

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Application No. 17556-A of the Murillo/Malnati Group**, pursuant to § 3100.5, for a waiver of § 3130.1 and an extension of the two-year period of time of effectiveness of Board of Zoning Adjustment Order No. 17556, issued May 22, 2007.

**HEARING DATE:** January 16, 2007  
**DECISION DATE:** January 16, 2007  
**DECISION DATE ON**  
**REQUEST FOR EXTENSION:** June 2, 2009

**DECISION AND ORDER**

On April 22, 2009, the Murillo/Malnati Group (“Applicant”) filed with the Board of Zoning Adjustment (“BZA” or “Board”) a request for an extension of the expiration date of BZA Order No. 17556, which had granted the Applicant zoning relief.

At its public meeting on June 2, 2009, the Board considered the Applicant’s request and the opposition of parties Deborah J. and James H. Freis, Jr., and Rikke Davis, and the party they represented, the “Concerned Neighbors” (collectively, “Concerned Neighbors”). At the public meeting, the Board decided, by a vote of 3-0-2, to grant the request for extension.

**FINDINGS OF FACT**

Procedural Background

1. Board Order No. 17556 granted the Applicant area variance relief pursuant to § 3103 of the Zoning Regulations.
2. Order No. 17556 was issued on May 22, 2007, and was effective 10 days later, on June 1, 2007. 11 DCMR § 3125.9.
3. All Board orders that authorize construction, including Order No. 17556, are no longer effective two years after their effective date, unless, within that two-year period, the holder of the order files plans with the Department of Consumer and Regulatory Affairs (“DCRA”) in order to secure a building permit. 11 DCMR § 3130.1.
4. Order No. 17556 became ineffective, i.e., expired, on June 1, 2009, because the Applicant, as of that date, had not yet filed plans to secure a building permit.

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5. On April 22, 2009, however, the Applicant filed this application requesting that the Board waive the two-year time limit of § 3130.1, pursuant to § 3100.5, and grant an extension of the time period of effectiveness of Order No. 17556 to June 1, 2011.
6. The Applicant also requested that the Board toll the expiration date of Order No. 17556 until the completion of Zoning Commission Case No. 09-01.
7. On May 22, 2009, the Concerned Neighbors filed an opposition to the Applicant's request for an extension of time.
8. A second filing in opposition from the Concerned Neighbors asked that the Board hold a hearing on the request for an extension of time if it decided not to deny the request.
9. The opposition filings addressed claimed impacts of the Applicant's proposed project and alleged that the plans originally submitted by the Applicant to the Board depict the Connecticut Park building as at least one-half floor higher than it actually is.
10. Most importantly, the opposition claimed that the request for extension failed to meet at least the first two of the three requirements of § 3100.5: good cause, no prejudice to any party, and not prohibited by law.

Substantive Facts

11. The request for extension of Order No. 17556 was filed more than a month before the order was to expire and was properly served on all parties to the original application. The filing of the request tolled the expiration of the Order.
12. No changes in plans are being proposed by the Applicant.
13. No new development has occurred in the area surrounding the property that is the subject of the original application, located at 2816-2822 Connecticut Avenue ("subject property").
14. The Applicant's proposed development on the subject property did, as of the original order, and continues to, satisfy all the requirements of the Zoning Regulations, except the rear yard, for which the variance was granted, including the parking requirements.
15. The conduct of construction, including the use of, or impeding of others' use of, public space or public alleys, is not within the Board's jurisdiction.
16. The District of Columbia is currently experiencing, along with the rest of the nation, a serious and unprecedented economic downturn.
17. In October 2008, the Applicant had construction financing in place, but this financing disappeared with the recent crippling of the national and international credit markets.

18. The Applicant has filed with DCRA for various site work and underpinning permits, and intends to file for building permits once it again obtains construction financing.

### **CONCLUSIONS OF LAW**

Section 3100.5 of the Zoning Regulations states, in pertinent part:

the Board may, for **good cause** shown, waive any of the provisions of this chapter, if, in the judgment of the Board, the waiver will **not prejudice the rights of any party** and is **not otherwise prohibited by law**. (Emphasis added.)

11 DCMR § 3100.5.

The Applicant requests that, pursuant to § 3100.5, the Board waive the two-year period of effectiveness of its orders as set forth in § 3130.1, and extend the effectiveness of Order No. 17556 for another two years, *i.e.*, until June 1, 2011. As a preliminary matter, the Board finds that this relief is not prohibited by law.

The Board takes administrative notice of the severe economic downturn being experienced by the District of Columbia and the whole of the United States. The poor economic climate has caused the Applicant to lose the construction financing it had arranged and has forced it to seek new financing arrangements. An inability to obtain construction financing is an impediment which must be overcome before Applicant's construction can begin. Since such financing is crucial to this, or any, project, the Board finds good cause to allow an extension of time within which to permit the Applicant to attempt to obtain it.

The Board finds no prejudice to any party in granting a two-year extension of the effectiveness of Order No. 17556. In this regard, the Board has seriously considered the filings of the opposition parties, but finds their claims meritless and more appropriate to a request for reconsideration of Order No. 17556. Such a request, however, would have had to have been filed within 10 days of the Order's May 22, 2007 issuance. Because the Board finds no prejudice, it concludes that a hearing is not necessary on the Applicant's extension request.

The Applicant also requested that the expiration of Order No. 17556 be tolled from the date of its extension request – April 22, 2009 – until the Zoning Commission completes its rulemaking process in Case No. 09-01, which will set forth new standards for modifications and extensions of BZA orders. The Board finds such tolling to be both too temporally uncertain and unnecessary. There is no date certain when the completion of the Zoning Commission's rulemaking process will occur. Further, the request to extend the two-year period of the Order's effectiveness was made prior to its expiration, effectively tolling its expiration until a decision was made on that request.

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For all the reasons set forth above, the Board concludes that the Applicant has met the requirements of § 3100.5.<sup>1</sup> Accordingly, its request to waive the two-year period mandated by § 3130.1 and to extend the effectiveness of BZA Order No. 17556 until June 1, 2011, is hereby **GRANTED**.

**VOTE:** 3-0-2 (Marc D. Loud, Shane L. Dettman, and Michael G. Turnbull, to Approve.  
Two Mayoral appointees (vacant) not participating, not voting.)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

A majority of Board members has approved the issuance of this order.

**ATTESTED BY:**

  
**RICHARD S. NERO, JR.**

**Acting Director, Office of Zoning**

**FINAL DATE OF ORDER:** JUL 16 2009

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.

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.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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,

<sup>1</sup>Both the Applicant and the opposition addressed the provisions of then soon-to-be-effective new § 3130.6 of the Zoning Regulations. This new regulation became effective on June 5, 2009, but was not in effect on June 1, 2009, when this decision was made; therefore, it was not applicable to this proceeding and the Board declines to address it.

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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.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on **JULY 16, 2009**, 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 and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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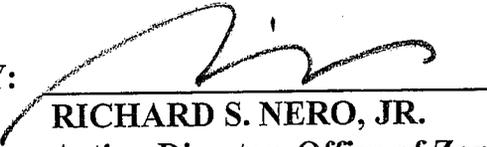
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**ATTESTED BY:**

  
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