

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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REGULAR PUBLIC MEETING

+ + + + +

WEDNESDAY

FEBRUARY 14, 2024

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The Regular Public Meeting of the District of Columbia Board of Zoning Adjustment convened via Video Teleconference, pursuant to notice at 9:30 a.m. EST, Frederick L. Hill, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

FREDERICK L. HILL, Chairperson
LORNA L. JOHN, Vice-Chairperson
CHRISHAUN S. SMITH, NCPC Designee

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD, Chairperson
JOSEPH S. IMAMURA, PhD, AOC Designee

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
PAUL YOUNG, A/V Production Specialist

OFFICE OF PLANNING STAFF PRESENT:

JOEL LAWSON
JONATHAN KIRSCHENBAUM
CRYSTAL MYERS
KAREN THOMAS
MAXINE BROWN-ROBERTS
MICHAEL JURKOVIC

The transcript constitutes the minutes from
the Regular Public Meeting held on February 14, 2024.

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P-R-O-C-E-E-D-I-N-G-S

9:36 a.m.

BZA CHAIR HILL: Good morning, ladies and gentlemen, the Board of Zoning Adjustment. Today's date is 2/14/2024. Happy Valentine's Day.

The public hearing will please come to order. My name is Fred Hill, Chairman of the District of Columbia Board of Zoning Adjustment. Joining me today is Vice Chair Lorna John, Board Members Carl Blake and Chrishaun Smith, and Zoning Commissioners Dr. Joe Imamura and Chairman Anthony Hood.

Today's meeting and hearing agenda are available on the Office of Zoning's website. Please be advised that this proceeding is being recorded by a court reporter and is also webcast live via Webex and YouTube live. The video of the webcast will be available on the Office of Zoning's website after today's hearing. Accordingly, everyone who is listening on Webex by telephone will be muted during the hearing. Also, please be advised that we do not take any public testimony at our decision meeting session.

If you are experiencing difficulty accessing Webex, which is our phone call-in site, then please call our OZ hotline number 202-727-5471; once again, 202-727-5471 to receive Webex log-in or call-in instructions.

At the conclusion of a decision-meeting session,

1 I shall, in consultation with the Office of Zoning, determine
2 whether a full or summary order may be issued. A full order
3 is required when the decision it contains is adverse to a
4 party including an affected ANC. A full order may also be
5 needed if the Board's decision differs from the Office of
6 Planning's recommendation. Although the Board favors the use
7 of summary orders whenever possible, an applicant may not
8 request the Board to issue such an order.

9 In today's hearing session, everyone who is
10 listening on Webex or by telephone will be muted during the
11 hearing and only persons who have signed up to participate
12 or testify will be unmuted at the appropriate time. Please
13 state your name and home address before providing oral
14 testimony or your presentation.

15 Oral presentations should be limited to a summary
16 of your most important points. When you are finished
17 speaking, please mute your audio so that your microphone is
18 no longer picking up sound or background noise.

19 All persons planning to testify either in favor
20 or in opposition should have signed up in advance. They will
21 be called by name to testify. If this is an appeal, only
22 parties are allowed to testify. By signing up to testify,
23 all participants have completed the oath or affirmation as
24 required by Subtitle Y408.7.

25 Requests to enter evidence at the time of an

1 online virtual hearing, such as written testimony or
2 additional supporting documents other than live video, which
3 may not be presented as part of testimony, may be allowed
4 pursuant to Subtitle Y103.15 provided that the person making
5 the request to enter an exhibit, explained (a) how the
6 proposed exhibit is relevant; (b) has a good cause that
7 justifies allowing the exhibit into the record including an
8 explanation of why their request did not file the exhibit
9 prior to the hearing Subtitle Y206; and (c) how the proposed
10 exhibit would not unreasonably prejudice any parties.

