



Jeffrey C. Utz
jutz@goulstonstorrs.com
(202) 721-1132

Lawrence Ferris
lferris@goulstonstorrs.com
(202) 721-1135

April 25, 2025

D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Suite 200S
Washington, D.C. 20001

Re: **BZA Application No. 21279 – 400 Morse Street NE (Square 3589, Lot 29)
(the “Property”) – Supplemental Submission**

Dear Members of the Board:

On behalf of ARP Morse LLC (“**Applicant**”), we hereby submit this Supplemental Submission and request for waiver pursuant to Subtitle Y § 101.9 to permit this submission after the 30-day deadline under Subtitle Y § 300.15. This Supplemental Submission is necessitated by guidance recently received from the Zoning Administrator regarding the successive processing of this Application and the application filed by the owners of the nearby property at 405-407 Morse Street NE (the “**405 Morse Property**”) in BZA Case No. 21292, requesting approval for an entertainment, assembly, and performing arts use, which was filed after this Application and is scheduled to be heard by the Board on May 21, 2025. Specifically, as recommended by the Zoning Administrator, the Applicant hereby requests an area variance from the requirement under Subtitle U § 802.1(c)(3) that there be no other property containing a live performance, night club, or dance venue within 1,000 feet.

As discussed in detail below, the Application satisfies the standards for an area variance. An updated Form 135 Self-Certification is attached as Exhibit A. A check in the amount of \$1,040 for the filing fee for the additional variance relief is being delivered to the Office of Zoning concurrent with this filing.

The Applicant also notes that it has notified the ANC of the additional variance relief being requested and, concurrent with this filing, is sending out updated hearing notices to property owners within 200 feet of the Property noting the additional relief being requested ahead of the Board’s hearing on May 14, 2025. A copy of the updated hearing notice is attached as Exhibit B. The additional relief being requested will also be included in the hearing notice signs posted on the Property.

A. Background

As discussed in the initial submission, the Property is improved with a two-story building (“**Existing Building**”), constructed in 1931, that is considered a contributing structure in the Union Market Historic District. The Applicant, which owns and operates other restaurants in the D.C. area, initially acquired the Property in 2022 and invested significant financial resources into preserving and restoring the historic structure for its prior restaurant at the Property, the former Palette 22, which occupied the Property until very recently. Unfortunately, despite the Applicant’s substantial investment, the prior restaurant concept — which was designed as a local neighborhood eatery serving primarily residents in the immediate vicinity — struggled to generate sufficient business, and the Applicant determined that, in order to succeed in the highly competitive dining environment in the Union Market neighborhood, it was necessary to pursue a concept that would act as a destination, drawing from across the District and the surrounding area. To that end, the Applicant has partnered with Ten Five Hospitality, as discussed in the initial statement, to bring a unique Country & Western-themed full menu restaurant/bar/lounge that will include live music performances. To that end, the Applicant filed this Application for special exception approval pursuant to Subtitle U § 802.1(c) on February 4, 2025.

Case No. 21292 was filed by the owners of the 405 Morse Property more than three weeks later, on February 28, 2025, and requests approval for an entertainment, assembly, and performing arts use pursuant to Subtitle U § 802.1(e). The Applicant became aware of the application for the 405 Morse Property during the Applicant’s outreach with the community and Advisory Neighborhood Commission (“ANC”) 5D.¹ The Applicant thereafter met with the Zoning Administrator to discuss the issue of the two applications being processed in short succession given the special exception criteria applicable to both cases that there be no other live performance, night club, or dance venue within 1,000 feet of the subject property. Following that meeting, the Zoning Administrator recommended that both applicants seek an area variance from the 1,000-foot restriction, which the Applicant now requests.

B. Jurisdiction of the Board

The Board has jurisdiction to grant the area variance relief requested pursuant to Subtitle X § 1000.1 of the Zoning Regulations.

C. There is Good Cause to Grant a Waiver for Late Filing.

Subtitle Y § 101.9 authorizes the Board to, upon a showing of good cause, waive e.g. the 30-day deadline for supplemental submissions under Subtitle Y § 300.15. Good cause exists for the grant of a waiver in this case as the Zoning Administrator’s recommendation to request the

¹ As noted in the Applicant’s Prehearing Submission, the Applicant presented to the ANC’s Zoning Committee on March 20, 2025, and to the full ANC at its regularly scheduled public meeting on April 8, 2025, and ANC 5D voted unanimously to support the Application.

area variance discussed below was not received until after the 30-day deadline for the Applicant’s Prehearing Submission had passed. Further, the Applicant did not become aware that the owners of the 405 Morse Property had requested approval for an entertainment use until the Applicant’s presentation to the ANC’s Zoning Committee.

