

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA
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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

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TUESDAY
MARCH 13, 2012

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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 9:39 a.m., Meridith Moldenhauer,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MERIDITH MOLDENHAUER, Chairperson
NICOLE SORG, Vice-Chairperson
LLOYD JORDAN, Board Member
JEFFREY HINKLE, Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

ANTHONY HOOD, Chairperson
MICHAEL TURNBULL, Board Member (AOC)
MARCIE COHEN, Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

The transcript constitutes the
minutes from the Public Meeting held on March
13, 2012.

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9:39 a.m.

CHAIRPERSON MOLDENHAUER: This meeting will please come to order. Good morning, ladies and gentlemen. We are located at the Jerrily R. Kress Memorial Hearing Room located at 441 4th Street.

Today is March 13, 2012, public meeting of the Board of Zoning Adjustments for the District of Columbia. My name is Meridith Moldenhauer, Chairperson. Joining me today, to my left is Vice-Chairperson Nicole Sorg, mayoral appointee.

To my far left is Michael Turnbull, representative of the Zoning Commission. To my right is Lloyd Jordan, mayoral appointee. To my far right is Jeffrey Hinkle, representative of the National Capital Planning Commission.

Copies of today's hearing agenda are available to you and are located to my left in the wall bin near the door. We do not

1 take any public testimony at our meeting
2 unless the Board asked someone to come
3 forward.

4 Please be advised this proceeding
5 is being recorded by a court reporter and is
6 also being webcast live. Accordingly, I must
7 ask you to refrain from any disturbing noise
8 or actions in the hearing room.

9 Please turn off all beepers and
10 cell phones at this time.

11 Mr. Secretary, do we have any
12 preliminary matters?

13 MR. MOY: Madam Chair, there are a
14 few but staff would suggest that the Board
15 address those after the case is called.

16 CHAIRPERSON MOLDENHAUER: Okay.
17 Fantastic. Why don't we take up our first
18 case of the morning.

19 MR. MOY: Yes. The case for Board
20 action is the expedited review calendar. As
21 the Board is aware, expedited review calendar
22 items are zoning applications that consist of

1 -- applications where the Applicant weighs the
2 right to a public hearing and the applications
3 are subject to either Board approval or
4 removed from the calendar for rescheduling to
5 a future date. This is pursuant to Sections
6 3118.3, .6, and .7 of the Zoning Regulations.

7 That application, Madam Chair, on
8 the calendar is Application No. 18339 of
9 Joseph M. Jones, pursuant to 11 DCMR 3104.1,
10 for a special exception to allow a rear
11 addition to an existing one-family detached
12 dwelling under Section 223. This is not
13 meeting the side yard (Section 405)
14 requirements in the R-1-B District at premises
15 5826 Nevada Avenue, N.W., property located in
16 Square 1999, Lot 82.

17 The filing from the Applicant --
18 rather, the Applicant's affidavit of posting
19 is identified in your case folders as Exhibit
20 21. Also in the record are filings from the
21 Office of Planning and the ANC. The ANC-3G
22 report is filed under Exhibit 20. The OP

1 report is filed under Exhibit 23.

2 With that, Madam Chair, the Board
3 is to act on the merits of the expedited
4 review calendar pursuant to Section 3118
5 requirements consisting of this Application
6 18339 for special exception relief under
7 Section 223.

8 CHAIRPERSON MOLDENHAUER: Thank
9 you very much, Mr. Moy, for that summary.
10 We'll jump into deliberation. I'll just start
11 us off here. I think this is a very
12 straightforward 223 case which has been
13 prepared properly for expedited review.

14 We have Office of Planning support
15 and approval of the case. They walked through
16 the standards under 223 and identify how this
17 Applicant has satisfied those requirements.

18 We also, as indicated by Mr. Moy,
19 have an Exhibit 20 which is in our record
20 which receives great weight based on our
21 standard and indicates that the ANC-3G voted
22 seven to zero to support the application.

1 There was no objections.

2 We also have a lengthy submission,
3 Exhibit 22, from a number of neighbors
4 submitted by the Applicant in regard to his
5 neighbors recommending support of the
6 property. Based on all the above, I have
7 reviewed the application and I think that I
8 would be in support as well of this
9 application.

10 Do any other Board members have
11 any comments or questions regarding the 223 or
12 the expedited review of this case? Seeing
13 none, then I will submit a motion to approve
14 Application 18337 pursuant to 11 DCMR 3104.1
15 for special exception to allow a rear addition
16 to an existing one-family detached dwelling
17 under Section 223 not meeting the side yard
18 under 405 requirements in an R-1-B District at
19 premises 5826 Nevada Avenue, N.W. A motion
20 has been made. Is there a second?

21 VICE CHAIR SORG: Second.

22 CHAIRPERSON MOLDENHAUER: A motion

1 has been made and seconded. All those in
2 favor say aye.

3 BOARD MEMBERS: Aye.

4 MR. MOY: Staff would record the
5 vote as five to zero to zero, this on the
6 motion of Chairperson Moldenhauer. Seconding
7 the motion was Ms. Sorg. Also in support of
8 the motion is Mr. Turnbull, Mr. Lloyd, and Mr.
9 Hinkle. Mr. Jordan.

10 MEMBER JORDAN: That happens a
11 lot.

12 MR. MOY: Terribly sorry. Again,
13 the vote was five to zero to zero. The motion
14 carries.

15 CHAIRPERSON MOLDENHAUER: Thank
16 you very much, Mr. Moy.

17 Seeing on our expedited calendar
18 there is no opposition, we would like to waive
19 our requirements and ask that a summary order
20 be issued.

21 MR. MOY: Yes. Thank you, Madam
22 Chair.

1 The next item or case for action
2 is the Appeal No. 18256 of Advisory
3 Neighborhood Commission 1C. As the Board will
4 recall, the Appellant amended the application
5 on February 28, 2012 to appeal the termination
6 of the Zoning Administrator in a refusal to
7 take enforcement action as erroneous which
8 should be reversed with appropriate relief to
9 be granted by the Board.

10 This is pursuant to 11 DCMR 3100
11 and 3101 from a May 13, 2011 decision by the
12 Zoning Administrator, Department of Consumer
13 and Regulatory Affairs, to issue a certificate
14 of occupancy.

15 This was in the original
16 advertisement to issue a certificate of
17 occupancy No. C054337 allowing a fast food
18 establishment (Peking Garden Carry Out) and
19 food delivery in the C-2-A District at
20 premises 2008 18th Street, N.W., property
21 located in Square 2555, Lot 47.

22 On February 28, 2012 the Board

1 completed public testimony, closed the record,
2 and scheduled its decision for March 13th.

3 With that, I'll leave you, Madam Chair, and
4 the Board to act on the merits of the appeal.

5 MR. MOY: Thank you very much, Mr.
6 Moy. This case before us is a very unique
7 case. I think it's probably a case of first
8 impression for the Board. I think the issue
9 here, and I'll just kind of summarize where we
10 stand in regards to start to discussing this
11 case is that we have before us a motion to
12 dismiss.

13 I think that we have a preliminary
14 matter to discuss is whether or not we have
15 jurisdiction. The question of whether we have
16 jurisdiction lies, I think, very specifically
17 on the question of do we find that the
18 decision not to enforce -- there has been a
19 decision not to enforce made, or by an
20 inference of the facts in the record has a
21 decision to delay or the lack of response then
22 made a decision not to act which would then be

1 based on the Zoning Regulations which would
2 provide us jurisdiction.

3 I think this is a very delicate
4 question, especially in regard to the fact
5 that we give our agency in regards to the
6 Zoning Administrator great deference in regard
7 to his actions and his enforcements.

8 However, at the same time, I do
9 think there are times potentially when the
10 lack of action or a delay in action does rise
11 to a situation where that potentially then
12 becomes a denial. We've reviewed some cases.

13 I think CAG v. Washington in which
14 the D.C. Court of Appeals noted that an
15 unreasonable delay by the administrative
16 agency in performing a required function may
17 effectively constitute a denial of relief.

18 There are other cases also that
19 say that relief delayed is not always
20 equivalent to relief denied. I think the
21 question here is -- something we need to look
22 at is, one, is enforcement -- enforcement is

1 based on the Zoning Regulations a
2 discretionary duty.

3 If it's a discretionary duty, is
4 it thus a required duty which would give rise
5 to potentially determining that unreasonable
6 delay can then be deemed denial. This is, I
7 think, where the crux of our discussion can
8 lay unless other Board members want to kind of
9 jump into something else.

10 I think it's obviously a very
11 challenging situation. I don't know where in
12 my view I have some questions as to whether or
13 not the Appellant has proven that there were
14 no other factors that went into potentially
15 the delay provided here. Also we are talking
16 about a delay.

17 While significant, it's not beyond
18 a year. It's not two years. It's not
19 something where potentially it may shock the
20 conscience in regards to being unreasonable.
21 I think, you know, the current condition of
22 delay may be reasonable based on priorities,

1 enforcement.

