

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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SPECIAL MEETING

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1137 MEETING SESSION (12th of 2002)

+ + + + +

MONDAY,
SEPTEMBER 30, 2002

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The special meeting of the District of Columbia Zoning Commission convened at 6:00 p.m. in the Office of Zoning Hearing Room at 441 4th Street, Northwest, Washington, D.C., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chair
ANTHONY HOOD	Vice Chair
JAMES HANNAHAM	Commissioner
PETER MAY	Commissioner
JOHN PARSONS	Commissioner

COMMISSION STAFF PRESENT:

ALBERTO BASTIDA, Secretary
SHARON SANCHEZ
STEPHEN MORDFIN, Office of Planning
JENNIFER STEINGASSER, Office of Planning
KAREN THOMAS, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

ALAN BERGSTEIN

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

6:05 p.m.

MS. MITTEN: Good evening, ladies and gentlemen. This is a special public meeting of the Zoning Commission of the District of Columbia for Monday, September 30, 2002.

My name is Carol Mitten, and joining me this evening are Vice Chairman Anthony Hood and Commissioners Peter May, John Parsons, and James Hannaham. The one topic for this evening's agenda for the special public meeting is a sua sponte matter, and I'll turn it over to Mr. May, since he's bringing the matter before the commission.

MR. MAY: Thank you very much, Madame Chairman. I have just distributed to you some information that describes the case in question. This is a BZA case, case number 16869, the application of King's Creek LLC for a number of variances related to a project, what, at the time, we thought was the Reed Cook Overlay. You've also received the decision and order that was issued in that case.

This case, it's a very interesting project, and it has a great deal of merit to the project. It involves the re-use of an existing and historic building with a popular commercial tenant in

1 the property, and the plan is for that tenant to
2 remain in the property. It has significant community
3 support, as well as a letter of support from Council
4 Member Graham, and, at the hearing, there was no
5 opposition to speak of. There was some question about
6 community input, but that was more or less resolved in
7 the course of the hearing.

8 As further background, the case itself, I
9 said before, at least for a while we thought was
10 within the Reed Cook Overlay and required variances
11 and, at the time, it was thought a special exception
12 with regard to height. As it turns out, the property
13 itself, because of the way the Reed Cook Overlay's
14 language reads, is not actually within the Reed Cook
15 Overlay because the property had been zoned
16 residential prior to the time or prior to a deadline
17 set in the language for the Reed Cook Overlay. So, in
18 fact, because it was already zoned residential, it was
19 not subject to this overlay, which further restricted
20 the height.

21 Nonetheless, much of the case is based on
22 that context that it was in the Reed Cook Overlay. OP
23 based much of its report on the Reed Cook conditions,
24 not just in terms of the special restrictions that it
25 imposed but also the intentions expressed in the Reed

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1 Cook Overlay with regard to promoting housing and, to
2 some extent, limiting the height of new buildings.
3 And, in fact, when the BZA first considered the case
4 or shortly thereafter, when they had a public meeting
5 on the matter, the BZA approved, by a vote of four to
6 one, all the variances and a special exception with
7 regard to the height because, at the time, it was
8 still thought that it was part of the Reed Cook
9 Overlay.

10 I voted against the case, at the time, because
11 of, essentially, two issues. One was the height of
12 the structure itself, and the other had to do with the
13 floor area ratio of the project, where it struck me,
14 in considering the case, that the BZA may have
15 exceeded its mandate and, in effect, re-zoned the
16 property by allowing an increase in the FAR from 1.8
17 allowed to a 3.9, roughly. I may have those numbers
18 slightly jumbled, but it was an increase of about a
19 2.0 in FAR. In addition, it proved a height of 69
20 feet. The property is zoned R-5-B, which means that
21 the height limitation is 50 feet. The Reed Cook
22 Overlay would have limited it to 40 feet and, again,
23 much of the case discussion was based on that. But,
24 as it turns out, that special limitation doesn't
25 really apply to the property. Nonetheless, a variance

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1 was required to exceed that height of 50 feet, and a
2 variance was required to exceed the FAR. The property
3 already exceeds the FAR because it's 1.9, and the
4 allowed is 1.8 in R-5-B.

5 My concern is that such a dramatic
6 increase in the FAR and the increase in height of 19
7 feet over the 50 feet that's allowed, those two items
8 in themselves exceeded the authority of the BZA in
9 that it was just simply too much. I don't think a
10 case was made that this property was so exceptional by
11 virtue of its shape or by the topography or any other
12 normally acceptable limitation of property to justify
13 both the increase in the FAR and the increase in the
14 height. I think I was a little bit more flexible in
15 the initial hearing on the question of the FAR because
16 the building already had full lot occupancy, and,
17 given that it's an historic structure, it didn't make
18 sense to advocate that some of the structure be torn
19 down in order to limit the lot occupancy and,
20 therefore, you know, a 1.8 FAR makes sense. I mean,
21 with 100% lot occupancy, if you go up to the normal
22 average height, if you will, you're going to exceed
23 the FAR by a significant amount. I think I was a bit
24 more flexible on that, but, in the end, this
25 combination of the extra height and the extra FAR was

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1 too much, in my opinion. In order to get to that much
2 height, the property would have to be zoned an R-5-D
3 to get above 60 feet, and that's one of the diagrams
4 that I passed out is a R-5-C is limited to 60 feet, R-
5 5-D goes up to 90 feet, which would have allowed the
6 property to be built that tall. And then the increase
7 in the FAR to 3.9 would put it above R-5-B, above R-5-
8 C, above R-5-D, and into the range of R-5-E, and that
9 scale of increase without some truly extraordinary
10 circumstance, to me, seemed excessive.

11 With regard to the practical difficulties
12 that were cited as reasons for the variance, the case
13 was made between the applicant and the Office of
14 Planning that the project was saving an existing
15 historic structure, and I think that, although this is
16 not an officially-recognized historic structure or, as
17 far as I know, no one made the case that it's a
18 contributing building within a historic district, I
19 don't think it's within the historic district, that,
20 while is a noble gesture, is not something that is
21 easily recognized as a practical difficulty.

22 Even given that, the argument was made
23 that the applicant should be allowed, in essence, to
24 stretch the height of the building up to this
25 extraordinary height as some justification for keeping

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1 the building. In other words, in order to work within
2 the limitations of this existing building, there
3 really had to be some effort to mold the building
4 rather than simply extend it vertically and continue a
5 "canyon effect," which was cited, and that stretching
6 the building, actually stretching it toward the back,
7 making it taller toward the back, would help in the
8 neighborhood conditions. And they cited other
9 structures in the street as already contributing to
10 this canyon effect.

11 As you can see from the information that I
12 passed out, particularly from the model photographs,
13 now I'm not sure how accurate that model truly is, but
14 there isn't a whole lot of other very tall structures
15 within that block. I think you'd have to look at the
16 page that shows the context and not just the, that
17 series. The largest building is the building across
18 the street, which is that PUD Development, the loss of
19 Adams Morgan, I think they call it. But, you know,
20 the property is immediately adjacent it seems or,
21 actually, vacant. The property itself is,
22 essentially, square. There is a slope to it, but
23 there's already a building on it, and, you know, the
24 areas where topography contributes to a practical
25 difficulty is really a case where some portion of the

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1 lot is, in essence, unbuildable, and, therefore,
2 you're forced closer to one side or another or have
3 to, you know, limit your occupancy in the lot for some
4 reason. I mean, clearly, the entire lot is occupiable.
5 It's, essentially, square. It's very hard to imagine
6 why there is some inherent practical difficulty.

7 Finally, I don't think that the case was
8 made that this was, that simply by virtue of it being
9 a historic building that the applicant approved that
10 it was truly necessary to have that much additional
11 floor area ratio or that much additional height. I
12 just felt uneasy enough about it that I thought should
13 bring the matter to the attention of the commission so
14 that they could consider those issues.

15 MS. MITTEN: Thank you, Mr. May. I would
16 like to point out that one of the circumstances under
17 which the Zoning Commission does undertake a sua
18 sponte review, as outlined in Section 3128.7A, is in a
19 particular instance where it appears to the Zoning
20 Commission that the board has exceeded its
21 prerogatives and has, thus, in effect, changed the
22 zoning, which is exactly what you've described. The
23 issue of the historic designation or lack thereof of
24 the structure is there's an inconsistency in the
25 order, it strikes me, and maybe it's just, you know, a

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1 question of whether we're using the word historic with
2 a big H or a little H, but on one of the findings of
3 fact, as you had said, this would be finding of fact
4 number 11 on page five that the applicant testified
5 that the existing structure, while not a designated
6 landmark, has a unique architectural style. On the
7 cases that I have been on, it's only when there is an
8 overt restriction on changing the structure, not by
9 choice but by mandate of another regulation that, you
10 know, the historic condition really rises to causing
11 the practical difficulty.

12 And I also noticed that on the context
13 model, I don't recall that the loss at Adams Morgan is
14 a PUD, but if it is, then that canyon effect was
15 actually blessed by the commission because that's a
16 long, long façade, long unbroken façade, and so for
17 the BZA, just as you said, to undertake to alleviate
18 this with such a generous allocation of FAR and
19 height, I think that does bear more scrutiny, so I
20 would support the request for sua sponte review.

21 Any comments or questions for Mr. May from
22 the other commissioners?

23 MR. PARSONS: I wanted to better
24 understand the historic preservation aspect of this.
25 The order says they will keep the building in its

1 entirety. What does that mean? Is that one-story
2 high? It appears from the elevations model that it's
3 a one-story building.

4 MR. MAY: It's an existing two-story
5 building, and it's somewhat confusing, again, because
6 of the topography. Without studying it again fully, I
7 believe that the Champlain Street elevation shows two
8 levels. The upper level is vacant, and the lower
9 level is the shop. But on the back side, you can
10 actually drive into the upper level because of the
11 change in the slope.

12 MR. PARSONS: So did the applicant share
13 exorbitant costs as a result of this?

14 MR. MAY: Well, there was no information
15 about costs of the development presented, and there's
16 a very clear implication from a study of the plans
17 that what is intended here is a very expensive set of
18 apartments. I mean, there is an allowance for one
19 "low-income housing unit," but, clearly, there is
20 going to be money spent on developing the property for
21 a high-end market.

22 MR. PARSONS: So the historic building
23 will be used for apartments?

24 MR. MAY: Some of it would be used for
25 apartments, and some of it used for parking.

1 MR. PARSONS: And then the existing Brass
2 Knob Restaurant?

3 MR. MAY: The existing Brass Knob store,
4 it's a salvage, architectural salvage store --

5 MR. PARSONS: Oh, okay.

6 MR. MAY: -- would remain on the lowest,
7 on the lower level, and then the upper level becomes
8 apartments at the front and the back and then parking
9 in the middle. They're actually putting a parking lot
10 into the middle of the building.

11 MR. PARSONS: So they're not gutting the
12 inside --

13 MR. MAY: The second floor --

14 MR. PARSONS: -- holding up the facades?

15 MR. MAY: -- they would be gutting.
16 That's right. They're not holding up the facades and
17 gutting the middle. They're going to build on top of
18 the existing structure. They'll insert new structure,
19 as needed, is what they described to me because I
20 asked, structurally, how this will work, and,
21 essentially, they're using this building as a platform
22 and then supplementing it, as needed.

23 MR. PARSONS: So was it your position that
24 if they remove the penthouses, I mean, did you offer
25 some solution to your concern?

1 MR. MAY: I don't recall in the discussion
2 in the session that --

3 MR. PARSONS: I mean, that's the cure here
4 is to start removing pieces of the building until --

5 MR. MAY: Yes.

6 MR. PARSONS: -- it gets down or to re-
7 zone it.

8 MR. MAY: Or to re-zone it.

9 MS. MITTEN: Well, if I could just
10 interject, too. I mean, I think that one of the other
11 issues that Mr. May raised is whether or not, in fact,
12 the issues that they cited, which is saving a
13 structure that's historic but is not designated
14 historic, so they want to have the benefit of making
15 the argument for purposes of getting a variance, but
16 they don't want to have the restrictions. I mean, I
17 assume they haven't applied to become a landmark?

18 MR. MAY: I haven't seen any indication of
19 that.

20 MS. MITTEN: So they don't want to have
21 the restrictions, so it's a self-imposed hardship in
22 that regard. And then the issue of the canyon effect,
23 I think it's a reasonable question as to whether or
24 not they've even met their burden of proof for a
25 variance.

1 MR. PARSONS: All right.

2 MS. MITTEN: So I think that's what we
3 could explore, if we undertook a review.

4 MR. PARSONS: How was it that everybody
5 was confused about the Reed Cook Overlay? I mean,
6 it's a boundary, it's pretty well defined.

7 MR. MAY: Well, the evolution of this is
8 somewhat lengthy. I'll try to do it as quickly as I
9 can. The initial thinking is that the height would
10 require a variance or would require a special
11 exception because the Reed Cook Overlay allowed only a
12 40-foot height --

13 MR. PARSONS: Right. I remember it well.

14 MR. MAY: -- and I had raised the question
15 whether, when you start to exceed 50, it should, in
16 fact, be a variance. The applicant or the applicant's
17 attorney presented a case that, in fact, that it
18 should be considered simply as a special exception
19 under Reed Cook. And while that whole thing was being
20 debated, apparently, after the case was heard
21 completely and, in fact, voted on, it was discovered
22 that, in fact, the property was not in the Overlay
23 simply because it had been zoned residential already.
24 Apparently, any property that was zoned residential in
25 some date in 1989 is not --

1 MR. PARSONS: I see.

2 MR. MAY: -- subject to the Overlay.

3 MR. PARSONS: And it has existing
4 residential use?

5 MR. MAY: It does not have existing
6 residential use.

7 MR. PARSONS: It's just zoned residential?

8 MR. MAY: It was zoned residential. It
9 was zoned R-5-B, and I assume that the existing use
10 was grandfathered because the second floor was, as I
11 understood it, offices before it was vacated.

12 MR. PARSONS: Such a mess.

13 MS. MITTEN: Anyone else have any other
14 questions? Mr. Hood.

15 MR. HOOD: Madame Chair, I just wanted to
16 ask Mr. May, I see here we had two votes, one in which
17 you oppose and the other one in which you were not
18 present and you didn't vote, and I just wondered,
19 Madame Chair, from a legal standpoint, 400.1, I think,
20 is dealing with the height, and Mr. May did not vote
21 on that. Can he bring that back to us as a sua
22 sponte?

23 MS. MITTEN: I don't think there's
24 anything that precludes that. In fact, I don't even
25 think that there's any requirement that a commissioner

1 who brings a case or decision by the BZA to the Zoning
2 Commission for sua sponte review had to have even sat
3 on the case. I don't believe you have to have even
4 participated in the case, I think that's just been the
5 tradition.

6 MR. HOOD: This condition has been very
7 traditional, and I know when I first got, we hadn't
8 had but one sua sponte, and it seems like, I'm not
9 saying I disagree. I agree with Mr. May's argument.
10 I'm just wondering, down the line, if that would be a
11 legal issue that would be thrown back at us.

12 MS. MITTEN: Well, we could ask Mr.
13 Bergstein, if you'd like.

14 MR. HOOD: I mean, if the commission feels
15 comfortable.

16 MS. MITTEN: Mr. Bergstein, is there any -
17 -

18 MR. BERGSTEIN: I agree with, I think, the
19 Chair's interpretation what the regulation says,
20 3128.1, within a 10-day period set forth in 3125.9,
21 which is a provision that says no order of the
22 commission becomes effective for 10 days. The Zoning
23 Commission may sua sponte and determine to review any
24 final decision of the board. There's no limitation as
25 to how it is that the matter comes before the Zoning

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1 Commission. I think the sense is that the Zoning
2 Commission, either through the board member or just by
3 reading the orders that the BZA grants, may decide to
4 sua sponte the order, so there's no requirement that
5 the member who actually sat on the hearing bring the
6 matter before the Zoning Commission. I agree with any
7 member of the commission can request the Zoning
8 Commission to consider a sua sponte.

9 MS. MITTEN: Thank you, Mr. Bergstein.

10 MR. HOOD: Thank you, Mr. Bergstein. I'm
11 glad we've cleared that up for future reference. I
12 think, though, in the past, each commissioner has just
13 been respectful of the commissioner who sits, and we
14 usually let them bring it forward, so I'm glad we
15 cleared that up.

16 Mr. May, I can tell you that, while I
17 agree with you and I will be voting to sua sponte this
18 with you, I'm just really concerned. It seems like
19 everything was predicated on the Reed Cook Overlay,
20 and that's been beaten up enough, so I won't ask you
21 to deliberate anymore. Thank you, Madame Chair.

22 MR. MAY: Can I respond to something that
23 Mr. Hood mentioned, and that is the fact that, on the
24 second vote, I wasn't present for the vote. I do feel
25 a need to explain that somewhat. I had been checking

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1 in with the chairman of the BZA with regard to the
2 progress on the case, and he informed me a few days
3 earlier that there were some issues with the case. He
4 explained what he thought the issues were. He did not
5 mention that there would be a re-vote on the basis
6 that this property was not in the Reed Cook Overlay.
7 Now I was on vacation at the time, I was out of town,
8 and I would not have been able to attend, but I
9 certainly would have sent in my proxy if I had been
10 aware that there would be another vote on that aspect
11 of the case. I was opposed to it as a special
12 exception, the height, and I was opposed to it as a
13 variance, and I would have voted so if I had been
14 fully informed of what the proceedings would be.

15 MS. MITTEN: Thank you. Any other
16 questions before we proceed? Mr. May, why don't you
17 put a motion on the table?

18 MR. MAY: I'm not sure exactly how this
19 should be worded, but I move that the Zoning
20 Commission perform a sua sponte review of BZA case
21 number 16869, the application of King's Creek LLC for
22 variances with regard to FAR and height.

23 MR. HOOD: I'll second that.

24 MS. MITTEN: Thank you. Any further
25 discussion? All those in favor of the motion, please

1 say aye.

2 (Chorus of ayes.)

3 MS. MITTEN: Those opposed, please say no.

4 (No response.)

5 MS. MITTEN: Ms. Sanchez, would you record
6 the vote?

7 MS. SANCHEZ: Yes, staff will record the
8 vote five to zero to zero; Mr. May making the motion;
9 Mr. Hood seconding; Commissioners Mitten, Parsons, and
10 Hannaham in favor of sua sponte review of BZA case
11 number 16869.

12 MS. MITTEN: Thank you.

13 MR. BASTIDA: Thank you, Madame Chairman.

14 This will be Zoning Commission case 0237, and the
15 staff will proceed expeditiously to comply with the
16 Section 3128 and will try to do these within an
17 expeditious within a 60-day pay period, I mean --

18 MS. MITTEN: Something on your mind, Mr.
19 Bastida?

20 MR. BASTIDA: Yes. With a 60-day time
21 period because of the need for the ANC, which is a
22 party to be able to address the issues, if they so
23 choose to do so.

24 MS. MITTEN: All right.

25 MR. BASTIDA: So thank you, Madame

1 Chairman.

2 MS. MITTEN: Thank you, Mr. Bastida.
3 We'll now adjourn this special public meeting of the
4 Zoning Commission, and we will resume in five minutes.

5 We'll let the Forest Hills Neighbors for Responsible
6 Preservation set up, if you need a few minutes to do
7 that. I believe we were going to have a slide
8 presentation, so we'll just break for five minutes and
9 re-convene. Thank you.

10 (Whereupon, the above-entitled matter was
11 concluded at 6:31 p.m.)

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