



**Request for City Council Committee Action
From the Department of Community Planning & Economic Development**

Date: June 10, 2004

To: Council Member Gary Schiff, Zoning and Planning Committee

Prepared by: Carrie Flack, Senior City Planner

Presenter in Committee: Carrie Flack, Senior City Planner

Approved by Neil Anderson, Supervisor, CPED Planning-Development Services

Subject: Appeal of the decision of the Zoning Board of Adjustment by Ross Fefercorn.

BZZ 1653 - 1221 West Lake Street – Ross Fefercorn has appealed the decision of the Zoning Board of Adjustment denying the application for the appeal of the decision of the Zoning Administrator regarding the parking variance (V-4554 – Approved on November 24, 1999) for the property located at 1221 West Lake Street.

RECOMMENDATION: The Board of Adjustment adopted the staff recommendation and denied the appeal of the decision of the zoning administrator.

Previous Directives: N/A

Financial Impact (Check those that apply)

No financial impact - or - Action is within current department budget.

Community Impact

Other: See attached.

Background/Supporting Information

Ross Fefercorn has filed an appeal of the decision of the Zoning Board of Adjustment. The appeal is associated with the decision of the Zoning Board of Adjustment to deny the requested appeal of the decision of the zoning administrator, director of inspections, planning director or other official involved in the administration or the enforcement of the zoning ordinance, specifically in reference to a parking variance (V-4554 – Approved on November 24, 1999) for the property located at 1221 West Lake Street.

The appellant received a parking variance from 167 spaces to 68 spaces in 1999 that was associated with several other land use applications. The appellant since revised the approved site plan eliminating 15,920 square feet of basement space. Removing 15,920 square feet of unbuilt basement floor area from the parking calculation results in 53 fewer required parking spaces for the development. Therefore, it is the decision of the Zoning Administrator that the two commercial buildings may be occupied by uses allowed in the C2, Neighborhood Corridor Commercial District with a combined parking requirement of 114 parking spaces. The appellant contends that the variance should allow the appellant to develop the property with any uses, so long as the total parking requirement does not exceed 167 spaces. The appellants complete statement for the appeal is attached.

At the May 6, 2004 Zoning Board of Adjustment meeting, eight (8) Board members were present. All eight members present voted to adopt the staff recommendation and denied the requested appeal of the decision of the Zoning Administrator regarding the parking variance (V-4554 – Approved on November 24, 1999) for the property located at 1221 West Lake Street. The May 6, 2004 Board of Adjustment minutes and the Planning Department staff report are attached.

Department of Community Planning and Economic Development - Planning Division Report

Appeal of the Decision of the Zoning Administrator
BZZ-1653

Date: April 15, 2004
May 6, 2004

Appellant: Ross M. Fefercorn

Address of Property: 1221 West Lake Street

Date Application Deemed Complete: February 6, 2004

End of 60 Day Decision Period: April 6, 2004 extended to July 15, 2004

Appeal Period Expiration: April 26, 2004

Contact Person and Phone: Ross Fefercorn, 612-363-6208

Planning Staff and Phone: Carrie Flack, 612-673-3239

Ward: 10 **Neighborhood Organization:** CARAG

Existing Zoning: C2, Neighborhood Corridor Commercial District

Continuance: This item was continued from the April 15, 2004 meeting at the request of the applicant.

Appeal of the decision of the Zoning Administrator: Ross Fefercorn has appealed the decision of the zoning administrator regarding the parking variance (V-4554 – Approved on November 24, 1999) for the property located at 1221 West Lake Street.

525.170. Appeals of decisions of the zoning administrator. All findings and decisions of the zoning administrator, planning director or other official involved in the administration or the enforcement of this zoning ordinance shall be final subject to appeal to the board of adjustment, except as otherwise provided by this zoning ordinance. Appeals may be initiated by any affected person by filing the appeal with the zoning administrator on a form approved by the zoning administrator. All appeals shall be filed within twenty (20) calendar days of the date of the decision. Timely filing of an appeal shall stay all proceedings in the action appealed, unless the zoning administrator certifies to the board of adjustment, with service of a copy to the applicant, that a stay would cause imminent peril to life or property, in which case the proceedings shall not be stayed. The board of adjustment shall hold a public hearing on each complete application for an appeal as provided in section 525.150. All findings and decisions of the board of adjustment concerning appeals shall be final, subject to appeal to the city council as specified in section 525.180.

