

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

DELLA BARBA PIZZA LLC,)

Applicant,) APPLICATION NO. _____
)

**APPLICANT DELLA BARBA PIZZA LLC'S STATEMENT IN SUPPORT
OF APPLICATION
FOR SPECIAL EXCEPTION RELIEF**

I. Introduction

This Statement is submitted in support of Della Barba Company, the operator of Della Barba Pizza, LLC (“Della Barba”) (the “Applicant”). Della Barba respectfully requests a use variance and special exception to expand its existing, nonconforming, pizza restaurant use beyond the first floor, with cellar, in order to provide for additional seasonal outdoor patio seating within public space. The existing structure is a two-story, semi-detached mixed-use building. The first floor and cellar service the eating establishment and the second floor serves as residential in an RF-1 District. The proposed outdoor patio restaurant will occupy the public space at the corner of 14th Street, N.E. and 1382 East Capitol Street, N.E., in Square 1035 at Lot 0814, (the “Property”). The Applicant is proposing to use the Building’s first floor and cellar as a casual dining restaurant featuring Italian cuisine. See Exhibits to Application with

Proposed Architectural Plans, Photos, Menu, Eating Questionnaire, Equipment, Business License and Certificate of Occupancy. Accordingly, the Applicant is requesting special exception relief pursuant to C § 204.9 and to change the existing nonconforming fast-food establishment use to restaurant use. Also, the Applicant is requesting use variance relief, or alternatively area variance relief , pursuant to X§1002.1 from C §§ 204.9(b) and 701.5, which provides that any new nonconforming use must be for residential purposes in the RF ones and any parking requirements. As needed, the Applicant is amenable to such terms and conditions as it has proposed in this application, or as may be set by the District of Columbia Board of Zoning Adjustment (“BZA”), as well as those subsequently imposed, if any, by the Public Space Committee and District of Columbia ABCA Board.

II. Jurisdiction of the Board

The BZA has jurisdiction to grant the use variance relief sought by the Applicant pursuant to 11 DCMR Subtitles U § 320.1(a) and X §§ 1000.4 and 1002.1(a) and by special exception pursuant to 11 DCMR Subtitles X § 901.2 and C § 204.9 (waiver of residential requirement) and C §701.5(waiver of parking requirement) in order to provide for additional seasonal outdoor patio seating within public space. The expanded restaurant will be operated on the first-floor and cellar with seven inside tables and seasonally thirty-seven removable tables outside in public space, if permitted by the Public Space Committee. The only interior changes are as

shown on the proposed plans in order to accommodate the existing food preparations. These modifications are necessary requirements for the conversion from fast-food carry out use to restaurant and bar use in the RF-1 (formerly R-4) District at premises 1382 East Capitol Street, N.E. (Square 1035, Lot 0814).

III. Background and History of Use. A.

Existing Use and History of Use.

As of August 16, 2022, Della Barba holds a business license to operate a fast-food establishment, trading as “Della Barba Pizza”. See Exhibit 6. The first floor and basement currently allow for food sales at the Property under a Certificate of Occupancy (“C of O”), No. CO2202357. See Exhibit 9. The current seven tables indoors with seventeen (17) seats is well within the maximum permitted Occupant Load of eighteen (18) seats allowed by its Certificate of Occupancy. This is within the maximum permitted occupied space of 1,100 square feet. This use is approved with the zoning code for fast food establishment and general zoning use for an eating and drinking establishment. The approved building use is for “mixed use” under Building Permit No. B2102975 for the two- story building (the “Premises”).

Since 2019 to the present, Della Barba has been in continuous operation as a neighborhood pizza carry-out serving the community. Pursuant to Business License No. 930523000006, Della Barba has operated a pizza style food service in this RF-1 District. The Property Owner, The Goal Family Trust, has authorized the Applicant,

“Della Barba Company”), as its Tenant, per terms of its Lease with power to maintain all permitted uses upon its legal compliance. Accordingly, the application is submitted in fulfillment of such purpose in pursuit of this request before the District of Columbia BZA to grant relief all now sought. The Applicant is prepared to accept any conditions in any Order issued by the BZA as well as to abide by the other conditions, if any subsequently contained in any grant by the city’s Public Space Committee for a Permit and the District of Columbia ABCA under a Class “C/D” Restaurant Liquor License. The proposed restaurant and bar will be operated under its current operating hours with no changes. The business opens at 12 noon and closes at 10:00pm, Monday through Sunday. The Applicant is prepared to accept the conditions outline herein upon grant of the relief requested. According to the propose Plans, an entrance area off 14th Street will remain unobstructed for patron ingress and egress at all times, as shown in Exhibits “14A, 14B, and 14C”.

