

Case Number: 20135

Name of Movant: Melinda Roth/Opposition Party and concerned neighbors and property owners

The relief you are requesting: Motion for a Rehearing

Each and every reason you believe you are entitled to relief and why the ZC or BZA should grant your motion, including relevant references to the Zoning Regulations or Map:

Subtitle Y § 700.5 states “Any party in a zoning appeal or a variance or special exception proceeding may make a motion to request that the Board re-open the record and rehear the application or appeal, in whole or in part, to permit the party to present newly discovered evidence which, by due diligence, could not have been reasonably presented to the Board prior to the issuance of the Board’s final order.”

We believe there are several critical pieces of new evidence that need to be presented.

Subtitle Y § 700.8 states that this motion must contain: (a) The newly discovered evidence; (b) The reason the newly discovered evidence could not have been reasonably presented to the Board prior to the issuance of the Board’s final order; and (c) The relief sought.

We hereby make the following four arguments:

(A) ANC Votes were tainted

- (a) We received campaign finance documentation from a concerned citizen who had no relation to this zoning case which shows at least one of the ANC Commissioners who voted to support the variance should have recused himself given a clear conflict of interest. Commissioner Putta voted in favor of the variance and only a few days later held a Ward 2 campaign event catered by the Applicant, Call Your Mother (“CYM”). Furthermore, both Andrew Dana (owner of CYM) and Jeff Zients (lead investor of CYM) gave the **maximum** personal campaign contribution allowed to Commissioner Putta’s campaign for the Ward 2 election.

The BZA must exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. Furthermore, the BZA cannot give “great weight” to a vote which had at least one commissioner with a clear, obvious conflict of interest.

- (b) The Movant was only conveyed this information two weeks ago, and we had to confirm that other candidates for the Ward 2 seat did not accept similar contributions.
- (c) We believe this obvious proof of bias must go back to the ANC with a proper vote, with Commissioner Putta and any other commissioner who has a clear conflict of interest with CYM, or Messrs. Dana or Zients disclosing their conflict and abstaining from the vote.

(B) CYM has opened a location in Capital Hill, which operates exactly as the Georgetown store has the right to do WITHOUT a Variance

- (a) On April 16th, CYM opened their new Capital Hill location (located in a commercial zone) and has been selling bagels and foodstuff without preparations of sandwiches. This is exactly the model that CYM has a current license at the proposed location to operate now, without needing any variance. Yet, under oath, they testified that this was not their business model, when urged by the Opposition Party to open as a retail establishment without asking for a variance. Since BZA has the obligation to grant the lowest level of relief, it is clear that CYM can indeed operate without the variance and intensification that would then stay with building and in the residential neighborhood forever.
- (b) Since CYM opened this Capital Hill location, they have been selling out of product, thereby showing this model can be successful. This new evidence was not available when the BZA deliberated.
- (c) Therefore, the BZA should hold a rehearing to include this new evidence given it contradicts the earlier record.

(C) The global health pandemic has severely impacted both Saxby's (the coffee shop directly across the street) and Wisemiller's (the deli which is located within 750 feet)

- (a) The requirements of the corner store provisions in the R-20 Zone include the restriction to be more than 750 feet away from a commercial zone. The undisputed fact is that the Subject Property is within 750 feet from the MU-3 Zone, and therefore asked for that requirement to be waived through an area variance.

Despite the fact that the very businesses that would be impacted (Saxby's, Wisemillers) were never contacted by CYM or the BZA, the Opposition Party was able to contact them and they testified on December 11, 2019 at the limited scope hearing. They were given three minutes like any other witness. However, there is now new evidence that these two businesses are now teetering on bankruptcy. While these businesses stated previously that granting the requested variance would be detrimental to their businesses and "negatively impact their economic viability" (Subtitle U § 254.15 (b)), the findings of fact and law only mentioned that the "*Party Opponent did not present sufficient supporting evidence to convince the Board that specific businesses in the MU-3A zone would be impacted by the granting of the area variance.*"

We now have new evidence of the impact CYM would have given how business has been impacted the past three months. Granting this variance would sign the death warrant of these two long time and beloved neighborhood establishments.

- (b) No one could anticipate the economic impacts that the Covid 19 crisis would have on Saxby's and Wisemiller's, and this evidence was unavailable to present to the BZA.

Both establishments can now present significant financial analysis and future projected cash flows.

- (c) We believe the BZA must re-open the record to allow this new evidence from both Wisemiller's and Saxby's. It would be materially prejudiced to argue that the Party Opponent did not present sufficient evidence and then not allow these two existing businesses to be able to present this information.

(D) The Mayor's order regarding social distancing completely changes the context and model of and the way that CYM stated their lines would be able to form, not block the sidewalk, and not extend past their property.

- (a) The diagrams and slides which proposed how lines would form at CYM are no longer valid given the new world of social distancing. See attached Exhibit A.

This issue needs to be thoroughly vetted given the new context of social distancing and inability for CYM to comply with their plans for managing and staging the lines. Recall that CYM suggested a tight, serpentine line with 1' separation between patrons.

- (b) This prior configuration is no longer safe either patrons or the immediate neighborhood and therefore invalid.

The BZA put great emphasis and relied upon CYM's promises regarding the lines and how many people can fit inside the shop, including stating in the Final Order, *"Information and diagrams concerning interior and exterior customer line management which demonstrated that approximately eight to ten people would be able to wait inside the Building, while up to an additional 50 persons could queue in the Property's outdoor space without blocking the public sidewalk (Ex. 113A)."* This is simply no longer valid and would constitute a valid public health risk if CYM plans to open in July.

- (c) All of this information about the lines must be reconsidered in light of Covid 19 and the BZA should reopen the record to allow CYM to present a more accurate depiction of how the lines will work given social distancing and that CYM is not allowed to utilize any third party delivery service according to the Final Order.

For all of the above reasons, all new, relevant and impactful evidence, we hereby request rehearing by BZA.

Whether consent was obtained by other parties: Not yet, have served other parties today
Certificate of Service: Please see attached

Signature and Date: MAR 19 June December 2020
Contact Information: Melinda Roth
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Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20001

19 June 2020

**RE: AFFIDAVIT OF SERVICE for MOTION for REHEARING
Case #20135 BZA Application - 3428 O Street, NW (Square 1228, Lot 76)**

I hereby confirm that I have sent a copy of the motion to the agent of the Applicant, the affected Advisory Neighborhood Commission (ANC2E) and the Office of Planning.

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