

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17696 of Hines VAFII 2100 M Street LP, pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception from the roof structure setback requirements under subsection 400.7, and the parking space requirements under subsection 2108.2, and a variance from the loading platform height requirements under subsection 2201.7, a variance from the van parking requirements under subsection 2115.8, a variance from the compact parking space requirements under subsection 2115.4, a variance from the 45 degree height setback from neighboring property requirement under subsection 1709.20 and a variance from the loading space height requirements under subsection 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75).

SUMMARY ORDER

HEARING DATE: December 18, 2007
DECISION DATE: December 18, 2007 (Bench Decision)

SELF-CERTIFIED

The zoning relief requested in this case was 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) 2A and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2A, which is automatically a party to this application. ANC 2A did not participate in the application. The Office of Planning (OP) submitted a report in support of the 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 exceptions under sections 400.7, and 2108.2, and variances pursuant to § 3103.2 from the requirements of sections 2201.7, 2115.4, 2115.8, 2201.6, and 1709.20. No parties appeared at the public hearing in opposition to this application.

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Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP report, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 400.7, and 2108.2, 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.


Based upon the record before the Board, the Board further concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 1709.20, 2201.7, 2115.4, 2115.8, and 2201.6, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

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 application (pursuant to Exhibit 11 – Architectural Plans) be **GRANTED**.

VOTE: 4-0-1 (Ruthanne G. Miller, Curtis L. Etherly, Jr., Marc D. Loud, and Shane L. Dettman to Approve. The third mayoral appointee not voting, not having participated in the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: December 20, 2007

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

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 § 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.

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, 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 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 THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17696

As Director of the Office of Zoning, I hereby certify and attest that on December 20, 2007, 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:

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rsn

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17696-A of Hines VAFII 2100 M Street LP, pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception from the roof structure setback requirements under subsection 400.7, and the parking space requirements under subsection 2108.2, and a variance from the loading platform height requirements under subsection 2201.7, a variance from the van parking requirements under subsection 2115.8, a variance from the compact parking space requirements under subsection 2115.4, a variance from the 45 degree height setback from neighboring property requirement under subsection 1709.20 and a variance from the loading space height requirements under subsection 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75).

HEARING DATE (Orig. Application): December 18, 2007
DECISION DATE (Orig. Application): December 18, 2007 (Bench Decision)
FINAL ORDER ISSUANCE DATE (Orig. Application): December 20, 2007
DECISION ON MOTION TO EXTEND ORDER: December 1 and 8, 2009

ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17676

The Underlying BZA Order

On December 18, 2007, the Board of Zoning Adjustment (the Board or BZA) approved the Applicant's request for special exception relief from the requirements of roof structure setbacks and parking spaces as well as variance relief from the requirements of loading platform height, van parking, compact parking spaces, the 45 degree height setback from neighboring property, loading space heights, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District. Thus, pursuant to 11 DCMR §§ 3104.1 and 3103.2, the Board granted special exceptions from the roof structure setback

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requirements under subsection 400.7 and the parking space requirements under subsection 2108.2 as well as variances from the loading platform height requirements under subsection 2201.7, the van parking requirements under subsection 2115.8, the compact parking space requirements under subsection 2115.4, the 45 degree height setback from neighboring property requirement under subsection 1709.20 and the loading space height requirements under subsection 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75). The Order was issued December 20, 2007. (BZA Order 17696)

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 December 20, 2009.

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 October 23, 2009, 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 due to expire December 20, 2009. (Exhibit 32). The Board received additional, supplemental material from the Applicant in support of the request for a time extension, pursuant to §3130.6. (Exhibit 33).

