

**DISTRICT OF COLUMBIA**  
**BOARD OF ZONING ADJUSTMENT**

**Prehearing Statement of NP 47 LLC**

**2021 4<sup>th</sup> Street, NW; Square 3082, Lot 26.**

**I. INTRODUCTION.**

This Statement is submitted on behalf of NP 47 LLC (the “Applicant”), owner of the property located at 2021 4<sup>th</sup> Street, NW (Square 3082, Lot 26) (the “Subject Property”). The Subject Property is improved with an existing three-story structure which was previously used for commercial purposes on a portion of the first floor and for residential purposes on a portion of the first floor, and all of the second and third floors (the “Building”). The Applicant is proposing to (i) expand the area of the Building’s third floor and reduce the number of existing residential units from three units to two units on the second and third floors;<sup>1</sup> (ii) re-establish the commercial use on the first floor and expand it into the space previously used for residential use on the first floor; and (iii) remove the existing deck at the rear of the Subject Property (the “Project”).

The Building, as it currently exists, has a nonconforming lot occupancy percentage of seventy-eight percent (78%) at the first and second story, which includes the failing second-level rear deck. The Applicant is removing this deck, which currently extends to the rear lot line. The removal of this deck re-establishes the previously existing rear yard of six feet and nine inches (6 ft. 9 in.). Subtitle E § 205.3 states: “In the case of a building existing on or before May 12, 1958, an extension or addition may be made to the building into the required rear yard; provided, that

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<sup>1</sup> While the Building has a C of O for only two units, it has three residential units with three separate entrances. The original building was constructed in the 1890s, likely with commercial use on the ground floor and residential use on the upper level. The northern portion of the building, added in the 1940s, provided two additional units each with its own separate entrance for a total of three residential units.

the extension or addition shall be limited to that portion of the rear yard included in the building area on May 12, 1958.” As demonstrated by the historic plat, historic photographs, and maps submitted with this Application, the current Building footprint existed as early as 1940.

Accordingly, the Applicant does not need rear yard relief for the third-floor addition.

While the proposed Project does not need relief from the rear yard requirements, it does require the following areas of relief:

1. Special Exception for Removal of Architectural Elements.

The Applicant is requesting special exception relief pursuant to E § 5203 from the prohibition against removing architectural elements original to the house (E § 206). The Applicant is proposing to remove a metal coping from the second-story of the Building. Although the element was added in 1940 and is not original to the portion of the structure built in 1890, the Zoning Administrator has determined that the small metal coping on the second-floor portion is considered an architectural element, the removal of which requires special exception relief.

2. Area Variance from Lot Occupancy and Expanding a Non-Conforming Structure.

The Applicant is seeking area variance relief from the maximum permitted lot occupancy percentage of sixty percent (60%), to do a small addition at the front of the Building and a third-story addition on top of the existing Building footprint. The Project will result in an overall reduction of lot occupancy from seventy-eight percent (78%) to seventy-six percent (76%), but as the third-floor lot occupancy is increasing, the Applicant must request relief. This aspect of the Project would also require variance relief for the expansion of an existing nonconforming structure.

3. Use Variance to Re-Establish and Expand the Commercial Use.

The Applicant is also requesting use variance relief from the Use Permissions of U § 301 in order to re-establish the commercial use on the first floor and cellar of the Building.

## II. **BACKGROUND.**

### A. **Previous Use.**

According to History Quest, the Building was constructed sometime between 1890 and 1909. It was subsequently expanded to its current footprint in 1940. Based on the design, it is likely that the original 1890s Building was designed for commercial use on the first floor and cellar and one (1) residential unit on the upper floors. The 1940-addition created two new residential units with two separate entrances: one leading to a stair for a second-floor dwelling unit and another entrance for a first-floor dwelling unit. According to the Certificates of Occupancy included with the Application, the first floor and cellar have been used as a retail grocery store since 1960. However, as the use was discontinued for more than three (3) years, the Applicant must now request variance relief to re-establish any commercial use.<sup>2</sup>

