

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

JULY 20, 2010

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MERIDITH H. MOLDENHAUER, Chairperson
SHANE L. DETTMAN, Member (NCPC)

ZONING COMMISSION MEMBERS 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.

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Meeting held on July 20, 2010.

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

2 9:58 a.m.

3 MADAM CHAIR MOLDENHAUER: This
4 meeting will please come to order. Good
5 morning, ladies and gentlemen. This is the
6 July 20, 2010 public meeting of the Board of
7 Zoning Adjustment of the District of Columbia.

8 My name is Meridith Moldenhauer,
9 Chairperson. Joining me today is Shane
10 Dettman, Representative of the National
11 Capitol Planning Commission. To my left
12 Michael Turnbull, Representative of the Zoning
13 Commission.

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. We do not
17 take any public testimony at our meetings
18 unless the Board asks someone to come forward.

19 Please be advised that this
20 proceeding is being recorded by a court
21 reporter and is also webcast live.
22 Accordingly, we must ask you to refrain from

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1 any disruptive noises or actions in the
2 hearing room. Please turn off all beepers and
3 cell phones.

4 Mr. Secretary, are there any
5 preliminary matters?

6 MR. MOY: Yes, we do, Madam Chair,
7 but staff would suggest that we take those
8 matters up on a case-by-case basis.

9 MADAM CHAIR MOLDENHAUER: Thank
10 you very much, Mr. Moy. I believe that we are
11 going to push the Kalorama case to the
12 afternoon if you want to call that case first
13 then.

14 MR. MOY: The Kalorama case?

15 MADAM CHAIR MOLDENHAUER: Yes. Or
16 just indicate that it will be called in the
17 afternoon.

18 MR. MOY: Yes. As you said, this
19 DC Court of Appeal remand of Appeal No. 17109-
20 B of Kalorama Citizen's Association will be
21 scheduled to the Board's 1:00 afternoon
22 session.

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MADAM CHAIR MOLDENHAUER: Thank
you very much, Mr. Moy.

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MR. MOY: You're welcome. So,
with that, should we move forward with the
first case for decision this morning, Madam
Chair?

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MADAM CHAIR MOLDENHAUER: Thank
you. Yes.

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MR. MOY: Good morning, Madam
Chair, members of the Board. That application
would be No. 18060. This is of Abigail Murray
pursuant to 11 DCMR 3103.2 for a variance from
the lot width and lot area requirements under
subsection 401.3 to allow the construction of
two semi-detached one-family dwellings in the
R-2 District at premises 4506 Edson Place,
N.E. (Square 5132, Lot 160 (existing lots 83
and 84)).

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Staff notes for the Board at the
hearing originally advertised variance relief
from lot occupancy is no longer required. At

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1 its decision meeting on June 15, 2010, the
2 Board rescheduled it's decision to July 20th.
3 This was to allow the Applicant additional
4 time to resubmit in response to the Board's
5 request for supplement information attended to
6 the variance test.

7 In addition, the Board requested
8 that the Applicant consult with the Office of
9 Zoning staff and staff has conferred with the
10 Applicant on a number of times during this
11 intervening period.

12 The Applicant has filed its
13 filing. It is identified in your case folders
14 as Exhibit No. 28 dated Monday, July 19, 2010.
15 There is no filing from ANC-7C. The Board is
16 to act on the merits of the variance relief
17 from Section 401.3 lot width lot area
18 requirements. That completes the status
19 briefing, Madam Chair.

20 MADAM CHAIR MOLDENHAUER: Thank
21 you very much, Mr. Secretary. I will start us
22 off in our deliberation this morning. This

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1 case was before us on May 18th and, as Mr. Moy
2 indicated, we were about to start a decision
3 on the 15th but believe that we did not have
4 sufficient documentation so we requested on
5 the record that the Applicant work with the
6 Zoning Office as she did provide additional
7 information to meet her burden.

8 Variance request has a very high
9 burden and, as we explained to her at the
10 hearing, she had not yet met that. The Office
11 of Planning in Exhibit No. 20 had recommended
12 that they could not recommend approval. We
13 believe that she lacked sufficient evidence
14 and lacked any factual basis for satisfying
15 the first prong of the test in regard to
16 exceptional circumstances.

17 We specifically asked that she
18 provide us some additional information
19 potentially relating to any discussions that
20 she had or any circumstances regarding her
21 correspondence with DCRA and the Zoning
22 Division of DCRA in regards to what transpired

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1 there.

