

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY  
MARCH 3, 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
- SHANE L. DETTMAN, Board Member (NCPC)
- GREGORY N. JEFFRIES, Board Member

OFFICE OF ZONING STAFF PRESENT:

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

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

- SHERRY GLAZER, ESQ.
- LORI MONROE, ESQ.

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The transcript constitutes the minutes  
from the Public Meeting held on March 3, 2009.

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

2 (10:26 a.m.)

3 CHAIRPERSON MILLER: This meeting  
4 will please come to order.

5 Good morning, ladies and gentlemen.

6 This is the March 3, 2009, public meeting of  
7 the Board of Zoning Adjustment of the District  
8 of Columbia.

9 My name is Ruthanne Miller. I am  
10 the chair of the BZA. Joining me today to my  
11 right is our Vice Chair, Mr. Marc Loud. To my  
12 left are Mary Oates Walker and Shane Dettman,  
13 Board Members. Also on the dais is Mr. Cliff  
14 Moy from the Office of Zoning, Ms. Lori Monroe  
15 from the Office of Attorney General, and Ms.  
16 Beverley Bailey from the Office of Zoning.

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

20 We do not take any public testimony  
21 at our meetings unless the Board asks someone  
22 to come forward.

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

8           Does the staff have any preliminary  
9 matters?

10           SECRETARY MOY: Yes, we do, Madam  
11 Chair, but staff would recommend that we take  
12 them up on a case-by-case basis.

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

15           SECRETARY MOY: Good morning, Madam  
16 Chair, members of the Board. We have a number  
17 of applications for decision this morning, the  
18 first being Application Number 17851 of Silvia  
19 and William Moten, pursuant to 11 DCMR 3104.1,  
20 for a special exception for a child  
21 development center -- this is 40 children and  
22 seven teachers -- under Section 205, in the R-

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1 5-A District. This is at premises 355  
2 Parkland Place, S.E., Square 5988, Lot 78.

3 At its public meeting, as the Board  
4 will recall on February 3rd, the Board  
5 convened this application, addressed  
6 preliminary matters, and deliberated on the  
7 post-hearing documents. After discussion, the  
8 Board scheduled its decision on March 3rd, and  
9 at the same time requested that the Office of  
10 Planning refer back to the Office of the State  
11 Superintendent of Education, or OSSE, for  
12 further comments.

13 The OSSE did make a filing, Madam  
14 Chair, and that document -- post-hearing  
15 document is in your case folders, identified  
16 as Exhibit 34. The Board is to act on the  
17 Section 205 special exception relief, and a  
18 possible variance relief to the number of  
19 required parking spaces under Section 2101,  
20 the Board will recall. If not, then staff can  
21 go into more discussion on that matter.

22 With that, that completes the

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1 staff's briefing, Madam Chair.

2 CHAIRPERSON MILLER: Thank you very  
3 much, Mr. Moy.

4 I think I'm going to turn over the  
5 start of this discussion to Ms. Walker.

6 MEMBER WALKER: Thank you, Madam  
7 Chair. As Mr. Moy said, this is an  
8 application for a special exception under  
9 Section 205 to establish a child development  
10 center. The center would have a maximum of 40  
11 children and 10 staff, and it is proposed to  
12 operate Monday through Friday from 6:00 a.m.  
13 to 6:00 p.m.

14 The center would have a day care  
15 component for children under six and an after-  
16 school program for children in kindergarten  
17 through sixth grade.

18 The Office of Planning went through  
19 the analysis of Section 205, and I think that  
20 we can incorporate that analysis from their  
21 initial report dated December 2, '08, which is  
22 our Exhibit 28.

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1           Section 205.2 requires that the  
2 facility be capable of meeting all code and  
3 licensing requirements. The application was  
4 referred to the Office of the State  
5 Superintendent of Education, which  
6 recommended, in a memo dated November 14, '08,  
7 that the special exception be granted. And  
8 that is at our Exhibit 25.

9           The office subsequently confirmed  
10 that recommendation in a memo dated February  
11 13, 2009, which is Exhibit 34.

12           In Section 205.3, there is a  
13 requirement that the facility create no  
14 objectionable traffic condition and no unsafe  
15 condition for pickup and dropoff. There is a  
16 DDOT report in the record dated December 12,  
17 '08, that concludes that the facility will not  
18 have a significant traffic impact on the  
19 neighborhood, and states that DDOT has no  
20 objection to the application. That DDOT  
21 report is our Exhibit 30.

22           In addition, OP's initial report

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1 notes that many parents will live in the  
2 neighborhood and will likely walk to the  
3 center. The report notes that there is  
4 adequate on-street parking available for  
5 short-term parking for parents who arrive by  
6 car, and that there are 10-foot sidewalks on  
7 each side of the street. So OP concluded that  
8 there is no unsafe condition for pickup and  
9 dropoff.

10 Section 205.4 requires that  
11 sufficient off-street parking be provided for  
12 teachers, staff, and visitors. Section 2101  
13 requires one space for every four employees.  
14 The applicant here proposes to expand to a  
15 maximum of 10 staff members. Therefore, three  
16 parking spaces are required. The applicant  
17 has proposed two parking spaces at the rear of  
18 the property, and the site cannot accommodate  
19 a third space. So variance relief from the  
20 parking requirement is needed.

21 In OP's supplemental report dated  
22 January 29, '09, OP goes through the variance

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1 analysis. That is our Exhibit 33.

2 In sum, the property is unique,  
3 because of the location of a two-story  
4 stairway, which divides the rear yard into two  
5 sections and limits the usable space. The  
6 location of the stairway creates a practical  
7 difficulty in placing a third space in the  
8 rear yard.

9 OP concluded that granting relief  
10 from the requirement to provide three spaces  
11 would not substantially impair the intent of  
12 the regulations or the integrity of the zone  
13 plan. There is ample on-street parking, and  
14 the applicant would be providing two of the  
15 three required spaces.

16 Moving back to Section 205, 205.5  
17 requires that there be no objectionable  
18 impacts on adjacent or nearby properties due  
19 to noise, activity, etcetera. There are a  
20 number of letters from the neighbors in the  
21 record. Four letters of support are attached  
22 to the applicant's supplemental filing dated

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1 January 22, '09, which is Exhibit 32. There  
2 are 11 letters in opposition collectively at  
3 Exhibit 31.

4 The focus of these letters is not  
5 negative impacts to nearby properties.  
6 Rather, the dominant theme of the opposition  
7 is the criminal activity and violence in the  
8 area that arguably makes the area unsafe for  
9 children to play outside.

10 Safety concerns were raised at the  
11 hearing, and information about this issue was  
12 requested from the Metropolitan Police  
13 Department. The Seventh District submitted a  
14 memorandum dated January 8, '09, which is an  
15 attachment to OP supplemental report at  
16 Exhibit 33. That memo recommends that a child  
17 development center not be established at the  
18 proposed location, and the memo cites a number  
19 of reasons, including the violent crimes in  
20 the neighborhood.

21 We heard testimony at the hearing  
22 about safety concerns because of criminal

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1 activity. So with respect to the crime issue,  
2 OP, in its supplemental report, notes that  
3 there are other child development centers in  
4 the immediate neighborhood, and that OP has  
5 not been made aware of any incidents at these  
6 facilities related to crime in the  
7 neighborhood.

8 We requested the Office of the  
9 State Superintendent of Education to address  
10 this issue, and in their supplemental letter  
11 -- Exhibit 34 -- they state, "We share the  
12 concerns for safety. However, all residents  
13 of the District of Columbia should be afforded  
14 the opportunity to have quality child care --  
15 child development facilities in their  
16 neighborhoods."

17 Section 205.7 requires that offsite  
18 play areas be located so as to not result in  
19 endangerment to children traveling between the  
20 facility and the play area. The memorandum  
21 from the Metropolitan Police Department raised  
22 concern about the location of the park which

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1 was proposed as the play area for the  
2 children.

3 The applicant initially proposed to  
4 walk the children across the street to play on  
5 federally-owned park land, and that park  
6 borders two busy streets, Malcolm X Avenue and  
7 Martin Luther King, Jr. Avenue. And it is not  
8 fenced.

9 The applicant proposed, in its  
10 supplemental statement at Exhibit 32, that the  
11 children will not play regularly at the park.

12 Rather, they propose to have the children  
13 play in the fenced area to the left of the  
14 building.

15 According to the survey of the  
16 property, which is at Exhibit 3, that area to  
17 the left of the building is only eight feet  
18 wide. So it raises the question of whether  
19 that is ample play space. But the Board  
20 should probably leave that question to the  
21 appropriate licensing agency.

22 Section 205.8 allows the Board to

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1 approve more than one child development center  
2 in a square within 1,000 feet of another child  
3 development center when the cumulative effect  
4 will not have an adverse impact on the  
5 neighborhood. We know that there are at least  
6 two child development centers within 1,000  
7 feet of the proposed center, but there is  
8 likely no adverse impact because they are  
9 located east of Martin Luther King Avenue.

10 I should point out that the  
11 application has the support of the Office of  
12 Planning and, again, of the Office of the  
13 State Superintendent of Education. And I will  
14 be voting to approve the application.

15 CHAIRPERSON MILLER: Thank you.  
16 Why don't we have a little bit of discussion.

17 That was a great recap.

18 I want to, first, raise the  
19 variance question, because, as Ms. Walker  
20 mentioned, the applicant filed a supplemental  
21 pleading to the application, which is our  
22 Exhibit Number 32. And in that filing, they

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1 indicate I think that they are going to have  
2 fewer teachers and assistant teachers perhaps  
3 than what they originally applied for.

4 And they present a number of -- as  
5 being six teachers and assistant teachers, and  
6 then they go through an analysis as to why the  
7 two off-street parking spaces are sufficient  
8 for that number, which I think is correct.

9 So I am -- I just want to ask the  
10 other Board members and Ms. Walker, you know,  
11 whether you think that variance relief still  
12 would be required. I think that Office of  
13 Planning did their analysis based on the  
14 original application.

15 MEMBER WALKER: Well, we heard in  
16 the hearing that they plan to expand faculty  
17 staff and enrollment to no more than 40  
18 children and no more than 10 staff. So if  
19 you're -- you're saying that the plan has  
20 changed?

21 CHAIRPERSON MILLER: That's my  
22 understanding, because I think that the

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1 hearing was December 9th, and this filing was  
2 January 22nd. If they -- so that's their  
3 representation on page 5, that there would be  
4 a maximum size of six teachers and assistants.

5 And they would have two parking spaces, which  
6 they do in the rear.

7 So if we agree with their analysis,  
8 then we wouldn't need to be granting any  
9 variance relief.

10 Does everybody see --

11 MEMBER WALKER: I guess the  
12 question is -- during the hearing, they  
13 amended their application. So if it's the  
14 case that you're saying that by this filing  
15 they have amended a second time, or is there a  
16 need for them to -- I mean, can we assume that  
17 they are amending just based on this? Do we  
18 need to grant them leave to amend? I'm just  
19 grappling with the procedural question here.

20 CHAIRPERSON MILLER: Okay. Did  
21 they officially -- you're saying they  
22 officially amended it during the hearing.

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1                   MEMBER WALKER: During the hearing.  
2                   That's my recollection.

3                   CHAIRPERSON MILLER: Okay. What  
4 I'm looking at I guess is their latest --  
5 their latest filing. And so their latest  
6 filing says, "We'll only have a maximum of six  
7 teachers and assistant teachers, and,  
8 therefore, the two off-street parking spaces  
9 meet the regulations." Therefore, they are  
10 not seeking variance relief. I mean, they  
11 don't say they are not seeking variance  
12 relief. They are saying they meet the  
13 requirements.

14                   MEMBER WALKER: Well, that raises  
15 the question of whether they would be able to  
16 serve 40 children with only six staff members.

17                   VICE CHAIRMAN LOUD: I would just  
18 say to the latter question, Board Member, that  
19 the education office, or whichever office  
20 you're talking about, the one that you really  
21 sort of drilled to get that supportive letter  
22 into the record -- and I think you did a great

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1 job, because I don't think that they had done  
2 it unilaterally on their own the first time.

3 But, nonetheless, that letter came  
4 in on February 13th, which was after this  
5 filing on January 22nd. And that letter,  
6 which presumably they had indicated they  
7 reviewed the entire record, suggested that  
8 they thought the applicant was capable of  
9 meeting all of the licensing requirements.

10 So we might be able to infer from  
11 that -- I'm certainly comfortable making that  
12 -- drawing that inference, that they have  
13 reviewed the entire file as of the date that  
14 they submitted this February 13th  
15 correspondence, and still reach the conclusion  
16 that they think anyway it's capable of meeting  
17 all licensing requirements.

