

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17600-B / 17606-C of:

Application of Dakota Square LLC, Motion of Fort Totten North,¹ pursuant to 11 DCMR § 3130.6, for a Two-Year Extension of BZA Order No. 17600;

and

Application of Dakota Points LLC, Motion of Fort Totten South,² pursuant to 11 DCMR § 3130.6, for a Two-Year Extension of BZA Order No. 17606-A

Original Application No. 17600 was pursuant to 11 DCMR § 3103.2, for a variance from the loading berth requirements under § 2201.1, to allow the construction of a mixed-use (commercial/residential) building in the C-2-A District at premises 300-320 Riggs Road, N.E. (Square 3748, Lot 52).

HEARING DATE (Orig. Application):	March 20, 2007
DECISION DATE (Orig. Application):	March 20, 2007
FINAL DATE OF ORDER (Order No. 17600):	March 21, 2007
DECISION ON 2009 MOTION TO EXTEND ORDER:	March 24, 2009
DATE OF ORDER ON 2009 MOTION (Order No. 17600-A)	April 7, 2009
DECISION ON 2011 MOTION TO EXTEND ORDER:	April 12, 2011

Original Application No. 17606 was pursuant to 11 DCMR § 3104.1, for a special exception from the roof structure uniform height provisions under § 411, to construct a four-story residential building in the C-2-A District at premises 5545-5549 South Dakota Avenue, N.E. (Square 3760, Lot 10) and 5553-5575 South Dakota Avenue, N.E. (Parcel 137/86).

HEARING DATE (Orig. Application):	May 8, 2007
DECISION DATE (Orig. Application):	May 8, 2007
FINAL DATE OF ORIGINAL ORDER (Order No. 17606):	May 9, 2007
FINAL DATE OF CORRECTED ORDER (Order No. 17606-A):	May 9, 2007
DECISION ON 2009 MOTION TO EXTEND ORDER:	March 24, 2009
DATE OF ORDER ON 2009 MOTION (Order No. 17606-B):	April 7, 2009
DECISION ON 2011 MOTION TO EXTEND ORDER:	April 12, 2011

¹ Fort Totten North is the successor in interest to Dakota Square LLC.

² Fort Totten South is the successor in interest to Dakota Points LLC.

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ORDER ON MOTIONS TO EXTEND THE VALIDITY
OF
BZA ORDER NOS. 17600 AND 17606-A

This order concerns a motion filed pursuant to 11 DCMR § 3030.6 to extend the validity of BZA Order Nos. 17600 and 17606-A. The joint motion was filed by the successors in interest to the Applicants in the original orders. These successor entities will hereafter be referred to collectively as “the Developers.”

For the reasons stated below, the Board of Zoning Adjustment (“Board” or “BZA”) grants the request. In doing so, the Board is issuing a single order that consolidates the two approvals for the sole purpose of establishing a single expiration date of May 9, 2013; which is two years from the most recent expiration date of Order 17606-A. This is being done because the two orders both concern the same project and the Board wishes to allow the Developers the greatest amount of time to apply for building permits. In all other respects, these remain separate approvals. Among other things, that means that each order retains its own separate requirement that a building permit for the structure approved therein be applied for by the new expiration date. The expiration of one order due to the failure of one of the Developers to file for a building permit by May 9, 2013, will not affect a successful vesting of the other order.

Underlying BZA Orders

On March 21, 2007, the Office of Zoning (“OZ”) filed in the record and served upon the parties an order approving Application No. 17600 for a variance from the loading berth requirements under § 2201.1 of the Zoning Regulations. Pursuant to 11 DCMR §§ 3125.5 and 3125.9, the order became “final” on that date and took effect 10 days later.

On May 9, 2007, OZ filed in the record and served upon the parties an order approving Application No. 17606 for a special exception from the roof structure requirements of § 411 of the Zoning Regulations. However, because of a minor error in the caption of this order, the Board issued a corrected summary order to accurately reflect that the proposal was for a four-story residential building, and not a four-unit residential building. The corrected order was in all other respects identical to BZA Order No. 17606, including its final date of May 9, 2007 (BZA Order No. 17606-A).

