

September 3, 2024

Via IZIS Only

District of Columbia Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20001

Re: BZA Case No. 21010: Application of NL 1271 5TH ST, LLC (the “**Applicant**”) to the District of Columbia Board of Zoning Adjustment (the “**Board**”) for 1271 5th Street, N.E. (Square 3591, Lot 3) (the “**Property**”) – Pre-Hearing Statement

Dear Chairperson Hill and Members of the Board:

On July 31, 2024, the Board opened and continued the public hearing for the Applicant’s application for four special exceptions to permit the construction of a new mixed-use building containing lodging and other commercial uses on the Property (the “**Project**”).

As background, the Applicant seeks the following: (1) relief from the parking requirements set forth in Subtitle C, Section 701.5, (2) relief from the loading requirements of Subtitle C, Section 901.1, (3) relief to permit eating and drinking establishment uses in a penthouse pursuant to Subtitle C, Section 1501.1, and (4) relief from the rear yard requirements of Subtitle G, Section 207.9. The Applicant has agreed to several conditions with respect to the requested relief, and those conditions are summarized in the attached **Exhibit A**.

This application is ready for the Board’s review and consideration on October 2, 2024.

Support for the Application: First, the application has all the necessary support to proceed. The Applicant has support from the Office of Planning (Exhibit 18), ANC 5D (Exhibit 12), the neighboring property owner to the north and east (Exhibit 23), and the two commercial tenants of the Property (Exhibits 14 and 15). The District Department of Transportation does not oppose the application given the Applicant’s commitment to transportation and loading mitigation measures (Exhibit 19). The Applicant is not aware of any opposition to the application.

Ripeness for Review under the Zoning Regulations: Second, the application is ripe for the Board’s review under the Zoning Regulations notwithstanding that an Order to amend the Zoning Map is pending for the Property. The application is ripe given (1) actions of the Zoning Commission that have taken or will take place prior to the Board’s October 2nd hearing on the application, (2) the type of relief requested in the application, (3) the text of the Zoning Regulations applicable to the Board’s treatment of pending amendments, (4) the Board’s past practice with respect to pending amendments, and (5) the “at-risk” nature of projects that require multiple entitlements.

1. The Zoning Commission Is Scheduled to Take Final Action on the Pending Map Amendment Prior to the October 2nd Public Hearing on the Application

The Board should not be concerned that it will be “getting ahead of” the Zoning Commission if it acts on the requested relief prior to the effectiveness of the pending amendment to the Zoning Map with respect to the Property. The Zoning Commission is scheduled to act first.

Prior to the opening of the Board’s public hearing on July 31, 2024, the Zoning Commission took proposed action to amend the Zoning Map for the Property from the PDR-1 zone to the MU-8B zone. Prior to the commencement of the Board’s continued public hearing on October 2, 2024, the Commission is scheduled to take final action on September 12, 2024.

Significantly, there is no opposition in the record of the Map amendment case pending before the Commission, and the Commission voted unanimously in support of the Map amendment at proposed action in July 2024. Assuming the Commission acts favorably on September 12, the Board will be well within its rights to hear and act on the requested relief while the Commission’s staff prepares and issues a written order.

The Applicant requests the right to update the Board following the Commission’s September 12th public meeting and fewer than 30 days prior to the public hearing on the application.

2. The Relief Requested Here Does Not Depend on the Pending Map Amendment

The relief requested here is not reliant on the pending Map amendment, so the Board may consider the requested relief independent of the Commission’s actions in the Zoning Map amendment case. If the Commission declines to take final action on the Zoning Map amendment, the Applicant will need to modify the *Project* for the Project to conform to the dimensional requirements of the PDR-1 zone. However, the Project would not require any new relief if the Property remains subject to the PDR-1 zone. Instead, the areas of relief would be identical under the PDR-1 zone and the extent of relief required in each area would be either identical (as to penthouse relief) or lesser (as to parking, loading, and rear yard relief) than the relief requested under the MU-8B zone.

3. The Zoning Regulations Permit the Board to Approve the Application Prior to the Effectiveness of Amendments that Apply to the Project

More generally, the Board is not barred from hearing—or even approving—the requested relief, prior to the issuance of the written order regarding the pending amendment to the Zoning Map for the Property. Rather, the Zoning Regulations are quite clear on the effect of a pending amendment to the Zoning Map with respect to an action by the Board. That is, the Board may approve relief from the Zoning Regulations for a site that is the subject of a pending Zoning Map amendment, and the applicant may thereafter obtain a building permit consistent with the approved relief and the Map amendment, once effective.

Under Subtitle A, Section 301.7, “All applications for building permits authorized by orders of the Board of Zoning Adjustment . . . *may* be processed in accordance with the Zoning Regulations and Zoning Map in effect on the date the vote was taken to approve the Board . . . application” As the result of this language, the future application for a building permit for the Project may be processed in accordance with the Zoning Regulations and Zoning Map in effect at the time of the Board’s vote (i.e., here under the currently effective PDR-1 zone) *or* the building permit for the Project may be processed in accordance with the Zoning Map in effect at the time the building permit is issued (i.e., here under the MU-8B zone, assuming it is effective at the time the building permit is issued). It is solely at the Applicant’s risk that the MU-8B zone becomes effective at the time of the building permit issuance. If the MU-8B zone is not then effective, the Applicant would have to return to the Board to modify the plans for the Project in the application at the Board’s discretion. The Applicant would not require new or different relief.

