GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 20135 of 3428 O Street LLC, as amended[1], pursuant to 11 DCMR Subtitle X, Chapter 10, for an area variance from the Corner Store requirements of Subtitle U § 254.6(g), to operate a corner store on the first floor and basement of an existing mixed-use building in the R-20 zone at premises 3428 O Street, N.W. (Square 1228, Lot 76).

HEARING DATES: October 30, 2019; December 4, 2019; December 11, 2019; January 15, 2020
DECISION DATE: January 15, 2020

DECISION AND ORDER

3428 O Street LLC (the "**Owner**"), the owner of Lot 76 in Square 1228 with an address of 3428 O Street, N.W. (the "**Property**") and Call Your Mother ("**CYM**," and collectively with the Property Owner, the "**Applicant**") filed an application (the "**Application**") with the Board of Zoning Adjustment (the "**Board**") on August 7, 2019, as subsequently revised on December 5, 2019, requesting the following relief under the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations, to which all references are made unless otherwise specified):

- Area variance from the Corner Store location requirements of Subtitle U § 254.6(g);

to operate a corner store on the first floor and basement of the existing mixed-use building on the Property. For the reasons explained below, the Board voted to **APPROVE** the Application.

FINDINGS OF FACT

I. BACKGROUND

NOTICE

1. Pursuant to Subtitle Y §§ 400.4 and 402.1, the Office of Zoning ("**OZ**") sent notice of the Application and the October 30, 2019 public hearing by a September 4, 2019, letter to:
   - the Applicant;
   - Advisory Neighborhood Commission ("**ANC**") 2E, the ANC in which the subject property is located and therefore the "affected ANC" per Subtitle Y § 101.8;
   - the Single Member District/ANC 2E03;
   - the Office of Advisory Neighborhood Commissions;

[1] The Applicant revised the relief to the requested area variance by submission dated December 5, 2019. (Finding of Fact ["**FF**"] 20.)

- Office of Planning ("**OP**");
- the District Department of Transportation ("**DDOT**");
- the Councilmember for Ward 2;
- the Chairman of the Council;
- the At-Large Councilmembers; and
- the owners of all property within 200 feet of the Property.

2. OZ published notice of the original October 30, 2019, public hearing in the *D.C. Register* on November 1, 2019 (66 DCR 14399), as well as through the calendar on OZ's website.[2]

PARTIES

3. The Applicant and ANC 2E were automatically parties in this proceeding per Subtitle Y § 403.5.

4. Melinda Roth (the "**Party Opponent**"), the owner of the property located at 3418 O Street, N.W., approximately 75 feet from the Property, filed a request for party status in opposition to the Application. (Exhibit ["**Ex**."] 36.)

5. The Board initially denied the Party Opponent's party status request at its October 30, 2019, public hearing because the Board concluded that she had not clearly articulated how she would be more distinctively or uniquely affected by the proposed use than other members of the surrounding neighborhood. (Public Hearing Transcript of October 30, 2019 ["**Oct. 30 Tr.**"] at 7-11.)

6. Based on testimony and submissions provided prior to the December 11, 2019, continued public hearing the Board on its own motion awarded her party status prior to considering the Applicant's revised area variance relief. (Public Hearing Transcript of December 11, 2019 ["**Dec. 11 Tr.**"] at 46-50.)

THE PROPERTY

7. The Property is a corner lot located on the southeast corner of 35th and O Streets, N.W. and contains approximately 617 square feet of land area.

8. The Property is improved with an existing two-story, mixed use building (the "**Building**") with retail uses on the first floor and basement and one residential unit on the second floor. The retail space was previously used as a flower shop and antique/gift shop and was vacant before CYM and the Owner signed a lease for the space. The Building has contained commercial uses since its construction in the 19th Century. (Ex. 123.)

9. A use variance granted pursuant to BZA Order No. 11248 (1973) authorizes retail uses

[2] Notice of the October 30, 2019, public hearing was published late in the *D.C. Register*. However, the Board finds that OZ otherwise provided proper notice of the public hearing. Particularly, the Board notes the volume of written responses and oral testimony received from the public, and therefore concludes that the late publication did not prejudice any interested individuals.

on the Property. (Ex. 13.)

10. The Property is surrounded by predominantly residential uses. To the north, south, and east of the Property are one-family dwellings and there are several multi-family buildings in the surrounding area. On the southwest corner of 35th and O Streets, is another corner commercial use, currently used as a coffee shop. The Property is approximately two blocks east of Georgetown University's campus, almost a quarter mile north of M Street N.W., and approximately a third of a mile west of Wisconsin Avenue. (Ex. 8.)

11. The Owner has leased the commercial space on the first floor and basement of the Property to CYM for use as a bagel shop. (Ex. 8, 123.)

12. The Property is zoned R-20.

13. The Residential House (R) zones are residential zones, designed to provide for stable, low- to moderate-density residential areas suitable for family life and supporting uses. (Subtitle D § 100.1.)

14. Subtitle D § 100.2 states that the R-zones are intended, in part, to:
    a) *provide for the orderly development and use of land and structures in areas predominantly characterized by low- to moderate-density residential development;*
    b) *recognize and reinforce the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place, preservation of housing stock, improvements to the overall environment, and low- and moderate-density housing to the overall housing mix and health of the city;*
    c) *allow for limited compatible accessory and non-residential uses; and*
    d) *allow for the matter-of-right development of existing lots of record.*

15. Subtitle D § 1200.3 states that the R-20 zone:
    "*…is intended to retain and reinforce the unique mix of housing types including detached, semi-detached, and row buildings and permit row buildings on small lots, and includes areas where a row buildings are mingled with detached buildings and semi-detached buildings.*"

16. The area surrounding the Property is also zoned R-20, except for five lots in Square 1223 zoned MU-3A, approximately 550 feet to the southwest of the Property, that are encircled by R-20 zoning.

II. THE APPLICATION

17. The Application proposes to use the Building's first floor and basement as a small corner store food shop specializing in bagels and bagel sandwiches. The operations would be limited to the preparation and sale of these items. No cooking or baking would take place on site, only toasting of sandwiches. The Application does not propose any exterior changes to the Building as part of the Application, merely a reconfiguration of the internal layout and minor exterior repair work. (Ex. 123.)

RELIEF REQUESTED

18. The Application, as filed on August 7, 2019, initially requested a use variance from Subtitle U § 201.1 to permit the proposed use as a prepared food shop, as defined in the Zoning Regulations. (Ex. 4 and 8.) The Applicant presented its case for the use variance at the October 30 and December 4, 2019, sessions of the public hearing.

19. In response to the Board's request at the December 4, 2019, continued public hearing to review if the proposed use might qualify as a corner store use, which would require less relief as it is a matter of right use in the R-20 zone, subject to specific conditions, the Applicant determined that the corner store regulations of Subtitle U § 254 would apply to the proposed use. The Applicant asserted that the proposed use complied with all but one of the matter-of-right corner store requirements and submitted a revision to the Application on December 5, 2019, withdrawing the initial request for a use variance from the Subtitle U§ 201.1 and instead requesting the following relief:
    - Area variance relief, pursuant to Subtitle U § 254.16, from the location requirements of Subtitle U § 254.6(g) prohibiting corner stores within 750 feet of a property line of a lot in a MU or NC zone (the "**750 Foot Rule**").

