

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY, NOVEMBER 3, 2009

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Shane Dettman, Acting Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

SHANE L. DETTMAN Acting Chairman
MEREDITH MOLDENHAUER Board Member

ZONING COMMISSION MEMBERS PRESENT:

MICHAEL G. TURNBULL Commissioner

OFFICE OF ZONING STAFF PRESENT:

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

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on November 3, 2009.

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

2 9:36 a.m.

3 ACTING CHAIR DETTMAN: The meeting
4 will, please, come to order. Good morning,
5 ladies and gentlemen. This is the November 3rd
6 Public Meeting of the Board of Zoning
7 Adjustment of the District of Columbia.

8 My name is Shane Dettman, Vice
9 Chairperson. Joining me today to my right is
10 Mr. Michael Turnbull representing the Zoning
11 Commission. To my left is Ms. Meredith
12 Moldenhauer, Mayoral Appointee Board Member,
13 Mr. Clifford Moy with the Office of Zoning,
14 Ms. Mary Nagelhout with the D.C. Office of
15 Attorney General and Ms. Beverley Bailey with
16 the Office of Zoning.

17 Copies of today's meeting agenda
18 are available to you and are located to my
19 left in the wall bin near the door. We do not
20 take any public testimony at our meetings,
21 unless the Board asks someone to come forward.

22 Please, be advised that this

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

7 The Board will take up any
8 preliminary matters that we have for this
9 morning's Public Meeting.

10 Does the staff have any preliminary
11 matters?

12 MR. MOY: Yes, we do, Mr. Chairman.
13 We actually have two. The first one is a
14 minor one, just a note for the audience that
15 the Office of Zoning -- we haven't reset the
16 clock, so even though it says 10:33, it's
17 actually 9:33.

18 The second preliminary matter which
19 is a large issue is one of the four cases
20 before you is the Appeal Application No. 17980
21 and staff is going to remove that off the
22 agenda for further processing.

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1 ACTING CHAIR DETTMAN: Thank you,
2 Mr. Moy. You said that's 17980?

3 MR. MOY: That's correct.

4 ACTING CHAIR DETTMAN: Okay. Are
5 there any other matters?

6 MR. MOY: No, sir.

7 ACTING CHAIR DETTMAN: Okay. I
8 think we can proceed with this morning's
9 agenda and the Public Meeting. And, Mr. Moy,
10 what I would like to do is for the first two
11 cases, 17620-A and 17676-A, as both of those
12 cases are both Motions for Extensions of
13 Validity of Order, I would like to take those
14 up together.

15 MR. MOY: Yes, yes.

16 ACTING CHAIR DETTMAN: We can call
17 those at once.

18 MR. MOY: Okay. The first of the
19 two cases that is being bundled together, as
20 you said, they are motions to extend the
21 validity of the order, one is to Application
22 No. 17620 or 17620-A of Leon and Peggy

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1 Robbins, pursuant to section 3130 of the
2 Zoning Regulations.

3 The second also which is a motion
4 to extend the validity of the order and this
5 one is to Application No. 17676-A of
6 Innovative Recyclers, Inc., I'm not going to
7 read the description of each one of these, but
8 to say that the -- but to say that on both of
9 these that the Board is to act on the merits
10 of the request to extend the time limits,
11 pursuant to provisions under section 3130.
12 That completes the staff's briefing on that,
13 Mr. Chairman.

14 ACTING CHAIR DETTMAN: Thank you,
15 Mr. Moy.

16 Colleagues, as Mr. Moy kind of laid
17 out for us, these two cases, 17676-A and
18 17620-A, are both motions of the -- motions
19 made by the applicant to extend the validity
20 of a Board approved order.

21 17676-A is Application of
22 Innovative Recyclers, Inc., that particular

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1 case was heard by the Board and decided by the
2 Board on October 23, 2007. It is a summary
3 order that the final date of the order is
4 October 26, 2007.

5 The other case 17620-A is the
6 Application of Leon Robbins. Again, that
7 application was heard and decided on January
8 15, 2008. It's a summary order that was
9 issued on January 17, 2008.

