

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17964-A of Application of Emory United Methodist Church, Motion for a Two-Year Extension of BZA Order No. 17964, pursuant to 11 DCMR § 3130.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a variance from the height requirements under § 770, a variance from the floor area ratio requirements under § 771.2, a variance from the lot occupancy requirements under § 772, a variance from the loading facility requirements under § 2201, and a special exception for multiple roof structures and required setbacks under §§ 770.6(a), 777, and 411.11, to allow the construction of a new building containing church, office, retail, residential and recreation uses, in the C-2-A District at premises 6100 – 6120 Georgia Avenue, N.W. (Square 2940, Lots 801, 802, 808, and 813).

HEARING DATES (Orig. Application):	September 22, 2009 and December 15, 2009
DECISION DATES (Orig. Application):	January 26, 2010 and February 23, 2010
FINAL ORDER ISSUANCE DATE:	March 4, 2010 (No. 17964)
DECISION ON MOTION TO EXTEND ORDER:	April 10, 2012

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17964

The Underlying BZA Order

On January 26 and February 23, 2010, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for variances from the height requirements under § 770, the floor area ratio requirements under § 771.2, the lot occupancy requirements under § 772, and the loading facility requirements under § 2201, and a special exception for multiple roof structures and required setbacks under §§ 770.6(a), 777, and 411.11, to allow the construction of a new building containing church, office, retail, residential and recreation uses, in the C-2-A District. Thus, pursuant to 11 DCMR §§ 3103.2 and 3104.1, the Board granted for a variance from the height requirements under § 770, a variance from the floor area ratio requirements under § 771.2, a variance from the lot occupancy requirements under § 772, a variance from the loading facility requirements under § 2201, and a special exception for multiple roof structures and required setbacks under §§ 770.6(a), 777, and 411.11, to allow the construction of a new building containing church, office, retail, residential and recreation uses, in the C-2-A District at premises 6100 – 6120 Georgia Avenue, N.W. (Square 2940, Lots 801, 802, 808, and 813).

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BZA Order No. 17964 (the "Order") was issued March 4, 2010. (Exhibit No. 69, BZA Order No. 17964.)

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 March 4, 2012.

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.)

Motion to Extend

On February 16, 2012, the Board received a letter, dated February 15, 2012, from the Applicant, which requested, upon a showing of good cause, a two-year extension of the Order of the Board in Application No. 17964, and a waiver of, or flexibility from, the impact of 11 DCMR § 3130.9, so as to continue to toll the expiration of the underlying order until the Board considered the request for the two-year extension. (Exhibit 71.) Accompanying the motion for a two-year extension and waiver request was a signed and notarized affidavit from Gina Merritt, who is the Principal of Northern Real Estate Urban Ventures ("NREUV"), which is the development manager for the Applicant. Ms. Merritt attested to the additional work and investments made by the Applicant and difficulties the Applicant has had to get the project financed and underway since the underlying BZA Order was issued. (Exhibit 71, Exhibit C.)

Waiver of 11 DCMR § 3130.9.

As heretofore noted, the Applicant filed its request for a time extension on February 16, 2012, approximately three weeks prior to the expiration of its underlying order. In that request the Applicant asked for waiver of, or flexibility from, the impact of 11 DCMR § 3130.9, pursuant to 11 DCMR § 3100.5, by which a request to extend tolls the expiration of the underlying order provided it is filed at least 30 days prior to that expiration date. Here, the Applicant filed the motion fewer than 30 days prior to the Order's expiration date. However, the Applicant is asking for a waiver of § 3031.9, by which the Board continue to toll the expiration of the underlying Order until the Board has considered the extension request. To support its request for the waiver, the Applicant indicated that the request for an extension was filed ahead of the expiration date, but that due to reductions in staffing and the reallocation of work responsibilities, the Applicant,

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.

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which is a church and not traditionally involved in real estate development, and its team needed additional time to verify key information relied upon in its affidavit supporting the request for an extension, and thus was unable to file the completed request for an extension at least 30 days prior to the expiration date of BZA Order No. 17964, pursuant to 11 DCMR § 3130.9. (Exhibit 71.)

Based on the record, at its meeting on April 10, 2012, the Board, by consensus, granted the waiver request to the 30-day filing requirement and continued to toll the expiration date of the order, allowing the underlying request to extend to be considered.

The merits of the 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).) As heretofore discussed, these motions also have a 30-day filing prerequisite, pursuant to 11 DCMR § 3130.9.² The motion was filed on February 16, 2012, less than 30 days before the order was due to expire on March 4, 2012. Nevertheless, the Board, having considered the Applicant's request for a waiver from the requirements of § 3130.9 and reviewed the Applicant's reasons for the delay in filing, granted the requested waiver and tolled the expiration date. As the motion was filed prior to the Order's expiration and not considered until the Board's April 10, 2012 public meeting, the parties had the requisite amount of time in which to respond pursuant to § 3130.

As discussed, 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

² Subsection 3130.9 reads as follows:

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.

