GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application Nos. 18167 / 17431-B of King's Creek, LLC, pursuant to 11 DCMR § 3129.7, for interior and exterior modifications to plans approved by BZA Order Nos. 17431 and 17431-A and an increase in the number of dwelling units from 22 to 31, and for an extension of BZA Order No. 17431, pursuant to 11 DCMR § 3130.6, to allow an addition to and conversion of an existing building for residential use in the RC/R-5-B District at premises 2329 and 2335 Champlain Street, N.W. (Square 2263, Lots 103 and 816).[1]

HEARING DATES (Orig. Application):	February 28 and March 14, 2006
DECISION DATE (Orig. Application):	May 2, 2006
DECISION ON MINOR MODIFICATION AND EXTENSION OF ORDER 17431:	November 18, 2008
ORDER 17431-A ISSUANCE DATE:	December 2, 2008
HEARING DATE ON MOTION TO APPROVE MODIFICATIONS AND EXTEND ORDER:	February 15, 2011
DECISION DATE ON MOTION TO APPROVE MODIFICATIONS AND EXTEND ORDER:	February 15, 2011

SUMMARY ORDER

Background

On May 2, 2006, the Board of Zoning Adjustment ("Board" or "BZA") voted to approve

[1] The revised caption reflects the Applicant's request, made at the public hearing on February 15, 2011, to retroactively amend the application to add a request for an extension of BZA Order No. 17431 pursuant to 11 DCMR § 3130.6. Pursuant to § 3100.5, the Board waived its notice requirements and allowed the Applicant to amend the application to seek approval of an extension of the original order as well as modification of approved plans as those plans were modified by Order No. 17431-A. As explained later in this order, the filing of a request to modify an order does not toll the time remaining to vest the original order, nor does the issuance of a modification order extend that time.

Application No. 17431, filed pursuant to 11 DCMR § 3104.1 and § 3103.2, for a special exception to allow a building height of 50 feet in the Reed Cooke ("RC") Overlay under § 1403, a variance to permit an addition to a nonconforming structure under § 2001.3, a variance from the floor area ratio requirement of § 402, and a variance from the court requirements under § 406 to allow an addition to, and conversion of, an existing building for residential use in the RC/R-5-B District at premises 2329 and 2335 Champlain Street, N.W. (Square 2563, Lots 103 and 816). BZA Order No. 17431 approving the application was issued on November 28, 2006. (Exhibit 9.)

On November 18, 2008, the Board voted to approve minor modifications to the approved plans and to extend the term of approval of Order No. 17431 for two years. This decision was set forth in BZA Order No. 17431-A, which was issued on December 2, 2008. (Exhibit 10.)

On November 30, 2010, the Applicant filed the current application, pursuant to 11 DCMR § 3129.7, requesting approval to modify the plans approved pursuant to BZA Order No. 17431 and as modified by BZA Order No. 17431-A. (Exhibit 1.) The Applicant's proposed modifications include revising the building's footprint, which decreases the lot occupancy from 92.80% to 88.22% on the first and second floors; revising the interior layout and exterior design of the building to simplify and rationalize the interior building configuration and exterior façade treatments; increasing the number of residential units from 22 to 31; and, although no parking is required for the project, providing 20 parking spaces, which is a reduction of one space from the 21 spaces in the plans previously approved by the Board.

MODIFICATION REQUEST

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register*, and by mail to Advisory Neighborhood Commission ("ANC") 1C, and to owners of property within 200 feet of the property. The site of this application is located within the boundaries of ANC 1C, which is automatically a party to this application. The ANC submitted a letter, dated January 28, 2011, indicating that after due review at the ANC's February 2, 2011 meeting, ANC 1C took no action on this application. (Exhibit 30.) The Office of Planning ("OP") submitted a timely report indicating that it supports the proposed modifications. (Exhibit 27.) A letter of support was also submitted by the Councilmember for Ward 1, the Ward in which the project is located. (Exhibit 28.)

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for modifications of approved plans. Section 3129.6 of the Zoning Regulations authorizes the Board to grant, without a hearing, requests for minor modifications of approved plans that do not change the material facts upon which the Board based its original approval of the application. (11 DCMR § 3129.6.) Other modifications, such as that being requested by the Applicant, may be requested at any time per § 3129.7,[2] but these require that a hearing be held. The scope of a hearing conducted on a

[2] In contrast, a two-year time limit exists for filing minor modifications to plans, which runs concurrently with the two-year period to file such plans. Because § 3127.7 authorizes the Board to hear other modification requests that

request for a non-minor modification is "limited to the impact of the modification on the subject of the original application, and shall not permit the Board to revisit its original decision." (11 DCMR § 3129.8.)

Based upon the record before the Board and having given great weight to the OP report[3] filed in this case, the Board concludes that the Applicant has met the burden of proof under 11 DCMR § 3104, specifically that approval of the proposed modifications will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps.

No requests for party status were received. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

REQUEST FOR EXTENSION TO FILE FOR A BUILDING PERMIT

Preliminary Matter

Subsection § 3130.1 of the Board's Rules of Practice and Procedure provides in part that "no order authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years … unless, within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit." The original two-year period for the Applicant to file such plans was extended by Order No. 17431-A until December 10, 2010.

The Applicant did not file a request for a time extension prior to that date, but did file a request to modify the plans approved in Order No. 17431 and modified in Order No. 17431-A. The Applicant believed that the filing of the modification request tolled the expiration of the two-year period and that the grant of the modification would automatically extend that period by another two years. Prior to the hearing on this application, the Board stated its disagreement with the Applicant's position, but granted the Applicant's request to amend its application *nunc pro tunc* to include a request for a time extension and to waive the requirement of § 3130.6 (a) that such a request be served on all parties and that the parties be allowed 30 days to respond.

