

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Application No. 20135-B of 3428 O Street LLC, as amended, pursuant to 11 DCMR Subtitle X, Chapter 10, for an area variance from Subtitle U § 254.6(g) to allow operation of a corner store use on the first floor and basement of an existing building in the R-3/GT zone at 3428 O Street, N.W. (Square 1228, Lot 76).¹

INITIAL ORDER DATE: June 16, 2020
HEARING DATE ON REMAND: January 31, 2024
DECISION DATES ON REMAND: November 29, 2023 and February 14, 2024

DECISION AND ORDER ON REMAND
DISMISSING THE APPLICATION

By order issued June 16, 2020, the Board granted, subject to conditions, a self-certified application submitted on behalf of 3428 O Street LLC, the owner of the property that is the subject of the application, and Call Your Mother (“CYM”), a tenant (together, the “Applicant”). The application, as amended, requested an area variance from the corner store requirements of Subtitle U § 254.6(g). Parties in this proceeding are the Applicant, the affected Advisory Neighborhood Commission (“ANC”), ANC 2E, and a party in opposition to the application, Melinda Roth, the owner of a property on O Street approximately 75 feet east of the subject property.

The party in opposition, along with a group of residents living near the subject property, appealed the Board’s order to the District of Columbia Court of Appeals, arguing *inter alia* that the Board erred in granting the requested area variance and that the proposed use required approval as a special exception. The Court of Appeals vacated the Board’s order and remanded the case for further proceedings on two specific topics: (1) the implications of CYM’s ten-year lease for a portion of the building at the subject property for the question of whether denial of the requested variance would cause practical difficulties to the owner of the subject property; and (2) whether the Applicant could permissibly proceed by solely seeking an area variance or whether instead a special exception was required. *See Roth v. District of Columbia Bd. of Zoning Adjustment*, 279 A.3d 840, 850 (D.C. 2022).

¹ By order issued August 25, 2023, the Zoning Commission approved text amendments that established new zone names. (See Zoning Commission Order No. 18-16.) As a result, the zoning classification of the subject property changed from R-20 to R-3/GT (a Georgetown Residential House zone). This order reflects the zoning provisions in effect at the time of the Board’s vote at the conclusion of the public hearing on remand.

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By procedural order issued December 4, 2023, the Board asked the parties and the Office of Planning for submissions addressing the two remand questions. On January 10, 2024, both the Applicant and the party in opposition submitted responses to the procedural order on remand (Exhibits 164 and 163, respectively).² For the reasons discussed below, the Board voted, following a public hearing on remand, to dismiss the application.³

Applicant's Case. In its submission in response to the procedural order on remand, the Applicant reiterated its assertion that the Board should approve the self-certified application for an area variance from Subtitle U § 254.6(g) so that the Zoning Administrator could make a determination about whether any special exception approval was also needed. The Applicant also repeated its assertion that the application satisfied the requirements for approval of the variance and argued that the Board could not now “revoke or reverse the previously granted variance based on Applicant’s refusal to apply for a special exception.” (Exhibit 164.)

Party in opposition. The party in opposition argued that the Applicant’s proposed use was not permitted as a matter of right but required approval as a special exception, along with “at least two, if not more, variances,” consistent with the zoning regulations governing a corner store use. The party in opposition also contended that variance relief was not warranted because the Applicant had not demonstrated any practical difficulties. (Exhibit 163.)

FINDINGS OF FACT

1. The property that is the subject of this application is a corner lot located at the southeast corner of the intersection of 35th and O Streets, N.W. with the address 3428 O Street, N.W. (Square 1228, Lot 76). The subject property extends approximately 30.29 feet along 35th Street and 20.38 feet along O Street. The lot area is 617 square feet.
2. The subject property is improved with a two-story wood frame building. The building has a door at its northwest corner, providing access to the first floor from both abutting streets. Another door, located in the northeast portion of the building, provides access to the second floor. A stair on the west side, south of the bay window, provides access to the basement.
3. The existing building is configured as commercial space on the first floor and basement level and for residential use on the second floor. The building was built in the early 1800s with a grocery store use on the ground floor and basement level and residential use on the second floor. Past uses of the commercial space, since the grocery store closed in 1970, include a health food store and an antique shop, which was permitted by the Board’s approval of a change of nonconforming use (retail grocery store; first floor) to “antique shop (retail sales)” with an apartment on the second floor. *See* Appeal No. 11248 (Roy

² The Board is required to give “great weight” to the recommendation of the Office of Planning (D.C. Official Code § 6-623.04) and to the issues and concerns raised by the affected ANC (D.C. Official Code § 1-309.10(d)(3)(A)). Neither the Office of Planning nor ANC 2E participated in this remand proceeding.

