

Government of the District of Columbia

ZONING COMMISSION



Zoning Commission Order No. 496-E

Case No. 85-19C

**(PUD and Map Amendment @ 1717 Rhode Island Avenue, N.W. -
St. Matthews)**

July 13, 1998

By Zoning Commission Order No. 496, dated November 3, 1986, the Zoning Commission for the District of Columbia approved an application of the Archdiocese of Washington (D.C.), for consolidated review of a planned unit development (PUD) and related change of zoning from SP-1 to C-3-C for property located at 1717 Rhode Island Avenue, N.W. The PUD site is comprised of lot 89 (former lots 85, 803, 841 and 843) in Square 159, measures 5 1,053 square feet in land area, and is improved with the St. Matthew's Cathedral and four church-owned row-structures.

Order No. 496 approved the proposal to renovate parts of the four row structures, retain the church sanctuary, and construct a new office building with a height of not more than 114 feet and a floor area ratio (FAR) of not more than 4.3. Order No. 496 became effective on January 16, 1987, and was valid for two years, until January 16, 1989, by which date the applicant was required to file an application for a building permit. Pursuant to the Order, construction was to commence by January 16, 1990. Section 2408.10 of the Zoning Regulations allows the Zoning Commission to extend the validity of a PUD "for good cause shown upon the filing of a written request by the applicant before the expiration of the approval."

The Commission has granted four previous extensions of the original PUD approval:

- Order No. 496-A, dated January 14, 1991, extended the validity of the PUD until April 8, 1992, by which time an application for a building permit was required and until April 8, 1993, by which time construction was to begin,
- Order No. 496-B extended the validity of the PUD for an additional period of two-years, until April 8, 1994, by which time an application for a building permit was required, and until April 8, 1995, by which time construction was to begin;
- Order No. 496-C extended the validity of the PUD again for an additional period of two years, until April 8, 1996, by which time an application for a building permit was required, and until April 8, 1997, by which time construction was to begin; and
- Order No. 496-D, dated November 10, 1997, and effective on December 19, 1997, extended the validity of the PUD for a period of two additional years, until April 8, 1998,

by which time an application for a building permit was required, and until April 8, 1999, by which time construction was to begin.

On February 27, 1998, prior to the expiration of Order No. 492-D, the applicant filed a motion for a further extension, this time for five years, of the PUD approval. The motion stated that Order No. 496-D had been appealed to the D.C. Court of Appeals by the Residential Action Coalition (RAC) and the Hotel Tabard Inn (Tabard Inn). The motion stated that, due to the litigation, the Archdiocese was once again forced to file for another time extension. In order to break the seemingly never-ending cycle of extensions and appeals, the applicant requested an extension of sufficient length that the appeal cycle could be concluded and the applicant would still have sufficient time to market the property. The Archdiocese outlined the scenario it has faced, as follows:

- The Archdiocese files a time extension;
- The Commission grants the extension and issues an Order;
- Opponents appeal the Order to the Court of Appeals;
- During the period of litigation, it is extremely difficult for the Archdiocese to market the property for ultimate development;
- Because of the length of the litigation period, the Archdiocese is then required to re-apply for a time extension; and
- The cycle starts again.

The applicant stated that the impact of this cycle is that it has never had a clear window of opportunity to market the property. Order No. 496-D was not published until December 19, 1997. If that Order had not been appealed, the Archdiocese would have been free to market the site, albeit for a limited (four and one-half months) period due to its expiration in April of 1998.

The applicant's motion noted that the sole criteria for determining whether a PUD should be extended is whether there is "good cause shown" (see 11 DCMR 2408.11). The applicant's motion stated that the pendency of litigation challenging Order No. 496-D serves as "good cause" for the Commission to extend the PUD, in accordance with § 2408.11 (c). Pending litigation is a specific criteria which the Zoning Commission must consider in determining whether there is good cause for a time extension.

The applicant's motion also stated that, in addition to being a criteria for demonstrating good cause for a PUD time extension, pending litigation has substantially hampered the applicant's ability to obtain financing and to commit to a completion schedule for any potential tenants, as

provided for in § 2408.1 l(a). Prospective lenders, builders and tenants will not rely on an appealed PUD Order until the Commission's decision is no longer subject to reversal.

The applicant's motion stated that the request complied with the requirements of § 2408.10. There have been no changes impacting the PUD since Order No. 496-D was issued approving the fourth time extension. Order No. 496-D specifically evaluated whether there had been any substantial changes impacting the approved PUD and found that there had been none.

Finally, the applicant's motion stated that no hearing was required. Section 2408.12 provides:

The Zoning Commission shall hold a public hearing on a request for an extension of the validity of a planned unit development only if, in the determination of the Commission, there is a material factual conflict that has been generated by the parties to the planned unit development concerning any of the criteria set forth in Subsection 2408.11. The hearing shall be limited to the specific and relevant evidentiary issues in dispute.

