GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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TUESDAY

JANUARY 18, 2005

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, DC 20001, pursuant to notice, at 10:00 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
CURTIS L. ETHERLY, JR.	Board Member
JOHN A. MANN II	Board Member, NCPC

ZONING COMMISSION MEMBERS PRESENT:

GREGORY JEFFRIES	Commissioner
ANTHONY HOOD	Commissioner

COMMISSION STAFF PRESENT:

BEVERLEY BAILEY	Zoning Specialist
CLIFFORD MOY	Secretary
JOHN NYARKU	Office of Zoning

D.C. OFFICE OF ATTORNEY GENERAL PRESENT.

LORI MONROE, ESQ

This transcript constitutes the minutes from the Public Hearing held on January 18, 2005.

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ZONING COMMISSION
CASE No. 05-13
EXHIBIT No. 2

ZONING COMMISSION
District of Columbia
CASE NO.05-13
EXHIBIT NO.2

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So we'll give five minutes to get this next case set up.

(Whereupon, the foregoing matter went off the record at 1:49 p.m. and went back on the record at 2:00 p.m.)

CHAIRPERSON GRIFFIS: Very well. Let's resume and call the last case of the morning.

MS. BAILEY: Application Number 17271 of JBG/Louisiana LLC, pursuant to 11 DCMR 3103.2, for a variance from the height limitations in the Downtown East Receiving Zone under subsection 1709.23, to allow an addition to an existing office building in the C-3-C District at premises 51 Louisiana Avenue, N.W., Square 631, Lot 17.

CHAIRPERSON GRIFFIS: Thank you very much, Ms. Bailey. Let me just get an assessment for our schedule of those present with us for Case Number 17271 to give testimony. Persons to give testimony, show of hands? Well, you guys are all part of the application, I'm assuming, or witnesses.

So there is no one else here present to give testimony. Okay. Mr. Nettler, why don't we turn it over to you and start the case, please.

MR. NETTLER: Thank you. I have a number of housekeeping matters first. First of all, of

course, my name is Richard Nettler with the law firm of Robins, Kaplan, Miller & Ciresi on behalf of the applicant for the proposed addition to 51 Louisiana Avenue.

There are a number of things that are being handed out to you right now, one of which is a letter from the shadow U.S. Senator for the District of Columbia responding to the letter that you have in your file from the Architect of the Capitol, letters of support from the Lincoln Company and from one of the neighbors of the property and from the Holiday Inn as well, and a very detailed study with attachments done by what is probably the principal security firm for the Federal government and for developers of Federal properties, Dusebella, Venture and Santori, who provide security consultants to the Department of Justice, Department of State, the Department of Transportation, the Internal Revenue Service, the Secret Service, the U.S. Marshal, the Federal Protective Service and GSA regarding the Architect of the Capitol's comments and the suggested security matters that we are -- security issues that we are addressing in this building, which you will see in the letter details quite explicitly, and you will hear a little bit more about that from the owner as well.

Those are the items that are in the record. Unfortunately, some people had to leave. Mr. Jacobs is about to start a meeting with the Sergeant at Arms and the Architect of the Capitol regarding this project. So he could not stay for this meeting. Lord Richard Rogers was unable to attend. So we have both the Senior Director and one of the other architects from Richard Rogers Architects here from London who will be testifying. I provided you with the CVs as part of our prehearing statement.

We have two witnesses, one of whom is on his way -- supposed to be on his way to Texas shortly who was here on behalf of the tenant, Jones Day, and had some other additional testimony that he is able to provide in terms of the market for these types of tenants in the District of Columbia, and David Orr who is supposed to be -- Actually, he is now going to be late for a meeting with DCRA on another project.

What I wanted to try and do before I --

CHAIRPERSON GRIFFIS: We will write them all notes.

MR. NETTLER: -- was to sort of get your temperature as well. We have a number of issues that we've addressed in our prehearing statement, including providing you some of the testimony such as Mr. Orr's,

and we have a number of issues that . . are, obviously, prepared here to address, both architectural issues, security issues, the land use planning issues, the economic issues, and traffic issues, if you want it, and construction issues as well, though we are going to sort of hold off on the necessity of providing those since we have again provided you with statements from our traffic planner.

If you would like to hear from Mr. Orr, I can put him on first out of order. Otherwise, his testimony is part of our application. I think it is pretty -- Our prehearing statement is pretty specific on some of the issues that are generally considered when addressing the relief that we are seeking here, and that is specifically some aspects of the practical difficulty question and JBG's representative as well is here.

So I am going to ask you, which is not probably normal, but ask you to take your temperature in terms of whether you would like me to put them on first so that they can leave or whether you have any questions for them or whether you might want to just go right into the application's other issues.

CHAIRPERSON GRIFFIS: Good. I think we have abandoned all things normal for today. So it's

not inappropriate for you to ask, and I think, first of all, the Board has received all this information, the filing from the applicant. It is incredibly complete, and also straightforward in terms of laying out the uniqueness and the combination of numerous factors, that being the size and the shape and the existence of the original building. The addition is addressed as well as some of the conditions below grade are substantially discussed. The practical difficulty also is no less than three, if not four, and we can get through all of those.

So what I would suggest, first of all, call your witnesses as you would in terms of their schedules. We can move on. It is my understanding that this is coming in with no opposition. So the more summations you can give, the better off, I think, we all will be, and then the Board can deal with this as it will, with all of that information.

Let me ask one -- I should say, it is not completely without opposition. Is there a representative of the Architect of the Capitol present today? Okay.

MR. NETTLER: As I mentioned, his meeting -- It was anticipated that -- They weren't going to be here anyway, but it was anticipated that this hearing

was going to be over so that Mr. Jac s could testify, even though the Architect of the Capitol wasn't going to be here.

CHAIRPERSON GRIFFIS: Okay. We all had that great anticipation.

MR. NETTLER: And I would also point out -- it's probably worth mentioning -- this is not in the Capitol overlay. It was our feeling after having obtained all the support that we did from DCPL, Office of Planning, from Commission of Fine Arts, having talked about this with the National Park Service as well, that we wanted to sort of expand our -- touch all bases, regardless of whether they were supposed to participate in this hearing as well.

CHAIRPERSON GRIFFIS: Are you saying this is out of the purview of the Architect of the Capitol, because it's not within the Capitol master plan?

MR. NETTLER: No, no. I'm saying it's not in the Capitol overlay district. So the Architect of the Capitol wouldn't normally have participated in this here, and probably would not normally have participated if it wasn't for us taking a proactive effort to bring to the attention what we were doing, just so everybody knew what we were doing.

CHAIRPERSON GRIFFIS: Right.

MR. NETTLER: The Architect of the Capitol was unable to have a meeting with us, and submitted this letter on behalf of a discussion over the phone as to what was being done at the site. So there were a number of attempts to have that meeting, and it was only until 2:30 this afternoon that the Architect of the Capitol and the Sergeant at Arms is available.

CHAIRPERSON GRIFFIS: They could meet here. We could sit in the back of the room or something.

MR. NETTLER: But I think we provide sufficient -- as you will see in the submissions that we have made, and you will hear from the witnesses, a sufficient response to the Architect of the Capitol's concerns that we will address in our testimony.

So without further ado, I just wanted to bring that up to your attention.

CHAIRPERSON GRIFFIS: Good. There's going to be one question that the Board is going to want you to answer, and it is going to go to the height, and I know you have outlined substantially in terms of the 110, the 130 and then from the -- or going to the 110 with the TDR.

So just a reiteration of whether you are, in fact, receiving the additional square footage that

would invoke that height or not.

MR. NETTLER: Well, we have it available to us. We could never use it, as we explained in the prehearing statement. The site is configured in such a fashion with the building that has to be retained that we could never use the TDR -- the density that was provided to us. The zoning regulations would permit us to bank those density, which we may end up doing, but we are coming to you as a pure variance, height variance, recognizing that we had the right to go to 110 with the TDRs that are available to us, but this is going from 90 to 130 feet.

CHAIRPERSON GRIFFIS: Okay. So that is a straightforward application, is from 90 to 130.

MR. NETTLER: Not unlike the realtor's situation, which also had the same -- They could use the TDRs as well, but they had it as a 90 to 130 feet.

CHAIRPERSON GRIFFIS: And I think that is clear now, and page 13 lays out, in fact, the FAR that is available that, obviously, you wouldn't be able to use if you went up to the nine as opposed to --

MR. NETTLER: We can't even use the existing FAR.

CHAIRPERSON GRIFFIS: Exactly. Okay. All right. That being said then, are there any other

preliminary questions by the Board? Okay. Let's move ahead.

MR. NETTLER: Then let me do this. Since Mr. Orr's testimony is here, and since he does have his meeting which he is already late for, let me excuse him. I would like Art to say a few words, and I know he's got to catch his plane. If he could just do it out of order, and then we will go with the owner and with the architects, if that is not a problem.

CHAIRPERSON GRIFFIS: Fine. The last thing before you get started: Is the ANC-6 represented today? ANC-6C? No representative of the ANC is here. Okay, let's move ahead.

WHEREUPON,

ART SANTRY

was called as a witness by the applicant and, having previously been duly sworn, testified as follows:

DIRECT EXAMINATION

MR. SANTRY: As Mr. Nettler said, I am Art Santry. I am with the Trammell Crow Company, and what I have done over the past decade or so is represent a number of law firms here in the District. I represent Patton Boggs, Vincent & Elkins, Miller & Chevelier, Ballard Spar, a number of firms, and am currently representing Jones Day.

Just sort of a macro p\ ,pective of what is going on in the law firm business and why it is applicable to this specific building: Law firms have enjoyed some steady growth over the last 15 years, and with that growth comes, obviously, a demand for additional office space.

Unlike other cities, we have a height limitation, which means that we can grow horizontally and, of course, horizontal growth means you've got boundaries and streets, which means you can only go so far before you have to go into another building.

So unlike Atlanta where you can go straight up and put 6-700,000 square feet of law firm in one building, it is more difficult here in the District.

In representing Patton Boggs in closing their deal just this past December, they ended up bifurcating operations. Thankfully, they were able to find an additional 100,000 square feet in a building directly across the street. So it is not as much of an inconvenience as it would be had they had to relocate X number of blocks down the way.

When Jones Day moved into this building back in the late Nineties, it was anticipated that they would be able to stay for their full 15 years

without taking additional space, and that -- The good news and the bad news is they grew rapidly, bad news being they need more space.

We have spent some time looking for space in the District and some time actually looking for space in Northern Virginia, and the reality is, to the extent that Jones Day has to bifurcate its operations, put offices in a building that is three, four, five blocks away, it is probably just as inconvenient and maybe more practical, candidly, to have those offices in Northern Virginia where some of their partners actually reside.

What the JBG companies has offered us is an opportunity to keep the practice group together under one roof, in essence, on the 51 Louisiana Avenue campus. The way the floorplate has been configured and the things that they have done -- I'm sure the architects will get into more specifics -- will allow Jones Day in essence to stay within the District and stay in that 51 Louisiana Avenue campus for what we see as an indefinite period of time.

You know, our goal, the firm's goal would be ideally to keep the firm located in Washington, D.C. and under one roof. That would be the most efficient way for the firm to continue to practice

law.

So again, I am here as a representative of Jones Day, not as a representative of JBG but as a representative of Jones Day and, of course, our desire is to make sure that this project works, and it is one that Jones Day can office in for a number of years to come -- decades to come.

BY MR. NETTLER:

Q Well, I have just two questions for you. First, are there -- What is the availability of other sites in the District for this type of a user?

A Well, you know, to the extent that -- and I will answer that two ways, Rich. One, there is additional space being built, as you know, by Republic Properties, not too far away but again, if you are three, four or five blocks away, you might as well be a long way away. That's sort of answer number one.

Answer number two is, to the extent that you want to do what an Arnold & Porter did, which is build a campus in one location, obviously, there are very few sites left, none in Georgetown. You know, could we assemble things in the CBD? Sure. There are places we could do it, but it's difficult. It would be a difficult thing, and you know, we still have time left on our lease, and it would make things difficult.

Q And the second one is. Are there time constraints on being able to start this project and have it available for Jones Day?

A Yes, that's a good question. We are busting at the seams. We do need space, and depending upon how this all transpires, we are going to make a decision as to whether we -- what we do about our space needs in the next two to three years.

Q But do you understand that there is a date certain that you must have new space to move into?

A Your targeted date is 35 months from today, in essence, which would be good. We could hang in there for that long.

MR. NETTLER: I have no other questions.

CHAIRPERSON GRIFFIS: If you split the two sites, would you split evenly the total square footage? Let's say now that is proposed to be 550,000 square feet when finished. Could you find two sites or two -- well, I'm not going to do the math -- that are 50 percent of that, or would you -- Go ahead.

MR. SANTRY: We have a lease in place now that carries us out another eight years, in essence. So what we would have to do is we've got roughly 200,000 feet where we are. We would have to find -- call it initially another 100,000 square feet

somewhere else.

CHAIRPERSON GRIFFIS: Is there efficiency to be co-located?

MR. SANTRY: Oh, yes, without question.

CHAIRPERSON GRIFFIS: Would you not replicate certain aspects of each site at each place?

MR. SANTRY: I mean, to the extent that we could do everything at 51 Louisiana Avenue, we would not replicate.

CHAIRPERSON GRIFFIS: Right, but if you split it up, aren't you duplicating?

MR. SANTRY: Yes.

CHAIRPERSON GRIFFIS: That would be my assumption. So you are actually looking for more square footage if you had to relocate --

MR. SANTRY: Right. Absolutely.

CHAIRPERSON GRIFFIS: -- than building onto the existing?

MR. SANTRY: Yes. You would have to replicate things like conference facilities, libraries, things like that.

CHAIRPERSON GRIFFIS: So if you took it at existing 300,000 square feet now and you were going to propose the addition that would bring it to 550, you are actually not going out, if you can't do the

addition, looking for 250,000. You may be looking for 300 or 350?

MR. SANTRY: Yes. You would be looking for more. Correct.

CHAIRPERSON GRIFFIS: Okay. And how many of those are around the area, 350,000 square feet buildings?

MR. SANTRY: Yes, that's very hard.

CHAIRPERSON GRIFFIS: But to deliver in '08. Okay.

MR. SANTRY: Difficult.

CHAIRPERSON GRIFFIS: Mr. Jeffries?

BOARD MEMBER JEFFRIES: Obviously, there's a number of locations that they could go, but it's really -- you know, really dealing with the location issue. Well, no even within the District, but the question is really just location, location.

CHAIRPERSON GRIFFIS: How pertinent is the location for the moniker of this firm? Does address make any difference?

MR. SANTRY: It does. It always does. Sure. I think -- Address aside, I think, Mr. Chairman, if you walked into their space and got a feel for that building, it's quite impressive. They like it. They would like to stay there.

It's a decision they made when they did what they did, moving up to the Hill. It was somewhat of a pioneering move, and in retrospect it was brilliant. I mean the views, the feel of the building. That area has really come around. So they would like to stay there.

CHAIRPERSON GRIFFIS: Pioneering right next to the Capitol. Good. Any other questions? Guess I have thicker skin than most, huh? Okay. Thank you very much.

MR. NETTLER: I actually would like to give some personal context to that, because Jones Day was originally located at Metropolitan Place -- Metropolitan Square and located there at a time when I was representing the District on the demolition of Rose Tavern and Keith Albey Theater situation, which was -- The development of Metropolitan Square was for the purpose of providing this use to Jones Day, which then grew out of that, which then resulted in Garfinkle's being turned over as an additional expansion space for Jones Day and which resulted in a use variance being provided by the Zoning Commission, because it was then slated as a department store under the Downtown Development District.

That use variance was very contentious,

and I was on the other side of that use variance. But it ended up being impossible to provide all of the expansion space for Jones Day when that use variance was granted.

So we then had to move into the Acacia Building, and then we had the same problem. What we are trying to do, as I think will be explained, is to solve a problem that doesn't continue to exist as it has in the past, but finalizes Jones Day's location and with an appropriate development project.

With that, I will turn it over to JBG.

CHAIRPERSON GRIFFIS: Actually, before you jump into -- Excuse me, but let me just get one clarification, too, in terms of the historic nature, which is one of the uniqueness aspects and also a practical difficulty which you have brought up.

It's a fascinating aspect that I had never heard the terminology of a standstill agreement. I'd love to use that myself. So we'll see if we can get that going.

The issue is these buildings are not designated. Is that correct?

MR. NETTLER: They are not designated because of the standstill agreement.

CHAIRPERSON GRIFFIS: Right. But they

have obvious historic significance, and that historic significance is given to this agreement of which the DCPL will review anything that happens on it. So just for total clarification, there is a historic significance which is part of its uniqueness, and your case presentation says practical difficulty also.

MR. NETTLER: Correct. And there was a landmark designation application that was prepared for those buildings. It was -- At the time that I was on the Issues Committee of D.C. Preservation League, and at that time the D.C. Preservation League tried to work out a number of different standstill agreements, of which this was one, in lieu of filing a landmark application; and Acacia wanted to work with DCPL on that issue.

Acacia had a proposal for the site that the Commission on Fine Arts rejected, because it pushed the density forward onto the site, both height and density forward onto the site.

CHAIRPERSON GRIFFIS: Right. And that's addressed in your written submission, which I think is very clear. But I just wanted to point it out, because actually it is invoked a couple of places in the submission differently. So just for clarification in the record, there is great historic significance

and an already agreement of historic review.

MR. NETTLER: Correct. And actually, we will probably have -- It's in the contemplation of the plans of JBG, the owners, that a more formal aspect to the historic significance will probably be developed subsequently, but that is the context in which it has its historical significance today with DCPL.

CHAIRPERSON GRIFFIS: Okay. Good.

MR. NETTLER: A landmark application is being considered.

VICE CHAIRPERSON MILLER: Thank you.

MR. NETTLER: Sorry. I didn't mean to be obtuse. Let me turn it over to JBG Company.

CHAIRPERSON GRIFFIS: Good.

WHEREUPON,

DEAN CINKALA

was called as a witness and, having previously been duly sworn, testified as follows:

MR. CINKALA: Thank you, Richard. Mr. Chairman, members of the Board, thank you for hearing our case today. My name is Dean Cinkala, a principal with the JBG Companies. As many of you may know, the JBG Companies is a real estate investment and development firm that's been in business in the metropolitan Washington area for over 40 years. We

have developed millions of square fe of office space and thousands of residential and hotel units.

JBG purchased 51 Louisiana in the summer of 2004 and, as Richard has stated briefly, it consists of two buildings totaling about 210,000 square feet, a 460-space above grade parking garage, which is a bit unusual for downtown D.C., and is occupied solely by Jones Day.

Later on in our discussion George Dove will touch in more detail on the limiting or practical difficulties of the site. But briefly, they are the irregular shaped nature of the site, the V shaped nature of the existing improvements, the standstill agreement we were just talking about, the fact that the existing Acacia Building and the annex building have 15-foot, floor to floor heights which make it difficult to make compatible with new development, as well as some very significant below grade issues, namely the WMATA Metro tunnel on the D Street boundary of the site and the Tiber Creek, a 24-foot combined storm drain/sewer that runs right through the middle of the property. So all very difficult issues that make it hard to develop this site.

One of the first things we did as we started to pursue redevelopment of this site was to

try to consider the selection of the appropriate design team for this project. We went back and looked at prior submissions to the Commission of Fine Arts, submissions that did fail, that were not well received, to try to gain some lessons learned.

I would say a couple of the lessons learned were that any project, any proposed redevelopment of this site that visually or physically imposed upon the existing Acacia or annex building, given their historic sensitivity, was not going to be well received, nor any new development that tried to mimic the existing development was likely not going to be well received.

That really led our selection to the Richard Rogers Partnership of London, and we have Ivan Harbour here, and Dennis Austin as well. They have a long history of working sensitively with historically significant buildings and integrating new development.

I think, based on our experience over this past fall where we have worked with DCPL cooperatively, we've worked with the Office of Planning, we've made our concept submission to the Commission of Fine Arts, we have received unanimous approval from the ANC, that this project and the

design has been well received. It h. been respectful to the existing site conditions, and I think has gained unanimous support.

We believe the application for the height variance is appropriate, given the unique circumstances of this site. Beyond that, though, we think there are some very positive benefits for redevelopment of this site.

We think bringing an architecture firm like Richard Rogers Partnership to town will provide world class architecture and a trophy building to the downtown marketplace. We will be able to accommodate the growing and expanding needs of a significant tenant in downtown Washington, D.C.

We have agreed to with the ANC to pursue a lead certified building. We are -- Through the redevelopment of this site, we are taking down what is universally viewed as an eyesore in this neighborhood, a almost six-level above grade parking deck, and as you can see from the OP staff report, our proposal does not cause any negative impact on the city's planning or zoning, as supported by their report.

One of the things Richard referred to early in his discussion was this issue that came up last week from the Sergeant at Arms of the Senate,

which was a security concern that was raised.

What we have tried to do over the last several business days was work with a firm named Dusebella, Venturi and Santori, a firm we have worked with extensively on a couple of our more important projects, to try to understand the concern and determine if we thought it was a legitimate concern.

We looked at three things, particularly. One, what were the existing conditions in the neighborhood today in relation to the Capitol building? What were the conditions like with this new building built? Then lastly, what kind of security protocol could we put in place in our building to mitigate any concern regarding our new proposed development?

We have a series of boards that we can have George Dove show to you shortly, George Dove with WDG. But in very brief conclusion, I think what we can show is that the existing conditions today -- there are at least 10 buildings that have clear line of sight to the Capitol building, and are at either closer distances or only in a small amount of further distances from the proposed new development.

Additionally, if you were to do a line of sight study and look at what is theoretically the

exposed area from the existing rooftops, the new development, in fact, doesn't create any additional exposed area. In most simplistic terms, we think the building doesn't exacerbate what is already an existing condition.

In fact, we would argue that our building, given where it is, provides some blockage to other public buildings that are behind our site.

Lastly, and you see this in the letter, Dusebella, Venturi and Santori recommends some very simple security things that we can do to our building, whether it is perimeter security, roof security, detection systems on the roof, or other matters like that that should adequately address the security concerns of this building.

CHAIRPERSON GRIFFIS: I believe in the submission you indicated that the existing structure has a roof terrace. Is that correct?

MR. CINKALA: It does. Yes, that would be right here.

CHAIRPERSON GRIFFIS: Oh, there is a model. What do you know. I got to look up once in a while, don't I. Holy moley, we're missing all the fun parts. Okay.

MR. SANTRY: We are going to bring it up

to you.

CHAIRPERSON GRIFFIS: Yes, indeed. I figured as much. Secondly, should we be concerned that this letter is noted Confidential and Privileged that you put into the record? It's public record now.

MR. NETTLER: It is. If you read -- They understood it was going to be made a part of the public record. They just asked for its distribution to be limited to --

CHAIRPERSON GRIFFIS: The general public. Good.

MR. NETTLER: Limited as much as possible.

CHAIRPERSON GRIFFIS: Okay. All right. Well, it's up to you how you want it handled. I mean, you can take it back out of the record.

MR. NETTLER: No, I would not.

MR. CINKALA: I think it's Bob Dusebella trying to be careful about the information he is disseminating about security concerns at the Capitol.

CHAIRPERSON GRIFFIS: Indeed. I think --

MR. NETTLER: You don't need to put it on the website.

CHAIRPERSON GRIFFIS: Well, who knows what is going to happen shortly. I think this is, obviously, an important issue for the Board, just

because the Architect of the Capitol has raised it.

I can say for myself in terms of reviewing this initially, it will be good to have the study, which sounds as if it's exhaustive and conclusive for us. I think we can get through it and have it submitted into the record. We'll see how far it goes and what it actually is.

My biggest concern in terms of receiving this letter is that it was just that. It was just a statement out there. There are security concerns in terms of the site lines into the park. For the Board, you know, we see it on the very, very small cases that take six hours and on the very big cases.

I mean, really, what we are trying to get to is the real substance of stuff. That doesn't do much for me in terms of -- because the logical extreme of a letter of that is to say let's design our cities to their death, and that means that there should absolutely be nothing that would somehow facilitate somebody's illegal and irrational behavior. I just don't understand what our cities would look like if we started to be judged and designed on that type of an aspect.

I mean, basically, you are looking at nothing higher than four feet above the sidewalk,

because that would put you above the person next to you in a larger organization or gathering. I don't see it. We are going to need a lot more substance if -- I will anyway, in terms of deliberating, in terms of an opposition position in this.

I think your point is well taken. It is actually -- I don't know that it was definitively put in your submission, but it was something that was clear in my mind in looking at it, is when you describe the site around and the heights of the buildings around it, you know, how does it not invoke the same notion of, well, what do they do with their roofs and how controlled are their occupants in and out of their buildings?

This is going to be a single user building, is it not?

MR. CINKALA: It will not be initially. Jones Day will likely take 50 percent of the new development initially, but I imagine over the long run, given our option and expansion negotiations, they will have a significant portion of the building encumbered.

CHAIRPERSON GRIFFIS: I see. It's going to be, I have to imagine, a Class A office building.

MR. CINKALA: Correct.

CHAIRPERSON GRIFFIS: -- will obviously have some sort of security check coming in and out.

MR. CINKALA: Absolutely.

CHAIRPERSON GRIFFIS: And I don't imagine those days are ever going to be over now. Right? I mean, even not the Class A buildings have that. Okay.

MR. NETTLER: The concerns that you raise are exactly what is stated in the shadow Senator's letter as well about having to --

CHAIRPERSON GRIFFIS: Is that so? Thank goodness I voted for him. Oh, I can't say that. Right. And that's Mr. Strauss who wrote this.

MR. NETTLER: Right.

CHAIRPERSON GRIFFIS: Oh, indeed. All right. Good. Very well, let's proceed.

MR. NETTLER: Our next witnesses are architects from Richard Rogers Partnership.

CHAIRPERSON GRIFFIS: I'm sorry. A quick question of the Board members. I think we should see all the boards that you have talked about. We are going to get to that point, and we are not moving beyond it.

MR. NETTLER: Right. I think it's better actually to see the project, and then we can go into--

CHAIRPERSON GRIFFIS: Good. Let's get to

substance, and then we'll get to the others.

MR. NETTLER: Because there are variables in the project which we are going to get into, because it is still undergoing review by the Commission of Fine Arts. It asked us to look at a number of items, not affecting the height of it but affecting other aspects of it.

So what we wanted to do was to give you the latest aspect of it, which was part of our prehearing statement, and so you can understand it better both in its context and how it interacts with the existing building. Then we are going to move into the boards as well in terms of the neighborhood and the Capitol.

The first witness is Ivan Harbour who, as I said, is a senior director of Richard Rogers Partnership, and I have provided his CV as part of my prehearing statement. I would ask that he be treated as an expert. Lord Richard Rogers, who has worked on this and who was here when we made the presentations to Office of Planning, DCPL and the CFA, as I'm sure you know, is one of the foremost living architects, a winner of the -- knighted in 1991, made a Life Peer in 1996, awarded the Legion of Honor in France, and I hope you come to agree with us. This is a pretty

significant project that really does a lot for Washington, D.C.

I will give you over to Ivan, assuming you will accept him as an expert.

CHAIRPERSON GRIFFIS: Are there any questions from the Board? I don't think there is any question, Mr. Harbour, and we bestow the great title of expert witness before the Board of Zoning Adjustment for the United States of America. Why don't you proceed with your testimony.

TESTIMONY OF IVAN HARBOUR

MR. HARBOUR: Certainly sounds very impressive.

CHAIRPERSON GRIFFIS: Doesn't it, though. It's all in the delivery.

MR. HARBOUR: Well, my first question for you is would you like me to bring the model up and put it on the bench?

CHAIRPERSON GRIFFIS: You know what. If there was a place where we could just see it. Do you guys want it up here closer? Are you going to point to it? Are you going to utilize it?

MR. HARBOUR: Actually, no. I will probably just point to the model and not be bold.

CHAIRPERSON GRIFFIS: I think we can keep

it -- can everyone see it if we lean forward? Let's do that. Actually, is that easily moved, the podium? That would be grand, because what we need to do is keep you on camera, too, for everything. So if you want to -- and you need to be close to a microphone.

I would move it right back where she is going, and then you can put a microphone right near it. So you can use both hands and not have to hold that thing. If it will stay there, that would be perfect. Let's try that microphone on the corner, if you just turn it on, on the table. Yes. The recorder will let us know if it's not picking up. We are all set.

MR. HARBOUR: Thank you very much for allowing me to present. I think the first thing to say is this, to us, is an extraordinary site, an extraordinary project, and we are very happy to have been asked to be involved in it.

The first thing that hit us is the quality of the existing building, the Acacia Building, '35 building, and it's probably not quite such quality but still hanging on in there with its main facade on 1st Street, the '53 addition, and I think our reaction to the site, similar to that already expressed, is how on earth can this exist with this parking garage at the

end of New Jersey Avenue. What a _ eat termination point.

So what has really pushed our approach as being to suggest something which is giving over perhaps something a little bit more to the public at the end of that avenue. So we could quite have easily have closed this island off and kept what is currently the back yard, kept that isolated, but our feeling was that, in order for this thing to develop and to become a real place where you are looking forward to coming to work in the morning from mass transit, hopefully using your car less, the ability to organize the building such that it addresses New Jersey Avenue, we create an entrance which is common to the whole complex here and make the central part of this enclosed space really work as a sort of vibrant heart.

Now the way we have done that is fairly straightforward. You can all see that drawing, I hope. We have taken liberty to suggest removal of the brick facing on the back of the '53 extension. It's very much -- whereas, the '35 building is stone faced on all sides, the extension is just faced on 1st Street -- to extend the existing floorplates used by Jones Day, and to create a vibrant heart into which all the circulation throughout the complex will work.

So it becomes a centralized piece of circulation, but not a core in the traditional way but more in the manner to which, certainly, we as architects perceive it. It is something that adds some excitement and movement to the space.

To the north of that over the existing parking garage, we have put the bulk of the accommodation and, importantly, that -- its relationship with the existing building differs on a floor to floor basis. We are putting 12 floors in a space adjacent to five to six floors of the existing building.

So what we have done is separate it from the existing building, which maintains and enhances the aspect in respect of that, but also in technical terms allows us to make connections which aren't necessarily at the same level. So it works as a circulation concept for Jones Day.

It splits the new from the old, respecting both, and we are allowing daylight to flow through between the two. We are identifying the new and the old, and that gives respect. We are not trying to copy or indeed imitate the old which, of course, with technology today is, well, prohibitively expensive and impossible to find that labor to do it.

The resultant space eated by that rectangular building and the two existing buildings -- we are suggesting that that is roof, and we are creating an atrium, and there is a lot of ongoing debate. I mean, this is a preliminary concept. I think the concepts are strong.

The nature of that roof, as you can imagine, is under hot discussion. We are balancing how it relates to the existing building. We don't want it to physically touch that building. It's important it stays separate, and how it relates to the new building and the extension and the triangular extension of existing. All those structurally need to make sense, so that when you walk into this space there is a sense that this thing is one organism and not an assembly of pieces.

I think probably the most exciting thing is the way that we've opened the heart of this building out onto New Jersey Avenue, particularly at street level, pulling way back from the back of pavement sidewalk line and opening this up, creating a sort of very generous publicly accessible space beyond in front of the new entrance to the two -- to the organization.

As presented at that entrance, you have

two ways of going. You can either follow the atrium to the back of the existing '35 building or the new atrium created between that and the new building. That gives our client the ability to, in the short and median term, to operate more than one occupier of the property. It gives them a subdivision within the space, which is not just the question of a sign on the door, but actually it is a direction which is highlighted by top light, sun and space.

I think that is broadly the project as it exists. AS I say, it is at a preliminary stage.

CHAIRPERSON GRIFFIS: Excellent. Good. thank you very much. It seems, coming from the written submission and your own testimony right now, obviously, one of the practical difficulties is the design solution based on a lot of the unique aspects of this. But one other has kind of come up that I didn't find specifically articulated.

That is the actual location of this site is an aspect of uniqueness, and its own practical difficulty. What I mean is you addressed written and orally very well defining that New Jersey Avenue. what is that to be in terms of the addition in conjunction with the existing building. But you know, you could say that anywhere. If you put a building

up, of course, you are going to have to figure it out. Is the front door here or there? What does it look like, blank wall or is it retail?

What you didn't speak to is what is across the street, and what we have are these monuments and these public parks and, then going even further. I mean, the stature of that location almost demands a design solution, and I think that is one of the important unique aspects to this, and presents itself as a difficulty, if not a substantial problem.

Let me ask you, as we go further, though, into it then, if you want to address further from the written submission, what is pushing you up?

MR. HARBOUR: In a straightforward way, what is pushing us up is the desire to create sensible volume within the overall perimeter that we can say is this sort of vibrant focal place. You know, we have deliberately not closed the atria spaces off at the end, because if we close them off, that seals them off from the external environment and it becomes a very introvert world.

What we really want to do here is make it clear that it has a function, obviously, as one whole, but that it is actually a window to outside as well. It is engaging with the street. It is not closing

itself off.

CHAIRPERSON GRIFFIS: I see. So those others that -- Well, let me see if I understand you correctly. What you're saying is within the massing that is allowed, within the volume, one being the site being the FAR, the square footage that you actually can put on the site -- Within that allowable, you want to maximize it -- that's pretty straightforward -- but that there are unique aspects to this that create, one, the need for the atrium design, but also practical.

You've got all the different floor levels, as I understand. That is allowing you to create your circulation between all these buildings -- right? -- and bring these floor levels. If you are going from, you know, floor levels that are five or ten feet apart, you can't put that necessarily in a five-foot ramp. I mean, you're running some distance. Correct?

MR. HARBOUR: That's correct.

CHAIRPERSON GRIFFIS: Okay. So you may need 20-30-40 feet to make up that difference. So that atrium is allowing you to do that, but that is not occupiable space.

So if I'm understanding what you are saying, is that open space, of course, creates this

dramatic effect, but it's also pe ips a practical design requirement and, therefore, the other square footage has to be massed with the remainder.

MR. HARBOUR: Yes. I mean, to be fair, you -- We've had discussions on the width of the rectangular building. You could push it much closer. You could make it touch the existing '53 extension. You could still make connections work, but they are pretty uncomfortable, and for us the loss of daylight and aspect.

It's very interesting working here and the expectations of proximity to window wall than they are, for example, in Europe, and naturally working in Germany. They won't allow you to be further than six meters -- I can't remember what that is in feet, but I suppose it's 20 -- from a window wall.

Although it would be technically acceptable here to bring all the rectangular building up against the triangular one and maybe, consequently, reduce its height and build the same overall floor area.

In terms of, certainly, a building which is maybe slightly more environmentally sustainable and, you know, is less reliance on our special lighting and perhaps every hope as we develop this,

start to look at how the atrium works as an environmental buffer to outside. Days like this are a classic example.

You know, we've got something that breathes easier and allows the building to, I suppose, look toward the future rather than just working with the unsubtlety of just floor space, FAR and that sort of statistic, I guess.

CHAIRPERSON GRIFFIS: That's an interesting point. Let me see if I understand what you are saying. So you could move this building -- You could squash it out. So you press it on the top, and it bowls out on the side, and that will encroach on the atrium and the open space. But your point is, one, it becomes a little more uncomfortable on the circulation of the change of grades. But you've brought up the second point of being more environmentally sensitive.

If I understand what you are saying correctly, it is the more window line you have, the more natural light you get in, the less artificial -- the less lighting you have to burn, which burns energy, which burns coal and -- I love those graphics that go all the way to Ohio. All right, I'm digressing.

So that's your point, is that you are actually getting a more environmentally -- which goes to your lead certification, depending on how you might -- or what level you are going to go to. But that is also one of the design solutions that have arisen out of some of the practical difficulties of the existing buildings and the site shape.

MR. HARBOUR: That's correct.

CHAIRPERSON GRIFFIS: I see. Okay.

MR. HARBOUR: I mean, as Dean has said, to actually virtually touch the '35 building, I think, in terms of respecting that building and enhancing its position, obviously, is problematic if you move that building close to it.

CHAIRPERSON GRIFFIS: Well, when you say problematic, how is it problematic?

MR. HARBOUR: Because the shoulders of that building were designed as freestanding, even though, of course, the same architect then attached something to one of the shoulders. So even he was subject to --

CHAIRPERSON GRIFFIS: And the Commission of Fine Arts was shown this separation from that existing?

MR. HARBOUR: Yes. Oh, yes. I think this

bird's mouth is opening out onto New Jersey Avenue and, as you say -- and everyone talks about the view to the Capitol. There is actually a stunning view west through the park land and over the monuments and beyond. It's an undiscovered view almost.

CHAIRPERSON GRIFFIS: Good.

MR. NETTLER: I think a couple of comment son that, because in the prior proposal for the site by Acacia, the Commission of Fine Arts suggested, which Acacia never pursued, that moving the density to the back of the site -- It didn't want the density -- The density coming close to the front of the site was not sensitive to those buildings, and so asked for the density to be pushed back.

When you start to push the density back, because of what is happening underneath, if you are going to provide parking, as David Orr had provided in his testimony and I think George will talk about a little bit, the cost of being able to do that, because the parking has to really go down deep and be very narrow because you have to deal with both the tunnel, the Metro tunnel, and the Tiber Creek, you are then pushing the density up a well, because you have to compensate for the cost of those construction costs.

That also pushes the density up. So you

have a variety of things that are going to push the thing up, again still not being able to take into account, still not to be able to use all the density on the site, even if it was a 6.5 FAR. You are still not being able to use all the density.

So all of those things -- and I think, as I say, George will go into that a little bit more -- again end up pushing that density up, including the things that Ivan has referred to.

VICE CHAIRPERSON MILLER: You said this a while ago. So I hope you remember what you were referring to. You made a remark about sensible volume, and I'm wondering how you measure that or what you had in mind for sensible volume.

MR. HARBOUR: I think it is a question of workplace. It's what is quality working environment, and I think my reference was related to -- in the States, we could actually fill this courtyard with construction, theoretically, but it doesn't create something -- and I'm using the word sensible as in sensible in terms of the human condition -- you know, it's not a great working environment, and we know we can do it and it's a gas guzzler, but it is not something we would recommend.

So getting the proportions right, getting

your window wall to core wall a good proportion so that you are creating a good working environment for those in the building.

VICE CHAIRPERSON MILLER: Thank you.

MR. NETTLER: Three other things that I want to mention is: When we met with the Commission on Fine Arts, DCPL, and the Office of Planning, there were three issues that we were asked to address.

One was we were originally encroaching onto New Jersey Avenue, which we no longer do, and so we have addressed that. The other two were the roof, the slanting roof that you see which is continuously going through a variety of redesigns, and we have -- if you want to see them, we have all of them, but we will eventually get back to Commission on Fine Arts on DCPL with one that we all are satisfied with.

Then the penthouse was also going -- is being considered in terms of how that might be designed or redesigned. So those are things that are going through an iterative process. In fact, we have a meeting tonight as well with DCPL to talk about that some more.

So those are not in place. Those are not set in place at this point. The only thing that's set in place is the height, and even the skin of the

building -- It's glass, but the pre[illegible]e type of glass is being --

CHAIRPERSON GRIFFIS: Well, on the two issues that are still under design, although I know I would love to spend the rest of the afternoon going through them, do they rise to any zoning issues that are before us?

MR. NETTLER: No. No, they will never -- No.

CHAIRPERSON GRIFFIS: Okay.

MR. NETTLER: It would either be a smaller roof or a smaller penthouse or something like that.

CHAIRPERSON GRIFFIS: Right. And the placement of the penthouse is staying where it is, and it is set back, as required.

MR. NETTLER: The setback will stay the same.

CHAIRPERSON GRIFFIS: The height is there.

MR. NETTLER: Right.

CHAIRPERSON GRIFFIS: Okay. I don't see anything covering that atrium that actually goes to any aspect.

MR. NETTLER: No. I just wanted you to know what issues were out there in terms of where the status of the plans are. That's all.

CHAIRPERSON GRIFFIS: Good. Okay.

BOARD MEMBER MANN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes, Mr. Mann.

BOARD MEMBER MANN: If I could just back up for one moment and ask a kind of a procedural question.

What is it that triggered CFA review of this project?

CHAIRPERSON GRIFFIS: Good question.

MR. NETTLER: Well, it's location. CFA, under Shipstead-Luce, has identified a number of sites in the city which it believes, and the Office of Planning has decided it is not worth challenging -- and I'm not sure that this was one that would have been challenged, but that it believes is covered by Shipstead-Luce, and this is one of those sites.

BOARD MEMBER MANN: Is it a predetermined location --

MR. NETTLER: That's right.

BOARD MEMBER MANN: -- when Shipstead-Luce was written?

MR. NETTLER: Well, not from when Shipstead-Luce was written, but from the interpretation of Shipstead-Luce since then.

BOARD MEMBER MANN: I see. Okay. Thank

you.

MR. NETTLER: Our next witness is George Dove, and George is going to address some of the issues of what we have been talking about, as well as some of the security issues that is alluded to in the letter that you have received.

CHAIRPERSON GRIFFIS: You know what. I would put the model down in a secure place.

MR. DOVE: Is this one?

MR. NETTLER: Yes, it is. I think George has been accepted as an expert in architecture here before, and his CV is part of our prehearing statement.

CHAIRPERSON GRIFFIS: Indeed. Any questions or concerns from the Board? I don't see any problem with expert status. Let's continue. The boards you are about to show are what was just handed out to the Board. Is that correct?

MR. NETTLER: Yes.

CHAIRPERSON GRIFFIS: Okay. So we'll follow along.

MR. NETTLER: Some of them were just handed out, and some of the others --

MR. DOVE: There's some additional information here that I couldn't get reproduced for

you.

CHAIRPERSON GRIFFIS: So we'll get them into the record.

MR. NETTLER: And some of them are already part of the record, actually. Go ahead.

TESTIMONY OF GEORGE DOVE

MR. DOVE: I am George Dove, principal at WGD Architecture. We are the associate architect on the project and pleased to be associated with RRP and JBG.

A couple of things, I guess, I want to go over just to get on the record are the special circumstances on this site. I think we have covered most of them. So I'll be brief. But clearly it is a five-sided site, meaning five streets intersecting, two of them diagonal, the existing building, its historic nature, the substantial amount of site that it takes up, and the extra high stories that are evident in that building uses up a lot of the volume that would be normally available on the site.

Another thing that is increasingly difficult to deal with is the diagonal crossing of the street by the Tiber Island sewer that goes through the site. I don't have a large scale, but it goes basically from northwest -- northeast down to

southwest and through going down to the south.

It goes under the existing building, and it will, in fact, go under ours, but it does limit significantly the manner in which we could utilize spaces that normally may be underground, because we've got to provide over 500 parking spaces.

That is taking a six-level space as it is. So there is none of the flow space that would normally be underground like first basement area that might be used for program space. So everything has to be above grade for the building, and that is sort of pushing the building, as we have talked about before, to try and fill up some of the volume.

I think those are the basic issues of the site and, of course, as you pointed out, you uniqueness of the site itself, being adjacent to the Capitol and historic open spaces and monuments, and trying to create a building here that has that special character that would make it a suitable neighbor for the historic elements of the Capitol grounds.

You have been given the letter that we got from our security group. What we've tried to do is document a few things, just to clarify where this building is in light of its existing neighbors, and try and demonstrate that, in our opinion and,

obviously, more importantly, in the opinion of security consultants, the building does not create a bigger threat than already exists.

The existing building is in this location. Just down Louisiana Avenue is 101 Constitution Avenue, which is actually the closest building to our imaginary point, which is the northwest corner of the Senate wing of the Capitol grounds, which happens to be the closest point for all of these.

Next-door to that is another building. The Bureau of Prisons is behind the Sheridan Hotel. It's just north of our proposed new site. 400 North Capital is here. It's just a little bit farther out than our existing building.

So you can see that there are a number of buildings that surround the location, not the least of which, important to remember, is that the existing building has an extensive rooftop deck which is used extensively by Jones Day for social events, as well as a very large meeting facility that is in the seventh floor of the '51 addition. So there are a lot of people already within the range that we are talking about.

The height of the buildings is about 20 feet higher than most of the buildings in the area,

with the exception of the new building that's been built just north of the Sheridan, which is of equal height at 130 feet.

MR. CINKALA: George, that is the Hyatt. Right?

MR. DOVE: That's the Hyatt. I'm sorry, not the Sheridan. I apologize. I've been calling it the Sheridan all day.

Using the same document and overlaying the existing threat, the white area or the transparent area represents a line of sight that exists from the rooftops of all the existing buildings that I just talked about. You can see that, basically from 101 Constitution all the way up to 400 North Capital Street, there is almost a continuous sight area to this wall, north wall, of the Senate building, including from the Sheridan which -- I mean Hyatt which overlooks our site and the adjacent buildings.

CHAIRPERSON GRIFFIS: Let me slow you down for a quick second, because I don't know about other Board members, but this is the first time that I have started to assess the height of a roof based on a sniper shot, and not being a rifleman myself, what is this actually meaning? Is 1600 feet a viable sniper shot to that corner? Are you the person to answer

that?

MR. DOVE: I'm not the person to answer that.

MR. NETTLER: I believe there is a discussion of that in the letter from our expert.

CHAIRPERSON GRIFFIS: Oh, is there?

MR. NETTLER: Yes.

CHAIRPERSON GRIFFIS: I looked at the last portion. They had three aspects that they are proposing. One is landscaping around, I imagine, big thick trees so you can't see anything. That's kind of too bad. The other is the glass. But they are assuming that a sniper can shoot from that distance. Is that correct?

MR. NETTLER: Well, the expert is saying that the likelihood of that happening is very remote.

CHAIRPERSON GRIFFIS: Oh, they do say that?

MR. NETTLER: Yes.

CHAIRPERSON GRIFFIS: I mean, is there anything that just helps me gauge? I mean, just like sun diagrams or buildings -- you know what I mean? What is helping me gauge what is and what isn't? You know what I mean? What am I looking at here?

MR. NETTLER: Well, that's the problem

with addressing the letter, is that the letter is very open-ended as to -- the letter, I mean, from the Architect of the Capitol is suggesting something without being specific because of a concern, which may not be a realistic concern, and the expert is saying, you know, we don't think it's very realistic, given the distance.

The expert actually has seen all of these diagrams and makes reference to them in its statement, that there are a whole bunch of other sites, whether close or farther, whatever, but he doesn't that -- doesn't believe that that security concern is a reasonable one and, nevertheless, there are things that the experts suggest that we would do with this building for security purposes -- I think controlling access into the building and up through the building -- that I'm assuming he would recommend for any building that was being built with a height and a sight line that this building has.

CHAIRPERSON GRIFFIS: Right. So in your discussions with your security agent or anything like that, they didn't give you a diagram of like, you know, this is a Class A sharpshooter and this is the distance that they can hit a bulls-eye. I mean, do you know anything like -- What's 1,000 feet?

MR. CINKALA: No. In fact, we talked at length -- and again, this issue came up the middle of last week. So we've tried to get as much detail as we could quickly.

One of the things Dusebella is going to do for us is actually go to the NYPD and their Sniper Division to try to get ourselves more educated on this, which you will see in the letter. It's in the second page. They say the threat of a sniper is legitimately credible, though the range from a perpetrator to target is significant.

CHAIRPERSON GRIFFIS: Right.

MR. CINKALA: So it's his way of saying that we think this is a long way off from being a credible threat.

