

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 11-13A
Z.C. Case No. 11-13A
Trammel Crow Company
(PUD Time Extension @ Square 1546, Lot 301)
January 12, 2015

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (“Commission”) was held on January 12, 2015. At that meeting, the Commission approved the request of Trammel Crow Company (“Applicant”) for a two-year time extension in which to file a building permit application for the consolidated planned unit development (“PUD”) and Zoning Map Amendment application approved by Zoning Commission Order No. 11-13. The property that is the subject of this application is located at 222 M Street, S.W. (Square 546, Lot 301) (the “Property”). The time extension request was made pursuant to § 2408.10 of the Zoning Regulations.

FINDINGS OF FACT

1. The consolidated PUD project approved in Z.C. Order No. 11-13, which became final and effective on July 6, 2012, authorized the construction of a mixed-use residential and church building. Z.C. Order No. 11-13 also authorized the rezoning of the Property from the R-3 Zone District to the CR Zone District.
2. In accordance with § 2408.8, Condition No. 17 of Z.C. Order No. 11-13 required that plans for a building permit be filed within one year after its effective date, *i.e.*, on July 7, 2014. Pursuant to § 2408.9, construction was to begin one year thereafter.
3. On August 3, 2012, two party-opponents in Z.C. Case No. 11-13 filed an appeal of Z.C. Order No. 11-13 with the D.C. Court of Appeals. Another party-opponent filed an appeal on August 6, 2012.
4. Subsection 2408.13 of the PUD regulations provides that in the event an appeal is filed the time limitations of §§ 2408.8 and 2408.9 shall run from the decision date of the court’s final determination of the appeal.
5. The Court of Appeals ultimately dismissed all of the cases and issued a final order dismissing the last case on January 15, 2013. (Exhibit [“Ex.”] 1C).
6. Therefore, pursuant to § 2408.13, the Applicant had until January 14, 2015 to file an application for a building permit and until January 14, 2016 to commence construction.

7. The Applicant has been unable to secure all necessary governmental approvals because of delays beyond the Applicant's reasonable control. The confluence of the appeals of Z.C. Order No. 11-13 and a delay in the completion of the 17th Street levee (flood barrier), which affects the flood zone categorization for the Property, result in the Applicant's inability to proceed with the Project within the valid time period of Z.C. Order No. 11-13. (Ex. 1K.)
8. The Property is currently within the Zone A Flood Hazard Area on the Federal Emergency Management Agency ("FEMA") Flood Insurance Rate Map ("FIRM"). New buildings on properties within Zone A have higher flood protection development standards than for properties outside of Zone A. FEMA will amend the FIRM as conditions change when properties become more or less prone to flooding. (Ex. 1D.)
9. The U.S. Army Corps of Engineers ("USACE") constructed an improved levee/flood barrier on the National Mall, across 17th Street, N.W. The purpose of the levee is to protect from flooding many areas of the District of Columbia, including the Property, that were deemed at risk following an assessment of flood risk areas after Hurricane Katrina. The levee was originally scheduled for completion in 2011. However, its construction fell significantly behind schedule. The levee was completed on October 31, 2014. With completion of the levee, the Property has a lower risk of flooding, so it will no longer be included in Zone A on the revised FIRM. However, the USACE must test and certify the levee before it is deemed complete. FEMA must then accredit the levee before it will change the FIRM. (Ex. 1F, 1G, 1H, 1I.)
10. The appeals of Z.C. Order No. 11-13 froze the Applicant's ability to proceed with any work on the project immediately after it was approved. Therefore, no work on any aspect of the project began until after the Court of Appeals dismissed the appeals in January 2013. This six month delay also gave the Applicant confidence that the levee would be completed and certified by the time it would apply for a building permit more than a year thereafter. (Ex. 1K.)
11. Due to a challenging finance environment, the Applicant sought predevelopment funding in late 2013/early 2014 so that it could commence with predevelopment activities, including completing construction drawings, with the understanding that the levee would be completed and the Applicant could submit an application for a building permit before Z.C. Order No. 11-13 expired. Since April 2014, the Applicant has significantly progressed with design development, and it continues to work on the drawings so that they will be complete enough for a building permit application. (Ex. 1K.)
12. As soon as the Applicant began design development in April 2014, it became aware that the 17th Street levee still had not been completed and that the Property was still in Zone A on the FIRM. Confident that the levee was nearing completion, the Applicant did not modify the design drawings to include additional flood protection measures since the Property would soon no longer be in Zone A. Modifying the drawings would have

included incorporating new design elements for greater flood protection as long as the FIRM remained unchanged. Such required flood protection requirements include reengineering and redesigning much of the building foundation to thicken the foundation walls, add more tie-backs, and include other ground and garage flood proofing measures. The architect, civil engineer, and structural engineer estimate that the additional costs for these changes would be \$4,000,000. (Ex. 1J, 1K.)

