

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

MARCH 11, 2008

+ + + + +

The Special Public Meeting
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 9:30 a.m., Ruthanne G. Miller,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

CURTIS L. ETHERLY, JR., Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:
LORI MONROE, ESQ.

The transcript constitutes the minutes
from the Public Meeting held on March 11,
2008.

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

2 9:59 a.m.

3 CHAIRPERSON MILLER: Good morning,
4 ladies and gentlemen. This meeting will
5 please come to order. We have both a special
6 public meeting and a hearing scheduled for
7 this morning and we will be starting with the
8 meeting.

9 My name is Ruthanne Miller. I'm
10 the Chair of the BZA and with me today is Mr.
11 Marc Loud. He's the Vice Chair. To my right
12 and next to him is Mr. Curtis Etherly who's
13 with the Zoning Commission now and to my left
14 is Mr. Shane Dettman representing NCPC. Mary
15 Oates Walker will be coming for the second
16 decision this morning and also joining us on
17 the dais is Ms. Lori Monroe from the Office of
18 Attorney General, Ms. Beverley Bailey from the
19 Office of Zoning and Mr. Clifford Moy will be
20 joining us momentarily.

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

1 left in the wall bin near the door.

2 We do not take any public
3 testimony at our meetings unless the Board
4 asks someone to come forward.

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

12 Does the Staff have any
13 preliminary matters?

14 MR. MOY: No, Madam Chair.

15 CHAIR MILLER: Thank you. Then
16 let's proceed with the agenda.

17 MR. MOY: Yes, the case for a
18 decision is Application Number 17722 of New
19 Beginnings Cooperative.

20 CHAIRPERSON MILLER: Mr. Moy, I
21 wonder if we can do the second one first as
22 Mr. Etherly is with us on that one right now

1 and that's probably a little quicker.

2 MR. MOY: Oh, yes. Okay.

3 Definitely.

4 CHAIRPERSON MILLER: Okay. Thank
5 you.

6 MR. MOY: Terribly sorry. The
7 case for a decision then is the motion for a
8 corrected order to Application Number 17700 of
9 Jewish Primary Day School of the Nation's
10 Capital, Inc. pursuant to Section 3129 of the
11 Zoning Regulations.

12 As the Board will recall, the
13 original application was pursuant to 11 DCMR
14 3104.1 and 3103.2 for a variance to allow
15 stacked parking spaced under subsection 2117.4
16 and a special exception to allow an increase
17 in the number of students from 225 to 275 and
18 an increase in the number of faculty from 42
19 to 56 and the use of a portion of the lot for
20 play area serving an existing private school
21 under section 206 (352) in the R-1-B and R-5-A
22 Districts at premises 6045 16th Street, N.W.

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1 That's in square 2726, lot 824.

2 On February the 27th of this year,
3 the Applicant filed a request to correct an
4 error in the language to -- in condition
5 number 6 in the issued summary order number
6 17700. That filing is in your case folders
7 identified as Exhibit 48.

8 According to the Applicant,
9 there's a text error in the description of the
10 change in grade between the proposed play area
11 and the adjacent property. The existing
12 approved language in condition number 6
13 describes a grade change of approximately 10
14 feet between the proposed play area and the
15 adjacent property. The grade change according
16 to the Applicant should be approximately 4
17 feet as reflected in the approved plans and
18 it's for this reason that the Applicant is
19 requesting a corrected order which would be
20 consistent with the approved plans.

21 The Board is to act on the merits
22 for the requested language change to condition

1 number 6 of the summary order and that
2 completes the staff's briefing, Madam Chair.

3 CHAIRPERSON MILLER: Thank you and
4 this motion was timely filed. I just want to
5 make a comment that I see this as a little bit
6 more than a clerical error because the 10 feet
7 was something that we looked at in the
8 Applicant's proposed findings and conclusions
9 of law as being one of the mitigating factors
10 that the -- of the grade change and I think I
11 had in my mind, you know, 10 feet and so, I
12 don't see this as just a clerical error.
13 However, we did understand that that language
14 and the condition was to describe the
15 landscaping plan and that the landscaping plan
16 showed a 4-foot grade difference and so, you
17 know, I understand that it was a clerical
18 error perhaps on the part of the Applicant.

19 So, then the question for me was
20 does this make a big enough difference in
21 order to change my views on granting the
22 application or changes any of the conditions

1 and so, I guess I'm left with the feeling that
2 the other mitigating factors suffice and that
3 I can sign off on the 4 feet and how do others
4 feel about this?

