

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18723-A of 2101 Morning Bright LLC, pursuant to 11 DCMR § 3130.6¹ for a two-year time extension of BZA Order No. 18723.

The original application was pursuant to 11 DCMR §§ 3103.2 and 3104.1, for variances from the lot occupancy (§ 772), rear yard (§ 774), and off-street parking location (§ 2116.12) requirements, and a special exception from the rooftop structure requirements under § 770.6(b), to allow construction of a mixed-use residential building with ground-floor retail in the ARTS/C-2-B District at 2105 10th Street, N.W. (Square 358, Lots 5, 6, and 802).

HEARING DATES (Original Application):	March 11 and May 20, 2014
DECISION DATE (Original Application):	May 20, 2014
EFFECTIVE DATE (Original Application):	June 2, 2014
DECISION DATES (Time Extension):	May 24 and June 7, 2016

DECISION AND ORDER

For the reasons explained below, the Board of Zoning Adjustment (the “**Board**”) voted to approve the Application.

FINDINGS OF FACT

The Order

1. By Order No. 18723 (the “**Order**”), the Board granted variances pursuant to 11 DCMR §§ 3103.2 and 3104.1 from the lot occupancy (§ 772), rear yard (§ 774), and off-street parking location (§ 2116.12) requirements, and a special exception from the rooftop structure requirements under § 770.6(b), to allow construction of a mixed-use residential building with ground-floor retail in the ARTS/C-2-B District at 2105 10th Street, N.W. (the “**Property**”) (Square 358, Lots 5, 6, and 802).

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraphs, are to provisions that were in effect on the date this Application was heard and decided by the Board of Zoning Adjustment (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (“the 2016 Regulations”). The repeal of the 1958 Regulations has no effect on the validity of the Board’s decision or the validity of this order.

2. The Order stated that there were only two parties to the original Case No. 18723 – the owner of the Property - 2101 Morning Bright LLC (the “**Applicant**”) – and ANC 1B. Although the Board had received party status requests in opposition to two individuals, the requests were withdrawn prior to the issuance of the Order – one by filing a withdrawal, the other by failing to appear at the hearing.
3. The Order became final on May 23, 2014, and pursuant to § 3125.9, became effective ten (10) days later, on June 2, 2014. Pursuant to § 3130.1, the Order was valid for two years – to June 2, 2016 – within which time period the Applicant had to file plans as part of a building permit application with the Department of Consumer and Regulatory Affairs.

The Application

4. On April 29, 2016, the Applicant submitted an application for a two-year time extension of the Order to June 2, 2018 (the “**Application**”). (Exhibit 1.)
5. The Application stated that it had been served to the two parties in Case No. 18723 – the Applicant and ANC 1B, as well as the Office of Planning (“**OP**”).
6. The Application stated that no changes were proposed to the exterior of the building as approved by the Order, nor was any additional relief requested.
7. The Application stated that no changes had occurred to the zone classification of the Property or to those portions of the Comprehensive Plan applicable to the Property.
8. The Application asserted that it had demonstrated good cause for the time extension under § 3130.6(c)(2) because the delay in filing a building permit application within the time period of the Order was due to difficulties obtaining required governmental approvals that were outside the Applicant’s control, specifically (i) reviews and permits from the Department of Consumer and Regulatory Affairs (“**DCRA**”) required prior to applying for a building permit and (ii) D.C. Council (the “**Council**”) approval of a lease pursuant to a government procurement contract on which the project financing depended.

OP Report

9. OP submitted a written report dated May 10, 2016 that analyzed the Application against the requirements of § 3130.6 and recommended that the Board approve the Application (the “**OP Report**”). (Exhibit 3.)
10. The OP Report stated that no substantial changes had occurred to the development surrounding the Property since the Order. The OP Report also stated that no substantial changes have been made to the provisions of the Zoning Regulations applicable to the Property since the Order (the new Zoning Regulations effective on September 6, 2016 would not apply to the Order, which is vested under the 1958 Zoning Regulations).
11. The OP Report concluded that the Applicant had demonstrated good cause under § 3130.6(c)(2) to obtain the requested time extension based on the Applicant’s good faith

attempts to obtain Council approval of the lease required to finalize the financing of the development to be built pursuant to the Order, and on the Applicant's efforts to obtain some of the necessary reviews and permits from DCRA.

Party Status Request

12. Three individuals filed requests for party status in opposition to the Application: Chee-Yuen Hung and Tamatane Aga, who resided in the same dwelling unit, and David Stirpe. (Exhibits 4-6.)

Persons in Opposition

13. The Board received six letters in opposition signed by six individuals, one of whom adopted another's letter, and three of whom had requested party status in opposition. (Exhibits 7, 8, 11-13, and 15.) These letters all asserted that there had been substantial changes to the material facts on which the Board had relied in approving the relief memorialized in the Order based on the Mayor's public materials proposing a homeless shelter on the Property, which these letters alleged would require changes to the plans approved by the Order.
14. These letters also asserted that the Applicant had failed to demonstrate good cause for the time extension because the delays were due the Applicant's lack of diligence in pursuing the necessary preliminary DCRA reviews and permits and for failing to apply for the governmental procurement until the final months of the Order's validity.
15. The Applicant responded to the requests for party status and letters in opposition by asserting that (i) party status requests are limited to hearings per § 3113.21, and (ii) the Applicant did not propose any changes that would require a modification of the Order and so no substantial changes had occurred in the material facts relied upon by the Board in issuing the Order. (Exhibit 9.)

