

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY, MARCH 16, 2010

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:49 a.m., Marc D. Loud, Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD	Chairman
SHANE L. DETTMAN	Vice Chairman (NCPC)
MERIDITH MOLDENHAUER	Board Member
NICOLE SORG	Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Spec.

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on March 16, 2010.

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Board of Zoning Adjustment
District of Columbia
CASE NO. Transcript
EXHIBIT NO. null

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

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Marc Loud, Chairman 3

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Board Deliberation:..... 6

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APPLICATION 18032-JOHN GRAHAM/LORRI KERR:.. 20

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

2 10:49 a.m.

3 CHAIRMAN LOUD: Good morning. This
4 meeting will, please, come to order. Ladies
5 and gentlemen, this is the March 16, 2010
6 Public Meeting of the Board of Zoning
7 Adjustment of the District of Columbia.

8 My name is Marc Loud, Chairperson.

9 Joining me today are Vice Chair, Shane
10 Dettman, representing the National Capital
11 Planning Commission, Ms. Meridith Moldenhauer,
12 Ms. Nikki Sorg, both Mayoral Appointees to
13 BZA, Mr. Clifford Moy, Secretary of BZA, Ms.
14 Sherry Glazer, attorney in the Office of the
15 Attorney General, and Ms. Beverley Bailey,
16 Zoning Specialist here in the Office of
17 Zoning.

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

21 We do not take any public testimony
22 at our meetings, unless the Board asks someone

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1 to come forward.

2 Please, be advised that this
3 proceeding is being recorded by a Court
4 Reporter and is also webcast live.
5 Accordingly, we must ask you to refrain from
6 any disruptive noises or actions in the
7 hearing room.

8 Please, turn off all beepers and
9 cell phones.

10 Does the staff have any preliminary
11 matters?

12 MR. MOY: Yes, we do, Mr. Chairman,
13 but staff would suggest that we take it as the
14 case is called.

15 CHAIRMAN LOUD: Yes, sir. Thank
16 you, Mr. Moy. Then why don't we proceed with
17 the agenda? And as you call the first case,
18 let me just apologize to all of you that are
19 here and have been waiting for us to start, we
20 had a number of filings come in yesterday and
21 even overnight in some of the cases that we
22 will be hearing and wanted an opportunity to

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1 review some of that as well as make sure that
2 we were prepared for this morning's calendar.

3 That often happens that we get late
4 filings, that's why we discourage it so
5 strongly and so again we do apologize.

6 Yes, sir, Mr. Moy?

7 MR. MOY: Yes. Good morning, Mr.
8 Chairman, Members of the Board. With that,
9 the first of the two decision cases is
10 Application No. 18017 of Carl and Undine Nash,
11 pursuant to 11 DCMR 3103.2. This is for
12 variances to authorize the conversion,
13 alteration, restoration, repair and use of a
14 warehouse building lot for human habitation as
15 a flat, two-family dwelling on an alley lot
16 under subsection 2507.1 and 2507.3, in the R-4
17 District at premises Rear of 1215 D Street,
18 S.E. This is in Square 1017, Lots 85 and 817.

19 On February 16, 2010, the Board
20 completed testimony, closed the record and
21 scheduled its decision on March 16. The Board
22 closed the record and there was no request for

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1 supplemental information.

2 So with that, the Board is to act
3 on the merits of the request for the use
4 variances, which is to convert an existing
5 structure on an alley lot to a family
6 dwelling. And that completes the staff's
7 briefing, Mr. Chairman.

8 CHAIRMAN LOUD: Thank you, Mr. Moy.

9 I do believe that we were fully briefed on
10 this case, which, as I recall, had some
11 interesting twists to it. It was not opposed
12 though by the ANC or by the Office of
13 Planning, as I recall.

14 So I don't necessarily think we're
15 going to take particularly long to deliberate
16 on this case. So why don't we just go
17 straight into it. And I think Ms. Moldenhauer
18 is going to lead us off.

19 MEMBER MOLDENHAUER: Thank you,
20 Chairman Loud. As Mr. Moy stated, this is a
21 use variance from the prohibition against
22 2507.1 and 2507.3 for converting a

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1 nonresidential structure on an alley.

2 The applicant wants to convert a
3 nonconforming warehouse in an R-4 Zone into a
4 flat, a two-family dwelling.

5 This application, while it was
6 self-certified, did present a unique aspect
7 where the applicant articulated in the hearing
8 that they did seek the ZA's opinion and the ZA
9 did provide them with some guidance on the
10 exact relief requested and that did then
11 modify the relief that they were asking for.

12 As Chairman Loud referenced, there
13 is no opposition except that actually OP,
14 while not recommending denial, states in their
15 report and during the hearing that they cannot
16 recommend approval.

17 Just while we are talking about
18 approval, we have Exhibits 19, 20, 21, 22, 23
19 and 24 and 25, all letters from the community
20 in support of the application which would go
21 to Prong No. 3 of the variance test.

22 Walking through the use variance

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1 test, we first have to determine that the
2 property has a narrowness or it has an
3 exceptional situation. Then we can determine
4 whether that unique and exceptional
5 circumstance of the property creates undue
6 hardship for the owner.

7 And then we go to the third prong,
8 whether that provides any substantial
9 detriment to the public good or impairs the
10 Zoning Plan.

11 The first prong, the applicant
12 submitted these statements, and documentation
13 in graphic form as well, that the lot is
14 unusually large for an alley dwelling. And
15 also a confluence of factors that the current
16 condition of the property is exceptionally
17 poor. The roof was caving in.

18 They showed, I think, you know,
19 very sufficient diagrams of the current
20 condition and they also presented testimony
21 that the structure while not historic is
22 contributing and, thus, the applicant desired

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1 more to, rather than raise the structure as
2 the architect recommended, maintain the
3 structure, which would cost them additional
4 money in regards to maintaining the property
5 and providing some use for the property.

6 So I think that in the first prong,
7 the applicant has sufficient documentation to
8 prove the first prong.

9 The second prong as to undue
10 hardship, this is a prong where I think the
11 other Board Members and I find a little more
12 challenging. One, not just in supporting the
13 prong, but also in interpreting the regs and
14 how that applies, especially because OP
15 interpreted the regs differently than what the
16 applicant did.

