

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

MARCH 2, 2010

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:05 a.m., Marc D. Loud, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD, Chairman
MERIDITH H. MOLDENHAUER, Board Member
NICOLE SORG, Board Member

ZONING COMMISSION MEMBERS PRESENT:

KONRAD SCHLATER, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist
JOHN NYARKU, Zoning Specialist

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

www.nealrgross.com

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.
SHERRY GLAZER, ESQ.

The transcript constitutes the minutes from the Public Meeting held on March 2, 2010.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

AGENDA ITEM	PAGE
Motion to Extend the Validity of the Order to Application No. 17474-C of ASR Group, Inc., by Metro Properties, Inc.	6
Vote to approve	10
Motion to Extend the Validity of the Order to Application No. 17723-A of Bozzuto Development Company	12
Vote to Approve	16
Application No. 18034 of William Basiliko . .	17
Vote to Approve	37
Application No. 18032 of John Graham and Lorri Kerr.	39
Rescheduled for Decision.	49
Application No. 17989 of Stephen A. W. McKinney.	50
Application No. 17989 - Recalled	55
Vote to Approve	64
ADJOURN, Chairperson Loud	66

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

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

10:05

CHAIRPERSON LOUD: This meeting will please come to order. Good morning, ladies and gentlemen. This is the March 2, 2010 public meeting of the Board of Zoning Adjustment of the District of Columbia.

My name is Marc Loud, Chairperson. Joining me this morning is Meridith Moldenhauer. To my left Mayoral Appointee Nicole Sorg; Mr. Clifford Moy, Secretary of the BZA; Ms. Lori Monroe, Office of the Attorney General; and Ms. Beverley Bailey, Zoning Specialist here in the Office of Zoning.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door. We do not take any public testimony at our meetings unless the Board asks someone to come forward.

Please be advised that this proceeding is being recorded by a court

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 reporter and is also webcast live.
2 Accordingly, we must ask you to refrain from
3 any disruptive noises or actions in the
4 hearing room. Please turn off all beepers and
5 cell phones.

6 Does the staff have any
7 preliminary matters?

8 MR. MOY: We do, Mr. Chairman, but
9 staff would suggest that we take that on a
10 case-by-case basis.

11 CHAIRMAN LOUD: Okay. Then why
12 don't we begin this morning's proceedings.
13 For those of you that have a copy of this
14 morning's calendar, we are going to go a
15 little out of the published order. We are
16 going to begin with Basiliko which is 18034.

17 No, we'll do the two modification
18 extension cases first and then Basiliko. Then
19 we will do Graham and Kerr and then McKinney.
20 If there is anyone in the audience for the
21 McKinney case, we are going to continue the
22 decision on the McKinney until 1:00 p.m. so

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 that if you are here just waiting for us to do
2 that, we'll call that case in about 10 minutes
3 or so.

4 We'll continue that to 1:00 p.m.
5 We are doing that because one of the Zoning
6 Commission members that participated in the
7 case will be joining us at 1:00 and wanted to
8 participate in that deliberation.

9 With that, Mr. Moy, if you could
10 call the first case on the calendar.

11 MR. MOY: Yes, sir. Good morning,
12 Mr. Chairman, members of the Board. That case
13 would be Application No. 17474-C. This is the
14 motion to extend the validity of the order of
15 17474-C of ASR Group, Inc., by Metro
16 Properties, Inc., by Metro Properties, Inc.,
17 pursuant to Section 3130 of the Zoning
18 Regulations.

19 As the Board will recall, the
20 original application was approved on May 23,
21 2009. Most recently the most recent Board
22 action was for a second modification on this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 application which was approved on November 3,
2 2009. The applicant filed on January 13,
3 2009. That is in the case folders identified
4 as Exhibit 41.

5 There are no other filings in the
6 record, although responses are allowed
7 pursuant to Subsection 3130.6. Other than
8 that, Mr. Chairman, the Board is to act on the
9 merits of the request to extend the Order
10 17474-C pursuant to Section 3130. That
11 completes the staff's briefing, Mr. chairman.

12 CHAIRMAN LOUD: Thank you, Mr.
13 Moy. I believe that we are prepared to review
14 this and vote on it this morning. I'll just
15 quickly recap the facts as I understand them
16 from the record.

17 The applicant first received BZA
18 approval for, I believe, what were 326 units
19 of residential development in the C-2-A in
20 June of 2006. Thereafter two minor
21 modifications were granted by BZA. In April
22 2008 a modification that resulted in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 conversion of what were planned as condos to
2 rental units.

3 Then in November 2009 BZA granted
4 a modification that reduced the project to 263
5 units roughly after eliminating one floor and
6 a further reduction to require parking to
7 about 132, I believe, or reducing the
8 requirement by 132.

9 Incidentally, or perhaps not
10 incidentally, but very centrally the previous
11 modifications also have a net effect of
12 extending the deadline for applying for the
13 building permit to April 12, 2010.

14 In the instant application the
15 applicant is seeking a two-year extension from
16 the April 2010 deadline and it cites two key
17 Section 3130.6 requirements that all applicant
18 seeking such a two-year extension must cite.

19 The two cited by the applicant are
20 that he's had difficulty obtaining financing
21 due to economic and market conditions.
22 Secondly, that there has been an inability to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 secure Government required approvals. The
2 applicant also indicates there is no change in
3 the plans from the November 2009 already BZA
4 approved modifications. He is simply seeking
5 the two-year extension.

6 As evidence for the two-year
7 extension and when 3130 was passed by the
8 Zoning Commission one of the requirements was
9 that there be substantial evidence but the
10 applicant cites, and this is in their Exhibit
11 41 Attachment D, it's a rejection letter from
12 Penrose Financial which is dated December 8,
13 2009.

14 Secondly, at Exhibit E the
15 applicant cites a letter from an Ellis Dale
16 Construction Firm indicating that if one were
17 to start as early as January 7, 2010 it would
18 take at least 180 days to secure a building
19 permit given the need for a Phase I
20 environmental study and then, secondly, the
21 follow-on structural and civil engineering
22 plans to incorporate the findings of the Phase

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I into a full building permit application.

2 I think the applicant meets the
3 test of 3130 there being substantial evidence
4 both in the form of the rejection letter from
5 the financial department company and this
6 articulation of the time line to even begin
7 the process to apply for the building permit
8 given the fact that there has not been a Phase
9 I at this point.

10 Given that as the background I
11 would like to move approval of this extension
12 request and I'll do that and then open it up
13 for further deliberation. I would like to
14 move approval for BZA Application No. 17474-C
15 of the ASR Group for a two-year time extension
16 of the order at 1300 Rhode Island Avenue, N.E.

