

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

**APPLICATION OF
NANDO’S OF H STREET, LLC¹
411 H STREET, N.E.**

**BZA APPLICATION NO. 18957
HEARING DATE: MARCH 24, 2015
ANC 6C04**

PREHEARING STATEMENT OF THE APPLICANT

**I.
NATURE OF RELIEF SOUGHT**

Nando’s of H Street, 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 for special exception relief under section 1320.4(c) to establish a fast food establishment in the existing row structures in the HS-H/C-2-A District at premises 411 H Street, N.E. (Square 809, Lot 69) (the “Site”). While Nando’s does not consider its operations to be a “fast food establishment”, section 199.1 of the Zoning Regulations would classify Nando’s food service model as a “fast food establishment” because its patrons pay for their meals prior to consuming them. If additional service is sought while dining, the patron places the order with wait staff and then pays after the food is served.

**II.
JURISDICTION OF THE BOARD**

The Board has jurisdiction to grant the special exception requested pursuant to D.C. Code § 6-641.07(g) and 11 DCMR § 3104.

¹ Although the BZA application was made in the name of Nando’s of H Street, LLC, the caption for the case in the BZA records is listed in the name of the property owner, Guggan Datta/Masala Dossa LLC. The correct applicant name is Nando’s of H Street, LLC, the tenant of the space.

III. BACKGROUND

A. Site Vicinity Characteristics

1. The Site

The proposed Nando's at 411 H Street, N.E., will be located in two former row structures on the south side of H Street, N.E., which have been combined by the owner of the properties into a single building on one lot of record. The Site is located in Square 809, which is bounded by H Street to the north, 5th Street to the east, G Street to the south, and 4th Street to the west. Commercial row structures are located to the east and west; a lot occupied by a rowhouse with frontage on 5th Street, N.E., and a portion of a public alley abut the Site to the south. The building is 33.16 feet wide and spans the entire width of the Site fronting H Street. The Site is 100 feet deep on its east side and 95 feet deep on its west side, due to the location of the public alley that abuts the Site's southwest corner. There is a rear yard at least 15 feet in depth between the rear of the building on the Site and the rear lot line. A private pathway, five feet wide, is located at the rear of the Site on the deeper portion of lot, which pathway provides access to the rear of the premises located at 415 and 417 H Street, N.E. The pathway is fenced on both sides, with a locked gate at the alley, and is not available for Nando's use. The occupants of 415 and 417 H Street, N.E., will continue to have access through this pathway. The private pathway is depicted on Exhibit B; photographs of the pathway are attached as Exhibit D. As shown on the Zoning Map, attached as Exhibit A, the Site is located in the C-2-A District and is within the housing sub-area of the H Street Neighborhood Commercial Overlay ("H-HS").

2. The Vicinity

The Site is located in the 400 block of H Street, N.E. This segment of H Street is continuing to be redeveloped with a wide variety of commercial, residential, and mixed-use

buildings. As a neighborhood in transition, many of H Street's existing structures are being converted and adaptively repurposed into uses that are more appropriate for the contemporary needs and demand in the area. Surrounding businesses include restaurants and bars, a grocery store, offices, coffee shops/bakeries, convenient stores, fitness studios, and hair and nail salons. H Street is a mixed-use and walkable neighborhood with excellent public transportation options, including Union Station Metrorail Station, multiple Metrobus lines, car- and bike-share facilities, and the future DC Streetcar, which will run directly in front of the Site.

B. Description of Proposed Use and Operations at the Site

The Applicant intends to occupy the existing building at 411 H Street, N.E., for use as an eating establishment, pursuant to the terms of its building lease. Nando's is a South African casual dining restaurant originating from the Mozambican-Portuguese community. The owner of the Site has leased all of the space within the combined building to Nando's for a new restaurant operation for a period of ten years, with options to renew the lease for a total of ten additional years. The proposed Nando's restaurant operation will provide approximately 4,550 square feet of gross leasable area and will seat approximately 138 patrons on two levels. The main entrance will front on H Street; two secondary exits are located at the rear of the building (one on each level) that provide access to trash and loading facilities, and a second means of emergency egress from the building required by the D.C. Construction Codes. Nando's intends to operate its restaurant establishment from 11 a.m. to 11 p.m. on Sunday through Thursday, and 11 a.m. to midnight on Saturday and Sunday. Nando's will not have a bar or lounge, but will be offering alcohol beverages with food service. There will be no outdoor seating of any kind.

