

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

OCTOBER 27, 2009

+ + + + +

The Regular Public Meeting
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 9:30 a.m., Marc D. Loud,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD, Chairman
SHANE DETTMAN, Vice Chair (NCPC)
MERIDITH MOLDENHAUER, Board Member

ZONING COMMISSION MEMBER PRESENT:

PETER MAY, Zoning Commissioner (NPS)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist
JOHN NYARKU, Zoning Specialist

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Board of Zoning Adjustment
District of Columbia
CASE NO. Transcript
EXHIBIT NO. null

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

The transcript constitutes the
minutes from the Public Meeting held on
October 27, 2009.

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

2 10:20 a.m.

3 CHAIRPERSON LOUD: The meeting will
4 please come to order.

5 Good morning, ladies and gentlemen.

6 This is the October 27th Public Meeting of
7 the Board of Zoning Adjustment of the District
8 of Columbia.

9 My name is Marc Loud, Chairperson.

10 To my right is Mr. Shane Dettman
11 representing the National Capital Planning
12 Commission, Mr. Peter May representing the
13 Zoning Commission, Mrs. Meridith Moldenhauer
14 to my left, Mayoral Appointee to the BZA. Mr.
15 Clifford Moy, Secretary to the BZA. And my
16 far left Ms. Beverley Bailey, Zoning
17 Specialist, Office of Zoning.

18 We would like to apologize to each
19 of you for coming out here late this morning.

20 It's our intention every Tuesday to get out
21 here by 9:30 a.m. So we do apologize.

22 Copies of today's meeting agenda

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1 are available to you and are located to my
2 left in the wall bin near the door.

3 We do not take any public testimony
4 at our meetings unless the Board asks someone
5 to come forward.

6 Please be advised that this
7 proceeding is being recorded by a court
8 reporter and it's also webcast live.
9 Accordingly, we must ask you to refrain from
10 any disruptive noises or actions in the
11 hearing room. Please turn off all beepers and
12 cell phones.

13 Does the staff have any preliminary
14 matters?

15 SECRETARY MOY: Yes, we do, Mr.
16 Chairman. But I would suggest that we take
17 that on a case-by-case basis.

18 CHAIRPERSON LOUD: I think we can
19 proceed with the agenda. And I believe the
20 order that we'd like to call the cases may
21 vary from the published agenda, in that we'd
22 like to call Hosseinkhani first, then D.C.

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1 Public Library, then the Park's matter.

2 SECRETARY MOY: Yes, sir.

3 Good morning, Mr. Chairman, members
4 of the Board.

5 The first case for decision then,
6 would be Application No. 17934 of Mr.
7 Hosseinkhani, pursuant to 11 DCMR § 3103.2,
8 for a variance from the nonconforming
9 structure provisions under subsection 2001.3
10 to allow a third-story addition to an existing
11 flat, which is a two-family dwelling in the R-
12 4 District at premises 1721 4th Street,
13 Northwest. That's in Square 519, Lot 54.

14 If the Board will recall, this
15 application was amended to also include area
16 variance relief from the lot occupancy section
17 403.2 and the rear yard setback, section 404.1
18 because of an addition of deck.

19 At it's last public meeting on
20 October 6, 2009 the Board convened and
21 deliberated on Application 17934. After
22 discussion, rescheduled its decision to

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1 October 27th. This was to allow the Board the
2 opportunity to review the applicant's untimely
3 filing at the time, which was granted into the
4 record. It would also allow time for the ANC-
5 5C additional time to clarify its position.

6 There are no additional filings in
7 the record, Mr. Chairman. During the course
8 of the Public Hearing ANC 5C did submit a
9 revised resolution letter, dated October 5,
10 2009, although it was date stamped October 6,
11 2009 stating how the ANC voted and meeting the
12 other requirements in the Zoning regulations.
13 That's identified as Exhibit 31 in your case
14 folder.

15 The Board is to act on the merits
16 of the multi-variance relief.

17 And that completes the staff's
18 briefing, Mr. Chairman.

19 CHAIRPERSON LOUD: Thank you.

20 I believe that, as you indicated,
21 we have a full record before us in
22 Hosseinkhani and we're prepared to deliberate.

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1 And Board Member Dettman is going to lead us
2 off.

3 VICE CHAIRPERSON DETTMAN: Thank
4 you, Mr. Chairman. I think it's going to be
5 relatively quick.

6 I think what we're looking at here
7 is a variance request 404, 403 and 2001.3 for
8 an addition story to an existing building
9 located at 1721 4th Street, Northwest.

10 As you'll recall, at the original
11 hearing the Board showed a little bit of
12 concern about the proposed architectural
13 design of the additional floor and requested
14 that the applicant revisit the design. And on
15 September 25, 2009 we received some revised
16 architectural drawings.

17 So with respect to the variance
18 test, I think that I'll rely a little bit on
19 DC OP's report submitted to us in Exhibit 21
20 for the purposes of taking the Board through
21 that test.

22 I think the applicant has

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1 successfully demonstrated that the property
2 does have some extraordinary conditions or
3 exceptional situations in that it's an
4 excessively small property. I believe OP's
5 report called it the smallest property in the
6 square. It's also the only triangular shaped
7 lot in the square. And looking at OP's
8 report, Exhibit 1, you can see how unusually
9 shaped that is.

10 In addition, the existing building
11 that's on the property currently does occupy a
12 very large percentage of the property leading
13 to an existing nonconformity in lot occupancy.

14 With respect to the second prong of
15 the test of whether or not those two
16 exceptional conditions, the odd shape as well
17 as the small size of the property, gives rise
18 to a practical difficulty, I think that burden
19 is met as well. I think the existing
20 nonconformity lot occupancy is not being
21 expanded with this particular project. The
22 only reason why lot occupancy relief is

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1 necessary is because this is an addition, a
2 third-floor addition to the existing
3 nonconforming building. It's again not
4 increasing the lot occupancy.

5 And in order to comply with lot
6 occupancy and rear yard, the applicant will be
7 required to demolish a substantial portion of
8 the building simply to come into conformance
9 with the regulations to add the third-story.

10 The applicant did provide some
11 testimony about having a practical difficulty
12 to provide larger living spaces to meet modern
13 standards. And while the Board has
14 entertained that argument as a practical
15 difficulty in the past, and may do so in the
16 future, I think for purposes of this
17 application I don't think the applicant has
18 testified to orally or submitted into the
19 record adequate information that would allow
20 us to find that a practical difficulty does
21 exist with respect to providing larger living
22 spaces. But nonetheless, I think that the

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1 second prong of the variance test is met
2 simply because of the need to demolish a
3 portion of the structure.

4 The third prong of the test, again,
5 I think that's also met. I don't think that
6 the addition of the third-story will cause any
7 substantial detriment of public good or the
8 intent and purpose of the Zone Plan,
9 especially with respect to the revised
10 drawings that we received on September 25th.
11 I think the revised architectural design is
12 more in tune with the existing structure and
13 the mansard roof that exists, as well as the
14 surrounding neighborhood.

15 So, Mr. Chair, I think that the
16 variance test is adequately met.

17 We did receive Exhibit 31 from the
18 ANC who took a supportive vote on October 5,
19 2009 with a quorum present, 10 members of a
20 total of 12. And they voted to support the
21 project.

22 As a final note, we did receive a

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1 letter in support, which is our Exhibit 23,
2 from a Muriel Gregory.

3 We received a signed petition,
4 Exhibit 24, in support of the project.

5 We also did receive one letter in
6 opposition to the project from a Mr. John
7 Grumbind at 1706 4th Street, Northwest
8 indicating concerns regarding the
9 architectural integrity of the Wardman design,
10 parking issues and the values of neighboring
11 properties. And I think, I mean this is a
12 property that doesn't provide any parking
13 right now and since it was constructed prior
14 to the Zoning Regulations, it's grandfathered
15 at least space.

16 And I think the requirement is only
17 one space, according to the regs. And I think
18 that the revisions to the architectural design
19 take care of the concerns regarding
20 architectural integrity of that existing
21 building.

22 So, Mr. Chairman, as I'm sure

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1 you're aware, I can make a motion if you're
2 ready or I can turn it back to you for other
3 comments by other Board members.

4 CHAIRPERSON LOUD: That was a great
5 analysis. I don't have any comments. Let's
6 see if Mr. May may have.

7 Ms. Moldenhauer, you're on this
8 case, are you? You are. Okay. We'll see if
9 they have any comments. If not, we can go
10 back to you for the motion.

11 COMMISSIONER MAY: I'm not going to
12 touch on all three points. I do want to talk
13 about the detriment to public good and the
14 concern of the neighbor across street about
15 exactly what this building would look like.
16 Because what was originally presented in the
17 application, I think, was problematic to say
18 the least.

19 And I think that at the moment the
20 city is being plagued by a number of third-
21 story additions that are very unattractive and
22 not fitting, and many of them proceed as a

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1 matter-of-right. But there's actually a long
2 history in this city of doing that with two-
3 story buildings. It's actually very, very
4 common.

