

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 78-B
Z.C. Case No. 70-16B
Modification to the Approved Planned Unit Development
(CESC 2101 L Street, LLC)
January 10, 2011

Pursuant to notice, the Zoning Commission for the District of Columbia (the “Commission”) held a public meeting on January 10, 2011. At the meeting, the Commission approved an application from CESC 2101 L Street LLC (the “Applicant”) for a modification to an approved planned unit development (“PUD”) for the property in Square 72, Lot 76, located at the street address 2101 L Street, N.W. (the “Property”). This PUD modification is authorized pursuant to Chapters 1 and 24 of the District of Columbia Zoning Regulations (the “Regulations”).

FINDINGS OF FACT

Procedural Matters

1. By Z.C. Order No. 60, dated March 19, 1973, the Commission granted preliminary approval of a PUD for what is now Lot 76 in Square 72. Final approval was granted in Order No. 78, dated December 5, 1973 (the “Order”). The Order approved the development of a commercial office building consisting of 557,000 of overall square footage, a height not to exceed 110 feet, and a maximum density of 7.0¹ floor area ratio (“FAR”) (the “Approved PUD”). Condition No. 4 of the Order read as follows

The proposed building shall have on the first floor level approximately 32,700 square feet of floor area set aside for retail use and an additional 19,000 square feet for retail use may also be provided at the first basement level.

2. The Applicant filed a request for modification of the Approved PUD on September 16, 2005, proposing a complete exterior renovation of the office building and additional gross floor area in connection with that request. The Applicant also requested a reduction

¹ The PUD site consists of 50,833 square feet of land area. Z.C. Order No. 78 stated that the proposed building would consist of 557,000 square feet of gross floor area with a total density of 7.0 FAR. The Commission notes that 557,000 square feet of gross floor area constructed on 50,833 square feet of land area would result in a density of 10.97 FAR. The additional square footage authorized by the Commission in Z.C. Order No. 78-A (further described herein), results in an overall authorized density of 7.1 FAR which would allow for a maximum gross floor area of 360,914.3 square feet. The building does not currently exceed 360,000 square feet.

of the floor area to be devoted to retail and service uses on the first floor level. The Zoning Commission approved the requested modification, allowing an overall density of 7.1 FAR and reducing the first floor level retail and service use requirement from 32,000 to 24,100 square feet through its publication in the *D.C. Register* of Z.C. Order No. 78-A on August 11, 2006. Specifically, Condition no. 4 was amended to read as follows:

The building shall have on the first floor level approximately 24,100 square feet of floor area set aside for retail uses and the service uses listed in § 701.1.

3. On June 9, 2010, the Applicant filed a request for a second modification to the Approved PUD seeking a further reduction in the square footage required to be dedicated to retail or service uses (the “Modification Request”). The Applicant sought to have the application granted under the consent calendar process of 11 DCMR § 3030, claiming that the modification was minor.
4. On June 4, 2010, the Office of Planning (“OP”) recommended that the Commission approve the minor modification as a consent calendar item pursuant to 11 DCMR §§ 2409.9 and 3030. In the alternative, OP recommended that the Commission set down the Modification Request for hearing.
5. On June 23, 2010, the West End Citizens Association (“WECA”) filed a letter in opposition to the requested modification, stating that the request was not minor in nature and that the primary amenity upon which the initial PUD was granted was the inclusion of retail uses.
6. At a public meeting on June 28, 2010, the Commission determined that the request did not constitute a minor modification and set the matter down for a public hearing.
7. The Applicant filed a prehearing statement on July 2, 2010 and a supplemental pre-hearing statement on September 1, 2010, and a hearing was scheduled for October 7, 2010.
8. On August 30, 2010, WECA filed a request for party status in opposition to the application.
9. OP filed a report on September 27, 2010, which recommended approval of the modification. The report stated that all other conditions of approval have been satisfied and the other public benefits and amenities offered as part of the original approval have been met. OP noted in its report and in testimony on the record at the public hearing that the requested modification, even without the additional amenities proffered by the Applicant, met the requirements for a second-stage PUD under Chapter 24 of the Zoning Regulations and should be approved.