11 The order of procedures for a special exception
12 and variances are pursuant to Y409.

13 At the conclusion of each case, an individual who
14 is unable to testify because of technical issues may file a
15 request for leave to file a written version of the planned
16 testimony to the record within 24 hours following the
17 conclusion of public testimony in the hearing. If additional
18 written testimony is accepted, then parties will be allowed
19 a reasonable time to respond as determined by the Board. The
20 Board will then make its decision at its next meeting
21 session, but no earlier than 48 hours after the hearing.
22 Moreover, the Board may request additional specific
23 information for the record. The Board and the staff will
24 specify at the end of the hearing exactly what is expected
25 and the date when a person must submit the evidence to the

1 Office of Zoning. No other information shall be accepted by
2 the Board.

3 Finally, the District of Columbia Administrative
4 Procedures Act requires that a public hearing on each case
5 be held in the open before the public. However, pursuant to
6 Section 405(b) and 406 of that Act, the Board may, consistent
7 with its rules and procedures and the Act, enter into a
8 closed meeting on a case for purposes of seeking legal
9 counsel on a case pursuant to D.C. Official Code Section 2-
10 575(b)(4) and/or deliberating on a case pursuant to D.C.
11 Official Code Section 2-575(b)(13), but only after providing
12 the necessary public notice in the case of an emergency
13 closed meeting after obtaining a roll call vote.

14 Mr. Secretary, do we have any preliminary matters?

15 MR. MOY: Good morning, Mr. Chairman and members
16 of the Board. I do have a few announcements related to
17 today's docket.

18 First, Case Application No. 20931 of Layla Bonnot
19 has been postponed, rescheduled to February 28th, 2024. Case
20 Application No. 21034 of Morningstar Community Development
21 has been postponed, rescheduled to April 24, 2024. Also,
22 Case Application No. 21041 of Nina Frant, F-R-A-N-T, that
23 application has been withdrawn by the applicant.

24 Finally, Mr. Chairman, for the record, the
25 chairman has reviewed and granted waivers to allow late

1 filings into the applicable case records pursuant to Subtitle
2 Y, Section 206.7 and Section 103.13. Any other late filings
3 during the course of today's live hearing should be presented
4 before the Board by the applicant or other parties or
5 witnesses after I call that case. And that's all from me,
6 Mr. Chairman.

7 BZA CHAIR HILL: Okay, thanks, Mr. Moy. Good
8 morning, everybody. Let me see. I guess this is it for us
9 today and you, Mr. Moy, may call our first case, please.

10 MR. MOY: The first and only case in the Board's
11 meeting session is a Board action on remand of Application
12 No. 20135-A of 3428 O Street, LLC. The underlying case is
13 captioned as a self-certified application pursuant to
14 Subtitle X, Section 10024 and Area Variance from Subtitle U,
15 Section 254.6G to allow a corner store use within 750 feet
16 of an M-U Zone. The property is located in the R-3/GT Zone
17 and the property is located at 3428 O Street, NW, Square
18 1228, Lot 76. And I think that's all I need to say. Thank
19 you, sir.

20 BZA CHAIR HILL: Okay, thank you. Good morning,
21 everybody. So this has been quite contentious and it has
22 been going on for a long time and I think has brought up some
23 questions for the Board that we need to kind of talk to. I
24 know that some of my board members have had an opportunity
25 to look at this, as we all have, but I'm going to ask if

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1 someone else will take the lead on this one for me and I
2 believe Mr. Smith, you might be willing to go first?

3 MEMBER SMITH: Sure, I'll go first. So the Board
4 is hearing this case that Mr. Moy into a remand by the
5 District Court of Appeals to address two topics, the vacation
6 of the Board's previous order granting an area variance to
7 3428 O Street, LLC, the owner of the property and by
8 extension, Call Your Mother, the tenant for the property at
9 3428 O Street, NW.

10 The court tasked us with two questions. The first
11 one was whether the denial of the requested variance would
12 cause practical difficulties to the owner of the subject
13 property since the lease of Call Your Mother was already
14 signed; and (2) that the Board conclude alone that an area
15 variance request by itself would be sufficient to operate the
16 proposed eating and drinking establishment corner store use.
17 I believe we have to take up the second question first by the
18 court regarding the area variance.

