

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 13-08A

Z.C. Case No. 13-08A

CityPartners 5914, LLC

**(Two Year Time Extension for Consolidated Planned Unit Development
Located at Parcels 229/160, 229/103, 229/151, 229/153 in Square 5914)**

October 21, 2019

Pursuant to notice, at its October 21, 2019 public meeting, the Zoning Commission for the District of Columbia (the “Commission”) considered the application (the “Application”) of CityPartners 5914 LLC (the “Applicant”) for a two-year Time Extension of Zoning Commission Order No. 13-08 (the “Original Order”), located at Parcels 229/160, 229/103, 229/151, and 229/153 in Square 5914 (the “Property”). 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, as modified herein.

FINDINGS OF FACT

BACKGROUND INFORMATION

1. Pursuant to the Original Order, the Commission approved the creation of a significant transit-oriented development at the Congress Heights Metro Station. This project, approved for two phases of construction, will include a mix of residential, retail, and office uses that will serve as a hub for people to live, work and shop in their neighborhood. The residential portion of the project will include 205-215 affordable and market rate residential units located in the building at the intersection of 13th Street and Alabama Avenue SE. This building will include ground floor retail uses, a prominent lobby entrance on Alabama Avenue and small office users along 13th Street. The proposed office building will be eight stories tall. Retail will also be provided on the ground floor of the office building. The Original Order also approved a Zoning Map Amendment from the R-5-A Zone to the C-3-B Zone.
2. The Commission’s unanimous approval of the PUD Project anticipated that development of the office building portion of the project may occur at a different time than the development of the residential portion of the PUD Project. The development of the office building will occur on property that is currently owned by the Washington Metropolitan Area Transit Authority (Parcels 229/160, 229/103, and 229/151) which will be acquired by the Applicant, and Parcel 229/153 - which is currently owned by the Applicant. Condition No. 5 of ZC Order No. 13-08 stated:

“The PUD shall remain valid for three years from the effective date of this Order, during which the Applicant must file for a building permit for the construction of the first building, and construction must begin within four years of the effective date of this Order for the PUD to remain valid. The PUD shall be vested as to any building or buildings for which construction has timely begun. Thereafter, for the PUD to remain valid, the Applicant must file for a building permit for the second building within five years of the effective date of this Order, and construction must begin within six years of the effective date of this Order.”

3. The Commission’s approval of the PUD Project in the Original Order became effective on June 5, 2015. In order for the PUD to remain valid, an application for a building permit for the construction of one of the buildings in the PUD Project was required to be filed prior to June 5, 2018 and construction must begin by June 5, 2019. On June 1, 2018, a Foundation-to-Grade Building permit application was filed with the Department of Consumer and Regulatory Affairs (FD #1800081).

PARTIES

4. The parties in Zoning Commission Case No. 13-08 were ANC 8E and the Alabama Avenue/13th Street Tenants Coalition (the “Coalition”). ANC 8E is deemed to be an “affected” ANC pursuant to Subtitle Z § 101.8.

THE APPLICATION

5. On May 31, 2019, the Applicant filed the Application requesting a two-year Time Extension of Z.C. Order No. 13-08, prior to the Original Order’s deadline of June 5, 2019 in which construction of the approved project was required to commence. The Applicant requested that it be allowed until June 5, 2021 to commence construction activity related to the development of the PUD Project.
6. The Applicant provided evidence that on May 31, 2019 it served the Application on ANC 8E, the Coalition, and the Office of Planning (“OP”) as attested by the Certificate of Service submitted with the Application. (Exhibit [“Ex.”] 1.)
7. The Application stated that since the Zoning Commission’s approval of the PUD Project in 2015, there has been no substantial change of material facts that undermine the Zoning Commission’s approval of the PUD Project. The factors relevant to the Zoning Commission’s approval of the PUD and Zoning Map Amendment application have not changed. No modifications have been made to the approved PUD Project or to the Zoning Regulations, nor have modifications been made to the Comprehensive Plan, that impact the Zoning Commission’s approval of the PUD Project. (Ex. 1.)
8. The Application asserted that good cause justifies the Commission’s granting the time extension because of pending litigation and other conditions and circumstances beyond the Applicant’s reasonable control that make the Applicant unable to comply with the time limits of the Original Order. The Applicant noted that one of the original members of the applicant in ZC Case No. 13-08 was an entity related to Sanford Capital, which owned interests in the residential buildings around the Congress Heights Metro Station

