

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17679-B of Jemal's TP Land and LLC, Motion for a Second Two-Year Extension of BZA Order No. 17679, pursuant to 11 DCMR § 3130.

The original application was pursuant to 11 DCMR § 3104.1, for special exceptions under §§ 353 and 2516, and under § 411 regarding roof structures, to permit the construction of a new residential development (two multiple dwellings, each containing 38 dwelling units) in the R-5-A District at premises 6923-6953 Maple Street, N.W. and 6916-6926 Willow Street, N.W. (Square 3357, Lots 26, 27, 28, 29, 40, 808, 811, 814, 815, 818, 819, 820, 824, 825, 840, and 843)

HEARING DATE (Orig. Application): November 13, 2007
DECISION DATES (Orig. Application): January 8, 2008 and February 5, 2008
FINAL ORDER ISSUANCE DATE (No. 17679): April 23, 2008
DECISION ON FIRST MOTION TO EXTEND ORDER June 22, 2010
ISSUANCE DATE OF FIRST EXTENSION (No. 17679-A): June 29, 2010
DECISION ON 2ND MOTION TO EXTEND ORDER: June 12, 2012

**ORDER ON SECOND MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17679**

The Underlying BZA Order

On January 8 and February 5, 2008, the Board of Zoning Adjustment (the "Board" or "BZA") approved the Applicant's request for special exceptions under §§ 353 and 2516, and under § 411 regarding roof structures to permit the construction of a new residential development (two multiple dwellings, each containing 38 dwelling units) in the R-5-A District. Thus, pursuant to 11 DCMR § 3104.1, the Board granted special exceptions under §§ 353 and 2516 which authorizes exceptions to building lot control in residence districts and under § 411 to permit the construction of a new residential development in the R-5-A District at premises 6923-6953 Maple Street, N.W. and 6916-6926 Willow Street, N.W. (Square 3357, Lots 26, 27, 28, 29, 40, 808, 811, 814, 815, 818, 819, 820, 824, 825, 840 and 843) Order No 17679 (the "Order") was issued April 23, 2008 (Exhibit 46)

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17679-B
EXHIBIT NO. 59

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BZA APPLICATION NO. 17679-B
PAGE NO. 2

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 23, 2010.

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 April 23, 2010 (Exhibit 48.) Also, on May 17, 2010, the Applicant filed a letter with the Board, dated May 11, 2010, that contained supplemental information together with a request to waive § 3130 9 of the Zoning Regulations to accept the Applicant's time extension motion that, with the supplemental information being filed, was completely filed less than 30 days prior to the expiration of the underlying Order and to toll that Order's expiration. (Exhibit 50.)

At a decision meeting on June 22, 2010, the Board found that the requirements of 11 DCMR § 3130 6 had been met and granted the Applicant both the waiver it requested pursuant to § 3130 9 as well as a two-year extension of BZA Order No 17679 until April 23, 2012 (Exhibit 52, BZA Order No 17679-A.)

2012 Motion to Extend

On April 20, 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 April 23, 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 54.)

Waiver of 30-Day Filing Requirement Pursuant to 11 DCMR § 3130 9

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

BZA APPLICATION NO. 17679-B
PAGE NO. 3

As stated, the Applicant's request for a second extension of the Order that was submitted on April 20, 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 54.) 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 three days before the Order was due to expire on April 23, 2012, thereby requiring a waiver of the requirements of § 3130.9.³

In its April 20, 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 April 20th submission, the Applicant stated that when it was made aware of the impending expiration, the Applicant researched the loan documents and financing restrictions related to the Property and that, due to the Applicant's extensive real estate portfolio, this was not an insignificant task and took considerable time to complete, thereby resulting in the Applicant filing its request for an extension less than 30 days prior to the expiration of the underlying Order. The Applicant indicated that no one was prejudiced by the delay in filing. (Exhibit 54)

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.

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 June 12, 2012 meeting, finding sufficient good cause shown, the Board voted to approve 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 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. Subsection 3130.6 expressly limits the number of time

³ During the Board's deliberations of this waiver request, it was mentioned that at a recent Zoning Commission public meeting, the Office of Planning had announced that it intended to bring forward a text amendment to amend 11 DCMR § 3130 to change or eliminate this requirement

BZA APPLICATION NO. 17679-B
PAGE NO. 4

extensions to one⁴ 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 April 20, 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 extension⁵