CHAIRPERSON GRIFFIS: If I'm coming off diminishing the concern, I don't mean to, because I think it is a very legitimate concern based on, you know, the location of the building. I mean, it's interesting that you picked the corner. I mean, it would have been more appropriate, this week's events, to actually pick the platform in front. That's where the new President or now the continuing President will be sworn in. I mean, isn't that the rifle shot you -- I shouldn't say that. But isn't that an interesting

target. But going from the corner that you picked, is there actually a pedestrian area there?

MR. DOVE: There is what's called Senate's Park.

CHAIRPERSON GRIFFIS: Right, and that's the green, and that's the park out. And there is trees and vegetation around that. But you are picking a point of the building at which no one would really be standing.

MR. DOVE: That's correct.

CHAIRPERSON GRIFFIS: Okay. Just trying to put all this information together.

MR. NETTLER: Unfortunately, it's a response to the Architect of the Capitol who is pointing out an area that, you're right, nobody would be standing in.

CHAIRPERSON GRIFFIS: Right. No, I'm not criticizing. I'm trying to fully understand.

MR. NETTLER: You can't access the Senate chamber. You can't see the Senate chamber from that part of this building.

CHAIRPERSON GRIFFIS: Right.

MR. NETTLER: It's blocked. So I don't understand -- I personally don't understand why the Sergeant at Arms picks the Senate chamber, since you

can't see it from any point on any of those buildings.

CHAIRPERSON GRIFFIS: Right.

MR. NETTLER: With any weapon. But because that's the point that he picked, we simply decided to, well, we'll take his point and then just show you that what we are doing doesn't change the situation as it currently exists.

CHAIRPERSON GRIFFIS: Right, and that makes sense, taking the point.

MR. CINKALA: Mr. Chairman, could I add something. One of the points you were making earlier is stressed throughout this letter from Dusebella, Venturi and Santori, which is there is a credible target identified. The solution typically is not to impose security enhancements on all of the surrounding neighborhood. It is to take that target and enhance it.

CHAIRPERSON GRIFFIS: Right.

MR. CINKALA: And whether that's ballistic glass or landscaping at the target, but not to affect a whole neighborhood or a whole community.

CHAIRPERSON GRIFFIS: Well, it makes some sense. It's easier to control one point than it is an infinite number.

MR. CINKALA: That's right.

CHAIRPERSON GRIFFIS: Okay. Of course, we could just try and change human behavior and we would all be better off. Okay.

MR. DOVE: The last document, just to --

CHAIRPERSON GRIFFIS: That's the purpose of zoning, isn't it, changing human behavior? Okay.

MR. DOVE: Just to reinforce the concepts we are talking about, I've emphasized what would be the new view angle from the new building to this north facade of the Senate wing.

You can see that it falls completely within already, if you will, jeopardized areas from the rooftops that are adjacent. So it really does not create any additional view angles, planimetrically anyway, from any -- other than what is already existing.

We talked about the view of the Senate.

CHAIRPERSON GRIFFIS: For clarification, when you are talking about you are not creating any new view angle, what you're saying is, okay, hypothetically I'm a sniper; I'm looking for different points of which. In the current configuration of the buildings that are there, I have the same view as would be created here. So you know, I've got two other options to go to.

MR. DOVE: In fact, t. .e are buildings closer by 400-500 feet.

CHAIRPERSON GRIFFIS: Right, which is shown on dimensions. Okay.

MR. DOVE: And then one last thing, just because we talked about it. Because there is a fairly heavily wooded area that's in this Senate Park, the view angle, at least to anything that is at grade, is actually partially obscured by the landscaping that is there. That may not be relevant, but I just thought it was interesting when you see it in a diagram. The hill is so high that the trees actually offer a buffer.

CHAIRPERSON GRIFFIS: Okay. Don't take that down. First of all, that's not in the record yet is it? We don't have that document. We can get that in.

MR. DOVE: We have that.

CHAIRPERSON GRIFFIS: But clearly, just for our understanding, the scale of that -- Is that scale of that drawing the cross-section on top?

MR. DOVE: Yes. This is 1600 feet from here.

CHAIRPERSON GRIFFIS: Excellent. So it is at a scale. And the trees that are shown, are those

also correctly scaled for the existing condition?

MR. DOVE: Yes.

CHAIRPERSON GRIFFIS: So that's really an existing condition that we are looking at. That's fascinating. Okay.

MR. DOVE: Fairly compelling.

CHAIRPERSON GRIFFIS: It is indeed. Okay. Anything?

MR. DOVE: I think that's all I was supposed to cover.

CHAIRPERSON GRIFFIS: Thank you very much. What else?

MR. NETTLER: Unless you have any questions for our other members of our team, that is our presentation. I will reserve any final statements after you have heard from the Office of Planning.

CHAIRPERSON GRIFFIS: Okay.

BOARD MEMBER MANN: I have a question.

CHAIRPERSON GRIFFIS: Yes, Mr. Mann?

BOARD MEMBER MANN: Do you know if this project is located within the boundaries of the former Pennsylvania Avenue Development Corporation?

MR. NETTLER: It's not.

BOARD MEMBER MANN: Okay. thank you.

CHAIRPERSON GRIFFIS: Let's move ahead

then. If there is nothing further from the applicant, let's go to the Office of Planning, and I wish I could say a very good morning to you.

MR. PARKER: I wish that as well. Good afternoon. My name is Travis Parker. I am with the Office of Planning.

Most of the issues addressed in my report have already been discussed or alluded to. In light of the hour, I'd be happy to stand on the record as submitted, unless there are questions from the Board.

CHAIRPERSON GRIFFIS: I think that's perfectly appropriate. Ms. Miller, questions?

VICE CHAIRPERSON MILLER: I was wondering if you had a comment on the security question?

MR. PARKER: None whatsoever.

VICE CHAIRPERSON MILLER: Okay, thank you.

CHAIRPERSON GRIFFIS: Fairly logical answer. Okay. I appreciate the report. It is, as usual, an excellent report. The graphics involved are also good in terms of the aerial photograph that really puts this in its place, and I think with a significant location to the adjacent park and also the -- It really shows quite well the different confluences of angles of streets that, as the Office of Planning has counted up, six-sided lot, or the

applicant has indicated it's a five-sided but, nonetheless, it is a very unique sided lot on this.

The, obviously, the analysis is put together very well, and a reiteration of some sort, but also an addition of their own analysis of the applicant's submission on this. So I don't have any other questions of it.

Mr. Nettler, do you have any cross-examination of the Office of Planning?

MR. NETTLER: No, I don't.

CHAIRPERSON GRIFFIS: Okay. One of the points that I would draw the Board's attention to, which I know we always do look at -- It's stated on the graph on page 2 of the Office of Planning. It's stated in the applicant's submission in terms of what the actual lot occupancy and FAR is, and done well. But this is all of it together, and I think that really helped me in terms of understanding the entire application of how it wasn't even getting close to what was allowable, be it the lot occupancy or be it the FAR, the actual square footage that's going into it. so I think it's helpful to re-review that on sheet 2.

That being said, if there is nothing else for the Office of Planning, let's move ahead. I don't

have any other government agency reports except for those already noted: One, Exhibit 21 is the Architect of the Capitol. Exhibit 22 is the Commission of Fine Arts.

We can move ahead to ANC-6C. Has the ANC shown up for our afternoon session in the morning? Okay. Very well. not having an ANC member here, we will just note, it is Exhibit Number 20. Ms. Miller?

VICE CHAIRPERSON MILLER: I just have a question for the applicant. I think I heard someone say that the cost of the garage in part drove the height. I'm wondering how you got to the number of parking spaces you have, whether if you had less parking spaces, that would alleviate the need or some of the need for the height variance.

MR. CINKALA: Let me answer that question. Right now we are at about 443 spaces, of which I think 40 are tandem spaces. If you look, I think, around downtown, that -- I am going to not get my math exactly right, but that's about a .7 to .8 ratio, which is on the edge of being typical for downtown parking.

If you look at the site condition today, they have some 460 spaces in a 210,000 square foot office building. So they are significantly over-

parked. We are trying to accomplish two things, candidly: One, build a building that responds to the market as best we can; and two, to meet the needs of our tenant, Jones Day, which has an historical record of having more parking than most people do have downtown.

So the number we have ended up at, in conjunction with discussions with them and our planning efforts, is a number that they can live with and we think we can live with from a marketability perspective of the building.

CHAIRPERSON GRIFFIS: Okay. Bottom line, you are going to help all those commuters find some residences in the District. Right? Yes. Good.

MR. NETTLER: I should, I guess, add to one thing. The number of spaces -- We actually have reduced the number of spaces from what we originally had, because it's become so difficult to fit those spaces in there economically. So we are at a point now where we are simply trying to replicate what Jones Day has, and it's not that much above what's required.

CHAIRPERSON GRIFFIS: Right. To the point of the balance of, one, how much the existing tenant wants but also how much the market would demand, essentially, to make this a viable project to build.

MR. NETTLER: Well, a. what the zoning regulations require.

CHAIRPERSON GRIFFIS: Right. But you are above what is actually required. Is that correct?

MR. NETTLER: We are, but we are not that much above.

CHAIRPERSON GRIFFIS: Right. We are not that much, and how many buildings, in your knowledge, downtown, new office buildings, are built to just the requirement of zoning, for parking?

MR. NETTLER: I would almost defer to George from that perspective. You know, I would say everybody is trying to hit with their new buildings this .6 to a .8 ratio for downtown parking.

CHAIRPERSON GRIFFIS: Are you aware of any new Class A office building that was built that built just to the zoning requirement?

MR. NETTLER: I'm not.

CHAIRPERSON GRIFFIS: That doesn't matter. We'll let it go.

VICE CHAIRPERSON MILLER: I just wanted to clarify that. But that is only one factor that is driving the height. It's also this sensible volume and other things you touched on.

MR. NETTLER: Yes, ma'am.

VICE CHAIRPERSON MILLER: Thank you.

MR. DOVE: There are some of those that are not built to code we are tearing down and building parking so that it will be above code.

CHAIRPERSON GRIFFIS: Above, though?

MR. DOVE: Yes.

CHAIRPERSON GRIFFIS: I mean, the point is the market is demanding that it is providing more parking than the actual zoning requirements require you to provide.

MR. DOVE: Yes. But a one per thousand ratio is considered a minimum ideal for an office building in the downtown area, and we are going to be right at about one per thousand.

MR. CINKALA: We are a little more than that, George. We are at about a .8.

MR. DOVE: But we are in that range.

CHAIRPERSON GRIFFIS: Right. Exactly. Okay. Good enough. Any other questions? Anything else from the Board? Anything for Office of Planning? Very well. Let's move ahead then. Where was I? Government reports, the ANC.

We were going to get into the ANC report. Is there anything, Mr. Nettler, you wanted to ask to that or we will just note the exhibit 20. They did

ask for leed's, l-e-e-d's. Interesting. Okay.

I imagine that you have discussed all that. We noted in your submission, actually, an excerpt from the website of the architects, and I know also -- Well, was it the architects? JBG also had something in there, was it not? Anyway, you guys are all working on getting some sort of environmentally sensitive design built, and it may, in fact, get to leed certification level.

MR. NETTLER: Correct.

CHAIRPERSON GRIFFIS: Okay. Anything else we need to highlight on that? Ms. Miller? Very well, let's move ahead then. Is there anyone here in support or in opposition of application 17271, which has been properly advertised for our morning session, to give testimony? Persons to give testimony? Not noting anybody here to provide testimony, let's move ahead, Mr. Nettler, for any closing remarks that you have.

MR. NETTLER: And I will be brief, given the fact that we are on our morning session.

I think that both the testimony that you've heard today and the submissions in the application make clear that we meet the requirements for obtaining an area variance, both in terms of the

uniquenesses of the site, which are many elements to the uniqueness, the practical difficulties of being able to utilize the site, given the zoning regulations and the needs -- or the consequences of these unique factors.

I think, as the Office of Planning has pointed out, that we are consistent with the zone plan. We do take the security issue seriously. That has been raised by the Architect of the Capitol, which is why we have our, of course, meeting with them today, and gone further to -- while we think the security issue is one that affects a lot of properties in this area, and while some may say that it is not one that would provide a basis for denying this application, we have gone further to ensure that we have had a very thorough review by what I would call the preeminent expert in this area and the expert who provides that advice to most other Federal agencies to give us an idea as to what we need to do to make clear that we provide as much security as possible, and even more so, apparently, than many other neighboring buildings.

We do have, as the representative of Jones Day recognized a very time sensitive situation for Jones Day and a construction schedule that we are

actually compressing to be able to meet their requirements. So we would ask for approval of this application and approval as quickly as possible, even if you should so deign to do so, a bench decision today with a summary order.

We do have a number of reviews that will be coming up. So in terms of this design and any other issues that come up, there are forms to address those, the Commission of Fine Arts, DCPL and others. So this an ongoing design challenge that will be met with them as well.

CHAIRPERSON GRIFFIS: Okay. Step lightly in that one. Mr. Nettler, does it give you any concern that, if we did a bench decision today, it would only be three members voting?

MR. NETTLER: That doesn't give me any concern. No.

CHAIRPERSON GRIFFIS: Good.

(Whereupon, the foregoing matter went off the record at 3:18 p.m. and went back on the record at 3:22 p.m.)

CHAIRPERSON GRIFFIS: Good. We'll call that our lunch break.

Just to be clear, we needed a moment just to -- There was a lot of information that was put into

the record today, and I think -- just a quick little deliberative session here -- I think the Board is prepared to move forward with deliberation today.

Based on the fact of the testimony that was provided and based on our opportunity essentially to go through this letter written by the consultants, but also to have it addressed by the applicant, I think the record is sufficiently complete, and I do believe it would be most appropriate and expeditious for the Board and its schedule, and based on the hearing that was completed today, to move ahead in deliberation under a motion.

I would move approval of Application 17271 of JBG/Louisiana LLC, and that would be a variance from the height under 1709.23, which would allow the building height increased to 130 feet at premises 51 Louisiana Avenue, N.W., and would ask for a second.

BOARD MEMBER MANN: Second.

CHAIRPERSON GRIFFIS: Thank you very much, Mr. Mann. Let's go quick through the decision. There's an awful lot that's put into this file, and it really actually was a very dynamic filing, not to mention the dynamic building and design, all of which goes directly to the variance cases I have looked at.

In terms of the deliberation, let me

start. The unique aspects to this are numerous and the confluence of all of those bring about the practical difficulties. Uniqueness begins with this. We indicated actually just the specific location, the dimension, the size of the size, meaning the differing size of the five sides and the great expanse of the site.

We have existing structures which, in fact, in the written filing by the applicant the court cases that were cited that go to how uniqueness can be -- existing buildings can be an aspect of uniqueness, and I think it is clear in this one, as we have seen before, but certainly clear in this one.

We have the below grade aspects that relate to the uniqueness and also the practical difficult that arises: The Metro tunnel, the Tiber Creek which I think was described as a sewer today, which is really disappointing, but nonetheless, the remedial aspects and the construction aspects that have to do with dealing with that. And then -- Well, I think that summarizes, if not specifically outlines most of the unique aspects. Obviously, you can all give more as we get into it.

Practical difficulty, I think, is arising out of all of those. Oh, well, one of the uniqueness

are the differing floor levels of the existing buildings in the two different buildings that were built at different times. The floor levels, if I recall -- there was a 15-foot floor to floor height. For our information, that is extreme. I mean, that's a beautiful height, but when you are trying to align it to two different floor levels and different areas on the site, it is obviously lends itself to practical difficulty.

I can summarize, in my mind, in terms of the persuasive argument that I heard today and in the written submissions, that the design solutions for these unique aspects create all the practical difficulties, and that is as you try and combine this whole V-shape buildings with a new building, all within the envelope of matter of right zoning, what gets pushed is the height, and the height gets pushed because of the below grade aspects. The height gets pushed in order to set back to create an atrium that creates a circulation through all the differing buildings that can accommodate the differing floor level. Well, those are the exciting ones. So those are the only ones I want to talk about.

I think the deference in terms of, actually, the completeness and success of actually all

the design solutions, I think, is shown well on the model in the massing and the deference to the existing buildings, as was part of the agreement or part of an unsuccessful proposal prior of kind of encroaching on the existing buildings.

One of the successful endeavors of the design solution is to set back and really give deference to those, which then again creates its own difficulties in how you mass out this site. The location itself is how you address so many streets. I mean, you have two, if not three, prominent street elevations on this, not to mention, as came up somewhat indirectly, but you have four or five spectacular views off of this, and each one needs to be addressed adequately, be it the vision of the building and also the vision from the building.

It is in the submission that the height that is being requested is, in fact, within the Height of Buildings Act of 1910, based on the width of the street going to 130 feet, and in terms of whether it would impair the intent and integrity of the zone plan, I don't think there has been any persuasive evidence that it would. In fact, the Office of Planning's analysis is actually supportive of the application, indicating that it, in fact, would not

impair the zone plan or map.

Whether it would impair the public good -- Would this go against the public good? I think, really, that's where the security issue comes into discussion. You know, more and more, the Board is hearing an awful lot on security, and this Board sits as the FMBZA also where it is of critical importance, and we are well briefed on an awful lot of issues involved in that.

So the question of seriousness and severity of security is not taken lightly by the Board. As I indicated earlier in the testimony, I hold to that opinion. I wasn't given much substance in this case in terms of what was the issue that was involved. In order to assess it, we need to know the specifics in order to measure and in order for us to make a decision on it, and also to assess whether there is any way it might be mitigated or, you know, is the security issue actually a matter of the height or not.

If it was reduced two levels and brought down to the same level of the buildings surrounding, would that mitigate the security issue, or just a building there -- does that create the security issue? All of these kind of comparative levels are not here

for me -- this case.

I also think that it was very persuasive in terms of the applicant's testimony and evidence regarding the actual view shed and what is existing, and what is created if this is actually built, and showing that the existing conditions and the proposed conditions don't necessarily create a unique aspect. This can be done anywhere else or, rather, there are other areas to find this same type or level of assumed security risk.

There are mitigating conditions which they had talked about in the letter and also in their testimony, I think, is exactly correct in the way you remediate any sort of security concerns around the target, that being it is not necessarily done at the point -- Well, it is done at the point that the target is, and it is obviously easier to secure one place than it is to secure an infinite number of places.

Then, you know, it really -- maybe because I'm hungry, but there seems to be some great symmetry to this, going back even with the security, to the design. Of course, I may have just lost that thought. Wow. Lunch break is a good thing, isn't it? Okay. Well, it was a monumental thought.

Nonetheless, I am going to move on. I am

going to move on, and maybe it will come back to me.

Okay. That's what I see in summation on this. Let me open it to others for any other comments that they might have.

VICE CHAIRPERSON MILLER: I concur with all that you have said so far. I think this case has a lot of different types of uniqueness, and I'm not sure that you have covered the one that regards its historic status and that the property is subject to a standstill agreement, which puts great limitations on the type of development that can be done, and that it is also -- We heard today that this may be formalized even further into historic landmark status.

I'm not sure that you made reference to the underground constraints such as the Tiber Creek combined with the storm sewer, and the Metrorail tunnel that limits the underground development of the site, and increase the costs of parking.

We did hear that that was just -- That is one aspect that drives the height, but only one, and others were the sensible volume concept that I found very interesting and the fact that they were designing this building in a way which will have positive impacts as opposed to any adverse impacts with respect to environmental and aesthetics.

Finally, the security was the one major issue for me, I think for all of us. That touched upon whether there were going to be any adverse impacts here. The Architect of the Capitol raised some concerns, but they were very vague, and I think that the applicant did a good job in rebutting those concerns.

The Architect of the Capitol, I assume by the fact that he submitted this letter, knew about the hearing and didn't appear or request an opportunity to submit anything further or more specific for our consideration. So I think that we do have the whole record here, and on that basis I think that the test has been met.

CHAIRPERSON GRIFFIS: Good, thank you. Others? Very well.

Lastly then, you know, I don't recall a straight height variance coming to this Board, and I think it is probably of the area variances -- in this city, probably one of the most difficult. I can only imagine, but this has been incredibly well put together, and it is obvious that the test has been met in terms of our presentation today and the application that was submitted.

So if there is nothing further, we do have

a motion before us. It has been seconded. I would ask for all those in favor to signify by saying Aye. Opposed? Why don't we record the vote?

MS. BAILEY: The vote is recorded as three-zero-two to approve the application. Mr. Griffis made the motion. Mr. Mann seconded. Ms. Miller is in agreement. Mr. Etherly and Mr. Jeffries are not present, and did not vote.

CHAIRPERSON GRIFFIS: Good. Thank you very much, Ms. Bailey. Thank you all very much.

MS. BAILEY: So we are doing a summary order?

CHAIRPERSON GRIFFIS: I see no reason why not to waive our regulations and requirements and issue a summary order on this.

MR. NETTLER: If a summary order makes any reference to the plans, as it sometimes does, to at least note that these plans may be subject to -- are subject, actually, to further view by Commission of Fine Arts and others.

CHAIRPERSON GRIFFIS: Excellent. Do you want to draft that?

MR. NETTLER: We will draft that.

CHAIRPERSON GRIFFIS: Good. Why don't we have that sent in as soon as you can.

Is there any other business for the morning?

MS. BAILEY: No, Mr. Chairman, just perhaps to let the afternoon persons who are here know what time we will begin.

CHAIRPERSON GRIFFIS: Good. Thank you all. Appreciate it, and I appreciate everyone's patience. You can see, no matter what the size of the project, we give great emphasis to them all, whether it be a small addition to a single family home or a 250,000 square foot addition to a building.

With that then, I will adjourn the morning session. We do have a full afternoon schedule that's been set. We are going to break for only 30 minutes. We will be back and call the afternoon session at four.

(Whereupon, the foregoing matter went off the record at 3:35 p.m.)

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

Time: 4:19 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order the afternoon session of the 18th of January 2005. This is the afternoon public hearing of the Board of Zoning Adjustment for the District of Columbia.

My name is Geoff Griffis, Chairman. Joining me today is the Vice Chair, Ms. Miller, and also Mr. Etherly with us. Representing the Zoning Commission is Mr. Hood, and representing the National Capital Planning Commission is Mr. Mann.

Copies of today's hearing agenda are available for you. They should be very clear on exactly what we are going to do with the rest of our afternoon.

Importantly, of course, all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions. First, we are creating an official transcript. The court reporter sitting to my right is doing that for all that is said today. We are also being broadcast live on the Office of Zoning's website.

Attendant to both of those, we ask several things. First of all, if people would turn off

cellphones and beepers at this time, that would be appropriate, so we don't disrupt the transmission. Also, I would ask that people coming forward to speak to the Board to provide testimony, to fill out two witness cards.

Witness cards are available -- Looks like that table is empty. There should be some at the table in front of us where you will provide testimony. Those two cards should go to the recorder prior to coming forward to speak to the Board.

The order of procedure for appeal applications will be as follows. First, we will have the statement and the witnesses of the appellant. Second, we will hear from the Zoning Administrator and their representatives. Third, we will hear from any k-- the case for the owner, lessee, operator of the property or appellant, rather -- if not the appellant.

Fifth would be the intervenor, and sixth will be rebuttal and closing statements by the appellant.

Cross-examination of witnesses is permitted by the applicant or parties or intervenors, as will be established for this afternoon's case. There is nothing that prohibits this Board from limiting the scope, time and direction of cross-

examination. We will get very specific into that, as needed, as we progress this afternoon.

The record will be closed at the conclusion of this hearing except for any material that is specifically requested by the Board, and we will, as you are probably all well aware, be very specific as to what is to be submitted into the Office of Zoning and when it is to be submitted.

After that material is received, of course, the record would finally be closed, and no other additional information would be accepted into the record.

The Sunshine Act requires that this Board conduct all proceedings in the open and before the public. This Board may enter into executive session, both during or after a hearing on a case, and that would be for purposes of deliberating on a case or just for reviewing the record on a case. That would be appropriate and in accordance with the Sunshine Act and our own rules of procedure and regulations.

The Board will make every effort to conclude sometime this afternoon, hopefully by six o'clock, but I will update you. Obviously, our morning session went well over. It was quite a fascinating morning, and I'm sure some of you sat

through most of it.

That being said, let's go to any preliminary matters that the staff is aware of, and say a very good afternoon to ms. Bailey and also Mr. Moy from the Office of Zoning. Ms. Monroe is with us this afternoon representing the Office of Attorney General.

Ms. Bailey, are you aware of any preliminary matters for the Board's attention this afternoon?

MS. BAILEY: Mr. Chairman and to everyone, good afternoon, sir. The staff does not have any.

CHAIRPERSON GRIFFIS: Good. Is there anyone present that has any preliminary matters for the attention of the Board. If so, you can come forward and have a seat at the table in front of us.

Not noting any indication of preliminary matters, let me ask all those who are going to provide testimony today if you would please stand and give your attention to Ms. Bailey, and she is going to administer the oath.

MS. BAILEY: Please raise your right hand.

(Witnesses sworn.)

CHAIRPERSON GRIFFIS: Thank you, Ms. Bailey.

MS. BAILEY: Ready in the case, Mr. Chairman?

CHAIRPERSON GRIFFIS: I thought so. Yes, let's move ahead.

MS. BAILEY: This is an appeal, and the number is 17249 of Advisory Neighborhood Commission 2A, and it is pursuant to 11 DCMR 3100 and 3101; from the administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs.

Appellant alleges that the Zoning Administrator erred by issuing a certificate of occupancy permit (No. 81956, dated August 19, 2004) for a 34-seat restaurant (Coggins Sandwich Manufactory) located within the George Washington University dormitory.

Appellant alleges that the restaurant and proposed sidewalk cafe is a commercial use serving the general public. Appellant alleges that this use was not contemplated by the Zoning Commission in Order No. 958. The property is zoned R-5-D, and it is located at 616 23rd Street, N.W., Square 43, Lot 26).

CHAIRPERSON GRIFFIS: It appears to me, first of all, we have initially a request for intervenor status from the George Washington

University, which would be a first preliminary within this case. It has, obviously, come to my attention, as it has been laid in front of me, that we have a second request for intervenor status from Coggins Sandwich Manufactory, LLC. Am I correct that that is the only two? Is there anyone here present that thinks that they have a request for intervenor status that has not been identified?

Very well. I am going to ask the appellant to come forward to the table, if they wouldn't mind.

Board members, let's take up first the request for intervenor status of George Washington University. If you wouldn't mind just introducing yourself for the record?

MS. D. MILLER: My name is Dorothy Miller, and I am Chair of ANC-2A, and this is located in my single member district, which is ANC-2A-05.

CHAIRPERSON GRIFFIS: Excellent.

MS. D. MILLER: I have given my cards to the people, and I've given copies.

CHAIRPERSON GRIFFIS: Perfect. Thank you very much. Let me just start off saying, first of all, do you have the letter dated January 18th from Andrew Kline requesting intervenor status for the

Coggins Sandwich Manufactory?

MS. D. MILLER: I just got it a moment ago.

CHAIRPERSON GRIFFIS: Indeed. As did we. Okay. Let's start off first then with the request from the George Washington University. Do you have any position on granting of intervenor status at this time, Ms. Miller?

MS. D. MILLER: They notified me that they wanted to interview -- be an intervenor, I mean, and that's -- I figured they would.

CHAIRPERSON GRIFFIS: Do you support that? Do you oppose it? Are you neutral on it?

MS. D. MILLER: I would oppose almost anything GW does at this point. I'm sorry.

CHAIRPERSON GRIFFIS: That's okay. Is there substance to that comment or is that what the Board should understand?

MS. D. MILLER: First off, they have violated everything in the order that was issued by the Zoning --

CHAIRPERSON GRIFFIS: Okay. I'm not getting to the substance of the appeal. This is just based -- The only issue before us right now is whether we grant them intervenor status, and are you aware of

the requirements for granting intervenor status? We can get at that, or what I'd like you to do is just focus on that point at this time.

MS. D. MILLER: What are the requirements?

CHAIRPERSON GRIFFIS: Yes, Ms. Miller.

MS. D. MILLER: I've never been asked that question before.

VICE CHAIRPERSON MILLER: Okay. I just want to jump in here. I'm not sure what you can say to this, but 3199.1 defines party, and with respect to appeals it says that the owner, lessee, operator, or contract purchaser of the property involved in the administrative decision, if not the appellant, is a party in these kind of cases.

So I'm not -- They are saying, and I don't believe that you are going to refute, that they are the owner of the building.

MS. D. MILLER: They do own the building.

VICE CHAIRPERSON MILLER: They do own the building.

MS. D. MILLER: But, obviously, I'm not sure that they own the sandwich shop.

CHAIRPERSON GRIFFIS: But they own that building over at GW?

MS. D. MILLER: They own the building.

VICE CHAIRPERSON MILL . They own the building. So it looks to me, Mr. Chairman, that they fall within (a)(3) as an owner and to be granted intervenor party status.

CHAIRPERSON GRIFFIS: I don't disagree. I was just giving Ms. Miller an opportunity as the appellant to address that.

VICE CHAIRPERSON MILLER: And she asked what the criteria were.

MS. D. MILLER: That's the first time I've been asked the question. That's the reason why.

CHAIRPERSON GRIFFIS: I'm just stepping out today. Okay. Any other concerns then? Any other comments? Board members, any comments? I think Ms. Miller is absolutely correct in pointing to this section and in terms of the test of granting or establishing the intervenor status, and I think it is well within the realm of the Board and also within the realm of this appeal that George Washington University be an intervenor in this appeal.

Let's take up the second. We have Coggins Sandwich Manufactory, and the same party is indicating in appeal it is the lessee, George Washington University being the owner. The lessee/operator of the property involved, and I think they do also fall

within the criterion of party or intervenor, as based on our own definitions.

That being found, I'll open it up, Ms. Miller, again for any comment that you have that may bring light to something that the Board is not aware of.

MS. D. MILLER: They have never filed a request with us, with the ANC or with me.

CHAIRPERSON GRIFFIS: For?

MS. D. MILLER: To be an intervenor.

CHAIRPERSON GRIFFIS: Is that a requirement for an appeal before the Board?

MS. D. MILLER: Well, it's usually expected.

CHAIRPERSON GRIFFIS: Is it?

MS. D. MILLER: Well, I got one from the others.

CHAIRPERSON GRIFFIS: Indeed. I don't know that that is any requirement from the Board's perspective, unless anyone can point that. Ms. Miller, are you aware of any requirement that this would be filed to the ANC prior to being filed before the Board?

MS. MONROE: You mean notice of the appeal? Am I understanding this correctly?

CHAIRPERSON GRIFFIS: . , just notice of requesting intervenor status in the appeal.

MS. MONROE: No, I don't think it would need to be.

CHAIRPERSON GRIFFIS: Indeed. I'm not aware of any regulation that requires that either, but it's an interesting point to bring up, and we will take it under consideration as we look at all of our regulations.

That being said, I think that Coggins also rises to the level of being an intervenor in the appeal. Ms. Miller?

VICE CHAIRPERSON MILLER: I would just like to comment that I think, by the fact that 3199.1(a)(3) lists them as being entitled to party status, I don't think, therefore, they are required to file in advance for it.

MS. D. MILLER: Excuse me. They never have to notify the ANC or anybody that they are going to show up and talk?

CHAIRPERSON GRIFFIS: Not based on our regulations.

MS. D. MILLER: Okay. Moving ahead then we will have the order of procedure as I outlined in my opening, and I will get to the specifics as we go

through it, but we will obviously start with the appellant's case, which is, Ms. Miller, your case.

In order to establish how we progress for this afternoon, first of all, let me make a quick statement. As our requirements in 3117 show, of course, the appellant's case is to be submitted 14 days prior to the hearing, the entire case, the witnesses that will be called, any evidence. Ms. Miller, I believe you have met that threshold, and the file is complete.

In terms of your presentation of the case, we have the hearing today to afford you an opportunity to embellish on those submissions. That being said, I in my notes show four major pieces to your case presentation, and that is you clearly asked for the revocation of the C of O of restaurant.

There are certain issues of error that you assert: One, notification by the Zoning Administrator of the issuance of a permit, also the permit granting for public space construction, issues of whether a bathroom was provided attendant to this restaurant. There are additional issues that fall under all of those headings.

That being said, am I aware -- am I not listing any of the pertinent issues that you are going

to present today?

MS. D. MILLER: A bathroom is provided, but it is not --

CHAIRPERSON GRIFFIS: I know. I listed that, because I'm just bullet pointing al your points.

MS. D. MILLER: I'm just -- I'm enlarging on all of those points, and to give you a map of the location.

CHAIRPERSON GRIFFIS: Perfect.

MS. D. MILLER: That they filed when they filed their application.

CHAIRPERSON GRIFFIS: I'm sorry. Just step back for a quick second. Have I missed any of your points that you are going to present?

MS. D. MILLER: I'm not quite sure that you have.

CHAIRPERSON GRIFFIS: Okay. I'm not going to stop you from talking about any of it, but I think that's it in terms of summation in my own notes.

That being said, Ms. Miller, I am going to afford you a 20 minute presentation on your case before us today. An equal amount of time will be afforded all others that are present today, that being the intervenors and also the Zoning Administrator.

So when you are ready, the clock will show

20 minutes, and I can give you an update, and I will probably give you an update -- the clock is front of me -- when you have about three minutes left so that you know to start concluding, and then we will move on.

Obviously, cross-examination or any questions from the Board don't count toward your time. Don't worry about the clock. If we start asking questions and it doesn't stop, I can assure you that I keep good track with it in front of me, if we need to make up or add any time to the clock.

So I am going to take a deep breath. You can do the same, and whenever you are ready, you can start.

MS. D. MILLER: Dear Chairman Griffis and Board members, I am Dorothy Miller, Chair of ANC-2A and the ANC Commissioner for ANC-2A-05, the single member district wherein this property is located. The ANC, at a properly noticed public meeting on Wednesday, October 17, 2004, with five of the six Commissioners present voted unanimously that I represent the ANC-2A in this case.

As the Board knows, commercial operations open to the public are not allowed on residentially zoned property, which is the designation of all of

Square 43, without an exception. What was done to protect the residential property from increased noise, traffic and health issues, including deliveries, trash, and pests and, particularly, the rats are getting exceptionally large these days related to the commercial use.

These uses can devalue residential property and impinge upon the residents' right of quiet enjoyment of their domiciles. Our regulations go even further to protect the residential nature of the communities throughout the city by allowing universities to operate in our neighborhoods only through special exception process under an approved campus plan.

Under the special exception process the Zoning Commission, in its order 958, approved construction of a dormitory on Square 43, and condition Number 7 of this order states: "and spaces for these and four food venue services in the lower and first levels." Nowhere in the order is it stated our implied that these services would or could be commercial restaurant facilities serving both students and public.

Prior to the fall of 2001 public hearing on this case, the university made two separate

presentations, one to the ANC and another to the Foggy Bottom Association, on this project. The university had at least two opportunities to reveal its plans for commercial operations, including a sidewalk cafe, a public space at this location, and failed to do so.

The record shows that the university went on to deliberately sidestep discussing the planned commercial use of these spaces during the public hearings. While we can only speculate as to the university's motivation, the outcome is apparent.

The Zoning Commission would assume that these venues -- and this is the first time they are using these things; I looked it up in the dictionary, and it means a gathering place -- were dining facilities similar to Georgetown University's new south campus dining facilities for GW students, and okay the whole project as a university use.

The community only learned of GW's commercial plans for these university use venues prior to the September 23, 2004, permit request by Coggins before the Public Space Committee.

Initially, the matter was pulled from the agenda, and Coggins was told it would need to file with the Zoning Commission to obtain a special exception for use of the public space, as the Zoning

Administrator had exceeded his aut .ity in granting the use of the public space.

Because the interim Zoning Administrator had, contrary to zoning regulations regarding commercial use in a residential zone, approved a certificate of occupancy, the Director of Public Space overruled his staff, and a permit was issued. In fact, at the hearing he said, because the Zoning Administrator has approved it.

When the ANC filed its appeal in this case, the new Zoning Administrator sent an inspector to investigate, and Coggins restaurant was found to be in violation of the zoning order, as issued, and was ordered to shut down.

I would like to call your attention to one of my attachments that shows the Hatchet article on that particular event. It is attached to my statement.

CHAIRPERSON GRIFFIS: What is the Hatchet?

MS. D. MILLER: Well, besides giving you something to chop with, it is the newspaper put out by the students.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: Where we get most of our basic information.

CHAIRPERSON GRIFFIS: Interesting.

MS. D. MILLER: The location of the commercial venues directly abutting the non-university residential area is already creating numerous problems, such as increase in late night pedestrian traffic.

Additionally, Foggy Bottom has to cope with an inordinate amount of tour bus traffic, and it is clear that these commercial operations will become a magnet, as has Columbia Plaza, and they are a block away, for tour bus operations, particularly during the summer months, further degrading the residential nature of our community.

The ANC is not opposed to neighborhood-serving retail, as demonstrated in the recent Columbia Plaza. Columbia Plaza and Watergate were the first two PUDs put up, and they were given permission for that. But this is university use.

What the ANC is opposed to is absorbing commercial operations onto its residential zoned property under the cover of university's use without a full public hearing and consideration.

There are city-wide and precedent setting implications in this case that needed to be discussed, but weren't because of a lack of university's closure,

resulting in a complete lack of community awareness during the Zoning Commission hearing.

This commercial operation located in the midst of our residentially zoned community on an R-5-D property needs to be considered in a proper setting and with a full discussion.

On behalf of the ANC and the community, I request that this case be remanded back to the Zoning Commission for a minor modification hearing that would allow such community input and consideration by the Zoning Commission.

I thank you for your time and attention to this matter, and I will answer any questions you might have. I would like to call your attention to the list of things that's attached to this that the public space people told these people they couldn't do, and I want you to notice, if you look at the pictures, the things they violated.

I told you about the article, and the plan -- If you look at the maps of the plans that were submitted with their request for the zoning thing, you don't see any sidewalk cafe, and you don't see this coming out on the street for commercial use. Neither one of those plans attached to my statement show that.

I thank you.

CHAIRPERSON GRIFFIS: Good. Thank you very much. A couple of quick questions, starting with the last. You indicated that -- Your letter is what I'm looking at, December 1, 2004, to Mr. Bello indicating that the Public Space Committee had not allowed certain things that were happening.

Specifically Item Number 8 read that the property owner displays no logos, insignias or advertising of any kind or structure, fixture or material in public space. I assume you are now relating to the photographs that are attached to that and the signage.

MS. D. MILLER: Right. Right.

CHAIRPERSON GRIFFIS: Is it your understanding that these signages are actually on public space?

MS. D. MILLER: Yes, they are, because they can be seen from the public. If you read the zoning regulations, it says none of this can be seen from the street, or from the public.

CHAIRPERSON GRIFFIS: The zoning regulations or the public space regulations?

MS. D. MILLER: Oh, yes, read 'em. I have a copy with me.

CHAIRPERSON GRIFFIS: But you bring up two

issues. Let's clear them all up one at a time, because my mind isn't as good as yours.

MS. D. MILLER: Oh, yours is better than mine.

CHAIRPERSON GRIFFIS: So the issue is in the public space. Are these signs on public space, meaning, another way, are they not on private space?

MS. D. MILLER: What the zoning regulations say, can be seen from public space. Now that's what the regulation says that I have.

CHAIRPERSON GRIFFIS: Okay, let's go to your issue then. What is the section that you are citing in the zoning regulations that preclude anything from being seen from public space?

MS. D. MILLER: I have a copy of the order as well. Can I get it? I thought I had this right with the rest of this. Here they are. I did have them with me. Thank you. I did have them right on the table with me.

CHAIRPERSON GRIFFIS: Okay, good.

MS. D. MILLER: This is page 3-12 in the new zoning regulations, and it deals with R-5 District.

CHAIRPERSON GRIFFIS: I'm sorry. Just give us the section, because quite frankly, we are

going to have 100 different pages up here. What's the section?

MS. D. MILLER: All right.

CHAIRPERSON GRIFFIS: Does it say in the beginning paragraph?

MS. D. MILLER: I'm going to get it to you. "No sign or display" --

CHAIRPERSON GRIFFIS: I'm sorry. I'm sorry to interrupt. What I need is the number. What's the section?

MS. D. MILLER: Oh. 351.2(d)

CHAIRPERSON GRIFFIS: 351.2(d), Chapter 5.

MS. D. MILLER: And below that comes 3.52.2 which covers universities. And I'd like to add that Congress said no signs could be on buildings like this, and they passed that law in 1911.

CHAIRPERSON GRIFFIS: What law is that?

MS. D. MILLER: Congress passed a law in 1911 and, if you look at the restrictions by the Public Space Committee, they also state that nothing can be seen from the street.

CHAIRPERSON GRIFFIS: Okay., 351.2(d) is what you are talking about, Ms. Miller?

MS. D. MILLER: I beg your pardon?

CHAIRPERSON GRIFFIS: 351.2(d)?

MS. D. MILLER: Right.

CHAIRPERSON GRIFFIS: That is for uses, no sign or display indicating existence of adjunct shall be visible from the outside of the building.

MS. D. MILLER: And then look at 352.2. But what I want to call your attention to is what was included in what the Public Space people said.

CHAIRPERSON GRIFFIS: What was the other cite?

MS. D. MILLER: If you look at the conditions that --

CHAIRPERSON GRIFFIS: Number 8.

MS. D. MILLER: Oh, the other one is 352.2: A college or university --

CHAIRPERSON GRIFFIS: I'm sorry. I'm probably confusing you. Yes, the Public Space Committee has .8 or the condition number 8, which reads that a property owner display no logos or insignias or advertising of any kind on any structure, fixture or material in public space.

MS. D. MILLER: And, well, and it cannot be seen from public space. They --

CHAIRPERSON GRIFFIS: That's what I'm asking. Show me in the Public Space Committee where it says that language, not the "in public space"

language.

MS. D. MILLER: Well, a building facing public is public space, because what it faces is public space.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: At least it is to me.

CHAIRPERSON GRIFFIS: Indeed, and I understand that.

MS. D. MILLER: And that's the reason, when Congress said you can't have pictures or signs painted on buildings, because they are in public space.

CHAIRPERSON GRIFFIS: Boy, how do we have them all over the city?

MS. D. MILLER: You're not supposed to. That was because the City Council didn't catch it quick enough, and then Jack Evans said, oh, they will sue us.

CHAIRPERSON GRIFFIS: Got ya. Okay. I don't see that direct language in the number 8 of the Public Space Committee. Let's go back to 351.2.

MS. D. MILLER: Well, what they did was, if you look at the pictures I originally gave you, they had signs outside the door, and I meant to bring the signs they had posted on every lamp post and every

tree.

CHAIRPERSON GRIFFIS: Right.

MS. D. MILLER: For a block around.

CHAIRPERSON GRIFFIS: The kind of banner signage.

MS. D. MILLER: Oh, and that's against the law, too, because --

CHAIRPERSON GRIFFIS: Indeed. Let's get specifically to your point, 351.2(d) which I cited and I read (d) portion. Ms. Miller, follow me up to 351.2 which states: "Commercial adjuncts as accessory uses to a hotel containing 100 or more rooms or suites shall be permitted in R-5 District, provided" (a), (b), and (d), that no sign or display indicating the existence of adjuncts shall be visible from outside the building. Is this a hotel?

MS. D. MILLER: It practically is. It's transient.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: But go down to --

CHAIRPERSON GRIFFIS: But on your comment, because I take every word of yours of great import, it kind of is for our understanding, and actually for our direct deliberation and decision on this case. Does the zoning regulations allow us to find out that this

kind of is a hotel and it, therefo..., is required to come under the regulations for that of a hotel?

MS. D. MILLER: Would you read 252.2. Read that one. That's just below it.

CHAIRPERSON GRIFFIS: Say it again.

MS. D. MILLER: Special exceptions, general, for R-5.

CHAIRPERSON GRIFFIS: I'm sorry. 352.2?

MS. D. MILLER: Right.

CHAIRPERSON GRIFFIS: Okay. "A college or university permitted in R-4 District under a 332.2 shall be permitted as a special exception in R-5 District if approved by the Zoning Commission under 3104."

MS. D. MILLER: See, these are all special exceptions, which they didn't ask for, they didn't get, and the order didn't give them.

CHAIRPERSON GRIFFIS: Did this building get a special exception approved from the Zoning Commission?

MS. D. MILLER: No, they didn't. Read the order. They got no special exception for that. Here's the order.

CHAIRPERSON GRIFFIS: For what didn't they get a special exception?

MS. D. MILLER: This is the order. They could have four feeding venues, but they didn't say --

CHAIRPERSON GRIFFIS: My question is did this building go through the Zoning Commission's review and get approved?

MS. D. MILLER: The building did, and for feeding programs for the students it did, but nowhere did it say there were going to be commercial.

CHAIRPERSON GRIFFIS: Good. Let's --

MS. D. MILLER: Nor anywhere did they say they were going to open onto the street and be open to the public.

CHAIRPERSON GRIFFIS: Is there a difference in what was built and what was shown to the Zoning Commission in plan?

MS. D. MILLER: Absolutely.

CHAIRPERSON GRIFFIS: How so?

MS. D. MILLER: Because they have put tables and chairs outside. They have built a sidewalk and a wall around it that's not supposed to be there.

CHAIRPERSON GRIFFIS: Are the tables and chairs in the public space?

MS. D. MILLER: Yes, it is.

CHAIRPERSON GRIFFIS: Does it have any bearing on this Board in terms of zoning?

MS. D. MILLER: It should, because the Zoning Administrator can't grant that. He has no control over public space.

CHAIRPERSON GRIFFIS: But how can it, when it goes across a property line?

MS. D. MILLER: It doesn't go across the property line. You cannot put something outside that you are not allowed to put.

CHAIRPERSON GRIFFIS: But if it's in public space, it's not on their property. Correct?

MS. D. MILLER: Even if it's on their property, it can't be in public space without a special exception, and they didn't ask for a special exception.

CHAIRPERSON GRIFFIS: There's two aspects. There's "on their property" or "in public space."

MS. D. MILLER: Both. It's both. Go take a look at it. There's a picture. I put a picture in, in my original.

CHAIRPERSON GRIFFIS: What is both? There's table and chairs on both public property and private?

MS. D. MILLER: First off, they were not granted that right. It required a special exception, which they didn't ask for.

CHAIRPERSON GRIFFIS: Let's go linear here. Let's just stick with one thing and hear it out. Okay? Otherwise, we are not going to get anywhere all day. Okay?

Is public space -- Is the permit issued in public space a zoning issue? Is it part and under our jurisdiction as it is outside of the property?

MS. D. MILLER: I don't think your question quite covers what the problem is. That's the reason why I keep coming back in a way that doesn't answer your question, because I don't think the question is fixed in such a way that it covers the situation. It just doesn't.

CHAIRPERSON GRIFFIS: Okay. How does it cover it?

MS. D. MILLER: The university operates in a residential area through special exception.

CHAIRPERSON GRIFFIS: Right.

MS. D. MILLER: They are guests in our neighborhood, and they need a special exception for anything they do that affects our neighborhood.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: They didn't ask for it, they didn't get it, and the Zoning Administrator, without authority, approved it.

CHAIRPERSON GRIFFIS: What is "it"?

MS. D. MILLER: I beg your pardon?

CHAIRPERSON GRIFFIS: What the "it"? You've lost me.

MS. D. MILLER: Approved an outdoor feeding thing -- feeding the public off of the sidewalk coming in, and anybody can go in. Now you go in the bathroom, you have to be escorted to the bathroom. How could they approve a restaurant or a fast food place that doesn't have a restroom? You have to go into the secure part of the building to use the restroom, and you have to be escorted there.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: Now you know there's something wrong with this.

