

**BEFORE THE BOARD
OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA**

**APPLICATION OF
NANDO’S OF WOODLEY PARK, LLC
2631 CONNECTICUT AVE., N.W.**

**BZA APPLICATION NO. 18881
HEARING DATE: DEC. 16, 2014
ANC 3C01**

STATEMENT OF THE APPLICANT

**I.
NATURE OF RELIEF SOUGHT**

Nando’s of Woodley Park, LLC (“Nando’s” or the “Applicant”), through undersigned counsel, submits this statement in support of its application to the Board of Zoning Adjustment (“BZA” or “Board”) pursuant to 11 DCMR §§ 3104.1 and 3103.2 for special exception relief under sections 1302.5(a) and 1307.5 to establish a fast food establishment/restaurant in the Woodley Park (“WP”) Neighborhood Commercial Overlay, and a variance from the enclosure wall requirements of section 721.3(j) in the WP/C-2-B District at premises 2631 Connecticut Avenue, N.W., Washington, D.C. (Square 2204, Lot 161) (the “Site”). Nando’s is classified a fast food establishment under section 199.1 of the Zoning Regulations because its patrons pay for their meals prior to consuming them. If additional service is sought while dining, the patron pays after the food is served.

**II.
JURISDICTION OF THE BOARD**

The Board of Zoning Adjustment (the “Board”) has jurisdiction to grant the requested special exception and variances requested pursuant to D.C. Code § 6-641.07(g) and 11 DCMR §§ 3104 and 3103.

III. BACKGROUND

A. Site Vicinity Characteristics

1. The Property

The proposed Nando's location at 2631 Connecticut Ave., N.W., is one of five ground floor retail/service spaces in the two-story commercial building at 2631-43 Connecticut Avenue, N.W. Located on the east side of Connecticut Avenue between Calvert Street and Woodley Road, N.W., the building was constructed as a matter-of-right under the Zoning Regulations in the early 1990s. The building is 136 feet wide and spans the full width of the lot. The property is 120 feet deep but the building's depth is only 105 feet with the remaining 15 feet used as the rear yard. A 15-foot wide alley abuts the property to the rear (east). No loading facilities were required or are provided at the building; instead, the rear yard is used for truck deliveries and pick-ups. A below-grade parking garage accessed off the alley provides 61 striped spaces and can accommodate approximately 20-30 more cars through attendant parking.

Other retail/service uses at the Site include Lebanese Taverna Restaurant, a dry cleaners, a Noodles & Company, and a Dunkin Donuts. As shown on the Zoning Map, attached as Exhibit A, the Site is located in the WP/C-2-B District. The retail space that is subject of this application contains approximately 3,442 square feet of space and was most recently leased by a bank. The property is owned by Grosvenor Urban Retail, LP.

2. The Vicinity

The Site is located in the Woodley Park neighborhood, which contains a mix of commercial and residential uses. On both sides of Connecticut Avenue are several independent restaurants, which include unenclosed sidewalk cafes that add to the vibrancy of the area. Many

retail/service uses are also located in the commercial corridors of Connecticut Avenue, Calvert Street and 24th Street, such as a florist, a small food market, a CVS pharmacy, a hardware store, a pet supply shop, a clothing boutique, a liquor store, as well as several other uses.

At the north end of the WP Overlay along Connecticut Avenue are residential condominium buildings and buildings that house the campus of Stanford University in Washington. Additional apartment buildings are located in the blocks to the north. Across the rear alley to the east are row dwellings. West of Connecticut Avenue and 24th Street are the Shoreham and Marriott Wardman Park hotels, and additional residential uses. The Site and the surrounding area are well-served by public transportation, including the Woodley Park-Zoo Metrorail Station and numerous Metrobus lines along Connecticut Avenue and Calvert Street.

B. Description of Proposed Fast Food Establishment

The Applicant intends to renovate the existing retail space formerly occupied by the Bank of America at 2631 Connecticut Avenue, N.W., for use as an eating establishment. Nando's is a South African casual dining restaurant originating from the Mozambican-Portuguese community. The proposed Nando's at the Site would provide approximately 97 indoor seats and approximately 46 seats on an outdoor patio at the front of the building, if approved by the Public Space Committee. The main entrance would be located on Connecticut Avenue, with a rear entrance for trash collection and deliveries along the public alley. As shown on the architectural drawings attached as Exhibit B, the Applicant proposes to create a new egress door and landing at the rear of the Site.

