

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY,

JANUARY 6, 2009

+ + + + +

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

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLEY BAILEY Sr. Zoning Spec.
JOHN NYARKU Zoning Spec.

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEVEN COCHRAN

This transcript constitutes the minutes from the Public Meeting held on January 6, 2009.

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

10:27 a.m.

CHAIRPERSON MILLER: This meeting will, please, come to order. Good morning, ladies and gentlemen, and happy new year. This is the January 6, 2009 Public Meeting of the Board of Zoning Adjustment of 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 is Mary Oates Walker, Board Member, and our other Board Member, Shane Dettman, is currently out of the country, so he will not be participating today.

Further on down is Mr. Cliff Moy from the Office of Zoning, Mary Nagelhout from the Office of Attorney General and Ms. Beverley Bailey from the Office of Zoning.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door. We do not

1 take any public testimony at our meetings
2 unless the Board asks someone to come forward.

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

10 Does the staff have any
11 preliminary matters?

12 MR. MOY: Yes, we do, Madam Chair,
13 but I think it would be wise to take them on
14 a case-by-case basis.

15 CHAIRPERSON MILLER: Okay. And I
16 think that we have two cases on the agenda for
17 our Public Meeting and it is the 17850,
18 JBG/14th & S, LLC case that has the
19 preliminary matters. Is that correct?

20 MR. MOY: Yes, Madam Chair.

21 CHAIRPERSON MILLER: Okay. So why
22 don't we call that case first then?

1 MR. MOY: Yeah. That case as you
2 just mentioned is Application No. 17850 of
3 JBG/14th & S, LLC, pursuant to 11 DCMR 3104.1
4 and 3103.2, for a variance from the lot
5 occupancy requirements under section 772, and
6 a special exception for a roof structure with
7 unequal heights under subsection 411.11, from
8 the restriction on eating and drinking
9 establishments under subsection 1901.6, from
10 the ARTS Overlay height guidelines under
11 subsection 1902.1, from the parking
12 requirements for an addition to an historic
13 structure under subsection 2120.6, for the
14 renovation of and addition to an existing
15 historic structure that will create a mixed-
16 use residential and retail development in the
17 ARTS/C-3-A, at premises 1407 S Street, N.W.,
18 and 1802, 1804, 1810, 1816 and 1818 14th
19 Street, N.W. This is in Square 206, Lots 1,
20 210, 230, 819, 820 and 821.

21 On December 2, 2008, the Board
22 completed public testimony and closed the

1 record and scheduled its decision on January
2 6, 2009. The Board requested additional
3 information to supplement the record from the
4 applicant and the other parties, including the
5 ANC.

6 Madam Chair, the Board has
7 received filings from the applicant and
8 Exhibits 40 and 41 are in your case folders.
9 Second, the Board has also received responses
10 to the applicant's filing from parties,
11 specifically, Joseph Freeman, Peter Knapp and
12 James Bogden and Charles Taylor. These are
13 identified as Exhibits 44, 43 and 42,
14 respectively.

15 Finally, the Board has also
16 received a response filing from ANC-2B, which
17 is identified as Exhibit 45 in the case
18 folders. And also finally, which is the
19 preliminary matter, this morning the Board has
20 received a filing from the applicant dated
21 January 6, 2009, of course. And that's for
22 the Board's consideration and action.

1 With that, the Board is to act on
2 the merits of the request for the variance and
3 special exception relief. And that concludes
4 the staff's briefing, Madam Chair.

5 CHAIRPERSON MILLER: Thank you,
6 Mr. Moy. Also, I think that our first
7 preliminary matter is whether to accept into
8 the record the letter filed by the applicant
9 dated January 6, 2009, today, that the Board
10 just received today in that it is beyond the
11 schedule that the Board set at the last
12 hearing.

13 This letter was written to, I
14 think, the Board and the parties an update
15 after a meeting with HPRB and applicant
16 proposes some modifications in this letter,
17 including modification to parking and loading
18 garage doors. I would suggest that we admit
19 this letter as it seems to reflect changes in
20 proposed plans that actually may improve the
21 project and mitigate some adverse impacts upon
22 neighboring properties.

1 Is there any objection to that?
2 Okay. Okay. So that's our first preliminary
3 matter. And the consensus of the Board is
4 that we will admit this letter. That being
5 so, that raises some questions though with
6 respect to whether or not we should continue
7 with our deliberation today on this case,
8 because it seems to indicate that there will
9 be new plans and we wouldn't have those plans
10 before us to deliberate on today.

11 And also, there hasn't been a
12 chance for the ANC and the opposition parties
13 to respond to the modification. I know that
14 the parties are here, so perhaps we can hear
15 from the parties before we make that decision.
16 And also, we also don't have in the record, at
17 this point, a supplemental report from the
18 Office of Planning, which I think was also
19 considered in the schedule that we set at the
20 last hearing that was supposed to be in by
21 January 5th.

22 So why don't -- yes, Mr. Cochran?

1 MR. COCHRAN: Madam Chair, I
2 believe that that was optional and we have met
3 with the applicant and we are happy to respond
4 to yesterday's meeting, if you wish.

5 CHAIRPERSON MILLER: Okay. Right,
6 there is more to respond to at this point. So
7 why don't the parties that are here come
8 forward? And why don't we start with
9 introductions with the applicant?

10 MS. PRINCE: Good morning,
11 Chairman Miller, Allison Prince here on behalf
12 of JBG with Tom Burkhardt from JBG as well.
13 We debated about --

14 CHAIRPERSON MILLER: Wait, wait.
15 Let's introduce the rest of the parties --

16 MS. PRINCE: Oh, I'm sorry.

17 CHAIRPERSON MILLER: -- before we
18 get into it. Okay. Sir?

19 MR. COUMARIS: Tom Coumaris,
20 opponent.

21 CHAIRPERSON MILLER: Okay. And I
22 also understand that two of the other

1 opposition parties with withdrawn their
2 opposition.

3 MS. PRINCE: Yes, they have.

4 CHAIRPERSON MILLER: Okay. So,
5 Ms. Prince, what would you like to say about
6 this?

7 MR. COUMARIS: I'm representing
8 Jim Bogden, the other opponent.

9 CHAIRPERSON MILLER: Who has not
10 withdrawn.

11 MR. COUMARIS: He has not
12 withdrawn.

13 CHAIRPERSON MILLER: Correct,
14 correct. Okay. Thank you.

15 MS. PRINCE: We debated about
16 whether to share with the Board the subtle
17 changes to the plans that we have made based
18 on discussions with the HPRB. We have the
19 plans here with us today.

20 As you know, we need flexibility
21 from this Board in connection with any
22 approval you grant to refine the drawings to

1 allow for HPRB approval. So we could have
2 refrained from updating you, but we thought it
3 was in the Board's interest to just let you
4 know that we are moving in this direction,
5 since it seemed to be responsive to some
6 issues that had been raised by the Board as
7 well.

8 Having said that, if we knew it
9 would result in a delay, we may have rethought
10 filing the updated plans, because we feel that
11 our final submission addressed the changes
12 that we were willing to make to loading in
13 terms of sound attenuation and other items.
14 So we would just ask you to understand that
15 these changes are -- we can provide you with
16 drawings. They are fairly subtle changes to
17 address a visual issue that was raised by the
18 HPRB and will be further deliberated upon by
19 the HPRB.