CHAIRPERSON GRIFFIS: I don't know. I don't really understand what the problem is.

MS. D. MILLER: Well, I'm asking that you send it back to the Zoning Commission so they can straighten it out.

CHAIRPERSON GRIFFIS: Actually, that's the second point I was going to bring up before I got mired into all the rest of this.

You are somewhat changing your request from the Board. First it was to overturn, based on an

error from the Zoning Administrator, overturn their issuance of the C of O.

MS. D. MILLER: That's correct.

CHAIRPERSON GRIFFIS: But in conclusion on this, you are asking us not to do that but rather just remand this -- what "this" is I'm not sure, but remand this to the Zoning Commission.

MS. D. MILLER: Remand this issue.

CHAIRPERSON GRIFFIS: What issue?

MS. D. MILLER: The issue of commercializing residential space in a residential community by the university.

CHAIRPERSON GRIFFIS: But my understanding is, looking at the plans and looking at this application, that the Zoning Commission approved this as planned.

MS. D. MILLER: No, they didn't. No, they didn't.

CHAIRPERSON GRIFFIS: And what in those plans was not approved or was not seen by the Zoning Commission or, for that matter --

MS. D. MILLER: Feeding the public and using an outside area to feed them.

CHAIRPERSON GRIFFIS: There were three -- As the Zoning Commission articulated, three food

venues

MS. D. MILLER: Four.

CHAIRPERSON GRIFFIS: Okay, four.

MS. D. MILLER: Three on the lower level, one on the first level.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: But if you read the rest of the things which they do not clarify on the regulations for an R-5-D District, they go to great lengths to say what can't be done anywhere else. So why should it be allowed to a university who is already abusing its privilege for being in our residential area?

CHAIRPERSON GRIFFIS: Okay. Wow, let's go to it then. You are asking for, let's say, revocation of the C of O or remanding this back to the Zoning Commission, because the Certificate of Occupancy was issued as a restaurant. The restaurant -- and your difficulty in your own submissions is that it's open to the public.

MS. D. MILLER: Correct.

CHAIRPERSON GRIFFIS: If it just feeds the students, that's fine. Is that correct? If there is an error, as you are asserting that the Zoning Administrator issued the C of O for restaurant, what

is the C of O that -- it should have been restaurant. What is the --

MS. D. MILLER: They call it a venue, and a venue is a gathering place.

CHAIRPERSON GRIFFIS: Yes, but the Zoning Commission called that. That's not --

MS. D. MILLER: No, they didn't. GW called it a venue.

CHAIRPERSON GRIFFIS: Okay, follow me here. What does the Zoning Administrator write on the Certificate of Occupancy which is an enumerated use in the regulations? What does he put on that C of O that would be appropriate?

MS. D. MILLER: I quoted that in my statement, and I have it marked in the order as well. "The dormitory will contain dormitory residence rooms for male and female upperclassmen, 88 below-grade parking spaces and spaces for three or four feed venues services on the lower levels and the first levels." It doesn't say anything about feeding the commercial public.

CHAIRPERSON GRIFFIS: Okay. Actually, your resolution number 04-10B indicates that, as I took it, the Zoning Administrator should have put on the Certificate of Occupancy student serving dormitory

food service.

MS. D. MILLER: That's right. That's what they are supposed to be.

CHAIRPERSON GRIFFIS: Is that a listed use in the zoning regulations for a Certificate of Occupancy?

MS. D. MILLER: When they asked for a dormitory for 800 students and four food places to feed them, what did you think they wanted?

CHAIRPERSON GRIFFIS: I wasn't on the Commission.

MS. D. MILLER: I know, but what would you think they wanted? To feed the students. But they don't want to do that.

CHAIRPERSON GRIFFIS: They don't want to feed the students?

MS. D. MILLER: No. That costs money, and GW likes to make money.

CHAIRPERSON GRIFFIS: I am lost. What is it? They just want to make money?

MS. D. MILLER: Oh, amen, brother.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: They have found out they can --

CHAIRPERSON GRIFFIS: But they don't make

money on the students.

MS. D. MILLER: Well, let's put it this way. They make money on them when they move into my building.

CHAIRPERSON GRIFFIS: All right. Well, we are digressing.

MS. D. MILLER: They make money on everything else.

CHAIRPERSON GRIFFIS: Digressing.

MS. D. MILLER: The students complain they make money on everything they do.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: They closed the one restaurant in the one dormitory, because it's cheaper for them to farm the stuff out than it is for them to try to run it.

CHAIRPERSON GRIFFIS: Ms. Miller, what I am going to try and do, which I'm not doing successfully, is, first of all, as you are well aware, and I know you are, an appeal is different than a special exception or a variance case.

MS. D. MILLER: This is my first one.

CHAIRPERSON GRIFFIS: Interesting. Well, let me help you out then. An appeal is different than a special exception or a variance. An appeal is

brought before this Board. You being the appellant have indicated that there is an error that has been done, and the Zoning Administrator in this appeal is who you are asserting made that error, and it's very simple to put on an appeal.

They are often complex, but it's simple in its process. That is, we need you to identify exactly what the action was and what the error was that led to that action. There, we have two remedies at the end of the day today. That is, we will either uphold the appeal or we will deny it.

If we uphold the appeal, it means that you were persuasive and we agree with you that the Zoning Administrator has acted in error in issuing the Certificate of Occupancy, or we will not agree with you and indicate that the Zoning Administrator did not err in issuing a Certificate of Occupancy.

That is, as far as I see, what our role, direction, jurisdiction is for the remainder of today.

MS. D. MILLER: Could I call your attention to the article that was done by the Hatchet when they sent an inspector down there to take a look? It's not this Zoning Administrator that did this, by the way. It's the last one.

CHAIRPERSON GRIFFIS: But it's the office

that did it. So --

MS. D. MILLER: Well, this certificate --

CHAIRPERSON GRIFFIS: What I really want to instruct you is not to get too caught into side issues and -- let me put it in my words -- into embellishments. This is a very base factual process that we run in appeals -- very. We don't hear, for instance, in your paragraph of adverse effects or maybe this is going to be a tour bus destination. None of that has any bearing on an appeal.

What we are only being asked -- What we are only looking at and what we can only hear is your evidence of what the error was that the Zoning Administrator did.

MS. D. MILLER: Well, let me ask you. Can I ask you a question?

CHAIRPERSON GRIFFIS: I suppose, yes.

MS. D. MILLER: What would you think if you had a restaurant and you --

CHAIRPERSON GRIFFIS: Okay. But, see, no, that's not a --

MS. D. MILLER: All right. The problem being is that, if the students don't use it, they lose money. So they open it to the public. So my point being is --

CHAIRPERSON GRIFFIS: [illegible], Ms. Miller, we are not here to argue about the problems or the adverse impacts or the effects or anything of that nature.

MS. D. MILLER: It's on our community that's being destroyed, and that's what I'm trying to protect, our community.

CHAIRPERSON GRIFFIS: No matter how passionate you get with it, I can only tell you, we have no jurisdiction. I have no authority to remedy that for you. Right now we need to hear from you on more evidence or additional evidence -- or you're done presenting the case. You have a sufficient amount here -- on the error that was conducted. That's it. That's all we have today.

MS. D. MILLER: Well, the point I saw when they had the hearing at the Public Space Committee, first off, they pulled it and said you have to go back to the Zoning Commission and get a special exception.

CHAIRPERSON GRIFFIS: How does that tell us to do anything?

MS. D. MILLER: Well, that's what they knew, to start with.

CHAIRPERSON GRIFFIS: Who was they?

MS. D. MILLER: This was Denise Richka.

CHAIRPERSON GRIFFIS: . .d she is a land use attorney? Does she have --

MS. D. MILLER: She is the one that sets up the meetings. Then the person over her --

CHAIRPERSON GRIFFIS: Does she have any knowledge of the regulations, that you are aware of?

MS. D. MILLER: She does. That's the reason why she told them that, and then the person over her overruled her, and with one day's notice they put this on the agenda. I complained about that.

CHAIRPERSON GRIFFIS: If I understand you correctly, Ms. Richter, who is in charge of the Public Space Committee, indicated that for her analysis of DCMR, Title XI, that the Zoning Administrator actually erred in issuing the C of O.

MS. D. MILLER: That they needed a special exception to do what they were requesting of her.

CHAIRPERSON GRIFFIS: Another way put. Okay. So I think we can take that under advisement as the basis of your appeal.

MS. D. MILLER: All right. Then two weeks later they changed their minds.

CHAIRPERSON GRIFFIS: That's fine. Okay. Anything else? Any other questions from the Board?

MS. D. MILLER: And the Public Space

people said you've got to overturn the Zoning Administrator, because that's why we approved it.

CHAIRPERSON GRIFFIS: Okay. Is it your understanding that this Board gives special exceptions for use of public space?

MS. D. MILLER: I beg your pardon?

CHAIRPERSON GRIFFIS: Does this Board hear special exceptions for use of public space?

MS. D. MILLER: This Board?

CHAIRPERSON GRIFFIS: Yes.

MS. D. MILLER: Or this Zoning Commission?

CHAIRPERSON GRIFFIS: Or the Zoning Commission.

MS. D. MILLER: The Zoning Commission does.

CHAIRPERSON GRIFFIS: They do?

MS. D. MILLER: They are the only ones that can approve special exceptions.

CHAIRPERSON GRIFFIS: For public space use?

MS. D. MILLER: For GW.

CHAIRPERSON GRIFFIS: No, I'm asking for public space use.

MS. D. MILLER: Public space use by GW. See, all GW stuff goes now under them.

CHAIRPERSON GRIFFIS: . see.

MS. D. MILLER: They took it away from the BZA, because it took all of your time you had.

CHAIRPERSON GRIFFIS: Ms. Monroe? Public space permit goes through the Zoning Commission?

MS. D. MILLER: Requests for them, use of public space.

MS. MONROE: No, I don't think so.

MS. D. MILLER: By the University, use of public space has to go to the Zoning Commission.

MS. MONROE: Within the context of the campus plans or --

MS. D. MILLER: Right, right, because they can't do it any other way. They cannot do it any other way.

CHAIRPERSON GRIFFIS: Indeed.

MS. D. MILLER: It's covered by the campus plan, just like my title on my statement says.

CHAIRPERSON GRIFFIS: Okay.

COMMISSIONER HOOD: Mr. Chairman, could I ask Ms. Miller a question?

CHAIRPERSON GRIFFIS: Of course.

COMMISSIONER HOOD: Ms. Miller, I see the submittals and everything that's been presented, and having been the person who participated on this when

it was in front of the Commission, I will tell you that I, to some degree, acknowledge your comments about clarification back to the Zoning Commission. How we get there, I don't know, and I want to hear from everyone else.

I'm sure I have agreement up here to a point, but I want to hear from the other people who are going to come up and speak.

Obviously, you have looked at the transcript of, I guess, the decision hearing that the Commission had.

MS. D. MILLER: I have the whole thing.

COMMISSIONER HOOD: In the transcript -- Help me fresh my memory. Sometimes things get lost. They don't always make in the order, but was it the intent -- or was that even discussed in the discussion among the Commissioners at the time? Unfortunately, that was -- whenever it was.

MS. D. MILLER: It started in '99 and then they took it up really in '01 and '02.

COMMISSIONER HOOD: Right. But to your knowledge, was that ever up for discussion? Did the Commissioners ever get to the point where they discussed whether it was going to be for non-students? Was that ever discussed in the discussions between the

Commissioners?

MS. D. MILLER: No, because in the past it had always been for students.

COMMISSIONER HOOD: In the transcript, did that ever come to light? Was that ever an issue?

MS. D. MILLER: No. No, because in the past it had always been for students. It's only been in the last two or three years that GW has commercialized everything down there.

COMMISSIONER HOOD: So from your knowledge, in the transcript it never said that it would be or that it would not be?

MS. D. MILLER: Correct..

COMMISSIONER HOOD; Okay. Thank you.

MS. D. MILLER: But that was before they start commercializing everything.

CHAIRPERSON GRIFFIS: Any other question, Mr. Etherly?

BOARD MEMBER ETHERLY: Thank you very much, Mr. Chair. Mrs. Miller, would there be a distinction between, let's say for hypothetical purposes, a bookstore? Would you be concerned if I as a non-student or employee -- I am in no way affiliated with the university, but I could conceivably go onto the campus bookstore and purchase a periodical of some

sort. Would that, in your mind, create an issue similar to this one here?

MS. D. MILLER: Can I give you a picture?

BOARD MEMBER ETHERLY: Well --

MS. D. MILLER: That's their library.

BOARD MEMBER ETHERLY: Once again, involving the situation with the bookstore.

MS. D. MILLER: The bookstore -- they have turned their library into a commercial venture. They've got Starbucks, and they've got video tapes for sale.

BOARD MEMBER ETHERLY: Okay. So with respect to -- Is it your argument then that the level of commercialization is what determines whether or not -- because what I'm asking in an indirect way is, clearly, there is -- I won't say clearly. There is precedent which speaks to the issue of incidental accessory uses, and the argument here that's been offered by the university or by the intervenor, to an extent, is that this is an incidental accessory use to the mission of the university.

So similar to a bookstore or some other type of incident use, how does this differ?

MS. D. MILLER: That would -- If it's for academic use, there's a big difference. Academic use

or commercial use to make money is a big difference.

CHAIRPERSON GRIFFIS: You mean anything for sale is commercial use?

MS. D. MILLER: No. They way they are doing it is commercial. Prior to --

CHAIRPERSON GRIFFIS: So I think what he is trying to push forward is what's the way? What's the threshold? What tips it for you? What is one commercial --

MS. D. MILLER: When they start things out on the street, start advertising all over the building, putting signs out on the sidewalk so that you can't walk, putting tables out there and chairs out there, and students coming from all over.

Now they said this building was going to be for these people. Now they have this building -- by the way, if you would like to see the articles -- have been vandalized and vandalized and vandalized, this same building.

CHAIRPERSON GRIFFIS: I don't know where that goes for us. But --

MS. D. MILLER: Well, it goes to the point that they have no control over the building.

CHAIRPERSON GRIFFIS: I see. You just made a statement, students from all over. So you have

problems from students from other dorms actually using these venues?

MS. D. MILLER: They have a right to, if they are students.

CHAIRPERSON GRIFFIS: I see.

MS. D. MILLER: But that means that they would be inside, and they are able to use the bathrooms inside without being escorted to them. They are students. It would be academic use.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: But selling to the public is not academic use.

BOARD MEMBER ETHERLY: If I could follow that up then, Mr. Chair, because I'm playing a little bit of devil's advocate, but at the same time I am also trying to make sure I understand the ANC's argument.

Is it perhaps the nature of the building that the facility in question finds itself in that would be an issue for you? By that question, I mean if the facilities that are at issue were located in another building on campus that perhaps had a more public aspect to it, would that change the ANC's argument? To be putting it bluntly, if this were not a dormitory space, would it be different? Would there

be a different outcome?

MS. D. MILLER: Of course, it would. I don't think you are saying it quite right, because you expect -- When I went to college, we had a cafeteria. Georgetown has cafeterias. Most of the other universities have cafeterias where they serve the people, but GW doesn't do it that way. They farm it out for commercial use.

Now there's a big difference. We are a tiny little residential neighborhood that they have overrun and dominated to the point they have Foggy Bottom/West End.

CHAIRPERSON GRIFFIS: Isn't that a changing of the times?

MS. D. MILLER: I beg your pardon?

CHAIRPERSON GRIFFIS: Isn't that a changing of the times?

MS. D. MILLER: No, only with GW.

CHAIRPERSON GRIFFIS: Only?

MS. D. MILLER: Only. The others don't do it. Now I read up on that, and I read up on it. Other universities are cutting back on taking all the students. GW doesn't say no to any of them.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: They are way over their

quota.

CHAIRPERSON GRIFFIS: Ms. Miller?

VICE CHAIRPERSON MILLER: Ms. Miller, you participated in the hearings on the GW campus plan before the Zoning Commission. Correct? And based on your ANC's resolution and other materials, I read that there is a condition in the Zoning Commission order that provides a basis for three or four food venue services on the lower and first levels.

My question is: That says to me that that was before the Zoning Commission, and didn't you have an opportunity in those hearings to explore what they had in mind by three or four --

MS. D. MILLER: We tried. We tried, and they didn't tell us. We tried to find out if they were commercial, and we said no to commercial, but they led the Zoning Commission to believe it was going to be for academic use only. If you read the transcript, you will see what I mean.

VICE CHAIRPERSON MILLER: So you did actually address that at the Zoning Commission?

MS. D. MILLER: We did at the hearings, at the ANC and at the Foggy Bottom.

CHAIRPERSON GRIFFIS: How about before the Zoning Commission is the question?

MS. D. MILLER: It never came up, because they presumed it was for academic use.

CHAIRPERSON GRIFFIS: But who made that presumption? The plans are in this record. It shows that there are sites for food venues, and that has not been disputed that --

MS. D. MILLER: And a building full of students. What would you think?

CHAIRPERSON GRIFFIS: I'm looking at plans that seem to be built according to the plans and --

MS. D. MILLER: Did you look at the two pictures of the plans they presented I gave you? Take a look at those two pictures.

CHAIRPERSON GRIFFIS: Two pictures of plans?

MS. D. MILLER: Oh, yeah. They are attached to my statement.

CHAIRPERSON GRIFFIS. Two pictures of plans --

MS. D. MILLER: It shows the location.

CHAIRPERSON GRIFFIS: What are you talking about? Figure N?

MS. D. MILLER: It was the first thing, I think, on my list, wasn't it, my attachment? No. That was the --

CHAIRPERSON GRIFFIS: which one? This? The site plan?

MS. D. MILLER: Yes.

CHAIRPERSON GRIFFIS: Okay. What is that site plan showing me?

MS. D. MILLER: That's showing you where it is located. Does it show you an outside cafe? Does it show you that you have all these things on it? No.

VICE CHAIRPERSON MILLER: Excuse me, Ms. Miller. Are you only concerned with the outside cafe? I think there are two -- We need to separate here, because outside is public space, and then there's GW space.

MS. D. MILLER: No. No. You know, a commercial place cannot compete. That's what we ran into with the Health and Wellness Center. The public athletic places came and testified they couldn't compete with a tax exempt organization, because GW can undersell them. There's no way they could make money and pay taxes. Now what these people are doing are trying to have it both ways.

CHAIRPERSON GRIFFIS: What are you talking about now?

MS. D. MILLER: We are talking about

commercializing what is supposed to be for academic use only.

CHAIRPERSON GRIFFIS: Okay. So if they sell food just to the students, it's not in your mind a commercial use?

MS. D. MILLER: I beg your pardon? No.

CHAIRPERSON GRIFFIS: You agree with me?

MS. D. MILLER: It's not commercial if they are selling just to the students, inside the building.

CHAIRPERSON GRIFFIS: And what would the C of O be listed for in order to get for a building permit an occupancy, certificate of occupancy -- what would be the listing on that C of O?

MS. D. MILLER: They would have a bathroom available to them.

CHAIRPERSON GRIFFIS: No, no, no. I need one letter -- or rather, one word. What is the type of C of O that is issued? The C of O is in the record. Correct? Do you have it in front of you?

MS. D. MILLER: It should be for academic use.

CHAIRPERSON GRIFFIS: Food service for academic use?

MS. D. MILLER: To serve academic use.

CHAIRPERSON GRIFFIS. Okay. Is that a proper classification for the Zoning Administrator to put on a C of O, in your understanding of the regulations?

MS. D. MILLER: He knew it.

CHAIRPERSON GRIFFIS: That doesn't really answer the question, but I'll move on.

MS. D. MILLER: Well, it answers it to me, because he did know.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: And he did know that they didn't have approval for public space use for tables and chairs and umbrellas.

CHAIRPERSON GRIFFIS: Indeed.

MS. D. MILLER: Or to put signs outside and the posters on all the trees.

CHAIRPERSON GRIFFIS: Okay.

MS. D. MILLER: They even had umbrellas and tables out there the day the place opened, and blocked the street as well.

CHAIRPERSON GRIFFIS: Right. We understand that. Yes, Mr. Etherly?

BOARD MEMBER ETHERLY: So perhaps to summarize, Mrs. Miller, it sounds like, in one instance in part, there is a concern about the -- in

the ANC's opinion, the encroachment upon public space of the operation --

MS. D. MILLER: Correct.

BOARD MEMBER ETHERLY: -- but that's not to suggest that -- Okay, let me -- the encroachment upon public space of the operation and, number two, the fact that the operation of the venues are open to members of the general public.

MS. D. MILLER: That makes -- You understand how small these streets are?

BOARD MEMBER ETHERLY: No, I understand.

MS. D. MILLER: And where they are located?

BOARD MEMBER ETHERLY: I understand. But I'm just trying to get a sense of the argument.

MS. D. MILLER: People live there. There is a church a half a block away, senior citizens a half a block away, and all of this traffic --

CHAIRPERSON GRIFFIS: Is that something the Zoning Administrator should have taken into account when issuing a C of O?

MS. D. MILLER: Why would he?

CHAIRPERSON GRIFFIS: He wouldn't?

MS. D. MILLER: No.

CHAIRPERSON GRIFFIS: Then it's not of

issue for us today.

MS. D. MILLER: I beg your pardon?

CHAIRPERSON GRIFFIS: Then it's not in the jurisdiction for an appeal. We are trying to establish what the error was that the Zoning Administrator --

MS. D. MILLER: The Zoning Administrator has made so many errors, and I won't bring them all up, because you know them.

CHAIRPERSON GRIFFIS: And it has no bearing on what we are doing today.

MS. D. MILLER: It does have bearing on it, because he had no right to grant them a commercial use.

CHAIRPERSON GRIFFIS: No, all his other errors that you were talking about.

MS. D. MILLER: And the space outside -- he doesn't have the authority for use of public space.

CHAIRPERSON GRIFFIS: Very well. Any other questions --

MS. D. MILLER: They don't own the sidewalks, and they don't own the streets.

CHAIRPERSON GRIFFIS: Very well. Let's go to cross. Who would like to start? George Washington. Oh, come on. Have some courage around

here.

Does the Zoning Administrator have any cross? Government, does anyone? Intervenors? Very well. Ms. Miller, thank you very much.

Let's move on then. I've lost my great organization in all that. Very well. Is government ready? Good evening.

MS. BELL: Good evening. Good afternoon. I am Lisa Bell. I am the Senior Counsel with the Office of the General Counsel for DCRA, and I am with the Zoning Administrator, Mr. Toye Bello.

I'd like to supplement the record just a little bit with a few remarks in support of the memorandum which I hope the Board has had an opportunity to review.

CHAIRPERSON GRIFFIS: Your memo?

MS. BELL: Yes. Actually, when we received it from your office, it was attached to Mr. Kline's letter. So it is actually not -- Mr. Kline submitted a letter, and DCRA actually submitted a statement. So you've probably read it and credited it to someone else maybe, but it's the government's position.

CHAIRPERSON GRIFFIS: Okay.

BOARD MEMBER ETHERLY: I believe it is

labeled Exhibit 28, Mr. Chair.

CHAIRPERSON GRIFFIS: We just received this.

MS. BELL: Oh. Oh.

CHAIRPERSON GRIFFIS: So talk slowly. Let's go.

MS. BELL: Well, actually, one of the first arguments I wanted to make, I wanted to raise, is we see this as a very narrow issue, and actually upon listening to the appellant's argument, I would like to make a preliminary point.

Unfortunately, the appellant hasn't been able to identify an error made by the Zoning Administrator in the issuance of the Certificate of Occupancy at issue here. So there is a basis for the Board to dismiss the appeal for failure to state a claim, for lack of a better way of explaining it, for which relief could be granted by this particular Board.

I apologize. I often use my litigation jargon, but you understand the point that we are raising here.