17 Is there further discussion?

18 MEMBER MOLDENHAUER: Chairman
19 Loud, I believe you have provided a very
20 thorough summary of the case and I do not have
21 any additional discussion. I would second the
22 case if there is no additional deliberation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN LOUD: Okay. A motion
2 has been made and seconded. Further
3 deliberation? Hearing none, all those in
4 favor say aye.

5 ALL: Aye.

6
7 CHAIRMAN LOUD: Is there any
8 opposition and/or abstentions?

9 Mr. Moy, can you read it back?

10 MR. MOY: Yes, sir. Of course.
11 The staff would record the vote as three to
12 zero to two. This is the motion of the
13 Chairman to approve the request to extend for
14 another two-year time period. Seconded by Ms.
15 Moldenhauer. Also in support of the motion
16 Ms. Sorg and we have a member not present and,
17 therefore, not voting.

18 CHAIRMAN LOUD: Thank you, Mr.
19 Moy. Is there anything further in this case?

20 MR. MOY: Other than whether or
21 not the Board would desire a summary order or
22 full order.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN LOUD: About a summary
2 order?

3 MR. MOY: That would be terrific,
4 Mr. Chairman.

5 CHAIRMAN LOUD: All right. Let's
6 go with that.

7 MR. MOY: The next application
8 would be also a motion to extend the validity
9 of the order for another two-year time
10 extension. This would be to Application No.
11 17723-A of Bozzuto Development Company. This
12 would be pursuant to Section 3130 of the
13 Zoning Regulations. The original application
14 was approved on February 26, 2008.

15 The applicant filed on January 29,
16 2010. That filing is in your case folders
17 identified as Exhibit 38. Also as allowed
18 under Section 3130.6 the filing was served on
19 all parties. There were two responses, Mr.
20 Chairman. Actually three but the first two
21 being from the Advisory Neighborhood
22 Commission 6C in your case folders as Exhibit

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 39.

2 The other filings from the Office
3 of Planning identified as Exhibit 40.
4 Subsequent to these two filings there is a
5 response filing from the applicant and that
6 document is identified as Exhibit 41. The
7 Board is to act on the merits of the request
8 to extend the validity of the order for
9 another two-year time period pursuant to 3130,
10 Mr. Chairman.

11 CHAIRMAN LOUD: Thank you, Mr.
12 Moy. Again, the Board Members have reviewed
13 this application and the underlying record and
14 we are prepared to vote on it this morning as
15 well. I do believe Mrs. Moldenhauer will
16 start us off.

17 MEMBER MOLDENHAUER: Thank you,
18 Chairman Loud. After reviewing the
19 application and reviewing the file the
20 applicant has submitted sufficient
21 documentation to support a two-year extension
22 under 3130 with substantial evidence. He has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 attached Exhibit A and Exhibit B to our
2 Exhibit 41.

3 Both of these, I think, satisfy
4 the higher requirement, official requirement,
5 for the new test because there are actual
6 signed and notarized affidavits from the
7 applicant's president and it indicates that
8 they have had an inability to obtain financing
9 and that their current equity investors and
10 lenders would not reduce such information into
11 writing but they have not been able to obtain
12 financing which is one of the elements or one
13 of the items in which we can provide good
14 cause for an extension.

15 In addition to that they have also
16 provided an additional exhibit which is
17 Exhibit B which is an affidavit from Ed Demer
18 who is the President of Demer Real Estate and
19 that also provides us additional information
20 regarding the market and the inability to
21 obtain financing.

22 As Mr. Moy stated, we also have a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 letter of support from the ANC which indicates
2 there was an unanimous vote after doing a
3 meeting with a quorum present to support the
4 extension and to continue support of the
5 project.

6 Based on this, I believe that we
7 have sufficient evidence to grant the
8 extension for two years and I would submit a
9 motion subject to obviously any additional
10 discussion but a motion to approve the
11 extension for BZA Case No. 17723 for 460 New
12 York Avenue, N.W. for two years to February
13 23, 2010.

14 CHAIRMAN LOUD: Thank you, Board
15 Member. A motion has been made. Is there a
16 second?

17 MEMBER SORG: I'll second.

18 CHAIRMAN LOUD: Motion has been
19 made and seconded. Further deliberation? Let
20 me just add that I agree with your analysis,
21 Board Member Moldenhauer, and I want to
22 commend you for walking through it and really

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 simplifying all of it.

2 I also want to thank the Pillsbury
3 firm because I think, as Ms. Moldenhauer
4 indicated, there is an affidavit signed by the
5 President. I know when we were first starting
6 with these cases there were representations
7 oftentimes made on the letterhead of the law
8 firm representing the applicant regarding the
9 financial hardship.

10 In this case the firm went out and
11 got notarized affidavits from at least two
12 direct parties so it makes it a lot easier for
13 us to provide the relief. A motion has been
14 made and seconded. Is there further
15 deliberation? Hearing none all those in favor
16 say aye?

17 ALL: Aye.

18 CHAIRMAN LOUD: There is no
19 opposition. Is there any abstention?

20 MR. MOY: No, sir. The final vote
21 would be three to zero to two. This is on the
22 motion of Ms. Moldenhauer to approve the order

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 for a two-year extension period of time.
2 Seconded by Ms. Sorg. Also in support of the
3 motion Mr. Loud and two members not
4 participating and, therefore, not voting.
5 Again, the final vote is three to zero to two.

6 CHAIRMAN LOUD: Thank you, Mr.
7 Moy. Again, a summary order would be
8 appropriate.

9 MR. MOY: Very good.

10 CHAIRMAN LOUD: Okay. Unless
11 there is anything further in this case, I
12 think let's go, as I said, a little bit out of
13 order and call the Basiliko case.

14 MR. MOY: Yes, sir. That would be
15 Application No. 18034 of William Basiliko,
16 pursuant to 11 DCMR 3104.1 and 3103.2. This
17 is for a variance from the lot occupancy
18 requirements under Section 403, a variance to
19 enlarge a structure devoted to a nonconforming
20 use under Subsection 2002.5, and a special
21 exception to change a nonconforming use
22 (beauty salon) to another nonconforming use

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 (art gallery and community center) under
2 Section 2003 in the R-4 District at premises
3 1916 9th Street, N.W. This is in Square 361,
4 Lot 122.

5 On February 23, 2010, the Board
6 completed public testimony, closed the record,
7 and scheduled its decision on March 2. The
8 Board did not request any supplemental
9 information because the record was full.