19 I first want to address the applicant's argument
20 that we only consider the relief requested in the self-
21 certification and let the Zoning Administrator decide whether
22 a special exception is needed. I fundamentally reject that
23 interpretation of the zoning regulations. While the Zoning
24 Administrator has primary authority for the administration
25 and determination of compliance with the zoning regulations,

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1 this does not negate the authority of the Board of Zoning
2 Adjustment as having final administrative responsibility for
3 interpreting the zoning regulations.

4 I also reject the notion that a self-certification
5 means that the Board of Zoning Adjustment should solely rely
6 on the applicant to make a determination of what zoning
7 relief is needed for an application. In line with the
8 Board's stated responsibilities and interpretation of the
9 regulations, the Board has the authority to dismiss an
10 application if no relief is needed which we have done many
11 times before on my tenure here and also to dismiss an
12 application if it finds that the relief requested is
13 insufficient.

14 So moving to the court's second question of this
15 remand, per the corner store regulations 254.13, a corner
16 store for which the use is a fresh market or grocery store
17 devoted primarily to the retail sale of food shall be
18 permitted as a matter of right. That seems to be very clear
19 to me in the regulations.

20 However, based on the sales model of the tenant
21 the time of the application of the vacated decision, the
22 applicant's proposal does not meet the definition of a matter
23 or right lease for a corner store. Therefore, I agree in
24 part with the party in opposition and I believe a special
25 exception under 54.14 is needed in this case. Because the

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1 applicant has only filed an area variance request, I believe
2 this case that's in front of us at this point, should be
3 dismissed. So I'll open it up to more dialogue from my board
4 members, but I do believe that an area variance is not what
5 is supposed to be needed here (audio interference).

6 BZA CHAIR HILL: Thanks, Mr. Smith. You're kind
7 of breaking up just a little bit, but we heard everything you
8 said up until the very, very end and even then it was just
9 a little bit garbled, but we heard everything and I
10 appreciate your analysis.

11 Vice Chair John?

12 VICE CHAIR JOHN: So I agree substantially with
13 Board Member Smith and I would just add a few comments of my
14 own. So as noted, the application is self-certified and the
15 applicant originally requested a variance to allow an eating
16 and drinking establishment at that location. It was amended
17 later to requested relief under the corner store regulations.

18 So the Board granted the application as a variance
19 from U254.6(g) which is the 750-foot rule requirement.
20 Because at that time, the BZA appeared to conclude that the
21 use was permitted as a matter of right under U254.1.

22 On appeal, the Court of Appeals vacated the order
23 and remanded the application for further proceedings on two
24 questions. The first question the Board asked as Board
25 Member Smith explained is what is the practical difficulty

1 to the owner of the building, given that Call Your Mother had
2 entered into a ten-year lease, and whether the applicant
3 could proceed by solely obtaining an area variance? And I
4 agree with the approach of Mr. Smith to look at the second
5 question first. And as to that question, whether the
6 applicant needs only an area variance, I believe that the
7 answer is no and that the applicant would need to apply for
8 a special exception under U254.14.

9 The applicant at the hearing, last hearing, stated
10 unequivocally that the applicant would not apply for a
11 special exception and that the court ought to defer to the
12 Zoning Administrator as to whether the requested relief was
13 sufficient.

14 The BZA's procedure order noted that the Court of
15 Appeals said that U254.14 appears by its terms to apply to
16 any corner store that does not meet the requirements of
17 254.13 and that a corner store that is a fresh food market
18 or grocery store can operate as a matter of right if it can
19 improve the conditions in 254.13.

20 The Court of Appeals also stated that it was
21 undisputed that Call Your Mother would not operate as a fresh
22 food market devoted primarily to the retail sale of food and
23 meet all of the conditions of 254.13 including the 750-foot
24 requirement. And so the corner store could not operate as
25 a matter of right. However, a corner store otherwise can be

1 given approval to operate under a special exception if it can
2 meet certain conditions in 254.14 and a corner store that
3 could not meet the requirements of 254.13 or 254.14 can
4 obtain a variance under 254.16.

5 I agree with the Court's analysis of how the
6 regulations should be interpreted because it's consistent
7 with the way this Board has looked at the relationship
8 between a matter of right, special exception, and variance
9 use.

