

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Zoning Commission**



**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
ZONING COMMISSION ORDER NO. 05-36J  
Z.C. Case No. 05-36J  
Toll DC II, LP  
(One-Year PUD Time Extension @ Square 749)  
September 15, 2014**

Pursuant to notice, the Zoning Commission for the District of Columbia (“Commission”) held a public meeting on September 15, 2014. At the meeting, the Commission approved a request from Toll DC II, LP (“Applicant”) for a one-year time extension to a previously approved planned unit development (“PUD”) and Zoning Map amendment for Lots 826 and 827 in Square 749, which is bounded by 2<sup>nd</sup>, 3<sup>rd</sup>, K, and L Streets, N.E. (“Property”), pursuant to Chapter 24 and 30 of the District of Columbia Zoning Regulations (11 DCMR).

**FINDINGS OF FACT**

1. By Z.C. Order No. 05-36, effective October 10, 2006, the Commission granted first-stage PUD approval to permit the construction of a two-phase apartment development around an outdoor central plaza, with a total of approximately 702 dwelling units, including 78 units restricted for affordable housing, ground-floor retail, and daycare uses, with a total gross floor area of 850,000 square feet on a site measuring approximately 101,000 square feet. The two phases of the Applicant's overall project are being constructed as a single building for zoning purposes, with the second phase being constructed as an addition to the first phase. At the same time that it granted first-stage approval for the overall project, the Commission granted consolidated approval for the Applicant to move forward with the first phase of the total project. Construction of this first phase was timely completed.
2. By Z.C. Order No. 05-36A, effective November 14, 2008, the Commission granted second-stage approval for the project's second phase, consisting of 500 dwelling units (including 50 dedicated affordable housing units) and approximately 14,000 square feet of retail uses to be constructed on the western portion of the Property. The resulting density of the overall project is 7.49 floor area ratio (“FAR”), and the approved height is 121 feet.
3. By Z.C. Order No. 05-36B, also with an effective date of November 14, 2008, the Commission approved a minor modification to the first phase of the PUD, to restrict

access, for safety purposes, to a small portion of the outdoor plaza to project residents only.

4. By Z.C. Order No. 05-36C, with an effective date of March 5, 2010, the Commission approved a minor modification to the PUD to modify the affordable housing proffer slightly to allow prospective tenants to utilize more than 30% of household expenses for payment of rent in order to accommodate arts professionals.
5. By Z.C. Order No. 05-36D, with an effective date of May 27, 2011, the Commission extended the validity of the second-stage PUD approval granted in Z.C. Order No. 05-36A to November 14, 2012, by which time application must be made for a building permit, with construction to commence by November 14, 2013.
6. By Z.C. Order No. 05-36E, with an effective date of May 27, 2011, the Commission approved the Applicant's phasing plan to allow the second phase of the development to be constructed in two sub-phases (Phase II-A to include approximately 244 dwelling units, and Phase II-B to include approximately 256 dwelling units), with timing such that in order for the PUD to remain valid, a building permit application for Phase II-A must be filed by November 14, 2012, and construction commence by November 14, 2013. In order for approval for Phase II-B to remain valid, a permit application must be filed not later than two years following the date of the issuance of a final certificate of occupancy for the residential portion of Phase II-A, with construction to commence within one year thereafter.
7. By Z.C. Order No. 05-36F, with an effective date of October 5, 2012, the Commission approved a two-year extension of the Phase II PUD approval such that in order for the PUD to remain valid, a building permit application for Phase II-A must be filed by November 14, 2014, and construction commence by November 14, 2015, and in order for approval for Phase II-B to remain valid, a permit application must be filed not later than two years following the date of the issuance of a final certificate of occupancy for the residential portion of Phase II-A, with construction to commence within one year thereafter.
8. By letter dated August 11, 2014, the Applicant filed a request to extend the validity of the PUD approval for a period of one year, such that a building permit application for Phase II-A of the development must be filed no later than November 14, 2015, and construction must start no later than November 14, 2016, and in order for approval for Phase II-B to remain valid, a permit application must be filed not later than two years following the date of the issuance of a final certificate of occupancy for the residential portion of Phase II-A, with construction to commence within one year thereafter.