    The Applicant presented this revised relief to the Board at the December 11, 2019, continued public hearing (at which the Board had already awarded party status to the Party Opponent).

APPLICANT'S SUBMISSIONS

20. In addition to its initial application (Ex. 8) and testimony at the continued public hearing, the Applicant made a total of four submissions to the record in support of its case:
    - A revised statement dated November 22, 2019, providing additional information requested by the Board at the October 30, 2019, public hearing (Ex. 113-113C, the "**Supplemental Submission**");
    - A revised burden of proof dated December 5, 2019, amending the relief and requesting an area variance from the corner store requirements (Ex. 123, the "**Revised Application**");
    - A letter dated December 30, 2019 responding to the Party Opponent's Motion for Continuance (Finding of Fact ["**FF**"] 47) seeking to postpone the January 15, 2020, hearing (Ex. 140, "**Response to Opponent's Motion**,"); and
    - A submission dated January 14, 2020 responding to the Party Opponent's Opposition Statement (FF 48) (Ex. 152-152C, "**Response to Party Opponent**").

The Supplemental Submission

21. The Supplemental Submission responded to several informational requests made by the Board at the October 30, 2019 public hearing including:
    - Information and diagrams concerning interior and exterior customer line management which demonstrated that approximately eight to ten people would be able to wait inside the Building, while up to an additional 50 persons could queue in the Property's outdoor space without blocking the public sidewalk (Ex. 113A);

- The determination that based on this queuing configuration, which the Applicant believed to be the optimal solution, the front door did not need to be reconfigured; and
- The Owner's statement detailing the practical difficulties the Owner would face if the relief was not granted to allow CYM to fully operate (Ex. 113B, the "**Owner's Statement**").

22. The Owner's Statement declared that the Owner would face practical difficulties without the relief requested to allow CYM, or another prepared food shop (as would be permitted under a corner store use), to open and operate fully in the Building because:
    - The Owner had executed a ten-year lease with CYM for the Property;
    - The Building is currently configured for commercial use with a large, built-in walk-in cooler in the basement, the removal of which would be cost prohibitive to the Owner and so limited the types of businesses that could be viable commercial tenants to prepared food shops and florists;
    - Economic changes have created challenges for traditional retail, as illustrated in articles attached to the Owner's Statement reporting the difficulties facing retail establishments in Georgetown, even along the main commercial corridors of Wisconsin Avenue and M Street, N.W. Nonetheless, the Owner asserted that CYM's proposed prepared food shop use would be successful because of current economic trends showing an increase in "buying experiences and food," but that without the requested relief to allow a prepared food shop it would be "extremely hard to a find a long term successful tenant" for the Property; and
    - The Building's configuration would also prohibit the conversion of the Property to residential use (the main matter-of-right use in the R-20 zone) given that market rent for a residential tenant is significantly lower than for a commercial tenant.

The Revised Application

Corner Store Requirements

23. The Revised Application asserted that the proposed use of the Property meets all of the requirements for a corner store use as specified in Subtitle U § 254 except for Subtitle U § 254.6(g)'s 750 Foot Rule.

Area Variance Relief

24. The Revised Application asserted that the Property is affected by a confluence of factors, including:
    - Its proximity (550 feet) to a small MU-3 zoned area when the Property and majority of surrounding area is zoned R-20;
    - Its configuration for, and long history as, a commercial use; and
    - That it is only one of three corner properties in the area used for commercial purposes.

25. The Revised Application asserted that these unique conditions resulted in practical difficulties for the Owner because:
    - A corner store use would be permitted as a matter of right except for its proximity to the small MU-3 zoned area;

- The Building's small size and existing configuration for commercial use would make it difficult for the Owner to convert to an entirely residential use, the only other matter-of-right use authorized the R-20 zone; and
- The restrictions of the Property and the underlying zone district would render it difficult for the Owner to find another tenant for the space.

26. The Application also provided details about the operations of the proposed bagel shop to demonstrate that approval of the Application would not result in any significant detriment to the public good, including the following:
    - Changes to CYM's menu and point of sale system to allow more expeditious processing of orders, thereby reducing the lines and wait times outside the shop;
    - Limited hours of operation (7 A.M. to 3 P.M.);
    - An agreement not to partner with third party delivery services;
    - An agreement not to permit outdoor music; and
    - Commitments to daily trash collection and weekly pest control.

Response to Opponent's Motion for Continuance

27. The Applicant's Response to the Opponent's Motion for Continuance (FF 47) opposed the request for a continuance of the January 15, 2020, limited scope public hearing because:
    - The Board had provided several weeks for the Party Opponent to provide additional responses after her testimony at the December 11, 2019, continued public hearing, more time than is typically afforded to party opponents;
    - The Party Opponent had already provided oral testimony and submitted numerous filings to the record prior to her being granted party status;
    - The Party Opponent had been able to seek legal representation from the beginning of the Application process and had acknowledged that she teaches at a law school and as such, understands legal analysis and argument; and
    - A further extension of the proceedings would only serve to prejudice the Applicant's case.

Response to Party Opponent

28. The Applicant's Response to the Party Opponent reiterated its justification for the requested area variance, noted that it was seeking relatively minimal relief, and rebutted several claims raised by the Opposition Statement (FF 48), including:
    - Confirming that the Owner had properly authorized CYM to represent its interests before the Board in the matter of the Application (Ex. 152A);
    - Confirming that the Application had self-certified the requested relief, and that the determination of whether any additional zoning relief would be required would be made by the Zoning Administrator in reviewing a building permit application; and
    - Rebutting the Party Opponent's assertion that the Application failed to satisfy the use variance test as it is not applicable to the Application's revised relief request for an area variance, for which the Applicant only had to demonstrate "practical difficulty", not the more stringent "undue hardship" required for a use variance (as had been

originally requested).

January 15, 2020, Public Hearing Testimony

29. In response to the Party Opponent, the Applicant testified at the January 15, 2020, continued public hearing that it had self-certified the Application and requested all relief it believed was required for the proposed use under the Zoning Regulations. The Applicant rebutted the Party Opponent's argument that only grocery stores are permitted as a corner store and then only by special exception under Subtitle U § 254.14 because the Applicant asserted that this special exception applies only to corner stores that are fresh market or grocery stores that are unable to meet the additional requirements of Subtitle U § 254.13 whereas the Application falls under the matter-of-right corner store use of Subtitle U § 254. The Applicant noted that the Party Opponent's interpretation was based on language from the Zoning Handbook, not the legal text of the Zoning Regulations. (Public Hearing Transcript of January 15, 2020 ["**Jan. 15 Tr.**"] at 45-46.)

30. The Applicant noted that it did so at its own risk because *"*[i]f the proposal otherwise fails to meet the Corner Store requirements of the Zoning Regulations, that will ultimately be for the Zoning Administrator to determine" as part of the zoning compliance review of any building permit application based on the Application if approved by the Board. The Applicant asserted that the Board itself has held, in BZA Application No. 18263-B, that when it considers a self-certified application, it is solely concerned with whether the Applicant has met its burden for the requested relief and does not consider potential additional relief that the Zoning Administrator might subsequently determine is needed. (Jan. 15 Tr. at 44-45, 49; Ex. 152B.)

