

Board of Zoning Adjustment
Application No. 20135-A of 3428 O Street LLC
Submission on Remand from Party in Opposition

This submission is in response to the Board of Zoning Adjustment’s (the “Board” or the “BZA”) Procedural Order of November 29, 2023. The BZA asks all parties to address two topics specified in the vacated decision by the DC Court of Appeals regarding the BZA’s award of an area variance under the DC Corner Store Regulations to the Applicant (3428 O Street LLC, the owner of the property). No other issues about this case are addressed in this submission.¹

The BZA’s Procedural Order requests submissions on the following:

- (1) Whether the Applicant must seek a special exception given the Corner Store Regulations (Subtitle U § 254) only allow fresh food markets or grocery stores as a matter of right, Call Your Mother (“CYM”), the tenant, is not a matter of right corner store. Therefore, if a special exception is sought what, if any, additional variance relief is needed under the Corner Store Regulations; and
- (2) Whether denial of the requested special exception and area variance(s) would cause practical difficulties to the Applicant.

Introduction

On August 11, 2022, the DC Court of Appeals vacated and remanded the BZA’s June 16, 2020 decision to award an area variance to the Applicant under the 2016 DC Corner Store Regulations (Subtitle U §254). CYM, a bagel chain restaurant that has grown to 15 locations in 3 states plus the District of Columbia, has continued to operate during this time. Unfortunately, the concerns raised by neighbors who originally opposed the variance starting in 2019 have materialized, and promises made by CYM to be a “good neighbor” in Georgetown, the only CYM location situated in a residential zone, have remained unfulfilled. See Annex A for a visual depiction of how CYM has negatively affected the character of this residential neighborhood.

¹ However, should the Applicant amend their original application, the Party in Opposition reserves all rights to address any issues beyond those requested in the BZA’s Procedural Order, including but not limited to the now overwhelming evidence of failure to meet the third prong required for a variance. This requirement needed for a variance states that relief should not have been granted if it creates a substantial detriment to the public good and if it impairs the intent, purpose and integrity of the Zone Plan.

A Special Exception is Required but Cannot Be Granted

As the Party in Opposition presented previously to the BZA (See BZA Public Hearing Transcript dated December 11, 2019), the Applicant cannot operate as a matter of right under the Corner Store Regulations as this is reserved only for fresh food markets and grocery stores. The Applicant therefore requires a special exception to operate under the DC Corner Store Regulations. The DC Court of Appeals agreed with the Party in Opposition's interpretation, specifically that CYM does not qualify to open as a matter of right, as they are indisputably not a fresh food market or grocery store.

Words must be given their plain meaning in legal concepts and in interpreting regulations. Subtitle U § 254.13 states: "A corner store for which the use is a fresh food market or grocery store devoted primarily to the retail sale of food shall be permitted as a matter of right," and is subject to several conditions. The next section, Subtitle U § 254.14 specifies:

"A corner store use that is not permitted as a matter of right pursuant to Subtitle U § 254.13, shall be permitted as a special exception if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9..." (emphasis added) and is subject to several conditions.

The DC Court of Appeals summarizes their review 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; a corner store otherwise can be given approval to operate under a special exception if it can meet certain conditions." See *Roth v. District of Columbia Bd. of Zoning Adjustment*, 279 A.3d 840, 850 (D.C. 2022).

There are also additional precedents from BZA cases to consider. Applications for other corner store uses include BZA Case 19623 (*Creative Grounds*, an art gallery with a prepared food shop) and BZA Case 20564 (*Jemals Prospects, LLC* the owner of that property with Greenheart, a juice bar and also considered a prepared food shop). In both cases, a special exception was requested since neither are fresh food markets or grocery stores. The different treatment for CYM was noted by the Party in Opposition at previous hearings and briefs. A special exception under Subtitle U § 254.14 was granted to *Creative Grounds* but, in contrast to CYM, "No parties appeared at the public hearing in opposition to this application" as stated in the BZA Order. The special exception requested by *Jemals Prospects*, only a few blocks away from the instant case, was denied by the BZA on January 26, 2022.

Unlike their original claims, CYM does not have a matter of right use, and must therefore request a special exception.