17 And as I said earlier, from our
18 understanding, from the applicant's testimony,
19 the applicant's interpretation came in
20 conjunction with the ZA's interpretation. And
21 this has to do with section 2507 and the
22 limitation to not create or rather construct

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1 or convert.

2 Here, obviously, the converting is
3 the issue because it's a nonresidential
4 structure, an alley structure, into a human
5 habitable alley.

6 I agree with the applicant and,
7 from my opinion, the ZA's interpretation that
8 because of the way that that section is read,
9 we don't have to determine whether the undue
10 hardship -- whether the applicant absolutely
11 cannot create a single-family, one-family
12 dwelling on the structure, but rather that
13 there is just simply an undue hardship for any
14 other nonresidential structure as it is
15 currently to convert that.

16 And there is sufficient
17 documentation in the record showing that a
18 warehouse, a continued warehouse use would not
19 be practical, that the property was on the
20 market for 17 months, that there was, you
21 know, no interest in the property. There is
22 sufficient exhibits presented by the applicant

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1 of addendums from other potential owners and
2 also from real estate agents in the market and
3 also showing the financial cost of improving
4 the property for a warehouse and the financial
5 cost of improving the property for an artist
6 studio and that those would both create an
7 undue hardship on the owner and not be
8 practicable.

9 I don't think in my interpretation
10 that we would actually have to show that a
11 single-family home is impossible or
12 impractical here. And I think that, in my
13 opinion, if we did, that the applicant would
14 have a challenge in meeting that standard.

15 I think that some of my colleagues
16 may interpret the section to say that under
17 2507.1, that it says except for the use of a
18 one-family dwelling, a structure shall not be
19 erected, constructed, converted, altered for
20 human habitability on an alley. And thus,
21 that would require under the use variance
22 standard of undue hardship that the applicant

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1 actually have to show that the applicant could
2 not create a one-family dwelling prior to them
3 moving on to a flat.

4 I will let the other Board Members
5 articulate that point. But I think that in my
6 interpretation, we can move past the prong
7 that they would satisfy that.

8 And then I think that the applicant
9 strongly supports Prong No. 3, which is the
10 Zone Plan. I think the initial interpretation
11 for why there was a discouraging of any
12 single-family dwellings or dwellings in alley
13 lots is not applicable for this improved
14 property.

15 The ability to take a property that
16 has not been able to be used for the last 17
17 months and actually create a positive
18 residential need, something that the density
19 is not going to be any greater than the
20 density that is permitted in an R-4 Zone as a
21 matter-of-right.

22 So I don't see any, you know,

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1 significant detriment to the Zone Plan or the
2 public good.

3 So with that being said, I've kind
4 of gone through that quickly, if any of the
5 Board Members want to articulate their view on
6 how they satisfied the second prong, I'll open
7 it up to the Board for discussion.

8 CHAIRMAN LOUD: Thank you, Mrs.
9 Moldenhauer. That was an excellent walk-
10 through the three prongs. I'm in agreement
11 with you fully on all three prongs. Maybe a
12 subtle nuance kind of difference on Prong 2,
13 which I'll get into momentarily. But before
14 doing that, let's see if any other Board
15 Members want to weigh in.

16 VICE CHAIRMAN DETTMAN: Thank you,
17 Mr. Chairman. I also am in agreement with the
18 outcome of Ms. Moldenhauer's analysis and with
19 respect to the interpretive nuance that she
20 discussed briefly. I think I see it a little
21 differently than how she approaches 2507,
22 which are both, you know, perfectly valid

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1 interpretations. I think they can be read
2 both ways.

3 But I think 2507, I think the
4 intent of 2507 is to, you know, kind of
5 control the proliferation of alley dwellings.

6 So not allowing the creation of more alley
7 dwellings and that's specifically in 2507.3
8 where it says "a nonresidential structure"
9 such as this one, "located on an alley shall
10 not be converted, altered for human
11 habitation."

12 And so I think that's the first
13 hurdle that the applicant needed to get over.

14 And as I stated, I think that the applicant
15 has.

16 But then I think that 2507 seeks to
17 control kind of the number or the density of
18 residential dwellings on alley lots. And I
19 think 2507.1 speaks specifically to that where
20 I interpret .1 to mean that a structure cannot
21 be erected, constructed, converted, etcetera,
22 on an alley lot, except as a one-family

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1 dwelling.

2 And so I think that's the only
3 appropriate, I think the regs say that's the
4 only appropriate, residential use for an alley
5 lot. And it adds the extra caveat that it has
6 to be on an alley that is at least 30 foot
7 wide.

8 And so to me, I think, the first
9 hurdle is the conversion of a nonresidential
10 structure.

11 And the second hurdle, you know,
12 the second application of the use variance
13 test would be for 2507.1.

14 I think that the applicant has made
15 an adequate showing that it would be very much
16 an undue hardship in order for them to use
17 this property, given the size of the existing
18 structure, given the condition that it is in
19 and the fact that it cannot be torn down if a
20 contributing structure to the Historic
21 District, that it would be an undue hardship
22 for them to put it to use as a one-family

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1 dwelling.

2 And then I agree with all of the
3 points that Ms. Moldenhauer makes with respect
4 to the third prong.

5 And I think that if the record is a
6 little bit light on that showing for a one-
7 family dwelling, I think that it is
8 strengthened by how good the third prong is
9 here. I think that it is a property that has
10 been vacant for quite some time. It was on
11 the market for 17 months.

12 And so I think that this is a good
13 project. In general, it is going to be a
14 positive contribution to the neighborhood.
15 And so I use the strength of the third prong
16 to help me get through all three prongs.

17 So that's all I have, Mr. Chairman.

18 CHAIRMAN LOUD: Good. Thank you,
19 Mr. Dettman. Ms. Sorg, did you have anything
20 to add?

21 MEMBER SORG: Sure. I will just
22 add that I agree with Ms. Moldenhauer's

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1 reading that in satisfying the conversion to a
2 residential structure, that then the twofold
3 solution is allowed. But I also see and agree
4 with Mr. Dettman's analysis that even if the
5 sort of stronger argument is required or there
6 is another hurdle that one has to get over,
7 that that is also satisfied based on the
8 existing conditions of the property, which not
9 only had been on the market for 17 months, but
10 had been, you know, blighted and vacant for
11 quite a long time in the neighborhood, which I
12 think actually contributes to both the third
13 prong, as you both have stated, and also the
14 first, I believe.