20 CHAIRPERSON MILLER: Well, let me
21 just follow-up and ask you, Exhibit 45 is a
22 letter filing from the ANC.

1 MS. PRINCE: Yes.

2 CHAIRPERSON MILLER: And in that
3 filing at page 2, they say that HPRB rejected
4 the conceptual design?

5 MS. PRINCE: HPRB had a series of
6 comments on the conceptual design and we will
7 be going back to refine the drawings. And one
8 of the comments was the visibility of the
9 garage doors. And by shifting the location
10 slightly and recessing the door, we had an
11 opportunity to address HPRB's concern, but
12 also we felt that the recessing of the door
13 was responsive to some of the issues that were
14 raised during the hearing.

15 We immediately after the HPRB
16 meeting made an effort to meet, so that we
17 could provide the Board with our thoughts in
18 this direction, but because of the way the
19 timing fell, we weren't able to meet until
20 yesterday. But this is much more of an HPRB
21 issue than -- as you know, there is no -- we
22 are not seeking any areas of relief regarding

1 the location of the garage or loading
2 entrances, so this is much more of an HPRB
3 issue than a BZA issue.

4 CHAIRPERSON MILLER: And I'm going
5 to turn to the other party in a second, but it
6 was an issue to a certain extent with respect
7 to adverse impacts on neighboring properties.

8 MS. PRINCE: Well, and that's
9 where -- that's why we wanted you to know
10 about recessing the door. We had mentioned
11 the sound attenuation in our earlier filing as
12 well.

13 CHAIRPERSON MILLER: Okay. And
14 before I turn to him, have you shared the
15 plans with the ANC and the opposing parties
16 and the change in the location?

17 MS. PRINCE: We have shared the
18 letter and not the plans we have, the plans
19 with us here today.

20 CHAIRPERSON MILLER: You shared
21 the letter that you sent to the Board?

22 MS. PRINCE: Yes.

1 CHAIRPERSON MILLER: Okay. Does
2 that mean you served them or did you discuss
3 the change?

4 MS. PRINCE: By email last night.

5 CHAIRPERSON MILLER: Email, okay.
6 So okay, let me turn to you. I'm sorry,
7 what's your name again?

8 MR. COUMARIS: Tom Coumaris.

9 CHAIRPERSON MILLER: Mr. Coumaris,
10 okay. Do you have a copy of the January 6
11 letter?

12 MR. COUMARIS: I just got it.

13 CHAIRPERSON MILLER: Oh, are you
14 on the mike? Is your microphone on?

15 MR. COUMARIS: Sorry. I just got
16 it this morning.

17 CHAIRPERSON MILLER: Okay.

18 MR. COUMARIS: I just got an email
19 about 5 minutes ago also from Steve Callcott
20 saying that he expects this will be on the
21 agenda for the HPRB on February the 28th, I
22 think it is.

1 CHAIRPERSON MILLER: Do you have a
2 response to the letter or do you have --

3 MR. COUMARIS: There is really --

4 CHAIRPERSON MILLER: Do you see a
5 time?

6 MR. COUMARIS: -- not time to
7 respond when you have just gotten something,
8 you know, a couple of hours before. I don't
9 think it's going to satisfy HPRB. It
10 certainly won't satisfy us, because, you know,
11 one of our issues is the traffic issue as far
12 as blocking that street and blocking the
13 alley. And if you are going to have a garage
14 door 5 feet in instead of at the alley line,
15 you are still going to have a car sticking
16 out.

17 If the car is 18 feet long, then
18 you are going to have 13 feet of the car
19 sticking out into the alley, as it tries to
20 open the garage door, blocking the alley. So
21 I mean, you are still blocking the alley. You
22 know, that's our issue with that is the

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1 blockage of the alley and S Street.

2 So no, I can't concede that the
3 ANC, that the HPRB or the opponents are going
4 to be satisfied with this.

5 CHAIRPERSON MILLER: So you can't
6 really speak for the ANC, but then why would
7 you need more time if you can't concede that
8 it would satisfy you?

9 MR. COUMARIS: I think to come up
10 with alternatives, if this is the route they
11 are trying to go, then I think that for us to
12 propose, much less negotiate, viable
13 alternatives along this route takes some time.

14 I think the major issue in this
15 case, also the other major issue, of course,
16 is the exemption from the ARTS Overlay for the
17 bars and restaurants, which is a big issue in
18 the community.

19 CHAIRPERSON MILLER: But that's
20 not what we're talking about, because we have
21 a late filing --

22 MR. COUMARIS: Right.

1 CHAIRPERSON MILLER: -- that just
2 came in.

3 MR. COUMARIS: The late filing is
4 what we're addressing.

5 CHAIRPERSON MILLER: Just the
6 topic of the late filing.

7 MR. COUMARIS: Yes, ma'am.

8 CHAIRPERSON MILLER: And the
9 question on the table is, you know, whether we
10 should continue to a later date, our
11 deliberation, in order to give the parties an
12 opportunity to respond to this filing, which
13 has nothing to do with the eating
14 establishment.

15 MR. COUMARIS: Certainly. I would
16 just say that, you know, from a long history
17 of being in these affairs that if you got
18 something that looks as if it may be
19 flexibility on party sides, maybe you should
20 let the parties talk a little bit more before
21 you consider it yourselves to see if something
22 is going to be worked out.

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1 It may be premature to go ahead
2 and give a decision immediately if there is a
3 possibility of some sort of negotiation.

4 CHAIRPERSON MILLER: Okay. I'm
5 going to turn to my colleagues. But
6 basically, we don't necessarily delay a case
7 to give the parties more time to negotiate,
8 per se. There has always been time to
9 negotiate. It's kind of like outside these
10 walls. But we do delay if there hasn't been
11 like due process or an opportunity for a party
12 to respond to something that has been raised.

13 MR. COUMARIS: Well, the applicant
14 has filed a submission and we clearly have not
15 had time to respond to it. I mean, that's
16 obvious, unless, you know, you are only going
17 to give somebody an hour to respond to a
18 submission, then, you know, I don't think
19 that's appropriate.

20 CHAIRPERSON MILLER: Okay. Board
21 Members, you have questions?

22 VICE CHAIRMAN LOUD: Good morning.

1 How is everybody this morning and happy new
2 year to everyone.

3 Ms. Prince, I wanted to ask you
4 about the status, I guess, of these changes
5 with HPRB, as well as your statement that you
6 didn't think that it would impact the plans to
7 the extent that it would be a land use or BZA
8 issue.

9 MS. PRINCE: Um-hum.

10 VICE CHAIRMAN LOUD: And I'm just
11 trying to process that in my mind.

12 MS. PRINCE: Sure.

13 VICE CHAIRMAN LOUD: Why do you
14 think it would not be a BZA issue to have
15 before us a final set of plans? And has HPRB
16 agreed to this proposed 3 to 4 foot shift to
17 the north or is that something that has to go
18 back before them and there will be further
19 negotiations back and forth?

20 MS. PRINCE: All right. At the
21 HPRB discussion on December 18th, the Board
22 had concerns about visibility of the garage

1 doors from S Street. It was not -- you know,
2 they discussed issues that are within their
3 jurisdiction, aesthetic issues.

4 After that, we met with Steve
5 Callcott to review some changes, some minor
6 changes shifting the garage entrance 4 feet to
7 the north towards Swann Street and setting in
8 the entrances. We reviewed those changes from
9 an aesthetic standpoint with the HPRB to see
10 if that would begin to address their aesthetic
11 issue. It was a positive meeting and OP was
12 at the meeting as well and felt it was
13 positive information.

