

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17696-C of Liberty Property Trust (formerly Hines VAFII 2100 M Street LP), pursuant to 11 DCMR § 3130, for a third time extension of one year of BZA Order No. 17696.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception from the roof structure setback requirements under subsection 400.7, and the parking space requirements under subsection 2108.2, and a variance from the loading platform height requirements under subsection 2201.7, a variance from the van parking requirements under subsection 2115.8, a variance from the compact parking space requirements under subsection 2115.4, a variance from the 45 degree height setback from neighboring property requirement under subsection 1709.20 and a variance from the loading space height requirements under subsection 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75).

HEARING DATE (Orig. Application):	December 18, 2007
DECISION DATE (Orig. Application):	December 18, 2007
ORIGINAL ORDER ISSUANCE DATE (17696):	December 20, 2007
DECISION ON 1ST MOTION TO EXTEND:	December 1, 2009 and December 8, 2009
ISSUANCE DATE ON 1ST EXTENSION ORDER (17696-A)	December 15, 2009
DECISION ON 2ND MOTION TO EXTEND:	December 6, 2011 and January 10, 2012
ISSUANCE DATE ON 2ND EXTENSION ORDER (17696-B)	January 20, 2012
DECISION ON 3RD MOTION TO EXTEND:	January 14, 2014 and February 4, 2014

ORDER ON THIRD MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17696

The Underlying BZA Order

On December 18, 2007, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for special exception relief from the requirements of roof structure setbacks and parking spaces as well as variance relief from the requirements of loading platform height,

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BZA APPLICATION NO. 17696-C
PAGE NO. 2

van parking, compact parking spaces, the 45 degree height setback from neighboring property, loading space heights, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District. Thus, pursuant to 11 DCMR §§ 3104.1 and 3103.2, the Board granted special exceptions from the roof structure setback requirements under § 400.7 and the parking space requirements under § 2108.2 as well as variances from the loading platform height requirements under § 2201.7, the van parking requirements under § 2115.8, the compact parking space requirements under § 2115.4, the 45 degree height setback from neighboring property requirement under § 1709.20 and the loading space height requirements under § 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75). The Order was issued December 20, 2007. (BZA Order 17696.)

Pursuant to § 3130.1 of the Zoning Regulations, Order 17696 was valid for two years from the time it was issued – that is, until December 20, 2009.

Section 3130.1¹ states:

No order [of the Board] 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.)

2009 Motion to Extend

On October 23, 2009, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6,² a two-year extension in the authority granted in the underlying BZA Order, which was due to expire December 20, 2009. (Exhibit 32.) The Board received supplemental material demonstrating good cause from the Applicant in support of that time extension request, pursuant to § 3130.6. (Exhibit 33.)

At decision meetings on December 1 and 8, 2009, the Board found that the requirements of 11 DCMR § 3130.6 were met and granted the Applicant a two-year extension of BZA Order No. 17696 until December 20, 2011. (Exhibit 35, BZA Order No. 17696-A.)

¹ Subsection 3130.1 was amended by the addition of the phrase “except as permitted in § 3130.6” by the Zoning Commission in Z.C. Case No. 09-01. The amendment became effective on June 5, 2009.

² Subsection 3130.6 was adopted by the Zoning Commission in Z.C. Case No. 09-01 and became effective on June 5, 2009.

BZA APPLICATION NO. 17696-C
PAGE NO. 3

2011 Motion to Extend

On November 4, 2011, the Board received a letter from the Applicant, which requested, upon a showing of good cause, a second two-year extension of the original Order as well as a waiver from the impact of 11 DCMR § 3130.6, pursuant to 11 DCMR § 3100.5, in order to allow a second extension to the Order. (Exhibit 37.)

At decision meetings held on December 6, 2011 and January 10, 2012, the Board waived the then-limitation to one extension and found that the requirements of 11 DCMR § 3130.6 were met and granted the Applicant a second two-year extension of BZA Order No. 17696 until December 20, 2013. (Exhibit 42, BZA Order No. 17696-B.)

