

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

SEPTEMBER 15, 2009

+ + + + +

The Special Public Meeting convened in Room 220 South, 441 4<sup>th</sup> 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, Chairperson  
SHANE L. DETTMAN, Vice Chairman (NCPC)  
MEREDITH MOLDENHAUER, Member

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD, Chair  
PETER G. MAY, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary  
BEVERLEY BAILEY, Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.  
LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Meeting held on September 15, 2009.

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

2 9:55 a.m.

3 CHAIRPERSON LOUD: This meeting  
4 will please come to order. Good morning,  
5 ladies and gentlemen.

6 This is the September 15th Public  
7 Meeting of the Board of Zoning Adjustment of  
8 the District of Columbia.

9 My name is Marc Loud, Chairperson  
10 and joining me today are Vice Chair Shane  
11 Dettman representing the National Capital  
12 Planning Commission, Mr. Peter May  
13 representing the Zoning Commission, Meredith  
14 Moldenhauer of the BZA, Mayoral Appointee. To  
15 her left, Mr. Clifford Moy, Secretary of BZA,  
16 Ms. Sherry Glazer, Office of the Attorney  
17 General, Ms. Lori Monroe, also Office of the  
18 Attorney General and on my far left Ms.  
19 Beverley Bailey, Zoning Specialist here in the  
20 Office of Zoning. We will be joined a little  
21 bit later by Chairman Anthony Hood of the  
22 Zoning Commission as well.

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1                   Copies of today's meeting agenda  
2 are available to you and are located to my  
3 left in the wall bin near the door. We do not  
4 take any public testimony at our meetings  
5 unless the Board asks someone to come forward.

6                   Please be advised that this  
7 proceeding is being recorded by a court  
8 reporter and is 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                  MR. MOY: Yes, we do, Mr. Chairman,  
16 but staff would suggest that the Board take  
17 those matters up on a case-by-case bases.

18                  CHAIRPERSON LOUD: Thank you, Mr.  
19 Moy and good morning and are we ready to call  
20 the first case for this morning and I think  
21 we're going to kind of stick to the order, but  
22 I'll let you know if we need to move out of

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1 the order.

2 MR. MOY: Yes, sir.

3 CHAIRPERSON LOUD: I think we're  
4 going to start with Bauman.

5 MR. MOY: Yes, sir.

6 CHAIRPERSON LOUD: Okay.

7 MR. MOY: Good morning, Mr.  
8 Chairman and Members of the Board.

9 That Application Number is 17917 of  
10 Jerome Bauman pursuant to 11 DCMR 3103.2 for a  
11 variance from the use provisions under  
12 Subsection 330.5 allowing office service and  
13 retail uses which are permitted in the C-1  
14 District in an existing building in the R-4  
15 District at premises 1452 D Street, N.E.  
16 That's in Square 1053, Lot 90.

17 As the Board will recall on  
18 September 1st, 2009, the Board completed  
19 public testimony, closed the record and  
20 scheduled its decision on September 15th,  
21 2009. The Board will question no additional  
22 information as the record was full. The Board

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1 is to act on the merits of the use variance  
2 from the use provisions under Subsection 330.5  
3 and essentially that completes the Staff's  
4 briefing, Mr. Chairman.

5 CHAIRPERSON LOUD: Thank you, Mr.  
6 Moy. I think we are ready to deliberate it --  
7 deliberate the application for relief and I'll  
8 go ahead and start us off.

9 Let me just sort of recap very  
10 briefly the facts. Then go into the use  
11 variance test and analysis.

12 I think as you indicated, Mr. Moy,  
13 this case is one in which the Applicant  
14 originally sought the use variance on the  
15 ground floor of a mixed-use building at 1452 D  
16 Street, N.E. to enable it to use the ground  
17 floor for "any use permitted in the C-1" and  
18 there are a list of C-1 permitted uses that  
19 became a part of our record during the course  
20 of the different hearings that we had on the  
21 case.

22 At the time of the filing, the

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1 ground-floor use had a C of O Number 26533 for  
2 retail grocery and delicatessen through a BZA  
3 special exception per our BZA Case Number  
4 16768, but the Applicant was unable to secure  
5 a tenant for the ground floor for at least a  
6 year and provided some evidence to that affect  
7 with respect to the exhibits in our file and  
8 the hearing testimony and the reason that he  
9 was unable to was due to the difficult  
10 economic times and that there simply were no  
11 takers and again, he provided evidence to that  
12 affect.

13 To avoid, I guess, the zoning  
14 uncertainty for a potential prospect for the  
15 ground floor retail space, the Applicant  
16 approached -- submitted an application with  
17 the BZA as I said for the sort of blanket any  
18 use permitted in the C-1 category of relief  
19 and we then reviewed it and had testimony and  
20 heard witnesses and reviewed exhibits, et  
21 cetera under that theory.

22 However, over the summer, the

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1           Applicant changed it's zoning relief request.

2           Specifically, I think it was August 19th.

3           This is our Exhibit 30 and the change was to  
4           seek a use variance for the entire building  
5           both the ground-floor retail which  
6           historically the special exception retail use  
7           as well as the upper floors which have been  
8           historically residential and have over the  
9           years been rented out as residential.

10           The purpose for the change in  
11           relief request was that the Applicant had  
12           identified a tenant, the Pathways to Housing  
13           nonprofit, that wanted to take the entire  
14           building. Both the ground floor residential  
15           as well as the upper floors residential.

16           We heard additional testimony I  
17           believe September 1st in the case that the  
18           site would be used by the prospect for about  
19           15 employees including what they call their  
20           act team and then a few administrators. There  
21           would be about seven employees on-site I think  
22           at anyone time. Most of the employees would

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1 come on-site for a very brief period of time  
2 and then disperse to their client base. Seven  
3 would remain on site throughout the day.

4                   The site would be used I said by  
5 the daily act team, by a number of clinicians  
6 that visit the building off and on. The  
7 prospect is a nonprofit that offers services  
8 to homeless persons with psychiatric  
9 disabilities.

10                  Let me see if there's anything else  
11 germane by way of facts. We did hear  
12 testimony from Rev. Coffman as well as from  
13 Mr. Bauman.

14                  The ANC did submit a report in our  
15 case. That's our Exhibit 27 where they were  
16 generally supportive of the relief being  
17 requested. The ANC's report was dated April  
18 15th, 2009. It was before the relief request  
19 changed, but nonetheless, they did generally  
20 speaking indicate their support for the relief  
21 and they had a few conditions on it.

22                  What I'm now going to do is walk

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1 through the use variance test and share my  
2 sense of where I'm coming out in terms of  
3 where the evidence lines up.

4 The first prong of the use variance  
5 test is that there be an exceptional situation  
6 with respect to topography or to circumstances  
7 so on and so forth and in this case, there was  
8 evidence that we have an existing building  
9 that was constructed for mixed uses with a  
10 neighborhood grocery store and an upper-level  
11 apartment for about 70 years.

12 There's also in the rear of the  
13 property a detached commercial building. It  
14 think it's used for a barber shop according to  
15 the testimony and that the ground floor has  
16 been continuous commercial use since 1932.

17 So, I think these were the factors  
18 to lift up and highlight regarding whether or  
19 not this particular Applicant has an  
20 exceptional situation with the property.

21 With respect to whether the  
22 exceptional situation causes an undue hardship

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1 for the Applicant, the evidence would tend to  
2 suggest that as to the ground floor commercial  
3 space there does appear to be an undue  
4 hardship to convert it to residential in terms  
5 of the potential cost of converting it to  
6 residential. There being some testimony and  
7 evidence submitted by the Applicant that the  
8 -- I'll consult my file for the exact figures.

9 I think it was 137,000 to convert the entire  
10 structure to one semi-detached residential  
11 unit and it was a little bit higher, \$177,000,  
12 to convert it to two flats and that the  
13 existing commercial since it had been  
14 commercial for so long could not easily  
15 convert to residential.

16 There wasn't any testimony that I  
17 can recall regarding the difficulty of  
18 continuing to use the upper floor conforming  
19 residential as residential. Most of the  
20 testimony went to the cost and the undue  
21 hardship of converting the ground floor for  
22 retail use. I'm sorry. Residential use.

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1                   In addition to that being a  
2 hardship, there was some testimony regarding  
3 the location of the property being on a corner  
4 lot opposite a liquor store and testimony  
5 about whether or not someone would want to  
6 live on the ground floor of a property located  
7 -- and also the fact that there was this --  
8 either there is a barber in the rear of the  
9 property or had been at some point in time,  
10 but there's been a commercial property there  
11 and the question of whether someone would want  
12 to live on the ground floor with a barber shop  
13 in the rear of the property.

14                   But, again, I note that there's no  
15 evidence presented that I can recall that the  
16 upper floor residential could not be used in  
17 conformity with the zone. Unlike the ground  
18 floor commercial space where there was  
19 testimony regarding broker's listings efforts  
20 to identify tenants over a period of time. I  
21 think some of the records speak to a year  
22 without any success on the part of the

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1       Applicant to identify a retail use in  
2       conformity with the special exception.

3                   There was no evidence regarding the  
4       residential on the upper floors that I can  
5       recall.

6                   With respect to whether or not  
7       there would be substantial detriment to the  
8       public good, again, I note that the ANC  
9       supported generally the application for relief  
10      particularly as initially presented for ground  
11      floor relief, but in the ANC's support, they  
12      were opposed to any use that exceeded more  
13      than three employees on site at anyone time.

14      That's at our Exhibit 27.

15                  I note in this case that there are  
16      going to be a maximum of seven persons in the  
17      building for most of the day and no more than  
18      15 employees will be on the site at anyone  
19      time, but both of those numbers, seven and 15,  
20      obviously exceed the three employees that are  
21      referenced in the ANC report.

22                  The Office of Planning evidenced

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1       its opposition to the use variance for the  
2       entire building. Essentially concluding that  
3       they did not believe that there had been proof  
4       of an undue hardship on the Applicant  
5       particularly with respect to converting the  
6       upper floors from their current conforming  
7       residential to nonconforming retail space.

8                   The Office of Planning also  
9       originally opposed the application on the  
10      ground that they didn't want to approve an  
11      indeterminate number and type of commercial  
12      uses again going back to all permitted C-1  
13      uses that were part of the original  
14      application.

15                  But, once the application changed,  
16       the Office of Planning weighed in that they  
17       thought that the third prong was moot because  
18       OP did not believe that the second prong had  
19       been made. That is the undue hardship.

20                  Now, with respect -- I think that  
21       sort of outlines the case and the evidence on  
22       each prong of the variance test.

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1                   I    think    where    I    come    out,  
2    colleagues,    is    that    I'm    very    sympathetic    to  
3    the   Pathway   tenant   and   the   situation   that   the  
4    Applicant   has   found   itself   in   seeking   to   find  
5    a   tenant   for   the   ground   floor/entire   building.

6                   But,    I    don't    think    that    the  
7    Applicant   has   made   the   test   for   an   undue  
8    hardship.    I   do   think   they've   made   the   test  
9    for   an   exceptional   situation   particularly   as  
10   relates   to   the   ground   floor   and   the   original  
11   area   of   relief   that   they   were   seeking   and   made  
12   a   very   strong   --   marshalled   the   evidence   very  
13   strongly   in   that   regard,    but   I'm   just   not  
14   seeing   where   there's   an   undue   hardship   on   the  
15   Applicant   that   would   result   in   it   being   unable  
16   to   use   the   upper   floors   residential   in  
17   conformity   with   the   zone.

18                   And    with    respect    to    substantial  
19    detiment   to   the   public   good,   I   do   think   that  
20    the   ANC   which   has   generally   supported   this  
21    process   throughout   has   been   very   clear   that  
22    they   did   not   want   to   see   more   than   three

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1 employees on the site at any one time and so,  
2 I think giving them the great weight that  
3 they're entitled to under our rules, that  
4 would be something that would tend to make me  
5 think that there could be substantial  
6 detriment to the public good.

7                   But, even without reaching the  
8 third prong, for me, the second prong is not  
9 met by the Applicant.