ANC Report

16. ANC 1B submitted a written report stating that at its June 2, 2016 regularly scheduled and properly noticed meeting, and with a quorum present, the ANC voted to recommend denial of the Application (the "**ANC Report**"). (Exhibit 10.)
17. The ANC Report stated the following issues and concerns with the Application:
 - (a) that substantial changes had occurred to the material facts on which the Board's decision memorialized in the Order had relied because the Mayor's proposed plans for the homeless shelter on the Property departed from various aspects of plans approved by the Order, including changing the use from an apartment building to a homeless shelter, potentially removing a rooftop terrace and balconies, adding a playground and reducing the square footage of the building; and
 - (b) that the Applicant had failed to demonstrate good cause as required by § 3160(c)(2) because (i) the delays in DCRA permitting were a normal part of the development process and so within the control of the Applicant, and (ii) the Council had appropriated funding to construct a temporary homeless shelter by purchase or eminent domain and so rendered the Applicant's asserted need of Council approval irrelevant.

18. The Applicant submitted a rebuttal to the ANC Report asserting (i) that the Application proposed no change of use of the Property from the apartment house use identified in the Order and that the Applicant would return to the Board for any modification of use or plans that would be required if changes were proposed; and (ii) that the Council's appropriation of funds to acquire the Property by eminent domain did not weaken the Applicant's asserted inability to proceed because the Mayor had indicated no intent to use eminent domain and had negotiated the lease awaiting Council approval that the Applicant needed to obtain financing to proceed with construction pursuant to the Order. (Exhibit 14.)

CONCLUSIONS OF LAW

1. The Board is authorized to grant variances from the requirements of the Zoning Regulations where (i) "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," (ii) the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property," and granting the requested variance would not cause (iii) "substantial detriment to the public good" or (iv) "substantial impairment to the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." Section 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3) (2018 Repl.); § 3103.
2. The Board is authorized to grant special exceptions, as provided in the Zoning Regulations, where, in the judgement of the Board, the special exception (i) will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map, (ii) will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, and (iii) complies with the special conditions specified in the Zoning Regulations. Section 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2018 Repl.); § 3104.
3. The Board considers requests for time extensions under § 3130.6 as a decision case based on the written submissions to the record without a public hearing. Requests for party status, which apply to hearings, are therefore not applicable in time extension applications, in which the only parties are those of the original approval that the application seeks to extend. The Board does consider all written comments submitted to the record in time extension cases. The Board therefore denied the three requests for party status in response to the Application.
4. Section 3130.6 authorizes the Board to extend the two-year time limit of § 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.

Timely filing - § 3130.6

- 5. The Board concludes that the Applicant filed the Application timely on April 29, 2016 prior to the expiration of the Order on June 2, 2016.

Service on all parties - § 3130.6(a)

- 6. The Board concludes that the Applicant served all parties to Case No. 18723 as defined by the Order - the Applicant and ANC 1B – and that the ANC had responded with the ANC Report. (Exhibit 10.)

No substantial change in material facts - § 3130.6(b)

- 7. The Board concludes that there was no change in material fact on which the Board had relied in approving the relief granted by the Order because the Applicant did not propose to change the design as shown on the plans approved by the Order. The Board notes that these approved plans establish what can be built on the Property per § 3125.8 unless subsequently modified by the Board pursuant to § 3129.

Good cause demonstrated - § 3130.6(c)

- 8. The Board concludes that the Applicant met its burden to demonstrate good cause under § 3130.6(c)(2) because the delays in obtaining the preliminary reviews and permits from DCRA and in negotiating a lease with the District, requiring approval of both the Mayor and Council, were outside of the control of the Applicant and despite its diligent efforts to obtain these necessary governmental approvals.

“Great Weight” to the Recommendations of OP

- 9. The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2012 Repl.).)
- 10. The Board concludes that the OP Report, which provided an-depth analysis of how the Application met each of the requirements for the requested area variance relief, is persuasive and the Board concurs with OP's recommendation that the Application be approved, as discussed above. In particular, the Board agreed with OP's determination that there had been no substantial change to the material facts upon which the Board had relied in the decision

memorialized in the Order and that the Applicant had demonstrated good cause necessary to obtain a time extension.

“Great Weight” to the Written Report of the ANC

11. The Board must give “great weight” to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 1B. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.)).). To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).
12. The Board is not persuaded by the ANC Report’s assertions that the material facts on which the Board had relied in approving the relief granted by the Order had substantially changed since that approval. The Board instead credits the OP Report’s determination that no change to the applicable zoning regulations or surrounding development had occurred. The Board concludes that the ANC Report’s focus on the Mayor’s proposed shelter on the Property was not legally relevant because it was a proposed, not a final, design, and any changes to the plans approved by the Order would require Board approval pursuant to §§ 3125.8 and 3129. As the Applicant reiterated, the Application did not propose any such changes.
13. The Board also finds unpersuasive the ANC Report’s assertions that the Applicant had failed to demonstrate good cause for the requested time extension because the delays in obtaining the necessary governmental approvals - DCRA’s preliminary review and permitting and the Council’s approval of the lease or Mayor’s use of eminent domain - was in spite of the Applicant’s best efforts and outside of its control. The Board concurred with the OP Report’s determination that the Applicant had documented its efforts to proceed through the DCRA review and permitting system and to negotiate with the Mayor and Council to obtain the lease of the Property necessary to finance the development of the Property pursuant to the Order.

DECISION

Based on the case record and the Findings of Fact and Conclusions of Law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the Application. Therefore, pursuant to 11 DCMR § 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Application No. 18723-A for a two-year time extension of Order No. 18723, which Order shall be valid until **June 2, 2018**.

VOTE: 4-0-1 (Marnique Y. Heath, Frederick L. Hill, Anita Butani-D’Souza, and Michael G. Turnbull to APPROVE; Jeffrey L. Hinkle not participating).

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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: April 19, 2019

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.