10 As my colleagues, I'm sure, already
11 are familiar with, the Zoning Commission
12 recently modified the Zoning Regulations with
13 respect to motions for extensions of orders,
14 that order, Zoning Order No. 09-01 went into
15 effect in June of 2009.

16 And let me just, for the sake of
17 the record, review the new standard with
18 respect to these types of cases.

19 3130.6 states "The Board may grant
20 one extension of the time periods in section
21 3130.1 for good cause shown upon the filing of
22 a written request for the applicant before the

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1 expiration of the approval, provided that the
2 Board determines that the following
3 requirements are met."

4 And I won't read every single one,
5 but I think 3130.6(c) is relevant to how the
6 Board will go forward today. It says "The
7 applicant must demonstrate that there is good
8 cause for such extension with substantial
9 evidence of one or more of the following
10 criteria."

11 Again, as you know, we have
12 received a lot of these types of cases of
13 recent given the current economic climate,
14 which is exactly what the applicants have
15 stated in this situation, inability to obtain
16 project financing, the economic downturn, the
17 tightening of the credit market.

18 However, since the new regulations
19 went into effect, the Board has really taken
20 to heart the new standard that must be met,
21 the substantial evidence. Colleagues, while I
22 would say that I agree with the applicants and

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1 I don't doubt that the applicant is having
2 trouble obtaining the necessary project
3 financing to advance their projects toward
4 building permit, I think that what has been
5 submitted in both of these cases does not yet
6 meet the substantial evidence requirement of
7 3130.

8 And I would recommend actually
9 putting off the Board's decision on these two
10 cases for one week's time, so that the
11 applicants can supplement their records with a
12 little bit more. I know that the Board has
13 accepted letters from banks, applications
14 submitted to banks as well as sworn affidavits
15 for meeting that substantial evidence
16 requirement.

17 So perhaps we can put this off for
18 a week and take it up at that time? And I'll
19 turn it over to my colleague.

20 MEMBER MOLDENHAUER: Mr. Chairman,
21 I agree with your statement. I think that
22 this is similar to another case you have had

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1 recently where we put off the case and
2 requested that they provide just some
3 additional information or some sort of further
4 evidence to satisfy this standard. And I
5 think that you have articulated what we are
6 looking for and I would move forward for a
7 continuance.

8 COMMISSIONER TURNBULL: Mr. Chair?

9 Mr. Chair, I like that. I would concur with
10 both of you. I don't think we are doing --
11 there is any kind of a hardship here in asking
12 for this. I think it is a proforma, I think,
13 that we are looking to get this on -- from
14 here on out.

15 And it shouldn't be difficult for
16 either one of them to provide us with that
17 information. So I would agree.

18 ACTING CHAIR DETTMAN: I think
19 that's absolutely right, Mr. Turnbull. Again,
20 this is proforma and I think what the Board is
21 trying to do is we have a new standard and
22 we're trying to be consistent in setting that

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1 standard and holding every single applicant to
2 it.

3 So, Mr. Moy, is there anything in
4 terms of a vote or anything that the Board
5 needs to take?

6 MR. MOY: I don't believe so. I
7 think the Board can move on its own by
8 consensus.

9 ACTING CHAIR DETTMAN: Okay. It
10 appears that we have consensus of the Board
11 Members that are present. And does one week
12 work, Mr. Moy?

13 MR. MOY: Yes, I think staff would
14 be agreeable to that.

15 ACTING CHAIR DETTMAN: Okay.

16 MR. MOY: Which would take us to
17 November 10th, I believe.

18 ACTING CHAIR DETTMAN: November
19 10th. And if -- I assume that the office will
20 inform the applicants.

21 MR. MOY: Absolutely. That would
22 be routine on the part of the Zoning Office.

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1 ACTING CHAIR DETTMAN: Okay. And
2 if the applicants need more time, we can just
3 push it further. Sounds good.

4 With that, I think we can move on
5 to the next case, Mr. Moy?

6 MR. MOY: Okay. Very good. The
7 next and last case for decision for the Board
8 this morning, Mr. Chairman, is a Modification
9 of Approved Plans. This is to Application No.
10 17474-B of ASR Group, Inc. by Metro
11 Properties, Inc., pursuant to section 3129 of
12 the Zoning Regulations.

