

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

SEPTEMBER 25, 2007

+ + + + +

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 Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chairperson
CURTIS ETHERLY, JR. Vice Chairperson
MARC LOUD Board Member
SHANE DETTMAN Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

GREGORY JEFFRIES Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLY BAILEY Sr. Zoning Specialist
ESTHER BUSHMAN Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

MATT JESICK
STEPHEN MORDFIN
STEPHEN RICE
ARTHUR JACKSON

The transcript constitutes the minutes from the Public Hearing held on September 25, 2007.

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1 are available to you and are located to my
2 left in the wall bin near the door.

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

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

12 Please turn off all beepers and
13 cell phones.

14 Does the staff have any
15 preliminary matters?

16 MR. MOY: No, ma'am, Chair. We
17 can take that up on a case-by-case basis.

18 CHAIRPERSON MILLER: Okay. Then
19 let's proceed with the agenda.

20 MR. MOY: Good morning, Madam
21 Chair, members of the Board. The three
22 applications for Board's decision this

1 morning, first being Application No. 17611 of
2 John Mitchener.

3 I'm going to read very quickly the
4 advertisement.

5 This application was pursuant to
6 11 DCMR 3104.1 for a special exception to
7 allow a garage addition serving an existing
8 single family row dwelling under Section 223,
9 not meeting the lot occupancy requirements,
10 Section 403, in the R-4 District at premises
11 314 12th Street, N.E., Square 986, Lot 53.

12 This application was originally
13 scheduled for the public meeting on September
14 4th. The Board delayed its decision pending
15 issuance of the Zoning Commission Order No.
16 07-15, which is a text amendment to Section
17 223.

18 This application for decision by
19 the Board is currently scheduled for its
20 meeting on October 2nd. However, it's
21 anticipated that the Zoning Commission order
22 will not be issued by that time. Staff is

1 suggesting that the Board reschedule its
2 decision to its next regularly scheduled
3 public meeting on November 6th.

4 That completes the Board's action
5 on this action.

6 CHAIRPERSON MILLER: Thank you
7 very much.

8 Yes, it's my understanding that
9 the Applicant asked that this be considered
10 under the new regs. and to wait for our
11 meeting when the new regs. were in effect.
12 So, therefore, with that in mind, this is just
13 a rescheduling. So we don't need to make any
14 motions at this point.

15 And it's my understanding that
16 November 6th, we can put it on the agenda for
17 that date; is that correct?

18 MR. MOY: That's correct, Madam
19 Chair.

20 CHAIRPERSON MILLER: Okay, and we
21 have the consensus of the Board to do that.
22 Okay.

1 MR. MOY: Very good.

2 CHAIRPERSON MILLER: Thank you.

3 MR. MOY: The next action of the
4 Board is a motion for modification of
5 Condition No. 6 of the BZA Order No. 17383-A
6 of the Lab School of Washington and waiver of
7 the six-month time requirement, pursuant to
8 Section 3126 of the Zoning Regulations.

9 This original application was
10 pursuant to 11 DCMR 3104.1 for a special
11 exception under 206 to allow an increase in
12 student enrollment from 310 to 330, an
13 increase in faculty and staff from 95 to 182,
14 a special exception under Section 206 to
15 permit the use of nearby property at 4749
16 Whitehaven Parkway, N.W., Square 1374, Lot
17 840, for administrative offices for the
18 school, and a special exception under Section
19 2116 to locate accessory parking spaces
20 elsewhere than on the lot served at an
21 existing private school located at premises
22 4759 Reservoir Road, N.W., Square 1372, Lot

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1 25, in the R-1-B zone.

2 Again, the Board rescheduled its
3 decision on this application on both September
4 4th and September 18th because of a lack of a
5 concurrent majority vote, pursuant to Section
6 3125.2, and on September 18th, the Board
7 rescheduled its decision at a special public
8 meeting on September the 25th.

9 The only filing submitted to the
10 record between September 4th and September
11 18th is an ANC-3D letter dated September 11th,
12 which is identified in your case folders as
13 Exhibit 92, which is in support of the
14 modification.

