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. Draft Brief

This DRAFT brief is subject to changes once legal counsel is retained, but in order to comply with the January 7, 2020 deadline, the neighbors who would be affected by the award of a variance in this case, as represented by Melinda Roth ("we" or the "Party"), are submitting this draft brief at this time. We moved for a continuance in order to have adequate time to retain legal counsel, but this motion was denied by the BZA. The Applicant's answer to oppose the Party's motion for continuance should be disallowed as it was filed several days beyond the 7 days required for any response by the regulations (D.C. Mun. Regs., tit. 11(Y) § 407.4 (2016)).

II. Introduction

Despite the fact that the Applicant carries the burden of justifying an area or use variance (District of Columbia Office of Zoning, Zoning Handbook (2020)), the BZA has gone to extraordinary lengths to justify awarding a variance to 3428 O Street LLC (the "Applicant"), supplying the Applicant an array of options when the original request for a use variance to operate a prepared food shop at 3428 O Street, NW failed to meet the legal requirements at the October 30, 2019 hearing (the "first hearing"). At the December 4, 2019 limited scope hearing (the "second hearing"), the Applicant ignored several areas where the BZA had requested further information, including summaries of the previous cases where the BZA had denied use variances for delis in the exact same neighborhood as well as details on the lease. During this second hearing, the BZA suggested an alternative, less onerous, approach and requested the Applicant amend the original application, instead of filing a new application, for an area variance under the Corner Store Provisions. This amended application was expedited, and a third, limited scope hearing, was held on December 11, 2019 (the "third hearing").

At the third hearing, the BZA unexpectedly awarded party status to Melinda Roth, who had initially been denied party status at the first hearing. While limited testimony was taken at the third hearing, the BZA permitted the Party to file final arguments by December 30, 2019 in advance of a final hearing scheduled for January 15, 2020. As noted above, the Party moved for a continuance in order to seek legal counsel. At the first hearing, another neighbor asked the BZA Chair if the neighbors in opposition could hire legal representation. The Chair responded that there was no need since party status was denied (lines 1-13 page 123, first hearing). After party status was awarded at the third hearing, we have reached out to numerous zoning lawyers and are actively working to retain counsel but have been unable to formally secure representation to date. This puts the Party at a tremendous disadvantage and a materially prejudiced situation. While the Applicant's counsel notes that Ms. Roth teaches at a law school and that the neighbors in opposition have been able to "cite cases and make arguments," none of the neighbors have any experience in zoning regulations or any other related disciplines. Nonetheless, the BZA denied the motion for a continuance but did grant the parties additional time to prepare for the next hearing, setting January 7, 2020 as the deadline for additional submissions by the Party, followed by January 14, 2020 as the deadline for rebuttal by the Applicant, prior to the fourth hearing on January 15, 2020.

III. Continued Confusion over the Applicant

It is imperative to clarify again who the Applicant is in this case as there has been continued conflation of the Applicant and Mr. Dana. Indeed, a BZA Board Member raised this issue when he asked, *"I just want you to address this issue around who you are representing and who the Applicant is."* (Line 19, page 139, third hearing). The Applicant is 3428 O Street LLC, the owner of the Subject Property. The Applicant is not Call Your Mother Deli ("CYM") or Andrew Dana, neither of whom have party status in this case. Their only connection to the Applicant (or this case) is that Mr. Dana, or an affiliate thereof, has apparently executed a lease with the Applicant.

