GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 17606-E of Dakota Points LLC, Motion of Fort Totten South[1] for a Fourth Two-Year Extension of BZA Order Nos. 17606 and 17606-A, pursuant to § 3130 of the Zoning Regulations.

The original application (No. 17606) was pursuant to 11 DCMR § 3104.1, for a special exception from the roof structure uniform height provisions under § 411, to construct a four-story residential building in the C-2-A District at premises 5545-5549 South Dakota Avenue, N.E. (Square 3760, Lot 10) and 5553-5575 South Dakota Avenue, N.E. (Parcel 137/86).

HEARING DATE (Orig. Application): May 8, 2007
DECISION DATE (Orig. Application): May 8, 2007
FINAL ORDER ISSUANCE DATE (No. 17606): May 9, 2007
FINAL DATE OF CORRECTED ORDER (No. 17606-A): May 9, 2007
DECISION ON 2009 MOTION FOR EXTENSION: March 24, 2009
FINAL DATE OF ORDER ON 1ST EXTENSION MOTION (No. 17606-B): April 7, 2009
DECISION ON 2011 MOTION FOR EXTENSION: April 12, 2011
FINAL DATE OF ORDER ON 2ND EXTENSION MOTION (No. 17606-C): June 19, 2011
DECISION DATES ON 2013 MOTION FOR EXTENSION: April 23 and May 7, 2013
FINAL DATE OF ORDER ON 3RD EXTENSION MOTION (No. 17606-D): May 22, 2013
DECISION DATE ON MOTION FOR 4TH EXTENSION: June 16, 2015

ORDER ON FOURTH MOTION TO EXTEND THE VALIDITY OF BZA ORDER NOS. 17606 AND 17606-A

The Underlying BZA Orders

On May 8, 2009, the Board of Zoning Adjustment (the "Board" or "BZA") approved the application for a special exception from the roof structure uniform height provisions under § 411, to construct a four-story residential building in the C-2-A District at premises 5545-5549 South Dakota Avenue, N.E. (Square 3760, Lot 10) and 5553-5575 South Dakota Avenue, N.E. (Parcel 137/86) (the "Subject Property"). On May 9, 2007, the Board issued Summary Order No. 17606,

[1] Fort Totten South is the current property owner ("Property Owner" or "Applicant" or "Movant") and the successor in interest to Dakota Points LLC which was the original Applicant.

as well as Corrected Summary Order No. 17606-A[2], granting special exception relief from the roof structure requirements of § 411 of the Zoning Regulations to construct a four-story residential building in the C-2-A District. (Exhibits 36 and 38, Case No. 17606.)

Pursuant to 11 DCMR §§ 3125.5 and 3125.9, the Order became "final" on that date and took effect 10 days later. Under the corrected Order, and pursuant to § 3130.1[3] of the Zoning Regulations, the Order was valid for two years from the time it was issued – until May 9, 2009.

Prior Time Extensions of BZA Order Nos. 17606 and 17606-A

The Applicant has requested, and the Board has granted for good cause, three prior time extensions on this project: Order No. 17606-B (March 24, 2009) (Exhibit 42, Case No. 17606), Order No. 17600-B / 17606-C[4] (July 19, 2011) (Exhibit 47, Case No. 17606), and Order No. 17606-D (May 22, 2013) (Exhibit 58, Case No. 17606). On March 24, 2009, by Order No. 17606-B, the Board extended the Order until May 9, 2011. On July 19, 2011, by Order No. 17606-C, the Board extended the previous orders until May 9, 2013. Also, on May 22, 2013, by Order No. 17606-D, the Board extended the validity of the Order in Case No. 17606 until May 9, 2015.

2015 Request to Extend Validity of Order Nos. 17606 and 17606-A

On May 8, 2015, the Applicant submitted a request to the Board, pursuant to 11 DCMR § 3130.6, for a two-year extension of the expiration date of Order Nos. 17606 and 17606-A (the "Order"). The Applicant requested that the Board extend the validity of the Order by a period of two years until May 9, 2017. This request for extension is pursuant to § 3130.6 of the Zoning Regulations, which permits the Board to extend the time periods in § 3130.1 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval.

