

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Board of Zoning Adjustment

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Application No. 17809 of Jemal's Uline LLC, pursuant to 11 DCMR §3104.1 for special exception relief from parking requirements for historic structures under § 2120 and a special exception from the roof structure number and setback requirements under § 411 to permit the expansion and renovation of the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts at premises 1130-1150 3rd Street, N.E. (Square 748, Lots 8-11, 42, 43, 802, 808-812).

Note: The applicant initially only sought variance relief from the parking requirements under § 2101.1. At the hearing and in its prehearing statement, the applicant requested to proceed as a special exception under § 2120 from the parking requirement for historic buildings. The request was supported by the Office of Planning and there was no opposition to the request.

HEARING DATE: September 16, 2008
DECISION DATE: September 16, 2008 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case is self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6C, which is automatically a party to this application. ANC 6C submitted a report in support of the application. The Office of Planning (OP) submitted a report recommending approval of the application subject to conditions. The Capitol Hill Restoration Society also submitted a letter in support of the special exception application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception relief under §§ 2120 and 411. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO.

18558

EXHIBIT NO.

9

Board of Zoning Adjustment
District of Columbia
CASE NO.18558
EXHIBIT NO.9

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Based upon the record before the Board and having given great weight to the OP and ANC reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 2120 and 411, that the requested relief can be granted being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

The Board concludes that the Applicant shall have flexibility to provide between 162 and 182 parking spaces. Finally, the Board concludes that the Applicant shall have flexibility to revise the project based on review and comments by the Historic Preservation Review Board provided that the revisions do not affect the zoning relief granted.

Pursuant to 11 DCMR § 3100.5, 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 application, pursuant to Exhibit No. 24 (Plans) as modified by Exhibit No. 29 (Revised Parking Plan), is hereby **GRANTED, SUBJECT to the following CONDITIONS:**

1. The Applicant shall provide a \$25 SmarTrip® card to each of the initial occupants of the development, including at a minimum the first 900 persons employed in the building.
2. The Applicant shall make available transit information in the lobby of the building for distribution to employees.
3. The Applicant shall provide indoor bicycle parking spaces at least equal to the number required pursuant to § 2119 of the Zoning Regulations.
4. The Applicant shall provide a car-sharing parking space in the development, should a car-sharing provider agree to the location of the space. However, if no car-share provider agrees to locate a car-share space in the development, then the Applicant shall provide written confirmation to that effect to the Zoning Administrator.
5. The Applicant shall have flexibility to (a) modify design features to comply with final HPRB approval so long as the modification does not affect the zoning relief granted in this Order, and (b) provide a range of between 162 (minimum) and 182 (maximum) parking spaces on-site, depending upon conditions determined at the time of construction.

VOTE: **5-0-0** (Ruthanne G. Miller, Anthony J. Hood, Marc D. Loud, Shane L. Dettman and Mary Oates Walker to approve)

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

Each concurring member has approved the issuance of this summary order.

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ATTESTED BY:


RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: OCT 02 2008

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

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.

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.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. CODE 2-1401.01 *ET SEQ.* (THE "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, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY

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THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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BZA APPLICATION NO. 17809

As Director of the Office of Zoning, I hereby certify and attest that on **OCTOBER 2, 2008**, 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 who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

Norman M. Glasgow Jr., Esq.
Mary Carolyn Brown, Esq.
Holland & Knight LLP
2099 Pennsylvania Ave., N.W., Suite 100
Washington, D.C. 20006

Chairperson
Advisory Neighborhood Commission 6C
P.O. Box 77876
Washington, D.C., 20013-7787

Single Member District Commissioner 6C04
Advisory Neighborhood Commission 6C
P.O. Box 77876
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Tommy Wells, Councilmember
Ward 6
1350 Pennsylvania Ave., N.W., Suite 408
Washington, D.C. 20004

Matthew LeGrant
Zoning Administrator
Building and Land Regulation Administration
D.C. Department of Consumer & Regulatory Affairs
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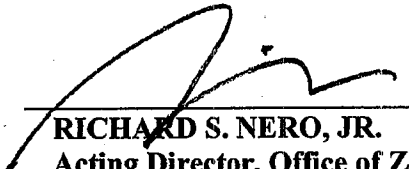
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Matthew LeGrant, Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

Jill Stern, Esquire
General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
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ATTESTED BY:


RICHARD S. NERO, JR.
Acting Director, Office of Zoning

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17809-A of Jemal's Uline LLC, pursuant to 11 DCMR § 3104.1 for special exception relief from parking requirements for historic structures under § 2120 and a special exception from the roof structure number and setback requirements under § 411, to permit the expansion and renovation of the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts at premises 1130-1150 3rd Street, N.E. (Square 748, Lots 8-11, 42, 43, 802, 808-812).