10                  And with that, let me open it up to  
11 Board Members.

12                  VICE CHAIRPERSON DETTMAN: Mr.  
13 Chairman, I agree with your analysis and kind  
14 of come out in the same place. I think that  
15 of the evidence that has been offered up by  
16 the Applicant in terms of what it will cost to  
17 retrofit this building, what we don't have  
18 before us is a showing that the second floor  
19 which, as you stated, has historically been  
20 used as a residential unit cannot be put to a  
21 conforming residential use or some use that  
22 could be allowed by way of special exception.

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1                   We don't have the information before us.

2                   The Applicant did establish that  
3                   this property does have exceptional  
4                   circumstances.

5                   I also think that they made the  
6                   case for an undue hardship as to the first  
7                   floor as well as the basement level, but when  
8                   the Applicant indicated that the -- their  
9                   request actually went to the entire building,  
10                  that's when I kind of took a step back and  
11                  reanalyzed the first two prongs and didn't  
12                  think that the evidence in terms of the  
13                  numbers that were presented qualified for the  
14                  second prong. They didn't meet the second  
15                  prong.

16                  With respect to the third prong  
17                  having not had to get there, I agree with you.

18                  I think that the ANC contemplated a much less  
19                  intense use by way of their condition of only  
20                  having three employees on the site at any one  
21                  time. I think in using the entire building,  
22                  the Applicant contemplates uses this building

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1 for more than three employees at any one time.

2 I also think that it's contrary to  
3 the Zone Plan. The Zone Plan is very, very  
4 clear about changing uses within nonconforming  
5 structures, changing uses within nonconforming  
6 structures in residential areas. That they  
7 should be a neighborhood facility and it's  
8 also -- the regulations are also very clear in  
9 2002.3 about extending a nonconforming use  
10 into an area of a structure that is not  
11 dedicated to that use and so, again, with  
12 respect to the third prong, I think that it's  
13 more detrimental to the Zone Plan than it  
14 would be to the public good.

15 COMMISSIONER MAY: The way this  
16 case has changed over time it's been a very  
17 interesting progression and I've become more  
18 sympathetic to the Applicant's case.

19 When we started out with a list of  
20 potential uses that could be sought as sort of  
21 a proactive way to assist them in dealing with  
22 the nonconforming use issue, that made me very

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1       uncomfortable.    Because in effect, it was  
2       rezoning the property to sort of a subset of  
3       C-1 allowed uses.    So, I was very  
4       uncomfortable with that notion and I certainly  
5       didn't believe the case had been made that  
6       that was necessary and appropriate.

7               I think the idea of having an  
8       office use on the ground floor, particularly  
9       the office use that was proposed, I think  
10       would be a relatively easy decision to make  
11       given the impact.    I understand the ANC's  
12       opinion on this, but I think that even if we  
13       had gotten a specific opinion from the ANC  
14       about this particular office use on the ground  
15       floor, they probably would have been okay with  
16       it given all of the other steps that the  
17       Applicant was taking to make sure that there  
18       was no impact on the neighborhood.

19               It's when the use extends to the  
20       second floor that it becomes more problematic.  
21               Because then that opens the door to not just  
22       this office use, but potentially, you know, if

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1       there were a new tenant further down the road,  
2       it would -- the same level of care wouldn't  
3       necessarily be put into the decision making  
4       and so, you could wind up with an office use  
5       that does have a more significant impact and  
6       so on.

7               I also think that just from the  
8       prongs of the test it's hard to get there with  
9       expanding the use to the second floor.

10              It's unfortunate I think that the  
11       sort of neighborhood nonconforming uses which  
12       I believe provide a very useful function in  
13       the neighborhood are increasing difficult to  
14       maintain within the neighborhoods.

15              I live not very far from this  
16       location and in the 20-some years that I've  
17       been in that area within one block, we've lost  
18       three neighborhood business that were  
19       nonconforming uses within the R-4 zone and  
20       there is -- fortunately, there remains one  
21       grocery and one dry cleaner. So, we're still  
22       functional as a neighborhood, but its -- we

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1       lost a dry cleaners and we lost two other  
2       grocery/deli-type places.

3                   What's interesting about that is  
4       that those three lost uses, those houses  
5       essentially became houses once again and so,  
6       every one of them is a private home and that  
7       may be an inevitable fate for this property if  
8       a commercial use that can be allowed under the  
9       Zoning Regulations is not -- can't be found  
10      that would work there.

11                  So, it's kind of unfortunate, but I  
12      think that that's -- I don't think that the  
13      case has been made and so, I'm not inclined to  
14      vote in favor of expanding the use to the  
15      second floor.

16                  CHAIRPERSON LOUD:        Thank you,  
17      colleagues.    It sounds to me as if we've  
18      reached a consensus.   I'm going to call for a  
19      vote in a few minutes.   I note, at least  
20      personally, it sounds like with other Board  
21      Members that none of us take any great sense  
22      of pleasure from the result that's being

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1                   reached today, but the test is what it is and  
2                   the variance test becomes a higher test when  
3                   the request is for a use variance as opposed  
4                   to an area variance.

5                   I do want to commend the Applicants  
6                   for the presentation of their case and note  
7                   that it sounded as if Board Members were  
8                   persuaded that the evidence before us may have  
9                   supported a more restrictive use variance  
10                  request just on the ground floor, but  
11                  nonetheless, it is what it is. We have before  
12                  us what we have before us.

13                  And unless there's further  
14                  deliberation, I'd like to call for a vote on  
15                  the application.

16                  All right. Hearing none, I'd like  
17                  to move that we deny Application Number 17917  
18                  Jerry Bauman use variance for office use of in  
19                  the R-4 at 1452 D Street, N.E.

20                  Is there a second?

21                  VICE CHAIRPERSON DETTMAN: Second.

22                  CHAIRPERSON LOUD: Application has

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1       been made and seconded.    Is there further  
2       deliberation?

3                   Hearing none, all those in favor of  
4       denial please indicate.

5                   (Ayes.)

6                   CHAIRPERSON LOUD:       All those  
7       opposed?    Are there any abstentions?

8                   Mr. Moy, can you read back the vote  
9       please?

10                  MR. MOY:       Yes, sir.    The staff  
11       would record the vote as 3 to 0 to 2.    This is  
12       on the motion of the Chair Mr. Loud to deny  
13       Application Number 17917.    Seconded by Mr.  
14       Dettman.    Also in support of the motion, Mr.  
15       Peter May and we have Ms. Moldenhauer and  
16       another Board Member not participating.

17                  So, again, that final vote is 3 to  
18       0 to 2.

19                  CHAIRPERSON LOUD:    Thank you, Mr.  
20       Moy.    I believe now -- thank you, Mr. May.    I  
21       think we're going to be joined shortly by  
22       Commissioner Hood -- Chairman Hood from the

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1       Zoning Commission, but for our purposes, we're  
2       going to go ahead and call the Gallery Square  
3       case. Okay.

4                    MR. MOY: Yes, sir, with the motion  
5        to extend the validity of the order to  
6        Application Number 17673 of Gallery Square,  
7        LLC. The original -- and this is pursuant to  
8        Section 3130 of the Zoning Regulations. The  
9        original application was pursuant to 3104.1  
10       for a special exception from the roof  
11       structure requirements under Section 411, a  
12       special exception to reduce the required rear  
13       yard under Section 774 and a special exception  
14       to reduce the number of required parking  
15       spaces by no more than 25 percent under  
16       Section 2108 and pursuant to 11 DCMR 3103.2  
17       variances from the accessibility requirements  
18       for parking spaces under Section 2117.4 and  
19       the off-street loading and service delivery  
20       space requirements under Section 2201.

21                   This was to permit the development  
22        of a ten-story building with retail on the

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1       first and second floors and offices above in  
2       the DD/C-3-C District at   premises 627-631 H  
3       Street, N.W.   Square 453, Lots 53 and 810.

4                   On July 30th, 2009, the Applicant  
5       filed this request to extend the time  
6       authority of its application order which is  
7       identified in your case folders as Exhibit 44.

8                   On August 3rd, 2009, the Applicant  
9       also filed a supplemental letter which is  
10      identified in your case folders as Exhibit 46.

11                  And finally, a final supplement to  
12       the record by the Applicant which was filed  
13       yesterday,   September 14th,   and it is  
14       identified as Exhibit 47.

15                  The Board must act on the merits of  
16       the request to extend the validity of the  
17       order pursuance to Section 3130 addressing the  
18       criteria under 3130.6.

19                  And that concludes the staff's  
20       briefing, Mr. Chairman.

21                  CHAIRPERSON LOUD:   Thank you, Mr.  
22       Moy.   I don't think we're going to necessarily

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1 spend a whole lot of time.

2                   As you indicated under Section  
3 3130, an Applicant can seek a two-year  
4 extension on a project. The number of  
5 criteria that have to be met, one, is that all  
6 parties are served and allowed 30 days to  
7 respond. That appears to be have been met.  
8 This was filed on July 30th. So, the 30-day  
9 period would have passed by now.

10                  The second requirement is no  
11 substantial change in material facts upon  
12 which the approval is based. In our record,  
13 we have as you mentioned Exhibit Number 44  
14 which is a representation by the managing  
15 member of the Gallery Square, LLC that there  
16 has not been any change. I take that back.  
17 It's not Exhibit 44. It's Exhibit 46.  
18 Exhibit 46 that there is no substantial change  
19 in the material facts upon which the  
20 application was granted.

21                  Third is that there's good cause  
22 for the extension including one or more of the

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1 following and one of the eligible criteria is  
2 inability to obtain financing due to economic  
3 market conditions. In our record, we have a  
4 statement from the Applicant regarding the  
5 history of its securing of financing and then  
6 the loss of that financing. Infusion of some  
7 equity capital by a potential investor and the  
8 reluctance of the banks to extend any  
9 additional credit to the Applicant even though  
10 it had been in place at one point in time.  
11 So, I think the Applicant makes that criteria.

12 And the finally, that the extension  
13 is not to exceed two years and in this case,  
14 the Applicant is only seeking a two-year  
15 extension.

16 So, I open it up to Board Members  
17 and see if there is anything additional that  
18 you want to add.

19 Hearing none, then I'd like to move  
20 that we approve Application Number 17673 of  
21 Gallery Square, LLC. Request for a two-year  
22 extension for validity of the decision order

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1                   in the DD/C-3-C at 627-631 H Street, N.W.

2                   Is there a second?

3                   MEMBER MOLDENHAUER: I second.

4                   CHAIRPERSON LOUD: All right.

5 Motion's been made and seconded. Is there any  
6 further deliberation?

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

9                   (Ayes.)

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

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

14                  MR. MOY: Yes, sir. Before I do  
15 that, Mr. Chairman, with respect to the final  
16 vote, we do a participating member absentee  
17 ballot.

18                  CHAIRPERSON LOUD: Yes.

19                  MR. MOY: That is Mr. Michael  
20 Turnbull and his absentee ballot is to approve  
21 with such conditions as the Board may impose.

22                  So, with that vote, that would give

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1 a final vote of 4 to 0 to 1. This would be on  
2 the motion of the Chairman Mr. Loud to approve  
3 the request to extend the validity of the  
4 order for two years. Seconded by Ms.  
5 Moldenhauer. Also, in support, Mr. Dettman  
6 and, of course, Mr. Turnbull and no other  
7 Board Member participated. So, that would  
8 give a final report of 4 to 0 to 1.

9 CHAIRPERSON LOUD: Thank you, Mr.  
10 Moy. Is there anything further on this case?

11 MR. MOY: No, sir.

12 CHAIRPERSON LOUD: Okay. Why don't  
13 we go to Sikder case 17949.

14 MR. MOY: Yes, sir. That reading  
15 is to Application Number 17949 of M. Sikder  
16 pursuant to 11 DCMR 3103.2 for a variance from  
17 the lot width requirements. Well, actually,  
18 what I should say is that this -- Mr.  
19 Chairman, this application has been amended.

20 CHAIRPERSON LOUD: Okay.

21 MR. MOY: And it has been --  
22 although as originally advertised, it was for

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1 the lot width requirements under Section 401,  
2 but the Applicant withdrew that requested  
3 relief to construct -- well, let me add the  
4 relief we're looking at. So -- and it was  
5 replaced with to add zoning relief from  
6 requirements of Section 401.6 the minimum lot  
7 frontage, 404 the rear yard requirements and  
8 the side yard requirements under Sections  
9 405.9 and 405.3.