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., certain conditions of the Applicant's financing commitment could not be met and replacement financing has not been available. Despite its marketing efforts, the Applicant has been unable to obtain a tenant which would enable the financing for the

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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construction of the project. The Applicant indicated that large class A building users that were slated for the Project have materially scaled back expansion plans and that the office market has become too soft so that new office space cannot be introduced. Despite the lack of financing, the Applicant has still funded work on plans and construction drawings necessary to apply for a building permit from the Department of Consumer and Regulatory Affairs for the Project. The Applicant provided a list of third party work solicited and funded by the Applicant. (Exhibit 33D). The extension would allow the Applicant the additional time in which to secure the permits and 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:

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- (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)

The Board finds that the Applicant has met the criteria set forth in this provision. The filing of the motion on October 23, 2009, prior to the expiration date, tolled the effect of the order. The request 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 December 20, 2007 (Exhibit No. 30 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, for a period not to exceed two years from the current expiration date, thereby establishing a new expiration date of December 20, 2011.

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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 December 20, 2011.

VOTE: 3-0-2 (Meridith H. Moldenhauer, Shane L. Dettman, and Michael G. Turnbull to approve; no other Board members 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: DEC 15 2009

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.

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,

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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. 17696-A

As Director of the Office of Zoning, I hereby certify and attest that on DEC 15, 2009, 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:

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Advisory Neighborhood Commission 2A
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Single Member District Commissioner 2A02
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ATTESTED BY:

A handwritten signature in cursive script, reading "Jamison L. Weinbaum", written over a horizontal line.

JAMISION L. WEINBAUM
Director, Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17696-B of Application of Hines VAFII 2100 M Street LP, Motion for a Second Two-Year Extension of BZA Order No. 17696, pursuant to 11 DCMR § 3130.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception from the roof structure setback requirements under subsection 400.7, and the parking space requirements under subsection 2108.2, and a variance from the loading platform height requirements under subsection 2201.7, a variance from the van parking requirements under subsection 2115.8, a variance from the compact parking space requirements under subsection 2115.4, a variance from the 45-degree height setback from neighboring property requirement under subsection 1709.20 and a variance from the loading space height requirements under subsection 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75).

HEARING DATE (Orig. Application):	December 18, 2007
DECISION DATE (Orig. Application):	December 18, 2007
FINAL ORDER ISSUANCE DATE (No. 17696):	December 20, 2007
DECISION ON FIRST MOTION TO EXTEND ORDER:	December 1 and 8, 2009
ISSUANCE DATE OF FIRST EXTENSION (No. 17696-A):	December 15, 2009
DECISION ON 2ND MOTION TO EXTEND ORDER:	December 6, 2011 and January 10, 2012

**ORDER ON SECOND MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17676**

This application and order concerns a motion filed pursuant to 11 DCMR § 3130 to extend the validity of the BZA Orders in Application No. 17696. For the reasons stated below, the Board of Zoning Adjustment (“Board” or “BZA”) grants the request.

The Underlying BZA Order

On December 18, 2007, the Board approved the Applicant’s request for special exception relief from the requirements of roof structure setbacks and parking spaces as well as variance relief from the requirements of loading platform height, van parking, compact parking spaces, the 45-degree height setback from neighboring property, and loading space heights, to allow the expansion of an existing office building with street level retail (through transferable development

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rights) by adding three new floors in the C-3-C District. Thus, pursuant to 11 DCMR §§ 3104.1 and 3103.2, the Board granted special exceptions from the roof structure setback requirements under § 400.7 and the parking space requirements under § 2108.2 as well as variances from the loading platform height requirements under § 2201.7, the van parking requirements under § 2115.8, the compact parking space requirements under § 2115.4, the 45-degree height setback from neighboring property requirement under § 1709.20, and the loading space height requirements under § 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75). The Order for the original application was issued December 20, 2007. (Exhibit 30, BZA Order 17696.)

Under the original Order, and pursuant to § 3130.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued – that is, until December 20, 2009.

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.)

2009 Motion to Extend

On October 23, 2009, 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 due to expire December 20, 2009. (Exhibit 32.) The Board received supplemental material demonstrating good cause from the Applicant in support of that time extension request, pursuant to § 3130.6. (Exhibit 33.)

