

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17606-D of Application of Dakota Points LLC, Motion of Fort Totten South¹ for a Third Two-Year Extension of BZA Order No. 17606-A, pursuant to § 3130 of the Zoning Regulations.

Original Application No. 17606 was pursuant to 11 DCMR § 3104.1, for a special exception from the roof structure uniform height provisions under § 411, to construct a four-story residential building in the C-2-A District at premises 5545-5549 South Dakota Avenue, N.E. (Square 3760, Lot 10) and 5553-5575 South Dakota Avenue, N.E. (Parcel 137/86).

HEARING DATE (Orig. Application):	May 8, 2007
DECISION DATE (Orig. Application):	May 8, 2007
FINAL ORDER ISSUANCE DATE (No. 17606):	May 9, 2007
FINAL DATE OF CORRECTED ORDER (No. 17606-A):	May 9, 2007
DECISION ON 2009 MOTION FOR 1ST EXTENSION:	March 24, 2009
FINAL DATE OF ORDER ON 1ST EXTENSION MOTION (No. 17606-B):	April 7, 2009
DECISION ON 2011 MOTION FOR 2ND EXTENSION:	April 12, 2011
FINAL DATE OF ORDER ON 2ND EXTENSION MOTION (No. 17606-C):	June 19, 2011
DECISION DATES ON MOTION FOR 3RD EXTENSION:	April 23 and May 7, 2013

ORDER ON THIRD MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17606-A

The Underlying BZA Order

On May 8, 2009, the Board of Zoning Adjustment (the “Board” or “BZA”) approved the application for a special exception from the roof structure uniform height provisions under § 411, to construct a four-story residential building in the C-2-A District at premises 5545-5549 South Dakota Avenue, N.E. (Square 3760, Lot 10) and 5553-5575 South Dakota Avenue, N.E. (Parcel 137/86) (the “Subject Property”). On May 9, 2007, the Office of Zoning (“OZ”) filed in the

¹ Fort Totten South is the current property owner (“Property Owner” or “Applicant” or “Movant”) and the successor in interest to Dakota Points LLC which was the original Applicant.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17606-D
EXHIBIT NO. 58

Board of Zoning Adjustment
District of Columbia
ZONING COMMISSION
CASE NO. 17606
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record and served upon the parties an order approving Application No. 17606 for a special exception from the roof structure requirements of § 411 of the Zoning Regulations. However, because of a minor error in the caption of the order (BZA Order No. 17606), the Board issued a corrected summary order (BZA Order No. 17606-A) to accurately reflect that the proposal was for a four-story residential building, and not a four-unit residential building. The corrected order was in all other respects identical to BZA Order No. 17606, including its final date of May 9, 2007 (BZA Order No. 17606-A (the "Order").) (Exhibit 38.) Pursuant to 11 DCMR §§ 3125.5 and 3125.9, the Order became "final" on that date and took effect 10 days later.

Under the corrected Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – until May 9, 2009.

2009 Extension of the BZA Order

On or about March 6, 2009, counsel for the original Applicant in Application No. 17606 filed a letter with the Board requesting an extension of the validity of Order No. 17606-A.

Subsection 3130.1 of the Board's Rules of Practice and Procedure states:

No order [of the Board] 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.) Subsection 3130.1 was amended by the addition of the phrase "except as permitted in § 3130.6" by the Zoning Commission in Z.C. Case No. 09-01. That amendment became effective on June 5, 2009.

Although the provision does not specify whether the two-year period begins on the date the order became final or when it took effect, the Board has traditionally used the former as the start date. Therefore, Order No. 17606-A was due to expire on May 9, 2009 unless building permits were applied for on or before that date. Because the Zoning Regulations did not, at the time the request for an extension was made, contain a provision expressly authorizing the BZA to extend the validity of an order past the two-year limit set forth in § 3130.1, the Applicant requested that the Board waive that provision.

Concerning the request to extend the Order, the Board granted the waiver requested pursuant to 11 DCMR § 3100.5. That provision authorizes the Board to waive many of its rules, including § 3130.1, upon a showing of good cause shown, if the waiver would not prejudice the rights of any party, and the waiver was not otherwise prohibited by law. The Board found that the criteria under § 3100.5 had been satisfied and, through the issuance of Order No. 17606-B, the Board extended the validity of the underlying Order for a period not to exceed two years. The new expiration date for the Order was May 9, 2011.

