

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

NOVEMBER 18, 2008

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

MICHAEL G. TURNBULL, FAIA,  
Commissioner (OAC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary  
BEVERLEY BAILEY, Sr. Zoning Specialist  
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.  
SHERRY GLAZER, ESQ.

The transcript constitutes the minutes from the Public Meeting held on November 18, 2008.

T-A-B-L-E O-F C-O-N-T-E-N-T-S

Opening Remarks . . . . . 4

APPLICATION NO. 17829 . . . . . 5

**Vote:** Five to zero to zero in favor 14

REQUEST FOR MODIFICATION OF APPROVED PLANS  
AND WAIVER OF SIX-

MONTH TIME REQUIREMENT TO APPLICATION NO.  
178431 . . . . . 14

**Vote:** Three to zero to two in favor 46

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

9:56 a.m.

CHAIRPERSON MILLER: This meeting will come to order.

This is the November 18th Special Public Meeting of the Board of Zoning Adjustment of the District of Columbia.

y

My name is Ruthanne Miller. I'm the Chair of the BZA.

To my right is Mr. Marc Loud, he is our Vice Chair. And next to him is Mr. Michael Turnbull from the Zoning Commission. To my left is Mary Oates Walker and Shane Dettman, Board members. And next to Mr. Dettman is Mr. Clifford Moy from the Office of Zoning, Lori Monroe from the Office of Attorney General And Ms. Beverly Bailey from the Office of Zoning.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door.

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

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

11                   Does the staff have any  
12 preliminary matters?

13                   MR. MOY: Yes, Madam Chair, but we  
14 ought to be more efficient and take that up on  
15 a case-by-case basis.

16                   CHAIRPERSON MILLER: Okay. Then  
17 as I understand it we have two cases this  
18 morning on the agenda for the Special Public  
19 Meeting and then afterwards we will be having  
20 a public hearing on other cases.

21                   So let's proceed with the agenda  
22 then for the Special Public Meeting.

1 MR. MOY: Yes. Good morning,  
2 Madam Chair, members of the Board. The first  
3 of the two cases for the Board's decision this  
4 morning is Application No. 17829 of Michael  
5 Barham and Monica Monroe. I'm going to read  
6 the original advertisement, Madam Chair, for  
7 the record. And that was pursuant to aa DCMR  
8 § 3104.1 and 3103.2 for a special exception  
9 use variance to establish an accessory  
10 basement apartment under section 202.10,  
11 alternatively a use variance from the  
12 requirement that an accessory apartment be  
13 located in a detached dwelling under  
14 subsection 300.3, in the R-2 District at  
15 premises 5819 5th Street, Northwest. That's in  
16 Square 3264, Lot 108.

17 At the Board's public hearing the  
18 Board will recall on October 21, 2008, the  
19 application was amended to request a use  
20 variance zoning relief from the requirement  
21 that an accessory apartment be located in a  
22 detached dwelling under subsection 300.3

1           Also on October 21st the Board  
2 completed public testimony, closed the record  
3 and scheduled a special public meeting on  
4 November the 18th, 2008. That's today. The  
5 Board requested additional information to  
6 supplement the record from the applicant and  
7 the Office of Planning and responses.

8           First, the applicant did make a  
9 filing and that is attached in your case  
10 folders dated October 24th. The Board is also  
11 in receipt of a Office of Planning report as  
12 well as responses.

13           Here we go. The applicant's  
14 filing in your case folders is identified as  
15 Exhibit 29. The Office of Planning  
16 supplemental report is identified as Exhibit  
17 30.

18           Finally, the Board is to act on  
19 the merits of the application.

20           And that completes the staff's  
21 briefing, Madam Chair.

22           CHAIRPERSON MILLER: Thank you

1 very much, Mr. Moy.

2 I think as you captured what's  
3 going on here is that when we last heard this  
4 case it was filed as a special exception from  
5 202.10 which allows an accessory apartment to  
6 be added with an existing one family detached  
7 dwelling if approved by the BZA. And at the  
8 hearing the Board came to the conclusion  
9 based on the evidence that was presented there  
10 that this was not appropriate under 202.10.  
11 That, in fact, it should be a use variance  
12 from 303 to permit the property to operate as  
13 a flat. We're not allowed as a matter of right  
14 use in the R-2 District.

15 We found that an accessory  
16 apartment wasn't being added because there was  
17 no internal connecting stairway.

18 And at that time the party did  
19 choose to address the case verbally for a use  
20 variance, but we did give him the opportunity  
21 to supplement his argument, which he did in  
22 the filing that you referenced, the October

1 24th, 2008 filing. And also we gave the  
2 opportunity to Office of Planning to give a  
3 closer evaluation as a use variance and submit  
4 a filing on that, which they did. And it's in  
5 support of the application as a use variance.

6 Before I get into the analysis for  
7 our use variances, is there anything anyone  
8 wants to say, particularly with respect to  
9 this property? I'll just say a little bit and  
10 then you all can add in.

