

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Zoning Commission**



**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA**

**ZONING COMMISSION ORDER NO. 02-38C**

**Z.C. CASE NO. 02-38C**

**Waterfront Associates LLC and the District of Columbia**

**(Time Extension for First-Stage PUD for West M Street Office Building and Northeast Building @ Square 542, Record Lot 89)**

**November 14, 2012**

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (the "Commission") was held on November 14, 2012. At the meeting, the Commission approved requests from Waterfront 425 M Street, LLC ("Waterfront") and the District of Columbia ("District") (collectively, the "Applicants") for a time extension for an approved first-stage planned unit development ("PUD") for property consisting of Record Lot 89<sup>1</sup> in Square 542 (the "Property"), pursuant to Chapters 24 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR").

**FINDINGS OF FACT**

1. By Z.C. Order No. 02-38A, the Commission approved a modification to a first-stage PUD ("First-Stage PUD"), a second-stage PUD ("Second-Stage PUD") and a zoning map amendment for the Property. The First-Stage PUD provides for the development of eight buildings including residential, office, and ground-floor retail uses and includes significant open spaces as well as the re-opening of the 4<sup>th</sup> Street right-of-way. The Second-Stage PUD includes the four buildings through the center of the Property and their adjacent open spaces. These four buildings include the East and West 4<sup>th</sup> Street Office Buildings with ground-floor retail space including a Safeway grocery store flanking the east and west side of 4<sup>th</sup> Street and the East and West Residential Towers which have a continuous open space connecting them to 4<sup>th</sup> Street. Z.C. Order No. 02-38A became effective upon its publication in the *D.C. Register* on January 25, 2008.
2. Condition No. 28 of Z.C. Order No. 02-38A approved the Second-Stage PUD for a period of two years from the effective date of the order, which was January 25, 2008. Within such time, the Applicant was required to file for a building permit as specified in

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<sup>1</sup> Record Lot 89 in Square 542 has been divided into Lots 822 through Lot 834 for assessment and taxation purposes.

- 11 DCMR § 2409.1. Construction must begin within three years of the effective date of the Order.
3. Condition No. 29 of Z.C. Order No. 02-38A provides that the approval for the First-Stage PUD is valid for a period of five years from the effective date of the order (i.e., January 25, 2008). Accordingly, by January 25, 2013, the second-stage PUD application(s) for the Northwest Building, the Northeast Building, and the West M Street Building must be filed. These second-stage applications could be submitted individually, at the same time, or in any combination thereof. The timeframe for filing the second-stage PUD application for the East M Street Building is separate and is based upon the date that Safeway vacated the premises, which was April 15, 2010. Accordingly, the second-stage PUD application for the East M Street Office Building must be filed by April 15, 2015.
  4. Building permits for the East and West 4<sup>th</sup> Street Office Buildings were issued on or around July 17, 2008. Construction commenced in September 2008.
  5. By Z.C. Order No. 02-38B, the Commission approved a two-year extension of the Second-Stage PUD with respect to the East and West Residential Buildings. That order required that the applicant file for a building permit no later than January 25, 2012, and commence construction by January 25, 2013. The developer of those buildings filed building permits for both the East and West Residential Buildings in advance of January 25, 2012. Construction has commenced on both the East and West Residential Buildings.
  6. Through a letter dated and received on June 21, 2012, the Commission received two documents: (1) Request for Extension of Time for First-Stage PUD Approval of West M Street Office Building submitted by Waterfront 425 M Street, LLC; and (2) Request for Extension of Time for First-Stage PUD Approval of Northeast Building submitted by the District of Columbia. Each request sought to extend the validity of the First-Stage PUD approval for a period of approximately two years and three months to coincide with the timeframe for the East M Street Office Building. The requests, if approved, would require that a second-stage PUD application for the West M Street Office Building and the Northeast Building must be filed no later than April 15, 2015. In the event that a second-stage application is filed for only one of the buildings by April 15, 2015, the first-stage approval would only expire as to the building for which no second-stage application was made.
  7. Waterfront submitted evidence that it has faced great difficulty securing initial financing for the development of the West M Street Office Building. This difficulty is due to the very limited market for initial financing of office buildings and requirements for substantial preleasing to obtain financing, which was supported by a letter from Steven Kurland, Senior Vice President of Forest City Financial Corporation. Waterfront also presented evidence of the numerous steps it has taken to actively market the West M

Street Office Building to potential tenants as well as evidence of high vacancy rates which further hinder Waterfront's ability to secure the required preleasing.

8. The District presented evidence as to the issues associated with the delay for moving forward with the second-stage PUD for the Northeast Building. Specifically, the District experienced initial delays in moving forward with development of the Northeast Building due to the dissolution of the RLA Revitalization Corporation and subsequent transfer of the project and related responsibilities to the District. In addition, the significant changes to the economic and financial markets resulted in further delay, especially with the proposed levels of affordability for the project and the shrinking budgets in the District.
9. The Applicants served a copy of the request on all parties (including Advisory Neighborhood Commission ("ANC") 6D, Tiber Island Cooperative Homes, Inc., and Carrollsburg Square Condominium Association) on June 21, 2012.
10. Through letters dated July 12, 2012, Waterfront and the District separately requested a postponement of the Commission's consideration of their requests in order to provide additional time to work with and present to ANC 6D.
11. On September 14, 2012, the Office of Planning ("OP") submitted a report supporting the application. (Exhibit ["Ex."] 9.)
12. On September 24, 2012, ANC 6D submitted a letter in opposition to the application, identifying, among other items, concerns with the existing conditions of the Property and the current leasing and marketing efforts for the development. (Ex. 10.) Waterfront filed a letter in response to this letter. (Ex. 11.)
13. At its public meeting on September 24, 2012, the Commission considered the requests. The Commission requested that the Applicants continue to work with ANC 6D to address its concerns and to address questions raised by the Commission, including the expected timeframe for the District moving forward with the Northeast Building.
14. On October 12, 2012, the District submitted a letter to the Commission responding to the requested clarifications. ANC 6D filed a resolution dated October 15, 2012, removing its opposition and supporting the requested extension. (Ex. 13.) Waterfront submitted a letter summarizing its work with ANC 6D and reiterating how the application meets the burden of proof. (Ex. 14.)
15. The Commission finds that the Applicants cannot move forward at this time with a second-stage PUD application for either the West M Street Office Building or the Northeast Building, despite the Applicants' diligent, good faith efforts, because of changes in the economic and market conditions beyond the Applicants' control.

### CONCLUSIONS OF LAW

1. Subsection 2407.10 of the Zoning Regulations authorizes the Commission to extend the time period of a first-stage PUD, but does not described the process or standard the Commission is to follow when deciding whether to do so. However, the Commission in the past has applied the process and standard stated in the Regulations for extending a second-stage or consolidated PUD order ("Final PUD Order"). (See Z.C. Order No. 05-28H, *Lano Parcel 12 LLC, Parkside Residential LLC, Parkside Homes LLC and Parkside Senior Housing LLC* (2011); Z.C. Order No. 02-51B, *Center for Strategic and International Studies, Inc.* (2009).)
2. Those provisions authorize the Commission to extend the validity of a Final PUD Order for good cause shown upon a request made before the expiration of the approval, provided: (a) the request is served on all parties to the application by the applicant, and all parties are allowed 30 days to respond; (b) there is no substantial change in any material fact upon which the Commission based its original approval of the PUD that would undermine the Commission's justification for approving the original PUD; and (c) the applicant demonstrates with substantial evidence that there is good cause for such extension as provided in § 2408.11. (11 DCMR § 2408.10.) Subsection 2408.11 provides the following criteria for good cause shown: (a) an inability to obtain sufficient project financing for the PUD, 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; (b) an inability to secure all required governmental agency approvals for a PUD 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 (c) the existence of pending litigation or such other condition or factor beyond the applicant's reasonable control which renders the applicant unable to comply with the time limits of the PUD order.
3. The Commission concludes that the Applicants complied with the notice requirements of 11 DCMR § 2408.10(a) by serving all parties with a copy of the requests and allowing them 30 days to respond.
4. The Commission concludes there has been no substantial change in any material fact that would undermine the Commission's justification for approving the original PUD.
5. The Commission finds that the Applicants presented substantial evidence of good cause for the extension based on the criteria established by 11 DMCR § 2408.11(a). Specifically, Waterfront has been unable to obtain sufficient project financing or required pre-leasing for the West M Street Office Building, following Waterfront's diligent good faith efforts, because of changes in economic and market conditions beyond Waterfront's

reasonable control. Furthermore, the District has been unable to fund the initial development of the Northeast Building, following the District's diligent good faith efforts, because of changes in economic and market conditions beyond the District's reasonable control.

6. Subsection 2408.12 of the Zoning Regulations provides that the Commission must hold a public hearing on a request for an extension of the validity of a PUD only if, in the determination of the Commission, there is a material factual conflict that has been generated by the parties to the PUD concerning any of the criteria set forth in § 2408.11.
7. The Commission concludes a hearing is not necessary for this request since there are not any material factual conflicts generated by the parties concerning any of the criteria set forth in § 2408.11 of the Zoning Regulations.
8. The Commission concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.
9. The Commission is required under § 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)) to give great weight to issues and concerns raised in the affected ANC's written recommendation. The Commission carefully considered the issues and concerns in the ANC's letter dated September 24, 2012, requested that the Applicants continue to work with the ANC to address them, and deferred action to allow this process to occur. The ANC subsequently filed a letter stating that it supported the requested extension. The Commission considered this support in its deliberations, and the Commission has provided the great weight to which the ANC is entitled.
10. The Commission is required 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) to give great weight to OP recommendations. OP submitted a report indicating that the Applicants met the requisite standards for a PUD extension, and therefore recommended that the Commission approve the requested extension. The Commission considered OP's report, and has given OP's recommendation great weight in approving this requests.

### **DECISION**

In consideration of the Findings of Fact and Conclusions of Law herein, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the requests for a two year and three month time extension for the First-Stage PUD approval of the West M Street Office Building and the Northeast Building approved in Z.C. Case No. 02-38A. The First-Stage PUD for these two buildings approved by the Commission shall be valid until April 15, 2015, within which time second-stage PUD applications shall be filed. These second-stage applications may

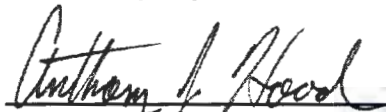


be submitted individually or at the same time. In the event that a second-stage application is filed for only one of the buildings by April 15, 2015, the first-stage approval shall only expire as to the building for which no second-stage application was made

The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. 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 identify or expression, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, genetic information, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

On November 14, 2012, upon the motion made by Chairman Hood, as seconded by Commissioner Turnbull, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Marcie I. Cohen, Peter G. May, and Michael G. Turnbull to adopt; Robert E. Miller, not present, not voting).

In accordance with the provisions of 11 DCMR §3028.8, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on March 8, 2013.

  
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ANTHONY J. HOOD  
CHAIRMAN  
ZONING COMMISSION

  
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SARA A. BARDIN  
DIRECTOR  
OFFICE OF ZONING