

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC DECISION MEETING

+ + + + +

TUESDAY

MAY 4, 2010

+ + + + +

The Public Decision 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., Meredith Moldenhauer, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MEREDITH MOLDENHAUER, Chairperson  
SHANE L. DETTMAN, Vice Chairperson,  
Board Member (NCPC)  
NICOLE SORG, Board Member

ZONING COMMISSION MEMBER PRESENT:

PETER MAY, Commission Member

OFFICE OF ZONING STAFF PRESENT:

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

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ATTENDEES (cont'd)

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Decision Meeting held on May 4, 2010.

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

APPLICATION NO. 17789  
Vote: Four, zero, one to deny..... 22

APPLICATION NO. 18052  
Vote: Three, zero, two to approve..... 31

APPLICATION NO. 18041  
Vote: Four, zero, one to deny..... 50

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

2 9:48 a.m.

3 CHAIRPERSON MOLDENHAUER: The  
4 meeting will come to order.

5 Good morning, ladies and  
6 gentlemen. This is the May 4, 2010 public  
7 meeting of the Board of Zoning Adjustment.

8 My name is Meredith Moldenhauer,  
9 Chairperson. To my right is Vice-Chair Shane  
10 Dettman, representative of the National  
11 Capital Planning Commission. To his right is  
12 Peter May, Zoning Commission representative.  
13 To my left is Nicole Sorg, Mayoral Appointee.

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

17 We do not take any public  
18 testimony at our meetings unless the Board  
19 asks someone 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 noise or action in the hearing  
6 room. Please turn off all cell phones and  
7 beepers.

8                   Does the staff have any  
9 preliminary matters at this time?

10                   MR. MOY: We do, Madam Chair. But  
11 the staff would suggest that we take that on a  
12 case-by-case basis.

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

15                   We'll be making a modification to  
16 the agenda this morning.

17                   The first case on our agenda, the  
18 appeal of Steuart Investment, is actually  
19 going to be moved to the afternoon session.  
20 So we will start off with the Motion for  
21 Reconsideration.

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1 MR. MOY: Good morning, Madam  
2 Chair and Members of the Board.

3 With that introduction, we have  
4 the Motion for Reconsideration. This is  
5 Application No. 17789 on behalf of Walgreen  
6 Eastern Company, Inc. And this would be  
7 pursuant to Section 3126 of the zoning  
8 regulations.

9 The original application was  
10 pursuant to 11 DCMR ' 3103.2, for a variance  
11 from the off-street parking requirements of  
12 Sections 2101 and 2115 to permit the re-  
13 development of the site to demolish an  
14 existing gas station/auto repair facility and  
15 to construct a pharmacy and drug store with  
16 underground parking at 4225 Connecticut  
17 Avenue, N.W. The property is in Square 2051,  
18 Lot 7.

19 Again, the motion for  
20 reconsideration was filed on March 29, 2010  
21 for reconsideration from the party opposition,

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1 Ted Occhialino, on behalf of the Concerned  
2 Citizens of Van Ness. That filing, Madam  
3 Chair, is identified in your case folders as  
4 Exhibit 57 in response to the motion for  
5 reconsideration from the Applicant -- the  
6 property owners -- which was filed on April 5,  
7 2010. The document is identified as 58 in  
8 your case folders.

9 There are three additional  
10 filings, Madam Chair. The party opposition  
11 filed a reply to the Applicant's response on  
12 April 15, 2010. That document is identified  
13 as Exhibit 60.

14 Consequently to this filing, the  
15 Applicant -- the property owners -- filed to  
16 strike this Exhibit 60 from the record. This  
17 was filed April 22, 2010, identified as  
18 Exhibit 61.

19 And finally, a reply to the party  
20 opposition's filing to strike is from the  
21 party opposition, a document dated April 28,

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1 2010, identified as Exhibit 62 in your case  
2 folders.

3 With that, Madam Chair, I think  
4 the staff is in here. And that completes the  
5 staff briefing, Madam Chair.

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

8 I will start off by indicating  
9 that there are three members that have  
10 reviewed the record and the transcript for  
11 this case. And those that have, if you can  
12 just say aye.

13 (A CHORUS OF AYES.)

14 CHAIRPERSON MOLDENHAUER:

15 Having that been completed, next would  
16 be the issue of the motion to strike.

17 Typically where the regulations do  
18 not specifically provide the ability to file  
19 motions or file reply motions, we typically  
20 then follow the D.C. Court rules. The D.C.  
21 Court rules in this instance actually also are

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1 silent on whether or not replies are granted.

2 And in most cases, you either are permitted  
3 to file a reply or you are recommended to ask  
4 for leave of the court to file a reply.

5 In this instance, we will actually  
6 not even be addressing those issues but rather  
7 granting the motion to strike on the fact that  
8 the reply was outside of the scope of the  
9 initial opposition. A reply is usually  
10 required to simply respond to the opposition  
11 of the other parties. In reviewing the reply,  
12 it actually brought up new cases that were  
13 available at the time of the initial motion  
14 for reconsideration but were not referenced.  
15 And for those reasons, we are going to grant  
16 the motion to strike.

17 That being said, we will now move  
18 on into deliberation on the merits of the case  
19 for the motion for reconsideration. And I  
20 will turn to Vice-Chair Shane Dettman to start  
21 us off on that deliberation.