III. RESPONSES TO THE APPLICATION (INITIAL AND REVISED)

OP REPORTS AND TESTIMONY

31. OP submitted three reports reviewing the Application:
    - An October 18, 2019, report recommending approval of the initially requested use variance relief with one condition (Ex. 39);
    - A November 27, 2019, supplemental report providing additional analysis and continuing to recommend approval of the initially requested use variance (Ex. 117); and
    - A December 9, 2019, third report (Ex. 126, the "**Third OP Report**") reviewing the Revised Application and responding to the Board's request at the December 4, 2019, continued public hearing for OP to review the corner store regulations of Subtitle U § 254 to determine if the proposed use might instead qualify as a corner store and so would require less relief than the use variance initially requested by the Application.

The Third OP Report

32. The Third OP Report concluded that the Revised Application had met the area variance test as stated below and therefore recommended approval of the Application as revised.
    - ***Extraordinary Condition Resulting in a Practical Difficulty***
        - The Building was originally constructed as a corner store in a residential zone and has been in constant use as such since its construction.

- "The lower levels have always functioned as commercial spaces and were originally built for a grocery store. Years later the grocery store was replaced with a health store, which was later replaced with a flower/gift shop – all uses that are also consistent with the corner store provisions."
- Because the Building was constructed as a corner store, and has been used continuously as such, the lower levels "have a commercial space configuration and layout. This includes the building's corner entrance and large display store windows."

- ***No Substantial Detriment to the Public Good***
  - The Revised Application did not propose any exterior changes to the Building that would impact its appearance or the historic character of the surrounding neighborhood.
  - The Applicant's proposed operational measures taken to expedite ordering and preparation would reduce wait times and lines outside the store. The Applicant had also demonstrated that a line could be accommodated outside the shop in such a way as to "prevent potential conflicts with pedestrians".
  - The Applicant would also not provide seating, and customers would not be encouraged to stand in front of the Building after receiving their orders.
  - The Applicant had agreed to provide daily trash collection, weekly pest control, and to limit its hours of operation as proposed by OP.

- ***No Substantial Impairment of the Zone Plan***
  - Granting the variance to locate a corner store less than 750 feet from the MU-3 zone would not harm the intent of the regulations which had been "to minimize potential impacts that a corner store commercial use could have on *commercial corridors"* and "[a]lthough the site is less than 750 feet from the MU-3A zoned area, it is well in excess of 750 feet from the main M Street and Wisconsin Avenue commercial corridors."
  - The specific use of the corner store as a bagel shop "is consistent with the use permissions for a corner store, which include eating and drinking establishments (U § 254.2), including food assembly and reheating (U § 254.8)."
  - The Applicant had sufficiently demonstrated that it would meet all of the other requirements for a corner store by providing details of its proposed operations including storage, signage, trash collection, number of employees, and hours of operation.

December 11, 2019 Continued Public Hearing Testimony

33. At the December 11, 2019, continued public hearing, OP testified in support of the Revised Application, noting that "the building's history and physical configuration makes it a corner store which is a matter of right use according to the Applicant." (Dec. 11 Tr. at 116.)

34. With regards to the practical difficulty faced by the Property Owner, OP testified that "as a matter of right use, the practical difficulty would be that the Applicant should be allowed

to do a matter of right use in a matter of right building or in a building that is—that would allow for a matter of right use." (Dec. 11 Tr. at 116.)

35. OP reiterated that the use of the Building has always been commercial, and as such OP did not feel that the corner store "would be disturbing the character of the street." (Dec. 11 Tr. at 118.)

36. In response to questions from the Party Opponent, OP stated that because the revised relief requested an area variance from a location condition for a matter of right use, OP only analyzed the Property's physical characteristics as regards the 750 Foot Rule from which relief was sought. Since the Application did not seek relief from the other requirements of Subtitle U § 254 for a matter of right corner store use, OP had not analyzed the Property's compliance with those requirements. Since the corner store use "is a matter of right use" and the requested relief is from a location condition, OP had not analyzed the intensity of that use compared to the prior retail use. (Dec. 11 Tr. at 120-121.)

37. OP also noted that while there were other mixed use and commercial properties in the surrounding area, including Saxby's Coffee across the street, OP did not "believe that any of them are defined as corner stores, at least according to the way the Regulations determine them to be." (Dec. 11 Tr. at 122, 124.)

January 15, 2020 Continued Public Hearing Testimony

38. At the January 15, 2020 continued public hearing, OP again testified in support of the Revised Application, noting that
    - the Revised Application was self-certified;
    - OP supported the Revised Application's requested area variance relief; and
    - OP accepted the Revised Application's assertion that the corner store use was matter of right in the R-20 zone and had not analyzed relief not requested. (Jan. 15 Tr. at 47-48.)

DDOT REPORT

39. DDOT submitted an October 16, 2019, report (Ex. 37, the "**DDOT Report**") that recommended no objection to the Application based on DDOT's conclusion that approval of the Application would potentially result in only minor increases to vehicle, transit, pedestrian, bicycle trips on the localized transportation network, as well as a slight reduction in the availability of on-street parking.

ANC REPORTS

40. In addition to its testimony at the continued public hearing, ANC 2E made a total of three submissions to the record:
    - A resolution stating that at its regularly scheduled, properly noticed public meeting on October 2, 2019, at which a quorum was present, the ANC voted to support the Application's initial request for a use variance (Ex. 38, the "**First ANC Report**"). The First ANC Report did not raise any issues or concerns with the Application;

- A correction to the First ANC Report noting that Commissioner Lisa Palmer was the ANC's designated representative (Ex. 114); and
- A resolution stating that at its regularly scheduled, properly noticed public meeting on January 7, 2020, at which a quorum was present, the ANC voted to support the Application's revised request for an area variance from the 750 Foot Rule of Subtitle U § 254.6(g) for corner stores (Ex. 151, the "**Second ANC Report**").

41. The Second ANC Report expressed the ANC's concern with upholding the integrity of the Zoning Regulations and particularly the intent of 750 Foot Rule but determined that 750 Foot Rule was not intended to apply to the Property because:
    - The 750 Foot Rule was created to focus commercial uses in the main Georgetown commercial corridors and "prevent commercial areas on M Street and Wisconsin Avenue NW from creeping into nearby residential areas";
    - The small MU-3A zoned area was a "small outlier of a zone section comprising only a half-block of property, completely removed from M Street and Wisconsin Avenue NW" and as such, was not the basis for the intent of the 750 Foot Rule; and
    - Exceptions to the 750 Foot Rule were always contemplated as possible, provided the other corner store requirements of Subtitle U § 254 were met, which the ANC believed the Application had demonstrated.

    The Second ANC Report therefore recommended approval of the Application's requested area variance relief from the 750 Foot Rule.

42. The Second ANC Report noted that CYM had been in discussion with the surrounding neighbors regarding the quality of life issues connected to the proposed use and that the ANC supported these discussions and believed that ongoing discussions would allow the proposed use to be integrated smoothly with the surrounding area.

