BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application of Jemal's Mass 12933, L.L.C.
400 Massachusetts Avenue, NW

PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF

I. Background:

The Subject Property, Record Lot 51 in Square 517, with premises address of 400 Massachusetts Avenue, NW, is improved with a 13-story apartment house with ground floor retail uses and four levels of below-grade parking. Construction of the apartment house is nearing completion. The Subject Property is zoned DD/C-2-C, and occupies roughly the eastern half of Square 517, a triangle-shaped square bounded by Massachusetts Avenue, NW, to the north, H Street, NW, to the south, 4th Street, NW, to the east, and 5th Street, NW, to the west.

In 2001, the Subject Property was designated as an amenity site to a Planned Unit Development ("PUD") approved by the District of Columbia Zoning Commission for the rehabilitation and redevelopment of the former Woodward & Lothrop Department Store building, located at 1025 F Street, NW. Pursuant to the PUD order (Zoning Commission Order No. 940), the Subject Property and one other amenity site were designated to be developed as substantial residential buildings. To this end, the Zoning Commission required as a condition to the PUD that a covenant be entered into, restricting development on the Subject Property to "not less than 200,000 and as much as 330,000 square feet of residential type of uses with commercial development to be provided on the ground level and cellar level only, and with no principal office uses permitted." This covenant was recorded on June 7, 2001.

In 2002, through Application No. 16881, the Board of Zoning Adjustment granted variance relief from the lot occupancy requirements and a special exception for roof structures to permit the construction of the mixed use - apartment house/commercial project on the Subject Property.

As part of the mixed use development of the site, the Subject Property has been made subject to a master condominium regime which includes two units: namely (1) a residential unit (which, in turn, is subdivided into a residential sub-condominium comprised of 256 dwelling units and approximately 200 parking spaces on the four below-grade levels; and (2) a commercial unit containing approximately 17,308 square feet on the ground level of the project (condominium lot 2463. Applicant 400 Massachusetts Avenue, LLC, the current of the commercial unit of the master condominium has contracted to sell said commercial

BZA
Case No. 17266
Exhibit No. 5

Board of Zoning Adjustment
District of Columbia
CASE NO. 17266
EXHIBIT NO. 5

condominium unit to Applicant Jemal's Mass 12933, L.L.C., and authorized the filing of the present application to the Board of Zoning Adjustment.

In the present application, the Applicant seeks variance relief from the parking requirements set forth in §2101.1 of the Zoning Regulations as it relates to the commercial/retail portion of the project on the Subject Property. More than the total required amount of parking is being provided within the building (83 spaces required, 200 spaces provided), however, all of said spaces are required for use by the residential portion of the project, leaving the commercial unit without the number of parking spaces required by the parking schedule for commercial/retail uses required under the Regulations.

Pursuant to §3113.8 of the Zoning Regulations, the Applicant will file its Statement of the Applicant with the Board no fewer than 14 days prior to the public hearing for the present Application. In said Statement, and at the public hearing, the Applicant will provide testimony to meet its burden of proof to obtain the Board's approval of the requested variance relief. Following herein, as required by the Board's application process, is a summary statement indicating how the Applicant expects to meet said burden of proof.

II. Burden of Proof:

A. Variance Relief

The test for variance relief is three-part: (1) demonstration that a particular piece of property is confronted with some exceptional condition or situation; (2) such that, without the requested variance relief, the strict application of the Zoning Regulations would result in some practical difficulty upon the property owner; and (3) that the relief requested can be granted without substantial detriment to the public good or zone plan.

(1) Exceptional Condition or Situation:

The Applicant will demonstrate, and the Board has previously held, that the Subject Property is impacted by an exceptional site configuration and street frontage. The Subject Property is an exceptionally large pie-shaped property with prominent frontages along both I Street, NW, and Massachusetts Avenue, NW. In addition, the Subject Property surrounds on three sides the former Old Engine Company No. 6 firehouse, which fronts on Massachusetts Avenue. These site constraints have dictated the design of the residential project, including the need to excavate to a sufficient depth to provide four levels of below-grade parking.

