

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Applicant’s Statement of 3428 O Street LLC

3428 O Street, NW (Square 1228, Lot 76).

I. INTRODUCTION.

This Applicant’s Statement is submitted on behalf of 3428 O Street LLC (the “Applicant”), owner of the property located at 3428 O Street, NW (Square 1228, Lot 76) (the “Subject Property”). The Subject Property is improved with an existing two-story building (the “Building”). The first floor and basement of the Building are currently leased to “Call Your Mother” (“CYM”) bagel shop.

CYM has operated at the Subject Property since issuance of C of O # CO2000796 on July 7, 2020, pursuant to BZA Order No. 20135, which granted area variance relief from the U-254 “Corner Store” locational requirement of U-254.6(g) of the Zoning Regulations, due to the Subject Property’s location within 750 feet of the MU-3A zone.

On February 14, 2024, after the BZA approval was vacated and remanded to the Board for further discussion, the Board voted to dismiss Application No. 20135, post-decision. No Order has been issued yet for that vote to dismiss. Based on that vote, the Department of Buildings has instructed the Applicant to apply for Special Exception relief pursuant to U-254.14, along with re-applying for the area variance relief granted previously.

II. JURISDICTION OF THE BOARD.

The Board has jurisdiction to grant the special exception approval requested pursuant to X § 901.1, Subtitle U § 254.14 and to grant area variance relief from U § 254.6(g), pursuant to X § 1002.1.

II. BACKGROUND.

A. Existing Use and History of Uses.

The Building was constructed in the early 1800s with a grocery store on the basement and first floor and residential use on the second floor. In 1970, the grocery store went out of business and was subsequently converted to a health food store. The most recent use prior to CYM's use was as a retail flower shop and antique/gift shop that operated by virtue of a use variance granted in BZA Order No. 11248 in 1973.

B. Description of the Subject Property and Proposed Use.

The Subject Property is located in the R-3/GT Zone. It is also located in the Georgetown Historic District and is within the Commission of Fine Arts jurisdiction area. It is a small corner lot measuring 617 square feet of land area. The Applicant is seeking approval to allow CYM to continue operations on the first floor and basement as a Corner Store – Prepared Food Shop - specializing in bagels.

CYM sells bagels, bagel sandwiches, and other to-go items including cookies, chips, pickles, sodas, bags of zataar seasoning, jams, peanut-butter, eggs, milk, and juices. All food items are prepared offsite and are reheated at this location.

CYM will has a mix of 15-20 full-time and part-time employees with 6-9 employees per shift. The current hours of operations are from 7:30AM to 2PM. The CYM staff are provided many benefits, including health and dental insurance, a 401k, paid vacations, a “fun committee,” a free gym membership, and—for certain staff—an equity plan.

As part of its commitment to being a good neighbor, CYM implemented processes in order to mitigate issues with potential lines and foot traffic in front of the Building. The kitchen and menu were adjusted to increase the speed of ordering. As there is no seating area, patrons are encouraged to stay in front of CYM after they've received their orders. It has daily private trash

pickups, with trash stored in the cellar until the time of pickup, weekly pest control contracts, and daily deliveries around 6am of products from the main store.

C. Surrounding Area.

The Subject Property is surrounded by a mix of uses. Directly abutting the Subject Property to the south and east are single-family dwellings. Across 35th Street to the west is another retail space on the corner of the 35th Street and O Street, NW. Across O Street to the north are single-family row dwellings. There are also several multi-family buildings in the surrounding area.

III. SPECIAL EXCEPTION

A. Special Exception Criteria

i. General Special Exception Standards

Pursuant to Subtitle X-901.2 of the Zoning Regulations, 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.

The Zoning Regulations specifically permit corner stores as a special exception. The granting of the special exception will be in harmony with the general purpose and intent of the zoning regulations nor adversely affect the use of neighboring property as described below under the criteria for approval and specifically U-254.13(a).

ii. Standard of Review for Special Exceptions

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. Specific Requirements of U-254.13

Pursuant to 254.14, a corner store use that is not permitted as a matter of right pursuant to Subtitle U § 254.13,¹ shall be permitted as a special exception if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9, subject to the following conditions:

(a) A corner store use shall be located so that it is not likely to become objectionable to neighboring property because of noise, traffic, deliveries, or other objectionable conditions;

The proposed corner store use is not likely to become objectionable to neighboring property because of noise, traffic, deliveries, or other objectionable conditions, for the following reasons.

