

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

**Modification of Significance to BZA Case No. 19200 and 19200A  
1401 Okie Street, NE (Square 4093, Lot 22)**

**PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF**

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This statement is submitted by Jemal’s Pappas Tomato’s, L.L.C. (the “Applicant”) pursuant to 11-Y DCMR § 704 for a modification of significance to the architectural drawings approved in BZA Order Nos. 19200 and 19200A for property located in the PDR-1 District at 1401 Okie Street, NE (Square 4093, Lot 22) (the “Site”).<sup>1</sup> The application also includes a request for special exception relief pursuant to 11-X DCMR, Chapter 9 to permit (i) “Entertainment, Assembly, and Performing Arts” uses, as defined by 11-B DCMR § 200.2(n) in the approved building at the Site (11-U DCMR § 802.1(d)); (ii) nightclub, bar, cocktail lounge, and/or restaurant uses in new outdoor roof decks (11-C DCMR § 1500.3); (iii) a reduction in the number of required parking spaces (11-C DCMR § 703); and (iv) to provide a rear yard depth of 4 feet, 9 inches whereas 12 feet is required (11-J DCMR § 205.2). The application also requests a variance pursuant to 11-X DCMR § 1000.1 from the requirements of 11-U DCMR § 802.1(d)(3), which do not permit Entertainment, Assembly, and Performance Arts uses within 1,000 feet of a property containing an existing live performance venue.

Pursuant to 11-Y DCMR § 300.15, the Applicant will file its Prehearing Statement with the Board of Zoning Adjustment (“BZA” or “Board”) no fewer than 21 days prior to the public hearing for the application. In this statement, and at the public hearing, the Applicant will provide testimony and evidence to meet its burden of proof to obtain the Board's approval of the requested special exception and variance relief. The following is a preliminary statement demonstrating how the Applicant meets the burden of proof.

**I. BACKGROUND**

**A. Description of the Site and Surrounding Area**

As shown on the Zoning Map attached hereto, the Site is located in the PDR-1 Zone District. The Site is located at the intersection of Okie and Fenwick Streets, NE and is bounded by Okie Street to the north, private property to the east and south, and Fenwick Street to the west. The Site is rectangular in shape and has approximately 78,950 square feet of land area. The Site is presently improved with an existing building that is being renovated pursuant to the architectural drawings approved by BZA Order Nos. 19200 and 19200A (attached hereto). Prior to its renovation, the building was operated with a wholesale use.

The Site is within the Ivy City neighborhood of the District. It is generally surrounded by production, distribution, and repair zones (PDR-1 through PDR-4), and is one block south of New

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<sup>1</sup> At the time that BZA Case Nos. 19200 and 19200A were reviewed and approved the Site was known as Lot 832. The Site has since been subdivided into Record Lot 22.

York Avenue, NE. Directly to the north is the Hecht Warehouse apartment building and an above-grade parking garage, both of which have ground floor retail and restaurant uses and are owned by the same Applicant development company. Directly to the east and south are vehicle storage yards owned by the District government. To the west is the Profish Limited seafood wholesaler. The CSX and Metrorail tracks are located across New York Avenue to the north; the National Arboretum and Mount Olivet Cemetery are located to the southeast. Small-scale residential development is located to the southwest.

## **B. Background of Case and Prior Development Approvals**

Pursuant to BZA Order No. 19200, effective on March 3, 2016, the Board granted a variance from the off-street parking requirements of Section 2101.1 of the 1958 Zoning Regulations (“ZR58”) to allow the adaptive reuse of the existing two-story warehouse building on the Site to retail and light manufacturing uses. Under Section 2101.1 of ZR58, a total of 223 on-site parking spaces were required for the proposed retail and manufacturing uses. The Board granted a variance from Section 2101.1 to allow the Applicant to provide zero parking spaces on the Site, based in part on the fact that the Applicant’s development company (Douglas Development Corporation) constructed a seven-story above-ground parking garage across Okie Street immediately to the north of the Site (less than 150 feet away). The parking garage contains over 1,000 parking spaces and was built to accommodate future development at the Site and other properties.

