

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY,
OCTOBER 21, 2008

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:00 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER	Chairperson
MARC D. LOUD	Vice Chairman
SHANE L. DETTMAN	Board Member (NCPC)
MARY OATES WALKER	Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Spec.

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on October 21, 2008.

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

10:24 a.m.

CHAIRPERSON MILLER: Good morning, ladies and gentlemen. This meeting will, please, come to order. We have on the agenda this morning first a Public Meeting and then that will be followed by a Public Hearing. And I'm going to be reading the intro to the Public Meeting first.

This is the October 21st Public Meeting of the Board of Zoning Adjustment of the District of Columbia. My name is Ruthanne Miller. I'm the Chair of the BZA. To my right is Mr. Marc Loud, our Vice Chair, to my left is Mary Oates Walker and Shane Dettman, Board Members. Next to Mr. Dettman is Mr. Cliff Moy from the Office of Zoning, Ms. Mary Nagelhout from the Office of Attorney General, and Ms. Beverley Bailey from the Office of Zoning.

Copies of today's meeting agenda are available to you and are located to my

1 left in the wall bin near the door. We do not
2 take any public testimony at our meetings,
3 unless the Board asks someone to come forward.

4 Please, be advised that this
5 proceeding is being recorded by a Court
6 Reporter and is also webcast live.
7 Accordingly, we must ask you to refrain from
8 any disruptive noises or actions in the
9 hearing room. Please, turn off all beepers
10 and cell phones.

11 Does the staff have any
12 preliminary matters?

13 MR. MOY: Yes, we do, Madam Chair,
14 but we can address that when I call the case.

15 CHAIRPERSON MILLER: Okay. Then
16 let's proceed with the agenda.

17 MR. MOY: The first and only case
18 for decision this morning in the Special
19 Public Meeting, Madam Chair, good morning,
20 Madam Chair and Members of the Board, is
21 Application No. 17810 of Michael Reitz,
22 pursuant to 11 DCMR 3104.1, for a special

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1 exception to allow a garage addition to an
2 existing one-family dwelling under section
3 223, not meeting the lot occupancy, section
4 403, and rear yard, section 404, requirements
5 in the D/R-5-B District. This is at premises
6 1505 Harvard Street, N.W., Square 2577, Lot
7 42.

8 On September 16, 2008, the Board
9 completed public testimony, closed the record
10 and scheduled its decision on October 21st.
11 The Board requested addition information to
12 supplement the record, principally, from the
13 District Fire Department, Office of Planning
14 and Mr. John Moore, as well as responses.

15 What has been filed, Madam Chair,
16 is as follows: The first is an OP
17 supplemental report dated October 10, 2008,
18 Exhibit 36. The Office of Planning has also
19 followed-up with an addendum, which is dated
20 October 17th, received into the office on
21 October 20th, which should be Exhibit 43. And
22 this addendum was to respond and provide

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1 comments on Mr. John Moore's submittal, which
2 is dated October 10, 2008, Exhibit 38.

3 Also attached to Mr. Moore's
4 filing is a report of his research into the --
5 into his, let's say, alleged right of way and
6 land easement and that was separated as a
7 separate exhibit, as Exhibit 37. And that
8 document is dated October 9th.

9 We also have a response to these
10 filings from Mr. Moore, a letter dated October
11 15, 2008, and that is Exhibit 39.

12 As preliminary matters, Madam
13 Chair, we have, in the record, 11 letters of
14 opposition from individuals, which were
15 submitted after the record was closed on
16 September 16th. These are Exhibits 28 through
17 42. The Exhibit 42 was filed on October 17th.
18 So these filings have been received into the
19 office from October 14th through October 17th.
20 So that's your first grouping of preliminary
21 matters.

22 The second is a filing this

1 morning from a Ms. Kathleen Clark regarding
2 her request for party status, which, at this
3 point, probably would be Exhibit 44. And that
4 completes the staff's briefing, Madam Chair.

5 CHAIRPERSON MILLER: Thank you,
6 Mr. Moy. Okay. I would suggest that we deal
7 with the preliminary matters first, before we
8 get into the merits of the application. As
9 Mr. Moy stated that when we had our hearing,
10 at the end of the hearing, we left the record
11 open only for specific documents related to
12 issues that we felt needed further
13 exploration.

14 We left the record open for the
15 Office of Planning to check with the Recorder
16 of Deeds to determine if there was an easement
17 on the rear yard of the applicant's property
18 and for OP to solicit a report from the D.C.
19 Fire and Emergency Medical Services to
20 determine if they would have sufficient
21 alternate access to the interior of square
22 2577, should the addition be constructed as

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1 proposed.

