

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 19200-B of Jemal’s Pappas Tomato’s LLC, pursuant to 11 DCMR Subtitle Y § 704, for a modification of significance to the plans and relief approved by BZA Orders No. 19200 and 19200A to include special exceptions under Subtitle U § 802.1(d) from the use provisions of Subtitle U § 802, under Subtitle C § 703.2 from the minimum parking requirements of Subtitle C § 701.5, under the penthouse use provisions of Subtitle C § 1500.3(c), and under Subtitle J § 210.1 from the rear yard requirements of Subtitle J § 205.2; and a variance from the location of entertainment use requirement of Subtitle U § 802.1(d)(3), to expand an existing mixed use building in the PDR-1 Zone at premises 1401 Okie Street N.E. (Square 4093, Lot 22).

HEARING DATE (Case No. 19200):	March 1, 2016
DECISION DATE (Case No. 19200):	March 1, 2016
FINAL ORDER ISSUANCE DATE (Case No. 19200):	March 3, 2016
MODIFICATION OF CONSEQUENCE ORDER (Case No. 19200-A)	November 1, 2016
MODIFICATION HEARING DATE:	December 19, 2018
MODIFICATION DECISION DATE:	December 19, 2018

SUMMARY ORDER ON REQUEST FOR MODIFICATION OF SIGNIFICANCE

BACKGROUND

On March 1, 2016, in Application No. 19200, the Board of Zoning Adjustment (“Board” or “BZA”) approved the self-certified request by Jemal’s Pappas Tomato’s, LLC (the “Applicant”) for an area variance from the off-street parking requirements under § 2101.1 of the Zoning Regulations of 1958, to allow the adaptive reuse of an existing warehouse building for retail uses in the C-M-1 Zone (now PDR-1 Zone) at premises 1401 Okie Street N.E. (Square 4093, Lot 832) (the “Subject Property”). The Board granted the variance to permit the Applicant to provide zero parking spaces on-site, based in part on the Applicant’s proposed construction of a seven-story above-ground parking garage across Okie Street immediately to the north of the Subject Property. The Board issued Order No. 19200 on March 3, 2016. The Board’s approval was subject to one condition:

1. Pending the approval of the Public Space Committee, the Applicant shall install curb ramps on the east-side of Fenwick Street at the intersection of Gallaudet Street as part of streetscape improvements, which will be coordinated through public space permits.

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On October 18, 2016, in BZA Application No. 19200-A, the Board approved a modification of consequence to redesign the architectural elements from the approved plans of Order No. 19200. Specifically, the modification of consequence permitted the addition of a new third-story addition to a portion of the west side of the building and the reconfiguration of the uses within the building to incorporate office use. Those changes resulted in relocated core elements, shifted penthouses at the roof levels, reconfigured partitions within the retail space to accommodate the office use, and reconfigured loading facilities. The modified plans reduced the number of required on-site parking spaces from 223 to 43; however, the project continued to provide no on-site parking spaces based on the relief granted in Application No. 19200. The Board issued Order No. 19200-A granting the modification of consequence on November 1, 2016.

MOTION FOR MODIFICATION OF SIGNIFICANCE

On October 4, 2018, the Applicant submitted a request for a Modification of Significance to the plans and relief previously approved in Orders No. 19200 and 19200-A. (Exhibits 1 and 12.)

In the current request, the Applicant proposes to further modify the plans in order to construct a partial second story on the northeast corner of the building, increase the amount of floor area on the second and third stories, and extend the building's ground floor into the rear yard for the first 36.5 feet of vertical height of the building. The Applicant proposes to add Entertainment, Assembly, and Performing Arts uses and Eating and Drinking Establishment uses to the project. The Applicant also proposes to add outdoor roof deck terraces in several locations on the building, some of which will be occupied with nightclub, bar, cocktail lounge, or restaurant uses. Revised plans were filed to the record. (Exhibits 31A and 31B.)

Based on the proposed modifications to the approved plans, the Applicant requests special exceptions under Subtitle U § 802.1(d) from the use provisions of Subtitle U § 802, under Subtitle C § 703.2 from the minimum parking requirements of Subtitle C § 701.5, under the penthouse use provisions of Subtitle C § 1500.3(c), and under Subtitle J § 210.1 from the rear yard requirements of Subtitle J § 205.2; and an area variance from the location of entertainment use requirement of Subtitle U § 802.1(d)(3)¹. The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 13.) In granting the certified relief, the Board made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

¹ Though Application No. 19200 was vested under the Zoning Regulations of 1958, an application for a modification of significance to a vested project shall conform with the 2016 Regulations as the 2016 Regulations apply to the requested modification. (11-A DCMR § 102.4.) Therefore, the relief requested in the current modification is from the Zoning Regulations of 2016.

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Regarding the request for special exception relief to establish Entertainment uses, and the related area variance from the location requirement of Subtitle U § 802.1(d)(3), the Board granted the Applicant flexibility to increase or decrease the total square footage of Entertainment uses provided in the building. In the Applicant's current proposal, the Entertainment use will occupy approximately 21,718 square feet of gross floor area; however, the Applicant's request for parking relief in this modification was calculated based on a scenario in which the entire gross floor area of the building would be devoted to Entertainment uses, as that would result in the most required off-street parking spaces, given the uses in the building. The Board granted relief from the requirement to provide 85 parking spaces, with the understanding that it represents the maximum possible parking requirement for the project. Accordingly, if the Applicant were to increase the gross floor area devoted to Entertainment use from what is currently depicted on the approved plans, no additional parking relief would be needed.