### B. **Description of the Subject Property and Proposed Project.**

The Subject Property is located in the RF-1 Zone. It is a small corner lot, measuring only 1,750 square feet of land area. At seventy-eight percent (78%) lot occupancy, the existing Building footprint exceeds the permitted lot occupancy in the RF-1 Zone. The Applicant is proposing to restore the original Building, construct a small front addition and an addition on top of the two-story portion of the existing Building footprint for a total of three (3) stories. The

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<sup>2</sup> C § 204.4: Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for any period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the zone in which the use is located.

cellar and first floor will be dedicated to commercial space. The number of existing residential units will be reduced from three (3) units to two (2) units—which is permitted as a matter of right in the RF-1 Zone. The Applicant is removing the deck at the rear of the Building which will reduce the lot occupancy on the second floor from seventy-eight percent (78%) to seventy-two percent (72%).

The three (3) existing residential entrances will be consolidated into one residential entrance on Oakdale Place. There will be a separate entrance for the commercial space. The 1940-addition fronts on 4<sup>th</sup> Street and has a small setback of approximately three feet (3 ft.), with two sets of exterior steps in the existing setback. The Applicant is proposing to remove the steps and add a storefront projection (the “Front Addition”) which will not be setback from the 4<sup>th</sup> Street lot line. The Front Addition will extend up to the second and third floors in the area of the 1940-addition only. The original 1890 section of the Building will retain the three-foot (3 ft.) setback at the second and third floor. From an interior perspective, the existing Building is essentially split into two structures. The 1940-addition has two residential units on the first and second floors, and those entrances are accessed by steps above sidewalk grade. The original Building was designed for commercial purposes on the first floor and had one (1) residential unit on the second and third floors. The Project will join the structures internally and re-establish and expand the commercial use on the first floor and provide one, three-bedroom residential unit per floor on the second and third floors.

The Front Addition will bring the front façade to the western lot-line, resulting in an overall decrease in lot occupancy—from seventy-eight percent (78%) to seventy-six percent (76%) on the first floor. The Applicant is proposing to partially extend this Front Addition up to the second and third floors. The proposed second and third floors will retain a partial three-foot

(3 ft.) setback from the front façade of the Subject Property, resulting in lot occupancies of seventy-two percent (72%) on those floors. As part of the restoration, the Applicant is proposing to modify the facades to provide additional windows for natural light on all three floors.

The existing ground floor has three different levels, none of which are level with the adjacent sidewalks. Further, the existing joists on the second and third floor will likely need to be replaced. Accordingly, the Applicant is proposing to lower all three floor levels to align with the adjacent sidewalk. Lowering these first-floor structures means that the Applicant will have to lower the existing cellar slab in order to provide a space with adequate ceiling height to be used by the commercial use.

**C. Surrounding Area.**

The Subject Property is surrounded by a mix of one-family row dwellings, flats, multi-family apartment buildings, and institutional buildings. It is located just over one block to the south and east from the Howard University campus and one-half mile (0.5 mi.) from the Shaw Metro Station. Abutting the Subject Property to the north is a parking lot serving a single-family dwelling. Abutting the Subject Property to the east is a multiple-dwelling condominium building with 8-10 units. Abutting the Subject Property to the west and south are 4<sup>th</sup> Street and Oakdale Place, NW. Across 4<sup>th</sup> Street is a large parking garage owned by Howard University which serves Howard University Hospital.

**III. THE APPLICATION SATISFIES THE SPECIAL EXCEPTION REQUIREMENTS OF SUBTITLE 11-X DCMR § 901.2, 11-E DCMR § 5203.3.**

**A. Overview.**

The Applicant is requesting special exception relief pursuant to E § 5203 from the prohibition against removing architectural elements original to the house (E § 206). The Applicant is proposing to remove a metal coping from the second-story of the Building. Although the element

was added in 1940 and is not original to the portion of the structure built in 1890, the Zoning Administrator has determined that the small metal coping on the second-floor portion is considered an architectural element.

