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June 7, 2005

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BY HAND
Ms Carol J Mitten
Chairperson
Zoning Commission
441 4th Street, NW, Suite 210
Washington, DC 20001

Re Zoning Commission Case No 05-13
Our File No 092218 0013

Dear Ms Mitten

Attached is the original and twenty (20) copies of JBG/Louisiana Avenue, L L C 's ("JBG") Opposition to S*ua Sponte* Review and Motion to Disqualify Commissioner Kevin Hildebrand

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L L P

Richard B Nettler
Jeannine Rustad

Enclosures (as stated)
cc Office of Planning
Ms Ellen McCarthy (by hand, w/encl)
Mr Travis Parker (by hand, w/encl)
Office of Attorney General
Alan Bergstein (by hand, w/encl)
Mr Dean Cinkala (by hand, w/encl)

ZONING COMMISSION
District of Columbia
Case 05-13
Exhibit 5

Word 45672105 1

ZONING COMMISSION
District of Columbia
CASE NO 05-13
EXHIBIT NO 5

bcc· Mr Geoffrey Griffis (by hand, w/encl)

Government of the District of Columbia
Zoning Commission

Z C Case No 05-13

OPPOSITION OF JBG/LOUSIANA AVENUE, L.C.C. TO *SUA SPONTE* REVIEW AND MOTION TO DISQUALIFY COMMISSIONER KEVIN HILDEBRAND

For the following reasons, JBG/Louisiana Avenue, L L C ("JBG") hereby opposes the Zoning Commission's (the "Commission") *sua sponte* review of the Board of Zoning Adjustment's (the "Board") decision in the underlying matter, BZA Application No 17271, and moves to disqualify Commissioner Kevin Hildebrand on the grounds of personal bias, given Commissioner Hildebrand's involvement before the Board

BACKGROUND

In the underlying matter, BZA Application No 17271 (the "Application"), JBG sought a variance from the height limitations of section 1709.23 of the zoning regulations to allow the construction of an addition, designed by Richard Rogers Partnership, Architects, ("RRP"), to an existing, historic office building at the subject property, 51 Louisiana Avenue, N W., Square 631, Lots 17 (the "Property") It is undisputed that with the height variance, JBG will still not be able to utilize the matter of right density permitted on the site because of commitments made prior to JBG's ownership of the site which require that the existing office buildings be retained, and without the height variance the inability to use the density otherwise permitted on the site is even greater. Contrary to statements made by members of the Commission, the height variance was not sought to allow for the construction of an underground garage of any particular size but, rather, a necessity

05-13 #5

from other site constraints documented in the record before the Board, which, as stated, still leaves JBG without the ability to use the Property's matter of right density

ARGUMENT

A. *Sua Sponte* Review is Inappropriate in the Instant Matter.

In reviewing decisions of the Board, the zoning regulations set forth the following guidelines to determine whether the Commission should invoke its *sua sponte* review authority

> (a) In a particular instance where it appears to the Commission that the Board has exceeded its prerogatives and has thus in effect changed the zoning,
> (b) Where it appears that a basic policy of the Commission, as expressed in the Zoning Regulations, has been violated as a result of action by the Board, or
> (c) In an unusual instance, as determined by the Commission

11 DCMR § 2817.7. In the instant matter, none of these criteria apply The Board did not exceed its prerogatives, effectively changing the zoning, but instead applied well-settled principles established by the D C. Court of Appeals for area variance cases Nor did the Board violate any basic principle of the zoning regulations To the contrary, the Board's granting of the height variance is consistent with the zoning regulations and map Moreover, the Board based its decision on the evidence in the record. Finally, as illustrated below, there are no unusual circumstances associated with the instant matter

1. The Proposed Review is Contrary to the Purpose and Intent of Section 3128 of the Zoning Regulations

a Adoption by the Commission of the Provisions for *Sua Sponte* Review.

Provisions for *sua sponte* review were added to the zoning regulations in 1972. Exhibit 4 The provision added in 1972 provided, as follows

> 8204 3 - No decision or order of the Board shall take effect until ten (10) days after having become final Within that time the Zoning Commission may, sua sponte, make an order staying for a period of ninety (90) days a decision or order of the Board pending review by the Zoning Commission, During this time, the Zoning Commission will consider and rule upon the merits of the decision or order of the Board,
>
> 8204 4 - Upon receipt of an order staying the effect of a decision or order of the Board, the Secretary of the Board shall forward to the Zoning Commission the record of the case, with notice to all the parties before the Board Within twenty (20) days after the record has been forwarded to the Zoning Commission, any party before the Board may file with the Commission and serve upon the other parties a memorandum in support of or in opposition to the action of the Board Any party may file and serve a reply memorandum within ten (10) days thereafter The Zoning Commission may, in its discretion, set the matter down for oral argument.
>
> 8204.5 - The Commission may issue an order affirming, modifying, or vacating the decision or order with instructions to the Board.

Exhibit 1. Thus, the Commission granted itself the authority to review orders of the Board, consistent with the Zoning Enabling Act However, neither parties nor persons participating at the Board level were given any appeal rights to the Commission. This latter point was clarified in 1978, when the *sua sponte* provisions were modified

With regard as to whether parties should have appeal rights to the Commission, in Z C Order No. 210, the Commission made it clear that there were no appeal rights to the Commission

> There was considerable testimony that the Commission should function as an appellate body for the Board and that parties to cases before the Board should have the right to appeal the decisions of the Board to the Zoning Commission, rather than or in addition to the Court of Appeals Even though the Board of Zoning Adjustment is an adjunct to the zoning Commission and the membership of the two bodies overlap, the Commission nevertheless finds that *the Board is an independent body* created by Act Congress charged with the carrying out of independent duties the role that has been established for it *The Zoning Commission was never intended to be an appellate body nor is it constituted such that it is able to be.*
>
> The Commission notes that the present right of appeal is available as a matter of right in the District of Columbia Court of Appeals. It is also well known that the American system of jurisprudence provides only one appeal as a matter of right in all courts of law, with a second appeal available only at the discretion of the court It is therefore entirely appropriate that the right of appeal from a final administrative decision of the Board of Zoning Adjustment continue to be available in the D C Court of Appeals. If the Zoning Commission where to be an appellate body, it would in effect make available a second appeal as a matter of right. The Commission notes that the Rules of the Board of Zoning Adjustment already provide for parties before the Board to ask the Board to rehear or reconsider a case, and although these are not appellate procedures as such, they are nevertheless a way in which additional consideration can be obtained.

Exhibit 2, p 1 (emphasis added) Z C Order No 210 replaced section 8204 5 with the following language.

> This sua sponte process does not grant any rights of appeal to the Zoning Commission There being no right of appeal to the Zoning Commission from any action of the Board, communications to the Zoning Commission, no matter the form, requesting that sua sponte review be undertaken need not be answered Sua sponte review is a discretionary internal process

Exhibit 2, p. 3 Thus, the Commission recognized that the Board was independent and that it (the Commission) was not to serve as an appellate body to the Board. Instead, the appropriate avenue for appeal is to the Court of Appeals

b Commission's History of *Sua Sponte* Review.

Since the adoption of the provisions for *sua sponte* review and until fairly recently, the Commission has reviewed only a handful of Board decisions Those cases are illustrative of the circumstances under which review by the Commission is appropriate and the extreme caution the Commission must take in exercising its review, so as not to overstep its bounds and act as an appellate body. These cases, which are summarized below involved (1) the reversal of an application for the incorrect relief (ie., application was heard as a use variance rather than a special exception), (2) suggestion of the Commission on review that appropriate relief was a map amendment, which was subsequently applied for and granted; (3) reversal of Board order denying relief to allow requested use (via a special exception) while an amendment for a map change was pending which precluded the use

The most recent case, Z C. Case No. 99-4 (Z C Order No 917), the underlying Board decision was reversed on the grounds of "unusual circumstances" – namely, that the wrong relief had been sought In that case, the applicant had sought a use variance from the Board to allow a repair garage in a C-3-C zone district The Board granted the variance by a vote of three to one Thereafter, the Commission member who had sat on the Board requested that the Commission exercise its *sua sponte* review The basis for this request was that a repair garage is permitted in the C-3 zone districts as a special exception pursuant to section 743.1 of the zoning regulations and,

accordingly, the Board had considered the case under the incorrect relief. The Commission reversed the Board's decision and remanded the case for a rehearing as a request for a special exception under section 743 1 of the zoning regulations Exhibit 3

In Z.C Case No 74-1 (Z C Order No 86), the Commission reversed the Board's denial of a special exception for parking lot Exhibit 4. At the time the application was brought before the Board, it was zoned R-2. It was subsequently rezoned to R-4 The applicant had sought, but was denied, a rezoning to C-2-A (from the R-2 zone). Subsequently, the applicant stated its intention to re-submit an application for a map amendment to C-2-A and, as such, requested a three (3) year limit on the special exception to allow the use while the application for a map amendment was pending. Accordingly, the Commission remanded to the Board with instruction to grant the application for a period of three (3) years. Exhibit 4.