The architectural drawings approved by BZA Order No. 19200 structurally preserved the existing building and included a number of renovations that resulted in approximately 54,521 square feet of gross floor area (0.69 FAR) and approximately 55,857 square feet of cellar floor area. The maximum building height was maintained at 35 feet and two stories. The renovated building complied with all applicable Zoning Regulations, except for parking.

Pursuant to BZA Order No. 19200A, effective on November 1, 2016, the Board approved a Modification of Consequence to the approved architectural drawings to add a new third-story addition to a portion of the west side of the building and to reconfigure 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 office use, and reconfigured loading facilities. The approved, modified building has approximately 73,244 square feet of gross floor area (0.93 FAR) and approximately 51,582 square feet of cellar floor area, and a maximum building height of 40 feet.

The architectural drawings approved in BZA Order No. 19200A also resulted in a significant reduction in required on-site parking spaces from the 223 parking space requirement generated under the original application to 43 parking spaces required under the approved modified plans. The reduction was in part a result of the adoption of the 2016 Zoning Regulations, which required fewer parking spaces per use than did ZR58, and also resulted from the revised building uses.

## C. Proposed Modifications to Project

As shown on the attached architectural drawings, which show a comparison between the drawings approved in Z.C. Case No. 19200A and the current proposal, the Applicant proposes to add new use categories to the building and to further reconfigure and construct additional floor area. The changes are a result of the Applicant finalizing and signing leases with building tenants that have specific programmatic needs and uses.

### 1. New Uses

The building was approved to contain PDR, retail, and office uses. The Applicant proposes to add (i) “Entertainment, Assembly, and Performing Arts” uses, as defined by 11-B DCMR § 200.2(n); and (ii) “Eating and Drinking Establishment” uses, as defined by 11-B DCMR § 200.2(j) to the building. The approved PDR, retail, and office uses will also remain in the mixed-use building.

The Entertainment use will be occupied by an establishment that includes fowling, curling, and axe throwing lanes, in addition to bar/lounge and seating areas. The Entertainment use will be located on a portion of the first and second floors of the building and will occupy approximately 21,718 square feet of gross floor area. Entertainment use is permitted in the PDR-1 District only if the Board grants special exception relief. Thus, in order to avoid returning to the BZA in the future, the Applicant respectfully requests flexibility to increase or decrease the total square footage of Entertainment uses permitted in the building, which may change over time. As set forth in this application statement, the proposed Entertainment use meets the special exception standards for relief, except for its proximity to another Entertainment use, for which the Applicant has requested a variance.

The Eating and Drinking use will be occupied by several new restaurant/bar establishments and will be in various locations throughout the building. The Eating and Drinking use is permitted as a matter of right in the PDR-1 District, but is permitted only as a special exception (in every zone) if located in penthouse habitable space pursuant to 11-C DCMR §1500.3(c). The proposed architectural drawings include several covered and uncovered roof decks that will be occupied by the various Eating and Drinking establishments. Although roof decks are not included in the definition of “penthouse habitable space,” the Applicant requests special exception relief pursuant to 11-C DCMR§ 1500.3(c) out of an abundance of caution.

### 2. Revised Building Design

As shown on the architectural drawings, the Applicant proposes to (i) construct a partial second story on the northeast corner of the building (previously one story in that location); (ii) increase the amount of floor area previously proposed for the second and third stories on the southwest corner of the building; and (iii) extend the building’s ground floor into the rear yard for the first 36.5 feet of vertical height of the building to increase the occupiable space in the southeast corner of the building for brewing equipment. The modifications to the building design result in an addition of approximately 19,936 square feet of gross floor area, such that the total GFA in the building increases from 73,244 square feet and 0.93 FAR (approved) to 93,180 square feet and 1.18 FAR (proposed). The building is still within the maximum matter of right density of 3.5 FAR. As noted above, 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, and/or restaurant uses.