Background and Analysis: The appellant has appealed the decision of the Zoning Administrator regarding an approved variance for parking spaces on property located at 1221 West Lake Street in the C2 District.

The appellant applied for a commercial parking variance along with several other land use applications related to reuse of the former Jay Kline property for six row houses and two commercial buildings. On October 25, 1999 the City Planning Commission approved the land use applications, including a parking variance for the two commercial

buildings from 144 spaces to 68 spaces. As a condition of approval, the Planning Commission restricted use of the basement level of the buildings to “auxiliary” uses and office space of no more than 4,360 square feet.

On November 3, 1999 the appellant appealed the Planning Commission decision to the City Council. Upon further review, it was determined that the actual parking requirement for the proposed development, absent a variance, was 167 spaces rather than 144 spaces. On November 24, 1999 the City Council granted a parking variance for the two buildings from 167 spaces to 68 spaces with the following restrictions on use of the basement level:

1. The basement space may be used for retail/service/office use providing the tenant also occupies a portion of the first floor or second floor of the building, and such use of the basement space is an ancillary use;
2. The basement space may be used for office/service use by tenants who otherwise do not occupy space on the first floor or second floor of the building; and
3. The basement space may not be used for a retail tenant who does not otherwise occupy space on the first floor or second floor of the commercial buildings.

The appellant now proposes to complete construction of the two buildings without the basement level. The change in the development plan raises a question of how failure to construct the basement may affect the approved parking variance. Section 525.50 of the zoning code states that the city shall withhold any required approval if the proposed plan is inconsistent with the final approved plan. Section 525.60 requires that the conditions of a land use approval must be observed or the approval may be terminated. Those sections appear below.

525.50. Plan consistency. The city shall withhold any building permit, demolition permit, grading permit, utility connection, license or other approval required for a use if the proposed plan is inconsistent with the final plan approved by the zoning administrator, planning director, board of adjustment, city planning commission or city council.

525.60. Compliance with conditions of approval. All land use approvals made pursuant to this zoning ordinance shall remain in effect as long as all of the conditions and guarantees of such approval are observed. Failure to comply with such conditions and guarantees shall constitute a violation of this zoning ordinance and may result in termination of the land use approval.

Calculation of the parking requirement for the two buildings included the two upper floors and basement level of each. In approving the parking variance, both the Planning Commission and City Council limited occupancy of the basement level to “ancillary” uses or office space. The restrictions on basement use were intended to minimize impacts of the development and were consistent with the variance application which proposed only limited use of the basement area. “Our plan calls for two 25,400 sq. ft. commercial buildings fronting Lake Street. Each building will provide 9,000 sq. ft. of market-rate retail space on the street level; 8,700 sq. ft. of market-rate office space on the second floor; and *potentially up to 7,700 sq. ft. of ancillary space at the basement level.*” (Project development summary from RMF Entities, LLC, emphasis added)

Julie McFadden, Astudio Architecture, described the proposed development as follows: “The buildings are being designed primarily for retail/office uses and not for food/restaurant uses. *The developer and leasing agent will not be pursuing sit-down restaurant establishments as tenants, and therefore we anticipate that wine/liquor licenses will not be sought.* One of the confirmed tenants, Tom Schmidt’s Urban Retreat Day Spa and Salon, is tentatively planning to include a juice/coffee bar, which may occupy approximately 300-500 sq. ft. of their tenant space. If Tom Schmidt does not move forward with this plan the leasing agent for the buildings will not solicit other competing coffee/deli tenants. If, on the other hand, Tom Schmidt does not include a food-related component, it is foreseeable that a non-franchised coffee or deli shop tenant may be solicited.” (Emphasis added)