5 COMMISSIONER ETHERLY: Madam
6 Chair, I would agree with your comments in
7 their entirety. We spent I believe quite a
8 bit of discussion both with respect to the
9 adjacent property owner and that testimony and
10 testimony on behalf of the Applicant
11 themselves with regard to how this particular
12 area was going to be programmed and was going
13 to be approached given the proximity to one of
14 the residential properties in the immediate
15 vicinity.

16 Again, I would agree with you that
17 this does get to the heart of one of the more
18 critical issues in the case, but I continue to
19 be comfortable with the programming plans of
20 the school for the use of that space and the
21 fact that if I recall correctly, there is more
22 traditional playground equipment located on

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1 another portion of the site as opposed to this
2 particular location.

3 I continue to have a comfort level
4 that the impacts with regard to activity in
5 this particular space will be minimal at most.
6 So, I continue to be comfortable with moving
7 forward positively on this case and would be
8 prepared to support the correction, if you
9 will, of the -- of our final order in this
10 case.

11 Thank you, Madam Chair.

12 VICE CHAIRPERSON LOUD: Madam,
13 Chair, I'm also in support of making the
14 correction. Particularly because in the
15 request for modification, and I recall this
16 being the case as the case was being heard,
17 the Applicant represents that Dr. Welsing had
18 the correct information -- Dr. Welsing was the
19 neighbor adversely or allegedly adversely
20 impacted by the Application. Did have the
21 correction regarding the grade change and that
22 it had been in the landscape plan all along.

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1 And I recall some of the concerns
2 that I had during the original dialogue were
3 more to the number of students that would be
4 on the playground particularly during the
5 aftercare hours and not necessarily this issue
6 of the grade change. So, for me, that's not
7 a big issue and I support the modification.

8 CHAIRPERSON MILLER: Any other
9 comments? I would just add that the
10 landscaping plan does show a buffering of
11 evergreen trees which is -- was still there in
12 the setback of 15 feet from the property.

13 So, okay. If there are no other
14 comments, then I would move to grant the
15 motion for corrected order to Application
16 Number 17700 of Jewish Primary Day School of
17 the Nation's Capital, Inc. pursuant to 3129 of
18 the Zoning Regulations.

19 Do I have a second?

20 COMMISSIONER ETHERLY: Second,
21 Madam.

22 CHAIRPERSON MILLER: Any further

1 deliberation? All those in favor say aye.

2 (Chorus of Ayes.)

3 CHAIRPERSON MILLER: All those
4 opposed? All those abstaining? And would you
5 call the vote please?

6 MR. MOY: Yes, Madam Chair. Staff
7 would record the vote as 4-0-1. This is on
8 the motion of the Chair Ms. Miller to grant
9 the Applicant's request for a corrected order.
10 Seconded by Mr. Etherly. Also in support of
11 the motion, Mr. Loud and Mr. Dettman and we
12 have no other Board Member participating. So,
13 again, the resulting vote is 4-0-1.

14 CHAIRPERSON MILLER: Thank you and
15 I believe this can be a summary order as we
16 have no party in opposition.

17 MR. MOY: Very good. Thank you.

18 CHAIRPERSON MILLER: Thank you.

19 MR. MOY: All right. That brings
20 us to the other case for a decision. Correct?

21 CHAIRPERSON MILLER: Why don't we
22 get Ms. Walker out here.

1 MR. MOY: I'll go ahead with the
2 reading, Madam Chair. This is Application
3 Number 17722 of New Beginnings Cooperative
4 pursuant to 11 DCMR 3103.2 for a variance from
5 the lot occupancy requirements under section
6 403, a various from the rear yard requirements
7 under section 404 and a variance from the
8 nonconforming structure provisions under
9 subsection 2001.3 to allow a third story
10 addition to an existing apartment building in
11 the R-4 District at premises 2922 Sherman
12 Avenue, N.W. That's in square 2852, lot 804.

13 Staff notes that the application
14 has been amended to include relief from the
15 story limitation for the maximum number of
16 stories under section 400 and the court
17 requirements under section 406.

18 The Board will recall on February
19 26th, 2008 the Board completed public
20 testimony, closed the record and scheduled its
21 decision on March 11th. The Board left the
22 record open for the Applicant and parties

1 including ANC 1A to file any supporting
2 information.