The owner of the building is currently renovating the combined building for restaurant use pursuant to Building Permit No. 1406024 issued December 5, 2014. The approved permit

drawings include the renovation work for the H Street façade. Separately, Nando's will obtain a building permit for the interior build-out for its specific use.

Trash will be collected at the Site in four refuse containers that are six feet deep, three feet wide and three feet in height. As shown on the floor plans attached as Exhibit B, the containers will be located in the rear yard of the Site, away from the building face, and will be shielded from the adjoining property and the alley by an extension of the current fence line that bounds the private pathway from the rest of the Site. Trash will be collected from the alley four times a week on Monday, Wednesday, Thursday and Friday, and no earlier than 8:00 a.m. so as to not interfere with residential pick-ups in the surrounding neighborhood. Loading for large deliveries will occur from the designated on-street loading areas on 4th Street, N.E., and will be transported to the Site on hand-trucks.

Exterior lighting will be installed at the rear of the building. The fixtures will be directed downward, illuminating the code-required exits and the associated staircase from the upper exit. The lights will be controlled to come on at dusk and illumination will be focused within the rear yard area of the Site.

Due to the preexisting uses of the Site, on-site parking is not required and will not be provided. A confirmation email from the Zoning Administrator is attached as Exhibit C.

C. Description of Proposed Fast Food Establishment Use

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, strict application of the Zoning Regulations classify Nando’s as a fast food establishment.² In all other respects, Nando’s is indistinguishable from a restaurant, which is permitted as a matter of right in the C-2-A 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 from wait staff and pay after being served.

² Under the proposed Zoning Regulation Review, an establishment where the customer pays for his meal first would no longer be 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

The housing sub-area of the H Street Neighborhood Commercial (“NC”) Overlay permits fast food establishments through special exception relief, pursuant to sections 1304.1, 1320.4(c), and 1325.1 of the Zoning Regulations. Although Nando’s is considered a restaurant in virtually every other jurisdiction, because its patrons pay for their meal prior to consuming it, the Zoning Regulations, as presently codified, deem it a fast food establishment due to the timing of payment by patrons. Consequently, Nando’s is required to seek special exception relief under section 1320.4(c) of the Zoning Regulations in accordance with the provisions of section 1304.1 and 1325.1 of the Zoning Regulations. Nando’s meets the standards for special exception relief as described below.

B. Compliance with Special Exception Standards

1. The NC Overlay – Section 1304.1

a. Purposes of the Overlay and No Adverse Impacts – Section 1304.1(a)

Under section 1304.1(a) of the Zoning Regulations, an applicant must demonstrate that the excepted use, 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 H-HS 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.

i. *Consistency with the Purposes of 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).

In this case, Nando's will substantially advance the purposes of the NC Overlay by establishing a retail/service business – an eating establishment – on the first and second levels of the newly combined building at 411 H Street. This segment of the H Street corridor is a pedestrian friendly destination for neighborhood-serving retail and restaurant establishments. Because Nando's is in every way a restaurant, with the exception of the timing of payment, it will be consistent with the attributes of the commercial segment of H Street. Nando's will offer a healthy menu of food choices in a hip, casual restaurant atmosphere. It is designed to appeal to the needs of the surrounding area's residents, workers, and visitors by offering an attractive, family friendly dining experience that is affordable to moderate income households. In addition, Nando's will not adversely affect the safe and efficient conditions for pedestrian and vehicular movement along H Street, N.E., or along the alley at the rear of the Site.