### 3. Parking and Loading

As a result of the proposed new uses and GFA in the building, a total of 85 parking spaces are required. As noted above, the Board originally approved a parking variance for the 223 required parking spaces under the 1958 Zoning Regulations (BZA Case No. 19200). Under the first modification application, the Board approved a parking variance for the 43 required parking spaces under the 2016 Zoning Regulations (BZA Case No. 19200A). As noted above, the Applicant proposes to add a variety of new uses to the building and requests flexibility to increase or decrease the amount of floor area devoted to Entertainment use. Thus, the Applicant's parking calculations assume that the entire gross floor area of the building will be devoted to Entertainment uses, which has the highest parking requirement. The result is a parking requirement of 85 on-site parking spaces. As approved in the prior two BZA applications, the Applicant does not propose to locate any parking spaces within the building, since it operates a 1,000-plus car private garage across Okie Street from the Site, which employees and visitors of the uses at the Site will be able to use. Thus, the Applicant requests special exception relief to not provide the 85 total parking spaces required.

Pursuant to BZA Case No. 19200A, the Board approved three loading berths (two at 30 feet deep and one at 55 feet deep), three loading platforms (two at 100 square feet and one at 200 square feet), and one loading platform (at 20 feet deep). As part of its existing building permit, the Applicant has already constructed the approved loading facilities. Pursuant to 11-C DCMR §§ 901.1 and 902.2, the existing loading facilities are consistent with the loading requirements for the proposed uses.

## II. SPECIAL EXCEPTION RELIEF

### A. Relief Requested

The Applicant seeks special exception relief pursuant to 11-X DCMR § 901.2 to permit (i) Entertainment, Assembly, and Performing Arts uses in the PDR-1 District (11-U DCMR § 802.1(d)); (ii) nightclub, bar, cocktail lounge, or restaurant uses on the building's proposed roof decks (11-C DCMR § 1500.3); (iii) a reduction in the number of required on-site parking spaces (11-C DCMR § 703); and (iv) a rear yard depth of 4 feet, 9 inches feet whereas 12 feet is required (11-J DCMR § 205.2).

### B. Burden of Proof

Pursuant to D.C. Code §6-641.07(g)(2) and 11-X DCMR § 901.2, the Board is authorized to grant a special exception where it finds 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 in each case to the special conditions specified. Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the requested relief are met. In reviewing an application for special exception relief, "[t]he Board's discretion... is limited to a determination of whether the exception sought meets the requirements

of the regulation.” *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 695, 706 (D.C. 1981) (quoting *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. *Id.*

C. **The Applicant Meets the Test for Special Exception Relief Under 11-U DCMR § 802.1(d)**

Pursuant to 11-U DCMR § 802.1(d), entertainment, assembly, and performing arts uses shall be permitted as a special exception if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9, subject to the following:

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

The proposed use will not become objectionable to neighboring property because of noise, traffic, parking, loading, number of attendees, waste collection, or other objectionable conditions.

The type of “entertainment, assembly and performing arts” use that is proposed for the Site is not the typical type of use “designed for public assembly that enables patrons to experience visual, auditory, performance, or literary arts; [or] attend sporting events or conferences,” as described by its definition in 11-B DCMR § 200.2(n)(1). Nor is it a use that is “characterized by activities and structures that draw large numbers of people to specific events or shows.” *See* 11-B DCMR § (n)(2). Rather, the proposed use falls into the entertainment, assembly, and performing arts use category because it provides an opportunity for its patrons to “participate in leisure activities.” *See* 11-B DCMR § (n)(1).

Because the use does not draw large “public assembly” type crowds for scheduled events, and instead offers discrete physical activity games that can be played individually or in small groups, the use will not generate the type of objectionable conditions that 11-U DCMR § 802.1(d) seeks to mitigate. Moreover, the Site does not abut any residential use; and in fact, the closest residential use is the Hecht Warehouse apartment house, which is also owned by the Applicant development company. Thus, it is in the Applicant’s best interest to ensure that no objectionable conditions are created at or near the Site.