10                   This is to construct a one-family  
11 semi-detached dwelling in the R-2 District at  
12 premises 410 57th Street, N.E. Square 5229,  
13 Lot 800.

14                   As the Board will recall, on July  
15 21st, 2009, the Board completed public  
16 testimony, closed the record and scheduled its  
17 decision on this September the 15th.

18                   The Board requested additional  
19 information to supplement the record from the  
20 Department of Transportation, Office of  
21 Planning and ANC 7C.

22                   Filings in your case folders, Mr.

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1 Chairman, are as follows. There's a filing  
2 from the Office of Planning which is  
3 identified as Exhibit 25. The second filing  
4 is from ANC 7C. That is identified as Exhibit  
5 26. There is a supplemental filing to that  
6 exhibit which is in the form of photographs  
7 and that is identified as Exhibit 28.

8 Finally, Mr. Chairman, the last  
9 filing is from a Ms. Mary Gaffney as President  
10 of the Northeast Boundary Civic Association.  
11 It's dated August 26th, 2009. It was received  
12 in the Office of Zoning on August 31st, 2009.  
13 That document is identified as Exhibit 27 in  
14 the case folders. The Board should consider  
15 this exhibit as a preliminary matter as this  
16 filing was not requested by the Board.

17 The Board is to act on the merits  
18 of the requested zoning variance relief as  
19 previously cited and that completes the  
20 staff's briefing.

21 CHAIRPERSON LOUD: Thank you, Mr.  
22 Moy and I want to welcome Chairman Hood from

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1 the Zoning Commission.

2 Good morning, sir.

3 ZC CHAIR HOOD: Good morning.

4 CHAIRPERSON LOUD: I think you  
5 indicated that the first matter is a  
6 preliminary matter. The issue of the report  
7 or letter that came in from Ms. Gaffney,  
8 Commissioner Gaffney, who also I believe  
9 testified before us. I want to commend her  
10 and thank her for her participation in the  
11 case.

12 In terms of our leaving the record  
13 open, we specify whether we're leaving the  
14 record open. I think the record before us is  
15 pretty full and our rules are fairly clear in  
16 terms of giving everyone notice that once we  
17 leave a record open, it's just for what we ask  
18 for and, in fact, I think our rules say that  
19 if the office receives something after that,  
20 it'll actually return it to the center.

21 In this case, I don't see any  
22 reason to allow into our record the last

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1 document you mentioned. The matter from  
2 Commissioner Gaffney that's dated 8/16/09. I  
3 think it was received in OZ 8/31/09.

4 On the other hand, we did ask for  
5 the other two. The Exhibit 36 with the  
6 pictures is part of Exhibit 28 and I think  
7 Exhibit 25 I believe from the Office of  
8 Planning, a supplement report. So, I would be  
9 in favor of allowing those into our record per  
10 our request. Not allowing in the report that  
11 came from Commissioner Gaffney.

12 Board Members, do you have any  
13 thoughts on that? All right. It seems like  
14 there's consensus. Commissioner Moldenhauer.  
15 All right. It seems like there's consensus  
16 on that.

17 So, I think we can move into the  
18 merits of the case and I'd be more than happy  
19 to start us off on this case.

20 I think we're all pretty much  
21 familiar with the facts of the case and so,  
22 I'm going to dive right into the area variance

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1 analysis and the evidence.

20 So, in terms of the uniqueness  
21 and/or the exceptional prong of the area  
22 variance request, the record before us

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1 indicates that it's a very oddly shaped lot  
2 that sort of looks like a triangle at the end  
3 of the day. It's very narrow toward the  
4 front, toward the street front. It's much  
5 wider at the back. It narrows down to about 8  
6 feet 7 inches on the frontage of 57th Street  
7 and it was originally created as part of a  
8 railroad right-of-way. It's currently used as  
9 an informal alley I think by the members of  
10 community and it's very angled with respect to  
11 surrounding property. So, it appears to have  
12 that odd shape as many of our cases. At least  
13 the first prong of the variance test.

14 In terms of whether that shape  
15 causes a practical difficulty for this  
16 Applicant, with respect to the frontage relief  
17 being sought by the Applicant, that's under  
18 our Section -- say it again.

19 VICE CHAIRPERSON DETTMAN: 401.6.

20 CHAIRPERSON LOUD: 401.6. Thank  
21 you, Mr. Dettman.

22 The shape certainly causes that

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1 practical difficulty because there's a  
2 requirement that the front -- that the  
3 frontage be 14 feet minimum. Here's only 8  
4 feet 7 inches and there's nothing. They can't  
5 be expanded on that frontage to meet the 14  
6 foot lot requirement. So, I think clearly the  
7 shape does cause that practical difficulty.

8 With respect to the rear yard  
9 relief being requested, the requirement is 8  
10 feet I think. Four feet is being provided.  
11 That's in our Section 405.9.

12 The lot shape also results in the  
13 house being placed as I indicated. Being  
14 located on the lot against the southwest  
15 boundary and that leaves about 4 feet for a  
16 side yard to the north and again, that's  
17 directly attributed to the shape of the lot as  
18 well as the recommendation of OP that the  
19 property be located on that part of the lot.

20 With respect to the rear yard,  
21 again, the shape of the property contributes  
22 to them not being able to make the rear yard

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1 requirement. Although there are points in the  
2 rear yard that meet the requirement which in  
3 this case is -- I believe it's 20 feet under  
4 Section 404, there's also a strip of it were  
5 no rear yard is provided at all. I mean zero  
6 feet. So, again, it's due to the odd shape of  
7 the property and I believe the rear yard in  
8 this -- on this lot is considered the southern  
9 boundary of the property.

10                   With respect to the requirement  
11 that there not be any semi-detached property  
12 in this zone, in the R-1 zone, the location of  
13 the property in accordance with the  
14 recommendation of OP at the southern boundary  
15 eliminates -- I'm sorry. It creates a semi-  
16 detached property and again, OP recommended  
17 that as a way to minimize the impact of the  
18 north neighbor and also in OP's view, to  
19 replicate the sort of rowhouse pattern that  
20 already existed on the block.

21                   In terms of whether there's  
22 substantial detriment to the public good, we

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1 heard testimony from the Office of Planning  
2 that there is no detriment to the public good  
3 from allowing the proposed development  
4 particularly as relates to the frontage  
5 requirement. That ultimately this would be a  
6 useless piece of property if some kind of  
7 relief would not be granted.

8 OP also testified that there would  
9 not be any light or air impact to the  
10 neighbors particularly since they've relocated  
11 the location of the development and OP also  
12 noted that there's a 64-foot rear yard to the  
13 owner for most of the lot. It's just -- parts  
14 of it that just are too small.

15 With respect to the side yard and  
16 in terms of detriment to the public good,  
17 there's evidence in our record that the  
18 placement is fairly consistent with other side  
19 yards in the vicinity. That's OP's testimony.

20 It's also reflected in Exhibit 21 of our  
21 record.

22 With respect to -- there has been

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1 some testimony about neighbors losing alley  
2 access and there being sort of a historical  
3 sense that this was the neighbor's alley. In  
4 the supplement that Mr. Moy talked about,  
5 Exhibit 25, it's clarified that the neighbors  
6 will have alley access through a paved alley  
7 that's to the north and I think the OP Exhibit  
8 at Exhibit 25, sort of gives you a good  
9 graphic of alley system surrounding the lot  
10 and which ones are unimproved, which ones are  
11 informal, which ones are public alleys and so  
12 forth and we may have some discussion later  
13 about a condition relative to that alley  
14 issue.

15 As indicated, the ANC did submit a  
16 report. It's our Exhibit Number 26 dated  
17 August 27th, '09 and in their report, they  
18 indicated that they did go out to the site  
19 with the Applicant. They were able to review  
20 the plans. They had a number of questions  
21 regarding the project and ultimately, they  
22 voted to oppose the project.

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1                   The reason listed in the -- there  
2 are a number of different reasons that jump  
3 out from different petitions that were signed  
4 or in some cases, some testimony given, but in  
5 the report, what comes out at me is that they  
6 indicate that the project will not fit in with  
7 the design and the appearance of the current  
8 homes in the area and I think that that  
9 opinion and perspective is entitled to great  
10 weight by us.

11                  The evidence in the record that  
12 would tend to address that point directly  
13 would be the evidence from the Office of  
14 Planning that by placing the property on the  
15 lot where they recommended that it be placed,  
16 it better replicated the rowhouse pattern on  
17 the block and I think, Mr. Moy, you mentioned  
18 Exhibit 28 which was a set of pictures of  
19 houses on the block and when I look at the  
20 plans which, I think, Exhibit 20 was the  
21 revised plan, I didn't see any great  
22 divergence from what's being proposed and the

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1 way the structures currently look on the  
2 block.

3 So, I respect ANC's position on  
4 that, but when I look at the evidence, I  
5 didn't agree with their conclusion on that.

6 And with that, I'll open it up to  
7 other Board Members.

8 MEMBER MOLDENHAUER: Thank you,  
9 Chairman Loud.

10 There was testimony regarding the  
11 use of the Applicant's property as an alley  
12 and then the fact that there was a paper alley  
13 that was unpaved in the area that they were  
14 not aware of and the ANC and the opposition  
15 did mention in addition to the fact that they  
16 were concerned about the fit of the property,  
17 but also that they would lose this access.

18 The Applicant then stated that he  
19 would work with the District of Columbia to  
20 put the alley on a paving list and if that did  
21 not get paved, that he would then personally  
22 pave it and I would put that we add that as a

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1 condition. Looking at Exhibit 25, saying that  
2 he would pave the slashed red lines leading to  
3 in an L-shape to the slashed white lines which  
4 would show actually the current compacted soil  
5 of the paved alley.

6 CHAIRPERSON LOUD: Thank you. In  
7 terms of potentially framing some sort of a  
8 condition around that, is there a way you  
9 might want to suggest some wording for a  
10 condition? You could either do it now or  
11 think about it maybe as Mr. Dettman weighs in.  
12 Either I think is fine.

13 Okay. You want to think about it a  
14 little? Okay.

15 Colleagues, any additional  
16 thoughts?

17 VICE CHAIRPERSON DETTMAN: Mr.  
18 Chairman, I agree with your analysis.

19 Just to add one point to your  
20 discussion regarding the ANC's concerns, I  
21 believe during their testimony they raised  
22 some issues with respect to air quality and

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1 noise during construction and just to kind of  
2 point out that, you know, there's -- if, in  
3 fact, those are issues, those aren't issues  
4 that should be addressed by the BZA. It's  
5 more of a enforcement and construction related  
6 issue that needs to be taken up with another  
7 branch of DCRA.

8                   With respect to the paving of the  
9 alley, I'd be in favor of a condition that  
10 would require the Applicant to pave a portion  
11 or the alley system whatever it ends up being.

12                I will note that while this is a variance and  
13 not a special exception, it's a little bit  
14 uncharacteristic that we would condition a  
15 variance if a variance runs with the land.

16                Nonetheless, I think we have done  
17 it in one or two other cases in the recent  
18 past and I could support a condition of that  
19 nature.

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

22                ZC CHAIR HOOD: I would just agree

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1 with everything I've heard especially Board  
2 Member Moldenhauer's conditional or at least  
3 point to the agreement. Because I think  
4 testimony was provided during the hearing that  
5 the Applicant would assist if not pave that  
6 alley which I think was a big concern and  
7 hopefully, that gets the gap a little closer  
8 together with what the community is saying.  
9 Their position may be reversed. Hopefully,  
10 that's one of those mitigation efforts. While  
11 we can't necessarily tie it to what we're  
12 discussing here today, but hopefully, that  
13 would bring them closer together.

14 Because as I read the ANC letter,  
15 it says that they did a walk through and I  
16 strongly believe that the developer should  
17 consider meeting with community stakeholders  
18 to reach a compromise. I think that's part of  
19 the compromise going in that direction.

20 Thank you.

21 CHAIRPERSON LOUD: Thank you, Mr.  
22 Chair. So, I think we're -- it sounds like a

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1 consensus is in place regarding the  
2 application itself and even the proposed  
3 condition, I think, that you talk about,  
4 Commissioner -- Board Member.