The final matter involved the Old Hecht Company building (the "Hecht Building") Exhibit 5 Prior to the adoption of the Downtown Development District Overlay (the "DD"), the owner of the Hecht Building entered into an agreement with the District of Columbia Preservation League ("DCPL") governing "critical development and preservation/restoration matters" concerning the property Because of this agreement with DCPL, the Hecht Building property was the only historic property within the DD to be excluded from the restrictions and incentives of the DD related to historic properties As such, the Hecht Building was subject to residential requirements of the DD However, with the adoption of the DD, the development contemplated under the DCPL agreement could not be accomplished. Exhibit 5, p 5 Accordingly, the owner had applied for and was granted relief from the housing requirements immediately after the adoption of the DD. The Commission, as

indicated in the Z C Order No 787, exercised its rights of review This is reflected in the Commission Order (Order No 787), granting a text amendment to include the subject property in the historic provisions of section 1704 of the DD Specifically, it was stated by the Commission:

> During the sua sponte review by the Zoning Commission of the March 8, 1991, BZA Order approving an application for a variance from the housing requirements on this site, a member of the Commission suggested that if the property owner experienced difficulties as a result of the present regulations, a text amendment would be the appropriate process to address those difficulties

Exhibit 5, pp 5-6

c The Instant Application.

The instant matter was brought to the attention of the Commission on the request of the Architect of the Capitol for *sua sponte* review The Architect of the Capitol had already evidenced its opposition to the Application in the proceedings below by submitting written opposition. The Architect of the Capitol did not, however, choose to participate as a party, thus securing appeal rights to the Court of Appeals as would be the proscribed avenue of recourse for a dissatisfied party. Instead, the Architect of the Capitol refused to meet with JBG until the day of the hearing, and by its actions avoided a Court of Appeals review and, instead, sought extra judicial review by bringing the matter before the Commission, a body on which it sits If the Commission were to reverse the Board under these circumstances and remand the matter for an additional hearing, the Commission would allow an end run around the appeal provisions provided for Board actions. Although the Architect of the Capitol's inability to respond to JBG's expert testimony was through no fault but its own, it now tries to use this as an as an unprecedented basis to reopen the record, quoting his comments

> I think it's clear that the record is incomplete without rebuttal testimony to the applicant's security analysis And I think for that reason alone there should be substantial import to send it back to the Board for additional hearing on that subject matter alone

Exhibit 10 at 10 [1] With all due respect to the Architect of the Capitol, this end-run around the Board's authority is inappropriate given that the Architect of the Capitol, or its representative, chose not to attend the hearing and provide testimony when and where appropriate

Additionally, unlike previous matters where the Commission has exercised its review power, this matter does not involve the application of erroneous relief. Nor does it involve a situation where a map amendment is pending What the Commission is attempting to do is to review the facts and the application of the area variance test (applicable here when seeking a height variance) and, as such, is acting as an appellate body Moreover, the statements made by Commissioners regarding the appropriate standard for review of an area variance application is at odds with settled court decisions As set forth above, in amending the *sua sponte* review provisions in 1978, the Commission explicitly recognized that this power was reserved for the Court of Appeals. For these reasons, a remand of the Board's decision for a further hearing is not warranted

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[1] As to the Commissioner Hildebrand's assertion that "this is such a unique condition where the applicant concurrently meeting with the Sergeant at Arms while the hearing was taking place," (Exhibit 10 at 11-12) again, JBG tried to schedule a meeting with the Sergeant prior to the hearing date, but was denied this opportunity It is factually incorrect for the Architect of the Capitol to suggest that JBG did not proactively cooperate with the Architect of the Capitol when, in fact, JBG, without requirement, notified the Architect of the Capitol of its Application and attempted to meet to discuss the Application at several points

2 The Commission's Concerns

In raising their issues of concerns, the Commission has suggested review by the Board, on remand, under criteria that is in contravention to decisions of the court on the application of the law to requests for area variances. The issues raised by the Commission were

(1) Whether there was a nexus between the difficulties that JBG raised and the relief granted and the degree to which compliance with the zoning regulations would render development of the Property economically infeasible. Also, whether a parking waiver would have been more appropriate because it appears that the height variance is simply a consequence of the provision of a too large garage,
(2) The degree to which JBG should rely on the standstill agreement as fixing the historic status of the property,
(3) Contemplation of the programmatic needs of the applicant,

Exhibit 10 at 4-7 & 15-16. As illustrated below, the D C Court of Appeals (again, the body statutorily vested with the authority to conduct the type of review being exercised by the Commission) has dealt with these types of issues in a manner which fully supports the Board's decision

a Nexus Between the Uniqueness of the Property, the Resulting Practical Difficulties and the Relief Granted

Independent of the correctness of the role that the Commission has taken upon itself, if it is going to act as an appellate body it must adhere to the standard of review applicable to such appellate bodies. That is, the scope of review of the Board's decision is limited to "whether 'findings made' are supported by and in accordance with reliable, probative, and substantial evidence in the whole administrative record . . and whether the conclusions of the Board flow rationally from these findings." *Russell v District of Columbia Board of Zoning Adjustment*, 402 A.2d 1231, 1234 (D.C 1979)(internal citations omitted)

It has been said that

> A variance, wisely used, provides local zoning officials with a means to accommodate a conflict between the requirements of a generally sound zoning ordinance and the needs of a particular situation.

E.C. Yorkley, ZONING LAW AND PRACTICE, §20-1 (4th ed.)(emphasis added) Practical difficulty has been said to be met when the strict application of the zoning regulations unreasonably deprive the property owner of a permitted use of the property E.C. Yorkly, ZONING LAW AND PRACTICE, §20-10 (4th ed) As the unchallenged record reflects, due to the confluence of factors inherent in both the Property itself and the existing structures, including agreements and agency decisions made prior to JBG's ownership of the Property, even with the height variance, JBG is deprived of developing the full FAR *See* Prehearing Statement at 13 [2]

As indicated above, the instant case is one where a "confluence of factors" come together to create practical difficulties in complying with the zoning regulations; thus necessitating the requested relief *See Gilmartin v. Board of Zoning Adjustment*, 579 A 2d 1164, 1168 (D.C. 1990) (noting that the zoning regulations don't preclude approval of a variance where the uniqueness arises from a confluence of factors but noting that "the critical point is that the extraordinary or exceptional

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[2] The Prehearing Statement sets forth the following table regarding inability to fully develop the available FAR

	Existing Conditions	C-3-C Matter of Right	Matter of Right with TDRs	Proposed
FAR	3 30	6 5	9.0	5 98
Gross Floor Area	300,997*	591,636	819,189	544,583**

*The gross floor area of the Acacia and Annex Buildings is 208,747 square feet The gross floor area of the garage is 92,250 square feet

** The gross floor area of the proposed new building and enclosed atrium is 335,836 square feet

condition must affect a single property") These factors include, the odd shape of the Property,[3] the configuration of the existing structures, the high floor plates in the existing structures; the historic nature of the existing buildings, which are required to be retained, and the history of CFA review of proposed additions to the Property by the prior owner Further compounding the ability to develop this Property are the subterranean factors, including the location of the Metro tunnel and Tiber Creek These factors will be addressed separately

Presumably, the Commission is heading in the direction it did in Z C Application No. 02-37/16869, wherein the Commission exercised its right of *sua sponte* review to reverse the Board's grant of an area variance [4] In that matter, the Commission relied upon a New York case to support the proposition that

> An applicant's claimed practical difficulties must not only result from the exceptional situation or condition of its property, but their proof must also bear some reasonable relationship to the magnitude of the relief granted. The quantum of proof for the practical difficulties claimed varies with the magnitude of the variance sought.