At decision meetings on December 1 and 8, 2009, the Board found that the requirements of 11 DCMR § 3130.6 were met and granted the Applicant a two-year extension of BZA Order No. 17696 until December 20, 2011. (Exhibit 35, BZA Order No. 17696-A.)

2011 Motion to Extend

On November 4, 2011, the Board received a letter from the Applicant, which requested, upon a showing of good cause, a second two-year extension of the original Order as well as a waiver

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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from the impact of 11 DCMR § 3130.6, pursuant to 11 DCMR § 3100.5, in order to allow a second extension to the Order. (Exhibit 37.)

Waiver of 11 DCMR § 3130.6 - Preliminary Matters

As a preliminary matter, the Board addressed whether the limitation to one extension in 11 DCMR § 3130.6 could be waived and it could grant 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 Zoning Commission in Z.C. Case No. 09-01 became effective on June 5, 2009. Subsection 3130.6 expressly limits the number of time extensions to one. 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).

At its deliberations on December 6, 2011, the Board members expressed reluctance to grant a second extension and requested that the Applicant provide additional, supplemental information to demonstrate that it would meet the requirements for the waiver as well as the extension and postponed its deliberations until January 10, 2012. The Board requested that the Applicant specifically focus on information pertaining to the impact over the last two years since the first extension was granted. The Board also asked for more specific information on the impact of a pre-release agreement or commitment and the efforts made by the Applicant to obtain such an agreement and alternative financing in that time frame. (Transcript (“Tr.”), December 6, 2011, at 14-17.) The Applicant provided the requested information in its filing of January 5, 2012. (Exhibit 40.)

At the January 10, 2012 meeting, having sought the advice of its counsel, the Board concluded that, pursuant to its authority under 11 DCMR § 3100.5, it was authorized to waive the limitation in 11 DCMR § 3130.6 to a single time extension. 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 § 3130.6 is not expressly listed among the provisions in § 3100.5 that the Board may not waive, the Board concludes that it is not prohibited from granting a waiver of § 3130.6. The Board then reviewed the evidence before it; and upon reviewing the materials submitted by the Applicant with its waiver and extension requests, the Board found good cause to grant the waiver as well as found that the Applicant met the substantive requirements of the section pertaining to time extensions. 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 2011 request to extend

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Pursuant to § 3130.6(a), an extension request must be served on all parties to the application and those parties are allowed 30 days to respond. (11 DCMR § 3130.6(a).) These motions also have a 30-day filing prerequisite, pursuant to 11 DCMR § 3130.9.³ The motion was filed on November 4, 2011, more than 30 days before the order was due to expire on December 20, 2011. Thus, the requirements of § 3130.9 were met. The motion and waiver request were served on all the parties to the case. (*See*, Exhibit 37, Certificate of Service.)

As previously mentioned, the Board placed the matter on its December 6, 2011, and at that time asked the Applicant to provide additional, supplemental information to support both of its requests. The Board concluded that the expiration date of the Order would be tolled by its request for additional information so that it would not expire. The Board placed the matter on its January 10, 2012 meeting agenda. The Applicant submitted the requested supplemental information in its filing dated January 5, 2012. (Exhibit 40.)

As discussed herein, the Zoning Commission adopted 11 DCMR § 3130.6 in Zoning Commission Case No. 09-01. The amendment 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;

³ 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.

- (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.)

The Board concludes that the Applicant has met the criteria set forth in § 3130.6. The motion for a time extension was served on all of the parties to the application and those parties were given 30 days in which to respond pursuant to § 3130.6(a). The record shows that the Applicant served the time extension request on all parties to the original application. (*See*, Certificate of Service, Exhibit 37.) No one objected to the request.

In satisfaction of § 3130.6(b), the Applicant indicated that there were no changes of the material facts upon which the Board based its original approval of the application. Based on the evidence in the record, the Board concludes that the Applicant has met the requirements of § 3130.6(b) that the material facts and the approved plans remain unchanged. 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.