2 In that documentation she provided
3 us an additional supplement that we received
4 yesterday which includes a two-page summary
5 and some additional documentation and plans
6 from a neighboring property that she referred
7 to in the hearing.

8 Her statements include things to
9 the effect of that there was another project
10 on the same block with the same lot that had
11 a similar development that she was seeking.
12 We had explained to her, and this is a stance
13 that the BZA takes in all cases, that other
14 developments are not sufficient evidence to
15 prove or to provide support for a variance or
16 any type of relief.

17 Simply because another project has
18 either been erected legally or potentially
19 illegally, we cannot make that determination
20 and that cannot be precedent or be support for
21 creating or granting some sort of relief.

22 In addition to that, she provided

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1 some statements regarding her discussion and
2 her mistaken belief that she could build two
3 semi-detached homes based on these discussions
4 with DCRA. I don't believe that there is
5 sufficient evidence that was enough to satisfy
6 her burden. We don't have specifically who
7 she spoke with at DCRA. We don't know exactly
8 what transpired there despite our request for
9 her to provide additional information.

10 Potentially, a mistaken
11 understanding is not sufficient to satisfy the
12 first prong of exceptional circumstances in
13 the property. In addition to that, she states
14 we asked if she had potentially satisfied the
15 first prong documentation or the second prong
16 and whether or not satisfying the zoning
17 requirements would be unduly burdensome.

18 Based on her testimony she is a
19 real estate agent who has the expertise and
20 the skill to provide us with an analysis of a
21 single-family home investment and return on
22 the investment compared to a two-family

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1 dwelling investment and there was never
2 sufficient documentation to satisfy her
3 burden.

4 We have no comparable analysis.
5 We did receive documentation with MRIS
6 listings. However, there was no accompanying
7 analysis or argument on her behalf on why
8 those that would be applicable in this case.

9 With this current fluctuating
10 market I cannot find that is persuasive
11 because they were not adequate comparisons
12 between what potential return she should get
13 on a single family house or what potential
14 return she could obtain on a two-family
15 dwelling.

16 She cost associated with going
17 through this project but I think this has been
18 a very minimal investment on her part in
19 regards to trying to obtain this relief. That
20 in and of itself would not overcome her --

21 The discussion for further
22 deliberation but before neighbors and an

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1 Exhibit we've been provided she has Exhibit
2 No. 25 which includes an ANC report which
3 indicates they would support the project.

4 That being said, those would most
5 likely go more towards prong No. 3 which I
6 don't believe we get there. At this point in
7 time I'll open up the floor to additional
8 deliberation.

9 MEMBER DETTMAN: Thank you, Madam
10 Chair. I agree with your analysis and the
11 outcome of your analysis. I think we simply
12 do not have enough information or evidence in
13 the record provided by the Applicant that
14 allows us to successfully get through the
15 first two prongs of the variance test.

16 I think the Applicant's
17 interactions with DCRA looked while there can
18 be a case made for exceptional zoning history
19 and interactions with DCRA or other government
20 agencies, I believe in this case DCRA looked
21 at the two lots and from a zoning perspective
22 could not be built upon and instructed the

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1 Applicant to combine them in order to build
2 anything which in this case is a single-family
3 detached dwelling but I don't consider that an
4 exceptional condition.

5 I think that if the lots had come
6 to us as two separate lots the Applicant would
7 have needed the same exact zoning relief. In
8 addition to that even if we could find
9 something exceptional about either the one lot
10 or the two lots as they used to exist, as you
11 stated, I think that the Applicant is unable
12 to make a showing of practical difficulty
13 based on the limited information that she
14 submitted through comparables listed in the
15 MRIS.

16 It may be that she's not
17 interested in constructing a single-family
18 detached dwelling because constructing two
19 dwellings would result in increased profit but
20 that's not a practical difficulty and not a
21 basis for meeting that test so I agree with
22 your analysis.

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1 COMMISSIONER TURNBULL: Madam
2 Chair, I would concur. I think what was
3 submitted recently as part of Exhibit 28, the
4 example of two other homes that she had
5 received, although they are very similar to
6 hers and it's under the minimum lot
7 requirements we really don't know what the
8 situation was with the ZA on these two lots.

9 They did not come before the BZA,
10 as I understand, so it may be just an error.
11 That's a separate issue but I don't think they
12 help her particular case with her situation.

13 We have her testimony but we
14 really don't have that other piece which is a
15 letter or something from someone in DCRA
16 confirming. She may have totally
17 misunderstood what we recommended to her.
18 We don't know that and she did not seem to
19 suggest that and she did not suggest to say
20 that she was given the wrong information but
21 we don't have that missing element from them.

