

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 10, 2012

+ + + + +

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 9:30 a.m., Meridith Moldenhauer, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MERIDITH MOLDENHAUER, Chairperson
NICOLE SORG, Vice-Chairperson
LLOYD JORDAN, Board Member

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD, Chairman
PETER MAY, National Park Service

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.
MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Public Meeting held on January 10, 2012.

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T-A-B-L-E O-F C-O-N-T-E-N-T-S

WELCOME:

Meridith Moldenhauer..... 4

STEPHANIE AND JOHN LESTER:APPLICATION NO. 18263:

For Board Action..... 5

VOTE TO DENY APPLICATION 18263 (5-0-0):... 14EQR-EYE STREET, LLC:APPLICATION NO. 18289:

For Board Action..... 15

VOTE TO APPROVE APPLICATION 18289 (5-0-0):. 25STEVE AND ELIZABETH ALLENBACH:APPLICATION NO. 18290:

For Board Action..... 26

VOTE TO APPROVE APPLICATION 18290 (4-0-1):. 38KEENER-SQUIRE PROPERTIES ON BEHALF OF THE
FIRST BAPTIST CHURCH OF THE CITY OF
WASHINGTON:APPLICATION NO. 18272:

For Board Action..... 39

VOTE TO APPROVE APPLICATION 18272 (5-0-0):. 541211 - 10TH STREET, LLC:APPLICATION NO. 18197:

For Board Action..... 55

Additional Evidence Submitted After Record as
Closed..... 57VOTE TO APPROVE APPLICATION 18197 (4-1-0):. 65MOTION FOR MINOR MODIFICATION TO CONDITION NO.
1 OF BZA ORDER NO. 18147 OF EUN SUN KIM

For Board Action..... 67

DECISION RESCHEDULED FOR FEBRUARY 7, 2012.. 70MOTION FOR A SECOND, TWO-YEAR TIME EXTENSION
OF ORDER NOS. 17696 AND 17696-A OF HINES VAFII
2100 M STREET, LP:

For Board Action..... 71

VOTE TO APPROVE THE MOTION (4-1-0):..... 82**NEAL R. GROSS**

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

9:46 a.m.

BZA CHAIR MOLDENHAUER: This meeting will please come to order.

Good morning, ladies and gentlemen.

We are located in the Jerrily R. Kress Memorial hearing room located at 441 4th Street, Northwest.

This is the January 10th, 2012 public meeting of the Board of Zoning Adjustment for the District of Columbia.

My name is Meridith Moldenhauer, Chairperson. Joining me today, to my left is Vice Chair Nicole Sorg. To her left is the representative of the Zoning Commission, Chairman Anthony Hood. And to my right is mayoral appointee, Lloyd Jordan.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door.

We do not take any public testimony at our meeting unless the Board asks someone

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to come forward.

Please be advised the proceeding is being recorded by a court reporter and is also being Webcast live. Accordingly, I must ask you to refrain from any disturbing noise or actions in the hearing room. Please turn off all cell phones and beepers at this time as to not disturb these proceedings.

Mr. Secretary, do we have any preliminary matters?

MR. MOY: If there are any, Madam Chair, staff would suggest that the Board address those when I call each of those separate cases.

BZA CHAIR MOLDENHAUER: Okay. Then why don't we proceed with the agenda?

MR. MOY: Good morning, Madam Chairperson, members of the Board. The first case for board action is application No. 18263. This is a non-party opponent's Motion for Reconsideration of the decision of the Board. This is, as I said, to application No.

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18263 of Stephanie and John Lester pursuant to Section 3126 and also a request for a waiver of Section 3126.2 of the Zoning Regulations.

The original application was approved by the Board on November 8th, 2011, as amended. And I'm going to read the caption for the record, Madam Chair, and that application was pursuant to 11 DCMR ' 3104.1 for a special exception under section 223, to allow a two-story addition to an existing one-family row dwelling and to construct a two-story accessory garage not meeting the lot occupancy requirement, section 403, rear yard requirement, section 404, and open court width requirement, section 406 in the CAP/R-4 District, at premises 117 C Street, Southeast.

Properly located in Square 733, Lot 23.

On November 23rd, 2011, Charles and Susan Parsons filed a request for reconsideration. That document, Madam Chair, is in your case folders identified as Exhibit 47. The Parsons also filed a supplemental

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document dated November 30th, 2011. That exhibit number is Exhibit 48. In addition, the waiver to the provisions under section 3126.2 is in their document filed on December 21st, 2011, and that filing is identified as Exhibit 49.

Subsequently, the applicants, John and Stephanie Lester, filed their opposition dated December 30th, 2011, received in the office January 3rd, 2012, identified in the case folder as Exhibit 50.

And I think that the Board is to act on the merits of the two requests from Charles and Susan Parsons, as well as the letter in opposition from the applicants.

That concludes the staff's briefing, Madam Chair.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy. And as you indicated we have in regards to this case a preliminary matter. We first need to address whether or not the Board desires to waive its

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requirements and permit a non-party status individual to request a Motion for Reconsideration. Then once we've made that preliminary decision, we can then address the merits of the Motion for Reconsideration if we get to that point.

So that being said, I will just start us off and then see what other comments other Board members have.

In this situation, I think we have a fairly strong regulatory and precedent case standard in which -- while we typically do not permit any motions to be filed by non-party status individuals, if an individual wishes to, they can obviously request party status and we can evaluate that during a hearing.

However, in this case Mr. Parsons never submitted a request for party status, never requested that during the hearing. He attended the hearing as an individual, which typically we provide only three minutes to provide their opposition. We provided him a

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great deal longer than that during the hearing at that time to provide his testimony.

And as I said, you know, he never -- it wasn't a situation in which maybe he requested party status and was, you know -- it was discussed and he decided that he did not want to be a party, but rather that he never submitted that request to start with.

Then the second question is has he presented in his submissions good cause to show why we should then waive this. And in my review of the submissions I don't see anything specifically in which he addresses any good cause to show why (1) he did not request party status at the beginning; and (2) then why we should consider this application now, even though he was not a party to this case.

He does present an argument that he has the likelihood of success on the merits, however, I don't see any good cause and I also disagree with him in regards to his argument of likelihood of success on the merits.

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I can go into the second element there, but before I dive into that I'll just kind of open up the Board to discussion. Obviously I'm in favor of declining a request to reconsider a case by a non-party status individual, or non-party.

Do any other Board members have any additional discussion?

MEMBER JORDAN: Madam Chair, I would agree with your analysis, and particularly I think it's very dangerous that we don't decide party status at the time of the hearing and that we continue to keep proceedings open like this so we can constantly have people coming in for reconsiderations of issues which they weren't even presented to us before.

And also I have a real concern on the Motion to Reconsideration. I don't think it meets the regulations in regards to presenting new evidence as required and showing good cause why it should be open. So

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I would agree with you.

BZA CHAIR MOLDENHAUER: Any additional discussion?

