

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18881 of Nando's of Woodley Park, LLC, pursuant to 11 DCMR §§ 3104.1, 3103.2, and 1304.1 for special exceptions from the 25 percent street frontage limitation under § 1302.5(a) and the fast food establishment prohibition under § 1307.5, and a variance from the enclosure wall requirements of § 721.3(j) to establish a fast food establishment in the WP/C-2-B District at premises 2631 Connecticut Avenue, N.W. (Square 2204, Lot 161).

HEARING DATE: December 16, 2014

DECISION DATE: February 10, 2015

DECISION AND ORDER

SELF-CERTIFIED

Nando's of Woodley Park, LLC ("Nando's" or the "Applicant") submitted this self-certified application on September 15, 2014, for the property located at 2631 Connecticut Avenue, N.W. (Square 2204, Lot 161) (the "Site"). The Applicant requested special exception relief from the 25 percent street frontage limitation of § 1302.5(a) and the fast food establishment prohibition of § 1307.5, and a variance from the enclosure wall requirements of § 721.3(j), to establish a fast food establishment in the WP/C-2-B District at the Site. Following a public hearing and public meeting, the Board of Zoning Adjustment ("Board" or "BZA") voted on February 10, 2015, to approve the application subject to conditions.

Preliminary Matters

Notice of Application and Notice of Hearing. By memoranda dated September 19, 2014, the Office of Zoning sent notice of the filing of the application to the D.C. Office of Planning ("OP"), the D.C. Department of Transportation ("DDOT"), Advisory Neighborhood Commission ("ANC") 3C, the ANC within which the Site is located, Single Member District 3C01, and the Councilmember for Ward 3. A public hearing was scheduled for December 16, 2014. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing on the application in the *D.C. Register*, and on September 25, 2014, sent such notice to the Applicant, ANC 3C, and all owners of property within 200 feet of the Site.

Request for Party Status. In addition to the Applicant, ANC 3C was automatically a party in this proceeding. Woodley Park Community Association ("WPCA"), a citizens association organized as a District of Columbia not-for-profit membership corporation, and Mr. Salim Zaytoun, owner

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

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of Café Paradiso, requested party status in opposition to the application. The Board granted the requests and consolidated them into a single opposition party.

Applicant's Case. Carolyn Brown of Holland & Knight LLP represented the Applicant. The Applicant presented three witnesses in support of the application at the public hearing: Burton Heiss, Managing Director and Senior Vice President of Nando's Restaurant Group, Inc., CEO of Nando's; Steve Combs of KLN Real Estate, broker for the property; and Lindsley Williams of Holland & Knight LLP as an expert in land use and zoning.

Government Reports. The Office of Planning ("OP") filed a report with the Board on December 8, 2014, recommending approval of the application subject to several conditions. (Exhibit 49.) The OP report set forth each of the provisions of §§ 1304.1 and 3104.1 and opined that each is met. The report also opined that the application met the standards of §§ 721.3(j) and 3103.2 for an area variance from the brick enclosure wall and refuse container requirements. DDOT also filed a report with the Board on December 9, 2014, stating that it had no objection to the requested relief. (Exhibit 50.) The OP report was presented at the hearing by Karen Thomas who testified that the Overlay cap was not intended to freeze businesses in time. Ms. Thomas indicated that the special exception process associated with the Overlay was designed to allow community input regarding a waiver of the cap.

ANC Report. ANC 3C submitted a report to the Board dated November 17, 2014, recommending approval of the application, with conditions. (Exhibit 53.) The recommended conditions were as follows:

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;
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.

Party in Opposition. WPCA objected to the special exception from the 25 percent eating establishment limitation, but did not oppose any other relief sought by the Applicant (see Testimony of Peter Brusoe, Exhibit 64, p. 1, and Hearing Transcript of December 16, 2014, (Tr.), p. 114). WPCA asserted that Woodley Park does not need another restaurant, since it believes the Woodley Park neighborhood has more than a sufficient number of eating establishments, and is already saturated with restaurants, and that granting the special exception to raise the 25 percent cap would result in reducing the amount of space available for retail and service-related businesses in the Woodley Park neighborhood. Furthermore, WPCA stated that the Applicant failed to meet the special exception standards set forth in § 1304.1 of the Zoning Regulations because raising the 25 percent cap would undermine the purposes of the

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Neighborhood Commercial (“NC”) and Woodley Park (“WP”) Overlay Districts. WPCA also asserted that there was not an exceptional circumstance pertaining to the Site or the economic conditions of the immediate area to justify the waiver.

