

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

JUNE 2, 2009

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD, Chairperson  
SHANE L. DETTMAN, Vice Chairman (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

GREGORY N. JEFFRIES, Vice Chairman  
MICHAEL G. TURNBULL, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary  
BEVERLEY BAILEY, Sr. Zoning Specialist

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Meeting held on June 2, 2009.

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

2 9:46 a.m.

3 CHAIRPERSON LOUD: Thank you, Mr.  
4 Moy. Let's proceed with the agenda for this  
5 morning. I believe we are going to call the  
6 cases somewhat out of order.

7 MR. MOY: Yes, sir. It's my  
8 understanding that the board is going to take  
9 up the first case for it's decision which is  
10 Application No. 17867. This is Baby Land  
11 Development Center pursuant to 11 DCMR 3104.1  
12 for a special exception to establish a child  
13 development center (40 children and six staff)  
14 under Section 205 in the R-2 District at  
15 premises 4628 H Street, S.E. This is in  
16 Square 5359, Lot 328.

17 If the board will recall, at its  
18 decision meeting on May 5, 2009 the board  
19 convened this case and deliberated on the  
20 applicant's request that the board delay its  
21 decision. The primary reason, Mr. Chairman,  
22 was that the applicant's request was to allow

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1 more time for their consultant to complete a  
2 traffic analysis.

3 At that time the applicant was  
4 anticipating receiving the traffic study by  
5 May 5th which was the date of the board's  
6 decision. The board subsequently rescheduled  
7 its decision to June 2nd.

8 There are two filings in your case  
9 folders, Mr. Chairman. First is the  
10 applicant's traffic analysis dated May 22,  
11 2009. This is identified as Exhibit 29.

12 The second filing is a District  
13 Department of Transportation letter dated May  
14 28, 2009, and this is identified as Exhibit  
15 30. Staff will note for the board that DDOT  
16 is requesting a delay to allow them more time  
17 to file a review of the traffic analysis and  
18 in their letter DDOT is claiming that they  
19 would submit a report to the board by Friday,  
20 June 19th.

21 The board is to act on the  
22 pleadings with respect to delaying its

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1 decision a third time for adapting the merits  
2 of the requested special exception relief.  
3 That completes the staff's briefing, Mr.  
4 Chairman.

5 CHAIRPERSON LOUD: Thank you, Mr.  
6 Moy. I believe we've had an opportunity to  
7 review the case as well as the recent  
8 pleadings that have come in on the case and, I  
9 think, certainly where I'm heading with this.  
10 We'll open it up for board members.

11 It would probably be in the best  
12 interest of the case to continue the case and  
13 look at June 23rd which might be our first  
14 available date for decision. The reason being  
15 that I think OP in its report initially wanted  
16 to have the benefit of a traffic analysis  
17 report and DDOT just got the benefit of it, I  
18 guess, May 19, May 20, something like that.

19 Our rules require that -- it's  
20 mandatory that DDOT be given 20 days to  
21 complete their review. I'm recommending that  
22 we continue this case to June 23rd and I am

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1 fine with the June 19th, Friday, June 19th for  
2 the DDOT and OP reports.

3 It would be better on June 17th  
4 because then when we have the packages  
5 transmitted to us they would be part of that  
6 package. But if the rules don't get us to  
7 June 17th, I'm fine with June 19th. We just  
8 have a supplemental transmission to board  
9 members.

10 Mr. Dettman, Mr. Turnbull, did you  
11 want to weigh in at all? Okay. Then I think  
12 what we'll do, Mr. Moy, is continue this case  
13 to June 23rd with a deadline of June 17 for  
14 DDOT and the Office of Planning to submit  
15 written replies to the traffic report.

16 If those come after June 17 we'll  
17 just deal with it when it happens. We will  
18 then -- it's my understanding that the record  
19 has been closed except for this traffic  
20 analysis report so as presiding officer I  
21 would like to suggest that we reopen the  
22 record under 3117.30 specifically and limited

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1 just to the DDOT report and the Office of  
2 Planning report.

3 Is there anything further on this  
4 case, Mr. Moy?

5 MR. MOY: No, sir. That's very  
6 good. To recap again, the board will  
7 reschedule its decision to June 23 with  
8 filings due no later than June 17 from DDOT  
9 and Office of Planning.

10 CHAIRPERSON LOUD: Thank you.

11 MR. MOY: All right. Very well.  
12 Then the next case, I believe, Mr. Chairman is  
13 Application 17556. This is a motion to the  
14 Application of Murillo/Malnati Group to extend  
15 the validity of the order pursuant to Section  
16 3100.5 of the Zoning Regulations.

17 Staff would just recite the  
18 original application relief. Back on January  
19 16, 2007, this application was pursuant to 11  
20 DCMR 3103.2 for a variance from the rear yard  
21 requirements under Section 404 to allow the  
22 renovation of four existing row dwellings and

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1 the construction of a new addition at the rear  
2 of the property in the R-5-D District at  
3 premises 2816-2822 Connecticut Avenue, N.W.  
4 This is in Square 2107, Lots 56, 57, 75, and  
5 76.

6 On April 22, 2009, the applicant  
7 filed a request to extend the expiration date  
8 of the BZA order 17556 which expires May 22,  
9 2009. This document is identified in your  
10 case folders as Exhibit 38.

11 Moreover, the applicant also  
12 request (1) that the board waive its -- as I  
13 have already stated, waive its time limits for  
14 good cause shown and to allow this order 17556  
15 to remain effective for two years after June  
16 2, 2009.

17 Second, the expiration date for  
18 this order is told from the date of this  
19 letter while the Zoning Commission Case 09-01  
20 is completing its proposed final rulemaking  
21 process.

22 The second filing in your case

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1 folders, Mr. Chairman, is a document from the  
2 opposition party Deborah Freis on behalf of  
3 and representing the concerned neighbors.  
4 This document is dated May 22, 2009,  
5 identified as Exhibit 39.

6 There are also three additional  
7 filings in the record. Exhibit 40 which is  
8 dated May 29, 2009 is a letter in opposition.

9 Kinley Bray of Arent Fox representing the  
10 Connecticut Park LLC which is supporting and  
11 joining with the opposition party concerned  
12 neighbors.

13 Two filings were submitted to the  
14 record last night, Mr. Chairman, which were  
15 the Exhibits 41 and 42. The first one dated  
16 June 1, 2009 consist of two letters  
17 authorizing Kinley Bray of Arent Fox to  
18 represent Ricki Davis and concerned neighbors.

19 The second document also dated June  
20 1st is a supplemental filing of the opposition  
21 party, Connecticut Park, LLC which is  
22 connected to the filing in Exhibit 40, I

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1 believe. Of course, this filing also includes  
2 representation of both Ms. Davis and concerned  
3 neighbors.

4 The board is to act on the merits  
5 of the request to extend the expiration date  
6 of 17556 pursuant to Section 3100.5 and to  
7 waive the time limits on the board action  
8 under Section 3130.

9 That completes the staff's  
10 briefing, Mr. Chairman.

11 CHAIRPERSON LOUD: Thank you, Mr.  
12 Moy. I believe the board is ready to  
13 deliberate on the motion for extension this  
14 morning and I think I'll go ahead and start us  
15 off.

16 I think as you had indicated, Mr.  
17 Moy, the underlying project was for the  
18 renovation of, I think, four townhouses along  
19 with a new addition in the rear that would  
20 result in a 33-unit development.

21 At the underlying case concerned  
22 neighbors was accepted by the board as a part

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1 along with Ms. Davis Garner, and I hope I'm  
2 pronouncing this correctly, Freis, F-R-E-I-S,  
3 the understanding being that the Davis Garner  
4 and Freis parties would be represented by  
5 concerned neighbors for the duration of the  
6 case.

7 The original order expired, or  
8 really expires June 2, 2009. This is because  
9 the initial order expired 10 days after -- I'm  
10 sorry, became effective 10 days after the May  
11 22, 2009 hearing so we are now at June 2nd and  
12 it's my belief that the underlying May 22nd  
13 order that went into effect June 2, 2007 is  
14 still in effect so the latter issue regarding  
15 tolling I don't think comes into play.

16 Now, moving on to the specific  
17 purpose. For the motion is applicant is  
18 requesting a two-year extension of the  
19 effectiveness of the order notwithstanding  
20 Zoning Commission Order 0901. The correct  
21 rule for the BZA with regard to two-year  
22 extension request is Rule 3100.5. That is the

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1 because the Zoning Commission order that I  
2 referenced has not taken effect yet.