Although Mr. Dana is not, and has never been, the Applicant, the conflation of these persons has unnecessarily complicated the analysis of the request for a variance in this case. The owner of 3428 O Street, NW has never appeared at the multiple hearings in this case while Mr. Dana has been permitted to sit beside counsel for the Applicant in each hearing as if he is the party seeking the variance. On multiple occasions, counsel for the Applicant confuses the Applicant with Mr. Dana and CYM. In his recent opposition to the Party's motion for continuance, counsel stated, "*This reconsideration is likely to penalize the Applicant, based on the timing of their hoped-for full-scale opening, should the Application be approved.*" The Applicant does not have a "full scale opening" - the only person with a potential opening is Mr. Dana and his restaurant. Moreover, Mr. Dana continually refers to himself as the Applicant under oath (Line 4, Page 65, second hearing; Line 13, page 46, third hearing; Line 23, page 87, third hearing), despite the fact he is not, to our knowledge, an officer, director, member, manager, shareholder, agent, or affiliate of 3428 O St LLC. Even the BZA frequently refers to Mr. Dana as the Applicant (i.e., line 20-22 page 137 first hearing).

This conflation serves to confuse who holds the burden of proof. CYM continuously and inappropriately poses as the Applicant in order to garner sympathy for any delays to open its restaurant, the costs incurred for renovation, and potential costs for breaking its lease should a variance not be granted. In fact, the BZA states, "*The hardship argument, in part, that you're making--and again, this is the hardship for the property owner versus you, which means at some level, your hardship is less relevant--is that you've already put a lot of money into it and you're going to have to get out of a lease…*" (lines 6-11 page 110 first hearing). However, these issues of delays and costs are irrelevant for a number of reasons.

First, as previously stated, **Mr. Dana is not the Applicant** and overcoming the burden of proof for a use or area variance belong only to the Applicant. Recourse for difficulties faced by Mr. Dana and his restaurant as a contractual tenant of the Subject Property are not provided (or available) to Mr. Dana under District of Columbia zoning law and the BZA has no authority to synthetically substitute Mr. Dana for the Applicant.

Second, regardless of whether the Applicant, 3428 O St LLC, supports the granting of a variance, determination of whether relief may be granted rests solely on whether the Applicant is actually affected (and not the Applicant's tenant). As detailed below, the Applicant has not suffered financially at all, and there is no indication that the Applicant will suffer financially if a variance is denied. Mr. Dana allegedly executed a lease for which he is obligated to pay rent regardless of whether his restaurant opens as a matter of right or with a variance. Moreover, the actual Applicant does not suffer if there are any delays to CYM opening as he is already receiving rent. Renovation costs were conducted at Mr. Dana's known risk as he was well aware that CYM needed a variance before the renovations began.

It is well beyond the BZA's authority, or scope of review, to inquire about the terms, remedies, or disposition of the parties to the subject lease. All that is relevant is that the Applicant is the lessor for which a counterparty is obligated to pay rent. **Accordingly, the Applicant is not financially affected regardless of whether a variance is granted**. To speculate on whether the Applicant would (in the future) be harmed if the tenant defaults as a result of a variance not being granted is irrelevant. Mr. Dana has stated that he will open regardless of the outcome of the variance so the Applicant will be paid rent in any case. If the tenant were to default or break the lease, that is a contractual matter between the parties to be settled by the D.C. Superior Court, not the BZA.

Third, the actual Applicant has not attended any of the three BZA hearings nor any of the ANC meetings. While he is not required to attend, it is clear that his absence (and his lack of testimony under oath), coupled with the focus on Mr. Dana's financial and logistical problems over the course of three hearings, clearly indicates that the spotlight is being directed at the wrong party. The Applicant, the correct party for whom the zoning law is drafted to protect, remains in the shadows because it fails, legally or sympathetically, to overcome the burden of proof required for a variance to be granted.

Fourth, the Applicant fails to meet the burden of proof to overcome the requirements for either a use or area variance under the prongs established by zoning law. As the upcoming hearing is limited to analysis of Corner Store Provisions and the area variance analysis, we set out our arguments below.

IV. Corner Store Provisions

The Applicant has filed an amended application for an area variance under the Corner Store Provisions (D.C. Mun. Regs., Subtitle. U §Section 254 (2016)). These provisions were part of the 2016 DC zoning rewrite, and there has been confusion about the exact requirements expressed during the third hearing by the BZA, by the Office of Planning and by the Applicant.

