DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT

Applicant's Submission in Response to Procedural Order on Remand

D.C. Court of Appeals Case No. 20-AA-445 – BZA Application No. 20135

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

Introduction.

In the Opinion for *Roth v. District of Columbia Board of Zoning Adjustment*, 279 A.3d 840 (2022) (the "**Remand Opinion**"), the Court remanded the case "*for further proceedings on two specific topics: (1) the implications of CYM's ten-year lease for the question whether denial of the requested variance would cause practical difficulties to the owner of the property; and (2) whether intervenors could permissibly proceed by solely seeking an area variance or whether instead a special exception was required.*"

In the Procedural Order for Remand (the "**Procedural Order**"), the Board invited "*submissions from the parties addressing the two topics specified by the Court of Appeals and in this procedural order."*

Issue #1: Further proceedings on the implications of CYM's ten-year lease for the question of whether denial of the requested variance would cause practical difficulties to the owner of the property.

The original application was filed as a use variance for a prepared food shop, as the only permissible uses were a flower shop (existing C of O) or a residential use given the zone. In all of the Applicant's filings related to its burden of proof, as well as OP reports analyzing the variance test, the argument focused on the configuration of the building and its history of commercial use on the first floor:

From the Applicant's Statement (Ex. 8) and

Prehearing Statement (Ex. 35)

The history of uses and configuration of the Building creates an exceptional situation where the Applicant will suffer an undue hardship if the use variance is not granted. Use of the Building as a one-family dwelling (the only matter-of-right residential use) is not feasible. There is already a residential use established above and as the only matter-of-right use would

be as a one-family dwelling, it would require extensive renovation in order to create a marketable floor plan. Even then, the existing first floor features, including large shop windows and a corner entrance are not conducive to residential use. The entire façade of the first floor would have to be redesigned which could prove difficult as it would require oversight and approval from OGB, HPRB and the Commission of Fine Arts. As the existing first floor and basement have always been used for commercial purposes and any alterations to convert the Building to a single-family residential use would not be feasible, the Applicant will be faced with an undue hardship if the relief is not granted.

From the First OP Report (Ex. 39):

This Applicant is requesting variance relief to operate a prepared food bagel shop in a building zoned for residential use. The building is exceptional in that its first floor and basement were designed and built as commercial space and have always been used for commercial purposes. Variance relief has been previously granted for commercial use of the space. The previous use, an flower / gift shop, which is a retail use, was granted variance relief in 1973 (BZA 11248). Accordingly, the Zoning Administrator granted the current Applicant a permit to operate their bagel shop as a retail business in this space. Employees are permitted to sell bagels to customers but are not permitted to toast and prepare them. Though the building is zoned R-20, which is primarily for single-family residential developments, the first floor and basement of this building have never been used for residential purposes. Originally, the building was constructed with residential units on the second floor and a grocery store on the first floor and basement. In the early 1970s, a health store replaced the grocery store and later the flower shop occupied the space. Since the building's first floor and basement have always been used for commercial purposes, they have a commercial configuration. The building has a corner entrance and large display store windows on the first level. Converting the retail space to a residential unit would be impractical, expensive and significantly burdensome on the owner. It would require a complete redesign of the first floor and extensive renovations to the building, and due to the configuration of the building, would be unlikely to result in desirable residential space.

From the Applicant's Powerpoint Presentation, Ex. 73, pp. 7-8:

- Property is faced with exceptional conditions relating to its existing (and historical) configuration as a commercial use and its very small size.

- First floor and basement have always been used for commercial purposes and have never been used for any residential purposes.
- Building is not configured for residential purposes as it has large shop windows and a corner entrance.
- The existing first floor and basement have always been used for commercial purposes.
- The existing first floor features, including large shop windows and a corner entrance are not conducive to residential use.
- Use of the Building as a single-family dwelling (the only matter-of-right residential use) is not feasible as it would require extensive renovation in order to create a marketable floor plan, if possible at all.
- Any such major renovation would like run into historic preservation and OGB issues.