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 concluded that the Applicant has 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 71.) 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. The Applicant requested the two-year extension in the authority granted in the underlying BZA Order because, due to the downturn in the economy, frozen lending markets, and overall residential housing market conditions in Washington, D.C., the Applicant has been unable to obtain the necessary financing commitment to begin the project, despite repeated attempts to obtain financing, both from the private and public sectors. To meet its burden of proof, the Applicant submitted information and documents for the record together with a signed and notarized affidavit, dated February 14, 2012, from Gina Merritt, who is the Principal of Northern Real

Estate Urban Ventures (“NREUV”), which is the Applicant’s development manager. In the affidavit, Ms. Merritt described the work the Applicant had undertaken over the last several years to secure financing, including public financing, and to obtain complete and accurate construction drawings and permits. The affidavit cited the difficulties the Applicant has encountered in obtaining financing for the project due to the drastic downturn in the economy and lending markets and its difficulty in meeting deadlines due to first-time changes made to the requirements for public financing. The Applicant indicated that given the combination of uses and that the project’s residential component is 100% affordable, the financing structure for the project is more complicated than for a typical residential development. Consequently, the Applicant and its team had to seek multiple types and sources of funding for the project. Although the Applicant received initial indications of interest from a number of lending sources, due to the drastic changes in the economy, frozen lending markets, and overall residential housing market conditions, none of these potential lenders thus far has been willing to close on financing for the project. Additionally, the affidavit described how the Applicant sought public financing in 2009 for a portion of the development, by applying for grant funds through the D.C. Department of Housing and Community Development (“DHCD”), which based on a Memorandum of Understanding, with the D.C. Department of Mental Health, had issued a Request for Proposals (“RFP”) inviting applications for these grants. According to Ms. Merritt’s affidavit, although the Applicant met the RFP’s program and eligibility requirements, for the first time in her experience, DHCD also required that applicants for the RFP program already have their final zoning approvals, a requirement which the Applicant could not meet by the deadline for the 2009 application.

The affidavit further described difficulties the Applicant had in obtaining completed, accurate construction drawings from the plans. Ms. Merritt stated that a dispute arose between the Applicant and its initial architect, leading the Applicant not to have construction drawings completed in time. In 2010, the Applicant obtained a third-party consultant to review the construction drawings prepared by the initial architect. The Applicant submitted a memorandum prepared by this consultant, (Exhibit 71, Tab E), to demonstrate how much more information and detail had been needed than was first provided to convert the approved plans into construction drawings. The Applicant submitted another memorandum for the record, (Exhibit 71, Tab F), as evidence of its inability to obtain construction pricing because of these deficiencies in the plans. The affidavit stated that in May 2011, these identified deficiencies lead the Applicant, as shown in a letter, (Exhibit 71, Tab G), to terminate its relationship with its initial architect who had been involved in the BZA process. Subsequently, an RFP was issued seeking a new architect for the project. Recently, new architects have been selected. (Exhibit 71, Tab C.)

The affidavit further described the efforts the Applicant has taken to obtain the needed financing, including public financing, as well as its selection of a new architect to convert the approved BZA plans into construction drawings, so it can file a building permit application. The affidavit indicated that in addition to seeking financing for the development, NREUV was responsible for managing the design and permitting phase for the building approved in Order No. 17964. To demonstrate its efforts to advance the project, the Applicant indicated that it believes that the

District will issue a new RFP this year and, when that occurs, the Applicant expects to submit an application to participate in the next round of funding. The Applicant has also re-initiated conversations with a potential investor, as indicated in a letter dated February 13, 2012, (Exhibit 71, Tab D), to purchase a limited partnership interest in the project, subject to certain conditions, to get the project financed and developed. Finally, the Applicant expects to file an application for a building permit once financing agreements are finalized and funds are issued, which also will be when the Applicant can finalize a construction contract with the project's general contractor and builder. The Applicant cited all of these activities as demonstrating its continued commitment to the project and good cause for its request for an extension of the Order. (Exhibit 71, Tab C.) Based on its review of the record, the Board concludes that the Applicant's submissions demonstrate the requisite good cause.

A response to the Applicant's motion for a two-year extension was filed from the Office of Planning ("OP"). OP issued a report in support of the time extension. (Exhibit 72.) The project is within the boundaries of Advisory Neighborhood Commission ("ANC") 4A. ANC 4A 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 in an unstable economic market and market conditions in the District as well as difficulties it encountered in completing construction drawings from the approved plans. The extension would allow the Applicant the additional time in which to continue to pursue and obtain construction financing, finalize its plans and construction drawings, and move forward with the project. 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.

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 March 4, 2010 (Exhibit 69 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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Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 17964 for a two-year time extension of Order No. 17964, which Order shall be valid until March 4, 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.

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 March 4, 2014.

VOTE: 4-0-1 (Lloyd J. Jordan, Rashida Y. V. MacMurray, Nicole C. Sorg, Jeffrey L. Hinkle, 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: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: APR 13 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 _____, 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 ANC's and SMD's 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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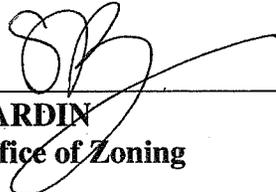
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