

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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REGULAR PUBLIC MEETING

+ + + + +

WEDNESDAY

JANUARY 26, 2022

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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, Lorna L. John, Vice Chair, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LORNA JOHN, Vice Chair
CARL H. BLAKE, Board Member
CHRISHAUN S. SMITH, Board Member (NCPC)

ZONING COMMISSION MEMBER[S] PRESENT:

ANTHONY HOOD, Chair
PETER MAY, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
PAUL YOUNG, Zoning Data Specialist

OFFICE OF PLANNING STAFF PRESENT:

HUGH GREEN

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Regular Public Meeting held on January 26, 2022.

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

2 (9:32 a.m.)

3 VICE CHAIRPERSON JOHN: Good morning, everyone.

4 PARTICIPANT: Good morning.

5 PARTICIPANT: Morning.

6 VICE CHAIRPERSON JOHN: Morning. Can you hear me?

7 MR. MOY: Morning, loud and clear.

8 VICE CHAIRPERSON JOHN: Okay. Great. Thank you.

9 I believe everyone is here.

10 MR. MOY: One, two, three, four. Yes, now you
11 have, beside Commissioner Anthony Hood for the first decision
12 meeting case, and then for the second decision meeting case,
13 you have the other Zoning Commissioner, Zoning Commissioner
14 Peter May.

15 VICE CHAIRPERSON JOHN: Okay.

16 MR. MOY: Yes.

17 VICE CHAIRPERSON JOHN: Good morning, Commissioner
18 Hood.

19 ZC CHAIR HOOD: Good morning, Madam Chair. How
20 are you this morning?

21 VICE CHAIRPERSON JOHN: Very well, thank you. And
22 you?

23 ZC CHAIR HOOD: I'm fine, thank you.

24 VICE CHAIRPERSON JOHN: Excellent. So, we'll go
25 ahead and get started then.

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1 Good morning, ladies and gentlemen. The Board of
2 Zoning Adjustment's January 26, 2022 hearing, public hearing
3 will please come to order.

4 My name is Lorna John, I'm the Vice Chairperson
5 of the District of Columbia Board of Zoning Adjustment.
6 Joining me today are Board Members Carl Blake and Chrishaun
7 Smith, and Zoning Commissioner Anthony Hood. Zoning
8 Commissioner Peter May is attending for one decision-making
9 case.

10 Today's meeting and hearing agendas are available
11 on the Office of Zoning website. Please be advised, that
12 this proceeding is being recorded by a Court Reporter, and
13 is also webcast live, via WebEx YouTube live. The video of
14 the webcast will be available on the Office of Zoning's
15 website, after today's hearing.

16 Accordingly, everyone who is listening on WebEx
17 or by telephone, will be muted during the hearing. Also,
18 please be advised, that we do not take any public testimony
19 at our decision meeting session.

20 If you experience difficulty accessing WebEx or
21 with your telephone call-in, then please call our OZ hotline
22 number at 202-727-5471 to receive WebEx login or call-in
23 instructions.

24 At the conclusion of the decision meeting session,
25 I shall, in consultation with the Office of Zoning, determine

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

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

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

18 Once again, if you experience difficulty accessing
19 WebEx or with your telephone call-in, or if you forgotten to
20 sign up 24 hours prior to this hearing, please call our OZ
21 hotline number 202-727-5473, to sign up to testify. And to
22 receive WebEx login, or call-in instructions.

23 All persons planning to testify, either in favor
24 or in opposition should have signed up in advance. They will
25 be called by name to testify. If this is an appeal, only

1 parties are allowed to testify. By signing up to testify,
2 all participants completed the oath, or affirmation as
3 required by Subtitle Y Section 408.7.

4 Requests to enter evidence at the time of an
5 online virtual hearing, such as written testimony, or
6 additional supporting documents, other than live video, which
7 may not be presented as part of the testimony, may be
8 allowed.

9 Pursuant to Subtitle Y 103.13, provided that, the
10 person making the request to enter an exhibit explains how
11 the proposed exhibit is relevant, the good cause that
12 justifies allowing the exhibit into the record, including an
13 explanation of why the requestor did not file the exhibit
14 prior to the hearing. Pursuant to Subtitle Y 206, and how
15 the proposed exhibit would not unreasonably prejudice any
16 party.

17 The order of procedure for appeal applications.
18 Pursuant to Subtitle Y 507, will be as follows. Preliminary
19 and procedural matters. Statement of the appellant and the
20 appellant's witnesses. The respective cases of the parties
21 or intervenors in support of the appeal, in the following
22 order.

23 The owner, lessee, operator, or contract purchaser
24 of the property involved, if not the appellant. The affected
25 ANC, if not the appellant, and any other party permitted to

1 intervene in the proceeding in support of the appeal. The
2 statement of the administrative official's, appellee's, case.
3 The respective cases of the parties or intervenors in
4 opposition to the appeal, in the following order.

