

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17926-A of Application of LT Propco LLC, Motion for a Two-Year Extension of BZA Order No. 17926, pursuant to 11 DCMR § 3130. The original application was pursuant to 11 DCMR § 3104.1, for a special exception to locate parking spaces on a lot that is separate from the building that they are intended to serve in accordance with § 2116.5. The relief is sought to permit the construction of a new one-story retail development on land bounded by Western Avenue, N.W., 44th Street, N.W., and Jenifer Street, N.W., and to use the existing surplus parking located on the existing Lord & Taylor parking lot at 4423 Harrison Street, N.W., in the C-3-A, C-2-A, R-5-B, and R-2 Districts (Square 1660, Lot 811 and Square 1580, Lot 33).

HEARING DATE (Orig. Application): June 23, 2009
DECISION DATE (Orig. Application): June 23, 2009 (Bench Decision)
FINAL DATE OF ORDER (Order No. 17509): June 30, 2009
DECISION ON 2011 MOTION TO EXTEND ORDER: July 12, 2011

SUMMARY ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17926

The Underlying BZA Order

On June 23, 2009, the Board of Zoning Adjustment (“Board” or “BZA”) approved a request from LT Propco LLC (the “Applicant”) for a special exception to locate parking spaces on a lot separate from the building that they are intended to serve in accordance with §§ 3104.1 and 2116.5. The relief is sought to permit the construction of a new one-story retail development on land bounded by Western Avenue, N.W., 44th Street, N.W., and Jenifer Street, N.W., and to use the existing surplus parking located on the existing Lord & Taylor parking lot at 4423 Harrison Street, N.W., in the C-3-A, C-2-A, R-5-B, and R-2 Districts (Square 1660, Lot 811 and Square 1580, Lot 33). On June 30, 2009, the Office of Zoning (“OZ”) filed in the record and served upon the parties an order approving Application No. 17926, subject to six conditions. Pursuant to 11 DCMR §§ 3125.5 and 3125.9, the order became “final” on that date and took effect 10 days later. (Exhibit 37.)

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Motion to Extend Validity of Order No. 17926

On or about May 31, 2011, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6, a two-year extension in the authority granted in Order No. 17926. The Applicant is requesting a two-year extension in the authority granted in that 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, all of which obstacles are outside of the Applicant's control, the Applicant has been unable to obtain all of the necessary financing commitments to begin the project, despite attempts to do so since the Board originally approved it. (Exhibit 39.)

Procedural Issues

After the issuance of Order No. 17926, but prior to the filing of this request to extend that order, the Zoning Commission ("Commission") adopted amendments to § 3130 to specifically authorize the Board to extend the time limits of § 3130.1. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009). Among other things, the new provisions allowed for only one extension of an order (§ 3130.6). The rules also addressed the question of whether an order would remain valid if the Board was unable to decide a request prior to its expiration date. The rules provide that an order's expiration would be tolled if an extension request was filed at least 30 days prior to the expiration date (§ 3130.9).

As to the criteria for granting a request, new § 3130.6 (c) requires the demonstration of good cause through 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 Order No. 17926

The Board finds that the motion has met the criteria in § 3130.6 to extend the validity of the underlying order. To meet the burden of proof under 11 DCMR § 3130.6, the Applicant submitted a letter dated May 31, 2011, that described its efforts and difficulties in obtaining financing and how it otherwise met the requirements of § 3130.6. In that letter, the Applicant indicated that it had served Advisory Neighborhood Commission ("ANC") 3E, the only other party in the case. It noted that there are no neighbors or structures that would be adversely affected as a result of the special exception that was granted. The Applicant stated that there was

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no substantial change to any of the material facts. (Exhibit 39.) To demonstrate the “good cause” prong of § 3130.6, the Applicant also provided an affidavit from Jerrold G. Bermingham, Executive Vice President for Development and Acquisitions for National Realty & Development Corp. (“NRDC”). The Applicant is an affiliate of NRDC. Mr. Bermingham is the Principal in Charge of the property for the Applicant and as such, he has been responsible for efforts relating to designing, financing, and constructing, and leasing regarding elements of the project. Since the effective date of the underlying order, the Applicant has made required changes, including structural, to the parking deck on the Lord & Taylor lot and has been diligently proceeding in good faith with the project, as approved by the order. However, it has been unable to obtain sufficient leasing commitments or project financing due to economic and market conditions beyond the Applicant’s control. Mr. Bermingham indicated that the Applicant is an affiliate a large real estate firm with a portfolio in excess of 22 million square feet, but despite that substantial financial wherewithal and its long-standing relationships with many of the world’s largest financial institutions and retail tenants, the Applicant has been unable to proceed with construction of the approved project due to the nationwide retail and economic environments. The affidavit goes on to say that, since the issuance of Order No. 17926, the Applicant has attempted to enter into leasing commitments with a number of retail tenants, but none would consummate the deal that would enable financing for the construction of the project to move forward. Mr. Bermingham stated that the Applicant has spent and continues to spend a substantial amount of monies monthly on the property and it is, therefore, in its best interests to develop it as expeditiously as possible. Thus, the Applicant continues to market the project to prospective tenants in order to make it an economically viable investment. (Exhibit 42.)

The Office of Planning (“OP”), by memorandum dated July 5, 2011, reviewed the application for the extension of the Order No. 17926 for “good cause” pursuant to § 3130.6. OP noted that to date there had been no substantial change to the Zoning Regulations or development in the immediate area that would substantially change the material facts upon which the Board based its 2009 decision. OP indicated it had no issue with the extension request.¹ (Exhibit 41.)

The project is within the boundaries of ANC 3E. The ANC submitted a resolution on June 29, 2011, in support of the Applicant’s motion to extend Order No. 17926 for the record. The resolution indicated that the ANC approved the resolution by a vote of 5:0 at the ANC’s regularly scheduled and duly noticed meeting on June 16, 2011, at which a quorum was present. (Exhibit 40.)

The Board found that the Applicant has met the criteria set forth in § 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 the “good cause” required under § 3130.6(c)(1). In addition, as required by § 3130.6(b), the Applicant has demonstrated that there is no substantial change in any of the material facts upon which the Board based its original approval in Order No. 17926.

¹ OP recommended that the Applicant provide supplemental information to support its initial letter request. In response, the Applicant provided the affidavit from Mr. Bermingham. (Exhibit 42.)

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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).

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, the Applicant's plans for development of the site would be substantially unchanged from those approved by the Board in Order No. 17926 (Exhibit No. 13 - 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. Having given the ANC's resolution great weight, 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. 17926 for a two-year time extension of Order No. 17926, which Order shall be valid, as conditioned, until June 30, 2013, within which time the Applicant must file plans for the proposed structures with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 4-0-1 (Meridith H. Moldenhauer, Jeffrey L. Hinkle, Nicole C. Sorg, and Lloyd J. Jordan to Approve; No Zoning Commission member participating or 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: JUL 22 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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JUL 22 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, 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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ATTESTED BY:


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