To show good cause for granting the waiver, the Applicant indicated that it is unable to obtain financing for the construction of the Project, the Applicant 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 June 12, 2012 meeting, finding sufficient good cause shown, the Board voted to approve 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 above, the Board received the Applicant's request, dated April 20, 2012, for a two-year extension in the authority granted in the underlying BZA Order, which was due to expire April 23, 2012 Included with the request was a sworn and signed affidavit from Douglas Jemal, Managing Member of the Applicant, to show good cause, pursuant to 11 DCMR § 3130 6 (Exhibit 54)

The Applicant served its extension request dated April 20, 2012 to the Chair of the Advisory Neighborhood Commission ("ANC") 4B, 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

⁴ During the Board's deliberations of this waiver request, it was mentioned that at a recent Zoning Commission public meeting, the Office of Planning had announced that it intended to bring forward a text amendment to amend 11 DCMR § 3130 to change or eliminate this restriction

⁵ 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

BZA APPLICATION NO. 17679-B
PAGE NO. 5

sharing all the documentation in support of that motion with them (Exhibit 54) OP, in its report dated June 5, 2012, noted that the application submitted by the Applicant dated April 20, 2012, has been in the public record since it was filed on April 20, 2012 (Exhibit 55.)

The project is within the boundaries of ANC 4B ANC 4B filed a letter on May 30, 2012, with an attached resolution in support of the request for an extension. The ANC stated that at a regularly scheduled, duly noticed meeting on May 22, 2012, at which a quorum of eight of nine members were present, ANC 4B voted unanimously (8-0) to adopt the resolution supporting the application (Exhibit 57)

OP filed a report recommending that the Board grant the Applicant's request for a second two-year extension of Order No 17679 (Exhibit 55) Councilmember Muriel Bowser, who represents Ward 4, which is the ward in which the project is sited, also submitted a letter on June 7, 2012, in support of the application (Exhibit 56)

According to the Applicant, the reasons for its request to the Board to extend Order No 17679 for another two years are because of its inability to finance the construction of the project in view of the deterioration the real estate market The Applicant also stated that a portion of the property is encumbered by a securitized loan which matures in 2013 and that the lender is unwilling to release that encumbered portion of the property and allow the development to proceed In its affidavit the Applicant indicated that over the last four years, there has been a downturn in the real estate market and the economy has fallen into recession, leading to economic conditions beyond the Applicant's control. This has discouraged financial institutions from lending for residential projects The Applicant also stated that its attempts to seek financing for the project from financial institutions such as Berkadia, Wells Fargo, and Virginia Commerce Bank have not been successful because of the uncertainty in market conditions and the softening of the housing market The Applicant noted in its sworn statement that it had acquired a securitized loan with Morgan Stanley Mortgage Capital, Inc which matures in 2013. That securitized loan encumbers a portion of the property and the lender is unwilling to release it and allow the development of the project to proceed. The Applicant stated that due to the downturn in residential market conditions since the approval of the project in 2008, it is unable to pay off the loan prior to the loan's maturity date in 2012 Therefore, due to the encumbrance and market conditions, the Applicant is unable to proceed with the development The Applicant requests the second two-year extension to allow time for the securitized loan to mature and to allow it to obtain financing for the construction of the project The Applicant believes that the real estate sub-market of the project area will be stronger by 2015, giving potential lending institutions more comfort with the project. (Exhibit 54.)

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 23, 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

BZA APPLICATION NO. 17679-B
PAGE NO. 6

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)

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

BZA APPLICATION NO. 17679-B
PAGE NO. 7

expire. Although the Applicant filed its request with a sworn affidavit on April 20, 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 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 Applicant's plans for development of the site would be unchanged from those approved by the Board in its Order dated April 23, 2008 (Exhibits No. 27 and 42 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 17679-B for a second two-year time extension of Order No. 17679, which Order shall be valid until **April 23, 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 ON WAIVER OF § 3130.9 MOTION (30-DAY FILING DEADLINE): 5-0-0

(Michael G Turnbull, Nicole C. Sorg, Lloyd J Jordan, Rashida Y. V MacMurray, and Jeffrey L. Hinkle, to Approve.)

VOTE ON WAIVER OF § 3130.6 MOTION (ONE-TIME EXTENSION): 5-0-0

(Lloyd J Jordan, Nicole C Sorg, Rashida Y. V. MacMurray, Jeffrey L Hinkle, and Michael G. Turnbull, to Approve)

VOTE ON TWO-YEAR TIME EXTENSION MOTION: 5-0-0

(Lloyd J. Jordan, Nicole C. Sorg, Rashida Y. V. MacMurray, Jeffrey L. Hinkle, and Michael G. Turnbull, to Approve)

BZA APPLICATION NO. 17679-B
PAGE NO. 8

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: JUN 18 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.