2011 Request for Extension of the BZA Order

On or about March 8, 2011, OZ received a second request to extend the expiration of the Order.² (Exhibit 44.)

That motion asserted that the Developers were unable to proceed with their building permit applications due to the “protracted reconstruction of the adjacent intersection by the District Department of Transportation (“DDOT”), coupled with ongoing negative economic circumstances.” (Exhibit 44.)

The Office of Planning (“OP”) supported the requests and agreed with the basis asserted. In its report OP specifically stated:

The reconstruction of South Dakota Avenue and Riggs Road was originally proposed to be completed in the fall of 2009, but work did not begin until the spring of 2010. Completion is now anticipated to occur in September 2011, at the earliest. The condition of the roadways, including lane closures, makes it difficult for the applicant to access the site with its construction vehicles. These factors are all beyond the applicant’s reasonable control.

(Exhibit 45.)

After the issuance of the order in 2009 granting the waiver, but prior to the filing of the second extension request in 2011, the Zoning Commission (“Commission”) adopted amendments to § 3130 to specifically authorize the Board to extend the time limits of § 3130.1. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009). Among other things, the new provisions allowed for only one extension of an order. (11 DCMR § 3130.6.) The rules also addressed the question of whether an order would remain valid if the Board was unable to decide a request prior to its expiration date. The rules provide that an order’s expiration would be tolled if an extension request was filed at least 30 days prior to the expiration date. (11 DCMR § 3130.9.)

As to the criteria for granting a request, § 3130.6(c) requires the demonstration of good cause through 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

² A request for an extension of a related case, Application No. 17600, was made at the same time as that second request for an extension of Application No. 17606 and the Order that was issued referenced both applications. The current extension request, however, is just for Application No. 17606.

- (3) The existence of pending litigation or such other condition, circumstance or factor beyond the applicant's reasonable control.

In 2011, the first question for the Board to resolve was whether the Developers were barred from making their requests due to the language in § 3130.6 which expressly allows the Board to grant only one extension. The Board did not count the 2009 extension towards this limit, as the new regulation was not in effect as of the final date of the order granting the first request for an extension, pursuant to § 6(A) of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-502 (6)(A). In granting the second request for an extension, the Board relied on 11 DCMR § 3100.5 and waived the limitation of one extension only.

The Board then found that the 2011 motion met the criteria in § 3130.6 to extend the validity of the underlying order. The failure to file for the two building permits again had been due largely to the protracted reconstruction of the adjacent intersection by DDOT. The Board found that this factor was beyond the Developers' reasonable control within the meaning of § 3130.6(c)(3) and constituted the "good cause" required under § 3130.6(c)(1). All the other conditions required by § 3130.6(b) were also met. Thus, pursuant to 11 DCMR § 3130, the Board approved a second two-year time extension of its approval in Case No. 17606 and extended the validity of Order No. 17606-A until May 9, 2013. (Exhibit 47.)

2013 Request for Extension of the BZA Order

On March 12, 2013, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6,³ a third two-year extension in the authority granted in the underlying BZA Order, which was then due to expire on May 9, 2013. (Exhibit 49.) The Applicant's March 12th letter indicated that the Order would expire before it would be able to submit a building permit application for its project at the Property because of delays resulting from factors outside of its reasonable control. The Applicant subsequently submitted additional information, including sworn affidavits, in support of the 2013 Motion to Extend on May 3, 2013, that provided documentation of the "good cause" for the extension request. (Exhibit 55.)

On April 23, 2013, the Board convened a public meeting to consider the third Motion to Extend BZA Order No. 17606-A for an additional two years. At that meeting, the Board requested additional information from the Applicant, including supporting documentation attesting to a "showing of good cause." The Board set a deadline of May 3, 2013 for the requested additional information and rescheduled the matter for consideration at a public meeting on May 7th.