- First and foremost, the operating hours are substantially limited to 7:30 am - 2:00 pm daily, which means that from 2:00 pm every day, until 7:30 am the next day, the use is completely dormant.
- CYM has posted signs asking patrons to consume their products off-site and not to sit on any neighboring stoops.
- Trash is collected and stored indoors in trash bins, which are stored inside overnight, and then taken outside each morning for daily private pickup.
- CYM's pest control plan includes weekly visits – more frequent than the standard practice for restaurants.
- Stanchions are used to keep any lines within the public space area adjacent to CYM on 35th Street.
- There is no music or other artificial noise, no outdoor seating, and no alcohol sales.
- The large majority of patrons are pedestrians.
- Any car or parking related issues aren't necessarily attributable principally to CYM's use. Coffee Republic across 34th Street, opens before CYM and closes at 6 pm every day, 4 hours after CYM.
- CYM is in the process of instituting line-shortening actions, including switching the point-of-sale program with the expectation of swifter service and shorter lines.
- The kitchen and menu are also being adjusted to increase the speed of ordering.
- As there is no seating area, patrons are encouraged to leave the area after receiving their orders.

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(b) The applicant shall demonstrate that the proposed corner store use will not detract from the overall residential character of the area and will enhance the pedestrian experience by providing within the application the following information:

(1) A demonstration of conformity to the provisions of Subtitle U §§ 254.5 through 254.12;

See below.

(2) A description of proposed uses, activities, goods sold, or services rendered, including:

CYM sells bagels and bagel sandwiches, along with other to-go items, including cookies, chips, pickles, sodas, bags of zaatar seasoning, jams, peanut butter, eggs, milk, and juices. All food items are prepared offsite and are reheated at this location.

(3) Proposed size and location within the principal building;

The floor area of CYM's operation is 1,1188 total SF, including the cellar space.

(4) Proposed number of employees at any one (1) time and in total;

CYM has a total of 15-20 employees for this location, with 6-9 employees per shift.

(5) Proposed hours of operation;

CYM's current and proposed hours are from 7:30 am until 2 pm, seven (7) days a week.

(6) Proposed signage;

Two small hand-painted signs took the place of the existing painted signs from the flower shop.

(7) Any proposed amplified music or other sound outside of the building containing the corner store use;

No such music or sound proposed.

(8) Any outdoor seating associated with the corner store use;

No outdoor seating.

(9) Proposed parking number, location, and screening such that any parking shall be fully screened from all adjacent properties, streets and alleys;

No parking

(10) Proposed location of all storage; and

Cellar storage- in the cellar walk-in, and on storage racks.

(11) Proposed location of trash storage and method and timing for removal;

Trash will be stored in the cellar and brought to the street level for private collection daily.

(c) Any alterations to the property proposed to accommodate the corner store use, including any grading changes, tree removal; or addition of retaining walls, patios, or pervious surfaces;

No changes.

(d) Any modifications to the building façade, including changes to window and door openings; and

No changes.

(e) The maximum sales area devoted to the sale of alcohol for off-site consumption shall be limited to a maximum of fifteen percent (15%) of the gross floor area of the ground floor of the corner store.

No alcohol sales.

Regarding conformity to the provisions of Subtitle U §§ 254.5 through 254.12:

254.5 The allowable total area for a corner store shall be one thousand-two hundred square feet (1,200 sq. ft.), not including cellar space, and shall be limited to the ground story and cellar or basement.

The total floor area, even counting the cellar space, is only 1,188 square feet.

254.6: A corner store shall only be located as follows:

- (a) On a lot that is at the intersection of two (2) generally perpendicular streets;**

The Subject property is on the southeast corner of O Street and 35th Street.

- (b) Not within five hundred feet (500 ft.) of more than one (1) other lot with a corner store use defined as an eating and drinking establishment;**

The Subject Property is not within five hundred feet (500 ft.) of any other lot with a corner store use defined as an eating and drinking establishment.

- (c) Not within five hundred feet (500 ft.) of more than three (3) other lots with a corner store use defined as retail, general service, or arts, design, and creation uses;**

The Subject Property is not within five hundred feet (500 ft.) of any other lot with a corner store use defined as retail, general service, or arts, design, and creation uses;

- (d) In any of the R-3 zones other than the R-3/GT zone, on an interior or through lot with a building that was built prior to May 12, 1958 for the purpose of a nonresidential use, as established by a certificate of occupancy, permit records or other historical documents accepted by the Zoning Administrator;**

Not applicable.

- (e) In any of the R-3 zones other than the R-3/GT zone, no nearer than five hundred feet (500 ft.) to a property line of a lot in an MU or NMU zone;**

Not applicable.

- (f) In the R-3/GT zone, on an interior or through lot with a building that was built prior to May 12, 1958, for the purpose of a nonresidential use, and only if the building was used for a corner store use within the previous three (3) years established by a certificate of occupancy, permit records, or other historical documents accepted by the Zoning Administrator; and**

Not Applicable.

- (g) In the R-3/GT zone, no nearer than seven hundred and fifty feet (750 ft.) to a property line of a lot in an MU or NMU zone.**

The Subject Property is approximately five hundred and fifty feet (550 ft.) away from the MU-3A zone on the west side of 36th Street between Prospect and N Streets. The Applicant is seeking area variance relief from this section as described below.