18 Madam Chair, I wanted to ask you,  
19 because I'm, you know, just sort of fumbling  
20 through things and left my zoning regs  
21 downstairs at the metal detector, but the six  
22 parking spaces -- six teacher's aides and the

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1 parking space requirement, under the formula  
2 that we use, does it meet the requirement of X  
3 number --

4 CHAIRPERSON MILLER: Yes, it does.

5 VICE CHAIRMAN LOUD: Okay. So --

6 CHAIRPERSON MILLER: I think it's  
7 two for every three, and they have six. I  
8 mean, one for every -- let's look. Let me  
9 pull it.

10 VICE CHAIRMAN LOUD: Okay.

11 CHAIRPERSON MILLER: I mean, I know  
12 it does, but just to -- to articulate it.

13 VICE CHAIRMAN LOUD: Right. I kind  
14 of thought you might be trying to draw us out  
15 on that. But if it meets the requirement of  
16 the regs, then we would have no need to  
17 deliberate on it and review it, correct?

18 MEMBER WALKER: Right.

19 VICE CHAIRMAN LOUD: So --

20 MEMBER WALKER: My question, Mr.  
21 Loud, was just procedurally, if the applicant  
22 amended the application during the hearing to

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1 say 10 staff members and 40 children, like  
2 through what vehicle now do we amend it again?

3 To go to six, exactly.

4 CHAIRPERSON MILLER: Okay. Let me  
5 -- I just have the regulation here. It's  
6 under 2101. For a child development center,  
7 it's one space for each four teachers and  
8 other employees. They have two spaces, and  
9 they are saying they are only going to have  
10 six teachers. I mean, I think it gives them  
11 space to go up to eight under this.

12 VICE CHAIRMAN LOUD: Right.

13 CHAIRPERSON MILLER: So I think,  
14 procedurally, we go with their last  
15 representation here. I don't think the Board  
16 should be granting a variance, if a variance  
17 is not needed. And I understand your concern  
18 that maybe down the road they might find that,  
19 oh, they need -- they do need another space.  
20 But I don't think that's now. I don't think  
21 that's really before us right now, that they  
22 would have to -- they would then have to come

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1 in for a variance.

2 And they originally didn't seek  
3 variance relief or advertise for variance  
4 relief. This came up I think in the process  
5 of evaluating the application.

6 Do others feel differently?

7 (No response.)

8 Okay. I understand -- I do  
9 understand your point. But I think the way  
10 it's -- by the way it's represented to us that  
11 they are in compliance, or they would be. So  
12 we don't need to consider the variance.

13 MEMBER WALKER: So, then, the  
14 conditions -- will there be a condition  
15 related to the number of children and the  
16 number of staff?

17 CHAIRPERSON MILLER: Okay. Office  
18 of Planning recommends a condition of 40  
19 children, I believe. That's what I -- if I'm  
20 --

21 MEMBER WALKER: Forty children.

22 CHAIRPERSON MILLER: Okay. I think

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1 we do need to know the number of children that  
2 -- so that the community, you know, knows  
3 what's there, and we can evaluate the other  
4 conditions based on how many children they are  
5 serving in part.

6 We don't always put a number on  
7 staff. Sometimes we do, sometimes we don't.  
8 But I think that that would be -- I'm not sure  
9 that that is necessary. I think that would be  
10 subject to the regulations, but tied to the  
11 parking, that they could have up to eight.  
12 But we don't necessarily have to put that in  
13 the order.

14 The Office of Planning doesn't  
15 recommend that we do that. How do people feel  
16 about that?

17 (No response.)

18 I mean, this is a very small  
19 number. I mean, it's easy to calculate based  
20 on the regulations. So I think that the  
21 parking regulations do control the number.  
22 It's just a question of whether we want to put

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1 a maximum in or not.

2 VICE CHAIRMAN LOUD: I'm content  
3 following the direction of Board Member Walker  
4 on this. One of the things that she noted I  
5 think in her summary of the case was that a  
6 lot of the opposition wasn't per se to the  
7 number of young people. It was, rather, to  
8 whether the applicant could create a safe  
9 environment for the young people.

10 So if in fact we don't put a cap on  
11 it, I'm fine with that. If we do put a cap, I  
12 can certainly understand that decision as  
13 well. But I am supportive of the way the case  
14 has been laid out by Board Member Walker and  
15 the facts that she chose to highlight. And I  
16 don't think that those facts suggest that the  
17 cap has been a problem in this case.

18 CHAIRPERSON MILLER: Okay. So you  
19 are in favor of not putting a cap in the order  
20 on the faculty? Or on the employees?

21 VICE CHAIRMAN LOUD: Correct.

22 CHAIRPERSON MILLER: Okay. I think

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1 I would be, too.

2 MEMBER WALKER: Or the children.

3 CHAIRPERSON MILLER: The children?

4 MEMBER WALKER: I guess that was  
5 the question. OP recommended that there be a  
6 cap on the number of children -- 40.

7 VICE CHAIRMAN LOUD: Again, I think  
8 I am supportive of the direction you want to  
9 move in, Board Member Walker. I don't have a  
10 sense of charting a different path than OP on  
11 it, but, again, the evidence wasn't that the  
12 cap of 40 was going to -- I mean, that the  
13 population of 40 was going to be a problem.

14 So to move our discussion along, I  
15 am supportive of however we -- however we land  
16 on this tributary. I don't think it's the  
17 main point of the case, though. So to move  
18 our discussion along, I'm supportive of where  
19 my colleagues want to go on this point.

20 CHAIRPERSON MILLER: Well, I guess  
21 I would suggest that we go with the conditions  
22 proposed by Office of Planning unless we have

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1 a reason to divert from them. That was my  
2 point, that they do recommend a maximum of 40  
3 children. They do not recommend any cap on  
4 the employees. And I think part of the reason  
5 they do that is because that is tied to the  
6 regulations, the parking regulations.

7 All right. Is there consensus on  
8 that? Okay. I think there is. All right.

9 So there will be a condition that  
10 approval shall be for a maximum of 40  
11 children. That will be the first condition.  
12 And not a -- there won't be a condition on the  
13 employees.

14 The Office of Planning also  
15 recommends that the center operate between the  
16 hours of 6:00 a.m. -- now I have -- they had  
17 in their report 6:00 p.m., but I have in my  
18 notes that -- I think they may have changed  
19 this at the hearing to 6:30 p.m., Monday  
20 through Friday, for children under the age of  
21 six years.

22 Do other Board members have an

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1 opinion on that? I'm not sure why there is --  
2 I don't think there is really a distinction  
3 here. I'm looking at the proposed conditions  
4 between the times for six year-olds and then  
5 -- oh, yes, there is a difference in time.

6 Children under the age of six is  
7 6:00 to 6:30, and after-school operate between  
8 the hours of 3:00 p.m. to 6:30 p.m. for  
9 kindergarten through grade six. This is  
10 addressing two different needs, the children  
11 under six and then after school for  
12 kindergarten through grade six.

13 Does anybody have a concern with  
14 those conditions?

15 (No response.)

16 Thereas, I am reading them from the  
17 Office of Planning report, December 2, 2008,  
18 except that I have changed 6:00 to 6:30, I  
19 think based on what came out at the hearing.

20 Okay. The other term -- the other  
21 condition is sometimes we put a term on new  
22 uses, and also on -- I'm looking at Exhibit

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1 28, Office of Planning's report. They also  
2 recommend a period of 10 years from the date  
3 of the Board's approval.

4 Comments on that?

5 (No response.)

6 I would suggest that that's a good  
7 term. We don't have any reason to believe  
8 that this center is going to have an adverse  
9 impact on neighboring properties, which is  
10 primarily the concern in a special exception  
11 case.

12 I think a lot of the -- if not all  
13 of the testimony, a lot of the testimony  
14 evidence of concern was about where this was  
15 located with respect to whether the children  
16 would be safe because of the crime around it.

17 But nothing really as to any adverse impact  
18 that this center would have on neighboring  
19 properties.

20 So I don't think it needs a short  
21 term -- that would be a reason for short term,  
22 if we were concerned about some adverse

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1 impacts from this operation.

2 So are you all right with the  
3 Office of Planning taking a look at it in --  
4 within 10 years?

5 I just want to make also a comment  
6 about 205.7, which says any offsite area shall  
7 be located so as not to result in endangerment  
8 to the individuals in attendance at the center  
9 and traveling between the play area and the  
10 center itself.

11 And I think Ms. Walker talked about  
12 the question about whether this park was safe  
13 for the children. I think the applicant  
14 addressed this in one way in saying that  
15 that's not going to be the primary offsite  
16 play area, that they are going to have play  
17 onsite for the most part. That doesn't mean  
18 that they can't ever go to this park. And we  
19 are certainly not saying that in our order at  
20 all.

21 And I don't think there was a real  
22 issue about their -- the safety for the

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1 individuals in traveling to the park if they  
2 were to ever use it.

3 Okay. Any other comments on this  
4 application?

5 (No response.)

6 Do we have a motion?

7 MEMBER WALKER: Madam Chair, I  
8 would like to move approval of Application  
9 17851 of Silvia and William Moten, pursuant to  
10 11 DCMR Section 3104, for a special exception  
11 for a child development center, under Section  
12 205, in the R-5-A district, at premises 355  
13 Parkland Place, S.E.

14 CHAIRPERSON MILLER: And I would  
15 second that. And that would be as conditioned  
16 by the Board in this meeting.

17 Further deliberation?

18 (No response.)

19 Not hearing any, all those in favor  
20 say aye.

21 (Chorus of ayes.)

22 All those opposed?

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1 (No response.)

2 All those abstaining?

3 (No response.)

4 And would you call the vote,  
5 please?

6 SECRETARY MOY: Yes, Madam Chair.  
7 Staff would record the vote -- we would record  
8 the vote as four to zero to zero. This is on  
9 the motion of Ms. Walker to approve, as  
10 conditioned -- there were four conditions to  
11 this order, seconded by Ms. Miller. Also in  
12 support of the motion are Mr. Dettman and Mr.  
13 Loud. And -- yes, that's four, right?

14 We also have an absentee ballot  
15 from Mr. Turnbull, who participated on this  
16 application. And his absentee vote is to  
17 approve, with such conditions as the Board may  
18 impose, and that would give a final vote of  
19 five to zero to zero.

20 CHAIRPERSON MILLER: I'm sorry, Mr.  
21 Moy. What was the last thing you said?

22 SECRETARY MOY: The final vote on

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1 this application is five to zero to zero, with  
2 -- which includes Mr. Turnbull's absentee  
3 ballot vote.

4 CHAIRPERSON MILLER: Okay. Thank  
5 you. And I believe this can be a summary  
6 order, as there are no parties in opposition.

7 SECRETARY MOY: Yes.

8 CHAIRPERSON MILLER: Okay. Thank  
9 you very much.

10 SECRETARY MOY: The next  
11 application is Application Number 17874 of  
12 Yebeltal Kebede, pursuant to 11 DCMR 3103.2,  
13 for a variance from the use provisions to  
14 establish a retail grocery store -- this is  
15 the basement and first floor -- under  
16 subsection 330.5, in the R-4 District, at  
17 premises 1403 6th Street, N.W. This is in  
18 Square 479, Lot 28.

19 On January 28th -- rather,  
20 January 27, 2009, the Board completed public  
21 testimony, closed the record, and scheduled  
22 its decision on March 3rd. The Board

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1 requested supplemental information to complete  
2 the record from the applicant and allowing for  
3 a supplemental report from the Office of  
4 Planning.

5 The applicant made his filing.  
6 This is in your case folders identified as  
7 Exhibit 29. The filing also includes an  
8 amendment to his application, which is to --  
9 for zoning relief to apply to the -- only to  
10 the basement level of the building and not to  
11 the first floor, which is indicated on page 2  
12 of the applicant's filing.

13 The Board is to act on the merits  
14 of the requested use variance, and the  
15 amendment, as I have just mentioned as a  
16 preliminary matter. And that completes the  
17 staff's briefing, Madam Chair.

18 CHAIRPERSON MILLER: Thank you, Mr.  
19 Moy. Why don't we start with the preliminary  
20 matter, which is that the applicant has asked  
21 to amend the application to have the grocery  
22 store just out of the basement, and the rest

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1 of the rowhouse would be residential.

2 I think in assessing whether or not  
3 to grant this kind of amendment we should  
4 weigh whether there is a prejudice to any  
5 party, and whether there is good cause to  
6 allow it to be amended. I mean, on the one  
7 hand I would say, you know, it's late for an  
8 amendment, in that others can't respond to it.

9 However, I don't think there is a  
10 prejudice to any party, in that the amendment  
11 would decrease the impact in this case of  
12 converting the rowhouse to commercial use. It  
13 would just be -- it would be less commercial  
14 use.

