

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

SEPTEMBER 22, 2015

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The Regular Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice, at 1:04 p.m., Lloyd Jordan, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

- LLOYD JORDAN, Chairperson
- MARNIQUE HEATH, Vice-Chairperson
- FREDERICK HILL, Board Member
- JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

- ROBERT MILLER, Commissioner

OFFICE OF ZONING STAFF PRESENT:

- CLIFFORD MOY, Secretary

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

- SHERRY GLAZER, ESQ.
- MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Public Meeting held on September 22, 2015.

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

1:04 p.m.

1
2
3 CHAIR JORDAN: Let's call our first decision case for
4 today, Mr. Moy.

5 MR. MOY: Yes, sir. That would be Appeal No. 19047
6 of Michael Cushman. As the Board will recall, this appeal was
7 originally heard on July 21, 2015, scheduled for decision on
8 September 15th and subsequently deferred to today's decision
9 meeting of September 22nd.

10 CHAIR JORDAN: So the Board met and deliberated on
11 this case and voted. And I think there was a vote of two to
12 one in that case and there was not -- so it was not a majority
13 decision. Since then I'm -- for the record, would Ms. Heath
14 and Mr. Hill indicate that you've read the record?

15 VICE CHAIRPERSON HEATH: Yes. I have reviewed the
16 record and watched the video and so I'm familiar with the prior
17 proceedings.

18 MEMBER HILL: I've also read the record and watched
19 the video and I'm also familiar with the prior proceedings.

20 CHAIR JORDAN: This is an appeal of the Zoning
21 Administrator's decision issuing a Certificate of Occupancy
22 allowing for 7 parking spaces and 4 open spaces, parking
23 spaces, for a total of 11 spaces on an alley lot in R-4 district.

24 I think we heard this July 21st and there was a
25 motion to dismiss for -- part of the case was granted for

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1 untimeliness regarding the seven -- parking garage, but we
2 denied the motion to dismiss regarding the four open parking
3 spaces, opining the appellant was notified that the parking
4 garage, should have appealed that parking garage as timely,
5 but not in regards to C of O issue for the four parking spaces.

6 So again, is the Board ready to deliberate on this
7 case? Okay, so let's go forward.

8 So as I just set forth what the matter was and the
9 question became whether or not the four parking spaces were
10 allowable. The Zoning Administrator approved those as within
11 the zoning regulations they're allowable on the lot. There's
12 actually two, three different arguments about what kind of --
13 why they're allowable on the lot, one of which is that they
14 were accessory use to the parking garage. And then the other
15 one was that they are independent principal uses. And I forgot
16 what the third argument was. Anyway, those are probably the
17 two arguments about why they were allowable.

18 We deliberated and on the vote of two to one I had
19 made the motion that -- well, supporting what the Zoning
20 Administrator did based upon this premise, one that the zoning
21 regulations did not prohibit having two principal uses. In
22 fact, we have cases on point that this Board has already
23 rendered previously, particularly case -- the one that comes
24 to mind is Case No. 17906 where we said that you can have more
25 than one principal use on a lot. You cannot have a -- the only

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1 prohibition that we have in our regulations is that you cannot
2 have two principal buildings on the lot. And so in keeping
3 with that level of precedence under 17906, I said that the way
4 these lots were configured -- you can't disrupt this -- there's
5 no questions coming from anybody on this.

6 Now you made me lose my train of thought. What was
7 I saying? Oh, so that -- or that under the argument under
8 Section 330 that this was a permissible accessory use for the
9 parking garage. So based upon either one of those two
10 theories, I had moved that we grant the relief that the Zoning
11 Administrator had not violated zoning regulations because
12 there had not been a showing of where the Zoning Administrator
13 had violated any regulations. And so therefore in conjunction
14 with what we did in the other previous case that this was
15 allowable under two different functions so I had moved that
16 we grant the relief.

17 And based upon that principle, I would move that
18 we sustain the decision of the Zoning Administrator in that
19 -- on one or two theories. That one, this is not -- there is
20 no regulation which he violated; two, that this property, the
21 parking spaces can be approved as accessory to the parking
22 garage; or three, that it is also allowable as an additional
23 principal use since there's no prohibition and that we have
24 previously ruled that you have more than one use on the lot.
25 That would be my motion.