2 And we left the record open for
3 Mr. Moore, who raised these issues at the
4 hearing, and even though he wasn't granted
5 party status, we gave him the opportunity to
6 respond to the Office of Planning and to
7 submit any additional information that he
8 might have with respect to the easement
9 question.

10 So that's just a reminder of what
11 we left the record open for. It's the normal
12 course and it's within our Rules and
13 Regulations to close the record at the end of
14 a hearing and leave it open only for specific
15 items, because if we just leave the record
16 open for any kind of submissions, that
17 somewhat can defeat the opportunity for other
18 parties to have due process to respond to
19 filings.

20 And so we carefully craft how we
21 leave the record open so that we can protect
22 that due process. So the first item that I

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1 think we need to address is whether or not we
2 allow into the record the 11 letters that came
3 in after the close of the record that Mr. Moy
4 mentioned.

5 In general, I often say that the
6 standard for that or for waiving any
7 regulation is whether there would be no
8 prejudice to any party and whether good cause
9 has been shown to waive the rules. So I guess
10 I'm just going to open it up for comments,
11 whether Board Members are of the view that
12 these 11 letters should be allowed into the
13 record and show good cause as to why they have
14 been filed untimely.

15 Well, let me make a suggestion and
16 see if there is concurrence by the Board
17 Members. I recognize that with the filing of
18 these letters that there are individuals who
19 are concerned about the application. However,
20 I don't believe that the letters really would
21 satisfy our granting that.

22 And we have our criteria in the

1 223 and I think that we will thoroughly
2 deliberate on those elements. But do others
3 see any reason that we ought to waive our
4 rules to let these letters in? Okay. Then
5 Not hearing anything, I conclude that that's
6 the consensus of the Board that they haven't
7 made the case that the rules should be waived
8 and therefore these letters won't be part of
9 the record.

10 VICE CHAIRMAN LOUD: Madam Chair?

11 CHAIRPERSON MILLER: Yes?

12 VICE CHAIRMAN LOUD: Madam Chair,
13 if I could be heard very briefly?

14 CHAIRPERSON MILLER: Sure.

15 VICE CHAIRMAN LOUD: I agree with
16 the conclusion that we have reached on that
17 and took a look at the Good Cause Rule
18 earlier. But my question concerns clarifying
19 which of the exhibits are actually letters.
20 I don't think all of what came in between
21 Exhibits 28 and 40 are opposition letters.
22 And I just want to make sure that we are all

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1 on the same page as regards that a couple of
2 them were reports that were responsive to the
3 OP investigation of easement and the like.

4 CHAIRPERSON MILLER: Okay. I'm
5 only referring to the letters that came in.
6 I can list -- they are Exhibits 28 through 41
7 and then I think 42 maybe had come in today.
8 I'm not referring to any of the reports that
9 came in after we closed the record, because we
10 allowed the record to be kept open for those
11 specific things. That would be the OP reports
12 and the submissions by Mr. John Moore that
13 address the easement question.

14 VICE CHAIRMAN LOUD: Then why
15 don't we do this? Why don't we say Exhibits
16 28 through 40, except for, I think, Exhibit 37
17 is the report on that record. Is that
18 correct?

19 CHAIRPERSON MILLER: Oh, all
20 right. Let's do that.

21 VICE CHAIRMAN LOUD: And Exhibit
22 38 is the letter from Mr. Moore regarding his

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1 position on the easements. Just so that we're
2 clear that we are not disallowing those
3 reports that we're going to later take a look
4 at as we proceed to analyze the case.

5 CHAIRPERSON MILLER: Okay. I see
6 all of OP's reports are accepted.

7 VICE CHAIRMAN LOUD: Are fine.

8 CHAIRPERSON MILLER: Okay.

9 VICE CHAIRMAN LOUD: Correct.

10 CHAIRPERSON MILLER: So we don't
11 necessarily have to refer to those by exhibit.
12 And then Mr. Moore has an Exhibit 37 and 38
13 and 39? Is that correct?

14 VICE CHAIRMAN LOUD: That's
15 correct. 37 would be, I think, the Thompson
16 report on the land records. 38 would be
17 Moore's letter on the easements and 39 is not
18 an opposition letter. I have to check. Let
19 me see what it is.

20 CHAIRPERSON MILLER: Okay.

21 MR. MOY: Madam Chair, if it will
22 help matters, I mean --

1 CHAIRPERSON MILLER: Sure.

2 MR. MOY: -- Mr. Loud is correct.
3 The letters in opposition would be Exhibits 28
4 through 35. And then we pick up with Exhibit
5 40, 41 and 42. So those would be the
6 preliminary matter letters.

7 CHAIRPERSON MILLER: Okay. So we
8 are clear on that and the record is clear on
9 that. Okay. Then just today we were handed
10 a letter from Ms. Kathleen Clark, which
11 requests party status in the application.

12 She says "Please, award me party
13 status in this matter. I did not understand
14 that my status might be in question, because
15 my work load kept me from being physically
16 present before you for these hearings. It is
17 quite possible that a lawsuit may be necessary
18 and I hope to protect my interest.

19 Mr. Reitz has made a serious error
20 of omission in his application. I beg that
21 the correct details of my property and the
22 negative impact of this project will be placed

1 in the record."

2 Okay. I guess, I think this also
3 falls in the same category of being late. Let
4 me say two things. First of all, she
5 requested party status and wasn't at the
6 hearing. And party status contemplates that
7 someone granted party status will have the
8 rights to participate in the hearing. And so
9 she couldn't participate in the hearing,
10 because she wasn't here and she wasn't here
11 really to make her case for it.

12 But her application for party
13 status was a part of the record. So anything
14 that she stated in connection with that
15 request for party status is a part of our
16 record. So I want to make certain that that's
17 clear. We often say that often when a party
18 status applicant requests party status and it
19 is denied, their submission asking for party
20 status in which they described the impacts and
21 how they are affected are made a part of the
22 record and treated as testimony.

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1 So that's what is happening with
2 her. She raises the question of protecting
3 her interests and that they might not be
4 protected if she is not granted party status.
5 And I want to state for the record what we
6 tell party status applicants based on our
7 knowledge of the law and Counsel from OAG.

8 And that is that party status is
9 not required in order to appeal a BZA Order to
10 the Court of Appeals. And I'm going to
11 reference the D.C. Code provision, so that
12 that's understood.

13 It says at D.C. Code 2-510(a) "Any
14 person suffering a legal wrong or adversely
15 affected or aggrieved by an order or decision
16 of the Mayor or an Agency in a contested case
17 is entitled to judicial review thereof."

18 D.C. Code 2-5029 "The term person
19 includes individuals, partnerships,
20 corporations, associations and public or
21 private organizations of any character other
22 than the Mayor, the Council or an Agency."

1 So I just wanted to put that out
2 there. Now, for those reasons, I again would
3 be inclined not to certainly grant party
4 status in this case. We already -- because
5 she was not there and we have included her
6 application in the record and I don't think
7 she has made a case for waiving the rules here
8 for good cause and no prejudice of any party.

9 Do others have a different view or
10 anything else they want to add to this?

11 VICE CHAIRMAN LOUD: Just that I
12 agree, Madam Chair. I also think if I recall
13 correctly, she is one of three neighbors that
14 live to the rear of the applicant's property,
15 I think. And part of their concern was the
16 whole question of the ability of public safety
17 vehicles to access the interior Square 2577.

18 So that -- and I agree that she
19 was not there at the hearing, so did not
20 qualify for party status. The hearing is
21 over, so to me there is no point in giving her
22 party status now.

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1 But in addition to that, the
2 issues that she is concerned about were raised
3 at the hearing. So it's not like we're not
4 going to address those in our deliberations.
5 And, in fact, were the subject of OP's Exhibit
6 36 report following the hearing. So I think
7 I agree with you, Madam Chair. I think it's
8 a good decision to not allow party status.

9 CHAIRPERSON MILLER: Okay. Yes,
10 and I glean that, you know, she was afraid
11 perhaps that she wouldn't be able to appeal if
12 she weren't a party and that's not the case.
13 Yes, okay. Then it's the consensus of the
14 Board, as I understand it, that we would deny
15 Ms. Clark's request for party status.

16 Okay. That brings us to the
17 merits of this application, which is for a
18 special exception under 223 to allow a garage
19 addition on an existing one-family residence
20 not meeting the lot occupancy, section 403,
21 and rear yard, section 404, of our
22 regulations.

1 Basically, section 223 has very
2 specific provisions which we explored at the
3 hearing and which the Office of Planning
4 thoroughly addressed. I want to cover them
5 somewhat and then get into the two main
6 issues. Yes, one was access for fire safety
7 trucks and equipment. And then the other was
8 whether there is a possible easement or right-
9 of-way that would affect our decision.

