

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

**APPLICATION OF
JEMAL'S 9TH STREET GANG OF 3, LLC**

**BZA APPLICATION NO. 18905
HEARING DATE: MARCH 10, 2015**

**I.
NATURE OF RELIEF SOUGHT**

This is the statement of Jemal's 9th Street Gang of 3, LLC (the "Applicant"), the owner of Lot 174 in Square 368, which has a street address of 1216-1226 (the "Property"). The Property is in the C-2-A District, within the boundaries of Advisory Neighborhood Commission ("ANC") 2F-06.

The Applicant seeks (1) a variance from the floor area ratio ("FAR") requirements of Section 771.2 of the Zoning Regulations, which permits a maximum density of 1.5 FAR for non-residential uses in the C-2-A District; and (2) special exception relief under Section 2120.6, which permits the Board of Zoning Adjustment ("BZA" or "Board") to grant relief from all or part of the parking requirements if the owner demonstrates that, as a result of the nature or location of a historic resource, providing the required parking will result in a significant architectural or structural difficulty in maintaining the historic integrity and appearance of the historic resource. As it relates to FAR, the Applicant proposes to expand the floor area of the existing row structures and connect them internally through a rear addition in order to accommodate commercial uses. The proposed overall FAR is 2.04, all of which will be for non-residential uses. The project will not have any off-street parking because doing so would result in an architectural and structural difficulty in maintaining the historic integrity of the existing structures on the Property.

This Prehearing Statement supersedes the Preliminary Statement submitted to the Board on October 14, 2014, and is submitted in accordance with Section 3113.8 of the District of Columbia Zoning Regulations (“Zoning Regulations”).

II. JURISDICTION OF THE BOARD

The Board has jurisdiction to grant the variance and special exception relief requested herein pursuant to sections 3103 and 3104 of Chapter 11 of the Zoning Regulations.

III. EXHIBITS IN SUPPORT OF THE APPLICATION

- Exhibit A: Building Permit No. B1403618
- Exhibit B: Historic Preservation Office (“HPO”) Staff Report and Historic Preservation Review Board (“HPRB”) Actions
- Exhibit C: Revised Architectural Drawings
- Exhibit D: Parking and Loading Statement prepared by Gorove/Slade Associates
- Exhibit E: ANC 2F Letter of Support
- Exhibit F: Biography and Outline of Testimony of Paul Millstein, Douglas Development Corporation
- Exhibit G: Resume and Outline of Testimony of Kevin Sperry, Antunovich Architects
- Exhibit H: Resume and Outline of Testimony of Erwin Andres, Gorove/Slade Associates, Inc.
- Exhibit I: Resume and Outline of Testimony of Steven E. Sher, Director of Zoning and Land Use Services, Holland & Knight LLP

IV.
BACKGROUND AND PROJECT DESCRIPTION

A. Overview of Subject Property and Surrounding Area

The Property has a land area of approximately 7,757 square feet and is located on the west side of 9th Street, N.W., between M and N Streets. The Property, which is zoned C-2-A, is within the boundary of the Shaw and the Blagden Alley/Naylor Court Historic Districts and is improved with three row houses that are contributing structures to these historic districts. North of the Property, along 9th Street, is a row house used as an office (1228 9th Street, Bell Architects); a vacant row house (1230 9th Street); WagTime dog day care center (1232 9th Street); Long View Art Gallery (1234 9th Street); a building with ground floor retail (1240 9th Street); and a multifamily building that is under construction (1250 9th Street). Abutting the Property to the south is a vacant parcel approved for a five-story residential project. Farther south, on the other side of a public alley, is a commercial building that houses a barber shop and liquor store. The Walter E. Washington Convention Center is opposite the Property on the east side of 9th Street.