5 The owner, lessee, operator, or contract purchaser
6 of the property involved. The affected ANC, and any other
7 party permitted to intervene in the proceeding in opposition
8 to the appeal.

9 Rebuttal evidence from the appellant, followed by
10 rebuttal evidence from the parties in support of the appeal,
11 in the order indicated in subparagraph (3) of this paragraph,
12 and closing arguments, in the order established in
13 subparagraphs (2) through (5) of this paragraph.

14 Pursuant to Subtitle Y Section 408.2 and 408.3,
15 the following time constraints shall be maintained. An
16 applicant, appellant, and all parties, except an affected ANC
17 in support, including witnesses, exclusive of cross-
18 examination, the maximum of 60 minutes collectively.

19 The appellee, persons and parties, except an
20 affected ANC in opposition, including witnesses,
21 collectively, have an amount of time equal to that of the
22 applicant and parties in support. But in no case, more than
23 60 minutes collectively.

24 Individuals, maximum of three minutes.
25 Organization representatives, maximum of five minutes. These

1 time restraints do not include cross-examination, and or
2 questions from the Board.

3 Cross-examination of witnesses by the applicant
4 or parties including the ANC, is permitted. The ANC within
5 which the property is located is automatically a party in a
6 special exception, or variance case. Nothing prohibits the
7 Board from placing reasonable restrictions in cross-
8 examination, including time limits and limitations in the
9 scope of cross-examination. Pursuant to Subtitle Y Section
10 408.5.

11 At the conclusion of each case, an individual who
12 was unable to testify because of technical issues, may file
13 a request for leave to file a written version of the planned
14 testimony to the record within 24 hours, following the
15 conclusion of public testimony in the hearing. If additional
16 witness testimony is accepted, then parties will be allowed
17 a reasonable time to respond, as determined by the Board.

18 The Board will then make its decision at its next
19 meeting session, but no earlier than 48 hours after the
20 hearing. Moreover, the Board may request additional specific
21 information to complete the record. The Board and the staff
22 will specify at the end of the hearing, exactly what is
23 expected, and the date when persons must submit the evidence
24 to the Office of Zoning. No other information shall be
25 accepted by the Board.

1 Once again, after the Board adjourns the hearing,
2 the Office of Zoning, in consultation with me, will determine
3 whether a full or summary order may issue. A full order is
4 required when the decision it contains is adverse to a party,
5 including an affected ANC.

6 A full order may also be needed if the Board's
7 decision differs from the Office of Planning's
8 recommendation. Although the Board favors the use of summary
9 orders whenever possible, an applicant may not request the
10 Board to issue such an order.

11 Finally, the District of Columbia Administrative
12 Procedures Act requires that the public hearing on each case
13 be held in the open, before the public. However, pursuant
14 to Section 405(b) and 406 of that act, the Board may,
15 consistent with its rules of procedures in the act, enter
16 into a closed meeting on a case for purposes of seeking legal
17 counsel on a case.

18 Pursuant to D.C. Official Code Section
19 2-575(b)(4), and or deliberating on a case pursuant to D.C.
20 Official Code Section 2-575(b)(13). But only after providing
21 the necessary public notice, and in the case of an emergency
22 closed meeting, after taking a roll call.

23 Mr. Secretary, do you have any preliminary
24 matters? Mr. Secretary.

25 MR. MOY: Yes, thank you, Madam Vice Chair.

1 Good morning, everyone. I do have just a very
2 quick announcement and preliminary matter portion, of this
3 hearing.

4 The Case Application Number 20374 of Matthew and
5 Alicia Amling. The Applicant had made a request for a
6 continuance. The Board granted the request. And that case
7 application has been rescheduled to April 27th, 2022. And
8 that's it for me, Madam Vice Chair.

9 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy. So,
10 can you call the first case?

11 MR. MOY: The first case of two, in today's public
12 decision meeting session is Case Application Number 19124C
13 of MR 622 Eye Street Land, LLC and ACY and YL Cheng, LLC.
14 This is -- the subject site is located at 600 Lot, Eye
15 Street, NW, Square 643, Lots 40, 50, 815-819, 821, 835, 843,
16 and 844.

17 This is the Applicant's request for a two-year
18 time extension of relief that was granted by the Board under
19 BZA Order Number 19124-B. This was for a variance from the
20 closed court width and area requirements, and special
21 exception, penthouse removed to allow a new, mixed-use,
22 residential building. And I believe that's all I have for
23 this. Thank you.

