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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning
Board of Zoning Adjustment

PUBLIC MEETING AND HEARINGS OF THE BOARD OF ZONING
ADJUSTMENT

10:02 a.m. to 5:55 p.m.

Tuesday, February 9, 2016

441 4th Street, N.W.

Jerrily R. Kress Memorial Room

Second Floor Hearing Room, Suite 220 South

Washington, D.C. 20001

1 Board Members:

2 MARNIQUE Y. HEATH, Chairperson

3 FREDERICK L. HILL, Vice-Chairperson

4 JEFFREY L. HINKLE, Board Member

5 ROBERT MILLER, Zoning Commission

6

7 Office of Planning:

8 STEPHEN GYOR

9 MAXINE BROWN-ROBERTS

10 STEVE COCHRAN

11 STEPHEN MORDFIN

12

13 Also Present:

14 CLIFFORD W. MOY, Secretary to the Board

15 MARY NAGELHOUT, ESQ.,

16 Office of Attorney General

17 Other:

18 TANIA JACKSON

19 CHRISTOPHER COLLINS, ESQ.

20 JERRY ZAYETS

21 KENDRA CHATBURN

22 STEVE ETMINANI

23 PAUL TUMMONDS

24 DAN VanPELT

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P R O C E E D I N G S

1
2 VICE CHAIRPERSON HILL: Let's see. So the
3 hearing will please come to order. Good morning,
4 ladies and gentlemen. We are located in the Jerrily
5 R. Kress Memorial Hearing room at 441 4th Street
6 Northwest. Today's date is February 9th, 2016 and
7 we're here for the public meeting and hearings of the
8 Board of Zoning Adjustment of the District of
9 Columbia.

10 My name is Fred Hill, Vice Chair person.
11 Joining me today is Mr. Jeffrey Hinkle, Board Member,
12 and Mr. Robert Miller, Member of the Zoning
13 Commission sitting in as a member of the board today.

14 Please be advised that this proceeding is
15 being recorded by a court reporter and is also
16 webcast live. Accordingly, we must ask you to
17 refrain from any disruptive noises or actions in the
18 hearing room. The Board's hearing procedures and how
19 we will process applications can be found on the
20 table by the back door. All individuals wishing to
21 testify today will need to do two things.

22 One, prior to testifying each person who
23 wants to address the Board must complete two witness
24 cards per person and give those cards prior to
25 testifying, to the court reporter who is seated to my

1 right.

2 I need you now, if you're going to be
3 testifying, to stand and take the oath. This will be
4 administered by Mr. Moy, secretary to the Board.

5 MR. MOY: Good morning.

6 [Oath administered to participants.]

7 MR. MOY: Ladies and gentlemen, you may
8 consider yourselves under oath.

9 VICE CHAIRPERSON HILL: All right, Mr. Moy,
10 do we have any announcements or preliminary issues?

11 MR. MOY: Thank you, Mr. Chairman. I do.
12 Good morning, Mr. Chairman.

13 VICE CHAIRPERSON HILL: Good morning.

14 MR. MOY: And Members of the Board. If you
15 can bear with me, for the transcript for the record,
16 we have a number of cases that originally were
17 scheduled on the docket and they've been rescheduled.
18 Two cases originally scheduled for decision making
19 have been rescheduled to February the 23rd, which is
20 the next -- which is the Board's next scheduled
21 hearing. And that's Application No. 19095. This is
22 a Foreign Missions case. And secondly, the appeal of
23 ANC 4C, 19067 has also been rescheduled to our next
24 hearing on the 23rd.

25 Application No. 18701B, this is of 1247 ESE,

1 LLC., has been postponed, rescheduled to February
2 23rd, 2016. Application No. 19167 of SK Asset Group,
3 LLC., also has been rescheduled but to March the 8th.
4 19156 of Brad Evans has requested a postponement to
5 work with the neighborhood, and that application has
6 been rescheduled to March the 29th, 2016. Two cases
7 also not heard today, will not be heard today is
8 19101, this is the property at 2112 through 2126 3rd
9 Street Northeast, has been rescheduled to March 8th,
10 2016, 19173 of Equity Trust Company, rescheduled to
11 March 1st, 2016, and finally, 19176 of Shank and
12 Miller has been withdrawn by the applicant.

13 Thank you, Mr. Chairman.

14 VICE CHAIRPERSON HILL: Okay. Thank you, Mr.
15 Moy.

16 I just want to let everyone know the order
17 which with we're going to go in today. We're going
18 to open the record to hear some testimony from Case
19 19127 first, and then we're going to return that back
20 to the end of the day. We're also going to hear
21 19174 at the end of the day. We're going to start
22 with 19216, which is KIPP DC, then after that we'll
23 go into 19175 of Crescent Communities, then 19177 of
24 Bailey Real Estate Holdings, followed by 19185,
25 Samson Gugsu, followed by 19074 of Alexander

1 Hastings, followed by 19148 of Park View
2 Condominiums, followed by 19169 of 311 K Street, and
3 then that will bring us back to 19127.

4 MR. MOY: Thank you, Mr. Chairman. So, with
5 that I believe for that one preliminary matter to
6 Application 19127, this is the application of 2800
7 Sherman, LLC. This is applicant that requested a
8 number of variance relief as well as special
9 exception relevant at 2800 Sherman Avenue Northwest.

10 VICE CHAIRPERSON HILL: Good morning.

11 MS. JACKSON: Good morning.

12 VICE CHAIRPERSON HILL: Could you please
13 introduce yourselves?

14 MS. JACKSON: I am Tania Jackson, Chief of
15 Staff to Councilmember Brianne Nadeau, the
16 councilmember from Ward 1.

17 MR. COLLINS: Christopher Collins with
18 Holland and Knight.

19 MR. ZAYETS: Good morning, Jerry Zayets,
20 Capitol City Real Estate representing ownership.

21 VICE CHAIRPERSON HILL: If you could just
22 turn on your microphone?

23 MR. NI: Steven Ni with McGraw Bagnoli
24 Architects.

25 VICE CHAIRPERSON HILL: Okay, great. Thank

1 you. So we're hearing this first, quickly, so we can
2 hear the testimony from the Chief of Staff. Thank
3 you for coming in this morning. And then we're going
4 to come back and hear this again. So this is just
5 here to listen to the testimony if we could, that you
6 have to offer, because I know you have someplace that
7 you had to be.

8 MS. JACKSON: Yeah. Thank you. I really
9 appreciate this.

10 So I was asked to get involved in order to
11 facilitate making sure that the developer and the
12 residents in the block who live right next to the
13 site had an opportunity to talk to each other about
14 some concerns that they had about their property
15 line. I understand that they were here previously
16 and expressed some concerns about where the
17 development was going to fall in terms of where their
18 line starts and where the development ends. And so
19 we did have a meeting. We reached a decision where
20 we'll actually -- I'm going to facilitate the
21 surveyor coming out. We're going to review the
22 survey to mark and make sure that there's a clear
23 understanding of where all the lines are.

24 And there are three property owners who were
25 the ones who were most vocal about their concern.

1 They all attended this meeting and we're satisfied by
2 this as the remedy. So we're going to have an
3 agreement, where we're all standing out there and
4 say, this is the place.

5 I think there was some confusion based on
6 just looking at the maps of what was what. And we
7 also, in our office, researched an alley -- what was
8 basically a public alley closing that had to happen
9 because of the old property lines in the
10 neighborhood. There was a, for lack of a better way
11 to explain it, there was sort of like a public right
12 of way that ended up becoming part of their yards.

13 And so the confusion kind of fell in on where
14 that line was, and I think we have reached some
15 understanding of where the line is and we're all
16 going to look at it with the surveyor and agree, this
17 is the line, and we won't come past the line.

18 VICE CHAIRPERSON HILL: Okay. Just give me
19 one second, please.

20 [Pause.]

21 VICE CHAIRPERSON HILL: Okay. All right.
22 Thank you. I'm just trying to understand the process
23 that we're going to follow here.

24 So does the applicant have anything to add
25 about the testimony?

1 MR. ZAYETS: No, I was actually present at
2 the meeting. It just seems like sometimes there's a
3 perception of -- differs than what's on paper, and
4 the idea is that we would reach out and just clarify
5 and meet on site and just make the parties satisfied.
6 That's all.

7 VICE CHAIRPERSON HILL: Okay.

8 MR. ZAYETS: So we're willing to participate
9 in this in any form or fashion.

10 VICE CHAIRPERSON HILL: Okay. So what was up
11 for discussion last week was there was egress issues
12 in terms of, you know, them getting out of the back
13 and kind of, you know, there was a gate that we were
14 talking about. There was all these different exits
15 through the garage. And the reason why I was going
16 to bring you guys back is that Commissioner Hood, who
17 was here last week, he's unable to be here today, and
18 so we're going to be listening to this and then we're
19 not going to be able to decide today because he's not
20 here. However, he's going to review the record and
21 then we'll be able to make a decision next week.

22 So, you know, I guess we can go ahead and --
23 so we'll go ahead and hear this now.

24 MR. ZAYETS: Okay.

25 VICE CHAIRPERSON HILL: And so, yeah, if

1 you'd like to go ahead and tell me like, what issues
2 you guys -- or is the opposition here? No? Okay.
3 Okay.

4 MR. ZAYETS: So, yeah --

5 VICE CHAIRPERSON HILL: So yeah, please, and
6 I'm sorry. The meeting that you had --

7 MS. JACKSON: Uh-huh.

8 VICE CHAIRPERSON HILL: -- was there any
9 discussion about the egress in terms of, you know,
10 them getting through their property and --

11 MS. JACKSON: Yes. So the developer offered
12 a great solution that he's going to show you an
13 easement that they came up with and some other ways
14 that they'll be able to get out. And we worked out
15 that solution.

16 We also, one of the other issues, just the
17 biggest issue is that one of the residents -- the
18 resident who was most upset and affected has
19 congestive heart failure and didn't know that he
20 could get a handicap space in front of his house that
21 would solve all of his problems. And thankfully as
22 the City Councilmember Representative I was able to
23 explain that to him and we're going to work on that
24 as a plan for him.

25 So in addition to the easement that was

1 offered there's another whole other solution that
2 kind of gets at what one of the problems was. I
3 think they really wanted to be able to drive into
4 their back and, you know, this solves the problem for
5 them in a different way. So, it's worked out in a
6 couple --

7 VICE CHAIRPERSON HILL: Yeah, that's
8 wonderful.

9 MS. JACKSON: -- in a couple of fashions.

10 VICE CHAIRPERSON HILL: I mean, that's
11 wonderful that you were able to meet like that, and
12 Chairman Hood, you know, who was here last week, he
13 recommended a meeting with you and thank you very
14 much. And so, please, I'd love to hear what the
15 solution was.

16 MR. ZAYETS: Sure. Absolutely. So I think
17 for Mr. Donaldson, I think that will be a perfect
18 solution for him to get that parking spot.

19 So if you could all refer to either the
20 submission packet or the drawing in front of you,
21 you'll see the -- this is pretty much half the entire
22 square in this project. So I'm just going to scroll
23 down real quick. So Lot 818, at the bottom it
24 demarks the development. Orienting north next to our
25 north is Lot 45. That's Mr. Jackson. Former Lot

1 822, the individual was never here. 137 is Mr.
2 Donaldson. And then 819.

3 So our project, which --

4 MR. COLLINS: And, Mr. Chairman, we're
5 referring to Exhibit 44 of the record.

6 MR. ZAYETS: Thank you. So part of what we
7 discussed is granting access. So there's several
8 ways we could achieve that. One is direct access
9 from Lot 45, Lot 822, and Lot 137, and Lot 819. So
10 we've marked the location of potential gates that
11 we'd be willing to place, provided that the residents
12 of the lots were interested in having them. So that
13 would be in the event of an egress, emergency, what
14 have you. They would be able to come into our
15 property and --

16 VICE CHAIRPERSON HILL: Excuse me. I'm
17 sorry. Can you say that again? Provided they're
18 interested in having them. Which ones interested in
19 having them?

20 MR. ZAYETS: So each gate represents --
21 they're located to the prospective lots.

22 VICE CHAIRPERSON HILL: Uh-huh. Okay.

23 MR. ZAYETS: So there's a gate on Lot 45
24 connecting our lot, 818.

25 VICE CHAIRPERSON HILL: Okay.

1 MR. ZAYETS: There's another one here on 822,
2 820 --

3 VICE CHAIRPERSON HILL: okay.

4 MR. ZAYETS: -- and 819 is not part of this
5 discussion. So provided they want the gates, we'll
6 put the gates.

7 VICE CHAIRPERSON HILL: Okay. When you say
8 provided they want the gates, so there wasn't a
9 decision to get the gates?

10 MS. JACKSON: I think that -- yeah, I think
11 the final decision about whether or not to have the
12 gates is going to be based on our meeting with the
13 surveyor. And for example, Mr. Donaldson, once we
14 talked about how they can park, they're going to be
15 able to park in front with no problem, then they
16 stopped having any kind of concern about an easement
17 or access.

18 I think that when we stand out there with the
19 surveyor and they see where the gates are actually
20 located, then that's when we'll get a sign off on the
21 easement agreement.

22 VICE CHAIRPERSON HILL: Okay.

23 MS. JACKSON: Because that was part of our
24 discussion; a big part of our discussion yesterday.

25 VICE CHAIRPERSON HILL: Okay. And you or

1 someone from your staff is going to be there at that
2 time. Is that --

3 MS. JACKSON: I'll be there.

4 VICE CHAIRPERSON HILL: Okay. That's great.

5 MS. JACKSON: That's my job.

6 VICE CHAIRPERSON HILL: Okay. That's great.

7 MR. ZAYETS: We are willing and able to do
8 whatever it takes to get them to make sure they're
9 pleased with it. My perception was that the biggest
10 question I felt was that they wanted to know that
11 their property was not being taken. It wasn't
12 encroached. That to me was the crux of it all, is to
13 get them comfortable with the boundary lines. It was
14 less about the access, but more so on the boundary
15 lines.

16 So once we got to the root of the matter, I
17 think that helped us move forward and come to a
18 better resolution.

19 So irrespective of that we're still willing
20 and able to offer what we're proposing up here. So
21 the gate is being the first thing. And then the
22 second thing is, in Lot 813 that we are in the
23 process of foreclosing on, we are willing and able to
24 grant an easement across the entire lot that will
25 allow the residents of all these lots, provided

1 they're willing to come together and come across.
2 And as you can see, this is 35 feet in length. That
3 will allow for plenty of bin storage and access
4 through -- it would bisect this lot and permanently
5 allow them to access the alley, provided they're
6 interested in this type of solution.

7 VICE CHAIRPERSON HILL: Okay. And when will
8 you know about that lot again?

9 MR. ZAYETS: So because of the foreclosure
10 process we can't foreclose on it until we've done the
11 whole public process. You have to notify them and so
12 on. It's about a year long. We've started the
13 process about 30 days ago.

14 VICE CHAIRPERSON HILL: Okay.

15 MR. ZAYETS: So we've obtained certificate
16 for the right to foreclose, so we're the ones that
17 hold that certificate, so there's no one else that
18 can step in. So we're actively doing that. So right
19 now we're in the best position to make that happen.

20 VICE CHAIRPERSON HILL: Okay. I can ask OP
21 now because OP was in objection. Okay.

22 Do you have anything else?

23 MR. ZAYETS: No, that was it. The biggest
24 sort of lesson here is basically just, work with the
25 neighbors, get them comfortable with the property

1 lines. Make sure that they understand where their
2 lines are and just make them happy and satisfy their
3 concerns.

4 VICE CHAIRPERSON HILL: Sure. Sure.

5 MR. ZAYETS: Pretty simple.

6 VICE CHAIRPERSON HILL: Yeah, I mean, there's
7 a lot of other issues in terms of the variances that
8 you were looking for. However, this was something
9 that was -- you know, there was a lot of objection to
10 it and Chairman Hood last week again had mentioned
11 again the egress issues. And so that's when you just
12 said, if they wanted it, I just wanted to clarify
13 what that meant. But that's great. I mean, I'm so
14 glad that you were able to -- thank you very much for
15 meeting with everyone such short notice. I mean, it
16 was only a week.

17 So I just kind of want to turn to OP and see
18 if they have anything additional to add because you
19 were in objection to the -- I think it was the area
20 variance.

21 MR. GYOR: Thank you, Mr. Chairman. Stephen
22 Gyor with the Office of Planning. Just want to note,
23 we support the applicant's efforts to work with the
24 neighbors. I have nothing additional to add as far
25 as the variance objections that we had in the prior

1 hearings. Thank you.

2 VICE CHAIRPERSON HILL: Does anyone else have
3 any questions from the Board?

4 MR. HINKLE: Mr. Chairman.

5 VICE CHAIRPERSON HILL: Oh, yeah.

6 MR. HINKLE: Or Vice Chair. What do I call
7 you when you're in that seat? I'm not sure.

8 A question for the applicants. I'm hearing a
9 lot of commitments but I don't know how this Board
10 would vote on this project. But if we were to
11 approve this project how do we tie those commitments
12 into the order because there's a lot of things that
13 need to happen in the future, it sounds like, for
14 this second scheme that we're seeing to allow access.

15 So I guess maybe, are you considering some
16 sort of condition on the order?

17 MR. COLLINS: there are several ways that we
18 could do it. We could have a full order or modified
19 full order where we could discuss the contested
20 issues as findings of fact.

21 MR. HINKLE: Uh-huh.

22 MR. COLLINS: The issues with the neighbor
23 about access for their trash or for their emergency
24 access, are really beyond the scope of the issues
25 before the Board.

1 MR. HINKLE: Right.

2 MR. COLLINS: But I suppose if the Board so
3 chooses you could put these conditions in. You've
4 heard the applicant, he's committed to do it, with
5 there are several provisions. Number one, if the
6 neighbors really want it, it's up to them to decide
7 whether they want it or not. And secondly, for Lot
8 813, if Mr. Zayets's company is successful in
9 completing the foreclosure, they are the only ones in
10 the position to do it now. It just takes a long
11 time.

12 MR. HINKLE: Right.

13 MR. COLLINS: We would not want the -- if the
14 Board chooses to approve the application we would not
15 want to have the commencement of construction be
16 delayed by completing the foreclosure because it is
17 not an issue that is before the Board. But the
18 findings could express the commitment to doing it.
19 As Mr. Zayets said, he will be before this Board many
20 times in the future and he is and they are people of
21 their word and they will do it.

22 We'll have to look carefully at how to
23 address it in the order, given that it is a
24 commitment and we're on television and the transcript
25 right now, saying that we will do it.

1 MR. HINKLE: Great.

2 MR. ZAYETS: Chris, one more thing. So part
3 of any redevelopment you're required to do what's
4 called a lot line check, or they call them wall
5 checks, various different things. I'm curious,
6 that's a stipulation of any building permit. We
7 could put that in that we need to verify the corners
8 or something along those lines as part of the C of O.
9 I mean, that's something that we're going to have to
10 do anyway. Our surveyor is going to have to come
11 back and certify those walls. So, you know, I would
12 have no issues certifying the corners or something
13 along those lines.

14 MR. COLLINS: Sure. And that is part of the
15 building permit process. That has to happen anyways.
16 So I'm not sure that that's appropriate for BZA
17 finding or condition. But it is something that needs
18 to happen and we can put that in as a finding that
19 that's part of the development process to do a wall
20 check; to make sure that the side of the building
21 that is adjacent to Mr. Jackson's property is in fact
22 on the applicant's property. And that's what we've
23 been trying to show all along with all these
24 submissions that we've done, Exhibit 42, Exhibit 44,
25 Exhibit 39. This is in fact on our property.

1 VICE CHAIRPERSON HILL: Okay. Ms. Nagelhout,
2 I don't know if you can help me with this and how we
3 get this --

4 [Pause.]

5 VICE CHAIRPERSON HILL: Okay. Could you do a
6 proposed findings of fact so that -- or a draft
7 order, decisions of law that puts all this into a way
8 that we can then vote on it next time? I mean, next
9 week we'll be here again. Sorry, we're off next week
10 for the holidays. So the week after that.

11 We would be able to have a meeting and decide
12 on this. And if we could just take a look at how
13 this would be written. I see everything you're
14 saying and it makes sense and I understand it. And
15 so if you can just put it in a way that we could hold
16 that to you, right, if you did get that lot, that
17 seems like the cleanest solution. And also obviously
18 the neighbors are the ones that would have that
19 decision and they're going to be there with the Chief
20 of Staff to decide whether they want the gates or
21 not. But if you can just tie all that up so that we
22 can vote on it, and that's what we'll end up doing?

23 MR. ZAYETS: Sure. We can do that.

24 MR. COLLINS: Would this be the appropriate
25 time for closing? I don't know if you have any other

1 questions.

2 VICE CHAIRPERSON HILL: I don't have any
3 other questions. The Board has any other questions?
4 Please, go ahead and close.

5 MR. COLLINS: Okay. Well, thank you.

6 VICE CHAIRPERSON HILL: Oh wait, hold on,
7 we've got one.

8 MR. COLLINS: You did make the --

9 MR. MILLER: Just for purposes of the --

10 MR. COLLINS: -- reference to the fact that
11 there are a number of variances and special
12 exceptions, which in deed there are in this case. We
13 did file an amended plan for 10 lots, and that's
14 Exhibit 39A. And that's what we were seeking,
15 specifically sheets 5, 6, and 7 of Exhibit 39A. They
16 show the layout of the lots, the buildings, the
17 parking, the bicycle parking, the trash area, and all
18 other aspects of the development.

19 The OP supplemental report opposes the lot
20 areas but determines that -- concludes that if the
21 Board were to support the lot areas then Office of
22 Planning would not object to the remainder of the
23 relief.

24 I just want to make one note that we have
25 also addressed, consistently, the roof structure

1 special exception, that at the time we filed the
2 application was in a pending regulation. It was not
3 yet in effect. But we addressed it and the special
4 exception provisions of that so we would ask that if
5 the Board does approve this applicant that the
6 special exception for the roof structure be included
7 in that decision.

8 In response to the OP report we did show a
9 plan in Exhibit 42 that shows 1,500 square foot
10 minimum lot areas. That produced eight lots. The
11 land area would support 9.27 lots, but we could only
12 get eight lots because of the unusual shape, the
13 irregular configuration of the property.

14 Lot A, the lot that's closest to the alley on
15 the west side would wind up being 3,175 square feet,
16 or more than twice the size of all the other lots,
17 but that's because the way the lot is -- the unusual
18 shape of it. There's nothing we could do about that.

19 The rest are 1,500 square feet. They still
20 would require other zoning relief because this is
21 unusual shape lot, unusual dimensions, there's not
22 quite deep enough, north/south, the direction, or an
23 east/west direction to make an even number of lots of
24 regular size that would be consistent with the
25 character of the neighborhood.

1 The result of that 1,500 square foot lot
2 you'll recall, when we did the exercise to show you
3 what we could do if we had conforming 1,500 square
4 foot lots. We had a 46-foot rear yard for the
5 Sherman Avenue buildings. That rear yard is larger
6 than the footprint of the buildings on those lots.
7 So you'd have this 46-foot wide gap. How do you
8 resolve that? Well, you fill that in with other
9 buildings which we did, and we did an exercise to
10 show buildings that would meet the 1,500 square foot
11 minimum. That jammed up those buildings into the
12 rear yard of the Sherman Avenue lots, and we fixed
13 that by regularizing the lot widths to be consistent
14 with what's permitted for IZ lots. We made the 17
15 feet. The minimum is 16 for IZ. We made the 17
16 feet. And we got a site plan that shows 10 lots and
17 10 buildings that are consistent with the character
18 of the design and configuration and character of the
19 other buildings in the neighborhood, specifically on
20 the side streets.

21 The average lot size on our plain is 1,390
22 square feet, whereas 1,500 square feet is permitted
23 by Zoning. The difference between 1,390 and 1,500 is
24 smaller than a compact parking space. And you recall
25 that all the parking on this project is over on the

1 west side. We did not put individual parking spaces
2 on each of the lots because it just didn't lay out
3 that way. It lays out best the way we've laid it
4 out.

5 The exceptional situation or condition, the
6 property is the shape and dimensions of the lot as I
7 mentioned. The petroleum contamination that Mr.
8 Zayets testified to previously, that's a result of
9 the prior commercial and industrial use of this R-4
10 residential zoned property that has to be remediated.
11 The practical difficulty is shown in the 1,500 square
12 foot lot area plan of having a layout that just has
13 some 20-foot-wide lots, some 16-foot wide lots, a 46-
14 wide deep gap along Gerrard Street. It would be out
15 of character with the other lots in the community.
16 It would also be an inefficient use of residential
17 land for a residential development in a residential
18 zone.

19 The soil remediation costs add to the
20 development costs, and the plan here, the goal is to
21 provide units within the market range in this
22 neighborhood. That's what is intended here, and
23 that's what the plan shows. And this application
24 does have the support of the Advisory Neighborhood
25 Commission, and we would respectfully request that

1 you grant our application.

2 VICE CHAIRPERSON HILL: Okay. Thank you very
3 much.

4 MR. COLLINS: Thank you.

5 VICE CHAIRPERSON HILL: So, Mr. Moy, we're
6 putting this on for a decision. Is that correct?

7 MR. MOY: That's up to the Board. It sounds
8 like it because I'm assuming you're going to be
9 receiving a draft order from the applicant. We
10 should set a deadline for that. And you'll be ready
11 to go.

12 VICE CHAIRPERSON HILL: How much time do you
13 need?

14 MR. COLLINS: If we could get until mid-week
15 next week, say next -- would next Thursday --

16 MR. MOY: Thursday would be fine. I was
17 thinking Thursday or I was going to give you Friday.
18 But if you can do it Thursday on the 18th, that would
19 be great.

20 MR. COLLINS: We'll do that.

21 VICE CHAIRPERSON HILL: All right.

22 MR. ZAYETS: I'm sorry, your next hearing
23 would be on the 23rd?

24 MR. MOY: That's correct.

25 VICE CHAIRPERSON HILL: Yes.

1 MR. ZAYETS: Thank you.

2 VICE CHAIRPERSON HILL: For a decision.

3 MR. COLLINS: And this is a decision,
4 correct?

5 VICE CHAIRPERSON HILL: Yes.

6 MR. COLLINS: No further hearing.

7 VICE CHAIRPERSON HILL: Yes. Yeah.

8 MR. COLLINS: Okay. Thank you.

9 VICE CHAIRPERSON HILL: All right. Thank you
10 very much. Thank you for coming down.

11 MR. ZAYETS: Thank you all.

12 [Pause.]

13 MR. MOY: Thank you, sir. I believe the next
14 case before the Board is Application No. 19216 of
15 KIPP DC. This is a request, Mr. Chairman, for a
16 special exception relief on the rooftop structure
17 requirements. This is what has been advertised,
18 captioned and advertised in the public record. This
19 is to permit the renovation of an existing public
20 school in the R-4 district at 1375 Mount Olivet Road
21 Northeast, Square 69, Lot 800.

22 VICE CHAIRPERSON HILL: Okay. Great. Thank
23 you, Mr. Moy. Good morning. Could you please
24 introduce yourself?

25 MS. CHATBURN: Yes, hi. Good morning. My

1 name is Kendra Chatburn and I'm representing the
2 leasee of the property, KIPP DC. This is a former
3 DCPS building so the actual owner is District of
4 Columbia.

5 VICE CHAIRPERSON HILL: Thank you. All
6 right. Well, I'm reviewing the record. In general I
7 saw this to be complete and didn't have a lot of
8 questions. I don't know where my colleagues are with
9 the Board here.

10 I did see that the ANC had a concern about,
11 they were interested in testing somehow, for 24 hours
12 of the lighting. Do you know about -- have you
13 talked to them or what their concerns were?

14 MS. CHATBURN: Yes. So we --

15 VICE CHAIRPERSON HILL: Could you talk to me
16 about that?

17 MS. CHATBURN: Yes. So we attended two ANC
18 meetings. There was like a preliminary ANC meeting
19 with just Commissioner Shropshire and the community
20 to review the types of cases that would be going in
21 front of the BZA. And so as we were presenting on
22 the special exception for roof screens a neighbor had
23 mentioned that there were lights along one of the
24 streets that was part of the school's like control,
25 and that that was bright.

1 So the school has followed up with that
2 neighbor to see if they can adjust the light angle,
3 adjust the light timing so that it doesn't affect
4 them anymore.

5 VICE CHAIRPERSON HILL: Okay.

6 MR. HINKLE: If I may, Mr. Chair.

7 VICE CHAIRPERSON HILL: Sure, of course.

8 MR. HINKLE: So the lighting, there's no
9 relationship between the lighting and the roof
10 structure.

11 MS. CHATBURN: That's correct.

12 MR. HINKLE: Okay. Thank you.

13 MS. CHATBURN: Uh-huh.

14 VICE CHAIRPERSON HILL: I don't have any
15 further questions. Does the Board have any further
16 questions?

17 I'd like to hear from OP if I could.

18 MS. BROWN-ROBERTS: Good morning, Mr.
19 Chairman and Members of the Board. We recommend
20 approval of the request on the roof structure. Thank
21 you.

22 VICE CHAIRPERSON HILL: Thank you. Is there
23 anyone here from the ANC? Is there anyone here from
24 the ANC?

25 Okay. Is there anyone here to speak in

1 support?

2 Is there anyone here to speak in opposition?

3 Okay. So as I said it seems really complete
4 to me. Do you have any questions to OP or do you
5 have anything else to add?

6 MS. CHATBURN: No, thank you.

7 VICE CHAIRPERSON HILL: Okay. Well, then I
8 would go ahead and make a motion to approve this
9 application. If I can get to it. Where is it?

10 Thanks. I'd make a motion to approve
11 Application 19216 of KIPP DC, pursuant to 11-DCMR-
12 3104.1, for a special exception from the rooftop
13 structure requirements pursuant to 411.11 and 411.3,
14 to permit the renovation of an existing public school
15 in the R-4 district at premises 1375 Mount Olivet
16 Road Northeast, Square 69, Lot 800.

17 MR. MILLER: Second.

18 VICE CHAIRPERSON HILL: Motion has been made
19 and seconded.

20 [Vote taken.]

21 VICE CHAIRPERSON HILL: The motion passes.
22 Mr. Moy.

23 MR. MOY: Staff would record the vote as
24 three to zero to two. This is on the motion of Vice
25 Chairman, Chairman Hill. Seconded the motion, Mr.

1 Miller. Also in support, Mr. Hinkle. We have a
2 board member not present with us today and a board
3 seat vacant. Motion carries, sir.

4 VICE CHAIRPERSON HILL: All right. Summary
5 order.

6 MR. MOY: Thank you.

7 [Pause.]

8 MR. MOY: Okay. I see the parties are to the
9 table. This is to Application No. 19175 of Crescent
10 Communities, LLC., and RCP Development Company. I
11 believe, Mr. Chairman, that the applicant has
12 withdrawn their requested relief for special
13 exception, which they had filed for 411.3 and 411.5.
14 So that's been withdrawn.

15 The application now then is a request for
16 variances from the side yard requirements under
17 775.1, loading requirements under 2201.1, and special
18 exception from the rear yard requirements under
19 774.1. And this is for a new mixed use building in
20 the C-3-C district. This is the South Capitol TDR
21 Receiving Zone at 21 Street Southeast, Square 659W,
22 Lot 21.

23 VICE CHAIRPERSON HILL: Thank you. Good
24 morning. If you could please introduce yourselves?

25 MR. ETMINANI: Steve Etminani. Steve

1 Etminani of RCP Development representing the
2 development team.

3 MR. TUMMONDS: Paul Tummonds, Goulston and
4 Storrs.

5 MR. VANPELT: Dan VanPelt with the Gorove
6 Slade Associates.

7 MR. CONNORS: Dennis Connors, SK&I
8 Architects.

9 VICE CHAIRPERSON HILL: Okay. Great. Well,
10 we've read the record and I do have some questions.
11 So I would like to hear your presentation if you'd
12 like to go ahead and start.

13 MR. TUMMONDS: Sure. Great. Good morning,
14 Mr. Chairman, Members of the Board. I'm Paul
15 Tummonds with the law firm of Goulston and Storrs.
16 The applicant is proposing the construction of a
17 mixed use project on the property that will be
18 developed in two phases. In total the project will
19 include approximately 550,000 square feet of gross
20 floor area, approximately 558 residential units, and
21 at least 260 parking spaces.

22 Vehicular access to the project's loading and
23 parking facilities will occur from a new curb cut
24 along I Street that has been located in the
25 approximate middle of the property in order to

1 provide sufficient distance to the South Capitol
2 Street intersection, intersection of South Capitol
3 and I, as well as the curb cut for the car wash which
4 is located immediately to the east of the property.

5 This building will have an FAR of
6 approximately 9.6, and a maximum building height of
7 130 feet. As will be noted by our architect, the top
8 two floors of the western edge of the building have
9 been set back in order to continue the South Capitol
10 view corridor.

11 This application has received the support of
12 ANC 6D, OP, and DDOT, and there is no opposition to
13 this application.

14 We'll follow your lead on the questions you'd
15 like so we'll now have our architect give kind of an
16 abbreviated run through of the project and then we'll
17 be available to answer any questions you have. Mr.
18 Connors.

19 MR. CONNORS: Thank you, Paul. Good morning,
20 Chairperson Hill and fellow board members. I'm very
21 excited to be here today on behalf of SK&I, our CP
22 development, and Crescent Communities.

23 I'll merely focus on the design. I know you
24 have the OP report in front of you.

25 This is a very brief overview of the site.

1 As you can see the site is located at the corner of
2 South Capitol and I Street, the Northeast corner. To
3 the north is the freeway, and surrounding the
4 property is a mixture of vacant land, new
5 development, some old mixed use retail, and then some
6 mid-century modern elements. Those are some of the
7 keys that we took while designing the aesthetic of
8 the building.

9 Right away I'll show you the proposed design.
10 And this focuses on two very important aspects of the
11 project that created the massing. Because the site
12 is very constrained along I Street there's not a lot
13 of access to the property. There's no rear alley and
14 there's no ability to access off of South Capitol.

15 It makes sense to take the two existing curb
16 cuts, which were for the McDonalds for the property,
17 and consolidate them into one central access through
18 the proposed development.

19 We expressed that in the design, so the
20 entrance becomes a grand entrance for vehicles and
21 pedestrians alike. And the bridge-like element
22 connecting the two side massings is a lighter
23 aesthetic and setback. The two flanking, more solid
24 components are what are the bulk of the project.

25 And then as Paul mentioned, on South Capitol

1 Street there's a very important feature, which is we
2 are setting back the top two floors to preserve the
3 very important view corridor for the city. But
4 rather than creating a wedding cake type of design,
5 we've incorporated that setback into the design
6 itself. It became a feature that is expressed on I
7 Street and then is also expressed on the north side
8 of the building.

9 And then you'll see on the ground floor,
10 along I Street, there's a mixture of retail,
11 residential amenities, and then up along South
12 Capitol Street that transitions into a more public --
13 a private realm, rather, with ground floor dwellings
14 and that separation along the South Capitol façade is
15 further accentuated by that glass carrying up through
16 the façade itself.

17 Here is a closer view of that grand entry.
18 You can see we put a lot of thought and time into
19 considering how that would feel from pedestrians,
20 from vehicles. And because it is two stories it
21 allows a lot of light and visibility and you can
22 actually see deep into the courtyard with a raised
23 element on the second floor covering the service and
24 loading, making that more discrete. And this
25 provides greater opportunity for the client to treat

1 this with materials and various landscaping
2 techniques in a more exciting fashion.

3 Here's the ground floor plan which shows the
4 phasing aspect to it, but you can see north is to the
5 left. So the rear of the property there, that is a
6 CSX land, and then to the top of the page, to the
7 east side is the neighboring car wash site.

8 As you can see, this shows how the vehicles
9 will come into a central court, which would be open
10 to the sky with a drop-off from both phases. And
11 then the service would be to the rear. At the same
12 time the design provides a buffer between the new --
13 between the neighboring properties, creating an
14 irregular court to the north and to the east.

15 And then along the west you can see in plan,
16 very clearly, this transition between the retail to
17 the amenities and to the dwelling units that will
18 have stoops and lead walks which will help activate
19 the streetscape and continue that pedestrian route up
20 to the Capitol.

21 Here are the two facades that show the design
22 on South Capitol. The main façade is a frame which
23 is flanked by two glass balconies at each end. And
24 that hyphen piece, that stitch of glass which relates
25 to the retail, it breaks up the length of that façade

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1 and also gives depth to the design as well.

2 Here's a typical floor, but you can see what
3 it would look like going down into that courtyard.
4 And in section, this explains a lot of what we're
5 asking for for relief as well because on the west
6 portion of the façade you see the property line. And
7 you can see that nine-foot easement that we have to
8 stay clear of. And then we have a setback on the top
9 two floors. Then we have the central courtyard. And
10 then on the east portion you can see that a regular
11 court between the east side and the property line.

12 And the roof plan, this is an exciting
13 opportunity for us to integrate the design from
14 bottom all the way to the top. You can see that the
15 thought process of the design carried through up to
16 this level as well. We intentionally left the south
17 middle of the building open, and then the north end
18 open as well by the pool. And this relates to the
19 very simple part of these two masses flanking this
20 entry point or focal point on the project. And then
21 the elements will be set back from South Capitol
22 appropriate to further accentuate that view corridor.

23 I'll leave you with the image of the project,
24 and hopefully that explains the design and our
25 thought process a little better.

1 VICE CHAIRPERSON HILL: Okay. I was just
2 curious, the pool, which side is the pool on? Is
3 that facing the stadium?

4 MR. CONNORS: Facing the Capitol. It's
5 facing north.

6 VICE CHAIRPERSON HILL: Oh, facing the
7 Capitol. You don't get views of the stadium from the
8 roof do you?

9 MR. CONNORS: I assume you probably will from
10 some portions looking down South Capitol because
11 South Capitol is so wide.

12 VICE CHAIRPERSON HILL: Yeah, I was just
13 curious.

14 Okay. I had a couple of questions in terms
15 of the ANC, I guess. You all have met with the ANC
16 and they had some conditions in terms of, you know,
17 their approval. Could you speak a little bit about
18 that and what you kind of came to?

19 MR. TUMMONDS: Sure. You know, I think that,
20 yeah, there were probably some conditions in the ANC
21 that are maybe not relevant to the relief that is
22 being requested. So you know, I think in the
23 previous case you heard there was the commitment by
24 that they will do what they have to do. I think in
25 this case the applicant has said, we will abide by,

1 and I think probably one of them being the financial
2 contribution to an affordable housing provider. This
3 project is not subject to IZ, but the applicant has
4 agreed to do that. I don't think it's probably
5 something that would be appropriate to be in an order
6 in this case because that's not what BZA cases are
7 about and it's not relevant to the relief we're
8 requesting. But the applicant has agreed to do that.

9 Similarly, the ideas of the construction
10 management plan, and I think the timing there too was
11 that when you have the construction management plan,
12 just share it with us. I think that is absolutely
13 something that the applicant has agreed they will do
14 in continuing the dialog with the ANC on that.

15 The other issue I think was pest -- I'm
16 sorry, not pest. Pets.

17 VICE CHAIRPERSON HILL: Pet waste.

18 MR. TUMMONDS: Yes, I'm sorry. Not to -- pet
19 waste. And I think we said yes, this building will
20 be designed to be able to address issues like that.

21 VICE CHAIRPERSON HILL: Okay. What about the
22 applicant shall not petition DDOT to make any block
23 adjustments to the building eligible for RPP?

24 MR. TUMMONDS: Yeah. So right now the
25 building is not eligible for RPP because it's in a

1 commercially zoned site. The applicant is also fined
2 with not having --

3 VICE CHAIRPERSON HILL: Agreeing not to
4 petition DDOT?

5 MR. TUMMONDS: Correct. Yes.

6 VICE CHAIRPERSON HILL: Okay. All right.
7 Does the Board have any questions at this point?

8 MR. HINKLE: Excuse me. I just wanted to
9 state that I appreciate the South Capitol Street view
10 corridor pull-back because you don't have to do that
11 until the new regulations are effective. Is that
12 correct? And that's --

13 MR. TUMMONDS: That's correct.

14 MR. HINKLE: That's something NCPC, my
15 agency, has been you know, really concerned about on
16 this site so that's certainly appreciated.

17 I just had one quick question on setbacks.
18 When I look at the west elevation, what would be on
19 the north side there's a small brown piece up at the
20 top, and I just couldn't figure out what that is.
21 I'm on page 14 of, I guess that's Exhibit 24A. So
22 that's it but it's difficult to see on the screen.

23 On the very north side it looks like you
24 don't meet a one-to-one setback on a small little
25 brown piece at the edge of the structure, top edge of

1 the structure.

2 MR. CONNORS: Yeah, I believe that's part of
3 the stair tower that's beyond in the Northeast corner
4 of the design.

5 MR. HINKLE: Do you have a north elevation?
6 I just couldn't find one in our package.

7 MR. CONNORS: I'm sorry. One second. Yes,
8 it shows on the roof plan itself, how that element is
9 set back. It could have been simply a model error.
10 I apologize if that's the case. But -- oh, I see
11 why. Because our regular court is set in along South
12 Capitol façade, you see some of the elements
13 beyond --

14 MR. HINKLE: Okay.

15 MR. CONNORS: -- as you take in that view.
16 So some of the things that appear on the far eastern
17 portion of the site, as well as some of the things
18 that appear on phase 2, they show up in the
19 elevation. But you can see how it's -- everything is
20 set back.

21 MR. TUMMONDS: I mean, site so, the short
22 answer to your question, Commissioner Hinkle, is that
23 those buildings on the roof will be set back from the
24 northern building wall --

25 MR. CONNORS: Correct.

1 MR. TUMMONDS: -- one to one.

2 MR. HINKLE: Okay. Great. Thank you.

3 MR. CONNORS: All right.

4 VICE CHAIRPERSON HILL: Okay. I'll go ahead
5 and turn to OP.

6 MR. COCHRAN: OP is pleased to stand on the
7 record unless you wanted to say something or answer
8 questions.

9 VICE CHAIRPERSON HILL: Sure, please. Go
10 ahead.

11 MR. MILLER: Thank you, Mr. Vice Chairman,
12 Mr. Chairman. What is the --

13 VICE CHAIRPERSON HILL: I don't know.

14 MR. MILLER: What is --

15 VICE CHAIRPERSON HILL: We'll go Mr. Vice
16 Chair. That's fine.

17 MR. MILLER: Mr. Vice Chair, I had a
18 question --

19 VICE CHAIRPERSON HILL: Sure.

20 MR. MILLER: -- Mr. Cochran. What is the
21 purpose of this 15-foot wide strip of land that the
22 District Government owns next to this property, if
23 it's not part of the right of way?

24 MR. COCHRAN: There are several agencies that
25 have not been able to determine the answer to your

1 question.

2 MR. MILLER: It sounds like that's a District
3 of Columbia situation, I guess, we have in a number
4 of places.

5 MR. COCHRAN: But it is not DDOT property.
6 It's not the right of way otherwise this would have
7 been a corner property.

8 MR. MILLER: So what is actually on -- what
9 is on it now, and what will be on it when you're
10 building this next to it?

11 MR. COCHRAN: So what is on it now is
12 basically part of the sidewalk. It looks, acts,
13 breaths, like it is part of the right of way. It
14 will remain part of the right of way. So it will
15 create a nicer public space environment than
16 currently exists. So we're not proposing any changes
17 to that 15-foot-wide strip other than maybe hopefully
18 making it look better.

19 MR. MILLER: Okay. It would be great if we
20 could transfer it and get taxable money from that
21 little strip.

22 MR. COCHRAN: As a member of the Zoning
23 Commission you'll know, this happens occasionally.
24 If you'll remember the Riverside Baptist Church had a
25 somewhat similar strip along Main Avenue that wasn't

1 part of the right of way but that was government
2 owned. And so that building also could not be
3 considered corner property.

4 MR. MILLER: Okay. Thank you.

5 VICE CHAIRPERSON HILL: Does the applicant
6 have any questions for OP?

7 MR. TUMMONDS: Nope.

8 VICE CHAIRPERSON HILL: Okay. All right,
9 with that then can I ask, is the ANC here? Anyone
10 from the ANC?

11 All right. Is there anyone here in
12 opposition? Anyone here in opposition?

13 Anyone here in support of the applicant?

14 All right. Let's see, would you like to
15 close?

16 MR. TUMMONDS: We thank you for your time.
17 We believe this case is ready for decision and we
18 would ask that you make a decision on this case
19 today.

20 VICE CHAIRPERSON HILL: Okay. Great. Is the
21 Board ready to deliberate? Okay. Well, I'll start.

22 I mean, I have read the record and having had
23 a chance to really kind of address the issues that I
24 had concerns with in terms of questions from the ANC.
25 I would feel comfortable that this applicant has met

1 the standards for the variance and I would move to
2 approve Application 19175 of Crescent Communities,
3 pursuant to 11-DCMR-3103.2 and 3104.1 for variances
4 from the side yard requirement under 775.1 and the
5 loading requirements under 2201.1 and special
6 exception from the rear yard requirements under 774.1
7 and the roof -- oh, the roof structure, we don't need
8 that. I'm sorry. And the roof structure
9 requirements under 411.3 and 411.5 to construct a new
10 mixed use building in the C-3-C district, South
11 Capitol TDR Receiving Zone at premises 212 -- sorry,
12 2 I Street Southeast, Square 695W, Lot 21.

13 MR. MILLER: Second.

14 VICE CHAIRPERSON HILL: Motion has been made
15 and seconded.

16 [Vote taken.]

17 VICE CHAIRPERSON HILL: The motion passes.
18 Mr. Moy.

19 MR. MOY: Staff would record the vote as
20 three to zero to two. This is on the motion of Vice
21 Chair Hill to approve the application for the relief
22 as he has cited. Seconded the motion, Mr. Miller.
23 Also in support, Mr. Hinkle, board member not
24 present, board seat vacant. The motion carries, sir.

25 VICE CHAIRPERSON HILL: Thank you. Summary

1 order.

2 MR. MOY: Thank you.

3 MR. TUMMONDS: Thank you.

4 MR. MOY: The next case before the Board, the
5 parties can come to the table to Application No.
6 19177, Bailey Real Estate Holdings.