The regulation is clear: A special exception cannot be granted if:

Section 254.14: *A corner store use that is not permitted as a matter of right pursuant to Subtitle U § 254.13, shall be permitted as a special exception if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9, subject to the following conditions:*

(a) A corner store use shall be located so that it is not likely to become objectionable to neighboring property because of noise, traffic, deliveries, or other objectionable conditions; (emphasis added)

The question over whether to grant a special exception should end here: There is overwhelming evidence in the record that neighboring properties found the use objectionable. Both adjacent properties, both residential, initially objected and were also part of the DC Court of Appeals case. Their updated statement is attached as Annex B.

CYM has opened and operated for a number of years and there is a significant amount of actual evidence: noise, pedestrian and automobile traffic, trespass, morning deliveries, trash, rats and other objectionable conditions. These objectionable conditions were further testified to at the January 8, 2024 meeting of ANC2E and agreed to by a number of ANC2E commissioners.

During the October 29, 2019 BZA Public Hearing (“Hearing”), many neighbors within 200 feet testified as to their objections. Party status was not granted at that time to the Party in Opposition, but individual neighbors were permitted to present their objections for 3 minutes each. Those neighbors, as the record showed, presented a poster map that showed 95% of those neighbors living in the impacted area (within 200 feet) had serious objections to granting a variance. These objections must be respected by the BZA. The overwhelming popularity and success of CYM is irrelevant.

At the first Public Hearing, BZA rightly stated that zoning is not a popularity contest. Instead, what matters is the opinions of those neighbors who are directly impacted. Both immediately adjacent residential neighbors have updated their original opposition statements (See Exhibit 142 E BZA Case 20135 for the original statements from the adjacent property owners). See Annex B for updated statements, which states in relevant part:

*We kindly request that you remove the illegal variance that CYM has and do not issue a new one or a special exception. **The business has been a burden to our peaceful neighborhood in many ways, and we find it extremely objectionable.*** (emphasis added)

It does not matter how successful or popular CYM, how many people love their bagels or how their popularity has fueled their growth to 15 outlets in numerous states. All of those locations are in commercial zones, and their use is permitted: The Corner Store Regulations are clear and state that a special exception cannot be granted if the corner store is objectionable to neighboring properties.

This position has been reinforced by the BZA just two years ago: In the *Jemals Prospects Case*, a special exception for a prepared food shop under the Corner Store Regulations was both denied by the ANC2E and the BZA. Recall that this application was also in ANC2E, just a few blocks away from CYM. Moreover, those denials were based on objections from the immediately impacted neighbors, who provided evidence from CYM to support their fears of objectionable conditions with the planned juice bar. The *Jemals* case was denied based on fears of objectionable conditions, whereas for CYM, there is actual, and not just feared objectionable conditions.

The *Jemals* case also requested a special exception and an area variance from U § 254.6 (g)(a) as this prepared food shop was also planned to be less than 750 feet from a commercial zone. As ANC2E noted in this case: “The relief that the Applicant requests would violate the intent of the ‘750 Foot Rule’ established by subsection 254.6(g) of subtitle U of the Zoning Code. For that reason alone, the area variance that the Applicant seeks should be denied.” (See Exhibit 26, BZA Case 20564 ANC2E Letter to BZA December 3, 2021).

The BZA should be consistent and apply similar standards for this substantially similar case in precisely the same neighborhood. If the Applicant seeks a special exception in this case, it would need to be granted at least two, if not more, variances, In addition, to the 750 ft. rule, or Subtitle U § 254.6 (g), the Applicant would also require a variance from U§254.6 (c) which states that a corner store cannot be, “within five hundred feet of more than three other lots with a corner store use defined as retail, general service, or arts, design, and creation uses.”

There are in fact 5 other lots with a “corner store use” within 500 feet. The Corner Store Regulations specifically state a corner store use does not have to be located on a corner, and the regulations also discuss corner store “use” meaning other commercial activities that are retail, general service, arts design and creation, or eating and drinking establishments. Such corner store use establishments can already exist and include more than those that came into existence under Subtitle U § 254. The Corner Store Regulations do not say corner stores, but specify instead “corner store use.” There is a distinct difference between “corner stores” and “corner store use.”

