

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY
FEBRUARY 11, 2014

+ + + + +

The Regular Public Meeting convened in
the Jerrily R. Kress Memorial Hearing Room, Room 220
South, 441 4th Street, N.W., Washington, D.C.,
20001, pursuant to notice at 9:44 a.m., Lloyd
Jordan, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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LLOYD JORDAN, Chairperson

JEFF HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MICHAEL TURNBULL, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary

JOHN NYARKU, Zoning Specialist

STEPHEN VARGA, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

ALLISON MYERS, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEVEN COCHRAN

The transcript constitutes the minutes
from the Public Meeting held on February 11, 2014.

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

19

(9:44 a.m.)

20

CHAIRPERSON JORDAN: Good morning.

21

Will we please come to order? Good morning, ladies and gentlemen. We're located at Jerrily R. Kress Memorial Hearing Room, at 441 4th Street, Northwest.

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1 We're here for the hearing and meeting of the Board
2 of Zoning Adjustment of the District of Columbia.

9 Today's -- today's proceedings are
10 being recorded, webcast live, and also the court
11 reporter sitting to my right is going to be taking
12 down testimony. So, therefore, I'm going to ask
13 that you refrain from any disruptive noises here in
14 this room during these proceedings.

22 The first thing I'm going to need you to
23 do is to complete two witness cards per person. Two

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1 witness cards per person, and give those to the
2 court reporter prior to you providing your
3 testimony or statement to the Board. So, that's
4 two witness cards per person, and give them to the
5 court reporter sitting to my right prior to your
6 testifying.

13 MR. MOY: Good morning. Do you
14 solemnly swear or affirm that the testimony you're
15 about to present in this proceeding is the truth,
16 the whole truth and nothing but the truth? Ladies
17 and gentlemen, you may consider yourselves under
18 oath.

19 CHAIRPERSON JORDAN: Good. Thank you.
20 If you're now familiar with how the Board operates,
21 there should be a document back by the door to my
22 left, which explains to you how we operate at the
23 Board of Zoning Adjustment. So, feel free to get

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1 that.

2 Well, let's see what we have here. We
3 have -- want to hold off on that party status call.
4 Any announcements to make?

5 MR. MOY: Yes, sir. Good morning, Mr.
6 Chairman, Members of the Board. Some preliminary
7 matters for the docket, and for the -- for the
8 transcript. On the docket, we have two cases that
9 have been postponed and rescheduled: application
10 number 18708 has been rescheduled to July 8, 2014,
11 and the second application is application number
12 18613 of Continental Mortgage. That has been
13 rescheduled to March 18th, 2014. That completes
14 what I have to say for this morning, Mr. Chairman.

15 CHAIRPERSON JORDAN: All right, thank
16 you. So, the Board is ready. Let's move into the
17 first decision case.

18 MR. MOY: Okay, I believe that's
19 application 18289, Mr. Chairman. This application
20 of -- of EQR-EYE Street, LLC. The applicant is
21 requesting a two-year time extension, Mr. Chairman.
22 Their statement is in your case folders, identified
23 on your exhibit.

1 CHAIRPERSON JORDAN: Decision cases?

2 I thought we had 18679. Did I miss that?

3 MR. MOY: 679, right?

4 CHAIRPERSON JORDAN: Yes.

5 MR. MOY: Yes, we do. Okay, let's do
6 that. Application number 18679; this is the
7 application of Richard and Janet Barnes. This is
8 their request forbearance relief from
9 non-conforming structure and light occupancy.
10 Their -- let's see. The Board actually had closed
11 the record after hearing public testimony on
12 December 17th, and scheduled its decision to today,
13 February 11th.

14 The Board didn't ask for any filing
15 other than allowing the applicant time to -- to meet
16 with HPRB.

17 CHAIRPERSON JORDAN: Okay. Is the
18 Board ready to deliberate on 18679? I think we did
19 get a letter from -- is it from the applicant?

20 MR. MOY: Yes.

21 CHAIRPERSON JORDAN: They did contact
22 HPRB, and I think they were told that there was no
23 special relief necessary. But with that, while

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1 we're deliberating, anybody have any thoughts? I
2 believe there's an exceptional situation or
3 condition that exists on this property. The lot is
4 smaller than the lot on the side of the street, and
5 particularly in its square. They have a
6 non-compliant rear yard that is adjacent to the
7 alley, and they're also a corner lot, which is
8 bounded by two streets and the alley, which makes
9 that generally exceptional there.

