

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

DECEMBER 2, 2008

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

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.

The transcript constitutes the minutes from the Public Meeting held on December 2, 2008.

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

Application No. 17812 of Pietros Kidane . 5

Application No. 17833 of Timothy Lawrence 7

VOTE: Three-two-one in favor of motion to
deny 71

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

2 10:38 a.m.

3 CHAIRPERSON MILLER: This meeting
4 will please come to order. Good morning,
5 ladies and gentlemen.

6 This is the December 2, 2008
7 Public Meeting of the Board of Zoning
8 Adjustment of the District of Columbia.

9 My name is Ruthanne Miller, I'm
10 the Chairperson of the BZA.

11 Joining me today is our Vice
12 Chair, to my right Mr. Marc Loud and Mary
13 Oates Walker and Shane Dettman to my left.

14 Also joining us today is Mr.
15 Clifford Moy from the Office of Zoning, Lori
16 Monroe from the Office of Attorney General and
17 Beverley Bailey from the Office of Zoning.

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

21 We do not take any public
22 testimony at our meetings unless the Board

1 asks someone be advised.

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

9 Does the staff have any
10 preliminary matters?

11 MR. MOY: Yes, we do, Madam Chair.
12 But staff would suggest that we take that on
13 a case-by-case basis.

14 CHAIRPERSON MILLER: Okay. Then
15 let's proceed with the agenda.

16 MR. MOY: Good morning, Madam
17 Chair and members of the Board.

18 The first case for a decision is
19 Application No. 17812 of Pietros Kidane,
20 pursuant to 11 DCMR § 3103.2 for a variance
21 from the use provisions to allow a catering
22 service/bakery under subsection 701.1 in the

1 C-1 District. This is at premises 409 18th
2 Street, Northeast, Square 4547, Lot 809.

3 On September 16, 2008 the Board
4 completed public testimony, closed the record
5 and scheduled its decision on December 2nd.

6 Well the Board requested additional
7 information to supplement the record from both
8 the applicant and the Office of Planning.

9 Madam Chair, there are no filings
10 in the record other than a letter that was
11 submitted by the applicant, Mr. Kidane. And
12 that letter is dated November 28th.

13 I think at that I'll leave it with
14 the chair to pick up. That will complete the
15 staff's briefing, Madam Chair.

16 CHAIRPERSON MILLER: Thank you.

17 As I understand it the applicant
18 is requesting that we postpone our decision
19 for one week as this case raises some issues
20 that involved the applicant having some
21 discussion with the Zoning Administrator and
22 then the Office of Planning that might effect

1 the application. So I would suggest that we
2 grant the postponement of our decision on this
3 case. There's no opposition. Is there any
4 objection to that?

5 All right. As the applicant has
6 asked for a week, why don't we schedule this
7 for next week, December 9th for decision
8 making and leave it at that? Okay.

9 MR. MOY: Yes, Madam Chair. That
10 would be at a Special Public Meeting on
11 December the 9th.

12 CHAIRPERSON MILLER: That's
13 correct. So that would be in the morning,
14 right? We don't have any other cases schedule
15 for decision making then?

16 MR. MOY: That's correct.

17 The next case, Madam Chair, and
18 the last case for the Public Meeting this
19 morning is Application No. 17833 of Timothy
20 Lawrence, pursuant to 11 DCMR § 3103.2. This
21 is for a variance from lot occupancy
22 requirements under section 403, and a variance

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1 from the alley setback requirements under
2 subsection 2300.4, to construct a private
3 garage on an alley lot in the R-4 District at
4 premises 1665 Harvard Street, Northwest. This
5 is in Square 2588, Lot 827.

6 On October 28th, 2008 the Board
7 completed the public testimony, closed and
8 record and scheduled its decision on December
9 2nd. The Board requested additional
10 information to supplement the record from the
11 applicant. And also the Board allowed
12 responses from the parties.

13 The applicant made a filing, and
14 that filing in response to the Board's
15 concerns and issues is in your case folders
16 identified as Exhibit 32. There are two
17 filings in response to that filing by the
18 applicant. One is from the party status, an
19 individual, Mr. Schneider, dated November 21,
20 2008 identified as Exhibit 33.

21 There's also a response filed by
22 ANC 1D, dated November 24, 2008. And that

1 document is identified as Exhibit 34 in your
2 case folders.

3 Finally, Madam Chair, we have two
4 other filings which should be viewed as
5 preliminary matter. There are three letters
6 in opposition identified as Exhibit 35 and
7 Exhibit 31. A preliminary matter because the
8 Board did not leave the record for any
9 additional letters other than what has already
10 been stated. And the Board should act on the
11 merits of the requested relief. And that
12 concludes the staff's briefing, Madam Chair.

13 CHAIRPERSON MILLER: Thank you,
14 Mr. Moy.

15 I think we should start with the
16 preliminary matters which Mr. Moy identified
17 as being two letters that were filed after the
18 record closed in this case, except that for
19 certain documents that the Board specifically
20 left the record open for and two letters that
21 don't fit within what the Board left the
22 record open for it, as I understand it, are

1 Exhibit 35 letter in opposition from
2 Christiane Frischmuth and John Griffin, dated
3 November 24, 2008 and a letter in opposition
4 from J.T. Roy, dated October 16, 2008 and
5 received November 3, 2008.

6 I guess my view on this is that we
7 can waive our rules if there's good cause and
8 no prejudice to a party, basically. I don't
9 see good cause here. And I think what's
10 important is that we have these deadlines and
11 close the record and only leave it open for
12 good cause, otherwise there won't be any
13 control with respect to materials coming in
14 after the record's closed regardless of what
15 the Board may state. And the danger in that is
16 prejudice to other parties because they don't
17 have an opportunity to respond to those
18 documents.

19 So I see that as a prejudice in
20 generally. But primarily I would recommend
21 that we not accept them for the reason that
22 there's been no cause shown for the Board to

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1 waive its rules.

2 Is there any objection to that?

3 Okay. I think that's the consensus then of
4 the Board to not allow into the record
5 Exhibits 35 and 31. And the other documents
6 that Mr. Moy mentioned were documents that the
7 Board specifically left the record open for.
8 And they will be considered in our
9 deliberation, and I believe have been read by
10 all the Board members.

11 So getting into the merits of this
12 case. I think that I will just start the
13 discussion with a few observations beginning
14 with the relief that's being sought here.

15 This a variance relief that's
16 being sought in order to put build a garage on
17 property that basically is quite small. The
18 garage is a matter-of-right us as we
19 established at the hearing. We looked at this
20 very carefully and determined that the
21 property was recorded before November 1, 1957.
22 And there was shown at the hearing the Sanborn

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1 Map on which a 1925 lot was shown.

2 So the applicant wants to build a
3 matter-of-right garage on the property.
4 However, the applicant needs variance relief
5 in order to do it. And the variance relief is
6 an area variance.

7 The applicant needs variance
8 relief for lot occupancy. What's allowed is 40
9 percent and the applicant is seeking a 100
10 percent lot occupancy.

11 And the applicant also needs
12 variance relief from the setback requirement
13 from the center line of the alley, 12 feet is
14 required and 7.5 is requested.

15 Specifically the applicant wants
16 to construct a one story two car garage over
17 the property, which is now an open parking
18 pad.

19 The applicant did file a
20 supplemental filing. And in that filing the
21 applicant revised the height of the structure
22 from 12.9 inches to 10.6 inches to mitigate

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1 the impact on the neighboring property to the
2 south.

3 For any variance test, and in
4 particular there are two types. There's an
5 area variance and a use variance. This is one
6 is for area variance. The applicant is allowed
7 as a matter-of-right to have a garage there,
8 but does not meet the area requirements to do
9 it without a variance. So we look at the three
10 prong test for variances, which is set forth
11 in the D.C. Code and in our regulations.

12 The first prong of the test is
13 whether or not there is a unique or
14 exceptional condition to the property. And it
15 reads: "Exceptional narrowness, shallowness
16 or shape of a specific piece of property at
17 the time of the original adoption of the
18 regulations or by reason of exceptional
19 topographical conditions or other
20 extraordinary or exceptional situation or
21 condition of a specific piece of property."

22 In this case we do have, I

1 believe, an exceptionally small lot. It's 557
2 square feet, 24 feet deep by 22 feet wide.
3 And we also have a case where its uniquely
4 situation in relation to other properties. It
5 is situated behind another property owner's
6 property, or behind property in different
7 ownership. And it's situated next to the lot
8 of the applicant that's before us. And I
9 believe it's separated by an alley or a
10 footpath.

11 So I think we start with that and
12 then see whether either of those conditions
13 give rise to a peculiar and exceptional
14 practical difficulty to the owner of the
15 property.

16 I don't think that there would be
17 much disagreement that this meets the
18 exceptional condition prong. But does anyone
19 feel that it doesn't? Okay. I think that
20 gets trickier then as we go along.

21 The next prong is the practical
22 difficulty test. And in essence, it's that

1 the strict application of any regulation
2 adopted under 6-651,01 through 6-651.02 would
3 result in peculiar and exceptional practical
4 difficulties to the owner of such properties.
5 Case law from the Court of Appeals has stated
6 that the difficulties must arise out of the
7 exceptional condition of the property.

8 To authorize an appeal relating to
9 such property and a variance from strict
10 application must be so as to relieve the
11 difficulty from the unique situation of the
12 property.

13 I just want to say a couple of
14 other things about that because this is not so
15 black and white.

16 What is considered a practical
17 difficulty is a judgment call for the Board.
18 And we have guidance from the Court of
19 Appeals. One is generally in Palmer. The
20 Court has said that compliance with the area
21 restrictions would be unnecessarily
22 burdensome.

1 The case of Gilmartin has given us
2 guidance with respect to factors to consider.
3 The Court in that case said BZA has the
4 flexibility to consider a number of factors
5 including but not limiting to:

6 (1) The weight of the burden of
7 strict compliance;

8 (2) The severity of the variance
9 requested, and;

10 (3) The effect the proposed
11 variances would have on the overall zone plan.

12 The Court has even said in
13 Gilmartin that even inconvenience to a
14 applicant may constitute a practical
15 difficulty. But this is a judgment call that
16 has been left to the Board.

17 So with that in mind -- also, oh,
18 the other is that the difficulties or
19 hardships due to unique circumstances peculiar
20 to the applicant's property and not to the
21 general conditions of the neighborhood.

22 So we have here a small lot. And

1 one practical difficulty, and I believe that's
2 what the Office of Planning focused on, was
3 that garage can't be built, which is a matter-
4 of-right use, cannot be built without relief
5 from the area requirements. Its just to small
6 a lot. And because of the short depth of the
7 property that effects the requirement for a
8 greater setback under the regulations for a
9 conforming parking space.

10 The opposition, and there is
11 opposition to this case; we have a party in
12 opposition and then the ANC has also opposed
13 the application, argue that the applicants
14 don't have a practical difficulty because they
15 can use the property as it is. There is a
16 parking pad there and they can use the
17 property that way. My understanding is that
18 at one point there was a gate and a fence and
19 the opposition says that they can secure their
20 vehicles in that manner without needing a
21 variance.

22 So, I think I'm going to open this

1 up to others. I would say I think based on the
2 facts in the record and the Office of Planning
3 report there is a practical difficulty in
4 having a garage on that property, which is a
5 matter-of-right use of the property without
6 variance relief from the area requirements for
7 lot occupancy and setback. I think we then
8 need to weigh whether it would be an undue
9 burden on the applicant to comply with the
10 regulations, which I think would then
11 translate to not building the garage and using
12 the property as it is or perhaps making some
13 other arrangements to secure the vehicles.

14 If others want to get into that
15 discussion before we get into the third prong
16 of the test, which goes to that we can grant
17 relief provided there's not substantial
18 detriment to the public good and that it does
19 not substantially impair the intent, purpose
20 and integrity of the zone plan as embodied in
21 the Zoning Regulations.

22 VICE CHAIRPERSON LOUD: Thank you,

1 Madam Chair. I think while we're on this
2 prong I would like to weigh in, however very
3 briefly.

4 This was a difficult case for me
5 in terms of the analysis of it. And I think
6 it was made difficult not so much by the
7 project itself or the marshaling of the
8 evidence for the project necessarily, but the
9 rigidity of the test for relief, it being a
10 variance test and the requirement on an
11 applicant with carrying its burden to meet
12 each prong of the test.

13 Going through the test for myself
14 and then looking at the record and looking at
15 my notes on the hearing and the other
16 materials, it was clear to me that we have a
17 unique property. It was a small lot, 557
18 square feet located, and it's sort of an
19 awkward kind of scenario where it was not on
20 the applicant's property but on the adjacent
21 neighbor's property, Mr. Schneider. So it was
22 kind of a combination of factors that made it

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1 a small lot. But here's where I really ran
2 into a challenge trying to continue the
3 analysis in a way that might support what the
4 applicant was looking. And it was the question
5 of the practical difficulty.

6 It's apparent from the evidence
7 that on a 40 percent lot occupancy lot where
8 the whole lot is 557 square feet that it would
9 be impossible to put this particular design
10 and make it fit on that lot and also have the
11 12 foot setback from the alley center line as
12 the rules require.

13 So those things made this project
14 moving forward an impossibility. But in terms
15 of whether they created a peculiar, an
16 exceptional practical difficulty I didn't
17 conclude that they did. Because there are
18 conforming uses for the lot in question that
19 don't require the kind of relief that the
20 applicant is proposing.

21 The relief proposed by the
22 applicant would be a 60 percent variance from

1 the lot occupancy required, about a 4½
2 variance from the setback. And, again, it's
3 not like the applicant was able to show that
4 this is going to be useless lot if there's no
5 relief or that he would have to use a lot for
6 purpose completely different from what he
7 seeks to use the lot for. As for example, if
8 all he could do were a private garage or an
9 artist loft and if we deprived him of the
10 opportunity to do the private garage, then the
11 only thing he could do there would be an
12 artist loft. So it would become kind of
13 useless in that sense.

14 In this case I think the evidence
15 showed that the driver for the private garage
16 was to be able to secure family vehicles. And
17 I just didn't find the evidence compelling
18 enough that there wasn't a conforming use for
19 the lot that would secure the vehicles, either
20 through the previous arrangement that had been
21 set up where I think it was gated and fenced
22 in, or some of the suggestions that were made

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1 during the hearing for other ways, I guess, to
2 enclose that lot.

3 So I reached the conclusion, and
4 it was after a lot of struggle, that this test
5 is a very high test to make. And in this case
6 I was not convinced that the second prong of
7 this, the practical difficulty prong, was met
8 head on by the evidence in the case.

9 CHAIRPERSON MILLER: Let me just
10 say that I understand that you're coming into
11 the deliberation, you know, with that
12 assessment. But that this deliberation also
13 the decision isn't made yet. You know, that
14 we also have the opportunity to discuss
15 somewhat.

16 And I think when I listen to what
17 you're saying, I think that in my view you're
18 applying too high a test. That you're talking
19 about other uses that wouldn't require the
20 variance, and that that goes to the use
21 variance which is a higher test which is undue
22 hardship and no other uses. And what we're

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1 looking at here is an area variance which
2 talks in terms of a practical difficulty upon
3 the owner. And therefore, I guess I find that
4 there is a couple of practical difficulties on
5 the owner which gets me through that prong.
6 And then we would look at substantial
7 detriment.

8 And I think this is not an easy
9 case because I'm not sure that there's a
10 practical difficulty in complying with some
11 regulation. Like they have a regulation to
12 provide parking, and they can't provide it,
13 and therefore they need the variance.

14 What we have here is a situation
15 where the applicant can't comply with the
16 regulations for a matter-of-right use. And so
17 I look that as the starting point that do they
18 a practical difficulty in providing a matter-
19 of-right use on the property. And I see that
20 they do because matter-of-right use as a
21 garage on an alley lot, but they don't meet
22 the area requirements for that. And then,

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1 though, we get into perhaps the undue burden
2 of that.

3 The undue burden would be, I guess
4 as I see it and that somewhat goes into your
5 analysis about other ways of providing parking
6 for their cars, is that's the burden. And is
7 it undue burden for them, perhaps, to park on
8 a parking pad instead of having a garage?
9 That's where I see the analysis going,
10 perhaps.

11 And then they did submit
12 documentation of criminal activity, vandalism
13 to the cars and we heard testimony from the
14 applicant about vandalism to the cars and that
15 they want to do this for greater security.

16 So the practical difficulty test,
17 it's not as clear cut as undue hardship. I
18 think we have to kind of look at that and
19 weigh it to some degree. But I think they have
20 put into evidence to me sufficient evidence of
21 a practical difficulty. And I guess I would
22 then look at is there substantial detriment to

1 the public good if we were to grant this
2 variance.

3 Anyway, and I want to let the
4 other speaks, but I just want others to be
5 clear of there is a difference between a use
6 variance and an area variance. And the test is
7 much harder for a use variance than an area
8 difficulty. There's a practical difficulty on
9 the owner and then we look at that practical
10 difficulty and weigh it in the context of, I
11 think, the substantial detriment to the public
12 good.

13 VICE CHAIRPERSON LOUD: Before we
14 do that, Madam Chair, I just wanted to clarify
15 both for those in the audience as well as my
16 colleagues, but especially those in the
17 audience that I didn't mean to suggest, if I
18 did, that the analysis that I'm looking at is
19 a use analysis. I just meant to convey that
20 the test for a variance, whether it's an area
21 variance or use variance, is a difficult test.
22 It's not like a special exception. And I was

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1 thinking more along those lines in making my
2 comments. And because it's a difficult test to
3 make, and I was looking at an area variance
4 test, that I'm looking for evidence in the
5 record that would really speak strongly to
6 there being some exceptional practical
7 difficulty. And you can't help but then look
8 at some of the evidence regarding the alleged
9 security breach and evidence pointing to those
10 issues and formulate some opinions about
11 whether or not that's an exceptional practical
12 difficulty created by the small size of this
13 lot.

14 And it was in that context more so
15 than as you characterize, a sort of a use
16 analysis. That I was making my comments about
17 the test being hard on the applicant in a case
18 like this.

19 And I kind of did that partially
20 to make clear to the applicant that some of
21 the shortcoming in the record is because the
22 test is a difficult test. Not necessarily

1 because the applicant didn't do a good job of
2 marshaling the evidence. But by no means was
3 I suggesting to this applicant that he had to
4 reach that much higher threshold for use
5 analysis. So I just want to make that clear.

6 MEMBER DETTMAN: Well, Madam
7 Chair, I'll weigh in.

8 I'm not inclined to agree with Mr.
9 Loud with respect to the practical difficulty.
10 I interpreted Mr. Loud's comment about that
11 there are other conforming uses as to mean not
12 a particular use, but actually there are other
13 ways to use this site for parking in a secure
14 fashion. I guess, at least, that's how I
15 approached it.

16 You know, entering into this
17 analysis keeping in mind the applicant's
18 stated objective to provide secure parking and
19 asking myself the question how does the size
20 of the lot, how does it unique location
21 present a practical difficulty for the
22 applicant in providing secure parking; I could

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1 quite reach a practical difficulty. I couldn't
2 find it for a couple of reasons.

3 One is that during the hearing we
4 had discussed whether the applicant had
5 invested other ways to achieve their objective
6 of getting secure parking without having to
7 build a structure. They did look at that and
8 they had mentioned that there was an aesthetic
9 reason why they didn't pursue that. And there
10 was a cost saying that the rollup garage door
11 could potentially be about the same amount of
12 money as it would to build a structure, to
13 build a private garage.

14 But also looking at the design
15 that we have in front of us, because that's
16 what the Board is required to do, I think as
17 designed there is a way to minimize the extent
18 of the variance. And I mention that because if
19 we eventually do get to the third prong that
20 would actually minimize the amount of adverse
21 impact on the surrounding neighborhood and
22 adjacent neighbors.

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1 So again, I can't quite find the
2 practical difficulty especially when it comes
3 to the lot occupancy request. And I'm not
4 certain how the unique circumstances on this
5 property create a practical difficulty that
6 warrants a 100 percent lot occupancy. I see
7 things in the design that could help the
8 applicant achieve their objective by building
9 a structure as well as minimizing the
10 potential impact on the neighbors.

11 CHAIRPERSON MILLER: Can I just
12 ask you, did you raise that at the hearing
13 what you saw in the design that could be
14 changed to minimize the relief needed?

15 MEMBER DETTMAN: No. I inquired
16 about what other types of security solutions
17 they had looked into. And I had thrown out
18 the idea of a rollup garage, because I've seen
19 that happen or utilized elsewhere in the city.
20 I didn't mention anything about the design.

21 The applicant did amend the
22 design. They lowered the roof. But I think

1 that if the main objective is to provide
2 secure parking, it's important while
3 minimizing adverse impact given the location
4 of this property, I think it would be
5 important to try to design this thing in a way
6 that meets your requirements, 9 by 19 with 6
7 foot of clearance, and position it and size
8 the structure in a way that gets as far away
9 from the surrounding property as possible. And
10 based on the revised designs, I still see room
11 for improvement. But since this is the design
12 that we have in front of us, this is the one
13 that I have to look at and vote on.

14 BOARD MEMBER WHEAT: Madam Chair,
15 I tend to agree with Board members Loud and
16 Dettman. I spent a great deal of time looking
17 at the practical difficulty prong looking back
18 at the record. And while I agree that the
19 practical difficulty here that arises out of
20 the small size of this lot is the inability to
21 construct of garage, which is matter-of-right
22 use, then next step in the analysis is the

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1 undue burden to the applicant. And all of the
2 information in the record speaks to the
3 security concerns that the applicant has as
4 being the undue burden. And there are other
5 ways here to secure the vehicles short of
6 erecting a garage.

7 And I was persuaded by a
8 photograph that appears at our Exhibit 27,
9 which was actually an attachment to Exhibit
10 28, which is correspondence from the neighbor
11 at 1653 Harvard Street Patricia Jane. And
12 that photograph shows the lot as it existed in
13 the past where it is completely enclosed by a
14 fence with a gate.

15 And so in looking at this undue
16 burden of the vandalism to the cars and the
17 security issues that were discussed in the
18 record, it's difficult to reach the conclusion
19 that a garage is necessary here to ameliorate
20 those concerns when this option is before us
21 in the record.

22 So I, too, am having difficulty

1 with finding that the practical difficulty
2 prong is met here.

3 CHAIRPERSON MILLER: Okay. Well I
4 think that, first, others should be considered
5 in the context of a balancing between this and
6 the impact on the public good. And I
7 understand that we go through each prong
8 separately to a certainly extent, except that
9 the second prong arises out of the first
10 prong. Certainly the difficulty has to arise
11 out of the unique conditions of the property.
12 But I think that there's such range of
13 guidance from the Court of Appeals from
14 anything to an inconvenience on the applicant
15 to unduly burdensome, that it's not a black
16 and white question.

17 I mean, for me I see that there is
18 a burden on the applicant. To me, there is a
19 practical difficulty. I mean, number one it's
20 a given that the garage I think would need
21 variance relief no matter what. So there's a
22 practical difficulty of putting a garage on

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1 the property.

2 But secondly, there is a practical
3 difficulty that the applicant has identified
4 with respect to security as the reason for
5 wanting to have a garage.

6 And then I think what's going on
7 is the Board is judging that need for security
8 versus other means of getting that without a
9 variance. And it seems to me that that's
10 something that we should look at in the
11 context of the third prong, substantial
12 detriment to the public good. Because if the
13 applicant has a practical difficulty and we're
14 trying to determine whether we ought to grant
15 variance relief that that practical difficulty
16 is it great enough, it seems like it would
17 make sense to look at the third prong then,
18 too. Because if there's no substantial
19 detriment to the public good and there is a
20 practical difficulty though it may not rise to
21 as high a degree as some Board members think
22 it should, it seems to me we ought to be

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1 looking at weighing both of use, not looking
2 at them in a vacuum.

3 I'm not sure if everyone would
4 agree with that. But I think that we could
5 continue with our discussion. And then finish
6 discussing the whole case with respect to
7 substantial detriment and then decide the case
8 as a whole.

9 VICE CHAIRPERSON LOUD: I think I
10 agree with you in this sense, Madam Chair,
11 that I think we absolutely have the
12 responsibility to make a finding of practical
13 difficulty, right, in isolation. And I don't
14 think that we can combine an analysis of,
15 like, two elements and not make it real clear
16 where we stand on each of these. Because as
17 I understand the variance test, each of the
18 elements have to be met. So I would agree with
19 you in that regard. But I do want to go
20 through the entire analysis, but I think it
21 will come back to either one or more of us
22 thinks that the evidence establishes a

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1 practical difficulty or it does not establish
2 a practical difficulty. I could be wrong on
3 that. You know, I've been wrong numerous
4 times and want to be enlightened on the right
5 analytical tool and framework to look at. But
6 it seems that whether this small lot with this
7 40 percent lot occupancy creates this
8 practical difficulty that the applicant has
9 presented to us has to be answered separately,
10 sort of on its own legs, because we can do
11 what we're charged with doing as a group. And
12 that we sort of can't merge the analysis too
13 much to get into the whole adverse -- not
14 adverse impact, but substantial detriment part
15 of the analysis.

16 CHAIRPERSON MILLER: I think
17 that's what's so difficult about this case.
18 And that's why I'm searching for a guidance in
19 the courts' cases. What the Court of Appeals
20 said in Gilmartin is that the BZA has the
21 flexibility to consider a number of factors
22 including but not limited to:

1 (1) The weight of the burden of
2 strict compliance to the severity of the
3 variance requested, and;

4 (3) The effect the proposed
5 variances would have on the overall zone plan.

6 So the way I read that is if we
7 can fit into those elements. And then we
8 weigh them altogether. And the way we identify
9 them, I mean we may identify that, yes, say
10 the applicant does have a practical
11 difficulty:

12 (1) In meeting the area
13 requirements. There's no other way they were
14 going to do it have a garage on the property
15 without variance relief, even though Mr.
16 Dettman might feel that they could have
17 minimized variance relief I think that they
18 need the relief.

19 The severity of the variances
20 requested, I mean I think that would also go
21 somewhat to Mr. Dettman's points that maybe
22 they didn't have to request such an extreme

1 variance. And that would enter into analysis.

2 And also the burden of strict
3 compliance would encompass the alternatives if
4 they could do parking elsewhere.

5 And the effect the proposed
6 variance would have on the overall zone plan.

7 So the way I read this, and
8 normally we go one, two, three. And, you
9 know, if you don't meet the second prong,
10 you're out. When I look at this it looks to
11 me this meaning the language of Gilmartin
12 about considering a number of factors, it
13 seems to me that we ought to be considering
14 the practical difficulty test with the effect
15 that the proposed variance would have on the
16 overall zone plan.

17 So I guess my view is -- it sounds
18 to me that at least I can identify practical
19 difficulty. Whether or not that rises to the
20 level of granting a variance is another
21 question. And that that would be encompassed
22 in the overall analysis with the effect the

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1 proposed variances would have on the zone
2 plan.

3 If you found that there was no
4 practical difficulty, period, no practical
5 difficulty then I think we would not need to
6 go on to the third prong. But I think it's
7 possible to find practical difficulties, but
8 then when you look at the whole picture you
9 might feel that those practical difficulties
10 don't rise to the level of granting a
11 variance. Just because they have a practical
12 difficulty doesn't mean they get the variance.

13 So it seems a little bit more
14 blurred in this case than other cases. It
15 seems to roll into the third prong. But when
16 I read the guidance from Gilmartin, it seems
17 like that's appropriate.

18 MEMBER DETTMAN: Madam Chair, for
19 purposes of moving our discussion along, I
20 agree with you that it wouldn't hurt to move
21 on to the third prong. And I say that because
22 thinking about what could come out of it. It

1 could strengthen the position of those who
2 don't see a practical difficulty. Those who
3 do see a practical difficulty might find that
4 it fails on the third prong, and I think again
5 for purposes of moving the conversation along,
6 we could look at the third prong.

7 But to your point or points about
8 the Court of Appeals or recent BZA cases, the
9 way I read Gilmartin talking about an
10 increases expense and convenience, at least
11 when coupled with the significant limitation
12 on the utility of the structure, again going
13 back to what I said about that I think that
14 there are other ways. If it was a fact that
15 all of these other ways, these alternatives,
16 would be create an expense or an increased
17 inconvenience on the applicant or if that all
18 these other ways would significantly limit the
19 utility of the structure, I might have a
20 different opinion. But I do see other ways
21 that wouldn't be extremely expensive, it
22 wouldn't be a large inconvenience and it

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1 wouldn't completely remove any utility
2 structure.

3 I also think that just looking at
4 these listings of Court of Appeals cases, I
5 think Russell might apply here, too, that
6 states that where an owner would be deprived
7 of all beneficial use of his property under
8 the strict application of the zoning
9 requirements he is entitled to a variance.

10 I think looking at what these
11 other ways are, I don't think if denied, that
12 the applicant is without any use of this
13 property because there are several
14 alternatives out there.

15 And finally, looking at Exhibit 33
16 which is a submission by Mr. Edward Schneider
17 it provides some information on previous Board
18 decisions where it says "That the Board has
19 repeatedly rejected variance requests for the
20 construction of parking garages based on
21 alleged security concerns." And I think the
22 first one, Application 15695 says it pretty

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1 well. "The Board denied applicant's request to
2 construct a parking garage finding that
3 applicant was not foreclosed from making
4 reasonable use of his lot and was able to park
5 and secure his vehicles without the need for
6 the requested variances."

7 And that filing goes on to
8 reference the De Azcarate case which talks
9 about self-created hardship, which that would
10 be an opinion that we individually reach.

11 I see an element here of a self-
12 created hardship which removes --

13 CHAIRPERSON MILLER: Okay. You're
14 making a lot of good points but I have to
15 interrupt because, again, we're again we're
16 rolling into use variance versus area
17 variance. And self-created hardships defeat
18 use variances.

19 MEMBER DETTMAN: Okay.

20 CHAIRPERSON MILLER: But I don't
21 believe they defeat area variances.

22 And also you were talking about

1 the test being if you couldn't use the
2 property another way. And, again, I think that
3 goes to use variance which is too high a
4 standard. We're talking about an area
5 variance which is practical difficulties.

6 MEMBER DETTMAN: I think the point
7 that you make about area versus use variance
8 is a good one. But just for the record, that
9 Court of Appeals case does reference an area
10 variance.

11 MS. MONROE: Madam Chair, if I
12 could just interject for one second?

13 You're right, the use variance --
14 an area variance cannot be defeated by undue
15 hardship. It's just one factor that you would
16 take into account, as opposed to a use
17 variance where it would just throw it out.
18 You could think about it as a factor in an
19 area variance case.

20 VICE CHAIRPERSON LOUD: Just
21 weight in again briefly. And I agree with
22 Commissioner Dettman in terms of going through

1 all of the prongs of the test. Because I
2 think it will be helpful for our overall
3 discussion.

4 But I wanted to, just while we're
5 on this whole practical difficulty prong
6 because I think it's instructive, at least for
7 me, what I almost hear you saying, Madam
8 Chair, is that almost as a matter of law if an
9 applicant comes in with a project that cannot
10 meet lot occupancy, say, or cannot meet some
11 other section of our regs, then by definition
12 that constitutes a practical difficulty. And
13 I say that because the analysis that you're
14 taking is one that I agree with, I just don't
15 agree that as a matter of fact it's a
16 practical difficulty. But I do agree that you
17 have a lot area that cannot be met with this
18 design. You can't build this garage on 40
19 percent lot occupancy when the whole lot area
20 is 557 square feet. And what I hear you saying
21 is that because you cannot do those things, it
22 is automatically a practical difficulty.

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1 And I think as Commissioners we
2 are empowered to look beyond just the sort of
3 mechanical violation of the regulations and
4 see what the purpose of the project is. If
5 there are other ways for the applicant to make
6 the project conform without violating, as it
7 were, whatever section the applicant needs
8 variance relief from.

9 Do you understand what I'm trying
10 to get at?

11 CHAIRPERSON MILLER: Yes, I do. I
12 think what I'm saying is as I look at this
13 case that if there's a matter-of-right use,
14 that an applicant can't build in accordance
15 with respect to the area requirements such as
16 in this case there's a matter-of-right use to
17 have a garage on an alley lot, then yes. Per
18 se, there's a practical difficulty here in my
19 view, as I think is the position of the Office
20 of Planning. That there's nothing that they
21 could do with respect to building a garage
22 which is a matter-of-right use on this

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1 property without needing variance relief
2 because the property is so small. However, I
3 see this practical difficulty not ending
4 there. That we could recognize that there's a
5 practical difficulty, but then we assess is
6 that practical difficulty unduly burdensome.

7 So to me in this case, which it's
8 rare that it comes like this, it seems almost
9 like a two step process. Like, yes, I see
10 there's a practical difficulty, but then is
11 that unduly burdensome on the applicant. And
12 so when I get into then is it unduly
13 burdensome, then it seems to me then I'm
14 weighing it, that issue, with respect to the
15 next prong which we're about to discuss.
16 Because that's somewhat more objective looking
17 at the totality of the situation is it unduly
18 burdensome given that maybe there's no
19 substantial detriment on the public good. If
20 there's no substantial detriment on the public
21 good, then is it unduly burdensome to have the
22 applicant comply with the regulations?

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1 If there is substantial detriment
2 on the public good, then I would think then it
3 might effect the burdensome question.

4 I understand what some of you are
5 doing is -- and I'm not saying it's wrong. Is
6 that you might want to look at the unduly
7 burdensome question in isolation. Does he or
8 does he not a burden with respect to the
9 parking. But to me it's not that clear. I
10 don't need to go that far that there's a
11 practical difficulty. I go to that afterwards
12 in weighing the whole equation for the
13 variance relief then.

14 Shall we go to the substantial
15 detriment or are there more comments on that
16 right now?

17 All right. I'll start with the
18 detriment to the public good. Office of
19 Planning didn't find that there's a detriment
20 to the public good. They were looking at the
21 room that the cars have to turn into the
22 garage and found that that was adequate. And

1 they found that other garages on the alley
2 were built to the property line.

3 And also, I believe, HPRB approved
4 the garage.

5 The ANC opposes the garage. Their
6 vote, as I have it recorded here, was split.
7 In the last filing, Exhibit 34, they passed a
8 resolution by a vote of three-one-two; three
9 in favor, one opposed, two abstaining. And I
10 don't believe that represents a majority of
11 the six members.

12 In any event, in their opposition
13 they cite adverse impacts on light and air of
14 the adjacent residence, 1701 Harvard Street.
15 They say being a 14 foot high building only 17
16 feet away from windows of that residence.
17 Since then the building height has been
18 reduced to 10 feet 6 inches. I'm not sure how
19 that would effect their analysis.

20 That the ANC argued that indirect
21 sunlight would be impacted, but they didn't
22 really qualify, I mean they didn't really

1 document how that would happen.

2 I believe that they said that the
3 garage would be undesirable intrusion upon
4 that residence. And Office of Planning said
5 the building would not be in the shadow of
6 that building.

7 I recognize that most property
8 owners would prefer to leave open spaces as
9 open space. I didn't see that there was a
10 case made, though, for substantial detriment
11 to the public good. And Office of Planning
12 found that it would not impair the intent,
13 purpose and integrity of the zone plan.

14 We did have some testimony about
15 sunlight on the patio or on the walls. I
16 didn't find that convincing, myself. It was
17 pretty general. I couldn't really see the
18 case that was made for that.

19 The applicant has proffered to do
20 a trellis on the wall that would be on, I
21 guess, 1701's property so that it could be
22 landscaped. However, the property wanted it.

1 So I didn't see a substantial detriment to
2 that property owner really. I think that
3 there was a wall going up, but it wasn't even
4 extending the length of the whole property.
5 And it would be trellised. So, you know,
6 landscaping could go on it. So I didn't see
7 the big impact there.

8 And then Office of Planning said I
9 guess the garage on the alley was in character
10 with other garages on alley lots and that they
11 went to the property line as well.

12 So that's my view on this. Others
13 want to give theirs?

14 VICE CHAIRPERSON LOUD: I agree
15 with you, Madam Chair, on the substantial
16 detriment prong of the test. A couple of
17 things that are to me.

18 First was that all of the photo
19 exhibits of that patio area, I'm talking about
20 the impact on Mr. Schneider the party status
21 applicant here -- not applicant, but we grant
22 party status. All of those photos show the

1 significantly shadowed patio already,
2 regardless of when the photos were taken. So
3 the argument about the light impacts seemed to
4 not have been -- well, it was diminished by
5 the photograph evidence.

6 In addition to which, some of the
7 case law that you passed around, and I'll find
8 it in a moment, but it makes the point that
9 the public good is necessarily synonymous with
10 the more narrow interest of neighboring
11 property owners. That was Draude. Okay,
12 silent E. Okay.

13 So again applying that to this
14 particular case, even in the ANC's resolution
15 of opposition a lot of their opposition tied
16 in specifically to that neighbor's concern and
17 not to more broad sort of neighborhood-wide or
18 public interest concerns. There were some
19 concerns about whether it would increase crime
20 in the alley, but it was all speculative,
21 there was nothing to back it up.

22 So, again, I don't see the

1 compelling evidence here that there would be
2 substantial detriment.

3 And even, as you point out, even
4 with respect to the neighbor the applicant put
5 on line a number of mitigating measures like
6 reducing the height to 10 feet 6 inches,
7 offering the trellis up to make it less
8 offending to the neighbor.

9 BOARD MEMBER WHEAT: Madam Chair,
10 I agree with you and Mr. Loud on this point.

11 In particular in Mr. Schneider's
12 Exhibit 33 there is an Exhibit 4B, a
13 photograph of the back yard that shows the
14 current situation including the existing
15 fence. And you can see where the proposed
16 roof line of the applicant's project will
17 fall. And so the current situation will not
18 change drastically when you consider the
19 location of the current fence. And so for
20 that reason, I think the impact to the
21 Schneiders is not significant.

22 CHAIRPERSON MILLER: Mr. Dettman,

1 are you going to weigh in on this one?

2 MEMBER DETTMAN: I think for the
3 sake of brevity, Madam Chair, I'll say that
4 I'm largely in agreement with the impact to
5 the overall public good. I do have a little
6 bit of concern about the potential impacts to
7 the Schneiders' property, which is no doubt
8 impact to neighboring properties as a part of
9 weighing the overall impact to the public
10 good.

11 So I do see a little bit of
12 potential for impact to that property, but as
13 to the larger public good I'm in agreement
14 with the rest of the Board.

15 CHAIRPERSON MILLER: Okay. So I
16 guess we're back to then the overall analysis
17 and how we approach that practical difficulty
18 prong which was the difficult question here.
19 Whether the Board looks at it in isolation
20 without going to substantial detriment or not.

21 I guess my view is that if we find
22 a practical difficulty, then we go on to the

1 next prong. And then we weigh them. But I
2 don't know that that's particularly clear in
3 black and white in cases. I don't think it's
4 clear that it isn't. But it does seem to
5 follow that that's appropriate if we looked at
6 that language in Gilmartin that talks about
7 BZA considering a number of factors and putting
8 in the weight of the burden of strict
9 compliance in the same analysis as the effect
10 of that the proposed variances would have on
11 the overall zone plan. If you find a
12 practical difficulty, you then have to assess
13 it and see if it is unduly burdensome and how
14 does it relate to your analysis of the
15 variance in general?

16 I would like to note, and I didn't
17 pull cases, but based on my history on the
18 Board I do recall that we have considered
19 security as a practical difficulty. And often
20 it's in the context of other factors that
21 we're considering. So when I look at the
22 cases that have been cited by the opposition's

1 filing with respect to that question in
2 Exhibit 33, the only one that I recognize that
3 was while during my tenure was the Deborah
4 Miles case. And I could be mistaken, but if
5 I recall correctly that the denial was not
6 based primarily on security concerns. I
7 think, and I could be wrong and if I'm wrong,
8 I'm wrong. I can't look it up now. But it was
9 in 2004, which was five years, but I believe
10 that in that case this owner's property shared
11 the same qualities as all these other
12 properties on the square. And that that was
13 the primary grounds for denial of that
14 application.

15 And I remember -- and I'm sorry
16 there's nobody else here who has this memory.
17 But if I'm not mistaken, I remember this case
18 because the Board was very upset that it had
19 to deny the variance. That we actually were
20 moved by the applicant's concern for security
21 but determined that there was no way that we
22 could grant a variance because her situation,

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1 her property was the same as all these other
2 properties on the square and that she could
3 not make the first prong of the variance test.

4 MEMBER DETTMAN: Madam Chair, I
5 think this was a very well thought out and a
6 very good deliberation. And if there's no
7 further deliberation, I am prepared to make a
8 motion.

9 CHAIRPERSON MILLER: Okay.

10 MEMBER DETTMAN: I would move to
11 deny Application No. 17833 pursuant to 11 DCMR
12 § 3103.2 for a variance from the lot occupancy
13 requirements of section 403, and a variance
14 from the alley setback requirements of
15 subsection 2300.4, to construct a private
16 garage in a alley lot in the R-4 District at
17 1665 Harvard Street, Northwest.