The applicant stated that it met the criteria under § 2408.1 l(c) ("pending litigation") as a demonstration of good cause, and that there is no factual conflict that the PUD extension has been appealed. Thus, there is no need for a hearing to determine whether a material factual conflict exists with respect to the criteria of § 2408.11.

Counsel for the Dupont Circle Citizens Association (DCCA), the Tabard Inn and RAC, by letters dated March 9 and March 17, 1998, opposed the time extension request and requested a hearing. As reasons, the opponents argued that: (1) there is no nexus between the current litigation, just initiated, and the two years since the prior litigation ended; (2) there is no basis for concluding that market conditions have hampered the Archdiocese from obtaining a tenant; and (3) there have been changes to the Comprehensive Plan and Zoning Regulations which undermine the original PUD approval. Further, the opposition stated that the change in the project developer (not the applicant) constitutes a change in material fact under § 2408.10(b) and, therefore, a hearing is required.

By report dated April 8, 1998, the Office of Planning (OP) recommended that the Commission extend the validity of the subject PUD and related Map amendment. The OP report stated

. . .Order No. 496-D has been appealed to the D.C. Court of Appeals, effectively limiting the applicant's ability to market and develop the project. Issues raised in the appeal appear to have been dealt with previously by the Commission and the D.C. Court of Appeals. The applicant has stated that, because of the timeframe involved in the litigation, by the time the litigation is concluded, the applicant is left with very little time to freely market the property free of court entanglement prior to re-filing a time extension, which is once again appealed. In the instance in which a PUD has essentially been in court for more than a decade, we believe there

is compelling need for a longer than normal extension period. If the project has time to be marketed and built, it will no longer require PUD extensions and will escape from the litigious loop it finds itself in now.

As it had done in the past, the OP analyzed the effect of any subsequent amendments to the Zoning Regulations and the Map, and to the Comprehensive Plan since the PUD was approved. The OP report states:

At the time of the approval of the PUD and Map change, the site was designated for high-density commercial land use on the 1985 Generalized Land Use Map of the Comprehensive Plan. In 1989, the Comprehensive Plan was amended. With that amendment, the Comprehensive Plan Generalized Land Use Map now depicts the site's use and density as being governed by the policies of two separate land use categories. Generally, the eastern half of the site is now located in an area designated for mixed-use, medium-density residential/medium-density commercial land uses. The western half of the site remains unchanged, designated for high-density commercial land use.

A direct translation of medium-density would produce either a C-3-A or a C-3-B zone district. With a PUD, the maximum commercial densities would range between 3.0 and 4.5 FAR. Total densities would range between 4.5 and 5.5 FAR. Thus, the approved PUD density of 4.3 FAR is not inconsistent with the density guidance provided by the amended Plan. Only the height, endorsed by the Historic Preservation Review Board (HPRB) at 114 feet, exceeds the limits (90 feet) of a direct translation of the Plan.

In 1991, the Zoning Commission created the Dupont Circle Overlay District (DCOD), which includes the site of the proposed PUD. As a major tool to ensure that newly-approved projects preserve and enhance the Dupont Circle neighborhood, with particular emphasis on its unique historic qualities, the DCOD limits the height and FAR of all subsequent PUDs to that of the underlying zone district. Because the proposed PUD was approved by the Commission prior to the enactment of the DCOD, the proposal can proceed as originally approved and would not be directly affected by the DCOD regulations. In addition, the project's design was approved by the Historic Preservation Review Board which determined its compatibility with the character of the historic district, recognizing the trade-off between the height the project needed in order to save most of the historic structures and the amenity of the renovation of the exterior of the adjacent historic cathedral. In fact, the proposed 114-foot height of the PUD continues to represent a transition in scale between the surrounding C-4 development which allows heights to 130 feet and SP-1 zoned development to the west with matter-of-right heights of 65 feet.

Based on the analysis above, the Office of Planning concludes that the Zoning Regulations and Map and Comprehensive Plan have not been changed for the subject site since the Zoning Commission extended the PUD and related Map amendment in Order No. 496-D. The changes that had occurred prior to that time were reflected in that order.

Although a request, dated March 31, 1998, was filed to waive the time limits for filing, no report was submitted by Advisory Neighborhood Commission (ANC) 2B.

