

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17809-B of Jemal’s Uline LLC, Motion for a Second Two-Year Extension of BZA Order No. 17809, pursuant to 11 DCMR § 3130.

The original application was pursuant to 11 DCMR § 3104.1 for special exception relief from parking requirements for historic structures under § 2120 and a special exception from the roof structure number and setback requirements under § 411, to permit the expansion and renovation of the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts at premises 1130-1150 3rd Street, N.E. (Square 748, Lots 8-11, 42, 43, 802, 808-812).

HEARING DATE (Orig. Application):	September 16, 2008
DECISION DATE (Orig. Application):	September 16, 2008
FINAL ORDER ISSUANCE DATE (No. 17809):	October 2, 2008
DECISION ON FIRST MOTION TO EXTEND ORDER:	September 28, 2010
ISSUANCE DATE OF FIRST EXTENSION (No. 17809-A):	October 1, 2010
DECISION ON 2ND MOTION TO EXTEND ORDER:	October 23, 2012

ORDER ON SECOND MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17809

The Underlying BZA Order

On September 16, 2008, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for special exception relief from parking requirements for historic structures under § 2120 and from the roof structure number and setback requirements under § 411, to permit the expansion and renovation of the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts. Thus, pursuant to 11 DCMR § 3104.1, the Board granted a special exception from parking requirements for historic structures under 11 DCMR § 2120 and a special exception from the roof structure number and setback requirements under 11 DCMR § 411, in order to expand and renovate the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts at premises 1130-1150 3rd Street, N.E. (Square 748, Lots 8-11, 42, 43, 802, 808-812). The Order was issued October 2, 2008. (Exhibit 32, BZA Order 17809.) (Exhibit 32.)

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 2, 2010.

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BZA APPLICATION NO. 17809-B
PAGE NO. 2

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.)

2010 Motion to Extend

On April 6, 2010, 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 then due to expire on October 2, 2010. (Exhibit 34.)

At its decision meeting on September 28, 2010, the Board found that the requirements of 11 DCMR § 3130.6 had been met and granted the Applicant the two-year extension of BZA Order No. 17809, until October 2, 2012. (Exhibit 36, BZA Order No. 17809-A.)

2012 Motion to Extend

On August 31, 2012, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6, upon a showing of good cause, a second two-year extension of the authority granted in the original BZA Order, which was then due to expire on October 2, 2012. (Exhibit 38.) Pursuant to 11 DCMR § 3130.9, an application for a time extension must be filed at least 30 days prior to the date upon which an order is due to expire. (11 DCMR § 3130.9.) Having filed the motion on August 31st for the second extension of the Order due to expire October 2, 2012, the Applicant met the time requirement under § 3130.9.

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

As part of its consideration of the motion for a second two-year time extension, the Board first addressed whether to waive the limitation to one extension in 11 DCMR § 3130.6 to allow the grant of a second extension of the Order. In Z.C. Case No. 09-01, the Zoning Commission (“Commission”) amended 11 DCMR § 3130, in part, by adding § 3130.6. The amendments adopted by the Commission in Z.C. Case No. 09-01 became effective on June 5, 2009.

¹ 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.

² Section 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. 17809-B
PAGE NO. 3

Subsection 3130.6 expressly limits the number of time extensions to one.³ In Z.C. Case No. 09-01, the Commission specifically authorized the Board to extend the time limits of § 3130.1 and provided the criteria for doing so. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009).

The Applicant's motion dated August 31, 2012, requested a second time extension of two years. The Office of Planning ("OP"), in its report on the second extension request, noted that approval of a second extension is up to the discretion of the Board. (Exhibit 39.) During deliberations, the Board noted that in the past, it has exercised its discretion pursuant to 11 DCMR § 3100.5⁴, to waive the limitation in 11 DCMR § 3130.6 to a single time extension for good cause shown.

The OP report also indicated that it would not object to a second extension in this case because the original approval and the first extension had been both granted before the text of § 3130.6 became effective. As §§ 3100 through 3105, 3121.5, and 3125.4 do not apply to extension requests, the Board concluded that it is authorized, for good cause shown, pursuant to 11 DCMR § 3100.5, to waive the restriction to one extension pursuant to § 3130.6. At its October 23, 2012 meeting, finding sufficient good cause shown, the Board approved the waiver of the one extension restriction requirement as part of its consideration of the underlying motion to extend.