10 After the hearing -- well,
11 actually, at the hearing at the close of this
12 case on February 23rd the Board did leave open
13 for further discussion among the Board Members
14 on the issue of the area variance relief. The
15 Board is to act on the merits of the requested
16 relief under Sections 2002.5, 403.2, and the
17 special exception relief under 2003. That
18 completes the staff's briefing, Mr. Chairman.

19 CHAIRMAN LOUD: Thank you, Mr.
20 Moy. I believe, as well, in this case we're
21 ready to vote this morning. I will start us
22 off.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 In this case, just to repeat some
2 of what you said, Mr. Moy, the applicant
3 proposes converting a non-conforming what had
4 been a beauty salon in the R-4 into an art
5 gallery/neighborhood facility through this
6 special exception criteria listed in Section
7 2003 and through applicable requested
8 variances for enlarging the structure that
9 currently houses the nonconforming beauty
10 salon.

11 He's going to do this increasing
12 the lot occupancy from the current 50 percent
13 to 57.9 percent in the R-4. The lot occupancy
14 caps at 40 percent.

15 Secondly, building a rear two-
16 story 185-square-foot addition that, in the
17 language of the applicant, adds interior space
18 most conducive to the display of art.

19 Secondly, provides handicapped accessible
20 restrooms on the first and second floors.

21 Thirdly, provides a suitable rear stair egress
22 from the second level.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 The Office of Planning supports a
2 grant of the special exception relief for the
3 conversion of uses. That's in our Exhibit 27.
4 They also support an area variance from the
5 lot occupancy requirements and they support a
6 use variance from Section 2002.5 which
7 prohibits enlargement of a structure devoted
8 to a nonconforming use.

9 ANC-1B also supports the
10 application. That's our Exhibit 29. I think
11 what we have before us is the request for
12 special exception relief to convert a
13 nonconforming use. Secondly, an area variance
14 from the lot occupancy required.

15 Then, thirdly, what has been
16 termed alternatively an area variance from the
17 requirement prohibiting the enlargement of a
18 structure devoted to a nonconforming use which
19 also is characterized by the Office of
20 Planning as a use variance. I walked through
21 my analysis based on what's in the record and
22 open it up to Board Members.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 First, with the special exception
2 test I conclude based on my review of the
3 record the testimony, the exhibits and so
4 forth that the applicant has met the burden.
5 With respect to how the applicant has met the
6 burden, I incorporate by reference and turn to
7 the Office of Planning Report, Exhibit 27,
8 beginning at page 4 which summarizes the
9 evidence required for Section 2003 special
10 exception relief.

11 Without repeating each of the
12 elements in that report I'll just, as I said,
13 incorporate it by reference. I will speak
14 very briefly to the idea of the neighborhood
15 facility requirement under Section 2003. I
16 think there was some testimony back and forth
17 regarding whether this proposed use would just
18 be offered by a for-profit entity met the test
19 of a neighborhood facility. I think I
20 concluded that it did.

21 I concluded that it did based on
22 testimony from the applicant that the facility

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 would be used primarily for local artists. It
2 would also be a gathering point for the local
3 community where workshops would be conducted,
4 workshops on relationship building. I think
5 the applicant testified to on greening
6 commercial property, small commercial
7 properties and the like.

8 In exchange with the expert
9 witness that the applicant brought to the
10 hearing, Mr. Steve Sher, there was discussion
11 regarding whether a for-profit applicant would
12 qualify as a neighborhood facility and the
13 testimony was that for sure in the past we had
14 granted that, for example, for a grocery
15 store.

16 I think there was some similar
17 retail uses like that there were clearly
18 neighborhood serving type uses. I think the
19 evidence suggested in this case this would
20 also be a neighborhood serving use. In light
21 of the OP report again, our Exhibit 27, and
22 how they walked through that analysis, I think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the applicant met that test.

2 With respect to the area variance
3 from Section 403.2 I also conclude that the
4 applicant has met that test. I do that
5 through applying a confluence of factors test.
6 I turn in that regard both to our record and
7 to the OP report that begins at page 3.

8 Walking through each element of
9 the 403 variance test for the unique and
10 exceptional situation prong, the evidence in
11 the record that suggest to me that the
12 applicant has met the burden is first and,
13 again, it's not any one of these in isolation
14 but it's all of them sort of as a confluence.

15 First, that the applicant's
16 property is one lot south of the zone boundary
17 for the arts C-2-A zone. There might be a lot
18 of properties that are south of the zone
19 boundary but there is probably only one
20 property that is one lot south of the zone
21 boundary.

22 The zone boundary could have been

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 anywhere. It's unclear to me why it was where
2 it was but given the fact that this applicant
3 proposes an RT use and the boundary is just
4 one lot to the north where the applicant is.
5 I think that is a big of an exceptional
6 situation, for me anyway.

7 Secondly the fact the property has
8 been a commercial property for the last 50
9 years. Thirdly, it lacks a second means of
10 egress which would place it up against one of
11 our building code requirements. Fourth, that
12 the property lacks adequate handicapped
13 accessible bathrooms on the current first and
14 second levels.

15 Finally, that there is some zoning
16 history regarding the property and the zone
17 map indicating that the property was a
18 C-M-1 property up through clearly 2006 and
19 perhaps as late as 2008 or 2009.

20 There is a C of O in the record,
21 Exhibit 10, dated March 11, '08 that
22 identifies the property as being C-M-1 when,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 in fact, we know that it was rezoned R-4. I
2 think when all of those factors are added to
3 each other, it paints a picture of an
4 exceptional situation at the property.

5 In terms of the practical
6 difficulty caused by the exceptional
7 situation, I think that the property is
8 currently at 52 percent lot occupancy which
9 exceeds, of course, the 40 percent cap. It's
10 clearly impossible for the applicant to demo
11 the property back to the 40 percent under the
12 zone.

13 In terms of the non-regulation
14 size bathrooms, I think that will hamper the
15 applicant's ability to do outreach to
16 handicapped artists and I think that creates
17 both a practical difficulty and, frankly, an
18 inhumane situation. I think there are many
19 artists who are handicapped and who should
20 have as much of an opportunity to participate
21 in this neighborhood facility as any other.

22 That, to me, is to be inferred

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 from the record. I don't think it was
2 addressed directly by the applicant but I
3 think it's a clear permissible inference from
4 the record.

5 Thirdly, the practical difficulty
6 would be that placing the baffles within the
7 existing footprint would create a much, much
8 smaller community space and exhibit area.
9 Then, finally, the lack of the second egress
10 would violate the building code.

