

**PART E
BURDEN OF PROOF**

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1527 9th, LLC (the "Applicant"), owner of Lot 812 in Square 397, with premises address of 1527 9th Street N.W. (the "Property") and the two-story semi-detached row building constructed thereupon (the "Building"), submits this application for the following purposes:

(1) With respect to the first floor of the Building, to request a special exception pursuant to Sections 3104.1 and 2003 of the Zoning Regulations (11 DCMR), to replace one nonconforming use with another nonconforming use in an R-4 zone; and

(2) With respect to the second floor of the Building, to request, pursuant to Section 3103.2 of the Zoning Regulations, a variance from the provisions of Section 2002.3 prohibiting the extension of a nonconforming use in an R-4 zone to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of the Zoning Regulations.

The Applicant's statements explaining how this application meets the specific tests identified in the Zoning Regulations for the grant of each of the Applicant's requests, is set forth below.

1. The Applicant Meets the Requirements for Special Exception Relief Under §§ 3104.1 and 2003 of the Zoning Regulations, to Replace a Nonconforming Use with Another Nonconforming Use.

In order for the Applicant to convert the use of the first floor from one nonconforming use (beauty parlor) to the proposed nonconforming use (art gallery and art studio), special exception relief is needed pursuant to Sections 3104.1 and 2003 of the Zoning Regulations.

Uses that are permitted by special exception are presumed to be appropriate for the applicable zoning district as long as certain conditions are satisfied. In considering special exception applications, the Board's discretion is generally limited to determining whether the relevant conditions and special exception criteria have been met. If an applicant meets its burden, the Board must ordinarily grant the application. First Baptist Church of Washington v.

District of Columbia Board of Zoning Adjustment, 432 A.2d 695 (1981); Stewart v. District of Columbia Board of Zoning Adjustment, 305 A.2d 516, 518 (1978).

For purposes of the Applicant's special exception request, the pertinent provisions of Section 2003 of the Zoning Regulations are Subsections 2003.1 through 2003.5, each of which is discussed below.

- A. §2003.1 – If approved by the BZA, as authorized in §§ 3103 and 3104 for variances and special exceptions respectively, a nonconforming use may be changed to a use that is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter of right, subject to the conditions set forth in this section.***

Pursuant to Section 2003.1, a threshold requirement for the replacement of one nonconforming use with another is that the proposed replacement use must be permitted as a matter of right in the most restrictive district in which the nonconforming use is permitted as a matter of right. In the Applicant's case, beauty shop use is first permitted as a matter of right in the C-1 zone (under §701.1(c)), whereas art gallery use and artist studio use both are permitted as a matter of right in the more restrictive SP zone (under §§ 501.1(h) and 501.2), respectively. To be precise, Section 501.2 provides that an artist studio use is permitted as a matter of right in the SP District, subject to the following criteria:

- (a) All operations and storage of materials shall occur inside the building;
- (b) Sales of art work produced by the occupants of the studio shall be permitted within the studio; and
- (c) The artist may teach the art to one or more persons.

It is the intention of the Applicant and its prospective tenant at the Property, SwatchRoom, LLC ("SwatchRoom"), that the art studio proposed for the rear section of the first floor of the Building will affirmatively satisfy all three criteria listed above.

- B. §2003.2 – The proposed use shall not adversely affect the present character or future development of the surrounding area in accordance with this title. The surrounding area shall be deemed to encompass the existing uses and structures within at least three hundred feet in all directions from the nonconforming use.***

either the present character or future development of the surrounding area. Indeed, the Applicant and SwatchRoom expect the art gallery with its adjacent studio only to enhance the character of the surrounding neighborhood, by providing a place where members of the community can meet together in a casual setting, learn about fine art, and appreciate the work of talented local artists, in addition to that of the principals of SwatchRoom themselves.

