

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

JUNE 18, 2013

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The Regular Public Hearing
convened in the Jerrily R. Kress Memorial
Hearing Room, Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 1:15 p.m., S. Kathryn Allen, Vice
Chair, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

S. KATHRYN ALLEN, Board Member

JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ROBERT MILLER, Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary

JOHN NYARKU, Zoning Specialist

STEPHEN RICE, Zoning Specialist

STEPHEN VARGA, Zoning Specialist

PAUL YOUNG, Zoning Data Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQUIRE

OFFICE OF PLANNING STAFF PRESENT:

MAXINE BROWN-ROBERTS

The transcript constitutes the
minutes from the Public Hearing held on June
18, 2013.

REPORTED BY:

Diyva Moolchandani

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

1:15 p.m.

MEMBER HINKLE: Let's call this meeting to order. Welcome. Good afternoon. As you can see, our Chairman is not here today, so pursuant to Section 3101.4 I will be presiding at least for a little while for this meeting.

I'm Jeff Hinkle, a Board member. To my left is Rob Miller, a representative from the Zoning Commission, and to my right is S. Kathryn Allen.

Before we get to the cases, we do have a preliminary matter. Each year the Board votes on Chair and Vice Chair, so we'll take a few minutes to take that vote, and then we'll - I know you're eager to get to the cases, so we'll get to the cases immediately after that.

With that, for the benefit of the other Board members, I will excuse myself from consideration from either one of those

1 positions. As a representative of the
2 National Capital Planning Commission, I
3 recognize that currently there is no
4 requirement for that representative to be a
5 District resident and actually go through the
6 process to become a Board member through the
7 appointment process.

8 So with that said, why don't we
9 jump straight into the elections. We'll vote
10 for the Chair first if I can, so do we have a
11 nomination for the Chair?

12 VICE CHAIR ALLEN: Thank you. I
13 move Lloyd Jordan, Chair.

14 MEMBER HINKLE: Terrific. Do we
15 have a second?

16 ZC MEMBER MILLER: I second that.

17 MEMBER HINKLE: We have a
18 nomination and second for Lloyd Jordan for
19 Chair. Any other nominations? Hearing none,
20 all those in favor of Lloyd Jordan as Chairman
21 for the District of Columbia Board of Zoning
22 Adjustment.

1 MR. MOY: Aye.

2 MEMBER HINKLE: Any nays? Voted
3 three to zero. Do we have any additional
4 votes?

5 MR. MOY: Yes, sir, we do.
6 Coincidentally, I do have an absentee vote for
7 Chair from Mr. Jordan, and Mr. Jordan votes
8 for Mr. Jordan as Chair.

9 MEMBER HINKLE: Terrific. Well,
10 congratulations, Mr. Jordan.

11 Why don't we move on to the vote
12 for Vice Chair, and I will kick us off with a
13 nomination for S. Kathryn Allen to be Vice
14 Chair. Any seconds?

15 ZC MEMBER MILLER: I would second
16 that.

17 MEMBER HINKLE: Any other
18 nominations? Seeing none, all those in favor
19 of S. Kathryn Allen to be Vice Chair.

20 MEMBERS: Aye.

21 MEMBER HINKLE: No nays. Do we
22 have an additional vote from Chairman Jordan?

1 MR. MOY: Yes, sir. As a matter
2 of fact, I also have an absentee vote from Mr.
3 Jordan for Vice Chair, and his - casting - his
4 vote is cast for Ms. Allen as Vice Chair.

5 MEMBER HINKLE: Well
6 congratulations, Ms. Allen. With that
7 business being over, we now have a new Vice
8 Chair, and what I'm going to do is pass the
9 Chair over to her, and she will manage the
10 remainder of today's hearing.

11 VICE CHAIR ALLEN: Excuse me one
12 second. Thank you. All right, so is
13 everybody ready? This is called baptism by
14 fire, so we'll get - we're going to get going.
15 Thank you I think.

16 Mr. Moy, can we actually first of
17 all welcome everyone. We have three hearings
18 I think for today. If everyone who is
19 planning to testify would stand to be sworn
20 in.

21 MR. MOY: Good afternoon, do you
22 solemnly swear or affirm that the testimony

1 you're about to present in this proceeding is
2 the truth, the whole truth, and nothing but
3 the truth? Ladies and gentlemen, you may
4 consider yourselves under oath.

5 VICE CHAIR ALLEN: Please remember
6 there are two cards that you need to fill out
7 and give to our kind person over there.

8 Okay, Mr. Moy, if you'll call the
9 first case.

10 MR. MOY: Yes, Maam Vice Chair.
11 Before I call the first case, congratulations
12 from the staff.

13 VICE CHAIR ALLEN: Thank you.

14 MR. MOY: As the Vice Chair, and
15 to Mr. Jordan as well.

16 VICE CHAIR ALLEN: I meant to say
17 earlier, he did have a family emergency, and
18 certainly our thoughts are with him.

19 MR. MOY: The first application
20 for the hearing is application of a 18570.
21 This is the application of 1875 North Capitol
22 Street, N.E., LLC, as advertised pursuant to

1 11 DCMR 3103.2 for a variance from the minimum
2 lot area requirements under Subsection 401.3
3 to convert a flat into a three-unit apartment
4 house in the 4-R District at premises 1845
5 North Capitol Street, N.E., Square 3510, Lot
6 22.

7 VICE CHAIR ALLEN: Thank you. Can
8 you please state your names for the record.

9 MR. SULLIVAN: Yes. Good
10 afternoon, Madam Chair and members of the
11 Board. My name is Marty Sullivan with the law
12 firm of Sullivan and Barros.

13 MS. BANULS: My name is Cynthia
14 Banuls representing the LLC.

15 VICE CHAIR ALLEN: Okay. All
16 right, so this case as Mr. Jordan generally
17 states, we take a fair amount of time
18 preparing and reviewing the cases so we're
19 familiar.

20 If you would like to make a
21 statement, of course you're welcome to do that
22 at your peril. Go right ahead.

1 MR. SULLIVAN: Thank you. I'll be
2 very brief. Again, my name is Marty Sullivan
3 of Sullivan and Barros here today on behalf of
4 1845 North Capitol Street, N.E., LLC, and the
5 principals of that entity are Ms. Banuls with
6 us here today and her husband and one other
7 person.

