

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY,

AUGUST 2, 2005

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice-Chairperson
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN G. PARSONS	Commissioner (NPS)
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL:

SHERRY GLAZER, ESQ.
LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

NONE PRESENT

This transcript constitutes the minutes
from the Public Meeting held on August 2, 2005.

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

10:11 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the 2nd of August 2005 Public Meeting of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis, Chairperson. With me today is the Vice Chair Ms. Miller and representing the National Capital Planning Commission is Mr. Mann. Representing the Zoning Commission with us on several cases this morning or on one particular case, Mr. Parsons.

Copies of today's hearing agenda are available for you. They are located where you entered into the hearing room. You can pick it up. I am going to be moving off our published order, but we will be getting to all the cases that are on that schedule.

Please, take note that all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two important fashions. So attendant to both of those, we ask that people turn off cell phones or beepers, at this time, so we don't have a disruption in our transmission.

This is, of course, a Public Meeting which means we will be, the Board will be deliberating on cases that have already been heard and coming to

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1 decisions on those cases. In addition to that, it
2 means that there is no other additional testimony that
3 is provided to the Board, but rather we will be
4 deliberating solely on the case that was presented and
5 created before us previously.

6 Let me say a very good morning to Ms.
7 Bailey with the Office of Zoning, also Mr. Moy,
8 representing the Office of Attorney General, Ms.
9 Monroe, et al, are with us this morning. Let me say
10 Ms. Bailey, good morning, and Mr. Moy. I would like
11 to, as I have indicated, change the schedule a little
12 bit and call 17352 first, and then we would move on to
13 17311, 17251 and 17313.

14 That would mean we would hear the 1464
15 Harvard, LLC variance first, rather, we would
16 deliberate on and call that. We can go to the
17 Palisade's Citizen's Association Permit Appeal, then go
18 to the O'Reilly Motion for Reconsideration and then
19 lastly and very quickly, we would go to Ertel
20 variances, lot occupancy, nonconforming structures.

21 With that, I'll turn it over to you, sir.

22 MR. MOY: Yes, sir. Thank you, Mr.
23 Chairman, good morning and Members of the Board. The
24 first case for decision is Application No. 17352 of
25 1464 Harvard Street, LLC, pursuant to 11 DCMR 3103.2,

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1 for a variance from the lot occupancy requirements
2 under section 403, to construct a multi-family 14 unit
3 residential building in the R-5-B District, that's at
4 premises 1464 Harvard Street, N.W., and is in Square
5 2668, Lot 69.

6 On July 19, 2005, the Board completed
7 public testimony on the application and scheduled this
8 decision on August 2, 2005. The Board did not request
9 any additional post-hearing documents for the record
10 and well, with that, then the Staff will conclude its
11 briefing, Mr. Chairman.

12 CHAIRPERSON GRIFFIS: Excellent. Thank
13 you very much, Mr. Moy. Board Members, as we get right
14 into this, of course, we did have a variance case
15 before us. Of particular interest and a little bit of
16 background as I know we are all very aware, the Office
17 of Planning and others have raised some concern about
18 whether there was actually FAR relief required in this
19 case. The Board was definitive in dispensing with that
20 in indicating that it was not, as there was evidence
21 presented in the hearing and also in the written
22 submissions.

23 In addition to that, during the hearing,
24 after hearing that evidence, the Office of Planning
25 also revised that statement and indicated that FAR was

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1 not an issue. I think also attendant to that aspect,
2 I would say that we can have great reliance on the fact
3 that the Zoning Administrator reviewed the application
4 and actually reviewed it for FAR and found that it was
5 satisfactorily in compliance.

6 Of course, that brings up an interesting
7 point in this case that the Zoning Administrator
8 reviews something and finds it in compliance, as it did
9 the first time around of the lot occupancy and then
10 found that it didn't step back, of course, and the FAR
11 stayed consistent in their view.

12 Looking at this, it was presented from
13 several aspects: 1) Testimony in opposition. There
14 were some issues by the Office of Planning and some
15 discussion by the Board of whether relief for the lot
16 occupancy was actually required. And I think we will
17 address that a little bit. I think it is appropriate
18 and the correct way to proceed with this to look at a
19 straight variance case that was brought before us.

20 Of course, this was reviewed and permitted
21 and it was in construction, meaning that the Zoning
22 Administrator at one point indicated that this was
23 properly in compliance with the regulations. Something
24 of whatever instance happened that that decision was
25 revisited, the applicant that was before us now decided

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1 in those conversations that it would be my projection
2 perhaps, but expeditious just to bring an application
3 without having any sort of referral or any other
4 complication brought a straight variance application
5 before us.

6 I think we ought to look at it in that
7 framework, because the applicant has put together a
8 full application and we should look at whether the
9 variance test is made or not for the lot occupancy. I
10 think there will be additional comments by Board
11 Members, perhaps on other aspects of it, but I think
12 it's important for us to look at it first in that
13 realm.

14 And with that, let me set a little bit of
15 the parameters with this. Clearly, we're looking at
16 the uniqueness as the first threshold in the variance
17 test as we go through. There are several aspects of
18 uniqueness to this case and I'll start with, I think,
19 probably the more limited, but also informative.
20 Because this is another case where a confluence of
21 conditions have come together to create the uniqueness
22 and the practical difficulties.

23 There was substantial testimony in terms
24 of the existing structure, the existing structure that
25 was accommodated in terms of the character, the

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1 massing. It was retained. I think that was a critical
2 aspect of this project to maintain that original
3 townhouse and put an addition to it that would fit
4 within the character of the neighborhood. Does that
5 meet the test of variances? Well, of course, it does
6 not often. But it does rise to the level of uniqueness
7 of character and circumstance in this case.

8 Additionally, with that, this was
9 permitted. It was documented, submitted, reviewed and
10 permitted. And I think that that does go to the
11 uniqueness and the unique circumstances that arise.
12 The practical difficulty as we look at it going into,
13 if it was found that this needed to be remedied in
14 terms of lot occupancy, the practical difficulty, of
15 course, of removing the major portion below the main
16 level of the residential building, it was testified to
17 the fact of, of course, it's a poured concrete, but it
18 also is part of the structural integrity of the entire
19 building that's going on.

