

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



**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-12A
Z.C. Case No. 14-12A
EAJ 1309 5th Street, LLC
(Time Extension – Consolidated Planned Unit Development and
Related Map Amendment @ Lot 5¹, Square 3591)
September 17, 2018**

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (“Commission”) was held on September 17, 2018. At that meeting, the Commission approved the request of EAJ 1309 5th Street, LLC (“Applicant”) for a time extension of the date before which the Applicant must file a building permit application for the consolidated planned unit development (“Consolidated PUD”), approved by the Commission as part of the PUD development pursuant to Z.C. Order No. 14-12 (“Approved PUD”). The Approved PUD pertains to 1309-1329 5th Street, N.E. (Lot 5, Square 3591) (“Property”), which includes two parcels: (i) the south parcel (“South Parcel”) being the subject of the Consolidated PUD and related map amendment pursuant to the Approved PUD, and (ii) the north parcel (“North Parcel”) being the subject of a first-stage PUD approval and the related map amendment set forth in the Approved PUD. This application pertains to the Consolidated PUD. The Consolidated PUD was approved under the Zoning Regulations then in place, which were repealed as of September 5, 2016 and replaced by new text and the existing zone names were also changed. Although development of the Consolidated PUD and the related map amendments are vested under those former regulations and map, all procedural requests, including requests for time extensions are decided under the replacement regulations. Thus, the time extension request was made pursuant to Subtitle Z § 705 of Title 11 DCMR (the Zoning Regulations of 2016).

FINDINGS OF FACT

BACKGROUND INFORMATION

1. The Property is located in the northeast quadrant of the District of Columbia on a rectangular lot bounded by 6th Street, N.E. to the east, 5th Street, N.E. to the west, a surface parking lot to the south, and a vacant lot to the north. (Exhibit [“Ex.”] 1, p. 3.) 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

¹ The Property is now known as Lot 5 in Square 3591. The Property was subdivided into Lot 5. Previously, the Property was known as Lot 800 in Square 3591.

of a mile from the NoMA-Gallaudet University Metrorail station. The Property is located in the Union Market District (which is also known as the “Florida Avenue Market District”), and the South Parcel today 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. (*Id.*)

2. The Approved PUD became final and effective upon publication in the *D.C. Register* on May 8, 2015. The Approved PUD includes: (i) the Consolidated PUD approval, pertaining only to the South Parcel, (ii) a first-stage PUD approval pertaining only to the North Parcel, and (iii) a related Map Amendment, pertaining to both the South Parcel and the North Parcel. 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. The subject of this extension request is the South Parcel and the Consolidated PUD approved with respect thereto. (*Id.*, pp. 1-3.)
3. The overall project authorized under the Approved PUD (“Project”), as approved by the Commission, is a mixed-use, transit-oriented development, with retail, office, and residential uses. The Project includes a total of approximately 541,400 square feet of gross floor area (“GFA”) in two buildings, one on the South Parcel (“South Building”) and the second on the North Parcel (“North Building”), for a total floor area ratio (“FAR”) of 6.3. The approved South Building retains the existing Union Market building and adds 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 consists of approximately 325,000 square feet of GFA (for an effective FAR of approximately 3.78) of retail and either residential or office use. (*Id.*)

CURRENT APPLICATION

4. Pursuant to Condition D.2 of the Approved PUD, the Consolidated PUD approval for the South Building was valid until May 8, 2017, within such time, an application must be filed for the building permit for the South Building as specified. Construction shall begin within three years after the effective date of this Order. The Applicant filed the instant application for a time extension of the Consolidated PUD prior to the expiration of the approval therefor. The filing of such extension tolled the expiration of the Consolidated PUD approval, although no application for a building permit could be approved unless the request was granted.
5. The Applicant and ANC 5D were the only parties to the Approved PUD proceedings. A copy of the application materials for this extension request were served on ANC 5D, as demonstrated by the Applicant’s Certificate of Service. (Ex. 1, p. 9.) The ANC did not respond to this extension request.
6. There has been no substantial change in the material facts upon which the Commission relied for its original approval of the Approved PUD that would undermine the justification for the approval thereof. The Project, as approved, continues to achieve the goals and policies of the Comprehensive Plan of the District of Columbia and the Florida Avenue

Market Small Area Plan (“Florida Avenue Market Study” dated March 2009) and satisfies the PUD evaluation criteria contained in the Zoning Regulations. Although the Applicant proposed a modification to the Approved PUD (Ex. 5; *see also* Z.C. Case No. 14-12B), that modification was withdrawn prior to the Commission’s deliberation on the instant time extension request. (Ex. 6.)