The Applicant thereafter worked quickly to meet with the Zoning Administrator to discuss the issue of the two nearby applications, but, due to the timing of the discussion with the Zoning Administrator in relation to the Applicant’s 30-day Prehearing Submission deadline, the Applicant was not able to receive the Zoning Administrator’s recommendation to seek a variance until after the 30-day deadline had passed. Moreover, the Applicant was not aware of the 405 Morse Property owners’ intent to seek approval of an entertainment use until the ANC Zoning Committee meeting and did not anticipate that the Zoning Administrator would recommend that the Applicant, as the first of the two applications, nonetheless seek preemptive variance relief. Accordingly, because the Applicant could not foresee that variance relief would be recommended by the Zoning Administrator in this case until after the Applicant’s Prehearing Submission was filed, the Board has ample cause to grant the requested waiver for late filing.

In addition, no party, stakeholder, or neighbor would be prejudiced by the approval of the requested waiver. Rather, the ANC and all other stakeholders have been provided notice of the additional relief being requested and will have ample time to provide additional input to the record.

D. The Application Satisfies the Criteria for an Area Variance.

As a condition to approval of an eating and drinking establishment with a live performance venue, Subtitle U § 802.1(c)(3) requires 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 feet (1,000 ft.) from any portion of the subject property[.]” As discussed above, over three weeks after the Application was filed, the owners of the 405 Morse Property filed an application for an entertainment, assembly, and performing arts use within 1,000 feet of the Property.

The Applicant notes that the requested variance relief is preemptive and is requested out of an abundance of caution based on the recommendation of the Zoning Administrator. Currently, there is no live performance, night club, or dance venue within 1,000 feet of the Property. Nevertheless, for all the reasons discussed below, the Application satisfies the standards for the approval of an area variance.

1. The Property Is Affected by an Exceptional Situation or Condition.

The Court of Appeals held in *Clerics of Saint Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d. 291, 293–94 (D.C. 1974), that the exceptional situation or condition standard goes to the property, not just the land; and that “. . . property generally includes the permanent structures existing on the land.” Further, it is not necessary that the uniqueness arise from a single situation or condition on the Property. Rather, it may arise from a “confluence of factors.” *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). One of the factors the Board

may consider in evaluating whether a property is unique is the property's past zoning history. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.2d 1091, 1097–98 (D.C. 1979).

Here, the Property is affected by a confluence of factors resulting in an exceptional condition related to (i) the unique structural configuration of the Existing Building, (ii) the need for the Applicant to incorporate a live musical performance component into the restaurant concept for the Property due to the challenges already faced in the competitive Union Market dining business environment, and (iii) the unique circumstances of this case, where a nearby application seeking approval for an entertainment, assembly, and performing arts use was filed over three weeks after the Applicant filed its Application but before the Application has been approved.

First, the design of the Existing Building for a standard eating and drinking establishment is challenged due to the historic configuration of the structure. The Existing Building's configuration reflects the original use of the building as a warehouse when it was constructed in 1931 and notably includes a front single-story loading bay area facing 4th Street NE, similar to the other historic warehouse buildings in this part of the Union Market district.² This single-story area is partitioned from the rest of the building interior by the original structural column grid, as shown on Sheet SD2.1 of the architectural plans included in the initial submission (Exhibit 6 of the Case Record) and excerpted in Figure 1 below. Prior to the Applicant's acquisition of the Property, most of the area of this column line was also improved with a wall, with the front interior of the building facing 4th Street NE walled off from the rest of the first floor except for a cased opening allowing access between the spaces. The Applicant maintained this bifurcated configuration for the restaurant space in order to maintain the existing historic fabric of the building, due in part to historic preservation requirements relating to the interior of the building. However, this segmentation of spaces is suboptimal operationally and from an interior design perspective for a dining use. The Applicant now proposes to improve this condition and make better use of the challenging interior space created by the historic column grid by removing the interior wall to better incorporate the front building area into a cohesive dining space and devoting the westernmost area of the first floor partly to a stage for live performances, along with adjacent seating for diners and audience members.

² For further discussion of the Existing Building's distinctive historic design, see the Union Market Historic District Nomination at Pages 8-9 (the Property is referred to as 1253 4th Street NE):
https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Union%20Market%20Terminal_0.pdf