11 Basically as I understood it, that  
12 this applicant purchased a property under the  
13 assumption that the basement could be used for  
14 another family given that the layout was such  
15 that there was no internal connection by a  
16 stairway and there was only an outdoor  
17 entrance, and there were separate appliances  
18 and metering, et cetera, for that base area  
19 that he believed that it was a flat,  
20 basically. And all the renovations took place  
21 before the applicant took possession of the  
22 property. And I think even perhaps it was a

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1 fiancée or whatever you actually did the  
2 purchasing and he came along later.

3 And then there's also evidence in  
4 the record about permits and inspection  
5 letters from DCRA which gave some more  
6 indication that this could be used as a flat.

7 Does anybody want to add anything  
8 else actually before I get into the analysis?

9 COMMISSIONER TURNBULL: Madam  
10 Chair, I would just add or reiterate what the  
11 Office of Planning said on page 2 of their  
12 report that the residential character of the  
13 neighborhood is not compromised. Because  
14 there's nothing really externally that really  
15 differentiates this house from the way it was  
16 before.

17 CHAIRPERSON MILLER: Right. And  
18 that does come into our analysis like on the  
19 third prong no adverse impact.

20 I was briefly going to so then set  
21 it up. It's a use in variance analysis. The  
22 first prong is whether there's an exceptional

1 condition. And then exceptional condition can  
2 go to zoning history, it can go to what's  
3 already on the property.

4 I think OP did an excellent job as  
5 well as the applicant in characterizing this  
6 as the exceptional condition is the layout of  
7 the property. It is configured now for two  
8 separate occupations as a flat and also there  
9 was a building permit issued January 12, 2005  
10 that allowed renovation removing the interior  
11 stairwell. And there was an inspection letter  
12 dated August 9th, 2005 for use as a two family  
13 unit.

14 Then the next prong is undue  
15 hardship that relates to this exceptional  
16 condition. And the undue hardship, basically  
17 what's exceptional or unique about the  
18 property that leads to an undue hardship upon  
19 the owner.

20 Basically the applicant has made  
21 the case that they relied on the layout and  
22 the DCRA documents and also I think some sales

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1 documents to believe that it could be rented  
2 it and that there is a financial hardship that  
3 would ensure to that applicant if he wasn't  
4 being able to rent it out. But that's somewhat  
5 very particular to this applicant. But I  
6 think also the hardship would go to any owner  
7 I think in this case because they would have  
8 to undo all the renovations that were done  
9 before in order to make this work as a single  
10 family dwelling. And I think that's an undue  
11 hardship in this case.

12 And I'll say one more thing. And  
13 basically then, as Mr. Turnbull said, that use  
14 of the property in this manner would not be  
15 adverse to the community, the neighborhood or  
16 contrary to the Comprehensive Plan or Zoning.  
17 Basically they're not increasing the parking,  
18 they're not making any external changes on the  
19 property. So there was no evidence at all of  
20 any detriment to the public good.

21 So I think that covers the three  
22 prongs.

1                   Does anybody else want to add  
2 anything else?

3                   I think the hardest part was just  
4 putting this in the right relief category.

5                   All right. If there's no further  
6 discussion, then I would approve Application  
7 No. 17829. I would move to approve  
8 Application No. 17829 of Michael Barham and  
9 Monica Monroe for a use variance to establish  
10 an -- okay. Let me pause here for a second.

11                   This is a use variance from 300.3  
12 to permit the property to operate as a flat  
13 where not allowed as a matter of right use in  
14 the R-2 District.

15                   MEMBER WALKER: Second, Madam  
16 Chair.

17                   CHAIRPERSON MILLER: Further  
18 comments? Okay.

19                   All those in favor say aye.

20                   ALL: Aye.

21                   CHAIRPERSON MILLER: All those  
22 opposed?

1 All those abstaining?

2 And would you call the vote,  
3 please?

4 MR. MOY: Yes, Madam Chair. The  
5 staff would record the vote as five to zero to  
6 zero on the motion of the Chair Ms. Miller and  
7 second by Ms. Walker. Also in support of the  
8 motion Ms. Dettman, Mr. Loud and Mr.  
9 Turnbull.

10 Again, the vote is five to zero to  
11 zero.

12 CHAIRPERSON MILLER: Thank you.

13 And this can be a summary order as  
14 there is no party in opposition.

15 MR. MOY: Very good.

16 The next and last case for  
17 decision, Madam Chair, in this Special Public  
18 Meeting is before the Board is a request for  
19 modification of approved plans and waiver of  
20 the six-month time requirement, and this is  
21 to Application 17431 of King's Creek, LLC,  
22 pursuant to 3128 of the Zoning Regulations.