With respect to noise, the “entertainment” uses will be located entirely within the walls of the building and will not generate any additional noise volumes or noise types that would be higher in intensity than those generated by a traditional eating and drinking establishment, which use is permitted as a matter-of-right at the Site. The portions of the Entertainment use that may be designated on an outdoor roof deck will be eating/drinking in nature only, and will not involve the “Entertainment-type” uses being requested for the interior of the building.

The same applies to traffic, parking, and number of attendees. Large groups of individuals will not be traveling to the Site at specific times to attend scheduled “public assembly” events. Rather, patrons will visit the proposed use at the Site with the same frequency as if it was a traditional eating or drinking establishment. Moreover, parking is provided in the above-grade parking garage located directly across Okie Street from the Site (less than 150 feet away), such that individuals driving to the Site will not take up on-street parking spaces in the neighborhood or cause additional traffic in the neighborhood while searching for street parking. Loading is not required for the Entertainment use; however, the building already provides three loading berths and one service/delivery space to service the approved uses.

Regarding waste collection, the Applicant will provide adequate on-site trash facilities located in the loading dock area on the ground floor, which will be able to fully accommodate the proposed entertainment use’s trash and will be collected at the same time and frequency that trash is collected for the other uses in the building. In addition, the tenant operating the proposed entertainment use will use reusable dishware, silverware, and glasses for its bar/restaurant component, such that patrons will not leave the establishment with food or beverage containers that could result in waste in the surrounding neighborhood. Moreover, the proposed physical activities will not generate any materials that could become waste when patrons leave.

2. *The property shall not abut a residential use or residential zone;*

The Site does not abut a residential use or residential zone. The Site abuts Okie and Fenwick Streets to the north and west, respectively. The Site abuts private property to the east and south (Square 4093, Lots 20 and 19), which are also zoned PDR-1 and do not contain residential use.

3. *There is no property containing a live performance, night club or dance venue either in the same square or within a radius of one thousand (1,000 ft.) from any portion of the subject property;*

The Site is located less than 1,000 feet from City Winery, which is located at 1350 Okie Street, NE (Square 4038, Lot 5) and contains a live performance use. The City Winery property is also owned by the Applicant development company, so it is in the Applicant’s best interest to ensure that no objectionable conditions are created by having two Entertainment uses in close proximity. However, as noted below, the Applicant requests a variance from 11-U DCMR § 802.1(d)(3).

4. *External performances or external amplification shall not be permitted; and*

The proposed use does not involve external performances or external amplification.

5. *The Board of Zoning Adjustment may impose additional requirements as it deems necessary to protect adjacent or nearby residential properties, including but not limited to:*
  - a. *Soundproofing;*
  - b. *Limitations on the hours of operation; and*
  - c. *Expiration on the duration of the special exception approval*

Based on the foregoing, the Applicant does not believe that additional requirements are necessary to protect adjacent or nearby properties.

**D. The Applicant Meets the Test for Special Exception Relief Under 11-C DCMR § 1500.3**

Pursuant to 11-C DCMR § 1500.3, a penthouse may house a “nightclub, bar, cocktail lounge, or restaurant use” upon special exception approval by the BZA under Subtitle X, Chapter 9. In this case, the proposed nightclub, bar, cocktail lounge, and/or restaurant use on the proposed roof decks will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not create any adverse impacts on neighboring property.

The nightclub, bar, cocktail lounge, and/or restaurant use is permitted as a matter-of-right in the PDR-1 District generally, and incorporating this use onto the proposed outdoor roof decks will not create any new or additional adverse impacts. The nightclub, bar, cocktail lounge, and/or restaurant use will create a unique and enjoyable eating and drinking option for patrons and visitors to the uses within the building. The roof deck structures themselves will comply with all development standards of the Zoning Regulations and the uses will meet all requirements in the DC Noise Regulations.

In addition, the proposed nightclub, bar, cocktail lounge, and/or restaurant use will not tend to affect adversely the use of neighboring property. The Site is located in the PDR-1 District and does not abut any residential uses. The closest residential use is the recently converted Hecht Warehouse building which now operates as a rental apartment house with ground floor retail uses. The Hecht building is owned and operated by the same Applicant development company, such that it is in the Applicant’s best interest to avoid creating any negative impacts to its residents with respect to noise, traffic, lighting, or other potential impacts.

Therefore, the proposed nightclub, bar, cocktail lounge, and/or restaurant use of the roof decks will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to adversely affect the use of neighboring property.

**E. The Applicant Meets the Test for Special Exception Relief Under 11-C DCMR § 703**

Pursuant to 11-C DCMR § 703, the Board may grant flexibility from the minimum required number of parking spaces when the provision of the required number of spaces would be contrary to other District of Columbia regulations; or impractical or unnecessary due to the shape or configuration of the site, a lack of demand for parking, or proximity to transit. The BZA may

grant a full or partial reduction in the number of required parking spaces, subject to the general special exception requirements of Subtitle X, and the applicant's demonstration of at least one of the conditions listed in 11-C DCMR § 703.2. As set forth below, the project meets the requirements and conditions of 11-C DCMR § 703(g).

Pursuant to 11-C DCMR § 703(g), the Board may grant the parking reduction if the Applicant demonstrates the existence of "existing public, commercial, or private parking, other than on-street parking, on the property or in the neighborhood, that can reasonably be expected to be available when the building or structure is in use." In this case, as noted above, the Applicant development company constructed and operates a seven-story above-grade parking garage across Okie Street from the Site (less than 150 feet). The parking garage contains over 1,000 parking spaces and was built to accommodate future development at the Site. In fact, it was initially assumed that the proposed building at the Site would require 223 parking spaces, such that more than an adequate number of parking spaces are available at the garage for the proposed uses at the Site. Thus, the Applicant can clearly demonstrate the existence of private parking in the neighborhood that will be available when the proposed building is in use, all in accordance with 11-C DCMR § 703(g).

**F. The Applicant Meets the Test for Special Exception Relief Under (11-J DCMR § 205.2).**

Pursuant to 11-J DCMR §§ 205.2 and 205.3, the minimum required rear yard depth is 2.5 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 12 feet. The rear yard is not required below a horizontal plane 20 feet. In this case, the Applicant proposes to extend the southeast portion of the building into the first 7 feet, 3 inches of the required 12-foot rear yard, which will extend up to a maximum height of 36.5 feet above the mean finished grade at the rear of the structure. The result is a 4 foot, 9 inch rear yard for a portion of the Site.

The structure needs to be extended into the rear yard to house brewing equipment for the proposed brewery to operate within the existing building, which is a matter-of-right use. The weight of the brewing equipment is significant. The only location within the existing building that could accommodate the heavy equipment is the cellar, where the slab-on-grade is strong enough to support the equipment's design loads. However, locating the equipment in the cellar would require extensive demolition of the existing structure, which would jeopardize the building's structural integrity which the Applicant is intentionally preserving and adaptively reusing. In contrast, the new structure built in the rear yard will allow for slab-on-grade construction.

The height of this portion of the building in the rear yard is controlled by the brewing equipment that it houses, the shortest component of which is 14 feet, 2 inches, and the tallest of which is 23 feet, 7 inches. To service and maintain the equipment, a five foot clearance is needed above to adequately run all of the supply lines for steam, compressed air, and hot/cold liquor for production. This five foot clearance also allows the use of a steel gantry to lift, move, and maneuver the equipment around as necessary to keep up with product volume demands. Once the five foot clearance is provided, in addition to the steel roof structure above, the minimum building height reaches



approximately 35 feet tall (measured as 36.5 feet tall to the top of the parapet), which is the height proposed.

Despite not meeting the rear yard requirement for the PDR-1 District, the proposed addition to the building in the rear yard will not result in any adverse impacts. The rear yard is not located adjacent to any residential uses, and the abutting sites to the rear (south) and east, which are closest to the proposed addition, are used as vehicle storage lots by the District and are also zoned PDR-1. Thus, no existing users or uses of adjacent sites will be adversely impacted if special exception relief for rear yard depth is approved.

