

GOVERNMENT OF THE DISTRICT OF COLUMBIA



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 12-14B

Z.C. Case No. 12-14B

3rd & M LLC, 3rd & K, LLC, and Park Inn Associates, LP

(PUD Two-Year Time Extension @ Square 542, Lots 817, 821, 816, 883, and 2124-2251)

December 9, 2019

Pursuant to notice, at its December 9, 2019 public meeting, the Zoning Commission for the District of Columbia (the “Commission”) considered the application (the “Application”) of 3rd and M, LLC, 3rd and K, LLC, and Park Inn Associates, L.P., (collectively, the “Applicant”) for a two-year time extension of the deadline to file an application for a building permit to construct the second building of the consolidated planned unit development (“PUD”) approved by Z.C. Order No. 12-14/12-14A¹ (the “Original Order”), for Lots 817, 821, 816, 883, and 2124-2251 in Square 542, with a street address of 300 K Street, S.W. (the “Property”). The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z 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). For the reasons stated below, the Commission **APPROVES** the Application.

FINDINGS OF FACT

1. Pursuant to the Original Order, the Commission granted the Applicant consolidated approval for the Property (the “Approved PUD”) and a related Zoning Map amendment to construct two new multifamily apartment buildings, one on the northern portion of the Property (the “North Building”) and the other on the southern portion (the “South Building”).
2. The parties to Z.C Case No. 12-14/12-14A other than the Applicant were Advisory Neighborhood Commission (“ANC”) 6D, the “affected” ANC pursuant to Subtitle Z § 101.8, the Carrollsburg A. Condominiums (“CAC”), and the Waterfront Towers Condominium (“WFT”).
3. The Original Order established a two-year period, starting from the issuance of a Certificate of Occupancy for the first building, within which the Applicant had to file an application

¹ Z.C. Case No. 12-14 applied to the North Building and Z.C. Case No. 12-14A to the South Building. The Commission heard the two cases together with a single shared record and order.

for a building permit to construct the second building, with construction to begin within four years of the issuance of that Certificate of Occupancy. (Original Order Condition D(3).)

4. A Certificate of Occupancy was issued for the South Building on April 27, 2018. This established the deadline for the filing of an application for a building permit for the North Building as April 27, 2020, with the construction to start by April 27, 2022.

The Application

5. On October 3, 2019, prior to the April 27, 2020 deadline to file an application for a building permit to construct the North Building as established by the Original Order, the Applicant filed the Application requesting a two-year extension.
6. The Applicant provided evidence that by October 4, 2019, it served the Application on ANC 6D, the Office of Planning (“OP”), the CAC board, and WFT’s attorney, as attested by the Certificate of Service submitted with the Application. (Exhibit [“Ex.”] 3.)
7. The Application also requested a waiver of Subtitle Z § 705.6’s prohibition on filing a time extension request more than six months prior to the expiration sought to be extended, since the Application was filed 24 days prior to this six-month period.
8. The Application asserted that good cause justifies the Commission’s granting the waiver to consider the Application early because the Applicant has simultaneously filed a request for a Modification of Consequence, and so the waiver would allow the Commission to maximize efficiency and consider both requests at the same time. (Z.C. Case No. 12-14C.)
9. The Applicant attested that there have been no substantial changes of material facts that would undermine the basis on which the Commission based its original approval. (Ex. 2.)
10. The Application asserted that good cause justifies granting the time extension because of the Applicant’s difficulty obtaining sufficient project financing for the development due to changes in economic and market conditions. (See Ex. 2C.)
11. Nearly 1,400 units have been delivered in the Southwest/Navy Yard submarket in the past year and 3,800 units have been delivered since 2017. Another 4,400 units are under construction or expected to deliver in the next year. (Ex. 2.)
12. The Applicant states that the oversupply of new residential units in the short term and rising costs of construction make the current financing environment not favorable for the second phase of construction. (Ex. 2.)
13. The Applicant and its consultant believe that the Applicant should delay financing until the submarket stabilizes, because it would not be feasible to currently secure suitable financing for the North Building.

Responses to the Application

OP

14. OP submitted a report dated November 8, 2019, recommending approval of the Application (the “OP Report”) for a time extension. (Ex. 5.) The OP Report noted that there are no substantial changes of material facts upon which the project was approved.

ANC

15. ANC 6D did not submit a response to the Application.

Other Parties

16. No other party submitted a 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 compliance with the limitations of Subtitle Z §§ 705.3, 705.5, and 705.6.
2. 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.
3. The Commission concludes that the Applicant has satisfied Subtitle Z § 705.2(a) by demonstrating that it had served all parties to the Original Order – ANC 6D, CAC, and WFT – and that all were given 30 days to respond from the October 4, 2019 date of service.
4. Subtitle Z § 705.6 requires that “[a] request for an extension of an approval may not be filed more than six (6) months prior to the expiration of the order.”
5. Subtitle Z § 101.9 authorizes the Commission to waive any of the provisions of Subtitle Z, if, in the judgment of the Commission, the Applicant demonstrates good cause for the waiver and the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.
6. The Commission concludes that good cause exists for the Applicant’s request for a waiver from the provisions of Subtitle Z § 705.6 to consider the time extension more than six months before the expiration of the Original Order, and that no party will be prejudiced by granting of this waiver. The Commission finds it is appropriate to waive this provision to consider the time extension concurrently with the modification of consequence proposed in Z.C. Case No. 12-14C and notes that the Application was filed less than a month early.
7. 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.

8. The Commission concludes that the Application satisfied Subtitle Z § 705.2(b) based on the Application and the OP Report.
9. 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.*
10. The Commission concludes that the Application met the standard of Subtitle Z § 705.2(c)(1) because the Applicant has diligently pursued the financing of the development of the Property and has not been able to move forward due to market conditions outside of its control, including oversaturation of delivered and pending units in the submarket and rising costs of construction making securing suitable financing to proceed infeasible.

“Great Weight” to the Recommendations of OP

11. The Commission must give “great weight” to the recommendations of OP under § 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 (2001); *see* Subtitle Z § 405.8.)
12. The Commission finds persuasive OP’s recommendation that the Commission approve the Application and therefore concurs in that judgment.

“Great Weight” to the Written Report of the ANC

13. 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.); *see* 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).)


14. Since the ANC did not submit a written report in this case, there is nothing to which the Commission can give “great weight.”

DECISION


In consideration of the case record and the 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 time extension, with a waiver of Subtitle § 705.6, to extend the deadline to begin construction of the North Building in the PUD approved by Z.C. Order No. 12-14/12-14A by two years to April 27, 2022, with construction to begin by April 27, 2024.

VOTE (December 9, 2019): 5-0-0 (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to **APPROVE**).

In accordance with the provisions of Subtitle Z § 604.9, this Z.C. Order No. 12-14B shall become final and effective upon publication in the *D.C. Register*; that is, on January 31, 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.