

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

**APPLICATION OF
AI POP UP LLC**

ANC 5D01

STATEMENT OF THE APPLICANT

I. NATURE OF RELIEF SOUGHT

This statement is submitted on behalf of the Applicant, Ai Pop Up LLC (the “**Applicant**”), as the tenant of the property located at 530 Penn Street NE (Square 3594, Lot 0006) (the “**Property**”), in support of its application for 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(e) and for 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 zone (Subtitle U § 802.1(e)(2)) and that external performances or external amplification shall not be permitted (Subtitle U § 802.1(e)(4)).

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 fronts on Penn Street and is bounded by an independent movie theatre to the east, the U.S. Park Police National Mall and Memorial Park Brentwood Facility and a hotel to the north,

and a 12-story, mixed use apartment building to the west. There are three PUDs located in Square 3594, all of which rezoned property from the PDR-1 zone to the MU-9 zone.¹ The Property is located in the PDR-1 zone in the Union Market neighborhood of Ward 5. The Property abuts an RF-1 zone to the rear, which is the location of the U.S. Park Police National Mall and Memorial Park Brentwood Facility that does not have a residential use. A copy of the Zoning Map is attached at **Tab A**. The Union Market District is a vibrant area with a diverse mix of uses including spanning dining, residential, office, retail, and entertainment uses.

As shown on the architectural plans attached at **Tab B**, the Property is improved with three structures. The Proposed Use will be located primarily in the structure with the outdoor patio space at the rear, which is 10,990 sq. ft. in size (the “**Existing Building**”). The Existing Building makes up less than 20% of the Property.

B. The Proposed Use

The Applicant has entered into a short-term lease for the Existing Building on the Property with the property owner to transform the vacant space from office use to assembly use as an entertainment event space (the “**Proposed Use**”). The Applicant proposes no structural expansion of the Existing Building, 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 Existing Building. Although attendees may filter out to the rear patio, the primary location of the Proposed Use will be located inside the Existing Building. 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 Use will event-focused and encompass discrete, sporadic events.

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

C. DOB Pop-Up Permit Program

The Pop-Up Permit Program (the “**PUP Program**”) is a program launched by DOB on April 22, 2024, in which applicants receive a temporary Certificate of Occupancy for use of a previously vacant building for up to one year without going through the traditional permitting process. As noted on the DOB website, an example of an eligible PUP Program application type is the conversion of a vacant office space to an assembly use through minimal to no construction, as is the Proposed Use in the subject BZA application. The new PUP Program provides a unique and commendable approach to activating vacant spaces in the District.

The 15-day process for obtaining a Certificate of Occupancy through the PUP Program begins with an applicant completing a pre-qualification form to ensure that the proposed use is feasible at the property and that the applicant has a confirmed lease agreement at the time of submission. After the applicant is approved for pre-qualification by DOB, the applicant submits the PUP application. DOB then reviews the application and completes any necessary inspections. Once approved, the applicant pays a fee and DOB issues the Certificate of Occupancy permitting the proposed use for up to one year.

The PUP Program is a successful initiative, which has benefitted the District as a whole by providing avenues to vacant properties and convert those long-vacant sites into vibrant, new uses.

D. Permit History

The Applicant was excited to avail itself the new PUP Program to utilize the Proposed Use at the Property. On June 26, 2024, DOB issued the Applicant a Certificate of Occupancy to change the use from office use to “assembly use for art and music activation.” A copy of the Certificate of Occupancy is attached at **Tab C.**

In accordance with the new Certificate of Occupancy, the Applicant organized several events to be held at the Property beginning in September 2024. The Applicant detrimentally relied on the Certificate of Occupancy and burdened the Property by securing entertainment, selling tickets, and organizing other event components. Unfortunately, on September 25, 2024, the Applicant was informed by DOB that an oversight occurred regarding the Certificate of Occupancy that BZA relief must be sought for the Proposed Use. The Certificate of Occupancy was no longer valid due to the BZA relief required for the Proposed Use. This issue was not identified prior to the Applicant's PUP Program submission or during the permit review process of the Proposed Use. As such, this issue was not brought to light until the meeting with DOB on September 25, 2024.