5 And the thing is that when people
6 did it in 1920 or 1930, at this point when we
7 look at those buildings we don't really notice
8 that those were actually originally built as
9 two-story buildings, and then there's that
10 third-story. And very often what happens is
11 the bay gets extended and you wind up with a
12 little porch or there or there are other
13 treatments that make it blend in with the
14 architecture of the building.

15 What we originally had in front of
16 us was something where it did not blend with
17 the architecture of the building or the row,
18 and it stood out like a sore thumb. And I
19 think in those circumstances we should be
20 vigilant about what we allow to proceed. And
21 I think that in the end what has been
22 presented with a slight increase in the height

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1 of the mansard portion of the roof I think
2 addresses this adequately and makes it fit
3 much better into the context of the
4 neighborhood. And I hope that it all comes
5 through exactly and looks as good as it does
6 in the renderings. But I'm pretty confident
7 that it will, and so that's why I'm
8 comfortable moving ahead.

9 CHAIRPERSON LOUD: Thank you, Mr.
10 May.

11 Mrs. Moldenhauer?

12 BOARD MEMBER MOLDENHAUER: I think
13 that Mr. Dettman summarized the issues, and I
14 believe that they've met the test.

15 CHAIRPERSON LOUD: Thank you.

16 Mr. Dettman, I think that we'll
17 turn back to you now for your motion. I just
18 wanted to say, again, it was a great analysis
19 of everything.

20 Out of an abundance of caution, I
21 thought I heard you mention that the OP
22 report was Exhibit 1. And just in case you

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1 did, I wanted to indicate that it was Exhibit
2 21 in case anyone was relying on that part of
3 your comments and goes back to check in the
4 record for Exhibit 1.

5 Is there a motion?

6 VICE CHAIRPERSON DETTMAN: Yes, Mr.
7 Chair. And this motion is made on the plans
8 that are before the Board in Exhibit 30, which
9 is the revised plans. I'm not sure if I
10 mentioned that.

11 That being said, I would move for
12 approval of Application No. 17934 pursuant to
13 11 DCMR § 3103.2, for a variance from the
14 nonconforming structure provisions under
15 subsection 2001.3 and a variance from the area
16 requirements of 404 and 403 rear yard and lot
17 occupancy to allow a third-story addition to
18 an existing flat in the R-4 District at 1721
19 4th Street, Northwest.

20 CHAIRPERSON LOUD: Thank you, Mr.
21 Dettman.

22 Motion has been made. Is there a

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1 second?

2 COMMISSIONER MAY: Second.

3 CHAIRPERSON LOUD: Motion's been
4 made and seconded.

5 Is there further deliberation?
6 Hearing none, all those in favor of the motion
7 say aye?

8 ALL: Aye.

9 CHAIRPERSON LOUD: All those who
10 are opposed? Are there any abstentions?

11 Mr. Moy, can you read back the vote
12 for us, please?

13 SECRETARY MOY: Yes, sir. The
14 final vote is four to zero to one on the
15 motion of the Vice Chairman Dettman to approve
16 the application for the variance relief
17 stated.

18 Second the motion Mr. Peter May.
19 Also in support of the motion Ms. Moldenhauer
20 and Mr. Loud. And no other Board
21 participated.

22 So again, the final vote is four to

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1 zero to one. Other than that the Board wishes
2 to waive the requirements of a summary order
3 or not.

4 CHAIRPERSON LOUD: Thank you, Mr.
5 Moy. So we can a summary order?

6 SECRETARY MOY: Yes, sir. The ANC
7 was in support of the --

8 CHAIRPERSON LOUD: Is that correct?
9 Okay. So why don't we do that.

10 And congratulations to the
11 applicant in this case.

12 Is there anything further in this
13 case? Okay.

14 When you're ready, Mr. Moy, you can
15 call the next case.

16 SECRETARY MOY: That would be
17 Application No. 17973 of D.C. Public Library,
18 pursuant to 11 DCMR § 3193.2, for a variance
19 from the off-street parking requirements under
20 subsection 2101.1. As the Board will recall,
21 the applicant amended their application to
22 withdraw relief from the open court with

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1 requirements under section 406.

2 This is to construct a new full-
3 service neighborhood library in the R-2
4 District at premises 115 Atlantic Street,
5 Southwest. Square 6172W, Lot 813.

6 As the Board will recall at its
7 Public Decision Meeting on October 6, 2009 the
8 Board convened, deliberated. After discussion
9 the Board on its own motion rescheduled its
10 decision to October 27th. This would allow
11 ANC-8D to correct deficiencies in its
12 resolution letter to meet the requirements of
13 3115.1 including the option of further
14 clarifying its exposition.

15 There were three filings in your
16 case folders, Mr. Chairman. The first from
17 ANC 8D, dated October 20, 2009, date stamped
18 October 22nd, 2009, Exhibit 38. In this
19 letter it also contains a request for the
20 Board to continue its decision "in order to
21 revisit dialogue with the community and the
22 D.C. Public Library." This would be a

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1 preliminary matter, Mr. Chairman.

2 The second filing is also a second
3 filing of ANC 8D, which is dated October 23rd
4 of 2009, identified as Exhibit 39.

5 And finally yesterday the Applicant
6 DCPL filed a motion to strike. This document
7 is dated October 29, 2009, which should be
8 Exhibit 40.

9 The Board is to act on the
10 preliminary matters and to then act on the
11 merits of the variance relief.

12 That completes the staff's
13 briefing, Mr. Chairman.

14 CHAIRPERSON LOUD: Thank you, Mr.
15 Moy.

16 I believe that we've got a
17 considerable record before us and want to move
18 forward. I believe let's do this, let's start
19 out with the threshold issue of this Exhibit
20 38 and Exhibit 39 and the response to that.
21 And then we can move into the issue on the
22 merits.

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1 I think Ms. Moldenhauer is going to
2 lead us off, certainly if we proceed to a
3 discussion on the merits. Did you want to
4 lead us off on the threshold question as well?
5 If not, I'm happy to start us off there.

6 BOARD MEMBER MOLDENHAUER: Chairman
7 Loud, I can start us off and then, obviously
8 you can.

9 CHAIRPERSON LOUD: Okay.

10 BOARD MEMBER MOLDENHAUER: There's
11 going to be a lot of discussion on this issue,
12 so I think --

13 CHAIRPERSON LOUD: Enough for
14 everybody here?

15 BOARD MEMBER MOLDENHAUER: Yes.

16 CHAIRPERSON LOUD: Okay.

17 BOARD MEMBER MOLDENHAUER: The
18 preliminary issue is whether or not we will
19 address the motion to postpone, which was
20 requested in Exhibit 39 by the ANC. So I
21 think what we should do is we should first
22 take whether or not we're actually going to

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1 accept that motion and whether we would strike
2 that motion or not. And then once we accept
3 or strike that motion, we can then determine
4 how we would act on that motion.

5 So I think that as a preliminary
6 matter since a motion has been submitted, even
7 though we do not accept supplemental
8 documentation after the record is closed, a
9 motion can be accepted. And this is a motion
10 to postpone or stay; I'd personally like to
11 rather clarify it as a motion to postpone
12 rather than as an indefinite stay or a stay
13 until an unstated time frame as the letter
14 states by Mrs. Jones.

15 So I would actually be in favor of
16 addressing the motion on its merits and
17 considering that, and then discussing that if
18 anyone has any additional discussions.

19 CHAIRPERSON LOUD: Thank you, Ms.
20 Moldenhauer. I'd be in support of what you've
21 just suggested. And it looks like from the
22 silence that everyone's agreeing with you.

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1 BOARD MEMBER MOLDENHAUER: So then
2 the next preliminary issue is whether or not
3 we would consider to grant the motion to
4 postpone or whether we would consider to deny
5 the motion to postpone.

6 I think that the issues presented
7 by the ANC in Exhibit 29 in regards to good
8 faith definitely bring up some concerns. And
9 this entire record has been quite
10 disheartening as to the fact that the
11 applicant has continually failed to present a
12 clear dialogue with the community, especially
13 considering that this is a D.C. Public Library
14 which is going to be serving the community,
15 considering that it's very disheartening.
16 However, I don't think that I can link their
17 request to the specific issue that's being
18 addressed, which is just the variance for
19 parking. I think that the record is full in
20 that regard, and that we could move forward
21 for a deliberation on that case.

22 CHAIRPERSON LOUD: Thank you, Ms.

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1 Moldenhauer.

2 Other Board members?

3 I would agree with you, Ms.
4 Moldenhauer. Some of the issues that are
5 raised in this Exhibit 39, and presumably, are
6 linked to the request for a continuance as you
7 suggest don't deal with the parking, which is
8 the only variance request before us now. They
9 talk about a raze permit being issued for the
10 building; why a new building as opposed to
11 rehabing the existing building.

12 So for all the reasons that you
13 just laid out, I'm supportive of allowing it
14 in the record, have reviewed it, of course,
15 and have reviewed the opposition to it and
16 would not be in favor of granting it.

17 BOARD MEMBER MOLDENHAUER: With
18 that if there's no additional deliberations, I
19 will submit a motion. A motion to accept
20 Exhibits 38, 39 and Exhibit 40, which would be
21 the applicant's motion to strike and/or deny
22 the motion to postpone.