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1                   The original application, Madam  
2 Chair, is to 11 DCMR §§ 3104,1 and 3103.2 for  
3 a special exception to allow a building height  
4 of 50 feet in the Reed Cooke Overlay, under  
5 §1403 and a variance to permit an addition to  
6 a nonconforming structure under subsection  
7 2001.3, a variance from the FAR, the floor  
8 area ratio requirements of §402 and a variance  
9 from the court requirements under §406 to  
10 allow an addition to and conversion of an  
11 existing building for residential use in the  
12 RC/R-5-B District. This is at premises 2329  
13 and 2335 Champlain Street, Northwest in Square  
14 2563, Lots 103 and 816.

15                   On the 31st of 2008 the applicant  
16 filed a request for modification of approved  
17 plans and the waiver of the six-month  
18 requirement. This document is identified in  
19 your case folders as Exhibit 56, Madam Chair.

20                   Also on November 10, 2007 the  
21 Office of Planning filed a supplement to a  
22 report, and that is identified in your case

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1 folders as Exhibit 57.

2 What's before the Board in terms  
3 of the Board's action is to act on the waiver  
4 of the six-month time requirement pursuant to  
5 3129.3 which states that requests for minor  
6 modifications be filed within a six month  
7 period from issuance of the final order.

8 Second then would be, depending on  
9 the Board's action, acting on the merits of  
10 the requested modification.

11 Madam Chair, we also have two  
12 preliminary matters, possibly one of the two  
13 at any rate.

14 One is a filing from the ANC which  
15 the office received on November the 14th,  
16 which identified as Exhibit 58 which appears  
17 to be timely.

18 The second is a filing from the  
19 applicant, which is an addendum to their  
20 initial filing to revise one of the sheets,  
21 the penthouse sheet which is Sheet A-07. And  
22 that document is identified as Exhibit 59.

1 Both these two filings were  
2 received on November the 14th.

3 That completes the staff's  
4 briefing, Madam Chair.

5 CHAIRPERSON MILLER: Thank you  
6 very much, Mr. Moy.

7 Why don't we start what I guess I  
8 would characterize as some of the preliminary  
9 issues.

10 First of all, a request for  
11 modification of plans is allowed within six  
12 months unless we grant a waiver of a late  
13 filing, basically. That is 3129.3, request  
14 for modification of plans has to be filed with  
15 the Board not later than six months after the  
16 date of the final order approving the  
17 application.

18 We often do waive this. And the  
19 standard is for good cause, generally, and no  
20 prejudice to any party. Basically the  
21 applicant in this case has presented as good  
22 cause that there has been a downturn in the

1 condominium market. I think that this Board  
2 is aware of. And they needed time to  
3 reconfigure their plans to convert the  
4 structure from condominium use to rental use.

5 And there's no indication that any  
6 parties would be prejudiced by waiving the  
7 six-month requirement. We don't have anything  
8 in the record to that effect.

9 Office of Planning is in support  
10 nothing that the changes are to exterior  
11 design. It doesn't change the view from the  
12 street level or increase the footprint of the  
13 building.

14 Is there any opposition to  
15 granting a waiver? Okay.

16 And I'm going to step back and say  
17 that I sat on this case originally. And Mr.  
18 Loud and Mr. Dettman did not. And I think  
19 that what we need is for you all to put on the  
20 record that you've read the record and are  
21 ready to deliberate on this modification  
22 request.

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1                   VICE CHAIRPERSON LOUD: Thank you,  
2 Madam Chair.

3                   As I you indicated, I did not sit  
4 on the original case, but was provided the  
5 full record by Mr. Moy and have read the full  
6 record. And having so read, do not have any  
7 opposition to a waiver of the six-month  
8 requirement.

9                   MEMBER DETTMAN: Madam Chair, I've  
10 also reviewed the record. I do not have any  
11 problems with granting the waiver and prepared  
12 to go forward.

13                   CHAIRPERSON MILLER: Okay. Good.

14                   The next preliminary matter is  
15 what I guess would be considered a request for  
16 a postponement of our deliberation by the ANC.  
17 It's Exhibit 58 that the Board just saw this  
18 morning. The ANC was and is a party to the  
19 case. They're automatically a party to ever  
20 case. And our rules provide that at 3128.4 a  
21 party shall have ten days within which to  
22 submit written comments that such a party may

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1 have concerning the requested modification.

2 Let me ask if the parties are here  
3 in this case? Is the applicant here? And is  
4 the ANC here? Okay. Well, I'll call you if  
5 we decide we need to call you.

6 Basically, the ANC says that voice  
7 vote at our November 5th, 2008 meeting with a  
8 quorum of seven Commissioners present,  
9 Advisory Neighborhood Commission 1C voted to  
10 request a postponement of the November 18,  
11 2008 BZA hearing on the above referenced case.  
12 This request is to allow ANC 1C sufficient  
13 time to allow notice and review by members of  
14 the community at large and to allow full  
15 consideration by vote of any proposed  
16 alternations or changes to be BZA Order 17431  
17 at the next general session meeting of ANC 1C  
18 on December 3, 2008.