Persons and Organizations in Support. The Board received numerous letters in support of the application from individuals and businesses located in the Woodley Park neighborhood and within the WP Overlay, and several individuals testified in support at the public hearing. The written and oral testimony commented favorably on the Applicant’s project. The Board received a petition with 120 signatures from residents throughout Woodley Park, plus an additional 19 signatures from owners and/or authorized representatives of Woodley Park businesses who expressed support for Nando’s coming into the community and helping to improve the vibrancy of the neighborhood.

Persons and Organizations in Opposition. The Board received letters in opposition to the application, and one person testified in opposition at the hearing. A number of individuals raised concerns that Woodley Park did not need new restaurants, and that making an exception to the 25 percent cap for Nando’s would allow restaurants to replace small retail and service businesses that are necessary to serve the neighborhood. There were also concerns that another restaurant would add to the existing problem with rodents.

FINDINGS OF FACT

The Site and the Surrounding Neighborhood

1. The Site is located at 2631 Connecticut Ave., N.W., more specifically described as Lot 161 in Square 2204. Square 2204 is bounded by Woodley Road to the north, Woodley Place to the east, Calvert Street to the south, and Connecticut Avenue to the west. The Square is bisected by a 15-foot wide public alley that runs parallel to Connecticut Avenue and abuts the rear (east) of the Site. The Site is located on the east side of Connecticut Avenue, between Calvert Street and Woodley Road, and contains approximately 16,560 square feet of land area. The Site is located in the C-2-B District and is within the WP Neighborhood Commercial NC Overlay District. The Site is also within the Woodley Park Historic District.
2. The Site is one of five ground floor retail/service spaces in the two-story commercial building at 2631-43 Connecticut Avenue, 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 Site. The Site is 120 feet deep but the building’s depth is only 105 feet, with the remaining 15 feet used as the rear yard. 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.
3. Other retail/service uses at the Site include Lebanese Taverna Restaurant, a dry cleaners, a Noodles & Company, and a Dunkin Donuts. The retail space that is subject of this

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application contains approximately 3,442 square feet of space and was occupied until the summer of 2014, under lease, by a Bank of America. The Site is owned by Grosvenor Urban Retail, LP.

4. The Site is located in Woodley Park, 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.
5. 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 of the Site 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.

The Applicant's Project

6. The Applicant proposes 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 known as Nando's, a South African casual dining restaurant. The proposed eating establishment 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 DDOT's 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. A new egress door and landing would be located at the rear of the Site.
7. A customer arriving at the Nando's will be presented with a menu and offered a table. When ready to order, the customer will go to a counter, place the order and pay for the food. The food will be brought to the table by wait staff served on ceramic, non-disposable dishware with metal utensils. Beverages will be served in glassware and non-disposable cups. Wait staff will 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.
8. The Zoning Regulations define "fast food establishment" 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 three conditions apply. (11 DCMR § 199.1 ("fast food establishment").) The second of those conditions is that "customers pay for the food before it is consumed."

9. Because Nando's customers pay for their food prior to consuming it, the Zoning Regulations classify Nando's as a fast food establishment. Apart from the fact that food is ordered at a counter, rather than through a waiter, Nando's is indistinguishable from a restaurant, which is permitted as a matter of right in the C-2-B District.

The Special Exception Relief

10. Pursuant to § 1307.5 of the Zoning Regulations, no fast food establishment is permitted in the WP Neighborhood Commercial Overlay District. Pursuant to § 1302.5(a), which governs all Neighborhood Commercial Overlay Districts, 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 ground floor properties fronting on the designated portion of Connecticut Avenue, Calvert Street, and 24th Street are already comprised of restaurants, fast food establishments, or prepared food shops.
11. The Board may allow deviations from the requirements of the NC Overlay Districts as a special exception provided certain standards in § 1304.1 are met. The Applicant seeks a special exception from § 1307.5 to permit a fast food establishment in the WP Neighborhood Commercial Overlay District and a special exception from § 1302.5(a) to permit the fast food establishment to exceed the 25 percent cap. The Board finds that the Applicant meets the test for special exception relief.