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1 And then I'd make a motion to deny
2 the motion to postpone and move forward on the
3 merits. Do I have a second?

4 CHAIRPERSON LOUD: Why don't we do
5 this: Did you make two motions?

6 BOARD MEMBER MOLDENHAUER: I did.

7 CHAIRPERSON LOUD: Why don't you
8 make one at a second, or the second one at a
9 time. All right.

10 BOARD MEMBER MOLDENHAUER: Okay.
11 Then the first, I'll make a motion to accept
12 the motion. Yes. To accept the motion to
13 postpone and accept Exhibits 38, 39 and
14 Exhibit 40.

15 CHAIRPERSON LOUD: Motion seconded.
16 Any further discussion?

17 Hearing none, all those in favor
18 say aye.

19 ALL: Aye.

20 CHAIRPERSON LOUD: Is there any
21 opposition? And there are abstentions.

22 Mr. Moy, can you read back the

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1 vote?

2 SECRETARY MOY: Yes, sir.

3 The final vote would be four to
4 zero to one on the motion of Ms. Moldenhauer.

5 Second by Mr. Loud. Also supported the
6 motion Mr. May and Mr. Dettman, the motion as
7 stated by Ms. Moldenhauer. So again, that was
8 four to zero to one.

9 BOARD MEMBER MOLDENHAUER: Next I
10 will make a motion to deny the motion to
11 postpone the request in Exhibit 39 by the ANC.

12 CHAIRPERSON LOUD: Motion seconded.
13 Any further deliberation?

14 Hearing none, all those in favor
15 say aye.

16 ALL: Aye.

17 CHAIRPERSON LOUD: There's no
18 opposition. Are there any abstentions?

19 Mr. Moy, can you read back the
20 vote?

21 SECRETARY MOY: Yes, sir. Again,
22 the final vote would be four to zero to one on

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1 the motion of Ms. Moldenhauer to deny the
2 motion to postpone as cited in Exhibit 39.

3 Second by Mr. Loud. Also supported
4 the motion Mr. May and Mr. Dettman. No other
5 Board member participating. So again, the vote
6 is four to zero to one.

7 CHAIRPERSON LOUD: Thank you, Mr.
8 Moy.

9 CHAIRPERSON LOUD: Okay. Before us
10 now we have the application for a parking
11 variance pursuant to section 2101.1 The prior
12 application for a variance for open courts had
13 been taken out of the case, and so the only
14 issue before us is the issue for parking.

15 The requirements are for a
16 determination that the subject property is
17 unique, as it regards to topography and the
18 rear retaining wall. And that that specific
19 issue of topography and the existing retaining
20 wall present a particular practical difficulty
21 for the applicant in order for them to satisfy
22 the required parking, which would be for this

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1 project, 21 parking spaces.

2 They present testimony that they
3 would only be able to present seven parking
4 spaces and that that would not have any impact
5 on the Zoning Plan.

6 Prior to going into each of those
7 elements, I will just say there has been
8 testimony and parties to the ANC in this case.

9 And we have received additional supplemental
10 letters to provide great weight. And based on
11 all of the documentation there's an inference
12 that the record has both notice, the quorum
13 was present and that they specifically
14 identified the different conditions or
15 elements that they wanted the Board to
16 consider great weight.

17 Going through the different issues,
18 I do think that this property does have a
19 unique topography and that there is a
20 considerable issue of the retaining wall. I
21 think that that is very clear in the case.
22 It's clear by the OP's report.

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1 So then going on to the second
2 prong of the test is whether or not that issue
3 of the topography and retaining wall creates
4 the practical difficulty for the parking
5 variance. And I think then, you know, I go to
6 the different testimony and all of the
7 different documentation.

8 We have statements from the
9 Architect and from the applicants Jeff
10 Bonvechio, stating that the need for -- that
11 they currently evaluated the parking to be
12 about nine spaces, and that staff currently
13 park off-street. And that the topography and
14 the needs of the project based on Monaco would
15 require them to need separate sections in the
16 project for teenagers, for younger students in
17 order to meet their needs of a public library
18 and the institutional requirements.

19 So that is some of the reasons that
20 they present for the need -- in fact, the cost
21 of actually going underground based on the
22 development envelope of the site because of

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1 the topography in the rear of the lot and the
2 retaining wall would create a potential
3 difficulty to actually build any parking
4 underground.

5 However, there is testimony, which
6 is there's some questions, so there's
7 testimony from the ANC, a Mrs. Jones, that
8 there were actually 14 spaces in the rear of
9 the property, not nine. And then by Mr. Oaten
10 that there was actually 15 in the rear of the
11 property. Again, not nine. And that, you
12 know, those were currently not being used
13 because that was mainly locked. And so I
14 think that there is a question as to how much
15 parking would be needed if it was redeveloped
16 and if there was an actual determination as to
17 what was there and what would be needed on the
18 site.

19 In addition to that, there was a
20 reference in the OP's report that directly
21 across the street is the South Capitol
22 Terrace, which has commercial parking which

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1 would assist the project and would also be for
2 the fact that they wouldn't actually need the
3 full parking of the 21 spaces.

4 However, there was also testimony
5 by -- I'm not sure actually who it was by.
6 But that's all right. It was stated that there
7 was going to be development across the street,
8 so I think there's a question as to whether or
9 not that factor should really be considered.
10 Because if there's development, then that
11 commercial space, within the walls of that
12 commercial parking would be lost.

13 So the question is: Do they meet
14 the test in regards to the topography being
15 the direct cause of the practical difficulty?
16 And I think the one question that I still have
17 is the architect upon a question by the Board
18 members had not considered any other layouts
19 based on the ability for them to develop that
20 site. So there was really no telling us
21 whether or not there would be a different
22 envelop that would permit more parking for the

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1 community and for the site. And I think that
2 still creates a question in my mind as to
3 whether or not the topography is the exact
4 reason for the practical difficulty. And that
5 being my concern and my issue, I'll open up
6 any additional conversation for the Board.

7 CHAIRPERSON LOUD: Thank you, Ms.
8 Moldenhauer. That was an excellent summary of
9 the facts in the case and the standard that
10 applies.

11 Let me just run through some of
12 what you set before us and provide my own take
13 on some of the evidence, and then open it up
14 further for our other Board members.

15 In terms of the uniqueness, I agree
16 with you. The testimony revealed that there's
17 an 18 percent whether the lot is unbuildable
18 due to the grade in the rear of the property
19 where the retaining wall is. There's a 16
20 foot high retaining wall.

21 In addition to that, there's a 12
22 foot no building zone in the rear of the

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1 property. There's a building restriction line
2 of 15½ feet, but I don't know if that
3 necessarily affects the parking part of the
4 equation. But all of this together paints a
5 portrait of a confluence of factors that
6 suggests that the property is exceptional.

7 In terms of practical difficulty,
8 the applicant testified that the constrained
9 size of the lot along with the program needs
10 that it had as a nonprofit under Monaco, which
11 you mentioned, essentially prevented them from
12 providing 14 additional spaces because they'd
13 basically only be able to provide those spaces
14 by going underground. And I think the record
15 before us indicated that that would cost about
16 \$200,000 for them to go underground. And so
17 that created a practical difficulty just in
18 terms of the cost.

19 In terms of the program needs, the
20 testimony was that they've got three different
21 populations that they're trying to serve:
22 Teens, I think young children, I guess they

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1 call it tweens now and seniors. And the
2 testimony was, anyway, through some meetings,
3 interaction with the community there was some
4 interest in separating these different
5 populations. And so these, what we're calling
6 pods were created as a part of the design to
7 keep the different populations separated
8 within the building. And so that influenced
9 their design choice, which was driven by what
10 they identified as a program need.

11 With respect to substantial
12 detriment to the public good, I believe that
13 Ms. McCarthy appeared for the applicant and
14 she testified that it was her opinion that
15 there would not be any substantial detriment
16 to the public good because in her testimony
17 there were 12 nearby bus routes, 34 percent of
18 the local population was under 18, and I guess
19 her conclusion that they would not drive.
20 Seven percent over 65. They did an anecdotal
21 survey which show that 30 percent, according
22 to her testimony, drove as part of the survey.

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1 And then she indicated that there was
2 substantial on-street parking nearby. And you
3 mentioned in your analysis the Capitol South
4 across the street.

5 So there was I think significant
6 testimony in the record that would tend to
7 support a conclusion on my part that there
8 would not be substantial detriment to the
9 public good as relates to the whole issue of
10 the parking.

11 We had a number of witnesses that
12 came before us from the ANC.

13 I want to commend the ANC because
14 as I recall, not only did most of Ward 8A and
15 C come, they came and they were not prepared
16 to go forward that day with the actual
17 hearing. I think they wanted it continued.
18 And we voted to go forward that day. And
19 notwithstanding that, they were all there,
20 they were all very prepared, all of them
21 testified in opposition to it. And I'm just
22 going to briefly go through some of that

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1 testimony.