3 Under Rule 3100.5 the BZA may waive  
4 a rule for good cause shown provided no  
5 prejudice is shown to the rights of any  
6 parties and it is not otherwise prohibited by  
7 law.

8 In this case the BZA is being asked  
9 to waive Section 3130.1 which provides that no  
10 order a board authorizing the erection or  
11 alteration of a structure shall be valid for a  
12 period longer than two years unless within  
13 such period the plans for the erection or  
14 alteration are filed for the purpose of  
15 securing a building permit.

16 In this case the applicant contends  
17 at our Exhibit 8, page 4, and I quote, "The  
18 applicant has only entered into sales  
19 contracts for 50 percent of the units.

20 And, secondly, that construction  
21 financing that was in place in October '08  
22 fell victim to the events that have crippled

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1 national and international credit markets  
2 since then and draws our attention almost by  
3 judicial notice to the events of the decline  
4 in credit markets that we are all very  
5 familiar with."

6 The opposition party, as you  
7 indicated, Mr. Moy, in Exhibit 39 along with a  
8 group called Connecticut Park, which was not a  
9 party in the underlying case at our Exhibit  
10 40, and then along with Ms. Davis Garner who  
11 was accepted provisionally as a party in the  
12 underlying case with the proviso that she was  
13 to be represented by concerned neighbors have  
14 all filed oppositions to the two-year  
15 extension request.

16 Essentially the opposition parties  
17 are arguing and those that seek to join them  
18 are arguing that (a) the board lacks authority  
19 to grant this extension because our Section  
20 3100.5 rule does not specifically jump out and  
21 tell you that you have authority to extend the  
22 project for two years.

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1           Also that they are prejudice.  
2           Particularly the party would be prejudice by  
3           alleged disruptions in the alley system  
4           through some of the construction that has  
5           already taken place at the site along with  
6           concerns about noise and the height of the  
7           project, as well as some alleged  
8           misrepresentations in the underlying plan,  
9           particularly the Connecticut party opponents,  
10          I do believe, are arguing that the applicant  
11          misrepresented the height by half a floor of  
12          the Connecticut Park condo. Not the  
13          applicant's project but the Connecticut Park  
14          building which they claim has some light and  
15          air impacts for the party opponents.

16                 Notwithstanding the concerns that  
17          have been raised by those in opposition to the  
18          motion to extend, I want to direct my comments  
19          back to the standard for granting the relief  
20          which is essentially that good cause be shown,  
21          no prejudice to a party, and that it is not  
22          otherwise prohibited by law.

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1           In this case I think the  
2 representation of the applicant that they have  
3 only sold 50 percent of the units coupled with  
4 their representation that construction  
5 financing that was in place in October of '08  
6 later fell victim to market conditions would  
7 be enough to satisfy my understanding of what  
8 the good cause shown is.

9           With respect to prejudice to  
10 parties, there are a number of concerns that  
11 are raised in the various pleadings. I think  
12 all of those concerns were disposed of in the  
13 original decision which talked about height  
14 and traffic and parking impacts and noise not  
15 being relevant to the rear yard relief that  
16 was the focus of the underlying case.

17           That was the only relief sought in  
18 the underlying case was rear yard relief so  
19 those issues were disposed of at page 7 of the  
20 original order and this is not the forum for  
21 those to be relegated in my perspective.

22           With that I'll open it up to other

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1 board members.

2 COMMISSIONER TURNBULL: Thank you,  
3 Mr. Chair. I think in this particular case,  
4 and we have seen implications come before the  
5 Zoning Commission for extensions of time in  
6 particular with applicants who have had PUDs  
7 where they have had to change from  
8 condominiums to rental units and gone through  
9 hoops to change that.

10 I think the question of the  
11 difficulty of economic times is obvious. We  
12 are in very difficult straights and it is  
13 difficult times for an applicant, an owner, a  
14 developer to get through this. I think from  
15 my own standpoint that is an obvious  
16 standpoint.

17 The country is going through some  
18 very, very difficult times and I don't think  
19 we need a substantial evidence brought forward  
20 to prove that point. I think this city is  
21 facing -- perhaps not as much as some other  
22 cities but we are still going through some

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1 very difficult times and financial times.

2 I think from my standpoint on the  
3 record I think this is an obvious scenario. I  
4 think the applicant needs to produce  
5 documentation from the standpoint of telling  
6 us how difficult it is. I don't think we need  
7 reports from financial experts telling us how  
8 bad it is.

9 VICE CHAIR DETTMAN: Mr. Chairman,  
10 I agree with you and Mr. Turnbull. I think  
11 the economic crisis is enough to demonstrate  
12 good cause. I think what the applicant has  
13 submitted to us in Exhibit No. 38 is adequate  
14 to meet the current standard under 3100.5.

15 CHAIRPERSON LOUD: Thank you, Mr.  
16 Turnbull and Mr. Dettman.

17 Mr. Turnbull, you raise an  
18 interesting question regarding the substantial  
19 (sound cut out) 3100.5. I don't think that it  
20 does. I think that once the Zoning  
21 Commission's proposed rulemaking takes effect  
22 completely that standard will shift.

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1 I think the bar will have to --  
2 when I say bar, counsel will have to reflect  
3 that shift in what is submitted to the board,  
4 particularly with respect to very specific  
5 language in the new regulation that talks  
6 about substantial evidence being needed to  
7 show good cause. At the juncture that we are  
8 at, we are still using Section 3100.5 that  
9 this requires a good cause showing and lack of  
10 prejudice.

11 I think what I'll do now is call  
12 for a vote and I would be happy to start us  
13 off with a motion. I would like to move for  
14 approval of the motion for extension in the  
15 case of Murillo/Malnati Group, BZA Case No.  
16 17556 for a two-year extension.

17 VICE CHAIR DETTMAN: Second.

18 CHAIRPERSON LOUD: Motion has been  
19 made and seconded. Is there further  
20 deliberation? Hearing none, all those in  
21 favor say aye.

22 ALL: Aye.

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1 CHAIRPERSON LOUD: All those  
2 opposed? All those in abstention?

3 Mr. Moy, if you could call the  
4 vote.

5 MR. MOY: Yes, sir. Staff would  
6 record the vote as three to zero to two. This  
7 is on the motion of the Chairman, Mr. Loud, to  
8 approve the motion for the extension of time  
9 of the order of 17556.

10 Seconded by the Vice Chair Mr.  
11 Dettman. Also in support of the motion Mr.  
12 Turnbull. The board has two other board  
13 members not participating. Again, the final  
14 vote is three to zero to two.

15 CHAIRPERSON LOUD: Thank you, Mr.  
16 Moy.

17 Can you call the next case, Mr.  
18 Moy?

19 MR. MOY: Yes, sir. That would be  
20 Application No. 17627. This is, again, a  
21 motion of 17627 of RIA, LLC, to extend the  
22 validity of the order pursuant to Section

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1 3100.5 of the Zoning Regulations.

2 The staff will read the original  
3 application of the order and this application  
4 was pursuant to 11 DCMR 3103.2 for a variance  
5 from the lot occupancy provisions under  
6 Section 403 and a variance from the parking  
7 space requirements under Subsection 2117.4 and  
8 pursuant to 11 DCMR 3104.1 for a special  
9 exception allowing the conversion and addition  
10 to an existing building to permit a new eight-  
11 unit apartment house under Section 353 in the  
12 R-5-A District. This is at premises 1007  
13 Rhode Island Avenue, NE, Square 3870, Lot 49.

14 On April 24, 2009, the applicant  
15 filed a motion to extend the effectiveness of  
16 BZA Order 17627 which would expire on August  
17 10, 2009. This document is identified in your  
18 case folders as Exhibit 42.

19 Mr. Chairman, there are no other  
20 filings in the record. The board is to act on  
21 the merits of the request pursuant to Section  
22 3100.5 to waive the time limits on board

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1 action under Section 3130. That completes the  
2 briefing, Mr. Chairman.

3 CHAIRPERSON LOUD: Thank you, Mr.  
4 Moy. Is there something funny over there, Mr.  
5 Moy?

6 MR. MOY: I'm getting a little  
7 tongue tied. My mouth is getting dry.

8 CHAIRPERSON LOUD: Now you know how  
9 I feel sometimes.

10 This is just like the case that we  
11 just heard. I think we can act on it pretty  
12 quickly. Our standard for the motion of  
13 extension is Rule 3100.5. 3100.5 requires  
14 that we can waive a rule for good cause shown  
15 provided there is no prejudice to the rights  
16 of any parties and it does not otherwise -- is  
17 not otherwise prohibited by law.