11 With regard to the third element
12 as to whether there is substantial detriment
13 to the public good, it is clear from the
14 record that 9th Street is intended as a
15 neighborhood retail serving node. There is
16 already a mix of locally owned boutiques and
17 restaurants and shops.

18 In fact, I think this property is
19 bordered on one side by a music store and on
20 the other side by a restaurant. The
21 convention center strategy and the main street
22 plan contemplate arts uses. As I had

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 indicated, the arts zone is directly in front
2 of this property and one lot to the north of
3 this property so I don't think there is any
4 substantial detriment to the public good.

5 Further, the ANC supports that
6 there is nothing in our record of anyone who
7 has expressed opposition to it so I think they
8 meet the test for area variance from the lot
9 occupancy. I would make the same argument as
10 to whether the applicant's project harms the
11 zone plan. I don't think it does for all the
12 same reasons that I just indicated.

13 Third and lastly there is the
14 variance request from the Section 2002.5.
15 With respect to that test the Office of
16 Planning argued that a use variance would be
17 appropriate. I think the applicant sort of
18 hedged its bets and argued both use variance
19 and area variance, in fact, to spread the
20 evidence around such that it would meet both
21 tests.

22 I conclude that the appropriate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 test would be the area variance test and I do
2 that based on the fact that for me a special
3 exception is what establishes the use in this
4 zone, the special exception under 2003 is
5 what, as I said, establishes the use for this.
6 The BZA has reviewed a very similar kind of
7 case before.

8 It was brought to our attention by
9 the applicant, I think, in this case. It is
10 a 1978 BZA case titled Gailor, No. 12725. In
11 that case the BZA granted area variance relief
12 from enlarging a structure devoted to a
13 nonconforming use. It was a high case but
14 clearly the analysis and the test used by BZA
15 was one of area variance.

16 If you look at page 3, paragraph
17 18 of that order, the practical difficulty
18 language which we associate with the area
19 variance exclusively and not with the use
20 variance is what the Board uses to walk
21 through the test in that case. In Gailor the
22 architect testified that the height increase

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 was necessary to convert the building from the
2 present use to the proposed use. That was the
3 extent of the testimony.

4 In this case the applicant's
5 record shows that the square footage increase
6 is necessary to convert the overall space in
7 a way that would result in, as I said,
8 compliant bathrooms that will be accessible to
9 the handicapped community and handicapped
10 artists. More importantly create a large and
11 more inviting space for artist exhibits.

12 I think if you look at Gailor,
13 which I'm doing, if you rely on Gailor, Gailor
14 clearly helps me to reach the conclusion that
15 the area variance would be the more
16 appropriate variance.

17 Even if I were to look at it from
18 a use variance standpoint, which is what the
19 Office of Planning recommended, I would find
20 and conclude under the undue hardship prong of
21 the use variance test that the applicant meets
22 the undue hardship.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 The historical use of the property
2 is a beauty salon and seeking to return it to
3 residential use after it being a beauty salon
4 for 50 years I think would be an undue
5 hardship in that we are talking about a
6 property that is built as a commercial
7 property lacking, for example, the kind of
8 kitchen amenities, kitchen structure that you
9 would expect in a residential facility.

10 It lacks the kind of bathrooms
11 that you would expect in a residential
12 facility and imposing upon this applicant all
13 the requirements financially and otherwise
14 trying to restore it to a use that it has not
15 had in 50 years, I think, would be an undue
16 hardship.

17 To recap, I think the applicant
18 meets the test for special exception. That,
19 to me, is what establishes the use. I think
20 the applicant meets the test for area variance
21 for lot occupancy for all the reasons I've
22 said. I think that the appropriate test for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Section 2002.5 relief is also area variance.
2 I think the application meets all of the tests
3 for that as well.

4 With that I'll turn to Board
5 Members for some additional feedback.

6 MEMBER MOLDENHAUER: Chairman
7 Loud, I believe that you have provided a very
8 thorough summary. I'll just add one or two
9 little points. One item that I think also
10 goes towards my analysis and my conclusion for
11 the special exception falling within the
12 neighborhood facility and satisfying the
13 requirements under 2003 is that the applicant
14 testified that the community users, the
15 individuals that will be using the property
16 for different community purposes will actually
17 not be paying him. He has to finalize the
18 structure.

19 He testified that his
20 understanding would be that they would
21 actually identify a nonprofit organization or
22 an organization that would benefit the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 community and then provide documentation that
2 they've actually provided some sort of
3 donation to that program and that would be the
4 compensation for the use of this facility.

5 I think that provides very
6 specific facts that are unique to this case
7 which show that it would be a neighborhood
8 facility and it would be benefitting the
9 community. I think you outlined all the other
10 requirements under special exception and why
11 it satisfies those requirements.

12 The area variance and use variance
13 for lot occupancy and then for the
14 nonconforming use, I agree with you. I think
15 they have satisfied the requirements for an
16 area variance.

17 There is definitely a confluence
18 of factors with regards to the unique history
19 of this property, the unique aspect that from
20 the '80s until 2008 the property has always
21 been identified as a C-M-1 on all D.C. public
22 records even though it was changed to an R-4.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I think that is exceptionally
2 unique and special to this property. In
3 addition to that, there is the historic aspect
4 of the property and there is testimony about
5 not wanting to be able to demolish a portion
6 of the property which you referenced.

7 I think there were also facts
8 going now towards the use variance which
9 conform with Gailor, the case that you
10 referenced, where the Gailor case specifically
11 says that the Board gave consideration to the
12 general character and use of the structures
13 existing within not less than 300 feet of the
14 nonconforming use.

15 I think here you testified that
16 the property next door is a commercial use.
17 The property next door to that is a restaurant
18 so I think that there are sufficient factors
19 to satisfy either the undue hardship standard
20 for a use variance with a practical difficulty
21 standard for an area variance.

22 I think that I would probably come

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 down more on a hybrid between the two for the
2 2002.5 relief and just then simply say that
3 they do satisfy the undue hardship for the
4 facts that have been stated.

5 CHAIRMAN LOUD: Thank you, Board
6 Member. I don't necessarily end up where you
7 are on the hybrid point but I think it's a
8 great discussion to have and hopefully one day
9 we'll get an application where that specific
10 issue will be briefed adequately by all the
11 parties, the specific issue of whether the
12 Section 2000.3 actually establishes the use or
13 whether it only establishes part of the use.

14 I think for today's case, the very
15 narrow case, as I come out you come out a
16 little differently. I respect you for it but
17 it sounds like in terms of the overall relief
18 we're in agreement in terms of that.