From the Applicant's Revised Burden of Proof (Ex. 123):

The history of uses, configuration of the Building, and proximity to the MU-3 zone, creates an exceptional situation where the Applicant will suffer a practical difficulty if the variance is not granted. Use of the Building as a single-family dwelling (the only matter-of-right residential use) is not feasible. There is already a residential use established above and as the only matter-of-right use would be as a single-family dwelling, it would require extensive renovation in order to create a marketable floor plan. Even then, the existing first floor features, including large shop windows and a corner entrance are not conducive to residential use. The entire façade of the first floor would have to be redesigned which could prove difficult as it would require oversight and approval from OGB, HPRB and the Commission of Fine Arts. As the existing first floor and basement have always been used for commercial purposes and any alterations to convert the Building to a single-family residential use would not be feasible, the Applicant will be faced with a practical difficulty if the relief is not granted.

From OP's Second Supplemental Report (Ex. 126):

The building is exceptional in that it was constructed and has been in constant use as a corner store use in a residential zone, with commercial on its first floor and basement levels and residential above. 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. Since the building's lower levels have always been commercial, they have a commercial space configuration and layout. This includes the building's corner entrance and large display store windows. The proposed use is consistent with the intent of the corner store provisions.

As discussed further herein, the Office of Planning and Applicant worked together to adjust the relief for an area variance from the 750 ft. rule of the corner store regulations. Even after that change, the Applicant maintained its original assertion that the unique configuration and history created a hardship—now with a reduced standard of practical difficulty—for the *owner* in utilizing the space for any by-right use (flower shop or residential use).

The Party in Opposition argued "the owner of this Property has a ten-year lease. They are being paid rent now. There is no practical difficulty if that owner is being paid rent now." (BZA Transcript from 12/11/19, p. 103). The Party in Opposition asserted this without having seen the lease as it was never entered into the record.

Regardless, the discussion of the lease highlighted two things:

(1) In this specific case, there was an identified end user of the space (prepared food shop/bagel shop), helping to narrow the request for relief - compared to other variance cases requesting general relief for a broad range of uses; and

(2) The intended use of the lease, as a full-service bagel shop, was not a by-right use in this space, further supporting the Applicant's variance argument about the difficulty of using this space for a matter-of-right use.

While the proposed tenant, Call Your Mother, did sign a lease agreement to use the space, it was signed in anticipation of this use being permitted by right and as stated on the record, was signed with bad advice from an architect who did not understand the zoning restrictions (See Board of Zoning Adjustment Public Hearing Tr. Oct 30, 2019, p. 103). The only thing the lease did in this case is identify an end user and specific requested use rather than a request for a general use. The existence of the lease did not change the variance argument but instead supported it further. The variance argument remained the same: the space cannot be put to any matter-of-right use without practical difficulty to the applicant. The terms of the lease and existence of a lease - which can be broken at any time - are a separate area of law that has not, in the past, been discussed in depth as part of the variance test.

The Court of Appeals requested that the Board discuss the implications of the existing ten-year lease as it relates to the practical difficulty argument. The variance test is based on the conditions of the property and available uses for the property, and the existence of this lease which was signed without information does not negate the other clear practical difficulties asserted (space designed and consistently used for commercial purposes) - conditions which the Board found met the variance test regardless of the lease. OP's Supplemental Report (Ex. 117) reflects this, noting that arguments related to the difficulty in finding a long-term tenant and difficulty of renting out space in Georgetown "are not in isolation particularly compelling arguments for a practical difficulty, as noted in the original OP report, the space was designed and consistently used for commercial purposes, and reconfiguration to residential would be impractical and expensive."

Likely, the response and discussion about the lease was only included in the Order to respond to issues raised by the Party in Opposition. The Applicant would argue that the existence of a lease would not impact the basis of its decision as to whether the owner faced a practical difficulty, for reasons stated also below that it was not a consideration, or certainly not a substantial consideration, in its decision. That being said, there was sufficient information to discuss the implications of the ten-year lease in the record and find that the existence of the lease did not change the Board's decision that there were practical difficulties to the owner even with an existing ten-year lease:

1. The Applicant submitted a statement from the Property owner and addressed this question in its Supplemental filing (Exhibits 113- cover letter and Exhibits 113B and 113C). Specifically, the Applicant stated in the cover letter:

   As discussed in Mr. McCann's statement, the property owner would face undue hardship if Call Your Mother Deli or another prepared food shop were not allowed to open at 3428 O Street, NW as the property itself is currently outfitted for a flower shop or a prepared food shop use. To renovate the property to suit another use would be cost-prohibitive and an unreasonable burden for the property owner. With Call Your Mother Deli as the tenant, the property owner is confident that they will be able to stay in business, ensuring that the property owner will not miss any rent payments over the next ten years. However, this may not be the case if Call Your Mother Deli is only permitted to open by Matter of Right. As mentioned in the enclosed Applicant's letter regarding the difference between the permitted and proposed use, "if customers are toasting and topping their own bagel, we expect that

to be much slower than if our cooks were allowed to make the sandwich. We think this could slow our throughput down from 12 sandwiches per minute to less than or about one sandwich per minute. This coupled with the fact that we do not expect a decrease in customer traffic means our wait time will increase by twelve times." Longer wait times could be harmful to the success of Call Your Mother Deli and, as a result, harmful to the property owner.

2. Mr. McCann's Statement (Exhibit 113B) reiterated these practical difficulties with information related to Georgetown commercial vacancies:

   I write to talk about the hardship the property owner would face if Call Your Mother Deli or another prepared food shop were not allowed to open in this space. It is well documented that traditional retail is struggling everywhere. This is especially true in Georgetown where there are numerous empty storefronts. There are two articles attached that discuss this, one has ANG Commissioner Murphy quoted as saying: "Georgetown, like all other retail districts in D.C. and around the country, are suffering - are feeling the effects of the change in customer behavior more people are shopping online -- younger people are buying experiences and food, not necessarily buying things." I agree with commissioner Murphy, it is hard for traditional retail to succeed. Because of that, I think it would be extremely hard to find a long term successful tenant that could lease this property. With Call Your Mother Deli as a tenant, I am confident that they will be able to stay in business in this tough retail market, ensuring that the property owner will not miss any rent payments over the next ten years. Additionally, the property as currently outfitted, having a large walk-in cooler built in the basement, is best suited for a flower shop or a prepared food shop. Removal of this walk-in cooler and transforming the space for residential use is essentially cost prohibitive and thus an unreasonable burden on any property owner. Lastly, market rent for a commercial tenant is significantly higher than a rental tenant. The property owner has become reliant on the commercial rent, and would feel the negative impact from the cost of renovation and of lost rent if this were to be turned into a rental property.

3. Explanation from Call Your Mother regarding the Differences between the by-right retail use (flower shop C of O for 'retail' was permitted) and proposed use (Exhibit 113C):

   By Right, we will have the toaster facing the customer, so the customer will toast their own bagel. Customers will be able to purchase a type of bagel, flavored cream cheese/spread,

and assorted toppings. With that, they will be able to take their bagel to the toaster, toast their own bagel and top it on their own. In addition to customers being able to make their own bagel, we will have pre-made bagel sandwiches that we make at our other location in Park View for purchase. These will be the same sandwiches on our menu in Park View. In order to ensure freshness, we propose to have a delivery every hour. Every hour we will drop off fresh, pre-made sandwiches that customers can buy in store. Because of our plan to be able to serve pre-assembled sandwiches in addition to toast-your-own options, we do not expect a decrease in customer traffic. We do expect a decrease in order completion times and increase in wait times. At our existing location our best cooks can make up to 3 bagel sandwiches per minute. On a busy weekend we have 4 cooks working, and an output of 12 sandwiches per minute. If customers are toasting and topping their own bagel, we expect that to be much slower than if our cooks were allowed to make the sandwich. We think this could slow our throughput down from 12 sandwiches per minute to less than or about one sandwich per minute. This coupled with the fact that we do not expect a decrease in customer traffic means our wait time will increase by twelve times. This will also take us from one delivery a day to up to eight deliveries a day to ensure quality and freshness of our sandwiches.