7 Mr. Chairman, this application has been
8 captioned and advertised for a special exception
9 relief from the conversion to apartment house
10 requirements under Section 336. This is to permit
11 the enlargement of a pre-1958 residential building
12 into a two-story, three-unit apartment house. This
13 is an R-4 district at 615 Upshur Street Northwest,
14 Square 3226, Lot 73.

15 I believe -- well, we'll come to that when we
16 get to the Office of Planning's suggested added
17 relief. But I believe there is a revised self-
18 certification in the record. Or would need one,
19 rather.

20 VICE CHAIRPERSON HILL: Thank you, Mr. Moy.
21 Okay. Could you -- good morning. Could you please
22 go ahead and introduce yourselves?

23 MR. UQDAH: My name is Taalib Ugdah. I am
24 single-member district Commissioner for CO-1. I'm
25 standing in or actually sitting in for Commissioner

1 John Paul Hayworth of 4C-07. This property is
2 located in his single-member district. He is on his
3 way. But out of -- in fact, he just stepped in, and
4 I will step back.

5 VICE CHAIRPERSON HILL: Thank you. Let's
6 just go on down the line and then he can sign some
7 witness cards in and get in.

8 MR. ALI: I'm Ramy Ali from Ram Design
9 Architects.

10 VICE CHAIRPERSON HILL: Could you say that
11 again, I'm sorry?

12 MR. ALI: Ramy Ali from Ram Design
13 Architects.

14 MR. SULLIVAN: Marty Sullivan from Sullivan
15 and Barros.

16 MR. YOUNG: Duane Young from Redwood
17 Ventures.

18 VICE CHAIRPERSON HILL: Good morning. Sorry
19 you're just rushing in here, but if you wouldn't mind
20 just introducing yourselves. Yourself.

21 MR. HAYWORTH: I'm John Paul Hayworth. I'm
22 the Commissioner for 4C-07.

23 VICE CHAIRPERSON HILL: Did you fill out a --
24 you haven't filled out witness cards yet, obviously?

25 MR. HAYWORTH: I believe my colleague

1 actually filled them out for me.

2 VICE CHAIRPERSON HILL: Okay. And you
3 haven't been sworn in, I don't think.

4 MR. HAYWORTH: I have not been sworn in.

5 VICE CHAIRPERSON HILL: Mr. Moy, you want to
6 swear him in?

7 MR. MOY: Yes, sir.

8 [Oath administered to Mr. Hayworth.]

9 VICE CHAIRPERSON HILL: Okay. Well, as I
10 assume the applicant knows, that we did receive a
11 letter most recently from, I guess it was last night,
12 from the ANC requesting a postponement so that they
13 are able to work with the applicant in terms of
14 coming to, you know, a resolution that you could get
15 their support for this project. They are, you know,
16 they voted 10 to nothing in opposition for the
17 special exception. And you know, the Board does take
18 the ANC into great weight when deciding it's -- when
19 it hears the cases. And so I guess I would like to
20 hear from the ANC in terms of where we are, because
21 you came down here. So maybe there is some either
22 movement or you have a suggestion that we can go down
23 the line here and see what the applicant has to say.

24 MR. HAYWORTH: Sure. And I appreciate the
25 opportunity.

1 So there are two things. One was a sort of
2 procedural objection, and then the second is the sort
3 of in practice. For the practice, the applicant has
4 met with neighbors. I believe twice thus far. One
5 the morning of our ANC meeting. And then again last
6 week to discuss potential changes to the plans. It's
7 my --

8 VICE CHAIRPERSON HILL: May I interrupt?

9 MR. HAYWORTH: Sure.

10 VICE CHAIRPERSON HILL: When was the morning
11 of the ANC meeting?

12 MR. HAYWORTH: Sorry. January -- I don't
13 have the date off the top of my head. It's the
14 second week of January. January 16th. 10th. Thank
15 you.

16 VICE CHAIRPERSON HILL: Okay. Okay. Thank
17 you. Sorry.

18 MR. HAYWORTH: Yeah. So when the project
19 originally began in the fall I spoke with the
20 representative for the developer and encouraged them
21 to reach out to the neighbors to try to come to an
22 agreement; that there were already objections from
23 the neighbors. They did not do so until the morning
24 of the ANC meeting.

25 And at the ANC meeting we did discuss a

1 resolution of opposition and included a paragraph
2 that made the opposition contingent, meaning if there
3 was an agreement between the neighbors and the
4 developer the ANC opposition would be removed.

5 VICE CHAIRPERSON HILL: And just to ask a
6 question, you said the majority in your letter, so I
7 wasn't clear as to what the majority meant. Like if
8 it was just the next door neighbors that were in
9 agreement. Like, who is the majority?

10 MR. HAYWORTH: Well, that's a good question.
11 I've actually not been participating in those
12 negotiations directly, but it is my understanding
13 that the neighbors immediately adjacent is what I
14 mean when I'm talking about majority. I'm meaning
15 the people who are immediately adjacent and within
16 that 200-foot radius that is typical.

17 VICE CHAIRPERSON HILL: So as of now there
18 hasn't been a resolution?

19 MR. HAYWORTH: No. From what my
20 understanding is, there was revised plans that were
21 presented to the neighbors last week, and those are
22 the same revised plans that were uploaded to the BZA
23 last night or yesterday. Those plans included some
24 of the revisions requested by neighbors, but not all.

25 One of the largest stumbling blocks between a

1 full agreement is the pop back. It would cause
2 significant shading into the property next door, and
3 so there was -- it was my understanding that they
4 were still going to continue to work to try to find
5 an agreement with that. The developer then responded
6 back and said that they were going to go ahead with
7 the revised plans in preparation for this meeting.

8 VICE CHAIRPERSON HILL: Okay. And as of now
9 the ANC would still be in opposition 10 to zero?

10 MR. HAYWORTH: Correct.

11 VICE CHAIRPERSON HILL: Okay. All right.
12 Would the applicant like to tell me where they are
13 with the neighbors and the majority issue, and
14 whether you'd like to -- yeah, just fill me in
15 please. Thank you.

16 MR. SULLIVAN: Sure. Thank you, Mr.
17 Chairman. Marty Sullivan from Sullivan and Barros on
18 behalf of the applicant. Of the changes made that
19 were presented to the community last week and that
20 were filed last night, were all in response to
21 comments from the community and the ANC and we think
22 it was a very aggressive response. We changed the --
23 we agreed to have no changes at all to the front
24 roofline. You won't see the addition from the front
25 street. Knocked off a whole story of the addition.

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1 However, we know there were -- this just
2 happened last week and we filed last night. So we're
3 okay with the postponement if that's the request. We
4 just -- Mr. Hayworth requested it go until April. We
5 don't think that's necessary that it go two months
6 for this. We think we're two weeks away.

7 I know I just had a case moved off of March
8 1st that was going to be controversial, so March 1st
9 would be a good -- three weeks would be great. We
10 think that's plenty of time. We're also, we're
11 encouraged by the fact that they think maybe there's
12 a chance to come to an agreement. I mean up to this
13 point we've made substantial changes and I think the
14 comments have been, we just don't want you to do this
15 project at all. So we're not sure if we can get to
16 agreement, but we'd like to try. We think it's worth
17 it.

18 VICE CHAIRPERSON HILL: Okay. That's great.
19 That's great. I don't know what the Board's position
20 is. I would be happy postponing it, then, until
21 March 1st because I'd like the ANC to continue to
22 work with the neighbors. And if they are to a point
23 where they could actually agree on to what's going to
24 be built in their neighborhood, I mean, that's
25 obviously what is important to the Board as well.

1 MR. HAYWORTH: If I could request a slightly
2 longer than three weeks? So the ANC meeting, next
3 meeting, is tomorrow. And so if we move until March
4 1st the ANC won't have a chance to weigh in until
5 after that -- after March 1st.

6 VICE CHAIRPERSON HILL: Okay. So then when
7 would that work out for the applicant?

8 MR. HAYWORTH: So our meeting is the second
9 Wednesday of every month. So any time after the
10 second Wednesday the ANC would have another
11 opportunity to weigh in.

12 MR. SULLIVAN: Eventually it's the point --

13 VICE CHAIRPERSON HILL: You want the vote.

14 MR. SULLIVAN: Yeah.

15 VICE CHAIRPERSON HILL: You want them to be
16 able to be able to vote and --

17 MR. SULLIVAN: We do. And then the initial
18 vote, although I don't think it was ever reflected in
19 the resolution, said something about if we come to
20 agreement with the neighbors then they withdraw their
21 opposition and then we wouldn't need to come back for
22 another meeting.

23 VICE CHAIRPERSON HILL: If you get the
24 majority.

25 MR. SULLIVAN: Yeah. I mean, the other

1 option here is to do a matter of right project, which
2 would be a much worse footprint. And if we get too
3 far back that becomes the option because we can't
4 wait around too long. But if we can have 30
5 seconds --

6 VICE CHAIRPERSON HILL: I'm just trying to
7 get you to get a vote. Yeah, sure.

8 MR. SULLIVAN: Right. I understand.

9 VICE CHAIRPERSON HILL: Take your time. Talk
10 with your client.

11 MR. SULLIVAN: I just, I want to make sure
12 there's a chance of that because a lot of the
13 feedback we've been having is, we don't like the
14 addition, period. And you shouldn't be able to do
15 any addition. So I want to make sure that there's
16 some hope there before we're just --

17 VICE CHAIRPERSON HILL: Well, you can --

18 MR. SULLIVAN: -- postponing something for so
19 long for no reason.

20 VICE CHAIRPERSON HILL: You agreed to put
21 them on the next agenda?

22 MR. HAYWORTH: Absolutely.

23 VICE CHAIRPERSON HILL: Okay.

24 MR. SULLIVAN: We're okay with March 15th if
25 that's available.

1 VICE CHAIRPERSON HILL: Sure. Okay. Well, I
2 think we're going to, then, postpone to March 15th,
3 but I'm going to ask if my colleagues have any
4 questions now.

5 MR. MILLER: Thank you, Mr. Vice Chair. Just
6 to address a couple of the issues in the ANC
7 resolution that we -- the previously ANC resolution
8 that we had. And it's also referenced in OP's
9 report. Can you just briefly state how you've
10 addressed -- how the addition does not impede the
11 adjacent chimneys, the chimneys of the adjacent
12 property, which is one of the criteria that has to be
13 met for this type of special exception relief.

14 MR. SULLIVAN: We're still working on that.
15 We're not sure. We think there's a chimney on one
16 side. We don't know if it's operable, and so we're
17 working on that and we'll continue to work with the
18 neighbor on that as well. And if we can't come to an
19 agreement on that we'll have to do a workaround,
20 which would probably tend to increase the footprint
21 as well. So those are some of the things we want to
22 work out.

23 MR. MILLER: Okay.

24 MR. SULLIVAN: Before -- hopefully two weeks
25 before the 15th or before the ANC meeting on the 9th.

1 MR. MILLER: And just for the record. So in
2 terms of the addition, how far back does it go from
3 the existing --

4 MR. SULLIVAN: It's 14 feet.

5 MR. MILLER: Fourteen feet.

6 MR. ALI: Fourteen, six.

7 MR. SULLIVAN: Fourteen, six.

8 MR. MILLER: From the existing house, and is
9 it also, it's 14 feet back from the adjacent
10 properties? Is their rear façade the same?

11 MR. ALI: Yes, they -- so it's 14.6 from both
12 exterior walls, yes.

13 MR. MILLER: Okay. Okay. Thank you.

14 VICE CHAIRPERSON HILL: Anyone else, any
15 questions right now?

16 MR. MILLER: Okay. Then we're going to
17 postpone this to March 15th. Okay. All right.
18 Great. Mr. Miller.

19 MR. SULLIVAN: I'm sorry, Mr. Chairman, I
20 just want to clear up the posting issue if it's out
21 there and formally ask for relief. He posted one day
22 late. It was the weekend after the blizzard. So,
23 and I just want to get that on the record that notice
24 was posted, and posted again once we realized the
25 sign was down as well.

1 VICE CHAIRPERSON HILL: Okay. All right, due
2 to the snowstorm I'll waive the requirement. Thank
3 you. All right. So March 15th.

4 MR. MOY: The next application, Mr. Chairman,
5 is Application No. 19185. This is the application of
6 Samson Gugsu and I suppose this is pronounced
7 Luleadey Jembere. Am I close? All right.

8 This is captioned and advertised for
9 variances, Mr. Chairman, from the use requirements
10 under Section 200 and the off-street parking
11 requirements under 2116.4, to permit a flat in the R-
12 1-B district at 3101 35th Street Northeast, Square
13 4325, Lot 15. And, Mr. Chairman, there is a request
14 for party status.

15 VICE CHAIRPERSON HILL: Okay. Thank you.
16 Are you the person for party status request? Okay.
17 If you could please just go down the line and
18 introduce yourselves?

19 MS. TRACY: Good morning to all assembled. I
20 am Cheryl Tracy. I live at 4920 Sergeant Road on
21 Northeast. I am representing Ms. Jacqueline Jones,
22 who is here, who resides next to the proposed site at
23 3103 35th Street Northeast.

24 VICE CHAIRPERSON HILL: Okay. And what's the
25 -- well, I guess -- all right. If you could please

1 go down the line? If you could just push the button?

2 MS. JEMBERE: I am Lule Jembree and I am
3 representing one of the owners.

4 MR. GUGSA: I am Samson Gugsa and I am one of
5 the owners. She is my wife. We are both owners.

6 VICE CHAIRPERSON HILL: Okay. First, I
7 guess, we're going to have to decide on the party
8 status request. And so if -- I guess you could share
9 with the Board a little bit, what are the issues
10 concerning the applicant?

11 MS. TRACY: The reason why we are applying
12 for party status, because we are directly affected by
13 the proposed special exception. For one, the street
14 that we live on is a half block of a street, meaning
15 it's half of a normal city size street, block. And
16 there is no sufficient turn-around space.

17 Currently, since they -- before they
18 purchased it, it had been vacant for quite a while
19 and we -- and actually the vehicles, emergency
20 vehicles, and any vehicles that come up the street
21 that far, do use their site for turn-around.

22 Also in addition to that, the homeowner is
23 totally against the property being an apartment. It
24 is a residential neighborhood, has been a residential
25 neighborhood for quite a while.

1 And based on those reasons, that's why we are
2 asking for a party status because Ms. Jones is
3 directly affected by the request.

4 VICE CHAIRPERSON HILL: Okay. And you're the
5 next door neighbor, the direct next door neighbor to
6 the property?

7 MS. TRACY: No, I'm actually --

8 VICE CHAIRPERSON HILL: I'm sorry,
9 representing here.

10 MS. TRACY: Yes. Which is directly next
11 door, correct?

12 VICE CHAIRPERSON HILL: Okay. Does the Board
13 have any comments or questions?

14 I'm going to grant the party status request.

15 MS. TRACY: Thank you.

16 VICE CHAIRPERSON HILL: And so -- you're
17 welcome. And so what that means is the party would
18 have an opportunity to cross-examine in terms of the
19 presentation today, and so that's what we're going to
20 go ahead and do. So as you, the applicant, if you go
21 ahead and get started on your presentation, that
22 would be great. Thank you.

23 MS. JEMBERE: Okay.

24 VICE CHAIRPERSON HILL: Can I ask real quick,
25 do you know around how much time you might need?

1 MS. JEMBERE: Just five minutes.

2 VICE CHAIRPERSON HILL: Okay. Great. Thank
3 you.

4 MS. JEMBERE: Less than five minutes,
5 actually.

6 Okay. So we purchased the property like in
7 June 2015, and we bought it from Fannie Mae. It was
8 a foreclosure property. And it was actually my first
9 home in the District, and it was listed as a
10 multiunit property on Redfin, so you know, we looked
11 at the property and it has, you know, it has -- it's
12 relatively a big property compared to, you know, all
13 the neighboring properties. It's about 7,500 square
14 feet. And most of the neighboring properties they're
15 like 3,000 something, 3,500.

16 So we purchased the property and then it was
17 built as a multi-unit -- it was built as a two-unit
18 property. It was well structured as a two-unit
19 property. It was separate. Separate meters.
20 Separate, you know, boilers. Everything separate.
21 Two separate entrances. So we were like okay, you
22 know, this is an interesting property. It's really
23 big so we can go ahead and, you know, make an offer.

24 So we purchase the property in June and then
25 we decided to rent one of the units. And then we

1 went to DCRA. You know, we just started the formal
2 application process. We went to DCRA and we found
3 out that, oh, this property doesn't have occupancy
4 like a certificate of occupancy, so you guys need to
5 get that.

6 And then we found out that, oh, in order to
7 get a certificate of occupancy you need to go through
8 the BZA process because that area is, it's an R-1-B
9 zone and only single-families are allowed, so you can
10 only -- you know, you can only go through the BZA
11 process.

12 So that's how the whole thing started. Like
13 we unknowingly bought the property from Fannie Mae.
14 You know, they listed it as a multiunit property, as
15 a two-unit property, and you know, we came -- I mean,
16 we just decided to go the legal route and started the
17 process.

18 MR. GUGSA: Can I say something?

19 MS. JEMBERE: Yeah, sure.

20 MR. GUGSA: Okay. So, just to say something.
21 So this property has been there for 12 years now.
22 It's built in 2004. It's been there for 12 years,
23 and right when you drive into that property you see
24 that there are two meters for the electric. On the
25 left side you see two gas meters, and two AC units.

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1 And once you get into the property you've got the
2 separation and two furnaces, and everything is
3 separated with duct work and everything. So it's a
4 multiunit, it's listed as a multiunit.

5 As a tax purposes, it's also in the tax
6 listing. It's stated as a multiunit. Even in the
7 DCRA site, not the DCRA information, but I think DCRA
8 pulled some information from the tax records, it's
9 listed as a two-unit.

10 So what we're trying to say is like, we
11 didn't -- we didn't make any changes. It's the
12 property was set up this way and we're trying to say,
13 okay, this property -- and when we purchased it, it
14 was actually tenant occupied. When it was a
15 foreclosure there was tenants when we purchased it.

16 So tried to get the process started and get
17 the certificate of CO, certificate of occupancy, and
18 at that point we found out that we need to go through
19 the BZA application because it's R-1-B unit, and at
20 that point we started this process.

21 MS. JEMBERE: And then the other thing I want
22 to mention is, so we went through the inspection with
23 DCRA, and the property meets all the requirements.
24 If you see the lot occupancy requirements, if you see
25 the OP report, lot occupancy requirement is 40

1 percent, and our property is 17 percent. It's --
2 what makes it unique is it's relatively bigger than
3 the neighboring properties. Like double the size of
4 the neighboring properties. So it meets all the
5 requirements. Even if you see the parking, like
6 there's a side setback, eight feet. Eight feet is
7 the side setback and -- I'm sorry. Eight feet is the
8 side setback and our property has 10 feet on the
9 right side and 12 feet on the right -- on the left
10 side.

11 So it meets all the requirements except that,
12 I mean, the only thing that we're requesting is --
13 well, there are two things that we're requesting is,
14 one is that property exists in the R-1-B zone. And
15 it's right next to an R-5-D zone, which is, you know,
16 an area for condominium apartments. And the other
17 side, the southern side, is actually bordered by a
18 park, and it's -- and according to the ANC
19 commissioner they told us that area is going to be a
20 town, like a townhouse, an apartment building as
21 well.

22 So it's not like in the meter of an R-1-B
23 zone. It's right in the corner. It's a corner
24 house. So we're not in the meter land, we're not
25 really affecting, you know what I mean, other people.

1 And also the other thing is -- and also the other
2 thing is -- oh yeah. Go ahead.

3 MR. GUGSA: So we're just basically saying
4 is, like, we purchased the property this way and
5 we're trying to be able to use it the way it is. And
6 like we have talked to the neighbors, and they're
7 aware -- even before purchasing, we talked to some
8 neighbors and they are aware of the property. And
9 it's been there for 12 years. We're not suggesting
10 anything new.

11 MS. JEMBERE: Yeah.

12 MR. GUGSA: This is the way --

13 VICE CHAIRPERSON HILL: I understand. I
14 understand. I understand.

15 MS. JEMBERE: We're not constructing anything
16 new. We're not asking for a new permit. We're not
17 saying, oh we're going to build like another unit and
18 then you know, rent this out and rent that out. But
19 we're just asking, you know --

20 VICE CHAIRPERSON HILL: I understand.

21 MS. JEMBERE: -- to continue to use --

22 VICE CHAIRPERSON HILL: That's okay.

23 MS. JEMBERE: -- the property as is.

24 VICE CHAIRPERSON HILL: I understand.

25 MS. JEMBERE: And we had the ANC meeting,

1 like with the neighbors, and we got one written
2 support from our neighbor, and we got one verbal
3 support from a neighbor. It's actually uploaded in
4 the website as well. And we got full support from
5 the ANC Board of Commissioners. And we got a support
6 from OP as well. And yeah, there's also a condition
7 for the parking space as well. We're asking, like,
8 you know, basically to park four vehicles on the
9 front area. But OP suggested, you know, for us to
10 park just one, one vehicle. And we're absolutely
11 okay with that. We've agreed with that
12 recommendation.

13 MR. HINKLE: There's a portion that's paved
14 right now. How many cars does that fit?

15 MR. GUGSA: Close to five cars right now.
16 Four to five cars.

17 MR. HINKLE: Four to five cars.

18 MS. JEMBERE: Four to five cars.

19 MR. GUGSA: The way the property is
20 structured, it's being it's a corner lot adjacent to
21 the condominiums in the back park right now. So it's
22 a corner lot, so there's close to 7,500 square foot.
23 So they built the property completed that their -- in
24 relation to the other properties on the other side.
25 They went further to the apartment; they build the

1 property. So we have close to 900 square foot of
2 front space.

3 MS. JEMBERE: Parking space. While the
4 requirement is like 375.

5 MR. GUGSA: It's already paved for parking,
6 that's why we're requesting to be able to use that as
7 an existing parking space.

8 MR. HINKLE: Okay. Thank you.

9 VICE CHAIRPERSON HILL: Okay.

10 MS. JEMBERE: Oh --

11 VICE CHAIRPERSON HILL: I'm sorry.

12 MS. JEMBERE: And one last thing.

13 VICE CHAIRPERSON HILL: Sure.

14 MS. JEMBERE: We also got support from DDOT,
15 so that's also one thing that I just want to mention.

16 VICE CHAIRPERSON HILL: Okay. Sure. Before
17 I have the party in opposition ask questions, is it
18 okay, I'm just going to hear from OP real quick?

19 MR. MORDFIN: All right. Good morning,
20 Chair, Members of the Board. I'm Stephen Mordfin.
21 And the Office of Planning recommends approval of
22 this application but with some conditions. First,
23 the applicant applied to permit a flat or two units
24 within the R-1-B. It's an existing building that the
25 applicant would have to convert into one. And due to

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1 agreement with that, as to the applicant?

2 MS. JEMBERE: Yeah.

3 VICE CHAIRPERSON HILL: Okay.

4 MS. JEMBERE: And then, can I add one more
5 thing?

6 VICE CHAIRPERSON HILL: Just one second.
7 Just give me one second, okay?

8 MS. JEMBERE: Okay.

9 VICE CHAIRPERSON HILL: Does the Board have
10 any questions of OP?

11 MR. HINKLE: Yeah, Mr. Mordfin, did you do
12 any research in terms of how the structure actually
13 got built within the R-1 zone?

14 MR. MORDFIN: I looked to try and find the
15 permits.

16 MR. HINKLE: Uh-huh.

17 MR. MORDFIN: I couldn't find any evidence of
18 permits. I don't know if that means there were no
19 permits, or it just means that I couldn't find
20 permits, but --

21 MR. HINKLE: Right. Right. And you didn't
22 find any previous C of Os for a flat --

23 MR. MORDFIN: No.

24 MR. HINKLE: -- or anything related to this?

25 MR. MORDFIN: I didn't.

1 MR. HINKLE: Interesting. I'm not familiar
2 with the area of the city. Is this a heavily transit
3 available area? Or is it a part of the city where a
4 lot of people drive?

5 MR. MORDFIN: Well, I mean, in this area here
6 it's developed with single-family detached houses.
7 And they all have driveways. It's off Bladensburg
8 Road. I don't know how much transit is available to
9 the residents of that neighborhood. I don't know how
10 much bus service is on Bladensburg Road.

11 MR. HINKLE: I guess my concern now is if you
12 were to take parking out of the front yard, and a lot
13 of people are driving because the transit is not
14 available, they would just parking on the street. Is
15 that a possibility? I mean, if you lose parking
16 spaces.

17 MR. MORDFIN: That is a possibility. It's
18 the same with anyone else that -- but for the
19 remainder of the houses there, their parking is in
20 the rear. They have their driveways going up the
21 side. But it just doesn't work in this case, and
22 just for preserving the residential appearance of the
23 neighborhood, not having paved the front yard, which
24 kind of gives it more of a commercial look, would be
25 better.

1 MR. HINKLE: I understand that. I also see
2 the photographs where there's like a, I don't know, a
3 townhouse or an apartment development immediately
4 adjacent to it with a large parking area. So I'm --

5 MR. MORDFIN: Yeah.

6 MR. HINKLE: I'm struggling a little bit with
7 the need to remove this parking just for, basically
8 aesthetic reasons versus practicality, I guess. But
9 I appreciate your comments.

10 In terms of the roadway, also in the
11 photographs it looks like the road is blocked. But
12 what's in the map, I think, in your report it appears
13 that the roadway could or maybe went through at one
14 point in time.

15 MR. MORDFIN: Yeah.

16 MR. HINKLE: Did you look at that?

17 MR. MORDFIN: Yeah. What you have there, it
18 butts Fort Lincoln.

19 MR. HINKLE: Uh-huh.

20 MR. MORDFIN: And so 35th Street is a public
21 street, and then when you get into Fort Lincoln, you
22 get Pine View Court Northeast.

23 MR. HINKLE: Okay.

24 MR. MORDFIN: It becomes a private street.

25 MR. HINKLE: That's all a private street.

1 Okay. Thank you.

2 VICE CHAIRPERSON HILL: Anything else? Sure,
3 go on. Please.

4 MR. MILLER: What is the land use map -- do
5 you know the land use map designation for this
6 property and for across the street and behind it
7 where the --

8 MR. MORDFIN: I'd have to look that up for
9 you.

10 MR. MILLER: Okay. I'm just wondering if
11 it's moderate density or low density. And can you
12 confirm that the park behind the property is planned
13 for development with a townhouse community?

14 MR. MORDFIN: Yeah, it is planned to have
15 townhouses. I don't think anything has been approved
16 for it yet.

17 MR. MILLER: Is that part of Fort Lincoln, or
18 no?

19 MR. MORDFIN: No, that's not part of Fort
20 Lincoln.

21 MR. MILLER: Okay. That's a different --
22 because it's a separate development.

23 MR. MORDFIN: Yes.

24 MR. MILLER: Okay. Thank you.

25 VICE CHAIRPERSON HILL: Okay, Ms. Tracy,

1 would you like to present first or ask questions?

2 MR. ROGERS: Mr. Vice Chair.

3 VICE CHAIRPERSON HILL: Oh, sorry.

4 MR. ROGERS: If I may?

5 VICE CHAIRPERSON HILL: Oh, DDOT is over
6 there.

7 MR. ROGERS: DDOT is here.

8 VICE CHAIRPERSON HILL: I'm sorry, I
9 apologize, you guys. One second, please. DDOT, go
10 ahead.

11 MR. ROGERS: Thank you. I appreciate that.

12 VICE CHAIRPERSON HILL: I didn't see you over
13 there. Sorry about that.

14 MR. ROGERS: That's all right. Jonathan
15 Rogers with the District Department of
16 Transportation.

17 DDOT wishes to clarify our position. Our
18 understanding of the relief that was requested was
19 for full parking relief, which is what our letter
20 reflects. And my understanding now is that the
21 parking related relief is related to the location of
22 that parking, between the property line and the
23 building façade. If that is something that the Board
24 decides to support, we would be in concurrence with
25 OP's condition that that one parking space be

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1 provided.

2 The issue with providing multiple parking
3 spaces is that there are public space regulations for
4 how the -- what is ordinarily the lawn area in front
5 of the house, should be treated. It's primarily
6 meant to be landscaped. And what's out there now is
7 a significant amount of paving. And so if the relief
8 were granted for the parking location, we would
9 request that the -- or the applicant would be
10 required to secure public space permits for the curb
11 cut and the treatment of that front, that front yard.
12 And that is something that would happen outside the
13 BZA process, but there would be -- we would ask that
14 the applicant work with us to enforce the one parking
15 space condition and ensure that public space
16 regulations are being followed.

17 VICE CHAIRPERSON HILL: Okay. Does the
18 applicant understand what DDOT just said? That you
19 would work with them?

20 MR. GUGSA: Yes. Yes.

21 VICE CHAIRPERSON HILL: Okay.

22 MR. GUGSA: Like, if possible we would like
23 to request at least two parking. But if it's the
24 requirement and if it's just one parking space, then
25 we're okay with that.

1 VICE CHAIRPERSON HILL: Okay. Okay, thank
2 you. All right, Ms. Tracy, you want to go ahead and
3 present, or would you like to ask questions of the
4 applicant now? You can also ask them afterwards.
5 Would you rather present first?

6 Please turn on your microphone. I'm sorry.

7 MS. TRACY: I think I'd rather present.
8 Thank you.

9 VICE CHAIRPERSON HILL: Okay. Please, go
10 ahead.

11 MS. TRACY: There have been several questions
12 raised and I may have the answer to it.

13 First of all, the proposed -- I'm sorry, on
14 this particular site that apartment was illegally
15 built which would explain why there are no records
16 for it. Also, if I could just read a section of my
17 statement here, just so that you can understand --
18 give me one second, please. I'm sorry.

19 VICE CHAIRPERSON HILL: That's all right.
20 Take your time.

21 MS. TRACY: Thank you. The area is a dead-
22 end street, which is half the distance of a city
23 block with no cul-de-sac, and it doesn't provide
24 space to turn around for vehicles that come up on the
25 block. We also are bombarded with the owners of 3105

1 and 3107, who also wrote as a proponent of this
2 project. They each have five cars.

3 Now I, myself, grew up on this street. This
4 street has been bombarded with a lot of development
5 as it was there before Fort Lincoln development laid
6 its first brick. I grew up on this street. Just
7 last month my family sold 3102 35th Street Northeast,
8 so I know the area well. Very well. And my auntie
9 lives at 3103 35th Street.

10 I am lenient toward the new purchasers, but
11 the problem has to be resolved. I am willing, and we
12 are willing to work with the new owners, and
13 especially DDOT to bring some type of order to the
14 street because the safety issue is really paramount,
15 because now that my auntie is using Metro Access,
16 they have a rule where they're not supposed to back
17 out of streets. And once the development gets -- the
18 parking gets used, there is no place to turn around
19 up at that street. And on the opposite side there is
20 a fire hydrant which blocks the neighbor across the
21 street from being able to park. Parking is
22 horrendous on that street, and it's unsafe.

23 It's just an unfortunate situation. But now
24 is the time that we're going to deal with it. I
25 noticed that you all did not mention anything about

1 the water because -- and let me just say that Ms.
2 Jones has said to me that she believes the water was
3 tapped illegally from her property. And I would
4 like, you know, some facts on that.

5 Also I want to put on record that I did
6 contact DDOT after reading their first statement of
7 affirming the project, letting them know that we
8 wanted a site visit to discuss options and ways that
9 we can resolve it.

10 But it is unfortunate that Ms. Jones is
11 directly opposed to the apartment.

12 VICE CHAIRPERSON HILL: Okay. Thank you.
13 No, just give me a second. So how do you turn around
14 now? Like how do people turn around now, because
15 there's people living there now, correct?

16 MS. TRACY: Yes. We're using -- no, not in
17 the proposed site. No, there's no one living in
18 there now. We use it --

19 VICE CHAIRPERSON HILL: There's no one there
20 -- the current -- your home is not currently
21 occupied?

22 MR. GUGSA: It's not currently occupied, no.

23 VICE CHAIRPERSON HILL: It's not currently
24 occupied. So how long has it been empty?

25 MR. GUGSA: It's been empty for the last

1 couple of -- a few months.

2 VICE CHAIRPERSON HILL: Okay. But when you
3 purchased it, it was occupied?

4 MR. GUGSA: When we purchased it, it was
5 tenant occupied.

6 VICE CHAIRPERSON HILL: Okay. And so when
7 there were people there, Ms. Tracy, how did they turn
8 around?

9 MS. TRACY: It was very difficult.

10 VICE CHAIRPERSON HILL: Okay.

11 MS. TRACY: Yes. It's always been difficult.

12 VICE CHAIRPERSON HILL: Okay. So it's always
13 been difficult.

14 MS. TRACY: But it's gotten worse because of
15 the few owner -- homeowners that could use their
16 parking lot space, by them having five vehicles. So
17 all of the space that we had before, growing up, when
18 I was growing up there, was available and cars could
19 turn around. But now that's nonexistent because
20 people have at least five cars to a house.

21 VICE CHAIRPERSON HILL: Okay. So your aunt
22 before when there were people in the building, it was
23 just difficult to turn around but they were still
24 able to. I mean, you're trying to resolve the
25 turning around issue. This is kind of a parking

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1 issue is what I'm trying to just understand.

2 Them having this house with two units in it,
3 you're not necessarily in opposition to the two
4 units; you're having a parking issue? Like it's the
5 fact that you can't turn around for emergency --

6 MS. TRACY: No.

7 VICE CHAIRPERSON HILL: There was something
8 in there with emergency vehicles.

9 MS. TRACY: Right. No, the issue is Ms.
10 Jones is directly opposed to the apartment being
11 there.

12 VICE CHAIRPERSON HILL: But why is she
13 opposed to the apartment? I'm just -- no, I'm just
14 trying to follow along. The apartment was there --

15 MS. TRACY: Yes.

16 VICE CHAIRPERSON HILL: -- in 2012. I'm
17 agreeing with you, it was there illegally, but it's
18 there now and just trying to understand that issue.
19 So she would rather the apartment not be there. She
20 would rather a single family home be there.

21 MS. TRACY: Correct.

22 VICE CHAIRPERSON HILL: Okay. With 11
23 bedrooms, or whatever it is. If it ends up being 11
24 bedrooms with 11 people, that's better than --

25 MS. TRACY: Well, Ms. Jones have lived

1 through the -- she's probably been educated since she
2 had the opportunity to experience the two-unit, the
3 11 bedrooms being used because she was there when the
4 apartment was being used. It brings on more traffic,
5 more cars --

6 VICE CHAIRPERSON HILL: Okay.

7 MS. TRACY: -- on to the block.

8 VICE CHAIRPERSON HILL: Okay.

9 MS. TRACY: And she's just totally opposed to
10 it and especially since it's built up so high it
11 looks directly over her entire house.

12 VICE CHAIRPERSON HILL: Okay.

13 MS. TRACY: And property.

14 VICE CHAIRPERSON HILL: Okay. Does the Board
15 have any other questions right now for the
16 opposition?

17 MR. HINKLE: Yeah, well, Mr. Vice Chair, I
18 would like to hear from DDOT in terms of the
19 emergency vehicle access and I mean obviously the
20 situation is what it is now and you're not putting in
21 a turn-around there. How do the emergency vehicles
22 access this area? Or would, I guess.

23 MR. ROGERS: I can't speak to that. I don't
24 know how they would operate. But it is currently a
25 dead-end.

1 In conversations with -- your last name, I'm
2 sorry.

3 MS. TRACY: Tracy.

4 MR. ROGERS: Ms. Tracy.

5 MS. TRACY: Cheryl Tracy.

6 MR. ROGERS: That DDOT has had, we've said
7 that we can do some investigation, and the issue is
8 that Pine View Court, just to the east, is a private
9 street and we can take a look at the history of that
10 and any sort of legal requirements that there might
11 be for access, or not. But because it's a private
12 street it's beyond the jurisdiction of DDOT. I think
13 opening that up would help.

14 It sounds like there's some circulation
15 concerns; I think is the root of --

16 MS. TRACY: Yes.

17 MR. ROGERS: -- of the concerns there. But
18 again, the ability to do that would be contingent
19 upon what sort of legal or access or easements
20 requirements were put in place, if any, as part of
21 that development. So that's a topic that we would
22 need to look into. We don't have that information at
23 the present time. But that's something that we've
24 discussed and can do that.

25 MR. HINKLE: Would any action in terms of

1 parking on this one subject site, any action by the
2 Board affect emergency vehicle access? Whether we
3 say you could have, you know, as many parking spaces
4 as exist now, or none, is there an effect on
5 emergency vehicle access to this area?

6 MR. ROGERS: Not as far as I can tell. The
7 assumption that it would make about -- I guess,
8 getting to the site for emergency vehicles, you would
9 just drive straight. It's the getting out is the
10 part that's a little bit more constrained because
11 there's no -- because it's a dead-end. I would
12 imagine that they would need to back into one of the
13 driveways, of which there are many on this street.
14 And if one parking space were to be approved here,
15 the idea would be that they would park as close to
16 the building façade as possible and you know, this
17 driveway could be available for those backing
18 maneuvers, as could any other driveway in the area.
19 It does sound like it is a little bit of a tight
20 street and it's not to say that that maneuver is the
21 easiest thing to do in the world, but it does seem
22 like that, practically speaking, is how emergency
23 vehicles would maneuver, you know, on this street.

24 MR. HINKLE: Okay. Thank you.

25 VICE CHAIRPERSON HILL: I have a question.

1 Ms. Tracy, I don't know if you know the answer to
2 this. So when there were people in this property do
3 you know, did they park in that lot that's right in
4 front of the building?

5 MS. TRACY: Yes, they did, and it made it
6 even harder because the positioning of the parking
7 spaces -- well, they could have done it better, but
8 if four cars were there it would make it very, very
9 hard to turn around.

10 VICE CHAIRPERSON HILL: Okay. So you're in
11 support of the pavement being removed from the front
12 yard and there just being one parking spot there.
13 You don't want the parking lot in front of the house?

14 MS. TRACY: That's not the issue. More so
15 Ms. Jones's issue is she doesn't want the apartment
16 there period.

17 VICE CHAIRPERSON HILL: Sure, I understand.

18 MS. TRACY: Okay.

19 VICE CHAIRPERSON HILL: But if the apartment
20 were there --

21 MS. TRACY: Yes.

22 VICE CHAIRPERSON HILL: Would you not want
23 the parking spaces, or would you want the parking
24 spaces?

25 MS. TRACY: We would want DDOT to assist in a

1 construction that would even make -- would make it
2 better because even with their parking space, it's
3 still difficult now. Without any cars there turning
4 into the proposed site unless you're going into the
5 proposed site.

6 VICE CHAIRPERSON HILL: Sure, I understand.

7 MS. TRACY: It's still difficult to turn
8 around there.

9 VICE CHAIRPERSON HILL: I understand.
10 Unfortunately, I don't think it's not under our
11 purview to force DDOT's hand on this, I don't think.
12 You know, so but okay. Thank you.

13 Do you have any questions of the opposition?

14 MR. MILLER: Ms. Tracy.

15 MS. TRACY: Yes.

16 MR. MILLER: Thank you for being here.

17 MS. TRACY: Thank you.

18 MR. MILLER: Thank you for your aunt being
19 here. So, I understand you're opposed to it being a
20 flat, and you'd rather it be single family. Is that
21 correct?

22 MS. TRACY: As designed, yes.

23 MR. MILLER: Do you prefer that it be vacant
24 than it being occupied?

25 MS. TRACY: May I confer?

1 MR. MILLER: Yes.

2 UNIDENTIFIED SPEAKER: Honest, yes.

3 MR. MILLER: Okay. All right. Thank you.

4 VICE CHAIRPERSON HILL: Okay. Ms. Tracy, you
5 have any questions for the applicant?

6 MS. TRACY: Not a question, but I do want
7 them to understand that we -- I particularly
8 understand the situation that you're in and I do look
9 forward to us resolving it. I do think it's feasible
10 to be resolved, if we all work together.

11 VICE CHAIRPERSON HILL: So from what you
12 said, what is the feasible to be resolved if you all
13 work together, because just now your aunt said that
14 she'd rather have the house empty, if it were a
15 house. And she's completely opposed to the two units
16 being there. What's the working together part?

17 MS. TRACY: The turn-around space because it
18 still would exist. You still -- even if it was
19 vacant --

20 VICE CHAIRPERSON HILL: I'm just trying to
21 understand.

22 MS. TRACY: I know. Understood. Even if it
23 was vacant, this space, the way that it's laid out
24 is, it just makes it very difficult to even use their
25 site to turn around.

1 VICE CHAIRPERSON HILL: Where is the turn-
2 around space that you're using now?

3 MS. TRACY: Their --

4 VICE CHAIRPERSON HILL: Their front yard?

5 MS. TRACY: Yes.

6 VICE CHAIRPERSON HILL: Their front yard.

7 MS. TRACY: But we pull all the way up and
8 then you have to back out and turn around.

9 VICE CHAIRPERSON HILL: Okay.

10 MS. TRACY: So if cars are there --

11 VICE CHAIRPERSON HILL: Okay. Okay.

12 MS. TRACY: -- you won't be able to pull
13 up --

14 VICE CHAIRPERSON HILL: Okay.

15 MS. TRACY: -- as far.

16 VICE CHAIRPERSON HILL: So I just want to be
17 clear.

18 MS. TRACY: Okay.

19 VICE CHAIRPERSON HILL: So you'd rather have
20 the lot and be able to use it as a turn-around space,
21 then not have the lot?

22 MS. TRACY: Well, let me just be clear. I'm
23 on two sides here. I'm representing my auntie at
24 3103, who is directly next to this site. I'm also
25 representing 3102 35th Street, having known that this

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1 problem has existed for quite a while. And I'm
2 working with my auntie to get it resolved somehow.

3 Now, having said that, what's your question
4 again? About what I prefer?

5 VICE CHAIRPERSON HILL: Yeah, that's right.

6 MS. TRACY: Versus?

7 VICE CHAIRPERSON HILL: Right now you're
8 using the spot in front of the house to turn around,
9 the paved area.

10 MS. TRACY: Yes.

11 VICE CHAIRPERSON HILL: And so it appears to
12 me that you would prefer that the paved area stay, so
13 that you can continue to turn around in that area.

14 MS. TRACY: But there is a sidewalk there.

15 VICE CHAIRPERSON HILL: So there's no curb
16 cut. There is a curb cut?

17 MS. TRACY: It is a curb cut. An angled curb
18 cut to go into their property. Then they have ample
19 amount of space on their site for their cars to turn
20 around. But if cars are parked on there, it makes it
21 very difficult for anyone else that's not going to
22 their site, but use their cut through to turn around.

23 VICE CHAIRPERSON HILL: Okay. And you
24 understand that OP and DDOT wants them to get rid of
25 that front paved area, and just make it -- DDOT, I

1 just want to make sure. You're getting rid of the --
2 you want the curb cut to go away, correct?

3 MR. ROGERS: My understanding of the relief
4 that is requested is the relief from where the
5 parking space is located, correct, between the
6 property line and the building façade?

7 VICE CHAIRPERSON HILL: Yes.

8 MR. ROGERS: So our original understanding
9 was that the applicant was seeking full relief from
10 the on-site parking. So that's -- our report
11 reflects a different relief than is being actually
12 requested. So, given the actual relief that's being
13 requested for the parking location, our position is
14 that if the board approves it, that the applicant
15 come forward and make some changes to the public
16 space.

17 I'm looking at the site picture now and I
18 think I understand some of the challenges in turning
19 around because from the curb cut the driveway
20 immediately makes a turn to the east, which would
21 make turning maneuvers a little bit more complicated.
22 I think some of the public space improvements that
23 we're envisioning would actually straighten out that
24 driveway so that it is directly perpendicular to the
25 street. And I think that would actually facilitate

1 turning movements so that ambulances and other
2 vehicles, private vehicles could kind of go into that
3 space and make a more normal turn-around maneuver.
4 So I actually think some of the changes that we're
5 thinking about will facilitate the circulation
6 problems that Ms. Tracy has identified today.

7 VICE CHAIRPERSON HILL: And those are the
8 changes that you had asked the applicant to work with
9 you on, right?

10 MR. ROGERS: In my earlier testimony,
11 correct. Yes.

12 VICE CHAIRPERSON HILL: Okay. And part of
13 those, just so I -- is to eliminate the curb cut?

14 MR. ROGERS: Well, no. If the Board approves
15 the parking relief requested there would need to be a
16 curb cut that would require a permit. But a curb cut
17 would be required to access that parking space.

18 VICE CHAIRPERSON HILL: I'm sorry. I didn't
19 understand. I understand now, thank you.

20 Ms. Tracy, you have one quick comment?

21 MS. TRACY: One quick comment.

22 VICE CHAIRPERSON HILL: Okay.

23 MS. TRACY: Also, I want you all to be aware
24 that they did mention 11 bedrooms. So one parking
25 space to 11 bedrooms?

1 VICE CHAIRPERSON HILL: Right. Yeah, that's
2 okay. That's -- okay. Thank you.

3 Does the applicant like to close with
4 anything?

5 MR. GUGSA: Just would like to answer some
6 questions. So one of your concern is with the water.

7 MS. TRACY: Yes.

8 MR. GUGSA: So, this is the water bill and
9 this is the --

10 VICE CHAIRPERSON HILL: Excuse me. Can I
11 just stop you a second? We're not here for the
12 water. So it's all right. Just go ahead and make
13 your closing and take however much time you need here
14 to make your closing. Okay? Thank you.

15 MR. GUGSA: Okay. Just one thing to say,
16 with the parking, we are working with everybody, like
17 making a -- trying to make a U-turn using the
18 driveway. We're okay. Like if we make a driveway
19 before we reach our property, then we'll do a,
20 like --

21 MS. JEMBERE: Yeah.

22 MR. GUGSA: We'll use anybody's driveway, so
23 we're okay with them using our driveway.

24 MS. JEMBERE: Yeah. And then the other thing
25 is, I mean, most people -- I mean, not most -- yeah,

1 most people right now, they come and you know, use
2 our property to make a, you know, to make a U-turn.
3 Like, they go inside our property and then they turn
4 back and then, you know, they use our property. I
5 mean, like okay, like we're not opposing anyone, like
6 you know what I mean, to use that -- but we bought
7 the property -- I mean, it's our private property as
8 well. And you know the fact -- I don't know. Like
9 it shouldn't be vacant in the first place. Like for
10 people to use our parking space. I mean, the reason
11 why it should be vacant is, okay, people can come and
12 use our space to make a U-turn. But you know, we're
13 paying mortgage on that property so I mean --

14 VICE CHAIRPERSON HILL: Okay.

15 MS. JEMBERE: -- it doesn't make sense for it
16 to be vacant.

17 VICE CHAIRPERSON HILL: Okay.

18 MS. JEMBERE: Yes.

19 VICE CHAIRPERSON HILL: Thank you very much.
20 I've neglected to ask, is there anyone here from the
21 ANC? Is there anyone here from the ANC? Is anyone
22 here to speak in support of the application? Anyone
23 else to speak in opposition?