22 I think as Mr. Dettman was saying

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1 earlier, even if this was two lots and she
2 came before us for a variance, there is
3 nothing exceptional about these lots that we
4 could grant this variance to build two
5 separate homes on even separate lots. Summing
6 up I would agree with both of your comments
7 that you made and I really don't think that
8 she's met the test for this.

9 MADAM CHAIR MOLDENHAUER: Thank
10 you, Mr. Turnbull. I do agree with your
11 comments. I just want to provide some
12 additional documentation for the record. I
13 also question how much weight I would give to
14 her testimony or to this last document she
15 provided in which she states that, "Attached
16 please find the original plan that were given
17 to me by DCRA to use as a guide for my
18 project."

19 I find that statement that she
20 submitted in writing to conflict directly with
21 her testimony at the hearing which I'll read
22 from the transcript which is page 63 of the

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1 transcript and start off at the beginning
2 where she says, "Okay. Well, what I want to
3 do is construct two semi-detached homes on the
4 land that I own there. It wasn't until I saw
5 two newly constructed homes built just three
6 doors away.

7 I'm a licensed realtor in D.C. and
8 Maryland. I went into those properties and
9 saw how beautiful they were on the inside and
10 it gave me motivation to do the same. I went
11 down to DCRA and I got a copy which is the
12 public information of the plans that were
13 approved by zoning."

14 I believe those statements to be
15 conflicting. In one statement at the hearing
16 she indicated that she went down and got these
17 plans from DCRA for her to use as a guide
18 versus in this statement she's indicating that
19 DCRA gave them to her as a guide for the
20 project.

21 That being said incorporating all
22 of the other statements that were provided by

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1 the Board members at this time I would be
2 ready to submit a motion to deny Application
3 No. 18060 for relief for an area variance for
4 a minimum lot area and lot width for the
5 construction of a two semi-detached dwellings
6 at 4506 Edson Place NE.

7 A motion has been made. Is there
8 a second?

9 MEMBER DETTMAN: Second.

10 MADAM CHAIR MOLDENHAUER: The
11 motion has been made and seconded. All those
12 in favor, say aye.

13 BOARD MEMBERS: Aye.

14 MR. MOY: Staff would record the
15 vote as three, zero to two. This is on the
16 motion of the Chair, Ms. Moldenhauer, to deny
17 the application for variance relief to lot air
18 and lot width. Seconded by Mr. Dettman.

19 Also in support of the motion Mr.
20 Turnbull. We have a Board member not present
21 and not voting and another Board member not
22 participating. Again, the application is

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1 denied on a vote of three to zero to two.

2 The next application for
3 decision, Madam Chair, which will complete the
4 Special Public Meeting is the D.C. Court of
5 Appeal Remand of Application No. 17810 of
6 Michael Reitz.

7 The original application was
8 pursuant to 11 DCMR 3104.1 for a special
9 exception to allow a garage addition to an
10 existing one-family dwelling under Section
11 223, not meeting the lot occupancy (section
12 403) and rear yard (section 404) requirements
13 in the D/R-5-B District at premises 1505
14 Harvard Street, N.W. (Square 2577, Lot 42).

15 The remand ordered by the District
16 Court of Appeals was received by the Zoning
17 Office on October 22, 2009. This document is
18 in your case folders identified as Exhibit 50.
19 The Board is to act on the issues attended to
20 the remand.

21 Staff notes another Board action
22 on this remand is that the scheduled decision

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1 meeting on May 11, 2010. The Board delayed
2 its decision to July 20th and scheduled a
3 limited public hearing on June 15th, 2010.
4 That completes the staff's briefing, Madam
5 Chair.

6 MADAM CHAIR MOLDENHAUER: Thank
7 you very much, Mr. Moy. In this case there
8 was an issue of a two-part question. First,
9 whether or not an easement existed, which we
10 determined it did, and then if it does exist
11 is it a private or a public easement and then
12 whether or not public or private easement is
13 incorporated into the denominator when
14 calculating lot occupancy.

15 In this case we had an argument
16 and briefs by both parties. Mr. Wright
17 presented his statements as the initial relief
18 requested and Mr. Keyes reprehended Mr. Moore
19 in regards to challenging the application.

20 We had documentation from deeds
21 dating back to January 22, 1914. In that
22 there was clear evidence that a easement

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1 existed subject to the right-of-way for alley
2 purposes and it described that area by meet
3 and bounds descriptions.

