

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 18770-B of &pizza, Motion for Minor Modification of Conditions and Plans in Order Nos. 18770-A, pursuant to § 3129 of the Zoning Regulations.

The original application was pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception to allow a fast food establishment (first floor) under section 733, and a variance from the rear yard requirements under section 774, for a one-story rear addition to an existing building in the CHC/C-2-A District at premises 405 8th Street, S.E. (Square 902, Lot 825).

HEARING DATES (Application No. 18770):	June 10, 2014, June 17, 2014, and September 9, 2014
DECISION DATE (Application No. 18770):	September 9, 2014
FINAL ORDER ISSUANCE DATE (No. 18770-A):	September 19, 2014
MINOR MODIFICATION DECISION DATE:	March 29 and April 19, 2016

SUMMARY ORDER ON REQUEST FOR MINOR MODIFICATION

BACKGROUND

The Board of Zoning Adjustment (“Board” or “BZA”) approved an application from &pizza (the “Applicant”) pursuant to 11 DCMR §§ 3104.1 and 3103.2, for a special exception to allow a fast food establishment (first floor) under § 733, and a variance from the rear yard requirements under § 774, for a one-story rear addition to an existing building in the CHC/C-2-A District at premises 405 8th Street, S.E. (Square 902, Lot 825). The Board heard Application No. 18770 over three hearing dates: June 10, 2014; June 17, 2014; and September 9, 2014. The application was approved on September 9, 2014. An Order and a corrected Order to correct a typographical error were issued on September 19, 2014. Order No. 18770-A (the “Order”) became effective 10 days after the issuance date of September 19, 2014.

The Order included 10 conditions, including a term limit of seven years from the effective date of the Order. As described in the Order and the record, the affected Advisory Neighborhood Commission (“ANC”), ANC 6B, initially had opposed the application, citing concerns regarding how the collection and storage of trash would exacerbate an existing serious rodent problem in the neighborhood. The Applicant, with the ANC’s assent, asked for a postponement in the case to

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BZA APPLICATION NO. 18770-B
PAGE NO. 2

allow the Applicant time to work with the ANC and the neighbors on a solution to the issues being raised. The postponement was granted. Subsequently, after extensive meetings and negotiations between the Applicant, the ANC and the neighbors, the Office of Planning (“OP”), the Department of Health, the District Department of Transportation (“DDOT”), and experts in the areas of noise mitigation, odor mitigation, rodentology, and trash containment procedures, the ANC submitted a second report, this time in support of the application and with a consolidated, negotiated list of conditions, including indoor trash, noise mitigation, and odor control, that satisfied the ANC and the neighbors.

There also were two applications for party status in opposition from two neighbors which the Board had granted. In pursuing the underlying application, the Applicant worked with the ANC and the party-opponents and other neighbors and, as heretofore described, eventually reached agreement on a set of conditions to mitigate the anticipated adverse impacts of the Applicant’s proposal. In light of that agreement, the party-opponents withdrew their opposition and changed their position to one of support.

Case No. 18770 was approved by the Board by a vote of 4-1-0 taken on September 9, 2014. The final date of Order No. 18770-A¹ is September 19, 2014. (See, Exhibit 44, Case No. 18770.)

MOTION FOR MINOR MODIFICATION

On March 10, 2016, the Applicant submitted an application for modifications to the Board’s previous approval in Application No. 18770 and also, pursuant to 11 DCMR § 3100.5, a request for a waiver of the requirement for a hearing under § 3129.7. (Exhibits 1 – 7C, 12.) Included with the request for modifications were a copy of the proposed amended conditions (Exhibit 5) and revised plans. (Exhibits 7A-7C and 12.)

Preliminary Matter: Waiver of § 3129.7 To Allow Matter to be Decided Without Hearing.

A threshold question was presented as to whether the requested changes constituted minor modifications under § 3129 so that the motion could be heard without a hearing. Subsection 3129.2 states:

“The Board shall consider requests to approve minor modifications to plans approved by the Board, as set forth in §§ 3125.7 and 3125.8. The request shall be in writing, shall state specifically the modifications requested and the reasons therefore and include a copy of the plans for which approval is now requested.”

Under § 3129.7, other aspects of a Board order may be modified, but require a hearing. (“A request to modify other aspects of a Board order may be made at any time, but shall require a hearing.”)

Although most of the requested modifications are proposed changes that are reflected in the plans, the reduced term and appointment of the community liaison would not be reflected in the

¹ A corrected Order was issued to fix a typo in Order No. 18770, which was also issued on September 19, 2014.