Consistency with the Purposes of the NC and WP Overlays (1304.1(a))

12. Under § 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 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.

The NC Overlay

13. 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).) The proposed fast food establishment satisfies the applicable criteria of the NC Overlay as described below.

- a. The fast food establishment will occupy ground floor space in an existing mixed-use commercial building that has been vacant for over eight months. The building currently provides office space and a range of neighborhood-serving retail and service uses, including other restaurants, a dry cleaners, 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.
- b. The opening of Nando's will result in the introduction of a new 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. The proposed Nando's has been 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.

The WP Overlay

14. 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.) The proposed eating establishment satisfies the applicable criteria of the WP Overlay as described below.
 - a. Nando's will allow the existing safe and efficient pedestrian travel paths to continue unaltered, and will not create 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. The establishment has been designed as a neighborhood-serving food establishment with most patrons expected to arrive at the Site on-foot or by public transportation. The restaurant will create new employment opportunities for residents of the District. All employees will be encouraged to use public transportation.
 - b. The proposed use 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, except that customers will order and pay for their food at a counter, rather than ordering through and later paying a

waiter. It will therefore 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.

Exceptional Conditions Justifying the Exception (§ 1304.1(b))

15. An exceptional circumstance exists pertaining to the Site's economic and physical condition. The owner of the Site was unable to lease the Bank of America space to an appropriate matter-of-right use for over 18 months. 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 owner marketed to other banks but received no interest from financial institutions. Changing economic conditions have reduced the need for bank space.
16. 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, which would require a special exception. Nevertheless, numerous eating establishments contacted the broker about the space. Almost a year after the bank gave notice of its intent to vacate the space, three viable tenants emerged: a discount mattress store, a convenience store, and Nando's. The owner entered into a letter of intent to lease the space to Nando's, the only restaurant providing a lease guarantee. Nando's restaurant emerged as the most viable alternative for the neighborhood.

Safe Pedestrian and Vehicular Access (§ 1304.1(c))

17. Subsection 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 Site 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.

Special Conditions Related to Design (§ 1304.1(d))

18. Subsection 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.

The Variance Relief

19. The Applicant seeks a variance from § 721.3(j) of the Zoning Regulations, regarding brick enclosure walls along the lot line and around refuse containers associated with fast food establishments. Under § 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 12 inches thick on the lot along the length of the 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).) In this case, the building in which Nando's proposes to locate abuts a 15-foot alley containing a zone boundary for the adjacent R-4 District.

Exceptional and Extraordinary Conditions

20. The Site 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. The proposed fast food establishment will only occupy a small portion of the building. The building was constructed as a matter-of-right for retail/service uses, including restaurants, and solely because of issues relating to business operations – the timing of payment – occupancy by a fast casual restaurant is jeopardized.
21. There is a grade change of approximately ten feet from the front to the back of the Site, 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 presently used by the matter-of-right restaurant, Lebanese Taverna, under the stairs that run parallel to the building.
22. 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.

23. The Site 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, which requires additional maneuverability room.

Practical Difficulties

24. Strict adherence to § 721.3(j) of the Zoning Regulations would obligate Nando’s to require the landlord to construct an enclosure wall the full width of the Site, 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.¹

25. 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. This valuable circulation feature would be eliminated if the Applicant were required to construct a six-foot tall brick wall for the entire length of the Site fronting on the alley.

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

¹ Under § 733.3 for C-2-A Districts, 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.

No Harm to Public Good or Zone Plan

27. The Applicant's business is virtually indistinguishable from a restaurant, except for the timing of payment, and 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 wall 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.
28. Overall, the zone plan will not be compromised since the proposed project will 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.

CONCLUSIONS OF LAW

Special Exception Relief

Pursuant to § 3104 of the Zoning Regulations, the Board is authorized to grant special exceptions where, in its judgment, the relief will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to affect adversely the use of neighboring property. Additionally, certain special exceptions must meet the conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of § 3104, the Applicant also had to meet the requirements of § 1304.1 of the Zoning Regulations.

Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and "if the applicant meets its burden, the Board ordinarily must grant the application." *First Washington Baptist Church v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973).)

