

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY, NOVEMBER 3, 2009

The Special Public Meeting convened in Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Shane Dettman, Acting Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

SHANE L. DETTMAN Acting Chairman  
MEREDITH MOLDENHAUER Board Member

ZONING COMMISSION MEMBERS PRESENT:

MICHAEL G. TURNBULL Commissioner

OFFICE OF ZONING STAFF PRESENT:

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

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on November 3, 2009.

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Board of Zoning Adjustment  
District of Columbia  
CASE NO. Transcript  
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1 P-R-O-C-E-E-D-I-N-G-S

2 9:36 a.m.

3 ACTING CHAIR DETTMAN: The meeting  
4 will, please, come to order. Good morning,  
5 ladies and gentlemen. This is the November 3<sup>rd</sup>  
6 Public Meeting of the Board of Zoning  
7 Adjustment of the District of Columbia.

8 My name is Shane Dettman, Vice  
9 Chairperson. Joining me today to my right is  
10 Mr. Michael Turnbull representing the Zoning  
11 Commission. To my left is Ms. Meredith  
12 Moldenhauer, Mayoral Appointee Board Member,  
13 Mr. Clifford Moy with the Office of Zoning,  
14 Ms. Mary Nagelhout with the D.C. Office of  
15 Attorney General and Ms. Beverley Bailey with  
16 the Office of Zoning.

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

22 Please, be advised that this

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1 proceeding is being recorded by a Court  
2 Reporter and is also webcast live.  
3 Accordingly, we must ask you to refrain from  
4 any disruptive noises or actions in the  
5 hearing room. Please, turn off all beepers  
6 and cell phones at this time.

7 The Board will take up any  
8 preliminary matters that we have for this  
9 morning's Public Meeting.

10 Does the staff have any preliminary  
11 matters?

12 MR. MOY: Yes, we do, Mr. Chairman.  
13 We actually have two. The first one is a  
14 minor one, just a note for the audience that  
15 the Office of Zoning -- we haven't reset the  
16 clock, so even though it says 10:33, it's  
17 actually 9:33.

18 The second preliminary matter which  
19 is a large issue is one of the four cases  
20 before you is the Appeal Application No. 17980  
21 and staff is going to remove that off the  
22 agenda for further processing.

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1                   ACTING CHAIR DETTMAN: Thank you,  
2 Mr. Moy. You said that's 17980?

3                   MR. MOY: That's correct.

4                   ACTING CHAIR DETTMAN: Okay. Are  
5 there any other matters?

6                   MR. MOY: No, sir.

7                   ACTING CHAIR DETTMAN: Okay. I  
8 think we can proceed with this morning's  
9 agenda and the Public Meeting. And, Mr. Moy,  
10 what I would like to do is for the first two  
11 cases, 17620-A and 17676-A, as both of those  
12 cases are both Motions for Extensions of  
13 Validity of Order, I would like to take those  
14 up together.

15                  MR. MOY: Yes, yes.

16                  ACTING CHAIR DETTMAN: We can call  
17 those at once.

18                  MR. MOY: Okay. The first of the  
19 two cases that is being bundled together, as  
20 you said, they are motions to extend the  
21 validity of the order, one is to Application  
22 No. 17620 or 17620-A of Leon and Peggy

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1 Robbins, pursuant to section 3130 of the  
2 Zoning Regulations.

3 The second also which is a motion  
4 to extend the validity of the order and this  
5 one is to Application No. 17676-A of  
6 Innovative Recyclers, Inc., I'm not going to  
7 read the description of each one of these, but  
8 to say that the -- but to say that on both of  
9 these that the Board is to act on the merits  
10 of the request to extend the time limits,  
11 pursuant to provisions under section 3130.  
12 That completes the staff's briefing on that,  
13 Mr. Chairman.

14 ACTING CHAIR DETTMAN: Thank you,  
15 Mr. Moy.

16 Colleagues, as Mr. Moy kind of laid  
17 out for us, these two cases, 17676-A and  
18 17620-A, are both motions of the -- motions  
19 made by the applicant to extend the validity  
20 of a Board approved order.

21 17676-A is Application of  
22 Innovative Recyclers, Inc., that particular

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1 case was heard by the Board and decided by the  
2 Board on October 23, 2007. It is a summary  
3 order that the final date of the order is  
4 October 26, 2007.