24 Okay. Well, with that then I'm going to --
25 does the Board have any other questions? Okay.

1 MR. MILLER: I should have asked this
2 earlier, Mr. Vice Chair.

3 So what do you want to do? You want two
4 units there, and how many bedrooms would each unit
5 have? And do you, yourselves intend to occupy it or
6 just to rent it out?

7 MR. GUGSA: So right now the property has two
8 five-bedroom units. And we're expecting a baby in
9 July, but we're still a small family. We can't fit
10 into a five-bedroom right now. So in the future we
11 had a plan to move into the property. But as of now
12 it doesn't make sense for us to move into a five-
13 bedroom.

14 MS. JEMBERE: And it's a huge property. It's
15 7,500 square feet. And even if you see the inside,
16 the bedrooms are huge. It's about 25,000 square feet
17 and you know, like we thought even before starting
18 the BZA process, like it takes about three months
19 like to come through this, you know, to this meeting.
20 So you know, we spoke with DCRA representative and we
21 said, I think we might as well, you know, convert the
22 property to, you know, to a single unit. But that's
23 a lot of money. That's, you know, that's over like
24 150,000. So there's nothing we can do about it.

25 And we're not you know, we're not

1 constructing anything new. We're just -- you know, I
2 mean, definitely we're not going to live in a 10-
3 bedroom house. Even a five-bedroom is, you know,
4 huge for you know, for a small family like us.

5 MR. MILLER: Okay. Thank you.

6 VICE CHAIRPERSON HILL: All right. Thank
7 you. So with that then I'm going to go ahead and
8 close the hearing. Is the Board ready to deliberate?

9 Okay. All right. After hearing the
10 testimony I was -- well, I was pretty clear in terms
11 of like, they'd gone to the ANC, they worked out with
12 OP, they agreed to the conditions with OP. DDOT now
13 has a condition that is the same condition as OP's,
14 and the applicant is in agreement.

15 I heard from the opposition in terms of the
16 access and the ability to turn around. It sounds as
17 though the front yard has been where people have been
18 turning around, and so that is now something that
19 DDOT has said would -- once the applicant has worked
20 with DDOT to resolve the issue so that you just have
21 the one parking space there, which the applicant was
22 in agreement to, then that would improve the
23 circulation in the neighborhood there, which would
24 hopefully then help the opposition's issue, which is
25 access and circulation.

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1 So in that regard I'm in support of the
2 application and would be interested in hearing if the
3 Board has any other comments.

4 MR. HINKLE: Yeah, I'm sorry, Mr. Vice Chair,
5 right? Chair. Whatever. The applicant is in
6 agreement to reduce the parking to one space. Is
7 that --

8 MR. GUGSA: If that's what's enforced the
9 case, yes.

10 MR. HINKLE: But that's not what you want,
11 right? You --

12 MS. JEMBERE: Well, we requested for, you
13 know, because it's a huge space, of course it's a
14 huge, you know, a huge yard, and it's already paved.
15 So we would love to use, you know, the four.

16 MR. HINKLE: Right. Right.

17 MS. JEMBERE: But we worked well with OP and
18 they suggested one. So --

19 MR. HINKLE: So you're in agreement with
20 that?

21 MR. GUGSA: Yeah. But again, I'm going to
22 ask them, if that's really going to help them out
23 with the parking. I imagine if we have that driveway
24 then it would be easier for anybody who is trying to
25 make a U-turn. It would support the U-turn for them.

1 But if they believe that one driveway is better for
2 them, then we're okay with that. I'll give this
3 opportunity to them to say which one they think is
4 the right one, one driveway or like removing the
5 driveway.

6 MS. TRACY: I'm glad you gave me the
7 opportunity.

8 VICE CHAIRPERSON HILL: Excuse me. I'm
9 sorry. Just wait, ma'am.

10 MR. HINKLE: I just had a question.

11 VICE CHAIRPERSON HILL: Wait a minute. Wait
12 minute. Sorry.

13 MR. HINKLE: I just had a question for the
14 applicant.

15 MS. TRACY: I'm sorry.

16 MR. HINKLE: Not asking for a conversation.

17 MS. JEMBERE: We are absolutely okay with the
18 one parking; with what OP and DDOT suggested.

19 MR. HINKLE: Okay. Thank you.

20 VICE CHAIRPERSON HILL: Now procedurally, Mr.
21 Moy --

22 MR. HINKLE: It just wasn't clear to me.

23 VICE CHAIRPERSON HILL: -- I'm just curious
24 because now I have a question for OP that -- I can
25 ask my question to OP? All right.

1 OP, so given all this discussion, do you have
2 any other suggestions or comments about the one
3 parking space?

4 MR. MORDFIN: Well, we had concluded that the
5 one parking space would be sufficient because that's
6 what's required by the zoning. The zoning requires
7 within the exception of the R-5-A to have one parking
8 space for a flat in all districts. So even though
9 it's not a use permitted as a matter of right, in the
10 R-1-B, one is what is written in there.

11 So therefore we conclude that one parking
12 space should be sufficient to serve a two-unit
13 building.

14 VICE CHAIRPERSON HILL: Okay. So you're not
15 changing your -- so that's fine.

16 MR. MORDFIN: Yeah.

17 VICE CHAIRPERSON HILL: So that's your
18 comment and that's what you have to say. Thank you.

19 MR. HINKLE: Mr. Chair.

20 VICE CHAIRPERSON HILL: Please, Mr. Hinkle.

21 MR. HINKLE: I'm sorry. But that's a minimum
22 requirement. That's not a maximum.

23 MR. MORDFIN: Correct. Correct. That's a
24 minute requirement. Yeah, there are no parking
25 maximums in the Zoning Regulations currently.

1 MR. HINKLE: Thank you.

2 VICE CHAIRPERSON HILL: Mr. Hill, do you have
3 anything else?

4 No, I'm sorry.

5 MS. TRACY: This is unfair.

6 VICE CHAIRPERSON HILL: I'm sorry. You've
7 had your opportunity.

8 MR. HINKLE: What I've heard is there is a
9 horrendous parking problem on this street. We have
10 two units with 11 bedrooms. It's not necessarily a
11 heavily transit oriented neighborhood, and I have
12 concerns of conditioning this approval on one parking
13 space. I think there's a condition out there that's
14 been there for 12 years. They don't know how it got
15 constructed. But I think limiting the site to one
16 parking space could exacerbate the problem versus
17 help it. And I'm not sure what's being gained from
18 that. A little more green space?

19 So I'm very open to --

20 VICE CHAIRPERSON HILL: I don't necessarily
21 disagree.

22 MR. HINKLE: The relief requested but the
23 condition --

24 VICE CHAIRPERSON HILL: If you have a
25 suggestion as to how to move forward with this I'm

1 also happy to hear that.

2 MR. HINKLE: I would move forward on this
3 application with approval without the condition of
4 one parking space, limiting it to one parking space.
5 Without, yeah.

6 VICE CHAIRPERSON HILL: Would OP be willing
7 to speak with the applicant for a few minutes here to
8 talk about -- DDOT has a question or a comment?

9 MR. ROGERS: If I may? So there are public
10 space regulations that apply to some of the area in
11 front of the house. Part of the public space.
12 Providing more than one parking space could be
13 contrary to those public space regulations. And so
14 there is a public space permitting component to this
15 conversation.

16 Without having studied the exact impacts, you
17 know, I think one parking space could be accommodated
18 within relative conformity with the public space
19 regulations. But I think additional paving, as you
20 know, sort of in line with what's out there today, is
21 certainly not in compliance with the public space
22 regulations. And so necessarily permitting multiple
23 parking spaces could have implications that they may
24 not -- that may not be something that is permissible
25 by DDOT from a public space permitting perspective.

1 VICE CHAIRPERSON HILL: Okay. So that sounds
2 like it's not going to get resolved right now in this
3 way. So I'm going to go back with my initial motion
4 which is to -- I don't know how to change it in this
5 instance, is to go ahead and approve, or make a
6 motion to approve the Application 19185 of Samson
7 Gugsu pursuant to 11-DCMR-3103.2 for variances from
8 the use requirement under 200 and the off-street
9 parking requirements under 2116.4 to permit a flat in
10 the R-1-B district at premises 3101 35th Street
11 Northeast. Conditioned on one space.

12 MR. HINKLE: Just to move this conversation
13 forward I will second that. I think it's a mistake
14 but if I vote no then --

15 VICE CHAIRPERSON HILL: No, then --

16 MR. HINKLE: -- this will not move forward.

17 VICE CHAIRPERSON HILL: How would I -- I
18 don't put the condition for the one space and then
19 they have to work with DDOT?

20 MR. HINKLE: Correct.

21 VICE CHAIRPERSON HILL: Okay. I'll change
22 the motion to, not on the condition of the one space,
23 and then working with DDOT to see if there is a way
24 to provide more parking and accommodate the
25 neighborhood.

1 MR. HINKLE: I'll second that.

2 MR. MILLER: I just wanted to comment on the
3 motion. I think I can be in support of it but I
4 think -- because I think a vacant housing is not a
5 productive use of property, so especially when
6 there's a need for housing in this city. But the
7 issues that the opposition has legitimately raised
8 about the street condition on this street and the
9 turnaround, really needs attention from the city.
10 And you've -- Mr. Rogers has indicated that they want
11 to work with the applicant and then maybe with the
12 other neighbors here to try to come up with a
13 relocated curb cut so that this property owner can,
14 both for their own use and for their good neighbors
15 use, be able to turn around in that driveway.

16 There looks like there's a Jersey barrier at
17 the end of this thing. There may be other -- even
18 though it's private space, there may be other
19 improvements that could be made just to make it a
20 safe situation and more accommodating for everybody
21 who lives on that block, and make it much more safe.
22 So I would encourage the applicant to work with DDOT
23 in the public space permitting process and DDOT gives
24 its own attention to this issue and hopefully this
25 moving forward would allow the neighbors to work

1 together and be good neighbors together and find a
2 resolution to that problem.

3 So with that, I will support your motion.

4 VICE CHAIRPERSON HILL: Mr. Moy, are you
5 clear on the motion?

6 MR. MOY: I think I am, but it would help if
7 you read that -- reread your motion, sir. Or do you
8 want me to do it for you?

9 VICE CHAIRPERSON HILL: That would be great
10 if you could do it for me. Thank you.

11 MR. MOY: Okay. As I understand it, then,
12 the motion is to approve the variance relief from the
13 use of requirements under Section 200, and the off-
14 street parking requirements under 2116.4, statute of
15 limitations long as the -- on the condition that --
16 actually that it's not on the condition of one off-
17 street parking space.

18 VICE CHAIRPERSON HILL: Yes, not on the
19 condition.

20 MR. MOY: So if that makes any sense.

21 VICE CHAIRPERSON HILL: And that they work
22 with DDOT to help resolve the issue.

23 MR. MOY: Okay. Good.

24 VICE CHAIRPERSON HILL: The motion has been
25 made.

1 MR. HINKLE: I seconded it.

2 VICE CHAIRPERSON HILL: Second it. Motion
3 has been made and seconded.

4 [Vote taken.]

5 VICE CHAIRPERSON HILL: The motion has been
6 carried. Mr. Moy.

7 MR. MOY: Staff would record the vote, then,
8 as three to zero to two. This is on the motion of
9 Vice Chair Hill, seconded, Mr. Hinkle. In support,
10 Mr. Miller. Member not present, board seat vacant.
11 Motion carries, sir.

12 VICE CHAIRPERSON HILL: And you have to do a
13 full order. Is that correct?

14 MR. MOY: That's correct, sir.

15 VICE CHAIRPERSON HILL: Okay. Thank you.
16 Thank you, all.

17 MS. TRACY: Thank you.

18 VICE CHAIRPERSON HILL: Fifteen-minute break.

19 [Off the record from 12:00 p.m. until 12:15
20 p.m.]

21 VICE CHAIRPERSON HILL: Good afternoon,
22 everyone. I just want to clarify again where we are
23 with the agenda, and so everyone kind of knows where
24 they stand. What we were going to do next was 19074
25 of Alexander Hastings, followed by 19148 of Park View

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1 Condominium. Then 19169 of 311 K Street. And then
2 the last on the docket today will be the appeal which
3 is 19174, Unit Owners and the Erie Condominium.

4 So with that being said, Mr. Moy, if you'd
5 like to call the next case?

6 MR. MOY: Yes, sir. Thank you, sir. That
7 would be Application No. 19074 of Alexander Hastings.
8 And this application, sir, has been captioned and
9 advertised for a special exception relief under
10 Section 223, not meeting the rear yard requirements
11 under Section 404.1, to allow the construction of a
12 two-story rear garage addition and a covered walkway
13 to an existing one-family dwelling. R-4 district,
14 1329 Holbrook Street Northeast, Square 4073, Lot 82.

15 VICE CHAIRPERSON HILL: Okay. Thank you.
16 Good afternoon. Could you introduce yourself?

17 MR. HASTINGS: Alex Hastings, owner and
18 applicant. Okay.

19 VICE CHAIRPERSON HILL: So, Mr. Hastings,
20 there seems to be a little bit of confusion with the
21 Office of Planning. I've read the record and
22 understanding the variant -- what the requested
23 relief is for this special exception. I was actually
24 interested in hearing from Office of Planning first
25 to maybe clarify what it is because you were in --

1 well, I'll let you go ahead and speak to it, if
2 that's all right.

3 MR. GYOR: Good afternoon, Mr. Vice Chair.
4 Stephen Gyor with the Office of Planning. We had a -
5 - we were a little bit confused as to which were the
6 most current plans, and as I understand it with
7 talking with -- after talking with the applicant that
8 it's Exhibit 33. There are a few different plans in
9 the record showing various degrees of encroachment on
10 the building restriction line, and Exhibit 33 shows -
11 - is the latest, and so that was our confusion as to
12 which was the latest.

13 And what is -- are you in opposition still?

14 MR. GYOR: So our position is that we support
15 the relief for the rear yard which is what's before
16 the Board here. We don't advocate -- we want to get
17 on the record that we don't advocate over the
18 building restriction line. That's a separate process
19 that goes through DDOT so -- but as far as the relief
20 for rear yard is concerned, we have no objections to
21 that relief.

22 VICE CHAIRPERSON HILL: Okay. Thank you.
23 And for the applicant, I noticed that you did meet in
24 front of the ANC?

25 MR. HASTINGS: Yeah, I met in front of them

1 twice.

2 VICE CHAIRPERSON HILL: And can you tell me
3 what the result was?

4 MR. HASTINGS: So, the first time I went in
5 front of the ANC they refused to accept e-mailed
6 copies of letters of support and asked me to come
7 back with printed copies as well as a sun study. So
8 I did that. That was the August meeting.

9 September meeting I came back with the
10 printed copies and the sun study, and they -- the
11 chair came back wanting unanimous support of all the
12 neighbors on the block. And at that point, I've
13 talked to my neighbors, some of them support it. No
14 one opposes it but some of them didn't want to write
15 letters of support, so I was kind of stuck with the
16 ANC at that point. Our ANC can be difficult to work
17 with at times.

18 VICE CHAIRPERSON HILL: So they weren't in
19 support or they're not in support now, or where do
20 you stand?

21 MR. HASTINGS: They voted to support on the
22 condition that I got the unanimous support of the
23 block. So, that's where it stands.

24 VICE CHAIRPERSON HILL: And how many people
25 are in the block?

1 MR. HASTINGS: They didn't really define a
2 block. They didn't define it was like, you know,
3 just like the unit block of my street or the entire
4 square or --

5 VICE CHAIRPERSON HILL: Okay.

6 MR. HASTINGS: There's e-mail communication.
7 Exhibit 46 is sort of my e-mail with the chair and
8 her demands.

9 VICE CHAIRPERSON HILL: Okay. Okay.
10 Actually, could you tell me just a little bit --
11 could you tell me a little bit about the project?

12 MR. HASTINGS: So the project is a two-story
13 structure at the rear of the property. The first
14 floor would be a garage parking. Second floor would
15 be a studio apartment. And that's connected with a
16 connecting corridor to a 10-foot addition at the back
17 of the main property.

18 VICE CHAIRPERSON HILL: Okay. Well, now that
19 I see again that -- hearing from the Office of
20 Planning and then also that DDOT had no objection, I
21 don't really have a lot of questions concerning the
22 special exception. Does the Board have any
23 questions? Please.

24 MR. MILLER: Thank you, Mr. Vice Chair. So
25 just a little bit more about the project.

1 So do you currently live at this --

2 MR. HASTINGS: Yes.

3 MR. MILLER: And so, are you going to rent
4 out this studio apartment or use it --

5 MR. HASTINGS: Correct.

6 MR. MILLER: -- yourself?

7 MR. HASTINGS: We're going to rent it out, at
8 least, you know, for the medium term.

9 MR. MILLER: Okay.

10 MR. HASTINGS: That's the plan.

11 MR. MILLER: And so how many -- what's the
12 size of your current household?

13 MR. HASTINGS: The current household is three
14 with another one coming in July.

15 MR. MILLER: Congratulations.

16 MR. HASTINGS: Thank you.

17 MR. MILLER: And what is your understanding
18 of this building restriction issue, and there's some
19 reference, maybe I should ask DDOT this, that other
20 approvals would be required.

21 MR. HASTINGS: Yeah, I know. I'm waiting to
22 go a public space permit and that's my intention to
23 do next, to build over the building restriction line.

24 MR. MILLER: And, Mr. Gyor, is that the only
25 entity, DDOT, that would have to approve that

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1 building restriction line encroachment? And what was
2 the purpose of that building restriction line in this
3 particular location?

4 MR. GYOR: Yes. As I understand it DDOT
5 would be the next government agency that he'd have to
6 get approval from. And the purpose is apparently
7 decades ago within the District there were these
8 building restriction lines set up which covers areas
9 that are designated for parking. Not for auto
10 parking, but for open space, in that sense of the
11 word, parking. And so these are essentially
12 considered part of the District's open space network.

13 MR. HASTINGS: Actually, can I add one thing?

14 MR. MILLER: Sure.

15 MR. HASTINGS: The building restriction
16 currently goes through my dining room, so I'm
17 actually already in violation of it. Just a lot of
18 the houses in the neighborhood I guess were built
19 before the building restriction lines, or in some way
20 such that they, you know, they don't -- none of them
21 conform on the corner lots at least.

22 MR. MILLER: Right.

23 MR. HASTINGS: Currently.

24 MR. MILLER: We have a lot of leftover
25 antiquated regulations which impeded improvements

1 from happening.

2 VICE CHAIRPERSON HILL: Any other questions?

3 MR. HINKLE: Yeah, thank you, Mr. Chair.

4 Could you talk a little bit about the issue of the
5 meaningful connection? How is this pergola that I'm
6 looking at, how is that a meaningful connection
7 between the addition and the house?

8 MR. HASTINGS: My understanding was that it's
9 like a pergola with sub two-foot I guess joist
10 spacing is what was needed to connect the two houses
11 and allow me to build a second story on the garage.
12 So that's why that's there, and there's not a ton
13 else.

14 MR. HINKLE: So it's really a connection from
15 the basement to the garage? Is that what I'm seeing?

16 MR. HASTINGS: Yeah.

17 MR. HINKLE: And that's what makes it
18 meaningful, right?

19 MR. HASTINGS: Yes.

20 MR. HINKLE: Okay. Yeah. I always think
21 that requirement is a little strange, but --

22 MR. HASTINGS: Yeah, I agree, but it is what
23 is.

24 MR. HINKLE: Right. Now I'm not sure and
25 maybe the Office of Planning can answer this. I

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1 thought it was a 50 percent -- 51 percent coverage
2 that made it a connection. It looks like he's just
3 proposing joists at two feet center.

4 MR. GYOR: As far as I know the connection
5 would have to allow access into one -- from one
6 building to another. As far as the two feet I'd have
7 to get back to you on that item.

8 MR. HINKLE: Okay. Thank you. Just curious.

9 VICE CHAIRPERSON HILL: Any other questions?
10 Okay. Well, upon reading the record, I mean, I feel
11 comfortable with the special exception and that you
12 know, I do see that there's 13 letters of support. I
13 don't know what the ANC was -- the majority. Or I'm
14 sorry, to all of 13. We do have 13 letters of
15 support and also DDOT doesn't have any objection to
16 it.

17 Is there anyone here from the ANC?

18 Is anyone here in support of this
19 application?

20 Anyone here in opposition?

21 Well, then that being the case I would move
22 to approve the application of 19074 pursuant to 11-
23 DCMR-3104.1 for a special exception under 223, not
24 meeting the rear yard requirements under 404.1, to
25 allow the construction of a two-story rear garage and

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1 addition and a covered walkway to an existing one-
2 family dwelling in the R-4 district at premises 1329
3 Holbrook Street Northeast, Square 4073, Lot 82.

4 MR. MILLER: Second.

5 VICE CHAIRPERSON HILL: Motion has been made
6 and seconded.

7 [Vote taken.]

8 VICE CHAIRPERSON HILL: The motion passes.
9 Mr. Moy.

10 MR. MOY: Staff would record the vote as
11 three to zero to two. This is on the motion of Vice
12 Chair Hill to approve the application for the special
13 exception requested as to plans as -- as to revised
14 plans as shown on Exhibit 33. Seconding the motion,
15 Mr. Miller. Also in support, Mr. Hinkle. Board
16 member not present today. Board seat vacant. Motion
17 carries, sir.

18 VICE CHAIRPERSON HILL: Thank you very much.
19 All right, Mr. Moy.

20 MR. MOY: Full order or summary order?

21 VICE CHAIRPERSON HILL: Oh, I'm sorry, a
22 summary order.

23 MR. MOY: Thank you.

24 All right, parties to the table. This is to
25 Application No. 19148 of Park View Condominium

1 Ventures, LLC., as captioned and advertised for
2 special exception relief under Section 337, to expand
3 an existing residential building into a 12-unit
4 apartment building not meeting the requirements of
5 330.7, R-4-D, or rather R-4 district, 525 Park Road
6 Northwest, Square 3037, Lot 55. Also, Mr. Chair, I
7 believe the applicant revised a relief to -- amended
8 the relief for variance relief to lot occupancy under
9 Section 403.2, revised self cert is under Exhibit 34,
10 and if the applicant can confirm that, thank you.

11 VICE CHAIRPERSON HILL: Thank you, Mr. Moy.
12 Could the applicant confirm that these are the relief
13 you're looking for?

14 MR. WOODILL: Yes, this is.

15 VICE CHAIRPERSON HILL: All right. So just
16 for the record again, I did review the previous
17 hearing. I saw you guys were here and kind of the
18 issues that you were working through. And then also
19 I have, you know, read everything.

20 At that time, I guess, it was pretty much,
21 you know, kind of an interpretation with OP, with
22 Office of Planning. And so I suppose I'd really kind
23 of like to hear from the Office of Planning first as
24 to after the last hearing, where you kind of are with
25 that.

1 MR. COCHRAN: With respect to the -- it's
2 actually not the Office of Planning. It's the Zoning
3 Administrator.

4 VICE CHAIRPERSON HILL: Sorry.

5 MR. COCHRAN: That's okay. We're working on
6 the Zoning Administrator's interpretation that this
7 requires a variance, not a special exception. And I
8 can go -- if you want me to, I can go into more
9 detail on why that came about, and how that came
10 about.

11 VICE CHAIRPERSON HILL: But now the applicant
12 is asking for the variance, correct?

13 MR. COCHRAN: Yes.

14 VICE CHAIRPERSON HILL: Okay. Thank you.

15 MR. COCHRAN: From 40 percent lot occupancy
16 as opposed to their previously thinking that they
17 might be allowed 60 percent lot occupancy. And
18 again, I can go into that if the applicant doesn't.

19 VICE CHAIRPERSON HILL: Okay. Thank you.
20 Okay. I'm sorry. For the record, could you go ahead
21 and introduce yourselves?

22 MR. WOODILL: Job Woodwill, and I'm the
23 principal of Landmark Construction Development and we
24 are also the owners of Park View Condominium Ventures
25 as well.

1 MS. BIRKS: I'm Jennifer Birks from R.
2 Michael Cross Design Group. I'm the project
3 architect on this project.

4 VICE CHAIRPERSON HILL: Okay. Great. Thank
5 you. I'm sorry, I'm kind of going out of order here
6 just a little bit. But please, go ahead.

7 MR. WOODILL: If you'd like, and mirroring
8 what Steve has said, I can give you a little bit more
9 of the backstory of the project of how we've got here
10 and what the confusion was with the relief needed,
11 and maybe explain how we got here, just briefly if it
12 pleases you.

13 VICE CHAIRPERSON HILL: Yeah, that would be
14 great. Thank you.

15 MR. WOODILL: Okay.

16 VICE CHAIRPERSON HILL: And then a little bit
17 more about the project. Thank you.

18 MR. WOODILL: Right. Right. Right. So we
19 purchased this --

20 VICE CHAIRPERSON HILL: Excuse me. I'm
21 sorry, could you please -- if you'd have a seat
22 there.

23 MR. WOODILL: He's also with us, so.

24 VICE CHAIRPERSON HILL: No, he can have a
25 seat if you want to have a seat. That's fine. Just

1 introduce yourself.

2 MR. WOODILL: So, when we first --

3 VICE CHAIRPERSON HILL: No, one second. I'm
4 sorry. Could you just introduce yourself, please?

5 MR. CROSS: Apologize. Michael Cross,
6 architect. Sorry for arising --

7 VICE CHAIRPERSON HILL: Okay.

8 MR. CROSS: -- arriving late.

9 VICE CHAIRPERSON HILL: Have you filled out
10 two witness cards?

11 MR. CROSS: I have.

12 VICE CHAIRPERSON HILL: Okay.

13 MR. CROSS: I was here earlier and I stepped
14 out for another appointment.

15 VICE CHAIRPERSON HILL: Were you worn in?

16 MR. CROSS: I was.

17 VICE CHAIRPERSON HILL: Okay. Great. Thank
18 you.

19 MR. WOODILL: We apologize for his tardiness.
20 I'm sorry. Beat him a little bit later.

21 When we purchased this project last year it
22 was at a time when there was some flux, if you will,
23 and the new regulations in R-4 were being
24 implemented. And my firm did quite a bit of due
25 diligence. We spoke with the Office of Zoning

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1 administrator, we had a PDRM. But I think we were
2 still all figuring out what the new regulations
3 meant, and at that time we were -- we believed the
4 relief -- actually, we didn't originally believe
5 there was any relief needed. We thought, due to our
6 research that this had to be a conversion because the
7 year it was built. It was built in 1968, so that's
8 post 1958, when the zoning code was enacted.

9 The area hasn't been rezoned at any time.
10 It's always been an R-4, and there is no BZA relief
11 on record anywhere that we could find. We did locate
12 building permits. We did locate inspections. We did
13 locate wall testings like that, but there wasn't a
14 definitive answer in the Office of Zoning
15 Administrator, in his mind, in Matt LeGrant's mind
16 that this was a conversion.

17 So our original application was based on the
18 interpretation of the new zoning ordinance that we
19 thought we needed a special exception. And at that
20 time we thought we would come under the 60 percent
21 occupancy rule, which for us was -- that made the
22 financial ability to do this project. The difference
23 between 40 and 60 percent for us at this project was
24 difference between marketable one-bedroom and
25 marketable two-bedrooms. But we bought it under the

1 presumption that it was under that 60 percent and it
2 wasn't really countermanded at any time.

3 When we were here last and in subsequent
4 talks with Matt LeGrant and with the Office of
5 Planning, he has made it clear that his ruling is
6 that this is -- that this particular property comes
7 under the 40 percent lot occupancy rule. His
8 reasoning is that it is a quote/unquote purpose built
9 structure. And if you do read the table it does say,
10 40 percent for all other structures.

11 However, there are structures on the same
12 block that have been actually approved by the BZA,
13 that are almost 70 percent, apartment houses.
14 There's a structure just behind us that is 55 percent
15 and there are some others that are just adjacent to
16 this building that are held at 60 percent rule, but
17 they're still apartment houses.

18 So having said that we're able to do a
19 technical, you know, overview of the project. We're
20 able to present, we're able to ask questions, or
21 we're happy to, you know, stand on the record. It's
22 up to the Board. And I'm sorry if that seems a
23 little bit of a convoluted story but it was a little
24 bit of a -- it was convoluted how we got here. So,
25 but this is what the Office of Zoning Administrator

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1 and Office of Planning has said, that relief that we
2 need, although we still think there's some, you know,
3 maybe some questions aren't fully answered. But you
4 know, we want to move forward with this relief.

5 VICE CHAIRPERSON HILL: Okay. Can you show
6 me how the plans -- I was curious as to where the
7 expansion actually is? I mean, I know there's a
8 building now that the existing apartment building is
9 there, and it's a 12-unit apartment building now.
10 And you're not changing the number of units, you're
11 just expanding the units.

12 MR. WOODILL: So I mean, you can look -- we
13 were able to show you an overhead, but essentially
14 that brick area you see in the middle, that's the
15 existing building.

16 MS. BIRKS: This is the existing building
17 right here.

18 MR. WOODILL: Right. Right.

19 MS. BIRKS: And in the plat you can see that
20 we're adding on to the front. To the front of the
21 existing building and to the rear of the existing
22 building.

23 VICE CHAIRPERSON HILL: Okay. And you did go
24 and I know you presented in front of the ANC and they
25 approved the application. Can you tell me a little

1 bit about what they said or how that went?

2 MR. WOODILL: We both went in front of the
3 ANC. We also spoke to their development committee,
4 and the single-member district member, he was in
5 favor of the development. The people in the
6 neighborhood know about this building. It's long
7 been an eyesore in the community. It's been pretty
8 dilapidated. It was used briefly for Veterans
9 Administration housing. And then the past owner just
10 basically didn't rent it out. Not the entire
11 building. It had four or five units rented and it
12 was continuously being run down. So it's been a
13 problem in the community. It's quite an ugly
14 building to be honest with you.

15 So the ANC was in great support of it being
16 that it's only we're asking for less than 50 percent
17 lot occupancy. It's quite a large lot. And mostly,
18 I think, because the building is -- you know, it was
19 rather unattractive as it is now. And juxtaposition
20 to other buildings which are literally adjacent to
21 it, which have much higher lot occupancies, both in
22 single-family and apartment buildings. We're
23 relatively low on our lot occupancy in comparison to
24 these other buildings.

25 So although there wasn't time to go back in

1 front of the ANC, you'll see there's a letter from
2 the Commissioner Boese where he expressed his
3 support, and there was very little conversation in
4 that ANC meeting of any negative impact to this
5 project. It was really had quite unanimous support
6 to be honest with you.

7 MR. CROSS: If I may? As Job said, the
8 hearing that we went to in the ANC, we did receive
9 unanimous approval of the project. We got a letter
10 of support at that time for the special application
11 on the 22nd of December. We got another letter
12 that's in your packet here today, and I think that
13 the line from that letter that kind of summarizes
14 their position is that the Commission was of the
15 opinion that the existing structure is inharmonious
16 with the neighborhood and that the proposed
17 development would have little negative impact on the
18 community. Seems to be their general position.

19 VICE CHAIRPERSON HILL: Yeah, I read the
20 letter from the Commissioner. Do you know where that
21 is in the exhibits? Thirty-eight?

22 MR. MOY: There is an ANC letter under
23 Exhibit 38, Mr. Chair, if that's the one you're
24 referencing. Dated January 27th.

25 VICE CHAIRPERSON HILL: I got it. Thank you.

1 MR. MILLER: There is also, just like, if I
2 could add, Exhibit 27, the ANC letter, the ANC form
3 says the Commission feels that the new building will
4 be far more compatible, and that the resulting units
5 will be far more beneficial to the community. And
6 then they go on with no discernible negative impact.
7 I just thought that we should add their previous
8 positive comment in addition to their no negative
9 comment.

10 VICE CHAIRPERSON HILL: Thank you. You know,
11 I recall from watching the hearing previously that,
12 you know, you weren't able to go back before the ANC
13 with the variance and so you go the letter. And it
14 did say, you know, the last paragraph, "Based on a
15 conversation in November the issue expressed about if
16 I'm confident that given an opportunity to consider
17 the current variance application ANC 1A would again
18 gain to vote this in support." And that's from Kent
19 Boese?

20 MR. WOODILL: Boese.

21 VICE CHAIRPERSON HILL: Boese, thank you.
22 The chair. So, does the Board have any other
23 questions?

24 MR. HINKLE: Well, we're looking at a
25 variance now and I'm struggling to find something in

1 the record that actually talks about the three prongs
2 of the variance test, which is you know, what makes
3 this property unique in terms of why you might need a
4 variance, what's your practical difficulty with your
5 request, and then, you know, how it impacts the
6 public good or the zone plan. Could you speak to
7 those a little bit?

8 MR. WOODILL: Yeah, absolutely. Again, this
9 may go down in a rabbit hole that perhaps is not the
10 best discussed here, but part of the difficulties of
11 this project is that we're somehow held to a
12 different standard than other apartment houses which
13 are in the same zone just down the street. I'm not
14 sure that's one of those three-prong arguments, but
15 it does seem a bit of a flaw in the zoning code. And
16 everybody seems to agree that this is not the way it
17 should be treated. Why wouldn't we be held to 60
18 percent when we're not even converting from a house?
19 This is an existing building that is already there.
20 We're not asking to convert -- take any of the
21 single-family home stock away. We're not doing any
22 of that. We're not converting a church, which is
23 there's another project right down the street. This
24 is an existing building that has been confirmed to be
25 conforming. It's legally there. We're just looking

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1 to expand it. But somehow we're held to a different
2 standard.

3 As far as the financial hardship and perhaps
4 we didn't lay that out in such great terms, but the
5 difference between a marketable one-bedroom and a
6 marketable two-bedroom in up here can be the
7 difference of \$200,000. And I'd like to think I'm
8 sort of an expert on that. I have about nine
9 developments in a 10-block radius there. I'm
10 probably the biggest developer in that area in that
11 Georgia Avenue corridor, and I can definitely tell
12 you that a marketable one-bedroom and a marketable
13 two-bedroom is a difference of \$200,000. And this
14 project has a difference of \$2.4 million which was
15 our profit in this project, distributed among various
16 people.

17 So it doesn't make the project financially
18 tenable for us, and I think we did good due
19 diligence. It just was at a time when no one was
20 really clear what standard this building would be
21 held to.

22 Does that clarify somewhat or -- and then the
23 adjacent buildings, I was saying, the adjacent
24 buildings are quite a bit larger and being approved
25 now. So we're also not able to compete with that as

1 well, which seems like an unfair advantage to those
2 buildings. And we are taking a building which is
3 legally already an apartment building, versus someone
4 just on Water Street behind us, 3542 Water Street,
5 which is owned by neighborhood development. They're
6 converting a single-family home to 12 units I
7 believe. It was 13 originally, now it's 12 units.
8 And a much higher lot occupancy, I think, over 55
9 percent. And we're looking for 49 percent.

10 MR. CROSS: I think the crux of the hardship
11 here comes down to the definition of what this
12 building is, which is exhibited by our original
13 application and the revised application. It is very
14 nuance. I just want to make sure that kind of that
15 is being picked up on.

16 The difference in the Zoning Regulations for
17 all other structure category and a conversion to
18 apartment house goes from 40 percent to 60 percent
19 lot occupancy. That's 150 percent, you know,
20 difference here.

21 So and in some cases it seems very clear cut
22 where that would be. But here we have a structure
23 that's existed as a residential structure in 1958.
24 There was a residence, that same residential
25 structure in 1968 when this building came into

1 existence. This building was lawfully permitted and
2 constructed. And therefor there's a lot of things
3 that would indicate that it could have been -- and in
4 fact the only way it legally could have come into an
5 existence is a conversion; was our original argument.

6 But it's been ruled that it was a purpose
7 built structure. Well, very fine line between those
8 two terminologies, but a huge difference in the lot
9 coverage that we would be held to. And so I think
10 that that's the largest part of the hardship here,
11 and while it's not a site specific, you know, an
12 irregularly shaped lot, I would say it's the exact
13 same sort of hardship where we have a building that
14 because of what it's called is restricted in its lot
15 coverage. Whereas our neighbors who are converting
16 existing row houses today, are being allowed 60
17 percent lot occupancy. And actually being granted up
18 to 69 percent in one case just down the block very
19 recently.

20 MR. HINKLE: But each case is different. I
21 mean, you can't compare your neighbors. I mean, it's
22 completely different circumstances.

23 MR. CROSS: Sure. Sure.

24 MR. HINKLE: So, you know, that's not --

25 MR. CROSS: Contextually in the neighborhood

1 however --

2 MR. HINKLE: -- apples and apples.

3 MR. CROSS: -- we are the anomaly. Most of
4 the neighborhood is at or above 60 percent lot
5 occupancy. This is one of the only buildings that is
6 below, and we're only asking for 49 percent lot
7 occupancy. So it's really only 7 percent above that
8 which the Zoning Administrator could allow today as
9 matter of right.

10 MR. WOODILL: And, Mr. Hinkle, I just might
11 add though although you're correct each case -- I
12 mean, I'm always interested in what comes in these
13 cases. But I think what Michael is saying is that,
14 however each case is different, we're more saying
15 that these other buildings are R-2 class -- in zoning
16 terms, they're apartment houses. That's what we're -
17 - yes, the cases are certainly nuance. We're just
18 saying that they are apartment houses.

19 VICE CHAIRPERSON HILL: Could I hear from OP
20 as to -- I'm a little unclear as to what the
21 recommendation is.

22 MR. COCHRAN: Well, I think if anyone is
23 unclear even as to the facts in the case they
24 wouldn't be alone.

25 It is a 12-unit apartment building. It's a

1 12-unit apartment building built on a 9,000 square
2 foot lot in an R-4 zone that requires 900 square feet
3 of lot area for each unit. So already there's --
4 it's a nonconforming structure.

5 There's no, as the applicant said, somehow it
6 got built, but there's no BZA record or DCRA record
7 of how it got permitted for that. There's
8 speculation as to whether a couple of adjacent tax
9 lots might have been considered as part of this lot
10 in the past, but nobody really knows. So the
11 applicant's got kind of an unusual situation on
12 establishing what some of the facts are.

13 But they are asking to increase from 33
14 percent to 49 percent lot occupancy. They'd be
15 extending a nonconforming building, and the side yard
16 on one side wouldn't be conforming, but the Zoning
17 Administrator has flexibility under Section 407 to
18 grant a bit of relief there under his authority. And
19 so he's determined that therefor that side yard,
20 under his ruling, is not nonconforming. You can give
21 that flexibility.

22 That leaves the applicant with only having to
23 ask for relief on lot occupancy to get above that 40
24 percent. The applicant had originally thought, okay,
25 the new R-4 regulations, they came in as if they were

1 a conversion which would allow for 60 percent. The
2 Zoning Administrator, Office of Planning think that
3 they misinterpreted the new regulations. Actually,
4 we think that they misinterpreted the old
5 regulations. And they clearly, as the Zoning
6 Administrator said, require a variance.

7 The applicant has demonstrated, OP feels,
8 excuse me, that they meet the third prong of the test
9 in terms of, you know, basically the avoidance of
10 negative impact. But they haven't really established
11 anything beyond there being some ambiguity about the
12 facts on the original construction of the case. But
13 that's one possible exceptional circumstance. But
14 they haven't taken that exceptional circumstance, if
15 it is one, and linked it to what the practical
16 difficulty is. For instance, they haven't explored
17 at least anything in the record, what would happen if
18 they did an expansion from 33 percent to 40 percent.
19 We don't know.

20 They've also, today, begun to argue that one
21 of the exceptional circumstances is the Zoning
22 Regulations, which is clearly something that OP would
23 resist as an exceptional circumstance. The Zoning
24 Regulations are the Zoning Regulations.

25 So we just have a very difficult time with

1 the argument that they've got an exceptional
2 circumstance leading to a practical difficulty. And
3 so we're not able to support the requested relief.

4 I can see by your expression -- if it were a
5 special exception it would be another matter. But
6 it's a variance according to the Zoning
7 Administrator, and we can't support it as a variance.

8 VICE CHAIRPERSON HILL: Okay. And you're
9 here for this variance. Yeah?

10 MR. WOODILL: Yes.

11 VICE CHAIRPERSON HILL: Yeah.

12 MR. WOODILL: I mean, to be honest with you,
13 I frankly thought that --

14 VICE CHAIRPERSON HILL: You disagree?

15 MR. WOODILL: No, I --

16 VICE CHAIRPERSON HILL: Oh.

17 MR. WOODILL: -- thought that their stance
18 was a little bit different. I knew that these were -
19 - that they maybe didn't quite think that we met the
20 tasks. But I thought there was a path to maybe a
21 better -- I don't know, more burden of proof from us.
22 But yeah, essentially I do disagree.

23 Also I think that we presented, and we have
24 it here, we're able to show what we showed the Zoning
25 Administrator as far as proof. He thought his burden

1 of proof was greater. We disagreed. We're happy to
2 show you that burden of proof. But I'm not sure that
3 solves our problem. Then we're back to some special
4 exception, and we've been told that we need a
5 variance. So.

6 And I just want to point, I mean, regardless
7 of the technicalities of it, there are buildings that
8 are just adjacent to us. And I understand the
9 nuances of they're different. But this is -- the
10 community supports it, it's low-impact on the
11 community, it's you know, it makes --

12 VICE CHAIRPERSON HILL: I'm trying to get how
13 you meet the standard for the variance test, you
14 know. And that's what I'm trying to see whether or
15 not you need to either -- and you can go ahead and
16 present that more thoroughly as to how you're meeting
17 the standard to -- you know, because you're not
18 getting OP's approval for the variance at this point.
19 Now whether or not you go back to OP and talk to them
20 a little more and see how they can be convinced that
21 this is something that, you know, would meet the
22 standard, or you have it right now. I suppose that's
23 what I'm just kind of struggling with.

24 MR. COCHRAN: OP would of course be happy to
25 work with the applicant further on this.

1 VICE CHAIRPERSON HILL: And I know you don't
2 want to go back to the drawing board again. But if
3 you present now and you're turned down you can't
4 apply again for another year.

5 MR. WOODILL: I mean, to be quite honest with
6 you, the conversation we had with OP and Matt LeGrant
7 in his office, I thought we were sympatico. Clearly
8 we're not now, so I'm a bit -- you know, maybe there
9 was more burden on us to have more communication with
10 them, but I frankly -- there was a conversation with
11 the Office of Zoning Administrator, with Mr. Cochran,
12 myself, and I believe both of you were there. And I
13 just again --

14 VICE CHAIRPERSON HILL: Well, you're clearly
15 not at the same place now. And so --

16 MR. CROSS: Yeah, I think that's --

17 MR. WOODILL: I don't know where we got --

18 MR. CROSS: -- the confusion here. We've
19 been working with this whole team and had very good
20 dialog since September. And you know, very much want
21 to work this out. If we need to go back to them, we
22 will again.

23 VICE CHAIRPERSON HILL: I think you're going
24 to have to go back to them. I mean, I don't see how
25 we're going to be able to do this right now,

1 otherwise it's not going to work out -- I just don't
2 think it's going to be able to work out for you guys.

3 MR. CROSS: Is there any insight that you can
4 share with us about how you do not see the hardship
5 of the categorization of this building being an
6 exceptional circumstance?

7 VICE CHAIRPERSON HILL: I mean, again, I
8 would think that you'd have to come back and present
9 the whole case in that way for me to kind of specify
10 that.

11 MR. WOODILL: We tried to -- in talking to
12 Matt LeGrant -- by the way, I have a great
13 relationship with Matt. I've been working with him
14 for years, and I'm rarely ever here because I do
15 matter of right projects, to be honest with you.
16 That's why I'm never here.

17 VICE CHAIRPERSON HILL: I saw the last
18 hearing. I know that you have a good relationship
19 with Matt, and you're still back here. You know.

20 MR. WOODILL: Right. But --

21 VICE CHAIRPERSON HILL: I understand what
22 you're saying.

23 MR. WOODILL: -- offline conversations were
24 sort of directed to, let's let the BZA decide what
25 this really is. And it seemed like the BZA was

1 reluctant to do that and referred to Matt LeGrant,
2 which I'm fine with. But we also, we thought that
3 our proof was strong that this could only have been a
4 conversion or it's an illegal building. That's you
5 know, their option. So.

6 VICE CHAIRPERSON HILL: Dose the Board have
7 any thoughts?

8 MR. MILLER: Yeah, I had some thoughts. And
9 let me say, I reviewed the record as well from the
10 previous case since I didn't sit on it.

11 Just one question for Mr. Cochran. I mean,
12 do you think this should be in the variance category
13 as opposed to special exception? I think you've --

14 MR. COCHRAN: Yes.

15 MR. MILLER: -- indicated that, I just wanted
16 to confirm that that is --

17 MR. COCHRAN: Yes.

18 MR. MILLER: -- the case. Okay. So I think
19 that there are, to use a BZA expression, a confluence
20 of factors which do create exceptional circumstances
21 here. Not only the irregularly shaped lot, the large
22 lot, the anomaly of it being the only large apartment
23 building in this particular area, and it being under
24 the 60 percent lot occupancy that others are
25 exceeding.

1 So I think what you need to bring to us is
2 what Mr. Cochran said, is more information on the
3 practical difficulty proceeding without this relief.
4 And you did indicate some financial information and
5 maybe there's other practical difficulties you can
6 point out, or arguments you can make that would help
7 us get to the relief that you need for this
8 expansion.

9 It looks like a good project. I mean, two-
10 bedroom units rather than one-bedroom units. That's
11 fulfilling a real need, making it more harmonious
12 with the neighborhood when it's currently not
13 harmonious. So as Mr. Cochran said, that meets the
14 third part of the test. And I think the exceptional
15 circumstances are there, in my own opinion. But I
16 think I would just need more information on the
17 practical difficulty or more arguments presented in
18 the record. And maybe you can do that here. If you
19 want to take a shot at it.

