

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Amended Applicant's Statement of 3428 O Street LLC
Application No. 20135

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

I. INTRODUCTION.

This Statement is submitted on behalf of 3428 O Street LLC (the “Applicant”), owner of the property located at 3428 O Street, NW (Square 1228, Lot 76) (the “Subject Property”). The Subject Property is improved with an existing two-story building (the “Building”), with retail use on the first floor and basement (flower shop and antique/gift shop) and one (1) residential unit on the second floor. The Subject Property is located in the R-20 Zone. The flower/antique shop was approved as a use variance in 1973, via BZA Order No. 11248. The Applicant is proposing to convert the existing use to a bagel shop (categorized as a prepared food shop), which is not permitted as a matter-of-right in the R-20 zone.

At the hearing on December 4, 2019, the Board requested that the Applicant file an amended Application for area variance relief from the corner store regulations. The Application was originally for use variance relief; however, OAG determined at the hearing that relief from the corner store regulations, specifically the 750-foot rule discussed below, would be an area variance rather than a use variance. As discussed more fully below, the proposed use conforms to all requirements for a corner store, except the requirement of U § 254.6(g), which provides that a corner store not be located: “In the R-20 zone, no nearer than seven hundred and fifty feet (750 ft.) to a property line of a lot in an MU or NC zone.”

The Subject Property is located approximately five-hundred and seventy feet (570 ft.) from the nearest property line of a lot within the MU-3 zone - at 1248 36th Street, NW. The

Applicant is therefore requesting area variance relief from the 750-foot location restriction of U § 254.6(g).

II. BACKGROUND.

A. Existing Use and History of Uses.

The Building was constructed in the early 1800s with a grocery store on the basement and first floor and residential use on the second floor. In 1970, the grocery store went out of business and was subsequently converted to a health food store. The most recent use of the first floor and basement space was as a flower shop and antique/gift shop that operated by virtue of a use variance granted in BZA Order No. 11248 in 1973. A copy of that BZA Order and historical Certificates of Occupancy have been included with this Application.

B. Description of the Subject Property and Proposed Use.

The Subject Property is located in the R-20 Zone. It is also located in the Georgetown Historic District and is within the Commission of Fine Arts jurisdiction area. It is a small corner lot measuring six hundred and seventeen square feet (617 sq. ft.) of land area. The Applicant is proposing to use the first floor and basement as a prepared food shop specializing in bagels. The Applicant will undertake some interior renovations and is proposing to construct a small service counter. The exterior renovations are limited to the removal of the mechanical units that are currently mounted to the facade and bay window roof, facade restoration including patch and repair work to the siding, and new transom windows where the mechanical units have been removed. New mechanical units will be located on the roof. The Applicant is not proposing to have any seating areas for patrons.

The tenant will be "Call Your Mother Deli" ("CYM") which already has an existing location on Georgia Avenue. Andrew Dana, the co-owner and co-founder of CYM, was born and

raised in Washington, DC (“DC”) in the Mt. Pleasant neighborhood. As he grew up going to Jellef every weekend and attended summer camp at Georgetown University, he is very familiar with the area and Georgetown has always been a dream second location for CYM.

According to Mr. Dana, one motivator for starting the business was the lack of staple neighborhood restaurants in DC. Due to the transient nature of the city, many restaurants in DC are bigger chain restaurants or “trendy” restaurants with flashy openings that do not necessarily prioritize the neighborhood in which they are located. The concept behind CYM was to create a neighborhood deli that could be around for generations and provide for the neighborhood where it is located. As part of its effort to be a true local business, all of CYM’s products are sourced locally from local farms and purveyors.

Another way CYM supports its neighborhood is by getting directly involved with the community. For example, at the existing location on Georgia Avenue, CYM has raised over ten-thousand dollars (\$10,000) for local charities, sponsored local block parties, sponsored neighborhood trash pick-ups, and taught cooking classes at local schools. Currently, CYM has a presence on Georgetown University’s campus, at the farmer’s market on Wednesdays.

CYM will have a mix of 15-20 full-time and part-time employees and the proposed hours of operation are from 7AM to 3PM. The CYM staff are provided many benefits, including health and dental insurance, a 401k, paid vacations, a “fun committee,” a free gym membership, and—for certain staff—an equity plan.

As part of its commitment to being a good neighbor, CYM is implementing new processes in order to mitigate issues with potential lines and foot traffic in front of the Building. CYM is also switching the point of sale to a new supplier which will allow them to take orders faster and move the line faster. The kitchen and menu are also being adjusted to increase the

speed of ordering. As there is no seating area, patrons will not be encouraged to stay in front of CYM after they've received their orders. It will also have daily private trash pickups, weekly pest control contracts, and daily deliveries around 6am of products from the main store.