14 Having said that, we are asking
15 from this Board for flexibility to address any
16 issues that come up from HPRB because of the
17 sequencing that we have here. And as this
18 Board is aware, from the recent N Street
19 Follies decision from the Court of Appeals,
20 the BZA does not need to wait for the HPRB to
21 rule in this matter before ruling itself.

22 There are two separate sets of

1 jurisdiction. In this case, since the changes
2 that we were making were somewhat responsive
3 to some of the BZA issues that were raised, we
4 felt we would share them with you. But if
5 it's overly complicating matters or creating
6 confusion about the interplay between HPRB and
7 BZA, we can withdraw the letter and the plans
8 and simply live with the notion that we will
9 be bound by whatever HPRB approves.

10 So we can go either way. We can
11 either -- you know, you can keep the letter in
12 the record and be aware that we are discussing
13 this with HPRB. It is likely that there will
14 be a shift to the north at the garage entrance
15 to address visibility, which would affect
16 traffic matters to a slight extent. And the
17 inset of the door, I think, is a responsive
18 change, or you can say well, we are just not
19 going to accept this letter and we will review
20 the record based on what is before it, based
21 on our final hearing submission and then leave
22 flexibility with the HPRB as we have asked for

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1 to approve whatever it is they are going to
2 approve from a visual standpoint.

3 CHAIRPERSON MILLER: Okay. I
4 don't think that the N Street Follies case
5 mandates that we go ahead and not wait for
6 HPRB. I think in that case the Board had
7 dismissed the case, based on what HPRB was
8 doing or what we thought HPRB was doing.

9 I'm thinking in this case, I mean,
10 often HPRB is looking at issues that don't
11 affect what this Board is looking at. In this
12 case, it sounds like what HPRB is dealing
13 with, in part, is this location of the garage
14 which is an issue in this case. So if there
15 is a meeting scheduled in February, why
16 shouldn't the Board wait for the final plans?

17 What would be the prejudice to the
18 applicant for us to wait?

19 MS. PRINCE: Well, we are very
20 anxious for a decision from the Board, so that
21 the project can proceed. That's first.
22 Second, I mean, the HPRB's jurisdiction is

1 aesthetic. They are talking about the
2 visibility of the doors. We have made a
3 change that will affect the visibility of the
4 doors.

5 Whatever additional subtle minor
6 changes may come from the HPRB's discussion,
7 we would ask for flexibility to address those.
8 But this case was really about special
9 exception relief involving height, lot
10 occupancy, percentage of frontage devoted to
11 restaurant use.

12 It wasn't about -- it didn't have
13 anything to do with garage access. In fact,
14 we put the garage access off the alley
15 consistent with the well-recognized DDOT
16 directive to put the garage entrance off the
17 alley. So the exact location of the garage
18 entrance off the alley, I think, is a fairly
19 subtle issue.

20 DDOT has weighed in on this
21 application already. A slight shift in the
22 location, I think, does not change DDOT's

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1 position. And I would simply ask that you
2 recognize that this case really was about a
3 lot of matters, none of which related to the
4 exact location of the garage entrance on the
5 alley.

6 VICE CHAIRMAN LOUD: But I do seem
7 to recall there being some overlap, I guess,
8 between HPRB's consideration of aesthetic
9 issues and the location of the garage. And it
10 may be my memory is faulty, but there was some
11 adverse impact testimony regarding sort of the
12 disruption of the peace and quiet of one of
13 the alley dwelling neighbors for the garage
14 door opening and closing.

15 MS. PRINCE: And that's why we
16 suggested that we would include sound
17 attenuation in the garage area. And now with
18 this further change, we will set back the
19 doorway 5 to 7 feet --

20 VICE CHAIRMAN LOUD: Well --

21 MS. PRINCE: -- which will allow
22 for further sound attenuation. But whether

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1 the garage --

2 VICE CHAIRMAN LOUD: --

3 personally, I think, those are probably steps
4 in the right direction, but procedurally, I'm
5 wondering if the impacted party is not the one
6 that is in the best position to sort of weigh
7 in on that and tell us that as opposed to the
8 applicant telling us that.

9 MS. PRINCE: Um-hum.

10 VICE CHAIRMAN LOUD: I think that
11 in terms of the lot occupancy issue, many of
12 the special exception issues, to me the case
13 is ripe for decision. But there is this
14 gnawing at me about procedurally there being
15 potentially some plans that are going to come
16 in that parties have not seen, including us.

17 MS. PRINCE: However, we have
18 asked -- first, there were discussions about
19 the location of the parking garage entrance in
20 the alley. I think the real rev in the case
21 was not wanting, some neighbors strongly
22 preferring the entrance to not be in the

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1 alley. So a 3 or 4 foot shift, I think, is
2 really not getting at the heart of that issue.

3 And obviously, we have had many
4 discussions with the community about the case.
5 But if we have the flexibility that we need in
6 our order to address any issues that HPRB
7 raises, not just an issue like this, then
8 there will be an opportunity for community
9 comment of any revised plans that we file with
10 the HPRB.

11 So these plans, this slight shift
12 in the location of the garage entrance, they
13 have not been approved by the HPRB. We will
14 file them with the HPRB and the neighbors can
15 comment on them at the HPRB and weigh in
16 there. We are not asking for this Board to
17 approve this slight revision. We are simply
18 letting you know we heard the Board's
19 comments, the HPRB's comments and in
20 responding to those comments, we feel that we
21 will address some of the issues that were
22 raised at the hearing, so we wanted to alert

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1 you to them.

2 We have the option to just not
3 share this update with you, because it's an
4 HPRB proceeding, but we felt it was in
5 everyone's interest just to let you know that
6 we are going in this direction and that with
7 the flexibility we would hope for in our
8 order, you will understand that the HPRB will
9 likely approve plans that involve a slight
10 shift. So that's really where we are.

11 VICE CHAIRMAN LOUD: Well, I don't
12 know if I necessarily agree that the applicant
13 had the option to not share the subsequent
14 developments with us, if those developments
15 change the plans that were submitted to us.
16 But I think you and I kind of want to go to
17 the same place.

18 MS. PRINCE: Yeah.

19 VICE CHAIRMAN LOUD: Which is that
20 variance. We have enough information on lot
21 occupancy --

22 MS. PRINCE: Um-hum.

1 VICE CHAIRMAN LOUD: -- to address
2 that issue and most of the special exceptions
3 and the relief from the Overlay. I think we
4 have enough information in the record. But
5 again, it's just the gnawing question of their
6 being an 11th hour sort of revision that key
7 parties, and there's some testimony this
8 morning, just got this morning and haven't had
9 any chance to respond to.

10 MS. PRINCE: Um-hum.

11 VICE CHAIRMAN LOUD: That strikes
12 me a little as just fundamentally unsound for
13 us to do, particularly if there is no
14 prejudice to the applicant in us not moving
15 forward today.

16 MS. PRINCE: Well, we are very
17 anxious for a decision. I certainly am very
18 opposed to the concept of placing the HPRB in
19 front of the Board and requiring us to get
20 action from the HPRB before the Board's
21 action. If it's a question --

22 VICE CHAIRMAN LOUD: Just on that

1 point, in your thinking, is there a way that
2 we could move forward on our decision? Let's
3 say we're not this morning, but there is a way
4 that we could move forward on a decision
5 before HPRB reconvenes on what, February 23rd,
6 28th or whatever you said.