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

ii. *Consistency with the Purposes of the H Street Overlay*

The purposes of the H Street Overlay are to implement the policies and goals of the Comprehensive Plan and H Street N.E., Strategic Development Plan; encourage residential uses along the H Street corridor; encourage the clustering of uses into unique destination districts along the corridor, particularly the provision of affordable units and reuse of upper floors; establish design guidelines for new and rehabilitated buildings that are consistent with the historic character and scale of the overlay district; and encourage the reuse of existing buildings along the corridor. See 11 DCMR § 1320.2.³ The proposed Nando's eating establishment will substantially advance these goals.

The Comprehensive Plan incorporates the policies and goals of the H Street N.E., Small Area Plan under the policy focus area for Capitol Hill known as the H Street/Benning Road Focus Area. 10A DCMR § 1511.2. The Small Area Plan lays out a vision for the H Street corridor as a great neighborhood shopping street that serves resident needs, provides connections to the larger city, and improves the livability of the surrounding community. The Plan recommends the development of four thematic areas along the H Street corridor, designed to guide community, private sector, and public agency action and investments. *Id.* The Site is located within the western gateway area, which extends on H Street between North Capitol Street and 7th Street, N.E. As noted in the Comprehensive Plan, this area is to be an “urban living” district intended for medium to high density residential development, with limited ground floor retail uses. 10A DCMR § 1511.6(a). The introduction of eating establishments, such as Nando's, along the H Street, corridor supports these policies and goals and fulfills the demand

³ The purposes of the H Street Overlay set forth in section 1320.2(f), which do not apply to sites fronting on H Street, are inapplicable to this Site.

for family-friendly, casual eating establishments in the area. Nando's will serve resident dining needs and improve the overall livability in the surrounding community. Nando's will also help revitalize existing vacant space, making the area more attractive to new residential development, and will help increase the competitiveness of existing businesses and attract new investment by supporting commerce in the western gateway area to create the "urban living" environment envisioned by the Plan.

Nando's use will also substantially advance the purposes of the H-HS Overlay District. Incorporation of a new Nando's restaurant on this segment of H Street will help improve the lively corridor and adaptively reuse and combine two existing vacant buildings that currently detract from the streetscape. Nando's will help establish the unique destination of H Street, N.E., by providing a new dining establishment that will appeal to the needs of the surrounding area's residents, workers, and visitors.

iii. *No Adverse Impacts to Neighboring Property and No Detrimental Effects*

Nando's eating establishment 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 of the Site. 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 their 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. Additionally, as a result of Nando's commitment to this specific location under a ten-year lease, the owner of the Site is revitalizing and rehabilitating the previously vacant buildings, ultimately becoming an asset to the community, rather than one that could be seen as a blight on this portion of the H Street corridor.

In addition, consistent with section 1320.2(b) of the Zoning Regulations, having a restaurant use at the Site, such as Nando's, will encourage the development of residential uses along this portion of H Street, N.E., by offering a diverse, affordable, and healthy dining option for families where few options presently exist. Nando's family-friendly operation will not generate any late night music, entertainment, or other disturbances in the surrounding neighborhood. There will not be any outdoor seating at the rear of the property. Additionally, Nando's is a smoke-free environment that prohibits employee smoking; thus, employees will not be using the rear stairs or the rear yard area for smoking breaks. All exterior lighting will be directed downward; trash and grease will be adequately contained, shielded from the adjoining property, and collected frequently; and rodents will be managed through an aggressive pest control program. Furthermore, the Nando's use is consistent with section 1320.2(e) of the Zoning Regulations, since it will reuse an existing building along the H Street corridor. Consequently, Nando's 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 H Street Overlay.