20 MR. WOODILL: I'm just worried. I'm just
21 worried that I have to fight to live another day and
22 I'm worried that my exceptional circumstances in some
23 way, you know, upset some people. I disagree with
24 the intrinsic case, and you know, I don't agree with
25 the fact that it should be a variance in the first

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1 place. So I have difficulty just --

2 MR. MILLER: And I'm sympathetic with you on
3 that point, actually. So that's why I want you to
4 try to make the practical difficulty argument so we
5 can just get to it.

6 MR. CROSS: So, just so it's on the record,
7 we have those slides and I can very quickly kind of
8 walk you through the information that's there.

9 MR. WOODILL: If you'd rather just -- can we
10 defer this, I'm fine with that. I want to -- you
11 know, if you think we need to come back I don't want
12 to waste the Board's time. I don't want to force you
13 into looking at something that is not necessary today
14 if we're going to have to come back regardless.

15 MR. MILLER: If it's going to show the
16 practical difficulty of -- it would be helpful to do
17 it today.

18 MR. WOODILL: But to be clear, if --

19 MR. MILLER: If it's not --

20 MR. WOODILL: As Mr. Cross said, I don't --

21 MR. MILLER: If it's just going to show --

22 MR. WOODILL: I wouldn't want to vote today
23 if it were of course going to be in my favor of
24 course.

25 VICE CHAIRPERSON HILL: Okay. Rather than go

1 through it now I think it would be better if you come
2 back and again provide a more clear argument for the
3 practical difficulty for the variance, and speak with
4 OP again. And so I would also would have liked to
5 have moved through this today. And again, I know
6 that you were here the last time, as I said, and you
7 were also interested in getting it done the last
8 time. And I do appreciate the differences of opinion
9 that you kind of have come up against at this point.

10 However, I think it would be in your best
11 interest to come back. So with that, Mr. Moy, when
12 is the next best time that we could come back with
13 this?

14 MR. MOY: Okay. Well, first of all, Mr.
15 Chairman, Mr. Miller's next hearing date where he's
16 going to be --

17 MR. MILLER: I can come whenever.

18 MR. MOY: Whenever? Okay.

19 MR. MILLER: Whenever they can make the --

20 MR. MOY: All right.

21 MR. MILLER: Whenever they can --

22 MR. MOY: All right.

23 MR. MILLER: -- work with OP to get to yes.

24 VICE CHAIRPERSON HILL: And, Mr. Miller,
25 we'll do this whenever it is convenient for you in

1 the docket.

2 MR. MILLER: Convenient, whenever.

3 VICE CHAIRPERSON HILL: No, I mean, during
4 whatever day Mr. Moy is about to tell me.

5 [Discussion off the record.]

6 MR. WOODILL: Is there any -- based on what
7 the burden of proof is I don't know how much you're
8 looking for. I mean, I certainly know we could dig
9 up a lot. But is there any usefulness to saying we
10 can go talk to Mr. Cochran off line and come back in
11 an hour or two? Or no, that's not what you want to
12 do?

13 I mean, I have other people to answer to,
14 that's why I was suggesting this. I'm not the only
15 person.

16 VICE CHAIRPERSON HILL: I understand. I
17 think you're going to just have to come back.

18 MR. WOODILL: Okay.

19 VICE CHAIRPERSON HILL: But I appreciate the
20 suggestion.

21 MR. MOY: All right, Mr. Chairman, I think as
22 you know the next hearing date, it's in two weeks.
23 The 23rd. You have quite a few case but I think
24 given the time line of the applicant I think --

25 VICE CHAIRPERSON HILL: If we can do the

1 23rd, that would be great.

2 MR. MOY: Yeah.

3 VICE CHAIRPERSON HILL: Okay? That's the
4 next time we're here. Okay? All right. Thank you.

5 MR. WOODILL: Appreciate it.

6 VICE CHAIRPERSON HILL: Thank you.

7 MR. MOY: The next application before the
8 Board, I believe, would be Application No. 19169 of
9 311 K Street, LLC. as captioned and advertised for
10 variance relief from the rear yard requirements, off-
11 street parking requirements, and loading
12 requirements. And I believe the applicant amended to
13 add additional relief, which is the loading -- well,
14 I guess I just said that. The loading relief under
15 2201.1. All right.

16 This is to build a hotel and apartment
17 building in a DD/DD-HPA/C-2-C district, 303 through
18 317 K Street Northwest, Square 526, Lots 20, 21, 804,
19 805, 824, 825, and 829.

20 VICE CHAIRPERSON HILL: Okay. Thank you, Mr.
21 Moy. Good afternoon. If everyone would please
22 introduce themselves?

23 MS. MAZO: Samantha Mazo with the law firm of
24 Griffin, Murphy, Moldenhauer, and Wiggins.

25 MR. PICHON: Sean Pichon, PGN Architects.

1 MR. ANDRES: Erwin Andres with Gorove/Slade
2 Associates.

3 MR. BURNS: Ryn Burns also with -- oh, sorry.
4 Ryn Burns, also with PGN Architects.

5 MR. SEQUAR: Habie Sequar, managing member of
6 311 K Street, LLC.

7 MS. MOLDENHAUER: Good afternoon, Members of
8 the Board. Meredith Moldenhauer.

9 VICE CHAIRPERSON HILL: Okay. Ms. Maza, is
10 that it?

11 MS. MAZO: Mazo. Yeah.

12 VICE CHAIRPERSON HILL: Mazo. Mazo. So we
13 obviously have everything in the record and have gone
14 through your application. There are some issues, I
15 guess, that I'd like to hear on that you know, I'll
16 go ahead and ask my questions I suppose after your
17 presentation. But I would like to hear your
18 presentation so if you would go ahead and like to
19 start.

20 MS. MAZO: Sure. No problem.

21 VICE CHAIRPERSON HILL: How much time do you
22 think you might need?

23 MS. MAZO: Probably need about 10 minutes.
24 Well, maybe 12 minutes with the full transportation
25 discussion.

1 VICE CHAIRPERSON HILL: Okay.

2 MS. MAZO: So as Mr. Moy mentioned, recently
3 this application was amended to include a request for
4 loading relief. And that was as a result of meetings
5 we had with DDOT in December in which we learned that
6 DDOT would not support the continuance of the
7 existing curb cut on the property from K Street.
8 Accordingly, to address that issue we had -- we
9 reconfigured the circulation and loading on the site
10 to locate all of the loading and internal circulation
11 off 4th Street, and we have requested the zoning
12 relief from this Board in order to provide our 30-
13 foot truck loading curbside.

14 We are providing a 20-foot service delivery
15 space internally, and that is probably the issue that
16 we'll be discussing most with in terms of our
17 discussion with DDOT.

18 I do want to highlight for the record that on
19 January 5th, 2016, the ANC 6E voted five to one to
20 one to recommend approval of the variance relief, and
21 that includes the request for parking relief which --
22 and rear yard relief which were initially requested
23 as well as the loading relief. And that meeting was
24 duly noticed with a quorum present. And a copy of
25 the ANC's resolution of approval is included in the

1 record at Exhibit 26.

2 You know, again, as we understand, we believe
3 the last matter to be resolved is the location of the
4 internal 20-foot service delivery space that's
5 required pursuant to 2201. We have worked closely
6 with DDOT and we have proposed multiple locations for
7 this service delivery space, all that satisfy the
8 zoning requirements for delivery locations pursuant
9 to Chapter 2200 of the Zoning Regulations.

10 We actually have a new proposal that we will
11 discuss today, and that we discussed very briefly
12 with DDOT outside, and we'll be happy to continue our
13 discussions with DDOT to resolve this operational
14 issue. But based on the documents in the record and
15 any presentation we provide today, we believe this
16 project satisfies the requirements for the requested
17 variance relief, and is complete. And so we would
18 ask the Board to take an action today. And as
19 quick --

20 VICE CHAIRPERSON HILL: Just to interrupt a
21 second. As you go through the presentation, if you
22 could just again kind of clarify how you're meeting
23 the standard for the rear yard and the off-street. I
24 know there's going to be the issue about the loading.

25 MS. MAZO: Sure.

1 VICE CHAIRPERSON HILL: But that would just
2 be helpful. Thank you.

3 MS. MAZO: Sure. Yeah, and to address that
4 I'm going to turn it over very briefly to Sean Pichon
5 of PGN Architects who will review the exceptional
6 circumstances on the property, as well as the project
7 and how we're satisfying the rear yard and parking
8 relief. And then turn it over to Erwin Andres who
9 will discuss the parking and this question of
10 loading. So there we go.

11 MR. PICHON: Thank you. Thank you, Board.
12 Again, my name is Sean Pichon with PGN Architects.
13 I'm going to walk quickly through the area that we're
14 dealing with here. This lot is located on 4th and K
15 Street Northwest. It is a landlocked parcel. It is
16 in a L shape, irregular shaped lot as you can see
17 here in the site map.

18 The site has, as Samantha mentioned, has been
19 restricted access along K Street. So all of our
20 access is along 4th Street. Again, there is no rear
21 access to the site.

22 The surrounding neighborhood, there is --
23 there are several developments that are happening in
24 adjacent parcels. Our site is a corner lot. There
25 is a development just to the north of our site, and

1 one to the east of our site that is planned for
2 future development. You can see in the photos to the
3 side that the development to the north of the site is
4 already under construction and it is almost complete.

5 The overall site district is done with a lot
6 of residential buildings of the downtown district
7 standards. What we're planning for is a 14-story
8 hotel/residential building. The first floor will be
9 hotel lobby, residential lobby, access to parking,
10 service corridors, and back of house uses. The next
11 ten floors would be the hotel. And then the top
12 three would be the residential apartments.

13 We are meeting all the requirements of all
14 the other zoning requirements. The rear yard, which
15 I'll walk you through, because we are a corner lot,
16 there -- to continue the street façade we're going
17 from lot line to lot line as you're looking along K
18 Street. And along 4th Street we're going lot line to
19 lot line, which is something that is desired from an
20 urban design standpoint, to not have gaps along the
21 street facades, the street wall. And because we're a
22 corner lot the rear yard cannot go all the way
23 through.

24 We are providing a compliant court at the
25 rear of the property. It's a closed court. In some

1 other districts we're allowed to use that as rear
2 yard. In this one we're not. But we are providing
3 more than what is required for the closed court
4 requirements.

5 VICE CHAIRPERSON HILL: Can you show me,
6 since you're a corner lot you just said the rear yard
7 can't go through. Show me where that is again.
8 Sorry.

9 MR. PICHON: Well, it shows up better on this
10 slide here. But because we're a corner lot we're
11 going from property line here to the corner, and then
12 from property line here to this property line. There
13 is another lot here. So our rear yard, from an urban
14 design standpoint, you would not want to break this
15 façade to allow for the rear yard to come through
16 here or for the rear yard to come through at this
17 point here. So you want to keep the continuance of
18 the street wall and so because of the corner lot our
19 rear yard doesn't continue all the way to the public
20 right of way.

21 So we have a compliant court, but it becomes
22 a closed court because we're extending the building
23 to the property lines.

24 VICE CHAIRPERSON HILL: Okay.

25 MR. PICHON: If that makes sense.

1 VICE CHAIRPERSON HILL: Thank you.

2 MR. PICHON: We're providing 20 units per --
3 or 20 hotel keys, rooms, per floor on the 10 stories
4 of hotel, and in another 10 units of residential per
5 floor, which gets us into the parking relief, which I
6 will let Erwin, who is going to go through all of the
7 access and how you enter and exit the site. But as a
8 matter of functional design, because of the irregular
9 shape of the lot, as you can see here from this
10 diagram we've maximized every square inch of the
11 parking area. But because the lot jogs and where
12 we're having the access in and locating cores in the
13 center of the building, we're -- our efficiency from
14 parking spaces to circulation space is abnormally
15 high. I mean, typically you want to have parking
16 garages with double-sided parking and for the maximum
17 efficiency. But because of the unique shape of this
18 lot, we're not able to get those efficient parking
19 layouts.

20 With that being said we are still providing
21 46 total parking spaces, along with the service
22 loading space at the garage level.

23 VICE CHAIRPERSON HILL: I'm sorry. I thought
24 it was 48. Did it go down to --

25 MR. PICHON: Oh, 47. Sorry.

1 VICE CHAIRPERSON HILL: Forty-seven. That's
2 right. You got rid of one, right?

3 MR. PICHON: Yeah.

4 VICE CHAIRPERSON HILL: Yeah.

5 MR. PICHON: We have a couple of --

6 VICE CHAIRPERSON HILL: Which one did you get
7 rid of? It was the --

8 MR. PICHON: It was the one directly adjacent
9 to the service space.

10 VICE CHAIRPERSON HILL: Was it a residential
11 or the hotel, or the apartment or the hotel one? You
12 had them separate, right, with 40 and eight at one
13 point?

14 MR. PICHON: Yeah, I --

15 MS. MAZO: It would be a hotel space but we
16 have not specifically designated which spaces would
17 be used for which use.

18 VICE CHAIRPERSON HILL: Okay.

19 MS. MAZO: But the idea would be to allocate
20 the eight in order to satisfy the residential
21 requirement and the rest would be used for hotel.

22 VICE CHAIRPERSON HILL: Okay. I'm sorry. I
23 just got confused by the 46 number. Thank you.

24 MR. PICHON: Sorry about that. We've gone
25 through a couple of iterations of these totals and

1 plans.

2 So over the two levels of parking we're
3 providing 47 spaces according to what we have in the
4 record, currently. And I'll turn it over to Erwin to
5 go through the access.

6 MS. MAZO: Oh, sorry. Sean, can I just ask
7 one question? Can you explain a little bit about the
8 mezzanine level for the first level of the garage and
9 the grade differential between that level of the
10 garage and the lower level where the elevator core
11 is, please?

12 MR. PICHON: Sure. Where we're -- what
13 Samantha is referring to is, as you come into the
14 garage we have a speed ramp directly down from 4th
15 Street, which is located here, coming straight down.
16 That gets us down about nine feet below grade.
17 We're, for this service space, we're maintaining a
18 10-foot high clear space per the zoning regulation.
19 And that area, which is located here, is
20 approximately one foot, seven higher than the
21 elevator level where the elevators are located. So
22 we've provided a five percent service ramp that gets
23 you from the service space down to the elevator
24 level.

25 MR. ANDRES: Again, good afternoon, my name

1 is Erwin Andres for Gorove/Slade Associates. What
2 I'd like to do is quickly go through the
3 transportation aspects of the plan. I'd like to
4 first go through the parking relief that we're
5 seeking, and then get into the loading issues that
6 DDOT had raised.

7 With respect to the site plan, I think Sean
8 did a good job of identifying how you get into and
9 out of the garage. As he had mentioned before,
10 initially the garage entrance was located on K
11 Street. Given our coordination with DDOT they didn't
12 want any curb cuts on K Street, given that it's a
13 future streetcar line, as well as K Street is an
14 arterial. So they wanted the driveway to be 4th
15 Street. So we relocated the driveway to the garage
16 from K Street to 4th Street. And in doing so we --
17 the issue that we had was we had a loading dock curb
18 cut on 4th Street at the time. So DDOT had concerns
19 with two curb cuts right next to each other. So in
20 the --

21 VICE CHAIRPERSON HILL: I'm sorry. Can you
22 say that again?

23 MR. ANDRES: So what had happened was we
24 originally had a curb cut for the loading on 4th
25 Street and a curb cut for the garage on K Street.

1 When DDOT had said that they don't want our garage
2 driveway on K Street we had to relocate that driveway
3 to 4th Street. So in essence what we had is we had
4 two curb cuts right next to each other on 4th Street.
5 Given that condition DDOT doesn't like having two
6 curb cuts right next to each other, and they don't
7 like back in movements of trucks from the public
8 roadway into the loading dock.

9 So we took their recommendations, and what we
10 had done is we looked to see if there's any way we
11 can put a 30-foot truck to go head into the -- head
12 in to the development, and then head out. Well,
13 unfortunately given the shallowness of the depth of
14 the lot it was practically impossible to get a 30-
15 foot truck head in, and a 30-foot truck to come out.

16 So what we had alternatively proposed was
17 that we would look to have any 30-foot trucks to load
18 curbside. But in addition to that we were able to
19 get a 20-foot vehicle, which satisfies the loading
20 requirement for a 20-foot vehicle to head in and head
21 out.

22 VICE CHAIRPERSON HILL: Can I ask quickly?

23 MR. ANDRES: Sure.

24 VICE CHAIRPERSON HILL: If you had gotten the
25 curb cut on K Street how would that have changed the

1 loading situation?

2 MR. ANDRES: Well, if -- there were two
3 issues with the loading situation that DDOT had
4 issues with. If we had -- if we had been able to
5 keep the K Street driveway, we would be able to keep
6 the loading dock where it was originally planned,
7 which was off of 4th Street. However, the truck
8 would still have to back in.

9 So DDOT had two issues with our loading
10 configuration. The first issue was they didn't like
11 the loading dock driveway and the garage access
12 driveway right next to each other. And then the
13 other issues, which probably is a much bigger issue,
14 is having 30-foot trucks back in from the street.

15 VICE CHAIRPERSON HILL: No, I understand.
16 I'm sorry, but if -- maybe I didn't catch it. If you
17 got the curb cut on K Street how would that have
18 changed the loading situation?

19 MR. ANDRES: Well, it would have satisfied
20 the separation between the two driveways. It would
21 not have satisfied DDOT's concern of trucks back in
22 from a public street.

23 VICE CHAIRPERSON HILL: Okay. Okay. You
24 still wouldn't have been able to deal with the truck
25 in --

1 MR. ANDRES: Yes.

2 VICE CHAIRPERSON HILL: -- the manner that
3 they would have been satisfied with.

4 MR. ANDRES: Yes, that's correct.

5 VICE CHAIRPERSON HILL: Okay. Thank you.

6 MS. MAZO: All right. And I'm sorry. And
7 for the record, a plan that showed our initial plan
8 with the curb -- I'm sorry, with the K Street curb
9 cut and the 4th Street curb cut is at Exhibit 12,
10 ground floor plan, Sheet A9.

11 MR. ANDRES: So with respect to the actual
12 parking relief that we're seeking, the current Zoning
13 Regulations identify that we need 122 parking spaces.
14 With the zoning rewrite that has been recently
15 approved but not yet adopted, the zoning requirement
16 is actually zero spaces because we are in a downtown
17 development zone.

18 If this project were not in the downtown
19 development zone the zoning requirement would be 28
20 spaces. We are providing 47 zoning compliance
21 spaces. As part of the plan we are actually
22 providing valet parking for the hotel guests. If you
23 look at the stacking that you're able to achieve, you
24 can achieve close to a third of that. So, you know,
25 the maximum capacity of parking we can achieve on

1 site is in a range of about 60 spaces. But in
2 addition to the fact that we do meet the new zoning
3 requirements, we are also in conjunction with some of
4 the nearby off-street parking managers, have
5 identified several letters of interest from garage
6 operators within a couple block radius.

7 And what we were able to do is secure up to
8 145 spaces through letters of interest from nearby
9 parking operators. Some of these parking operators
10 are managing surface lots and they believe that, you
11 know, given the low utilization of some other spaces
12 that there are availability of spaces for potential
13 overflow related to the hotel facility.

14 In addition to that there is actually a large
15 garage that's underneath the Safeway, which is a
16 block away, where it serves Safeway but it's about
17 250 spaces. And those parking spaces are typically
18 about half full.

19 So in addition to these parking lots that we
20 have letters of interest, there are some -- a good
21 supply of off-street parking spaces in this
22 neighborhood. And I'm also familiar given that I
23 live in the neighborhood as well. What we've also
24 identified is that the site is well served by
25 transit. As I mentioned, the potential K Street

1 streetcar alignment is along K Street. The Redline
2 and the Greenline are very convenient, walking
3 distance to the site. There is significant bus
4 activity. There's BikeShare within a couple blocks
5 away. So the site is well served by alternative
6 means and alternative modes. So and as I mentioned,
7 the bike facilities are very good.

8 With respect to the justifications I
9 mentioned, because of the fact that we are providing
10 marketing for the site to be very transit friendly,
11 and the fact that there are alternative modes that
12 are convenient, we've also, as I mentioned before,
13 secured letters of interest from off-site parking
14 operators. We believe that -- and the fact that it
15 does meet the requirements of the new zoning rewrite,
16 we believe that the parking relief that we're
17 requesting is justified.

18 And here are the locations of some of the
19 locations of the parking facilities.

20 MS. MAZO: Yeah. And I'm sorry, Erwin. We
21 had also proposed significant transit demand
22 management steps to DDOT.

23 MR. ANDRES: Yes. So, as I mentioned, these
24 are the off-site facilities. In conjunction with all
25 of the items that I've identified, we are also

1 agreeing to an aggressive transportation demand
2 management program, which includes --

3 MR. HINKLE: Mr. Erwin.

4 MR. ANDRES: Yes.

5 MR. HINKLE: I just want to stop you for a
6 second. You can't seriously propose that the surface
7 lots in this area are available for, you know,
8 external parking reasons because we all know that
9 these will be developed sometime soon.

10 MR. ANDRES: Oh, absolutely. And --

11 MR. HINKLE: You know, you and our former
12 chairman has gone through this multiple times.

13 MR. ANDRES: Uh-huh. Oh, and absolutely,
14 Commissioner Hinkle. But it's important to
15 understand that you know, just like the Safeway
16 parking lot, even though that there is parking in
17 these new developments, there are opportunities for
18 shared parking.

19 MR. HINKLE: Sure. Sure. No, I think -- and
20 I don't know where the Board is. I think you made
21 the argument for the parking relief.

22 MR. ANDRES: Okay.

23 MR. HINKLE: So --

24 MR. ANDRES: Well, then I'll just --

25 MR. HINKLE: But, yeah, just --

1 MR. ANDRES: Oh, no, no, you know, we
2 completely understand that a lot of these surface
3 parking lots are going to be converted into
4 development sites.

5 MR. HINKLE: Uh-huh.

6 MR. ANDRES: And we don't deny that by any
7 means. But we do believe that there are
8 opportunities when those development sites come back
9 online, whether they're office buildings that have
10 parking available for people parking outside, or
11 retail component parking, that there are shared
12 opportunities throughout this neighborhood that are
13 available.

14 MR. HINKLE: Sure. Or else they also ask for
15 parking relief. So, you know.

16 MR. ANDRES: Yes.

17 MR. HINKLE: You know what I'm saying.

18 MR. ANDRES: Oh, I completely understand.
19 But, you know, given the new Zoning Regulations we do
20 believe that we are where we need to be.

21 So with respect to the transportation demand
22 management element, so I can have this on the record,
23 they do include -- they were included in our report
24 that was submitted to DDOT and are up on the screen
25 right now. And so I'd like to get into the loading

1 discussion.

2 With respect to the loading, the loading
3 requirements include one 30-foot loading berth and
4 one 20-foot service space, as I had identified, given
5 the front in and front out requirements for 30-foot
6 trucks, it is not physically possible to provide that
7 30-foot loading space inside the building.

8 So we proposed to DDOT the opportunity to
9 have a valet space in front of the hotel that in
10 instances, if a 30-foot truck shows up, that they can
11 manage it so that the valet space also acts as an on-
12 street loading space for this 30-foot truck. You
13 know, given our experience on buildings of this size,
14 hotel -- right now the hotel is proposed to be 200
15 rooms, and there's 30 sort of extended stay
16 apartments associated with the building. Given that
17 it's 200 rooms, we anticipate the need for three
18 deliveries a day. And those deliveries typically
19 consist of linens, any sort of vending -- any soda or
20 vending type refills, and any other office deliveries
21 related to the management of the hotel.

22 So with that volume we believe that it could
23 be accommodated curbside. But we do believe that
24 because of the fact we are providing a 20-foot
25 service space indoor, some of those deliveries would

1 actually not take place in a 30-foot truck, but would
2 take place in a cargo van that could fit in a 20-foot
3 service space which we have identified indoors.

4 In addition to that, we've provided what we
5 believe are appropriate service corridors to get you
6 from the service space to the service elevator. And
7 I think what I'd like to go through now is the plan
8 that is currently before you.

9 So what I'm showing before you --

10 VICE CHAIRPERSON HILL: Can I interrupt you
11 real quick?

12 MR. ANDRES: Yeah, sure.

13 VICE CHAIRPERSON HILL: Where is the valet
14 parking for the truck proposed? I didn't understand
15 that. It's on 4th, I assume?

16 MR. ANDRES: Yes. So it's on 4th Street.
17 We're proposing a 50-foot space, which is enough
18 space to provide for two cars that are loading and
19 unloading for the hotel. And then also that 50-foot
20 space is big enough to accommodate a 30-foot truck in
21 the event a 30-foot truck shows up.

22 VICE CHAIRPERSON HILL: Okay. And I forget.
23 So I can't remember the direction of that street.
24 It's not one-way?

25 MR. ANDRES: It's actually two-way.

1 VICE CHAIRPERSON HILL: Okay.

2 MR. ANDRES: 4th Street is two-way up until
3 you get to L Street.

4 VICE CHAIRPERSON HILL: Okay. So then the
5 truck would pull in and then at the curb. So it
6 would unload from the back facing K Street?

7 MR. ANDRES: Yes. So the back of the truck
8 would be facing K Street.

9 VICE CHAIRPERSON HILL: Okay.

10 MR. ANDRES: But it would unload whatever the
11 materials were, and there's a service corridor --
12 actually, that's not shown on this level, because I'm
13 on a level below it. But there is a service corridor
14 that would take you from the front, from where the
15 curbside loading space is, in to the administrative
16 space and the back of house space.

17 VICE CHAIRPERSON HILL: Okay. Thank you.

18 MR. ANDRES: So this plan as shown identifies
19 a loading space, a 20-foot zoning compliant loading
20 space in this area. Now, it's important to note that
21 as Sean had identified, that area within the garage
22 has a zoning compliant height clearance of 10 feet,
23 which is why we -- which is why we located the
24 service space in that area because it meets the
25 zoning compliant height clearance.

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1 So the plan was to provide a ramp that's five
2 percent, that takes you down to this area, which
3 takes you over to the elevators. And that distance
4 currently shown up there is in the range of about 95
5 feet. And just to give you a sense of scale, this
6 room, I had actually scaled it off visually, is 40
7 feet from the window to the back wall, and 50 feet
8 from that wall to that wall.

9 So in essence, if somebody dropped off a
10 service -- had something that required to be on a
11 dolly, they would essentially run the outside of this
12 room to get to the freight elevator. We've worked on
13 numerous projects where that distance is a typical
14 distance. I'll give you some examples after this.
15 And the other is -- so DDOT had issues in that plan
16 that were showing. DDOT had issues with the distance
17 that -- from the service space to the freight
18 elevator. They also had some issues with some of the
19 maneuverability associated with the 20-foot truck,
20 which I will also get into.

21 And then one of the other issues they had was
22 that they were concerned that somebody would try and
23 roll down something down this 10 percent ramp, and
24 that's why we actually included this five percent
25 ramp in response to that. So we believe that this

1 plan sort of tries to meet DDOT's concerns, which
2 this slide shows.

3 So with respect to what I'll go through as
4 some of the elements of DDOT's concerns. So when
5 service vehicles come in they'll essentially turn
6 into the site and pull into that loading space. When
7 they leave they back up, pull forward, back up, and
8 pull out. It, you know, typically when you back out
9 of a space you back out and pull out. What this does
10 is it requires an extra two movements, which for
11 something that would happen three times a day, we
12 don't think is -- you know, we think this is actually
13 typical, or not a real, you know, a real issue. But
14 DDOT had raised this and we just wanted to address
15 the fact that we don't think that, you know, that
16 turning maneuver is a difficult situation.

17 You know, in some instances some people do
18 this trying to pull into parking space. So it's, you
19 know, we don't think that this is an incredibly
20 burdensome operation.

21 VICE CHAIRPERSON HILL: And how big, again,
22 is this vehicle?

23 MR. ANDRES: Twenty feet.

24 MR. HINKLE: What is behind that loading
25 space? It's marked as number 2 in my --

1 MR. ANDRES: Yes. So in this plan it's
2 actually a parking space. So you know, in some cases
3 you know, if DDOT is really concerned about it we can
4 actually eliminate it and then just increase our
5 variance by another space.

6 The other issue they had, as I mentioned
7 before, was a 90-foot -- 95-foot distance from the
8 service loading area to the loading dock. I had
9 appeared before you probably about two months ago
10 with a hotel project, actually around the corner from
11 here at 5th and I, where the distance from the
12 service space to the freight elevator is about 100
13 feet. And we've worked on PUDs where the whole block
14 or the whole square share the same loading facilities
15 where the distance isn't, you know, necessarily a
16 really big issue.

17 And in this case when you get up from the
18 service space to the loading elevator and get up to
19 the ground floor, you're actually right next to the
20 back of house. So, you know, there's a lot of
21 benefits to locating the elevator where it is.

22 But understanding that DDOT has this issue,
23 you know, we came up just recently with an
24 alternative plan. And the alternative plan is
25 essentially the -- pretty much the same plan for some

1 minor tweaks. And the alternative plan essentially,
2 what it does is the previous plan had the loading
3 space up here. What we did is we flipped it, we
4 moved it down to this location so that when a truck
5 pulls in and comes down the ramp, instead of turning
6 left into that space they would turn right into that
7 space.

8 What that does is two things. It gets you
9 closer so that instead of 95 feet from the service
10 space to the loading elevator, we reduce it to 75
11 feet. So, you know, we're trying to close the
12 distance. We don't think the distance is a major
13 issue in the first place, but we hear DDOT and so we
14 try to accommodate them by reducing that distance, so
15 that distance is now 75 feet.

16 And what we also show is that for the service
17 vehicle to come out it just makes one -- it just
18 makes two movements. It backs up and then pulls out.
19 So that's how we address sort of two of DDOT's major
20 concerns. The maneuvers are much simpler and it gets
21 us closer to the service elevator.

22 VICE CHAIRPERSON HILL: And that parking
23 spot, again for the backing out, that is something
24 that you've already taken away or you would have to
25 take away?

1 MR. ANDRES: Yes. So as part of this plan
2 right now we're providing 47 spaces. As part of this
3 plan we're going to be requesting an extra space
4 variance because then we have to eliminate it to
5 provide 46 spaces.

6 And in conjunction with the plan we are
7 committing to a loading management plan that will
8 help schedule deliveries and help manage them and
9 provide for the opportunity to reduce or minimize any
10 conflicts of the valet operation on 4th Street with
11 the loading operation.

12 So with that I'm available for questions.

13 VICE CHAIRPERSON HILL: Okay. I'm about to
14 turn to the Office of Planning, but does the Board
15 have anything -- oh, sorry.

16 MS. MAZO: [Speaking off microphone.]

17 VICE CHAIRPERSON HILL: Sure.

18 MS. MAZO: You mentioned 5th and I. Did that
19 property, though, have rear alley access and is that
20 a difference between that project and this one?

21 MR. ANDRES: Yes. So that project had an
22 existing alley that they were -- that we were able to
23 derive our access from, our service access from. In
24 this situation obviously given the configuration of
25 the square and the lot, there is no alley access.

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1 VICE CHAIRPERSON HILL: Okay. Well, I'll go
2 ahead and ask a couple questions right now, first
3 then.

4 So the ANC voted five one to one, right, in
5 support. I'm just curious, what was the one decent?

6 MS. MAZO: The one decent had to do with
7 parking and it is a particular commissioner who had
8 told us beforehand she was going to decent and she
9 did. So.

10 VICE CHAIRPERSON HILL: Okay. All right.
11 Does anybody have any -- do you guys have anything
12 else right now? Okay.

13 Does anybody have any questions before I turn
14 to OP? Okay, please go ahead.

15 MR. MILLER: So I probably missed this at the
16 beginning of your presentation but, Mr. Andres, so
17 what would you have to eliminate or redesign to have
18 a 30-foot internal loading?

19 MR. ANDRES: Essentially you would probably -
20 - there is a ground floor use that consists of
21 restaurant and lobby space. In order for a 30-foot
22 truck to sort of pull head in and meet DDOT's
23 requirements, you would eliminate at significant
24 amount of sort of the lobby. You know, you'd have a,
25 you know, 30-foot truck running through a good

1 portion of the lobby in order for it to turn itself
2 around or make a three-point turn to get itself back
3 out.

4 MR. MILLER: Okay.

5 MS. MOLDENHAUER: Could I also ask the
6 architect to explain from an architectural
7 perspective what that would do to the street frontage
8 along K Street if you had a loading berth? Sean?

9 MR. PICHON: Yes. We looked at a couple of
10 different scenarios to provide loading off of 4th
11 Street, to pull in and be able to maneuver around
12 inside the building. One was a hammerhead load in
13 which put loading right along 4th Street on the
14 internal side. So you would pull in -- you would
15 pull in off of 4th Street and then back in to a
16 loading space that was here, and then pull back out.

17 What that did was it made a majority of your
18 façade along 4th Street a blank wall, which was not
19 deemed as desirable from a design standpoint. Also
20 we looked at another alternative that brought the
21 loading space in and we utilized this back space,
22 similar to what we're doing now with the service
23 space. That was -- we were able to get space, the
24 loading space in, but it impacted a significant
25 amount of the back of house on the hotel floor, which

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1 basically rendered the hotel lobby not able to
2 perform all of the back of house duties that it would
3 need to do on that floor.

4 So those were the two scenarios that we
5 looked at as far as providing the head in/head out
6 loading spaces on the ground floor level.

7 MR. MILLER: Thank you. I'll look forward to
8 hearing DDOT's comments on your alternative loading
9 plan.

10 VICE CHAIRPERSON HILL: Yeah. And before we
11 get there, actually, so just is there a way that you
12 can remove more parking to get a truck to turn
13 around? Just, the back of house would get taken
14 away. There's not a way to eliminate more --

15 MR. PICHON: Yeah, it's --

16 VICE CHAIRPERSON HILL: -- parking to do it,
17 just like you're doing it with the 20-foot van?

18 MR. PICHON: It had a lot to do -- so we also
19 looked at bringing the loading down to the lower
20 level where the parking is. It has to do with the
21 headroom clearances that you're required to have for
22 loading. We're required to have a 14-foot high
23 loading space, which if we are bringing the trucks
24 down to a lower level we're still eating up the
25 ground floor space in that same headroom

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1 configuration because we can't bring the trucks down
2 at a really steep ramping.

3 So in either case, whether we're loading at
4 the ground floor level, or we're loading at a lower
5 kind of sub mezzanine level for loading, we're still
6 impacting the ground floor level and its ability to
7 function, all of the back of house uses that the
8 hotel is going to require.

9 VICE CHAIRPERSON HILL: Okay. All right.
10 May I hear from Office of Planning, please? Or may
11 we hear?

12 MR. COCHRAN: Thank you, sir. With respect
13 to the rear yard relief, OP supports the relief from
14 Section 774.1, stand on the record about that.

15 With respect to parking, we continue to
16 support relief from 2101.1. Whether that relief be
17 the 74 space that the applicant had been requesting
18 up until today, or 76 spaces which the applicant may
19 have to wind up requesting if the loading changes.

20 When it comes to the loading itself we do
21 feel that the applicant has demonstrated exceptional
22 circumstances. They had originally come in with a
23 loading coming off of K Street. Both OP and DDOT
24 said this is not in conformance with any of the K
25 Street plans for this important street, be it from a

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1 pedestrian standpoint or from future trolley
2 circulation. So they went ahead and revised and made
3 everything off of 4th Street. So they did have that
4 exceptional circumstance.

5 With respect to practical difficulty I think
6 it's pretty clear, even from the discussion today,
7 that they do have a practical difficulty.

8 However, when it comes to the third prong of
9 the test I think OP is going to have to defer to DDOT
10 on that. That concludes our testimony.

11 VICE CHAIRPERSON HILL: Thank you. And with
12 that we're going to turn to DDOT.

13 MR. ROGERS: Good afternoon. I'll speak
14 primarily about the loading relief since that seems
15 to be the area of concern.

16 Curbside space is a rare commodity. It's a
17 finite resource. There's only so much space. You
18 take space out to accommodate loading and you
19 necessarily negatively impact parking availability or
20 other curbside uses. This area is rapidly developing
21 and will put further pressures on the curbside. If
22 you saw from the applicant's transportation analysis,
23 most of the curbside in the area is taken up by
24 parking and that parking is highly utilized. So
25 there's already heavy demands on that curbside.

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1 There will be heavier demands on that curbside in the
2 future.

3 The building itself is projected for
4 passenger pick up and drop off, already projected to
5 have some curbside demand from that aspect.

6 With respect to the 30-foot loading berth,
7 DDOT understands the challenges of providing a 30-
8 foot berth within DDOT standards in terms of
9 proximity and the backing movements. And so the
10 issue isn't so much around providing relief from that
11 component, but it is about making the 20-foot loading
12 service delivery area that's proposed as useful as
13 possible. So as to minimize the externality, the
14 pushing off-site the loading requirements, we feel
15 like the current proposal, the combination of the
16 distance of the loading facility to the core, the
17 fact that there is ramping involved, the fact that
18 there isn't really a designated service corridor, in
19 combination these factors make that service area less
20 likely to be used, and therefore put additional
21 strain on the curbside use, which is, we've already
22 mentioned, is already a limited resource.

23 And so that -- looking at the proposal
24 holistically, those are the challenges that we see to
25 the space actually being used. So much so that, you

1 know, we don't have the level of confidence that the
2 space, as proposed, at least the previous iteration
3 that that space would be used appropriately and that
4 folks would just park on the curbside. And that's
5 effectively in our perspective, tantamount to full
6 loading relief which is not what's being requested
7 here.

8 Some of the changes that were proposed today
9 I think are steps in the right direction. But
10 they're things that we're just hearing today for the
11 first time and can't necessarily evaluate those
12 today, but are committed to working with the
13 applicant to see if those changes, in aggregate, are
14 able to make that service space more likely to be
15 used, and therefore limiting the impact to curbside
16 space.

17 With that I'd be happy to answer any
18 questions you may have.

19 VICE CHAIRPERSON HILL: Does the Board have
20 any questions?

21 MR. HINKLE: I think just one. The proposal
22 for the shared valet on-street loading space, is that
23 done often in the city? Is that common?

24 MR. ROGERS: That is not a particular use of
25 curbside space that I'm familiar with being applied

1 other spaces, or other places. I think in an effort
2 to already minimize the amount of space dedicated to
3 this particular building, that was a direction that
4 we pushed the applicant to pursue.

5 Just to be clear, there are approval
6 processes for valet staging areas and for curbside
7 commercial loading zones that typically occur after
8 the BZA process. And so there's no -- there has not
9 been a level of approval yet for those features. But
10 certainly in an effort to make that footprint as
11 compact as possible, the combined space is a
12 direction that we feel like is the right one to go
13 and seek out some efficiencies out of the same amount
14 of space.

15 MR. HINKLE: Okay. Thank you.

16 VICE CHAIRPERSON HILL: Does the applicant
17 have any questions of the Office of Planning or DDOT?

18 MS. MAZO: Yeah, I just have one, maybe two
19 questions. The first question is, does DDOT have any
20 objection to the requested parking relief?

21 MR. ROGERS: We have a -- the reports to date
22 have focused on the loading because that is the
23 outstanding issue. We have reviewed the parking
24 relief and have not put something into the record on
25 that yet because we're still working out this

1 loading. Generally, the parking relief does seem to
2 be appropriate. There may need to be some tweaks to
3 the transportation demand management plans, but in
4 general the level of relief is not something that
5 DDOT would object to with the proper TDM measures in
6 place. I think the TDM measures are close and I
7 don't have the specific tweaks in front of me, but
8 it's something that we could -- I'd be happy to
9 provide to the record.

10 VICE CHAIRPERSON HILL: So I'm sorry, just to
11 clarify the question. So the applicant would have to
12 have you approve first the fact that they could do
13 the valet with the truck, correct? You know, before
14 we could even understand this?

15 MS. MOLDENHAUER: No. Let me just jump in
16 here if I can clarify. We're seeking from the Board,
17 zoning relief today. And we understand as are with a
18 lot of other larger projects like this, that we will
19 have to go before DDOT for public space issues. Some
20 of those will include the curb cuts and the valet
21 parking and the curbside use. So those are DDOT
22 specific issues that we will need to continue to work
23 with DDOT on, but are not -- while they are part of
24 this general process, they are a separate process
25 which they have their own jurisdiction over, and we

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1 are looking for the approval under the zoning relief
2 for the loading issues that have --

3 MR. HINKLE: So, Ms. Moldenhauer -- right.

4 MS. MOLDENHAUER: -- bifurcate the two
5 different issues.

6 MR. HINKLE: Right. Right.

7 MS. MOLDENHAUER: Okay. Does that help?

8 MR. HINKLE: So the 30-foot loading is also
9 part of your variance request, right?

10 MS. MOLDENHAUER: It is. But what we've
11 said, and maybe Erwin can provide some additional
12 information, is that the likelihood of using a 30-
13 foot truck on this site is not as likely. That the
14 majority of the uses, since it's only 200 keys, it's
15 a smaller hotel, it will mostly be done, and Erwin
16 went through the different types of uses in his
17 testimony, the linens and the vending, you know, will
18 mostly occur. And what we've tried to do is identify
19 all of those that will occur onsite, on the 20-foot
20 van space, and that we would have limited use that
21 would be coordinated through our loading management
22 coordinator onsite for any, if not limited potential
23 use for curbside loading.

24 MR. HINKLE: Okay.

25 MS. MOLDENHAUER: So the goal was to try to

1 put as much as possible onsite since the difference
2 between a 30-foot and 20-foot is very limited, and
3 there's other projects I know that this Board has
4 approved on 14th Street or other areas where the
5 applicant, as we have done here, is indicating that
6 we will have a majority of our loading done by a
7 smaller vehicle due to restrictions and practical
8 difficulties with the site.

9 MR. HINKLE: Okay.

10 VICE CHAIRPERSON HILL: Do you have something
11 to respond there?

12 MR. ROGERS: I think it is reasonable to
13 assume that there will be 30 foot trucks servicing
14 the site. And as I said in my testimony, that we
15 understand the challenges of providing that 30-foot
16 truck on site. But we -- and we'll work with the
17 applicant to come up with the appropriate curbside
18 usage and signage. And that would happen through
19 separate DDOT process. And I think we can get to
20 agreement there.

21 So there will be 30-foot truck usage. The
22 idea is to, as Ms. Moldenhauer was saying, to get as
23 much onsite, or to get as much loading activity that
24 is possible onsite. And that's the discussion about
25 the 20-foot service delivery space and making that as

1 usable as possible. And I think we had laid out some
2 concerns with the proposal. I think the applicant
3 has come back and made a series of adjustments to try
4 to make that space more usable. I think that's
5 something that we need to take a closer look at.

6 But in terms of the actual loading activity
7 generated by this site, it is expected to, you know,
8 to generate some activity. But the point is, make as
9 much that can happen onsite, onsite. And that's kind
10 of the, I think the remaining question that we have
11 and are happy to continue to work with, with the
12 applicant on it.

13 VICE CHAIRPERSON HILL: Do you see a way for
14 them to put a truck in there to satisfy your
15 requirements, given what you've seen with the plans,
16 I'm just curious if you see a way to pull a truck in
17 there and turn it around.

18 MR. ROGERS: I think on the 30-foot truck
19 piece, we've acknowledged that there's challenges to
20 doing that and there's not an expectation that we
21 have. But in terms of the 20-foot truck we would, I
22 think, and I'm not an architect, I'm not a designer,
23 but we've laid out the expectations that we have from
24 our perspective that would make that space usable.
25 And that is close proximity to the core, no ramping,

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1 or some way to generally make that space more likely
2 to be used. And --

3 VICE CHAIRPERSON HILL: As far as the 20-foot
4 loading plan, are you comfortable with it now or you
5 still have to take a look at it more closely?

6 MR. ROGERS: Still have to take a look at it
7 more closely.

8 VICE CHAIRPERSON HILL: Okay. Thank you.
9 Anyone else have questions for DDOT or OP?

10 Does the applicant have any more questions
11 for DDOT or OP?

12 All right. Does the Board have any more
13 questions for the applicant?

14 Would the applicant like to say something?

15 MS. MAZO: Yeah, just a few minor comments.
16 The first is to reiterate the uniqueness and the
17 exceptional situations that we have on the site,
18 including its size and its shape and the proximity to
19 K Street where there's no curb cut. And then I
20 believe the question of practical difficulty appears
21 to be resolved and we have demonstrated that there is
22 practical difficulty.

23 And then it goes to the third prong of impact
24 and I believe on the loading issue, first of all my
25 understanding is that DDOT has said that they don't

1 believe that there will be a significant impact for
2 the relief for the 30-foot trucks. And so that -- to
3 allow those to be loaded curb side.

4 So then the question, as I understand it, has
5 been narrowed down to the location of this 20-foot
6 service delivery berth that's required. And I would
7 just like to put on the record that the Zoning
8 Regulations have specific requirements for the
9 location and accessibility of those service delivery
10 spots. And the location that has been proposed at
11 every iteration of these plans does indeed satisfy
12 those requirements. Based on my reading I don't
13 believe that the zoning regs have a requirement for
14 proximity to the elevator core or length of a ramp,
15 and Mr. Andres's testimony that has not been refuted,
16 demonstrates that the lengths that we are proposing
17 here, whether it be 95 or 76, or certainly within the
18 realm of possibility and are reasonable for this type
19 of site, and accordingly -- and the one point I also
20 would like to make is that the applicant has
21 committed and will continue to commit to a
22 significant loading management plan. But unlike an
23 apartment building or another use, this is a hotel,
24 and there will be a dedicated loading manager who
25 will work with the deliveries, who will schedule the

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1 deliveries, who will work with the truck drivers, or
2 the drivers, whether they be trucks or vans, to help
3 them and to show them where to go on this -- whether
4 it be a curbside delivery to go through the dedicated
5 loading service area from the curbside to the
6 interior, or whether it be from this interior
7 internal service berth where we are also proposing
8 dedicated loading space and a very gradual ramp.

9 So for all those reasons we certainly believe
10 that the record in this case reflects that the
11 applicant satisfies these requirements and we would
12 ask to move for decision today. And the applicant
13 will most certainly commit to working with DDOT and
14 to resolving this internal operational issue. But
15 from our standpoint as to the zoning issues, those
16 issues have been resolved.