ZC CHAIR HOOD: I would agree with both of my colleagues. I think even there have been particularly cases where we have tried to deal with reconsideration party status in the middle of a hearing, and I think that's very dangerous territory. And I think I don't have any more to expound like my colleagues here, but I would agree wholeheartedly and I think we need to make sure we keep intact 3126.2 of the Zoning Regulations. Thank you, Madam Chair.

BZA CHAIR MOLDENHAUER: Thank you.

And I definitely agree with all the parties and I just want to -- as I said, I don't believe that we should stray from the regulations, nor do I think that good cause was shown, nor do I think that there's a likelihood of success. And just on that note I did want to address that issue in regards to

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likelihood of success. I think that, you know, there are sections in the transcript which do indicate; page 102, sections 16 to 20, in which we were leaving the record open specifically for any submission from Mr. Walls in which there was conflicting statements. And then there was a specific section under section 104 which specifically restricted the information that was being let open under the third prong of section 223; section 104, line 5.

In addition to that; to just identify for the record, the Board handles many cases each week and over each month and sees many -- a variety of cases, and also a lot of those cases sometimes do have factual and legal overlaps. Here the Board had a hearing schedule which actually during that month had two overlapping topics which were a trellis issue and a meaningful connection. Those cases, as I said, occurred during the same month and so the Board was presented with

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that information with some additional legal background on both of that.

The Board was educated clearly on the case precedent in regards to confirming that a 51 percent coverage created a meaningful connection. And thus, Mr. Parsons' submissions, one, was not what the Board had left the record open for, nor was it information that would create a reversible error because it would not have changed the Board's decision on the legal issue of a trellis.

And so based on that, I think it's time we'll submit a vote. And so, we'll submit a vote to deny the request to waive the requirements and hear a Motion for Reconsideration by a non-party status individual.

A motion has been made. Is there a second?

MEMBER JORDAN: I second it.

BZA CHAIR MOLDENHAUER: Motion's

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been made and seconded. All those in favor, say aye? Aye.

VICE CHAIR SORG: Aye.

MEMBER JORDAN: Aye.

ZC CHAIR HOOD: Aye.

BZA CHAIR MOLDENHAUER: Mr. Moy, if you can read back the vote?

MR. MOY: Yes, Madam Chair. Before I do that, we have -- or rather the Board is in receipt of an absentee ballot from another member who actually participated on this application, and that is Jeffery Hinkle. And his absentee ballot vote is to deny the non-party movant per section 3126.2 not being applicable.

So that would give a total vote of; do my quick math, 5 to 0 to 0, on the motion of Chairperson Moldenhauer to deny the waiver of a section 3126.2 to hear the reconsideration. Seconding the motion, Mr. Jordan. Also in support of the motion Ms. Sorg and Mr. Hood. So again, the motion

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carries to deny.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy. And in conjunction with this order I'd like to specifically ask OAG to prepare a full order on the original case so that that can be provided instead of having -- I think this case was originally just a summary order.

If we can then go to the next case, please, Mr. Moy?

MR. MOY: Yes, thank you, Madam Chair. That would be application No. 18289. This is the application of EQR-EYE Street, LLC, pursuant to 11 DCMR ' 3104.1 and ' 3103.2, for a special exception relating to penthouse setback and uniform height requirements under subsection 771.1. Staff notes that this application was amended by the applicant to withdraw special exception relief from section 411.11. A variance from the lot occupancy requirements under subsection 772.1, a variance from the closed court requirements

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under subsection 776.4, and a variance from the floor area ratio limitations from historic lots under subsection 1707.4, to restore historic buildings and construct an addition to create a residential and retail building with below-grade parking in the DD/C-2-C District at premises 443-459 I Street, Northwest. Property located at Square 516, Lots 812 through 815 and 876.

As the Board will recall, on December 13th, 2011 the Board completed public testimony, closed the record and scheduled its decision on January 10th, 2012. The Board requested additional information to supplement the record from the applicant and other individuals. Staff also notes for the record that the applicant had requested flexibility language in the proposed order to allow minor changes in design if there was no change in the zoning relief granted by the Board, if the application is granted at all.

The filings in your case folders,

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Madam Chair, are the following: First there's a filing from an individual Aaron Martin dated December 27th, 2011 identified as Exhibit 36.

He and Luke Stewart have a supplemental letter filed on the record also, which is identified as Exhibit 38. The Office of Planning's supplemental report dated January 5th, 2012 is identified as Exhibit 37, which I believe clarifies the Office of Planning's position to the closed court variance relief.

And finally, the applicant's filing of course dated January 5th, 2012 identified as Exhibit 38, as requested by the Board.

So the Board is to act on the merits of the request for special exception relief related to the penthouse setback and uniform height requirements under subsection 771.1, a variance from the lot occupancy requirements under subsection 772.1, a variance from the closed court requirements under subsection 776.4, and the variance from the FAR under subsection 1707.4.

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That completes the staff's briefing, Madam Chair.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy. As indicated we are here for multiples types of area variance relief and a special exception for roof structure relief.

The case fortunately had an additional submission that was submitted by the applicant which addressed some of the testimony that we heard in this case by Mr. Martin and Mr. Stewart, who presented opposition testimony, and I think it created a dialogue amongst the Board and the applicant in regards to, you know, potential dislocation of some of the current commercial tenants.

While we understand that the applicant has that right, we did express some concerns and the applicant then did submit an additional submission on January 5th indicating that they had worked with those two individuals. And we have I think a very, you

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know, strong additional submission addressing those issues, indicating a letter of support both from Mr. Stewart and from Mr. Martin, stating that they're working with the applicant to find alternative practice areas.

We also then have a letter from Mr. Abrams who's the operator of the Gold Leaf Studios indicating that the applicant has been extremely accommodating to him and to his tenants. And also something from Bicycle Space, which was also mentioned during the opposition individual testimony. We also then have the letters from the HPR staff review and recommendations, and that goes hand in hand with Mr. Moy's reference to the request for some flexibility.

That being said, I'm just going to kind of jump back in then to -- we have -- identifying the different letters of support that we have for this case. We have support from ANC 6C. The applicant in that submission did address the other ANC, which is a

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bordering ANC, but not the ANC within which the -- would receive great weight. But we do have great weight support from ANC 6C with a quorum present in which they voted 6 to 0 to support the application.

We also have a letter from DDoT indicating that they have no objection to the application as well.

OP had initially submitted a recommendation approving the lot occupancy request and the roof structure height initially under 411.5, and there's also references to 771.1, but they initially indicated that they could not make a recommendation on the closed court relief.

However, during the testimony during the hearing we did hear extensive submissions and discussion regarding the closed court along with an additional submission that we received dated December 12th specifically addressing the relief for the closed court and how that satisfied the

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first prong relating the location of the historic aspects of the building and the uniqueness of -- the fact that this is a very long loft space that was being constructed and the requirements to maintain certain aspects of the building in regards to how that then affected the need for the courts.

And so, I think that based on the testimony, both OP and myself; and I'm not sure other Board members, had a level of comfort following the hearing and following the submissions in regards to satisfying the standards for a variance, an area variance for the closed court area requirements and the closed court under 774.6.