7. The Applicant provided substantial evidence that there is good cause for extending the expiration of the Consolidated PUD. The Applicant has been diligently, and in good faith, pursuing development of the Project. The Applicant has expended significant time and resources to identify development partners and finance and develop the Project. (Ex. 1, pp. 4-7; 1E; 6.) The Applicant funded a wide variety of expenditures to facilitate the implementation of the Project and provided a detailed list of work and costs funded by the Applicant totaling approximately \$2,150,000. (Ex. 1E, 6.) The Applicant’s efforts to implement the Project include:
 - (a) Solicitation of office and residential development partners (“Development Partners”) – the 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;
 - (b) Due diligence and joint venture/Development Partner negotiation – the 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; and
 - (c) Implementation of prior approved requirements – the Applicant has continued to develop the Project by implementing elements of the prior approved Order. For example, Applicant 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.

8. However, despite the Applicant’s work to find a development partner and the negotiations and redesign relating to such partnership search, 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 Approved PUD (i.e., by May 8, 2017). Factors beyond the Applicant’s reasonable control that justify the extension include:
 - (a) The Applicant’s loss of the most recent Development Partner for the North Building due to the current climate of PUD appeals in the District;
 - (b) The South Building’s movie theater tenant’s failure to perform under its lease, resulting ultimately in the loss of the theater lease commitment;

- (c) The speculative nature of the office component of the South Building;
- (d) The Applicant's inability to commit additional capital to the South Building without a theater or office tenant;
- (e) The complex structural engineering and high construction costs associated with constructing over the existing Union Market – the Approved PUD contemplates constructing eight new stories of the South Building above the existing Union Market without interrupting activity within or closing the Market; such construction effort presents substantial technical and engineering challenges. To address these challenges, the Applicant retained specialized expertise, including structural engineers who specialize in bridge construction, to solve the technical challenges involved. In addition, the financing associated with such complicated construction required additional time to investigate and fund;
- (f) The Applicant's self-imposed requirement to minimize adverse impacts to the existing tenants and businesses in the Market; and
- (g) Uncertainty of the timing of development of the adjacent Gallaudet-owned parcel to the south, which the Applicant currently licenses for much needed parking for the Market and other businesses in the area.

Taken together, these challenges have taken longer to resolve than the Applicant originally anticipated.

- 9. The Office of Zoning referred the application to the Office of Planning ("OP") on May 11 2017. (Ex. 2.) On May 22, 2017, OP filed a report with the Commission recommending approval of the PUD time extension request until May 8, 2019. OP concluded that the Applicant satisfied the relevant standards of Subtitle Z § 705. (Ex. 4.)
- 10. ANC 5D did not provide a response to this application, and there were no other documents filed by third parties or persons in the record of this case.

CONCLUSIONS OF LAW

The Commission may extend the time period of an approved PUD provided the requirements of Subtitle Z § 705.2 are satisfied. The Applicant has satisfied each of the requisite conditions.

Section 705.2(a) requires that the Applicant serve the extension request on all parties and that all parties are allowed 30 days to respond. The only party in the original case was ANC 5D, which was properly served with this time extension request but did not respond to this request. The Applicant has satisfied this notice requirement.

Section 705.2(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 Approved PUD. Based on the information provided by the Applicant and OP, the Commission concludes that extending the time

period of approval for the Consolidated PUD is appropriate, as there are no substantial changes in the material facts that the Commission relied on in approving the original Consolidated PUD.

Section 705.2(c) requires that the Applicant demonstrate with substantial evidence one or more of the following criteria:

- (a) An inability to obtain sufficient project financing for the development, 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 development 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 order.

Based on the substantial evidence placed into the record by the Applicant, as recited above, the Commission concludes 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 Consolidated PUD. The Applicant has worked in good faith to advance the development of the overall Project and the development of the South Building. However, numerous factors outside the Applicant's control, including litigation risk, market conditions, and construction challenges, require additional time for the Applicant to resolve or design around. The Commission concludes that granting the time extension request until May 9, 2019 is an appropriate amount of time in light of the existing conditions. For these reasons, the Commission finds that the Applicant has satisfied the requirements of § 705.2(c)(3).

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's recommendations. OP recommended approval of the time extension request, and the Commission concurs in its recommendation.

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 time extension of the Consolidated PUD application approved in Z.C. Order No. 14-12. The consolidated PUD approved by the Zoning Commission shall be valid until May 9, 2019, before which time the Applicant will be required to file a building permit application for the South Building. Construction of the Consolidated PUD must start no later than May 9, 2020.

On September 17, 2018, upon motion by Vice Chairman Miller, as seconded by Chairman Hood, the Zoning Commission took **FINAL ACTION** to **APPROVE** this application its public meeting by a vote of **4-0-1** (Anthony J. Hood, Robert E. Miller, Peter G. May, and Michael G. Turnbull to approve, and Peter A. Shapiro, not present, and not voting).

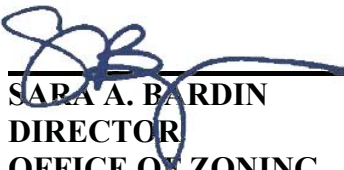
In accordance with the provisions of 11-Z DCMR § 604.8 this Order shall become final and effective upon publication in the *D. C. Register* on November 9, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING