

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Application No. 18247 of Big City Development LLC**, pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under § 771.2, a variance from the rear yard requirements under § 774.1, a variance from the off-street parking requirements under § 2101.1, and a variance from the loading requirements under § 2201.1, to allow the development of a new restaurant in the HS/C-2-A District at premises 1309 and 1311 H Street, N.E. (Square 1027, Lots 88 and 89)

**HEARING DATE:** September 20, 2011

**DECISION DATE:** September 20, 2011

**DECISION AND ORDER**

**Self-Certification**

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibit 6.)

**Notice**

The Board of Zoning Adjustment (“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”) 6A, and to owners of property within 200 feet of the site.

**The Application**

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving elements that are necessary to establish the case pursuant to § 3103.2 for: (a) a variance to exceed the 1.0 floor area ratio (“FAR”) limit on non-residential floor area that is allowed under §§ 931.3 and 1331.2 (the “non-residential FAR variance”); (b) a variance from the rear yard requirements under § 774.1; (c) a variance from the off-street parking requirements under § 2101.1; and (d) a variance from the loading requirements under § 2201.1, to allow the development of a new restaurant in the HS/C-2-A zone.

**The Non-Residential FAR Variance**

The Applicant proposes to rehabilitate and expand two existing buildings on the property and create a single three-story restaurant use, resulting in non-residential FAR of 2.67. Since the Zoning Regulations allow a maximum non-residential FAR of only 1.00, variance relief is required. The threshold question before the Board is whether the non-residential FAR variance is a “use” variance or an “area” variance.<sup>1</sup> For the reasons which follow, the Board finds that the non-residential FAR variance is a “use” variance.

**Classification as “Area” or “Use” Variance**

The Zoning Regulations do not define the term “area” variance or “use” variance. As noted by one commentator, “[t]he distinction between “area” and “use” variances, and the imposition of separate requirements for the granting of each type, are inventions of the courts.” *3 Anderson’s Am. Law. Zoning* § 20:6 (4<sup>th</sup> ed.). In the District of Columbia, the dichotomy between “area” variances and “use” variances was recognized in the *Palmer* case. *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535 (D.C. 1972). *Palmer* explained that an area variance relates to restrictions such as side yard, rear yard, frontage, setback or minimum lot requirements, whereas a use variance “seeks a use *ordinarily* prohibited in the particular district.” (emphasis supplied.) *Palmer* also established the statutory requisite of “practical difficulties” to a showing for area variances and the statutory requisite of “undue hardship” – a higher burden -- to a showing for use variances. *Id.* at 541.

The Applicant asserted that its request for non-residential FAR in excess of the amount permitted should be analyzed as an area variance. However, this Board has twice held that an application of this kind seeks use variance relief.

In *Application No. 16827 of The Stuart Building, LLC* (2002) the Board stated:

Applicant's request for a variance from the floor area ratio provisions of § 531 entails a use variance, because the maximum permitted FAR in the DCOD/SP-1 District is 4.0, of which only 2.5 may be used for nonresidential purposes as a matter of right. The FAR of the subject property is 2.57, and would increase to 3.2 with the planned addition. Thus the Applicant does not seek an area variance to increase the 4.0 FAR permitted as a matter of right for residential use of the property. Rather, the Applicant seeks to use the entire building, with a planned expansion, for nonresidential use. That is, the Applicant seeks a use variance so that the subject property may be devoted to nonresidential office uses in excess of the 2.5 FAR permitted as a matter of right in the SP-1 District.

Similarly, in *Application No. 18111 of the Kingdom of Sweden by National Property Board Sweden, SFV (Statens Fastighetsverk)* (2010), the Board “determined that the variance relief being sought ... from the non-residential floor area ratio limitations is a use variance, not an area variance.” While the Board may have misapplied the area variance test in the cases cited by the

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<sup>1</sup> There is no dispute that the other variances (rear yard, parking, and loading) are “area” variances.

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Applicant, the result was likely inadvertent since there is nothing in the orders to suggest that the Board intended to reverse its past precedent. And the Board declines to do so here. Therefore, the Board will analyze the Applicant's request for an increase in non-residential density as a use variance.

**ANC**

The site of this application is located within the jurisdiction of ANC 6A, which is automatically a party to this application. The ANC submitted a timely report indicating that at a duly noticed public meeting at which a quorum was present, the ANC voted to support the application. (Exhibit 25.)

**Government Reports**

The Office of Planning ("OP") submitted a timely report indicating that it supported the application. (Exhibit 26.)

**The Burden of Proof**

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that the Applicant has met the burden of proving under 11 DCMR §§ 3103.2 that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty in complying with the rear yard, parking, and loading requirements of the Zoning Regulations, and an undue hardship in complying with the non-residential FAR limits in 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.

**Waiver of Findings of Fact and Conclusions of Law**

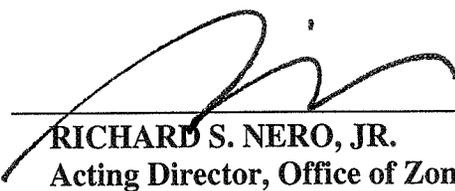
No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party. Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirements of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application, pursuant to Exhibit 24-C, Plans, be **GRANTED**.

**VOTE:**       **4-0-1** (Nicole C. Sorg, Jeffrey L. Hinkle, Lloyd J. Jordan, and Konrad W. Schlater to Approve; Meridith H. Moldenhauer not participating, not voting.)

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

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

ATTESTED BY: \_\_\_\_\_

  
RICHARD S. NERO, JR.  
Acting Director, Office of Zoning

FINAL DATE OF ORDER: NOV 29 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



**BZA APPLICATION NO. 18247**

As Director of the Office of Zoning, I hereby certify and attest that on NOV 29 2011, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail or delivered by electronic mail in the case of those ANCs and SMDs that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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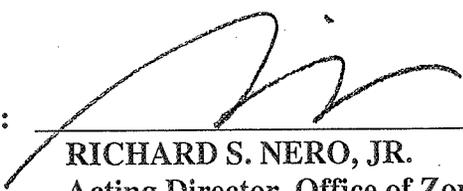
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ATTESTED BY:

  
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Acting Director, Office of Zoning