10 They're contributing historically,
11 which had not previously been considered, and they
12 have public space that adjoins their property and
13 how it bounds their particular property.
14 Effectively, they don't have a real side yard, or
15 ability for a side yard, and their lot is
16 odd-shaped.

17 I believe these things present a
18 practical difficulty in regards to the rear yard and
19 side yard requirements, and thus affects their lot
20 occupancy. If a patio were to be put there, it
21 would -- if a patio was put there, it would eliminate
22 the applicant's parking space that they have, that
23 they use the space for.

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1 I believe the design of this proposed
2 deck will allow light and air to be allowed to be
3 passed through to the other adjacent property and
4 to the street, and I don't see any detrimental --
5 any determent to the public good.

6 The deck that they propose certainly is
7 something similar to the other in the neighborhood.
8 The OFC has reached the same conclusion to which we
9 give great weight to. So, it would be my thought
10 that we would approve this request for relief. Any
11 other thoughts on this matter?

12 COMMISSIONER TURNBULL: Thank you, Mr.
13 Chair. I struggle with this. I don't think the
14 office of planning has changed their stance. I
15 don't think we've seen anything that would -- even
16 with the recent submittal from HP, but I do see some
17 issues here. Maybe we could ask OP to look into
18 this whole thing on decks.

19 I mean I guess to review it, especially
20 in the area where we're talking. But I struggle
21 with it. I mean there's already a non-complying
22 deck next door. And so, that sort of exacerbates
23 the whole situation.

1 But I see a situation here which I could
2 be a little bit more lenient on, but I still think
3 OP has raised a good point from the standpoint of
4 the consistency of the zoning regulations, and
5 maybe I ought to ask Mr. Cochrane to go back and
6 maybe meet with the rest of OP, and look at that
7 whole deck situation in that area, and to come back
8 a little later on with the zoning commission at
9 least to report on something.

10 I'm not going to stand in the way of
11 this, but I -- I am troubled. I think I would hate
12 to see that whole alley now proliferated with decks.
13 I think we're looking at this as a case-by-case
14 situation. I think in this case, you would make an
15 argument for it, but as I see, I think that it is
16 a situation that opens up a can of worms too.

17 So, I think luckily we're looking at
18 this as a case-by-case and not a whole neighborhood
19 issue. So, I'm willing to go along with this, but
20 I still struggle with the overall concept of it.
21 Anyway, thank you.

22 CHAIRPERSON JORDAN: Mr. Hinkle?

23 MR. HINKLE: Yes, Mr. Chair, I

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1 appreciate Mr. Turnbull's comments. I've sat on
2 this Board for a number of years now, and I think
3 that decks are one of the more difficult cases that
4 we see here. That and dogs.

5 So, I'm on the fence, if you will, on
6 this case as well. I don't think the site is unique
7 in terms of its size, but I think you've laid out
8 a couple of other conditions in terms of how it sits
9 on the corner and relates to the alley, and some of
10 the other conditions of the site that I think I can
11 lean towards approving this.

12 It would be helpful for OP to take a look
13 at this. We see a lot of cases similar to this, and
14 it is tough that the property adjacent to it has a
15 deck very similar to what is being proposed.
16 Perhaps that is one of the conditions that we should
17 consider in terms of this property being unique in
18 that the right to privacy and air and light is being
19 affected at this property because of that adjacent
20 deck.

21 So, with that said, I think I can support
22 the relief being requested in this case, but you
23 know it would be helpful to have another look at

1 this, because these are the toughest cases I think
2 we have.

3 COMMISSIONER TURNBULL: Yes, I would
4 continue on with Mr. Hinkle. A lot of times people
5 put up decks illegally. They don't understand the
6 ramifications of building something like this, and
7 what it does to their property. And so, I wish
8 there was a way of making that clear as to who the
9 impact of what these decks are doing onto their
10 property and to the land use.

11 So, I would reiterate Mr. Hinkle's
12 concern.

13 CHAIRPERSON JORDAN: I appreciate the
14 comments, and I agree. I looked at this several
15 different ways to reach the conclusion. But I do
16 think the enforcement of the illegal decks is
17 something where we really need to try to get our arms
18 around. And the only way that we know, that the
19 District would know about that, is if the neighbors
20 certainly did some inquiries, and we didn't find out
21 until testimony here that that deck was illegal, and
22 that was a particular problem.

23 So, with that, I would move that we grant

1 the relief requested in 18679.

2 MR. HINKLE: Second.

3 CHAIRPERSON JORDAN: Motion made and
4 second. Any additional discussion? All those in
5 favor signify by saying aye.

6 (Chorus of ayes.)