18 In this case we are being asked to  
19 waive Section 3130.1. With respect to the  
20 good cause shown, the applicant contends at  
21 page 2 of its Exhibit 42 that, "Despite the  
22 applicant's best efforts there is no financing

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1 for residential project of this type at this  
2 time."

3 Secondly, that, "The applicant has  
4 over the past two years sought financing from  
5 a number of different sources and has been  
6 unable to obtain commitments to allow the  
7 project to proceed."

8 I'm persuaded by those  
9 representations by counsel for applicant that  
10 a good cause case has been made with respect  
11 to their being prejudice to the rights of any  
12 parties, there is no opposition to this motion  
13 that has been filed so I don't think that  
14 there is any showing on the record of  
15 prejudice and it's not otherwise prohibited by  
16 law.

17 I will note that in this case and  
18 in the New Jersey case 17604, which comes  
19 right after this case, both of which are  
20 represented by the same firm, that the show  
21 cause -- I'm sorry, the good cause standard --  
22 the case for good cause made in each of the

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1 pleadings related to the proposed Zoning  
2 Commission order 0901.

3 I guess it was out of an abundance  
4 of caution and using that as a guide. Yet,  
5 the proof that was offered related very  
6 clearly to the lower standard of that 3100.5  
7 allowed so it might be very helpful if this is  
8 being reviewed by counsel to take note that  
9 once the Zoning Commission order comes into  
10 effect, the standard that the BZA has been  
11 using to approve these motions to extend will  
12 change.

13 It will ratchet up to a substantial  
14 evidence standard and very generalized  
15 representation such as there is no financing  
16 for residential project of this type may not  
17 suffice as the proof required under the new  
18 standard. With that I'll open it up to other  
19 board members.

20 COMMISSIONER TURNBULL: Thank you,  
21 Mr. Chair. I guess sort of repeating what we  
22 talked about for the record, I think the state

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1 of the economy is what it is. There is enough  
2 testimony out there in the real world that  
3 will tell us that we are in difficult times  
4 and applicants are having a tough time making  
5 their financial agreements so I think in this  
6 particular case again I think they have shown  
7 good cause and the financial straights of what  
8 we're going through is a good cause argument  
9 and I would recommend for the extension.

10 CHAIRPERSON LOUD: I think I'll  
11 call for the vote unless Mr. Dettman has  
12 anything to add to that. First, let me motion  
13 for approval of this application and I'll  
14 start us off with the motion.

15 I would like to move that the board  
16 approve Application No. 17627 for a two-year  
17 extension order for the effectiveness of the  
18 relief that was granted in the underlying  
19 case.

20 COMMISSIONER TURNBULL: Second.

21 CHAIRPERSON LOUD: Okay. The  
22 motion has been made and seconded. Is there

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1 further deliberation? Hearing none, all those  
2 in favor say aye.

3 ALL: Aye.

4 CHAIRPERSON LOUD: All those  
5 opposed? All those in abstention?

6 Mr. Moy, can you read back the  
7 vote.

8 MR. MOY: Yes, sir. My please.  
9 The staff would record the vote as three to  
10 zero to two. This is on the motion of the  
11 Chairman, Mr. Loud, to approve the request to  
12 extend the order two years. Seconded by Mr.  
13 Turnbull.

14 Also in support of the motion Mr.  
15 Dettman and two other board members not  
16 participating. Again, the final vote is three  
17 to zero to two. Because of the nature of this  
18 application is the board inclined to waive the  
19 records for a summary order?

20 CHAIRPERSON LOUD: Yes, Mr. Moy.

21 MR. MOY: Very good.

22 CHAIRPERSON LOUD: Mr. Moy, do we

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1 need to do anything by way of waiving the  
2 record for summary orders for any of the  
3 previous cases? Okay. All right.

4 MS. MONROE: No, but I think the  
5 first one, the Murillo/Malnati, will be fuller  
6 because there was opposition just so you know.

7 CHAIRPERSON LOUD: Gotcha. Thank  
8 you very much, Ms. Monroe.

9 And is there anything further on  
10 this case?

11 MR. MOY: Not on this case, sir.

12 CHAIRPERSON LOUD: So then, as I  
13 understand, we have two further cases for the  
14 morning.

15 MR. MOY: That's right. Staff's  
16 understanding is the third member for the next  
17 two cases will be here momentarily.

18 CHAIRPERSON LOUD: Okay. So that  
19 would leave us in a posture where we pretty  
20 much can't do anything.

21 MR. MOY: That's correct.

22 CHAIRPERSON LOUD: Why don't we

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1 take a break for about five minutes and then  
2 we can come back out in about five minutes and  
3 we'll resume the morning's calendar.

4 MR. MOY: Very good.

5 (Whereupon, at 10:14 a.m. off the  
6 record until 10:27 a.m.)

7 CHAIRPERSON LOUD: Good morning. I  
8 think we are going to resume the morning  
9 special -- I'm sorry, the morning meeting  
10 calendar for June 2nd. We have been joined by  
11 Mr. Greg Jeffries representing the Zoning  
12 Commission. Good morning, Mr. Jeffries.

13 COMMISSIONER JEFFFRIES: Good  
14 morning.

15 CHAIRPERSON LOUD: Mr. Moy, I think  
16 you were going to call the next case.

17 MR. MOY: Yes, sir. That would be  
18 Application No. 17604. Again, this is a  
19 motion to this application of NJA Associates,  
20 LLC, to extend the validity of the order  
21 pursuant to 3100.5 of the Zoning Regulations.

22 Staff is going to read the original

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1 application that was heard on May 8, 2007.  
2 This application was pursuant to 11 DCMR  
3 3104.1 for a special exception for a waiver of  
4 the rear yard requirements under Subsection  
5 774.2 to allow the construction of an office  
6 building at 1111 New Jersey Avenue, SE. This  
7 is Square 743-N, Lot 78, in the C-3-C  
8 District.

9 On April 24, 2009 the applicant  
10 filed a motion to extend the effectiveness of  
11 BZA Order 17604 which would expire December  
12 13, 2009. That document is identified in your  
13 case folders as Exhibit 38.

14 Mr. Chairman, there are no other  
15 filings to this application. The board is to  
16 act on the merits of this request pursuant to  
17 3100.5 to waive the time limits on board  
18 action under Section 3130. That completes the  
19 staff's briefing, Mr. Chairman.

20 CHAIRPERSON LOUD: Thank you, Mr.  
21 Moy. I think we are ready to deliberate on  
22 this motion for extension. As has been said

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1 in the other cases, the BZA reviews this  
2 request for an extension under our Rule  
3 3100.4. Notwithstanding Zoning Commission  
4 Order 09-01 our rule governs because the  
5 proposed Zoning Commission rule has not taken  
6 effect yet.

7 Under 3100.5 the BZA may waive a  
8 rule for good cause shown provided there is no  
9 prejudice to the rights of any parties and it  
10 is not otherwise prohibited by law. In this  
11 case, as in the earlier cases this morning, we  
12 are being asked to waive the provisions of  
13 Section 3130.1.

14 With respect to good cause shown in  
15 this case, the applicant contends at page 3,  
16 Exhibit 38, and I quote, "Despite the  
17 applicant's best efforts there is no financing  
18 for new office projects of this type at this  
19 time." I think this is an 11-story 164,000  
20 square foot project.

21 "Additionally, the applicant  
22 contends that it has over the past two years

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1 sought financing from a number of different  
2 sources and has been unable to obtain  
3 commitments to allow the project to proceed."

4 I'm persuaded that they have met  
5 the good cause standard given their  
6 representations in Exhibit 38. There is no  
7 opposition to it so there is no record showing  
8 any potential prejudice to rights of any  
9 parties and it is not otherwise prohibited by  
10 law. I would be in favor of supporting this  
11 motion to extend.

12 Board members, do you have any  
13 comments or concerns on that?

14 COMMISSIONER JEFFRIES: No.

15 CHAIRPERSON LOUD: Okay. Hearing  
16 none, then I'll propose a motion and we can  
17 move to a vote. I would move that the BZA  
18 approve Application No. 17604, request for  
19 time extension of BZA order for construction  
20 of an 11-story office building in the C-3-C at  
21 1111 New Jersey Avenue, SE.

22 VICE CHAIR DETTMAN: Second the

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1 motion.

2 CHAIRPERSON LOUD: Thank you, Mr.  
3 Dettman. The motion has been made and  
4 seconded. Further deliberation? Hearing  
5 none, all those in favor say aye.

