

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17676-B of the Application of Innovative Recyclers, Inc., Motion for a Second Extension of the Validity of BZA Order No. 17676, pursuant to § 3130 of the Zoning Regulations. The original application was pursuant to 11 DCMR § 3103.2 for a variance from building height requirements under subsection 840.1, and pursuant to 11 DCMR § 3104.1, for a special exception to establish a solid waste handling facility under subsection 802.4, in the LO/C-M-1 District at premises 2225 Lawrence Avenue, N.E. (Square 4106, Lot 820).

Note: For the reason stated below the Board approved an extension of the validity of the underlying Order, for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of October 26, 2013.

HEARING DATE BZA ORDER 17676:	October 23, 2007
DECISION DATE BZA ORDER 17676:	October 23, 2007
ISSUANCE DATE BZA ORDER 17676:	October 26, 2007
ISSUANCE DATE BZA ORDER 17676-A EXTENDING BZA ORDER 17676:	November 20, 2009

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17676

The Underlying BZA Order

On October 23, 2007, the Board of Zoning Adjustment (the “Board” or “BZA”) approved the Applicant’s request for variance relief from building height requirements and for a special exception to establish a solid waste handling facility in the LO/C-M-1 District. The Order was issued October 26, 2007. (BZA Order 17676.) Under the Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – until October 26, 2009. (11 DCMR § 3130.1.)

First Extension of Underlying BZA Order

On September 15, 2009, the Applicant filed a motion for a two-year extension of the underlying Order that was due to expire. (Exhibit 37.) At that time, § 3130 had been recently amended to

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establish criteria and procedures for such extension requests. The new § 3130 was adopted by the Zoning Commission in Z.C. Case No. 09-01, and became effective on June 5, 2009. Therefore, the new criteria and procedures, particularly those set forth in §§ 3130.1, 3130.6, and 3130.9, were applicable to the Applicant's 2009 request to extend¹.

Subsection 3130.1 provided, in part:

No order [of the Board] 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, except as permitted in § 3130.6.²

Subsection 3130.6 provided in full:

The Board may grant one extension of 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; provided, that the Board determines that the following requirements are met:

- (a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;
- (b) There is 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; and
- (c) The applicant demonstrates that there is good cause for such extension, with 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

¹ The amendments to § 3130 are still in effect, as will be explained further.

² Subsection 3130.1 had been amended by the addition of the phrase "except as permitted in § 3130.6".

- (3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.

The Applicant claimed in 2009 that it was unable to secure a permit from the Department and Consumer and Regulatory Affairs ("DCRA"), and unable to obtain financing for the project due to economic and market conditions beyond its control. (Exhibit 39.) The Board found at that time that the Applicant had followed the applicable procedures to obtain an extension and had satisfied the criteria in § 3130.6 that are set forth above. Thus, on November 20, 2009, the Board extended the underlying BZA Order for a two-year period that was to expire on October 26, 2011. (BZA Order 17676-A, Exhibit 40.)

Second Extension of Underlying BZA Order

On October 7, 2011, the Applicant filed a second request to extend the underlying BZA Order. (Exhibit 42.) The Board considered the request at a Public Meeting on November 8, 2011 and noted several deficiencies. Specifically: (1) the request had not been filed a minimum of 30 days prior to the October 26th expiration date, in accordance with §3130.9; (2) there was no indication that the request had been served on other parties in accordance with § 3130.6(a); (3) the Applicant had not addressed *why* the Board should waive the rule in §3130.6 which limits the Applicant to one extension³; and, (4) the Applicant had not explained that there would be no substantial change in any material facts upon which the Board based its original approval, as specified by § 3130.6(b). As such, the Board voted to deny the request on November 8, 2011 and closed the record.

The Board's oral ruling of November 8 had not been reduced to a final written decision when the Applicant requested the Board to reopen the record and reconsider its oral decision, and provided additional information in support of its extension request. (Exhibits 44 and 45.) The new filings specifically requested waivers of the requirements contained in: § 3130.6 (one extension limit), § 3130.9 (filing must be 30 days prior to expiration date), § 3126.2 (reconsideration motions available only after a final written order), and § 3121.9 (materials received after closing of the record must be returned).

The Board's authority to reopen the case

The threshold question is whether the Board can reopen the case. As noted above, the Board had not issued a final written order denying the Applicant's request for a second extension. Therefore, the Applicant cannot move for reconsideration pursuant to § 3126.2, which allows such a motion within 10 days of the date of issuance of a *final written order*. However, the Board may reconsider the extension motion pursuant to § 3124.2, which states:

³ The Applicant acknowledged that a waiver was necessary but did not provide sufficient evidence explaining why it was necessary. For instance, there were no affidavits from a principal in the firm which detailed why the Applicant needed a second extension, only a statement from its counsel.

Prior to the filing of a final decision, the Board may, on its own motion, reopen the record and require further hearing on designated issues.

(11 DCMR § 3124.2.)

