

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Applicant’s Statement of 3428 O Street LLC

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 (antique shop) and one (1) residential unit on the second floor. As the Subject Property is located in the R-20 Zone, the antique shop use is considered an existing non-conforming use. The Applicant is proposing to convert the existing non-conforming retail use to a bagel shop (categorized as a prepared food shop), which is also a non-conforming use. Under the 1958 Regulations, this change from one non-conforming use to another would have been permissible with special exception approval. However, under the 2016 Regulations, this special exception relief was strictly limited to residential uses, effectively making the special exception irrelevant.¹ Accordingly, the Applicant is requesting relief from the R-Zone use requirements of U § 201 in order to use the basement and first floor of the Subject Property as the home of “Call Your Mother” bagel shop.

BACKGROUND.

¹ Under the 1958 Regulations, the special exception for a change from one nonconforming use to another was available for one-family dwellings, flats, multiple dwellings, and *neighborhood facilities*. ‘Neighborhood facilities’ was interpreted to mean neighborhood-serving uses; and the special exception was granted frequently. Under the 2016 Regulations, the term “neighborhood facilities” was removed, leaving a use variance as the primary option for a change from one nonconforming use to another.

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 an antique shop that operated by virtue of a use variance granted in BZA Order No. 11248 in 1973. A copy of that BZA Order and applicable 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 617 square feet 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 Applicant already operates "Call Your Mother" bagel shop located on Georgia Avenue and is proposing to use the Subject Property as a second location. The proposed hours of operation are from 7AM to 3PM.

C. Surrounding Area.

The Subject Property is surrounded by a mix of uses. Directly abutting the Subject Property to the south and east are one-family dwellings. Across 35th Street to the west is another

retail space on the corner of the 35th Street and O Street, NW. Across O Street to the north are one-family row dwellings. There are also several multi-family buildings in the surrounding area.

II. USE VARIANCE.

The Applicant is requesting use variance relief from the Use Permissions of U § 201 in order to convert the premises from its most recent use as a retail store to the proposed use as a prepared food shop. The Board is authorized to grant use variance relief where it finds that three conditions exist:

- (1) The property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or conditions;
- (2) The owner would encounter an undue hardship if the zoning regulations were strictly applied; and
- (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.

See French v. District of Columbia Board of Zoning Adjustment, 628 A.2d 1023, 1035 (D.C. 1995); *see also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

The variance procedure has many purposes. It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack, alleviate an otherwise unjust invasion of property rights and prevent usable land from remaining idle. These purposes infuse meaning into the phrase "exceptional and undue hardship." *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 541-42 (1972).

It is well established that because of the nature of variances and their effects on the zone plan, the stricter “undue hardship” standard applies to requests for use variances while the “practical difficulty” standard applies to requests for area variances. *Palmer v Board of Zoning Adjustment* 287 A.2d 535 (D.C. 1972). For the Board to grant use variance relief, “it must be shown that the regulations ‘preclude the use of the property in question for any purpose for which it is reasonably adapted, *i.e.*, can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?’” *Palmer v. BZA*, at 542, citing 2 A. Rathkopf, *The Law of Zoning and Planning*, Note 21, at 45-5 (3d ed. 1962).

A. The Subject Property is Unique Because it is Affected by an Exceptional Situation or Condition.

The phrase “other extraordinary or exceptional situation or conditions” in the above-quoted variance test applies not only to the land, but also to the existence and configuration of a building on the land. *See Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment*, 320 A.2nd 291, 294 (D.C. 1974). 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 an undue hardship if the zoning regulations are

strictly enforced, because the potential use of the space is limited to the same use as is currently approved – the antique retail store.

B. Strict Application of the Zoning Regulations Would Result in an Undue Hardship to the Owner.

An owner is presented with an undue hardship when their “property cannot be put to any zoning-compliant use for which it can be reasonably adapted.” *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). In a recent case, the D.C. Court of Appeals upheld this Board’s approval of a use variance and noted that economic harm to an owner in converting a portion of their property into a zoning-compliant use, coupled with significant limitations on the utility of a building, constituted undue hardship necessary to satisfy the second prong of the use variance test. *The Oakland Condo v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748 (D.C. 2011).