10. Advisory Neighborhood Commission (ANC”) 2A provided a letter of support, stating that ANC 2A had voted unanimously at a duly-noticed ANC meeting with a quorum of Commissioners present, to support the instant request, subject to the condition that the space on the first floor level shall not be leased to a nightclub or used for nightclub purposes (as that term is defined by the Alcohol Beverage Regulation Administration pursuant to license types “CN” and “DN”). (Exhibit 7.) The Applicant agreed to this condition.
11. On September 28, 2010, WECA filed a request for postponement of the scheduled public hearing based on the Applicant’s failure to post the public notice on the property at least 40 days prior to the public hearing as required by 11 DCMR § 3015.4.
12. The Applicant filed its Affidavit of Posting on September 30, 2010. On October 6, 2010, the Applicant filed its Affidavit of Maintenance and a request for waiver of the posting requirement under 11 DCMR § 3015.4.
13. At the October 7, 2010 public hearing, the Commission granted party status in opposition to WECA and granted WECA’s request for postponement of the hearing due to the late posting of the property. The Commission scheduled a continuation hearing for November 18, 2010.
14. As a preliminary matter at the November 18, 2010 hearing, WECA requested a change in its status from a party in opposition to a party in support. The Commission recognized WECA as a party in support of the modification.
15. At the conclusion of the Public Hearing on November 18, 2010, the Commission took proposed action to approve the application, and left the record open for certain additional information.
16. On December 2, 2010, the Applicant submitted additional information, including a detailed list of furnishings requested by Fire Station Engine #23 and their prices, and a letter from the District of Columbia Public Library requesting that the Applicant purchase chairs for the children’s room within the existing West End Library that could be moved to the new facility once opened.
17. The proposed action of the Commission was referred to the National Capital Planning Commission (“NCPC”) pursuant to § 492 of the District Charter. NCPC, by action dated November 24, 2010, found the proposed modification of the approved PUD would not affect the federal interests in the national capital and would not be inconsistent with the Comprehensive Plan for the National Capital.

18. The Commission took final action to approve the modification at its public meeting on January 10, 2011.

The Merits of the Requested Modification

Nature of the Modification Requested

19. The application seeks to further reduce the amount of first floor level space dedicated to retail and service uses, and seeks flexibility in the design of the space. Z.C. Order No. 78-A requires the PUD to set aside 24,100 square feet of space on the first floor level for the retail uses and service uses listed in § 701.1 of the Regulations. The application seeks to reduce the amount of required retail and service use space to 16,700 square feet.
20. Paragraph 22 of Z.C. Order No. 78-A, which identified the public benefits of the PUD, made the following conclusion as to the retail component sought to be reduced:
 - c. Uses of Special Value: The Project will provide ground-floor retail, a pedestrian oriented use that will enhance the street activity of the area.

The Basis for the Request

21. Although the L Street retail frontage (13,197 square feet) is fully leased, the Applicant has been unable to lease any of the 21st Street retail space (approximately 12,857 square feet). The inability to lease the 21st Street retail space is due to the atypical size of the retail bays on 21st Street. At 140 feet deep, the space is more than twice as deep as a typical retail bay and is difficult to divide into multiple retail spaces because it is 75 feet wide with an additional 45 feet in width that extends behind the elevator core and lobby with no window frontage. The space has been vacant since the completion of the 2006 renovation of the building. The requirement to provide 24,100 square feet of retail uses, which include the deepest interior spaces of the first floor, is preventing the Applicant from leasing the portions of the building with window frontage along 21st Street because no prospective tenant is willing to take all of the 12,857 square feet of vacant space.
22. The 21st Street retail space is difficult to subdivide in a way that is attractive or desirable to most retail tenants. The space is significantly larger than typical retail space within a commercial office building, which presents challenges in leasing such space. The previous tenant in the space, Galileo Restaurant, was significantly larger than the typical restaurant tenant in the market for space today. The Applicant followed through on 161 different leads with no success, and remains unable to lease the entire space or a portion of the space that would leave available a typical retail layout for a second tenant. The Commission credits the Applicant's proffered testimony that a typical "white tablecloth" restaurant size is 5,000 to 7,000 square feet and the typical casual dining or semi-fast

food operation is 3,000 to 4,000 square feet, and both types of restaurants require visibility and high foot traffic along adjacent street frontage.

