DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Opposition Statement for 3428 O Street LLC

Application No. 20135

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

I. INTRODUCTION.

This Statement is submitted on behalf of numerous neighbors who own homes within 200 feet 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 original application was for a use variance for the Applicant's proposed prepared food shop called Call Your Mother ("CYM"), which is not permitted as a matter of right in the R-20 zone. This amended application is now a request for an area variance under the corner store provisions. We are opposed to the granting of this variance.

II. BACKGROUND.

A. Lack of a Fair Process and Ability for the Applicant to Amend Application Rather than Submit a New Application for the New Variance.

A first hearing was held on October 30, 2019. At the hearing, the BZA requested the Applicant to submit five different requests in advance of a narrow scope hearing to be held on December 4th, 2019. While the Applicant failed to address all the BZA requests, a second hearing was nevertheless held on December 4th.

At the December 4th hearing, the BZA first had a closed door session with the Office of the Attorney General ("OAG"). Immediately thereafter, the BZA returned to open session and suggested to the Applicant that they amend their application to apply under the corner store provisions as an area variance, rather than a use variance. The BZA further advised the Applicant that they did not need to file a new application, rather, an amended application would be sufficient.

The DC statute lists "use" and "area" variances separately, and CYM specified a "use" variance in its original application. An amended application means slight changes or additional information, not an entirely new type of variance under a different statute, and it is unclear why the Applicant was permitted to amend their application rather than be requited submit a new application and file a new case for the distinctly different type of variance they are now seeking.

B. Lack of a Fair Process in Denying the Granting of Party Status and Limitation to Request new party status.

In advance of the original October 30, 2019 hearing, the neighbors within 200 feet of the Subject Property timely filed a request for Party Status. They were denied such status, with the stated reason by the BZA that, to have Party Status one must have an adjoining wall to the Subject Property. The BZA erred in this determination.

Zoning regulations allow persons significantly or uniquely affected by an action requested of the Board to ask to participate as parties in certain contested case proceedings. The zoning regulations on party status do not have a requirement for an adjacent wall, but denied the original neighbor party status for that reason.

However, at this third hearing scheduled for December 11th, 2019, regarding the "amended application" rather than a new application, denies the rights for either neighbors within 200' or the owner of an adjacent property to file for party status – under what is now a completely different variance request. The owners of 3424 O Street, a directly adjacent property, have attested that they would now like to apply for Party Status for this area variance, but because BZA suggested the Applicant only amend their application and has an accelerated one week process, these homeowners are denied their right to seek party status. Lack of party status is not only is a distinct disadvantage for those opposed to the variance to correct the misrepresentations made by the Applicant, it is also important for any appeal the opposition plans to pursue should a variance be granted.

Requests for party status must be filed with the Board "not less than fourteen (14) days prior to the date set for the hearing" on a matter. 11 DCMR § 3022.3. *Ait–Ghezala v. District of Columbia Bd. of Zoning Adjustment, 148 A.3d 1211, 1216 (D.C. 2016)*, but this hasty and accelerated one week process denies the adjacent property owner and the affected neighbors their right to apply for party status. Finally, there was no public notice of the third hearing on this entirely new variance request either by mail to the affected area, nor was notice physically posted on the Subject Property of this hearing.

C. Incorrect Statements, Misrepresentations and Relevant Information Withheld from the Applicant's Submissions.

1. **The Applicant does not conform to all requirements for a corner store**: The Applicant states in their amended application that **"**the proposed use conforms to all requirements for a corner store, except the requirement of U § 254.6(g)" (the rule that a corner store not be located closer than seven hundred and fifty feet (750 ft.) to an MU or NC zone). This is untrue.

   As stated in the opposition letter from the Citizens Association of Georgetown (CAG), §254.6b "provides that a corner store should not be located within 500' of another corner store use defined as an eating and drinking establishment. Saxby's is a corner store serves food and drinks and is located across the street from this property and well within 500'." The Applicant therefore does NOT meet all other requirements for a corner store. While the BZA can waive this provision to be across the street from Saxby's, the Applicant must conform to *all other restrictions* if this requirement is to be waived. Section 254.14(b) (1) states the Applicant must demonstrate "conformity to the provisions of

Subtitle U §§ 254.5 through 254.12." The BZA, by regulation may waive the Saxby's restriction, but the regulations do not specifically mention any available waiver to the restriction that the proposed location is closer than 750 feet to a Mixed Use zone, which already contain another corner store (Wisemiller's).

2. **ANC and CAG Unanimously Supported the 750 ft Rule Ban for Corner Stores**: The Applicant continues to mention ANC support, but this support was for the use variance in the original application. With respect to an area variance, the ANC position is entirely different.

   The zoning rules provide that a corner store not be located: "In the R-20 zone, no nearer than seven hundred and fifty feet (750 ft.) to a property line of a lot in an MU or NC zone."