First Extensions of the BZA Orders

Subsection 3130.1 of the Board’s Rules of Practice and Procedure provides in part that:

No order of the Board authorizing the erection or alteration of a structure shall be valid for a period longer than two (2) years ... unless, within such period, the

BZA ORDER NO. 17600-B / 17606-C
PAGE NO. 3

plans for the erection or alteration are filed for the purposes of securing a building permit.

Although the provision does not specify whether the two-year period begins on the date the order became final or when it took effect, the Board has traditionally used the former as the start date. Therefore, Order No. 17600 would expire on March 21, 2009 and Order No. 17606-A would expire on May 9, 2009 unless building permits were applied for on or before those dates.

On or about March 6, 2009, counsel for the original Applicants in Applications 17600 and 17606 filed two letters with the Board requesting extensions of the validity of Orders Nos. 17600 and 17606-A.

Because the Zoning Regulations did not, at that time, contain a provision expressly authorizing the BZA to extend the validity of an order past the two-year limit set forth in § 3130.1, the Applicants requested that the Board waive that provision. In addition, because Order No. 17600 was likely to expire before the BZA could act on the request, and because Title 11 was silent on the subject, the applicant in that case specifically requested that the “Board toll the expiration date of the underlying Order from the date the motion to extend was filed.” *Application No. 17600-A of Dakota Square LLC*, 56 DCR 2995 (2009). In response, the Board found “that the expiration was tolled at the time the Applicant’s motion was filed.” *Id.*

Concerning the request to extend the orders, the Board granted the waiver requested pursuant to 11 DCMR § 3100.5. That provision authorizes the Board to waive many of its rules, including § 3130.1, upon a showing of good cause shown, if the waiver would not prejudice the rights of any party, and the waiver was not otherwise prohibited by law. In each instance, the Board found that the criteria under § 3100.5 had been satisfied and, through the issuance of Order Nos. 17600-A and 17606-B, the Board extended the validity of each underlying order for a period not to exceed two years. The new expiration date for Order No. 17600 was March 21, 2011 and the new expiration date for Order No. 17606-A was May 9, 2011.

Second Request for Extensions of the BZA Orders

On or about March 8, 2011, OZ received a second request to extend the expiration of each order. (17600, Exhibit 39; 17606, Exhibit 44.)

The motion asserted that the Developers were unable to proceed with their building permit applications due to the “protracted reconstruction of the adjacent intersection by the District Department of Transportation (“DDOT”), coupled with ongoing negative economic circumstances.” (17600, Exhibit 39; 17606, Exhibit 44.)

The Office of Planning (“OP”) submitted a report supporting the requests and agreeing with the basis asserted. OP specifically stated:

BZA ORDER NO. 17600-B / 17606-C
PAGE NO. 4

The reconstruction of South Dakota Avenue and Riggs Road was originally proposed to be completed in the fall of 2009, but work did not begin until the spring of 2010. Completion is now anticipated to occur in September 2011, at the earliest. The condition of the roadways, including lane closures, makes it difficult for the applicant to access the site with its construction vehicles. These factors are all beyond the applicant's reasonable control.

(17600, Exhibit 40; 17606, Exhibit 45.)

Procedural Issues

After the issuance of the orders granting the waivers, but prior to the filing of the new requests, the Zoning Commission ("Commission") adopted amendments to § 3130 to specifically authorize the Board to extend the time limits of § 3130.1. *Z.C. Order No. 09-01*, 56 DCR 4388 (June 5, 2009). Among other things, the new provisions allowed for only one extension of an order. (11 DCMR § 3130.6.) The rules also addressed the question of whether an order would remain valid if the Board was unable to decide a request prior to its expiration date. The rules provide that an order's expiration would be tolled if an extension request was filed at least 30 days prior to the expiration date. (11 DCMR § 3130.9.)

As to the criteria for granting a request, new § 3130.6(c) required the demonstration of good cause through 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.