With respect to the requirements of § 3130.6(c), the Board required that the Applicant submit "substantial evidence" for the record to meet that subsection's requirements of good cause, particularly as to that good cause related to the specific time period under consideration. As well as its initial filing of November 4, 2011 (Exhibit 37), the Applicant submitted supplemental information for the record on January 5, 2012 (Exhibit 40) in response to the Board's requests at its December 6, 2011 meeting. The Board concludes that the Applicant's submissions demonstrate the requisite good cause.

In its filings, the Applicant stated that it performed considerable additional work following the grant of the first extension, to seek alternate financing and a pre-leasing commitment from a large tenant for the project. (Exhibit 40, Tab A.) The Applicant submitted a sworn affidavit from Mr. Allen, Vice President, who is the principal-in-charge of the Applicant's project. (Exhibit 37, Tab F.) Additionally, he certified the requested information the Applicant provided in its January 5, 2012 letter. (Exhibit 40.) In its submissions, the Applicant stated that since the Board's original approval, the Applicant has spent over \$2.06 million on advancing the project to a point where it would be ready for the filing of a building permit if financing were available. However, due to the continuing financial crisis and the resultant difficulties in the financial health of the bank that had committed to financing the building renovation and expansion when the BZA approved the relief in 2007, the bank is now unwilling to finance it without a pre-

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leasing commitment for the new space. Because of the poor market conditions that continue since 2008 and despite marketing the project to a large number of potential tenants, the Applicant has been unsuccessful in securing such a commitment or in finding financing without it. In particular, the Applicant noted not only has it been actively marketing the project to prospective tenants since 2008, it also demonstrated this by providing a list of prospective tenants it has approached just in the last two years. At the present time, the expansion space is in the final stages of a competitive selection by a major tenant prospect that would enable financing and construction to proceed, according to the Applicant. The Applicant requests the extension so that its current competitive position for a pre-lease agreement will not be further hampered and the funds already expended not be wasted. (Exhibits 37 and 40.)

The Board concludes that the Applicant's difficulties in securing pre-lease commitments from project lender-approved tenants and to extricate itself from its original financing or to find more flexible alternative financing, despite its considerable efforts and investment in pursuing the project, constitute the "good cause" required under § 3130.6(c)(1). Neither the ANC nor any other party to the applications objected to a second extension of the Order.

The time extension, therefore, would not prejudice the rights of any party. For these reasons, the Applicant is requesting another extension of two years in the validity of the Order for Application No. 17696, until December 20, 2013. The Board concludes that the extension is appropriate under the current circumstances.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirements of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

Pursuant to 11 DCMR §§ 3129 and 3130, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of a second two-year time extension of Order No. 17696, which Order shall be valid until **December 20, 2013**, within which time the Applicant must file plans for the proposed structures, pursuant to the plans in Exhibits 11 in the record, with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: **4-1-0** (Meridith H. Moldenhauer, Nicole C. Sorg, Lloyd J. Jordan, and Michael G. Turnbull (by absentee vote), to Approve; Jeffrey L. Hinkle (by absentee vote), to Deny.)

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:

JAN 20 2012

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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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17696-B

JAN 20 2012

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, or delivered by electronic mail in the case of those ANCs and SMDs that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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Single Member District Commissioner 2A02
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ATTESTED BY:



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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17696-C of Liberty Property Trust (formerly Hines VAFII 2100 M Street LP), pursuant to 11 DCMR § 3130, for a third time extension of one year of BZA Order No. 17696.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception from the roof structure setback requirements under subsection 400.7, and the parking space requirements under subsection 2108.2, and a variance from the loading platform height requirements under subsection 2201.7, a variance from the van parking requirements under subsection 2115.8, a variance from the compact parking space requirements under subsection 2115.4, a variance from the 45 degree height setback from neighboring property requirement under subsection 1709.20 and a variance from the loading space height requirements under subsection 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75).