24 VICE CHAIRPERSON JOHN: Okay. Thank you, Mr. Moy.
25 So, as the secretary stated, this is a request for an

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1 extension of time. And the Applicant claims that because of
2 ongoing difficulties with the pandemic, he was unable to
3 obtain financing. And based on that information, I have no
4 objection to granting the extension of time. But I would
5 like to hear from the Board Members.

6 MEMBER SMITH: Madam Chair, I agree with your
7 assessment. COVID is an ongoing concern and I do understand
8 that, you know, they would have financial issues, as we have
9 seen with multiple cases that came before us, requesting the
10 same type of time extension. So, I will also be in support
11 of it.

12 VICE CHAIRPERSON JOHN: Thank you. Anyone else?

13 MEMBER BLAKE: Yes, Madam Chair, I would be
14 prepared to support the request as well, seeing how the
15 procedure requirements for the extension have been met.
16 There have been no substantial changes in any material facts,
17 on which the Board has based its original approval, as it
18 relates to the zoning regulations.

19 There have been no changes in the physical, or use
20 provisions, or requirements for the site. The developments
21 have taken place in the area, but I credit the Office of
22 Planning's assessment, that nothing has happened that would
23 undermine the Board's justification for the original rule,
24 or the extension. And there's no change in the approved
25 development proposed at the time.

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1 Furthermore, the Applicant has demonstrated good
2 cause for an extension, but the pandemic remains an ongoing
3 hardship, as Board Member Smith pointed out. So, for those
4 reasons, I would be pressed to support the request for the
5 two-year extension as well.

6 VICE CHAIRPERSON JOHN: Thank you, Board Member
7 Blake. Would you --

8 ZC CHAIR HOOD: I would also agree, Madam Chair.
9 I think it warrants our approval, especially around COVID,
10 and I think at times, they've asked the Board for that
11 extension. I think it warrants it, and I think it's well
12 justified. So, I will be supporting this application as
13 well. Thank you.

14 VICE CHAIRPERSON JOHN: Okay. Thank you,
15 Commissioner. So, I will make a motion then to approve
16 Application Number 19124C, as captioned and read by the
17 secretary, and ask for a second. Mr. Smith.

18 MEMBER SMITH: Second.

19 VICE CHAIRPERSON JOHN: Mr. Moy, would you please
20 take the roll call?

21 MR. MOY: Yes, thank you.

22 When I call your names, if you would please
23 respond with a yes, no, or abstain to the motion made by Vice
24 Chair Lorna John to approve the request for a two-year time
25 extension. The motion was seconded by Mr. Smith.

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1 Mr. Blake.

2 MEMBER BLAKE: Yes.

3 MR. MOY: Mr. Smith.

4 MEMBER SMITH: Yes.

5 MR. MOY: Vice Chair John.

6 VICE CHAIRPERSON JOHN: Yes.

7 MR. MOY: Zoning Commission Chair, Anthony Hood.

8 ZC CHAIR HOOD: Yes.

9 MR. MOY: And we have a Board Member not
10 participating, or present today, Madam Vice Chair. Staff,
11 would record the vote as 4-0-1. And this is on the motion
12 made by the Vice Chair to grant the request for a two-year
13 time extension. The motion was seconded by Mr. Smith. Also,
14 in support of the motion is Mr. Blake, and Zoning Commission
15 Chair Anthony Hood. Again, the motion passes on a vote of
16 4-0-1.

17 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy. And
18 when you're ready, please call the next case.

19 MR. MOY: Okay. This is the next and last case
20 in the Board's public decision-making session. This is Case,
21 Application Number 20564 of Jemal's Prospects, LLC. This
22 application, the subject site is located at 3343 Prospect
23 Street, NW, Square 1220, Lot 30. This is a self-certified
24 application and was caption advertised for special exception,
25 under Subtitle C Section 204.9. Pursuant to Subtitle X

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1 Section 90.12, or actually that might be 901.2.

2 But anyways, and as well as two area variances to
3 Subtitle X Section 1002 from the corner store requirements
4 for Subtitle U Section 254.6(g). And the corner store
5 requirements of Subtitle U Section 254.8.

6 The requested relief would allow for a new corner
7 store and in a portion of an existing one-story commercial
8 building, formerly containing a nonconforming dry
9 cleaning/upholstery use.

10 This was last heard by the Board on December 22nd,
11 2021. And at that hearing the Board requested supplemental
12 information from the Applicant, as well as responses from all
13 the parties. And I believe those were on the record, Madam
14 Vice Chair, under Exhibits 49A, and Exhibit 52 from the ANC:
15 2C. As well as the other party in opposition, under Exhibit
16 50.

17 And finally, Madam Vice Chair, there is, as you're
18 aware, there is a motion from the Applicant to reopen the
19 record. That motion has received responses from the parties
20 in opposition, from both the party opposition as well as ANC:
21 2E. That's it, Madam Vice Chair.