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

The Property is located in the RF-1 Zone. It is a rectangular shaped lot measuring less than 3,000 square feet in land area. The existing Building lot occupancy will not change from its current size. Abutting the Property to the north is a semi-detached row dwelling. Abutting the Property to the south is a lot not included in the subject property. Abutting the Property to the west is 14th Street, N.E. and to the east is East

Capitol Street, Northeast. Approximately one block away from the property is a large public park, known as “Lincoln Park”.

The surrounding area is made up of a mix of primarily residential uses and only a few restaurants. Patrons are primarily drawn from those residential units, and as such the current food operations do not generate, and have not created, any additional traffic to this site. The Applicant does not anticipate that a patio seated area for restaurant use will cause any significant additional traffic. This projection is highly likely because of Della’s existing client base originates from the local neighborhoods which the business has historically served.

IV. Support for Application

Enclosed with this statement, please find as a part of the Applicant's Application, all supporting Exhibits. As further supporting evidence, the identity of witnesses the Applicant intends to call for hearing to offer supporting testimony is provided as follows:

- (a) Mr. Joseph Barber, Managing Partner of Della Barba Pizza regarding the business organization and food service operations;
- (b) Ms. Tracey Wingate, General Counsel to Della Barba Company regarding ANC and community outreach and communication efforts;
- (c) Mr. Ziad Elias Demian, AIA – APA, of **demian\wilbur\architects** regarding the proposed plans and design elements; and

(d) Mr. Anthony M. Rachal III, Counsel for Applicant regarding the Applicant for BZA relief.

In addition to this information, the Applicant is providing the Board with its pre-filed efforts of the community outreach by its principals and consultants. Community comments and suggestion have been incurred, resulting from its due diligence to gather community input in preparing this submitted Application. The Applicant has made adjustments in response to such prior interactions and stands prepared to continue further community engagement during the customary BZA approval process. These early community consults, included personal contacts, meetings and discussions with ANC 6A and the SMD 6A04 Representative since March 2024. These efforts are summarized within the Exhibit 11, entitled “Community Outreach”. One area of concern was raised numerous times regarding the restaurant’s operation at the property without any alcohol service. This concern for the lack of onsite bar service is to be addressed by the Applicant’s intent to secure a Class C/D (Restaurant) Liquor License upon BZA approval. The Premise will comply with any conditions or requirements in pursuit of a such Restaurant Class “C/D” License that maybe imposed by the DC ABCA and further community review following favorable action by that licensing agency.

During its development of proposed plans for the requested expansion, the Applicant met with the local ANC to understand their concerns regarding the proposed

expanded outdoor patio food service. In order to prepare for this request that expands the capacity of its seated food services, the Applicant diligently consulted with members of the ANC for their renewed support. During these consultations with the ANC, some members of the ANC made suggestions that are now incorporated into this Application before the BZA.

Moreover, due to several prior years of servicing neighbors and the general public at large, the Applicant has received encouragement and requests for the expansion of on-site table service, including the addition of alcohol beverages for diners, not just carry-out service. These many suggestions and requests strongly point to an out-right demand for enhanced food services which are finally being met by this Application. As a result of such customer interactions and these important follow-up discussions with the ANC in pursuit of customer demands, the Applicant was strongly motivated to file for the relief requested herein. The Applicant stands ready to continue to accommodate restaurant operations at the property specifically in accord with the ANC concerns in order to alleviate any future issues. Under its proposed plans, the Application will operate under the following conditions:

- (1) No changes in hours from current limited times of operations: from 12:00 noon until 10:00pm, Monday thru Sunday;
- (2) No permanent structure will be erected in public space, except with movable table, chairs, plantings and umbrellas;
- (3) No live, recorded, or amplified music in any outdoor patio space, and evergreens and plantings shall be installed and maintained in movable planters to abate noise emanating from the sidewalk patio;

- (4) No tables will exceed the number shown in its plans, or as authorized by the BZA;
- (5) Current delivery schedules will be maintained without change;
- (6) Currently scheduled trash removals will be maintained without change;
- (7) The outdoor patio operations will comply with conditions imposed by the Public Space Permit; and
- (8) The restaurant will comply with all conditions set for the issuance of a Class C/D Restaurant License granted by the DC ABCA.

