

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

MARCH 30, 2010

+ + + + +

The Special Public Meeting convened in Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Meridith Moldenhauer, Madam Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MERIDITH MOLDENHAUER, Madam Chairperson  
SHANE L. DETTMAN, Vice Chairperson (NCPC)  
NICOLE SORG, Member

ZONING COMMISSION MEMBER PRESENT:

MICHAEL G. TURNBULL, FAIA, Commissioner  
(AOC)

OFFICE OF ZONING STAFF PRESENT:

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

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

The transcript constitutes the minutes from the Special Public Meeting held on March 30, 2010.

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

BOARD MOTION TO APPLICATION No. 18032

Vote: 3-2-0 to deny variance relief ..... 20

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

2 9:45 a.m.

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

5 Good morning, ladies and gentlemen.

6 This is Tuesday, March 30, 2019, the  
7 Public Meeting for the Board of Zoning  
8 Adjustments for the District of Columbia.

9 My name is Meridith Moldenhauer,  
10 Chairperson.

11 Joining me today is Vice Chairman  
12 Shane Dettman representative of the National  
13 Capital Planning Commission and Nicole Sorg, BZA  
14 Mayoral Appointee. And representing from the  
15 Zoning Commission is Michael Turnbull.

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

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

22 Please be advised that this is a

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1 proceeding that is being reported by the court  
2 reporter and is also being webcast live.  
3 Accordingly, we must ask you to refrain from any  
4 disturbing noises or actions in the hearing room.

5 Please turn off all beepers and cell phone.

6 Does the staff have any preliminary  
7 matters?

8 SECRETARY MOY: Well, yes we do, Madam  
9 Chairperson. And staff would recommend that we  
10 take that matter up after I do the reading of the  
11 case application.

12 CHAIRPERSON MOLDENHAUER: Thank you,  
13 Mr. Moy.

14 SECRETARY MOY: Well, good morning,  
15 Madam Chairperson, I should say. And good  
16 morning to other members of the Board.

17 This is Application, this is the  
18 Board's own motion to address Application No.  
19 18032 of John Graham and Lorri Kerr, This  
20 application is pursuant to 11 DCMR ' 3104.1 and  
21 3103.2. This was the original application, Madam  
22 Chair, for a special exception to allow a rear

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1 sunroom addition to an existing one-family row  
2 dwelling under section 223, not meeting the lot  
3 occupancy (section 403) requirements and  
4 variances to allow to second floor addition for  
5 use as an art studio to an existing accessory  
6 garage not meeting the height and story  
7 limitations under subsection 2500.4 in the R-4  
8 District at premises 657 C Street, Northeast.  
9 Square 865, Lot 79.

10 The Board's action, Madam Chair, is to  
11 reopen the record and to address the disposition  
12 of variance relief to subsection 2500.4.

13 Mr. Turnbull, I believe, is  
14 participating after having reviewed the record  
15 and will serve as a fifth member of the Board.

16 And as the Board will recall, the last  
17 action of the Board was on March 16, 2010 where  
18 the Board bifurcated the application and voted  
19 separately on the special exception relief and on  
20 the variance relief.

21 Finally, the preliminary matters we  
22 spoke addresses a letter, dated March 24, 2010

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1 from a Paul Ganier and Eveline Schum, Exhibit No.  
2 34, an adjacent neighbor at 645 C Street,  
3 Northeast.

4 And with that, staff would complete  
5 its briefing. Thank you.

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

8 At this point in time I would like to  
9 recommend that we reconsider the vote that  
10 occurred on March 16th. It was a two-to-two  
11 vote. And that's under Section 3126.7.

12 It is our motion that within ten days  
13 from the final written decision, which has not  
14 occurred yet, that we can submit a recommended  
15 vote to rescind that motion to approve the  
16 variance.

17 Is there any additional deliberations  
18 as to my motion to rescind the motion to approve  
19 the variance?

20 Based on a consensus, it appears that  
21 we all vote in favor of rescinding the prior two-  
22 to-two vote on March 16th for this case.