5 The other case 17620-A is the  
6 Application of Leon Robbins. Again, that  
7 application was heard and decided on January  
8 15, 2008. It's a summary order that was  
9 issued on January 17, 2008.

10 As my colleagues, I'm sure, already  
11 are familiar with, the Zoning Commission  
12 recently modified the Zoning Regulations with  
13 respect to motions for extensions of orders,  
14 that order, Zoning Order No. 09-01 went into  
15 effect in June of 2009.

16 And let me just, for the sake of  
17 the record, review the new standard with  
18 respect to these types of cases.

19 3130.6 states "The Board may grant  
20 one extension of the time periods in section  
21 3130.1 for good cause shown upon the filing of  
22 a written request for the applicant before the

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1 expiration of the approval, provided that the  
2 Board determines that the following  
3 requirements are met."

4 And I won't read every single one,  
5 but I think 3130.6(c) is relevant to how the  
6 Board will go forward today. It says "The  
7 applicant must demonstrate that there is good  
8 cause for such extension with substantial  
9 evidence of one or more of the following  
10 criteria."

11 Again, as you know, we have  
12 received a lot of these types of cases of  
13 recent given the current economic climate,  
14 which is exactly what the applicants have  
15 stated in this situation, inability to obtain  
16 project financing, the economic downturn, the  
17 tightening of the credit market.

18 However, since the new regulations  
19 went into effect, the Board has really taken  
20 to heart the new standard that must be met,  
21 the substantial evidence. Colleagues, while I  
22 would say that I agree with the applicants and

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1 I don't doubt that the applicant is having  
2 trouble obtaining the necessary project  
3 financing to advance their projects toward  
4 building permit, I think that what has been  
5 submitted in both of these cases does not yet  
6 meet the substantial evidence requirement of  
7 3130.

8 And I would recommend actually  
9 putting off the Board's decision on these two  
10 cases for one week's time, so that the  
11 applicants can supplement their records with a  
12 little bit more. I know that the Board has  
13 accepted letters from banks, applications  
14 submitted to banks as well as sworn affidavits  
15 for meeting that substantial evidence  
16 requirement.

17 So perhaps we can put this off for  
18 a week and take it up at that time? And I'll  
19 turn it over to my colleague.

20 MEMBER MOLDENHAUER: Mr. Chairman,  
21 I agree with your statement. I think that  
22 this is similar to another case you have had

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1 recently where we put off the case and  
2 requested that they provide just some  
3 additional information or some sort of further  
4 evidence to satisfy this standard. And I  
5 think that you have articulated what we are  
6 looking for and I would move forward for a  
7 continuance.

8 COMMISSIONER TURNBULL: Mr. Chair?

9 Mr. Chair, I like that. I would concur with  
10 both of you. I don't think we are doing --  
11 there is any kind of a hardship here in asking  
12 for this. I think it is a proforma, I think,  
13 that we are looking to get this on -- from  
14 here on out.

15 And it shouldn't be difficult for  
16 either one of them to provide us with that  
17 information. So I would agree.

18 ACTING CHAIR DETTMAN: I think  
19 that's absolutely right, Mr. Turnbull. Again,  
20 this is proforma and I think what the Board is  
21 trying to do is we have a new standard and  
22 we're trying to be consistent in setting that

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1 standard and holding every single applicant to  
2 it.

3 So, Mr. Moy, is there anything in  
4 terms of a vote or anything that the Board  
5 needs to take?

6 MR. MOY: I don't believe so. I  
7 think the Board can move on its own by  
8 consensus.

9 ACTING CHAIR DETTMAN: Okay. It  
10 appears that we have consensus of the Board  
11 Members that are present. And does one week  
12 work, Mr. Moy?

13 MR. MOY: Yes, I think staff would  
14 be agreeable to that.

15 ACTING CHAIR DETTMAN: Okay.

16 MR. MOY: Which would take us to  
17 November 10<sup>th</sup>, I believe.

18 ACTING CHAIR DETTMAN: November  
19 10<sup>th</sup>. And if -- I assume that the office will  
20 inform the applicants.

21 MR. MOY: Absolutely. That would  
22 be routine on the part of the Zoning Office.

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1                   ACTING CHAIR DETTMAN:    Okay.    And  
2   if the applicants need more time, we can just  
3   push it further.   Sounds good.