A. No Matter of Right Use

From the DC Zoning Handbook (http://handbook.dcoz.dc.gov/definitionsglossary/c/), a Corner Store is defined as a "limited commercial and service use in residential rowhouse zones, oriented to serve the immediate neighborhood." The handbook continues:

> *Only a corner store for which the use is a fresh food market or grocery store devoted primarily to the retail sale of food is permitted as a matter-of-right subject to certain provisions. All other corner store uses detailed in Subtitle U § 254 are only allowed by special exception, subject to conditions enumerated in Subtitle U §§ 254.14 and 254.15*

First of all, 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), which provides 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." Counsel for the Applicant during the third hearing further explains, "That is the only -- we have determined that's the only requirement of the corner store regulations that we don't meet. And so we've effectively self-certified otherwise that we'll meet the corner store regulations but for that requirement." (Lines 13-17 Page 90, third hearing). The Applicant is therefore asking for a waiver of that 750 ft rule through an area variance; we will discuss the lack of proof for an area variance later in this brief. **However, the Applicant does not even meet the requirements for a corner store.**

There are different types of permitted corner stores in Section 254. As stated in Section 254.2: *A corner store use shall be a retail, general service, arts design and creation, or eating and drinking establishment use subject to the provisions of this section*. The provisions then separate out either:

(i) Subtitle U § 254.13: A corner store "which the use is a fresh food market or grocery store devoted primarily to the retail sale of food" and states that this type of store "shall be permitted as a matter of right subject to the following conditions" or

(ii) Subtitle U § 254.14: A corner store use "that is not permitted as a matter of right pursuant to Subtitle U § 254.13, 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"

Since the Applicant's amended application states that, "The Applicant is proposing to use the first floor and basement as a prepared food shop specializing in bagels," it is clear the Applicant is not proposing to be a grocery store and therefore **is permitted under 254.14 as a special exception, and must meet certain conditions to receive that exception by the BZA**.

Ms. Crystal Myers from the Office of Planning (OP) stated during the third hearing, "Again, this is now considered a matter of right use" (lines 9-10, page 118, third hearing). She claims the use is now a matter of right, but the regulations state otherwise, and only permitted as a special exception under 254.14. OAG (and BZA subsequently) erred by opining that this was a matter of right use. The OP should know these regulations and their approval of the variance is therefore flawed. The Official DC Zoning Blog states, "*Most new corner stores would not be permitted by-right – a new store would typically require a special exception, meaning BZA and neighborhood review of potential impacts and a demonstration that the use would enhance the pedestrian environment of the residential character of the neighborhood*." (See http://zoningdc.org/2015/08/28/corner-stores-under-the-proposed-regulations/). **As the amended application does not state that CYM is a grocery store, there is no matter of right to open under the corner store provisions.**

CYM may indeed open as a matter of right given the previous retail use of the subject property as discussed in the first and second hearings. But in this case, they would require a use variance in order to cook and prepare food and not just sell it. Since they abandoned that approach to amend their application to ask for an area variance under the Corner Store Provisions, they must meet the requirements under 254.14 in order to be granted a special exception by the BZA.

B. Applicant Does Not Meet Corner Store Requirements

By self certifying, the Applicant is ignoring the Corner Store Provisions, and falsely claiming to meet them. As an eating and drinking establishment, the Applicant must comply with numerous requirements, including 254.14 (a) which states "*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*." Both adjacent property owners have opposed the variance and have submitted written and oral testimony about the noise, traffic, deliveries and safety issues also lack of fire wall between the properties. These letters are contained in Exhibit E. The Applicant cannot self certify that they meet this requirement when there has been direct evidence to contradict this requirement already in the record.

