

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18064-A of HAI Real Estate Holdings LLC, Motion for a Two-Year Extension of BZA Order No. 18064 and Waiver of 30-Day Filing Requirement, pursuant to 11 DCMR § 3130.

The original application was pursuant to 11 DCMR § 3104.1, for a special exception from the rear yard requirements under subsection 774.5, and a special exception from the parking requirements under subsection 2120.6, to allow an addition to an existing office building in the DC/C-3-C District at premises 1820-1822 Jefferson Place, N.W. (Square 139, Lot 75)

HEARING DATE (Orig. Application):	May 18, 2010
DECISION DATE (Orig. Application):	May 18, 2010
FINAL ORDER ISSUANCE DATE (No. 18064):	May 21, 2010
DECISION ON MOTION TO EXTEND ORDER:	July 10, 2012, July 31, 2012, and September 25, 2012

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 18064

The Underlying BZA Order

On May 18, 2010, the Board of Zoning Adjustment (the “Board” or “BZA”) approved the Applicant’s request for special exceptions from the rear yard requirements under § 774.5 and the parking requirements under § 2120.6, to allow an addition to an existing office building in the DC/C-3-C District. Thus, pursuant to 11 DCMR § 3104.1, the Board granted special exceptions under §§ 774.5 and 2120.6 to permit the construction of an addition to an existing office building in the DC/C-3-C District at premises 1820-1822 Jefferson Place, N.W. (Square 139, Lot 75). Order No. 18064 (the “Order”) was issued May 21, 2010 (Exhibit 29).

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 May 21, 2012.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18064-A

EXHIBIT NO. 39

Board of Zoning Adjustment
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Section 3130.1¹ 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 May 21, 2012, the Board received a letter from the Applicant's attorney, which requested, pursuant to 11 DCMR § 3130.6,² a two-year extension in the authority granted in the underlying BZA Order, which was then due to expire on May 21, 2012. The Applicant's letter also contained a request to waive § 3130.9 of the Zoning Regulations to accept the Applicant's time extension motion, which was filed less than 30 days prior to the expiration of the underlying Order so as to toll that Order's expiration.

Waiver of 30-Day Filing Requirement Pursuant to 11 DCMR § 3130.9

As stated, the Applicant's request for an extension of the Order was submitted on May 21, 2012, less than 30 days prior to its expiration date. The Applicant also requested a waiver of § 3130.9 of the Zoning Regulations to accept the time extension motion despite that it was filed less than 30 days prior to the expiration of the underlying Order, and to toll that Order's expiration. The Applicant submitted a statement that explained the difficulties the Applicant had in obtaining financing and moving the project forward as well as described several personal hardships he suffered, all of which has caused delay in the project. Additionally, the Applicant indicated that no one would be prejudiced by the delay in filing. (Exhibit 31.)

Subsection 3130.9 says "A request for a time extension filed at least thirty (30) days prior to the date upon which an order is due to expire shall toll the expiration date for the sole purpose of allowing the Board to consider the request" (11 DCMR § 3130.9.) The request was submitted the day the Order was due to expire on May 21, 2012, thereby requiring a waiver of the requirements of § 3130.9.

Subsection 3100.5 provides

¹ 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.

² Section 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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Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter 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 §§ 3100 through 3105, 3121.5, and 3125.4 do not apply to extension requests, the Board has concluded that it is authorized, for good cause shown, pursuant to 11 DCMR § 3100 5, to waive the 30-day provision and toll the expiration date of the Order for the purpose of allowing the Board to consider the request. At its July 10, 2012 meeting, finding sufficient good cause shown and that no party would be prejudiced, the Board, by consensus, approved the waiver of the 30-day filing requirement and tolled the expiration of the Order.

The Merits of the Motion to Extend

As noted above, the Board received the Applicant's request, dated May 21, 2012, for a two-year extension in the authority granted in the underlying BZA Order, which was due to expire May 21, 2012. Thereafter, the Applicant filed supplemental information on July 26, 2012 (Exhibit 34) and also on September 14, 2012 (Exhibit 37), to meet the good cause requirements of 11 DCMR § 3130 6

The Applicant served its extension request and supplemental information to the Chair of the Advisory Neighborhood Commission ("ANC") 2B, which is the affected ANC and the only other party to the case, and to the Office of Planning ("OP"), notifying them of the Applicant's motion for a two-year time extension and sharing all the documentation in support of that motion with them. (Exhibits 31, 34, and 37)

The project is within the boundaries of ANC 2B. ANC 2B filed a letter report on June 18, 2012, in support of the request for an extension. The ANC's report stated that at a regularly scheduled, duly noticed meeting on June 13, 2012, at which a quorum of the members was present, ANC 2B voted 5.3 1 to support the application for an extension of time (Exhibit 32.)

OP filed a report recommending that the Board grant the Applicant's request for a two-year extension of Order No. 18064. (Exhibit 33.)

The Applicant's May 21st letter stated that Applicant had endured a number of personal hardships since the Board's approval which exacerbated his ability to move the project forward. These hardships included two extensive back surgeries and two untimely deaths in his family, including that of his wife and step-sister. Also, the Applicant's letter indicated that an adverse office market and financing conditions had made getting the project developed extremely difficult. As a result, after first unsuccessfully attempting to prelease the project, the Applicant revised his strategy in order to try to bring in an equity partner to help develop the property or to sell it to a more established developer who could have more success in obtaining financing (Exhibit 31)

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The Applicant's submission included a letter from the real estate services company retained by the Applicant to market the property for the purposes of preleasing the property and bringing in an equity partner or selling it. The real estate firm's letter indicated that the property had been listed for approximately 12 months and that, to date, the Applicant had received three offers, two of which were in negotiations. The real estate firm's letter noted that in both negotiations, keeping intact the already-granted zoning relief was crucial. According to the real estate services firm, if the approval were to expire, the property's value would be negatively impacted, thus, the Applicant required extension of the Board's original approval (Exhibit 31, Tab B.)