That being said, I do think that the applicant has satisfied the requirements based on the confluence of factors and I'll open up the floor to additional discussion and deliberation on this case. And I do commend them for at least taking the effort with the tenants and presenting that information to the

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Board, and I appreciate that.

VICE CHAIR SORG: Thank you, Madam Chair. I agree with your analysis and so don't have a lot to add. I think what happened in this case is that during the hearing, you know, there were a few things that we were surprised by based on the individuals who came in to testify, but I think that the applicant in this case did a good job in supplementing the record in their post-hearing filings, specifically, as you mentioned, addressing the way that they have worked with it and involved the tenants, as well as further information that we requested on the HPRB. So I thought it was useful to -- that the included the original design based on the public process that that would have gone through as well. I thought it was helpful. So I would agree with your analysis. Thank you.

MEMBER JORDAN: Madam Chair, and I would agree with both of you that I think this

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is -- this particular project meets the test that's necessary for them to get the relief. However, I'm concerned about this. And as there's been other cases, the involvement of the people who are affected is very important and it shouldn't happen from here. It should happen before it gets here. And although it's after the fact, it just troubles me because although we're doing a lot of development, we're doing a lot of building in town, there are people who are being affected that need to have conversations with the people doing the development prior to getting here and not that requires us to pushing things back and get to the conclusion where we are today, which could have been done before. So I just wanted to say that.

BZA CHAIR MOLDENHAUER: I appreciate those comments, Mr. Jordan.

Are there any additional deliberations from Board members?

(No audible response.)

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BZA CHAIR MOLDENHAUER: If there's nothing additional, then I think we are at a point where I'll submit a motion, a motion to approve application 18289 pursuant to 11 DCMR ' 3104.1 and ' 3103.2 for a special exception relating to the penthouse setback and uniform height requirements under subsection 771.1 and 411.11, a variance from the lot occupancy requirements under subsection 772.1, and a variance from the closed court requirements under subsection 776.4, and a variance from the floor area ratio limitations from the historical lot under subsection 1707.4, to restore a historic building and construct an addition to create a residential and retail building with below-grade parking at premises 443-459 I Street, Northwest.

A motion has been made. Is there a second?

VICE CHAIR SORG: Second.

BZA CHAIR MOLDENHAUER: Motion's been made and seconded. I'd just indicate

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that I would actually recommend the motion be conditioned on providing some flexibility based on HPRB's decision.

So motion's been made and seconded.

All those in favor, say aye? Aye.

VICE CHAIR SORG: Aye.

MEMBER JORDAN: Aye.

ZC CHAIR HOOD: Aye.

MR. MOY: Madam Chair, before I give a final vote, we again have an absentee ballot from Mr. Jeff Hinkle, who is absent today. His absentee ballot in this application is to approve with such conditions as the Board may impose.

So that would give a final vote of 5 to 0 to 0. This is on the motion of Chairperson Moldenhauer to approve the relief as she just stated with the condition for flexibility language. Seconding the motion, Ms. Sorg. Also in support of this motion, in addition to Mr. Hinkle, Mr. Hood and Mr. Jordan. Again, the final vote is 5 to 0 to 0.

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The motion carries.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy. Seeing that there's no opposition in this case, the Board would request that a summary order be issued and that we waive our requirements.

MR. MOY: Very good. Thank you.

BZA CHAIR MOLDENHAUER: The next application before the Board for action is application No. 18290. This is of Steve and Elizabeth Allenbach, pursuant to 11 DCMR ' 3104.1, for a special exception to allow additions to an existing one-family row dwelling under section 223, not meeting the lot occupancy, section 403, requirements in the R-4 District at premises 1414 A Street, Northeast. Property located in Square 1056, Lot 28.

As the Board will recall, on December 20th, 2011 the Board completed public testimony, closed the record and scheduled its decision January 10th. The Board requested

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additional information to supplement the record by Friday, January the 6th, 2012.

The applicant made its filing as requested by the Board. That filing is in your case folders identified as Exhibit 34, as well as a supplemental filing which is the set of revised drawings identified as Exhibit 36.

In addition, Madam Chair, an individual neighbor who is opposed who testified at the public hearing also made a filing dated January 4th, 2012 identified in your record as Exhibit 35. The staff was a little unclear whether or not this would be a potential preliminary matter since the record was closed. And in reading the record it was a little unclear as to whether or not the Board allowed a filing from Ms. Holod to submit a filing since she did not request party status. But I'll leave that to the Board to determine.

So with that, the Board is to act on the merits of the requested zoning relief

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for a special exception under section 223, not meeting the section 403 requirements.

That completes the staff's briefing, Madam Chair.

BZA CHAIR MOLDENHAUER: So first of all the question of, you know, do we accept Exhibit 35 into the record, and I think that while we were requesting specific information about the pop-up, I -- and this individual who submitted this, Bonnie Holod, they did not attend the hearing. I think that, you know, this information is new information that we had not previously received, so it is something that I think, you know, the Board should consider and take a look at. And it does specifically relate to that information which we left the record open for in regards to the pop-up and how potentially the third floor would potentially affect both the streetscape and the rear property owners on the other side of the alley.

So that being said, we'll now jump

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into deliberation on this case. And this is a request to add a third story and to renovate the garage and property located on A Street.

We have a letter from OP under 223 special exception relief indicating that they recommend approval of the application for the lot occupancy and the rear yard. And the main issue here that came up I think during the hearing was, one, testimony from a neighboring property on Ames Street in regards to the impact under the light and air that might be affected by their property by the addition. And then also the question of whether or not the addition or structure would be viewed from the street and whether that would substantially visually intrude upon the character, scale or pattern of houses along the subject streetscape. And I think that those were the two main issues and elements that the Board was inquiring about during the hearing and then were addressed in the additional submissions.

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That being said, the applicant, in its additional submissions, did provide, our Exhibits 34 and 36, a revised plan showing that they are now going to set back the third floor from the initial property line and from the brick frontage on A Street to hopefully reduce the visibility from A Street. Considering that this is looking at the streetscape on A, on that side of the street it's the only house -- currently all houses currently are only two stories. There's no third -- three-story houses on that street. So this would be the first potentially pop-up or third story on that street creating a very obvious potential distraction or change in the streetscape.

The applicant did present submissions in regards to the property across the street, which is the Car Barn Condominiums, which were -- let's see here. They were built -- what did they indicate? Yes, in 1986 and then converted into condos in

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'04. But those were built as three-story structures on the other side of the street. And the applicant presents that as an argument as to, you know, why this would not significantly change the streetscape.

Additionally, they indicate that -- I think that, Ms. Sorg, you asked this question as to potentially how many properties on A Street, on that side, the north side of A Street would potentially be able to as a matter of right build an additional third floor. And the applicant submits that based on their calculation of the 16 homes, 9 of them would be able to construct a third floor as a matter of right.

While I appreciate those elements, I do think that, you know, this applicant is not doing this as a matter of right. They indicate if they wanted to take down the garage, they could then, you know, build it. If they wanted to do that, obviously that would be their choice and they wouldn't have

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to come to the Board and have the Board, you know, assess the property in regards to the standards. But I think that since they are, I personally don't view the likelihood of other properties being able to do that as a matter of right relevant, because right now we're not basing it on potentially what could happen. We're basing it on what is there today. And this is the -- there's no other third-story houses on that street.