22 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy. So,
23 this is an application to change, well -- I'm sorry, let's
24 start this again. This is an application to change the
25 existing, nonconforming dry cleaning and upholstery use in

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1 a corner store, to a retail and drinking establishment with
2 on-site cooking use, in an existing, semi-detached, one-story
3 commercial building in the R-20 zone.

4 And as Mr. Moy mentioned, at the last hearing, the
5 Board requested additional information on the leasing history
6 from the Applicant, and responses from the parties, which
7 have been entered into the record.

8 So, I will address the preliminary matter first.
9 So, the Applicant filed a motion to reopen the record on the
10 Subtitle Y 602.6, and continue the case, which the parties
11 in opposition and the ANC oppose. The Applicant seeks to
12 undo -- update the record with sworn affidavits from the
13 Applicants and Green Heart to correct the record in
14 connection with a landlord/tenant complaint that has been
15 taken out of context. And confirm the timeline listed in the
16 PowerPoint and letter for the record.

17 So, I will give you my thoughts, and I would like
18 to hear from the Board. So, I'm inclined to deny the
19 request. Mainly, because this is a full record, which is
20 sufficient for the Board to make a decision. Moreover, the
21 issue of the Green Heart lease was raised at the hearing.
22 And the Applicant could have corrected it at that time, by
23 direct testimony of the property owner, or in the timeline
24 if submitted in response to the Board's request.

25 And this was quite a discussion during the

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1 hearing. And so, I don't believe that it is appropriate to
2 allow the Applicant to reopen the hearing on an issue that
3 could have been resolved, not only at the hearing, but in the
4 timeline. And so, with respect to the other issues, I
5 believe that the Board has the ability to decide the
6 appropriate weight to give to the testimony, which, you know,
7 was raised by the Applicant -- or to the issues raised by the
8 Applicant.

9 So, I'd like to hear from the other Board Members,
10 and Mr. Blake would like to give your thoughts?

11 MEMBER BLAKE: I would agree with your assessment,
12 Vice Chair John. It is a full record, sufficient to make a
13 decision. And the lease was discussed in the hearing and
14 there were ample opportunities to discuss the specifics of
15 it at that point.

16 And therefore, I think your -- it's not going to
17 add a lot of value at this point to have the additional
18 information submitted.

19 VICE CHAIRPERSON JOHN: Thank you. Commissioner
20 May.

21 COMMISSIONER MAY: Well, I'm torn, to say the
22 least. The new information that come into the record since
23 the hearing, I mean, it certainly adds some new twists to the
24 discussion from before. And I personally, would feel like
25 I would benefit from having further information from the

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1 Applicant.

2 I meant I know that sort of runs us through
3 another round of Applicant submissions, and then comments
4 from the ANC and the parties in opposition. But I feel like,
5 I don't feel like I have a really clear picture of exactly
6 what happened with the lease and I'm trying to give everybody
7 the benefit of full information being included in the record.
8 So, I would be inclined to allow further information into the
9 record.

10 VICE CHAIRPERSON JOHN: Thank you, Commissioner.
11 Mr. Smith.

12 MEMBER SMITH: I agree with you, Chair John, and
13 Mr. Blake. I do believe that we have a full record here.
14 And I went back and listened to the tape, the previous
15 hearing. And some of these discussions to me did arise, in
16 that the part of, part of our discussion in the previous
17 hearing. So, I believe we have a full record. And I think
18 I have enough information for us, for me to be able to
19 deliberate this case. So, I support both of your positions.

20 VICE CHAIRPERSON JOHN: Okay, so thank you. Do
21 you want to add anything else, Commissioner May? I've not
22 changed my opinion.

23 COMMISSIONER MAY: Well, I mean I can count. So,
24 yes, I mean, I'm glad you all feel that the record is clear.
25 And I'd be happy to hear why you think, or what your thoughts

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1 are on how the decision should go based on this complete
2 record, which --

3 VICE CHAIRPERSON JOHN: So --

4 COMMISSIONER MAY: So, I don't believe is as
5 complete as --

6 VICE CHAIRPERSON JOHN: Okay.

7 COMMISSIONER MAY: -- would benefit me, but, you
8 know.

9 VICE CHAIRPERSON JOHN: Okay. So, I'll just --
10 (Simultaneous speaking.)

11 VICE CHAIRPERSON JOHN: Yes, I'll just add a
12 couple of my thoughts. The issue of economic hardship, which
13 the Applicant claimed, is directly related to whether or not
14 the Applicant was able to lease the property. And the offer
15 of additional information did not state that there was no
16 lease.

17 So, you know, that would have made a difference
18 to me. If the Applicant said, well, there was no lease. And
19 the ANC is mistaken. And I was trying to lease the property.
20 And I put notices in trade journals. There is nothing like
21 that.