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1 VICE CHAIRPERSON HEATH: I would support the
2 motion under the third premise. I had a hard time wrapping
3 my brain around the fact that this could be an accessory use.
4 But give that we can have two principal uses I agree with the
5 motion that you've made, again, based on that third part of
6 the argument.

7 CHAIR JORDAN: Or that he had the grounds to do it.
8 So motion made and seconded that we sustain the decision of
9 the Zoning Administrator.

10 VICE CHAIRPERSON HEATH: Correct, so second.

11 CHAIR JORDAN: Any discussion, others, please?
12 So the motion is made and seconded that we sustain the decision
13 of the Zoning Administrator, allowing the Certificate of
14 Occupancy for four parking spaces.

15 COMMISSIONER MILLER: Thank you, Mr. Chairman. I
16 agree that there's ambiguity or silence in the zoning
17 regulations which maybe need clarification, but that's why
18 we're here to interpret, as the BZA, what's going on here. But
19 I continue to have a concern about these open parking lot spaces
20 being considered accessory to the parking garage and I don't
21 see any specific provision that would allow for four car share
22 spaces in an R-4 zone. ZA was interpreting and it's a
23 reasonable interpretation that the car sharing spaces were a
24 private lot and that they've interpreted private lots
25 privately leased to individuals could be permitted in the R-4

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1 zone.

2 However, in this case, the car sharing spaces are
3 being leased to a commercial venture car sharing company which
4 I wholeheartedly support and glad that they are doing business
5 in the District of Columbia. But I think the commercial nature
6 of that use and the intensity for versus, I think, in the R-2
7 zone they're allowed two, but there are further restrictions
8 if they're beyond two.

9 I think the intensity of the amount of parking
10 that's going on in this alley lot is -- it does appear to have
11 an adverse impact on the surrounding houses and neighbors.
12 And I would like that adverse impact to be looked at in a BZA
13 special exception case that would -- if we sustain the appeal
14 might be the way that this has to go for the owner, that they'd
15 have to go for special exception. And I think this adverse
16 impact probably could be mitigated, but we can't even get to
17 there unless we sustain the appeal and say that the ZA erred
18 in allowing for this intensity of use.

19 There was the difference between the building
20 permit. There is nothing on the building permit that had said
21 that -- we dealt with that issue in the dismissal motion, but
22 there's nothing in the permit, the building permit which talked
23 about the four open parking spaces, talked about creating
24 permeable surface, but there was no building plans filed with
25 stripes or parking spaces or anything of that nature. So it

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1 was only when the C of O was issued and then the signs were
2 put for Zipcar or whatever car sharing service is being offered
3 there, that the neighbors really knew that that was what was
4 happening back there.

5 So for all of those reasons, I respectfully
6 disagree and I would not be able to support your motion to
7 uphold the ZA in this case.

8 CHAIR JORDAN: Thank you. Mr. Hinkle?

9 MEMBER HINKLE: Thank you, Mr. Chairman. I
10 continue to support your motion. I think in the last meeting
11 I did express my uncomfortableness with calling these four
12 spaces accessory to the other seven, but I don't think there's
13 anything within the regulations that state that they cannot
14 be. It's a bit of a tenuous argument, but I think it's a valid
15 argument.

16 And alternately, I do believe that you can also have
17 two principal uses on a lot and so you could look at this in
18 either way and still see how the total of the number of parking
19 spaces can be allowed. Certainly, I understand the issues
20 that Commissioner Miller brought up in terms of the potential
21 impact of these parking spaces on the neighboring properties,
22 but I'm just not sure how we get to that point. So yes, I would
23 sustain the Zoning Administrator. I would vote to sustain the
24 Zoning Administrator's determination.

25 CHAIR JORDAN: Mr. Hill, anyone? You don't have

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1 to.

2 All right, then let's put it to a vote. All those in favor
3 of the motion signify by saying aye.

4 (Ayes.)

5 Those opposed, nay.

6 (Nay.)