While many jurisdictions classify Nando's as a restaurant, under the District's Zoning Regulations it is deemed a fast food establishment. A fast food establishment is defined as:

a place of business, other than a "prepared food shop," where food is prepared on the premises and sold to customers for consumption and at least one of the following conditions apply:

- a) The premises include a drive-through;
- b) Customers pay for the food before it is consumed. One characteristic that would satisfy this element would be building permit plans that depict a service counter without seating unless the applicant certifies that the intended principal use is for a restaurant or grocery and that the counter is part of a carry out service that is clearly subordinate to that principal use; or
- c) Food is served on/in anything other than non-disposable tableware. Characteristics that would satisfy this element include, but are not limited to: the building permit plans do not depict a dishwasher or do depict trash receptacles in public areas.

A proposed or existing establishment meeting this definition shall not be deemed to constitute any other use permitted under the authority of these regulations, except that a restaurant, grocery store, movie theater, or other use providing carryout service that is clearly subordinate to its principal use shall not be deemed a fast-food establishment.

11 DCMR § 199.1 ("fast food establishment").

Because Nando's customers pay for their food prior to consuming it, the Zoning Regulations classify Nando's as a fast food establishment.¹ In all other respects, Nando's is indistinguishable from a restaurant, which is permitted as a matter of right in the C-2-B District. Wait staff serve meals to guests at their tables in ceramic, non-disposable dishware with metal utensils. Beverages are served in glassware and non-disposable cups. Wait staff clear and clean the tables after the guests finish their meals. Customers may order additional food and beverages at their table and pay after being served.

¹ Under the proposed Zoning Regulation Review, an establishment where the customer pays for his meal first is no longer automatically classified a fast food restaurant. See proposed 11B DCMR § 101.1 ("fast food restaurant").

IV.
The Application Meets the Standards for
Special Exception Relief under the Zoning Regulations

A. Standard of Review

Pursuant to section 1307.5 of the Zoning Regulations, no hotel, inn or fast food establishment is permitted in the WP Neighborhood Commercial ("NC") Overlay District. Nando's is classified a fast food establishment under section 199.1 of the Zoning Regulations because its guests pay for their meals prior to consuming them. Pursuant to 1302.5(a), restaurants, fast food establishments, and prepared food shops within an NC Overlay District are limited to no more than 25 percent of the linear street frontage, as measured along the lots that face designated roadways. Presently, approximately 33 percent of the lots that face the designated portion of Connecticut Avenue, Calvert Street, and 24th Street are already comprised of restaurants, fast food establishments, or prepared food shops.²

The Board may allow deviations from the requirements of the NC Overlay Districts as a special exception provided certain standards are met. 11 DCMR § 1304.1. As described below, the Applicant meets the test for special exception relief.

B. Compliance with Special Exception Standards

1. Consistency with the Purposes of the NC and WP Overlays

Under section 1304.1(a) of the Zoning Regulations, an applicant must demonstrate that the excepted use at the site, intensity, and location proposed will substantially advance the stated

² It appears the 25 percent cap on eating establishments may have been set artificially low in 1989 when the WP Overlay was created. Testimony in 2002 before the District of Columbia Zoning Commission on proposed amendments to the cap suggested that an Office of Planning survey in 1988-1989 calculated that Woodley Park had a restaurant linear frontage that was less than 25 percent of the total frontage. Consequently, in creating the overlay, it was expected that setting the limit at 25 percent would allow for growth and would not be unduly burdensome. However, the 2002 testimony before the Zoning Commission suggests that Woodley Park was in fact above 25 percent from the start—at 33 percent—and that share of frontage has not changed since that time. This application is the first request to exceed the cap.

purposes of the NC Overlay District and the specific overlay in which the site is located, which in this case is the WP Overlay District. The Applicant must also demonstrate that the proposed use will not adversely affect neighboring property, nor be detrimental to the health, safety, convenience, or general welfare of persons residing or working in the vicinity.

a. The NC Overlay

The NC Overlay is designed to encourage a scale of development, a mixture of building uses, and other attributes, such as safe and efficient conditions for pedestrian and vehicular movement, consistent with the District of Columbia Comprehensive Plan. It is also designed to encourage the retention and establishment of a variety of retail, entertainment, and personal service establishments, predominantly in a continuous pattern at ground level, so as to meet the needs of the surrounding area's residents, workers, and visitors. 11 DCMR §§ 1300.3(a) and (b).

