

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 15-27B__

Z.C. Case No. 15-27B

Carr Properties OC, LLC

(Modification of Significance to Approved Consolidated PUD @ Square 3587, Lot 833)

July __, 2020

At the properly noticed virtual public hearing on July 6, 2020, the Zoning Commission for the District of Columbia (the “Commission”) considered an application from Carr Properties OC, LLC (the “Applicant”) for (i) a modification to the approved consolidated planned unit development (“PUD”) for Lot 833 in Square 3587 (the “Building C1 Site”); and (ii) a second-stage PUD and a modification to the approved-first stage PUD for Lot 834 in Square 3587 (the “Building C2 Site”) (together, the “Application”) in accordance with the consolidated and first-stage PUD approved by Z.C. Order No. 15-27 (the “Original Order”). At the hearing, the Commission determined to issue individual orders for the Building C1 Site and the Building C2 Site; the subject of this order is the Building C1 Site only.

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.

FINDINGS OF FACT

Notice

1. On May 13, 2020, the Office of Zoning (“OZ”) sent notice of the virtual¹ public hearing to:
 - The affected Advisory Neighborhood Commission (“ANC”) 5D, the “affected ANC” pursuant to Subtitle Z § 101.8;
 - The affected ANC Single Member District (“SMD”) 5D01;
 - The Office of Planning (“OP”);
 - The District Department of Transportation (“DDOT”);
 - The Department of Energy and the Environment (“DOEE”);
 - The D.C. Housing Authority (“DCHA”);
 - The Council of the District of Columbia (“DC Council”); and
 - Property owners within 200 feet of the Building C1 and C2 Sites.

¹ The hearing was originally scheduled and noticed for April 23, 2020 (Ex. 17); however, because of the COVID-19 pandemic, OZ suspended all public hearings and the hearing did not occur as originally scheduled.

(Exhibit [“Ex.”] 23.)

2. OZ also published notice of the July 6, 2020 public hearing in the D.C. Register on May 22, 2020 (67 DCR 5331) as well as through the calendar on OZ’s website. (Ex. 22.)

Parties

3. The only parties to this case were the Applicant and ANC 5D.
4. 1250 4TH ST EDENS LLC and UNION MARKET APARTMENTS, LLC (“Parties in Support”) in the original case, did not participate in this case.
5. There were no additional requests for party status.

Consolidated PUD Approval

6. Pursuant to the Original Order, the Commission approved a consolidated PUD (the “Consolidated PUD”) and a first-stage PUD (the “First-Stage PUD,” and collectively with the Consolidated PUD, the “Overall PUD”), together with a related Zoning Map amendment from the C-M-1 Zone District to the C-3-C Zone District² (currently the PDR-1 and the MU-9 zones, respectively) for property now known as Lots 833-835 and 838-840 in Square 3587 (the “Overall PUD Site”).³
7. As approved in the Original Order, the Overall PUD contemplated the development of the Overall PUD Site with four buildings known as Buildings A through D containing a range of residential, retail, office, and hotel uses.
8. The Original Order approved the Overall PUD to be constructed in two phases:
 - a. Phase I/Consolidated PUD - the southern portion of Building A (“Building A1”), Building B, and the southern portion of Building C (“Building C1”); and
 - b. Phase II/First-Stage PUD - the northern portion of Building A (“Building A2”), the northern portion of Building C (“Building C2”), and Building D.

² The C-M-1 and C-3-C Zone Districts were designations of the 1958 Zoning Regulations under which the Commission approved the Original Order.

³ At the time the Original Order was approved the Overall PUD Site was known as Lots 805, 814, and 817, which were Assessment and Taxation (“A&T”) lots located within Record Lot 6. The remaining portion of Record Lot 6 is known as A&T Lot 819 and is owned by the District. Lot 819 is not included within the Overall PUD Site. However, the Original Order approved significant improvements to Lot 819 that will be undertaken by the Applicant as part of development of the Overall PUD. *See* Original Order, footnote 3.

Following approval of the Original Order, new A&T lots were created for the Overall PUD Site, such that the Overall PUD Site is now known as Lots 833-835 and 838-840. A new survey was also prepared and confirmed that the PUD Site area is 208,671 square feet, excluding Lot 819.

9. As part of the Consolidated PUD, the Commission approved Building C1 to be developed with:
 - a. A maximum building height of 130 feet;
 - b. Approximately 217,558 square feet of gross floor area (“GFA”) devoted to office use;
 - c. Approximately 10,563 square feet of GFA devoted to retail use; and
 - d. 138 on-site parking spaces.
10. The Original Order granted the following flexibility as development incentives for Building C as a whole:
 - a. Loading berth size requirements;
 - b. The rear yard depth requirements; and
 - c. The building lot control requirements.