Z C. Order No 02-37/16869 at 4, *citing, In the Matter of National Merritt v Weist*, 41 N.Y 2d 438, 443, 361 N E.2d 1028, 393 N Y S 2d 279 (1977). In the first place, proof that the relief needed must bear some reasonable relationship to the magnitude of the relief requested has never been accepted by District of Columbia courts and was rejected by the Court in *United Unions, Incorporated v District of Columbia Board of Zoning Adjustment*, 554 A.2d 313 (1989), in the case where the relief

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[3] The fact that this is a large lot does not diminish this factor, as the Property is not a vacant lot but, rather, contains an oddly shaped, historic building *See* Exhibit 10 at 13 When the odd shape of the Property is coupled with the odd shape of the existing historic structures, it leaves little room for additional development

[4] As in the instant case, in Z C Case No 02-37, the Commission inappropriately acted as an appellate review authority.

is being sought to development property that is encumbered with a historic building In *United Unions*, the Court rejected a challenge to an area variance granted to construct an addition to the Corcoran Gallery stating that "the peculiar difficulties of adding onto the original * * * building seem to comprise the practical difficulties that the variances were designed to surmount." *Id* at 318. This is particularly true here with 51 Louisiana Avenue where the design of the addition cannot even take advantage of the full floor area ratio So, unlike the cases relied upon in *Gilmartin v District of Columbia Board of Zoning Adjustment*, 579 A 2d 1164, 1171 (D C. 1990), this isn't even a case where the expansion of the building to the density permitted under the zoning regulations could be achieved without an area variance.

In addition, unlike *Merritt*, the relief in the instant case was not of great magnitude, nor was it found to have serious detrimental effect on the surrounding neighborhood; in fact the Application was unanimously supported by the Advisory Neighborhood Commission. Exhibit 9 The applicant in *Merritt* sought to construct a shopping center with a total floor area of 180,500 square feet and an over-all length of 965 feet This was approximately ninety percent (90%) larger than the matter of right floor area of 15,000 square feet and length of 180 feet *Id.* at 440. In denying the requested relief, the zoning board found that the shopping center would.

> (1) be harmful to the character of the surrounding area which consisted of residential and residentially zoned properties,
> (2) result in a hazardous traffic condition on Route 9,
> (3) create flooding and drainage problems for the village and the surrounding area and
> (4) violate the village wetlands ordinance which prohibits the alteration of natural watercourses

Id at 441 As explained by the Court in *Gilmartin v District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164 (D C. 1990), in deciding area variance cases, the

> BZA has the flexibility to consider a number of factors, including, but not limited to. 1) the weight of the burden of strict compliance; 2) the severity of the variance(s) requested, and 3) the effect the proposed variances would have on the overall zone plan

Gilmartin, 579 A 2d at 1171 In the instant matter, in contrast to *Merritt*, the variance requested in the instant matter was only fifteen percent (15%) from the matter of right height, a height found, without challenge, to be consistent with the surrounding neighborhood and, in fact, the Application was unanimously supported by the ANC. Additionally, there was no adverse impact caused by the requested variance Accordingly, the relief is relatively *de minimis* and the record supports the grant of the variance With regard to the economic burden caused by the confluence of factors at the Property, it was only one of the many factors considered by the Board, but not the driving factor.

Finally, with regard to the Commission's suggestion that a parking waiver may have been the more appropriate relief, as provided herein and as supported by the record, the requested relief is supported without necessarily relying on the subterranean unique factors That is, the odd shape of the lot, the historic nature and odd shape of the existing structures, the stand-still agreement with DCPL and CFA's review of prior proposals for the development of the Property and the high floor plates in the existing structures, alone, make it practically difficult to develop the Property in compliance with the zoning regulations. Indeed, although JBG has taken into consideration the parking needs of the existing tenant in designing the proposed parking garage, if JBG were to build a smaller garage (either one that provided the requisite number of parking spaces under the zoning regulations, or less), there would be no effect on the need for the height variance for the proposed

addition. The subterranean factors merely added to the difficulties in developing the Property, rather than being the primary factor relied upon by either JBG or the Board.

b. Both JBG and the Board Properly Relied Upon the Stand-Still Agreement with DCPL and the Review History by CFA.

The stand-still agreement with DCPL resulted from threatened development of the Property by a prior owner that would have resulted in demolition of a portion of the historic structures and would have had a significant impact on the remaining building As testified by a representative of JBG, upon purchasing the Property and studying how an addition could be constructed on the site, JBG:

> 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

Exhibit 6, at 195-196. Thus, not only is it the stand-still agreement with DCPL that contributes to the historic nature of the improvements, but the history of CFA review, as well

A review of the Commission's own history illustrates that agreements with DCPL do result in treatment of the subject property as if it were a designated historic property *See e g* Exhibit 5 (certain properties were originally excluded from the historic preservation provisions of the DD based on their subjection to a development agreement with DCPL). That DCPL would apply for designation of the improvements to the Property is not mere speculation but, as a result of the history of the development of the Property and the stand-still agreement, it would be a certainty in the event

that JBG (or any subsequent owner) attempted to circumvent the terms of the stand-still agreement and propose to develop the Property in such a manner that would impinge on the historic quality.

The fact that JBG was aware of any of the unique circumstances to the Property, including the stand-still agreement, does not preclude the granting of an area variance, as Hildebrand suggested. Contrary to Hildebrand's implication that JBG was "double dipping" (Exhibit 6 at 7), it has been explained that

> . . . since hardship can neither be measured by the cost of the property to the owner nor by the difference between the value of the land has as restricted and the value it would have if the variance were granted, there is no danger that a knowledgeable purchaser could create evidence of hardship by paying an excessive purchase price for property that is restricted

Rathkopf, The Law of Zoning and Planning §58 22 (2004) Again, focusing on the design developed to deal with a historic building, the Court, in *United Unions*, stated that the need to "construct in an odd-shaped space in a manner consistent with the original" historic building "are special conditions simply not shared by the other buildings in the area, and they justify the BZA's discretionary judgment that the variances were warranted " 554 A 2d at 317-318

c The Board Appropriately Considered the Programmatic Needs of JBG.

Programmatic needs of an applicant is a factor that has been recognized by the Court. *See Association for Preservation of 1700 Block of N Street, N W v. District of Columbia Board of Zoning Adjustment*, 384 A 2d 674 (D C. 1978), *Draude v District of Columbia Board of Zoning Adjustment*, 582 A.2d 949 (D C 1990) In *1700 Block of N Street, N W*, the Court upheld the finding of the Board that one of the "peculiar practical difficulties" was the "construction of the

YMCA's proposed indoor pool as part of its private club facilities", which was found to present "certain structural design problems " Likewise, in the instant matter, design problems are inherent in the Property based on the configuration of the existing structures and the high floor plates of those structures. These factors make it difficult to connect the addition to the existing building. When taking into consideration the limited footprint available for construction, matching the floor plates of the existing buildings would only further exacerbate the feasibility in developing the Property, as any developer would be further deprived of utilizing available FAR. *See* Prehearing Statement at 13.

Similarly, in *Draude*, the Court upheld consideration of George Washington University's ("GWU") need to expand and programmatic requirements, including the need of GWU to physically link to and interconnect its addition with its main building In upholding these considerations, the Court stated that

> GWU was required to use this particular site for an addition to the Burns Building for a variety of reasons First, this site allows GWU to continue to use the valuable asset of the pre-existing Burns Building, which is already devoted to ambulatory care. Second, a successful ambulatory care center requires proximity to the hospital, due to the extensive interaction between medical staff and the hospital Third, any new addition must comply with the George Washington University Campus Plan Fourth, the expansion of the Burns Building on the subject site is the only economically feasible location for the required consolidated ambulatory care facility

582 A.2d at 955-56

B. Commissioner Hildebrand should be recused do to the Architect of the Capitol's involvement in the Application and resulting bias.