4 That was then continued to be
5 conveyed through the title of all of the
6 different deeds on Harvard Street to
7 subsequent owners by incorporating any
8 easement or incumbrance from prior title.
9 I think that it was very clear to us that
10 there was an easement.

11 The question then was whether that
12 was a private or public easement. There was
13 argument that indicated that there were no
14 public officials that used it, no public
15 garbage companies; that there was limited
16 access for those individuals that were on
17 Harvard Street; and that the documentation was
18 actually the easement only recorded against
19 those individuals on Harvard Street; that a
20 portion of the alley was actually blocked off
21 by gate which was then locked to not permit
22 access by the public but rather by those

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1 individuals that had use for it.

2 Based on that testimony and that
3 documentation, I think that it was clear to me
4 that this was a private easement. Even though
5 it says for right-of-way for alley purposes,
6 I believe it is a small, narrow pedestrian
7 access, not for the general public but rather
8 for those individuals on Harvard to access the
9 rear of their homes and that's how it appears
10 it has been continued to be used for the
11 neutral benefit of those home owners.

12 The next question then was how to
13 apply that area to a lot occupancy test. Does
14 it apply? Is it incorporated in the
15 calculation or is it excluded in that
16 calculation? We have Appeal Case 17631 of
17 ANC-3E, Todd Bully in which the Board called
18 upon to consider whether three different
19 easements within a multiple lot residential
20 development should be included in the land
21 area of the lot that each incumbered.

22 In that case there was a

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1 determination that there was supposed to be a
2 use in regards to a private/public analysis
3 and if the easement was for private use it was
4 then incorporated into the total calculations
5 for lot occupancy.

6 In reviewing this case I think
7 that while there were statements from Mr.
8 Keyes about other jurisdictions and
9 applications of other tests, I think that
10 having a case which articulates an analysis we
11 should follow that.

12 By following that analysis I would
13 indicate that this area is within the lot and
14 should be incorporated in the lot occupancy
15 that whether or not it can potentially be
16 built on or not is not a determinative factor
17 here when you're looking at a private
18 easement.

19 I also think that there are many
20 private easements throughout the city and we
21 have a jurisdiction where you're dealing with
22 many very old buildings and many potentially

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1 old easements and to create a precedent where
2 you are then all if a sudden going to make
3 many properties potentially even more
4 nonconforming when someone may not know that
5 because it may be buried in the land records
6 from an older easement creates future problems
7 and I think that shall continue to apply, that
8 standard that was applied in a past case in
9 '07 would be appropriate here in determining
10 that it was a private easement and should be
11 incorporated in the lot occupancy.

12 That being said, I'm going to open
13 up the floor for additional deliberation.

14 MEMBER DETTMAN: Thank you, Madam
15 Chair. I agree that the outcome of your
16 analysis of this case and follow your approach
17 in terms of determining whether it's a private
18 or public easement and then at that point you
19 say that because it's a private easement it
20 should be included.

21 I think I would go one additional
22 step but I agree with you whether or not the

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1 easement exist. I think it does. It was
2 created in 1914, showed up in a couple
3 subsequent deeds, although it doesn't show up
4 in deeds following 1914 or even 1916.

5 There is no evidence in the record
6 or in the oral testimony that it was ever
7 terminated. Although it doesn't show up
8 currently on the plat that is associated with
9 this property, again, we have nothing in the
10 record that states that it was ever terminated
11 so I think it does exist.

12 I agree with you that I think it's
13 a private easement. Although it does say "for
14 alley purposes" which on its face reads like
15 it's available for anyone to use it, I think
16 that because it doesn't appear officially on
17 the current plat, I think looking at the
18 evolution of these lots, some of them are land
19 lots, it's only four feet in width so
20 obviously it wasn't intended to provide access
21 for vehicles or garbage pickup or whatnot.

22 Looking at the existing

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1 conditions, you made a couple of points about
2 how it's gated off and only property owners
3 that abut the easement, the four-foot wide
4 easement, have keys to that lock. I think it
5 clearly is a private easement.

6 I think at that point, though, I
7 kind of get passed the public versus private
8 test and I look at whether or not the
9 existence of an easement, whether it's public
10 or private, preclude an adjoining property
11 owner from building on that easement.

12 To me I look to the definitions in
13 the zoning regulations and kind of ask the
14 question under the zoning regulations does
15 this private easement kind of divest the
16 Applicant of its right to build upon that
17 area.

