

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17753-C of Application of W Street Acquisitions LLC, Motion for a Second Two-Year Extension of BZA Order No. 17753, pursuant to 11 DCMR § 3130.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a variance from the lot area requirements of § 401.3, a variance from the lot occupancy requirements of § 403.2, a variance from the rear yard requirements of § 404.1, variances from the side yard requirements of §§ 405.3 and 405.9, a variance from the front yard requirements of § 2516.5(b), and a special exception under § 2516 which authorizes exceptions to building lot control in residence districts to permit the construction of a new residential development in the R-4/R-3 District at premises 1226-1252 W Street, S.E. (Square 5782, Lots 98, 99, 694, 810, 811, 812 and 1022).

HEARING DATE (Orig. Application): February 19, 2008
DECISION DATE (Orig. Application): February 19, 2008 (Bench Decision)
FINAL ORDER ISSUANCE DATE: February 21, 2008 (No. 17753)
CORRECTED ORDER ISSUANCE DATE: December 8, 2009 (No. 17753-A)
DECISION ON MOTION TO EXTEND ORDER: April 13, 2010
ORDER ISSUANCE DATE ON MOTION TO EXTEND: April 19, 2010 (No. 17753-B)
DECISION ON 2ND MOTION TO EXTEND ORDER: March 13, 2012

ORDER ON SECOND MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17753

The Underlying BZA Orders

On February 19, 2008, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for variances from the lot area requirements of § 401.3, the lot occupancy requirements of § 403.2, the rear yard requirements of § 404.1, the side yard requirements of §§ 405.3 and 405.9, and the front yard requirements of § 2516.5(b) and a special exception under § 2516 which authorizes exceptions to building lot control in residence districts to permit the construction of a new residential development in the R-4/R-3 District. Thus, pursuant to 11 DCMR §§ 3103.2 and 3104.1, the Board granted for a variance from the lot area requirements of § 401.3, a variance from the lot occupancy requirements of § 403.2, a variance from the rear yard requirements of § 404.1, variances from the side yard requirements of §§ 405.3 and 405.9, a variance from the front yard requirements of § 2516.5(b), and a special exception under § 2516 which authorizes exceptions to building lot control in residence districts to permit the

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO.

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EXHIBIT NO.

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construction of a new residential development in the R-4/R-3 District at premises 1226-1252 W Street, S.E. (Square 5782, Lots 98, 99, 694, 810, 811, 812 and 1022). BZA Order No. 17753 (the "Order") was issued February 21, 2008. (Exhibit No. 39, BZA Order No. 17753.)¹

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 – that is, until February 21, 2010.

Section 3130.1² 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.)

2010 Motion to Extend

On February 18, 2010, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6,³ a two-year extension in the authority granted in the underlying BZA Order, which was due to expire February 21, 2010. (Exhibit 43.)

At its decision meeting on April 13, 2010, the Board found the requirements of 11 DCMR § 3130.6 were met and granted the Applicant a two-year extension of BZA Order No. 17753 until February 21, 2012. (Exhibit 46, BZA Order No. 17753-B.)

2012 Motion to Extend

On January 20, 2012, 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 of the Board in Application No. 17753 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 of the Order. (Exhibit 47.) The Applicant indicated that the request for a second extension was filed more than 30 days prior to the expiration date of BZA Order No. 17753-B, pursuant to 11 DCMR § 3130.9. Accompanying the motion for a second two-year extension and waiver request was a signed and notarized

¹ Subsequently, a corrected Order, No. 17753-A, was issued to accurately reflect the hearing and decision dates for the underlying application. (Exhibit 41, BZA Order No. 17753-A.)

² Section 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.

³ Section 3130.6 was adopted by the Zoning Commission in Z.C. Case No. 09-01 and became effective on June 5, 2009.

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affidavit from Stan Voudrie, who is the manager of the Managing Member of the LLC that owns the subject property, and who attested to the additional work and investments made by the Applicant from the time the underlying BZA Order was last extended. (Exhibit 47, Tab C.)