HEARING DATE (Orig. Application):	December 18, 2007
DECISION DATE (Orig. Application):	December 18, 2007
ORIGINAL ORDER ISSUANCE DATE (17696):	December 20, 2007
DECISION ON 1ST MOTION TO EXTEND:	December 1, 2009 and December 8, 2009
ISSUANCE DATE ON 1ST EXTENSION ORDER (17696-A)	December 15, 2009
DECISION ON 2ND MOTION TO EXTEND:	December 6, 2011 and January 10, 2012
ISSUANCE DATE ON 2ND EXTENSION ORDER (17696-B)	January 20, 2012
DECISION ON 3RD MOTION TO EXTEND:	January 14, 2014 and February 4, 2014

ORDER ON THIRD MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 17696

The Underlying BZA Order

On December 18, 2007, the Board of Zoning Adjustment (“Board” or “BZA”) approved the Applicant’s request for special exception relief from the requirements of roof structure setbacks and parking spaces as well as variance relief from the requirements of loading platform height,

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van parking, compact parking spaces, the 45 degree height setback from neighboring property, loading space heights, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District. Thus, pursuant to 11 DCMR §§ 3104.1 and 3103.2, the Board granted special exceptions from the roof structure setback requirements under § 400.7 and the parking space requirements under § 2108.2 as well as variances from the loading platform height requirements under § 2201.7, the van parking requirements under § 2115.8, the compact parking space requirements under § 2115.4, the 45 degree height setback from neighboring property requirement under § 1709.20 and the loading space height requirements under § 2201.6, to allow the expansion of an existing office building with street level retail (through transferable development rights) by adding three new floors in the C-3-C District, at premises 2100 M Street, N.W. (Square 72, Lot 75). The Order was issued December 20, 2007. (BZA Order 17696.)

Pursuant to § 3130.1 of the Zoning Regulations, Order 17696 was valid for two years from the time it was issued – that is, until December 20, 2009.

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.)

2009 Motion to Extend

On October 23, 2009, 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 due to expire December 20, 2009. (Exhibit 32.) The Board received supplemental material demonstrating good cause from the Applicant in support of that time extension request, pursuant to § 3130.6. (Exhibit 33.)

At decision meetings on December 1 and 8, 2009, the Board found that the requirements of 11 DCMR § 3130.6 were met and granted the Applicant a two-year extension of BZA Order No. 17696 until December 20, 2011. (Exhibit 35, BZA Order No. 17696-A.)

¹ Subsection 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 Subsection 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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2011 Motion to Extend

On November 4, 2011, the Board received a letter from the Applicant, which requested, upon a showing of good cause, a second two-year extension of the original Order as well as a waiver from the impact of 11 DCMR § 3130.6, pursuant to 11 DCMR § 3100.5, in order to allow a second extension to the Order. (Exhibit 37.)

At decision meetings held on December 6, 2011 and January 10, 2012, the Board waived the then-limitation to one extension and found that the requirements of 11 DCMR § 3130.6 were met and granted the Applicant a second two-year extension of BZA Order No. 17696 until December 20, 2013. (Exhibit 42, BZA Order No. 17696-B.)

Third Motion to Extend

On December 18, 2013, the Board received a letter from the new owner of the Subject Property, who is now the Applicant, which requested, pursuant to 11 DCMR §§ 3130.6 and 3130.7, a third extension for one year in the authority granted in the underlying BZA Order, which was due to expire December 20, 2013. (Exhibit 44.)

The new owner and now Applicant is requesting a one-year extension in the authority granted in the underlying BZA Order because, having only acquired the Property recently, it was unable for reasons beyond its control to secure all required government agency approvals by the time the Order would expire. According to the Applicant, the reasons for the request to extend the Order are because of the change in property owner and the additional time required to reassess the viability of the office market and the project and to have sufficient time in which to obtain necessary government approvals. The timing of the new owner taking control of the Property prevented a timely ability to proceed with preparing and submitting a complete building permit application that would vest the Order before it was due to expire.