³ This order on remand also affirms the Board’s vote on July 15, 2020 to deny a motion for rehearing of the initial order submitted by the party in opposition on June 19, 2020 (Exhibit 158) and opposed by the Applicant (Exhibit 159).

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Herbert Jones; January 17, 1973). More recently, the commercial space was operated as a flower shop.

4. In April 2019, 3428 O Street LLC (the property owner) and Call Your Mother (the operator of a bagel shop at another location) signed a lease for CYM's operation of a bagel shop on the ground floor and basement level of the existing building at the subject property. (Transcript of October 30, 2019 at 108.)
5. The subject property is located in a Georgetown Residential House zone, R-3/GT (formerly R-20). For purposes of use permissions, the R-20 zone was classified under R-Use Group C (*see* Subtitle U § 200.2).
6. By self-certified application submitted August 7, 2019, the Applicant requested a use variance from Subtitle U § 201.1, which listed the uses permitted as a matter of right in R-Use Group C. The proposed use was stated as "an Eating and Drinking Establishment – Prepared Food Shop (bagel shop)," described as "a prepared food shop specializing in bagels on the first floor and basement" of the existing building at the subject property. The application stated the basement of the building was then used as storage and the first floor was used as "an Antique Store, Flower and Gift Shop, and Office." (Exhibit 1.)
7. At a public hearing on December 4, 2019, the Board asked the Applicant to provide a statement explaining how the proposed use would qualify as a corner store pursuant to Subtitle U § 254 along with any relief the Applicant might require from the requirements of Subtitle U § 254. (Exhibit 121.)
8. On December 5, 2019, the Applicant amended the request for relief by submitting a self-certified application seeking an area variance from the corner store regulations at Subtitle U § 254.6(g). The Applicant asserted that "the proposed use conforms to all requirements for a corner store, except the requirement of [Subtitle] U § 254.6(g), which provides that a corner store not [sic] be located: 'In the R-20 zone, no nearer than seven hundred and fifty feet (750 ft.) to a property line of a lot in an MU or NC zone.'" (Exhibits 123, 124.)
9. Properties near the subject property were also zoned R-20 except for an area to the south and west (the west side of 36th Street between Prospect and N Streets, NW) that was located in a Mixed Use zone, MU-3A. The subject property was located approximately 570 feet from the nearest property line of a lot in the MU-3 zone, a property at the southwest corner of the intersection of 36th and N Streets (1248 36th Street, NW).
10. After additional public hearing sessions, the Board voted to approve the amended application. An order reflecting the Board's decision was issued on June 16, 2020. The order was appealed to the District of Columbia Court of Appeals, which upheld the Board's decision in part but vacated the Board's order and remanded the case to the Board for further proceedings. *See Roth v. District of Columbia Bd. of Zoning Adjustment*, 279 A.3d 840 (D.C. 2022).

11. With respect to the area variance, the Court upheld the Board's determinations that the subject property was affected by an extraordinary or exceptional condition and that the variance could be granted without causing substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. *Roth* at 846-848.
12. With respect to whether the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of the subject property, the Court held that "[g]iven the ten-year lease, it is not immediately clear whether or how denying the requested area variance would result in practical difficulties to the owner." *Roth* at 847.
13. With respect to an argument that "CYM's proposed use could be approved only if CYM obtained a special exception," the Court noted that "[a]rguably, 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." *Roth* at 849.
14. On appeal, the Applicant argued that the planned use was not eligible for approval by special exception so "they permissibly proceeded by seeking an area variance under [Subtitle U] § 254.16 rather than a special exception under [Subtitle U] § 254.14." The Court noted the explanation for the Board's ruling on the issue, as stated in the order approving the application: "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 [food] markets or grocery stores which do not [meet] the additional requirements of Subtitle U § 254.13." However, the Court did not "view that as a sufficient explanation of the BZA's ruling." *Roth* at 849.
15. The Court held: "Considered in isolation, the language of [Subtitle U] § 254.14 does not seem limited solely to fresh food markets or grocery stores. Rather, § 254.14 appears by its terms to apply to any corner store that does not meet the requirements of § 254.13. On that view, the corner-store regulation arguably operates as follows: a corner store that is a fresh-food market or grocery store can operate as a matter of right if it can meet certain conditions, § 254.13; a corner store otherwise can be given approval to operate under a special exception if it can meet certain conditions, § 254.14; and, if necessary, a corner store that cannot meet the requirements of § 254.13 or § 254.14 can obtain a variance under § 254.16." *Roth* at 849-850.
16. The Court "express[ed] no definite view on that issue, instead remanding the case for the BZA to more fully address the question whether [the Applicant was] required to obtain a special exception or instead could proceed by solely obtaining an area variance." The case was remanded "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.” *Roth* at 850.