43. Commissioner Lisa Palmer testified at the December 4, 2019, continued public hearing in support of the Application for the initially requested use variance, stating that:
    - The ANC had concluded that the Applicant had demonstrated that the operations of the proposed bagel shop would not result in any substantial detriment to the public good;
    - The ANC had determined that the queuing diagrams presented by the Applicant demonstrated that patrons of the shop would be able to queue on the sidewalk without disrupting use of the sidewalk or neighboring properties; and
    - the Applicant had expressed its willingness to work with the surrounding community to ensure that the Property was clear of litter.

    (Public Hearing Transcript of December 4, 2019 ["**Dec. 4 Tr**."] at 67-71.)

PARTY IN OPPOSITION

44. In addition to her public testimony at the October 30, 2019; December 11, 2019; and January 15, 2020 public hearings, the Party Opponent filed a total of six submissions to the record:
    - An initial October 15, 2019, request for party status (Ex. 36, the "**Party Status Request**");

- An October 30, 2019, letter reiterating the concerns raised in the Party Status Request that the proposed bagel shop would result in crowds of patrons "from all over DC and beyond" who would disrupt the surrounding neighborhood. The Party Opponent further contended that CYM had "no fundamental right to open this restaurant at this location." (Ex. 81);
- A December 4, 2019, letter submitted prior to the second hearing, stating the Party Opponent's belief that the Applicant had not met its burden under the variance test for the original use variance and had not fully responded to the Board's questions and requests from the first hearing. The Party Opponent also argued that the Applicant should simply be required to open as a retail establishment under the existing variance (Ex. 119);
- A letter submitted on December 10, 2019, objecting to the Board's denial of the Party Opponent's party status request (Ex. 127);
- Following the Board's granting her party status, a December 19, 2019, motion for continuance to postpone the January 15, 2020, session of the public hearing (the "**Motion for Continuance**", Ex. 138); and
- A January 7, 2020, statement in support of The Party Opponent's December 11, 2019, oral testimony (the "**Opposition Statement**", Ex. 142).

Party Status Request

45. The Party Status Request stated that the Party Opponent believed that her property and the surrounding neighborhood would be adversely affected by the Board's approval of the proposed bagel shop due to large crowds waiting on the sidewalk outside the Building, noise, trash, litter, rodents, and increased demand for parking. The Party Status Request acknowledged that the Property had been used previously for commercial uses but asserted that the Application would result in a much more intense use than what had been there previously.

December 11, 2019, Continued Public Hearing

46. The Party Opponent participated as a party at the December 11, 2019 continued hearing, and raised the following issues:
    - The Party Opponent questioned whether CYM could properly be considered the "applicant" in the case since the variance test considers impacts on a property owner (Dec. 11 Tr. at 98 and 114);
    - The Party Opponent questioned the Applicant about the feasibility of converting the space to a residential use based on conversions of similar corner properties in the surrounding area (Dec. 11 Tr. at 98-100);
    - The Party Opponent argued that the Applicant had failed to meet its burden under the first two prongs of the variance test, particularly to demonstrate the second prong's practical difficulties, because the Applicant was able to open a bagel shop, albeit only as a retail use, under the Property's existing use variance (Dec. 11 Tr. at 103);
    - One of the Party Opponent's witnesses, Mr. Savage, raised concerns that the Application did not meet the other locational requirements for corner stores, specifically Subtitle U § 254.6(b), which requires corner stores to not be located within 500 feet of another corner store used and defined as an eating and drinking

establishment because Saxby's Coffee is located on opposite corner from the Property (Dec. 11 Tr. at 105);

- Mr. Savage responded to the Applicant's reference to the ANC's support by noting that the ANC had voted in support of the inclusion of the 750 Foot Rule when it was under review in 2015 (Dec. 11 Tr. at 106); and
- The Party Opponent and Mr. Savage both raised concerns that approval of the Application would result in a "dangerous precedent" by allowing commercial uses in a residential zone. (Dec. 11 Tr. at 111-112.)

Motion for Continuance

47. The Party Opponent's Motion for Continuance cited the need for more time to prepare her response to the Applicant's testimony and filings and to potentially obtain counsel.

Opposition Statement

48. As a preliminary matter, the Opposition Statement contended that the Board's award of party status only at the December 11, 2019, continued public hearing and not earlier materially prejudiced the Party Opponent's case by not allowing her time to obtain counsel.

49. The Opposition Statement alleged the following substantive issues with the Application:
    - CYM could not properly be considered as the Applicant in the case, because it was a lessee of the Property and not the owner, and that the Owner had not properly authorized CYM to represent its interests before the Board. The Party Opponent argued that this created confusion as to which entity bore the burden of proof to justify the variance;
    - The Application misinterpreted the Zoning Regulations for a corner store, which the Party Opponent asserted was not a matter-of-right use;
    - The Application had not demonstrated compliance with the corner store regulations of Subtitle U § 254; and
    - The Application did not meet any of the prongs of the variance test required to obtain relief from the 750 Foot Rule requirement of Subtitle U § 254.6(g).

50. With specific regard to the Application's compliance with the variance test, the Opposition Statement asserted the following:
    - *The Application had not demonstrated that the Property was affected by an exceptional condition.*
        - The Building's physical features including the large shop windows, corner door opening, and basement walk-in cooler did not constitute an exceptional condition because the Applicant had not provided any cost estimates for conversions and was "merely speculating" that the cost would be prohibitive.
        - The Applicant had only considered the possibility of conversion to residential use, and not conversion to a retail food establishment without on-site food preparation as is permitted under the existing use variance, and under which CYM could operate but at a reduced capacity.

- The location of the Property is not "unique" based on its location relative to the MU-3 zone because "any factor relating to the location to the MU-3 zone would affect any other property nearby in the R-20 Zone" and "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). Further, "The granting of a variance where the circumstances do uniquely affect the petitioner's property could lead to similar requests by other property owners … Approval of such requests would be tantamount to an amendment of the zoning map or regulations …" *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 234 (1973).
- The Property's history of commercial use is not an exceptional condition because the court has held that "the proposed use of a property is not a sufficient basis for determining the presence of exceptional conditions," *Metropole*, 141 A.3d at 1083, and "the use or prior use of a particular property […] is inapplicable to the first condition that the property itself be unique." *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 540 (1972).[3]

- *The Application has not demonstrated that it will suffer a practical difficulty if required to comply with the Zoning Regulations.*
  - The Opposition Statement noted that the practical difficulties needed to affect the Owner and not the tenant, and as such any practical difficulties suffered by CYM were not the appropriate basis for the variance test. The Opposition Statement asserted that the Application had failed to show how the Owner would suffer practical difficulties.
  - The Applicant's arguments related to financial hardship were not sufficient because the Board "simply has no authority to grant a variance in order to assure the petitioner a profit." *Taylor,* 308 A.2d at 236.
  - The Applicant's arguments that converting the Building to residential use are not sufficient because the Building could continue as a retail use under the existing variance.
  - The Applicant has not demonstrated that it was unable to find an alternative tenant to CYM, or otherwise been unable to rent or sell the Building. The Opposition Statement noted that CYM's representative had in fact testified that he was aware of significant interest in the Building from other businesses which had contacted him directly.

- *The Application has not demonstrated that it would not result in substantial detriments to the public good or the zone plan.*
  - The Opposition Statement noted that the Applicant had not provided sufficient details as to how it planned to mitigate the adverse impacts of the proposed use including fire and safety hazards, noise, odors, traffic, and parking. In support of

[3] The Board notes that this quotation is not *Palmer*, but *Capitol Hill Restoration Soc'y, Inc. v. D.C. Bd. of Zoning Adjustment,* 398 A.2d 13, 16 (D.C. 1979) and includes the ellipsis added above.

this final point the Opposition Statement referenced parking violations incurred by CYM's contractor's during construction.