19 Actually, I think it would be  
20 appropriate to call the applicant up so that  
21 we could hear the applicant's response to this  
22 request, unless other Board members feel

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1 otherwise. Okay.

2 And is there any other party here  
3 in this case? Okay.

4 Sir, why don't you start, yes,  
5 with identifying yourself for the record,  
6 please?

7 MS. BAILEY: Madam Chair, I don't  
8 know if you want the applicant to come over  
9 here to speak?

10 CHAIRPERSON MILLER: Yes, if  
11 that's what works best, that's fine.

12 MR. GHARAI: My name is Sassan  
13 Gharai. I am the architect on the project. I'm  
14 with SGA Companies. And next to me is Mr.  
15 David Cordingley, who is the owner of the  
16 property.

17 CHAIRPERSON MILLER: Are you all  
18 right standing like that.

19 MR. GHARAI: Yes, it's fine.

20 CHAIRPERSON MILLER: Well, I was  
21 just going to ask for a response to the  
22 motion. And I'm just wondering since you're

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1 not attorneys, maybe we ought to swear you in.

2 MR. GHARAI: Okay.

3 CHAIRPERSON MILLER: Even though  
4 this isn't a real hearing, per se.

5 MR. GHARAI: Okay.

6 CHAIRPERSON MILLER: Ms. Bailey,  
7 would you?

8 (Witnesses sworn).

9 CHAIRPERSON MILLER: Okay. And  
10 then you'll need to speak into the microphone  
11 for it to be on the record and everything.

12 MR. GHARAI: Yes.

13 CHAIRPERSON MILLER: I'm sorry.  
14 Could you repeat identifying yourself, please?

15 MR. GHARAI: My name is Sassan  
16 Gharai. I'm the architect on the project. I'm  
17 with SGA Companies. And this is:

18 MR. CORDINGLEY: My name is Dave  
19 Cordingley. I'm with Gourley & Gourley. We're  
20 the owner of the properties as being the  
21 lender before.

22 CHAIRPERSON MILLER: Okay. Do you

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1 have a response to this request? First of  
2 all, have you been served with it?

3 MR. GHARAI: Yes, we've read it.  
4 I think our response is that (microphone does  
5 not work) -- essentially stays the same.

6 Can I go back there now? Okay.

7 CHAIRPERSON MILLER: Does it work  
8 now? Does yours work?

9 MR. GHARAI: Ah, there we go.  
10 Sorry. Sorry about that. I think it does work  
11 now.

12 Our response is basically is,  
13 first of all, we did go and meet with the ANC  
14 last Wednesday night. And we've made very,  
15 very little changes to the project. None of  
16 the changes that we're asking for have any  
17 effect on any of the original requests that we  
18 made to the BZA. So, I guess my response is  
19 that we would like to go forward without  
20 really having to go back to the ANC. Because  
21 the ANC basically approved this in the  
22 condition that it's in and the changes that

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1 we're making don't change of the things that  
2 they approved.

3 CHAIRPERSON MILLER: You're  
4 referring to two years ago they approved?

5 MEMBER DETTMAN: Yes. Yes.

6 CHAIRPERSON MILLER: Okay. I have  
7 a question also. I think we might as well  
8 bring this in. The supplemental information  
9 that just came to the Board this morning as  
10 well, which was a revision to the request for  
11 approval of minor modification of approved  
12 plans.

13 MR. GHARAI: What we did, though,  
14 was when we met with the ANC they seemed to  
15 have a problem with us having a gym at the  
16 penthouse level. So we basically took that  
17 out.

18 CHAIRPERSON MILLER: Oh.

19 MR. GHARAI: And that's the extent  
20 of the change that we made.

21 CHAIRPERSON MILLER: This is  
22 somewhat hearsay because they're not here for

1 them to represent their side. But I'm just  
2 curious what was their concern about the gym?

3 MR. GHARAI: I think in that  
4 neighborhood there have been issues about  
5 rooftops being used as living space. I think  
6 that was basically what it was. And they  
7 talked about the definition in the zoning code  
8 of what a penthouse space can be used for.

9 CHAIRPERSON MILLER: And without  
10 getting too much into the merits, though, the  
11 gym was replacing what?

12 MR. GHARAI: It was replacing --  
13 there were four individual penthouse spaces  
14 that belonged to the condo below. So what they  
15 were replacing was individual space that  
16 belonged to the condo owners and converting it  
17 into basically what would become common space.

18 CHAIRPERSON MILLER: Is this the  
19 hot tubs that are being replaced?

20 MR. GHARAI: Yes, the hot tubs got  
21 taken out.

22 CHAIRPERSON MILLER: Okay.

1 MR. GHARAI: Keeping with the  
2 times.

3 CHAIRPERSON MILLER: And who has  
4 seen your revision?

5 MEMBER DETTMAN: Just you have,  
6 basically.

7 CHAIRPERSON MILLER: So they  
8 haven't had a chance to comment on this?

9 MR. GHARAI: Well, we didn't  
10 change the actual physical layout of anything.  
11 I mean, what we basically did was change the  
12 use of the space. So but you're right, we  
13 didn't go back to them and say okay we've  
14 changed this now based on your comments.