15 CHAIRMAN LOUD: Thank you, Ms.
16 Sorg. I think having heard from each of you,
17 there is not much I can add.

18 I agree with the analysis on the
19 use variance under the section 2507.3, sort of
20 leaning on that. Personally, I come out under
21 2507.1. I do think that even once you get
22 through the hurdle being in the residential

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1 and qualifying that use, that .1 requires you
2 to establish the single-family use. And this
3 is a flat.

4 But I think the evidence supports
5 the variance from 2507.1, I think as Mr.
6 Dettman mentioned. He mentioned it in regards
7 to Prong 3. I would mention it in regards to
8 Prong 2 as well, the 17 months that it was on
9 the market, the sheer size of the property,
10 it's over 5,000 square feet, maybe close to
11 6,000 square feet and the cost of rehabbing it
12 as a single-family for a market that may not
13 be there on an alley lot at that price, and
14 they did submit some numbers, I think would be
15 an undue hardship.

16 And so without repeating everything
17 that everyone else said, I'm in agreement with
18 the outcome. And am prepared to support the
19 direction that Mrs. Moldenhauer wants to go
20 in.

21 With that being said, is there
22 further discussion? All right. Is there a

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1 motion?

2 MEMBER MOLDENHAUER: Yes. The
3 motion for BZA Case No. 18017 for 1216 D
4 Street, S.E., Square 1017, Lots 85 and 817, to
5 approve the application's request for a use
6 variance from 2507.1 and 2507.3 to convert a
7 structure on an alley lot into a two-household
8 flat for human habitability.

9 CHAIRMAN LOUD: All right. A
10 motion has been made. Is there a second?

11 VICE CHAIRMAN DETTMAN: Second.

12 CHAIRMAN LOUD: The motion is made
13 and seconded.

14 All those in favor say aye.

15 ALL: Aye.

16 CHAIRMAN LOUD: Is there any
17 opposition? Mr. Moy, can you read back the
18 vote, please?

19 MR. MOY: Yes, sir. Staff would
20 record the vote as 4-0-1. This is on the
21 motion of Ms. Moldenhauer to approve the
22 application, as advertised, seconded by Vice

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1 Chair Mr. Dettman. Also in support of the
2 motion are the Chair, Mr. Loud, and Ms. Sorg.
3 No Zoning Commissioner participating. So
4 again, the final vote is 4-0-1 to approve.

5 CHAIRMAN LOUD: Thank you, Mr. Moy.

6 MR. MOY: Full order, summary
7 order, sir?

8 CHAIRMAN LOUD: Summary order.
9 Appreciate that. And thank you, Mrs.
10 Moldenhauer for taking us through that.

11 Mr. Moy, when you are ready, you
12 can call the next case.

13 MR. MOY: Yes. And that would be
14 Application No. 18032 of John Graham and Lorri
15 Kerr, pursuant to 11 DCMR 3104.1 and 3103.2.
16 This is for a special exception to allow a
17 rear sunroom addition to an existing one-
18 family row dwelling under section 223, not
19 meeting the lot occupancy, section 403,
20 requirements and variances, to allow a second
21 floor addition for use as an art studio to an
22 existing accessory garage not meeting the

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1 height and story limitations under subsection
2 2500.4 in the R-4 District at premises 647 C
3 Street, N.E. The subject property is in
4 Square 865, Lot 79.

5 I note for the Board that the
6 applicant at the hearing on February 16 had
7 withdrew it's relief under 2500.7.

8 On March 2, 2010, the Board
9 convened the application for deliberation at
10 its Public Meeting. After deliberation, the
11 Board requested the applicant submit
12 additional supporting information.

13 The filing was submitted in your
14 case folders as Exhibits 31, 32 and 33, all
15 dated March 12, 2010, which was the deadline.

16 And so the Board has two actions.
17 The first is to act on a letter from Tom
18 Hamilton from ANC-6C Single Member District,
19 Exhibit No. 30, which was filed on February
20 19th after the record had been closed, as a
21 preliminary matter.

22 And the second action is to act on

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1 the merits of the applicant's requested zoning
2 relief.

3 That completes the staff's
4 briefing, Mr. Chairman.

5 CHAIRMAN LOUD: Thank you, Mr. Moy.

6 So why don't we take up the preliminary
7 matter first of the Exhibit 30, which is a
8 request from the ANC to have its report
9 entered into the record after we had initially
10 closed the record. Of course, the rules
11 require that once we close the record, it is
12 official nothing else will be considered. But
13 I do believe that we are able to waive that
14 rule under 3100.5.

15 And so the provision under 3100.5
16 allows us to do that for good cause shown and
17 no prejudice to any party. I think in this
18 case, I would be supportive of allowing it
19 into the record, but let me hear from others.

20 Are there any thoughts from others with
21 respect to it? Okay.

22 So then why don't we allow it into

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1 our record and make it a part of what we have
2 available to us for the deliberation.

3 I think with that, I believe that
4 we have gotten a lot of information at the
5 hearing. I think we continued this once
6 before to ask for some additional information
7 and we have since got some supplemental really
8 good information from Mr. Connors in the case.

9 And I think we are ready to deliberate.

10 Sort of similar to Nash, because of
11 all of the hearings, because of all the
12 supplemental information that came in, this
13 probably won't take very long to deliberate.
14 And I think I'll turn to Ms. Sorg to perhaps
15 get us started.

16 MEMBER SORG: Okay. Thank you, Mr.
17 Chairman. So in this Case No. 18032, John
18 Graham and Lorri Kerr, well, there are two
19 sections of relief that they are seeking.

20 So, first, under 223 to replace an
21 existing deck with an enclosed sunroom, which
22 is requiring relief from lot occupancy, it's

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1 not something that we have talked a lot about.

