

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18916-B of 49th Street Developer LLC, pursuant to 11 DCMR Subtitle Y § 705¹, for a two-year extension of BZA Order No. 18916.

The original application was pursuant to 11 DCMR § 3104.1, for a special exception from the new residential developments requirements under § 353, to construct a new affordable multi-family residential development for seniors and 21 affordable one-family dwellings in the R-5-A District² on undeveloped land at the intersection of East Capitol Street, S.E. and 47th Street, S.E. (Square 5348, Lots 1-8).

HEARING DATE (Original Application):	February 10, 2015
DECISION DATE (Original Application):	February 10, 2015
FINAL ORDER ISSUANCE DATE (Order No. 18916):	February 12, 2015
TIME EXTENSION FILED³	December 8, 2016
TIME EXTENSION DECISION DATE:	January 18, 2017

SUMMARY ORDER ON MOTION TO EXTEND
THE VALIDITY OF BZA ORDER NO. 18916

The Underlying BZA Order

¹ The original application was filed under the Zoning Regulations (Title 11, DCMR) which were then in effect (the “1958 Zoning Regulations”) but which were repealed on September 6, 2016 and replaced with new text of Title 11, DCMR (the “2016 Regulations”). Other than the description of the original application and its caption, the other references in this Order to provisions contained in Title 11 DCMR are to the 2016 Regulations. The repeal of the 1958 Zoning Regulations and their replacement with the 2016 Regulations has no effect on the vesting and validity of the original application.

² The zone districts were renamed in the 2016 Zoning Regulations. Thus, the R-5-A District is the RA-1 District under the 2016 Regulations. This is reflected on the Zoning Map. This change in nomenclature has no effect on the vesting or validity of the original application.

³ On April 28, 2016, the Applicant and Contract Purchaser filed an initial request for a two-year time extension but later, on May 16, 2016, withdrew that request. The Board accepted the withdrawal of that time extension request. (Exhibits 1, 8, and 9, Case No. 18916-A.) No order was issued for Case No. 18916A and no time extension had been given.

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Board of Zoning Adjustment
District of Columbia
CASE NO. 18916B
EXHIBIT NO. 4

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On February 10, 2015, the Board of Zoning Adjustment (the "Board") approved the Applicant's request for a special exception from the new residential developments requirements under § 353, to construct a new affordable multi-family residential development for seniors and 21 affordable one-family dwellings in the R-5-A District on undeveloped land at the intersection of East Capitol Street, S.E. and 47th Street, S.E. (Square 5348, Lots 1-8). The Board issued its written order ("Order") on February 12, 2015. Pursuant to 11 DCMR Subtitle Y §§ 604.11, the Order became final on February 12, 2015 and took effect 10 days later.

Under the Order and pursuant to Subtitle Y § 702.1 of the Zoning Regulations, the Order was valid for two years from the time it was issued -- until February 12, 2017. (Exhibit 1.)

Motion to Extend Validity of the Order Pursuant to 11 DCMR Subtitle Y § 705.1

On December 8, 2016, the Applicant sent a letter requesting that the Board grant a two-year extension of Order No. 18916. This request for extension is pursuant to Subtitle Y § 705 of the Zoning Regulations, which permits the Board to extend the time periods in Subtitle Y § 702.1 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval.

Criteria for Evaluating Motion to Extend

Pursuant to Subtitle Y § 705.1(a), the Applicant shall serve on all parties to the application and all parties shall be allowed 30 days to respond. The record reflects that the Applicant served all parties at least 30 days in advance of the public meeting. The parties to the original application included the affected Advisory Neighborhood Commission ("ANC") which is ANC 7E. The extension request also was submitted to the Office of Planning ("OP") and the Department of Transportation ("DDOT"). (Exhibit 1.)

Pursuant to Subtitle Y § 705.1(b), the Applicant indicated in its request that there has been no substantial change in any of the material facts upon which the Board based its original approval of the application. (Exhibit 1.)

Under Subtitle Y § 705.1(c), good cause for the extension must be demonstrated 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.

To demonstrate good cause, the Applicant submitted a letter arguing that it has encountered difficulties in securing District of Columbia funding for the project. Without District funding, the Applicant noted, the project cannot move forward and be constructed. Although the Applicant has duly applied for District funding, the project was not funded by the Department of Housing and

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Community Development ("DHCD") in either the 2015 and 2016 funding round, which has caused a delay in the project. After not getting funded in the 2015 funding round, the Applicant resubmitted their application to DHCD in the 2016 funding round which was due on June 6, 2016. The Applicant stated that the project again was not selected by DHCD as recently announced by the Mayor.