In testimony presented to the Zoning and Planning Committee of the City Council the appellant stated: “*The purpose of needing to have this extra language to use the lower level for either a service or office use, is that in the unlikely event that Tom Schmidt is unable to use the lower level in the future, my lenders would disallow income because I wouldn’t have use for the lower level...* So we all want to see the project go forward, but a little glitch is that I am

unable to get financing for the development without having an alternative source of income in the unlikely event that the Urban Retreat is unable to be there. Other than that, the project really hasn't changed." (Zoning and Planning minutes, November 16, 1999, emphasis added)

The appellant now argues that the variance allows him to develop the property with any uses, so long as the total parking requirement does not exceed 167 spaces. However, the record shows that approval of the parking variance included restricted use of the basement level of both buildings in order to minimize the impact of the development. Because the basement level will not be constructed in either building, it is reasonable and consistent with city ordinance to apply the parking variance in a manner that recognizes that the change from the previously approved plan will result in a reduction of the amount of required parking. Removing 15,920 square feet of unbuilt basement floor area from the parking calculation results in 53 fewer required parking spaces for the development. Therefore, it is the decision of the Zoning Administrator that the two commercial buildings may be occupied by uses allowed in the C2 Neighborhood Corridor Commercial District with a combined parking requirement of 114 parking spaces. This number is reached by taking 167 spaces for the development overall less 53 spaces attributable to the basement level of both buildings. To decide otherwise would result in a windfall of unrestricted parking spaces attributable to the un-built basement space. This could permit the two upper floors of the buildings to be developed in a manner not intended by the City Council when it approved the variance, including multiple restaurant uses.

Planning staff agrees that the Zoning Administrator has correctly interpreted the zoning code. Unless the parking variance is applied in the manner decided by the Zoning Administrator, the appellant's revised plan for development of the property would be inconsistent with the final plan approved by City Council in 1999 and with the conditions and guarantees of approval of the prior land use approvals, contrary to requirements of sections 525.50 and 525.60.

Recommendation of the Department of Community Planning and Economic Development Planning Division:

The Department of Community Planning and Economic Development Planning Division recommends **denial** of the appeal of the decision of the Zoning Administrator.

HEARING AGENDA

Minneapolis Board of Adjustment:

Ms. Debra Bloom

Mr. David Fields

Mr. John Finlayson

Mr. Daniel Flo

Mr. Paul Gates

Ms. Marissa Lasky

Mr. Barry Morgan

Mr. Peter Rand

The Board of Adjustment of the City of Minneapolis will meet at **2:00 p.m.**, on **Thursday, May 6, 2004** in **Room 317 City Hall**, Minneapolis, Minnesota, to consider requests for the following:

1. 1221 West Lake Street (BZZ-1653, Ward 10)

Continued from the April 15, 2004 meeting no testimony presented:

Ross Fefercorn has appealed the decision of the zoning administrator, regarding the parking variance (V-4554 – Approved on November 24, 1999) for the property located at 1221 West Lake Street.

Department of CPED Planning Division Recommendation by Ms. Flack:

The CPED Department Planning Division staff recommends **denial** of the appeal of the decision of the Zoning Administrator.

TESTIMONY

Staff presented their report and recommendation to the Board of Adjustment.

Finlayson: Thank you. Is the applicant present? We are limited to whether or not the Zoning Administrator has the right to make this decision, not about the building. Applicant, state your name and address for the record please.

Mr. Chairman and Members of the Board, my name is **John Hermann**, I am an attorney at Faegre and Benson and I represent the applicant, Mr. Fefercorn and the limited liability company that is developing the project. I think there are a number of factors with respect to this project that have been misstated or inaccurately stated in the staff report to you and in Mr. Graham's report to you. I would like to first deal with those. Second I would like to deal with why the Zoning Administrator has exceeded the authority that he has with respect to the interpretation of the code and finally I would like to suggest that the adjustment that he has made is an adjustment

which is not founded in the nature of the change, even if this Board should arrive at the conclusion that he has the right to make the decision.

