

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**APPLICATION OF
AI POP UP LLC AND SONGBYRD LLC**

ANC 5D01

PREHEARING STATEMENT OF THE APPLICANT

I. NATURE OF RELIEF SOUGHT

This prehearing statement seeks to expand and incorporate both existing tenants at 530 Penn Street NE (Square 3594, Lot 0006) (the “**Property**”), Songbyrd LLC (“**Songbyrd**”) and Ai Pop Up LLC (“**Ai Pop Up**”), on behalf of UM 500 Penn Street, NE LLC, an affiliate of EDENS Development (the “**Property Owner**”), owner of the Property (collectively, the “**Applicants**”), to update the application for special exception relief for the Property and seek relief for both tenant spaces, pursuant to Subtitle X § 901.1 for eating and drinking establishments with live performance, night club or dance venues and for entertainment, assembly, and performing arts use in the PDR-1 zone under Subtitle U §§ 802.1(c) and (e) (the “**Proposed Use**”). The Applicants also seek area variance relief pursuant to Subtitle X § 1002.1 from the conditions that an entertainment, assembly, and performing arts use in the PDR-1 zone shall not abut a residential use or a residential zone under Subtitle U §§ 802.1 (c)(2) and (e)(2) and shall not be located within 1,000 feet of any other property containing a live performance, night club, or dance venue under Section U §§ 802.1(c)(3) and (e)(3).

For the reasons set forth below, the Applicants satisfy the special exception and area variances for the Property. Moreover, as outlined below the Board may choose to determine that such area variance(s) will ultimately not be necessary.

II. JURISDICTION OF THE BOARD

The Board of Zoning Adjustment (the “**Board**”) has jurisdiction to grant the special exception relief requested herein pursuant to Subtitle X § 901.2 of the Zoning Regulations. The Board has jurisdiction to grant the area variance relief requested herein pursuant to 11 DCMR Subtitle X § 1000.1.

III. BACKGROUND

A. The Property and the Surrounding Neighborhood

The Property is an irregularly-shaped lot approximately 64,996 sq. ft. in land area. The Property is located in the PDR-1 zone in the Union Market neighborhood of Ward 5.

The Property fronts on Penn Street and is bounded by an independent movie theater to the southeast, the federally-owned, unzoned U.S. Park Police National Mall and Memorial Park Brentwood Facility to the northeast, a hotel to the northwest, and a 12-story, mixed use apartment building to the west. Penn Street, NE borders the Property to the southwest. Three PUDs have been approved in Square 3594, all of which rezoned property from the PDR-1 zone to the MU-9 zone (or its antecedent under the 1958 Zoning Regulations).¹

In general, the Union Market District in which the Property is located is a vibrant area with a diverse mix of uses including dining, residential, office, retail, and entertainment uses.

None of the properties abutting the Property are located in a residential zone. Instead, the property to the west of the Property is zoned MU-9 and the Property to the east of the Property is zoned PDR-1. Although the Zoning Map putatively shows the abutting U.S. Park Police National Mall and Memorial Park Brentwood Facility as within the RF-1 zone, that Facility has been in federal jurisdiction and ownership since the inception of the District’s Zoning Regulations and has

¹ See Z.C. Case Nos. 17-14, 15-19, and 11-25.

historically been shown as “Government” property on the District’s official Zoning Map. The nominal labeling of such site as RF-1 on the current online Zoning Map is not sufficient to impose such zoning designation upon that federally-owned lot. By the express terms of the Zoning Regulations that lot is not in any zone at all and therefore cannot be in a residential zone.² In any event the abutting federal property does not have a residential use. A copy of the Zoning Map is attached at **Tab A**.

Neither Ai Pop Up nor Songbyrd abuts a residential use. An EDENS-owned, separately tenanted building occupied by an office use separates the Ai Pop Up space from the mixed-use building to the west. The theater to the east does not contain residential uses.

