

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-12G

Z.C. Case No. 14-12G
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 15, 2022

Pursuant to notice, at its December 15, 2022 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” or the “South Parcel”) for (i) a waiver from the Commission’s rules limiting the number of time extensions, and (ii) a two-year time extension of the deadline to file a building permit application for the 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), and 14-12D(2), 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 the 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

PRIOR APPROVALS

1. Pursuant to the Original Order, effective May 8, 2015 (the “Original Order Effective Date”), the Commission approved (i) a consolidated PUD to construct a vertical expansion designated as five stories to the existing building on the South Parcel (“South Building PUD”) for entertainment (movie theatre) and either office or residential uses, at the Applicant’s election, (ii) a first-stage PUD with respect to lots north of the South Parcel (“North Parcel”) to construct a new building (the “Future North Building”) with ground floor retail/restaurant uses, an adjacent outside plaza, upper stories containing residential uses and below grade parking to serve the entire Property, and (iii), together for the South Parcel and the North Parcel, a related Zoning Map amendment rezoning both from the CM-1 (now PDR-1) to the C-3-C zone, to construct two buildings on property containing a total of approximately 85,820 square feet of land area in Ward 5.

2. Condition D.2 of the Original Order approved the South Building PUD for two years from May 8, 2015, the Original Order Effective Date, during which time the Applicant was required to file a building permit application for the South Building PUD.
3. 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 for the South Building PUD until May 9, 2019.
4. 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 for the South Building PUD until May 8, 2020. Pursuant to Subtitle Z §§ 702.1 and 204.3, such deadline was automatically extended for a period of six months; that is, until November 9, 2020.
5. Pursuant to Z.C. Order No. 14-12D(1),² filed on December 15, 2020 and effective January 1, 2021, an administrative one-year time extension, pursuant to Subtitle Z § 705.9, was approved extending the deadline to file a building permit application for the South Building PUD until November 9, 2021.
6. Pursuant to Z.C. Order No. 14-12D(2),³ filed on November 8, 2021 and effective November 26, 2021, an administrative one-year time extension, pursuant to Subtitle Z § 705.9, was approved extending the deadline to file a building permit application for the South Building PUD until November 9, 2022.

PARTIES AND NOTICE

7. In addition to the Applicant, the only other party to Z.C. Case No. 14-12 was Advisory Neighborhood Commission (“ANC”) 5D, the “affected” ANC pursuant to Subtitle Z § 101.8.
8. On November 4, 2022, 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.”] 3.)

II. THE APPLICATION

9. On November 4, 2022, the Applicant filed the Application requesting a two-year time extension of the November 9, 2022 deadline to file a building permit application for the South Building PUD, as established by Z.C. Order No. 14-12D(2). The Application also

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 on the existing 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 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.

3 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.

requested a waiver from Subtitle Z § 705.5 to allow a third time extension and a second extension for more than one year. Subtitle Z § 705.5 allows applicants to request no more than two time extensions for an approved PUD (not including any granted under Subtitle Z §§ 702.1-702.3 or 705.9) and limits the second time extension to one year. In these circumstances, this time extension is the Applicant's third time extension request, and the request is for more than one year. (Ex. 3.)

10. The Application asserted that extraordinary circumstances justified the additional time extension requested, with such circumstances including (a) the COVID-19 pandemic and related effects on the real estate market for office uses and movie theaters, two uses approved under the South Building PUD, (b) financing difficulties given the recent spike in interest rates, and (c) construction challenges related to cost and material challenges endemic to the real estate industry. (Ex. 3.) The Applicant asserted that the South Building PUD requires sixteen public benefits as outlined in Conditions B.1-B.16 of the Original Order, many of which have already delivered or are in progress. (Ex. 3E) The Applicant also stated that it has delivered park-like interim uses on the Property in excess of the public benefits required in the South Building PUD. The Applicant pointed out that a second-stage PUD for the North Parcel has been approved and is under construction and the Future North Building is scheduled to be delivered in 2023. Finally, the Applicant asserted that it has taken diligent steps to advance the development of new construction for the South Building PUD. (Ex. 3.)