8 They are requesting relief from
9 the minimum lot provisions of 401.3. I will
10 just briefly summarize the extraordinary
11 conditions and the practical difficulty.

12 The primary condition actually
13 involves three sort of subconditions. It's
14 the historical legal use of the property as
15 reflected in C of O history. It's the
16 internal configuration of the building
17 throughout that time and when they purchased
18 it, and most particularly it was DCRA's action
19 in approving it for three units and then later
20 rescinding that approval after the property
21 had already undergone a complete renovation.

22 I think you have all the

1 information regarding the historical use.

2 There was actual C of O evidence from prior to
3 1958 and all the way up through 1985 that this
4 was an apartment house for up to four units,
5 and apparently at some point according to the
6 C of O it was converted back to a flat
7 although even that information is a little
8 ambiguous because one of the C of O's seems to
9 reflect three units.

10 So when the applicant purchased
11 the property and found it with an unattached
12 basement floor and an apparent layout that
13 suggested three units including three
14 kitchens, they went to DCRA with a Building
15 Permit application and worked with DCRA staff
16 and based on DCRA's review of historical C of
17 O's and the information about the layout of
18 the building, they said, yes, you can do this,
19 and they granted a building permit and then
20 the applicant went forward, renovated the
21 property and then when it was finished found
22 out that they wouldn't be able to get a C of

1 O for three units, and so here we are asking
2 for relief.

3 So the practical difficulty is
4 one, not only the significant expense spent in
5 restoring the property as three units but also
6 if relief were not granted they would lose the
7 value of that third unit and have to spend
8 significant amounts to reconfigure the
9 property back to two units which apparently it
10 hadn't even been when they purchased it.

11 So that's prong one and two.
12 Regarding the prong three, there's no
13 substantial detriment to the public good.
14 Based on the historical use, it had already
15 been an apartment house for many years.

16 We have 24 letters of support, and
17 these are all within 200 feet. It's not far-
18 flung support. It's all from adjacent blocks
19 and adjacent properties.

20 We have no opposition that we know
21 of other than the single-member district rep.
22 The applicant can provide - because of the way

1 the public space works and the right of way,
2 they can actually provide two parking spaces.
3 They're not legal because they're not all
4 entirely on the property, but that does help
5 ease the parking situation there, and that's
6 more parking than almost anybody has in that
7 area because the lack of an alley access.

8 The property also has a little -
9 it appears larger than it is because the
10 public right of way is so wide, and they have
11 public space permits to do some additional
12 work in the public space.

13 There's no harm to the integrity
14 of the zone plan, and I refer to the Office of
15 Planning's recommendation for approval in that
16 respect. I believe this Board knows how rare
17 such a recommendation is in these cases. I
18 know I do, and Office of Planning's primary
19 concern in my opinion is the integrity of the
20 Zone Plan, and they have opined that the Zone
21 Plan is safe with an approval here.

22 So that's all I have. If you'd

1 like to hear from the applicant, Ms. Banuls is
 2 a principal and she's also the architect, or
 3 if you have any questions, I've kind of laid
 4 out everything that she would say. She'd be
 5 repeating what I said, so we're happy to
 6 answer questions.

7 VICE CHAIR ALLEN: I will start.
 8 If you could give us - if you could just maybe
 9 walk us through the financials in terms of,
 10 you know, very briefly sort of what was done
 11 and then what it would cost you to change it
 12 back if the relief wasn't granted. If you
 13 could just speak to that, that would be
 14 helpful. You have to put your mic on please.

15 MS. BANULS: You're talking about
 16 in order to converting the basement again if
 17 relief wasn't granted for the upper floor?

18 VICE CHAIR ALLEN: Yes.

19 MS. BANULS: I think we've
 20 basically outlined - I think we're talking
 21 pretty much about first the big problem would
 22 be that up until when we were given the

1 Certificate of Occupancy to the upper two
2 units, but from that time I think it was back
3 in February we have basically lost a
4 significant amount of income on that unit. I
5 mean it's basically completely done but we
6 haven't been able to get any income.

7 First of all, I think it would be
8 renting - you know, the income from that unit
9 that we have lost plus renovating or - I think
10 it would be close to \$80,000.00 just in order
11 to flip it back not to mention that the other
12 two units upstairs are already rented, so it
13 would also mean, you know, not being able to
14 do anything with that unit probably until the
15 following year because the upper unit is
16 already rented as well.

17 So it's not only the construction
18 cost, but it would also be -

19 VICE CHAIR ALLEN: Loss of income,
20 is that what you're saying?

21 MS. BANULS: The loss of income as
22 well. It's a very hardship - big hardship

1 that we're going through right now obviously..

2 VICE CHAIR ALLEN: I understand.
3 Any other questions? Mr. Miller.

4 ZC MEMBER MILLER: Thank you,
5 Madam Chair. You referred to the single-
6 member district position. I thought there was
7 something in our record which indicated that
8 the ANC itself took a vote in opposition.

9 MR. SULLIVAN: That's correct.

10 ZC MEMBER MILLER: In the
11 submission by and the ANC, the one thing that
12 I wanted to address in terms of the basement,
13 they said that the basement had been plagued
14 by problems - of water problems. Can you just
15 address that concern, whether or not the
16 renovation that you did was - for the
17 basement, whether those water problems would
18 be addressed.

19 MS. BANULS: The problems were
20 addressed. When we had bought the property
21 last year, I had many neighbors actually tell
22 me that there was a huge water problem that

1 they used to talk about like freezing water on
2 the sidewalk for years, and when we excavated
3 and fixed the water line, it turns out that
4 there was a crack on the water line, so that
5 had been addressed and that was fixed months
6 ago, so that has nothing to do with any of the
7 problems - the basement problems or anything
8 like that.

9 There is no water problem in the
10 basement now.

11 ZC MEMBER MILLER: I just wanted
12 to get it on the record as part of the
13 substantial renovation that you've done on the
14 vacant and dilapidated property that kind of
15 blighted the neighborhood for years, and you
16 need to be applauded for that.

