DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT

Prehearing Statement of Opposition

Application No. 20135

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

I. INTRODUCTION

This Prehearing Statement is submitted on behalf of concerned neighbors of the owner of the property (the "Applicant") located at 3428 O Street, NW (Square 1228, Lot 76) (the "Subject Property"). The Subject Property is located in the R-20 Zone. In the R-20 zone, a prepared food shop is not permitted as a matter-of-right. The Applicant is requesting use variance relief from the R-Zone use requirements of U § 201 in order to use the basement and first floor of the Subject Property for the "Call Your Mother" ("CYM") restaurant. CYM has an original location in the Petworth neighborhood, which is wildly popular with frequent lines of over an hour on the weekends. However, the Petworth location is zoned appropriately, is located on a major thoroughfare and has parking available for patrons. In contrast, the Subject Property is on a quiet, residential one lane, one-way cobblestone street, with no set parking, with no inside or outside seating, and no proper place for any trash dumpsters. The neighbors would love for CYM to come to Georgetown for another branch of their successful restaurant, but to locate in a proper commercial zone rather than in the center of the R-20 residential zone.

II. BACKGROUND

A. History and Proposed Use

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The Subject Property has been previously used for a quiet flower and gift shop. There were no long lines, no additional trash all strewn over the neighborhood, no noise issues, no early openings and no parking issues from this use.

CYM has already begun to renovate the building to meet its specifications, despite not having this variance approved. The co-owner and co-founder, Andrew Dana, is on the record of stating that they are not interested in other, more appropriate Georgetown locations which could offer seating and parking because of the price negotiated for the Subject Property. Mr. Dana has stated that other locations would be more expensive and that they have a "sweetheart deal" for this proposed location. The price of rent is not a reason to grant a variance from carefully constructed zoning regulations that have existed for decades.

Moreover, as commented by the Citizens Association of Georgetown (CAG) opposition letter, there is a specific rule that disallows any prepared food shop to be within 500 feet of another one in Section 254.1 of the zoning code.[1] Saxby's coffee shop, an eating and drinking establishment, is right across the street from the Subject Property and well within this 500 feet restriction. Moreover, Saxby's has both indoor and outdoor seating as well as dumpsters located on their property. Finally, Saxby's already sells bagels and coffees, as well as other similar proposed menu items at CYM.

[1] While corner stores are permitted in the R-20 zone, a corner store may not be located within 500 ft. of another corner store being used as an eating and drinking establishment. http://handbook.dcoz.dc.gov/use-categories/other-uses/corner-stores/

This means the needs of the immediate neighborhood are already served. In fact, CYM is considered a "destination" restaurant which, like the Petworth location, will attract customers from all over DC, MD and VA as well as tourists from all over the country, and even world.

III. USE VARIANCE

As the Applicant stated in its Pre-Hearing Statement, the Board is authorized to grant use variance relief 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 conditions;
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> (2) The owner would encounter an undue hardship if the zoning regulations were strictly applied; and
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> (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, 628 A.2d 1023, 1035 (D.C. 1995); *see also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment,* 534 A.2d 939 (D.C. 1987).

All three conditions must exist, and the burden of proof is on the Applicant to demonstrate them. None of the three conditions exist as detailed below.

A. The Subject Property is Not Affected by an Exceptional Situation or Condition.

The Applicant claims that the Subject Property is affected by its unusual configuration of a door opening to the corner and large "shop windows." As discussed below, the Applicant argues that it would be a hardship and expensive to convert the first floor and basement therefore to a residential use. There is no evidence to suggest this is true, especially when there are other

residential homes in Georgetown that have similar features (See attached pictures in Exhibit I which shows homes with a corner door and homes with large "shop windows" and even one house only blocks away with both features). None of these houses have had any expensive conversions, and the doors and windows remain as these features may be considered part of the historic charm of the area. In addition, the property could be rented out as other commercial space that would not require a variance, but the Applicant completely glosses over this possibility. There are no other exceptional situations or conditions – in fact, the second floor has been rented out for residential use, therefore proving that there is nothing that unusual about the Subject Property that indicates this first prong of the test has been met.

B. Strict Application of the Zoning Regulations Would Not Result in an Undue Hardship to the Owner.

An owner is presented with an undue hardship when their "property cannot be put to any zoning-compliant use for which it can be reasonably adapted." *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). The Applicant claims there would be an undue hardship if the variance is not granted. Yet, the property was never listed for sale or for rent. There is not one shred of evidence that the Subject Property could not be rented for another commercial purpose that would not require a variance. The fact is the Applicant has stated they have a "sweetheart deal" for renting this location and it is impossible to know whether any other parties would be interested in renting or buying the building if it has not been subject to the market test. If the building had been for sale or vacant for some time, one could *possibly* argue that there is some hardship to the owner. However, in this instance, the floral shop closed and consolidated with their other nearby location and within days, the renovations by CYM started. It is impossible to know who else might have been interested because the Subject Property was

never listed on the real estate market nor offered to any other businesses or potential tenants or owners. There is no evidence of any hardship to the owner at all.