   The granting of an area variance in this case would directly countermands the September 14, 2015 unanimous decision of ANC2E and CAG to support the inclusion of the 750 ft rule ban in U § 254.6(g) for new corner stores, in which the ANC and CAG stated:

   > Georgetown is well served by retail and other commercial stores on Wisconsin and M Street as well as numerous corner stores throughout the neighborhood. Accordingly, we support this section placing a 750 restriction on new corner stores…

   ANC2E supported inclusion of this exact language and rule, with the full knowledge of the existence of the MU-3 zone. In addition, the 750' rule was added to the regulations *specifically because of conditions in the R-20 Georgetown Zone*. Zoning Commission Order 08-06A (Corner Stores), states as follows:

   > The Commission also recognized that there already existed several corner stores in the Georgetown historic district and, due to the tight proximity of the commercial corridors and Georgetown University, accepted a larger spacing of corner stores in the R-20 zone from the commercial zones.

   Therefore, to approve this area variance request the BZA will have to override the specific determination of the Zoning Commission and the unanimous decision of ANC2E and the CAG. This is not reasonable.

3. **Not Neighborhood Serving**: The CAG also notes in their opposition letter that the corner store requirement needs to be "neighborhood serving" for the BZA to waive the Saxby's issue noted in §254.6b and according to §254.15(a). CAG's opposition letter states that, "This bagel shop will be seeking and, based on experience, receiving customers for its wares both inside and outside of Georgetown. It is likely to attract customers from the larger surrounding area of DC and Northern Virginia, which will generate large amounts of vehicular and foot traffic in this quiet residential

neighborhood." The Applicant does nothing to prove it will serve the local neighborhood and merely "hopes" to be a neighborhood deli. The food source does not come from the neighborhood, but from the larger DC/MD/VA area. Moreover, the popularity of their brand is based on recognition in national food publications and has led CYM to become a destination restaurant. Mr. Dana himself mentioned at the December 4th hearing that they "have the whole city and all the press on their side." The letters of support in the case record are almost entirely those who live well outside of the 200 feet impacted radius near the Subject Property –.

4. **Other Commercial Uses Possible**: The Applicant states that the Subject Property has always been used for commercial purposes. While accurate, it does not justify an increase in the intensity of use. Moreover, the Applicant states that the only other potential use is a flower shop, neglecting the fact that any other retail or services tenant could be in the space as a matter of right. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.*At 1170. No such proof has been offered by the Applicant.

III. THE APPLICATION DOES NOT MEET THE BURDEN OF PROOF FOR GRANTING AREA VARIANCE RELIEF.

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 W*ashington 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 does not meet the three-part test for the requested variance.

First, it is important to note the differences between a use variance requested in the original application, and an area variance which the BZA suggested the Applicant amend their application to apply for instead. The standard for granting a variance, as stated in Subtitle X § 1000.1 differs with respect to use and area variances as follows: (a) An applicant for an area variance must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of property; and (b) An applicant for a use variance must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in exceptional and undue hardship upon the owner of the property. *See Subtitle X § 1000.1*. The regulations are clear that the area variance has a lower standard, which indicates some overreach by the BZA to suggest it in the first place.

A. No Extraordinary or Exceptional Condition affecting the Subject Property.

To prove an extraordinary or exceptional condition, or uniqueness, the Applicant must show that the property has a peculiar physical aspect or other extraordinary situation or condition, that is connected to a practical difficulty. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.25 1091, 1096 (D.C. 1979). 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 Applicant claims that the Subject Property is faced with exceptional conditions relating to its existing configuration as a commercial use and its small size. However, they only refer to conversion to residential use, and never mention the possibility of other retail use. In addition, they discuss the large shop windows and a corner entrance as features which would need to be reconfigured at a prohibitive expense if the Subject Property were to be converted for residential use. Those opposed to the variance request has previously showed photographic evidence that this is simply not true as there are numerous examples throughout Georgetown, and indeed steps away from the Subject Property which show these exact same features remaining in properties now used as residences. The Applicant claims that these exceptional conditions "would lead to a practical difficulty if the Zoning Regulations are strictly enforced, because the potential use of the space is limited to the same use as is currently approved – a flower shop." This is equally untrue. There are numerous other potential uses of the space, including allowing CYM to operate as a matter of right and without a variance. In addition to any other possible retail uses, CYM has stated that they will open as a matter of right if the variance is not granted. This only serves to prove there is no exceptional condition leading to any practical difficulty.

In addition, the Applicant now states in the amended application that 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...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." There is in fact nothing unique about the location of the Subject Property. If anything, the Applicant makes the point that the small MU-3 zone may be unique. The location of the Subject Property is in the heart of the R-20 zone and there is no proof offered about any exceptional condition relating to the exact location. In fact, the critical requirement for the extraordinary or exceptional conditions affecting a property is that the extraordinary or exceptional condition must affect a single property. *Metropole Condo. Ass'n v. District of Columbia Bd. of Zoning Adjustment, 141 A.3d 1079, 1082–83 (D.C. 2016).* It is clear that any factor relating to the location to the MU-3 zone would affect any other property nearby and not be at all unique or exceptional to the Subject Property.