15 CHAIRPERSON MILLER: And is there  
16 a prejudice to the applicant if the Board were  
17 to grant the postponement to after December  
18 3rd?

19 MR. GHARAI: I think the issue  
20 there would be that our two year limit is up  
21 on the 28th of November. So in that respect,  
22 yes, there would be.

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1 CHAIRPERSON MILLER: Is the  
2 architectural layout exactly the same whether  
3 it's storage or gym?

4 MR. GHARAI: Yes, it is the same.

5 CHAIRPERSON MILLER: Do Board  
6 members have any other questions?

7 VICE CHAIRPERSON LOUD: Thank you,  
8 Madam Chair. Just a couple of quick follow up  
9 questions.

10 Just to clarify, the ANC's report,  
11 our Exhibit 58, indicates that they met  
12 November 5. And I think you continued to  
13 reference a November 12th meeting.

14 MR. GHARAI: Correct. I wasn't--  
15 I wasn't --

16 VICE CHAIRPERSON LOUD: So a  
17 separate meeting here?

18 MR. GHARAI: Yes. I wasn't  
19 present at the earlier meeting.

20 VICE CHAIRPERSON LOUD: Okay.

21 MR. GHARAI: And I don't know that  
22 that happened in public because we weren't

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1 aware of it, and I think otherwise we would  
2 have gone to that meeting. Because they talk  
3 about a voice vote. So I'm not entirely clear  
4 of when and how that meeting really took  
5 place.

6 VICE CHAIRPERSON LOUD: But for  
7 your November 12 meeting you did meet with the  
8 Chair of the ANC and an assembly of community  
9 people?

10 MR. GHARAI: Yes, I did. I did.

11 VICE CHAIRPERSON LOUD: Okay.

12 MR. GHARAI: There were three  
13 people from the ANC present and there were  
14 probably 15/16 community members present as  
15 well.

16 VICE CHAIRPERSON LOUD: Do you  
17 recall any vote being taken at that meeting?

18 MR. GHARAI: Yes, they did take a  
19 vote. They passed a -- there was a motion  
20 passed to basically -- what they really wanted  
21 to do was they really wanted this to start all  
22 over again, which I felt was unfair.

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1 VICE CHAIRPERSON LOUD: And was  
2 that your recollection of that?

3 MR. GHARAI: Yes. Yes.

4 VICE CHAIRPERSON LOUD: That was  
5 the motion that passed?

6 MR. GHARAI: Yes. Yes.

7 VICE CHAIRPERSON LOUD: Okay.  
8 Just switching gears a little bit. In terms of  
9 the prejudice to the applicant by delaying a  
10 decision, apart from the fact that the  
11 November 2006 order would expire, I guess  
12 November 28th, or somewhere thereabouts, is  
13 there any other prejudice?

14 MR. GHARAI: No.

15 VICE CHAIRPERSON LOUD: Okay.

16 MR. GHARAI: No. And I -- that's  
17 it.

18 VICE CHAIRPERSON LOUD: Thank you.

19 I'm sorry, one final question. At  
20 the underlying hearing the BZA granted party  
21 status to a gentleman named John Holmes.

22 MR. GHARAI: Correct.

1 VICE CHAIRPERSON LOUD: And I  
2 believe you did copy him in your earlier  
3 submission --

4 MR. GHARAI: Yes.

5 VICE CHAIRPERSON LOUD: -- when it  
6 was still going to be a gym?

7 MR. GHARAI: Yes.

8 VICE CHAIRPERSON LOUD: But it  
9 doesn't look like he was served with respect  
10 to the modification to storage space.

11 MR. GHARAI: Hold on. No, we  
12 didn't.

13 VICE CHAIRPERSON LOUD: Thank you.

14 CHAIRPERSON MILLER: Okay. I  
15 guess if there are no other questions, you can  
16 take a seat again.

17 MR. GHARAI: Okay. Thank you.

18 MR. CORDINGLEY: Thank you.

19 CHAIRPERSON MILLER: Okay. I guess  
20 I'll start the discussion on this. This is  
21 something that really just came to the Board's  
22 attention this morning. So I'll have to see

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1 whether we're ready to resolve this. I'm  
2 sorry the ANC's not here to question them a  
3 little further. But they have their request.

4 And anything like a postponement  
5 or a waiver we talk about granting for a good  
6 cause and no prejudice to any party. So  
7 that's what we need to weigh here.

8 On the one hand when I look at the  
9 ANC letter I don't see a good argument for a  
10 good cause that effects the modifications  
11 here. I just see a request for postponement.  
12 They say to allow notice and review by members  
13 of the community at large and full  
14 consideration. But they had an ANC meeting,  
15 apparently. So I'm not sure why that wasn't  
16 adequate.

