

May 5, 2017

VIA IZIS AND HAND DELIVERY

Anthony J. Hood, Chairman
Zoning Commission for the District of Columbia
441 Fourth Street, NW, Suite 210S
Washington, DC 20001

Re: Z.C. Order No. 14-12 (the “Order”) – Application of EAJ 1309 5th Street LLC (the “Applicant”) for a Consolidated and First-Stage Planned Unit Development (“PUD”) and Related Zoning Map Amendment (collectively, the “Application”) for 1309-1329 5th Street, NE (Lot 800, Square 3591) (the “Property”) – Request to Extend the Order for a Period of Two (2) Years

Dear Chairman Hood and Commissioners:

Pursuant to Title 11, Subtitle Z, Section 705 of the District of Columbia Zoning Regulations (“**Section 705**”), the Applicant hereby requests a two (2) year extension of the approval of the Consolidated PUD approved in the Order.

The Application pertains to two buildings and surrounding open space on the Property (collectively, the “**Project**”). The building proposed for the southern portion of the Property (the “**South Building**”) is the subject of the Consolidated PUD portion of the Application, and the building proposed for the northern portion of the Property (the “**North Building**”) is the subject of the First-Stage PUD. The Order provides that the approval of the Consolidated PUD for the South Building is valid until May 8, 2017, and that within such time the Applicant must file for a building permit for the South Building. Order at Decision ¶ D.2. For the reasons set forth more fully herein, the Applicant cannot comply with the timeline provided in the Order.

In the days following this extension request, the Applicant intends to submit an application for a modification of the Order (the “**Modification**”), along with a Second-Stage PUD application with respect to the North Building. These forthcoming applications, if approved, would facilitate programmatic modifications to improve the viability of the overall Project and provide a refined program for the South Building and a design for the North Building (since the First-Stage approval did not include design review). These applications would also allow the delivery of the Project in a more expedited and holistic fashion by eliminating the prior

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proposed phasing. This extension request is made pursuant to Section 705 for the good cause shown herein.

In support of this extension request, enclosed please find the following:

- Exhibit A – Extension Application Form;
- Exhibit B – Authorization Letter from the Applicant;
- Exhibit C – Surveyor’s Plat of the Property;
- Exhibit D – Z.C. Order No. 14-12;
- Exhibit E – Affidavit from the Applicant; and
- A check made payable to the DC Treasurer in the amount of \$520 for this extension request pursuant to Subtitle Z, Table 1600 of the Zoning Regulations.

If this extension request is approved, the Applicant would be required to file for a building permit for the South Building by no later than May 8, 2019, unless otherwise set forth as part of the Modification. The Applicant requests that this extension request is considered by the Zoning Commission at the same public meeting as the to-be-filed Modification and Second-Stage applications are scheduled for Final Action should they be approved by the Commission.

I. **THE ZONING COMMISSION HAS JURISDICTION TO GRANT THE REQUESTED TIME EXTENSION**

Under Section 705.2, the Zoning Commission may, upon the filing of this written request by the Applicant before the expiration of the approval contained in the Order, extend the validity of the Order for good cause, provided that the Applicant documents the following:

- (a) The extension request is served on all parties to the Application by the Applicant, and all parties are allowed thirty (30) days to respond;
- (b) There is no substantial change in any of the material facts upon which the Zoning Commission based its original approval of the Application that would undermine the Zoning Commission’s justification for approving the original Application; and
- (c) The Applicant demonstrates with substantial evidence that there is good cause for such extension, as provided in Section 705.2(c).

Under Section 705.2(c), the Applicant must demonstrate one or more of the following criteria:

- (1) An inability to obtain sufficient financing for the Project approved in the Order, following the Applicant’s diligent good faith efforts to obtain such financing, because of changes in economic and market conditions beyond the Applicant’s reasonable control;

- (2) An inability to secure all required governmental agency approvals for the Project approved in the Order 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
- (3) 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.

Below is the Applicant's documentation of the good cause underlying this request for a two (2) year extension of the Order with respect to the South Building's Consolidated PUD approval.