18 Looking through our zoning
19 regulations and the definitions, there is one
20 definition that defines a building line as a
21 line beyond which a property owner has no
22 legal or vested right to extend a building or

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1 any part of a building without special
2 permission and approval of the proper
3 authorities.

4 I think in this situation an
5 applicant wishing to build upon this private
6 easement is not subject to the approval or
7 special permission of any kind of authority.
8 Essentially it would have to be the adjoining
9 property owners getting together and
10 collectively going through the process of
11 eliminating that easement but it is not
12 subject to any kind of district government
13 approval or special permission.

14 To me I don't think the area of
15 the subject property that lies within the
16 easement does not qualify as a building line
17 as defined by the zoning regulations, and so
18 because this discussion ultimately boils down
19 to whether or not it should be included in lot
20 occupancy, I think the definition of lot
21 occupancy stating that a figure that expresses
22 that portion of lot lines and building lines

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1 is that it's occupied, or may be occupied,
2 under the provisions of this title under the
3 zoning regulations.

4 I think that the private easement
5 does fit under that definition. I think it's
6 an area that lies within a lot. It does not
7 qualify as a building line and that it
8 currently is not but it is certainly capable
9 of being occupied by what is defined as
10 building area in the zoning regulations and so
11 I think that it should be ultimately included
12 in the calculation for lot occupancy.

13 That does not mean that the owner
14 has the right to just go ahead tomorrow and
15 build upon that area. For purposes of zoning
16 I think he does have that right but I think
17 there is another mechanism that lies outside
18 of Title 11 of the D.C. municipal regs that
19 would prevent the property owner from building
20 upon that area.

21 I think that in this case the
22 Board originally had made the right

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1 determination that it should be included and
2 that it would not require the Applicant to
3 pursue additional zoning relief in order to
4 construct the project.

5 MADAM CHAIR MOLDENHAUER: Mr.
6 Turnbull.

7 COMMISSIONER TURNBULL: Thank you,
8 Madam Chair. A little different twist from
9 Mr. Dettman on that. I'm not sure I totally
10 follow that. I mean, I guess I can see it but
11 I think we are all coming to the same
12 conclusion.

13 I'm just going back on Exhibit --
14 go back to the various maps and whether it's
15 in Exhibit 37 or not, or Exhibit No. 43, the
16 1928 map there was no indication of words of
17 an easement by the public or otherwise but the
18 1904 map does show that and there is nothing
19 in the record showing that the alley is
20 recorded as a public alley in the records of
21 the D.C. surveyor. I think I would agree with
22 you, Madam Chair, that it is a private

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1 easement.

2 I sort of come to the same
3 conclusion, I guess, in a way that Mr. Dettman
4 talked about buildable area. I was going back
5 to Exhibit No. 53 which was a letter from Mr.
6 Wright to which he attached photographs of the
7 back of the area. This space that is a
8 remnant of a private easement is basically an
9 easement with a big tree back there. It's
10 been planted.

11 In that sense, I guess Mr. Dettman
12 is right. I mean, somebody has done things
13 already that sort of ignore the fact that
14 there is an easement and you can't build on.
15 If you can't build on it, can you really plant
16 substantial trees on it which other people
17 have done. I guess I'm not quite sure how you
18 resolve that but I see your point and
19 obviously it's been done in a nonbuildable
20 area.

21 People have just sort taken over
22 that space as it is but I would concur it's a

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1 private easement and I agree with both you --
2 Mr. Dettman has got a little bit different
3 flavor to that you have, Madam Chair, but I
4 think we are all heading in the same
5 direction.

6 MADAM CHAIR MOLDENHAUER: Thank
7 you very much. I think we all are coming out
8 in the same final determination but it's just
9 a matter of how do we get there. And to throw
10 one more issue out there, I think it also has
11 to do with the definition of a lot and if it's
12 incorporated in the definition of a lot, then
13 it's automatically incorporated in determining
14 the lot occupancy.

15 Section 11 DCMR 199.1 says the lot
16 is the land bounded by defined lines that when
17 occupied, or two be occupied by a building or
18 structure or accessory building includes the
19 open space required under this title. A lot
20 may or may not be the land so recorded on
21 records of the surveyor of the District of
22 Columbia.

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1 I think that this definitely falls
2 within that definition and I think that
3 whether the easement is potentially occupying
4 area that may be open space may be open space
5 required by the title for setback or for side
6 yards or things to that affect.

7 It may be an area that is not
8 currently occupied but could be occupied in
9 the future by the mutual termination of an
10 easement and then the desire to build on that
11 by one or by all of the parties in order to
12 potentially pursue or to terminate the private
13 easement.