5 So, did you take a stab at some  
6 language?

7 MEMBER MOLDENHAUER: Yes, I would  
8 state that it's conditioned on the Applicant's  
9 -- that the Applicant shall work with the  
10 District Department of Transportation to  
11 request that the unpaved alley be placed on  
12 the District's paving schedule and if not so  
13 paved by the Department of Transportation  
14 within 24 months, the Applicant shall pave the  
15 alley at its sole expense and cost.

16 The alley shall be defined pursuant  
17 to Exhibit 25 the red slashes identified as  
18 public alley never paved in a L shape towards  
19 the white slashes identified as public alley  
20 compacted soil.

21 CHAIRPERSON LOUD: Just can you  
22 give mt the last -- I got the slashes public

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1       alley never paved. This is at Exhibit 25 and  
2       then how you finished it out.

3                    MEMBER MOLDENHAUER: In an L-shaped  
4       direction towards the white slashes identified  
5       as a public alley compacted soil.

6                    CHAIRPERSON LOUD: Thank you very  
7       much and I am familiar with that section of  
8       Exhibit 25. So, I just wanted to look at it  
9       as you described it.

10                  I'm in agreement with the  
11       condition. Let me hear from other Board  
12       Members.

13                  VICE            CHAIRPERSON           DETTMAN:  
14       Chairman, can I just -- I'd like to pose a  
15       question. Why wouldn't we just require the  
16       Applicant to pave a portion of the alley  
17       outright and not put in the portion of the  
18       condition that says that the Applicant will  
19       work with DDOT?

20                  I'm just envisioning -- we've seen  
21       a lot of these projects from this Applicant.  
22       I'm just envisioning the Applicant making a

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1 phone call to DDOT, waiting a bunch of months,  
2 saying that he's worked with them and just  
3 kind time keeps going on and nothing's being  
4 done. He's offered to pave the alley.

5 There was a similar case, same  
6 Applicant, where we had a condition that he  
7 would pave the alley to the rear of his  
8 property. You know, I don't think that we  
9 need to require him to pave the entire alley  
10 system, but perhaps the 12-foot alley that's  
11 to the south of his property leading back to  
12 the rear of his property. Something of that  
13 nature.

14 I just don't want this thing to  
15 kind of open up a loophole where the Applicant  
16 has said well, I made the phone calls. I've  
17 complied with the condition.

18 MEMBER MOLDENHAUER: Mr. Dettman,  
19 that's why I included that if it's not so  
20 paved within 24 months and the 24 months, the  
21 reason why I provided that was because that  
22 would mostly be construction time frame

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1       between getting a permit following the BZA and  
2       then having the building finally constructed.

3       That way by the end of the time frame in  
4       which the building is then erected, if he had  
5       not yet obtained -- if he had just put in a  
6       simple call, it would obviously put the burden  
7       on him to do more than just a call because he  
8       knows the if the Government doesn't pave it,  
9       he has to pave it at his own expense.

10                   VICE CHAIRPERSON DETTMAN: I can go  
11       along with the wording. Just to be frank, if  
12       I was the DDOT official, I'd wait the two  
13       years and then have the Applicant pay for the  
14       alley.

15                   CHAIRPERSON LOUD: Listening to  
16       Board Member Moldenhauer, I kind of liked what  
17       she suggested. Although I would be curious as  
18       to whether it can be truncated a little bit  
19       from 24 months. What I liked about it is if  
20       the Government is budgeted and has an  
21       obligation to do this kind of work, I hate to  
22       ask our taxpayers and our citizens to do what

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1 is the Government's job to do.

2 So, that's why even though they  
3 offered to do it, I mean a citizen shouldn't  
4 be in a position of offering to do something  
5 that our taxes are paying for.

6 On the other hand, I think if we  
7 narrow the time frame for this Applicant, it  
8 ought to be doing everything it can, e-mails,  
9 telephone calls, letter writing campaigns,  
10 hiring lobbyists, whatever it takes to get  
11 DDOT to finish this so that it can save that  
12 expense of having to finish it.

13 But, if after going through all of  
14 that they still can't get DDOT to do it, then  
15 as they had promise to do it falls on them to  
16 do.

17 So, I like what both of you are  
18 saying. I'm agreeing with both of you, but  
19 I'm just -- there's something about forcing  
20 citizens to pay for stuff that the Government  
21 should be doing that just -- but, so, I don't  
22 know if you'd be willing to truncate the time

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1 frame a little bit.

2 MEMBER MOLDENHAUER: I actually  
3 don't think that we should truncate the time  
4 frame, but I was just thinking maybe there  
5 would be some additional suggested language.  
6 That the Applicant shall request and pursue  
7 its best efforts to obtain DDOT paving.

8 Probably that way, obviously, we're  
9 not addressing the condition requiring them to  
10 request it, but we are requiring them to make  
11 their best efforts.

12 CHAIRPERSON LOUD: I'm amenable to  
13 that.

14 ZC CHAIR HOOD: Mr. Chairman, while  
15 I agree with everything, I said, you know,  
16 best efforts sometimes are mentioned down  
17 here, but they're not actually carried  
18 through.

19 I kind of like where you were going  
20 and I agree with -- I actually agree with both  
21 of the Board Members Dettman and Moldenhauer,  
22 but my problem is the point when I look at the

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1 OP report and we talk about the paving  
2 schedule, you know, citizens in this city  
3 always hear that, at least I do, maybe it's  
4 just me, always hear that it's not in the  
5 budget and the schedule is -- maybe things  
6 have changed and sometimes it takes five to  
7 six, seven to eight years to get a street  
8 done. So, well, lately things have picked up.

9 Maybe that's the new city. The way we're  
10 moving, but I think we need to -- I like your  
11 idea. It's not necessarily going with Board  
12 Member Moldenhauer and not all the way going  
13 back demanding what Board Member Dettman said,  
14 but let's find that happy medium at one year.

15 Well, I know she's tying it to the  
16 -- Board Member Moldenhauer is tying it to the  
17 two years that they had, but I just think if  
18 we do one year that puts a little more onus on  
19 the Applicant and DDOT to try to get this done  
20 and accomplish it. Because I think that's one  
21 of the concerns that we heard loud and clear  
22 at the hearing.

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1                   I think we're doing due diligence  
2 if we try to find that happy medium.

3                   CHAIRPERSON LOUD:       Board Member  
4                   Moldenhauer, I think everybody's trying to  
5                   meet you where you are. It sounds like if  
6                   there's -- you have a little room to include a  
7                   solid time frame on the Applicant that's less  
8                   than 24 months. That we probably are there.

9                   MEMBER MOLDENHAUER:       Yes, what  
10                   about 18? I hate to -- maybe I could give  
11                   into the one year, but I just feel like it's  
12                   -- it is tight with construction and  
13                   everything else and depending upon, you know,  
14                   when their paving time frame is determined  
15                   based on winter, I would just be concerned  
16                   that we also provide sufficient time frame.

17                   So, I would recommend 18 months if  
18                   everybody else is agreeable to that.

19                   CHAIRPERSON LOUD:       Yes, I'm  
20                   amenable to that.

21                   ZC CHAIR HOOD:       I think that's  
22                   good. She brings up a good point about the

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1                   winter. So, I'm agreeable.

2                   CHAIRPERSON LOUD: Okay. So, as I  
3                   was saying, now, it seems like we're moving  
4                   toward a vote and we're all in agreement in  
5                   terms of the application itself and the  
6                   relief.

7                   In addition to which, there's been  
8                   a condition articulated by Board Member  
9                   Moldenhauer and the only change is, I think,  
10                  to what had been articulated which the  
11                  transcript will capture are that now the  
12                  Applicant will use his best efforts and the  
13                  time period is 18 months. Okay.

14                  So, then is there a motion on this  
15                  application? Why don't I? Okay. I move  
16                  approval of Application Number 17949 for four  
17                  area variances with respect to proposed single  
18                  family development at 411 57th Street, N.E.

19                  Is there a second?

20                  MEMBER MOLDENHAUER: I second.

21                  CHAIRPERSON LOUD: Motion's been  
22                  made and seconded. Is there further

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1                   deliberation?

2                   Hearing none, all those in favor  
3                   say aye.

4                   (Ayes.)

5                   CHAIRPERSON LOUD:       All    those  
6                   opposed? Are there any abstentions?

7                   Mr. Moy, can you read back the vote  
8                   for us please?

9                   MR. MOY: Yes, sir, the staff would  
10                  record the vote as 4 to 0 to 1. This is on  
11                  the motion of the Chair Mr. Loud to approve  
12                  the application as conditioned. Seconded by  
13                  Ms. Moldenhauer. Also in support of the  
14                  motion, Mr. Dettman and Mr. Hood and we have  
15                  one Board Member not present. Actually, it's  
16                  actually vacant, but anyway, the final vote is  
17                  4 to 0 to 1.

18                  CHAIRPERSON LOUD: Thank you, Mr.  
19                  Moy. Is there anything further with this  
20                  case?

21                  MR. MOY: No, sir.

22                  CHAIRPERSON LOUD: Then why don't

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1 we call the next case which I believe is Park.

2 MR. MOY: The next case for  
3 decision is the motion for a reconsideration.

4 This is from the ANC 6C. Appeal Number 17902  
5 of Joseph Park. This is pursuant to 3126 of  
6 the Zoning Regulations.

7 Now, the original appeal  
8 application was pursuant to 11 DCMR 3100 and  
9 3101 from an August 29th, 2008 decision of the  
10 Zoning Administrator to revoke Certificate of  
11 Occupancy Permit Number 167331. Again, that's  
12 167331 for a liquor store. This is the Oasis  
13 Liquors in the R-4 District at premises 1179  
14 3rd Street, N.E. and that's in Square 773, Lot  
15 277.

16 On July 23rd, 2009, the Board  
17 received the request for a reconsideration  
18 from the ANC. This filing is identified in  
19 the case folders, Mr. Chairman, as Exhibit 34.

20 Staff also notes, for the record,  
21 that there's no indication in this Exhibit 34  
22 that this was served on parties. However,

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1                   despite that, it appears that there was no  
2                   prejudice because there are response filings  
3                   from the parties in the record.

4                   And the filings were as follows,  
5                   Mr. Chairman. First is the response filing  
6                   from the Appellant. Response to the ANC 6C's  
7                   motion for reconsideration and that's  
8                   identified as Exhibit 36.

9                   There's also a supplemental filing  
10                  to that Appellant's response and that is  
11                  identified as Exhibit 39.

12                  The next set of filings is from the  
13                  Appellee which is DCRA. Their response to the  
14                  motion for reconsideration. That document is  
15                  dated July 27th, 2009 and is identified as  
16                  Exhibit 35.

17                  Finally, the last grouping of  
18                  filings, Mr. Chairman, the first is an  
19                  individual letter in support of the Appellant  
20                  from a Fred Tarpley to deny the motion for  
21                  reconsideration and that filing is dated  
22                  August 31st, 2009. Identified as Exhibit 37

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1 and also a set of six individual letters in  
2 support of the Appellant from neighbors. This  
3 is identified as Exhibit 38.

4                   These last two groupings or last  
5 two exhibits, Exhibit 37 and Exhibit 38,  
6 should be considered by the Board as a  
7 preliminary matter.

8                   The Board is to act on the merits  
9 of the motion for reconsideration as defined  
10 in its Section 3126.6.

11                  And that concludes the staff's  
12 briefing, Mr. Chairman.

13                  CHAIRPERSON LOUD: Thank you, Mr.  
14 Moy. I think you've sort of outlined how we  
15 got to this point and our decision and then  
16 both the post-hearing submissions leading to  
17 the decision and then the post-written  
18 decision filings on the part of the parties.

19                  I just want to start I guess with  
20 Exhibits 37 and 38 and suggest to Members of  
21 the Board that we not allow those exhibits  
22 into our record. Those were -- the case has

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1       been heard. The decision has been written and  
2       these are documents that go to matters that  
3       were before us when we were hearing the case.

4       We didn't request them at any point in time.

5       They're not -- neither of these documents are  
6       from parties. I think the parties are allowed  
7       to reconsider petitions for reconsideration.