2 OP is in support of it. And you know, we
3 have all sort of voiced our support.

4 So I think as we have done in the
5 last two hearings, we can sort of -- I would
6 voice my support for that again. And we can
7 kind of let that be.

8 On the second relief, it is asking
9 for an area variance from the height and story
10 requirements under 2500.4 to add a second
11 story to an existing garage to make an artist
12 studio. And the regulation there says that
13 "In this zone, accessory structures should not
14 exceed one-story or 15 feet in height."

15 We have gone over the way that
16 those things are measured in the last hearing
17 and things like that. So where we were after
18 the last meeting, I think, the purpose of
19 creating the addition is to create an artist
20 studio, which we have heard a lot about the
21 reasons for that and things like that.

22 So the main reason, I think, that

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1 we asked the applicant to supply the
2 supporting information that we got, which
3 consisted of, you know, cost estimates and
4 recommendations from their architect and also
5 an email about, you know, hazardous materials
6 and things of that nature, was, as sort of
7 contained in the OP report from the initial
8 reading, because we wanted to understand
9 better if there was or what the connection was
10 between the exceptional condition under the
11 first prong of the variance test, which there
12 is no argument that there isn't an exceptional
13 condition of the property, which is a grade
14 change between the alley and the rear yard,
15 but we wanted to understand more what the
16 connection was between that exceptional
17 condition and to take us to the second prong
18 of, you know, how that might affect the
19 construction of the addition and how that
20 might be related to the practical difficulty.

21 In my opinion, and I know that we
22 have talked about this a lot, the supplemental

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1 information that we got has done a lot to
2 relate these two conditions. What we got was
3 three possibilities for the construction of
4 this addition, which is something that we
5 asked for.

6 And I'll start from the third and
7 move to the front. The third method is not a
8 matter-of-right possibility. And if we look
9 at the email that the applicant has supplied
10 from USG regarding the systems that would
11 prohibit or prevent the transference of fumes
12 from one area of the house to another, I think
13 we can discount the third possibility of
14 adding this use, based on, you know, not being
15 able to protect the rest of the structure, you
16 know, from the leakage of whatever hazardous
17 materials may be used in this recreational
18 pursuit.

19 And so we can move to the second
20 method, which would be a matter-of-right for
21 the applicant to remove the existing garage
22 and build in its place an artist studio, which

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1 would be semi-detached from the house and
2 would be entered from the rear of the
3 property.

4 In this case, I think that we can
5 deduce two things: That the matter-of-right
6 construction based on its excessive cost can
7 be seen as a practical difficulty as compared
8 to the presented option, which holds a cost
9 shy of \$30,000 compared to over \$70,000.

10 And also you can see, I think, that
11 in the replacement of the garage, the lion's
12 share of the cost, of the excessive cost of
13 this option is related to mitigating the
14 exceptional condition of the property as it is
15 related to excavation and foundation and those
16 sorts of issues.

17 So in that case, I think perhaps we
18 can, based on the cost that we have been shown
19 for the various options of this addition of
20 including this use in the house, which is a
21 recreational use like many others, I think,
22 then through having been shown the practical

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1 difficulty of dealing with the conditions of
2 the property, then, you know, relate that to
3 the first prong of it being related to the,
4 you know, exceptional difficulty related to
5 the relief that is being requested.

6 And then as to the third prong, I
7 think this is something that we all sort of
8 have been in agreement on. The house is not
9 historical, but it's in the Historic District.

10 And the proposal has support from all the
11 surrounding neighbors as well as the ANC. And
12 we have lots of documentation that similar
13 construction projects have been done to
14 supporting structures on the alley in the
15 neighborhood and the square as well.

16 So in that case, even though OP --
17 in that case, I don't think that it would, as
18 OP says in its report, result in a substantial
19 detriment to the public good.

20 So that's kind of where I am
21 leaning in regard to this case. So I would
22 ask further input from Board Members.

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1 CHAIRMAN LOUD: Thank you, Ms.
2 Sorg. I think that was a great walk-through
3 of the variance test and, of course, the OP
4 supports the 223. And so we pretty much adopt
5 by reference their report conclusions on that
6 part of it, the lot occupancy part.

7 Let's see what other Board Members
8 think and then we can perhaps suggest a
9 motion. While don't I just jump in? No, go
10 ahead, Mr. Dettman.

11 VICE CHAIRMAN DETTMAN: Thank you,
12 Mr. Chairman. And thanks to Ms. Sorg for a
13 great analysis and summary of the case, though
14 I do come out with a different result.

15 I think the information that, the
16 supplemental information, was provided by the
17 applicant was very, very helpful. However, it
18 still didn't get me to see the connection
19 between the first prong and the second prong.

20 I agree that the property has an
21 exceptional condition with the grade, the
22 grade change, between the alley and the rear

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1 yard and the resultant flooding that
2 occasionally occurs. I do see that as an
3 exceptional condition.

4 And I do see that based on the
5 information that was provided by the applicant
6 in Exhibit 33, in terms of the cost, and the
7 difficulty to provide an artist studio, a
8 space that would allow the applicant to use
9 using these different types of chemicals,
10 that's a difficulty in relation to the need to
11 maintain a safe household.

12 But whether or not the grade
13 change, that exceptional condition, gives rise
14 to a practical difficulty if the regulations
15 were strictly applied, that's the connection
16 that I don't see.

17 With respect to the second method
18 of development, the matter-of-right method,
19 that is articulated in Exhibit 33, I read that
20 as it is, essentially, expanding the basement.

21 And I think that the \$50,000 estimate for
22 excavation, new foundation, walls, roof, door

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1 and windows, I question what that cost would
2 be if it was a totally flat site.

3 I wasn't convinced that the
4 topographic change in the rear yard was so
5 substantial that it would add significantly to
6 the cost of excavation. And so again, I
7 didn't see the connection between it.

8 I do follow Ms. Sorg's analysis
9 that the topographic change gives rise to a
10 practical difficulty because of this and the
11 practical difficulty would be cost. But I was
12 not persuaded that that cost was so
13 substantially higher because of the grade
14 change. I think that the cost for Method 2
15 would be higher simply because you are
16 excavating and expanding a below-grade space,
17 the basement.

