning Commission concludes that the Applicant has satisfied its burden of proof and therefore **APPROVES** the Application for: a modification of significance to Z.C. Order No. 15-27, as modified by Z.C. Order 15-27D, to permit nightclub, bar, cocktail lounge, and restaurant uses in


the penthouse of Building C1 and to revise Decision No. A.1 to read as follows (additions in **bold and underlined** text, deletions shown in ~~**bold and strikethrough**~~ text):

- A.1. The Project shall be developed in accordance with:
- (a) The Architectural Plans and Elevations dated December 23, 2016 (Ex. 61A1-61A15), as supplemented by the revised sheets dated January 26, 2017 (Ex. 72A1-72A3), and as revised and supplemented by the sheets dated March 13, 2017 (Ex. 75A1-75A2), and as revised by the sheets dated April 7, 2017 (Ex. 76A) (“Plans”), all in the record of Z.C. Case No. 15-27;
 - (b) As modified for the penthouse of Building C1, which shall be developed in accordance with the architectural drawings at Exhibit 1E of Z.C. Case No. 15-27D, dated October 1, 2019 (**“Modified C1 Penthouse Plans”**), **as modified by the architectural drawings at Exhibit 2C of Z.C. Case No. 15-27B, dated March 15, 2019;**
and as modified by the guidelines, conditions, and standards of this Order, as may be further modified by the Commission.

All other conditions of Z.C. Order Nos. 15-27 and 15-27D remain unchanged and in effect.

VOTE (July 27, 2020): 5-0-0 (Michael G. Turnbull, Anthony J. Hood, Robert E. Miller, Peter G. May, and Peter A. Shapiro to **APPROVE**)

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 15-27B(1) shall become final and effective upon publication in the *D.C. Register*; that is, on October 30, 2020.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

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, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.