Criteria for Evaluating Motion to Extend

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[2] Because of a minor error in the caption of the order (BZA Order No. 17606), the Board issued a corrected summary order (BZA Order No. 17606-A) to accurately reflect that the proposal was for a four-story residential building, and not a four-unit residential building. The corrected order was in all other respects identical to BZA Order No. 17606, including its final date of May 9, 2007 (BZA Order No. 17606-A (the "Order").)

[3] Subsection 3130.1 states:

> No order authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years, or one (1) year for an Electronic Equipment Facility (EEF), unless, within such period, the plans for the erection or alteration are filed for the purposes of securing a building permit, except as permitted in § 3130.6.

(11 DCMR § 3130.1.)

[4] Order No. 17600-B / 17606-C pertained to both Fort Totten North and South.

Subsection 3130.6 of the Zoning Regulations authorizes the Board to extend the time periods for good cause provided: (i) the extension request is served on all parties to the application by the applicant, and all parties are allowed 30 days in which to respond; (ii) there is no substantial change in any of the material facts upon which the Board based its original approval; and (iii) the applicant demonstrates there is good cause for such extension. Pursuant to 11 DCMR § 3130.6(c)(1), good cause is established through the showing of substantial evidence of one or more of the following criteria:

1. An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;

2. An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays 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.

(11 DCMR § 3130.6.)

Background.

In its motion, the Applicant summarized the project, thusly: The Fort Totten development consists of two related projects separated by Riggs Road, N.E.: Fort Totten North and Fort Totten South. The subject of this time extension motion is Fort Totten South. However, the two projects were intended to be built in two phases with Fort Totten North being built first before Fort Totten South was built. Both projects received BZA approval in 2007. The Applicant indicated that Fort Totten North is almost completed.

In 2006, the District Department of Transportation ("DDOT") began the process of a project to realign and improve the intersection at South Dakota Avenue and Riggs Road, affecting both Fort Totten North and South. DDOT significantly completed this project in 2012. The Fort Totten South site (the "Subject Property"), originally had frontage on South Dakota Avenue, but the realignment resulted in the creation of another parcel of developable land adjacent to the Subject Property where the road had been previously. This parcel, which is currently publicly owned, is known as the Triangle Parcel.

The record shows that since 2007, this second parcel of land has been intended by DMPED, DDOT, and the Applicant to be developed simultaneously as part of the Fort Totten South project, so that Fort Totten South will include the Subject Property and the second parcel. The consolidation of the two parcels will allow for a larger project that would provide many benefits to the community, including affordable housing as part of a mixed-income residential community, neighborhood-serving retail along Riggs Road, and more active, walkable streets in

this central location within the Fort Totten neighborhood. However, for that to be possible, the second parcel first must be transferred to the Applicant through the appropriate public disposition process. (Exhibits 1 and 1C, Case No. 17606-E.)

The Merits of the Request to Extend the Validity of the Order Pursuant to 11 DCMR § 3130.6

The Motion was submitted on May 8, 2015 which was prior to the then expiration date of May 9, 2015. The Board finds that the request was timely as it was made before the underlying approval expired, per the requirements of 11 DCMR § 3130.6.

In its Motion, the Applicant indicated that it had met the service requirements of § 3130.6(a) and that there are no material changes to the facts, as required by § 3130.6(b).

To establish good cause for the request, the Applicant submitted a letter dated May 8, 2015, that stated the reasons the Applicant was requesting a time extension. The Applicant cited several factors beyond its control that prevented it from moving forward with the project. The Applicant argued that a confluence of factors contributed to the "good cause" necessary to extend the Order, including:

(1) The delay of DDOT's reconfiguration of the intersection of Riggs Road, South Dakota Avenue, and 3rd Street, N.E.;
(2) The phased nature of the Fort Totten redevelopment;
(3) Ongoing property acquisition negotiations; and
(4) Economic and market conditions.

(Exhibits 1-1G, Case No. 17606-E.)