The new owner and Applicant pointed out that the recent economic downturn that affected development conditions in the District, particularly in the office market, had caused the prior delays based on which the Board had granted the prior two extensions of the Order. Although the economic conditions have since improved, the previous owner of the Property had not proceeded with developing the project because of the then state of the economy and depressed office market that, according to the new owner and Applicant, continued even after the Order was extended a second time. The prior owner had been unable to continue with preparing the necessary plans for vesting the Order. Approximately one year after the second extension was granted, the prior owner put the Property and building up for sale to sell the project to another owner who could have more success in developing it. Because the prior owner had stopped efforts to develop the project, it sold the Property to the new owner without having completed many of the steps needed for the project to be able to proceed under the Order.

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According to the Applicant, while the previous owner did work on the construction drawings and plans for the project leading up to the second extension of the Order, it was unable to continue. The construction drawings and plans were not sufficiently complete so that a building permit application could be filed. Thus, the new owner which only acquired the Property in May 2013 faced an impossibly short time frame in which to effectuate the Order once it acquired the Property and the entitlements to the project. The new owner stated that it inherited the history of the project and an approved BZA Order that had not been vested due to adverse economic conditions. The previous owner's inability to proceed with the project was outside of the owner's control, and the now owner could only accept the limited progress made at the time it took ownership. The now owner acquired the project with the intention of constructing the project, but it indicated that it needed the time to study the project and determine whether it is viable for the present office market conditions or another use.

The now owner and Applicant attested to its good faith efforts to effectuate the underlying BZA Order by indicating that it assessed the viability of the project as quickly as possible. Less than two months after taking ownership of the Property, the Applicant engaged an engineer and an architect to evaluate the project in light of the office market conditions. To demonstrate that good faith effort, it provided the contract for engineering and architectural services for the study. The Applicant stated that it is still actively engaged in the study and is still collecting information that will allow it to make an informed decision about the viability of the project given the present office market. To further demonstrate its efforts, the Applicant provided an affidavit from its Senior Vice President, Regional Director and representative, John S. Gattuso. Mr. Gattuso indicated that because the new owner has not yet determined whether the project is appropriate for the office market, it has not yet proceeded with developing construction drawings for the project. Mr. Gattuso goes on to state that if the owner loses the entitlements granted by the BZA under the Orders, any future efforts to market the project to future tenants could be further hampered and would significantly diminish the expected value of the investment on which the owner relied. The requested one-year extension would allow the Applicant the additional needed time in which to make a fully informed determination as an owner who recently acquired the Property and to prepare all of the documents necessary for it to receive the appropriate government approvals that would vest the Order. (Exhibit 44.)

Accordingly, the Applicant requested that, pursuant to § 3130.6 of the Regulations, the Board extend the validity of its prior Order for one additional year, thereby allowing the Applicant additional time to complete its study of the project, prepare documents, and apply for a building permit.

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

As part of the application for a third time extension, the Applicant requested that the Board waive the limitation to one extension in 11 DCMR § 3130.6 to allow the grant of a third extension of the Order. The Board in its deliberations noted that this request was no longer required as a result of the Zoning Commission's approval of Z.C. Case No. 12-11.

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On February 25, 2013 the Zoning Commission took final action to approve Z.C. Case No. 12-11, which included text amendments to BZA Rules and Procedures – Chapter 31, specifically to 11 DCMR §§ 3130.6 and 3130.9 in regard to time extensions of the validity of orders. The text amendment eliminated the limitation on granting more than one time extension (§ 3130.6) and also eliminated the 30-day rule for filing before the expiration date of an order so as to toll the expiration of the underlying order (§ 3130.9). The order and final rulemaking for Z.C. Case No. 12-11 was issued on June 14, 2013 in the *D.C. Register* and thereby finalized on that date.

