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James Freas  
Acting Director


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## PUBLIC HEARING MEMORANDUM

Public Hearing Date: January 13, 2015  
Land Use Action Date: January 27, 2015  
Board of Aldermen Action Date: February 2, 2015  
90-Day Expiration Date: April 6, 2015

DATE: January 9, 2015

TO: Board of Aldermen

FROM: James Freas, Acting Director of Planning and Development  
Alexandra Ananth, Chief Planner for Current Planning  
Stephen Pantalone, Senior Planner 

SUBJECT: **Petition #475-14**, THOMAS ENSELEK/S&H NEWTON REALTY, for SPECIAL PERMIT/SITE PLAN APPROVAL to EXTEND A NONCONFORMING USE to allow 17 indoor seats and ten outdoor seats for a total of 27 seats for an existing yogurt shop that currently operates as a retail use with no seating, and to waive four parking stalls at **665 Watertown Street**, Ward 2, Newtonville, on land known as SBL 21, 23, 1, containing a combined total of approx. 6,839, sq. ft. of land in a district zoned MULTI RESIDENCE 1. Ref: Sec 30-24, 30-23, 30-21(b), and 30-19(d)(13) and (m) of the City of Newton Rev. Zoning Ord. 2012.

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The purpose of this memorandum is to provide the Board of Aldermen and the public with technical information and planning analysis which may be useful in the special permit decision making process of the Board of Aldermen. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Land Use Committee of the Board of Aldermen will want to consider in its discussion at a subsequent Working Session.



**665 Watertown Street**

## **EXECUTIVE SUMMARY**

The property at 665 Watertown Street consists of a 6,839 square foot lot improved with a two-story building consisting of a commercial space on the ground floor and a residential unit on the second floor with a two-car garage, as well as undeveloped open space along Edinboro Street. The commercial unit, which has been in existence since 1904, is an existing nonconforming use because the site is located in a residential zoning district. The petitioner opened a frozen yogurt store in May of 2014, and is now seeking to add 17 indoor seats and ten seasonal outdoor seats. The petitioner will also apply for a sidewalk seating permit, which is outside the purview of this special permit.

The addition of seating will automatically convert the land use from retail to restaurant from a zoning perspective. Any change from one nonconforming use to another nonconforming use is considered an extension of such use and requires a special permit. The conversion from retail to restaurant use also increases the required number of parking stalls, which cannot be accommodated on site. As such, the petitioner is also requesting a special permit for a waiver of four parking stalls.

In terms of traffic and parking, the Planning Department believes that the proposed seating will have a modest impact on the number of vehicle trips to the site, as the business will continue to be locally based and many customers will walk to the site. Parking is available on both sides of Watertown Street proximate to the site, and based on city staff's recent site visits, on-street parking is underutilized. There is also a traffic light directly in front of the business, which provides safe passage for pedestrians crossing Watertown Street. For these reasons, the Planning Department believes the requested parking waiver is appropriate.

The Planning Department is concerned about the proposed location of the outdoor seating in the lawn area adjacent to residential properties. While the petitioner is only proposing two picnic tables in this area, there is significant lawn space for additional customers to congregate. During peak summer months this outdoor seating could generate significantly more noise and litter than the existing use. Since the restaurant is a nonconforming use in a residential neighborhood, the Planning Department does not believe it is appropriate to extend it even closer to residential properties, particularly without providing screening to mitigate its impacts. The Planning Department has suggested the petitioner construct a six-foot stockade fence and plant vegetation around the lawn area to mitigate noise generated by the use. The Planning Department also suggests enclosing the dumpster that is currently in the parking lot with a sight obscuring fence, as is typically requested with commercial uses.