3 The staff is prepared to go
4 through these line items if the Board desires.
5 Otherwise, suffice it to say that the only
6 filing in the record in your case folders is
7 the filing -- supplemental filing from the
8 Applicant dated March 5th, 2008 and is
9 identified as Exhibit 31.

10 Finally, the Board has to act on
11 the merits of the multiple variance zoning
12 relief.

13 That completes the staff's
14 briefing, Madam Chair.

15 CHAIRPERSON MILLER: Thank you and
16 I would just like to comment that the
17 supplemental filing by the Applicant was
18 really quite helpful in zeroing in on the
19 elements that this Board has to consider in
20 this case.

21 When we heard the case, I think we
22 tried to convey that we're not a policy board.

1 That we have to find that the Application
2 meets the elements of the variance test and
3 so, the Applicant did an excellent job I think
4 in filling in some of the blanks and
5 highlighting a lot of the points to address
6 those specific elements.

7 Let me start with I think
8 capturing what this is about a little bit.
9 The Applicant, New Beginnings is a nonprofit
10 cooperative association incorporated in the
11 District of Columbia and it's organized to
12 provide housing and home ownership for its
13 members. Its members consist of nine families
14 who are long terms residents of the building
15 who lived under terrible conditions resulting
16 in criminal prosecution of the previous owner.
17 These members as a cooperative bought the
18 building under the Tenants Right to Purchase
19 Act with extensive assistance from D.C.
20 Government sources.

21 The property is a three-story
22 multi-family building. The Applicant seeks to

1 renovate and reconfigure the building and add
2 an additional story to create 15 units for a
3 mixture of three bedrooms, two bedrooms and
4 one bedroom units. Lot occupancy and rear
5 yard are nonconforming and would not change.

6 The court nonconformity would
7 increase from one foot to four feet and I
8 think the main issue with respect to zoning
9 here was the addition. That that would create
10 a new nonconformity and allow four stories
11 where only three stories is allowed, but the
12 building would still be under the height
13 requirements provided by the Zoning
14 Regulations.

15 So, we need to look this picture
16 in the context of the variance test that we
17 stated. The first prong of the variance test
18 is whether there's a unique or exceptional
19 condition.

20 Exceptional condition the Court of
21 Appeals has said is not necessarily the
22 topography or the shape of the property which

1 it often is, but it does not have to be. The
2 Court of Appeals looks to existing structures
3 that are on the property that might create
4 exceptional conditions. The Court of Appeals
5 has said that circumstances peculiar to an
6 Applicant's property can be considered and
7 that the Board can look to a confluence of
8 factors.

9 Specifically, I look at -- we can
10 get to the -- we'll be getting into this. A
11 private covenant may be considered in its own
12 right as an extraordinary condition of a
13 particular piece of property and we'll get
14 into -- there is a covenant on this property.
15 That was in the Capital Hill Restoration
16 Society case.

17 Another factor just to throw out
18 because I know that it does arise here is that
19 self-created hardship is not a factor to be
20 considered in an area-variance analysis. That
21 that's in a use-variance analysis and that's
22 in the De Azcarate case, Court of Appeals case

1 in 1978.

2 Another point is that the BZA can
3 be more flexible when it assesses a nonprofit
4 organization. That was in the Monaco case and
5 the Court has said that the public need for
6 the use is an important factor in granting or
7 denying a variance in cases where a public --
8 where there's a nonprofit public organization
9 or nonprofit organization.

10 So, keeping some of those factors
11 in mind, when we looked at the exceptional
12 circumstances in this case, I believe there is
13 a confluence of factors here that do rise to
14 a level of exceptional circumstances.

15 First of all, we are dealing with
16 a nonprofit. New Beginnings is a cooperative
17 association that has been incorporated in the
18 District of Columbia as a nonprofit. It has
19 the constraints of an existing structure on
20 the property already. It has an existing
21 nonconforming structure.

22 It has a covenant on the property

1 which I think is a very big factor in this
2 case with respect to its practical
3 difficulties which we'll get to next, but
4 there is a DHCD long-term covenant that runs
5 with the land for 40 years and that covenant
6 requires an affordability level and the
7 Applicant made a very strong case, I believe,
8 that that could only be maintained with 15
9 units.

