

BOARD OF ZONING ADJUSTMENT

Statement in Support of Modification of Significance and Time-Extension on behalf of 1247 ESE, LLC

1247 E Street, SE (Square 1019, Lot 43)

I. INTRODUCTION AND NATURE OF RELIEF SOUGHT.

This Statement in support of the modification (the “**Modification**”) and Time Extension (the “**Extension**”) is submitted on behalf of 1247 ESE, LLC (the “**Applicant**”), owner of the property located at 1247 E Street, SE (Square 1019, Lot 43) (the “**Subject Property**”). The Applicant requested and obtained BZA Approval for a use variance in BZA Case No. 18701 & 18701-A (the “**Original Case**” or the “**Original Order**”, submitted with this Modification) to use the front portion of the first floor and cellar space below it (the “**Commercial Space**”) as a restaurant, subject to certain conditions.¹ Since then, and despite diligent efforts, the Applicant has been unable to find a tenant for the restaurant use. The impact of COVID-19 on the restaurant industry has been devastating, and the short and midterm outlook of new business formation in the restaurant industry is bleak, rendering the search for a restaurant tenant very challenging.

The Applicant needs to have the ability to lease the Commercial Space to other types of commercial uses, other than the approved restaurant use. In order to increase the marketability of the Commercial Space, the Applicant wants to avoid coming back to the BZA to ask for a modification under the same set of facts and conditions every time there is a new tenant, and would like to have the flexibility to use the Commercial Space for general retail, service, or office uses for

¹ Limiting hours of operation, delivery times, outdoor music, outdoor seating, among other things.

the first floor and lower level of the building.² Accordingly, the Applicant is requesting a Modification of Significance in order to change the approved use of the Commercial Space to allow for general retail, service, and office uses in addition to the approved restaurant use. This Modification would not extinguish the ability to use the Subject Property as a restaurant, which may be a possibility in the future.

Specifically, the request is to allow the following uses:

- A. Retail Use as permitted pursuant to Section U-512.1(k), as such use is defined and described in Section B-200.2(bb)
- B. General Service Use as permitted pursuant to Section U-512.1(l), as such use is defined and described in Section B-200.2(cc)
- C. Office Use pursuant to as permitted pursuant to Section U-510.1(r), as such use is defined and described in Section B-200.2(w)
- D. Restaurant Use specifically as approved in BZA Order No. 18701

Pursuant to Y § 704.7, “the scope of a hearing conducted pursuant to Subtitle Y § 704.1 shall be limited to impact of the modification on the subject of the original application, and shall not permit the Board to revisit its original decision.” The Board previously determined that the building could not be reasonably adapted for residential use as the historic property’s Commercial Space was originally designed and built for a commercial retail use, with large windows, multiple egresses, high ceiling, and a first floor at grade. The Board found that it would be an undue hardship to the Applicant to have to convert the Commercial Space to residential use as such a conversion would be prohibitively expensive, and even with an expensive conversion, the Commercial Space would have limited utility as a residential use because of the large windows, lower grade level, and windowless basement – all of which cannot

² The Board approved a similar request for flexibility in BZA Case No. 19180 (1525 9th Street, NW) and BZA Case No. 20417 (4914-4918 Central Avenue, NE).

be modified because of historic preservation concerns. As noted in Y § 704.7, the Board is not asked to revisit the original decision, and the Applicant is not required to put forth any justification for a use variance, as that was already approved. The Applicant is required to put forth justification for the modification of the approved commercial use.

II. JURISDICTION OF THE BOARD.

The Board has jurisdiction to grant the special exception relief requested pursuant to Y § 704 of the Zoning Regulations.

III. BACKGROUND.

On November 15, 2013, the Applicant filed the initial use variance for restaurant use (BZA Case No. 18701). The Applicant argued that the exceptional conditions affecting this Property, including the fact that the building was originally designed and built, and has been continuously operated as, a mixed use building, with the first floor Commercial Space having never been used for residential purposes, led to an undue hardship as converting the Commercial Space to residential space was prohibitively expensive. The ANC supported the Application and the Office of Planning recommended approval.

The Board approved the Original Application with a vote of 3-0-2, and the Order became effective on February 27, 2014. Following issuance of the Original Order, the Applicant renovated the outside shell of first-floor space as well as the residential portion of the building. The permit process and the renovation took longer than expected, and was not completed until February 2015, at which time a broker was hired to find a tenant. In December 2015, the Applicant applied for its first time-extension. At that point, the combination of permitting issues and construction had left the Applicant little time to secure a tenant. The ANC unanimously voted to approve the time-extension application, and on March 8, 2016, the Board granted the first two-year extension of

BZA Order No. 18701-A, which extended the validity of the order to February 27, 2018 (18701-B). The Applicant requested a second time-extension on in 2018 (18701-C) which extended the validity of the order to February 27, 2020. A third time-extension (18701-D) was approved by the board extending the validity of the order to February 27, 2022.

The Board granted each time extension, finding that there was good cause. The factors associated with the time extensions have changed over time. Originally, and after overcoming the permitting delays, the Applicant was waiting on new developments to be completed in the surrounding area. The additional residential units planned in the area would have increased foot traffic and density in the surrounding area of the Commercial Space and been a great incentive to prospective restaurant tenants., However, as those were delivered during the course of 2020, the emergence of COVID-19 and its impact on the restaurant industry created new challenges which make it practically impossible to find a tenant for a new restaurant space.