17 VICE CHAIRPERSON HILL: Does the Board have
18 any more questions for the applicant?

19 Okay. Well, I'll tell you -- well, first of
20 all, is there anyone here from the ANC? Is there
21 anyone here from the ANC? No?

22 Anyone here in support for the applicant?

23 Is there anyone here in objection with the
24 applicant? No? All right.

25 So I'm a little bit uncomfortable, I'll tell

1 you, with the loading. I actually, you know, I can
2 go in with the Office of Planning and I can see how
3 you meet the standard for the relief that you're
4 asking for the rear yard and the off-street.

5 The problem that I also have with the
6 loading, and this is possibly unfortunately, is I
7 live in the neighborhood also. And so I know how
8 dense that area is. And the truck loading and
9 unloading that you speak of off of 4th Street right
10 there, the fact that I don't even know now whether or
11 not you can put it there is one thing, I suppose, in
12 terms of -- and I don't know what the Board thinks,
13 but -- and then the fact that DDOT now is not
14 necessarily comfortable with your alternative loading
15 plan, although it seems as though they are, could be,
16 I would be more interested in, you know, findings of
17 fact, you working with DDOT to see if they can -- if
18 you can get closer to their issues concerning the
19 truck with, you know -- because I also think whether
20 or not it happens once, whether it happens twice a
21 week, I don't know. And I mean, it's going to
22 happen. And so, what are you going to do with that
23 truck?

24 And that's what I'm not really comfortable
25 with. So even though I would love to move to a, you

1 know, place where we could deliberate, and again, I'm
2 going to hear what the rest of my colleagues think, I
3 would want you to go back, talk to DDOT, and then
4 come back for a decision.

5 MR. MILLER: Mr. Vice Chair. This is a great
6 project, but I would agree with you. You've done a
7 lot of work and I think -- but DDOT is just seeing
8 some things today. I think they need to -- you need
9 to sit down with them and maybe do the tweaks or
10 whatever that -- and we need to get a report that is
11 closer to a nonobjection on the loading, and speaks
12 to the parking.

13 I mean, it's obvious, I think that we have a
14 verbal okay on that but I think we need a report from
15 DDOT on this type of project that is less negative.
16 And so it's the functional service. I think you've
17 made some adjustments. They haven't -- just seeing
18 them today. So maybe in your very choice of way you
19 can get them there and with maybe some additional
20 tweaks and the TDM and the loading management, and
21 that will be all part of it. But so that's what I
22 would encourage, that we defer this and hopefully to
23 not postpone it a long period of time and we can get
24 to that point.

25 VICE CHAIRPERSON HILL: Mr. Hinkle.

1 MR. HINKLE: No, I tend to agree with you
2 two. What I would like to see is actually a findings
3 of facts and conclusions of law from the applicant
4 and that would help me consolidate their arguments.
5 And then the other thing is as you mentioned, maybe
6 another report with some comfort level from DDOT in
7 terms of the loading issue.

8 VICE CHAIRPERSON HILL: Okay. How quickly do
9 you think the applicant can work with DDOT?

10 MS. MAZO: We could work with them very
11 quickly. We could come back on the 23rd. Is DDOT
12 comfortable with that time frame? We want to make
13 sure -- because we had extended this previously but
14 we want to make sure that that's a reasonable time
15 frame for DDOT.

16 MR. ROGERS: Which would make the DDOT report
17 due next Tuesday with the holiday?

18 VICE CHAIRPERSON HILL: I'm waiting for Mr.
19 Moy. Sorry.

20 MR. MILLER: We can waive that, can't we?

21 MS. MOLDENHAUER: Could you wait for the
22 Thursday before the hearing?

23 MR. MOY: If the Board desires to hear this
24 again on the 23rd, I'm assuming this is a continued
25 hearing.

1 MS. MOLDENHAUER: We would ask to come back
2 for decision.

3 VICE CHAIRPERSON HILL: Just do this for
4 decision.

5 MR. MOY: For decision. It would be -- yeah,
6 the 16th. You know, if you need the time I'm okay
7 with filing by Thursday, February the 18th.

8 VICE CHAIRPERSON HILL: Is that good?

9 MR. ROGERS: If we can set up a time in the
10 next several business days and give us -- to give
11 DDOT enough time to review and write the report, the
12 18th would be fine.

13 VICE CHAIRPERSON HILL: Okay. Great. I
14 mean --

15 MS. MOLDENHAUER: Oh, I was just --

16 VICE CHAIRPERSON HILL: Ms. Moldenhauer, do
17 you have something?

18 MS. MOLDENHAUER: If we could then just file
19 our findings of facts and conclusions of law, then on
20 the morning of the 19th, that way we can see what
21 DDOT filed on the 18th. Unless of course we get an
22 earlier draft, but I just --

23 VICE CHAIRPERSON HILL: That's fine.

24 MS. MOLDENHAUER: Okay. Thank you very much.

25 VICE CHAIRPERSON HILL: Okay? Oh, and also

1 for the record, I also like the project. It looks
2 like a nice project. You know, I mean, but I am in
3 the neighborhood so, yeah. Okay. Thank you all very
4 much.

5 We're going to take a 10-minute break. But
6 just, it's only going to be 10 minutes because I know
7 we've got the appeal next. Thank you.

8 [Off the record from 2:08 p.m. until 2:20
9 p.m.]

10 VICE CHAIRPERSON HILL: Good afternoon. Mr.
11 Moy, if you'd call our last case for the day?

12 MR. MOY: Thank you, sir. That would be
13 Appeal No. 19174. This is of the Unit Owner's
14 Association of the Erie Condominium. And I'll read
15 this caption as advertised, Mr. Chair. This is the
16 appeal of the decision by the Zoning Administrator to
17 issue Building Permit No. B, B as in Bravo, 1410680,
18 to construct a new 40-unit residential building with
19 underground garage parking in the RC/R-5-B district,
20 2337 Champlain Street Northwest, Square 2563, Lot
21 887. Mr. Chair, there's a number of motions on the
22 table for the Board to address, among other things.
23 Thank you, sir.

24 VICE CHAIRPERSON HILL: Thank you, Mr. Moy.
25 All right. Good afternoon, everyone. Thanks for

1 waiting here for so long.

2 Let's see, if we could just go through and
3 introduce ourselves, first?

4 MR. PAPKE: Sure. Good afternoon. My name
5 is Brian Papke, Design Manger Capitol City Real
6 Estate.

7 MS. SHIKER: Christine Shiker with the law
8 firm of Holland and Knight.

9 MR. TONDRO: Maximillian Tondro representing
10 DCRA and the Zoning Administrator.

11 MR. LeGRANT: Good afternoon. Matthew
12 LeGrant, the Zoning Administrator, DCRA.

13 MS. HORVITZ: Good afternoon, I'm Laurie
14 Horvitz representing the appellant here, the Unit
15 Owner's Association of Erie Condominium.

16 MR. WIEDIS: Good afternoon. I'm Richard
17 Wiedis. I am the president of the Erie Condominium
18 Association.

19 VICE CHAIRPERSON HILL: I'm sorry, could you
20 say your last name again?

21 MR. WIEDIS: Wiedis. W-I-E-D-I-S.

22 VICE CHAIRPERSON HILL: Okay. All right.
23 Well, Mr. Moy, I think the first thing is we have a
24 motion for dismissal. Is that correct? And so what
25 I'd like to do is kind of I guess hear

1 MR. TONDRO: I believe the zoning --

2 VICE CHAIRPERSON HILL: Sorry?

3 MR. TONDRO: Pardon me.

4 VICE CHAIRPERSON HILL: Sure.

5 MR. TONDRO: I believe the Zoning
6 Administrator has not yet been sworn in.

7 VICE CHAIRPERSON HILL: Oh, I'm sorry.

8 MR. TONDRO: Pardon me.

9 [Oath administered to the Zoning
10 Administrator.]

11 VICE CHAIRPERSON HILL: Thank you. I guess
12 I'd like to hear first about the timeliness and the
13 motion to dismiss, and we can kind of work through
14 that first, and then we'll kind of move on from
15 there.

16 MS. SHIKER: Okay. Great. As the movant
17 should we -- we'll start?

18 VICE CHAIRPERSON HILL: Please.

19 MS. SHIKER: Thank you. Members of the
20 Board, good afternoon. Again, my name is Christine
21 Shiker with the law firm of Holland and Knight, and I
22 am representing the owner of the property that is the
23 subject of the appeal.

24 We believe that this case should be dismissed
25 as untimely because appellants did not bring the

1 appeal within 60 days of when they knew or should
2 have known about the zoning decision, which is
3 required under Section 31112.2A of the Zoning
4 Regulations.

5 Inferring every inference to appellants, they
6 knew or should have known of the revised penthouse
7 design as of the date that the building permit was
8 issued, which was June 17th, 2015. Thus, the appeal
9 should have been brought by August 16th, 2011. The
10 appeal, as you are aware, was brought in late October
11 and in our pleadings we said it was October 27th
12 because that was the date in ISIS.

13 VICE CHAIRPERSON HILL: I'm sorry. I'm
14 sorry, can you do that date again? 6/17/15, and
15 then --

16 MS. SHIKER: Was the date that the building
17 permit was issued.

18 VICE CHAIRPERSON HILL: Right.

19 MS. SHIKER: Sixty days from that date would
20 be August 16th, 2015.

21 VICE CHAIRPERSON HILL: Right. There you go.
22 Okay. Thanks.

23 MS. SHIKER: The appeal was brought October
24 23rd, 2015. That is over 125 days after the building
25 permit was issued, and more than 60 days after the

1 appeal deadline ended.

2 This case has a long history as you've seen
3 by the reams of documents that have been submitted.
4 I want to just point out a few salient facts that
5 support our motion to dismiss to the extent that the
6 Board goes to the merits of the case, we'll get into
7 more detailed facts. But I'm going to do a short
8 rendition of facts.

9 In November 2013 Capitol City bought the
10 property, and in December 2013 they started their
11 initial outreach with appellants. Revisions to the
12 design were evaluated with the Zoning Administrator
13 and a determination letter was issued in February of
14 2014.

15 Owner at that time was working with the
16 appellants and learned that there were some concerns
17 with respect to the air handling units. Those are
18 the square boxes that sit on top of residential
19 buildings. They are permitted under both the zoning
20 regulations and the building code, to be unscreened
21 on the main roof of a building. If they go to the
22 top of the roof structure, they must be screened by a
23 parapet wall.

24 They were proposed to be on the main roof,
25 and the plans that the Zoning Administrator reviewed

1 and approved in 2014, while it did have a variety of
2 refinements from the original BZA approval, generally
3 had the penthouse at the same height as was on the
4 penthouse plans. It complied with the Zoning
5 Regulations, and in fact was not subject to the
6 relief of the BZA.

7 In response to these concerns about the
8 location of the air handling unit, owner presented at
9 a live meeting with appellants on March 18th, 2014.
10 At that meeting the owners presented plans to
11 appellants showing them the revised design that had
12 been reviewed and okayed by the Zoning Administrator
13 with one big revision. And I would ask that the plan
14 be shown here.

15 This is the plan that was shown on March
16 18th. It shows -- that's not it. There it is. It
17 shows the proposed penthouse as approved by the
18 Zoning Administrator with an additional three and a
19 half feet parapet to screen the air handling units
20 that were placed on the roof of the penthouse in
21 response to the concerns raised by appellants.

22 At this meeting, and Mr. Papke was at that
23 meeting, the appellants expressed support for this
24 solution because they were very concerned about the
25 noise and visual impact of the air handling units.

1 These plans were presented on March 18th. They were
2 e-mailed to appellants on March 19th. They were e-
3 mailed again to appellants on April 29th.

4 VICE CHAIRPERSON HILL: Can you go back and
5 say those dates again, please?

6 MS. SHIKER: March 18th is the date of the
7 meeting.

8 VICE CHAIRPERSON HILL: The meeting.

9 MS. SHIKER: That plan was shown. On April -
10 - excuse me. On March 19th the following day, those
11 plans were e-mailed to appellants, showing three and
12 a half additional feet on the penthouse. On April
13 29th there was another e-mail to appellants
14 forwarding the plans and asking for questions and
15 comments.

16 From the time of the March 18th meeting until
17 owner met again with appellants in May of 2015, so a
18 course of a year, owner informed appellants four
19 separate times that they planned to go in accordance
20 with these plans.

21 The building permit plan was submitted in
22 July of 2014, so a few months after this was
23 presented on March 18th, 2014. And it is to the
24 right. It shows a very similar configuration; a
25 primary penthouse with air handling units screened by

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1 a parapet.

2 VICE CHAIRPERSON HILL: And what date again?
3 That was July?

4 MS. SHIKER: That was filed in July of 2014.
5 I don't have the exact date, but those plans were
6 pending with the Zoning Administrator and DCRA for 11
7 months before the permit was issued on June 17th,
8 2015.

9 The penthouse in both plans is greater than
10 the nine feet that was shown on the BZA plans
11 approved by the board. That nine feet had been a
12 concession to the appellants at the time, to try to
13 not adversely impact their views. This increase in
14 height was completely consistent with the Zoning
15 Regulations, it was lower than what was permitted,
16 and it was a concession to screen the air handling
17 units. The air handling units could have been on the
18 roof and they were always proposed to be on the roof.

19 Therefore, as noted in the cases cited in the
20 owner's motion to dismiss, the 60-day requirement has
21 been routinely enforced by this Board, and it has
22 routinely been applied to an earlier date than the
23 building permit. In this case the appellants knew,
24 they were presented the increased height in March of
25 2014. Owners followed up with them religiously to

1 get some sense of objection or support for this.
2 They were told in person that they supported this
3 plan. They designed the entire building and the
4 loads and the mechanical equipment to support the air
5 handling units on the roof.

6 The building permit was then issued in June.
7 They got through construction up to the roof, and the
8 first time they hear there's an objection is in
9 October of 2015. That is well after the 60-day time
10 period. They knew, they filed it untimely, and
11 unfortunately the appeal must be dismissed because it
12 was not timely. Thank you.

13 VICE CHAIRPERSON HILL: Okay. Thank you.

14 MR. TONDRO: Good afternoon, Mr. Chair and
15 Members of the Board.

16 I would just like to clarify first of all, my
17 name, pardon me for the record again, is Maximilian
18 Tondro. And I just wanted to clarify first, again,
19 that I'm representing in this case here, solely DCRA
20 and the Zoning Administrator, not the permit holder,
21 pardon me, who is separately represented by counsel.

22 In this particular case, as in many, DCRA and
23 the permit holder have interests that co-align with -
24 - in maintaining the permit, but they are also
25 fundamentally different, whereas the permit holder is

1 interested only in this particular permit, DCRA's
2 interest is instead in the long-term functioning of
3 the permitting process. The reason that I joined the
4 motion to dismiss is precisely for that long-term
5 reason, this concern that we maintain the 60-day
6 period that is enshrined in the Zoning Regulations.

7 I want to make very clear, as I tried to in
8 my brief, that I am not making moral judgments of any
9 party in this case. There have been allegations on
10 all sides that we're confronted with. But the ZA's
11 role, however, is to determine only if the permit
12 complied with the law. Not whether one side misled
13 the other, or one side blackmailed the other, or
14 whatever it is that one side says to the other.

15 The interactions between private parties are
16 not something to which the ZA is privy, nor is it
17 relevant to the ZA's role in determining compliance
18 with the Zoning Regulations.

19 In this particular case, as has already been
20 said, and as the Commissioners I'm sure know, the 60-
21 day period starts from the time period that the
22 appellant had notice or knowledge, and that is either
23 that they had actual notice or that they reasonably
24 should have had notice or knowledge.

25 In this particular case the permit was

1 posted. Apart from what the permit holder's counsel
2 has just said in terms of prior notice that was
3 provided, in this particular case we can rely on the
4 posting of the permit, on the property adjacent to
5 appellants, on June the 17th, 2015. From that time
6 period 60 days takes you to August the 16th, 2015.
7 And yet, there was no attempt during those 60-day
8 period to contact DCRA or to determine what was
9 approved in those particular plans.

10 VICE CHAIRPERSON HILL: Mr. Tondro, could you
11 just repeat that again? The posting you said again?

12 MR. TONDRO: Yes. The permit was issued on
13 the 17th of June and should have been posted as of
14 that day. Again, if it was posted the next day, June
15 the 18th, then it would -- the 60-day period would
16 have run one more day. But we're not talking about
17 one or two days each way. We're talking about 68 or
18 67, or 66 days beyond what was the 60-day period.

19 And again I would, just I want to emphasize,
20 the issue is when they have notice. It's not
21 necessarily that they have the actual plans. It's
22 when they have notice that they're put on notice to,
23 as part of their due diligence, go out and reach out
24 and determine what that is.

25 In this particular case the appellant's chose

1 to rely on, allegedly, and I say allegedly only
2 because we don't have any basis to know, but
3 allegedly chose to rely on what was communicated to
4 them by the permit holder. What we know is that
5 DCRA, when I say we, we know the fact was that the
6 permit was posted, it was issued as of that date, and
7 as a result they were on -- the appellants were on
8 notice, as was the ANC or anybody else about the fact
9 that this permit had been issued and if there were
10 questions they should contact DCRA to determine what
11 happened.

12 I referenced in my brief the fact that in
13 this particular case the appellants had what I deemed
14 extraordinary notice. What I meant by that was as
15 opposed to most appellants or most citizens of the
16 District, they have a situation where they don't
17 know, they've never been in the process, they don't
18 know that the Board of Zoning Adjustment exists, they
19 don't know how this works, they have no advanced
20 knowledge that any permitting is going to happen.
21 They are still bound by that 60-day period.

22 In this particular case the facts were all
23 the opposite. The appellants had extensive
24 knowledge, four years earlier, that there was a
25 project going on. They had had experience with the

1 Board and knew, therefore at the very least, who they
2 could start to contact to figure out where things
3 were. There are the next door neighbors, they had
4 access to the permit that was posted outside. And in
5 addition, because this was a big site, this was not a
6 small site, a small garage that was being built in a
7 single-family residential district, this is a massive
8 undertaking. As a result, there was foundation to
9 grade work that was done under a separate permit that
10 had been issued back in April. So before this permit
11 was already issued, there is three months' worth of
12 construction ongoing onsite that should have put them
13 on notice, hey, there's a permit here. We need to
14 know what was going on.

15 So that is what I mean when I was saying
16 extraordinary notice. Unusually so. Furthermore, I
17 would also point out that as I said in the brief
18 itself, that they are represented by counsel. I
19 understand that it's not a situation that the
20 appellants retained that counsel during that four-
21 year period, but rather was that they had, prior to
22 this issuance, they had obtained counsel. They could
23 have reached out and determined if that was something
24 they wanted to do in order to protect the due
25 diligence. Finally, I would say that as Mr. Wiedis

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1 himself indicated in the letter to the Board, he is a
2 lawyer, an attorney. And as such, maybe does not
3 have knowledge specifically about land use or zoning,
4 but certainly should be aware of appeal rights and
5 the process by which they work and the need to be
6 careful about them.

7 So I think that that is an extraordinary, as
8 opposed to, again, the normal citizen of the District
9 who has none of that specialized knowledge.

10 Sorry, I'm pausing because there is an
11 assertion that was made in the subsequent filings in
12 response to my brief that somehow the issue now turns
13 on whether or not DCRA provided the plans. I will
14 point out, and I want to emphasize this, there is
15 nothing on the record that I have seen that shows
16 that any attempt to reach out to DCRA occurred within
17 that 60-day time period. The most that we have is an
18 assertion that after they filed the appeal in October
19 that they tried to call me and they made some
20 requests to the Zoning Administrator.

21 Without substantiated evidence I think they
22 have the burden of proof to provide the fact that
23 they reached out, that they tried to make an honest
24 attempt. And if DCRA failed then obviously we failed
25 and we made a mistake. But I don't see anything on

1 the record that would indicate to us, that. If there
2 was, there was an assertion that at some time there
3 was an attempt made to reach out to DCRA to find the
4 approved plans, and that it was a staffer or somebody
5 said that it was not -- the plans were not available
6 or they're not authorized.

7 We don't know what the circumstances are. We
8 don't know without knowing a specific date, how that
9 interacts with the appeal period. We don't know
10 either whether or not it was a low level staffer, or
11 who it was under what basis, and without knowing the
12 name of the person it's hard for us to reconstruct
13 what that conversation was.

14 One possibility might be that if this
15 occurred after the plans were approved, that since we
16 keep the official copy, we cannot release that
17 official copy for anybody to take out unsupervised
18 because it is the official copy. We have to maintain
19 the copy in the records. We do allow it to be
20 photocopied, and that is provided with an off-site
21 third-party vendor. So it may be that there was a
22 miscommunication that way, but we don't know what the
23 circumstances are, and above all, we don't know the
24 date. But there's been nothing that's been shown to
25 us on the record that establishes the fact that this

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1 occurred within that time period, the 60-day time
2 period.

3 The 60-day time period is therefore a reason.
4 It has a fundamental legal -- it's fundamental legal
5 philosophy as to why it's there. It is there in
6 order to provide finality to make sure that all
7 parties, if they are noticed, that they are able to
8 be in a position where they can rely on the decision
9 once it's been made. And this is to open up this to
10 allow appellants to simply say, well, you know, I
11 went down at one point to DCRA at some point without
12 saying who it was I spoke to, and that supposedly
13 somehow releases them from all obligations, when
14 combined with the idea that the permit holder made
15 misrepresentations to us, this is going to open the
16 flood gates from DCRA's perspective. Is it four
17 months? Is it six months? Is it 12 months?

18 I would point out, too, that in this
19 particular case appellants are really seeking for
20 effectively equitable relief. They are seeking to
21 qualify for the exemption under 312.2D, that allows
22 for the exception from the 60-day period. That one
23 requires extraordinary circumstances outside of
24 appellant's control.

25 I can't see how appellant's failing to do

1 down to DCRA is outside of their control. I think
2 that's a fundamental point.

3 I will also just make a couple brief
4 comments. The appellants cite a BZA appeal, 17414 as
5 justification that for the exceptional circumstances
6 exception. But that case involved two different
7 permits for a single-family garage. There was a
8 garage that was built as one story and then
9 subsequently a second story. In that particular
10 case, however, the Board -- the appeal was filed
11 timely for the second permit and the Board allowed
12 the first permit to be incorporated in because they
13 were dealing with the same structure because there
14 was no real prejudice to the parties, because they
15 were already on notice.

16 This is not that case. This is a very
17 different case. And I will leave it at that for now.
18 Thank you.

19 VICE CHAIRPERSON HILL: Thank you. Hello.
20 Are we done? We're not going to go all the way down
21 through the row there? No? All right.

22 Hi, how are you?

23 MS. HORVITZ: I'm good.

24 VICE CHAIRPERSON HILL: Good.

25 MS. HORVITZ: Again, this is Laurie Horvitz

1 on behalf of the appellant and I need to obviously
2 address both the regulations and the legal standards
3 that govern the timeliness of an appeal, and also
4 address a number of factual contentions, almost every
5 one of which we would contest and have evidence to
6 refute. Much of which has already been submitted in
7 the written record.

8 So let me just start by way of background.
9 And this Board is obviously very familiar with
10 3112.2, regular people are not, but this Board is.
11 And it has been properly characterized that there is
12 a reasonableness component to it and there is a
13 knowledge based component of it. And it's supposed
14 to be knowledge of the decision complained of, but it
15 also recognizes that there are sometimes when a
16 neighbor won't know what the plans are with respect
17 to a relevant structure.

18 And for that reason there was a provision
19 that was inserted, which speaks to under-roof
20 requirements. And this may be an appropriate
21 circumstance. It hasn't been mentioned at all by my
22 colleagues, that this is exactly the circumstance
23 where the neighbor did not know and I will contend,
24 should not have known, what was going to be
25 constructed next door until the activity at the roof

1 level began, which wasn't until October of 2015.
2 First observations were made between the 7th and 9th
3 of October and early inquiries were immediately sent
4 to the permit holder saying, what's going on? Why is
5 this so tall? This is not what we contemplated.

6 By no means at that time were the penthouse
7 structures under roof. They were not. And we have
8 submitted a photograph that shows that the --
9 although the mechanical penthouse area, which is what
10 clued my client in to the fact that it was going up,
11 had been kind of blocked out. The cabanas, the
12 interior finished space next to each private rooftop
13 deck, there were just a few frame -- there was just
14 framing of that. A few two by fours, if you will.
15 And there is a photograph that was taken on October
16 22nd, the day before we filed our appeal on the 23rd,
17 showing that under no circumstances could anybody
18 contend that the relevant structures were under roof
19 at the time of the appeal.

20 Now, I will, you know, deal with the 60-day
21 issue as well, of course. But it's important to
22 understand that there is a provision that seems to
23 contemplate a circumstance where an appellant may not
24 know until they're seeing construction going up, and
25 they've defined what under roof is in the

1 regulations. And when the Zoning Commission adopted
2 that provision it put that the rationale for this
3 provision, and I quote from the D.C. Register was,
4 "Because an appellant may not have notice of
5 knowledge of a decision until construction is under
6 way, the amendment provides that no appeal may be
7 filed later than 10 days after construction is,"
8 quote/unquote, "under roof."

9 So there's certainly a legal argument here
10 based on the facts, that since what we're challenging
11 are the rooftop structures and they were not yet
12 under roof, that -- and we certainly fell within the
13 -- I mean, they weren't under roof yet. So we had 10
14 days after they were under roof under that provision,
15 that we were timely if the under roof provisions are
16 consulted as instructive of what was really intended
17 when you look at the entire 3112.2, including that
18 subpart, which is part of that provision.

19 Now, it's important when you look at the
20 history not to start in November or December of 2013.
21 That's not where this story starts, and that's not
22 where the knowledge of what was anticipated to be
23 built was first derived by my client, because as the
24 record fully shows, there was an earlier BZA case in
25 2012, Case No. 18330. It was at that time that the

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1 penthouses were promised to be nine feet. My client
2 was present and a party to that proceeding. So we
3 don't start with the new owners who are sitting here
4 today and are the current permit holders, to derive
5 an understanding of what can and cannot be built at
6 the site. No, we start when the original owners,
7 also represented by the same counsel here, show up
8 and say this is what we want to build, and here are
9 plans. They all show nine feet. And then
10 extensively -- excuse me, the testimony at the BZA
11 hearing in 2012, in April of 2012, over and over and
12 over again in the applicant's direct case said, we
13 are creating low-rise penthouse structures to offset
14 what could be -- or minimize the adverse effects of
15 what we're asking for, which is a taller building.

16 So that's the knowledge base that my client
17 had when the new owners purchased. Okay. The new
18 owners come in and they say, we're going to redesign
19 the building completely. We're taking away the
20 courtyard. Well, my client wants to make sure that
21 this new owner understands that there are constraints
22 on what can be built. So he sends an e-mail, and
23 this is December of 2013, and says, "What are you
24 planning here? Are you planning," and it's in
25 writing via e-mail, "are you planning to increase the

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1 height of the penthouses." Get a written response on
2 December 23rd, 2013. And that date will be
3 important.

4 Answer, "No." Okay?

5 So if we're going to start from the beginning
6 we have to start with what my client knew and
7 reasonably should have known at that time. There's
8 no e-mail in the record that ever says, by the way,
9 we've changed our mind. It's now going to be with
10 parapet 16.45 feet. We've abandoned the nine feet.
11 It's a he said/she said as to what happened at the
12 march meeting, and we will certainly talk about that
13 and we will talk about the plans that were e-mailed
14 the next day.

15 But if there was such candor and
16 collaboration as alleged by the permit holders'
17 counsel, then one would expect to see something that
18 flagged the issue for the next door neighbor building
19 that had squarely asked the question in December and
20 gotten an unequivocal response that they weren't
21 increasing the penthouses.

22 So let's talk about this exchange in March of
23 2014. And we'll come all the way up and talk also,
24 of course, about the post-permit period. But since
25 it's been raised as though we should go all the way

1 back in time.

2 First of all, the exhibit that is Sheet A9,
3 let's be clear on this, the red brackets that have
4 all the calculations, they weren't there. Those have
5 been added for your benefit. Okay? So any
6 computations or -- that information was not
7 contemporaneously communicated.

8 But what's more important is, look at the
9 date on the plans. The plans are dated December 9th,
10 2013. Okay? So there is a meeting in March of 2014
11 and they're talking about the building. We would
12 directly controvert the contention that the owners of
13 the Erie were advised that the boxes, the utility
14 boxes were being put on the roof, and that that's why
15 they were adding to the penthouse height, and that
16 that's why there were going to be parapets. There's
17 no recollection of any of that conversation
18 occurring.

19 There is a conversation about, where are
20 these boxes going to be? Can they be further away
21 from our property line? And that's all in the
22 record. But the record shows that the suggestion by
23 the Unit Owners at the Erie, was can't you just move
24 them further away? There's no responding e-mail that
25 says, oh no, we've decided we're going to put them on

1 top. And by the way, you should be advised that
2 that's going to add four or five feet to the
3 penthouse. There's no e-mail to that affect.

4 So in March of 2014, they show a plan that's
5 still dated December 9th, 2013. Now recall that
6 after the date that these plans were supposedly
7 generated, the owner had communicated, we're not
8 increasing the penthouse. That was communicated on
9 the 23rd of December.

10 So then they e-mailed these same plans the
11 next day. I know that the Vice Chair wanted to make
12 sure that he knew what that day was. And if you read
13 the transmittal to that e-mail, it says, and it's in
14 our prehearing statement, which was marked as Exhibit
15 18 and our sub-exhibit I to that, and it says, "See
16 attached. We have not yet made the revisions as
17 discussed but will do so in the near future. One of
18 the major things we are working through right now is
19 having a more specific design for the mechanic units
20 and their location, as well as the green roof areas,
21 et cetera."

22 So why would Erie Condominium, who had been
23 told that there was going to be no increase in
24 penthouse height, and then is given an old set of
25 plans, put any significance to that at the time? And

1 certainly did not express support at that time for an
2 increase in penthouse height, because that was not
3 discussed at that time. Or at any time until October
4 when the question was asked.

5 Now, I'm somewhat sympathetic to the concerns
6 of DCRA. I mean, obviously this case needs to be
7 judged on the facts of this case and none other. And
8 I certainly would dispute the contention that this is
9 going to open flood gates. And let me reiterate why.
10 Floodgates of untimely filings as alleged.

11 This is a pretty unusual circumstance. You
12 do have an owner next door, the Erie, that is aware
13 of what's supposed to be built. Right? I mean, they
14 saw the plans, they heard the testimony in 2012.
15 They had written representations in 2013 when the new
16 owner was redesigning it to take away the two-block
17 system.

18 So their reliance and expectations are very
19 different than the typical owner who has no idea
20 what's going up, and sees a permit posted. You know,
21 it's a totally different situation. The
22 reasonableness of my client's understanding and
23 knowledge is unique to the circumstance, which is
24 their long history with the project and the expressed
25 representations and obligations created by 18330, and

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1 the representations that were made in 2013.

2 Now I can't recall how much Ms. Shiker said
3 about the Zoning Administrator's involvement in
4 February of 2014. But let me be clear on that.
5 There was a zoning determination letter in -- there
6 was first a zoning determination letter in April of
7 2013, by the Zoning Administrator, that actually
8 reduced the height of the penthouse from what was BZA
9 approved, by one foot. So we also knew that in April
10 of 2013.

11 Then there's another Zoning Administrator
12 determination which we didn't get a copy of from
13 February of 2014, and there is a serious dispute of
14 fact as to what, if any approval was granted by the
15 Zoning Administrator to increase penthouse height
16 then. But I can tell you that if you go on the
17 website for the Zoning Administrator, it shows no
18 increase in height. So it can't be imputed with
19 knowledge of something which is not posted online,
20 and the opinion makes no reference to an increase in
21 penthouse height.

22 Now, I've heard that there should be some
23 investigation when a permit is posted. And first of
24 all, I don't know the date of posting and I don't
25 believe it's actually in the record as to what the

1 exact date of posting is. But I do have -- you know,
2 I have something of an outsider's point of view here,
3 despite the compliments that were doled out by
4 counsel or DCRA. I'm not quite the zoning lawyer
5 expert that he made me out to be. And sometimes you
6 see things with a clarity that, you know, that only
7 outsiders see.

8 So I went and I looked at the building
9 permit. It's in the record. It does not say that
10 the plans are available for inspection by the public.
11 It says that they're on file at DCRA, but it doesn't
12 say that they're available for inspection. It does
13 not cite Rule 3112. It does not state that there is
14 an appeal right of 60 days. You know, we're all used
15 to explanation of benefits now and people putting you
16 on notice of what your appeal rights are. Why is
17 DCRA posting a document that gives a normal person, I
18 don't care whether he's a criminal lawyer or a
19 beautician, or somebody, anybody outside of the
20 construction, architecture, and zoning field. Why
21 isn't the building permit meaningfully putting people
22 on notice that there is a supposedly 60-day clock on
23 challenging? How hard would that be? It's a one-
24 page document and they could do it.

25 So I would contend that the notice is

1 deficient if it's supposed to convey that kind of
2 obligation on people who know nothing about how this
3 system works. The fact that the unit owners were
4 here for a special exception and variance proceeding,
5 doesn't mean that they have any idea when they see a
6 permit that they have supposedly 60 days to do
7 something. You know, assuming they saw the permit.
8 But if they went and they found the permit, and they
9 put on their little hardhat and they read it, or
10 wherever it was posted, how were they supposed to
11 know that?

12 And DCRA, you know, made the case which I
13 strongly refute, that there needs to be an error on
14 the part of DCRA in order to extend the timeframe.
15 Now that's not written anywhere in the regulations.
16 It's just not there. And there is authority where
17 this body has found exceptional circumstances because
18 of questionable or wrongful conduct by an owner. So
19 this is not unprecedented.

20 But if you need, if you're searching for
21 something to find that says, well, what could DCRA
22 have done better, then what I would suggest is that
23 if you want to people on meaningful notice that they
24 have an affirmative obligation to undertake a very
25 rapid due diligence period, go down to Southwest

1 Washington, look for the plans, hire an attorney, and
2 do all that within 60 days, that you ought to put it
3 on your permit. It wouldn't be that hard.

4 So our contention is that Erie reasonably
5 relied on what it knew at the time. It actually
6 engaged in a lot of due diligence. It engaged in the
7 due diligence that I've described, and much more
8 where there were requests for plans, verification
9 that the penthouses weren't going up in height. You
10 know, questions, e-mails, meetings, but none of it --
11 you know, and you can take testimony on this if you
12 like. None of it caused my client, who clearly is
13 interested in this site, to have any concerns that
14 there was a dramatic departure from what had been
15 committed to under oath in 18330, before this body,
16 represented in writing, and for which there were no
17 published determination letters contradicting that
18 finding. In fact, it lowered the height, and that --
19 and speaking to the issue of DCRA's saying, well, we
20 don't know on the record what efforts were undertaken
21 to find the plans. Well, isn't it -- you know, if
22 you ask the developer and they say we're not changing
23 it, it's not changing, it's not changing, the
24 promises we made to you are still the promises we're
25 keeping, isn't that reasonable diligence in this

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1 unique circumstance? I would contend yes.

2 Now, Mr. Wiedis did go down to DCRA. It was
3 not during the 60-day period. It was after the
4 appeal was filed, and we wanted to prepare -- shortly
5 after. And not to my surprise he was told -- he had
6 the permit number. He was told that he was not an
7 authorized person, he was not affiliated with the
8 developer, and he was not permitted to see the plans.
9 He's like, no, no, no, you know --

10 VICE CHAIRPERSON HILL: Ms. Horvitz. Is it
11 Ms. Horvitz?

12 MS. HORVITZ: Horvitz.

13 VICE CHAIRPERSON HILL: Horvitz, I'm sorry.
14 And I appreciate what you're saying, and I'm there
15 with you, I'm listening to everything. I'm just
16 trying to, at this point, get to kind of more the
17 timing.

18 MS. HORVITZ: Okay.

19 VICE CHAIRPERSON HILL: And the timeliness of
20 getting past whether or not this is going to get
21 dismissed.

22 MS. HORVITZ: Sure. Okay.

23 VICE CHAIRPERSON HILL: And then there will
24 be the opportunity to kind of drill down more into
25 the appeal.

1 MS. HORVITZ: Sure.

2 VICE CHAIRPERSON HILL: And I do have some
3 questions as well, but whenever you get to kind of
4 the end of your discussion about the timeliness.

5 MS. HORVITZ: Okay. And the only reason I
6 raised this issue is one, because it was raised by
7 the movant. And two, because what I would contend is
8 that the only evidence in the record is that the
9 plans were not available. I mean, we don't know what
10 would have happened for sure if he'd gone a week
11 before or a week after. But the only evidence we
12 have in the record is that when he did go he was told
13 that they were unavailable, and then told well, we
14 can't find them anyway.

15 So if all inferences are to be drawn as Ms.
16 Shiker suggested, then that inference is, well, it
17 looks like they weren't available to the public. So
18 it's a moot point whether he went the day after he
19 filed the appeal, or the day before he filed the
20 appeal. The only evidence in the record is that when
21 he went they weren't there and he was told he
22 couldn't see them.

23 So drawing that inference, there's no
24 evidence that they were ever publically available.
25 What's to conclude that if when he went they weren't?

1 And there's clear misinformation by staff as to
2 providing it. And I am sure this body has heard that
3 before because I've heard that before. You go down
4 to Southwest, you go down time and time, can't find
5 it. This is not surprising. This is exactly what
6 happens and it's deeply troubling, particularly when
7 a building permit is challenged.

8 And just to be clear, the plans that are
9 referenced, the A9 that were discussed, they're not
10 the same as the building permit plans.

11 VICE CHAIRPERSON HILL: If we get to that,
12 that's fine. I'm just like --

13 MS. HORVITZ: Oh, no, but it's higher.

14 VICE CHAIRPERSON HILL: I understand.

15 MS. HORVITZ: It's taller than what was
16 disclosed at that point. And it can't all be
17 explained by the parapet. So if they say that we
18 knew about what was really going to be built, that
19 too is untrue.

20 VICE CHAIRPERSON HILL: I understand.

21 MS. HORVITZ: So speaking then -- switching
22 quickly because I've already given you the factual
23 predicate for both, switching to the exceptional
24 circumstances standard, which is --

25 VICE CHAIRPERSON HILL: I'm sorry, I was just

1 looking for the timeliness for the dismissal. Like
2 when you knew, or when you would have known about the
3 permitting. Is that what you're about to speak
4 about?

5 MS. HORVITZ: No, no, no, what I was going to
6 switch to is that there is normally a 60-day time
7 frame after you reasonably --

8 VICE CHAIRPERSON HILL: Should have known.
9 Right.

10 MS. HORVITZ: -- should have known.

11 VICE CHAIRPERSON HILL: Reasonably should
12 have known. Right.

13 MS. HORVITZ: Right? But then there is, and
14 this has been conceded by co-counsel, there is an
15 exceptional circumstances exception to that 60 days.
16 That's 3112.2D.

17 VICE CHAIRPERSON HILL: Okay.

18 MS. HORVITZ: So I just wanted to circle back
19 using the same --

20 VICE CHAIRPERSON HILL: Okay. All right.

21 MS. HORVITZ: -- facts, and point out that we
22 contend that the exceptional circumstances standards,
23 which give you more than 60 days, apply here.

24 VICE CHAIRPERSON HILL: Okay. Can I ask you
25 a question, actually?

1 MS. HORVITZ: Yes.

2 VICE CHAIRPERSON HILL: So you had known
3 about the redesign. You mention in --

4 MS. HORVITZ: Yes.

5 VICE CHAIRPERSON HILL: -- your testimony of
6 your --

7 MS. HORVITZ: Yeah.

8 VICE CHAIRPERSON HILL: How did you know
9 about the redesign?

10 MS. HORVITZ: Because when the new owners
11 bought it they said, we would like to change the
12 design of the building because it had two bars and --

13 VICE CHAIRPERSON HILL: So did they approach
14 you? Is that how you knew?

15 MS. HORVITZ: Yes. Yes.

16 VICE CHAIRPERSON HILL: Okay. So there
17 wasn't a posting or anything like that, that you
18 noticed that you were told about -- you were made
19 known of it by the owner approaching you.

20 MS. HORVITZ: Approaching my client.

21 VICE CHAIRPERSON HILL: Okay.

22 MS. HORVITZ: Correct.

23 VICE CHAIRPERSON HILL: Okay.

24 MS. HORVITZ: The point being, though, that
25 it didn't flag any intention to increase or the

1 penthouse structures.

2 VICE CHAIRPERSON HILL: And do you know
3 whether your client was aware of the posting in June
4 of '15 as far as like, you know, the work that they
5 were going to do to the building?

6 MS. HORVITZ: I am unaware of anybody
7 actually having physically observed the posted
8 permit. I'm not in a position to dispute when it was
9 posted or where it was posted. I mean, they live
10 next door and there was construction ongoing. The
11 point being that they thought they knew what the
12 construction was.

13 VICE CHAIRPERSON HILL: Okay. Okay. I'm
14 just trying to find out how much more time you need
15 for the timeliness issue.

16 MS. HORVITZ: Oh, I'm almost done.

17 VICE CHAIRPERSON HILL: Okay. Okay.

18 MS. HORVITZ: The only other issue is that I
19 would, if we turn to the exceptional circumstances
20 standards, which gives this body permission to go
21 beyond the 60 days in appropriate circumstances,
22 which I contend we've met, then what I'd like to
23 emphasize is there really isn't any prejudice to the
24 owner or the District of Columbia government in
25 applying that standard.

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1 And the reason that I say that is, that the
2 first 60 days, you know, if the owner builds after
3 they get the permit, they're doing it at their own
4 risk because they know it could be appealed, right?
5 So you take that 60 days away. Whatever they built
6 during that period, there's no prejudice associated
7 with that.

8 And as I said, the penthouses themselves were
9 largely unbuilt when we filed the appeal. And then
10 the fact that they continued to build after we
11 appealed, again, that's on them. That's, you know,
12 that was at risk again under appropriate court
13 authority.

14 So they were building up, but they weren't
15 building the structures to which this appeal focuses.
16 And so they can't very well claim prejudice as they
17 have by saying, well, we built a building below,
18 because that's not the point of this appeal. The
19 appeal is, where were we on the penthouse structures
20 and I see no prejudice if the appeal relates to the
21 roof level which they had just gotten to when the
22 appeal was filed within a day of learning the actual
23 facts.

24 VICE CHAIRPERSON HILL: Okay. I understand.

25 MS. HORVITZ: Okay.

1 VICE CHAIRPERSON HILL: Sure.

2 MS. HORVITZ: Finally, this Board does
3 actually have the authority to waive almost any
4 provision in the Zoning Regulations, except for ones
5 that expressly enumerated. And I'm referring to
6 Section 3100.5. And it does not exempt this
7 particular 60-day appeal period from the waiver
8 requirements. So this Board does have latitude to
9 waive this requirement.

10 VICE CHAIRPERSON HILL: Okay.

11 MS. HORVITZ: And it is not jurisdictional as
12 this body recently knows. It's claims processing
13 instead. So if that's of interest I can address that
14 at a later time.

15 VICE CHAIRPERSON HILL: Okay. Thank you.

16 MS. HORVITZ: Thank you.

17 VICE CHAIRPERSON HILL: I don't know where
18 the Board is with this, or whether you, my
19 colleagues, have further questions. I want you to
20 ask your question. I have, I guess, I kind of made
21 most of my immediate questions asked about the
22 timing. I'm not going to be able to make a
23 determination right now about the dismissal. And so
24 I would be looking to hold that decision in abeyance
25 until we come back for a decision, I suppose. And

1 then what I would suggest is going ahead and hearing
2 the merits of the appeal, and then coming back and
3 the first thing we would do is decide whether or not
4 to accept the dismissal based on timeliness, and then
5 we would know whether or not we're going to move
6 forward and deliberate concerning the appeal.

7 MR. TONDRO: Chairman. Pardon me, Chairman
8 Hill.

9 VICE CHAIRPERSON HILL: Oh, sorry.

10 MR. TONDRO: If I can just say, I was hoping
11 at the very least, except for relief from that, if we
12 actually rebut some of what I believe are
13 unsubstantiated allegations in that presentation.
14 There is a lot of charges raised back and forth and I
15 believe at the very least there should be a full
16 hearing on this issue.

17 In terms of your proposal we at DCRA believe
18 that this is a really crucial issue to determine
19 appellant -- the timeliness issue separate from
20 everything else. Appellant has, on the one hand
21 asserted, that this will not open the floodgates
22 because it's a very narrow exception. In the same
23 breath she then turns around and says the permit
24 itself is, on face, completely invalid, which means
25 as noticed. And therefore as a result every single

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1 permit that's out there is now all of a sudden open
2 to not subject to the appeal window.

3 I think this is something that needs to
4 actually be decided by the Board before we move on to
5 the merits. I respectfully request that.

6 VICE CHAIRPERSON HILL: Give me a second.

7 MR. MILLER: Mr. Vice Chair, I think we
8 probably should allow an opportunity for rebuttal on
9 the issues that we've discussed back and forth, with
10 a very limited time period.

11 I do have an immediate question at the
12 appropriate time that I would like to ask the
13 property owner. Or actually this is more appropriate
14 to DCRA, and it's one immediate question and I think
15 it might -- it would help me know whether I can
16 actually answer -- deal with the motion to dismiss
17 before going to a merits. So I might be able to go
18 to motion, but I have the one --

19 VICE CHAIRPERSON HILL: Please.

20 MR. MILLER: I have one question. And that
21 question is, well, it has a couple parts, but are
22 there publically accessible -- is there a publically
23 -- was there a publically accessible set of building
24 plans associated with this building permit that
25 showed the rooftop structures at the height that they

1 are being built to. Or maybe they've been built to
2 already. And how long has it been public? If so,
3 how long has it been publically accessible? Was it
4 at the time of the building permit filing? Was it
5 later? Was there a revision before the issuance? I
6 assume the issued building permit was associated with
7 plans that showed the height.

8 But could you just address that, and how was
9 it publically accessible? Is it online? Is it only
10 on site at DCRA?

11 MR. TONDRO: Yes. Thank you, Commissioner
12 Miller. Yes, the Board plans -- all I can say from
13 right now, because obviously we were first alerted to
14 this issue four months after the fact. So trying for
15 us to determine after the fact whether -- what
16 actually happened in these specific plans is hard for
17 us to know. But I will tell you what the procedure
18 is. The procedure is, that as soon as the permit is
19 issued, okay, there is a period in time whereas
20 usually about a week to maybe 10 days where the plans
21 are processed, and that they are still -- I want to
22 emphasize this, they are being processed. They are
23 still in the DCRA building. They are still able to
24 be accessed. Accessed. They're able to be found.
25 They are then placed into the records room.