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1           The reason for doing that is that it's  
2 best to dispose of a case based on its merits and  
3 not based on a failed vote of a two-to-two.  
4 There's some more cases to this effect. And it's  
5 the Board's desire to decide cases on its merits  
6 versus deciding a case on a two-to-two vote. So  
7 we've actually had a fifth member who has read  
8 the full record, Mr. Turnbull.

9           And before getting into the merits of  
10 the case, I'd like to address the preliminary  
11 matter of Exhibit 34, which is a letter from a  
12 neighbor who is not a party. And as we state at  
13 the end of each of the hearings, once a case is  
14 closed we don't admit any additional  
15 documentation into the record. And the letter  
16 seems to provide similar perspectives as prior  
17 letters stated. And in addition to that, there  
18 is really nothing new in that that we haven't  
19 already heard through prior testimony.

20           So, my recommendation would be to not  
21 permit this letter in since the record has been  
22 closed and to have it returned by the Director

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1 under Section 3121.9.

2 So, I'd like to open the floor to any  
3 other Board members to see if they concur or if  
4 they have any additional discussions.

5 VICE CHAIR DETTMAN: I concur, Madam  
6 Chair.

7 CHAIRPERSON MOLDENHAUER: Based on the  
8 consensus, it appears that everyone is in  
9 agreement. So we will not admit Exhibit 34 into  
10 the record and ask the Director to return that to  
11 Paul Ganier and Eveline Schum.

12 Next, what I'd like to do is open up  
13 the deliberation now on the merits of the case  
14 for the variance under section 18032. And I'll  
15 turn it to our fifth member, Mr. Turnbull, who I  
16 believe has read the record.

17 COMMISSIONER TURNBULL: Yes, Madam  
18 Chair. I just wanted to point out for the record  
19 that I've gone back through transcripts for  
20 February 16th, March 2nd and March 16th. And I've  
21 also reviewed the video, the archive video of the  
22 last deliberation that the Board had from March

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1 16th several times. And I've gone through the  
2 file. So I think I'm pretty well versed on what  
3 the rest of you have all discussed.

4 CHAIRPERSON MOLDENHAUER: Thank you,  
5 Mr. Turnbull.

6 I'd like to open the floor for  
7 deliberations. If you'd like to start us off?

8 COMMISSIONER TURNBULL: Yes. Thank  
9 you.

10 In going through this, there was a lot  
11 of conflicting testimony or testimony that was  
12 confusing at times and at other times -- there  
13 are parts of this that are troubling.

14 Usually as a member of the Zoning  
15 Commission I'm strictly usually enforcing,  
16 basically agreeing with the Office of Planning on  
17 the regulations and the influence on the Zone  
18 Plan. And at this point after going through and  
19 reading and watching the testimony, and watching  
20 your deliberations, I believe it's my feeling  
21 that I concur with the Office of Planning and  
22 with both you, Madam Chair, and Mr. Dettman that

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1 this does not rise to the level of meeting the  
2 first and second prongs with the practical  
3 difficulty.

4 I was just going back and looking at  
5 Mr. Dettman's comments that he was not persuaded  
6 that the cost was so substantially higher because  
7 of the grade change. And he talks about method  
8 2. And then going back, I think you were  
9 basically going on the same issue that this was  
10 really a personal preference of the applicant  
11 that gives rise to the practical difficulty.

12 In looking at this, so I'm in  
13 agreement. I don't want to go back, unless you  
14 want me to go back and review it. But I  
15 basically agree with both of you on meeting the  
16 variance of the first and second prong and how  
17 they tie in with the practical difficulty of this  
18 site.

19 I'm also conflicted by the third  
20 prong, which I'm confused by the way the  
21 applicant presented his case. And to me, it's  
22 conflicting with things that we know on the

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1 Zoning Commission. And I'm referring back to  
2 *Zoning Commission No 19-08*. And that is the  
3 Brookland Artspace Lofts where we specifically,  
4 that whole development was specifically oriented  
5 to creating artist living quarters and artist  
6 work space. So that sets up the premise that  
7 artists and their workspaces are closely  
8 interrelated; living and workspace.

9 The applicant has made a pretty  
10 specific case. You can go back through the  
11 testimony that this is, from his standpoint, a  
12 very toxic job, which I am surprised. But he is  
13 making the case that he even wears gloves, that  
14 the fumes can go through the drywall and get into  
15 -- I'm looking back actually to what the  
16 architect said. He said "I think John mentioned  
17 to me not too long ago that only after a month  
18 that these solvents and things could actually  
19 seep through and permeate actual party walls. And  
20 since the houses are not made of masonry, they  
21 are wood, it could ultimately get into the  
22 neighbor's yard."

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1           So he's making a very big case. And  
2 there's evidence here from the architect and what  
3 he looked at with talking with U.S. Gypsum and  
4 saying that this is a highly toxic area.

5           You don't solve the problem by moving  
6 it into a separate on the second floor of another  
7 structure. Because it's still going to seep out  
8 into the public space.

9           So if you read the intent of what the  
10 applicant is doing, to be on the third prong, it  
11 fails by his own saying: This is a hazard place.  
12 I don't necessarily agree with this and I'm not  
13 commenting on whether he's right or wrong. But  
14 by his statements he's saying that this is a very  
15 toxic space and it can't be in the house. So  
16 let's put it outside where everyone in the alley  
17 or in the other neighbor's yard can breathe the  
18 fumes that are going to be seeping through the  
19 walls. That's what's in the record. The record,  
20 you can go back and I can cite paragraph and  
21 pages where this is said.

22           I'm not commenting whether it's true

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1 or what. So I think from his own standpoint, the  
2 third prong is not met. But that's sort of like  
3 a secondary matter.

4 I think the case in point is really  
5 what the issues, the arguments that you two made  
6 on March 16th regarding the first and second  
7 prong. And so I would concur with you, you and  
8 Mr. Dettman on that.

9 CHAIRPERSON MOLDENHAUER: Thank you  
10 very much, Mr. Turnbull. And is there any  
11 additional deliberation based on Mr. Turnbull's  
12 statements?

13 MEMBER SORG: Thank you, Madam  
14 Chairwoman.

15 I wanted to say a couple of things. I  
16 think personally I'm still leaning towards my  
17 former position based on the testimony regarding  
18 the topography of the land and the cost for  
19 renovations and construction. But I also wanted  
20 to say that I think that Mr. Turnbull's comments  
21 with regard to making some kind of ruling or  
22 judgment that is based on the contention that oil

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1 paints, or whatever materials are being used, are  
2 so hazardous. I agree that that's not a good  
3 idea to go there because, as you said, there are  
4 many, many examples where living and making art  
5 not only exists in harmony, but are encouraged to  
6 do so. So in that sense I do agree and I think  
7 that his point is very well made.

8 VICE CHAIR DETTMAN: Madam Chairman,  
9 I'm still in the same position as I was when we  
10 first decided this case, and would certainly  
11 agree with Mr. Turnbull's comments with respect  
12 to the third prong.

13 The variance is essentially  
14 perpetuated by the applicant's desire to have an  
15 artist studio on the subject property, just as  
16 the special exception 223 request was perpetuated  
17 by the desire to have a space for the children to  
18 pay outside and not have to contend with the  
19 drainage and the resulting issue with mosquitoes  
20 in the backyard.

21 And so the practical difficulty I  
22 think here is that if the regulations were

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1 strictly applied, the applicant would not be able  
2 to provide an artist studio on the subject  
3 property. And so the question is: Whether or  
4 not there's an exceptional condition that gives  
5 rise to that practical difficulty that's specific  
6 to this property?

7 You know, the testimony and the  
8 filings in the record talk about drainage issues  
9 caused by the drainage easement on the side of  
10 the property, it causes flooding, mosquitoes, you  
11 can't use the backyard.

12 There is mention of a grade change in  
13 the backyard that contributes to the drainage  
14 issues in that, I believe that it was testified  
15 to that, the use of the oil paintings and the  
16 fumes would be an exceptional condition.