2 I believe Commissioner Mitchell,
3 Melvin Mitchell or if he's not a Commissioner,
4 I think he's just a witness of the ANC. He's
5 an architect, faculty member at UDC. He
6 testified about the community outrage at the
7 lack of interaction with the architects for
8 the project, which is a thing that we hear
9 over and over again from this record in terms
10 of the exhibits, the actual testimony from the
11 witnesses. And that where the community had
12 gotten together, it was clear from Mr.
13 Mitchell's perspective that the community was
14 very much in opposition to the design of the
15 project. There was some concern about the
16 loss of parking and the impact on nearby
17 residents from Mr. Mitchell. But there was
18 just tremendous amount of angst about the
19 design. He saw the design as a sore thumb in
20 the community.

21 Commissioner Sims appeared, and his
22 testimony was that the majority of the

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1 community does not favor the project due to
2 the parking. And that the current library
3 redevelopment was being done not for the
4 current residents, but for presumably folks
5 that would be moving in at some unspecified
6 point in time.

7 Commissioner Shelton appeared as
8 well. And he was additionally a voice in
9 opposition to the project. He'd indicated how
10 long he'd lived in D.C., been a resident since
11 1952. His bottom line was design. He called
12 it a hideous structure, completely out of
13 realm for what should be in that community.
14 Felt like the Government was shoving the
15 project down the community's throat. Again,
16 echoing Mr. Mitchell and some of the other
17 ANCs that there had been no outreach to the
18 community and no outlet for feedback.

19 Mr. Audit appeared. He's with Mt.
20 Pleasant ANC and a community organizer. And,
21 again, the issue of the design of the project
22 came up and the way that allegedly the Public

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1 Library precluded Ward 8 residents from
2 speaking directly with the architect. It was
3 his opinion, although he's not an architect,
4 that the pods were not necessary, that there
5 had not been discussion with the community
6 about the pods.

7 Let's see, Ms. Deon Brown appeared
8 as well and she testified. She testified that
9 there was broad community support for the
10 library. She also indicated that there was a
11 literature drop done for every house in the
12 community, and it was her opinion that the
13 community was excited about rebuilding the
14 library. Thought it would be a rebranding for
15 the neighborhood. And she indicated that the
16 design changes were well received, and that
17 the neighbors on her block or the neighbors of
18 the local community were interested. Were
19 mostly seniors and very interested in life
20 long learning opportunities and so welcomed
21 the library.

22 Chairman Jones appeared in

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1 opposition. Did not support 14 space variance
2 because she believed it need to be absorbed by
3 nearby residents. That a number of neighbors
4 had converted their garages already for
5 personal use and so did not have access to
6 their own off-street parking.

7 And she had some concerns about the
8 courts at the time that she appeared, but
9 those concerns I think were remedied by the
10 fact that the court relief has now been
11 removed.

12 And, again, this theme of the
13 design, of it not being consistent with the
14 surrounding community.

15 So there was a lot of testimony
16 both for the project in terms of the variance
17 standard, against the project for the variance
18 standard.

19 When I look at the record before
20 us, I'm looking very narrowly at the variance
21 test. And you did an excellent job of
22 outlining what the elements are, the

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1 uniqueness, the separate situation, the
2 practical difficulties, the substantial
3 detriment to the public good, et cetera. And
4 as the application is now before us, it has
5 gone through some changes.

6 I believe the ANC had a meeting on
7 September 24. Representatives from the D.C.
8 Public Library apparently were there based on
9 the exhibit that the ANC submitted to us. I
10 think it's our 38, maybe. And I think
11 Councilmember Barry was there, that's in the
12 ANC's representation of who was at that
13 meeting.

14 The design was changed a little.
15 It's not clear from the record if it was
16 changed because of that meeting or if it was
17 changed anyway, but it was softened in the
18 sense that the pods, which were I think multi-
19 colored initially when it came up before the
20 Board, there's a uniform finish now and then
21 color to it that makes it somewhat more
22 harmonious with the main part of the building.

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1 Given what I can see in the record,
2 I think that the applicant has made a case for
3 variance relief. I will say that I've not
4 seen a case before me during my tenure here on
5 the BZA where it appears from the record
6 consistently in different types of exhibits
7 that an applicant either has gone out of its
8 way or just through oversight has consistently
9 not engaged the community on its project. And
10 it baffles me as to why that's the case. It's
11 almost like the applicant -- this is just pure
12 speculation, this is not the record. So I'm
13 not going to say that.

14 But it's baffling to get a good
15 handle on the outreach strategy of the
16 applicant in this case.

17 That notwithstanding, I think our
18 jurisdiction is the land use issues and
19 specifically the parking variance for 66
20 percent, for 14 spaces. And I think based on
21 the testimony in the record, the testimony of
22 Ms. McCarthy, the testimony regarding the

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1 availability of parking in the nearby area and
2 whether it would create a detrimental impact,
3 I think that they've made their case.

4 I think that the objections of the
5 community are strong objections, but I don't
6 think all of them go to the land use issues
7 that we deal with. And I think there are
8 other forms in our overall scheme of engaging
9 civic leaders that are proper forms for those
10 issues to be addressed. From a land use
11 standpoint, though, I think that the applicant
12 has made a case.

13 And with that, let me turn to other
14 Board members.

15 COMMISSIONER MAY: Thank you, Mr.
16 Chairman.

17 I have a few comments to make. I
18 think, first of all, I sorry -- Board member
19 Moldenhauer used the right word in describing
20 the process as disheartening. nd it really is
21 disheartening to have a case like this come
22 before us when there is such acrimony between

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1 the applicant and the ANC when the applicant
2 is a public agency that's trying to provide
3 services to that community. It's just
4 baffling to me that this would be such a
5 contentious issue.

6 That the design of the project
7 itself would cause such difficulties for the
8 ANC, and the agency, the Public Libraries
9 would insist on pressing forward for this with
10 every available means. It's astonishing to
11 me. And this is the sort of thing that I've
12 had to do in my career is advocate for public
13 building projects and meet with communities,
14 and work with them to resolve issues. I just
15 don't understand it. Now that's just a
16 reaction to the nature of the case.

17 I think it's very good that the
18 court relief that was originally requested has
19 been addressed in another way. Because I
20 think that that was very clearly self-imposed
21 in my mind by the design and it was something
22 that could be addressed by a design change,

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1 and it was.

2 There remain, I think, significant
3 design issues:

4 I think the fact that the parking
5 is in front of the building is bad;

6 I think the nature of the design
7 is, at least in the initial application,
8 looked quite alien in nature. And I think,
9 frankly, the quality of the materials that
10 were presented were not very good. So it made
11 an alien design seem even more foreign because
12 of the quality of what was presented, and;

13 I think that the reception by the
14 community just really tells it all when it
15 comes to the proposed designed, and;

16 And I think the design itself is
17 also quite impractical. And I'm very
18 concerned that given the fact that the library
19 systems seems to be facing economic straits in
20 its operations across the city, that they
21 would be engaging in the process of building a
22 design that seems to be very, very complicated

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1 and very expensive to maintain. And so I
2 wonder how many days a week they're going to
3 be able to keep this thing open because
4 they're spending too much time or money
5 maintaining it.

6 However, all of those issues, I
7 think, are beside the case. I think that when
8 I look at that and think about whether those
9 amount to a contributing factor in evaluating
10 the test for a variance, I don't see enough to
11 say that this in fact going to be detrimental
12 to the public good.

13 I do see the constraints on the
14 property and the difficulty of building there.

15 And I think that in all honesty, the idea of
16 having 21 parking spaces for a neighborhood
17 library is not the right number, and it's not
18 needed. And I can see how having to provide
19 that many spaces would be very difficult.

20 Now, could you configure the site
21 to come up with 15 spaces comfortably? I
22 think maybe you could. So are we really

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1 debating how much relief is granted? I'm not
2 sure that we are. I think the fact that we
3 cleared the threshold to grant the relief and
4 what they're providing is reasonably
5 approximate to what is there now, I think
6 leads me toward it probably being close
7 enough.

8 I say "probably."

9 I do have a question, though, which
10 is that what we received -- let me see if I
11 can find the exact exhibit. But it was the
12 relatively recent submission that includes the
13 design.

14 Can I pull yours? It's not
15 numbered, but it's the letter dated October
16 5th from Arent Fox and it includes this
17 revised image of the project which is more
18 subdued and uses more wood and a little less
19 bumpy, if you will, than the previous designs.

20 This letter indicates that the
21 applicant would like flexibility and they show
22 this as an example of how the design may be

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1 evolving. But it's not clear to me that this
2 is, in fact, the design that's proposed. If
3 it is the design that's proposed, I am much
4 more comfortable with this from a design
5 perspective and it does allay some of my
6 concerns. I still think its problematic in
7 many other ways, but again not in ways that
8 contribute to my evaluation of the test.

9 So, it would be helpful to me to
10 know that this in fact it.

11 MS. GLAZER: Mr. May, sorry to
12 interrupt. Could you identify the exhibit for
13 the record, please?

14 COMMISSIONER MAY: I wish I could.
15 It's not stamped. It's a letter dated October
16 5th from Arent Fox.

17 MS. GLAZER: Thank you.

18 COMMISSIONER MAY: I think we
19 received it at the last hearing, probably
20 before it had been stamped with an exhibit
21 number.