7 MS. PRINCE: Yes. And then the
8 parties would have an opportunity to comment
9 on these drawings. However, based on the
10 issues that we are aware of to date, I'm not
11 confident that it will be a fruitful dialogue,
12 but you could ask -- you could put off the
13 decision for a very short time providing them
14 with opportunity to comment on this slight
15 shift and the inset, yet not require us to
16 wait until the BZA has acted.

17 VICE CHAIRMAN LOUD: And those are
18 the plans that you have, that you brought with
19 you this morning?

20 MS. PRINCE: Yes.

21 VICE CHAIRMAN LOUD: You said that
22 you did not file. Okay, okay. Thank you.

1 MEMBER WALKER: Okay. But you
2 expect that the plans that you have brought
3 with you this morning will, in fact, change
4 again when HPRB reviews them further?

5 MS. PRINCE: HPRB inevitably will
6 make some minor design refinements. And
7 that's why in past cases when I have been in
8 this situation, I have asked for flexibility
9 from this Board. They could make certainly
10 changes, adjustments to the facade appearance,
11 for example. They have asked for some minor
12 facade changes.

13 MEMBER WALKER: Okay. But --

14 MS. PRINCE: Those kind of things.

15 MEMBER WALKER: -- with respect t
16 other specific issue of the location of the
17 entrance of the garage doors --

18 MS. PRINCE: Um-hum.

19 MEMBER WALKER: -- when is it
20 likely that that issue will be finalized with
21 HPRB?

22 MS. PRINCE: With HPRB, not until

1 the decision is taken up in February.

2 MEMBER WALKER: Okay. Thank you.

3 MS. PRINCE: And possibly later.

4 CHAIRPERSON MILLER: Okay. I want
5 to turn to Mr. Cochran in a second, but I
6 think what is different in this case with
7 respect to waiting for HPRB, and I'm not sure
8 yet whether we need to wait for HPRB, but I do
9 think that the applicant had an obligation to
10 give to the Board and the parties the most up
11 to date plans to rule on. And that when we
12 give flexibility, it's flexibility with
13 respect to anything HPRB might do that doesn't
14 affect a zoning issue.

15 MS. PRINCE: Um-hum, right.

16 CHAIRPERSON MILLER: And in this
17 case, you know, it does go to an issue that
18 was raised in the hearing with respect to
19 adverse impacts on neighboring property
20 because of the location of the garage and
21 that's why I think this is an issue here. Mr.
22 Cochran, do you want to weigh in on this as to

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1 what you think the Board needs to wait for,
2 you know, before ruling in this case?

3 How long, you know, it might be
4 for the HPRB to act? For instance, you know,
5 if it's just going to be next month, we might
6 want to wait. You know, that might affect our
7 decision. If it's going to be a longer haul
8 and they are really going to get to other
9 issues that are not really related to our
10 proceedings, we wouldn't need to wait, I
11 think.

12 MR. COCHRAN: I think the
13 applicant has addressed the issues that you
14 asked the applicant to address with respect to
15 the relief being requested. The location of
16 the garage door, as far as I can tell, has
17 nothing to do with the relief being requested.
18 The impacts that would come from the garage
19 door are related to a matter-of-right
20 possibility on where the location of the
21 garage door would be.

22 For those reasons, I don't see

1 what additional information the applicant
2 would need to provide for the Board to make a
3 decision today. The meeting yesterday was
4 positive. It does seem like visually the
5 location of the garage doors has been improved
6 from S Street.

7 Certainly the staff felt that, the
8 HPO staff, things were moving in the right
9 direction, but they certainly didn't want to
10 give any comments more specific than that,
11 because it has to go to Historic Preservation
12 Review Board.

13 But again, in my limited
14 experience with the -- with this Board, there
15 have been other instances where flexibility
16 has been granted, either with respect to
17 percentage or with respect to physical
18 location and measurements in inches or feet.
19 And it seems like that the applicant -- what
20 the applicant is asking for in terms of that
21 flexibility is not out of line with the types
22 of flexibility that has been given by the

1 Board before. Especially since it has nothing
2 to do with the relief being requested.

3 CHAIRPERSON MILLER: Um-hum.

4 MR. COCHRAN: It's a case of if
5 these plans go to the Zoning Administrator, do
6 they reflect your decision? And with respect
7 to what could be done, like I said, as a
8 matter-of-right. If you give flexibility
9 within a few feet or a certain percentage of
10 distance from here or there, then the Zoning
11 Administrator would still be able to approve
12 the plans if they, in fact, met all of the
13 requirements.

14 So I'm afraid I may have been
15 treading on OAG'S turf in giving -- that's
16 simply my opinion. It's certainly not a legal
17 opinion.

18 CHAIRPERSON MILLER: Okay. Any
19 other Board questions? Any other comments the
20 parties want to make? Do you want to
21 introduce yourself for the record, sir?

22 MR. BOGDEN: Yes, I'm Jim Bogden,

1 one of the parties to the case. I apologize
2 for being late. I don't want to comment on a
3 specific zoning issue, but just in general
4 about the process. You know, it's only two
5 months since these plans were first revealed
6 to the community. And there has been very
7 little time for adequate consideration and
8 consultation.

9 The community hasn't had a chance
10 to speak with one voice about this. The ANC
11 has opposed the rushed process. And I just
12 hope that the Board considers that granting
13 this application, at this time, would give
14 every other developer the opportunity to ram
15 something through, you know, without
16 consideration of adequate community
17 consultation. Thank you.

18 MR. COUMARIS: If I could just
19 make one comment? For myself, you know, and
20 Mr. Bogden is here, so he is speaking for
21 himself now, you know, I will concede that you
22 know some of these issues are not necessarily

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1 germane to the HPRB. Of course, the major
2 issue for the community and for the city and
3 the neighborhood associations is the requested
4 exemption from the ARTS Overlay limitation on
5 bars and restaurants and that's what we are
6 going to end up in court on, I'm sure.

7 So I mean, that, you know, is a
8 totally unrelated issue to this. The other
9 two special exceptions and the variance, I
10 would also concede only one of them is
11 partially related to the garage entrance. You
12 know, those are concessions that I'm willing
13 to make.

14 If there is some way to
15 facilitate, you know, I'm not totally opposed
16 to -- you know, I'm not trying to be an
17 obstructionist, and if there is any way that
18 there is some sort of proceeding that we can
19 do even today that will grandfather or give
20 some sort of okay to the applicant, I'm not
21 totally opposed to that, you know. But it
22 would have to be with some sort of condition

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1 that, you know, certain things will be met as
2 far as the garage entrance and placements.

3 CHAIRPERSON MILLER: I'm sorry,
4 you lost me.

5 MR. COUMARIS: I'm sorry.

6 CHAIRPERSON MILLER: I mean, I
7 think that we are considering, you know,
8 continuing our deliberation to a later date.
9 It could just be a couple of weeks or so in
10 order to give the parties a chance to respond
11 to the change in the plans.

12 MR. COUMARIS: Yes, ma'am.

13 CHAIRPERSON MILLER: And what is
14 reflected in the January 6th letter. So I'm
15 not sure that we are asking for that today,
16 especially since the ANC isn't here. But is
17 that what you are suggesting some conditions
18 that you might want related to the changes
19 that have been presented?