### **I. SIGNIFICANT ISSUES FOR CONSIDERATION:**

When reviewing this request, the Board should consider whether:

- The waiver of up to four parking stalls is appropriate because literal compliance with the parking requirements is impracticable due to the location, size, depth,

shape, or the grade of the lot, or that such exceptions would be in the public interest, or in the interest of safety or protection of environmental features. (§30-19(c)(3),(d)(13), and (m))

- The proposed nonconforming restaurant use is not substantially more detrimental than the existing nonconforming retail use is to the neighborhood. (§30-21(b))
- The specific site is an appropriate location for the proposed restaurant use. (§30-24(d)(1))
- The restaurant use as developed and operated will not adversely impact the neighborhood. (§30-24(d)(2))
- There will be no nuisance or serious hazard to vehicles or pedestrians. (§30-24(d)(3))
- Access to the site over streets is appropriate for the types and number of vehicles involved. (§30-24(d)(4))

## II. CHARACTERISTICS OF THE SITE AND NEIGHBORHOOD

### A. Neighborhood and Zoning

The site is located on Watertown Street at the corner of Edinboro Street. The site is approximately ½-mile from the West Newton and Newtonville village centers. The site is mostly surrounded by multi-family and single-family residential uses, and non-profit/public uses, including the Horance Mann Elementary School (**ATTACHMENT A**). The zoning districts in the surrounding neighborhood consist of Multi-Residence 1 and 2, Single Residence 1 and Public Use. The site is zoned as Multi-Residence 1 (**ATTACHMENT B**).

### B. Site

The site consists of an 6,839 square foot lot, improved with a two-story mixed use building, consisting of approximately 1,256 square feet of commercial space on the ground floor, a four-bedroom apartment on the second floor, and a two-car garage on the ground floor. The building is located along the Watertown Street frontage and along a portion of Edinboro Street. The remainder of the lot fronts on Edinboro Street, and consists of a driveway accessing the rear of the building and open space abutted by residential properties. There is an approximately six-foot stockade fence along the rear property line (from Edinboro Street), but no fencing along the side property line that abuts #107 Edinboro Street. There is some limited vegetation along the rear of the lawn area.

The site has been used commercially since as early as 1904, and therefore is a

legally nonconforming commercial use in a residential zoning district. The petitioner currently operates a frozen yogurt store, “Yogurt Beach,” without seats, and a convenience store, “Beach Convenience.” Prior to the petitioner taking over the commercial unit in May, the entire commercial space operated as a convenience store for a number of years.

### III. PROJECT DESCRIPTION AND ANALYSIS

#### A. Land Use

The petitioner has been operating a frozen yogurt store since May of 2014, and would like to add indoor and outdoor seats to the site. From a zoning perspective, adding seats will convert the use from a nonconforming retail use to a nonconforming restaurant use. The change from one nonconforming use to another nonconforming use requires a special permit.

The addition of 17 indoor seats and ten outdoor seats, not including sidewalk seating, should not significantly impact the intensity of the existing commercial use in terms of number of customers frequenting the site. The business is already operating and can continue to operate with or without seating. However, the addition of outdoor seating will increase the amount of noise, litter, and overall activity on the site generated by the use, which may impact the surrounding residential neighborhood, particularly in regards to the proposed outdoor seating in the lawn area. As such, the Planning Department is concerned about the location of the outdoor seating, and that it is extending a nonconforming commercial use in a manner that may adversely affect the adjacent residential properties.

#### B. Building and Site Design

The petitioner submitted a surveyed plot plan, which does not show the outdoor seating or any other improvements, as well as a zoomed in site plan that shows a portion of the lot. The zoomed in site plan, which shows the outdoor seating, was adjusted after the initial filing to show optional seating in the lawn area. The Planning Department has indicated to the petitioner that it would like to see all of the proposed seating on a surveyed site plan showing the entire site, since the petitioner is now proposing seating in the lawn area, and the Planning Department is suggesting additional improvements to the site. The Planning Department does not believe that this petition should be approved until this plan has been provided.

The petitioner is proposing to locate 17 seats inside the existing commercial space, ten seats either along Edinboro Street and/or in the lawn area adjacent to the driveway, and ten seats partially on the public sidewalk along Watertown Street. The seating on Watertown Street will extend into the public way and will require

approval from the City's Health Department for sidewalk seating. The Planning Department does not have any particular concerns with the outdoor seating along the side of the building on Edinboro Street, as it is setback from the residential properties and does not encourage customers to congregate on the site unless seating is available.

The Planning Department is concerned about the impact of outdoor seating in the lawn area, which is located on Edinboro Street and is adjacent to residential properties. Based on the following google map image from 2011 and a recent photo of the site, it appears that a significant amount of vegetation has been removed from the lawn area. It is unclear how much was removed before and after the petitioner began operations. Whereas customers may have previously assumed the lawn area was not part of the site, the removal of vegetation and addition of picnic tables will encourage them to use this space.