Pursuant to 11-X DCMR § 901.2, 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, subject also, in this case, to the specific requirements for relief under 11-E DCMR § 5203.3.

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. Requirements of 11-X DCMR § 901.2.**

The granting of a special exception in this case “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 in accordance with the Zoning Regulations and Zoning Maps ...” (11-X DCMR § 901.2). Given the nature of the proposed Project, the Building's mass, height, and architectural design will be in harmony with the purpose and intent of the Zoning Regulations and Zoning Maps and will not adversely affect the surrounding properties. The Applicant is proposing to restore the original 1890 Building and renovate the portion of the Building constructed in 1940. As part of the renovation, the Applicant will construct the Front Addition, replace the existing façade with open windows, and add a level

only on top of the existing second floor of the 1940-addition. The original 1890 section of the Building already has three stories. The proposed changes will help distinguish the original 1890 Building from the later-added 1940-addition. As the metal coping is part of that later addition, removing it should not have an impact on the surrounding character of the neighborhood, as it was not part of the original design and the original Building is being restored.

**C. Requirements of Subtitle 11-E DCMR § 5203.3.**

Subtitle E § 206(a) states that “a roof top architectural element original to the building such as cornices, porch roofs, a turret, tower or dormers, shall not be removed or significantly altered, including changing its shape or increasing its height, elevation, or size.” Subtitle E § 206.2 continues that “in an RF zone district, relief from the design requirements of Subtitle E § 206.1 may be approved by the Board of Zoning Adjustment as a special exception under Subtitle Y Chapter 9, subject to the conditions of Subtitle E § 5203.3.”

The Applicant is proposing to remove a metal coping on the second floor of the Building. The Applicant is therefore requesting relief pursuant to Subtitle E § 5203.3, which states that a special exception to the requirements of Subtitle E § 206 shall be subject to the conditions of Subtitle E § 5203.1(b), (c), and (d).

The Application satisfies the requirements of E § 5203.1 as follows:

- (b) Any addition, including a roof structure or penthouse, shall not block or impede the functioning of a chimney or other external vent on an adjacent property required by any municipal code;**

The Applicant is proposing to remove the metal coping on the second floor only from the 1940-addition. As part of the renovation, the Applicant will do a small three-foot (3 ft.) addition at the front of the Building, replace the existing façade with open windows and add a level only on top of the existing second floor of the 1940-addition. This shall not block or impede the

functioning of a chimney or other external vent on an adjacent property required by any municipal code.

**(c) Any addition, including a roof structure or penthouse, shall not interfere with the operation of an existing or permitted solar energy system on an adjacent property, as evidenced through a shadow, shade, or other reputable study acceptable to the Zoning Administrator;**

The Applicant is proposing to remove the metal coping on the second floor. As part of the renovation, the Applicant will do a small three-foot (3 ft.) addition at the front of the Building, replace the existing façade with open windows and add a level on top of the existing second floor. This shall not interfere with the operation of an existing or permitted solar energy system on the adjacent properties.

**(d) A roof top architectural element original to the house such as cornices, porch roofs, a turret, tower, or dormers shall not be removed or significantly altered, including changing its shape or increasing its height, elevation, or size;**

This provision seems to have been included in error, as E § 5203.3 provides relief from this exact provision of E § 206; i.e. it's a circular provision that requires one to comply with the restriction in order to get relief from the restriction. The Applicant is proposing to remove the metal coping on the second floor. As part of the renovation, the Applicant will do a small three-foot (3 ft.) addition at the front of the Building, replace the existing façade with open windows and add a level on top of the existing floor. The proposal safely meets the general special exception requirements of 11-X DCMR § 901.2.

#### **IV. THE APPLICATION SATISFIES THE STANDARD FOR AREA VARIANCE RELIEF.**

The burden of proof for an area variance is well established. The Board of Zoning Adjustment may grant an area variance if it finds that "(1) there is an extraordinary or



exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.” *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, No. 16-AA-932, 2018 WL 1748313, at \*2 (D.C. Apr. 12, 2018); *Ait-Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211, 1216 (D.C. 2016) (quoting *Washington Canoe Club v. District of Columbia Zoning Comm'n*, 889 A.2d 995, 1000 (D.C. 2005)) (internal quotation marks omitted). As set forth below, the Applicant meets the three-part test for the requested variance for lot occupancy and nonconforming structure relief.

