

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



**Application No. 17562-A of W Street, S.E. 38-42-43, L.L.C.**, pursuant to 11 DCMR § 3104.1, for a special exception to construct five three-unit multiple dwellings<sup>1</sup> under § 353, in the R-5-A district at premises 1749-1759 W Street, S.E. (Square 5755, Lots 38-43).<sup>2</sup>

**HEARING DATES**                    January 30, 2007 and April 10, 2007  
**DECISION DATES:**                March 6, 2007 and April 10, 2007  
**DATE OF DECISION**  
**ON REQUEST FOR**  
**MODIFICATION:**                 June 23, 2009

**DECISION AND ORDER ON REQUEST FOR MODIFICATION**  
**AND EXTENSION OF TIME WITHIN WHICH TO BEGIN CONSTRUCTION**

**PRELIMINARY MATTERS**

On September 28, 2006, this application was submitted by W Street, S.E. 38-42-43, LLC (“Applicant”), the owner of the property that is the subject of this application (“subject property”). The original plans showed parking in the front yard area, for which a variance was requested. During the proceedings on this application, the location of the parking was changed to the rear yard, obviating the need for the parking variance.

The original application/plans also showed six three-unit attached buildings, for a total of 18 units. This Board (“BZA” or “Board”), expressed concern with the density of the project and the Applicant reduced the project to five buildings, with three units per building, for a total of 15

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<sup>1</sup>Although the original advertisement used the term “three-unit row dwellings,” by definition, a row dwelling cannot have more than one residential “unit” because it is defined as a “one-family dwelling having no side yards,” and a “one-family dwelling” must, by definition, be used “exclusively as a residence for one (1) family.” 11 DCMR § 199.1.

<sup>2</sup>The application was originally advertised for a variance from parking requirements as well as for the special exception relief, but the parking variance was obviated by a change in plans. Also, the original advertisement was for six structures, but was changed to five in response to concerns from the neighborhood and the Board of Zoning Adjustment. Lastly, although the originally-advertised zone district, R-5-A, has been retained here, the zoning of the subject property has been changed to R-3 since the time of the hearing on this application.

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units. The Applicant submitted an amended application and new plans to the Board formalizing the changes. Exhibit No. 41.

Although the Office of Planning (“OP”) had supported the original request for 18 units (Exhibit No. 25), it stated in its February 23, 2007 Supplemental Report, at 1-2, that:

[i]t is OP’s position that a reduced project [from 18 units to 15] would be more sensitive to the existing neighborhood character at the eastern portion of the subject block, and more in keeping with the development expectations of neighborhood residents. DHCD also recommended reducing the project.

Exhibit No. 36.

At the conclusion of the hearing, the Board decided to grant the revised application. Order No. 17562, permitting five three-unit attached buildings, was issued on May 29, 2007, making it effective on June 8, 2007. As with all Board orders, Order No. 17562 was valid for a period of two years from its effective date, *i.e.*, until June 8, 2009, unless plans were filed to obtain buildings permits within this two-year period. 11 DCMR § 3130.1. The Applicant obtained building permits on October 10, 2008, but 11 DCMR § 3130.3 further requires that construction of the project for which the permits were obtained must begin within six months of their issuance, which would have been by April 10, 2009.

After moving expeditiously toward construction and receiving the building permits on October 10, 2008, the Applicant was stopped by the inability of the Department of Housing and Community Development (“DHCD”) to provide previously-arranged-for financing. Due to the recent serious economic downturn experienced by the District of Columbia and the nation, the DHCD cannot provide the Applicant gap financing through its Housing Production Trust Fund Program. Also due to the poor economy, the projected sales prices for the project’s large duplex units have dropped, making the project with 15 larger units economically infeasible. Therefore, on May 29, 2009, the Applicant filed this request to modify its plans in order to construct 18 smaller units, but within the same five buildings as approved by the Board.

The Applicant requested three specific items of relief: (1) “minor” modification of the plans back up to 18 units, (2) waiver of § 3129.3’s requirement that a modification request be filed within six months of the Board’s approval of the application,<sup>3</sup> and (3) waiver of § 3130.3, which requires that construction begin within six months of the date of building permit issuance. Both requested waivers would be permitted by 11 DCMR § 3100.5, which requires three showings: good cause, no prejudice to any party, and no legal prohibition.

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<sup>3</sup>This relief is no longer necessary because § 3129.3 was changed, as of June 5, 2009, to allow a modification request to be filed within two years of the date of the final order approving the application. The final order (Order No. 17562) was dated May 29, 2007, and the Applicant filed its request for modification on May 29, 2009.

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**FINDINGS OF FACT**

Request for Modification

1. Order No. 17562, issued on May 29, 2007, and effective on June 8, 2007, permitted the Applicant to construct five attached buildings, each with three residential units, at address 1749-1759 W Street, S.E.
2. When the application was heard by the Board and the Order issued, the subject property was situated in an R-5-A zone district.
3. Section 353 requires that all new residential development in an R-5-A zone that includes multiple dwellings be reviewed by the Board as a special exception.
4. On November 14, 2008, Zoning Commission Order No. 08-12 re-zoned to R-3 the Square and lots that comprise the subject property.
5. Neither multiple dwellings nor flats are permitted in R-3 zone districts. 11 DCMR § 320.3.
6. Applicant's approved plans for five three-unit buildings would still be permitted in the R-3 zone because Order No. 17562, granting permission to build them, pre-dated the zone change. If they were constructed, they would be nonconforming structures. 11 DCMR § 199.1, definition of "Nonconforming structure."
7. On May 29, 2009, the Applicant filed a request to modify its plans. The requested modification would result in the same exterior building configuration as that which was approved by Order No. 17562, but would also result in an increase in density from 15 to 18 dwelling units.
8. None of the other parameters of the buildings will change, i.e., the floor area ratio and footprint of the five attached buildings will remain the same.
9. During the hearing on the application, the density of the project was an issue of concern for the Board. See, e.g., January 30, 2007 Hearing Transcript at 130, lines 7-12.
10. The density of the project, i.e., the total number of units, is a material fact upon which the Board based its original approval of the application.
11. Section 3129.7, effective June 5, 2009, provides that when a modification is not "minor," i.e., when it changes a material fact upon which the Board based its original approval of an application, a hearing is required.