As mentioned above, and as the Board has previously held, the Subject Property is also exceptional as a result of its zoning history. The Subject Property was designated as an amenity site for the Woodward and Lothrop Building PUD. Thus, despite its commercial zoning, the Subject Property is restricted by covenant to provide a minimum of 200,000 square feet of residential use on-site, with permitted commercial use (not general office) on the ground and cellar levels. The current improvements have been constructed in compliance with the PUD order and the restrictive covenant. Further, the chosen master condominium regime is a direct result of the mixture of residential and commercial contemplated for the site by the PUD.

(2) Resulting Practical Difficulty:

The Applicant will demonstrate, and the Board has previously held, that, as a result of exceptional conditions affecting the Subject Property, the strict interpretation of the Zoning Regulations will result in a practical difficulty upon the Applicant.

As the Board may recall from Application No. 16881, significant practical difficulty was encountered in developing the residential and retail project on the Subject Property consistent with the requirements of the PUD order. The resulting residential/retail project confronted inefficiencies created by the site configuration, resulting in significantly increased costs to the project (including construction of four levels of below-grade parking).

The landmark firehouse serves as a prime example. Owing to its location (mid-block and surrounded on three sides by the Subject Property), the project's parking level footprint was required to be significantly reduced. At the same time, market indicators suggested the necessity of providing as close as possible to a 1:1 ratio of parking spaces to dwelling units in order to remain competitive in the rapidly developing downtown residential market. Thus, four levels of below-grade parking were excavated and constructed at great expense to the project. A fifth level of parking was also studied but the resulting soil studies indicated that it would not be feasible or prudent to construct.

As with the earlier application, the Applicant here is confronted with a practical difficulty in complying with the Regulations as a direct result of the exceptional conditions impacting the Subject Property. The project has been constructed in compliance with the PUD order, the restrictive covenant and the BZA order, including the parking schedule set forth in the Zoning Regulations. The parking provided well exceeds the number of spaces required based upon the mixed uses proposed for the building. Nonetheless, given the extremely competitive nature of the current downtown residential market, the parking spaces created in

the project all are needed to be provided to residents of the building in order to approximate as closely as possible the 1:1 ratio benchmark of parking to residential units.

These spaces are required to be allocated at the expense of the ground level retail/service uses in the building. The exceptional lot configuration noted above results in a practical difficulty, in that no more parking can feasibly be provided on the site. As demonstrated in Application No. 16881, the construction of a fifth level of below-grade parking on this oddly-configured and situated site would be prohibitively costly and impractical from an engineering perspective. Were it not, the developer would have pursued such a course during original planning for the project in order to provide the optimal amount of parking to support the residential portion of the project.

(3) No Harm to Public Good or Zone Plan:

The Applicant will demonstrate, and the Board has previously held, that the application can be approved without harm to the public good and without detriment to the integrity of the zone plan. Nor does the present request for variance relief alter in any substantial fashion the Board's earlier approval in Application No. 16881.

As before, the project as a whole complies with the parking schedule set forth in §2101.1 of the Zoning Regulations. Pursuant to that schedule, 83 spaces are required based upon the number of residential units (256) and the commercial gross floor area (17,308 sf) constructed on the site. Approximately 200 spaces have been provided on the four parking levels. Nonetheless, as a result of the market realities impacting downtown residential properties, all the parking provided on site must be devoted to the residential portion of the project. The present application only regards ownership and allocation of the 200 parking spaces, as established per the condominium regime. Absolutely no reduction in total parking spaces provided in the building is proposed or contemplated.

Ground level retail uses are contemplated by Applicant Jemal's Mass 12933, L.L.C.. While the DD/C-2-C zoning for the Subject Property would otherwise permit general office use, the PUD Order and the restrictive covenant require that only those commercial uses other than principal office uses be permitted. Such permitted retail and service uses, for example a pharmacy, other retail or restaurant, are largely intended for, and overwhelmingly patronized by, clients and customers arriving by foot, including residents of the project. Like the residential uses they support, these sorts of ground level retail and service uses are integral to the vitality necessary for a "living downtown". Thus, off-street parking is not integral to the operations of such retail and service uses. In any event, the Subject Property is located in close proximity to the Gallery Place/Chinatown Metrorail

station, and is serviced by numerous Metrobus routes. In addition, there are an abundance of short-term public parking spaces available in very close proximity to the site. Thus, no detriment to the public good would result from the approval of the variance request.

2285993_v1