

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
ZONING COMMISSION ORDER NO. 14-12C  
Z.C. Case No. 14-12C  
EAJ 1309 5<sup>th</sup> Street LLC

(Modification of Consequence of Consolidated PUD & Related Map Amendment @  
Square 3591, Lots 801-808, 7003-7005, 7011-7014, 7016, 7018, and 7023)  
April 29, 2019

Pursuant to notice on April 29, 2019, the Zoning Commission for the District of Columbia (the “Commission”) held a public meeting during which, the Commission approved the application of EAJ 1309 5<sup>th</sup> Street, LLC (the “Applicant”) for a Modification of Consequence (the “Application”) of a planned unit development (a “PUD”) approved by Z.C. Order No. 14-12 (the “Original Order”), as extended by Z.C. Order 14-12A, for Lots 801, 802, 808, 7003-7005, 7011- 7014, 7016, 7018, and 7023 in Square 3591, between 5<sup>th</sup> Street, N.E. to the west and 6<sup>th</sup> Street, N.E to the east (the “Property”). The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z of Title 11 of the District of Columbia Municipal Regulations (the “Zoning Regulations,” to which all subsequent citations refer unless otherwise specified). For the reasons stated below, the Commission **APPROVES** the Application.

**FINDINGS OF FACT**

**Background**

1. Pursuant to the Original Order, the Commission granted the Applicant both consolidated and first-stage approval for Lot 800<sup>1</sup> in Square 3591 (the “PUD Site”), together with a map amendment from the CM-1 Zone District to the C-3-C Zone District (the “Approved PUD”).
2. The Property is part of the PUD Site for which the Commission granted consolidated approval under the Approved PUD. The Property includes the existing two-story Union Market building, referred to in the Original Order as the “South Building” (the “South Building”).
3. The Approved PUD authorized the renovation of the South Building with five additional stories up to a height of 120 feet with approximately 216,400 square feet, including 62,400

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<sup>1</sup> Subsequently subdivided into Record Lot 5 (Z.C. Order No. 14-12A).

square feet of retail uses, a 42,000 square foot movie theater, and 112,000 square feet of office or residential uses.

4. The Approved PUD also authorized a 12,500-square-foot Union Market Plaza for community outdoor social and cultural uses and events, including concerts and festivals, with this space and events included as public benefits of the Approved PUD. (Conditions B.4 and B.11 of the Original Order.)
5. The Commission granted a two-year time extension of the Original Order in Z.C. Order No. 14-12A.
6. The Applicant and affiliates filed an application for second-stage approval of a different portion of the PUD Site in Z.C. Case No. 14-12B but withdrew the application prior to Commission approval.

### **Parties**

7. The only party to the Z.C Case No. 14-12 other than the Applicant was Advisory Neighborhood Commission (“ANC”) 5D, the “affected” ANC pursuant to Subtitle Z § 101.8.

### **The Application**

8. On April 10, 2019, the Applicant filed the Application requesting a Modification of Consequence to authorize modifications to the plans approved by the Approved PUD to allow a temporary recreation and entertainment area on the currently empty roof of the South Building, including the installation of a garden, recreation space, open stage, and an enclosed restaurant (the “Interim Conditions”), on an interim basis prior to starting the renovation of the South Building authorized by the Approved PUD.
9. The Application noted that the Interim Conditions would comply with Conditions B.4 and B.11 of the Original Order by providing outdoor community space and events.
10. The Applicant served the Application on April 10, 2019 to 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.”] 1.)
11. OP submitted a report dated April 19, 2019 stating no objection to the Application being considered as a Modification of Consequence and recommending approval of the Application, provided the Applicant provided a dimensioned roof plan showing the proposed setbacks for all structures (the “OP Report”). (Ex. 4.) The OP Report also proposed language to modify Condition A.1 of the Original Order to authorize the relief requested by the Application.
12. The Applicant submitted a dimensioned plan of the roof in response to the OP Report. (Ex. 5, 5A.)

13. The Applicant submitted a resolution in support of the Application by ANC 5D, adopted at its duly noticed public meeting held on February 9, 2019, with a quorum of six of seven Commissioners present (the “ANC Report”). (Ex. 1D.)