7 Those opposed nay. The motion carries,
8 but I think we have some absentees?

9 MR. MOY: Yes, we do have one, Mr.
10 Chairman, from a Member participating on this
11 application, who is Vice Chairperson Allen, and her
12 absentee vote is to approve the application. So,
13 that would give a final vote of 4 to 0 on the motion
14 of Chairman Jordan to approve for granting grant
15 relief to sections 2001.3, 403 and 404; second the
16 motion Mr. Hinkle to support, Mr. Michael Turnbull.
17 We have a seat vacant. Motion carries, 4 to 0.

18 CHAIRPERSON JORDAN: Let's go ahead and
19 let it have full order just because we had a party
20 not positioned, but I didn't find that to be very
21 credible. But still, let's let it have full order.

22 MR. MOY: Okay, very good. Thank you,
23 sir. All right, so, with that, Mr. Chairman, which

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1 of the --

2 CHAIRPERSON JORDAN: 289?

3 MR. MOY: Okay, 289. Back to where we
4 were. Okay, this is application number 289 of
5 EQR-EYE Street LLC. This is applicant's request
6 for a two-year time extension. Mr. Chairman, as I
7 said earlier, their application, their request, is
8 under exhibit 44. There is an Office of Planning
9 Report under Exhibit 45; there is no filing from ANC
10 60.

11 CHAIRPERSON JORDAN: This case I think
12 is not ready for us to make a decision on. In fact,
13 I would want to either move this to a hearing case
14 or the applicant -- I would suggest that the
15 applicant supplement this record with a --
16 something more than just the affidavit; one that
17 shows there had been an attempt to get this matter
18 financed.

19 Even though it is being self-financed,
20 I can't -- I'm not clear from the filing that they've
21 even presented this to their own finance committee.
22 I wasn't clear about the language being used.
23 Additionally, there's some discussion about this

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1 property not being marketable, but there's no
2 independent support for that statement that's being
3 made.

4 I would like to see the record
5 supplemented with the supporting documentation to
6 show that this property cannot be financed at this
7 time, whether internally or externally, but more
8 than just that statement, and additionally
9 something regarding this not being a marketable
10 property, which is contained. That's just my
11 thought. Anybody else have an opinion on this?
12 Mr. Hinkle?

13 MR. HINKLE: No. I tend to agree with
14 you, Mr. Chair.

15 CHAIRPERSON JORDAN: Although the
16 Zoning Commission has removed the number, the
17 maximum number of extension to orders, we're still
18 very -- it does not mean that the applicant does not
19 required -- is not required to come in with
20 supporting documentation to show there is air
21 quality justification for it.

22 So, I don't want us to become sloppy in
23 that regard; that we just let these things -- I would

1 like to have this record supplemented. Mr. Moy, we
2 can let the -- if you would let the applicant know
3 the additional information that we would like to
4 have, and we put this on for another decision date.
5 I don't know if we want to do a hearing or a decision.

6 MR. HINKLE: I think if we get the
7 documents that you requested, I think just a
8 decision date would be suitable.

9 CHAIRPERSON JORDAN: That's fine with
10 me too.

11 MR. MOY: Mr. Chairman, staff would
12 suggest a date of March 4th.

13 CHIEF JUDGE BARNETT: Is that a day when
14 Mr. Hood is on?

15 MR. MOY: No, actually there's another
16 Zoning commissioner.

17 CHAIRPERSON JORDAN: Let me ask why is
18 Mr. Hood on --

19 MR. MOY: He -- he -- my understanding
20 is that he was one of the originally participating
21 members on the original applicant. That's the
22 reason why.

23 CHAIRPERSON JORDAN: So, let's find a

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1 date with Mr. Hood.

2 MR. MOY: Okay, that puts us on March
3 11th, Mr. Chairman.

4 CHAIRPERSON JORDAN: Okay, and the date
5 for submission?

6 MR. MOY: Let's save March the 4th.

7 CHAIRPERSON JORDAN: So, that would be
8 our disposition for that day that this will go on,
9 March 11th, with submission March 4th; information
10 supporting the inability to get this project
11 financed and support for the inability that this is
12 not marketable property.

13 MR. MOY: Okay, very good. 18688, Mr.
14 Chairman. Next application for decision,
15 application number 18688, Lock 7 Development, LLC.
16 As the Board will recall, this application
17 requested grant relief from the height requirements
18 under Section 770 FAR 771, and off-street parking
19 requirements under Section 2101.1.

20 The applicant did file with a
21 supplemental as requested by the Board under
22 exhibit 50, and the Board will stand on the merits
23 of the requested relief, Mr. Chairman.