6 ALL: Aye.

7 CHAIRPERSON LOUD: All those  
8 opposed? All those abstaining?

9 Mr. Moy, will you please call the  
10 vote?

11 MR. MOY: Yes, Mr. Chairman. The  
12 staff would record the vote as three to zero  
13 to two. This is on the motion of the Chair,  
14 Mr. Loud, to approve the request to extend the  
15 order two years. Seconded by the Vice Chair  
16 Mr. Dettman. Also in support of the motion  
17 Mr. Jeffries. The other two board members  
18 were not participating. Again, the vote is  
19 three to zero to two.

20 Because of the nature of the  
21 application request, would the board care to  
22 waive the requirements for a summary order?

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1 CHAIRPERSON LOUD: Yes, sir, Mr.  
2 Moy.

3 MR. MOY: Very good.

4 The next and final case for  
5 decision, Mr. Chairman, is Application No.  
6 17337 which would be 17337-A of N Street  
7 Follies. This is the motion to strike  
8 supplemental materials filed by the applicant  
9 on the remand of this application of N Street  
10 Follies.

11 The staff is going to read the  
12 original application, although knowing that  
13 relief has changed on this application based  
14 on the hearing of April 28, 2009.

15 Pursuant to 11 DCMR 3104.1 and  
16 3103.2 for special exceptions to allow a hotel  
17 under Section 512 for a partial waiver of the  
18 rear yard requirements under Subsection 534.6  
19 and to allow multiple roof structures and roof  
20 structures not meeting the normal setback  
21 requirements of Subsection 530.4 under Section  
22 411 and for variances from the height

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1 requirements under Section 530, the floor area  
2 requirements under Section 531, and the court  
3 requirements under Section 536 to allow the  
4 construction of an addition to an existing  
5 building to be used as a hotel in the DC/SP-1  
6 zone district at premises 1743 through 1755 N  
7 Street, N.W., Square 158, Lot 69, 835, and  
8 836.

9 As the board will recall, on April  
10 28, 2009 the board convened the remand of this  
11 application. After public testimony and  
12 deliberation the board scheduled a date of  
13 June 2 to act on the merits of the motion to  
14 strike the supplemental materials filed by the  
15 applicant.

16 The applicant, ANC-2B, and William  
17 Green, the other opposition party, were  
18 allowed to respond to the motion to strike  
19 which was filed by the party intervenor. The  
20 board issued a deadline for all parties to  
21 file pleadings by May 8, 2009.

22 Finally, another action. The board

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1 on April 28th scheduled a continued hearing on  
2 this application of October 13, 2009.

3 In your case folders, Mr. Chairman,  
4 is a filing from the applicant, the  
5 applicant's response dated May 8, 2009,  
6 identified as Exhibit 77. There are no other  
7 filings. The board is to act on the merits of  
8 the motion to strike and that concludes the  
9 status briefing, Mr. Chairman.

10 CHAIRPERSON LOUD: Thank you, Mr.  
11 Moy. I do believe we are ready and are going  
12 to deliberate on the motion to strike this  
13 morning. Let me back up and just very briefly  
14 give a bit of context, at least as I  
15 understand it, leaving out an abundance of  
16 details I'm certain but at least framing it  
17 for what will follow this morning's  
18 discussion.

19 Essentially, as I understand the  
20 case, and the original case obviously I wasn't  
21 on it, the BZA heard N Street's case and the  
22 Office of Planning's testimony on January 24th

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1 but did not go further in the case because of  
2 the time. That is, the case had proceeded  
3 late into the evening and so it was stopped  
4 for that reason. That was January 24, '06.

5 So it was continued and I think it  
6 was to be heard at a hearing set for February  
7 28th but in the intervening period the  
8 Historic Preservation Review Board adopted a  
9 February 23, '06 staff report of the HPO,  
10 Historic Preservation Office, and they  
11 rejected N Street's concept design for the  
12 project.

13 As a result, the BZA then agreed  
14 with the Tabbort, and I hope I'm pronouncing  
15 that correctly, Corporation that since no  
16 building permit for the hotel project could  
17 ensue without the HPRB that the case was moot  
18 and the BZA dismissed the case at that  
19 juncture. That is, after having only heard  
20 from the applicant and the Office of Planning.

21 I will note what the Court of  
22 Appeals noted in their decision which is that

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1 HPRB never formally considered N Street's  
2 design plan and, as a result, the applicant  
3 never filed design plans with the mayor, nor  
4 with HPRB. Rather, the dismissal was based on  
5 the HPO recommended denial to the HPRB of the  
6 concept design. That is correct, Mr.  
7 Jeffries.

8 Now, as indicated by Mr. Moy, the  
9 dismissal was appealed to the DC Court of  
10 Appeals and on June 30 the DC Court of Appeals  
11 reversed the BZA finding that, and I'm going  
12 to quote them, "The BZA erred as a matter of  
13 law in concluding that the petitioner's  
14 application was moot because petitioner's  
15 design plans were not formally rejected under  
16 the Historic Protection Act and because the  
17 record lacks substantial evidence to support  
18 the BZA's conclusion.

19 This is the Court of Appeals slip  
20 opinion at page 8. The Court of Appeals  
21 reasoned that either the mayor's agent or the  
22 HPRB could have approved the same or modified

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1 plans once a formal application was performed  
2 instead of the concept design review that had  
3 been initiated by industry.

4 The Court of Appeals also rejected  
5 the BZA's position that the plans were "more  
6 bound if not deceased by the HPRB concept  
7 design decision under doctrine of  
8 attenuation." I won't go into all of that.  
9 The point is that the Court of Appeals  
10 rejected the BZA's position on that.

11 As a consequence, the case was  
12 remanded by the Court of Appeals to BZA for  
13 further proceedings not inconsistent with the  
14 DCCA's order. That brings us to the motion to  
15 strike because it's our understanding that the  
16 remand was for us to be able to push the case  
17 forward in any manner that is not inconsistent  
18 with the Court of Appeals order.

19 Before us now then is the  
20 applicant's revised set of plans which are  
21 Exhibit 70 and the Tabbort Corporation's  
22 motion to strike the revised plans as well as

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1 for a remand scheduling order.

2 I have reviewed it. These are my  
3 thoughts and comments. I'll open it up to  
4 board members as well. Upon review of what  
5 has been submitted in the record, and some  
6 discussion with counsel on this end, have  
7 construed the revised set of plans as an  
8 amendment to the original plans in that, No.  
9 1, there are three areas of relief that are  
10 being sought in the revised as opposed to the  
11 original seven under the original plan.

12 No. 2, the current plans that the  
13 applicant has submitted were by the  
14 applicant's own admissions in Exhibit 70  
15 developed through conversations with HPO staff  
16 that occurred in recent weeks.

17 No. 3, that said conversations  
18 between the applicant and the HPO staff  
19 changed the building interior, changed the N  
20 Street facade, changed the court treatment and  
21 resulted in different size and location of the  
22 major penthouse structure.

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1                   Since under our rules plan  
2 amendments require leave for admission and I  
3 do believe that the revised plans constitute  
4 an amendment, I'll note that under Section  
5 3117.D the presiding officer can grant such  
6 leave and so were we to construe these revised  
7 plans as an amendment requiring the first  
8 motion to amend, it would be my position that  
9 can be accomplished under 3117.D.

10                   So to sort of sum up where we are  
11 at this point, I believe that Applicant's  
12 Exhibit 70 should be treated as a motion for  
13 leave to file amended plans. Secondly, the  
14 motion to strike that was submitted by Tabbort  
15 should be construed as an opposition to the  
16 motion to leave that the revised plans  
17 represent.

18                   The standard for a motion to amend  
19 is that there be no prejudice to any party  
20 from the amended pleadings. In this case I am  
21 of the opinion that with some provisos, some  
22 conditions, that the revised set of plans do

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1 not present any prejudice to the Tabbort  
2 Corporation and so I would be of a mindset to  
3 first grant the motion for leave to file the  
4 amended plans, deny the motion to  
5 strike/opposition to those amended plans.

6 The big caveat is that the Exhibit  
7 70 submission, with the revised plans, not  
8 necessarily be the plans that this applicant  
9 is allowed to submit but rather that we  
10 establish a date certain.

11 On that date all final plans that  
12 this applicant would have for this project be  
13 submitted to the BZA, be shared with the  
14 Tabbort Corporation and other parties to this  
15 case and that any relevant statements, factual  
16 representations, witnesses, evidence, expert  
17 reports, etc., be filed on or right around  
18 that same date and beyond that date there  
19 would be no additional filings of plans and  
20 that we would then ready this case for posture  
21 to be heard. I think we have all agreed, at  
22 least informally, on October 6 as the hearing

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1 date.

