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via IZIS

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: BZA Case No. 20135 – 3428 O Street, NW- Response to the Submission of Party Opponent Melinda Roth

Dear Members of the Board:

The following is the Applicant's response to the submission of party opponent, Melinda Roth, filed on January 8, 2020.

On December 11, 2019, party status was requested by, and granted to, Melinda Roth, individually. In the January 8th submission, however, the submission claims to be filed on behalf of a group of "neighbors…as represented by Melinda Roth." No group of neighbors was granted party status, and no persons have authorized Ms. Roth to represent them. So, despite this claim in the submission, the Applicant presumes that this is the submission of Melinda Roth alone, and is not on behalf of any group.

Ms. Roth undertakes several arguments in opposition to the subject Application. Several of those arguments are not relevant to the Board's decision. The Applicant will discuss those briefly before responding to the relevant arguments regarding the area variance test as requested by the Board.

Confusion over the Applicant

Ms. Roth's apparent confusion over the identity of the Applicant is not germane to the Board's consideration of this Application. The Applicant, as is true in every case, is the owner of the property which is the subject of the Application. In this case, the Applicant is 3428 O Street, LLC (the "Owner"), the owner of 3428 O Street, NW. The Owner has authorized Sullivan & Barros, LLP to represent it before the Board. This is a common situation before the Board, where tenants and contract purchasers often effectively pursue the BZA case on behalf of an owner.[1] While it is not required, in order to clarify the situation for Ms. Roth we are also submitting a

[1] See Case No. 20146 approved by the Board on 11/20/2019, wherein the Board approved a use variance based on testimony from the contract purchaser regarding undue hardship to the then-owner and contract seller, who neither appeared nor submitted any direct testimony.

letter from the property owner clarifying that Mr. Dana has also been authorized to speak on behalf of the property owner (Exhibit A).

Self-Certified Application

Ms. Roth spends a considerable portion of her submission arguing that the Applicant has filed an erroneous self-certification. She claims the proposal does not meet the other Corner Store regulations. The BZA has consistently held that assertions of erroneous certification are irrelevant to its review of applications. (See BZA Order No. 18263-B, p. 9-10, attached and highlighted as Exhibit B.) The Applicant's counsel has certified to the Board that the Applicant only requires the requested relief in order to be permitted to operate as a Corner Store. If the proposal otherwise fails to meet the Corner Store requirements of the Zoning Regulations, that will ultimately be for the Zoning Administrator to determine.[2]

Use Variance vs. Area Variance

The standard of relief for this case has been significantly lowered as a result of the change from a use variance to an area variance. "An applicant for an area variance need only show that the proposed use will be compatible with the Zoning Regulation, and that compliance with the area restriction would be *unnecessarily burdensome*." See Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 542 (D.C.1972). "On the other hand, an applicant for a use variance bears the heavy burden of showing that the property cannot be used for any purpose consistent with the zoning district." *Monaco v. D.C. Bd. of Zoning Adjustment*, 461 A.2d 1049, 1052 (D.C. 1983)

Ms. Roth's submission addresses the variance argument primarily from the view of a use variance standard. The Applicant is no longer required to prove undue hardship, but simply that strict compliance with the 750-foot rule is unnecessarily burdensome to the Applicant. This change in review affects not only Prongs 1 and 2, but also Prong 3, since the Zoning Regulations assume compatibility with the underlying zone of the proposed corner store use, and the analysis of substantial detriment to the public good relates narrowly to the impact of the relief from the 750-foot rule, rather than relating to the overall impact of a change in use from retail to prepared food shop.

Degree of Relief is Minimal

Another benefit to the applicant in the change from use variance to area variance is that one of the factors that the board may consider in evaluating practical difficulty is the degree of relief being requested. "BZA has the flexibility to consider a number of factors including, but not limited to: 1) the weight of the burden of strict compliance; 2) the severity of the variance(s)

[2] In the interest of efficiency, the Applicant will not address all the specific mistaken assertions within Ms. Roth's 'erroneous certification' argument; but we will be prepared to answer any questions on the topic at the hearing should the Board have questions.

requested; and 3) the effect the proposed variance(s) would have on the overall zone plan." *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990); *Washington Canoe Club v. D.C. Zoning Comm'n*, 889 A.2d 995, 1001 (D.C. 2005)

The degree of relief in this case may be looked at from two perspectives. The granting of relief would allow a permitted retail use that involves the sale of bagels, to then be toasted by the patrons, to be upgraded to a prepared food shop, where staff will prepare and toast the bagels. As testified to in the hearings, this amounts to turning the toaster around. Another perspective, probably the more appropriate one, is to view the degree of relief as the difference between being 557 feet from the closest MU zone and being 750 feet from that zone, as is required by the Regulations. That distance is as the crow flies. The actual walking distance between the subject property and the MU zone is 773 feet. In both cases, the degree of relief is minimal.