2 Who knows, maybe budgetary
3 restraints or employee restraints. We did
4 hear in the testimony from the DCRA Council
5 that this investigation is pending. To me
6 there is still this question maybe there is
7 some action.

8 The Appellant did not obtain a
9 FOIA request to potentially investigate how
10 intense is that investigation, that coming
11 investigation, to maybe provide more evidence
12 that this is not due to other factors in which
13 the agency would have discretion, but rather
14 due to potentially maybe the determination by
15 the ZA that they did not deem this to be a
16 zoning violation and, thus, have not made it
17 a priority.

18 I think the leap that the
19 Appellant here is wanting us to make is that
20 the ZA did not act because they deemed this to
21 be potentially maybe compliant or maybe not as
22 egregious of a violation and, thus, it's a

1 denial. I don't see specifically any facts
2 here that can help me make that inference.

3 That being said, I think I've kind
4 of laid out a lot and thrown my opinion out
5 there. I'm going to open up the Board for
6 other discussion.

7 MEMBER JORDAN: Madam Chair, I
8 would agree with you on the latter part. I do
9 disagree in regards to the CAG case. I don't
10 think there was any holding in particular in
11 this jurisdiction regarding that question
12 about the delay. I wouldn't even call it a
13 dicta in the case. They discussed it as a
14 possibility.

15 There's a series of cases which in
16 other jurisdictions, particularly on the
17 federal level, which found that unreasonable
18 delay was enough for enforcement action, or
19 for mandamus, etc.

20 However, I agree with you. I
21 don't think we have enough in this record. If
22 you read through those cases, and if you

1 follow those particular holdings, as a
2 determination we have to find that the delay
3 is unreasonable.

4 I have not seen anything presented
5 to us that gave all the background of why
6 there -- of there is a delay, if it's still in
7 the process, or has it just been put on the
8 shelf and left alone. I think that is
9 incumbent upon the Appellant to actually give
10 us those facts, as you said, to make that
11 determination.

12 VICE CHAIR SORG: Thank you, Madam
13 Chair. I agree with you with regard to also
14 the latter portion. I also agree to some
15 extent with Mr. Jordan's points.

16 The only other thing that I would
17 note is to me it is also in this meaningful
18 that the Appellant in this case does under the
19 Zoning Regulations have another remedy that is
20 laid out and available to them. That, in
21 fact, may give a more full remedy to them
22 than, in fact, what they are seeking to do

1 here.

2 To me when the Zoning Regulations
3 does provide, for example, seeking to join
4 another party, if the Appellant views that
5 there's unlawful actions going on, that speaks
6 to our jurisdiction. But, at the same time,
7 I do agree with you, Madam Chair, that I don't
8 feel that a refusal to enforce would never
9 practically come before the Board. Thank you.

10 MEMBER JORDAN: I just want us to
11 be careful about us relying on, I think,
12 641.09 because it says in addition to other
13 remedies, other lawful means. I think if we
14 had found enough, I think we could have moved
15 there but it's in addition to.

16 The court action is not an
17 exclusive remedy so it would still be that.
18 In fact, if you read it, that can probably
19 happen at the same time if you read that
20 particular statute.

21 CHAIRPERSON MOLDENHAUER: No, and
22 I think, Ms. Sorg, I think that going to be

1 the confirmation of indicating that. We have
2 other options but this -- while in this case
3 does not rise to the level maybe to satisfy
4 the standards to seek, I think, a very high
5 level of relief such as us taking action in a
6 situation like this or finding that a delay
7 equates to denial or a decision under which we
8 would have jurisdiction.

9 I think there are circumstances in
10 which we could find that. I just don't think
11 unfortunately in this situation that we have
12 the facts and the evidence which would permit
13 us to make that inference which is required on
14 such a decision like this.

15 I'll see if there's any other
16 questions of Board members or comments of
17 Board members. Seeing none, at this point in
18 time I will submit a motion to grant the
19 motion to dismiss for lack of jurisdiction.

20 ZC MEMBER COHEN: I'll second that
21 motion.

22 CHAIRPERSON MOLDENHAUER: A motion

1 has been made and seconded. All those in
2 favor say aye.

3 BOARD MEMBERS: Aye.

4 MR. MOY: At this time we would
5 record the vote as five to zero to zero. This
6 is on the motion of Chairperson Moldenhauer to
7 grant the motion to dismiss for lack of
8 jurisdiction. Seconding the motion was Ms.
9 Cohen.

10 Staff understands that Mr. Jordan
11 has reviewed the record to participate so also
12 in support of the motion is Ms. Sorg, Mr.
13 Lloyd Jordan, and Mr. Hinkle. Again, the
14 final vote is five to zero to zero. The
15 motion carries.

16 CHAIRPERSON MOLDENHAUER: Thank
17 you very much, Mr. Moy.

18 ZC MEMBER COHEN: Madam Chair, I
19 would just like to before I step down from
20 this, I have nothing legally to add or I would
21 have done it before we voted, but it just
22 appears to me that unfortunately the Zoning

1 Administrator may not have the resources to
2 act quickly.

3 I think we need more transparency
4 in the process, at least from my point of view
5 as a resident of the District of Columbia, you
6 know, a taxpaying person. It just became a
7 very convoluted process. I think that there
8 is this outlet.

9 I'm not sure why the ANC did not
10 know or did not choose to follow their outlet
11 because I think that it was a long time before
12 they got any type of -- well, they didn't get
13 a response. There needs to be, I think, much
14 more of a transparent process so that this
15 does not happen again. That's all I wanted to
16 comment on. Thank you.

17 MEMBER JORDAN: Let me add to
18 that. At the same time, and I agree with
19 that, there are still other mechanisms when a
20 department or department employee is not
21 acting that it needs to be raised to the level
22 of the executive, the department director,

1 and/or to the mayor to get activity. I would
2 support what you're saying.

3 ZC MEMBER COHEN: And I appreciate
4 it because you have great experience in this
5 area so thank you for your comments, too.

6 MR. MOY: The next action before
7 the Board is to address the request for a
8 second to your time extension for Application
9 No. 17753-B of W Street Acquisition, LLC
10 pursuant to 11 DCMR 3104.1 and 3103.2 for a
11 variance from the lot area requirements of
12 Section 401.3; a variance from the lot
13 occupancy requirements of Section 403.2.

14 A variance from the rear yard
15 requirements of Section 404.1; variances from
16 the side yard requirements of Sections 405.3
17 and 405.9; a variance from the rear yard
18 requirements of Section 2516.5(b).

19 And a special exception under
20 Section 2516 which authorizes exceptions to
21 building lot control in residence districts to
22 permit the construction of a new residential

1 development in the R-4/R-3 District at
2 premises 1226-1252 W Street, S.E. (Square
3 5782, Lots 98, 99, 694, 810, 811, 812, and
4 1022.).

5 On January 20th of 2012 the
6 Applicant filed this request and that filing,
7 Madam Chair, is under Exhibit 47 in your case
8 folders. The Board should take up as a
9 preliminary matter as the Zoning Regulations
10 only allow for one extension pursuant to
11 Subsections 3130.6.

12 There is also a filing from the
13 Office of Planning report under Exhibit 48 in
14 your case folders. With that, Madam Chair,
15 there is, I believe no other filings in the
16 record.

17 The Board is to act on the merits
18 of the request for the second extension
19 attended to Subsection 3130 and specific
20 requirements as described in Subsection
21 3130.6, Sub (a) through (c). That completes
22 the staff's briefing, Madam Chair.

1 CHAIRPERSON MOLDENHAUER: Thank
2 you very much, Mr. Moy. We obviously have
3 before us a request for an extension, a two-
4 year extension. We have in our submission the
5 Office of Planning's report which outlines the
6 requirements under Subsection 3130.6
7 articulating the requirements for no
8 substantial change.

9 Most importantly, a due caution
10 for the extension based on substantial
11 evidence in the record. I think here our
12 Exhibit 47 the Applicant has submitted what my
13 opinion would satisfy the requirements for
14 substantial evidence.

15 They have provided exhibits which
16 include the affidavit from the Applicant and
17 specific representative from W Street
18 Acquisitions, LLC indicating the efforts they
19 have gone through in regards to updating their
20 soil surveys to working with different
21 contractors and architects and the different
22 banks in regards to construction loans and the

1 challenges they've had over the last six
2 months specifically trying to obtain financing
3 in that regard with the challenges of the
4 market and the challenges of the financing
5 institutions.

6 Based on that and the initial
7 submissions in the record, I think that the
8 Applicant has satisfied the standards for the
9 two-year extension. I'll see if there are any
10 additional comments or submissions that other
11 Board members would like to identify.

12 VICE CHAIR SORG: Madam Chair, I
13 agree with your analysis and I would support
14 a motion. I would only add also that I found
15 in the property owner's affidavit the
16 specificity of this particular -- mention this
17 particular market in the District as being
18 unaware of any new market rate sales. I agree
19 with your mentioning of the efforts that have
20 been made and so forth.