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1                   VICE-CHAIRPERSON   DETTMAN:       Thank  
2                   you, Madam Chair.

3                   And before actually going through  
4                   the five different points that were raised by  
5                   the opposition party in their motion for  
6                   reconsideration, I would just inform the Board  
7                   that we do have an Exhibit 59 which is simply  
8                   just a re-authorization submitted by the  
9                   Applicant. And it would be my suggestion that  
10                  we allow this in the record simply to have it.

11                  CHAIRPERSON       MOLDENHAUER:        I  
12                  confirm that recommendation and that Exhibit  
13                  59 which is the authorization letter should be  
14                  admitted into the record.

15                  VICE-CHAIRPERSON   DETTMAN:        Thank  
16                  you.

17                  With regard to the merits of the  
18                  reconsideration, I have in front of me Exhibit  
19                  57 which is the opposition party's motion for  
20                  reconsideration where the opposition party  
21                  articulates five different areas where it

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1 feels the Board either erred or applied the  
2 wrong zoning regulation. And I'm prepared to  
3 address each of those five areas.

4 The first one was the opposition  
5 party alleging that the zoning relief must be  
6 denied because the Applicant did not request  
7 or obtain relief from Section 5115.4 of the  
8 zoning regulations which is the requirement  
9 for a certain number of compact parking  
10 spaces, being required to have four contiguous  
11 compact spaces I believe. And so, this was  
12 addressed during the hearing and most  
13 specifically during our deliberations of the  
14 case by former Chair Loud.

15 In framing our deliberations for  
16 this case, it was mentioned that the Applicant  
17 did submit a post-hearing submission  
18 indicating that they did in fact amend their  
19 application to include relief from 2115.4.  
20 However, the Board found that in reviewing the  
21 record and reading over the hearing

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1 transcripts that the Applicant did not in fact  
2 formally amend their application. And the  
3 Board did not consider that area of relief  
4 before them. It was basically two areas of  
5 relief. It was for the number of required  
6 parking spaces and then the compact parking  
7 spaces -- the number.

8 So therefore, those are the two  
9 areas of relief that the Board did actually  
10 deliberate on.

11 The opposition party indicates  
12 that the Board granted conditional approval of  
13 the relief from 2115.4. The Board was very  
14 clear in its deliberations that it was  
15 addressing whether or not relief from 2115.4  
16 was necessary. It was sub-certified  
17 application for those two areas of relief.  
18 And that's what the Board focused in on  
19 narrowly.

20 You can refer to page 2 of the  
21 order that addresses this very issue where it

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1 says, "The Board finds that no request for  
2 relief from 2115.4 was included in the  
3 original application." And this is further  
4 addressed later on in the order in pages 12  
5 and 13 which at the bottom of page 12 includes  
6 a notation basically indicating to the ZA that  
7 the Applicant is required to comply with all  
8 areas of the zoning regulations -- I think  
9 that's implied -- with the exception of the  
10 two areas of relief that were pursued and then  
11 ultimately granted in this case.

12 And so, while the Board did not  
13 explicitly take an action or make a notation  
14 on the record that they are granting  
15 conditional approval of this area of the  
16 zoning regulations, again it's implied that  
17 when going forward for a building permit or a  
18 certificate of occupancy or what not that  
19 outside of the two areas of relief that the  
20 Board focused in on narrowly, the Applicant is  
21 required to comply with all areas of the

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1 zoning regulations.

2 With respect to the second area  
3 the party opposition raises -- which is page 2  
4 of their motion -- the party opposition  
5 believes that the Board relied upon the wrong  
6 parking requirement when looking at the  
7 variance request for the number of required  
8 parking spaces. But having looked through the  
9 order as well as the transcript, you can just  
10 simply look to page 1 of the order where it  
11 indicates that Walgreens proposes to provide  
12 31 spaces, and that the requirement is 57  
13 spaces. Page 5 of the order also basically  
14 talks about that technical amendment that was  
15 made to the zoning regulations by the Zoning  
16 Commission. And I think that notation in the  
17 order is merely to note that regardless of  
18 what requirement was applied -- the 57 or the  
19 46 -- a variance was going to be required  
20 regardless. But that in no way indicated that  
21 the Board was considering anything other than

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1 a minimum parking requirement of 57 spaces.  
2 Additionally at page 19 and page 44 of the  
3 transcript during the deliberation of the  
4 case, former Chair Loud mentions that the  
5 requirement is 57 spaces, and that 31 were  
6 going to be provided.

7 Third, the party opposition  
8 indicates that the Board is only authorized to  
9 grant up to a 25 percent reduction in parking.

10 And they referred to Section 2108.1 for that  
11 argument. However, if you look at 2108.1, it  
12 basically gives the Board the authority to  
13 grant up to a 25 percent reduction in the  
14 minimum parking requirements by way of a  
15 special exception. Anything in advance of 25  
16 percent, an Applicant would be required to  
17 pursue a variance.

18 And so 2108 basically articulates  
19 the specific criteria that the Board has to  
20 apply in looking at a special exception  
21 request for a parking reduction. And that's

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1 not unlike any special exception request where  
2 an applicant is required to meet the general  
3 special exception criteria in 3104. And it  
4 specifically says in 3104, "and the specific  
5 criteria, if applicable, in each case."