**A. Extraordinary or Exceptional Condition affecting the Subject Property.**

To prove an extraordinary or exceptional condition, or uniqueness, the Applicant must show that the property has a peculiar physical aspect or other extraordinary situation or condition. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.25 1091, 1096 (D.C. 1979). 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.2<sup>nd</sup> 1164, 1168 (D.C. 1990).

Among the unique conditions for this Property, first and foremost is the footprint and configuration of the existing Building. The Building was constructed in two phases which do not appear to be connected internally and has consisted of three residential units along with the commercial space. The Building was not built to the front property line, as it has a three-foot (3 ft.) setback. The Building does not have alley access. This condition, along with the existing lot occupancy of 78%, leads to enclosed exterior space on the northeast corner of the lot. The current Building has been neglected for many years and a significant update is required in order

to restore the Building. The Applicant is burdened with a nonconforming, substandard site (1,750 square feet) with a wide party wall. The existing configuration is onerous, and the existing structure was constructed about three feet back from the 4<sup>th</sup> Street property line. The square shape of the lot is also unusual for the RF-1 zone in that the depth and width both differ from the traditional rowhouse configuration. The Subject Property is the only property in this square with an entrance on 4<sup>th</sup> Street. The building located at 350 V Street, NW does have frontage on 4<sup>th</sup> Street but its entrance is located on V Street. This is the only other building in the square with any frontage on the block of 4<sup>th</sup> Street and it extends to the depth of the Applicant's proposed Front Addition on the property line.

The two-story north portion of the Building was added to the Building in 1940. This 1940-addition resulted in a pre-1958 nonconforming lot occupancy of seventy-eight percent (78%) on the first floor, seventy-eight percent (78%) on the second floor and forty-seven percent (47%) on the third floor. The Applicant is proposing a lot occupancy of seventy six percent (76%) on the first floor and seventy two percent (72%) on the second and third floors. The existing footprint of the Building coupled with the dimensions of the lot creates an exceptional condition which limits the Applicant's ability to update or expand the existing Building in a conforming manner with respect to the lot occupancy.

The fact that the Building was constructed in two separate stages also creates a unique situation in which the existing ground floor has three different levels, none of which are level with the adjacent sidewalks. Accordingly, the Applicant is proposing to lower all three (3) floor levels to align with the adjacent sidewalk. Further, due to the 1940-addition, the joists on the second and third floor have been warped overtime and will likely need to be replaced. the current

structure was constructed in two parts and requires a significant update in order to efficiently use the existing structure.

With the exception of the proposed addition along 4th Street to cover the existing 3-foot setback, the Applicant is maintaining the existing footprint of the structure and reducing lot occupancy overall via the removal of a deck. As part of maintaining the existing structure, the Applicant must move the stairs in order to achieve efficient residential layouts. Moving the stairs places the residential entrances on Oakdale, which is much more compatible for residential use than 4th Street which is a heavily traveled street. However, the relocation of the stairs will take up approximately 80 square feet at the rear of the Building.

**B. Practical Difficulties will occur if the Zoning Regulations are Strictly Enforced.**

The second prong of the variance test is whether a strict application of the Zoning Regulations would result in a practical difficulty. It is well settled that the BZA may consider “a wide range of factors in determining whether there is an ‘unnecessary burden’ or ‘practical difficulty’... Increased expense and inconvenience to an applicant for a variance are among the factors for the BZA’s consideration.” Gilmartin, 579 A.2d at 1711. Other factors to be considered by the BZA include: “the severity of the variance(s) requested”; “the weight of the burden of strict compliance”; and “the effect the proposed variance(s) would have on the overall zone plan.” Thus, to demonstrate practical difficulty, an applicant must show that strict compliance with the regulations is burdensome, not impossible.

