

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY  
MAY 18, 2004

+ + + + +

The Public Meeting convened in Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:00 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE MILLER	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN MANN II	Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

KEVIN HILDEBRAND	Commission Member
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OFFICE OF ZONING STAFF PRESENT:

Clifford Moy	Acting Secretary
Beverly Bailey	Office of Zoning

OFFICE OF CORPORATION COUNSEL:

Sherry Glazer, Esq.

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AGENDA ITEM

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

9:13 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the special public meeting of 18 May 2004 of the Board of Zoning Adjustment in the District of Columbia.

My name is Geoff Griffis, Chairperson.

Joining me today is the Vice Chair Ms. Miller. We are happy to have Mr. Etherly with us this morning as always and representing in our public meeting this morning is Mr. Hildebrand who represents the Zoning Commission and Mr. Mann representing the National Capital Planning Commission.

We do have just one item on the agenda for the meeting this morning. So, I would dispense with everything up and to the point, of course, that we are live on the Office of Zoning website and also being recorded as our procedure requires.

So, I would ask that people present turn off cell phones and beepers and we will begin our proceedings.

Of course, this is the time where the Board will deliberate on a case that has already been heard. No additional information is accepted at this point. The record is full and we are prepared.

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So, I would also say good morning to Ms. Bailey with the Office of Zoning and Ms. Glazer with Corporation Counsel and Mr. Moy also with the Office of Zoning and why don't we get to our business.

MR. MOY: Good morning, Mr. Chairman and members of the Board.

The first and only case in the special public meeting is Application Number 17155 of Ray Hwang and Matthew Depue pursuant to 11 DCMR 3103.2 for a variance from the minimum lot area requirements under Subsection 401.2 to allow the conversion of a single-family semi-detached dwelling into a four-unit apartment house in the R-4 District and premises 35 -- 3518 10th street NW Square -- Square 2832, Lot 807.

The Board should note that at its hearing on May 4th, 2004, the applicant amended the application to three units.

On May 4th, 2004, again, the Board completed testimony on the application and scheduled its decision on May 18, 2004.

The Board also requested the following post-hearing documents: (1) Revised plans for the now three-unit apartment house including a site plan showing the parking arrangement which is in your case

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1 folders identified as Exhibit 27 and also an ANC-1A  
2 report which I understand is in the -- in your case  
3 folder as Exhibit 28.

4 And that completes the staff report, Mr.  
5 Chairman.

6 CHAIRPERSON GRIFFIS: Good. Thank you  
7 very much and I'm not sure. Perhaps I didn't hear.  
8 You also indicated that we had a recent submission  
9 from the ANC?

10 MR. MOY: Yes, sir.

11 CHAIRPERSON GRIFFIS: Okay. We would need  
12 to waive our requirements to accept that. Is that  
13 correct?

14 MR. MOY: That's correct, Mr. Chairman.

15 CHAIRPERSON GRIFFIS: Is there any  
16 opposition to waiving our requirements and accepting  
17 that record of -- rather the letter of May 12, 2004  
18 into the record?

19 VICE CHAIRPERSON MILLER: No objection.

20 CHAIRPERSON GRIFFIS: Very well. We'll  
21 take it as a consensus of the Board. Accept it in.

22 It does -- it does -- actually, it goes  
23 right to the heart of the matter as I see this case.  
24 I know the Board's very familiar with this and  
25 familiar with this type of case in terms of the area

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1 variance for the conversion of a single family this  
2 being a semi-detached.

3 Of course, in numerous areas of the city  
4 that there is now more interest, it is great to see  
5 that properties are being upgrade renovated and made  
6 available for families.

7 The ANC takes on the position that they do  
8 support this project and had met obviously with the  
9 applicant in this and the -- the supporting aspect of  
10 this is the fact that they are encouraged by one of  
11 the units that was being proposed would be affordable  
12 to households as they state in their letter with  
13 income of less than 30,000 and they actually placed it  
14 in the building on the top floor and not in the  
15 basement.

16 Critical to us, of course, and -- and I  
17 know this Board clearly supports the -- the provision  
18 and -- and creation and maintenance of affordable  
19 housing across the city. It's -- it's obviously an  
20 important aspect of any city and critically important  
21 to the District of Columbia.

