

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 08-07D
Z.C. CASE NO. 08-07D
Four Points Development, LLC
(PUD Time Extension @ Square 5785, Lot 839 and Part of Lot 906)
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 Four Points Development, LLC (“Applicant”) for a two-year extension of the time in which to begin construction of the approved building (“Building 1”) located at Lot 839 and part of Lot 906 in Square 5785 (“Property”). 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. 08-07, having an effective date of October 25, 2013, the Commission approved applications for a first-stage planned unit development (“PUD”) and a related Zoning Map amendment from the C-2-A and C-M-1 Zone Districts to the C-3-A Zone District for Square 5772, Lots 827, 829, 831, 880, 984, 1017, and 1019; Square 5783, Lots 829 and 1018; Square 5784, Lots 898, 899, and 900; and Square 5785, Lots 839 and 906 (collectively, the “PUD Site”).¹
2. Pursuant to Z.C. Order No. 08-07A, having an effective date of May 22, 2015, the Commission approved a second-stage PUD and modifications to the approved first-stage PUD to allow development of Building 1 with a six-story residential building with approximately 71 residential units, 80% of which would be set aside for households earning up to 60% of the area median income (“AMI”).
3. Decision No. C.1. of Z.C. Order No. 08-07A required the Applicant to file a building permit application for Building 1 no later than May 22, 2017, with construction to begin no later than May 22, 2018. The Applicant filed a building permit application for Building 1 on June 15, 2015, thus meeting the first condition in Decision No. C.1.

¹ The original PUD was approved under the 1958 Zoning Regulations. On September 6, 2016, the provisions of ZR58 were repealed and replaced with the 2016 Zoning Regulations. Under the 2016 Zoning Regulations, the approved C-3-C Zone District converts to the MU-9 zone, although PUD related map amendments granted prior to September 6, 2016 are unaffected.

However, due to unforeseen litigation regarding the PUD, the Applicant was unable to begin construction by May 22, 2018.

4. On May 1, 2018, the Applicant filed a request for a two-year extension of the time to begin construction of Building 1, such that if approved construction must begin no later than May 22, 2020.
5. The Applicant's request for a two-year time extension was supported by evidence describing the Applicant's actions following submission of the building permit application to move forward with development of Building 1. The Applicant submitted the following documentation in support of its case that it could not reasonably comply with the time limit set forth in Z.C. Order No. 08-07A to commence construction:
 - a. Following submission of the building permit application, the Applicant undertook the following actions to move forward with development of Building 1:
 - i. On July 16, 2015, the Applicant participated in a preliminary design review meeting ("PDRM") meeting with DDOT;
 - ii. On August 14, 2015, the Applicant filed a Sheeting and Shoring permit application with the Department of Consumer and Regulatory Affairs ("DCRA") (Permit No. SH1500070); on August 27, 2015, the Applicant filed a Sheeting and Shoring permit application with DDOT (Tracking No. 114354); and on August 31, 2015, the Applicant filed a Sheeting and Shoring permit application with DC Water (Tracking No. 15-329563);
 - iii. On August 28, 2015, the Applicant filed an application to DC Water for Large Water Service (Tracking No. 15-329571);
 - iv. On November 25, 2015, the Applicant filed a tree removal permit to the District Department of Transportation ("DDOT"), which was approved on February 10, 2016 (Permit No. PA119720);
 - v. On December 1, 2015, the Applicant paid \$13,540.53 for the issuance of the building permit;
 - vi. On December 18, 2015, the Applicant filed a public space permit application with DDOT, which was approved with conditions on April 28, 2016 (Tracking No. 120696); and
 - vii. Throughout this process, the Applicant worked closely with District agencies and received approvals on the building permit application and the DCRA sheeting and shoring permit application from all agencies other than DDOT and DC Water. The DDOT Sheeting and Shoring permit has been fully approved pending payment; and