The Applicant stated that it was requesting a two-year extension of Order Nos. 17606 and 17606-A for the following reasons:

- The intersection realignment was a massive infrastructure improvement that took a significant amount of time to complete;

- The extended time for completion of the intersection realignment deferred the Applicant's ability to commence work on Fort Totten North. Since Fort Totten North was the first of the two phases, the start of Fort Totten South was subsequently deferred. Fort Totten North, which includes approximately 350 apartment units, a Wal-Mart, and additional neighborhood serving retail, is nearing completion and is expected to deliver in the summer of 2015;

- The Applicant's and DMPED's discussions regarding the transfer of the parcel created by the intersection realignment are progressing, but the disposition process is complex and a significant amount of time is required from all stakeholders to ensure the goals of the

District are properly served. The extension is necessary to ensure that the Triangle Parcel and the Subject Property are developed together in a unified manner; and

- With the introduction of Fort Totten North and several nearby rental projects, the Applicant has recognized a greater need for for-sale housing, as opposed to additional rental product, in the neighborhood. The Applicant is now reconfiguring its program to account for this change by modifying the plans for Fort Totten South to for-sale units, which the Applicant believes will improve the neighborhood by enhancing the diversity of housing options.

If the extension is granted, the Applicant has stated that it intends later this year to submit applications to the BZA to: 1) modify the currently approved plans for the Subject Property, and 2) seek approval of plans for the Triangle Parcel.

The Applicant is seeking an extension of the validity of the Order as the result of the confluence of factors that have slowed its project, and the Applicant believes that together, these factors constitute the "good cause" necessary for the Board to extend the Fort Totten South Orders. To support its argument and demonstrate good cause, the Applicant submitted to the record:

(1) News articles regarding the Fort Totten redevelopment (Exhibits 1A and 1E, Case No. 17606-E);
(2) Site plans, and street realignment plans (Exhibits 1B, 1D, and 1G, Case No. 17606-E);
(3) Letter from the Deputy Mayor for Planning and Economic Development (“DMPED”)(Exhibit 1C, Case No. 17606-E); and
(4) Affidavit from the developer (Exhibit 1F, Case No. 17606-E).

DDOT's Intersection Reconfiguration

The Board finds that the extended period for the DDOT's extensive reconfiguration of the intersection of Riggs Road, South Dakota Avenue and 3rd Street, N.E. is a factor beyond the Applicant's reasonable control that meets the good cause requirement of § 3130.6(c). The changes in the road configurations were a complex infrastructure project that took a long time to complete, and which, ultimately, delayed the Applicant's ability to proceed with the Fort Totten South project. The road reconfiguration was not completed until 2012, at which time the Fort Totten North project was able to commence construction. The Applicant stated that it initially had expected that it would be able to begin construction of the Fort Totten North project in 2010, when DDOT had anticipated completion of the road realignment. However, the road realignment took two years longer than expected, which deferred the commencement of the Fort Totten North project. The development team had to wait to commence construction on Phase 1 until the new roads were operational. Ultimately, Phase 1 was delayed by three years, which had a cascading effect of delaying Phase 2.

Planned Phasing of Fort Totten Development

The Board finds that the phased nature of the broader overall Fort Totten redevelopment effort and the resultant delays in a phase that, by design, preceded the Fort Totten South project constitute an additional good cause reason for granting this extension request. Since 2007, the redevelopment of Fort Totten North had been intended to precede the project at Fort Totten South. All of the planning and underwriting for the two Fort Totten projects included this phasing. The Fort Totten North and Fort Totten South projects were approved by separate BZA orders, although the cases were considered together. The Board credits the Applicant's statement that it would not have been reasonable or prudent, given the Fort Totten market, for both phases to proceed to construction and then deliver simultaneously, making it necessary to delay the Fort Totten South project until after the Fort Totten North project was well underway or completed. However, plans to redevelop Fort Totten North were delayed by the extended completion of the intersection realignment. Phase 1 is now under construction and is nearing completion, as described in the news article in Exhibit 1A of the record of Case No. 17606-E. Unfortunately, the delayed start of Fort Totten North had a domino effect, setting back the plans for Fort Totten South. The development of Fort Totten South cannot begin until Phase 1 is complete, thus necessitating this time extension request.

Acquisition of Public Parcel and Design of Phase 2- Ongoing Negotiations

Now that Phase 1 is nearly complete[5], the Applicant and its affiliates want to proceed with Phase 2 (Fort Totten South) as soon as possible and prudent. However, the Applicant asserts that delays beyond the Applicant's control regarding the ownership of the project site constitute good cause for granting of this time extension request. The Board finds this to be an additional factor to meet the good cause requirement.