22 However, how that plays into the test and  
23 what is part of our jurisdiction is another aspect.  
24 What we have is a building that by all accounts and  
25 it's -- it's unrefuted, in fact, in this application,

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1 is in disrepair if not worse. This building needs  
2 some attention to it in order for it even to be  
3 habitable and going through this, the Board, of  
4 course, is open and does have the jurisdiction to hear  
5 practical difficulty cases based on the economics of a  
6 property, but that threshold is pretty high in terms  
7 of making an economic argument. In -- in many  
8 respects, it goes to quite frankly not making as much  
9 money as possible. Of course, we're aware of that and  
10 the applicant certainly didn't make that case, but  
11 rather that -- that this cannot be done. That it is  
12 no -- there is no economic feasibility.

13 I know the Board approached this  
14 application with an open mind as we do all our  
15 applications and looked to finding out this property  
16 must have three as -- well, originally proposed four  
17 and as amended by the applicant, three units in order  
18 to make it economically viable and going through that,  
19 of course, it was held out also with there was going  
20 to be one unit provided as affordable.

21 Now, we do have overlays in the city that  
22 do have the aspect of affordability. The closest  
23 proximity to this I think would probably be the Reed-  
24 Cooke overlay that does factor in that aspect and --  
25 and -- and different pieces of -- of development.

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1           That is not the case here. So, it's difficult  
2 for us to go to that as a requirement or even a  
3 threshold of a test that's made.

4           Going back to whether three units make  
5 this viable and less than three would not, I -- I -- I  
6 was looking to be compelled by that argument. Going  
7 through the documentation and also the submissions, I  
8 couldn't find that. Indeed, at the end was their --  
9 one of their expert witnesses even made the statement  
10 on the record that indicated that this could be done  
11 as two and it would be economically viable as two and  
12 so, going back in and factoring there all of that, I'm  
13 not sure how although we can establish that there is  
14 an -- an aspect of uniqueness here in terms of the  
15 conditions of the building.

16           The practical difficulty that comes out of  
17 that uniqueness that being the cost that it would take  
18 to do the renovation. It has to be factored back into  
19 what's the final product and what we're being asked to  
20 do is saying well, the practical difficulty is a fact  
21 of what we want to offer which is -- which is a  
22 supportable cause and that being an affordable unit.  
23 What we want to offer, therefore, makes us add units  
24 to it.

25           When -- when looking at that, I -- I'm not

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1 compelled that that makes our -- our -- the threshold  
2 of our test. Not to mention, it then goes back to --  
3 it almost puts us back to the uniqueness aspect. If  
4 that -- if -- if that's unique on what one wants to  
5 offer in terms of product and unit at the end of the  
6 day, how is that -- how do we -- how do we -- how do  
7 we look at that as a unique aspect when the next  
8 person -- and, you know, ironically or maybe  
9 coincidentally, it should be, if you recall the day of  
10 this hearing, we actually had a decision making on an  
11 almost identical application in -- in the -- in the  
12 same neighborhood and this is not the first of this  
13 like in this neighborhood or -- or in other  
14 neighborhoods in the city.

15 And it's important for us to understand  
16 and I know we do, the broad picture of what each  
17 decision is and how each rests on the facts that are  
18 presented to us, but also the implication of what the  
19 next application can look to in terms of consistency  
20 of a decision by this Board.

21 So, I go back to the fact of if -- if the  
22 certain matter of product is -- is an applicant's  
23 desire to provide, we have to then look very, very  
24 closely at the aspect of is that unique to the -- to  
25 the -- to the property and is it actually the -- the

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1 requirement for it to make it economically feasible.

2 For me, it -- it has not been persuasive  
3 in that argument.

4 I think going to the comprehensive plan or  
5 rather whether this would impair the intent and  
6 integrity of the zone plan, I think it has difficulty  
7 getting to that also. This is an R-4. Is it very  
8 clear what the regulations state in terms of the  
9 allowable unit for that. The -- the general over --  
10 the general description of what the R-4 is is also  
11 very specific. There's never been any ambiguity in  
12 terms of that aspect of the regulation.