10 In this zone, there is a maximum
11 of 60 percent lot occupancy allowed. And
12 currently, the structure on the property takes
13 up 48.9 percent lot occupancy and the addition
14 would bring it to 69.6 percent. And 223
15 allows properties in this category to go up to
16 70 percent, provided they meet all the
17 requirements of 223.

18 Office of Planning found that
19 there was not a substantial adverse impact on
20 neighboring properties, that the addition is
21 sufficiently setback from the neighboring west
22 apartment building. And I think that is an

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1 issue that we need to talk about as far as
2 affect on neighboring properties.

3 Office of Planning found that it
4 would not impair privacy, because the addition
5 wouldn't have windows along the property lines
6 shared with neighboring properties, that it
7 was in character with the neighborhood, no
8 special treatments required and no
9 nonconforming use is being introduced. It's
10 the same use.

11 So that basically follows the
12 requirements of 223. So I think that the
13 issues that -- some of the issues that we
14 should talk about are, first of all, is it
15 sufficiently setback from the neighboring west
16 apartment building, so that it doesn't have a
17 substantial adverse impact on that property?

18 Does anyone want to start that
19 discussion? Certainly, this addition goes
20 over the driveway and brings a structure
21 closer to the apartment building than before,
22 and so I think any neighboring property is

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1 usually concerned often when a structure is
2 brought closer to their own property.

3 By right, the regulation would
4 allow this applicant to build to its lot line
5 where it is going. And what's at issue here
6 really is the question of lot occupancy and
7 rear yard.

8 Okay. I think just to say, I
9 mean, if I were a neighbor, I would be
10 concerned that someone is building out close
11 to my property. But I don't think that that's
12 the test under 223. I think the test is
13 substantially adverse or something, affect on
14 light and air and I don't think there is any
15 evidence in the record to show that it would
16 have substantially adverse impact on light and
17 air and certainly not on privacy, because
18 there aren't any windows.

19 If there aren't comments on that
20 issue, then I would go to access for fire and
21 emergency service vehicles if the addition is
22 constructed over the driveway. Again, if you

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1 look at the pictures, I'm looking at the
2 pictures in Exhibit 5 there. It's a private
3 driveway. And I don't think -- we explored
4 whether there was -- you know, they had given
5 to the public, you know, a right for fire
6 trucks to use that public driveway for access
7 for emergency equipment to the extent that
8 they no longer could use it for their own
9 purposes.

10 And we didn't see any evidence of
11 that. And then we just were looking at well,
12 for the safety of the people in that square,
13 were there other access points? Because we do
14 consider, you know, safety as -- in our
15 adverse impact assessment.

16 So the Office of Planning did send
17 information to the fire department and they
18 did respond. And they said that -- Exhibit 36
19 is the Office of Planning's supplemental
20 report and attached to it was an October 2nd
21 report from Captain Chris Rodgerson, who said
22 I think on point that the applicant's private

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1 driveway is not a part of a public way or
2 public alley and the D.C. Fire Department has
3 sufficient alternate access on 15th Street and
4 Columbia Road, N.W.

5 So I think that responds to that
6 concern. Do others have concerns on that
7 issue? Okay. Then that brings us to the
8 question about whether there is a public or
9 private easement on the applicant's property
10 that would affect this application.

11 We did get submissions from Mr.
12 Moore and we got submissions from the Office
13 of Planning on this question. And to me,
14 there seems to be conflicting and inconclusive
15 evidence whether or not there is a 4 foot
16 right-of-way in the rear of the property or an
17 easement.

18 I don't believe that it is within
19 the Board's jurisdiction to resolve that kind
20 of a conflict. I think that things that
21 affect, you know, my concern about this is I'm
22 of the understanding that if there is an

1 alley, it's usually created by the Council.
2 So I'm not clear whether what is being
3 referenced as a public alley and the
4 submission is really an easement and if it is
5 an easement, whether it still exists.

6 And even if it exists, the Board
7 has, in a previous case, considered the
8 question of easements. We haven't considered
9 questions of public right-of-way, but we have
10 considered an easement. And that we
11 determined that even if there is an easement
12 on a property, that that did not affect the
13 calculation of the lot occupancy, that that
14 property was still included in the lot.

15 That case is Appeal No. 17631.
16 Because the issue here became if there was an
17 easement then or a right-of-way, that maybe
18 would affect the lot occupancy to knock this
19 out of 223, because Mr. Moore said it would
20 take the lot occupancy up to 75.8 percent, I
21 think.