8                   So, I would suggest we start by  
9       denying these documents entry into our record.

10                  Okay. It seems like there's --  
11       Chairman Hood, are you in support of denying  
12       Exhibits 37 and 38? Okay.

13                  ZC CHAIR HOOD: Yes, I am.

14                  CHAIRPERSON LOUD: Yes, sir.

15                  ZC CHAIR HOOD: Mr. Chairman, I  
16       think I may have misplaced the ANC which is  
17       Exhibit 34.

18                  CHAIRPERSON LOUD: Okay.

19                  ZC CHAIR HOOD: So, if I can get a  
20       copy. Okay. Thank you.

21                  CHAIRPERSON LOUD: Yes, sir. All  
22       right. So, that takes care of Exhibits 37 and

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1 38.

2 Do we need to vote on that, Mr.  
3 Moy, formally? No. Okay. All right.

4 So, now, we're dealing with the  
5 motion for reconsideration brought by the ANC,  
6 the response to that brought by the DCRA and  
7 then the Appellant. Correct? The Appellant  
8 had a response to the Appellee's motion for  
9 reconsideration that was untimely. Be Mr.  
10 Gale. All right. So, we would need to -- as  
11 a preliminary matter I guess either way then,  
12 Mr. Gale's response. Okay.

13 And I think Mr. Gale's response is  
14 germane to the motion for reconsideration. He  
15 goes into some of the reasons why he doesn't  
16 think reconsideration is appropriate and then  
17 in terms of not being the time lines of our  
18 rules, he's a few days outside, but he talks  
19 in his submission about wanting to retire and  
20 not, you know, giving the Applicant a chance  
21 to go out and get another attorney and then  
22 when it became apparent that that was not

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1 going to be possible, doing what I thought was  
2 a great sort of follow-up and he was making  
3 sure something got in on the record. So, I  
4 think that under 3100.5 we could waive our  
5 rules, allow that in and I think it would be  
6 appropriate in this setting. Okay.

7 Looks like Chairman Hood is  
8 studying the issue and generally in agree with  
9 -- all right. So.

10 ZC CHAIR HOOD: Nobody would have  
11 never known I was looking for 3105 if you  
12 didn't say I was. No.

13 CHAIRPERSON LOUD: I told you were  
14 studying the issue.

15 All right. So, that take care of  
16 the exhibits that we're going to allow into  
17 our record.

18 And this is a motion for  
19 reconsideration on the Park case. The Park  
20 case is something that's probably fresh for  
21 most of us. We just heard it very recently.  
22 A lot of evidence. A lot of testimony came

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1       in. A number of very outstanding witnesses on  
2       both sides for the ANC as well as for the  
3       Applicant and the DCRA.

4               But, what it boils down to, I  
5       think, is the following. The ANC has  
6       submitted a timely request for reconsideration  
7       identifying four findings, 10, 15, 16 and 25  
8       that they don't believe support the  
9       conclusions of law that are reached in the  
10      ultimate decision.

11              Secondly, the DCRA responded to the  
12      ANC's motion for reconsideration. They did  
13      not themselves file a motion for  
14      reconsideration in a timely fashion. So, we  
15      would not be considering any issues raised by  
16      the DCRA other than their response to the  
17      ANC's motion for reconsideration. So, to the  
18      extent that the DCRA filing agrees or  
19      disagrees with the timely motion for  
20      reconsideration, we'll take that up to the  
21      extent that extraneous issues are raised in  
22      the DCRA response. Those are filed outside of

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1 the reconsideration period.

2 I think largely DCRA's issues track  
3 what the ANC raised and I'll just go over very  
4 briefly what the ANC raised and then suggest a  
5 course that I think is appropriate given the  
6 circumstances and then open it up for Board  
7 Members.

8 First, the ANC challenged Finding  
9 Number 10 which states that through September  
10 2006, the Appellant continued to operate his  
11 store only sporadically one or two days a week  
12 or less as his health permitted and what the  
13 ANC argued with respect to this finding is  
14 that there was no evidence presented to  
15 support the Applicant's testimony on this  
16 point and several witnesses testified that  
17 they never saw the store open either though  
18 their schedules varied by date and time. It  
19 seems this is less a fact than an assertion by  
20 the Applicant.

21 And the DCRA weighs in with respect  
22 to this finding by indicating that there was

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1 no notice to the DCRA of West. West was a  
2 statement that was submitted in the record. I  
3 think at Exhibit 14 of the record. Similarly,  
4 a statement of White also as part of Exhibit  
5 14 or tax returns.

6 Now, these are not issues that were  
7 raised by the ANC with respect to Finding  
8 Number 10 and to the extent DCRA wanted to  
9 raise those issues with respect to the case,  
10 it had an opportunity to raise those.

11 So, I think with respect to Finding  
12 Number 10, we're going to deal with the ANC's  
13 concerns and again, DCRA is limited to just  
14 what was brought out by DCRA with respect to  
15 that.

16 Where I come out on that, Board  
17 Members, is that the Board is free to credit  
18 evidence based on our assessment of witnesses,  
19 the candor, the credibility. All witnesses  
20 that come before us are under oath and we  
21 realize that and the fact that an Applicant's  
22 testimony is not supported by other

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1       corroborating evidence in the record does not  
2       preclude the Board from crediting that  
3       testimony and this seems to be the essence of  
4       the ANC's position on Finding Number 10. Is  
5       that, and I quote, "There was no evidence  
6       presented to support the Applicant's  
7       testimony." We're free to credit the  
8       testimony of the Applicant without going  
9       further.

10           Moreover I think the record as a  
11       whole showed some support of the overall  
12       finding that the Applicant did not abandon the  
13       store operation or intend to abandon the store  
14       operation over the three-year period that's  
15       subject to the rule.

16           So, I guess the main point for the  
17       ANC is that the Board is free to credit -- as  
18       long as the evidence is in the record, the  
19       Board is free to credit whatever testimony it  
20       chooses to credit even if there's conflicting  
21       testimony and we don't necessarily have to  
22       explain why we credit some testimony and some

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1 evidence over other as long as there's  
2 evidence in the record to support it.

3 And with respect to Finding Number  
4 10, there was evidence in the record to  
5 support that there had not been an abandonment  
6 of the liquor -- the Oasis Liquor store.

7 With respect to Finding Number 15,  
8 the ANC says a merchant financial activity  
9 statement from -- I'm sorry. The finding is a  
10 merchant financial activity statement from  
11 American Express for Appellant's store during  
12 the period of December 12th, 2007 to January  
13 11th, 2008 shows one transaction with a sale  
14 amount of \$5.95 and the ANC says that this  
15 statement was not made available to the ANC,  
16 was not presented during the hearing and as  
17 such -- excuse me for one moment. And as  
18 such, was unsworn testimony.

19 My thoughts on that, Board Members,  
20 is that the exhibit was a part of our record.

21 I think it was part of Exhibit 14. It was in  
22 our record before the hearing. Our record is

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1 a public record. It's open and available to  
2 obviously parties and other witnesses or  
3 anybody to come down and take a look at to be  
4 prepared for the hearing and so, the  
5 suggestion that it was not made available to  
6 the ANC is something that I don't think the  
7 record supports.

8 It's a business record. So, it  
9 would clearly be admissible despite the  
10 hearsay rule and again, it was something that  
11 was a part of our record.

12 The DCRA also indicates in their  
13 response, that they notice of the merchant  
14 financial statement until the hearing and  
15 again, the first cut at it, the information  
16 was in our record. It was in our record at  
17 Exhibit 14 before the hearing and my second  
18 thought on it is that the materiality of this  
19 financial activity statement to the overall  
20 decision we've reached I think is pretty small.

21 The entire decision we've reached  
22 was that there had not been a three-year

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1 period that could be demonstrated that there  
2 had been an abandonment of the liquor license  
3 or an intent to abandon it and we relied on a  
4 number of pieces of evidence to get to that  
5 conclusion including the lease that Mr. Mic  
6 Young Jung, I think his name was, executed  
7 with the Applicant around May, I believe, of  
8 '08 including the testimony of the Applicant  
9 who we found to be very creditable that he had  
10 filed tax returns during that period of time.

11 The testimony that he had maintained an  
12 inventory during that period of time.

13 So, the record is full of a lot of  
14 testimony that would support our conclusion  
15 that there had not been an abandonment and the  
16 conclusion did not fall upon this one little  
17 isolated piece of evidence.

18 With respect Finding Number 16  
19 which reads as follows: "Through the year  
20 2008, the Appellant filed with the D.C.  
21 Government unincorporated business franchise  
22 tax returns for his store. The 2004 and 2005

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1 returns show income from the business. While  
2 the 2006 return shows no income, but shows  
3 that repairs were made to the subject  
4 property."

5 With respect to this finding, the  
6 ANC says again this information was not  
7 provided to the ANC, a party in this case, was  
8 not presented during the hearing and as such  
9 was unsworn testimony. "Our representative  
10 Commissioner Ann Phelps objected to the  
11 allowance of any post-hearing submissions."

12 With respect to this concern raised  
13 by the ANC, I want to read from the transcript  
14 roughly where at page 324 of the transcript.  
15 "As BZA Chair, I directed the Appellant to  
16 serve tax records to the Appellee which would  
17 have been DCRA and to the ANC for response.  
18 The Appellant was to serve these records by  
19 April 24th and the Appellee and the ANC were  
20 to respond by May 6th, 2009."

21 It appears to me from our record of  
22 the motion for reconsideration that the ANC

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1 did not get these tax records and so, I think  
2 under our Rule 3121.6 as well as the very  
3 clear specific indication at the hearing and  
4 reflected on the transcript, the ANC should  
5 have been served with the tax records and  
6 again, unless I'm misreading their motion for  
7 reconsideration that did not happen and I  
8 don't think that the tax records that we  
9 received indicated that there had been service  
10 on them.

11                   But, to bolster what was in our  
12 transcript record, 3121.6 says the Board shall  
13 allow all parties to a case an opportunity to  
14 file written responses to any exhibits,  
15 information or briefs submitted after the  
16 close of the hearing. Well, we did that. We  
17 said that the Applicant had to file these tax  
18 records by April 24th and then we said that  
19 the ANC and the DCRA had until May 6th to file  
20 responses to that.

21                   It appears that the DCRA did get a  
22 copy of these tax records and did not file

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1       their response. So, we're not going to -- I  
2       don't see any error with respect to DCRA  
3       having a chance to respond. They did not take  
4       advantage of the opportunity.

5                   But, the ANC represents to us that  
6       they never got those tax records. So, with  
7       respect to that allegation, I think that we  
8       ought to have a limited reopening of the  
9       record for the purpose of the Applicant  
10      serving the ANC with the tax records, the ANC  
11      having an opportunity to respond per 3121.6  
12      which is in writing and then the Board  
13      scheduling out a further decision on this  
14      after we get those responses from the ANC.  
15      I'm sorry. Not the ANC, but the -- yes, from  
16      the ANC on that matter.

17                  It doesn't talk about responses to  
18      the responses and further responses. It just  
19      talks about the ANC having that opportunity to  
20      file a written response.

21                  So, I think we should reconsider  
22      and reopen the record just for that one issue

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1 on this finding. I believe it's 16 that the  
2 ANC talked about.

3 I also want to note that the whole  
4 issue of the tax records that we left the  
5 record for was a initiated by DCRA.  
6 Specifically, and I hope I'm pronouncing it  
7 correctly, Mr. Rejell who during cross  
8 examination began to question Mr. Park  
9 regarding the existence of these tax records  
10 and let me just find this in our record.

11 If you look at the transcript at  
12 303, Mr. Rejell starts a cross examination of  
13 Mr. Park. Sorry. Going back to page 160 of  
14 the transcript and Mr. Rejell says "From say  
15 2003/2004, do you have any tax records that  
16 indicated you paid sales or income tax for  
17 your business from 2003 forward?" Mr. Park  
18 then says "Yes." Mr. Rejell says "Do you have  
19 any proof for that period of time?" And Mr.  
20 Park says "Of course, I have income tax  
21 returns." That's at page 161.