In addition, case law shows that the courts have repeatedly declared—and we reiterate here—that "the proposed use of a property is not a sufficient basis for determining the presence of exceptional conditions." *Metropole Condo. Ass'n, 141 A.3d at 1083*; see also *Capitol Hill Restoration Soc'y, Inc., 398 A.2d 13, 16 (D.C. 1979*. In addition, "[T]he use or prior use of a particular property is inapplicable to the first condition that the property itself be unique." *Palmer, 287 A.2d at 540*.

B. The Applicant will not face a Practical Difficulty if the Regulations are strictly enforced.

The second prong of the area variance test is whether a strict application of the Zoning Regulations would result in a practical difficulty. It is well settled that the BZA may consider "a wide range of factors in determining whether there is an 'unnecessary burden' or 'practical difficulty.' The Applicant's statement mentions that, "Increased expense and inconvenience to an applicant for a variance are among the factors for the BZA's consideration." *Gilmartin, 579 A.2d at 1711*. However, these expenses and inconveniences are to the owner of the property, not to CYM. The owner faces zero expense or inconvenience should CYM open as a matter of right.

Should CYM choose to break the lease, according to testimony provided under oath from Mr. Dana during the first hearing, breaking the lease would cost CYM $100,000. This means the owner would receive that amount, and be able to use that amount if there were any delays in locating another more appropriate tenant.

The Applicant further states that "Other factors to be considered by the BZA include: "the severity of the variance(s) requested"; "the weight of the burden of strict compliance"; and "the effect the proposed variance(s) would have on the overall zone plan." Thus, to demonstrate practical difficulty, an applicant must show that strict compliance with the regulations is burdensome, not impossible." There is no demonstration by the Applicant that any practical difficulties exist beyond desire if the variance is not granted. The Applicant claims that use of the building as a residence is not possible, but this as stated above has been shown with evidence to be untrue. It is unclear that any renovations would be required given the evidence of residences with similar features, and, regardless, the Applicant continues to provide no cost information for any such renovations.

Finally, the Applicant incorrectly claims that "any commercial purposes and any alterations to convert the Building to a single-family residential use would not be feasible" and that therefore the Applicant will be faced with a practical difficulty if the relief is not granted, ignoring the fact that the Subject Property has a variance to open as a retail or services business as a matter of right.

C. Substantial Detriment to the Public Good and Impairment the Intent, Purpose, and Integrity of the Zone Plan.

Relief cannot be granted if it creates a substantial detriment to the public good and if it impairs the intent, purpose and integrity of the Zone Plan.

The discussion related to this prong of the variance test is similar whether for a use variance or an area variance. The Board has received considerable information from the Applicant on this question; and has heard considerable testimony from opponents and supporters. In the end, the Applicant has clearly not met its burden of proof to show that the proposed use will not be a substantial detriment to the public good.

The Applicant incorrectly states that the "primary argument of the opponents related to the impact of customers standing in a line outside the building." Those opposed to the variance have

not focused on how the line will snake or be managed – these were direct requests from the BZA at the first hearing. Rather, the focus is on the detrimental impact to residents who live within the 200 ft radius of the Subject Property including the inevitable and unarguable increases in noise, litter, rats, decrease in rare residential parking spaces and the resulting diminution of property values to those who thought when they purchased their property that they would be protected by the R-20 zone.

CYM's promises to be good neighbors cannot change any of those issues. The OP, DDOT and even the ANC conducted no independent studies regarding potential negative effects, and instead blindly relied on the Applicant's own promises and agreements to hire a weekly pest control specialist and have trash removed from their premises daily. With no indoor or outdoor seating and no ability to place outside trash receptacles, common sense dictates that there will be manifold negative lasting effects in the immediate neighborhood.

The Applicant's amended application also discusses the testimony of ANC Commissioner Lisa Palmer. Her testimony about CYM's current behavior at their existing Parkview location was irrelevant since that location is in a commercial zone – located on six lane Georgia Avenue – and not in a quiet residential neighborhood along a one way, cobblestone street. The Georgia Avenue location has designated parking, trash receptacles, and seating inside the restaurant.

Moreover, the Zoning Regulations in Rule 11-Y 406.4 state that, "The oral testimony of the ANC representative shall not be given great weight unless accompanied within seven (7) days by written documentation approved by the respective ANC, which supports the testimony." This written documentation has not been provided and, as such, renders her testimony irrelevant.

The BZA must, however, "grant only the amount of relief needed to alleviate the difficulty proved." 11 DCMR § 2120.6. Additionally, pursuant to 11 DCMR § 3104.1, "in the judgment of the Board, the special exceptions [must] be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and [must] not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps." See *Ait–Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211, 1216 (D.C. 2016). Given the Applicant is willing to open as a matter of right, there has been no evidence of any practical difficulty for the owner of the Subject property nor CYM.

Finally, the owners of both the neighborhood deli Wisemiller's that exists in the nearby MU-3 zone (and within 750 feet) as well as the building that houses the coffee shop Saxby's directly across the street from the Subject Property (and within 500 ft thereby triggering the corner store 500 ft. restriction) oppose granting this variance. Granting a variance for CYM to operate as a corner store would "negatively impact the economic viability" of their businesses. See U §254.15(b). This is also evidence that granting the variance would affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning.

III. CONCLUSION.

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