The Applicant also (again) claims that converting the Subject Property to a single-family residential use would not be feasible, yet the Applicant provides no cost estimates to do so. Moreover, as stated above, other residential homes in the very neighborhood have the exact same features which the Applicant cites as the reason the Subject Property could supposedly not be converted to residential use.

Furthermore, the fact that the Applicant signed a lease, is paying rent, and has paid for permits and renovations should not be considered an undue hardship that would meet this prong of the test. These financial issues are irrelevant, and risks that the Applicant took, knowing that they would need a variance yet continuing to renovate the restaurant. They appear very confident that they would receive the variance as the renovation work has continued through October 29th despite the BZA Hearing the next day. Finally, this prong of "undue hardship" is applicable to the owner of the building only – and not the would-be tenant.

C. There Would Be Substantial Detriment to Public Good and Clear Harm to the Zone Plan.

In order to grant the variance, there must not be substantial detriment to the public good nor the impairment of the intent, purpose or integrity of the zone plan. This condition is not met when so many of the actual neighbors (especially those within 200 feet) oppose the variance (See Exhibit II for a Petition opposing the variance).

The Applicant cites approval by the ANC 2E as evidence that the variance would not harm the public good. However, a closer review of the vote shows that the two Commissioners who

represent the areas nearest to the Subject Property voted against the variance. Support came from those Commissioners who represent residents who would not have to deal with the noise, litter, parking and rodent issues that will come if the restaurant were to open.

In addition, the Applicant also cites the concept of a neighborhood deli which could be around for generations and their track record of giving back to the Petworth community as evidence of contributing to the public good. This is simply irrelevant. Neither of these statements change the fact that granting the proposed variance would negatively impact the nearby property owners. In fact, the Applicant's arguments about the co-owner loving the neighborhood and desiring a Georgetown location should have little bearing on whether the variance should be granted. There are numerous vacant, properly zoned, commercial spaces in Georgetown for the Applicant to lease. As of September 2019, 12.3% of retail space within the Georgetown Business Improvement District was vacant, which translates to 54 storefronts/spaces.

The promises made by the co-owner to try to mitigate the neighborhood concerns include daily trash pick ups, weekly pest control contracts, closure by 3 pm, daily deliveries at 6 am, and newer technology to "move the line faster." However, DC Department of Public Works can attest that there is a constant problem with trash in the neighborhood. Saxby's has several dumpsters at the side of its restaurant, but there is no such similar space for the Subject Property. It is unclear where patrons would place their trash once leaving the restaurant, and such trash will likely end up in residential cans or on the sidewalks, tree boxes and streets. DPW can also attest to the constant rodent problem in this neighborhood. Weekly pest control does not stop the rat population, especially when there is additional trash created by patrons that would then be spread around the neighborhood. The proposed closing time of 3pm also does nothing to change

the substantial detriment to the public good. In other words, the neighborhood would "only" have these noise, litter, rodent and parking issues until 3pm. Sadly, the litter and rodent issues do not disappear at closing time. Daily deliveries at "around" 6 am along with 15-20 full-time and part-time employees arrivals would create noise at an hour where most nearby residents are likely still sleeping.

Finally, the new point of sale technology mentioned in the Applicant's Pre-Hearing Statement is also irrelevant as this technology helps improve the experience of those in line waiting to order, but not of those living nearby and impacted by the long lines, and other noise issues such lines present in a quiet residential neighborhood. The Pre-Hearing Statement claims since there will be no seating, "patrons will not be encouraged to stay in front of CYM after they've received their orders." Patrons may therefore sit on stoops of other properties to consume their food, adding to the litter, noise and rodent arguments above. As stated in the 1973 opinion rendered by the BZA for this same property in case 11248 and Exhibit 13 in the present case, "The building is very small and a decorator's studio is not expected to generate many customers." CYM on the other hand, is expected to generate many, many customers. The location is therefore unsuitable given the brunt of its popularity will be felt by the quiet residential neighborhood since the Subject Property cannot accommodate numerous customers.