13 The original application, if the
14 Board will recall, is pursuant to 11 DCMR
15 3103.2, for a variance from the off-street
16 parking requirements under section 2116 and
17 pursuant to 11 DCMR 3104.1, for a special
18 exception to construct six three-unit row
19 dwellings under section 353, in the R-5-A
20 District at premises 1749 through 1759 W
21 Street, S.E. This is in Square 5755, Lots 38
22 through 43.

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1 On September 29, 2009, the
2 applicant filed this request for minor
3 modification of approved plans and a waiver of
4 the 6 month time requirement for filing the
5 modification. This document is identified in
6 your case folders as Exhibit 37.

7 The second and only filing in the
8 record is a response by the Office of
9 Planning, their report, which is dated October
10 27, 2009, is identified as Exhibit 38, which
11 is in support of the request for the minor
12 modification.

13 Staff would note for the record
14 that Zoning Commission Order 09-01 amended
15 section 3129, as well as 3130, which is the
16 time limit. And in reference to the time
17 limits, the change here was changed from the 6
18 month time requirement to 2 years after the
19 date of the final order approving the
20 application.

21 In conclusion, the -- again, the
22 staff -- the applicant is requesting a second

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1 modification of approval. The first
2 modification was decided April 1, 2008. The
3 summary order was issued April 2, 2008, which
4 is Order No. 17474-A.

5 The Board is to act on the merits
6 of the applicant's request for the second
7 modification pursuant to the provisions of
8 section 3129. And that completes the staff's
9 briefing, Mr. Chairman.

10 ACTING CHAIR DETTMAN: Thank you,
11 Mr. Moy. Just a couple points I wanted to
12 raise for my colleagues. The applicant is
13 requesting, as Mr. Moy stated, approval of a
14 minor modification to approve plans as well as
15 a waiver of our rules, specifically 3129.3,
16 the 6 month requirement.

17 However, Mr. Moy stated the recent
18 Zoning Commission text amendment in Case No.
19 09-01 modified 3129.3 to change the 6 month
20 requirement to 2 years. 3129.3 states "The
21 request for a minor modification of plans
22 shall be filed with the Board not later than 2

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1 years after the date of the final order
2 approving the application."

3 So with respect to that request,
4 the waiver of 3129, I don't think that that's
5 actually applicable and that the applicant is
6 within that 2 years. So what we have before
7 us here is just a request for approval of a
8 minor modification to approve plans.

9 And just to draw the distinction
10 between this particular case and the two that
11 we addressed first in the morning, this is a
12 request under 3129 for a modification of
13 approved plans as opposed to a request for an
14 extension of the time limits of a Board action
15 under 3130.

16 In March of 2006, the Board
17 approved this application by way of a summary
18 order. And very quickly looking at that order
19 which is attached to our Exhibit No. 37,
20 supplied by the applicant, it looks like the
21 Board originally granted relief from lot
22 occupancy, the residential recreation space

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1 requirements, which are no longer in place, a
2 variance from 2115.2 for accessory parking
3 area or parking garage with 25 or more
4 required spaces, so essentially that was the
5 percentage that could be dedicated to compact
6 spaces and a special exception from the roof
7 structure elements.

8 Subsequently, the applicant
9 returned in April of 2008 for a modification
10 to their plans, which the Board found to be
11 minor and approved that modification. And we
12 have another modification before us today.

13 The modifications that have been
14 made to the plans by the applicant currently
15 include, again, mainly driven by the economic
16 climate right now, the removal of an -- the
17 entire third floor of the apartment building
18 and the removal of one level of below-grade
19 parking.

20 Other than that, the building
21 remains the same, the lot occupancy and the
22 other kind of area requirements that the

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1 applicant is required to meet.

2 Having reviewed the modified plans,
3 colleagues, I think that this is actually --
4 it meets the standard of a minor modification
5 and does meet the requirements under 3129.
6 And I'm inclined to recommend approval of this
7 application.