The Applicant is seeking special exceptions from §§ 1307.5 and 1302.5(a) to establish a fast food establishment in the WP Neighborhood Commercial Overlay. Subsection 1307.5 prohibits fast food establishments in the WP Overlay. Subsection 1302.5(a) provides that restaurants, fast food establishments, and prepared food shops shall occupy no more than 25 percent of the linear street frontage within a particular NC Overlay District, as measured along the lots that face designated roadways in the particular district. The Board may allow deviations from these requirements provided that the standards set forth in § 1304.1 are met.

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As a preliminary matter, the Board agrees with the Office of Planning that the purpose of the cap was not to freeze the number of eating and drinking establishments at the 25 percent level. Rather, that number simply acts as a threshold after which an applicant for a new eating and/or drinking establishment use must meet certain criteria. As noted, a special exception applicant involves a “site-specific discretionary review of proposed uses that are generally deemed to be presumptively compatible or desirable in a particular area or zoning district.” Rathkopf's *The Law of Zoning and Planning*, RLZPN § 61: (2014). Based on the above findings of fact and having given great weight to OP and the ANC, the Board concludes that the Applicant meets the standards of § 1304.1 as follows:

Subsection 1304.1(a): The excepted use, building, or feature at the size, intensity, and location proposed will substantially advance the stated purposes of the NC Overlay District and the particular NC Overlay District, and 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.

The Board concludes that Nando's will substantially advance the stated purposes of the NC Overlay and the WP Overlay, and 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. The Board finds that Nando's will advance the purposes of the NC Overlay by occupying ground floor space in an existing mixed-use commercial building that has been vacant for over eight months. Nando's, an affordable and family-friendly dining experience for the Woodley Park community, will be indistinguishable from a restaurant with the exception of the timing of payment, consistent with the attributes of the commercial segment of Woodley Park, and appealing to the needs of the area's residents, workers, and visitors.

WPCA and persons in opposition to the special exception claimed that Woodley Park is already oversaturated with restaurants. However, a comparison of the 2004 and 2014 Inventory of Woodley Park Eating Establishments suggests otherwise. The 2004 Inventory submitted to the record as Exhibit 64 by WPCA shows that the percentage of eating establishments was 24.78 percent, or just below the 25 percent cap. By 2014, a new inventory of eating establishments showed that the number eating establishments had increased to 33 percent. (See Exhibit 66.) Yet, there is no evidence of any special exception applications to the BZA to exceed the cap since the overlay was enacted in 1989. While WPCA suggested this was due to the lack of adequate tools to monitor and enforce the cap, a comparison of the two inventories suggests another explanation. The amount of total street frontage in Woodley Park (the denominator) was corrected to delete property not within the overlay and other errors, but there was no change in the number of linear feet devoted eating establishments (the numerator). This resulted in an increase in the *percentage* of street frontage cap but no actual change in the *number* of eating establishments. This supports the contention that this application represents the first true increase in the cap since its adoption 26 years ago. (See Z.C. Case No. 86-26, Exhibit No. 196, at 22.) Thus, this requested relief is not excessive and will not have any significant impact on the community. In fact, given the substantial increase in the Woodley Park population, particularly in the number of children, and the lack of new eating establishments in recent years to address

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the changing demographics, the Board concludes that Nando's will be an appropriate addition to the neighborhood.

The Board also concludes that the proposed Nando's will substantially advance the purposes of the WP Overlay by allowing the existing safe and efficient pedestrian travel paths to continue unaltered. Nando's will not create any conflicts between pedestrian and vehicular traffic; it will create new employment opportunities for residents; produce minimal noise, refuse, or traffic; and will generally benefit the community by contributing to the variety of eating establishments in the WP Overlay.

Subsection 1304.1(b): Exceptional circumstances exist, pertaining to the property itself or to economic or physical conditions in the immediate area that justify the exception or waiver.

The Board concludes that exceptional circumstances exist pertaining to the Site's economic and physical conditions. For over 18 months, the owner of the Site worked diligently to lease the space to an appropriate matter-of-right use. The Applicant's real estate broker actively marketed the Site to a variety of users, but was unable to find any appropriate matter-of-right tenants willing to rent the space. After almost a year of the Site remaining vacant, only three viable tenants emerged: Nando's, a convenience store (a 7-11), and a discount mattress store. Given the demographics of the community and the desire for quality retail, Nando's was the most attractive option for the neighborhood.

