

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 15-21C**

Z.C. Case No. 15-21C

Kenilworth Revitalization I JV, LLC & DCHA

**(Time Extension for Planned Unit Development @ Squares 5113, 5114, and 5116)
January 28, 2021**

Pursuant to notice, at its January 28, 2021 public meeting, the Zoning Commission for the District of Columbia (the “Commission”) considered the application (the “Application”) of Kenilworth Revitalization I JV, LLC and DCHA (collectively the “Applicant”) for Lots 5 through 9 in Square 5113; Lot 10 of Square 5114; and Lots 164, 165, 172-180, and 186 in Square 5116, (the “Property”). The Commission considered the Application pursuant to Subtitle Z, Chapters 1 and 7, under Subtitle Z § 705 of the Zoning Regulations (Title 11 of the District of Columbia Code of Municipal Regulations, Zoning Regulations of 2016, to which all references are made unless otherwise specified). The Applicant requested a waiver under Subtitle Z § 101.9 from Subtitle Z § 705.5’s maximum one-year period for a second time extension and a two-year time extension of Z.C. Order No. 15-21 (the “Original Order”), as extended by Z.C. Order No. 15-21A and as modified by Z.C. Order No. 15-21B, that approved a consolidated and first-stage planned unit development (“PUD”).

For the reasons stated below, the Commission **APPROVES** the Application.

FINDINGS OF FACT

I. BACKGROUND

PARTIES

1. The following were parties to the Original Order:
 - The Applicant; and
 - Advisory Neighborhood Commission (“ANC”) 7D, in which district the Property is located and so the “affected” ANC pursuant to Subtitle Z § 101.8.

NOTICE

2. The Applicant served ANC 7D with the Application, as initially filed as a modification of consequence, on December 4, 2020, and again as subsequently revised as a time extension on January 13, 2021. (Ex. 2.)

PRIOR APPROVALS

3. Pursuant to the Original Order, effective January 20, 2017, the Commission approved:

- A consolidated PUD (the “Consolidated PUD”) for Phase 1 of the proposed development to construct 166 new residential units and 2,980 square feet of non-residential uses;
- A first-stage PUD (the “First-Stage PUD”) for Phases 2 and 3¹ of the proposed development including the development of three multi-family buildings, townhouses, and stacked flats; with
- A related map amendment for the Property from the R-1-B and R-5-A Zone Districts to the R-5-B and C-2-A Zone Districts, respectively (collectively, the “Approved PUD”).

4. Pursuant to Z.C. Order 15-21A, effective January 24, 2020, the Commission approved a two-year extension of the deadlines established by the Original Order to the following:

Consolidated PUD

- By January 20, 2021 - file an application for a building permit to construct the Consolidated PUD;
- By January 20, 2022 - start construction of the Consolidated PUD; and

First-Stage PUD

- By January 20, 2021 - file a second-stage PUD application for Phase 2 of the Approved PUD, which timely filing will extend the validity of the First-Stage PUD to January 20, 2022.

5. Pursuant to Z.C. Order No. 15-21B, effective April 16, 2021, the Commission approved a Modification of Consequence to the plans and conditions for the First-Stage PUD approved by the Original Order.

II. THE APPLICATION

6. The Application (Ex. 2, 5), filed on December 4, 2020, requested²:

- A waiver under Subtitle Z § 101.9 from Subtitle Z § 705.5’s maximum one-year period for a second time extension; and
- A further two-year extension of the deadlines established by the Original Order, as extended by Z.C. Order No. 15-21A, to the following:
 - By January 20, 2023 – file an application for a second-stage PUD for Phase 2 of the Approved PUD, with timely filing extending the validity of the First-Stage PUD to January 20, 2024.

7. The Application asserted, supported by the Applicant’s affidavit, that: (Ex. 6.)

- No substantial change had occurred to any of the material facts upon which the Commission had based its approval of the Approved PUD and that the Commission had in the Original Order anticipated the difficulty of completing the Approved PUD within the normal time periods due to its scale and complexity; and

¹ The Approved PUD was to be constructed in staggered phases so as to minimize displacement to the existing residents of the affordable housing units on the Property during construction (*see* Z.C. Order No. 15-21 at 17).