17. By procedural order issued December 4, 2023, the Board invited submissions addressing the two topics specified by the Court of Appeals and scheduled a public hearing on remand. The Board requested comments on “whether the appropriate zoning relief to allow the Applicant’s proposed use is a special exception under Subtitle U § 254.14” and asked that submissions “identify which provisions in the corner store regulations, if any, require approval of variance relief to permit the Applicant’s planned bagel store operation.”
18. The procedural order on remand provided an overview of the zoning provisions governing a corner store use relevant to the application in this proceeding as follows.
 - (a) A “corner store” was defined for zoning purposes as “A limited commercial and service use in residential rowhouse zones, oriented to serve the immediate neighborhood.” (Subtitle B § 100.2.)
 - (b) The corner-store regulations, at Subtitle U § 254.1, specified the “residential rowhouse zones” where a corner store use was permitted, which included R-3 and R-20 zones. This provision delineated where a corner store might be permitted (and, by implication, the zones that are not considered “residential rowhouse zones” where a corner store use is not permitted as a matter of right or by special exception). Subtitle U § 254.1 did not state that a corner store use was permitted as a matter of right in the listed zones, nor did it authorize the Board to approve any corner store by special exception. Instead, the purpose of Subtitle U § 254.1 was to give effect to the zoning definition of “corner store” by indicating the particular zones where the use was permitted. The property at issue in this proceeding was zoned R-20, where a corner store use could be permitted in accordance with Subtitle U § 254.1.
 - (c) Similarly, Subtitle U § 254.2 gave effect to the zoning definition of “corner store” by describing the range of activities that might be considered “a limited commercial and service use ... oriented to serve the immediate neighborhood.” Pursuant to Subtitle U § 254.2, a corner store use might be devoted to activities that are encompassed within any one of four different use categories: retail; general service; arts, design, and creation; or eating and drinking establishment. (Subtitle U § 254.2; see also Subtitle B § 200.2 (Use Categories).)
 - (d) The Applicant described the planned bagel store as a corner store use operating as an eating and drinking establishment. The requirements for a corner store use permitted as a matter of right are set forth in Subtitle U § 254.13. As a threshold matter, no corner store may be permitted as a matter of right unless the corner store is one “for which the use is a fresh food market or grocery store devoted primarily to the retail sale of food.” (Subtitle U § 254.13.)