23. The retail layout prior to the 2006 renovation of the building was not conducive to vibrant, pedestrian-friendly uses because the building design employed arcades, which have recently been rejected by the planning community and by the Commission as a failed experiment in pedestrian-friendly design. Although the 2006 renovations undertaken by the Applicant significantly improved the aesthetic of the building and the prominent corner, it remains difficult to sustain large format retail uses in such a space due to the surrounding buildings on 21st Street, only some of which have retail store fronts.
24. The reduction in the minimum retail square footage requested would enable the Applicant to fully lease the portions of the first floor level which have visible store fronts and would result in a fully leased building and an active street front.

Replacement Public Benefits and Amenities

25. The following benefits and amenities will be created as a result of the proposed modifications:
 - (a) The Applicant shall purchase for the West End Public Library the furnishings listed in the District of Columbia Public Library's request dated December 2, 2010 and submitted with the Applicant's December 2, 2010 filing. (Exhibit 37.) The furnishings have a value of approximately \$10,000;
 - (b) The Applicant shall purchase for Fire Station Engine #23 the list of requested items submitted with the Applicant's December 2, 2010 filing. (Exhibit 37.) The items have a value of approximately \$20,000; and
 - (c) The Applicant will not permit a nightclub on the first floor level.

Compliance with PUD Standards

26. In evaluating a PUD application, the Commission must "judge, balance, and reconcile the relative value of project amenities and public benefits offered, the degree of development incentives requested and any potential adverse effects." (11 DCMR § 2403.8.) Although the retail space being lost was proffered as a public benefit, and acknowledged by the Commission to be a "use of special merit", the same may be said for additional contributions offered by the Applicant and its agreement to not permit a nightclub on the first floor level retail space. Overall, the public benefits that have and will be provided by this PUD continue to justify the development incentives previously granted.

Comprehensive Plan

27. The project will remain consistent with and further goals and policies enumerated in the Comprehensive Plan as follows:
- (a) The Generalized Land Use Map: The Project is consistent with the Generalized Land Use Map, which recommends for the Property a mix of medium-density commercial uses and high density residential uses. The project will not be inconsistent with this use category. The existing building will be enhanced through this modification process; and
 - (b) Preserving and Ensuring Community Input: Through the PUD modification process, the Applicant has worked with representatives of ANC 2A, as well as the surrounding neighborhood, to create appropriate proffers that will benefit the neighborhood and the District of Columbia.

CONCLUSIONS OF LAW

1. The impact of the modified project on the surrounding area and operation of city services is acceptable given the quality of public benefits of the project.
2. The approval of the modification is not inconsistent with the Comprehensive Plan.
3. The application seeks a reduction in the amount of first floor area set aside for retail and service uses. The public benefits being added through this modification are substantially equivalent to the public benefit being lost.
4. The PUD, as modified, will not cause adverse effects on any nearby properties.
5. The Commission is required under § Section 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 identified in the written report of an affected ANC, which for this application is ANC 2A. That ANC voted unanimously in favor of approving the modification, provided that it includes a condition prohibiting use of the retail space as a nightclub. (Exhibit 7.) Because the Commission cannot compel the Applicant to disallow a permitted use, and because the Applicant has nevertheless agreed to do so, the Commission recognizes this voluntary commitment as a public benefit. However, the ANC's proposed language does not entirely comport with the District's licensing designation for the sale of alcoholic beverages and does not precisely state how such a prohibition could result. The Commission has crafted a condition that resolves both concerns.

6. 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), to give great weight to OP's recommendations. For the reasons stated above, the Commission concurs with OP's recommendation for approval and has therefore given the OP recommendation the great weight it is entitled.
7. The modified PUD will continue to promote the orderly development of the Property in conformance with the District of Columbia Zone Plan as embodied in the Zoning Regulations and Map of the District of Columbia. Further, the Zoning Commission concludes that its decision is in the best interest of the District of Columbia and is consistent with the intent and purposes of the Zoning Regulations.
8. The Applicant for a PUD modification is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.

