

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 06-04G
Z.C. CASE NO. 06-04G
Florida & Q Street, LLC
(PUD Time Extension @ Square 3100, Lot 48)
June 11, 2018

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (“Commission”) was held on June 11, 2018. At the meeting, the Commission approved a request from Florida & Q Street, LLC (“Applicant”) for a one-year extension of the time period in which to begin construction of the approved planned unit development (“PUD”) located at 1600 North Capitol Street, N.W. (Square 3100, Lot 48) (“Property”).¹ The Commission considered the application pursuant to Subtitle Z, Chapter 7 of the District of Columbia Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations (“DCMR”).

FINDINGS OF FACT

1. Pursuant to Z.C. Order No. 06-04, having an effective date of June 15, 2007, the Commission approved a consolidated PUD and a related Zoning Map amendment from the C-2-A Zone District to the C-2-B Zone District to enable the development of a new mixed-use building at the Property.
2. Pursuant to Z.C. Order Nos. 06-04C and 06-04E, the Commission approved modifications to the PUD, and pursuant to Z.C. Order Nos. 06-04A, 06-04B, and 06-04D, the Commission approved extensions for the time in which the Applicant was required to file a building permit application for the PUD. Pursuant to Z.C. Order No. 06-04F, the Commission approved an extension for the time in which the Applicant was required to begin construction of the project, such that construction was required to begin no later than June 15, 2018.
3. The approved PUD, as modified by Z.C. Order Nos. 06-04C and 06-04E, involves construction of a mixed-use development having a total gross floor area of approximately 85,428 square feet. Approximately 84,306 square feet of the building are devoted to residential use, providing between 85 and 95 dwelling units, and approximately 4,998

¹ The Applicant’s request was for a two-year extension of the time period in which to begin construction of the approved PUD; however, following discussions with Advisory Neighborhood Commission (“ANC”) 5E, the Bloomingdale Civic Association, and the Office of Planning, the Applicant agreed to the one-year extension.

square feet of floor area are devoted to retail use in the cellar. The approved PUD has a maximum density of 4.5 floor area ratio ("FAR") and a maximum building height of 72'-4.5" not including penthouses. The approved PUD includes 41 parking spaces located on one level of underground parking accessed from Florida Avenue.

4. The Applicant filed a building permit application for the PUD on June 11, 2015, which vested the PUD extension approved in Z.C. Order No. 06-04D. However, due to the extensive history of environmental contamination at the Property, the Applicant's recent assumption of "Responsible Party" status for clean-up activities, and the outstanding environmental approvals needed, the Applicant was unable to begin construction of the PUD by June 15, 2018.
5. On April 30, 2018, the Applicant filed a request for another two-year extension for the PUD, such construction would be required to begin no later than June 15, 2020. In submitting the application, the Applicant requested a waiver from 11-Z DCMR § 705.5, which provides that an "applicant with an approved PUD may request no more than two (2) extensions. The second request for an extension may be approved for no more than one (1) year." As set forth below, granting the waiver pursuant to 11-Z DCMR § 705.5 does not prejudice the rights of any other party.
6. The Applicant's extension request was supported by evidence describing the Property's history of gasoline station use and resultant environmental contamination that is beyond the Applicant's reasonable control. The Applicant submitted the following documentation in support of its case that it could not reasonably comply with the time limits set forth in Z.C. Order No. 06-04F:
 - a. Until 2003, the Property was owned and operated by Exxon Mobil ("Exxon") as a gas station. On July 28, 2003, Exxon sold the Property to Five Q, LLC. At the time of the sale, Exxon remained the "Responsible Party" for an ongoing spill case (LUST Case No. 94-016), which identified Exxon as being responsible for the cleanup of the Property and achieving a "No Further Action" ("NFA") designation by the District Department of Energy and the Environment ("DOEE");
 - b. On January 18, 2011, DOEE issued an NFA letter to Exxon, which stated that no further remedial action was necessary unless the residually contaminated soil was removed, disturbed, or excavated, in which case Exxon would be required to report to DOEE for further direction and guidance prior to commencement of work. The letter indicated that Exxon remained the Responsible Party for any previously incurred or future liability due to residual contamination left in place;
 - c. On June 16, 2016, the Applicant purchased the Property from Five Q, LLC. Recognizing that the NFA was conditional based on the soil staying in place, the Applicant decided to enter into the Voluntary Remediation Action Program ("VRAP") with DOEE to implement a Voluntary Remedial Action Plan ("VRAP Plan") to remediate the Property using a risk-based approach for the development

of a residential building, and to assume Responsible Party status for all historic contamination at the Property. Although it is highly unusual for a private property owner to take on the Responsible Party status for a property, the Applicant saw no other way but to take this action so that the PUD could move forward as approved;