6 Next, the party opposition claims  
7 that -- I'll read right from their motion. It  
8 says, "Despite the plans submitted by the  
9 Applicant showing a 45-foot corner sign tower,  
10 the order erroneously concludes that the  
11 proposed building design is well within the  
12 parameters of the C-3-A zoning district." And  
13 that was a finding of fact in the order.

14 And my read of the order is that  
15 the finding of fact that says that it was well  
16 within the parameters of the C-3-A is merely  
17 just a finding by the Board that indicates  
18 that other than the two areas of relief that  
19 were being contemplated, the proposal is in  
20 general conformance with the height, the FAR,  
21 the yard requirements, the courts. The use is

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1 presumed to be compatible with the area -- the  
2 C-3-A area. It was in no way erroneous in  
3 trying to say that the proposed design was out  
4 of conformance with the zoning regulations.

5 Now the opposition party does say  
6 that the proposed signage and the lighting as  
7 well as the moving letters appear to not be  
8 compliant with some of the sign regulations.  
9 However, that is not a zoning issue that's  
10 before the Board. And perhaps it's an issue  
11 for another body in the D.C. government.

12 And finally, they say that the  
13 size of the sign and the lighting of the  
14 signage -- in fact, they even say the overall  
15 use -- does not meet the public good test.  
16 But however, if you read very closely the  
17 language of the third prong of the variance  
18 test, it says, "Can the relief be granted?"  
19 So those two areas of relief that the Board  
20 was looking at -- can the relief be granted  
21 without causing substantial detriment to the

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1 public good. And so the Board, I believe,  
2 properly applied this variance test with  
3 respect to the third prong and came out with  
4 the result that they did.

5 Finally, one final note on item  
6 number 4 is that by making the notation in the  
7 order that it was well within the parameters  
8 of the C-3-A district, that should in no way  
9 be construed that the Board basically is  
10 resolving the issue of whether or not it's in  
11 compliance with the rest of the zoning  
12 regulations for the Zoning Administrator. It  
13 was merely to note to the Zoning Administrator  
14 that outside of these two areas of relief that  
15 were ultimately granted, the ZA still needs to  
16 put this application through a full analysis  
17 for compliance with the zoning regulations.

18 And again finally, the fifth and  
19 final point that states that in the total  
20 absence of proof that there would be undue  
21 hardship on the owner of the property if the

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1 variance were not granted, the Board erred and  
2 lacked jurisdiction to grant the Applicant a  
3 variance. This goes to whether or not the  
4 Board was determining whether or not there was  
5 a practical difficulty on Walgreens or a  
6 practical difficulty for the property owner  
7 which was Mid-Atlantic Realty.

8 The opposition party does note  
9 that they are not claiming that they're saying  
10 that Mid-Atlantic Realty is not the owner. In  
11 fact, they're saying to the contrary. The  
12 opposition party's proposed findings clearly  
13 acknowledge that Mid-Atlantic Commercial  
14 Properties is the Applicant. What they're  
15 saying is that the Board considered the  
16 practical difficulty on Walgreens which was  
17 the contract purchaser and not the property  
18 owner.

19 Looking through the transcripts of  
20 the deliberations, the Board never  
21 specifically called out whether or not it was

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1 Walgreens or whether it was Mid-Atlantic.  
2 Every reference that the Board made was to the  
3 Applicant. And the Applicant was indeed the  
4 property owner.

5 But in fact, when we were going  
6 through the three prongs in the variance test,  
7 the first one we found that there was an  
8 exceptional condition on the property --  
9 multiple in fact -- primarily the size and the  
10 shape of the property and the fact that it  
11 narrowed down towards the rear of the  
12 property, and to a lesser extent the 15-foot  
13 building restriction line and the design  
14 desire of DDOT and DC OP to put the building  
15 on Connecticut Avenue. Those were the  
16 exceptional conditions.

17 And in fact what we said was that  
18 it would be practically difficult to establish  
19 any commercial use on this property that is  
20 economically feasible in a manner that  
21 satisfies the strict application of the

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1 minimum parking requirements in Chapter 21.  
2 And so I think that regardless of who the  
3 property owner is, the exceptional conditions  
4 on this specific piece of property creates  
5 some practical difficulties in meeting the  
6 strict application of the zoning regulations.

7 And so, with all that being said,  
8 Madam Chair, I'm inclined to and prepared to  
9 make a motion to deny the motion for  
10 reconsideration on this case.

11 CHAIRPERSON MOLDENHAUER: Thank  
12 you very much, Mr. Dettman. That was a very  
13 thorough analysis.

14 I'll open it up the Board for any  
15 additional deliberation.

16 ZC MEMBER MAY: I don't have  
17 anything really to add to that. I just want  
18 to say that I had reviewed the record myself  
19 and conducted a sort of parallel analysis for  
20 my own purposes. And I agree with  
21 Commissioner Dettman. And therefore, if that

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1 was an actual motion, I would second it. Was  
2 that an actual motion?

3 VICE-CHAIRPERSON DETTMAN: I can  
4 make the motion right now if we're ready.

5 ZC MEMBER MAY: Okay.

6 CHAIRPERSON MOLDENHAUER: I don't  
7 believe we have any additional deliberations.

8 I concur with Mr. Dettman and Mr.  
9 May. I feel that in reviewing the record and  
10 the transcript that the Board did not err.  
11 They applied all of the correct standards for  
12 all of the different five concerns that were  
13 brought up by the motion for reconsideration.

14 And if there is a motion, we can  
15 move forward on that motion.

16 VICE-CHAIRPERSON DETTMAN: I'd  
17 move to deny the motion for reconsideration in  
18 Application No. 17789.

19 ZC MEMBER MAY: Second.

20 CHAIRPERSON MOLDENHAUER: The  
21 motion has been made and seconded.

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1 Is there any further deliberation?

2 (No audible response.)

3 CHAIRPERSON MOLDENHAUER: Seeing  
4 none, all those in favor, say aye.

5 (A CHORUS OF AYES.)

6 CHAIRPERSON MOLDENHAUER: Mr. Moy,  
7 can you read back the vote?

8 MR. MOY: Yes, Madam Chair.

9 The staff would record the vote as  
10 four to zero to one on this motion of the  
11 Vice-Chair Mr. Dettman to deny the motion for  
12 reconsideration; seconded by Mr. Peter May.  
13 Also supported the motion were Ms.  
14 Moldenhauer, the Chair, and Ms. Sorg; and no  
15 other Board are participating.

16 So again, the final vote is four  
17 to zero to one.

18 The next application for a  
19 decision, Madam Chair, I believe is  
20 Application No. 18052. This is Freeda's Child  
21 Development Center pursuant to 11 DCMR '

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1 3104.1 for a special exception for a child  
2 development center for 24 children and ten  
3 staff, which actually has been amended to six  
4 staff, under section 205 in the R-1-B District  
5 at premises 3217 Alabama Avenue, S.E. The  
6 property is in Square 5677, Lot 804.

7 On April 20, 2010, the Board  
8 completed public testimony, closed the record,  
9 and scheduled its decision on May 4, 2010.  
10 The Board requested additional information to  
11 supplement the record pursuant to Section  
12 3121.5. These were to be filings from the  
13 Applicant and ANC 7, both tenet to letters of  
14 authorization.

15 Those filings are in your case  
16 folders, Madam Chair. The first one is from  
17 the Applicant identified as Exhibit 36. The  
18 second filing is from ANC 7B and is in your  
19 case folders identified as Exhibit 37. The  
20 Board is to act on the merits of the special  
21 exception request under Section 205.

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1                   That completes staff's briefing,  
2                   Madam Chair.

3                   CHAIRPERSON   MOLDENHAUER:        Thank  
4                   you very much.

5                   And as Mr. Moy indicated, both  
6                   documents were requested by the Board.   So  
7                   obviously those are part of our record.

8                   And I will begin our deliberation.

9                   This is a relief sought for a  
10                  special exception pursuant to 205 for a child  
11                  development center at 3217 Alabama Avenue,  
12                  S.E.   And the standard under 205 is I think  
13                  well articulated in the Office of Planning  
14                  report which is our Exhibit 25.  And I'll kind  
15                  of go through some of the different elements  
16                  since there are a couple of different issues  
17                  here.

18                  First,        section    205.2,        which  
19                  requires a letter of recommendation or  
20                  approval by OSSE, and this is our Exhibit 21,  
21                  which is in our application file by OSSE,

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1 stating that they would support an  
2 application. There was testimony by the  
3 Applicant actually that OSSE had encouraged  
4 them. And so that then satisfies that prong.

5 The next prong is section 205.3  
6 which generally says there should be no  
7 objectionable traffic condition resulting from  
8 the child development center. Here OP's  
9 report specifically articulates some of the  
10 concerns about potentially having the  
11 Applicant instruct any parents to not park or  
12 allow the children to cross Alabama Avenue.  
13 We heard testimony from the Applicant  
14 regarding their endeavors to inform the  
15 parents not to do that.

16 We also heard testimony from a Mr.  
17 Justin Aristrum who indicated that he also has  
18 children that attend the child development  
19 center. He lives in the area, that he had  
20 been informed by the Applicant and that he had  
21 no longer been taking any -- I guess he took

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1 all precautions that he no longer was crossing  
2 Alabama Avenue in his drop-off or pick-up  
3 routine.

4 In addition to that, Section 205.4  
5 says that there should be sufficient parking.

6 Here we heard testimony from the Applicant  
7 indicating that they were going to provide all  
8 of the three required on site parking  
9 requirements in the rear, that they were going  
10 to take down a fence and provide a third space  
11 there. So that satisfies our requirements.

12 And the next would be 205.5 which  
13 indicates that this actually states that there  
14 should not be any negative impact for outdoor  
15 play to the surrounding community. It does  
16 not actually require that there are outdoor  
17 locations nearby. I'll get into that issue in  
18 a moment. But that was some of the concerns  
19 for the ANC.

20 What I'll do next is for Sections  
21 205.8 to 205.10, I'll just then incorporate

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1 OP's report to see if they satisfy the rest of  
2 those elements. And I don't need to go  
3 through those in detail.

4 Next what I'm going to do is I'm  
5 going to address some of the concerns because  
6 there were some significant concerns brought  
7 up by the ANC. We had opposition submitted in  
8 Exhibits 23, 24, the letter submitted by ANC  
9 Commissioner Marlon at the hearing, and we  
10 also had then their subsequent Exhibit 37  
11 which was submitted.