18 And I think that the applicant's
19 desire to have an artist studio is a personal
20 need. A personal preference of the applicant
21 and it's not something specific to the
22 property. And I think that if you read in

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1 Chapter 31 the language of the variance test,
2 it does say that by way of some exceptional
3 condition or situation that is specific to a
4 piece of property, that you can go on to --
5 and whether or not that gives rise to a
6 practical difficulty.

7 In this case, I think it's the
8 personal preference of the applicant that
9 gives rise to the practical difficulty and
10 that's not -- we're not able to fit that into
11 the variance test.

12 And based on information provided
13 by the Office of the Attorney General, I think
14 that past BZA cases as well as Court of
15 Appeals throughout the country have seen it
16 the same way, that variance relief is
17 extraordinary relief and that it permits what
18 would otherwise not be permitted in that zone.

19 And I'm reading from a recent case
20 in BZA Application No. 17977 and that variance
21 relief cannot merely be granted based on the
22 personal preference of an applicant.

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1 It needs to be tied to an
2 extraordinary condition on a specific piece of
3 property. And so I am failing to see the
4 connection between the first and second prong.

5 And I cannot support the application for that
6 reason.

7 CHAIRMAN LOUD: Thank you, Mr.
8 Dettman. Is there further?

9 MEMBER MOLDENHAUER: Thank you, Ms.
10 Sorg and Mr. Dettman. I think that the
11 analysis that was initially provided, I agree
12 with a portion of it, but then I diverge and
13 end up more where Mr. Dettman is. But I do
14 think that the applicant has shown a parallel
15 between the exceptional circumstances of the
16 property and then the need to potentially
17 excavate the basement.

18 I think my problem is more on the
19 case law or the precedent that Mr. Dettman
20 referenced. And I appreciate him bringing up
21 that specific case, because as Ms. Sorg was
22 going through it, I thought about that issue a

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1 little bit more and I think that if it was
2 just between the applicant's additional
3 submission in Exhibit 32 with Option 1 and
4 Option 2, and there was no Option 3, I think
5 that then this would be a pretty, you know,
6 simple case in regards to supporting it.

7 But because there is an Option 3
8 and the logic behind why Option 3 is not
9 feasible is directly related to the
10 applicant's personal preference and the use of
11 that space. Whether that space was then, you
12 know, used tomorrow or the next day for simply
13 maybe a bedroom or for another use that didn't
14 have the safety hazards associated with it, I
15 think that then creates the personal
16 preference, which that case that Mr. Dettman
17 referenced specifically talks about.

18 So and then comparing the cost of
19 Option 1 and Option 3, there really is no
20 difficulty there in regards to providing to
21 satisfy the variance test on the second prong.

22 CHAIRMAN LOUD: Thank you, Mrs.

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1 Moldenhauer. I think this is a tough case for
2 me, too. And I know we have gone to different
3 places on these types of cases, depending on
4 whether the use proposed is a recreational
5 use, a basement for storage and the like. And
6 this is an artist studio.

7 But I think where I come out to be
8 succinct is in alignment with Ms. Sorg. And I
9 don't think -- I think for the area variance,
10 practical difficulty test, that the test is
11 that there is a practical difficulty.

12 I think that there is a nexus and I
13 think Mrs. Moldenhauer conceded that there is
14 some, even if it's slight, nexus between the
15 exceptional situation and the practical
16 difficulty.

17 Where I think I disagree with Mrs.
18 Moldenhauer is that I do think a difference of
19 \$4,000 or \$5,000 in a climate like what we are
20 in now in a recession is unnecessarily
21 burdensome. And I think that that's all the
22 case law requires for practical difficulty,

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1 unlike the undue hardship. It's that it is
2 just unnecessarily burdensome, whatever that
3 means.

4 And in this case, I think it means
5 the additional cost would be a cost that this
6 applicant would not need to incur if the
7 applicant were to go with what has been
8 presented as Option 1. And I think the issue
9 of the artist studio is a tough one. I mean,
10 it's a tough one.

11 But part of that issue is tied to
12 some health considerations. And that makes it
13 a little less tough for me, because if we are
14 taking a look at granting relief from strict
15 application and we do it because we want
16 people to have -- in an urban climate, in a
17 dense urban climate, we want them to be able,
18 for example, to recreate on their rooftop deck
19 or to be able to get a little more space for a
20 variety of recreational kinds of needs and to
21 not do it when there is some really clear
22 indication from this record that it is not

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1 disputed that there is potentially a health
2 hazard.

3 It just seems to me a
4 prioritization of values that is a little
5 askew. So it is a really close call. I mean,
6 I could go either way on it. But I think the
7 confluence of factors between -- there is a
8 price differential that is significant between
9 Options 1 and 3.

10 There are some indicia of some
11 potentially severe health considerations. And
12 we are talking about an area variance
13 practical difficulty test. I think that this
14 applicant just barely made it over that
15 threshold. I sort of don't think it has
16 precedential value for any future cases, but I
17 think that the applicant, in my mind, has just
18 made it over that threshold.

19 MEMBER SORG: Okay. If I can add
20 something, Chairman Loud? I couldn't agree
21 more actually with your comments about
22 recreation space.

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1 And I think I wanted to just add
2 something small to that, which is that if you
3 are looking at it in that way, you know, and I
4 think we have seen it from this Board in the
5 past, you know, if we are in favor or, you
6 know, if we want to encourage recreation space
7 in residential structures because they are
8 beneficial to the character of our city and
9 to, you know, people's use and enjoyment of
10 their homes, then perhaps you might even be
11 able to say that and we view this use, you
12 know, as an artist studio as the same kind of
13 recreational space as we would, you know,
14 otherwise see in a rooftop deck or other types
15 of, you know, children's playroom or whatever
16 it is.

17 You can say that the inability to -
18 - if you count -- if you give way to the
19 health hazards that we have seen in the third
20 option presented in the supplemental filing as
21 important, you can then see that there is a
22 practical difficulty in the inability to have

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1 this recreation space, you know, in the house
2 as a matter-of-right. If that makes sense.