II. OVERVIEW OF THE PROPERTY AND PROJECT

A. The Property

The Property is located in the Northeast quadrant of the District of Columbia on a rectangular lot bounded by 6th Street, NE to the east, 5th Street, NE to the west, a surface parking lot to the south, and a vacant lot to the north. The Property is located in the heart of the Union Market District (which is also known as the "Florida Avenue Market District"), and the site of the South Building contains the existing two-story market building (known as "**Union Market**") that is at the center of retail activity in Union Market District today. In total, the Property consists of approximately 85,820 square feet of land area, as depicted on the plat attached as Exhibit C. The South Building is the subject of this extension request.

The Property is located within the boundaries of Advisory Neighborhood Commission ("ANC") 5D. The Property is in ANC Single-Member-District 5D01 in Ward 5. It is approximately one third of a mile from the NoMA-Gallaudet University Metrorail station.

B. Project Background and Approval

The Applicant filed the original Application with the Zoning Commission on July 9, 2014. The Project, as approved by the Zoning Commission, is a mixed-use, transit-oriented development, with retail, office, and residential uses. The Order approved a total of approximately 541,400 square feet of gross floor area ("**GFA**") in the South Building and North Building as a whole, for a total floor area ratio ("**FAR**") of 6.3. The approved South Building retained the existing Union Market building and added stories above for a total GFA of approximately 216,400 square feet (with an effective FAR of approximately 2.52) of theater, retail, and either residential or office use. The approved North Building consisted of approximately 325,000 square feet of GFA (for an effective FAR of approximately 3.78) of retail and either residential or office use.

The Zoning Map amendment approved in the Order amended the Property's zoning from the C-M-1 to the C-3-C Zone District, which allows for greater height and density and a greater mix of uses than the underlying zoning.

On February 11, 2015, the Zoning Commission voted to approve the Project, and the Order became effective upon publication in the *D.C. Register* on May 8, 2015. Pursuant to a condition of the Order, the approval for the South Building contained in the Order is valid until May 8, 2017. Due to the Applicant's work to find a development partner and the negotiations and redesign relating to such partnership search and the exit of the theater partner from the Project, along with the market and other conditions beyond the Applicant's reasonable control, the Applicant has been unable to file an application for a building permit for the South Building within the period required under the Order (i.e., by May 8, 2017). As indicated above, the Applicant has been diligently and in good faith pursuing development of the Project and as such will seek modification of the previously-approved Consolidated PUD in the coming days to facilitate a development program that is more suitable to its new development partner's desired project design and more viable under current market conditions.

III. **THE ZONING COMMISSION SHOULD GRANT THIS EXTENSION REQUEST BECAUSE THE APPLICANT HAS SATISFIED ALL RELEVANT PROCEDURAL REQUIREMENTS AND GOOD CAUSE EXISTS**

A. **This Extension Request Is Served on all Parties to the Application**

The Applicant and the ANC were the only parties to the Application. A copy of this extension request is being served simultaneously on ANC 5D, as demonstrated by the Certificate of Service appended hereto. The ANC will have thirty (30) days to respond to this extension request. Further, the approval of this extension request will not prejudice the rights of any party and is not otherwise prohibited by law. Therefore, this extension request satisfies Section 705.2(a) for an extension of the Order.

B. **There Has Been No Substantial Change to Any of the Material Facts Upon Which the Zoning Commission Based Its Original Approval of the Application**

There has been no substantial change in the material facts upon which the Zoning Commission relied for its original approval of the Application that would undermine the justification for approval. The Project, as approved (and including the forthcoming Modification and Second-Stage PUD applications referenced above), achieves the goals and policies of the Comprehensive Plan of the District of Columbia and the Florida Avenue Market Small Area Plan and satisfies the PUD evaluation criteria contained in the Zoning Regulations. Therefore, this extension request satisfies Section 705.2(b) for an extension of the Order.

