GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Order No. 18109-A of Washington Metropolitan Community Development Corporation, Motion for a Two-Year Extension of BZA Order No. 18109.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a variance from the floor area ratio requirements under subsection 771.2, a variance from the nonconforming structure provisions under subsection 2001.3, and a special exception from the parking requirements for a historic resource under subsection 2120.6, to allow the construction of a retail and commercial office building in the C-1 District at premises 5127-5131 Nannie Helen Burroughs Avenue, N.E. (Square 5196, Lots 801 and 805).

HEARING DATE (Orig. Application): October 5, 2010
DECISION DATE (Orig. Application): October 5, 2010
FINAL ORDER ISSUANCE DATE (No. 18109): October 14, 2010
DECISION ON MOTION TO EXTEND ORDER: October 23, 2012 and November 7, 2012

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 18109

The Underlying BZA Order

On October 5, 2010, the Board of Zoning Adjustment (the "Board" or "BZA") approved the Applicant's request for a variance from the floor area ratio requirements under § 771.2, a variance from the nonconforming structure provisions under § 2001.3, and a special exception from the parking requirements for a historic resource under § 2120.6, to allow the construction of a retail and commercial office building in the C-1 District. Thus, pursuant to 11 DCMR §§ 3104.1 and 3103.2, the Board granted a special exception under § 2120.6 and variances under §§ 771.2 and 2001.3, to allow the construction of a retail and commercial office building in the C-1 District at premises 5127-5131 Nannie Helen Burroughs Avenue, N.E. (Square 5196, Lots 801 and 805). Order No. 18109 (the "Order") was issued October 14, 2010. (Exhibit 31.)

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 14, 2012.

Section 3130.1[1] 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 September 5, 2012, the Board received a letter from the Applicant's attorney, 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 14, 2012. (Exhibit 33.)

On October 23, 2012, the Board convened to consider the Motion to Extend BZA No. 18109 for two years. At that meeting, the Board requested additional, first-hand information and allowed the Applicant to supplement the record with an affidavit of good cause for the extension. In response, the Applicant submitted an affidavit to supplement the record on November 2, 2012, to meet the good cause requirements of 11 DCMR § 3130.6. (Exhibit 36.)

The Applicant served its extension request and supplemental information on the parties in the case and provided them the requisite 30 days in which to respond, pursuant to § 3130.6. Thus, the Applicant served the request to the Chair of Advisory Neighborhood Commission ("ANC") 7C, which is the affected ANC and the only other party to the case, and to the Office of Planning ("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. (Exhibits 33 and 36.)

The project is within the boundaries of ANC 7C. ANC 7C did not file a report on the request for extension. OP filed a report recommending that the Board grant the Applicant's request for a two-year extension of Order No. 18109. (Exhibit 34.)

To demonstrate good cause for its request for an extension, the Applicant's November 2nd filing contained an affidavit from the Executive Director of the Washington Metropolitan Community Development Corporation ("WMCDC"), the Applicant in this case. (Exhibit 36.) He attested that, due to the current economic and market conditions, the Applicant had been unable to secure financing for the project until it first secured sufficient interest from a credit-worthy anchor retail tenant. The Applicant stated that it had been awarded the redevelopment rights to the subject

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[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.

property through a competitive process managed by the Deputy Mayor for Planning and Economic Development ("DMPED") in 2008. Then, the Applicant and the District entered into a Disposition and Development Agreement on March 31, 2010. Subsequently, the development timetable was extended on October 6, 2011 and the project received a second extension approval by the District of Columbia Council in September 2012.

In its affidavit, the Applicant indicated that since the award of redevelopment rights, it has worked diligently together with the DMPED toward the redevelopment of the historic Strand Theater. As evidence of that, the affiant indicated that on October 22, 2009, the project received concept approval from the Historic Preservation Review Board. Also in 2009, the Applicant engaged professional retail brokers in an effort to identify potential tenants for the subject property. The Applicant indicated that the development team reached out to a variety of partners, including the Washington DC Economic Partnership and DMPED which presented the project as part of the District's presentation to the International Council of Shopping Centers ("ICSC") annual conference in Las Vegas. The project also had been listed on multiple listing sites for at least three years. The affiant stated that several potential retailers have been shown the property. Despite these efforts, the Applicant indicated that there had been minimal interest from credit-worthy tenants during the period 2009 -- 2012.

Nonetheless, substantial progress on the project has been made. The affidavit states that the Applicant, during the period 2009 – 2011, held numerous discussions with a number of local banks to explore underwriting for the project. At the time, all of the banks thus contacted had indicated that they would not be interested in providing financing without a credit-worthy anchor tenant to secure the construction and permanent financing.

