

Arent Fox

September 10, 2012

VIA ELECTRONIC FILING

Lloyd Jordan, Chair
Board of Zoning Adjustment
441 Fourth Street NW, Suite 210 S
Washington DC 20001

Kinley R. Bray

Attorney
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Reference Number
029604.00004

Re Application of Shophouse, LLC
BZA Application No 18204 **18402**
Request for Party Status and Opposition to Application

Dear Chairman Jordan and Members of the Board

On behalf of our client, FAPFABI, LLC (an affiliate of EastBanc, Inc) and the additional entities described herein (collectively "Opponents"), we hereby request status as a party in opposition to the above-referenced application. We have just been retained as EastBanc's counsel in this matter, understanding that this request for party status is untimely, we also respectfully request, for the following reasons, that the Board waive its rules pursuant to 11 DCMR § 3100.5 to consider this filing and admit EastBanc as a party to the application. In the alternative, we offer the following as a statement in opposition to the Application.

I. REQUEST FOR WAIVER OF TIME DEADLINE FOR FILING PARTY STATUS REQUEST

We respectfully request that the Board waive its filing deadline under 11 DCMR § 3106.2 and allow this request for party status into the record. Opponents have never been contacted by the Applicant in this case to discuss the proposed addition to the existing building, and were not aware of any requested relief from the BZA until the Advisory Neighborhood Commission's consideration of the matter on the evening of September 4, 2012, the same date on which party status requests were due.

Opponents submit that the acceptance of its party status request will not prejudice the rights of the Applicant because it was filed as expeditiously as possible upon learning of the Application, and because, as an immediately adjacent property owner, Opponents clearly meet the tests for party status.

II. REQUEST FOR PARTY STATUS

A Entities Seeking Party Status The entities seeking party status are:
GENBUS/885665.2

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18402
EXHIBIT NO. 28

SMART IN YOUR WORLD™

1050 Connecticut Avenue, NW
Washington, DC 20036 5339
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1675 Broadway
New York, NY 10019 5820
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Board of Zoning Adjustment
District of Columbia
CASE NO. 18402
EXHIBIT NO. 28

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(1) EastBanc, Inc , on behalf of their affiliate, FAPFABI, LLC, the record owner of 2807-2809 M Street N W (Lot 839 in Square 1212), which is immediately adjacent to the property that is the subject of this Application, as well as

(2) Eastbanc's tenant, India Palace LLC (d/b/a Taj of India Restaurant),

(3) P&P Corporation (d/b/a La Chumiere Restaurant), tenant of 2813 M Street, N W ; and

(4) Lobos, Inc (d/b/a Don Lobos Restaurant), tenant of 2811 M Street, N W (see authorization letters attached)

All of these entities are restaurants located immediately west of the subject property and all rely on their access to the 5' public alley behind the subject property for deliveries. All entities will appear in opposition to the subject application and through the undersigned counsel.

B Interests of the Opponents As immediately-adjacent neighbors, Opponents will be more significantly and distinctively impacted by the subject application than will the general public. The use of the alley behind the Subject Property is of critical importance for restaurant deliveries, allowing the Applicant's proposed use of the shared alley is offensive to and will likely jeopardize the business of all three restaurant operators joining in this party status request. In addition, the Applicant's proposed use of the alley would make a restaurant operation in the interior of the shared alley virtually impossible, thereby significantly diminishing EastBanc's property value in 2807-2809 M Street, N W.

C Impact of the Requested Relief and the Unique Interests of the Opponent Given the close proximity of the Opponent's operations to the Subject Property, the Opponent is uniquely affected by the proposed development.

The principal objection of Opponents is to the Applicant's proposal to effectively co-opt a 5' public alley for its exclusive use by storing its trash cans within the alley rather than on private property. While the use of the alley alone by such a high-volume operator such as Shophouse in and of itself poses a threat to the three restaurants upstream, the storage of trash cans on public property, even for short time periods, will impede or prohibit access to other users of the alley.

The Applicant initially sought relief from Section 733.4 of the Zoning Regulations to allow the construction of fiberglass containers for storage of trash in the alley way, the revised application filed with the Applicant's pre-hearing statement notes that trash will be stored in the GENBUS/885665 2

basement and taken to the alley for collection. We think this is untenable, the Subject Property and the properties owned by EastBanc are all quite small, with limited setbacks from the rear property line, and each faces challenges in receiving deliveries and storing trash for collection, however, neither of these facilities is built to a zero lot line condition as the Applicant is proposing here. Allowing the Applicant to expand its building to fill its entire property leaves no room to store trash and increases the likelihood of storage in the public alley or, if trash is stored in the basement of the subject property, the continued pest control problems the property has experienced since Furin's vacated the property over a year ago.

In order to protect their property and business interests, the Opponents seeks to fully participate in the hearing on the instant application, including the presentation of evidence and cross-examination of witnesses. As such, we respectfully request this Board grant Party Status to the Opponent.