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Request for Extension

12. The Applicant was issued six building permits on October 10, 2008, allowing it to construct the project on the subject property.
13. Due to the loss of its financial backing, the Applicant was unable to begin construction within six months of the permits' issuance, as required by 11 DCMR § 3130.3.
14. The loss of financial backing was beyond the Applicant's control, being due to the serious economic downturn in the District and the nation, of which the Board takes administrative notice.
15. Financing is crucial to construction of this, and every, project, and without it, construction is not possible.
16. The ANC was originally opposed to this application, but its concerns were largely met by changes to the plans, and there has been no opposition filed to this request for modification.
17. Section 3130.3 is not one of the Zoning Regulations which the Board is prohibited from waiving (See, 11 DCMR § 3100.5), so its waiver is not prohibited by law.

**CONCLUSIONS OF LAW**

Request for Modification

Section 3129 allows the Board to grant, without a hearing, minor modifications of plans already approved by the Board. Only minor modifications may be allowed without a hearing. Any requested modification which is not minor would require a hearing. Such is the case here.

The Applicant, although not changing the footprint of the buildings, is requesting a 20% increase in the density of the project. The Board finds that this is not "minor," particularly in view of the fact that a density of 18 units, which was the density originally applied for, was considered by the Board and the neighborhood to be too dense. *See, e.g.*, January 30, 2007 Hearing Transcript at 81, lines 9-10, and April 10, 2007 Hearing Transcript at pp. 169 - 171. The reduced density of the project, from 18 units to 15, was a material fact relied upon by the Board in deciding to approve the application. A change in this material fact removes the modification request from the category of "minor" modifications. 11 DCMR § 3129.6. Moreover, the zoning of the subject property has been changed from R-5-A to R-3, permitting even less density than the 15 units now permitted by Order No. 17562. Neither flats nor multiple dwellings are permitted by right in an R-3 district, and arguably, the Applicant would need use variance relief to increase the project's unit total to 18.

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Because this is not a “minor” modification, the Board cannot grant it pursuant to § 3129. If it is to be granted, a hearing must first be held. 11 DCMR § 3129.7.

Request for Extension

Section 3100.5 permits the Board to waive many of the Zoning Regulations if there is good cause shown, no prejudice to any party, and such waiver is not prohibited by law. 11 DCMR § 3100.5.

The Applicant is requesting that the Board, pursuant to § 3100.5, waive the requirement of § 3130.3 that construction begin within six months of building permit issuance. As a preliminary matter, the Board finds that such a waiver is not prohibited by law. Nor would such a waiver prejudice any party. There were no parties in opposition to the request for modification/extension.

The Board also finds good cause for the waiver. The Applicant has shown that it diligently pursued completion of this project (*See*, Exhibit No 50, Attachment B), culminating in the issuance of six building permits on October 10, 2008. Only one month later, in November, 2008, DHCD notified the Applicant that no funds were available to finance its project. In November, 2008, the country was in the midst of the economic downturn administratively-noticed by the Board in Finding of Fact No. 15. The downturn continued for six months after the issuance of the building permits, and, indeed, continues today. The Applicant could not proceed without the DHCD funding and has therefore requested an extension of the § 3130.3 six-month period to a period of one year from the date of this order. The Board concludes that the Applicant has shown good cause for this extension, that it would not prejudice any party, and that it is not prohibited by law.

For all the reasons stated above, the Board has determined that the request for modification/extension may be partially denied and partially granted:

1. The requested modification of plans is not “minor” and so cannot be granted without a hearing. Accordingly, the request for modification of plans is hereby **ORDERED DENIED**.
2. The requested extension of the six-month period set forth in § 3130.3 to a period of one year from the date of effectiveness of this order is hereby **ORDERED GRANTED**.

**VOTE:**       **3-0-2** (Marc D. Loud, Shane L. Dettman, Peter G. May, to partially deny and partially grant. 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: AUG 12 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.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Board of Zoning Adjustment



**BZA APPLICATION NO. 17562-A**

As Director of the Office of Zoning, I hereby certify and attest that on AUG 12 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:

Anthony Washington  
Managing Member  
W Street, SE, 38-42-43 LLC  
M & A Development  
4330 Montgomery Avenue  
Bethesda, Maryland 20814

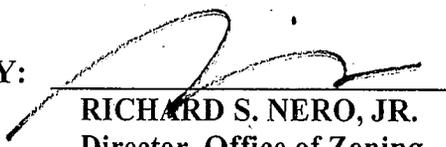
Bennett Rushkoff, Esquire  
Acting General Counsel  
Department of Consumer and Regulatory Affairs  
941 North Capitol Street, N.E., Suite 9400  
Washington, D.C. 20002

Chairperson  
Advisory Neighborhood Commission 8A  
2100 M.L. King Avenue, SE  
Washington, D.C. 20020

Marion S. Barry, Councilmember  
Ward Eight  
1350 Pennsylvania Avenue, N.W., Suite 102  
Washington, D.C. 20004

Single Member District Commissioner 8A04  
Advisory Neighborhood Commission 8A  
2100 M.L. King Avenue, SE  
Washington, D.C. 20020

ATTESTED BY:

  
**RICHARD S. NERO, JR.**  
Director, Office of Zoning