22 Thirty-seven? Maybe. Maybe 37?

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1 Anyway, that's what I have to say.

2 CHAIRPERSON LOUD: Let's see if Ms.
3 Bailey may have -- do you have an exhibit
4 number for it? Okay.

5 Excuse me. As we're doing that,
6 and I think that's a very important question
7 to clear up. I too saw that submission and
8 was moved significantly by way of support for
9 the project based on the changes represented
10 by what you just described, Mr. May. So I
11 think we need to clarify your question
12 regarding -- it's Exhibit 37 as Ms.
13 Moldenhauer had suspected. So we're talking
14 about Exhibit 37 so that everyone is on the
15 same page.

16 And I think Mr. May's question is,
17 is this it? Is this the deal? Is that what
18 is going to be moved forward by the applicant?

19 And I think certainly BZA needs to know the
20 answer to that question before we can vote on
21 this. And I think the community needs to be
22 clear as well.

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1 So perhaps not right this second.
2 I think I'll see if Mr. Dettman can walk us
3 through his concerns, questions, responses.
4 And then we'll get back to the issue that Mr.
5 May raised.

6 VICE CHAIRPERSON DETTMAN: Well, I
7 won't belabor the point as it pertains to the
8 way procedurally this application has
9 progressed, especially with the interaction
10 with the community. And I think this is an
11 example of DCPL designing a building that they
12 themselves are proud of instead of the
13 community actually taking pride in their brand
14 new library. And that is disheartening and
15 baffling.

16 With respect to the narrow request
17 of parking, I would agree with you Mr.
18 Chairman that I think the uniqueness test, the
19 first prong in the variance test is met. I
20 think that the 15 foot building restriction
21 line does encumber some area of the property
22 that could otherwise be used for parking, but

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1 because of the restriction line it can't.

2 I think the presence of the
3 substantial retaining wall and the amount of
4 land that is unavailable for development given
5 the steep topography in the backside of that
6 property is an exceptional situation and does
7 contribute to a practical difficulty. But I
8 also think that the chosen envelop of the
9 building contributes to the applicant's
10 practical difficulty as well.

11 And I think that looking at the
12 design of the building with the amphitheater
13 underneath the one pod and the entrance way
14 under the other pod, you know I think that
15 that is a desire of the library and that
16 particular design is not a result of any
17 community input. In fact, during the
18 applicant's case we heard testimony that the
19 amphitheater is a programmatic desire of the
20 library.

21 So in a sense to the extent that
22 the chosen envelope, the amount of land area

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1 that the footprint of this building occupies
2 contributes to the practical difficulty, I
3 would think that that is actually kind of a
4 self-created situation. That, of course, this
5 is an variance and a self-created practical
6 difficulty or hardship is just only one factor
7 that the Board needs to consider.

8 That being said, I think that the
9 variance test has been met, although by the
10 skin of their teeth.

11 I think that the retaining wall and
12 the building restriction line create enough of
13 a practical difficulty to warrant a variance
14 of 14 parking spaces, I believe it is.

15 With respect to the detriment to
16 the public good, the applicant argued that the
17 library site is served by 12 bus routes,
18 including those that connect to nearby Metro
19 stations.

20 You had mentioned their survey and
21 that a high percentage of their patrons
22 actually walk to the site, or use any other

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1 means of public transportation and whatnot.

2 There's a substantial degree of on-
3 street parking.

4 And so I think that there's enough
5 there to determine that with respect to the
6 third prong that there won't be an adverse
7 impact or a significant impact to the public
8 good, or the Zone Plan.

9 And that's my position on the
10 variance for parking, Mr. Chairman.

11 CHAIRPERSON LOUD: Thank you, Mr.
12 Dettman.

13 Let me ask this question: Without
14 repeating anything that we've already covered,
15 do Board members see an opportunity or need to
16 have an additional round? Okay. It doesn't
17 appear as such. I didn't know if you want to.

18 COMMISSIONER MAY: No. If we're
19 going to get clarity on that, that would be--

20 CHAIRPERSON LOUD: Okay. So I
21 think in that case, and I want to just make
22 sure we're doing this properly from a legal

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1 standpoint, Ms. Glazer, Mr. May had a question
2 that I think that is important to all of us.
3 And I wanted the opportunity to call up Ms.
4 Bray during the decision just to get an answer
5 to that specific question. And in terms of
6 the procedure for that, the legality of it?

7 MS. GLAZER: I'm not sure what the
8 question is.

9 CHAIRPERSON LOUD: His question was
10 whether this Exhibit 37, which was submitted
11 by the applicant and represented by the
12 applicant as being the modified plan for the
13 library, is in fact the fixed plan, design for
14 the library. Because there was some language
15 apparently in the letter that said this is
16 what? Subject to change? Mr. May can--

17 COMMISSIONER MAY: Yes. They're
18 requesting certain flexibility to change
19 exterior materials of the proposed library
20 building in response to community concerns.
21 And then they show this rendering, and it's
22 not absolutely clear that in fact they want to

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1 build this or whether they want to build the
2 original design.

3 So, I mean the basic question is:
4 How firm is this as a proposed design?

5 MS. GLAZER: I mean, I don't know
6 if the ANC is here. It could be prejudicial
7 to allow additional testimony in the record at
8 this point without the ANC present.

9 The applicant did indicate, I
10 believe, that that was a modified design. And
11 if the Board wants to clarify that, I don't
12 see any harm in doing so.

13 On the issue of flexibility,
14 though, I think the Board has to deliberate
15 based on the record it has before it unless it
16 wants to ask for additional information and
17 give the ANC an opportunity to comment or
18 review it.

19 CHAIRPERSON LOUD: Well, would the
20 Board be able to vote approval of Exhibit 37
21 as what we would approve and if the applicant
22 waivers from Exhibit 37, they're not in

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1 compliance with our approval?

2 MS. GLAZER: I believe that's true
3 in general. I assume that the applicant was
4 asking for a condition which would give it the
5 authority to make minor design -- not design
6 changes, but to change the materials is what I
7 thought they requested.

8 COMMISSIONER MAY: Right. It's
9 just the letter that they submitted doesn't
10 make it clear that this is their starting
11 point for making those changes or whether it's
12 somewhere between the original design and
13 this. That's all.

14 MS. GLAZER: I thought Exhibit 37
15 was their modification, and that's what was --

16 COMMISSIONER MAY: I understand
17 that. And I read over it several times. It's
18 not clear to me that that is in fact what
19 they're saying is the final design. That's
20 why I'm asking the question.

21 MS. GLAZER: Well, if the Board
22 isn't clear on any point, I think they have

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1 the right to request additional information.
2 The only problem would be to give the ANC an
3 opportunity to comment on anything as a matter
4 of due process.

5 CHAIRPERSON LOUD: Well, I
6 understand Mr. May's point, and I agree with
7 Mr. May's point. I mean, we should have a
8 fixed firm rendering that represents the
9 change in the design before us. On the other
10 hand, I mean we've spent some considerable
11 time reviewing this record now, deliberating
12 this morning. If there's a way that we can
13 push forward this morning and make a decision,
14 I think that's what we would like to do. And
15 are looking for options that from a legal
16 standpoint won't run afoul of due process or
17 anything like that.

18 If this applicant were to delete
19 the language in the Exhibit 37 memo, reserving
20 to itself some flexibility, that would not be
21 a due process issue, would it?

22 MS. GLAZER: I'm not sure I

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1 understand the question, but --

2 COMMISSIONER MAY: Mr. Chairman,
3 I'm not sure that we would want that
4 necessarily either. I think that having some
5 flexibility as they continue their discussions
6 with the community is probably wise. The
7 question is whether, in fact, they are
8 planning on this uniform treatment of the
9 surfaces and so on that are expressed here as
10 opposed to the prior version which had all
11 sorts of metal panels and things like that.

12 I think that's the real question
13 that I'm looking for clarity on. And if they
14 want to, you know manipulate these fins that
15 are covering the surfacing or something like
16 that in consultation with the community, I'm
17 happy enough that they have some flexibility
18 to do that. The question is whether this
19 overall image is the starting point or whether
20 its this is the starting point.

21 MS. GLAZER: I don't see any
22 problem in calling Ms. Bray up solely to

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1 clarify that issue.

2 CHAIRPERSON LOUD: Okay. And let
3 me ask this question: So if Ms. Bray comes up
4 and she's asked that question and the ANC is
5 or is not here, is there a requirement that
6 the ANC be able to respond to -- I know they
7 can't question her because she's the attorney.
8 But is there a due process requirement
9 regarding the ANC as a party having a chance
10 to respond to that?

11 MS. GLAZER: I don't believe so,
12 not if Ms. Bray merely affirms what she
13 already said in writing.

14 CHAIRPERSON LOUD: Okay. Then with
15 that concern, Mr. Dettman, let me defer to
16 you.

17 VICE CHAIRPERSON DETTMAN: Mr.
18 Chairman, I would just like to ask one
19 question. And I think if the Board is going
20 to go forward and want to get clarity on
21 what's going to be constructed based on Ms.
22 Bray's letter of October 5th, I think that's

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1 fine. But this, it actually raises a question
2 in my mind that I've had for a while, it's
3 that the variance that we're looking at right
4 now is parking. It only goes to the design of
5 the building in terms of the envelop of the
6 particular building. And with this particular
7 case where there's been so much debate about
8 the design of the building, I'm just wondering
9 is the Board going to vote, and by the sounds
10 of it it might be that we might be supporting
11 the parking variance and then we're going to
12 tie the applicant down in terms of
13 constructing the actual building that's shown
14 in the plans that's in the record?