- The Opposition Statement asserted that ANC Commissioner Palmer's testimony, given at the December 4, 2019 continued public hearing concerning CYM's operations at its current location, could not be accorded great weight because it has not met the requirements of Subtitle Y § 406.4 to be accompanied by written documentation from the ANC supporting the testimony.
- The Opposition statement noted that the BZA must "grant only the amount of relief needed to alleviate the difficulty proved" (§ 2120.6 of the 1958 Zoning Regulations) and that "no variance is required to allow CYM to open -- and the BZA by law is required to grant the 'lowest' available relief."

51. The Opposition Statement also asserted that approval of the Application would set a precedent that would jeopardize the integrity of both the commercially and residentially zoned areas of Georgetown.

January 15, 2020, Continued Public Hearing

52. The Party Opponent participated as a party at the continued, limited scope public hearing of January 15, 2020, asserting that:
    - She had been unable to fully participate in the first two portions of the public hearing that the Board held on the initially requested use variance relief;
    - The only permissible matter-of-right corner store use in the R-20 zone is a grocery store pursuant to Subtitle U § 254.13, and all other uses would require a special exception pursuant to Subtitle U § 254.14;
    - The Application needed waivers from the locational provisions of Subtitle U § 254.6(c) and the prohibition against on-site cooking of Subtitle U § 254.8 (Jan. 15 Tr. at 25-2) and that the Board could only waive the locational requirements of Subtitle U § 254.6(c) if the Applicant demonstrated that the proposed use would 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" nor result in undue impacts on residents of the area. (Subtitle U § 254.15; Jan 15. Tr. at 27);
    - Substantial evidence in the record demonstrated that the proposed use would not only result in adverse impacts on the surrounding residential properties but would also negatively impact the MU zone within 750 feet as well as the main Georgetown commercial corridors; and
    - Approval of the Application would be precedent setting and would result in more commercial uses in residentially zoned areas. (Jan. 15 Tr. at 28-30.)

53. With regard to the variance test, the Party Opponent reiterated the arguments advanced in the Opposition Statement that:
    - The Applicant's argument that the Property was unique due to its location relative to the MU zone was also not sufficient because it would mean that "all of the properties," including her own, would be similarly affected;
    - The Application failed to demonstrate that the Property was affected by a unique condition because, per the holding in *Palmer* [*sic*], "the use or prior use of a particular

property is inapplicable to the first condition that the property itself be unique." As such the Applicant's arguments regarding the historic use of the property were irrelevant because "just because it's always been commercial doesn't make it unique. It makes it that it has always been commercial." (Jan. 15 Tr. at 31); and

- The Application failed to demonstrate that the Owner would suffer from practical difficulties if CYM was unable to open the proposed bagel shop at the Property because the Owner's Statement's assertion that it would be difficult to find a suitable alternate tenant did not include supporting evidence of the Owner's attempts to find another tenant for the Property. (Jan. 15 Tr. at 31-32, 34.)

PERSONS IN SUPPORT

54. The Board received letters and heard testimony from persons in support of the application, including members of the surrounding community and members of CYM's staff. The community members in support generally cited to the need for more commercial uses in Georgetown. The CYM staff testified in their individual capacities, and not on behalf of the Applicant, as to the operations of the proposed bagel shop, including measures to minimize potential adverse impacts to the surrounding neighborhood, as well as the company's local ties and commitment to the community.

55. Mr. Christopher Matthews testified at the December 11, 2019 continued public hearing based on his participation in the Citizens Association of Georgetown ("**CAG**") zoning subcommittee that worked with OP in creating the corner store regulations of Subtitle U § 254. Mr. Matthews testified that:

- The intent of the 750 Foot Rule had been to prevent "bleeding commercial activity from M and Wisconsin into the neighborhood";
- The intent of the 750 Foot Rule was not to prevent the ongoing commercial use of historically commercial corner store buildings like the Building; and
- The MU-3A zoned area was an anomaly not anticipated in the creation of the 750 Foot Rule because it was one of the last remaining remnants of an old commercially zoned stretch of west Georgetown.

(Dec. 11 Tr. at 134-137.)

56. In response to questions from the Party Opponent about his involvement in the CAG's support of the 750 Foot Rule, Mr. Matthews explained that based on the discussions between CAG and OP earlier in the process he had believed the 750 Foot Rule only applied to Wisconsin Avenue and M Street, N.W. and not to the small MU-3 area at issue, and that his vote in support was for the larger package of residential zoning changes that included the 750 Foot Rule. (Dec. 11 Tr. at 136-137.)

PERSONS IN OPPOSITION

57. The Board also received letters and heard testimony at the October 30, 2019; December 11, 2019; and January 15, 2020, public hearings from persons in opposition to the application. The persons in opposition commented unfavorably on the Applicant's proposed use of the Property and cited to potential adverse impacts of the operation of the proposed bagel shop including excessive crowds, increased pedestrian and vehicular

traffic, reduced parking availability, trash and rodent issues, and noise.

58. D.C. Council Member Jack Evans, Council Member for Ward 2, submitted a letter opposing the Application asserting that the proposed bagel shop would be a more intense use than previous commercial uses of the Property that would result in adverse impacts on the surrounding residential area. (Ex. 40.)

59. Although ANC 2E voted to support the Application, the ANC Single Member Commissioner for the Property, Rick Murphy, submitted a letter in opposition to the Application's initial request for a use variance. Commissioner Murphy cited the need to preserve the "quiet residential character" of the R-20 zone, and expressed his concerns about the amount of traffic, noise and trash that the proposed bagel shop would generate. (Ex. 41.)

CONCLUSIONS OF LAW

PARTY STATUS DECISION

1. At the January 15, 2020 continued public hearing, the Board denied the Party Opponent's Motion for Continuance to further postpone the continued public hearing because the Party Opponent had been provided with numerous opportunities to testify and respond to the Application, both as a non-party and party. (Jan. 15 Tr. at 11-12.) The Board notes that the Party Opponent had ample opportunity to obtain counsel during the nine weeks between the deadline for filing the party status request and the date of the Motion for Continuance and that the Party Opponent had the opportunity to fully participate as a party in the continued public hearing at which the revised relief was presented and was considered.

VARIANCE RELIEF

2. Section 8 of the Zoning Act of 1938 (D.C. Official Code § 6-641.07(g)(3) (2018 Repl.); see also Subtitle X § 1000.1) authorizes the Board to grant variances from the requirements of the Zoning Regulations where:
   i. "*by reason of exceptional narrowness, shallowness, or shape of a specific piece of property … or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property,*
   ii. *the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property," and granting the requested variance would not cause*
   iii. *substantial detriment to the public good or*
   iv. *substantial impairment to the intent, purpose, and integrity of the Zone plan as embodied in the Zoning Regulations and Map.*"

AREA VARIANCE

3. Subtitle X § 1001 distinguishes between use and area variances,[4] with use variances limited to three specific categories:
   - Uses not permitted as a matter of right or by a special exception;
   - Uses expressly prohibited; or
   - A prohibited expansion of a nonconforming use. (Subtitle X § 1001.4.)