In the first place, what has been suggested in the staff report is flat out inaccurate in stating that the City Council in any way restricted the uses of the second or first level of this building. The suggestion made in the testimony of the Planning staff person that this would quote, "Allow development in a fashion not anticipated or approved by the Council", is simply not accurate. There were no restrictions whatsoever placed on the uses of the first or second floor. Restaurants and hundreds, if not thousands of other kinds of uses, are all permitted uses in this zone and all were allowed to this applicant. I would ask all of you to think about what you actually decide with respect to a variance. What you actually decide is because of hardships associated with the unique configuration of the property or the nature of the uses or because of the availability of a large amount of public transportation, a large number of people who walk to the premises, or biking accessibility. It's permissible to develop a property with less than a certain number of parking spaces. In this case what you concluded is that regardless of the number of required spaces from whatever use was needed on this property (and it could have been more than the number suggested – 167 that is a hypothetical number based on a certain division and of square footage into the total area built), that this property could be served with 99 fewer parking spaces. And the reasons given in the decisions on this level and the decision of the Council, which increased the amount as the staff report correctly stated, the reasons given were the accessibility of the area to extraordinary transit, the unusual configuration of the site, the desire of having street frontage completely occupied by the building, therefore a larger building than you might have on this kind of location generally, to maintain the Lake Street street frontage, the proximity of the Midtown Greenway and the like.

Let me propose a different hypothetical for you. Let's say for example these basements were built, that these basements were occupied 100% percent by storage for the retail users on the first floor. Those spaces then, under the zoning code would have a zero parking requirement. You could still have any use you wanted on the first and second floor and as long as those uses didn't require more than the 167 spaces in the prototypical analysis, the 99 variance would have been sufficient. If some of those uses because of their high intensity or because of the way the spaces were laid, out require the 185 spaces the use would not have been permitted. And the exact number of spaces is always determined, always in your code, by the nature of the use.

The two code sections that have been suggested here that authorize the zoning department not to modify the variance, but to withhold a permit are appropriate for us to spend a minute on talking about. Now you should know both of the buildings on this property and the parking lot, are under construction already. The city has already issued all necessary building permits for the construction. My client has here with him and can supply the Board with stamped plans if they want to see that. The only change in the building was the elimination of some square footage in the basement, so a provision that says you can hold a permit quote, "If the proposed plan is inconsistent with the plan approved by the Zoning Administrator", has no applicability. Similarly, what were the conditions and guarantees of the approval? The conditions and guarantees of the approval were that we would not use the basement for intensive uses, that any retail in the basement would have to be connected to a first floor retail. In other words, you could not have separate retail accessible only through the basement and that it should be quote,

“Auxiliary space”, which is not a defined term in your code but it is a term to my mind, and I think to the lay person, and I think as the staff suggested, a lower intensity use or maybe a lot of storage. I don’t think either of these sections authorizes the Administrator based on the request of the neighborhood, the Council Member, or anyone else to modify the terms of the variance. I have practiced zoning and land use law in the city and in the state for over thirty (30) years. I hate to admit that. I helped to draft this code as a special outside council from the city. I have closed hundreds, if not thousands of real estate transactions. When we go to a closing and we say to our lender this project has a parking variance, this project has plans which have been stamped and approved by the city, this project is ready to go into construction. We don’t say to the lender but hey you know what, if the Zoning Administrator decides later that something is different about this building he can change the variance, he can revoke the variance, he can reduce the variance. We have a lender here that relied on the fact that users could have up to 167 necessary spaces not the number that we will be left with after this. I don’t think there is anything in the code that authorizes the matter that the Zoning Administrator has put before you. Expo-facto, some people think that there shouldn’t be restaurants here. If this owner determined that he wanted to put no users on the second floor and therefore the second floor had a zero parking requirement or he made it entirely storage, which has no parking requirement, he would have the ability to put users on the first floor that used up the whole amount of the parking. You can’t expo-facto impose a requirement to say you don’t like one tenant or another. It would lead to chaotic conditions, both in the lending market and in the land use approval process with respect to the city.