Nando's will substantially advance the purposes of the NC Overlay by occupying ground floor space in an existing mixed-use commercial building that has been vacant for the past eight months. The building currently provides office space and a range of neighborhood-serving retail and service uses, including other restaurants, a drycleaners, and a coffee shop on the ground floor, and yoga and fitness classes and other services elsewhere in the building. The area is also served by a small market, a hardware store, a CVS pharmacy, art retail shops, and other uses. The opening of Nando's will result in the introduction of a new hip, casual dining experience for the Woodley Park community that is family-friendly. Nando's is virtually indistinguishable from a restaurant, with the exception of the timing of payment, and will be consistent with the attributes of the commercial segment of the Woodley Park neighborhood. It is designed to appeal to the needs of the surrounding area's residents, workers, and visitors by offering an attractive dining experience that is affordable to moderate income households. Nando's will

serve employees within the building, workers in the immediate area, visitors to the neighborhood, including guests at the two nearby hotels, and residents of Woodley Park.

Because Nando's will be locating in an existing tenant space, the provisions of section 1300.3(c) pertaining to limitations on the maximum height of new buildings are not implicated.

b. The WP Overlay

The purposes of the WP Overlay District are “to provide for safe and efficient pedestrian movement by reducing conflicts between pedestrian and vehicular traffic so as to improve access to retail services, the Metrorail station, and other uses in the area.” 11 DCMR § 1307.2.

Nando's will significantly advance the purposes of the WP Overlay by allowing the existing safe and efficient pedestrian travel paths to continue unaltered, and by not creating any conflicts between pedestrian and vehicular traffic. Access to retail, services, the Metrorail station, and other uses in the area will continue as contemplated by the regulations. Nando's is designed as a neighborhood-serving food establishment with most patrons arriving at the Site on-foot or by public transportation, and will create new employment opportunities for residents. Nando's employees will be encouraged to use public transportation.

Nando's will not adversely affect neighboring property and will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the neighborhood. As a fast casual restaurant, Nando's is virtually indistinguishable from a restaurant use as defined under the Zoning Regulations, except that patrons pay for the meal before consuming it. Nando's will operate and function like a restaurant, and will produce no more noise, refuse or traffic than other restaurants operating in the same block. Consequently, it will not adversely affect neighboring property, nor be detrimental to the health, safety,

convenience or general welfare of persons residing or working in the vicinity. Rather, it will benefit the community by contributing to the variety of eating establishments in the WP Overlay.

2. Exceptional Circumstances Justifying the Exception

In support of the request for special exception relief, an applicant must demonstrate that exceptional circumstances exist, pertaining to the property itself or to economic or physical conditions in the immediate area, that justify the exception or waiver. 11 DCMR § 1304.1(b).

Here, the owner's inability to lease the space to an appropriate matter-of-right use during the past 18 months constitute exceptional circumstances pertaining to the property's economic and physical condition. Consequently, the Applicant seeks special exception relief to exceed the 25 percent cap on eating establishments and allow a fast food establishment in the WP Overlay.

In June 2013, the then-tenant, Bank of America, notified the property owner that it would not be renewing its lease. The owner, through its real estate broker, KLNB, immediately began marketing the space to uses that could quickly take occupancy with little need for tenant build-out so there would be little gap in rental income. The most logical choice was another bank. However, despite marketing to each and every bank with locations in the District of Columbia, the owner received no interest from financial institutions. Changing economic conditions have reduced the need for bank space as online banking, automated tellers, and remote tellers have become the public's primary access to financial institutions.

The real estate broker also advertised the space to other uses that would not require any special zoning relief, and specifically declined to market the space to restaurants. Nevertheless, numerous eating establishments contacted the broker about the space notwithstanding the additional time and uncertainty that zoning approval would entail. Almost a year after the bank gave notice to vacate the space, three viable tenants emerged: a discount mattress store, a

convenience store, and Nando's. Given the demographics of the community and the desire for quality retail, the owner entered into a letter of intent to lease the space to Nando's. The fast casual restaurant emerged as the most attractive and viable alternative for the neighborhood.

3. Safe Pedestrian and Vehicular Access

Section 1304.1(c) of the Zoning Regulations requires an applicant to demonstrate that vehicular access and egress are located and designed so as to minimize conflict with principal pedestrian ways, to function efficiently, and to create no dangerous or otherwise objectionable traffic conditions. In this case, Nando's will occupy space within an existing building, which is already located and designed so as to not create conflicts with principal pedestrian ways.

Vehicular traffic to the building – both car and truck traffic – is located off the rear alley, which is accessed from Woodley Road, a secondary pedestrian way. The building's parking garage, which can accommodate up to 80 or 90 cars through attendant parking, is also accessed off the rear alley. Thus, there are no conflicts with Connecticut Avenue, which is the principal pedestrian thoroughfare. The property is one of the few commercial buildings in the area that offers public parking, which helps address the severe on-street parking shortages in the Woodley Park neighborhood.

