

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



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

INITIAL ORDER DATE: June 16, 2020

DECISION DATE ON REMAND PROCEDURE: November 29, 2023

PROCEDURAL ORDER ON REMAND

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 a corner store requirement of Subtitle U § 254.6(g).

Parties in this proceeding are the Applicant, the Advisory Neighborhood Commission (“ANC”) 2E, and Melinda Roth (the “party in opposition”), who owns 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 on 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.) This order reflects the zoning provisions in effect at the time of the Board’s vote at the conclusion of the public hearing.

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At a public meeting on November 29, 2023, the Board voted to issue this procedural order to request specific submissions and to schedule a continued public hearing on January 31, 2024 for further proceedings on remand. By this procedural order, the Board invites submissions from the parties and the Office of Planning addressing the two topics specified by the Court of Appeals and in this procedural order. Submissions are due by January 10, 2024 and must be served on all parties at the time of filing. The submissions must be based solely on the record in this case and shall not include any materials not before the Board in the original proceeding. All factual assertions must be followed by citations to the transcript page(s) or exhibit(s) that support the contention. No responses will be accepted.

Special exception approval. The submissions should address whether the appropriate zoning relief to allow the Applicant's 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 Applicant's planned bagel store operation.

A "corner store" is 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.) The corner-store regulations, at Subtitle U § 254.1, specify that the "residential rowhouse zones" where a corner store use is permitted are the R-3, R-13, R-17, R-20, RF-1, RF-2, and RF-3 zones. This provision delineates *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 does not state that a corner store use is permitted as a matter of right in the listed zones, nor does it authorize the Board to approve any corner store by approval as a special exception. Instead, the purpose of Subtitle U § 254.1 is to give effect to the zoning definition of "corner store" by indicating the particular zones where the use is permitted. The property at issue in this proceeding is zoned R-20, where a corner store use may be permitted in accordance with Subtitle U § 254.1.

Similarly, Subtitle U § 254.2 gives 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).) 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.) 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, which address matters including a corner store's maximum size and location within a building (Subtitle U § 254.5); the minimum distances from an existing

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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)); other location requirements (Subtitle U § 254.7); and 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). The 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)).

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).

While 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." Because the Zoning Regulations contemplate 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 § 254.13.²

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

² The Court of Appeals noted that:

Considered in isolation, the language of § 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.

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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. The latter showing 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).

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 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

Variance. 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. 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. 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?

This procedural order on remand is not a final order of the Board and is therefore not the proper subject of a motion for reconsideration. Accordingly, it is **ORDERED** that the Board **APPROVES** the issuance of this procedural order on remand.


VOTE: 4-0-1 (Frederick L. Hill, Lorna L. John, Chrishaun S. Smith, and Anthony J. Hood voting to issue this procedural order on remand; one Board seat vacant)

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."

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: December 4, 2023

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.