The Applicant's time extension motion was put on the Board's July 10, 2012 decision meeting agenda. On July 10, 2012, the Applicant submitted a letter to the Board and requested that the Board defer consideration of the extension request until the Board's July 31st special meeting to allow the Applicant sufficient time to file additional documentation to supplement the record. (Exhibit 34.) At the decision meeting on July 10, 2012, the Board granted the request for postponement of the extension decision to July 31, 2012 and allowed the Applicant to file supporting documentation related to the requirements of § 3130.6

The Applicant provided supplemental information for the record by letter dated July 26, 2012. The Applicant's July 26th letter outlined the project that the Board had approved in the Order, noting that in addition to having received BZA approval, the Applicant had completed a lengthy Historic Preservation approval process as well. He described the further difficulties that he had undergone after obtaining the Board's and Historic Preservation's approvals, first, he tried unsuccessfully to prelease the office building through the real estate services firm he had retained and subsequently, he was in the process of seeking but had not yet found an equity partner or sold the project to a more experienced developer. The Applicant indicated that several personal issues, including undergoing two serious back surgeries and two family deaths, had exacerbated the difficulty for him to shoulder sole responsibility for completing the project. He stated that he had invested substantial time and savings in the project to date and recently had received several serious expressions of interest in response to the latest listing with the real estate services firm he had retained, demonstrating the feasibility of the project. The submission also contained a listing agreement and marketing materials. (Exhibit 36.)

On July 31, 2012, the Board convened the case for deliberation at its public decision meeting. Having reviewed the Applicant's latest filing, the Board rescheduled its decision for September 25, 2012, and allowed the Applicant to submit additional supplemental information focused on the Applicant's attempts to secure financing to meet the "good cause" requirements of § 3130.6

Thereafter, on September 14, 2012, the Applicant, through its attorney, submitted additional supplemental information documenting the Applicant's difficulties in securing leases and financing for the project to demonstrate good cause for granting the two-year extension of the Board's prior approval. The September 14th filing also included a letter from the financial services firm the Applicant had retained that had been unable to obtain financing for the Applicant despite soliciting financing proposals on the Applicant's behalf from a number of local

and regional lenders. The financial services firm stated that prospective lenders had declined to provide financing due to the failure of the project to meet a preleasing requirement of 70% - 80% of the project's leasable space. The Applicant's September 14th submission indicated that the Applicant also had retained a real estate services firm to lease the property, but that the firm had been unsuccessful in that endeavor. The September submission also included a copy of the Leasing Brokerage Agreement and the real estate services firm's marketing materials. (Exhibit 37)

At its decision meeting on September 25, 2012, 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. 18064 until May 21, 2014.

According to the Applicant, the reasons for its request to the Board to extend Order No. 18064 for another two years are because of its inability to finance the construction of the project in view of the deterioration of the real estate market. The Applicant also stated that he has had several personal hardships, including two serious back surgeries and two untimely deaths in his family – that of his wife and a step-sister – which made it difficult to have sole responsibility for pursuing the project. In the affidavits and letters submitted by the Applicant, he indicated that over the last two years, there has been a downturn in the real estate market and the economy has fallen into recession, leading to economic conditions beyond the Applicant's control.

To show good cause for a time extension of the Order, the Applicant's September 14th filing included a letter from a financial services firm the Applicant had retained that indicated it had been unable to obtain financing for the Applicant despite soliciting financing proposals on the Applicant's behalf from a number of local and regional lenders. The financial services firm's letter stated that the prospective lenders had declined to provide financing due to the failure of the project to meet a preleasing requirement of 70% - 80% of the project's leasable space. (Exhibit 37.)

Also, the Applicant's submissions stated that the Applicant had retained a real estate services firm to lease the property, but that the firm had been unsuccessful in preleasing the property. The Applicant's July 26th filing included a letter from the real estate services company retained to market the property for the purposes of preleasing and bringing in an equity partner or selling the property. The real estate firm indicated that the property had been listed for approximately 12 months and the Applicant had received three offers, two of which were in negotiations. The real estate firm's letter emphasized that both negotiations depended on keeping intact the already-granted zoning relief and noted that if the approval were to expire, the property's value would be negatively impacted, thus necessitating extension of the Board's approval. (Exhibit 31, Tab B.)

Therefore, due to the personal difficulties thus stated and market conditions, the Applicant is unable to proceed with the development at this time. Nonetheless, the Applicant believes the project remains feasible and will facilitate the renovation of turn-of-the-century row houses and

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enhance the block on which the property is sited. Thus, the Applicant requests the two-year extension to allow time for the Applicant to secure financing. (Exhibit 37.)

In addition, the Applicant stated 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 21, 2010. Also, 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 secure financing. 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.

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

Subsection 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,
 - (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.)

As discussed herein, 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. Although the Applicant filed its request on May 21, 2012, which was less than the required 30-day period for tolling, the Applicant presented reasons, as described above, for its delay in filing its motion and the supporting documents. Pursuant to § 3100.5, the Board voted to grant the Applicant's request for flexibility and tolled the effect of the underlying Order.

The Board also 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 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 May 21, 2010 (Exhibit No. 25 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 original 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.

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. 18064-A for a two-year time extension of Order No. 18064, which Order shall be valid until May 21, 2014, 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: 3-0-2

(Nicole C. Sorg, Lloyd J. Jordan, and Jeffrey L. Hinkle, to Approve, Rashida Y. V. MacMurray and Zoning Commission member, neither participating, nor voting.)

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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: October 10, 2012

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.