22 So, I don't see how putting the lease in context
23 would assist me in my decision. So, that's sort of where I
24 came in on. And I agree with you, it was not an easy
25 decision.

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1 So, all right. So, I'll go ahead then, make a
2 motion to deny the request to reopen the record, and ask for
3 a second.

4 MEMBER BLAKE: Second.

5 PARTICIPANT: Second.

6 VICE CHAIRPERSON JOHN: Oh, sorry. That was Mr.
7 Blake. Mr. Moy, would you please call the roll on that one?

8 MR. MOY: When I call each of your names, if you
9 would please reply with a yes, no, or abstain to the motion
10 made by Vice Chair John, to deny the motion to reopen the
11 record. This motion was seconded by Mr. Blake.

12 Mr. Smith.

13 MEMBER SMITH: Yes, to deny.

14 MR. MOY: Mr. Blake.

15 MEMBER BLAKE: Yes, to deny.

16 MR. MOY: Vice Chair John.

17 VICE CHAIRPERSON JOHN: Yes, to deny.

18 MR. MOY: Zoning Commissioner Peter May.

19 COMMISSIONER MAY: No.

20 MR. MOY: And we have one Board Member not
21 participating today, Madam Vice Chair. Staff, would record
22 the vote as 3-1-1, and this is on the motion made by Vice
23 Chair John to deny the request to reopen the record. The
24 motion to deny was seconded by Mr. Blake.

25 Also, in support of the motion to deny is Mr.

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1 Smith, and the opposing vote to the motion to reopen, to deny
2 is from Zoning Commissioner Peter May. And we have, as I
3 said a Board Member not present. So, the motion carries on
4 a vote of 3-1-1.

5 VICE CHAIRPERSON JOHN: So, I'd like to move on
6 now to deliberating on the merits of the request. And for
7 that I'm proposing is that the Board should decide the
8 request for area variances first. And then decide the
9 special exception. So, I'll give a few thoughts and then
10 hear from the Board on the area variances.

11 So, the two area variances requested are from
12 Subtitle U 254.6(g) for a corner store, no closer than 700
13 feet from a property line in the MU Zone. And Subtitle U
14 254.8 to allow a grease trap for use in assembling the
15 smoothies.

16 So, the standard for a use variance, an area
17 variance, is very high. And the Applicant must prove that
18 an exceptional condition exists that creates a practical
19 difficulty that prevents the Applicant from complying with
20 the regulations. And so, the relief goes to the property
21 owner, not the proposed use. And the practical difficulty
22 must not be caused by the particular use proposed.

23 So, I don't believe that a corner store in a
24 residential neighborhood is a unique or exceptional
25 circumstance. And the Applicant has not detailed his efforts

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1 to rent the property with any reliable evidence. The
2 existing lease with the tenant shows that the Applicant was
3 able to rent the property.

4 Although the Applicant sought to place the lease
5 and (audio interference) case in context, the Applicant did
6 not refute, attempt to refute the existence of a lease. And
7 the Board still, aside from the information offered by the
8 ANC, does not have, I do not believe there's a copy of the
9 lease. And so, there is no clear indication when the lease
10 was entered into.

11 In any event, there is an existing relationship
12 with Green Heart, and the Applicant seeks relief because of
13 the use proposed by Green Heart. But the most important
14 thing is that the Applicant did not support the variance
15 under Subtitle U 254.15. The juice bar would be only 175
16 feet from M Street, which would extend a more intense use,
17 further into the residential area. And the need for the
18 grease traps is driven by the proposed use.

19 The parties in opposition, including the ANC have
20 testified overwhelmingly about the adverse impacts to the
21 residential character of the neighborhood, due to increased
22 traffic on 34th Street, trash.

23 But I credit in particular the testimony of Ms.
24 Andris (phonetic), the abutting property owner, concerning
25 noise and foot traffic, which I don't believe would be

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1 mitigated by the Applicant's proposed condition. So, I am
2 not in support of either variance. But I would really like
3 to hear from other Board Members. And I'll start with you,
4 Mr. Smith.

5 MEMBER SMITH: Ms. John, I largely agree with your
6 assessment of this request before us. And I'll go through
7 all three prongs in my position on that. So, the first one,
8 extraordinary or exceptional situation or condition,
9 resulting in peculiar and exceptional practical difficulties
10 to the property owner.

11 So, the variance requests are from, you know, as
12 you stated, from corner store requirements of Subtitle U
13 Section 254.6(g). The corner store requirements for
14 prohibiting installation of grease traps.

15 So, in, you know, in -- conducting my analysis on
16 the first prong, I do not believe that the Applicant has
17 sufficiently demonstrated, as you have stated, that there's
18 a practical difficulty on the part of the property owner to
19 be able to use the property.