The Applicant offers these conditions as proposed above in order to ensure that the requirements are clear, enforceable, and specifically tailored to mitigate the potential impacts of the requested use.

Throughout its past years of business, the Applicant has not had any complaints from customers, neighbors or the District of Columbia government agencies. In the ensuing years, the Applicant will undertake the necessary measures to ensure that the restaurant maintains the highest health and safety standards to pass all inspections. Again, as of the date of filing, the Applicant has not received any complaints from District authorities, the ANC, or members of the public regarding its current operating hours, noise, trash, employee or customer policies and procedures. The history of the business evidences the Applicant's commitment to running an effective and a clean working and dining environment as a full-service neighborhood restaurant.

Also, during consultations with the ANC, as set forth in Exhibit 11 on Community Outreach, in response to members' requests, Applicant on several occasions

offered to conduct a review of proposed floor plans for the restaurant. This open dialogue permits a virtual ‘walk-through’ for any interested or concerned members. The Applicant, its architect, the ANC 6A Chair and the SMD Representative all reiterated these offers to conduct plan reviews at members’ convenience. The manager provided the ANC with both his email address and phone number in order to expedite discussion of all comments and requests. The Applicant continues to remain available for ANC members to avail themselves of future contacts as necessary during this Application approval process.

V. THE APPLICATION SATISFIES SPECIAL EXCEPTION REQUIREMENTS OF SUBTITLE C

§204.9 and C § 701.5.

A. Special Exception Criteria

i General Special Exception Standards

Pursuant to Subtitle X § 901.2 of the Zoning Regulations, the Board is authorized to grant special exception relief where, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property.

ii Standard for Review

In reviewing applications for a special exception under the Zoning Regulations, the Board’s discretion is limited to determining whether the proposed

exception satisfies the relevant zoning requirements. If the prerequisites are satisfied, the Board ordinarily must grant the application. See, e.g., *Nat'l Cathedral Neighborhood Ass'n. v. D.C. Board of Zoning Adjustment*, 753 A.2d 984, 986 (D.C. 2000).

B. The Application Satisfies the General Special Exception Criteria of Subtitle X- 901.2.

The granting of the special exception will be in harmony with the general purpose and intent of the zoning regulations.

“The RF zones are intended to: (a) Recognize and reinforce the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place, preservation of housing stock, improvements to the overall environment, and low- and moderate-density housing to the overall housing mix and health of the city; (b) Allow for limited compatible non-residential uses.”

The proposed use of the Property will serve as a continuing community resource that family connections and encourage walkability. Accordingly, the granting of the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to adversely affect the use of neighboring properties.

C. The Application Satisfies the Specific Requirements of C § 204.9.

If approved by the Board of Zoning Adjustment, pursuant to C-204.9, a nonconforming use may be changed to another nonconforming use, subject to the general special exception requirements of X-901.2, and the following conditions:

Section 204.9: (a) The proposed non-conforming use would be permitted as a matter- of-right in the most restrictive subtitle in which the existing non-conforming use is permitted as a matter of right, in accordance with following order, from most restrictive to least restrictive subtitle:

- (1) **Subtitle D – Residential House (R) zones;**
- (2) **Subtitle E – Residential Flat (RF) zones;**
- (3) **Subtitle F – Residential Apartment (RA) zones;**
- (4) **Subtitle H – Neighborhood Mixed-Use (NMU) zones;**
- (5) **Subtitle G – Mixed-Use (MU) zones;**
- (6) **Subtitle I – Downtown zones (D);**
- (7) **Subtitle J – Production, Distribution, and Repair (PDR) Zones; and**
- (8) **Subtitle K – Special Purpose Zones.**

The proposed nonconforming use is permitted as a matter-of-right in the most restrictive subtitle (Subtitle G – (MU)) in which the existing non- conforming use is permitted as a matter of right. The proposed restaurant use is first permitted as a matter-of-right in the MU-3A zone district.

(b) In the R, RF, or RA zones, the proposed use shall be either a single dwelling unit, flat, or a multiple dwelling unit development; except on an alley lot, the proposed use may only be a single dwelling unit;

The Applicant is requesting an area or use variance from this subsection.