2 To recap, I think where I am on it  
3 is that we should treat the motion to strike  
4 as an opposition to applicant's -- what we  
5 will treat as the applicant's motion for leave  
6 to amend and grant the motion for leave to  
7 amend, allow revised plans but be really clear  
8 that the date by which those have to be  
9 submitted is going to be well in advance of  
10 October 6 and we can talk about that date if  
11 the parties are here.

12 We can talk about that date so that  
13 there is a clear demarcation point and  
14 everybody is given the opportunity to move  
15 this case forward. My rationale for that  
16 looking at the record is that it doesn't make  
17 any sense, to me anyway, to require this  
18 applicant to expend funds prosecuting a set of  
19 plans, advancing them through BZA that it no  
20 longer supports. It has a different  
21 architect. There have been conversations with  
22 HPO staff.

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1           To require them to defend or push  
2 forward those plans for the sake of defending  
3 or pushing forward those plans just seems to  
4 be a waste of expense, a waste of effort and  
5 would almost effectively end up in the same  
6 kind of mootness for the applicant that brings  
7 us to this juncture in the first place. That  
8 is why I am in support of allowing some  
9 revised plans.

10           On the other hand, the round robin  
11 about when these plans end so that the  
12 opponent will know what case is before it,  
13 will know how to cross examine witnesses, will  
14 know which record it's responding to, has to  
15 come to an end.

16           I think we have agreed October 6 is  
17 the benchmark date that we are going to work  
18 from so we can work backward from there in  
19 terms of bringing finality to these issues.  
20 Then do what the Court of Appeals has directed  
21 us to do which is to organize further  
22 proceedings.

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1                   With that I'll open it up to board  
2 members for thoughts.

3                   COMMISSIONER JEFFFRIES:     So, Mr.  
4 Chair, on this date certain where the  
5 applicant would submit drawings, those  
6 drawings could be considered what type of  
7 drawings, amended final drawings? How would  
8 you term those drawings?

9                   CHAIRPERSON LOUD:     Definitely final  
10 drawings. I think they would be considered  
11 amended as well because I'm sure this Exhibit  
12 70 that they have submitted is already in  
13 effect amending what had been their original  
14 plans. But for me the emphasis would be on it  
15 being absolutely final.

16                  COMMISSIONER JEFFFRIES:     And the  
17 deal is in terms of what you stated is that  
18 you are not accepting the argument from  
19 Tabbort that these are supplemental drawings  
20 but they are really amended. Is that sort of  
21 the differentiation?

22                  CHAIRPERSON LOUD:     Yeah, I think

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1 it's a good point. I try perhaps not as  
2 successfully as I could have to outline some  
3 of the reasons why I think they are not  
4 supplemental in terms of there having been a  
5 number of areas of relief that have been taken  
6 off the table all together and it may result  
7 in more agreement.

8 But also a different architect,  
9 different kind of cross examination. That  
10 architect is presumably going to have to  
11 present these plans and be subject to cross.  
12 Then the applicant's representation that,  
13 "Hey, these still may change."

14 COMMISSIONER JEFFFRIES: Right.

15 CHAIRPERSON LOUD: It's hard to  
16 call them supplemental if the applicant is not  
17 willing to be boxed in to a really finite set  
18 of plans.

19 COMMISSIONER JEFFFRIES: Okay.  
20 Thank you.

21 MR. MOY: Mr. Chairman, if I may  
22 just for the staff's edification and

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1 understanding, we are talking about --

2 CHAIRPERSON LOUD: Yes, sir.

3 MR. MOY: -- a full set of plans.  
4 In other words, not change the drawings from  
5 the earlier set of drawings in and of its own.

6 CHAIRPERSON LOUD: That is a good  
7 question. Let me hear from other board  
8 members regarding your thoughts on that and  
9 I'll share mine.

10 VICE CHAIR DETTMAN: Mr. Chairman,  
11 I think your approach is the right one to  
12 take. With respect to Mr. Moy's question, I  
13 think a full set of drawings would be helpful  
14 for the board so that they don't have to look  
15 at the entire record for this case and try to  
16 pick and choose which pieces of the plans that  
17 we are looking at. One set of plans at the  
18 final date I think will allow us to bring this  
19 case to resolution in a very, very finite and  
20 clean manner.

21 CHAIRPERSON LOUD: Thank you. I'm  
22 in agreement with Mr. Dettman. I think given

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1 the long history of the case it's important,  
2 especially if we are going to stick to this  
3 October 6th date, to have a really  
4 comprehensive record before us that we can  
5 review and so the short answer is yes, Mr.  
6 Moy.

7 MR. MOY: Thank you.

8 CHAIRPERSON LOUD: Now, Mr. Moy,  
9 you are going to have to -- and/or Ms. Monroe  
10 -- let me know if we need to vote on any of  
11 what I have just said. Okay. Since we don't  
12 need to vote on any of what I have just  
13 stated, then why don't we call the parties up  
14 and see if we can figure out some of these  
15 dates. I take it that the parties are here.  
16 For the transcript why don't you identify  
17 yourselves for the record and whom you  
18 represent.

19 MS. BAILEY: Mr. Chairman, I'm  
20 sorry. I apologize for interrupting.

21 CHAIRPERSON LOUD: It's quite all  
22 right.

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1 MS. BAILEY: Initially the board  
2 had decided that the continuation date would  
3 be October 13 but I understand that date has  
4 been changed. It's now October 6th. Is that  
5 correct?

6 CHAIRPERSON LOUD: We are going to  
7 move with the assumption that we are probably  
8 going to end up October 6th. The reason being  
9 the October 13th Tuesday aligned with the  
10 three-day weekend and so we are going to try  
11 to see if we could just make it a four-day  
12 weekend for everyone. Or least, if not a  
13 four-day weekend there would be no BZA.

14 MS. BAILEY: Not a problem, sir.  
15 Just wanted to make sure that was on the  
16 record because we had originally said the  
17 13th.

18 CHAIRPERSON LOUD: Thank your, Ms.  
19 Bailey. We'll make that correction going  
20 forward. I think one of the questions I'll  
21 ask them is they can do the October 6th but  
22 it's my understanding there has been some

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1 preliminary vetting and that date might work.

2 Thank you, Ms. Bailey.

3 CHAIRPERSON LOUD: Good morning,  
4 again.

5 MS. BRAY: Good morning. Thank  
6 you, Mr. Chairman. Kinley Bray on behalf of  
7 the Tabbort Inn.

8 MR. KEYES: Good morning, Mr.  
9 Chairman. George Keyes on behalf of N Street  
10 Follies, the applicant.

11 CHAIRPERSON LOUD: Good morning,  
12 Ms. Bray. Good morning, Mr. Keyes. We  
13 welcome you to these proceedings. The reason  
14 we called you up is essentially so that we can  
15 get clarity on some dates to move forward.

16 I think that we have resolved for  
17 ourselves the question of the pleadings that  
18 have been before us and I'm really not calling  
19 you up for that purpose but if we can move  
20 forward in terms of the finality of plans, the  
21 date by which that can be accomplished, and  
22 then working with that date to make sure that

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1 the Office of Planning, the ANC, the Tabbort  
2 Corporation, all have dates to reply to that.

3 Let's begin then with the October  
4 6th hearing date. Is that a date that we can  
5 all agree on for the case?

6 MR. MOY: Yes, Mr. Chairman.

7 CHAIRPERSON LOUD: All right. We  
8 will confirm the hearing date for October 6,  
9 2009. Secondly, the deadline date for the  
10 applicant to submit what Mr. Greg Jeffries  
11 called the final amended plans and it is my  
12 personal hope, colleagues on the board, that  
13 the applicant will have this finalized with no  
14 further revisions sometime in July.

15 The reason I'm hopeful that may  
16 happen is because the ANC typically takes off  
17 the entire month of August and it will be  
18 great to be able to put a final set of plans  
19 in their hands before they break so they can  
20 review it for the entire month.

21 Then they come back and they meet  
22 around September 15 I think, Mr. Moy has done

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1 some homework to find out so that when we meet  
2 again October 6 everybody will have had every  
3 opportunity to be ready. It doesn't guarantee  
4 that they will be ready but no one will be in  
5 a position to say that they just didn't have  
6 enough time, they had to turn around a report  
7 too close to a meeting that they had to hold,  
8 so on and so forth.