In BZA Case #19623 (Creative Grounds), the Office of Planning’s (“OP”) memorandum recommending approval of the special exception required by the coffee shop, OP utilizes other stores not on corners which have not been considered or processed under the Corner Store Regulations but have previously existed. This helps to show that corner store use does indeed mean stores that have existed before the CSR came into effect and do not need to be located on a corner. OP cites examples in BZA case #19623 of other “corner store uses” which are similar to the 5 corner store uses that the Petitioners have cited.

First, to claim that no store opened before the 2016 zoning rewrite can be classified as a corner store does not make any sense given the wording of the regulations. The regulations are clear when they refer to “corner store use” as meaning stores that already exist. The Official Zoning Blog states that “This Blog continues and sets out rules for new corner stores, thus distinguishing

between existing corner store use establishments and new corner stores applying under the new CSR (See <http://zoningdc.org/2015/08/28/corner-stores-under-the-proposed-regulations/>). Second, the CSR specify in Section 254.6 (f) that new corner stores must be

In the R-20 zone, on an interior or through lot with a building that was built prior to May 12, 1958, for the purpose of a nonresidential use, and only if the building was used for a corner store use within the previous three (3) years established by a certificate of occupancy, permit records, or other historical documents accepted by the Zoning Administrator.”

This distinction permits stores that are not actually on corners to be considered corner stores. Therefore, those “neighborhood-based retail establishments tucked into predominantly residential neighborhoods” that are not actually on corners must be considered to be “corner store use” establishments.

The Applicant does not meet the requirements of § 254.6 (c) as the Subject Property is located within 500 feet of five such corner store use establishments:

1. Formerly Saxby’s Coffee Shop, now Coffee Republic 3500 O St NW: 81.7 feet
2. Barber Shop, 1329 35th St NW: 26.7 feet
3. Formerly Bredice Brothers Hardware and Shoe Repair, now a research firm 1305 35th St NW: 211.5 feet
4. Georgetown Cleaners & Tailors, 1303 35th St NW: 229.7 feet
5. Custom TV Solutions, 1301 35th St NW: 248.7 feet

Therefore, the Applicant would need to apply for relief from Subtitle U § 254.6 (c) as the subject property is located within 500 feet of more than three lots defined as corner store use. However, once, and if, the Applicant amends their application to apply for this needed relief, the BZA may waive this requirement as specified in Section 254.15 provided the planned corner store meets the following four requirements:

- (a) Be neighborhood serving;
- (b) Not negatively impact the economic viability or vitality of an area zoned MU or NC that is closer than seven hundred and fifty feet (750 ft.) to an R-20 zone or five hundred feet (500 ft.) to any other R zone;
- (c) Not create a concentration of non-residential uses that would detract from the overall residential character of the area; and
- (d) Not result in undue impacts uses on residents of the area through the concentration of such.

The Applicant cannot meet *ANY* of those conditions to waive the restriction and must therefore request a variance.

As the owner of Wisemiller Deli testified at the Hearing, CYM affects their economic viability and they are within, and should be protected, by the 750 foot rule. Gina Vogel, owner of Wisemiller's, testified during the December 11, 2019 BZA Public Hearing, that Wisemiller's is truly a neighborhood deli and has been operating for over 68 years. She stated:

“We entered into the lease agreement with the explicit understanding that under the District zoning rules, no other prepared food shop or corner store could operate in our immediate Georgetown University area due to the minimum distance restrictions in the commercial zone. Our economic vitality is predicated on this protection afforded to use under the law.” See BZA Public Hearing Transcript December 11, 2019, p 127.

Moreover, with the former Saxby's (now Coffee Republic), and four other commercial uses, the overall residential character of the area has been significantly and negatively altered by CYM.

Finally, the fourth condition - undue impact - is demonstrably not met for such a waiver as there is, again, actual and overwhelming evidence that the residents – those within 200 feet and most impacted – have had a significant undue impact.