21 CHAIRPERSON MOLDENHAUER: I just
22 wanted to make sure that I was clear that

1 those efforts were made after the first two-
2 year extension was already granted. This is
3 obviously a request to not only obtain that
4 extension but also to waive our requirement to
5 permit only one two-year extension.

6 I think the great efforts that
7 have to be shown in regards to providing good
8 cause to waive that section I think are fairly
9 high. I think the Applicant has specified the
10 time line and shown the efforts that have gone
11 on. I should clarify these are efforts that
12 have not occurred initially but, rather,
13 efforts that have occurred between the last
14 extension and this application to extend.

15 MEMBER JORDAN: Madam Chair, I
16 just want to put on the record I think we
17 really need to be concerned here about
18 granting the second extension and whether or
19 not we even have authority to do so. I really
20 don't believe we have authority to grant a
21 second extension.

22 The provision under 3130.6 is very

1 clear and specific in regards to this
2 particular action about an extension. It says
3 one-time extension. Generally a statutory
4 construction has been set forth in several
5 cases; Howard v. Riggs, Goodwin v. D.C. where
6 there's a general provision as in the waiver
7 provision that we have. The specific statute
8 is right on point with the one-year extension
9 -- the two-year extension being one time.

10 Additionally, this body was just
11 given in 209 the authority to do the one year
12 -- by the Zoning Commission to do the one-time
13 two-year extension period. The other
14 provisions were already there so it was clear
15 that the Zoning Commission knew it was already
16 allowable by waiver but specifically came back
17 and said, "You can do this one time."

18 We had this discussion and I was
19 not sitting on this particular Board at that
20 time but just recently here in case -- what is
21 the case number? BZA case 17600-B and C this
22 particular body had a long discussion about it

1 and said that we only had the ability to give
2 an extension one time.

3 The language in our own holding,
4 our own findings is very, very clear. I just
5 think that given a second extension is not
6 within our power to do so.

7 VICE CHAIR SORG: I just wanted to
8 add, Madam Chair, in response to Mr. Jordan's
9 comment, you know, I understand his concern
10 for the legal precedence with regard to the
11 interpretation of the regulation. I'm not a
12 lawyer and I think this provision was adopted
13 -- please somebody correct me if I'm wrong --
14 around 2006. I think it was adopted, the time
15 extension.

16 Regardless, I think there is a
17 reason that they've called this the great
18 recession. As a citizen and somebody in this
19 industry, I think that it's not among the
20 provisions that the Zoning Regulations, to my
21 understanding, says we cannot waive.

22 I think that we're also in a

1 position when there is good cause shown, when
2 effort has been shown between the time of an
3 extension and the request for a second
4 extension to try to encourage projects that
5 could be beneficial for the city in places,
6 for example, where new housing is needed.

7 Just basically that I think there
8 are more extreme circumstances here than
9 people may have imagined there would have been
10 in March of 2012. That's all I would add.

11 MEMBER JORDAN: And I don't
12 disagree with that. I mean, if we have the
13 power, I certainly understand completely that
14 we would need to do it because I think there
15 is cause generally. What we have to do here
16 is to build consistency within our decisions
17 so others who are trying to uproot in the
18 Zoning Regulations have some basis of
19 understanding of what the law is.

20 If we adopt by -- become willy
21 nilly about what we're doing, then there's no
22 consistency in understanding what the Regs are

1 so there is no real foundation. This is what
2 I would certainly want to do but I think this
3 is so fundamental as to granting an additional
4 extension where it's very clear by what the
5 regulation says that it's one time and
6 specific in regards to a two-year extension.
7 It's very specific in regard.

8 Now, the Zoning Commission can do
9 unlimited extension in regards to PUD so they
10 already have the opportunity and they knew
11 that this was coming before us and, in fact,
12 was trying to give us some leeway to do this
13 but limited us in this regard. I just want us
14 to be real careful as we step forward here in
15 how we adjust and change rules.

16 Plus, this particular body, as I
17 said in the case of the application of Dakota
18 Square, LLC, in our decision we use words and
19 said that we would allow their kind of second
20 extension because the first one was passed
21 just before the Zoning Commission actually
22 gave the authority to do the one-time

1 extension. So we made that a very, very
2 special exception and we said that. That is
3 the reason why we made that decision.

4 Otherwise, our hands would have
5 been tied there. I just think that for the
6 record we need to examine and be careful about
7 what we do so that we can provide consistency
8 and predictability in what citizens are doing
9 in regards to zoning.

10 CHAIRPERSON MOLDENHAUER: Um --
11 please.

12 ZC MEMBER TURNBULL: Madam Chair,
13 her's correct. The Zoning Commission has
14 granted additional two-year extensions on
15 projects. But I think maybe in this instance
16 from a legal question it might be worthwhile
17 to ask Ms. Glazer of OAG a technical question
18 regarding whether or not we could do it.

19 CHAIRPERSON MOLDENHAUER: Just to
20 make sure that everyone is clear, I know that
21 Mr. Jordan is identifying one case but we have
22 in this Board since the date of the case that

1 Mr. Jordan is referencing we have, I believe,
2 granted two other second two-year extensions
3 to my recollection, of course.

4 What are they? I don't know. I'm
5 just telling you I know that I voted on at
6 least two or three other cases for a two-year
7 extension. I believe they were unanimous
8 decisions of the Board. Maybe there was one
9 opposition. Mr. Hinkle is indicating maybe he
10 was an opposition for that case.

11 In the interest of creating a
12 precedent, I think that in my view we had
13 conferred with OAG and OAG's opinion was that
14 the regulations specifically permitted that we
15 have the right to waive any requirement that
16 is not specifically articulated as a non-
17 waivable requirement which this is not one of
18 those sections which is identified in our
19 ability to waive any section under the Regs.

20 I think you're right, there needs
21 to be a transparency in regard to our decision
22 and a consistency in regards to our decision.

1 But I do think that there are also evolutions
2 and facts. I think that maybe from the date
3 of that decision because I think I might have
4 been on all these cases.

5 I think there is also a evolution
6 of facts where you have a case before you
7 where it may be the first case. I think in
8 those situations obviously you are evaluating
9 the circumstances and you are saying to
10 yourself, "Wow, we have a two-year order."

11 I think at that time I even looked
12 at the Zoning Representative, the Zoning
13 Commission representative, and said, "What was
14 the intention of this regulation," trying to
15 understand exactly whether we should -- even
16 if we have the discretion, to grant a waiver
17 whether we should grant a waiver.

18 I think that was a lot of kind of
19 my thought process in regards to this issue.
20 As it evolved, I think, as Ms. Sorg was
21 indicating, I think one of the factors that
22 came to light as more of these repressed --

1 not more.

2 Obviously there have been a few
3 more that there are very unique circumstances
4 in which the development community and the
5 Applicant before us are being constrained by.
6 That may not have been a factor that was
7 apparent when the Zoning Commission instituted
8 this regulation but that we do have the
9 authority to grant a second extension if good
10 cause is shown.

11 I think that's where then, again,
12 there is an evolution in the cases where we
13 then started requiring specific evidence. I
14 do think -- I know back when I was first on
15 the Board and this reg first came out actually
16 and we first started actually instituting this
17 reg, we went specifically to the issue of
18 substantial evidence.

19 The Board at that time -- Marc
20 Loud was on the Board and we were all kind of
21 really focusing on we need substantial
22 evidence. We actually rejected a whole bunch

1 of cases and said, "No, you're not providing
2 us enough information. You need to give us
3 more substantial evidence. We want affidavits
4 from the Applicant."

5 That was an evolution in that
6 interpretation of the Regs. I think here the
7 evolution here has been where we actually now
8 if you want to show good cause are asking for
9 specific evidence that shows that from the
10 date of the prior extension potentially to a
11 new request for at two-year extension that
12 they have shown specific evidence to show good
13 cause and they have made great effort and that
14 the new evidence goes towards that new time
15 frame and not potentially to the overall time
16 frame of the application.

17 This is kind of my evaluation of
18 how we have evolved and have changed, but I do
19 think that we have been consistent still, in
20 my opinion, of holding an Applicant to a
21 certain standard and then potentially having
22 the authority. Well, not potentially but

1 having the authority to waive this requirement
2 if the Board feels that there's good cause.

3 MEMBER JORDAN: But are we not
4 attempting to legislate something that has
5 been legislated by the Zoning Commission as to
6 the word one and --

7 CHAIRPERSON MOLDENHAUER: We've
8 had Zoning Commission members that have
9 actually voted for two-year extensions.

10 MEMBER JORDAN: One of the other
11 issues I'm having is that if there's been --
12 if there has been some prior precedence, then
13 we should have actually been briefed on those
14 prior precedence so we don't have this
15 discussion. I just wanted to pause, hit that
16 speed bump, be deliberate to understand all
17 aspects of what we very well may or may not
18 do. I think there was a request for an
19 opinion or something.