BZA APPLICATION NO. 18770-B
PAGE NO. 3

plans. Under the Zoning Regulations, the Board may consider waiving § 3129.7, with a showing of good cause and lack of prejudice. (11 DCMR § 3100.5.)

The Board first considered the case at the Board's Public Meeting of March 29, 2016 and, at the request of the ANC, the Board postponed its decision until June 19, 2016. (Exhibits 18 and 19.) The reason for the request for a postponement was the lack of notice and transparency of the request for minor modifications and thus the ANC's lack of an opportunity to comment on the changes being sought to the Order. The Board granted the ANC's request for a postponement to give the ANC time to review the matter and comment on it.

At the June 19th Public Meeting, the Board waived the requirement in § 3129.7 that a minor modification deal with plans, as the proposed modification affects previously approved conditions as well as modifications to the plans, and proceeded without a hearing.

The Board granted the Applicant's request and waived the requirement to hold a hearing on the request for modification of conditions under § 3129.7. Although the request was not simply a minor modification of plans, such that it could be granted without a hearing, the Board found good cause and a lack of prejudice, as the proposed changes had been fully reviewed and agreed to with the neighborhood stakeholders and, as ultimately revised, had the support of the Office of Planning ("OP"), the District of Columbia Department of Transportation ("DDOT"), and the affected ANC. Accordingly, the Board waived the requirement to hold a public hearing on the modification.

Motion for Minor Modification

In this application, the Applicant requested to modify BZA Order No. 18770A (2014), which granted a special exception under § 733 for a fast food restaurant, and a rear yard variance under § 774 to allow construction of a one story rear yard addition. The original order (BZA Order 18770) was replaced by No. 18770A to correct a typographical error. The Applicant requested to modify conditions numbered 1, 4, 7, 3(i), and 11, and also filed revised plans reflecting these changes. (Exhibits 7A-7C, and 12.)

The change requested would reduce the term of approval from seven years to five years. According to the Applicant, the reduced term was agreed to by the ANC and others in the community who originally opposed the modifications, but ultimately agreed to the changes provided there was a shorter term. (Exhibits 3 and 4.) The other changes related to installation of a pollution control system in lieu of a ventless oven system (condition no. 4), relocating the HVAC system to the roof (condition no. 7), installation of a "trash extension" for storage of trash and recycling (condition no. 3(i)), and appointment of a liaison with the community to ensure operations in accordance with the BZA Order (condition no. 11).

In its letter requesting changes in the previous approval, the Applicant acknowledged and apologized for having begun construction without the requisite permits and not in accordance with the terms of the original BZA Order, Order No. 18770-A. The Applicant requested to modify the

BZA APPLICATION NO. 18770-B
PAGE NO. 4

approved conditions of Order No. 18770-A after extensive discussions and negotiations with neighbors and the ANC and after the Applicant had first conducted two-plus months of illegal construction in violation of the conditions of the original BZA order. The Applicant stated that it met with four neighborhood stakeholders and they spent considerable time and effort to reengineer the space as it was built out before the stop work order, to address how to modify the Applicant's proposal from the approved Order.

The specific revisions included:

- I. Reducing the term from seven years to five years;
- II. Changing the oven type from the originally proposed vent-less system;
- III. Relocating the HVAC unit; and

Adding conditions:

- IV. To confirm that trash extension will be used only for storage of trash and recycling; and
 - V. To appoint a representative of the Applicant to ensure compliance with conditions; and
- Submitting revised plans, to reflect the above-stated revised conditions, under Exhibits 7A-C and 12.

Pursuant to § 3129.4, all requests for minor modifications must be served on all other parties to the original application and those parties are allowed to file comments within 10 days of the filed request for minor modification. ANC 6B received notice of the request for proposed modifications to BZA Order No. 18770-A on March 11, 2014. Having just met on March 8, 2016, the ANC requested a postponement of the Board's consideration of the request for proposed modifications to allow the ANC time in which to meet to consider and comment on the request. The Board granted the ANC's request that the Board postpone its deliberations at the March 29, 2016 Public Meeting, as heretofore described in the preliminary matter in this Order.