The Applicant now requests a two-year extension of Order No. 18916 for the following reasons: (a) the project cannot move forward to the permitting stage until the requisite funding is authorized and awarded for the project; (b) at present, funding is not finalized for the project with respect to the proposed Fiscal Year 2017 budget; and (c) the Applicant is working with the Deputy Mayor for Planning and Economic Development ("DMPED") on an effort to identify funding sufficient to move the project forward and those discussions are on-going. In addition to its statement documenting its difficulties in securing funding, the Applicant shared a letter of support from ANC 7E's Chair addressed to DHCD's Director. In this letter, dated April 12, 2016, the Chair of the ANC restates the ANC's support for the project approved by the Board and also expresses support for the Applicant's request for a time extension of the zoning approval. (Exhibit 1.)

The Merits of the Request to Extend the Validity of the Order Pursuant to 11 DCMR Subtitle Y § 705.1

The Board finds that the motion has met the criteria of Subtitle Y § 705.1 to extend the validity of the underlying order. To meet the requirements of Subtitle Y § 705.1(a), the record reflects that the Applicant served the parties to the application and all parties were allowed at least 30 days to respond. While not technically in response to this request for a time extension, the letter from the Chair of ANC 7E, which was the only other party to the proceeding, that was submitted to the record did restate the ANC's support for the project approved by the Board and also expressed the ANC's support for a time extension of the zoning approval. (Exhibit 1.) No party to the application objected to an extension of the Order.

As required by Subtitle Y § 705(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. 18916. 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 that would affect the approval.

To meet the burden of proof for "good cause" required under Subtitle Y § 705.1(c), the Applicant provided information regarding its efforts to secure the necessary funding for the project. The project consists of two affordable housing components: a three-story, 178-unit rental apartment building for seniors and 21 for-sale row houses. The request affects both components of the project. The project received the Board's approval in February 2015. However, the project was not funded by the Department of Housing and Community Development ("DHCD") in the 2015 and 2016 funding round, resulting in a delay in the project. After not getting funded in the 2015 funding round, and at DHCD's urging, the Applicant resubmitted their application to DHCD in the 2016

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funding round which was due on June 6, 2016. The project again was not selected by DHCD. The Applicant indicated that it has been working diligently with DMPED and DHCD to obtain the necessary funding for the project. The costs of construction of affordable housing are such that the project cannot be constructed without such funding.

In evaluating the extension request, the Board considered the Applicant's good faith and diligent efforts to move forward with development on the Property. The Applicant indicated that it has every intention of proceeding with this substantial affordable housing project, and it has been working to subdivide the Property into buildable lots pending approval of funding. (Exhibit 1.) Given the totality of the conditions and circumstances described above and in the information that was provided, the Board finds that the Applicant satisfied the "good cause" requirement under Subtitle Y § 705.1(c), specifically meeting the criteria for Subtitle Y §§ 705.1(c)(1) and 705.1(c)(2). The Board finds that the delay in securing the public funding is beyond the Applicant's reasonable control and that the Applicant demonstrated that it has acted diligently, prudently, and in good faith to proceed towards the implementation of the Order.

OP expressed its support for the project and recommended approval of the requested time extension. OP, in its report dated January 9, 2017, reviewed the application for the extension of the Order for "good cause" pursuant to 11 DCMR Subtitle Y § 705.1, and noted that the Applicant had demonstrated that: (a) the application had been served on ANC 7E with time for the ANC to respond; (b) there had been no change in the Zoning Regulations that would impact the material facts upon which the Board based its original approval; and (c) there have been no recorded changes or significant development project in the square or its immediate surroundings that would impact the Board's original approval. Further, OP noted that the Applicant needed the time extension of the Board's previous approval because the Applicant has not been able to obtain the anticipated project funding. At the time of the original approval, it was anticipated that the project would be financed in part by DHCD which only issues funding for various projects on a yearly basis. However, when the project was approved in April 2014, the Applicant was unable to meet the deadline for the application for funding submissions on May, 9, 2014. Thus, the application for funding was first submitted in 2015; and although it was not selected, DHCD encouraged resubmission of the proposal the following year. Thus, the Applicant resubmitted their proposal to DHCD on June 6, 2016, but the project again was not selected. The Applicant has stated that they will continue to work with DHCD to secure funding. OP expressed its support for the project, which includes extensive affordable housing, and recommended "approval of the requested time extension for BZA Order 18916 ... to allow the applicant additional time to pursue funding for the project." (Exhibit 2.) The Board concludes that extension of the approved relief is appropriate under the current circumstances and that the Applicant has met the burden of proof for a time extension under Subtitle Y § 705.1.

Pursuant to 11 DCMR Subtitle Y § 101.9, the Board has determined to waive the requirement of 11 DCMR Subtitle Y § 604.3, 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.

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Pursuant to 11 DCMR Subtitle Y § 702, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of Case No. 18916-B for a two-year time extension of Order No. 18916, which Order shall be valid until **February 12, 2019**, within which time the Applicant must file plans for the proposed project with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 3-0-2 (Frederick L. Hill, Carlton E. Hart, and Michael G. Turnbull, to APPROVE; two Board seats 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 1, 2017

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.