The Zoning Administrator issued the Certificate of Occupancy pursuant to the Zoning Commission's order. The Zoning Commissioner's order,

the 958, was issued pursuant to the campus plan.

CHAIRPERSON GRIFFIS: Let me interrupt you. Do you want us to hold your motion in abeyance until you present your case? You've just made a motion to dismiss.

MS. BELL: Well, I was going to -- That's correct. I was going to proceed with my argument, but if the Board would like to ask us questions, either myself or Mr. Bello, we would be glad to.

CHAIRPERSON GRIFFIS: Let's go. Let's go ahead. Let's hear your argument.

MS. BELL: Okay. Pursuant, as I said, to the campus plan, what the appellant overlooked is that, when the campus plan was actually issued, the plans that both the BZA, the Zoning Commission and, subsequently, the Zoning Administrator reviewed were the actual floor plans for the dormitory as well as for the food venues

What has happened here is Coggins sought interior work permits pursuant to those plans, which DCRA approved, and then subsequently the use, the Certificate of Occupancy, was issued based on the exact same plans. Nothing has changed.

Unfortunately, she is making an argument here, her concerns about who the audience is and her

concerns about what she understood the food service venue to mean, whether it means a restaurant or a commercial restaurant or a cafeteria, arguments is that she really should have raised when the campus plan was initially brought before the Board as well as the other ANC arguments that were raised.

I took a look at the record and, unfortunately, that was not something that was raised by the ANC, or at the very least before the Zoning Commission when it took a look at whether or not to add three or four food venues.

It is clear that she was confused about what the term food venue means. The Zoning Commission has used that term with regard to GW, and the Zoning Administrator has interpreted that term to be somewhat analogous to food courts. He is here today, and he can certainly describe for you what his understanding of food service venue is, but I think it is fair to say that the interpretation, what the Zoning Commission intended was for food eateries to be in the areas on the lower and general level, which is exactly what now exists as far as GW is concerned.

So to the extent that she is concerned about who the audience is, I think the Board can concede that the Commission did not identify who the

audience should be. She is making an assumption, and she is interpreting what the Zoning Commission's intention is, as we would be or anyone else would be looking at the order.

The actual language of the order does not indicate who the food service venue should provide service to.

Now there are other areas --

CHAIRPERSON GRIFFIS: But isn't it covered in terms of an accessory use? I mean doesn't it somehow fall into who it is going to serve by the fact that, as I am assuming the Zoning Administrator defined it as an accessory use to the larger principal use.

MS. BELL: That would be our interpretation, but it is also fair to say that it is an interpretation. The appellant, obviously, wishes to interpret it another way. But to the extent that she is confused or to the extent that anyone would be confused about who the actual audience id, that is an argument that should have been made at the time at the further processing. That is not a timely argument to be raised here with regard to the Zoning Administrator and the Certificate of Occupancy.

E-V-E-N-I-N-G S-E-S-S-I-O-N

(5:00 p.m.)

The Certificate of Occupancy was issued for the use that had been approved by the Zoning Commission. So the question here is -- the core issue is whether or not the Zoning Administrator properly implemented the Zoning Commission's order when it issued the Certificate of Occupancy, and I think there is no other answer but he did.

CHAIRPERSON GRIFFIS: Okay. I think that is well stated on what the issue is before us. So before you get right into that then, speak to the issue of the assertion that there was no bathroom associated with this restaurant which the C of O is granted for, and whether the permit granting for the public space construction -- how you -- what your legal view of that is, and also the notification of the Zoning Administrator of the issuance of the permit.

MS. BELL: Well, our argument with regard to the papers and the argument that I am prepared to make today with regard to the sidewalk cafe -- It is really not properly before you. The use of a public space is not a permit that should be a part of this appeal.

To the extent that the Public Space Committee might have suggested that it was contingent upon the Certificate of Occupancy and its validity is another issue, but it is not before you in that it would not be an error of the Zoning Administrator, because the Zoning Administrator didn't have a role in that process.

As to notification, we see the notification issue again as something that should have been raised by the appellant during the Zoning Commission's order. Whether or not she was well informed, it was properly disclosed, and she received adequate due process considerations is again not an issue that the Zoning Administrator would have the responsibility nor the duty to provide to her with regard to her understanding about, you know, the definitions or the ambiguities of what the Zoning Commission means.

In effect, what the appellant is saying is, to the extent that I was confused, I want the Zoning Administrator to explain to me his interpretation and to listen to my interpretation and in some way, shape or form make some assessment about it.

Now I will have the Zoning Administrator

speak to the issue of the bathroom and the food court, because he is best able to provide those facts.

MR. BELLO: Well, good evening, Mr. Chairman, Board members. The issue of bathrooms is not a zoning issue. It is actually a building codes issue.

CHAIRPERSON GRIFFIS: Indeed.

MR. BELLO: To the extent that bathrooms are provided in other locations of the premises, it speaks to the fact that these food venues are viewed under the building codes as pretty much delis that can share common bathrooms.

CHAIRPERSON GRIFFIS: Okay. So the issue of bathroom is the fact that one would need to be accessible, whether it be common and shared by the different venue, but one would have to be provided, and one was provided when this was issued?

MR. BELLO: Absolutely. There is a bathroom both on the lower level and on the first floor.

CHAIRPERSON GRIFFIS: Okay. Anything else?

MR. BELLO: Well, I think the single question before the Board has pretty much been answered, quite frankly. And again, that goes to --

Well, the issuance of the Certificate of Occupancy clearly is predicated on the issuance or the previous issuance of a building permit that implemented the Zoning Commission order.

If the building permit is not found to be flawed, which I think ample evidence has been submitted here that it isn't, then the Certificate of Occupancy could not have been issued in error.

COMMISSIONER HOOD: Mr. Chairman.

CHAIRPERSON GRIFFIS: Yes, Mr. Hood?

COMMISSIONER HOOD: I want to ask Ms. Bell, if you would look on what you submitted to us in the submittal we got relatively recently, the one that was submitted that we were speaking of earlier, on page 2 about three-quarters of the way down right after it says *Drudy v. D.C. Board of Zoning Adjustment*.

The next sentence really concerns me, and this goes into what we are asked to make sure we understand exactly what is going on. It says the BZA has delegated authority to evaluate specific projects, modifications of further processing of the campus plan to the Zoning Commission.

Can you explain that to me? I'm not following that.

MS. BELL: As I understand, the zoning regulations spell out that the further processing of campus plans has been transferred to the Zoning Commission.

COMMISSIONER HOOD: But you state the BZA has delegated authority.

MS. BELL: Yes, because it would have been the authority that the BZA would have initially had.

COMMISSIONER HOOD: Maybe you could help me, Mr. Bello.

MR. BELLO: I can expound on that a little bit. I think that Ms. Bell actually wanted to say that the Zoning Commission had amended the zoning regulations to take up the responsibility for campus plan approvals. That's basically what that is.

CHAIRPERSON GRIFFIS: That's right. We didn't give anything away. They took it.

COMMISSIONER HOOD: No, they didn't give anything away, and that concerns me, because this goes back to this whole understanding issue. If we're thinking that the BZA -- and, no, I'm not trying to go jurisdictional or all that stuff. I'm just trying to make sure we understand, in all fairness to Ms. Miller, Commissioner Miller.

I want to make sure we understand exactly

what is going on, because if didn't understand that, then I want to make sure that, if you read the transcript, Ms. Bell -- I believe you said you reviewed the Zoning Commission's transcript.

MS. BELL: Well, I didn't review the transcripts. I reviewed the paperwork, the orders and things.

COMMISSIONER HOOD; Okay.

MS. BELL: But you are absolutely right. This was my error. I did not know that the Zoning Commission granted the authority to themselves.

COMMISSIONER HOOD: Right. I don't know why they did that.

CHAIRPERSON GRIFFIS: Aren't you getting into a bigger issue here? I mean, isn't your direct question what is your legal interpretation of whether we have the jurisdiction to hear this appeal or should this not be --

COMMISSIONER HOOD: I've been wanting to ask that since about 4:30.

MS. BELL: Whether you have the legal --

CHAIRPERSON GRIFFIS: Do we have the jurisdiction to hear this appeal, because it is based on a campus plan? Mr. Bello?

MR. BELLO: I do think that you retain

jurisdiction on appeals. The Zoning Commission has not take up that responsibility, because, clearly, the decision of the Zoning Administrator in issuing a C of O is what is being appealed here.

CHAIRPERSON GRIFFIS: And is there another avenue before the Zoning Commission for this in terms of bringing a motion for clarification on a condition of one of their special exceptions?

MR. BELLO: Absolutely. I believe the amendment clearly states that in campus plan approvals, the Zoning Commission is wearing the hat of the BZA. Actually, those hearings are conducted under the rules and practice and procedures of the BZA.

CHAIRPERSON GRIFFIS: Right. I see what you are saying. Yes, indeed.

MS. BELL: And can I interrupt. Maybe it's something Corporation Counsel can address, but it would seem to me many of the Court of Appeals decisions that I have read does not suggest that the BZA would not have the authority to rule with regard to the campus plans.

COMMISSIONER HOOD: Well, the question, is have the ones that you read -- did the jurisdiction lie up under the Zoning Commission, which was done in the year of 2000. That was just done. You know, I

guess those previous cases.

MS. BELL: No, I understand what you're saying.

COMMISSIONER HOOD: Case law would have been prior to the Zoning Commission. I'm not a lawyer.

MS. BELL: Yes, but there have been more recent cases with regard to challenge just to portions of the plans that have been taken up to the Court of Appeals. So I have not seen anything to suggest that the Board does not have jurisdiction, but it is something that I can look at, if there is a concern or if you want to know the government's position.

COMMISSIONER HOOD; I really would like -- I think it should be properly in front of the Zoning Commission, since the Chairman made the segue into that. That's just my opinion.

CHAIRPERSON GRIFFIS: The appeal should be?

MS. BELL: You think the appeal should be.

COMMISSIONER HOOD; Well, not the appeal. Probably a better way, the modification, whether it's a minor modification or whatever, a clarification or whatever you call it -- I think that's better served in front of the Commission.

MS. BELL: But this isn't a -- I understand what you are saying, but she didn't frame this as a clarification. She is framing this as an error.

COMMISSIONER HOOD; I agree with you.

CHAIRPERSON GRIFFIS: Mr. Hood brings up an excellent point, but that's not the strategy that was actually implemented by the appellant in this case. They decided to bring an appeal. Be that as it may, that's what we're faced with. So let's move on. What else do we have from the government?

BOARD MEMBER ETHERLY: Can I jump in, Mr. Chair?

CHAIRPERSON GRIFFIS: Yes, of course.

BOARD MEMBER ETHERLY: I want to come at it from kind of a little bit of a different angle, not dealing with kind of the jurisdictional piece but talking a little bit about kind of the accessory nature of the use.

There has been clearly some reference in DCCRA's submission as well as submission of the other intervenor with regard to the issue of accessory use and what's kind of incidental to the operation, if you will, of a university.

In your thinking -- and I will put this

same question, if the opportunity presents itself, to the other intervenor -- is there a limit to how you might define what is accessory, i.e., let's say for the sake of discussion that it could be demonstrated that more than 50 percent of the patrons of the food court venue were, in fact, not affiliated with the university. Are you aware of any precedents or any regulatory practice of custom in your experience, Mr. Bello, or from a legal standpoint that would necessarily dictate maybe a different outcome if 51 percent of the patrons were, in fact, not affiliated, if somehow you could even demonstrate that? But for the sake of discussion, let's say you could.

If 51 percent of the patrons of the food court venue were, in fact, not affiliated with the university, would that change the nature of the accessory use? Would that make it not accessory or not incidental any longer?

MS. BELL: Well, that is actually an interesting question, because as I understand it, GW believes the accessory use is to the dormitory, where I think the government's position is the accessory use is to the university.

BOARD MEMBER ETHERLY: To the overall operation of the university.

MS. BELL: That's right, to the overall, and I understand, you know, there is the lot test or some -- You know, there is case law that suggests that the same lot test is necessary, but to our way of thinking the campus university is one lot, and so it would be everything within the campus boundary.

I think, with regard to incidental public users of accessory use, I think there is a line about -- to be drawn when you are talking about the quantity of people who use a service that is incidental to the dominant use.

So if the dominant use is a university and the accessory use is a restaurant where 80 percent of the people who use the restaurant are not affiliated with the university, don't attend the university and are sort of people who come from Maryland and Virginia just for the purposes of going to this restaurant, I think that certainly suggests that the analysis is different.

BOARD MEMBER ETHERLY: And is that something that the Zoning Administrator would consider or would endeavor to explore or analyze? And let's go to the reason why I'm asking this. Playing a little bit of devil's advocate and taking the ANC argument to its logical conclusion, the concern here is that

through the accessory or incidental use, are we in effect creating a subtle loophole that enables a university or other tax exempt entity to essentially become a commercial player, but with the benefit of the protection of the incidental or accessory use.

So is there -- How would BZA even go about trying to determine that or is that even something that the Zoning Administrator looks at when confronted with this type of application?

MR. BELLO: There actually is a previous Zoning Administrator determination that an accessory function would be limited to no more than 20 percent of the aggregate principal activity, however mode of measurement you decide to impose.

In the case of a university such as this that is embedded in an open landscape, the practical difficulties are quite obvious, but I do agree that there ought to be, and there is, a limit to an incidental and accessory function, as it is not being accessible to the general public at large.

I think there is evidence on the records that at least 80 percent of the users of these premises are students, and to that extent, if you applied that definition or that standard, then it would still be clearly subordinate to the overall

function of the university.

BOARD MEMBER ETHERLY: Thank you. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you very much. Let me just make one comment. You made an assertion that the university may not -- may look at this as just accessory to the dormitory, and the Zoning Administrator indicates that it is more in the total campus. Is that what you were saying?

MS. BELL: Yes. I glean that form their papers.

CHAIRPERSON GRIFFIS: Okay. I didn't. So I think they will probably highlight that, and the one assertion that I would say is they talk about how the IRS has actually said that this is incidental to the university, to the academic use, and thereby why their standing for the venues can be classified as the IRS does, because it takes it into accessory to the entire academic and university use. But they will probably say it better than I can in their words.

Okay. Ms. Miller?

VICE CHAIRPERSON MILLER: Mr. Bello, I just wanted to probe a little bit. I'm not sure what your role was exactly with respect to the C of O, but you made a statement that, you know, it's up to you to

interpret and implement the Zoning Commission order; and the Zoning Commission order spoke in terms of food venues. And you interpreted that to mean food courts or these type of food establishments that are operating and that are at issue before us.

I'm wondering on what basis did you conclude that this fit food venues?

MR. BELLO: I actually would consider this to be an eating establishment, a location where people gather for that. The closest definition for any kind of eating establishment is that of a restaurant or a fast food restaurant as provided for in the regulations.

VICE CHAIRPERSON MILLER: Where are the specific categories for a Certificate of Occupancy laid out? Are they laid out in some regulations? I mean, you don't just think of any word you want and put it in. You have to actually choose a specific designation that comes the closest. Isn't that correct?

MR. BELLO: Yes. That will be under the use provisions for each zoning district.

Your question was how do you determine a use category?

VICE CHAIRPERSON MILLER: Well, where do

you find it? Where did you find like restaurant? Is it somewhere in some regulation?

MR. BELLO: Section 199.1, actually provides a definition for restaurant.

CHAIRPERSON GRIFFIS: The definitions for all the uses. I understand that. I think the question: Globally, when you put something onto a C of O -- My gosh, we've been through a few remands and appeals on this -- you have to pick a designated use in the zoning regulations. Is that correct?

MR. BELLO: Yes. You have --

CHAIRPERSON GRIFFIS: Or if a regulation allows you to find a similar type of use, of which -- let's not get into that realm, unless that was needed, and it doesn't seem like you invoked that or needed that in this campus plan.

MR. BELLO: That's correct.

CHAIRPERSON GRIFFIS: So generally speaking, a C of O, you find a designated defined use, zoning use, and that's what goes on the C of O.

MR. BELLO: As a first step. That's correct.

CHAIRPERSON GRIFFIS: Okay. So when you did that, you went to 199, and you went to restaurants. Is that correct?

MR. BELLO: That's correct.

CHAIRPERSON GRIFFIS: And as we look at the restaurants in 199, what were your other choices? Maybe that would help the Board. You indicated one previously, deli, food court.

MR. BELLO: Exactly.

CHAIRPERSON GRIFFIS: Okay. Fast food even will be a different type restaurant than restaurant.

MR. BELLO: Correct.

VICE CHAIRPERSON MILLER: For instance, Ms. Miller had suggested academic use or something, and that's not in this list.

MR. BELLO: It's not.

CHAIRPERSON GRIFFIS: So is, as indicated in the resolution from the ANC, student serving dormitory food service a defined zoning use?

MR. BELLO: Well, where the zoning regulations define a specific user -- and part of the Zoning Administrator's job is to assist an applicant to first and foremost fit into a specific use as described -- the Zoning Administrator would actually not be allowed to look outside of the use fits the description of the use that's being presented before him.

CHAIRPERSON GRIFFIS: Okay. So if I understand what you're saying is, say this food venue came to you, and they said, look, what we really are is a student serving dormitory food service, and you said, wow, that's great, but I got to find something to put on the C of O; let me look if that fits under restaurant. Does it fit under the restaurant definition as it's written, which is "a place of business for food, drinks or refreshments are prepared and sold to customers, primarily for consumption on premises; this term shall include, but not be limited to, establishments known as cafe, counter, cafeteria or other small business, but shall not include fast food restaurant"? Does what happens here fit within that definition?

MR. BELLO: Absolutely.

CHAIRPERSON GRIFFIS: Why is it not a fast food? Well, that's Ms. Miller's next question. She's coaching me as we go.

MR. BELLO: Well, the answer to that question is that it could be, and even if one had been issued for a fast food restaurant, that decision would still not have been in error.

CHAIRPERSON GRIFFIS: Okay.

BOARD MEMBER ETHERLY: Just as a follow-

up, we talked a little bit about the issue of the public space piece, and I don't want to really touch the issue, the permit part of it. But let me ask a question just from the standpoint of: Does the nature that there is a public space associated with the food venue in DCRA's mind or in the Zoning Administrator's mind, change the nature of the accessory use? Would it matter or should it matter if the use were entirely enclosed within the dormitory space? Would that change the analysis or change the outcome of your analysis?

MS. BELL: Well, I think it is important to note that the outside space was designated on the floor plans as they were approved, when the dormitory was approved initially through the Zoning Commission. So I think it's fair to say, to the extent that they considered food venues, they obviously understood, or at least they were told, what the intention was, at least for the ground level restaurant to include an outside area.

BOARD MEMBER ETHERLY: Okay. And from the standpoint of the Zoning Administrator, the fact that there is an outside portion which is affiliated to the use wouldn't change the outcome of your determination?

MR. BELLO: No, sir.

BOARD MEMBER ETHERLY: Thank you. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you. Anything else for us?

MS. BELL: No.

CHAIRPERSON GRIFFIS: Any other questions? Ms. Miller?

VICE CHAIRPERSON MILLER: In all your vast experience -- I mean, are you familiar with any situations with universities or other public buildings or entities where the public has been restricted from enjoying or making use of any restaurant or other similar kind of public space that is a part of that building?

MR. BELLO: I am, quite frankly, not aware of one.

CHAIRPERSON GRIFFIS: Can I rephrase the question? From the zoning perspective, is there a use definition which you would grant a C of O which would preclude public use for food service? Is there a designation that we are missing here?

MR. BELLO: The answer is no.

CHAIRPERSON GRIFFIS: So for instance, in the record there is a letter from a hospital that has accessory services, the card shop, the food and all

sorts of other things in it. If they came for a Certificate of Occupancy for those types, a stationery store, any other accessory, is there any -- in any of these kind of uses, restaurants or whatever it is, bookstores, is there any designation that would show on the C of O that it was for private use only, not public use or for those users of the primary use? Does that make sense?

MR. BELLOW: Yes, it does. Ordinarily, under normal circumstances an incidental and accessory use does not have to be identified on the Certificate of Occupancy. That is not true necessarily for a campus in which you have several buildings on different lots, as a matter of practicality.

Given the direction that this type of activity has gone where vendors are, in fact, contracted to run these facilities, the business license structure -- DCRA is structured in such a way that, without a Certificate of Occupancy for such incidental users, as we have here, they would have difficulty obtaining a business license to operate, because it goes to the name of the operator.

CHAIRPERSON GRIFFIS: I see. You know, another analogy that pops into my mind is like an airport, and the concessions at an airport. I mean,

is it, in your mind, analogous to this? It may be a totally different scale.

MR. BELLO: Well, really, the question goes to who the incidental user is.

CHAIRPERSON GRIFFIS: Right.

MR. BELLO: If you access an airport, do you automatically become an incidental user? I think so. I think, if you access the campus boundaries, that you somewhat become an incidental user, be it of the library, the university hospital or any other facility on the campus.

CHAIRPERSON GRIFFIS: That's an interesting point. Yes?

BOARD MEMBER ETHERLY: Just very briefly. With regard to the question that you asked about what would you conceivably call it, perhaps an analogy came to mind. Is there a different -- I don't think it's an applicable case, but I'll just ask it, because I think there is a subset of restaurants or facilities out there that are private in nature.

Think, for example, of private membership clubs, University Club, Cosmo's Club, which clearly will have restaurant type operations that are available only to their members. Perhaps a C of O will have something entirely different and doesn't go

to the level of detail as to specify a restaurant, but how would you characterize that type of operation?

Once again, I don't think it is very applicable. So it's probably a very easy question to answer. Would we call it a club or something? How would you characterize it?

MR. BELLO: Actually, the zoning regulations does provide a definition for private club use, and also determines the structure under which you can operate a private club.

BOARD MEMBER ETHERLY: Okay. So it's an entirely different category.

MR. BELLO: That's correct.

BOARD MEMBER ETHERLY: Excellent. Thank you. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Indeed. Excellent question. Okay. If there is nothing further from the Board, let's go to the cross-examination of Mr. Bello. Ms. Miller? You don't need to raise your hand. You're up.

CROSS-EXAMINATION

BY MS. D. MILLER: Ms. Bell, are you familiar with the University Club's request for public space to serve food outside? The University Club, which is next to Thurston Hall -- are you familiar

with that?

CHAIRPERSON GRIFFIS: But you want to ask Mr. Bello.

MS. D. MILLER: I'm leading up to the point, the fact that they had to request public space use and it was denied.

CHAIRPERSON GRIFFIS: Okay. I'm just asking you to cross-examine the witness, not the attorney.

MS. D. MILLER: I'm cross-examining her.

MS. BELL: No, no, no. You are cross-examining the witness, which is --

MS. D. MILLER: Oh, I can't cross-examine you?

MS. BELL: No, sorry.

MS. MILLER; What a shame. Well, you suggested that they changed -- they filed plans to change the floor plan for inside the Coggins. Are you familiar with the fact that the ANC is supposed to get copies of every permit that is requested when it is requested, not after it is issued? The law requires it.

MS. BELL: Well, wait. I am going to object to that, because I'm a little confused. So I think that he is not going to be able to answer.

What notification are you referring to? Are you referring to great weight or --

MS. D. MILLER: No. The law requires that anytime anybody files an application that affects an ANC or a single member district that the Consumer and Regulatory Affairs is supposed to notify the ANC and that ANC Commissioner. It's required by law.

Now he said that they filed plans to change the plans -- Coggins.

CHAIRPERSON GRIFFIS: So the direct question, Ms. Miller, is are you aware of the fact that notification of request for -- or applications for permit are to -- notification of application of permits are to be given to the ANC?

MS. D. MILLER: Right.

MR. BELLO: Absolutely, and that notification would have occurred at the time of the issuance of the building permit, not only for the construction of the building proper, as a routine also for the tenant layout permit, and would not be necessary for the issuance of a Certificate of Occupancy, because the Certificate of Occupancy is predicated on the building permit that had already been noted.

