

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning



MEMORANDUM

To: Office of Documents and Administrative Issuance (via-email)
From: Sharon S. Schellin
Secretary to the Zoning Commission
Date: August 24, 2009
Re: Publication for the Office of Zoning

Please publish the following in the *D.C. Register* on August 28, 2009:

1. Z.C. Order No. 05-17C/05-324C (Case No. 05-17C/05-32C);
2. Z.C. Order No. 06-29A (Case No. 06-29A);
3. Z.C. Order No. 06-31B (Case No. 06-31B); and
- ✓ 4. Z.C. Order No. 06-43A (Case No. 06-43A).

Attachment

ZONING COMMISSION
District of Columbia
CASE NO. 06-43A
EXHIBIT NO. 7

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 06-43A
Z.C. Case No. 06-43A
(American University – Extension of the Validity of Z.C. Order No. 06-43)
July 27, 2009

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia (the "Commission") was held on July 27, 2009. At the meeting, the Commission approved a request from American University ("AU" or "Applicant"), pursuant to § 3130.6, for an extension of the validity of Z.C. Order No. 06-43 (the "Subject Order"), by granting a two-year extension of the time period set forth in § 3130.1 to file plans for the renovation of and addition to the McKinley Building, on the Main Campus of American University, for the purposes of obtaining a building permit. No other extension was formally sought or granted.

FINDINGS OF FACT

1. By Zoning Commission Order No. 06-43, the Commission approved a special exception to renovate the McKinley Building, on AU's Main Campus, to become home to the new School of Communications. The renovation was to include the demolition and rebuilding of a portion of the building, and includes the expansion of the building, primarily underground. The entire renovation will add approximately 3,152 square feet of new gross floor area.
2. Pursuant to 11 DCMR § 3035.5, the Commission uses the Board of Zoning Adjustment ("BZA") rules of practice and procedure in processing, reviewing, and approving college and university uses.
3. Z. C. Order No. 06-43 became effective upon its publication in the *D.C. Register* ("DCR") on July 20, 2007. Pursuant to 11 DCMR § 3130.1, the Commission's approval is valid for a period of two years. If no application for a building permit or motion for time extension is filed within that timeframe, the approval expires.
4. A building permit must be issued six months after a permit application is filed, 11 DCMR § 3130.2, and construction must commence no later than six months thereafter, 11 DCMR § 3130.3.
5. Effective June 5, 2009, a new § 3130.6 was added to the Zoning Regulations. That provision authorized the BZA to, "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 certain showings are made.
6. The BZA's rules do not expressly authorize an extension of the time within which to start construction.
7. By letter dated and received by the Commission on June 16, 2009, pursuant to 11 DCMR § 3130.6, the Applicant filed a request to extend the validity of the Z.C. Order No. 06-43

for a period of two years, such that an application for a building permit must be filed no later than July 20, 2011, and construction must commence no later than July 20, 2012.

8. The Applicant's extension request was made pursuant to and only addressed the requirements of 11 DCMR § 3130.6 for extending the validity of the Subject Order. (Exhibit 1.) It did not seek a waiver from the construction timing requirements of § 3130.3 or explain why such a waiver is needed.
9. As to § 3130.6, an Applicant must demonstrate good cause by offering substantial evidence of one or more of the criteria set forth in § 3130.6(c). In this instance, the Applicant asserted its, "inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control."
10. The Applicant offered substantial evidence that it has been unable to follow its financial plan for raising donations of \$20 million to pay for a major portion of the McKinley Building renovation costs. AU noted that while significant effort is being put into fundraising for the School of Communications, the state of the economy has affected gift-giving and has slowed progress such that AU has received pledges that total less than five percent of its fundraising goal. Given the turmoil in the financial markets, AU noted that it is not prudent to proceed with the project until more progress is made in fundraising. (Exhibit 1.)
11. Advisory Neighborhood Commission ("ANC") 3D submitted a letter to the Commission on July 5, 2008, indicating the ANC's vote in support of extending the approval with the caveat that the contribution of the McKinley Building expansion to increased traffic will be included in AU's 2011 Campus Plan treatment of the cumulative campus traffic increase with appropriate traffic mitigation measures. (Exhibit 4.)
12. Thomas Smith, ANC Commissioner for SMD 3D02, submitted a letter to the Commission on July 8, 2009, opposing the extension of the approval. In his letter, Mr. Smith stated that AU failed to meet the requirements in 11 DCMR § 3130.6. He claimed that the application was not delivered in a timely manner and that the community did not have sufficient time to review the request. Also, Mr. Smith stated that traffic conditions have changed since the special exception application for further processing was approved. Further, Mr. Smith stated that AU should have been able to raise the funds to commence construction on the McKinley Building project and failed to produce substantial evidence why it did not have the funds. Mr. Smith requested that the Commission delay action on the application for two to three months. (Exhibit 5.)
13. Neighbors for a Livable Community submitted a letter to the Commission on July 25, 2009 in opposition to extending the approval, stating that the McKinley Building project should be considered as part of AU's next Campus Plan cycle. (Exhibit 6.)