The Applicant already controlled the Fort Totten North parcel and the Subject Property and had a project planned when the District decided to improve the intersection of Riggs Road and South Dakota Avenue, N.E. The realignment of the intersection resulted in a new publicly owned parcel (the "Triangle Parcel") adjacent to the privately owned Subject Property. The prior street alignment with the Subject Property fronting on South Dakota Avenue and the Triangle Parcel are shown in Exhibit 1B, Case No. 17606-E.

Together, the Subject Property and the Triangle Parcel comprise the totality of the land that will contain the Fort Totten South development. Since at least 2007, when it became apparent that the Triangle Parcel would be created, both the Property Owner and the District of Columbia have intended that Fort Totten South would include the Triangle Parcel. However, the Fort Totten South Orders govern only the Subject Property and not the Triangle Parcel, so the Applicant intends to file a separate application with the Board for the portion of the Fort Totten South project that will be on the Triangle Parcel.

[5] Fort Totten North was approved pursuant to BZA Order No. 17660, as extended.

The Applicant, DDOT, and DMPED have been working in good faith for several years to dispose of the Triangle Parcel, and the parties have made significant progress. However, the disposition of public land is an understandably complex process that takes time. It is important that the goals of the District are achieved through the transfer of public land, so all parties must consider many factors in the discussions regarding the Land Disposition Agreement ("LDA") that will allow the Applicant to take title. As the letter from DMPED in the record explains, (Exhibit 1C, Case No. 17606-E), this has resulted in a process that is productive but ongoing and not yet completed.

Once the Applicant takes title to the Triangle Parcel, it plans to combine it with the Subject Property to become one parcel for the entire Fort Totten South project, as shown in Exhibit 1D, Case No. 17606-E. The Fort Totten South development will be designed, constructed, and will have the appearance of a single project seamlessly spanning both parcels. The LDA negotiations must be completed and the Applicant must be able to take title to the Triangle Parcel before it can proceed with the Fort Totten South project. The Board credits the Applicant's statement that no prudent developer would construct half of an integrated project with title to the other half unresolved and thus finds that title to the Triangle Parcel is essential to allowing the construction of the entire Fort Totten South project as one.

In addition, the Applicant has indicated that due to changes in the market conditions (described below), the Applicant must modify the plans approved in the Fort Totten South Orders. The Applicant plans to submit a modification request as soon as practical, but until resolution of the LDA and certainty about the title of the Triangle Parcel is reached, the Applicant stated that it cannot proceed with changing its plans and filing such an application.

Economic and Market Conditions

According to the Applicant, while delayed phasing and ongoing negotiations with DMPED posed the main impediment to pursuing the development approved under the Fort Totten South Orders, ongoing challenges with market conditions have also contributed to the delay. Thus, difficulty with changing market conditions constitutes another independent condition beyond the Applicant's reasonable control that the Applicant says supports the Board's finding that good cause exists to grant the extension request.

The neighborhood residential submarket has changed from when the Fort Totten South was first designed and approved. As designed and approved, the Fort Totten South is a rental apartment building, and with a reasonable horizon at the time, the Applicant expected a market appropriate for that product. However, a glut of rental apartments has recently been delivered in the Fort Totten submarket, as described in the news article in the record at Exhibit 1E, Case No. 17606-E. The Applicant now plans to offer a for-sale residential project, because, as described in the developer's affidavit in the record at Exhibit 1F, Case No. 17606-E, the market is much more receptive to for-sale units. This change in ownership type also necessitates a modification to the plans to make the units suitable for a sale, as opposed to rental.

Good Faith Effort to Move Forward

When evaluating this extension request, the Board also has considered the Applicant's and its affiliates' good faith and diligent efforts to move forward with development on the Subject Property. The Applicant has indicated that it has every intention of proceeding with this project, and it indicated that it has recently engaged in a redesign of the plans to allow the project to proceed in response to current market demands for for-sale housing in this neighborhood. The Board's approval of this time extension request will give the Applicant time to finish plans that it intends to submit soon as a modification application. Concept plans for the proposed modification are in the record at Exhibit 1G, Case No. 17606-E.