² The Application initially requested the time extension as a Modification of Consequence of Condition No. D.3 of the Original Order, but at the Commission’s direction was revised to request the relief as a Time Extension under Subtitle Z § 705.

- The Applicant, despite the diligent efforts to complete project financing and obtain required governmental approvals, and for reasons outside of its control, required the further extension of the First-Stage PUD because of delays in:
 - Securing the required project financing, specifically funds from the Housing Protection Trust Fund (“HPTF”) and Low-Income Housing Tax Credits (“LIHTC”), which in turn delayed the preparation of the architectural and civil drawings and plans necessary to file the application for the second-stage PUD application and required the revising of the Approved PUD’s budget to account for changes in permitting costs and additional security required for the Property (Subtitle Z § 705.2(c)(1)); and
 - Obtaining the required government approvals for Phase 1/the Consolidated PUD due to delays in the permitting process caused by the COVID-19 pandemic, which delayed the filing of the application for the second-stage PUD for Phases 2 that was contingent on the construction of the Consolidated PUD as part of the Approved PUD’s overall phasing (Subtitle Z § 705.2(c)(2)).

8. The Application asserted that it met the standards for a waiver under Subtitle Z § 101.9 of Subtitle Z § 705.5’s maximum one-year period for the second time extension of a Commission order because:

- Good cause existed for the waiver due to the scale and complexity of the Approved PUD and the delays that were outside of the Applicant’s control and since the Applicant was diligently proceeding to complete the permitting and construction of the Approved PUD; and
- Granting the waiver would not prejudice the parties to the Original Order, in this case the ANC, which was served and did not object.

III. RESPONSES TO THE APPLICATION

OP

9. OP submitted a January 4, 2021 report that: (Ex. 4.)

- Reviewed the initial Application that requested the time extension as a modification of consequence; and
- Recommended approval of the further extension of the deadlines of the Original Order, as subsequently extended, based on OP’s determination that the additional time was necessary for the Applicant to obtain the required permits and address the necessary resident relocation and infrastructure needs.

ANC

10. ANC 7D did not submit a written report in response to the Application.

11. ANC 7D03 Commissioner Dorothy Douglas submitted a January 27, 2021 letter stating: (Ex. 7.)

- That the Applicant had presented the Application at the ANC’s January 12, 2021 public meeting, and the ANC had not taken a final vote on the Application; and

- Commissioner Douglas, as the ANC Commissioner in whose Single Member District the Property is located, supported the Application.

CONCLUSIONS OF LAW

1. Pursuant to the authority granted by the Zoning Act, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01 (2018 Rep1.)), the Commission may approve an application for a time extension of an order approving a PUD consistent with the requirements of Subtitle Z § 705.
2. The Commission concluded at its January 14, 2021 public meeting, that the Application, as a request to extend the validity of the Original Order, did not qualify as a modification of consequence under Subtitle Z § 703 as initially requested, but instead as a time extension under Subtitle Z § 705.
3. The Commission concludes that the Application complied with Subtitle Z § 705.2's timely filing requirement because it was filed on December 4, 2020, prior to the January 20, 2021 deadline established by Z.C. Order No. 15-21A to file a second-stage PUD application under the First-Stage PUD and thereby extend the validity of the First-Stage PUD.
4. The Commission concludes that the Applicant satisfied Subtitle Z § 705.2(a)'s requirement to serve the Application on all parties with at least 30 days to respond because the Applicant served the Application on ANC 7D on December 4, 2020, more than 30 days before the January 14, 2020, public meeting at which the Commission first considered the Application. The Commission notes that although the Application initially requested a modification of consequence, it identified the possibility that the relief requested might be a time extension, and the Applicant re-served ANC 7D with the Application restated as a time extension on January 13, 2021.
5. The Commission concludes that the Application demonstrated compliance with Subtitle Z § 705.2(b)'s requirement that no substantial change had occurred to the material facts upon which the Commission based its approval of the Approved PUD had changed because the Applicant was proceeding with the construction of the Approved PUD in accordance with the Original Order.
6. The Commission concludes that the Application met Subtitle Z § 705.2(c)'s requirement to demonstrate with substantial evidence one or more of the following criteria, as detailed below:
 - 1) *An inability to obtain sufficient project financing for the development, following an applicant's diligent good faith efforts to obtain such financing because of changes in economic and market conditions beyond the applicant's reasonable control;*
 - 2) *An inability to secure all required governmental agency approvals for a development by the expiration date of the PUD order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control; or*

