

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION



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

Z.C. Case No. 12-14E

3rd and M, LLC, 3rd and K, LLC, and Park Inn Associates, L.P.

(Two-Year Time Extension for Approved PUD

@ Square 542, Lots 816, 817, 821, 883, and 2124-2251)

May 30, 2024

Pursuant to notice, at its public meeting on May 30, 2024, 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. (together, the “Applicant”) for a two-year time extension for the consolidated Planned Unit Development (“PUD”) and related map amendment approved under Z.C. Order No. 12-14/12-14A, as modified by Z.C. Order Nos. 12-14C and 12-14D and extended by Z.C. Order Nos. 12-14B and 12-14(1) (together, the “Orders”) for development of the property at Lots 816, 817, 821, 883, and 2124-2251 in Square 542 (the “Property”). The Orders approved development of two new residential buildings in two phases, Phase One, a new residential building on the south parcel of the Property (the “South Building”); and Phase Two, a new residential building on the north parcel of the Property (the “North Building”) (together, the “Project”).

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, 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 Z.C. Order No. 12-14/12-14A, effective March 14, 2014, the Commission approved a consolidated PUD and related map amendment to construct two new residential buildings, in two phases, underground parking, and associated site improvements at the Property, with Phase One, the South Building and Phase Two, the North Building. The Order required the Applicant to file a building permit application for Phase Two, the North Building, within two years of the issuance of the Certificate of Occupancy for Phase One, the South Building. The South Building was constructed and received its Certificate of Occupancy on April 27, 2018, which required a building permit application for the North Building to be filed by April 27, 2020.

2. Pursuant to Z.C. Order No. 12-14B, effective January 31, 2020, the Commission approved a two-year time extension to file a building permit application for the North Building until April 27, 2022.
3. Pursuant to Z.C. Order Nos. 12-14C and 12-14D, effective July 3, 2020, and December 9, 2022, respectively, the Commission approved Modifications of Consequence to the conditions and approved plans for the North Building.
4. Pursuant to Z.C. Order No. 12-14(1), effective May 6, 2022, a one-year administrative extension due to the COVID-19 pandemic was granted, under Subtitle Z § 705.9, to extend the time to file a building permit application for the North Building until April 27, 2023¹; therefore, the Applicant was required to start construction on the North Building by April 27, 2024. The Applicant timely filed a building permit application for the North Building on April 6, 2023.

PARTIES AND NOTICE

5. In addition to the Applicant, the other parties to the Original Order were Advisory Neighborhood Commission (“ANC”) 6D, the “affected” ANC pursuant to Subtitle Z § 101.8, as well as Carrollsburg A Condominium, and Waterfront Tower Condominium.
6. On April 24, 2024, the Applicant served the Application on ANC 6D, Carrollsburg A Condominium, Waterfront Tower Condominium, the Office of Planning (“OP”), and the District Department of Transportation (“DDOT”), as attested by the Certificate of Service submitted with the Application. (Exhibit [“Ex.”] 3.)

THE APPLICATION

7. On April 24, 2024, the Applicant filed the Application requesting a two-year extension of the validity of the Orders, until April 27, 2026, to file a new building permit application and, until April 27, 2028, to start construction on the North Building. As noted above, the Applicant already timely filed a building permit application for the North Building on April 6, 2023, but the Applicant is certain that the application will lapse and that allowable extensions will be exceeded because start of construction on the North Building is more than two years away and the Applicant will not pull any building permit before then. In addition, the Application requested a waiver from the requirement of Subtitle Z § 705.5, which limits the second time extension for an approved PUD to no more than one year. (Ex. 2.)
8. The Application asserted that it met the requirements, under Subtitle Z § 101.9, for a waiver from Subtitle Z § 705.5. Pursuant to Subtitle Z § 101.9, the Commission may, for good cause shown, waive any of the provisions of this subtitle if, in the judgment of the Commission, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. The Applicant stated that there is good cause for granting the waiver to

¹ Pursuant to Subtitle Z § 705.5, an administrative extension granted under Subtitle Z § 705.9 does not count as a time extension request for an approved PUD; therefore, the administrative extension granted in Z.C. Order No. 12-14(1) does not count as a time extension request.

preserve the Applicant's substantial investment in the Project by allowing completion of the North Building. The Applicant noted that it completed construction of the South Building and timely filed a building permit application for the North Building. However, despite diligent efforts pursuing the necessary financing to start construction of the North Building, the Applicant failed to meet the deadline established due to unfavorable economic and real estate market conditions. The Application stated that the waiver of the requirement that an extension request be no more than a year will not prejudice the rights of any party and is not otherwise prohibited by law. (Ex. 2.)