As shown on the architectural plans attached at **Tab B**, the Property is improved with three abutting structures. An office tenant occupies the westernmost commercial component on the property (the “**Maurice West Component**”). Ai Pop Up occupies the center commercial bay on the Property which is 10,990 sq. ft. in size (the “**Ai Pop Up Component**”). Finally, Songbyrd occupies the Property’s easternmost commercial bay, which is approximately 3,013 sq. ft. in size (“**Songbyrd Component**”). The Existing Ai Pop Up Component and the Songbyrd Component are within the same metal-sided structure.

B. The Proposed Use

Songbyrd and Ai Pop Up are within the same metal-sided structure on the same property. Songbyrd, incorporated in 2014, opened in 2015 in the Adams Morgan neighborhood. In 2021, Songbyrd moved to its current location at the Property. Songbyrd and Ai Pop Up occupy the southeast portion of the Property highlighted in yellow in the DC Surveyor’s Plat attached at **Tab**

² See 11-A DCMR § 208.1(a) (“The following government properties shall not be considered included in any zone: (a) Properties owned by the Government of the United States and used for or intended to be used for a Federal public building or use”).

C. Songbyrd's space faces Penn Street NE to the south and is surrounded by Ai Pop Up's space on its west and north and a theater use to the east. Songbyrd is operating under a valid restaurant Certificate of Occupancy and their ABCA license has an entertainment endorsement.

Accessory to Songbyrd's restaurant business, Songbyrd offers live entertainment, typically musical performances, with a capacity of up to 150. Songbyrd has since assessed that it requires special exception relief under Section 802.1(c)³ for its existing operations. Recognized by both local and national publications, Songbyrd and its companion business Byrdland Records have played a key role in the ongoing revitalization of the Union Market District, making it a destination for D.C. music fans.

Earlier in 2024, Ai Pop Up entered into a short-term lease for the Ai Pop Up Component on the Property to transform the space from office use to assembly use as an entertainment event space ("**Proposed Ai Use**"). The Applicant proposes no structural expansion of the Ai Pop Up Component, but rather a temporary change of use for a period of time prior to the redevelopment of the Property with the intention of activating the Ai Pop Up Component. The Property is intended to be used for approximately 10-12 events between now and early 2025 which are currently scheduled. Therefore, if approved, the Proposed Ai Use will event-focused and encompass discrete, sporadic events.

Ai Pop Up submitted its Updated Statement of the Applicant on October 17, 2024,⁴ setting forth the reasons why the Board should grant Ai Pop Up special exception relief and variance relief. Recently, the Zoning Administrator informed the Ai Pop Up that the referral letter it

³ We note that a Correction Order issued by Department of Buildings references Section U-802.1(e) for Songbyrd, but the Applicants believe that Section U-802.1(c) would be the more appropriate section of the zoning regulations to apply since the live music venue is accessory to a restaurant and retail use.

⁴ The background regarding Ai Pop Up, described in the Updated Statement of the Applicant § III.C–D, is incorporated by reference.

submitted was not complete. The Zoning Administrator indicated that, upon review of the area and other abutting uses, Ai Pop Up must seek relief from Subtitle U § 802.1(e)(3) because Ai Pop Up is located as part of the same property as Songbyrd. Furthermore, on November 7, 2024 the DOB issued Songbyrd a correction order stating that special exception and variance relief is required to maintain its current use and operation. See attached **Tab D**. This prehearing statement includes the following supplemental statement seeking to incorporate Songbyrd into the case and seek relief from Subtitle U §§ 802.1 (c) and (e) collectively.

IV. NATURE OF SPECIAL EXCEPTION RELIEF SOUGHT AND STANDARD OF REVIEW

The Applicants request special exception relief, pursuant to Subtitle X § 901.1 for entertainment, assembly, and performing arts use in the PDR-1 zone under Subtitle U §§ 802.1 (c) and (e). Pursuant to D.C. Code § 6-641.07(g)(2) and Subtitle X § 901.2, the Board is authorized to grant a special exception where it finds the special exception:

- (1) Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;
- (2) Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and
- (3) Subject in specific cases to special conditions specified in the Zoning Regulations. 11 DCMR Subtitle X § 901.2.

Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific requirements for the relief are met. In reviewing an application for special exception relief, “[t]he Board’s discretion . . . is limited to a determination of whether the exception sought meets the requirements of the regulation.” *President & Dirs. of Georgetown College v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58, 68 (D.C. 2003); *see also Stewart v. District of Columbia Bd. of Zoning Adjustment*,

305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. *Id.*

V. APPLICANTS MEET BURDEN FOR SPECIAL EXCEPTION RELIEF

The Applicants meet the burden for special exception relief for entertainment, assembly, and performing arts use in the PDR-1 zone under Subtitle U §§ 802.1(c) and (e) because (1) the relief is harmonious with the general purposes and intent of the Zoning Regulations and maps, (2) the relief will not tend to adversely affect the use of neighboring property, and (3) the Proposed Use would comply with the conditions specified in the Zoning Regulations for the proposed special exception relief.

The full argument that the Applicants meet the standard for special exception relief, as articulated in the Updated Statement of the Applicant § V.A–C, is incorporated by reference with the exception of § V.C(3), which addressed the third condition specified in the Zoning Regulations for the proposed special exception relief. The special exception relief is appropriate for both tenants as the use embraces the diverse and activated urban environment that Union Market embodies. Ai Pop Up and Songbyrd are co-tenants of the Property—situated on the same lot and the same property—owned by the Property Owner. Outside of two separate operators of live performance venues collocated on the same property, the Applicants are not aware of any properties within the square or within 1,000 feet of the Property containing a live performance, night club, or dance venue.

VI. NATURE OF VARIANCE RELIEF SOUGHT AND STANDARD OF REVIEW

The Applicant seeks area variances from the conditions that an eating and drinking establishments with live performance, night club or dance venues and an entertainment, assembly, and performing arts use in the PDR-1 zone shall not abut a residential use or zone under Subtitle

U §§ 802.1(c)(2) and (e)(2) and shall not be located within 1,000 feet of a property containing a live performance, night club or dance venue under Subtitle U §§ 802.1(c)(3) and (e)(3).

Under D.C. Code § 6-641.07(g)(3) and 11 DCMR Subtitle X § 1000.1, the Board is authorized to grant variance relief where it finds that three conditions exist:

- (1) The Property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or condition;
- (2) The owner would encounter practical difficulties or undue hardship if the zoning regulations were strictly applied; and
- (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map. 11 DCMR Subtitle X § 1001.1; *see also French v. Board of Zoning Adjustment*, 658 A.2d 1023, 1035 (1995); *see also Capitol Hill Restoration Society, Inc. v. Board of Zoning Adjustment*, 534 A.2d 939 (1987).

The Court of Appeals has held that the purpose of variance procedure is to “prevent usable land from remaining idle.” *See Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 541 (1972).

VII. THE APPLICANTS MEET STANDARD FOR VARIANCE RELIEF

The argument that the Applicants meet the standard for variance relief, as articulated in the Updated Statement of the Applicant § VII.A–C, is incorporated by reference. The Property is unique as it is improved with multiple structures on the same lot. In fact, the Maurice West Component was constructed originally on the site and is a masonry structure while the Ai Pop Up and Songbyrd Components structure was attached to the masonry building later. Thus even though the underlying record lot abuts a residential use the live music/entertainment uses do not abut a residential use. Both tenants’ operations are uniquely separated from the residential use by two separate structures located on its large lot and are uniquely buffered by commercial structures and uses to the east and west and a government facility to the north. The Property’s unique conditions as well as permitting history give rise to practical difficulties that would result from a strict application of the zoning regulations. And, given that Songbyrd has been in operation for three

years with no adverse impact to the public good, relief for this Property collectively complies with the variance standard.