17 Now the fumes certainly, the  
18 exceptional fumes certainly give rise to a  
19 practical difficulty in not being able to have an  
20 artist studio on the property. But, again, that's  
21 all based on a personal preference of the  
22 applicant. It's not specific to a piece of

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1 property, this particular piece of property. And  
2 I think the variance language is clear that it  
3 has to be specific to a piece of property.

4 And then the remaining question is  
5 whether or not the drainage issue and the  
6 topography gives rise to that practical  
7 difficulty. And there's no connection there, or  
8 at least I can't see it.

9 I think Mr. Turnbull's comments about  
10 the third prong, which we didn't really address  
11 thoroughly previously because we didn't get past  
12 the first and second prong, like Ms. Sorg said  
13 are very well made.

14 We have evidence in the record that  
15 there's probably not going to be detriment to the  
16 public good. We have the neighbors are in  
17 support of this artist studio on the second floor  
18 of the garage. However, with respect to the  
19 intent, purpose and integrity of the Zone Plan, I  
20 think that there is significant potential for it  
21 being substantially detrimental Zone Plan simply  
22 because to grant a variance on the basis of a

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1 personal preference of an applicant really opens  
2 the door for subsequent requests, similar  
3 requests or other variance requests going  
4 forward. So I think that it would fail on the  
5 third prong as well.

6 CHAIRPERSON MOLDENHAUER: Thank you  
7 very much.

8 I agree with Mr. Dettman and with Mr.  
9 Turnbull. And I would incorporate my prior  
10 statements and discussions from March 16th. I  
11 think that, as said previously, I don't believe  
12 that the exceptional circumstances relate to the  
13 detriment of the second prong and as stated  
14 earlier, we didn't really get past the second  
15 prong.

16 At this point in time if there is no  
17 further deliberation, I will call for a new vote.

18 Is there a motion?

19 At this point in time the case has  
20 already been decided. As I said at the beginning  
21 of the case, we do not take public testimony  
22 during deliberation. So if the applicant desires

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1 to speak with somebody, he can speak with the  
2 Zoning staff afterwards.

3 VICE CHAIR DETTMAN: Madam Chair, I  
4 would move to deny the variance request of  
5 Application No. 18032.

6 CHAIRPERSON MOLDENHAUER: Is there a  
7 second?

8 COMMISSIONER TURNBULL: Second.

9 CHAIRPERSON MOLDENHAUER: Mr. Moy, can  
10 we call a vote?

11 SECRETARY MOY: Yes. Yes, you may.

12 CHAIRPERSON MOLDENHAUER: I'd like to  
13 call a vote then. All those in favor say aye.

14 ALL: Aye.

15 CHAIRPERSON MOLDENHAUER: All those  
16 opposed?

17 Mr. Moy can you call back the record,  
18 and are there any absentee ballots?

19 SECRETARY MOY: Yes, Madam  
20 Chairperson.

21 Before I give a final vote count, we  
22 do have an absentee ballot from Mr. Loud who also

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1 participated on the application. And his  
2 absentee ballot is to vote against a denial of  
3 the variance relief. So in other words, he would  
4 be opposed to the motion to denial.

5 So that would give a final vote of  
6 three-to-two-to-zero. This is a motion on the  
7 Vice Chair Mr. Dettman to deny the variance  
8 relief. Seconded by Mr. Turnbull, also  
9 supporting the motion is Ms. Moldenhauer. In  
10 opposition to the motion is Ms. Sorg and Mr.  
11 Loud.

12 Again, the total vote is three-to-two-  
13 zero.

14 CHAIRPERSON MOLDENHAUER: Thank you  
15 very much, Mr. Moy.

16 Is there anything else on the agenda  
17 for today?

18 SECRETARY MOY: No, Madam Chairperson.

19 CHAIRPERSON MOLDENHAUER: Then I'd  
20 like to call this session to close.

21 (Whereupon, the Special Public Meeting  
22 was adjourned at 10:05 a.m.)

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