Third Motion to Extend

On December 18, 2013, the Board received a letter from the new owner of the Subject Property, who is now the Applicant, which requested, pursuant to 11 DCMR §§ 3130.6 and 3130.7, a third extension for one year in the authority granted in the underlying BZA Order, which was due to expire December 20, 2013. (Exhibit 44.)

The new owner and now Applicant is requesting a one-year extension in the authority granted in the underlying BZA Order because, having only acquired the Property recently, it was unable for reasons beyond its control to secure all required government agency approvals by the time the Order would expire. According to the Applicant, the reasons for the request to extend the Order are because of the change in property owner and the additional time required to reassess the viability of the office market and the project and to have sufficient time in which to obtain necessary government approvals. The timing of the new owner taking control of the Property prevented a timely ability to proceed with preparing and submitting a complete building permit application that would vest the Order before it was due to expire.

The new owner and Applicant pointed out that the recent economic downturn that affected development conditions in the District, particularly in the office market, had caused the prior delays based on which the Board had granted the prior two extensions of the Order. Although the economic conditions have since improved, the previous owner of the Property had not proceeded with developing the project because of the then state of the economy and depressed office market that, according to the new owner and Applicant, continued even after the Order was extended a second time. The prior owner had been unable to continue with preparing the necessary plans for vesting the Order. Approximately one year after the second extension was granted, the prior owner put the Property and building up for sale to sell the project to another owner who could have more success in developing it. Because the prior owner had stopped efforts to develop the project, it sold the Property to the new owner without having completed many of the steps needed for the project to be able to proceed under the Order.

BZA APPLICATION NO. 17696-C
PAGE NO. 4

According to the Applicant, while the previous owner did work on the construction drawings and plans for the project leading up to the second extension of the Order, it was unable to continue. The construction drawings and plans were not sufficiently complete so that a building permit application could be filed. Thus, the new owner which only acquired the Property in May 2013 faced an impossibly short time frame in which to effectuate the Order once it acquired the Property and the entitlements to the project. The new owner stated that it inherited the history of the project and an approved BZA Order that had not been vested due to adverse economic conditions. The previous owner's inability to proceed with the project was outside of the owner's control, and the now owner could only accept the limited progress made at the time it took ownership. The now owner acquired the project with the intention of constructing the project, but it indicated that it needed the time to study the project and determine whether it is viable for the present office market conditions or another use.

The now owner and Applicant attested to its good faith efforts to effectuate the underlying BZA Order by indicating that it assessed the viability of the project as quickly as possible. Less than two months after taking ownership of the Property, the Applicant engaged an engineer and an architect to evaluate the project in light of the office market conditions. To demonstrate that good faith effort, it provided the contract for engineering and architectural services for the study. The Applicant stated that it is still actively engaged in the study and is still collecting information that will allow it to make an informed decision about the viability of the project given the present office market. To further demonstrate its efforts, the Applicant provided an affidavit from its Senior Vice President, Regional Director and representative, John S. Gattuso. Mr. Gattuso indicated that because the new owner has not yet determined whether the project is appropriate for the office market, it has not yet proceeded with developing construction drawings for the project. Mr. Gattuso goes on to state that if the owner loses the entitlements granted by the BZA under the Orders, any future efforts to market the project to future tenants could be further hampered and would significantly diminish the expected value of the investment on which the owner relied. The requested one-year extension would allow the Applicant the additional needed time in which to make a fully informed determination as an owner who recently acquired the Property and to prepare all of the documents necessary for it to receive the appropriate government approvals that would vest the Order. (Exhibit 44.)

Accordingly, the Applicant requested that, pursuant to § 3130.6 of the Regulations, the Board extend the validity of its prior Order for one additional year, thereby allowing the Applicant additional time to complete its study of the project, prepare documents, and apply for a building permit.