Google Maps Image  
from 2011



Photo of current  
conditions

While the petitioner only proposes two picnic tables in the lawn area, the Planning Department expects that additional customers may choose to sit on the grass. As indicated in the above photo, the lawn area is in close proximity to the adjacent residential properties. The Planning Department discourages the petitioner from using the lawn area for seating, but also realizes that with or without tables customers may use the space now that the vegetation has been cleared. As such, the Planning Department recommends the petitioner construct and plant screening along the property lines to mitigate the impact of noise and the visual impact of the seating. The Planning Department also recommends that the petitioner place and maintain trash receptacles on their property near the proposed seating during operating hours, so that litter in front of the property does not become a problem for the neighborhood.

The Planning Department also recommends that the petitioner screen the existing dumpster, which is located in the driveway off of Edinboro Street and is visible from the public way.

C. Traffic and Parking

The petitioner is seeking a waiver of four parking stalls, calculated as the required number of parking stalls for the current use (ten) less the requirement number of parking stalls for the prior use (six). While there is vacant land on the site along Edinboro Street that could potentially accommodate these stalls, the Planning Department would not encourage parking in this area, as it would encroach into a residential street.

The Planning Department believes that there is adequate on-street parking on Watertown Street to handle the potential parking demands of this use. City staff visited the site several times and noted very low parking utilization on Watertown Street proximate to the site. In addition, the Planning Department expects that many customers walk to the site from the surrounding neighborhood due to the local nature of the use, and that the addition of seating to an existing business, without any change in the product, will not substantially increase the number of trips generated by the use.

D. Landscape Screening

The zoomed in site plan provided by the petitioner does not label vegetation as existing or proposed, and does not specify whether the proposed fencing is wooden or chain link. The Planning Department recommends that the petitioner provide six foot sight obscuring wood fencing and small trees along the side and rear property lines where the lawn is located, in addition to the fencing and vegetation that is existing, in order to mitigate the visual and noise impacts of the proposed outdoor seating in the lawn area. The Planning Department also recommends that the

petitioner enclose the existing dumpster in the driveway so that it is not visible from the public view. The Planning Department recommends that these improvements be shown on a site plan that accurately shows the entire site so that there is no confusion between plans in the future.

#### IV. TECHNICAL REVIEW

##### A. Technical Considerations (Chapter 30, Newton Zoning Ordinance):

The Zoning Review Memorandum (**ATTACHMENT C**) provides an analysis of the proposal with regard to zoning. The petitioner is seeking the following reliefs:

- Section 30-19(d)(13), 30-19(m), to waive four parking stalls.
- Section 30-21(b), to change from a nonconforming retail use to a nonconforming restaurant use.

##### B. Engineering Review

As the petitioner is not increasing the impervious surfaces on the lot by more than 400 square feet or 4% no engineering review is required.

#### V. PETITIONER'S RESPONSIBILITIES

The petitioner should consider following recommendations proposed by the Planning Department in this memorandum:

- Limit the outdoor seating to the location along the side of the building on Edinboro Street and discourage the use of the lawn area;
- Increase the screening of the lawn area by continuing the stockade fencing and planting new trees along the side property line abutting #107 Edinboro Street;
- Screen the existing dumpster located in the driveway so that it is not visible from the public way;
- Submit a revised site plan showing the entire site with the proposed seating, fencing, and landscaping prior to being scheduled for a working session.

#### **ATTACHMENTS:**

- Attachment A:** Land Use Map  
**Attachment B:** Zoning Map  
**Attachment C:** Zoning Review Memorandum

# Land Use Map 665 Watertown St.

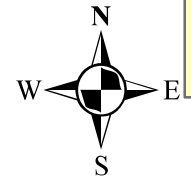
City of Newton,  
Massachusetts

### Legend

#### Land Use

- Single Family Residential
- Multi-Family Residential
- Mixed Use
- Open Space
- Nonprofit Organizations

