

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17816-A of Michael D. Sendar, pursuant to 11 DCMR § 3103.2, for a variance from the use provisions for a general retail business under subsection 330.5, in the R-4 District at premises 816 and 818 Rhode Island Avenue, N.W. and 819 and 821 Q Street, N.W. (Square 396, Lots 28, 805 and 806).

HEARING DATE (Orig. Application):	September 23, 2008
DECISION DATE (Orig. Application):	October 7, 2008
FINAL ORDER ISSUANCE DATE:	October 14, 2008 (Summary Order)
DECISION ON MOTION TO EXTEND ORDER:	September 28, 2010

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17816

The Underlying BZA Order

On October 7, 2008, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for a variance from the use provisions for a general retail business under § 330.5, in the R-4 District. Thus, pursuant to 11 DCMR § 3103.2, the Board granted a use variance under 11 DCMR § 330.5, to allow ground floor retail use in four existing interconnected two-story buildings at premises 816 and 818 Rhode Island Avenue, N.W., and 819 and 821 Q Street, N.W., (Square 396, Lots 28, 805 and 806).¹ The Order was issued October 14, 2008. (BZA Order 17816). (Exhibit 32).

Under the Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – until October 14, 2010.

¹ The Applicant reiterated that he intended to abide by the conditions in the underlying Order, whereby the retail businesses would be limited to Neighborhood Shopping District uses under § 701 and would not include alcohol beverage uses, newspaper distribution, or gasoline service. The second floors would remain residential. (Exhibit 40).

BZA APPLICATION NO. 17816-A
PAGE NO. 2

Section 3130.1² 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)

Motion to Extend

On August 19, 2010, the Board received a letter, dated August 15, 2010, from the Applicant, which requested, pursuant to 11 DCMR § 3130.6,³ a two-year extension in the authority granted in the underlying BZA Order, which was due to expire October 14, 2010. (Exhibit 40).

The Applicant is requesting a two-year extension in the authority granted in the underlying BZA Order because, due to the deterioration of the real estate market in Washington, D.C., the frozen credit markets, and the continuing economic crisis these have caused, the Applicant has been unable to consummate any contracts to sell or develop the property, despite the Applicant's ongoing attempts to market the property, including discussions with several prospective buyers and development partners. The stumbling block for completion of a contract has been the lack of available financing from banks or other traditional lenders. To meet its burden of proof, the Applicant provided a signed affidavit which indicated that the Applicant has diligently marketed the property both for sale and development of the site since the time of the BZA's original approval. According to the Applicant's affidavit, between October, 2008 and September, 2009, the property was listed with Marcus & Millichap. During this period, two contacts broke down because of the prospective Buyers' inability to obtain financing. In October, 2009, the Applicant posted a "For Sale by Owner" sign on the property and directly fielded sales inquiries. At that time, he engaged in preliminary discussions with three developers for the purpose of forming a joint venture to construct and operate a mixed-use building at the premises. While the Applicant remains in discussion with several buyer prospects and two potential development partners, they have expressed that the stumbling block to consummating the deal is the lack of available financing. The Applicant noted that there has been an increase in interest in the property and he will continue his attempts to sell or develop the property, notwithstanding the lending crisis, provided that the use variance remains in place. (Exhibit 40, Statement of Michel D. Sendar).

² Section 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. The amendment became effective on June 5, 2009.

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

BZA APPLICATION NO. 17816-A
PAGE NO. 3

There was no response to the Applicant's motion filed by the Office of Planning ("OP"). The project is within the boundaries of Advisory Neighborhood Commission ("ANC") 2C. ANC 2C did not file a report on the time extension request.

According to the Applicant, the reasons for the request to the Board to extend the time of the Order are because of his and his prospective buyers and development partners' inability to secure financing in an unstable economic market and market conditions in the District and the consequent inability of the Applicant to consummate a contract for sale or to develop the property as a joint venture. The extension would allow the Applicant and these prospective buyers or development partners the additional time in which to secure financing and to complete either a sale or contract to develop the property. Accordingly, the Applicant requested that, pursuant to § 3130.6 of the Regulations, the Board extend the validity of its prior Order for an additional two years, thereby allowing the Applicant additional time to secure financing and apply for a building permit.

Criteria for Evaluating Motion to Extend

The Zoning Commission adopted 11 DCMR § 3130.6 in Zoning Commission Case No. 09-01. The Section became effective on June 5, 2009.

Section 3130.6 of the Zoning Regulations states in full:

- 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;

BZA APPLICATION NO. 17816-A
PAGE NO. 4

- (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).

Furthermore, 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. The Applicant filed his request on August 19, 2010, which was more than the required 30-day period for tolling.

Also, 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 Applicant's inability to complete a contract for sale or to develop the property as a joint venture because neither he nor prospective buyers or development partners are able to secure the necessary financing and the poor economic conditions in the District constitute the "good cause" required under § 3130.6(c)(1).

As required by § 3130.6(b), there is no substantial change in any of the material facts upon which the Board based its original approval. In requesting this extension of the Order, the Applicant's plans for development of the site would be unchanged from those approved by the Board in its Order dated October 14, 2008 (Exhibit No. 7 (Sketch and Plans) in the record). There have been no changes to the zone district classification applicable to the property or to the Comprehensive Plan affecting this site since the issuance of the Board's Order.

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.

Accordingly, pursuant to § 3130.6 of the Regulations, the Board hereby extends the validity of the underlying Order, as conditioned, for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of October 14, 2012.

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. It is therefore **ORDERED** that this request for extension of time be **GRANTED** until October 14, 2012.

BZA APPLICATION NO. 17816-A
PAGE NO. 5

VOTE: 3-0-2 (Meridith H. Moldenhauer, Michael G. Turnbull, Jeffrey L. Hinkle, to approve; Nicole C. Sorg and third Mayoral appointee (vacant) not participating, nor voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 01 2010

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.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17816-A

OCT 01 2010

As Director of the Office of Zoning, I hereby certify and attest that on _____, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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