By way of explanation, during the year 2008, as a result of the sharp economic downturn, the Board received several requests to extend the time for filing plans. Because the Board's rules did not expressly authorize the grant of such extensions, the Board used its general waiver authority to allow for orders to remain valid beyond the two-year period. OP, in a report dated

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may be needed long after the original approval has vested, such requests for an increase to enrollment or the construction of an addition to an already approved and vested special exception, no time limit was established to file such request. Obviously if an order's validity has expired, such a modification cannot be sought.

[3] As to the affected ANC, since it took no position, there was nothing to which to give great weight.

December 22, 2008, petitioned the Zoning Commission ("Commission") for a text amendment to expressly authorize the Board to grant such extensions.

The Commission, after hearing and public comment, issued Zoning Commission Order No. 09-01 to "codify[] the Board's inherent authority to grant a time extension to allow more time to file … plans and establish[] the standards to be utilized." The Commission added new provisions to § 3130 based upon §§ 2408.9 and 2408.10, which set forth the procedures and criteria for obtaining time extensions for Planned Unit Developments ("PUD"). However, unlike the PUD rules, the Board is only authorized to grant a single extension, § 3130.6, of not more than two years, § 3130.9. Although § 3130.10 tolls an order's expiration if a request is filed at least 30 days prior to the expiration date, § 3130.10 prohibits the issuance of a building permit after expiration unless and until the request is granted. The Commission also established a fee for the filing of such requests.

The Board does not believe that the Commission intended for these prerequisites to a time extension to be avoided by the filing of a modification request. This conclusion is buttressed by the fact that the PUD process, upon which the new rules were based, does not treat modification requests as negating the need to request time extensions. *See, e.g.*, *Zoning Commission Order No. 06-45A, Minor Modification and Time Extension of Approved Planned Unit Development for Consolidated PUD and Related Map Amendment*, 57 DCR 2824 (2010); *Zoning Commission Order No. 06-34A, Extension and Modification to Approved Consolidated Planned Unit Development*, 56 DCR 6557 (2009). Thus, the Board itself has recognized that "approval of a minor modification, pursuant to Section 3129, does not alter the term limit." *Application No. 17474-B of ASR Group, Inc., by Metro Properties, Inc.*, 56 DCR 9010, 9012 (2009). The same would be true for modifications for which a hearing is required by § 3129.7, as is the case here.

The Applicant cited no Board rule in support of its proposition that a granted modification inherently includes a time extension, but pointed to past Board practice, particularly *Application No. 18144 of National Indian Gaming Association*, 57 DCR 11995 (2010). That order contains no explicit grant of a time extension. However, because the modification application also sought additional zoning relief the order included the following boilerplate language at its end:

> PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

No doubt, the Applicant viewed this language as granting a time extension. The Board must also acknowledge that this paragraph has customarily appeared in Board orders granting only modifications, perhaps giving those applicants the same impression. Since this Board does not intend for modification orders to have that effect, this boilerplate paragraph will now only appear in orders "authorizing the erection or alteration of a structure," 11 DCMR § 3130.6, and not in

orders modifying such an order or the plans approved therein. Nevertheless, in the interest of fairness, the Board will deem such paragraphs as granting two-year extensions in any prior modification orders in which they appear.

Going forward, the Board will not consider the filing of a modification request as tolling or the grant of such a request as extending the validity of an order.

The Merits

To meet its burden of proof, the Applicant's witnesses testified under oath that the Applicant has diligently sought a developer and financing and attempted to move forward with development of the property since the time of the BZA's original approval. The Applicant's real estate broker indicated that although he has been working with a number of lenders and capital sources on behalf of the Applicant, these sources have been unwilling to finance the approved project given the layout and design of the units as shown on the approved plans, combined with the recent adverse market conditions for residential projects. The Applicant also testified that development of the property has been delayed due to the pendency of litigation.

Criteria for Evaluating Motion to Extend

Pursuant to § 3130.6, the Board may grant one extension of the two-year term of validity, established in § 3130.1 for orders that authorize the erection or alteration of a structure, for good cause shown and provided that certain requirements are met.[4]

Here, the application was submitted before the expiration date of the prior order, and notice was provided, *inter alia*, to the public, the affected ANC, and the owners of property within 200 feet of the subject property. Those property owners include John W. Holmes, who was a party in opposition in the original proceeding (Application No. 17431), but did not participate in the original modification of approved plans (Application No. 17431-A) or in this proceeding. The Applicant attended meetings of ANC 1C to present the application. OP recommended approval of the requested extension.

The Board finds no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application. Finally, the Board finds that the Applicant's inability to obtain sufficient project financing due to economic and market conditions beyond the Applicant's reasonable control, and the recent existence of pending litigation affecting the property constitute the "good cause" required under § 3130.6(c). Based upon the record, the Board finds that the Applicant has met the criteria set forth in § 3130.6.

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[4] This application is the Applicant's first request for an extension of time since § 3130.6 went into effect, and thus is consistent with the provision stating that the Board "may grant one extension." At the time the prior request was made, in Application No. 17431-A, the Zoning Regulations did not address the number of times that the Board could grant extensions.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application for modification of approved plans, as shown in Exhibit 26, Exhibit E – Modified Plans, and for a two-year extension of time, is **GRANTED**. Order No. 17431 shall be valid until December 12, 2012 within which time the Applicant must file plans for the proposed structure with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 3-0-2 (Meridith H. Moldenhauer, Anthony J. Hood, and Jeffrey L. Hinkle to Approve. Nicole C. Sorg not present, not voting; No other Board member (vacant) participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
The majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 23 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NOS. 18167 / 17431-B

As Director of the Office of Zoning, I hereby certify and attest that on March 23, 2011, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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JAMISON L. WEINBAUM
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