15 I just don't understand why we
16 would tie them to a particular design when it
17 doesn't go to the variance parking. It's
18 always been a question of whether or not the
19 approved plans and the Board record, we've
20 always said that they have to construct that.

21 In this particular case we might
22 support a variance of 14 parking spaces, which

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1 to me says that they can build a building as
2 long as they provide the 7 parking spaces that
3 they said they're going to provide.

4 Going forward from a BZA decision
5 if the applicant decides to engage the
6 community, if another governmental agency or
7 body decides to get involved, it might result
8 in changes to the design which would require
9 the applicant to come back for a modification
10 of approved plans.

11 It's kind of a question mark I've
12 always had in terms of we're going to vote on
13 a parking variance but require them to build
14 this exact building design with the pods and
15 whatnot. So if there's not an answer to this
16 question, that's fine. We'll get the clarity
17 on the design and go forward.

18 CHAIRPERSON LOUD: I don't have an
19 answer to that question. Let me see from a
20 legal standpoint there's some really clear
21 guidance on that to Mr. Dettman's question.

22 MS. GLAZER: Well, I don't have the

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1 rule at my fingertips.

2 CHAIRPERSON LOUD: Okay.

3 MS. GLAZER: But the application is
4 approved according to the plans that are
5 presented. And that's in the regulation.

6 VICE CHAIRMAN DETTMAN: That's
7 right.

8 MS. GLAZER: So the Board would
9 have to approve -- if it were to approve this
10 variance application, it would be accordance
11 with Exhibit 37.

12 CHAIRPERSON LOUD: All right. So
13 then what I've heard is that Ms. Bray can
14 answer the specific question. She can come to
15 the table and Mr. May can ask his question.
16 She can answer that specific question without
17 it creating a due process issue for our
18 proceeding.

19 Ms. Moldenhauer.

20 BOARD MEMBER MOLDENHAUER: Just
21 before we get to that, I mean I just want to
22 kind of go back. Because even though I hear

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1 what the rest of the Board members are saying,
2 I still find a separation between the
3 uniqueness of the topography and the retaining
4 wall and the building envelop, which I think
5 creates, as Mr. Dettman said, is a self-
6 inflicted issue that they're creating which is
7 the need for this divergence from the parking
8 requirement. And whether it's, you know, as
9 Mr. May said, whether it's 21 spaces or 15
10 spaces or somewhere between 21 and 15 and 7,
11 the issue still is I think that the uniqueness
12 is not the absolute factor, which is creating
13 the practical difficulty here. I think that
14 it's the building envelope.

15 And there's testimony and there's
16 information in our record as to the cost.
17 That the only other option would be that they
18 would need to build parking underground or add
19 another story on the building. But on direct
20 question from the Board there was never any
21 other design considered by the applicant which
22 i think states that this is a self-imposed

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1 difficulty and that they have not yet shown us
2 that with potentially another design, that
3 this is the only way by going underground or
4 by adding another floor that would using the
5 envelope or using the buildable area based on
6 the topography that would create this
7 practical difficulty. And that's still a
8 question.

9 And everyone else, all the other
10 Board members are saying that they're on the
11 fence and just right over. I'm on the fence
12 and just right under the requirements.

13 So I want to throw that issue out
14 before we get any additional clarity.

15 CHAIRPERSON LOUD: Well, let me
16 suggest this: Why don't we do both? Why
17 don't we get the clarity that goes to Mr.
18 May's point. And then we can have an
19 additional round.

20 Your point is that you don't
21 believe that the practical difficulty is
22 proximately caused by the unique and

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1 exceptional situation that you do believe
2 exists?

3 BOARD MEMBER MOLDENHAUER: Exactly.
4 I don't believe that the two are tied
5 together.

6 CHAIRPERSON LOUD: Okay.

7 BOARD MEMBER MOLDENHAUER: I don't
8 believe that there's been any supporting
9 evidence to show that these elements that
10 we're referencing as to the uniqueness is
11 directly caused and is the approximate cause
12 of the difficulty.

13 CHAIRPERSON LOUD: Okay. And so in
14 our second round we can sort of have a go at
15 that particular issue. But I think to resolve
16 the issue of what we have before us, why
17 don't we get this out of the way and then we
18 can return back to you point. How's that?
19 Okay.

20 COMMISSIONER MAY: Mr. Chair, you
21 want me to ask the question again directly?
22 Okay.

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1 So the question I have is the
2 design that was submitted on October 5th in
3 Exhibit 37, is that the current state of the
4 design and you're requesting some additional
5 flexibility regarding materials?

6 MS. BREY: That is correct.

7 COMMISSIONER MAY: Okay. Thanks.

8 CHAIRPERSON LOUD: Okay. And the
9 questions have been answered to your
10 satisfaction?

11 COMMISSIONER MAY: Yes.

12 CHAIRPERSON LOUD: Okay. Now why
13 don't we move on then and Ms. Moldenhauer has
14 raised an issue regarding the second prong and
15 the sufficiency of the evidence to establish
16 whether the uniqueness, the topography, the
17 restricted building line, et cetera, is really
18 the approximate cause or the driver of this
19 practical difficulty. And so I'd like to open
20 it up again if Board members want to weigh in
21 on Ms. Moldenhauer's concern of that
22 particular issue.

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1 Would Board members like to raise,
2 Ms. Moldenhauer has raised, you know, sort of
3 like a laser focusing us in specifically on
4 the second prong and whether it's proximately
5 connected to the first prong? And so I
6 thought in this round before we close out and
7 go the decision on it, we would respond to
8 that if we have responses to it.

9 COMMISSIONER MAY: You know, I
10 think that on-the-fence is a good way to
11 describe this and are you slightly over or
12 slightly under.

13 I mean, I think that the nature of
14 the site is cause for relief because I think
15 that while you might be able to come up with a
16 site that meets the parking requirements, it
17 might either be extraordinarily expensive such
18 as parking below the building or it might be a
19 really contorted building, or a building that
20 doesn't work well with the program because
21 it's three floor rather than two, or something
22 like that.

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1 I think one could, as I said
2 before, design a building that has 15 parking
3 spaces and still meets the program, or
4 something like that. And you're right, we
5 didn't have any explanation of that as a part
6 of this case. But nonetheless, I think what
7 you've connected and make the case for the
8 relief, then the question becomes what's the
9 right amount of parking.

10 And given what's the record I
11 didn't see a real reason why relieving them of
12 7 spaces out of the 21 or 14 spaces out of the
13 21, I mean I didn't see a really strong
14 argument that you really needed to have 15
15 spaces on site, or we needed to have 20 spaces
16 on site. I think that it was they made a
17 reasonable case that 7 is going to be enough.

18 And I think that if we didn't have
19 such concern about the design and the
20 neighborhood's reaction to it, it probably
21 would have been fine the 7 spaces and not much
22 on the facts.

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1 BOARD MEMBER MOLDENHAUER: I just
2 think that even based on your statements there
3 is still this questions that, you know we're
4 making this large leap that okay it should be
5 okay, or we're assuming that, okay, well then
6 based on the fact that they've potentially
7 made this one argument that they're
8 sufficient, that okay, well we don't really
9 know whether 15 would have been needed, or
10 whether 7 would be needed; and so we're just
11 going to permit this large jump, this large
12 assumption.

13 You know, I think that there was
14 testimony, there was conflicting testimony
15 that there was currently potentially in
16 existence of 9 spaces, or there was currently
17 in existence of 15 spaces. There was
18 testimony that this would impact the public
19 parking on the street. That there would be
20 some concern by the local neighbors. There
21 was then conflicting testimony in support by
22 Mrs. Brown that there would not be any

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1 problems with parking in the community.

2 So I think there is a question as
3 to what would be the right number of spaces if
4 this was focused. And I think that also one
5 of the issues is is that our main hearing was
6 so focused on the court issue, that I don't
7 think the applicant actually provided
8 sufficient support for this parking issues.
9 Because that was kind of, that took backseat
10 to the court and to the design.

11 And so again, I just go to the
12 issue of, you know, could there exist another
13 building envelope that would meet the
14 programmatic needs of the application that
15 would potentially provide more parking? And I
16 don't think that the applicant has submitted
17 anything to ensure they even considered that.

18 And thus, it's a self-inflicted difficulty
19 and not something that is potentially cause or
20 we can't make that determination, we can't
21 make that leap I don't think from the record
22 that that's caused by the topography and by

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1 the rear retaining wall. And I that's just I
2 don't feel there's enough in the record to
3 show that.

4 VICE CHAIRPERSON DETTMAN: Ms.
5 Moldenhauer, I certainly understand your
6 comments, absolutely.

7 The argument that this is a self-
8 created situation, I think that when it comes
9 to an area variance test it doesn't
10 automatically defeat the variance test like it
11 would in a use variance case. It's just one
12 factor that the Board needs to weigh in
13 addition to the retaining wall, the
14 topography, the building restriction line, you
15 know the other factors that the applicant has
16 testified to.