20 CHAIRPERSON MOLDENHAUER: From
21 OAG. Sorry, there was a request from OAG so
22 I will turn now to OAG. I appreciate you

1 turning us back in that direction because I
2 think it's very important.

3 OAG MEMBER GLAZER: To clarify for
4 the record, OAG has advised that the Board has
5 the authority so that's no an issue as far as
6 I'm concerned. The authority is based on the
7 fact that Section 3130 is a waivable provision
8 and that's consistently what OAG has advised
9 the Board, I believe.

10 The being said, OAG has also
11 cautioned about requiring a certain amount of
12 evidence in support of waiving since we do see
13 it as an important provision that is not
14 merely a procedural provision. It really is
15 a substantive provision. I agree with the
16 Chair's assessment of the chronology in terms
17 of the past BZA orders.

18 I can remember the first one which
19 was in the last few months. I don't recall
20 the name of the application but I know that at
21 that time the Board suggested to the Applicant
22 that they come back and provide additional

1 evidence from the last extension forward. I
2 believe the Board was thinking along those
3 lines. Certainly OAG was thinking along those
4 lines at this point.

5 MEMBER JORDAN: That would have
6 been helpful to have prior to today, those
7 cases and thought processes so that we can
8 understand what our process very well may have
9 been. I think those things are key to what we
10 do here so we can build some consistency and
11 direction just to let people know that we're
12 not doing this on a regular basis.

13 VICE CHAIR SORG: I think -- Mr.
14 Jordan, respectfully I do think that in our
15 briefing OAG did mention that it was pursuant
16 to 3100.5 that this wasn't one of regulations
17 that's called out as unwaivable and that was
18 what I was going --

19 MEMBER JORDAN: I'm talking
20 about --

21 VICE CHAIR SORG: -- to ask you.

22 MEMBER JORDAN: I'm talking about

1 decisions by this Board, prior rulings and
2 orders of this Board. I didn't see that in
3 any other briefing.

4 CHAIRPERSON MOLDENHAUER: Well, I
5 think obviously that's a separate issue in
6 regards to this specific case. I think at
7 this point in time I think it's been a very
8 good discussion but I want to kind of pull
9 back to the questions and see if there is any
10 other discussion in regards to the standards
11 or any other opinions about this application
12 before us for W Street.

13 MEMBER HINKLE: Yes, Madam Chair.
14 Just real quick. As we noted before, I did
15 vote in opposition in a previous case. Part
16 of that was my concern for the precedent that
17 we were setting. The other part was I didn't
18 think there was sufficient evidence in terms
19 of allowing that additional two-year
20 extension.

21 My other different opinion in this
22 case, I think within the documents we have the

1 Applicant has shown some sufficient work
2 towards this project, even in the last couple
3 years. I think that has convinced me to
4 support this extension.

5 I'll reiterate my concern and I
6 understand Mr. Jordan's concern about setting
7 a precedent because I think there was an
8 intent by the Zoning Commission to limit
9 these. In this case I'm convinced that
10 there's good cause to allow the extension.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you very much, Mr. Hinkle, for providing that
13 opinion, especially in relationship to some of
14 the past cases. I appreciate that.

15 Are there any other Board members
16 that wish to comment at this time prior to
17 maybe a motion being submitted?

18 VICE CHAIR SORG: No, Madam Chair.
19 I would support a motion to approve.

20 CHAIRPERSON MOLDENHAUER: Okay.
21 So then let me submit a formal motion. I
22 submit a motion to approve Application 17753

1 and 17753-A and B for a second two-year
2 extension under 3130.6 and a waiver of our
3 requirements under Subsection 3100.5. This
4 would be effective as of the expiration of the
5 original order. A motion has been made. is
6 there a second?

7 ZC MEMBER TURNBULL: Second.

8 CHAIRPERSON MOLDENHAUER: Motion
9 has been made and seconded. All those in
10 favor say aye.

11 BOARD MEMBERS: Aye.

12 CHAIRPERSON MOLDENHAUER: All
13 those opposed?

14 MEMBER JORDAN: I'm abstaining.

15 ZC MEMBER TURNBULL: Madam Chair,
16 if the Chair desires, I will bring this issue
17 before the Zoning Commission for further
18 clarification or perhaps a language change
19 working with OAG.

20 CHAIRPERSON MOLDENHAUER: I think
21 that would be fantastic. I don't recall who
22 was the other Commissioner on some of these

1 other cases as we, as I described earlier,
2 evolved in potentially our analysis of this
3 but I do know that I have looked to the Zoning
4 Commissioners who sits on these cases to give
5 us their opinion.

6 I think it would always be
7 helpful, especially if they believe that there
8 is a specific potential intent as to when they
9 instituted this regulation, and they feel that
10 our interpretation of this now may be
11 different from what their intention was.

12 If they can review it and either
13 provide additional guidance or maybe allow the
14 status quo, however they feel is best, I
15 think, would be a great opportunity. Thank
16 you for that recommendation.

17 That being say, Mr. Moy, I think
18 you need to read back the vote.

19 MR. MOY: Yes, I do. Thank you.
20 I was waiting for my time.

21 Staff would record the vote as
22 four to zero to one, this on the motion of

1 Chairperson Moldenhauer to approve the request
2 for a second two-year time extension, as well
3 as waiving the requirement for that one time
4 extension pursuant to Section 3130.6.

5 Seconded the motion was Mr.
6 Turnbull. Also in support of the motion Ms.
7 Sorg, Mr. Hinkle, abstaining Mr. Jordan. Mr.
8 Jordan. Yes, Mr. Lloyd Jordan. Again, the
9 final vote is four to zero to one. The motion
10 carries.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you very much, Mr. Moy.

13 MR. MOY: This is a full order or
14 summary order?

15 CHAIRPERSON MOLDENHAUER: Summary
16 order.

17 MR. MOY: Summary. Thank you.

18 The next application for Board
19 action is Application No. 18308 of Bozzuto
20 Development Group. Let me read the original
21 caption as it was originally advertised.

22 This is pursuant to 11 DCMR 3104.1

1 and 3103.2 for a special exception from the
2 roof structure requirement under Subsection
3 411.11; variance relief from the parking
4 requirements under Subsections 2101.1 and
5 2108.2; a variance from the loading
6 requirements under Subsection 2201.3; variance
7 from the lot occupancy requirements under
8 Subsection 772.1.

9 All this to renovate, convert and
10 expand an existing warehouse building for
11 residential (63-unit apartment house) use in
12 the DD/C-2-C District. This is at premises
13 640 New York Avenue, N.W., property located
14 Square 525N, Lot 828.

15 As the Board will recall, the
16 Applicant had amended his application to
17 withdraw the special exception relief from
18 Sections 411.11 and 770.6(b) roof structure
19 requirements.

20 As well, the Applicant amended to
21 add variance relief from Section 2116.12 which
22 requires parking spaces provided within a

1 structure to be located at least 20 feet from
2 all lot lines that abut public streets, and
3 Section 2001.3, expansion of a nonconforming
4 structure.

5 A note for the record also that
6 the variance relief from the loading
7 requirements under Subsection 2201.3 was
8 previously approved. On February 14, 2012,
9 the Board completed public testimony, closed
10 the record, and scheduled its decision on
11 March 12th. The Board requested additional
12 information to supplement the record from the
13 Applicant and the Office of Planning.

14 In your case folder, Madam Chair,
15 is the filing from the Applicant dated March
16 2, 2012 identified as Exhibit 36. Also in
17 your case folders is an OP supplemental report
18 dated March 5, 2012 under Exhibit 35.

19 With this the Board is to act on
20 the merits of the Applicant's amended relief
21 for approval. That completes the staff's
22 briefing, Madam Chair.

1 CHAIRPERSON MOLDENHAUER: Thank
2 you very much, Mr. Moy.

3 This case we have before us is a
4 very interesting case in regards to the
5 discussions that we had during the hearing,
6 and then also in regards to additional
7 submissions that were provided to us.

8 The case was previously approved
9 but then there were some modifications that
10 the Applicant wanted to make in regards to the
11 parking based on some of the changes with
12 public space and vault use over the period of
13 time in which the initial application was
14 granted and based on currently how the public
15 space office is dealing now with vaults.

16 Based on that, they had presented
17 us with, I think, maybe at the time of the
18 hearing maybe more of a limited factor in
19 regards to how they would be able to satisfy
20 the parking standards in regards to the 20-
21 foot distance from a street.

22 I think in their additional

1 submissions they did provide, I think,
2 extensive information in regards to options,
3 the challenges with mechanical parking, in
4 regards to the layout and the size of the
5 building.

6 In regards to the soil and the
7 challenges there they have actually also
8 provided us with a study by a specialized
9 engineer talking about the subservice
10 exploration and technical evaluation of the
11 lot.

12 I think they did an extensive job.
13 Also I believe pursuant to some Board
14 questions providing some specific layouts and
15 to show the challenges of satisfying the
16 parking requirements in a configuration either
17 above ground or potentially even below ground.