15 The Board is to act on the merits,
16 the request for the modification and the
17 waiver of the six-month time requirement.

18 That completes the staff's
19 briefing, Madam Chair.

20 All participating members on this
21 application is Mr. Etherly, Ms. Mitten, and
22 yourself, Ms. Miller.

1 CHAIRPERSON MILLER: Thank you.

2 We've had to continue this a
3 couple of times because we didn't have three
4 members participating, but we do have an
5 absentee ballot from Ms. Mitten at this point.
6 So we can go forward today.

7 The two motions before us and the
8 ANC has supported both, and the first one is
9 for the waiver of the six months to file a
10 motion for reconsideration. In this case, the
11 Applicant indicated that they were waiting to
12 make sure that they would need to file a
13 motion, and that's why they were a little bit
14 late.

15 So I have no problem with that
16 motion. There's good cause, and it doesn't do
17 any prejudice to any party.

18 Is there consensus?

19 VICE CHAIRPERSON ETHERLY:

20 Absolutely. No objection, Madam Chair.

21 CHAIRPERSON MILLER: Okay, and I
22 believe we'll deal with the absentee ballot

1 later.

2 And then the meat of the motion
3 basically goes to a provision in our order
4 that anticipated that 43 angled parking spaces
5 would be in place by a certain date. That
6 would be November 12th, 2007, I believe, in
7 which case the school would be in compliance
8 with the parking requirements and not need
9 parking relief.

10 And as it has turned out, the
11 motion indicates that there have been a lot of
12 problems with getting permits and things of
13 that nature that's beyond the Applicant's
14 control, and that won't be in place in time
15 and they don't want to be out of compliance.

16 And so, therefore, they would be
17 seeking this extension of time until August
18 12th, 2008, for that to get in place.

19 And I don't have a problem with
20 that either, and I want to note also that part
21 of my rationale goes to the fact that they
22 have a TNP in place that obligates them to

1 provide additional parking elsewhere when a
2 problem is noted in their plan.

3 So for those reasons I would be in
4 favor of this motion.

5 VICE CHAIRPERSON ETHERLY: I'll
6 echo your comments, Madam Chair. As you
7 indicated, the Applicant did note that in
8 their submittal due to some of the delays,
9 both in terms of permitting and other
10 processes, there has been a considerable
11 difficulty in starting some of the work that,
12 in turn, leads to their ability to develop the
13 spaces, i.e., the site walk curb and gutter,
14 and because of that, clearly, the spaces
15 themselves would not be able to be introduced
16 onto the site until that particular work is
17 done.

18 And I think it is important to,
19 again, indicate as you noted the Applicant is
20 fully committed to the implementation of their
21 TNP and has acknowledged that there may,
22 indeed, be other steps that they will have to

1 take to supplement or expand some of their TNP
2 related effort in the interim until the spaces
3 can be completed by August of 2008.

4 But with all of those items in
5 mind, Madam Chair, I think this motion is
6 entirely appropriate and I'm fully prepared to
7 support it.

8 CHAIRPERSON MILLER: Okay. Thank
9 you.

10 I don't have any further comments
11 on this. So I would then move to approve the
12 motion for modification on Number 6, of final
13 Order No. 17383-A of the Lab School of
14 Washington and waiver of six-month time
15 requirement.

16 Do I have a second?

17 VICE CHAIRPERSON ETHERLY:
18 Seconded, Madam Chair.

19 CHAIRPERSON MILLER: Any further
20 comments?

21 (No response.)

22 CHAIRPERSON MILLER: Okay. All

1 those in favor say aye.

2 (Chorus of ayes.)

3 CHAIRPERSON MILLER: All those
4 opposed?

5 (No response.)

6 CHAIRPERSON MILLER: All those
7 abstaining?

8 (No response.)