13. Because the Applicant reasonably anticipated that the levee would be complete and accredited by sometime in 2014, it never budgeted for these significant additional costs. These costs are too high for the Project to remain viable, so the Project can be built only if the FIRM is amended to remove the Property from Zone A. (Ex. 1K.)
14. In anticipation of the levee being completed, certified, and accredited, the Applicant immediately began exploring options to initiate an amendment to the FIRM, known as a Letter of Map Amendment (“LOMA”), for only the Property. However, conversations with FEMA representatives in October 2014 revealed that it is very unlikely that FEMA would amend the FIRM for just the Property and issue a LOMA. Currently, FEMA plans to amend the entire FIRM for the District of Columbia once the levee is certified and accredited. This will remove the Property from Zone A, but because the changes to the FIRM will not occur until approximately Spring 2016, the Applicant would have to include the expensive and unnecessary flood protection measures in the building’s design to file an application for a building permit any sooner. The Applicant desires to avoid the expense of redesigning a building that will never be built with that design. Thus, the Applicant will not have the necessary government approval (a change to the FIRM for the Property) to apply for a building permit for a viable project before the Order expires since FEMA will not amend the FIRM for more than a year and will not issue a LOMA. (Ex. 1K.)
15. On December 14, 2014, ANC 6D filed a letter requesting that the Commission postpone its “hearing” on the application because of a desire to offer testimony. The ANC also expressed concern about lack of engagement from the Applicant. (Ex. 4.)
16. On December 22 and December 23, 2014, Regina and Robert Weller filed a letter and supporting information opposing the time extension. This information did not address the merits of the Applicant’s time extension request and primarily concerned the original PUD approval. (Ex. 5, 6.)
17. On December 29, 2014, the Carrollsburg Square Condominium Association submitted a letter in support of the time extension, stating that, as the most directly affected property, they would like to see the project proceed. (Ex. 7)
18. In its January 2, 2015 report to the Commission, the Office of Planning (“OP”) recommended approval of the PUD time extension request. OP concluded that the Applicant satisfied the relevant standards of §§ 2408.10 and 2408.11. (Ex. 8.)

19. On January 5, 2015, the Applicant submitted a letter in response to the ANC, noting that the Applicant made multiple attempts to communicate with the ANC but did not receive any response, so the Commission should not delay its decision. (Ex. 9.)

CONCLUSIONS OF LAW

The Commission may extend the time period of an approved PUD provided the requirements of 11 DCMR §§ 2408.10 and 2408.11 are satisfied. Subsection 2408.10(a) requires that the applicant serve the extension request on all parties and that all parties are allowed 30 days to respond. The Applicant served all parties to the PUD and Zoning Map Amendment application when it filed the time extension application on November 20, 2014.

Subsection 2408.10(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 original PUD. The Commission concludes that extending the time period of approval for the consolidated PUD is appropriate since there are no substantial changes in the material facts that the Commission relied on in approving the original consolidated PUD application.

Subsection 2408.10(c) requires that the applicant demonstrate with substantial evidence that there is a good cause for the proposed extension, as provided in § 2408.11. Pursuant to § 2408.11, an extension of validity of a PUD may be granted if the applicant has demonstrated with substantial evidence one or more of the following criteria:

- (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, circumstance or factor beyond the applicant's reasonable control that renders the applicant unable to comply with the time limits of the PUD order.

The Commission finds that there is good cause shown to extend the period of time in which the Applicant is required to file a building permit application for the mixed-use residential and church building project approved in the Order. The Commission acknowledges the delay that the appeals of the Order caused to the Applicant. In addition, the Commission recognizes the distinct and substantial impacts on the project resulting from the significant delay in the construction, certification, and accreditation of the 17th Street levee (flood barrier), which affects the Property's flood zone categorization and the flood protection requirements imposed on the project. In order to proceed with the project, the Applicant would have to incorporate costly

flood protection measures that are unnecessary since the FIRM will eventually change. The Commission concludes that the Applicant sufficiently demonstrated that it was ultimately not able to proceed with the Project due to delays in governmental approval processes that were beyond the Applicant's reasonable control. For these reasons, the Commission finds that the Applicant has satisfied the requirements of 11 DCMR§ 2408.11(a) regarding the consolidated PUD application.

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 raised in the written report of the affected ANC. The Commission recognizes the positions of ANC 6D but finds that its request for a delay was not warranted and was based on a misunderstanding. The ANC did not state any reasons that it objected to the merits of the application, and it misunderstood that the Commission would consider the request at a public hearing instead of a public meeting. Also, the Applicant attempted to contact the ANC prior to the ANC's December 2014 meeting. Thus, the Commission finds that the ANC did not demonstrate how the Applicant did not satisfy the criteria of §§ 2408.10 and 2408.11, so it provided no basis for the Commission to delay or deny the application.

The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (DC Law 8-163, D.C. Official Code § 6-623.04), to give great weight to OP recommendations. Accordingly, the Commission credits and agrees with OP's recommendation that approval of the time extension request is justified.

DECISION

In consideration of the above Findings of Fact and Conclusions of Law contained in this order, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of a two year time extension of the consolidated PUD application approved in Z.C. Order No. 11-13. The consolidated PUD approved by the Zoning Commission shall be valid until January 14, 2017, by which date the Applicant will be required to file a building permit application to construct the approved consolidated PUD. Construction must commence by January 14, 2018 for the PUD to remain valid.

On January 12, 2015, upon the motion of Vice Chairperson Cohen, as seconded by Commissioner Turnbull, the Commission **ADOPTED** this Order at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, Peter G. May, and Michael G. Turnbull to adopt).

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In accordance with the provisions of 11 DCMR 3028.8, this Order shall become final and effective upon publication in the *D. C. Register* on May 22, 2015.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING