

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



**Order No. 19169-C of Birchington, LLC<sup>1</sup>**, pursuant to 11 DCMR Subtitle Y § 704, for a modification of significance to the relief approved by BZA Order No. 19169 to include special exceptions from the loading requirements of Subtitle C § 901.1, and from the access requirements of Subtitle C § 904.2, to construct a hotel in the D-4-R Zone at premises 303-317 K Street N.W. (Square 526, Lots 20, 21, 804, 805, 824, 825, and 829).

The original application (No. 19169) was pursuant to the Zoning Regulations of 1958<sup>2</sup>, and as amended, pursuant to 11 DCMR § 3103.2, for variances from the rear yard requirements under § 774.1, the off-street parking requirements under § 2101.1, and the loading requirements under § 2201.1, to construct a hotel and apartment building in the DD/DD-HPA/C-2-C District (now D-4-R District) at premises 303-317 K Street N.W. (Square 526, Lots 20, 21, 804, 805, 824, 825, and 829).

<b>HEARING DATE</b> (Case No. 19169):	February 9, 2016
<b>DECISION DATE</b> (Case No. 19169):	February 23, 2016
<b>FINAL ORDER ISSUANCE DATE</b> (Case No. 19169):	February 29, 2016
<b>TIME EXTENSION ORDER</b> (Case No. 19169-A)	March 28, 2018
<b>MODIFICATION HEARING DATE:</b>	July 25, 2018
<b>MODIFICATION DECISION DATE:</b>	July 25, 2018

**SUMMARY ORDER ON REQUEST FOR MODIFICATION OF SIGNIFICANCE**

**BACKGROUND**

On February 23, 2016, in Application No. 19169, the Board of Zoning Adjustment (“Board” or

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<sup>1</sup> Birchington, LLC, the Applicant for the modification of significance herein, is the successor in interest to the original Applicant in Case No. 19169, which was 311 K Street, LLC.

<sup>2</sup> This and all other references to the relief granted in Order No. 19169 are to provisions that were in effect the date the Application was heard and decided by the Board of Zoning Adjustment (the “1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text (the “2016 Regulations”). New zone names also went into effect on September 6, 2016. The zone name of the property was DD/DD-HPA/C-2-C at the time of the original approval and is now D-4-R. The repeal of the 1958 Regulations has no effect on the validity of the Board’s original decision or the validity of Order No. 19169.

**BZA APPLICATION NO. 19169-C**  
**PAGE NO. 2**

“BZA”) approved the self-certified request by 311 K Street, LLC, the original applicant to this case which has been succeeded in interest by Birchington, LLC, the current applicant (the “Applicant”) for area variances from the rear yard requirements under § 774.1, the off-street parking requirements under § 2101.1, and the loading requirements under § 2201.1, to construct a hotel and apartment building in the DD/DD-HPA/C-2-C District (now D-4-R District). The Board issued Order No. 19169 on February 29, 2016. The approval in Case No. 19169 was subject to the approved plans at Exhibit 41 in the record of Case No. 19169 and three conditions, namely:

1. The Applicant shall limit the financial incentive as part of the TDM plan to bikeshare and carshare memberships only.
2. The Applicant shall provide a minimum of eight short-term bicycle spaces.
3. The Applicant shall amend the Loading Management Plan to require any delivery using a truck 20 feet in length or shorter to use the on-site delivery space.

Subsequently, in BZA Case No. 19169-A, the Board approved a two-year time extension of the validity of Order No. 19169 on March 28, 2018, whereby that order would remain valid until February 29, 2020. Order No. 19169-A was issued on March 29, 2018.

On February 13, 2018, the Applicant submitted a request for a Modification of Consequence to the Board for the approval in Case No. 19169. (Exhibits 1-3C in the record of Case No. 19169-B.) Subsequently, on March 12, 2018, the Applicant withdrew its request for a Modification of Consequence, indicating that it would be filing a new modification application after it further refined the project. (Exhibit 5 in the record of Case No. 19169-B.)

**MOTION FOR MODIFICATION OF SIGNIFICANCE**

On May 17, 2018, the Applicant submitted a request for a Modification of Significance to the relief previously approved by the Board in Order No. 19169. (Exhibits 1-4 in the record of Case No. 19169-C.) As heretofore discussed, the Applicant is the successor in interest to the original applicant and this is the same Property for which the Board approved variance relief in Order No. 19169.

In Case No. 19169, the Board approved, with three conditions, area variances, pursuant to the 1958 Regulations, from the rear yard requirements under § 774.1, the off-street parking requirements under § 2101.1, and the loading requirements under § 2201.1 for one 30’ berth, to construct a hotel and apartment building in the DD/DD-HPA/C-2-C District (now D-4-R District). The Board issued Order No. 19169 granting that relief. That order became effective on February 29, 2016. (Exhibit 3A.)

**BZA APPLICATION NO. 19169-C**  
**PAGE NO. 3**

Subsequently, in BZA Case No. 19169-A, the Board approved a two-year time extension of the validity of Order No. 19169 and issued Order No. 19169-A on March 29, 2018. (Exhibit 3C.)

In the present case, Case No. 19169-C, the Applicant is now requesting special exceptions from the loading requirements of Subtitle C § 901.1 for two 30' berths, and from the access requirements of Subtitle C § 904.2, to construct a hotel in the D-4-R Zone, as the project has changed from one to construct a hotel and apartment building to one for a hotel only. The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibits 8 (revised) and 6 (original).)<sup>3</sup>

*The Merits of the Request for Modification of Significance*

Pursuant to Subtitle Y § 704.1, any request for a modification that does not meet the criteria for a minor modification or modification of consequence<sup>4</sup> requires a public hearing and is a modification of significance. The Applicant's request complies with 11 DCMR Subtitle Y § 704, which provides the Board's procedures for considering requests for modifications of significance.

In the current case, the Applicant submitted an application for new special exception relief from the loading requirements of Subtitle C § 901.1, and from the access requirements of Subtitle C § 904.2, to construct a hotel in the D-4-R Zone. The Applicant is now proposing an all-hotel project, which necessitates additional loading relief under the 2016 Regulations. Accordingly, the Applicant has requested this Modification of Significance to allow for special exception relief pursuant to Subtitle C § 909.2 from the requirement for two, additional on-site 30'-loading berths in addition to the one 30' berth approved in Order No. 19169 and Subtitle C § 909.3 from the requirement for 12% maximum slope for driveways. These areas of relief have been identified in the Revised Self-Certification Form at Exhibit No. 8. Since additional relief was being requested to that previously approved in Case No. 19169, the case met the definition of a modification of significance and a public hearing was held.

Pursuant to Subtitle Y § 704.6, a public hearing on a request for a modification of significance shall be focused on the relevant evidentiary issues requested for modification and any condition impacted by the requested modification. Pursuant to Subtitle Y § 704.7, the scope of a hearing conducted pursuant to Subtitle Y § 704.1 is limited to the impact of the modification on the subject of the original application, and does not permit the Board to revisit its original decision. Pursuant to Subtitle Y § 704.8, a decision on a request for modification of plans shall be made by the Board on the basis of the written request, the plans submitted therewith, and any responses

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<sup>3</sup> The original self-certification request (Exhibit 6) included relief under the 1958 Regulations but was revised to instead request relief under the 2016 Regulations. In correspondence dated July 11, 2018, the Zoning Administrator confirmed that the loading relief requested in the revised self-certification (Exhibit 8) could be approved by a special exception pursuant to Subtitle C § 909.2. (Exhibit 37.)

<sup>4</sup> See, Subtitle Y §§ 703.3 and 703.4.

**BZA APPLICATION NO. 19169-C**  
**PAGE NO. 4**

thereto from other parties to the original application. Finally, pursuant to Subtitle Y § 704.9, the filing of any modification request under this section does not act to toll the expiration of the underlying order and the grant of any such modification does not extend the validity of any such order.

*Notice.* Pursuant to Subtitle Y §§ 704.4, and 704.5, all requests for modifications of significance must be served by the moving party on all parties in the original proceeding at the same time that the request is filed with the Board. The Applicant served the Office of Planning (“OP”), the Department of Transportation (“DDOT”), the affected Advisory Neighborhood Commission (“ANC”), ANC 6E, and the affected Single Member District ANC Commissioner 6E07 when the current application was filed. (Exhibits 3.)