- (e) Even a corner store operating as a fresh food market or grocery store use must meet a series of requirements to qualify as a matter-of-right operation. The requirements include, at Subtitle U § 254.13(a), that the use must meet the requirements of Subtitle U §§ 254.5 through 254.12. These latter provisions address matters including:
 - (i) a corner store's maximum size and location within a building (Subtitle U § 254.5);
 - (ii) the minimum distances separating a proposed corner store use from an existing corner store operating as an eating and drinking establishment, from other corner lots containing existing corner stores operated as retail, general service, or arts, design, and creation uses, or from lots in an MU or NC zone (Subtitle U §§ 254.6(b), (c), and (g));
 - (iii) other location requirements (Subtitle U § 254.7); and
 - (iv) prohibitions against on-site cooking of food or installation of grease traps (Subtitle U § 254.8), sales of alcoholic beverages for on-site consumption (Subtitle U § 254.9), external storage of materials or trash (Subtitle U § 254.10), and on-site use or storage of dry-cleaning chemicals (Subtitle U § 254.11) as well as restrictions on signage (Subtitle U § 254.12).
- (f) A matter-of-right corner store use must also comply with restrictions on hours of operation (Subtitle U § 254.13(b)), the percentage of customer-accessible sales and display area that must be dedicated to the sale of a general line of food products intended for home preparation and consumption (Subtitle U § 254.13(c)), and the amount of retail space that must be dedicated to the sale of perishable goods (Subtitle U § 254.13(d)), as well as a prohibition against the sale of alcohol for off-site consumption without special exception approval (Subtitle U § 254.13(e)).
- (g) Although the scope of corner stores that may be permitted as a matter of right is narrowly prescribed by Subtitle U § 254.13, the Board is authorized under Subtitle U § 254.14 to permit, as a special exception "[a] corner store use that is not permitted as a matter of right pursuant to Subtitle U § 254.13."
- (h) Because the Zoning Regulations contemplated that a corner store use might operate as any of a range of activities within the ambit of Subtitle U § 254.2, and because Subtitle U § 254.14 is not restricted to any specific type of corner store use (unlike Subtitle U § 254.13, which is limited to corner stores operating as "a fresh food market or grocery store devoted primarily to the retail sale of food"), the Board is authorized under Subtitle U § 254.14 to approve, by special exception, any sort of corner store use allowed under Subtitle U § 254.2 if the use cannot meet the requirements for a matter-of-right operation under Subtitle U § 254.13.

- (i) Any proposed corner store use that does not qualify as a matter-of-right operation may be permitted by special exception under Subtitle U § 254.14 provided that (a) the planned corner store use will be located so that it is not likely to become objectionable to neighboring property because of noise, traffic, deliveries, or other objectionable conditions and (b) an applicant demonstrates that the proposed corner store use will not detract from the overall residential character of the area and will enhance the pedestrian experience.
 - (j) The latter showing – that a proposed corner store will not detract from the overall residential character of the area and will enhance the pedestrian experience – should be made through an applicant’s provision of certain information responsive to the list at Subtitle U §§ 254.14(b)(1) through (b)(11) as well as Subtitle U § 254.14(c) (any alterations to the property proposed to accommodate the corner store use), Subtitle U § 254.14(d) (any modifications to the building façade, including changes to window and door openings), and Subtitle U § 254.14(e) (restrictions on sales of alcohol for off-site consumption).
19. The procedural order on remand stated the Board’s determination that the “Applicant’s proposal did not meet the very limited circumstances under which a corner store use is permitted as a matter of right. As a corner store planned for operation as an eating and drinking establishment, and not as a fresh food market or grocery store devoted primarily to the retail sale of food, the Applicant’s use could not be permitted as a matter of right under Subtitle U § 254.13 even if the Applicant could demonstrate compliance with all of the other requirements listed in Subtitle U § 254.13(a) through (e).”
20. Pursuant to Subtitle U § 254.14(b)(1), an applicant for special exception approval of a corner store use must provide a “demonstration of conformity to the provisions of Subtitle U §§ 254.5 through 254.12” as part of a showing that the planned use would not detract from the overall residential character of the area and would enhance the pedestrian experience. The procedural order on remand requested submissions addressing whether Subtitle U § 254.14(b)(1) required 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) was 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. The parties were asked to 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.”

21. The Board also asked the parties to address (a) whether a variance from any zoning regulation, including the 750-foot rule of Subtitle U § 254.6(g), was necessary if a corner store could be approved as a special exception based in part on an applicant's demonstration of conformity (rather than compliance) with Subtitle U §§ 254.5 through 254.12 and (b) whether any other variance relief from the corner store regulations would be needed if an applicant could obtain permission for the planned corner store use by special exception.
22. If a party asserted that any variance relief was needed, the Board requested comments on 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.

CONCLUSIONS OF LAW AND OPINION

The Applicant requested an area variance from Subtitle U § 254.6(g) to allow operation of a corner store use on the first floor and basement of an existing building in the R-3/GT zone at 3428 O Street, N.W. (Square 1228, Lot 76). The Board is authorized under § 8 of the Zoning Act to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. *See* 11 DCMR Subtitle X § 1000.1.

