

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18167-A/17431-C of King's Creek, LLC, Motion for a Third Two-Year Extension of BZA Application Nos. 18167/17431, pursuant to 11 DCMR § 3130 and for a Waiver of § 3130.9 (time extension filing at least 30 days prior to expiration of an order) and a Waiver of § 3130.6 (one extension of the time period permitted).

The most recent application was pursuant to 11 DCMR § 3129.7, for interior and exterior modifications to plans approved by BZA Order Nos. 17431 and 17431-A and an increase in the number of dwelling units from 22 to 31, and for an extension of BZA Order No. 17431, pursuant to 11 DCMR § 3130.6, to allow an addition to and conversion of an existing building for residential use in the RC/R-5-B District at premises 2329 and 2335 Champlain Street, N.W. (Square 2263, Lots 103 and 816).

HEARING DATES (Orig. Application): February 28 and March 14, 2006

DECISION DATE (Orig. Application): May 2, 2006

**DECISION ON MINOR MODIFICATION AND
1ST EXTENSION OF ORDER NO. 17431:** November 18, 2008

ORDER NO. 17431-A ISSUANCE DATE: December 2, 2008

**HEARING DATE ON MODIFICATION AND
2ND ORDER EXTENSION:** February 15, 2011

**DECISION ON MODIFICATION AND
2ND ORDER EXTENSION:** February 15, 2011

ORDER NO. 18167/17431-B ISSUANCE DATE: March 23, 2011

DECISION ON 3rd MOTION TO EXTEND ORDER: February 12, 2013

ORDER ON THIRD MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NOS. 18167/17431

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18167-A/17431-C

EXHIBIT NO. 41

Board of Zoning Adjustment
District of Columbia
CASE NO. 18167
EXHIBIT NO. 41

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Background: the Underlying BZA Orders

On May 2, 2006, the Board of Zoning Adjustment ("Board" or "BZA") voted to approve Application No. 17431, filed pursuant to 11 DCMR § 3104.1 and § 3103.2, for a special exception to allow a building height of 50 feet in the Reed Cooke ("RC") Overlay under § 1403, a variance to permit an addition to a nonconforming structure under § 2001.3, a variance from the floor area ratio requirement of § 402, and a variance from the court requirements under § 406 to allow an addition to, and conversion of, an existing building for residential use in the RC/R-5-B District at premises 2329 and 2335 Champlain Street, N.W. (Square 2563, Lots 103 and 816). BZA Order No. 17431 approving the application was issued on November 28, 2006. (Exhibit 9.)

2008 Request for Modification of Approved Plans and 1st Time Extension

On November 18, 2008, the Board voted to approve minor modifications to the approved plans and to extend the term of approval of Order No. 17431 for two years until December 2, 2010. This decision was set forth in BZA Order No. 17431-A, which was issued on December 2, 2008. (Exhibit 10.)

2010 Request for Modification of Approved Plans and 2nd Time Extension

On November 30, 2010, the Applicant filed an application (No. 18167), pursuant to 11 DCMR § 3129.7, requesting approval to modify the plans approved pursuant to BZA Order No. 17431 and as modified by BZA Order No. 17431-A. (Exhibit 1.) The Applicant's proposed modifications included revising the building's footprint, which would decrease the lot occupancy from 92.80% to 88.22% on the first and second floors; revising the interior layout and exterior design of the building to simplify and rationalize the interior building configuration and exterior façade treatments; increasing the number of residential units from 22 to 31; and, although no parking was required for the project, providing 20 parking spaces, which would be a reduction of one space from the 21 spaces in the plans previously approved by the Board. The Applicant further amended its application to include a request to extend the validity of the underlying orders, Nos. 17431 and 17431-A, for two more years.

On February 15, 2011, after a public hearing, the Board voted to approve the Applicant's requested modifications to the plans approved pursuant to BZA Order No. 17431, as modified by BZA Order No. 17431-A, and for a second two-year extension of time. The approved modifications included revising the building's footprint by decreasing the lot occupancy on the first and second floors, revising the exterior and interior building configuration and exterior façade treatments, increasing the number of residential units from 22 to 31, and providing 20 parking spaces. BZA Order No. 18167/17431-B approving the modifications and extending the expiration date of Order No. 17431 until December 12, 2012, was issued March 23, 2011. (Exhibit 35.)