Request for Waiver of One-Extension-Only Requirement Pursuant to 11 DCMR § 3130.6

As part of the application for a third time extension, the Applicant requested that the Board waive the limitation to one extension in 11 DCMR § 3130.6 to allow the grant of a third extension of the Order. The Board in its deliberations noted that this request was no longer required as a result of the Zoning Commission's approval of Z.C. Case No. 12-11.

BZA APPLICATION NO. 17696-C
PAGE NO. 5

On February 25, 2013 the Zoning Commission took final action to approve Z.C. Case No. 12-11, which included text amendments to BZA Rules and Procedures – Chapter 31, specifically to 11 DCMR §§ 3130.6 and 3130.9 in regard to time extensions of the validity of orders. The text amendment eliminated the limitation on granting more than one time extension (§ 3130.6) and also eliminated the 30-day rule for filing before the expiration date of an order so as to toll the expiration of the underlying order (§ 3130.9). The order and final rulemaking for Z.C. Case No. 12-11 was issued on June 14, 2013 in the *D.C. Register* and thereby finalized on that date.

Criteria for Evaluating Motion to Extend

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. (11 DCMR §3130.) 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.

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

The Board finds that the motion has met the criteria of § 3130.6 to extend the validity of the underlying order with some caveats. To meet the burden of proof, the Applicant submitted an affidavit from its representative that described its recent acquisition of the Property and the project, its efforts to study the current office market conditions and project viability, and its reasons for delay in completing construction documents and obtaining government approvals. (Exhibit 44, Tab C.) The Applicant also submitted a contract for an engineering and architectural feasibility study of the project to demonstrate its good faith efforts. (Exhibit 44, Tabs B and J.)

As set forth in the affidavit, the new owner had recently acquired the Property and project. It has been diligent about its efforts to evaluate the project approved by Order 17696 by contracting for the services of an engineer and architect to study possible expansions of the building, including the approved project, as they relate to the office leasing market. The new owner acquired the Property in May 2013 and engaged the contract in July 2013. It states that it can take six months

BZA APPLICATION NO. 17696-C
PAGE NO. 6

or more typically to complete such an assessment. It has not completed construction drawings for the project since it has not yet completed its evaluation of the viability of those plans for the market. The new owner points out that if it loses the entitlements granted by the BZA under the Orders, any future efforts to market the project to future tenants could be further hampered and this will significantly diminish the expected value of the investment on which the new owner relied. With some caveats, the Board finds that the Applicant has met the criteria set forth in this provision.

The Office of Planning ("OP"), by memorandum dated January 7, 2014, reviewed the application for the extension of the Order for "good cause" pursuant to 11 DCMR § 3130.6 and recommended approval of the requested one-year extension. (Exhibit 45.) The Site is within the boundaries of Advisory Neighborhood Commission ("ANC") 2A. The ANC was the only other party to the case and was provided the required notice of the request for the extension and did not submit a report on the matter.

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.

The Board found 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 No. 17696. 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 Board voiced some concerns during its deliberations about this third extension request and asked to have these concerns memorialized in this order. The Board noted that the Applicant was a new owner and was being approved for a third and final time extension of one year for the plans and project approved in Order No. 17696. The Board noted that it was granting this extension in deference to OP's recommendation to give the new owner time to look over the prior owner's plans and financials. Additionally, although the Zoning Commission had removed the one-extension-only limitation to § 3130.6 in Z.C. Case No. 12-11, the Board indicated that it would not be likely to entertain any further extensions in this case beyond this third one. The Board also warned the Applicant that should the new owner after completing its assessment of the approved project seek to modify those already approved plans and/or the project, it would need to come back and seek further approvals from this Board.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirements of 11 DCMR § 3125.3, which required 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

BZA APPLICATION NO. 17696-C
PAGE NO. 7

ORDERS APPROVAL of Case No. 17696-C for a third one-year time extension of Order No. 17696, which Order shall be valid until **December 20, 2014**, within which time the Applicant must file plans for the proposed development with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 4-0-1 (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle, and Michael G. Turnbull to APPROVE; the third mayoral appointee 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: February 19, 2014

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.