17 If we get into it, you know, we're  
18 talking about this is a request for minor  
19 modifications. So we have to think of it in  
20 that context.

21 On the other hand, what's the  
22 prejudice to the applicant? We would have to

1 take some action today if we were to postpone  
2 it to either only postpone it to before  
3 November 28th or else grant an extension of  
4 the order today while this is being continued,  
5 if we were to continue it.

6           You know, I also find it hard to  
7 separate this from the submission on November  
8 14th in which the gym space has changed to  
9 storage. What do we do that? That has not  
10 been noticed on the parties. So if we were to  
11 consider that submission, then I think we  
12 would probably, if the applicant wanted us to,  
13 postpone. However, I want to raise one other  
14 question, and that is to my colleges. I'm not  
15 sure I have the answer right now on whether we  
16 want to break or whether we can sort this out.

17           But if this storage room is not  
18 changing, whether it's the use that was  
19 changing, storage versus gym, whether that's  
20 something we have to even approve, you know.  
21 We didn't condition this. The plans were  
22 approved as they were marked. Whether they

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1 can have flexibility either way or whether we  
2 need to open this up to the ANC. This is a  
3 use question and that wasn't at issue in the  
4 prior proceeding.

5 So I guess on the one hand I have  
6 less concern if we were to go forward today  
7 and vote on what was presented to the ANC and  
8 their response, that doesn't give me as much  
9 of a problem as this later submission. Because  
10 that hasn't been served on the parties. And  
11 there is another party, as Mr. Loud I think  
12 indicated to the proceeding below.

13 And Office of Planning, you know  
14 is this something that's going to create a  
15 problem without getting into the merits too  
16 much?

17 MEMBER DETTMAN: Well, Madam  
18 Chair, I don't exactly know the answer to your  
19 question but I do have a thought to share with  
20 respect the penthouse and whether its used as  
21 a gym or storage.

22 I heard the applicant just say

1 that the reason why this was changed is the  
2 ANC had concerns about what that space was  
3 going to be used for and I believe he kind of  
4 said that the ANC tied it to some Zoning  
5 Regulations, that the Zoning Regulations  
6 prescribed what these penthouses are able to  
7 be used for.

8 I don't know of anyplace in the  
9 Zoning Regulations that actually prescribe  
10 what uses can go in there. I do know, however,  
11 that the Height On Buildings Act does speak to  
12 it. But the Zoning Regulations themselves  
13 don't.

14 So the reason why I bring this up  
15 is that if the applicant believes that having  
16 a gym up there is going to make these  
17 apartments more marketable and that the use is  
18 allowed under the Zoning Regulations, I would  
19 be comfortable going forward with what the ANC  
20 was presented with instead of the recent  
21 modification.

22 And you might want to pose the

1 question to OP. They might know where in the  
2 regs it says that they can't be used for a  
3 gym. I just can't find it.

4 CHAIRPERSON MILLER: Well, I think  
5 if we were to go that route, which is where I  
6 was more comfortable also because the parties  
7 had an opportunity to respond, and they did.  
8 And even though the ANC's response was a  
9 request for more time, they didn't indicate  
10 why that was justified. But I think we would  
11 have to ask the applicant, you know, which one  
12 they want to proceed with. Because I think  
13 with what you're hearing is that the second  
14 one has not been served on --

15 MR. GHARAI: Madam Chairperson,  
16 we'd be happy to stick with the gym and have  
17 you ignore the last submission that we made.

18 CHAIRPERSON MILLER: Any questions  
19 while they're up here?

20 Okay. Thank you.

21 I would suggest then that we go  
22 forward with deliberating on this motion for

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1 modification of plans because, first of all,  
2 I think in the ANC letter they just don't give  
3 enough grounds substantively at all as to why  
4 they need this postponement, and that is the  
5 standard. And sufficient time it's just not  
6 clear why they didn't have sufficient time in  
7 their November 5th meeting.

8 Also, this letter is not even  
9 signed by the chair of the ANC. Apparently  
10 it's only signed by the Chair of the Planning,  
11 Zoning and Transportation Committee.

12 So is there a consensus then that  
13 we would go forward on the modification motion  
14 that was filed by the applicant. And we  
15 would, I guess, disregard the November 14th  
16 filing. I guess I would interpret that as the  
17 applicant is withdrawing it.

18 MEMBER DETTMAN: And, Madam Chair,  
19 just --

20 CHAIRPERSON MILLER: Exhibit 59  
21 that was being withdrawn.

22 MEMBER DETTMAN: And just so the

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1 record is clear, we're essentially denying the  
2 request from the ANC to postpone?

3 CHAIRPERSON MILLER: Yes. Because  
4 good cause hasn't been shown.

5 I think there is we talked about  
6 whether it would be prejudiced to a party, we  
7 probably have the authority to extend this  
8 order. So there might not be great prejudice.  
9 But I think that when a party is asking for an  
10 extension of time they have to say more than  
11 they need more time. You know, what is the  
12 good cause.