In Conclusion, the existence (or absence) of a lease in this case is not a substantial consideration when reviewing the variance test as it is related to the configuration as the owner would face the same unique practical difficulties (configuration of the building and inability to utilize the property for any matter-of-right use without significant cost) regardless of the lease. And in this case, the lease was signed under the assumption that the proposed lesee's use would be permitted by right, further highlighting the difficulties of putting a by-right use in the space. The Board typically does not dig into lease terms as part of its review and the lease was never submitted to the record.

Regardless, the Applicant provided sufficient information in the record for the Board to further opine on the implications of the ten-year lease to satisfy the variance test in combination with the other practical difficulties in the record. The various burden of proof statements submitted to the record and the OP Reports (Exhibits 8, 35, 39, 73, 123, and 126) continually noted that the owner would face an undue hardship (or later, a practical difficulty) without the relief because of the difficulty of reconfiguring the space for residential use or for finding a flower shop tenant/long-

term commercial tenant. The Property Owner submitted a statement discussing its reliance on the commercial space and difficulty of finding a commercial tenant. And then in response to the Party in Opposition, the Applicant provided testimony that the loss of CYM as a tenant was likely without relief, as noted in Exhibits 113-113C and testimony from Mr. Dana in the October 30, 2019 hearing (10/30/19 Tr. p. 102-106). While CYM does operate elsewhere, it is not a franchise and the testimony clearly indicated that it would operate this space at a loss, and heavily implied (without getting into the terms of the lease or stating outright) that it would not work at this location. And of course, having to start over with a new tenant and go through the BZA process again with either an area or use variance would create an obvious practical difficulty for the owner. (See Dec. 4, 2019 Tr., p. 77)

Issue #2: Further proceedings on whether intervenors could permissibly proceed by solely seeking an area variance or whether instead a special exception was required.

According to the Remand Order, the court remanded for the Board to further address this issue. Specifically, the court mandated further proceedings on whether intervenors could permissibly proceed by solely seeking an area variance or whether instead a special exception was required. The Court noted that "In sum, we largely uphold the BZA's reasoning." More specifically in the Opinion, the Court stated that:

> "*Arguably, the BZA could have declined to rule on that issue and could instead have simply granted the requested area variance and left to the Zoning Administrator whether that variance was sufficient to permit CYM's proposed use. The BZA did not take that approach, however. Rather, the BZA decided that CYM did not require a special exception. We remand for the Board to further address that issue*."

As discussed below, the option for the BZA to decline to rule on this issue is not simply arguable. It is well-settled that the BZA, in evaluating requests for relief, is limited to a determination of whether the applicant meets the requirements of the relief sought (Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment, 802 A.2d 359, 2002). The further case law on this topic discussed below provides that the Board *does*, of course, have the option, on its own motion, to dismiss an application when there is no plausible

basis to conclude that the relief requested is sufficient.[1] This is based on the principle of judicial efficiency, not because of any requirement for the Board to seek out and spot possible additional areas in need of relief.

To require this would fundamentally change the nature of the Board's responsibilities, making the Board (not the Zoning Administrator's office) the principal reviewer of zoning compliance for any BZA project, regardless of the relief requested. It would also open the Board up to countless appeals based on any argument that additional relief may be needed for any given application, rather than allowing the Board to focus on and evaluate and approve the relief requested. The Board agreed with this self-certification principle in Conclusion of Law #30, so it is not clear how that Conclusion by the Board squares with this request now to delve into the issue of whether or not the Applicant should have been requesting special exception approval back in 2019. The Board stated with clarity that the Zoning Administrator will ultimately determine whether additional relief is required. If that is so, what purpose does the additional inquiry requested by the Board serve. The response to the Court of Appeals must be that the Application was self-certified, and the Board had no obligation to dismiss the Application based on a view that the relief requested was not sufficient for the proposed use.

Self-Certification

Before directly answering the question of whether the proposed use, with the granted variance, qualifies as a matter-of-right Corner Store use under Section U-254, we address the foundational premise of self-certification, which in this case makes the answers to this issue and the Board's additional issues in the Remand Order, a moot point.

The BZA Application was self-certified (BZA Exhibit No. 124). The Applicant requested area variance relief from one section of the Regulations, under the presumption that this was the only relief required for the proposed use. The Board has consistently held that arguments asserting the need for additional zoning relief are irrelevant to its consideration of an application for [special exception] relief. (BZA Order No. 18263-B, p.9) (BZA Exhibit 152B).