15 And I think there is probably good  
16 cause to allow it, because I don't think it  
17 would change our deliberation on this case.  
18 And so I think we, for those reasons, should  
19 allow the amendment. Do others have an  
20 opinion on that? Is there consensus on that?  
21 Okay. I see consensus from Broad members.

22 Okay. So we'll allow the

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1 amendment, and we will address our  
2 deliberation to the application. So amended.

3 And, actually, at this point, then, I would  
4 like to turn to Mr. Dettman to start the  
5 discussion in this case.

6 MEMBER DETTMAN: Thank you, Madam  
7 Chair. What I'd like to do is start off by  
8 just providing a little bit of background on  
9 the case, in addition to what Mr. Moy has  
10 already provided. As Mr. Moy stated, this is  
11 a request for a use variance in order to  
12 establish a grocery store in the R-4 District  
13 at the property located at 1403 6th Street,  
14 N.W.

15 As this is a request from the use  
16 provisions of Section 330.5, the applicant is  
17 required to meet the use variance test and is  
18 required to -- and would be held up to the  
19 undue hardship standard.

20 Currently, the applicant is  
21 operating a grocery store located at the  
22 corner of 6th and O Street, or 1401 6th

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1 Street, N.W. During the testimony, and in the  
2 record, we were informed that the applicant's  
3 current lease on that property is going to be  
4 ending soon, and the owner of that property is  
5 not offering a renewal of that lease.

6 The applicant also -- the applicant  
7 is proposing to move the grocery store to the  
8 neighboring property located at 1403 6th  
9 Street, which is currently a two-family  
10 dwelling in which the applicant owns and  
11 resides in, and the proposal is that the  
12 grocery store would be located in the basement  
13 and first level of the existing row dwelling,  
14 and the upper unit would be retained as a  
15 residential use.

16 During the testimony -- so I would  
17 like to step into the three-prong variance  
18 test now. And moving into the first prong,  
19 where the applicant is required to demonstrate  
20 that the property is affected by an  
21 exceptional or extraordinary situation or  
22 condition, we have in the record, and during

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1 the testimony, the applicant points to several  
2 factors that they believe create a uniqueness  
3 in this property.

4 They state that the closest  
5 shopping opportunity for the neighborhood is a  
6 Giant store, which is located two blocks away.

7 There is no similar corner store within  
8 walking distance of the location. The  
9 existing store is a convenience to the  
10 neighbors, and we heard during testimony at  
11 the hearing from neighbors that that was in  
12 fact the case.

13 The applicant also states that the  
14 store provides services to the neighborhood  
15 not available at the Giant store. And,  
16 finally, that there is no commercial property  
17 available to operate a grocery store within a  
18 two-block radius of the subject property.

19 A post-hearing submission -- that's  
20 Exhibit 29 from Fairfax Realty -- confirms  
21 that there isn't another opportunity for  
22 moving this grocery store into a commercial

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1 property.

2 The Office of Planning found that  
3 the property did not meet the first prong of  
4 the variance test, stating that -- stating  
5 that the subject property exhibits no unusual  
6 shape, topography, or dimension. The lot has  
7 similar dimensions or other -- to other lots  
8 on the square and in the vicinity.

9 So it seems that DCOP kind of  
10 focused their analysis, with respect to the  
11 first prong, on the physical characteristics  
12 of the property. But, as we know, the Board  
13 is able to not only consider the physical  
14 characteristics of the property, but could go  
15 outside the property and find some other  
16 extraordinary condition.

17 In this case, looking very hard  
18 into the record, trying to find something that  
19 would meet the first prong of the variance  
20 test, I spent a lot of time trying to figure  
21 out whether or not the termination of the  
22 lease, the applicant's lease on the current

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1 grocery store, could be enough to meet the  
2 exceptional or extraordinary situation prong.

3 And I guess the -- looking at some  
4 of the court cases, I guess the conclusion  
5 that I came to is that while I -- while I  
6 could consider that an extraordinary  
7 condition, that actually does give rise to an  
8 undue hardship on the applicant. It certainly  
9 does. The termination of the lease is going  
10 to require him to shut down his business,  
11 leading to an economic hardship.

12 It doesn't go to the applicant's  
13 property. It doesn't go to the subject  
14 property in this case. It goes more to the  
15 property where the current grocery store is  
16 located. And, as the variance test lays out,  
17 the extraordinary situation and undue hardship  
18 needs to go to a specific piece of property  
19 and needs to go to the subject property.

20 So with that, I couldn't get myself  
21 to find that the application meets the first  
22 prong of the variance test.

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1           Going on to the second prong of the  
2 variance test where the exceptional or  
3 extraordinary situation needs to give rise to  
4 an undue hardship on the property owner, as I  
5 have stated, there is an undue hardship here.

6       There is going to be a business loss. But,  
7 again, it doesn't go to the specific property,  
8 in that the -- there is no unique situation  
9 that is specific to this property that gives  
10 rise to the undue hardship.

11           Just to finish out the three prongs  
12 of the variance test, the third prong, stating  
13 that the granting of the variance will not  
14 cause substantial detriment to the public  
15 good, nor substantially impair the intent,  
16 purpose, and integrity of the zone plan, I  
17 think, based on what we heard from the ANC,  
18 several letters that were submitted in  
19 support, a petition that was signed by 65  
20 people, it seems that this grocery store does  
21 provide a public good. And it does provide  
22 benefits to the neighborhood.

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1           OP saw it a little differently.  
2           They felt -- they acknowledged the benefits  
3           that it provides to the neighborhood, but they  
4           also said that the applicant's proposal had  
5           some gaps in terms of garbage storage,  
6           deliveries to the store during the week, that  
7           needed to be clarified. They thought that  
8           what they had seen in the record could have  
9           given rise to adverse impacts to the  
10          neighborhood based on deliveries and trash  
11          removal.

12           And they also -- DCOP also states  
13          that granting the variance could have negative  
14          impacts and could impair the intent and  
15          purpose of the zoning regulations for granting  
16          a commercial -- a new commercial use in the  
17          residential neighborhood.

18           I generally see it the way DCOP  
19          sees it. I think that there is a potential  
20          for impacts to the neighborhood with respect  
21          to deliveries and trash removal. I don't  
22          think it was well established how handicapped

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1 accessibility was going to be accommodated in  
2 this site, and I think that our efforts to  
3 protect the R-4 from overpopulation, too much  
4 density as well as the encroachment of  
5 commercial uses, I think that the third prong  
6 is not met.

7 So I guess at this point, Madam  
8 Chair, it is my position that the applicant  
9 did not meet the use variance test. And I  
10 will send it back to my colleagues at this  
11 point.

12 CHAIRPERSON MILLER: Thank you very  
13 much. That was excellent.

14 Do others have comments on this?

15 (No response.)

16 Okay. All right. I just want to  
17 add to that, I think that the analysis is  
18 exactly correct, that in this case there is a  
19 rowhouse, which is conforming to residential  
20 use, and there is nothing exceptional about  
21 this property, the rowhouse property, that  
22 creates an undue hardship in using that

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1 property in accordance with the regulations.

2 So I think that is the basic  
3 analysis here. I know that there was a lot of  
4 testimony that the grocery store per se next  
5 door served a public interest, but we are  
6 talking about the rowhouse property. And  
7 applicant relied on Monaco to a large extent,  
8 and in Monaco, that was a nonprofit to begin  
9 with, and it was operating as a nonprofit in  
10 the property and it wanted to expand. In this  
11 case, this property is operating  
12 residentially.

13 So, and we are talking about  
14 conforming use being -- a nonconforming use  
15 being introduced where there is a conforming  
16 use. So I think there is a big difference  
17 there. And I think Office of Planning was  
18 concerned about the encroachment of commercial  
19 space into residential area.

20 So that is all I want to add to  
21 that very thorough analysis. Anybody else?

22 (No response.)

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1 I think that the applicant did the  
2 best that he could to make a very creative  
3 argument, but I don't think that the law  
4 really supports it. So if there are no other  
5 deliberations on this, do we have a motion?

6 MEMBER DETTMAN: Madam Chair, I  
7 would move for denial of Application Number  
8 17874, pursuant to 11 DCMR 3103.2, for a  
9 variance from the use provisions of subsection  
10 330.5, to establish a retail grocery store in  
11 the R-4 District at 1403 6th Street, N.W.

12 CHAIRPERSON MILLER: Second.

13 Further deliberation?

14 (No response.)

15 All those in favor of the motion  
16 say aye.

17 (Chorus of ayes.)

18 All those opposed?

19 (No response.)

20 All those abstaining?

21 (No response.)

22 And would you call the vote,

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1 please?

2 SECRETARY MOY: Yes, Madam Chair.  
3 Staff would record the vote as four to zero to  
4 zero. This is on the motion to deny the  
5 application by Mr. Dettman. In support of the  
6 motion, Ms. Walker -- or, rather, Ms. Walker  
7 seconded the motion. Other Board members in  
8 support of the motion is Ms. Walker and Mr.  
9 Loud.

10 We have also, Madam Chair, an  
11 absentee ballot from Mr. Turnbull, who also  
12 participated on the application. And his vote  
13 is to deny. If I may read his comments, it's  
14 very brief, Madam Chair. Mr. Turnbull writes  
15 that, "The application does not -- does not  
16 meet the three-part variance test. One, the  
17 property does not exhibit specific uniqueness.  
18 Two, the property is flat, which is a  
19 conforming use. There are no conditions that  
20 would make the continuous of that impossible.  
21 And, three -- and finally, three, granting  
22 the relief would impair the intent of the

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1 zoning regulations."

2 So that would give a final vote of  
3 five to zero to zero.

4 CHAIRPERSON MILLER: Thank you.

5 SECRETARY MOY: The next  
6 application is 17873 of Tanya Topolewski,  
7 pursuant to 11 DCMR 3103.2, for a variance  
8 from the lot area requirements to convert an  
9 existing flat -- a two-unit dwelling -- to a  
10 three-unit apartment under subsection 401.3,  
11 in the R-4 District at premises 4114 New  
12 Hampshire Avenue, N.W., Square 3229, Lot 58.

13 On January 27, 2009, the Board  
14 completed public testimony, closed the record,  
15 and scheduled its decision on March 3rd. The  
16 Board requested supplemental information to  
17 complete the record from the applicant, the  
18 ANC, and parties, as well as a supplemental  
19 report from the Office of Planning, and draft  
20 findings of fact and conclusions of law.

21 The record contains filings from  
22 the applicant only. As indicated in your case

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1 folders, Madam Chair, the applicant filed on  
2 February 3rd, and the document is Exhibit --  
3 is identified as Exhibit 32.

4 There is a second filing dated  
5 February 10th from the applicant identified as  
6 Exhibit 33. That could be viewed as a  
7 supplemental to their initial filing of  
8 February 3rd, or the Board can take that up as  
9 a preliminary matter, since that came in on  
10 the 10th as opposed to February 3rd.

11 The applicant also filed draft  
12 findings of fact and conclusions of law. That  
13 document is identified as Exhibit 34.

14 The Board is to act on the merits  
15 of the requested variance relief, number 1.  
16 Number 2, the Board should also make a  
17 decision to act on option 1 or option 2, or  
18 both, as proposed by the applicant. And each  
19 option has their own specific relief.

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

22 CHAIRPERSON MILLER: Thank you, Mr.

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1 Moy. Were you suggesting that any of the  
2 filings were untimely?

3 SECRETARY MOY: It's the second  
4 filing from the applicant, Exhibit 33.

5 CHAIRPERSON MILLER: Would that be  
6 the proposed --

7 SECRETARY MOY: No.

8 CHAIRPERSON MILLER: No. Okay.  
9 Which one is it?

10 SECRETARY MOY: It's a -- they  
11 filed --

12 CHAIRPERSON MILLER: Post hearing?

13 SECRETARY MOY: -- with an attached  
14 letter to document and confirm that a three-  
15 unit building is more likely than a two-unit  
16 building to attract total rent. Exhibit 33.  
17 It was requested information from the Board.

18 CHAIRPERSON MILLER: Okay. Thank  
19 you. And I have it in front of me now. I  
20 think other Board members do. So we would  
21 need to waive that into the record, should we  
22 choose to accept it. It's a little bit late.

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1 Mr. Moy, how late is it?

2 SECRETARY MOY: About seven days.

3 CHAIRPERSON MILLER: Okay. Okay.

4 As I've stated, the standard is no prejudice  
5 to any party for good cause. And I think that  
6 that is met here. It is responsive to the  
7 Board's concerns, and there is no prejudice to  
8 any party.

9 Okay. Is that consensus of the  
10 Board on that?

11 (No response.)