22 So I guess my bottom line view on

1 this is that it's inconclusive and it's not up
2 to this Board to make that kind of decision.
3 And that we should go on the information that
4 was sent to us from the Zoning Administrator,
5 in which case the lot occupancy would be under
6 70 percent.

7 And I also want to add one other
8 thing. I think there is also a question about
9 encroachments of neighboring properties onto
10 the applicant's property that might affect the
11 lot occupancy as well. And I think that what
12 we should be doing is just looking at what was
13 referred to us by the Zoning Administrator
14 unless there is conclusive evidence to the
15 contrary and I don't think that there is
16 conclusive evidence to the contrary.

17 Others?

18 MEMBER DETTMAN: Madam Chair, I
19 just wanted to raise an issue that just came
20 to mind before we go ahead and make a motion.
21 And I don't think this has a bearing on the
22 merits of the case. But I'm looking at OP's

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1 report, Exhibit No. 26, and I know in cases
2 that come in to the BZA under 223, the Board
3 has typically taken the position that if there
4 is an existing nonconformity that is not being
5 extended or increased, that we wouldn't go
6 ahead and grant relief from that.

7 It's an existing condition that is
8 just going to remain as is. And there was
9 some mention in the record that this could be
10 done as a matter-of-right if the front porch
11 was removed or something like that. I don't
12 exactly know exactly what it was. But in OP's
13 report on page 2, again, this is Exhibit 26,
14 it mentions that the existing rear yard is
15 9.66 feet. And that the proposed rear yard is
16 9.66 feet.

17 Now, I know the case was
18 advertised for lot occupancy and rear yard.
19 However, if this is an existing nonconformity
20 that is not being extended or increased, it
21 might be worth deciding whether or not to
22 continue to keep that in as we go forward.

1 CHAIRPERSON MILLER: I think
2 that's a good point. I think in any event,
3 the relief sought is relief pursuant to 223.
4 And that relief is needed. And I think yes,
5 we should clarify that it is needed because
6 the applicant doesn't meet the lot occupancy
7 of requirements of section 403.

8 And I think what we often say is
9 it's just we might mention that it's not in
10 compliance with 404, but they don't need
11 relief regarding that noncompliance, because
12 it's pre-existing, nonconforming condition.
13 Yes. I think that it's important to make that
14 distinction. But in any event, it would still
15 be relief under 223.

16 So you're suggesting in the motion
17 that it just refers to not meeting lot
18 occupancy requirement and that it perhaps be
19 noted in a footnote or something that it
20 didn't meet the rear yard, but wasn't required
21 to?

22 MEMBER DETTMAN: However the order

1 is crafted, that would be fine placing it in
2 a footnote or just on the record right now as
3 we did not that since it's a pre-existing
4 condition, rear yard relief, though
5 advertised, is not necessary.

6 CHAIRPERSON MILLER: Okay.
7 Anything else? And do we have a motion then?

8 MEMBER DETTMAN: Actually, I'll
9 move for approval of Application No. 17810 of
10 Michael Reitz, pursuant to 11 DCMR section
11 3104.1, for a special exception to allow a
12 garage addition to an existing one-family
13 dwelling under section 223, not meeting the
14 lot occupancy requirements of section 403 at
15 premises 1505 Harvard Street, N.W.

16 CHAIRPERSON MILLER: Second.
17 Further deliberation?

18 All those in favor say aye.

19 ALL: Aye.

20 CHAIRPERSON MILLER: All those
21 opposed? All those abstaining? And would you
22 call the vote, please?

1 MR. MOY: Staff would record the
2 vote as 4-0-0. This is on the motion of Mr.
3 Dettman to approve the application to section
4 223, seconded by Ms. Miller. Also in support
5 of the motion Ms. Walker and Mr. Loud.

6 Madam Chair, we also have an
7 absentee vote from Mr. Hood, who also
8 participated on the application, and his
9 absentee vote is to approve the application,
10 which would give a final vote of 5-0-0.

11 CHAIRPERSON MILLER: Thank you,
12 Mr. Moy. And this can be a summary order. I
13 don't believe we have any party in opposition.

14 MR. MOY: That's correct.

15 CHAIRPERSON MILLER: Okay.

16 MR. MOY: Thank you.

17 CHAIRPERSON MILLER: Thank you.

18 And is there anything else on the agenda for
19 the Special Public Meeting?

20 MR. MOY: No, that concludes this
21 session, Madam Chair.

22 CHAIRPERSON MILLER: Okay. Thank

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1 you. Then this meeting is adjourned.

2 (Whereupon, the Special Public

3 Meeting was concluded at 10:56 a.m.)

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