Moreover, the Applicant must meet Subtitle U §§ 254.14 (b) which states:

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;

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

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

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

(5) Proposed hours of operation;

(6) Proposed signage;

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

(8) Any outdoor seating associated with the corner store use; Subtitle U-31

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

(10) Proposed location of all storage; and

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

None of this information has been provided in the amended application. In the case #19623 (Creative Grounds), a corner store approved by the BZA for an area variance in December 2017, the application sets out those 11 requirements as part of the application. The same holds true for the only other known application for a variance under the Corner Store Provisions, case #19650 (City Corner Market). In both of these cases, the Applicants also self certified but included in their application how they met each of the requirements under Subtitle U §§ 254.14 (b). **The BZA cannot approve this request without the Applicant following the specifications of what needs to be contained within their application.**

In addition to already failing to meet 254.14 (a) and not providing the required information needed in 254.14 (b), the Applicant's proposal also fails to meet the requirement under 254.8 that, "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." Mr. Dana has testified under oath that there will be toasters (and microwaves) utilized at CYM. This is evidence of cooking -- not merely preparing and reheating. Again, this issue has been skillfully avoided by CYM by claiming their Georgetown menu items will be different, but there has been no testimony or discussion in the amended application to address this requirement.

Finally, the Applicant does not meet 254.6 (c) which states that a corner store cannot be located "*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*." This requirement refers to corner store use, and the Subject Property is located within 500 ft of five (5) other lots with a corner store use. While the Applicant ignores these other lots as they argue, firstly, that only stores that have gone through the Corner Store Provisions of 2016 are actually considered corner stores, and, secondly, that only stores

located on a corner can be considered corner stores. These are both false statements, as evidenced by the language of the regulations, statements from the OP and Zoning Commission and two other previous cases processed under the Corner Store Provisions.

First, to claim that no store opened before the 2016 zoning rewrite can be classified as a corner store does not make any sense given the wording of the regulations. The regulations are clear when they refer to "corner store use" as meaning stores that already exist. The Official Zoning Blog states that "*A corner store is a small, neighborhood-based retail establishment tucked into a predominantly residential neighborhood.*" This Blog continues and sets out rules for new corner stores, thus distinguishing between existing corner store use establishments and new corner stores applying under the new Corner Store Provisions (See http://zoningdc.org/2015/08/28/corner-stores-under-the-proposed-regulations/).

Second, the Corner Store Provisions specify in Section 254.6 (f) that new corner stores must be "*In the R-20 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.*" This distinction permits stores that are not actually on corners to be considered corner stores. Therefore, those "neighborhood-based retail establishments tucked into predominantly residential neighborhoods" that are not actually on corners must be considered to be "corner store use" establishments.

The Applicant does not meet the requirements of 254.6 (c) as the Subject Property is located within 500 feet of five such corner store use establishments:

1. Saxby's Coffee Shop, 3500 O St NW: 81.7 feet
2. Barber Shop, 1329 35th St NW: 26.7 feet
3. Bredice Brothers Hardware and Shoe Repair, 1305 35th St NW: 211.5 feet
4. Georgetown Cleaners & Tailors, 1303 35th St NW: 229.7 feet
5. Custom TV Solutions, 1301 35th St NW: 248.7 feet

Please see Exhibit C for further details on these measurements. All of these corner store use establishments have been contemplated under the Corner Store Provisions in the DC Zoning Handbook: grocery stores, fitness centers, yoga studio, shoe repair, hair salon and barber, artist studio, furniture making, photographic studio, cafe, coffee shop, or an ice cream parlor. These buildings were all built before 1958 and have been operating in their current corner store uses for well over three years.

Therefore, the Applicant needs to apply for relief from Subtitle U § 254.6 (c) as the Subject Property is located within 500 feet of more than three lots defined as corner store use. However, once, and if, the Applicant amends their application to apply for this needed relief, the BZA may only waive this requirement as specified in Section 254.15 as follows:

254.15 The Board of Zoning Adjustment may waive the location restrictions of Subtitle U §§ 254.6(b) and (c) provided the applicant adequately demonstrates that the proposed corner store use will:
(a) Be neighborhood serving;
(b) Not negatively impact the economic viability or vitality of an area zoned MU or NC that is closer than seven hundred and fifty feet (750 ft.) to an R-20 zone or five hundred feet (500 ft.) to any other R zone;

(c) Not create a concentration of non-residential uses that would detract from the overall residential character of the area; and
(d) Not result in undue impacts uses on residents of the area through the concentration of such.