C. **Good Cause Exists for Granting this Extension Request and Such Cause is Supported by Substantial Evidence**

Under Section 705.2(c), the Applicant must demonstrate good cause with substantial evidence as a prerequisite of the Zoning Commission granting this extension request. As noted above, Section 705.2(c) enumerates three criteria, any one or more of which satisfies the good cause requirement. Good cause exists for the Zoning Commission to grant this extension request, and such cause is demonstrated by substantial evidence as detailed herein and by the exhibits

attached hereto. In particular, the Applicant's efforts to move the Project forward towards implementation, to solicit and negotiate with development partners, to modify the Project into a marketable product mix, and to work to address existing market and financing challenges beyond the reasonable control of the Applicant (along with the existence of other factors) satisfy Section 705.2(c) for an extension of the Order. These diligent, good faith efforts of the Applicant detailed below in response to market factors beyond the control of the Applicant have prevented the Applicant from complying with the timeline prescribed in the Order.

In granting past extensions, the Zoning Commission has determined that an applicant's efforts to implement a project approved by an Order of the Zoning Commission and adverse market conditions constitute good cause under Section 705.2(c). The complications of losing the Project's theater partner further support the good cause standard under Section 705.2(c). The Applicant's efforts to proceed with the Project, in particular, comply with the standards set forth in Section 705.2(c).

i. **Efforts by Applicant to Finance and Develop the Project**

As evidence of the Applicant's diligent good faith efforts to finance and develop the Project, since the Order issuance, Applicant has expended significant time and resources to identify development partners and finance and develop the Project. The Applicant has funded a wide variety of expenditures to facilitate the implementation of the Project. A list of work and costs funded by the Applicant totaling approximately \$2,020,000 as described in an affidavit from the Applicant attached as Exhibit E (the "**Affidavit**"). As can be seen in a review of the Affidavit, the Applicant has undertaken a great deal of effort to achieve the development of the Project. The key initiatives to implement the Project on the Property are as follows:

- Solicitation of office and residential development partners ("Development Partners") – Applicant engaged in a process to solicit experienced, proven developers to implement the unique complexities of the Project by interviewing, reviewing, and ultimately signing non-binding agreements with two Development Partners for the Project. Such efforts are more thoroughly detailed in the Affidavit.
- Due diligence and joint venture/Development Partner negotiation – Applicant engaged with two different Development Partners in detailed negotiations relating to the joint venture between the parties. Each such Development Partner spent a great deal of time and money to review and design their respective elements of the Project. After these two Development Partners exited the Project, the Applicant's current Development Partner, Great Gulf entered began negotiating with the Applicant to develop both Project buildings. Even before such negotiations were complete, the Applicant's current Developer Partner, Great Gulf, embarked on its significant due diligence for the site. Further, and more importantly, as detailed below, the parties launched into a redesign for the Project that will allow the Project to become a reality.

- Implementation of prior approved requirements – Applicant has continued to develop the Project by implementing elements of the prior approved Order. For example, Applicant has funded and worked with the consultant hired to create the “Streetscape Guidelines” for the Union Market District, which will allow the creation of a unique and cohesive experience in the public realm of the Union Market District.

As described in the Affidavit, significant efforts were made to advance a residential project on the South Building in particular. While this process ultimately did not result in a residential project moving forward, the process was helpful to advance the structural design of the South Building, at first with the theater and then without such component. Ultimately that process led to the realization that from a financing and constructability perspective (i) the Project needed to be constructed as a whole, (ii) the underground garage needed to be constructed as part of the Project’s first phase, and (iii) the South Building needed to be programmed as an office building.

Taken in totality, the above efforts demonstrate the diligent good faith of the Applicant to successfully implement the Project. The Applicant has consistently worked to bring the Project to fruition throughout the period of validity of the Order.

ii. Redesign of Approved Project

As referenced above, the previously-approved Project requires modification in order to create a more viable development. This modification has taken time to design.

A primary consideration of such modification is that the theater partner involved in the prior approval was unable to proceed with the Project. Such theater space was tailor made for the particular theater partner and its removal¹ necessitated the redesign of the Project (which will be submitted in a detailed manner in the coming days as part of the Modification and Second-Stage PUD applications).

