

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18269-A of Triangle Development Associates LLC, Motion for a Two-Year Extension of BZA Order No. 18269, pursuant to § 3130 of the Zoning Regulations.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for an area variance from the floor area ratio requirements under § 771.1; an area variance from the lot occupancy requirements of § 772.1; and a special exception under § 2108 to reduce the amount of parking spaces required for the nonresidential uses, to allow an addition to an existing residential building with ground floor retail in the C-3-A District at premises 1375 Kenyon Street, N.W. (Square 2843, Lot 78).

HEARING DATE (Orig. Application): November 1, 2011
DECISION DATE (Orig. Application): November 1, 2011
FINAL ORDER ISSUANCE DATE (Order No. 18269): November 3, 2011
DECISION ON 1ST EXTENSION OF ORDER DATE: December 3, 2013

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 18269

The Underlying BZA Order

On November 1, 2011, the Board of Zoning Adjustment (the "Board") approved the Applicant's request for an area variance from the floor area ratio requirements of § 771.1; an area variance from the lot occupancy requirements of § 772.1; and a special exception to reduce the amount of parking spaces required for nonresidential uses under § 2108, to allow an addition to an existing residential building with ground floor retail at 1375 Kenyon Street, N.W. (Square 2843, Lot 78) (the "Site"). The Board issued its written order ("Order") on November 3, 2011. Pursuant to 11 DCMR §§ 3125.6 and 3125.9, the Order became final on November 3, 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 date it was issued -- until November 3, 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 Order

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. 18269, which was due to expire on November 3, 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. The Applicant served its extension request on the parties to the case, including the affected Advisory Neighborhood Commission ("ANC") 1A, and provided them the requisite 30 days in which to respond, pursuant to § 3130.6. The Applicant also served the request on the Office of Planning ("OP").

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. (Exhibit 37, Tab B.) As set forth in the affidavit, the existing building on the Site is financed by a New Market Tax Credit ("NMTC") allocation and the Federal National Mortgage Association ("FNMA"), both of which impose substantial constraints on redevelopment of the Site. First, with respect to the NMTC

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allocation, pursuant to IRC § 45D(d)(1)(A), NMTCs are limited to certain qualified investments, and the rental of real property only qualifies if the property is not residential rental property. IRC § 168(e)(2)(A)(i), defines "residential rental property" as "any building or structure if 80% or more of the gross rental income from such building or structure for the taxable year is rental income from dwelling units." 26 U.S.C. § 168(e)(2)(A)(i) (West). Upon stabilization of the addition, the building would have been in default of the NMTC loan because it would have then been deriving more than 80% of its gross rental income from the residential portion of the building, and thus would have become a "residential rental property" as defined in IRC §168(e)(2)(B). The NMTC loan is being repaid and the restrictive covenants will be released in the near future. The extension will allow sufficient time for the Applicant to completely repay the NMTC allocation and release the applicable restrictive covenants on the Site, which will then enable the Applicant to move forward with construction of the addition.

Second, the existing FNMA loan on the Site would require the Applicant either to pre-pay the FNMA loan and refinance the Site, or to complete the addition out of cash reserves, since FNMA loans do not permit subordinate third party financing. The FNMA loan prepayment penalty ranged from approximately \$4,000,000 to \$11,000,000, so the prepayment alternative is not viable. However, as a result of: (1) improving market conditions; (2) the Applicant's offer to reinvest all of the proceeds of any supplemental loan proceeds in the collateral; and (3) FNMA's improving balance sheet, FNMA has expressed a willingness to waive many of the supplemental loan requirements, which would permit the Applicant to borrow 100% of the cost of the expansion. Thus, the extension will enable the Applicant to continue working with FNMA to reach financing terms that will enable the Applicant to move forward with construction of the addition. (Exhibit 37.)

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. 18269. 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 November 26, 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. (Exhibit 39.) The Site is within the boundaries of Advisory Neighborhood Commission ("ANC") 1A. At its regularly scheduled meeting on November 13, 2013, at which a quorum was present, ANC 1A voted 11-0-0 to recommend the Applicant's request for a two-year extension and submitted a resolution indicating its support and the vote. (Exhibit 38.)

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

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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. 18269-A for a two-year time extension of Order No. 18269, which Order shall be valid until **November 3, 2015**, within which time the Applicant must file plans for the proposed development with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 4-0-1 (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle, and Michael G. Turnbull 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: November 5, 2013

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOADR SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.