The next question then is in regards to the submission by Ames -- you know, the property on Ames Street. Is the addition going to potentially create any impact on the light and air of the properties on the other side of the alley? And we do have a sun study that was presented. And I think that, you know, it shows that there would be, you know, an impact, but I don't know in my view whether it shows that there would be a substantial impact.

In addition to that, the

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submissions don't show a change in regards to having the property be -- from a two-story building to a three-story building, so I think that that is a challenge in regards to assessing those diagrams. I do think that they show that there would be an impact. I don't think that that's a question. The question is is it a substantial impact? And, you know, they're indicating that obviously there would be an impact during some of the winter months, during about three of the winter months, but the question is is that substantial?

That being said, I'm still fighting with whether or not the property would satisfy the standard in regards to impacting the streetscape. I'm on the fence I think in regards to the 223 standard. We do have support from ANC 6A in our record which would receive great weight. And we do have -- I think that's everything.

That being said, I will open up the

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floor to additional deliberations from Board members.

VICE CHAIR SORG: Thank you, Madam Chair. I think I agree for the most part with your analysis. And while you seem perhaps to be teetering on the fence with regard to your judgment in this case, I think I'm, based on the applicant's subsequent submissions, over the fence. And I think that, you know, as indicated, and as you indicated, in the OP report the applicant does meet the test for the 223.

Most of our discussion in this case and in your analysis, as you just mentioned, goes toward, you know, the second and third prongs and about whether the first owner on this block, specifically on this side of the street, to construct a third-story addition would constitute an intrusion upon the character of the neighborhood. And I only would voice a slight difference in opinion with regard to the fact that several of the

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other neighbors could construct this as a matter of right.

Certainly I agree with you that we look at each of these applications as to what is being requested here. This is of course not a matter of right. That's why they're here. But in terms of impacting the character, I, in my personal view, want to exercise caution in terms of being fearful of a first project.

I think there are a lot of regulations in our, you know, 11 DCMR that do go towards potentials of future development, of course. And here in this case I don't find that personally it's that -- the fact that this is the first of these owners, many of who could complete a very similar project in terms of massing and scale, I don't find that compelling in terms of the third prong. And I think in that sense I agree with Office of Planning.

And of course with regard to the

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second prong, I would, you know, note of course in this case that now the setback is moved back nine feet and only rises above the cornice line seven feet. I don't think that that -- being the case of its physical massing that it is a cause for concern.

So I would -- just wanted to note that and would be in support of the application.

BZA CHAIR MOLDENHAUER: Thank you, Ms. Sorg.

Is there any additional deliberation from Board members?

COMMISSIONER MAY: Yes, I would agree with my colleagues. This is one that I was on the fence until the submissions, and having, you know -- with the character of that side of the street. However, if you look across the street, there are already three stories. And I think the setback helped out dramatically for me.

I was not convinced that the shadow

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studies was presenting anything that showed me major or great harm that would be necessary for me to change my mind regarding that. And then I think what also took me over the top was the fact that the others as a matter of right could do this without coming before us.

So I would be in support.

BZA CHAIR MOLDENHAUER: Any final deliberation?

(No audible response.)

BZA CHAIR MOLDENHAUER: Is there a motion?

MEMBER JORDAN: Madam Chair, I would move that application 18290, pursuant to 11 DCMR ' 3104.1 for a special exception to allow for additions to an existing one-family row dwelling under section 223, not meeting a lot occupancy requirement of section 403 requirement in the R-4 District at this premises, be approved.

BZA CHAIR MOLDENHAUER: A motion has been made. Is there a second?

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VICE CHAIR SORG: Second.

BZA CHAIR MOLDENHAUER: A motion's been made and seconded. All those in favor, say aye? Aye.

VICE CHAIR SORG: Aye.

MEMBER JORDAN: Aye.

ZC CHAIR HOOD: Aye.

BZA CHAIR MOLDENHAUER: Mr. Moy, do we have any absentee ballots?

MR. MOY: No, we do not, which is not required in this case, Madam Chair, because one of the Board members is not participating on this application and so therefore not voting.

So that would give a final vote of 4 to 0 to 1. This is on the motion of Mr. Jordan to approve the application for special exception relief under section 223. Seconding the motion, Ms. Sorg. Also in support of the motion, Chairperson Moldenhauer and Mr. Hood. And one Board member not participating. So again, the final vote is 4 to 0 to 1. The

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motion carries to approve the application.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy.

So onto the next case for the morning.

MR. MOY: The next application for Board action is application No. 18272 of Keener-Squire Properties, on behalf of the First Baptist Church of the City of Washington. This is pursuant to 11 DCMR ' 3103.2 and ' 3104.1 for a special exception for roof structures of unequal height pursuant to section 411.

The application was amended by the applicant to withdraw variance relief from the location of compact parking spaces under subsection 2115.4. And also in the caption it reads for requesting relief height provisions under section 530 to allow the development of an apartment house as an addition to an existing church building in the DC/SP-1 and DC/SP-2 Districts at premises 1328 16th

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Street, Northwest. Property is located in Square 181, Lot 163.

As the Board will recall, again on November 15th, 2011 the Board completed public testimony and closed the record and scheduled its decision on January the 10th. The Board requested additional information to supplement the record from the applicant and the party opposition by December 2nd, 2011.

Those filings are in your case folders, Madam Chair, from the applicant identified as Exhibit 43. And the party opposition's filing also is identified -- or rather is identified as Exhibit 44.

Responses were allowed in the record and there are two filings to that effect. The party opposition's response is identified as Exhibit 46 and the applicant's response filing identified as Exhibit 45.

The Board is to act on the merits of the request for special exception relief from section 411 and variance relief from

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section 530.

That completes the staff's briefing, Madam Chair.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy. And as indicated, we do have, you know, some additional submissions from the applicant and from the party opponent, the Richmond Group. And we -- all Board members have reviewed those and, you know, we have reviewed the sun study provided by the Richmond Group and also then the submissions by the applicant in regards to identifying some of their argument in regard to the inconsistencies in the sun study and the statements by -- or the submissions by Rand in regards to the construction totals and the maintenance costs and deferred maintenance and life cycle studies in regards to costs for the maintenance of the church.

That being said, before I get started jumping into the merits of the case, I just want to address one of the standards that

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we have before us. In addition to the relief there were some comments and some discussion during the hearing and in the submissions as to whether or not the overlay, the Dupont Circle Overlay and the purpose of the overlay applies in this case; and if so, how it applies.

During the hearing I did identify that we had a submission, or that we had a recent case that, you know, we had been on, that I had been on which was the N Street Follies case, which had addressed that. And since then the Board members, including myself, have I think reviewed the order in that case. And that case, in my opinion, was very clear that the overlay and the purpose of the overlay does apply and that it should be reviewed and analyzed as part of the relief that is being sought here.