1 And the records room keeps them. The reason there is
2 an ongoing digitization of plans as they come
3 through, but the point is that there is a
4 recordkeeping entity, the records room, that if
5 somebody requests a permit plans, you file -- go in
6 and you request it. Will you get it at that moment?
7 Not necessarily. It may be that they have to track
8 it down. It may be that it is, for example, in the
9 Zoning Administrator's office, or in my office
10 because I'm preparing for the appeal or something
11 like that. But we have to sign it out, so that it is
12 always knowable where those plans are.

13 And those plans can then be provided. It's
14 happened multiple times that if someone -- that if
15 the records room calls me and says, hey, you signed
16 out these plans, do you still have them? I say yes,
17 they're right here in my office. I'll bring them
18 down. That's one. So I think they are publically
19 available. There may be a timeline, but there is no
20 question that you should be able to request them.
21 And in this particular case there is no evidence that
22 they in fact -- they in fact admitted they didn't
23 even make the attempt.

24 Second of all is the issue of being able to
25 consult. So they're available. However, this is the

1 official copy. As a result, we have to maintain that
2 -- we can't -- giving it out somebody could scratch
3 on it, someone -- I mean, do whatever. Okay?
4 Therefor what we have as a system is you can request
5 for copies to be made. And those copies are made by,
6 it's Blue Boy, which is a third-party vendor, and
7 it's a certain amount of money that they cost per
8 page, and that happens is they come, maintain custody
9 of the records, they pick up the records. They then
10 reproduce them, they bring them back signed in,
11 signed out so we don't lose track of the records.
12 And then the plans are -- the copies are provided to
13 the people who request them.

14 Separate from that there have been times when
15 -- multiple times I've been at the agency for about a
16 year, but there's been multiple times when somebody
17 will come in, ask to be able to consult the plans.
18 We need to have a staff, somebody from staff on hand
19 to supervise their consultation of the official
20 plans, because they are the official plans. But that
21 has happened multiple times. I don't know if that
22 addresses your concern. But in terms of being online
23 there is nothing yet online. That is a process that
24 we're slowly going towards.

25 But the fact of the matter is that the

1 records room does have them. And again, I would
2 assert here, if there was an assertion that I
3 personally would not have filed the motion on time --
4 not have joined the motion on timeliness if I had any
5 allegation that was substantiated on the basis that
6 somebody had come to DCRA during the 60-day time
7 period, had been turned away, and I was able to
8 corroborate that that had happened, because that
9 seems to me, beyond the pail. If we didn't provide -
10 - if we messed up, if we didn't provide the documents
11 that were supposed to be publically available, then
12 that's clearly on us. But that's not the case here.

13 Here we have a situation where somebody just
14 chose not to -- they relied, supposedly on what the
15 permit holder said. They chose not to do their basic
16 due diligence in coming down to DCRA to contacting us
17 to figure out what was going on.

18 MR. MILLER: Just a very quick follow up.
19 I'm sorry.

20 So can you or the property owner assert
21 unequivocally that there were publically accessible
22 building permit plans that showed the roof structures
23 and height of the roof structures that this project
24 was built to, and from what date was that? You're
25 saying a week or 10 days after the issuance?

1 MR. TONDRO: Yes. So first of all, I guess
2 there's two parts to that that I failed to respond
3 earlier to it. The first part, which is the issue of
4 what was shown. What was shown are the approved plan
5 -- what I call the approved plans, which are the
6 plans which they're able to build right now. Those
7 are the same plans that haven't been revised since
8 the issuance of that building permit.

9 So that's that issue. In terms of what was
10 publically available, yes, they were always
11 publically available from the time of issuance upon
12 request. And there might be a time lag from that
13 request, but it certainly wouldn't be the 60 days and
14 I would argue that if you had made that request on
15 the 60th day to see the plans and you didn't get it
16 until the 70th day, that that alone should have been
17 the exceptional circumstances outside of appellant's
18 control and able to do that. There's been no proof
19 like that in this particular case.

20 MR. MILLER: Did the owner have anything to
21 add to that question -- answer?

22 MS. SHIKER: I have a few points to make. I
23 will also say in response to your question, the
24 permits, plans, have the date they were submitted and
25 then the dates of revision. The last revision date

1 of the permit plans is identified as February of
2 2015, so from February -- and we don't believe, we
3 cannot ascertain with exact certainty, but we do not
4 believe any revisions were made to the relevant plan
5 pages, but no revisions were definitely made after
6 February of 2015. To answer that question.

7 I have a few additional points I'd like to
8 make if this is an appropriate time.

9 VICE CHAIRPERSON HILL: Just give me one
10 second. I have a question for Mr. Tondro.

11 So, Mr. Tondro, just for my own
12 clarification, when would the applicant have known to
13 come down and take a look at those permits?

14 MR. TONDRO: Our assertion, which I think is
15 backed up -- couple issues. The issue that 3112.2
16 states specifically that is the date of the
17 administrative decision, and that's the key word, the
18 administrative decision, when they had notice or
19 knowledge or reasonably should have had notice or
20 knowledge of that administrative decision. That's
21 what starts the appeal period, right?

22 That administrative decision has been held by
23 the Board multiple times since this is about the
24 Zoning Regulations, when it is publically announced
25 on the permit tracking website, that the Zoning

1 Administrator has approved a permit as being zoning
2 compliant. That's before the permit is issued.

3 Once the permit is -- so in other words,
4 there's already an alert for people of the fact that
5 there is -- that there are --

6 VICE CHAIRPERSON HILL: So they have to track
7 that the permits have been issued?

8 MR. TONDRO: But it's a publically available
9 and again, that's the reason why I brought up the
10 fact that we're dealing with people who are
11 knowledgeable because the issue is that these are
12 publically available. I'm not saying everybody is.
13 I understand that. But I'm saying in this particular
14 case you have a series of -- they have the counsel,
15 who certainly is very well versed, and that has been
16 one of the standards in terms of predating the appeal
17 period to before the permit issuance. Okay?

18 That's not what we're asserting here. I'm
19 just providing that as background. And that, anyhow,
20 would have been the 15th of June. In this particular
21 case the permit issuance was on the 17th of June.
22 Okay.

23 VICE CHAIRPERSON HILL: That's okay, I'm just
24 -- it doesn't have to get that complicated.

25 MR. TONDRO: Sorry. But --

1 VICE CHAIRPERSON HILL: There's no posting
2 for this. There's nothing like that, right. It's
3 just you know --

4 MR. TONDRO: There is a posting as of that
5 date --

6 VICE CHAIRPERSON HILL: On the website.

7 MR. TONDRO: That on the website and the
8 permit is required to be posted by the permit holder
9 on the actual site. And I believe that they stated
10 in one of their filings that it was posted as
11 properly posted, as they are required to do by law,
12 on a piece of plywood right next to -- in other
13 words, a sign posting --

14 VICE CHAIRPERSON HILL: Right.

15 MR. TONDRO: -- right on their property.

16 VICE CHAIRPERSON HILL: Right. Okay.

17 MR. TONDRO: And I believe that the permit
18 holder actually has a photograph of that.

19 VICE CHAIRPERSON HILL: Yeah, I see there's -
20 - yeah.

21 MR. TONDRO: Sorry.

22 MR. HINKLE: And, Mr. Chairman, just a quick
23 question. I'm looking at a copy of the building
24 permit from 6/17.

25 VICE CHAIRPERSON HILL: Yeah.

1 MR. HINKLE: 2015. There's a box there that
2 says, plans, that's it's like one, two, three, four,
3 the end of the fourth row. What is that supposed to
4 indicate?

5 MR. TONDRO: That is a great question. I'm
6 being utterly honest; I have never seen that one
7 filled out so I don't happen to know what that is.
8 What I would refer again, as I said in my filing down
9 below, it says as a condition precedent. And it says
10 that the approved application and plans are on file
11 with the District Government. And obviously in this
12 particular case that would be DCRA, and that is in
13 fact exactly what, if you go to the records room, you
14 get to have, you get access to the application and
15 the plans are available at the records room.

16 MR. HINKLE: Okay.

17 MR. TONDRO: And the Zoning Administrator did
18 also ask me earlier, just to add on the fact, that
19 ANCs are also alerted in terms of notice being
20 provided to the neighborhood. Whenever building
21 permits are issued there is notice provided to the
22 ANCs who then disseminate from there.

23 VICE CHAIRPERSON HILL: Okay. I'm not
24 exactly sure how we're going to move forward here for
25 a second because I'm still not comfortable. And, you

1 know, we can -- and we'll continue through this
2 process and then we can get to the point and see
3 whether we want -- you know, how late we want to go
4 or what are we going to do, meaning you can ask your
5 questions and then the appellant will have the
6 opportunity, I guess, to ask you some questions and
7 we'll figure out the timing here. I mean, I still
8 don't see that, you know, when the appellant was
9 supposed to have known that these changes have taken
10 place. Okay? And that's where I'm kind of just
11 trying to get to. All right.

12 So that being said, if you'd like to ask your
13 questions as you first started to ask to do, correct?

14 MR. TONDRO: Actually, I was asking if I
15 could rebut.

16 VICE CHAIRPERSON HILL: Okay.

17 MR. TONDRO: As opposed to asking questions.

18 VICE CHAIRPERSON HILL: Please.

19 MR. TONDRO: If that was possible. Okay.

20 VICE CHAIRPERSON HILL: Yeah, please, go
21 ahead.

22 MR. TONDRO: Okay. I'll try to keep it as
23 quick as possible. Thank you.

24 I just want to emphasize here that what I'm -
25 - again, this is from DCRA's perspective, okay? We

1 are in a position where what we're seeing is there is
2 a shifting of, as it were, responsibility from a
3 decision made by the appellant, a mistake, I think,
4 failure to have done basic due diligence once they
5 were provided on notice to DCRA. And it's this
6 attitude of, it's not our fault, we can blame
7 somebody else. There must be this, there must be
8 that. And there's a whole series of contradictions
9 that I see happening again, being stated.

10 First of all, as I just said, there's this
11 assertion that oh, there's going to be no
12 consequence. There's no prejudice whatsoever to DCRA
13 from this because this is such a narrowly defined
14 case. And then right away they turn around and say,
15 no, in fact the permit itself is facially invalid.
16 And therefore as a result does not constitute notice.

17 And I would say, point out, if that is the
18 case that's going to be not just for all zoning
19 cases, it's going to be for all construction code
20 cases. This is going to have incredible knock-on
21 effect. So the idea that this is not going to have -
22 - cause enormous prejudice to DCRA, I have real
23 problems with that.

24 I will also point out that Ms. Horvitz says
25 on the one hand that she is complimented, for the

1 fact that I say that she is an experienced --
2 experienced with zoning and land use but then asserts
3 that she's not. At the same time, she says that she
4 knows all these stories about DCRA having gone down
5 to Southwest, and especially because of building
6 permits. Either you know and you're experienced, or
7 you're not and you don't have experience. It
8 wouldn't be one or two.

9 Similar she says that on the one hand the
10 building -- the zoning permit appeal period of 60
11 days is an incredibly short time. Well, if she's
12 familiar with building permit appeals, which she just
13 indicated that she was, she knows that under the
14 construction code appeals are within 10 days. So
15 again, there's, I think, a whole bunch of sort of
16 contradictions that are built in here to make a case
17 when there really isn't anything that is going on.

18 Along those same lines, the appellants are
19 representing this fact that on the one hand they knew
20 exactly what was going to be built, and therefore
21 they had no reason to consult DCRA. And yet on the
22 other hand they say, but we couldn't trust these
23 people and they showed us a plan from December 13,
24 2013 that had this, that looked different, but we
25 didn't have to rely on that one because there was

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1 another one that we -- there was a zoning
2 determination letter, there was another zoning -- for
3 me, this paints clear evidence that there is
4 confusion. And if confusion, any potential
5 confusion, then you're on notice to make sure that
6 you know what is permitted. Who can permit and
7 authorize construction? Is it the permit holder?
8 No, the permit holder has no authority to issue a
9 permit. The only one who has authority to issue a
10 permit is DCRA.

11 And so at the end of the day that is where
12 the due diligence trail leads is straight down to
13 when you're put on notice, when you see that permit
14 placard next to you, when you're aware that
15 construction is going on. If you have any doubt in
16 your mind as to what is going to be built. Any
17 doubt. You want to know the plans. Well, if you
18 don't trust the person next to you, you don't trust
19 that builder reasonably, why are you going to trust
20 that they provided for plans? Especially when those
21 plans are stamped and issued by a third-party and
22 that third-party is the government, and you have an
23 ability to go to the government.

24 Again, had there been any evidence, any
25 substantiated evidence, but there is nothing. In

1 fact, they admitted that -- the appellant's counsel
2 admitted that they never even bothered to come down
3 within the 60-day time period. Appellant's counsel
4 indicates that she has experience with zoning, and
5 yet never advised them. Appellant themselves, again,
6 as a lawyer, is aware of appeal rights; is aware of
7 how this happens to circumscribe one's ability to
8 exercise your rights. These things are really
9 important issues that cannot just be, I believe, just
10 sort of dismissed.

11 Finally, I just want to point out, this issue
12 of under roof, 312. -- sorry, 3112.2B. I just want
13 to point out that I think the clear reading of it is
14 in fact contrary to what she's saying because
15 3112.2B2, B is the one that specifies on the roof.
16 B1 does. B2 then specifies that this provision,
17 quote, "Shall not relieve an appellant of the
18 jurisdictional requirement in paragraph A." Unquote.
19 Paragraph A is the 60-day appeal period.

20 So contrary to what the appellant's counsel
21 is asserting, I believe the plain meaning of this is
22 in fact that the under roof does not provide an
23 additional, and in fact if anything can sometimes
24 foreclose because the appellant -- if there's an
25 appellant who sees something being built up and fails

1 to respond within 10 days, then that would shorten
2 that 60-day time period. That's the way that I see
3 the plain meaning of that section. Finally, I will
4 just point out again, we're dealing with an issue of
5 notice. Not notice of the plans, but notice that a
6 permit was issued.

7 In terms of any change of plans, right, what
8 the issue, the nature of those plans, they were on
9 notice that there was a permit issued. That triggers
10 responsibility to be able to go and figure out what
11 that is. Okay? Just like if you go -- there's a
12 title report. If there's something recorded in the
13 land records, you're deemed to have knowledge of
14 what's on the land records. You have to go and
15 consult the land records.

16 In this particular case it's the same thing.
17 They're deemed with notice to go, and they're deemed
18 with knowledge to have at least made that attempt to
19 have gone to DCRA. Again, if there was any evidence
20 whatsoever on this -- in this case in what the
21 appellants are asserting, that this is a situation
22 where they came to DCRA within a 60-day period, it
23 would be a different game. But it's not.

24 And one last point, and this is really my
25 last point. Pardon me. Appellants have also

1 asserted there's plenty of authority for the fact
2 that the Board has before granted exceptions under
3 circumstances that are similar to them. Yet they
4 fail to cite a single case in this, when they just
5 said it right now. They provided in their first
6 brief, they referred to 17109, Kalorama Citizens.

7 That one as I pointed out in my brief, which
8 I believe is why they did not bring it up again, was
9 specifically about the fact that DCRA failed to do
10 what they were supposed to do. That's not the case
11 here. That's not part of the allegations. There's
12 none of that allegations. Therefore, that's in
13 opposite.

14 The only other one they cite to is 17414,
15 which I just go through saying in my initial, where
16 is a very different situation. You're dealing with
17 two different permits. The appeal was timely filed
18 for one permit and therefore the Board deemed that
19 since it was already under appeal for the same
20 structure, there is no prejudice for allowing that
21 earlier appeal to be incorporated in it. That is not
22 the case there.

23 So I'll rest at that. I'm sure I haven't
24 convinced you, but I just want to put that on record.
25 Thank you.

1 VICE CHAIRPERSON HILL: Thank you. Mr.
2 Tondro, I just want to let you know, I haven't been
3 here very long, but I have no interest in the
4 floodgates for this opening up. Okay? I just want
5 to be -- you know, I would not -- that is not my
6 intent, you know, just to say. So please, so does
7 the property owner have anything to add?

8 MS. SHIKER: Yes, we do. I have a few points
9 that I'd like to make

10 First, following Mr. Tondro on the under roof
11 provision, that was put into protect property owners
12 not to extend appeal deadlines. Basically that
13 provision was put in that even if you did not know of
14 the permit until the building is under roof, you only
15 now have 10 days because of the extreme prejudice
16 that would result to a property owner by not at least
17 capping that exceptional situation language.

18 So I do not believe that in any scenario,
19 under roof was allowed to say people can come up
20 until 10 days after the building is under roof to
21 bring an appeal. Especially when they knew of the
22 building permit.

23 That gets me to my second point. Appellants
24 were watching the site like a hawk, all during this
25 process. And attached to our motion to dismiss we

1 have many e-mails starting in September. There is
2 some activity on the site, what's going on? What are
3 you building? We're like, we're doing some water
4 line replacement. That's a water main replacement.

5 Again in February, there's some site work
6 going on, what is going on now? Please let us know
7 what's going on. These are e-mails are all from
8 appellants and they're all attached. And again, they
9 said in March of 2015, we want to meet with you. We
10 want to find out what you're building. We want to
11 find out what you're building. Sorry. They said, we
12 want to find out what you're building. We want to
13 know more. There's things going on at the site.

14 Owner said, we'll come to your roof. They
15 brought the building permit plans. They met with
16 them on their roof on May 12th, 2015. And I don't
17 believe I said that in my introductory statement.
18 When the permit was issued in June it was posted on
19 the board. We have submitted a copy. This was not
20 from June 17th, 2015. This is a recent picture. But
21 it shows the extensive amount of permits.

22 And this building right back here is the Erie
23 building. It is right next door. It is not very far
24 away. They were watching the sites, the permit was
25 posted, they should have known.

1 Now this idea that the building permit is
2 facially deficient because it doesn't say that you
3 only have 60 days to appeal, this board has dismissed
4 cases for neighbors who are not nearly as savvy or
5 involved in development as the appellants are. On
6 pages 10 of my -- of the owner's motion to dismiss,
7 there are several appeals that are mentioned where
8 they say, "Construction activity on the site is
9 enough to put a neighbor on notice. The posting of a
10 building permit on the site is enough to put the
11 neighbor on notice."

12 The reason why the building permit is the
13 last date is once you start construction they have 60
14 days to bring it. After that you are fully within
15 construction and the prejudice grows by the day, to
16 the owner for an appeal. That is why this provision
17 is in here.

18 We believe that it should be dismissed based
19 on timeliness, given the long interactive history of
20 the case, and the fact that they were on notice as of
21 the date of the issuance of the building permit.

22 VICE CHAIRPERSON HILL: Thank you.

23 MR. TONDRO: Pardon me --

24 VICE CHAIRPERSON HILL: Sure.

25 MR. TONDRO: -- Mr. Vice Chair. If I can

1 just ask that if the Board does determine that it
2 does not want to, at this moment, that they're not
3 prepared to make a decision it, that nonetheless for
4 the interest of us going forward, that it does at
5 least take a vote to consider what it is. If they
6 then want to put it aside afterwards and move to the
7 merits.

8 But I think this is a really important issue
9 that should be addressed by the Board. I don't think
10 -- and I would request that if they are going to take
11 a vote that you clarify what precisely it is;
12 precisely so we do not end up with the flood gates
13 being opened. If it's going to be a very narrow
14 reason for why it is that timeliness is not accepted,
15 I just think that we need that moving on as opposed
16 to later on having this idea that it's going to
17 become -- we deal with the merits and then for
18 whatever happens the timeliness is then rereviewed,
19 and maybe it's a more expansive argument as to why
20 the timeliness is dealt with at that time, which
21 creates bad precedent for us going forward. Thank
22 you.

23 VICE CHAIRPERSON HILL: Okay. So what I'm
24 going to do is, I just don't feel comfortable. Okay?
25 And there's three of us here. You're not going to

1 get all three right now, right? So we're going to
2 hear the case, okay?

3 So we're going to hear the appeal. We have
4 Mr. Miller here who is going to be back for the
5 decision for the dismissal. I won't be able to
6 deliberate right now on the dismissal. So my
7 suggestion, and I'm listening, looking to my
8 colleagues here, is to go ahead and hear the appeal,
9 hold the dismissal in abeyance until we come back.
10 And then discuss in particular, what the reasoning
11 is, one way or the other for the dismissal. And then
12 we'll see what happens with the appeal.

13 If it's dismissed, then we won't need to go
14 to deliberations. And if it isn't then we will.
15 Okay. So does anyone want to take five minutes or
16 are we going to go right into it?

17 Mr. Moy, you look like you want to say
18 something.

19 MR. MOY: Well, I'm asking how much time do
20 you want to allow for their --

21 VICE CHAIRPERSON HILL: Sure, for the
22 presentations.

23 MR. MOY: For their arguments, yes.

24 VICE CHAIRPERSON HILL: Okay. Is the
25 appellant ready?

1 MS. HORVITZ: Yes.

2 VICE CHAIRPERSON HILL: Okay. How much time
3 do you think you'd need for the appeal?

4 MS. HORVITZ: For our direct case, not
5 anticipating how much questioning, maybe 35, 40
6 minutes.

7 VICE CHAIRPERSON HILL: Okay. And the other
8 side, how much time? Okay. Let's go with 30
9 minutes. Is that good?

10 MS. HORVITZ: Yes.

11 VICE CHAIRPERSON HILL: Or less. If you can,
12 or less because we've obviously already been here.
13 Okay. But this is important. I'm not trying to say
14 -- please take your time and you have our full
15 attention.

16 MS. HORVITZ: Well, thank you. I do
17 appreciate that and I appreciate the Board's
18 willingness to consider the merits. I think that
19 there is a dovetailing of evidence that speaks to the
20 case of the appeal, and the dismissal issues. So
21 perhaps some of the testimony will be pertinent to
22 both.

23 As I said, I am Laurie Horvitz and I'm
24 counsel for the appellant. And as I also said, the
25 appellant is the Unit Owner's Association of Erie

1 Condominium. And at the beginning Mr. Wiedis
2 introduced himself. He is the president of the
3 association and he has been the president for seven
4 years or so. So throughout the entire relevant
5 period Mr. Wiedis has been the president. And he
6 will be providing direct testimony after my
7 introductory remarks.

8 As we all know, this appeal is of a decision
9 by the Zoning Administrator and DCRA to approve and
10 issue a building permit, specifically B1410680. And
11 that permit is, as you know, in the record in
12 appellant's prehearing statement. It was attached as
13 Exhibit G to that filing.

14 The permit authorized construction of a new
15 40-unit residential building and just to avoid any
16 confusion about the address of the building,
17 sometimes you'll see that it's 2337 Champlain Street
18 Northwest, but I believe it continues through and it
19 also has other street addresses, include 2345
20 Champlain Street. So sometimes there's some
21 confusion when you look up the permits, that you'll
22 see one address or the other, but it's one in the
23 same project.

24 And the subject property, and this is
25 significant, is located in the Reed-Cook Overlay

1 within an R-5-B zone. And in the absence of a
2 special exception the maximum height of a building on
3 that site is 40 feet, pursuant to D.C. -- Zoning
4 Regulations 1402.1. And of course this is important
5 because the issue on the appeal is, how tall could
6 the roof be and how tall could the penthouse be, and
7 so forth.

8 Now the Erie is an eight-unit condominium.
9 So it's a small number of units. It sits immediately
10 adjacent to the subject property. It's specifically
11 2351 Champlain Street. And the Erie has rooftop
12 terraces that face the building that the permit
13 holder is currently construction. And although the
14 subject property, which is what I'll refer to as 2337
15 Champlain, is lower in terms of height because of the
16 slope of Champlain Street. It now is authorized to
17 be taller than the adjacent property next door, which
18 is the Erie.

19 And as the appellant has made clear in
20 extensive prehearing filings, this case does present
21 a very, very important issue concerning the legal
22 effect of BZA orders. This Board approved certain
23 plans for the subject property as part of a special
24 exception proceeding in 2012. There was also a
25 variance request associated with the FAR, but the

1 special exception was associated with the height of
2 the building. So to go above the as of right of 40
3 feet, the applicant at the time, FCP Champlain, came
4 before this body in Case No. 18330, and asked for
5 permission to build a taller building. And so --

6 VICE CHAIRPERSON HILL: I'm sorry. Say that
7 again.

8 MS. HORVITZ: Okay. So in BZA Case No.
9 18330, in 2012, the applicant at the time was the
10 prior owner of the same property. That applicant
11 came in seeking two forms of relief.

12 VICE CHAIRPERSON HILL: Uh-huh.

13 MS. HORVITZ: One was a variance for floor
14 area ratio, and the justification had to do with
15 where the garage had to go and the unique slope, and
16 therefor they had -- they needed a little extra floor
17 area ratio than as of right.

18 And then the other aspect of that application
19 in 2012, it was actually filed in 2011, heard in
20 2012, was a special exception from the height
21 restrictions. So since the height in this Reed-Cook
22 Overlay can't be more than 40 without a special
23 exception, they came in to build a taller structure.
24 I think as originally proposed it was going to be
25 about 48.5 feet, or something like that. And there's

1 a max of 50, I believe. So they were coming in on
2 the high end of that range.

3 So that was the issue in 2012. The applicant
4 wanted, at the time, to build a taller building.
5 Erie Condominium was very concerned, particularly
6 because of its immediately adjacent rooftop terraces.
7 You know, you're going to be taller than our rooftop
8 terraces, and you're going to be looking down at us.
9 There were privacy, shadow, and any variety of
10 concerns as one would expect in a normal contested
11 special exception proceeding for extra height
12 immediately adjacent.

13 Erie Condominium was granted party status and
14 I was fortunate enough to represent the Association
15 at that time.

16 So the plans that were submitted to the BZA
17 in 2012 were clear. How high was the penthouse roof
18 going to be; rooftop structure going to be? Nine
19 feet. And it wasn't buried, you know, as some
20 incidental, immaterial aspect of that application. I
21 mean, I have submitted illustrative parts of the
22 plans that were submitted as Exhibit 30 in the BZA
23 case, 18330. But, you know, the site plan and zoning
24 criteria page at A1 specifically identifies the
25 penthouse height as nine feet. The rendered building

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1 sections show a roof elevation, a specific roof
2 elevation of 198 feet, 10 inches, and the penthouse
3 roof elevation of 207 feet, 10 inches. The west
4 elevation show the same thing, and so forth and so
5 on.

6 And I've submitted, in the prehearing
7 statement, actual copies of some of the plans that
8 were part of the BZA approved plans in 2012.

9 Now, maybe, you know that could happen and it
10 could be not a very important issue. But it was.
11 When the applicant at the time in 2012 came before
12 this body, it chose to put tremendous emphasis on
13 this concession. There was extensive testimony in
14 the direct case by the applicant about how although
15 they had as of right, the ability to build 18 feet,
16 six inches at the time, it was not going to do that.
17 No, no, no. It was a low-rise penthouse. It was
18 going to be nine feet, or eight feet above the
19 parapet. It was emphasized by Ms. Shiker in her
20 introductory remarks; by Mr. Sherr (phonetic) when he
21 came in and testified; by the architect expert.
22 Everybody testified about it as though this was
23 grounds for this body to find that there were no
24 adverse effects associated with the increased height
25 to the adjacent property. Obviously it was relevant,

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1 right, because if you're going to make the building
2 taller and then you put a penthouse on top,
3 understanding the relationship of those two was
4 pertinent to this body's analysis at the time.

5 And I provide in my prehearing -- I actually,
6 in the appeal document itself, and in the prehearing
7 statement, actually append copies of the transcripts
8 themselves from that hearing in April of 2012. You
9 can read it. It was clear as can be. We're not
10 building above -- we're building this low-rise
11 penthouse structure.

12 This Board decides to our disappointment,
13 that the special exception will be granted, and
14 issues not the summary findings but the longer form,
15 details, findings of fact, conclusions of law,
16 expressly mentions the low-rise component as a
17 finding of fact in paragraph 31, specifically
18 addresses it in its conclusions when analyzing the
19 effect on views and other impacts on Erie
20 Condominium, and based on that record, and that
21 record only, concluded that the special exception
22 should be granted to give extra height to the
23 building.

24 Now, what's the legal effect of that? You
25 know, the first case that was called today, that

1 people got up and said, you know, you don't need to
2 really put it in conditions because we're on camera
3 and you'll put it in your finding of facts, and we're
4 honest people so don't worry about it, we'll do it.
5 Well, the Board went beyond that. And it actually,
6 in its ordering clause, and it looks to me like this
7 is fairly new, maybe in the last year or so but I
8 don't know, the Board's ordering clause said that its
9 approval of the special exception was expressly, and
10 I quote, "Subject to the plans that were submitted to
11 the BZA as Exhibit 30."

12 So what does that mean? It means you've got
13 to build in accordance with it. Then the order goes
14 on and says, and it's essentially quoting the
15 statute, the regulation, which says that all
16 construction associated with this project shall be
17 built in accordance with the plans approved by the
18 BZA unless modified by the BZA.

19 Well, that is not what happened. The
20 building permit that was issued, as they have
21 conceded, there is no disputed fact on this, as
22 they've conceded, DCRA has now approved plans to
23 build a penthouse when you count the parapet of 16.45
24 feet, when it promised a nine-foot penthouse.

25 Now if you're sitting right next door in your

1 rooftop terrace and you fought hard for that
2 concession, and in fact then had a settlement
3 agreement which is now in the record, which
4 negotiated a one-foot reduction in the height of the
5 roof, that was huge to Erie at the time. They got a
6 one-foot corresponding reduction in the height of the
7 penthouse. The elevation of the penthouse. Every
8 foot counts.

9 And yet the Zoning Administrator and DCRA for
10 reasons that have yet to be explained, thought it was
11 permissible to issue a building permit that deviated
12 in that material respect from this body's order.

13 Now, there is language also in the filings by
14 the owner in particular that causes great concern and
15 will require some analysis. The owner is contending
16 that the Zoning Administrator can approve any plans
17 that change the design or characteristics of the
18 building as long as it doesn't increase the relief
19 that was granted by this body. Any changes. So, and
20 I'm dumbfounded by this.

21 But again, I haven't been around the block as
22 much as others here. But to me, when I see an order
23 and a regulation that absolutely require construction
24 in accordance with the approved plans, and I don't
25 see that language inserted in the duly adopted and

1 published Zoning Regulations that says, you can make
2 changes, Zoning Administrator and DCRA, for anything
3 that doesn't change the relief granted. I don't see
4 that in the regulations.

5 There is an effort now by the owner, and
6 perhaps DCRA, and perhaps the Zoning Administrator,
7 although that's not clear, to completely rewrite the
8 Zoning Regulations to provide that kind of latitude
9 to the Zoning Administrator, where no such latitude
10 is permitted under the Zoning Regulations as
11 currently adopted. It is not a circumstance that
12 that kind of latitude is permitted.

13 And I did submit, also -- I mean, we have a
14 parallel court case and the owner has contended in
15 writing, and I submitted this, that the
16 representations made under oath and in plans are
17 irrelevant to what can be approved. Irrelevant to
18 what can be approved. How can that be if you have
19 made the approval subject to an order and a plans
20 that were approved that had this specific
21 requirement?

22 So I would -- we'll hear some testimony now
23 from Mr. Wiedis. It's really a very legal case.
24 It's a legal issue as to whether or not there can be
25 this kind of departure from the approved BZA plans.

1 There's no citation to any regulation that gives that
2 kind of latitude. As this body knows, there's a
3 minor modification regulation. They didn't come
4 forward and get a modification from this body and
5 say, we want to do this.

6 And why does it matter? Because if they can
7 change anything except for the actual height of the
8 roof, then what's the point of all of your analysis
9 of the adverse impacts that are based on shadow
10 studies that are predicated on what's actually going
11 to be built, that are based on representations about
12 what will be there and what my client will see.

13 You know, whether you respect the importance
14 of use or not, your analysis, this body's analysis in
15 2012 was fact based. And the owner wants to throw
16 all those facts out and say, it doesn't matter, we
17 can do whatever we want.

18 I would ask you to find that the Zoning
19 Administrator erred when he authorized the permit
20 because it was inconsistent with BZA order 18330,
21 inconsistent with the plans that were submitted in
22 conjunction with that, inconsistent with the Zoning
23 Regulations that required compliance with the BZA
24 plans, and inconsistent with subsequent zoning
25 determinations that did not -- and this is an issue

1 that may require more factual exploration -- did not
2 approve this increase. And I would now turn the mic
3 over to my client, Mr. Wiedis.

4 MR. WIEDIS: May it please the Board. My
5 name is Rich Wiedis. Thank you for having us here
6 today of -- there's been talk about my qualifications
7 as a lawyer. I am a lawyer. I was a Justice
8 Department prosecutor. I'm not an expert in zoning
9 law. I did want to say that I'm very appreciative of
10 the Board and its efforts in looking at all the
11 detailed facts that I've observed by sitting here all
12 day, as well as paying attention to the facts in our
13 case, which are very important to real people. And
14 that's an incredibly important function.

15 I've been a District resident for 30 years,
16 lived in Adams Morgan for 20 years, and I've lived at
17 2351 Champlain Street, the Erie, since 2009 when I
18 bought my condo in the height of the financial
19 crisis. Of course the most important financial
20 decision that I've made in buying this property.

21 I know the Erie submitted a long prehearing
22 statement. I don't want to summarize everything in
23 there, but I did want to give you a little bit of the
24 history of how we got here, mostly to emphasize the
25 context and why this is so important to me and my

1 association.

2 So when we purchased our condo, condos in
3 Adams Morgan, me specifically and my neighbors, we
4 were aware of the height limitations and density in
5 the Reed-Cook Overlay District. This was important
6 to us because our units, some of them have rooftop
7 terraces that face the subject property at 2337
8 Champlain Street.

9 So when we purchased our properties we really
10 relied on the laws of the District of Columbia and
11 the zoning restrictions that were in place and
12 actually limited the height of our building compared
13 to the neighboring buildings. And yes, we knew there
14 was a neighboring lot next door and assumed that
15 there was probably going to be a building built
16 there. But we thought we had a right to rely on the
17 restrictions for the heights in the particular
18 district where we purchased our property.

19 So in 2012, probably three years after I'd
20 moved on to Champlain Street, the owner of the lot at
21 2337 Champlain applied to the District and the BZA
22 for a variance from the FAR requirements and a
23 special exception to the height limitations in that
24 district. And I personally participated in those
25 proceedings as a representative of the Erie. And the

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1 owner in that case was represented by Holland and
2 Knight and their fine counsel, Ms. Shiker, as well.
3 So she has knowledge of what happened back at that
4 time as well as we do.

5 But in that case the owner applied for the
6 FAR variance and the special exception and claimed as
7 other applicants have today, that they had practical
8 difficulties in building that particular building and
9 that's why they should get the particular zoning
10 relief that they asked for.

11 At the time, the Erie, myself, my neighbors,
12 objected to the variance and special exception relief
13 because we actually didn't believe that the
14 applicant, FCP, was being honest with the BZA. And
15 what was our basis for believing -- we've had a lot
16 of discussion today about theories, but I kind of
17 like to deal in facts. That's my career and I
18 certainly hope that this Board is very concerned with
19 the facts as well. I'd spoken with other
20 knowledgeable developers. They had told me that
21 there were plenty of solutions to constructing a
22 large building on the site at 2337 Champlain Street
23 that didn't require the variance and special
24 exception relief that the FCP group at the time was
25 requiring.

1 So we were very distressed about the relief
2 that they applied for, which we didn't think was
3 proper and quite frankly we thought they were making
4 things up.

5 In addition to that I had had conversations
6 with the owner, or one of the representatives at FCP
7 who actually told me at the time that he didn't need
8 the height and the FAR relief to build the building
9 there. But nevertheless they came before the BZA,
10 they made their representations, represented as part
11 of that proceeding that there were going to be
12 limitations on the penthouse heights, and although
13 the BZA ruled against us as reflected in our summary,
14 we learned subsequently when Cap City purchased the
15 property, that those practical difficulties that
16 required the zoning relief actually went away. The
17 earlier developers had said that they needed to
18 locate the garage at a particular point on the
19 street, and because of that the special exception was
20 required. And when we eventually saw the plans from
21 Cap City, they were able to move the garage quite
22 easily. And you know, we left our head scratching as
23 to how the earlier developer could have come before
24 the Board and swore under oath that they had these
25 practical difficulties, and another developer comes

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1 along and easily solves those problems.

2 Nevertheless, in 2012 the applicant and
3 Holland and Knight, their lawyers, as part of that
4 effort to get the zoning relief, stated many times
5 under oath that the penthouse structures would only
6 be nine feet. And the plans submitted to the BZA
7 showed nine foot penthouses and there was testimony
8 from counsel and architects about the practical
9 difficulties which we now believe were never there.

10 After a long proceeding in which this issue
11 was very important to us because the proposed roof
12 structure was going to be almost three feet higher
13 than our roof decks, and allow people to stand over
14 our roof and look down on to what we though was our
15 property --

16 VICE CHAIRPERSON HILL: That's the original
17 proposal? Or that's what you thought was the
18 original proposal?

19 MR. WIEDIS: The original proposal, correct.
20 And, you know, we were all very upset by that.

21 The Board, for whatever reasons in its
22 deliberations, eventually credited the
23 representations and promises that were made by the
24 prior applicant, and issued the detailed decision
25 which you've all read, which is 18330 in which the

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1 Board approved FPC's application but made the
2 approval subject to the plans that had been submitted
3 in that case.

4 Now after the BZA's decision, myself and my
5 neighbors, we still thought that what the prior
6 development had done was improper and we eventually
7 did file a lawsuit against them. And there was
8 successful settlement of that lawsuit where we met
9 with them and there were some financial
10 considerations as well as the owner agreeing to
11 reduce the height of the roof to make it more
12 acceptable to us.

13 But, you know, we didn't really want to stand
14 in the way of the new construction in a form that was
15 within the laws of the District. So we agreed to
16 that. And in exchange for the owner's agreements, we
17 waived a number of very important legal rights. We
18 thought we could have proven, quite frankly in court,
19 that there were these misrepresentations in the prior
20 case. And we're glad now that the new owner kind of
21 came along and gave us peace of mind that I believe
22 we actually were right and could have proven it.

23 But in any way, there was the settlement
24 agreement, and as a result of that Holland and Knight
25 and the old owner went to the Zoning Administrator

1 and got a new zoning order, a determination letter.
2 I think it was dated April 9th of 2013, which is
3 Exhibit B in our exhibit books. And in those changes
4 our settlement agreement was incorporated and the
5 changes did not increase in any way the total height
6 of the penthouse structures.

7 Fast-forward to the end of 2013, FCP sold the
8 property to the current owner and the Erie reasonably
9 expected the current owner to build in accordance
10 with the revised and approved plans. When the
11 current owner bought the property it continued to use
12 the same zoning attorneys that they had used before,
13 Holland and Knight and got this April 9th, 2013
14 zoning letter.

15 Now the end of 2013 a representative of the
16 owner contacted me and our association to explain
17 tentative plans to redesign the building. And the
18 owner provided our association with a letter that
19 listed 10 or 12 benefits of the new design. And
20 there were in fact some benefits of the new design.
21 Unbeknownst to us, however, the owner didn't list
22 many of the disadvantages that we believe they were
23 actually intending to incorporate in their plan.

24 VICE CHAIRPERSON HILL: Is that letter in the
25 record?

1 MR. WIEDIS: The letter is in the record.

2 VICE CHAIRPERSON HILL: I'm trying to
3 remember the letter.

4 MR. WIEDIS: Well, the letter is not in the
5 record. However, the e-mail that repeats this list
6 of benefits is in the record at Exhibit H.

7 MS. HORVITZ: It's, in your docket, it's 18.
8 And then it's Exhibit H within that is the list of
9 benefits. Is that right? Yeah.

10 MR. WIEDIS: So we looked at this list of
11 benefits. We weren't totally satisfied. I mean, you
12 know, there had been some discussion about whether we
13 were going to trust the new owner or not trust them,
14 and we were more interested in working out a
15 resolution. We weren't necessarily distrusting
16 everything that the owner said. So we posed a list
17 of questions and I think we sent those list of
18 questions, which is at Exhibit H. You can take a
19 look at that. They were sent in late December of
20 2013. And if you go to the last page of Exhibit H
21 you'll see the list of questions and the owner
22 responded to those questions.

23 MS. HORVITZ: So it's your docket, Exhibit
24 18, and then there is a Tab H. And he's referring to
25 the attachment to that e-mail chain, which is the

1 questions and the answers provided.

2 MR. WIEDIS: So there were a number of
3 questions. Important for this case is number 4 where
4 we said, "Are you changing the proposed height of the
5 penthouse structures?" And a representative of the
6 owner, I believe it was Mr. Papke, said, "No."

7 Also, question number 8, obviously we were
8 concerned about the roof height, so we asked, "Are
9 you changing the agreed upon elevation of the
10 building?"

11 And Mr. Papke responded to the Association
12 and said, "No."

13 VICE CHAIRPERSON HILL: Which number is that?

14 MR. WIEDIS: So that would be question 8 is
15 the one I just read.

16 VICE CHAIRPERSON HILL: Right.

17 MR. WIEDIS: And question 4 is the one I read
18 before that.

19 VICE CHAIRPERSON HILL: Okay. Okay. Thanks.

20 MR. WIEDIS: So I didn't really find these
21 representations from the new owner to be surprising
22 since I knew about the BZA order, which had limited
23 the penthouse structures and the Zoning Administrator
24 order dated April 9th, 2013 which imposed limitations
25 of the height of the penthouse structures as well.

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1 So it was not until October 2015 that I had
2 observed the construction of the roof section of the
3 building. And we saw it at a time when -- we saw it
4 at a time when the construction had started, yes, but
5 they hadn't gotten to the construction of the
6 stairwells and the highest part of the property.

7 And of course there's been some discussion
8 about the timing of when we did this. You know, we
9 had received earlier versions of the plans similar to
10 what was shown here. Unlike representations from
11 counsel on the other side, we never agreed to that.
12 In fact, we requested further changes. We were
13 concerned about where those electrical structures
14 were going to be. But we actually asked the
15 developer to try to move them all the way to the
16 other side of the building so they wouldn't be near
17 our private space. Or put them down on the ground.

18 And they said they were exploring that. In
19 fact, they had showed us several versions of plans.
20 I might add that of all the versions of plans that we
21 saw, none of them were the permit plans at all. So,
22 you know, again there was a representation that we
23 saw the permit plans. The plans that the Board is
24 now seeing and making judgments on, we were never
25 shown those by the developer, although they were

1 showing us certain versions of the plans which we
2 contend didn't accurately show what was going on.

3 So you know, given that we were in
4 discussions and we'd seen some versions of the plans
5 that were not offensive and that they were telling us
6 they were working on making this acceptable to us,
7 you know, we didn't feel a need to ask for additional
8 sets of plans because they were giving us things that
9 you know, we thought were accurate when in fact we
10 don't think they actually are consistent with what
11 they built.

12 So based on the documents that I've examined,
13 I believe the Zoning Administrator made a mistake by
14 failing to properly consider and implement material
15 aspects of the plans that the BZA approved in Case
16 18330 on the plans referenced in his own
17 determination letter of April 9th, 2013.

18 Or that he was badly misled. And one of the
19 things we haven't got into is, you know, now after
20 the fact I've seen some of the documents that were
21 submitted to the Zoning Administrator and what I note
22 oddly is that when they're seeking the approval of
23 the Zoning Administrator, they leave out a couple of
24 the sheets that actually show what the roof is going
25 to look like. And there's been no explanation to me,

1 and we can't figure out why when seeking approval
2 from the Zoning Administrator for changes that we
3 believe the developer knew were going to be offensive
4 to the neighbors and violated Order 18330, they
5 simply left out some of the sheets that were most
6 important to the zoning determination.

7 As a result, either because of this deception
8 or some other issue I don't know about, we think the
9 Zoning Administrator wrongly approved the project
10 that bears little resemblance to the plan that the
11 Board actually approved in 2012 and that abandons
12 some of the features that the prior owner promised to
13 incorporate in order to comply with the Zoning
14 Regulations and lessen the adverse effects on our
15 property.

16 [Discussion off the record.]

17 VICE CHAIRPERSON HILL: Okay, I've got a
18 question for you. Are you finished?

19 MR. WIEDIS: I have just a bit more.

20 VICE CHAIRPERSON HILL: Okay.

21 MR. WIEDIS: But I wanted you to take a look
22 at these pictures if you would.

23 VICE CHAIRPERSON HILL: All right, we're --
24 and I'm just letting you know, we're 33 minutes. But
25 just to let you know.

1 MR. WIEDIS: So instead of the nine-foot
2 penthouse there's a rooftop structure that is at
3 least 16 and a half feet, and these are the photos
4 that we are now showing to the Board, as to what's
5 seen from the roof. The owner did not reduce the
6 height of the usable roof space by one foot as was
7 promised to us in 2013. Instead another issue of
8 course, is that they've elevated the usable roof with
9 decking. That's one example of a disadvantage in
10 their plan that they didn't point out in their
11 initial letters. So they gave us a list of
12 advantages, but they didn't say hey, we're going to
13 go up two feet higher than we said that the prior
14 owner was going to go up with this decking.

15 And if the Board wants to take a look at
16 that.

17 [Pause.]

18 VICE CHAIRPERSON HILL: Okay. I'm sorry. Do
19 you have anything else or is --

20 MR. WIEDIS: So I wanted to show the Board
21 pictures of some of this decking.

22 VICE CHAIRPERSON HILL: Uh-huh.

23 MR. WIEDIS: Which is important because that
24 goes up two feet higher than the proposed roof
25 structure. I'm sorry, the proposed height of the

1 roof. So that effectively vitiates the advantages
2 that we obtained by negotiating with the prior owner.

3 So you know, I also find it somewhat shocking
4 that the owner and Holland and Knight are now taking
5 the position in this proceeding with the plans that
6 were approved by this body previously based on some
7 of their sworn oral testimony, and representations
8 from the owner's lawyer are now irrelevant. And you
9 know, I obviously feel quite disadvantaged as a
10 citizen of the District that they would make those
11 representations to get the Board to take
12 administrative action that's adverse, and now they're
13 saying those representations are irrelevant.