(c) In the R and RF zones, the corner store provisions of the relevant subtitle shall apply;

The existing Building can qualify under the corner store provisions due to the fact that at 1,100 sf. it does not exceeds the maximum size permitted for corner stores (i.e. 1,200 sf).

(d) The external impacts of the proposed use will be deemed to be no greater than the existing use;

The external impacts of the proposed restaurant use will be no greater than the existing convenience store use. The proposed restaurant use would not have a deleterious impact on the neighborhood. Further, the current use presents a low bar – there were no complaints about its present and past operations within the community. Finally, the Applicant proposed to live within the existing hours of operations and permit no outdoor music as proposed conditions on the restaurant use:

1. the maximum hours of the interior premises and outdoor space shall be maintained as presently exists.
2. the maximum hours of operation for the sidewalk seating shall be the same.

(e) The proposed use shall not adversely affect the present character or future development of the surrounding area within at least three hundred feet (300 ft.) of the site;

The proposed restaurant use will not adversely affect the present character or future development of the surrounding area, including within 300 feet of the Property. The Property has been used for commercial purposes since its original construction. As the proposed restaurant, it will continue to be a neighborhood- serving use but one

that more appropriately complements the present character of the surrounding area.

(f) The proposed use shall not create any deleterious external effects, including, but not limited to, noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects;

The proposed restaurant use will not create any deleterious external effects. The proposed restaurant is not likely to generate any external noise, illumination, vibration, odor, design, or siting effects and will be a more compatible use than the present use which has not received any community complaints.

(g) When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use; and

Not Applicable.

(h) The Board of Zoning Adjustment may require the provision of changes, modifications, or amendments to any design, plan, screening, landscaping, type of lighting, nature of any sign, pedestrian or vehicular access, parking and loading, hours of operation, or any other restriction or safeguard it deems necessary to protect the value, utilization, or enjoyment of property in the neighborhood.

The Applicant has proposed conditions if deemed necessary by the Board.

D. The Application Satisfies the Specific Requirements of C § 701.5.

With regard to this proposal to allow a restaurant with outdoor patio seasonal

seating, the Applicant seeks BZA approval to waive the parking requirements under a grant of special exception relief:

- C § 701.5 Requirements for parking in the RF-1 zone for approved Restaurant use as proposed(Restaurants not permitted in the RF-1 zone).

Pursuant to 11 DCMR Subtitle Y § 101.9, the Board may determine to waive the requirement of 11 DCMR Subtitle C § 701.5. The proposed plans provided for the restaurant expanded seasonal outdoor use which has limited seating capacity. The patrons of this restaurant are drawn primarily from repeat business of residents in the surrounding neighborhood within walking distance. The business's proposed plans include bicycle parking spaces as an alternative to reliance upon automotive vehicular travel. There are existing Metrobus lines that service both customers and employees. Consequently, the absence of parking will not adversely impact the community. Under these circumstances, the Board should reach findings of fact and conclusions of law that a waiver will not prejudice the rights of any party, nor result in a substantial detriment to the public good, nor will it harm the zone plan. As proposed, the special exception as to the parking requirement is appropriate in this case.

VI. USE VARIANCE.

The Applicant submits it meets the burden of proof for a use variance. The use

variance is requested for both the proposed restaurant use and also for the outdoor seating which may be interpreted as an extension of the restaurant use and with respect to which 11- C 204.1 states that:

“A nonconforming use of land or structure shall not be extended in land area, gross floor area, or use intensity; and shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment of this title.”

An applicant for a use variance must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in exceptional and undue hardship upon the owner of the property. Some of the elements of proof for a use variance are the same as an area variance. These include the Property’s uniqueness. As stated above, the Property has been operated as a mixed-use property, with the first floor being a commercial space and the cellar being a commercial space.

The difference between an area variance and a use variance burden of proof resides in the difference between the “practical difficulties” standard for the area variance and the “exceptional and undue hardship” standard of the use variance.

In this case, the strict application of the residential use requirement would clearly result in an undue hardship on the Applicant. Residential use of the property is not suitable for the Property with its exposure to a busy thoroughfare and at-grade

corner entrance feature. The property was clearly designed for retail sales or a corner store with a residential unit on the second floor. As such it was deemed a contributing building in this district. Given these contributing retail features, it is unlikely that a change in these features for residential use would be consistent with the prior long-term use. Further, the cost of renovating and converting the Property for residential use of the first and cellar floors would not likely be economic for residential use as evidenced by the long list of Certificates of Occupancy for the Property. The current and previous owners do not appear to be successful in sustaining a residential use at the Property.