19 Board Member Sorg.

20 MEMBER SORG: Thank you, Chairman
21 Loud. I have one point and one comment. I
22 think that both you and Ms. Moldenhauer very

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 adequately to my mind explained my view as
2 well of the satisfaction of the variance in
3 this case.

4 I wanted to add also from the OP
5 report that they also suggest that the
6 blueprint of 2004 which is in this area also
7 suggest and recommends that 9th Street be
8 rezoned to be consistent with the existing
9 uses on the street and I think that is an
10 important consideration also in this case.
11 That, of course, would include the previous
12 beauty salon use as well as the proposed use
13 by the applicant.

14 The comment that I wanted to make
15 given that your discussion has, in my opinion,
16 satisfied the tests for the variance. The
17 comment that I wanted to make is that, you
18 know, in the zoning statutes as well as other
19 initiatives in the city, you know, encourage
20 arts use as well as community benefit.

21 In that sense I think that we can
22 commend this applicant for what he is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 indicating as his intended use both in the
2 community living room idea which gives
3 donations to D.C. programs, but also in his
4 stated intent of offering 80 percent
5 commission to artists which is above and
6 beyond what most commercial galleries would
7 do. So those are my comments.

8 CHAIRMAN LOUD: Thank you, Board
9 Member. I think those were important ones to
10 put on the record because there is that public
11 detriment prong of the test. Clearly, as you
12 allude to, by going overboard and requesting
13 the persons that use the facility make a
14 donation to education, non-profit education
15 uses.

16 And then being generous about the
17 whole art management relationship and pressing
18 for handicapped accessible bathrooms so there
19 would not be any discriminatory impact to
20 handicapped artists. I think all of it
21 relates to that public detriment prong. I
22 agree with you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Is there further deliberation?
2 Hearing none, then I would like to move
3 approval of BZA Application No. 18034 for
4 variance and special exception relief to
5 change the use from a beauty salon to an art
6 gallery in the R-4 at 1916 9th Street, N.W. as
7 well as to increase lot occupancy from the 40
8 percent capped in the R-4 to 57.6 percent, as
9 well as to enlarge a structure devoted to a
10 nonconforming use. Is there a second?

11 MEMBER MOLDENHAUER: I'll second.

12 CHAIRMAN LOUD: Motion has been
13 made and seconded. Is there further
14 deliberation? Hearing none, all those in
15 favor say aye.

16 ALL: Aye.

17 CHAIRMAN LOUD: All those who
18 oppose. Are there any abstentions?

19 MR. MOY: Mr. Chairman, the staff
20 would record the vote as three to zero to one
21 based on the motion of the Chair Mr. Loud to
22 approve the application as advertised for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 relief. Second of the motion by Ms.
2 Moldenhauer. In support of the motion Ms.
3 Sorg. Other members not present and not
4 voting.

5 Finally, Mr. Chairman, we also
6 have another participating member on this
7 application. There is Mr. Turnbull and he
8 submitted an absentee ballot and his vote is
9 to approve the application with any conditions
10 the Board may impose. That will give a final
11 vote four to zero to one to approve.

12 CHAIRMAN LOUD: Thank you, Mr.
13 Moy. I want to thank the applicants for a
14 well-prepared presentation. Is there anything
15 further in this case? A summary order would
16 be appropriate. I guess there is no
17 opposition from the ANC or any parties if you
18 would like to do that.

19 MR. MOY: Very good.

20 CHAIRMAN LOUD: Anything further?

21 MR. MOY: Not on this application,
22 Mr. Chairman.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 CHAIRMAN LOUD: Okay.

2 MR. MOY: The next application,
3 and last for the public meeting session, Mr.
4 Chairman, is Application No. 18032.

5 CHAIRMAN LOUD: Okay.

6 MR. MOY: This is John Graham and
7 Lorri Kerr pursuant to 11 DCMR 3104.1 and
8 3103.2 for a special exception to allow a rear
9 sunroom addition to an existing one-family row
10 dwelling under Section 223 not meeting the lot
11 occupancy Section 403 requirements and
12 variances to allow a second floor addition for
13 use as a art studio.

14 This is to an existing accessory
15 garage not meeting the height and story
16 limitations under Subsections 2500.4 and
17 2500.7 in the R-4 District at premises 657 C
18 Street, N.E., Square 865, Lot 79.

19 As the Board will recall, on
20 February 16, 2010, the Board completed public
21 testimony, closed the record and scheduled its
22 decision on March 2nd. The Board did not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 request any additional information because the
2 record was full.

3 We do have in your case folders,
4 Mr. Chairman, which would be a preliminary
5 matter, a letter from Tom Hamilton from ANC-6C
6 SMD dated February 19, 2010. That is
7 identified as Exhibit 30. The Board is to act
8 on the merits of the application. That
9 completes the staff's briefing, Mr. Chairman.

10 CHAIRMAN LOUD: Thank you, Mr.
11 Moy. I think that you recapped the case
12 excellently. I think after our review of what
13 had been submitted I think perhaps we may want
14 to look at reopening the record for some
15 additional information on it.

16 I'm going to turn to Board Member
17 Moldenhauer and ask if you could help us out
18 with respect to giving the applicant guidance
19 on what we are reopening the record for. Once
20 we reopen it we'll take into consideration
21 Exhibit 30, the Tom Hamilton letter.

22 MEMBER MOLDENHAUER: Thank you,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Chairman Loud. What we have right now before
2 us is a case that we need to analyze more in
3 regards to the facts and the legal issues.

4 I think that most of the facts we
5 have received so far, while are appropriate
6 for you to provide us, are more in regards to
7 individual requirements and the law requires
8 us to look more at the property issues and the
9 specific uniqueness and the practical
10 difficulty of the property.

11 So what I think would be helpful,
12 and it may or may not end up being
13 determinative, but I think it would be very
14 helpful for us to hopefully provide the
15 applicant all the opportunities to provide the
16 sufficient support to prevail potentially on
17 this case would be that we would need from the
18 applicant additional information as to why it
19 is impractical for the building of this art
20 studio to exist within the main structure,
21 whether there is additional information on the
22 hazards, or whether or not there is additional

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 information on the chemicals that will be
2 used, or why providing the potential air
3 handling units or door structures or different
4 types of filtration issues in the current
5 building would be overly costly.

6 Thus, it makes it more of a
7 practical difficulty to construct such an art
8 studio inside the main structure of the home
9 and, thus, would allow us to analyze the
10 situation to say that having the art studio
11 inside the home versus on a second story
12 garage accessory use would create a practical
13 difficulty. I'm trying to be as clear as
14 possible and provide some information that
15 would be helpful.