Certainly there is nothing about the Applicant's proposed art gallery and art studio uses at the Property that will adversely impact future development of the surrounding area. The property that adjoins the Property on the north (Lot 31, discussed in Part D of this application) and several properties on the west side of this block of 9th Street are all vacant properties owned by Shiloh Baptist Church, which has made multiple announcements in recent years about redeveloping them as part of a complex to be known as "Victory Village", to include a community services center at Lot 31 (1531-1533 9th Street) and an education and conference center across the street from and slightly north of the Property at 1526-1528 9th Street). It still remains to be seen whether the Church will proceed with the redevelopment of these properties as announced, or will continue to hold some or all of them vacant for a longer period, but in either event there can be no doubt that the Applicant's proposed use of the property will have zero impact on what the Church decides to do in this regard.

Meanwhile, under the existing conditions of this portion of 9th Street, as discussed in Part D of this application, the Property is situated among a mix of other small businesses, a few row houses, the Church's existing family life center and outreach center, and the Church itself. The Applicant believes the proposed art gallery and art studio uses of the Property will complement the immediate neighborhood and will be a welcome addition to the Shaw community.

C. §2003.3 – *The proposed use shall not create any deleterious external effects, including but not limited to noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects.*

The proposed art gallery and art studio will not create any deleterious effects. These uses will not generate excessive noise, illumination, vibration, odors, or traffic, and will involve interior renovations but no significant exterior modifications to the Building. As discussed below, the proposed programming of the Building is directed toward community residents and is

not anticipated to generate vehicular traffic or loading concerns. Although, per the Zoning Regulations, the proposed uses of the first floor (as well as those of the second floor, discussed in Section 2 of this Part E, below) do not require the Applicant to provide any off-street parking spaces, the proposed lease with SwatchRoom would create two (2) new parking spaces at the rear of the Property, accessible from the public alley.

The intended normal hours of operation will be 8 a.m. to 8 p.m. All operations of the art gallery and studio are expected to be conducted within the Building, which does not have a roof deck or patio.

The Applicant appreciates that the Board may require the provision of, or direct modifications to, any design regarding screening, landscaping, lighting, signage, hours of operation, or any other restriction it deems necessary to protect the value, utilization or enjoyment of property in the neighborhood, pursuant to section 2003.7.

D. §2003.4 – When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use.

This subsection is not applicable to the Property, as the Property has not been changed to a conforming use.

E. §2003.5 – In Residence Districts, the proposed use shall be either a dwelling, flat, apartment house, or a neighborhood facility.

The proposed art gallery and art studio use of the Property qualifies as a neighborhood facility. While the Zoning Regulations do not provide a definition of "neighborhood facility", the Board has indicated in past decisions that a neighborhood facility includes the following characteristics: (1) is patronized by people who live and work close by; (2) is not used by any one group but rather by all members of the community; (3) is not exclusive; and (4) is accessible by walking. (See BZA Order Nos. 16412 and 18034).

The proposed art gallery and art studio uses meet all four of these criteria. The Applicant's and SwatchRoom's intent is to provide a gallery opportunity for local artists, one that is complementary to the many nearby restaurant and retail businesses in the Shaw community. In addition, the proposed art gallery will provide a place where any members of the immediate community who are interested can come to learn about and experience fine art, to

attend lectures and discussions, or simply to meet, socialize, and spend time casually. The art studio at the rear of the first floor will provide the principals of SwatchRoom with a place to generate artwork for the gallery, and in the future may also be made available for neighborhood residents and other visitors to take classes in painting, sculpture, or other fine arts, and possibly to discover their own talents. The art gallery is not intended to be a “destination use”, and thus it is expected to be patronized primarily by local residents and by those who patronize other businesses in the 7th and 9th Street commercial corridors and elsewhere in the Shaw community. The Applicant and SwatchRoom believe that most visitors will come to the art gallery on foot, as the Property is easily accessible from the other points of Shaw by walking.

Conclusion – Section 1

For all of the foregoing reasons, special exception relief pursuant to Sections 3104.1 and 2003 of the Zoning Regulations with respect to the first floor of the Building, as described above, is appropriate.

