

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 15-18C
Z.C. CASE NO. 15-18C
Initio, LP
(Two-Year PUD Time Extension
@ Square 1194, Lot 15 [2715 Pennsylvania Avenue N.W.]
March 9, 2023

Pursuant to notice, at its public meeting on March 9, 2023, the Zoning Commission for the District of Columbia (the “Commission”) considered the application of Initio, LP (the “Applicant”) for a two-year time extension of the Planned Unit Development (“PUD”) approved in Z.C. Order 15-18 (the “Original Order”), as modified by Z.C. Order Nos. 15-18A, 15-18B, and two administrative COVID-19 administrative extensions granted by Z.C. Order Nos. 15-18(1) and 15-18(2), for Square 1194, Lot 15 (the “Property”) to extend the deadline for construction to commence on the approved PUD to March 9, 2025 (the “Application”). The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z of Title 11 of the District of Columbia Municipal Regulations (Zoning Regulations of 2016, the “Zoning Regulations”, to which all subsequent citations refer unless otherwise specified). For the reasons stated below, the Commission **APPROVES** the Application.

FINDINGS OF FACT

I. BACKGROUND

PRIOR APPROVALS

1. Pursuant to the Original Order, Z.C. Order No. 15-18, effective March 10, 2017, the Commission approved a consolidated PUD and related map amendment to construct a mixed-use building with a restaurant on the ground floor and a four-story apartment house with seven residential units above (the “Project”). The Original Order was approved under the Zoning Regulations of 1958, which allowed the Commission to waive up to 50% of the PUD minimum land area requirement. The Commission granted a 50% waiver and an additional waiver because the Property still could not satisfy the minimum land area threshold requirements under the Zoning Regulations of 1958. The Commission also granted flexibility from parking and rear yard requirements.
2. Pursuant to Z.C. Order No. 15-18A, effective February 2, 2018, the Commission approved a minor modification to apply the minimum land area requirements of Subtitle X § 301.1 of the Zoning Regulations to the approved PUD and granted a waiver of minimum land area requirements under Subtitle X § 301.3.

3. The Original Order was effective on March 10, 2017, and appealed to the District of Columbia Court of Appeals on April 3, 2017. The District of Columbia Court of Appeals granted a motion to dismiss the appeal on March 9, 2018. Accordingly, under Subtitle Z § 705.8, the Original Order was then effective as of March 9, 2018, and a building permit for the approved PUD was required to be filed by March 9, 2020. Such building permit was timely filed.
4. Pursuant to Z.C. Order No. 15-18B, effective December 28, 2018, the Commission approved a modification of consequence to reduce the size of the Property; grant flexibility for additional lot occupancy; increase the height of the elevator overrun; and modify the brick color of the building from red to mid-tone gray.
5. Pursuant to Z.C. Order Nos. 15-18(1) and 15-18(2), the construction commencement date for the approved PUD was administratively extended to March 9, 2022 and March 9, 2023, respectively.

PARTIES

6. The parties to the Original Order were the Applicant and Advisory Neighborhood Commission (“ANC”) 2E.

II. THE APPLICATION

7. On January 31, 2023, prior to the expiration of the extension to March 9, 2023, the Applicant filed the Application requesting a two-year extension to March 9, 2025. The Application asserted that the two previous extensions to the approved PUD were the result of COVID-19 administrative extensions, under Subtitle Z §§ 702.1-702.2 or 705.9, and excluded from the two extension requests allowed for an approved PUD under Subtitle Z § 705.5. Accordingly, this request constitutes the Applicant’s first request for a time extension. The Application also asserted that it satisfied the good cause requirements of Subtitle Z § 705.2 to justify the time extension. (Ex. 3.)
8. The Application asserted it satisfied the requirement of Subtitle Z § 705.2(a) to serve all parties and attested by Certificate of Service, included with the Application, that the Applicant served the Application on the ANC 2E, ANC Single Member Commissioner 2E07 and 2E06, and the Office of Planning (“OP”) on January 31, 2023. (Ex. 3, p. 7.)
9. The Application asserted that it satisfied the requirements of Subtitle Z § 705.2(b) because no substantial change has occurred in any of the material facts on which the Commission relied upon in approving the Original Order. The Application stated that the PUD was approved under the Zoning Regulations of 1958 and while this request is being reviewed under the Zoning Regulations of 2016, the criteria for an extension are similar under both sets of regulations. Furthermore, the Commission’s original analysis of potential Project impacts remains unchanged as there has been no new development near the site. (Ex. 3.)
10. The Application asserted that it satisfied the substantial evidence requirements of Subtitle Z § 705.2(c) to justify the time extension because financial difficulties resulting from

