

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Application No. 18238-A of Eighth Street LLC**, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the use restrictions of Subtitle U § 512.1(e)(1) to continue a fast food use approved in BZA Order No. 18238 in the MU-25 Zone at premises 413 8th Street, S.E. (Square 902, Lot 828).

**HEARING DATES:** March 31, 2021 and April 21, 2021  
**DECISION DATE:** April 21, 2021

**SUMMARY ORDER**

Relief Requested. The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 39.)

Prior Application. The Board of Zoning Adjustment ("Board" or "BZA") granted Application No. 18238 to allow the operation of a fast food use on the property. The Board's approval was subject to three conditions, including a ten-year time limit.<sup>1</sup> BZA Order No. 18238 was issued on August 1, 2011.

Notice of the Application and Public Hearing. The Board referred the application to the appropriate agencies and provided proper and timely notice of the public hearing in accordance with Subtitle Y § 402.1.

Parties. The parties to this case were the Applicant, Advisory Neighborhood Commission ("ANC") 6B, and the party proponents, Linda Elliott and John West.<sup>2</sup>

ANC Report. The ANC submitted two reports for the record for this application:

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<sup>1</sup> This application was originally filed as a modification of consequence to BZA Order No. 18238-A, and subsequently amended to a modification of significance, to modify the conditions of the underlying order, including the extension of the time limit. Pursuant to Subtitle Y §§ 703.13 and 704.9, which states that the grant of a modification shall not extend the validity of any order, the application was amended to instead request special exception relief under Subtitle U § 512.1(e)(1).

<sup>2</sup> The Board received three requests for party status. (Exhibits 24-24C; 27-27A; and 30-30A.) At the public hearing on March 31, 2021, the Board denied the requests for party status in opposition of Linda Young and A. Katherine Szafran but granted the request for party status in support filed by Linda Elliott and John West. (Exhibit 50.)

**BZA APPLICATION NO. 18238-A**  
**PAGE NO. 2**

- The first ANC Report indicated that at a regularly scheduled, properly noticed public meeting on February 9, 2021, at which a quorum was present, the ANC voted to support the application with eight conditions intended to mitigate the impacts of the continued use of the property as a fast food operation. The ANC Report recommended approval of the Applicant's request for a 12 year term of approval but took no position on the Applicant's request for a further ten-year conditional approval. (Exhibit 31.)
- The second ANC Report indicated that at a regularly scheduled, properly noticed public meeting on April 14, 2021, at which a quorum was present, the ANC modified its prior letter in support to revise the proposed conditions for clarity and to add citations to the case record. As noted in the ANC Report, the conditions were negotiated and agreed to by the Applicant and neighbors of the property, including the party proponents. (Exhibit 51.)

The Board concurs with the ANC's recommendation to approve the relief requested with the conditions as written in the second ANC Report. The Board concludes that the conditions will serve to mitigate the potential impacts of the approval and appropriately address concerns raised by the neighbors regarding trash storage, rodents, noise, deliveries, and maintenance of outdoor space. The Board determined to limit the term of its approval to 12 years and declined to adopt the Applicant's proposal for a conditional extension of the term for another ten years; thus, the condition language proposed by the ANC for that scenario was no longer relevant.

OP Report. The Office of Planning submitted a report recommending approval of the application. (Exhibit 34.)

DDOT Report. The District Department of Transportation submitted a report indicating that it had no objection to the application. (Exhibit 35.)

Public Input. The residential and commercial neighbors of Square 902 collectively submitted a memorandum to the record to provide background information on the process leading to the proposed conditions and indicated that the neighbors are in support of the application provided that the conditions are adopted as part of the Board's approval. (Exhibit 36.) In addition, ten neighbors submitted written testimony detailing the adverse impact of the fast food use on the property and supporting the need for conditions to mitigate these impacts. (Exhibit 52.) The Board received a letter in support from Capitol Hill Restoration Society. (Exhibit 49.)

At the public hearing on March 31, 2021, neighbors Ritu Upadhyay, Kirk Beatley, Linda Young, and Katherine Szafran testified in support of the application, on the basis of the Applicant's work with the neighborhood and agreement to conditions that would mitigate impacts of the use. At the public hearing on April 21, 2021, Ritu Upadhyay, Kirk Beatley, and Kristen Fenty testified to emphasize that their support of the application is contingent on the adoption of the conditions proposed.