Furthermore, the ZA Corrective Order states that relief is needed from Subtitle U § 802.1(e)(3)⁵. The Property is uniquely impacted by the permitting history outlined in the Application and above; but also by the exception condition that both tenants are co-located on the same Property. Subtitle U §§ 802.1(c)(3) and (e)(3) require that “[t]here is no property containing a live performance, night club or dance venue either in the same square or within a radius of one thousand (1,000 ft.) from any portion of the subject property.” No other lot within the square or within a radius of 1,000 contains a live performance or night club use. Ai Pop Up and Songbyrd are co-tenants on the Property—situated on the same lot—owned by the Property Owner. This application sees special exception relief for the Property which contains two tenants. These tenants can co-exist with varying business hours and substantial sounds mitigation measures to have no adverse impact on neighbors or each other. If Subtitle U §§ 802.1(c)(3) and (e)(3) do apply to the Property, then given their unique co-location on the same lot and unforeseen permitting history, these collective facts create an exceptional condition that gives rise to practical difficulty. And, the history of operations and co-location on the same lot supports the conclusion that relief would not create an adverse impact to the public good.

VIII. COMMUNITY OUTREACH

The Applicants presented this application to the ANC 5D’s zoning committee and received a vote of support for all relief requested by ANC 5D at its November 12, 2024 public meeting. The ANC supported the application and relief for both co-tenants as consistent with the Florida

⁵ The Board (or the Zoning Administrator) may determine that relief from Subtitle U §§ 802.1(c)(3) and (e)(3) is not required as Ai Pop Up and Songbyrd are co-tenants located on the same Lot and Property and 802.1(c)(3) and (e)(3) only apply to other properties or other uses in the Square or that relief from Subtitle U § 802.1(c)(3) is not required for Songbyrd due to the history of the Property.

Avenue Market Study and harmonious with the evolution of the Union Market area. The ANC acknowledges that the uses activate ground floor space, provide amenities that contribute to a vibrant community for residents and visitors of Union Market.

IX. VARIANCE RELIEF MAY NOT BE NECESSARY

The Applicant believes that it meets the standard for area variance relief but given the nature of this relief but asserts that the area variance under Sections 802.1(c)(2) and (e)(2) maybe unnecessary in this circumstance. The abutting federally-owned lot is putatively labeled RF-1 on the online Zoning Map, but the Map is contradicted by 11-A DCMR § 208.1, which expressly provides that federally-owned land that is in federal use is not subject to zoning. Accordingly, the Property does not abut any residential zone.

Similarly, the relevant portions of the Property containing the Songbyrd and Ai Pop Up uses do not abut any residential use. The Maurice West Component intervenes between the Ai Pop Up use and The Mo, the mixed-use building containing residential apartments to the west of the Property.⁶The Applicant believes that an area variance under Sections 802.1(c)(3) and (e)(3) is also unnecessary in this circumstance. Songbyrd and Ai Pop Up are not on separate properties within 1,000 feet of each other. They are on a single property under common ownership and are actually located in the same metal-sided structure, and located within separately-demised spaces within the structure. However, out of an abundance of caution, the Applicants seek area variances from Sections 802.1(c)(2) / (e)(2) and (c)(3)/(e)(3⁷).

⁶ The Applicant is discussing this configuration with the Zoning Administrator.

⁷ We note that the Applicants are discussing the specific relief requirements with the Zoning Administrator. The elements of the relief being requested in this application might be modified and/or reduced prior to or at the hearing.

X. CONCLUSION

For the reasons stated above, the Project meets the applicable standards for special exception relief and variance relief under the Zoning Regulations. Accordingly, the Applicants respectfully request the Board grant the application.

Respectfully Submitted,

COZEN O'CONNOR

A handwritten signature in blue ink, appearing to read 'M. Moldenhauer', is written over a thin horizontal line.

Meridith H. Moldenhauer

TAB A

