

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18701-B of 1247 ESE LLC, pursuant to 11 DCMR § 3130, for a two-year extension of BZA Order No. 18701-A.

The original application was pursuant to 11 DCMR § 3103.2, for a variance from the use provisions to operate a restaurant in the first floor space within an existing apartment house under § 330.5 in the R-4 District at premises 1247 E Street, S.E. (Square 1019, Lot 43).

HEARING DATE (Original Application):	February 4, 2014
DECISION DATE (Original Application):	February 25, 2014
FINAL ORDER ISSUANCE DATE (Order No. 18701-A):	February 27, 2014
DECISION DATE ON EXTENSION OF ORDER:	March 8, 2016 ¹

SUMMARY ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 18701-A

The Underlying BZA Order

On February 25, 2014, the Board of Zoning Adjustment (the "Board") approved the Applicant's request for variance from the use provisions to operate a restaurant in the first floor space within an existing apartment house under § 330.5 in the R-4 District at premises 1247 E Street, S.E. (Square 1019, Lot 43) (the "Subject Property").² The Application, which was unopposed, was granted on February 25, 2014, and the Board issued its written order ("Order") on February 27, 2014. Pursuant to 11 DCMR §§ 3125.6 and 3125.9, the Order became final on February 27, 2014 and took effect 10 days later.

¹ The Motion for a Time Extension was initially scheduled for decision on February 23, 2016, but was postponed at the Applicant's request. (Exhibit 11.)

² This property is also the subject of a separate application and approval in Case No. 19196.

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Under the Order and pursuant to § 3130.1 of the Zoning Regulations³, the Order was valid for two years from the time it was issued -- until February 27, 2016. Order No. 18701-A is subject to seven conditions.⁴

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

On December 10, 2015, the Applicant submitted an application for a motion together with supporting documents, pursuant to 11 DCMR § 3130.6, for a two-year extension of Order No. 18701-A, which was due to expire on February 27, 2016. This request for extension is pursuant to § 3130.6 of the Zoning Regulations, which permits the Board to extend 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. Moreover, the Applicant served on all parties to the application by the applicant, and all parties were allowed 30 days to respond, pursuant to § 3130.6(a). (Exhibit 3.)

To establish good cause for the request, the Applicant submitted a letter and supporting documentation dated December 10, 2015, that stated the reasons the Applicant was requesting a time extension. (Exhibits 3-3A.) The Applicant cited factors beyond its control that prevented it from moving forward and completing the project. The Applicant indicated that following issuance of the Order in this case, the Applicant renovated the first floor space as well as the residential portion of the building on the Subject Property. However, the Applicant, in its request for a time extension, indicated that the permit process and renovation of the space took longer than expected, as has the process of finding an appropriate tenant. The Applicant also noted that proposals to construct three nearby new residential developments, which were not anticipated at the time of the original approval, are expected to increase foot traffic within the neighborhood and thereby should increase the marketability of the site. (Exhibit 3.) The Applicant stated that it requested a two-year extension of the Order because of circumstances beyond its control from completing the project and which prevented it from vesting the Order for the reasons described.

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 §

³ 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.)

⁴ The conditions in Order No. 18701-A continue in force through the extension of time granted in this order.

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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 found that the Applicant has met the criteria set forth in 11 DCMR § 3130.6. As required by § 3130.6(a), 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. (Exhibit 3.) No party to the application objected to an extension of the Order.

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. 18701-A. There have been no changes to the Zone District classification applicable to the Subject Property or to the Comprehensive Plan affecting the Property since the issuance of the Board's order. (Exhibits 3 and 8.)

The Board found that the motion has met the criteria of § 3130.6 to extend the validity of the underlying order. 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). To meet the burden of proof, the Applicant submitted a letter and supporting information describing the factors beyond its control that prevented it from moving forward with the project: unexpected delays in the permit and renovation process as well as the delay in the process of seeking a restaurant tenant. (Exhibits 3 and 3A.) Since the Board issued Order No. 18701-A in February of 2014, the Applicant has been working diligently to secure the necessary commitments and other approvals to move forward with the project approved by the Board. In addition to the letter signed by the Applicant, the Applicant submitted a project timeline outlining the Applicant's efforts to complete the project following the approval of Order 18701-A. (Exhibit 3A.)

Given the totality of the conditions and circumstances described above in the Applicant's letter and other supplemental information 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 his submissions for the extension, the Applicant demonstrated that it has

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acted diligently, prudently, and in good faith to proceed towards the implementation of the Order.

The Office of Planning ("OP"), in its report dated February 16, 2016, 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 8.)

The Subject Property is within the boundaries of Advisory Neighborhood Commission ("ANC") 6B. The ANC submitted a report recommending approval, dated February 10, 2016, with regard to the request for a time extension. The ANC's report stated that at its regularly scheduled and properly noticed public meeting of February 9, 2016, the ANC, with a quorum present, voted 7-0-0 to support the Applicant's request to extend the expiration date of the Order. (Exhibit 9.)

The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the approval of the Applicant's request. (Exhibit 10.)

The Board concluded 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. 18701-B for a two-year time extension of Order No. 18701-A, which Order shall be valid until **February 27, 2018**, 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 all required permits.

VOTE: **4-0-1** (Marnique Y. Heath, Frederick L. Hill, Jeffrey L. Hinkle, and Peter G. May, to APPROVE; one Board seat 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: March 10, 2016

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.