9 CHAIRPERSON MILLER: And, Mr. Moy,
10 would you read or note the absentee ballot?

11 MR. MOY: Yes, ma'am. The
12 absentee ballot from Ms. Miller is to vote to
13 approve --

14 CHAIRPERSON MILLER: Excuse me.

15 MR. MOY: I'm sorry?

16 CHAIRPERSON MILLER: Do you mean
17 Ms. Mitten?

18 MR. MOY: Oh, yes. I haven't had
19 my coffee sufficiently.

20 This is Ms. Mitten. Her vote is
21 to approve the modification and the waiver of
22 the six-month time requirement. So that would

1 give a resulting vote of three to zero to two
2 on the motion of Ms. Miller, seconded by Mr.
3 Etherly.

4 Also we have two other Board
5 members not participating, and again, the vote
6 is three to zero to two.

7 CHAIRPERSON MILLER: Thank you.

8 And then I would suggest that this
9 could be by summary order since there's no
10 opposition in the case.

11 PARTICIPANT: No objection.

12 CHAIRPERSON MILLER: Okay. Thank
13 you.

14 MR. MOY: The next and last
15 decision of the Board in this special public
16 meeting is a motion for reconsideration of
17 Application No. 17446-A, pursuant to Section
18 3126 of the Zoning Regulations.

19 The original application of 17446
20 of Pauline Ney was pursuant to 11 DCMR 3104.1
21 for variances from lot occupancy requirements
22 under 403 and nonconforming structure

1 provisions under Subsections 2001.3 and 2002.4
2 to construct four residential units above
3 existing one story retail structures in the R-
4 5-B District at premises 2160 through 2162
5 California Street, N.W., which is on Square
6 2530, Lots 99 and 100.

7 The participating Board members
8 are Ms. Miller, the Chair; Mr. Etherly, the
9 Vice Chair; and Mr. Shane Dettman.

10 Originally this was scheduled for
11 decision on September 4th and the 18th of this
12 year. The Board rescheduled to September 25th
13 because of the lack of a majority concurring
14 vote pursuant to 3125.2.

15 The Board does have a preliminary
16 matter, a filing from the opposition party
17 requesting continuance. This is a letter
18 dated September 19th, 2007, and is identified
19 in your case folders as Exhibit 118.

20 The Board is to act on the merits
21 of the motion for reconsideration and
22 rehearing, and that completes the staff's

1 briefing, Madam Chair.

2 CHAIRPERSON MILLER: Thank you.

3 I guess first we can address
4 perhaps the request that would delay deciding
5 this case because one of the participating
6 parties is not here today.

7 What we have said in this kind of
8 instance in the past is the parties don't
9 participate in the meeting and, therefore,
10 that isn't good cause enough to delay our
11 decision making on a case, and I would suggest
12 that that's also the case today, especially
13 with this case and especially with -- I say
14 "this case." This is one of the cases that
15 has been affected by lack of a quorum and
16 bringing in new Board members, and that is one
17 of our greatest concerns these days in
18 transition.

19 So for that reason, I wouldn't
20 suggest that on this reason alone, that the
21 party is not presently in the hearing room,
22 that we postpone our decision.

1 Also, I think it is good if the
2 parties can hear the case or the deliberation,
3 but there are also other means in that we're
4 on the Internet, and the deliberations are
5 also reflected in a transcript, which is
6 available shortly hereafter.

7 So for those reasons I wouldn't
8 delay deciding this case. I don't know if
9 other members have comments on that point.

10 (No response.)

11 CHAIRPERSON MILLER: Okay. I
12 think the next question though is do we have
13 everything that we need to decide this case.
14 Originally we had a motion for reconsideration
15 based on new evidence showing that, in fact,
16 there was a conforming use in one part of the
17 building of this project that had been
18 represented to us as being a nonconforming
19 use, and that does change the order, and
20 that's why we've reopened the record, to see
21 if there was validity to that point.

22 And we had a hearing on that, and

1 we've had papers on that. And so I think the
2 question now is are we ready to decide the
3 case.

4 I guess I would suggest that there
5 might be a little bit more information that we
6 might want, that I would be interested in
7 seeing. I'd like to hear from the Board
8 members.

9 We've had representations, and it
10 seems to me that it has been conceded that
11 approximately 700 square feet of basement of
12 one of the buildings is being devoted to and
13 has been devoted to residential use, which was
14 a conforming use in this building. And before
15 deciding the case, I think it might be useful
16 to get into the record accurate plans from the
17 Applicant that actually delineate the exact
18 area that has been used for residential use
19 and conforming use in this building.