1. Background

Although not required by any applicable regulation, statute or procedural protocol, given the proximity of the Property to the Capitol grounds, JBG, on its own initiative, informed the Architect of the Capitol (the "Architect of the Capitol") of the requested relief by letter and telephone approximately a month before the Board hearing date and made several attempts to meet with the Architect of the Capitol to review the plans. These proactive actions undertaken by JBG were not required but rather were undertaken voluntarily. Rather than meet with the JBG prior to the hearing on the Application, the Architect of the Capitol sent a letter to the Board objecting to the requested relief. *See* Exhibit 7 The Architect of the Capitol failed to serve a copy of this letter on either JBG or its counsel (*see* Exhibit 7) and the letter and its contents was not discovered until counsel for the Applicant reviewed the Board's file on January 11, 2005

The Architect of the Capitol's objection was based on speculation by the Senate Sergeant at Arms that the "lines of sight that would be created from the roof and penthouse of the proposed structure would present a serious security risk to the Senate wing of the Capitol." *See* Exhibit 7. The Architect of the Capitol did not provide any supporting evidence that such a risk was, in fact, created by the proposed addition subject to the Application. Nor did the Architect of the Capitol or The Sergeant of Arms apply for party status or testify at the hearing

Upon receipt of a copy of the Architect of the Capitol's letter to the Board, JBG made additional, albeit unsuccessful, attempts to meet with the Architect of the Capitol and the Sergeant of Arms As indicated by Commissioner Hildebrand at the Commission's April 11, 2005 public

meeting, neither the Architect of the Capitol nor The Sergeant of Arms accommodated JBG's request for meeting until the date of the hearing on the Application before the Board. *See also* Exhibit 6 at pp. 181 (indicating that, given that the Property is not within the Capitol Overlay, the Architect of the Capitol "would not normally have participated if it wasn't for [JBG] taking a proactive effort to bring to the attention [of the Architect] what we were doing ") Being unsuccessful in its efforts to meet with the Architect of the Capitol prior to the hearing, JBG retained Ducibella Venter & Santore ("DVS"), 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, to review any security issues presented by the proposed project DVS submitted a detailed report on the security of the proposed addition subject to the application

As noted by Commissioner Hildebrand at the April 11, 2005 public meeting of the Commission, neither the Architect of the Capitol nor The Sergeant of Arms met with JBG until the day of the hearing on the Application before the Board. However, what Commissioner Hildebrand did not disclose to his fellow Commissioners is that the failure of the Architect of the Capitol to meet with JBG prior to the hearing was due to the Architect of the Capitol's own refusal to agree to an earlier meeting. Furthermore, Commissioner Hildebrand did not disclose that, despite JBG's openness with the Architect of the Capitol, as evidenced by JBG having voluntarily provided the Architect of the Capitol with notice of its intention to seek the request relief, the Architect of the Capitol did not serve a copy of its letter of objection to the Board on either JBG or JBG's counsel As a result, JBG did not learn of the January 3, 2005 letter of objection until January 11, 2005, a week before the scheduled hearing date.

Finally, it should be noted that the Architect of the Capitol did not participate in the proceedings before the Commission of Fine Arts ("CFA"), the federal agency charged with reviewing private buildings adjacent to public buildings and grounds of major importance. Proceedings before CFA were ongoing contemporaneously with the Application By contrast, District of Columbia Preservation League ("DCPL") which has a long history with the project, actively participated. The Architect of the Capitol elected not to present any information to, or appear before the CFA. CFA unanimously approved the project subject to this application *See* Exhibit 8.

2 Standard for Disqualification/Recusal.

It is well established that criteria governing recusal of officers applies equally to administrative decision makers acting in an adjudicative capacity. *Morrison v Board of Zoning Adjustment*, 422 A.2d 347, 349-50 (D.C. 1980), *Dupont Circle Citizens Ass'n v Alcoholic Beverage Control Board*, 766 A.2d 59, 65 (D.C 2001) Judicial disqualification is required when "the judge's impartiality might reasonably be questioned " ABA Model Code of Judicial Conduct, Canon 3 E(1), 28 U S C § 455

A party seeking recusal of an administrative decision maker must allege facts that

(1) are material and stated with particularity,
(2) are such that, if true, they would convince a reasonable person that a bias exists; and
(3) show that the bias is personal as opposed to judicial in nature

Dupont Circle Citizen's Ass'n, 766 A 2d at 65 (internal quotations omitted), *see also Vann v. District of Columbia Board of Zoning Adjustment*, 441 A 2d 246, 250 (D.C. 1982).

3. Facts in Support of Recusal and/or Disqualification Clearly Illustrate Bias.

Commissioner Hildebrand sits on the Commission as a representative of the Architect of the Capitol As already stated, although electing not to seek party status, the Architect of the Capitol submitted a letter in opposition to the Application before the Board Not satisfied with the decision of the Board and not having obtained party status before the Board, Commissioner Hildebrand used his influence and position on the Commission to obtain *sua sponte* review of the Board's decision. Any reasonable person would be convinced that Commissioner Hildebrand, as a representative of the Architect of the Capitol, is biased based upon the Architect of the Capitol's documented position in opposition to the Application and motivation in bringing the matter before the Commission.

4 Commissioner Hildebrand's Bias stems from a Source Outside His Position as a Commissioner.

As for the third prong of the test for recusal – that the bias be personal rather than judicial – the Court has found that "recusal is necessary when the alleged bias is traceable to a source other than the judge's participation in the case." *Gladden v District of Columbia Board of Zoning Adjustment*, 659 A 2d 249, 256 (D C 1995)(holding that ex parte contacts with Board members can result in the absence of an impartial hearing) The distinction between personal bias and judicial bias has been explained as follows

> personal bias is unlike judicial exposure to the case in that a distinction is drawn 'between a judicial determination derived from the evidence and lengthy proceedings had before the court, and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources beyond the four corners of the courtroom '

In the Matter of Lawrence D Bell, 373 A.2d 232, 233-234 (D C 1977); *see also Dupont Circle Citizen's Association*, 766 A 2d at 65 (D C 1001). That is, personal bias is based on something "other than what the judge learned from his participation in the case" *Id* In the instant matter, the bias of Commissioner Hildebrand is based not on what he may learn in the instant proceedings, but based on the position already advocated by the Architect of the Capitol in the proceedings before the Board as a person having submitted written opposition to the application filed by JBG. *See, e.g*, *Morrison, supra* (wherein the chairman of the Board recused himself from participating in the proceedings during the time in which he was serving as the private attorney, in unrelated litigation, against the president of the applicant before the Board).

a The Architect of the Capitol's Position in Opposition before the Board Raises Bias.

That a person's participation in opposition to a matter he is now to judge serves as bias was upheld in *Dupont Circle Citizen's Association v District of Columbia Alcohol Beverage Control Board*, 766 A 2d 59 (D C 1001) In *Dupont Circle,* the Alcohol Beverage Control ("ABC") board member in question, prior to becoming an ABC board member, had been an Advisory Neighborhood Commissioner for the subject property As an ANC commissioner, he had

> (1) signed a letter published in the Washington Post criticizing the former Chair of the [ABC] Board for granting the earlier license to [the applicant], (2) requested a member of the Council of the District of Columbia to introduce legislation barring the issuance of a license to [the applicant], (3) testified before the [ABC] Board in opposition to [the Applicant's] previous license application.

766 A 2d at 64 The ABC Board's decision to disqualify the board member in question was upheld by the court, which found that the board member's "alleged bias stemmed from a source other than

prior service as a Board member " *Id* at 65. In upholding the disqualification of the board member, the court stated that the board member's public pronouncements.

> . on essentially the same factual issue he would be judging as a Board member – whether [the applicant] would be licensed by the Board – gave rise to a reasonable question as to his impartiality

Id The court further noted that disqualification was appropriate regardless of whether the prior testimony in opposition had been made in the capacity as an ANC commissioner or as a private citizen. *Id* (stating, specifically, that whether the testimony was given as an ANC commissioner or as a private citizen was "beside the point")

Given that the Architect of the Capitol previously submitted written opposition to the Application, Commissioner Hildebrand, as a representative of the Architect of the Capitol, cannot now be permitted to decide issues regarding the validity of the Board's decision granting the requested variance

b. Other Outside Influence

In *Gladden, supra*, the allegation of bias was based on: (1) a memorandum from the Office of the Corporation Counsel advising the Board on the applicability of a recent case of the Court of Appeals, (2) a report of the Office of Planning; (3) public testimony of a representative of a government agency; and (4) statements of the Board members 659 A 2d at 256 The Court concluded that there was no bias, as the alleged improper influence was a part of the record in the form of either written reports or testimony from advisory agencies to the Board, as opposed to being from a member of the Board of Zoning Adjustment *Id.* at 257. Accordingly, the Court noted that

the petitioners had "the opportunity to focus on and develop these points at the hearing and did not do so." *Id*