The Applicant is proposing to restore the existing Building and use the commercial space as a neighborhood-serving restaurant with two residential units above; a reduction from the current configuration of three disjointed units. The Applicant is burdened with a nonconforming,

substandard site with a wide party wall. The existing configuration is onerous, and the existing structure was not constructed to the property line. The Applicant will face a practical difficulty if the zoning regulations are strictly enforced. The Applicant is removing a deck in the rear which reduces the *overall* lot occupancy from seventy-eight percent (78%) to seventy-six percent (76%)—the second and third floors will have lower lot occupancies of seventy-two percent (72%). The need to locate the core towards the rear of the Building reduced the flexibility in the design of the interior floor plan. It also limits the available space at the rear of the Building.

If the Subject Property had a conforming lot size of 1,800 square feet, it would require less relief and could request special exception relief for lot occupancy, rather than variance relief. The Applicant would have to reduce the projection by six inches, but the second and third floor would be at 70% lot occupancy (instead of 72%) if the lot measured 1,800 square feet (the first floor would still be over lot occupancy, at 72%).

As part of the project, the Applicant is restoring the Building, rather than demolishing it, due to the practical difficulties it would face with new construction. As noted above, the Applicant is permitted to provide a rear yard of six feet and nine inches (6 ft. 9 in.) because that rear yard existed prior to 1958. Were the Applicant to demolish the existing Building—rather than restore it—a matter-of-right building would be limited to 60% lot occupancy—or 1,050 square feet, resulting in a loss of existing square footage the Applicant would otherwise be entitled to utilize.

Accordingly, the Applicant is planning to restore the existing Building which creates other practical difficulties. Due to the Building being created in two separate stages, the Applicant is faced with unique conditions, including three separate residential entrances, none of which are level, and warped floor joists. The Applicant is faced with a practical difficulty

because it will lose square footage under a matter-of-right scenario, and in order to restore the existing Building, it must undergo costly interior renovations, including lowering all three (3) floor levels (on the first floor) to align with the adjacent sidewalk and replace the existing joists on the second and third floor. In order to align the first floor with the adjacent sidewalk the Applicant must lower the cellar slab which will provide an adequate ceiling height for the cellar. The additional square footage from the third-story addition and Front Addition help mitigate these additional costs unique to this Building's restoration.

As the space is limited due to the stairs and existing layout, the Applicant is proposing a small three-foot addition at the front of the Building—where the space can be most efficiently utilized—in order to add more space to the commercial and residential spaces without significantly impacting the footprint of the Building. The Applicant would have to remove portions of the rear in order to comply with the 60% matter-of-right (or even the 70% special exception) and do the Front Addition. The proposed front addition not only allows the Applicant to have a more-aesthetically pleasing and inviting design, but practically it adds a much-needed 105 square feet to the commercial space. It also allows for three-bedroom units on the second and third floors. Without the Front Addition, the Applicant would face a practical difficulty as the commercial space would be limited to only approximately 800 square feet. Further, the loss of the partial addition on the second and third floors would result in inefficient units in terms of size, layout, and window placement, and the Applicant would no longer be able to provide three-bedroom units.

The only other property with any frontage on 4<sup>th</sup> Street extends to the depth of the proposed Front Addition and the Applicant is simply proposing to match that extension. Overall, the degree of variance relief requested is relatively minor when considering that the additional

Building footprint is in the front of the Building, adjacent to the public right-of-way, rather than at the rear or sides of the Building adjacent to other properties.

**C. Relief Can be Granted without Substantial Detriment to the Public Good and without Impairing the Intent, Purpose, and Integrity of the Zone Plan.**

Relief can be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the Zone Plan, as the proposed Project is within the height and story limit of the RF-1 Zone, results in an overall decrease in lot occupancy, and creates two family-sized (three-bedroom) units.