II. STATEMENT OF OPPOSITION TO APPLICATION

For the following reasons, the Opponent is opposed to the application and respectfully requests that the Board deny the relief requested by the Applicant.

A. The Applicant is Not Entitled to Variance Relief

The Board is empowered to grant a variance where it finds three conditions

- (1) The property is unique because, *inter alia*, of its size, shape, or other extraordinary or exceptional situation or condition relating to the property,
- (2) The owner would encounter practical difficulties if the zoning regulations were strictly applied; and
- (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.

Roumel v District of Columbia Bd of Zoning, 417 A 2d 405, 408 (D.C. 1980). It is fundamental that "the difficulties or hardships [shown be] due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood." *Gilmartin v Board of Zoning Adjustment*, 579 A2d 1164, 1168 (D.C. 1990), citing *Palmer v Bd of Zoning Adjustment*, 287 A 2d 535, 539 (D.C. 1972).

1. The Subject Property is Not Unique

The Subject Property is by no means the smallest on the block, nor is it the only property in the Square with a proportionately large building on a small lot. Each of the Opponents face the exact same challenges in maintaining and upgrading their facilities as required by applicable building codes, while maintaining enough “front of house” space to make a restaurant use profitable. Each building is limited in the amount of floor area that may be devoted to commercial uses, when combined with the constraints derived from their historic status, make expansion or significant alteration of Opponents’ buildings extraordinarily difficult. The mere size of the Applicant’s property is not sufficient to constitute a unique or exceptional condition warranting a variance, as many properties of similar size are located throughout this neighborhood and all are subject to the same controls contained within the District of Columbia Zoning Regulations.

2. The “Undue Burdens” Stated by the Applicant are Self-Created.

The Applicant states that in order to make the existing building useable for the special exception it seeks, an addition to the building is necessary (Applicant’s prehearing statement, p 12). Additionally, the additional 262 square feet the Applicant seeks to construct for its special exception commercial use is “too small and irregular in shape to be used for residential purposes.” This is an entirely self-created hardship, and as such, is a bar to relief. *Oakland Condominium v Board of Zoning Adjustment*, 22 A 3d 748, 755 (D C 2011)(“Knowledge that a particular use would violate the Zoning Regulations is enough to raise the specter of a finding of self-imposed hardship, which would defeat a use variance request.”)

This property has already been granted a use variance to allow the entire property, which exceeds the maximum permitted FAR devoted to commercial uses, to be used for commercial purposes, it cannot now state that another use variance is required to facilitate an addition of its own creation to satisfy a use that is not permitted as a matter-of-right, nor extant on the property, when there has been no demonstration that other uses could not operate in the Subject Property in compliance with the Zoning Regulations. Moreover, the owner of the Subject Property is a sophisticated real estate investor with knowledge of the limitations on use. To claim an undue hardship post-acquisition is disingenuous, to claim a hardship now, after already receiving a variance to allow for full commercial use of the existing building, is inexplicable.

2. The Relief Cannot Be Granted Without Adverse Affects on Surrounding Properties

The relief requested is not, as the Applicant states, *de minimis*. While 262 square feet of gross floor area may appear to be a minor addition to the building, the elimination of all space

within the Subject Property to handle the high-volume deliveries and trash removal that are expected of a fast-food user represents an enormous change to the use of the public alley, which is shared by many restaurant users. The Applicant has not demonstrated how it intends to operate such that deliveries and trash removal will not interfere with the other users of the public alley, all of whom depend on such access to maintain their restaurant operations. This Applicant has not even bothered to approach its neighbors in the square to discuss its Application.

The Board must consider any adverse impacts that would be felt by surrounding properties were the relief to be granted. In this instance, because of the already high-density nature of the surrounding neighborhood and the corresponding high demand for use of the public alley, the relief requested would indeed significantly and adversely impact the Opponents. Such adverse impacts are a substantial detriment to the public good, and as such the Application cannot meet the tests for either the variance or special exception relief requested.

III. Witnesses / Case Presentation

The Opponent intends to call the following witnesses

- 1 Philippe Lanier, EastBanc, Inc
- 2 George Rızık, EastBanc, Inc.

III. Conclusion.

The Opponents are uniquely affected by the proposed development as adjoining property owners. Accordingly, we respectfully request that this Board grant the request for party status and urge the denial of the Application.

Sincerely,



Kinley R. Bray

Cc Philippe Lanier
George Rızık
La Chumiere
Don Lobos
Taj of India
Advisory Neighborhood Commission 2E

DC Office of Planning



BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



FORM 140 - PARTY STATUS REQUEST

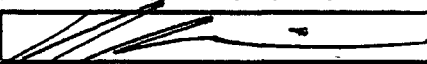
Before completing this form, please review the instructions on the reverse side
Print or type all information unless otherwise indicated. All information must be completely filled out.