16 CHAIRMAN LOUD: Thank you, Board
17 Member. I support the direction that you are
18 heading in. I note that OP had some problems.
19 I think OP felt the property was unique and
20 exceptional but they couldn't figure out why
21 they needed a second story.

22 They couldn't figure out how the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 sunken rear yard created the need for the
2 second story over the garage for the art
3 gallery. I think there was some testimony in
4 there about the respiratory condition of the
5 applicant's daughter which you alluded to
6 being a personal situation.

7 For me it helps to fill some of
8 the gaps in the record that prevent me from
9 being able to form a conclusion. It doesn't
10 mean that the conclusion that I would form
11 would be in support of or would be against.
12 With those gaps in the record it's hard to
13 reach a conclusion so I support what you are
14 suggesting.

15 Is the applicant present? All
16 right. Typically at a decision we do not
17 break to allow for questions or obviously
18 follow-up testing. I think it's important
19 that the applicant understand what we are
20 requesting. If the application doesn't
21 understand it, I would be willing with the
22 consent of colleagues allow the applicant to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 ask clarification questions.

2 If the applicant is clear on what
3 is being requested, if you don't understand
4 and just have questions seeking clarification
5 of what the record is being held open for, we
6 can do that. I think it would facilitate the
7 next steps pretty adequately. If it goes
8 beyond that, I don't think it would be
9 appropriate.

10 MEMBER MOLDENHAUER: Just for the
11 record also, I read the record on the file in
12 this case.

13 CHAIRMAN LOUD: Okay. If you
14 could just identify yourself for the record.

15 MR. GRAHAM: My name is John
16 Graham. I'm the applicant for Application
17 18032 which was done by my wife and I on
18 February 16. We are happy to provide this
19 additional information. I guess my only
20 question would be what form should it take,
21 what would be the procedural process for doing
22 this appropriately. If I could have some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 guidance from the Chairman of the Board that
2 would be helpful.

3 CHAIRMAN LOUD: I'll defer to
4 Board Member Moldenhauer who is leading us
5 through this and then I'll add anything to it
6 if I think there is something additional.

7 MEMBER MOLDENHAUER: Thank you,
8 Mr. Chairman. I think that what we will be
9 looking for, and you can work with Ms. Bailey
10 on this, it would be a letter. It could be a
11 very simple letter but a letter that
12 articulates maybe with backup.

13 I think we are going to give you
14 enough time to contact a contractor and to
15 evaluate the cost difference which would then
16 lead potentially to the practical difficulty
17 of creating an art studio within the home.

18 Whether it articulates the
19 construction or the need for certain air
20 ventilation systems or certain types of doors
21 or additional insulation, there is testimony
22 about the neighbors and the concerns about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 some of the chemicals seeping through the
2 walls.

3 What we would be looking for would
4 be a letter potentially maybe if you can have
5 a contractor provide cost so that we can see
6 that potentially it would be more difficult
7 practically speaking to create in accordance
8 with the zoning requirements in the home
9 versus allowing you then to build the
10 structure on top of your garage.

11 MR. GRAHAM: We can certainly do
12 that. That's not a problem. I think the crux
13 of our request was more like kind of health
14 issues in keeping with things with my kids.
15 Was that sufficient or would you also like
16 feedback on those things because I think there
17 is a matter of space within the house.

18 If there were to be a studio it
19 would either be where the kids sleep or where
20 the kids play. I suggest that we would do
21 something like an addition on the house or
22 within the existing structure is what you are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 asking for, the practical point.

2 MEMBER MOLDENHAUER: Let me
3 actually address the first element that you're
4 talking about before you get to the second.
5 When we grant the relief, we grant the relief
6 to the property.

7 While the issues about your
8 children are persuasive and we understand
9 them, unfortunately we cannot take those into
10 account legally to the degree so, as Chairman
11 Loud said, the current docket that we have and
12 documentation we have right now has gaps. We
13 are trying to fill those gaps on the legal
14 issues that we require.

15 We are looking more
16 for the issue of a practical difficulty that
17 can either be quantitative or, if there is a
18 specific health issue that goes to the general
19 public, that would be associated with your
20 neighbors or with the general concerns of you
21 as an owner and maybe the next five or six
22 owners that may own the property after you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 I think that answers your question. If you
2 have additional questions, please let me know.

3 MR. GRAHAM: I think that's fine.
4 We're just new at this so we're just trying to
5 play by the rules. That's fine. I think how
6 quickly would you need this kind of turned
7 around?

8 CHAIRMAN LOUD: I think we're
9 looking at a couple of weeks to give you a
10 chance to get this information pulled
11 together. If you could submit it back to BZA
12 by -- let me see, two weeks out is March 16 so
13 perhaps by that Friday which would be March
14 12th?

15 MR. MOY: March 12th.

16 CHAIRMAN LOUD: March 12th. Then
17 we could potentially look at it over the
18 weekend and get ourselves prepped and come in
19 Tuesday morning prepared.

20 MEMBER SORG: Mr. Chairman, can I
21 make one suggestion?

22 CHAIRMAN LOUD: Please.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MEMBER SORG: As you say, you're
2 new at this.

3 MR. GRAHAM: Yes.

4 MEMBER SORG: The request that Ms.
5 Moldenhauer is speaking of, which I think will
6 help us greatly, your architect should also be
7 able to help you cost this. That will be a
8 little bit easier for you.

9 MR. GRAHAM: He's not here this
10 morning. That's fine.

11 MEMBER SORG: I mean, just that
12 you may not have to also involve other
13 contractors and things. It might be less
14 costly for you.

15 MR. GRAHAM: That is certainly
16 helpful. I appreciate the opportunity to
17 provide feedback and we'll get that to you by
18 the 12th.

19 CHAIRMAN LOUD: Is there anything
20 additional, Board Members Moldenhauer or Sorg?
21 Okay. So then when we reschedule this for
22 decision on Tuesday, March 16.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 It's very important that you make
2 that March 12 deadline because the following
3 Tuesday, March 16, I think we'll be on recess
4 until April so we really want to have an
5 opportunity to make a decision on this March
6 16 and we look forward to the follow-up and
7 being able to address the case in full on the
8 16th.

9 MR. GRAHAM: Thank you very much.

10 CHAIRMAN LOUD: Thank you.

11 Mr. Moy, I don't think there is
12 anything further in this case but we did not
13 formally call 17989. I don't know if we need
14 to call it to continue it.

15 MR. MOY: No, but I don't need to
16 read the entire advertisement. You just named
17 the case. If you want to continue, Mr.
18 Chairman, I have no problems with that.