that were part of the land included in the PUD Project. By 2017, Sanford Capital related entities had defaulted on various loans and the residential properties on the site were placed in court-ordered receivership. The Applicant realized that Sanford Capital was not going to change its behavior regarding its maintenance and operation of the residential buildings on the Property. Therefore, the Applicant took ownership of these apartment buildings in December 2017. The Applicant has removed the Sanford Capital related entities from the project entirely. Sanford Capital has no interest, ownership, or potential future ownership interest in the PUD Project. (Ex. 1.)

9. The Applicant stated that in taking possession of the residential parcels it inherited the litigation that the Sanford Capital related entities were involved in related to those properties. At the time the Application was filed there were two cases pending before the DC Superior Court regarding those properties. The Applicant stressed that it and the principals of CityPartners 5914, LLC had no control, ownership, or management responsibilities of those residential buildings prior to December 2017 and did not create the housing conditions that led to the appointment of the Receiver. (Ex. 1.)
10. The Applicant stated that since taking ownership of the residential properties it had offered the Tenant Association the right to purchase the buildings through TOPA, and it made a settlement offer to the Tenant Association. At the time of the filing of the Application, all of the former tenants in the buildings that were formerly owned by Sanford Capital had been relocated to other locations in close proximity to the PUD Project, with all relocation costs and expenses paid by the Applicant. The Applicant argued that its current proffers to the ten former tenant member households who make up the Tenant Association go well beyond the proffers that were approved in the Original Order. The Applicant's offer to the former tenants included the following:
 - CityPartners 5914, LLC will pay \$100,000.00 to each Tenant Association member household;
 - CityPartners 5914, LLC will pay the taxes on the initial payment of the \$100,000 fee, up to \$10,000 per Tenant Association member household;
 - CityPartners 5914, LLC committed to and has paid for the relocation and moving costs for each Tenant Association member household;
 - CityPartners 5914, LLC will also allow tenants to move back into the beautiful new apartment building at the Congress Heights Metro site, at the same rent they were paying to live in the existing buildings. Increases in rent will be subject only to annual rent increases equal to the amount of the "automatic" rent increase allowed by DC's rent control law;
 - CityPartners 5914, LLC has also invited tenants to invest in and participate in the new development, with a minimum investment of \$10,000. Their investment would be considered as equity in the new project, and tenants could receive a preferred interest rate of 7%; and
 - CityPartners 5914, LLC will arrange for and cover costs for a financial consultant—if requested—to help each Tenant Association member household decide how best to invest their \$100,000 payment. (Ex. 1)

11. The Applicant noted that while it continues to pursue negotiations with the Tenant Association in order to resolve the two pending Superior Court cases as expeditiously as possible, the existence of these cases renders it unable to start construction of the PUD Project by June 5, 2019 for the following reasons.

- It is not possible to secure construction financing without a resolution to the TOPA notice that the Applicant provided to the tenants in June of 2018, and a reconciliation as to whether the tenants will negotiate to purchase the residential buildings to redevelop the sites themselves. If the PUD expires, the development opportunity is lost for the Applicant, but it is also lost for the tenants, if they decide they want to develop the site. The Applicant stated that if the PUD expires, all parties lose with no benefit realized for the tenants, community or the city.
- As part of the outstanding litigation, the tenants' attorneys have filed a Lis Pendens action which has clouded the title of the residential properties. This cloud prevents title insurance and without title insurance, the Applicant has not been able to close on financing for the project.
- One of the pending Superior Court cases is related to the continued placement of a court appointed Receiver to remediate mold and resolve any housing code violations in the residential buildings. This litigation continues despite the fact that the tenants have stated on the record that if the tenants exercise their TOPA rights and purchase the buildings, they intend to tear them down. While the Receiver has had full and unilateral control of the residential properties since November 2017, the buildings have continued to receive housing code violations and fines. In addition, under the direct control and management of the Receiver, the building at 1331-1333 Alabama Avenue was severely damaged by fire that has rendered all of the 24 units uninhabitable. The Applicant has filed an injunction with the Court asking that the Receiver be removed for negligence and malfeasance and that the two fire damaged buildings not be renovated. The Applicant stated that it cannot start construction as it is prohibited under the Receivership statute to assert any management or control on site until the Receiver completes his work, or is removed to allow for the community-supported, transit oriented, mixed-income redevelopment of the site. The Applicant has funded the Receiver's account for operations and for the completion of his plan. The Applicant estimated that the Receiver will complete his work within six months of the date this application was filed. (Ex. 1.)