The BZA's Procedural Order on Remand from November 29, 2023, asks about U § 254.14 (b) (1) which states:

U § 254.14 (b) The applicant shall demonstrate that the proposed corner store use will not detract from the overall residential character of the area and will enhance the pedestrian experience by providing within the application the following information:

(1) A demonstration of conformity to the provisions of Subtitle U §§ 254.5 through 254.12;

The words of the Corner Store Regulations are clear: Subtitle U §§ 254.5 through 254.12 are applicable to all corner stores, whether a fresh food or grocery store which are permitted as a matter of right according to U § 254.13 as well as other corner stores which are permitted through a special exception according to U § 254.14. The difference in language where grocery stores and fresh food markets “shall meet the requirements of Subtitle U §§ 254.5 through 254.12” versus other corner stores which must show a “demonstration of conformity to the provisions of Subtitle U § 254.5 through 254.12” is not substantively different. Those conditions or requirements in U § 254.5 through 254.12 apply to all corner stores, despite the slightly nuanced language. A demonstration of conformity means those requirements must be conformed to, or met. There cannot be an alternative interpretation of these regulations where somehow a “demonstration of conformity” does not mean the requirements are not applicable.

There are also arguments that the Applicant requires variances from two additional requirements:

(1) U §254.8: There shall be no on-site cooking of food or installation of grease traps; however, food assembly and reheating is permitted in a corner store; and

(2) U §254.10: All storage of materials and trash shall occur within the building area devoted to the corner store. There shall be no external storage of materials or trash.

CYM cannot demonstrate conformity to either of those requirements. For U §254.8, only reheating is allowed. Toasting is not reheating. For U §254.10, CYM keeps several trash cans outside all day. There have been some issues where their trash cans have been left outside overnight as well, but that is not the norm, and Annex A shows that CYM has anywhere from 2-6 cans outside the store during opening hours. This directly contradicts the requirement that all trash shall occur within the building area.

In summary, the Applicant requires at least two, if not four, variances. In addition to the U§ 254.6 (g) (the 750 ft. Rule), the only variance the Applicant initially applied for given they mistakenly believed they could self certify that they had a matter of right to open as a prepared food shop, the Applicant would have to address these other requirements discussed above they do not meet. The 750 ft. Rule and then U § 254.6 (c) where the subject property is within 500 ft. of 5 other corner store use establishments would require area variances. The Applicant would bear the burden of proof that they meet the three prong test to receive these variances, including not only the practical difficulties for the owner of the property but also the third prong which states there cannot be a substantial detriment to the public good. Use variances would be required to provide relief for the heating and trash requirements, which require the Applicant also proving they meet the three prongs necessary.

No Practical Difficulties

With regard to any practical difficulties faced by the Owner, no such practical difficulties exist. The fact that no practical difficulties exist was a focus of the DC Court of Appeals opinion and previously recognized by at least one prior BZA Commissioner.²

² During the first BZA Public Hearing on October 30, 2019, Commissioner Hart asked

What I'm trying to understand is there are 100 other types of uses that we could look at. It could be a hardware store. It could be something else. I don't know what else...What I'm trying to get to is while they may not have looked at 50 uses, are they saying that this is the only particular use that they're trying to get? That's the part that I'm trying to get to. We're being asked to do a variance -- to approve a variance. There is a business that can operate here right now, as a retail -- as a shop that is not preparing the bagels, but is just selling the bagels. There is a legitimate business that's able to do that. So this particular owner can be there right now, but just not prepare that. I'm trying to nail down what is the aspect that is the hardship that we need to address? October 30 Transcript p. 39-40

CYM signed a ten year lease in April 2019. See BZA Public Hearing October 30, 2019, line 23, p. 108, and the owner has collected rent for nearly 5 years. In addition, the owner rents the upstairs apartment for \$3,750 a month. The building was purchased in 1996 for \$217,500 by the owner's now deceased father. It is clear that the owner has reaped significant profit from his investment.

No effort was ever made to advertise the space for rent or sale. The building was never vacant. A commercial space that previously housed a hardware store less than a block away at 1305 35th Street was easily rented within the last year. The owner said that he faced no delays in finding a tenant. And while the owner and CYM can speculate all day that it *might* be difficult, no one has ever tried to find a tenant or buyer of the property. Moreover, the owner has a ten year signed lease in hand.

CYM stated that they would have to pay a substantial penalty to the owner to break the lease. There have been some discrepancies in the terms of the lease (questions as to whether the term is 10 years or 5 years plus a 5 year option, cost to break the lease, rent, etc.). Despite being requested in an earlier hearing, the lease has never become part of the record in this case.

