

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18372-B of 2321 4th St LLC and H Street Community Development Corporation, pursuant to 11 DCMR § 3130, for a one-year extension of BZA Order Nos. 18372 and 18372-A.

The original application was pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 772, a variance from the off-street parking requirements under subsection 2101.1, a variance from the loading berth minimum vertical clearance height requirements under subsection 2201.6, to allow the construction of a new residential apartment building with ground floor retail and service uses in the C-3-A District, at premises 2321 4th Street, N.E. (Square 3629, Lot 808).

HEARING DATE (Original Application):	June 26, 2012
DECISION DATE (Original Application):	June 26, 2012
FINAL ORDER ISSUANCE DATE (Order No. 18372):	July 3, 2012
MODIFICATION (No. 18567) HEARING / DECISION DATE:	June 11, 2013
ISSUANCE OF ORDER ON MODIFICATION (No. 18567/18372-A):	June 24, 2013
DECISION ON 1ST EXTENSION OF ORDER DATE:	July 8, 2014

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NOS. 18372 AND 18372-A

The Underlying BZA Order

On June 26, 2012, the Board of Zoning Adjustment (the “Board” or “BZA”) approved Application No. 18372 of 2321 4th Street LLC, on behalf of H Street Community Development Corporation (the “Applicant”). The Applicant’s original request was for variances from the lot occupancy requirements under § 772, from the off-street parking requirements under § 2101.1, from the loading requirements under § 2201.1, and from the loading berth minimum vertical clearance height requirements under § 2201.6, to allow the construction of a new residential apartment building with ground floor retail and service uses in the C-3-A District at premises 2321 4th Street, N.E. Pursuant to 11 DCMR § 3103.2, the Board granted a variance from the lot occupancy requirements under § 772, a variance from the off-street parking requirements under § 2101.1, a variance from the loading requirements under § 2201.1, and a variance from the loading berth minimum vertical clearance height requirements under § 2201.6, to allow the

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BZA APPLICATION NO. 18372-B
PAGE NO. 2

construction of a new residential apartment building with ground floor retail and service uses in the C-3-A District at premises 2321 4th Street, N.E. (Square 3629, Lot 808). Order No. 18372 approving the original request was issued July 3, 2012. (Exhibit 33, Application No. 18372.)

Under the Order and pursuant to § 3130.1¹ of the Zoning Regulations, the Order was valid for two years from the time it was issued -- until July 3, 2014.

2013 Request for Modification of Approved Plans in Order No. 18372

On March 22, 2013, the Applicant in Case Nos. 18567/18372 submitted a request for approval of minor modifications to the plans approved by the Board pursuant to Order No. 18372, to allow the construction of a new residential building with ground floor retail and service uses at premises 2321 4th Street, N.E. (Square 3629, Lot 808) in the C-3-A District. (Exhibits 1 and 4, Application No. 18567.) In the modification request submitted as Application No. 18567, the Applicant asked that the entire record of Application No. 18372 be incorporated by reference. The record reflects that the request for modification was served on all of the parties to the case: the Office of Planning (“OP”) and Advisory Neighborhood Commission (“ANC”) 5E, the affected ANC, and the Single District Member, ANC 5E02. (Exhibit 1, Application No. 18567.)

In Application No. 18567, which was heard as a motion for modification of approved plans in Order No. 18372, the Applicant requested approval of modifications to the approved design in Application No. 18372 in order to have a greater likelihood of obtaining funding from D.C. Housing Finance Agency (“DCHFA”) and D.C. Department of Housing and Community Development (“DHCD”). The new design will reduce the building from six stories and 64’-6”, to five stories and 54’-10”, reduce the number of units from 155-160 units to 116-120 units, and maintain the residential parking ratio of one parking space for every four units, plus three spaces for retail, as previously approved by the Board, for a total of 32 parking spaces. The Applicant also proposes to increase the number of bicycle parking spaces, from 53 spaces to 60 spaces, although none are required. The breakdown of the units remains essentially the same, although the project would add four three-bedroom, two-bathroom units, where previously there were none. The modification was required for the number of on-site parking spaces provided; no other relief was required. The Applicant indicated that the revised project did not create any new areas of zoning relief. (See, Exhibits 4, 29, and 31, Application No. 18567.)

Pursuant to § 3129.7, the Board convened a hearing on the requested modifications on June 11,

¹ 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), 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.)

BZA APPLICATION NO. 18372-B
PAGE NO. 3

2013 and, based on the record before the Board, decided to grant the motion for modification of approved plans, pursuant to 11 DCMR § 3129. On June 24, 2013, the Board issued Order No. 18567/18372-A, in which it approved the application for modification of approved plans, pursuant to the revised modified plans dated May 28, 2013 at Exhibit 29, Tab E (Application No. 18567). (See, Order No. 18567/18372-A, Exhibit 35 in Case No. 18372.) In Order No. 18567/18372-A, the Board indicated that in all other respects Order No. 18372 and the plans approved therein remained unchanged and that the granting of the modifications approved pursuant to Order No. 18567/18372-A did not extend or toll the validity of Order No. 18372.