As a result of contacts made at the ICSC, in April 2012, a national discount retailer expressed interest in occupying the ground floor of the project and in July 2012, entered into a Letter of Intent for the retail space. On the strength of the Letter of Intent and also in July 2012, the Applicant executed a term sheet with a local bank for construction and permanent financing for the project. As a result, design and predevelopment work resumed with the project's architects. Plans are currently at the Design Development Stage and the development team has prepared a Stage I Historic Review Submission for tax credit approval and is working with DMPED to round out the funding for the project. However, the affiant notes that despite the solid progress, the Applicant would not be able to complete its construction drawings and file for building permits prior to the expiration of Order No. 18109 on October 14, 2012, and thereby requests an extension of two years of that order's effectiveness. (Exhibit 36.)

As discussed above, the Applicant's time extension motion first was put on the Board's October 23, 2012 decision meeting agenda. At that meeting, the Board requested supporting documentation pursuant to the requirements of § 3130.6 and rescheduled its decision for November 7, 2012. In response to the Board's request for additional documentation, the Applicant submitted its supplemental filing on November 2, 2012. That filing contained an

affidavit from the Executive Director of the Applicant who has first-hand information regarding the project and the Applicant's efforts to obtain financing for the project. (Exhibit 36.)

As discussed herein, the Applicant, through its attorney, submitted a request for a time extension and supplemental information supporting that request, documenting the Applicant's difficulties and efforts in securing a credit-worthy anchor retail tenant and financing for the project to demonstrate good cause for granting the two-year extension of the Board's prior approval. The Applicant's filings indicated that the Applicant has received a commitment from a national chain retailer as well as filed for a Federal Historic Rehabilitation Tax Credit to secure financing for the development. Moreover, the Applicant has attested that design and predevelopment work is well underway, but a time extension is required in order for it to have sufficient time in which to complete the construction drawings and file for building permits. (Exhibits 33 and 36.)

At its decision meeting on November 7, 2012, 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. 18109 until October 14, 2014.

According to the Applicant, the reasons for its request to the Board to extend Order No. 18109 for another two years are because of the impossibility of securing financing for construction of the project on a speculative basis in the economic climate that persisted since 2008 and its difficulties in securing a credit-worthy retail tenant to anchor the project until recently. The Applicant indicated that over the last two years, the Applicant had difficulty securing an anchor tenant and consequently was met with resistance from potential lending institutions in securing construction and permanent financing until it had a potential anchor tenant. To show good cause for a time extension of the Order, the Applicant's filings included an affidavit from the Applicant's Executive Director, who was able to provide first-hand documentation of the Applicant's efforts and difficulties both in securing financing and obtaining an anchor tenant over the last two or three years. (Exhibit 36.) The Applicant attested that, after diligent effort, as of July 2012, it had an executed Letter of Intent from a potential anchor tenant, a national chain discount retailer, which commits the parties toward the negotiation of a long-term lease for all of the project's retail space, with delivery of said retail space in the first quarter of 2014. On the basis of that Letter of Intent, a local lender has begun the underwriting process that will lead to a commitment for construction and permanent financing. In light of this progress, the Applicant will be able to proceed with the development of construction drawings for the retail space to meet the specifications of the Letter of Intent; however, it is necessary for the Applicant to have an extension of time to complete its building permit application because there is insufficient time in which to complete those drawings and file for a building permit before the approval order is set to expire.

In sum, due to the difficulties in obtaining an anchor tenant and project financing the Applicant encountered because of market conditions beyond its control, the Applicant has been unable to proceed with the development in sufficient time before the order is due to expire. Even so, the Applicant has made significant progress in overcoming these difficulties through obtaining a

Letter of Intent from an interested national retail chain and the start of underwriting from a local lender. Nevertheless, the Applicant still needs an extension of time in which to complete the construction drawings and file for building permits. Thus, the Applicant requests the two-year extension to allow ample time for the Applicant to complete its development plans and construct the project. (Exhibit 36.)

In addition, the Applicant stated 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 14, 2010. 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 and complete its development plans and file for building permits. 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 on September 5, 2012, thus meeting the required 30-day period for tolling. Pursuant to 11 DCMR § 3130.9, the Board granted the tolling of the Order's expiration date to provide the Board time in which to consider the request for a two-year extension of that Order.

The Board also 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 difficulties and the delay in obtaining a credit-worthy anchor retail tenant and securing the necessary financing and the poor economic conditions in the District's real estate market during the period in question 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 October 14, 2010 (Exhibit No. 11 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 original 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. 18109-A for a two-year time extension of Order No. 18109, which Order shall be valid until **October 14, 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: 4-0-1 (Lloyd J. Jordan, Nicole C. Sorg, Anthony J. Hood (by absentee vote), and Jeffrey L. Hinkle, to Approve; 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: January 30, 2013

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

BZA APPLICATION NO. 18109-A

As Director of the Office of Zoning, I hereby certify and attest that on January 30, 2013, 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: _____

SARA A. BARDIN
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