Renovations are currently underway at the Property pursuant to Building Permit No. B1403618, a copy of which is attached as **Exhibit A**. These renovations were the subject of H.P.A. #13-215, and were approved by HPRB on April 25, 2013 (*see* HPO Staff Report and HPRB Actions, attached as **Exhibit B**). In accordance with this approval, the three lots for the row houses were combined into a single record lot and the structures are currently being renovated to connect as a single building with selective penetrations through party walls and with a rear addition. As shown on Sheet 5 of the enclosed architectural plans and elevations (the “Plans”) attached as **Exhibit C**, the approved renovations allow for 15,702 square feet of floor area within the building. Of that floor area, 11,632 square feet is counted toward the project

FAR, which equals an FAR of 1.46, as permitted in the C-2-A District. These renovations modify the original historic structures, which together had 10,748 square feet of floor area, of which 8,723 square feet were counted toward FAR (1.12 FAR). The Applicant now proposes to expand the floor area of the approved renovations in order to accommodate an additional 4,196 square feet for commercial and office uses.

B. Project Description

The expansion proposed under this application increases the floor area of the building (counted toward FAR) from 11,632 square feet to 15,828 square feet, which is equal to an increase in density from 1.46 FAR to 2.04 FAR. As shown on the Plans, the building program will include commercial use in the cellar and on the first and second levels, and office use on the second and third levels. A total of 12,836 square feet will be devoted to commercial use and a total of 7,062 square feet of gross floor area will be devoted to office use. Specifically, the Applicant seeks to lease the cellar and a portion of the first floor to a restaurant, and the remainder of the first floor to a small fitness studio/gym. A portion of the second floor is intended for a low-occupancy, speakeasy-type bar, and the remainder of the second and all of the third floor is intended as office space.

The proposed addition is a three-story concrete masonry warehouse-like structure that connects the existing buildings to a two-story garage structure located northwest of the Property in Blagden Alley. The addition is set back such that it does not impose on the facades of the existing historic structures. The window openings in the addition are accented with black channel steel frames and wood planks reminiscent of the adjacent garage structure. The alley side of the addition will be set back to create a series of elevated and grade level outdoor patios.

The existing east and south facades and interior walls that enclose the east/south spaces will remain, while the less-significant rear wing structures and fire-damaged interior of the north building will be demolished. The existing wood floor framing will be reinforced to provide increased structural capacity for mercantile use. Steel framing is proposed for the new structure in combination with wood joists compatible with the existing structure. An accessible route throughout the building is provided by a central lobby accessed from Blagden Alley and an elevator that connects the floors of the existing buildings to the higher floor elevation at the alley.

Loading facilities are not required for the project, pursuant to Section 2200.5,¹ which governs historic properties and provides that no additional loading berths, platforms, or service/delivery spaces are required for a building that is located in an historic district and that is certified as contributing to the character of that historic district. As described above, the Property is within the boundary of the Shaw and the Blagden Alley/Naylor Court Historic Districts and the three buildings are contributing structures to the historic districts.

V.
THE APPLICATION MEETS THE REQUIREMENTS FOR
VARIANCE RELIEF

The burden of proof for area variance relief is well established. The Applicant must demonstrate that the property is affected by an exceptional or extraordinary situation or condition, that the strict application of the Zoning Regulations will result in a practical difficulty to the Applicant, and that the granting of the variance will not cause substantial detriment to the public good nor substantially impair the intent, purpose or integrity of the zone plan. *Palmer v.*

¹ Section 2200.6 is inapplicable in this case because it applies to non-historic properties.

D.C. Bd. of Zoning Adj., 287 A.2d 535, 541 (D.C. 1972). As outlined below, the application satisfies the three-part test for area variance relief.

A. The Property is affected by an Exceptional Situation or Condition

The Court of Appeals held in *Clerics of St. Viator v. D.C. Bd. of Zoning Adj.*, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the property, not just the land. The Court of Appeals held in *Gilmartin v. D.C. Bd. of Zoning Adj.*, 579 A.2d 1164, 1167 (D.C. 1990), that it is not necessary that the exceptional situation or condition arise from a single situation or condition on the property. Rather, it may arise from a "confluence of factors." *Id.* It is not necessary that the property be unreservedly unique. Rather, applicants must prove that a property is affected by a condition that is unique to the property and not related to general conditions in the neighborhood.