The history of uses and configuration of the Building creates an exceptional situation where the Applicant will suffer an undue hardship if the use variance is not granted. Use of the Building as a one-family dwelling (the only matter-of-right residential use) is not feasible. There is already a residential use established above and as the only matter-of-right use would be as a one-family dwelling, it would require extensive renovation in order to create a marketable floor plan. Even then, the existing first floor features, including large shop windows and a corner entrance are not conducive to residential use. The entire façade of the first floor would have to be redesigned which could prove difficult as it would require oversight and approval from OGB, HPRB and the Commission of Fine Arts.

As the existing first floor and basement have always been used for commercial purposes and any alterations to convert the Building to a single-family residential use would not be feasible, the Applicant will be faced with an undue hardship if the relief is not granted.

III. CASE LAW.

A. Case No 19737.

In BZA Case No. 19737 the Board approved a use variance for office use on the first and second floors of an existing two-story building at 500 13th Street, SE. The Office of Planning supported the use variance as it related to office use on the first floor, but recommended denial for the use on the second floor. The applicant argued that the history of commercial uses coupled with its location adjacent to a PDR zone created a unique condition where the applicant was unable to use the building for residential purposes and as a result, the building had been left vacant for quite some time. At the hearing, the Office of Planning testified that the property was unique in the sense that it had a commercial first floor that was not permitted to be used for commercial purposes. In its deliberation, all Board members readily supported the variance request for the first-floor use based on the fact that the first floor had always been used and was designed as a commercial space. The Board was split with regards to the commercial use on the second-floor space as it was already configured as a residential space. Regarding the third prong, many neighbors testified to the fact that a commercial use was much needed in the neighborhood as there was a surplus of housing in this particular area.

In the present case, the Applicant is only requesting relief to maintain the status quo and use the existing non-residential space for a non-residential purpose. Similarly, the history of commercial use on the first floor and the existing configuration creates a situation where the Applicant would face an undue hardship if it had to convert the first floor and basement of the

Building to residential use. Moreover, it would eliminate a previously existing and appreciated commercial space in the community.

B. Case No. 19578.

In BZA Case No. 19578, the Board approved a use variance for a hair salon on the first and second floors of an existing two-story building at 944 Florida Avenue, NW. The applicant argued that the history of commercial uses, the cost of converting commercial space into residential space, and the cost of updating the existing residential space created an exceptional situation where the applicant would face an undue hardship if it had to use the building for residential purposes.

In its report, the Office of Planning recommended denial of the request, arguing that while the property was unique due to its continued non-residential use, the Applicant had not proven an undue hardship. After the hearing, the Board requested additional information from the Applicant which focused on the feasibility of maintaining the existing second floor use and renovating the building for residential use. In its deliberation, the Board granted the relief, determining that the history of uses coupled with the cost of updating the existing residential space and converting the non-residential space created an exceptional situation which would lead to an undue hardship if relief were not granted.

As noted above, the Applicant in the present case is only requesting relief to maintain the status quo. The Applicant would face a similar hardship if the relief were not granted, as it would have to convert the existing non-residential space and residential unit into one single space, as single-family use is the only permitted residential use in the R-20 zone. The present case is distinguishable from Case No. 19578 as the Applicant is not proposing to expand a non-residential use to existing residential space. The request is simply for the continued use of

existing non-residential space and the Applicant will maintain the residential unit on the second floor of the Building.

C. Case No. 18701.

In BZA Case No. 18701, the BZA approved a use variance request very similar to the present case, approving a restaurant at 1247 E Street, SE, based on the undue hardship inherent in converting an originally built commercial first floor space from commercial to residential use. The Office of Planning supported the use variance, noting that the existing configuration of the commercial space created an exceptional situation. The space was originally constructed as a grocery store, had always been used for various commercial purposes, and was never outfitted or adapted for residential use. Similarly, the Subject Property was originally designed with commercial use on the ground floor and basement and converting the purpose-built commercial space to residential space would result in an undue hardship for the Applicant.

IV. CONCLUSION.

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

Respectfully Submitted,

/S/Martin P. Sullivan

Martin P. Sullivan
Sullivan & Barros, LLP
Date: August 7, 2019