20 It seemed to me that the
21 Applicant conceded the point, but we have
22 plans in the record from a previous hearing

1 that don't delineate that area, and I think
2 that's important in this case because we were
3 under the assumption in the previous order
4 that it was all nonconforming and, therefore,
5 could it be used for commercial purposes
6 throughout that basement, throughout that
7 building, and I think that has changed.

8 So I think we need to have
9 accurate plans in the record, and I think it
10 would also be useful to have an accurate
11 written description of that area as well so
12 that we have a full reflection in the record
13 of this area.

14 Comments?

15 VICE CHAIRPERSON ETHERLY: I'll
16 agree with your direction, Madam Chair. To
17 say the least, this has, of course, been a
18 very protracted and rather animated case that
19 has raised a lot of energies, as well as a lot
20 of concern, and I think the motion for
21 reconsideration is just another step in that
22 along that continuum, if you will.

1 But I think the motion for
2 reconsideration was, indeed, proper based on
3 the evidence that was provided by the opponent
4 in this particular matter. With that evidence
5 in hand, I think clearly there were a number
6 of questions raised that on their face were
7 one might say rebutted somewhat by the
8 Applicant in this matter, but I agree that
9 that rebuttal would perhaps be further
10 buttressed by clearer plans.

11 I think ultimately at the end of
12 the day the plans will indicate that the issue
13 of the conforming space is going to be one
14 which can be resolved and, I think, resolved
15 in a fairly straightforward way, but I think
16 the question has been more than adequately
17 raised by the opponent that in order for that
18 resolution to be as clear as necessary, the
19 plans need to clearly indicate what precisely
20 is happening in the area of this conforming
21 space.

22 I think this Board could, with

1 some extended deliberation, resolve this issue
2 today, but I think, again, that the opponents
3 have raised more than enough of a question
4 that the plans need to be absolutely beyond a
5 shadow of a doubt here as to what is happening
6 on this level in question.

7 And I think with that in mind
8 clear plans and a clear textual discussion of
9 what will be happening regarding those plans
10 and this particular space I think are more
11 than appropriate, Madam Chair, before this
12 Board to decide on its action.

13 CHAIRPERSON MILLER: Mr. Dettman.

14 COMMISSIONER DETTMAN: Yes. Madam
15 Chair, I would agree with your comments as
16 well as Mr. Etherly's comments regarding the
17 need to have a revised, accurate set of plans
18 on the record, with an accompanying sort of
19 text description of what will be going on in
20 the basement of it would be 2162 California
21 Street.

22 Not being an original

1 participating member on the case, however, I
2 have read through the entire record, and Mr.
3 Moy has pointed out according to 3105.15 in
4 the regs. it states that a member attending
5 the decision meeting and having read the
6 transcript and reviewed the complete record
7 may participate and may vote even though that
8 member may not have attended any or all of the
9 prior meetings or hearings on the appeal or
10 application.

11 And so if I may, if it's
12 appropriate to take a minute and sort of step
13 through the sort of analysis that I went
14 through in reading the entire record just to
15 make sure that I am clear on everything.

16 And just to step back, in the
17 transcripts, I've pulled out of the
18 transcripts what the Board limited the last
19 hearing to and it was whether the basement had
20 a converted residential use. If so, how long
21 was it in existence? And if the residential
22 use, most importantly, if the residential use

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1 existence had any material impact on the
2 Board's decision.

3 And I don't think there's any
4 question on whether, on behalf of the
5 Applicant or the opposition, whether there's
6 a residential use in the basement. I think
7 they both concur on that.

8 A second point, how long has it
9 been in existence? I think the number that
10 was put forth was for at least ten years, and
11 so I think this really hinges on the third
12 point: does the residential use/existence
13 have any material impact on the Board's
14 decision?