**V. USE VARIANCE.**

The Applicant is also requesting use variance relief from the Use Permissions of U § 301 in order to re-establish the neighborhood-serving commercial use on the first floor and cellar of the Building. The Applicant is proposing to use the first-floor as a restaurant and the cellar as restaurant and tenant storage. 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 Subject 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 A.2<sup>nd</sup> 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.2<sup>nd</sup> 1164, 1168 (D.C. 1990).

The Subject Property is faced with exceptional conditions relating to its location and history of uses. The Subject Property is a corner lot with high commercial visibility and is located across 4<sup>th</sup> Street from Howard University and a block from a PDR-3 Zone.

Another exceptional condition is the fact that the Building was originally designed and built and has been continuously operated as a mixed-use building. From an interior perspective, the existing Building is essentially split into two structures. The 1940-addition has two residential units on the first and second floors, and those entrances are accessed by steps above sidewalk grade. The original 1890s Building was designed for commercial purposes on the first floor and has one (1) residential unit on the second and third floors. The commercial space on the first floor of the original Building is clearly distinguished from the addition by the type of entrance provided—the residential entrances are set back and are above-grade whereas the commercial entrance has a corner-facing door, larger windows, and is much closer to the sidewalk-grade. The Project will join the structures internally, establish one grade level for the first floor, and re-establish the original commercial use on the first floor. The current residential entrance on 4<sup>th</sup> Street is hazardous, as the existing steps are a tripping hazard, and the residential entrances on 4<sup>th</sup> Street do not meet code and would have to be modified regardless. As discussed below, the Applicant's unique situation leads to an undue hardship if the zoning regulations are strictly enforced.

**B. Strict Application of the Zoning Regulations Would Result in an Undue Hardship to the Owner.**



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 location and history of the Subject Property creates an exceptional situation where the Applicant will suffer an undue hardship if the use variance is not granted. Use of the existing first floor and cellar commercial space for residential purposes is not feasible. As discussed above, that portion of the Building was originally designed for commercial purposes, and its design is distinguishable from adjacent residential uses. The Applicant is proposing to have a relatively open plan for the first floor which will help to control additional renovation costs. The proposed restaurant use will require some minor framing and some additional windows, but a new residential unit would be significantly costlier, with additional framing, drywall, doors, insulation, plumbing, plans and permitting costs that exceed that of an open commercial space.

Further, the continued use of the existing first-floor residential space would create an undue hardship for the Applicant. As discussed above, the original building was constructed circa 1890 and the second part of the building was constructed in 1940. The ground floor of the original structure has a footprint of 815 square feet and the ground floor of the 1940s building has a footprint of 300 square feet. The ground floor of the original building has always been used for commercial purposes, but the 1940s ground floor was most recently used for residential

purposes. The Applicant is proposing to re-establish the existing commercial use on the ground floor of the original building, connect that portion of the ground floor with the ground floor of the 1940s residential space, and convert that space to a single floor of commercial use.

The Applicant will face an undue hardship if the Applicant cannot convert the 1940s residential ground floor to a commercial use, including (1) difficulty re-establishing the previously existing commercial use; (2) inefficient residential unit layouts; and (3) logistical issues with multiple residential entrances.

Without that additional space, the commercial space will be extremely limited. At approximately 815 square feet, the existing retail space is not large enough to support a cafe with a kitchen, receiving and storage areas. In addition, as part of maintaining the existing footprint, the Applicant must move the stairs in order to achieve efficient residential layouts. Moving the stairs places the residential entrances on Oakdale, which is much more compatible for residential use than 4th Street which is a heavily traveled street. However, the relocation of the stairs will take up approximately 80 square feet, or 10%, of the existing commercial space. Expanding the commercial space across the entirety of the ground floor allows the Applicant to still fit a small seating area, small kitchen, dry storage, and an appropriate number of bathrooms into approximately 1,100 square feet.

It also allows for a more efficient use of residential space. The Applicant is proposing to reduce the number of residential units (from three to two) and maintaining the ground floor as residential would result in either a very small third unit at the ground floor or an overly large, inefficient unit if combined with the existing units above.