CHAIRPERSON GRIFFIS: Okay.

MS D. MILLER: No, we are not talking about the building occupancy. We are talking about the changes that Coggins requested, filed a permit for changes which we never receive, nor did we ever receive a copy of -- We first saw that --

CHAIRPERSON GRIFFIS: We are not getting anywhere if we both talk.

MS. D. MILLER: I know. I just want to tell you, we first saw the permit before the Public Space Committee, is the first time the ANC ever saw the permit.

MS. BELL: I guess this is why I interrupted. You are talking about two separate things. The Public Space permit is different than the building permits or the internal --

MS. D. MILLER: No. I'm talking about the occupancy permit. The first time we saw the occupancy permit was before -- in the hearing.

CHAIRPERSON GRIFFIS: I don't understand the term occupancy permit.

MS. D. MILLER: They were given an occupancy permit for this commercial restaurant.

CHAIRPERSON GRIFFIS: Mr. Bello?

MR. BELLO: What I was saying earlier a little bit is that a separate notice for the issuance

of a Certificate of Occupancy would not have been necessary, because their notice already occurred at the time of the issuance of the building permit.

MS. D. MILLER: We never got that either.

CHAIRPERSON GRIFFIS: What?

MS. D. MILLER: If we were supposed to get that, we did not get that either.

CHAIRPERSON GRIFFIS: The base building permit? You never received notification of it?

MS. D. MILLER: No. But don't feel bad. We didn't get any for half of the things down there. They just don't -- They don't bother. We have gone to Mr. Clark two or three times to try to get permits., and it's not working that way.

CHAIRPERSON GRIFFIS: All right. How often do you get notification to DCRA of issuance of permits or application for permits?

MS. D. MILLER: Very rarely.

CHAIRPERSON GRIFFIS: Give me a number. I mean, what does that mean to me, very rarely?

MS. D. MILLER: From one to ten, two.

CHAIRPERSON GRIFFIS: Two a day?

MS. D. MILLER: Did we get a permit --

CHAIRPERSON GRIFFIS: Two a minute? Two a week? Two a year? What are you talking about.

MS. D. MILLER: I'm talking about in the last 10 or 12 years, and the only reason I got most of the ones for the hospital was because the Director picked them up and brought them to me, because they never gave us a single copy on the hospital when they were building it.

CHAIRPERSON GRIFFIS: What's your understanding of DCRA's issuance of notifications of applications for permit?

MR. BELLO: Twice monthly.

CHAIRPERSON GRIFFIS: Twice monthly.

MS. D. MILLER: Now permits for -- The law requires that they give us these when they are requested, not when they are issued -- when they are requested. If you go back and read the regulations, and we met with Mr. Clark and explained that to him. There were seven ANC Commissioners --

CHAIRPERSON GRIFFIS: Okay. I hear your words, and I have heard them numerous times. I also read them. But I need some factual evidence that shows me that either they issued them or notification wasn't sent to you, you didn't get the notification.

MS. D. MILLER: I've never gotten it.

CHAIRPERSON GRIFFIS: I now have two different statements on the same issue.

MS. D. MILLER: I never got them. In fact, when we met with Mr. Clark and he said to the then interim Zoning Administrator to give us copies and to give them according to the ANCs, he said, I can't do that. And this was seven ANC Commissioners that met with him, and I've got the letter that Mr. Bardine wrote requesting it.

CHAIRPERSON GRIFFIS: Okay. Next cross question.

MS. BELL: Actually, this seems like it's going to last a little longer than I had expected. Could we have a break for a moment or could I leave for a moment on a personal matter? I have child care concerns.

CHAIRPERSON GRIFFIS: Me, too. Mine is being delivered in about five ;minutes. Yes, let's take -- Now?

MS. BELL: IF we could. I don't know if your child is being delivered to you here?

CHAIRPERSON GRIFFIS: Let's do it. Let's take five minutes. We will resume at six o'clock.

MS. BELL:. Do you have any estimate as to how long you think the hearing will last?

CHAIRPERSON GRIFFIS: We have cross now. We have the presentations of George Washington and the

other appellant. I would imagine at 20 minutes our questions are getting slimmer and slimmer. No more than an hour more.

MS. BELL: Okay. Great. Thanks.

CHAIRPERSON GRIFFIS: Okay. We will take five minutes.

(Whereupon, the foregoing matter went off the record at 5:58 p.m. and went back on the record at 6:09 p.m.)

CHAIRPERSON GRIFFIS: Good. Then let's resume. Okay, Ms. Miller, it was to you, cross-examination questions.

MS. D. MILLER: I have another question. Mr. Toye, I'm sure that you read the order that -- what is number -- what is it, 558? You know the one I am referring to, the order for it. Did you see anywhere in there that they requested a special exception to have a commercial restaurant or to have an outdoor feeding area in the order?

MR. BELLO: Well, the simple answer to your question is, no, there isn't a separate special exception for a venue.

MS. D. MILLER: Okay. Now the question came up about Coggins being a fast food. It is a fast food restaurant. They make special sandwiches that

you can carry right out. So it is in essence a fast food shop. Correct?

MR. BELLO: I can't say that. Again since this decision predated my assumption of the office, I can't say for sure if an assessment was made as to whether the fast food restaurant category would be more appropriate than the restaurant. But as I said earlier, either of those categories would have been okay.

MS. D. MILLER: Were you familiar at all with the hearings that went on concerning the Health and Wellness Center which is right across the street from this about the public using it?

MR. BELLO: I am vaguely familiar with that, yes.

MS. D. MILLER: And do you remember how stringent they tried to make that, that it would be for university use only?

MR. BELLO: I do believe that the -- I think it was the Board -- The Board did set specific conditions.

MS. D. MILLER: Because the subject came up then, as I recall, and I think you will recall, that they wanted to open it to the public, and the Zoning Commission said absolutely not.

Now I think -- Would you think that, had this subject come up before the Zoning Commission about that this would be for public use as well as university use -- do you think they would have made a different decision?

MS. BELL: I am going to object to that question. It requires that he speculate, because that is not what happened. So you really can't give an answer.

CHAIRPERSON GRIFFIS: I agree. It calls on speculation to answer the question. Is there another direct question or a rephrase of the question?

MS. D. MILLER: All right. I have others, but I guess it's a little late. I have quite a few questions, and I think probably they would not be appropriate this time, because the subjects that we are trying to cover really never came up before the Zoning Commission, and because they didn't come up, no conditions were put on it that should have been.

I think the conditions, in my opinion -- and I think, if it gets back to the Zoning Commission, you will find out they will put them on.

CHAIRPERSON GRIFFIS: Okay. Well, I appreciate your judgment. All right. If there's no other further cross-examination from Ms. Miller, is

there any cross from the University, any from the other intervenor? None? We thank you very much, Ms. Bell.

Let's move then to -- Let's hear from the University. Why don't you make yourself comfortable and have a seat.

MR. MOORE: Mr. Chair, if it's all the same to you, I would stand.

CHAIRPERSON GRIFFIS: If you are more comfortable standing, indeed.

MR. MOORE: I learned my trade standing up rather than sitting down.

CHAIRPERSON GRIFFIS: So am I, but I like a comfortable chair. Okay.

MR. MOORE: So if you don't mind, I'd like to stand. Good afternoon, Mr. Chairman, members of the Board. I am Jerry Moore, law firm of Venable LLP, appearing this evening on behalf of George Washington University. With me is the George Washington University Senior Counsel, Charles Barber.

We have submitted our case in writing for the record, and I think that we have touched on most of the points that the Board has issued today, and for that reason I'll be very brief in my presentation.

With due respect to Mrs. Miller, the

presence of a retial related facility in a residential district is neither breaking news nor an isolated case. The Zoning Administrator approved the C of O simply because the Zoning Commission approved the C of O. Could the Zoning Commission have limited the use of that restaurant? Absolutely. Absolutely.

It could have done that by special exception. Did it? No, it didn't. Was it presented to the Zoning Commission? Yes, it was. Yes, it was, and not only was it presented to the Zoning Commission, it was presented to the ANC and presented to the Foggy Bottom Association.

As evidence of that, I would suggest -- I would proffer to you the resolution of ANC-2A which was passed in conjunction with the Square 43 case: "Therefore, be it further resolved that ANC-2A does not oppose the construction of a dormitory, residence hall, and ancillary services project on Square 43."

The Foggy Bottom Association by letter dated November 30, 2001, which was entered into the record in the BZA case approving the dormitory: "Dear Madam Chair and members of the Commission: Foggy Bottom Association is in general agreement with the position of Advisory Neighborhood Commission 2A, and does not oppose the construction of a

dormitory/residence hall and ancillary services project on Square 43."

They knew about it. They acted on it. They were a party -- Both were parties in the case. They did not appeal the case. They did not ask for reconsideration. They come to the Board of Zoning Adjustment assigning error to the Zoning Administrator way too late. They were wrong in their interpretation that this was not approved by the Zoning Commission because, in fact, it actually was.

The food venue is located within the University's approved campus area and provides services that are directly related to the University's mission, as set forth in its approved campus plan. As such, the Coggins food venue is an accessory use that is customary and incidental to the principal use.

To emphasize the point, we have done a survey of universities in the District of Columbia and nationwide. A part of that survey is in your files as an exhibit.

With Howard University, we have pointed to you the BZA cases where the BZA had approved a Panini's restaurant, a Sky Rancher restaurant, and a Chik-Fil-A restaurant at Howard University.

At American University -- and I have

photographs for you here -- we have cited the case where the Zoning Commission approved a number of ancillary retail related -- accessory retail related uses at American. American has a Hagen-Das ice cream shop. It has a Chevy Chase Bank. It has a Subway sandwich shop. It has a McDonald's restaurant. It has a book store. It has a UPS store. It has a hair products store, all open to the public, all with signage to the outside. There is no restriction to any of these -- to any of these retail related uses on the campus of any university in the city.

You have in the record a letter from the D.C. Hospital Association which makes it clear that every single hospital in this city except Howard University Hospital is located in a residential zone, and every single hospital in this city has a retail related ancillary use.

Bob Nelson in his letter to you said that nobody comes to a hospital as a destination business to go to a restaurant or a gift shop. They are there to do the business of the hospital. Same thing with the University. Same thing with the University.

We have done a survey, and Mr. Kline is here to talk for his client, where 86 percent -- 86 percent of the users of this Coggins restaurant are

students at the University, and that doesn't even include the faculty and the staff of the university.

Nobody comes to these restaurants or comes to campus for the exclusive purpose of using these retial related facilities. They are there for the benefit of the students of the University in full furtherance of its mission.

I have read to you the ANC resolution. I have read to you the letter from the D.C. Hospital Association. You have in the record the Zoning Commission's order and the basis on which that Zoning Commission's order was based, that these food venues were approved by the Commission, and they knew about them. The ANC knew about them. The Foggy Bottom Association knew about them. They chose not to comment on them. They were approved.

So in the end, the Coggins food venue was approved by the Zoning Commission. It is recognized as a use that is customary and incidental to the principal University use by zoning precedents and by the Internal Revenue Service.

It is factually dependent upon the patronage of the 700 students in the dormitory in which it is located. It is located entirely within the approved campus area, and it is consistent with

retail related uses that have been repeatedly -- repeatedly approved and are now in existence in the District of columbia and in other jurisdictions.

Thus, the ANC appeal is clearly without merit and, for that reason, should be promptly denied. There was no error here.

In our application we also made it clear, the written presentation to the Zoning Commission, that the retail related uses at the Square 43 dormitory will be operated in a similar fashion as those at the Marvin Center -- that is, open to the public. That is in the record. That is black and white. It's there, and it is on that basis that the Zoning Administrator issued the C of O allowing this Coggins food venue service to be at this location in this dormitory, on this campus in furtherance of the mission of the University. Thank you.

CHAIRPERSON GRIFFIS: Good. Thank you very much. A couple of quick questions.

First of all, the resolution of the ANC and also the Foggy Bottom Association -- you cited a letter from them. Are they in the record?

MR. MOORE: They are in the record of the BZA case -- of the Zoning Commission case -- I'm sorry -- for the approval of the Square 43 --

CHAIRPERSON GRIFFIS. But they are not, in fact, in the file.

MR. MOORE: -- but I can offer them to the record in this case.

CHAIRPERSON GRIFFIS: Yes, why don't we do that, if you wouldn't mind.

MR. MOORE: I have one for Ms. Miller as well.

CHAIRPERSON GRIFFIS: Also, going to your survey there was --

MR. MOORE: In addition -- I'm sorry, Mr. Chairman -- we have letters of support that didn't reach the file from some residents of the area. I would like to cite one from Ms. Olive Hopkins who lives in the same residential complex as Mrs. Miller. I will just read briefly:

"I have been a resident of Foggy Bottom for over 20 years, and I am amazed that an ANC Commissioner would tell me that I cannot use a convenience store in my neighborhood. I think these stores should be open to everyone. Very few people from outside Foggy Bottom will use these stores, because (a) there is very little parking; (b) only people who live in Foggy Bottom know about the stores; and (c) people from other areas can buy the same

things where they live. They are not coming."

We have a letter from the Consortium of Universities as well in support of the decision of the Zoning Administrator. I will give those to Ms. Bailey -- if she were here.

CHAIRPERSON GRIFFIS: She will be right back. She is making copies of your last filing.

MR. MOORE: Mr. Barber and I are available for any questions that you might have. I will also have copies of these photographs from American University which show a McDonald's, Subway, and UPS store, all signs on the outside, all open to the public.

CHAIRPERSON GRIFFIS: Are you aware of Exhibit Number 21 and Number 23, which are both letters?

MR. MOORE: I'm sorry.

CHAIRPERSON GRIFFIS: Let me start with Exhibit Number 23, a letter from Kevin Mullin. Let me get to the heart of this matter.

MR. MOORE: Yes. Those are the letters I just gave to --

CHAIRPERSON GRIFFIS: Okay. So you are adopting these into your presentation of the case?

MR. MOORE: Yes.

CHAIRPERSON GRIFFIS: And also Exhibit Number 21, Eileen Hennessey?

MR. MOORE: Yes. Yes, those are letters that come from the residents of the Foggy Bottom neighborhood saying that they do not agree with the ANC position on this.

CHAIRPERSON GRIFFIS: Okay. It would be appropriate to keep them in the record, as we don't have any other way to have letters of support. Substantively, let's get to this 86 percent. That was what you just stated and also in your written submission. You said that 86 percent of those that use the facilities are students. Correct?

MR. MOORE: Yes.

CHAIRPERSON GRIFFIS: But you then made a statement of that's not including the staff.

MR. MOORE: That's correct.

CHAIRPERSON GRIFFIS: So then to be very clear, in addition to the 86 percent you have people that are obviously directly associated with the University that are using this.

MR. MOORE: Correct. That's correct.

CHAIRPERSON GRIFFIS: So did you get an assessment of how much that is?

MR. MOORE: We do not have an assessment

of those. What we were able to do is we were able to track the students by what's called a GWorld Card.

CHAIRPERSON GRIFFIS: I see.

MR. MOORE: They come in. They swipe it. Ah, that's a student.

CHAIRPERSON GRIFFIS: I see.

MR. MOORE: Count another one.

MR. BARBER: But the point is, I think, Mr. Griffis, that the number -- the percentage of University users is in excess of 86 percent. How much in excess we can't judge, but it is in excess. I am one of those people. I am a staffperson. I go to Coggins and pick up a sandwich. I won't be counted in that 86 percent.

CHAIRPERSON GRIFFIS: Indeed. That's a good clarification, and another clarification is your name and address for the record.

MR. BARBER: I'm sorry. You got me. Charles Barber, Senior Counsel, George Washington University, 2100 Pennsylvania Avenue.

CHAIRPERSON GRIFFIS: Excellent. Thank you, Mr. Barber. So my assumption then -- Well, I don't know. But clearly, it's above 86 percent use of those that are directly associated with the University.

MR. BARBER: Yes.

CHAIRPERSON GRIFFIS: Okay. I think that's all I have. Question?

BOARD MEMBER ETHERLY: Yes. I just wanted to jump in, because I wanted to follow up on that very quickly.

Your offer of that statistic -- would that suggest that if the statistic were lower, would that perhaps change the outcome of the analysis? Let's say the statistic, instead of 86 percent, were 49 percent and you had a slight majority of the patrons of Coggins coming from off campus. Would that change the outcome of the analysis?

MR. MOORE: It would not change the analysis in this case, because this case is dependent upon assignment of error to the Zoning Administrator in issuing the Certificate of Occupancy.

As long as the issue was brought before the Zoning Commission, which it was, and it was addressed by the Zoning Commission, which it was, and approved by the Zoning Commission, it wouldn't matter if there was just one student going in there. That's all that it' matters. The Zoning Commission has approved the use, period.

BOARD MEMBER ETHERLY: Okay.

CHAIRPERSON GRIFFIS: But to be clear on this case, you said that on the record at the Zoning Commission -- Oh, now I forget -- what center was it?

MR. MOORE: The Marvin Center.

CHAIRPERSON GRIFFIS: The Marvin Center was given as an analogous use. So, clearly, it was addressed, although perhaps in some folks' mind limitedly, but it was addressed in terms of what was actually going to happen there.

MR. MOORE: Well, indirectly, yes. The University wouldn't put this facility there as a stand-alone facility without it being a part of the University. It can't be there unless the University says it is going to be there.

CHAIRPERSON GRIFFIS: Right.

MR. MOORE: And the University put it there to serve its students, for no other reason. To the extent that there are incidental public users was in the case at the Zoning Commission, but the Zoning Commission approved it as is. Why? Because that is the status quo. That's what is happening today in colleges and universities, not only in Washington but around the country. That's what's happening.

BOARD MEMBER ETHERLY: Just to follow up, Mr. Chair, we had a little bit of that exchange

between DCRA and you earlier regarding clarification on that issue: Is the accessory use being offered as accessory to the operation of the dormitory or the operation of the mission of the University?

I am not necessarily beholden to whether or not that is a pivotal question, but I'll just -- For sake of clarification, I wanted to be sure we cleared that up.

MR. MOORE: The dormitory has no mission except to further the mission of the University.

BOARD MEMBER ETHERLY: Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you. Excellent. Good question. Ms. Miller?

VICE CHAIRPERSON MILLER: Mr. Moore, I wonder if you could just explain a little further about what's at the Marvin Center? Is it very similar to these food venues?

MR. MOORE: Well, let me ask Mr. Barber to do that. He is better able to do that than I, if you don't mind.

MR. BARBER: Thank you. The Marvin Center is our student center. So there will be a number of media rooms, but in terms of the retail food venues you have a Subway, you have Starbucks, you have

Einstein Bagels, you have an oriental stir fry of a particular chain.

So, yes, they are comparable retial food venues, some of which are associated with national chains.

VICE CHAIRPERSON MILLER: And are they open to the public?

MR. BARBER: Oh, they certainly are.

VICE CHAIRPERSON MILLER: Are they visible to the public or you wouldn't know unless you went in the building?

MR. BARBER: The way they are situated, particularly since we have reconfigured the building, they are mostly on the interior. The situation before you is probably more analogous to American University where they have a lot of visible presence on the street. With the ivory tower before you, you have the visible presence, particularly of Coggins, and then the rest of them are in the lower part of the building. With the Marvin Center they tend to be in the interior of the building.

VICE CHAIRPERSON MILLER: But the public can go into the Marvin Center?

MR. BARBER: Yes, they can, and they do.

VICE CHAIRPERSON MILLER: Okay. Thank

you.

CHAIRPERSON GRIFFIS: Good. Anything further? Any other questions? Mr. Hood?

COMMISSIONER HOOD: Mr. Moore or Mr. Barber, you mentioned that the Zoning Commission approved -- they put approval on it. Okay, that's understood. But looking back at the transcripts, which I'm sure you have -- I haven't -- was there ever discussion about who was going to actually use the venues? Was there ever -- Did that discussion ever take place?

MR. MOORE: That discussion did not take place, because I think there was a general assumption, because we put in our application it would be operated the same way as the food venues at Marvin Center, that it would be operated the same way as the Marvin Center. Was there ever a direct discussion on that issue? No, sir.

COMMISSIONER HOOD: And let me ask you, in the other universities -- I'm sure you looked at the other -- You alluded to another campus plan, which I would not talk about, but was that made evident in that case, too, because they are actually the same principle.

MR. MOORE: I can't speak to the Howard

University case. I can speak for the American University case, and there was a discussion on that specific issue, and the end result was that the restaurants are there, with the outside signage, serving the public -- well, serving the university, incidentally serving the public.

COMMISSIONER HOOD: Now when I look in the order and it says the dormitory will contain three or four food venue locations, three on the lower level and one at ground level, I know the Commission normally when we try to do ground level, we do that for a reason. I'm just wondering if you had looked at this transcript, did we talk about that? I can't remember. So I have to lean on you.

MR. MOORE: It didn't come up, Mr. Hood. I might add one other thing, is that the Coggins restaurant, as we have pointed out in our papers -- it curtails its hours pretty severely during the Christmas break, simply because there's not enough people there to justify the restaurant being open.

In addition to that, it is a -- The food venues close to the public at ten o'clock at night, but they remain open to the students until two o'clock the next morning, simply because their primary mission is to serve the students. To the extent that there

are incidental public users, there are no incidental public users after ten o'clock, or very many of them that come in during the breaks.

CHAIRPERSON GRIFFIS: Indeed, and that is part of your written submission.

MR. MOORE: Yes. Yes, it is.

CHAIRPERSON GRIFFIS: Okay.

COMMISSIONER HOOD: My next question: You alluded to the Marvin Center. In the order -- I was looking over the order 958. Does it allude to that? I saw it somewhere. Maybe it was in your submittal, but I saw where the Marvin Center was alluded to.

MR. MOORE: Yes, it was in the Zoning Commission case approving Square 43.

COMMISSIONER HOOD: Square 43?

MR. MOORE: That's the ivory tower dormitory that is it at issue here.

COMMISSIONER HOOD: And the reason I'm proceeding like this matter, because you know, we had another case I think you represented, and we specifically looked at the uses or who could use the facility.

MR. MOORE: Yes, you did.

COMMISSIONER HOOD: I just want to make sure we are consistent. If it's your testimony we

didn't do that with American University and Howard, then --

MR. MOORE: It's my testimony that you did do that with American University. I don't know about Howard.

COMMISSIONER HOOD: The use issue.

MR. MOORE: Yes. And you did do that with the Health and Wellness Center, as someone pointed out.

COMMISSIONER HOOD: Yes, I remember that one for some reason.

MR. MOORE: As I said, the Zoning Commission has the authority to cap or to regulate accessory uses, if it chooses to do that. It did not do that in this case. Therefore, there was no error, and that's the issue.

I think Ms. Bell was correct in moving the Board to deny the appeal, because there is no evidence of error, because that's the only issue before the Board: Did the Zoning Administrator commit error in issuing that C of O? There is no evidence that he did, and you need look no further than Order 958.

We've given you a lot of background, but the truth of the matter is Order 958.

COMMISSIONER HOOD; You know, Mr. Moore,

let me ask you for clarification. That order is not in front of us, but for clarification issue, would you object to maybe the Zoning Commission -- You may get the same -- probably may get the same outcome, but object for future campus plans that they may revisit, would you have a problem with that?

MR. MOORE: I haven't discussed that with Mr. Barber.

MR. BARBER: Let me just add, Mr. Hood --

COMMISSIONER HOOD; I know that's a wide open question.

MR. BARBER: Well, let me take a swing at it. I just don't think it would be appropriate. I think the ANC had their shot at that. This was not a surprise. This was not something we were hiding back. It was in our papers about how these venues would be operated. They know how the Marvin Center operates.

Some of their members -- Some of their constituents go to the Marvin Center to buy their cup of coffee, their sandwich from Subway. So it was on the record.