Let me make one other point. As explicit on page three (3) of the staff report, the basements have seventy-seven hundred (7,700) square feet out of a 25,400 square foot commercial building. In spite of the fact that the suggestion was that the basement areas were going to be lower intensity, we have to have circulation, connections to the first floor probably would be auxiliary, probably wouldn’t have much of a parking demand at all if they had been built. What the Zoning Administrator has suggested that you affirm and allow him to do, is to reduce the amount of the variance here by 100% of the basement by the maximum parking load for normal retail uses, one space per 300. So he is proposing that you reduce the variance from 167 to 114, which would be a 53 stall reduction in the amount of variation that is allowed on this property. Go back with me to the beginning when this application was filed. This Board allowed a variance from 144 and said the unique shape, the desire to have this building up to the curb, the availability as is allowed in the permitted variances for reduction up to zero (0) of parking, because of transit, because of accessibility to walking, made it okay to have uses on this property that needed 144 initially and then the Council said 167 and there would not be a problem and met the hardship test. We have made the building less intense. There is no basement. I don’t think taking the basement out in any way violates a requirement that you not use the basement for retail, other than retail that is accessible from the upper floor and that you can use it only for auxiliary uses. We have not violated the condition of the variance, but we are being suggested that we lose 100% of the maximum amount I could ever imagine the basement would have in terms of parking needs. So let me suggest to you, at least a semi-rational approach to how you might think of adjusting this. If you look at the basement in the context of the entire building, the basement 7700 square feet represents 30.3% of the total square footage of the building. It was intended to be used less intensely, probably wouldn’t have had 30.3% of the parking requirement. But instead of taking away 57 spaces of the variance, wouldn’t it be more rational

to say if you give up 30% of your space, we'll take away 30% of your parking variance. The parking variance here is 99 spaces, so therefore 30% of that would be 30 spaces. My client would reluctantly find a 30 space reduction an acceptable one even though he doesn't think there is basis in law for this expo-facto review, even though he doesn't think that there would have ever been a demand for 30 spaces for uses in the basement, even though the findings of the variance were that the hardship allowed the 99 space reduction and still would have allowed adequate parking given the time of day use, the nature of the transit, and so on. But I don't think there is any basis for sustaining the decision that Mr. Graham has made, and I have great respect for him, I think he is a terrific administrator, but I think in this particular case he has overstepped his authority and he has proposed something to you that is not sustainable in terms of the logic of the original decision, not sustainable and is a terrible precedent for the city in terms of this kind of review. I don't know where this goes. I hope the Board will give serious pause before it simply affirms this and seriously considers all the statutory underpinnings or at a minimum seriously looks at whether the change in the nature of the building, 7700 square feet of 25,000 warrants such a big adjustment. My client is here too and I think he might want to say something? Is there any questions? We are in construction, talking to tenants, we've got some signed leases and this is very problematic. Thank you very much.

Finlayson: Anyone to testify in favor?

Members of the Board of Adjustment, my name is **Ross Fefercorn**, I represent the Calhoun Park Companies, LLC, which I am Chief Managing Officer and my address is 7625 Metro Boulevard, Suite #145, Edina, Minnesota 55439. I'll try to be brief. I guess I know why we hire these attorneys because they are so eloquent and know the rules and regulations fairly well. There are a couple of things that I would like to clarify. Number one, yes the building is under construction and in the planning report it would appear as though the appellant now proposes to complete construction. In fact I would like to give you a little history. We bought the Jay Kline Chevrolet site without subject from the city and paid 25,000 more of the appraised value.

Finlayson: This is about whether the Zoning Administrator has the authority to make this decision. Much of the previous testimony wasn't directed at that either. I only want to hear testimony on whether or not he has the right to make this decision.

Ross Fefercorn: I don't think I have anything else to say after that.

Finlayson: Anyone to testify in favor? Anyone against? Care to testify? Step forward. Name and address please.

Justice Gibson: I live at 3033 Emerson Avenue South. I have prepared a statement that I would like to read. I have made copies of the statement if the Board wants to receive copies of those. I think it would help them follow along, may I pass those out please? We are here to discuss the Ross Fefercorn appeal decision of the Zoning Administrator as mentioned. This is important to adjoining neighborhood constituents because the intent and content of the development has changed greatly from the original plans approved with respect to development structure and intensity. We are here to protect our neighborhood from what was initially portrayed as a family and health oriented low intensity development and is now clearly shifted toward higher intensity