The instant matter presents a much clearer case for recusal and/or disqualification. The issue goes beyond one of ex parte contacts with the Commission, but of a Commissioner's personal interest as an opponent of the Application before the Board In *Gladden*, the alleged bias was based on influence from the Board's counsel, the Office of Planning and another outside agency The petitioner, in that case, had a remedy to any potential "bias" – namely responding to the evidence presented In contrast, in the instant matter, the bias stems not from influence from outside agencies, but from an opponent before the Board who submitted a letter in opposition to the Board prior to the introduction of any evidence, and declined to present evidence as a party, but whose representative sits as a member of the Commission. JBG would be without remedy if Commissioner Hildebrand were allowed to participate in this matter, as JBG could not be assured that Commissioner Hildebrand would not let the Architect of the Capital's preemptive opposition to the Application influence his decision Given the interest of the Architect of the Capitol in this matter and its outcome, recusal and/or disqualification of Commissioner Hildebrand is imperative. *See Liljeberg v Health Services Acquisition Corp*, 486 U.S. 847 (1988)(recusal appropriate where judge was a member of the board of trustees of an entity interested in the outcome of the litigation before the judge)

In *Liljeberg*, the judge was a member of the board of trustees of an entity negotiating with Liljeberg. 486 U S at 850. The success of that entity in its negations depended on Liljeberg prevailing in the litigation *Id.* The trial judge denied the motion to vacate the judgment in favor of

Liljeberg, claiming that the judgment wasn't tainted, as he had "forgotten" about this interest during the pending litigation. 486 U S at 850-851 The Supreme Court upheld the determination that the judge's purported lack of knowledge did not "eliminate the risk that 'his impartiality might reasonably be questioned' by other persons." 486 U S. at 859. Of particular note is the Court's statement that the purpose of recusal is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible" 486 U S at 865 (emphasis added); *see also Morrison*, 422 A.2d at 349 (stating that disqualification has been used to "insulate the administrative process and its decision makers from prejudice and bias") The Court stated that the Court of Appeals had correctly noted that a judge must disqualify himself if he

> knows that he, individually or as a fiduciary, has a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceedings

486 U S at 867 Thus, in accordance with *Liljeberg*, the only way that the Commission can avoid any appearance of bias going forward is to disqualify Commissioner Hildebrand from participating in the matter

CONCLUSION

For the reasons stated above the Board's grant of the requested relief should be upheld and Commissioner Hildebrand should be excluded from taking any further action in this matter

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L L P

Dated June 7, 2005

Richard B Nettler #929471
Jeannine Rustad #451110

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Suite 1200
Washington, D C 20006
(202) 775-0725
Counsel for Parties in Opposition

Government of the District of Columbia

ZONING COMMISSION

Zoning Commission Order No, 49
June 29, 1972

ORDERED

That after public notice and hearing as prescribed by law the following text change established by the Zoning Commission of the District of Columbia, as shown in the Zoning Regulations, is hereby modified and amended.

Case No. 72-14

AMENDMENT INSTRUCTIONS:

1 Substitute the word Board for the words (Zoning Commission) in Subsection 8203 1 as follows:

"8203.1 - Each appeal or application to the Board shall be made on the appropriate form provided by the" Board and all information required by such form shall be furnished by the appellant or applicant at the time of filing the appeal. At the time of filing such appeal or application any fee required by the Commissioners of the District of Columbia shall be paid to the District of Columbia Treasurer. (As amended April 20, 1959)."

2 Delete paragraph 8203.54 which now reads as follows:

"8203.54 - Mailing a copy of such notice to each street address of private property located within one hundred (100) feet of the premises which are the subject of the appeal or application,"

3 Renumber existing paragraph 8203.55 to be 8203.54,

4 Delete subsection 8203.6 and paragraphs 8203.61 and 8203.62 which now read as follows:

"8203.6 - At the time of filing, the appellant or applicant shall be given a Zoning Notice showing the calendar number of the appeal, the nature of the appeal, and the location, time and date when the appeal will be heard. The appellant or applicant shall be responsible for posting said notice as follows:"

"8203.61 - Posting of the Zoning Notice on the premises for at least eleven (11) days immediately prior to the public hearing. Notice shall be posted on each street frontage of the property in plain view of the public and where it can be read from the public sidewalk or street. If the notices are defaced, torn down or removed, the appellant shall immediately notify the Board, obtain new notices from the Board and repost the premises."

"8203.62 - Failure to properly post and maintain the Zoning Notice in accordance with the requirements of subparagraph 8203.61, shall result in postponement of the hearing. Subsequent failure to post and maintain the Zoning Notice in accordance with the requirements of subparagraph 8203 61 shall result in the denial of the appeal unless good cause is shown by the appellant or applicant why the appeal should be heard or be again postponed. In the event that the appeal is denied for failure to properly post and maintain the notice, the applicant shall not institute a new appeal for at least sixty (60) days, the provisions of 8204.3 notwithstanding."

5 Delete Subsection 8203.7 and paragraphs 8203.71 through 8203.74 which now reads as follows:

"8203.7 - At a hearing, the order of procedure shall be as follows:"

"8203.71 - Appellant's or applicant's side of the case,"

"8203.72 - Director's, Department of Licenses and Inspections, Commissioners' of the District of Columbia or other administrative officer's side of the case."

"8203.73 - Interested property owners' or other interested persons side of the case,"

"8203.74 - Appellant's or applicant's rebuttal."

6. Renumber existing Subsections 8203.8 and 8203.9 to be 8203.6 and 8203.7 respectively.

7 Delete Subsection 8204 1 which now reads as follows:

"8204.1 - A rehearing on an appeal or application shall not be held by the Board except upon a motion to reconsider its action on such appeal or application made by a member of the Board not later than the first meeting succeeding the meeting at which the Board decided the appeal or application. Any such motion must be carried by at least four affirmative votes."

8. Renumber Subsections 8204.2 and 8204.3 to 8204.1 and 8204.2 respectively.

9 Change the title of Section 8204 to read as follows:

"8204 - Rehearings, New Appeals and Review By the Zoning Commission."

10 Add new Subsections 8204.3, 8204.4 and 8204 5 to read as follows:

"8204 3 - No decision or order of the Board shall take effect until ten (10) days after having become final. Within that time the Zoning Commission may, sua sponte, make an order staying for a period of ninety (90) days a decision or order of the Board pending review by the Zoning Commission, During this time, the Zoning Commission will consider and rule upon the merits of the decision or order of the Board,

"8204.4 - Upon receipt of an order staying the effect of a decision or order of the Board, the Secretary of the Board shall forward to the Zoning Commission the record of the case, with notice to all the parties before the Board Within twenty (20) days after the record has been forwarded to the Zoning Commission, any party before the Board may file with the Commission and serve upon the other parties a memorandum in support of or in opposition to the action of the Board. Any party may file and serve a reply memorandum within ten (10) days thereafter. The Zoning Commission may, in its discretion, set the matter down for oral argument."

"8204.5 - The Commission may issue an order affirming, modifying, or vacating the decision or order with instructions to the Board "

WALTER E. WASHINGTON

JOHN A. NEVIUS

STERLING TUCKER

GEORGE M. WHITE

RICHARD L. STANTON

ATTESTED:
James E. Bess
Administrative Officer

Government of the District of Columbia

ZONING COMMISSION

Zoning Commission Order No. 210

Case No 76-18

March 9, 1978

Pursuant to notice, public hearings of the District of Columbia Zoning Commission were held on December 2 and 9, 1976 and February 10, 1977, to consider an amendment to the text of the D. C. Zoning Regulations. The Amendment proposed to repeal those portions of the Zoning Regulations which authorize the Zoning Commission, sua sponte, to stay orders of the Board of Zoning Adjustment and to rule upon the matters disposed of in such orders.

At the public hearings, there was testimony both for and against the proposal. There was considerable testimony that the Commission should function as an appellate body for the Board and that parties to cases before the Board should have the right to appeal the decisions of the Board to the Zoning Commission, rather than or in addition to the Court of Appeals. Even though the Board of Zoning Adjustment is an adjunct to the Zoning Commission and the membership of the two bodies overlap, the Commission nevertheless finds that the Board is an independent body created by Act of Congress charged with the carrying out of independent duties in the role that has been established for it. The Zoning Commission was never intended to be an appellate body nor is it constituted such that it is able to be.

The Commission notes that the present right of appeal is available as a matter of right in the District of Columbia Court of Appeals. It is also well known that the American system of jurisprudence provides only one appeal as a matter of right in all courts of law, with a second appeal available only at the discretion of the court. It is therefore entirely appropriate that the right of appeal from a final administrative decision of the Board of Zoning Adjustment continue to be available in the D. C. Court of Appeals If the Zoning Commission were to be an appellate body, it would in effect make available a second appeal as a matter of right. The Commission notes that the Rules of the Board of Zoning

Adjustment already provide for parties before the Board to ask the Board to rehear or reconsider a case, and although these are not appellate procedures as such, they are nevertheless a way in which additional consideration can be obtained.