- d. On March 12, 2017, the Applicant met with DOEE to discuss the VRAP process. DOEE was receptive to the idea and appreciated the Applicant's offer to assume Responsible Party status;
 - e. On May 16, 2017, pursuant to DOEE's guidance, the Applicant submitted a VRAP application to DOEE for redevelopment of the Property. The VRAP application confirmed that the Applicant would be required to perform assessment and remediation work and take corrective action in place of the previous Responsible Party;
 - f. By letter dated May 30, 2017, DOEE approved the Applicant's VRAP application and granted Responsible Party status to the Applicant, contingent upon submission of (i) a Certificate of Financial Responsibility; (ii) a detailed VRAP Plan explaining the proposed technologies that would be used to remediate residential contamination to levels that are protective of human health and the environment; (iii) a site-specific quality assurance/quality control plan for the activities to be carried out during implementation of the remedial approach; and (iv) a site-specific Health and Safety Plan addressing federal Occupational Safety and Health Administration regulations;
 - g. On June 26, 2017, the Applicant submitted to DOEE all of the documents requested in DOEE's May 30, 2017 letter, including the VRAP Plan;
 - h. On August 17, 2017, DOEE requested revisions to the VRAP Plan (clarify that monitoring well construction and locations will be proposed to DOEE before installation; clarify that any over excavation will be proposed to DOEE before completion; and change the attainment sampling from two quarters to four quarters), and on August 22, 2017, the Applicant submitted the revised VRAP Plan to DOEE; and
 - i. On September 6, 2017, DOEE approved the VRAP Plan and the transfer of Responsible Party status for the Property from Exxon to the Applicant.
7. In its application materials, the Applicant indicated that finalizing the above stated items would take approximately six to 12 months, as they would require field work and DOEE approval. The application also stated that once the items listed above were complete, that an additional six to 12 months would be needed to update the foundation and construction plans and work with the District to obtain building permits that take into account the VRAP Plan

approved after the original building permit application was filed. The specific VRAP Plan activities are as follows:

- a. Prior to implementation of the VRAP Plan, pre-excavation soil borings are required to characterize soils for disposal within the limits of the building foundation and to vertically delineate soil impacts for the remedial excavation. To do so, the Property needs to be divided into a 50-foot by 50-foot grid with one soil boring advanced in each grid section. Soil samples will be collected from five feet below grade to the boring termination depths of approximately 30 to 35 feet below grade. The remedial excavation design will be determined following evaluation of pre-excavation soil boring data and will be submitted to DOEE for approval prior to completion of work;
 - b. Prior to implementation of the VRAP Plan, a project-specific vapor barrier needs to be designed and approved by DOEE. The results from the pre-exaction soil samples will be utilized while selecting the appropriate vapor barrier design; and
 - c. Prior to implementation of the VRAP Plan, a project-specific sub-slab depressurization system needs to be designed and approved by DOEE.
8. Other than the Applicant, the only party to this case was Advisory Neighborhood Commission (“ANC”) 5E. As indicated on the Certificate of Service, the Applicant served the PUD extension request on ANC 5E on April 30, 2018. (Exhibit (“Ex.”) 1.)
9. ANC 5E submitted a resolution to the record, indicating that at its duly noticed public meeting of June 5, 2018, at which a quorum of Commissioners was present, ANC 5E voted 7-0-0 to support a one-year extension, rather than the two year requested, conditional upon the Applicant fulfilling its community benefits package within 90 days of the approved extension. (Ex. 5.) The ANC’s resolution indicated that the Applicant’s legal representative had informed the Single Member Commissioner for the area in which the Property is located that the remediation work can be accomplished in such a manner as to permit construction to begin by June 15, 2019.
10. The Office of Planning (“OP”) submitted a report to the record, dated June 1, 2018, recommending that the Commission approve a one-year extension and the waiver from 11-Z DCMR § 705.5. (Ex. 4.) OP indicated that the Applicant demonstrated good cause for the extension request due to environmental contamination based on the Property’s former gas station use, that prevents the Applicant from beginning construction at this time. OP also stated its support for the Applicant’s work with DOEE on remediation and environmental measures at the Property. (See Ex. 4, p. 3.)
11. The Applicant agreed to a one-year extension at the Commission’s June 11, 2018 public meeting.