Based upon its manner of operation in other communities in the District, it can be expected that Nando's will bring to the H Street corridor a business operation that will provide employment opportunities, and to advance the sustainability initiatives of the District.

b. Exceptional Circumstances Justifying the Exception – Section 1304.1(b)

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, H Street is still emerging as the destination corridor envisioned in the Comprehensive Plan and Zoning Regulations. Many of the older retail and restaurant establishments on and around the H Street N.E., corridor are still struggling to survive. Many have failed, leaving ground floor spaces vacant, and thus detracting from the quality and character of the streetscape and degrading the economic vitality of the neighborhood and the city as a whole. The particular buildings at 411-413 H Street, N.E., had been vacant for several years and were in a state of disrepair. They required significant costly rehabilitation in order to attract an economically viable tenant. Nando's leasing of the property for an initial ten-year lease term has provided the owner with sufficient collateral to obtain funds to permit a total renovation of the building, which when completed will enhance this portion of the H Street, N.E., corridor. While H Street, N.E., has been a focus of redevelopment in the last several years, there are few quality, family friendly affordable dining options available to area residents.

c. Safe Pedestrian and Vehicular Access – Section 1304.1(c)

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, there is no vehicular access from H Street, N.E., into the Site, thus maintaining a pedestrian-friendly environment that will not be interrupted or hampered by crossing vehicular traffic. Any vehicle access to the Site is only available at the rear of the Site from the public alley. Since there is the limited open space at the rear of the Site, vehicle use at the alley will be restricted to just trash and grease collection. Thus, due to the limited vehicular access to the Site there is little opportunity for the principal pedestrian ways to be adversely impacted by use of the Site for an eating establishment, and no dangerous or otherwise

objectionable traffic conditions along H Street, N.E., are likely to arise due to the presence of Nando's at this location.

d. Special Conditions Related to Design – Section 1304.1(d)

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 exterior alterations to the building, as shown on the architectural drawings submitted with the application as Exhibit 12 to the BZA record, have already been approved in Building Permit No. B1406024 as consistent with the H Street Overlay. As shown on those drawings, the Nando's space has been attractively designed to be compatible with the existing streetscape and the purposes of the H Street Overlay. Consequently, the Applicant does not anticipate the need for any additional conditions or design requirements for the successful operation of the eating establishment.

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

2. The H Street Overlay – Section 1325.1

Section 1325.1 of the Zoning Regulations provides that the Board may grant special exception relief from the requirements of the H Street Overlay District provided the following criteria are met.

a. Consistency with the Design Requirements – Section 1325.1(a)

Pursuant to section 1325.1(a), projects must be consistent with the design intent of the design requirements of section 1324, and the design guidelines of the H Street, N.E., Strategic Development Plan.

The proposed Nando's restaurant is consistent with the design intent and requirements of section 1324 and the H Street Overlay design requirements to the extent that they are applicable. Virtually all of the design requirements of the H Street Overlay District apply to new construction, residential uses, or parking structures, none of which apply to this application. See 11 DCMR §§ 1324.1 – 1324.7; 1324.11 – 1324.13. Under section 1324.8, each commercial use with frontage on H Street, N.E., shall devote not less than 50 percent of the surface area of the streetwall at the ground level to display windows having clear or clear/low-emissivity glass, and to entrances to commercial uses or to the building. In this case, more than 50 percent of the ground level streetwall and commercial entrances are devoted to clear display windows. No security grilles are proposed and thus section 1324.9 is inapplicable. In compliance with section 1324.10, the commercial use has an individual public entrance directly accessible from the public sidewalk on H Street. Projection signs will comply with the height and location requirements of section 1324.14. Façade panels will not be placed in a location that interrupts windows or doors, and they will project no more than 12 inches from the face of the building, in full compliance with section 1324.15. Consistent with section 1324.16, no roof sign is proposed.

b. Urban Design Features – Section 1325.1(b)

Section 1325.1(b) requires the architectural design of the project to enhance the urban design features of the immediate vicinity in which it is located; and if a historic district or historic landmark is involved, the Office of Planning report to the Board shall include review by the State Historic Preservation Officer and a status of the project's review by the Historic Preservation Review Board ("HPRB"). In this case, the architectural design of the project will enhance the urban design features of the existing structures on the Site and within the immediate

vicinity. The buildings are not historic landmarks or located within an historic district, and thus no review by HPRB is required.