The merits of the 2012 request to extend

As noted above, the Board received the Applicant's request, dated August 31, 2012, for a two-year extension in the authority granted in the underlying BZA Order, which was due to expire October 2, 2012. Included with the request was a sworn and signed affidavit from Paul Millstein, Vice President, Douglas Development, Inc. and Managing Member of the Applicant, to show good cause, pursuant to 11 DCMR § 3130.6. (Exhibit 38, Tab B.) Also included with the motion was additional documentation in support of the Applicant's good cause for its request. (Exhibit 38, Tabs C and D.)

The Applicant served its extension request dated August 31, 2012 to all parties to the initial BZA application, which included Advisory Neighborhood Commission ("ANC") 6C, which is the affected ANC, and OP, notifying them of the Applicant's motion for a two-year time extension and sharing all the documentation in support of that motion with them. (Exhibit 38.) OP, in its

³ During the Board's deliberations, there was discussion of the Board's discretion to waive the one-time limitation and whether the Zoning Commission would be taking the issue up in a text amendment case to amend 11 DCMR § 3130 to change or eliminate this restriction. The Zoning Commission is scheduled to hear Z.C. Case No. 12-11, which is a rulemaking case that includes a provision for amending this restriction, on November 8, 2012.

⁴ 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.

BZA APPLICATION NO. 17809-B
PAGE NO. 4

report dated October 16, 2012, noted that the application submitted by the Applicant dated August 31, 2012, has been in the public record since filing. (Exhibit 39.)

The project is within the boundaries of ANC 6C. ANC 6C did not submit a report on the request.

OP filed a report recommending that the Board grant the Applicant's request for a second two-year extension of Order No. 17809. (Exhibit 39.) The District Department of Transportation ("DDOT") filed a report of no objection to approval of the request. (Exhibit 40.)

According to the Applicant, the reasons for its request to the Board to extend Order No. 17809 for another two years are because of its continued inability to finance the construction of the project in view of the deterioration the real estate market. The Applicant indicated in its motion and the supporting documents it submitted with that motion that the original approval occurred just as the office real estate market entered into a significant downturn. Despite the problems with the market, the Applicant stated that since the original approval in 2008 until the present, it had made aggressive attempts to obtain financing for the project, but had not been successful. The Applicant stated that, although it has contacted several lenders and other potential investors, those potential investors and lending institutions had not approved financing that would have made the project viable. Furthermore, the Applicant indicated that it continues to monitor the financial markets closely in order to secure financing for the project. The Applicant noted that while the latest reports suggest that the Washington commercial real estate market may be starting to stabilize, it is not anticipated that recovery would occur ahead of the Order's scheduled expiration on October 2, 2012, thereby necessitating a further extension request. (Exhibit 38.)

In addition, the Applicant indicated that the plans approved for the development of the site and other material facts are unchanged from those approved by the Board in its Order issued on October 2, 2008. Also, there have been no changes to the Zone District classification or the Comprehensive Plan applicable to the property. The extension would allow the Applicant the necessary additional time in which to secure financing. 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.

The Zoning Commission adopted 11 DCMR § 3130.6 in Zoning Commission Case No. 09-01. The Subsection 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.)

Pursuant to 11 DCMR § 3130.9, for a request for a time extension to toll the expiration date of the underlying order for the sole purpose of allowing the Board to consider the request, the motion must be filed at least 30 days prior to the date on which an order is due to expire. The Applicant filed its request with a sworn affidavit on August 31, 2012, which met the required 30-day period for tolling.

The Board found that the Applicant has met the criteria set forth in § 3130.6. The motion for a 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). The Applicant's inability to secure the necessary 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

BZA APPLICATION NO. 17809-B
PAGE NO. 6

Applicant's plans for development of the site would be unchanged from those approved by the Board in its Order dated October 2, 2008 (Exhibit No. 24 (Plans), as modified by Exhibit No. 29 (Revised Parking Plan) in the record). 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 § 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. Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 17809-B for a second two-year time extension of Order No. 17809, which Order shall be valid until **October 2, 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.

VOTE: 3-1-1 (Lloyd J. Jordan, Jeffrey L. Hinkle, Nicole C. Sorg, to Approve; Anthony J. Hood, to Oppose; and 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: October 24, 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.