1. May the Board grant a second extension of the orders?

The first question for the Board was whether the Developers were barred from making their requests due to the language in § 3130.6 which expressly allows the Board to grant only one extension.³ The Board finds that the prior extension is not counted towards this limit. As explained above, the new regulation was not in effect as of the final date of the orders granting the first requests for an extension. Section 6(A) of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-502 (6)(A), defines a rule to mean the "whole or any part of any Mayor's or agency's statement of general or particular applicability *and future effect*"

³ This limitation also may be waived pursuant to § 3100.5.

BZA ORDER NO. 17600-B / 17606-C

PAGE NO. 5

(emphasis added). Therefore, the limit of one extension stated in the new rule was prospective only, so that the prior extension does not count towards this limit.

2. Should the Board waive the 30-day filing prerequisite to toll Order No. 17600-A's expiration?

Subsection 3130.9 reads as follows:

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.

The flip side of this rule is that if a request to extend an order is filed less than 30 days before the order's expiration date, the order will expire unless the Board grants the request before that date.

In this instance, the request to extend both orders was filed on March 8, 2011. Order No. 17606-B was not due to expire until May 9, 2011, and the Board voted to grant the request on April 12th, well before expiration would have occurred. Therefore, there was no need to toll the expiration date.

However, just as happened in the first extension request to extend Order No. 17600, the second request was not filed in sufficient time to allow the Board to decide the case before expiration. As noted, the Commission adopted § 3130.9 to expressly permit the tolling of an order if a request is filed at least 30 days before expiration. In doing so, the Commission modified the precedent established in Order No. 17600-A that allowed tolling to occur no matter how close to the expiration date the request was filed. Nevertheless, the Developer claims to have not understood the meaning of § 3130.9 and, having not complied with it, seeks a waiver from its time limit. Since the request was filed before the order's expiration, the Board is willing to retain jurisdiction over the order to consider the request. As already noted, the Applicant must demonstrate good cause, the absence of prejudice, and that no law prohibits the waiver.

As to good cause, the Applicant states it found § 3130.9 confusing and did not read it as being at all relevant to the Board's jurisdiction to decide requests to extend facially expired orders. While the Board does not find § 3130.9 to be unclear in any way, it recognizes the relative newness of the provision and that the Board in Order No. 17600-A expressly ruled that the filing of the prior request less than 30 days before order expiration automatically tolled its expiration. Clearly, the Commission's adoption of § 3130.9 modified that precedent by requiring that time extension requests be filed at least 30 days prior to an order's expiration date in order for tolling to occur. The Board will honor this intent going forward and will not consider any future request to waive § 3130.9 based upon its purported ambiguity. With that *caveat* made, the Board finds good cause under these unique circumstances.

As to the remaining elements for a waiver, the Board concludes that merely maintaining the *status quo* to permit the Board to consider the merits of the extension prejudices no one. The

BZA ORDER NO. 17600-B / 17606-C
PAGE NO. 6

Board further concludes that there is no law precluding granting the waiver. The Board therefore waives the 30-day filing prerequisite to the tolling of the expiration date of Order No. 17600-A "for the sole purpose of allowing the Board to consider the request." (11 DCMR § 3130.9.)

The Merits of the Request to Extend

The Board finds that the motion has met the criteria in § 3130.6 to extend the validity of the two orders. The failure to file for the two building permits was due largely to the protracted reconstruction of the adjacent intersection by DDOT. This factor was beyond the Developers' reasonable control within the meaning of § 3130.6(c)(3) and constitutes the "good cause" required under § 3130.6(c)(1). In addition, as required by § 3130.6(b), the Developers have demonstrated that there is no substantial change in any of the material facts upon which the Board based its original approval in Order No. 17600 or Order No. 17606-A.

Pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case Nos. 17600 and 17606 for a two-year time extension of Order Nos. 17600 and 17606-A, which Orders shall be valid until May 9, 2013, within which time the Applicant must file plans for the proposed structures with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: **4-0-1** (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Michael G. Turnbull to Approve; No other Board member (vacant) participating)

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: JUL 19 2011

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.