**C. No Substantial Detriment to the Public Good nor Substantial Impairment to the Intent, Purpose and Integrity of the Zone Plan.**

The requested relief would have no substantial detriment to the public good nor substantial impairment to the intent, purpose, and integrity of the zone plan. The Building was constructed for commercial use on the ground floor and, until recently, was used as a retail grocery store since at least 1960. The reestablishment of neighborhood-serving commercial use is likely to be a benefit to the residents in the area. From the Applicant's review of the area, there are a number of restaurants about a half-mile (0.5 mi.) to the south of the Subject Property and then to west of the Subject Property, on the other side of the Howard University Hospital, but none in the immediately surrounding area. Due to its location on a boundary to the higher-density PDR-3 Zone, the restaurant will be able to serve the immediately surrounding area without disrupting any neighboring residential uses.

## **VI. CASE LAW**

### **A. Case No 19737.**

In BZA Case No. 19737 the Board approved a use variance for office use on the first and second floors of an existing two-story building at 500 13th Street, SE. The Office of Planning supported the use variance as it related to office use on the first floor, but recommended denial for the use on the second floor. The Applicant argued that the history of commercial uses coupled with its location adjacent to a PDR zone created a unique condition where the applicant was unable to use the building for residential purposes and as a result, the building had been left vacant for quite some time. At the hearing, the Office of Planning testified that the property was unique in the sense that it has a commercial first floor that is not permitted to be used for commercial purposes. In its deliberation, all Board members readily supported the variance request for the first-floor use based on the fact that the first floor had always been used and was set up as a commercial space. The Board was split with regards to the commercial use on the

second-floor space as it was already configured as a residential space. Regarding the third prong, many neighbors testified to the fact that a commercial use was much-needed in the neighborhood, as there was a surplus of housing in this particular area.

In the present case, the Applicant is only requesting relief for the first-floor use and will maintain the existing residential use on the upper floors. Similarly, the history of commercial use on the first-floor coupled with its location on a corner and across from a PDR Zone and Howard University creates a situation where the Applicant would face an undue hardship if it had to convert the first floor to residential use and it would eliminate a previously existing and much-needed resource in the community.

**B. Case No. 18701.**

In BZA Case No. 18701, the BZA approved a use variance request very similar to this one, approving a restaurant at 1247 E Street, SE, based on the undue hardship inherent in converting an originally-built commercial first floor space from commercial to residential use. The Office of Planning supported the use variance, noting that the existing configuration of the commercial space created an exceptional situation. The space was originally constructed as a grocery store, had always been used for various commercial purposes, and was never outfitted or adapted for residential use. Similarly, the first floor of the Subject Property was originally designed for commercial use and converting the commercial space to residential space would result in an undue hardship for the Applicant.

**C. 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 subject case in many ways. In both cases, the first floors of the respective

buildings had been built for commercial use and never used for residential use. The circumstances are also similar to the present case in that the property is located on a corner lot on two heavily travelled streets. Not only is the Subject Property located on the corner of two-heavily travelled streets, but it is located across from Howard University and a block from a PDR-3 Zone. The present case is distinguishable because the Applicant is only requesting relief for retail use on the first floor.

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 was inherently expensive to renovate a purpose-built commercial space to a residential unit.

**D. Case No. 16474.**

In BZA Case No. 16474, the Board approved a use variance from the RF-1 Use Permissions to allow the first and second floors of a building located at 1131 8th Street, NE, to be used as an office. The applicant leased the property with the understanding that it could be used as an office. The Board granted the use variance, finding that the location across the street from Gallaudet University and the building's configuration made it particularly suitable for use as an office as opposed to a residence. In the subject case, the Applicant is only proposing to use the first floor for commercial purposes. The Building's configuration and the location on the

corner – across from Howard University and down the street from a PDR-3 Zone - make the Subject Property particularly suited for a neighborhood-serving commercial use.

**VII. CONCLUSION.**

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

Respectfully Submitted,

/S/Martin P. Sullivan

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Martin P. Sullivan  
Sullivan & Barros, LLP  
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