On May 3, 2013, the Applicant submitted a letter containing, among other documents, two signed and notarized affidavits, one from the Managing Member of Fort Totten South, LLC, the Property Owner and Applicant in this matter, and the other from the Senior Vice President of

³ As mentioned, § 3130.6 was adopted by the Zoning Commission in Z.C. Case No. 09-01 and became effective on June 5, 2009.

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Dakota Square, LLC, successor in interest to Dakota Points, LLC, the original applicant in BZA Application No. 17606 and development partner of the Property Owner, and previous owner of the Property prior to its transfer to the current Property Owner, which together are the "development team", to supplement the record and meet the good cause requirements of 11 DCMR § 3130.6. (Exhibit 55, Tab A.) The affidavits detailed the history of the project and the impact of DDOT's delay in reconfiguring and reconstructing the intersection of South Dakota Avenue, Riggs Road, and 3rd Street, N.E. (the "intersection") and portions of 3rd Street, Chillum Place, and Kennedy Street, N.E. (the "DDOT Project") on the development team's project. The Applicant's documentation indicated that the intersection was initially intended to be completed in Fall of 2009; however, the DDOT work was only substantially completed by the fourth quarter of 2012 and now is just closing out in May 2013. The Movant noted that the delay in the reconstruction work of the adjacent intersection is the same primary reason upon which the Board approved the previous two extension requests.

The affidavits and other supporting documentation also described the development team's good faith efforts to bring the project to fruition. The Applicant indicated that it had submitted a letter from the development team to DDOT, which DDOT requested in order to generate a letter to describe the timing of and efforts related to the DDOT Project. (Exhibit 55, Tab B.) Additionally, the Applicant explained that despite the difficulties to implement its project approved by the Order because of the delays caused by the DDOT Project, the development team had made sizeable efforts to obtain financing for the project. In 2008 they retained the services of Cassidy/Turley to solicit funding from third parties. However, that 2008 solicitation for funding was not successful, primarily because of the uncertainty regarding the project's timing due to the ongoing DDOT Project and work related to the intersection. At the end of 2008, the development team retained Studley to solicit interest in financing the project; that attempt in early 2009 was also unsuccessful. The development team again sought financing in 2010. As part of that effort, in September 2010, the original applicant, Dakota Points, LLC, was recapitalized by Fort Totten South, LLC, which is an affiliate of The JBG Companies. This recapitalization allowed the development team's project to continue to progress, although activity has remained constrained due to the delays of the DDOT Project.

The affidavits and other documentation submitted by the Applicant show how DDOT's Project resulted in the Applicant's property not being accessible during the term of the DDOT Project and for the boundaries of the Applicant's property not able to be finalized until the DDOT Project is closed out. The affidavits describe how the timing of the DDOT Project was subject to a great deal of delay. According to the Applicant's documentation, DDOT began its initial planning for the DDOT Project in 2006 and planned to complete it by Fall of 2009. Instead, for a variety of reasons including funding delays, complications discovered during the construction, including the location of significant utilities requiring relocation, and a redesign process, the completion of the Applicant's project approved by the Order was delayed by several years. The DDOT Project also did not initially include funding for the scale of the efforts it faced. The Applicant indicated that three utilities (DC Water, Washington Gas, and Verizon) as well as the Federal Highway Administration were involved in the work, thus introducing additional layers of

complexity and delay. Throughout this time, the Applicant has been working closely with DDOT and has continuously updated its timing as the DDOT Project's delays unfolded. The Applicant committed to continue to work closely with DDOT to finalize the DDOT Project and also to implement its own project since the two projects are significantly interrelated. (Exhibit 55.)

The Applicant served its extension request on the parties to the case and provided them the requisite 30 days in which to respond, pursuant to § 3130.6. The Applicant served the request and the documentation in support of its motion on the Chair of Advisory Neighborhood Commission ("ANC") 4B, which is the affected ANC and the only other party to the case, and on the Office of Planning ("OP"). (Exhibits 49 and 55.)

