

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY,  
DECEMBER 16, 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 10:30 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary  
BEVERLEY BAILEY Sr. Zoning Spec.

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on December 16, 2008.

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

10:43 a.m.

CHAIRPERSON MILLER: This meeting will please come to order. Good morning, ladies and gentlemen. We have a Special Public Meeting on the agenda for this morning first and then to be followed by the Public Hearing.

So I am going to start out reading the intro for the meeting. It is December 16, 2008, Special Public Meeting of the Board of Zoning Adjustment for the District of Columbia. My name is Ruthanne Miller. I'm the Chair of the BZA.

To my right is Mr. Marc Loud. He is our Vice Chair. To my left are Mary Oates Walker and Shane Dettman, Board Members. Next to Mr. Dettman is Mr. Cliff Moy from the Office of Zoning, Ms. Lori Monroe from the Office of Attorney General and Ms. Beverley Bailey from the Office of Zoning.

Copies of today's meeting agenda

1 are available to you and are located to my  
2 left in the wall bin near the door. We do not  
3 take any public testimony in our meetings,  
4 unless the Board asks someone to come forward.

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

11 Please, turn off all beepers and  
12 cell phones.

13 Does the staff have any  
14 preliminary matters?

15 MR. MOY: Yes, we do, Madam Chair.  
16 Staff would suggest that we take it on a case-  
17 by-case basis.

18 CHAIRPERSON MILLER: Okay. Let's  
19 do that then. Let's proceed now then with the  
20 agenda.

21 MR. MOY: Good morning, Madam  
22 Chair and Members of the Board. The first

1 application for the Special Public Meeting is  
2 Application No. 17835 of Louis P. Fiore,  
3 pursuant to 11 DCMR 3104.1 and 3103.2, for a  
4 special exception to construct an accessory  
5 garage serving an existing one-family row  
6 dwelling under section 223, not meeting the  
7 lot occupancy, section 403, requirements and  
8 variance from the alley set-back requirements  
9 under subsection 2300.4 in the R-4 District.  
10 This is at premises 225 9<sup>th</sup> Street, N.E.,  
11 that's in Square 939, Lot 95.

12 If the Board will recall, on  
13 October 28, 2008, the Board completed public  
14 testimony, closed the record and scheduled its  
15 decision at this Special Public Meeting today.  
16 The Board requested additional information to  
17 supplement the record both from the applicant  
18 and responses from parties and the Office of  
19 Planning.

20 Those filings are entered into the  
21 record, Madam Chair. The first filing is from  
22 the applicant and is identified as Exhibit 34

1 in your case folders. We also have a filing  
2 from the Office of Planning, which is their  
3 supplemental report, that's identified as  
4 Exhibit 38. It is dated December 16<sup>th</sup>,  
5 although the deadline we, the Board, gave was  
6 December 12<sup>th</sup>, so it's a bit late, but it's in  
7 the record.

8 We have two additional filings,  
9 both responses. One from Ms. Patricia  
10 Marshall, who was granted party status. That  
11 filing is identified as Exhibit 35. And also  
12 a filing from -- rather two filings from the  
13 ANC-6A, Exhibits 36 and 37.

14 The Board is to act on the merits  
15 of the requested special exception and  
16 variance relief.

17 The two matters here: First,  
18 there is the filing submitted by Ms. Marshall.  
19 There are eight letters in opposition, which  
20 is attached to her filing. The second filing  
21 for preliminary matter is a filing from the --  
22 rather -- well, from the applicant, because in

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1 the redesign of the program, it has resulted  
2 in an increase in lot occupancy, 72 percent,  
3 which results in the variance relief, which is  
4 separate from what was advertised as special  
5 exception relief.

6 That completes the staff's  
7 briefing, Madam Chair.

8 CHAIRPERSON MILLER: Thank you,  
9 Mr. Moy. Okay. It seems that we have a few  
10 preliminary issues to address first. I think  
11 the easiest is did you say the Office of  
12 Planning report was a couple days late or  
13 something?

14 MR. MOY: Yes, that filing was  
15 dated December 16<sup>th</sup>, the letter, Exhibit 38,  
16 and the Board had requested all responses in  
17 by December the 12<sup>th</sup>.

18 CHAIRPERSON MILLER: Okay. And  
19 the Board has the authority to waive  
20 requirements, such as that, especially ones  
21 that it imposes itself if there is good cause.  
22 And I think that the -- I mean, there's almost

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1 always good cause to hear the Office of  
2 Planning. And this was a very helpful  
3 thorough report, so I would suggest that we  
4 waive our rules and accept that into the  
5 record.

6 And is that the consensus of the  
7 Board? Okay. Now, we've got two pleadings,  
8 I believe, from the ANC. And one objects to  
9 our considering the variance relief, I  
10 believe, because they claim that they didn't  
11 get the notice, 30 day notice, required by  
12 D.C. Statute 1-30910(b). And that provision  
13 just speaks to notice of D.C. Government  
14 proposed actions.

15 And for a few reasons, I don't  
16 think that's applicable in this case. One is  
17 that the hearing on this case itself, notice  
18 of that was given to the ANC in accordance  
19 with that provision. So they had notice of  
20 the hearing and opportunity to participate and  
21 they did.

22 So they were already a part of the

1 hearing and it's often the case that we allow  
2 an applicant to revise plans and other parties  
3 have an opportunity to respond. And they were  
4 on notice of that at the hearing. And the ANC  
5 representative was at the hearing.

6 And I reviewed the transcript to  
7 make sure, at the hearing, that I did converse  
8 with the ANC rep to make sure when we were  
9 scheduling the dates for responses to any  
10 revisions that would have been filed in the  
11 case, that the ANC had time to respond, had  
12 time to have their meeting and then time to  
13 respond.

14 And we actually did schedule  
15 around the ANC. So I don't see any reason  
16 that this case would need to be readvertised  
17 on that basis. And the ANC actually has filed  
18 -- they did meet and they did file a  
19 submission in response to the revision.

20 So how do others feel on that  
21 issue?

22 VICE CHAIRMAN LOUD: I agree with

1 you, Madam Chair. I think you stated it  
2 fairly and fair to both parties.

3 CHAIRPERSON MILLER: Okay. I  
4 think that's the consensus of the Board. And  
5 then we get to I think the question of the  
6 eight letters that were attached to Ms.  
7 Marshall's submission. And as a party, Ms.  
8 Marshall had the right and opportunity to  
9 respond to the submissions.

10 We didn't leave the record open  
11 for general responses, but we can admit them  
12 if we find good cause to do so. And I think--  
13 and no prejudice to a party. And I think that  
14 in this case, there is good cause,  
15 particularly, because of almost the same  
16 reason that the applicant did change the  
17 degree of relief.

18 It did change from special  
19 exception to variance. And if part of what I  
20 was saying before was that at least we didn't  
21 need to readvertise, because the ANC was on  
22 notice and the party in opposition was on

1 notice. And clearly, these other neighbors  
2 were on notice.

3 So I think in all fairness though,  
4 being on notice and not readvertising, they  
5 should have that opportunity to respond and  
6 they did. So I would suggest that we admit  
7 them. And the responses were, I thought,  
8 quite relevant and on point as well.

9 Okay. So the consensus is then  
10 that we will accept those letters into the  
11 record.

12 This is kind of a peculiar  
13 posture, because usually, I mean, often when  
14 an applicant revises the plans, they come  
15 closer within the degree of relief they are  
16 seeking. In this case, what I mean is, they  
17 are now seeking greater relief. Before they  
18 were seeking special exception with respect to  
19 lot occupancy and now they are seeking  
20 variance with respect to lot occupancy.

21 So it's an unusual posture. That  
22 being said, I think we need to see what we

1 want to do with this case. I think the  
2 problem it raises for me is I think that what  
3 was particularly addressed in the Office of  
4 Planning report, that being that they  
5 shouldn't be granted -- well, Office of  
6 Planning has taken this position.

7           There are two variances that are  
8 at issue in this case. One goes to lot  
9 occupancy and one goes to alley set-back.  
10 Alley set-back was in the case before and they  
11 have actually improved their position with  
12 respect to alley set-back relief. They need  
13 less relief now than they did before.

14           They have -- alley set-back has  
15 been changed from 12 feet to 5 feet, I  
16 believe. So they have actually improved on  
17 that end. But even as they have improved,  
18 Office of Planning's position on this has been  
19 that they never made the case for variance  
20 relief with respect to alley set-back.

21           And I think that we can address  
22 that today, but my concern is with respect to

1 the other part, lot occupancy. What is  
2 peculiar is that we grant variance relief if  
3 there is a practical difficulty in complying  
4 with the regulations. And if they can comply  
5 and come in under 223, then that somewhat  
6 defeats their argument for variance relief  
7 with respect to the practical difficulty test  
8 under the lot occupancy issue.

9 And so Office of Planning in so  
10 briefing it, I think, very thoroughly has made  
11 a case that they think that they can be  
12 granted special exception if they revise their  
13 plans further. So I think the dilemma here  
14 today is, you know, it's often we usually say,  
15 you know, yes or no. And in this case, it  
16 looks to me like they probably can meet the  
17 special exception test, according to Office of  
18 Planning and what I have seen in the record,  
19 but they haven't today.

20 It would be another going back to  
21 the drawing board. And just to say just a  
22 little bit more with respect to variance, I

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1 think that the Office of Planning is correct  
2 also that they haven't made a case for a  
3 uniqueness that gives rise to a specific  
4 practical difficulty arising out of the  
5 uniqueness with respect to either test.

6 But the difficulty I find myself  
7 in is that, you know, normally we are  
8 definitively deciding yay or nay and I think  
9 that this plan is so close to complying with  
10 223 that I wouldn't want to necessarily deny  
11 it today, based on the fact that they changed  
12 their plans and are now seeking a variance,  
13 because I think according to Office of  
14 Planning's report, they could meeting the 223.

15 So I don't know if people want to  
16 comment on that part of this procedure, at  
17 this point?

18 VICE CHAIRMAN LOUD: Thank you,  
19 Madam Chair. I agree with the way you are  
20 approaching the analysis in the case, Madam  
21 Chair, and I, too, have found it difficult to  
22 land specifically on where we are going to

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1 come out this morning. But I am very clear  
2 from the record that I don't find a unique  
3 condition to the property.

4 It's shaped rectangularly. There  
5 are no extenuating circumstances around it.  
6 It doesn't abut historic property. I mean,  
7 there is nothing about it that is unique that  
8 would allow the applicant to meet the variance  
9 test. So the request for relief from the  
10 alley center line, to me, just doesn't -- it's  
11 not borne out by the record.

12 Now, originally when the  
13 application came up, it was for 223 asking for  
14 lot occupancy relief. And OP, as you  
15 indicated, absolutely supported the applicant,  
16 provided the applicant got the lot occupancy  
17 down from 70.3 to 70 percent, I think.

18 When it came back on revision, the  
19 project had changed a little bit. Lot  
20 occupancy went up to 72 percent triggering the  
21 need for variance relief all over again. But  
22 for the same reasons that I don't think the

1 property is unique and could establish the  
2 test for a variance with respect to the relief  
3 from the alley center line, I don't think if  
4 we were to consider it for lot occupancy  
5 relief that it has any uniqueness as well.

6 So I'm back with you to the 223  
7 analysis. And if the -- you know, if we look  
8 at the record and look at what OP has said  
9 regarding the 223 analysis and the light and  
10 air analysis, the privacy questions, we look  
11 at the ANC report, which by the way the OP  
12 report is entitled to great weight as is the  
13 ANC report, particularly the OP report though  
14 talks about the applicant making the test and  
15 OP being willing to support the application if  
16 certain conditions are made with respect to  
17 the lot occupancy and the roof deck.

18 And for me, when OP makes a report  
19 like that and they have gone through the  
20 analysis and they have taken a look at the  
21 evidence, I mean, I do take it to heart and  
22 take it under consideration. And they have

1       been very clear in this report that this  
2       applicant could meet 223 if it conforms the  
3       plan to the lot occupancy of 70 percent and  
4       removes the roof deck.

5               So I am very much inclined to, on  
6       this record, follow OP's recommendation.

7               MEMBER DETTMAN: Madam Chair, I'm  
8       in agreement with yourself as well as what Mr.  
9       Loud has said thus far. With respect to the  
10      variance request from the alley set-back  
11      requirement, I think we have enough in the  
12      record to go forward today on deciding that  
13      relief request.

14              I agree with respect to the first  
15      prong of the test that I'm not seeing a  
16      uniqueness here. This is a nonconforming lot,  
17      which in other cases and at times that can be  
18      the uniqueness that gives rise to a practical  
19      difficulty, but in this case, the lot width  
20      and lot area is not a unique characteristic  
21      that would create a practical difficulty for  
22      the applicant to meet that set-back.

1           And that was acknowledged at the  
2 hearing by the applicant when we were looking  
3 over the numbers saying well, it looks like  
4 you can meet the 12 foot set-back as well as  
5 not encroach upon your required rear yard.

6           With respect to the lot occupancy  
7 request, and we spent a lot of time talking  
8 about that at the hearing as well and looking  
9 at what were the alternatives available to the  
10 applicant, and one of the changes that was  
11 made to the garage is that they squared it  
12 off. It was the diagonal entrance and they  
13 squared it up to the alley to satisfy or  
14 address some concerns that were made by OP and  
15 the ANC.

16           And let me just step back and say  
17 I kind of commend the applicant for being  
18 flexible and looking at the design of the  
19 height in the relationship to the alley. And  
20 it was acknowledged at the hearing that by  
21 squaring up the garage to the alley, it was  
22 going to increase the lot occupancy over 70

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1 percent.

2 But what was said at the hearing  
3 is that if you decrease the width of the  
4 garage, you could make up for that and come  
5 back below the 70 percent.

6 But what we have before us, these  
7 revised plans, is that the reason why we have  
8 now a variance request from lot occupancy is  
9 that in squaring up and decreasing the width,  
10 the applicant has also decided to increase the  
11 depth by 2 feet, from 19.5 to 21.5 feet, which  
12 takes them above 70 percent.

13 So I agree with Mr. Loud that I  
14 don't see the proposed garage design meeting  
15 the variance request because of a failure to  
16 meet the first prong. I am open to allowing  
17 the applicant to go back to the drawing board  
18 and see what can be done to the footprint of  
19 this garage, keeping in mind that they need to  
20 meet the parking requirement.

21 But I think that there are several  
22 alternatives there that will bring this thing

1 in under 223 and back under as a special  
2 exception.

3 MEMBER WALKER: Madam Chair, I  
4 agree with you and my other colleagues. This  
5 is sort of a procedural aberration here. It  
6 is uncommon for us to request a party to  
7 actually make a second revision. I think we  
8 need to have some flexibility here, because  
9 the revisions that are before us were in  
10 response to, I think, the comments in the  
11 hearing that the Board Members made.

12 And so I, too, would be in favor  
13 of allowing the applicant to make revisions to  
14 the plans, so that we can do an analysis under  
15 223.

16 CHAIRPERSON MILLER: Thank you.  
17 And I also would like to, you know, comment  
18 the applicant for making, you know, a lot of  
19 changes that actually improved the garage with  
20 respect to impact on the neighborhood and  
21 bringing the height down and making it flush  
22 instead of angled on the alley.

1           But I think it is good that we  
2 proceed, at least, as you all have done pretty  
3 much on the alley set-back, because we don't  
4 want the applicant to draft new plans that  
5 would require a variance relief. I think we  
6 can make that clear today that we have looked  
7 at the three prongs of that test and are  
8 convinced that it fails. And in large part,  
9 because we are convinced that the applicant  
10 can come in under 223.

11           And I would just also mention  
12 that, you know, one of the -- there are  
13 aspects of an exceptional condition. You  
14 know, as Mr. Dettman said, I mean, it's  
15 nonconforming. It's very narrow. And then  
16 there was another point made as to where it  
17 was located on the block, that there is larger  
18 public space in the area and alley to the  
19 south of the applicant's property.

20           But they don't give rise to a  
21 practical difficulty in complying with other  
22 requirements of 223. And I think the

1 applicant also mentioned the practical  
2 difficulty of, you know, wanting to produce  
3 the green space in his yard, but the  
4 applicant, you know, has made that decision in  
5 doing additions to the rear of his property  
6 that reduced the green space.

7 So it just does not rise. In  
8 general, I don't find any of the exceptional  
9 conditions giving rise to a practical  
10 difficulty and complying to at least come  
11 under 223.

12 Is there any other comments on the  
13 alley set-back and the lot occupancy variance  
14 question? Okay. I think then the next item,  
15 you know, as Ms. Oates Walker was talking  
16 about, allowing the applicant the opportunity,  
17 should he want it, to revise one more time to  
18 come in under 223.

19 And because we are not deciding on  
20 a specific plan today under 223, I think that  
21 we want to be hesitant about how much we want  
22 to say as to how we would rule, because we

1 don't want to rule in advance. On the other  
2 hand, I think that the applicant has already  
3 done two versions of this garage and probably  
4 would like whatever guidance we can give.

5 Not that we give guidance, but as  
6 far as if we have made some -- if we have some  
7 impressions based on the evidence we have  
8 already said we have with respect to anything  
9 that would trigger variance relief. And the  
10 only other thing I'm referring to is the roof  
11 deck issue, because I think that that affects  
12 how the applicant may revise the plans.

13 And while, you know, we are not  
14 reaching that issue today, I would say that  
15 there is, to me, quite a lot of evidence in  
16 the record from Office of Planning and the ANC  
17 to which we give great weight, plus all the  
18 neighbors that because of the position of this  
19 garage, it would be a great invasion of  
20 privacy into neighbor's yards, different from  
21 the normal roof deck. And I think there seems  
22 to be a lot of merit to that.

1                   And then, I guess, there was the  
2                   problem with respect to well, if they screen  
3                   it, which was one of the suggestions that I  
4                   did throw out myself, it appears that that  
5                   adds a lot of massing somewhat and perhaps  
6                   interference with light into people's yards.  
7                   So it does look a little bit problematic with  
8                   respect to the prong of our test where we look  
9                   at adverse impacts on neighboring properties.

10                   But I just wanted to share my  
11                   impressions, at this point, because I know it  
12                   is a big deal for the applicant to revise  
13                   plans one more time. So it's not a decision  
14                   of the Board, but if others want to share  
15                   their perceptions at this point, feel free.

16                   VICE CHAIRMAN LOUD: Again, Madam  
17                   Chair, I think I'm repeating myself, but  
18                   Exhibit 26 of the record is the Office of  
19                   Planning report from October 20, 2008. And  
20                   they walk through an analysis of 223 and on  
21                   page 3, and like you, I'm not saying that this  
22                   is dispositive or that I have reached a

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1 conclusion yet, but certainly this is  
2 something that I would take under  
3 consideration and give it the appropriate  
4 weight.

5 They talk about the light and air  
6 and privacy impacts. In particular, the  
7 privacy impact, they talk about the garage  
8 itself not posing any 223 adverse impact, but  
9 that the deck on top of the garage posing a  
10 privacy issue. Now, that's a matter of  
11 record. It's something anybody who reviews  
12 this case up to this point can take a look at  
13 this report and can review.

14 And I think for me, I would be  
15 looking very seriously at the report and  
16 trying to wade through the evidence and reach  
17 a conclusion.

18 CHAIRPERSON MILLER: Okay. Are  
19 there any other comments that Board Members  
20 want to make before we move into then making  
21 a decision on further scheduling? Okay. Then  
22 I would suggest that we schedule this for

1 decision on February 3<sup>rd</sup> allowing time for the  
2 applicant to make any revisions should he like  
3 to bring the plans into accordance with just  
4 meeting relief under section 223.

5 We could leave the record open for  
6 the revised plans and any explanatory comments  
7 the applicant wishes to make and give the ANC  
8 and the party in opposition and Office of  
9 Planning an opportunity to respond. And that  
10 would be that. The record would only be open  
11 for that purpose.

12 So if we have February 3<sup>rd</sup> as a  
13 decision date and we move backwards, what  
14 would the date for initial filings and then  
15 responses be? Mr. Moy, do you have an idea?

16 MR. MOY: I have a suggestion,  
17 Madam Chair. If I work backwards from the  
18 decision date of February the 3<sup>rd</sup>, over the  
19 holidays, allowing for the holidays, we could  
20 give parties time to respond a deadline of,  
21 let's say, Wednesday, January the 28<sup>th</sup>.

22 And then perhaps again with

1 sensitivity for the holidays, time for the  
2 applicant time to respond, if he does, let's  
3 say, perhaps a week or a week and a half,  
4 let's say a week before, which would give us  
5 January the -- it would be Wednesday the 21<sup>st</sup>  
6 or Monday the 19<sup>th</sup> and the 20<sup>th</sup> are holidays,  
7 so I would say either January 21, 22 or 23<sup>rd</sup>.  
8 That's a Wednesday, Thursday or Friday.

9 CHAIRPERSON MILLER: Let me ask if  
10 the applicant is here in this case. Okay. Do  
11 you want to just -- do you have an opinion  
12 about the schedule? Because we don't want to  
13 require you to file something before you are  
14 ready. We just don't want to set it too late.  
15 In that, you know, we know applicants are  
16 often anxious to get moving.

17 So is that schedule all right with  
18 you? Okay. All right. That's good. So  
19 okay, if we did, so we're saying we hit  
20 Inauguration week, so if -- okay, January 21<sup>st</sup>  
21 if a holiday?

22 MR. MOY: Well, the holiday --

1 CHAIRPERSON MILLER: No, January  
2 21<sup>st</sup> is fine.

3 MR. MOY: -- would be the  
4 Inauguration Day is Tuesday, the 20<sup>th</sup>.

5 CHAIRPERSON MILLER: Okay.

6 MR. MOY: So for the applicant to  
7 file any revised plans would be either  
8 Wednesday, the 21<sup>st</sup>, or Thursday, the 22<sup>nd</sup>.

9 CHAIRPERSON MILLER: Okay. Well,  
10 you know, unless I hear otherwise, he seemed  
11 to indicate this was fine. So I would just  
12 pick the earlier date, so that the ANC has a  
13 little more time.

14 MR. MOY: Let's make it Wednesday,  
15 the 21<sup>st</sup>.

16 CHAIRPERSON MILLER: Yeah. And  
17 I'm sure that, you know, I mean, it could  
18 always be shared with the ANC earlier, but  
19 this would be the required date. Okay. So  
20 that would be served on Office of Zoning, the  
21 ANC and Ms. Marshall and the Office of  
22 Planning. Okay. January 21<sup>st</sup> and January 28<sup>th</sup>

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1 for responses and February 3<sup>rd</sup> for decision.

2 MR. MOY: Right.

3 CHAIRPERSON MILLER: Okay. Good.

4 Okay. I think that concludes that case.

5 MEMBER DETTMAN: Madam Chair?

6 CHAIRPERSON MILLER: Yes?

7 MEMBER DETTMAN: I just want to

8 make one --

9 CHAIRPERSON MILLER: Do you have a  
10 comment? Yes?

11 MEMBER DETTMAN: -- comment very,  
12 very quick. I noticed in the revised plans  
13 that there is a ever so slight miscalculation  
14 on the area that if corrected works to the  
15 applicant's advantage. So you know, they are  
16 saying it's about 72 percent lot occupancy.  
17 It's closer to 70. So it's very, very close  
18 and I just wanted to point that out.

19 CHAIRPERSON MILLER: Okay.

20 Anything else? Okay. Thank you.

21 MR. MOY: The next -- the second  
22 case, Madam Chair, is Application No. 17845 of

1 Arnold Nicholson, pursuant to 11 DCMR 3104.1,  
2 for a special exception to allow a two-story  
3 rear addition to an existing one-family row  
4 dwelling under section 223, not meeting the  
5 court requirements under section 406, in the  
6 R-4 District at premises 1418 K Street, S.E.,  
7 that's in Square 1065, Lot 46.

8 On November 18, 2008, the Board  
9 completed public testimony, closed the record  
10 and scheduled its decision for December 16<sup>th</sup>.  
11 The Board did allow the ANC-6B to file a  
12 supplemental letter after their regularly  
13 scheduled meeting on, ANC meeting, December  
14 9<sup>th</sup>. Madam Chair, that filing is in the  
15 record, timely filed, it is identified in your  
16 case folders as Exhibit 28.

17 And the Board is to act on the  
18 merits of the requested special exception  
19 relief. And that completes the staff's  
20 briefing, Madam Chair.

21 CHAIRPERSON MILLER: Thank you.

22 And I'm going to let Mr. Dettman address this

1 specifically. But in general, my recollection  
2 is this was a pretty straightforward case.  
3 The ANC was in opposition for some reason.  
4 And we had a question with respect to why that  
5 would be so. And I think it was very  
6 successful in that the applicant went back to  
7 the ANC and got their unanimous support.

8 So I thought that was very  
9 positive. But, Mr. Dettman, do you want to  
10 address why this meets the special exception  
11 test?

12 MEMBER DETTMAN: Certainly, Madam  
13 Chair. I'll just note that at the hearing, as  
14 I guess a prehearing submission, we received  
15 a letter from the ANC, which is Exhibit No. 25  
16 in our record, that voiced their opposition,  
17 their original opposition to the case. And it  
18 was based on the grounds that -- it says "The  
19 Commission is taking this action per reviewing  
20 the applicant's documentation and believes the  
21 new footprint may present concerns for air,  
22 light and privacy for the adjoining neighbors.

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1                   Additionally, the letters of  
2 consent/support from abutting neighbors are  
3 not clear regarding these issues."

4                   As Mr. Moy stated, we received a  
5 follow-up letter from ANC-6B, that is Exhibit  
6 No. 28 in our record, withdrawing their  
7 opposition to the case, stating that "The  
8 Commission does not believe the new footprint  
9 presents any concerns for air, light and  
10 privacy and that the letters of support from  
11 the abutting neighbors are clear regarding  
12 these issues."

13                   So that being said and seeing that  
14 there is no opposition, the application has  
15 the support of the Capitol Hill Restoration  
16 Society, and again from the residents at 1420  
17 and 1416 K Street, S.E., which are the two  
18 abutting neighbors.

19                   I think what I would like to do  
20 instead of going through the individual  
21 provisions of section 223, just adopt the D.C.  
22 -- the Office of Planning's report, which

1 recommends approval for the request from the  
2 open court requirements under 223, just  
3 stating that according to the report the  
4 application meets all of the requirements  
5 under 223, as well as the general special  
6 exception requirements.

7 CHAIRPERSON MILLER: Thank you.  
8 And I think at the hearing, we went through  
9 all of the elements very carefully and found  
10 that they did meet, but we wanted to leave the  
11 record open for the possibility that the ANC  
12 might also agree, which they did. So any  
13 other comments?

14 Do we have a motion?

15 MEMBER DETTMAN: Madam Chair, I  
16 don't have the advertised language before me.

17 CHAIRPERSON MILLER: Oh.

18 MEMBER DETTMAN: Oh, maybe I do.  
19 I have it.

20 CHAIRPERSON MILLER: Okay.

21 MEMBER DETTMAN: Therefore, I  
22 would move for approval of Application No.

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1 17845 of Arnold Nicholson, pursuant to 11 DCMR  
2 3104.1, for a special exception to allow a  
3 two-story rear addition to an existing one-  
4 family row dwelling under section 223, not  
5 meeting the court requirements under section  
6 406, in the R-4 District at premises 1418 K  
7 Street, S.E.

8 CHAIRPERSON MILLER: Second. Any  
9 further comments?

10 All those in favor say aye.

11 ALL: Aye.

12 CHAIRPERSON MILLER: All those  
13 opposed? All those abstaining? And would you  
14 call the vote, please?

15 MR. MOY: Yes, Madam Chair. The  
16 staff would record the vote as 4-0-1. This is  
17 on the motion of Mr. Dettman to approve the  
18 application as advertised, seconded by Mrs.  
19 Miller, the Chair. Also in support of the  
20 motion Mr. Loud and Ms. Walker. And we have  
21 a Zoning Commission Member not present, not  
22 voting. Again, the resulting vote is 4-0-1.

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1                   CHAIRPERSON MILLER: Thank you.  
2                   And this can be a summary order, as there is  
3                   no party in opposition.

4                   MR. MOY: Yes, very good.

5                   CHAIRPERSON MILLER: The next  
6                   item, Madam Chair, for the Board's action is  
7                   an application that was before the Board last  
8                   week on December the 9<sup>th</sup> for a decision. This  
9                   is Application No. 17812 of Pietros Kidane.  
10                  If the Board will recall, this application on  
11                  December 9<sup>th</sup> was for the Board's action, but  
12                  there was no filing from the applicant and the  
13                  Board directed the staff to come back to the  
14                  Board with a perspective reschedule date.

15                  The -- in your file is a letter  
16                  from Mr. Kidane that was submitted into the  
17                  record this morning and I think I'll leave it  
18                  with that, Madam Chair.

19                  CHAIRPERSON MILLER: Thank you.  
20                  Yes, I think that last week we talked about  
21                  how -- we heard from Mr. Jackson from the  
22                  Office of Planning and he indicated that Mr.

1 Kidane had met with the Zoning Administrator.

2 And we just got this letter this  
3 morning and we're trying to figure out exactly  
4 what relief Mr. Kidane is seeking. I think he  
5 is back to seeking a use variance, but we want  
6 to clarify a little bit more on that and the  
7 nature of his operations, so that we have all  
8 the information we need to make a decision.

9 Is Mr. Kidane here? Oh, could you  
10 come forward, please? We will just maybe ask  
11 you a few questions. You know, as we say, we  
12 don't take testimony from individuals, unless  
13 we ask them to, and we are asking you to. And  
14 maybe he should be sworn in though, Ms.  
15 Bailey. Would that be okay?

16 MS. BAILEY: Would you, please,  
17 raise your right hand?

18 (Whereupon, the witness was  
19 sworn.)

20 MS. BAILEY: Thank you.

21 CHAIRPERSON MILLER: Why don't you  
22 have a seat at the table? We're just going to

1 keep you a few minutes. And you press the  
2 push button to speak, the green light will go  
3 on. Okay. If you could give your name and  
4 address for the record?

5 MR. KIDANE: Yes, my name is  
6 Pietros Kidane. My residential address is  
7 1322 Half Street, Southeast Washington.

8 CHAIRPERSON MILLER: Okay. And we  
9 had a hearing on your application while you  
10 were out of the country, I believe.

11 MR. KIDANE: Yes, ma'am.

12 CHAIRPERSON MILLER: By a  
13 representative. And we're not sure that this  
14 case requires another hearing, but what we  
15 want to do is just take this opportunity to  
16 ask you a few questions, so that we can make  
17 our analysis and then issue a decision in a  
18 month or so.

19 So we are not sure whether the  
20 nature of the request has changed since you  
21 went to speak with the Zoning Administrator.  
22 You are seeking a use variance, I understand.

1 MR. KIDANE: Really what -- if I  
2 may?

3 CHAIRPERSON MILLER: Yes, go  
4 ahead.

5 MR. KIDANE: You see, the -- I  
6 think the way I put use variance is simply to  
7 see if I can use the place. But I don't know  
8 if there is an exception or variance, but the  
9 month is when I had discussion with the Zoning  
10 Administrator after having more than one  
11 discussion and, you know, report.

12 He concluded, you know, against  
13 what I was, you know, proposing. He said  
14 actually if you are not selling most of the  
15 stuff from the premise, you are considered  
16 like a manufacturer. Although, I am only a  
17 small, you know, bakery.

18 And I understand that is according  
19 to rules, but he told me I have two options.  
20 One option was to open the door to a  
21 contingent coffee shop and then in that case,  
22 I would have a permission by right, because I

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1 would be able to sell from the coffee shop.

2 The other alternative was to seek  
3 relief from the Board. Now, seeing as the  
4 first alternative suggested by the  
5 Administrator is no more available, because  
6 the coffee shop has closed because of, you  
7 know, market problems, I'm left now with this  
8 small bakery, you know, to be able to sell by  
9 delivering to other people, because my permit  
10 -- my building is so small, I can't have a  
11 counter and a space for people to come and to,  
12 you know, serve them.

13 So I don't know if they are right  
14 -- to me the right request is a special  
15 exception or a variance. I have no preference  
16 being totally ignorant about, you know, the  
17 subject. I just put change in variance. I  
18 mean, I don't know the right terminology. I  
19 mean, a relief in variance use something like  
20 that. But if --

21 CHAIRPERSON MILLER: That's okay.  
22 We will, figure that out. But I think we

1 wanted to know are you seeking, you know,  
2 variance from the regulation that the Zoning  
3 Administrator says applies to you?

4 MR. KIDANE: Yes, ma'am. The  
5 Administrator told me he has -- after my  
6 discussion, he has determined this is, you  
7 know, kind of a manufacturing wholesaler. And  
8 for that in C-1 it's not permitted. So he  
9 said I should seek -- I cannot do anything  
10 else, unless I seek, you know, relief from the  
11 Board.

12 CHAIRPERSON MILLER: Okay. So on  
13 page 1 of your letter, you have in quotes  
14 "wholesale and manufacturing bakery with  
15 accessory retail sales and deliveries."  
16 That's what the ZA said you were?

17 MR. KIDANE: That's what he  
18 determined.

19 CHAIRPERSON MILLER: Okay. And do  
20 we have in the record like how small you are?  
21 I mean, you're saying you're so small.

22 MR. KIDANE: Well, I mean, in

1 terms of area, you know, I'm only 900 square  
2 feet.

3 CHAIRPERSON MILLER: Okay.

4 MR. KIDANE: For production and  
5 all the other purposes the, you know,  
6 facilities. It's too small for me to be able  
7 to put in, you know, small counter for people  
8 to access and take their products.

9 CHAIRPERSON MILLER: You don't  
10 have a counter?

11 MR. KIDANE: I don't have a  
12 counter. What people come in and wait and,  
13 you know, have a line-up. There is no space  
14 for that.

15 CHAIRPERSON MILLER: Do people  
16 come and buy from the premises?

17 MR. KIDANE: People come and they  
18 ask and, you know, they come in the door.  
19 Either I put them in their car or they ask me  
20 and I deliver to their place. Anyway, it's  
21 all in the community. It's very close.

22 CHAIRPERSON MILLER: Oh, they all

1 order ahead. Is that it?

2 MR. KIDANE: Pardon, ma'am?

3 CHAIRPERSON MILLER: They order  
4 ahead?

5 MR. KIDANE: Yes.

6 CHAIRPERSON MILLER: They call  
7 you?

8 MR. KIDANE: They order ahead most  
9 of the time and some people they also come in  
10 and say I need this and that and I prepare for  
11 them.

12 CHAIRPERSON MILLER: And how many  
13 employees do you have?

14 MR. KIDANE: It's actually -- from  
15 the enterprise between my wife, myself and  
16 then my brother sometimes on part-time basis  
17 he gives us a hand. He came last time to  
18 replace me here.

19 CHAIRPERSON MILLER: Your wife,  
20 yourself and one other person. Is that what  
21 you said?

22 MR. KIDANE: Yes.

1 CHAIRPERSON MILLER: Okay.

2 MR. KIDANE: But they are all  
3 part-time.

4 CHAIRPERSON MILLER: Part-time,  
5 okay.

6 MR. KIDANE: Yeah.

7 CHAIRPERSON MILLER: How do you do  
8 your delivery?

9 MR. KIDANE: What we do now is we  
10 put -- you know, my products are more solid.  
11 They are not liquid or anything. I put them  
12 into package and then I -- later I put them in  
13 people's cars when they come to my door or I  
14 take them to their place. You know, a school  
15 or a church or, you know, person looking for  
16 anything.

17 CHAIRPERSON MILLER: So you don't  
18 have trucks? You don't have trucks  
19 delivering?

20 MR. KIDANE: No, we don't have  
21 trucks. We are a small bakery.

22 CHAIRPERSON MILLER: And what kind

1 of food do you make?

2 MR. KIDANE: We specialize in  
3 Italian food. We are preparing lasagna. We  
4 are preparing biscotti. We are preparing, you  
5 know, different finger food. This is what we  
6 specialize mainly.

7 CHAIRPERSON MILLER: And I don't  
8 know if this is in the record or not, but  
9 what's like the volume of the food that you  
10 produce? Like, you know, do you do like a lot  
11 of deliveries for events or do you just do  
12 small deliveries or what's it like?

13 MR. KIDANE: You know, our  
14 customers are basically, you know, small  
15 community members. You know, let's say people  
16 might order for 20 people, you know, or they  
17 might order a cake for, you know, 10 people,  
18 5 people, it depends. So I mean, the small  
19 curry order too big for whatever we deliver.  
20 We don't have vans or things like that. And  
21 we don't intend to do that.

22 If we have to do that, then we

1 have really to move out of the place, which  
2 means it will be much bigger. This is a very  
3 small place which will remain a community or  
4 neighborhood based activity.

5 CHAIRPERSON MILLER: How long have  
6 you been doing this?

7 MR. KIDANE: About a year and a  
8 half.

9 CHAIRPERSON MILLER: And there is  
10 a provision, I think, in the regs that talk  
11 about percentage of your sales that are  
12 deliveries. Do you have any idea what that  
13 would be for you?

14 MR. KIDANE: Yes. Yes, our  
15 experience is, you know, since, as I said, we  
16 didn't have much space in there, we are using  
17 the coffee shop to see for, you know, people  
18 talk to the reception and sell and from that  
19 we figure out about 50 percent of our -- you  
20 know, maybe 56 percent, I can't say exactly,  
21 were sold, you know, by orders for off-site.

22 CHAIRPERSON MILLER: Okay. I just

1 have one more question just so I understand  
2 it. 50 percent of the orders, you know, for  
3 the groups of like small community, 20 people  
4 having a little lunch or whatever, and what's  
5 the other 50 percent?

6 MR. KIDANE: Well, the other, as  
7 you know, they just let's say it's Sunday and  
8 people come and they tell us, you know, come  
9 in and say at 12:00 will you prepare five  
10 lasagnas for me, things like that, you know,  
11 and they come and take it or they say, you  
12 know, have birthday cake. Will you do this  
13 for me? And they come and take it. I'm  
14 deferring that from just ordering.

15 You know, we prepare for them four  
16 or five dishes earlier and then these are  
17 sold, as I said, pre -- you know, pre-direct  
18 sale. You know, I mean, maybe four or five  
19 days earlier.

20 CHAIRPERSON MILLER: So if you  
21 don't have deliveries, then you can't operate  
22 your business basically. Is that right?

1 MR. KIDANE: Yes, we can't  
2 operate, ma'am, the business if that's the  
3 case.

4 CHAIRPERSON MILLER: And is that  
5 different from pick-ups? I mean, if you had  
6 just pick-ups? I'm not exactly sure if that's  
7 a distinction, but if it were, if people could  
8 just come to you to pick up?

9 MR. KIDANE: Yeah, some people do  
10 come in.

11 CHAIRPERSON MILLER: They do that,  
12 yeah.

13 MR. KIDANE: Yeah. But most of  
14 the people they say, for example, you know,  
15 1:00 or they say for the end of the day at  
16 4:00 or 5:00. So we have to go and -- these  
17 are mainly, you know, kind of prestigious  
18 schools or church, you know, or a group of  
19 community members or in meetings of the  
20 community, things like that.

21 CHAIRPERSON MILLER: Okay. I  
22 guess one other question and then I'll see if

1 other Board Members have questions. Do you  
2 have specific hours of operation, days and  
3 hours?

4 MR. KIDANE: Yes. We work 7:30 up  
5 to 4:00 or 5:00 and after that we -- you know,  
6 the neighborhood is just residential. After  
7 that there is no activities.

8 CHAIRPERSON MILLER: And do you  
9 work seven days a week or what?

10 MR. KIDANE: We work actually  
11 seven days a week and Mondays we are closed.  
12 Six days a week. Mondays we are closed.

13 CHAIRPERSON MILLER: Okay. Do  
14 Board Members have other questions?

15 VICE CHAIRMAN LOUD: Good morning.  
16 I believe when your representative came for  
17 the hearing last time, you were out of the  
18 country and part of the discussion that we got  
19 into, which I don't want to get into a lot  
20 this morning, but part of it concerned whether  
21 or not the business was a catering firm or  
22 seeking relief as a catering firm. I just

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1 wanted to put the question to you.

2 Do you consider your establishment  
3 a catering establishment? And I'm going to  
4 follow that up with a more specific question,  
5 but I just wanted to get a sense from you.

6 MR. KIDANE: Thank you, sir, for  
7 bringing this question because it's basically  
8 my in-laws which put this -- I don't know much  
9 different. I do not know the difference  
10 between catering and delivery. So I -- you  
11 know, for me, whether it is delivery or  
12 catering, the thing I will do is just, you  
13 know, deliver the food. I don't have the  
14 specialty or intention to do the catering,  
15 which also includes laying down tables, taking  
16 stuff and that's -- we don't have neither  
17 people nor knowledge to do that.

18 So it was basically my  
19 misunderstanding of the difference between the  
20 two. There really is just more to do.

21 VICE CHAIRMAN LOUD: The second  
22 part of the question, this ties in directly to

1 what the regs define as a catering  
2 establishment, which would be if more than 75  
3 percent of your orders are placed within three  
4 hours of delivery. I guess the idea of being  
5 with a catering firm, you may call a week  
6 ahead, a couple weeks ahead to make sure that  
7 they can squeeze you in and prepare your  
8 order. For a delivery firm, at least the  
9 rules make a distinction.

10 So are you -- do most of your  
11 orders -- are most of your orders placed  
12 within three hours of delivery or in excess of  
13 that?

14 MR. KIDANE: I didn't get it quite  
15 clear.

16 VICE CHAIRMAN LOUD: It's actually  
17 a definition of a catering establishment.  
18 It's confusing, right? Yeah.

19 MR. KIDANE: Yes, sir.

20 VICE CHAIRMAN LOUD: I understand.  
21 Are you aware of whether or not most of the  
22 orders that are placed with your business are

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1 placed within three hours of the time that you  
2 deliver those orders?

3 So for example, someone would come  
4 in or call in at 9:00 a.m. and then you  
5 deliver by 11:30 or something like that or are  
6 most orders placed a day ahead of time, a week  
7 ahead of time, something more along the latter  
8 lines?

9 MR. KIDANE: I think it's more  
10 done differently. But we do prepare  
11 ourselves, you know. You know, guessing what  
12 will be continuous request. For example, we  
13 would prefer something like, you know, 40  
14 breads a day. We prepare around 20 lasagnas,  
15 you know. In that case if somebody they call  
16 and say do you have this, then we give them  
17 that.

18 But, you know, if they tell us  
19 prepare this for me for -- it's possible for  
20 us to -- we, you know, have to plan ahead.

21 VICE CHAIRMAN LOUD: Thank you. I  
22 don't have any additional follow-up.

1 MR. KIDANE: Thank you, sir.

2 CHAIRPERSON MILLER: What was your  
3 building used for before? Do you know?

4 MR. KIDANE: It's a very  
5 interesting question, ma'am. I'm glad you  
6 bring this, because when I bought the  
7 building, it was a fast food restaurant. I  
8 bought it about 2.5 years ago. And I was  
9 assuming that I was able to do deli or, you  
10 know, fast food mixed with other stuff.

11 But after I bought it, I saw the  
12 occupancy was for fast food when I bought it,  
13 but after I bought it when I went to the  
14 Zoning Administration, they told me this has  
15 changed in the meantime. The occupancy permit  
16 they gave was long time ago, but it's wrong.  
17 Around 2005, they updated the zoning and fast  
18 food was not allowed.

19 Then I bought this and I said  
20 look, I bought this because I thought I would  
21 be able to continue with some deli there.  
22 They said I should have, which is true,

1 checked with them first, you know, to make  
2 sure that that this is -- continue. But they  
3 were kind enough to give me one year time to  
4 change.

5 That's why, you know, I'm still in  
6 search, because at once I thought I was going  
7 to do -- prepare food and then they told me I  
8 have to have a bigger reception area. Then I  
9 change to bakery and then I am finding this  
10 again. So onward, I'm infeasible  
11 opportunities. This is my last chance.

12 But indeed, this was a fast food  
13 restaurant when I bought it.

14 CHAIRPERSON MILLER: And when does  
15 your temporary Certificate of Occupancy run  
16 to? When does it end?

17 MR. KIDANE: Actually, it has  
18 expired right now, because they gave me --  
19 again, as of the new one up to end of October.  
20 Since my hearing was 16 of September, they  
21 gave me to cover two weeks. But, you know, as  
22 we were trying to come in and then meet the

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1 Zoning Administrator and Office of  
2 Development, we took time and right now I am  
3 not covered. I report this to the  
4 Administrator. He is aware.

5 CHAIRPERSON MILLER: Right. He is  
6 aware, right. Okay. Anything else? Okay.  
7 What I think we are going to do then is  
8 schedule a decision on your case the first  
9 meeting after the holidays, when we get back.  
10 This is our last meeting before the holidays.  
11 So we return on January 6<sup>th</sup>.

12 So I think with everything we have  
13 in the record, plus you just provided us a lot  
14 of good information, we're going to go back,  
15 we'll study the regulations and then we will  
16 make a decision in your case on that day.  
17 Okay?

18 MR. KIDANE: Thank you very much.

19 CHAIRPERSON MILLER: Okay.

20 MR. KIDANE: Appreciate it.

21 CHAIRPERSON MILLER: Thank you.

22 Have a good holiday.

1 MR. KIDANE: Same to you all.

2 Thank you.

3 CHAIRPERSON MILLER: Okay. Do we  
4 have anything else then on our agenda for our  
5 Special Public Meeting?

6 MR. MOY: No, Madam Chair, that  
7 completes it.

8 CHAIRPERSON MILLER: All right.  
9 Then the meeting is adjourned.

10 (Whereupon, the Special Public  
11 Meeting was concluded at 11:41 a.m.)

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