17 VICE CHAIR ALLEN: Okay. Can we
18 hear from Office of Planning.

19 MS. BROWN-ROBERTS: Good
20 afternoon, Madam Chairman, and members of the
21 BZA. I'm Maxine Brown-Roberts representing
22 the Office of Planning. I am going to stand

1 on the record we provided an analysis of the
2 variance request in the report and I will take
3 any questions.

4 VICE CHAIR ALLEN: Do the
5 applicants have any questions of Ms. Roberts,
6 Brown-Roberts?

7 MR. SULLIVAN: No, Madam Chair,
8 thank you.

9 VICE CHAIR ALLEN: Members of the
10 Board? No, are there any other agencies that
11 would like to testify? Do we have a report
12 from anybody else? DDOT it looks like had a
13 no objection report. Is there anyone here
14 from ANC 5E? Yes, would you like to state
15 your name for the record please. Please sit
16 down and make sure your mic is on. There
17 should be a bright green light.

18 MS. PINKNEY: Hi. Good afternoon.
19 I am Sylvia Pinkney, Commissioner 5E04, where
20 1845 North Capitol Street is located. I am
21 here to represent the ANC Commission 5E.

22 5E did vote on 5/21/2013 to oppose

1 the development of the three-unit apartment
2 building. Part of that opposition was based
3 on the fact that this building has actually -
4 well the lot itself isn't quite half of the
5 lot square footage necessary for this
6 building.

7 There is a Certificate of
8 Occupancy. It is dated 1985. That
9 certificate does not match the Application for
10 Occupancy. The application states that 1845
11 is wood and stone, that there are three floors
12 plus a basement, but the Certificate of
13 Occupancy states that there's a first floor,
14 second floor, and a basement.

15 Well having lived in Eckington for
16 the past 32 years, I am very familiar with the
17 homes. I have served as Commissioner as well
18 as Eckington Civic Association president, so
19 by living in the neighborhood you often walk
20 through the neighborhood, and you know who is
21 living where in the neighborhood.

22 The homes on North Capitol Street

1 in that particular block, they are renters,
2 they're rooming houses. There are very few
3 homeowners living in those homes.

4 They tend to just bring folks that
5 want a room to the area. This particular home
6 as I stated in my testimony, we have had
7 severe problems with this home flooding.

8 Now while we are told that the
9 flooding will be addressed, as we speak half
10 a wall is down and the rains continue to come,
11 and it - that - if anybody can live in that
12 basement apartment, I really wish them well,
13 but at this point the work that is being done
14 after the basement was dug out, it looks
15 extremely insecure.

16 There's mud, everything is just
17 backed up over there. Also, I would like to
18 state for the record that according to
19 historical records from my figures that the
20 main historical use of this building has been
21 a two-unit flat not a four-unit apartment
22 because a four-unit apartment is not mentioned

1 until 1981. It specifically has four units in
2 - on the page, so while there's 1981
3 Certificate of Application, I could not find
4 a Certificate of Occupancy for 1981, so again,
5 I say that 1985 is the first Certificate of
6 Occupancy and it does state four-unit, but in
7 `89, 1989, there's a certificate that changes
8 this four-unit over to a two-unit flat, so I
9 am saying that legally on paper there is a
10 Certificate of Occupancy for `85.

11 There is a Certificate of
12 Occupancy for `89 that changes to two flats.
13 I mean to a two-unit flat, so counting from
14 `89 up to the present time, that would be 20
15 some years that this building has been a two-
16 unit flat and only four or five it has legally
17 on paper a four-unit apartment, if you follow
18 what I'm trying to say here.

19 Okay, so based on that, since the
20 main historical use has been a two-unit flat
21 and not a four-unit apartment, the ANC is in
22 opposition to this building.

1 Also let me state for the record
2 that there's an order, Order Number - there's
3 an order referring to - okay, Order Number
4 18484 issued 2013. I think the developer
5 stated that this order somehow relates to what
6 they are trying to do and how he should be
7 approved because this particular order - okay,
8 so what I'm trying to say is the order issued
9 was for 26 T Street, N.E., not far from this
10 home, 1845.

11 Well I was part of the Commission
12 when that order was issued, and we issued it
13 because the young lady came to us for a zoning
14 variance request because she purchased a home,
15 a four-story home, that was completed and sold
16 to her.

17 VICE CHAIR ALLEN: Ms. Pinkney,
18 I'm just going to - we've got to move a little
19 bit along.

20 MS. PINKNEY: Oh, okay.

21 VICE CHAIR ALLEN: I want to make
22 sure that you're on point.

1 MS. PINKNEY: I'm just trying to
2 get everything in. This - so the ANC takes
3 each of these variances case by case, and her
4 particular case is not related to the case we
5 are here today for because that was a four-
6 unit apartment - I mean building already
7 completed, and she had no idea that it was not
8 legal.

9 VICE CHAIR ALLEN: Okay. Thank
10 you very much. We certainly want - we
11 appreciate your coming down, Ms. Pinkney. We
12 always take the ANC's report with great weight
13 and weigh it against the other evidence that
14 comes in, so we appreciate very much your
15 point.

16 Did applicants have any questions
17 for the ANC?

18 MR. SULLIVAN: No, Madam Chair, we
19 don't. Thank you.

20 VICE CHAIR ALLEN: Okay. Members
21 of the -

22 MS. PINKNEY: Excuse me. There's

1 another witness.

2 VICE CHAIR ALLEN: Another
3 witness, okay. We're just - unless they're an
4 ANC.

5 MS. PINKNEY: No.

6 VICE CHAIR ALLEN: Okay. Then I
7 haven't called for other witnesses yet. Thank
8 you. Any questions from the ANC from the
9 Board members, no?

10 Okay, so do we have any parties or
11 persons in support of the application that
12 would like to testify? Do we have any parties
13 or persons in opposition to the application?
14 Okay. Can you come on down now. Mr. Moy.
15 Thank you. Can you state your name for the
16 record, and you have three minutes to make a
17 statement.