2. The Applicant Meets the Requirements for a Use Variance Pursuant to §3103.2 of the Zoning Regulations, to Relieve the Applicant from §2002.3, Which Prohibits the Extension of a Nonconforming Use to Portions of a Structure Not Devoted to That Nonconforming Use at the Time of Enactment or Amendment of the Zoning Regulations.

The plans of the Applicant and SwatchRoom to renovate and use the first floor of the Building as an art gallery with adjacent art studio, assuming the Board grants the special exception relief discussed in Section 1 of this Part E, above, will not be feasible unless the Board grants further relief, permitting the second floor of the Building to be renovated and used for purposes accessory to the first floor use, as offices for SwatchRoom’s staff to manage and support the art gallery and art studio operations. Such permission must come, if at all, from the Board’s grant of a variance from the strict application of Section 2002.3 of the Zoning Regulations, because the requested accessory office use would be, contrary to that Section, an extension of a nonconforming use in the R-4 zone to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of the Zoning Regulations.

The burden of proof for use variance relief in the District of Columbia is well established. An applicant must demonstrate (1) that the physical characteristics of the subject property create financial hardship for the applicant in using the property consistent with the Zoning Regulations;

(2) that granting the variance will not cause substantial detriment to the public good, such as impacts on traffic, noise, lighting, etc.; and (3) that granting the variance will not be inconsistent with the general intent and purpose of the Zoning Regulations and Map. As set forth below, the application meets this three-part test for the use variance requested.

A. The Physical Characteristics of the Property Create Financial Hardship for the Applicant in Using the Property Consistent with the Zoning Regulations.

The Property is impacted by a combination of unique and exceptional conditions. First, notwithstanding that the Property is currently located in a residential zone, the Building is designed and constructed for the obvious purpose of a commercial use on the first floor, with the projecting glass retail storefront and entryway fronting on 9th Street being easily the Building's most prominent physical characteristic. The Property is taxed as a Class 2 -- Commercial property. For roughly six decades, and possibly longer, the Property has continuously functioned as a commercial and retail property (beauty salon), which happened to also include dwelling quarters upstairs. Over time, it is apparent that the physical condition of those dwelling units deteriorated to the point that they ceased to be occupied by any residents, and by the time the Applicant purchased the Property in September, 2012, the second floor of the Building appeared to be unfit for human habitation.

The physical location of the Property, in the southern half of Lot 397, on the east side of 9th Street, N.W., north of P Street, creates another unique and exceptional situation, arising from the combination of the following existing or anticipated conditions:

(i) The Property is adjacent to the Lot 811 property, which is also improved with a two-story building designed and constructed for the obvious purpose of a commercial use on the first floor, with its own projecting glass retail storefront and entryway fronting on 9th Street. Like the Building, the building on Lot 811 has been used for decades primarily for a commercial purpose. Currently the building on Lot 811 is being used exclusively for commercial purposes, with the two stories of the structure being occupied by two unrelated businesses. Viewed together, the Building and the adjacent building on Lot 811 have a predominantly commercial appearance;

(ii) On the other (northern) side of the Property, there currently exists (as it has for more than five decades) an open lot with a curb cut on 9th Street (part of Lot 31), which will either remain in this condition during the Applicant's ownership (and, hopefully, SwatchRoom's tenancy) of the Property, or, if Shiloh Baptist Church proceeds with its announced development plans, be redeveloped into a new community services building having a distinctly business/office (non-residential) character, which will be occupied and operated for non-residential purposes;

(iii) Directly across the street from the Property is the towering (more than twice the height of the Building) façade of the Henry C. Gregory III Family Life Center annex to Shiloh Baptist Church, which currently houses, among other things, a retail (restaurant) use in its first floor, despite being located in the R-4 Zone;

(iv) Also across the street from the Property, and then 20 to 30 steps to the right (north), is the Marks Electrical Service property, with premises address of 1530 9th Street, N.W., which prominently displays a commercial sign and is operated, as it has been for decades, for commercial and office purposes, on all three floors of its building;