Area Variance Test

Exceptional Conditions/Confluence of Factors Resulting in Practical Difficulty.

Variance procedure is designed to provide relief from strict letter of zoning regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust invasion of property rights and prevent usable land from remaining idle. *Palmer v. Board of Zoning Adjustment,* 1972, 287 A.2d 535. The Court of Appeals has determined that the Board can rely on a wide variety of factors for exceptional conditions and there can be a confluence of factors that make up the exceptional condition. "Moreover, the unique or exceptional situation or condition may arise from a confluence of factors which affect a single property." *Gilmartin v. D.C. Board of Zoning Adjustment*, 579A.2nd 1164, 1168 (D.C. 1990).

An applicant for an area variance need only show that the proposed use will be compatible with the Zoning Regulation, and that compliance with the area restriction would be unnecessarily burdensome. See Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 542 (D.C.1972). On the other hand, an applicant for a use variance bears the heavy burden of showing that the property cannot be used for any purpose consistent with the zoning district. Id. at 542. *Monaco v. D.C. Bd. of Zoning Adjustment*, 461 A.2d 1049, 1052 (D.C. 1983)

"We also have said that to satisfy the second, "practical difficulties" requirement, the property owner need only demonstrate that compliance with the area restriction would be "unnecessarily burdensome" and that the difficulties are unique to the particular property. In determining whether this requirement is met, ***it is proper for the BZA to consider a "wide range of factors," including (but not limited to) economic use of property and increased expense and inconvenience to the applicant***." *Neighbors for Responsive Gov't, LLC v. D.C. Bd. of Zoning Adjustment*, 195 A.3d 35, 55–56 (D.C. 2018).

The confluence of factors affecting the subject property and creating an unnecessary burden for the property owner in this case include:

- The history of commercial use in the subject building, continuing today, and the current configuration of the building as designed for commercial use, and not designed for a permitted residential use, makes it unnecessarily burdensome for the property owner to convert the property to residential use.[3]
- The location of the property, slightly within the 750-foot radius of a small, isolated, half-block section of the MU Zone, which itself is not zoned consistent with its residential designation in the Comprehensive Plan's Future Land Use Map. This condition combines with the above condition to severely limit the property owner's options, as compared to similarly situated properties with these same conditions but not within the 750-foot radius of this particular MU zone.
- The condition of the property being subjected to changes in the Zoning Regulations on at least two occasions, 1958, and 2016, wherein Regulations were adopted which somewhat affected the property owner's ability to use the building for some it's possible originally available uses; *i.e.*; the uses which are permissible to it have become more limited through the adoption of new Regulations. In 1958, the commercial property became nonconforming. In 2016, permitted uses were further impacted by the gutting of the previously available special exception relief for a change from one nonconforming use to another. In 2016, the Property was further restricted by the 750-foot rule, even though it is not located within 750 feet of the MU zones on Wisconsin and M Streets, the areas sought to be protected by this Regulation.
- The exceptional conditions discussed above also combine to potentially harm the financial viability of the property owner's tenant, thereby burdening the landlord. Even Ms. Roth agrees with this premise, in Section IV.C. of her submission, where she claims that the owner of the Saxby's *building* (not the tenant) will be damaged by the economic impact of this proposed use on their tenant.

No Substantial Harm to The Public Good or the Integrity of the Zoning Regulations

The Board specifically requested that the Applicant and Party Opponent focus solely on Prongs 1 and 2 of the variance test, as Prong 3 has been fully vetted through the three prior hearings. Although the party opponent chose to write several pages on Prong 3, we do not believe that she introduced any new information that would require a rebuttal. The Applicant will be prepared to answer any remaining questions the Board may have about Prong 3 at the hearing.

[3] The Board has made a finding of the more difficult standard of undue hardship for similar situations throughout the city; and in many cases without any detailed evidence of financial situations. For support, see BZA Orders No. 18701, approving a use variance for a café in an office space which was formerly a candy store at 1247 E St SE; and BZA Order No. 19737, approving a use variance for office use in a historically commercial building which was currently used for residential, at 500 13th St, SE.

Sincerely,

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CERTIFICATE OF SERVICE

I certify that on January 14, 2020, I served a copy of this Response to the Submission of Party Opponent Melinda Roth to the following, via email.

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