That being said -- sorry, I'm just trying to make sure I take a look at everything. That being said, I still, in

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reviewing this case, see that the -- in my opinion that the applicant satisfies the standard and does not have any issue in regards to substantial non-compliance with the overlay purpose or -- and does satisfy the variance standards and the special exception standards that it's seeking in this case.

In my analysis, in order to determine that there is no substantial incompletion with the overlay, the overlay does desire to preserve open spaces. And I think that the opposing party does make a very strong point that the PUD application for the Richmond Condominium was specifically created for the purpose of creating that open space, and I think that that open space is protected by the overlay. But then the question comes as to the degree of shadow that is potentially cast by this potential building, or this building project. How does that impact it?

And in reviewing the submissions presented by the applicant, Exhibit 43, page

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-- of course I've got it tabbed here, but there's no page number. It's the shadow study March 21st and on September 21st, the equinox.

I was looking at the area in which it overlays a shadow during that brief period of time and its affect is, you know, approximately maybe, you know, one-fourth of the year or one-fourth of -- 22 percent of the entire area. And to me, you know, that is not something that is substantial enough to create an issue in regards to creating a non-compliance with the intent of the overlay district, nor affecting the standard of the special exception relief.

That being said, the question of whether or not the applicant overall satisfies the variance standard, this is a church and the question is, you know, does the church deserve the review of a reduced standard for the first prong of a variance test for applying the non-for-profit analysis in regards to having the exceptional circumstance

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of the property go towards the programmatic needs of the church?

And I think that here we have received sufficient testimony, in my view, that the needs of the church are intertwined, the programmatic needs are intertwined with the need to provide the basement space or the lower-level space for their programs, for the, you know, child care, for the different aspects of the church's -- their mission. And while it -- in regards to the inability to construct a building that would potentially demo that portion of the property and thus, you know, taking away those services from the church and from the church's mission, I think does go to that first prong.

And then there was a question as to whether or not -- since this is a for-profit development that then goes to the long-term maintenance needs of the church, I do think that that does relate to the mission of the church in the regards to the overall need of

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the building.

And there -- on a side note, there were some testimony in regards to the historic aspect of the church and the fact that this property had been assembled over a long period of time and is now one lot. I don't think that -- while history is always interesting, I don't think that it's specifically applicable in regards to our analysis here. I think that the issue simply is that currently we're looking at a property that is one lot and that the building -- that there is one building on the property that is connected.

We had a case this morning which we were talking about, you know, connections and meaningful connections, and I do think that this property does satisfy that precedent that we have upheld in regards to the connection. And so, I think that this property does warrant the review in regards to the aspect of some of -- as one of the confluence of factors the historic aspect of the original church

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building which has been obviously added onto over the years.

That being said, I think that the applicant does satisfy the standards. As identified earlier; I think I identified earlier, Office of Planning does review the analysis for both the variance standard and special exception relief and does recommend approval.

In our Exhibit 29 we have a letter of unanimous support from the ANC, ANC 2B, in this case. And while we do have strong opposition from the Richmond and I do, you know, recognize the impact, I don't find it to be a substantial impact or an impact that would create a non-compliance with the purpose or integrity of the Zone Plan.

That being said, I'll open up the floor to deliberations from other Board members.

COMMISSIONER MAY: Thank you, Madam Chairman. I would tend to agree with

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everything that you've said there. You know, my thoughts on this are that this -- you know, what's being proposed here is a -- I think a very reasonable response to the constraints of the property. And in fact, what they have proposed I think in the long run is more beneficial to the neighboring properties. I mean, a 90-foot tall building, 160 feet wide versus a 90-foot by 40-foot section and a 70-foot by 200-foot section I think actually would be -- have a worse impact on the adjacent properties, or the property across the street to the north.

You know, the shadow analysis or studies that were done show that it really is at best a toss up between the different development scenarios. I don't see an extraordinary additional impact that results from this building.

I think this is a fairly straightforward case of pushing the density of the building to the west to ensure that the

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church is preserved, but not just the church.

I mean, the church is a low-rise building and a low-rise addition to it, and I think that those are actually, as I said, beneficial to the neighbors to the north.

I would also cite that the enthusiasm of the ANC for the project is a significant factor and I think that overall what's being requested is fairly modest considering what could be done as a matter of right. So I would support it.

VICE CHAIR SORG: Thank you. I would just quickly note that I agree with both of my colleagues and would echo Mr. May's contention that -- and I agree that this is a pretty sensible solution and reasonable in terms of its massing and scale with regard to the context.

One of the discussions that you brought up, Madam Chair, was the reduced bar on the first prong of the variance test for these types of applicants that include

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churches, and I think there was a suggestion of a suggestion of a possible slippery slope with regard to these types of tie ups. And I think from my view I would note that the facts in this case and the evidence shown that goes toward each prong of the variance test is very specific with regard to the historic nature, the, you know, constraints of the property and so on and so forth. So to note that this is a very specific confluence of factors that I don't think is necessarily applicable obviously to any other potential similar tie up would be just what I would want to add. Thank you.

Thank you. Any other deliberation?

Let me just actually -- I was just jumping through my notes and I want to bring up one other last point.

That being said, I think we just wanted to make sure that we're clear on this issue. Obviously after Monaco/Draud provided some additional specificity in regards to the

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conditions and the additional flexibility -- and the case actually says the need to expand is not however automatically exempt to a public service organization from all zoning requirements where a public service organization applies for an area variance in accordance with Monaco. It must show (1) that the specific design it wants to build constitutes an institutional necessity not merely the most desired various options; and (2) precisely how the needed design feature requires the specific variance sought.

And I think in that regard I think that we did have testimony in regards to the applicant along with Mr. Squire in regards -- and both in the additional submissions that this is not just a more desirable, but rather is a necessity and that, you know, the project would not occur if not for these needed relief that are being sought. In addition to that, I think that they did explain how it specifically tied to the variances that were

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being applied for.

That being said, I was going to jump to another issue that I just wanted to bring up. During the testimony we did hear concerns in regards to the impact on use and enjoyment of the property in regards to and the impact on the public good based on the increased height of the property and the roof deck that was being provided. And we heard testimony from Mr. Squire in which he did provide confirmation that they do have a lot of other buildings where they provide 24-hour maintenance to the building and they will lock the roof top deck at certain hours.

And so I would throw out a discussion to the Board as to whether or not we would want to potentially condition this potential approval. Based on the discussion that Board members are having, it seems like we're all on the same page there to requiring that the applicant take those necessary measures to ensure that there is no impact on

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neighboring properties.

Do any Board members have any comments on that last issue?

MS. GLAZER: Madam Chair, I hate to interrupt, but I believe the applicant proffered a proposed condition about curfews.

BZA CHAIR MOLDENHAUER: They did. That's why I was identifying it now.

VICE CHAIR SORG: Madam Chair, I agree. I think I was going to mention the same thing, that I recall in the hearing and in their submissions the applicant did proffer I think a 10:00 p.m. and 11:00 p.m. close. So I think if -- a condition would be fine.