9 With that I'll turn to you, Mr.  
10 Keyes, to get your thoughts on that and then  
11 open it up to board members.

12 MR. KEYES: Mr. Chairman, my only  
13 hesitation in that is the possibility and the  
14 likelihood that we are going to go to HPRB and  
15 ask for consideration of this in the interim  
16 period.

17 As we explained in our response to  
18 the motion to strike, the changes that we've  
19 made are really diminimus changes. These  
20 changes really are cosmetic. They don't  
21 really affect the essence of what the BZA is  
22 looking at, the parameters the BZA focuses on.

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1 By doing that we strip the case down. We try  
2 to make it simpler and clearer and, in fact,  
3 make it easier for the party opponent to hone  
4 in on issues that are important to it.

5 My concern is by establishing a  
6 July date you take out of our hands the  
7 ability to go before the Historic Preservation  
8 and make an adjustment in response to that.  
9 If your concern is getting the plans in the  
10 hands of the ANC and the applicant and the  
11 opponent at a time when they could act, I  
12 would encourage right after Labor Day, the  
13 Tuesday after Labor Day. That would be at  
14 least a month ahead of the hearing.

15 CHAIRPERSON LOUD: Mr. Keyes, my  
16 strong feeling -- I'll open it up to other  
17 board members -- is that you guys have got to  
18 do better than that. This was raised --

19 MR. KEYES: The Historic  
20 Preservation Board doesn't meet in August  
21 either so perhaps --

22 CHAIRPERSON LOUD: You have

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1 represented to us in a number of pleadings  
2 that you are almost on the five-yard line,  
3 that you have spoken to HPO staff and that as  
4 a result of that a number of changes have  
5 already been made and you really felt you were  
6 right there in terms of having a final set of  
7 plans.

8 MR. KEYES: Mr. Chairman, let me  
9 give you an example. One of the major issues  
10 for the Historic Preservation concerns the  
11 amount of structural demolition of the  
12 interior and changing the historic fabric of  
13 the interior. That literally comes down to  
14 trying to decide which interior walls preserve  
15 the integrity of the historic structures.

16 That could change. I mean, we  
17 could be talking about an interior wall  
18 separating one room from another as an issue  
19 for historic preservation. How can that  
20 possibly have any bearing on the BZA case?

21 It doesn't affect the FAR. It  
22 doesn't affect the footprint. It doesn't

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1 affect any of the parameters that the board  
2 considers in looking at a case but it's a  
3 historic element that Historic wants to deal  
4 with.

5 If Historic says to us we can go  
6 with this application, if you move this wall  
7 two feet and leave this wall in place, change  
8 this room to, you know, a reception area and  
9 not a luggage room, we would like to have the  
10 ability to respond to that and I don't see how  
11 it prejudices either the board in its  
12 deliberation or the opponent. Since Historic  
13 doesn't meet in August, maybe the end of July  
14 as a date by which we submit a full set.

15 MS. BRAY: If I could respond.

16 VICE CHAIR DETTMAN: Well, I was  
17 just going to say I know even in the recent  
18 past the board has reviewed a case, voted on  
19 it, and put in the order that subject to HPRB  
20 review, you know, if HPRB changes do not  
21 result in any new or increased relief, then we  
22 just go forward. The changes that you are

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1 describing sound like it's not going to impact  
2 the relief that the board would be reviewing.

3 By the sounds of it we could still  
4 kind of look at July as a final date for the  
5 plans, go forward in October and hope that  
6 between then if you do go to HPRB the changes,  
7 interior or what have you, that occur to the  
8 plans don't raise any new form of relief and  
9 we just go forward with the plans that were  
10 submitted in July.

11 Again, we could put in the order  
12 like we did most recently with the old Whitman  
13 Walker project on 14th Street we put in there  
14 as a caveat in the order subject to any  
15 changes that the HPRB might have.

16 CHAIRPERSON LOUD: Thank you, Mr.  
17 Dettman.

18 Mr. Jeffries, I don't know if you  
19 were going to make a point or not. Okay.  
20 Then I'll go to counsel for the party  
21 appointed but I just wanted to note before we  
22 go there we may not have to go there. Just in

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1 the sense that I think I heard Mr. Keyes say  
2 he thought he could get final plans submitted  
3 to BZA by the end of July. Okay. So with that  
4 I'll turn to you.

5 MS. BRAY: I would just like to  
6 note for the record that the end of July would  
7 be suitable. I understand, Mr. Chairman, that  
8 you picked up the point that I was going to  
9 make which is this applicant has represented  
10 numerous times and numerous occasions before  
11 this board that they intended to go to HPRB  
12 and, in fact, they have not.

13 To the extent that HPRB or HPO  
14 discussions do change the relief that is  
15 required, our suggestion would be to push back  
16 the October 13th or the October 6th date well  
17 in advance of the date by which plans are to  
18 be submitted.

19 That is, the applicant should seek  
20 an extension in June of July noting that they  
21 are not going to be able to have plans by the  
22 end of July so that we do not prepare a case

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1 based on plans that are going to change again.

2 I understand that you are aware of that  
3 concern and you want to end the round robin,  
4 as you put it.

5 Our concern is simply we don't have  
6 any issue with anything that doesn't change  
7 the relief needed. Given that flexibility in  
8 the board's order such as the board has done  
9 in the Whitman Walker case is completely  
10 acceptable to the Tabbort.

11 It's the material changes, things  
12 like the core and location of walls that can  
13 push massing about on a project and drive  
14 relief if necessary that we are really  
15 concerned about that.

16 CHAIRPERSON LOUD: Thank you. Let  
17 us do this. Let us -- let me ask you, Mr.  
18 Keyes, is Friday, July 24, will that work for  
19 applicant in terms of submitting finalized  
20 plans?

21 MR. KEYES: What's wrong with  
22 Friday, July 31st?

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1 CHAIRPERSON LOUD: There is nothing  
2 wrong with it. As long as it doesn't turn  
3 into Friday August 8th there is nothing wrong  
4 with Friday July 31st.

5 MR. KEYES: Mr. Chairman, we would  
6 be happy to take the end of July as a date for  
7 submission.

8 CHAIRPERSON LOUD: All right. With  
9 respect to that Friday, July 31 date, what  
10 should be communicated, I think, is that is  
11 the final -- that is the date for final plans  
12 and I believe our position -- I'll open it up  
13 to others, is that no plans will be accepted  
14 after that date.

15 Obviously something happens that is  
16 completely beyond the control and  
17 foreseeability. That's different. In the  
18 main that is the drop-dead date and once those  
19 plans are submitted, those are the plans that  
20 we are all working with with respect to the  
21 remand in case it has to go forward.

22 In addition to the plans being

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1 submitted on that Friday, I would like to also  
2 request the applicant, or ask of the applicant  
3 if any of the statements or information or  
4 expert reports, any of the sort of evidentiary  
5 matter that would normally be submitted  
6 relative to the hearing can also be submitted  
7 that same Friday, July 31st.

8 MR. KEYES: That was my intent,  
9 Mr. Chairman.

10 CHAIRPERSON LOUD: Excellent. So  
11 that is all of the Section 3118 type stuff.

12 Mr. Dettman, did you want to weight  
13 in?

14 VICE CHAIR DETTMAN: Just a couple  
15 questions, Mr. Chairman. One is that July  
16 31st is the plans do change are we going to be  
17 looking at those plans determining what the  
18 relief is going to be reviewed and then are we  
19 actually going to be sending out notice? Are  
20 we going to be notifying the people within 200  
21 feet of the project area on the relief that is  
22 going to be looked at in October?

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1 CHAIRPERSON LOUD: Yes. It's my  
2 understanding and my hope and there have been  
3 some pleadings back and forth around that  
4 issue is that notice will go out by OZ of the  
5 new date and it will go out to all persons  
6 within the 200 foot radii based on the current  
7 records.

8 VICE CHAIR DETTMAN: Okay.  
9 Secondly, if additional changes to the plans  
10 do occur, compared to what is shown in Exhibit  
11 70, are we going to need the applicant to  
12 formally amend the application again?

13 CHAIRPERSON LOUD: My thought on  
14 that is that we wouldn't need a formal  
15 amendment again because what we did on the  
16 first half of this public meeting is say to  
17 the applicant, "We are construing your Exhibit  
18 70 as essentially a motion to amend and we are  
19 going to grant the motion to amend but we are  
20 going to leave open what the final plans look  
21 like until July 31st so requiring another  
22 motion to amend I think will create

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1 duplication of effort and expense for all  
2 concerned. That's my thought on it. Okay.