Based on the foregoing, the Board finds that the Applicant has demonstrated good faith efforts to progress towards building permits to the extent possible at this time. This good faith effort to proceed is evidenced by construction being nearly complete on the Fort Totten North parcel. Also, the good faith effort is shown by that fact that the Applicant has continued to perform site studies and to prepare the Fort Totten South site for construction. The Board credits the Applicant's assertion of good faith and that the Applicant has no advantage to sitting on a vacant parcel of land. The Applicant has demonstrated a great interest in seeing the Fort Totten North and Fort Totten South projects through to completion as planned. The Board finds that approval of the extension request will make completing the Fort Totten South project possible.

The Extensions Meet the Requirements of §§ 3130.6(a), (b), and (c)

The Board finds that the Applicant provided sufficient evidence of the requirements of the regulation to support the approval of the requested extensions as described below.

Extension Request Served on All Parties to the Application

The Applicant stated that the extension request was served simultaneously on all parties to the original application for BZA Case No. 17606, which included only the Office of Planning ("OP") and Advisory Neighborhood Commission ("ANC") 4B. The application for an extension contained a Certificate of Service indicating that it was served on all parties. (Exhibit 1, Case No. 17606-E.)

Also, as required by the regulation, the parties to the application were allowed 30 days to respond to this request.

No Substantial Change to Any of the Material Facts

There has been no substantial change in any of the material facts relating to the case. Based on the record, the factors satisfying the special exception relief for the Subject Property remain as they were for the Board's approval of the requested relief. Regarding the special exception relief under the Fort Totten South Orders, the roof structure relief is still in harmony with the general

purpose and intent of the Zoning Regulations and Zoning Maps and does not affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps.

The Board finds that the Applicant's motion has met the criteria of § 3130.6 for extending the validity of the underlying order. To meet the burden of proof, the Applicant submitted a letter and supporting documents and information that described the factors beyond its control that prevented it from moving forward with the project, as described above. (Exhibits1-1G, Case No. 17606-E.)

Given the totality of the conditions and circumstances described above in the Applicant's letter and other supplemental information that was provided, the Board finds that the Applicant satisfied the "good cause" required under § 3130.6. And, despite the challenges the Applicant described in its submissions, the Applicant demonstrated that it has acted diligently, prudently, and in good faith to proceed towards the implementation of the Order's approval.

The Board finds that the Applicant has met the criteria set forth in 11 DCMR § 3130.6. The reasons given by the Applicant were beyond the Applicant's reasonable control within the meaning of § 3130.6(c)(3) and constitute "good cause" required under § 3130.6(c)(1). In addition, as required by § 3130.6(b), the Applicant demonstrated that there is no substantial change in any of the material facts upon which the Board based its original approval in Order Nos. 17606 and 17606-A. There have also been no changes to the Zone District classification applicable to the Site or to the Comprehensive Plan affecting the Site since the issuance of the Board's order.

The Office of Planning ("OP"), in its report dated June 5, 2015, reviewed the application for the extension of the Order for "good cause" pursuant to 11 DCMR § 3130.6 and recommended approval of the requested two-year extension. (Exhibit 3, Case No. 17606-E.) The Site is within the boundaries of Advisory Neighborhood Commission ("ANC") 4B. The ANC did not submit a report with regard to the request for a time extension.

The motion for the time extension was served on all the parties to the application and those parties were given 30 days in which to respond under § 3130.6(a). No party to the application objected to an extension of the Order. The Board concludes that extension of the relief is appropriate under the current circumstances.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirements of 11 DCMR § 3125.3, which requires that the order of the Board be accompanied by findings of fact and conclusions of law. Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 17606-E for a two-year time extension of Order Nos. 17606 and 17606-A, which Order shall be valid until **May 9, 2017**, within which time the Applicant must file plans for the proposed project with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: **3-1-1** (Lloyd J. Jordan, Jeffrey L. Hinkle, and Marnique Y. Heath to APPROVE; Marcie I. Cohen, OPPOSED; one Board seat vacant).

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

ATTESTED BY: _____.
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: June 26, 2015

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.