HEARING DATE (Orig. Application):	September 16, 2008
DECISION DATE (Orig. Application):	September 16, 2008 (Bench Decision)
FINAL ORDER ISSUANCE DATE:	October 2, 2008 (Summary Order)
DECISION ON MOTION TO EXTEND ORDER:	September 28, 2010

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17809

The Underlying BZA Order

On September 16, 2008, the Board of Zoning Adjustment ("Board" or "BZA") approved the Applicant's request for special exception relief from parking requirements for historic structures under § 2120 and from the roof structure number and setback requirements under § 411, to permit the expansion and renovation of the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts. Thus, pursuant to 11 DCMR § 3104.1, the Board granted a special exception from parking requirements for historic structures under 11 DCMR § 2120 and a special exception from the roof structure number and setback requirements under 11 DCMR § 411, in order to expand and renovate the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts at premises 1130-1150 3rd Street, N.E. (Square 748, Lots 8-11, 42, 43, 802, 808-812). The Order was issued October 2, 2008. (BZA Order 17809). (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 2, 2010.

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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 August 18, 2010, the Board received a letter, dated August 18, 2010, 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 due to expire October 2, 2010. (Exhibit 34).

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 obtain the necessary financing commitment to begin the project, despite attempts to obtain financing for the project ever since the Board originally approved it. To meet its burden of proof, the Applicant provided a signed and notarized affidavit which indicated that the Applicant has diligently sought financing and attempted to move forward with development of the site since the time of the BZA's original approval. The Applicant noted that while the latest reports suggest that the Washington commercial office market may begin to stabilize in the second half of 2010, its recovery will be slow and will not rebound before the time when the underlying BZA Order was due to expire. (Exhibit 34, Tab B).

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") 6C. ANC 6C filed a report, dated September 13, 2010, indicating that at a duly-noticed, regularly-scheduled, public meeting of the ANC at which a quorum was present, the ANC voted unanimously, 8:0:0, to support the two-year extension, with the caveat that the Applicant's representative ensure the maintenance of the property during the two-year period. (Exhibit 35).

According to the Applicant, the reasons for its request to the Board to extend the time of the Order are because of its inability to secure financing in an unstable economic market and market conditions in the District. The extension would allow the Applicant the additional time in which

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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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.

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;
 - (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

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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 August 18, 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 secure the necessary permits and 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 2, 2008 (Exhibit No. 24 (Plans), as modified by Exhibit No. 29 (Revised Parking Plan) 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 2, 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 2, 2012.

VOTE: 3-0-2 (Meridith H. Moldenhauer, Jeffrey L. Hinkle, Anthony J. Hood, by absentee vote, 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.

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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. 17809-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:

Mary Carolyn Brown, Esq. and Norman M. Glasgow, Jr., Esq.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006

Chairperson
Advisory Neighborhood Commission 6C
P.O. Box 77876
Washington, D.C. 20013

Single Member District Commissioner 6C04
Advisory Neighborhood Commission 6C
1150 5th Street, N.E.
Washington, D.C. 20002

Tommy Wells, Councilmember
Ward Six
1350 Pennsylvania Avenue, N.W., Suite 408
Washington, D.C. 20004

Melinda Bolling, Esq.
Acting General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W.
Washington, D.C. 20024

ATTESTED BY:


JAMISION L. WEINBAUM
Director, Office of Zoning

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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Application No. 17809-B of Jemal's Uline LLC, Motion for a Second Two-Year Extension of BZA Order No. 17809, pursuant to 11 DCMR § 3130.

The original application was pursuant to 11 DCMR § 3104.1 for special exception relief from parking requirements for historic structures under § 2120 and a special exception from the roof structure number and setback requirements under § 411, to permit the expansion and renovation of the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts at premises 1130-1150 3rd Street, N.E. (Square 748, Lots 8-11, 42, 43, 802, 808-812).

HEARING DATE (Orig. Application):	September 16, 2008
DECISION DATE (Orig. Application):	September 16, 2008
FINAL ORDER ISSUANCE DATE (No. 17809):	October 2, 2008
DECISION ON FIRST MOTION TO EXTEND ORDER:	September 28, 2010
ISSUANCE DATE OF FIRST EXTENSION (No. 17809-A):	October 1, 2010
DECISION ON 2ND MOTION TO EXTEND ORDER:	October 23, 2012

**ORDER ON SECOND MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17809**

The Underlying BZA Order

On September 16, 2008, the Board of Zoning Adjustment ("Board" or "BZA") approved the Applicant's request for special exception relief from parking requirements for historic structures under § 2120 and from the roof structure number and setback requirements under § 411, to permit the expansion and renovation of the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts. Thus, pursuant to 11 DCMR § 3104.1, the Board granted a special exception from parking requirements for historic structures under 11 DCMR § 2120 and a special exception from the roof structure number and setback requirements under 11 DCMR § 411, in order to expand and renovate the existing Uline arena and ice house in the C-M-1 and C-M-3 Districts at premises 1130-1150 3rd Street, N.E. (Square 748, Lots 8-11, 42, 43, 802, 808-812). The Order was issued October 2, 2008. (Exhibit 32, BZA Order 17809.) (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 2, 2010.

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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.)

2010 Motion to Extend

On April 6, 2010, the Board received a letter 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 October 2, 2010. (Exhibit 34.)