4. The area variance category is instead "open ended" and broadly encompasses deviations from requirements "that affect[s] the size, location, and placement of buildings and other structures …" and those that are a "precondition to a matter of right use" amongst other examples. (Subtitle X § 1001.3(a) and (f); *NRG, LLC v. D.C. Bd. Of Zoning Adjustment*, 195 A.3d 35, 61 (D.C. 2018).)

5. An applicant for an area variance must prove that an extraordinary condition of the property would result in "peculiar and exceptional practical difficulties" by demonstrating first that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. (*Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990); Subtitle X § 1002.1(a).)

6. "[B]ecause of the nature of the respective types of variances and their effects on the zone plan the higher 'undue hardship' standard applies to requests for use variances while the lower 'practical difficulty' standard applies to area variances." (*Gilmartin*, 579 A.2d at 1170.)

7. The Board concludes that the Application's request for relief from Subtitle U § 254.6(g)'s 750 Foot Rule properly qualifies as an area variance because it falls within two examples of area variances described by Subtitle X § 1001.3 as a deviation from:
   - A "precondition to a matter of right use" and
   - A requirement "that affect[s] the size, **location**, and placement of buildings and other structures …"

   (Subtitle X § 1001.3(a) and (f) (emphasis added).) Further, the Application did not request relief under any of the three specific types of use variances defined in Subtitle X § 1001.4. (*See also Monaco v. D.C. Bd. of Zoning Adjustment*, 409 A.2d 1067, 1072 (D.C. 1979) ("We cannot say that the BZA improperly characterized this change as an area variance simply because it facilitated a change of use accomplished, fundamentally, by special exception").)

[4] The Zoning Commission adopted definitions of use and area variances into the Zoning Regulations in 2013 in Z.C. Case No. 12-11; prior to that time these categories had been defined by case law. OP's setdown report for Z.C. Case No. 12-11 stated that "use variance treatment is only appropriate when an applicant seeks to establish a use that is not permitted at all within a zone district, as opposed to a use that is permitted, but restricted or conditioned in some way." (Z.C. Case No. 12-11, Ex. 1 at 14.)

Area Variances from Corner Store Location Requirements

8. "The 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) requested; and 3) the effect the proposed variance(s) would have on the zone plan." (*Gilmartin*, 579 A.2d at 1171.)

Extraordinary or Exceptional Situation

9. "The extraordinary or exceptional conditions affecting a property can arise from **a confluence of factors**; however, the critical requirement is that the extraordinary or exceptional condition must affect a single property." (*Metropole*, 141 A.3d at 1082-83 (emphasis added).)

10. "[E]xisting structures are as important as topography in creating 'other extraordinary or exceptional situation or condition of a specific piece of property.'" (*Monaco*, 409 A.2d at 1099 (internal citations omitted).)

11. The Board concludes that the Property is affected by an exceptional situation and condition resulting from a confluence of factors, including that:
    - The Property is a corner lot;
    - The Property is smaller than most of the lots in the surrounding area;
    - The Building was constructed for the express purpose of being used as a corner store, and has been used as such continuously since the time of its construction in the 19th century;
    - The Property is one of only three corner commercial properties in a primarily residential area;
    - The Property is an existing corner commercial property that is located less than 750 feet from a half-block area zoned MU-3A;
    - This MU-3A zoned area is a small, outlier zone in an area that is otherwise uniformly zoned R-20; and
    - The Property was already used for a commercial use at the time this half-block was zoned MU-3A.

12. The Board notes that the Property, as a corner lot, differs from the vast majority of properties surrounding it; and its small size, as shown on the Zoning Map, further distinguishes it from the surrounding lots. The Board therefore does not find persuasive the Party Opponent's argument that the Property is not "uniquely affected" because other properties, including the Party Opponent's, are also within 750 feet of the MU zone, and so granting the Application's requested area variance would lead to an effective rezoning of the nearby properties in the R-20 zone. (FF 50.)

13. The Board concludes that the Property's historical commercial use, which was legally sanctioned by the use variance previously granted by the Board, constitutes "unique historical circumstances" that constitutes an extraordinary circumstance analogous to that previously upheld by the Court of Appeals. (*Monaco*, 407 A.2d at 1091.) The Board is not persuaded by the Party Opponent's citation to *Palmer* [actually *Capitol Hill*, 398 A.2d

13] that prior use cannot be an exceptional condition because the *Monaco* Court narrowed the *Capitol Hill* holding, stating:

> [t]hough we recently rejected the possibility that unique circumstances could refer to the personal misfortunes of the applicant or to the previous use of the property, in that case [*Capitol Hill*] the subject site was a row house of design, size, and acreage similar to others in the neighborhood … [and] the history … was merely the previous **illegal** use made of the property made by the owner. (*Monaco*, 407 A.2d at 1097 (internal citation omitted) (emphasis added).)

Just as the *Monaco* Court upheld the Board's grant of a variance based partly on the unique historical circumstances of the property constituting an exceptional circumstance, so in this case the Board concludes that the unique historical and legal commercial use of the Building that had built for that purpose constitutes one of several factors that flow together to create the exceptional circumstances required for variance relief. (*See French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (1995) (upholding Board's finding that "exceptional circumstances existed, given the site's 'irregular shape, steeply sloping grade, the large size and physical configuration of the existing building, and its previous history of chancery use.").)

14. As has been held by the Court, the Board may grant area variances in cases where the Applicant chose the property with the knowledge that variance relief would be needed, as self-created hardship is only a bar to a use variance. (*NRG*, 195 A.3d at 56-57, 60; *See also, Gilmartin*, 579 A.2d at 1171 ("[P]rior knowledge or self-imposition of the difficulty did not bar granting an area variance. Rather, that fact was but one of many factors that BZA might consider in reaching its decision."); *Ass'n for Preservation of 1700 Block of N Street NW v. D.C. Bd. of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978)("self-created hardship is not a factor to be considered in an application for an area variance, … as that factor applies only to a use variance.").)

15. The Board notes that because of the Property's unique circumstances as a corner lot of unusually small size on which the Building was purpose-built for commercial use and consistently used as such in a legal fashion, there are very few, if any, similar properties and so granting the requested area variance would not effectively rezone the R-20 zone surrounding the Property. The Board therefore is not persuaded by the Party Opponent's citation to *Taylor*, 308 A.2 at 230 ("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 is without power to do this directly or indirectly.")

Practical Difficulties

16. "[T]o 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." (*NRG*, 195 A.3d at 56-57; *Gilmartin*, 579 A.2d 1170-71.)

17. The Board concludes that strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to the Owner by preventing its use of the Building as a corner store, as is otherwise a matter-of-right use in the R-20 zone, because the Building was purpose-built for as a corner store, has been continuously used for commercial purposes, and is configured for commercial uses. This past building configuration and use renders it peculiar in the surrounding residential neighborhood. (S*ee Capitol Hill*, 398 A.2d at 16) ("the use or prior use of a particular property may have some bearing on [the] 'practical difficulties' … determination[] of the second statutory requirement" for a variance.).)

