

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17860-B of Application of Jemal’s KFC LLC, Motion for a Two-Year Extension of BZA Order No. 17860, pursuant to 11 DCMR § 3130. The original application was pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under § 771, a variance from the rear yard requirements under § 774, and a variance from the parking requirements under § 2101.1, to permit the development of a two-story commercial building in the C-2-A District at premises 1442 Pennsylvania Avenue, S.E. (Square 1065-NE, Lot 49).

HEARING DATE (Orig. Application): January 6, 2009
DECISION DATE (Orig. Application): January 6, 2009 (Bench Decision)
FINAL ORDER ISSUANCE DATE: January 8, 2009 (Summary Order)
DATE OF DECISION ON RECONSIDERATION: March 3, 2009
DATE OF ORDER ON MOTION FOR RECONSIDERATION: May 28, 2009
DATES OF DECISION ON MOTION TO EXTEND ORDER: February 8, 2011 and March 1, 2011

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17860

The Underlying BZA Orders

On January 6, 2009, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for variances from the floor area ratio (§ 771), rear yard (§ 774) and parking requirements (§ 2101.1) to permit the construction of a new two-story commercial building in the C-2-A District at premises 1442 Pennsylvania Avenue, S.E. (Square 1065-NE, Lot 49). BZA Order No. 17860 approving the application was issued January 8, 2009. (Exhibit 28.)

By letter dated January 21, 2009, filed with the Office of Zoning on January 26, 2009, Advisory Neighborhood Commission (“ANC”) 6B, the ANC within which the property is located and a party to the application, moved for reconsideration of the Board’s order. The ANC requested the Board to require that the terms of a Memorandum of Understanding between the Applicant and neighbors of the site be attached to the variance. (Exhibit 35.) By Order No. 17860-A, dated May 28, 2009, the Board denied the ANC’s Motion. (Exhibit 37.)

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Motion to Extend

On January 3, 2011, the Board received a letter, dated January 3, 2011, from the Applicant, which requested, pursuant to 11 DCMR § 3130.6, a two-year extension in the authority granted in BZA Order No. 17860. (Exhibit 39.) The Applicant is requesting a two-year extension in the authority granted in that BZA Order because, due to the deterioration of the real estate market in Washington, D.C., the frozen credit markets, and the continuing economic crisis these have caused, the Applicant has been unable to obtain the necessary financing commitment to begin the project, despite attempts to obtain financing for the project ever since the Board originally approved it. To meet its burden of proof, the Applicant provided two signed and notarized affidavits which indicated that the Applicant has diligently sought financing and attempted to move forward with development of the site since the time of the BZA's original approval. The Applicant noted that while the latest reports suggest that the Washington commercial real estate market may begin to stabilize in 2011, its recovery will be slow and will not rebound before the time when the BZA Order was due to expire. (Exhibit 39, Exhibit C, and Exhibit 45.) The Applicant also included a letter from Washington Savings Bank, the lender which had financed the acquisition of the property by the Applicant, stating that it was "unable to provide construction financing for a new structure on the property." (Exhibit 47.)

The Office of Planning ("OP"), by memorandum dated January 31, 2011, recommended approval of the requested extension. (Exhibit 42.) The project is within the boundaries of ANC 6B. ANC 6B filed a report, dated February 9, 2011, indicating that at a duly noticed, regularly scheduled, public meeting of the ANC on February 8, 2011, at which a quorum was present, the ANC voted unanimously, 10-0, to support the Applicant's request as presented. (Exhibit 44.)

According to the Applicant, the reasons for its request to the Board to extend the time of BZA Order No. 17860 are because of its inability to secure financing in an unstable economic market and market conditions in the District. The extension would allow the Applicant the additional time in which to secure financing. Accordingly, the Applicant requested that, pursuant to § 3130.6 of the Zoning 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.

Criteria for Evaluating Motion to Extend

The Zoning Commission adopted 11 DCMR § 3130.6 in Zoning Commission Case No. 09-01. The Section became effective on June 5, 2009.

Section 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

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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.)

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 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 Order dated January 8, 2009 (Exhibit No. 9 (Plans)) 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.

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Accordingly, pursuant to § 3130.6 of the Zoning Regulations, the Board hereby extends the validity of the underlying Order, as conditioned, for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of January 8, 2013.

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 January 8, 2013, within which time an application shall be filed for a building permit. In all other respects Order No. 17860 and the plans approved therein remain unchanged.

VOTE: 3-0-2 (Meridith H. Moldenhauer, Jeffrey L. Hinkle, and Anthony J. Hood (by absentee vote) to Approve; Nicole C. Sorg and third Mayoral appointee (vacant) not participating, not voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 08 2011

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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MAR 08 2011

As Director of the Office of Zoning, I hereby certify and attest that on _____, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, 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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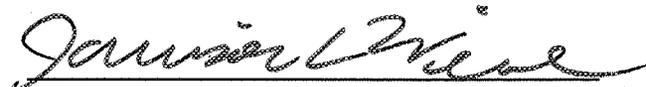
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