

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION ORDER NO. 14-12D
Z.C. Case No. 14-12D
EAJ 1309 5th Street LLC
(One-Year Time Extension for PUD @ Square 3591 [1309 5th Street, N.E.])
June 24, 2019

Pursuant to notice, at a public meeting held on June 24, 2019, the Zoning Commission for the District of Columbia (the “Commission”) considered the request of EAJ 1309 5th Street LLC (the “Applicant”) for a one-year time extension of the May 8, 2019 deadline to file a building permit for a consolidated planned unit development (“PUD”) and related map amendment approval established by Z.C. Order No. 14-12 (the “Original Order”), as extended by Z.C. Order No. 14-12A, and as modified by Z.C. Order No. 14-12C, for Lots 801-802, 808, 7003-7005, 7011-7014, 7016, 7018, and 7023 in Square 3591 (collectively, the “Property”). 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 citations refer unless otherwise specified). For the reasons stated below, the Commission **APPROVES** the application.

FINDINGS OF FACT

1. By the Original Order, effective on May 8, 2015 (the “Effective Date”), the Commission granted the Applicant approval of a consolidated PUD (the “Consolidated PUD”) to construct a four-story addition to the existing Union Market (the “South Building”) and first-stage PUD approval (the “First-Stage PUD Approval”) to demolish an existing building and reconstruct as a mixed-use development (the “North Building”) on the Property.
2. The parties to the Original Order were the Applicant and Advisory Neighborhood Commission (“ANC”) 5D. (Original Order, Findings of Fact [“FF”] No. 6.)
3. The Original Order established a two-year period starting with the Effective Date – by May 8, 2017 - within which the Applicant had to file an application for a building permit for the South Building under the Consolidated PUD. (Original Order Condition D(2).)
4. The Original Order established a five-year period starting with the Effective Date – by May 8, 2020 - within which the Applicant had to file an application for a second-stage PUD

approval for the North Building under the First-Stage PUD. (Original Order, Condition D(2).)

5. On November 9, 2018, in Z.C. Order No. 14-12A, the Commission extended the May 8, 2017 deadline for the Consolidated PUD approval for the South Building to May 9, 2019.
6. In Z.C. Order No. 14-12C,¹ effective August 30, 2019, the Commission approved a Modification of Consequence to the plans approved with the Consolidated PUD.

The Application

7. On May 7, 2019, prior to the expiration of Z.C. Order No. 14-12A, the Applicant filed an application for a one-year extension of the May 9, 2019 deadline for filing a building permit for the South Building of the Consolidated PUD (the “Application”).
8. The Application included a Certificate of Service attesting to service on the only other party to the Original Order, ANC 5D, on May 7, 2019. (Exhibit [“Ex.”] 1.)
9. The Application asserted that no substantial change had occurred in any of the material facts on which the Commission had relied in approving the preliminary PUD approval for the Property in the Original Order.
10. The Application justified the requested extension due to the inability to obtain project financing, and other market factors affecting development costs, specifically:
 - a) The Applicant’s unsuccessful efforts to secure development partners, thereby increasing construction costs and financing. The Application notes that while it has entered four non-binding agreements with potential partners, none have been successful;
 - b) The difficulties facing the Applicant in terms of developing office uses in the PUD due to the lack of existing office space in the area, the lack of an anchor tenant, and the high rate of office vacancy in D.C. generally; and
 - c) The increased construction costs affecting the project due to overall inflation in construction pricing and international tariffs affecting the cost of various construction commodities.

Responses to the Application

Office of Planning (“OP”)

11. OP submitted a June 14, 2019 report recommending approval of the Application (the “OP Report”). (Ex. 4.) The OP Report stated that no substantial change had occurred to the

¹ Z.C. Case No. 14-12B, an application for second-stage PUD approval and a modification of the Consolidated PUD, was withdrawn by the Applicant.

material facts upon which the Commission had relied in issuing the Original Order and concluded that the Applicant satisfied the relevant standards of Subtitle Z § 705.2.

ANC 5D

12. ANC 5D did not submit a written report in response to the Application. However, the ANC was in support of the original PUD application. (Original Order, FF 53-55.)

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. The Commission concludes that the Applicant timely filed the Application on May 7, 2019, prior to the May 9, 2019 consolidated PUD deadline that the Application extension seeks to extend.
3. Subtitle Z § 705.2(a) requires that an Applicant serve the extension request on all parties and that all parties are allowed 30 days to respond.
4. The Commission concludes that the Applicant has satisfied Subtitle Z § 705.2(a) by demonstrating that it had served the only other party to the Original Order – ANC 5D – and that the ANC was given 30 days to respond from the May 7, 2019 date of service.
5. 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.
6. The Commission concludes that the Application satisfied Subtitle Z § 705.2(b) based on the Application and the OP Report.
7. 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.*

8. The Commission concludes that the Application met the standard of Subtitle Z § 705.2(c)(1) because the Applicant has provided sufficient documentation of its efforts to secure development partners and financing for the project, along with the current economic difficulties impacting the development of PUD.

“Great Weight” to the Recommendations of OP

9. 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.
10. The Commission found OP’s recommendations that the Commission approve the Application persuasive and concurred in that judgment.

“Great Weight” to the Written Report of the ANC

11. The Commission must give “great weight” to the issues and concerns raised in a written report of the 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 Y § 406.2.) To satisfy the great weight requirement, the Commission must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016.) 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) (citation omitted).)
12. Since ANC 5D did not submit a written report to the record, there is nothing to which the Commission can give “great weight.”

DECISION


In consideration of the case record and 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 to extend the deadline established by Z.C. Order No. 14-12, as extended by Z.C. Order No. 14-12A and as modified by Z.C. Order No. 14-12C, to file a building permit for the South Building under the Consolidated PUD by one year to May 8, 2020.

VOTE (June 24, 2019): 5-0-0 (Michael G. Turnbull, Robert E. Miller, Anthony J. Hood, Peter A. Shapiro, and Peter G. May to **APPROVE**).


In accordance with the provisions of Subtitle Z § 604.9, this Z.C. Order No. 14-12D shall become final and effective upon publication in the *D.C. Register*; that is, on January 24, 2020.

BY 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.