22 So, the whole suggestion that there

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1 was surprise to the DCRA regarding the tax  
2 issue, that there was not an adequate  
3 opportunity to dig into that issue on cross  
4 examination is something that I can't agree  
5 with and it seems as if from the transcript  
6 that's something that the DCRA itself raised  
7 and raised to challenge the veracity of a  
8 statement that they believe Mr. Park had made  
9 regarding filing of these tax records and  
10 again, all of that going to support the  
11 overall argument that Mr. Park had been making  
12 that he did not intend to abandon his business  
13 and the tax records were a small part of the  
14 testimony and evidence that Mr. Park had put  
15 forward including evidence that this was his  
16 sole means of retirement and he would not have  
17 walked away from it.

18                   And then the record is replete with  
19 a lot of testimony. Again, I found Mr. Park  
20 to be a credible witness on his testimony  
21 alone.

22                   So, that's some of the background

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1 for that and I just wanted to lay that out  
2 with respect to the whole tax records issue.

3 I think the final point raised by  
4 the ANC is that Finding Number 25, the  
5 Appellant spent approximately \$30,000  
6 repairing and renovating the subject property  
7 in preparation for the operation of the liquor  
8 store business by Mic Young Jung. This is our  
9 hearing transcript I guess at 133 and the ANC  
10 and I'm quoting. Once again, this is based  
11 solely on the Applicant's testimony with no  
12 supporting documentation.

13 And then they go on to raise some  
14 much more generalized concerns about the  
15 decision, but nothing specific like the four  
16 findings that they challenged.

17 Going back to what I said regarding  
18 Finding Number 10, it's the Board's discretion  
19 and it's not abuse of that discretion for the  
20 Board to credit testimony in the record based  
21 on the witness and the witness' veracity and  
22 credibility and demeanor and all of those

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1 types of things.

2 And with respect to whether \$30,000  
3 was actually spent in repairs, it's  
4 immaterial. Again, it's part of the larger  
5 argument that the Applicant was making for the  
6 BZA regarding lack of abandonment and it  
7 doesn't matter if he spent \$30,000, if he  
8 spent \$2,000. There's some evidence in the  
9 record that he had executed a lease with Mic  
10 Young Jung I think right around that time and  
11 that evidence suggests that he did not intend  
12 to abandon the liquor use whether or not there  
13 were any repairs to the store.

14 So, the issue I think is immaterial  
15 and I disagree with the ANC that we ought to  
16 reconsider on that basis

22 VICE CHAIRPERSON DETTMAN: Mr.

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1 Chairman, I think you did a great job laying  
2 out the evidence that pertains to the points  
3 that the ANC has raised as well as the couple  
4 of points that DCRA has raised and I'm in  
5 agreement with you.

6 I think that the one point that's  
7 worth opening up the record on a very limited  
8 basis is the tax returns and the Applicant's  
9 not serving the ANC with those tax returns. I  
10 think the ANC deserves an opportunity to  
11 receive those tax returns, review them and  
12 respond.

13 ZC CHAIR HOOD: I concur.

14 CHAIRPERSON LOUD: All right. So,  
15 then why don't we do this? Consistent with  
16 our deliberations here, the Applicant -- I  
17 guess the Applicant was the Appellant in this  
18 case, Mr. Park, should serve the ANC with all  
19 the tax returns that the Office of Zoning was  
20 served with consistent with our leaving the  
21 record open, the transcript regarding our  
22 leaving it open, within seven days of today's

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1 date and that would take us to September 22nd.

2                   Then the ANC should respond in  
3 writing to those by October 21st. I  
4 understand that the ANC has meeting on October  
5 14th, somewhere around there. So, this would  
6 give the ANC several days after the meeting to  
7 file a written response to the returns.

8                   And then we can come back here on  
9 October 27th and render a decision on the  
10 reconsideration and the extent to which it  
11 changes the outcome on the case.

12                   Okay. So, we need to now vote on  
13 this, Mr. Moy?

14                   We need to vote on this and so, the  
15 vote would that we've granted a limited  
16 reconsideration of the motion with respect to  
17 -- okay. Do I need to repeat everything I  
18 said or is it clear from the transcript?  
19 Okay.

20                   So, then what I would like to move  
21 colleagues is that we grant a limited  
22 reconsideration of the ANC's motion for

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1       reconsideration. Limited to the issues of the  
2       Appellant re-serving the ANC or serving the  
3       ANC with the tax returns that we left the  
4       record open for submission and only those tax  
5       returns by September 22nd. That the ANC file  
6       a written response to those or at least have  
7       an opportunity to by October 21st and that we  
8       re-calendar this for a decision on October  
9       27th.

10                   Is there a second?

11                   ZC CHAIR HOOD: Second.

12                   CHAIRPERSON LOUD: Motion is made  
13        and seconded. Further deliberation?

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

16                   (Ayes.)

17                   CHAIRPERSON LOUD: All those  
18        opposed? Are there any abstentions?

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

21                   MR. MOY: Yes, sir. Staff would  
22        record the vote as 3 to 0 to 2. This is on

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1 the motion of Chair Mr. Loud. Seconded by Mr.  
2 Hood. Also in support of the motion, Mr.  
3 Dettman. This is to reconsider reopening the  
4 record on a limited basis as to Findings of  
5 Fact 16 for the Applicant or the Appellant to  
6 serve the ANC all the tax returns by September  
7 22nd. ANC's response to the filing by October  
8 21st. The Board to take up its decision --  
9 rescheduled decision on October 27th.

10 CHAIRPERSON LOUD: Thank you, Mr.  
11 Moy. Is there anything further on this case?

12 MR. MOY: No, sir.

13 CHAIRPERSON LOUD: Okay. Thank  
14 you. Why don't we call then the next and I  
15 think final decision for the morning which is  
16 Case Number 17825 1400 Maryland Ave.

17 MR. MOY: Yes, sir. That is as you  
18 said Application Number 17825 of 1400 Maryland  
19 Ave Ltd Empire Leasing, Incorporated pursuant  
20 to 11 DCMR 3104.1 for a special exception to  
21 establish a gasoline service station with  
22 convenience store under Section 743 (706 and

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1 2302) in the C-3-A District at premises 1400  
2 Maryland Avenue, N.E. This is in Square 1049,  
3 Lot 803.

4 As the Board will recall on July  
5 21st, 2009, the Board completed public  
6 testimony, closed the record and scheduled its  
7 decision on September 15th.

8 The Board requested additional  
9 information to supplement the record from the  
10 Applicant and DDOT. Those filings have been  
11 received the Board, Mr. Chairman.

12 The first filing is from the  
13 Department of Transportation and that filing  
14 is identified in your case folders as Exhibit  
15 64.

16 The Applicant's filing is  
17 identified as Exhibit 66 dated August 21st,  
18 2009.

19 And finally, the third filing is a  
20 document from a Patrick Jenkins owner of  
21 Checkers Restaurant. The document is dated  
22 September 3rd, 2009. Received in the office

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1 September 8th, 2009. Identified in the case  
2 folders as Exhibit 65. This filing should be  
3 considered by the Board as a preliminary  
4 matter.

5 Other than that, the Board is to  
6 act on the merits of the special exception  
7 request to establish a gasoline station under  
8 Section 743.

9 The completes the staff's briefing,  
10 Mr. Chairman.

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

13 Mr. Chairman Hood is -- okay. All  
14 right. Thank you, Mr. Dettman.

15 Okay. So, the only preliminary  
16 matter is Exhibit 65? The Checkers' owner  
17 matter.

18 MR. MOY: Yes, sir.

19 CHAIRPERSON LOUD: Okay. And I  
20 think with respect to that it is a letter  
21 that's not really germane to the zoning  
22 necessarily. There's a lot of personal

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1 business impacts -- alleged impacts to the  
2 business success of the Checkers Restaurant  
3 but not necessarily zoning issues and we  
4 didn't leave our record open for that. So, I  
5 would be for not allowing Exhibit 65 in.

6                   Okay. It looks like there's  
7 agreement on that and I think we can go  
8 straight into the merits of the deliberation.

9                   I think we're ready to deliberate and I think  
10 Mr. Dettman is going to start us off on that.

11                  VICE CHAIRPERSON DETTMAN: Thank  
12 you, Mr. Chairman.

13                  In going through the record, I did  
14 notice one thing that I thought maybe I'd  
15 raise to the Board's attention and address  
16 before getting int the provisions that are  
17 applicable in this case.

18                  I did notice that actually early on  
19 in this application there were two motions to  
20 dismiss raised by the ANC. I don't remember  
21 exactly -- one I think was Exhibit 40. One  
22 was just before that. One was filed prior to

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1 the Applicant's original denial by the Public  
2 Space Committee and then a follow-up motion  
3 for consideration, I'm sorry, motion for  
4 dismissal was filed following the Public Space  
5 Committee's denial of the application.

6 I don't remember if we've actually  
7 formally dealt with those motions, but I just  
8 wanted to make sure that we closed the loop on  
9 that.

10 If we didn't address the motions  
11 for dismissal, I would be of a mind to deny  
12 the motions to dismiss on the basis of the  
13 Court of Appeals decision in the Industry  
14 Palli's case. I think the argument was that  
15 because Public Space Committee actually had  
16 denied the original plans, the original  
17 Applicant's plans, that the BZA application  
18 was moot and I think that having read the  
19 decision of the Court of Appeals, the denial  
20 by a different governmental body does not  
21 prevent the Board of Zoning Adjustment and  
22 should not prevent the Board of Zoning

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1 Adjustment to hear the case that's before  
2 them.

3 CHAIRPERSON LOUD: Yes, I would  
4 agree with you, Board Member Dettman and since  
5 we have already heard the case and had a  
6 number of witnesses at the case including the  
7 ANC itself and the architect, traffic  
8 engineer, so on and so forth and we've gone  
9 through the different special exception  
10 criteria.

11 Out of that abundance of caution so  
12 that we don't get a motion for reconsideration  
13 on the motion to dismiss, I just want to make  
14 it really clear that the motion to dismiss is  
15 denied.

16 I know at Exhibit 32 there's a  
17 motion to dismiss and you mentioned a second  
18 motion to dismiss. If you happen to have that  
19 exhibit number, that would be helpful.

20 But, again, I think we're  
21 clarifying that the motions to dismiss are  
22 denied as moot.

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1                   We've heard the case already.  
2 Motion to dismiss is an extraordinary relief  
3 to grant. What you're basically saying is  
4 that assuming arguendo every inference is  
5 drawn in favor of the non-moving party. That  
6 there's no way that that party could get  
7 relief. It's a lot bigger than a motion for  
8 summary judgment. I can think of very few  
9 circumstances where a motion to dismiss would  
10 actually be granted.

11                   But, again, in this case, we want  
12 to go on record being really clear that these  
13 motions to dismiss that may not have ever had  
14 a ruling on them are denied and we're going to  
15 go to the merits of the case.

16                   Ms. Monroe, did I do that properly?  
17 Do we need to vote on that -- on the motions  
18 to dismiss?

19                   MS. MONROE: No, it's okay.

20                   CHAIRPERSON LOUD: Okay.

21                   MS. MONROE: The case --  
22 essentially the motion to dismiss itself is

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1 now moot because the case has been heard.

2 CHAIRPERSON LOUD: Heard on the  
3 merits. So.

4 MS. MONROE: So, I -- yes, I just -  
5 - it was just kind of cleaning that up. I  
6 talked to Mr. Dettman about it.

7 CHAIRPERSON LOUD: Okay. All  
8 right. Good. So, with that then, Mr.  
9 Dettman, I'll turn it back to you.

10 VICE CHAIRPERSON DETTMAN: Okay.  
11 And as I said, the latter motion to dismiss  
12 was Exhibit 40 and I think Ms. Monroe is  
13 looking for the exhibit number for that first  
14 motion.

15 CHAIRPERSON LOUD: Well, if the  
16 latter is for the first one, I can tell you it  
17 was 32, Exhibit 32. So, we have both exhibit  
18 numbers.

19 VICE CHAIRPERSON DETTMAN: Okay.  
20 Thank you.

21 So, going forward, Mr. Chairman,  
22 this is an application to establish a gasoline

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1 service station with a convenience store  
2 located at 1400 Maryland Avenue, N.E.