Waiver of 11 DCMR § 3130.6 – Preliminary Matters

As a preliminary matter, the Board addressed whether the limitation to one extension in 11 DCMR § 3130.6 could be waived so that it could grant a second extension of the underlying Order. In Z.C. Case No. 09-01, the Zoning Commission for the District of Columbia (“Commission”) amended 11 DCMR § 3130.6. The amendments adopted by the Commission to in Z.C. Case No. 09-01 became effective on June 5, 2009. Subsection 3130.6 expressly limits the number of time extensions to one. In Z.C. Case No. 09-01, the Commission also specifically authorized the Board to extend the time limits of § 3130.1 and provided criteria for doing so. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009).

During its deliberations on March 13, 2012, Board members sought advice of its counsel and concluded, based on that advice, that, pursuant to its authority under 11 DCMR § 3100.5, it was authorized to waive the limitation in 11 DCMR § 3130.6 to a single time extension. Subsection 3100.5 provides:

Except for §§ 3100 through 3105, 3121.5 and 3125.4, 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.

As § 3130.6 is not expressly listed among the provisions in § 3100.5 that the Board may not waive, the Board concluded that it is not prohibited from granting a waiver of § 3130.6 and therefore has the discretion to do so.⁴ The Board then reviewed the evidence before it; and upon reviewing the materials submitted by the Applicant with its waiver and extension requests, the Board found good cause to grant the waiver and found that the Applicant met the substantive requirements of the section pertaining to time extensions. Further, the Board concludes that granting the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

The merits of the 2012 request to extend

Pursuant to § 3130.6(a), an extension request must be served on all parties to the application and those parties are allowed 30 days to respond. (11 DCMR § 3130.6(a).) These motions also have a 30-day filing prerequisite, pursuant to 11 DCMR § 3130.9.⁵ The motion was filed

⁴ A majority of the Board supported the waiver of the one-extension-only provision in the Zoning Regulations; however, at least one Board member expressed the judgment that a waiver of this provision was not appropriate and that he would not support a second extension.

⁵ Subsection 3130.9 reads as follows:

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January 20, 2012, more than 30 days before the order was due to expire on February 21, 2012. Thus, the requirements of § 3130.9 were met and the expiration date was tolled.

As discussed herein, the Zoning Commission adopted 11 DCMR § 3130.6 in Z. C. Case No. 09-01. The amendment became effective on June 5, 2009. Subsection 3130.6 of the Zoning Regulations states in full:

- 3130.6 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
 - (3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.

(11 DCMR § 3130.6.)

A request for a time extension filed at least thirty (30) days prior to the date upon which an order is due to expire shall toll the expiration date for the sole purpose of allowing the Board to consider the request.

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The Board concluded that the Applicant met the criteria set forth in § 3130.6. The motion for a time extension was served on all of the parties to the application and those parties were given 30 days in which to respond pursuant to § 3130.6(a). The record shows that the Applicant served the time extension request on all parties to the original application. (*See*; Exhibit 47.) No one objected to the request.

In satisfaction of § 3130.6(b), the Applicant indicated that there were no changes of the material facts upon which the Board based its original approval of the application. Based on the evidence in the record, the Board concluded that the Applicant met the requirements of § 3130.6(b) that the material facts and the approved plans remain unchanged. 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 original Order.

With respect to the requirements of § 3130.6(c), the Board required that the Applicant submit "substantial evidence" for the record to meet that subsection's requirements of good cause, particularly as to that good cause related to the specific time period under consideration. The Applicant submitted information together with a signed and notarized affidavit from the Applicant's manager for the record on January 20, 2012, explaining the reasons for the request and the work and investments in the project that the Applicant had made to demonstrate good cause. (Exhibit 47, Tab C.) The Board concludes that the Applicant's submissions demonstrate the requisite good cause.