Additionally, the team has concluded that the office use is best suited for the South Building and residential use is best for the North Building, refining the use ranges and flexibility approved for both under the Order. The Applicant has already started meeting with District agencies relating to the Modification (and the Second Stage PUD at the North Building). In addition to generating significant costs, the redesign of the previously-approved Project along with the negotiation of transaction documents between Applicant and its current development partner created meaningful delay.

As a result of the above, subsequent to this extension request, the Applicant seeks approval of the modification of the plans approved by the Order, which modifications are

¹ Note that the Applicant brought a theater into the Union Market District, just not to this Property.

necessitated by the redesign of the Project. The Applicant is excited to present the updated project to the Zoning Commission and agencies and to bring the Project to reality.

iii. **Phasing**

The Applicant and its affiliates and partners are pursuing several projects in the Union Market area. The first phase of such projects was the renovation and reopening of the existing central Union Market retail building. The introduction of Union Market's vibrant, consumer-focused retail and unique event space has raised the profile of the Union Market District. This establishment of a consumer retail base supports future phases of redevelopment and will attract residents and additional patrons to Union Market. As a result, the Applicant believed that continuing the momentum and catalytic effect of the Union Market without distraction (i.e., without immediately surrounding construction) would help further grow the Union Market and extend its positive effect all over the Union Market District over the last two (2) years.

In addition, we note that, despite the requested extension, after the to-be-filed Modification (and Second-Stage PUD), the end result will be that the entirety of the Project – both the South Building and North Building – will likely be completed more quickly than originally contemplated under the Order.

iv. **Real Estate Office Market and Economic Conditions Pertaining to Financing the Project**

The Applicant requires an extension to the Order in part because the office and theater components of the Project specifically have made the implementation of the Project challenging due to conditions beyond the Applicant's reasonable control.

Generally, traditional office space cannot typically be financed and introduced without a tenant definitively in place. The lack of a traditional office market in the Union Market District has further complicated the ability to obtain office financing since approval of the Order. While the Applicant believes that there is a unique office market opportunity generally in the Union Market District, it requires an innovative vision not yet shared by all developers. However, the Applicant and its affiliates have been successful leasing existing smaller spaces in the Union Market District to non-traditional technology and creative office users. Outside of this market need, the condition of the Union Market District office market would need to significantly improve to convince traditional office developers (and their lenders) to move forward.

In a related vein, to date, it has not been possible to agree on joint venture terms without financing contingencies and to persuade lenders of the Project's viability to support a financing commitment for an office component of the Project.

v. **Summary**

In light of the conditions beyond the Applicant's reasonable control as described above, financing, designing, and developing the Project in accordance with the originally proposed timeline has not been possible. With the knowledge gained over the last two (2) years, the

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Applicant has again engaged in a lengthy process to find a development partner who can undertake and deliver the quality of a Project that this site and area demand and to redesign the Project. The redesigned Project is currently being coordinated with the ongoing phasing of development in the Union Market area to ensure it would be viable. However, nearly two (2) years have lapsed since the issuance of the Order despite the Applicant's numerous and ongoing diligent good faith efforts.

If the approval granted by the Order lapses without extension, the Applicant's current efforts to implement the Project will be even further hampered. As of this date, the Applicant believes that if the Modification (and Second Stage PUD) being proposed subsequently to this extension request is approved, the Project will be much better positioned to succeed. Therefore, this extension request satisfies Section 705.2(c)(1) and (3) for an extension of the Order.

If desired by the Zoning Commission, the Applicant is willing to provide further information regarding its satisfaction of the standards of Section 705.

IV. CONCLUSION

For the foregoing reasons, the Applicant has satisfied the requirements for the Zoning Commission to grant the requested two (2) year extension of the Consolidated PUD approval contained in the Order. The Applicant reserves the right to supplement this filing with additional documentary evidence in advance of consideration by the Zoning Commission. Thank you for your attention to this application.

Respectfully submitted,



Jeffrey C. Utz



David A. Lewis

Certificate of Service

I certify that on May 8, 2017, I delivered a copy of the foregoing document via hand delivery or first class mail to the addresses listed below.



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