3 I'll just point to the -- point the  
4 Board's attention to the most recent version  
5 of the plans that we're considering here. The  
6 plans have gone through a series of revisions  
7 that I don't think is necessary to describe  
8 fully, but we did receive Exhibit Number 66  
9 which has an attachment of the revised -- of  
10 the most recent plans showing the changes that  
11 have been made to the sign following the  
12 public hearing as well as the plans, I believe  
13 they're Exhibit 60, which shows the site plan  
14 of the overall site. So, those are actually  
15 the two plans that we're looking at.

16 Again, Exhibit Number 66 shows the  
17 changes that have been made to the sign.

18 For the rest of what's being  
19 proposed, that's Exhibit Number 60 in our  
20 record.

21 In order to establish such a use,  
22 the Applicant needs to demonstrate that they

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1 meet the provisions of 743 which actually  
2 takes us back to 706 for a gasoline service  
3 station in a commercial zone as well as  
4 chapter 23 of the Zoning Regulations in  
5 addition to 3104 which is our general special  
6 exception criteria.

7                   And I'll just take us through  
8 starting off with Section 706. 706.3 --  
9 there's a little bit of overlap between 706  
10 and chapter 23 which I'll deal together.

11                   706.3 which essentially is mirrored in  
12 2302.2 states that the station shall not be  
13 located within 25 feet of a residence district  
14 unless separated from the residence district  
15 by a street or alley. The Applicant does meet  
16 that provision. The gasoline service station  
17 will not be located within 25 feet of  
18 residence district. In fact, the closest  
19 residential boundary to the subject property  
20 is approximately 200 feet away -- 250 feet  
21 away which is taken from DCOP's report dated  
22 July 14th.

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1                   706.4 deals with the operation and  
2 basically, it states the operation of the use  
3 shall not create any dangerous or other  
4 objectionable traffic conditions and let me  
5 just give a very, very quick -- this is where  
6 most of our testimony, most of our analysis  
7 kind of zeroed in on and I'll very, very  
8 quickly give a synopsis of the process -- the  
9 public space process and the DDOT analysis and  
10 everything that was basically offered to us in  
11 testimony as well as filings.

12                   In January of '08, the Public Space  
13 Committee denied the Applicant's proposal  
14 based on several issues that essentially have  
15 been resolved. Those issues basically went to  
16 the queuing and vehicle maneuvering in the  
17 public space, the use of the public space by  
18 the gasoline service station, locations of  
19 driveways and whatnot. But, as I said,  
20 although it was denied in January of '09, the  
21 issues that are articulated in their letter  
22 have been resolved.

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1                   In June of '09, DDOT basically  
2 withheld their support. Again, basically  
3 going to queuing and backing maneuvers of  
4 vehicles, the potential elimination of street  
5 parking spaces caused by the turning sweep of  
6 fuel vehicles.

7                   In June of '09, the PSC, Public  
8 Space Committee, approved the revised design  
9 with conditions and I believe that the  
10 condition was that the Applicant would extend  
11 the Maryland Avenue median that currently  
12 exists a distance of 5 feet and that was in  
13 order to prevent vehicles from actually making  
14 left-hand turns onto Maryland Avenue or left-  
15 hand turns off of Maryland Avenue into the  
16 subject property. Based on what I've  
17 gathered, the Applicant has agreed to the  
18 extension of that median by a distance of 5  
19 feet.

20                   Following the Public Space  
21 Committee's approval, July 21st, '09, we  
22 received a filing from DDOT supporting the

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1 project. Stating that the Applicant has  
2 agreed to using smaller truck sizes to deliver  
3 gasoline, 35-foot trucks to deliver their  
4 gasoline. Doing that basically alleviated the  
5 concern that DDOT had with respect to impacts  
6 on legal street parking. It also alleviated  
7 the concern with respect to internal vehicle  
8 circulation as well as to the queuing and  
9 backing maneuvers in through public space.

10 Finally, following the hearing,  
11 Board had requested some information from DDOT  
12 with respect to again the truck turning  
13 movements on to 14th and Maryland as well as  
14 the potential closing of the median and we  
15 received a post-hearing filing from DDOT  
16 stipulating that they still had no concern  
17 with respect to impacts to legal street  
18 parking.

19 They did note that parking does  
20 occur on the eastern side of 14th Street as  
21 well as the southern side of Maryland Avenue.  
22 However, I do note that those areas are

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1 posted as no parking. So, basically, parking  
2 there is taking place illegally and  
3 notwithstanding that, if there is an impact to  
4 the cars being parked along those sides of the  
5 curb, it's illegal parking and needs to be  
6 addressed in some other venue.

7                   Finally, DDOT basically has  
8 indicated that they're going to require the  
9 Applicant to close the median along Maryland  
10 Avenue. So, not just extend it 5 feet, but  
11 close the median.

12                   So, with respect to 706.4 not  
13 causing any dangerous or objectionable traffic  
14 conditions, I think the Applicant has shown a  
15 willingness to work and has made substantial  
16 improvements and revisions to their plans as  
17 well as the way they're going to operate this  
18 business. That would lead me to believe that  
19 there's not going to be any dangerous or  
20 objectionable traffic conditions created.

21                   They've reduced the size of the  
22 building to facilitate internal site

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1 circulation. They have stated they're  
2 committed to using smaller delivery trucks and  
3 they've also committed to limiting the number  
4 of hours they're going to delivery gasoline.  
5 They've demonstrated that these size trucks  
6 are going to be able to move appropriately.  
7 That's Exhibit Number 55. They've moved the  
8 driveways. They've basically committed to  
9 using appropriate signage to direct vehicles  
10 and trucks in the directions that they need to  
11 go.

12 The traffic study that was provided  
13 to the Board, that is our Exhibit 47,  
14 basically indicated taking into account the  
15 existing levels of service, growth in the  
16 background number of traffic as well as the  
17 number of trips that are going to be generated  
18 by this particular use, all of the studied  
19 intersections are going to be -- are going to  
20 basically operate at a level of service of D  
21 or better.

22 There were a few intersections that

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1 do end up being at a level of service E which  
2 we have been told several times that DDOT  
3 looks at that as an intersection that's at a  
4 failure.

5                   However, if you consider those  
6 intersections minus the minimal number of  
7 trips that this operation is actually going to  
8 generate, just basically looking at existing  
9 and then the background growth in traffic  
10 again minus this operation, those  
11 intersections are going to be operating at a  
12 level of service E anyway and so, I think in  
13 terms of the additional amount of delay that  
14 this operation is going to contribute to the  
15 studied intersections and that particular  
16 intersection which is the intersection of H,  
17 Benning and Maryland and Bladensburg Road, I  
18 think overall you're looking at a potential  
19 increase in the delay of about one and a half  
20 seconds. So, I don't think that this  
21 particular use is going to cause any kind of  
22 adverse or objectionable traffic and

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1 congestion concerns.

2                   In addition, page 13 of the traffic  
3 study kind of lays out in Table 5 the number  
4 of trips that are expected to be generated and  
5 it's really minimal not even taking into  
6 account any kind of pass-by trip reduction.  
7 Basically cars that are already going to be on  
8 the street and in passing the site are going  
9 to happen to decide that they want gasoline.  
10 Which was a 62 percent reduction. Not even  
11 taking that into account, the total number of  
12 trips during the peak hours is 40 trips, 21  
13 in, 19 out and 54 during the P.M. Total in a  
14 24-hour period, you're looking at about 650  
15 trips, 326 in, 325 out. So, I think that  
16 706.4 is met.

17                   706.5 states that the Board may  
18 impose requirements pertaining to design,  
19 appearance, screening or lighting and other  
20 requirements. I think that the Applicant by  
21 themselves based on input from the community,  
22 the ANC, DDOT, the Public Space Committee has

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1 resolved a lot of these concerns with respect  
2 to screening and lighting.

3 They've reduced the number of gas  
4 pumps from two to four from their previous --  
5 from their original proposal which basically  
6 spread the operation out onto the substantial  
7 public space that exists around the site.  
8 They've pulled everything onto the property  
9 and in addition, have agreed to improve the  
10 public space with a substantial amount of  
11 landscaping as well as surround it with an  
12 wrought-iron fence to prevent cars from  
13 impinging upon that public space.

14 They've put in provisions to  
15 provide sidewalks for pedestrian safety  
16 accessing the actual convenience store.

17 They have a green roof. They've  
18 reduced the height of the canopy.

19 The Board did kind of zero in on  
20 the size of the sign that was being proposed  
21 at the hearing and encouraged the Applicant to  
22 revisit the design of that sign and we did

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1 receive I've mentioned a revised proposal for  
2 the design of the sign. That's at Exhibit 66  
3 and although the scale of the plans are a  
4 little bit small, it appears as if the  
5 Applicant has decided to reduce the size of  
6 the sign from 14 feet to a maximum height of 8  
7 foot which consists of a 6 foot sign and it's  
8 kind of side mounted on an 8 foot pole. So,  
9 in total from grade to the top of the sign, it  
10 looks like it's a total height of 8 feet.

11 DCOP as well as DDOT actually  
12 recommended a series of conditions which I can  
13 get into following my articulation of the  
14 provisions. I think that it's appropriate  
15 that the Board entertain maybe a condition  
16 that would go to the sign stipulating the  
17 maximum height at 8 feet.

18 706.6 stated that the required  
19 parking spaces may be arranged so that all  
20 spaces are not accessible at all times. The  
21 Applicant based on the plans before us will be  
22 providing the requisite number of parking

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space which it is four based on the square footage of the building and it does not appear as if -- they're not going to be inaccessible at anytime. They're arranged in a manner that they can be accessed at all times and that the moving of those vehicles will not have to impinge upon the public space at anytime.

17 2302.4 states that the driveway or  
18 any entrance or exit shall not be closer than  
19 40 feet to a street intersection. The plans  
20 that we have, Exhibit 60, indicate that the  
21 driveways, the one that's on Maryland as well  
22 as the one that's on 14th Street, are not only

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1 at least 40 feet away from the intersection,  
2 but they also meet DDOT's design and  
3 engineering standards which I think determines  
4 whether or not they qualify for a public space  
5 permit and I think that regulation is 60 feet  
6 and DDOT's testimony at the hearing has  
7 indicated that they meet that 60-foot  
8 provision as well.

9 Finally, I think that the -- with  
10 respect to the general special exception  
11 criteria whether or not the use is in harmony  
12 with the general purpose and intent of the  
13 Zoning Regulations as well as not tend to  
14 adversely affect the neighboring properties, I  
15 think that these types of uses automatically  
16 receive a little bit of push back from the  
17 community, but I think that the Applicant  
18 should be commended in the way that they've  
19 either willingly or because they basically  
20 were told to do it have changed their design.

21 And what I see in front of us now  
22 is a gas station that has done its very best

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1 to try to match the surrounding community in  
2 terms of the finishing on the facade of the  
3 building. It's made substantial provisions to  
4 protect pedestrian safety as well as the  
5 quality of the public space.

6 So, I think that the special  
7 exception criteria, 3104, 2300 as well as 706  
8 are met by the Applicant. Again, I think that  
9 the Applicant -- it's been a long road for the  
10 Applicant. Many postponements of the BZA  
11 hearing, but when it's all said and done, I  
12 think the Applicant did an admirable job of  
13 trying to keep this as a profitable business  
14 venture while protecting and adhering to the  
15 demands of the ANC and the community.

16 With that, Mr. Chairman, I'll turn  
17 it back over to you.

18 CHAIRPERSON LOUD: Thank you, Mr.  
19 Dettman. That was a very thorough analysis of  
20 the criteria and the evidence that matches  
21 against the criteria.

22 The only questions that I really

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1 had about the case and the evidence as the  
2 case proceeded forward were the questions  
3 related to 706.4, objectionable traffic  
4 conditions and there had been some testimony  
5 early on about potentially some of the  
6 vehicles backing or maneuvering out of the  
7 proposed development in a way that might  
8 interrupt traffic or pedestrians and I think  
9 you addressed all of those head on in respect  
10 to your analysis and all of those were pretty  
11 much answered I think by what you said in  
12 terms of some of the changes that were made by  
13 the Applicant to the overall project.