Also, pursuant to Subtitle Y § 400.4, the Office of Zoning provides notice upon its acceptance on behalf of the Board of an application requiring a public hearing to the applicant, the affected ANC, the affected Single Member District ANC Commissioner, OP, DDOT, and the Councilmember for the ward within which the property is located. Pursuant to Subtitle Y § 402.1, the Board also provides notice of the public hearing to the applicant, the affected ANC, the affected Single Member District ANC Commissioner, all owners of property within 200 feet of the subject property, any leaseholders on the subject property, OP and all other appropriate government agencies, and the Councilmember for the ward within which the property is located.

Proper and timely notice of the application was provided to ANC 6E, the only other party to Application No. 19169, the ANC Commissioner for Single Member District 6E07, OP, DDOT, the Ward Councilmember for the Property, and the Council Chairman and the At Large Councilmembers. Also, notice of the public hearing was provided to the Applicant, ANC 2E, all owners of property within 200 feet of the subject property, and the Ward Councilmember. (Exhibits 18-30.)

*Reports.* ANC 6E submitted a report dated June 20, 2018, in support of the application for a modification. The ANC report indicated that at a regularly scheduled, properly noticed public meeting on June 5, 2018, at which a quorum was present, the ANC voted 6:0:0 to support the relief requested in this application. (Exhibit 31.)

OP submitted a timely report, dated July 13, 2018, recommended approval of the requested special exceptions as a Modification of Significance. In its report, OP asked the Applicant to supply additional drawings of the street-facing facades and provide additional information about the compliance of the revised penthouse with relevant zoning regulations. (Exhibit 38.)

DDOT submitted a report dated June 29, 2018, stating that it had no objection to the granting of the request. (Exhibit 35.)

*Burden of Proof.* As directed by 11 DCMR Subtitle X § 901.2 and Subtitle Y § 704, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for special exceptions and a modification of significance. With its application, the Applicant submitted the required documents in conjunction with the application, including a

**BZA APPLICATION NO. 19169-C**  
**PAGE NO. 5**

statement demonstrating how the application meets the burden of proof for the special exception relief from the loading requirements of Subtitle C § 901.1, and from the access requirements of Subtitle C § 904.2 and for a Modification of Significance. (Exhibits 3, 9, 34, and 41.) The only parties to the case were the ANC and the Applicant. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that in seeking a special exception from 11 DCMR Subtitle C §§ 901.1 and 904.2, the Applicant has met the burden of proof under 11 DCMR Subtitle X § 901.2, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board also concludes that in seeking a modification of significance to Case No. 19169, the Applicant has met its burden of proof under 11 DCMR Subtitle Y § 704.

As noted, the only parties to the case were the ANC and the Applicant. Accordingly, a decision by the Board to grant the request would not be adverse to any party and therefore an order containing full finding of facts and conclusions of law need not be issued pursuant to D.C. Official Code § 2-509(c) (2012 Repl.). Pursuant to 11 DCMR Subtitle Y § 101.9, the Board has determined to waive the requirement of 11 DCMR Subtitle Y § 604.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED** that this application for modification of significance of the Board's approval in Application No. 19169-C is hereby **GRANTED**.

In all other respects, Order No. 19169 remains unchanged.

**VOTE ON ORIGINAL APPLICATION ON FEBRUARY 23, 2016: 3-0-2**

(Frederick L. Hill, Robert E. Miller (by absentee ballot), and Jeffrey L. Hinkle (by absentee ballot), to APPROVE; Marnique Y. Heath not participating or voting; one Board seat vacant.)

**VOTE ON MODIFICATION OF SIGNIFICANCE ON JULY 25, 2018: 5-0-0**

(Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Robert E. Miller to APPROVE.)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

A majority of the Board members approved the issuance of this order.

**BZA APPLICATION NO. 19169-C**  
**PAGE NO. 6**

**ATTESTED BY:**

  
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**SARA A. BARDIN**  
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** August 7, 2018

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.