

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION ORDER NO. 13-18B
Z.C. Case No. 13-18B
WBG Wheeler Road, LLC
(Two-Year Time Extension for Consolidated PUD
@ Square 5925 [4129 Wheeler Road, S.E.]
June 10, 2019

Pursuant to notice, at a public meeting held on June 10, 2019, the Zoning Commission for the District of Columbia (the “Commission”) considered the application (the “Application”) of WBG Wheeler Road, LLC (the “Applicant”) for a two-year time extension of the April 17, 2019 deadline to file a building permit and the April 17, 2020 deadline to begin construction of the consolidated planned unit development (“PUD”) established by Z.C. Order No. 13-18 (the “Original Order”), as extended by Z.C. Order No. 13-18A, for Lot 65 in Square 5925 (the “Property”), together with a waiver of the extension time limitation in Subtitle Z § 705.5 (the “Application”). 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 DCMR, 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. By the Original Order, effective on April 17, 2015 (the “Effective Date”), the Commission granted the Applicant a consolidated PUD approval for the Property (the “Approved PUD”).
2. The parties to the Original Order were the Applicant and Advisory Neighborhood Commission (“ANC”) 8E. (Original Order, Finding of Fact 8.)
3. The Original Order established a two-year period starting with the Effective Date – ending on April 17, 2017 – within which the Applicant had to file an application for a building permit to construct the Approved PUD, with construction to begin by April 17, 2018. (Original Order Condition D(4).)
4. In Z.C. Order No. 13-18A, effective February 2, 2018, the Commission granted a two-year extension to the deadline to file an application for a building permit to April 17, 2019 and an extension of the deadline to begin construction to April 17, 2020.

The Application

5. On April 17, 2019, prior to the April 17, 2019 deadline to file a building permit application established by Z.C. Order No. 13-18A, the Applicant filed the Application for a two-year extension of the April 17, 2019 deadline to file a building permit for the Approved PUD and the April 27, 2010 deadline to begin construction.
6. On May 10, 2019, the Applicant revised the Application to include a request for a waiver of Subtitle Z § 705.5's one-year term limit for a second time extension (the "Revised Application"). (Exhibit ["Ex."] 4.)
7. The Application included Certificates of Service attesting to service of the Application on the only other party to the Original Order, ANC 8E, on April 17, 2019, and subsequently of the Revised Application on May 10, 2019. (Ex. 2, 4.)
8. The Application asserted that no substantial change had occurred in any of the material facts on which the Commission had relied in approving the preliminary PUD approval for the Property in the Original Order.
9. The Application justified the requested extension due to the inability to obtain project financing due to economic and market conditions beyond the Applicant's reasonable control. The Application cites to the difficulties faced by developers in Wards 7 and 8 in securing project financing as well as difficulties in construction and leasing.
10. The Application asserted that good cause exists to grant a waiver to allow the Applicant additional time to continue its efforts to secure financing for the PUD.

Responses to the Application

Office of Planning ("OP")

11. OP submitted a report on May 31, 2019, recommending approval of the Application (the "OP Report"). (Ex. 5.) The OP Report concluded that the Applicant satisfied the relevant standards of Subtitle Z § 705.2 and that the granting of the waiver from Subtitle Z § 705.5 was also appropriate.

ANC 8E

12. ANC 8E did not submit a written report regarding 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. The Commission concludes that the Applicant timely filed the Application before the April 17, 2019 deadline for filing an application for a building permit that the Application seeks to extend.
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) by demonstrating that it had served the only other party to the Original Order – ANC 8E – and that the ANC was given 30 days to respond from the April 17, 2019 date of service. The Commission notes that ANC 8E did not submit any report or comment to the record.
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 that the Application satisfied Subtitle Z § 705.2(b) based on the Application and the OP Report, which stated that no substantial change had 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)(1) because the Application has provided sufficient documentation of the Applicant’s inability to secure project financing for the PUD despite its diligent efforts. The Commission credits the Application’s statements regarding the general difficulties in securing financing in the area surrounding the Property.
9. 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.

10. The Commission concludes that the Application demonstrated good cause to waive Subtitle Z § 705.5's maximum one-year extension period for the second time extension because the Application has provided sufficient evidence of the larger economic conditions and trends which have impacted the Applicant's ability to obtain financing for the project.

“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 found OP's recommendations that the Commission approve the Application persuasive and concurred 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 any written report raising any issues or concerns, there is nothing for the Commission to accord “great weight.”

DECISION


In consideration of the case record and 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 a two-year time extension with a waiver of Subtitle Z § 705.5, to extend the deadline to file an application for a building permit to construct the consolidated PUD approved by Z.C. Order No. 13-18 and extended by Z.C. Order No. 13-18A, by two years to April 17, 2021, and to extend the deadline to begin the construction of the PUD to April 17, 2022.

VOTE (June 10, 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 Order 13-18B shall become final and effective upon publication in the *D.C. Register*; that is, on January 24, 2020.

BY 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 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.