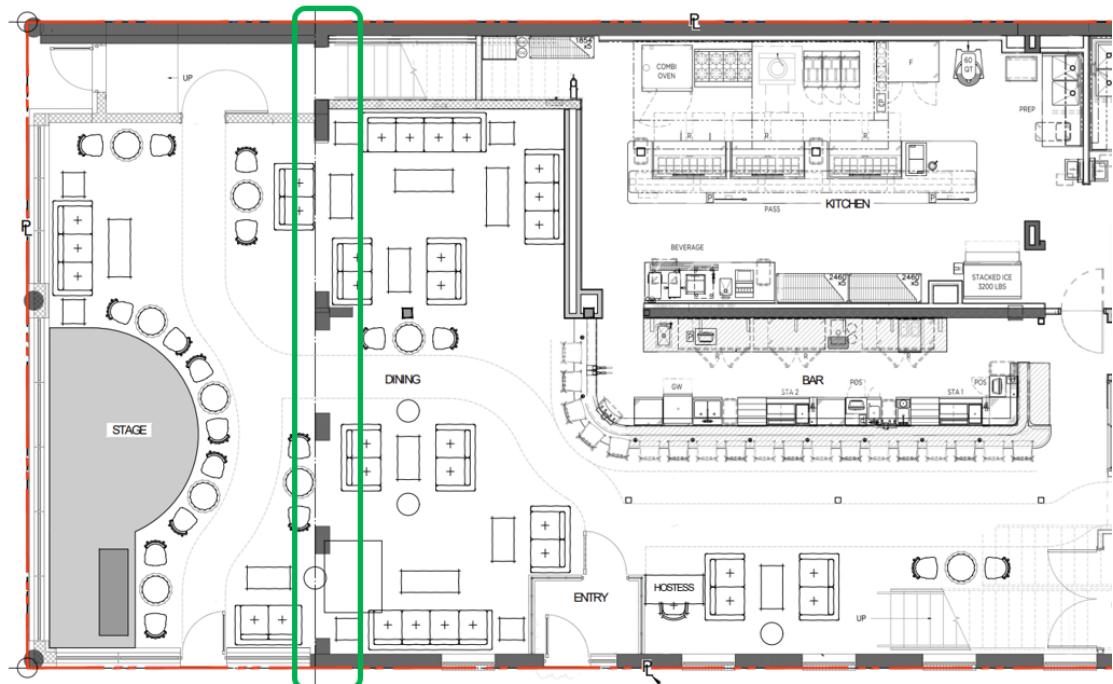


Figure 1: Excerpt of First Floor Plan. Original columns marked in green.

Another factor contributing to the exceptional condition affecting the Property is the Applicant's need to offer a new dining concept that incorporates live musical performances in order for the Property to remain competitive in the highly active business environment for eating and drinking establishments in the Union Market area. As discussed above, while the Applicant initially pursued a restaurant concept focused primarily on residents from the immediate vicinity, the prior establishment struggled to take hold. The Applicant determined that, in order to maintain viability, a new concept, involving a live music component, was necessary that would attract diners and guests from a wider swath of the District and the surrounding area.

Lastly, the unique circumstances of this case — where weeks after the Applicant submitted the Application, another application for an entertainment use was filed within 1,000 feet — constitutes a factor contributing, along with the other factors discussed above, to the exceptional situation affecting the Property. It is highly unusual for an applicant to file an application for special exception relief that includes as a condition a minimum area restriction for similar uses, with no such uses existing in the area at that time, and for another property owner within the restricted area to apply for the Board's approval several weeks later but while the first application is still pending. The Applicant learned of the 405 Morse Property owners' proposed use and of the filing of Case No. 21292 during the Applicant's outreach with the ANC, as discussed above, and the Applicant worked quickly to consult with the Zoning Administrator thereafter to receive guidance on how the two projects would be reviewed during permitting. However, the situation is extremely unusual, and the Applicant was not aware of the proposal or application later filed by the 405 Morse Property owners, nor could have foreseen that the Zoning Administrator would recommend that the Applicant request a variance based on the later-filed application for that site.

As noted above, under the Court of Appeals’ decision in the *Monaco* case, 407 A.2d at 1097–98, the Property’s zoning history is among the factors the Board may consider in evaluating whether the Property is affected by an exceptional situation or condition. Thus, this unique zoning background for the Property, involving the later nearby application, constitutes another factor contributing to the exceptional condition under the variance test.

In this case, all of the conditions described above, together, converge to create an exceptional situation affecting the Property.

2. Strict Application of the Zoning Regulations Would Result in a Practical Difficulty.

To satisfy the second element for the area variance standard, the Applicant must demonstrate “practical difficulty.” The D.C. Court of Appeals has held that an applicant must demonstrate that “compliance with the area restriction would be unnecessarily burdensome” and that the practical difficulty is “unique to the particular property.” *Gilmartin*, 579 A.2d at 1170. As the Court of Appeals has explained, the “nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.” *Id.* at 1171. “Increased expense and inconvenience to applicants for a variance are among the proper factors for [the Board]’s consideration.” *Id.* (citing *Barbour v. D.C. Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976)). Thus, to demonstrate practical difficulty, the Applicant must show that strict compliance with the regulations is burdensome, not impossible.