[1] BZA Order No. 18263-B, p. 10.

The Applicant did not request special exception relief under U-254.14 or any other provision. This means that it is ultimately for the Zoning Administrator to decide whether such relief is required, in addition to the variance relief granted. Any aggrieved party then would have the right to appeal the Zoning Administrator's decision to the BZA, and the BZA would have the right to affirm or overrule that decision.

This is a well-established principle of law in D.C. zoning law, pursuant to numerous BZA decisions which include extensive on-point discussion. It is puzzling why this is not mentioned in the Procedural Order. It is especially puzzling that the Procedural Order goes so deeply into the question of whether additional relief should be required, when it is irrelevant to the Board's review of the variance request, and in fact the Board ruled accordingly in the BZA Order, in Conclusions of Law #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." [citing Order No. 18263-B.]*

This does not mean that the Board is precluded from considering and commenting on the substance of the matter - as the Board did in the BZA Order.[2] The Board has no obligation or requirement to so comment, and the fact that the Board expresses an opinion on the substantive point (in affirming that special exception relief is not required) does not change the fact that the ultimate decision still rests with the Zoning Administrator. Even when the Board ruled on this point specifically, in the same Order it ruled that regardless of the Board's opinion on the point, the decision is still ultimately the Zoning Administrator's (see above).

The Board, in its analysis of the self-certification aspect of this case (Conclusions of Law #30), cites BZA Order No. 18263-B (the "**Lester Order**"). In the Lester Order, the Board laid out

[2] In Conclusions of Law #26: "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 [sic] the additional requirements of Subtitle U § 254.13.

a comprehensive analysis of the reasons for self-certification and why it works the way it does. In Lester, the Board ruled, and noted the established history of rulings, that arguments asserting the need for additional zoning relief are irrelevant to its consideration of an application for special exception relief. Also in those cases, the Board noted that the Board was free to express its opinion on the substantive matter, and that expressing such an opinion did not alter the fact that the ultimate decision *still* rests with the Zoning Administrator, regardless of the Board expressing its opinion on the substantive matter.

In Lester, the Board stated:

> "As will be explained, the board has consistently held that arguments asserting the need for additional zoning relief are irrelevant to its consideration of an application for special exception relief. Nevertheless, the board will also explain why a basis exists to conclude that the Applicant's planned trellis will create a single building [meaning additional relief is not required]."p. 9.
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> "However, because there is always the chance that the zoning administrator might later disagree as to the type of relief needed, each self-certification form, including the one made here, requires the applicant, and where applicable its agent, to acknowledge that: "… *Any approval of the application by the Board of Zoning Adjustment (BZA) does not constitute a Board finding that the relief sought is the relief required to obtain such permit, certification, or determination*."[3] p. 9.
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> "Thus the Board's grant of this or any other self-certified application does not prevent the Zoning Administrator from denying a building permit because more relief is needed, or the Board from affirming the denial. It is for this reason the Board has consistently held that assertions of an erroneous certification are irrelevant to its review of applications."[4] P. 9-10.

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[3] The Applicant's counsel in this case signed a self-certification form with this same language. This language makes it clear beyond any doubt that the Zoning Administrator has the authority to an independent decision on the question of additional required relief, without regard to the Board's expressed opinion.

[4] The Board is saying that not only does the decision still rest with the Zoning Administrator, but that the ZA's decision may be appealed and the Board itself may disagree with its original opinion on the substance of the matter. In Lester, the Board noted that it *may* dismiss an application when there is no plausible basis to conclude that the relief requested is sufficient, stating that "*The Board has the right not to waste its time*". The Board echoed this principle in

Lester cites for additional support Application No. 17537 of Victor Tabbs. In Tabbs, p. 9, the Board stated:

> The question of whether an applicant should be requesting variance relief is not germane to the question of whether a special exception should be granted. As the Board previously stated in Application No 16974 of Tudor Place Foundation, Inc, 51 DCR 8885 (2004): *Assuming that the opposition is correct … the most that can be said is that the applicant will need variance relief. That fact alone does not require the Board to deny a special exception. … Our inquiry is limited to the narrow question of whether the Applicant met its burden under the general and specific special exception criteria that apply to the requested use. Having concluded that it has done so, the Board must grant the application.*
>
> The Board then proceeds to say: "*While not required to address this concern [emphasis added], the Board notes that the ANC's argument that a variance is required is not supported by the facts in this case*."[5]

If the Board were subject to reversible error, either by the Court or on its own motion, for not requiring an applicant to add additional relief, this would conflict directly with the Court of Appeal's admonition that "in evaluating requests for special exceptions, the BZA is limited to a determination of whether the applicant meets the requirements of the exception sought." *Georgetown Residents Alliance v. District of Columbia Bd. of Zoning Adjustment*, 802 A.2d 359, 363 (D.C., 2002).

As noted by the Board in Lester: It would defeat the entire purpose of the self-certification process if one of the "requirements of the exception sought" is to prove the exception alone will suffice. The sufficiency of the self-certified relief must be proven in the first instance to the Zoning Administrator and not the Board. Lester, p. 10.

BZA Order No. 18250 (*Raymundo B. Madrid*), when it stated that "*the Board's decision to dismiss under these circumstances is solely within its discretion and is based upon principles of judicial efficiency*."

[5] Another example of how the Board is free to express its substantive opinion without encroaching on the Zoning Administrator's jurisdiction to make the ultimate decision on the sufficiency of the requested relief.

We answer the Board's additional questions below, but based on the above, the answers are irrelevant. In response to the Remand Order's request for further proceedings, the general response should be that the Applicant could indeed proceed at the BZA by solely seeking an area variance, because the Application was self-certified, the Applicant only requested the one variance, and the Board is limited to a determination of whether the applicant meets the requirements of the variance sought. The question of additional required relief was not properly before the Board, and while the Board was free to comment on this point, as it did, the ultimate decision is still for the Zoning Administrator, and any aggrieved party would be able to appeal the decision of the Zoning Administrator.

In a self-certified application, the Board cannot require a party to amend an application to include a certain relief that the party chooses not to request. The applicant bears the risk that the Zoning Administrator may not agree with the applicant, along with the risk that the BZA may reverse the Zoning Administrator's decision in an appeal. Finally, because the arguments asserting need for additional relief are irrelevant to the Board's consideration of the Applicant's variance request in this case, the Board cannot revoke the previously granted variance approval based on the Applicant's refusal to now apply for a special exception.

The following is our attempt to answer the additional questions beyond the mandate of the Remand Order.

Question: The submissions should address whether the appropriate zoning relief to allow the applicants proposed use is a special exception under subtitle U § 254.14 and identify which provisions in the corner store regulations, if any, require approval of variance relief to permit the applicants planned bagel store operation.

Answer: As discussed above, this issue is not before the Board. The Applicant has not applied for any special exception and does not intend to file for a special exception. The Board is limited to ruling on only the area variance relief requested. The question of whether additional relief is required is a question for the Zoning Administrator. The Board did have the option of dismissing the Application, prior to or during the hearing, for the purpose of judicial efficiency, if it felt that there was no plausible basis for the Zoning Administrator to view the proposed use as a matter of right corner store (with the approved relief). That time has past and the decision effectively stayed with the Zoning Administrator.

If the Zoning Administrator were to find that special exception relief under U 254.14 is required, then the Applicant would have to return to this Board to seek such special exception relief. If the Zoning Administrator were to find that special exception relief was not required, and that was appealed and this Board reversed the Zoning Administrator, then the Applicant would have to return to this Board for the special exception. Unless and until one of those scenarios happens, the Applicant cannot be forced to apply for or argue for special exception relief, and the Board cannot revoke or reverse the previously granted variance based on Applicant's refusal to apply for a special exception.

