

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18247-A of Big City Development, LLC, pursuant to 11 DCMR § 3130, for a two-year extension of BZA Order No. 18247.

The original application was pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under § 771.2, a variance from the rear yard requirements under § 774.1, a variance from the off-street parking requirements under § 2101.1, and a variance from the loading requirements under § 220.1, to allow the development of a new restaurant in the HS/C-2-A District at premises 1309 and 1311 H Street, N.E. (Square 1027, Lots 88 and 89).

HEARING DATE (Original Application):	September 20, 2011
DECISION DATE (Original Application):	September 20, 2011
FINAL ORDER ISSUANCE DATE (Order No. 18247):	November 29, 2011
DECISION ON 1ST EXTENSION OF ORDER DATE:	December 17, 2013

SUMMARY ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 18247

The Underlying BZA Order

On September 20, 2011, the Board of Zoning Adjustment (the "Board") approved the Applicant's request for an area variance from the floor area ratio requirements of § 771.2; an area variance from the rear yard requirements of § 774.1; an area variance from the off-street parking requirements of § 2101.1; and an area variance from the loading requirements of § 2201.1, to allow the development of a new restaurant in the HS/C-2-A District at premises 1309-1311 H Street, N.E. (Square 1027, Lots 88 and 89) (the "Site"). The Board issued its written order ("Order") on November 29, 2011. Pursuant to 11 DCMR §§ 3125.6 and 3125.9, the Order became final on November 29, 2011 and took effect 10 days later.

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 November 29, 2013.

Subsection 3130.1 states:

No order 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),

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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 Validity of the Order Pursuant to 11 DCMR § 3130.6

On October 31, 2013, the Applicant sent a letter to the Board that requested, pursuant to 11 DCMR § 3130.6, a two-year extension of Order No. 18247, which was due to expire on November 29, 2013. The Applicant is requesting this extension due to its inability to obtain sufficient project financing, despite its good faith efforts, due to economic and market conditions beyond the Applicant's reasonable control.

Criteria for Evaluating Motion to Extend

Subsection 3130.6 of the Zoning Regulations authorizes the Board to extend the time periods for good cause provided: (i) the extension request is served on all parties to the application by the applicant, and all parties are allowed 30 days in which to respond; (ii) there is no substantial change in any of the material facts upon which the Board based its original approval; and (iii) the applicant demonstrates there is good cause for such extension. Pursuant to 11 DCMR § 3130.6(c)(1), good cause is established through the showing of 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 the Order Pursuant to 11 DCMR § 3130.6

The Board finds that the motion has met the criteria of § 3130.6 to extend the validity of the underlying order. To meet the burden of proof, the Applicant submitted an affidavit that described its efforts and difficulties in obtaining financing. As set forth in the affidavit, the Applicant owns and operates two existing restaurants: (1) The Carolina Kitchen, located in Largo, MD, which opened in 2005, and (2) The Carolina Kitchen Bar & Grille, located in Hyattsville, MD, which opened in 2008. The Applicant is also in the process of opening a third outpost at 2300 Washington Place, N.E. (known as Rhode Island Row). The Applicant purchased the H Street Site with the goal of developing a new restaurant concept at the Site. (Exhibit 35.)

Since the Board issued Order No. 18247 in November of 2011, the Applicant has been working diligently to secure the necessary funding to move forward with development of the Site. The

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Applicant has contacted several lenders with whom it has worked in the past, including Industrial Bank, which has successfully financed a number of the Applicant's prior projects. However, no lenders thus far have been willing to finance development of the new restaurant on any reasonable terms. For example, as set forth in a letter from Douglas Dillon, Industrial Bank's Senior Vice President and Commercial Lending Group Head, Industrial Bank is interested in committing funding for the Applicant's project at the Site in the future, but is not yet willing to do so at this point. Due to the economy's fragile condition over the past few years, it has been challenging to fund projects, particularly new restaurant concepts that require substantial construction and operational start-up costs. Based on Industrial Bank's experience working with the Applicant on other business ventures, Industrial Bank knows that the Applicant is knowledgeable about the restaurant industry, from both the financial and managerial aspects of operation. However, before Industrial Bank will commit funding for the project at the Site, it wants to see the following three things:

1. The successful completion and opening of the Applicant's newest restaurant on Rhode Island Row;
2. Negotiation and agreement upon a sufficient personal guarantee and collateral from the Applicant in order to secure investment and provide additional support; and
3. Further refinement and market analysis of how the Applicant's proposed new restaurant concept relates to its established brands and the mix of existing restaurants on the H Street corridor.

(Exhibit 35, Tab C.)

The Applicant has already invested substantially in the Site and is committed to moving forward with development and opening of a new restaurant at the Site. However, it will take additional time and resources until the Applicant can secure financing to get the project up and running.

The Board found that the Applicant has met the criteria set forth in 11 DCMR § 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 "good cause" required under § 3130.6(c)(1). In addition, as required by § 3130.6(b), the Applicant demonstrated that there is no substantial change in any of the material facts upon which the Board based its original approval in Order No. 18247. There have also been no changes to the Zone District classification applicable to the Site or to the Comprehensive Plan affecting the Site since the issuance of the Board's order.

The Office of Planning ("OP"), by memorandum dated December 3, 2013, reviewed the application for the extension of the Order for "good cause" pursuant to 11 DCMR § 3130.6 and recommended approval of the requested two-year extension. The Site is within the boundaries of Advisory Neighborhood Commission ("ANC") 6A. At its regularly scheduled meeting on December 12, 2013, at which a quorum was present, ANC 6A voted 7-0 to recommend the Applicant's request for a two-year extension. However, no written report was filed by the ANC.

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The motion for the 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). No party to the application objected to an extension of the Order. The Board concludes that extension of the relief is appropriate under the current circumstances.

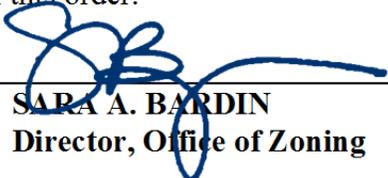
Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirements of 11 DCMR § 3125.3, which required that the order of the Board be accompanied by findings of fact and conclusions of law. Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 18247-A for a two-year time extension of Order No. 18247, which Order shall be valid until **November 29, 2015**, within which time the Applicant must file plans for the proposed restaurant with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: **3-0-2** (Lloyd J. Jordan, Jeffrey L. Hinkle, and Michael G. Turnbull to APPROVE; S. Kathryn Allen, not present or participating, 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: December 18, 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.