3 MR. KEYES: Mr. Chairman, I'm a  
4 little puzzled by the notion that the board  
5 has of what an amendment constitutes. It  
6 seems to me if no relief is requested that  
7 wasn't advertised and, in fact, in this case  
8 we are eliminating areas of relief, it doesn't  
9 constitute an amendment and doesn't require  
10 notice to any party because the application  
11 hasn't changed. I mean, everyone is on notice  
12 that the case has been continued to a date  
13 certain.

14 All the parties who appeared at the  
15 April 28th hearing are aware of that date and  
16 we'll certainly provide copies of the final  
17 plans to all party opponents and we'll be  
18 coordinating with the ANC. I'm not sure if  
19 another notice to the entire neighborhood is  
20 what is called for.

21 CHAIRPERSON LOUD: My take on that  
22 is that the plans will change from the

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1 original notice that went out to the 200 foot  
2 radii neighbors. It's already changed  
3 somewhat. The April 14 submission was a  
4 change from those plans. My understanding is  
5 that it may change again between now and July  
6 31st.

7 Your representation is that it will  
8 be very, very minimal but, again, on the  
9 record we know that it will change. Since  
10 there have been a number of A changes and  
11 potentially new members in the surrounding  
12 community, that it would be prudent to send  
13 that notice out.

14 I don't think it will create any  
15 prejudice for you if they show up at the  
16 October 6th hearing. It doesn't guarantee  
17 that they will be granted. If they don't have  
18 any interest that is protected by one of our  
19 regs, then they just show up and that is part  
20 of the business before the BZA but I don't see  
21 how you are prejudiced by the notices going  
22 out again for change of plans.

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1 I think you have already provided  
2 the addresses. I don't know if you have  
3 already provided the label but you have  
4 already provided the addresses for the new  
5 residence. Is that correct?

6 MR. KEYES: We did in connection  
7 with that last set of notices that went out  
8 for the new hearing date. What you say raises  
9 concerns that new parties could be admitted to  
10 this case. I think that is to the prejudice  
11 of the applicant. This case has been  
12 notorious, dare I say, for many years. The  
13 community is well represented by the party  
14 opponents, the ANC.

15 I'm not sure that creating an  
16 opportunity for additional parties is going to  
17 do anything but complicate this case. Since  
18 the change in the application really is to  
19 shrink the profile of the building, I'm not  
20 sure that the community is adversely impacted  
21 by the amendments.

22 CHAIRPERSON LOUD: Well, again,

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1 I'll ask my colleagues here to weigh in but I  
2 think that one of the -- part of what we are  
3 trying to get at right now is to make sure we  
4 have these plans in a posture where the ANC  
5 can take these plans and educate the community  
6 about these plans over the summer and be  
7 really prepared by that September 15 ANC  
8 meeting.

9 My sort of off-the-cuff take is  
10 that the relief being requested has been  
11 reduced significantly and there may be much  
12 more support in the community for it than  
13 initially but to suggest that if the plans  
14 change, and we don't know right now because we  
15 don't have the plans, that the community  
16 should not receive any kind of notice of it I  
17 think would fly in the face of our rules.

18 VICE CHAIR DETTMAN: Mr. Chairman,  
19 I do understand Mr. Keyes' point. My take on  
20 it, and I don't know if the board can do this.

21 Maybe OAG can help us but if no new  
22 form of relief is triggered by the changes in

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1 the plans, I don't remember what the original  
2 relief was, but if nothing new gets triggered,  
3 I would think that the board has already gone  
4 through the party status process in the  
5 beginning of the hearing and we have one party  
6 to the case.

7 If the changes trigger a new form  
8 of relief that could somehow uniquely affect  
9 someone else, I think the board could  
10 entertain applications for party status.

11 If Mr. Keyes' statement about that  
12 we are just reducing the amount of relief and  
13 no new relief is going to be sought, I'm not  
14 sure that the board should entertain any new  
15 applications for party status that result as  
16 we notify the surrounding community.

17 CHAIRPERSON LOUD: But you are for  
18 notifying, still setting up a notification.

19 VICE CHAIR DETTMAN: I'm for  
20 setting up a notification as well as allowing  
21 persons to testify in support or against.

22 CHAIRPERSON LOUD: Okay.

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1                   Mr. Jeffries, did you want to weigh  
2 in at all?

3                   COMMISSIONER JEFFFFRIES: I actually  
4 sort of understand your request to have final  
5 amended drawings for certain dates so that  
6 everyone could take one last look and  
7 procedurally just have everything in place.

8                   I would concur with Mr. Dettman  
9 that if there really are no changes to the  
10 drawings that really pertain to our view of  
11 the application, the relief that is being  
12 sought, I don't really see the need to really  
13 open that up to new parties and so forth so I  
14 would agree. I think it's good still that  
15 there will be notice given and that people can  
16 testify and so forth.

17                   MS. MONROE: I'm not sure you can  
18 decide. You can't talk about parties yet. We  
19 give notice and then at the time you decide.  
20 I think it's kind of discretionary with the  
21 board.

22                   I mean, I see both sides but you

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1 are on remand free to do whatever within  
2 reason what is necessary to move the case  
3 forward. I think you can send the notice out  
4 and then maybe nobody will even come forward.

5 You don't know yet. I don't think you can  
6 decide now whether or not you are going to let  
7 parties in --

8 CHAIRPERSON LOUD: I'm kind of with  
9 Ms. Monroe and I'm with my colleagues. I  
10 think the notice should go out when the final  
11 plans come in but I don't see how we can stop  
12 anybody who gets that notice from filing  
13 something that says they want to be a party.  
14 We can't stop them from showing up at the  
15 October 6th hearing.

16 I think I've said on the record  
17 earlier that once that happens it doesn't  
18 guarantee anything for that person that would  
19 submit that from my vantage point but it's  
20 something that seems like we would have to  
21 take up at the October 6th hearing.

22 The narrow issue that I was talking

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1 about was just sending out the notices with  
2 respect to the July 31 submission. I think we  
3 all want to keep this case within the  
4 boundaries that have been set already by the  
5 proceedings today and by the court of appeals  
6 order. There is no interest, at least, on my  
7 part personally in making this sort of a wide  
8 open free for all.

9 MR. KEYES: Mr. Chairman, will the  
10 case be advertised as stated in terms of the  
11 original relief or will it be advertised in  
12 terms of the relief which we believe will be  
13 requested at the hearing which is only for a  
14 special exception under Section 512 for a  
15 hotel?

16 CHAIRPERSON LOUD: Go ahead. I'm  
17 sorry. Go ahead, Ms. Monroe.

18 MS. MONROE: I think it should be  
19 advertised for whatever the new plans show.  
20 Whatever you ask for then is what you get  
21 advertised. As far as I'm concerned, and I  
22 think the board agrees, the old plans are

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1 essentially really moot now.

2 MS. BRAY: If I may, Mr. Chairman,  
3 the Tabbort, and I believe I speak on behalf  
4 of the ANC, at least in this respect, I think  
5 would appreciate seeing with the amended  
6 drawings an amended description of the relief  
7 necessary. If, indeed, it is just a special  
8 exception for hotel, that's fine.

9 If there are other things we would  
10 like to see them enumerated by the applicant.

11 I might suggest having represented applicants  
12 before this board myself that the applicant  
13 may want to submit a revised self-  
14 certification since this was a self-certified  
15 application.

16 CHAIRPERSON LOUD: First, with  
17 respect to the advertising, I agree with Ms.  
18 Monroe that the advertising should reflect the  
19 plans and the exact relief being requested.  
20 With respect to resubmitting a self-certified  
21 affidavit and the like, I'll let you respond,  
22 Mr. Keyes.

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1 MR. KEYES: I don't think we have  
2 any difficulty doing that. I don't see --  
3 well, we won't have a problem with it.

4 CHAIRPERSON LOUD: I think her  
5 other point was having an amended description  
6 of the relief. It seems to me that the  
7 advertisement will cover that. Wouldn't it?

8 MS. BRAY: Right. The  
9 advertisement would cover that. Typically I  
10 think the advertisement comes right off of an  
11 application for relief and that description is  
12 provided by the applicant on that form.

13 CHAIRPERSON LOUD: Okay. I believe  
14 we are able to move forward now with some more  
15 dates. Okay. We have set Friday, July 31 as  
16 the deadline for the final plans as well as  
17 the Section 3118 type sort of prehearing  
18 statements and the like.

19 Then we were going to give the ANC  
20 until Monday, September 28th, to file it's  
21 reply to the plans with the understanding that  
22 they would meet around September 15 so that

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1 would give them a good turnaround to respond  
2 to it. I believe we were also going to give  
3 Tabbort until the same time, September 28th,  
4 as well as the Office of Planning.

5 We have discussed the notice going  
6 out on July 31st by the Office of Zoning. Is  
7 there anything that we are leaving out? Mr.  
8 Dettman mentioned DDOT. I think we can also  
9 include them under our regs.

10 So then to recap, we are going to  
11 set the hearing for October 6. The  
12 applicant's deadline to submit the revised  
13 plans, the absolute final revision, is July  
14 31st along with any of the supporting  
15 evidentiary statements and reports and expert  
16 lists, etc.

17 The ANC and the party opponents  
18 will be given, as well as OP and DDOT, will be  
19 given until September 28th to reply to the  
20 final plans. We will all see each other again  
21 on October 6th for the hearing.

22 MS. BAILEY: Mr. Chairman,

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1 originally there were two parties in  
2 opposition to this application, the Tabbort  
3 Corporation and the William A. Green so we  
4 have only heard from the Tabbort Corporation.

5 There is a question mark by whether Mr. Green  
6 is still a party opponent of this project even  
7 though we haven't heard from him.

8 CHAIRPERSON LOUD: Thank you, Ms.  
9 Bailey. I did see that in the record and it's  
10 my understanding that they were granted party  
11 status and we never heard from them again. I  
12 don't know if that representation is accurate.

13 I think what we'll do is these  
14 dates that are being given to the party  
15 opponents would apply to that party opponent  
16 as well and the notice would go out to  
17 whatever last address that they gave us and  
18 then they are free to reply or continue what I  
19 think has been characterized as a pattern of  
20 sort of removing themselves from the  
21 proceedings. Thank you though.

22 MS. BRAY: Mr. Chairman.

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1 CHAIRPERSON LOUD: Yes.

2 MS. BRAY: If I may, the Cyan  
3 Service, Inc. is the organization Mr. Green  
4 was representing. He was not admitted as an  
5 individual party. I don't think there is a  
6 history of him removing himself from the  
7 proceedings. Mr. Green, I believe, is no  
8 longer employed by Cyan Service, Inc.

9 I do not know whether Cyan Service  
10 intends to participate at this stage but Cyan  
11 Service was similarly situated with Tabbort in  
12 the original proceeding and we just didn't get  
13 to the party opponent cases so they were very  
14 active in the case back in 2006.

15 CHAIRPERSON LOUD: Let me just  
16 clarify. So Cyan Systems is the party  
17 opponent?

18 MS. BRAY: Cyan Service, Inc.

19 CHAIRPERSON LOUD: Cyan Service.  
20 Mr. Green was their representative?

21 MS. BRAY: That's right.

22 CHAIRPERSON LOUD: Who was he?

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1 What was his relation to Cyan Service?

2 MS. BRAY: I believe he was an  
3 officer.

4 CHAIRPERSON LOUD: Okay.

5 MR. KEYES: That's my understand,  
6 Mr. Chairman. When I was informed that Mr.  
7 Green was no longer there, we simply served  
8 Cyan Services, Inc. with no name not knowing  
9 who their representative might be.

10 CHAIRPERSON LOUD: Do they have a  
11 registered agent?

12 MR. KEYES: I did not check the  
13 city's incorporation records.

14 CHAIRPERSON LOUD: It might be  
15 useful, Mr. Keyes, I don't know, and just  
16 serve the registered agent for service or  
17 process. We nonetheless for our purposes at  
18 BZA we will make sure that we send the notices  
19 that we are sending to all of the parties to  
20 Cyan Services so that they have the same  
21 opportunity.

22 MR. MOY: Mr. Chairman, I just want

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1 to add to the discussion. Everything you said  
2 is accurate but I just want to also add that  
3 in the previous order it also states that Mr.  
4 Green, who is or was Director of Operations  
5 for Cyan Services was granted party status to  
6 represent his company and other companies in  
7 the area which include Johns Hopkins  
8 University and Arts Ladies, United Auto  
9 Workers, and Middle East Institute for the  
10 record for what that's worth.

11 CHAIRPERSON LOUD: Thank you so  
12 much for opening up that can of worms, Mr.  
13 Moy. Practically speaking what does that  
14 mean? Somebody has to get notice on behalf of  
15 all of those entities and we should --

16 MS. MONROE: I think servicing Cyan  
17 Service is it. I mean, --

18 CHAIRPERSON LOUD: Okay.

19 MS. MONROE: I also have a feeling  
20 that probably all those listed individuals or  
21 companies are within 200 feet or have some  
22 interest in the 200 feet so they will be

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1 notified anyway.

2 CHAIRPERSON LOUD: Okay.

3 MS. MONROE: That's my take on it.

4 CHAIRPERSON LOUD: Let's proceed  
5 accordingly to make sure that Cyan Services  
6 get notice.

7 MR. KEYES: Mr. Chairman, genuine  
8 question. Are we proposing a morning session  
9 on the 6th and whether or not there is another  
10 case on -- I mean, how much time will we be  
11 allotted for this?

12 CHAIRPERSON LOUD: Very good  
13 question.

14 MR. MOY: If I could, Mr. Chairman.  
15 We have it scheduled for 1:00 in the  
16 afternoon.

17 CHAIRPERSON LOUD: Do we have  
18 anything after that case?

19 MR. MOY: Yes, we do, Mr. Chairman.

20 CHAIRPERSON LOUD: Okay. So we  
21 have two cases for the afternoon.

22 MR. MOY: That's all. We won't

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1 another case for the afternoon.

2 CHAIRPERSON LOUD: All right. I'm  
3 just wondering. Sometimes we are able to  
4 finish up these decisions in the morning  
5 really quickly and would it be useful to  
6 schedule them before the 12:00 noon break  
7 depending on what else you have.

8 MR. MOY: Right now, Mr. Chairman,  
9 you are absolutely correct. It's a public  
10 meeting day. Conceivably the board is in  
11 control of what they schedule for that morning  
12 so if you want to as an option schedule this  
13 for the morning and then run it through the  
14 afternoon, that might give the board more  
15 flexibility in handling this application.

16 CHAIRPERSON LOUD: So how many  
17 decisions do we have? We don't have any yet?

18 MR. MOY: Not now.

19 CHAIRPERSON LOUD: I think if we  
20 set it around maybe 10:30, 11:00. We are  
21 usually through by 10:30. Thank you, Ms.  
22 Bailey. Around 10:00, 11:00 we could get it

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1 started before the lunch break, break for  
2 lunch, and then keep it going in the  
3 afternoon.

4 MR. MOY: That can work.

5 CHAIRPERSON LOUD: Okay. Let's do  
6 that. Okay. I believe then we all have our  
7 marching orders in the sense of the next steps  
8 in the case. Unless there is anything  
9 specific, I think we are through for the  
10 morning calendar.

11 MR. KEYES: Thank you, Mr.  
12 Chairman.

13 CHAIRPERSON LOUD: Thank you both.  
14 Appreciate your time and your patience this  
15 morning.

16 Mr. Moy, do we have anything  
17 remaining for this morning's calendar?

18 MR. MOY: No, sir. That completes  
19 the special public meeting.

20 CHAIRPERSON LOUD: Thank you. I  
21 wanted to say one thing for the record before  
22 they cut off the tape and that is I wanted to

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1 compliment the Office of Zoning, Mr. Nero, Mr.  
2 Moy, Ms. Bailey, and their whole team for one  
3 of the extension cases this morning.

4 I forget which one but it was a  
5 case that expired June 2nd of 2009 and through  
6 their genius they made sure to schedule it for  
7 June 2, 2009 so that the whole issue of  
8 tolling never came up.

9 I don't think it was a coincidence,  
10 a blind coincidence. They are borderline  
11 geniuses and I just wanted to acknowledge Mr.  
12 Nero, Mr. Moy and their staff. It was very  
13 subtle but it was absolute genius to do it on  
14 June 2nd.

15 MR. MOY: Mr. Chairman --

16 CHAIRPERSON LOUD: Thank you for  
17 all of your effort.

18 MR. MOY: The staff appreciates the  
19 gratitude of the board but I would have to say  
20 it was probably the luck of the draw.

21 CHAIRPERSON LOUD: Thank you for  
22 the effort of your team. It makes a big

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1 difference.

2 This meeting is adjourned.

3 (Whereupon, at 11:24 a.m. the

4 public meeting was adjourned.)

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