20 MR. COUMARIS: Well, I think
21 especially as far as the garage and the
22 parking situation, it would be -- there would

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1 probably be a necessity that it be any
2 decision that the Board could render today
3 would probably have to be conditional on
4 something with the HPRB at a very minimum.

5 But I'm just saying that I'm not
6 trying to be an obstructionist. If the Board
7 does want to give some sort of approval today
8 that would help the project, you know, in the
9 future, going forward, I'm not totally opposed
10 to that. We're not going to try to block
11 that.

12 I don't think it's possible to
13 give a blanket approval, you know, unless it's
14 subject to the HPRB then. But there are
15 different, you know, issues in this
16 application that could be separated.

17 VICE CHAIRMAN LOUD: Just on that
18 point, I wanted to ask you, your -- some of
19 your neighbors, Freeman and Knapp, in
20 particular, withdrew their opposition to the
21 applicant's project. And I wanted to
22 understand clearly am I hearing you say that

1 with respect to the lot occupancy, the height
2 issue exceeding 83 feet and the 45 degree set-
3 back issue that you are not opposed to those
4 grounds for relief? Just to help sort of
5 narrow this thing.

6 MR. COUMARIS: I'm just saying
7 that I'm not totally opposed to the Board
8 making a decision on one of those or all of
9 those issues if it will help the applicant in
10 their process of, you know, getting further --
11 getting the thing further down the road.

12 VICE CHAIRMAN LOUD: Okay. That's
13 different --

14 MR. COUMARIS: But personally, I
15 can't speak for Mr. Bogden.

16 VICE CHAIRMAN LOUD: -- from
17 saying you're not -- I'm sorry, I didn't mean
18 to interrupt you. Go ahead.

19 MR. COUMARIS: You know, that's my
20 own position personally. I would not, you
21 know, but I can't speak for the other parties
22 and Mr. Bogden is here, he is an opponent

1 also. I think that you have got to understand
2 that as a community, we divide who is going to
3 make which concessions and which agreements,
4 you know.

5 When you have four parties, the
6 community decides one applicant is going to
7 have an agreement that will cover trash pickup
8 and things like that. Another opposing party
9 will make an agreement that will get us a
10 little bit more. And then you have the
11 ultimate one who ends up in the Court of
12 Appeals, you know, appealing the case, who has
13 to reserve and make no concessions.

14 So the fact that there are not as
15 many opposing parties here now is part of the
16 process that the community decides. You know,
17 we have to decide when we are facing the D.C.
18 Court of Appeals case, which neighborhood
19 organization is going to put in \$10,000 and
20 which is going to put in \$5,000. Who is going
21 to have the case? Who is going to -- you
22 know, so these are decisions that we have to

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1 make as a community.

2 And you know, if you haven't been
3 involved in community affairs, you know, you
4 don't know that. But you know, we make a
5 decision as to --

6 VICE CHAIRMAN LOUD: Well, I don't
7 want to --

8 MR. COUMARIS: -- who is going to
9 be --

10 VICE CHAIRMAN LOUD: -- get too
11 far into the appeal of the matter. I just
12 wanted to clarify whether you were withdrawing
13 your opposition to some of the grounds for
14 relief, just so the issues could be narrowed--

15 MR. COUMARIS: No, I'm not.

16 VICE CHAIRMAN LOUD: -- your
17 neighbors having done so.

18 MR. COUMARIS: I'm not withdrawing
19 my opposition.

20 VICE CHAIRMAN LOUD: Okay. I
21 understand.

22 MR. COUMARIS: I'm just saying

1 that if the Board -- if it would facilitate
2 the movement of the project and if it would
3 help the Board, if there are certain separable
4 issues that you wanted to decide now, I
5 wouldn't be opposed to that.

6 VICE CHAIRMAN LOUD: Okay.

7 MR. COUMARIS: Personally.

8 VICE CHAIRMAN LOUD: Thank you.

9 MR. COUMARIS: I'm not speaking
10 for Mr. Bogden.

11 CHAIRPERSON MILLER: Okay. Any
12 other Board questions? Okay. I think then
13 the Board should deliberate, at this time,
14 whether we want to set this off for decision
15 making at a later date and if so, when. And
16 I think that the grounds for setting this off
17 for a later date would be that the plans have
18 changed and that the change in plans relates
19 to an issue that is before the Board that goes
20 to adverse impact on neighboring properties
21 from the application.

22 It looks like it is a change that

1 is probably in a positive direction, but the
2 question is should we continue it to allow the
3 other parties an opportunity to respond to the
4 new plans? And even though the -- and the
5 applicant has just said that they are pretty
6 minor changes and they are in a positive
7 direction, as far as that issue goes.

8 We haven't really looked at the
9 plans yet. And it may be a minor change. It
10 sounds like it is and a positive change. But
11 that being said, we still haven't looked at it
12 and we still -- maybe the opposing parties
13 might say no, it isn't a positive change. So
14 we have really only heard the applicant say it
15 -- present it like a positive change and
16 Office of Planning.

17 And it sounds like a positive
18 change, but you never know. Sometimes you
19 haven't heard from the opposition. What I'm
20 hearing from the applicant and even Office of
21 Planning is that we probably don't need to
22 wait for HPRB necessarily to go through its

1 whole process.

2 I think what I would like to have
3 the applicant not brief but address and Office
4 of Planning also, it sounded like regardless
5 if there is a change, the applicant is asking
6 for some flexibility. If there is a change
7 with respect to this location within a foot or
8 two or whatever, why it wouldn't affect our
9 decision.

10 Because it sounds like that's what
11 they are saying. But on the other hand, I
12 think what some of the Board Members are
13 thinking is that we're making a decision with
14 respect to whether there is adverse impact on
15 the neighboring properties related to this
16 garage and whether the conditions mitigate it
17 sufficiently.

18 So we want to know, you know,
19 where it is, at least I do, and why it doesn't
20 matter if it's a foot or two, you know. So I
21 think that would fill out the record and make
22 sure that the other parties have due process,

1 you know. And I don't see that -- I think if
2 we put this off to our next decision meeting,
3 which would be February 3rd, I don't see a
4 real prejudice to the applicant in that they
5 need to get HPRB approval before they can go
6 forward anyway.

7 How do you all feel about that?

8 VICE CHAIRMAN LOUD: I agree with
9 you, Madam Chair. And I sort of articulated
10 it in my back and forth a little bit earlier
11 that the more for me the feeling of complete
12 due process and fairness in allowing parties
13 to have a little bit more than the January 6th
14 dated notice to respond.

15 Whether I think that it will
16 change the position of any of the parties is
17 kind of beside the point. It's the fairness
18 of the question. And so I hope that -- and I
19 appreciate that you are getting it back on the
20 calendar as soon as we can, because I think
21 that's important.

22 But also, I want for the parties

1 to understand that it is just for them to
2 respond in a very limited way to this, I
3 think, January 6th update/revision and any
4 plans that are developed in response to that.
5 It's not to go beyond that into some of the
6 things that we talked about this morning about
7 whether the process of engagement with the
8 community was fair, etcetera, etcetera,
9 etcetera.

10 I just think that certainly for my
11 purposes as a Board Member, I think, whatever
12 decision I make will be a better decision
13 because the key parties have had a chance to
14 weigh in on the final plans. So I'm
15 supportive of a brief delay.