12 Then in support, we have the  
13 testimony, as I said, by Justin Aristrum, a  
14 petition that was signed and submitted by the  
15 Applicant -- our Exhibit 26 -- and then the  
16 letter from the Council Member Yvette  
17 Alexander. And I don't have what exhibit that  
18 is at the moment. But that was in our case  
19 file I believe as Exhibit 38.

20 And so, in considering the  
21 differing concerns brought up both in

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1 testimony and in writing by the ANC  
2 Commissioner, one of her major concerns was  
3 the traffic both in pick-up and drop-off, and  
4 also in the safety issues of crossing or using  
5 Alabama Avenue. And here, we must give great  
6 weight to the DDOT report in which they  
7 actually provide support for the Applicant so  
8 long as they inform their parents and clients  
9 to not use Alabama Avenue but rather to pull  
10 up and drop off their students in an alternate  
11 means. I believe that that would be  
12 sufficient. We also heard testimony from the  
13 Applicant indicating that they've been taking  
14 those precautions and they have been  
15 satisfying that condition. In addition, OP  
16 worked with DDOT and the Applicant and also  
17 supports the application.

18 Some additional concerns that the  
19 ANC brought up both in testimony and in their  
20 letters were that the students are potentially  
21 -- or the children would potentially be

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1 traveling to an offsite location. Again, as I  
2 said under 205.5, we're not actually concerned  
3 as to where the children will go, rather that  
4 it won't make an objectionable impact. And  
5 there are no statements in the ANC's letters  
6 or in the testimony by the ANC Commissioner  
7 that that's actually going to impact the  
8 students. Thus it's not really something that  
9 we have control over to decide in the auspice  
10 or the authority of the BZA.

11 In addition to that, under Section  
12 205.7, the issue again about the safety,  
13 there's no indication or statements in the  
14 ANC's letters that there's actually anything  
15 that would be violating that section, rather  
16 some additional concerns that we don't have  
17 the enforcement or control to evaluate in our  
18 standard.

19 That being said, we have  
20 considered the safety concerns and the  
21 concerns of the ANC. But I think that the

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1 support of the local neighbors, the petition  
2 that actually had the signed names and the  
3 addresses from the Applicant -- our Exhibit 26  
4 -- I gave more weight to because the surveys  
5 that the ANC put forward didn't actually  
6 indicate who was signing them or who was  
7 reviewing them. And so I thought that the  
8 fact that we actually had addresses and  
9 signatures on the petition in support, I gave  
10 more weight to that than the unnamed surveys  
11 from the ANC which were submitted to us in the  
12 hearing.

13 Based on that, I would be in  
14 support of the application. Is there any  
15 additional deliberation?

16 (No audible response.)

17 CHAIRPERSON MOLDENHAUER: Seeing  
18 none, I will submit a motion to approve  
19 Application 18052 for a special exception  
20 pursuant to 205, conditioned on a five-year  
21 term, requiring the three parking spaces be

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1 provided on site, that the Applicant informs  
2 all parents and clients of the need to not  
3 drop off on the south side of Alabama Avenue,  
4 and that this would be for 24 children, six  
5 employees, from 7:00 a.m. to 6:00 p.m., Monday  
6 through Friday.

7 Do I have a second?

8 MS. SORG: I'll second.

9 CHAIRPERSON MOLDENHAUER: The  
10 motion has been made and seconded.

11 Is there any further deliberation?

12 (No audible response.)

13 CHAIRPERSON MOLDENHAUER: Seeing  
14 none, all those in favor, say aye.

15 (A CHORUS OF AYES.)

16 MR. MOY: Madam Chair, the staff  
17 would give the vote as three to zero to two.  
18 This is on a motion of Ms. Moldenhauer to  
19 approve the special exception relief under  
20 Section 205 per the conditions as stated;  
21 seconded by Ms. Sorg; also in support of the

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1 motion, Mr. Dettman; we have no other members  
2 participating on voting on this application.

3 Again, the final vote is three to  
4 zero to two to approve.

5 CHAIRPERSON MOLDENHAUER: Thank  
6 you.

7 At this point in time, we will  
8 close the public meeting but it will be re-  
9 opened this afternoon at 1:00. And now we  
10 will begin our public meeting.

11 (Whereupon, at 10:17 a.m., the  
12 hearing was adjourned to be reconvened at 1:20  
13 p.m.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

1:20 p.m.

CHAIRPERSON MOLDENHAUER: This meeting will come to order.

Good afternoon, ladies and gentlemen. This is the May 4th public meeting of the Board of Zoning Adjustment.

My name is Meredith Moldenhauer, Chairperson. Joining me to my right is Vice-Chair Shane Dettman, representative of the

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1 National Capital Planning Commission. To his  
2 right is Peter May, representative of the  
3 Zoning Commission. To my left is Nicole Sorg,  
4 Mayoral Appointee.

5 Copies of today's meeting agenda  
6 are available to you and are located to my  
7 left in the wall bin near the door.

8 We do not take any public  
9 testimony at our meeting unless the Board asks  
10 someone to come forward.

11 Please be advised that this  
12 proceeding is being recorded by a court  
13 reporter, and it's also being webcast.  
14 Accordingly, we ask you to refrain from any  
15 disturbing noise or actions in the hearing  
16 room. Please turn off all cell phones and  
17 beepers.