III. RESPONSES TO THE APPLICATION

OP

11. On December 13, 2022, OP filed a report (the "OP Report") recommending approval of the Application. The OP Report found that there have been no substantial changes in any material facts upon which the Zoning Commission based its original approval, there have been no substantial changes to the Future Land Use Map or Generalized Policy Map for the area around the Property since the original approval (although there have been changes to the Comprehensive Plan with respect to "PDR" land), and several PUDs have been reviewed and approved by the Zoning Commission in the Florida Avenue Market Area with densities and heights consistent with what is anticipated in the Florida Avenue Market Small Area Plan. The OP Report also found that the Applicant has demonstrated good cause for the extension, citing "difficulties in proceeding with the project as originally approved, including securing a development partner, increasing construction costs, and financing" and that there were "unprecedented effects on the real estate market for office use and movie theaters, which are two of the significant, but yet unbuilt uses approved for the South Building PUD." (Ex. 6.)

ANC

17. On December 15, 2022, ANC 5D filed a letter ("ANC Letter") in support of the Application, stating that at a properly called and noticed meeting, with a quorum present, ANC 5D voted 5-0-1 to support the Application. The ANC Letter stated that the Applicant

“has shown good cause for an extension to its original approval” and that the ANC “appreciates the public benefits and amenities that have already been delivered as part of the Union Market PUDs ... [and its] concerns continue to be ensuring that the development of the Union Market District and the property move forward in an orderly way with benefits that primarily benefit the neighborhood and the area of the ANC...” (Ex. 7.)

CONCLUSIONS OF LAW

1. Subtitle Z § 705.2 authorizes the Commission to extend the time period of an order approving a PUD 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 to the application 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 served the Application on the only other party to the Original Order, ANC 5D, which was given 30 days to respond from the November 4, 2022 date of service and responded with a letter of support.
4. Subtitle Z § 705.5 requires that “[a]n applicant with an approved PUD may request no more than two (2) extensions, not including any granted due to the COVID-19 pandemic under Subtitle Z §§ 702.1-702.3 or 705.9. The second extension for an 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 third time extension and a second extension for more than one year because of:
 - The difficulties confronting the Applicant in constructing the building and mix of uses approved in the South Building PUD;
 - The Applicant’s ongoing efforts to deliver interim uses, the ongoing and active uses of the Property, the public benefits proffered under the Original Order, and the development of the North Parcel; and
 - The support of ANC 5D for the time extension.
7. The Commission concludes that no party will be prejudiced by the granting of this waiver, as ANC 5D, the only other party, supports the Application.

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 satisfies Subtitle Z § 705.2(b). No changes have occurred since the original approval that undermine the Commission's conclusions in approving the South Building PUD.
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 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 standard of Subtitle Z § 705.2(c)(1) because the Applicant has demonstrated that it has diligently pursued financing for the development of the Property and has not been able to move forward due to market conditions outside of its control, including challenges obtaining financing and disruptions caused by the COVID-19 pandemic.

"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 § 405.8. (*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. D.C. Bd. of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (D.C. 1978).)

15. ANC 5D submitted a written report recommending approval of the Application. The Commission finds ANC 5D’s support for the Application persuasive and concurs in that judgment.

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 requirements 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), and 14-12D(2), until November 9, 2024, within which time a building permit application must be filed under the South Building PUD. The Conditions in Z.C. Order No. 14-12, remain unchanged and in effect as previously modified.


VOTE (December 15, 2022): 4-0-1

(Robert E. Miller, Joseph S. Imamura, Anthony J. Hood, and Peter G. May to **APPROVE**; 3rd Mayoral appointee seat vacant, not voting)

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 14-12G shall become final and effective upon publication in the *DC Register*; that is, on April 7, 2023.



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.