

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18182-A of Lincoln-Westmoreland Housing, Motion for a Two-Year Extension of BZA Order No. 18182, pursuant to § 3130 of the Zoning Regulations.

The original application was pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a variance from the height requirements under subsections 770.1 and 2604.2, a variance from the floor area ratio requirements under subsection 771.2, a variance from the rear yard requirements under subsection 774.1, a variance from the parking requirements under subsection 2101.1, a variance from the loading requirements under subsection 2201.1, and a special exception from the roof structure requirements under subsection 411.5, to allow the construction of a new apartment building in the ARTS/C-2-B District at premises 1718-1734 7th Street, N.W. (Square 419, Lots 846 and 847).

HEARING DATE (Orig. Application): March 15, 2011
DECISION DATE (Orig. Application): April 5, 2011
FINAL ORDER ISSUANCE DATE (No. 18182): April 14, 2011
DECISION DATES ON MOTION TO EXTEND ORDER: April 23 and May 7, 2013

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 18182

The Underlying BZA Order

On April 5, 2011, the Board of Zoning Adjustment (the “Board” or “BZA”) approved Lincoln-Westmoreland Housing’s (the “Applicant”) request for a variance from the height requirements under §§ 770.1 and 2604.2, a variance from the floor area ratio (“FAR”) requirements under § 771.2, a variance from the rear yard requirements under § 774.1, a variance from the parking requirements under § 2101.1, a variance from the loading requirements under § 2201.1, and a special exception from the roof structure requirements under § 411.5, to allow the construction of a new apartment building in the ARTS/C-2-B District. Thus, pursuant to 11 DCMR § 3103.2, the Board granted variances from the height requirements under §§ 770.1 and 2604.2, a variance from the floor area ratio (“FAR”) requirements under § 771.2, a variance from the rear yard requirements under § 774.1, a variance from the parking requirements under § 2101.1, a variance from the loading requirements under § 2201.1, and a special exception from the roof structure

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BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18182-A
EXHIBIT NO. 37
Board of Zoning Adjustment
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requirements under § 411.5, to allow the construction of a new apartment building in the ARTS/C-2-B District at premises 1718-1734 7th Street, N.W. (Square 419, Lots 846 and 847). Order No. 18182 (the “Order”) was issued April 14, 2011. (Exhibit 31.)

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 April 14, 2013.

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 March 7, 2013, the Board received a letter and Form 150 from the Applicant, 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 April 14, 2013. (Exhibit 33.) The Applicant submitted additional information in support of the Motion to Extend on May 2, 2013, that provided more documentation of the “good cause” for the extension request. (Exhibit 35.)

On April 23, 2013, the Board convened a public meeting to consider the Motion to Extend BZA No. 18182 for 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. On May 2, 2013, the Applicant submitted a signed and notarized affidavit from its Development Manager that indicated that he had written and attested to the accuracy of the previously submitted letter with justifications for the request for an extension, to supplement the record and meet the good cause requirements of 11 DCMR § 3130.6. Additionally, the Applicant submitted two letters of support, one from the Senior Vice President of AGM Financial Services, Inc. which is the lender that has been working with the Applicant to secure project funding for the Applicant’s project, and the other from the D.C. Housing Finance Agency (“DCHFA”) which is the agency issuing the bonds and overseeing the tax credits for the project. (Exhibit 35.)

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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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 to the Chair of Advisory Neighborhood Commission ("ANC") 2C, 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 documentation in support of that motion with them. (Exhibit 33.)

The project is within the boundaries of ANC 2C. ANC 2C did not submit a report or respond to the motion. OP filed a report recommending that the Board grant the Applicant's request for a two-year extension of Order No. 18182 based on the evidence of the Applicant's sworn testimony. OP's report also indicated that the Applicant has continued to make efforts to proceed with the project's building permit phase. (Exhibit 34.)

To demonstrate good cause for its request for an extension, the Applicant's May 2nd filing contained an affidavit from Robert Agus, Development Manager for the Applicant, who indicated that he has been leading the development projects at the subject properties for the Applicant and is attesting to the accuracy of the facts presented in the "Justification for Request" submitted with the Motion to Extend. (Exhibit 35.) That Justification for Request stated that the Applicant has encountered delays in securing financing from DCHFA and the U.S. Department of Housing and Urban Development ("HUD"). The Applicant stated that DCHFA issues tax exempt bonds to support development of affordable rental properties, allocates "4% Low Income Housing Tax Credits" to help secure equity for developments, and also makes loans for pre-development costs. The Applicant plans to use all three DCHFA sources of funding. The Applicant also indicated that the senior staff and board members of DCHFA are supportive of the Applicant's plan. However, due to DCHFA procedural and board changes, including a prolonged vacancy on the DCHFA board, the closing on the Applicant's pre-development loan occurred a full year later than anticipated. This delay caused the Applicant to be unable to pay for its design team to complete the permit plans on schedule. Additionally, the Applicant expects to purchase air rights from WMATA above that portion of Lot 846 that WMATA took to build the Metro, but there have been delays beyond the Applicant's control in obtaining the necessary approvals and agreements with WMATA. Also, one of the project's funding sources is a mortgage insured and credit-enhanced by HUD. Because of the aforementioned WMATA and DCHFA delays, the submission of applications to HUD for mortgage insurance and credit enhancement has been delayed as well. (Exhibit 33.)