17 You know, to your question about
18 could there be a design that could allow for
19 all 21 spaces, could here be a design that
20 could require a lesser degree of a variance?
21 I'm sure that there are designs out there;
22 this is the design that the applicant decided

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1 to pursue.

2 Looking at the design with the
3 material changes, now that we've gotten
4 clarity on that, I think that there's enough
5 there to warrant the variance test.

6 CHAIRPERSON LOUD: Well, I
7 certainly have empathy with where you're
8 coming from on the design issue. My recall is
9 that a lot of our discussion around even
10 whether there were alternate designs didn't
11 have a lot to do with the parking. It just
12 had a lot to do with the fact that we just did
13 not like the design. And it was in that
14 context, I think, that as you pointed out that
15 drove a lot of the discussion in the hearing.

16 When I look at this record I think
17 the applicant has demonstrated that the
18 topography of the lot, the fact that it loses
19 18 percent of what normally could be built on
20 it, I'm sure that it could get 14 spaces on
21 that 18 percent that's lost when added to the
22 fact that there's a no park zone in the rear

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1 of the building, a 15 foot restriction line in
2 the front of the building; I mean, it's
3 severely constrains the amount of parking that
4 it can work with or that it can develop on
5 that site.

6 I didn't see anything in the record
7 that would suggest to me that even with a
8 different design they could get 21 parking
9 spaces. They might be able to get a number of
10 over 7, but still need to come before us for
11 variance relief.

12 And when Mr. -- I think his name is
13 Bonvechio, testified about the program needs
14 of th library, the size of the building that
15 they were placing for us was driven by this
16 sort of standard formula that they use for
17 libraries in terms of size that they to aim
18 for as a North Star.

19 So I'm very, very, very empathetic
20 to the question of the design. But my recall
21 is that O always talked about that in the
22 context of do I like the way this building

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1 looks? Is there another way for this building
2 to look? Not so much would this design yield
3 five more spaces or would this design yield 10
4 more spaces.

5 So that's sort of where I come out
6 on it.

7 Is there further deliberation?
8 Yes?

9 BOARD MEMBER MOLDENHAUER: No. I
10 obviously, I disagree. I think that the issue
11 is not even a matter of design. It's a matter
12 of, you know, showing the connection between
13 uniqueness and the difficulty.

14 But I think that the discussion is
15 full. And if you'd like, since I don't
16 believe I'll be voting in favor of it, you,
17 Chairman Loud, you can make a motion.

18 CHAIRPERSON LOUD: Let's first see
19 if there's any further deliberation on it and
20 then move this to a closure.

21 Okay. Hearing none, then I would
22 like to move for approval of Application No.

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1 1797, D.C. Public Library, for a variance
2 relief with respect to 14 parking spaces of a
3 required 21 not being met based on the
4 discussion that we've had and the articulation
5 of the evidence tied to the three prongs of
6 the variance test, and with the certainty that
7 Exhibit 37 represents what the applicant will
8 be moving forward with as its design.

9 COMMISSIONER MAY: Second.

10 CHAIRPERSON LOUD: Motion's been
11 made, seconded. Is there further deliberation?
12 Hearing none, all those in favor of the
13 motion say aye.

14 ALL: Aye.

15 CHAIRPERSON LOUD: All those
16 opposed?

17 BOARD MEMBER MOLDENHAUER: Aye.

18 CHAIRPERSON LOUD: And are there
19 any abstentions?

20 And, Mr. Moy, can you read back the
21 vote?

22 SECRETARY MOY: Yes, sir. The vote

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1 would be three to one to one on the motion of
2 the Chair, Mr. Loud, to approve the
3 application for a variance relief 2101.1 off-
4 street parking requirements seconded by Mr.
5 Peter May also supporting the motion Mr.
6 Dettman. No other Board members. So again,
7 that's three to one -- oh, and Ms. Moldenhauer
8 opposed to the motion. So again, that's three
9 to one to one.

10 CHAIRPERSON LOUD: Thank you, Mr.
11 Moy.

12 And I want to thank Mr. May who is
13 going to be leaving now. Thank you for
14 joining us this morning. We're going to be
15 joined, I think, by Commissioner Hood.

16 I also want to thank to Ms.
17 Moldenhauer, who did an outstanding job I
18 think of briefing the case and setting it
19 before us for deliberation.

20 MS. GLAZER: Mr. Chair?

21 CHAIRPERSON LOUD: Yes.

22 MS. GLAZER: Is the Board going to

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1 rule on the request for flexibility?

2 CHAIRPERSON LOUD: You have to
3 elaborate, Ms. Glazier, let me know what you
4 mean.

5 MS. GLAZER: The applicant also
6 asked for flexibility on the materials. And I
7 don't know if that was deliberated or not.

8 CHAIRPERSON LOUD: Okay. Mr. May,
9 perhaps hang on for a few more moments.

10 I don't know what that means.

11 COMMISSIONER MAY: Well, as long as
12 the form of the building is decided and the
13 basic look of it, I think that they're talking
14 about changes in the actual material of some
15 of these fins and so on. I think that that's
16 reasonable. And I would support granting them
17 some flexibility, particularly if they're
18 going to be working hard with the community to
19 try to make it as acceptable as possible to
20 them.

21 CHAIRPERSON LOUD: Is that
22 something that we would need to vote on, Ms.

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1 Glazier?

2 MS. GLAZER: Well, since it's been
3 segregated, I think it would be wise to vote
4 on it since this point. The issue has been
5 segregated from the general approval.

6 CHAIRPERSON LOUD: Okay. Then
7 we'll follow the advice of counsel on that.

8 I'm in agreement with you, Mr. May.

9 I think we've gotten this close to the finish
10 line. I think, obviously, if there are going
11 to be some modifications to this, then I think
12 it's rule 3126, whichever rule governs minor
13 modification would be the appropriate route to
14 do those modifications. But in light of the
15 qualification that Mr. May put on it, I would
16 be in support of giving them some limited
17 flexibility on material selections and being
18 responsive to the community, I think is the
19 way he put it.

20 COMMISSIONER MAY: Right.

21 CHAIRPERSON LOUD: I move for
22 approval of allowing the applicant some

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1 limited flexibility for materials selection as
2 tied to dialogue with the community.

3 Is there further discussion?

4 COMMISSIONER MAY: I second.

5 CHAIRPERSON LOUD: All right.

6 There's a second. Motion's made and seconded.

7 Further discussion? Hearing none,
8 all those in favor say aye.

9 ALL: Aye.

10 CHAIRPERSON LOUD: All those who
11 are opposed? Are there any abstentions?

12 And, Mr. Moy can you read back the
13 vote, please?

14 SECRETARY MOY: For clarification,
15 how did Mr. Moldenhauer vote?

16 BOARD MEMBER MOLDENHAUER: In
17 favor.

18 SECRETARY MOY: In favor? Thank
19 you.

20 So that would be a vote of four to
21 zero to one on motion of the Chairman, Mr.
22 Loud, to approve the language that provides

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1 for limited flexibility in the selection of
2 the exterior building materials. Second by
3 Mr. Peter May. Also supporting the motion Ms.
4 Moldenhauer and Mr. Dettman. Again, that's
5 four to zero to one.

6 CHAIRPERSON LOUD: Thank you, Mr.
7 Moy.

8 If there's nothing further with
9 this case if we can call the final decision
10 case for this morning?

11 SECRETARY MOY: Yes, sir.

12 That would ANC 6C's motion for
13 reconsideration of Appeal No. 17902 of Joseph
14 Park, pursuant to Section 3126 of the Zoning
15 Regulations. The original appeal that was
16 approved on May 12, 2009 is pursuant to 11
17 DCMR § 3100 and 3101 from an August 28, 2008
18 decision of the Zoning Administrator to revoke
19 the Certificate of Occupancy Permit No. 167331
20 for a liquor store, Oasis Liquors, in the R-4
21 District at premises 1170 3rd Street,
22 Northeast, Square 773, Lot 277.

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1 As the Board will recall at its
2 Public Decision Meeting on September 15, 2009
3 the Board convened and deliberated on the ANC
4 6C's motion for reconsideration. After a
5 discussion the Board reopened the record for
6 the limited reconsideration of the ANC's
7 motion attended to findings of fact and No. 16
8 in the order.

9 The Board requested the appellant
10 to serve ANC 6C all the tax returns with a due
11 date of September 22nd of 2009. The ANC 6C to
12 respond by October 21st of 2009 and the Board
13 reschedule its decision on October 27th.

14 There are two filings in your case
15 folder, Mr. Chairman. The first from the
16 appellant Joseph Park who filed his tax
17 return, and his document is dated September
18 15, 2009, identified as Exhibit 40.

19 The ANC 6C filed a response, dated
20 October 19, 2009. And that is identified as
21 Exhibit 41.

22 With these exhibits then, the Board

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1 is to act on the merits of the motion for
2 reconsideration pursuant to section 3126.