BZA CHAIR MOLDENHAUER: Okay. Then that being said, I'll submit a motion, a motion to approve application 18272, pursuant to 11 DCMR ' 3103.2 and ' 3104.1 for a special exception for a roof structure of uneven -- unequal height pursuant to section 411, and for a variance on the location of compact parking spaces under subsection 2115.4, and

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the height provision under section 530 to allow the development of an apartment house on an addition to an existing church building in -- at premises 1328 16th Street, Northwest, with the condition that the rooftop would be closed at 10:00 during the week and 11:00 on the weekends and locked by 24-hour maintenance of the building.

That being the motion, is there a second?

VICE CHAIR SORG: Second.

BZA CHAIR MOLDENHAUER: Motion's been made and seconded. All those in favor, say aye? Aye.

VICE CHAIR SORG: Aye.

MEMBER JORDAN: Aye.

COMMISSIONER MAY: Aye.

MR. MOY: Before giving the final vote, Madam Chair, again we have an absentee ballot from Jeff Hinkle who participated on this application, and his absentee ballot vote is to approve with such conditions as the

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Board may impose.

So that would give a final vote of 5 to 0 to 0, this on the motion of Chairperson Moldenhauer to approve the application for the special exception and variance relief, as well as the two conditions. Seconding the motion, Ms. Sorg. Also in support of the motion, Mr. May and Mr. Jordan. And of course Mr. Hinkle.

So again, the final vote is 5 to 0 to 0. The motion carries.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy.

MR. MOY: The next application before the Board for action is application No. 18197 of 1211 - 10th Street, LLC, pursuant to 11 DCMR ' 3103.2 for a variance from the lot occupancy requirements.

Well, let's say that this -- let me restate that, Madam Chair. The applicant -- this is an amended application which reduced the number of units of three dwelling units

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from four -- originally four units which resulted in withdrawing relief from sections 403 and 406 and adding variance relief from section 401.3, minimum lot area, and section 405.8, side yard requirements. And this is to permit a rear addition to and conversion of a one-family dwelling in a now-three-unit apartment house in the R-4 District at premises 1211 10th Street, Northwest. Property located Square 368, Lot 82.

On November 28th, 2011 the Board completed public testimony and closed the record and scheduled its decision on January the 10th. However, there is a filing from the applicant in your case folders, Madam Chair dated December 30th, 2011, identified as Exhibit 45. This is a potential preliminary matters since the record was closed, but staff will leave this to the Board for decision.

With that, the Board is to act on the merits of the amended variance relief from sections 401.3 and section 405.8.

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And that completes the staff's briefing, Madam Chair.

COMMISSIONER MAY: Okay. As a preliminary matter, the record was closed, so we're not going to accept any additional submissions in that regard. I think that the hearing was full in that case.

So we'll then continue onto the merits of the case, and I will turn to Vice Chairman Sorg to start us off.

VICE CHAIR SORG: Thank you, Madam Chair. Just quickly to summarize some of the facts in this case, as noted in the introduction, it was an amended case. The applicant was originally requesting variance relief to renovate a historic structure, which is located near Blagden Alley, into four units. The application was since amended to three units, which of course affected the relief that was required.

And now, as mentioned, they are asking for two areas of variance relief, one

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for minimum lot restrictions in the R-4 Zone which required 900 square feet per unit. And here they're asking for under 800, about 770 square feet for the three units that are proposed. Additionally, variance relief from 405.8, decreasing the non-conforming side yard. In this zone, row houses would be allowed as a matter of right in a new construction, but here this is a change to a non-conforming structure. The side yard relief would be required.

I think when we first heard this case, the filings, in my opinion, were a bit thin and the applicant subsequently not only amended the application but also submitted what I believe are some useful and some less than useful new information.

One thing to note also, that in our previous hearing I believe we did not have -- had not received a letter from the ANC. We have now received that letter from ANC 2F from I believe July 27th, which is in support of

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the application.

Office of Planning in their report had recommended denial on the initial application and the -- in my opinion, the additional submissions by the applicant from the architect noting the complicated requirements and suggestions that would be imposed by the historic status, which were in discussion in the testimony as well, in addition to the topography of the lot, its sloping nature, as well as the poor condition of the structure -- I think that the opinion submitted by the architect, as well as the revised plans, are helpful in this case. I find a little bit less helpful the additional imagery. I think in the hearing one of the things that Mr. May specifically requested was sort of a little wider views. I don't believe that's something that we have received.

Nonetheless, based on what we have in our filing at this point, I believe that through the confluence of factors that I

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mentioned that the application, to my opinion, does sort of squeak over the variance test here with regard to the uniqueness that goes towards impractical difficulty and overcomes the concerns that are raised in the original Office of Planning report.

I think that based on the zone that we're in, it's, in my opinion, fairly easy to see the second and third prongs, that there would not be; and I think OP agrees with this in their original report as well, any substantial detriment to the public good as a result of this project, nor would there be any substantial harm to the Zone Plan.

That being said, I can at this point be in support of the application. Thank you, Madam Chair.

BZA CHAIR MOLDENHAUER: Thank you, Ms. Sorg.

Is there any additional deliberation from Board members?

COMMISSIONER MAY: Thank you, Madam

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Chairman. I would note first that although I was not here at the last hearing I have received all the materials and read the transcript of that meeting, so I'm fully prepared to participate in the decision making.

I am also a bit disappointed that we didn't see some additional photography that showed more of the context. I saw the explanation for why it wasn't provided. I didn't think that was particularly compelling, but I have basically reached the same conclusion as Board Member Sorg in that the -- you know, the series of conditions that we're dealing with here are sufficient from my perspective. Well, I will speak only from my opinion of this.

The historic preservation concerns here of trying to retain this frame structure is a significant challenge for anyone who would redevelop the property. The fact that it's landlocked, which ordinarily I'm not

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terrifically sympathetic about -- but I think that does add another complication when you're trying to preserve the façade, and the existing condition of the building, which is clearly in very, very bad shape, although it's -- again, it would have been good to have some better photography to describe that. And then also the context of other buildings in the immediate vicinity give me some comfort that allowing this to be a three-unit building instead of flats is not specifically harmful to the Zone Plan.

You know, I fully appreciate OP being vigilant in protecting R-4 Zones and the primarily single-family nature of R-4 Zones, but the allowance to convert an existing property to apartments when there is sufficient land area on the property I think is also there for a reason. And I've participated in several cases in the past where an exception or a variance from that requirement has been requested; and frankly

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I've been quite stingy about that, and I think that for the most part those cases are not well made.

In this circumstance I think there is the accumulation of factors. The historic preservation issues, the landlocked nature, the condition of the building and the context all add up to me to a sufficient basis for granting relief to that despite the Office of Planning's objections, so I fully support the application as it has now been modified.

I would also comment that this is one project that has gone through huge changes in the time that we've been looking at it and I really appreciate how it has improved, because it really has improved, and I hope it will be a viable project and will be completed.

BZA CHAIR MOLDENHAUER: Thank you.

Any final deliberation?