On remand, the Applicant reiterated its argument that the Board should grant the area variance requested in the self-certified application and leave to the Zoning Administrator the question of whether that variance was sufficient to permit the proposed use. According to the Applicant, "[i]t 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," citing *Georgetown Residents Alliance v. District of Columbia Bd. of Zoning Adjustment*, 802 A.2d 359 (D.C. 2002). The Applicant contended that 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" and asserted that, since the Applicant did not seek a special exception under Subtitle U § 254.14 "or any other provision...it is ultimately for the Zoning Administrator to decide whether such relief is required, in addition to the variance relief granted." (Exhibit 164.)

The self-certification process allows applicants to decide the type of zoning relief needed while acknowledging that an applicant assumes the risk that the property owner might require additional or different zoning relief from the relief specified in a self-certified application in order to obtain, for the desired project, any building permit, certificate of occupancy, or other administrative

determination based on the Zoning Regulations and Map. The Board's approval of a self-certified application does not constitute a finding by the Board that the relief requested was the relief required to obtain the necessary permit and does not prevent the Zoning Administrator from denying a building permit application because more relief is needed, or prevent the Board from affirming such a denial. For this reason, the Board has consistently held that assertions of an erroneous certification are irrelevant to its review of applications. *See, e.g.*, Application No. 16974 (Tudor Place Foundation; July 29, 2004) (the most that can be said in response to an argument that a self-certified application was incomplete is that the applicant would also need variance relief; that fact did not require the Board to deny a request for a special exception because the Board's inquiry was limited to the narrow question of whether the applicant met its burden under the general and specific special exception criteria); accord Application No. 18250 (Raymundo B. Madrid; May 10, 2012); Application No. 17537 (Victor Tabb; July 27, 2007) ("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").

In this case, the Board initially granted the requested area variance and deferred to the Zoning Administrator to administer the Zoning Regulations before issuing any permit for the Applicant's proposed use. The Applicant favored that approach now, stating that the Applicant would have to return to the Board to seek special exception relief if the Zoning Administrator determined that a special exception under Subtitle U § 254.14 was needed or, if the Zoning Administrator decided that a special exception was not needed, that determination could be appealed to the Board, which could reverse the Zoning Administrator's determination, requiring the Applicant to seek a special exception. The Applicant acknowledged that the Board has "the option, on its own motion, to dismiss an application when there is no plausible basis to conclude that the relief requested is sufficient" but asserted that dismissal would be appropriate only "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." According to the Applicant, the Board had the option to dismiss an application only "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." The Applicant asserted that, in this case, that time has passed "and the decision effectively stayed with the Zoning Administrator." (Exhibit 164.)

In this remand proceeding, the question is not only whether additional relief is needed to achieve the Applicant's purpose but, more fundamentally, whether the Applicant requested the relief necessary to allow the planned use of the subject property. Because the Board has determined that the Applicant's corner store use cannot be permitted as a matter of right but requires approval as a special exception under Subtitle U § 254.14, the Board finds no plausible basis to consider the Applicant's request for an area variance from Subtitle U § 254.6(g) because that variance alone is insufficient to achieve the Applicant's purpose. Compare, Application No. 20564 (Jemal's Prospects, LLC; February 29, 2024) (Board dismissed a self-certified application for a special exception under Subtitle C § 204.9 to allow a change in nonconforming uses and denied area variances from "two conditions of an otherwise by-right the corner store use" where the applicant proposed a new corner store use operating as eating and drinking establishment in a portion of an existing building that formerly contained a nonconforming dry cleaning/upholstery use; the Board

did not find a plausible basis to consider the relief requested as a special exception under Subtitle C § 204.9, because the proposed corner store use would not be nonconforming, or agree with the Applicant's characterization of the planned corner store use as permitted as a matter of right except for two requirements for which variances were sought but instead concluded that, consistent with Subtitle C § 204.9(c), any relief required for the planned corner store use should be considered under the corner store regulations because a corner store could be permitted in the R-20 zone either as a matter of right under Subtitle U § 254.13 or if approved as a special exception under Subtitle U § 254.14)⁴ and Application No. 19630 (Goirand and Xenophontos; November 20, 2018) (self-certified application for a special exception from lot occupancy requirements was dismissed because the Board found no basis to conclude that the requested relief was sufficient under the circumstances, where the special exception provision did not apply to the applicants' proposal and the applicants declined to revise the application to request variance relief).