c. Vehicular Access – Section 1325.1(c)

Pursuant to section 1325.1(c), vehicular access and egress shall be located and designed so as to encourage safe and efficient pedestrian movement, minimize conflict with principal pedestrian ways, function efficiently, and create no dangerous or otherwise objectionable traffic conditions. This requirement is the same as section 1304.1(c) of the NC Overlay, described above.

d. Parking and Traffic Conditions – Section 1325.1(d)

Pursuant to section 1325.1(d), parking and traffic conditions associated with the operation of a proposed use shall not adversely affect adjacent or nearby residences. As discussed above under the NC Overlay requirements, parking and traffic conditions associated with the operation of the proposed use will not adversely affect adjacent or nearby residences.

e. Noise – Section 1325.1(e)

Section 1325.1(e) provides that noise associated with the operation of a proposed use shall not adversely affect adjacent or nearby residences. The proposed Nando's will not generate significant noise and thus will not adversely affect adjacent or nearby residences. No outdoor seating will be provided, and Nando's smoke-free policy eliminates the need for employee smoking breaks, which might generate loud conversations at the rear property that could disturb adjoining residences.

The rooftop-mounted kitchen exhaust fan and HVAC equipment will be state-of-the-art. The kitchen exhaust fan will operate at full capacity only during peak dining hours between 11:00 a.m. and 2:00 p.m., and 5:30 p.m. and 8:30 p.m. At other times, it will operate at 20-30

percent capacity. None of this equipment will exceed 65 dB during daytime hours or 60 dB during nighttime hours, consistent with and as measured under the District's noise regulations.

f. Signage – Section 1325.1(f)

Section 1325.1(f) provides that the size, type, scale, and location of signs shall be compatible with the surrounding corridor and consistent with the design guidelines of the H Street, N.E., Strategic Development Plan. In this case, the proposed signage is consistent with the size, type, scale, and location of other signs within the H Street corridor and is consistent with the design guidelines of the H Street, N.E., Strategic Development Plan. The signage will be exclusively located above the show window, constructed of durable materials, and sensitively designed. The signage will not affect the display windows, will not consist of backlit box signs or neon product advertisements, will not block visibility into the fast food establishment, and will not be overly obtrusive.

3. Fast Food Establishments – Section 1320.4

Section 1320.4 of the Zoning Regulations provides that fast food establishments are permitted in the HS Overlay only with special exception relief approved by the Board, provided the following criteria are met. These criteria duplicate four of the ten requirements found in the underlying C-2-A provisions for fast-food establishments. Three of the criteria – those pertaining to the required separation from a residence district, the brick lot line wall, and brick trash enclosure – may be modified by the Board pursuant to section 733.12.

a. Location near to Residence District – Sections 1320.4(c)(1) and 733.2

Pursuant to sections 1320.4(c)(1) and 733.2, no part of the lot on which the fast food establishment is located shall be within 25 feet of a Residence District, unless separated therefrom by a street or alley. In this case, the Site abuts in part a public alley that runs east-west

along the western 16.5 feet of the Site's southern property line, and then turns south at a 90 degree angle, leaving 16.66 feet of the southern property line abutting the R-4 District. The east-west portion of the public alley is 13.33 feet wide; the north-south portion of the public alley is 10.08 feet wide. Therefore, under its present classification as a fast food establishment for zoning purposes, Nando's restaurant operations will be located within 25 feet of a residence district without the required separation created by a street or alley for the full width of the property. Strict adherence to section 1320.4(c)(1) would prevent a fast food establishment from operating at the Site at all, since the Site directly abuts the R-4 District but just at the southeast corner of the property. This is the location of the private access easement, however, which fully screens the use from adjacent properties by the two fences on either side of the pathway. As described above, Nando's is deemed a fast food restaurant due only to the time at which patrons pay for their food. Nando's will not create any objectionable conditions with respect to noise, refuse, traffic, parking, or pedestrian safety. Therefore, the proposed use complies with the spirit and intent of sections 1320.4(c)(1) and 733.2.