Pursuant to Subtitle Y § 704.1, any request for a modification that does not meet the criteria for a minor modification or modification of consequence² requires a public hearing and is a modification of significance. The Applicant's request complies with 11 DCMR Subtitle Y § 704, which provides the Board's procedures for considering requests for modifications of significance.

Pursuant to Subtitle Y § 704.6, a public hearing on a request for a modification of significance shall be focused on the relevant evidentiary issues requested for modification and any condition impacted by the requested modification. Pursuant to Subtitle Y § 704.7, the scope of a hearing conducted pursuant to Subtitle Y § 704.1 is limited to the impact of the modification on the subject of the original application, and does not permit the Board to revisit its original decision. Pursuant to Subtitle Y § 704.8, a decision on a request for modification of plans shall be made by the Board on the basis of the written request, the plans submitted therewith, and any responses thereto from other parties to the original application. Finally, pursuant to Subtitle Y § 704.9, the filing of any modification request under this section does not act to toll the expiration of the underlying order and the grant of any such modification does not extend the validity of any such order.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 5D and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 5D, which is automatically a party to this application. ANC 5D submitted a report indicating that at a regularly scheduled, properly noticed public meeting on November 13, 2018, at which a quorum was present, the ANC voted 4-1 to support the plan modifications and the relief requested. (Exhibit 32.)

OP submitted a timely report recommending approval of the requested modification of significance. (Exhibit 34.) DDOT originally submitted a report indicating that it could not make

² See, Subtitle Y §§ 703.3 and 703.4.

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a recommendation. (Exhibit 33.) Before the public hearing, DDOT submitted a supplemental report stating that it had no objection to the granting of the request, with two conditions. (Exhibit 37.) Those conditions were adopted by the Board, along with the condition regarding flexibility requested by the Applicant and the previously-adopted condition of Order No. 19200, which remains in effect.

As directed by 11 DCMR Subtitle X § 901.2, Subtitle X § 1002.2, and Subtitle Y § 704, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for special exceptions, area variance, and modification of significance. The only parties to the case were the ANC and the Applicant. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that in seeking special exceptions under Subtitle U § 802.1(d) from the use provisions of Subtitle U § 802, under Subtitle C § 703.2 from the minimum parking requirements of Subtitle C § 701.5, under the penthouse use provisions of Subtitle C § 1500.3(c), and under Subtitle J § 210.1 from the rear yard requirements of Subtitle J § 205.2, the Applicant has met the burden of proof under 11 DCMR Subtitle X § 901.2, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board also concludes that in seeking an area variance from the location of entertainment use requirement of Subtitle U § 802.1(d)(3), the Applicant has met the burden of proof under 11 DCMR Subtitle X § 1002.1, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. The Board also concludes that in seeking a modification of significance to Orders No. 19200 and 19200-A, the Applicant has met its burden of proof under 11 DCMR Subtitle Y § 704.

Pursuant to 11 DCMR Subtitle Y § 604.3, the order of the Board may be in summary form and need not be accompanied by findings of fact and conclusions of law where granting an application when there was no party in opposition.

It is therefore **ORDERED** that this application for modification of significance is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED MODIFIED PLANS IN EXHIBITS 31A AND 31B, AND THE FOLLOWING MODIFIED CONDITIONS:**

1. Pending the approval of the Public Space Committee, the Applicant shall install curb ramps on the east-side of Fenwick Street at the intersection of Gallaudet Street as part of streetscape improvements, which will be coordinated through public space permits.

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2. The Applicant shall implement the Loading Management Plan as proposed by the Applicant in the November 5, 2018 CTR for the life of the project, unless otherwise noted. The Applicant will also be required to secure public space permit approval for all work in public space.
3. The Applicant shall design and construct pedestrian improvements at the New York Avenue and Fenwick Street intersection to DDOT standards including installing ADA-compliant curb ramps at all pedestrian crossings, upgrading crosswalks with high visibility striping, and modifying any stormwater inlets or other infrastructure that conflicts with these improvements.
4. The Applicant shall have flexibility to increase or decrease the amount of floor area in the building devoted to Entertainment use.

In all other respects, Orders No. 19200 and 19200-A remain unchanged.

VOTE ON ORIGINAL APPLICATION ON MARCH 1, 2016: 3-0-2
(Marnique Y. Heath, Frederick L. Hill, Michael G. Turnbull, to APPROVE; Jeffrey L. Hinkle, not participating or voting; one Board seat vacant.)


VOTE ON MODIFICATION OF CONSEQUENCE ON OCTOBER 18, 2016: 3-0-2
(Anita Butani D'Souza, Jeffrey L. Hinkle, and Michael G. Turnbull to APPROVE; Frederick L. Hill, not participating or voting; one Board seat vacant.)

VOTE ON MODIFICATION OF SIGNIFICANCE ON DECEMBER 19, 2018: 5-0-0
(Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Peter G. May to APPROVE.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: December 26, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.