Therefore, pursuant to § 3124.2, the Board reopened the record, considered the Applicant's additional filings, and conducted further deliberations on the Applicant's request for a second extension. Because the Board reopened the record on its own motion, it was unnecessary to reach the questions posed by the Applicant regarding waiver of § 3126.2 (reconsideration requirements) and § 3121.9 (materials filed after closing of the record must be returned). These issues became moot. Thus, the Board turned to the merits of the request for a second extension.

Merits of the request for a second extension

The Board finds that the supplemental filings, particularly the filings in Exhibit 44, provide substantial evidence that the Applicant has good cause for the extension in accordance with § 3130.6(c). The Applicant has been in protracted litigation with DCRA concerning its application for a solid waste facility permit and, without a permit, has been unable to obtain financing from a lender. The supplemental filings include a signed letter to this effect from a principal in the Applicant's firm. (Exhibit 44.)

In addition, the supplemental filings satisfactorily address the concerns discussed by the Board during its deliberations on November 8, to wit:

- The late filing

The Applicant filed its initial motion on October 7, 2011, approximately 19 days prior to the expiration date. Subsection 3130.9 allows an order to remain valid after its expiration date if a request for a time extension is filed at least 30 days prior to the expiration date. Therefore, because the Board could not reach the merits of the request prior to the expiration date, the order expired absent the grant of a waiver. Section 3100.5 allows the Board to waive this requirement after finding good cause and a lack of prejudice to any parties. The Board finds such good cause in that the Applicant erroneously concluded that the expiration date of the last order was November 20, 2011 instead of October 26, 2011, resulting in a motion to extend that was slightly late. (Exhibit 42.) In addition, no party will be prejudiced by the late filing, as no party has filed any objection to the extension request.

- Service on the parties

The Applicant clarified that it served ANC 5B and the Office of Planning with its extension request, in accordance with § 3130.6(a). (See, Exhibit 44 and Certificate of Service attached thereto.)

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- Waiver of § 3130.6 limiting the Applicant to one extension

The Board waives this rule to permit a second extension, finding good cause and a lack of prejudice to the parties under § 3100.5. The Applicant noted that it made significant efforts to settle the litigation with DCRA after the first extension was granted in 2009, stating it had been in settlement negotiations with DCRA since that time. Indeed, the Applicant and DCRA pursued settlement talks with diligence. (Exhibit 44.) The Board finds that the protracted negotiations, especially those dating from the granting of the first extension, constitute the good cause that is necessary to waive the rule. The Board also finds that there will be no prejudice to any parties as a result of allowing a second extension. As noted, no party has filed any objection to the extension relief that is requested.

- No substantial change to material facts

Subsection 3130.6(b) requires that, to grant an extension, there be no substantial change in any of the material facts upon which the Board based its original approval of the application. The Applicant states this is so and the Board makes this finding based, in part, upon the Applicant's assertion. (Exhibit 44). The Board also notes that the Applicant's plans for development of the site will be unchanged from those approved by the Board in its underlying order (BZA Order No. 17676, Exhibit No. 35.) In addition, there have been no changes to the zone district classification applicable to the property or to the Comprehensive Plan affecting this site since the issuance of the Board's underlying order.

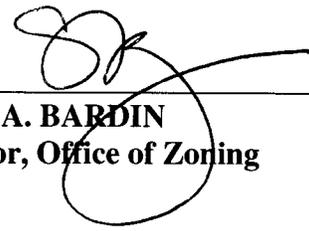
In conclusion, the Board finds that the Applicant has **met the criteria** set forth in § 3130.6 to allow an extension. Accordingly, pursuant to § 3130.6 of the Regulations, the Board hereby **extends the validity** of the underlying Order, for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of October 26, 2013. Order No. 17676 will expire on that date unless the plans for the alteration approved in that order are filed with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit. Pursuant to 11 DCMR § 3101.6, 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 request for extension of time be **GRANTED** until October 26, 2013.

VOTE: 4-0-1 (Meridith H. Moldenhauer, Nicole C. Sorg, Michael G. Turnbull and Jeffery L. Hinkle to Approve; Lloyd J. Jordan abstaining)

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

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ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: **MAY 21 2012**

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.

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As Director of the Office of Zoning, I hereby certify and attest that on MAY 21 2012, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail or delivered by electronic mail in the case of those ANCs and SMDs that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

George Rodgers, Jr., President
Innovative Recyclers, Inc.
2225 Lawrence Avenue, N.E.
Washington, D.C. 20018

Philip R. Croessmann, Esq.
Westberg Croessmann & Warren, P.C.
7331 Wilson Road
Warrenton, VA 20186

Chairperson
Advisory Neighborhood Commission 5B
2116 R Street, N.E.
Washington, D.C. 20002

Single Member District Commissioner 5B02
Advisory Neighborhood Commission 5B
2429 Hamlin Street, N.E.
Washington, D.C. 20018

Melinda Bolling, Esquire
General Counsel
Office of General Counsel
Dept. of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

Councilmember
Ward Five
1350 Pennsylvania Avenue, N.W., Suite 107
Washington, D.C. 20004

ATTESTED BY:

A handwritten signature in black ink, appearing to read 'S.A. Bardin', is written over a horizontal line. Below the signature is a large, hand-drawn circle.

SARA A. BARDIN
Director, Office of Zoning