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VIA IZIS AND HAND DELIVERY

D.C. Board of Zoning Adjustment
441 4th Street, NW - Suite 210
Washington, DC 20001

Re: BZA Case No. 18881 – Motion for Reconsideration of Condition No. 1
4631 Connecticut Avenue, N.W. (Square 2204, Lot 161)

Dear Members of the Board:

On behalf of Nando's of Woodley Park, LLC ("Applicant"), we hereby move for reconsideration of Condition No. 1 in Board of Zoning Adjustment ("BZA" or "Board") Order No. 18881 pursuant to 11 DCMR § 3126.2. That condition limits the validity of the order to five years. For the reasons set forth below, the Applicant cannot accept this time limit but offers an alternative means of limiting the use authorized by the Board.

A. Applicant's 10-year Lease Term Conflicts with Five-Year Time Limit.

By order issued April 24, 2015, the BZA approved the above-referenced application to allow a fast casual/fast-food restaurant to locate at 4631 Connecticut Avenue, N.W., Washington, D.C. The approval was granted over opposition from the Woodley Park Community Association ("WPCA"), which was concerned that permitting Nando's to occupy the proposed space would permanently fix that space for occupancy by an eating establishment in the future if Nando's vacated the space, contrary to the Overlay District limitations on eating establishments. In recognition of this concern, Advisory Neighborhood Commission ("ANC") 3C suggested, and the Applicant agreed to, a condition that would require any future eating establishment to apply for a separate special exception, to ensure that the future use would meet the same criteria in the Zoning Regulations. Ultimately, however, the BZA determined that a time-limit on the validity of the order would be the best way to ensure that the Applicant, or any subsequent establishment, demonstrated continuing compliance with the conditions of the order. Thus the BZA adopted Condition No. 1 in this order.

Without knowledge of Nando's lease arrangements with the property owner, the BZA, in its deliberations, fixed in Condition No. 1 the effectiveness of the order at five (5) years after the effective date of the BZA order. Unfortunately, the building owner and Nando's had negotiated a business arrangement that provides for an initial term of ten (10) years, with the term beginning when renovations of the space are completed and a certificate of occupancy is issued permitting Nando's to open for business. In the lease, the building owner also granted Nando's two (2) five years options to renew the term of the lease. Thus the five-year time limit of Condition No. 1 of the BZA order conflicts with Nando's lease term, and would not even afford Nando's the ability to operate for even five (5) full years, due to the order's effective date. Thus, Nando's would not be able fulfill its lease obligations to the building owner, and would find itself in the position of being in default of the lease terms before the lease term had even commenced. Additionally, Nando's will be investing in excess of \$1.0 million dollars to fitout of the space for its restaurant operations, and would not be able to amortize that investment over a term of lease that was limited to less than five (5) years. Effectively then, without BZA reconsideration and modification of this condition of the approval, it would be imprudent for Nando's proceed to fitout and then open for business knowing that it would be placed in jeopardy for violation of its lease terms. Thus the grant of the relief by the BZA, with that relief limited to five (5) years, would have the practical effect of denying the intended relief. To give value to the relief intended by the BZA and the ANC, we request a term of relief under Condition No. 1 of the BZA order be extended to twenty (20) years, beginning from the date of issuance of a certificate of occupancy to Nando's for its operations at the space, provided that the relief granted by the order would expire should Nando's cease to conduct its business operations in the space at any time prior to the end of the twenty (20) year period.

B. Alternative Means of Compliance

While the Applicant believes the suggested ANC condition regarding the period of the effectiveness of any order would achieve the ANC's intended purpose and be legally sufficient,¹ the Applicant suggests that, if the BZA determines that it cannot extend the term of relief under Condition No. 1 to twenty (20) years as set forth above, then the BZA should consider adoption of the following conditions in lieu of a condition fixing a term of relief, which conditions would control Nando's operations in the space

1. Food for on-premises consumption shall be served only in/on non-disposable tableware and shall be served to patrons by staff (as opposed to self-service);
2. Wait staff will clear and clean the tables after guests finish their meals;

¹ While any personal condition imposed by the BZA to restrict a use variance is unlawful *per se*, see *National Black Child Development Institute v. District of Columbia Bd. of Zoning Adjustment*, 483 A.2d 687, 691 (D.C. 1984), the Board may impose conditions voluntarily agreed to by an Applicant. See *President and Directors of Georgetown College v. District of Columbia Bd. of Zoning Adjustment*, 837 A.2d 58, 77 (D.C. 2003).

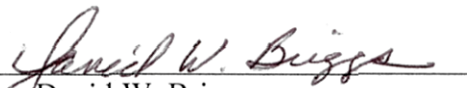
3. Carry out service shall be clearly subordinate to the principal on-premises use.

These conditions are consistent with the similar fast-food establishment use approved in BZA Case No. 18957.

Consequently, the Applicant requests in the alternative that either (a) Condition No. 1 be revised to reflect that the BZA's approval shall be valid for a period of **Twenty (20) Years** commencing with the date of issuance of a certificate of occupancy to Nando's for use of the space, or (b) Condition No. 1 be replaced with the proposed condition nos. 1-3 above, and the remaining conditions in the approved order be renumbered accordingly.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
David W. Briggs

Enclosures

cc: Karen Thomas, Office of Planning (Via email)
Woodley Park Citizens Association
Advisory Neighborhood Commission 3C (Via US Mail to post office box address)