Now it was behooving on them -- It was their obligation to bring it up at that Zoning Commission. They did with the Health and Wellness Center, and the Zoning Commission responded. They had

the opportunity when this issue was before the Zoning Commission. This dormitory with its food venues was before the Zoning Commission. They had the opportunity to raise this issue as a possible objectionable impact. They did not.

I think that door should be foreclosed to them.

COMMISSIONER HOOD: Okay. Thank you.

CHAIRPERSON GRIFFIS: Any other questions? Good. One last note I wanted to bring to light, and maybe you want to highlight it. But you cite the Citizens Coalition case for the Board, and that had to do with Georgetown University, and it was going to the accessory use. Actually, that was their generator plant, whatever they call it.

MR. MOORE: It's the co-gen plant.

CHAIRPERSON GRIFFIS: So the analogy, if I understand it, and asking for you to correct it if I don't fully understand, was that here for the University's use they were going to create their own electricity, but anything overflowing what they actually needed at that point, electricity being what it is, they were going to sell it off to PepCo. That was more of an overflow or an accessory to what the main purpose was.

The analogy was to go to this, that the principal use is the University, and the accessory are these food services, and the incidental users are those that aren't directly related to the University or aren't directly students.

MR. MOORE: Yes, sir. The principle we cited the Co-gen case for is that the fact that a university accessory use is open to incidental public users does not diminish the status as an accessory use.

CHAIRPERSON GRIFFIS: Indeed. Okay. Good. I don't have anything further then unless the Board has any other additional questions. Anything further? Okay. Then let's go to cross. Ms. Miller, do you have questions?

CROSS-EXAMINATION

BY MS. D. MILLER: Don't you think there is a difference between the campuses of American U. and Georgetown and George Washington? In other words, aren't those other two defined campuses, and this one has such a fluid border that it seems to me under everywhere?

MR. BARBER: I think there are differences among those campuses, but those differences are not significant for the purpose of the issue before us

today.

MS. D. MILLER: And isn't the Marvin Center in the sort of center and heart of the University where this is on the periphery in our residential area next to a special street?

MR. BARBER: The Marvin Center is on 20th Street right across from Tower Records near -- about a half a block from Pennsylvania Avenue, however you might want to categorize it.

MS. D. MILLER: This is on 23rd Street. Right? Which is a special street.

MR. BARBER: Yes. Ivory Towers is on 23rd Street.

MS. D. MILLER: And we did -- I can't believe that you can say that we didn't raise this question when you came before the ANC, when you came before Foggy Bottom. My recollection is we raised it both times, and you all assured us it wasn't going to be commercial. It was going to be just for university use, and nothing was said about any feeding --

MR. MOORE; Wait a minute. You're testifying, Ms. Miller.

MS. D. MILLER: All right, all right. Did you at anytime tell us there was going to be something outside? You never did, that I know of.

MR. MOORE: Wait a minute. What is the question.

CHAIRPERSON GRIFFIS: Asked and answered.

MS. D. MILLER: The question is: Did you tell us that it was going to be an outside serving area?

MR. BARBER: There are two separate questions. Outside serving area?

MS. D. MILLER: Right.

MR. BARBER: Our plans clearly showed an outside patio.

MS. D. MILLER: No, not the plans you gave us, not the plans that I've got, nor did you say --

MR. BARBER: The plans that were submitted to the Zoning Commission that we shared with the ANC did show an outside serving area.

MS. D. MILLER: My plans didn't show that, the one that I saw. The other one was that --

MR. MOORE; Ms. Miller, the plans upon which the Zoning Administrator relied in issuing the C of O, in consistency with the zoning regulations, show the food venue at ground level with the outside patio.

MR. BARBER; In fact, I do recollect -- I recollect a conversation, in answer to your question,

with Elizabeth Elliott. Elizabeth Elliott -- You know Elizabeth Elliott. She is a former Chair of the ANC, and the issue was impact of the students in the neighborhood and weren't they going to be making excessive noise and the like.

She pointed out, well, you got a patio, and they could be outside. I remember her bringing that up. So I know she was aware of it.

MS. D. MILLER: All right. But --

MR. BARBER: And our plans certainly were clear.

MS. D. MILLER: The patio she referred to -- wasn't that the center court?

MR. BARBER: No. It was the outside. She pointed out to me the G Street patio. That's on the plans right here in the record.

MS. D. MILLER: Not the ones we have. Anyway, the -- I guess that's it.

MR. MOORE: Thank you.

CHAIRPERSON GRIFFIS: Thank you very much. Is there any other cross from the other intervenor or the government? No other cross? Okay. Then let's go to the second intervenor.

MR. KLINE: Good evening. Andrew Kline on behalf of Coggins Sandwich Manufacturing. Craig

Hanken, who is a principal of the licensee, unfortunately, had to leave. He had to return to New York, was here earlier but, unfortunately, had to leave.

I am going to be very brief. Although my client has the most at stake in this proceeding today, as it is the venue that operates at that location, unfortunate to have had Mr. Bello and Ms. Bell, Mr. Moore and Mr. Barber do the heavy lifting today, because it seems to me that most of the issues have been covered.

I just want to make two brief points. One is: Ms. Miller said -- and I took note of it, because I think it kind of makes the point based on everything else that we have heard today -- that when she went to college we had cafeterias. When I went to college, we had cafeterias, too.

There was a food service venue. It was on campus. There was a meal plan. You know what? Everybody hated the meal plan. Nobody ate there. My parents bought me a meal card. I never used it, and I took other money. Where did I go? I went to commercial establishments that were on or near the campus.

The fact of the matter is the college

cafeteria that most of us probably knew -- and I'm not going to say loved, but existed -- is an anachronism. It doesn't exist anymore, and the reason that it doesn't exist is because it has been supplanted by promotional uses on campuses all over the country.

Mr. Hanken, who as I said was here earlier and unfortunately had to leave, was previously with Cosi, which is another chain, has 10 or 15 locations in the Washington area, and he recounted to me -- and we will submit something for the record, as he is not here, and I'm not testifying. But they are on six campuses around the country.

When he was with Cosi, they opened locations on six campuses. So the point is what was done here is exactly consistent with the modern trend for food service on university campuses. That's the way it's done.

Now to open up a Subway or a McDonald's or a Friday's or a Coggins in a university dorm or in another university facility and pretend like the public is not welcome does not represent a very good business model, and it certainly -- having it open to the public does not change its character as being incidental to the mission of the university and as being an accessory use to what was done in this

dormitory.

You have already heard the statements that 86 percent of the sales, based on a survey that was done, are from students, and that is based upon the GCard that is used commonly on the George Washington University campus.

That doesn't include those students who may have left their GCard in their jeans and washed it in the washing machine or left it back in their dorm or students who otherwise used cash to purchase food in the establishment, and this has previously been pointed out. It doesn't include faculty members who may have dined there or even staff members such as Mr. Barber who is here today who indicates that he purchases food and dines in the establishment.

So the fact of the matter is this establishment serves the very purpose which was intended by the Zoning Commission, which is to be in the Ivory Towers dorm and serve the university population, be they students, be they staff members, be they faculty members.

The only other point I want to address is there has been a lot of discussion around and about the use of public space. The use of public space is something that is under the province of the Mayor,

under reorganization order. There is a Public Space Committee that was constituted.

It is up to the Public Space Committee to determine whether public space will be used, and I am the attorney that handled the public space permit before the Public Space Committee.

The Public Space Committee granted a public space permit. Their only comment concerning zoning or a Zoning Administrator decision was, if it has a Certificate of Occupancy for a restaurant, then a sidewalk cafe, a public space permit -- sidewalk cafe with a public space permit is perfectly appropriate, which is why they approved the public space permit. There wasn't anything under the public space regulations which prohibited the issuance of that permit, which is why they approved it.

The comment to Ms. Miller was, if you have difficulty with the use, then that is a zoning issue, and you need to take that up with the Zoning Administrator, and that's what brings us here today.

Other than that, I believe it has thoroughly been covered this afternoon. If any of the members have any questions, I will be certainly happy to answer them.

CHAIRPERSON GRIFFIS: Good. Thank you

very much. Are there questions from the Board? Is it your understanding then that under the newly constituted Public Space Committee that even campus plans -- even areas that are in the campus plan go through the Public Space Committee for public space permits?

MR. KLINE: Any use of public space goes through the Public Space Committee.

CHAIRPERSON GRIFFIS: Okay.

MR. KLINE: The Public Space Committee has jurisdiction over public space.

CHAIRPERSON GRIFFIS: Just to hit this even further home then, even through it is all within the campus plan, the streets and the sidewalks are still public?

MR. KLINE: Correct. And to hit it even further, to use your analogy, in order to use public space, as you probably know, one must rent it from the District of Columbia, and in order to do that you apply for a public space permit. That's exactly what was done in this case.

CHAIRPERSON GRIFFIS: Okay. Good. Thank you very much. If there is nothing further from the Board, let's go to cross. Ms. Miller?

CROSS-EXAMINATION

BY MS. MILLER: Your comments that all of this comes under the Public Space Committee -- Aren't you aware that a permit for use of public space under the campus plan has to be granted as a special exception by the Zoning Commission?

MR. KLINE: I believe we are into legal argument, and I wasn't testifying. I was really making argument on behalf of my client. But my --

CHAIRPERSON GRIFFIS: I'm sorry. You are the legal representative of your client. Is that correct?

MR. KLINE: That's correct.

CHAIRPERSON GRIFFIS: All right. Then we got to have cross -- We can't.

MS. D. MILLER: All right. Now the other thing --

CHAIRPERSON GRIFFIS: I said I'm not sure what we are doing.

MS. D. MILLER: Well, he has made a couple of statements I don't agree with, and I am trying to figure out how to correct them.

CHAIRPERSON GRIFFIS: Okay. I tell you what. Why don't you save it for our closing, and that way --

MS. D. MILLER: Well, I could do that.

Okay. Could do that.

CHAIRPERSON GRIFFIS: Okay. If there is no cross of the attorney, which I assume there isn't, then we will move on. You don't need to go anywhere. We are ready for closings.

MS. D. MILLER: A couple of things happened at this hearing and at the hearing before the Zoning Commission and at the hearing before the ANC and the Foggy Bottom. Now I gave you a copy of the one that -- the thing that shows the center court.

It was our understanding, and I have it on tape, that that was where they thought -- we thought they were going to feed the students from these restaurants, if they fed them outside. And that is what Elizabeth Elliott thought when she asked the question, that it would be in this center court area, not on our sidewalk, not on our street, and not next to a special street like 23rd Street.

Now the other thing is that we know that the boundary on George Washington is awfully loose, and intense use of something should be in the center, not on the periphery of the campus; because the periphery of the campus -- This block was originally -- I don't know whether you are familiar with it or not -- was originally kept residential to protect us from

the institution until GW bought all of the houses on it and tore them down, without permission them down. They were told to maintain them.

Then they built this. And if we had said no to the dormitory -- ah, ANC doesn't want us to put the students on campus. That's exactly what they would have said. The only reason we approved this was because they owned the land. They were going to build a dormitory. Little did we think it was going to be something this big and this obnoxious, and the problems it is causing our neighborhood.

One of the things that has happened is that we have on Columbia Plaza, which is bringing all of this out with GW, is a thing called Sizzling Express, and buses are coming from out of town and parking there and unloading illegally in places to feed, because you have to feed the tourists.

So we have got buses parked all over our area. We have got students walking so that you can't drive, and it does get to be a little irritating that a residential area is being totally destroyed and that our government doesn't seem to care, or the people who are supposed to represent us don't seem to care that we have no recourse.

We don't have money. We don't have the

lawyers. We don't have the staff. We don't even have an office, because of the way Congress set up the ANCs, and you change them every two years and we have got new ones coming in that haven't the vaguest idea of what's already gone on.

Now I was told this was the way to try to correct this problem, that I should file to have the Zoning Administrator's thing -- issuance overturned, because that's what the Public Space Committee said. We only granted it, because the Zoning Administrator approved the occupancy.

So when I went to the Zoning Office and asked how I could cope with it, that was what I was told. I should bring a complaint to overturn the Zoning Administrator's issuance of that, and that's what I have tried to do. Obviously, I am failing, and I'm sorry I am failing, because my neighborhood is being destroyed, and that hurts.

We don't have lawyers. We don't have money, but we do try.

CHAIRPERSON GRIFFIS: Indeed. Thank you very much, Ms. Miller. Are there any last questions from the Board?

Let me begin. First of all, I appreciate everyone's patience with the Board this afternoon in

staying so late, and in addition to putting so much time into addressing this appeal, as much time as you put in and the passion and the effort the Board has equally given that time and attention to all these issues and trying to sift through all the responses and, specifically, trying to really narrow the scope of this within our own jurisdiction so that we could frame it in a point and position that we could deliberate and decide on.

I believe that, through this hearing, it has been fruitful in narrowing that, and I believe that the Board is prepared to deliberate on this today and offer a bench decision.

Ms. Miller, it isn't lost on this Board, or specifically me, the larger issues that are brought up in this appeal, the larger issues in your, frankly, moving concluding remarks of tourists and bus traffic that are coming in, in terms of the expansion of the University or, as you say, the loose boundary of the University.

I take issue with the loose boundary, as I thought I was part of the approval of the boundary campus plan, but I understand what you mean. It's moving, and has over the decades.

The issue of the population of students

and how they impact the daily life of the residents that are adjacent to the University -- Gosh, you even elicited Congress and what they have done, all of which are important and specific issues of pertinence, certainly, to the residential area in Foggy Bottom and, I think, overall in the city.

But to this Board all of those issues don't go directly to the matter at hand for the appeal. You've brought up a larger issue about where this type of service should be located. Is it appropriate close to a border or should it be more central?

Again, it counts to the argument that is much more appropriate before now the Zoning Commission in terms of the special exception in approving the building itself, and that process, as is shown in the submissions today and in the oral testimony, was provided; and it was provided under the Zoning Commission order which was issued, which leads us directly to the matter at hand that I find that we were investigating, whether there was an error that was created by the Zoning Administrator in issuing a Certificate of Occupancy.

Really, it does go directly to the question of was the Zoning Commission's order and

issuance of this and description and, more appropriately, the issuance of the permit, the base building permit -- maybe that's the connection you could get to. Was there in that chain of events an error that -- or that chain of events that led to a Certificate of Occupancy not being issued or issued for something else?

At this point, I haven't seen any persuasive evidence that shows me where the error was made, but rather I see very persuasive evidence of how, in fact, the Zoning Administrator followed the Zoning Commission's own order and the issuance of the original permit and then issued subsequently, the Certificate of Occupancy in question.

Let me open it up to others that may have additional brief -- or deliberation on this, and then I will continue, if need be. Mr. Hood?

COMMISSIONER HOOD: Mr. Chairman, I would just say that -- I'll start off one set, that I believe that this should have been in the jurisdiction of the Zoning Commission, to begin with. But I was presented as an appeal, and since that's the way it was presented, I'm ready to move forward in that venue.

When I looked at the summary order after

hearing all of the discussions, I think Ms. Miller raises a concern, also the bigger picture of it that's going on. I would encourage Ms. Miller. A statement I think she made for the record earlier was -- in other words, she wouldn't sit at the table at all with GW. I don't know if she said it in that exact vein, but that's the way I interpreted it. But I would tell you that, looking at the summary order and trying to figure out what the Zoning Commission's intent was, this issue may not have been specifically brought up, but when I look in the order, and we say three on the level -- and I'm just reading the last part of 20 that's in the order -- three on the lower level and one on the ground level -- When I look at that, I know how the Commission usually intends to try to attract business on the ground floor level.

That may have been the intent. I don't want to speak for my other colleagues as one who participated on that case. So the issue of whether it is for non-students or students only, to my knowledge, never came up, and I don't know if it has ever come up as far as restaurants or eating establishments on any campus.

If it has, I will be the first to say that I made a mistake. But I'm not sure. I know it has

come up in other classifications dealing with fitness centers and the like, but in this instance -- and when I look at this, and this is what gives me the confidence level -- When I look at ground level, I believe that my interpretation of what we meant, or what I meant as one who participated, would have meant to draw in the general public or not just for students only.

Again, I'll go back to my first statement. I think it is better served in front of the Commission, but this is the way it's presented, and this is what I have faced in front of me, and this is how I will govern myself accordingly. Thank you.

CHAIRPERSON GRIFFIS: Good. Thank you, Mr. Hood. Ms. Miller?

VICE CHAIRPERSON MILLER: As one who didn't participate in it, I look at the language of the Commission order where it specifically reflects spaces for three or four food venue services, and looking at that, I find it extremely reasonable that the Zoning Administrator would interpret it the way he has and issue a Certificate of Occupancy for a restaurant in this case.

I think it would have been improper to read in an interpretation restricting the public,

based on that language. I think that the Zoning Commission has restricted use by the public when it intended to do so. So I don't think it would be proper at all to read in some kind of restriction where one isn't stated.

Also, based on that language and based on the testimony we heard, the plans were before the Commission showing a space for three or four food venue services, and I think the time to challenge the access to those services was in that hearing before the Zoning Commission, and that we wouldn't have authority in this particular case to change the conditions to restrict.

Based on the testimony we heard, it also appears that this is an accessory use to the University and is allowable. So I don't think that -- I don't think we have any evidence that the ZA made an error in this case.

Finally, with respect to the public space issues, we don't have jurisdiction to address those.

CHAIRPERSON GRIFFIS: Good. Thank you. Mr. Etherly.

BOARD MEMBER ETHERLY: Thank you very much, Mr. Chair. I will associate myself for the purposes of brevity with the remarks of all of my

colleagues who have spoken thus far. I will perhaps take just a quick second of dicta which, for those of us who have not been exposed to the joys of law school, simply means language or aspects of a case decision or deliberation that don't necessarily go to the merits of the case.

That is to really echo, I think, what the Chair got to in his remarks with respect to perhaps the pains oftentimes and criticisms that this Board has taken with respect to what is very clearly a long, complex and sometimes perhaps even sordid history with respect to the interplay and relationship between Foggy Bottom and the University.

I agree once again completely with the grounds for the motion as we begin to move in that direction, Mr. Chair. I think it is the absolutely right outcome, but from the standpoint of the dicta aspect of my comments, I will just simply note sometimes I am hopeful that we do not lose sight of the forest because we are so caught up in the trees.

I think this is perhaps an instance where, as has been alluded to by the intervenors, we do have some evidence on the record that there are, in fact, some very positive and constructive purposes that are perceived to be served by the subject property here,

as evidenced by some of the letters that we received from Foggy Bottom residents, and it is perhaps a rare occasion that we have had illustrations of that type of spirit with respect to George Washington University and Foggy Bottom residents. But I don't think that fact is lost on me, that we do have records, we do have testimony in the record, written testimony, which speaks to the positive impact that the subject venue/food court serves in this particular instance, and I think that is very important to note.

As was stated by Mrs. Miller, I appreciate the spirit with which she spoke about it, but I also do take very seriously concerns that perhaps a community or a neighborhood is dying, as Mrs. Miller alluded to, or being strangled in some sense.

As I noted before and as the Chair noted, this case has had a complicated history, and there have been significant emotions and energies, fears, anger, frustration, you name it. The emotion has probably been on the table with respect to the relationship here, but I just don't simply believe that we find ourselves at that type of situation with respect to this piece.

Once again, all of that is dicta. I think, as my colleagues have stated previously, the

regulation, the law, the letter of the law, the letter of the Zoning Commission's decision, I believe, was followed in this case, and I don't find error. But I believe it was important to note that, because I just can't -- I just wouldn't want any of our residents to feel that there is a deaf ear here at the Board on the part of any of our colleagues to concerns about the struggle of may of our communities as they try to continue to fashion a relationship with large institutional neighbors.

All of that being said, I just felt it was very important to note that, Mr. Chair, that I think there are some very positive aspects that are being served by the venue here. I hope this Zoning Commission will take a look at it and make an appropriate decision, if they deem necessary, but I just felt it was important to note that. Thank you very much, Mr. Chair.

CHAIRPERSON GRIFFIS: Good. Thank you very much, and appreciate those words.

Are there others? If not, at this time I would move denial of Appeal 17249 of the Advisory Neighborhood Commission 2A which was, of course, asserting that the Zoning Administrator erred in issuing the Certificate of Occupancy permit Number

81956 which was dated August 19, 200-, at the location within George Washington University known as the Coggins Sandwich at the premises of 616 23rd Street,N.W., and ask for a second.

BOARD MEMBER ETHERLY: Second, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly. Speaking again to the motion, I think what has been raised is an awful lot of issues in terms of the ANC's understandings and also the treatment of the ANC or perceived treatment by the University. But I believe that in this appeal that the evidence is lacking to support their assertions, the assertions of (1) the intent of the Zoning Commission, but also the assertions that the Zoning Administrator erred.

There are several specific aspects that were enumerated in the appeal submission, all of which either became not zoning issues or the Zoning Administrator played no role in. We talked about the permit granted for the use of public space. We talked about the bathrooms for the specific restaurant. We've talked about notification.

Then it went to really the heart of the matter as we looked at this, as it was defined, and that was whether the issuance of the C of O was in error, and that was loosely defined, as it sometimes

is in appeals, and that's not inappropriate necessarily, but the evidence submitted was not that it was a wrong classification, that it should not have ever been issued.

Evidence actually was presented of the fact that the plans that went through for special exception approved at the Zoning Commission had not changed, and that the Certificate of Occupancy was issued based on the construction of plans and permitted plans attendant to that approval.

Thereby, not having evidence to the contrary, I find that the Zoning Administrator did correctly issue the Certificate of Occupancy.

Additionally, we had evidence and testimony that the ANC did participate in the special exception before the Zoning Commission at which these plans were presented, and also the Foggy Bottom Association. There was testimony presented that it was -- the analogy was drawn to the Marvin Center, which is a publicly accessed service center, part of the University.

It would have been interesting if there was persuasive evidence to the contrary, but that evidence, in fact, was not refuted.

So be that as I have in my notes and in my

understanding in deliberation on this, I will turn it over to others, if there's further comment.

BOARD MEMBER ETHERLY: And I think just one final point, Mr. Chair, as the seconder of the motion. I think a very important part of the function of the ANCs is to raise a question, and I think a very important question has been raised here, and it is one that the Zoning Commission, once again at the appropriate point in time, if they so desire, will take it up.

I think it is an important question to ask what is the limit of the accessory use function that a university or an institution can take advantage of. It is a complicated question, as has been alluded to in testimony.

Clearly, the nature of universities in some fashion has changed, such that the traditional model that we might think of fondly as we look back on our college years may not still be applicable. I think that is an important question to be raised by the ANC.

That's not to throw the ANC a bone here. I want to be very clear about that. But that is to note that I think it is a very important question to ask and to seek some resolution on. So I just wanted

to highlight that, Mr. Chair. Thank you.

CHAIRPERSON GRIFFIS: Thank you very much. Anything further? If not, we have a motion before us. It has been seconded. I would ask for all those in favor to signify by saying Aye. And opposed? Abstaining? Ms. Bailey, if you wouldn't mind recording the vote.

MS. BAILEY: The Board has voted five-zero-zero to deny the appeal. Mr. Griffis made the motion. Mr. Etherly seconded. Mrs. Miller and Mr. Mann and Mr. Hood are in agreement, and this is a full order, Mr. Chairman.

CHAIRPERSON GRIFFIS: That's correct. Very good. Thank you all very much. Appreciate you all being down here. We made it five minutes past my assessment of when we would end.

Is there anything else for the Board this afternoon?

MS. BAILEY: No, Mr. Chairman.

CHAIRPERSON GRIFFIS: Very well. If there is nothing further for the Board, let's adjourn the afternoon session of the 18th of January 2005.

(Whereupon, the Public Hearing of the Board of Zoning Adjustment was adjourned at 7:08 p.m.)

CERTIFICATE

This is to certify that the foregoing transcript in the matter of: Public Hearing

Before: Board of Zoning Adjustment

Date: January 18, 2005

Place: Washington, D.C.

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

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