16 MEMBER WALKER: Madam Chair, I
17 agree. The applicant has revised plans in
18 their possession that they can submit and I
19 don't see any great prejudice to the applicant
20 here because there will not, according to Ms.
21 Prince, be a final decision by the HPRB before
22 February, late February. And because the

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1 plans do reflect a change that, in my view,
2 would relate to a zoning issue, I think it
3 would be useful to the Board to see the most
4 up to date drawings.

5 CHAIRPERSON MILLER: Yes, Mr.
6 Cochran?

7 MR. COCHRAN: Thank you, Madam
8 Chair. I just wanted to ask for something for
9 clarification. OP's comment, the request for
10 OP comments then is limited to the measure by
11 the location of the garage door? Is that what
12 you are asking us to comment on?

13 CHAIRPERSON MILLER: Well, we had
14 asked you to -- well, we gave you the option
15 of commenting before, in general --

16 MR. COCHRAN: On the other --

17 CHAIRPERSON MILLER: -- on the
18 issues on any of the changes or
19 recommendations that the applicant had made,
20 you know, after the hearing.

21 MR. COCHRAN: Okay. One of the
22 concerns we have been hearing today is the

1 request for relief from the 25 percent
2 restaurant requirement, restaurant and bar,
3 eating and drinking establishment. So either
4 we or the applicant can comment on any new
5 information on that or, basically, I'm hearing
6 that this is getting more open in terms of
7 what we can or cannot comment on.

8 CHAIRPERSON MILLER: Okay. No, I
9 mean, I thought that the applicant made all
10 their comments. Office of Planning didn't
11 submit a memorandum, which was, you know, I
12 guess due January 5th. So I'm saying --

13 MR. COCHRAN: Again, it wasn't
14 due, it was optional.

15 CHAIRPERSON MILLER: Okay.
16 Optional. But if -- I guess, if other Board
17 Members agree, if there was something that,
18 you know, you would have said in that January
19 5th memorandum and we give you extra time to
20 say, we would leave the record open for you to
21 address any of those issues that may have been
22 raised in the applicant's post-hearing filing

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1 and the other parties post-hearing filings.

2 Nobody else though. We are not
3 opening those issues at all for anybody else.

4 MR. COCHRAN: Okay.

5 CHAIRPERSON MILLER: They all
6 responded. They all did their filings. It's
7 just the Office of Planning and it's an
8 option.

9 MR. COCHRAN: Great.

10 CHAIRPERSON MILLER: As you said.

11 MR. COCHRAN: Thank you.

12 CHAIRPERSON MILLER: Okay. But I
13 mean, I would really like to put this issue to
14 bed if you could weigh in on this one about,
15 you know, why we don't have to wait for HPRB.

16 MR. COCHRAN: Absolutely, Madam
17 Chair.

18 CHAIRPERSON MILLER: Okay.

19 MR. COCHRAN: We will respond --

20 CHAIRPERSON MILLER: That would be
21 great.

22 MR. COCHRAN: -- on whatever date

1 you give us.

2 CHAIRPERSON MILLER: Okay. All
3 right. And before I set the schedule, there
4 was just one other point. You know, the Board
5 was ready to deliberate, you know, on all the
6 issues in this case today, but for the change.
7 And so since there is going to be a
8 postponement, there was one question that we
9 wanted to just ask the applicant.

10 And that went to the car-sharing
11 space. It seemed that in your post-hearing
12 submission, you said that you would work with
13 DDOT with respect to placing bicycle racks on
14 public space. You had no objection to the
15 car-sharing space being on the street, but it
16 wasn't within your control. And we were just
17 wondering if you would be comfortable making
18 the representation that you would, you know,
19 do the same as a condition, work with DDOT to
20 try to get it on the street, as you would with
21 respect to the bicycle racks?

22 And that, you know, if you can't,

1 it will be in your retail space. Okay. Okay.
2 All right. So okay. The reason I was
3 thinking of February 3rd, you know, one is to
4 give enough time for the ANC and the opposing
5 parties to file. And also, we don't have --
6 Inauguration Day we don't meet and two weeks
7 is too quick a turnaround.

8 So I think what should be done
9 first is that the applicant could just file
10 one more filing with respect to the impact of
11 changing the location and why we don't need to
12 wait for HPRB proceedings, why it doesn't
13 matter either within a few feet or so or
14 whatever your argument is going to be with
15 respect to that.

16 I guess that would just be a
17 supplement to your January 6th letter. When
18 could you do that by, a week or so?

19 MS. PRINCE: We don't even need a
20 week. Friday.

21 CHAIRPERSON MILLER: Okay, Friday.
22 What's the date on that then?

1 MS. PRINCE: January 9th.

2 CHAIRPERSON MILLER: Okay. All
3 right. All right. Mr. Moy, then when would
4 we need the responses from the opposition
5 parties then and Office of Planning?

6 MR. MOY: I would suggest it could
7 be two weeks from that Friday, the 23rd, or
8 the following Monday of January 29th, whatever
9 the Board is comfortable with. The staff can
10 go with either of those two dates. Friday the
11 23rd or Monday the 26th.

12 CHAIRPERSON MILLER: I think
13 Monday is okay with us. That's a week ahead
14 of our -- yeah, okay, let's do that.

15 MR. COUMARIS: Could I ask a
16 question?

17 CHAIRPERSON MILLER: Yes, sir.

18 MR. COUMARIS: I should have
19 brought this up earlier, I realize, but I
20 think it's going to become significant to the
21 case. We have gotten new information that has
22 come in from the Department of Trans -- from

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1 the Department of Sanitation. A letter that
2 says that in the future if this building is
3 built to 100 percent lot occupancy, that they
4 will no longer provide trash pickup in our
5 back alley, which will affect the surrounding
6 properties a lot.

7 I mean, for the entire future from
8 now on, the D.C. Department of Sanitation will
9 refuse to pick up trash in the alley, because
10 of a --

11 CHAIRPERSON MILLER: Okay.

12 MR. COUMARIS: -- lack of a
13 turning radius. Is this something that we can
14 bring in in a response letter by the 26th?

15 CHAIRPERSON MILLER: It's not
16 related to the issue that's on the table. If
17 you have an issue that you think warrants
18 reopening the record, you would have to file
19 a motion to reopen the record.

20 MR. COUMARIS: Okay. What is the
21 issue on the table that we're responding to by
22 the 26th?

1 CHAIRPERSON MILLER: The January
2 6th letter reflecting the changes that were
3 made in the plans.

4 MR. COUMARIS: So it's only for
5 that?

6 CHAIRPERSON MILLER: Yes. And
7 whether or not -- whether we need to wait for
8 HPRB or not. Mr. Cochran, would you want to
9 be doing your response after the applicant's
10 and the opposition parties or --

11 MR. COCHRAN: Well, certainly
12 after the applicant's --

13 CHAIRPERSON MILLER: -- not
14 necessarily?

15 MR. COCHRAN: -- which is --

16 CHAIRPERSON MILLER: Okay.

17 MR. COCHRAN: -- this Friday. I
18 would prefer to do it after the opposition
19 party.

20 CHAIRPERSON MILLER: Okay.

21 MR. COCHRAN: And it would be
22 useful also since our offices are moving some

1 time between the 14th and 26th, it hasn't been
2 pinned down exactly.

3 CHAIRPERSON MILLER: Oh, eww,
4 okay. How about the 28th for the Office of
5 Planning? Will that work?

6 MR. COCHRAN: That would be fine.
7 Thank you.

8 CHAIRPERSON MILLER: Okay. Let me
9 just say this, Mr. Coumaris, if you are
10 planning to file a motion, you should file it,
11 you know, fairly soon, so that the applicant
12 has time to respond and that we would pick it
13 up in our deliberation on February 3rd.