18 They also then, I thought,
19 provided some very persuasive information in
20 regards to the market studies for other
21 buildings in the surrounding area in regards
22 to the number of units per spaces that are

1 being provided.

2 Here in regards to the challenge
3 that they would have including documentation
4 from a lender indicating that they would have
5 the challenge of obtaining financing without
6 meeting a specific threshold for parking-to-
7 unit ratios.

8 I thought that was very
9 interesting because one of my questions during
10 the hearing was, you know, and I think this is
11 a question we have a lot of times, is this
12 just a market-driven desire?

13 Is it a desire to have more
14 parking because obviously it's going to be
15 better for the project, or is this really more
16 of a necessity and a practical difficulty
17 where it's not just something where that you
18 would want for additional profits that is
19 required in order to make the project feasible
20 and move forward.

21 I think here the Applicant has
22 satisfied that standard and shown that while

1 maybe it's obviously probably a little bit of
2 both, at the same time they have, I think,
3 satisfied in my view the requirement to show
4 that these is a market necessity and it
5 creates a practical difficulty based on all of
6 the land factors. But then, also, actually
7 not being able to simply provide fewer spaces
8 because of its inability to obtain financing.

9 That being said, as I always kind
10 of go my long-winded statements here, I think
11 there is ANC support for the application, DDoT
12 support, OP support of this. I'm going to
13 open up the floor to any additional Board
14 discussion. I knew that there were some
15 specific Board members that had some questions
16 about this before the additional supplemental
17 documentation.

18 ZC MEMBER TURNBULL: Madam Chair,
19 I feel comfortable with the new evidence that
20 has been presented. I would support a motion
21 for approval.

22 CHAIRPERSON MOLDENHAUER: Anybody

1 else?

2 MEMBER HINKLE: No, Madam Chair.

3 I just wanted to state that I certainly
4 appreciated the supplemental information. I
5 thought that was extremely helpful. Certainly
6 living in one of the buildings listed, I
7 understand the market demand for parking in
8 this area. It's there. Even if people don't
9 drive every day, there are certainly a lot of
10 people in cars so I certainly understand that
11 issue.

12 CHAIRPERSON MOLDENHAUER: Any
13 other Board members? Okay. Seeing none and
14 on other comments on this application, I would
15 like to submit an application to support
16 application 18308 pursuant to 11 DCMR 3104.1,
17 and 3103.2, for a special exception from --
18 I'm sorry. I'm reading -- I believe the roof
19 setback was taken out. The 2001 -- sorry.
20 Okay.

21 Pursuant to 11 DCMR 3103.2 and for
22 a variance relief from the parking requirement

1 under Subsection 2101.1 and 2108.2, and a
2 variance from the loading requirements under
3 Subsection 2001.3, and a variance from the lot
4 occupancy requirements under Subsection 772.1
5 to renovate and convert an existing warehouse
6 building for residential (62-unit apartment
7 house) at location 4600 New York Avenue. A
8 motion has been made.

9 Sorry. You're not on the mic I
10 don't think.

11 OAG MEMBER GLAZER: I think there
12 are two additional sections that weren't
13 mentioned. 2116.12 regard setbacks.

14 CHAIRPERSON MOLDENHAUER: Sorry,
15 yes.

16 OAG MEMBER GLAZER: I believe
17 2001.3, expansion of a nonconforming
18 structure.

19 CHAIRPERSON MOLDENHAUER: I may
20 not have. Yes, variance relief from 2116.12
21 requiring parking spaces provided within the
22 structure to be located at least 20 feet from

1 all lot lines that abut public streets, and
2 under Section 2001.3, expansion of a
3 nonconforming structure. I think that
4 encapsulates everything.

5 MEMBER HINKLE: We, Madam Chair, I
6 think the Applicant has requested also some
7 flexibility to make internal alterations to
8 the structure. I'm not sure if that needs to
9 be put in a motion or not.

10 CHAIRPERSON MOLDENHAUER: I think
11 it does. We can make that to ensure that the
12 order does provide that flexibility. Thank
13 you very much, Mr. Hinkle, for reminding me of
14 that as I am getting tongue-tied in my motion.

15 A motion has been made. Is there
16 a second?

17 VICE CHAIR SORG: Second.

18 CHAIRPERSON MOLDENHAUER: The
19 motion has been made and seconded. All those
20 in favor say aye.

21 BOARD MEMBERS: Aye.

22 CHAIRPERSON MOLDENHAUER: Aye.

1 MR. MOY: Staff would record the
2 vote as five to zero to zero. This is on the
3 motion of Chairperson Moldenhauer to approve
4 the multiple variance relief as she just
5 cited. Seconding the motion was Ms. Sorg.
6 Also in support of the motion Mr. Turnbull,
7 Mr. Lloyd Jordan, and Mr. Hinkle. Again, the
8 final vote is five to zero to zero. The
9 motion carries.

10 CHAIRPERSON MOLDENHAUER: Thank
11 you very much, Mr. Moy. Seeing there is no
12 opposition in this case, the Board would like
13 to ask that we waive our requirements and a
14 summary order be issued.

15 MR. MOY: Indeed. Thank you very
16 much, Madam Chair.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you.

19 MR. MOY: The next application
20 before the Board for action is Application No.
21 18312 of Rashid Salem, pursuant to 11 DCMR
22 3103.2, for a variance from the lot area

1 requirements under Subsection 401.3, and, as
2 originally advertised, a variance from the lot
3 occupancy requirements under Subsection 403.2,
4 to renovate and construct an addition and
5 convert a flat (two-unit dwelling) to a four-
6 unit apartment house in the R-4 District at
7 premises 1341 Irving Street, N.W., property
8 located in Square 2848, Lot 815.

9 As the Board will recall, the
10 Applicant amended his application to withdraw
11 variance relief from lot occupancy
12 requirements under Subsection 403.2 and to
13 amend the number of units from four units to,
14 I believe, three units. No? Okay. We'll
15 clarify that. It's still a four unit? Okay.

16 On February 14th the Board
17 completed public testimony, closed the record,
18 scheduled its decision for March 13th. The
19 Board allowed the Applicant and the ANC to
20 file supplemental information. That filing
21 from the Applicant, Madam Chair, is in your
22 case folders identified as Exhibit 37.

1 The Board is to act on the merits
2 of variance relief from the lot area
3 requirements under Subsection 401.3. That
4 completes the staff's briefing, Madam Chair.

5 CHAIRPERSON MOLDENHAUER: Thank
6 you very much Mr. Moy. I think that this case
7 -- just to make sure we clarify the first
8 issue, there was some discussion during the
9 hearing about potentially modifying the
10 application to be a three-unit submission
11 versus a four-unit submission.

12 However, the supplemental
13 submission from the Applicant, which was dated
14 March 6th, Exhibit 37, does submit information
15 indicating that they were still requesting a
16 four-unit application.

17 I want to make sure this is
18 correct so I'm actually going to ask that
19 council step forward and we'll actually allow
20 a brief confirmation of that so we make sure
21 we go into the decision properly.

22 MR. SULLIVAN: Thank you, Madam

1 Chair. My name is Marty Sullivan from
2 Sullivan and Barros on behalf of the
3 Applicant. We are requesting four still. The
4 discussion that we had at the hearing was that
5 to the extent you could bifurcate the decision
6 if you didn't want to grant four, we obviously
7 would take three over two. That would be less
8 of a practical difficulty than two but we are
9 requesting four.

10 CHAIRPERSON MOLDENHAUER: I just
11 want to make sure. You are requesting four as
12 your primary application, but you are orally
13 amending your application to in the
14 alternative requesting a three unit if that
15 does potentially become the circumstance.

16 MR. SULLIVAN: That is correct.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you very much for that clarification.

19 So now I'm going to turn to Board
20 members to discuss the issue in regards to
21 whether the Applicant satisfies the standard
22 for the variance test, one, showing that

1 there's exception circumstances.

2 I think that here the Applicant is
3 articulating that there's practical --
4 exceptional circumstances based on the
5 physical condition of the building.

6 The Applicant, I think, has
7 presented extensive documentation in regards
8 to the disrepair of the property and the
9 condition of the shell of the structure and
10 the cost associated with potentially having to
11 renovate or provide any useful application of
12 this building to be able to construct
13 anything, either a single-family home or make
14 it financially feasible by constructing a
15 three or four-unit project.

16 The question is potentially if we
17 find that those conditions are extraordinary
18 or exceptional, do they then specifically
19 relate to the practical difficulty here in
20 regards to relief in which it would require
21 because the lot does not provide 900 square
22 feet per the apartment space here where they

1 are requesting four spaces.

2 The Applicant supplied additional
3 construction cost analysis and additional
4 marketing analysis showing that the return of
5 the cost associated with potentially creating
6 four units and the challenge of potentially
7 marketing a larger three-unit building or an
8 even larger two-unit building will create a
9 practical difficulty for the Applicant.

10 Office of Planning has recommended
11 denial of the case. We have some letters of
12 support from the owner at 1324 Kenyon Street.
13 We also have the ANC's letter which recommends
14 denial of a four-unit building but then does
15 support a three-unit project.