14 I think just following up with
15 another analysis in this case I still come to
16 the point where it was proper from where the
17 BZA previously should include that area in the
18 lot occupancy calculations and to approve this
19 application as a special exception.

20 Is there any additional
21 deliberation on this case?

22 MEMBER DETTMAN: Madam Chair, I

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1 just wanted to make one last point. While the
2 direction that we are going is consistent with
3 the Board's decision in the Boley case and the
4 way I kind of described it in that you include
5 everything within the lot, within the
6 boundaries of the lot as the lot is defined by
7 the zoning regulations unless there is a
8 portion written out that qualifies in the
9 definition of a building owner which basically
10 does not give the property owner the right to
11 build in that area unless given special
12 permission.

13 With our approach, that is a
14 little bit different than how the Board has
15 treated cases in the past where we have a
16 property -- just for the sake of an example,
17 we had a case, the Hinson case along South
18 Carolina Avenue where the front yard was
19 partially encumbered by a building restriction
20 line because the right-of-way of South
21 Carolina Avenue kind of went right through the
22 front yard.

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1 In that case in calculating lot
2 area and in other cases where we had building
3 restriction lines, we typically included the
4 area within the building restriction line
5 towards the lot occupancy. With this approach
6 it's different.

7 I think it's the right approach
8 that we're taking today but just to get on the
9 record that we are going in a slightly
10 different direction and that perhaps going
11 forward we can follow this approach instead of
12 the latter.

13 MADAM CHAIR MOLDENHAUER: Thank
14 you, Mr. Dettman. With that being said I
15 think that we are all in agreement so I will
16 in this case -- if my terminology is
17 incorrect, I'll ask OP to chime in -- 17810
18 which was an appeal of a remand of application
19 previously for a special exception to allow a
20 garage addition to an existing one-family
21 addition under 223, we are going to deny the
22 appeal and we are going to confirm our prior

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1 decision on 223 providing some additional
2 articulation as to our decision of the fact
3 that there is a private easement which was
4 correctly identified and included in the lot
5 occupancy.

6 There is a motion. Is there a
7 second?

8 COMMISSIONER TURNBULL: Second.

9 MADAM CHAIR MOLDENHAUER: Motion
10 has been made and seconded. All those in
11 favor say aye.

12 BOARD MEMBERS: Aye.

13 MR. MOY: Staff would record the
14 vote as three to zero to two on the motion of
15 the Chair Ms. Moldenhauer to actually to deny
16 the appeal and to reaffirm the Board's earlier
17 decision on the special exception relief 223.

18 Seconded the motion Mr. Turnbull.
19 In support of the motion Mr. Dettman. One
20 Board member not present and not voting and
21 another Board member not participating.
22 Again, the final vote is three to zero to two.

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1 MADAM CHAIR MOLDENHAUER: Thank
2 you very much, Mr. Moy. I believe that
3 concludes our morning.

4 MR. MOY: Yes, Madam Chair. I
5 would just remind the Board that the third
6 case for decision was rescheduled from this
7 morning to 1:00 this afternoon which is the
8 remand of Appeal No. 17109 of Kalorama
9 Citizens Association.

10 MADAM CHAIR MOLDENHAUER: Thank
11 you.

12 (Whereupon, at 10:33 a.m. off the
13 record until 2:04 p.m.)

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

4

2:04 p.m.

5

MADAM CHAIR MOLDENHAUER: This

6

meeting will please come to order.

7

Good afternoon, ladies and

8

gentlemen. This is the July 20, 2010 Public

9

Meeting of the Board of Zoning Adjustment for

10

the District of Columbia continued from this

11

morning.

12

My name is Meridith Moldenhauer,

13

Chairperson.

14

Joining me today is Shane Dettman

15

representing the National Capital Planning

16

Commission. And to my left representing the

17

Zoning Commission Mr. Konrad Schlater.

18

Copies of today's meeting agenda

19

are available to you and located to my left in

20

the wall bin near the door.

21

We do not take any public

22

testimony our meeting unless the Board asks

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1 some to come forward.

2 Please be advised that this
3 proceeding is being recorded by a court
4 reporter and is also webcast live.

5 Accordingly, we must ask you to refrain from
6 any disruptive noises or actions in the
7 hearing room. Please tell all cell phones and
8 beepers.