(v) Shiloh Baptist Church owns five currently vacant row building properties on the west side of 9th Street, north of the Gregory Family Life Center, with premises addresses of 1526 and 1528 9th Street and 1532, 1534, and 1536 9th Street, N.W. The Church has announced, as part of its "Victory Village" project, its intention to redevelop those properties, following construction of the new community services center building on Lot 31 abutting the Property. Among other things, the Church announced its plans to redevelop 1526 and 1528 9th Street, sandwiched between the Gregory Family Life Center and the Marks Electrical Service property, as an education and conference center. If the Church carries out this intention, these properties will be redeveloped to create another structure(s) in the immediate vicinity of the property that will probably be non-residential in its architectural character and will certainly be non-residential in use; and

(vi) The southern one-fourth of Square 397 lies in the C-2-A zone, with the boundary of that zone being separated from the southern edge of Lot 811 (adjacent to the Property) by a mere 75 feet or so – specifically, by the frontage of three narrow two-story

row dwellings and a paved parking lot with curb cut serving the Shiloh Baptist Church Outreach Center at 1507 9th Street.

Taking all of the foregoing existing or anticipated conditions together, the Property lies in a primarily residential zone (R-4) but is physically located on a stretch of 9th Street that has the overall look and feel of a mixed-use, commercial and residential neighborhood, rather than a predominantly residential neighborhood. If Shiloh Baptist Church carries through with its announced plans to construct a community services center at 1531 9th Street and to redevelop 1526 and 1528 9th street as an education and conference center, the Property will be completely surrounded (in terms of its 9th Street frontage, not in terms of the rear alley) by structures of a non-residential character, being used exclusively for non-residential purposes.

As stated above, the second floor of the Building fell into a state of extensive disrepair prior to the Applicant's acquisition of the Property, and does not appear to have been used, or usable, for residential purposes for a considerable period of time. The upstairs portion of the Building will require substantial and costly renovations in order to be restored to any kind of productive use. If, by strict application of Section 2002.3 (and the by-right use restrictions of Section 330.5) of the Zoning Regulations to the second floor of the Building, the Applicant were to be left with no option other than to construct habitable dwelling units therein, the Applicant would be required to incur significant costs to achieve this objective, with little assurance that the dwelling units would hold much "market appeal" to tenants – given the primarily non-residential character of the Building and of the immediately adjacent properties – and with little likelihood of being able to recoup the renovation costs, except over a protracted term of ownership (which would be protracted even further by any periods of vacancy). This would create a financial hardship for the Applicant.

By contrast, if the Applicant is permitted to proceed, under its prospective lease of the Property to SwatchRoom, with the planned renovation and use of the Building and Property as described in this application, the entire Building – not merely one floor – and the Property itself, will be renovated, reinvigorated, and restored to a vibrant, productive, culturally enriching and inspiring, and community-serving use as a neighborhood-based art gallery with adjacent art studio, with accessory office uses on the second floor to make the art gallery and art studio operations possible, and, moreover, the costs of completing this exciting transformation of the

Property will be built into the lease terms between the Applicant and SwatchRoom under a long-term (multiple years with extension options) commercial lease. This transformation will include the establishment of two new off-street parking spaces and also a comprehensive refurbishment (but not expansion) of the exterior of the Building, to include without limitation re-pointed, repaired, and repainted brickwork, repainted decorative trim, new windows in the existing window openings, a new metal cornice at the top of the Building face, new roof and gutter system, new wood fence on the boundary line with Lot 31, and a new glass and metal storefront and entry door (matching the existing type and style).