MEMBER JORDAN: Madam Chair, I would agree with all the analysis. I do

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believe that this project meets the area variance test due to its uniqueness and difficulties. One, the historic preservation nature of the building and the slope, and combined with the fact that the lot next door is kind of -- I'm not saying absentee owner, but there's no one involved. And there was an attempt to reach out to the owner to use that property to better enhance this particular property, and that this property has been long vacant and kind of neglected, and it doesn't to me change the character of the neighborhood or the street and particularly protects the zoning requirement there.

BZA CHAIR MOLDENHAUER: Thank you.

And thank you everyone for the analysis. I think that I agree with everyone's thoughts. And I'll see if there's any motion.

VICE CHAIR SORG: Thank you, Madam Chair. I'll submit a motion to approve application No. 18197 for 1211 - 10th Street, LLC for variance relief from section 401.3 for

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minimum lot area required, from section 405.8 for decreasing of non-conforming side yard, and from section 2001.3 for expansion of a non-conforming structure for the conversion into a three-unit apartment house in R-4 at 1211 10th Street, Northwest.

COMMISSIONER MAY: Second.

BZA CHAIR MOLDENHAUER: Motion's been made and seconded. Is there any additional deliberation?

(No audible response.)

BZA CHAIR MOLDENHAUER: I'm sorry, the motion's been made and seconded. We'll call for -- all those in favor, say aye? Aye.

VICE CHAIR SORG: Aye.

MEMBER JORDAN: Aye.

COMMISSIONER MAY: Aye.

MR. MOY: Madam Chair, before I call the final vote, we again have an absentee ballot vote from Jeffery Hinkle who also participated on this application, and his absentee ballot vote is to deny the

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application. In his comments; and I suppose I should read into the record, is that "there is sufficient -- insufficient documentation related to the expense, effort, and risk to prove necessary for three units and associated relief from 401.3 support relief from 405.8."

With that, then the vote would be 4 to 1 to 0, this on the motion of Vice Chairperson Sorg to approve the application for the two variance relief requested. Seconding the motion, I believe Mr. May. Also in support of the motion, Ms. Moldenhauer and Mr. Jordan.

So again, the final vote is 4 to 1 to 0 to approve, and the motion carries.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy. And seeing that we have no opposition in this case, we like to waive our requirements and ask that a summary order be issued.

MR. MOY: Very good. Thank you, Madam Chairperson.

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The next application before the Board for action, this is an applicant's request for a minor modification to condition No. 1 of BZA Order No. 18147. This is of Eun Sun Kim, pursuant to Section 3129 of the Zoning Regulations.

For the record, the original application was approved on December 14th, 2010, and that application was pursuant to 11 DCMR ' 3104.1 for a special exception to allow a fast food establishment under section 733 in the C-2-A District at premises 1100 Eastern Avenue, Northeast. Property located in Square 5200, Lot 805.

The applicant filed his request to modify Condition No. 1 on November 22nd, 2011, and that document is identified in your case folders as Exhibit 33. Subsequently, the Office of Planning filed its report dated January 3rd, 2012, and that document is identified as Exhibit 35.

There are other filings in the

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record, Madam Chair, that is opposed to the request for modification of Condition No. 1. And for the record, we do have a letter from Council Member Alexander, Exhibit No. 37, and a resident of the Deanwood Community, Sherry Lawson, Exhibit No. 36.

With that, essentially then the Board is to act on its jurisdiction on the matter and if the Board deems that it has the authority, then it should deliberate on the criteria pursuant to section 3129.

That completes the staff's briefing, Madam Chair.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy.

And as you indicated, we have multiple letters of opposition in this case from council members, from ANCs, and we also have a letter of recommendation not to accept this application as the fact that the BZA does not have jurisdiction from Office of Planning.

Office of Planning does address I think some

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very significant issues in regards to the lack of jurisdiction: (1) that the liquor sales are permitted as a matter of right within the zone; (2) that there's a separate address that would provide for the liquor store rather than the application that was initially submitted under 1100 Eastern Avenue, that this is actually a completely different address, which is actually 1102 Eastern Avenue; and that the area for the special exception use is a fast food, which is completely different than the liquor sales.

That being said, if the -- I'm right now inclined to just completely deny this application and dismiss it for lack of jurisdiction. However, since the submissions that we have in the record from the applicant don't -- they are potentially misleading in regards that they say that the address is 1100 Eastern Avenue, even though OP and the ZA indicate that that is not the case, what I'm inclined to do out of an abundance of caution

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is to leave the record open, allow the applicant to submit any additional documentation to potentially clarify these issues either -- and coordinate with OP and to provide that in our record, if OP is inaccurate or it's not the case that this is a completely different address, and then take it up next month for a decision.

However, you know, I obviously have all the faith in OP and the ZA and believe that most likely next month we probably will deny this case for lack of jurisdiction, but as I said, out of an abundance of caution my recommendation to the Board would be to leave the record open and see if the applicant wishes to submit anything additional.

VICE CHAIR SORG: I agree, Madam Chair.

BZA CHAIR MOLDENHAUER: That being said, and it seems like everyone's agreeing; I see nod of heads, and we will then continue this case to a February decision.

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MR. MOY: Okay. That date, Madam Chair, would be February the 7th.

BZA CHAIR MOLDENHAUER: Okay.
Thank you.

MR. MOY: The next and final application for Board action is a motion for a second, two-year time extension of Order Nos. 17696 and 17696-A of Hines VAFII 2100 M Street, LP, pursuant to Section 3130 of the Zoning Regulations.

For the record, the first extension request was approved on December 8th, 2009. The original underlying application was approved on December 18th, 2007.

With that, the staff's final reading is that, as the Board will recall, on December 6th, 2011 the Board deliberated and rescheduled its decision on January 10th. The Board requested supplemental documentation to validate the applicant's good cause with substantial evidence pursuant to Section 3130.6(c)(1) through (3) by January 5th, 2012.

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That filing from the applicant, Madam Chair, is in your case folders, identified as Exhibit 40. The Board is to act on the merits of the request to extend the validity of Orders 17696-A and 17696 pursuant to Section 3130.

And that concludes the staff's briefing, Madam Chair.

BZA CHAIR MOLDENHAUER: Okay. Before the Board now is a request for a second two-year extension, and the applicant -- last time we extended the hearing to today's hearing requesting the applicant submit some additional information showing that the applicant had taken efforts not just in the prior year during the two-year extension, but from the second -- for the first extension through 2011.

And the applicant did supplement the record and provide an additional submission indicating a letter from the applicant stating their efforts, the

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challenges with the financing and their continued efforts to try to obtain tenants, which are required by financing over the last, you know, year-and-a-half, two years since the prior extension was granted.

That being said, I have great reservation in providing secondary extensions.

I think that the regs were put in place for a reason. However, I do recognize the very unique situation which I don't think, you know, the Zoning Commission had probably an idea of -- no one had an idea of in regards to the potential financial crisis that the U.S. and actually the world would come in contact with, you know, after that reg was put into place creating some of these unique situations.

That being said, the question is, just in general, I think a matter of, you know, creating a precedent for potentially granting these second extensions, and that's what gives me, I think, great pause.

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And so I'll open up the floor to additional deliberation of Board members.