16 The Applicant did supplement their
17 record to show that two of the individuals who
18 testified in opposition are now in support of
19 the project so kind of outlining the different
20 factors before us in this case.

21 I will now turn to other Board
22 members to see if they have any specific

1 comments that they would like to add.

2 VICE CHAIR SORG: Thank you, Madam
3 Chair. I will start out. I don't think my
4 comments are going to be particularly
5 eloquent. I struggled with this case a lot
6 and I think kind of went back and forth on
7 whether or not -- I'm going to address it as
8 the original request for four units, whether
9 or not it met the test.

10 I think based on a couple of
11 things that I have been thinking and looking
12 over the case just even yesterday and this
13 morning, through a sort of very unique
14 assortment of factors I do think they meet the
15 test.

16 There are things that we have
17 talked about that you have mentioned also that
18 have to do in terms of the first prong about
19 the disrepair, the existing structure, the
20 history of the property in terms of
21 foreclosure and things like that, which
22 obviously we know each of those things on

1 their own can satisfy the first prong, but in
2 combination I think they can.

3 One of the things to me that I
4 wanted to mention in specific -- actually,
5 there's two things I want to mention in
6 specific. The first thing that I wanted to
7 mention is that while the relief is being
8 requested -- here the 900 square feet relief
9 is tied to the lot area.

10 If they are asking for four units,
11 then what they are really asking for is relief
12 in terms of the lot area to make it 618 square
13 feet per unit. I think when you look at the
14 structure because, if you remember, the
15 Applicant is actually not asking to build an
16 addition as per the footprint of the property
17 that was existing already.

18 I think when you look at that, the
19 footprint of the existing building on the
20 property itself, it is larger than what one
21 might otherwise find in this area.

22 When you do the calculation, and

1 this is rough and probably a little bit off,
2 what you get here just in building footprint
3 is about 1,500 gross square feet per foot
4 which is large.

5 I mean, I think most of the
6 residences, existing original residences in
7 this area, would not over the entire building
8 area be 1,500 square feet.

9 Certainly while the regulation
10 requires us to look at the lot area in terms
11 of the 900-square-foot rule, I think when you
12 look at the existing property and the
13 Applicant's project to build out the floors
14 using that existing, although rather
15 deteriorated outside envelope, to me that
16 tempers the relief that is being required over
17 the sort of specific number of square feet per
18 lot area when you look at what is existing and
19 what the project plans are in terms of what
20 the gross square foot measurements are of each
21 of the floors that are existing. They are not
22 building an addition and they are not building

1 another floor up, so on and so forth.

2 I think, secondly, in reference
3 further to the second and third prong of the
4 test has to do with market necessity as market
5 dictates. I think any of us who know the
6 market in Columbia Heights in combination, I
7 think, with some of the additional information
8 in the supplemental -- information that the
9 applicant gave to the Board, while some of the
10 numbers I'm not totally clear on, but I
11 certainly do believe and can see from both
12 their construction cost and the market
13 information, and from general knowledge, that
14 a 1,300 square foot apartment in Columbia
15 Heights in the area that we're talking about
16 is even kind of big for what the market is
17 demanding.

18 To me in terms of the practical
19 difficulty as well as to the detriment, I
20 think, what the project specifically proposing
21 in terms of building and adding units on the
22 street in this area is not a negative to the

1 community.

2 I think that is also further
3 bolstered by the turnaround and voicing of the
4 turnaround of some of the opposition that the
5 Chair mentioned. That's what I'll say about
6 that.

7 I think in the end I kind of creak
8 over the -- that's not the right way to say
9 it. Just get over the line in terms of the
10 Applicant's request for variance for four
11 units and I would be in support of it. Thank
12 you.

13 CHAIRPERSON MOLDENHAUER: Any
14 other Board members?

15 ZC MEMBER TURNBULL: Thank you,
16 Madam Chair. I cannot support the project as
17 a four-unit development unlike my colleague.
18 For me the Zoning Regs do not talk about
19 market profitability and the ability to sell
20 units. They talk about what the zone is and
21 how you meet the requirements of the zone.

22 I could support three which is

1 even a stretch for me at that, but I could
2 accept three because it's in the intent and
3 the spirit of the 900 square feet. It comes
4 close to meeting our requirement. But I'm a
5 little bit troubled by the Applicant in
6 Exhibit 37 where he talks about being a Metro-
7 oriented project.

8 Yet, he's providing two spaces and
9 still wants three to four RPP permits. He
10 wants five to six -- he's providing five to
11 six -- to me in that area it's tight as it is.
12 I think I was a little bit upset by him trying
13 to discredit the ANC and say we shouldn't --

14 I think it was very clear in the
15 ANC's report that when they first voted for
16 the project they voted no. Then they had a
17 second vote based upon three units and that
18 was voted for overwhelmingly. I'm a little
19 bit -- I don't like that kind of a technique
20 by the Applicant of trying to play down or not
21 give the ANC great weight.

22 I still agree with the OP's

1 report. I don't think that they have really
2 developed yet how it's that unique other than
3 the property was in disrepair. I think we
4 accept that. I think the practical difficulty
5 of the site, there is nothing really unique
6 about this property.

7 I'm also a little bit disturbed
8 when I just happened to go through the
9 construction cost and I just picked three
10 items. I just looked at the excavation and
11 backfill. This property whether it's two,
12 three, or four is going to be the same
13 footprint.

14 If I look at the two unit they've
15 got down \$10K, but when I look at the other
16 one, the other two developments is \$25K. If
17 I look at the deck on the two unit, it's \$30K.
18 If I look at the other ones, it's only \$20K.
19 If I look at the siding which, to me, is going
20 to be the same no matter what you're going to
21 be doing, it's \$16K on the two unit but it's
22 \$24K on the other units.

1 I don't want to nit pick. I just
2 picked three items. To me this is -- I'm
3 troubled by what this is trying to show. I'm
4 not convinced by the documents that this is
5 really a bona fide case to tell me -- again,
6 I'm saying, the Zoning Regs are not driven by
7 market profitability.

8 It becomes a point at times but I
9 think that to me in trying to satisfy the
10 intent of the zone, the regulations, I think
11 I could agree with three. To me that's -- I'm
12 stretching myself on that but I could vote for
13 a three but not a four.

14 CHAIRPERSON MOLDENHAUER: Do any
15 other Board members want to provide any
16 comments?

17 MEMBER HINKLE: Yeah, Madam Chair.
18 Thank you. Just real quick, you know, we see
19 one of these projects almost every month and
20 I find it interesting. I think what we're
21 seeing is an issue of the market and the base
22 cost of some of these dilapidated structures.

1 It really makes it difficult to meet the
2 matter of right construction to rehabilitate.

3 Three units or four units I'm not
4 concerned with, but I think the Applicant has
5 made a case for one of those. That's all I
6 wanted to say.

7 I think there's really a market
8 condition that is really making it difficult
9 to put some of these properties within the
10 city back into working order. I'm not sure
11 what the solution is. Perhaps we need to look
12 at how these properties are zoned initially.
13 That's all I wanted to say.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you, Mr. Hinkle. I agree with you. I think
16 that -- I mean, speaking to Mr. Jordan's
17 comment earlier today in regards to case
18 precedent, we did last week approve an
19 application near -- I forget which alley it
20 was called but it was near --

21 PARTICIPANT: Naylor Court.

22 CHAIRPERSON MOLDENHAUER: Naylor

1 Court. Thank you -- in which there was
2 similar testimony in regards to market
3 conditions that I think are applicable here in
4 regards to paralleling potentially case
5 precedent where there was evidence that this
6 does relate to the practical difficulty.

7 Adding to Mr. Turnbull's comment,
8 I do think it does relate to the practical
9 difficulty and there has been a lot of case
10 precedent which goes to that fact that you can
11 show economic challenges that prove practical
12 difficulty.

13 I think here the Applicant has
14 shown that there is a market difference
15 between selling a 1,600-square-foot unit and
16 an over-2,000-square-foot unit and that
17 there's a challenge that unfortunately the
18 larger you go you don't get more money. The
19 less money you get on those per square foot,
20 especially in certain areas of the city so I
21 think that is a factor.

22 Speaking to another point that Mr.

1 Turnbull brought up, I absolutely agree with
2 him in regards to I thought it was actually
3 quite outlandish of the Applicant to, I think,
4 in my recollection -- of course, this may not
5 be absolutely correct -- who indicated
6 initially that they were willing to
7 potentially reduce or take away RPP permit
8 requirements for the project because of the
9 ANC's concern about parking to potentially
10 mitigate those concerns.

11 Then in their submission it says,
12 "Well, we're going to put in two spaces and we
13 also want three to four on top of those two,"
14 which I think does express the specific
15 concerns of the neighborhood. If I were to
16 support, which I do think I can support under
17 the Regs, a four-unit building, I would
18 support it with having the condition of having
19 no RPP permits permitted for this project.

