

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION ORDER NO. 03-12X/03-13X
Z.C. Case No. 03-12X/03-13X
District of Columbia Housing Authority
(Five-Year Time Extension for PUD @ Squares 739, 767, and 768)
January 28, 2019

Pursuant to notice, at a public meeting of the Zoning Commission for the District of Columbia (the “Commission”) held on January 28, 2019, the Commission approved the request of the District of Columbia Housing Authority (“DCHA”) for a five-year time extension of the December 18, 2018 deadline to file applications for second-stage planned unit development (“PUD”) approval established by Z.C. Order No. 03-12/03-13 (the “Original Order”), as extended by Z.C. Order Nos. 03-12I/03-13I and 03-12R/03-13R, for Lots 800-802 in Square 739, Lots 44-47 in Square 767, and Lots 19-22 in Square 768¹ (collectively, the “Property”), together with a waiver of the time limitations in Subtitle Z §§ 705.3 and 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 Title 11 of the District of Columbia Municipal Regulations (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

1. By the Original Order, effective on October 8, 2004, the Commission granted Capper/Carrollsbury Venture, LLC, DCHA, and Square 769, LLC (collectively, the “Applicant”) preliminary PUD approval for the Property, together with other properties located in the southeast quadrant of Washington, D.C. (collectively with the Property, the “PUD Site”).
2. The parties to the Original Order were the Applicant and Advisory Neighborhood Commissions (“ANC”) 6D and 6B. (Original Order, Finding of Fact 5.)
3. The Original Order required the filing of the first second-stage PUD application for those portions of the PUD Site for which the Original Order only granted preliminary PUD approval by April 8, 2006 and all remaining second-stage PUD applications by October 8, 2008. (Condition 27.)

¹ Although the Application included Lot 77 in Square 882, this lot is subject to the second-stage PUD approval of Z.C. Order No. 03-12G/03-13G, as extended by Z.C. Order Nos. 03-12L/03-13L and 03-12P/03-13P, and so is not properly part of this approval.

4. The Applicant filed its first second-stage PUD application in Z.C. Case 03-12A/03-13A on April 29, 2005, prior to the April 8, 2006 deadline of the Original Order.
5. On June 26, 2009, in Z.C. Order No. 03-12I/03-13I, the Commission extended the October 8, 2008 deadline to file second-stage PUD applications for Squares 739, 767, and 768 to December 31, 2013.
6. On April 24, 2015, in Z.C. Order No. 03-12R/03-13R, the Commission further extended the December 31, 2013 deadline to file second-stage PUD applications for Squares 739, 767, and 768 to December 18, 2018.

The Application

7. On December 18, 2018, prior to the expiration of Z.C. Order No. 03-12R/03-13R, DCHA filed an application for a five-year extension of the December 18, 2018 deadline to file a second-stage PUD application for the Property.
8. The Application also requested a waiver of Subtitle Z § 705.5's limit of two extensions and Subtitle Z § 705.3's maximum two-year term for the first extension and maximum one-year term for the second extension.
9. The Application included a Certificate of Service attesting to service on all parties to the Original Order, including ANCs 6B and 6D, on December 18, 2018. (Exhibit ["Ex."] 2.)
10. 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.
11. The Application justified the requested extension due to the inability to obtain project financing, in particular that:
 - a. The HOPE VI funding for the affordable components of the PUD was depleted with the development of the first phase of townhomes in 2008;
 - b. The Property lost the designation as a *Difficult Development Area* for the purposes of Low Income Housing Tax Credit Investment, which eliminated a 30% equity boost previously available to incentivize investment in the Property; and
 - c. DCHA's commitment to restoring all 707 original public housing units that were originally on site, and to returning as many original residents of the Arthur Capper/Carrollsborg public housing to the PUD developed partially on the site of these residents' prior public housing units, creates complications for the financing for the affordable units which, due to operating subsidies and reduced rents, do not support debt.