20 The property has been used for other less intense,
21 intense commercial uses. And based on the testimony that we
22 heard, and the information that's within the record, some of
23 those uses, while they were not the former, they were more
24 retail service in nature, that was not as, they were not
25 having an intense amount of pedestrian and vehicular traffic

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1 going to the property.

2 The Applicant has not demonstrated that not being
3 able to develop the property with a corner store, within 700
4 feet of a commercial serving zone is an exceptional practical
5 difficulty. And again, the property could be used, I believe
6 for a less intensive nonconforming use.

7 To the second prong, I do believe that the corner
8 store in this location would be contrary to the public good.
9 The property zone R-20, which is intended for residential
10 use. An eating and drinking establishment that would fall
11 under the definition of a corner store, I believe, would have
12 substantial traffic and delivery impacts. A substantial
13 amount of traffic and delivery would have an undue impact on
14 the surrounding residential uses within the area.

15 And I believe the intent of the 750-foot rule is
16 to protect against these types of uses in residential zones
17 that are in close proximity to zones that are specifically
18 created for this type of use, neighborhood serving,
19 commercial uses, which this property is within 170 feet of
20 that particular type of zone.

21 To the third prong, no (audio interference) to the
22 intent purpose and integrity of the zoning regulations, I
23 believe that the proposal to vary the distance requirements
24 for a new corner store in proximity to the MU and MC zones,
25 would impair the intent purpose and integrity of the zoning

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1 regulations. Again, this property is zone R-20, which is
2 intended for residential use.

3 The intent of a ZR -- of the zoning regulations
4 is for nonconforming uses to gradually go away, and
5 properties to come into compliance with the intended use of
6 a particular zone. The request before us, I believe, would
7 not continue to support -- would continue to support the
8 continuation of a commercial use. And matter of fact, I
9 believe, it will result in an intensification of commercial
10 uses at that corner in a residential zone. So, for that, I
11 don't support the variances.

12 VICE CHAIRPERSON JOHN: Thank you, Mr. Smith.
13 Commissioner May. Oh, it's Commissioner May, thank you.

14 COMMISSIONER MAY: So, I am, I wouldn't say that
15 I agree 100 percent of what's been said so far. But I'll,
16 I appreciate Board Member Smith's analysis in walking through
17 the prongs of the test in particular.

18 But I'm going to step back a little bit from the
19 purpose and intent of the zone, and the zoning map, and the
20 regulations, which because, you know, I was on the zoning
21 commission when the corner store regulations were written,
22 and these rules were put into place.

23 And I believe that the intention in circumstances
24 like this is for corner store regulations, is to actually
25 promote some level of commercial activity in neighborhoods,

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1 like this. Because it is, it's a feature of many of the
2 rowhouse communities throughout the city. And it's local
3 neighborhoods serving retail that is quite beneficial.

4 I live in a neighborhood where, you know, there
5 used to be a half a dozen corner stores and now there's one.
6 And the neighborhood is not better off for that. Yes, we
7 have more housing, but, you know, we've lost some good
8 neighborhood serving retail in the process, dry cleaners and
9 corner stores, and that serve convenient, they're convenient
10 sources for food and such.

11 So, the notion that the 750-foot rule really comes
12 into play, is it's, the idea is to try to avoid circumstances
13 where more intense commercial uses wind up locating in the
14 corner store locations, when there is nearby commercial
15 activity. And so, when nothing, you know, when that
16 particular use could be in the commercial area, it's better
17 off in the commercial area.

18 But the, you know, there are circumstances where
19 there is, there are existing buildings that have been
20 designed for commercial use. I mean this is a building that
21 was designed from the very beginning to be a commercial use,
22 otherwise it would have been a two-story rowhouse, like
23 everything else. It is something of an anomaly, and I think
24 that that does create something of an exceptional
25 circumstances, by its, you know, the building by its mere

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1 existence.

2 That being said, I think that we've, you know,
3 we've seen evidence, so that really goes to the third prong.
4 But working backwards, the second prong, that being said,
5 about the purpose, I agree that this particular use would
6 generate some level of traffic, either, you know, well either
7 vehicles for people coming to the store, or delivery
8 vehicles. And I, you know, it's sort of -- that's a close
9 call in my mind, based on the testimony that we've heard.

10 The area where it really falls down, is that I
11 don't think that the Applicant, based on the information
12 that's in the record, really demonstrated that there was no
13 other option than to go to this particular use. As Board
14 Member Smith cited, there have been other uses in this
15 property that have been less impactful.

16 And we simply don't see evidence in the record
17 that the Applicant sought out such uses. They somehow
18 happened upon this particular use, and seemed to be very
19 quick to sign a lease for it. I think it also does not, I
20 mean this is a secondary condition, but it does go to the
21 idea that somehow these impacts might be managed.