In this case, the Property is improved with three row structures that are contributing structures within the Shaw and Blagden Alley/Naylor Court Historic Districts. The individual lots have been subdivided into a single record lot. A rear addition and other renovations to connect the buildings internally have been approved for the Property and are currently under construction. While additional density can be achieved through the residential use of the Property, the Property is on a section of 9th Street – mid-block between M and N Streets – where there are no other residential uses in the existing structures. All of the existing structures along this section of 9th Street are occupied with office or commercial uses, or are vacant but planned for non-residential uses. The building immediately to the north is a commercial office; the next building to the north is vacant; the next building is the WagTime dog day care center; and the building on the other side of the Long View Art Gallery is vacant, but expected to have ground floor retail.

B. Strict Application of the Zoning Regulations would Result in a Practical Difficulty

The requested relief is for an area variance, and the appropriate test is whether the strict application of the zoning regulations results in a "practical difficulty." In reviewing the standard for practical difficulty, the D.C. Court of Appeals stated in *Palmer* that "[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome." *Palmer*, A.2d at 542 (*footnote omitted*).

"The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case." In area variances, applicants are not required to show "undue hardship" but must satisfy only "the lower 'practical difficulty' standards." *Tyler v. D.C. Bd. of Zoning Adj.*, 606 A.2d 1362, 1365 (D.C. 1992) (citing *Gilmartin*, A.2d at 1167). Finally, it is well settled that the BZA may consider "a wide range of factors in determining whether there is an 'unnecessary burden' or 'practical difficulty' Increased expense and inconvenience to the applicant for a variance are among the factors for BZA's consideration." *Gilmartin*, A.2d at 1171 (citing *Barbour v. D.C. Bd. of Zoning Adj.*, 358 A.2d 326, 327 (D.C. 1976)); *see also Tyler*, A.2d at 1367 (D.C. 1992). Other factors to be considered by the BZA include "the severity of the variance(s) requested;" "the weight of the burden of strict compliance;" and "the effect the proposed variance(s) would have on the overall zone plan." *Gilmartin*, A.2d at 1171. Thus, to demonstrate practical difficulty, an applicant must show that strict compliance with the regulations is burdensome, *not* impossible. The Applicant meets this standard.

In this case, the additional FAR results from the build-out of the second and third floors of the building, which the Applicant seeks to expand in order to make the space more suitable for its prospective tenants. To comply with the Zoning Regulations, the Applicant would need to limit the second and third floors of the building to 3,858 square feet and 1,118 square feet,

respectively. However, as illustrated in the Plans, currently, the bulk of the second floor would be divided by the building stair, and the remaining portion is a narrow corridor occupied primarily by elements of the building core. These features make for a very inefficient floor plate that would be unusable and unmarketable to most office or commercial tenants. The existing layout for the third floor is most problematic because the third floor is utilized almost completely by elements of the building core, making the space nearly unusable altogether.

Arguably, the Applicant can achieve additional density on the Property under the Zoning Regulations with the construction of residential units in lieu of non-residential uses. However, providing residential uses in this manner is practically difficult for the following reasons:

Access. Currently, the project is designed with one elevator off of Blagden Alley to service the commercial uses on the Property. If residential units were constructed on the Property, a second elevator would need to be provided off of 9th Street as well as a handicap lift to provide accessibility up from the sidewalk to the first floor residential lobby. Installing two elevators in the project would be grossly inefficient because of the relatively small and elongated building footprint. The existing stairwell on 9th Street will be utilized by the office and commercial tenants of the project, but is not suitable for including residents of the project and their guests.

Building Code, Core Factor and Plumbing Chases. As stated above, a residential layout on the third floor of the building would be grossly inefficient because it requires two elevators in a relatively small elongated footprint. This configuration also would not meet the 75-foot common path of egress required by the Building Code and would result in a building with an exceptionally high core factor. Typically, a core factor of 85-90 percent can be achieved with an efficient design; however retrofitting residential units into this retail-oriented footprint results in

an inefficient 67 percent core factor. The added network of residential bathroom and kitchen plumbing throughout the floor would need to be collected and routed down through commercial spaces, losing headroom in the commercial space below.