18. The Board concludes that the Applicant has demonstrated that it would suffer economic practical difficulties without the area variance because:
    - Traditional retail establishments are struggling to survive even on the main Georgetown commercial corridors of Wisconsin Avenue and M Street, N.W., leading the Board to conclude that it would likely be difficult for a small retail space to survive when significantly removed from these areas;
    - The Board credits the Owner's Statement that businesses providing food and unique customer experiences present a better long-term economic option than traditional retail; and
    - The Board also finds that the "as-built" condition of the property, particularly the built-in walk-in cooler, limits the Owner's ability to convert the Property to residential use, or even to a broader spectrum of retail uses. This effectively limits the building to a food-based use, or to a florist as was there previously, and in turn further limits the Owner's pool of potential tenants.

    The Board therefore concludes that the Owner would face a practical difficulty in trying to find an alternate retail tenant that would be viable in the space.

19. Beyond the impacts on the ability to secure an economically viable tenant, the Board also concludes that a conversion to either another form of retail or to residential use would be "unnecessarily burdensome" on the Owner, because a corner store, including one operating as a prepared food shop, is a matter-of-right use in the R-20 zone and the 750 Foot Rule is intended to protect the main commercial corridors, which OP and the ANC concluded would not be affected by the requested area variance. (*See NRG*, 195 A.3d at 56.) The Board therefore is not persuaded by the argument of the Party Opponent and persons in opposition that the Owner failed to prove "practical difficulties" because the Property could continue with a commercial retail use as a "matter of right" under the existing use variance.

20. The Board notes that the Court of Appeals has recognized that:
    - "[i]ncreased expense and inconvenience to applicants for a variance are among the

proper factors for [the Board's] consideration,"

- "prior knowledge or self-imposition of the [practical] difficulty did not bar granting an area variance,"
- "at some point economic harm becomes sufficient [for a variance], at least when coupled with a significant limitation on the utility of the structure," and
- "[w]e have never held that proof of economic burden is irrelevant to the decision whether to grant an area variance."

(*Gilmartin*, 579 A.2d at 1169, 1171; *Tyler v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362, 1366-67 (1992)) The Board is therefore not persuaded by Party Opponent's arguments that the Board is unable to consider economic burdens when evaluating the second prong of the variance test. The Board notes that the Party Opponent's argument relies on the Court's statement in *Palmer* that "it is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if not put to another use, will yield a greater return." (*Palmer*, 287 A.2d at 542.) However, the Board notes that the Court of Appeals subsequently stated that *Palmer* "merely set forth a general standard … leaving specific questions regarding the nature and extent of burden to a cases-by-case analysis …. Although this statement was within the section of the [*Palmer*] opinion discussing area variances, it appears that it refers to the particular use of a property and thus the economic discussion is more appropriately confined to use variances". (*Gilmartin,* 579 A.2d at 1170.)

21. The Board is not persuaded by the Party Opponent's arguments that CYM's representative's testimony regarding interest in the Property is sufficient to disprove the foregoing. The Board notes that the Party Opponent herself commented on the "well documented vacancy rate and empty storefronts in the main commercial corridor of M/Wisconsin Streets." (Ex. 142 at 7.) The Board credits the Owner's Statement that given the limitations of the Property and the difficulties facing traditional retail establishments, that it would be difficult to find an economically viable alternate tenant, and notes that although some interest has been expressed in the Building, that may not necessarily constitute viable tenants.

22. The Board concludes that the Owner has provided sufficient evidence of both the difficulty of finding an economically viable tenant due to the broader economic conditions and specific physical attributes of the Property, as well as the difficulty and expense in converting the Property to alternate retail or residential use. The Board does not find persuasive the Party Opponent's assertion that the Owner's Statement provided insufficient evidence of the practical difficulties the Owner would face without the requested area variance. The Board found the Owner's Statement credible, and credits OP's corroborating conclusion that the practical difficulties justified the approval of the area variance request. The Court of Appeals has upheld the Board's approval of area variances without requiring

> evidence supporting [the applicant's] claim that compliance with the zoning regulations was 'not feasible,' such as the purchase price, financial projections, comparative financial scenarios, or costs from development alternatives.… **The mere fact that petitioners presented contrary**

> **evidence … is immaterial**. As the trier of fact, the Board may credit the evidence upon which it relies to the detriment of conflicting evidence, and need not explain why it favored the evidence on one side over that of the other. … Petitioner perhaps misconceives the variance process to require [the applicant] to defend every economic aspect of its proposed development design as a *sine qua non* to variance approval. **We discern no such absolute obligation** in this case from D.C. Code § 6-641.07(g)(3).

(*Fleischman*, 27 A.3d at 561-62, 563 (internal quotation and citation omitted) (emphases added); *see also Monaco*, 409 A.2d at 1072 ("BZA found that [Applicant] has shown "practical difficulties" by demonstrating that " the building is not readily adaptable to residential use.") and *St. Mary's Episcopal Church v. District of Columbia Zoning Commission*, 174 A.3d 260, 270 (2017).)

No Substantial Detriment to the Public Good

23. "Any concern that some area variances might "drastically" alter the character of the zoned district is addressed by the requirement that an applicant for a variance of any type must bear the burden of demonstrating that the variance will cause no substantial detriment to the public good and will not substantially impair the intent, purpose, and integrity of the zone plan." (*NRG,* 195 A.3d at 62.)

24. The Board concludes that the scope and scale of the proposed corner store utilizing the area variance from the 750 Foot Rule will be limited and will not negatively impact the economic viability or vitality of either the MU-3A zoned area or the commercial corridors of Wisconsin Avenue and M Street, N.W. which are what the Board finds the 750 Foot Rule was truly intended to protect. The Board notes that the Applicant will only be offering a limited range of products and has agreed to limit their hours of operation. The Board credits the reports and testimony of OP and the ANC that the area variance from the 750 Foot Rule would not result in any substantial undue impacts on the commercial uses in nearby commercial corridors. The Board credits the statements in the ANC Report, as further supported by the testimony of Mr. Matthews, that the 750 Foot Rule was intended to protect the businesses located along the main commercial corridors of Wisconsin Avenue and M Street, N.W., not isolated pockets of commercial or mixed-use zone property, and that it was always expected that there would be exceptions for specific corner store uses. (FF 56.) The Board is therefore not persuaded by the Party Opponent's arguments that the corner store use would unduly impact existing businesses in the MU-3A zone, because the Board notes that the Property has been operating as a commercial use less than 750 feet from the MU-3A zone for years and that the Party Opponent did not present sufficient supporting evidence to convince the Board that specific businesses in the MU-3A zone would be impacted by the granting of the area variance.

25. The Board concludes that approval of the requested variance relief will not result in substantial detriment to the immediately surrounding properties because:
    - The Property has historically been used for commercial uses;
    - The corner store use is permitted as a matter of right;
    - The corner store regulations limit the operations to the preparation and toasting of

sandwiches and prohibit a full kitchen;

- The Applicant has proposed operational limitations, including measures proposed to expedite the ordering and service process, as depicted in the Applicant's queuing diagrams;
- The Applicant has accepted conditions to this Order that limit and mitigate potential adverse impacts on the surrounding neighborhood, including limits on the hours of operation, noise, and third-party delivery services, as well as required trash removal and pest control.

