

2011 MAR -8 PM 2:14

John T. Epting
Director

jepting@goulstonstorrs.com
202-721-1108 Tel
202-263-0538 Fax

March 8, 2011

By Hand Delivery

Meredith Moldenhauer, Chairperson
D.C. Board of Zoning Adjustment
441 4th Street, N.W., Second Floor
Washington, D.C. 20001

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17606

EXHIBIT NO. 44

2011 MAR -8 PM 1:33

Re: Board of Zoning Adjustment Order Nos. 17600-A and 17606-B -- Emergency Request for Waiver to Extend Orders

Dear Chairperson Moldenhauer and Members of the Board:

On behalf of Fort Totten North, LLC, and Fort Totten South, LLC (collectively, the “**Property Owners**”), the owners of 300-320 Riggs Road, NE (Lot 52 in Square 3748) (“**Fort Totten North**”), and 5543-5575 South Dakota Avenue, N.E. (Lot 22 in Square 3760) (“**Fort Totten South**”, collectively with Fort Totten North, the “**Properties**”), respectively, and the successors in interest to the applicants under BZA Order Nos. 17600-A and 17606-B (the “**Orders**”), respectively, we hereby submit this letter as an emergency request for a second extension of the expiration date of the Orders. The Board of Zoning Adjustment (the “**Board**” or “**BZA**”) extended BZA Order No. 17600 on March 24, 2009 such that BZA Order No. 17600-A (collectively, attached as Exhibit A) will expire on March 21, 2011. The Board extended BZA

Order No. 17606 on March 24, 2009 such that BZA Order No. 17606-B (collectively, attached as Exhibit B) will expire on May 9, 2011.

As described below, due primarily to the protracted reconstruction of the adjacent intersection by the District Department of Transportation (“DDOT”), coupled with ongoing negative economic circumstances, the projects on the Properties have not been able to proceed with their building permit applications and therefore, will lose their entitlements if the Orders are not extended. The Properties are part of an area-wide development, based on a Land Disposition and Development Agreement (“LDA”) between Dakota Triangle, LLC and the District of Columbia, and joined into by the predecessors in interest to the Properties, dated December 19, 2008 (attached as Exhibit C). The master development plan for those three sites includes nearly 800,000 square feet of developable, above-grade gross square feet, with approximately 95,000 square feet devoted to retail use, approximately 898 residential units, and approximately 720 parking spaces. As a result of the LDA, the projects on the Properties are involved in a joint effort between DDOT, the District of Columbia, the community, and the Property Owners. Since the Properties are linked to one cohesive effort, DDOT’s delay in constructing the intersection has jeopardized the Property Owners’ ability to move forward with the projects on the Properties. The intersection was initially intended to be finished in the Fall of 2009. However, the intersection is still being constructed. As evidenced by the pictures of the current state of the construction of the intersection (taken on March 1, 2011 and attached as Exhibit D), there are a number of lane closures, temporary traffic control devices, and construction and utility relocation equipment that make gaining access to the Properties difficult, if not impossible. In addition, the reconstruction of the intersection has altered typical travel patterns in the area with the likely diversion of traffic to other routes while the construction is in progress.

DDOT's inability to finish the reconstruction work in a timely manner is similar in nature to pending litigation against the project; in that situation, the period of an Order's validity is tolled under § 3130.5. Due to DDOT's failure to finish the road construction, the BZA should find the basis for a waiver to extend the subject Orders. Allowing the Orders to lapse would further delay the redevelopment efforts. Further, not extending the Orders would create a negative impact on the District, due to its long term interest in this area and the surrounding neighborhood due to the denial of affordable housing and vital retail currently unavailable in the vicinity.

I. Jurisdiction of the BZA

Section 3130.6 authorizes the Board to grant one time extension from BZA Orders. The BZA possesses the inherent authority to waive the provisions of 11 DCMR § 3130.1 under 11 DCMR § 3100.7 in order to extend its Orders as it deems necessary. Under 11 DCMR § 3100.5, the BZA "may, for good cause shown, waive any of the provisions of [Chapter 31 of the Zoning Regulations] if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law." As detailed above, not granting the waiver will prejudice the Property Owners and will not be in the long term interest of the District of Columbia.

II. Property Owners' Request

Therefore, Property Owners hereby request, that:

1. The BZA waive its time limits relating to BZA Order No. 17600-A and BZA Order No. 17606-B for good cause shown and allow the Orders to remain

effective for two (2) years after March 21, 2011 and May 9, 2011 (or later per the phasing request below), respectively; or

2. BZA Order No. 17600-A and BZA Order No. 17606-B are tolled until DDOT completes the construction of the roads and intersection adjacent to the Properties and the Property Owners provide notice to the BZA that such construction has been completed. From that point, the Orders are extended two (2) additional years, with BZA Order No. 17606-B having the option to be phased for a ten (10) year period.¹

III. Standards for Evaluation of Request

The Property Owners are asking for such action by the BZA as the result of a unique confluence of factors that have not permitted the projects on the Properties to proceed.