The site of this application is located within the jurisdiction of ANC 6B, which is automatically a party to this application. An ANC report was submitted to the record, which stated that the proposed modifications were being supported "despite the fact that &pizza in concert with the owner of 405 8th Street, S.E. – Capitol Hill Investors, LLC (CHI) – conducted two and a half months of construction without construction permits and pursuant to unapproved plans that contradicted the most fundamental requirements upon which the ANC's support of the 2014 variance request and fast food exception was premised and which &pizza was ordered to comply with by the BZA in its September 2014 Order." Despite the Applicant's failures in proceeding appropriately and legally under the original Order, as negotiated with the community and ordered by this Board, the ANC, citing the Applicant's "diligent" work in the last six months to work with a group of neighbors, former ANC Commissioners, and engineers and other experts to determine how what had thus far been constructed could be modified to bring the project into line with "the spirit of the requirements of the original Order," the ANC agreed to support the modification as presented by the Applicant in its submission of April 13, 2014. The ANC's report stated that at a regularly scheduled, properly noticed meeting of April 12, 2016, at which a quorum was present,

BZA APPLICATION NO. 18770-B
PAGE NO. 5

the ANC voted 8-1-0 to support the Applicant's request for modifications, provided the Applicant submitted and the Board approved modifications to conditions in the Order, to read as follows:

1. Paragraph 1 (revised). "The exception shall be for a period of five (5) years from the original September 19, 2014 date of the unmodified Order:"
2. Paragraph 3 (new "i"). "The trash enclosure shall be used only for the storage of trash and recycling;"
3. Paragraph 4 (revised). "As specified in Exhibits 7A-C, the applicant shall use a ventless oven system, install either a hood or exhaust grill over each oven stack, and remove all cooking exhaust through the specified ductwork and Pollution Control Unit (PCU) described in Exhibit 12. The PCU will exhaust through the face of the building as specified in Exhibits 7A-C. The applicant shall maintain the system in good working order, and shall enter a maintenance contract with a service provider to, among other things, regularly clean the ductwork and PCU and provide new or clean filters in order to ensure effective elimination of odors from the vented cooking exhaust for the duration of the time that the applicant operates at 405 7th (sic) S., SE."
4. Paragraph 7 (revised) "As specified in Exhibits 7A-C: the HVAC unit at the rear of the property shall be replaced with a new HVAC unit located atop the trash enclosure; a mini split to cool the trash enclosure will also be installed atop the trash enclosure; and a cooler condenser shall be installed atop the dog leg roof. These mechanicals will be soundproofed as specified in Exhibits 7A-C to meet the standards employed by ArtUSA (or similar noise control product business) at 413 8th Street, S.E. No additional mechanical equipment shall be installed on either roof or at the rear of the property."
5. Paragraph 11 (new). "The applicant shall appoint a designated individual member of its organization to ensure compliance with the provisions of this order."

The ANC noted that its support was contingent on approval of the modification to the conditions cited above and the plans at Exhibit 7A-C. Were any of the conditions or Exhibit 7A-C not agreed to by the Applicant or incorporated into the modified Order, the ANC stated that it would oppose the requested modification. The ANC took no position on whether the modifications should be deemed "minor" or not. (Exhibit 27.)

OP submitted a timely report dated March 22, 2016, recommending approval of the modifications requested by the Applicant. Further, OP stated its opinion that the proposed modifications were minor and do not change the material facts on which the Board based its original decision. (Exhibit 9.)

Letters of support for the modification application were entered into the record by Pure Barre and Metro Mutts, both of which are businesses next door to the Applicant's location. (Exhibits 13-14, 20-21.)

BZA APPLICATION NO. 18770-B
PAGE NO. 6

The only parties to the case were the ANC and the Applicant. No parties appeared at the public meeting in opposition to the application. Accordingly, a decision by the Board to grant this application would not be averse to any party.

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 for minor modification of approval, specifically of the conditions and approved plans in Case No. 18770. Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that in seeking a minor modification to the approval in Case No. 18770, the Applicant has met its burden of proof under 11 DCMR § 3129, that the minor modification has not changed any material facts upon which the Board based its decision on the underlying application that would undermine its approval.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.5, 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.