In the interest of judicial efficiency, the Board declines to follow the Applicant's recommendation in this remand proceeding to leave the issue for the Zoning Administrator again. "It is the Board, not the Zoning Administrator, which has final administrative responsibility to interpret the zoning regulations." *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006), quoting *Murray v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990) and citing D.C. Code § 6-641.07(g)(4) (empowering the Board to "reverse or affirm, wholly or partly, or ... modify" any order or decision appealed from, or to "make such order as may be necessary to carry out its decision").⁵ See also, e.g., *Salsbery v. District of*

⁴ The order noted that:

When considering an application for a special exception, the Board is "limited to a determination of whether the applicant meets the requirements of the exception sought." (*Georgetown Residents Alliance v. Dist. of Columbia Bd. of Zoning Adjustment*, 802 A.2d 359, 363 (D.C. 2002).) The Board will generally make a decision on the relief requested in a self-certified application unless there is no plausible basis to find the self-certified relief sufficient to achieve the applicant's purpose. (See Application No. 18263-B of Stephanie and John Lester, order issued November 8, 2011.) However, the Board may, "on its own motion, dismiss an application when there is no plausible basis to conclude that the relief requested is sufficient." (Application No. 18263-B at 10.) In this case, the Board finds that the self-certified application did not present a plausible basis for the Board to conclude that the relief requested (a special exception to allow a change in nonconforming uses) is sufficient to achieve the Applicant's purpose (a new corner store, which would be a conforming use) and therefore this portion of the application was dismissed.

Application No. 20564 (Jemal's Prospects, LLC; February 29, 2024).

⁵ For that reason, the Board may dismiss an application, accompanied by a referral from the Zoning Administrator, on the ground that no zoning relief is needed. See, e.g., Application No. 21206 (Rebecca Latorraca; March 11, 2025) (application for use variance from Subtitle U § 401.1 to allow an accessory apartment in an attached principal dwelling in the RA-2 zone; Board concluded that the proposed use was permitted as an accessory use as a matter of right subject to the requirements of Subtitle U § 253), Application No. 18366 (Clifford Reese; July 10, 2012) (application for a special exception to allow a home occupation in a semi-detached principal dwelling in the R-5-A zone; the Board, unlike the referral memorandum, did not "interpret the exclusion of a basement from the computation of occupancy as precluding a basement from serving as the location of a home occupation."), and Application No. 18044 (Rock Creek Market, LLC; April 22, 2010) (Board dismissed an application for a use variance to allow the sale of prepared food at an existing grocery store, a nonconforming use, in the R-4 zone, after Zoning Administrator disapproved the applicant's request for a certificate of occupancy to use the premises as a "prepared food shop/grocery" and directed the applicant to seek a use variance; Board reaffirmed a previous decision on a self-certified application (Application

Columbia Bd. of Zoning Adjustment, 318 A.2d 894, 896 (D.C. 1974) (“it is the Board’s responsibility to interpret the zoning regulations adopted by the Zoning Commission”), citing *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 232 (D.C. 1973) (Court recognized the Board’s interpretation of the zoning regulations and described its “only task” as “to determine whether the Board’s interpretation is plainly erroneous or inconsistent with the regulations”); *Keefe Co. v. District of Columbia Bd. of Zoning Adjustment*, 409 A.2d 624, 625, FN2 (D.C. 1979) (in affirming Zoning Administrator’s determination, the Board did not engage in rule-making but was interpreting a phrase within its statutory authority; “In this jurisdiction the Zoning Commission promulgates the regulations, but it is the responsibility of the BZA to interpret the regulations adopted by the Commission”); *Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1242-1243 (D.C. 1993) (Court affirmed Board decision that a proposed use constituted a “processing establishment” that was permitted as a matter of right, reversing a determination by the Zoning Administrator that a use variance was required; Board is charged with interpreting the zoning regulations promulgated by the Zoning Commission).

In this case, the Board did not lose its authority to dismiss the application on its own motion due to the passage of time, the stage of the proceeding, or any other factor. The Board disagreed with the Applicant’s assertion that the decision remained with the Zoning Administrator since the Board previously granted the Applicant’s request for an area variance, given that the Board’s initial order was vacated and the Court did not affirm the Board’s order with respect to approval of the variance.