20 Is it holding up the whole building? I
21 don't think we need to be definitive in understanding
22 that structural analysis, but clearly we need to
23 understand that this isn't just an independent piece
24 that sits there, but is integral to the rest of the
25 structure. Obviously, it would create a practical

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1 difficulty in removing it, as it would have to be
2 restructured.

3 The other aspect is the impact and the
4 practical difficulty of reforming the open area on the
5 side yard, restricting any of the parking areas or the
6 below grade and how it would actually impact the rest
7 of the building that would go up.

8 In terms of whether it would impair the
9 intent of the Zone Plan and Map or would it somehow be
10 a detriment to the public good, I'll let others speak
11 substantially to this, but I don't think there was any
12 persuasive evidence that provided that it would. We
13 did have testimony of persons in opposition of this
14 application of its impact to the R-5-B. And I would
15 say that in looking at that, there was testimony about
16 a similar circumstance or perceived similar
17 circumstance across the street where a terrace had been
18 put on a garage.

19 Well, from all the testimony, my
20 understanding is that that was an accessory structure,
21 that there was something that was put on top. I,
22 frankly, wasn't persuaded that it was analogous or even
23 integral to the application. I think it may stand
24 alone. It may have its own difficulties, but for the
25 informative nature to this case, I did not find

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1 anything substantial to look at.

2 Looking specifically at this case of
3 whether it would impact the R-5-B, I don't think it
4 does. Substantially looking at how you calculate lot
5 occupancy, even just starting with the intent of lot
6 occupancy and what it means, this doesn't rise to the
7 level of impairing the intent of the R-5-B. Looking
8 into it even further, whether it actually would
9 calculate out to count towards lot occupancy, I think
10 it could be persuaded that it does not.

11 However, I don't think we need to rise to
12 that level of being determinative in finding that.
13 That may be well enough from me, so I'll open it up to
14 others for additional deliberation or different
15 directions.

16 VICE CHAIR MILLER: I think this case is
17 kind of well, not totally unusual, but a little bit
18 problematic in that we're dealing with an application
19 for a variance from the strict application of the
20 regulations, basically, here as interpreted by the
21 Zoning Administrator the second time he looked at this
22 project as opposed to, I think, looking at it in the
23 context of the strict application of the regulations as
24 perhaps we would interpret them.

25 And I know that, in this case, the

1 applicant has also brought an appeal, but we're looking
2 at the variance case first, so we have to take it as we
3 see it. In an appeal case, we would have the Zoning
4 Administrator here to explain why he interpreted in the
5 way that he did. But given that we don't have the
6 Zoning Administrator here, and we're looking at this as
7 a variance test, I look at it as a variance from the
8 Zoning Administrator's interpretation the second time
9 and the fact that he did do a reinterpretation.

10 And I think that what is unique about this
11 is the zoning history in this case and that the Zoning
12 Administrator did do a "reinterpretation" after
13 construction had already progressed. And I think that
14 that in and of itself created the practical difficulty,
15 because even though there was a confluence of factors
16 that maybe altogether could have provided a uniqueness,
17 I don't think they are that strong. And I think that
18 what is unique is actually this reinterpretation after
19 construction began, which led to the practical
20 difficulty of undoing it.

21 Because we did hear testimony that had the
22 Zoning Administrator told the applicant early on before
23 construction, then the applicant perhaps could have
24 redesigned the project so that there wouldn't be this
25 practical difficulty of having to remove the terrace,

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1 in this case. So I think those first two prongs of the
2 variance test are met and I don't think that there is
3 or we didn't hear any evidence of substantial detriment
4 in this case for granting the variance. And, in fact,
5 that the terrace is a positive and that it would be a
6 detriment to have a concrete slab instead of a terrace,
7 in this case. So that's where I am.

8 CHAIRPERSON GRIFFIS: Excellent.

9 VICE CHAIR MILLER: At this point.

10 CHAIRPERSON GRIFFIS: Thank you. Others?
11 Mr. Parsons?

12 COMMISSIONER PARSONS: Certainly, I think
13 this case is unique. I can't imagine or can't recall
14 any other time that I have been around that a Zoning
15 Administrator has made a decision when the building is
16 90 percent up. And my sense is that what's here is a
17 cry for help from the Zoning Administrator on a very
18 narrow interpretation of the Zoning Regulations.

19 And I think it would be unfortunate to
20 dismiss this and send it back saying he was right the
21 first time. So I think we ought to recognize that
22 removing this terrace makes no sense structurally or
23 aesthetically, and that we should grant the variance.

24 CHAIRPERSON GRIFFIS: Good. Thank you for
25 that. This is an interesting piece and, you know,

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1 often times I perhaps too late at night think boy, if
2 it was just structured this way, we could hit home a
3 definitive message or a definitive direction. And no
4 application ever comes to us that way, because this is
5 particularly interesting. If the applicant came to us
6 without having gone and gotten a permit and said, you
7 know, undue caution, we're coming in for a variance, it
8 would be in a different form to have the discussion of
9 whether it was properly before us or not.

10 Mr. Parson brings up I think pointedly an
11 aspect, that I know the Board has been wrestling with
12 a little bit, is whether we would actually just dismiss
13 this and find that it was not needing of relief for lot
14 occupancy. I think Mr. Parsons is correct in saying
15 that may not be appropriate for us, at this point. But
16 I think the Board should take some note of that, that
17 this isn't set up in an appeal form where we are
18 deciding whether the Zoning Administrator was correct
19 or not. We're not fully stepping into the shoes of the
20 Administrator to determine that.

21 I think the Board has spent enough time
22 looking at what was presented before us to come to
23 preliminary conclusions that this may not need relief
24 from lot occupancy. However, I don't think that we
25 have enough information from the Zoning Administrator

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1 in how they calculated or they were interpreting it.
2 And so the point being, I don't think we need to go to
3 that level or that direction and be determinative in
4 it, but rather, as we have now done, structured it
5 under the variance case.

6 I would go back to some of the
7 uniquenesses, but also the extraordinary situations and
8 conditions. And I think it is not like me often to
9 cite court cases, but I think it is appropriately done
10 in this case with all those that we always hear about
11 and we hear about these for good reasons. Clerics of
12 St. Viator has indicated that existing structures play
13 a very important aspect of creating uniqueness and can
14 be those elements of practical difficulty.

15 I think that, in this case, the grade of
16 the land, the existing townhouse did not mean well,
17 this isn't historically designated, that is not the
18 requirement that I have ever seen in any legal document
19 that is the threshold of creating a uniqueness or a
20 practical difficulty.

21 Well, I'll leave it at that. There are
22 two other cases, actually, that the applicant cites of
23 which we could go further into, but I think the record
24 adequately reflects their pertinence to this case, and
25 that is Monaco and De Azcarate. I know the Board is

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1 very familiar with both of those and I think that's all
2 I need to conclude on that.

3 So let me open it up to any others. Mr.
4 Mann?

5 BOARD MEMBER MANN: I agree with this sort
6 of well-reasoned analysis, but I just wanted to add one
7 thing regarding the testimony in opposition, which I
8 thought didn't address the Zoning Regulations so much
9 as that it addressed kind of aesthetic concerns and
10 social concerns, and I didn't think that the testimony
11 that we heard in opposition was very well formulated or
12 made a very strong case against granting the relief
13 that was sought.

14 I mean, I think, we have a very strong
15 case regardless of what we heard about the testimony,
16 but I just think that that testimony didn't rise to any
17 sort of level, to me, that took any sort of, you know,
18 serious consideration.

19 CHAIRPERSON GRIFFIS: Excellent. Well
20 put. Very well. Are there any others, further
21 deliberation? Yes?

22 VICE CHAIR MILLER: I just want to
23 emphasize this and we probably all said it in different
24 ways, but I really believe that we don't have a full
25 record before us. We don't have the ZA. But had this

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1 case first come as an appeal, that most likely we
2 wouldn't be here looking for a variance, because
3 variance implies that, not implies, means that they
4 cannot comply with the regulations without undue
5 hardship or practical difficulty.

6 And based on the evidence we have in the
7 record, it looks like they can comply. But we're just
8 not conclusively deciding that, because we don't have
9 the due process protections or whatever that we have in
10 an appeal to hear the Zoning Administrator's point of
11 view.

12 CHAIRPERSON GRIFFIS: Very well. Others?
13 Anything else? If not, let me give a final note then.
14 The ANC-1B was in support, Exhibit 27. They indicated
15 in their letter as we all well recall that there were
16 varying and ranging items of discussion, but they
17 focused on, and Mr. Sealer responded to the variance
18 request for lot occupancy, and they found that the
19 building design was appropriate in the underlying R-5-B
20 and also was in harmony with the abutting properties.

21 Which is an interesting point, boy, we
22 could talk forever on this, but I'm going to let it go
23 at that. But one of the aspects obviously when we go
24 into the building area, which would go to lot
25 occupancy, is whether that which is being calculated

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1 rises above the main level of the residential floor,
2 but also doesn't impair the light and air. And so that
3 comment just invoked that thought, I know which is part
4 of our process and deliberation on this as the ANC
5 looked at it and found that not, only indirectly
6 perhaps, affecting the light and the air. I could take
7 that from their sentence of saying that it was in
8 harmony with the abutting and neighboring buildings.

9 Okay. If there's nothing further, I think
10 it's appropriate then to move approval of Application
11 17352 for the 1464 Harvard, and that is for the
12 variance from the lot occupancy requirements under 403,
13 and that would provide the ability to construct the
14 multi-family 14 unit residential building, and ask for
15 a second.

16 VICE CHAIR MILLER: Second.

17 CHAIRPERSON GRIFFIS: Thank you.

18 VICE CHAIR MILLER: Mr. Chairman, did you
19 also note that even though the Office of Planning
20 didn't support the application in their written report,
21 that at the hearing did support the application? That
22 they did have the information they needed to do that?

23 CHAIRPERSON GRIFFIS: I had mentioned a
24 little bit in the beginning.

25 VICE CHAIR MILLER: Okay.

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1 CHAIRPERSON GRIFFIS: But I think that's
2 an important point to revisit and I thought they had
3 very determinative and strong language at the hearing
4 that was very informative to myself in my deliberation
5 above and beyond as you have indicated their initial
6 written submission. Good. Anything else? Very well.

7 If there's nothing further then, we do
8 have a motion before us. It has been seconded. I
9 would ask for all those in favor to signify by saying
10 aye.

11 ALL: Aye.

12 CHAIRPERSON GRIFFIS: Aye. And opposed?
13 Very well. Mr. Moy, why don't we record the vote?

14 MR. MOY: Yes, sir. The Staff would
15 record the vote as 4-0-0 on the motion of the Chairman
16 to approve the application, seconded by Ms. Miller,
17 also in support of the motion Mr. Mann and Mr. John
18 Parsons. We also have received an absentee ballot from
19 Mr. Etherly and he has voted to approve or support the
20 application, which would give a final vote as 5-0-0.

21 CHAIRPERSON GRIFFIS: Excellent. Thank
22 you very much.

23 MR. MOY: Summary order, Mr. Chair?

24 CHAIRPERSON GRIFFIS: Excellent point. I
25 think we can waive our rules and regulations and issue

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1 a summary order. However, I would like to indicate
2 that we have a bit of substance in terms of meeting the
3 variance test and I think that the Board would probably
4 draft up a brief footnote, perhaps, or how we would do
5 it indicating our discussion on whether relief was
6 required or not. But clearly, the order would reflect
7 a variance test that has now been granted, unless there
8 is any opposition or difficulty with that from the
9 Board.

10 Good. Very well. Mr. Parsons, is that it
11 for your role with us this morning?

12 COMMISSIONER PARSONS: It is. Thank you
13 very much.

14 CHAIRPERSON GRIFFIS: Very well. Thank
15 you very much.

16 COMMISSIONER PARSONS: Have a good summer.

17 CHAIRPERSON GRIFFIS: Indeed. Have a very
18 good summer yourself. We will see you in September.

19 COMMISSIONER PARSONS: All right.

20 CHAIRPERSON GRIFFIS: Let's move ahead
21 then to the next case, 17311.

22 MR. MOY: Yes, sir, this is an Appeal to
23 Application No. 17311 of Palisade's Citizen's
24 Association. Staff is going to read this. This was an
25 application that was pursuant to 11 DCMR 3100 and 3101,

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1 from the Administrative Decision of the Zoning
2 Administrator of the Department of Consumer and
3 Regulatory Affairs.

4 The appellant alleged that the Zoning
5 Administrator erred by issuing Building Permit No. B,
6 as in bravo, 468560, dated December 20, 2004, for the
7 construction of a single-family dwelling that does not
8 comply with the Wesley Heights Overlay District, by
9 exceeding the gross floor area requirements, lot
10 occupancy requirement and height and story limitations
11 in the WHOD/R-1-A District at premises 4825 Dexter
12 Terrace, N.W., in Square 1381, Lot 806.

13 On July 5, 2005, the Board received a
14 filing from the appellant, the Palisade's Citizen's
15 Association, requesting a "dismissal" of their appeal,
16 which is in your case folder identified as Exhibit 19,
17 and Staff has interpreted this request as a withdrawal
18 of their filing, and Staff has followed-up by
19 contacting the appellant to that end. That completes
20 the Staff's briefing on this case, Mr. Chairman.

21 CHAIRPERSON GRIFFIS: Excellent. Thank
22 you very much, Mr. Moy. And I take it then the fact
23 that there is no action required by the Board, but we
24 have been noticed of the withdrawal of that appeal.

25 MR. MOY: Yes, sir.

1 CHAIRPERSON GRIFFIS: Excellent. Then why
2 don't we --

3 BOARD MEMBER MANN: Mr. Chairman?

4 CHAIRPERSON GRIFFIS: Oh, okay, Mr. Mann?

5 BOARD MEMBER MANN: I was just wondering
6 if I could just take this opportunity to identify a
7 special guest that we have in the audience today?

8 CHAIRPERSON GRIFFIS: Oh, of course. What
9 a perfect time.

10 BOARD MEMBER MANN: Theresa Cantors-
11 Rendrick, she is a Presidential Management Fellow. She
12 has spent the summer at the National Capital Planning
13 Commission. She has been interested in zoning issues
14 and has finally had the opportunity to come over on
15 perhaps one of our least interesting days of the year.

16 CHAIRPERSON GRIFFIS: Exactly.

17 BOARD MEMBER MANN: But nonetheless, I
18 would like to welcome her to the proceedings and hope
19 that she enjoys them.

20 CHAIRPERSON GRIFFIS: Good. Thank you.
21 And welcome. Mr. Mann is correct that this isn't the
22 most interactive time to see the Board at action, but
23 rather it is a very important time in the Board's
24 proceedings and that is when we have, as I said in my
25 opening, heard very interesting cases and have now set

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1 for a time for making the decision. So it is one might
2 say dryer than normal, but an important part of our
3 responsibility.

4 With that, Mr. Moy, why don't we call the
5 next case?

6 MR. MOY: Yes, sir, the next case is a
7 Motion for Reconsideration, pursuant to section 3126,
8 to Application No. 17251 of Paul and Frances O'Reilly,
9 pursuant to 11 DCMR 3104.1, for a rear two-story
10 addition to an existing single-family row dwelling
11 under section 223, not meeting the rear yard
12 requirements under section 404, the side yard
13 requirements section 405, and the nonconforming
14 structure provisions 2001.3, in the R-1-B District at
15 premises 3715 Albemarle Street, N.W., and that's in
16 Square 1888, Lot 48.

17 On July 12, 2005, Ms. Amelia Psillos,
18 granted party status on December 14, 2004, filed a
19 Motion for Reconsideration of the Board's decision of
20 January 4, 2005. And that filing is identified in your
21 case folders as Exhibit 37. Staff notes that pursuant
22 to section 3126, 10 days is an allowable time period to
23 submit a filing, which in this case with the issuance
24 of the final order of June 29th would exceed the 10 day
25 period. However, Staff notes for the Board that

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1 typically the Office allows three days for mailing
2 purposes, which then would render this filing within
3 the allowable time period.

4 So with that, Staff would leave with the
5 Board that if the Board chooses to waive the section
6 and preliminary matter, then the reasons our outlined
7 in Ms. Psillos' letter in which she alleges new
8 evidence for Board action. And that would conclude the
9 Staff's briefing, Mr. Chairman.

10 CHAIRPERSON GRIFFIS: Thank you very much,
11 Mr. Moy. I appreciate that and I think you are
12 absolutely correct in looking at that that we do have
13 to consider prior to the Motion of Reconsideration is
14 whether we can hear the Motion for Reconsideration,
15 based on the aspect of whether it is timely filed or
16 not, and then based on our decision on that
17 determination. Ms. Miller?

18 VICE CHAIR MILLER: Yes, Mr. Chairman.
19 With respect to whether we can hear this Motion for
20 Reconsideration, it's my interpretation of the
21 regulations and the case law interpreting this type of
22 regulation that we cannot hear this motion. And if we
23 can, that we should not, because this goes to the issue
24 of finality. It's a different type of extension of
25 time than in the normal cases when we have a case

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1 before us and parties ask for extensions of time for
2 different types of filing, for party status, for things
3 like that, that's totally within our discretion.

4 However, this is a special kind of
5 situation where it goes to the effectiveness of an
6 order. Under our regulations, there are 10 days from
7 the filing of the order in the record and the service
8 on the parties in which a final order becomes
9 effective. And effective means that then the parties
10 can rely on that order. Then an applicant can go pull
11 permits, etcetera without worrying that further action
12 might be taken.

13 And there a Court of Appeals' decision
14 that speaks to this. It's Waste Management of Maryland
15 v. District of Columbia Board of Zoning Adjustment, and
16 I'm going to cite it, because I think it's quite
17 important, 775(a) 2nd 117, 2001. They talk about the
18 good reason why the 10 day rule cannot be waived. It
19 is known as Administrative Finality in Administrative
20 Law. "An applicant and even other parties must have
21 certainty as to when an order is final."

22 The Court of Appeals specifically stated
23 the following: "A rule designating a period after
24 which the order, requirement, decision or determination
25 of the Administrator/Officer is no longer subject to

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1 review is a salutary one. It provides a period after
2 which the permittee knows that he may proceed safely in
3 accordance with the permit. Where the permit is
4 denied, it gives those opposing its issuance assurance
5 that the applicant, who has been denied the permit, may
6 no longer secure review and a possible reversal by the
7 Board, and their vigilance may no longer be
8 maintained."

9 So, in this case, I think that we don't
10 have jurisdiction and, therefore, we should not even
11 consider the merits in this case.

12 CHAIRPERSON GRIFFIS: Excellent. Thank
13 you. You have thoroughly documented and discussed. I
14 tend to agree in terms of reading 3125.6 and that is
15 the finality. And I think, well, let me step back and
16 say the two aspects that I think are critical in your
17 discussion is establishing finality. And that is
18 absolutely important. And that is the basis of when an
19 order becomes effective. I mean, when it is actually
20 in service. And 3125.6, as you say, does establish
21 that for purposes of this chapter, decision or order
22 shall be and become final upon its filing in the record
23 and the service upon the parties.

24 And I think the reliance through the
25 Administrator finality, of what you are discussing,

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1 must be understood with important thresholds. The only
2 thing that rises to the level of reconsideration goes
3 into evidence that could not have been presented in the
4 case that was before us and, therefore, there is a
5 Motion for Reconsideration.

6 Although, we wouldn't go to that level, at
7 this point, because we haven't found that it was
8 timely, but I think it's informative in continuing
9 cases that that is the threshold of which we would have
10 reconsiderations or be able to approve Motions for
11 Reconsideration. In some of my deliberations looking
12 at this in terms of finality, I thought wow, this is
13 very determinative and seems fairly rigid and I'm not
14 sure that I was of the mind to take that step in being
15 so determinative, because I am a firm believer that
16 there should be relief available either for those
17 parties in opposition or for applicants, if need be, if
18 the Board had erred.

19 Looking at this particular case, I think
20 that you are very right. I think it is absolutely
21 correct in looking at that our order is final and that
22 we do not have the ability to waive that timeliness and
23 reconsider it. In fact, if there was an error, there
24 is relief possible and that would be by a person in
25 opposition. It could be appealing other official

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1 rulings. It could be taking it to the Court of
2 Appeals. There are additional avenues to pursue.

3 And I think that we have to set up, as
4 difficult as it might be, those strong elements of
5 finality for the Administrative effectiveness, and so
6 that other things can happen. Although, our
7 regulations clearly state that a Motion for
8 Reconsideration is not required before you go to the
9 Court of Appeals. But certainly wouldn't you want to
10 exhaust certain steps along the way?

11 All in all, it's a hard decision for me,
12 but, in this specific case, I think it is not a
13 difficult one, because I think it absolutely is the
14 case that our order is final and our timeliness
15 requirement should not be waived. Mr. Mann?

16 BOARD MEMBER MANN: I agree and I think
17 that Ms. Miller's argument was pretty persuasive and,
18 quite frankly, I think that the strict adherence of the
19 rule actually works to everybody's benefit, because
20 then there is no question as to when something should
21 be accepted or when it shouldn't and it levels the
22 playing field and it makes it fair for everybody.

23 CHAIRPERSON GRIFFIS: I think that's very
24 well said. In fact, looking at the cases that we have
25 gone through in this past month, having different

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1 opinions of the Zoning Administrator as projects are
2 almost complete, seems to be very problematic for
3 everyone concerned. Having cases decided and then
4 taken up by other Boards or agencies or sua sponte
5 coming, what is the timeliness of that? Could you
6 waive your timeliness upwards of five, six years?
7 Could something be under different ownership after
8 being constructed and then be revisited?

9 I think although difficult, I think it is
10 absolutely correct and, frankly, we're going to have to
11 live by the decisions that we make, which is exactly
12 why we take so much time in our own deliberations off
13 the record and on the record to make sure that we are
14 doing things correctly. And I don't think anything is
15 ever lightly discussed or thought about. And I think
16 this, in fact, in many ways reemphasizes this Board's
17 own understanding of the severity of what we do. And
18 I think that's a critical aspect to reinforce. And I
19 think it is done so in a small way in our deliberation
20 and action on this case.

21 I think we are ready then for a motion.
22 If anyone is so moved? Ms. Miller?

23 VICE CHAIR MILLER: Mr. Chairman, I would
24 move to dismiss the Motion for Reconsideration of
25 Application No. 17251 of Paul and Frances O'Reilly. Do

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1 I read the whole thing?

2 CHAIRPERSON GRIFFIS: No, you don't have
3 to. I wouldn't read the whole thing. Let me just make
4 --

5 VICE CHAIR MILLER: On grounds of
6 untimeliness.

7 CHAIRPERSON GRIFFIS: Excellent. And I
8 would second the motion, but ask for clarification.
9 Was your motion to deny the Motion for Reconsideration?
10 You stated dismiss.

11 VICE CHAIR MILLER: Dismiss. Well, I
12 think dismiss is appropriate, because we are not ruling
13 on the merits. We are -- that's why I think dismiss is
14 appropriate.

15 CHAIRPERSON GRIFFIS: Okay.

16 VICE CHAIR MILLER: Dismiss as on
17 untimely. Okay.

18 CHAIRPERSON GRIFFIS: Good. We have a
19 motion before us. It has been seconded. Did you want
20 to speak to the motion?

21 VICE CHAIR MILLER: No, I think I have
22 spoken to it.

23 CHAIRPERSON GRIFFIS: Indeed. I think we
24 all have spoken well to this motion. Unless there's
25 others? No other further comments to it, then we do

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1 have a motion before us to dismiss the Motion for
2 Reconsideration based on the fact that it was not
3 timely filed. It has been seconded. I would ask for
4 all those in favor of the motion to signify by saying
5 aye.

6 VICE CHAIR MILLER: Aye.

7 BOARD MEMBER MANN: Aye.

8 CHAIRPERSON GRIFFIS: Aye. And opposed?
9 Abstaining? Very well. Mr. Moy, if you wouldn't mind?

10 MR. MOY: Staff would record the vote as
11 3-0-1 on the motion of Ms. Miller to dismiss the Motion
12 for Reconsideration, based on an issue of timeliness,
13 seconded by the Chairman, Mr. Griffis, also in support
14 of the motion, Mr. Mann. And as I said, that was on a
15 vote of 3-0-1, no Zoning Commission Member
16 participating. We do have an absentee ballot from Mr.
17 Etherly, although I would add that his vote was to deny
18 the Motion for Reconsideration on the grounds of the
19 substance of the motion as opposed to an issue of
20 timeliness. So Staff with input from OAG would give a
21 final vote of 3-0-2. Right?

22 MS. MONROE: Yes.

23 CHAIRPERSON GRIFFIS: Really? So we would
24 take Mr. Etherly's absentee vote as an abstention from
25 the motion?

1 MS. MONROE: Yes, Mr. Chair, because his
2 vote was not on the particular motion that was made by
3 the Board, which was based solely on timeliness, as I
4 understood it.

5 CHAIRPERSON GRIFFIS: Sure, sure. Okay.
6 I think that's appropriately said and Mr. Moy has read,
7 I believe, the absentee vote sent in by Mr. Etherly,
8 which obviously was an excellently deliberated
9 conclusion, but in a different vein, but also to deny
10 the motion. Okay. That said, let's move ahead to the
11 last, I believe, case for our decisions this morning.

12 MR. MOY: Yes, sir, that case would be
13 Application No. 17313 of Edward Ertel and Jennifer
14 Squires, pursuant to 11 DCMR 3103.2, for a variance
15 from the lot occupancy requirements under section 403,
16 and a variance from the nonconforming structure
17 provisions under subsection 2001.3, to allow an
18 addition to a single-family row dwelling in the R-4
19 District, that's at premises 924 G Street, S.E., that's
20 in Square 949, Lot 33.

21 The most recent action of the Board is
22 where the Board convened a Special Public Meeting on
23 July 12, 2005 to decide the merits of this application.
24 Revised drawings were not submitted in time for Board
25 review and so the Board scheduled its decision on

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1 August 2, 2005. The applicant has since filed revised
2 drawings and restated how the changes address the test
3 for variance relief, which is dated July 19, 2005, and
4 is identified in your case folder as Exhibit 30. So
5 the Board is to act on the merits of the application
6 for variance relief. And that completes the Staff's
7 briefing, Mr. Chairman.

8 CHAIRPERSON GRIFFIS: Excellent. Thank
9 you very much, Mr. Moy. And you did state, at the
10 conclusion of this we had indicated that it would
11 possibly be more efficient for the processing of this
12 if the applicant went before HPRB and then came back
13 with any changes that might have been made and which
14 turns to have been made. I think there may have been
15 some miscommunication of the actual responsibility of
16 our processing and noticing and I certainly know that
17 the Board apologizes to the applicant, if that was a
18 miscommunication.

19 And I speak to that as one of the letters
20 in the file was indicating some questioning of, you
21 know, we had stated that they would be on certain dates
22 and they were constantly, consistently moved and I just
23 want to be absolutely clear that we had gone above and
24 beyond our normal scheduling in order to accommodate
25 fitting this in at Special Public Meetings, but that

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1 our requirements, are obvious or at least obvious to
2 me, are that we would have to have drawings, because
3 drawings are what we approve and what we would look to
4 in terms of making or not making the variance test.

5 All that being said, we are here today and
6 I believe that the record is completely full on this.
7 And it's interesting because the design did
8 substantially change after the review of the Historic
9 Preservation, although the relief sought, well, the
10 relief sought did change a little bit, but not
11 substantially and, therefore, the test that was
12 presented and also was well-reiterated recently can
13 obviously be taken up by the Board.

14 I will go into framing this, if need be,
15 unless others want to take it on. Ms. Miller?

16 VICE CHAIR MILLER: No, go ahead.

17 CHAIRPERSON GRIFFIS: A couple of quick
18 things, a couple of very quick things, then I do want
19 to turn it over to the other Board Members and we can
20 get through this very quickly. This is an interesting
21 case and the Office of Planning, again, had come in
22 preliminarily indicating that there perhaps was not
23 enough information or that they didn't believe that it
24 met the test.

25 And I think it reemphasizes the importance

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1 of the public hearing process that, for one, providing
2 an ability to be able to give testimony, but also for
3 the interaction of information that we get from the
4 applicant. And I think it was very important to go
5 into all of these aspects. Now, we obviously look at
6 the uniqueness, practical difficulty and then, of
7 course, whether it will impair the intent and integrity
8 of the Zone Plan and Map or the public good.

9 Looking at the uniqueness, there are two
10 points to this. One, it's very clear, and I think it's
11 the Capitol Hill Restoration Society versus the Board
12 of Zoning Adjustment, that just because a building is
13 in the Historic District or is a contributing building
14 doesn't make it unique. I don't think any of us
15 disagree and I certainly don't disagree with that.

16 However, it doesn't say just because
17 you're in that that can't be a unique aspect, but it
18 has to be individually shown. Again, as we have said
19 numerous times, and this case is also important,
20 looking at other past court decisions, Clerics of St.
21 Viator we already talked about this morning, the
22 existence of a structure can be an aspect of
23 uniqueness, if it's proven to us by the applicant, and
24 that uniqueness can arise the practical difficulty.

25 This to me is the case in both

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1 circumstances, I think more importantly just the
2 existence of the structure. This is a de minimis size
3 lot, just above 1,400 square feet, where the matter-of-
4 right would have to be 1,800. It is not accessed from
5 an alley or a rear. It had an original curb cut that
6 went to an old carriage house. It has actually two
7 structures on a single, small lot.

8 The house itself is very small in size.
9 Is it the smallest? Is it absolutely different than
10 any other building? It is not, but it certainly is a
11 unique aspect of the size, the room configurations on
12 the interior for the utilization of it and in the
13 confluence of all these factors, the secondary
14 structure on the lot itself.

15 The applicant has proposed to attach both
16 to make them utilized as a single structure, but it is
17 practically difficult in that circumstance, in doing
18 that, because of the smaller size of the lot.
19 Obviously, the smaller size means your square footage
20 is diminished also for what you can provide. The fact
21 that each structure is at the end of the lot itself, so
22 in order to connect it, you're going to have to occupy
23 most of the lot. There is no rear yard there. This is
24 a corner lot, which is another unique aspect of the
25 confluence of aspects to this.

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1 And all of those, I think, go clearly to
2 the point of uniqueness and the practical difficulty of
3 connecting, making a single connection, so that they
4 might utilize more of their property and in a manner of
5 which is appropriate and not, certainly, out of the
6 ordinary of utilization of their premises and property.

7 The aspect of where the Historic District
8 comes into it, the applicant had said, you know, we
9 cannot demolish this, we cannot add on top. They were
10 very definitive and I think that that was not wrongly
11 stated based on their knowledge of the historic review
12 process of today. Can we rest on the fact that it is
13 impossible to do that? No, but I think we can be
14 persuaded and I am persuaded that that is a reality.

15 That is the threshold is never in the area
16 variances, is it impossible, could you do something
17 totally different? Is it practically difficult? Well,
18 I think looking at the documentation of the character,
19 of the height of the rest of the buildings in the
20 Historic District, it shows that it would be
21 practically difficult to design something, especially
22 on a corner lot that would be visual.

23 It would be seen from all directions. You
24 know, you could not set this back. An addition
25 couldn't be set back far enough, so it isn't seen from

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1 the street, because it would be entirely and always
2 seen, because it's a corner lot. I think it is very
3 persuasive that it is a practical difficulty in the
4 aspect that it is in a Historic District.

5 And, lastly, I guess, would it impair the
6 integrity of the Zone Plan and Map or the public good?
7 I was very persuaded on that photo documentation of the
8 surrounding corner conditions in this zone. And what's
9 interesting also, I think we can go to the fact that
10 this building existed and really that's the existence
11 of this structure, the building existed before the
12 zoning was enacted in 1958, which I think in many ways,
13 and I think our regulations actually read this way,
14 that is a unique characteristic of the property.

15 So looking at this Historic District and
16 how each of the corners are dealt with, and they are
17 dealt with differently, but most of them are solid to
18 an opening, which is often an alley or to a rear yard
19 of some sort. Those corners are held.

20 Why do I say this? Well, I say this
21 because the zoned district that this is in is
22 maintained and it would actually be coming more into
23 compliance with the character of the rest of the area,
24 which obviously isn't detrimental to the zoned district
25 that it's in. It certainly isn't detrimental to the

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1 public good. I don't see anything arising in the
2 evidence that would indicate that it would be.

3 So that summation, I find that it does
4 meet the test for the variance, but let me have others
5 speak to it.

6 VICE CHAIR MILLER: Mr. Chairman, I think
7 that you covered a lot of ground, so let me see what I
8 can add to that. First of all, I think that there is
9 a Court of Appeals case, the Gilmartin case, which
10 really speaks to this situation and that case actually
11 also involved a carriage house.

12 In putting this in context, with respect
13 to the first prong, the uniqueness prong, the courts
14 were saying that the rationale behind the uniqueness
15 test is that difficulties that are common to or affect
16 an entire neighborhood or a substantial portion are
17 properly addressed by seeking amendment of the
18 regulations themselves from the Zoning Commission.

19 So I think that when we're looking at this
20 piece of property, we have to say well, if we grant a
21 variance here, does that mean that so many other
22 properties are just like this and that, you know, they
23 all should get that relief, in which case we would be
24 amending the regulations.

25 And in looking at this piece of property,

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1 I think that it is that confluence of factors that make
2 this property unique, I think, that being the
3 configuration of the two structures on the property
4 with the open space in between and that it's a corner
5 lot, that it's in a Historic District, that it's
6 landlocked with a blank wall abutting the property and
7 that it's so small.

8 And there was no evidence that I recall of
9 any, if not several, other properties of this type on
10 Capitol Hill. And I think what happened with Office of
11 Planning when they came in, they were looking at each
12 factor individually like well, this isn't the only
13 historic property or this isn't the only property that
14 doesn't have alley access or this isn't the only
15 property that has like three small bedrooms, etcetera,
16 instead of putting it together with the confluence of
17 factors, which has been held to be valid for
18 considering uniqueness.

19 With respect to the practical difficulty,
20 there was certainly evidence that compliance with the
21 area restriction would be unduly burdensome. I also
22 want to just back up just a little bit and say that a
23 lot of information came out during the hearing. And
24 then after the hearing, the applicant also addressed
25 the test for the variance much more thoroughly than in

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1 the original application.

2 I think they made a strong case that they
3 cannot use the property efficiently or to serve their
4 needs with their family in the configuration that
5 exists, and that other changes either would be
6 precluded by historic regulations, so they didn't make
7 that case definitively, but they certainly would be
8 burdensome, the other options that would be demolishing
9 the carriage house, so that they could then build
10 something right next to their house or adding a third
11 story.

12 Both seem unlikely, though the HPRB hasn't
13 necessarily ruled on that, that they could do either
14 one in a Historic District. But even without reaching
15 that question, that certainly to me rises to the level
16 of unduly burdensome. And the court has said that
17 certain factors for determining what's unduly
18 burdensome -- well, certainly, that it's up to the BZA
19 to make that judgment, and that increased expense and
20 inconvenience to applicants are certainly proper
21 factors. So, in this case, I think that they have made
22 a strong showing that it would be unduly burdensome and
23 a practical difficulty.

24 With respect to no substantial detriment,
25 the last prong, to the public good, we didn't hear any

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1 evidence of adverse impact on neighbors and, in fact,
2 we heard evidence that this would be an improvement
3 and, as you said, more in character actually with the
4 neighborhood.

5 So for that reason, for those reasons, I
6 think that the variance test has been met.

7 CHAIRPERSON GRIFFIS: Excellent. Thank
8 you. Others, anything else? Yes, Mr. Mann?

9 BOARD MEMBER MANN: I would add that I
10 certainly agree with Ms. Miller's analysis. I also
11 think, just as a side note, it's interesting that I
12 think the applicant's case was actually strengthened in
13 this particular case by having gone to HPRB first,
14 because it did contribute more definitively to the
15 uniqueness of the property.

16 CHAIRPERSON GRIFFIS: Good. Very well.
17 Is there proposed action?

18 VICE CHAIR MILLER: I just want to make
19 one more point. I was just looking over my notes and
20 in giving Office of Planning the great weight that we
21 do with respect to addressing their concerns, one of
22 their arguments about the practical difficulty test was
23 that well, the applicant can use the carriage house for
24 some purpose, like they are using it now as a rental,
25 and I believe that that is not the test, that you can

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1 use property for another purpose when we're considering
2 an area variance, that the test is really that there is
3 a real practical difficulty to the applicant.

4 And in this case, there is a real
5 practical difficulty to using it in a way that is
6 efficient for its family. So I don't think that that
7 is determinative, that the fact that it can be used for
8 another purpose defeats this practical difficulty test.
9 So I just wanted to add that for the record.

10 CHAIRPERSON GRIFFIS: Excellent. It is
11 interesting, all those put together, because I think
12 you're exactly right in terms of the fact that we don't
13 need to and we don't require in an area variance to
14 show that it cannot be used for anything else or in
15 another way.

16 And it's interesting that the zoning
17 district that was put upon this two-story building
18 allows, by matter-of-right zoning, additional height,
19 you know, additional stories, additional densities
20 allowed here, and how it's massed on this site is
21 what's presented to us. And then we need to evaluate
22 whether there is a unique aspect and whether it's
23 practically difficult and compliant with all of the
24 area requirements.

25 It is not, as you said, that boy, you

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1 could do something totally different or you could move,
2 you know? That's not a test that we need to concern
3 ourselves with, but that we should look at what is
4 proposed, what is in front of us, and that's what we
5 need to take up. And I think you're absolutely right
6 in bringing that to a point, that we are very clear on
7 the test that has to be met and how it is to be met.
8 Okay. Anything else then?

9 VICE CHAIR MILLER: At this point then, I
10 would like to move to approve Application No. 17313 of
11 Edward Ertel and Jennifer Squires, pursuant to 11 DCMR
12 section 3103.2, for a variance from the lot occupancy
13 requirements under section 403, and a variance from the
14 nonconforming structure provisions under section
15 2001.3, to allow an addition to a single-family row
16 dwelling in the R-4 District at premises 924 G Street,
17 S.E., Square 949, Lot 33.

18 BOARD MEMBER MANN: Second.

19 CHAIRPERSON GRIFFIS: Thank you, Mr. Mann.
20 Speaking to the motion, Ms. Miller, any additional
21 deliberative comments?

22 VICE CHAIR MILLER: No, I think I have
23 spoken to it.

24 CHAIRPERSON GRIFFIS: Good. Mr. Mann?

25 BOARD MEMBER MANN: I have nothing further

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1 to add.

2 CHAIRPERSON GRIFFIS: Excellent. We do
3 have a motion before us and I absolutely agree with all
4 the deliberation that has happened and, obviously, will
5 be supporting the motion. So with that, we do have a
6 motion before us to approve the variance. It has been
7 seconded. I would ask for all those in favor to
8 signify by saying aye.

9 BOARD MEMBER MANN: Aye.

10 VICE CHAIR MILLER: Aye.

11 CHAIRPERSON GRIFFIS: Aye. And opposed?
12 Abstaining? Very well. Mr. Moy?

13 MR. MOY: Yes, sir. The Staff would
14 record the vote as 3-0-1 on the motion of Ms. Miller to
15 approve the application, seconded by Mr. Mann. We have
16 no participation from a Zoning Commission Member. Also
17 in support of the motion, of course, is the Chair, Mr.
18 Griffis.

19 We also have an absentee ballot from Mr.
20 Etherly and his vote was to approve the application,
21 which would give a final vote of 4-0-1 to approve the
22 application. Staff notes that there was no party
23 status in this case. The ANC-6B had voted no
24 objections to the variance application.

25 Would Staff care to waive for a summary

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1 order or a full order?

2 CHAIRPERSON GRIFFIS: Discussing with the
3 Board briefly, I don't see a reason why we would not
4 waive our rules and regulations and issue a summary
5 order on this case. Unless there's other comments on
6 that, why don't we move ahead and issue? Yes?

7 VICE CHAIR MILLER: Wait a minute.

8 MR. MOY: Staff would also note for the
9 record that the Capitol Hill Restoration Society,
10 Exhibit 22, had voted to oppose the application,
11 although they are not granted party status for the
12 record.

13 VICE CHAIR MILLER: Right. I was just
14 noting that Office of Planning didn't support it. I
15 just wanted to double check what they stated.

16 CHAIRPERSON GRIFFIS: After great
17 deliberation by the Board, Mr. Moy, I think, obviously,
18 what we're looking at for clarity is issuing summary
19 orders lends itself to a great degree of efficiency,
20 administrative efficiency, as they don't take as long.
21 However, the Board has a couple of concerns in this
22 case, most importantly the fact that the Office of
23 Planning, although we didn't request them to, they did
24 not supply a supplementary report based on the
25 additional information that was provided.

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1 So the point being we still need to, I
2 believe, address their concerns in their original
3 report, and I think we can easily and adequately do
4 that as we have done in our own deliberation now. But
5 it probably and it should be addressed in the issuance
6 of the order, meaning we need to issue a full order on
7 this case. I would hope that our deliberation and our
8 notes can provide for an adequate and expeditious
9 issuance of the order, but we will put it in the
10 lineup. So with that, let's issue a full order in this
11 case.

12 MR. MOY: Okay. Staff will comply with
13 the Board's wishes.

14 CHAIRPERSON GRIFFIS: Fabulous. Very
15 well. Is there anything else for the Board's attention
16 in this Public Meeting this morning?

17 MR. MOY: Not in the session this morning,
18 Mr. Chairman.

19 CHAIRPERSON GRIFFIS: Very well. If there
20 is nothing further for the Board's attention in the
21 Public Meeting of the 2nd of August 2005, I think we can
22 adjourn and enter into Executive Session for most of
23 the rest of the day. Thank you all very much.

24 (Whereupon, the Public Meeting was
25 concluded at 11:16 a.m.)

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