18 Does the staff have any  
19 preliminary matters?

20 MR. MOY: Yes, we do, Madam Chair.

21 And I can go over that once I do the reading

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1 for the case.

2 CHAIRPERSON MOLDENHAUER: Perfect.

3 Thank you, Mr. Moy.

4 MR. MOY: Okay. That would be for  
5 the Board's decision the Appeal No. 18041 of  
6 Steuart Investment Company. This is pursuant  
7 to 11 DCMR ' 3100 and 3101 from the October  
8 20, 2009 decision of the Zoning Administrator,  
9 Department of Consumer and Regulatory Affairs,  
10 determining that a proposed commercial  
11 development does not comply with the combined  
12 lot development (off-site residential)  
13 provisions under subsection 1706.7(b)(2) in  
14 the DD/C-3-C District. This is at premises  
15 442 through 444 at New York Avenue, N.W. and K  
16 Street, N.W., Square 483, Lot 9 and Square  
17 515N -- N as in November -- Lot 62.

18 On April 6, 2010, the Board  
19 completed public testimony, closed the record,  
20 and scheduled this decision on the 4th of May,  
21 2010. The Board did request additional

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1 information to supplement the record pursuant  
2 to Section 3121.5. These filings requested  
3 from the Appellant, property owner and the  
4 Appellee DCRA, both supporting documents  
5 tended to the rèsumès of expert witnesses at  
6 the public hearing -- one from the Appellant,  
7 one from the Appellee.

8           There was also a request allowed  
9 into the record for additional information  
10 from the Appellant. And following through in  
11 your record files, Madam Chair, the first is  
12 the rèsumè of Paul Goldstein, filed by DCRA.  
13 And that's identified as Exhibit 23 filed on  
14 April 27, 2010.

15           There are two separate filings  
16 from the Appellant, I would say as a  
17 preliminary matter because the documents were  
18 untimely filed. They were filed on April 30,  
19 2010 -- Exhibit 24 and Exhibit 25. Exhibit 25  
20 is the rèsumè of Ellen McCarthy.

21           Subsequent to the filing of

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1 Exhibits 24 and 25, there were filings from  
2 DCRA dated April 30, which is a motion to  
3 strike the Appellant's Exhibits 24 and 25.  
4 And this is identified as Exhibit 26, and a  
5 reply to that filing from the Appellant, which  
6 is identified in your case folders as Exhibit  
7 27 also dated April 30.

8           Apart from the preliminary matter,  
9 the Board is to act on the merits of the  
10 appeal. And that completes the staff's  
11 briefing, Madam Chair.

12           CHAIRPERSON MOLDENHAUER: Thank  
13 you very much.

14           In regards to the documents that  
15 were filed after the specific date that we  
16 actually articulated for allowing the evidence  
17 into the record, I have conferred with my  
18 other Board Members and we are going to admit  
19 Exhibit 25 into the record which is Ellen  
20 McCarthy's rèsumé since we had actually asked  
21 for that specific documentation.

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1           But in regards to entering in  
2 Exhibit 26, which is the additional  
3 documentation of the case information, we are  
4 going to grant the motion to strike stating  
5 that it was late and while there were  
6 statements that we would allow the record to  
7 stay open for specific documentation, it would  
8 only have been allowed to be maintained open  
9 for a specific period of time. And since that  
10 was filed late, we are not going to permit  
11 that into the record.

12           Moving on to the merits of the  
13 case, the Appellant comes before us to  
14 evaluate whether or not the ZA erred in  
15 finding that the combined lot development that  
16 the Appellant submitted violated Section  
17 1706.7(b)(2). The Appellant states that in  
18 their argument, both in writing and before us  
19 during their testimony, that Section 1706.7  
20 does not apply because they are not using  
21 bonus density as stated at the beginning of

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1 1706.7, but rather that the additional GFA is  
2 created via the combined lot development. And  
3 a combined lot development creates one single  
4 lot, and FAR no longer applies upon the time  
5 that the combined lot development is created.

6 The District counters their argument and  
7 states that 1706.7 does apply because the  
8 combined lot development does create, as they  
9 state, bonus density or increased density.  
10 And thus anything above the permitted matter  
11 of right within that zone would be considered  
12 bonus density. And 1706.7 would apply.

13 We have multiple filings by both  
14 parties. We have received testimony including  
15 many very helpful diagrams on both sides of  
16 the argument to try to flush out some of these  
17 issues in regards to the GFA and the FAR  
18 that's permitted, the transferring of GFA from  
19 the combined lots of the residential lot to  
20 the commercial lot, and then how that would  
21 affect the total FAR that would either be

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1 permitted, be it permitted to be transferred  
2 or not be permitted to be transferred under  
3 Section 1706.7.

4 We received expert testimony from  
5 Ms. McCarthy. And we also received limited  
6 expert testimony from Mr. Goldstein, limited  
7 to just the scope of his planning background,  
8 not in regards to his expertise on combined  
9 lot developments.

10 I think one of the major issues  
11 that is before us is whether or not this  
12 Appellant falls under the Section 1706.7 which  
13 is to "assist the development of residential  
14 and the preferred use, the following density  
15 bonuses may be used." And I think the  
16 question is does this combined lot development  
17 fall under that term of density bonuses.