The Board interprets Subtitle U § 254 as requiring approval as a special exception in accordance with Subtitle U § 254.14 for any proposed corner store use in a residential rowhouse zone, as specified in Subtitle U § 254.1, that cannot meet the requirements for operation as a matter of right in accordance with Subtitle U § 254.13.⁶ This interpretation is consistent with Court’s holding in *Roth* that Subtitle U § 254.14 is not, by its terms, limited solely to fresh food markets or grocery stores (which was the Applicant’s view) but applies “by its terms” to any corner store that would not meet the requirements for a matter-of-right use consistent with Subtitle U § 254.13. This approach is also consistent with prior decisions of the Board and the Zoning Administrator, which have consistently stated the need for approval of a corner store use by special exception under Subtitle U § 254.14, without requiring variances from other provisions of Subtitle U § 254, when the proposed use did not meet the requirements for a matter-of-right corner store use under Subtitle U § 254.13.⁷

No. 17906 (Se Y. Jeong; August 11, 2009) holding that no zoning relief was required because the sale of the prepared items did not constitute an expansion of the grocery use or change in principal use but was an inherent part of a grocery store use).

⁶ The Board made no determination in this proceeding with respect to whether the variance requested by the Applicant was needed if the proposed use was approved by special exception in accordance with Subtitle U § 254.14.

⁷ See Application No. 19623 (Creative Grounds DC; December 8, 2017) (Board granted an application, submitted with a referral from the Zoning Administrator that listed the necessary relief solely as a special exception under Subtitle U § 254.14, without any variances, to allow a corner store containing an art gallery and prepared food shop on the ground floor and cellar of an existing building in the RF-1 zone, at a location not in conformity with locational provisions stated in Subtitle U §§ 254.6(b), 254.6(c), or 254.7(b)); Application No. 19650 (City Corner Market, Inc;

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With regard to the second question on remand, the Board concludes that the Applicant cannot permissibly proceed by seeking solely an area variance and instead a special exception is required. Accordingly, the Board decided to dismiss the application because the Applicant's proposed use required approval as a special exception, which the Applicant did not request. In light of that decision, and given that the Board's prior decision to grant the requested area variance was vacated on appeal, the Board found no need in this remand proceeding to address the implications of CYM's 10-year lease on the question of whether denial of the variance would cause practical difficulties to the owner.

Based on the findings of fact and conclusions of law stated in this Order on Remand, the Board concludes that the application, pursuant to 11 DCMR Subtitle X, Chapter 10, for an area variance from Subtitle U § 254.6(g) to allow operation of a corner store use on the first floor and basement of an existing building in the R-3/GT zone at 3428 O Street, N.W. (Square 1228, Lot 76) must be dismissed because the proposed use requires approval as a special exception in accordance with Subtitle U § 254.14. Accordingly, it is **ORDERED** that the application is **DISMISSED**.

VOTE: 4-0-1 (Frederick L. Hill, Lorna L. John, Chrishaun S. Smith, and Anthony J. Hood voting to DISMISS; Carl H. Blake not participating)

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: September 9, 2025

December 21, 2017) (self-certified application for a special exception under Subtitle U § 254 (no specific provision identified) to allow a corner store at an existing building in the RF-1 zone, then containing a nonconforming grocery store; applicant proposed a corner store operating as a grocery store with sales of alcohol for off-premises consumption and asserted that the planned use would meet the requirements for approval of a special exception under Subtitle U § 254.14); Application No. 20726 (Pablo Ortiz; June 14, 2022) (Board approved a special exception under Subtitle U § 254.14 to allow operation of a corner store, including the sale of alcohol for off-site consumption, in the RF-1 zone, where the Zoning Administrator referral memorandum listed the necessary relief as a special exception under Subtitle U § 254.13(e) for permission to sell alcohol at a corner store for off-site consumption; the existing use of the property was as a nonconforming grocery store without sales of alcohol), and Application No. 20564 (Jemal's Prospects LLC; February 29, 2024) (Board dismissed a portion of a self-certified application that sought a special exception under Subtitle C § 204.9 to allow a change in nonconforming uses, and denied variances from two provisions contained in Subtitle U § 254, where the applicant requested relief to allow a new corner store operating as an eating and drinking establishment; Board disagreed with applicant's assertion that the proposed corner store use would be permitted as a matter of right except for the two requirements for which variances were sought and held instead that the proposed corner store use required approval as a special exception under Subtitle U § 254.14).

PURSUANT TO 11 DCMR 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.

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.