It is therefore **ORDERED** that this application is hereby **GRANTED, SUBJECT TO THE PLANS AT EXHIBITS 7A-C AND 12 AND WITH THE FOLLOWING CONDITIONS:**

1. Approval shall be for a period of **FIVE (5) YEARS** from the original September 19, 2014 date of the unmodified order.
2. Hours of operation shall not exceed:
 - a. Sundays through Wednesdays, 10:00 a.m. to 11:00 p.m.;
 - b. Thursdays, 10:00 a.m. to midnight; and
 - c. Fridays and Saturdays, 10:00 a.m. to 2:00 a.m.
3. Garbage shall be collected a minimum of six days per week, and recycling a minimum of five days per week, and adhere to the following conditions:
 - a. Collections shall not occur before 7:00 a.m.;
 - b. The Applicant shall provide the garbage and recycling companies with keys to the trash enclosure;
 - c. All receptacles shall be kept within the trash enclosure only, unless being hauled to or from sanitation trucks;
 - d. All receptacles shall be secured with lids, including while within the trash enclosure and while being hauled to and from sanitation trucks. Exterior doors to the trash enclosure shall remain closed unless refuse is being hauled to sanitation trucks;
 - e. Garbage and recyclables shall be placed within receptacles within the trash enclosure only;
 - f. Garbage and recycling spills shall be cleaned as they occur;
 - g. Daily, prior to opening, the Applicant shall ensure that no debris was left within the breezeway and that the trash enclosure doors are properly shut and secure.

BZA APPLICATION NO. 18770-B
PAGE NO. 7

- h. The trash enclosure shall be power washed weekly or more often to prevent food or grease film on the floor of the enclosure, breezeway, and receptacles; and
 - i. The trash enclosure shall be used only for the storage of trash and recycling;
 - j. The Applicant shall allow DPW, DCRA and Zoning Administrator inspectors to access the trash enclosure and breezeway.
- 4. As specified in Exhibits 7A-C, the Applicant shall use a ventless oven system, install either a hood or exhaust grill over each oven stack, and remove all cooking exhaust through the specified ductwork and Pollution Control Unit (PCU) described in Exhibit 12. The PCU will exhaust through the face of the building as specified in Exhibits 7A-C. The Applicant shall maintain the system in good working order, and shall enter into a maintenance contract with a service provider to, among other things, regularly clean the ductwork and PCU and provide new or clean filters in order to ensure effective elimination of odors from the vented cooking exhaust for the duration of the time that the Applicant operates at 405 8th Street, S.E.
- 5. No vents shall be permitted on the roof or at the rear of the property with the exception of the bathroom exhaust vents.
- 6. No outdoor seating shall be permitted, including the rear yard and the roof. Employees shall not be permitted to take breaks within the rear yard or the breezeway.
- 7. As specified in Exhibits 7A-C: the HVAC unit at the rear of the property shall be replaced with a new HVAC unit located atop the trash enclosure; a mini split to cool the trash enclosure will also be installed atop the trash enclosure; and a cooler condenser shall be installed atop the dog leg roof. These mechanicals will be soundproofed as specified in Exhibits 7A-C to meet the standards employed by ArtUSA (or similar noise control product business) at 413 8th Street, S.E. No additional mechanical equipment shall be installed on either roof or at the rear of the property.
- 8. The trash enclosure (as depicted in the plans in Exhibits 7A-C) shall include a trash compactor, cardboard baler (as depicted in Exhibit 40E), and odor control unit to be constructed as proposed. The trash enclosure shall comply with the recommendations contained in the rodentologist report dated May 22, 2014, (Exhibit 40D), except for nos. 12, 15, and 16, which are not applicable to this site.
- 9. Deliveries shall be made through the front only. No deliveries shall be made through the breezeway.
- 10. The Applicant shall frequently remove trash and debris from the sidewalk to the front of the property and power wash this area regularly.
- 11. The Applicant shall appoint a designated individual member of its organization to ensure compliance with the provisions of this order.

BZA APPLICATION NO. 18770-B
PAGE NO. 8

In all other respects, Order No. 18770-A remains unchanged.

VOTE ON ORIGINAL APPLICATION ON SEPTEMBER 19, 2014: 4-1-0

(Lloyd J. Jordan, Marnique Y. Heath, S. Kathryn Allen, and Jeffrey L. Hinkle, to APPROVE; Marcie I. Cohen, opposed.)

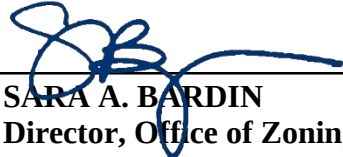
VOTE ON MINOR MODIFICATION ON APRIL 19, 2016: 5-0-0

(Marnique Y. Heath, Anita Butani D'Souza, Frederick L. Hill, Jeffrey L. Hinkle, and Robert E. Miller, to APPROVE.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this summary order.

ATTESTED BY: _____


SARA A. BARDIN

Director, Office of Zoning

FINAL DATE OF ORDER: May 2, 2016

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 § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THEREOF, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.