Criteria for Evaluating Motion to Extend

Subsection 3130.6 of the Zoning Regulations authorizes the Board to extend the time periods for good cause provided: (i) the extension request is served on all parties to the application by the applicant, and all parties are allowed 30 days in which to respond; (ii) there is no substantial change in any of the material facts upon which the Board based its original approval; and (iii) the applicant demonstrates there is good cause for such extension. (11 DCMR §3130.) Pursuant to 11 DCMR § 3130.6(c)(1), good cause is established through the showing of 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.

The Merits of the Request to Extend the Validity of the Order Pursuant to 11 DCMR § 3130.6

The Board finds that the motion has met the criteria of § 3130.6 to extend the validity of the underlying order with some caveats. To meet the burden of proof, the Applicant submitted an affidavit from its representative that described its recent acquisition of the Property and the project, its efforts to study the current office market conditions and project viability, and its reasons for delay in completing construction documents and obtaining government approvals. (Exhibit 44, Tab C.) The Applicant also submitted a contract for an engineering and architectural feasibility study of the project to demonstrate its good faith efforts. (Exhibit 44, Tabs B and J.)

As set forth in the affidavit, the new owner had recently acquired the Property and project. It has been diligent about its efforts to evaluate the project approved by Order 17696 by contracting for the services of an engineer and architect to study possible expansions of the building, including the approved project, as they relate to the office leasing market. The new owner acquired the Property in May 2013 and engaged the contract in July 2013. It states that it can take six months

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or more typically to complete such an assessment. It has not completed construction drawings for the project since it has not yet completed its evaluation of the viability of those plans for the market. The new owner points out that if it loses the entitlements granted by the BZA under the Orders, any future efforts to market the project to future tenants could be further hampered and this will significantly diminish the expected value of the investment on which the new owner relied. With some caveats, the Board finds that the Applicant has met the criteria set forth in this provision.

The Office of Planning ("OP"), by memorandum dated January 7, 2014, reviewed the application for the extension of the Order for "good cause" pursuant to 11 DCMR § 3130.6 and recommended approval of the requested one-year extension. (Exhibit 45.) The Site is within the boundaries of Advisory Neighborhood Commission ("ANC") 2A. The ANC was the only other party to the case and was provided the required notice of the request for the extension and did not submit a report on the matter.

The motion for the 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). No party to the application objected to an extension of the Order. The Board concludes that extension of the relief is appropriate under the current circumstances.

The Board found that the Applicant has met the criteria set forth in 11 DCMR § 3130.6. The reasons given by the Applicant were beyond the Applicant's reasonable control within the meaning of § 3130.6(c)(3) and constitute "good cause" required under § 3130.6(c)(1). In addition, as required by § 3130.6(b), the Applicant demonstrated that there is no substantial change in any of the material facts upon which the Board based its original approval in Order No. 17696. There have also been no changes to the Zone District classification applicable to the Site or to the Comprehensive Plan affecting the Site since the issuance of the Board's order.

The Board voiced some concerns during its deliberations about this third extension request and asked to have these concerns memorialized in this order. The Board noted that the Applicant was a new owner and was being approved for a third and final time extension of one year for the plans and project approved in Order No. 17696. The Board noted that it was granting this extension in deference to OP's recommendation to give the new owner time to look over the prior owner's plans and financials. Additionally, although the Zoning Commission had removed the one-extension-only limitation to § 3130.6 in Z.C. Case No. 12-11, the Board indicated that it would not be likely to entertain any further extensions in this case beyond this third one. The Board also warned the Applicant that should the new owner after completing its assessment of the approved project seek to modify those already approved plans and/or the project, it would need to come back and seek further approvals from this Board.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirements of 11 DCMR § 3125.3, which required 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


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ORDERS APPROVAL of Case No. 17696-C for a third one-year time extension of Order No. 17696, which Order shall be valid until **December 20, 2014**, within which time the Applicant must file plans for the proposed development with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 4-0-1 (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle, and Michael G. Turnbull to APPROVE; 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: February 19, 2014

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.