- b. During this time, the Applicant also applied for and secured a variety of debt and equity financing sources for Building 1 as follows:
 - i. On November 1, 2014, the Applicant submitted a request to the DC Housing Finance Agency (“DCHFA”) for acquisition and new construction financing for Building 1, and on March 24, 2015, DCHFA issued a resolution confirming the Applicant’s eligibility to receive Low Income Housing Tax Credits, and recommending the issuance of both taxable and tax exempt multifamily housing mortgage revenue bonds in an amount up to \$14,000,000.00 for the project; and
 - ii. On June 2, 2014, the Applicant submitted a funding proposal to the DC Department of Housing and Community Development (“DHCD”), and on October 8, 2014, the Applicant received a letter from DHCD indicating that funding had been reserved for the development of Building 1, with the final funding recommendation to be determined at a later date.
- 6. Despite the Applicant’s diligent efforts to move forward with development of Building 1, in the fall of 2015 the Applicant recognized the existence of a disagreement with its development partner regarding the proposed phasing and uses for the PUD Site, including for the Property. Although the Applicant’s initial dispute was resolved through a First Amendment to Option Agreement, dated September 21, 2015, disputes reemerged shortly thereafter and were followed by several months of negotiation.
- 7. On January 13, 2016, the Applicant filed a complaint against its development partner in the Superior Court of the District of Columbia. Following almost a year of litigation, on October 18, 2016, the case was ultimately settled and dismissed.
- 8. As a result of the litigation that was unforeseen at the time that the second-stage PUD for Building 1 was approved, the Applicant had to suspend all development work on Building 1 for almost a year, which remained suspended due to a subsequent related dispute, which was finally resolved and memorialized in an amendment to Four Points’ Option Agreement on September 18, 2017. Since that time, the Applicant focused development efforts on preparing a second-stage PUD application for Square 5784, Lots 899, 900, and 1101 (“Building 4”), which it filed with the Commission on March 9, 2018. (*See* Z.C. Case No. 08-07C.)
- 9. In its application materials, the Applicant stated that following settlement of the litigation and the remaining disagreements, the Applicant was finally able to continue to pursue development of Building 1. However, the Applicant indicated that there are a variety of additional actions and approvals that need to occur prior to beginning construction of Building 1, including the following:

- a. The Applicant must reengage its permit expediter to reinstate all permit applications that were previously filed, reviewed, and/or granted for Building 1, but have since lapsed;
 - b. The Applicant must resubmit a proposal, review bids, and reengage a new general contractor for development of Building 1;
 - c. The Applicant must re-secure all financing that was lost during the litigation process, since the debt and equity sources previously secured for Building 1 are no longer valid and will need to be reengaged. For example, as noted in DHCD's October 8, 2014 letter filed in the case record, failure to submit all requested items can result in the withdrawal of a funding reservation, and that being the case, awardees are encouraged to resubmit their applications through future DHCD requests for proposals; and
 - d. Throughout the litigation process and subsequent renegotiations, the Applicant continued to actively solicit financing for the project (e.g. letter dated September 2, 2016, to Enterprise Community Investment outlining the terms and conditions under which Enterprise could make an equity investment in Building 1 (Exhibit M to the Affidavit, and letter dated February 24, 2017, from Bellwether Enterprise submitting a non-binding debt financing proposal for Building 1).
10. The Applicant indicated that it has begun to collect materials to resume the development process but that another 24 months are necessary to complete the process and obtain all necessary permits to begin construction of Building 1. As a result of this lengthy process, prolonged by unanticipated litigation and additional time needed to renegotiate various terms set forth in the Applicant's Option Agreement, the Applicant is unable to begin construction of Building 1 within the time limits set forth in Z.C. Order No. 08-07A.
 11. Other than the Applicant, the only party to this case was Advisory Neighborhood Commission ("ANC") 8A. As indicated on the Certificate of Service, the Applicant served the PUD extension request on ANC 8A on May 2, 2018. (Ex. 1.) The ANC did not submit a resolution on the application to the record.
 12. The Office of Planning ("OP") submitted a report to the record, dated June 1, 2018 recommending that the Commission approve the requested two-year extension. (Ex. 4.) OP indicated that the Applicant demonstrated good cause for the extension request due to litigation between the development partners that prevented the Applicant from moving forward with construction of Building 1.
 13. Because the Applicant demonstrated good cause with substantial evidence pursuant to 11-Z DCMR § 705.2(c), the Commission finds that the request for the two-year time extension to begin construction of Building 1 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 due to litigation that commenced following submission of the building permit application, the Applicant had to suspend all development work on Building 1 for almost a year, which remained suspended due to a subsequent related dispute. The litigation was beyond the Applicant's reasonable control and prevented the Applicant from proceeding with construction of Building 1.

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 affected ANC's written issues and concerns. In this case, ANC 8A did not submit a written report with respect to the application, and therefore there is nothing to give great weight to.

5. 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 agrees with OP that approval of the requested two-year time extension is warranted.
6. Subsection 705.7 of Subtitle Z provides that the Commission must hold a public hearing on a request for an extension of the validity of a PUD 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.
7. The Commission concludes that its decision 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 the application for a two-year extension of the time in which to begin construction of Building 1, located at Lot 839 and part of Lot 906 in Square 5785 such that construction must begin no later than May 22, 2020.

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 identity 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.


At its public meeting of June 11, 2018, upon the motion of Commissioner Turnbull as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **APPROVE** the

application by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Peter G. May, and Michael G. Turnbull to approve; Peter A. 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 October 12, 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