At its decision meeting on September 28, 2010, 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. 17809, until October 2, 2012. (Exhibit 36, BZA Order No. 17809-A.)

2012 Motion to Extend

On August 31, 2012, the Board received a letter from the Applicant, which requested, pursuant to 11 DCMR § 3130.6, upon a showing of good cause, a second two-year extension of the authority granted in the original BZA Order, which was then due to expire on October 2, 2012. (Exhibit 38.) Pursuant to 11 DCMR § 3130.9, an application for a time extension must be filed at least 30 days prior to the date upon which an order is due to expire. (11 DCMR § 3130.9.) Having filed the motion on August 31st for the second extension of the Order due to expire October 2, 2012, the Applicant met the time requirement under § 3130.9.

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

As part of its consideration of the motion for a second two-year time extension, the Board first addressed whether to waive the limitation to one extension in 11 DCMR § 3130.6 to allow the grant of a second 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.

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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Subsection 3130.6 expressly limits the number of time extensions to one.³ In Z.C. Case No. 09-01, the Commission 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).

The Applicant's motion dated August 31, 2012, requested a second time extension of two years. The Office of Planning ("OP"), in its report on the second extension request, noted that approval of a second extension is up to the discretion of the Board. (Exhibit 39.) During deliberations, the Board noted that in the past, it has exercised its discretion pursuant to 11 DCMR § 3100.5⁴, to waive the limitation in 11 DCMR § 3130.6 to a single time extension for good cause shown.

The OP report also indicated that it would not object to a second extension in this case because the original approval and the first extension had been both granted before the text of § 3130.6 became effective. As §§ 3100 through 3105, 3121.5, and 3125.4 do not apply to extension requests, the Board concluded 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 October 23, 2012 meeting, finding sufficient good cause shown, the Board approved the waiver of the one extension restriction requirement as part of its consideration of the underlying motion to extend.

The merits of the 2012 request to extend

As noted above, the Board received the Applicant's request, dated August 31, 2012, for a two-year extension in the authority granted in the underlying BZA Order, which was due to expire October 2, 2012. Included with the request was a sworn and signed affidavit from Paul Millstein, Vice President, Douglas Development, Inc. and Managing Member of the Applicant, to show good cause, pursuant to 11 DCMR § 3130.6. (Exhibit 38, Tab B.) Also included with the motion was additional documentation in support of the Applicant's good cause for its request. (Exhibit 38, Tabs C and D.)

The Applicant served its extension request dated August 31, 2012 to all parties to the initial BZA application, which included Advisory Neighborhood Commission ("ANC") 6C, which is the affected ANC, and 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 38.) OP, in its

³ During the Board's deliberations, there was discussion of the Board's discretion to waive the one-time limitation and whether the Zoning Commission would be taking the issue up in a text amendment case to amend 11 DCMR § 3130 to change or eliminate this restriction. The Zoning Commission is scheduled to hear Z.C. Case No. 12-11, which is a rulemaking case that includes a provision for amending this restriction, on November 8, 2012.

⁴ 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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report dated October 16, 2012, noted that the application submitted by the Applicant dated August 31, 2012, has been in the public record since filing. (Exhibit 39.)

The project is within the boundaries of ANC 6C. ANC 6C did not submit a report on the request.

OP filed a report recommending that the Board grant the Applicant's request for a second two-year extension of Order No. 17809. (Exhibit 39.) The District Department of Transportation ("DDOT") filed a report of no objection to approval of the request. (Exhibit 40.)

According to the Applicant, the reasons for its request to the Board to extend Order No. 17809 for another two years are because of its continued inability to finance the construction of the project in view of the deterioration the real estate market. The Applicant indicated in its motion and the supporting documents it submitted with that motion that the original approval occurred just as the office real estate market entered into a significant downturn. Despite the problems with the market, the Applicant stated that since the original approval in 2008 until the present, it had made aggressive attempts to obtain financing for the project, but had not been successful. The Applicant stated that, although it has contacted several lenders and other potential investors, those potential investors and lending institutions had not approved financing that would have made the project viable. Furthermore, the Applicant indicated that it continues to monitor the financial markets closely in order to secure financing for the project. The Applicant noted that while the latest reports suggest that the Washington commercial real estate market may be starting to stabilize, it is not anticipated that recovery would occur ahead of the Order's scheduled expiration on October 2, 2012, thereby necessitating a further extension request. (Exhibit 38.)

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 October 2, 2008. 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

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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 with a sworn affidavit on August 31, 2012, which met the required 30-day period for tolling.

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 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

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Applicant's plans for development of the site would be unchanged from those approved by the Board in its Order dated October 2, 2008 (Exhibit No. 24 (Plans), as modified by Exhibit No. 29 (Revised Parking Plan) 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.

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. 17809-B for a second two-year time extension of Order No. 17809, which Order shall be valid until **October 2, 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: 3-1-1 (Lloyd J. Jordan, Jeffrey L. Hinkle, Nicole C. Sorg, to Approve; Anthony J. Hood, to Oppose; and 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: October 24, 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.