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1 CHAIRPERSON JORDAN: Are we ready -- is
2 the Board ready to deliberate on this matter? This
3 is a case that initially I was troubled, but I've
4 come full circle regarding this case with the
5 supplemental documentation and what was presented
6 at hearing.

11 I think there are exceptional
12 circumstances based upon a confluence of factors
13 with this property. One of the biggest is a
14 building restriction line that extends along the
15 street. I'm not so sold on the fire station being
16 across the street, but I do see the effect of that
17 on the property.

18 Another big issue is the environmental
19 contamination of the site due to the prior use, and
20 the need to preserve the facade on the building adds
21 additionally to the exceptional circumstances and
22 conditions of this building.

23 The building line restriction does

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1 indeed pose a practical difficulty on this
2 property. It is the contamination also, because it
3 presents a practical difficulty for the use of this
4 property. I believe the strict application's only
5 regulations would be a problem for this applicant.

6 The other thing I find that is very
7 supporting in this matter is that they are going to
8 have affordable housing as part of this component.
9 And so, I think this is something for the public good
10 in regards to its particular use.

11 Now, we went through a series of
12 discussions with them and a supplemental
13 documentation about alternatives within a zoning
14 regulation, and I think we looked at that several
15 different ways, and looking at the financial aspect
16 of it, the marketability, and it's -- the only thing
17 that makes a -- that would be reasonable for any
18 business standpoint to redo this property, or to
19 develop this property and allow a reasonable return
20 is with the relief requested by the applicant.

21 The other alternative simply did not
22 bear out. In fact, some of them would've had to
23 have been pursued at a loss to the applicant. The

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1 parking justification is one where we really look
2 at it very hard, but this is an area where it only
3 utilizes 60 percent of the on-street parking. And
4 so, the relief from the few units or spaces of
5 parking that are being requested I don't see being
6 impactful to the neighborhood. Also, the
7 applicant is going to put in place some traffic
8 demand management in addition.

9 I do have a concern about our discussion
10 about the conditions and the traffic demand where
11 the applicant -- we've had this discussion, and I
12 certainly want to hear from the Board about the
13 occupants. The applicant is submitting that they
14 will allow -- that they will supplement the first
15 occupants of the project with \$100 car share
16 membership, and \$100 capital bike share membership,
17 or \$200 smart card. I mean to say or, not and but
18 or.

19 As we've discussed on this Board, what
20 happens after the initial occupants move out and
21 somebody else moves in, then they might go get a car,
22 or they're not encouraged to use mass transit or
23 other available means other than getting a car.

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1 So, we had that discussion.

2 I think we should place on the applicant
3 as a condition that the applicant should cause any
4 new occupants of each residential unit to be offered
5 car share membership, capital bike share
6 membership, smart cards.

7 Now, I move the dollar amount off of that
8 in my thought because it -- I think that the
9 applicant can do it in several ways. If it is
10 rental -- it is stays rental property, then that's
11 certainly in the control of the applicant. If it
12 becomes condos, I think the applicant should be
13 required within the condo docs to pass that onto any
14 new occupants.

15 For instance, if a condo unit is sold and
16 the owner of the condo unit decides to rent out their
17 unit, then I think the documents can require the
18 owner to provide that first tenant some type of
19 alternative transportation, and that's why we
20 removed the dollar amount. Whether or not they're
21 going to be able to \$100 or \$150, or \$200 is still
22 in the air, but it is also something that can get
23 passed on to the occupants.

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1 The other conditions I would find to be
2 acceptable, except I would make a small change in
3 number 6, where the restriction for 17 units
4 obtaining residential parking permit to all 17
5 spaces that would -- they would be relieved from;
6 that it should run with the land, and there should
7 be an inclusion that the applicant has offered in
8 any leases, but I also think they need to be recorded
9 with any kind of declaration on this property so
10 that it does run with the land.

11 So, those are my thoughts on this
12 particular matter. Anybody else? Mr. Hinkle?

13 MR. HINKLE: Thank you, Mr. Chair. I
14 neglected to state in the beginning I was not here
15 for the January 14th hearing, but was here for the
16 subsequent hearing on February 4th. So, I am
17 participating in this decision.

18 I had a couple of thoughts in terms of
19 the exceptional conditions, and I think we get to
20 the same place but different ways. In terms of the
21 building restriction lines, I don't necessarily see
22 these as exceptional conditions. I think these are
23 found throughout the city and even on a number of

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1 properties within the square.