Leasing, Amenities and Parking. Given the limited space available for residential use, a building design that incorporates residential units would forego amenities commonly available in today's residential market, thus reducing the marketability of the units. Additionally, trash would have to be walked down to the ground floor of the building because the current trash room is not designed to accommodate a residential trash chute. Three residential parking spaces would be required in addition to the commercial parking, but cannot be provided, as discussed below.

C. No Substantial Detriment to the Public Good Nor Substantial Impairment to the Intent, Purpose and Integrity of the Zone Plan

The requested variance relief can be granted without impairing the intent, purpose and integrity of the Zone Plan. The proposed additional floor area is within the existing building footprint, which is compatible with the scale and design of the building expansion and consistent with the surrounding structures and uses on this section of 9th Street. It does not affect the facades of the historic structure, but simply allows the Applicant to provide desirable and functional office and commercial space for local small businesses. The office use contemplated for the project will allow a viable day time use, generating additional "eyes on the street," which will enhance the safety of the area, and also increase the potential number of patrons for the other small businesses in the immediate area during business hours.

VI.
THE APPLICANT MEETS THE TEST FOR
SPECIAL EXCEPTION RELIEF

A. Required Parking Calculation

As described above, Section 2101.1 of the Zoning Regulations requires 21 off-street parking spaces to accommodate the proposed development. The sections of the Zoning Regulations that dictate the number of required parking spaces for the project are as follows:

11 DCMR § 2120.3: *A historic resource and any additions thereto are exempt from the requirements of § 2100.4 to provide additional parking as a result of a change of use ... except that parking shall be required for any addition where (a) the gross floor area of the historic resource is being increased by 50% or more, and (b) the parking requirement attributable to the increase in gross floor area is at least four spaces.*

11 DCMR § 2100.4: *When the use of a building or structure is changed to another use that requires more parking spaces than required for the use existing immediately prior to the change, or if the building or structure is vacant, the use that existed immediately prior to the vacancy, parking spaces shall be provided for the additional requirement in the amount necessary to conform to section 2101. (Emphasis added.)*

11 DCMR § 2101.1:

- *For retail use in the C-2-A District, one parking space is required for each additional 300 square feet of gross and cellar floor area in excess of 3,000 square feet.*
- *For office use in the C-2-A District, one parking space is required for each additional 600 square feet of gross and cellar floor area in excess of 2,000 square feet.*

11 DCMR § 2118.7: *No parking spaces are required for buildings or structures with a gross floor area and cellar floor area less than the minimum sizes specified in the schedule established by § 2101. For buildings or structures containing more than one commercial use where the first 3,000 square feet of gross floor area and cellar floor area do not require parking, this exemption shall apply to the combined gross floor area and cellar floor area contained in the building or structure and shall be pro-rated between the separate uses. (Emphasis added.)*

Under this application, the building floor area is being expanded from its original size of 8,723 square feet to 15,828 square feet, which is an increase of 81.5 percent. Therefore, pursuant to Section 2120.3, the addition to the historic resources is not exempt from the parking

requirements and the Applicant is required to provide the additional number of parking spaces required by the proposed uses.

The immediate prior use on the Property was 10,748 square feet of commercial, which had a parking requirement of 26 spaces.² The proposed use for the Property is 12,836 square feet of commercial and 7,062 square feet of office, which results in 36 required commercial parking spaces and 11 required office parking spaces (47 total).³ After subtracting 26 spaces (requirement for prior use) from 46 spaces (requirement for proposed uses), the “additional requirement” per Section 2118.7 is 21 spaces. The Applicant requests a special exception under Section 2120.6 to provide zero on-site parking spaces.

B. Standard for Approving Special Exception Relief

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, “[t]he Board's discretion ... is limited to a determination of whether the exception sought meets the requirements of the regulations.” *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. *Id.*

C. Description of Relief Requested

Pursuant to Section 2120.6 of the Zoning Regulations, the Board may grant relief from all or part of the parking requirements if the owner demonstrates that, as a result of the nature or

² $(10,748 - 3,000) / 300 = 25.8$ (rounds up to 26 spaces).