The Applicant must therefore prove it will be neighborhood serving (which it has not done so, given their customer base spans the world as evidenced by their reviews and comments on social media). More importantly, the language in 254.15 (b) states that the BZA **may not waive** the location restrictions of 254.6 (c) if the proposed corner store would negatively impact the economic viability of the nearby commercial corridor. Specifically, this part of the regulation which is extended only for the R-20 Georgetown residential zone to 750 feet does not mean the Subject Property has to be further than 750 feet from an MU zone (as stated in 254.6 (g) where the Applicant is asking for a variance from the MU3 zone) but the wording of this requirement means the main commercial zone. The intent of this requirement was to ensure that new corner stores would not negatively impact the viability of the main commercial corridors, or as stated in the Zoning Blog, "we don't want new stores to take away from the vitality of commercial districts." See http://zoningdc.org/2015/08/28/corner-stores-under-the-proposed-regulations/. Given the well documented vacancy rate and empty storefronts in the main commercial corridor of M/Wisconsin Streets, it is difficult to see how the Applicant could make any argument at all that there would not be a negative impact to the viability of this commercial zone, if CYM locates in the heart of the R-20 zone instead. We can also argue that the Applicant would fail § 254.15 (d) given the residents are already served by the two neighborhood eating and drinking Saxby's, Wisemiller's, and even Starbucks and Peete's coffeeshops just blocks away.

C. Requirement to be Located No Nearer than 750 ft to the MU3 Zone Should Not be Waived

The Applicant is requesting an area variance in order to waive Section 254 6 (g) in the Corner Store Provisions which state that a corner store cannot 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 countermand the September 14, 2015 unanimous decision of both the ANC2E and CAG to support the inclusion of the 750 ft rule ban specified in Subtitle U § 254.6(g) for new corner stores under the Corner Store Provisions , in which the ANC and CAG stated jointly: "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…" See Exhibit D.

Furthermore, ANC2E supported inclusion of this exact language and rule, with the full knowledge of the existence of the MU-3 zone. This rule was specifically established with Georgetown in mind. 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.

The intent was not only to protect the residential character but also not to negatively impact the economic viability or vitality of an area zoned MU or NC. Other residential zones in DC have a requirement to be no nearer than 500 feet, but this amount was extended only for the Georgetown R-20 zone to 750 feet.

Therefore, to approve this area variance the BZA will have to override the specific determination of the Zoning Commission and the unanimous decision of ANC2E and the CAG.

In addition, 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 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.

V. Applicant Has Not Met Burden of Proof

The burden of proof for an area variance is well established. As stated by the Applicant in their amended statement, "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).

It would be a gross overreach should the BZA grant a special exception for an activity that has been deemed previously to be "offensive and disruptive to the general character of the neighborhood" and "substantially impair the purpose, intent or integrity of the Zoning Regulations and Map" on three separate occasions. See Exhibit B for further details on the relevant cases that the Applicant's counsel dismissed perfunctorily as too old to be relevant. These cases are however extremely relevant as in each case, the ANC and the BZA determined that there was substantial harm to the public. This is true for delis that were not even contemplating long lines or the popularity of CYM; these variances were denied because the ANC and BZA protected the integrity of the zoning plan and the obvious harm to the public these establishments would bring if allowed to operate in the heart of the R-20 residential zone.

As set forth below, **the Applicant does not meet any of the three-part test for the requested variance.**

A. First Prong: No extraordinary or exceptional conditions

There are no extraordinary or exceptional conditions affecting the property. The Applicant has failed to provide any proof of such exceptional conditions.