The Applicant also submitted two letters to supplement the previously filed request for an extension of time. Both letters indicated support for the project. One letter was from the Senior Vice President of AGM Financial Services, Inc. which is the lender that has been working with the Applicant to secure HUD project funding for the Applicant's project, and the other is from DCHFA's Executive Director indicating that that the agency has been working with the Applicant, remains supportive, and expects to issue approximately \$22 million in tax exempt bonds to fund the project. (Exhibit 35.)

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The Applicant's time extension motion first was put on the Board's April 23, 2013 decision meeting agenda. At that meeting, the Board requested 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 2, 2013, containing the affidavit from the Applicant's Development Manager and the two letters of support from DCHFA and from AFM Financial Services, Inc. regarding the Applicant's efforts to obtain financing for the project. (Exhibit 35.)

As discussed herein, the Applicant submitted a request for a time extension with supplemental information in support of that request and documented the reasons for the delays in obtaining pre-development and construction financing and the necessary agreements for air rights from WMATA. The DCHFA's Executive Director provided a letter of support as well as the financial services company assisting the Applicant in securing HUD financing. The Applicant demonstrated its difficulties and efforts in securing pre-development and construction financing for the project, completion of the permit plans, finalizing the approval of the construction plans, and purchase of air rights, thereby showing good cause for granting the two-year extension of the Board's prior approval. The Applicant's filings indicated that the Applicant has been unable to secure financing and obtaining necessary approvals for the project due to delays beyond its reasonable control. The Applicant has attested that it has been working consistently and diligently to move forward with the project, but that a time extension is required in order for it to have sufficient time in which to complete obtaining financing, permits, and other approvals so can proceed with the project. (Exhibits 33 and 35.)

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 April 14, 2015.

According to the Applicant, the reasons for its request to the Board to extend Order No. 18182 for another two years are because of the inability of securing financing and approvals for construction of the project due to delays in obtaining financing from DCHFA and HUD and other approvals beyond its reasonable control. The Applicant demonstrated that over the last two years, the Applicant has made considerable progress to continue to proceed with the project in good faith, but has had difficulty securing pre-development and construction financing due to delays beyond its control at the agencies from which it needs to obtain approvals and financing. To show good cause for a time extension of the Order, the Applicant's filings included an affidavit from the Applicant's Development Manager, who was able to provide first-hand documentation of the Applicant's efforts as well as its difficulties in securing financing and other approvals. (Exhibit 35.) The Applicant attested that since the Board's approval in BZA Case No. 18182, the Applicant has been proceeding in good faith with the project as approved, but has been unable to obtain sufficient pre-development and construction financing and other approvals due to the conditions beyond the Applicant's control. The Applicant also submitted two letters of support, one from DCHFA and another from a financial services company assisting the

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Applicant with its HUD applications. These letters reiterate the reasons for delay and urge the Board to grant the Applicant the time to complete the project. (Exhibit 35.)

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 April 14, 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 financing, complete its permit plans, obtain agreement to purchase air rights from WMATA, and file for building permits. 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.)

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 its request on March 7, 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.

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 found that the Applicant demonstrated that it was proceeding in good faith with the project as approved through its work with DCHFA, WMATA, and the financial services company assisting the Applicant with its HUD financing applications. Notwithstanding these efforts, the Applicant submitted adequate evidence of the difficulties beyond its reasonable control in obtaining sufficient pre-development and construction financing and in obtaining other necessary approvals to 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 April 14, 2011 (Exhibits 8 and 22, attachment B – Plans and Elevations, 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. 18182-A for a two-year time extension of Order No. 18182, which Order shall be valid until **April 14, 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.

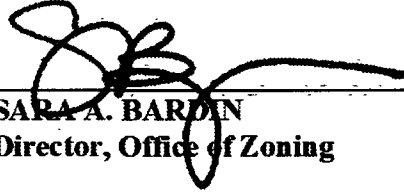
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VOTE: 4-0-1 (Lloyd J. Jordan, Robert E. Miller, S. Kathryn Allen, and Jeffrey L. Hinkle
(by absentee ballot) to APPROVE; one Board member seat vacant.)

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 13, 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.