20 That would be my way of
21 potentially mitigating the third prong of the
22 test in regards to the ANC's specific concerns

1 in the record regarding parking and
2 essentially providing them a four-unit
3 building and then they would simply have two
4 spaces they will be providing along with that
5 four-unit building.

6 I'll open it up for additional
7 discussion.

8 MEMBER HINKLE: Yes, just my
9 interpretation -- thank you, Madam Chair.
10 Just my interpretation of what the Applicant
11 was proposing in terms of the RPP permits is
12 that they were actually limiting it to perhaps
13 -- they are proposing two parking spaces with
14 four units so they would limit the remainder
15 -- not the remainder.

16 That's not the correct way but
17 allow up to four RPP units, whereas if you had
18 four units, each unit could perhaps have two
19 permits so you would come up with eight. In
20 fact, they are actually stating that they
21 would limit the potential amount of RPP
22 permits for the entire building.

1 MEMBER JORDAN: Regarding those
2 permits, if I remember correctly in the case
3 that we did have the Applicant agree and it
4 was an issue about the parking. I think it
5 was on 14th Street somewhere.

6 The reason why it worked, I think
7 we had a letter or something from DoT, was
8 because of the fact DoT had not yet issued
9 RPPs for that side of the street and so they
10 could do it at that point. I just don't know
11 if it's already occurred in this area. That
12 was one of our fail safes.

13 CHAIRPERSON MOLDENHAUER: DDoT
14 actually sent in that letter specifically that
15 they could do it for anything.

16 MEMBER JORDAN: Oh, for any place?

17 CHAIRPERSON MOLDENHAUER: Any
18 place as soon as DDoT -- they can identify in
19 their system that this specific address --
20 they can do it by address or building is not
21 legally permitted to have any RPP permits, or
22 maybe they are limited to a certain number of

1 RPP permits.

2 I understand they are reducing it
3 from the potential ability that they could
4 have but if they were to have a legal flat,
5 you're not talking about more than one
6 required parking space, maybe two.

7 Obviously, you know, someone could
8 obviously park on the street but I think in
9 order to specifically mitigate these concerns,
10 my preference would be to say no RPP with
11 having one legal space and one LCE space on
12 the premises.

13 Especially considering, as Mr.
14 Turnbull indicated, this is a Metro -- there's
15 a lot of accessibility in regards to other
16 alternative transportation in the area. That
17 would be my recommendation. I'll see what
18 other Board members think about that.

19 VICE CHAIR SORG: I agree, Madam
20 Chair. I like the four units and no RPP idea
21 because they have two parking spaces. I think
22 it does go to mitigating some of the concerns

1 over there. Thank you.

2 MEMBER JORDAN: That would reach
3 the major concern of the neighborhood, I
4 believe. I think I could support that.

5 CHAIRPERSON MOLDENHAUER: Is there
6 any other deliberation from Board members?

7 MEMBER JORDAN: Well, the last
8 question is can we enforce that ourselves or
9 does it have to be -- I'm trying to remember
10 back when we did do it. Is that something
11 because it was by agreement? Do we have the
12 authority?

13 CHAIRPERSON MOLDENHAUER: The
14 Applicant here has partially consented but I
15 think it's a condition that we can impose. I
16 know that OAG has informed us in the past so
17 long as we have specific factors in a case
18 which lead to the necessity to mitigate, we
19 can impose conditions.

20 Here I believe that we have
21 specific facts in the case which lead to the
22 need to mitigate and, thus, this would -- and

1 we can thus make it a requirement which would
2 be part of the property and run with the land.

3 Obviously we don't specifically
4 enforce it but if a neighbor did have an issue
5 with this, it would be part of the condition
6 and they could potentially ask the Office of
7 Zoning to institute enforcement action.

8 OAG MEMBER GLAZER: I just wanted
9 to add I believe in the other case I agree
10 with Mr. Jordan. It was proffered, I think.

11 CHAIRPERSON MOLDENHAUER: It was.
12 In the other case, yes, it was.

13 OAG MEMBER GLAZER: Yes. I'm not
14 sure if it was proffered here.

15 CHAIRPERSON MOLDENHAUER: It was
16 proffered and then it was changed.

17 OAG MEMBER GLAZER: Okay.

18 CHAIRPERSON MOLDENHAUER: Is there
19 any other deliberation then on this issue or
20 on any other issues about this case?

21 MEMBER HINKLE: I just wanted to
22 be clear. I think the proposal on the table

1 here is for the higher density there would be
2 a restriction on the RPP permits. Is that
3 correct?

4 CHAIRPERSON MOLDENHAUER: Yes.
5 That would be what I would be submitting a
6 motion for, yes. If all members then have no
7 additional comments, then I'll submit a motion
8 to approve Application 18312 pursuant to 11
9 DCMR 3103.2 for a variance lot area
10 requirements under 401 and a variance in the
11 lot occupancy requirements under 403 to
12 renovate and construct an addition and convert
13 a flat to a four-unit apartment building in
14 the R-4 District at premises 1341 Irving
15 Street, N.W. with the condition that there
16 would be no RPP permits for this property.
17 The motion has been made. Is there a second?

18 VICE CHAIR SORG: Second.

19 CHAIRPERSON MOLDENHAUER: Motion
20 has been made and seconded. All those in
21 favor say aye.

22 BOARD MEMBERS: Aye.

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CHAIRPERSON MOLDENHAUER: All

those opposed?

ZC MEMBER TURNBULL: Opposed.

MR. MOY: Staff would record the

vote as four to zero to one, this on the motion of Chairperson Moldenhauer to approve the application for variance relief from the lot area requirements under Section 401.3. I believe the Applicant withdrew variance relief from the lot occupancy requirements.

This would be under the condition that there would be no RPP permits permitted as a condition. Seconding the motion was Ms. Sorg. Also in support of the motion Mr. Lloyd Jordan and Jeffrey Hinkle. Opposed to the motion is Mr. Turnbull. Again, the final vote is four to zero to one. The motion carries, Madam Chair.

CHAIRPERSON MOLDENHAUER: Thank

you very much, Mr. Moy. Considering we have an opposition, we obviously will not be able to ask for a summary order so it will be a

1 full order.

2 MR. MOY: Very good. Thank you.

3 ZC MEMBER TURNBULL: Madam Chair,
4 I have not yet decided but I may review this
5 with the Commission to see whether we're going
6 to sua sponte or not.

7 CHAIRPERSON MOLDENHAUER: Okay.
8 Thank you very much for letting us know.

9 At this point in time we have our
10 last case before us but I would like to take
11 a quick 15-minute recess. We will reconvene,
12 let's just say, at 11:15. Thank you.

13 (Whereupon, at 10:59 a.m. off the
14 record until 11:27 a.m.)

15 CHAIRPERSON MOLDENHAUER: Okay.
16 We're back on the record for our last case for
17 the morning. I'll turn to Mr. Moy, our
18 secretary, to schedule it -- announce our
19 case.

20 MR. MOY: Yes. Back on the record
21 after a recess. The last and final
22 application for the Board for action is

1 request from the Applicant to reopen the
2 record and for reconsideration of Application
3 No. 17676 of Innovative Recyclers, Inc.,
4 pursuant to pursuant to Section 3126 and
5 request to waive requirements of Sections
6 3130.6 and 3130.9 of the Zoning Regulations.

7 The original application was
8 approved on October 23, 2007, as amended. For
9 the record, that application read as follows:

10 Pursuant to 11 DCMR 3103.2, for a
11 variance from the prohibition of outside
12 storage under Subsection 806.4, and a variance
13 from building height requirements under
14 Subsection 840.1, and pursuant to 11 DCMR
15 3104.1 for a special exception to establish a
16 solid waste handling facility under Subsection
17 802.4. This is in the LO/C-M-1 District at
18 premises 2225 Lawrence Avenue, N.E., property
19 located in Square 4106, Lot 820.

20 On February 21st of this year the
21 Applicant filed their motion. This is under
22 Exhibit 44. In addition, the Applicant has

1 filed two other filings subsequent to that
2 which is, I believe, Exhibits 45 and 46.

3 In addition, the Applicant is
4 requesting that the Board waive the
5 requirements from Sections 3130.6 and 3130.9.
6 These are the standards for time extensions
7 and the expiration of the first extension
8 order.

9 I think the staff is going to
10 conclude here, Madam Chair.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you very much. At this point before getting
13 into the motions by the Applicant, I would
14 like to indicate that based on the
15 information, I would like to recommend to the
16 Board that on our motion under Section 3124.2
17 we reopen this case and address the request
18 for a second to your time extension.

19 I will look to Board members to
20 see if Board members are in agreement to that.
21 Seeing everyone nodding their heads and I will
22 indicate by confirmation of unanimous Board

1 members, we will then take that motion under
2 our own motion under 3124.2 to reopen the
3 case.

4 Based on that, the request for
5 waiver and the Applicant's motion are moot
6 and, thus, we will deny those -- address those
7 as moot and we'll move on in regards to the
8 merits of the case.