II. THE APPLICATION MEETS THE BURDEN OF PROOF FOR GRANTING AREA VARIANCE RELIEF

The burden of proof for an area variance is well established. The Board of Zoning Adjustment may grant an area variance if it finds that “(1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.” *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, No. 16-AA-932, 2018 WL 1748313, at *2 (D.C. Apr. 12, 2018); *Ait-Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211, 1216 (D.C. 2016) (quoting *Washington Canoe Club v. District of Columbia Zoning Comm'n*, 889 A.2d 995, 1000 (D.C. 2005)) (internal quotation marks omitted). As set forth below, the Applicant meets the three-part test for the requested variance.

A. Extraordinary or Exceptional Condition affecting the Subject Property.

To prove an extraordinary or exceptional condition, or uniqueness, the Applicant must show that the property has a peculiar physical aspect or other extraordinary situation or condition. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.25 1091, 1096 (D.C. 1979). Moreover, the unique or exceptional situation or condition may arise from a confluence of factors which affect a single property. *Gilmartin v. D.C. Board of Zoning Adjustment*, 579A.2nd 1164, 1168 (D.C. 1990).

The Subject Property is faced with exceptional conditions relating to its existing configuration as a commercial use and its small size. The first floor and basement have always been used for commercial purposes and have never been used for any residential purposes. Accordingly, the Building is not configured for residential purposes as it has large shop windows and a corner entrance in order to attract patrons. As discussed below, these exceptional conditions create a situation that would lead to a practical difficulty if the Zoning Regulations are strictly enforced, because the potential use of the space is limited to the same use as is currently approved – a flower shop.

In addition, the Property has a unique location. The use would be otherwise permitted as a matter-of-right but for its proximity to a tiny section cut out of the R-20 zone which operates as an MU-3 zone. The entire MU-3 zone here consists of 3-4 properties, and is just one side of a street and less than half a square. All other surrounding properties are zoned R-20. While that fact alone may not be unique, it does create an exceptional circumstance when the history of the Subject Property is considered. Based on a review of the corner lots within 750 feet of that 1248 36th Street, NW, the Subject Property is one of only three corner properties that is currently categorized as “store” use and is not fully residential.¹ All other corner lots within 750 feet are used for residential purposes.

B. The Applicant will face a Practical Difficulty if the Regulations are strictly enforced.

The second prong of the variance test is whether a strict application of the Zoning Regulations would result in a practical difficulty. It is well settled that the BZA may consider “a wide range of factors in determining whether there is an ‘unnecessary burden’ or ‘practical

¹ The other two are Saxby's Coffee Shop at 3500 O Street, NW and 1301 35th Street, NW (the current occupancy is unknown).

difficulty'... Increased expense and inconvenience to an applicant for a variance are among the factors for the BZA's consideration." Gilmartin, 579 A.2d at 1711. Other factors to be considered by the BZA include: "the severity of the variance(s) requested"; "the weight of the burden of strict compliance"; and "the effect the proposed variance(s) would have on the overall zone plan." Thus, to demonstrate practical difficulty, an applicant must show that strict compliance with the regulations is burdensome, not impossible.

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.

C. Relief Can be Granted without Substantial Detriment to the Public Good and without Impairing the Intent, Purpose, and Integrity of the Zone Plan.

Relief can be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the Zone Plan.

The discussion related to this prong of the variance test is similar whether for a use variance or an area variance. The Board has received considerable information from the Applicant

on this question; and has heard considerable testimony from opponents and supporters. The Applicant has clearly met its burden of proof to show that the proposed use will not be a substantial detriment to the public good. The primary argument of the opponents related to the impact of customers standing in a line outside the building. The Applicant has provided substantial evidence that it is implementing systems that will reduce the number of people in line at any one time, and will capably keep even large lines adjacent to the Property, while still allowing plenty of space for passing pedestrians.

And most telling was the testimony of ANC Commissioner Lisa Palmer, who took the time to investigate Call Your Mother's current use in Parkview, finding from that SMD that CYM is a model citizen, the lines are quiet and respectful, and the location and area around it are cleaner than it was before CYM opened. Many applicants come before the Board promising good behavior. Few are caught in-the-act as CYM has been at its Parkview location.

III. CONCLUSION.

For the reasons outlined in this Amended Applicant's Statement, the Applicant respectfully requests the variance relief as detailed above.

Respectfully Submitted,

/S/Martin P. Sullivan

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Date: December 5, 2019