18 In interpreting that, I think it's  
19 clear in my mind that if prior to 2001 when  
20 this section of the reg was put into place,  
21 this combined lot project could have been

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1 approved and gone through. Now the question  
2 is with this new reg in place, does it apply,  
3 and if it does apply, then does it require  
4 that they can only transfer 3.5 of FAR to the  
5 receiving lot in a C-2-C zone?

6 And in reviewing that, as I said  
7 along with reviewing all of the diagrams,  
8 drawing some of our own diagrams trying to  
9 understand what was happening, I put a lot of  
10 weight into the 2001 -- the January 25, 2001  
11 OP report -- when interpreting regulations.  
12 And if it's not exactly clear since there's no  
13 specific definition in the regs as to what is  
14 density bonuses or bonus density, we then have  
15 to go and try to interpret what does that  
16 mean. And I looked at the January 25, 2001 OP  
17 report to try to assist and understand exactly  
18 what was being stated by the DC Office of the  
19 Zoning Commission and the Office of Planning  
20 in implementing these regs.

21 And in looking at that, I looked

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1 at a couple of different sections. Page 2,  
2 there's a box and it states that "The extra  
3 density should not be eligible to create TDRs,  
4 engage in combined lot transfers, or meet the  
5 minimum housing requirements." So there they  
6 actually grouped in all of these means or  
7 mechanisms or programs for creating extra  
8 bonus density and said that all of those  
9 should not be eligible to meet the minimum  
10 housing requirement, thus not separating out  
11 or distinguishing between bonus density  
12 created through a TDR and bonus density  
13 created through the DD overlay or bonus  
14 density created by a combined lot. I think  
15 that in hearing the Appellant's argument, they  
16 are seeking us to read in a specific exclusion  
17 because the regs are silent not to exclude --  
18 or rather they're looking for us to  
19 potentially exclude combined lot developments  
20 from the bonus density over the general  
21 limitation of an 8 FAR.

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1           And again, when I go back to page  
2 11 of the OP report where it says -- I'll  
3 paraphrase it. It says, "The ability to  
4 complete combined lot transfers should be  
5 limited to the original target DD density."  
6 And here I think that it's very clear that  
7 they're saying that if you're going to do a  
8 combined lot transfer, it has to be limited to  
9 the initial target density. It would be  
10 limited in this case to 8 FAR. And then  
11 anything above that would be considered bonus  
12 density and thus be limited under Section  
13 1706.7 and here 1706.7(b)(2) where it states  
14 that the maximum residential FAR that would be  
15 accepted through a combined lot would be 3.5  
16 thus requiring that there was an extra 1.1 or  
17 a 46,000 and change or 47,000 and change of  
18 gross square footage that would need to be  
19 provided for elsewhere and not on this  
20 residential lot.

21           In addition to that, I then

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1 flipped to page 14 which talks about the  
2 findings in this report. And it says, "The  
3 density bonus should not be transferable in a  
4 combined lot situation or generating  
5 transferable development as that would defeat  
6 the goal of the bonus to provide additional  
7 housing units." And this was I think some of  
8 the major issues that the District brought up  
9 in their argument that the purpose of limiting  
10 the transferability of only 3.5 would be so  
11 that the purpose would be to provide a mix of  
12 different residential units throughout the  
13 area and not to have a single residential  
14 building that provided minimum required  
15 housing for multiple different projects.

16 Last -- and I also just looked at  
17 Exhibit 3 which provided some recommended  
18 language. That's page 3 of Exhibit 3 which is  
19 Section E. And I feel that that also provided  
20 a similar framework for me to be able to  
21 interpret this section. And thus, I would

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1 apply it to state that anything over the 8 FAR  
2 that's permitted would be considered bonus  
3 density applying Section 1706.7 to this  
4 project stating that they could then only  
5 transfer 3.5 FAR, having a remainder that  
6 would have to be provided for in another  
7 either combined lot development or in the  
8 original commercial lot that was subject to  
9 the combined lot transfer.

10 Having provided just I guess a  
11 preliminary review of my opinion on the case,  
12 I'll open up the floor to any additional Board  
13 Members.

14 VICE-CHAIRPERSON DETTMAN: Madam  
15 Chair, I'm in agreement with your analysis and  
16 your outcome on this case. And I don't have  
17 too much more to offer.

18 I agree with you in terms of what  
19 constitutes bonus density. It's density above  
20 and beyond what would be permitted as a matter  
21 of right.

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1           And I think that your reading of  
2           some of the language in the OP report is  
3           entirely accurate. I think the CLD provisions  
4           provide for the ability to satisfy residential  
5           requirements under the overlay through  
6           combined lot development and allows you to  
7           plan for two or more properties kind of as a  
8           single entity in terms of the allocation of  
9           uses, but maintains a focus on retaining the  
10          target densities that are originally  
11          contemplated. And in this situation, it's the  
12          8.0. And so, anything above the 8.0 matter of  
13          right density would be considered bonus  
14          density subject to the provisions of 1706.

15                 So again, I agree with your  
16                 analysis.

17                 ZC MEMBER MAY: Let me just say  
18                 this has been a real struggle to try to define  
19                 the intent of the regulations here and to sort  
20                 through what's combined lot density, what's  
21                 bonus density, and so on.