3 CHAIRMAN LOUD: Yes, sir, Mr.
4 Dettman?

5 VICE CHAIRMAN DETTMAN: Just one
6 additional point. It's that, you know, I
7 think we have all expressed support for the
8 223. But I think the 223 factors into our
9 considerations for the variance test, because
10 the applicant has pursued an expansion of the
11 existing lot occupancy by, I think, 9.9
12 percent by enclosing in the rear patio so that
13 they could have a sunroom.

14 Noting that the drainage issues in
15 the rear yard has created, I think, a problem
16 with standing water, mosquitos and they want
17 to recreate in that fashion.

18 And then they are pursuing the
19 variance for the sake of establishing an
20 artist studio. And I guess looking at those
21 two requests together, and again noting that
22 the artist studio is very much a personal

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1 preference of the applicant, I'm just
2 wondering if you forego the additional lot
3 occupancy on the rear of the house for a
4 sunroom, does that allow you to expand
5 horizontally, not vertically on the garage,
6 into the rear yard to provide some additional
7 footage for the artist studio?

8 I believe it's a two-car garage
9 currently. They are only required to provide
10 one parking space by the Zoning Regulations.

11 And so I see flexibility there.
12 And in addition, the additional square footage
13 on the back of the garage could potentially
14 alleviate any drainage issues that are
15 resulting from the drainage from the alley.

16 But instead of pursuing that
17 avenue, they have decided to expand their
18 living space and then tack on a variance for
19 the artist studio. And to me, given how the
20 regs are structured, it's one or the other.
21 And that the personal preference is not giving
22 rise to a practical difficulty for the artist

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1 studio.

2 MEMBER MOLDENHAUER: Okay. To just
3 kind of, I guess, follow-up on that, I feel
4 this is a very challenging case. I think
5 Chairman Loud really provided some new
6 arguments or perspectives, but I still feel
7 that, unfortunately, at the end of the day I
8 can't get there.

9 I think that while maybe Chairman
10 Loud's statement that the \$8,000 would be
11 significant, I don't know if I agree with
12 that. I think that potentially if it was the
13 relief on its own, then it may be an issue of
14 weighing, and we have done this before, or we
15 balance the actual extent of the relief to the
16 level of the practical difficulty.

17 And I think that here based on an
18 owner's personal plight not being able to be
19 considered at all as a factor towards that, we
20 can only then rely on this smaller
21 distinction, this \$8,000 change or practical
22 financial economic difficulty that is

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1 presented here in this case.

2 And I think that as Mr. Dettman
3 stated the fact that there is the 223 relief,
4 which we are in support of, that then this
5 additional relief on top of that is not
6 supported by a sufficient level of practical
7 difficulty, given that we can't consider the
8 personal safety concerns or the personal use
9 that this space is going to go towards.

10 I think that Mr. Dettman brings up
11 a very good point. But if we also look back
12 to the three proposed methods that we have in
13 this other filing, what I think you are
14 suggesting is -- you can put it this way.

15 The third method is the suggestion
16 that the artist studio be added onto the
17 basement. And if the applicant were not
18 asking for the 223 relief for the sunroom,
19 then the third method it would be transitive.

20 It would be either the basement or the second
21 floor.

22 But basically, I think, in my

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1 opinion, the third method that is being
2 proposed here is an addition to the house,
3 and, you know, for the artist studio. And
4 whether it is the basement or not. Because
5 the third method is not being shown to be
6 unusable because of cost, in this case, it is
7 being shown as Chairman Loud described as
8 unworkable because of the possible health
9 hazards that would be difficult to mitigate.

10 So and then if you go back to the
11 second option, this option is basically
12 replacing the existing garage. And so it
13 doesn't have an effect, I don't think, on the
14 lot occupancy. And so it isn't affected by
15 the addition of the sunroom or not and then
16 neither is the first one, of course.

17 VICE CHAIRMAN DETTMAN: Looking at
18 Exhibit No. 33 with the three methods, I read
19 the third method as the one that is,
20 essentially, just using the existing basement.

21 No expansion out the back, no excavation.
22 It's just -- and the applicant notes that it

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1 is a method that they do not endorse due to
2 safety concerns.

3 But it says the only logical place
4 for such an artist studio is the existing rear
5 cellar beneath the first floor kitchen. And
6 so but as you noted, Ms. Sorg, the safety
7 concerns and we got weigh in from a company
8 about drywall and not being able to stop these
9 fumes.

10 The second one entails actually
11 demolishing the existing garage. I suspect it
12 is to free up lot occupancy, so that you can
13 expand out the back of the house. And from
14 what I gather, because of the grade change
15 between the main floor and the basement level,
16 it looks like it's maybe about 5 feet above-
17 grade, they would expand out, excavate to get
18 the head room and then cover over this
19 additional space and maybe have a deck on top.

20 I assume that they are demolishing
21 the garage in order to free up the lot
22 occupancy in order to do that. I think my

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1 previous comment was that well, instead of
2 doing that, forego the additional lot
3 occupancy with the sunroom and tack it onto
4 the garage.

5 And if necessary -- I don't know,
6 I'm not going to try to design and I'm not to
7 try to put together a variance test, but I see
8 a stronger case for a variance if we were to
9 go that option with putting additional lot
10 occupancy on the garage. And if you wanted to
11 try 223, that gives you 70 percent.

12 But if you couldn't fit an artist
13 studio in that additional space, you know, a
14 strong case for additional lot occupancy by
15 way of a variance because it's necessary to
16 put in this artist studio and alleviate the
17 flooding concerns that are in that exact spot
18 in the rear yard.

19 So that's kind of how I was
20 approaching it.

21 CHAIRMAN LOUD: Okay. Perhaps we
22 can take it around one more time and then I

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1 think we're going to call for the vote.

2 For me, personal plight and
3 practical difficulty always go together. I
4 have read the memo from the Attorney General.

5 I think personal plight may not go to
6 exceptional situation, but I even take
7 exception with that argument. There are
8 plenty of considerations that we look at for
9 exceptional situation that go beyond the land.

10 We have looked at zoning history
11 just in a case we had a few months ago, the
12 Rosen case. And we look at things other than
13 the land. And I think all of us can see that.