2 So, I wasn't buying the argument in
3 terms of the building restriction lines. But let's
4 see. Oh, also there was discussion by the
5 applicant that potentially the H Street overlay
6 might someday be extended to this property. So,
7 really what they're proposing could be in line with
8 that, and I thought that was kind of an odd argument
9 as well. I wasn't buying that, nor the argument
10 about the proximity to the Starburst Intersection
11 with Benning Road and Florida Avenue. Wasn't
12 buying that as well.

13 What I did buy was the proximity to the
14 fire station, and I don't think that in and of itself
15 is a unique condition. There's lots of properties
16 near fire stations. But I think that proximity
17 actually created an exceptional condition in that
18 there's costs associated with this new construction
19 to mitigate the potential noise impacts on the
20 residential units to make them marketable.

21 And so, I did think that was a unique
22 condition. I agree with you in terms of the
23 environmental clean up, and I appreciate the

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1 documentation that the applicant provided in that
2 regard.

3 Then you mentioned the alternative
4 analysis that the applicant provided, and I think
5 that was very helpful for myself in this regard. The
6 applicant's attorney on a number of other cases has
7 done the same thing, and it really helps the Board
8 in terms of understanding some of the issues
9 involved with developing some of these properties.

10 Just in terms of the parking variants,
11 the applicant in other documentation has shown that
12 this is really a transit-rich area. There's a new
13 street car line coming in line; there's multiple bus
14 lines. There's plenty of bike share locations, as
15 well as plenty of car share locations.

16 So, that documentation was helpful.
17 What I did have a concern about is the discussion
18 about adequate on-street parking in the immediate
19 area. I think the Board in evaluating these
20 parking variants should look at the need or the
21 demand of parking in alternative transportation
22 that a project is generating, or anticipated to
23 generate, as well as the need to address that by the

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1 property itself in terms of providing onsite
2 parking, as well as the availability of other
3 transportation alternatives.

4 I don't think the Board should be
5 looking at whether or not a neighborhood can support
6 additional on-street parking, especially like --
7 that essentially places the burden on other
8 residences, and that's my concern.

9 Then if you consider a location like
10 this where this proposal is, it's on a stretch of
11 Florida Avenue that actually could see or has the
12 potential to see significant redevelopment in the
13 future. I think if all of these projects rely on
14 the availability of on-street parking, that parking
15 is not going to be available over time.

16 So, I think that is a concern of mine.
17 Let's see. With that, I guess I -- well, the
18 occupant is requesting a significant amount of
19 relief for the parking. At least there is still
20 parking there, and I think the applicant has made
21 an argument that there's sufficient alternative
22 modes of transportation as well that serves the
23 site.

1 So, I'm supportive of the applicant's
2 request for relief in all cases: the FAR, the
3 height, as well as parking. In terms of the
4 conditions, I was unclear in terms of your proposal
5 for even if this is a condo for the first occupant
6 of each unit. So, even if that unit sells or is
7 rented out, you're proposing that there's a transit
8 benefit related to that? I wasn't clear with that.
9 I'm sorry.

10 CHAIRPERSON JORDAN: It really goes to
11 -- and I'm still working through it. It still goes
12 to what you just said about as time goes on the use
13 of the property and others coming in with parking.

14 If we just limit -- make the requirement
15 that the alternative mode of transportation benefit
16 is offered to the first tenants, what happens to
17 subsequent tenants, or subsequent owners? Where
18 is the incentive? How do we make sure that they're
19 not getting cars?

20 So, that's kind of what I'm trying to
21 wrap my arms around what I propose that the
22 applicant, whichever way it needs to make it happen,
23 either by the condo docs or even by -- well,

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1 particularly by condo docs if they're sold, because
2 if it remains as a rental property, then the
3 applicant stays in control.

4 MR. HINKLE: Right.

5 CHAIRPERSON JORDAN: The difficulty
6 comes with if it sold its condos, how do you manage
7 those units like that? Because arguably the second
8 group would not receive the same of benefits --

9 MR. HINKLE: Yes.

10 CHIEF JUDGE BARNETT: -- if an owner
11 passes, or if you have one owner and he then
12 subsequently rents the property, he or she rents the
13 property to a tenant.

14 MR. HINKLE: Right.

15 CHAIRPERSON JORDAN: I just wanted to
16 make sure we're around that. So, that's why I took
17 off the dollar amount to give them whatever dollar
18 amount the owner of the property, whether it is the
19 applicant or any subsequent owners of any condos,
20 would have to offer some type of car share
21 membership, Capital Bike Share membership or Smart
22 Card membership.