**Special Exception Relief**

The Applicant seeks relief under Subtitle X § 901.2, for a special exception under the use restrictions of Subtitle U § 512.1(e)(1) to continue a fast food use approved in BZA Order No. 18238 in the MU-25 Zone.

Based upon the record before the Board, and having given great weight to the appropriate reports and recommendations filed in this case, the Board concludes that the Applicant has met the burden of proof that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map and that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. The Board further concludes that, pursuant to Subtitle X § 901.2(c), any other specified conditions for special exception relief have been met.

Pursuant to Subtitle Y § 604.3, the order of the Board may be in summary form where granting an application when there was no party in opposition. As a summary order, it does not constitute binding legal precedent on the Board and shall not be considered by the Board in evaluating future applications.

It is therefore **ORDERED** that this application is hereby **GRANTED** and, pursuant to Subtitle Y § 604.10, subject to the **APPROVED PLANS**<sup>3</sup> at **EXHIBITS 41A - 41B**, subject to the following **CONDITIONS**:

1. This approval shall be for a term of **twelve (12) years**, beginning on the date the order became effective.
2. Deliveries to the site shall be restricted to Monday through Friday, between 10:00 a.m. to 4:00 p.m.
3. All trash pick-ups from the site shall be from the street curb.
4. The Applicant (or the Applicant through its Tenant) shall replace the outdoor trash/recycling shed with a dedicated trash/recycling walk-in cooler and shall reconfigure the space currently dedicated to the outdoor trash/recycling shed, mechanicals, and the Tenant's walk-in food cooler to allow the new trash/recycling walk-in cooler to be connected to the building by a code-compliant, enclosed hallway as specified in the drawings and design notes in Exhibit 41B.

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<sup>3</sup> Self-certification: In granting the certified relief, the Board made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

**BZA APPLICATION NO. 18238-A**  
**PAGE NO. 4**

5. The Applicant (or the Applicant through its Tenant) will relocate the existing HVAC compressors for the Tenant's space and install new mechanicals necessary to the operation of the two walk-in coolers as indicated in Exhibit 41B and will soundproof those mechanicals as indicated in Exhibit 41B.
6. The Applicant and Tenant will not store food, trash, recycling, furniture, or equipment of any type in the outdoor area in the rear of the building or within the constructed sound barrier, except as may be necessary, on a temporary basis, for periodic maintenance of the building or mechanical equipment.
7. The Applicant shall remove from the rear yard of 413 8<sup>th</sup> Street, S.E. the existing HVAC units servicing the second floors of 413 8<sup>th</sup> Street, S.E. and 415 8<sup>th</sup> Street, S.E.<sup>4</sup> and install new HVAC units (one on the roof of 413 8<sup>th</sup> Street, S.E. and one on the roof of 415 8<sup>th</sup> Street, S.E.) as close to 8<sup>th</sup> Street as practicable, but not to the west of where the HVAC units on the roof of 411 8<sup>th</sup> Street, S.E. are installed.
8. The Applicant (or the Applicant through its Tenants) shall maintain the outdoor spaces in the rear of 413 8<sup>th</sup> Street, S.E. and 415 8<sup>th</sup> Street, S.E., including by ensuring that:
  - a. They are kept free of rodent burrows and all rodent harborage, including weeds and leaves;
  - b. The trees behind 413 8<sup>th</sup> Street, S.E. are watered, trimmed, and treated for mold or insects as needed; and
  - c. The leaves are cleared from the yards, trench drains, and gutters on a regular and established schedule.
9. The Applicant will remove the boards from the 413 8<sup>th</sup> Street, S.E. side of the existing fence on the west side of the rear yard of 413 8<sup>th</sup> Street, S.E.

**VOTE: 5-0-0** (Frederick L. Hill, Lorna L. John, Chrisaun S. Smith, Carl Blake, and Peter G. May to APPROVE)

**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

<sup>4</sup> 415 8<sup>th</sup> Street, S.E. is also owned by the Applicant

**BZA APPLICATION NO. 18238-A**  
**PAGE NO. 5**

**FINAL DATE OF ORDER:** May 3, 2021

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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 SUBTITLE A § 303, 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

**BZA APPLICATION NO. 18238-A**  
**PAGE NO. 6**

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.