The Site on a busy thoroughfare with limited parking along North Capitol Street lends itself more readily to a destination use, like the proposed restaurant, as opposed to a convenience store use. A small convenience use will not be able to rely on commuters and thru traffic to help sustain convenience store type retail sales because it will not be convenient to stop and shop.

Pursuant to 11 DCMR Subtitle X § 1002.2, the Applicant seeks to satisfy its burden of proof under 11 DCMR Subtitle X § 1002.1 for the Board's granting a use variance relief from the Use Permissions of 11 Subtitle U § 301 in order to obtain approval for expanded restaurant with seasonal outdoor patio service. 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).

Variance procedures have as an essential purpose to accommodate changes in use. By grant of a variance, the subject project is afforded relief designed to prevent the strict letter of the regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust deprivation of property value and restriction of property rights, as well as prevent usable land from remaining idle and without public benefit. These purposes give meaning to 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. *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). For multiple prior years, this Property was faced with exceptional conditions relating to its mixed-use nature and size of the Building. The first floor was configured for retail sales of new and used electrical appliances and the services of small electrical appliances. This commercial use was continued by conversion to grocery sales. The Property is situated on the corner of a major intersection of designated major arterial streets, i.e. East Capitol and 14th Streets. In particular, East Capitol serves as major commuter route into and out of the District of Columbia. These intersecting streets are major Metrobus service corridors. Since 2019, the Applicant has used the Property as a fast-food eating and drinking

establishment by permit issued for the first-floor level (with small cellar) under a valid C of O, but the second floor is not included. It is part of the mixed use residential approved the Property. The Applicant's proposed expanded restaurant use is limited to the first floor (and the cellar) since there is this residential use¹ on the second story.

The Building is only two stories and the second floor is completely separated from the restaurant use. The larger mixed-use building is impractical and been shown to be neither financial nor productive given the continuous commercial use over an extension period of time by multiple owners and tenants. 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 these tenants will be subject to the constant corner intersection vehicular and pedestrian traffic. The previous owner had such difficulty finding residential renters and the current owner is facing the same hardship given that the highest and best use has always been, and continues to be, a non-conforming commercial use. The residential uses in the immediately surrounding area are not located on the street corner. Neither the owner nor the Tenant as the Applicant cannot compete with residential rental rate that equals or

¹ Other RF-1 matter-of-right uses are permitted, too, but residential use was established via mixed-use building.

surpasses a commercial use at this location. Without the requested expansion, it will be difficult for the business to be sustained given rising cost of the recently adopted minimum wage. The Applicant is one of the few remaining eating establishments. Recent business reporting notes that many restaurants have recently closed throughout the city.²

No alternative use ever considered that would involve conversion of the entire building to residential use given the location drawbacks. Indeed, the first-floor space has never been used for residential purposes since 1987. The cost to demolish, remove and reconstruct the premises such that all space would be converted into the entire Building to residential use would be very costly and a clear financial hardship. The cellar space is very small with no windows and low ceiling. Since the space has always been used for commercial, there are many changes required to purposes it residential; this renovation is extremely costly due to the satisfaction of various different building code considerations and requirements. Moreover, given both the success of Applicant's business and that the current use which has always been legally permitted, it would be an invasion of ownership rights to interfere needlessly with a beneficial this commercial use. Despite the success of the present operation, the restaurant's expansion would support environmentally friendly sustainable

² Source: Washington Business Journal.

community living. This local out of home dining option will reduce the carbon footprint of local residents. There would reduce need to travel to seek the use and enjoyment of similar establishments. The expansion of seasonal patio use will accommodate a family dining near home without long travel times. This supports the public policy of creating livable neighborhoods taking full advantage of corner properties that maintains a residential mixed-use. This permitted use avoids a hardship for the Applicant in that it is effectively maintaining an otherwise unrentable space by operation of a successful business. The Applicant is unable to rent out the small first-floor space for residential use or any other matter-of-right use; accordingly, the Applicant will face an undue hardship if the relief is not granted.