Despite the owner's trouble leasing the retail space at the Site, WPCA claimed that Woodley Park is a desirable neighborhood with a "healthy" real estate market, and that economic conditions should not justify the special exception. However, the Board concludes that based on the Applicant's good faith efforts to lease the retail space to a matter-of-right use, and its failure in finding a viable tenant due to the poor economic conditions, there are exceptional circumstances that justify the requested special exceptions.

Subsection 1304.1(c): 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.

The Board concludes that in this case, the Applicant will occupy a space within an existing building, which is already located and designed so as to not create conflicts with principal pedestrian ways. Vehicular traffic and the building's parking garage are located off of the rear alley and accessed from Woodley Road, a secondary pedestrian way. The Board finds that there are no conflicts with Connecticut Avenue, which is the principal pedestrian thoroughfare.

Variance Relief

Standard of Review

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The Applicant seeks a variance from § 721.3(j), regarding brick enclosure walls along the lot line and around refuse containers associated with fast food establishments. Under § 8 of the Zoning Act (D.C. Official Code § 6-641.07(g)(3) (2012 Repl.), 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 Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995), quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). See, also, *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). Applicants for an area variance need to demonstrate that they will encounter “practical difficulties” in the development of the property if the variance is not granted. See *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972)(noting that “area variances have been allowed on proof of practical difficulties only while use variances require proof of hardship, a somewhat greater burden”). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be “unnecessarily burdensome.” See *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).

As discussed below, the Board concludes that the Applicant has met its burden of proof for an area variance from § 721.3(j) of the regulations.

Exceptional and Extraordinary Conditions

The Board concludes that the Site is affected by a confluence of several exceptional and extraordinary conditions. The Site is already improved with an existing building that was constructed for retail/service uses and presently has multiple retail, service, and restaurant tenants. As one of several tenants in the building, Nando’s does not have the authority to burden other retail/service establishments by constructing a continuous six-foot tall brick wall along the property line, since doing so would interfere with the other tenants’ access to and use of the rear yard. In addition, a 10-foot grade change from the front to the back of the Site necessitates stairs from the ground floor level at the rear of the building to the alley level. Finally, the Site 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. Based on the foregoing, the Board concludes that these “confluence of factors” create exceptional and extraordinary conditions affecting the Site.

Practical Difficulties

The Board further concludes that the exceptional and extraordinary conditions create practical difficulties for the Applicant in complying with § 721.3(j) of the Zoning Regulations. If the Applicant were forced to construct an enclosure wall for the full width of the Site, it would unduly burden the matter-of-right uses that are not subject to these provisions, unnecessarily impede their access to the alley, and create practical difficulties for delivery trucks and service

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vehicles that would have to load and unload in the alley, thereby blocking the alley and restricting access to commercial properties to the south of the Site. The wall would also exacerbate tight conditions for owners of abutting residential properties, since installing the wall would eliminate the Site's existing 15-foot rear yard that is presently used for circulation.

The Board finds that 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.

No Substantial Detriment to Public Good or Substantial Impairment of the Zone Plan

The Board finds that requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The Applicant's business is virtually indistinguishable from a restaurant and does not produce the high volumes of refuse characteristic of typical fast food establishments. 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, and trash pick-ups will increase by one visit per week. Not erecting the walls will enhance circulation and maneuverability in the alley, thus promoting the public good. Furthermore, the Applicant will comply with the conditions set forth in the OP report (Exhibit 49) and in the ANC resolution (Exhibit 53), which will ensure that the Nando's does not result in any detriment to the public good. Overall, the Board concludes that 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.

Imposition of a Term

Based upon the evidence of record, the Board believes that the requested relief may be granted without adverse impacts to the community. However, the Board is permitting a use that is prohibited in the overlay. Were it not for the ability of the Board to allow this use as a special exception pursuant to § 1304, this would have been an application for a use variance. (11 DCMR § 3103.6.) In addition, the Board heard a great deal of testimony expressing concern over the potential adverse impacts of adding another eating establishment particularly with regard to an existing problem with rodents. Finally, the Applicant's case and the community's support for this project were based upon positive attributes associated with the Nando's brand. But, as will be explained in the ANC great weight discussion that follows, the Board cannot limit its approval to that franchise. Therefore, although the Board firmly believes that based upon on the record, and with the conditions it has imposed, a fast food establishment will not tend to create adverse impacts; the accuracy of that prediction can only be tested once actual operations begin.