**G. The Applicant Meets the General Test for Special Exception Relief Under 11-X DCMR § 901.2**

In addition to satisfying the specific requirements set forth in 11-U DCMR § 802.1(d) and 11-C DCMR § 1500.3, the Applicant must also demonstrate that the requested special exception meets the more general requirements of 11-X DCMR § 901.2. Before granting an application for a special exception, the Board must determine that the requested relief 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(a-c). The stated purposes of the Zoning Regulations are set forth in section 6-641.02 of the D.C. Code:

Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the national capital, and zoning regulations shall be designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein.

D.C. Code § 6-641.02 (2001).

In this case, the proposed entertainment use in the building and proposed nightclub, bar, cocktail lounge, and/or restaurant use(s) in the penthouses will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. A variety of other uses are already located and operating successfully in the immediately surrounding neighborhood (e.g. Mom's Organic grocery, Nike community store, T.J. Maxx, Petco, Planet Fitness and other yoga and fitness studios, a bike shop, City Winery entertainment venue, breweries and distilleries, and a variety of other eating and drinking establishments). Therefore, the proposed mix of uses in the building and on the outdoor roof decks will be in harmony with the purpose and intent of the

Zoning Regulations and Zoning Map to continue to permit a variety of neighborhood-serving uses and activities in the immediately surrounding area.

Moreover, as described above, the proposed entertainment and nightclub, bar, cocktail lounge, and/or restaurant uses will also not affect adversely the use of neighboring property. The Site does not abut any residential zones or residential uses. The closest residential use to the Site is the Hecht Warehouse residential building, which as previously stated is also owned by the Applicant development company. However, that building is located across Okie Street from the Site and is already surrounded and leased by several existing eating and drinking establishment and retail uses. Therefore, any additional impacts created by the proposed uses at the Site will not create a perceptible impact to residents of the building.

With respect to parking, relief has already been granted by the Board for 223 parking spaces, and the subject request only requires relief for 85 parking spaces. The Board previously determined that the existing parking garage located across Okie Street from the Site would adequately accommodate the parking needs for the uses within the building, which has been reduced compared to the original approval. Moreover, the Applicant has provided the most conservative parking estimate by assuming that 100% of the building's GFA would be devoted to Entertainment uses, which has the highest parking requirement of all the proposed uses in the building. Therefore, the parking relief is 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.

Finally, the rear yard relief is for 7 feet, 3 inches only. As described above, the building addition has to be located in the rear yard in order to accommodate the extremely heavy brewing equipment, and the structure's height is the minimum possible based on the equipment's required height and clearances. Although the structure does not meet the technical zoning requirement, it will not create any adverse effects since the properties abutting the Site's rear yard are zoned PDR-1 and are presently used by the District as vehicle storage lots.

Accordingly, the proposed use of the Site is in harmony with the purpose and intent of the Zoning Regulations and the project meets the test for special exception relief under 11-U DCMR § 802.1(d), 11-C DCMR § 1500.3, 11-X DCMR § 901.2, and 11-U DCMR § 205.2.

### **III. VARIANCE RELIEF**

#### **A. Relief Requested**

The Applicant seeks a variance pursuant to 11-X DCMR § 1000.1 to permit Entertainment, Assembly, and Performing Arts uses within 1,000 square feet of a property containing a live performance, night club, or dance venue, as required by 11-U DCMR § 801.1(d)(3).

#### **B. Burden of Proof**

The Board is authorized 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 condition;
2. The owner would encounter practical difficulties if the zoning regulations were strictly applied or exceptional and undue hardship; 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*, 658 A.2d 1023, 1035 (D.C. 1995) (quoting *Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980)); *see also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). As discussed below, and as will be further explained in the Applicant's prehearing statement and at the public hearing, all three prongs of the area variance test are met in this application.

A. **The Site is Unusual Because of its Size, Shape, or Topography and is Affected by an Exceptional Situation or Condition**

The phrase "exceptional situation or condition" 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. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974). Moreover, the unique or exceptional situation may arise from a confluence of factors which affect a single property. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990).