C. No Substantial Detriment to Public Good and No Harm or Impairment to the Zoning Regulations and 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 a Fast Food establishment since at least 1988 and the neighborhood has embraced the restaurant use. There exists strong community support for this proposal. Based upon this positive support, this business would not likely have a negative impact on the community it has served favorably for several years without complaints. Prior uses at the premises, since 1987, were also involved commercial sales and services. The Applicant is proposing to expand the use to an outer patio in public as permitted by

the city's Public Space Committee. There is no ability to expand to the second floor without destroying the current residential use. There are a number of available residential properties within the area and removing a second-floor housing unit that has been successfully used for residential purposes is counter to maximizing residential space while using the public space for additional restaurant seating. This is the best option that will enhance the use of the Property overall to serve the needs of families in the community.

VI. AREA VARIANCE.

Alternatively, the Applicant is requesting area variance relief from C-204.9(b), which states that in R, RF, or RA zones, the proposed nonconforming use "shall be either a single dwelling unit, flat, or a multiple dwelling unit development." This request is properly filed as an area variance. See X- 1001.3(f), which lists "[p]reconditions to the establishment of a special exception use" as one "example" of an area variance.¹ This Board is authorized to grant an area variance 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).

¹ See also recent BZA Application No. 21026 for 5200 Wisconsin Avenue, NW, which allowed a change from bank use to retail use in the RA-2 zone, pursuant to this same Special Exception and Area Variance path.

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.

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 E.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.2d 1164, 1168 (D.C. 1990).

The Property has been operated as a mixed-use property, with the first floor being a commercial space since at least 1988 and the cellar being a commercial space connected to it since that date. The Property has been designated as a contributing community resource in the neighborhood district. The first floor, with existing shop windows along both the East Capitol and Fourteenth Streets N.E. facades remain intact. The Building now features a side entrance at street grade to allow easy access for patrons, in contrast to the neighboring structures built as residential buildings with elevated front porches. This allows patrons direct access into the center of the store rather than guiding them into a corner opening.

B. The Exceptional Condition Results in a Practical Difficulty to the Owner.

Because of its location in an R or RF zone, the nonconforming use is not able to be used for anything but the previous and existing retail sales of fast food or convenience store or similar retail use. This consistent use highlights the importance of the Property's adaptive commercial features and the difficulties associated with modifying the Building entirely to residential use.

The necessity of keeping these features in any conversion to residential use creates an awkward and uneconomic residential use considering the cost of all of the Property improvements that will be required to improve the Property for residential use. Further, conversion to residential use is not an optimal community beneficial outcome. The proposed restaurant use would preserve the commercial character of the Building including continued public access with the side entrance, existing windows and commercial signage. Residential use would not enhance the Property's

unique features or convey its any significance advantage for this RF-1 District.

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 to the zone plan. The Property has been used as a commercial space since 1988, so the proposed change of that commercial use will not create a substantial new condition. While a restaurant would tend to have more patrons on-site at one time than a convenience store, it would have fewer overall patrons and presumably less total trips into and out of the location because the restaurant is not always at full capacity. The Outdoor seating is seasonal and subject to weather conditions which impact its maximum usage. Again, this issue of size will be thoroughly vetted by the DC Public Space Committee review and approval with respect to the outdoor permitted area available for the proposed restaurant seating. Consequently, the City has an interest in the success of small businesses, including minority business owners, to diversify employment opportunities in the City as opposed to an overreliance on Federal jobs – especially given the current climate. The proposed restaurant use is consistent with that City interest.

VII. Conclusion

Over its past years of operations, Della Barba has enhanced the neighborhood's dining and entertainment options for local families. This requested relief will enhance and further neighborhood quality of life and environmental sustainability by avoiding

needless travel for similar food services. Della Barba has steadfastly remained open to community food needs and it will continue serving the public in a safe and responsible manner. It provides hospitality careers and employment opportunities to the city's workforce community. Della Barba enjoys being a vital member of a vibrant, developing neighborhood and foresees a brighter future for the restaurant as part of a District-wide desire for sustainability of neighborhoods. For the reasons stated above, Applicant respectfully requests that the BZA grant both the use variance and special exception in order to allow for expanded outdoor patio-seated for the existing nonconforming family restaurant. Thank you.

Respectfully submitted,

Della Barba Pizza LLC

BY: /s/ Anthony M. Rachal III

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