14 So I think the personal plight
15 question to me, since we all agree that there
16 is some kind of exceptional situation, the
17 personal plight discussion fits more squarely
18 in the practical difficulty.

19 And I think every time we take a
20 look at practical difficulty, we take a look
21 at how that impacts the person, that personal
22 situation. It's either going to cost more

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1 money, they are going to get a smaller room as
2 opposed to a larger room, they are not going
3 to be able to do a room at all, so it always
4 impacts the person, I think, a practical
5 difficulty prong.

6 So I'm still kind of there with the
7 applicant, barely, barely, barely, but
8 nonetheless making this case. And I think, at
9 least for me, I'm not saying for others, but
10 for me it misplaces the analysis to look at
11 personal plight under the exceptional
12 situation prong of this test.

13 There has never been any
14 representation by this applicant that we were
15 looking at a case where what made it
16 exceptional was this artist studio, this
17 proposed use. He never said that. He talked
18 about the grade. We are all talking about the
19 grade change.

20 And again, there is so many cases
21 where we ourselves have looked at more than
22 the land, so to suggest that that is what it

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1 takes to make an exceptional situation, I
2 think is again veering just a little off
3 course.

4 With that, I'll open it up to
5 colleagues. Okay. It doesn't appear as
6 though there are any further remarks. So I
7 think what we ought to do -- at this point,
8 sometimes you just have to agree to disagree,
9 and move on. And unless there is further
10 discussion, I think I'll call for a motion at
11 this point.

12 Is there a motion?

13 MEMBER SORG: Yes. I submit a
14 motion in Application No. 18032 of John Graham
15 and Lorri Kerr for special exception pursuant
16 to 3104.1 and 3103.2, to allow a rear sunroom
17 addition to an existing one-family row
18 dwelling under section 223, not meeting the
19 lot occupancy requirements, and variances to
20 allow second floor addition to an existing
21 accessory garage not meeting the height and
22 story limitations under subsection 2500.4 and

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1 2500.7 in the R-4 District at 647 C Street,
2 N.E. That was a motion to approve.

3 CHAIRMAN LOUD: Okay. Thank you.
4 It was long. I think the one thing was 2500.7
5 removed from consideration?

6 MEMBER SORG: Oh, yes.

7 CHAIRMAN LOUD: Okay. So as
8 corrected, 2500.4. A motion has been made as
9 corrected. Is there a second? I would like
10 to second the motion.

11 All those in favor say aye.

12 MEMBER SORG: Aye.

13 CHAIRMAN LOUD: Aye. All those who
14 oppose?

15 VICE CHAIRMAN DETTMAN: Opposed.

16 MEMBER MOLDENHAUER: Opposed.

17 CHAIRMAN LOUD: Okay. Mr. Moy, can
18 you read back the vote?

19 MR. MOY: Yes.

20 MEMBER MOLDENHAUER: Can we
21 separate out the relief requested, so we -- I
22 think we all want to approve the 223 relief

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1 requested.

2 CHAIRMAN LOUD: Yes.

3 MEMBER MOLDENHAUER: And I know
4 that in the past we have separated out our
5 votes in regards to the different relief
6 requested items. And then maybe if Ms. Sorg
7 wants to restate her motion in a two part
8 process?

9 CHAIRMAN LOUD: Okay.

10 MEMBER MOLDENHAUER: We can then
11 vote on those separately.

12 CHAIRMAN LOUD: If you don't mind,
13 let me just ask AG about that, because I know
14 sometimes we have been up here and they have
15 said that you have to either vote a project up
16 or down. So I just want to be clear. I agree
17 with you. I think it's a very practical way
18 to proceed, but I just want to make sure OAG
19 weighs in.

20 MS. GLAZER: I don't know.

21 MR. MOY: Well, while she is
22 thinking that response, Mr. Chairman, the

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1 staff would record the vote as 2-2-0, which
2 the motion would fail for lack of a majority
3 vote.

4 CHAIRMAN LOUD: Thank you, Mr. Moy.

5 MS. GLAZER: The Board has taken
6 separate votes in the past. There are
7 practical considerations that the Board has to
8 consider when it makes that decision though.

9 MR. MOY: For the record, while
10 there is a brief pause. On that 2-2-1 vote,
11 that was on the motion of Ms. Sorg to approve,
12 seconded by Mr. Loud. In opposition to the
13 motion Mr. Dettman and Ms. Moldenhauer. No
14 Zoning Commissioner participated on this
15 application.

16 CHAIRMAN LOUD: Okay. I think the
17 discussion has been around, as I understand
18 it, the two areas of relief and how connected
19 they are from a functional standpoint and
20 whether one area could go forward and be
21 viable without the other part of what had been
22 presented to us.

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1 And I think I'm for the
2 extraordinary step of asking Mr. Connors to
3 come forward, if he is so interested, and just
4 letting us know. We will come out of
5 deliberation. Very, very limited questions as
6 to whether the project could go forward on the
7 223 if it has any practical value at all.

8 And we can then sort of bifurcate
9 our vote. And again, I just want to
10 emphasize, that you for your follow-up to
11 supplemental presentations. As you can see,
12 we struggled with a lot of the issues. But I
13 think where we are now, Mr. Connors, is just
14 on separating the 223 out and not revisiting
15 some of the strong arguments regarding the
16 artist studio.

17 MR. CONNORS: Sure. Good
18 afternoon, Mr. Chairman. Again, I'm Dennis
19 Connors. I'm the architect working for John
20 Graham and Lorri Kerr.

21 John asked me to come today because
22 he attended the last hearing and although I

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1 know you don't normally take information when
2 cases are closed, you took information from
3 him. And since he could not be here today, he
4 asked me to come.

5 I suppose certainly, I'm not sure I
6 understand if the case is voted and it's tied,
7 that means it fails together? So the concern
8 is to separate them out, so that at least that
9 the sunroom, the 223 would be accepted.

10 Certainly, I would request that for
11 the -- on the client's behalf, because the
12 whole issue with this unique property and the
13 arrangement of the surrounding conditions,
14 which have an effect on the property, went to
15 the heart of the family's recreation space.