7 The motion carries. Mr. Moy, please.

8 MR. MOY: Staff would record the vote as four to
9 one. This is on the motion of Chairman Jordan to sustain or
10 affirm the ZA's decision and issue the C of O; seconded the
11 motion, Vice Chairperson Health; also in support, Mr. Hinkle
12 and Mr. Hill; opposed to the motion is Mr. Miller. Again, the
13 final vote is four to one.

14 CHAIR JORDAN: Thank you. Appreciate it. All
15 right, so now let's call our next case. And I just want to
16 say for the record I did mess up this morning. I meant to say
17 when Peter was here that I didn't confuse May and Moy today,
18 thank you. I want that on the record.

19 MR. MOY: Which is fine, too. I look up to Mr. May.

20 CHAIR JORDAN: Do you want to call the --

21 MR. MOY: Yes. The next and final action of the
22 Board for decision, this Application No. 18114-A. This is the
23 remand of Ward 5 Improvement Association Appeal.

24 As the Board will recall, the Board convened on
25 August 4th, deliberated, and scheduled a final deliberation

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1 for today, September 22nd.

2 CHAIR JORDAN: Yes. Give me one second please.
3 I'll catch up with myself. Okay. This case is the continuing
4 saga on the Stadium Club deliberation. We have -- this case
5 has lasted longer than most members of the Board of Zoning
6 Adjustment and the Zoning Commission and it's been around for
7 a number of years.

8 At our last meeting, we were unable to reach certain
9 conclusions regarding a finding of what we were required to
10 find or remand and so we're back at it.

11 We also have a memorandum prepared by the Office
12 of the Attorney General, particularly that which is provided
13 by Alan Bernstein regarding the position of where we are with
14 our order and with some recommendations on how we should
15 probably proceed to move forward on this case.

16 I'm trying to figure out how we go. Let me say
17 this. One of the issues that we received from Office of the
18 Attorney General is that meet the findings and we said this
19 the last time it was set that we have to be able to whatever you're
20 finding, whatever that we decide or whatever your position is
21 on any of these propositions or issues in this case, you've
22 got to justify it and show what's in the record that supports
23 it.

24 One of the problems that I have with it, with this
25 case now that it's gone through -- it's been around what, maybe

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1 eight years, six, seven, eight years -- is that a lot of the
2 players have changed. We know now a lot of the information
3 that is necessary to make a decision regarding whether or not
4 a business a sexually oriented business enterprise and during
5 the testimony, I'm not certain if all the testimony provided
6 that backup support, because there are certain questions that
7 we're identifying here as a board at this point, trying to
8 answer what does fondling mean, what does rubbing mean, what
9 is sexually stimulating, what does that mean? I don't know
10 if the record has everything that we need. I had thought that
11 one way for the Board to proceed was to recommend that we
12 reschedule a hearing on this. And I don't know how that
13 operates with the Court of Appeals, but I think there are
14 certain -- the Board doesn't have in front of it all of the
15 information necessary to move forward to make the type of
16 decision in light of what the remand was and now knowing being
17 on the other side of the moon, where there were some
18 deficiencies in the testimony and the record here. So that
19 was my thought that this is something that we should probably
20 reschedule a hearing on and have the current Board deal with
21 that issue versus people -- but for Mr. Hinkle, everybody is
22 new to this.

23 I think there's been at least three Zoning
24 Commission members, I think, and probably four, three to four
25 different sets of Board of Zoning Adjustment members. And so

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1 what else is missing? Well, you can read the record to some
2 extent and look at the tapes and all that, but part of that
3 is trying to get an aspect or feel for the credibility of the
4 witnesses and this certainly turns on credibility also.

5 So I just don't -- that's my initial thought about
6 it before we proceed on. Otherwise, then we can just go
7 through, I would suggest we go through the list of questions
8 presented by the Office of Attorney General. Excuse me one
9 second.

10 I just checked with counsel and agree with my
11 assessment. We talked about this earlier on, how we were going
12 to proceed and we decided to go have them rebrief us, the
13 parties rebrief us versus holding a hearing on the matter. In
14 hindsight, that might not be the right play because I don't
15 -- my recommendation to the Board would be that we reschedule
16 this for a hearing before this Board knowing the issues that
17 you have to identify so the Board can ask of the witnesses the
18 intelligent questions to support the record to say because a
19 couple of the witnesses said that the person was fondling
20 herself. Well, we're trying to struggle with what the
21 definition of fondling means. So what was it in their mind
22 when they said fondling.