ATTACHMENT A

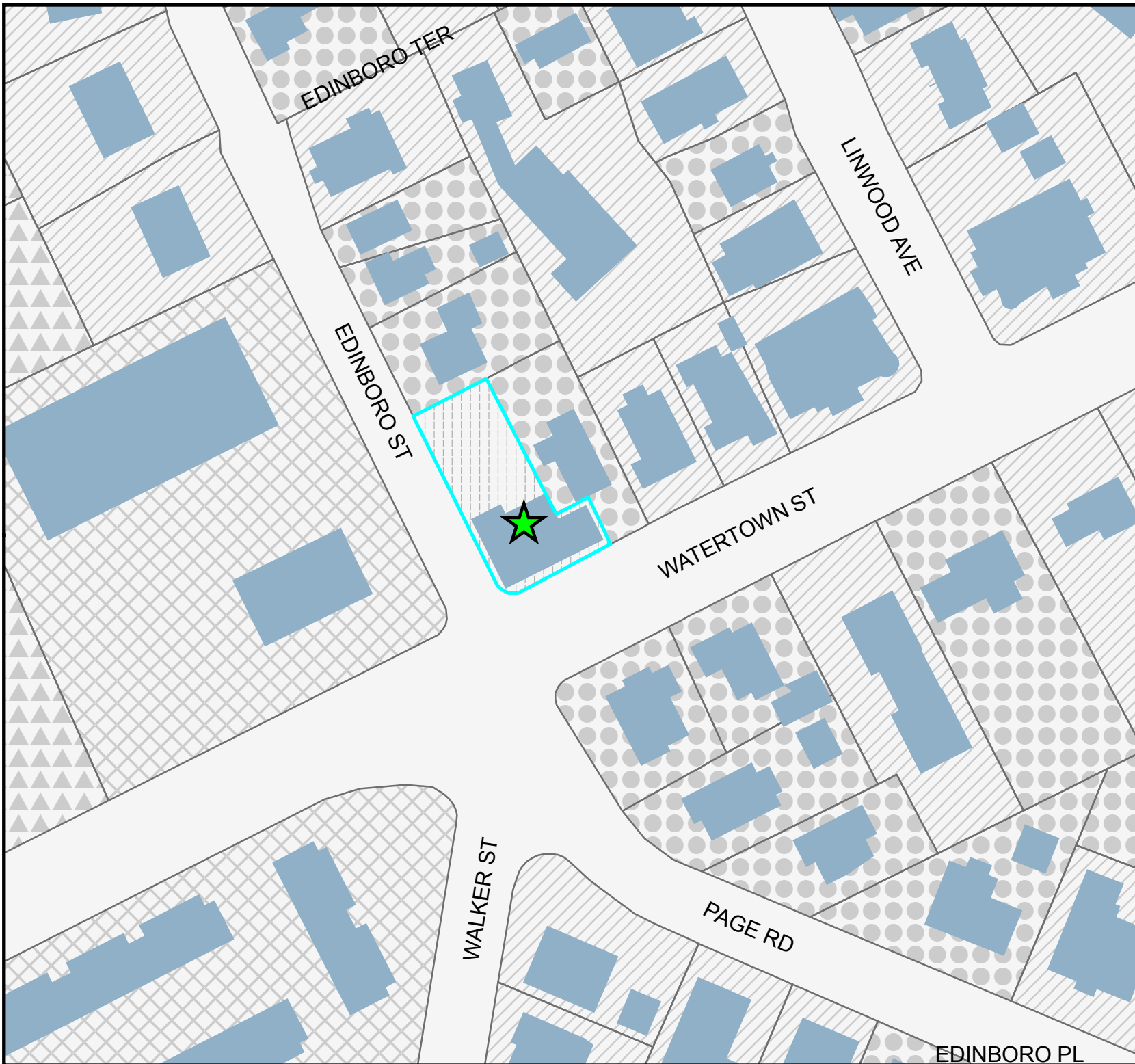


The information on this map is from the Newton Geographic Information System (GIS). The City of Newton cannot guarantee the accuracy of this information. Each user of this map is responsible for determining its suitability for his or her intended purpose. City departments will not necessarily approve applications based solely on GIS data.