19 CHAIRMAN LOUD: So you want me to
20 do your job this morning. Okay. All we need
21 to do in that case is just on the record
22 indicate that it's being continued to 1:00

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 p.m. on March 2, 2010. We'll make a decision
2 at that time. Is that adequate?

3 MR. MOY: This current case? I'm
4 sorry.

5 CHAIRMAN LOUD: This is for the
6 McKinney case.

7 MR. MOY: McKinney case. That's
8 right.

9 CHAIRMAN LOUD: Yeah. I think I
10 had mentioned early on that we were going to
11 continue it until 1:00 but I did that in the
12 context of just allowing persons who were in
13 the audience to leave but we never really
14 called the case.

15 MR. MOY: That's right. I can
16 start that off a bit if you prefer, Mr.
17 Chairman.

18 CHAIRMAN LOUD: Whatever the right
19 decision would be.

20 MR. MOY: That would be
21 Application 17989 of Stephen A. W. McKinney.
22 This case is pursuant to 11 DCMR 3103.2 for a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 variance from the lot area requirements under
2 Section 401, and a variance from the alley
3 width requirements under Subsection 2507.3.

4 This is to convert an existing
5 building, carriage house, on an alley lot to
6 a one-family dwelling in the R-2 District at
7 premises rear of 4615 42nd Street, N.W.,
8 Square 1732, Lot 816. As the Chairman has
9 just said, this will be discussed, deliberated
10 and acted on at the 1:00 p.m. session.

11 CHAIRMAN LOUD: Thank you, Mr.
12 Moy. Again, we'll act on that at 1:00 p.m.
13 today.

14 Unless there is anything further
15 on this morning's decision calendar -- there
16 isn't so it is adjourned.

17 (Whereupon, at 10:55 a.m. the
18 meeting was adjourned to reconvene at 2:23
19 p.m.)

20
21
22

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:23 p.m.

CHAIRMAN LOUD: Good afternoon.

This hearing will please come to order. This is the March 2nd public hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Marc Loud, Chairperson. Joining me today are Vice Chair Shane Dettman. I'm sorry. Joining me today is Mr. Konrad Schlater representing the Zoning Commission. To my left Board Members Meridith Moldenhauer and Nicole Sorg; Mr. Clifford Moy, Secretary of the BZA; Ms. Sherry Glazer, Office of the Attorney General; on the far end Ms. Beverley Bailey, Zoning Specialist in the Office of Zoning.

I think I indicated that it was the afternoon public hearing but, in fact, we are going to call a special public meeting of the BZA in order to address one decision that has been carried over from our morning

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 calendar. If you will just bear with me one
2 second. All right. Here we go.

3 Copies of today's meeting agenda
4 are available to you and are located to my
5 left in the wall bin near the door. We do not
6 take any public testimony at our meetings
7 unless the Board asks someone to come forward.

8 Please be advised that this
9 proceeding is being recorded by a court
10 reporter and is also webcast live.
11 Accordingly, we must ask you to refrain from
12 any disruptive noises or actions in the
13 hearing room. Please turn off all beepers and
14 cell phones.

15 Does the staff have any
16 preliminary matters:

17 MR. MOY: No, sir. Not for the
18 public meeting part of -- I'm getting tongue-
19 tied -- for the public meeting.

20 CHAIRMAN LOUD: Thank you, Mr.
21 Moy. I think for those of you in the
22 audience, we typically do not have our

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 meetings in the afternoon but we carried over
2 a case from the morning so I think Board
3 Members are struggling to find the words to
4 reflect that. So we are in the afternoon
5 meeting decision calendar. I think we are
6 prepared to call our only case for that.

7 MR. MOY: Yes, sir. Good
8 afternoon, Mr. Chairman, Members of the Board.
9 That case for decision is Application No.
10 17989. This is of Stephen A. W. McKinney
11 pursuant to 11 DCMR 3103.2 for a variance from
12 the lot area requirements under Section 401
13 and a variance from the alley width
14 requirements under Subsection 2507.3.

15 This is to convert an existing
16 building, a carriage house, on an alley lot to
17 a one-family dwelling in the R-2 District at
18 premises 4615 47th Street, N.W. The subject
19 site is in Square 1732, Lot 816.

20 On February 2, 2010, the Board
21 completed public testimony, closed the record,
22 and scheduled its decision on March 2nd. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Board requested additional information to
2 supplement the record from the applicant and
3 respondents.

4 In your case folders, Mr.
5 Chairman, you have a filing from the applicant
6 dated February 16, 2010, and is identified as
7 Exhibit 33. We also have filings from the
8 party opposition to respond to the applicant's
9 filing. The first filing is dated February
10 26, 2010 from Bruce Lowrey identified as
11 Exhibit 34.

12 The individual also filed a
13 supplemental identified as Exhibit 35 which is
14 a page correction to his filing to Exhibit 34.
15 The Board is to act on the merits of the
16 requested two area variances and that
17 completes the staff's briefing, Mr. Chairman.

18 CHAIRMAN LOUD: Thank you, Mr.
19 Moy. I believe our record is full and we are
20 going to deliberate this afternoon. I believe
21 Mr. Schlater is going to start us off.

22 COMMISSIONER SCHLATER: Thank you,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Mr. Chairman. Reading the record on this case
2 I'm inclined to support the variance for Mr.
3 McKinney. I think the applicant has met the
4 variance requirements and I'm just going to
5 walk through my thinking on it.

6 The first requirement is does it
7 properly exhibit a specific uniqueness. I
8 think the applicant has met the burden on
9 this. We've got a three-story structure on
10 our rear alley lot. It's a large alley lot
11 that doesn't have any street frontage which is
12 a fairly unique case, particularly on this
13 block.

14 It's a very old building that
15 requires a lot of money in order for upkeep.
16 The lot is sloping fairly severely to the
17 rear. I think even OP in its report
18 acknowledged that the applicant had met this
19 requirement.

20 On the undue hardship argument, I
21 looked through the applicant's supplemental
22 filing No. 33 basically showing what they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 thought a fair and reasonable return on its
2 investment would be. I'm going to quote one
3 part of it.

4 "Shown on Exhibit A is a simple
5 calculation of a fair and reasonable return on
6 the total investment of \$561,000. Assuming a
7 conservative annual rate of 6 percent the
8 analysis concludes that a fair and reasonable
9 return on the investment would be \$2,800 a
10 month."

11 I think the applicant has provided
12 comps on what they might be able to get for an
13 artist studio rental here. The comps that
14 they provided showed they could get around
15 \$750 a month.

