

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Applicant's Statement of 106 13th Street LLC

106 13th Street, SE (Square 1036, Lot 60).

I. INTRODUCTION.

This Statement is submitted on behalf of 106 13th Street LLC (the “**Applicant**”), the owner of the property located at 106 13th Street, SE (Square 1036, Lot 60) (the “**Property**”). The Property is improved with a two-story building (the “**Building**”). The first floor has been consistently used for commercial purposes since at least 1961, as evidenced by the Certificates of Occupancy included with the Application. The cellar level is unoccupied, and the second story was most recently used for residential purposes.

The Applicant intends to maintain the existing restaurant use on the first floor, which is permitted without relief since there is an existing Certificate of Occupancy for that use on that floor. The Applicant is herein requesting to expand the existing restaurant use to the cellar level and second story. Accordingly, the Applicant is requesting use variance relief from the use requirements of the RF-1 Zone (U § 301).

II. JURISDICTION OF THE BOARD.

The Board has jurisdiction to grant the variance relief requested pursuant to Subtitle X § 1000.1 from the use requirements of Subtitle U § 301.

III. BACKGROUND.

A. Existing Use and History of Uses.

According to History Quest, the Building was constructed in 1912. According to past Certificates of Occupancy, included with this Application, the first floor of the Property has been

used as an eating and drinking establishment since at least 1961. In 1987, all three levels (cellar, first, and second) were approved for a deli use. In 1990, the use was changed to a restaurant use with seating, but only on the first floor. Since 1990, the first floor has been used as a restaurant. The first floor is permitted to be used as a restaurant as it has a valid C of O, but the second floor and cellar level are not included in that approved C of O.

B. Description of the Property, Surrounding Area, and Proposed Use.

The Property is located in the RF-1 Zone. It is a small rectangular lot measuring 1,540 square feet in land area. The existing Building occupies almost the entire lot. Abutting the Property to the north is a row dwelling that has been converted to multiple dwelling units. Abutting the Property to the south is an alley. Abutting the Property to the west is 13th Street. Across 13th Street is a large public park. Abutting the Property to the east is the side of a row building that has been converted to multiple dwelling units.

The Applicant owns Pacci's Trattoria, an Italian restaurant in Silver Spring. The Applicant is proposing to open a second location at the Property. Regardless of whether the cellar and second floor are approved, the Applicant will continue to use the first floor as a restaurant, as is permitted by right as there is a valid C of O for restaurant use on the first floor - for up to 50 seats. The requests for relief relate only to the cellar and second floor use.

The Applicant is proposing to have 130 seats - with 30 seats in the cellar, 40 on the first floor and 60 on the second floor. The proposed hours of operation are 11:30am to 2:30pm and 4:30pm to 9:30pm. The Applicant anticipates a maximum of 22 employees (split up between shifts). The surrounding area is made up of a mix of primarily residential uses. The Applicant anticipates that the majority of patrons will be from the immediately surrounding area. This will mitigate any traffic concerns related to added seating on the cellar level and second floors.

IV. USE VARIANCE.

The Applicant is requesting use variance relief from the Use Permissions of U § 201 in order to obtain approval for general retail, service, and office use. The Board is authorized to grant use 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 conditions;
- (2) The owner would encounter an 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.

See French v. District of Columbia Board of Zoning Adjustment, 628 A.2d 1023, 1035 (D.C. 1995); *see also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

The variance procedure has many purposes. It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust invasion of property rights, and prevent usable land from remaining idle. These purposes infuse meaning into the phrase “exceptional and undue hardship.” *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 541-42 (1972).

It is well established that because of the nature of variances and their effects on the zone plan, the stricter “undue hardship” standard applies to requests for use variances while the “practical difficulty” standard applies to requests for area variances. *Palmer v Board of Zoning Adjustment* 287 A.2d 535 (D.C. 1972). For the Board to grant use variance relief, “it must be shown

that the regulations ‘preclude the use of the property in question for any purpose for which it is reasonably adapted, *i.e.*, can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?’” *Palmer v. BZA*, at 542, citing 2 A. Rathkopf, *The Law of Zoning and Planning*, Note 21, at 45-5 (3d ed. 1962).

A. The Property is Unique Because it is Affected by an Exceptional Situation or Condition and a Strict Application of the Zoning Regulations Would Result in an Undue Hardship to the Owner.

The phrase “other extraordinary or exceptional situation or conditions” in the above-quoted variance test applies not only to the land, but also to the existence and configuration of a building on the land. See *Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment*, 320 A.2nd 291, 294 (D.C. 1974). Moreover, the unique or exceptional situation or condition may arise from a confluence of factors which affect a single property. *Gilmartin v. D.C. Board of Zoning Adjustment*, 579A.2nd 1164, 1168 (D.C. 1990). An owner is presented with an undue hardship when their “property cannot be put to any zoning-compliant use for which it can be reasonably adapted.” *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). In a recent case, the D.C. Court of Appeals upheld this Board’s approval of a use variance and noted that economic harm to an owner in converting a portion of their property into a zoning-compliant use, coupled with significant limitations on the utility of a building, constituted undue hardship necessary to satisfy the second prong of the use variance test. *The Oakland Condo v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748 (D.C. 2011).