10 So under 254.14, the Board must look to whether
11 under Section A of that provision, whether the planned corner
12 store use will be located so that it is not likely to become
13 objectionable to neighboring properties because of noise,
14 traffic, deliveries, objectionable conditions, and the
15 applicant must demonstrate that the proposed corner store use
16 will not detract from the overall residential character of
17 the area and will enhance the pedestrian experience.

18 I believe the confusion and I believe there's some
19 ambiguity in the regulations, that of course, the Board is
20 required to clarify, is how the regulations determine how the
21 special conditions should be applied under 254.14 and the
22 language in the regulation has to do with the degree of
23 compatibility with the provisions in 254.13.

24 So in looking at the provisions under U254.14,
25 then the Board would be (audio interference) as to whether

1 or not --

2 BZA CHAIR HILL: I'm sorry, Ms. John, can you
3 repeat that last portion again? Your mic kind of went out.

4 VICE CHAIR JOHN: Okay, sorry. So under 254.14
5 the Board has to decide if the application meets the
6 requirements of 254.14(a) and (b) which I read earlier. And
7 to do that, the Board has to evaluate the degree to which the
8 application complies with the criteria described in 254.13,
9 so 254.13 as a matter of right. 254.14 says if you meet all
10 of those conditions in 254.13, then under this provision,
11 looks to see how the corner store complies with the
12 requirements in 254.13. It could have been stated more
13 clearly, but in the end I believe that's the most reasonable
14 interpretation.

15 So as to the issue of the self-certification,
16 there's been a lot of debate about how the Board should look
17 at self-certified applications, but I believe the Board has
18 consistently reserved for itself the statutory duty to
19 interpret the regulations and we have done that, from time
20 to time. They've also asked applicants to revise their
21 applications if we think that the remedy requested is not
22 appropriate, as in this case. Sometimes, applicants agree
23 to revise their application, sometimes not.

24 So because this case is -- because in this case,
25 the Board has the duty and the authority to interpret its

1 regulations and because the regulations are not really that
2 clear, I don't believe that we can rely on the self-
3 certification principles because I don't believe -- I believe
4 they're required -- I believe this is a policy and a process
5 developed through case law. But in this case, it simply is
6 not proper to delegate to the Zoning Administration the
7 Board's to interpret the regulations. And I would leave it
8 there and see what other board members think.

9 BZA CHAIR HILL: Okay, thank you, guys. So I was
10 -- Chairman Hood, I'll let you go last, if that's okay. I
11 was on this original case and you know, we heard all of the
12 testimony and information -- actually, I heard all of it
13 during the case, and then the Court of Appeals sent us back
14 vacated and remanded to us to take a look at this. And so
15 we had a hearing and was able to take a closer look at -- or
16 I should say another look at the regulations. I think that
17 I made a mistake and at that time, had also agreed with the
18 analysis that was provided to the BZA from various legal
19 divisions that give us information, as well as the Office of
20 Planning, as well as the ANC, who all believed that we were
21 under the correct relief in order for us to move forward with
22 the application.

23 After the court had vacated and remanded this
24 decision, I went back and looked at everything and also had
25 a chance to speak with our Office of Zoning Legal Division,

1 as well as had an opportunity to hear what my fellow board
2 members had to say about this and I would agree that this is
3 not actually a matter of right and that it's something that
4 would need a special exception in order for this to be
5 approved.

6 I think that what the -- I also struggled a lot
7 with whether or not a self-certified application meant that
8 the Board merely just looks at the self-certified application
9 and finds one way or the other on that self-certified
10 application. I also would agree with my colleagues that
11 that's not the case, that we have on many times asked for the
12 applicant to revise the application and we, the Board, had
13 I had different information I guess to look at, should have
14 asked the applicant to revise their application for a special
15 exception at that time when this first application came up.

16 I think that I would agree with some of the
17 discussion that when we asked the Zoning Administrator or
18 deferred to the Zoning Administrator it tends to be a lot
19 about numbers of lot occupancy or measurements as opposed to
20 the way that the regulations are to be interpreted. I do
21 think it falls under the responsibility of the Board to
22 interpret those regulations as the final authority, and this
23 again coming back from the Court of Appeals.