12. OP submitted a report dated July 25, 2019 ("OP Report"). The OP Report noted that there have been no substantial changes to the Comprehensive Plan since the project's approval that would affect the material facts upon which the project was approved. The OP Report also concluded that should the Commission decide to grant an extension, OP recommends the extension be limited to one (1) year since an additional year was already included in the original approval. (Ex. 11.)

13. The Coalition did not participate in the Application.
14. ANC 8E did not participate in the Application.

SUBMISSIONS OF THE OFFICE OF THE ATTORNEY GENERAL AND RESPONSES OF THE APPLICANT

15. The Office of the Attorney General (“OAG”), which was not a party to the original case, submitted a waiver (dated July 2, 2019) requesting that the Commission accept into the record a letter in opposition to the Applicant’s time extension request. OAG’s opposition to the time extension request was based on three arguments: first, OAG claimed the Applicant had full knowledge of Sanford Capital’s actions; second, OAG claimed that the Applicant violated the Tenants’ TOPA rights; and third, OAG argued that granting the time extension would not be in the public interest. In a footnote, OAG noted that “In the event the Commission does not deny the current PUD extension, OAG asks that the extension be limited to one year instead of the two years requested.” The Commission granted the waiver and accepted the letter into the record. (Ex. 5.)
16. On July 3, 2019, the Applicant submitted a letter into the record which requested the removal of the application from the Zoning Commission’s July 8, 2019 Public Meeting Agenda. The Commission granted this request. (Ex. 6.)
17. On July 8, 2019, the Applicant requested additional time to respond the OAG’s opposition. The Commission granted this request. (Ex. 7.)
18. On July 19, 2019, the Applicant submitted its response to OAG’s opposition. The Applicant noted that the information provided in OAG’s opposition was not relevant to the Zoning Commission’s determination of whether the Applicant has satisfied the standards for approval of a PUD Time Extension request. The Applicant also noted that while it does not believe the Zoning Commission is the proper forum to litigate issues, it felt compelled to respond to some of the unfair and inaccurate claims made by OAG. The Applicant’s response argued that approving the time extension request was in fact in the public interest because if the PUD expired the development opportunity is lost for the Applicant and all of the benefits and offers to the Tenants are lost as well. The Applicant provided evidence of the support the project has in the surrounding community. The submission also provided evidence rebutting the arguments made by OAG with regard to the Applicant’s relationship with Sanford Capital. (Ex. 9, 9A-9D.)
19. On July 26, 2019 and July 29, 2019, OAG submitted its response to the Applicant’s July 19, 2019 submission and a waiver request asking that the Commission accept this document into the record. OAG argued that the Applicant failed to satisfy the standards of Subtitle Z §705.2. The Commission approved the waiver and accepted OAG’s letter into the record. (Ex. 15, 15A-15B.)
20. On July 29, 2019, the Applicant submitted a letter into the record which requested that the Commission defer action on the application until October 21, 2019 to allow more time for the relevant parties to come to an agreement. The Commission granted this request. (Ex. 14.)

21. On August 5, 2019, the Applicant submitted its response to OAG’s submission dated July 26, 2019. (Ex. 16.)
22. On October 21, 2019, OAG requested another waiver from the Commission to allow an additional submission. In this submission, OAG requested that the Commission “continue the hearing set for October 21, 2019 in this matter for sixty (60) to ninety (90) days” to allow the Tenants Association additional time to negotiate with an alternative developer for the site. The Commission approved the waiver and accepted OAG’s letter into the record. (Ex. 17, 17A.) At the October 21, 2019 Public Meeting, the Commission did not agree with OAG’s proposed continuance and found OAG’s arguments to be not germane to the Application.