23 There's the question of one of the witnesses said
24 somebody was rubbing. Well, we're talking about potentially
25 temporal aspect of touching, then how long were they touching

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1 themselves? Was it a quick touch? What does that mean? So
2 I want to make sure we do justice with this case. And I think
3 a current Board that could hear this relatively quickly, you
4 know the issues, the issues have been beat out for us, but I
5 think the reason why you're struggling is that it's just not
6 there to do it. That's just my thought. Anybody else want
7 to weigh in on that?

8 Anybody so beat up they got to go forward? Yes.

9 VICE CHAIRPERSON HEATH: I tend to agree with you.
10 I hadn't thought about rehearing this, but I know that one of
11 the things that I'm really struggling with is trying to pull
12 from the record information that we all feel is credible.
13 There is information in the record, but some of it we feel isn't
14 credible for various reasons and all we have to rely on is this
15 information that has been passed on to us or video that we can
16 view. And I don't feel like we can -- all of the answers to
17 the questions that we have can be properly -- we can't get all
18 the answers that we need from this information. And so it
19 makes it very difficult for me to feel like I can properly
20 evaluate this. And I've sort have been stuck on that for a
21 while. So I would tend to agree with you that if a hearing
22 is appropriate, that may be the best way to bring this to
23 closure once and for all.

24 CHAIR JORDAN: Anyone else? Mr. Miller, please?

25 COMMISSIONER MILLER: Well, I hadn't really

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1 thought about that possibility until you just brought it up,
2 Mr. Chairman. On the one hand, I can see the value to all of
3 us together as a group hearing exactly what the dancers are
4 doing and we can ask questions about it at the hearing and one
5 of the things I -- a couple of us commented on, we were just
6 surprised that the ZA never asked for the video tapes from the
7 36 cameras that are there. I'm not sure we can get tapes of
8 what was going on there five years ago at this point. But I
9 don't know if they would be -- if we would be able to get tapes
10 of the dance performances that are happening now just so that
11 we can have a better understanding of what exactly is
12 happening, what provocative movements the dancers may be
13 making to get the tips that they're getting.

14 I was prepared to go through the record and identify
15 those parts of the testimony and affidavits that do support
16 the preliminary decision that I voted on which was that there
17 was sexual arousal or stimulation which was one part of the
18 sexual activities test. And then the other part was fondling
19 or other erotic touching. I was prepared to go through and
20 say that there was, as some of us had indicated before, there
21 was other erotic touching, not necessarily the fondling, and
22 make the distinctions between them.

23 I defer to what the Board wants to do. This thing
24 has been prolonged so long. It's -- and maybe at this point
25 it doesn't matter how much more longer it's prolonged, I'm

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1 not sure we can get at what actually happened five years ago
2 and get testimony that's going to be helpful as to what those
3 witnesses saw five years ago at this point. It's so long ago,
4 they'd have to rely on what they said then almost and what's
5 in our record already. So I'm not sure what they can say new
6 about five years. If we can get new evidence about the
7 operations of the club, of course, that doesn't really go to
8 the C of O. But that might be helpful.

9 CHAIR JORDAN: For instance, when they use the word
10 fondling, what did that mean to them? When you say fondling,
11 what does that word mean to you, Mr. So and So, because some
12 of them used the word. Were they all using the same definition
13 for fondling?

14 When you said that the person rubbed, remember
15 because we're also talking -- well, I don't want to get graphic.
16 Was it -- how long did they do it? Did they just put their
17 hands there? Just different questions that we know now on the
18 back end that we probably want to hear the testimony about so
19 you can drill in to it instead of trying to guess, because right
20 now we read the record, we see fondling, but we don't know what
21 that really meant in that person's mind when he used the word
22 fondling, especially when we're trying to struggle with the
23 definition of fondling, that kind of stuff. That's why I think
24 at least we can try our best to get more information from them.

25 COMMISSIONER MILLER: I'm willing to go that

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1 route. I think there is enough evidence in the record to
2 understand at least that the erotic touching is an integral,
3 repeated and important part of every dance movement by one of
4 the dancers. I think there is enough in the record, but I have
5 no objection. I would defer to your judgment in terms of if
6 you want to proceed with another hearing to try to get more
7 information on that.