18 MS. TORAN: My name is Bobbie
19 Toran. I live four doors on T Street North
20 Capitol from this property, and I've been
21 living there since '68 and they were saying
22 that they had three units property when

1 somebody was living there. It's never been
2 there because I know two or three families,
3 not no apartment, no roomers were staying
4 there, but I know about three families were
5 staying there and the last ones that was on
6 staying there was on Section 8, and also the
7 basement was not no apartment because there
8 was having water with the flooding down there,
9 and the seller that bought the house at that
10 time, they had this young man going there, the
11 nicest man, you know, he had a few like
12 painting stuff in the - but there's never been
13 a basement apartment and they never had no
14 three units, no kitchen there.

15 All I know they had a bathroom
16 upstairs on the second floor and one on the
17 first floor, but all this - but apartments -
18 the basement has never been a living area
19 because it been flooded so much down in the
20 basement.

21 So they - I see where they is
22 trying to put a basement apartment there but

1 on the side. They also put a door there. I
2 guess when the tenants go in and out the side
3 door, but the door, you see how wide I am, I'm
4 being honest, how wide - I can't go this way.
5 I have to go this way to even get through the
6 door, so that's them. They're trying to put
7 an apartment there and the way they're putting
8 it there and then from the front where on
9 North Capitol, they did cut an iron from under
10 the front steps.

11 The door ran - because I know - I
12 was told that they're trying to put a patio
13 out there also but I just can't see how they
14 could do it - how they can do it, and, you
15 know, that's what I have to say about it, but
16 they've never been no apartments. There's
17 always been three families separate had lived
18 in that property because I've been there since
19 '68.

20 The first family there, my mother
21 used to take care of the lady and her family
22 that was living there.

1 VICE CHAIR ALLEN: But you said
2 there were three families that have lived in -

3
4 MS. TORAN: Yes, on and off, yes,
5 three families, but I've never seen no, you
6 know, four separate apartments or anything
7 like that.

8 VICE CHAIR ALLEN: Okay, thank
9 you, Ms. Toran, for coming down. Thank you.
10 Do the applicants have a question?

11 MR. SULLIVAN: No, thank you,
12 Madam Chair.

13 VICE CHAIR ALLEN: Okay. Members
14 of the Board, any questions? All right.
15 Applicant, do you have a rebuttal or closing
16 statement that you'd like to make please?

17 MR. SULLIVAN: If I could briefly
18 please. Thank you. Just a couple of the
19 items that Commissioner Pinkney spoke of,
20 there's a 1951 - all this information is in
21 the record - C of O or Application for C of O
22 for apartment house including the basement and

1 a 1981 C of O application for apartment four
2 units for second in the basement, and then a
3 1985 C of O also says apartment putting four
4 units, so we're pretty much in agreement on
5 the `81 and `85 C of Os. It says four-unit
6 apartment house. The 1951 says apartment
7 house which means at least three units.

8 Regarding the construction being
9 done, there is some construction in the public
10 space building done. There's permits for that
11 and compliance with that will be enforced by
12 DCRA and/or DDOT obviously and that's not part
13 of this application.

14 I think this case - I think the
15 Board has approved several different types of
16 cases from 900-foot relief. One is the
17 dilapidated condition. Another one is what I
18 call the estoppel case where the property has
19 already been three units, and then there's a
20 third case which is estoppel plus DCRA issuing
21 a permit. I think we've got all three here.

22 I haven't seen a case with as much

1 evidence I think for relief from 900-foot
2 rule. I would just add that because of the
3 hardship on the applicants, I would request a
4 bench decision if the Board is so inclined to
5 approve and request that if we can do it, at
6 least a hybrid, a summary order, to avoid
7 additional months of delay in getting this
8 property back into productive use. Thank you.

9 VICE CHAIR ALLEN: Thank you. Any
10 questions?

11 So we have heard evidence and
12 reviewed the file. I know one of the concerns
13 that we had with the ANC, not concerns, the
14 concern that they were opposed to this. We
15 looked at - I looked at very closely, but it
16 appears that the majority of the concern in
17 addition to those points that were raised here
18 centered around not setting a precedent.

19 I wasn't so swayed by the number
20 of folks who were in support of it in terms of
21 neighbors because according to the ANC that
22 would be good for them because they could

1 potentially make some of the similar requests,
2 but I did look at the points that were made by
3 the applicant and think that all three of the
4 elements for the variance have in fact been
5 met.

6 I think that the objection,
7 primary objection, in writing made by the ANC
8 that there was a clear distinguishing factor
9 given the unusualness I hope and certainly the
10 uniqueness or extraordinary exceptional
11 situation of DCRE's original certificate, and
12 so I would be inclined to support the
13 applicant's motion, and so move.

14 MEMBER HINKLE: Thank you, Madam
15 Chair. I just wanted to say that I'm in
16 agreement with your assessment there. I think
17 there is an exceptional situation here in that
18 there was some reliance on some building
19 permits that were issued by DCRE and just in
20 reviewing the file and the plans that we have,
21 it's pretty clear that even in the demolition
22 plans there were three kitchens and then what

1 was proposed was three kitchens, and for me
2 that says there were three units in the
3 structure and an expectation that they could
4 build three units which they were permitted
5 for and just wanted to state that I'm in
6 complete agreement with the Office of
7 Planning's report. I think they did a good
8 analysis of this project as well, so I'm in
9 support of this, and so I'll second your
10 motion.

11 VICE CHAIR ALLEN: Thank you. Mr.
12 Miller.

13 ZC MEMBER MILLER: Thank you,
14 Madam Chair. I would agree with the Chair and
15 Mr. Hinkle's comments and the applicant's
16 comments about the historical and legal use of
17 the property as a three-unit building and the
18 good faith and reliance on the building permit
19 that was issued by DCRA, and I think you are
20 bringing - you have substantially renovated a
21 long-vacant dilapidated building and a blight
22 on the neighborhood, and I think that's an

1 important element here as well, so I'm in
2 supportive of your motion, Madam Chair.

3 VICE CHAIR ALLEN: All right.
4 We're prepared to vote? Yes? It's been -
5 motion has been made and seconded. All in
6 favor.

7 MEMBERS: Aye.

8 VICE CHAIR ALLEN: The ayes have
9 it, Mr. Moy, and we're asked for a hybrid kind
10 of ruling. Is that possible?

11 MR. MOY: My understanding, Madam
12 Chair, unless OAG tells me different that ANC
13 was opposed to the application, so to me
14 that's a full order - unless OAG tells me
15 differently.