The project is within the boundaries of ANC 4B. Although ANC 4B did not submit a report or respond to the motion, the Single Member District ("SMD"), ANC 4B09, submitted a letter dated April 10, 2013, indicating his support for the extension request. The SMD's letter further stated that the development team has been active in its engagement of the community and has had numerous meetings since 2007 with the local community to discuss the project. He explained that the ANC continues to support the application and the request for another extension, but did not believe it necessary to take another vote on the matter given its prior support and full agendas. He opined that the relief approved by the Board and its extension of that Order will not create any adverse conditions. (Exhibit 52.)

OP filed a report recommending that the Board grant the Applicant's request for a two-year extension of Order No. 17606-A based on the evidence provided. In its report OP noted that reconstruction of the intersection of South Dakota Avenue and Riggs Road was originally proposed to be completed in 2009, but was not finished until this year. OP noted that until the road construction was completed, final lot boundaries could not be determined, which contributed to the Applicant not being able to secure financing, as well as not being able to access the site. OP noted that the poor economic conditions over the last several years also contributed to the Applicant's inability to secure financing. OP opined that all of these factors are beyond the Applicant's reasonable control. (Exhibit 51.)

DDOT submitted a letter dated May 6, 2013, at the Applicant's request, that described the timing and status of DDOT's reconfiguration and reconstruction of the South Dakota Avenue and Riggs Road intersection. DDOT confirmed that the DDOT Project rehabilitating the aforementioned intersection was substantially completed by July 27, 2012 and that final inspection was completed with the Federal Highway Administration on December 11, 2012. DDOT indicated that this part of its project is currently being closed out by DDOT, DC Water, and the contractor. DDOT also had asked if the Applicant would require as-builts and noted that there may be other intersection work related to the other related application (Fort Totten North, which is BZA Case No. 17600) that may be required by DDOT to be completed by the developer. (Exhibit 56.)

A letter of support for the request for the extension of Order No. 17606-A was submitted for the record by the Lamond-Riggs Citizens Association ("Citizens Association"). The Citizens

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Association letter indicated that the Citizens Association had held an Executive Board meeting at which a quorum was present on April 13, 2013, and at which the Executive Board of the Citizens Association voted to pass a resolution supporting the Applicant's extension request. (Exhibit 53.)

Limitation to One Time Extension

On December 10, 2012, the Zoning Commission took proposed action to approve Z.C. Case No. 12-11, which included text amendments to BZA Rules and Procedures – Chapter 31, specifically to 11 DCMR §§ 3130.6 and 3130.9 in regard to time extensions of the validity of orders. The text amendment would eliminate the limitation on granting more than one time extension (§ 3130.6) and also eliminate the 30-day rule for filing before the expiration date of an order so as to toll the expiration of the underlying order (§ 3130.9). The Zoning Commission took final action February 25, 2013. However, as the order and final rulemaking for Z.C. Case No. 12-11 has not as yet been issued, the text amendment is not technically finalized.

The Board took note of the recent actions by the Zoning Commission to amend 11 DCMR § 3130.6 to eliminate any limit placed upon the number of extensions allowed to be approved by the Board. Nevertheless, as the rulemaking by the Zoning Commission was not yet finalized, the Board relied on 11 DCMR § 3100.5 to grant a waiver of the effect of § 3130.6's limitation to only one extension. Subsection 3100.5 of the Zoning Regulations authorizes the Board to waive many of its rules, including § 3130.6, upon a showing of good cause shown, if the waiver would not prejudice the rights of any party, and the waiver is not otherwise prohibited by law. The Board found that the criteria under § 3100.5 has been satisfied and waived the provision in § 3130.6 that limits time extensions to one as well as granted the request for a third time extension.

Tolling the Expiration Date of the Underlying Order

Pursuant to 11 DCMR § 3130.9, for a request for a time extension to toll the expiration date of the underlying order for the sole purpose of allowing the Board to consider the request, the motion must be filed at least 30 days prior to the date on which an order is due to expire.⁴ The Applicant filed its request on March 12, 2013, thus meeting the required 30-day period for tolling. Pursuant to 11 DCMR § 3130.9, the Board granted the tolling of the Order's expiration date to provide the Board time in which to consider the request for a two-year extension of that Order.

"Good Cause" for Extension

The Zoning Commission adopted 11 DCMR § 3130.6 in Zoning Commission Case No. 09-01. As mentioned herein, the subsection became effective on June 5, 2009.