22 Doesn't help, that part of this property, there's
23 an ongoing issue with their management of trash. And the
24 fact that it had to come out in the hearing that there are
25 trash receptacles at the next-door business, as part of this

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1 building, that are just, that are sitting out in violation
2 of the zoning restrictions on the property, doesn't really
3 speak well to the ability of the Applicant to manage this
4 property consist with any conditions that we might propose.

5 I do think that's a secondary consideration, but
6 it's, it is evidence that this is not a very strong case for
7 variance relief. And I think that's all I have to say.

8 VICE CHAIRPERSON JOHN: All right. So, I will
9 then move on to the requested relief under the Subtitle C
10 204.9. And so, the Applicant -- I'm sorry -- did someone say
11 something?

12 MEMBER SMITH: I did, Madam Chair. Board Member
13 Blake, did you have any comment?

14 VICE CHAIRPERSON JOHN: Oh, thank you. Board
15 Member Blake. I'm so sorry.

16 MEMBER BLAKE: That's okay, Vice Chair John. Yes,
17 just a quick, I wanted to expedite matters, I'd say I agree
18 with the observations made by Board Member Smith that this
19 may, the situation does not, this situation does not justify
20 a variance relief. I think it's important that we would --
21 the impact on the neighborhood community is important, but
22 I also see impact on the MU-4 zone, which may well have a
23 fair amount of vacancies available at this time to serve.

24 Commissioner May pointed out the importance of
25 being able to provide the community services, and he talked

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1 about a couple things like a dry cleaner, and so forth. Much
2 less intense uses than this, but a service, those services
3 would actually be and have been in this zone for a while.
4 And have existed in harmony with the MU-4 zone.

5 But this is a much more intense use and it has a
6 lot of MU-4 zone type features to it, that could well be
7 served better on the main thoroughfare. So, which is just
8 one block away, and to a large extent, does essentially,
9 applies, cause really an extension of the MU zone into this
10 residential neighborhood, because of the magnitude of the
11 intensity of the activity.

12 As it related to the grease trap issue, it does
13 look like the grease trap would be an issue for the operator.
14 But as I understand it, the issue should relate, the
15 practical difficulty should be on the owner of the property,
16 and not on the operator of the property.

17 So, in which case I don't see the connection
18 between the building and how this situation, and how it
19 actually provides, or causes a practical difficulty to the
20 owner of the property as opposed to the operator. Certainly,
21 from the operator's perspective, it would. But from the
22 owner's perspective of the building, I do not see it other
23 than you could not find another tenant, because you didn't
24 have a grease trap. That's all I have to say.

25 VICE CHAIRPERSON JOHN: Thank you, Board Member

1 Blake. So, let's move on now to the relief under Subtitle
2 C 204.9. So, the Applicant seeks to change -- well applied
3 for relief, to change the existing nonconforming dry cleaning
4 and upholstery store, and a corner store, to a retail and
5 drinking establishment with on-site cooking.

6 The Applicant and the Office of Planning have
7 analyzed this project as a change from a nonconforming use
8 to another nonconforming use, under Subtitle C 204.9. The
9 Applicant also states that a corner store is a matter of
10 right use under Subtitle U 254.

11 However, I do not agree with that characterization
12 because the retail and drinking establishment is a
13 nonconforming use -- I'm sorry, because the retail and
14 drinking establishment is permitted under Subtitle U 254, as
15 a special exception. So, based on the plain language of
16 Subtitle U 254, I believe that the retail and drinking
17 establishment, as I've said, should be permitted under U 254,
18 but only as a special exception.

19 In other words, there's only one matter of right
20 retail establishment in the corner store, which is the case
21 of the fresh foods market. And even that requires a special
22 exception, and certain, even that has special conditions that
23 the Applicant must comply with.

24 So, I'm not in support of this part of the
25 application, and I would deny it because it does not seek the

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1 appropriate relief. And I'd like to hear from other Board
2 Members. Mr. Blake, would you like to start?

3 MEMBER BLAKE: Yes, Madam Chair, I would agree
4 with that the conforming to -- nonconforming to nonconforming
5 relief is not the appropriate relief for this as it is a
6 conforming use as a corner store. The argument made by the
7 Applicant was that this is out of an abundance of caution,
8 that they would choose the conforming, to nonconforming to
9 nonconforming. In which case, whether you look at it from
10 that perspective, or the perspective of U 254.1(4), it would
11 need to go through all the provisions of the corner store
12 provisions for evaluation.