16 VICE CHAIR ALLEN: Okay, and, Mr.
17 Sullivan, if you'd like to support that in
18 some way, that would also probably be helpful.
19 Is that - okay.

20 MR. SULLIVAN: Absolutely.

21 VICE CHAIR ALLEN: Yes.

22 MR. SULLIVAN: Absolutely.

1 VICE CHAIR ALLEN: Okay. Mr. Moy,
2 can you call the -

3 MR. MOY: Yes, the status for
4 recording the vote is three to zero. That's
5 on the motion of Ms. Allen, seconded motion,
6 Mr. Hinkle. Also in support Mr. Miller. We
7 have no other member participating, and we do
8 have a vacant seat, so again, the motion
9 carries on a vote of three to zero to two.

10 VICE CHAIR ALLEN: All right.
11 Thank you.

12 MR. MOY: Thank you.

13 VICE CHAIR ALLEN: And again,
14 thanks to the ANC. Mr. Moy, can you call the
15 next please.

16 MR. MOY: Yes, that would be
17 Application Number 18571. This is the
18 application of Jaime Flood pursuant to, as
19 advertised, 11 DCMR 3104.2 and 3103.2. This
20 is for a variance from the alley setback
21 requirements under Subsection 2300.2 and a
22 special exception under Section 223 to allow

1 the construction of a carport at the rear of
2 a row dwelling not meeting the lot occupancy
3 requirements under Section 403 and not-
4 conforming structure provisions under
5 Subsection 2001.3 in the R-4 District at
6 premises 803 9th Street, N.E., property
7 located in Square 933, Lot 14.

8 VICE CHAIR ALLEN: Okay. Thank
9 you. Can you state your name please for the
10 record.

11 MS. FOLWER: Hi, I'm Jennifer
12 Fowler with Fowler Architects.

13 MR. FLOOD: I'm Jaime Flood. I'm
14 the homeowner.

15 VICE CHAIR ALLEN: Welcome. Okay.
16 We have - the Board I believe has reviewed the
17 filing. We did receive a letter from the ANC,
18 understand, and we think we're reasonably
19 comfortable with the information provided but
20 you're, of course, welcome to make a statement
21 if you'd like or we can rest on the record.

22 MS. FOLWER: I would love to rest

1 on the record. I did want to point out the
2 filing - the sign posting was not timely, and
3 I just don't want that to slip through the
4 cracks in case we need to address it.

5 VICE CHAIR ALLEN: Mr. Moy, was
6 that an issue?

7 MR. MOY: Just a second. According
8 to my record, it's not highlighted, but since
9 I have a moment I wouldn't mind checking the
10 deadlines.

11 VICE CHAIR ALLEN: Are you talking
12 about the Affidavit of Posting?

13 MS. FOLWER: I think the sign was
14 actually posted late. The affidavit was filed
15 on time. It was just the sign posting.

16 MR. MOY: Yes, according to that
17 date of posting, it was posted June 6 I
18 believe.

19 VICE CHAIR ALLEN: Okay. Is there
20 any concern about allowing the filing
21 information to come in?

22 MS. FOLWER: I don't think so.

1 MEMBER HINKLE: No, I mean this is
2 initially to inform the public and obviously
3 there was a discussion at the ANC in regards
4 to this. I would expect that it may be
5 delayed.

6 VICE CHAIR ALLEN: Okay, so waived.

7 MS. FOLWER: Thank you.

8 VICE CHAIR ALLEN: Anything else
9 that you'd like to say or that was you're only
10 -

11 MS. FOLWER: That was really - yes,
12 thank you so much.

13 VICE CHAIR ALLEN: No problem. Any
14 questions from the members? No. Any report
15 from D.C. Office of Planning?

16 MS. BROWN-ROBERTS: We stand on the
17 record for a recommendation of approval of the
18 special exception variance. Thank you, Madam
19 Chair.

20 VICE CHAIR ALLEN: Okay. Any other
21 agencies here? I see that - in fact that DDOT
22 had a no objection, is that correct? Okay,

1 and we have an ANC on file as well that was
2 late -

3 MR. MOY: We got that today, Madam
4 Chair.

5 VICE CHAIR ALLEN: Right, but that
6 it was also a yes.

7 ZC MEMBER MILLER: Right, I guess,
8 Madam Chair, the letter is dated June 14 and
9 notes that the Commission voted eight to
10 nothing to support the request for a variance
11 from the alley setback requirements and
12 special exception to allow the construction of
13 the carport.

14 VICE CHAIR ALLEN: Great. Do we
15 have any parties or persons in support of this
16 application that would like to testify? Do we
17 have any parties or persons in support? Do we
18 have any parties or persons in opposition to
19 the application? Any parties in opposition?

20 So at this point if the applicant
21 would like to make a rebuttal or - I guess
22 there's nothing to rebut or a closing

1 statement, you may feel free.

2 MS. FOLWER: I'd just to thank the
3 Board for your time as well as the Office of
4 Planning's thorough report. Thank you.

5 VICE CHAIR ALLEN: Thank you. Does
6 anyone have any statements or anything that we
7 need to -

8 MEMBER HINKLE: Madam Chair, if I
9 may jump in real quick.

10 VICE CHAIR ALLEN: Sure.

11 MEMBER HINKLE: The Office of
12 Planning noted that they do not believe that
13 relief is necessary from 2001.3, and I tend to
14 agree with that analysis.

15 There is a non-conforming structure
16 on the site, and that's a house but I don't
17 necessarily believe that relief from 2001.3 is
18 necessary in this case.

19 VICE CHAIR ALLEN: Okay. Great.
20 I would agree with that. Okay, so on the
21 special exception 223, we - the carport
22 appears to propose to construct a carport over

1 an existing parking pad at the rear of the
2 property indicated that there is no light or
3 air that would be affected. The privacy of
4 the surrounding properties would not be
5 compromised, and the construction of the
6 carport would not substantially alter the
7 character of the alley. Any other
8 considerations, we feel I think that you've
9 supported certainly that element.