10 There's another exceptional
11 circumstance about this case I think and we
12 have seen it in other Court of Appeals cases
13 where this nonprofit has not only a critical
14 need for affordable housing, but -- but it has
15 -- it's important that it be in this
16 particular building. That was one of the
17 issues that we explored at the hearing. You
18 know, whether they could have affordable
19 housing in another building which wouldn't
20 require variance relief and what's unique
21 about this is there are all these loans tied
22 to this particular building and that the

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1 members of the nonprofit themselves have roots
2 in this community.

3 They've lived there for many
4 years. I think in the supplemental pleading,
5 we saw that they lived there from eight years,
6 ten years, 14 years, 18 years, 21 years. Many
7 of them are immigrants and social services
8 that assist them and the schools that their
9 children attend are all nearby.

10 And I think that this case also
11 has a very unique history in that the tenants
12 purchased the building on the -- under the
13 Tenants Right to Purchase Act, you know, with
14 the assistance of government officials. They
15 were encouraged to do this. They lived in
16 substandard conditions. They've been waiting
17 for this building for a very long time.

18 So, that's -- I think that they
19 have clearly met the exceptional circumstances
20 test. That's only the first test.

21 But, I would also say that Office
22 of Planning opposed this application saying

1 that they didn't meet the exceptional
2 circumstances and that was based on a very
3 strict reading of exceptional circumstances.
4 That was based on the shape of the property
5 and the specifics to the physical parts of the
6 property and I do recall that the
7 representative of the Office of Planning said
8 that he heard a lot of compelling testimony at
9 the hearing and while he didn't necessarily
10 say he wanted to change his position, he did
11 seem to look at the case differently I think
12 as I did after I heard the testimony and I
13 think a lot of the Board Members.

14 But, I want to go on to the
15 practical difficulty and go through this and
16 then others can join in.

17 Practical difficulty is a test for
18 an area variance. It's difference from a use
19 variance. They have to show that there's an
20 undue burden on the Applicant from complying
21 with the regulations not it's not possible.

22 Specifically, the Draude case,

1 Court of Appeals case, says, you know, in
2 dealing with a public service organization
3 which I think is similar to, you know, a
4 nonprofit, they said that where a public
5 service organization applies for a area
6 variance in accordance with Monaco, it must
7 show (1) that the specific design it want to
8 build constitutes an institutional necessity
9 not merely the most desirous of various
10 options and (2) precisely how the needed
11 design features require the specific variance
12 sought.

13 I think that the Applicant made a
14 very strong case that the additional story was
15 really the only way to provide the 15 units
16 and without the addition, they couldn't
17 provide the 15 units. Without the units, they
18 couldn't carry the carrying costs for the
19 remaining 11 units. Wouldn't be able to meet
20 the terms of the covenant to keep them
21 affordable.

22 They talked about how they were

1 tapped out on additional funding sources to
2 supplement, you know, what they could carry
3 for 11 units and then we discussed the
4 structural additions that they looked into in
5 order to comply which would be to make it --
6 to transform the basement to the cellar would
7 bring them into compliance, but that would
8 involve either raising the grade or lowering
9 the ceiling which was expensive and
10 complicated. It affected the foundation. It
11 affected egress. I think that they said
12 something like it would cost at least \$50,000
13 to lower four levels and it all just -- it
14 didn't seem to make sense I think. Well, they
15 didn't have the financing to do it.

16 And then we'll get to the third
17 element of no substantial detriment, but it
18 didn't seem to make sense especially in no
19 substantial detriment because they're not
20 going beyond the height requirements in this
21 case. I think the neighboring property was
22 comparable in height to how tall they would be

1 with the additional story.

2 So, as far as no substantial
3 detriment, they weren't changing the character
4 of the neighborhood. They were within the
5 height requirements.

6 And then the public benefits were
7 very -- not that we look at public benefits.
8 We look at no substantial detriment, but in
9 that bigger picture, public benefits is really
10 kind of the flip side and by doing this, there
11 would be no displacement of the owners who
12 need to be in this area and who have been
13 through a great deal over the last several
14 years and it fulfills a public housing need in
15 accordance with the comprehensive plan.

16 So, I think that all three tests
17 are very filled out in this case and it is
18 because it is unusual. I mean this is the
19 variance where we're looking at the situation,
20 you know, larger than the physical aspects of
21 the property and that's not that common, but
22 in this case, I think that all the elements

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1 were met.

2 So, we'll now turn to others for
3 comments.

4 VICE CHAIRPERSON LOUD: Madam
5 Chair, I think you did a very good job as
6 usual of laying out the elements for the
7 variance and then applying the facts to it.