Therefore, the Applicant now seeks special exception relief and variance relief to permit the Proposed Use at the Property as anticipated and scheduled.

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

The Applicant requests 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(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. APPLICANT MEETS BURDEN FOR SPECIAL EXCEPTION RELIEF

The Applicant meets the burden for special exception relief for entertainment, assembly, and performing arts use in the PDR-1 zone under Subtitle U § 802.1(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.

A. The Relief is Harmonious with the General Purpose and Intent of the Zoning Regulations and Maps

The requested relief will be in harmony with the purpose and intent of the Zoning Regulations and related maps. The Zoning Regulations permit the Proposed Use by special exception and is thus an anticipated use in the PDR-1 zone. Further, the District has placed a policy emphasis on infill development of vacant or underutilized properties in the New York Avenue/Brentwood Corridor. The Proposed Use would be a positive addition to the community by activating a vacant building and providing access to events as the PUP Program is intending to encourage.

B. The Relief Will Not Tend to Adversely Affect the Use of Neighboring Property

The Project will not tend to adversely affect the use of neighboring properties for a number

of reasons: (1) the Property is located in a vibrant, mixed use area, (2) the Proposed Use is anticipated to have little impact on the abutting residential zone, (3) and the Proposed Use would advance the goals and objectives of the District as outlined in the Zoning Regulations.

The Union Market District is a vibrant neighborhood with many different uses, including dining and entertainment uses in which many community members assemble and patronize Union Market businesses. Although the Property is located in the PDR-1 zone, it abuts two PUDs, which rezoned those areas from PDR-1 to MU-9.² Those high-density, mixed-use buildings feature over 700 dwelling units between them plus commercial uses, including an arcade. As the Union Market District has evolved by reducing the amount of industrial uses and increasing the number of housing options in the area, there also comes a need for entertainment and activities for new residents and the community that will better utilize vacant properties. The Proposed Use would be a great addition to the neighborhood.

While the Property abuts a large property zoned RF-1 zone to the rear, it is the location of the U.S. Park Police National Mall and Memorial Park Brentwood Facility. On the opposite side of the abutting RF-1 lot to the northeast is Brentwood Park. As such, the closest residential use in the RF-1 zone are single-family rowhomes located just under a half-mile away off of Mount Olivet Road NE. Therefore, the requested relief will not tend to adversely affect the use of neighboring property.

C. The Proposed Use Complies with the Specified Conditions

(1) The use shall be located and designed so that it is not likely to become objectionable to neighboring property because of noise, traffic, parking, loading, number of attendees, waste collection, or other objectionable conditions;

The Proposed Use is not anticipated to be objectionable to neighboring property. The

² See Z.C. Case Nos. 17-14 and 11-25.

Proposed Use will take place primarily inside of the Existing Structure. Although some of the programming will filter through to the outdoor patio area to the rear of the Property, this space abuts the U.S. Park Police National Mall and Memorial Park Brentwood Facility and will not be likely to become objectionable due to the temporary nature of the Proposed Use.

Additionally, the Property is greatly buffered from a residential use in a residential zone as the closest residential use in the RF-1 zone are single-family rowhomes located just under a half-mile away off of Mount Olivet Road NE.

The Proposed Use is also not anticipated to be objectionable to the abutting apartment building and hotel due to the sporadic nature of the proposed events. The Property will not be in use 24/7, but rather for 10-12 discrete events over the course of the next year.

(2) The property shall not abut a residential use or residential zone;

The Applicant is seeking variance relief from this condition outlined in Section VI and VII below.

(3) There 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;

The Applicant is 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.

(4) External performances or external amplification shall not be permitted; and

The Applicant is seeking variance relief from this condition outlined in Section VI and VII below.

(5) The Board of Zoning Adjustment may impose additional requirements as it deems necessary to protect adjacent or nearby residential properties, including but not limited to: (A) Soundproofing; (B) Limitations on the hours of operation; and (C) Expiration on the duration of the special exception approval;

The Applicant will comply with any additional requirements proposed by the Board.