³ Retail use: $(12,836 - 1,935) / 300 = 36.3$ (rounds up to 37 spaces). The 1,935 figure is the prorated retail exemption.
Office use: $(7,062 - 710) / 600 = 10.5$ (rounds up to 11 spaces). The 710 figure is the prorated office exemption.

location of the historic resource, providing the required parking will result in significant architectural or structural difficulty in maintaining the historic integrity and appearance of the historic resource. The Board shall grant only the amount of relief needed to alleviate the difficulty proved. The applicant shall also demonstrate compliance with the general special exception standard set forth in § 3104 and shall address each of the following criteria as part of its presentation to the Board:

- a) Maximum number of students, employees, guests, customers, or clients who can reasonably be expected to use the proposed building or structure at one time;
- b) Amount of traffic congestion existing and/or that the redevelopment of the historic resource can reasonably be expected to add to the neighborhood;
- c) Quantity of existing public, commercial, or private parking, other than curb parking, on the property or in the neighborhood that can reasonably be expected to be available when the redevelopment is complete; and
- d) Proximity to public transportation, particularly Metrorail stations, and availability of either public transportation service in the area, or a ride sharing program approved by the District of Columbia Department of Transportation.

In this case, providing on-site parking spaces would result in significant architectural and structural difficulties in maintaining the historic integrity and appearance of the historic row structures on the Property. Section 2116.2 of the Zoning Regulations requires parking spaces to be located either within a parking garage or on an open area on the same lot. However, due to the Property's size and dimensions, its location on Blagden Alley, and the contributing nature of the existing structures within the Blagden Alley/Naylor Court Historic Districts, the Applicant cannot provide any off-street parking spaces on the Property. It is certainly not possible to locate 21 surface parking spaces at the rear of the Property, and it is infeasible to construct a parking structure below the existing historic buildings.

Entry for parking through the proposed courtyard for the project is not feasible because an underground transformer vault has been installed in that location to provide upgraded power to the Property. Parking would also not be feasible from 9th Street because (i) providing access would require a new curb cut from 9th Street which is not likely to be approved by DDOT, (ii) the only feasible entry point is south of the brick carriage house, which has been preserved for historic purposes, and (iii) the entry would need to be at least 20 feet wide and this space is not available.

The only way to accommodate parking on the Property would be to partially demolish portions of the building and relocate the transformer, which would eliminate the uses in the cellar and on the first floor of the building. It would also require the majority of the floor plate to be dedicated to drive aisles, yielding approximately six parking spaces per level and requiring four levels below grade to achieve 21 parking spaces. The end result would be a historic carriage house flanked by a 20-foot wide parking garage entry, turning a pedestrian-friendly entry into a transit-oriented façade and bringing vehicular traffic into Blagden Alley, which the residents of Blagden Alley are strongly against. Therefore, locating parking on the Property would result in significant architectural and structural difficulties in maintaining the historic integrity and appearance of the historic buildings.

Section 2120.6(a): Maximum number of students, employees, guests, customers, or clients who can reasonably be expected to use the proposed building or structure at one time.

The building will be occupied by several types of commercial businesses that will draw people to the Property at different times throughout the day and night. Two separate office users are planned for the second and third floors of the building. The office space will be occupied primarily during the day and by a relatively small number of employees. A low-occupancy, speakeasy-type bar open during the evening hours will be located in the rear portion of the

second floor. The bar will have a small number of employees and a limited number seats, thus drawing a relatively small crowd. A restaurant will be located on a portion of the first floor and cellar; and a small fitness studio/gym will also occupy a portion of the first floor. The restaurant will draw lunchtime and dinnertime patrons; the gym will be used throughout the day and into the evening.

Section 2120.6(b): Amount of traffic congestion existing and/or that the redevelopment of the historic resource can reasonably be expected to add to the neighborhood.