9 Mr. Secretary, are there any
10 preliminary matters?

11 MR. MOY: Yes, Ma'am Chair. But
12 staff suggests that we take that up as I call
13 the case.

14 MADAM CHAIR MOLDENHAUER: Thank
15 you, Mr. Moy.

16 The last case for our public
17 meeting then today?

18 MR. MOY: Yes, I'm sorry. That
19 would be the District of Columbia Court of
20 Appeal Remand of Appeal 17109-B of Kalorama
21 Citizens Association.

22 As the Board will recall, the

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1 original appeal was advertised as Appeal No.
2 17109 of Kalorama Citizens Association
3 pursuant to 11 DCMR 3100, from the
4 administrative decision of David Clark,
5 Director, Department of Consumer and
6 Regulatory Affairs, from the issuance of
7 Building Permit Nos. B455571 and B455876,
8 dated October 6, 2003 and October 16, 2003,
9 respectively, to Montrose LLC, to adjust the
10 building height to 70 feet and to revise
11 penthouse roof structure plans to construct an
12 apartment building in the R-5-D District at
13 1819 Belmont Road, Northwest, (Square 251, Lot
14 45) and from the issuance of the original
15 Building Permit No. B449218, dated March 11,
16 2003.

17 As the Board will recall also on
18 June 14, 2010 the Board issued a procedural
19 order on remand. The order outlined filing
20 procedures for the parties and responses.
21 Parties were to submit documents by July 2,
22 2010. Any responses for the deadline, July

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1 12, 2010. And, of course, the Board's
2 decision on July 20th.

3 In your case folders, Madam Chair,
4 you have four filings. The first is from the
5 Appellee, DCRA, a letter dated July 2, 2010
6 identified as Exhibit 95.

7 The Board is also in receipt of
8 ANC 1C letters, dated July 1, 2010 but
9 received into the Zoning Office on July 2nd
10 and July 5th. And they are identified as
11 Exhibits 96, 97 and 98.

12 The filing also contains a request
13 to waiver their July 2, 2010 filing deadline.

14 The Intervenor, the property
15 owner, filed a response letter, dated July 12,
16 2010 identifying the case folders as Exhibit
17 99, his response to replies to Exhibits 95
18 through 11.

19 The Appellant letter, which is
20 dated July 12, 2010 is identified in your case
21 folders as Exhibit 100. This is a preliminary
22 matter in that the submission deadline was

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1 July 2nd.

2 The Board is to act on these
3 submissions attended to the remand.

4 And that concludes the staff's
5 briefing, Madam Chair.

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

8 The Board will accept all
9 documentation in this case in order for us to
10 have a full file and review all the matters.
11 I believe the matters have been fully briefed
12 and there's no prejudice to any of the parties
13 by accepting all the documentation.

14 That being said, we now get into
15 the issue that is before us. The Court found
16 that the Board did not explicitly consider or
17 apply any of the Unabridged Webster's
18 Dictionary before concluding that the sixth
19 level is an attic.

20 And so then our obligation right
21 now is to analyze the three different
22 Webster's Unabridged Dictionary definition of

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1 the word "attic" and determine how those apply
2 to the facts of this case and how that either
3 confirms that the sixth floor is an attic or
4 confirms that it is now.

5 Then now looking at the Webster's
6 definition, we have three different
7 definitions. We have them labeled as:

8 Definition A: Which is a low story
9 or vault above the main order or orders of a
10 facade in the classical style.

11 Definition B: A room or rooms
12 behind an attic, and;

13 Definition C: Part of the
14 building immediately below the roof and wholly
15 or partly within the roof framing a garret or
16 storage space under the roof.

17 Looking at these three definition,
18 I think that Definition A while providing some
19 clarification as to what exactly an attic is,
20 is not absolutely clear.

21 Definition B, considering that
22 they're using the term that they're trying to

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1 define in the definition, provides no
2 assistance in my opinion.

3 So, then I moved to Definition C,
4 which states as I read earlier, "part of the
5 building immediately below the roof."

6 Looking then at our case file and
7 the different briefings, I turn to KCA's
8 Exhibit 100 and they have attached as an
9 exhibit, Attachment 4 portions of the
10 transcript. And I think that this was
11 provided mostly on my point as to, in my
12 opinion, how to determine whether the area was
13 immediately below the roof.

14 And this section Chairperson
15 Griffis at the time was inquiring with the
16 architect, I believe, Mr. Smith or their
17 expert Mr. Smith. And they provided in the
18 record that when you looked up, you looked up
19 directly to the wooden joist or beams.