U-254.7 A corner store shall not be permitted:

- (a) On an alley lot;**
- (b) On a lot or within a building containing more than one (1) dwelling unit or another corner store;**
- (c) Within a building that is accessory to the principal building on the lot;**
- (d) On an R zoned lot within Squares 1327 or 1350, 1351, 1352, or 1353 inclusive; or**
- (e) In the R-3/GT zone, on an interior or through lot that has not been used for corner store uses for three (3) or more consecutive years shall not be deemed eligible for a corner store use.**

The Subject Property does not fall within any of the descriptions within (a) through (e) above.

254.8 There shall be no on-site cooking of food or installation of grease traps; however, food assembly and reheating is permitted in a corner store.

There shall be no on-site cooking of food and no grease traps on the Subject Property. Products are cooked at the Park View location and merely assembled and re-heated at the Subject Property.

254.9 There shall be no sale of alcoholic beverages for on-site consumption in a corner store.

There is no sale of alcoholic beverages.

254.10 All storage of materials and trash shall occur within the building area devoted to the corner store. There shall be no external storage of materials or trash.

This requirement is and will be 100% complied with.

254.11 There shall be no on-site use or storage of dry cleaning chemicals in a corner store.

This requirement is and will be 100% complied with.

254.12 Only one (1) external sign may be displayed on the building's façade, provided that the sign is not illuminated and is flush-mounted.

There are currently two small signs on the Building, which were there for the previous use. The Applicant is determining whether relief is needed for a second sign or if the sign can be removed.

IV. AREA VARIANCE.

The Applicant is requesting an area variance relief from the "Corner Store" locational requirement of U-254.6(g) of the Zoning Regulations, due to the Subject Property's location within 750 feet of the MU-3A zone.

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 relief from the alley lot height requirements.

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.2nd 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.2nd 1164, 1168 (D.C. 1990).

The Subject Property is faced with exceptional conditions relating to its existing configuration as a commercial use and its small size. The first floor and basement have always been used for commercial purposes and have never been used for any residential purposes. Accordingly, the Building is not configured for residential purposes as it has large shop windows and a corner entrance in order to attract patrons. As discussed below, these exceptional conditions create a situation that would lead to a practical difficulty if the zoning regulations are strictly enforced, especially .

In addition, the Property has a unique location. The use would be otherwise permitted as a matter-of-right but for its proximity to a tiny section cut out of the R-20 zone which operates as an MU-3 zone. The entire MU-3 zone here consists of 3-4 properties, and is just one side of a street and less than half a square. All other surrounding properties are zoned R-20. While that fact alone may not be unique, it does create an exceptional circumstance when the history of the Subject Property is considered. Based on a review of the corner lots within 750 feet of that 1248 36th Street, NW, the Subject Property is one of only three corner properties that is currently categorized as "store" use and is not fully residential. All other corner lots within 750 feet are used for residential purposes.

B. Strict Application of the Zoning Regulations Would Result in an Practical to the Owner.

The history of uses and configuration of the Building creates an exceptional situation where the Applicant will suffer practical difficulties if the area variance is not granted. While the building originally had a C of O for retail use for the first floor, that C of O has expired. Use is now limited, effectively to residential use. Use of the Building as a single-family dwelling is not feasible. There is already a residential use established above and as the only matter-of-right use would be as a single-family dwelling, it would require extensive renovation in order to create a

marketable floor plan. Even then, the existing first floor features, including large shop windows and a corner entrance are not conducive to residential use. The entire façade of the first floor would have to be redesigned which could prove difficult as it would require oversight and approval from OGB, HPRB and the Commission of Fine Arts.

As the existing first floor and basement have always been used for commercial purposes and any alterations to convert the Building to a single-family residential use would not be feasible, the Applicant will be faced with a practical difficulty if the relief is not granted.

C. No Substantial Detriment to Public Good and No Harm to the Zone Plan.

Granting the relief will not result in a substantial detriment to the public good, nor will it harm the zone plan. Regarding the public good, The Application received a resolution in support from ANC 2E. The tenant will be "Call Your Mother Deli" which already has an existing location on Georgia Avenue (and has been operating in this location with great success). The concept behind CYM was to create a neighborhood deli that could be around for generations and provide for the neighborhood where it is located. CYM has a proven track record of giving back to the neighborhood in which it is located. As described above, the nature of the use is relatively limited.

Regarding the zone plan, the first floor and basement space have been used for commercial purposes since the 1800s and the use itself is permitted via special exception. The Applicant is proposing to continue to use the first floor and basement for commercial purposes, as permitted via special exception.

V. CONCLUSION.

For the reasons outlined in this Prehearing Statement, the Applicant respectfully requests the variance relief as detailed above.

Respectfully Submitted,

/S/Martin P. Sullivan

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