23 I didn't put a limit because I didn't

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1 want to hit any subsequent condo owner with a dollar
2 amount because that might be ownness in that regard.
3 So, that was my thought.

4 MR. HINKLE: I understand where you're
5 coming from. I'm just not quite sure how workable
6 it is at this point. I think it is something
7 certainly that the Board could explore more and
8 really try to figure out how to make those things
9 happen.

10 I would certainly be open to a condition
11 that would require the applicant, if these are
12 rentals, to provide this to each occupant at the
13 initiation of the rental agreement or if these are
14 condos at the first sale.

23 CHAIRPERSON JORDAN: Okay. All right,

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1 I'm just trying to put that through. I can agree
2 with that. I'm just trying to work through that.
3 Mr. Turnbull, anything?

4 COMMISSIONER TURNBULL: No. My
5 colleague, Ms. Cohen, sat on this case. I'm here
6 just to provide my warmth, friendship and good
7 looks.

8 CHAIRPERSON JORDAN: And we're so glad
9 you did. Did you have a meeting last night?

10 COMMISSIONER TURNBULL: Yes, and we
11 have one tonight, too.

12 CHAIRPERSON JORDAN: If you don't know,
13 the Members of the Zoning Commission meet usually
14 on Monday nights, and sometimes late, until 11:00
15 or 12:00 at night. The next morning, one of them
16 is designated to sit with us. So, last night was
17 a night you had Zoning Commission. You're having
18 Zoning Commission again, and you guys just work too
19 hard.

20 COMMISSIONER TURNBULL: We're having
21 ZRR hearings in the neighborhoods, and that'll be
22 for tonight, tomorrow and Thursday. Tonight we're
23 going to be at Wilson High School at 6:00.

1 CHAIRPERSON JORDAN: So, with that, I
2 would move that we grant the relief requested to the
3 applicant with the following conditions: that the
4 applicant shall designate a member of the property
5 management team as a transportation management
6 coordinator to ensure that the information
7 identifying programs and incentives for
8 alternative use of the transportation is
9 disseminated to all tenants.

20 Number four, that the applicant shall
21 include links to the commuterconnection.org site,
22 or goDC.com site for -- on the property management
23 website; that the applicant shall provide at least

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1 30 secure bicycle parking spaces in the bicycle
2 storage room of the property; that the applicant
3 shall restrict 17 units from the -- 17 units from
4 obtaining the RPP's to all 17 parking spaces which
5 they receive relief from, with restrictions being
6 enforced through the following means: First, the
7 recording of any covenant that runs with the land
8 for the life of the project, and two, that inclusion
9 of the restriction in 17 of the residential leases
10 or in the condo declaration, whichever is
11 applicable.

12 So, that would be my motion.

13 MR. HINKLE: I'll second that.

14 CHAIRPERSON JORDAN: Motion made and
15 seconded. Any further discussion? All those in
16 favor signify by saying aye?

17 (Chorus of ayes.)

18 Those opposed nay? Mr. Moy?

19 MR. MOY: Yes, sir. Before I record
20 the vote, we have two absentee ballots from two
21 Members participating on this application from Ms.
22 Marcie Cohen, and from Vice Chairperson Kathryn
23 Allen. In both cases, they voted to approve the

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1 applications with conditions as imposed by the
2 Board.

3 So, that would give a final vote of 4 to
4 0. We have one Board seat vacant. There's a
5 motion for Chairman Jordan to approve the
6 application with the relief requested. Second the
7 motion: Mr. Jeffrey Hinkle, and of course also in
8 support Ms. Cohen and Vice Chairperson Allen.
9 Motion carries.

10 CHIEF JUDGE BARNETT: All right, thank
11 you.

12 MR. MOY: Thank you, sir. The next and
13 last item before the Board for decision is a DCCA
14 remand of Appeal Number 18031 of the West End
15 Citizens Association. As the Board will recall,
16 this was before the Board for a decision last week
17 on February the 4th, and we're here today for a
18 decision. Thank you, Mr. Chairman.

19 CHAIRPERSON JORDAN: Okay, is the Board
20 ready to deliberate on this one? All right, I'll
21 -- I'll lead off. This is a -- this case is one
22 that's been very troubling. In fact, it still sits
23 in front of the Court of Appeals, and was remanded

1 to us to make a decision on the argument of whether
2 or not the defenses are equitable assertions in this
3 matter for latches or estoppel is applicable.

4 We've looked at this every which way. I
5 was particularly concerned about this matter
6 because I could not get comfortable in getting my
7 arms around it, and I wanted to make sure we had
8 substantial time to do so.