4                   With that, I think we can move on  
5   to the next case, Mr. Moy?

6                   MR. MOY:    Okay.    Very good.    The  
7   next and last case for decision for the Board  
8   this morning, Mr. Chairman, is a Modification  
9   of Approved Plans.   This is to Application No.  
10  17474-B   of   ASR   Group,   Inc.   by   Metro  
11  Properties, Inc., pursuant to section 3129 of  
12  the Zoning Regulations.

13                  The original application, if the  
14  Board will recall, is pursuant to 11 DCMR  
15  3103.2, for a variance from the off-street  
16  parking requirements under section 2116 and  
17  pursuant to 11 DCMR 3104.1, for a special  
18  exception to construct six three-unit row  
19  dwellings under section 353, in the R-5-A  
20  District at premises 1749 through 1759 W  
21  Street, S.E.   This is in Square 5755, Lots 38  
22  through 43.

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1           On September 29, 2009, the  
2 applicant filed this request for minor  
3 modification of approved plans and a waiver of  
4 the 6 month time requirement for filing the  
5 modification. This document is identified in  
6 your case folders as Exhibit 37.

7           The second and only filing in the  
8 record is a response by the Office of  
9 Planning, their report, which is dated October  
10 27, 2009, is identified as Exhibit 38, which  
11 is in support of the request for the minor  
12 modification.

13           Staff would note for the record  
14 that Zoning Commission Order 09-01 amended  
15 section 3129, as well as 3130, which is the  
16 time limit. And in reference to the time  
17 limits, the change here was changed from the 6  
18 month time requirement to 2 years after the  
19 date of the final order approving the  
20 application.

21           In conclusion, the -- again, the  
22 staff -- the applicant is requesting a second

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1 modification of approval. The first  
2 modification was decided April 1, 2008. The  
3 summary order was issued April 2, 2008, which  
4 is Order No. 17474-A.

5 The Board is to act on the merits  
6 of the applicant's request for the second  
7 modification pursuant to the provisions of  
8 section 3129. And that completes the staff's  
9 briefing, Mr. Chairman.

10 ACTING CHAIR DETTMAN: Thank you,  
11 Mr. Moy. Just a couple points I wanted to  
12 raise for my colleagues. The applicant is  
13 requesting, as Mr. Moy stated, approval of a  
14 minor modification to approve plans as well as  
15 a waiver of our rules, specifically 3129.3,  
16 the 6 month requirement.

17 However, Mr. Moy stated the recent  
18 Zoning Commission text amendment in Case No.  
19 09-01 modified 3129.3 to change the 6 month  
20 requirement to 2 years. 3129.3 states "The  
21 request for a minor modification of plans  
22 shall be filed with the Board not later than 2

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1 years after the date of the final order  
2 approving the application."

3 So with respect to that request,  
4 the waiver of 3129, I don't think that that's  
5 actually applicable and that the applicant is  
6 within that 2 years. So what we have before  
7 us here is just a request for approval of a  
8 minor modification to approve plans.

9 And just to draw the distinction  
10 between this particular case and the two that  
11 we addressed first in the morning, this is a  
12 request under 3129 for a modification of  
13 approved plans as opposed to a request for an  
14 extension of the time limits of a Board action  
15 under 3130.

16 In March of 2006, the Board  
17 approved this application by way of a summary  
18 order. And very quickly looking at that order  
19 which is attached to our Exhibit No. 37,  
20 supplied by the applicant, it looks like the  
21 Board originally granted relief from lot  
22 occupancy, the residential recreation space

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1 requirements, which are no longer in place, a  
2 variance from 2115.2 for accessory parking  
3 area or parking garage with 25 or more  
4 required spaces, so essentially that was the  
5 percentage that could be dedicated to compact  
6 spaces and a special exception from the roof  
7 structure elements.

8 Subsequently, the applicant  
9 returned in April of 2008 for a modification  
10 to their plans, which the Board found to be  
11 minor and approved that modification. And we  
12 have another modification before us today.

13 The modifications that have been  
14 made to the plans by the applicant currently  
15 include, again, mainly driven by the economic  
16 climate right now, the removal of an -- the  
17 entire third floor of the apartment building  
18 and the removal of one level of below-grade  
19 parking.

20 Other than that, the building  
21 remains the same, the lot occupancy and the  
22 other kind of area requirements that the

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1 applicant is required to meet.

2           Having reviewed the modified plans,  
3 colleagues, I think that this is actually --  
4 it meets the standard of a minor modification  
5 and does meet the requirements under 3129.  
6 And I'm inclined to recommend approval of this  
7 application.