8 And, colleagues, anything?

9 MEMBER MOLDENHAUER: Mr. Chair, I
10 have reviewed the record also and I believe
11 that the minor issues of reconfiguring the
12 units to permit additional units on one level,
13 revising the lobby, eliminating the roof
14 terrace and, as you stated, the floor
15 modification and the penthouse structure being
16 reduced. I don't believe those would be major
17 issues in regards to why the application was
18 approved and why the application went forward
19 initially, so I would consider them minor and
20 would be willing to move forward on this.

21 ACTING CHAIR DETTMAN: All right.
22 Thank you, Ms. Moldenhauer. Right. I think

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1 that this most certainly does not change the
2 material facts that the Board relied upon in
3 approving the original application, as well as
4 the subsequent modification.

5 For purposes of the record, Ms.
6 Moldenhauer, 3129.6 states that "No Member
7 shall vote on a request for modification of
8 plans unless the Member participated in and
9 voted on the original decision or read the
10 record."

11 I just wanted to make sure for the
12 record that that's clear --

13 MEMBER MOLDENHAUER: Yes, and I
14 would -- oh --

15 ACTING CHAIR DETTMAN: -- that you
16 have.

17 MEMBER MOLDENHAUER: And I would
18 note on the record that I have reviewed the
19 record.

20 ACTING CHAIR DETTMAN: Great. Yes,
21 sir?

22 MR. MOY: Mr. Chairman, while there

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1 is just a brief pause, staff would just like
2 to correct the record on my reading earlier,
3 because I gave the -- I guess I was reading
4 the wrong text.

5 And I just wanted to read for the
6 record, for the transcript, that this
7 Application of 17474-A of ASI -- ASR Group,
8 the original application was pursuant to 11
9 DCMR 3103.2, for a variance from the lot
10 occupancy requirements under section 772, and
11 a variance from the residential recreation
12 space requirements under section 773, to allow
13 the construction of a new 326-unit apartment
14 building in the C-2-A District at premises
15 1300 Rhode Island Avenue, N.E., Square 3956,
16 Lot 801.

17 The decision was made on the
18 original application on May 23, 2006. The
19 modification date was April 1, 2008. And that
20 Bench decision, the summary order, was issued
21 April 2, 2008, for the record.

22 ACTING CHAIR DETTMAN: Great.

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1 Thank you, Mr. Moy. If there is nothing
2 further on this, I can make a motion.

3 Before I do that, I'll note that
4 pursuant to 3129.4, the application -- the
5 applicant's application for a modification has
6 been served on all parties to this case, which
7 in this application was just the ANC.

8 That being said, I would move for
9 approval of Application No. 17474-B for
10 approval of a minor modification to approved
11 plans.

12 MEMBER MOLDENHAUER: I second.

13 ACTING CHAIR DETTMAN: The motion
14 has been made and seconded.

15 All those in favor?

16 ALL: Aye.

17 ACTING CHAIR DETTMAN: Opposed?
18 Any abstentions?

19 MR. MOY: Mr. Chairman, the Office
20 have received the absentee ballot on the third
21 participating Member on this application and
22 that is Mr. Loud. And his absentee ballot

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1 says two things. First is that he has
2 reviewed the record and is prepared to vote.
3 Second, his vote is to approve with any such
4 conditions as the Board may impose.

5 So that would give a final vote of
6 3-0-2. This is on the motion of the Chair,
7 Mr. Dettman, to approve the modification of
8 approved plans, seconded by Ms. Moldenhauer.
9 In support of the motion, of course, Mr. Loud.

10 No other Board Member of Zoning Commissioner
11 participating.

12 So again the final vote is 3-0-2.

13 ACTING CHAIR DETTMAN: Thank you,
14 Mr. Moy.

15 I think that takes care of the
16 Board's Public Meeting. Mr. Moy, what happens
17 next? Do I have to conclude the Public
18 Meeting and open up the Public Hearing?

19 MR. MOY: Yes. Adjourn the Public
20 Meeting session and now you do your opening
21 remarks for the morning session of the Public
22 Hearing.

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ACTING CHAIR DETTMAN: Thank you.
This Public Meeting will stand adjourned.
(Whereupon, the Special Public Meeting was concluded at 9:56 a.m.)

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