

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION CORRECTED¹ ORDER NO. 14-12C(1)
Z.C. Case No. 14-12C
EAJ 1309 5th Street LLC
(Modification of Consequence of Consolidated PUD & Related Map Amendment @
Square 3591, Lots 801, 802, 7004, 7005, 7011, 7013, 7034, 7036-38))
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 5th 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, 7004, 7005, 7011, 7013, 7034, and 7036-7038 in Square 3591, between 5th Street, N.E. to the west and 6th 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 800² 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

¹ This is a corrected version of Z.C. Order No. 14-12C published in the August 30, 2019, edition of the *D.C. Register* to reflect updated A&T lots and to clarify the nature of the Interim Improvements as proposed in the Application and as had been reviewed and approved by the Commission.

² 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 the installation of the following to the currently empty roof of the South Building:
 - (a) temporary park, recreation, entertainment, and food/beverage-related improvements (including landscaping and hardscaping, seating, restrooms, enclosed restaurant space, open stage and/or performance areas, and the like (the “Park Improvements”); and
 - (b) life-safety and accessibility improvements to allow safe public access to and occupation of the Park Improvements (e.g., stair wells, railing, elevator, etc., on the top level of the Union Market building (the “Life Safety Improvements,” and collectively with the Park Improvements, the “Interim Improvements”), on an interim basis prior to starting the construction of the South Building authorized by the Approved PUD.
9. The Application noted that the Interim Improvements 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 Improvements 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.

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, the Commission concluded that the Applicant satisfied its burden of proof and therefore **APPROVES** the Applicant’s request for a Modification of Consequence to Z.C. Order No. 14-12, as extended by Z.C. Order No. 14-12A, the conditions of which all remain unchanged and in effect except Condition No. A.1, which is hereby revised to read as follows (deletions shown in **bold** and ~~striketrough~~ text; 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 35A-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 Interim Improvements shown in drawings 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.

VOTE (Apr. 29, 2019): 5-0-0 (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Michael G. Turnbull, and Peter G. May to **APPROVE**).

In accordance with the provisions of Subtitle Z § 604.9, this Corrected Order became final and effective upon publication or the original version of Z.C. Order No. 14-12C in the *D.C. Register* 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.



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.