2012 Motion to Extend

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On December 10, 2012, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6,¹ upon a showing of good cause, a third two-year extension in the authority granted in the underlying BZA Order, which was due to expire on December 12, 2012, as well as requests for the Board to waive, pursuant to § 3100.5 of the Zoning Regulations, the 30-day filing requirement in § 3130.9, to allow tolling of the expiration of the Order, and the restriction to one extension in § 3130.6, to allow more than one extension of the Order. (Exhibit 37.)

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

As stated, the Applicant's request for a third extension of the Order that was dated December 10, 2012 and submitted on December 11, 2012, contained a request to waive § 3130.9 of the Zoning Regulations to accept the Applicant's time extension motion that was filed less than 30 days prior to the expiration of the underlying order and to toll that order's expiration. (Exhibit 37.) 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 one day before the Order was due to expire on December 12, 2012, thereby requiring a waiver of the requirements of § 3130.9.

In its December 10, 2012 letter, the Applicant requested that the Board exercise the discretion that it is granted pursuant to 11 DCMR § 3100.5, and waive the 30-day requirement in 11 DCMR § 3130.9. Also in its December 10th submission, the Applicant, to demonstrate good cause for the delay in filing, explained that it believed it would receive the necessary conditional *No Further Action Letter* or the conditional *Case Closure Letter* from the D.C. Department of the Environment ("DDOE") prior to the expiration date of the Order, which would have enabled the Applicant to have filed its plans for the approved project with the Department of Consumer and Regulatory Affairs ("DCRA") prior to December 12, 2012. Once it realized that it would not receive the necessary DDOE letter prior to the Order's expiration date, the Applicant assembled the necessary supporting materials, and prepared and submitted its extension request, which resulted in the Applicant filing its request for an extension less than 30 days prior to the expiration of the underlying Order. The Applicant further indicated that no one was prejudiced by the delay in filing. (Exhibit 37.)

Subsection 3100.5 provides:

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.

¹ 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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As §§ 3100 through 3105, 3121.5, and 3125.4 do not apply to extension requests, the Board concludes 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 sole purpose of allowing the Board to consider the request. At its February 12, 2013 meeting, finding sufficient good cause shown, the Board, by consensus, approved the waiver of the 30-day filing requirement.

Waiver of One-Extension-Only Requirement Pursuant to 11 DCMR § 3130.6

Also as a preliminary matter, the Board addressed whether to waive the limitation to one extension in 11 DCMR § 3130.6 to allow the grant of a third extension of the Order. In Z.C. Case No. 09-01, the Zoning Commission ("Commission") amended 11 DCMR § 3130, in part, by adding § 3130.6. The amendments adopted by the Commission in Z.C. Case No. 09-01 became effective on June 5, 2009. Subsection 3130.6 expressly limits the number of time extensions to one.² In Z.C. Case No. 09-01, the Commission also specifically authorized the Board to extend the time limits of § 3130.1 and provided the criteria for doing so. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009).

In its letter of December 10, 2012, the Applicant requested that the Board exercise its discretion pursuant to 11 DCMR § 3100.5, and waive the limitation in 11 DCMR § 3130.6 to a single time extension.³

To show good cause for granting the waivers and the time extension, the Applicant filed a sworn affidavit in which it indicated that it is unable to move forward with the building permit application by the expiration date of the Board's Order because of delays that are beyond the Applicant's control. In its statement, the Applicant described the extensive efforts it has made to move forward with the project, the substantial funds it has expended to support the remediation and mitigation of any outstanding environmental issues, and its diligent efforts to pursue approval from DDOE. The Applicant further stated that it believed it would have received the necessary conditional *No Further Action Letter* or the conditional *Case Closure Letter* from DDOE prior to the expiration date of the Order, which would have enabled the Applicant to have filed plans for the approved project with DCRA prior to December 12, 2012; however, this did occur ahead of the expiration date.

² On December 10, 2012, the Zoning Commission took proposed action to approve Z.C. Case No. 12-11 which included text amendments to the BZA Rules and Procedures – Chapter 31 of the Zoning Regulations including the provisions pertaining to time extensions to the validity of BZA orders. The text amendment would both eliminate the limitation on granting more than one time extension (§ 3130.6) and the 30-day rule for filing before the expiration date of an order (§ 3130.9). The Zoning Commission is expected to take final action in February 2013.

³ Subsection 3100.5 provides:

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.

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Moreover, the Applicant indicated that it has not benefitted in any way from the delay of development of the property; and there would be no benefit to the District, the neighborhood, or the Applicant in depriving the Applicant additional time in which to develop the Project. The Applicant also asserted that granting the waiver would be in the interest of administrative efficiency for the Board and the community.