8 CHAIR JORDAN: Anyone else, any other thoughts?
9 Well, then I would move that we reschedule a hearing and receive
10 additional information from the parties here so that we can
11 move forward with making a decision on these particular issues.
12 I think it's essential. I don't want to beat a dead horse,
13 but that's what my motion would be that we reschedule a hearing
14 on this matter, an evidentiary hearing.

15 MEMBER HINKLE: Yes, Mr. Chair, thank you. Is
16 this like a limited hearing or is this rehearing the entire
17 case?

18 CHAIR JORDAN: Oh, I don't know. Whichever way
19 you felt. I didn't think about that part, but I guess we can
20 ask the questions in a more limited way. And ask for certain
21 information that if we can get to supplement the record.

22 MEMBER HINKLE: I'm not quite what those questions
23 would be.

24 CHAIR JORDAN: Well, the questions for one, are the
25 tapes available from five years, if there's additional

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1 documents. But I think the question asking him is what do you
2 mean by the things that you talked about. Was there anything
3 reported to management while you were on site and was it taken
4 care of, was it not taken care of? How many dancers were there
5 that you saw do these things? I mean all that conversation.
6 How long was the person touching themselves. I don't see how
7 we can even render that in the temporal aspect of where we
8 already began to talk about.

9 COMMISSIONER MILLER: Right, right.

10 CHAIR JORDAN: I would say we could limit it, but
11 you can make it as far as you want to make it.

12 I guess I made a motion or was it not seconded or
13 we don't want to do it? What do you want to do? The motion
14 dies for lack for lack of a second?

15 MEMBER HINKLE: I'll second it.

16 CHAIR JORDAN: Motion made and seconded that we
17 schedule this for at least a limited hearing on the issues
18 that's presented before the Board to get more additional
19 information.

20 Any other unreadiness to the motion? I think we already talked
21 about this, beat this to death. All right, ready for a vote,
22 everyone.

23 All those in favor of the motion, signify by saying
24 aye.

25 (Chorus of ayes.)

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1 Those opposed, nay. Motion carries. Mr. Moy?

2 MR. MOY: Staff would record the Chairman's motion
3 to schedule a limited hearing. Seconded the motion, Vice
4 Chairperson -- or rather Mr. Hinkle. Also in support, Vice
5 Chairperson Heath, Mr. Rob Miller, Mr. Fred Hill. I think
6 that's five, right? Unless I'm missing someone. Motion
7 carries, sir.

8 CHAIR JORDAN: So the motion carries. So then we
9 need to get a date. And let's talk about information that the
10 Board thinks they need. While Mr. Moy is looking up the dates,
11 so we know we want to see if we can get the tapes, if tapes
12 available, tapes from club. Do we need the -- I think we really
13 need the testimony of the witnesses because they're the ones
14 we're relying on for affidavits. I think we need to get a
15 record of discipline and by that I mean how the owner may have
16 disciplined -- record of discipline of violations of the rules,
17 of the policies.

18 Did we have -- if we can get, I don't know if the
19 ABRA person is still there. I don't know if we need to have
20 the ABRA and the DCRA person back and any -- I would like to
21 actually talk to the appellant's people, witnesses. You get
22 an affidavit, what does that mean? So appellant's witnesses.

23 Do you have a date?

24 MR. MOY: Yes, so the next time that Mr. Miller will
25 be back with the Board is October 20th.

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1 CHAIR JORDAN: October 20th. Anything else
2 anybody can think of they need to get from them? You can ask
3 them questions. But definitely if we can get the tapes and
4 the disciplinary records. Okay, let's put this for October
5 20th for a hearing, a limited hearing on this so we can drill
6 down on some of these questions and we can know where what we're
7 talking about. All right?

8 Good. Anything else coming before us today?

9 MR. MOY: Not from me, Mr. Chairman.

10 CHAIR JORDAN: All right. The Board, anything,
11 anybody? So the animal still lives. So then we'll be
12 adjourned. Thank you.

13 (Whereupon, the above-entitled matter went off the
14 record at 1:34 p.m.)

15

16