9. The August 11, 2014 letter indicated that the basis for extension of the validity of the PUD is based on factors beyond the Applicant's reasonable control that prevent the Applicant from complying with the time limits of the PUD. In April 2013, the Applicant purchased the Property from the longstanding owner, K Street Developers, LLC. In the months following acquisition of the Property, the Applicant undertook an extensive study of the PUD designs for Phase II as approved by the Commission in order to move the project forward to construction. On April 7, 2014, the Applicant filed an application to modify the PUD as it pertains to Phase II only. At its June 9, 2014 public meeting, the Commission voted to set down the application for a public hearing while offering a number of suggestions for further study and refinement by the Applicant of the proposed revised Phase II designs. The Applicant addressed those comments in its prehearing package of materials submitted to the Commission on July 25, 2014. The Applicant was recently advised that a public hearing on the modification application (Z.C. Case No. 05-36I) is scheduled for October 30, 2014, which is two weeks prior to the current expiration date of the PUD. This timeframe will effectively prevent the Applicant from satisfying the condition of Z.C. Order No. 05-36F, namely, to file a building permit application by November 14, 2014. As a result, the Applicant is requesting a one-year time extension to allow opportunity for the PUD modification application to be heard and decided by the Commission, for the Applicant to finalize its construction drawings consistent with approval by the Commission, and to move forward to permit.
10. The District of Columbia Office of Zoning referred this matter to the Office of Planning ("OP") for analysis and recommendation. By memorandum dated September 5, 2014, OP stated its support for approval of the requested time extension.
11. In compliance with 11 DCMR § 2408.10(a), the Applicant served Advisory Neighborhood Commission ("ANC") 6C with a copy of the application at least 30 days prior to the hearing.

### **CONCLUSIONS OF LAW**

The Commission may extend the validity of a PUD for good cause shown upon a request made before the expiration of the approval, provided: (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 fact 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 that there is good cause for such extension as provided in § 2408.11. (11 DCMR § 2408.11). Subsection 2408.11 provides the following criteria for good cause shown: (a) an inability to obtain sufficient project financing for the PUD, 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; (b) an inability to secure all required governmental agency approvals for a PUD 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 (c) the existence of pending litigation or such other condition or factor beyond the applicant's reasonable control which renders the applicant unable to comply with the time limits of the PUD order.

The Commission concludes that the application complied with the notice requirements of 11 DCMR § 2408.10(a) by serving ANC 6C with a copy of the application and allowing 30 days to respond.

The Commission concludes that there has been no substantial change in any material fact that would undermine the Commission's justification for approving the original PUD.

The Commission further concludes that the Applicant presented substantial evidence of good cause for the extension based on the criteria established by 11 DCMR § 2408.11(c). Specifically, the pending PUD modification application (Z.C. Case No. 05-36I) is not scheduled to be heard by the Commission until two weeks prior to the current expiration date of the PUD. This timeframe prevents the Applicant from being able to comply with the time limits of the PUD order, finalize its construction drawings consistent with such approval, and move forward to permit.

Subsection 2408.12 of the Zoning Regulations provides that the Commission shall 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 § 2408.11. The hearing shall be limited to the specific and relevant evidentiary issues in dispute. The Commission concludes that there is no material factual conflict in issue and that consideration of the request for extension is appropriate without need for a public hearing.

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.

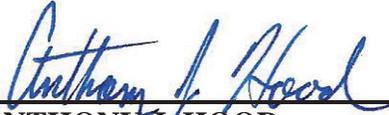
### **DECISION**

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 request for a one-year time extension of an approved PUD for Lots 826 and 827 in Square 749. In order for this PUD to remain valid, a building permit application for Phase II-A must be filed by November 14, 2015, and construction must start no later than November 14, 2016. In order for approval of Phase II-B to remain valid, a permit application must be filed not later than two years following the date of the issuance of a final certificate of occupancy for the residential portion of Phase II-A, with construction to commence within one year thereafter.

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 September 15, 2014, upon the motion of Vice Chairman Cohen, and as seconded by Commissioner Turnbull, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, and Michael J. Turnbull to adopt; Peter G. May to adopt by absentee ballot).

In accordance with the provisions of § 3028.8 of the Zoning Regulations, this Order shall become final and effective upon publication in the *D.C. Register* on October 24, 2014.

  
\_\_\_\_\_  
**ANTHONY J. HOOD**  
CHAIRMAN  
ZONING COMMISSION

  
\_\_\_\_\_  
**SARA A. BARDIN**  
DIRECTOR  
OFFICE OF ZONING