First of all, they have argued that the large shop windows, corner door opening and even a walk in cooler in the basement (that the Applicant themselves installed) make it cost prohibitive to convert the property to residential use. None of these arguments have been proven -- in fact, we have proven the opposite. As Exhibit A shows, there are at least 4 properties in the immediate vicinity with the very same characteristics that are either residential or longstanding office rentals, establishing that the Subject Property is by no means unique. One of the properties was actually converted to residential use, despite a prior BZA finding that "the property is not reasonably suited for residential use given the

small size of the first floor." (Application No. 13541, BZA Decision September 4, 1981). Furthermore, the Applicant has avoided providing any cost estimates to any conversion, merely speculating that it would be cost prohibitive.

Secondly. 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. The Applicant claims that the 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 simply untrue. As Chairman Hill stated to the Office of Planning in the first hearing, "The aspect that I'm trying to get to is we're being asked for a variance. There seems to be an ability to do some other type of retail here."

As noted by Chairman Hill, there are numerous other potential uses of the space, including renting the Subject Property to any other potential tenant who would not require a variance as well as allowing CYM to operate as a matter of right and without a variance. CYM had previously stated that they will open as a matter of right if the variance is not granted. Despite claiming the shop was ready to open in mid October, and then again in mid December, they have intentionally chosen not to open as a matter of right, as they understand that this would prove that there are no difficulties in operating without a variance.

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. 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 in the R-20 zone and therefore not be at all unique or exceptional to the Subject Property. As stated in by the DC Courts, *'If the circumstances affect the whole area the reasonableness of the regulations are challenged and the proper remedy is to seek an amendment of the regulation rather than a variance.'* See Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment 426 A.2d at 331.

Moreover, the DC Court of Appeals has found that "*The granting of a variance where the circumstances do not uniquely affect the petitioner's property could lead to similar requests by other property owners, which, as a matter of due process, would have to be granted. Approval of such requests would be tantamount to an amendment of the zoning map or regulations, and the Board [i.e., the Board of Zoning Adjustment] is without power to do this directly or indirectly*." Taylor v District of Columbia Bd. of Zoning Adjustment No. 6954 (D.C. 1973).

Both the Applicant and the OP have stated that the building has always been commercial use as somehow prove of the exceptional condition to the Subject Property. However, case law shows that the courts have repeatedly declared—and we reiterate once again —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. As discussed later, the Office of Planning (OP) erroneously uses the prior use as commercial use to provide support for the variance. Crystal Myers, from OP, states, "For a space that has a history of being commercial, never residential, we thought that it was appropriate to recommend approval." Case law says it is not. **The history of the space does not make it unique in any way and should not be a factor in proving the first prong as made clear in the Palmer case**.

The Applicant has failed to present sufficient evidence of an exceptional or extraordinary condition inherent in the property which would satisfy the showing of uniqueness needed to justify a variance.

B. Second Prong: No Practical Difficulties

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 amended 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 Subject Property, not to CYM. The actual Applicant has faces zero expense or inconvenience as they have been receiving rental payments for several months.

According to testimony provided under oath from Mr. Dana during the first hearing, breaking the lease would supposedly cost CYM $100,000. This means the Applicant would receive that amount, and be able to use that amount if there were any delays in locating another more appropriate tenant. The BZA is under no obligation to ensure the Applicant makes a profit, or even the highest profit on their use of the Subject Property. As stated in the Taylor case, **the BZA *"simply has no authority to grant a variance in order to assure the petitioner a profit*.**" See Taylor v District of Columbia Bd. of Zoning Adjustment.

There is no demonstration by the Applicant that any practical difficulties exist beyond the desire of their tenant. The Applicant claims that use of the building as a residence is not possible or cost prohibitive. 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. See Exhibit A.

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. As Chair Hill noted in the first hearing, any other retail (or service) use is permitted without the need for a variance. The OP also conveniently ignores this issue in their reports and recommendations for approval.

DC Zoning Regulations state that "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." The building has not been vacant, and there was no attempt by the owner to try and rent or sell the building to any other retail or service establishment where a variance would not be required.