13 So, in that sense, I do agree that it is, that is
14 the case. When you review the report, it does appear that
15 this particular use of a corner store, would require a
16 special exception under U 254.1(4). And that also was
17 pointed out by the Office of Planning's analysis, which said
18 as a fresh, as a fresh food -- that this is not a grocery
19 store, so therefore it would need to -- it would not qualify
20 for 250 as a matter of right option.

21 So, in that sense, it does have to go through U
22 254.1(4). So, I would agree with your analysis that that is
23 not the applicable relief. And I do not think that the
24 Applicant addressed U 254.1(4) in their analysis. So,
25 therefore, I don't think that the burden of proof was

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1 presented.

2 VICE CHAIRPERSON JOHN: Thank you, Mr. Blake.
3 Commissioner May.

4 COMMISSIONER MAY: Yes, I don't have any, I don't
5 have a lot to add. I think I generally agree that the case
6 has not been made about the special exception relief. I
7 would just note that, you know, special exceptions are
8 designed for uses that are generally considered to be
9 consistent with the use, within the uses within the zone, but
10 require special conditions, or may require special
11 conditions, and require a level of review.

12 And that was the level of review that we kept in
13 place for corner store uses. The original proposals were to
14 do a lot of these things simply as matter of right, but based
15 on community feedback we determined that it was important to
16 have the ability of the community to speak up, have a voice
17 in the placement of these, you know, of this level of retail
18 uses within residential areas.

19 In this circumstance, again, I think, I don't
20 think the Applicant really made the case that this change of
21 nonconforming uses is appropriate or necessary or anything
22 at this point capable of sufficient mitigation. So, I'm not
23 inclined to grant this special exception. Although it's a
24 very close call on that.

25 VICE CHAIRPERSON JOHN: Thank you, Commissioner.

1 Board Member Smith.

2 MEMBER SMITH: I won't belabor the point. I don't
3 have too much to add. I agree with all of your assessments
4 on this. I do agree that because the use is allowed within
5 the zone, by special, by right in certain matters, as Mr.
6 Blake stated. It's an allowable use within the zone. It's
7 not a prohibited use. While, you know, it would require a
8 special exception and we would have to apply the standards
9 for review of this case, if this was a special exception.

10 So, I do agree. I don't believe that this was the
11 correct request for us to consider. So, I'll just leave it
12 at that. So, I agree with my colleagues.

13 VICE CHAIRPERSON JOHN: Okay. Thank you. And I
14 wanted to add that the Board is required to give great weight
15 to the recommendation of the Office of Planning, but because
16 of all of the discussion and the reasons we all articulated,
17 I believe that the Board has done that, and I cannot credit
18 the Office of Planning's report because of these reasons.

19 Excuse me, so I will make a motion to dismiss
20 Application 20564, as read and captioned by the secretary,
21 with respect to the relief requested under C 204.9. And deny
22 the variance request under Subtitle U 254, and ask for a
23 second. Mr. Smith.

24 MEMBER SMITH: Second.

25 VICE CHAIRPERSON JOHN: Mr. Moy, Mr. Moy.

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1 MR. MOY: Yes. Yes, when I call each of your
2 names, if you would please reply, respond with a yes, no, or
3 abstain to the motion made by Vice Chair John to deny and
4 dismiss. This motion was seconded by Mr. Smith.

5 Mr. Blake.

6 MEMBER BLAKE: Yes.

7 MR. MOY: Mr. Smith.

8 MEMBER SMITH: Yes.

9 MR. MOY: Vice Chair John.

10 VICE CHAIRPERSON JOHN: Yes.

11 MR. MOY: Zoning Commissioner Peter May.

12 COMMISSIONER MAY: Yes.

13 MR. MOY: And we have a Board Member not
14 participating today, Madam Vice Chair. Staff, would record
15 the vote as 4-0-1. And this in on the Vice Chair's motion
16 to deny and dismiss. Seconded by Mr. Smith. Also, in
17 support of the motion, Mr. Blake and Zoning Commissioner
18 Peter May. Board Member not present. Again, the motion
19 carries of a vote of 4-0-1.

20 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy. So,
21 it is now 10:24 and I'm going to suggest we take a quick
22 break and resume at 10:30. And the appeals, we will continue
23 with the schedule as announced. And the first appeal will
24 be Appeal Number 20580, followed by 20572.

25 MR. MOY: Madam Vice Chair, if I could have one

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1 second. I just want to note in the today's transcript that
2 when I spoke on preliminary matters at 9:30 this morning.
3 I miss spoke on a reschedule date to Case Application Number
4 20374, of Matthew and Alicia Amling. The rescheduled date
5 is May the 4th. And that's all I have to say.

6 VICE CHAIRPERSON JOHN: Thank you.

7 MR. MOY: Thank you.

8 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy. So,
9 let's reconvene at 10:30. Thank you.

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

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: DC BZA

Date: 01-26-22

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was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



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