SUBMISSIONS OF ADDITIONAL NON-PARTIES

23. On July 12, 2019, the Commission approved a request to accept into the record an e-mail (with supporting materials) from a non-party in support of the application. Mr. David Conn, a Ward 8 resident, posited that denying the PUD extension request would not be in the best interest of the surrounding community and would result in the continued blighted condition of the site. (Ex. 8, 8A – 8A4.)
24. On July 29, 2019, the Commission approved a request to accept into the record a letter from a non-party in support of the application. Ms. Stacy Smith, Mayoral appointee for the Workforce Investment Council and Chair of its Youth Committee. (Ex. 12, 12A.)
25. On July 30, 2019, the Commission approved a request to accept into the record a letter from a non-party in support of the application, Mr. Terrance Lynch. (Ex. 13, 13A.)

CONCLUSIONS OF LAW

1. Subtitle Z § 705.2 authorizes the Commission to extend the period of an order approving a PUD upon determining that the time extension request demonstrated satisfaction of the requirements of Subtitle Z §§ 705.3, 705.5, and 705.6.
2. The Commission concludes that the Applicant timely filed the Application prior to the June 5, 2019 deadline for commencing construction of the approved PUD project, which deadline the Application seeks to extend.
3. Subtitle Z § 705.2 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 satisfied the requirement of Subtitle Z § 705.2(a) by demonstrating that it had served all parties to the Original Order – Order No. 13-08 - and that all were given 30 days to respond from the May 31, 2019 date of service.
5. Subtitle Z § 705.2 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 that the Application satisfied Subtitle Z § 705.2(b) based on the Application and the OP Report, which stated that no substantial change has occurred to the material facts upon which the Commission had relied in issuing the Original Order.
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 Subtitle Z § 705.2(c)(3) because of the existence of various litigation matters before the DC Superior Court (including the TOPA suit, the Lis Pendens action, and the litigation regarding the Court appointed Receiver) that affected the Property. The Commission agrees that these matters were beyond the applicant's reasonable control and rendered the Applicant unable to comply with starting construction of the first building by June 5, 2019. The Commission did not find the arguments of OAG to be persuasive and determined that they were outside the scope of the Commission's proper review of a PUD time extension request. The Commission also determines that the period of the time extension should be limited to one year and concludes that granting a PUD time extension for one year is in the public interest and is consistent with other time extensions that the Commission has granted. The Commission also notes that the one-year time extension was the time period that OP requested and that OAG asked for if the Commission determined that the Applicant had satisfied the requirements of Subtitle Z § 705.

"Great Weight" to the Recommendations of OP

9. Pursuant to §13(d) 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)) and Subtitle Z § 405.8, the Commission must give "great weight" to the recommendations of OP. *Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A. 3d 1079, 1087 (D.C. 2016)
10. The Commission notes OP's conclusion that there have been no substantial changes to the Comprehensive Plan since the project's approval that would affect the material facts upon which the project was approved and finds persuasive OP's recommendation that the time extension request be limited to one year.

“Great Weight” to the Recommendations of the ANC

11. 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)) and Subtitle Z §406.2, the Commission must give “great weight” to the issues and concerns raised in the written report of the affected ANC. To satisfy this great weight requirement, District agencies 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).
12. ANC 8E did not participate in this case.

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, subject to the following conditions and provisions:

The conditions in Z.C. Order No. 13-08 remain unchanged and in effect, except that Condition No.C.5.as stated or incorporated in this order is hereby revised to read as follows (deletions shown in **bold-and-strikethrough** text; additions shown in **bold** and underlined text):

C. MISCELLANEOUS.

5. The PUD shall remain valid for three years from the effective date of this Order, during which the Applicant must file for a building permit for the construction of the first building, and construction must begin within ~~four~~ **five** years after the effective date of this Order for the PUD to remain valid. The PUD shall be vested as to any building or buildings for which timely construction has begun. Thereafter, for the PUD to remain valid, the Applicant must file for a building permit for the second building within five years after the effective date of this Order, and construction must begin within six years after the effective date of this Order.

On October 21, 2019, upon the motion of Chairman Hood, as seconded by Commissioner Shapiro, the Zoning Commission took **FINAL ACTION** to **APPROVE** the application at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro and Michael G. Turnbull to approve by proxy. Peter G. May not present and not participating).

In accordance with the provisions of Subtitle Z DCMR § 604.9, this Order No. 13-08A shall become final and effective upon publication in the DC Register; that is on _____.

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.