### **CONCLUSIONS OF LAW**

1. Subtitle Z § 703.1 authorizes the Commission, in the interest of efficiency, to make Modifications of Consequence to final orders and plans without a public hearing.
2. Subtitle Z § 703.3 defines a Modification of Consequence as “a modification to a contested case order or the approved plans that is neither a minor modification nor a modification of significance.”
3. Subtitle Z § 703.4 includes “a proposed change to a condition in the final order” and “a redesign or relocation of architectural elements” as examples of Modifications of Consequence.
4. The Commission concludes that the Applicant satisfied the requirement of Subtitle Z § 703.13 to serve the Application on all parties to the original proceeding, in this case ANC 5D.
5. The Commission concludes that the Application qualifies as a Modification of Consequence within the meaning of Subtitle Z §§ 703.3 and 703.4, as a request to modify a final condition and redesign of the architectural elements approved by the Original Order, and therefore can be granted without a public hearing pursuant to Subtitle Z § 703.17(c)(2).
6. The Commission concludes that because ANC 5D, the only party other than the Applicant to the Approved PUD, had filed a response to the Application, the requirement of Subtitle Z § 703.17(c)(2) to provide a timeframe for responses by all parties to the original proceeding had been met, and therefore the Commission could consider the merits of the Application at its April 29, 2019 public meeting.
7. The Commission finds that the modification proposed by the Application is consistent with the Approved PUD because the Interim Conditions provide some of the public benefits and uses authorized by the Approved PUD prior to the construction of the South Building.

#### **“Great Weight” to the Recommendations of OP**

8. D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Z § 405.8 require the Commission to give “great weight” to the recommendations contained in the OP Report.
9. The Commission found OP’s lack of objection to the Application being considered as a Modification of Consequence and recommendation that the Commission approve the Application persuasive and concurred in that judgment.

### **“Great Weight” to the Written Report of the ANC**

10. D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.) and Subtitle Z § 406.2 require the Commission to give “great weight” to the issues and concerns contained in the written report of an affected ANC. 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).)
11. The Commission found the ANC Report’s support for the Application persuasive and concurred in that judgment.
12. The Application is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.

### **DECISION**

At its public meeting on April 29, 2019, in consideration of the case record and the Findings of Fact and Conclusions of Law herein, upon the motion of Commissioner Shapiro, as seconded by Vice Chairman Miller, the Zoning Commission for the District of Columbia took **FINAL ACTION** to **APPROVE** a Modification of Consequence to the PUD approved in Z.C. Order 14-12 by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

The conditions in Z.C. Order No. 14-12 remain unchanged, except that Condition No. A.1 is hereby amended and restated as follows (additions in **bold and underlined** text):

#### **A. PROJECT DEVELOPMENT**

1. The PUD shall be developed in accordance with the architectural drawings prepared by Shalom Baranes Architects, Bohler Engineering, and Mahan Rykiel, submitted into the record on July 10, 2014 as Exhibit 2A1-2A6, as modified by the architectural drawings and pages submitted on August 29, 2014 as Exhibit 13-13H in the record, as modified by the architectural drawings and pages submitted on December 16, 2014 as Exhibit 19-19H in the record, as modified by the architectural drawings and pages submitted on February 2, 2015, as Exhibit 35A1-35A7B in the record, as modified by the architectural drawings and pages submitted on February 11, 2015, as Exhibit 44A1-44A7 in the record, and as modified by the architectural drawings and pages submitted on March 2, 2015 as Exhibit 51-51B in the record, and as modified by the guidelines, conditions, and standards herein (collectively, the “Plans”). **Prior to the construction of the South Building, the Applicant shall have the right to develop The Market with the Park**

**Improvements and Life Safety Improvements shown in plans submitted into the record in Z.C. Case No. 14-12C as Exhibits 1F and 5A, dated March 30, 2019 and April 18, 2019, respectively.**

In accordance with the provisions of Subtitle Z § 604.9 of the Zoning Regulations, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on August 30, 2019.

**BY THE ORDER OF THE D.C. ZONING COMMISSION**

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

  
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ANTHONY J. HOOD  
CHAIRMAN  
ZONING COMMISSION

  
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SARA A. BARDIN  
DIRECTOR  
OFFICE OF ZONING