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As the Board has stated before: “Without a foreknowledge of the future, a term limit allows the Board to ‘hedge its bets’ that its prediction of no adverse impacts, or that predictable adverse impacts can be mitigated, will prove correct.” (*Application No. 18138-A A Motion for Reconsideration of Order No. 18138 of St. Paul’s Episcopal Church* (2011).) As expressed by a New Jersey court, a term limit on a zoning exception provides an “escape hatch” if it is later determined that the use was not consistent with the public good. (*Application No. 18138-A*, quoting, *Houdaille Construction Materials, Inc. v. Bd. of Adjustment of Tewksbury Township*, 223 A.2d 210 (N.J. Super. App.Div. 1966).)

For these reasons, the Board believes that such an “escape hatch” is needed here. Taking into account the amount of time that may be needed to build out the new eating establishment, five years is the maximum period that can be permitted to pass before the Board should have an opportunity to determine whether the impact of Nando’s operations matched the Board’s predictions.

Great Weight to ANC

Section 13(b)(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Code § 1-309.10(d)(A)), requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, ANC 3C recommended approval of the requested relief (Exhibit 53), with conditions. The Board accords the ANC recommendation the great weight to which it is entitled and concurs in its recommendation, with the exception of condition no. 3 in its resolution. That condition would require any future, new eating establishment proposed for the space to seek special exception relief in conformance with the applicable provisions of the Woodley Park Overlay and Zoning Regulations.

The Board is concerned that proposed condition no. 3 would impermissibly regulate the business conduct of the tenant, rather than the use of the property, which would be unlawful *per se*. See *Nat'l Black Child Dev. Inst., Inc. v. D.C. Bd. of Zoning Adjustment*, 483 A.2d 687, 691 (D.C. 1984). *Accord Dexter v. Town Bd. of Town of Gates*, 105, 324 N.E.2d 870, 871 (1975) (it is “a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies”). In *Olevson v. Zoning Bd. of Review of Town of Narragansett*, 44 A.2d 720, 722 (1945), the court found a condition limiting the operation of a boarding and room house to the applicant to be “unusual and peculiar” because the condition:

Rather than providing for a condition relating to that real estate in connection with the type of zoning to be applied thereto, is an attempt to grant [the applicant] himself a license to operate a boarding and rooming house ... as long as he so desires, but that such license is to be entirely personal to him and is to terminate when he ceases to so occupy such property.

Id.

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Because the ANC's proposed condition contains the same flaw, the Board does not find its advice to impose that condition to be persuasive.

Great Weight to OP

The Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Official Code § 6-623.04) to give great weight to OP recommendations. The Board also concurs with OP's recommendation that the zoning relief should be granted and will impose its recommended conditions, other than the ANC's personal condition repeated in the OP Report.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1 and 1304.1, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3103.2 for an area variance from § 721.3(j), that there exists an exceptional or extraordinary situation or condition related to the Site that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

It is therefore **ORDERED** that the application is hereby **GRANTED, SUBJECT** to the **APPROVED PLANS AT EXHIBIT 34B, AND THE CONDITIONS** below. References to "the Applicant" shall refer to Nando's of Woodley Park, LLC its successors or assigns or a future person or entity operating a fast food establishment on the premises under the authority of this order. The **CONDITIONS** are as follows:

1. The Board's approval shall be valid for a period of **FIVE (5) YEARS** beginning on the effective date of this order.
2. The Applicant shall use the existing trash compactor at the Site.
3. The Applicant shall use the same waste collection company as other eating establishments in the building in order to reduce the number of trash pick-ups and trucks using the alley.

4. Trash service at the Site shall occur at least five times per week.
5. All food and drinks consumed on the premises shall be served on/in non-disposable tableware with no exceptions.
6. The property owner and the Applicant shall communicate with ANC 3C and the Woodley Park Community Association on a quarterly basis and make a reasonable attempt to resolve any issues regarding trash removal and rodent control, or assist in any way in the cleanliness of the alley.

VOTE: **4-0-1** (Lloyd J. Jordan, Marnique Y. Heath, Jeffrey L. Hinkle, and Robert E. Miller to Approve; S. Kathryn Allen not present, not voting.)

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

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

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: April 24, 2015

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 § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE

CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, 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.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.