14 MR. COUMARIS: So it needs to be
15 in the form of a motion?

16 CHAIRPERSON MILLER: Yes, because
17 the record has been closed except for the
18 issues that was raised in the January 6th
19 letter and also except with respect to giving
20 the Office of Planning an extension of time to
21 file their post-hearing submission.

22 So we do have rules in our

1 regulations that go to specifically a
2 reopening of the record, because that's what
3 it would be. Okay. Any other questions? All
4 right. Thank you.

5 MS. PRINCE: Thank you.

6 MR. MOY: Madam Chair, the next
7 and final case for decision is Application No.
8 17812 of Pietros Kidane, pursuant to 11 DCMR
9 3103.2, for a variance from the use provisions
10 to allow a catering service/bakery under
11 subsection 701.1 in the C-1 District at
12 premises 409 18th Street, N.E., and that's in
13 Square 4547, Lot 809.

14 At its Special Public Meeting on
15 December 9th and December 16, 2008, the Board
16 rescheduled its decision on this application
17 to allow for additional time for the applicant
18 to meet with the Zoning Administrator and with
19 the Office of Planning.

20 And on December 16, 2008, the
21 applicant filed a two page letter, which is
22 identified in your case record as Exhibit 27.

1 There are no further filings in this record
2 case, Madam Chair. And the Board is to act on
3 the merits of the requested zoning relief.
4 And that completes the staff's briefing, Madam
5 Chair.

6 CHAIRPERSON MILLER: Thank you,
7 Mr. Moy. This was somewhat of an unusual case
8 in that I think it seemed that the applicant
9 wasn't clear with respect to, you know,
10 certainly where he fell within the
11 regulations. Was this a catering service or
12 a bakery or what.

13 And he did go to the Zoning
14 Administrator and then this was referred to
15 us. I think he spoke with the Zoning
16 Administrator twice and I think that the
17 second time the Zoning Administrator
18 characterized it as a wholesale bakery with
19 accessory uses.

20 In any event, I think what the
21 Board decided to do was we took in a lot of
22 testimony to figure out exactly what kind of

1 operation the applicant had in mind and then
2 we looked at the regulations to determine
3 where we thought it fit.

4 So that's where we are now. I
5 just want to give a little bit of background,
6 too, because I think the facts are pretty
7 important in this case.

8 In this case, the applicant
9 purchased the property in December of 2005
10 when the building was being operated as a fast
11 food restaurant. And this building is located
12 in a commercial strip and, apparently, this
13 fast food restaurant was the only one of its
14 kind in the neighborhood.

15 And at that point, there was an
16 occupancy permit for use as a fast food. And
17 when the applicant went to -- when he
18 purchased the property, he thought that that's
19 what he could use it as, because that's what
20 it had been operating as, but when he went to
21 apply, the regs had changed and then he was
22 told that no grandfathering applied.

1 In any event, he is not -- I don't
2 think this is a fast food restaurant. And I
3 think we need to look at it in light of the
4 new regulations as to what it is. When I
5 looked at the regulations, I thought it fell
6 within a food delivery service, which is not
7 what the ZA actually determined.

8 And I think that some of the
9 reasoning, I think, that there may be a
10 difference between what we determined here and
11 we can talk about, you know, how people see it
12 otherwise, part of it is, you know, our
13 regulations are not perfect in this sense at
14 all. And a lot of my conclusions are drawn
15 based on the testimony and the whole record in
16 this case. And I'm not sure that the ZA heard
17 as much as we did.

18 So we looked at a bakery and fast
19 food and prepared foods and things like that.
20 And what I was drawn to as being most
21 applicable was food delivery service, because
22 under the food delivery service provision, let

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1 me cite the provision also. Well, I think
2 it's in 701.

3 But it says "Food delivery
4 service: Any establishment that derives more
5 than 75 percent of its sales from delivery
6 orders will be considered a food delivery
7 service in all cases. This definition does
8 not include catering establishments."

9 What we heard from the applicant,
10 he didn't know whether it was going to be more
11 than 75 percent or not basically. A lot of
12 this was really unknown. But when he
13 described the operation, it sounded as if he
14 was going to be preparing, making food on the
15 premises and then taking orders for say groups
16 of 20 or so like in the community.

17 And so it seemed to me that this
18 was something that would involve a lot of food
19 delivery service. So there is not eating on
20 the premises and it didn't even sound like a
21 carry-out where people are going to come in
22 and get one thing and go. It was more like an

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1 organized making meals for groups.

2 The ZA had called it wholesale and
3 manufacturing bakery with accessory retail
4 sales and deliveries. I don't think it is
5 wholesale, because he is not making it for
6 businesses to sell. He's not making it in
7 huge quantities, that's what I understand
8 wholesale to mean. I'm not sure whether that
9 is defined in our regs, but I think that this
10 fit the best under 701.4(q), which is food
11 delivery service.

12 But I mean, before we go into the
13 variance question, I want to see if others
14 think based on their assessment of the facts
15 that this would be the right place for it,
16 because this is not a matter-of-right use in
17 the C-1 District. So if that's what we are
18 calling -- if that's what we are finding this
19 business use to be, then we would need to go
20 into the variance analysis.

21 So I guess I want to see if there
22 are other thoughts about evidence that you

1 heard that would either lead you to think that
2 this is or isn't a food delivery service,
3 other than what I might have already said.

4 VICE CHAIRMAN LOUD: Very briefly.
5 Madam Chair, I agree with everything you said.
6 I would just add the following two things. I
7 think on the wholesale manufacturing bakery,
8 I think, point, it's mooted now. I think the
9 issue is that when the applicant met with the
10 ZA, there was an adjacent coffee shop and
11 apparently 50 percent of what was produced at
12 the food delivery service was sold to the
13 coffee shop and then resold by the coffee
14 shop.

15 And so for that reason the ZA
16 concluded that it was a wholesale
17 manufacturing location. But the coffee shop
18 has since closed due to market conditions. So
19 that's no longer the case and I think that we
20 can safely land where you were in terms of it
21 not being a wholesale bakery.

22 It would have been a different

1 question, I think, if the coffee shop were
2 still open, but it's not. And second with
3 respect to it being a food delivery service,
4 I just wanted to add that none of what is sold
5 by the applicant includes accessories for
6 serving what is sold, and so that would take
7 it out of the catering definition and get it
8 neatly back into food service delivery.

9 MEMBER WALKER: Madam Chair, I
10 agree with both of you. I was persuaded by
11 the applicant's testimony that his facility is
12 so small that he doesn't even have a counter.
13 And indeed, most of his patrons call ahead to
14 place orders more than three hours.

15 And just for purposes of
16 clarification, the definition of food delivery
17 service that you reference is actually in 199,
18 section 199.1. I think you referenced 701.4
19 matter-of-right uses in the C-1 District. But
20 the term is defined in section 199.

21 CHAIRPERSON MILLER: Thank you.
22 Thank you so much. Okay. That's right. I

1 jumped to matter-of-right uses, which this is
2 not, but the definition is at 199. Okay. So
3 I think at this point we can then move into
4 the variance analysis, because it is not a
5 matter-of-right use under 701.4.