4. Special Conditions Related to Design

Section 1304.1(d) provides that the Board may impose requirements pertaining to design, appearance, signs, size, landscaping, and other such requirements as it deems necessary to protect neighboring property and to achieve the purposes of the NC Overlay District and the particular overlay district. The Nando's space has been attractively designed to be compatible with the existing streetscape and the surrounding Woodley Park Historic District. Further review

by the Historic Preservation Review Board of any exterior changes to the existing space will also ensure that the neighboring properties are protected.

Based on the foregoing, the Applicant has demonstrated that it meets the test for special exception relief for a fast food establishment in the Woodley Park Overlay.

V.

The Application Meets the Standards for A Variance under the Zoning Regulations

A. The Requested Variance Relief

The Applicant seeks a variance from section 721.3(j), regarding brick enclosure walls along the lot line and around refuse containers associated with fast food establishments. Under section 721.3(j)(2), in the C-2-B District, where fast food establishments will be located on a lot that abuts an alley containing a zone district boundary for a residence district, the establishment is required to construct and maintain a continuous brick wall at least six feet high and twelve inches thick on the lot along the length of that lot line. Fast food establishments in the C-2-B District are also required to house any refuse dumpsters in a three-sided brick enclosure equal to six feet in height or the height of the dumpster, whichever is greater. The entrance to the enclosed area cannot face a residential district. 11 DCMR § 721.3(j)(3). Here, the building in which Nando's proposes to locate abuts a 15-foot alley containing a zone boundary for the adjacent R-4 District.

The Applicant notes that while the C-2-B District necessitates a variance to obtain relief from these provisions, the more restrictive C-2-A District requires a lesser burden of proof. Under section 733.3, the requirement for a brick wall at the lot line is eliminated completely if the building spans the full width of the lot, as is the case here. That is, in the C-2-A District where fast food establishments are permitted by special exception only, no relief from this

provision is required at all. With respect to the refuse container enclosure, the C-2-A District allows deviations as a special exception instead of a variance. The rationale for this incongruity is not evident in the regulatory history of this provision.

B. Standard of Review for Variance Relief

Under D.C. Code § 6-641.07(g)(3) (2001 ed.) and 11 DCMR § 3103.2, the Board is authorized to grant an area variance where it finds that three conditions exist:

(1) the property is unique because, *inter alia*, of its size, shape or topography; (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.

French v. District of Columbia Board of Zoning Adjustment, 658 A.2d 1023, 1035 (D.C. 1995), quoting *Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). See, also, *Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). As discussed below, the Applicant meets this three-prong test for relief from the brick enclosure wall requirements for fast food establishments.

C. The Site's Extraordinary or Exceptional Conditions

The Site has several extraordinary conditions that give rise to an exceptional situation. First, the property is improved with an existing building that spans the full width of its lot. The building houses five ground floor commercial uses with other services and office space above. However, the proposed fast food establishment will only occupy a portion of the building. The building was constructed as a matter-of-right for retail/service uses, including restaurants, but solely because of issues relating to business operations – the timing of payment – occupancy by a fast casual restaurant is jeopardized. The existing building and intended occupancy create

exceptional conditions in the property. See *Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974) (existing structures are as important as topography in creating "other extraordinary or exceptional situation or condition of a specific piece of property"); see also *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1099 (D.C. 1979).

Second, there is a grade change of approximately ten feet from the front to the back of the property, necessitating stairs from the ground floor level at the rear of the building to the alley level. This constrains the effective placement of trash enclosures and accessibility to the rear service doors of the retail spaces. It provides the opportunity, however, to house most trash receptacles, dumpsters and cooking oil drums (used by the matter-of-right restaurant, Lebanese Taverna) under the stairs that run parallel to the building.

Third, as just one of several tenants in the building, Nando's does not have the ability or the authority to burden other retail/service uses with zoning constraints. In this case, the continuous brick wall six feet in height along the property line is intended solely for fast food establishments and would interfere with the other tenants' access to and use of the rear yard.

Finally, the property is located along a narrow, 15-foot wide alley that limits maneuverability for both passenger vehicles of neighboring residents and service trucks associated with the commercial properties along Connecticut Avenue. The overwhelming majority of the residential properties abutting the alley have parking spaces located off the alley. Several of these properties include six-foot high privacy fences with gates to the parking spaces. Other properties simply have concrete parking pads at their rear property line. These conditions greatly restrict the maneuverability of vehicles in and through the alley, and the ability to enter and exit from residential parking spaces. Trash trucks that service the commercial dumpsters

are larger in size than residential trucks and must be able to “fork lift” the bins into the truck’s container. This requires additional maneuverability room.