24 I think that also as I was looking back at the
25 record, there were two cases similar to this that asked for

1 special exceptions before this application which happened to
2 be Call Your Mother, and then there was a fourth one that was
3 also referred after the Call Your Mother case that was for
4 a special exception from the Zoning Administrator. What
5 should have probably happened is that the application would
6 have gone through, the application did go through. It was
7 approved by the Board. Then if this had been the correct --
8 if all were on the same page or all thought the same way, the
9 Zoning Administrator at that time would have viewed the
10 application and said this actually should have a special
11 exception or is in need of a special exception and kicked it
12 back to the BZA. So that check and balance would have taken
13 place in the same way. And instead, the check and balance
14 has been the Court of Appeals and we get remands from the
15 Court of Appeals and we don't necessarily agree with the
16 Court of Appeals. In this particular case, I think that I
17 would agree with my colleagues in that this application
18 should be dismissed because it's not here for the correct
19 relief.

20 So that all being said, I will turn this to
21 Chairman Hood.

22 ZC CHAIR HOOD: Thank you. As one who is filling
23 in for one of my former colleagues, I will tell you that I
24 reviewed the record which I mentioned previously and I've
25 heard the analysis of both Board Member Smith, Vice Chair

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1 John, yourself. I would concur. While I know especially we
2 do self-certs and interpretations when applicants sometimes
3 come down here, I believe they try to rewrite the
4 regulations, but the Zoning Commission, I think, has a
5 legislative -- I always like to refer people back to look at
6 the legislative history of what the Zoning Commission's
7 intent was, especially as Board Member John mentioned, the
8 analysis between Subtitle U254.13 versus Subtitle U254.14 and
9 I think you all have said it and I would agree with the way
10 this is going, so I don't have any further comment. I thank
11 you all for what you have done on this.

12 Thank you, Mr. Chairman.

13 BZA CHAIR HILL: Thank you, Chairman Hood. And
14 I do want to thank again Board Member Smith and Vice Chair
15 John for their analysis of this as they weren't on the
16 original case.

17 All right, I'm going to make a motion to dismiss
18 Application 20135, as captioned and read by the Secretary,
19 and ask for a second, Ms. John?

20 VICE CHAIR JOHN: Second.

21 BZA CHAIR HILL: Motion made and seconded. Mr.
22 Moy, if you could take a roll call?

23 MR. MOY: When I call your name, if you will
24 please respond to the motion made by Chairman Hill to dismiss
25 the motion. To dismiss was seconded by Vice Chair John.

1 Mr. Smith?

2 MEMBER SMITH: Yes.

3 MR. MOY: Vice Chair John?

4 VICE CHAIR JOHN: Yes.

5 MR. MOY: Chairman Hill?

6 BZA CHAIR HILL: Yes.

7 MR. MOY: And Zoning Commission Chair Anthony Hood?

8 (No audible response.)

9 MR. MOY: Staff would record the vote as 4 to 0
10 to 1. And this is on the motion made by Chairman Hill to
11 dismiss. The motion to dismiss was seconded by Vice Chair
12 John who also supported the motion to dismiss as well as
13 voting to dismiss from Zoning Commission Chair Anthony Hood,
14 Mr. Smith, Vice Chair John, and Chairman Hill with no other
15 members participating. Again, the motion carries on a vote
16 to 4 to 0 to 1.

17 BZA CHAIR HILL: Thank you, Mr. Moy. All right,
18 Mr. Moy, you can call our next case when you get a chance.

19 ZC CHAIR HOOD: All right, you all have a good
20 day.

21 BZA CHAIR HILL: Thank you, Chairman Hood.

22 ZC CHAIR HOOD: Happy Valentine's Day, everybody.

23 VICE CHAIR JOHN: Happy Valentine's Day to you.

24 (Whereupon, the above-entitled matter went off the
25 record at 10:02 a.m.)

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C E R T I F I C A T E

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In the matter of: Public Meeting

Before: DC BZA

Date: 02-14-24

Place: teleconference

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my direction; further, that said transcript is a
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