9. The Application asserted that it met the requirements, under Subtitle Z § 705.2, for the proposed two-year time extension because: (Ex. 2.)
- The Applicant served the extension request on all parties to the application and all parties were allowed thirty (30) days to respond;
 - There has been no substantial change in any material facts upon which the Commission based its original approval; and
 - Good cause justifies the Commission's granting the time extension because, despite diligent efforts, the Applicant has been unable to obtain financing for the North Building due to a combination of factors beyond its reasonable control, including rising vacancy rates, increased construction costs, and a hostile lending environment. The Applicant attached an affidavit from a Vice President of an indirect owner of the Applicant detailing meetings with several capital market brokers and good faith efforts to secure financing for the North Building (Ex. 2B.); and a letter from a CBRE Vice Chairman detailing the difficulty with securing financing for new multifamily developments in the Southwest DC market. (Ex. 2C.)

RESPONSES TO THE APPLICATION

10. On May 28, 2024, OP submitted a report (the "OP Report") recommending approval of the requested two-year extension, both to file a building permit application and start construction, and the waiver from the limitation of Subtitle Z § 705.5 to allow a second extension of a PUD approval for more than one year. The OP Report concluded that the Application met the requirements of Subtitle Z § 705.2, for the two-year extension, and Subtitle Z § 101.9, for the waiver because there have been no substantial changes in any material facts upon which the Commission based its original approval; and the Applicant has demonstrated good cause as current unfavorable market conditions beyond its reasonable control necessitate additional time to secure financing for the North Building. (Ex. 6.)
11. ANC 6D did not submit a written report in response to the Application, and neither did Carrollsburg A Condominium nor Waterfront Tower Condominium.

CONCLUSIONS OF LAW

1. Subtitle Z § 101.9 authorizes the Commission to waive, for good cause shown, any of the provisions of this subtitle, if the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

2. The Commission concludes that the Applicant has satisfied Subtitle Z § 101.9 by demonstrating good cause for waiver of Subtitle Z § 705.5 to allow for a second extension to a PUD approval for more than one year. The Commission wants construction of the North Building to be completed and agrees that additional time to file a new building permit application and start construction is necessary, given that current unfavorable economic and real estate market conditions have made it difficult for the Applicant to secure the necessary financing. Further, the waiver to allow a two-year extension will not prejudice the rights of any party and is not otherwise prohibited by law.
3. Subtitle Z § 705.2 authorizes the Commission to extend the time period of an order 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.
4. Subtitle Z § 705.2(a) requires that an Applicant serve the extension request on all parties and that parties are allowed 30 days to respond.
5. The Commission concludes that the Applicant has satisfied Subtitle Z § 705.2(a) by demonstrating that it served all parties, which in this case are ANC 6D, Carrollsburg A Condominium, and Waterfront Tower Condominium, and that all three parties were given 30 days to respond. The Commission notes that none of the three parties filed a response to the Application.
6. Subtitle Z § 705.2(b) requires that the Commission find that no substantial change has occurred to any of the material facts upon which the Commission based its original approval that would undermine the Commission's justification for that approval.
7. The Commission concludes that the Application satisfied Subtitle Z § 705.2(b) based on the Application and the OP Report, which stated there has been no substantial change to the material facts upon which the Commission based its original approval of the PUD that would undermine the Commission's justification for that approval.
8. Subtitle Z § 705.2(c) requires that an application requesting extension of the time period(s) of an order 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 government 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.*

9. The Commission concludes that the Application meets the standards of Subtitle Z § 705.2(c)(1) because, despite diligent efforts, the Applicant has been unable to secure the necessary financing for the North Building, due to unfavorable economic and real estate development market circumstances beyond its reasonable control. Accordingly, the Applicant was unable to start construction of the North Building within the time limits established and needs additional time to file a new building permit application and start construction. The Commission concludes there is good cause to extend the time limit for two years, both to file a building permit application and to start construction, to enable delivery of the North Building, which will allow the completion of Phase Two of the Project as envisioned.

“GREAT WIGHT” TO THE RECOMMENDATION OF OP

10. The Commission is required to 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. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).)
11. The Commission finds OP’s recommendation to approve the Application persuasive and concurs in the judgment.

“GREAT WIGHT” TO THE RECOMMENDATION OF OP

12. The Commission must give “great weight” to the issues and concerns raised in the written report of an affected ANC that was approved by the full ANC at a properly noticed public meeting 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 Bd. of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (D.C. 1978) (citation omitted).)
13. ANC 6D did not file a written report in response to the Application.

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 Applicant’s request for:

- Waiver from Subtitle Z § 705.5’s requirement, which limits the second time extension for an approved PUD to no more than one year; and
- A two-year time extension of the validity of the Orders, with the requirement that the Applicant file a new building permit application no later than April 27, 2026, and start construction no later than April 27, 2028, for the North Building.

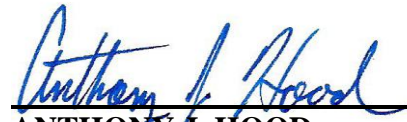
VOTE (May 30, 2024): (4-0-1)

(Joseph S. Imamura, Tammy Stidham, Anthony J. Hood and Robert E. Miller to **APPROVE**; 3rd Mayoral Appointee seat vacant.)


In accordance with the provisions of Subtitle Z § 604.9, this Order No. 12-14E shall become final and effective upon publication in the *District of Columbia Register*, that is, on August 23, 2024.

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 RESIDENT 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.