GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-12H
Z.C. Case No. 14-12H
EAJ 1309 5th Street, LLC
(Two-Year Time Extension for PUD @ Square 3591, Lots 801, 802, 7004, 7005, 7011, 7012, 7013, 7034, 7036, 7037, and 7038)
December 19, 2024

Pursuant to notice, at its December 19, 2024 public meeting, the Zoning Commission for the District of Columbia (the "Commission") considered the application (the "Application") of EAJ 1309 5th Street, LLC (the "Applicant") concerning Lots 801, 802, 7004, 7005, 7011, 7012, 7013, 7034, 7036, 7037, and 7038 in Square 3591 (the "Property") for (i) a waiver from the Commission's rules limiting the number and duration of time extensions, and (ii) a two-year time extension of the deadline to file a building permit application for the approved consolidated planned unit development ("PUD") approved by Z.C. Order No. 14-12 (the "Original Order"), as extended by Z.C. Order Nos. 14-12A, 14-12D, 14-12D(1),14-12D(2), and 14-12G, and as modified by Z.C. Order Nos. 14-12C and 14-12C(1). The Commission reviewed the Application pursuant to the Commission's Rules of Practice and Procedures, which are codified in Subtitle Z of Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations, ["Zoning Regulations of 2016"], to which all subsequent regulatory citations refer unless otherwise specified). For the reasons stated below, the Commission **APPROVES** the Application.

FINDINGS OF FACT

I. BACKGROUND

THE PROPERTY

1. The Property is located in Ward 5 in the Northeast quadrant of the District 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 to the north, a newly delivered mixed-use building; is in the heart of the Union Market District; and contains the two-story market building (known as "The Market" or the "Existing South Building") that remains the center of retail activity in the Union Market District today.

PRIOR APPROVALS

2. Pursuant to the Original Order, effective May 8, 2015, the Commission approved (i) a consolidated PUD for the South Parcel, including the Existing South Building and a Future South Building("South Building PUD"), (ii) a first-stage PUD with respect to lots adjacent to the Property (the "North Parcel"), including the North Building, and (iii), together for the Property and the North Parcel, a related Zoning Map amendment rezoning both from

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the CM-1 (now PDR-1) to the C-3-C (now MU-9B) Zone District. The Original Order authorized:

- A Consolidated PUD both for the Existing South Building to allow ground floor retail/restaurant uses, an event space on the second level, and outdoor plazas; and for the Future South Building, a vertical expansion of the Existing South Building to a height of 120 feet and a gross floor area of approximately 216,400 for entertainment (movie theatre) and either office or residential uses above the theatre, at the Applicant's election; and
- A First-Stage PUD for the North Building to include ground floor/retail uses and upper story residential uses with a total height of 120 feet and a gross floor area of approximately 325,000 square feet. The North Building is now fully constructed and is currently occupied.

3. Condition No. D.3 of the Original Order approved the South Building PUD for two years of the Original Order effective date, during which time the Applicant was required to file a building permit application.

4. Pursuant to Z.C. Order No. 14-12A, filed on May 5, 2017, and effective November 9, 2018, the Commission approved a two-year time extension of the deadline to file a building permit application under the South Building PUD until May 9, 2019.

5. Pursuant to Z.C. Order No. 14-12D[1], filed on May 7, 2019, and effective January 24, 2020, the Commission approved a one-year time extension of the deadline to file a building permit application under the South Building PUD until May 8, 2020. Pursuant to Subtitle Z § 702.1[2] and 204.3, such deadline was automatically extended for a period of six (6) months; that is, until November 9, 2020.

6. Pursuant to Z.C. Order No. 14-12D(1),[3] filed on December 15, 2020 and effective January 1, 2021, the deadline to file a building permit application under the South Building PUD was administratively extended for one year pursuant to Subtitle Z § 705.9[4], until November 9, 2021.

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1 On June 26, 2017, the Applicant filed an application for a modification to the South Building PUD and a Second-Stage PUD for the North Parcel in Z.C. Case No. 14-12B. On August 23, 2018, the Applicant withdrew such application without the Commission having ever taken action with respect thereto. On April 10, 2019 the Applicant filed an application for a modification of consequence to the South Building PUD to permit interim improvements and uses in the Existing South Building on the Property in Z.C. Case No.14-12C, which modifications were approved in Z.C Order Nos. 14-12C and 14-12C(1), effective August 30, 2019.

2 Under Subtitle Z § 705.5, administrative extensions granted due to the Covid-19 pandemic per Subtitle Z § 702.1, do not count as an extension request under Subtitle Z § 705.5.