3 And that completes the staff's
4 briefing, Mr. Chairman.

5 CHAIRPERSON LOUD: Thank you, Mr.
6 Moy. I think we can dive directly into the
7 reconsideration of the motion. i'll be happy
8 to take the lead on it. And I don't think this
9 will take an extraordinary amount of time.

10 Let me just start out with the rule
11 that we've been joined by Mr. Lori Monroe of
12 the Office of Attorney General. And it's good
13 to see you. In fact, we'll start out with the
14 rule that was provided for our review by Ms.
15 Monroe as we first sat down to deliberate this
16 case.

17 This is covered by section 2005.1
18 in the D.C. Regs. And we've addressed the
19 standard for that.

20 Also significantly BZA has adopted
21 that rule or applied that rule in the Appeal
22 Case No. 15893, the Appeal of Malone which

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1 talks about the history. That's a BZA case
2 which talks about the history of section
3 2005.1 and notes how the originally proposed
4 language was ultimately rejected by the Zoning
5 Commission included the following phrase:

6 "Intent to resume active operation
7 if a nonconforming use shall not alter the
8 provisions of this chapter." Shall not alter
9 the provisions of this chapter. That's Malone
10 at page 4. That language was rejected by the
11 Zoning Commission.

12 And District case law is consistent
13 with the approach that the Zoning Commission
14 took, and specifically of disallowing an
15 intent to resume from altering the provisions
16 of section 2001.5.

17 The District case law is embodied
18 in GW University versus DC BZA, 428 A2nd at
19 1342, D.C. case 1981. And the case law from
20 the GW case is as follows:

21 The test in the District continues
22 to be: (1) whether there was an intent to

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1 abandon, and; (2) some overt act or failure to
2 act which carries the implication of
3 abandonment.

4 So that the intent to abandon is a
5 very strong component of the law in the
6 District of Columbia as regards abandonment in
7 cases like this.

8 Now, the ANC has filed Exhibit 41.

9 I think the challenging findings 16, findings
10 25; they make I think four points and I'm
11 going to respond to each of the four briefly.

12 I am not in favor, by the way, of
13 reversing our earlier decision on the case. I
14 think the decision was based on substantial
15 evidence in the record, substantial evidence
16 that we went over in very great detail at the
17 initial deliberation, which basically
18 concluded that there was not a three year
19 period of time that we could point to where it
20 was shown that the appellant abandoned or had
21 the intent to abandon operation of the liquor
22 store.

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1 But the ANC says that the Board
2 made an error with respect to finding 16 when
3 we stated that the 2005 tax returns showed
4 income. And my review of the record, and I'm
5 looking at what the ANC submitted, the tax
6 returns show at page 5 at line, I think, I-5,
7 total taxable income of negative \$10,580. But
8 there's no gross income indicated.

9 So I think the ANC is right. I
10 commend the ANC for bringing this error and
11 factual finding to our attention. That's
12 something that should be corrected, I guess in
13 an amended version of our decision.

14 But very interestingly, this same
15 tax return that the ANC brings to our
16 attention to suggest that we made the wrong
17 decision also includes some information at
18 page 5. There are two boxes, Box 4 and Box 5.

19 Box 4 says: "If the business is terminated,
20 state the reason." Box 5 says: "Termination
21 date." And the applicant did not check either
22 of those boxes. Again, it just corroborates

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1 all that we've already said about there not
2 being evidence in the record, sufficient
3 evidence to establish that this appellant
4 intended to abandon the operation as the Oasis
5 Liquors.

6 Secondly, the ANC says that the
7 Board made an error stating that in 2005 the
8 tax return showed that repairs were made. And
9 again, the ANC is correct. Looking at line 12
10 of the tax returns for 2006 it does not show
11 that any repairs were made, and we should make
12 that correction to our finding. But again,
13 it's a technical correction.

14 The same year tax returns show an
15 operation loss of \$8,645. That's evidence
16 that a business was up and operating during
17 that year. They lost money. I don't think
18 that the rule requires that the business have
19 to make money, but that it's the appellant has
20 an intent to abandon.

21 That same return for '06 again says
22 this Box 4 and 5 on page 5 which gives a tax

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1 filer an opportunity to say that the business
2 has been terminated, state the reason,
3 termination date. And again in '06 that was
4 not checked off by the appellant.

5 The ANC goes on then to say that
6 tax records show no income for 2007, 2008 but
7 finding 16 did not claim that there was tax
8 recorded income for '07 and for '08. So
9 there's no need to address that.

10 With respect to finding 25 in
11 effect the ANC is asking the BZA to reconsider
12 what we already reconsidered on September 14
13 and rejected on September 14 where the
14 discussion that we had regarding whether there
15 was actually \$30,000 in repairs in 2008 at that
16 time, September 14, echoing our deliberation.

17 The Board credited Mr. Park's testimony that
18 there were \$30,000 in repairs in 2008 all
19 going to the renewal and -- not renewal so
20 much, but execution of a lease for the
21 property again, which goes to defeat the
22 argument that there was an intent to abandon

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1 it. And the Board was free to credit that
2 testimony, and we did so. And we said as such
3 September 14.

4 Finally the ANC says that the Board
5 decision as a whole was weighted very heavily
6 by our reliance on the tax records. And Board
7 member Laud, Board member Dettman and Chairman
8 Hood from the Zoning Commission are quoted in
9 the ANC's reconsideration motion at page 2.

10 I can only speak for Board member
11 Loud in saying that my reliance of the tax
12 records was done in concert with all of the
13 other evidence that was in the record,
14 including finding Mr. Park to be a credible
15 witness crediting his testimony regarding
16 whether he intended to abandon and so forth
17 the payment of the safekeeping for the
18 license, the execution of the April 2008
19 lease. Later on I do mention the tax filings
20 and I do mention the income erroneously. So
21 I'm the culprit for the fact that the finding,
22 that income for 2005 in the first place, but

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1 also what the ANC quotes me on also exonerates
2 the statements that I made. Because the
3 emphasis I place is on the tax filings, not
4 necessarily the tax income. I think the
5 filings demonstrate along with the other
6 evidence the ongoing desire to continue to
7 operate this business.

8 So again, sort to close this out at
9 least from my perspective, I think the ANC has
10 done an excellent job of bringing to our
11 attention some things that we need to correct,
12 but I don't think that it changes the bottom
13 line as to whether or not substantial evidence
14 support our finding that the appellant, Mr.
15 Park, did not intend to abandon operation of
16 the Oasis Liquors.

17 And with that, let me turn it over
18 to Mr. Dettman.

19 VICE CHAIRPERSON DETTMAN: Mr.
20 Chairman, I really don't have anything to add.
21 I agree with you on the outcome of this
22 motion. And with respect to the corrections

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1 that you've identified that you propose to be
2 changed in the order, I think that that's
3 appropriate.

4 I think the ANC raises some very
5 good points with respect to some comments that
6 we made about the tax returns.

7 During our decision I believe I
8 stated that the relevant three year period in
9 this case to me, the three year period that I
10 relied upon was the three year period that
11 immediately preceded the ZA's notice of an
12 intent to revoke the C of O. And within that
13 area, within that three year period, was an
14 executed lease dated 2008.

15 The weight of my support for the
16 case was mostly placed on that executed lease.

17 And the other testimony and the other
18 evidence that you have already gone through
19 supported my weight on that lease. So I'm in
20 agreement with you with respect to this
21 motion.

22 CHAIRPERSON LOUD: Thank you, Mr.

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1 Dettman.

2 Then what I'd like to do is move
3 that we deny the motion for consideration of
4 the ANC 6C in Case No. 17902. Is there a
5 second?

6 VICE CHAIRMAN DETTMAN: Second.

7 CHAIRPERSON LOUD: Motion has been
8 made and seconded. Any further deliberation?
9 Hearing none, all those in favor say aye.

10 ALL: Aye.

11 CHAIRPERSON LOUD: All those who
12 oppose? Are there any abstentions?

13 SECRETARY MOY: Yes, sir, Mr.
14 Chairman. Before I give a final vote there is
15 -- oh, I sorry. Mention the abstentions. But
16 I do have an absentee ballot, if I'm not
17 jumping the gun here, from Anthony Hood who
18 also participated. And his absentee vote is
19 to deny the motion, the ANC's motion.

20 CHAIRPERSON LOUD: Thank you.

21 SECRETARY MOY: So with that, would
22 give a final vote of three to zero to two. A

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1 motion of the Chair, Mr. Loud, to deny ANC
2 6C's motion to reconsider, seconded by Mr.
3 Dettman, Vice Chair. No other Board members
4 participating. So again with Mr. Hood's
5 absentee vote to deny, that would give a total
6 vote of three to zero to two.

7 CHAIRPERSON LOUD: Thank you, Mr.
8 Moy.

9 Is there anything further in this
10 case?

11 SECRETARY MOY: No, sir.

12 CHAIRPERSON LOUD: Then I think
13 what we'll do is adjourn the morning Decision
14 Meting, take a five minute break, and then
15 we'll come back and get started on the morning
16 Hearing cases.

17 (Whereupon, the Special Public
18 Meeting was adjourned at 11:49 a.m.)

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