13 And so, it does tend to impair the intent  
14 and integrity of the zone plan when one looks at the  
15 fact of the establishment of what would be unique in  
16 terms of getting to the practical difficulty could be  
17 said of any other property on that block if this was  
18 to be pursued.

19 In terms of the public good, clearly, this  
20 would not be against the public good. I think it  
21 would be -- and the -- the neighbors said it very  
22 succinctly and -- and articulated it very well. This  
23 would be a -- a great attribute to the block and,  
24 therefore, to the public good, but we can't get to the  
25 public good without getting through the first two

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1 tests.

2 That's my synopsis. I would open it up to  
3 others if they have comments.

4 Ms. Miller.

5 VICE CHAIRPERSON MILLER: I basically  
6 concur with much of what you said. I was certainly  
7 moved and sympathetic to the concerns of the community  
8 that there was this abandoned property and property  
9 that had been abandoned for anyway from ten to 25  
10 years and -- and -- and that they would like to see  
11 this converted into the proposal. It would certainly  
12 would be better.

13 But, our decision really isn't based on --  
14 on that. That's a consideration, but we have a very  
15 high legal test that we have to meet in order to grant  
16 a use variance which is -- is what this is and there  
17 are three -- three prongs to the use variance.

18 One is uniqueness and I could -- I could  
19 almost go there finding that this was unique and that  
20 it had been abandoned for so long.

21 But, the second test, I think, is where  
22 this really falls down and that's that the strict  
23 application of the regulations would create undue  
24 hardship and the Court of Appeals in Palmer said that  
25 that means that reasonable use cannot be made the

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1 property in a manner consistent with the zoning  
2 regulations.

3 And there was testimony at the hearing  
4 that -- that the property could be used as a -- for  
5 two units which is allowed as a matter of right and  
6 the applicant said merely that the profit returned  
7 would not be very great and in another Court of  
8 Appeals case Salsbury v. D.C. BZA which is in 1976  
9 that the Court said that a self-inflicted hardship  
10 where you buy something and -- and -- and you end up  
11 paying more than you might get in return, that just  
12 can't support the grant of a use variance.

13 But actually, I mean we explored at the  
14 hearing whether or not it was impossible for anybody  
15 to invest in this property to make it work and that  
16 just wasn't the case.

17 With respect to detriment to the public  
18 good, I think that it's true. We really can't -- we  
19 can't -- even if we find that it's a detriment to the  
20 public good, if it doesn't meet the second prong, then  
21 we can't grant the variance and I mean I certainly  
22 found that the evidence was mixed and the ANC  
23 certainly supported the variance because it was going  
24 to improve the property.

25 However, I agree with you, Mr. Chairman,

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1 that it is inconsistent with the comprehensive plan as  
2 the Office of Planning also stated because it would  
3 increase the intensity of the use of the property  
4 beyond that permitted by the zoning regs.

5 So, all in all, I'd say that we would have  
6 to deny the application.

7 CHAIRPERSON GRIFFIS: Others? Let me just  
8 make one clarification and we'll take any action on  
9 that.

10 First of all, Ms. Miller has -- has cited  
11 court cases that do go to use variance which  
12 oftentimes is where we see most of the economic  
13 hardship because it goes to the economic viability  
14 often of the businesses and, in fact, the court case  
15 that she cites went to businesses that run.

16 To be absolutely clear, this is an area  
17 variance and it's an area variance from the lot  
18 requirements. The lot area requirements of which  
19 would be 900 square feet per allowable for the lot  
20 which would establish how many units would be made.

21 Now, the Board has taken great time to  
22 look at whether this type of variance is a use or an  
23 area. Clearly, it goes to both in terms of the  
24 intensity as she's indicated. The intensity of use of  
25 the property, but what's regulating here is not the

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1 use. It's a residential use. It's an allowable  
2 matter of right use. Use is not changing, but rather  
3 the area is and area requirement and not being able to  
4 establish the number of units.

5 Whether Office of Planning believes that  
6 or not, that is, in fact, what the Board has  
7 established and I think it's absolutely correct.