16 So I viewed this at the beginning
17 that their yard, which they don't use, is
18 normally their recreation space. But what
19 they have done is they have displaced the
20 potential of using their basement as rental
21 income to allow their children to recreate in
22 the basement.

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1 But that's not really useful all
2 the time. The idea behind the sunroom was
3 that their children could at least sit outside
4 in a semi-enclosed room and, you know, play
5 cards and eat peanut butter and jelly
6 sandwiches, things like that. And so that is
7 the child's recreation space.

8 And the adult recreation space or
9 when their children grow up maybe was the
10 artist studio on the garage.

11 So yes, the recreation space is
12 tied in with that sunroom. And certainly, you
13 know, it would be a benefit to their family to
14 have that.

15 CHAIRMAN LOUD: Okay. So thank you
16 very much. I think you have sort of responded
17 directly to what Mrs. Moldenhauer has
18 presented.

19 Ms. Sorg, you look like -- okay,
20 all right. So thank you.

21 I think what we will do now is, and
22 I'll make sure from counsel we proceed

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1 accordingly, we will entertain a motion just
2 for relief on the 223. If we have to undo
3 something that we have done with respect to
4 the 2-2 vote, we will do that. Thank you.
5 Ms. Glazer?

6 MS. GLAZER: Well, since the prior
7 motion failed, it would be appropriate for the
8 Board, if it desires, to proceed with a new
9 motion. And the first motion could be for
10 relief on the 223 portion alone.

11 CHAIRMAN LOUD: Okay. Why don't we
12 do that? Is there a motion then on the 223
13 relief?

14 MEMBER SORG: Yes. So in this
15 Application 18032, I submit a motion for
16 approval for the special exception under
17 3104.1 and 3103.2, to allow a rear sunroom
18 addition to an existing one-family row
19 dwelling under section 223.

20 CHAIRMAN LOUD: Okay. The motion
21 has been made with respect to the 223. We
22 have incorporated that into our discussion

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1 somewhat. Is there a second?

2 MEMBER MOLDENHAUER: I second.

3 CHAIRMAN LOUD: The motion has been
4 made and seconded. Is there further
5 discussion?

6 Hearing none, all those in favor
7 say aye.

8 ALL: Aye.

9 CHAIRMAN LOUD: Is there any
10 opposition and/or abstentions? And, Mr. Moy,
11 can you read back the vote?

12 MR. MOY: Yes, Mr. Chairman. Staff
13 would record the vote as 4-0-1 on the motion
14 of Ms. Sorg to approve the application
15 pursuant to the special exception relief under
16 section 223, seconding the motion is Ms.
17 Moldenhauer. In support of the motion is Mr.
18 Loud and Mr. Dettman.

19 CHAIRMAN LOUD: Thank you, Mr. Moy.
20 Then just a tally of where we are. There is
21 a vote of approval for the 223. The variance
22 relief did not meet it's burden. It did not

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1 get the three votes, so that is denied. And I
2 believe that a summary order would be
3 forthcoming for the 223.

4 Okay. All right. Is there
5 anything further with this case?

6 MR. MOY: No, sir.

7 CHAIRMAN LOUD: Again, I just want
8 to commend the applicant for a really great
9 job. It was a tough, tough call and you need
10 three votes to prevail and you came close, but
11 you just weren't able to get there this time.

12 But don't let that discourage you in the
13 future.

14 Mr. Moy?

15 MS. GLAZER: Mr. Chair, just
16 clarification perhaps.

17 CHAIRMAN LOUD: Okay.

18 MS. GLAZER: A full order for the
19 denial?

20 CHAIRMAN LOUD: Yes, because for
21 denials you have to do a full order, correct?

22 MS. GLAZER: Correct.

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1 CHAIRMAN LOUD: Thanks for the
2 clarification. We will have a full order on
3 the variance. But we can still do the 223 as
4 a summary? I mean, there's no point to being
5 in a queue on that if he doesn't need to be.

6 MS. GLAZER: Mr. Chair, I would
7 recommend voting again on the variance for the
8 denial separately and then you will have two
9 orders and one can be summary and one can be
10 full.

11 CHAIRMAN LOUD: All right. So we
12 have to have a motion again or can we go on
13 the motion that is already on the record?

14 MS. GLAZER: I would recommend a
15 new motion.

16 CHAIRMAN LOUD: All right.

17 MS. GLAZER: Only the variance
18 portion.

19 CHAIRMAN LOUD: Then I would move,
20 just to sort of facilitate us, that we approve
21 this application for variance relief for
22 second floor addition to a garage structure

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1 not meeting the height and story limitations
2 of 2500.4. Is there a second?

3 MEMBER SORG: Second.

4 CHAIRMAN LOUD: The motion has been
5 made and seconded.

6 All those in favor say aye.

7 MEMBER SORG: Aye.

8 CHAIRMAN LOUD: Aye. All those who
9 oppose?

10 VICE CHAIRMAN DETTMAN: Oppose.

11 MEMBER MOLDENHAUER: Oppose.

12 CHAIRMAN LOUD: Mr. Moy, can you
13 read back the vote, please?

14 MR. MOY: Yes. That vote again
15 would be 2-2-1 on the motion of the Chair, Mr.
16 Loud, to approve the variance relief under
17 2500.4 seconded by Ms. Sorg. Opposed to the
18 motion are Mr. Dettman and Ms. Moldenhauer.
19 No Zoning Commission participating. So the
20 motion fails and the relief for the variance
21 request fails on 2-2-1.

22 CHAIRMAN LOUD: Okay. Thank you,

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1 Mr. Moy. Now that would be a full decision
2 and the 223 a summary decision. I want to
3 thank my colleagues, too, for all of the fine
4 work everyone put into this morning's decision
5 cases.

6 With that, Mr. Moy, is there
7 anything further?

8 MR. MOY: No, sir.

9 CHAIRMAN LOUD: Is that all?

10 MR. MOY: That's it.

11 CHAIRMAN LOUD: Okay. So with
12 that, we are going to go directly into this
13 morning's hearing calendar. The decision
14 meeting is adjourned.

15 (Whereupon, the Special Public
16 Meeting was concluded at 11:50 a.m.)

17

18

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