Question: The submissions filed in response to this procedural order should address whether Subtitle U § 254.14(b)(1) requires an applicant to demonstrate compliance with the zoning regulations at Subtitle U §§ 254.5 through 254.12 or whether Subtitle U § 254.14(b)(1) is instead a directive indicating that an application for special exception approval should address whether a planned corner store operation would satisfy the provisions set forth in Subtitle U §§ 254.5 through 254.12 and explain how the proposed use may be approved consistent with Subtitle U § 254.14 despite any lack of alignment with Subtitle U §§ 254.5 through 254.12.3

The submissions should address the significance of the wording used in Subtitle U § 254.13(a) – a matter-of-right corner store "*shall meet the requirements* of Subtitle U §§ 254.5 through 254.12" (emphasis added) – relative to the wording of Subtitle U § 254.14(b)(1), which directs an applicant for a special exception to provide information including a *demonstration of conformity to the provisions* of Subtitle U §§ 254.5 through 254.12 (emphasis added) as part of a showing that "the proposed corner store use will not detract from the overall residential character of the area and will enhance the pedestrian experience."

Answer: To the extent we understand it, This question is, in part, the same question as the first. And to that extent, the answer is the same as above. This entire analysis, and the questions, most of which do not seem to spring from the Court's mandate, are moot points, because the Applicant has not asked for special exception relief under U-254.14.

Question: The submissions filed in response to this procedural order should address whether a

variance from any provision, including the 750-foot rule of Subtitle U § 254.6(g), is necessary if a corner store may be approved as a special exception based in part on its demonstration of conformity (rather than strict compliance) with Subtitle U §§ 254.5 through 254.12.

Answer: This is a question for the Zoning Administrator. We do not think there is any difference between the meaning of the terms "conformity" and "compliance". [6]

Question: The submissions should also address whether any other variance relief from the corner store regulations would be needed if the Applicant could obtain permission for the planned corner store use by special exception.

Answer: Clearly another question for the Zoning Administrator. In order to answer this question, the Applicant would have to speculate, and possibly also submit new evidence, which is not permitted.

Question: If any variance relief is needed, what are the implications of CYM's ten-year lease for a portion of the building at the subject property on the question of whether denial of the requested variance would cause practical difficulties to the owner of the subject property?

Answer: Variance relief from D-254.6(g) was requested and was approved by the Board in this case. What is before the Board now is the mandate for further proceedings on the implications of CYM's ten-year lease for the question whether denial of the requested variance would cause practical difficulties to the owner of the property. The Applicant made an extensive argument as to the practical difficulty to the owner of the Property, and the Board, and the Office of Planning,

[6] A discussion of conformity vs compliance in the context of U-254, to our knowledge was not part of the original BZA case, nor is it mentioned in the Court's Opinion. There is probably no difference between the two terms, but that would also be a decision for the Zoning Administrator, or perhaps for the Board in the course of an application where such a special exception request is being requested. Of note, in Webster's, the word "compliant" is used within the definition of the word "conform" and the example given for "conform" is: "*The building doesn't conform to local regulations*." By this definition, there is no difference between the two terms in this context. At any rate, the question goes beyond the Court's mandate and X-801.1.

agreed that these arguments clearly showed practical difficulties to the owner.[7] See above for more discussion on Issue #1.

We hope that the Board finds this submission helpful in responding to the Remand Order.

Respectfully Submitted

Martin P Sullivan

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[7] The lease is not even part of the BZA record and all discussion of the potential impact, per the terms of the lease, between an owner and tenant is incredibly speculative at best. As a fundamental point, it is impossible to claim that illusory and unlikely 100% payment of a 10-year lease agreement, when payments would be made in exchange for nothing, could compensate an owner for the practical difficulties of a variance denial. One result of a variance denial based on this legal theory would be to preclude a landlord and tenant from ever coming to a lease agreement prior to the issuance of a BZA approval for that use. The terms of such an agreement should not become part of the analysis, because the practical difficulty and harm ensues to the owner, regardless of whether or not he may have managed to contractually offset the impact of that practical difficulty. In other words, the owner's practical difficulty with this Property, without the variance relief, remains, regardless of whether he is able to get partially compensated for an agreement relating to the Property, when the Property cannot actually be used for the purpose contemplated in the lease.

Certificate of Service

I certify that on January 10, 2024, I served a copy of this filing to the following:

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Respectfully Submitted,

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