10 The - I have to see here which
11 things we need to move. Sherry, could you
12 come up for just one quick second please.
13 Great. Thank you.

14 All right, so the two special
15 exception requests, 223 which encompasses
16 Section 403 and 2300.2, again the lot
17 occupancy of 69.5 percent, we think you've met
18 all of those requirements, and so we would
19 move - I would move that we approve that
20 request.

21 ZC MEMBER MILLER: I would second
22 that, Madam Chair. This is a very simple

1 construction of a - simply covering an
2 existing trellis of a carport. The garage
3 door is located where all the other garage
4 doors are located in this alley, so I would
5 fully support the motion for the variance and
6 special exception.

7 VICE CHAIR ALLEN: Great. It's
8 been moved and seconded. All in favor.

9 MEMBERS: Aye.

10 VICE CHAIR ALLEN: Any opposed?
11 Mr. Moy.

12 MR. MOY: Yes, Madam Chair, staff
13 will record the vote as three to zero on the
14 motion of Chairman Jordan to motion, second
15 the motion, Chairman -

16 VICE CHAIR ALLEN: Chairman Allen.

17 MR. MOY: Oh, I thought I said
18 Chairman Allen. Sorry about that. Chairman
19 Allen. Seconded motion was Mr. Miller. Also
20 in support, Mr. Hinkle. We have no other
21 member participating, and we have a seat
22 vacant. The motion carries.

1 VICE CHAIR ALLEN: Thank you.

2 Okay. Thank you very much.

3 MR. MOY: Madam Chair, is there a
4 desire to waive the requirements for a summary
5 order?

6 VICE CHAIR ALLEN: Yes.

7 MR. MOY: Thank you.

8 VICE CHAIR ALLEN: Okay.

9 MR. MOY: The next case before the
10 Board for hearing is Application Number 18568.
11 This is the appeal of Shaw Dupont Citizens
12 Alliance, and as advertised, pursuant to 11
13 DCMR 3100 and 3101 from a decision of the
14 Department of Consumer and Regulatory Affairs
15 in its interpretation of Sections 1901.6 and
16 1900.1 allowing a drinking establishment in
17 the ARTS/C-3A District at premises 1346 T
18 Street, N.W., property located in Square 238,
19 Lot 88.

20 VICE CHAIR ALLEN: Thank you, Mr.
21 Moy. So can you introduce yourselves and give
22 us your affiliation for the record please.

1 Thank you. You have to put your mic on
2 please.

3 MS. ALLSOPP: I apologize. Good
4 afternoon, Madam Chairwoman and members of the
5 Board. My name is Runala Allsopp, and I
6 represent DCRA.

7 VICE CHAIR ALLEN: Thank you.

8 MR. LeGRANT: Good afternoon. I'm
9 Matthew McGrant. I'm a Zoning Administrator
10 for DCRA.

11 MR. KLINE: Good afternoon. Andrew
12 Kline here on behalf of the intervenor, Al's
13 Market, LLC.

14 MR. JIMENEZ: Good afternoon.
15 German Jimenez on behalf of Shaw Dupont
16 Citizens Alliance.

17 VICE CHAIR ALLEN: I'm sorry. Your
18 name again.

19 MR. JIMENEZ: German Jimenez.

20 VICE CHAIR ALLEN: Thank you.
21 Excuse me one second. Mr. Moy, just you want
22 - on that last that we want a summary order.

1 Thank you.

2 VICE CHAIR ALLEN: Okay. Thanks,
3 everyone, for being here. As you aware, this
4 is an appeal so it's a little bit different.
5 On the - I think the first thing that we would
6 look at is the Al's Market. Mr. Kline,
7 pursuant to Section 3199.1 a lessee of the
8 subject property is by definition a party, so
9 intervenor status is unnecessary.

10 MR. KLINE: Great. Thank you.

11 VICE CHAIR ALLEN: So, for the
12 record, we'll state that you've said Al's
13 Market is a party. Would the appellant or any
14 of the appellant's witnesses wish to make a
15 statement?

16 MR. JIMENEZ: To begin the -

17 VICE CHAIR ALLEN: Yes.

18 MR. JIMENEZ: Yes, that would be
19 great. I just want to open up by referring to
20 the Lesiglative history of the ARTS overlay
21 district. I just want to quote - it's in your
22 materials.

1 VICE CHAIR ALLEN: Let me just -
2 Mr. Jimenez, let me just let you know that we
3 have reviewed all the record very carefully.
4 We're pretty familiar with most of the - you
5 know, what you provided, and it was very
6 helpful.

7 If there's something that is not
8 there that you think you really need to put on
9 the record, then feel free, but you don't
10 really need to go through all of the details
11 with us if it's part of the record.

12 MR. JIMENEZ: Very good. There is
13 something that I want to highlight, and that
14 is the purpose of the ARTS overlay district
15 when it was initially enacted was to eliminate
16 inconsistencies between the zoning regulations
17 that govern the 14 and U Street areas, and I
18 stress areas, the comprehensive plan for the
19 national Capitol.

20 It was also to encourage the
21 continuation of ongoing commercial and
22 cultural restoration and revitalization of the

1 corridors and most importantly it was to
2 protect the adjacent residential areas
3 including Logan circle, Shaw, and Dupont East
4 neighborhoods.

5 VICE CHAIR ALLEN: Thank you. My
6 trusty Office of General Counsel has reminded
7 me that we have motions on the table that we
8 need to address, so we will do that first.

9 So the - hold on one second. Okay,
10 so the first motion I believe is the Al's
11 Market's Motion to Dismiss. Is that correct?

12 MR. KLINE: Yes, I think in terms
13 of time, ours was filed first. The Government
14 then filed a Motion to Dismiss that raised
15 many of the points that we raised in our
16 Motion to Dismiss.

17 Quite simply, the reason for the
18 Motion to Dismiss is there is no decision that
19 was made that was a legal decision within the
20 60 days prior to the appeal.

21 The Certificate of Occupancy
22 approving the use of this particular premises

1 was originally approved back in 2004, so the
2 use has been in effect for quite some time.
3 It would be our position that the appellant is
4 way out of time in terms of appealing the use
5 for this particular piece of property.