8           And, colleagues, anything?

9           MEMBER MOLDENHAUER:   Mr. Chair, I  
10 have reviewed the record also and I believe  
11 that the minor issues of reconfiguring the  
12 units to permit additional units on one level,  
13 revising the lobby, eliminating the roof  
14 terrace and, as you stated, the floor  
15 modification and the penthouse structure being  
16 reduced. I don't believe those would be major  
17 issues in regards to why the application was  
18 approved and why the application went forward  
19 initially, so I would consider them minor and  
20 would be willing to move forward on this.

21           ACTING CHAIR DETTMAN:   All right.  
22 Thank you, Ms. Moldenhauer. Right. I think

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1 that this most certainly does not change the  
2 material facts that the Board relied upon in  
3 approving the original application, as well as  
4 the subsequent modification.

5 For purposes of the record, Ms.  
6 Moldenhauer, 3129.6 states that "No Member  
7 shall vote on a request for modification of  
8 plans unless the Member participated in and  
9 voted on the original decision or read the  
10 record."

11 I just wanted to make sure for the  
12 record that that's clear --

13 MEMBER MOLDENHAUER: Yes, and I  
14 would -- oh --

15 ACTING CHAIR DETTMAN: -- that you  
16 have.

17 MEMBER MOLDENHAUER: And I would  
18 note on the record that I have reviewed the  
19 record.

20 ACTING CHAIR DETTMAN: Great. Yes,  
21 sir?

22 MR. MOY: Mr. Chairman, while there

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1 is just a brief pause, staff would just like  
2 to correct the record on my reading earlier,  
3 because I gave the -- I guess I was reading  
4 the wrong text.

5 And I just wanted to read for the  
6 record, for the transcript, that this  
7 Application of 17474-A of ASI -- ASR Group,  
8 the original application was pursuant to 11  
9 DCMR 3103.2, for a variance from the lot  
10 occupancy requirements under section 772, and  
11 a variance from the residential recreation  
12 space requirements under section 773, to allow  
13 the construction of a new 326-unit apartment  
14 building in the C-2-A District at premises  
15 1300 Rhode Island Avenue, N.E., Square 3956,  
16 Lot 801.

17 The decision was made on the  
18 original application on May 23, 2006. The  
19 modification date was April 1, 2008. And that  
20 Bench decision, the summary order, was issued  
21 April 2, 2008, for the record.

22 ACTING CHAIR DETTMAN: Great.

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1 Thank you, Mr. Moy. If there is nothing  
2 further on this, I can make a motion.

3 Before I do that, I'll note that  
4 pursuant to 3129.4, the application -- the  
5 applicant's application for a modification has  
6 been served on all parties to this case, which  
7 in this application was just the ANC.

8 That being said, I would move for  
9 approval of Application No. 17474-B for  
10 approval of a minor modification to approved  
11 plans.

12 MEMBER MOLDENHAUER: I second.

13 ACTING CHAIR DETTMAN: The motion  
14 has been made and seconded.

15 All those in favor?

16 ALL: Aye.

17 ACTING CHAIR DETTMAN: Opposed?  
18 Any abstentions?

19 MR. MOY: Mr. Chairman, the Office  
20 have received the absentee ballot on the third  
21 participating Member on this application and  
22 that is Mr. Loud. And his absentee ballot

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1 says two things. First is that he has  
2 reviewed the record and is prepared to vote.  
3 Second, his vote is to approve with any such  
4 conditions as the Board may impose.

5 So that would give a final vote of  
6 3-0-2. This is on the motion of the Chair,  
7 Mr. Dettman, to approve the modification of  
8 approved plans, seconded by Ms. Moldenhauer.  
9 In support of the motion, of course, Mr. Loud.

10 No other Board Member of Zoning Commissioner  
11 participating.

12 So again the final vote is 3-0-2.

13 ACTING CHAIR DETTMAN: Thank you,  
14 Mr. Moy.

15 I think that takes care of the  
16 Board's Public Meeting. Mr. Moy, what happens  
17 next? Do I have to conclude the Public  
18 Meeting and open up the Public Hearing?

19 MR. MOY: Yes. Adjourn the Public  
20 Meeting session and now you do your opening  
21 remarks for the morning session of the Public  
22 Hearing.

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ACTING CHAIR DETTMAN: Thank you.  
This Public Meeting will stand adjourned.  
(Whereupon, the Special Public Meeting was concluded at 9:56 a.m.)

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