As described in detail in the Parking and Loading Memorandum, prepared by Gorove/Slade Associates and attached as **Exhibit D**, the proposed redevelopment of the Property will not add any perceptible level of traffic congestion to the neighborhood. Due to the Property's location in a walkable, mixed-use neighborhood, patrons of the retail uses are expected to be neighborhood residents, employees of local establishments, persons attending events at the Convention Center, and/or visitors staying in one of the many hotels located within the immediate vicinity. Therefore, it is anticipated that a significant number of patrons will walk or bike to the Property, thus minimizing any impact on the traffic network or parking availability in the neighborhood. Finally, as detailed in the Parking and Loading Memorandum, there is sufficient on-street parking available along this section of 9th Street to support the proposed redevelopment of the Property.

Section 2120.6(c): Quantity of existing public, commercial, or private parking, other than curb parking, on the property or in the neighborhood that can reasonably be expected to be available when the redevelopment is complete

As explained in detail in the Parking and Loading Memorandum, public parking is available for a fee in parking garages in close proximity to the Property. These garages, along with on-street availability, would provide sufficient capacity to handle the parking demand generated by the project. (See **Exhibit D**, Figure 7).

Section 2120.6(d): Proximity to public transportation, particularly Metrorail stations, and availability of either public transportation service in the area, or a ride sharing program approved by the District of Columbia Department of Transportation.

The Property is well served by multiple public transportation facilities, including Metrorail, Metrobus, and car- and bike-share facilities, and is located in a walkable, mixed-use neighborhood. The Property is located approximately 0.1 miles from the Mount Vernon Square Metrorail Station, which services the Green and Yellow lines, and approximately 0.5 miles from the McPherson Square Metrorail station, which services the Orange, Blue, and Silver lines. The Property is also within convenient walking distance of numerous Metrobus routes, including the 64, 70, 79, G2, and G8 lines, which are all located within 0.2 miles of the Property. Eight permanent car-share locations are located within 0.4 miles of the Property (serviced by ZipCar and Hertz On Demand). Taxis, Car2Go vehicles, and other point-to-point transportation services are also easily accessed throughout the neighborhood, as are Capital Bikeshare docks, which are located in all directions.

VII.

COMMUNITY OUTREACH

At its regularly scheduled, duly noticed public meeting on December 10, 2014, at which a quorum was present, ANC 2F voted unanimously to approve the project. A copy of the letter of support is attached as **Exhibit E**. Additionally, the Applicant hosted a community meeting in Blagden Alley on February 11, 2015, to explain the project, answer questions, and address any concerns/input from nearby residents and property owners. As a follow up to the February 11th meeting, the Applicant attended a community meeting on February 18, 2015, hosted by Commissioner Charlie Bengel, the Single Member District Representative for ANC 2F-06. The meeting was focused on issues relating to Blagden Alley. Finally, the Applicant communicated

via e-mail with residents on the 900 block of M Street on February 20th to understand outstanding concerns relating to the project. The residents presented the following questions to the Office of Planning:

- 1. Provide a breakdown of the parking calculations. What was the previous floor area that is exempt from parking, and what calculations are being applied to the new area?*
- 2. Why doesn't Section 2200.6 require loading for the Property?*

The responses to the questions are addressed in this prehearing statement.

VIII. **WITNESSES**

1. Paul Millstein
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2. Kevin Sperry
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3. Erwin Andres
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Washington, DC 20036
4. Steven E. Sher
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Mr. Sperry will be proffered as an expert witness in the area of architecture/building design; he has not been accepted as an expert witness by the Board. Mr. Andres will be proffered as an expert witness in the area of parking/transportation planning and engineering; he has been

accepted as an expert by the Board. Mr. Sher will be proffered as an expert witness in area of land planning and zoning; he has been accepted as an expert by the Board.

IX.
CONCLUSION

For the reasons stated above, the Application meets the applicable standards for variance relief and special exception approval under the Zoning Regulations. Accordingly, the Applicant respectfully requests that the Board grant the application.

Respectfully Submitted,



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