6 We also raised the issue of
7 standing which I'll leave for the Government
8 to address in more detail because I think they
9 did so in their motion.

10 I do want to raise one other point
11 which I think is very important, and I don't
12 think was raised in either motion. Even if
13 the Board were to believe that the appellant's
14 arguments have merit, the question is where
15 does that leave us, and where that leaves us
16 given the previously issued Certificate of
17 Occupancy is non-conforming use which has
18 never been abandoned, which hasn't been
19 discontinued, which based on the appellant's
20 own pleadings was in use as late as September
21 of last year.

22 So under those circumstances and

1 for all of the reasons set forth in the two
2 motions that were filed as well as from a
3 practical standpoint, what we're left with is
4 a non-conforming us. We would ask that the
5 appellant's case be dismissed.

6 VICE CHAIR ALLEN: Thank you.

7 MR. KLINE: Thank you. Can we - if
8 the Government - welcome, by the way, Mr.
9 Zoning Administrator and Ms. Allsopp. If you
10 would like to just make a short statement or
11 give us your position on this, we would
12 appreciate it. Thank you.

13 MS. ALLSOPP: Sure. We would adopt
14 this as the same argument as Source Theater,
15 our position is similar, which is that the
16 Certificate of Occupancy which issued for the
17 theater in 2009, so that once again appellant
18 is now over four years after the fact the
19 Certificate of Occupancy was issued, so
20 clearly the appellant is out of time and his
21 appeal will be time barred on that basis.

22 His argument is that the theater

1 should also be classified as a drinking
2 establishment, however, indecisions as to what
3 that property should be classified as was made
4 in 2009, so that position is time barred.
5 That claim is time barred, and as to standing,
6 appellant contends that the Zoning
7 Administrator's email constituted a
8 determination when in fact it was the Zoning
9 Administrator's long-standing interpretation
10 of the regulation.

11 It wasn't a new decision. All of
12 the decisions related to Al's Marketplace and
13 the Source Theater were made in 2004 and 2009.
14 Secondly, as to standing, the appellant has
15 not shown that he - that the Shaw Dupont
16 Citizens Alliance has been aggrieved.

17 Their position is that all this
18 parade of horrible things will happen unless
19 the tavern is in operation, but to date,
20 nothing has happened. The right to appeal is
21 for parties who have been aggrieved, not for
22 people who think they may be aggrieved at some

1 point down the line, so on that basis we'd
2 argue that they don't have standing.

3 VICE CHAIR ALLEN: Thank you.

4 MR. KLINE: Madam Chair, I would
5 also, if I may, tender a letter from the
6 Advisory Neighborhood Commission 1D. I had
7 intended to use it if we got to the merits,
8 however, they do express concern with -

9 MR. JIMENEZ: Can I object to that?

10 MR. KLINE: Consistency.

11 VICE CHAIR ALLEN: No, just go back
12 to your -

13 MR. KLINE: And their feeling that
14 the business had previously been properly
15 licensed, had a Certificate of Occupancy, and
16 that it would be unfair at this late date to
17 challenge the use, so I would like to tender
18 that for the record as well.

19 VICE CHAIR ALLEN: You can give
20 that to Mr. Moy please.

21 MR. KLINE: Thank you.

22 VICE CHAIR ALLEN: I'm going to

1 allow the appellant to make - again, Mr. - I
2 will allow you to make a statement based on
3 the testimony that you just heard here or the
4 statements, it really wasn't testimony, the
5 statements that you heard from Mr. Kline and
6 the Government, and please respond to their
7 statements.

8 MR. JIMENEZ: Okay.

9 VICE CHAIR ALLEN: Regarding
10 timeliness, regarding timeliness, and
11 regarding standing, those two issues only
12 please.

13 MR. JIMENEZ: For timeliness, the
14 ARTS overlay district section that we're
15 talking about, 1901.6, didn't come into law
16 until March of 2010, that's after the C of Os
17 were issued.

18 Taking Mr. Kline's point first, in
19 the law it clearly states to continue a
20 Certificate of Occupancy, it has to be in
21 conformity with existing laws, and the
22 existing law at the time was this ARTS overlay

1 district when they changed it to be a square-
2 by-square approach.

3 So the decision was in response to
4 some emails and also a request to Mr. LeGrant
5 for a determination letter, and he responded
6 that this was his decision with respect to the
7 ARTS overlay district and that we could
8 appeal, and so the new decision is the
9 enforcement of the ARTS overlay district, in
10 particular Section 1901.6.

11 That decision was sometime in
12 February, and we're well within that period.
13 If you look at certain court cases, there's a
14 case, Baskin. In Baskin, the analysis went
15 through. There had to be a decision, and
16 there was an issuance of some permits and then
17 later there was a letter, but basically they
18 said that there was no new decision,
19 therefore, they were time barred.

20 In our case, there is a new
21 decision, and that decision is that when you
22 issue a Certificate of Occupancy, it has to be

1 in conformity with the current laws, so that's
2 on timing.

3 The response with respect to
4 standing and us being an aggrieved party, the
5 Shaw Dupont Citizens Alliance, our boundaries
6 are 12th Street to 15th Street, U Street to S
7 Street. This property is within our
8 boundaries. We have 50 paying members. We
9 have one member who is an abutting property
10 owner who is here to testify, and we've been -
11 let me just state for the record that the
12 test for a standing, if there's a logical
13 nexus, and I think that's Civic Association of
14 Georgetown, then we should be given standing,
15 and in this case, and this is adjusting both
16 DCRA and the intervenor, that we were
17 aggrieved in the sense that if the ARTS
18 overlay district were properly enforced, then
19 they could not have issued a Certificate of
20 Occupancy and then we would not have had to go
21 and protest in front of ABRA and negotiate a
22 voluntary settlement.

1 So I have a letter here that I can
2 introduce that states the number of hours that
3 our members have incurred basically
4 negotiating and going to a protest with ABRA,
5 and none of that would have been necessary had
6 the Zoning Administrator properly enforced the
7 ARTS overlay district, and I can give you a
8 copy of that.

