

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



**ZONING COMMISSION ORDER NO. 664-C**  
**Case No. 98-02M/97-12M/94-17C/91-19M/89-19C**  
**(Washington Development Group – Modification)**  
**July 31, 2003**

This Decision and Order arises out of a request by Washington Development Group, Inc. (“WDG” or “Applicant”), for a time extension of its planned unit development (“PUD”) approved in Zoning Commission Order Nos. 664, 664-A, and 664-B.

At its July 31, 2003, public meeting, the Zoning Commission for the District of Columbia (“Commission”) denied the Applicant’s request for an extension, having been unable to find that there had been “no substantial change in any of the material facts upon which the Commission based its original PUD approval that would undermine the Commission’s justification for approving the original PUD”, as required by 11 DCMR § 2408.10(b).

**Procedural History**

The property that is the subject of this application, located in the air-rights parcel above the Center Leg of the Interstate 395 Freeway, is owned by the District of Columbia. The Applicant and the District of Columbia entered into a lease of the property. The lease is dated December 28, 1990.

A PUD in the air-rights parcel was first approved by the Zoning Commission in Case No. 89-19C, Order No. 664, dated June 11, 1990. The approved PUD consisted, essentially, of a deck over Interstate 395 south of Massachusetts Avenue, N.W. and north of E Street, N.W. There were to be three (3) office buildings, an apartment building, a hotel, and a retail pavilion. The PUD was modified in Case No. 91-19M, by Order No. 664-A, dated June 8, 1992, which permitted the addition of an atrium connecting the two (2) office buildings nearest Massachusetts Avenue, the elimination of one floor for each of those office buildings, the addition of an auditorium, and the reconfiguration of open space on the deck. This modification request was motivated by the Applicant’s efforts to secure a lease of office space to the Securities and Exchange Commission.

In 1995, the Applicant filed an application to extend the validity of the modified PUD approved by Order No. 664-A. This time extension request, Z.C. Case No. 94-17C, was approved by Order No. 664-B, dated July 10, 1995, and was to expire two (2) years after the date it was published in the *D.C. Register*, that is, on September 1, 1997.

On August 15, 1997, the Applicant filed a letter with the Zoning Commission requesting a modification of the approved project in order to move the residential component of the PUD off-site to Parcel 51B, a site north of Massachusetts Avenue, N.W. Although the Applicant's letter did not include a formal request to extend the validity of the approved PUD, the Zoning Commission treated it as such.

The modification request was lacking in many respects and was the subject of public hearings before the Zoning Commission held on May 21, July 23, and September 28, 1998 and March 4, 1999. The March 15, 1999, hearing was adjourned midway as a result of the Commission's concerns that there were too many unresolved issues. At the close of the hearing, the Applicant was requested to: (1) respond to eleven (11) requests for specific information from the Zoning Commission; (2) have the D.C. Department of Housing and Community Development ("DHCD") provide evidence that it was a co-applicant in the modification and time extension application; (3) resolve the issue over whether the Applicant had any rights to Parcel 51B, the site north of Massachusetts Avenue; and (4) resolve the Comprehensive Plan language that directed the Mayor to explore canceling the lease with the Applicant. The hearing was continued until June 10, 1999, and by letter dated June 1, 1999, the Applicant requested postponement on the basis that the Financial Responsibility and Management Assistance Authority<sup>1</sup> had yet to reach a decision as to whether the Applicant should be granted control of the site north of Massachusetts Avenue. No further hearings were held in this case.

In the original and subsequent applications for this PUD, the Commission granted party status to the Georgetown University Law Center ("GULC"), the Second Baptist Church, and the Mount Carmel Baptist Church. Advisory Neighborhood Commission ("ANC") 2C<sup>2</sup> was automatically granted party status in the case.

On December 13, 2002, the Applicant filed a letter with the Office of Zoning requesting that the Zoning Commission confirm that the previously approved PUD remained valid and that the application for the PUD modification was active, pending resolution of the litigation over site control of the property included in the PUD.

On December 30, 2002, counsel for GULC objected to the Applicant's request for confirmation that the PUD remained valid. Counsel for GULC stated: there was no communication from the Applicant between June 1999 and December 13, 2002, regarding the PUD modification application; the Applicant failed to comply with the Commission's request that it submit a complete application for the modification; the Applicant failed to comply with the Commission's request that it establish that it has title to both the original PUD site and the site upon which the residential component was to be relocated, Parcel 51B; there had been no action by the Commission to extend the original PUD; and the facts originally relied upon were outdated.

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<sup>1</sup> Also known as the Control Board, FRMAA is no longer in existence.

<sup>2</sup> Subsequently, the ANC boundaries were redrawn and the air-rights parcel is now located in ANC 6C.