D. Resulting Practical Difficulty

The confluence of these factors creates significant difficulties in providing a brick lot line wall and brick trash enclosure. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1979) (uniqueness may stem from a confluence of factors). Strict adherence to the Zoning Regulations would obligate Nando’s to require the landlord to construct an enclosure wall the full width of the property, even though Nando’s occupies less than one-third of the building’s length. Doing so would unduly burden the matter-of-right uses that are not subject to these provisions and unnecessarily impede their access to the alley. It would also impose restrictions that are not even required for fast food establishments in the more restrictive C-2-A District.

Construction of a six-foot tall brick wall along the alley would also create practical difficulties for delivery trucks and service vehicles. Presently, these vehicles can pull out of the alley and into the rear yard of the building for loading and unloading. If the brick wall were constructed, loading and unloading would occur in the alley, thereby blocking the alley and restricting access to commercial properties to the south of the Site, which also require deliveries. The six-foot wall would likewise negatively affect abutting residential properties. The alley is only 15 feet wide, which makes maneuverability extremely difficult under present conditions. The introduction of a wall along the entire length of the building would only exacerbate the tight conditions and make it difficult for residents to back their cars out into the alley. Presently, the building at 2631-41 Connecticut Ave., N.W., provides a 15-foot rear yard, which effectively widens the alley to 30 feet in places, thus enhancing circulation in the alley. This valuable

circulation feature would be eliminated if the Applicant constructed a six-foot tall brick wall the entire length of the property.

Construction of a six-foot tall brick enclosure wall for the refuse dumpsters would also create similar practical difficulties in maneuverability and safe and effective collection of the refuse, given the narrowness of the alley.

E. No Harm to Public Good or Zone Plan

The requested relief can be granted without harm to the public good and without threat to the integrity of the zone plan. Because the Applicant's business is virtually indistinguishable from a restaurant, except for the timing of payment, it does not produce the high volumes of refuse characteristic of typical fast food establishments that use disposable service containers and paper products, and large quantities of cooking oil and grease. In addition, not erecting the walls will enhance circulation and maneuverability in the alley, thus promoting the public good. Nando's will use the same trash compactor that was installed for the building's use when Noodle's leased the adjacent space in 2011 from the same landlord. In addition, trash pick-ups will increase by one visit per week.

Overall, the zone plan will not be compromised since the proposed project will, for all intents and purposes, serve as a restaurant that will enhance the vitality of the street and provide a variety of healthy food choices at reasonable prices for those who visit, work, and live in the neighborhood.

The granting of the variance would also be consistent with Board's previous approval in BZA Case No. 18210. There, the Board granted Noodles & Company the same relief at the same property. A copy of that order is attached as Exhibit D.

VI.
ANC Support

At its duly noticed and regularly scheduled meeting of November 17, 2014, Advisory Neighborhood Commission 3C voted 4-2-1 to support this application, subject to the following conditions:

1. Nando's shall use the existing trash compactor at the site;
2. Trash service at the site will be increased from four times a week to five times a week; and
3. Any future, new eating establishment proposed for this space shall be required to seek special exception relief in conformance with the applicable provisions of the Woodley Park Overlay and Zoning Regulations.

VII.
Witnesses

The following witnesses may be called to testify at the Board's public hearing on the application:

1. Burton Heiss, CEO, or Shawn Baxter, Real Estate Manager, Nando's Restaurant Group
2. Perry Reith, Grosvenor Urban Retail, LP
3. Steve Combs, KLNB Real Estate

VIII.
Exhibits in Support of the Application

The following exhibits are attached to this statement in further support of the application:

- Exhibit A: Portion of the Zoning Map illustrating the site
- Exhibit B: Architectural drawings
- Exhibit C: Outlines of witness testimony
- Exhibit D: Copy of BZA Order No. 18210

IX.
CONCLUSION

For the reasons stated above, the requested relief meets the applicable standards for special exceptions and a variance under the Zoning Regulations. Accordingly, the Applicant respectfully requests the Board to grant the application.

Respectfully submitted,

HOLLAND & KNIGHT, LLP

By: 

David W. Briggs

Mary Carolyn Brown

800 17th Street, N.W. Suite 1100

Washington, D.C. 20006

(202) 955-3000

Counsel for Nando's of Woodley Park, LLC

December 2, 2014