The Applicant also claims there would be no harm to the zoning plan. However, should this variance be granted it will set a precedent for all of DC, not just Georgetown, that popular restaurants can move into quiet residential neighborhoods despite the very zoning laws which are meant to prevent this from happening. It would be a slippery slope to allow such restaurants to enter residential neighborhoods despite the protection the zoning regulations provide as well as

the overwhelming opposition by the immediate neighbors. If this were McDonald's or any oter fast food restaurant, would there even be a question as to whether it is appropriately located? Many of the immediate neighbors believe property values will dramatically decrease, and should this variance be approved, would contemplate moving out of Georgetown and DC altogether.

There is a distinct difference for the commercial use that the Subject Property is currently allowed versus this fast food restaurant (see below for definition of fast food restaurant). Granting a variance impairs the intent, purpose and integrity of the zoning plan by allowing CYM to enter into a neighborhood that is in the R-20 Zone. The history of commercial use in the Subject Property is not the same as what the Applicant is proposing, which is why a variance is required in the first place.

IV. THE SUBJECT PROPERTY CANNOT OPEN IN THE Z-20 ZONE BECAUSE IT IS NOT A PREPARED FOOD SHOP – IT IS A FAST FOOD RESTAURANT

The Office of Planning Staff Report recommends approval of the variance as a "prepared food shop" predicated on the following assumption: "Employees are permitted to sell bagels to customers but ***are not permitted to toast and prepare them***." Page 2, emphasis added.

This extremely limited approval in no way reflects how CYM will actually operate. Applicant realizes the only path forward due to the zone is to be categorized as a "prepared food shop," by the admission of the Applicant. While no menu has been made available for the subject property, a quick review of their Georgia Avenue restaurant shows that CYM both toast and prepare bagels into sandwiches. Therefore, under the Zoning Regulations Rewrite (ZRR) of 2016, Applicant is correctly categorized as a "fast food establishment." As such, must be at least 25 feet from a residence, thus its ability to open at the Subject Property is void *ab initio*.

Under 11 DCMR B-100, a fast food establishment is defined as:

> A business, other than a prepared food shop, where food is prepared and served very quickly; and where the food is typically made of preheated or precooked ingredients, served to the customer in a packaged form for carry-out/take-away, although it may be eaten on site.
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> Characteristics of a fast food establishment may include:
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> (a) Foods that are prepared by production-line techniques;
> (b) Foods that are standardized foodstuffs shipped to a franchised establishment from central locations;
> (c) The establishment includes trash receptacles located in the dining area for self-bussing of tables;
> (d) Seating for customers; and
> (e) Food served on disposable tableware.
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> An establishment meeting this definition shall not be deemed to constitute any other use permitted under the authority of these regulations, except that a restaurant, grocery store, movie theater, or other use providing carry out sales that is clearly subordinate to its principal use shall not be deemed a fast-food establishment.

As stated in Applicant's Prehearing Statement, all these characteristics are met. Food is prepared and served very quickly: "*CYM is also switching the point of sale to a new supplier which will allow them to take orders faster and move the line faster*" and "*the kitchen and menu are also being adjusted to increase the speed of ordering*". The food is typically made of preheated or precooked ingredients, *"daily deliveries around 6am of products from the main store"*. Finally, 100% of the food is served to the customer in a packaged form for carry-out/take-away, "*there is no seating area*".

To help further elucidate the nature of a food service establishment post ZRR, an Eating Establishment Questionnaire per 11 DCMR A-301.2 has been created.[2] Based on the questionnaire, all criteria for a fast food establishment exist.

[2] https://eservices.dcra.dc.gov/DocumentManagementSystem/Home/retrieve?id=Eating%20Establishment%20Questionnaire-1.pdf

Case law also supports the argument that CYM is a fast food establishment. In BZA Case 18559, Einstein's Brothers Bagels – with a nearly identical menu to CYM – was classified by the Office of Planning as a fast food establishment and had to seek a variance in the NO/C-2-A (nonresidential) Zone. A more detailed discussion is found in BZA Case 17214, in which a Blimpie's deli was found to be a fast food restaurant. See also*, Gorgone v. District of Columbia Bd. of Zoning Adjustment, 973 A.2d 692*.

Of all cases, the case that is most applicable is BZA Appeal No. 18027-A of Mehmet Kocak and Philly Pizza & Grill, Inc., a fast food establishment that operated less than four blocks from 3248 O Street (but operating in a C-2-A District). The BZA found almost nearly identical circumstance (long line, noise, carryout) and concluded that Philly Pizza was a fast food establishment.

In sum, the zoning rules and case law clearly demonstrate that CYM is a fast food establishment, and the variance must therefore be denied.

V. CONCLUSION.

For the reasons outlined in this Prehearing Statement, we respectfully request the variance relief DENIED as detailed above.

Respectfully Submitted,

Melinda Roth, on behalf of Concerned Citizens of West Georgetown