At its regularly scheduled public meeting on January 13, 2003, the Zoning Commission decided that it would hold a status hearing for this case, with participation limited to the parties and the representative of the property owner, the District of Columbia. By letter dated February 4, 2003, the Office of Zoning informed all parties to this case that submissions regarding the validity of the PUD were to be submitted to the Commission by March 21, 2003, and that the status hearing would be held on April 7, 2003. Thereafter, the Applicant requested that the April 7, 2003, status hearing be postponed. The Zoning Commission granted this request for postponement and rescheduled the status hearing for May 29, 2003.

The status hearing was for informational purposes only and the Commission did not allow testimony or cross-examination. At the status hearing, representatives of the Applicant, representatives of GULC, representatives of ANC 6C, and representatives of the Second Baptist and Mount Carmel Baptist Churches made presentations to the Commission regarding the PUD modification and time extension request.

At the conclusion of the May 29, 2003, status hearing, the Commission required that WDG provide the following information in order to proceed with the application:

- Materials previously requested (on March 15, 1999) by the Zoning Commission to complete the PUD modification application to move the residential component of the original PUD to Parcel 51B north of Massachusetts Avenue, and
- A submission that addressed how WDG satisfied the burden of proof for a PUD extension both in 1997 and today.

On July 3, 2003, WDG submitted a letter to the Commission and the parties in this case stating that it was withdrawing the PUD modification request and again asking the Commission to extend the original PUD.

In support of its request for an extension, WDG's July 3, 2003, submission conceded that the commercial portion of the approved PUD was not large enough to attract a major government tenant seeking in excess of 1,000,000 square feet of net leaseable space, that the construction of a deck over the freeway was very costly, and that the inclusion of thirty percent (30%) of the proposed housing for low/moderate income tenants was economically impractical in 1999. The Applicant also claimed that litigation between the District of Columbia and the Applicant regarding the lease for the air-rights parcel, beginning in 1995, caused a "cloud" on the Applicant's interest in the site and made it impossible to obtain financing. In regard to the issue of whether a substantial change in the material facts upon which the Commission based its original decision had occurred, the Applicant provided a cursory response that no substantial changes had occurred.

On July 18, 2003, GULC submitted its opposition to the PUD time extension request. GULC's submission asserted that the Applicant's PUD extension request should be denied, because there

have been substantial changes in the material facts upon which the Zoning Commission based its approval of the PUD, including changes in the neighborhood surrounding the air-rights parcel.

On July 16, 2003, ANC 6C submitted a letter outlining its opposition to the time extension request. The ANC's letter noted that the neighborhood of the Center Leg Freeway has changed significantly since the three (3) Zoning Commission Orders were entered and that numerous large-scale residential projects are presently under construction in the area. It argued that in order to help build and expand the residential neighborhood that is starting to form, more residential units should be required on the air-rights parcel.

On July 30, 2003, WDG submitted a proposed rebuttal to the July 18, 2003, submission of GULC and the July 16, 2003, submission of ANC 6C. WDG's rebuttal was returned, because the Zoning Commission did not provide an opportunity for rebuttal.

The Office of Planning ("OP") submitted a report regarding the modification and extension of the PUD dated July 21, 2003. In this report, OP asserted that it was no longer prudent to extend this PUD and that termination of the PUD will allow an opportunity to determine the means by which the air rights can best be developed. In particular, OP noted that there have been substantial changes in the materials facts (e.g. development patterns and planning policies) upon which the Commission based its original 1990 approval of the PUD that would undermine the Commission's justification for approving the original PUD. OP noted that residential construction now surrounds the PUD site, hotel use no longer suffers from poor market conditions, and that the residential component to the PUD is too small. OP also asserted that the configuration of the PUD is inconsistent with the current policies and goals of connecting development in the Downtown East section of the city to the Downtown core.

### **FINDINGS OF FACT**

1. The approved PUD was to be located over the Center Leg of Interstate 395 Freeway, bounded on the north by Massachusetts Avenue, N.W., on the east by the eastern boundary of the Freeway retaining wall and Second Street, N.W., on the south by E Street, N.W., and on the west by the eastern boundaries of Lot 859 in Square 568, Lots 850 and 849 in Square 566, Lot 58 in Square 564 and a portion of Third Street, N.W.
2. The PUD site contains approximately 271,400 square feet, of which 222,280 square feet were to be developed. The project approved was allowed up to 5.97 FAR, of which 3.50 FAR was to be devoted to office space, .19 FAR to retail use, 1.72 FAR to a hotel and apartments, and .56 FAR to parking. Lot occupancy was to be eighty-two percent (82%) and height was allowed to 130 feet. (Order No. 664-A).
3. Zoning Commission Order No. 664, which originally approved the PUD in 1990, contained a number of factual findings that were relied upon by the Commission in its approval of the PUD, but not longer reflect existing conditions:

- (a) The area around the site was being developed with large-scale office buildings. (Finding of Fact 16). Now, however, there is significant residential development occurring in this area.
- (b) Portions of the area around the site were occupied by low- and moderate-income tenants and boarded up two- and three-story rowhouses. (Finding of Fact 17). Those row houses have been removed and are being replaced with new development.
- (c) The area around the site was zoned HR/C-3-C, C-3-C, HR/SP-2, and SP-2, and the PUD-related zoning of C-3-C, “would be a logical extension of the prevailing C-3-C and HR/C-3-C zoning, which is located on three sides of the PUD site”. (Finding of Fact 18). The approval of the original PUD came before the Commission’s approval of the Downtown Development District Overlay, which gave the area an entirely new focus by establishing requirements and incentives to develop residential uses. The proposed C-3-C zone is now inappropriate for this location.
- (d) The project was determined to be consistent with the Comprehensive Plan. (Finding of Fact 22). The current Comprehensive Plan, however, disfavors the project by directing the Mayor in the Policies in Support of the Public Action Objectives to “Explore the termination of the lease between the District and the Washington Development Group.” 10 DCMR § 1138.1(x).
- (e) The project was intended to assist the development of the eastern portion of the downtown area. (Finding of Fact 33). However, the area surrounding the air-rights parcel is no longer in need of such assistance. The Downtown East area, especially Massachusetts Avenue between 3<sup>rd</sup> and 6<sup>th</sup> Streets, N.W., has seen an abundance of development, primarily residential, in the last 3-5 years. Thus, the originally approved PUD could no longer be seen as a catalyst for development because that development is already well underway.
- (f) The proposed balance between residential, office, and hotel was acceptable. (Finding of Fact 60). Now, however, as noted in OP’s report, commercial use is no longer encouraged to the extent it was when the original PUD was approved. The Commission agrees with the conclusions of the Office of Planning that large commercial and small residential and retail components of the project are no longer appropriate for the site.
- (g) The PUD was compatible with city-wide goals, plans, and programs. (Conclusion of Law 3). However, the Downtown planning and development goals of the District of Columbia and its residents have changed significantly since the original PUD was approved. These new goals and policies now include: increased Downtown housing, increased retail and arts uses Downtown, and improving the connection between the Downtown core and Downtown East. The

PUD does not connect development in the Downtown East section of the city to the Downtown core nor does it add significant housing, retail, or arts use. Therefore, the Commission finds that the PUD is no longer compatible with the current goals and policies of the District of Columbia.

5. OP, ANC 6A, and ANC 2C supported the first extension of this PUD (ZC Order No. 664-B). OP, in its report, did not support this application for an extension. Counsel for ANC 6C, the ANC now representing the area in which the subject property is located, submitted a letter in opposition. The letter did not indicate that it was adopted at a duly-noticed public meeting and, therefore, is not entitled to great weight. ANC 2C, who was sent the notice of the status hearing, did not submit anything for this case.

### CONCLUSIONS OF LAW

Chapter 24 of the Zoning Regulations sets forth the time limits for all final PUD approvals (i.e. a consolidated PUD or the second stage of a two-stage PUD). Within two (2) years of final approval of a PUD, an application for a building permit must be filed, unless this time is extended by the Commission. The decision to extend the time for filing a building permit is entirely within the discretion of the Commission. 11 DCMR §§ 2408.8. An extension can be granted only if there is, “no substantial change in any of the material facts upon which the Commission based its original PUD approval that would undermine the Commission’s justification for approving the original PUD.” 11 DCMR § 2408.10(b). In addition, in order to grant a PUD extension request, the Applicant must demonstrate with substantial evidence that there is good cause for such an extension. 11 DCMR 2408.10(c). If either of these criteria is not met, the Commission has no choice but to deny the application for an extension.

As stated in Finding of Fact No. 3, and as concluded by the Office of Planning and ANC 6A, to whom the Commission must give great weight, significant and substantial changes have occurred in the area surrounding the subject property since 1990, the date of the original approval, and in 1992, the date of the last approved modification. Therefore, the facts the Commission relied upon in approving the PUD have changed substantially such that the Commission’s justifications for approving the PUD are undermined. Thus, the Commission must deny the request for an extension of the PUD.

The Commission did not reach the issue of whether there was good cause for the extension in this case, having found that the requirement established in 11 DCMR § 2408.10(b) was not met.

### DECISION

For the reasons stated above, the Commission concludes that the applicant has not met the burden for extending the period of approval for a planned unit development as outlined in 11 DCMR § 2408.10. It is hereby **ORDERED** that the applicant’s request for an extension of the period of approval for the planned unit development is **DENIED**.

Vote taken at its July 31, 2003, decision meeting: 5-0-0 (Carol J. Mitten, Anthony J. Hood, John G. Parsons, James H. Hannaham, and Peter G. May, to deny).

In accordance with the provisions of 11 DCMR § 3028.9, this order shall become effective upon publication in the *D.C. Register*; that is on NOV 28 2003.

  
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CAROL J. MITTEN  
Chairman  
Zoning Commission

  
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JERRILY R. KRESS, FAIA  
Director  
Office of Zoning