If the Board does not grant the use variance relief sought by the Applicant for the second floor, thereby making this space unavailable for use by SwatchRoom for accessory offices supporting the primary art gallery and art studio uses, then SwatchRoom will not be able to proceed with its lease of the Property from the Applicant, the proposed art gallery and art studio uses of the Property will not come to fruition, and the above described comprehensive refurbishments to this more-than-100-year-old Building will not occur within any foreseeable time frame. Such an outcome would create a significant financial hardship for the Applicant, which purchased the Property with the specific intent of being able to lease it to SwatchRoom for the proposed art gallery and art studio (with second-floor accessory office) uses. Such an outcome would also, in the Applicant's opinion, constitute an unfortunate missed opportunity for the Shaw community.

For all of the foregoing reasons, a strict interpretation of Section 2002.3 of the Zoning Regulations would cause a significant financial hardship to the Applicant, deserving of relief from the Board.

B. Granting the Requested Variance Will Not Cause Substantial Detriment to the Public Good, such as Impacts on Traffic, Noise, Lighting, etc.

The grant of the requested variance relief, allowing the nonconforming use of the first floor to be extended to the second floor of the Building, for accessory office use supporting the proposed art gallery and art studio, will not create any substantial detriment to the public good.

If the Board grants the requested use variance, there will be no impact on traffic, noise, or lighting, and no other detrimental impacts to any member of the public, or to the public vantage

along 9th Street, to the public alley at the rear of the Property, or to any adjoining property. At the same time, the grant of the requested relief will make it possible for the Applicant (and specifically SwatchRoom under its proposed lease with the Applicant, as discussed in Subsection 2.A above) to renovate the Building as a much brighter and more vibrant facility promoting the work of local artists and providing a place for community members to meet, socialize, learn about and appreciate the arts, and also to create and new works of art, and all of these things will substantially benefit the public good.

Prior to filing this application, the Applicant and SwatchRoom informally presented their concept for the use of both floors of the Building to the ANC Commissioner for the Single Member District on which the Property is located (ANC 6E-01), who indicated that this application, if filed, would receive his enthusiastic support, and likely the support of ANC 6E as well.

C. Granting the Requested Variance Will Not Be Inconsistent with the General Intent and Purpose of the Zoning Regulations and Map.

The grant of the requested variance relief, allowing the nonconforming use of the first floor to be extended to the second floor of the Building, for accessory office use supporting the proposed art gallery and art studio, will not be inconsistent with the general intent and purpose of the Zoning Regulations and Map.

As discussed above, the Property has historically been used primarily for commercial purposes, with two dwelling units upstairs. However, over time, the second floor of the Building ceased to be used, and due to physical deterioration became unsuitable for use, for residential purposes. The two dwelling units in this Property have not been part of the available rental housing stock of this neighborhood for a considerable period of time, and if the second floor of the Building, after being renovated by SwatchRoom under its lease with the Applicant (an eventuality that will occur only if the Board grants this use variance, as discussed in Subsection 2.A above), is used henceforth as a supporting office accessory to the proposed art gallery and art studio uses, there will be no impact on the residential character of the surrounding portions of this neighborhood that are situated in the R-4 zone. No portion of the Property is currently being used for residential purposes, or has been used for such purposes for quite some time, and if the

requested variance relief is granted, this absence of residential use at the Property will not change.

However, if the Board grants the requested use variance, making it possible for the Applicant (and specifically SwatchRoom under its proposed lease with the Applicant, as discussed above) to renovate and operate the Building as a community-serving art gallery and art studio, the resulting facility will be a cultural amenity to this neighborhood that will make the Shaw community, which is already notably undergoing a period of revival and resurgence after prior periods of decline, an even more attractive locale for existing and prospective new residents, which will help advance the intent and purpose of the Zoning Regulations and Map with respect to those portions of the Shaw community situated in the R-4 zone.

Conclusion – Section 2

For all of the foregoing reasons, the Applicant satisfies the requirements of Section 3103.2 of the Zoning Regulations for variance relief from Section 2002.3 regarding extensions of nonconforming uses within existing structures, and therefore the Board's grant of the requested variance permitting the proposed use of second floor of the Building, as described above, is appropriate.