12 Okay. Then, that is the consensus  
13 of the Board. We will accept this into the  
14 record and now proceed with the merits. And I  
15 am going to turn to Mr. Loud to start our  
16 discussion on that.

17 VICE CHAIRMAN LOUD: Thank you,  
18 Madam Chair, and good morning again.

19 Let me begin just by placing before  
20 us what the essential relief is requested this  
21 morning, and then I will do a recap of the  
22 facts. Before us is a project to convert a

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1 flat in the R-4 into a three-unit apartment  
2 dwelling, apartment or condo dwelling, under a  
3 unique set of circumstances in that the  
4 applicant proposes alternative plans and has  
5 submitted alternative plans for us.

6 The first one we'll call the  
7 preferred plan, and the second one we'll call  
8 option 2. The preferred plan and the option 2  
9 both share a variance request for lot area.  
10 The lot that we're talking about is 2,387  
11 square feet, and in the R-4 to get three units  
12 you have to be at a minimum of 2,700 feet, 900  
13 square feet per unit. So that is common to  
14 both plans before us.

15 With respect to the preferred plan,  
16 it also includes a variance request for lot  
17 occupancy. Currently, it is 72 percent. It  
18 would go up to 72.7 percent under the  
19 preferred plan. And, additionally, a variance  
20 request for open court relief. The  
21 requirement is 10 feet. The plan is to  
22 provide for about a little less than two feet,

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1 1.83 feet.

2 Moving on to option 2, as noted, it  
3 would include the variance request for lot  
4 area, but, unlike the preferred plan, would  
5 also seek variance relief for closed court  
6 width. The requirement is for 15 feet. The  
7 plan offers up 4.8 feet, as well as closed  
8 court area relief. The requirement is for 350  
9 feet, and the applicant proposes 81.44 feet.

10 So that is sort of an overview of  
11 the -- as I understand it, overview of the  
12 relief being requested. Now, I am going to  
13 briefly recap the facts, because they are not  
14 necessarily complex, but they are a bit  
15 convoluted, particularly since they are  
16 different options before us.

17 This is a project where the  
18 applicant proposes to convert an existing  
19 three-level flat into a three-unit, three-  
20 level apartment and/or condo, where the  
21 applicant would be removing the interior stair  
22 connection between the basement and the first

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1 floor, rather than upgrading it, rather than  
2 upgrading the non-compliant 24-inch wide stair  
3 to a compliant 36-inch wide stair.

4           The applicant would also create a  
5 code compliant and modified separate rear  
6 access for each unit by replacing the existing  
7 and allegedly unsafe enclosed and concealed  
8 rear doors and porches on levels one and two  
9 with, under the preferred option, an existing  
10 spiral staircase running on the property from  
11 the south side, from the ground up to the top  
12 of the existing structure for the second  
13 floor, as well as the rooftop deck.

14           Additionally, under the preferred,  
15 the new rear stair on the north side of the  
16 property would access the first floor unit.  
17 This would, as I indicated at the outset,  
18 necessitate area, very minor lot occupancy,  
19 and open court relief.

20           Now, under option 2, the spiral  
21 stairs just mentioned that would have been on  
22 the south side are located now at the north

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1 side of the property, and the rear -- and,  
2 again, it goes from the ground all the way up  
3 to the second level providing access for that  
4 unit. The rear service stairs are installed  
5 at the first floor, and under this scenario it  
6 necessitates area relief, as I indicated,  
7 closed court relief, and -- closed court width  
8 relief, and closed court area relief.

9 In addition to all of the above,  
10 the evidence in the record, testimony, and  
11 pleadings show that the acquisition, the rehab  
12 costs for all that the applicant proposes to  
13 do, hovers around but exceeds \$800,000, that  
14 the applicant is more likely to get financing  
15 for a three-unit project than a two-unit  
16 project.

17 Also, that a two-unit project under  
18 applicant's evidence would result in a  
19 negative monthly cashflow of \$586. That is  
20 our Exhibit 32, Attachment I. Applicant calls  
21 it Exhibit I. But since we number our  
22 exhibits, I am going to call it Attachment I.

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1           Also, where applicant's lot area  
2 obviously doesn't meet the minimum in the R-4  
3 for the three unit. The project includes two  
4 rear parking spaces. The Office of Planning  
5 opposes the project, largely on conversion  
6 grounds.

7           The notion that converting a two-  
8 unit into a three-unit that does not have the  
9 minimum 2,700 square feet is, on its face,  
10 violative of zoning. And the ANC in this case  
11 supports it, in addition to a number of  
12 opposition letters, as well as a number of  
13 support letters.

14           With that being articulated as sort  
15 of the factual predicate, I would like to walk  
16 through the variance test and launch our  
17 discussion for what perhaps will be a spirited  
18 take on how and -- how and/or whether this  
19 project meets the variance test.

20           With respect to the first  
21 requirement that the project be -- or the  
22 property be unique or have some exceptional

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1 situation relative to it, I am -- I have  
2 warmed up to the idea, although I was not  
3 supportive originally, that the -- that there  
4 are a confluence of factors that create an  
5 exceptional situation in this case.

6 First for me would be the fact that  
7 the lender has made it very, very clear that a  
8 three-unit project is more likely to get  
9 funding than a two-unit project. And I say  
10 that in the context of what I think is a very  
11 tight credit market, and the inability of the  
12 applicant -- and I'm drawing an inference --  
13 to shop this deal around, seeking the best  
14 financing that you can get.

15 I think this is a very solid piece  
16 of evidence in the record regarding whether  
17 this project goes forward at all or whether  
18 this project remains a vacant debilitating  
19 property. So I think that there is something  
20 exceptional about the fact that a lender is  
21 saying to an applicant that, "You need to have  
22 three units," where Zoning is saying, "You can

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1 only have two units, because they are 2,300  
2 square feet."

3 By itself, I don't know if it would  
4 be exceptional, but I think under the  
5 confluence of factors analysis I think it is  
6 one piece that, when added to other pieces,  
7 makes it an exceptional situation.

8 I think related to that, because  
9 the lending piece is almost a symptom of the  
10 problem and not necessarily the whole problem,  
11 but related to it is the fact that this  
12 property has suffered from severe deferred  
13 maintenance, and restoring it to some kind of  
14 productive use is going to require significant  
15 investment on the part of an applicant, either  
16 this applicant or some other applicant.

17 And so if perhaps the property were  
18 not in the condition that it were in, it would  
19 take less of a financing commitment for a  
20 lender to restore it, and this applicant would  
21 not be in the situation where three units were  
22 needed. But that is not the case. It is --

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1 in this situation it is. She has contacted a  
2 lender. That lender has said to her that  
3 three units are more likely to get financing.

4 So, again, using the confluence of factors,  
5 these pieces are added to one another.

6 Thirdly is the argument advanced by  
7 the applicant, which on its face would not  
8 have moved me. But, again, with the other  
9 pieces I think put me over in the category of  
10 supporting the applicant meeting this prong of  
11 the test.

12 And that is the apparent original  
13 design of the structure as a three-unit  
14 structure with the three separate entrances to  
15 the English basement, the unique configuration  
16 where there is a bedroom, a kitchen, and a  
17 bath already in the basement level. The  
18 building has an entrance and an egress on each  
19 level already.

20 So those are factors that, again,  
21 once added to each other I think meet the test  
22 of their being an exceptional situation. OP I

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1 noted is not in support of it, but they are  
2 largely looking at the physical limitations of  
3 the property. It is a rectangular-shaped  
4 property. There is nothing extraordinary  
5 about it. Applicant makes the argument that  
6 it is a large lot.

7 I don't get that argument, because  
8 even though it's a large lot it is not 2,700  
9 square feet. So it would have to -- you know,  
10 the argument to me doesn't support it being  
11 unique. I think that prong of the test, the  
12 uniqueness, the exceptional situation, really  
13 extends from some of the things I have  
14 outlined above.

15 In terms of the practical  
16 difficulty inherent in this case, we have  
17 heard testimony, both at the hearing and in  
18 the submissions, that the total acquisition  
19 and rehab costs are around \$800,000, or  
20 actually a little north of \$800,000, based on  
21 the submissions that were post-hearing. That  
22 would be our Exhibit 32.

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1           And under the numbers that were  
2 submitted, there is a \$5,000 monthly mortgage,  
3 which at 70 percent loan-to-value results in a  
4 \$4,700 a month gross to the applicant for a  
5 two unit, but a \$5,400 net to the applicant  
6 for a three unit.

7           Under the scenario -- and this is  
8 also noted in the plaintiff's -- applicant's  
9 post-hearing Exhibit Number 33 -- 32, I'm  
10 sorry, Attachments H and I, it shows a  
11 negative \$586 a month loss on a two unit  
12 project. And I can't imagine a lender taking  
13 a risk like that in this climate versus a net  
14 \$477 gross on a three-unit project. In  
15 addition to which upgrading the interior  
16 stairway to maintain a connection between the  
17 basement and the first level would cost  
18 approximately \$25,000 and reduce the living  
19 space.

20           And I think that is important,  
21 because if it is going to be two units that --  
22 that interior connection would have to be

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1 maintained, and it would have to either be  
2 upgrade to make it code compliant or remain  
3 its current non-code compliant, which would  
4 create a host of other problems for this  
5 applicant.

6 So I do think that there is a  
7 practical difficulty. That has been  
8 demonstrated through the economic testimony,  
9 as well as the submissions that came in post-  
10 hearing, particularly Exhibit 32. And I  
11 believe we just talked about Exhibit 33, and  
12 allowing that in, which is the letter from the  
13 Cardinal Bank.

14 With respect to no substantial  
15 detriment to the public good, I note that the  
16 billing that we're talking about remains the  
17 same size after the conversion. There is no  
18 additional increase to the footprint.

19 Now, under the preferred plan,  
20 there is a spiral staircase at the south side  
21 of the building, which is about 19.6 feet and  
22 results in a .7 increase of lot occupancy.

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1 But I am not seeing where that would be --  
2 where that would create a substantial  
3 detriment to the public good or impair the  
4 zone plan. It's a fairly de minimus intrusion  
5 into that space, and increase of lot  
6 occupancy.

7 In addition to which we are also  
8 talking I think about a property that will  
9 remain vacant, because, again, of the deferred  
10 maintenance, the cost of trying to restore it  
11 to a productive use, and the difficulty of  
12 getting financing in this climate.

13 So having a three-unit property  
14 that doesn't add to the building footprint,  
15 that is rehabbed and that has life and  
16 residential activity in it, to me is much less  
17 offensive to the public good than perpetuating  
18 the status quo, which is you have a  
19 deteriorating property, which is only going to  
20 deteriorate further. And there does not  
21 appear to be a line of entrepreneurs willing  
22 to take on this risk.

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1           So I think that that prong of the  
2 test is met as well. There is testimony in  
3 the record about two rear parking spaces.

4           And with that, Madam Chair, I'll  
5 pause and allow colleagues to weigh in.

6           CHAIRPERSON MILLER: That was  
7 really excellent. Do others have comments?

8           (No response.)

9           I'll make a few comments, then,  
10 while others might be giving this more  
11 thought. I basically agree with your analysis  
12 that it meets the variance test, that there is  
13 a confluence of factors in the -- which leads  
14 to -- which gives rise to uniqueness in this  
15 case.

16           There already is an improvement on  
17 the property, so the applicants have to work  
18 with that improvement, and the courts have  
19 recognized that that -- that is -- that can be  
20 a unique situation. And as you said, it is  
21 one that needs a great deal of renovation and  
22 great cost to be -- at great cost to the

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1 applicant.

2           So I think that is -- goes to the  
3 exceptional circumstances. Also, the current  
4 configuration of the property we heard gives  
5 rise to certain safety concerns that they are  
6 trying to address and privacy concerns. And  
7 also, they are going to be making this  
8 property LEED Platinum Certified. And that  
9 also adds unique factors for the architect to  
10 work with. So I think it does rise to  
11 uniqueness.

12           And I think that the financing  
13 question comes in at the practical difficulty  
14 element of the test. Also, I think that this  
15 property, if I'm not mistaken, also -- when I  
16 was talking about the configuration, I think  
17 it is configured so that it would work as a  
18 three unit more than other typical flats in  
19 the neighborhood.

20           So I think that that made a strong  
21 case that there would be practical  
22 difficulties in renovating this property, and

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1 also, if it were only two units in -- in  
2 making it financially feasible.

3 And also, I agree, I don't see any  
4 adverse impacts to neighboring properties  
5 should relief be granted. And the other  
6 comment I just want to make is that, with  
7 respect to the lot occupancy, it's an increase  
8 of 72 percent to 72.7 percent, which in my  
9 view is a small degree.