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1           And the thing that I think that on  
2 the one hand I'm sympathetic to the appeal and  
3 the Appellant's case here, the difficulty that  
4 I still have is no matter what is the language  
5 of 1706.7 -- and it's the entirety of that  
6 section -- and the specific reference to a  
7 limitation in CLDs of 3.5 FAR.

8           I think getting the extra  
9 information about the Office of Planning's  
10 report and all of the other background I think  
11 is helpful to form one's thinking about this.

12          But no matter that, even if that led to a  
13 slightly different picture, it's the fact that  
14 there is this 3.5 FAR limitation that's in  
15 1706.7 that I just can't get past. Whether or  
16 not it was intended by the Zoning Commission,  
17 it seems clear to me that the intention is  
18 that no matter what happens with combined lot  
19 development, it's going to be limited to the  
20 3.5 FAR for a DD/C-2-C zone. I just can't get  
21 past that simple point. Whether that really

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1 was what was intended, whether it's driving  
2 the right results from the Office of  
3 Planning's perspective I think is a different  
4 question.

5 The Appellant argued that this in  
6 effect is going to result in sort of a  
7 perversion of the original intent of the  
8 combined lot development. I guess there is  
9 that potential that it could result in they're  
10 being in fact less residential development as  
11 a result. But it also could be that the  
12 density -- the residential density that has to  
13 go from the first site off to another site, if  
14 it can't all fit in the second site that's  
15 part of this case, then it could go somewhere  
16 else. And that would fulfill a residential  
17 requirement at another site. And then you  
18 truly still have that bonus density that's  
19 above and beyond the limitation of what's  
20 stated in 1706.7(b) or 1(b) -- whatever.

21 So anyway, I'm not totally

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1 confident that we're really getting to the  
2 root intention here. But I think just the  
3 plain reading of the regulations that we have  
4 at hand leads me to this conclusion.

5 MS. SORG: I think that the  
6 sentiments that I hear in what Commissioner  
7 May is saying in that I also feel -- I feel  
8 like the problem here is that the proposed  
9 development makes sense with regard to the  
10 downtown overlay as I read it. I mean, it's  
11 for horizontal -- wants horizontal  
12 integration, wants all these things. And also  
13 that combined lot development is meant to  
14 encourage those things also and encourage  
15 investment in the downtown and encourage these  
16 sorts of integrated uses and things that go  
17 along with that.

18 But I guess I also get a little  
19 tripped up in looking at 1708 and how it  
20 relates to 1706.7 in the sense that I have  
21 trouble getting away from that the latter

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1 regulation seems to refine the allowances set  
2 forth in the prior. So while I think that  
3 this development would benefit the area that  
4 it wants to come to, and that this is sort of  
5 exactly the type of thing that the downtown  
6 wants, perhaps it's something which -- as we  
7 discussed earlier -- that can be discussed as  
8 a text amendment if the intent of what the  
9 Zoning Commission was looking at is not  
10 reflected in what's ending up happening.

11 CHAIRPERSON MOLDENHAUER: I think  
12 that all the Board Members agree that this  
13 does seem to be a really great project, and  
14 obviously everyone would be encouraging of it.

15 But unfortunately, our job is not to make  
16 law. We have to apply the law that's before  
17 us. And we are not the law-making body. The  
18 BZA simply has to try to interpret that and to  
19 interpret the actions of the ZA. And in doing  
20 that here, I think we are reviewing the regs  
21 as they are written and trying to state that

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1 obviously as I said earlier, I think that pre-  
2 2001, this would have gone off without an  
3 issue.

4           However, now that these regs are  
5 put into place, it is apparent to me that any  
6 bonus density above the 8 FAR which is stated  
7 specifically by reference in Section 1706.7(b)  
8 where it states any increase in gross floor  
9 area, I think the reason for they're doing  
10 that is that they're trying to identify the  
11 fact that the gross floor area is now the  
12 combined lot aspect, that it's not going to be  
13 a FAR. It's actually going to be any increase  
14 in any gross floor area as identified under  
15 the combined lot section of the regs is going  
16 to be limited to 3.5.

17           That being said, I will submit a  
18 motion to deny the appeal of No. 18041. Do I  
19 have a second?

20                           VICE-CHAIRPERSON DETTMAN:   Second.

21                           CHAIRPERSON       MOLDENHAUER:           My

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1 motion has been made and seconded.

2 Is there any further deliberation?

3 (No audible response.)

4 CHAIRPERSON MOLDENHAUER: Seeing  
5 no further deliberation, all those in favor,  
6 say aye.

7 (A CHORUS OF AYES.)

8 MR. MOY: Staff would record the  
9 vote as four to zero to one. This is on the  
10 motion of the Chair, Ms. Moldenhauer, to deny  
11 the appeal. In support of the motion, Mr.  
12 Dettman, the Vice-Chair -- seconded rather.  
13 Also in support of the motion are Ms. Sorg and  
14 Mr. May. No other Board Member participating.

15 So again, the vote count is four  
16 to zero to one.

17 CHAIRPERSON MOLDENHAUER: Thank  
18 you very much, Mr. Moy.

19 Thank you to the parties and  
20 Applicants.

21 I don't believe we have anything

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1 else on the calendar. So this meeting for  
2 today is adjourned.

3 (Whereupon, at 1:44 p.m., the  
4 hearing was adjourned.)

5

6

7

8

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