MEMBER JORDAN: Madam Chair, I would -- I'm concerned about 3130.6 and I don't know if we have authority to do that. I think it's very clear and specific. It says one extension. And I don't think we have the same -- I question whether or not we have the same discretion and leeway as we have with other regulations that points to our discretion for changing it. So I don't know if we received an opinion about it, but I have a real concern about us being able to grant an additional extension.

VICE CHAIR SORG: Madam Chair, I don't know if you want to look for opinion from OAG or not, but I think that we've spoken about this, you know, and in general we have the right to waive our rules, and I do believe that waiving the one-time extensions as stipulated in 3130.6 is under our discretion.

And in this case I think I understand that we

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want to be careful obviously in waiving those rules, but I do think that something that the Chair touched on, you know, really is the economic reality that we find ourselves in. These regs were written before, you know, the largest recession from, you know, 1929.

And I think that while I would certainly not advocate giving carte blanche to this type of action, you know, in the first hearing we urged the applicant to give us, you know, more information on two of the points in the deposition that was submitted, and I think that the applicant fully addressed the questions that we had.

And I think that in addition to that, the applicant is indicating that should they be able to find, you know, one of the large tenants such as those that they indicate in their post-hearing submission, they would move forward without delay. I mean, certainly that's just in an application.

On the other hand, given the

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economic realities in the city, in addition to what I think is good cause shown, I wouldn't want to hamper the swift ability for a project like this, which is fairly large scale, in our downtown area to move forward quickly. So I would be in favor of granting this request.

BZA CHAIR MOLDENHAUER: That being said, I just want to turn it over to OAG and see if they have any comment in regards to Mr. Jordan's question.

MS. GLAZER: Madam Chair, I'm going to refer the Board to the section on waivers, which is 3100.5, and that provision says that the Board may for good cause shown waive any of the provisions of this chapter except it excepts out some provisions; 3100 through 3105, 3121.5 and 3125.4.

That being said, 3130 is not one of the provisions that's excepted. Therefore, I would conclude that the Board does have the authority to waive the provision -- to waive the requirements of Section 3130, provided the

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applicant makes a showing of good cause.

BZA CHAIR MOLDENHAUER: Well, I mean, I think the question is -- yes, the question is obviously we've all expressed some concern. I do think that -- thank you, OAG, for -- Ms. Glazer, for providing the additional confirmation.

I do think we have the authority. The question is, you know, do we want to exercise that authority? And do we find that there are, you know, exceptional circumstances and good cause shown here to create, you know, this flexibility in granting this waiver? And, you know, I do think that obviously the -- as Ms. Sorg pointed out, we've gone through an extremely, you know, horrible financial crisis and recession and which has hit I think the real estate market and construction in a very unique and very harsh way.

However, I do think that, you know, there are signs that the economy is coming back and the question is, you know, is it

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something where we want to grant a -- and maybe -- in my opinion, maybe this is an opinion where we split the baby, and instead of granting a full two-year extension, we grant a one-year extension.

I think the reason why we, you know, encourage -- one of the reasons why potentially -- and I'm just thinking out loud here, why there's this two-year extension is because (1) you know, conditions change, factors change in regards to the conditions that we consider; and (2) it's also to encourage new development rather than having things, you know, lag -- you know, potentially, you know, getting approval and then having someone just wait and to sit back and hold onto that. And I think that that might be able to be addressed by providing a one-year extension.

I think that they've obviously made progress. They're talking with different tenants. And I think that that might be a way

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to make an accommodation, but also not provide an open flow gate for the future.

MEMBER JORDAN: Well, I think if -- and I can live with the interpretation by OAG, and hearing what the argument is that the economic conditions are the basis of this relief, then I think we're still covered if you grant the full relief. Because within that period of time it just gives them an option. Otherwise, we might see them back again. I think that the conditions are changing. And so, if we just do one year, they may be back here again and then we're going to be faced with the dilemma. So if we're going to do it, then we probably should just go ahead and do the two.

VICE CHAIR SORG: Madam Chair, I'm inclined to agree with Mr. Jordan. First of all, I'm excited to hear that you both think the economy is improving. I think are indications both ways that continue.

But to the point, I think I agree

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with Mr. Jordan that, you know, BZA orders are in effect for two years. We're talking about waiving a rule that says that we can extend it for one time period. And I think that (A) with regard to the regulations, it's in my mind just a little bit cleaner; (2) if we're going to grant a second extension, to do so for two years.

In addition, I think, you know, based on sort of general knowledge of development and construction and timelines and so forth, I agree with Mr. Jordan that it's not unlikely that even if the applicant were to land a tenant like this, it still might take more than a year to get into a permit. So, and I agree that we don't want to be faced so quickly with the types of potential requests that might come afterwards.

BZA CHAIR MOLDENHAUER: Well, I think then we're all -- you know, I think that we're all on the same page in regards to the fact that this is an application which has

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shown a very unique situation where they've specifically identified that the numerous methods in which they've gone about trying to find alternative financing and the inability to obtain alternative financing -- they've also shown over the last two years their extensive attempts to obtain tenants and the inability to obtain those and that impact, how that impacts their inability to finance the project going forward.

So that being said, I would submit a motion to approve a two-year extension pursuant to 3130 from December 8th, 2009.

VICE CHAIR SORG: Second.

BZA CHAIR MOLDENHAUER: Sorry. To approve a two-year extension from December 20th, 2011. That makes more sense. And I knew that there was something wrong there.

Motion has been made. Is there a second?

VICE CHAIR SORG: Second.

BZA CHAIR MOLDENHAUER: Motion's

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been made and seconded. All those in favor, say aye? Aye.

VICE CHAIR SORG: Aye.

MEMBER JORDAN: Aye.

MR. MOY: Before staff gives the final vote, Madam Chair, we have -- the Board is in receipt of two absentee ballots from two participants on the application.

The first is from Michael Turnbull and his absentee ballot vote is to approve the application. I'm going to read his comments for the record, Madam Chair, since he took the time to write it on his absentee ballot.

He says, "I believe that the latest documentation submitted demonstrates that the applicant is proceeding with due diligence on meeting pre-leasing conditions in what is a difficult economic market and should be granted an extension."

The second absentee ballot is from Jeffery Hinkle and he takes an opposing view where Mr. Hinkle votes to deny the request for

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a two-year time extension. And his comments reads, "Pursuant to 3130.6 the Board may only grant one extension. While good cause is shown in this case for a potential extension, the Board's granting of a second extension would set a bad precedent and not comply with the intent of the Zoning -- the Commission Action No. -- case No. 09-01 that limits the number of time extensions."

So with these two votes, Madam Chair, the final vote would be 4 to 1 to 0. This is on the motion of Chairperson Moldenhauer to approve the two-year time extension. Seconding the motion would be Vice Chair Sorg. Also in support of the motion, Mr. Jordan and of course Mr. Turnbull.

So again, the final vote is 4 to 1 to 0 to approve. The motion carries.

BZA CHAIR MOLDENHAUER: Thank you very much, Mr. Moy.

I believe that concludes our cases for this morning. And so, we will reconvene

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next week. Thank you.

(Whereupon, the meeting was
concluded at 11:24 a.m.)

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