8 VICE CHAIRPERSON MILLER: Mr. Chairman,  
9 let me --

10 CHAIRPERSON GRIFFIS: Yes.

11 VICE CHAIRPERSON MILLER: I just want to  
12 note that the applicant sought a use variance in this  
13 case.

14 CHAIRPERSON GRIFFIS: Understand.

15 VICE CHAIRPERSON MILLER: So, that -- that  
16 is also part of my reason for addressing it as a use  
17 variance.

18 CHAIRPERSON GRIFFIS: Right. And as you  
19 may recall, we -- well, there it is. Okay.

20 Others? Is there action?

21 VICE CHAIRPERSON MILLER: Oh, let me also  
22 clarify then, given that my whole analysis was  
23 premised on a use variance, I would also say that --  
24 that I would concur with your analysis that even if  
25 this is an area variance that they still don't meet

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1 the second prong with respect to practical difficulty  
2 based on economics, profit. Because there was  
3 evidence in the record that there still would be some  
4 profit just not as much as they were hoping for.

5 CHAIRPERSON GRIFFIS: Right. And -- and  
6 for -- for further discussion on this, the -- the mere  
7 fact that -- that I was deliberating this as an area  
8 variance and have found that it does not meet the  
9 test. The use variance, of course, is the higher  
10 threshold and, therefore, if you couldn't get through  
11 an area, you obviously couldn't get through a use.  
12 So, it's -- it is -- it's an important aspect to -- to  
13 look at and -- but, I'm -- I'm sure that we all can  
14 concur and it seems that the facts in the case and the  
15 deliberation I'm understanding is -- is very similar  
16 to those issues whether use or area.

17 Okay. Any -- any other? Why don't we  
18 continue our deliberation or a motion then -- if  
19 there's a motion?

20 VICE CHAIRPERSON MILLER: I would move  
21 then that we deny Application Number 17155 of Ray  
22 Hwang and Matthew Depue pursuant to 11 DCMR Section  
23 3103.2 for a variance from the minimum lot area  
24 requirements under Subsection 401.3 to allow the  
25 conversion of a single-family semi-detached dwelling

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1 into a three-unit apartment house in the R-4 District  
2 at premises 3518 10th Street, N.W. Square 2832, Lot  
3 807.

4 CHAIRPERSON GRIFFIS: Is there a second?

5 COMMISSIONER MANN: Second.

6 CHAIRPERSON GRIFFIS: Thank you, Mr. Mann.  
7 Further deliberation?

8 We have a motion before us that has been  
9 seconded. I would say, first of all, I think the  
10 Board -- I know in our limited executive session, but  
11 also, I -- I think I know the Board and it's feelings  
12 and thoughts and I can say in my own opinion that we  
13 -- we absolutely support and urge the redevelopment of  
14 this property and look forward to hearing news if we  
15 ever get news that this is actually being done and  
16 being constructed as a -- as a matter of right  
17 development and I think it will be good for block as  
18 the neighbors had said and I know that we fully  
19 support that.

20 Clearly, from the deliberation that I've  
21 understood here today, to grant an additional use --  
22 additional units to this building cannot meet our  
23 test, but again, that in no way precludes this from  
24 being redeveloped and two units being utilized and --  
25 and for that matter, it would be the assumption that a

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1 profit could also be made not only a good product  
2 being offered.

3 With that then if there's no other  
4 comments, we have the motion to deny before us. It's  
5 been seconded. I would ask for all those in favor of  
6 the motion signify by saying aye.

7 (Ayes.)

8 CHAIRPERSON GRIFFIS: And opposed?

9 MR. MOY: Staff would record the vote as  
10 5-0-0 on the motion of Ms. Miller, the Vice Chair, to  
11 -- to deny the application. Seconded by Mr. Mann.  
12 Also in support of the motion, Mr. Griffis, the Chair,  
13 Mr. -- Mr. Hildebrand and Mr. Etherly.

14 CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.

15 Is there any other business attended to the Board in  
16 the special public meeting this morning?

17 MR. MOY: No, sir.

18 CHAIRPERSON GRIFFIS: Very well. Then we  
19 will adjourn the special public meeting and we will  
20 resume our public hearing in a matter of moments.  
21 Thank you all.

22 (Whereupon, the special public meeting was  
23 concluded at 9:31 a.m.)

24

25