3) *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 order.*

7. The Commission concludes that the Application met the standards of Subtitle Z § 705.2(c)(1) and (2) because the Applicant has demonstrated that reasons outside of its control had caused delays in:

- Securing the required financing for the Approved PUD, in part due to its reliance on several public funding sources including the HPTF and LIHTC, and the need to make budget adjustments to account for permitting and security costs; and
- Obtaining the necessary construction permits because of the COVID-19 pandemic's impact on government services.

8. The Commission concludes that the Applicant met the requirements of Subtitle Z § 101.9 – good cause, no prejudice to parties, and not otherwise prohibited by law – for the requested waiver from Subtitle Z § 705.5's limit of one year for a second time extension because:

- The ongoing nature of the COVID-19 pandemic would continue to impact the Applicant's ability to obtain financing and governmental approvals;
- The Commission recognized the complexity of constructing the Approved PUD in the Original Order and the need to provide additional time to ensure that infrastructure and relocation needs were properly addressed; and
- The Commission has no knowledge of any law that would prohibit the waiver.

GREAT WEIGHT TO RECOMMENDATIONS OF OP

9. 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).)

10. The Commission finds OP's recommendation to approved the Application persuasive and concurs in that judgement because OP supported the request to extend the deadline to file a second-stage PUD application under the First-Stage PUD, even though OP reviewed the Application as a modification of consequence, as originally filed, instead of a Time Extension.

GREAT WEIGHT TO WRITTEN REPORT OF THE ANC

11. The Commission must give “great weight” to the issues and concerns raised in a written report of the affected ANC that was approved by the full ANC at a properly noticed meeting that was open to the public 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).)

12. Since the ANC did not submit a written response to the Application, there is nothing to which the Commission can afford “great weight.” Nevertheless, the Commission finds ANC Commissioner Douglas’s support persuasive and concurs in that judgement.

DECISION

In consideration of the case record and Findings of Fact and Conclusions of Law herein, the Commission concludes that the Applicant has satisfied its burden of proof and therefore **APPROVES** the Application’s request for a waiver of Subtitle Z § 705.5’s maximum one-year extension and a two-year extension by modifying Condition No. D.3 of Z.C. Order No. 15-21, as extended by Z.C. Order No. 15-21A and as modified by Z.C. Order No. 15-21B, to read as follows (deletions shown in **bold** and **strikethrough** text; additions in **bold** and **underlined** text):

D. MISCELLANEOUS

3. ~~Pursuant to § 2407.10 of the Zoning Regulations, the Commission is specifying a longer period than one year for the The first-stage PUD, which shall be valid for a period of three years from the effective date of this Order until January 20, 2024, provided that a second-stage PUD application for Phase 2 shall be filed within two years of the effective date of this Order before January 20, 2023.~~

All other conditions of Z.C. Order No. 15-21, as extended by Z.C. Order No. 15-21A and as modified by Z.C. Order No. 15-21B, remain unchanged and in effect.

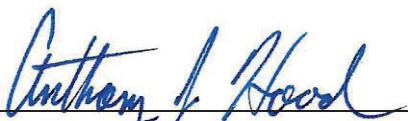
VOTE (Jan. 28, 2021): 5-0-0

(Michael G. Turnbull, Peter G. May, Robert E. Miller, Anthony J. Hood, and Peter A. Shapiro, to **APPROVE**).

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 15-21C shall become final and effective upon publication in the *D.C. Register*; that is, on April 16, 2021.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.



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.