14 In closing you know, I think that the owner
15 and Holland and Knight are really undercutting the
16 BZA process. We observed it. You know, we were
17 disadvantaged by it in some way, but we saw it work.
18 We eventually worked out an important agreement with
19 the owner of the old property, and we expected the
20 new owner to make accurate representations to us
21 about his plans to abide by those prior agreements.

22 VICE CHAIRPERSON HILL: Okay. So just for a
23 procedural standpoint and also to clarify what I
24 believe we're going to do now, is we're going to ask
25 DCRA if they have any cross, as well as the owner

1 will have an opportunity to cross.

2 Then DCRA will have an opportunity to
3 present, each party will have an opportunity to
4 cross, we'll finally get to the builder, the owner
5 that is, and the same. And then you will have an
6 opportunity to provide a summary. Obviously if the
7 Board has any questions at any time, please feel
8 free. And for your summaries I was just kind of
9 thinking through this again, you know, how did -- and
10 what I'm listening for is, again, how did the ZA err.
11 And just to clarify that. That's what I'm listening
12 for.

13 So that being the case, would you like to
14 cross, Mr. Tondro?

15 MR. TONDRO: Yes. Thank you, Mr. Vice Chair.

16 If I can, Mr. Wiedis, on this issue of the
17 roof deck, I just want to drill down on that a little
18 bit. If you can look at the approved plans, the
19 permit set, which is A301 that I presume you're using
20 for stating what the roof deck actual elevation is.
21 Can you just tell me what that is?

22 VICE CHAIRPERSON HILL: Mr. Tondro, could you
23 repeat that again, just for me?

24 MR. TONDRO: Yes. Absolutely. What I'm
25 seeking to understand, there's been an assertion that

1 the roof deck has changed and I wanted to understand
2 how that relates to the elevation of the roof deck.
3 There's been an assertion that it's been increased by
4 two feet and something, and I want to understand what
5 -- where they're starting from and where they're
6 ending from. So since we're talking about in theory,
7 we're talking about the ZA's decision that supposedly
8 erred when he approved the permit as different from
9 the BZA plans. What I want to understand is those
10 two markers. What was the roof elevation shown on
11 the BZA plans and I was going to start backwards,
12 what was it that was shown in the permit and see what
13 those distinctions was?

14 VICE CHAIRPERSON HILL: Okay.

15 MR. TONDRO: If you can answer that. Thank
16 you.

17 MR. WIEDIS: So, again, I don't have the
18 document. Could you tell me which document you're
19 looking at?

20 And again, just to clarify for the record,
21 you know, we were never provided with the actual
22 permit plans. We were provided with other sets of
23 plans, and I know that it may sound odd to the people
24 in this room, but I'm giving this testimony from the
25 perspective of a citizen of the District of Columbia.

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1 You know, we had no way of knowing that the permit
2 plans were different than the plans that the
3 developer was showing us, sitting in my living room.
4 And he had every opportunity to give us those plans,
5 and he actually led us to believe that those were the
6 final plans.

7 But apparently went to Zoning Administrator,
8 was something that was different. So to the extent
9 that I felt that I was misled, that was --

10 VICE CHAIRPERSON HILL: Mr. Tondro, is there
11 something you can point me to that shows the two
12 feet?

13 MR. TONDRO: Yes. Well, in fact Mr. Wiedis
14 can actually show whatever he is using as the basis
15 for his allegation. We can start there. I believe
16 it's more or less the same.

17 VICE CHAIRPERSON HILL: Mr. Wiedis, take your
18 time. I also would like to know what the starting
19 point is.

20 MR. WIEDIS: Okay. Well, what is the
21 specific question?

22 MR. TONDRO: I think -- are you looking at,
23 is it A301? Is that the sheet number, just for
24 everybody's purpose?

25 MR. WIEDIS: Yeah. A301, yes.

1 MR. TONDRO: Yeah, and just to be clear for
2 the members of the Commission, I'm willing to give
3 Mr. Wiedis the opportunity to use the plans that he's
4 using. But in this particular case I think there is
5 in the exhibit provided by the permit holders, their
6 second motion and it's Tab J.

7 VICE CHAIRPERSON HILL: Mr. Tondro, when you
8 said A301, where is the A301? In which exhibit that
9 we have?

10 MR. TONDRO: Yes. No, I was just about to
11 give it. Right. A301 down here at the bottom,
12 A.301, and I will provide you this. Yes, owner's
13 motion to dismiss, Exhibit K, please. Thank you.

14 And I would direct Mr. Wiedis to look up on
15 the upper left-hand side, you can see all the way on
16 the left-hand side, just there are not only issues --
17 dimensions of height, but also very specifically
18 elevation which provides an absolute comparison. So
19 if you can -- Mr. Wiedis, just to rephrase the
20 question, if you can please tell me what you're
21 seeing there that is listed as the roof deck, the
22 elevation of the roof deck?

23 MR. WIEDIS: Well, I think the document
24 speaks for itself. I don't --

25 MR. TONDRO: Just for the record, please, can

1 you state what it says?

2 MR. WIEDIS: I mean, there is -- not to be
3 difficult but there is --

4 MR. TONDRO: The allegations -- we are not
5 the moving party. The person who has -- the party
6 that has the burden of proof to make the allegation
7 and substantiate it, I believe is the appellant in
8 this case. And therefore we need to know on what
9 basis you're asserting there was a change from the
10 plans; from the BZA plans to the approved plans. So
11 if you can show us on what basis you're making that
12 allegation.

13 MR. WIEDIS: Mr. Tondro, that's part of the
14 problem is there is 20 sets of plans.

15 MR. TONDRO: Your counsel has submitted
16 records stating a very clear dimensional difference
17 of two something, I think it's 2.11 feet. Where does
18 that discrepancy come from? It has to be from one
19 measurement to another measurement. I'm not trying
20 to be difficult myself.

21 MR. WIEDIS: The discrepancy is from, I
22 believe, the plans of the prior owner with this plan.

23 VICE CHAIRPERSON HILL: The plans that the
24 BZA approved? Is that what you were --

25 MR. TONDRO: Wait. We can go back if we want

1 to. We can go back to the original and start from
2 the original back. All I'm trying to establish here
3 is try to understand the basis for appellant's
4 allegation that there is a discrepancy, must be based
5 by definition on two different plan sets. One is
6 what the BZA approved and one is what the Zoning
7 Administrator approved.

8 There is some allegation. We just need to
9 understand what that allegation is based on. If we
10 want to start with the BZA plans, we can start with
11 the BZA plans. It should be a simple issue if you're
12 able to cite 2.11 or whatever it was.

13 MS. HORVITZ: Do you mind if I help out a
14 little bit?

15 MR. TONDRO: That's fine.

16 VICE CHAIRPERSON HILL: Sure. Of course.

17 MS. HORVITZ: All right. In the 2012
18 proceeding, 18330, there was considerable testimony
19 about what the height differential would be of actual
20 users of the roof services. Throw out the idea of
21 what is roof elevation and so forth. The testimony
22 was how tall is -- you know, how high is one person
23 standing versus another person standing. And to do
24 that the testimony actually figured out what was the
25 roof top surface of the Erie. Their testimony was I

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1 guess it was like 196, right? So --

2 MR. TONDRO: Objection. I hate to say this,
3 but --

4 MS. HORVITZ: Yeah.

5 MR. TONDRO: -- this is all about subject to
6 approve plans. If we're talking about subject to the
7 rest of the order I believe that's a different issue.
8 We're talking about subject to approve plans. You've
9 made extensive --

10 MS. HORVITZ: Okay.

11 MR. TONDRO: -- basis on this. The issue
12 that you're asserting the allegations, I think you
13 should be prepared to defend them and provide
14 substantial evidence for that.

15 MS. HORVITZ: So just to complete the -- I'm
16 giving you the factual explanation whether you like
17 it not. And you can argue the law. But in the BZA
18 case and in the --

19 MR. TONDRO: As long as my objection is on
20 the record, please.

21 MS. HORVITZ: Okay. In the BZA case and in
22 the BZA order there was an expressed finding of fact
23 as to the difference in height of users based on
24 testimony. And then the subsequent Zoning
25 Administrator determination, April 9, 2013, reduced

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1 that difference to one foot, 10 inches. And
2 comparing that determination to the plans that you
3 are just describing is the basis of our contention.

4 MR. TONDRO: So if I can understand, the
5 assertion that there is a difference between what the
6 -- that the ZA erred in approving the plans that were
7 approved, that were issued for the permit on June
8 17th, 2015, the error he made in approving those was
9 not based on those plans. It was based on some other
10 indeterminate plans. It was not based on those plans
11 and how they distinguished from the BZA plans. I'll
12 leave that at that. Or, unless you want to confirm
13 that.

14 Can you confirm that? In other words, that
15 the allegation that there was a -- let me rephrase
16 this. This whole proceeding is based on an
17 allegation that the Zoning Administrator erred in
18 approving the permit because the permit departed from
19 what the plans that were approved with the Board's
20 application, their decision in BZA Application 18330.
21 There's an assertion, one of the allegations is that
22 the alleged violation is that there was a discrepancy
23 between what was approved by the Zoning Administrator
24 in June 17th, 2015. We're not talking about the
25 zoning determination letters because those were never

1 appealed. We're talking about the administrative
2 decision that was appealed, which is the permit that
3 was issued on June 17th, 2015.

4 The only -- I'm looking for the supporting
5 evidence that says that there was a change that the
6 Zoning Administrator permitted under those permit
7 drawings that differed from those plans that were
8 issued -- to which the subject to -- subject to the
9 approved plans language of the Board in BZA
10 Application 18330.

11 If you want, if you can just give me a
12 confirmation that you understand that and you're
13 arguing that instead that the allegation is based on
14 something else that has nothing to do with the plans
15 that were approved with the June 17th, 2015, that
16 would be permissible too.

17 MS. HORVITZ: Well, our contention in this
18 appeal is that as to the penthouse height, which was
19 clearly marked in the BZA approved plans --

20 MR. TONDRO: I'm asking about the roof deck.

21 MS. HORVITZ: Okay.

22 MR. TONDRO: Which is an allegation you
23 raised.

24 MS. HORVITZ: I understand. But my point to
25 answer your question, there is a direct discrepancy

1 between the plans that were approved by the BZA in
2 18330, which had a penthouse height of nine feet, and
3 a corresponding elevation to reflect that, and the
4 approved permit plans.

5 MR. TONDRO: Are you --

6 MS. HORVITZ: There are additional
7 allegations --

8 VICE CHAIRPERSON HILL: Mr. Tondro, let her
9 finish.

10 MS. HORVITZ: What?

11 VICE CHAIRPERSON HILL: I was just asking to
12 let you finish.

13 MS. HORVITZ: Oh, thank you. I appreciate
14 that.

15 There are additional allegations that there
16 were numerous other oral representations made under
17 oath which made it into findings of fact in the BZA
18 order that are inconsistent with the now approved
19 plans. And they include the differential in height,
20 based on the fact that the decking is defacto
21 creating an extra elevation. And in our prehearing
22 we also point out things like, it was promised that
23 these interior rooftop structures would not -- there
24 would be no interior usable space on the roof other
25 than the mechanical house. And now you're selling

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1 cabanas and advertising them as interior space.

2 VICE CHAIRPERSON HILL: Okay, Mr. Tondro, I
3 don't think there's another set of plans to compare
4 them to is what I think we're getting at, right?

5 MR. TONDRO: Or if you will permit me, I'll
6 ask Mr. Wiedis to look at the specific exhibits and
7 we can read them off. I just wanted to clarify that
8 their allegation appears to be unsubstantiated. It's
9 an allegation they raised. If they want to stipulate
10 that they withdraw it, that's fine. I'm just trying
11 to understand on what basis they're supporting that
12 allegation that there's a differential in roof deck.
13 If they're not willing to state what it was, if it
14 was 198.2 and now it's 197.6, or something like that,
15 how is the Zoning Administrator supposed to know
16 whether or not -- and how is the Board supposed to
17 know whether or not the Zoning Administrator erred or
18 did not err.

19 MS. HORVITZ: Some of our contentions are
20 based on specifically submitted plans that are
21 different and that speaks to the penthouse height.
22 Other of our allegations are based on oral testimony
23 sworn to before this body and then reflected in a
24 written decision by the BZA in which those were
25 specific findings of fact. And I assume, then the

1 District can try to differentiate which of those are
2 excusable error and which of those he's not supposed
3 to have notice of. But our allegations go beyond
4 merely the approved plans. My focus in my
5 presentation was the approved plans, but the
6 prehearing statement goes beyond that and is
7 incorporated into the record here.

8 MR. TONDRO: And can I just ask, keeping in
9 mind that the allegations here are not about the
10 conduct of the permit holder, at least that is not
11 why this is before the Board, this is about the
12 decision by the Zoning Administrator, not what the
13 permit holder did or didn't do.

14 So keeping that in mind could you please at
15 least provide what allegation it is you're stating
16 about the roof deck, because I saw that there was a
17 statement in the roof deck that I believe Mr. Wiedis
18 just raised, that there was a discrepancy. Can you
19 either state what that is clearly so I can follow up?
20 Or can you withdraw it and make it clear that you're
21 withdrawing that allegation? Thank you.

22 MS. HORVITZ: We have provided, in the
23 prehearing statement, sworn testimony by the
24 applicant in 2012, a representation that the height
25 differential of actual users between the two roofs

1 would be two feet, 10 inches. We have provided in
2 the record, including in the prehearing statement and
3 in our original submission, a finding by the Zoning
4 Administrator which correctly was not appealed
5 because we were in support of it, stating the height
6 differential would be one foot, 10 inches between the
7 two. And now there is elevated rooftop decking which
8 we -- since we do not have a complete set of approved
9 permit plans because we could not get them from DCRA,
10 we cannot tell you how it's actually as built. But
11 it is -- it appears to be elevating the users above
12 the Erie rooftop surface in a manner that is
13 inconsistent with the promises made and the findings
14 of the BZA.

15 VICE CHAIRPERSON HILL: Mr. Tondro, why don't
16 we move to another question?

17 MR. TONDRO: Absolutely. If I can actually
18 just go to this specific exhibit and just ask that
19 question, then I'll move right on. Thank you.

20 VICE CHAIRPERSON HILL: Sure.

21 MR. TONDRO: If I can. If we can then turn,
22 then, to this exhibit, A.301, Tab K in owner's motion
23 to dismiss, which is -- do you have the exhibit
24 number?

25 UNIDENTIFIED SPEAKER: It's Exhibit K.

1 MR. TONDRO: Yeah, I know. For the BZA. Do
2 you all have them before you?

3 VICE CHAIRPERSON HILL: Yeah.

4 MR. TONDRO: 16K. Thank you.

5 VICE CHAIRPERSON HILL: Yeah.

6 MR. TONDRO: If you can look on the upper
7 left-hand side. I'm sorry for a lengthy descriptions
8 in what I think should be a very simple statement.

9 Can you please read where it says, I believe
10 it's the third from the top if you need me to follow
11 you through, starting from the top left-hand side, it
12 says, "Penthouse parapet." Then, "Penthouse roof."
13 Then, "Top of T-O penthouse FF and deck. Top of
14 architectural wall, top of parapet," and then it
15 says, "roof." Right?

16 VICE CHAIRPERSON HILL: Mr. Tondro, it's
17 really hard to read off of these computers, just to
18 let you know.

19 MR. TONDRO: And that is the --

20 MR. WIEDIS: It's hard to read off of the
21 actual plans that I'm looking at as well.

22 VICE CHAIRPERSON HILL: If you want to tell
23 me the number?

24 MR. TONDRO: I would be happy. I wanted them
25 to understand what number he was using --

1 VICE CHAIRPERSON HILL: Yeah.

2 MR. TONDRO: -- because he was across.

3 VICE CHAIRPERSON HILL: Sure.

4 MR. TONDRO: I apologize.

5 VICE CHAIRPERSON HILL: That's all right.

6 MR. TONDRO: What I'm reading at roof says,
7 196.64. I mean, is that right? Just to make
8 absolute sure that we're reading off the same.
9 196.64 is the top of the roof. The top of the
10 parapet is 198.31. Does that correspond to what you
11 see, Mr. Wiedis?

12 MR. WIEDIS: No.

13 MR. TONDRO: Okay. Can you tell me what you
14 see then instead? Are we not dealing with the same
15 plans or would you like me to provide you a copy of
16 the plans which were submitted on the BZA record?

17 MR. WIEDIS: I'm only going to testify under
18 oath that the document speaks for itself. It's hard
19 for me to focus on a particular number on this
20 document when there are hundreds. But if your
21 question is, can I read the document to you, I
22 suppose I can.

23 MR. TONDRO: Thank you, Mr. Wiedis for the
24 cooperation for the Board. I will -- if I can turn
25 then instead to BZA 18330, which I believe you are

1 very familiar with. There is Exhibit 30 of 18330,
2 30H in particular which is the plans to which we have
3 the magic phrase, "Subject to approved plans." And I
4 would like to turn to A4.1.

5 MR. WIEDIS: Okay. What tab are you at?

6 MR. TONDRO: This is Tab H. It's 30H on the
7 original application. 18330. I can also provide you
8 a copy to look at if you'd like, or if you want to
9 repeat the answer that the document speaks for itself
10 as long as you'll confirm that it's not different
11 than what I say, that would be fine.

12 What I'm looking for is the statement on the
13 BZA plans as to what the roof elevation is supposed
14 to be. That the Zoning Administrator used in
15 determining whether or not the approved plans were
16 compliant. I'm trying to make this as simple as
17 possible. I'm really not trying to make this
18 difficult.

19 MS. HORVITZ: It would help if you told us
20 the docket number in this case that you're referring
21 to.

22 MR. TONDRO: I don't believe we have a docket
23 in this case. It may or may not be an exhibit, but
24 it is a BZA record exhibit, BZA 18330. I can make a
25 motion if you really want to go down that we need to

1 go and add in a record from 18330 which was, I
2 believe, the case that you used, that you yourself
3 were the party to, and that you are asserting is the
4 basis for reliance on --

5 MS. HORVITZ: We have submitted illustrative
6 plans from Exhibit 30 in Case No. 18330. We did not
7 submit a full set of plans from that proceeding. So
8 I'm trying to determine which plans you are referring
9 to and why you think my client has them in front of
10 him.

11 VICE CHAIRPERSON HILL: It's okay. We're all
12 going to get through this together. I'm just letting
13 you know.

14 MR. TONDRO: Thank you.

15 VICE CHAIRPERSON HILL: We're all going to
16 get through this together. Let's all just take a
17 deep breath, okay? All right? Okay.

18 MR. TONDRO: Absolutely. I mean I am --

19 VICE CHAIRPERSON HILL: So I also want to
20 know --

21 MR. TONDRO: I am --

22 VICE CHAIRPERSON HILL: So 18330 -- it's
23 okay.

24 MR. TONDRO: Wait a second. I'm starting
25 from --

1 VICE CHAIRPERSON HILL: Okay. Right.

2 MR. TONDRO: -- the premise that the
3 allegation here --

4 VICE CHAIRPERSON HILL: Got it.

5 MR. TONDRO: -- is that there is a departure
6 from that. I'm starting from the plans. I'm
7 starting from the --

8 VICE CHAIRPERSON HILL: I'm trying to find
9 that plan as well.

10 MR. TONDRO: Yes.

11 VICE CHAIRPERSON HILL: Right.

12 MR. TONDRO: 18330.

13 VICE CHAIRPERSON HILL: It's 18330, right.

14 MR. TONDRO: Exhibit 30H. 30H. Pardon me.
15 I thought I already said that.

16 VICE CHAIRPERSON HILL: That's okay. That's
17 okay.

18 MR. TONDRO: I apologize.

19 VICE CHAIRPERSON HILL: 30H in our docket,
20 right? Or whatever.

21 MR. TONDRO: In BZA 18330. In the original
22 case, yes. I apologize if I did not --

23 [Discussion off the record.]

24 VICE CHAIRPERSON HILL: Can you speak in the
25 microphone? Sorry.

1 MS. HORVITZ: If he's going to ask about A4.1
2 that's in the record of this case. Is that the page
3 you'd like to direct your attention to? Because if
4 that's the case --

5 VICE CHAIRPERSON HILL: Can you confirm it's
6 the same as what Mr. Wiedis is looking at?

7 MS. HORVITZ: Yes. And that was submitted
8 with our prehearing statement at Exhibit 18E, as one
9 of the pages of the plans.

10 MR. TONDRO: Unfortunately I think the one
11 that was submitted on the record in this case is
12 probably not legible because it's copied in black and
13 white as opposed to the original color. So may be
14 easier to use the 18330.

15 And again, I apologize, Mr. Wiedis for this
16 question. If it's uncomfortable I'm just asking if
17 you can read off of that what it says for the
18 elevation for the roof.

19 MR. WIEDIS: What this document says is
20 198.10.

21 MR. TONDRO: Thank you. Then I'll stop.
22 Thank you.

23 VICE CHAIRPERSON HILL: Okay, Mr. Tondro, the
24 first one again, the first 198.10 again that you
25 showed us, could you tell me where that was again?

1 MR. TONDRO: I'm sorry. Yes. The first one
2 is Tab K at Exhibit 18 --

3 MS. HORVITZ: Sixteen.

4 MR. TONDRO: I'm sorry, 16K of this Board's
5 record.

6 VICE CHAIRPERSON HILL: Okay.

7 MR. TONDRO: Which is owner's motion to
8 dismiss, Tab K, A.301, and if you look at the top
9 left it just says that the top of the parapet is
10 198.31, the roof is 196.64 as opposed to what Mr.
11 Wiedis just said for the original BZA approved plans
12 establish that the roof was to be at 198 feet and 10
13 inches.

14 MR. WIEDIS: Is that what was reduced by one
15 foot and some inches in the subsequent determination
16 letter?

17 MR. TONDRO: Well, actually I believe I'm
18 asking the questions but that's fair enough.

19 VICE CHAIRPERSON HILL: Oh, sorry. You don't
20 have to answer it.

21 MR. TONDRO: No, no.

22 VICE CHAIRPERSON HILL: Okay. Please, go
23 ahead then and answer.

24 MR. TONDRO: That's --

25 MR. WIEDIS: I believe that was reduced by

1 one foot and some odd inches.

2 MR. TONDRO: Well, that was actually the
3 follow up -- the follow up question I was going to
4 ask was going to give you an opportunity to provide
5 the answer. Okay? Again, I'm starting from the
6 question that what the Zoning Administrator was
7 supposed to -- supposedly erred was not what he said
8 in the prior zoning determination letters. Those
9 were issues that were resolved at that time and
10 place. If there was a challenge to it at that time,
11 that was it.

12 A zoning determination was subsequently
13 issued. That would replace that. That's the long
14 standing practice of the board that it's the permit
15 that matters. It's not the zoning determination
16 letter because of the permit that authorized
17 construction.

18 The issue here, the allegation, is that it's
19 the permit drawings versus the board drawings, that
20 there's a discrepancy. And so all I was trying to
21 understand, which I believe we've already gone into
22 at length, but to give you an opportunity to state to
23 what extent was your understanding that your
24 allegation that there was a change in height of the
25 roof deck based on the private agreement between

1 yourself and appellants? Between the appellants and
2 the permit holder, sorry.

3 MR. WIEDIS: And what was incorporated in the
4 determination letter.

5 MR. TONDRO: It may have been interpreted in
6 -- it may have been incorporated in the zoning
7 determination letter, which is not under appeal at
8 this particular time. But my question is, where does
9 that understanding of the base point, the starting
10 line for the 2.11 feet difference, does that start
11 from what the Board's plans were, the BZA plans that
12 were issued? Or instead the one-foot reduction
13 under, I guess, the private agreement between the
14 parties to which the Zoning Administrator was not a
15 party?

16 MR. WIEDIS: It was based on the plans that
17 the Zoning Administrator approved.

18 MR. TONDRO: And then what -- if that was the
19 baseline from which it started -- we can actually go
20 back there, because that was a good one. Be very
21 clear. The plans, what was it based on? Was it
22 based on the plans approved by the Board as the
23 starting point? Or if it was not -- as the lowest
24 point? What is the source of this discrepancy
25 between the alleged discrepancy of two feet, 11?

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1 What is the source of that discrepancy is all I'm
2 trying to understand. If you could provide an answer
3 as to what that is. And I'm wondering --

4 MR. WIEDIS: The District's letter.

5 MR. TONDRO: Dated what?

6 MR. WIEDIS: April 9th, 2013.

7 MR. TONDRO: And what was that in -- that was
8 the Zoning Administrator's -- the zoning
9 determination letter that was in turn based on the
10 private agreement. Is that right, between the
11 parties?

12 MR. WIEDIS: I wasn't there when the Zoning
13 Administrator -- at that document. I believe Ms.
14 Shiker was the person that went to see the Zoning
15 Administrator.

16 MR. TONDRO: But you read the zoning
17 determination letter?

18 MR. WIEDIS: I said I believe Ms. Shiker was
19 the person. I don't know who it was, but I believe
20 it was her law firm.

21 MR. TONDRO: I'll stop there. I don't think
22 there's a point.

23 VICE CHAIRPERSON HILL: Okay.

24 MR. TONDRO: Thank you.

25 VICE CHAIRPERSON HILL: So now we get to move

1 over to the owner, and that was a nice segue there, I
2 suppose. Ms. Shiker.

3 MS. SHIKER: We have no cross-examination.

4 VICE CHAIRPERSON HILL: Oh.

5 MS. SHIKER: We're going to go to our
6 testimony when it's time. Thank you.

7 VICE CHAIRPERSON HILL: Great. Would you
8 like to present, Mr. Tondro, or do you --

9 MR. TONDRO: Yes, if I may do?

10 VICE CHAIRPERSON HILL: Okay.

11 MR. TONDRO: I think there's a couple issues
12 I'd like to raise sort of first here. Again, this
13 goes back in some ways to the issues of the timing
14 beforehand, or the issues that were discussed that
15 time I asked you before and I apologize if I'm
16 raising up again, but I think this is important.

17 I am here to represent the Zoning
18 Administrator. This is DCRA. These are long-term
19 implications that have major effects for how it is
20 that permits are processed going forward. And I take
21 this very very seriously because it does have those
22 potential for knock-on effects.

23 I do want to emphasize, again, I apologize
24 for using up the Board's patience. I had thought it
25 would be a very simple question that I asked. The

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1 allegations were that there was a discrepancy in
2 plans. The allegations were, and the only right to
3 appeal at this point is what the Zoning Administrator
4 determined as of June 17th, 2015 and those plans that
5 was issued. That is the crux of what it is. That,
6 vis-à-vis, the Board. What the Board approved in
7 18330. Whether those corresponded or whether they
8 did not correspond.

9 I've tried my best to understand from
10 appellant's filings what it is precisely that they're
11 asserting. I thought that I had understood that
12 there were two allegations in terms of factual
13 discrepancies. Now there appears to be a panoply of
14 other unstated issues. I had thought that the issue
15 was fundamentally the issue of subject to approved
16 plans.

17 I'm going to go through a couple things.
18 First of all, one allegation I think could be quickly
19 dismissed is that there is an alleged violation of
20 Section 3205. I don't believe that's applicable
21 since that relates to the fact that conditions that
22 are included by the Board must be followed. I don't
23 think there's any allegation. There's only two
24 conditions that were included in 18330. I'll read
25 them off to you if I may.

1 One, the use of the roof deck be limited to
2 occupants of the top story of units, not the entire
3 building. And two, that the roof deck space be set
4 back at least 20 feet from the north property line
5 and defined by a balcony. I don't think those are at
6 issue in this case, so I don't believe that that
7 requirement that conditions of the Board order, the
8 specific conditions be -- holds any weight; has any
9 merit.

10 VICE CHAIRPERSON HILL: Could you repeat that
11 again, please?

12 MR. TONDRO: In other words, the allegation
13 that the alleged violation of Section 3205, I don't
14 believe is accurate. I think it's without merit
15 because there were only two conditions in Board
16 Application 18330, neither which have been alleged to
17 be violated. They do not relate to penthouse roof
18 deck. They do not relate to the roof decking.

19 In terms of the other two issues, as I
20 understood, I understood them to be two different
21 distinct things. One was that there was an alleged
22 change in height of 2.11 feet in between -- as I had
23 understood until now, I had understood it from the
24 Board's -- what the Board approved in 18330, to what
25 the Zoning Administrator approved.

1 I have to say that I was a little perplexed,
2 which is the only reason why I unfortunately
3 subjected everybody to the question because when I
4 look at those what I see is that there's actually, if
5 anything, a discrepancy in favor of the Zoning
6 Administrator in the sense that it's actually less.
7 The roof deck at the very end. What I see is 198.58
8 versus 198 and 10 inches. They're more or less
9 equal. I don't see any difference in terms of the
10 roof deck. So I was trying to understand what that
11 circumstances were.

12 But I think the real issue here that we're
13 dealing with that's behind everything is the issue of
14 the penthouse roof. I think that's -- we can
15 probably all stipulate to that.

16 And I think, at least from DCRA's
17 perspective, that we're willing to stipulate that
18 there's no question that there was a discrepancy.
19 And I believe the discrepancy is about five feet, 12
20 inches. Five point 12 feet, I'm sorry. Difference I
21 see between the Board approved plans in 18330, an
22 elevation of 207, 207 feet, 10 inches to instead, 212
23 feet, point 95. That's what I see as the crux of the
24 issue.

25 The alleged violation here is of Sections

1 3125.7, 3125.8, which have these magic words. It's
2 really 3125.8. 3125.7 says that -- makes it clear
3 that the plans are part of the approval process. And
4 then .8 is the one that says that it's subject to
5 approved plans. Right?

6 And in this particular order for BZA
7 Application 18330 the Board ordered, as is already
8 stated, quote, "The application is granted, hereby
9 granted subject to the approved plans as shown on
10 Exhibit 30 and the following conditions." Unquote.

11 We're dealing with a fundamental question of
12 interpretation here. What the appellants urge is
13 that this magic phrase, subject to the approved
14 plans, means that any change, no matter how minute or
15 inconsequential, requires an applicant to request
16 modification from the Board with a calm commitment
17 need for the Office of Planning to review the
18 modification first.

19 DCRA differed, begs to differ, and instead
20 asserts that this phrase is being consistently
21 interpreted to mean that only when the proposed
22 changes increase a specific relief approved by the
23 Board does an applicant have to seek a modification.
24 Provided of course that the changes proposed by the
25 owner are complaint with the Zoning Regulations as a

1 matter of right.

2 In other words, our assertion is that if --
3 and I'll walk through these cases to make it very
4 clear, all right? And I'm trying to be as up front
5 as we possibly can be about this because this really
6 is a fundamental issue and I will say this is an
7 issue that not only does the ZA need clarity on if
8 there is a disagreement, the Board needs it, I think
9 owners need it, and I think ANCs and neighbors need
10 it. So this is the opportunity for the Board to make
11 a decision and deal with the ramifications of what
12 those are, because I think there really are these two
13 different world views. Either everything or what
14 DCRA has -- the Zoning Administrator has consistently
15 applied, is the fact that it's limited to the relief
16 that has been requested and the changes that are
17 otherwise a matter of right that do not relate to
18 that requested relief, should be allowed without
19 anyone going back to the Board.

20 I can understand that might be not immediate
21 apparently. So I'm just going to, if I may have your
22 patience to walk through the reasons why the logic
23 behind that. Okay?

24 VICE CHAIRPERSON HILL: Please.

25 MR. TONDRO: Thank you. First of all, DCRA

1 believes that unless -- that there really is no
2 middle ground that is practical. If the Board is
3 going to accept the maximus position of the
4 appellants, all modifications -- I mean, any changes
5 must seek modification from the Board. All right?
6 Because the ZA cannot review every word of a board
7 order, including the background, the description, the
8 parties' positions, and all the findings of facts and
9 the conclusions of law. We're talking about pages
10 and pages and pages for every single building permit
11 applicant that comes through. That's just not
12 possible.

13 But as if that wasn't enough, appellants are
14 asserting that somehow it's the transcript that has
15 to be reviewed as well for every single building
16 permit that has a building, for where there's a
17 property with a board application that was granted.
18 It's just simply unsustainable. There's not the
19 staff for DCRA to deal with that.

20 So if that is the situation then the Zoning
21 Administrator is going to have to fall back on to, if
22 there's a change, go to the Board and ask for a
23 permission. Okay? And I just want to elucidate and
24 make it very clear so we're all understanding what
25 that would implicate. That would mean a change in

1 materials. It would indicate a change of colors. It
2 would indicate potentially a change of windows. And
3 I'm just going to point out, I'm holding up the
4 original Board plans for 18330. I'm just showing you
5 the front page of Exhibit 30H. Okay? You can see
6 they're color photos. These are printed off the DCOZ
7 website. You can see it down below right here. But
8 you can see that it shows in color, it has
9 representations about what is being shown. If
10 there's any change to this, subject to the approval -
11 - if subject to approved plans means any change
12 requires going back to the Board, they make any
13 change, they decide that they're going to put a
14 cornice on there, they're going to change the
15 mullions, the width of the mullions or the numbers or
16 the fenestration or how that's organized.

17 In this particular case the original
18 proposal, as was alluded to by Mr. Wiedis, or as
19 specifically stated, the original one had a zero lot
20 line. One of the relief granted was the side yard.
21 The side yard has since been provided back in the
22 actual -- in the permit plans. That's a change.
23 Does that mean that in order for them, for appellants
24 to get what they wanted, that they would have had to
25 have had this application go back to the Board for

1 approval for that kind of modification?

2 This is a very very tricky issue. In
3 addition to that is the fundamental problem. As
4 again you can see by looking at this, almost all
5 applications the plans are provided with Board
6 applications or concept plans. They're not
7 construction drawings. They're not that detailed,
8 they don't provide that level of detail.

9 It is true that there is Section 3129 which
10 provides for minor modifications, but that has to
11 happen within two years of the relief. Otherwise it
12 has to go back to regular modification. And again,
13 the 3129 allows for an expedited review only to the
14 extent the Board determines that that's appropriate.
15 But that's based on the fact that the parties aren't
16 going to want -- the parties to the process aren't
17 going to want to reopen it, which means it's going to
18 be in a huge expanse, I would think. Talk about the
19 floodgates earlier, Vice Chair Hill. I think this
20 would be the floodgates opening for the Board for a
21 huge number of minor modifications and modifications
22 period for those where you have an application more
23 than two years out.

24 Again, there's many properties in the
25 District that have applications -- that have relief

1 granted by the Board and the Board orders back in the
2 '60s or the '70s or something. Thirty years later
3 we're going to have to come back and have another
4 modification. If so, again, that's for the Board to
5 decide. There's no question that's for the Board to
6 decide. It's just that that is the implication of
7 what that's going to have.

8 The ZA's -- and I would just point out too,
9 there are unknown ramifications of that. I don't
10 know whether that would mean that applicants are
11 going to provide less information going forward or
12 that they know they're going to be held to precisely
13 what they show and therefore they don't show anything
14 else. Or if they just do what often happens
15 sometimes, I've seen in a couple of Zoning Commission
16 orders where they allow for a certain amount of
17 flexibility. Maybe that's another way out, and
18 however that flexibility is defined. But I think
19 there's going to have to be -- there will be
20 ramifications and how that's determined, again, it's
21 up to the Board.

22 The ZA's alternative interpretation from this
23 maximum position that any change has to happen,
24 right, which is established practice, has been
25 instead to limit, subject to the approved plans, to

1 be only that relief which is granted by the Board.
2 So for example, if a property received relief from a
3 rear yard requirement, let's say 10-foot rear yard
4 instead of the required 20 foot. The ZA has approved
5 permits that change the Board approved plans in a
6 different unrelated area of relief. So you have that
7 rear yard that's been reduced, but they come in and
8 they want to change what was on the plans for the
9 front yard setback, or for the building height,
10 right? As long as those changes still correspond,
11 they're still matter of right, they still work within
12 the Zoning Regulations, the Zoning Administrator's
13 established practice has been to permit those.

14 This would, and I should hasten to add too,
15 of course Section 3205 still applies so any expressed
16 conditions would also be limiting that. But from the
17 ZA's perspective, when a plan comes in, a permit
18 plan, he looks at the Board's decision, the Board
19 granted relief in area A, area B, area C. All right.
20 Are they corresponding to those areas of the plans?
21 Fine, then the rest they can more or less do what
22 they want as long as that is within the matter of
23 right, and as long as there's no express conditions.
24 The ZA again does not have time to go through the
25 transcript or through the entire order to try and

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1 find some suggestion to be able to understand what it
2 was that motivated the Board, that was crucial for
3 the Board in issuing their decision.

4 Another example what the ZA has granted
5 before, has approved permits that departed from the
6 Board approved plans by reducing the relief requested
7 or granted. So as I already alluded to, in this
8 particular case where the Board originally granted
9 relief from the side yard requirement, this permit
10 holder then subsequently came in and said, no, no,
11 no, you know what, we can conform with that. Well,
12 the Zoning Administrator says, well, there's no need
13 to go back to minor modification. You're reducing
14 the grant of relief that you already had. You don't
15 need to go and change that. Why do we need to change
16 that?

17 Similarly, we've already heard about the
18 discussion about the reduction in height that was
19 agreed to privately between the two parties. That's
20 also, in theory, should require modification if we're
21 going to go down this line of looking at every single
22 possible change has to reflect in terms of a
23 modification.

24 And similar then, in terms of the setback.
25 There is a separate agreement, as I understand,

1 between the two parties that increased the setback of
2 the usable area, the roof, from the adjacent owner
3 that was negotiated privately between the parties.
4 Had nothing to do with the Zoning Administrator. It
5 had nothing to do with the Board. It's a departure
6 from what was depicted and approved by the Board and
7 the Board's plans.

8 Again, does that mean that from now on every
9 time that there's any particular change it has to go
10 back to the Board? If so, the Zoning Administrator
11 will take that and say, I'm sorry, I apologize that I
12 made a mistake. We now have clarity. We now
13 understand. ANCs can sit there and rely on the fact
14 they have the exact subject plans. Owners can change
15 their plans to make sure that they know that they're
16 held accountable to that. If that's the case, that's
17 fine. We just need clarity on this issue.

18 Turning instead to the specifics. Again, I
19 think I've already dealt just those two issues of the
20 height of the roof deck, which I think I've already
21 sort of dealt with. And then really the issue of the
22 height of the penthouse roof. This is an issue of
23 five feet of increase from nine feet to roughly 14
24 feet. It's within what is allowed as a matter of
25 right. Again, this bright line rule that the Zoning

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1 Administrator has used, the whole purpose of a bright
2 line rule is to follow that line.

3 In this particular case the relief requested
4 was building height. There was no request for
5 relief, there was no express condition that limited
6 the height of the rooftop, the penthouse, the
7 rooftop, the top of the roof of the penthouse. That
8 was therefore, from the Zoning Administrator's sense,
9 was that was basically built into that request for
10 relief from height. That the Board, when considering
11 that, considered the fact that there would have been
12 this allowable -- that there had been another 15 feet
13 of allowable space for the purposes of penthouses,
14 only under the matter of right.

15 And that was what then they proposed. There
16 was a matter of right, and that is why the Zoning
17 Administrator made that decision that it was
18 separate; that it was enough of a separation. It was
19 not the same. Obviously it's related between the
20 height of the building and then the additional height
21 of the rooftop deck. I think we can -- or not deck,
22 the rooftop penthouse.

23 But at some point one has to draw a bright
24 line rule. I think you can similarly -- I remember
25 talking to Alan Bergstein about this very question.

1 And one of the questions there came up was, issue of
2 building height versus lot occupancy. It might be a
3 circumstance where the Board considers -- grants a
4 reduction or an increase, let's say, in lot occupancy
5 on the assumption that there's a corresponding
6 reduction in height. Either the ZA has to be in a
7 position where he says the only thing that was
8 granted was an increase in lot occupancy. That's all
9 I'm going to look at. Or it's all fair game. Any
10 change, you have to go back to the Board.

11 So really, that's where we rest, that we
12 don't believe that the ZA made an error in this
13 particular case. However, if the Board does
14 determine, we would like to seek confirmation and
15 clarity from this and we believe that it's necessary
16 for all parties involved.

17 And again, I don't think that anybody would
18 dismiss, and certainly not DCRA, the fact that there
19 is incredible reliance on what the Board does. The
20 Board works very hard. But neighbors, ANCs, and
21 owners may spend an incredible amount of resources,
22 the time as well as energy and so forth, in reliance
23 on what goes on in the Board. We understand that.
24 The issue is we need to have a clear guideline as to
25 how it is that this is to be interpreted and

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1 understand how that's going to correspond and be
2 enforced going forward. Thank you. With that I
3 rest.

4 VICE CHAIRPERSON HILL: I just have a quick
5 question. So the by right that you spoke about, and
6 I'm in agreement that it's really just the penthouse
7 and the five feet that we're talking about, the five
8 feet, 10 inches. So that again was by right.

9 MR. TONDRO: By right up to -- right. Up to
10 15 feet they could go.

11 VICE CHAIRPERSON HILL: Right.

12 MR. TONDRO: And so that was in, within --

13 VICE CHAIRPERSON HILL: Right.

14 MR. TONDRO: -- the envelope that is
15 permitted by right, yes.

16 VICE CHAIRPERSON HILL: Exactly. And the
17 appellant would have known of this change due to the
18 posting for the plans, and then they would have gone
19 down to DCRA and looked at the plans and seen that
20 again the plans had been changed. Or I'm not exactly
21 sure changed is the right word. The plans now
22 included a height of a penthouse structure that's
23 going to be to this 15 feet, 10 inches.

24 MR. TONDRO: Right.

25 VICE CHAIRPERSON HILL: That's they way --

1 MR. TONDRO: All I'm saying is --

2 VICE CHAIRPERSON HILL: -- it should have
3 taken place.

4 MR. TONDRO: -- if there was any confusion or
5 concern about the representations made by the permit
6 holder, I certainly would be -- it's just like in a
7 real estate transaction, you're the buyer from the
8 seller. You don't necessarily trust the seller,
9 you're going to go and make sure that you do your due
10 diligence and look at what else is out there. This
11 is the same kind of situation here that from our
12 standpoint, if there was any confusion, and it
13 appears that there was some confusion or at least
14 some reason for them to be doubtful as to the
15 voracity, or at least the willingness of the permit
16 holders to provide plans, because there's repeated
17 requests from February and March for the approved
18 plans. Our assertion is that as of the date that
19 that permit was issued and posted on the property
20 right next door, it was up to them. They had notice
21 under the Zoning Regulations, 3112.2B to come to DCRA
22 and to ask us for those plans to confirm that there
23 was no double-dealing. There was no, you know,
24 playing around and mixing around all these issues
25 that have been asserted here. That's the reason why

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1 DCRA is the custodian of the records and there's an
2 official copy right there.

3 VICE CHAIRPERSON HILL: All right. Does the
4 Board have any questions right now?

5 MR. MILLER: Just one quick one.

6 VICE CHAIRPERSON HILL: Sure.

7 MR. MILLER: So how long has this
8 longstanding interpretation of what you have the
9 authority -- that it's only tied to the relief that
10 was requested and granted, and the conditions. I
11 assume it's been a long time and are there also court
12 cases on that point?

13 MR. TONDRO: I don't have a court case. I
14 don't believe it was litigated yet on this issue.
15 Otherwise I'm sure this would have already been
16 raised a long time ago by the appellants, if not by
17 us, for whomever's side it came down on. But I would
18 turn it over to the Zoning Administrator to answer
19 the specifics of your question, if I may.

20 MR. MILLER: Okay.

21 MR. LeGRANT: Good afternoon, Members of the
22 Board. My experience as Zoning Administrator now
23 going on nine years is that has been the practice
24 during my tenure. I can't -- it is my general
25 understanding it was the practice of my predecessors.

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1 I cannot speak specifically to that. Perhaps the
2 Holland and Knight, which their combined experience
3 spans prior to my tenure. But I can just speak for
4 myself as during my tenure as Zoning Administrator
5 that's been my practice.

6 MR. TONDRO: And I would say, it's also one
7 of the difficulties is sort of proving what didn't
8 happen, there's a counter-factual, because it's a
9 difficulty of trying to prove when it was that a
10 permit was issued that departed from the BZA plans.
11 If there was no appeal, how are we supposed to figure
12 out when exactly that started. But from our
13 understanding it's a longstanding practice.

14 MR. MILLER: Thank you. Okay. Thank you.

15 VICE CHAIRPERSON HILL: Okay. Does the
16 appellant have any cross?

17 MS. HORVITZ: Yes, I do. Thank you. What's
18 the basis for the characterization that the
19 difference is five feet? To speed it along, you
20 relied on an exhibit from the building permit set
21 that shows the penthouse parapet at 16. -- at 213
22 feet, 10 inch. 213, 10 feet. Part one.

23 MR. TONDRO: Yeah.

24 MS. HORVITZ: Okay. And then the roof
25 elevation is 196.64.

1 MR. TONDRO: Yes, that is what I read. Since
2 I'm able to read the plans.

3 MS. HORVITZ: Okay. Thank you. Cute. So
4 isn't that a difference of 7.46, or thereabouts?

5 MR. TONDRO: Yes.

6 MS. HORVITZ: And isn't that approximately an
7 80 percent increase over a promised nine-foot
8 penthouse?

9 MR. TONDRO: That I'm not sure I'm following
10 you on.

11 MS. HORVITZ: All right. So if a penthouse
12 is promised to be nine feet, and now with parapet
13 it's 16.45, that's a pretty substantial percentage
14 increase, is it not?

15 MR. TONDRO: I prefer I think, generally, to
16 deal with the absolute feet. If you want to deal
17 with percentages, that's fine. If that's your
18 assertion that is 80 percent. I think it's a little
19 less than that, but --

20 MS. HORVITZ: Okay. And --

21 MR. TONDRO: I just --

22 MS. HORVITZ: Yeah, go ahead.

23 MR. TONDRO: -- want to understand if I can.
24 I know I'm not supposed to answer the questions but -
25 - or ask the questions in this case. But I'm using

1 the plans that you did or did not rely on?