9 So, I have reviewed the record in this
10 case in every way you could look at it: up, down,
11 sideways, back and forth. Not that I didn't have
12 anything else to do, but I reviewed the hearing
13 video. I reviewed the video twice. I guess it was
14 a night having insomnia or something.

15 I read the transcript of the hearing
16 twice, and looked at all the exhibits over and over
17 again in this matter. So, I think I'm real clear
18 about what has transpired here.

19 It is unfortunate. There is an
20 unfortunate trail of missteps that I conclude
21 happened here with everybody all the way around.
22 To some extent, this did get out of whack and some
23 of it started -- I think most of it started with the

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1 government, but I understand the government
2 bombarded with a lot. But we have to be sure that
3 we do a good job up front so that citizens can
4 measure and know with certainty that actions taken
5 by government is a proper action up front, and that
6 we all can rely on it.

7 I do believe that the argument for
8 latches can arguably be made if we're talking about
9 the 2008 C of O. I don't think that's the case. I
10 think the action that's actually appealed from is
11 November 4, 2009 C of O. I think that's clear, and
12 I don't think that you can hold the appellant to say
13 that latches should be invoked because they were
14 very diligent once they were aware of the 2008 C of
15 O that the zoning administrator did act on that, and
16 did revoke that particular 2008 C of O.

17 I don't think latches is applicable
18 here. That 2009 C of O was issued November 4th,
19 2009, and the appeal was taken November 11th, 2009.
20 And I don't think any records show that within that
21 week's period of time that there was enough to show
22 unreasonable delay in filing this appeal.

23 However, I do think that the 2008 C of

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1 O does come into play when you consider the estoppel
2 assertion by the appellee. I believe that there's
3 been some errors in the whole process, and errors
4 in even our initial consideration of how that
5 estoppel was going to come into play.

6 What the appellant actually is saying is
7 that, "Look, District of Columbia Government, you
8 are now estopped from stopping us or revoking our
9 C of O at this point because we relied on you making
10 the determination that what we were doing was proper
11 under the law, and based upon that reliance, we did
12 do some things to our detriment."

13 And so, in fact they assert that in their
14 document exhibit 9, on page 7 and etcetera, and
15 throughout. I don't think they were real clear
16 hard-hitting with the definitive line to that, but
17 I think their complete argument does center around
18 that.

19 So, as I said, they're saying in
20 essence, the appellee or the applicant was saying,
21 "DC Government, look. At this point, you can't
22 revoke. No matter what you do BZA, it's wrong for
23 you to revoke or have the zoning administrator

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1 revoke operation at this point that you should be
2 estopped."

3 As you know, the estoppel applies where
4 there is a case to be made where a party must show
5 that they acted in good faith; that based upon the
6 affirmative act of a municipal government, they've
7 made some -- they've taken some actions to their
8 detriment in reliance of that, and particularly in
9 reliance of the 2008 C of O.

10 In this case, the doctrine will apply
11 based on the facts that in 2008 a C of O was issued
12 but it was not complete with all the details
13 required on a C of O. The C of O listed the -- listed
14 on the document that it was simply a change of
15 ownership, but it did define on that document use.

16 It defined on that document that it was
17 a use for 1,835 square feet, which happens to be the
18 total square footage of that building. That in of
19 itself doesn't give any particular onlookers to
20 know that meant all three floors, unless you knew
21 that the building was 1,835 square feet. So, I
22 understand the neighborhood's concern.

23 As I said, this has been a real difficult

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1 case. But the C of O, the 2008 C of O, did list
2 retail or wholesale store use for 1,835 square feet.
3 The C of O also listed in detail; on that C of O it
4 said, "Retail sales, cigarette sales, medicine
5 sales, grocery store sales and sandwich shop."

6 Further causing issue with this was the
7 particular reviewer. I think the particular
8 reviewer should've gone a little bit deeper. What
9 the reviewer did in the application was take the
10 application as submitted by Mr. Hart from the
11 applicant, where it said that this building had all
12 these uses, and I don't think the reviewer went back
13 to look at the previous C of O to see that the owner
14 at that time actually had a C of O, but it was not
15 for the full building's use in that way. But they
16 just took it on, and said, "That was the use for the
17 building for 1,835 square feet."

18 We get this a lot. We talked earlier,
19 Mr. Turnbull, about how someone may not have
20 permission, proper C of O to do something things,
21 like put on a deck. We just kind of assumed we see
22 those things, but that property was operated that
23 way.