The Application

11. On March 22, 2019, the Applicant filed the Application requesting (i) a modification to the approved consolidated PUD for Building C1 to make minor design refinements to the Building C1 penthouse and special exception relief to permit nightclub, bar, cocktail lounge, and restaurant uses in the penthouse of Building C1; and (ii) a second-stage PUD and a modification to the approved first-stage PUD to convert the primary use of Building C2 from residential to office use and to also permit nightclub, bar, cocktail lounge, and restaurant uses in the Building C2 penthouse.
12. On December 19, 2019, the Applicant filed a letter requesting that the Commission set down the Application for the change in use of Building C1’s penthouse only. (Ex. 11.) The Applicant’s letter stated that after filing the Application, the Applicant filed and the Commission approved, a modification of consequence to make the requested design refinements to the Building C1 penthouse (Z.C. Order No. 15-27D), and therefore, with respect to Building C1, the Commission only needed to consider the special exception request for Building C1’s penthouse, since no further changes were proposed to its design.
13. The Application stated that during the week the penthouse would primarily be used as office amenity space as previously approved in the Original Order. The special exception would permit the Applicant to be able to rent out the penthouse space to third parties for events not otherwise associated with the office use, which could include uses and/or events that fall within the “nightclub, bar, cocktail lounge, and restaurant” use categories as defined in the Zoning Regulations.

14. The Application provided evidence that the nightclub, bar, cocktail lounge, and restaurant uses proposed for the penthouse would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and would not tend to affect adversely the use of neighboring property. The relief would permit office tenants to take advantage of the penthouse space for informal gatherings for the majority of the week, and give the Applicant the ability to host outside third-party events on the evenings and weekends. The penthouse would create a unique and enjoyable space at the top of the Union Market neighborhood, overlooking the city, and would not create any adverse effects. The nightclub, bar, cocktail lounge, and restaurant uses are consistent with the goals of the penthouse regulations to generate an affordable housing contribution. Moreover, the penthouse structures will comply with all height, bulk, and setback standards set forth in Subtitle C § 1500.
15. The Application also provided evidence that the proposed nightclub, bar, cocktail lounge, and restaurant uses would not tend to affect adversely the use of neighboring property. Although the Overall PUD Site and much of its surroundings are presently vacant or under construction, the Building C site will eventually be surrounded on all sides by streets or alleys, with no portion of Building C directly abutting any residential properties. Moreover, Building C1 is an office building without any residential tenants.
16. In addition, the Application stated that the majority of the patrons visiting the proposed penthouse nightclub, bar, cocktail lounge, or restaurant uses would be residents or visitors of the Overall PUD and/or the Union Market neighborhood, such that no impacts would be created by additional vehicular trips driving to the Building C1 Site to access the rooftop. Moreover, Building C1 exceeds the minimum number of required on-site vehicle parking spaces, such that it will be able to accommodate the proposed bar/restaurant use. Thus, the proposed uses for the penthouse will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to affect adversely the use of neighboring property, in compliance with the special exception standards of Subtitle C § 1500.3 and Subtitle X § 901.2.

Applicant's Public Hearing Testimony

17. At the July 6, 2020, virtual public hearing, the Applicant proffered John Crump of Smithgroup, Erwin Andres of Gorove/Slade Associates, Lauren Brandes of Oculus, and Shane Dettman of Holland & Knight as expert witnesses in architecture, transportation planning, landscape architecture, and land use planning, respectively. The Commission granted expert status to all four, noting that only John Crump had not previously been accepted as an expert, but accepting him as an expert based upon review of his resume. (Ex. 15B.)
18. The Applicant rested on the existing case record and did not provide a formal presentation other than to give a general overview of the Application. However, the Applicant responded to questions posed by the Commission, including through testimony from John Crump and Austen Holderness, representing the Applicant. None of the questions related to the proposed change in use for the penthouse in Building

C1. The information provided by the Applicant at the hearing was primarily related to Building C2, other than noting the approximate value of the contribution that would be made to the Housing Production Trust Fund (“Trust Fund”) as a result of the penthouse habitable space in Building C1.