The Commission does find that the concept of sua sponte review, which was instituted to allow the Zoning Commission to interject itself into the procedural process in the event that certain specific instances should warrent such action, is an appropriate concept to be reserved for use by the Zoning Commission itself. The Commission therefore finds that the present Regulations need to be clarified to continue the concept of sua sponte review but limit and define the scope of that review.

The Commission finds that the proposed amendment was referred to the National Capital Planning Commission under the terms of the District of Columbia Self-Government and Governmental Reorganization Act and that the NCPC reported that the proposed amendment would not have a negative impact on the interests or functions of the Federal Establishment within the National Capital

The Commission finds that the proposed amendment is in the best interests of the District of Columbia and is consistent with the intent and purpose of the Zoning Regulations andd the Zoning Act. The Commission therefore hereby orders adoption of the following amendments to the Zoning Regulations:

1. Delete existing Sub-section 8204.3 and replace it with the following:

   8204.3 No decision or order of the Board shall take effect until ten days after having become final pursuant to the Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment of the District of Columbia. Within that time the Zoning Commission may, sua sponte, determine to review any order or decision of the Board. Such determination shall be transmitted forthwith to the Secretary of the Board who shall forward to the Zoning Commission the record in the case with notice to all parties before the Board.

2. Delete existing Sub-section 8204.4 and replace it with the following:

   8204.4 Upon receipt of the record, the Zoning

Commission shall review the case and take such action as it deems appropriate, provided, however, that the Zoning Commission will not reverse or modify the order or decision of the Board without affording the parties before the Board an opportunity to present memoranda to the Commission in support of or in opposition to the action of the Board The Zoning Commission action may include, without limitation, affirmance, modification or reversal of the Board's action; hearing argument on the Board record in the case, remanding the case to the Board for reconsideration, rehearing or other action pursuant to instructions of the Zoning Commission.

3. Delete existing Sub-section 8204.5 and replace it with the following:

8204.5 This sua sponte process does not grant any rights of appeal to the Zoning Commission. There being no right of appeal to the Zoning Commission from any action of the Board, communications to the Zoning Commission, no matter the form, requesting that sua sponte review be undertaken need not be answered. Sua sponte review is a discretionary internal process.

4. Add a new Sub-section 8204.6 as follows:

8204.6 The Zoning Commission will look to the following guidelines when determining whether to invoke its sua sponte review authority. The Commission may exercise its discretion for sua sponte review:

a. in a particular instance where it appears to the Commission that the Board of Zoning Adjustment has exceeded its prerogatives and has thus in effect changed the zoning,

b. where it appears that a basic policy of the Zoning Commission, as expressed in the Zoning Regulations, has been violated as a result of a Board of Zoning Adjustment action, or

c. in an unusual instance, as determined by the Zoning Commission.

Vote of the Commission taken at the public meeting held on February 9, 1978: 4-0 (George M White, John G. Parsons, Walter B. Lewis and Theodore F. Mariani to adopt, Ruby B. McZier not present, not voting)

WALTER B. LEWIS
Chairman

STEVEN E. SHER
Executive Director

This order was adopted by the Zoning Commission at its public meeting held on March 9, 1978 by a vote of 4-0 (George M. White, John G. Parsons, Walter B. Lewis and Ruby B. McZier to adopt, Theodore F. Mariani not present, not voting).

In accordance with Section 3.62 of the Rules of Practice and Procedure before the Zoning Commission of the District of Columbia, this order is effective on 24 MAR 1978.

Government of the District of Columbia
ZONING COMMISSION

ZONING COMMISSION ORDER NO. 917
Case No. 99-4
(*Sua Sponte* Review of Board of Zoning Adjustment Application No. 16426)
September 13, 1999

This Decision and Order arises from the *sua sponte* review by the Zoning Commission for the District of Columbia of an order issued by the Board of Zoning Adjustment (BZA) that granted BZA Application No. 16426, concerning a request by Seung W. Hong pursuant to 11 DCMR § 3107.2, for a variance under 11 DCMR § 741 to construct an automobile repair service center in a C-3-C District at premises 21 L Street, S W (Square 648, Lot 22).

PROCEDURAL HISTORY

This variance application was filed with the BZA on December 18, 1998 A letter in opposition was filed on February 4, 1999 by Mr Joseph Nathanson, owner of property abutting the subject site. Advisory Neighborhood Commission (ANC) 2D submitted a letter indicating that the ANC had voted unanimously in favor of the application at its properly noticed meeting of February 8, 1999, with a quorum present.

Pursuant to notice, the BZA held a hearing on April 21, 1999. Testimony was heard from the applicant At the conclusion of the hearing, the Board rendered a bench decision to grant the use variance. On June 11, 1999, the Board issued a Summary Order granting the application by a vote of three to one The Order stated the Board's conclusion that the applicant had met the burden of proof, pursuant to 11 DCMR § 3107, that there existed an exceptional or extraordinary situation or condition relating to the property that created an undue hardship for the owner in complying with the Zoning Regulations, and that the requested relief could be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The requirement of 11 DCMR § 3331.1, which provides that orders of the Board must be accompanied by findings of fact and conclusions of law, was waived.

By letter dated April 30, 1999, then Zoning Commissioner Angel F Clarens requested that the Commission review the Board's decision, *sua sponte*, pursuant to 11 DCMR § 3101. Mr. Clarens was the member of the Commission who sat on the Board hearing the application At its regularly scheduled meeting of June 14, 1999, the Commission

decided to invoke its *sua sponte* review authority in this matter, and took a unanimous vote to stay the order of the Board

By letters dated September 10, 1999, the Office of Zoning sent notice on the Commission's action to members of the BZA, the applicant and ANC-2D The letters also requested written submissions on the regulations governing this case and the reasons why the Board's decision should not be overturned. Responses were received October 22, 1999 from Sheila Cross Reid, Chairperson of the Board, from the applicant, and from ANC-2D

FINDINGS OF FACT

1. The subject property is located at 21 L Street, S.W (Square 648, Lot 22) in the South Capitol area of Ward 2.

2. The property is zoned C-3-C, Major Business and Employment Centers

3 The C-3-C district is a medium-high density commercial zone that permits a maximum floor area ratio of 6.5, a maximum height of 90 feet, and a maximum lot occupancy of 100 percent 11 DCMR §§ 770 1, 771 2, 772.1

4 A repair garage is permitted in any C-3 district if approved by the Board, through the special exception process, in accordance with conditions specified in 11 DCMR § 3108.

5 A repair garage is first allowed as a matter-of-right in the commercial-light manufacturing (C-M) district. 11 DCMR § 801.7(h).

6. The applicant requested a use variance to be granted by the Board in order to construct and operate an automotive repair service center on the site. The applicant's only ground for requesting a variance was the "appropriateness" of his property for an automobile repair service center.

CONCLUSIONS OF LAW

The Zoning Regulations provide that no decision or order of the Board shall take effect until 10 days after having become final pursuant to Board rules. 11 DCMR § 3103.1. Within that 10-day period, the Commission may *sua sponte* determine to review any order or decision of the Board. 11 DCMR § 3103.2 In this case, the Board's order became final on June 11, 1999, and the Commission promptly decided three days later to invoke its *sua sponte* review authority and to stay the Board's order

The Commission may exercise its direction for *sua sponte* review when (1) the Board exceeded its prerogatives and thus in effect changed the zoning, (2) the basic policy of the Commission, as expressed in the Zoning Regulations, was violated as a result of

Board action, or (3) in an unusual instance, as determined by the Commission 11 DCMR § 3103 8. Upon *sua sponte* review, Commission action may include, among other things, reversal of the Board's action and remanding the case to the Board for reconsideration, rehearing, or other action 11 DMCR § 3103 5.