13 VICE CHAIRPERSON LOUD: Madam  
14 Chair, I would also be in favor of allowing  
15 the proceeding to go forward today. I've  
16 noticed as well that seven of the eight  
17 Commissioners apparently were present November  
18 5th. And the proffered reason for wanting the  
19 postponement would be so that there could be  
20 larger briefing of the community, which I do  
21 understand that. But the fact that seven of  
22 the eight were present and the word was out

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1 and available to those seven suggest to me  
2 that there may have been sufficient  
3 opportunity to get the word out in the  
4 community in addition to which apparently  
5 there was a follow up meeting on November 12  
6 that there's been some testimony about. So I'm  
7 not sure that the notice issue is one that at  
8 the end of the day is going to have a lot of  
9 impact in that community.

10 And the underlying case that came  
11 before us concluded with the ANC largely  
12 supportive of the application. I think they  
13 ended up not expressing an opinion at all on  
14 the height issue, but supporting the other  
15 issues. And none of that is being modified or  
16 altered here.

17 So all things being equal, I'd be  
18 in support of moving forward today and  
19 bringing this to a conclusion,

20 CHAIRPERSON MILLER: Okay. Then  
21 it's the consensus of this Board to deny the  
22 request of the ANC for a postponement to grant

1 the waiver of the six-month to file the  
2 request for modification. Okay. And now we  
3 can proceed the merits of this.

4 And, you know, we do have to keep  
5 in mind that this isn't a general application,  
6 it's a minor modification. And I think that  
7 what we were hearing from the applicant was  
8 that, you know, if there were certain concerns  
9 that perhaps some individuals wanted to reopen  
10 case. But that's not what's appropriate. And  
11 that's not what's before us.

12 All right. Why don't we get into  
13 the request what are the modifications? Do  
14 either of you want to address the proposed  
15 modifications, how it's different from the  
16 previous plans. We did talk about elimination  
17 of hot tubs to begin with.

18 MEMBER DETTMAN: Madam Chair, I  
19 can take the Board through the minor  
20 modifications to the approved plans, which is  
21 what we have before us is Exhibit 56, Exhibit  
22 B, our Exhibit 56 and Attachment B to that

1 exhibit which shows those modifications.

2

3 And I guess what I can do is use  
4 DCOP's supplemental report, which is our  
5 Exhibit 57, because they do a very good job in  
6 three very brief bullet points of describing  
7 the modifications.

8 We've already mentioned the  
9 elimination of private penthouses for the  
10 fourth floor units. Those were private roof  
11 terraces for the fourth floor units. Instead  
12 what the modified plans show is that they've  
13 combined those private penthouses and  
14 essentially made the rooftop terrace available  
15 to all of the residents of the building. So  
16 they've reconfigured it to house a gym, a  
17 residence lounge, restrooms and some access  
18 stairs in order to provide two means of egress  
19 to the roof.

20 It should be noted that the area  
21 of the penthouse is going to be reduced by 400  
22 square feet as well.

1           And finally -- well, I've already  
2 mentioned it. That they've reconfigured the  
3 fourth floor to accommodate a staircase to the  
4 rooftop and place individual mechanical  
5 equipment within each unit.

6           I believe it was noted in Exhibit  
7 56 that some of the apartments are going to  
8 become smaller as a result of providing that  
9 extra stair as well. But essentially, and  
10 I'll read right from DCOP's report. "The  
11 proposed reconfiguration would not effect the  
12 exterior design, change the view from the  
13 street level or increase the building  
14 footprint."

15           So it does appear that these  
16 modifications are minor.

17           And I guess maybe a final bullet  
18 point, and maybe this could be confirmed by  
19 DCOP, that with respect to the relief that was  
20 granted to FAR, height of building and the  
21 court, none of these modifications change the  
22 degree of the variances or changes the special

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1 exception analysis that was approved by the  
2 Board previously.

3 CHAIRPERSON MILLER: Thank you.  
4 Yes, I would agree. And even though when I  
5 was thinking about the ANC's request, I mean  
6 when we look at their postponement, none of  
7 the relief that's being sought effects the  
8 relief that we granted, the zoning relief. So  
9 it's not a time to open up new arguments,  
10 really.

11 So, yes, I thought that the Office  
12 of Planning did a very good job in succinctly  
13 addressing this and the applicant laying it  
14 out. And I would agree that these are minor  
15 and they don't effect the relief that was  
16 granted by the Board.

17 Other comments?

18 VICE CHAIRPERSON LOUD: No. I  
19 agree with Mr. Dettman's analysis and support  
20 it.

21 The only thing I would add is that  
22 it appears that the applicant is trying to

1 spin on a dime and succeeding in terms of the  
2 market downturn and not ending up holding a  
3 piece of property that's utterly  
4 nonproductive. And this is a way to allow the  
5 property to have a productive use in that  
6 community. So I think it's something that for  
7 all the reasons that were previously mentioned  
8 and just the reality of the market in the  
9 several months and making a productive  
10 presence in the community instead of an empty  
11 blight in the community, that it's something  
12 that I'll support.