20 And so by reading that I
21 understand the facts as they are in evidence
22 to me. And if -- I'm not, I'm 5 foot. But if

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1 I were 6'8", I could look up and put my head
2 between one of the four or five wooden joists
3 and see the remainder of the space and look up
4 to the roof, thus I would be immediately below
5 the roof.

6 There is nothing for me to believe
7 that there is any sort of drywall or ceiling
8 structure that would impede my ability to put
9 my head up and through those rafters, or
10 however you want to term them, but those roof
11 structural aspects to see the remainder of the
12 area that I consider to be directly or
13 immediately below the roof structure.

14 That being said, I would state
15 that the areas in question do fall within
16 Webster's definition 1C, which is immediately
17 below the roof.

18 That being said, I'll open up the
19 floor to additional Board deliberation as to
20 whether they have any additional perspectives
21 on that or any expansions.

22 MEMBER DETTMAN: Madam Chair, I

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1 have nothing to further add. I agree with
2 your conclusion that the areas in question
3 here do meet -- I think that they could be
4 considered to be an attic, however they do not
5 meet the structural headroom requirement per
6 the Zoning Regulations 6'6" so that they'd be
7 included in the FAR calculation if they fail
8 on the 6'6" structural headroom requirement,
9 and therefore would be excluded from the
10 calculation.

11 MADAM CHAIR MOLDENHAUER: Yes. I
12 appreciate you adding that additional portion
13 in regards to the fact that even though they
14 are considered an attic, they are not
15 considered an attic with the headroom for
16 calculations to be added FAR.

17 Commissioner Schlater, do you have
18 any additional --

19 COMMISSIONER SCHLATER: Ma'am
20 Chair, I concur with both of your analyses.

21 I would say that I think this area
22 could be considered an attic under both

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1 Definition 1A, which is a low story or wall
2 above main order of the facade. And I also
3 think it would fall under the definition of
4 attic in 1C:

5 "The part of a building
6 immediately below the roof and wholly or
7 partly within the roof framing." And I think
8 it's important to note that that portion of
9 the definition that says it could be "wholly
10 or partly within the roof framing" is
11 important to this case because you do have an
12 area above the roof framing and an area below,
13 and they can both be considered attic. And I
14 think it's an important point.

15 I don't think there's much to say
16 except that I think this is a low story. It's
17 not considered habitable space by DCRA, and
18 most apt for storage, given that it's only
19 6'5" tall.

20 So I think it falls pretty clearly
21 under the definition of an attic, which is
22 pretty broadly defined in this case.

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1 MADAM CHAIR MOLDENHAUER: Just
2 commenting on I don't know, and I don't
3 believe that in my opinion it should fall
4 under the Definition 1A when it talks about
5 facade in the classical style. I think it's a
6 really broad statement. But in regards to
7 what we have on the record there have been
8 statements back and forth as to the fact that
9 the classical style of a roof framing would
10 provide structural beams and that would -- let
11 me get the language.

12 That these are not specifically
13 bracing the structure, but rather that they
14 are not attached to the actual roof rafters.
15 And I think that that kind of in my mind
16 questions whether this falls under Section A
17 in a classical style. It think that it more
18 falls under Section C of definition. But
19 that's me parsing out definitions and words.

20 Is there any additional
21 deliberations or specifications that Board
22 members would like to make? Seeing none, then

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1 I think we are all in agreement.

2 I will submit a motion on BZA Case
3 17109-B to affirm the denial of the appeal,
4 thus qualifying the term "attic" under the
5 Webster's definition and stating that the
6 facts here do prove that this is an attic
7 within the Webster's definition.

8 That being said, there's a motion.
9 Is there a second?

10 COMMISSIONER SCHLATER: Second.

11 MADAM CHAIR MOLDENHAUER: The
12 motion's been made and seconded.

13 All those in favor say aye.

14 ALL: Aye.

15 MR. MOY: Yes, Ma'am Chair. Staff
16 would record the vote as three to zero to two.
17 It was on the motion of the Chair, Ms.
18 Moldenhauer to affirm the denial of the appeal
19 and qualify the term "attic."

20 Second the motion, Mr. Schlater.
21 Also in support of the motion Mr. Dettman. We
22 have no other participating Board members. So

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1 again, the final vote is three-to-zero-to-two.

2 MADAM CHAIR MOLDENHAUER: Thank
3 you very much, Mr. Moy.

4 I believe that concludes our
5 Public Meeting.

6 (Whereupon, the Public Meeting of
7 the Board of Zoning Adjustment was concluded
8 at 2:18 p.m.)

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