Subsection 3130.6 of the Zoning Regulations states in full:

⁴ This requirement would also be eliminated by the Zoning Commission's rulemaking in Z.C. Case No. 12-11 once that rulemaking is finalized.

- 3130.6 The Board may grant one extension of 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; provided, that the Board determines that the following requirements are met:
- (a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;
 - (b) There is no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application; and
 - (c) The applicant demonstrates that there is good cause for such extension, with 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.

(11 DCMR § 3130.6.)

The Board found that the Applicant has met the criteria set forth in § 3130.6. The motion for a 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). The Board also found that the Applicant demonstrated that it was proceeding in good faith with the project as approved through its cooperation with DDOT and in its attempts to obtain financing despite the obstacles it faced due to the poor economic climate and the delays in DDOT completing its Project. To demonstrate "good cause" for the request for a time extension, the Applicant submitted evidence of the difficulties it faced that were beyond its reasonable control including the delays in DDOT's completion of the DDOT Project which prevented the Applicant from having access to its Property and the capability of determining its boundaries, as well as the difficulties the Applicant had in obtaining financing to implement the project and to obtain other necessary approvals. This

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evidence including two sworn affidavits demonstrated the “good cause” required under § 3130.6(c)(1).

The Applicant’s time extension motion initially was put on the Board’s April 23, 2013 decision meeting agenda. At that meeting, the Board requested that the Applicant provide additional supporting documentation pursuant to the requirements of § 3130.6 and rescheduled its decision for May 7, 2013. In response to the Board’s request for additional documentation, the Applicant submitted its supplemental filing on May 3, 2013, which contained two sworn affidavits, one from the Managing Member of the Property Owner and the other from the Senior Vice President to the successor in interest to the original applicant and development partner to the Property Owner regarding the delays and difficulties to the Applicant’s project caused by the delays that occurred in completion of the DDOT Project and the Applicant’s efforts to obtain financing for the project. (Exhibit 55, Tab A.)

As discussed herein, the Applicant submitted a request for a third time extension with supplemental information including sworn affidavits in support of that request and documented the reasons for the project’s delay. The primary reason for the delay in the implementation of the Order is the delay associated with DDOT’s reconfiguration and reconstruction of the South Dakota Avenue, Riggs Road, and 3rd Street, N.E., intersection and portions of 3rd Street, Chillum Place, and Kennedy Street, N.E. While that intersection was initially anticipated to be finished in the Fall of 2009, DDOT’s work was only substantially completed in the fourth quarter of 2012 and is only closing out in May 2013. The affidavits described the Applicant’s good faith efforts to bring the project to fruition, including its multiple efforts to secure financing. The Applicant’s documentation also noted the obstacles to completing its project caused by the delays in the DDOT Project, since, throughout the term of the DDOT Project, the Applicant’s Property was not accessible and the boundaries of the Property could not be finalized until the DDOT Project is closed out. Consequently, the Property Owner has not secured financing nor been able to implement the Order. (Exhibits 49 and 55.)

The Applicant also indicated that the plans approved for the development of the site and other material facts are unchanged from those approved by the Board in its Order issued on May 9, 2007. There have been no changes to the Zone District classification or the Comprehensive Plan applicable to the property. The extension would allow the Applicant the necessary additional time in which to gain access to its Property, define the boundaries, secure financing, complete its permit plans, and file for building permits. Accordingly, the Applicant requested that, pursuant to § 3130.6 of the Regulations, the Board extend the validity of its underlying Order for an additional two years, thereby allowing the Applicant additional time to secure financing and apply for a building permit.

At its decision meeting on May 7, 2013, the Board found that the requirements of 11 DCMR § 3130.6 had been met and granted the Applicant the two-year extension of BZA Order No. 18174 until May 9, 2015.

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Neither the ANC nor any party to the application objected to an extension of the Order. The Board concludes that the extension of that relief is appropriate under the current circumstances.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, 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. 17606 for a two-year time extension of Order No. 17606-A, which Order shall be valid until May 9, 2015, within which time the Applicant must file plans for the proposed structure 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 (by absentee ballot), and Robert E. Miller to APPROVE; one Board member 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: May 22, 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.