Responses to Application

Office of Planning

19. OP submitted a total of three reports concerning the Application:
 - a. A report dated November 27, 2019, recommending that the Commission set down the Building C2 components of the Application for a public hearing (the “OP Setdown Report”); (Ex. 10.)
 - b. A report dated January 3, 2020, recommending that the Commission also set down the Building C1 components of the Application for a public hearing (the “Supplemental OP Setdown Report”) (Ex. 12.); and
 - c. A pre-hearing report dated June 26, 2020, recommending approval of the Application (the “OP Hearing Report”) (Ex. 29.)
20. The OP Setdown Report recommended that the Commission set down the Application for Building C2 for a public hearing, and also identified items for which more information or clarification was needed from the Applicant prior to the public hearing. The OP Setdown Report did not address the portion of the Application requesting special exception relief for Building C1’s penthouse.
21. The OP Supplemental Setdown Report acknowledged that the Building C2 components of the Application were set down by the Commission on December 9, 2019, but that the modification for the penthouse use for Building C1 was not included. In reviewing the request, OP recommended setdown of the requested modification to introduce nightclub, bar, cocktail lounge, or restaurant uses in the Building C1 penthouse originally approved for office amenity space. The OP Supplemental Setdown Report stated that the proposed penthouse use met the special exception standards of Subtitle X § 901.2 and that it would also be consistent with the approved PUD to create an active, mixed-use development and generate an affordable housing contribution. (Ex. 12, p. 2.)
22. The OP Hearing Report recommended approval of (i) the modification of the first-stage PUD and second-stage PUD for Building C2; (ii) the modification of the consolidated PUD for Building C1; and (iii) special exception relief to allow nightclub, bar, cocktail lounge, and restaurant uses in the habitable penthouses for Buildings C1 and C2. (Ex. 29, p. 1.) The OP Hearing Report evaluated the special exception relief requested to permit nightclub, bar, cocktail lounge, and restaurant uses in the penthouses. In doing so, OP found that the proposed penthouse uses “would be in harmony with the intent

of the approved PUD to create an active, mixed use development that would attract residents and tourists and bring greater vitality to Florida Avenue Market.” OP also stated that the proposed uses are permitted within the underlying zone and would generate an affordable housing contribution. (Ex. 29, p. 15.) In addition, OP found that the proposed penthouses would not adversely affect the use of neighboring property and therefore “recommend[ed] approval of special exception use of the habitable penthouse space for Building C1 and Building C2 with flexibility to rent out the penthouse space to third parties for events not associated with the office use, which could include uses that fall within the ‘nightclub, bar, cocktail lounge or restaurant’ use category.” (Ex. 29, p. 16.)

23. The OP Hearing Report stated that it solicited comments from DHCD and DOEE on the Application, and that the Applicant met separately with DDOT to address transportation concerns. The OP Hearing Report included a chart summarizing the comments from the Zoning Commission at setdown and from OP and the other District agencies, and the Applicant’s responses thereto. (Ex. 29, pp. 3-7.)
24. At the public hearing, OP testified in support of the Application and otherwise rested on the record of its reports previously submitted to the case record.

Department of Transportation

25. On June 22, 2020, DDOT submitted a report (“DDOT Report”) stating it had no objection to the Application subject to conditions related to Building C2 only. (Ex. 27, p. 3.) The DDOT Report primarily discussed Building C2, but recognized that the “Applicant also requests a Modification to an Approved Consolidated PUD for neighboring Building C1 to allow for a restaurant, night-club, or cocktail lounge on the penthouse level.” (Ex. 27, p. 1.) At the public hearing the Applicant agreed to all three of DDOT’s conditions related to Building C2.
26. At the public hearing, DDOT testified in support of the Application and otherwise rested on the record and acknowledged that the Applicant had agreed to the three conditions related to Building C2 as stated in the DDOT Report.

ANC 5D

27. By letter dated January 23, 2019, ANC 5D stated that at a duly noticed, regularly scheduled meeting of ANC 5D, with a quorum of commissioners and the public present, the ANC voted 5-0-0 to support a related application that was previously filed for Buildings A2, C2 and D combined (the “Original ANC Report”). (Ex. 2F.) The ANC Report expressed its general support for the overall PUD and also stated its support for the proposal to develop Building C2 as an office building with ground floor retail and a first class design. However, the ANC’s vote in the Original ANC Report was done prior to the filing of the subject Application on March 22, 2019.
28. By letter dated August 12, 2019, the ANC issued a second report after reviewing and voting on a presentation from the Applicant regarding the Application specifically (the

“ANC Report”) (Ex. 18.) The ANC Report stated that at a regularly scheduled monthly meeting with a quorum of commissioners and the public present, ANC 5D voted 6-0-0 to support the Application for a modification to Building C1’s penthouse and a second-stage PUD and modification to the first-stage PUD for Building C2.

29. The ANC Report stated its support for the proposed nightclub, bar, cocktail lounge or restaurant use in the Building C1 and C2 penthouses, confirming that the use would not create any adverse impacts to the neighborhood. (Ex. 18, p. 1.)
30. The ANC did not attend or testify at the public hearing.

Other Responses

31. The Parties in Support did not file a response to the Application or testify at the Public Hearing, and no other written responses were received. No individuals or organizations testified at the public hearing.