2 MS. HORVITZ: I'm asking the question based
3 on the permit set that has been put in by the owner.

4 MR. TONDRO: Okay.

5 MS. HORVITZ: Which shows a penthouse --

6 MR. TONDRO: Okay.

7 MS. HORVITZ: -- parapet elevation of 213.10,
8 and comparing it to the BZA approved plans. The
9 exercise that you --

10 MR. TONDRO: Yes.

11 MS. HORVITZ: -- sought to engage my client
12 in.

13 MR. TONDRO: Yes. If what you wanted was the
14 two plans that that I was relying on for the
15 discrepancy that I stipulated to, I was stipulating
16 between, as I stated, the original board plans which
17 were BZA Application 18330 and that was A4.1, I
18 believe. And then on the other hand, that was the
19 original, that was sort of the baseline. And then
20 from there, going instead to the Tab K of -- 16K in
21 the exhibit of this particular proceeding of owner's
22 motion to dismiss.

23 MS. HORVITZ: But that's more than five feet.

24 MR. TONDRO: Pardon me. If you're including
25 the parapet, yes. I was using the penthouse roof.

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1 MS. HORVITZ: Okay. And you said that 3205.3
2 does not apply. Is that your opinion, or your
3 testimony? That this is not a condition, the
4 penthouse height is not a condition.

5 MR. TONDRO: There are two conditions in the
6 order for BZA 18330. I read them both off into the
7 record. Neither of them deals with the height of the
8 penthouse roof.

9 MS. HORVITZ: And just to be clear, so you're
10 interpreting 3205.3 to only require compliance with
11 separately enumerated conditions in BZA orders?

12 MR. TONDRO: One second. Yes, and the reason
13 is for the following. I'm looking at the order for
14 BZA Application 18330, page number 16.

15 MS. HORVITZ: Yes.

16 MR. TONDRO: And that one states, "It is
17 therefore ordered that the applications hereby
18 granted, subject to the approved plans as shown on
19 Exhibit 30 and the following conditions." Unquote.

20 MS. HORVITZ: Okay. So you're disregarding
21 the compliance with the subject -- the plans, and
22 you're saying that the only compliance that's
23 necessary is with the two enumerated conditions
24 unless the change increases the relief granted?

25 MR. TONDRO: 3205 I don't think is a posit

1 here because of the fact that the two conditions are
2 irrelevant. So I don't think 3205 is relevant. If
3 there was a condition that was violated, which is not
4 the case, then 3205 would be relevant. Otherwise, in
5 terms of interpreting subject to approved plans, and
6 again, I'm not trying to be nice. I'm just trying to
7 make sure we're separating, subject to approved plans
8 as I stated, the ZA's established practice has been
9 to limit to the area of the relief that was granted
10 by the Board. And to that, and only to that,
11 provided other changes were made within as a matter
12 of right that complied with the Zoning Regulations.

13 MS. HORVITZ: So just to be clear, your
14 interpretation of 3205.3 relates only to separately
15 enumerated conditions?

16 MR. TONDRO: I believe that's the case. Give
17 me one second to --

18 MS. HORVITZ: I mean, it does use the word
19 conditions. Just, if this is an important issue that
20 the Board needs to decide, it should appreciate that
21 the Zoning Administrator's interpretation is that
22 unless it's set forth in a separately enumerated
23 condition it doesn't matter.

24 MR. TONDRO: Yes. I'm struggling to
25 understand why -- yes, absolutely. 3205.3, I'll just

1 read off if I may. "If a building permit or a
2 certificate of occupancy has been issued under the
3 authority of the decision of the Board to approve a
4 special exception or variance, then for the purposes
5 of 3205.4 and 3205.5, each condition to the approval
6 of the special exception or variance shall be treated
7 as a condition to the issuance of the building permit
8 or the certificate of occupancy."

9 I think that's plain language. I think it's
10 clear when the Board issues its orders, what are
11 conditions and what are not.

12 MS. HORVITZ: All right. But isn't an
13 addition condition that the construction be compliant
14 with the subject to the plans?

15 MR. TONDRO: No, that's governance by 3215.7
16 and 3215.8.

17 MS. HORVITZ: Okay. And you raised the
18 timeliness issue in your remarks to some extent. Can
19 you explain why Mr. Wiedis, when he went to DCRA, was
20 unable to review a set of the plans?

21 MR. TONDRO: As I have stated before on the
22 record, in the absence of any evidence to give me a
23 time, a date, a place, a person with whom they spoke,
24 a place in the sense of which room where, I don't
25 understand how it is that I can possibly respond to

1 that. It's an unsubstantiated allegation. I'm not
2 saying it's not accurate. I'm not saying he didn't
3 go there. I'm just saying we have no independent
4 evidence to know, number one, did it happen. Number
5 two, when it happened. With whom he interacted, and
6 therefore what was said. If we know the person and
7 the time we could be in a position where we could
8 understand from that person and maybe even bring them
9 to testify if there was a miscommunication.

10 I would point out that it's pretty clear that
11 the parties here, the two parties other than DCRA,
12 have had plenty of communication and plenty of
13 misinterpretation between the two of them. So I
14 think it's very clear that that is easily happened.

15 MS. HORVITZ: And can you explain why a DCRA
16 staff member would communicate to Mr. Wiedis that the
17 plans were not publically available to him because he
18 was not affiliated with the developer?

19 MR. TONDRO: As I said before, I have no way
20 of knowing. The only thing that it possibly occurs
21 to me is a time when it appears this is not the case,
22 which is before permit issuance. It has been
23 established practice that before permit issuance,
24 while they were under review and while the plans are
25 subject to change, I want to repeat, while they're

1 under review before the permit is issued, that at
2 that point those plans are deemed to be owned
3 effectively by the applicant, and as a result or not
4 shared.

5 Having said that, however, I also have sat in
6 on many cases where our standards practice is that
7 when a neighbor comes in and identifies himself as a
8 neighbor, that they are granted access to that plans.
9 Again, supervised by a DCRA staff. I can provide
10 examples. 7 Grant Circle was a recent case where
11 that happened. There was another at 67 V. This is
12 common practice.

13 MS. HORVITZ: Have you ever encountered any
14 other circumstance where you've heard that a neighbor
15 has gone to DCRA and been unable to review a set of
16 plans? Have you ever heard that before?

17 MR. TONDRO: I'm not -- no. Not that I am
18 personally am aware of. Have there been times when
19 people have reached our personally to me? Have there
20 been times when they reached out to other people?
21 Yes. But I have never had a situation where somebody
22 says they were told flat out that they would never
23 get any plans, no.

24 MS. HORVITZ: And I would direct that
25 question to the Zoning Administrator.

1 VICE CHAIRPERSON HILL: Mr. LeGrant.

2 MR. LeGRANT: Yes. So let me understand your
3 question. The question is, anyone ever come, I guess
4 in this case to me, and said I was not able to get
5 access to plans?

6 MS. HORVITZ: Correct.

7 MR. LeGRANT: Okay. What has happened on
8 occasion is I think probably about three or four
9 occasions, or in my tenure, is that people said, hey,
10 Mr. Zoning Administrator, you directed me to -- I'm
11 an interested neighbor, I want to look at the plans.
12 I went to X office, file room, records office or
13 something, and I wasn't -- I was told I couldn't get
14 -- I could not see those plans. This was a neighbor.
15 He said, I'm sorry, you got misinformation. Let me
16 correct that, and I would go to that individual and I
17 would say, those are public records, you have to
18 provide them. So I corrected that I think on three
19 occasions during my tenure.

20 VICE CHAIRPERSON HILL: Any more questions,
21 Ms. Horvitz?

22 MS. HORVITZ: No.

23 VICE CHAIRPERSON HILL: Okay. So now the
24 property owner would have an opportunity to present.
25 Does the property owner want to present? And if so,

1 how long would the property like to present?

2 MS. SHIKER: We do not need to cross-examine,
3 but we do need to present and I think that would be
4 no more than 20 minutes, probably closer to 15
5 minutes.

6 VICE CHAIRPERSON HILL: Okay.

7 MS. SHIKER: Thank you. The permit holder
8 believes that the appellant's challenge to the
9 issuance of the building permit is without merit and
10 should be dismissed for three reasons.

11 First, as has been discussed at length here,
12 the Zoning Administrator routinely grants building
13 permits for projects that include modifications to
14 the BZA approved plans so long as the BZA plans do
15 not impact the relief granted or the conditions set
16 forth in the order, in the BZA order.

17 In many cases, as we're going to describe
18 here, we discuss with the Zoning Administrator how we
19 are fulfilling the intent of the BZA order. There
20 have been multiple evidence of this discussion and
21 ultimately the building permit plans that were
22 reviewed were consistent with the intent of that
23 order.

24 Second, the appeal is barred by the doctrine
25 of equitable estoppel. I agree with Mr. Tondro, this

1 is a fundamental issue. The Zoning Administrator has
2 historically taken this position and I think you have
3 seen through our statement, there are many, many
4 examples of this occurring. The owner just went
5 through the normal process that it expected to go
6 through for that issue. I will point out that ZRR,
7 which was approved in January and will go into effect
8 in September, does now identify certain areas of
9 changes that the Zoning Administrator -- I looked at
10 the site yesterday -- can make, and puts it much more
11 akin to a PUD. So I certainly think we'll see
12 changes to the amounts of flexibility that are going
13 to have to come out of a BZ order if this consistent
14 and historic interpretation is changed.

15 And finally, as we have discussed in length
16 in the motion to dismiss, the appellants are barred
17 by bringing this from *Latches*. They've known about
18 this. We're going to go through some facts in a
19 minute. The owner has been hard at work with
20 appellants and this late date with the building
21 constructed, it's a very difficult situation. And so
22 they're barred by *Latches* from bringing the appeal.

23 The building is being constructed in
24 accordance with the approved building permit plans.
25 No one has asserted otherwise. Those building permit

1 plans are in accordance with the BZA order, including
2 the conditions, and they comply with the Zoning
3 Regulations as determined by the Zoning Administrator
4 through the process. Therefore, the appeal is
5 without merit.

6 I will ask Mr. Papke to give you some facts.
7 I want to make a couple of clarifications and then
8 I'm going to talk a bit about how the facts apply to
9 the law. There's a lot of different numbers floating
10 around and there has been questions about them and
11 I'd like just to throw some numbers out so that you
12 can understand. There's a difference when we're
13 talking about the height of the penthouse or the
14 height of the roof or the parapet in terms of
15 elevation above sea level, versus the zoning height.

16 Appellants refer to the nine feet that was
17 discussed in depth at BZA 18330. That was the height
18 above the roof. But the elevation on those plans was
19 that 207.10. So that's 207.83 in terms of feet.

20 The height of the top of the building was at
21 198.10. There was private property owner agreements
22 that lowered the height of the building and the
23 height of the parapet. That's a private settlement
24 agreement that we talked about the April 2013 letter
25 that was required by the settlement agreement. That

1 lowered it a foot. While not germane here, there is
2 nothing required in that settlement agreement that
3 references nine feet in height.

4 There were plans that we're going to talk
5 about that were presented, and we're going to talk
6 about the height of the penthouse on those plans. So
7 207.10 is the height of the penthouse on the BZA
8 approved plans. We have 208.78, which is what is
9 shown before you add the parapet on the March plans,
10 which I'm going to refer to, which are the schematic
11 plans on the left. And then the building permit
12 plans, we've all agreed through much testimony,
13 213.1, not 10. 213.1. So it's just -- it's very,
14 very close to 213.

15 So when you hear these different discussions,
16 the seven feet versus the five feet, it's because
17 people are comparing elevations to absolute heights
18 because the roof of this building kept getting lower
19 and lower and lower, which ultimately had less impact
20 on the Erie. So all of the relief granted by the
21 Board in the special exception was not used. The
22 roof got lower by about two feet from the time the
23 Board approved it to the time that it was gone in for
24 building permit.

25 So I'd ask Mr. Papke to give some facts and

1 then I'll sum up.

2 MR. PAPKE: Here we go. Good afternoon.
3 Good evening, maybe. My name is Brian Papke again.
4 I'm the design manager, Capitol City Real Estate.
5 I'm just going to read down my letter here to make
6 sure I get everything in if you don't mind.

7 I've been involved with this project since
8 Capitol City purchased the property in November 2013.
9 When Capitol City purchased the property we knew of
10 the BZA order and the approved plans, as well as the
11 requirements to build in accordance with approved
12 plans. The property was underwritten based on this
13 requirement and Capitol City was prepared to
14 construct the building according to the BZA approved
15 plans.

16 We took the opportunity to study the building
17 design to determine if there were modifications to
18 the layout that would enable us to construct a
19 consistent design but with better efficiencies. Our
20 goal was to keep the exterior design of the building
21 the same, not impact any of the areas of relief
22 granted by the Board, comply with the conditions of
23 the BZA order, and to positively impact the Erie to
24 the north, given the history of their opposition.

25 We initially met with the Zoning

1 Administrator to determine if the proposed revisions
2 would be sufficiently consistent with the BZA
3 approval such that we could move forward with
4 schematic designs. The Zoning Administrator
5 requested that would provide additional information
6 and reach out to the neighbors to ensure that they
7 supported the modifications given their act of
8 involvement in the case.

9 We reached out to the appellants to review
10 the changes, which we felt had a positive impact on
11 the Erie building, including the following. This is
12 just highlights of some of the things.

13 We incorporated a conforming side yard to
14 allow more light and air, as well as providing a
15 green space with trees. This eliminated any direct
16 physical contact with the Erie building, removed the
17 need to do underpinning and property line work, and
18 resulted in less potential noise transmission between
19 the two buildings post-construction.

20 We pulled the north wall of the penthouse
21 structure on the side of the Erie building back an
22 additional eight feet from the previous design, which
23 provides much more buffer than the previous design
24 did. We also pulled the west wall of the penthouse
25 structure on the street side, Champlain Street, back

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1 an additional seven foot, six from the previous
2 design to allow for more clear views southward from
3 the Erie penthouse front roof deck.

4 Interesting to me when Mr. Wiedis provided
5 these sketches. I sketched my own sketch on there
6 what the previous design approximately looked like in
7 the little block there. Just a side note.

8 So appellants indicated general support for
9 these revisions. You know, I guess as documented
10 here for the record in an e-mail from him to me,
11 basically saying, or quote, "You can indicate to the
12 administrator that we are likely to be in favor of
13 the new design." Unquote.

14 We met again with the Zoning Administrator
15 and he then issued the February 2014th determination
16 letter. The plans, which are provided and reviewed
17 with the Zoning Administrator did not change the
18 areas of relief. The height of the roof was at 197
19 feet, dash, 10 inches, and the height of the parapet
20 was at 199 feet, dash, six inches. The penthouse
21 height had a -- the penthouse had a height of 208.78
22 feet. And this was believed to be consistent with
23 the BZA rule.

24 We continued our outreach to appellants.
25 While it took several months of back and forth we

1 finally scheduled an in-person presentation to
2 appellants and presented the project to them on March
3 18th, 2014. By that time, we were aware the
4 appellants had concerns regarding the location of the
5 air handling units on the main roof. These units
6 were proposed to be located on the main roof of the
7 building and they would be unscreened, which is
8 permitted by both the Zoning Regulations and building
9 code.

10 Appellants were worried about the visual
11 impact of the air handling units as well as the
12 noise. While we were able to move forward the design
13 of the project as approved by the February
14 determination letter, we proposed revised penthouse
15 to appellants that placed the air handling units on
16 top of the roof of the penthouse, screened by a
17 parapet wall. This was in direct response to the
18 concerns that they expressed.

19 At the March meeting we showed that parapet
20 wall as being 3.5, that's three and a half feet, on
21 top of the penthouse as was previously shown.
22 Appellants represented to us at that meeting that
23 this solution was acceptable.

24 I sent the plans to Appellant Wiedis on March
25 19th and then again on March 29th. When I stated

1 that the plans were continuing to be modified it was
2 because these plans were schematic drawings and not
3 construction drawings. I did not say that we would
4 lower the penthouse further from what was shown in
5 those documents as we had agreed this solution was
6 the best.

7 Based on the appellant's general indication
8 of support at the March meeting and the fact that
9 appellants who were consistently reaching out to us,
10 never objected to this solution, we fully designed
11 the roof and penthouse based on this revision,
12 including loads, structure, mechanical line
13 connections, as well as the green roof and storm
14 water management systems.

15 We submitted the building permit application
16 on July -- in July of 2014. We broke ground at the
17 end of January, beginning of February 2015.
18 Excavation, underpinning, and sheeting and shoring
19 began in February and March, 2015. We completed the
20 building's foundation in April of 2015. We had
21 multiple e-mail correspondence with appellants during
22 this time. Given issues that were raised in the e-
23 mails, I instructed my employees, Christian Kronan
24 and Mike Lawler, to meet the appellants and show them
25 the building permit plans.

1 They met with appellants on May 12th, 2015 to
2 review and discuss those plans. That meeting
3 occurred at the Erie building and then they went to
4 the roof to discuss the penthouse. The building
5 permit was issued as of June 17th, 2015. It was
6 laminated and immediately posted on our property no
7 the board which is immediately adjacent to
8 appellant's property.

9 In June through October 2015 we worked on
10 construction of the building under the main building
11 permit. We were contacted by appellants in early
12 October regarding the penthouse and then this appeal
13 was filed.

14 MS. SHIKER: In this process when the owner
15 became -- when Capitol City, the permit holder,
16 became the owner of the property, they took every
17 step to work with appellants to try to resolve their
18 concerns and to address their issues. They were
19 prepared to move forward with the exact BZA approved
20 plans, but there were many benefits to the appellants
21 from these plans. And I think a lot of the
22 construction benefits said there was going to now be
23 a nice side yard between the two properties was a
24 very large benefit.

25 Before they went forward with schematic

1 design they met with the Zoning Administrator two
2 different times to review all of these changes. The
3 Zoning Administrator issued two different reliance
4 letters and concluded that the changes had an
5 imperceptible impact on the architectural design of
6 the project, and that the modifications would also
7 reduce the impact of the Erie building to the north.

8 The Zoning Administrator went through that
9 analysis to make sure that the intent of the Board's
10 order was being met. While the revised penthouse at
11 this time was not nine feet, as was testified at the
12 BZA hearing, the height at 208.78 was generally
13 consistent with these plans. 207.10 was the approved
14 penthouse height on the BZA plans. It was now at
15 208.78, and it had a height that was well less than
16 what was permitted as a matter of right, which was 18
17 and a half feet. And it complied with all the BZA
18 conditions, all the conditions in the BZA order.

19 I know there has been comments that the
20 permit holder deceived the Zoning Administrator by
21 not providing these plans. We are not sure why
22 they're not posted, but I do have here for the
23 record, the e-mail that transmitted the plans that
24 does include the roof plan and the section showing
25 the height of the plan on it. Again, it does not

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1 show the parapet which is shown here. It shows
2 208.78, because that is what the owner was intending
3 to move forward with, also why the owner responded
4 affirmatively to appellant's request. Are you
5 changing the penthouse height? No. Because in the
6 appellant's view 208.78 was generally the same as
7 207.10, and it was moving forward with those plans.

8 Third, in the BZA order, the BZA concluded
9 that the additional height under the special
10 exception would not have any adverse impact on the
11 Erie. And the conclusion of law states, despite the
12 fact that the association has no right to a view
13 across the site, and the association has no expressed
14 easement for a view across the site, the applicant
15 has made significant efforts to maintain the views
16 for the Erie.

17 They did not include a condition as to the
18 nine feet. They did include two extra conditions
19 relating to the use of the roof and what was going to
20 go on there.

21 The next refinement to the plan came as a
22 direct result of the request of the appellants. As
23 Mr. Papke testified, there were concerns about the
24 air handling units. There was discussion about where
25 they would go, and at the March 18th meeting owner

1 presented a revised document and it was basically the
2 exact document that had been presented to the ZA with
3 the addition of the parapet to say, here we were at
4 208.78. We'll put the air handling units here, we
5 have to screen them with a parapet. It added three
6 and a half feet. At this point it was clear that the
7 penthouse would be taller than nine feet at this
8 presentation. And as Mr. Papke testified,
9 appellant's expressed support for this solution at
10 their March 18th meeting.

11 Owner viewed the nine-foot penthouse as a
12 concession to the Erie to assist with maintaining
13 those views consistent with the Board's order. With
14 this change they believed it to be a new different
15 concession, but a concession all the same because the
16 roof structure continued to comply with the
17 regulations, it had been set back further. It had
18 been set to the east further so that the views to the
19 south would be better. These changes were made in
20 direct consultation. They had no view that they were
21 violating a BZA order because the intent of the BZA
22 order -- excuse me, the BZA order, was to preserve
23 those views and to reduce impacts, and there was no
24 specific condition despite the fact the Board found
25 it necessary to put multiple conditions about the use

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1 of the roof in that order.

2 Several months later and multiple updates to
3 appellants, owner designed the building with all of
4 the different elements that go into it with the air
5 handling units on the top. They submitted for
6 building permit, and the Zoning Administrator's
7 office reviewed and approved the plans. The
8 penthouse complied with the height permitted by the
9 Zoning Regulations, was further set back from the
10 abutting property to the north. All the conditions
11 of the BZA order were met, and the plans were
12 otherwise consistent with the February 2014
13 determination letter in which the refinements to the
14 building had been evaluated in light of the intent of
15 the BZA order. The construction of the building is
16 proceeding in accordance with those approved plans
17 right now.

18 Contrary to appellant's assertion, owner does
19 not believe that you can simply ignore the approval
20 or conditions of the BZA. Owner complied with the
21 conditions and believed it was complying with the
22 intent of the BZA order. The owner went through a
23 detailed evaluation of these initial refinements to
24 ensure that they were consistent with the BZA. The
25 final change, which is the issue of the appeal, was

1 made in direct response from appellants.

2 In March 2014, if appellants had expressed
3 the concern about this additional height on top of
4 the penthouse, owner could have constructed the
5 project with the air handling units on the main roof,
6 not the penthouse roof, as proposed in the plan
7 approved in February 2014 by the Zoning
8 Administrator. But that's not what the appellants
9 asked for in these meetings. They were obligated to
10 inform the owner at these different times with all of
11 these different communications that this is not what
12 they wanted. The air handling units would go on the
13 main roof. They're now limited by estoppel and
14 *Latches* to bringing this appeal and the Zoning
15 Administrator has clearly shown that it did not err
16 in issuing the permit.

17 This is a situation where an owner took every
18 reasonable step to work with an appellant. And at
19 this late date, with the building almost fully
20 constructed with occupancy originally planned for
21 March or April of this year, are in a very difficult
22 situation despite all of their efforts and reasonable
23 steps. Thank you.

24 VICE CHAIRPERSON HILL: Thank you. Ms.
25 Horvitz, do you have any questions for the building

1 owner?

2 MS. HORVITZ: I do. Thank you.

3 VICE CHAIRPERSON HILL: And if so can I ask
4 you just a little bit, do you know how long you might
5 need?

6 MS. HORVITZ: Fifteen minutes.

7 VICE CHAIRPERSON HILL: Can you do 10?

8 MS. HORVITZ: I'll do my best.

9 VICE CHAIRPERSON HILL: Okay. Because then
10 you also have to sum up.

11 MS. HORVITZ: My summary should be short.

12 VICE CHAIRPERSON HILL: Okay. Thank you.

13 MS. HORVITZ: Mr. Papke, did you write Mr.
14 Wiedis of Erie Condominium Association on December
15 23rd, 2013 and state that you were not increasing the
16 penthouse height?

17 MR. PAPKE: Yes.

18 MS. HORVITZ: So that was December 23rd,
19 2013?

20 MR. PAPKE: I need to confirm the
21 documentation. You have that?

22 MS. HORVITZ: Late December, 2013.

23 MS. SHIKER: The document is in the record.
24 Can you point to the page, please?

25 MS. HORVITZ: Sure. Exhibit 18. And H, Tab

1 H, on the last page. So you can see the e-mail from
2 Brian Papke to Rich Wiedis. Do you see that, dated
3 December 23rd, 2013?

4 [Pause.]

5 MR. PAPKE: It sounds like the answer is yes,
6 if it's included that list of questions, that's one
7 of the questions. Correct.

8 MS. HORVITZ: Yes. Specifically question
9 number 4.

10 MR. PAPKE: I don't have that in front of me,
11 but I do recall that question.

12 MS. HORVITZ: Okay. And did you, on December
13 23rd, 2013, already have a set of plans dated
14 December 9, 2013 in which you decided to increase the
15 penthouse height?

16 MR. PAPKE: I'm not sure what your question
17 is. Did I increase it later?

18 MS. HORVITZ: Well, you've referred to plans
19 such as the one that is Sheet A9 that has an
20 increased penthouse height, correct?

21 MR. PAPKE: I referred to that plan you said?

22 MS. HORVITZ: I mean, at the beginning of the
23 testimony there was a reference to this Sheet A9 that
24 was -- this is the sheet that you say was given to my
25 clients in March. Is that correct?

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1 MR. PAPKE: That's correct.

2 MS. HORVITZ: But it's dated December 9th,
3 correct?

4 MR. PAPKE: Yeah, that's correct. That's
5 dated that date. Doesn't mean it was created that
6 date.

7 MS. HORVITZ: Well, when was it created?

8 MR. PAPKE: I'm not sure. Later.

9 MS. HORVITZ: So you created it after
10 December 9th, 2013, but put a date of December 9th on
11 it?

12 MR. PAPKE: I believe -- I don't have a
13 specific recollection, but it was meant to match the
14 previous set.

15 MS. HORVITZ: So as you sit here today do you
16 know whether or not when you made the representation
17 to my client on December 23rd, 2013, that you were
18 not increasing penthouse height, do you know whether
19 or not you had already had plans designed to increase
20 the penthouse height?

21 MR. PAPKE: I did not have a drawing showing
22 that additional parapet height, and I have planned
23 for the same 208.78 as was shown in this drawing and
24 the previous. So I guess this, as part of our
25 discussion in continuing our e-mails, we added that

1 parapet later.

2 MS. HORVITZ: But dated the document December
3 9th.

4 MR. PAPKE: Yes. It was dated to match the
5 pervious set, since all the other drawings were the
6 same.

7 MS. HORVITZ: All right. And then it was
8 testimony of you or counsel that there was a general
9 support expressed by the Erie Condominium to the
10 concept of the redesign. Do you recall that?

11 MR. PAPKE: Can you say that date again?
12 What?

13 MS. HORVITZ: I didn't give you a date.
14 There was testimony that there was general support by
15 the Erie Condominium when you went to them about the
16 redesign, correct?

17 MR. PAPKE: At what point did I go to them?
18 Say that again.

19 MS. HORVITZ: It was Ms. Shiker said that
20 there was general support.

21 MS. SHIKER: Can you tell him --

22 MS. HORVITZ: I believe it was in the January
23 2014 time frame.

24 MR. PAPKE: I'm just trying to determine at
25 what point you're looking for their support because I

1 know that, you know, specifically the March 18th
2 meeting was the primary crux of everything that came
3 together. So from that meeting I would represent
4 that based on our discussion with everybody there,
5 including all the members of the Board that showed up
6 from the Erie, including Mr. Wiedis, we all discussed
7 lots of changes, the biggest of which was adding --
8 moving the mechanical units in favor of a green roof,
9 hiding it from light, sound, everything that
10 mechanical units involve. Yes. I would represent
11 they were largely in favor of that.

12 MS. HORVITZ: But you represented to the
13 Zoning Administrator before that that there was
14 general support by the Erie Condominium, correct?

15 MR. PAPKE: Yeah, referencing the e-mail I
16 read before on the record, they were in favor of
17 that. And that's prior to any addition to any
18 parapet.

19 MS. HORVITZ: All right. So I don't know
20 what this was assigned. Mr. Moy has stepped away.
21 But Ms. Shiker put into evidence the transmittal e-
22 mail to the Zoning Administrator dated January 23rd,
23 2014. Do you see that?

24 VICE CHAIRPERSON HILL: Ms. Horvitz, just, I
25 understand where you're going in terms of the

1 questioning, and I am not sure whether or not you
2 know, whether he conveyed clearly enough to the Board
3 as to what the intent was. It's not necessarily
4 helping me get to where the error was with the ZA.

5 MS. HORVITZ: Okay.

6 VICE CHAIRPERSON HILL: And so just to
7 refocus for your questions and then also for your
8 summary, again --

9 MS. HORVITZ: Right.

10 VICE CHAIRPERSON HILL: -- how did the ZA
11 err. That's what I'm going to be, and we as a board,
12 are going to be focused upon.

13 MS. HORVITZ: And I appreciate that guidance.
14 I mean, there is an assertion of *Latches* and
15 equitable estoppel that's been asserted. And so I'm
16 trying to establish that there's something of an
17 unclean hands here with respect to the conduct of the
18 owner that precludes them from asserting equitable
19 defenses here. I mean --

20 VICE CHAIRPERSON HILL: And again, whether
21 that's in our purview or not, I don't think so. I
22 mean, so I just want you to make best use of your
23 time.

24 MS. HORVITZ: I appreciate that.

25 VICE CHAIRPERSON HILL: And how much energy

1 we might have left.

2 MS. HORVITZ: Okay.

3 VICE CHAIRPERSON HILL: To focus. So, thank
4 you.

5 MS. HORVITZ: Fair enough. Just to wrap this
6 up, on --

7 VICE CHAIRPERSON HILL: So this is your --
8 just to be clear, this is your summary now?

9 MS. HORVITZ: No.

10 VICE CHAIRPERSON HILL: Okay.

11 MS. HORVITZ: I wish.

12 VICE CHAIRPERSON HILL: Okay.

13 MS. HORVITZ: Okay. On January 17th, 2014
14 Ms. Shiker wrote on your behalf and advised the
15 Zoning Administrator that the Erie was in general
16 support, correct?

17 MR. PAPKE: That looks correct.

18 MS. HORVITZ: All right. But that was just a
19 few weeks before you had told Erie Condominium
20 Association that you weren't increasing the penthouse
21 height, correct?

22 MR. PAPKE: I'm not exactly sure. A few
23 weeks before?

24 MS. HORVITZ: Yeah, December 23rd.

25 MR. PAPKE: In reference to that, back to

1 that January 2nd e-mail, is the e-mail to me in favor
2 of the design.

3 MS. HORVITZ: Right. So January 2nd, after
4 you told them that all these characteristics that
5 were benefits, including not increasing the penthouse
6 height, it was based on those representations that
7 you got some generalized support, correct?

8 MR. PAPKE: Yes.

9 MS. HORVITZ: All right. And the generalized
10 support was predicated on your answers on December
11 23rd, that there would not be an increase in
12 penthouse height, correct?

13 MR. PAPKE: Can you ask that question again?
14 I lost my train of thought. Sorry.

15 MS. HORVITZ: Okay. You now recall that
16 there was an expression of generalized support in
17 early January 2014, correct?

18 MR. PAPKE: Correct.

19 MS. HORVITZ: And that that is just two weeks
20 after you'd made the representations that you weren't
21 increasing the penthouse height.

22 MR. PAPKE: That's correct.

23 MS. HORVITZ: All right. And Ms. Shiker,
24 would you stipulate that the plans that are attached
25 to zoning determination letter dated February 10,

1 2014 on the Zoning Administrator's website do not in
2 fact have any of the plans showing any increase in
3 height?

4 MS. SHIKER: I don't think that I'm subject
5 to cross-examination, but we did submit the plans
6 that show the penthouse height at 208.78 just like we
7 have testified. It shows it at 208.78.

8 VICE CHAIRPERSON HILL: I have to wait for
9 Mr. Moy, or --

10 MS. HORVITZ: Just for the record, you don't
11 need to examine them now, but I'm submitting the
12 online posting of the determination letter from
13 February 10, 2014, which does not include any of the
14 plans showing an increase in height. Even though the
15 testimony was that the Zoning Administrator approved
16 an increase in height at that time.

17 VICE CHAIRPERSON HILL: Okay.

18 MS. HORVITZ: And, Mr. Papke, when you sent
19 the plans to my client you testified you sent the
20 plans to my client in March of 2014.

21 MR. PAPKE: Yep.

22 MS. HORVITZ: All right. And those were
23 dated December 9, 2013?

24 MR. PAPKE: Yeah, I believe so.

25 MS. HORVITZ: All right. That's all I have.

1 VICE CHAIRPERSON HILL: Okay. All right.
2 Well, if you wouldn't mind, I guess giving a summary
3 to us of your case and then so we'd be able to take
4 it back and think about it.

5 MS. HORVITZ: Thank you. The Board's
6 indulgence. Could I ask Mr. Wiedis two or three
7 rebuttal testimony questions, just to rebut specific
8 facts? That were put on by the owner. Just very --

9 VICE CHAIRPERSON HILL: Very quickly.

10 MS. HORVITZ: Fast. Fast.

11 VICE CHAIRPERSON HILL: Sure.

12 MS. HORVITZ: Okay. Mr. Wiedis, did you ever
13 expressly agree to putting the mechanical equipment
14 on top of the penthouse roof with any knowledge that
15 that would result in an increase in penthouse height?

16 MR. WIEDIS: No, we did not. We asked for
17 them to move the mechanical equipment somewhere else.

18 MS. HORVITZ: Okay. And were you ever given
19 a set of permit plans on May 12th, 2015?

20 MR. WIEDIS: No, I was not.

21 MS. HORVITZ: Okay. Did you attend a meeting
22 on May 12th, 2015 with the owner?

23 MR. WIEDIS: I believe so.

24 MS. HORVITZ: And do you recall any
25 discussion of penthouse height at that time? Height.

1 MR. WIEDIS: That meeting was largely about
2 our concerns that the owner was going across the
3 property line as part of his construction.

4 VICE CHAIRPERSON HILL: Okay, Ms. Horvitz,
5 that's three.

6 MS. HORVITZ: That's it.

7 VICE CHAIRPERSON HILL: Okay.

8 MS. HORVITZ: I'm done with that.

9 VICE CHAIRPERSON HILL: All right. Do you
10 have any cross for those?

11 MS. SHIKER: No cross. Thank you.

12 MR. TONDRO: Can I just ask one question.
13 Just one?

14 VICE CHAIRPERSON HILL: Of course.

15 MR. TONDRO: Mr. Wiedis, can you just tell us
16 what was the approximate date you believe you went to
17 DCRA to request the plans?

18 MR. WIEDIS: It was January 19th. And I went
19 to the permit room and the plans room. And I was
20 told by I believe Ms. Jones, and I just say I
21 believe, that first I was told I wasn't entitled to
22 the plans and then I was told that she did not have
23 the plans. And she never clarified which reason was
24 the actual reason that she would not give me the
25 plans.

1 MR. TONDRO: And that was 2016?

2 MR. WIEDIS: Yes.

3 MR. TONDRO: Okay. And you made no other
4 request of any other individual follow up?

5 MR. WIEDIS: Well, we called your office
6 early in the process and asked to talk to you about
7 the whole process, and you didn't return any of our
8 calls. Although we made several attempts to reach
9 you.

10 MR. TONDRO: I recall -- I don't want to go
11 back and forth. I recall one phone call. I
12 apologized, my wife was very ill at that moment in
13 October. I recall one. I'm sorry if I didn't get
14 back to you on that one. Again, as I've stated, that
15 was outside the --

16 VICE CHAIRPERSON HILL: It's okay. We're not
17 going to do this.

18 MS. HORVITZ: No. Okay.

19 VICE CHAIRPERSON HILL: Okay. So please.

20 MS. HORVITZ: Thank you.

21 VICE CHAIRPERSON HILL: Sure.

22 MS. HORVITZ: Just to clarify, there were
23 further requests made for plans directly to the
24 Zoning Administrator himself, which were never
25 responded to. Let me --

1 VICE CHAIRPERSON HILL: Would you like to
2 respond to that?

3 MR. TONDRO: I'd just like --

4 VICE CHAIRPERSON HILL: We're just going to
5 go back and forth but I just want to -- I'll give you
6 an opportunity to respond.

7 MR. TONDRO: And I appreciate it. Really,
8 I'm --

9 VICE CHAIRPERSON HILL: Okay.

10 MR. TONDRO: Really apologize.

11 VICE CHAIRPERSON HILL: Sure.

12 MR. TONDRO: This time the response now of
13 January 19th, I guess, with Ms. Jones. That was
14 something that was helpful. That was something that
15 we could have responded to. That was something that
16 we could have figured that out. If we have something
17 else like that, if there's any allegations in terms
18 of specific e-mails to the Zoning Administrator with
19 a specific date, I think that would be helpful for
20 all of us.

21 VICE CHAIRPERSON HILL: Okay. Okay. Okay.
22 Ms. Horvitz, you want to go ahead and do your
23 closing?

24 MS. HORVITZ: I do, but I could have provided
25 the e-mails to the Zoning Administrator requesting

1 the plans, but if that's of interest to the body.

2 But if it's not --

3 VICE CHAIRPERSON HILL: You've already had
4 your opportunity at that particular play.

5 MS. SHIKER: I am so sorry, but this is like
6 additional testimony.

7 VICE CHAIRPERSON HILL: We're just going to
8 stop, everyone is going to stop, and please --

9 MS. SHIKER: And I just would like to clarify
10 for the record that none of those outreach, none of
11 those calls that you're saying now, happened before
12 August 16th, 2015.

13 VICE CHAIRPERSON HILL: Okay, okay, we're
14 done. We're done. We're done. Okay?

15 MS. HORVITZ: So in closing --

16 VICE CHAIRPERSON HILL: All right. How much
17 time do you need?

18 MS. HORVITZ: Five, seven minutes.

19 VICE CHAIRPERSON HILL: Okay. We'll give you
20 five minutes.

21 MS. HORVITZ: Okay. I actually completely
22 agree with counsel for DCRA, that this case does
23 present a really serious issue which is what is the
24 impact of BZA orders. But I disagree with the
25 solution which is just to deny the appeal.

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1 There are a lot of constructive ways that
2 this body can consider how to solve this problem,
3 whether it's granting express flexibility in orders,
4 which I've seen. I in fact quoted one in my most
5 recent filing. Whether it's enumerating more
6 conditions and being more mindful of the fact that
7 you better put it in a condition. I mean, Holland
8 and Knight is drafting your proposed findings of
9 fact. They're not adding the conditions. And then
10 they're coming in and saying, unless it's a condition
11 and DCRA is saying the same thing.

12 So there are a lot of ways to solve this
13 problem, and it's an important problem which I hope
14 if you take the appeal, which I sincerely hope you
15 will, you'll have an opportunity to start dealing
16 with this. But we're dealing with the facts of this
17 case and the order in this case, and what was
18 expected and required in this case at the time.

19 And BZA order 18330 said that the approval
20 was subject to the plans, and now the Zoning
21 Administrator has in fact erred. There's no disputed
22 fact as to the fact that he approved a plan that
23 created something that is adverse to the neighbor.
24 And I don't buy into the idea that this is opening,
25 you know, opening a huge problem where any incidental

1 change completely unrelated to the zoning relief, it
2 now needs to come back, like the color of the façade.

3 I mean, something that should be thought of
4 from an institutional point of view, but here there's
5 a direct and material correlation between the height
6 of the penthouse on top of the taller roof. I mean,
7 if there were an example of something that was
8 derivatively material to the relief that was granted,
9 it would be something like this. It's not changing
10 something on the other side of the lot. You know, I
11 mean, that's not why we're here. We're here because
12 obviously in 2012 the relationship between the
13 relief, the special exception relief of more feet of
14 building for which they can sell more condominium
15 units, was going to have an adverse impact on my
16 client's property. And they saw the connection then,
17 and it was a material connection. And every foot
18 mattered.

19 So the Zoning Administrator did err because
20 whatever amount of flexibility or judgment he may
21 have, he exceeded it here. I mean, it's frightening
22 to me that he can decide what the intent -- which
23 things are important to the Board, you know, several
24 years later without reading the order, without
25 consulting the findings of fact, without evidently

1 really comparing the plans. And that now we're being
2 told that there's some longstanding historical
3 practice for which I have found no case. There's
4 nothing. And even if you look at the zoning
5 determination letters upon which the owner and DCRA
6 are relying to establish the long standing practice,
7 they're not very compelling because there are
8 countless zoning determination letters which analyze
9 facts that are not directly germane to the relief
10 that was sought, or that was granted. Why is he
11 bothering to mention any facts? Why is he
12 considering the views? Why is he looking at the
13 imperceptible impact on the Erie? Why is he talking
14 about the roof structures and where they are and what
15 they're going to do?

16 That's what happened here. He got at least
17 two to three opportunities to look at this, and he's
18 not limiting himself to oh, lock step. This is not
19 increasing the height. That's all I need to know.

20 So it isn't a long standing practice. I
21 mean, is it germane to understand what the relief
22 was? Sure. But then why are the zoning
23 determination letters looking at anything else? They
24 are.

25 So what I would ask, I mean, even if this

1 body is not persuaded by one argument or another of
2 ours with respect to the height of the decking or
3 whatever, the rooftop structure is a perfect example.
4 And it's material in the facts of this case. We're
5 not here to revisit 18330. This body already made a
6 determination. It was predicated on certain facts.
7 And the Zoning Administrator and the owner don't have
8 the right to disregard those findings and plans,
9 based on the order as it was written at the time.
10 Not based on a better order that you might construct
11 in the future to avoid this problem in the future.
12 Thank you.

13 VICE CHAIRPERSON HILL: Thank you. Okay.
14 Well, I also wanted to say that I appreciate very
15 much the property owners and their concern with the
16 penthouse and how -- and, you know, the fact that
17 it's there now and how the views are different from
18 what you have thought they were going to be. I just
19 want to let you know, I appreciate that as a
20 homeowner myself that lives in a condominium building
21 and also has different buildings coming up around me,
22 that that's something that is very unnerving and
23 upsetting, and particularly when you thought that you
24 were on top of it.

25 So I understand that. And also for the

1 building and DCRA, all these things have been brought
2 up today. We all have been here for a very long
3 time. We do realize the import of not only the
4 dismissal that we're going to discuss, but then also
5 the appeal itself. And so with that being said I'm
6 going to, I guess, end the hearing, this, and ask for
7 a time because as I stated before, I wanted to have a
8 little time to look through the dismissal and also
9 now I guess Mr. Hinkle is going to be out until I
10 believe it's March 8th, Mr. Moy. And for this, I
11 think it would be best if he was here.

12 MR. MOY: Indeed.

13 MR. TONDRO: Mr. Vice Chair, can I just ask
14 two questions? If the Board will consider the
15 following things in making its ruling for the benefit
16 of DCRA in terms of establishing practice going
17 forward, and that is in terms of timeliness, to when
18 you are making your decision to be very clear if it
19 is to grant -- or to deny the motion for timeliness,
20 to provide as narrow a reason as possible or
21 something that gives us clear guidance. And
22 similarly also in terms of when you get to the
23 merits, if there is an issue of going back to the
24 modification, if the Board could explain also when
25 the zoning determinationer (sic) -- Zoning

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1 Administrator, pardon me, should -- what constitutes
2 sufficient. Is it what appellants were happy with
3 that those were approved first, those changes? Or
4 the changes afterwards. How is it that precisely
5 that the ZA is supposed to make his decision?

6 VICE CHAIRPERSON HILL: Well, we'll provide -
7 - no, that's okay. I understand. And you did
8 clarify that in the beginning. And that's okay. And
9 I know that particularly with regard to whether this
10 will be dismissed or not, providing clear guidance as
11 to why. And if it were to get to us deliberating for
12 the appeal, again, providing very clear guidance for
13 DCRA and the ZA as to how to move forward and what
14 this actually means, because we also want clarity so
15 that these processes for the public do not come up as
16 much, as well as it would make it easier for us to
17 move forward.

18 So that being said, Mr. Moy, is March 8th
19 still good for a decision?

20 MR. MOY: Yes, Mr. Chairman. Yes. Yes. You
21 know, the staff of course always yields to the Board.

22 VICE CHAIRPERSON HILL: Well, do you have a
23 different suggestion?

24 MR. MOY: No, I think the 8th is good. I was
25 hesitating -- well, not really hesitating. I had

1 another thought and while you were speaking I was
2 conferring with our counsel. And we're thinking that
3 perhaps if the Board would desire, it might be useful
4 as a segue to the comment that I was just hearing, it
5 might be useful for the Board to receive draft
6 findings of fact, conclusions of law on both the
7 motion to dismiss and on the merits of the appeal.

8 VICE CHAIRPERSON HILL: Okay.

9 MR. MOY: It might be useful for the Board
10 to --

11 VICE CHAIRPERSON HILL: That would be useful.

12 MR. MOY: -- to digest.

13 VICE CHAIRPERSON HILL: So then we would be
14 pushing that back the 16th in order to receive those?

15 MR. MOY: Well, I think the Board can still
16 decide this on the 8th and perhaps have the parties
17 submit these drafts let's say at the latest by
18 Thursday, February the 25th, if that's doable by the
19 parties.

20 MR. HINKLE: If I could suggest something?
21 You know, I will be out for a couple weeks, but also
22 this is an important question and I would like our
23 Chairman to weigh in, Ms. Heath, if she so chooses.
24 I mean, she could read the record and actually make a
25 decision on this as well.

1 So I don't know if the 8th is sufficient time
2 or if it is, that's fine. I mean, that's fine for
3 me. But --

4 VICE CHAIRPERSON HILL: Mr. Hinkle is
5 suggesting one more week so that the Chair can review
6 the record, and it is extensive, in order to provide
7 another person here to give their opinion as to how
8 to move forward. So that will be the 16th?

9 MR. MOY: That would be March the 16th.
10 Well, actually March the 15th.

11 VICE CHAIRPERSON HILL: Fifteenth.

12 MR. MOY: Oh, that's the Ides of March, I
13 believe.

14 So anyways, okay, so that would be March 15.
15 In that case then let's give the parties the
16 additional week to file. So let's then, we can still
17 make that March the -- for the filing, for Thursday,
18 March 10th. Sound good?

19 VICE CHAIRPERSON HILL: Yes. All right.
20 Well, thank you all very much. Thank you for coming
21 down. Thank you for waiting all day. And I hope you
22 got a little bit of a lesson as to what we do. But
23 thank you. Have a nice evening.

24 MS. HORVITZ: Thanks so much.

25 VICE CHAIRPERSON HILL: Mr. Moy, do we have

1 anything else this evening?

2 MR. MOY: Definitely not from the staff, sir.

3 VICE CHAIRPERSON HILL: All right. I don't
4 have anything else to add, so with that I'll close
5 the hearing. Thank you.

6 [Hearing adjourned at 5:55 p.m.]

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