3 On November 6, 2020, prior to the expiration date established in Z.C. Order No. 14-12D, the Applicant filed a request for a further time extension of the South Building PUD under Z.C. Case No. 14-12F thereby tolling the expiration of the South Building PUD. On September 9, 2021, the Applicant withdrew the time extension request under Z.C. Case No. 14-12F because it was superseded by Z.C. Order No. 14-12D(1).

4 Under Subtitle Z § 705.5, administrative extensions granted due to the Covid-19 pandemic per Subtitle Z § 705.9, do not count as an extension request under Subtitle Z § 705.5.

7. Pursuant to Z.C. Order No. 14-12D(2),[5] filed on November 8, 2021 and effective November 26, 2021, the deadline to file a building permit application under the South Building PUD was administratively extended for one-year pursuant to Subtitle Z § 705.9,[6] until November 9, 2022.

8. Pursuant to Z.C. Order No. 14-12G, filed on November 4, 2022 and effective April 7, 2023, the Commission approved a two-year time extension of the deadline to file a building permit application under the South Building PUD until November 9, 2024; and a waiver from the Commission's rules, under Subtitle Z § 705.5, to allow a third time extension and a second extension for more than one year.

PARTIES AND NOTICE

9. In addition to the Applicant, the only party to Z.C. Case No. 14-12 was Advisory Neighborhood Commission ("ANC") 5D, the "affected" ANC pursuant to Subtitle Z § 101.8.

10. On November 8, 2024, the Applicant served the Application on ANC 5D, the Office of Planning ("OP"), and the District Department of Transportation ("DDOT"), as attested by the Certificate of Service submitted with the Application (Exhibit ["Ex."] 2 at 12).

II. THE APPLICATION

11. On November 8, 2024, the Applicant filed the Application requesting a two-year time extension until November 9, 2026, to file a building permit application under the Consolidated PUD for the Future South Building; and a waiver, pursuant to Subtitle Z § 101.9, from Subtitle Z § 705.5 to allow a fourth time extension and a third extension for more than one year. The Application stated that this extension request relates only to the Consolidated PUD and the Future South Building, as the Existing South Building and the interim improvements and uses inside are to remain intact during construction of the Future South Building, as approved under Z.C. Order Nos. 14-12C and 14-12C(1). The Application further stated that in the next two years the Applicant expects to either satisfy filing a building permit application or seek modification of the Consolidated PUD to make permanent the interim conditions at the Property. (Ex. 2)

12. The Applicant asserted it met the requirements of Subtitle X § 705.2 for the requested two-year time extension and the requirements of Subtitle X § 101.9 for a waiver from Subtitle Z § 705.5's maximum of two-time extensions and a maximum of one year for a second time extension because:
    - The time extension request was served on all parties and parties were allowed 30 days to respond;

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[5] On June 6, 2019, affiliates of the Applicant filed an application for a second-stage PUD for the North Parcel, which application was approved in Z.C. Order No. 14-12E, effective July 31, 2020.

[6] Under Subtitle Z § 705.5, administrative extensions granted due to the Covid-19 pandemic per Subtitle Z § 705.9, do not count as an extension request under Subtitle Z § 705.5.

- There has been no substantial change in any material facts upon which the Commission based its approval of the Original Order that would undermine the Commission's justification for that approval; and
- Good cause justifies the Commission granting the time extension and the waiver because the Applicant has faced extraordinary circumstances that have delayed commencement of construction of the Future South Building, including
  - Post-pandemic effects on the real estate market for office and movie theaters;
  - Financing difficulties exacerbated by high interest rates; and
  - Construction challenges unique to the structural design and increased construction costs; and
- The time extension request does not prejudice the rights of any party and is not prohibited by law as the only party to the Application, in this case ANC 5D, was served with the Application, the Applicant maintains a close working relationship with the ANC to ensure that its concerns are addressed, and no law prohibits this extension request.

(Ex. 2)

13. Despite these challenging circumstances, the Applicant notes the significant steps it has taken to deliver and enhance the benefits of the Consolidated PUD, including:
- The Applicant has advanced or completed nearly all of the Original Order's public benefits ahead of construction of the Future South Building (See Ex. 2A, Summary of Public Benefits);
- The Applicant has converted the top level of the Existing South Building into additional publicly accessible outdoor and recreational space, on an interim basis (as described and approved in Z.C. Order 14-12(C)) (*See* Ex. 2B, photos of the Union Market); and
- The Applicant has completed construction of the North Building (the First-Stage PUD per the Second-Stage PUD approved in Z.C. Order 14-12E) and the building is complete and currently occupied.