A. LDA and Intersection Reconfiguration

The Property Owners' projects are part of the area-wide development project mentioned above which includes the property bounded by Riggs Road, NE, South Dakota Avenue, NE, Parcel 137/86 and Lot 10 in Square 3760 ("DDOT Parcel", collectively with the Properties, the "Project Site") which is governed by the LDA. The LDA contemplates developing the DDOT Parcel as part of a larger mixed-use development concept that includes the Properties.² The

¹ In BZA Order No. 17721, dated March 28, 2008, the Board approved the construction of a two phased project at 60 L Street, N.E. whereby the first phase of the project was approved for a period of two years and the second phase of the project was approved for a period of ten years (unless the plans for the erection or alteration of the structures were filed for the purposes of securing a building permit in the interim). The uncertainty of market conditions was cited for such two phased approval; here the road reconfiguration and the overall size of the Project on the three parcels are reasons for phasing. We request that a ten (10) year phasing approval is granted for BZA Order No. 17606-B for Fort Totten South.

² The D.C. Council's related legislation, the "South Dakota Avenue-Riggs Road Excess Property Emergency Disposition Approval Resolution of 2006" (R16-746) (the "**Resolution**") (attached as Exhibit F) and the "Riggs Road Disposition Extension Approval Resolution of 2008" (R17-678) ("**Extension Approval**") (attached as Exhibit G), further demonstrates that the Properties are all part of a larger development.

projects on the Project Site are intended to function as one organic project, with the uses complementing and enhancing each other and ultimately leading to a carefully coordinated redevelopment of the Fort Totten neighborhood as envisioned by the District of Columbia. Expiration of the Orders will negatively impact the entire Project Site development and attempts to jump start the area's much-needed redevelopment. Coordinating redevelopment of the three large parcels comprising the Project Site in a coherent fashion is already difficult; not extending the time limits will place additional constraints on the Properties' development.

In order to develop the larger mixed-use project, the Property Owners required an integrated and collaborative effort with DDOT to redesign and reconstruct the roads and intersection of Riggs Road and South Dakota Avenue (including the removal of the ramp surrounding the DDOT Parcel). The design process to reconcile DDOT's interests of vehicular and pedestrian safety and efficient traffic flow with the Property Owners' concerns of creating a pedestrian friendly intersection with "Main Street" appeal and easy access to retail options and the resulting work by DDOT have been underway since the passage of the Resolution on July 11, 2006. Such work by DDOT created significant delay in finalizing the LDA and required the Council's re-authorization of the disposition of the DDOT Parcel. Although DDOT's construction and reconfiguration of such new intersection was intended to commence in Spring 2008 and be completed approximately eighteen months later, such work did not start until March 2010 and is still ongoing. Pictures of the current state of the road and intersection construction are attached as Exhibit D. Pictures showing the extent of the road and intersection construction area are attached as Exhibit E. DDOT has stated to the Property Owners that the earliest the intersection might be completed (and therefore, the earliest date that affiliates of the Property Owners could close on the DDOT Parcel) is approximately September 9, 2011. Until the

intersection is finished and closing occurs under the LDA, it is premature to seek to force development at the Project Site. It is only at such point that the projects' construction can begin. In fact, the Property Owners cannot access the Fort Totten South site from the road network given the current construction disruption.

Among other aspects, the final construction of the intersection will set the terms for the financial aspects of the transaction with the District, since the final boundaries of the DDOT Parcel will only be known at such time. Since the DDOT Parcel boundaries are unknown until the DDOT work is completed, the Feasibility Period described in Article 1 (page 9) and § 2.8 (page 24) of the LDA had to be extended (although it was intended to run 210 days after December 19, 2008). Under § 5.1.1(j)(y) of the LDA (page 36), the realignment of Riggs Road is to be completed and the District is to give notice to affiliates of Property Owner upon completion as a condition for such affiliate to close under the LDA. Therefore, the entire project is stalled until the reconstruction of the intersection and related roads is finalized.

It would not be reasonable to expect any developer to proceed with the construction of the project on any portion of the Properties, or even to expend substantial sums of money to prepare plans to do so, if there is a possibility that the overall development will be further delayed. Further, no tenant would sign any lease or letter of intent on the site nor would any lender commit to funding such project until they also know that the project is proceeding with certainty. Therefore, the Property Owners could not be expected to construct the buildings approved by the Orders until the construction of the intersection and related roads is complete and an affiliate of the Property Owners has closed on the DDOT Parcel.

B. Economic and Market Conditions

While the road construction poses the main impediment to pursuing the development approved under the BZA Orders, the current economic conditions cannot be entirely dismissed. Despite such conditions, the Property Owners (and their affiliates) have made good faith efforts to progress towards building permits to the maximum extent possible. The Property Owners have continued to perform site studies to prepare the sites for construction and have demolished the old buildings on 300-330 Riggs Road, NE. In addition, the Property Owners have approached numerous lenders and possible tenants for the Properties without obtaining a firm commitment as a result of the uncertainty described herein. The extension of the Orders would remove one such uncertainty.

IV. The Extensions Meet the Requirements of §§ 3130.6(a), (b), and (c)

In addition to the good cause describe above, further factors support the approval of the requested extensions as described below.