15 And pertaining to that third
16 point, I just wanted to offer up the two
17 paraphrased, I guess, positions that the
18 opponent and the Applicant have taken. The
19 opposition claims that this presence, the
20 existence of the apartment, would require the
21 Applicant to get a use variance. So they're
22 saying that it does have a material impact on

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1 this, and they did not seek the relief that
2 they appropriately should.

3 In response, the Applicant claims
4 that because the total amount of nonconforming
5 space in this structure at the end of the day
6 is being reduced, that the presence of this
7 apartment doesn't matter, and again, it's
8 because the total amount of nonconforming
9 square footage was going to be reduced.

10 And they rely upon 3202.3 in the
11 regs. on that, and as an aside, they also
12 mention that, well, the use isn't changing.
13 It's going from apartment to accessory storage
14 that would be accessory to the residential
15 units being constructed above.

16 On that point, I would tend to
17 agree with the opposition on that issue. I
18 think 3202.3 applies to commercial
19 buildings --

20 CHAIRPERSON MILLER: Mr. Dettman,
21 let me just interrupt you here for a second
22 because I think it was really helpful since it

1 is so fresh in your mind to actually review
2 for us, you know, what the issues are, but I
3 think we were saying that we were going to
4 wait until we get into the record the accurate
5 plans and the description of that space before
6 we go into the merits of the legal arguments.
7 Would you agree with that?

8 COMMISSIONER DETTMAN: Yes, I
9 agree.

10 CHAIRPERSON MILLER: I don't know
11 if I interrupted you prematurely or not, but
12 I thought that you might be going into that
13 area, and I think we were going to save that
14 for once we have the -- okay.

15 COMMISSIONER DETTMAN: I'll agree.

16 CHAIRPERSON MILLER: Okay. You
17 did make an interesting point though, and I
18 just want to follow up because we need to be
19 clear exactly what we're asking from the
20 Applicant, and I think it's clear that we are
21 asking for revised plans that accurately
22 depict where this conforming use space is,

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1 correct?

2 But then you said and then we were
3 talking about certain texts, and I think you
4 were saying, well, what's going on in that
5 area. I think that might be useful. What
6 actually I had in mind was just a verbal
7 description that goes along with plans, you
8 know, the conforming space, you know, borders
9 this and that.

10 Do you know what I'm saying?

11 COMMISSIONER DETTMAN: Yes, I do,
12 Madam Chair. I think I was simply reiterating
13 your suggestion, and I had worded it textual
14 description, but if what you meant by just an
15 appropriate set of plans, an accurate set of
16 plans with the appropriate labeling on those
17 plans as to the use inside those spaces, then
18 I would agree with that as well.

19 CHAIRPERSON MILLER: I mean, I
20 think actually both types of descriptions
21 would be fine for a full record. I think that
22 they've made representations in the filings,

1 but actually if we had something that goes
2 along with the plans delineating, describing
3 the area that is residential and then how it
4 would be used residentially.

5 I think we talked about storing
6 bicycles or whatever it is.

7 VICE CHAIRPERSON ETHERLY: No, I
8 totally agree, Madam Chair. I mean, I think
9 to an extent, not that we're being coy here,
10 but I think to an extent what's frustrating
11 about this from the motion to reconsider to
12 where we are here is clearly there was late I
13 don't want to say disclosure, but it emerged
14 late that there was a residential use at work
15 here, and that was incredibly frustrating.

16 Once we found that that was,
17 indeed, the case, it was a fairly kind of
18 straightforward written submittal that said,
19 well, yeah, but that's ultimately not going to
20 have an impact here.

21 And to an extent at the end of the
22 inquiry from a zoning standpoint, that perhaps

1 may be the case, but the clarity that I think
2 needs to be established before the Board moves
3 to that particular determination can only be
4 buttressed by plans here because I think the
5 opposition has raised a credible question
6 regarding the Applicant's -- and again, I want
7 to be very careful here because I'm not making
8 this an issue of credibility, but the fact
9 that that residential space is there has been
10 there from all apparent indications without
11 any fairly straightforward representation as
12 to the fact that it was there, how much of it
13 was there.