Motion to Extend Validity of the Order Pursuant to 11 DCMR § 3130.6

On June 6, 2014, the Board received a letter with supporting documents from the Applicant's attorney, which requested, pursuant to 11 DCMR § 3130.6,² a one-year extension³ of the validity of Order Nos. 18372 and 18372-A (Exhibits 33 and 35 in Case No. 18372) prior to the Order expiration date of July 3, 2014. The Applicant served its extension request and supplemental information on Advisory Neighborhood Commission ("ANC") 5E, which is the affected ANC and the only other party to the case, and to the Office of Planning ("OP"). (Exhibit 37.) All parties were allowed 30 days in which to respond, pursuant to § 3130.6(a).

The Office of Planning ("OP") filed a report on July 1, 2014 in which OP recommended the Board grant the request for a time extension. (Exhibit 38.)

ANC 5E did not submit a response to the Applicant's request.

To establish good cause for the request, the Applicant submitted a statement and exhibits including a notarized affidavit from the Applicant's Project Manager who is a Managing Member of the LLC, indicating the reasons for the request to extend the validity of the Orders. The Applicant stated that it plans to develop a new residential apartment building in the C-3-A District on the Site, which development will contain approximately 116-120 residential units, approximately 12,072 square feet of ground floor retail and service uses, and 32 vehicle parking spaces (the "Project"), pursuant to the approved plans in BZA Order No. 18372, which became final on July 3, 2012, as modified by BZA Order No. 18372-A, which modification order became final on June 24, 2013.⁴ Since the Board approved the Orders, the Applicant's affidavit indicated that it had worked diligently to obtain financing for the Project and to secure all required government agency approvals. The Applicant indicated the work it had done with

² Subsection 3130.6 was adopted by the Zoning Commission in Z.C. Case No. 09-01 and became effective on June 5, 2009.

³ A two-year time extension is allowed under § 3130, but the Applicant, upon questioning by the Board at its decision meeting, stated on the record that it only was requesting a one year extension.

⁴ The modification order did not change the final expiration date for the Orders in Case No. 18372, which remained July 3, 2014.

BZA APPLICATION NO. 18372-B
PAGE NO. 4

various District agencies and utilities as part of its predevelopment activities. This entailed submitting the Project to the Department of Housing and Community Development (“DHCD”) through a competitive request for proposals process. By letter dated December 3, 2013, DHCD affirmed its commitment to reserve funds for the Project. (See, Tab A.) Also, by resolution dated March 13, 2014, the District of Columbia Housing Finance Agency (“DCHFA”) granted funding for the Project. (See, Tab B.) Having secured significant financing opportunities from multiple District agencies, the Applicant indicated that it has instructed its team to move forward expeditiously with the development of detailed construction plans in order to file a building permit application with the Department of Consumer and Regulatory Affairs (“DCRA”). The Applicant also submitted construction plans to a third-party plans reviewer and now is in the process of addressing and responding to the third-party reviewer’s comments. (See, Tab C.) Further, the Applicant, on May 30, 2014, submitted plans and paid filing fees to D.C. Water for its preliminary plan review of the Project. The scheduled completion date for that application for review is June 29, 2014. (See, Tab D.) The Applicant stated that it remains committed to moving forward with the approved Project and has invested substantially in the Site over the years. Although the Applicant has been awarded significant financing opportunities from multiple District agencies and is almost ready to submit its construction plans to DCRA to apply for a building permit, the Project Manager indicated that the Applicant is requesting a one-year extension of the Orders’ validity before these expire on July 3, 2014, in an abundance of caution to avoid the risk that the approvals would expire before it obtained the government approvals it needs to move forward. (Exhibit 37, Ex. B.)

Criteria for Evaluating Motion to Extend

Subsection 3130.6 of the Zoning Regulations authorizes the Board to extend the time for an Order’s validity 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

BZA APPLICATION NO. 18372-B
PAGE NO. 5

The Board finds that the Applicant's 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 and other supporting documents and information that described its efforts and difficulties in obtaining financing and other government approvals before the Board's approvals expired. Since the Board issued Order No. 18372 in July of 2012, the Applicant has been working diligently to secure the necessary commitments and other approvals to move forward with the Project, as approved by the Board. The Applicant attached a sworn, notarized affidavit from the Applicant's Project Manager which described the Applicant's efforts in this regard. (Exhibit 37, Ex. B.)

Given the totality of the conditions and circumstances described above and in the affidavit and other supplemental information that was provided, the Board found that the Applicant satisfied the "good cause" required under the third prong of § 3130.6. Moreover, despite the challenges the Applicant described in its submissions for the extension, the Applicant demonstrated that it has acted diligently, prudently, and in good faith to proceed towards the implementation of the Orders.

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) and (2). 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 approvals in Order Nos. 18372 and 18372-A. 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 Orders.

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 Orders. The Board concludes that extension of the approved 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. 18372-B for a one-year time extension of Order Nos. 18372 and 18372-A, which Orders shall be valid until **July 3, 2015**, within which time the Applicant must file plans for the proposed project with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: **5-0-0** (Lloyd J. Jordan, Peter G. May, S. Kathryn Allen, Marnique Y. Heath, and Jeffrey L. Hinkle, to APPROVE).

BZA APPLICATION NO. 18372-B
PAGE NO. 6

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: July 10, 2014

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.