16 Whether or not you agree with
17 those comps I think it's fairly clear that
18 there is a wide gap between what a fair and
19 reasonable return on the investment is and
20 what the property could be rented for for an
21 artist studio. I'm swayed by that analysis.
22 I don't think there is any other use that is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 going to provide a reasonable return on the
2 applicant's investment.

3 I think given the property taxes I
4 think we got an estimate that the property was
5 assessed at \$185,000 so that \$1,200 a month is
6 a lot of caring cost on the property. On a
7 simple economic argument I think I'm swayed on
8 the undue hardship.

9 Then you get to the third prong of
10 the test which is the no substantial detriment
11 to the public good. We've got support in this
12 case from ANC-3E. We've got support from the
13 neighbor at 4619, Mr. Lemon, who testified
14 that it would be a great improvement to the
15 security and integrity of the neighborhood.

16 We do have a party in opposition,
17 two neighbors, Mr. Lowrey and Ms. Liendo, in
18 opposition. Ms. Liendo testified that she was
19 seeking to purchase the property. In some
20 respects I discounted that testimony because
21 it seemed like there was another motive. She
22 testified last to the detrimental impacts of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 having housing there and more to her desire to
2 purchase the property.

3 Mr. Lowrey, on the other hand, was
4 worried that the housing would be used for
5 student usage, basically college kids going in
6 there throwing parties. I am sympathetic to
7 that argument of Mr. Lowrey.

8 It does seem that the applicant
9 has worked with the neighbors, with the ANC to
10 offer up to basically say that he would be
11 willing to agree that this property would be
12 owner occupied and I think he is making good
13 faith efforts in that regard.

14 I don't think there is a great
15 risk of this house becoming a party house of
16 college kids. The applicant has stated that
17 he intends to live there as soon as he is able
18 to do that.

19 The other things of no substantial
20 detriment is you've got a lot of other traffic
21 already in that area and you've got an animal
22 hospital parking garage which generates

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 substantial traffic. There is a lot of trash
2 and debris on the alley so I don't think that
3 this use making it into a single family
4 residence is going to actually increase
5 traffic in an appreciable amount.

6 I think I tend to agree with one
7 of the neighbors that having a homeowner on
8 that lot is actually going to be an
9 improvement to the alley. I don't see any
10 detriment so that's why I'm going to support
11 the variance today.

12 CHAIRMAN LOUD: Thank you,
13 Commissioner Schlater. I think that was an
14 excellent recap of the evidence in the record
15 as well as the test it has to meet to be
16 granted.

17 Let's see if other Board Members
18 have any additional reflections.

19 MEMBER MOLDENHAUER: Commissioner
20 Schlater, I think, provided a very full
21 analysis of the facts. I think that he fully
22 articulated the uniqueness of the building,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 the lower lot on the alley without any street
2 frontage, the age of the building.

3 There was a lot of testimony from
4 the applicant about the history of the
5 building, the prior use, and that then
6 provided some additional support for some of
7 the extensive repairs and improvements that
8 will need to be made on the building in its
9 current condition no matter what the use would
10 be. I think that goes towards the undue
11 hardship. There were a lot of economic
12 factors provided which specified that there
13 would be no matter what repairs needed.

14 There was testimony and requests
15 about OP asking about wouldn't a washroom
16 facility be needed if it was used as an artist
17 studio or something to that effect. With
18 those issues and those factors along with the
19 undue hardship and the economic factors
20 provided by Exhibit 33, I do think that they
21 satisfy the undue hardship.

22 One of the things that I felt was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 a very weak portion of the case which was
2 potentially the fact that the applicant did
3 not market the property strongly. There was
4 testimony that the applicant simply put a
5 lease sign up which was obviously putting a
6 lease sign up on an alley non-street frontage
7 property.

8 I think with their Exhibit 43
9 there was sufficient evidence to show that
10 even if they had marketed it there would not
11 have been a reasonable return on the
12 investment or reasonable lease that would have
13 been profitable for the property. That would
14 be all my additional points to be made and I
15 agree with Commissioner Schlater.

16 CHAIRMAN LOUD: Thank you, Board
17 Member Moldenhauer, for your further response.
18 Let me just say, as I indicated, I thought it
19 was an outstanding analysis. I support the
20 direction that you're moving in. Shortly I
21 think we are going to hear a motion.

22 You did mention that the ANC

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 report recommended a condition regarding a
2 covenant that would require the applicant to
3 be an owner-occupied resident of the alley
4 property. I think that you were right on in
5 terms of some reasons why that might be
6 problematic if we were to make that a
7 condition.

8 Although I support the ANC and I'm
9 glad the applicant did extensive outreach to
10 the community and to the ANC, I would not be
11 in favor of that being made a condition of the
12 grant of approval.

13 With that, I think we can probably
14 hear a motion on it and move forward.

15 COMMISSIONER SCHLATER: Mr.
16 Chairman, I move that we vote to approve the
17 application of Stephen A. W. McKinney, Case
18 No. 17989.

19 CHAIRMAN LOUD: Can you say the
20 case number one more time? I didn't hear.

21 COMMISSIONER SCHLATER: 17989.

22 CHAIRMAN LOUD: Very good. All

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 right. It's been moved. Is there a second?
2 I second the motion. Motion has been made and
3 seconded. Further deliberation? Hearing none
4 all those in favor say aye.

5 ALL: Aye.

6 CHAIRMAN LOUD: All those who
7 oppose? Are there any abstentions?

8 If you could read back the vote,
9 Mr. Moy.

10 MR. MOY: Yes, sir. The staff
11 would record the vote as four to zero to one.
12 This is on the motion of Commissioner
13 Schlater. Seconding the motion was Chairman
14 Loud. Also supporting the motion is Ms.
15 Moldenhauer, Ms. Sorg, and we have a member
16 not present and not voting. Again, total vote
17 is four to zero to one to approve the
18 application as advertised.

19 CHAIRMAN LOUD: Thank you. Since
20 there is a party opponent this would not be a
21 summary order. I do want to commend the
22 applicant, obviously the ANC and the Office of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Planning for its report and the party status
2 opponent as well in terms of helping to brief
3 the issues.

4

5 Is there anything further in this
6 case?

7 MR. MOY: No, Chair.

8 CHAIRMAN LOUD: Okay. Then that
9 will adjourn this afternoon's special public
10 meeting and we can move directly into this
11 afternoon's hearing agenda.

12 (Whereupon, at 2:37 p.m. the
13 meeting was adjourned.)

14

15

16

17

18

19

20

21

22

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701