The Commission concludes that this case is "an unusual instance" in that the Board applied a use variance standard when the application should have been considered a request for a special exception A repair garage is permitted in a C-3 district if approved by the Board, pursuant to the special exception process 11 DCMR § 743.1. By considering the application a request for a use variance, the applicant was improperly required to meet the more difficult burden of proof for a use variance, which requires a showing that undue hardship would result from the strict application of the Zoning Regulations to the property, rather than the more lenient special exception showing that the proposed use would be in harmony with the general purpose and intent of the Zoning Regulations and Map and would not tend to affect adversely the use of neighboring property. 11 DCMR § 3108.1. Therefore, the Commission reverses the Board's order in BZA Application No. 16426 and remands the application for rehearing as a request for a special exception, pursuant to 11 DCMR § 743 1

The Board may grant a special exception where the exception would be in harmony with the general purpose and intent of the Zoning Regulations and Map and would not tend to affect adversely the use of neighboring property in accordance the Zoning Regulations and Zoning Map. 11 DCMR § 3108 1 On remand, all parties and interested persons will be afforded an opportunity to offer testimony and evidence in support of or in opposition to a request for a special exception allowing operation of an automotive repair service center on the applicant's property

The Commission has accorded ANC-2D the "great weight" to which it is entitled. The record reflects that the affected ANC voted unanimously to support the application However, the ANC's testimony addressed the criteria for a use variance and not the standards applicable to a request for a special exception On remand to the Board, the ANC may submit additional testimony addressing whether an automobile repair service center would be in harmony with the general purpose and intent of the Zoning Regulations and Map and would not tend to affect adversely the use of neighboring property.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS** that the Summary Order of the Board of Zoning Adjustment granting a variance in BZA Application No 16426 be **REVERSED AND REMANDED** for further consideration as an application for a special exception

This Order was adopted by the Zoning Commission at its regular public meeting on September 13, 1999 by a vote of 4 to 0 to approve (Angel F. Clarens, Anthony J. Hood, Herbert M. Franklin, and John Parsons, to adopt).

In accordance with the provisions of 11 DCMR 3028, this Order shall become final and effective upon publication in the District of Columbia Register, that is on FEB 25 2000.

ANTHONY J. HOOD
Chairman
Zoning Commission

JERRILY R. KRESS, FAIA
Director
Office of Zoning

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 86

CASE NO, 74-1

March 21, 1974

Pursuant to Section 8204.5 of the Zoning Regulations, the Zoning Commission hereby vacates the Board of Zoning Adjustment Order entered in BZA Application Number 11450, dated January 7, 1974, and, based upon the hereinafter stated Findings of Fact, Conclusions of Law and Decision, instructs the Board of Zoning Adjustment to grant approval of said application Number 11450 subject to the conditions set forth in the Decision.

FINDINGS OF FACT

1. National Permanent Federal Savings and Loan Association filed Application No. 11450 with the Board of Zoning Adjustment on July 13, 1973, pursuant to Section 8207.2 of the Zoning Regulations, for a special exception in order to establish a parking lot in an R-2 zone district, as provided by Section 3101.48 of the Zoning Regulations.

2 The Board of Zoning Adjustment conducted a public hearing on said application for a special exception on September 19, 1973.

3. After considering said application for a special exception in Executive Session on November 20, 1973, the Board issued an Order denying said application on January 7, 1974, with Messrs. Harps and Scrivener dissenting from the majority.

4. The Zoning Commission, pursuant to Section 8204.3 of the Zoning Regulations, issued Order No. 82 on January 17, 1974, staying the effect of said Board of Zoning Adjustment Order.

5 The Subject site is Pocated at 4201 Fessenden Street, N. W., lots 26 and 27 in Square 1669, The site is bounded by a 10 foot alley to the north, Fessenden Street , N. W., on the south, 42nd Street, N. W., on the east and an existing bituminous parking lot and a bank building owned by the applicant, all in lot 36 on the west. The proposed parking lot is located in its entirety within 200 feet of an existing commercial district and is contiguous with such commercial district,

6. The subject site has been cleared of all structures and is presently vacant.

7. The subject site was in an R-2 zone district, until the issuance of Zoning Commission Emergency Order No. 75 of October 18, 1973, which rezoned the site to R-5-B for a period of no more than 120 days. The site has been rezoned R-4 by Zoning Commission Order No. 87, Said special exception is still required to allow a parking lot in the R-4 zone district.

8. The proposed parking lot will provide 33 additional parking spaces for use by the applicant bank and adjacent retail business establishments. On Sundays the lot would be available for use by worshipers at the Apostolic Church of St, Mary, located immediately east of the site across 42nd Street, N. W.

9 The applicant filed an application with the Zoning Commission to change the zoning of the subject site from R-2 to C-2-A. The Zoning Commission denied applicant's request without a public hearing on July 13, 1973. The applicant has stated its intention to re-submit said application for zone change to the Commission, and accordingly, requested a three year limit on the use of the site as a parking lot,

10. The requested lot would be open from 8:00 a.m. to 6:00 p.m. and will be managed by the Doggett Parking Company. There will be no outside or drive-in windows located on the site.

11. The applicant proposes to provide egress and ingress to the proposed parking lot from an existing driveway from Wisconsin Avenue, through the existing parking lot to the west of the site in lot 36.

12. The District of Columbia Department of Highways and Traffic offered no objection to the proposed parking lot, providing that the sole driveway access be via Fessenden Street, because it was less heavily traveled than Wisconsin Avenue and would be preferable.

13. At least three financial institutions in the immediate neighborhood of the applicant's site have been allowed to use off-street parking lots by the Board (see Applications 11176, 10962 and Appeal 6325).

14 Opposition to the proposed parking lot from residents of the immediate neighborhood felt that due to the present traffic conditions in the neighborhood, the use of the site as a parking lot would increase the traffic problem.

CONCLUSIONS OF LAW

1. The proposed special exception is in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with said Zoning Regulations and Maps.

2. That the use of said site as a parking lot is reasonably necessary or convenient to the neighborhood, which presently has a shortage of commercial parking facilities contributing to traffic congestion in the area,

3. That said parking lot is located and all facilities thereof are so designed that it is not likely to become objectionable to adjoining or nearby property because of noise, traffic, or other objectionable conditions,

DECISION

1. The Commission believes that the proposed parking lot can benefit the adjacent neighborhood by decreasing the amount of on street parking on Wisconsin Avenue, and adjacent residential streets One of the basic factors leading to traffic congestion of this area is on street parking and double parking by those persons patronizing retail business establishments located on both sides of Wisconsin Avenue, In providing accessible off-street parking the applicant helps contribute to the solution of the traffic and parking problems presently confronting the retail and residential inhabitants of this area,

2. The Commission has carefully reviewed the record of this application, the transcript of the public hearing conducted by the Board and the evidence in support and opposition to said special exception and finds that the subject site is appropriate for use as a parking lot,

3 In consideration of its findings and conclusions herein, the Commission instructs the BZA to grant approval of said special exception for the construction of a parking lot in lots 26 and 27 of Square 1669, located at 4201 Fessenden Street, N. W., subject to the conditions set forth below:

a. The said parking lot will be in existence for a maximum of 3 years from the effective date of this Order.

b. The applicant shall meet all requirements of Section 7404 of the Zoning Regulations applicable to the R-4 zone in the construction of said parking lot.

c. That applicant shall close the existing driveway off of Wisconsin Avenue, N. W., into the parking area located in lot 36, so as to lessen traffic congestion on Wisconsin Avenue.

d. The only access and egress to all parking facilities owned by applicant and adjacent to its present building be located off of Fessenden Street, N. W.

e. The applicant shall construct and maintain a suitable buffer surrounding said parking lot along the alley on the north, 42nd Street, N. W., on the east and Fessenden Street, N. W., on the south (except for the appropriate driveway entrance off of Fessenden Street).

f. Plans for said buffer, shall be submitted for the approval of the BZA within 30 days of the effective date of this Order.

WALTER E. WASHINGTON

JOHN A. NEVIUS

STERLING TUCKER

GEORGE M. WHITE

RICHARD L. STANTON

ATTEST: MARTIN KLAUBER
Executive Secretary

CORRECTED ORDER

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 787
Case No. 94-20
(Text Amendment - 11 DCMR 1707.4)
November 13, 1995

Pursuant to notice, a public hearing was held by the Zoning Commission for the District of Columbia to consider the application of the law firm of Wilkes, Artis, Hedrick and Lane, on behalf of Square 456 Associates, requesting the Zoning Commission to amend the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning.

The application was filed on December 1, 1994, and requested the Zoning Commission for the District of Columbia to add a new paragraph 1707.4(w) to Subsection 1707.4, the Downtown Development District section applicable to the Downtown Historic District. The proposed paragraph 1707.4(w) include Lot 857 and part of Lot 867 in Square 456 in the list of properties governed by the Downtown Historic District provisions of the DDD regulations. The proposed amendment would reduce the FAR of the above-referenced lots in Square 456 from 10.0 to 6.0, eliminate the minimum requirements of 2.0 FAR for residential use, create the opportunity to utilize transferrable development rights (TDRs) to make-up off-site, what is lost in on-site development, and allow the applicant to develop the site as a matter of right.