As §§ 3100 through 3105, 3121.5, and 3125.4 do not apply to extension requests, the Board concludes that it is authorized, for good cause shown, pursuant to 11 DCMR § 3100.5, to waive the restriction to one extension pursuant to § 3130.6. At its February 12, 2012 meeting, finding sufficient good cause shown, the Board, by consensus, approved the waiver of the one extension restriction requirement. Further, the Board concludes that granting the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

The merits of the 2012 request to extend

As noted, the Board received the Applicant's request, dated December 10, 2012, for a two-year extension in the authority granted in the underlying BZA Order, which was due to expire December 12, 2012. Included with the request was a sworn and signed affidavit from Michael Dyer, Chief Operating Officer of G&G, LLC, which is the owner of King's Creek, LLC, which is owner of the property that is the subject of BZA Order Nos. 17431, 17431-A, and 18167/17431-B. The purpose of the Mr. Dyer's affidavit was to show good cause for the requests for the waivers and time extension, pursuant to 11 DCMR § 3130.6. (Exhibit 37.)

The Applicant served its extension request dated December 10, 2012 to the Chair of the Advisory Neighborhood Commission ("ANC") 1C, which is the affected ANC, 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. (Exhibit 37, Tab D.) OP, in its report dated February 5, 2013, noted that the application submitted by the Applicant dated December 10, 2012, has been in the public record since it was filed. (Exhibit 38.)

The project is within the boundaries of ANC 1C. ANC 1C filed a letter report on February 8, 2013, in support of the request for an extension. The ANC stated that at a regularly scheduled, duly noticed meeting held on February 6, 2013, at which a quorum of seven of eight members were present, ANC 1C voted unanimously (7:0) to adopt the resolution supporting the application. (Exhibit 39.)

OP filed a report recommending that the Board grant the Applicant's request for a third two-year extension of Order No. 18167/17431. (Exhibit 38.)

According to the Applicant, the reasons for its request to the Board to extend Order No. 18167/17431 for another two years are because of its inability, despite its diligent efforts, to secure all of the required government agency approvals by the expiration date of the Board's Order due to delays that are beyond the Applicant's control. The Applicant's sworn affidavit

stated that since Order No. 17431 was issued, the Applicant had taken many steps to move forward with the overall project, including engaging a leading global real estate agency to market the property to third-party purchasers, creating a marketing brochure, entering into a Letter of Intent with a third-party purchaser in September 2011 and in January 2012, executing an agreement to sell the property to the third-party purchaser. However, the Applicant's statement also indicated that the property is affected by petroleum contamination from the property to the north. BP Products of America ("BP") has taken responsibility for the clean-up and together with the Applicant has been working with DDOE to remedy the environmental issues. To date, some work has been completed to remedy the environmental issues but it has not been completed in order for DDOE to issue either a conditional *No Further Action Letter* or a conditional *Case Closure Letter* to enable the granting of a building permit. The Applicant also stated that it has engaged a real estate agency to market the property and have been successful in attracting potential purchasers, but in one instance a contract was nullified due to the non-completion of the environmental clean-up. The Applicant has another potential purchaser who has entered into an agreement to purchase the property and begin construction contingent on clearance by DDOE. The Applicant indicated that granting the requested extension would provide the time needed for the Applicant to secure the necessary approvals to move forward with the third party purchaser to develop the property.

In addition, the Applicant 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 March 23, 2011. 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 the required government approvals. 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 the additional time to secure those required governmental approvals 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 with a sworn affidavit on December 11, 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 required government approvals due to delays beyond the Applicant's control 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 March 23, 2011 (Exhibit No. 35 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.

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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.

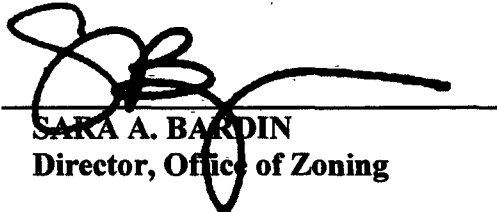
Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 18167-A/17431-C for a third two-year time extension of Order No. 17431, which Order shall be valid until **December 12, 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: 4-0-1 (Lloyd J. Jordan, Nicole C. Sorg, Jeffrey L. Hinkle, and Anthony J. Hood (by absentee vote), to Approve; the third Mayoral appointee 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: February 21, 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.