14 So, I'm in favor of the project as  
15 well. I think they did a good job of being  
16 adaptable as it proceeded forward in  
17 addressing and the only concern I really had  
18 was 706.4.

19 I did want to ask -- I know we had  
20 an ANC report in the record and that would be  
21 entitled to great weight. I think it's our  
22 Exhibit 49. Was the ANC report and I know

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1 that they came before us and they testified in  
2 opposition to it.

3 Did you have any thoughts with  
4 respect to some of the concerns that they  
5 raised?

6 VICE CHAIRPERSON DETTMAN: I think  
7 what I tried to do is as I took the Board  
8 through the provisions, tried to address some  
9 of the concerns that the ANC raised in their  
10 report.

11 CHAIRPERSON LOUD: Right.

12 VICE CHAIRPERSON DETTMAN: I do  
13 have Exhibit 49 in front of me and I have  
14 underlined here the primary issue is the  
15 Applicant's proposal to eliminate a  
16 significant quantity of public parking on 14th  
17 Street that is in excess of the standard  
18 parking restrictions required.

19 I don't see that as a possibility  
20 here. I think that there were two curb cuts  
21 along Maryland Avenue and one along 14th  
22 Street in a different location at one time.

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1 Those curb cuts were closed at some point in  
2 time, but, you know, the inclusion of two  
3 driveways further along Maryland Avenue and  
4 14th Street especially considering that the  
5 location of the curb cuts are most likely in  
6 areas where DDOT has stipulated where there's  
7 not legal parking anyway, I don't see where --  
8 as the ANC states that the elimination of a  
9 significant quantity of public parking on 14th  
10 Street, I just don't see that in this  
11 application.

12 CHAIRPERSON LOUD: Thank you, Board  
13 Member Dettman. I'm inclined to agree with  
14 you as well.

15 I know some of the changes they've  
16 made with regard to smaller delivery trucks  
17 and the like also mitigated against the need  
18 to take a number of parking spaces off of 14th  
19 Street or eliminate those 14th Street parking  
20 spaces for fuel truck delivery. They reduced  
21 significantly the size of the fuel trucks.

22 VICE CHAIRPERSON DETTMAN: Mr.

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1 Chairman, Ms. Monroe just handed me Exhibit  
2 Number 56 which is a later filing by the ANC.  
3 I do have it. It's not labeled Exhibit  
4 Number 56, but if it's all right, I'd like to  
5 just take a minute to flip through this later  
6 filing. Because it appears the ANC continues  
7 to -- let me just take a second to see where  
8 in terms of their support or opposition to the  
9 application is and they submit 22 pages  
10 raising issues that I want to make sure that  
11 we've addressed in our deliberation today.

12 CHAIRPERSON LOUD: Okay. As you do  
13 that, again, for me, the issues that you sort  
14 of walked through around 706.4 were the ones  
15 that kept coming up over and over again and I  
16 do remember. The supplemental filing from the  
17 ANC would not have changed that for me, but I  
18 do think it's important that the ANC knows  
19 that we've reflected upon their concerns.

20 As you do that, I wanted to say  
21 that we are at about 11:30. We normally would  
22 break at 12:00 noon anyway and we're still in

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1 the decision calendar.

2 We're going to call the morning  
3 hearing calendar once we come out of this  
4 calendar and we're probably going to shift the  
5 cases around a little bit. I think we want to  
6 kind of get through Tropicana and get through  
7 Washington International School first.

8 Tropicana, we think if the members of  
9 the audience are here, is a case that we can  
10 probably do on-the-record case on. We think  
11 that the Washington International School is a  
12 case that is pretty straightforward and we can  
13 go through it.

14 We think that the Rosan case is the  
15 most interesting case of the morning if not  
16 one of the most interesting cases since I've  
17 been on the BZA, but it has a lot of things in  
18 it including party status and other issues  
19 that we cannot go through promptly and so, we  
20 want to try to get the other cases out of the  
21 queue before we get started on the Rosan case.

22 And, in fact, when we send notices

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1 out regarding the morning calendar, we  
2 indicate that the case can be called in any  
3 order. So, just so that parties are aware of  
4 how we intend to proceed this morning.

5 But, again, we'll come out of the  
6 decision deliberation and we'll call the  
7 hearing calendar before we do anything.

8 Are the parties here for the  
9 Tropicana Jamaican Eatery case? Okay. And  
10 okay. All right. Okay.

11 And Washington International  
12 School? Okay. All right.

13 Mr. Dettman.

14 VICE CHAIRPERSON DETTMAN: Mr.  
15 Chairman, a lot of what we have here in these  
16 pages in Exhibit Number 56 goes to whether or  
17 not granting of the special exception would or  
18 would not be consistent or comply with the  
19 policies of the Comprehensive Plan and we  
20 spent a lot of time talking about that at the  
21 hearing and stated that, you know, the Board  
22 looks for consistency and compliance with the

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1       Zoning   Regulations   not   necessarily   the  
2       Comprehensive Plan.

3               With respect to the provision of  
4       the special exception, they state that that  
5       would basically create objectionable traffic  
6       conditions. I think that we've addressed that  
7       provision of the regs and I'm inclined to say  
8       that it does not create any objectionable  
9       traffic conditions as I've stated.

10              They do propose some conditions  
11       which when we're ready I have a listing of  
12       conditions and looking through what the ANC  
13       has proffered, I think that my list that I've  
14       pulled together covers everything that they're  
15       offering.

16              CHAIRPERSON LOUD:   Thank you.   I  
17       think when you're ready, we can move to the  
18       proposed conditions.

19              VICE CHAIRPERSON DETTMAN:   Okay.  
20       Relying upon DCOP's report to the Board as  
21       well as looking at DDOT's filings which I was  
22       able to pull one potential condition from

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1       their filings, but essentially what DCOP has  
2       offered is to prohibit any external sound  
3       amplification systems and that is consistent  
4       with ANC proposed condition.

5                   Deliveries of gasoline shall not be  
6       made to the site between the hours of 7:00 and  
7       9:30 a.m. and 4:00 and 7:30 p.m. OP actually  
8       had recommended 7:00 a.m. to 9:00 p.m., but  
9       DDOT kept it to the peak a.m. and p.m. hours  
10      and I think that that's appropriate.

11                  Deliveries of gasoline shall be  
12       made by trucks no longer than 35 feet in  
13       length bumper-to-bumper.

14                  Canopy lighting shall be recessed  
15       in the canopy, no protruding below the canopy  
16       and facing downward. That's consistent with  
17       an ANC condition. As is, floodlights shall be  
18       angled downward and shielded in order to avoid  
19       light spillage on neighboring properties.

20                  The trash enclosure shall be  
21       composed of board-on-board construction  
22       consisting of pressure treated lumber. The

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1 trash enclosure shall remain closed and locked  
2 except during the pick up and drop -- the pick  
3 up of garbage. We don't want to be dropping  
4 off garbage here.

5 The facade material for the  
6 building -- for the renovated building shall  
7 be brick. Originally, it was proposed to be  
8 stucco. Now, it's going to be brick.

9 The height of the canopy shall be  
10 no taller than 15 feet. That's actually a  
11 requirement in the regulations, but I see no  
12 harm in including it as a condition.

13 As I mentioned with respect to the  
14 proposed price sign that's going to be located  
15 at the corner outside of public space, that  
16 perhaps we say the size of the sign shall be  
17 no higher than 8 feet.

18 And finally, the ANC, again in  
19 their Exhibit Number 56, Condition Number 6,  
20 they say that they want us to require the  
21 complete closure of the median at the 1400  
22 block of Maryland Avenue.

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1                   As I stated earlier, DDOT's latest  
2 filings said that they were going to require  
3 the Applicant to close that median and the  
4 Applicant followed up that report with a  
5 filing of their own asking us not to require  
6 them to close the median, but instead  
7 basically just require them to do what the  
8 Public Space Committee approved, is to extend  
9 it 5 feet.

10                  I think based on DDOT's analysis of  
11 the extension of the median, the closure of  
12 the median using signage that requires right  
13 turns in and right turns out only along  
14 Maryland Avenue preventing no left turns  
15 either into the property off Maryland Avenue  
16 or onto Maryland Avenue, I don't see a need to  
17 have a condition at all with respect to the  
18 median.

19                  Based on DDOT's filings and  
20 testimony, I reach a level of comfort in both  
21 scenarios with the closing of the median or  
22 with the adequate mitigation of any potential

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1 traffic impacts that would be associated with  
2 turns onto or off of Maryland Avenue being  
3 able to adequately mitigate that situation  
4 through an extension of the median and with  
5 appropriate signage. So, I don't see a need  
6 to condition it one way or the other.

7 I think that it continues to be an  
8 issue that will be worked on by the Applicant,  
9 Public Space as well as DDOT as well as any  
10 business owners in the surrounding area. I'm  
11 sure that they'll weigh in on what potential  
12 impact the closing of the median will have on  
13 the surrounding community. So, I don't see a  
14 need for a condition.

15 CHAIRPERSON LOUD: Okay. I would  
16 agree with you, Board Member Dettman and I  
17 think it's part of the reason why we didn't  
18 take up the whole Checkers' letter regarding  
19 the median issues. Because that's going to be  
20 something that's worked out continuously  
21 through the Public Space Committee process.

22 And, of course, as you mentioned,

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1 the original canopy height I think was going  
2 to be 16 feet, but they removed that from the  
3 proposal. Fifteen feet is the regulation.  
4 They agreed to do 15 feet. So, keeping that  
5 in the conditions is something that doesn't  
6 matter to me one way or the other.

7 And I think we're at the point of a  
8 motion.

9 VICE CHAIRPERSON DETTMAN: I move  
10 for approval of Application Number 17825  
11 pursuant to 11 DCMR 3104.1 for a special  
12 exception to establish a gasoline service  
13 station with convenience store under Section  
14 743 pursuant to provisions in 706 and 2302 in  
15 a C-3-A District at 1400 Maryland, Avenue,  
16 N.E. as conditioned.

17 CHAIRPERSON LOUD: Thank you. I  
18 second the motion. The motion's been made and  
19 seconded. Is there further deliberation?

20 Hearing none, all those in favor of  
21 the motion say aye.

22 (Ayes.)

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1                   CHAIRPERSON LOUD: All those who  
2 oppose. Are there any abstentions and/or  
3 absentees?

4                   MR. MOY: Yes, Mr. Chairman.

5                   Before staff gives the final vote --

6                   CHAIRPERSON LOUD: Okay.

7                   MR. MOY: -- well, first of all,  
8 the motion is approve the application as  
9 conditioned on the motion of Mr. Dettman.  
10 Seconded by Mr. Loud. The absentee ballot  
11 from another participant on the application is  
12 Mr. Turnbull and his absentee vote is to  
13 approve with such conditions as the Board may  
14 impose.

15                   So, that would give a final total  
16 vote of 3 to 0 to 2 to approved as  
17 conditioned.

18                   CHAIRPERSON LOUD: Thank you, Mr.  
19 Moy and is there anything further in this  
20 case?

21                   MR. MOY: Not on this case, but we  
22 do have one other housekeeping item for ten

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1 seconds.

2 CHAIRPERSON LOUD: All right.

3 Thank you. Thank all of you who came this  
4 morning for the decision calendar.

5 I think we've got one final  
6 promised ten-second matter. Then we'll go  
7 into the hearing --

8 MR. MOY: That's right.

9 CHAIRPERSON LOUD: -- calendar.

10 MR. MOY: If you'll recall, Mr.  
11 Chairman, on September the 8th public hearing  
12 and this is subject to Application Number  
13 17956 of Habneed Asari. This is the subject  
14 property at 4355 Fesantant Street, N.W.

15 As the Board will recall on  
16 September 8th, the Applicant with concurrence  
17 from parties, the Board granted the  
18 continuance of the hearing to either October  
19 20 or November 24th pending feedback from the  
20 party status Sandra Rosenhouse which the Board  
21 granted and Ms. Rosenhouse did contact the  
22 staff on September 10th, 2009 and confirmed

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1 that she could not participant or be present  
2 at the public hearing on October 20th.

10 CHAIRPERSON LOUD: Thank you, Mr.  
11 Moy. I don't have any comments. Board  
12 Members? Okay. No comments. We're set.  
13 Okay.

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