PLEASE NOTE: YOU ARE NOT REQUIRED TO COMPLETE THIS FORM IF YOU SIMPLY WISH TO TESTIFY AT THE
HEARING. COMPLETE THIS FORM ONLY IF YOU WISH TO BE A PARTY IN THIS CASE.
(Please see reverse side for more information about this distinction.)

Pursuant to 11 DCMR §§ 3022.3 or 3106.2, a request is hereby made, the details of which are as follows:

Name: **FAPFABI, LLC (a subsidiary entity of EastBanc, Inc.)**
Address: **3307 M Street N.W.**
Phone No(s): **202 737 1000** E Mail: **alanier@eastbanc.com**

I hereby request to appear and participate as a party in Case No.: **18402**

Signature:  Date: **9/5/12**

Will you appear as a(n) ☒ **Proponent** ☐ **Opponent** Will you appear through legal counsel? ☒ **Yes** ☐ **No**

If yes, please enter the name and address of such legal counsel

Name: **Kinley R. Bray, Esq. Arent Fox LLP**
Address: **1050 Connecticut Ave N.W. Washington DC 20036**
Phone No(s): **(202) 715-8572** E Mail: **kinley.bray@me.com**

PARTY WITNESS INFORMATION:

On a separate piece of paper, please provide the following witness information:

- 1 A list of witnesses who will testify on the party's behalf;
- 2 A summary of the testimony of each witness (*Zoning Commission only*),
- 3 An indication of which witnesses will be offered as expert witnesses, the areas of expertise in which any experts will be offered, and the resumes or qualifications of the proposed experts (*Zoning Commission only*), and
- 4 The total amount of time being requested to present your case (*Zoning Commission only*).

PARTY STATUS CRITERIA:

Please answer all of the following questions referencing why the above entity should be granted party status:

- 1 How will the property owned or occupied by such person, or in which the person has an interest be affected by the action requested of the Commission/Board?
- 2 What legal interest does the person have in the property? (i.e. owner, tenant, trustee, or mortgagee)
3. What is the distance between the person's property and the property that is the subject of the application before the Commission/Board? (Preferably no farther than 200 ft)
4. What are the environmental, economic, or social impacts that are likely to affect the person and/or the person's property if the action requested of the Commission/Board is approved or denied?
5. Describe any other relevant matters that demonstrate how the person will likely be affected or aggrieved if the action requested of the Commission/Board is approved or denied.
6. Explain how the person's interest will be more significantly, distinctively, or uniquely affected in character or kind by the proposed zoning action than that of other persons in the general public.

Except for the applicant, appellant or the ANC, to participate as a party in a proceeding before the Commission/Board, any affected person shall file with the Zoning Commission or Board of Zoning Adjustment, this Form 140 not less than fourteen (14) days prior to the date set for the hearing.

September 10, 2012

Lloyd Jordan, Chairman
Board of Zoning Adjustment
441 Fourth Street N.W , Suite 210 S
Washington D C. 20001

Re: Application of Shophouse, LLC
BZA Case No 18402

Dear Chairman Jordan and Members of the Board

I hereby authorize the law firm of Arent Fox, LLP to represent my interests in opposition to the above-referenced case before the Board. Arent Fox is authorized to act on our behalf and as our agent with respect to this matter

Sincerely,

FAPFABI, LLC

By: 

September 10, 2012

Lloyd Jordan, Chairman
Board of Zoning Adjustment
441 Fourth Street N W , Suite 210 S
Washington D C 20001

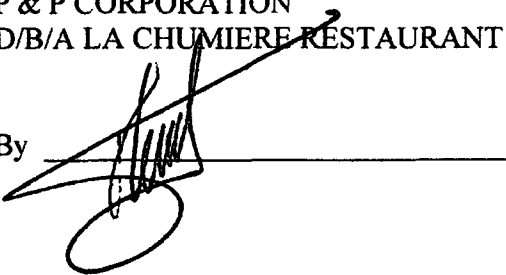
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Sincerely,

P & P CORPORATION
D/B/A LA CHUMIERE RESTAURANT

By 

September 10, 2012

Lloyd Jordan, Chairman
Board of Zoning Adjustment
441 Fourth Street N W., Suite 210 S
Washington D C 20001

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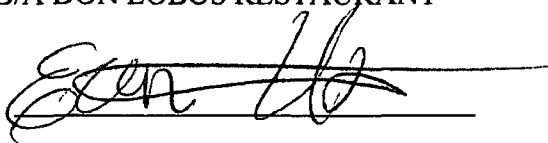
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Sincerely,

LOBOS, INC
D/B/A DON LOBOS RESTAURANT

By

A handwritten signature in black ink, appearing to read "Evan H.", is written over a horizontal line. The signature is stylized with a large, looped initial "E" and a trailing flourish.

September 10, 2012

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Board of Zoning Adjustment
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Sincerely.

INDIA PALACE, LLC
D/B/A TAJ OF INDIA RESTAURANT

By: Ashanti D. Jones 09/10/2012