12. The Application asserted that good cause exists to grant a waiver to allow DCHA additional time to fulfill the housing, economic and social goals sought to be achieved by the PUD approved by the Original Order, including the creation of sorely needed affordable housing.
13. The Office of Planning (“OP”) submitted a January 18, 2019 report recommending approval of the Application (the “OP Report”). (Ex. 6.) The OP Report concluded that DCHA satisfied the relevant standards of Subtitle Z § 705.2 and that the granting of the waiver from Subtitle Z §§ 705.3 and 705.5 was also appropriate (although the OP Report did not specifically refer to Subtitle Z § 705.3, it did refer to its limits on the time periods of extensions). In doing so, OP noted the PUD would create affordable housing, including for the former residents of the Capper-Carrollsborg public housing complex, and that denying the requested extension, or approving an extension less than the requested five years, would likely further delay completion of these public policy goals.
14. Although neither ANC 6B or ANC 6D filed a report in this case, each ANC provided letters of support in a related case (Z.C. Case No. 03-12W/03-13W, and, with respect to ANC 6D, Z.C. Case No. 07-08C), wherein DCHA has sought approval to extend the temporary surface parking lot use for an additional five-year period. (Ex. 1D.)

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 DCHA timely filed the Application on December 18, 2018, the deadline for filing a second-stage PUD application that the time extension 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 DCHA has satisfied Subtitle Z § 705.2(a) by demonstrating that it had served all parties to the Original Order – DCHA, Capper/Carrollsborg Venture, LLC, Square 769 LLC, and ANCs 6B and 6D – and that all were given 30 days to respond from the December 18, 2018 date of service. Although none of the parties filed a response to the record, the Commission notes that both ANC 6B and 6D had filed a letter of support in one or more related cases wherein the Applicant has sought approval to utilize portions of the Property for surface parking for a period of five years.
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 DCHA has diligently pursued the financing of the development of the Property and has not been able to move forward due to market conditions outside of its control, including the depletion of HOPE VI funding and removal of the Difficult Development Area designation related to LIHTC funding.
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 Applicant demonstrated good cause to waive (i) Subtitle Z § 705.5's maximum of two extensions and (ii) Subtitle Z § 705.3's maximum one-year extension period for the second extension because DCHA has continued to develop other properties subject to the PUD approved by the Original Order despite the financing setbacks and granting the extension would allow the approved development to occur on the Property and so achieve the housing, economic development, and social goals, including retaining affordable housing and the return of Capper-Carrollsborg's remaining former residents on the Property. The Commission determined that granting the waiver will not prejudice the rights of any party nor is it otherwise prohibited by law.

“Great Weight” to the Recommendations of OP

11. D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Z § 405.8 require the Commission to give “great weight” to the recommendations contained in the OP Report. The Commission found OP's recommendations to waive the limits on time periods for extensions and to approve the Application persuasive and concurred in that judgment.

“Great Weight” to the Written Report of the ANC

12. D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.) and Subtitle Z §406.2 require the Commission to give “great weight” to the issues and concerns contained in the written report of an affected ANC – in this case, ANCs 6B and 6D. Both ANCs did file written reports supporting DCHA’s related applications for temporary uses of the Property before the Commission and were provided the opportunity to file a response to the Application. However, as neither ANC submitted a written report in this case, the Commission has nothing to which it can give “great weight.”


DECISION

At its public meeting on January 28, 2019, in consideration of the case record and Findings of Fact and Conclusions of Law herein, upon the motion of Commissioner Turnbull, as seconded by Commissioner Shapiro, the Zoning Commission for the District of Columbia took **FINAL ACTION** to waive Subtitle Z §§ 705.3 and 705.5 and to **APPROVE** the Application to extend the deadline for the second-stage PUD applications for Squares 739, 767, and 768, as originally established in Z.C. Order No. 03-12/03-13 and as previously extended by Z.C. Order Nos. 03-12I/03-13I and 03-12R/03-13R, by five years to December 18, 2023, by a vote of **4-0-1** (Anthony J. Hood, Peter G. May, Peter A. Shapiro, and Michael G. Turnbull to approve; Robert E. Miller, not present, not voting).


In accordance with the provisions of Subtitle Z § 604.9 of the Zoning Regulations, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on August 30, 2019.

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