VI. NATURE OF VARIANCE RELIEF SOUGHT AND STANDARD OF REVIEW

The Applicant seeks area variance from the condition that 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(e)(2) and that external performances or external amplification shall not be permitted (Subtitle U § 802.1(e)(4)).

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 APPLICANT MEETS STANDARD FOR VARIANCE RELIEF

A. The Property is Affected by an Exceptional Situation or Conditions

Here, the permit history is a unique and exceptional condition. The Court of Appeals has found an exceptional condition exists where a property owner has “demonstrated a good faith and detrimental reliance” on a history of government approvals, including certificates of occupancy, building permits, or building inspections. *See Oakland Condo. v. D.C. Bd. Of Zoning Adjustment*, 22 A.3d 748, 754 (2011). As a result, the court upheld the Board’s conclusion that an “unfortunate and unusual chain of events presents an exceptional situation unique to [the] property.” *Id.* at 753. Here, the chain of events surrounding the Certificate of Occupancy, including the issuance and

subsequent revocation, presents an exceptional condition unique to the Property. The Applicant detrimentally relied on the Certificate of Occupancy and in good faith organized events that are now sold out before DOB realized the permitting error.

In summation, the Applicant demonstrated good faith reliance on the DOB-issued Certificate of Occupancy and thus, the chain of events surrounding the Certificate of Occupancy, including the issuance and subsequent revocation coupled with the location of the Property in the context of the surrounding area, presents an exceptional condition unique to the Property.

B. The Applicant Will Face Practical Difficulty with Strict Zoning Compliance

The Applicant faces practical difficulty in complying with both conditions that the Property does not abut a residential use or zone and that no external performances or amplifications be permitted. The Applicant filed the required documentation, which led to the issuance of the Certificate of Occupancy by DOB in accordance with the PUP Program. In good faith reliance on the Certificate of Occupancy, the Applicant proceeded with scheduling, organizing, and selling tickets to these events. Had the Applicant been made aware that a Certificate of Occupancy could not be issued until the applicable variance relief was approved by the BZA, the Applicant would not have pursued the Proposed Use at the Property. The Applicant detrimentally relied on the Certificate of Occupancy by signing the lease, organizing and scheduling several events at the Property through the remainder of 2024 and coordinating programs for 2025.

The Court of Appeals in *Oakland Condo.* articulated that case law “squarely establishes that the BZA may consider ‘[e]conomic use of property. . . as a factor in deciding the question of what constitutes an unnecessary burden.’” *See* 22 A.3d 756 (citing *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (1990)). The Applicant has undertaken the significant burden of booking entertainment, securing publication and promotion, and other

responsibilities associated with coordinating the events. Therefore, similarly to the property owner in *Oakland Condo.*, the Applicant has a right to continue a nonconforming use based on its detrimental reliance on the issued Certificate of Occupancy and investment.

Therefore, but for the exceptional and unique conditions of the permit history and the PUP Program, the Applicant would not have pursued the Proposed Use at the Property. As such, strict zoning compliance at this stage would cause the Applicant practical difficulty.

C. The Variance Relief Will Not Cause Substantial Detriment to the Public Good or the Zoning Regulations and Maps

The requested variance relief would not cause substantial detriment to the public good because the Project contributes positively to the public good by providing an entertainment space for the surrounding community and infilling an underutilized, vacant office building.

As such, the Project is not a large development and thus will not greatly impact the surrounding neighborhood. The neighborhood will be enhanced and enriched with the Proposed Use by providing a space for entertainment to residents in the area.

VIII. COMMUNITY OUTREACH

The Applicant will formally present the application to ANC 5D at its next available public meeting.

IX. 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 Applicant respectfully requests the Board grant the application.

Respectfully Submitted,

COZEN O'CONNOR

A handwritten signature in blue ink, appearing to read "MHM".

Meridith H. Moldenhauer

A handwritten signature in blue ink, appearing to read "MSW".

Madeline Shay Williams