COVID-19 have challenged the Applicant's ability to secure tenants or investors for the site. Rampant inflation over the last 12-18 months has dramatically increased the costs of construction and financing. In addition, the Applicant learned that its building permit documents needed to be updated to comply with the 2017 Building Code and thus spent considerable time searching for a consultant to review the plans and bring them into conformance. Moreover, the Applicant's original mechanical, electrical, and plumbing engineering (MEP) firm went out of business and the Applicant had to hire a new MEP firm to redraw and restamp the mechanical drawings. (Ex. 3.) The Application also included an affidavit supporting the justification for the time extension that was signed by Anthony Lanier, the President and CEO of the developer for the approved PUD. (Ex. 3E.)

III. RESPONSES TO THE APPLICATION

OP REPORT

11. The Office of Planning ("OP") submitted a report on March 1, 2023 (the "OP Report"), that recommend approval of the Application. OP found that the Applicant has satisfied the requirements of Subtitle Z § 705.2 to justify the extension request by citing the COVID-19 pandemic, rising costs and interest rates, and changes to the Building Code. OP notes that since the Commission's original approval, it is not aware of any significant development in the surrounding area that would materially impact the Commission's decision. OP acknowledges that the Original Order was approved under the Zoning Regulations of 1958, which have since been superseded by the Zoning Regulations of 2016, but the criteria under which an extension request is reviewed are similar under both sets of regulations. In addition, the Comprehensive Plan has been updated, but the changes to the Citywide and Area Elements do not substantively impact the facts upon which the Project was approved. OP also notes that the Property is now within a Resilience Focus Area on the Comprehensive Plan Generalized Policy Map and resilience issues will be addressed as part of the permitting process. (Ex. 5).

ANC REPORT

12. ANC 2E did not submit a report in response to the Application.

CONCLUSIONS OF LAW

1. Subtitle Z § 705.2 authorizes the Commission to extend the time period of an order approving a PUD upon determining that the time extension request demonstrated satisfaction of the requirements of Subtitle Z § 705.2 and upon a determination that the limitations of Subtitle Z §§ 705.3, 705.5, and 705.6 have been adhered to.
2. The Commission concludes that the Applicant timely filed the Application on January 31, 2023, prior to the extension expiration on March 9, 2023.
3. Subtitle Z § 705.2(a) requires that an Applicant serve the extension request on all parties and that all parties are allowed 30 days to respond.

4. The Commission concludes that the Applicant has satisfied Subtitle Z § 705.2(a)'s requirement to serve all parties by demonstration that the Applicant served the only other party to the Original Order—ANC 2E—and that the ANC was given 30 days to respond from the January 31, 2023 date of service.
5. Subtitle Z § 705.2(b) requires that the Commission find that there is no substantial change in any of the material facts upon which the Commission based its original approval of the PUD that would undermine the Commission's justification for approving the PUD.
6. The Commission concludes, based on the Application and the OP Report, that the Application satisfied Subtitle Z § 705.2(b)'s requirement that no substantial change in any of the material facts upon which the Commission based its approval of the Original Order has occurred that would undermine the Commission's justification for that approval.
7. Subtitle Z § 705.2(c) requires that an application demonstrate with substantial evidence one or more of the following criteria:
 - (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.*
8. The Commission concludes that the Application met the standard of review of Subtitle Z § 705.2(c)(1) because of financial challenges resulting from the COVID-19 pandemic as well as regulatory changes and market factors beyond the Applicant's reasonable control that prevented the Applicant from complying with the deadline to commence construction on the approved PUD.

“GREAT WEIGHT” TO THE 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. (*See Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).)

10. The Commission found OP's recommendation that the Commission approve the Application persuasive and concurs in that judgment.

"GREAT WEIGHT" TO THE RECOMMENDATIONS OF 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. (See *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. D.C. Bd. of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).)

The affected ANC, ANC 2E, did not submit a report in response to the Application; therefore, the Commission has nothing to which it can give "great weight."


DECISION

In consideration of the case record, the Findings of Fact, and the 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 two-year time extension to extend the deadline for construction to commence on the approved PUD to March 9, 2025.

VOTE (March 9, 2023): 4-0-1

(Peter G. May, Robert E. Miller, Anthony J. Hood, and Joseph S. Imamura to **APPROVE**; 3rd Mayoral Appointee seat vacant, not voting)

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 15-18C shall become final and effective upon publication in the *D.C. Register*; on April 7, 2023.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS THE D.C. HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (THE "ACT"). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE 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. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.