On April 13, 1998, at its regular monthly meeting, the Zoning Commission considered the Applicant's motion, the opposition of DCCA, Tabard Inn and RAC and the report of the OP. Based upon the current standards of §§ 2408.10 through 2408.11, the Commission finds:

1. Under § 2408.1 l(c), the applicant has demonstrated good cause for a time extension based upon the existence of pending litigation or such other conditions, circumstance or facts beyond the applicant's reasonable control which rendered the applicant unable to comply with the time limits of the PUD order. The opposition's arguments that prior litigation had no impact on this project are not cogent or supportable. The Court of Appeals remanded the litigation over the prior extension requests to the Commission in June, 1995, and that remand was not disposed of until the issuance of Order No. 496-D. While the Commission voted to grant the PUD extension on May 13, 1997, through no fault and for reasons not under the control of the applicant, Order No. 496-D was not final and effective until December 19, 1997. The project opponents appealed on January 20, 1998. That appeal is presently pending in the Court of Appeals.
2. While the developer of the project was mentioned in Finding of Fact No. 2 of Order No. 496, the property owner and applicant has always been the Archdiocese of Washington (D.C.). The developer is not referenced in any of the extension orders. None of the material facts relied upon by the Commission in approving the PUD or any of the extensions had to do with who was the project's developer. The change in project developer therefore is not a substantial change in a material fact upon which the Zoning Commission based its original PUD approval. A PUD must be constructed in accordance with the approved plans without regard to which developer or builder is involved with its construction.
3. Consistent with Order Nos. 496-C and 496-D, the applicant remains committed to the completion of the project, having already expended a large sum of money in actual development of the project. The applicant has submitted substantial evidence regarding its provision of significant up-front amenities, as required by Order No. 496.
4. The applicant has submitted substantial evidence that there is good cause for a further PUD extension. There is no question as to the pendency of litigation and the affidavit of the

representative of the Archdiocese sufficiently demonstrates the effect that this has had on the ability to proceed.

5. The Commission finds that there is no need for a further hearing. The Commission adopts the analysis and findings of the OP report addressing the effect of changes to the Comprehensive Plan, the Zoning Regulations and the Map. Further, as specifically stated in Order No. 496-D, the Commission notes that, in footnote 12 of Hotel Tabard Inn v. District of Columbia Zoning Commission (“Tabard Inn”), 661 A.2d 150, 155 (DC 1995), the Court stated that:

Petitioners also claim that the Zoning Commission failed to adequately consider the amended Comprehensive Plan, the Dupont Circle Overlay District regulations (DCOD) and the ANC’s recommendations. However, in its order extending the validity of the PUD, the Zoning Commission adopted the report issued by the Office of Planning, which evaluated the existing PUD under the amended Comprehensive Plan and recommended the extension of the validity of the PUD. The Office of Planning found that the PUD was consistent with the amended Plan except that the PUD exceeded the amended Plan’s maximum height requirement of 90 feet. The Office of Planning found that any changes in the DCOD regulations affected subsequent PUDs only, and thus had no effect on the Archdiocese’s PUD. The Zoning Commission referred to the ANC’s objections and recommendations in its Order, but ultimately declined to follow the ANC’s recommendations. Consequently, we conclude that the Zoning Commission adequately considered the amended Comprehensive Plan, DCOD regulations, and ANC recommendations.

In light of the Court upholding the Commission’s prior findings, the Commission has no legal authority to revisit the changes to the Comprehensive Plan and the adoption of the DCOD.

6. The Commission determined that a five-year time extension, as requested by the applicant, was too long a period of time before which the Commission might again evaluate whether material facts had changed, if the project does not go forward. Extension for a three-year period, rather than for two years, would provide a time frame for disposition of the presently-pending litigation and thereafter an opportunity to market the project.

The Zoning Commission further believes that its decision to extend the validity of the PUD is in the best interests of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations and Zoning Act.

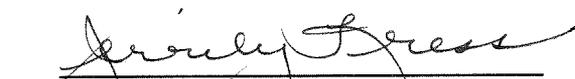
In consideration of the Commission’s findings and the reasons set forth herein, the Zoning Commission for the District of Columbia hereby orders that the validity of Order Nos. 496, 496-

A, 496-B, 496-C and 496-D be **EXTENDED** for a period of **THREE YEARS**; that is, until April 8, 2001, by which time application for a building permit must be filed. The time for beginning construction is also extended for three years, until April 8, 2002.

Vote of the Zoning Commission taken at the monthly meeting on April 13, 1998: 3-O (John G. Parsons, Jerrily R. Kress and Maybelle Taylor Bennett) to extend the validity of Z.C. Order Nos. 496,496-A, 496-B, 496-C and 496-D for a period of three years.

This order was adopted by the Zoning Commission at its public meeting held on July 13 by vote of 3-O ((John G. Parsons, Jerrily R. Kress, Herbert Franklin) to approve Angel F Clarens and Anthony Hood not voting not having hear the case.

In accordance with provisions of 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register, that is, on AUG 21 1998



JERRILY R. KRESS, FAIA
Chairperson
Zoning Commission



SHERI M. PRUITT-WILLIAMS
Interim Director
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