The Property is faced with exceptional conditions relating to its mixed-use nature, size of the Building, and conditions in the cellar. The first floor of the Property has been used as an eating and drinking establishment since at least 1961. In 1987, all three levels (cellar, first, and second) were approved for a deli use. In 1990, the use was changed to a restaurant use with seating, but

only on the first floor. Since 1990, the first floor has been used as a restaurant. The first floor is permitted to be used as a restaurant as it has a valid C of O, but the second floor and cellar level are not included in that approved C of O. The Applicant is in a unique position where it is permitted to use the first floor for a non-conforming use but is limited to residential use on the second story.

The lot is small, only 1,540 square feet, and the second floor is not separated from the restaurant use like it would be in a larger mixed-use building. Accordingly, the fact that the first floor has always been used for commercial purposes—and will continue to be used for commercial purposes—will make it extremely difficult for the Applicant to obtain residential tenants as the tenants will be subject to the smells and sounds of the restaurant use. The previous owner had such difficulty finding renters that he occupied the unit and rented the other bedroom to an employee. There are no comps in the area for rental units on top of a restaurant in a row dwelling. The residential uses in the immediately surrounding area are not located in mixed-use buildings but in entirely residential buildings. As the Applicant is unsure about the potential rental price or even the possibility of renting out those units, renovating the units for residential use and attempting to mitigate impacts from the restaurant—if even possible—is a risk. If it were being converted to restaurant use it would be much less expensive.

One alternative would be to convert the entire building to residential use. However, the first-floor space has never been used for residential purposes, so removing that space and converting the entire Building to residential use would be a clear hardship. To convert a space that has always been used for commercial purposes to residential is extremely costly and requires different building code considerations. Moreover, the first floor is approved for restaurant use and discontinuing that use in order to make the upper units more appealing would be a clear undue

hardship to the Applicant, who purchased the Property knowing he could use the first floor as a restaurant as a matter-of-right.

Regarding the cellar, it cannot be converted to residential use because of issues related to Building Code. It is not possible to put a window in the cellar and there is no place for a light well. Accordingly, it is not possible to put in a window for emergency egress. A window for emergency egress is required by building code. Therefore, the Applicant cannot use the cellar for residential use.

In summary, due to the existing mixed-use nature, the history of uses, the size of the building, the difficulties with the cellar, and the lack of comps in the area, the Applicant will face an undue hardship if the relief is not granted. Moreover, the building cannot be converted to residential use without significant hardship as it has been used as an eating and drinking establishment for 60 years.

C. No Substantial Detriment to Public Good and No Harm to the Zone Plan.

Granting the relief will not result in a substantial detriment to the public good, nor will it harm the zone plan. The Building has been used as an eating and drinking establishment since at least 1961 and the Applicant is proposing to expand the use to other parts of the same building. The use will serve the neighborhood and the Applicant's proposed hours of operation will mitigate any potential issues. There are a plethora of available residential properties within the area and removing a unit that has not been successfully used for residential purposes and using it for additional restaurant seating will be a better use of the property overall.

V. CASE LAW

A. Case No. 19578.

In BZA Case No. 19578, the Board approved a use variance for a hair salon on the first and second floors of an existing two-story building at 944 Florida Avenue, NW. The applicant argued that the history of commercial uses, the cost of converting commercial space into residential space, and the cost of updating the existing residential space created an exceptional situation where the applicant would face an undue hardship if it had to use the building for residential purposes. In its report, the Office of Planning recommended denial of the request, arguing that while the property was unique due to its continued non-residential use, the applicant had not proven an undue hardship. After the hearing, the Board requested additional information from the applicant which focused on the feasibility of maintaining the existing second floor use and renovating the building for residential use. In its deliberation, the Board granted the relief, determining that the history of uses coupled with the cost of updating the existing residential space and converting the non-residential space created an exceptional situation which would lead to an undue hardship if relief were not granted.

The present case is stronger than Case No. 19578 as the Applicant in the present case is permitted to use the first floor as a restaurant use as a matter-of-right. The Applicant will face a similar hardship in the difficulty of renting out units above a particularly impactful commercial use. A restaurant and hair salon are certainly more intrusive (smells/noises) than a small office.

B. Case No. 18838.

In BZA Case No. 18838, the Board approved a use variance from the RF-1 Use Permissions to allow the first and second floors of a building to be used as a bar/restaurant. That case is similar to the present case in many ways. In both cases, the first floors of the respective buildings were configured for commercial use.

In BZA Case No. 18838, the Board found that the applicant met the undue hardship burden of proof based on the inherent expense of converting the building to residential use. The applicant was not required to provide financial documents but testified that the residential renovation would be significantly more expensive because residences require more electrical, plumbing, and framing than a commercial use, especially if that commercial use had an open floor plan. Based on this testimony, the Office of Planning stated that it was willing to support that application. The Board also found this testimony met the burden of proof and granted the use variance. In the present case, the Applicant is also asserting that it is inherently expensive to renovate an existing commercial space to a residential space.

VI. CONCLUSION.

For the reasons outlined in this Applicant's Statement, the Applicant respectfully requests the variance relief as detailed above.

Respectfully Submitted,

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Date: January 7, 2021

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