Here, the Applicant is faced with a practical difficulty if relief is not granted from the 1,000-foot separation restriction under Subtitle U § 802.1(c)(3). If this relief is denied, the Applicant would be forced to find an alternative site for the proposed eating and drinking establishment and live performance venue that is at least 1,000 feet from the 405 Morse Property which would, in effect, require forfeiting the significant investment the Applicant has already made into restoring the historic Existing Building. Such investment has included interior and exterior restoration and renovation work, and adapting the structure to a restaurant use contributing to the overall vibrancy of this area of the District. The Applicant has already attempted to operate a more typical eating and drinking establishment at the Property, but a new restaurant concept is required that includes a unique activating component that draws interest from a broader geographical market than the immediate vicinity in order for the Property to maintain competitive viability. The Applicant is likely to face significant hardship if a tenant that does not have such a live music component is required to be located at the Property as such business does not appear to work in this particular configuration and size.

Furthermore, because of the Property’s unique interior configuration, driven by the historic column grid associated with the Property’s original construction as a warehouse with a front loading bay, the Property faces challenges in pursuing an alternative, more traditional dining-only restaurant concept. The proposed use, by including a modest space for a live musical performance component, is able to partly compensate for the challenging interior layout posed by the placement of the historic structural columns, but removing this critical design and program solution would

leave the Applicant to continue grappling with the resulting disjointed and operationally challenging space configuration within the building.

Also, and importantly, a key factor contributing to the practical difficulty in this case is the later filing of Case No. 21292 proposing another entertainment use of which the Applicant had no knowledge prior to its meeting with the ANC after filing the Application. If the requested variance relief is denied, this would, in effect, allow a later-filed application subject to the same 1,000-foot restriction to block and dislodge this Application, by no fault of the Applicant's and despite being filed in advance of the other application.

For all of these reasons, the Applicant faces a practical difficulty if the Board denies relief from the 1,000-foot area restriction and, thus, meets the second prong of the variance standard.

3. Relief Can Be Granted Without Substantial Detriment to the Public Good and Without Impairing the Intent, Purpose, and Integrity of the Zone Plan.

Finally, the Applicant must demonstrate that “granting the variance will do no harm to the public good or to the zone plan.” *Gilmartin*, 579 A.2d at 1167. Here, the requested variance relief from the 1,000-foot area restriction may be granted without any detriment to the public good or zone plan. To the contrary, the requested relief will allow the Applicant to contribute to the overall vibrancy of this part of the District by bringing a new, unique dining concept that will include a live music performance component. Live performances will be entirely interior with no exterior performances or amplification, as required by the applicable special exception criteria, and will be limited to the first floor. The proposed use is well located in the heart of the Union Market district, and otherwise meets all of the requirements for special exception approval. As noted in previous filings and above, the Applicant presented to ANC 5D’s Zoning Committee and the full ANC, and the ANC voted unanimously in support of the Application and proposed use.

Importantly, if not for the later-filed application for the 405 Morse Property, the Applicant would not be compelled to now request this preemptive area variance relief, as recommended by the Zoning Administrator, which, as stated above, the Applicant is requesting strictly out of an abundance of caution. Moreover, granting the requested relief will allow this historic Property to be put toward a productive and neighborhood-enhancing use that is able to adapt to the challenging interior configuration and structural layout of the Existing Building. To deny relief in this case, where the requested relief is the result solely of an application by a nearby property owner submitted after the Application was filed — and where the Applicant’s proposed use will both contribute to the overall vibrancy of the surrounding area and is fully supported by the community — would be contrary to fundamental fairness, which cannot be the intent of the variance provisions or the Zoning Regulations.

In sum, the area variance relief requested in this case is fully aligned with the public good and the intent, purpose, and integrity of the zone plan. And for all of the reasons discussed above, the Application satisfies the criteria for the grant of an area variance from the 1,000-foot area restriction under Subtitle U § 802.1(c)(3).

E. Conclusion

For the reasons discussed in the initial submission, the Application meets the standards for approval of the requested special exception relief to permit an eating and drinking establishment with a live performance venue. For the reasons discussed above, the Application also meets the standards for approval of an area variance from the 1,000-foot area restriction under Subtitle U § 802.1(c)(3). Accordingly, the Applicant respectfully requests that the Board approve the Application.

We look forward to presenting to the Board at the public hearing on May 14, 2025. Please feel free to contact the undersigned at (202) 721-1135 if you have any questions, and thank you for your consideration of this matter.

Sincerely,

/s/ Jeffrey C. Utz

/s/ Lawrence Ferris

Certificate of Service

The undersigned hereby certifies that copies of the foregoing document and attachments were delivered via email to the following addresses on April 25, 2025.

Crystal Myers
Office of Planning
crystal.myers@dc.gov

Erkin Ozberk
District Department of Transportation
erkin.ozberk1@dc.gov

ANC 5D
5D@anc.dc.gov

Hector Arbuckle – ANC 5D01
5D01@anc.dc.gov

/s/ Lawrence Ferris
Lawrence Ferris