4. The Board Regularly Approves Cases While Zoning Amendments Are Pending

The Applicant’s request that the Board proceed with this application prior to the effective date of the Map amendment is not unusual. Every time the Board acts it is doing so while there are pending amendments to the Zoning Regulations and/or Zoning Map, including amendments that could potentially affect the property or the project that is the subject of the amendment. There are currently more than ten (10) cases pending before the Zoning Commission with amendments to the Zoning Regulations. The Board could not possibly wait until those amendments were resolved before acting on pending cases that could be affected by those amendments, and it has not done so historically.

Rather, the above-referenced Section 301.7 applies to amendments to the Zoning Regulations the same as it does to amendments to the Zoning Map: a building permit subject to either type of amendment *may* proceed with the Zoning Regulations and/or Zoning Map in effect at the time of the Board’s vote *or may* proceed with the Zoning Regulations and/or Zoning Map in effect at the time of the building permit issuance.

There is no basis in the Zoning Regulations or otherwise for the Board to distinguish between a pending amendment to the Zoning Regulations and a pending amendment to the Zoning Map. The applicable language in the Zoning Regulations treats all such amendments equally, and the Board is obligated to do so as well.

5. The Board Regularly Approves Projects That Are Contingent on Other Approvals

At the July 31st public hearing, the Board expressed some concern that it would be issuing an “advisory” decision in this case because the Project it was reviewing was not fully-buildable at the time of the Board’s vote. However, the Applicant’s request to proceed in this case “at-risk” that the Commission approves the pending amendment to the Zoning Map is not unique. The Board regularly hears and approves applications that are contingent upon other approvals.

- Applicants proceed under a similar “at-risk” (or contingent) posture for cases that require both zoning relief and review by the Public Space Committee (“PSC”), for

instance for the location of a curb cut for loading or parking. That is, the Board may approve relief for a project that requires independent approval from the PSC. If the PSC does not approve the project that the Board approved, then the applicant could not build the Board-approved project. That dynamic does not make the Board's approval merely "advisory." Rather the Board's approval in such a case is contingent upon receipt of corresponding PSC approval. Similarly, the Board often hears cases that require approval from the Historic Preservation Review Board, Old Georgetown Board, or Commission on Fine Arts after obtaining zoning relief from the BZA. The Board does not treat any of those cases, which are contingent upon independent approvals, as advisory or require a final action from those other bodies before acting itself.

- The Zoning Commission also hears cases and grants zoning relief in a similarly at-risk or contingent posture. A Planned Unit Development ("**PUD**") that is accompanied by an amendment to the Zoning Map is reviewed by the Commission before the amendment to the Zoning Map becomes effective, and the Commission regularly does grant zoning relief prior to the effectiveness of the PUD-related Map amendment. In a PUD-related Map amendment case, the Map amendment does not become effective until the recordation of a covenant with the Recorder of Deeds, which typically occurs long after the Commission has voted to approve the requested zoning relief and even, typically, well after the Order is issued by the Commission. The non-effectiveness of the Map amendment at the time of the Commission's review does not make the Commission's review and approval of zoning relief merely advisory. Rather the Commission's review is contingent upon the effectiveness of the Zoning Map amendment.
- Likewise, in every case before the Board that relies on the applicant's self-certification of zoning compliance, the applicant is proceeding "at-risk" that the applicant would have to return to the Board for modifications to address an error in the certification or a modification to the approved plans. The Board's approval is contingent upon the Department of Buildings finding that the self-certification is accurate as to all areas not subject to a request for zoning relief. In all cases, the approval of the BZA is binding on the applicant, including the Applicant in this case, and is not advisory.

The Applicant proposes that pursuant to Subtitle X, Section 901.4, the Board include a condition in the order with respect to the application that provides that the requested relief is contingent upon the Commission's written order approving the pending Zoning Map amendment.

However, in sum, there is nothing unusual or improper about the Board hearing and approving a request for relief that is contingent upon another approval, even when that other approval is an amendment to the Zoning Map. That is especially true in this case where the Board will know prior to the October 2nd hearing the final outcome of the Map amendment review and where the Applicant will be able to build in accordance with the Map amendment as long as it is effective at the time of the issuance of the building permit for the Project. The application is complete and ready for the Board's consideration and vote at the October 2nd public hearing.

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If you have any questions, please do not hesitate to contact the undersigned at (202) 721-1127. Thank you for your attention to this application.

Respectfully Submitted,

GOULSTON & STORRS PC

/s/ Jeff C. Utz

/s/ David A. Lewis

Certificate of Service

I hereby certify that a copy of the foregoing document was sent to the following by e-mail by no later than September 3, 2024:

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