The Applicant requested the second two-year extension in the authority granted in the underlying BZA Order because, due to the deterioration of the real estate market in Washington, D.C., the Applicant continues to be unable to obtain the necessary financing commitment to begin the project, despite repeated attempts to obtain financing. To meet its burden of proof, the Applicant submitted a signed and notarized affidavit from the manager of the Managing Member of the LLC which is the owner of the subject property. In its affidavit, the Applicant indicated that it has diligently sought financing and attempted to move forward with the project in the time since the last extension approval. The Applicant stated that since the BZA approval was extended in 2010, the real estate market for residential construction had improved in many areas of the District, but that, nonetheless, the development of new market rate for-sale homes in the Anacostia area of Ward 8 has remained challenging. Regardless, since the 2010 extension approval, the Applicant has invested substantial time and effort to move the project forward, including legal, architectural, engineering, permits, and other development costs. The Applicant has continued to contact banks and lenders to seek construction financing for the project, but has not as yet been successful in convincing any of these lenders to provide financing. The affidavit indicated that these economic conditions were beyond the Applicant's control and that, due to the economy, the Applicant was unable to secure financing for the approved project. To demonstrate its efforts to advance the project, the Applicant has brought in a major homebuilder that is active in the metropolitan area into the LLC as an equity partner; updated the soil survey; met with DC Water and the utility companies to confirm the adequacy of service and location of lines; and on September 22, 2011, obtained revised concept approval and approval of the

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subdivision from the Historic Preservation Review Board, with delegation to staff of any further review. The Applicant also retained architectural and engineering professionals to prepare construction drawings and engineering work so as to proceed to obtain a building permit once financing was secured. The Applicant indicated that much of the necessary design and engineering work has been completed, but that due to the delay in placing the project financing, the Applicant has been unable to have these professionals complete the construction documents. (Exhibit 47, Tab C.)

A response to the Applicant's motion was filed from the Office of Planning ("OP"). OP issued a report in support of the time extension. (Exhibit 48.) The project is within the boundaries of Advisory Neighborhood Commission ("ANC") 8A. ANC 8A did not file a report.

According to the Applicant, the reasons for its request to the Board to extend the time of the Order are because of its inability to secure financing until recently in an unstable economic market and market conditions in the District. The extension would allow the Applicant the additional time in which to continue to pursue and obtain construction financing, finalize its plans, and move forward with the project. Accordingly, the Applicant requested that, pursuant to § 3130.6 of the Regulations, the Board extend the validity of its prior Order for an additional two years, thereby allowing the Applicant additional time to secure financing and apply for a building permit.

Based on its review of the record, the Board concluded that the Applicant's submissions demonstrate the requisite good cause. The Applicant's inability to secure the necessary permits and financing and the poor economic conditions in the District constitute the "good cause" required under § 3130.6(c)(1).

As required by § 3130.6(b), there is no substantial change in any of the material facts upon which the Board based its original approval. In requesting this extension of the Order, the Applicant's plans for development of the site would be unchanged from those approved by the Board in its underlying Order dated February 21, 2008 (Exhibit 12 in the record).⁶ 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 Order.

Neither the ANC nor any party to the application objected to an extension of the Order. The Board concludes that the extension of that relief is appropriate under the current circumstances.

Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 17753 for a second two-year time extension of Order No. 17753, which Order shall be valid until February 21, 2014, within which time the Applicant must file plans for the proposed structure with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

⁶ The corrected Order (BZA No. 17753-A) did not alter the plans approved by the Board in the original Order (BZA No. 17753).

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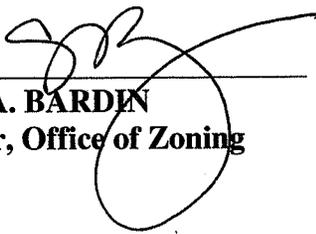
Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this request for extension of time be **GRANTED** until February 21, 2014.

VOTE: 4-0-1 (Meridith H. Moldenhauer, Michael G. Turnbull, Nicole C. Sorg, Jeffrey 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.

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 20 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 **MAR 20 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:

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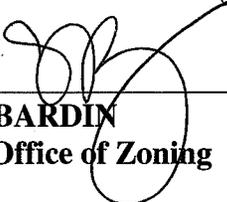
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