10 And so when we do our variance  
11 analysis, we can -- when we are instructed by  
12 the courts to weigh the severity of the relief  
13 that's being requested when we are considering  
14 the other elements as well. And so I think  
15 that the severity is small in this case, and I  
16 think they have made a practical difficulty  
17 argument that certainly rises to the  
18 uniqueness here.

19 So I think that is all I have to  
20 add. I think you -- you really covered this  
21 very thoroughly. And were you covering  
22 primarily the preferred option, Mr. Loud? Or

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1 does your analysis go to both?

2 VICE CHAIRMAN LOUD: I think the  
3 analysis would go to both the preferred and  
4 the option 2. The only difference is that  
5 there is more information that I put out,  
6 because there are some parts of what's needed  
7 in the preferred that don't apply with the  
8 option 2 -- for example, the spiral staircase  
9 taking 19.6 square feet and necessitating the  
10 need for some lot occupancy variance relief.

11 But if you sort of extract that out  
12 of the discussion, everything else would apply  
13 to the variance test as pertains to option 2.

14 CHAIRPERSON MILLER: Okay. Great.

15 Other comments?

16 (No response.)

17 MEMBER DETTMAN: Madam Chair, I am  
18 in agreement with the way Mr. Loud has laid  
19 out the variance test as it applies to the  
20 conversion from two units to three units. But  
21 what I'm struggling with is the lot occupancy,  
22 and mainly I am not seeing -- of the three

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1 unique factors that Mr. Loud kind of  
2 articulated, and, you know, the financing and  
3 the deferred maintenance and the original  
4 design of the structure, I am not seeing how  
5 any of those factors, or collectively those  
6 factors, create a practical difficulty in the  
7 lot occupancy.

8           And I understand it is de minimus,  
9 and we are able to look at the severity of the  
10 variance being requested. However, I guess it  
11 is my take that, in order for us to do that,  
12 there at least has to be something there. And  
13 if there is -- if there is nothing that  
14 contributes to the first prong when it comes  
15 to lot occupancy, the severity of the variance  
16 really doesn't apply.

17           I think we have two options here.  
18 One triggers lot occupancy, one doesn't,  
19 because the spiral staircase would be located  
20 in an area that is already contributing to lot  
21 occupancy. And the reason why we have two  
22 options here is because of a fire and life

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1 safety issue.

2 The applicant stated that they  
3 really just don't know which option is going  
4 to satisfy fire and life safety once they get  
5 to DCRA. So I think that the chance that we  
6 might see a change in the plans because of  
7 fire and life safety issues is equal on both  
8 sets of plans. Whether or not they advance  
9 option 1, it might not meet life safety. They  
10 might have to come back here.

11 So it's the lot occupancy that I am  
12 having trouble with, and fitting it into the  
13 variance tests right now.

14 CHAIRPERSON MILLER: Well, let me  
15 ask you, in the areas that we discussed why  
16 the variance would be granted, we talked about  
17 privacy and safety concerns, we talked about  
18 that this was Platinum LEED Certified, as  
19 certainly goals that were trying to be reached  
20 by the -- in this renovation. And then, of  
21 course, we talked about costs.

22 Can you identify any of those areas

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1 as not being affected? Were we not to grant  
2 the variance for lot occupancy?

3 MEMBER DETTMAN: Just to make sure  
4 I understand your question, Madam Chair, you  
5 are asking that if we were to deny the lot  
6 occupancy, essentially go with option 2, would  
7 some of the features, as they relate to the  
8 LEED rating and the safety, would any of those  
9 things be impacted?

10 CHAIRPERSON MILLER: And the  
11 privacy.

12 MEMBER DETTMAN: And the privacy?

13 CHAIRPERSON MILLER: Yes.

14 MEMBER DETTMAN: I don't think so.  
15 I think it's not going to affect the LEED  
16 rating. The thing that is triggering the lot  
17 occupancy is the new spiral staircase, and the  
18 spiral staircase doesn't go to any of the LEED  
19 goals that the applicant is trying to attain.

20 As with respect to privacy, I think  
21 that if there is any loss of privacy or  
22 enjoyment of use on neighboring properties it

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1 has already happened with the screen-in  
2 sunroom and the windows that look into it. I  
3 don't think that there is going to be a loss  
4 of privacy by relocating the spiral stair from  
5 one side of the sunroom to the other.

6 And there was a third that I can't  
7 recall.

8 CHAIRPERSON MILLER: It was safety.

9 MEMBER DETTMAN: Safety. Well, I  
10 agree with the applicant that there is  
11 somewhat of a safety concern with the  
12 condition and the location of the existing  
13 stair. The applicant had stated that, as the  
14 stair is located right now, there is this  
15 opportunity for people to reach into a window.

16 And in order to remove that safety  
17 concern what they have opted to do is  
18 essentially turn the area that is now occupied  
19 by the unsafe stair, they have turned that  
20 into living space, which has required them to  
21 move the spiral staircase further out into the  
22 yard and contributing to lot occupancy.

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1 I think that there are -- and I was  
2 asking the applicant some questions. I think  
3 there are numerous ways to fix this safety  
4 issue without actually triggering lot  
5 occupancy. But I think simply by going with  
6 option 2 and moving the staircase from one  
7 side of the sunroom to the other allows the  
8 applicant to satisfy their safety concerns,  
9 remove the safety concerns, without triggering  
10 additional relief.

11 VICE CHAIRMAN LOUD: I think -- and  
12 I share some of the concern about the lot  
13 occupancy issue, but not as much I think  
14 because it's only .7 deviation. But I think  
15 one of the reasons why the applicant has two  
16 options before us is because they do not have  
17 a certainty that either option would meet with  
18 approval at DCRA, and so I can see the  
19 argument being made and having some weight to  
20 it that there is a practical difficulty,  
21 potentially a practical difficulty in going  
22 with option 2, which is why they have a

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1 preferred option in the first place.

2 I mean, I think if there was some  
3 certainty around option 2 being really in play  
4 and being really viable, that perhaps that  
5 would be the only option that they would bring  
6 before us. But I think there is a real  
7 concern, based on, as I understand the record,  
8 their having hired a consultant, a design  
9 consultant, having had some conversations with  
10 DCRA, that they need to broaden what they  
11 present, so that it has the best chance of  
12 getting through the DCRA vet.

13 So I am not certain that I am  
14 comfortable making the assumption or  
15 conclusion that they can really do this option  
16 2, so why are we even looking at the preferred  
17 option? In fact, they may not be able to do  
18 this option 2 at all, and that would present  
19 them with a practical difficulty.

20 So I understand, but, again, I am  
21 sort of looking at the same set of facts  
22 slightly differently.

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1                   CHAIRPERSON MILLER:     I guess I  
2     would say that I don't think it's accurate  
3     that there would be no practical difficulties  
4     or, I don't know, other benefits from the  
5     preferred option, because otherwise I don't  
6     know why that the applicant would be pursuing  
7     that.

8                   As I understand it at least, it's a  
9     more efficient use of -- it results in a more  
10    efficient use of the space, and I don't see  
11    any adverse impact from that, or any detriment  
12    to the public good by a .7 increase in lot  
13    occupancy.

14                  So, and I guess my understanding is  
15    of the -- that this is the ideal -- the  
16    preferred option is the ideal plan for a  
17    variety of reasons. And I think that they  
18    have identified practical difficulties to  
19    support a uniqueness that goes to the property  
20    in general.

21                  So I would be hesitant to take that  
22    one off the table. I would be inclined to

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1 approve both for the applicant to take to  
2 DCRA, given the uncertainty also with respect  
3 to the safety code compliance issues.

4 VICE CHAIRMAN LOUD: And just so  
5 that I'm clear, that is also where I am, Madam  
6 Chair, in terms of granting approval to both  
7 the option 2 under the variance test and the  
8 preferred plan under the variance test, if  
9 colleagues are so inclined.

10 But I just wanted to clarify where  
11 I stood on that, because I do think that we  
12 had indicated that would be a point that we  
13 would definitely make a decision on during  
14 deliberations, whether we approve the request  
15 for two plans.

16 MEMBER WALKER: Madam Chair, let me  
17 just state that it is really difficult for me  
18 to vote to approve a plan that triggers  
19 variance relief when the applicant has put  
20 forth another plan that does not trigger  
21 variance relief.

22 And let me also say that I think it

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1 is not typical of the Board to accept these  
2 alternative plans, and that we should be  
3 careful not to get into the business of, you  
4 know, trying to help applicants get through  
5 the DCRA process. But it is only here because  
6 the severity of the variance is so slight that  
7 I would be in favor of variance relief for the  
8 preferred option.

9 CHAIRPERSON MILLER: I think that's  
10 true in general; we do not take two plans.  
11 And I think that the applicant made a  
12 compelling case here. But that's an  
13 interesting point about the fact that there's  
14 a -- there's a plan that would not require  
15 variance relief for lot occupancy, whether  
16 that should mean that we don't grant variance  
17 relief for lot occupancy for the first plan.

18 I think in this case that the  
19 practical difficulty doesn't mean  
20 impossibility. So it is not -- that's true,  
21 they have a second plan here because it is not  
22 impossible for them to go forward without lot

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1 occupancy. But I think they made the case, as  
2 far as I see it, that there was a practical  
3 difficulty in complying with the regulations  
4 with respect to lot occupancy to achieve  
5 certain goals and -- that relate uniquely to  
6 this structure.

7 So I think that's what they have to  
8 do. I mean, they have an improvement on the  
9 property that has a lot of problems, and they  
10 are trying to develop it in a way that  
11 addresses the problems of safety and privacy  
12 and at the same time strives to reach this  
13 very high level of green designation, which I  
14 don't see a good reason for us to thwart, just  
15 based on a .7 percent for the lot occupancy.

16 VICE CHAIRMAN LOUD: I kind of want  
17 to echo that. I mean, just not even looking  
18 at these specific facts for a moment, if ever  
19 a case begs out for relief from strict  
20 application of zoning, one that comes to you  
21 and says we need a .7 deviation, you know,  
22 forget the facts, if it's lot area, lot

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1 occupancy, open court. But they're saying,  
2 you know, we just need a .7 deviation, I think  
3 it's one that we ought to very seriously  
4 consider whether zoning should be strictly  
5 applied to that case.

6 Now, in this particular case, you  
7 add to that the fact that, as the chair just  
8 pointed out, that they make a variance case  
9 under the preferred plan, they line up the  
10 evidence that establishes each prong of the  
11 test, and while they don't show that it's  
12 impossible, arguably, to not require lot  
13 occupancy relief, they nonetheless make the  
14 case that it is practically -- that there is a  
15 practical difficulty to making that case.

16 And I just repeat the point that  
17 there is no certainty -- even the applicants  
18 aren't certain. I think they have cited this  
19 preferred option as preferred, because they  
20 think that, you know, maybe DCRA will  
21 appreciate that one better. But they don't  
22 really know if DCRA is going to go for that

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1 one or go for this option 2.

2 DCRA may kick option 2 right out  
3 the door, and, again, there goes the whole  
4 practical difficulty confidence that we have  
5 that option 2 meets with the zone. But I have  
6 said that, and I'm repeating myself. So I  
7 think that when all of these factors are added  
8 up, and the fact that it is .7 that they are  
9 seeking relief under, it really screams out  
10 for serious consideration for variance relief.

11 CHAIRPERSON MILLER: Any other  
12 comments?

13 (No response.)

14 Mr. Moy? Oh, I'm just wondering if  
15 Mr. Turnbull had any comments on this, whether  
16 we should hear them before -- not necessarily  
17 what his vote is, but are there comments that  
18 we should consider?

19 SECRETARY MOY: Well, I can read  
20 what he has in comments without giving away  
21 his vote. He -- Mr. Turnbull writes that this  
22 structure, with its existing floor plan,

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1 appears to have been used as a three flat.  
2 This would be a unique circumstance compared  
3 to other structures and would be expanding a  
4 non-conforming use, and no harm to the zone  
5 plan.

6 CHAIRPERSON MILLER: Okay. Thank  
7 you. Are there any other comments?

8 (No response.)

9 Okay. Not hearing any, do we have  
10 a motion?

11 VICE CHAIRMAN LOUD: Madam Chair,  
12 colleagues, I would like to move approval of  
13 Application Number 17873, for variance relief  
14 under the applicant's preferred plan for lot  
15 area, under Section 401.3, lot occupancy under  
16 403.2, and open court under 406.1, and for  
17 variance relief under applicant's option 2  
18 for, again, lot area relief under 401.3,  
19 closed court width relief under 406.1, and  
20 closed court area relief under 201.3.

21 CHAIRPERSON MILLER: Second.

22 MS. MONROE: And I just want to

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1 open it up for final deliberation, and if  
2 there is any comment from OAG on this also, as  
3 to how we proceed with this, whether we should  
4 approve both plans or -- both options or one  
5 option, such as the preferred option with  
6 flexibility to proceed with option 2 if need  
7 be. Is it okay to approve both plans? That  
8 is the way Mr. Loud phrased it.