In sum, there are no practical difficulties for the owner: They have a tenant who signed up to a ten year lease. The DC Court of Appeals states: "Given 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." See *Roth* p11. The Court goes on to recognize that CYM has many successful other operations and could make payments on this lease whether or not a single location, like this one, were profitable.

The Property Manager of the Subject Property wrote a letter to the BZA that he "thinks" it may be difficult to rent the subject property to anyone else.³ As ANC 2E Commissioner Rick Murphy testified in the second hearing:

³ Mr. McCann never appeared at any of the ANC or BZA hearings and never testified under oath. He is also not an expert witness on the real estate or property market, serving as Property Manager of the Subject Property only after his father died in July 2019. There was no opportunity to cross-examine his speculative opinions, though the BZA credits the Owner's Statement numerous times in their Decision and also states, "The Board found the Owner's Statement credible" in their determination that there was evidence to find practical difficulties. See Exhibit 156 p 21.

Now, the only evidence of...hardship the applicant has offered is a letter from the manager of the applicant. In that letter, Mr. Sean McCann says, and I quote, I think it would be extremely hard to find a long-term successful tenant that could lease this property. Closed quotes. That's an opinion. It's not a statement of fact. See BZA Public Hearing Transcript December 4, 2019, p.90.

The Applicant submitted no other evidence of any practical difficulties: just an opinion, which contradicts other statements made by the owner of the building that people were knocking down the door to rent the property (October 30 hearing, line 21-22 page 40).

CYM can operate without BZA approval of the special exception and variances being sought, as they could operate as a bakery and sell bagels in the space. The BZA need not choose the most profitable option. Moreover, CYM could easily rent alternative space in commercially zoned Georgetown that would allow for seating and a full restaurant. CYM signed a lease with 3428 O Street LLC that was not conditional upon BZA approval. Any issues for CYM are contractual and between landlord and tenant. The issues for CYM, the money they have sunk into renovations, are irrelevant for a request for zoning relief. The focus must be on practical difficulties for the owner, and no practical difficulties have ever been shown.

Conclusion

At the October 30, 2019 hearing, BZA proposed a 3-5 year lookback to see if CYM was harmonious with the neighborhood. CYM agreed to this. Now, nearly 5 years later, the time is now to review that situation. The overwhelming evidence is that CYM is far from harmonious and is indeed damaging to the neighborhood, and granting the variance was a mistake as a matter of law and a matter of policy, and the special exception and any variances sought must therefore be denied.

Annex A Photographic Evidence of Objectionable Conditions

A residential Georgetown community transformed by a fast food establishment that has brought a stream of people into the intersection of 35th and O Streets NW



Sitting and eating on our doorsteps,



despite posted signs:

Spilling onto neighboring Streets:

O Street NW



35th St NW

Overflowing public trash cans, CYM trash cans:

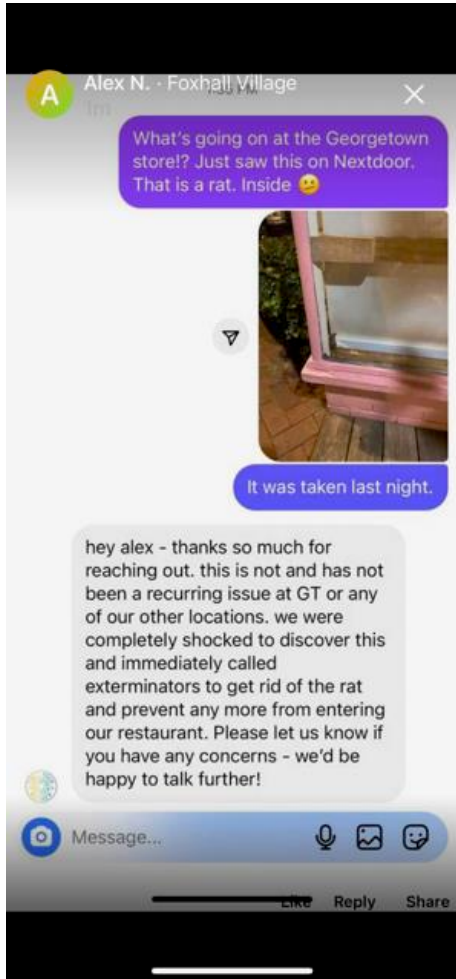




Food remains dropped into resident trash cans and on sidewalks:



Rodents repeatedly seen in CYM with NO action from Health Inspectors:



Resulting in humongous rats in residents' yards that residents have had to bear the costs of exterminating:



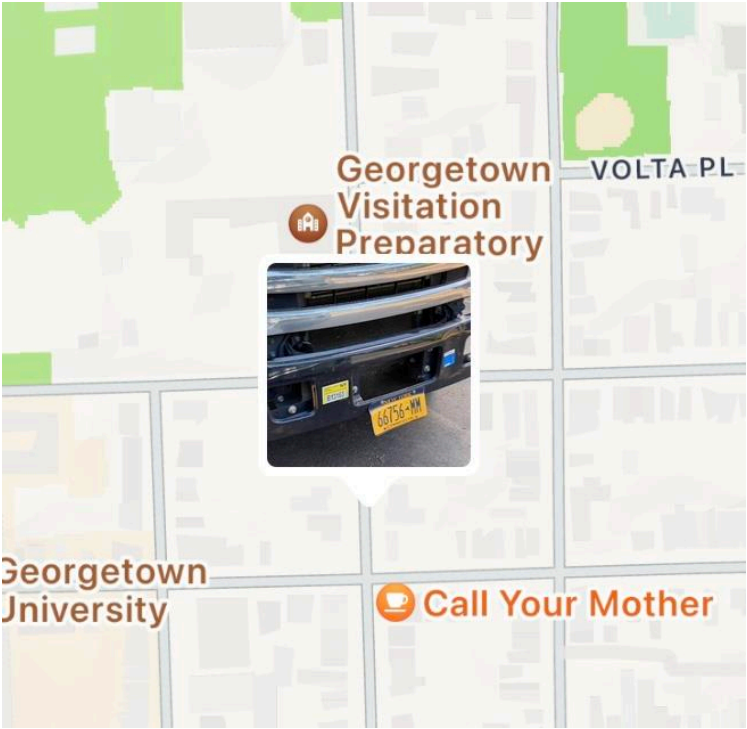
Delivery trucks blocking buses from turning onto O Street and parked each day at the fire hydrant:



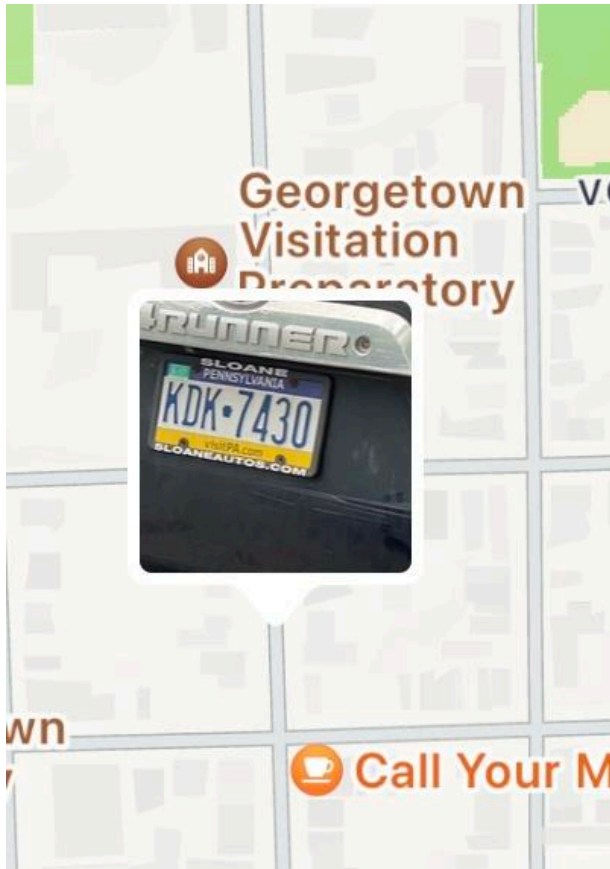
Cars from outside the neighborhood turning the intersection into a parking lot as patrons pick up internet-placed orders and park at the fire hydrant consuming their takeout:



Connecticut



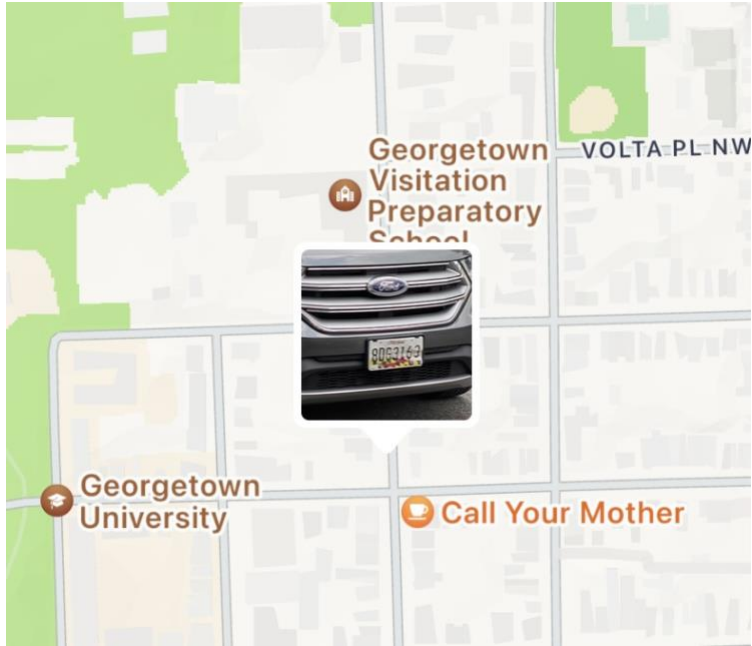
New York



Pennsylvania



Virginia



Maryland



Alabama

Annex B Updated Statement from Immediately Adjacent Property Owners

On behalf of the owners of 3424 O Street and 1331 35th Street:

Our names are Nabil Emad and Julian Clarke and we are issuing this statement as the homeowners of the property located at 3424 O Street and 1331 35th Street, both immediately adjacent to Call Your Mother at 3428 O Street. We wanted to state serious concerns that we, as well as our tenants, have been having due to the presence of this business in our residential neighborhood.

Firstly, we must express our disappointment in learning that the city has allowed the business to operate with an illegal variance in this location. We continue to have serious concerns about the safety and well-being of our tenants.

One of the most pressing issues we are facing is we are alarmed by the absence of a firewall between the cooking facilities and our buildings, which poses a significant fire risk to our housing. This is a clear violation of the fire code regulations in Washington, DC. Our knowledge of this issue stems from an incident during the construction of CYM when a contractor inadvertently drilled through the drywall, penetrating the wall at 3424 O Street. This incident is indicative of the potential dangers associated with the lack of proper fire safety measures between our properties and poses a life-threatening risk to our tenants.

Moreover, the constant noise and long lines associated with Call Your Mother have been a source of disruption. The peaceful residential atmosphere we once enjoyed has been compromised, leading to an uncomfortable living environment. This disturbance is not only affecting our current tenants but also deterring potential future tenants who are reluctant to live next to a busy bagel shop. Daily, CYM patrons are found sitting by our front doors or on our stoops even with signs specifically stating that this is private property.

In addition to these concerns, the excessive amount of trash generated by CYM has attracted a growing number of rats to the area. This poses a significant health risk to our tenants, and we cannot ignore the impact it has on the overall quality of living in our neighborhood. Restaurant patrons are also using our private trash and recycle receptacles after they visit CYM.

Considering the aforementioned issues, we kindly request that you remove the illegal variance that CYM has and do not issue a new one or a special exception. The business has been a burden to our peaceful neighborhood in many ways, and we find it extremely objectionable.

We appreciate your prompt attention to this matter to restore the charm that our neighborhood once had. We can be reached at latimerclarke@hotmail.com and themads@gmail.com if you require any further information.

Thank you for your understanding and cooperation.

Sincerely,
Nabil Emad & Julian Clarke

BZA APPLICATION NO. 20135-A

I hereby certify and attest that on January 10, 2024, a copy of the requested submission from the Party in Opposition was delivered by electronic mail to the parties of the underlying case, as well as other entities from which the Board has requested a response, listed below:

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Signed Melinda Roth, Party in Opposition