utilizations. Mr. Fefercorn has made it clear that he intends to do whatever he wants with the space within the restrictions of the C2 zoning and has displayed an arrogance regarding his rights to the additional variances and spaces that he clearly has not earned by his actions with respect to the plan for which the variance was based. We are here as a neighborhood to take a stand against the developer who has come in with the support of the neighbors based on the initial proposal and has since lost that support and respect of the neighborhood constituents. We feel he has essentially performed a bait and switch operation on our neighborhood, and we are here to limit the impact of this change. I am going to address this briefly and in three (3) parts. What is the decision of the Zoning Administrator and who currently supports that? Why is the decision of the Zoning Administrator appropriate and defensible? And why is the decision of the Zoning Administrator a fair and just compromise to the local constituency affected by the development and developer? Note in part three, that I have also prepared a reasonable tenant mix as an example to show that this not severely hampering Mr. Fefercorn, but is only limiting him in bringing in high intensity restaurants into our neighborhood.

As stated, what is the decision of the Zoning Administrator? The decision of the Zoning Administrator, Blake Graham was to reduce the variance of spaces allotted in Variance #4554 from 167 to 114 based on issues with planning consistency and compliance with the additions of approvals, citing sections 525.50 and 525.60 of the Zoning Code, which have already been discussed. The following parties currently support the decision of the Zoning Administrator to deny the appeal made by Mr. Fefercorn, the 40 members of the Fremont, Emerson, Dupont and Lake Street constituents that have signed the petition to support the decision of Blake Graham and the CARAG Board, based on vote, at the last neighborhood association meeting.

Why is the decision of the Zoning Administrator appropriate and defensible? We support this decision as appropriate and defensible due to the fact that many key facts in support of the original variance request are no longer consistent with the current plan and that Mr. Fefercorn was clearly aware that the variance of stalls above 112 would not be required unless the basement was for commercial use. This by the way conflicts what Mr. Fefercorn and his lawyer said a few minutes ago and I do have the supporting evidence to support that if there is any facts that anyone has any questions about, I have all the supporting documentation here. Part 4 of the variances for commercial buildings, Variance #4554 of the Conditional Use Permit, application C-2018, addresses the required justifications for the variance. Item #1 of that section, specifically addresses unique undue hardships. In this section, Fefercorn states that if the development is limited by the reduction of the basement for commercial use and I quote, "Required parking declines 112 stalls", this is taken directly from his original request for a variance. Stating, as I said, this is completed opposite of what his lawyer just up here saying, if there is no commercial use of the basement, there is no need for more than 112 stalls. He performed a self imposed limitation of the commercial space by not building the basement, and the content in the request for a variance, he clearly should have expected the reduction. An additional point to Item #1, in the above section also refers to his ability to leverage excess parking of Calhoun Square due to the fact that, the Primary Tenant of Urban Retreat was expected to occupy approximately 35% of the rentable space and would have peak periods that would not conflict with peak periods at Calhoun Square. This is no longer valid due to that fact that Fefercorn is now seeking tenants that would have peak times conflicting with the peaks at Calhoun Square and more importantly, I feel that the original argument is flawed due to the fact

that special provisions point; C2 of section 541.170 of the Zoning Code, clearly states that off-site parking must be within 300 feet of the site. The Calhoun Square parking lot is clearly not in that distance requirement as measured by any common path.

Finlayson: Do you have any testimony as to whether the Zoning Administrator has the right to make this decision or not? As opposed to debating other irrelevant testimony?

Justice Gibson: I feel this is relevant because this is what the variance is based on and if we can't bring to light the facts of why he received the original variance.

Finlayson: Sir, does the Zoning Administrator have the right to make this decision? That is what we are here to hear. Not this other?

Justice Gibson: Then where is our opportunity to present this information? This is where I was informed to go.

Finlayson: Several years ago, the original variance was granted.

Justice Gibson: I think it is certainly more relevant than anything his attorney had to say. I will be brief and move on quickly then.

I would just like to highlight a couple of other key points. The staff recommendation to Lisa McDonald, dated 1999, determined only 112 stalls would be required for full retail use of the upper floor. 167 stalls – if the basement. So, the staff recommendation, Michael Orange supports that as mentioned before, even in Fefercorn's original request for the variance, he even stated that if the basements were not built for commercial use, he would not need more than 112 stalls.