A. Extension Request Served on All Parties to the Application

In the instant case, this extension request is being served simultaneously on all parties to the original applications for BZA Case Nos. 17600 and 17606. All parties to the application will be allowed thirty (30) days to respond to this request. Further, just as the initial relief of BZA Order Nos. 17600 and 17606 and the extension of such orders by BZA Order Nos. 17600-A and 17606-B did not prejudice the rights of any party, the extension of the Orders will not prejudice any party. There are no neighbors or structures that would be adversely affected as the result of the loading variance relief under BZA Order Nos. 17600 and 17600-A or the special exception relief for the varying heights of the roof structure under BZA Order Nos. 17606 and 17606-B. In

fact, since the projects proposed are part of an area-wide project benefiting the local community and revitalizing the South Dakota Avenue and Riggs Road intersection, the effects on the neighbors and community would be positive if the Orders are extended. An adverse effect would likely result from allowing the Orders to expire. Further, there are no prohibitions under D.C. laws that would disallow the extension of the Orders as requested.

B. No Substantial Change to Any of the Material Facts

The factors satisfying the variance standards and allowing for the special exception relief for the Properties remain as they were for the Board's approval of the requested relief. There has been no substantial change in any of the material facts relating to the case.

Regarding the variance relief under BZA Order No. 17600, the exceptional, unique conditions of the Fort Totten North property remain, such as the odd configuration of the lot and the slope issues. Similarly, the practical difficulty that would be created by the strict application of the Zoning Regulations remains. Fort Totten North, LLC would still face infeasible or unnecessary construction if the Zoning Regulations were strictly enforced, requiring the full sized loading berth. Finally, the Zone Plan would still not be harmed through the approval of the requested relief since the project on Fort Totten North and related relief would enact policies desired by the Zoning Regulations and Comprehensive Plan. That project would improve the area and allow a more efficient use of the Fort Totten North property.

Regarding the special exception relief under BZA Order No. 17606, the roof structure relief is still in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and does not affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps.

C. Conformance with the Comprehensive Plan and Zoning Regulations

This request for a waiver for good cause shown under § 3100.5 of the Zoning Regulations for an extension of time within which to complete the projects on the Properties is consistent with the intent and purposes of the Zoning Regulations, the requirements of Chapter 31 of the Zoning Regulations, and the District of Columbia Comprehensive Plan (“Plan”) for the National Capital. The Land Use Map of the Plan designates the site for Moderate Density Commercial use. The Plan’s land use designation of the Property has not changed since the Orders were approved. Further, the Plan’s policies and goals still support the projects on the Properties, and would support an extension of time for both Orders.

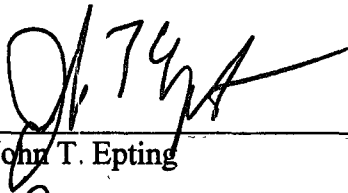
V. Waiver from § 3130.9, if applicable

If § 3130.9 is deemed to require that a waiver request such as the instant request is to be filed at least (30) days prior to the date of expiration of the Orders, we also request a waiver from § 3130.9.

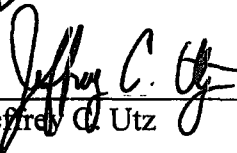
Enclosed please find a check for \$560.00. This amount represents the filing fee for extensions under § 3180.1(f). Such amount is calculated as twenty percent of the initial filing for BZA Case No. 17600 (\$800) and for BZA Case No. 17606 (\$2,000). Therefore, the filing fee for this extension request is \$160 and \$400, respectively.

We would be happy to produce any other information or evidence in support of the above letter and greatly appreciate your consideration of this matter.

Respectfully submitted,



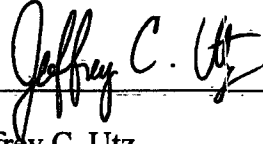
John T. Epting



Jeffrey C. Utz

Certificate of Service

I certify that on March 8, 2011, I delivered a copy of the foregoing document via hand delivery or first class mail to the addresses listed below.

A handwritten signature in black ink, appearing to read "Jeffrey C. Utz", is written over a horizontal line.

Jeffrey C. Utz

Jennifer Steingasser
Office of Planning
1100 4th Street, S.W., Suite E650
Washington, D.C. 20024

ANC 4B (9 copies)
6856 Eastern Avenue, N.W. #316
Washington, D.C. 20012

Douglass Sloan
313 Nicholson Street, N.E.
Washington, D.C. 20011

FORT TOTTEN NO. 1, LLC
 4445 WILLARD AVENUE SUITE 400
 CHEVY CHASE, MD 20815
 240-333-3600

PNC Bank NA
 Washington, DC

DATE
 03/08/2011

CHECK NO
 46200030

AMOUNT
 \$560.00

Pay: **FIVE HUNDRED SIXTY AND 00/100 DOLLARS**

PAY TO THE ORDER OF
 DC Treasurer

Case # 17600-A & 17600-B

Emergency Request Waiver to Expedite Orders



[Handwritten Signature]

AUTHORIZED SIGNATURE

⑈46200030⑈ ⑆054000030⑆ 5303557706⑈