b. Brick Wall – Sections 1320.4(c)(2) and 733.3

Section 1320.4(c)(2) provides that if any lot line of the lot abuts an alley containing a zone district boundary line for a Residence District, a continuous brick wall at least six feet high and 12 inches thick shall be constructed and maintained on the lot along the length of that lot line. Section 733.3 eliminates this requirement if a building extends the full width of its lot, as is the case here. Applying the more restrictive standard of the H Street Overlay, the Applicant requests a modification of this requirement. Here, the alley abutting the Site's rear contains a zone district boundary line for the R-4 District. Strict compliance with section 1320.4(c)(2) would require the Applicant to construct a six-foot tall brick wall along the entirety of the

irregular rear lot line, which would block access not only to the rear of the building, but also to the private pathway benefitting the adjoining properties at 415 and 417 H Street, N.E. Since section 1320.4(c)(2) provision does not allow for a gate or other opening in the continuous brick wall, it would be impossible to service the building from the alley impossible. It would also impede fire/life safety egress in the case of an emergency. Finally, a brick wall would make maneuverability more difficult for residents who park on the other side of the alley. Consequently, a waiver from this requirement is appropriate.

c. Refuse Dumpsters – Sections 1320.4(c)(3) and 733.4

Sections 1320.4(c)(3) and 733.4 require refuse dumpsters to be housed in a three-sided brick enclosure equal in height to the dumpster or six feet, whichever is greater. The entrance to the enclosure must include an opaque gate and may not face a Residence District. Similar to installing a brick wall along the lot line abutting the alley, creating a six-foot tall refuse enclosure would impede maneuverability, exacerbate the tight conditions in this location, and disrupt safe and effective trash collection in the alley. Instead, the applicant proposes to enclose the trash receptacles with a six-foot wood fence, which is consistent with the other fences in the square, and bounding the present private pathway. The refuse containers will be located at the interior of the lot along the private access easement and will not face into the alley or abut any residential properties.

d. Linear Street Frontage – Section 1320.4(c)(4)

Pursuant to section 1320.4(c)(4), the fast food establishment use shall occupy no more than 25 percent of the linear street frontage within the HS Overlay District as measured along the lots that face the designated roadway. According to estimates provided by the Zoning Review Branch of the Department of Consumer and Regulatory Affairs, fast food and food delivery

establishments occupy approximately five percent of the linear street frontage within the HS Overlay's designated roadways. The introduction of Nando's on H Street will not cause the 25 percent cap to be exceeded.

4. Variance

Section 733.1 of the Zoning Regulations provides that fast food establishments shall be permitted in the C-2-A District as a special exception if approved by the Board under § 3104 and subject to the provisions of section 733.1. Section 733.12 provides that an applicant for special exception under section 733 may request the Board to modify the conditions enumerated in sections 733.2 through 733.4,⁴ provided that the general purposes and intent of section 733 are complied with. As discussed above, the Applicant believes that section 733.12 applies in this case and that the application can be approved as a special exception. However, the Planning, Zoning and Economic Development ("PZE") Committee of Advisory Neighborhood Commission ("ANC") 6C recommended to the full ANC that the relief described above should be treated as variances. In the event the Board determines that the higher variance standard applies, the Applicant argues in the alternative that it meets the variance standard as well. The Applicant notes that the PZE Committee supported the relief under the variance test.

⁴ Section 733.2 provides that "[n]o part of the lot on which the use is located shall be within twenty-five feet (25 ft.) of a Residence District unless separated therefrom by a street or alley."

Section 733.3 provides that "[i]f any lot line of the lot abuts an alley containing a zone district boundary line for a Residence District, a continuous brick wall at least six feet (6 ft.) high and twelve inches (12 in.) thick shall be constructed and maintained on the lot along the length of that lot line. The brick wall shall not be required in the case of a building that extends for the full width of its lot."