(Ex. 2)

III. RESPONSES TO THE APLICATION

OP

14. On December 2, 2024, OP filed a report (the "OP Report") supporting the Application and finding that it meets the requirements of Subtitle Z § 705.2 for the requested extension and the requirements of Subtitle Z § 101.9 for the requested waiver. OP concluded that there have been no substantial changes to the Comprehensive Plan Future Land Use Map or the Generalized Policy Map for the Florida Avenue Market Area (although there were changes in the 2021 Comprehensive Plan update with respect to the importance of PDR land), land designated for other uses such as this Property are anticipated to change use accordingly. OP stated that the Applicant demonstrated that the economics of the Future South Building are infeasible at this time due to post-pandemic challenges to the office market and difficulties in obtaining office financing and an equally challenging market for movie theatres as well as high construction costs. OP also noted that the Applicant has delivered many of the public benefits and amenities proffered through the Original Order. (Ex. 4)

ANC

15. ANC 5D did not file a response to the Application.

CONCLUSIONS OF LAW

1. Subtitle Z § 705.2 authorizes the Commission to extend the time period of an order upon determining that the time extension request demonstrated satisfaction of the requirements of Subtitle Z § 705.2 and compliance with the limitations of Subtitle Z § 705.3, 705.5, and 705.6.

2. Subtitle Z § 705.2(a) requires that an Applicant serve the extension request on all parties and that parties are allowed 30 days to respond.

3. The Commission concludes that the Applicant has satisfied Subtitle Z § 705.2(a) by demonstrating that it had served the Application on the only other party to the Application, ANC 5D, which was given 30 days to respond from the November 8, 2024, date of service.

4. Subtitle Z § 705.5 requires that "[a]n applicant with an approved PUD may request no more than two (2) extensions. . .[and a] second extension may be approved for no more than one (1) year."

5. Subtitle Z § 101.9 authorizes the Commission to waive any of the provisions of Subtitle Z if, in the judgment of the Commission, the Applicant demonstrates good cause for the waiver and the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

6. The Commission concludes that good cause exists for the Applicant's request for a waiver from the provisions of Subtitle Z § 705.5 to allow a fourth time extension and a third extension for more than one year because of the difficulties confronting the Applicant in constructing the building and mix of uses approved in the Future South Building due to economic and market challenges.

7. The Commission concludes that no party will be prejudiced by the granting of this waiver, as ANC 5D was served with the Application and did not file a response.

8. Subtitle Z § 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 PUD.

9. The Commission concludes that the Application satisfied Subtitle Z § 705.2(b) because there has been 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 that approval.

10. Subtitle Z § 705.2(c) requires that an application demonstrate with substantial evidence one or more of the following criteria:

1. *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;*
2. *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*
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 order.*

11. The Commission concludes that the Application meets the standards of Subtitle Z § 705.2(c)(1) and (c)(3) because the Applicant has demonstrated that it has diligently pursued the financing to construct the Future South Building and has not been able to move forward due to significant economic and market challenges outside its reasonable control, including a depressed market for office and movie theatres exacerbated by the Covid-19 pandemic, and high interest rates and construction costs, which made obtaining financing for the Future South Building infeasible within the time limits of the Original Order.

"Great Weight" to the Recommendations of OP

12. The Commission must give "great weight" to the recommendation of OP pursuant to § 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 (2018 Repl.)) and Subtitle Z § 405.9 (*Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016)).

13. The Commission finds persuasive OP's recommendation that the Commission approve the Application and therefore concurs in that judgment.

"Great Weight" to the Written Report of the ANC

14. The Commission must give "great weight" to the issues and concerns of the affected ANC expressed in a written report of an affected ANC that was approved by the full ANC at a properly noticed meeting that was open to the public pursuant to § 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)(2012 Repl.)) and Subtitle Z § 406.2. To satisfy this great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase "issues and concerns" to "encompass only legally relevant issues and concerns." (*Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978))

15. ANC 5D did not file a response to the Application; therefore, there is nothing to which the Commission can give great weight.

DECISION

In consideration of the case record and the Findings of Fact and Conclusions of Law herein, the Commission concludes that the Applicant has satisfied its burden of proof and therefore

APPROVES the Application's request for a two-year time extension (with a waiver of Subtitle Z § 705.5 pursuant to Subtitle Z § 101.9) of Z.C. Order No. 14-12, as extended by Z.C. Order Nos. 14-12A, 14-12D, 14-12D(1), 14-12D(2), and 14-12G until November 9, 2026, within which time a building permit application must be filed under the Future South Building. The Conditions in Z.C. Order No. 14-12, remain unchanged and in effect as previously modified.

VOTE (December 19, 2024): 4-0-1 (Gwen Wright, Anthony J. Hood, Robert E. Miller, and Tammy Stidham to approve; Joseph S. Imamura, not present, not voting)

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 14-12H shall become final and effective upon publication in the *District of Columbia Register*; that is, on March 7, 2025.

ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION

SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.