18 VICE CHAIRPERSON LOUD: Second,
19 Madam Chair.

20 CHAIRPERSON MILLER: Further
21 deliberation?

22 Okay. I would like to put on the

1 record that I oppose the motion to deny. That
2 I think that the three prong test for a
3 variance is met in this case. That we have a
4 lot that is exceptional small in size and
5 situation, and that has a practical difficulty
6 in building a matter-of-right garage on that
7 property without variance relief. And that
8 further that it would be unduly burdensome to
9 deny a variance relief in that applicant has
10 presented a case for security concerns, has
11 documented it. And that there is no
12 substantial detriment on the public good in
13 granting the relief.

14 And I would also suggest that
15 those who are in support of the motion give
16 great weight to the Office of Planning and
17 address why you differ with the Office of
18 Planning's position where you do. I am in
19 agreement with the Office of Planning.

20 I differ with the ANC position in
21 that, first of all, is that there isn't even
22 a majority that has submitted the resolution

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1 that's before us.

2 Secondly, it's based on the height
3 of a wall that has been decreased in height.

4 And also doesn't address the
5 public good question.

6 And finally, I wasn't convinced by
7 the evidence in the record that there would be
8 an adverse impact on light and air on the
9 property that's most impacted by this
10 application.

11 VICE CHAIRPERSON LOUD: I wanted
12 to thank you, Madam Chair, for taking us
13 through what has been a very difficult and
14 informative discussion at least for me in
15 terms of the elements of this variance test
16 that we've not touched upon before.

17 I remain where I was at the
18 beginning, even after listening to everything.
19 And I think with respect to the Office of
20 Planning report, which is at Exhibit 25, I'm
21 actually in agreement with the parts of the
22 report that talk about the uniqueness of the

1 property and the substantial -- whether relief
2 could be granted without substantial
3 detriment. So I don't think there's a need
4 for me to distinguish those aspects of it.
5 But with respect to the practical difficulty
6 I think it boils down to something that we
7 talked about earlier. And I think
8 Commissioner Walker was the first one to raise
9 it. I think I may have put it on the record
10 here. But it's the whole idea that if we're
11 going to say that when an applicant's project
12 doesn't meet the technical requirements of the
13 zone, that by definition that's a practical
14 difficulty, which is what I hear OP saying in
15 their report and I think it's along the lines
16 of what you were saying, then that's one
17 thing. But that's not my understanding.

18 And this is a case first personal
19 impression for me. That's not my understanding
20 of how we've been addressing practical
21 difficulty in any of the variance cases that
22 we've had. That it's more than just the fact

1 that the applicant says my project does not
2 meet the requirements of the zone and
3 therefore, you know, I'm entitled to this
4 relief. There has to be something peculiar
5 and exceptional about the practical
6 difficulty. And you talked about weighing the
7 severity of the relief requested against the
8 burden, I think, that the project presents.
9 But to me there has to be more than just the
10 fact that this project does not meet the
11 requirements of this zone. And that's what I
12 think OP did in their analysis. They simply
13 said, hey, you got 40 percent lot occupancy,
14 you got a 12 foot setback, you have a 557
15 square foot area. It's impossible to create
16 a parking structure given all of those
17 limitations, so that's your practical
18 difficulty.

19 And I disagree with that approach.
20 I could be wrong. I disagree with that
21 approach. I think that we have to look beyond
22 the technical violation and see what is really

1 happening here. What's falling apart? What
2 is the applicant not able to do because of
3 this zone regulation? And in this case what
4 the applicant maintains he's not able to do is
5 secure his vehicles in the alley. And the
6 record does not support that these vehicles
7 cannot be secured on this alley lot.

8 So those were the reasons that I
9 am supporting Commissioner's Dettman motion.
10 Again, I do it with tremendous sense of
11 difficulty because of the applicant's project
12 I think is a reasonably good project. But I do
13 not believe that he's met the practical
14 difficulty prong of the test.

15 CHAIRPERSON MILLER: I just want
16 to make one comment because that prong is
17 something that I think the Board struggles
18 with over years, you know. And I just want to
19 make a distinction because I would agree that
20 sometimes you might see a case where the
21 applicant is asking for an area variance
22 because they can't do what they want to do.

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1 Like, say, they want to build something as big
2 as they want. I think what's different here
3 is that the applicant can't build its matter-
4 of-right no matter what size without variance
5 relief. So I just want to distinguish that.
6 That's where I am. It's not just that an
7 applicant comes in and says I can't meet the
8 requirements because I want to do this, this
9 and this. This goes to a matter-of-right use
10 at all. He can't do it at all without
11 variance relief.

12 BOARD MEMBER WHEAT: Madam Chair,
13 the Office of Planning report speaks of the
14 practical difficulty as being the inability to
15 erect a garage. And I agree with that. But
16 the next step, as you pointed out, is that the
17 practical difficulty must be unnecessarily
18 burdensome to the applicant. And in assessing
19 that burden actually the Office of Planning
20 report is silent. That's what prompted me to
21 go back and look at the record, look at the
22 submissions from the applicant. And the

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1 applicant, as Mr. Loud just stated, speaks of
2 it in terms of the inability to secure the
3 vehicles. And that was an argument that was
4 not persuasive to me.

5 I think when it boils down to here
6 the burden that we were talking about, the
7 inability to park in a garage versus parking
8 on an open pad, is one of convenience. And I
9 think that this convenience factor is
10 insufficient to warrant our granting variance
11 relief.

12 MEMBER DETTMAN: With respect to
13 the DCOP report, Madam Chair, I without
14 repeating what's already been said, I'll just
15 say I agree with Mr. Loud and Ms. Walker.

16 I do have a follow-up question
17 with respect to the ANC report. Could I just
18 ask for clarification on the weight that the
19 ANC report is going to carry? I heard you
20 mention something and I think I missed it.

21 CHAIRPERSON MILLER: I'm going to
22 check the regs. What I noted was that the ANC

1 report was not by a majority of the ANC. Not
2 by a majority vote. It was a three-one-two
3 vote; three in favor, one against, two
4 abstaining. And let me check. And I think a
5 majority vote would be four. They have a six
6 member ANC.

7 MEMBER DETTMAN: Right. And the
8 report that was submitted in Exhibit 20 prior
9 to the hearing they had a quorum for the six
10 member ANC is four, five were present. In
11 Exhibit 34 they mentioned five were present at
12 the well.

13 So I think the vote at the second
14 hearing was three-one-one. I could be wrong.
15 It only says it's a three-one vote.

16 CHAIRPERSON MILLER: I have
17 Exhibit 34, which is the second vote.

18 MEMBER DETTMAN: Right. Yes.

19 CHAIRPERSON MILLER: It said
20 passed by a vote of three to one with two
21 abstentions.

22 MEMBER DETTMAN: Right. And in the

1 paragraph just before that it says: "A quorum
2 of the six member ANC is four, five
3 Commissioners were present."

4 CHAIRPERSON MILLER: Right.

5 MEMBER DETTMAN: I suspect that
6 the vote was three-one and possibly one
7 abstention. That's just a guess on my part.

8 But I'm wondering if 3115 doesn't
9 really mention anything about a majority. It
10 just says "Number of members of the ANC that
11 constitute a quorum, and the number of members
12 present." And then the vote on the motion.

13 CHAIRPERSON MILLER: That's true.

14 Do you think the ANC has been
15 given great weight then? It just means
16 addressing the issues that they raise in their
17 report, which I think we did. In any event I
18 did to a certain extent. When we talked about
19 the height of the wall having an adverse
20 impact, and the light on 1701.

21 MEMBER DETTMAN: I think we
22 adequately addressed their issues. I was just

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1 asking for clarification on whether or not
2 what you said was suggesting that it didn't
3 qualify for great weight. And I wasn't sure.

4 CHAIRPERSON MILLER: Okay. I
5 think it's worth noting that this might not
6 represent the community in that there's not a
7 majority. However, it is an ANC report. So
8 since great weight means that we just address
9 their issues, it doesn't mean that we give it,
10 I don't know, greater importance than I think
11 that we don't have to necessarily resolve that
12 question.

13 VICE CHAIRPERSON LOUD: Madam
14 Chair, just on this point. I think under
15 3115.2 I think that Commissioner Dettman
16 brought it up. But I do think that we have to
17 give it great weight because it meets all of
18 the criteria for an ANC report. But in terms
19 of what that actually means since we are
20 assuming that the majority vote goes with the
21 ANC report, do we really have to distinguish
22 anything about the report? I thought it's

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1 only when you make a decision that's contra
2 the ANC that you have to articulate the basis
3 for differing with the ANC. Is that a
4 misinterpretation?

5 CHAIRPERSON MILLER: Well, if you
6 agree with the ANC, then it's going to be a
7 part of your rationale.

8 I think that it sounds to me like,
9 we haven't had a vote on this but if the
10 majority is on the same side as the ANC, I
11 don't believe that the majority really agrees
12 though with the ANC's position. Because when
13 we were having the discussion about
14 substantial detriment it seemed as if the
15 majority did not find substantial detriment,
16 and that's what their ANC resolution goes to.

17 I think that we've addressed it.

18 Okay. I just want to ask Ms.
19 Walker about the inconvenience point. Because
20 I understand your assessment of going to
21 analyze the undue burden on the applicant if
22 they don't get the relief. And I just wasn't

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1 clear whether in your inconvenience factor
2 that you noted whether you weighed the
3 vandalism reports? Whether do you mean that
4 you think that it's less convenient if they
5 have other forms of enclosing the vehicle, but
6 that those forms of enclosure such as a
7 pulldown or a fence would suffice in meeting
8 the security concerns, and therefore the
9 difference between the two is just one of
10 convenience? Is that what you meant?

11 BOARD MEMBER WHEAT: I didn't
12 exactly follow that. But I think that there
13 are alternatives available to the applicant to
14 address the security concerns that they have
15 short of erecting a building that is not
16 compliant with the Zoning Regulations. And as
17 an example, I pointed out the gate that
18 existed on the lot before that was erected by
19 a previous owner.

20 So the security concerns were not
21 persuasive to me when I was looking at this
22 burden to the applicant. So if you remove the

1 security concerns and if you look at parking
2 on a parking pad versus parking in a garage,
3 then essentially it is an issue of convenience
4 to the applicant. The convenience of being
5 able to park your vehicle inside away from the
6 elements and so forth.

7 CHAIRPERSON MILLER: Okay. I just
8 want to ask one more question for the others.
9 In your analysis, because I've read this many
10 times, as far as Gilmartin says the BZA has
11 the flexibility to consider a number of
12 factors including but not limited to: (1) The
13 weight of the burden of strict compliance. So
14 from what I'm hearing it sounds like some of
15 you have not -- although the rest of you,
16 think that this is a low burden that they
17 comply with the regulations by having parking
18 on the parking pad or secured in other ways.
19 They don't need a variance for that. And do
20 you think the severity of the variance
21 requested, do you think that it's -- are you
22 considering those other two factors? The

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1 severity of the variance requested and the
2 effect of the proposed variances would have on
3 the overall zone plan?

4 I want to wrap this up, because I
5 just want to make sure I understand the
6 rationale for where I think the majority is
7 going is that you don't a great burden in
8 comply with the regulations. And that trumps
9 the rest of the analysis, or that outweighs,
10 or that you stop there?

11 We all agree that it's an
12 exceptional property and then we get to the
13 next step. So just for the sake of clarity, it
14 sounds to me that the rest of you are in favor
15 of, but you can correct me if I'm wrong,
16 denying on grounds of practical difficulty
17 because the burden of strict compliance is
18 low? Because there are other ways to park.

19 VICE CHAIRPERSON LOUD: I'm not
20 sure --

21 CHAIRPERSON MILLER: Compliance
22 means that the variance is denied.

1 VICE CHAIRPERSON LOUD: I'm not
2 sure I understand what you just said, but let
3 me just repeat my grounds for opposing relief
4 on the practical difficulty question.

5 That the applicant failed to
6 present sufficient evidence to demonstrate
7 that the small size of the lot and the unique
8 location of the lot was the approximate cause
9 of the applicant not being be able to secure
10 vehicles on the alley lot. And in reaching
11 that conclusion, I did take a look at the fact
12 that he's seeking 60 percent variance from
13 what's allowed, but it's more the fact that I
14 don't see this approximate connection between
15 the size of the lot, the location of the lot,
16 in being unique and the lot not serving the
17 applicant's purpose of securing his vehicles.

18 CHAIRPERSON MILLER: Thank you.

19 Any other comments? Okay.

20 There's a motion that's been
21 seconded. All those in favor say aye.

22 MR. LOUD and MS WALKER: Aye.

1 CHAIRPERSON MILLER: All those
2 opposed.

3 Opposed.

4 CHAIRPERSON MILLER: All those
5 abstaining?

6 And would you call the vote,
7 please, Mr. Moy.

8 MR. MOY: Yes, Madam Chair.

9 The staff would record the vote as
10 three to one to zero. This was on the motion
11 of Mr. Dettman to deny the application.

12 Second the motion is Mr. Loud.
13 Those in support of the motion Ms. Walker.
14 Opposed to the motion to deny is the Chair Ms.
15 Miller. Three to one to zero.

16 Madam Chair, we also have an
17 absentee ballot from Mr. Anthony Hood who also
18 participated on the application. And his
19 absentee vote is to deny the application based
20 on the applicant not meeting the second prong
21 of the variance test.

22 That would give a resulting vote

1 of four to one to zero.

2 CHAIRPERSON MILLER: Okay. Thank
3 you very much.

4 Do we have anything else on the
5 agenda for this morning.

6 MR. MOY: Yes. Just one final
7 housecleaning here. On the first case, which
8 is 17812 of Kidane, staff is also in receipt
9 of an absentee ballot from Mr. Hood who also
10 participated on the application. And just for
11 the record, for the record's sake, Mr. Hood
12 also agreed to delay the decision of the Board
13 to a date that the Board may impose.

14 CHAIRPERSON MILLER: Okay. Thank
15 you very much.

16 If there's no other business on
17 the agenda for this morning, then this meeting
18 is adjourned.

19 (Whereupon, at 12:04 p.m. the
20 meeting was adjourned.)

21

22