Section 733.4 provides that "[a]ny refuse dumpsters shall be housed in a three (3) sided brick enclosure equal in height to the dumpster or six feet (6 ft.) high, whichever is greater. The entrance to the enclosure shall include an opaque gate. The entrance shall not face a Residence District."

a. Standard of Review for Variance Relief

Under D.C. Code § 6-641.07(g)(3) (2012 Repl.) 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.

b. The Site's Extraordinary or Exceptional Conditions

The Site has several extraordinary conditions that give rise to an exceptional situation. First, the Site is improved with two existing row structures (currently being combined into a single building) that span the entire width of the lot and have been vacant for several years. 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, the Site is irregularly shaped with an uneven rear yard. In this location, half of the Site's rear lot line abuts private property and half of the Site's rear lot line abuts a public alley. Third, the abutting public alleys are unusually narrow, at approximately 10 feet and 13

feet in width, respectively, which limits maneuverability for both passenger vehicles of neighboring residents and for service trucks associated with any commercial uses in the area. Fourth, loading has recently been prohibited on H Street due to future DC Streetcar operations, which limits the areas available for loading. Fifth and finally, the rear portion of the Site is encumbered by the fenced-off pathway that serves exclusively the neighboring properties to the east. See Exhibit D.

c. 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 require Nando's to construct a six-foot tall brick wall along the alley for the full width of the Site. Doing so would unduly burden the surrounding matter-of-right uses that are not subject to these provisions and would unnecessarily impede their access to the alley. Installing the required brick wall would also create practical difficulties for delivery trucks and service vehicles to fit in and turn around in the alley, since the wall would exacerbate the already tight conditions of the 10-foot at 13-foot alley widths.

Furthermore, installing the wall would result in the Applicant having no access to the alley, since section 733.3 is silent regarding an entrance through the brick wall, while the three-sided brick enclosure requirement for refuse dumpsters specifically refers to a gate. With no rear access to the alley, all loading, trash removal, and deliveries would have to be on H Street, which is not allowed anymore due to the location and operation of the DC Streetcar. Thus, installing a brick wall at the rear of the Site would eliminate all reasonable options to service the building, including the ability to provide emergency egress from the building. Finally, the portion of the

Site that abuts the residential district is *de minimus*. However, this small portion of the Site serves as a fenced-off private pathway for the benefit of the neighboring commercial properties. Thus, there is already an actual and effective separation between the Site and the residential district.

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.

d. No Harm to the 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 at the rear of the Site will enhance circulation and maneuverability in the alley, thus promoting the public good.

Nando's will use four 6-foot by 3-foot trash containers, 3 feet in height, which will be located on the interior of the Site shielded from the adjoining properties and residential uses by an extension of the current wood fence. Trash, which will be collected four times a week, and grease pickup will be coordinated so as to not interfere with residential pick-ups in the surrounding neighborhood. Frequent and aggressive rodent control measures will be in place. Furthermore, trash vehicles used by Nando's will be smaller than city residential trash trucks, given the size of the dumpsters being used.

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 H Street, N.E., and provide a variety of healthy food choices at reasonable prices for those who visit, work, and live in the neighborhood.

V.
ANC Support

On March 4, 2015, the Applicant presented its application to the PZE Committee of Advisory Neighborhood Commission (“ANC”) 6C which voted 4-0-2 to recommend that the full ANC support the project, subject to several conditions and provided that modifications from the fast-food site requirements be treated as variances. The Applicant is scheduled to present the application to the full ANC on March 11, 2015, which is after the date that this submission is due.

VI.
Witnesses

The following witness 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

VII.
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: Updated floor plans and site plan showing location of trash containers and fenced-off pathway
- Exhibit C: Email from the Zoning Administrator confirming that no on-site parking is required for the proposed use

Exhibit D: Photographs of fenced-off pathway at rear of Site to adjacent properties

Exhibit E: Outline of witness testimony

VIII.
CONCLUSION

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

Respectfully submitted,

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