14 I think the Board has taken the
15 appropriate step of looking for clarification
16 on exactly what's going on in that space now,
17 but in particular, in terms of going forward,
18 what's going on in that space going forward
19 and in terms of delineating exactly how that
20 space is going to be carved out.

21 Mr. Dettman was absolutely on
22 point in terms of his analysis because I

1 believe it's indicated that there is, in fact,
2 perhaps some overlap between what is now
3 residential space and what is contemplated to
4 be space for commercial usage, i.e., storage
5 potentially.

6 And so I think the Board is taking
7 both an abundance of caution here, as well as
8 an acknowledgement of the questions. Again,
9 credibility is not the right word because I'm
10 not suggesting that there was some purposeful
11 obfuscation here, but I think clearly there's
12 a question of fact that the opposition has
13 raised that we simply need to get the answer
14 to, and the best way to get that answer is not
15 necessarily simply in letter form. It's going
16 to have to be in hard and fast black ink on
17 the page of a plan, and I think that's what
18 the Board is looking to do here, and I think,
19 therefore, it's appropriate that we hold off
20 on our decision today until we have those
21 plans in place.

22 But absolutely it has been

1 somewhat frustrating because I think this
2 could have very easily been dealt with with
3 clear plans that delineate exactly what the
4 nature of the existing residential space is
5 and what the nature of that space will be
6 going forward.

7 Thank you, Madam Chair.

8 And again, welcome, Mr. Dettman.
9 We chose a very good case for you to step into
10 the fray on.

11 CHAIRPERSON MILLER: Okay. I
12 think we're in agreement, but basically there
13 are a lot of legal issues that have been
14 briefed by the parties that arise from these
15 facts, and as Mr. Etherly says, out of an
16 abundance of caution -- I think appropriately
17 so -- we want to make sure we have the exact
18 plans, the exact description of that area and
19 the exact planned residential use of that area
20 at issue, and then when we deliberate the
21 legal issues we won't have any question with
22 respect to the facts.

1 So just a second.

2 (Pause in proceedings.)

3 CHAIRPERSON MILLER: Okay. I
4 think what we want to do is just finish our
5 deliberation on this and then maybe after we
6 finish we could take a question or two, but
7 basically we are in meeting.

8 And as I was saying before, I
9 mean, we have to balance a lot of things when
10 we schedule as well, and as much as I would
11 like to accommodate the request to delay our
12 decision making until after October 8th, I
13 think that there are other factors that weigh
14 against that and that go to the uncertainty
15 with this Board's composition, which I think
16 is the most important, that the Board members
17 who have been participating on this case
18 decide it to the extent that that's within our
19 control.

20 So I would suggest I think that
21 the items that we're asking for from the
22 Applicant are very, very, very basic, and I

1 would suggest that the Applicant be required
2 to submit the plans and the descriptions that
3 we -- the revised plans and the description
4 that we have requested on Friday and so that
5 we could take this up on Tuesday, the
6 following Tuesday.

7 And if for any reason the
8 opponents have any concerns and they want to
9 file a motion before then, they could. But it
10 doesn't seem to me that this is something --
11 it's not like legal arguments that the other
12 side would need to rebut. I mean, we're
13 asking them to submit exactly something that
14 reflects their representations. What are
15 their real plans now or just go with plans and
16 the plans that were submitted before obviously
17 need to be revised because they didn't reflect
18 that use.

19 So any other comments?

20 VICE CHAIRPERSON ETHERLY: No.
21 Again, Madam Chair, I would most certainly
22 agree. It perhaps is also important to talk.

1 This is not necessarily the 800 pound gorilla
2 in the room, but in looking at the
3 opposition's submittal here, clearly, the
4 opposition is extraordinarily and has been
5 extraordinarily concerned by virtue of this
6 residential space here.

7 In the original submittals the
8 opposition's phrasing included words such as
9 concealment and kind of deliberate
10 nondisclosure, if you would, and I'm
11 paraphrasing, if you would, in terms of
12 deliberate nondisclosure. But the opposition
13 was extraordinarily concerned about the fact
14 that this was not made apparent earlier, and
15 I think an important thing to acknowledge here
16 that perhaps the opposition was hopeful the
17 Board would do is from that nondisclosure
18 perhaps move in a negatively inferential way.