CONCLUSIONS OF LAW

Pursuant to 11 DCMR §3130.6 of the Zoning Regulations, the Commission may grant one extension of the time periods outlined in 11 DCMR § 3130.1 for good cause shown upon a request made before the expiration of the approval. As noted, the Applicant is asserting the existence of good cause based upon its, “inability to obtain sufficient project financing due to economic and market conditions beyond the applicant’s reasonable control.” (11 DCMR § 3130.6 (c).) In addition, there must be, “no substantial change in any of the material facts upon which the [Commission] based its original approval of the application that would undermine the [Commissions] justification for approving the original application.” (11 DCMR § 3130.6 (b).)

The Commission concludes that the Applicant complied with the notice requirements of 11 DCMR § 3130.6(a) by serving all parties to Case No. 06-43 (the only party was ANC 3D) with a copy of the application on June 16, 2009, and allowing them 30 days before the public meeting to respond.

The Commission concludes that there has been no substantial change in any material facts that would undermine the Commission’s justification for approving the special exception for further processing of an approved campus plan. The Applicant has not changed any aspects of the proposed McKinley Building project, and the impacts and conditions under which the special exception was considered have not appreciably changed.

The Commission concludes that the Applicant has met the burden of proof of showing substantial evidence of good cause pursuant to 11 DCMR § 3130.6 (c). Specifically, AU has demonstrated that economic and market conditions beyond its reasonable control have affected gift-giving and have slowed fundraising progress such that AU cannot proceed with the project until more progress is made in fundraising.

As to the requirement of § 3130.3 that construction must commence six months after a building permit is issued for this project, the Applicant did not seek or prove the need for a waiver of that provision and so none can be granted. The Commission assumes that the Applicant will not apply for a building permit until it has resolved the funding issues it describes, and therefore will be prepared to commence construction within six months after the permit is issued. Should unforeseen circumstances thereafter delay the start of construction, the Applicant may seek a waiver of § 3130.3.

The Commission is required under D.C. Official Code § 1-309.10(d) to give great weight to the issues and concerns expressed in the affected ANC's written recommendation through articulating with precision why it does or does not find the advice persuasive. The Commission concludes that it is not appropriate or necessary to add the condition requested by ANC 3D to this Order. A condition cannot impose a requirement on a future proceeding and, in any event, the Commission’s review of AU’s next Campus Plan must address all relevant traffic impacts.

The ANC did not indicate whether it would support the requested extension without the condition imposed, and this Commission cannot assume either the ANC's support or opposition.

DECISION

In consideration of the Findings of Fact and the Conclusions of Law herein, the Zoning Commission of the District of Columbia hereby orders **APPROVAL** of the application for a two-year extension of the time period set forth in § 3130.1 for the filing of the plans approved in Z.C. Order 06-43 for the purposes of obtaining a building permit; that is until July 20, 2011. Pursuant to § 3130.3, construction shall commence no later than six months after the permit is issued. Failure to meet either deadline will result in the expiration of the validity of the Subject Order.

The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, 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. 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 material, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination, which is also prohibited by the act. In addition, harassment based on any of the above protected categories is also prohibited by 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 denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

On July 27, 2009, upon motion of Chairman Hood, as seconded by Vice Chairman Keating, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of **5-0-0** (Anthony J. Hood, William W. Keating, III, Konrad W. Schlater, Peter G. May, and Michael G. Turnbull to adopt).

In accordance with the provisions of 11 DCMR § 3028.8, this Order shall become final and effective upon publication in the *D.C. Register*, that is, on August 28, 2009.