9 The letter is from our ADC Chair,
10 and it also from a member, Ron Renchard, who
11 is here.

12 VICE CHAIR ALLEN: Just hold it for
13 now please. Just hold it.

14 MR. JIMENEZ: The other point that
15 we're talking about dealing with the non-
16 conforming use issue that Mr. Kline raised,
17 and there's no exception in this particular
18 statute.

19 If anything, it says that it's with
20 respect to establishments. The old
21 establishment -

22 VICE CHAIR ALLEN: Excuse me.

1 You're talking about non-conforming use now as
2 opposed to timeliness.

3 MR. JIMENEZ: Oh, I thought you
4 said address theirs in order.

5 VICE CHAIR ALLEN: Well timeliness
6 and then standing. Are you saying that -

7 MR. JIMENEZ: Oh, yes, going back
8 to the standing or timeliness?

9 VICE CHAIR ALLEN: No, I meant - I
10 just want to make sure that you're still
11 addressing either the timeliness issue or the
12 standing issue.

13 MR. JIMENEZ: Oh, yes, let me just
14 finish the standing then. To the last point,
15 and that was in the Legislative history, part
16 of the purpose is to protect the residential
17 area, and this is the area. We live in the
18 area. We've got members who are abutting
19 property members, and without the enforcement,
20 we're not going to really be able to benefit
21 just in general.

22 VICE CHAIR ALLEN: Okay. Thank

1 you. Do either the Board members have a quick
2 question or comments? Do you want to maybe
3 address - let's address the standing issue
4 first. Do you have a comment on that? Go
5 ahead, Mr. Miller.

6 ZC MEMBER MILLER: I'll start. I
7 think I would be inclined to deny the Motion
8 to Dismiss on the grounds of standing but
9 grant the Motion to Dismiss on the grounds of
10 timeliness.

11 I think the Shaw Dupont Alliance,
12 I think they exist for this very type of
13 issue, and I think they meet the standards for
14 standing, but on the timeliness, I'm very
15 concerned. I agree with the arguments by Al's
16 Market and DCRA that are in our record.

17 I think the decision that the Shaw
18 Dupont Citizens Association is referring to is
19 not a new decision. It was just confirming
20 what he said, what the ZA said in that very
21 email was a long-standing interpretation, and
22 so I don't think - I think it would set a very

1 bad precedent that just an email confirming a
2 long-standing interpretation of a Government
3 rule starts a new time period for appeals
4 would be a terrible thing, very unpredictable
5 for the Government and for the citizens and
6 the public, so for those reasons and the
7 reasons that are in the record, I would
8 support the Motion to Dismiss on timeliness
9 after - but I would grant the - deny the
10 Motion to Dismiss on standing.

11 VICE CHAIR ALLEN: Okay. Mr.
12 Hinkle.

13 MEMBER HINKLE: Yes, thank you. I
14 tend to agree with my colleague, Mr. Miller.
15 There are some C of Os for both the Source
16 theater as well as the property in question
17 that have been in place for awhile, and it
18 seems like as Mr. Miller stated to base an
19 appeal on an email from the Zoning
20 Administrator that simply reaffirms how they
21 approach an issue I think really would set a
22 bad precedent, so I would support dismissing

1 this appeal based on that.

2 I do think the Shaw Dupont Citizens
3 Alliance may have standing in this case, but
4 I would agree with motions to dismiss based on
5 the timeliness issue.

6 VICE CHAIR ALLEN: Okay. I think -
7 you know, I have to agree with my colleagues.
8 I think that while it's difficult for me to
9 see or to get to the demonstration of actually
10 being aggrieved, I think that is a fairly - we
11 could take some leeway with the standing
12 certainly based on case history and that sort
13 of thing, so I think just to sort of knock
14 that out, why don't we move that we would move
15 to deny, thank you, the appellant's - the
16 Motion to Dismiss based on standing. Is there
17 a second?

18 ZC MEMBER MILLER: Second.

19 VICE CHAIR ALLEN: All in favor.

20 MEMBERS: Aye.

21 VICE CHAIR ALLEN: Mr. Moy, do you
22 want just hold off and let me get to the I

1 think the abutter issue. The challenge to the
2 designation that the theater should have been
3 raised really within 60 days of the issuance
4 of the - hold on please - or when the
5 applicant reasonably should have had notice or
6 knowledge of the decision, and then secondly
7 on the one in January of 2004, they should
8 have been raised within again a similar
9 timeframe, I think that the Government's
10 statement on this was very clear and very well
11 done, and I find it very - I find the
12 statements and sort of the - when you could
13 have known or should have known that those
14 arguments really don't change that, the time
15 period, even if we take into account your
16 concerns or your issues that you raised on
17 testimony or your statement regarding when the
18 law changed or whatever, there still has been
19 way - a length of time since that, so based on
20 that I would move that we deny the - this
21 motion based on timeliness.

22 ZC MEMBER MILLER: You mean to

1 grant the motion -

2 VICE CHAIR ALLEN: I'm sorry.

3 ZC MEMBER MILLER: Based on
4 timeliness. I would second the motion to
5 grant the Motion to Dismiss based on
6 timeliness.

7 VICE CHAIR ALLEN: Thank you. All
8 in favor.

9 MEMBERS: Aye.

10 VICE CHAIR ALLEN: Aye. Mr. Moy,
11 please go ahead please.

12 MR. MOY: Yes, staff, record the
13 vote on the two actions. That was three to
14 zero to two, and coincidentally both motions
15 were made by Chair Allen, seconded by Mr.
16 Miller. The first action was to deny the
17 Motion to Dismiss on standing. The second -
18 and also in support of the vote, Mr. Hinkle,
19 three to zero to two, and on the second motion
20 which was to grant the motion based on
21 timeliness, and that's on the vote count of
22 three to zero to two also. Both motions

1 carry.

2 VICE CHAIR ALLEN: Thank you. I
3 think that's it.

4 MR. KLINE: Great. Thank you.

5 VICE CHAIR ALLEN: Sure. Is there
6 any other business before the Board? No
7 objections, then I move that we adjourn.
8 Thank you.

9 (Whereupon, the above-entitled
10 matter was adjourned at 2:27 p.m.)

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In the matter of: Public Hearing

Before: DC BZA

Date: 06-18-13

Place: Washington, DC

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