The owner -- the actual Applicant -- has not appeared under oath because he could only testify that he "thinks" it may be difficult to rent the subject property. As ANC 2E Commissioner Rick Murphy testified in the second hearing, "Now, the only evidence of...hardship the applicant has offered is a letter from the manager of the applicant. In that letter, Mr. Sean McCann says, and I quote, I think it would be extremely hard to find a long-term successful tenant that could lease this property. Closed quotes. That's an opinion. It's not a statement of fact."

In fact, Mr. McCann's letter is directly contradicted by his own tenant, Mr. Dana. Under oath, Mr. Dana has stated that the owner told him that "people email me and call me all the time looking to lease this building." (October 30 hearing, line 21-22 page 40). Mr. Dana also said that the owner had "a lot of people banging down the door to lease the space." (October 30 hearing, line 1 page 41). There is a reason why the owner has not come to testify at any hearing related to this matter.

C. Third Prong: 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. Here, as with all the prongs, the burden of proof is on the Applicant to prove that granting the variance would not be a substantial detriment to the public good, nor an impairment to the intent, purpose and integrity of the Zoning Plan. Once again, the Applicant does not provide enough evidence to meet their necessary burden of proof. This is the only prong that ANC2E looked at, and therefore their 6-2 split vote to recommend granting the variance(s) can hardly be given the "great weight" required when the ANC process was flawed and failed to look at any of the other requirements or two prongs that the Applicant must prove.

Regarding the third prong, the Applicant's submissions and testimonies center on the intent that CYM promises to be "great neighbors." This is merely a statement of hope of their behavior, and does not prove at all that there will not be substantial detriment to the public good. The mere fact that they mention taking mitigating factors such as private trash pick up and weekly private pest control service only proves the point that there is going to be an increase in trash and rodent activity.

The Applicant incorrectly states that the "primary argument of the opponents related to the impact of customers standing in a line outside the building." We have not focused on how the line will snake or be managed – these were direct requests from the BZA at the first hearing. Rather, our 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 CYM's own promises. 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. We understand the attraction to having a popular restaurant open up in Georgetown and the consequential actions from the ANC Commissioners who do not live or represent constituents in the immediate area to appear to be friendly to successful businesses at a time that the

main Georgetown commercial corridor is suffering from the highest vacancy rates ever. However the popularity of CYM cannot be the only proof needed to gain a variance.

The Applicant deflects providing any real evidence about the third prong, and instead discusses how the lines will be arranged on the sidewalk and will move faster with new technology, how CYM has been involved and supportive of the Park View community where their original location is based, and how the whole city is behind them. This does nothing to prove that there is not a substantial detriment to the public good at this proposed location in Georgetown. While the BZA has been clear that this is not a popularity contest, CYM has rallied their social media supporters and garnered significant support. This, again, does not equate to proof that there is not a substantial detriment to the public good. In fact, CYM's promises to be great neighbors is directly contradicted by the fact they have posted on Instagram that there are "some people in Georgetown who really really really really hate bagels" and are "delaying us." This is hurtful and patently untrue. Every neighbor who opposes the variance has been clear in demonstrating we all want CYM to come to an appropriate location -- and we are not delaying them, it is the need for a variance and the accompanying process that is delaying them. Their social media posts and outlandish claims to their numerous supporters (they have almost 19,000 Instagram followers) only serve to provide support that they will not be good neighbors. See Exhibit F for further details of CYM's behavior.

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 like O 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 already irrelevant testimony unable to be given any great weight.