12. Because the Applicant demonstrated good cause with substantial evidence pursuant to 11-Z DCMR § 705.2(c) of the Zoning Regulations, the Commission finds that a one-year extension to begin construction of the approved PUD should be granted.

CONCLUSIONS OF LAW

1. Pursuant to 11-Z DCMR § 705.2, the Commission may extend the validity of a PUD for good cause shown upon a request made before the expiration of the approval, documenting the following:
 - 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 facts 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 one or more of the following criteria:
 - i. 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;
 - ii. An inability to secure all required governmental agency approvals for a development by the expiration date of the order because of delays in the governmental agency approval process that are beyond the Applicant's reasonable control; or
 - iii. 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.
2. The Commission concludes that the Applicant complied with the notice requirements of 11-Z DCMR § 702.2(a) by serving all parties with a copy of the application and allowing them 30 days to respond.
3. The Commission concludes there has been no substantial change in any material facts that would undermine the Commission's justification for approving the original PUD.
4. The Commission also concludes that the Applicant presented substantial evidence of good cause for the extension based on the criteria established by 11-Z DCMR § 705.2(c). Specifically, the Applicant provided substantial evidence that there are significant

environmental impediments at the Property that are beyond the Applicant's reasonable control and which prevent the Applicant from proceeding with construction at this time.

5. The Commission waives the requirements of 11-Z DCMR § 705.5, which provides that an applicant may request no more than two PUD extensions. In this case, the original PUD was approved under the 1958 Zoning Regulations, which did not limit the permitted number of extensions for a PUD. However, the Applicant is unable to move forward with beginning construction by June 15, 2018, due to the existence of environmental contamination of the Property, which is still being evaluated and remediated, and which process must be complete before construction can occur. Also, while environmental remediation is occurring, the Applicant cannot reasonably obtain financing for the project. Thus, despite the Applicant's diligent, good faith efforts to expedite the environmental review process as quickly as possible, it has been unable to secure all required governmental approvals that are required to begin construction. Therefore, the Commission finds it reasonable to waive the requirements of 11-Z DCMR § 705.5 in granting this PUD extension request and that waiving the requirements will not prejudice the rights of any other party.
6. 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 the issues and concerns stated in an affected ANC's written report. ANC 5E, as the affected ANC, received notice of the request and was given 30 days to respond, excluding Saturday, Sundays, and holidays. As noted, the ANC's resolution expressed concern over granting a two-year extension given the Applicant's verbal indication that a one-year period would suffice. The Applicant agreed to a one-year extension, which is what the Commission voted to grant.
7. 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 (2001)), to give great weight to OP recommendations. The Commission agreed with OP's recommendation that the Commission approve a one-year extension to commence construction of the approved PUD.
8. 11-Z DCMR § 705.7 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 11-Z DCMR § 705.2. 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 11-Z DCMR § 705.2.
9. The Commission concludes that its decision to extend the validity of the PUD for one additional year is in the best interest of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations.

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 a one-year extension of the time in which to begin construction of the approved PUD located at 1600 North Capitol Street, N.W. (Square 3100, Lot 48), such that construction must begin by June 15, 2019.

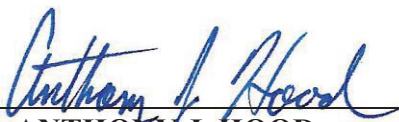
The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., ("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 June 11, 2018, upon the motion of Chairman Hood, as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **APPROVE** the application for a one-year extension at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Peter G. May, and Michael G. Turnbull to approve; Peter Shapiro not present, not voting).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on August 3, 2018.

BY THE 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**