As noted above, the Commercial Space has never been used for residential use, and a commercial use is an ideal use of the space, as evidenced by the strong support by the ANC, recommendations of approval from OP, and granting of the original application and the time extensions. As demonstrated by the C of Os, the uses have not been limited to restaurant use and are relatively broad, including office use, a rugby club, a grocery shop and a retail confectioner and wholesaler. Prior to BZA Case No. 18701, the BZA granted use variance relief for the non-profit office use in BZA Case No. 15694. The Applicant has included the C of Os for the Commercial Space as part of this Modification, as well as the Order for BZA Case No. 15964.

IV. JUSTIFICATION FOR THE MODIFICATION

Subtitle 11-Y DCMR § 704 outlines the requirements for a modification of significance. The Applicant has provided all materials outlined in Y § 704.2. Further, Y § 704.2(b) requires

that the Applicant provide the “nature of, reason(s), and grounds for the modification of significance.” As established in previous cases, the exceptional conditions affecting this Property include the fact that the building was originally designed and built, and has been continuously operated as, a mixed-use building, with the front portion of the first floor and cellar space having never been used for residential purposes. The Original Case allowed for this Commercial Space to be used as a restaurant. It was already challenging to rent out this Commercial Space as a restaurant prior to COVID. The Applicant anticipated that the new developments nearby would increase foot traffic to the area. However, the restaurant industry has been devastated by COVID, so the potential pool of tenants has certainly decreased as a result, despite the new developments and despite diligent efforts by the Applicant. Sadly, because of these factors, restaurant use is no longer viable in this location in the immediate future. The Applicant has included two articles with this submission detailing the impacts of COVID-19 on the DC restaurant industry and DC businesses in general.

Without this flexibility for general retail, service, or office use, the Applicant is hampered in his efforts to lease the Commercial Space. First, prospective tenants do not like the uncertainty associated with going through a BZA modification and generally are not able to wait 5-6 months to make a decision on the space they want to lease while a modification makes its way through the BZA process. Second, if the future tenants of the Commercial Space were to end a lease, the Applicant would have to find a tenant with the same type of business to replace the previous tenant, or else go to the Board again for relief. Both reasons above severely limit the available pool of tenants, add uncertainty to the marketing process, and create additional financial burden on the Applicant, which is why the Applicant is requesting flexibility to use the Commercial Space for general office, service, or retail use, in addition to the approved restaurant use.

Because of COVID-19, there is a significant amount of leasable commercial space available in adjacent commercially zoned districts. The Subject Property is at a disadvantage because it is zoned residentially, the Commercial Space use is limited to restaurant use, and any interested tenant would have to wait 5-6 months before any modifications could be applied for and granted for the new proposed use, as is the case right now. This flexibility would allow the Applicant to market the space to other commercial uses other than a restaurant. Without this modification, the Commercial Space will very likely remain vacant.

As detailed above and in the Original Case, the Commercial Space has been used for a variety of commercial uses, not just restaurant use. The currently approved restaurant use is a relatively intense commercial use of this property—certainly more intense than any office or retail use. The Applicant agrees to have the same conditions from the previous orders placed on the proposed general uses: Operating times shall not exceed 7:30 am to 8:00pm., Monday through Friday, and 9:00am to 8.00 p.m., Saturday and Sunday; deliveries shall only be allowed between 8.30 am to 5:00 p.m., Monday through Friday, and 9.30 a.m. to 2.00 p.m., Saturdays only; outdoor seating shall be permitted if approved by the Public Space Committee; outdoor seating is not permitted between the entry door on E Street and the fence line of 1245 E Street, SE; no outdoor music shall be allowed.

The Subject Property is located only three-tenths of a mile (0.3 mi.) from the Potomac Avenue Metrorail Station—or about a 4-minute walk. The Applicant anticipates that any patrons, clients, or employees of the future commercial use will arrive by public transportation and therefore the use will not adversely impact the traffic conditions in the neighborhood.

V. REQUIREMENTS FOR A TIME EXTENSION

The Applicant is also requesting a two-year time extension. The Board may extend the time periods in Subtitle Y § 702.1 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval; provided, that the Board determines that the following requirements are met:

(a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;

The Applicant has served all parties to the Application.

(b) There is no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application; and

There has been no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application.

(c) The applicant demonstrates that there is good cause for such extension, with substantial evidence of one (1) or more of the following criteria:

(1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;

(2) An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control; or

(3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.

The Applicant asserts that there is good cause for the extension due to the time necessary to secure a tenant due to the current economic and market conditions beyond the Applicant's reasonable control, as discussed in the Board's hearing on February 2, 2022.

As noted above, the restaurant industry has been devastated by COVID, so the potential pool of tenants has decreased as a result, despite the new developments and despite diligent

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efforts by the Applicant. The Applicant has included two articles with this submission detailing the impacts of COVID-19 on the DC restaurant industry and DC businesses in general. These circumstances are beyond the Applicant’s control and have made finding a tenant for the approved use particularly challenging for the time being.

VI. CONCLUSION.

For the reasons outlined in this Statement, the Applicant respectfully requests the Modification of Significance and Time Extension as detailed above.

Respectfully submitted,

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Date: February 9, 2022

Alexandra Wilson

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