8 The only thing that I would add to
9 what you've said which you've said with some
10 -- a little more detail is that in the group
11 of 15 units that the Applicant proposes to
12 construct, there were nine families that had
13 been a part of the project originally as to
14 which the Applicant seeks to return these
15 families to the development. These nine
16 families have collectively an additional 14
17 members of the family that are part of their
18 family. So, we're talking about in total 32
19 individuals that would need to be returned to
20 this project and collectively, they need
21 larger units. They need three-bedroom and
22 two-bedroom units as opposed to the current

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1 floor plan which is dominated by one-bedroom
2 units.

3 So, to my way of thinking, this
4 causes a practical difficulty for the
5 Applicant in that he -- it would have to
6 select which of these nine applicants could
7 not return because there would not be enough
8 room in the development for all nine
9 applicants to return if they were not going to
10 get the relief from us that they seek.

11 So, I think that's an important
12 factor in my deliberation of the case and I
13 think it also may apply as well to the
14 exceptional situation prong of the test, too.
15 Where as the court's have ruled, the
16 exceptional situation prong is independent of
17 the uniqueness prong and can relate to
18 personal circumstances of the applicant not
19 just the land itself as long as it affects
20 this single property and in the case that
21 we're talking about, this does affect the
22 single property there if there are long-

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1 standing ties between these nine families and
2 this property, between their children and
3 schools in the neighboring and in the process
4 that they had to go through to eventually
5 acquire this site with DHCD funding support
6 with the previous owner and match the price of
7 another bidder on it. So, there's some of
8 that history connected to these nine families
9 that I think is both unique and creates a
10 practical difficulty as well.

11 CHAIRPERSON MILLER: I think it's
12 also important in the history here that the
13 units had to be reconfigured because the
14 people who were living here before were living
15 in, you know, overcrowded conditions. It's
16 not the worst thing. You know, they lived
17 there before. How come they can't go back and
18 you know, why do they have to reconfigure and
19 that's why because they were bad conditions.

20 Others?

21 I want to acknowledge certainly
22 that we have in the record a letter in support

1 from ANC 1A and we had testimony from the ANC
2 1A commissioner in the form of a letter also
3 and we also had a letter from the Chief of
4 Staff for Jim Graham -- Council Member Jim
5 Graham and also a letter in support of the
6 application from Council Member Graham and
7 there is no opposition in this case.

8 Any other comments? Okay. Then I
9 would like to move approval of Application
10 Number 17722 of New Beginnings Cooperative
11 pursuant to 11 DCMR Section 3103.2 for a
12 variance from the lot occupancy requirements
13 under section 403, a variance from the rear
14 yard requirements under 404, a variance from
15 the nonconforming structure provisions under
16 subsection 2001.3 to allow a third-story
17 addition to an existing apartment building in
18 the R-4 District at premises 2922 Sherman
19 Avenue, N.W.

20 And I think -- and this also
21 includes relief from the story limitation on
22 the maximum number of stories, section 400 and

1 the court section 406 requirements. Just
2 wanted to make sure because the application
3 was amended to include those.

4 Okay. Do I have a second?

5 VICE CHAIRPERSON LOUD: Section.

6 CHAIRPERSON MILLER: Further
7 deliberation? Okay. All those in favor say
8 aye.

9 (Chorus of Ayes.)

10 CHAIRPERSON MILLER: All those
11 opposed? All those abstaining? And would you
12 call the vote please?

13 MR. MOY: Yes, Madam Chair. Staff
14 would record the vote as 4-0-1. This is on --
15 the Chair Ms. Miller to approve the
16 application. Seconded by Mr. Loud. Also in
17 support of the motion, Ms. Walker, Mr. Dettman
18 and we have no Zoning Commission member
19 participating in the case.

20 CHAIRPERSON MILLER: Thank you and
21 this will also be a summary order as there's
22 no party in opposition. Okay.

1 MR. MOY: Fabulous. Thank you.

2 CHAIRPERSON MILLER: Thank you.

3 Do you we have anything else on
4 our agenda for this morning's special public
5 meeting, Mr. Moy?

6 MR. MOY: No, Madam Chair, that
7 completes the special public meeting session.

8 CHAIRPERSON MILLER: Okay. Then
9 the meeting is adjourned and I will be calling
10 the public hearing.

11 (Whereupon, the meeting was
12 concluded at 10:26 a.m.)

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