In this case, the Site is developed with an existing building that was originally constructed and used as a warehouse. The Applicant is preserving the existing structure and adaptively reusing it to suit uses that are in demand in the transitioning neighborhood. The Applicant has owned the Site for four years and has actively marketed the Site to matter-of-right uses such as manufacturing, retail, and office uses.

To date, the Applicant has been successful in attracting several manufacturing and retail tenants to the building; however, given the large size of the existing structure and the PDR-1 zone district, the Applicant has been unable to lease up the space, even when divided into smaller retail spaces. The proposed Entertainment use is one that requires a large amount of square footage, unlike many retail stores. Indeed, the Applicant has already leased space in the immediate adjoining blocks to large retailers, including Mom's Organic grocery, Nike community store, T.J. Maxx, Petco, Planet Fitness, and recently a Target. Most importantly, the Applicant has also recently leased space to City Winery, which is an Entertainment use located within 1,000 feet of the Site.

**B. Strict Application of the Zoning Regulations Would Result in a Practical Difficulty to the Applicant**

Strict application of 11-U DCMR § 801.1(d)(3) would result in a practical difficulty to the Applicant. As noted above, the Applicant has tried to lease the Site to matter-of-right uses for four years. Due to the large floorplate of the existing warehouse structure, few users can operate at the Site, and the Applicant has been unsuccessful in attracting the more typical retail and eating and drinking establishment tenants that require less square footage. Thus, the existing building has remained vacant, which is a practical difficulty to the Applicant.

Moreover, the Applicant has worked hard to create Ivy City as a mixed-use destination for all types of visitors, residents, and employees. In 2018 it established City Winery as an “Entertainment” use less than 1,000 feet from the Site. At the time, the Applicant was not aware that it would not be able to lease space at the Site to a matter-of-right use. City Winery has been successful in attracting visitors to Ivy City and creating jobs for District residents. The Applicant cannot relocate the existing establishment so it is less than 1,000 feet from the Site, and believes that the close proximity of the mix of uses will be beneficial in continuing to grow the Ivy City economy. Thus, strictly applying the 1,000-foot rule would result in a practical difficulty to the Applicant by preventing it from leasing space in a building that is otherwise difficult to lease to traditional retailers.

**C. The Requested Relief Will Not Result in a Substantial Detriment to the Public Good Nor a Substantial Impairment to the Intent, Purpose and Integrity of the Zone Plan**

Relief can be granted without creating a 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 Zoning Map. The adaptive reuse of the existing warehouse structure with a variety of new community-serving uses will significantly contribute to the vibrancy of the surrounding blocks and the revival of Ivy City.

As noted above, the Entertainment use is consistent with other uses already located and operating successfully in the immediately surrounding neighborhood, including City Winery. The type of “Entertainment” use proposed for the Site is not the typical type of use “designed for public assembly,” and it is not “characterized by activities and structures that draw large numbers of people to specific events or shows.” See 11-B DCMR § (n)(2). Instead, the proposed use falls into the “Entertainment” use category because it provides an opportunity for its patrons to “participate in leisure activities.” See 11-B DCMR § (n)(1). Thus, the proposed uses at the Site are different from the existing public assembly uses and events that are hosted at City Winery. The two uses will not be in competition with each other, and will not draw large crowds at the same or similar times. Moreover, the Site does not abut any residential use and the “entertainment” uses will be located entirely within the walls of the building and will not generate any additional noise volumes or noise types that would be higher in intensity than those generated by a traditional eating and drinking establishment, which use is permitted as a matter-of-right at the Site.

Thus, locating the Entertainment use in the building at the Site will not result in any detriment to the public good or impair the intent, purpose, or integrity of the Zone Plan even though it will be located within 1,000 feet of another Entertainment use.

#### **IV. ENGAGEMENT WITH ADVISORY NEIGHBORHOOD COMMISSION**

The Applicant has discussed the proposed project with the Single Member District (“SMD”) representative for Advisory Neighborhood Commission (“ANC”) 5D01, the SMD in which the Site is located, but has not yet formally presented the application to the full ANC. The Applicant will continue to work with the ANC and community stakeholders throughout the BZA application process and will provide an update on its community engagement prior to the public hearing on this case.