The Board specifically credits the ANC Report and testimony of the ANC's authorized representative, Commissioner Palmer, that the Applicant had already engaged in discussions with the community to ensure the successful integration of the proposed use into the neighborhood. (Ex. 151; FF 43.) The Board therefore is not persuaded by the Party Opponent's argument that the Applicant has not provided specific mitigations for any of the potential adverse impacts. The Board also notes that the Party Opponent's concerns about fire and building safety will be addressed during the licensing and Certificate of Occupancy process.

No Substantial Impairment of the Zone Plan

26. The Board concludes that approval of the requested variance from the 750 Foot Rule will not result in substantial impairment of the zone plan because corner store uses are permitted as a matter of right in the R-20 zone pursuant to Subtitle U § 254.1 and so will not degrade the overall residential character of the R-20 zone. The Board credits the analysis of the Third OP Report, as well as OP's testimony at the hearings, which did not object to or raise concerns with the Applicant's interpretation of the Zoning Regulations and which concluded that the Application had met the requirements for a corner store as well as the area variance test. (FF 33-38) The Board concurs with the Application's interpretation of the Zoning Regulations that the special exception use referenced in Subtitle U § 254.14 applies only to corner store uses that are fresh markets or grocery stores which do not meeting the additional requirements of Subtitle U § 254.13. The Board therefore is not persuaded by the Party Opponent's argument that the Application does not meet the requirements for a corner store and therefore is not a matter-of-right use and notes that the Party Opponent did not cite to any provision in the Zoning Regulations in advancing this claim, but instead relied upon language in the D.C. Zoning Handbook. (Ex. 142 at 3-4.)

27. The Board concludes that the variance will not undermine the specific intent of the 750 Foot Rule as discussed above (CL 24), finding that the Zoning Commission "never intended the requirement to be inflexible, but that it was merely designed to establish a "standard of reference" which could be waived or modified in appropriate cases," in the words of the *French* Court upholding a similar area variance. (*French*, 658 A.2d at 1035.)

28. The Board concludes that because the Property is approximately 200 feet, or 27%, short of the distance from a MU zone required by the 750 Foot Rule, the requested area variance was a relatively minor variance that would not substantially impair the zone plan. (*See French*, 658 A.2d at 1035.)

29. The Board notes that due to the very nature of the variance test, cases are analyzed based on the facts of the specific case. (*Palmer,* 287 A.2d at 542; *St. Mary's Episcopal Church v. District of Columbia Zoning Com'n*, 174 A.3d 260, 271 (2017).) The Board concludes that the Property is affected by unique circumstance not applicable to many other properties in the area, including both residential and commercial uses. The Board is therefore not persuaded by the Party Opponent's citations to previous BZA cases involving proposed deli uses to be persuasive because those cases were prior to the adoption of the current Zoning Regulations, involved use variances which have a different standard than the area variance requested by the Application, and were opposed by the ANC.

30. The Board notes that the Application is self-certified and that the Zoning Administrator will ultimately determine whether additional relief is required. The Board stands by its rulings in prior cases that this is a risk inherent in all self-certified applications and that the potential for this additional relief does not have bearing on the Board's analysis of the relief requested in the Application.[5] The Board therefore is not persuaded by the Party Opponent's argument that the Board cannot grant the Application because it also requires relief from Subtitle U § 254.6(c), which states that a corner store shall "*not be located within five hundred feet (500 feet) of more than three (3) other lots with a corner store use defined as retail, general service, or arts, design, and creation uses*." The Board credits OP's testimony that the properties cited by the Party Opponent as commercial uses within 500 feet of the Property did not meet the definition of a "corner store" in the Zoning Regulations. The Board notes that the Party Opponent did not provide any evidence that the commercial uses she cited are designated as corner stores based on a determination or certificate of occupancy issued by DCRA or any other District agency.

"GREAT WEIGHT" TO THE RECOMMENDATIONS OF OP

31. The Board must give "great weight" to the recommendations of OP under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04) and Subtitle Y § 405.8.

32. The Board finds persuasive OP's recommendation to approve the Application based on OP's analysis that the Application satisfied the area variance test, would not cause substantial detriment to the public good or surrounding neighborhood, and would not result in substantial impairment to either the general intent of the R-20 zone, or to the specific intent of the 750 Foot Rule to reduce impacts to the main Georgetown commercial corridors of Wisconsin Avenue and M Street, N.W. The Board therefore concurs with OP's recommendation to approve the Application.

"GREAT WEIGHT" TO THE WRITTEN REPORT OF THE ANC

33. The Board must give "great weight" to the issues and concerns raised in a written report of the affected ANC that was approved by the full ANC at a properly noticed meeting that

[5] BZA Application No. 18263-B. (Ex. 152B.)

was open to the public pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2012 Repl.)) and Subtitle Y § 406.2. To satisfy the great weight requirement, the Board must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. (*Metropole*, 141 A.3d at 1087.) The District of Columbia Court of Appeals has interpreted the phrase "issues and concerns" to "encompass only legally relevant issues and concerns." (*Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978) (citation omitted).)

34. The Board finds persuasive the ANC Reports' recommendation to approve the Application, and the Second ANC Report's concerns to maintain the integrity of the Zoning Regulations and to ensure quality of life for the Property's neighbors.

35. As discussed above, the Board concurs with the ANC's conclusion that the requested area variance would not damage the intent of the 750 Foot Rule. In reaching this conclusion, the Board also credits the additional information provided by Mr. Matthews that provided background for the ANC's position.

36. The Board notes that that the Second ANC Report, in expressing its support for the Application, praised the communication with the Applicant on quality of life issues and the conditions agreed to by the Applicant governing its operations.

37. The Board notes that the December 4, 2019, testimony of ANC Commissioner Palmer regarding the Applicant's proposed operations and agreement to the proposed conditions cannot be accorded great weight because the specifics of her testimony were not formally adopted in writing by the ANC pursuant to Subtitle Y § 406.4, even though the ANC Reports nominated Commissioner Palmer to represent the ANC. Nonetheless, the Board finds Commissioner Palmer's testimony credible and informative.

38. The Board therefore concludes that the issues and concerns raised by the ANC Reports were addressed by the Applicant, including the conditions included in this order and concurs with the ANC Reports' support for the Application.

DECISION

In consideration of the case record, the Findings of Fact and Conclusions of Law, the Board concludes that the Applicant has satisfied the burden of proof for an area variance from the corner store location requirements of Subtitle U § 254.6(g), and therefore **ORDERS** that the Application is **GRANTED**, subject to the following conditions:

1. The Building shall be constructed in accordance with the Approved Plans, dated May 14, 2019 (Ex. 6), as required by Subtitle Y §§ 604.9 and 604.10.

2. The hours of operation for the proposed use shall be 7 a.m. to 3 p.m. daily.

3. The Applicant shall provide weekly pest control on the Property.

4. The Applicant shall not permit any outdoor music or speakers.

5. The Applicant shall not provide any outdoor seating.

6. The Applicant shall not partner with any delivery service apps, including but not limited to, UberEats and Caviar.

VOTE (Jan 15, 2020): 3-0-2 (Frederick L. Hill, Carlton E. Hart and Peter A. Shapiro, to **APPROVE**; Lorna L. John not participating; one Board seat vacant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: June 16, 2020

PURSUANT TO SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILE PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILE A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO)

OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.