Moreover, the following issues have not been addressed by CYM, and help prove that there will be substantial detriment to the public good should the variance be granted:

1. **Safety/Fire Hazard**: As addressed above, there is a dangerous potential fire hazard between the Subject Property and the adjacent properties. Exhibit XXXX shows the pictures of the two walls, which has merely dry wall between the two properties and nothing else. During the renovation process for CYM, contractors broke through the party wall between 3428 and 3424 O Street on two separate occasions. The lack of a fire wall is safety issue. It is a violation of DC Code for a food preparation establishment not to have undertaken adequate safety measures. Both adjacent properties, as well as the upstairs apartment are at risk of a fire hazard, especially since the tenant has installed heavy equipment that necessitated an estimated $200,000 upgrade of the electrical system.
2. **Noise/Smell**: The Subject Property is a wood frame clapboard building dating to the 1800s. Sound travels unimpeded between adjoining properties and as the owners of 3424 O Street can attest, neither the owner nor the tenant have installed sound-proofing along party walls. The residents of both adjoining properties can expect to hear both movement and conversations before 6 am when staff and deliveries arrive, to after 3 pm when the store should close, but staff will remain to clean up and prepare for the next morning. This would go on 7 days per week,

year round. The adjacent properties will not just suffer from the noise, but also from the smells that permeate. There has already been a dangerous gas leak during the renovations. Residents of these adjacent properties would see an inevitable diminution of the enjoyment of their homes as well as a decline in property values for their owners.

3. **Traffic/Parking**: As residents have noted in the record, traffic has already increased as 3-6 workmen vans have parked each day around the intersection, without proper permits and taking up scarce residential spots. This has included installation of heavy equipment by crane, that was also performed without permitting and residents saw a giant crane parked outside their homes as the operator waited for spots to open up closer to the Subject Property. See Exhibit F for photographic evidence. It is hard to imagine that traffic will not increase as people from outside the area come to check out the heavily advertised destination deli by vehicles, scooters and bicycles. Moreover, given visitors can park for up to two hours without needing a residence parking permit, it is equally hard to imagine that there will not be a decrease in what is already rare residential spots. This will be exacerbated by services at neighboring Holy Trinity church, where a majority of parishioners come from outside Georgetown during what will be one of CYM's busiest times. Clearly, the increase in traffic and decrease in parking will substantially affect those that live in the neighborhood.

The Applicant has not met their burden of proof to dismiss the third prong. There is no mitigation plan to deal with the external trash from patrons. Mr. Dana testified that he has procured parking for "all" his staff, but has provided no proof of these spots for the 5-6 employees he claims will be at CYM during any one shift. On the contrary, as has been the case with all the contractors, employees and customers will park on the street. Mr. Jose Amoya and Detective Sparks, two of the Department of Public Work's ticketing agents, can attest to the increase in parking tickets that have been issued in front of the Subject Property since renovations started. See Exhibit F for examples.

The BZA must "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). No variance is required to allow CYM to open -- and the BZA by law is required to grant the "lowest" available relief.

VI. Precedent Setting

There are precedent-setting implications of granting the requested variance to the long-term viability of Georgetown's commercial zone and the quiet residential character of its side streets. If this variance is granted, it will convey to future tenants and the owner has admitted to neighbors that after the five-year lease to Mr. Dana expires (as the lease is supposedly not for ten years, but for five, with an option to extend), he intends to rent to a restaurant that will pay far higher rents. If commercial enterprises such as CYM are allowed to peel off into the lower-rent residential areas, we can expect to see many more empty storefronts in the commercial zone. Other business owners on 35th Street have already indicated a keen interest in the outcome of this case.

Although OAG and the BZA would argue that each variance applicant is looked at individually, analysis of ten years' worth of data reveals that the BZA has in fact awarded variances in clusters across the District of Columbia. If the past is any indication of future actions, we can expect to see many

more area variances granted in Georgetown, since the BZA has been shown to grant a higher percentage of area variances than use variances over the ten year period examined.

The granting of an area variance to Call Your Mother would not only require the BZA to give short shrift to current zoning laws and regulations, but would require it to overturn precedent established in past rulings, as well as to run roughshod over the strong objections of resident property owners within the 200 ft perimeter who will be most directly impacted as well as the businesses within 750 feet.

VII. Conclusion

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