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1 Even DCRA in its brief said that there's
2 some inconsistencies with the C of O treatment of
3 this property in their brief. That was one of the
4 statements. The reviewer failed to look at the
5 previous owner's C of O and understand what was
6 going on, but signed on the bottom of that
7 application process in the reviewer's section,
8 "Continuing the same use and just change of owner."

9 So, the C of O came out with that. The
10 2008 C of O came out with the use being as I described
11 earlier for the grocery store, the sandwich shop,
12 the retail sales, the medicine sales, etcetera,
13 etcetera.

14 So, that came on. In reliance thereof,
15 the applicant completed his negotiations and
16 actually purchased the grocery store operation from
17 the previous owner, and entered into a lease with
18 the George Washington University to operate the
19 property. Then engaged architects and obtained
20 building plans and building permit.

21 Then entered contracts with various
22 suppliers and vendors, and had discussions with
23 local businesses in the neighborhood, and even

1 applied with the Commission of Fine Arts. The
2 Commission of Fine Arts, relying on that C of O, also
3 granted -- approved that this should be used as
4 requested by the applicant.

5 Even with that, they went further to
6 ABRA, but ABRA rejected the request, but at least
7 they did go for it based upon reliance of that C of
8 O, and they also invested in the construction.

9 As I said earlier, the District
10 responded, and in their response even said there
11 were some errors and bad record in this case. Now,
12 in 2009, when the zoning administrator rightly so
13 based upon the concerns of the appellant revoked
14 that C of O, and said, "Well, I'm not certain what
15 sandwich shop meant." And understanding that a
16 grocery store can, as a matter of right, do prepared
17 foods, packaged prepared foods, but they couldn't
18 do any cooking.

19 So, the zone administrator wanted to
20 find out whether or not they were going to do any
21 cooking, and felt comfortable enough after meeting
22 and interviewing the applicant that there was not
23 going to be any cooking. It was going to be the

1 normal packaged foods. So, reissued that 2009 C of
2 O.

3 That 2009 C of O was essentially the same
4 C of O that was issued in 2008, but with all the
5 detail, all the boxes checked, and probably most
6 discerning is that the box where -- previously
7 didn't say floors. It actually put three in there,
8 but the same square footage: 1,835 square feet.

9 So, it is my opinion that estoppel would
10 be applicable; that the applicant or the appellee
11 relied on the government issuing the 2008 C of O,
12 and to its detriment took action, and that at this
13 point that we're way down the road in regards to
14 revoking the application -- excuse me, the C of O,
15 because there's been some detrimental reliance
16 based upon their good faith belief that the 2008 C
17 of O gave them authority to do that, which they did.

18 It is unfortunate because the
19 neighborhood is concerned, and I take these things
20 very seriously. The West End Citizens Association
21 are usually very diligent about what they do. But
22 government has to be sure. When it takes an action,
23 it has to be sure as it can be about the action that

1 it takes. So, that's just my thought. Anyone
2 else? Mr. Hinkle?

3 MR. HINKLE: Yes. Thank you, Mr.
4 Chairman. I'm glad you went first. This was quite
5 a difficult case to get your head around, and
6 decision for the Board to come up with. But I think
7 you spelled out all the issues quite well, and I tend
8 to be in agreement with what you came up with. So,
9 I'll leave it at that without stating too much more.

10 CHAIRPERSON JORDAN: Mr. Turnbull?

11 COMMISSIONER TURNBULL: Thank you, Mr.
12 Chair. I would agree with Mr. Hinkle's assessment.
13 I would echo his comment that I'm glad you went
14 first. I think your analysis was very thorough,
15 and I think again it was a complicated issue, but
16 I think you simplified it as much as it can be
17 simplified. I would concur with your analysis.

18 CHAIRPERSON JORDAN: Thanks. Yes,
19 like I said, that's what you get for not sleeping.
20 But anyway, with that, I would move that the Board
21 find that latches is not applicable to this matter.
22 However, the equitable estoppel is applicable to
23 this particular matter.

1 || COMMISSIONER TURNBULL: Second.

2 CHAIRPERSON JORDAN: Motion made and
3 second. All those in favor, signify by saying aye.

4 (Chorus of ayes.)

5 CHAIRPERSON JORDAN: Those opposed
6 nay? Mr. Moy?

7 MR. MOY: Yes, sir. The Board also has
8 an absentee ballot from Vice Chairperson Allen.
9 And she is in agreement with the motion that is made
10 by the chairman that latches is not applicable, but
11 estoppel is.

17 CHAIRPERSON JORDAN: All right, thank
18 you. Let's move into our hearing cases, please.

21

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