19 That's a complicated way of say,
20 "Hey, Applicant, you didn't tell us this space
21 was residential. Clearly, you knew it was
22 there," and I'm just paraphrasing the argument

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1 again, "and because you knew it was there and
2 didn't disclose it and knew that it had
3 perhaps a material role to play on the relief
4 that was being sought, you're going to suffer
5 the consequences here."

6 And I understand that argument. I
7 perhaps am not one who's willing to take such
8 a Draconian step here because I think with a
9 clear indication of what's happening in terms
10 of that basement space, both now and in terms
11 of going forward with clear, clear plans, I
12 think ultimately the zoning issue is going to
13 be a fairly straightforward question.

14 So that is perhaps offered as just
15 a little additional light and insight into
16 where at least this Board member's thinking is
17 heading here. But I want to acknowledge where
18 the opposition's submittal was on this.
19 Clearly, the opposition was hopeful that by
20 virtue of this lack of disclosure on the
21 residential space, the Board would perhaps be
22 inclined to take a very, very heavy handed

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1 step here, and I simply don't think that
2 that's dictated by the facts in place.

3 So I just wanted to also offer
4 that for the record, Madam Chair.

5 CHAIRPERSON MILLER: Okay. I'm
6 not going to offer any points of view at this
7 point on the merits of the arguments. I mean,
8 there are a lot of legal arguments, as Mr.
9 Dettman also started to address, but that's
10 what we will be addressing next week, all of
11 the legal issues, including unclean hands, et
12 cetera.

13 I think the first concern is just
14 to make sure that we have in the record the
15 exact facts, and then we'll deal with the
16 legal issues.

17 Okay. So I guess by consensus
18 we'll reschedule our decision making on this
19 case to next Tuesday, and, Mr. Moy, would you
20 be in touch with the Applicant to let them
21 know about the documents we're requesting?

22 MR. MOY: Yes, ma'am, staff would

1 notify all the parties. If I may also ask,
2 too, for clarity on the staff's part, just to
3 recap for the staff.

4 So the filing from the Applicant
5 on the revised drawings, including a narrative
6 text to delineate the nature of the space
7 would be due by this Friday, September 29th,
8 for the Board's action on October 2nd. This
9 would be a revision to Sheet No. HP-1.1, which
10 is in Exhibit 47, titled "Existing Basement
11 and First Level Plans."

12 The staff is assuming that the
13 sheets would include a revision of the
14 existing plans as well as a proposed sheet.

15 CHAIRPERSON MILLER: Okay, and
16 also we did talk about two different types of
17 text, and we thought they probably both would
18 be useful. One was a verbal description of
19 what the plans show with respect to that area,
20 and then the other was just confirmation of
21 the exact planned use of that area.

22 MS. BAILEY: Madam Chair, for

1 clarification, the filing date is this Friday,
2 September 28th, not September 29th.

3 CHAIRPERSON MILLER: And that
4 would be served on the parties as well.

5 And I just want to reiterate that
6 we think this is really a pictorial
7 representation of what's already in the
8 record, but we just want to make sure and get
9 the record accurate. That's why we don't
10 really believe that we need to schedule in
11 time for a response from the opponents, but
12 should something come to their attention, they
13 can bring that to our attention by Monday
14 before our decision making.

15 Anything else?

16 (No response.)

17 CHAIRPERSON MILLER: Okay. That's
18 our decision on that. I don't believe we have
19 any other decisions for this morning, do we,
20 Mr. Moy?

21 MR. MOY: No, ma'am. That
22 completes the special public meeting.

1 CHAIRPERSON MILLER: Okay. I just
2 was looking out at the audience. At one point
3 I thought that there was some burning
4 question, but there isn't. Okay, and
5 questions can also be asked of the Office of
6 Zoning later.

7 Okay. Then that completes this
8 morning's agenda for our meeting. So our
9 meeting is adjourned.

10 (Whereupon, at 10:49 a.m., the
11 special public meeting was concluded.)