CONCLUSIONS OF LAW

1. Pursuant to the Zoning Regulations, the purpose of the PUD process is to provide for higher quality development through flexibility in building controls, including building height and density, provided that a PUD:
 - a. Results in a project superior to what would result from the matter-of-right standards;
 - b. Offers a commendable number or quality of meaningful public benefits; and
 - c. Protects and advances the public health, safety, welfare, and convenience, and is not inconsistent with the Comprehensive Plan.

(Subtitle X § 300.1.)
2. In evaluating a PUD, the Commission shall find that the proposed development:
 - a. Is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site;
 - b. Does not result in unacceptable project impacts on the surrounding area or on the operation of city services and facilities but instead shall be found to be either favorable, capable of being mitigated, or acceptable given the quality of public benefits in the project; and
 - c. Includes specific public benefits and project amenities of the proposed development that are not inconsistent with the Comprehensive Plan or with other adopted public policies and active programs related to the subject site.

(Subtitle X § 304.4.)

3. The Commission concludes that the Applicant satisfied the requirement of Subtitle Z § 703.13 to serve the Application on all parties to the original proceeding, in this case ANC 5D and the Party in Support.
4. Subtitle Z § 704.4 stipulates that the scope of a hearing on a modification of significance “shall be limited to the impact of the modification on the subject of the original application and shall not permit the Commission to revisit its original decision.”
5. The Commission concludes that the proposed modification to the use of Building C1’s penthouse is consistent with the Overall PUD, as authorized by the Original Order and as modified by Z.C. Order No. 15-27D, because the modification is minor, does not change the exterior of Building C1, and does not change the Commission’s analysis in granting the Overall PUD under Subtitle X § 304.4. The change in use to Building C1’s penthouse proposed no changes affecting the Overall PUD’s (i) consistency with the Comprehensive Plan; (ii) mitigation or balancing any potential adverse impacts to ensure no unacceptable impacts; or (iii) proffered public benefits.
6. Subtitle X § 303.13 authorizes the Commission to grant special exception relief as part of a PUD, upon demonstration of compliance with the special exception standards.

Special Exception Review Standards

7. The Commission is authorized to grant special exceptions where, in the judgment of the Commissions, the special exceptions:
 - a. Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;
 - b. Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and
 - c. Will meet such special conditions as may be specified in this title.
8. For the Application’s requested special exception relief from Subtitle C § 1500.3, there are no special conditions specified elsewhere in the Zoning Regulations.

Special Exception Criteria – Subtitle X § 901.2

9. The Commission concludes that the Applicant has satisfied the burden of proof under the general special exception criteria to permit nightclub, bar, cocktail lounge, and restaurant uses in the penthouse of Building C1 for the following reasons:
 - a. The penthouse would create a unique and enjoyable space at the top of the Union Market neighborhood and would not create any adverse effects;

- b. The uses are consistent with the goals of the penthouse regulations to generate an affordable housing contribution;
- c. The penthouse will comply with all height, bulk, and setback standards set forth in 11-C DCMR § 1500;
- d. Building C will be surrounded on all sides by streets or alleys, with no portion of the building directly abutting any residential properties. Building C1 is an office building without any residential tenants; and
- e. The majority of the patrons visiting the penthouse nightclub, bar, cocktail lounge, or restaurant uses will likely be residents or visitors of the Overall PUD and/or the Union Market neighborhood, such that no impacts will be created by additional vehicular trips driving to the Building C1 Site to access the penthouse. Building C1 also exceeds the minimum number of required on-site vehicle parking spaces, such that it will be able to accommodate the proposed bar/restaurant use.
- f. Therefore, the Commission concludes that the proposed penthouse uses will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to adversely affect the use of neighboring property.

“Great Weight” to the Recommendations of OP

- 10. The Commission is required to give “great weight” to the recommendation 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. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).)
- 11. The Commission finds persuasive OP’s analysis of the Application and recommendation that the Commission approve the Application and therefore concurs in that judgment.

“Great Weight” to the Written Report of the ANC

- 12. The Commission must give “great weight” to the issues and concerns raised in the written report of the affected ANC 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 Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).)

13. The Commission finds the ANC Report persuasive in its support of the Application and recommendation for approval and concurs in that judgement.

DECISION

In consideration of the record and the Findings of Fact and Conclusions of Law herein, the Zoning Commission concludes that the Applicant has satisfied its burden of proof and therefore **APPROVES** the Application for a modification of significance to permit nightclub, bar, cocktail lounge, and restaurant uses in the penthouse of Building C1.

VOTE (_____, 2020): _____ (Anthony J. Hood, Robert E. Miller, Peter G. May, Peter A. Shapiro, and Michael G. Turnbull to **APPROVE**.)

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 15-27__ shall become final and effective upon publication in the D.C. Register; that is, on _____.