9 Here we have a request for a
10 second two-year extension. We obviously just
11 addressed the issues this morning also in
12 regards to authority to potentially grant a
13 two-year extension here. Since we are
14 reopening the case, we had a prior case that
15 had expired November 20, 2011.

16 We do have a specific substantial
17 evidence from the Applicant showing that under
18 the regulations they have had delays due to
19 agency restrictions such as DCRA not being
20 able to move forward on obtaining their
21 permits due to foregoing legislation and
22 litigation.

1 There was potential settlement in
2 October 2011 but they have now -- that was not
3 finalized. They are almost at that point so
4 it does satisfy our standards in regards to
5 providing a specific good cause shown for the
6 need to extend due to extenuating
7 circumstances.

8 The Applicant in their letter
9 signed by the president of Innovative
10 Recycling indicates that they believe the
11 lender would not be interested in making funds
12 available to them. I don't think that rises
13 to the level of substantial evidence because
14 it's not something that we've typically
15 accepted such as a letter actually from the
16 lender or specifying a lender's name.

17 As I indicated earlier, I do think
18 the Applicant does satisfy the requirements
19 under the other prongs of 3130.6 such as
20 Government agency delays or litigation that
21 potentially created delays. That being said,
22 I do think that the Applicant has satisfied

1 the standards and I would be in support of
2 granting a second two-year extension and
3 waiving our requirements to permit a second
4 two-year extension.

5 That being said, I'll see if any
6 other Board members have any other comments or
7 discussion for deliberation. Seeing none,
8 then I will submit a motion to approve
9 Application 17672 for a two-year extension
10 under 3130.6 and waiving our requirements to
11 permit a second two-year extension. Motion
12 has been made. Is there a second?

13 VICE CHAIR SORG: Second.

14 CHAIRPERSON MOLDENHAUER: Motion
15 has been made and seconded. All those in
16 favor say aye.

17 BOARD MEMBERS: Aye.

18 CHAIRPERSON MOLDENHAUER: All
19 those opposed.

20 MEMBER JORDAN: I'm abstaining
21 again based upon our earlier discussion today.

22 CHAIRPERSON MOLDENHAUER: Thank

1 you. If Mr. Moy could read back the vote.

2 MR. MOY: Yes, Madam Chair. Staff
3 would record the vote as four to zero to one.
4 This is on the motion of Chairperson
5 Moldenhauer to approve the application for a
6 second two-year extension, as well as waiving
7 the requirements for the one-year extension
8 requirement.

9 Seconding the motion was Ms. Sorg.
10 Also in support of the motion Mr. Turnbull and
11 Mr. Hinkle. Abstaining is Mr. Jordan. Again,
12 the final vote is four to zero to one. The
13 motion carries.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you very much, Mr. Moy. See that there is no
16 opposition in this case, the Board would like
17 this to be a summary order.

18 MR. MOY: Yes. Thank you, Madam
19 Chair.

20 CHAIRPERSON MOLDENHAUER: Thank
21 you. That concludes our morning.

22 ZC CHAIR HOOD: Madam Chair, if I

1 could, I hate to interrupt. I guess that was
2 good timing for me. I just wanted to say
3 something on the record that is customarily
4 done by the Chair of the Zoning Commission and
5 the Zoning Commission members.

6 Today is possibly your last
7 hearing and I think that you have definitely
8 made a contribution to this Board and to this
9 Office of Zoning, and to the city as a whole
10 in the way you have conducted and the way
11 you've done hearings.

12 I've heard a lot of great comments
13 about how you have carried out hearings. As
14 you know, in the work that we do on Monday
15 they love us, on Tuesday they've got a problem
16 with us. That's par for the course and that's
17 the decisions that we've had to make.

18 In my 14 years some Mondays they
19 speak to me and then some Monday evenings they
20 don't. I think you have exemplified as a
21 chair of the BZA as one of the best chairs.

22 I can go down and say you were one

1 of the best chairs on the Board of Zoning
2 Adjustment, the way you've handled it, the way
3 you've always been courteous, not just to
4 Board members and the staff, but also to the
5 public.

6 I think that this city is served
7 better by you, by Chairperson Meridith
8 Moldenhauer coming this way. You will be
9 missed. We appreciate everything you've done.
10 I as the Chairman just wanted to stop by and
11 make sure that I put that on the record.

12 When you can't sleep at night, you
13 can just run back and listen to Anthony Hood's
14 comments. I'm sure the others on the
15 Commission agree with my comments. It's been
16 a pleasure to serve with you. You will be
17 missed. One thing I know you will still be
18 engaged in something in this city if not back
19 to see you here on the Board at some other
20 time.

21 The best to you as you continue to
22 stay engaged in the workings of the city.

1 This Board I know for sure is a better Board
2 because you passed by. Thank you, Chairperson
3 Moldenhauer. I just wanted to stop by and say
4 that.

5 MEMBER JORDAN: It would be easier
6 to say ditto. We don't know exactly when it's
7 going to be the last day but we definitely
8 want to make sure that you are acknowledged.
9 We as your colleagues certainly have great
10 admiration and appreciation for you. I know
11 I've learned a lot under you.

12 We just want to make sure that
13 we're on the record. Hope the video is still
14 going because we really want everybody to see
15 how much we appreciate you on this particular
16 Board. I know I was Johnny Come Lately. Am
17 I the baby? Yeah. Let me say this.

18 Because we wanted to be sure that
19 we showed you our appreciation and before, not
20 knowing what would be your last day, but we
21 know today it's today, is the day that you are
22 here and we really wanted to do this so that

1 we don't be remiss in not showing our support
2 from your fellow -- this is a gift from your
3 fellow members of the BZA showing our great
4 support for you.

5 If you open it, I can read it. It
6 says -- well, your name is on the gavel and
7 the other plaque kind of death threat thing
8 says, "With great admiration and appreciation
9 for your leadership to the Board of Zoning
10 Adjustment 2009 to 2012." Thank you.

11 CHAIRPERSON MOLDENHAUER: Well,
12 this is funny considering everyone always says
13 I need to gavel more often at the beginning
14 and the end of a hearing. I want to say thank
15 you so much to everybody and to Mr. Hood for
16 your exceptional words. They mean so much to
17 me. It really does.

18 Mr. Jordan and Mr. Hinkle, getting
19 to work with you. Obviously Vice Chair Sorg,
20 it's been amazing working with you. Mike, I
21 think I get to see you more than maybe other
22 Zoning Commission members.

1 ZC MEMBER TURNBULL: That's been
2 pointed out.

3 CHAIRPERSON MOLDENHAUER: I like
4 it. It's good. It's really been -- obviously
5 all of the staff members here and all of the
6 individuals at OAG and OP, it's been
7 absolutely amazing. I've been honored to be
8 able to be part of it.

9 As everyone knows, I would love to
10 continue on but I think obviously I don't have
11 to worry anybody about giving birth on the
12 dias this summer at least. Obviously it's
13 been such an amazing opportunity.

14 I do look forward to continuing on
15 with the District and with Zoning and be as
16 much as part of everything that I can. As
17 everyone knows I love this city and I will do
18 everything to continue to make sure that it's
19 the best city it can be.

20 ZC MEMBER TURNBULL: We're not
21 going to see you on the other side of the
22 dias, though. Are you representing --

1 CHAIRPERSON MOLDENHAUER: I don't
2 know. We'll have to see what life will have
3 happen.

4 VICE CHAIR SORG: Madam Chair,
5 before you close the meeting, I wanted to just
6 add my remarks. You are the one person
7 sitting here that's been serving on the Board
8 since I've been here.

9 I think as someone coming in to
10 this context without a legal background and
11 some of the experience that those people who
12 have been serving longer have had, I have
13 really, really deeply appreciated getting to
14 know you, becoming friends with you, and your
15 advice and counsel and education ever since
16 I've been here. It means a great deal to me.
17 Thank you.

18 MR. MOY: Madam Chair, if I may,
19 since we are speaking on the record, it would
20 be remiss of me not to say a few words on
21 behalf of the Director of the Office of Zoning
22 and certainly in my office I have staff that

1 serves the BZA.

2 It's been a real honor and a
3 privilege to serve you. All I can say is --
4 not to belabor this but all I can say is that
5 you have made your mark with the BZA and that
6 will hold up for years. Thank you.

7 CHAIRPERSON MOLDENHAUER: Again, I
8 am so appreciative of being able to be part of
9 this team. It's an amazing team from top to
10 bottom. I am so gracious to hear all of your
11 amazing words. I don't want to get teary but
12 I'm really happy. I obviously look forward to
13 continuing to watch everybody and to be part
14 of whatever life will have in store. Thank
15 you.

16 That being said, I will gavel the
17 conclusion of this hearing. Who know, you may
18 see me back here next week but we'll see what
19 happens.

20 (Whereupon, at 11:41 a.m. the
21 hearing was adjourned.)

22

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: DCZC

Date: 03-13-12

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

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