13 CHAIRPERSON MILLER: Okay. Yes.  
14 That's a very good point. Yes, housing is  
15 quite critical and the developers have had to  
16 make some changes to respond to the market.

17 Okay. Any other comments.

18 MEMBER DETTMAN: Just a question,  
19 Madam Chair. As we move forward upon voting,  
20 will the Board need to extend the original  
21 order as well in that it's going to expire on  
22 november 28th or will -- if the Board were so

1 inclined to approve the modifications, does  
2 that provide another two years.

3 CHAIRPERSON MILLER: I guess we  
4 should clarify in the order, but I interpret  
5 the rules as that this would extend it another  
6 two years and this modification would be an  
7 extension of the previous order. So they're  
8 one order; well, they're two orders but  
9 they're two orders together, whatever, the  
10 same property. So that it would extend the  
11 time, start the clock going for another two  
12 years unless we wanted to make it shorter.  
13 But I don't see any reason to do that with any  
14 of the evidence that we have.

15 MS. MONROE: Madam Chair, so the  
16 Board is not going to extend, is that it?

17 CHAIRPERSON MILLER: No. We're  
18 saying that it would be two years. That this  
19 would be a supplement to the underlying order  
20 and they would be read together, and that  
21 there would be two more years starting from  
22 the date of this order unless you think it

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1 should be characterized otherwise?

2 I think it's the consensus of this  
3 Board, though, that there would be two more  
4 years. Is there an issue with that?

5 MS. MONROE: Well, I think without  
6 explicitly extending, the modification would  
7 just go for the rest of the term of this  
8 order, which would be a few weeks.

9 CHAIRPERSON MILLER: All right.  
10 Let's explicit state in the order that it will  
11 be for two years from the date of the  
12 modification order. Okay.

13 Any other comments before we vote  
14 on this? Okay.

15 Then I would move approval of  
16 request for modification of approved plans and  
17 waiver of the six-month time requirement to  
18 Application No. 17431 King's Creek, LLC,  
19 pursuant to 3129 of the Zoning Regulations.

20 Do I have a second?

21 VICE CHAIRPERSON LOUD: Second,  
22 Madam Chair.

1 CHAIRPERSON MILLER: Further  
2 comments?

3 All those in favor say aye?

4 ALL: Aye.

5 CHAIRPERSON MILLER: All those  
6 opposed?

7 All those abstaining?

8 MR. MOY: Staff would record the  
9 vote as three to zero to two, Madam Chair. It  
10 was on the motion of the Chair Ms. Miller to  
11 approve. Seconded by Mr. Loud. Also in  
12 support of the motion Mr. Dettman. We have a  
13 Board member and Zoning Commission member not  
14 participating on the case. So, again, it's  
15 three to zero to two. And also to noting the  
16 other actions of the Board attendant to this  
17 approval.

18 Summary order, Madam Chair?

19 CHAIRPERSON MILLER: I think this  
20 should be a summary order unless my colleagues  
21 disagree with me. We don't have a party that  
22 I think is in opposition. As evidenced in our

1 record we did have the request for  
2 postponement.

3 MS. MONROE: Madam Chair?

4 CHAIRPERSON MILLER: Yes.

5 MS. MONROE: Pardon me. But I  
6 think since the ANC is a party and their  
7 motion was denied, that that would have to be  
8 addressed in the order.

9 CHAIRPERSON MILLER: Okay. I  
10 guess, you know, and that's fine. It's just  
11 that some of our full orders take several  
12 months to issue. And I'm not sure whether this  
13 rises to that. Part of my concern is this  
14 letter not being signed by the Chair of the  
15 ANC. Not having a resolution attached to  
16 this. Maybe we could just have some kind of  
17 a hybrid order. I mean, you know, whatever.  
18 It's not even clear that they're in  
19 opposition. But I certainly would have no  
20 objection to reference -- I don't know,  
21 referencing in an order that this motion was  
22 denied. I don't know.

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1                   What do other Board members think?

2                   VICE CHAIRPERSON LOUD: I think  
3 your suggestion for a hybrid order if it can  
4 be incorporated into the format that we  
5 normally do for the summaries, was an  
6 excellent suggestion and we can lease it at  
7 that without sort of parsing apart the ANC  
8 report.

9                   CHAIRPERSON MILLER: Okay. Thank  
10 you.

11                   Anything else on our agenda for  
12 our Special Public Meeting?

13                   MR. MOY: No. That completes the  
14 Special Public Meeting session, Madam Chair.

15                   CHAIRPERSON MILLER: Okay. Then  
16 this meeting is adjourned.

17                   The Board is going to take a quick  
18 break before it comes back for the hearing,

19                   (Whereupon, at 10:50 a.m. the  
20 Special Public Meeting was adjourned.)

21

22