9 MS. MONROE: I think if you are  
10 going to approve both, you should just approve  
11 both. There is no point in approving one and  
12 saying, "Well, if you want flexibility, go for  
13 the other one." Just -- they are both  
14 approved, and whichever one DCRA accepts is  
15 it, I think.

16 CHAIRPERSON MILLER: Okay. That's  
17 -- I just wanted to doublecheck. That's the  
18 way Mr. Loud phrased it, and I am -- I think  
19 that is a good way to proceed. I just wanted  
20 to doublecheck before we went forward.

21 Okay. Any other deliberations?

22 (No response.)

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1           Okay. Not hearing any, there is a  
2 motion that has been seconded. All those in  
3 favor say aye.

4           (Chorus of ayes.)

5           All those opposed?

6           (No response.)

7           All those abstaining?

8           (No response.)

9           And would you call the vote,  
10 please?

11           SECRETARY MOY: Yes. Staff would  
12 record the vote as four to zero to zero on the  
13 motion of Mr. Loud to approve the application  
14 for both options, option 1 and option 2.  
15 Although tied to the exhibits, it is option C  
16 and option D. Seconded the motion is Ms.  
17 Miller. Also in support of the motion, Ms.  
18 Walker and Mr. Dettman.

19           And, of course, with Mr. Turnbull's  
20 absentee vote to approve, it would give a  
21 final vote of five to zero to zero.

22           CHAIRPERSON MILLER: I don't

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1 believe there's a party in opposition in this  
2 case. Am I correct?

3 (No response.)

4 No party in opposition.

5 Also, I think we should mention  
6 that the ANC was in support of the  
7 application.

8 SECRETARY MOY: Yes.

9 CHAIRPERSON MILLER: Okay. Thank  
10 you.

11 MS. BAILEY: Madam Chair, there is  
12 no party in opposition to this.

13 CHAIRPERSON MILLER: No, there is  
14 no party in opposition.

15 MS. BAILEY: Oh, okay. Oh.

16 CHAIRPERSON MILLER: Mr. Moy?

17 SECRETARY MOY: Yes.

18 CHAIRPERSON MILLER: We have been  
19 going in order on the public meeting agenda.  
20 But I believe that the next case Commissioner  
21 Jeffries is on, and he may be participating in  
22 this case. So I would suggest that we skip to

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1 number 5, Application Number 17867 of Baby  
2 Land Development Center.

3 SECRETARY MOY: Yes, man.

4 CHAIRPERSON MILLER: And then, we  
5 can proceed with Mr. Jeffries when he is here.

6 SECRETARY MOY: Yes, very good.

7 CHAIRPERSON MILLER: Okay.

8 SECRETARY MOY: Again, that  
9 application is Number 17867 of Baby Land  
10 Development Center, pursuant to 11 DCMR  
11 3104.1, for a special exception to establish a  
12 child development center of 40 children and  
13 six staff, under Section 205, in the R-2  
14 District, at premises 4628 H Street, S.E.,  
15 Square 5359, Lot 328.

16 On January 13, 2009, the Board  
17 completed public testimony, closed the record,  
18 and scheduled its decision on March 3rd. The  
19 Board requested supplemental information to  
20 complete the record both from the Office of  
21 Planning and the applicant and the ANC.

22 Madam Chair, the only filing of

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1 record is by the applicant, which is dated  
2 February 25, 2009, and is identified in your  
3 case folders as Exhibit 27.

4 That completes the status briefing,  
5 Madam Chair.

6 CHAIRPERSON MILLER: Thank you, Mr.  
7 Moy.

8 From what I understand is the  
9 applicant is seeking an extension of time for  
10 the Board's decision on this case in order to  
11 submit a traffic analysis report. She did not  
12 give us a timeframe as to how long that would  
13 take, so I think we just have to use our best  
14 judgment in setting a time.

15 Also, when such a report is  
16 submitted, we would need to give an  
17 opportunity for the ANC to respond. So, and  
18 we are also waiting for I believe a report  
19 from DDOT, and we don't have any indication  
20 from the Office of Planning as to how long  
21 that would take either.

22 SECRETARY MOY: That's correct.

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1 CHAIRPERSON MILLER: Right. He was  
2 hoping -- we were hoping it would be by now.  
3 So what I would suggest is that we set this  
4 for decisionmaking in two months. That would  
5 be our May 5th decision meeting that this  
6 could be put on the agenda for.

7 And then, as I understand it, the  
8 ANC in this area meets on April 14th, is that  
9 correct --

10 SECRETARY MOY: That is correct.

11 CHAIRPERSON MILLER: -- next, so I  
12 think that the report by the traffic analyst,  
13 as well as DDOT report, should be submitted by  
14 April 7th and served on the ANC, so that they  
15 would have an opportunity to address it and  
16 consider it at their April 14th meeting. And  
17 then, the ANC should have until April 21st to  
18 submit any comments.

19 So the dates would be set for  
20 decisionmaking on May 5th, traffic reports  
21 from the analyst and DDOT due April 7th, and  
22 also served on the ANC, and ANC report, should

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1 they decide to submit one to the Board, due  
2 April 21st, also to be served on the  
3 applicant.

4 And Office of Planning? Yes.  
5 Okay. And Office of Planning. And Office of  
6 Planning could also submit I guess a report  
7 one week later, if -- should they desire to.  
8 We are not requiring it, but that would be the  
9 28th. They could have an opportunity to  
10 submit a report.

11 SECRETARY MOY: Right.

12 CHAIRPERSON MILLER: Okay.

13 SECRETARY MOY: Good.

14 CHAIRPERSON MILLER: Everyone all  
15 right with that schedule? Okay.

16 At this point, then, we have two  
17 decisions left on our agenda, and I would  
18 suggest that we take a break at this point and  
19 come back when Mr. Jeffries is with us, if in  
20 fact he is on his way for this meeting.

21 So at this point, we will take a  
22 break.

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1 (Whereupon, the proceedings in the foregoing  
2 matter went off the record at 11:56  
3 a.m. and went back on the record at  
4 2:28 p.m.)

5 CHAIRPERSON MILLER: We're back on  
6 the record.

7 We are still in our public meeting.  
8 Actually, we have two cases that we are going  
9 to be deciding, and then we'll address the  
10 schedule for this afternoon's hearing.

11 So, Mr. Moy, whenever you are ready  
12 to call the -- one of the two remaining cases  
13 on the public meeting agenda.

14 SECRETARY MOY: Yes, Madam Chair.  
15 Thank you. That would be Application Number  
16 17875 of BB&H Joint Venture, on behalf of  
17 Potomac Foods Company. This is pursuant to 11  
18 DCMR 3104.1, for a special exception to permit  
19 the continued use of an accessory parking lot  
20 serving a Burger King restaurant under Section  
21 214, in the R-1-B District at premises Rear  
22 4422 Connecticut Avenue, N.W. This is in

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1 Square 1971, Lot 822.

2 On February 3, 2009, the Board  
3 completed public testimony, closed the record,  
4 and scheduled its decision on March 3rd. The  
5 Board requested supplemental information to  
6 complete the record from the applicant and the  
7 ANC. Those filings, Madam Chair, are in the  
8 record in your case folders from the  
9 applicant. Their post-hearing document is  
10 identified as Exhibit 33.

11 The second filing is from ANC-3F,  
12 and that document is identified as Exhibit 34.

13 It's a bit of a preliminary matter, since it  
14 is -- since that filing was due Friday,  
15 February 27th, and it was entered into the  
16 record on Monday, March 2nd.

17 Other than that, the Board is to  
18 act on the merits of the special exception  
19 relief for the accessory parking lot.

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

22 CHAIRPERSON MILLER: Thank you, Mr.

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1 Moy.

2           So we should deal with the  
3 preliminary matter first, and that is whether  
4 to waive our rules to admit the ANC report,  
5 light of the fact that it was untimely. And I  
6 would suggest that we admit the report. Our  
7 standards are good cause and no prejudice to  
8 any party, and I don't believe there is any  
9 prejudice to any party. And the ANC report I  
10 think is quite valuable to our deliberations.

11           Do others have any objections to  
12 admitting it?

13           (No response.)

14           Okay. Then, we will admit that  
15 last ANC filing into the record.

16           So getting to the merits of this  
17 case, this case involves an accessory parking  
18 lot that has been authorized by special  
19 exception to operate as an accessory parking  
20 lot to the Burger King fast food restaurant on  
21 adjacent property since 1982. It is an R-1-B  
22 District and abuts residential properties to

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1 the west, specifically two-story one-family  
2 semi-detached dwellings facing 35th Street.

3 The lot is also directly across a  
4 20-foot wide north-south public alley from the  
5 rear of the Burger King restaurant, which  
6 fronts Connecticut Avenue.

7 Burger King and other properties  
8 fronting Connecticut are in the C-3-A  
9 District, which is commercial. I would note  
10 that ANC is in opposition to the continued  
11 operation of the parking lot as it has been  
12 operating, and I found their last report quite  
13 informative and helpful.

14 And they did a chart showing  
15 proposed conditions and those that were in  
16 agreement -- where the parties were in  
17 agreement and opposed, and I would like to at  
18 least compliment the ANC to begin with on  
19 their really very thorough and helpful filing.

20 Getting to the issues in this case,  
21 I think that the main problem that we heard  
22 with respect to this parking lot were from

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1 noise from trucks accessing the dumpsters that  
2 are in the parking lot, and we heard issues  
3 with rodents as a result of the dumpsters.

4 At the end of the hearing, we asked  
5 the applicant to look into possibly enclosing  
6 these dumpsters, which seemed to be  
7 responsible for generating the problems that  
8 we heard about, and they did come back with --  
9 with a proposed solution.

10 And at the same time, though we  
11 were aware that there was another provision in  
12 our regulations that we hadn't had time to  
13 study and ask them to look at that as well,  
14 and that regulation in particular is 11 DCMR  
15 2303.1(c), which says, "No other use shall be  
16 conducted from or upon the premises, and no  
17 structure other than an attendant shelter  
18 shall be erected or used upon the premises  
19 unless the use or structure is otherwise  
20 permitted in the district in which the parking  
21 lot is located."

22 So they took a look at that

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1 regulation. We took a look at that  
2 regulation. And I assume that the ANC did as  
3 well.

4 And I think -- I think I really --  
5 I think that we ought to get right to the  
6 heart of this. When we looked at that  
7 regulation, not only did it seem relevant with  
8 respect to whether the structure was allowed,  
9 but it raised the question of whether or not a  
10 dumpster serving a fast food restaurant would  
11 be authorized on this accessory parking lot to  
12 that restaurant.

13 So I think that that is a very key  
14 issue that I think we need to look at, because  
15 this dumpster seems to be the source of the  
16 problems, at least the major problems I think  
17 in this case.

18 So we started to -- the Board did  
19 take a look at 2303.1(c) and tried to  
20 determine whether these types of dumpsters  
21 serving fast food restaurants are allowed in  
22 this district. And in looking for dumpsters

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1 -- the situation where dumpsters serve a fast  
2 food restaurant, it appears that the first  
3 time we see this is in Chapter 721. And in  
4 particular 721.3 talks about fast food  
5 restaurants, and under that it talks about  
6 refuse dumpsters serving these fast food  
7 restaurants.

8 So I think one could conclude that  
9 this type of refuse dumpster is not one that  
10 is permitted in this R-1-B District.

11 I am going to throw that legal  
12 conclusion out to my colleagues for comment.  
13 Any comment, or is there consensus that that  
14 is in fact the conclusion of the Board?

15 VICE CHAIRMAN LOUD: I agree with  
16 you, Madam Chair.

17 CHAIRPERSON MILLER: I would like  
18 to comment that certainly in the previous  
19 order in 2004, I believe it's within the  
20 conditions that the Board allowed dumpsters.  
21 And I was on that Board, and I believe that  
22 the reason that that was allowed in that case

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1 was I don't think the Board focused on the  
2 fact that the dumpsters were serving the  
3 Burger King restaurant, as opposed to  
4 dumpsters or trash containers being in a  
5 parking lot to service the parking lot trash.

6 And I think that explains if there  
7 is any inconsistency between what this order  
8 might say and the last order. I think that  
9 there was a lot of evidence in this record  
10 showing the problems emanating from the  
11 dumpster that I don't recall in the other one.

12 And this caused us to take a closer look at  
13 2303.1(c).

14 Also, this is an accessory parking  
15 lot under 214, and 214.5 refers us to 2303.3  
16 and to -- in general, to the 2300. So, on  
17 careful scrutiny, it seems that this dumpster  
18 does not belong in a parking lot in a  
19 residential district.

20 I think also when we were looking  
21 at the problems in this case, yes, they all  
22 seem to emanate from this dumpster. And when

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1 we were looking at even enclosing it, it  
2 became -- it seemed like it may become a  
3 structure that also was not allowed in this  
4 district.

5           Okay. Let's -- I think that, you  
6 know, 214 is what we begin with, and the  
7 Office of Planning went through the provisions  
8 of 214. And I don't think that there was any  
9 opposition that the parking lot met those  
10 standards, except for compliance, basically,  
11 with Chapter 23. And that is where we went  
12 also for continued analysis.

13           I think I would also say that -- I  
14 think I can speak for the Board, but others  
15 can speak also, that we look to the standards  
16 of 3104 as well, that there not be an adverse  
17 impact on neighboring property.

18           And the evidence seemed pretty  
19 strong that there were adverse impacts on  
20 neighboring property with respect to noise  
21 from trucks that were servicing the dumpster,  
22 with respect to rodents that certainly were a

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1 result from the food and other types of trash  
2 from the Burger King that were placed in these  
3 dumpsters.

4 I think, then, if we take the  
5 dumpster away, I think that that solves a lot  
6 of the problems and changes, to a certain  
7 extent, the conditions that have been  
8 recommended. So what I would suggest is that  
9 we put before us the ANC chart, and the  
10 applicant's proposed conditions, and Office of  
11 Planning's proposed conditions, and then  
12 determine which conditions we want to impose  
13 on this parking lot.

14 Okay. Is everybody ready? Let's  
15 see. Okay. The first condition deals with a  
16 term for this parking lot, and it has been  
17 termed at various different periods of time in  
18 the different orders. 1982 was termed for  
19 three years, 1994 for five years, 2000 for  
20 four years, 2004 for four years.

21 The applicant sought -- or is  
22 seeking 10 years or an indefinite amount of

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1 time. The ANC is proposing two years. The  
2 Office of Planning originally proposed 10, and  
3 then changed it to five I think at the  
4 hearing.

5 I think the factors that we need to  
6 consider are, one, that this has been an  
7 ongoing use since 1982, but also that this  
8 applicant came forward out of compliance and  
9 with lots of problems. So I think taking the  
10 dumpster out is going to address a lot of the  
11 problems, but, on the other hand, there were  
12 problems even with reporting to the ANC, and  
13 things like that that weren't well justified,  
14 I don't believe. It is not like they couldn't  
15 do it for some extraordinary reason.

16 So I think two years is too short,  
17 because it is just a very short turnaround,  
18 and I think that we -- by taking the dumpster  
19 out, we are providing great protection to the  
20 neighborhood.

21 I would suggest perhaps three  
22 years, just to make sure that things are under

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1 control, and that they are working well,  
2 particularly with respect to the communication  
3 with the neighborhood and the ANC. But what  
4 do others think?

5 MEMBER JEFFRIES: Madam Chair, I  
6 agree. I think that three years would be  
7 sufficient for now, given these issues around  
8 communication. I mean, you know, clearly  
9 through some of the testimony we saw that  
10 there was, you know, some potential breakdown,  
11 and I think it is -- it is important that we,  
12 you know, keep this in place long enough to  
13 see how things work out. And then, perhaps at  
14 the next go-round we could look at the longer  
15 term.

16 But I think we just need to have a  
17 shorter term at this point, just to make  
18 certain that things are working out. So I  
19 would agree with you, Madam Chair.

20 CHAIRPERSON MILLER: Okay. Is  
21 there anybody in disagreement with that?

22 (No response.)

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1 I mean, and certainly, you know, if  
2 things do work smoothly, next time they come  
3 they could then be more likely to get a much  
4 longer term. Okay.

5 The second condition that the ANC  
6 proposes, it says, "Install guard rails,  
7 pilons, planter boxes, or another method to  
8 narrow the entrance to the north, so that  
9 delivery and trash trucks cannot enter the  
10 accessory parking lot."

11 Now, I think basically if --  
12 certainly, if the dumpster is not there, we  
13 are not going to have these trash trucks  
14 coming into the accessory parking lot. Do we  
15 think for enforcement reasons that we need to  
16 -- do you have the chart?

17 I think the issue is: do we need  
18 to take further action to ensure that delivery  
19 and trash trucks don't enter the parking lot?

20 I mean, we can say -- we can say that they  
21 are prohibited from entering the parking lot  
22 and/or we can say that they have to do some

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1 type of narrowing of the entrance, so that  
2 it's not possible.

3 MEMBER JEFFRIES: Well, if the  
4 intent is to remove the dumpsters all  
5 together, I don't think we need to put, you  
6 know, additional reinforcements and, you know,  
7 I mean, obviously, with the -- with the  
8 dumpsters removed we can just put language in  
9 here that just talks about prohibition. I  
10 mean, I don't think we need to narrow -- we  
11 have removed sort of the source of contention  
12 I guess as relates to the parking lot by  
13 removing the dumpsters. So --

14 CHAIRPERSON MILLER: If we look at  
15 applicant's proposed condition number 2, they  
16 start with "Vehicles used for restaurant  
17 deliveries and trash pickup shall not access  
18 the accessory parking lot at any time." So we  
19 can use that one.

20 MEMBER JEFFRIES: Yes.

21 CHAIRPERSON MILLER: So does  
22 anybody think that we need to go further with

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1 respect to requiring physical changes to the  
2 entrance in order to prevent trucks from  
3 entering?

4 (No response.)

5 Okay. Not hearing from anybody, I  
6 think that the consensus is, then, we will  
7 just put in the prohibition from these trucks  
8 being able to access the parking lot.

9 I think while we recognize there  
10 has been some problem we think with -- we have  
11 removed the source of the problem for the most  
12 part.

13 I think we can skip all of the  
14 conditions that are proposed that deal with  
15 trash pickup, because there is not going to be  
16 a trash dumpster there. Okay.

17 Well, there is a provision I think  
18 in number 4 which talks about trash cans. And  
19 I think that there is a distinction between  
20 trash cans serving the parking lot versus the  
21 dumpster serving the Burger King.

22 MEMBER WALKER: That is proposed

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1 condition number 6, Madam Chair.

2 CHAIRPERSON MILLER: Whose proposed  
3 condition number 6?

4 MEMBER WALKER: You said number 4.  
5 It's number 6.

6 CHAIRPERSON MILLER: Oh, okay, it's  
7 applicant's number 4 and ANC's number 6.  
8 Okay. And they agree on that. That's fine.  
9 We're not saying there can't be any trash cans  
10 servicing the parking lot. We're saying they  
11 can't have the dumpster there which services  
12 the Burger King.

13 Okay. So everybody in -- okay.  
14 Fine. So that one is in.

15 Okay. And number 8 of the ANC  
16 conditions deals with an exterminator and --  
17 did I skip something?

18 MEMBER JEFFRIES: ANC number 7.

19 CHAIRPERSON MILLER: I'm sorry.  
20 Okay. Let's go back. Oh, okay. This says --  
21 number 7, "The parking surface and fence along  
22 the western boundary of the site shall be

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1 maintained in good condition at all times.  
2 All parts of the lot shall be kept free of  
3 refuse and debris. Landscaping shall be  
4 maintained in a healthy, growing condition,  
5 and in a neat and orderly appearance. And the  
6 trees located on the property shall be pruned  
7 at least once a year."

8 Okay. I think that the ANC is  
9 saying that this is similar to what the  
10 applicant has proposed, except it adds the  
11 maintenance of the fence. Wait a second. And  
12 gives the applicant leeway to pave or  
13 landscape.

14 Okay. I think it's -- well, so  
15 does number 5 of the applicant's give them the  
16 leeway to pave or landscape. So I think that  
17 the -- the only difference here is they are  
18 adding the fence, which I think is fine.  
19 That's one of the screenings.

20 Anybody have a problem with that?

21 (No response.)

22 Okay. So we will include ANC

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1 condition number 7.

2 Moving on to ANC condition number 8  
3 deals with the exterminator. "Exterminator  
4 shall perform extermination services twice a  
5 month to control any rodents. In addition,  
6 the portion of the fence owned by the  
7 applicant and located on the property shall be  
8 reinforced underground to help prevent any  
9 rodents from entering the neighboring  
10 properties." It is agreed to by both ANC, OP,  
11 and applicant. Okay?

12 So no problem?

13 (No response.)

14 Number 9 deals with "Applicant  
15 shall appoint a neighborhood and ANC liaison.  
16 The applicant shall notify the ANC and all  
17 residences within 200 feet of the property of  
18 the name, telephone number, and e-mail address  
19 of the appointed liaison. When the individual  
20 is no longer designated to act as the liaison,  
21 the applicant shall use the same procedures to  
22 notify the neighborhood of his or her

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1 successor." And that is agreed to by Office  
2 of Planning and applicant.

3 Any problems?

4 (No response.)

5 Okay. Number 10 proposed by the  
6 ANC is, "The applicant shall provide to the  
7 ANC and the residences within 200 feet an  
8 annual report summarizing its compliance with  
9 the conditions." Their justification is that  
10 this was a condition in the 2004 BZA order,  
11 and the applicant didn't comply with it.

12 They say the previous condition is  
13 not done on a yearly basis, so no -- so new  
14 residents and/or new ANC Commissioners will  
15 not have the name.

16 Okay. I kind of think that this is  
17 not that burdensome to ask of the Burger King  
18 Corporation that they -- that one of the  
19 problems in this case was that they weren't  
20 responsive to the ANC.

21 So I would be in favor of including  
22 it. How do others feel?

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1 (No response.)

2 Okay. That is the consensus is to  
3 include it.

4 MEMBER JEFFRIES: I mean, we do --  
5 there is going to be a liaison, right?

6 CHAIRPERSON MILLER: Yes.

7 MEMBER JEFFRIES: I mean, it seems  
8 terribly formal to me. But, you know, if the  
9 rest of the Board is in support, I am fine.

10 CHAIRPERSON MILLER: The reason I  
11 am in support is just because they were so out  
12 of compliance with dealing with the ANC that I  
13 think in this case it justifies their being  
14 structured to pay attention to how they need  
15 to be in compliance.

16 We heard a lot of testimony about  
17 how this person didn't know about the order,  
18 and that person didn't. If they have a  
19 requirement that they have to meet, then they  
20 will pay more attention I think.

21 MEMBER JEFFRIES: And you know this  
22 could be like one paragraph --

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1 CHAIRPERSON MILLER: Yes, I --

2 MEMBER JEFFRIES: -- on a yearly  
3 basis, "We are in compliance."

4 CHAIRPERSON MILLER: Yes.

5 MEMBER JEFFRIES: "We keep the  
6 trees pruned and the fences straightened out."  
7 Okay. fine.

8 CHAIRPERSON MILLER: I do -- yes.

9 MEMBER JEFFRIES: I just -- I just  
10 -- okay.

11 CHAIRPERSON MILLER: That's why,  
12 because I don't think it so burdensome, you  
13 know? Is everybody okay with that one?

14 MEMBER WALKER: Yes.

15 CHAIRPERSON MILLER: Okay. Okay.  
16 The next one is just a wording issue. The ANC  
17 represents that the Office of Planning and the  
18 applicant have worded the following two  
19 conditions differently. The Office of  
20 Planning condition states, "Existing wheel  
21 stop signage, guard rail, and parking space  
22 striping, and direction signage painted on the

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1 pavement shall be properly maintained."

2           ANC prefers the following wording,  
3 "The applicant shall maintain wheel stops so  
4 that no vehicle or any part thereof will  
5 project over any lot or building line or on or  
6 over the public space."

7           MEMBER JEFFRIES: Wait. We are  
8 talking about the parking lot when it says  
9 "any lot." I mean --

10           CHAIRPERSON MILLER: Lot line on  
11 the parking lot. I don't really have a  
12 problem with Office of Planning's language,  
13 but do you think the other one is better?

14           MEMBER JEFFRIES: Okay. Yes. Yes,  
15 I don't have a problem with Office of  
16 Planning's wording either.

17           CHAIRPERSON MILLER: Just leave it  
18 with Office of Planning's? Okay. Let's do  
19 that, okay. So we'll take the Office of  
20 Planning language on that one.

21           MEMBER JEFFRIES: So that's it.

22           CHAIRPERSON MILLER: I'm sorry.

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1 What did -- did number -- this was kind of  
2 confusing. Do you see number 12, but did that  
3 go with the previous one?

4 MEMBER JEFFRIES: Yes, I think that  
5 -- yes, that probably --

6 CHAIRPERSON MILLER: Okay. And I  
7 didn't read that.

8 MEMBER JEFFRIES: Yes. The Office  
9 of Planning's is more of a catch-all.

10 CHAIRPERSON MILLER: Okay.  
11 Number 12, just for the record, had read, "The  
12 applicant shall, as necessary, repaint and  
13 maintain the entrance and exit directional  
14 arrows on the surface of the parking lot."

15 So the consensus of the Board is  
16 that the Office of Planning's language covers  
17 it sufficiently. Okay.

18 I think that may cover it. Do  
19 others -- I think the only other conditions  
20 dealt with dumpsters. For instance, the  
21 applicant had one for enclosing -- erecting a  
22 structure to enclose the dumpsters, and that

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1 is no longer relevant, because they won't be  
2 there.

3 Oh, I think which leads me to I  
4 guess the last condition, which would be that  
5 no dumpsters serving the Burger King  
6 restaurant may be located on the parking lot,  
7 on this accessory parking lot.

8 Anything else?

9 MEMBER DETTMAN: Actually, Madam  
10 Chair, there is one thing that I think might  
11 need clarification. Looking at the ANC  
12 report, condition number 4, "Deliveries and  
13 trash pickup shall be limited to the hours of  
14 10:00 a.m. and 6:00 p.m." That showed up in a  
15 previous order, too, and it applied to  
16 deliveries and trash pickup in general.

17 So, essentially, it applied to the  
18 Burger King lot as well. So I bring it up  
19 because it was suggested by the ANC, agreed  
20 upon by the applicant and OP, I would say it  
21 would apply to the accessory parking lot. But  
22 since we are not allowing trash and deliveries

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1 on the parking lot, that is not applicable.  
2 But does this condition still stand?

3 I think our jurisdiction here goes  
4 to the accessory parking lot. So --

5 CHAIRPERSON MILLER: I think that  
6 was raised by the applicant that we didn't  
7 really have jurisdiction over that, because no  
8 trash pickups even were occurring on the  
9 parking lot, even though they were occurring  
10 next to the parking lot when the dumpsters  
11 were there.

12 So we are -- I think in our order  
13 we have -- we are prohibiting delivery and  
14 trash trucks on the property, so that this  
15 probably would be outside our jurisdiction.

16 So I think that I guess that would  
17 be my position, that we -- we not include it.

18 I think that they were saying that they were  
19 going to do this anyway, as a good neighbor,  
20 and I hope that would be the case. But do  
21 others have a different view on this?

22 MS. GLAZER: Madam Chair, I just

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1 want to point out, I think in the post-hearing  
2 submission the applicant said that they would  
3 agree to that condition in the "spirit of  
4 harmony." So the Board might interpret that  
5 as proffering -- a proffering.

6 CHAIRPERSON MILLER: We're going to  
7 get to this in the next case. We are often  
8 faced with that kind of situation where the  
9 parties agree to a condition, even though it's  
10 not within our jurisdiction. And I think the  
11 position of the Board has been that we don't  
12 include it in our orders, because we only  
13 include in our orders what is within our  
14 jurisdiction.

15 But I would hope that if the  
16 applicant had agreed to that that they would  
17 agree to that outside our order.

18 Okay. Her name? What is her name?

19 MS. GLAZER: Sherry Glazer.

20 CHAIRPERSON MILLER: Okay.  
21 Anything else that the Board thinks we need to  
22 cover with respect to this application?

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1 MEMBER JEFFRIES: Besides voting?

2 CHAIRPERSON MILLER: Okay. Yes,  
3 besides voting. I think we have covered the  
4 conditions and everything.

5 Okay. Then, I would move approval  
6 of Application Number 17875 of BB&H Joint  
7 Venture, on behalf of Potomac Foods Company,  
8 pursuant to 11 DCMR 3104.1, for a special  
9 exception to permit the continued use of an  
10 accessory parking lot serving a Burger King  
11 restaurant under Section 214, at premises Rear  
12 4422 Connecticut Avenue, N.W., as conditioned.  
13 And do I have a second?

14 MEMBER DETTMAN: Second.

15 CHAIRPERSON MILLER: Further  
16 deliberation?

17 (No response.)

18 Okay. I just want to clarify that  
19 the Board found that the dumpster should not  
20 be on the property, because it would be in  
21 violation of 11 DCMR 2303.1(c), and also  
22 because it has an adverse impact on

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1 neighboring properties.

2 Okay. Any further deliberation?

3 (No response.)

4 All those in favor say aye.

5 (Chorus of ayes.)

6 All those opposed?

7 (No response.)

8 All those abstaining?

9 (No response.)

10 And would you call the vote,  
11 please?

12 SECRETARY MOY: Yes, Madam Chair.  
13 Staff would record the vote as five to zero to  
14 zero. This is on the motion of the Chair, Ms.  
15 Miller, seconded Mr. Dettman. Also in support  
16 of the motion, Ms. Walker, Mr. Loud, and Mr.  
17 Jeffries. Again, the vote is five to zero to  
18 zero to approve as conditioned.

19 CHAIRPERSON MILLER: Okay. My  
20 question is what kind of order this is going  
21 to be. It's interesting, because we are  
22 approving the application. On the other hand,

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1 we are denying the dumpsters on the property.

2 And, on the other hand, the ANC is -- was  
3 opposed. However, I think what they were most  
4 opposed to the Board has readdressed.

5 So I think I am going to leave it  
6 up to -- well, let's talk about this, whether  
7 we leave it up to OAG. Perhaps it can be some  
8 kind of a hybrid order where, you know, it  
9 doesn't have to be a really lengthy full  
10 order, but you can hit the points, you know,  
11 that were at issue. Anybody?

12 (No response.)

13 Okay. Do you have a comment, Ms.  
14 Glazer?

15 MS. GLAZER: Yes. I think this  
16 needs to be a full order, because there are  
17 disputed issues and parties in opposition.

18 MEMBER JEFFRIES: I mean, you  
19 weren't discussing whether it should be a  
20 summary order or a full order. You were  
21 really talking about how the order should be  
22 characterized? I mean --

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1 CHAIRPERSON MILLER: Yes. I mean,  
2 it's just funny, because I think that the  
3 parties in opposition actually might not be in  
4 opposition, given the relief that we granted.

5 But, and then we granted the exception to the  
6 applicant, but the applicant might have some  
7 concern with respect to the conditions.

8 So I think Ms. Glazer's point is  
9 that, therefore, because of these issues --  
10 certainly there are issues to be addressed.  
11 Sometimes we do like a hybrid order, which is  
12 kind of like in between summary and full. But  
13 I guess OAG feels that it looks like a full  
14 order. So however long it is going to be,  
15 that's fine. Okay. Let's leave it at that.

16 All right. I think we are ready  
17 for the last case on our public meeting  
18 agenda. Ready when you are, Mr. Moy.

19 SECRETARY MOY: Yes, Madam Chair.  
20 What is before the Board now is the -- there  
21 is a motion by ANC-6B for a consideration of  
22 Application Number 17860, pursuant to

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1 Section 3126 of the zoning regulations. The  
2 Board will recall this is to -- to the  
3 application of Jemal's KFC, LLC, pursuant to  
4 11 DCMR 3103.2, which was for a variance from  
5 the rear yard requirements under Section 774,  
6 and a variance from the parking requirements  
7 under subsection 2101.1, to permit the  
8 development of a two-story commercial building  
9 in the C-2-A District at premises 1442  
10 Pennsylvania Avenue, S.E. This is in Square  
11 1065-NE, on Lot 49.

12 The office -- the Board received  
13 this request on January 21, 2009, and this  
14 filing is identified in your case folders as  
15 Exhibit 35.

16 Consistent with the regulations,  
17 the applicant filed a response to the motion.  
18 It was a timely filing dated January 23,  
19 2009.

20 The motion for reconsideration  
21 should be evaluated by the Board pursuant to  
22 Sections 3126 and 31 -- 3126.6 and 3126.4.

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1           And I think for brevity, the staff  
2 is going to complete its briefing at this  
3 point, Madam Chair.

4           CHAIRPERSON MILLER: Mr. Moy, they  
5 didn't ask for a rehearing, though, did they?  
6 Just for reconsideration?

7           SECRETARY MOY: That's correct.

8           CHAIRPERSON MILLER: Okay. So,  
9 then, I'm looking at 3126.4, which says that,  
10 "A motion for reconsideration shall state  
11 specifically all respects in which the final  
12 decision is claimed to be erroneous, the  
13 grounds of the motion, and the relief sought."

14           Okay. I think that the gist of  
15 this is that the neighboring parties in this  
16 case and the applicant had come to an  
17 agreement. And they entered into a memorandum  
18 of understanding, and the neighboring parties  
19 who are seeking reconsideration in this case  
20 want us to -- I believe we were in error to  
21 not have incorporated the conditions that they  
22 agreed to.

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1           And the reason that they say we  
2 were in error I believe is just that I think  
3 they say something like, "If the agreement is  
4 to endure, then the terms of the MOU must be  
5 incorporated in our order." So that is where  
6 we are on this.

7           And this is kind of what I was  
8 alluding to in the discussion in the previous  
9 case, whether just because the parties agree  
10 to conditions whether this Board should  
11 incorporate them in its orders. And the Board  
12 has been taking the position that we should  
13 not -- that we should only incorporate in our  
14 order the conditions that we find are  
15 necessary to mitigate adverse conditions based  
16 on our jurisdiction and the evidence that's in  
17 the record.

18           So I think when I did, though, look  
19 at the summary order, I don't believe that it  
20 really captured sufficiently what this Board  
21 stated on the record at the hearing. The  
22 summary order basically says that we found

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1 that the terms of the MOU were not relevant to  
2 the variance relief requested in the case, and  
3 I don't really think that that captures that.

4           Though I don't think we were in  
5 error to not include them in the order, I  
6 think that perhaps in our reconsideration  
7 order -- I mean, I don't think that we -- I  
8 think that we should deny reconsideration --  
9 the reconsideration motion, because I don't  
10 think we made a mistake by not including them.

11           But I think that we ought to  
12 address a little more fully, reflective of our  
13 decisionmaking at the hearing, why the  
14 proposed conditions were -- were not  
15 incorporated. And they weren't incorporated  
16 for reasons such as we found that they weren't  
17 -- some weren't within the Board's  
18 jurisdiction, some weren't supported by  
19 substantial evidence in the record, some  
20 weren't related to the relief sought in the  
21 case, and some weren't necessary because they  
22 were already required as a matter of law.

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1           We went through each and every  
2 proposed condition and found for one of those  
3 reasons that they shouldn't be incorporated in  
4 the order. And I think we recognize that they  
5 weren't designed to mitigate any adverse  
6 impacts, but we didn't find that we needed  
7 them in the order to mitigate against any  
8 adverse impacts.

9           And also, I guess -- you know, and  
10 so I think that our order should more fully  
11 reflect that, and I think also -- I was  
12 certainly persuaded that the applicant's  
13 representations at the hearing that they were  
14 going to comply with those conditions were  
15 believable, credible, and also that the MOU is  
16 a legally enforceable agreement as well.

17           So for all of those reasons, I  
18 would deny the motion for reconsideration, but  
19 have our order reflect more fully our reasons  
20 for not including the conditions.

21           Other comments?

22           MEMBER JEFFRIES: Second. Was that

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1 a motion?

2 CHAIRPERSON MILLER: There's no  
3 motion.

4 MEMBER JEFFRIES: Oh, oh, oh. I  
5 thought --

6 CHAIRPERSON MILLER: Other comments  
7 before we have a motion?

8 (No response.)

9 Okay. Then, my motion would be to  
10 deny ANC-6B's motion for reconsideration of  
11 Application Number 17860, pursuant to  
12 Section 3126 of the zoning regulations.

13 MEMBER JEFFRIES: Second.

14 CHAIRPERSON MILLER: Okay. Further  
15 deliberation?

16 (No response.)

17 All those in favor say aye.

18 (Chorus of opposed.)

19 All those opposed?

20 (No response.)

21 All those abstaining?

22 (No response.)

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1                   And would you call the vote,  
2 please?

3                   SECRETARY MOY: Staff would record  
4 the vote as three to zero to zero. This is on  
5 the motion of the Chair, Ms. Miller, to deny  
6 the ANC's request for reconsideration.  
7 Seconded by Mr. Jeffries. Also in support of  
8 the motion are Ms. Walker. And, again, that  
9 vote is three to zero to zero. I'm sorry,  
10 three to zero to two, no other Board members  
11 participating.

12                   Thank you, Mr. Jeffries.

13                   CHAIRPERSON MILLER: Okay. Do we  
14 have anything else on the agenda for today's  
15 public meeting?

16                   SECRETARY MOY: No, ma'am.

17                   CHAIRPERSON MILLER: Okay. Then,  
18 the meeting is adjourned.

19 (Whereupon, at 3:12 p.m., the proceedings in  
20 the foregoing matter were  
21 adjourned.)

22

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