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 modification of the approved PUD. Condition No. 4 of Z.C. Order No. 78, as modified and restated in Z.C. Order 78-A, is revised to read as follows:

- “4. The building shall have on the first floor level a minimum of 16,700 square feet of floor area set aside for retail uses permitted in the C-3-C Zone District and the service uses listed in § 701.1. The first floor retail uses shall be concentrated along the L and 21st Street frontages to the maximum extent possible; however, the Applicant shall have the flexibility to subdivide the space and to provide retail bays of varying depths to accommodate specific tenant needs and to facilitate entry from 21st Street to the interior first floor spaces for non-retail users.”

All other conditions contained within Z.C. Order No. 78, as restated in Zoning Commission Order 78-A, shall remain in full force and effect.

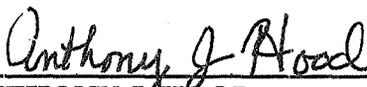
The Commission's approval of this modification is subject to the additional following guidelines, conditions and standards: For the purposes of these conditions, the term “Applicant” shall mean the person or entity then holding title to the Subject Property. If there is more than one owner, the obligations under this Order shall be joint and several. If a person or entity no longer holds title to the Subject Property, that party shall have no further obligations under this Order; however, that party remains liable for any violation of these conditions that occurred while an Owner. Whenever compliance is required prior to, on, or during a certain time, the timing of the obligation is noted in bold and underlined text:

1. All leases to occupy any portion of the first floor level shall include a provision in which the tenant agrees not to apply for a Nightclub license (N) as that license and its two classes is described at D.C. Official Code § 25-113(d).
2. **Prior to issuance of the next certificate of occupancy for the first floor level, whether for a change of ownership or use or the issuance of any building permit for interior renovation,** the Applicant shall purchase and provide to the West End Public Library the furnishings for the Children's Room listed in the District of Columbia Public Library's request dated December 2, 2010 and submitted with the Applicant's December 2, 2010 filing and marked as Exhibit 37.
3. **Prior to issuance of the next certificate of occupancy for floor level, whether for a change of ownership or use or the issuance of any building permit for interior renovation,** the Applicant shall purchase and provide to Fire Station Engine #23 the list of requested items submitted with the Applicant's December 2, 2010 filing and marked as Exhibit 37.

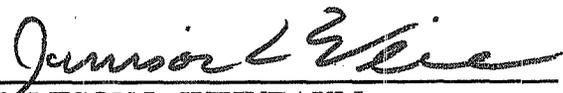
On November 18, 2010, upon the motion of Commissioner May, as seconded Commissioner Turnbull, the Zoning Commission **APPROVED** this application at the conclusion of its public hearing by a vote of 4-0-1 (Anthony J. Hood, Greg M. Selfridge, Peter G. May, and Michael G. Turnbull to approve; Konrad W. Schlater, not present, not voting).

On January 10, 2011, upon the motion of Commissioner Turnbull, as seconded by Chairman Hood, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of 5-0-0 (Anthony J. Hood, Konrad W. Schlater, Greg M. Selfridge, Peter G. May, and Michael G. Turnbull to adopt).

In accordance with the provisions of 11 DCMR § 3028.8, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on February 4, 2011.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



JAMISON L. WEINBAUM
DIRECTOR
OFFICE OF ZONING

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning



Z.C. CASE NO.: 70-16B

FEB 3 2011

As Secretary to the Commission, I hereby certify that on FEB 3 2011 copies of this Z.C. Order No. 78B were mailed first class, postage prepaid or sent by inter-office government mail to the following:

1. *D.C. Register*
2. Kinley Bray, Esq.
Arent Fox, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
3. ANC 2A
West End Branch Library
1101 24th Street, N.W.
Washington, D.C. 20037
4. Commissioner Rebecca K. Coder
ANC/SMD 2A02
2501 M Street, N.W. #721
Washington, D.C. 20037
5. Gottlieb Simon
ANC
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
6. Councilmember Jack Evans
7. DDOT (Karina Ricks)
8. Melinda Bolling, Acting General Counsel
DCRA
1100 4th Street, S.W.
Washington, D.C. 20024
9. Office of the Attorney General (Alan Bergstein)
10. West End Citizens Association
c/o Barbara Kahlow
800 25th Street, N.W. #704
Washington, D.C. 20037

ATTESTED BY:

Sharon S. Schellin
Secretary to the Zoning Commission
Office of Zoning