Finally, I would just like to point the example parking requirements. I think this is important as well. I have made a few changes to them since our last neighborhood meeting, based on some suggestions by Mr. Fefercorn that the allocations of second floor office space was not quite as realistic as he would think. So the important thing here is he has one high intensity fast food restaurant there already and that even with the variance at 112, he would have the ability to put in another high intensity fast food restaurant as well as a third sit down type restaurant with reasonable capacity. That is three (3) restaurants, taking a total of ½ of the first floor space that he has the ability to use. So we are not restricting him in any way that is reasonable. I will leave it up to that then.

Finlayson: Anyone else? Yes sir.

Good afternoon ladies and gentlemen, my name is **Craig Kepler**, I am a lawyer with the law firm of Naegle, Krause and Moore. I am the lawyer for Mr. Philip Quale, who is the spokesperson for Fremont, Emerson and Dupont resident neighborhood, as well as a resident of that neighborhood himself. I won't reiterate the points made by the last speaker. I will simply point out that with respect to the Zoning Code, Section 525.50, the code section states that the city can hold building permit license or other approval if the final building doesn't match the

original building as proposed in the variance application. Here we have a man who was given a variance for a building that required 167 spaces, part of the compact in that variance is that he invest the money into the community to construct a building that is going to require those spaces. He did not do that. He invested much less money and what he is trying to do obviously is increase the square foot profit generating ability of the smaller building that he did build. But the only thing that we are asking this Board to do affirm that the parking intensity commensurate with the investment that he has made in the community. As pointed out earlier, we think that is actually less than 114 spaces that the Zoning Administrator has proposed. We believe that the decision should be upheld. Thank you.

Finlayson: Anyone else? Yes.

Hello, my name is **Aaron Rubenstein** and I live at 3249 Emerson Avenue South and I am the Chair of the CARAG Neighborhood, Zoning Committee. I believe there is a copy of CARAG's resolution on this issue on the last page of the packet. I just wanted to point out our first two of our findings to support a recommendation to your Board that you deny the appeal. The first is that reduced square footage of the project means reduced overall parking demand for the types of uses anticipated by CARAG in support of the original parking variance, in 1999. The second is, to retain or grant the one 167 space allotment to the project would have two undesirable consequences: it would set a precedent for granting a parking variance bonus, by reducing the project size after the variance has been approved and it would allow for significantly more restaurant space that CARAG did not support during the extensive involvement of the developer selection process, due to the evening and nighttime traffic generation and its impact on the adjacent residential area as restaurants with liquor licenses may stay open until 2:00 a.m. Thank you.

Finlayson: Anyone else? I see none. Close the public portion of this item. Board comment or motion please.

Gates: Chairman, I would like to abstain from discussion and voting on this issue. The attorney for the appellant is representing a business that I am involved with. And I think to avoid any appearance of conflict I'll just sit this one out.

Fields: Mr. Chairman, you agree that a lot of the testimony that we heard was actually irrelevant to the very basic question of the Zoning Administrator had the right. I am sorry, in understanding the history of the dispute, but if indeed we are going to make a decision based on whether Mr. Graham had the right to make this call, it seems to me that there is no question that he did. It is stated very clearly in the sections. To me basically a site plan that was agreed upon was changed significantly from what was agreed upon. The Zoning Administrator made a call and had the right to make that call. I'll make a motion to support the staff recommendation.

Bloom: I'll second that motion.

Lasky: Made comments. Ms. Lasky's voice did not pick-up on the tape recording.

Finlayson: I think it is very clear that the Zoning Administrator had the right to make this call. All the concerns about parking, density, restaurants, usage etc. can be readdressed when they reapply. Further comment? None. Call the Roll.

ROLL CALL VOTE:

Yeas: Bloom, Fields, Finlayson, Lasky, Morgan, Rand

Nays: None

Recused: Gates

Abstained: Flo

Absent: None

BOARD OF ADJUSTMENT ACTION:

Mr. Fields moved to adopt the staff recommendation and **deny** the application for the appeal of the decision of the Zoning Administrator. Ms. Bloom seconded the motion. Motion passed.