6 I would say that we did look at
7 701.4 to see whether or not it could fit as a
8 matter-of-right use and we did look at bakery,
9 but we didn't feel, based on the testimony or
10 I didn't feel, I think my colleagues didn't
11 feel either that based on the testimony, that
12 this really was a bakery, because we
13 understood that they were going to be making
14 Italian foods and things like that.

15 So we didn't feel that that fit.
16 So given that it's not a matter-of-right use,
17 we need to apply the variance test to this
18 application to see whether there is an
19 exceptional condition in this case and whether
20 that exceptional condition gives rise to an
21 undue hardship upon the applicant to comply
22 with the regulations.

1 And then if we were to grant the
2 relief, that there would be no substantial
3 detriment to the public for doing that or
4 impairment of the Zoning Regulations or Plan.

5 So first, is there an exceptional
6 condition here? And I think that there is in
7 this case. We can look at a confluence of
8 factors or a situation. It doesn't have to
9 be something that is particularly unique with
10 respect to the shape of the land. There is an
11 improvement upon the land and this building it
12 sounds like it's exceptionally small. As Ms.
13 Walker said, it's too small to have a counter
14 in.

15 And that goes to the fact as to
16 whether he can use it to comply with the
17 regulations, like make it fit as a restaurant,
18 for instance, or whatever. And I think he
19 made a very good case that it was too small.
20 Because he was trying to come in to make it
21 fit under matter-of-right use and he couldn't.

22 I think it's also significant that

1 the space was previously used as fast food,
2 which is also not a matter-of-right use and
3 that it wasn't unreasonable for the applicant
4 to rely on that fact that it had been used as
5 a fast food business when he purchased it and
6 thought that he would be able to use it in a
7 way that is -- actually has less adverse
8 impacts on a community than fast food.

9 Fast food often has containers and
10 trash problems and things like that, traffic
11 and this business doesn't sound that way. It
12 sounds very much contained within and then
13 they deliver it. I think that these factors
14 do lead to an undue hardship upon the
15 applicant, because I don't think that he is
16 able to come into compliance based on what his
17 business is.

18 I mean, it is a food business and
19 I think he -- if he could, he would adapt it
20 to the space to make it work, but in the
21 testimony that we heard, you know, he can't
22 put in a counter. He can't do things like

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1 that to make it fit within the regs.

2 As Mr. Loud said, there was an
3 alternative that the ZA mentioned about
4 connecting with the business next door, but
5 that business is no longer there. And we did
6 hear the applicant say that his only choice
7 would be to go out of business if he doesn't
8 get the relief.

9 I think that, and I'll go through
10 this and then go to others, relief can be
11 granted without substantial detriment to the
12 public good, because this space is located in
13 a self-contained block with other commercial
14 stores and it had been a fast food store, a
15 fast food business and there was a coffee shop
16 next door and we didn't have evidence that
17 that was causing any adverse impacts on the
18 community.

19 In fact, he actually is serving
20 the community and there is no opposition from
21 the community at all. He is going to be
22 delivering with a small car, so we're not

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1 talking about trucks. We're not talking about
2 a lot of traffic. I think he said the company
3 staff will procure goods once a week and
4 deliver it with a small truck.

5 This particular building has been
6 an eating establishment since at least 1999.
7 It never had seats or anything else like that
8 that would make it comply with the regs. And
9 he said it would have neighborhood friendly
10 hours from 7:30 a.m. to 5:00. The ANC
11 supports the application.

12 Oh, Office of Planning was
13 originally opposed to a use variance. But in
14 their report, I note that they said that they
15 didn't feel that the applicant had documented
16 how utilization of property in a conforming
17 manner would be an undue hardship.

18 I think that that changed in the
19 hearings that we had since then, since that
20 report. And so I'm not clear that Office of
21 Planning is still in opposition. All right.
22 I think I'll let others comment on that

1 variance. Are there other comments or not?

2 VICE CHAIRMAN LOUD: Since you
3 insist, Madam Chair. I just wanted to note
4 that it was unclear to me the extent to which
5 the text amendment figured into the uniqueness
6 and the zoning history for this particular
7 property. But what I do want to note is that
8 the text amendment was initiated by ANC-6A,
9 that changed the definition.

10 And in this case, it happens to be
11 ANC-6A that supports the applicant's project.
12 So going to that prong of substantial
13 detriment to the public good, I mean, it comes
14 full circle that the ANC initiated the text
15 amendment to sort of help tighten up these
16 loosely operated businesses as fast foods, but
17 they are turning around and they are
18 unanimously in support of the applicant here.

19 So I really don't think that there
20 is any detriment to the public.

21 CHAIRPERSON MILLER: Yeah, I think
22 that this kind of operation really wasn't or

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1 really isn't reflected almost in the
2 regulations. It's really -- because when we
3 hear all the testimony, it wasn't like one
4 that would -- so you would imagine have
5 adverse impacts on the community at all.

6 It sounded like a great service,
7 like oh, wouldn't we all like to have this
8 here? That was the impression I had. And so
9 it's very different from fast food, you know,
10 where it gets a lot of -- invites a lot of
11 traffic and things like that.

12 So maybe when the regs are refined
13 in the next round, you know, this may get a
14 better place. All right. Anything else? Mr.
15 Moy, do you want to -- are there any comments
16 you need to read from any absentee votes?

17 MR. MOY: Not especially. I think
18 they -- I don't want to be premature on this,
19 because there hasn't been a motion made.

20 CHAIRPERSON MILLER: Right. I
21 just wanted to make sure there wasn't anything
22 we needed to consider. Okay. In that case

1 then, I would move to approve Application No.
2 17812 of Pietros Kidane, pursuant to 11 DCMR
3 3103.2, for a variance from the use provisions
4 to allow a food delivery service under
5 subsection 701.4, in the C-1 District at
6 premises 409 18th Street, N.E.

7 Do I have a second?

8 VICE CHAIRMAN LOUD: Second.

9 CHAIRPERSON MILLER: Further
10 deliberation?

11 All those in favor say aye.

12 ALL: Aye.

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

16 MR. MOY: Yes, Madam Chair. The
17 staff would record the vote as 3-0-0. This is
18 on the motion of the Chair, Ms. Miller, to
19 approve the application, seconded by Mr. Loud.
20 Also in support of the motion is Ms. Walker.
21 As the Chair indicated, we do have absentee
22 ballots from Mr. Dettman and Mr. Hood, who

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1 participated. Mr. Hood is in support of the
2 application as well. Mr. Dettman, the other
3 Board Member, is also in support of the
4 application.

5 And going back on the Chair's
6 earlier question, one of Mr. Dettman's remarks
7 was that he felt that he would also be in
8 favor if the Board decided the applicant's
9 request was actually matter-of-right. So I
10 just wanted to indicate that for the record.
11 But Mr. Dettman is in support of the -- both
12 the relief requested in this application.

13 So that would give a resulting
14 vote of 5-0-0.

15 CHAIRPERSON MILLER: Okay. And
16 this can be a summary order as there is no
17 party in opposition. And that means that the
18 order will issue very soon.

19 Okay. Thank you. Happy new year.
20 Okay. Do we have anything else on the agenda
21 for this morning's meeting?

22 MR. MOY: No, that concludes the

1 Public Meeting this morning, Madam Chair.

2 CHAIRPERSON MILLER: Thank you.

3 Then this meeting is adjourned.

4 (Whereupon, the Public Meeting was
5 concluded at 11:42 a.m.)

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