CITY OF NEWTON, MASSACHUSETTS  
Mayor - Setti D. Warren  
GIS Administrator - Douglas Greenfield

0 12.5 25 50 75 100 Feet

Map Date: January 07, 2015





# Zoning Map

## 665 Watertown St.

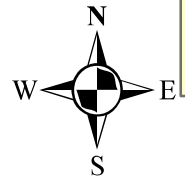
City of Newton,  
Massachusetts

### Legend

#### Zoning

- Single Residence 1
- Multi-Residence 1
- Multi-Residence 2
- Public Use

ATTACHMENT B



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CITY OF NEWTON, MASSACHUSETTS  
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0 12.5 25 50 75 100  
Feet

Map Date: January 07, 2015





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**ATTACHMENT C**

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James Freas  
Acting Director

**ZONING REVIEW MEMORANDUM**

Date: November 24, 2014

To: John Lojek, Commissioner of Inspectional Services

From: Jane Santosuosso, Chief Zoning Code Official  
Alexandra Ananth, Chief Planner for Current Planning

Cc: Thomas Enselek, Yogurt Beach, applicant  
James Freas, Acting Director of Planning and Development  
Ouida Young, Associate City Solicitor

**RE: Request to change from a nonconforming retail use to a nonconforming restaurant use, and for a waiver from four parking stalls to add 27 seats**

Applicant: Tom Enselek, Yogurt Beach	
Site: 665 Watertown Street	SBL: 21023 0001
Zoning: MR1	Lot Area: 6,839 square feet
Current use: Frozen yogurt shop	Proposed use: Restaurant with 17 indoor seats, 10 outdoor seats

**BACKGROUND:**

The property at 665 Watertown Street consists of a 6,839 square foot lot improved with a frozen yogurt shop which opened in May 2014 with a legal building permit requiring that the establishment have no seating. Located in a Multi-Residence 1 district, building permits on file indicate that there has been a commercial use on the site since as early as 1904, when it was used as a store. Prior to the current use as the frozen yogurt shop, the site was a convenience store.

The yogurt shop currently operates with no seats as a retail establishment. The applicant is proposing to expand his business by adding 17 indoor seats and ten outdoor seats, for a total of 27 seats, creating a restaurant use. As the site is located in an MR1 district, non-residential uses are not allowed. However, as the previous use of the site was as a retail store, the change to a restaurant use may be permitted by special permit as a change from one nonconforming use to another. The addition of seats for the restaurant requires a waiver from the parking provisions for the number of stalls required.

The following review is based on plans and materials submitted to date as noted below.

- Zoning Review Application, prepared by Thomas Enselek, applicant, dated 10/14/2014
- Certified Plot Plan, signed and stamped by Curt A. Nunes, surveyor, dated 6/9/2014
- As-built plan with seating, floor plan, prepared by Mark S. Lewis Architectural Design, dated 7/22/2014
- As-built plan with seating, site plan, prepared by Mark S. Lewis Architectural Design, dated 7/22/2014

**ADMINISTRATIVE DETERMINATIONS:**

1. The site is located in a Multi-Residence 1 district. The previous use of the site was as a retail store. The applicant opened the shop with no seats as a retail establishment selling frozen yogurt, and would now like to add 27 seats. The addition of the seats changes the use to a restaurant use, which is also not allowed in an MR1 district. To change from one nonconforming use to another requires a special permit per Section 30-21(b).
2. The property has a parking credit of six stalls from the previous use. The addition of 27 seats changes the yogurt shop from a retail use to a restaurant use. A restaurant use requires one stall for each three seats and one stall per each employee at the busiest shift per Section 30-19(d)(13). Utilizing the formula of  $A-B+C$ =the required number of stalls, where A is the number of stalls required for the proposed use (10), B is the number required for the previous use (6), and C is the number of stalls available (0), the number of stalls required for the proposed restaurant use is four. Per section 30-19(c)(2), the applicant requires a special permit to waive four stalls.
3. See “Zoning Relief Summary” below:

<b>Zoning Relief Required</b>		
<i>Ordinance</i>	<i>Required Relief</i>	<i>Action Required</i>
§30-21(b)	Request to change from a nonconforming retail use to a nonconforming restaurant use	S.P. per §30-24
§30-19(d)(13) §30-19(m)	Parking waiver for 4 parking stalls	S.P. per §30-24