By memorandum dated February 3, 1995, the Office of Planning (OP) for the District of Columbia analyzed the planning and zoning issues relative to the application. The report indicated that in the adoption of the Downtown Development District, the Zoning Commission included the entirety of the Downtown Historic District within the historic preservation provisions of 1707.4, with the exception of the lots along the 7th Street frontage of Square 456. This approach was adopted based on a petition by the D.C. Preservation League. The Preservation League did not include the subject frontage in its petition because it had (and has) a covenant with the property owner governing some critical development and preservation/restoration matters. Accordingly, the subject properties were subject to preservation-related development restrictions, but did not become formally subject to the restrictions and incentives of the DDD related to historic properties. This exclusion also left the properties subject to a housing requirement, a regulatory outcome that the then property owner concurred with.

The OP noted that if Lot 857 and a part of Lot 867 (now known as Lot 868) are included in Subsection 1707.4, two adjacent historic Lots 34 and 37 owned by other persons and separated from each other by the applicant's corner property on Lot 857, should also be included in Subsection 1704.4 The OP recommended that the case be set down for a public hearing and that Lots 34 and 37 be included in the text to be advertised for the public hearing to provide for uniformity and equal treatment of the lots in Square 456.

By letter dated February 2, 1995, the Residences at Market Square, The Pennsylvania, requested that the Commission not set the case down for a public hearing. The letter pointed out that the proposed text amendment is inconsistent with the Comprehensive Plan. The letter emphasized that the Comprehensive Plan Amendments Acts of 1994 designated the area as the prime generator of downtown housing, particularly along 7th Street. It added that the proposal would reduce the housing requirement on a site which was already counted in the housing target for the area, and which already has been substantially reduced by the Council's arena approval for the Gallery Place site.

The Advisory Neighborhood Commission (ANC) 2C, in a letter dated February 9, 1995 indicated that the ANC at its meeting held on February 1, 1995, voted 4 to 0 in support of a set down for the case.

On February 13, 1995, at its regular monthly meeting, the Commission considered the applicant's request, the recommendation of the OP, and the letter from the Residences at Market Square, The Pennsylvania. The Commission was persuaded by the OP recommendation to set the application for hearing and include Lots 34 and 37 in the proposed text. Accordingly, the Commission authorized a public hearing for the case and included Lots 34 and 37.

On March 31, 1995, the Office of Zoning (OZ) published the public hearing notice of the proposed amendment in the District of Columbia Register, and in the Washington Post. The public hearing notice indicated that the Commission would consider modifications to the text of the proposed amendment or alternative proposals that are reasonably related to the scope of the proposed amendment.

On May 11, 1995, the public hearing of the case scheduled for May 15, 1995 was cancelled after the Office of Zoning determined that the number of Commissioners likely to participate in the hearing would not constitute a quorum. The public hearing was rescheduled and readvertised for June 26, 1995.

Councilmember Jack Evans, by letter dated May 9, 1995 supported the amendment. He indicated that the text amendment would treat this site in the same manner as other properties included in the

Downtown Historic District, allowing the property owner to restore the vacant existing building to active use.

At the public hearing session on June 26, 1995, the Commission heard the presentation of the OP and the testimony of about six witnesses in support of the application.

The Office of Planning by memorandum dated April 28, 1995, and through testimony presented at the public hearing indicated that Lots 867 and 857 in Square 456 are located in the Downtown Historic District, and/or the Pennsylvania Avenue historic area, and that both historic areas are subject to development restrictions and incentives pursuant to the Downtown Development District (DDD) regulations. The purposes of the restrictions are to encourage restoration of historic buildings while also providing a modest degree of excess density for the construction of additions, to provide for compatibility in historic design, and to ensure a reduced scale of buildings in the historic district compared to the normal height and bulk of buildings in the Downtown.

Additionally, the OP pointed out that Section 1707, provided for combined lot development, making it possible for unused development rights of up to 4.0 FAR to be transferred to a receiving lot or lot within the DDD boundaries or within either of two designated receiving zones for transferable development rights (TDRs). This provision provides financial renumeration to assist in the restoration of the historic properties and to provide a degree of compensation for the restrictions on on-site development. The second incentive is that the enumerated historic properties are not subject to a housing requirement in locations where such a requirement might normally apply pursuant to DDD provisions.

The OP further indicated that the applicant has plans for renovation, adaptive reuse and new development of its properties. The proposed development would renovate the main frame of the existing "old" Hecht Company building and construct an addition that continues behind the facades of the adjacent 7th Street buildings, including the "dogleg" portion of the "Old Hecht Company Complex." The new construction and the renovated parts of the historic buildings would be joined as a single building complex and would be occupied with arts uses at and below grade and offices on the upper floors. The large vacant property along F Street would be developed with a major office building, projected to be expansion space for the adjacent American Association of Retired Persons (AARP) Headquarters building that was built several years ago in the south-western corner of the square. The AARP expansion site is subject to a housing requirement under the provisions of the DDD. The housing requirement is proposed to be provided in Lot 857,

known as the "Murray" Parcel, at the corner of 7th and E Streets, N.W. The AARP and the Murray parcel will be legally linked in accordance with the provisions of the DDD combined lot development agreement.

The OP also testified that the purpose of requesting the proposed text amendment is to be able to proceed with the development as a matter of right, rather than to require Board of Zoning Adjustment (BZA) variances to reduce the housing requirement. The report added that the project has been approved by the Mayor's Agent for Historic Preservation and by the Historic Preservation Review Board (HPRB). The project's aim is to comply with the DDD requirements. The applicant's specified development package which will be contained in the combined lot development covenant, will then comply with both the zoning and historic preservation requirements. The OP concluded its report and presentation by recommending that the Commission adopt the text amendment as advertised in the Notice of Public Hearing.

The applicant and his team of expert witnesses by written statements submitted to the record and in presenting their case at the public hearing testified as follows:

- Square 456 Associates views this case as one of uniformity of construction of similarly situated properties under the provisions of the DDD Regulations that apply to historic properties, under Section 1707.4. Additionally, the amendment is required from the standpoint of the uniformity clause of the D.C. Code.

- The historic properties located in Square 456 are the only historic properties which are not subject to the requirements of and permitted to proceed with the benefits accorded under the provisions of Section 1707. These properties are the only buildings that are within both the Downtown Historic District and the Downtown Development District and which are not now subject to the 6.0 FAR limitation on on-site development. The proposed amendment would treat the subject properties in the same manner as all other properties which meet the same two criteria.

- These properties were not included within the scope of Subsection 1707 because of the preservation agreement negotiated by DCPL and the former owner/developer. The present regulations allow a greater amount of on-site density, but also prevent any unusable density from being transferred off the site.

- The site also carries the double burden of historic preservation requirements and the costs of compling with D.C. Law 2-144 and a housing requirement under the DD District, either on or off-site. No other historic property in the DD District must comply with both those requirements. The Zoning Commission clearly recognized the difficulties created by an overlap between preservation and housing, and in Subsection 1706.20, specifically provided that "The residential requirements shall not apply to any lot restricted to a maximum development of 6.0 FAR."

- Square 456 contains the only buildings within the Downtown Historic District which are subject to the housing provisions. The historic properties on Square 456 are also the only properties in the Downtown Historic District not limited to 6.0 FAR. On the other hand, the existing buildings along 7th Street in Square 456 are prevented from achieving the allowable 10.0 FAR due to their historic character and location within the Historic District (i.e., the constraints imposed by D.C. Law 2-144). While these buildings are not able to achieve the density permitted by the DD District, they are also not eligible for any of the benefits accorded to all other historic properties within the Downtown Development District, such as the ability to utilize transferrable development rights (TDRs) if the maximum density cannot be achieved on-site.

- On April 1, 1988, when the owner entered into the agreement with DCPL, no residential use was required on the site and no TDRs were available to recapture density which could not fit on the site. The DD District had not even been presented for public review by the Office of Planning, considered by the Downtown Partnership, presented to the Zoning Commission or set for public hearing. The assumptions which underpinned the agreement were that all the space to be built on the site could be and would be used exclusively for commercial purposes.

- With the DD District now in place, the development contemplated under the DCPL agreement cannot be accomplished. The economic consequences of proceeding under the adopted Downtown Development District provisions combined with the current office market conditions completely stifle development on the site.

- During the sua sponte review by the Zoning Commission of the March 8, 1991, BZA Order approving an application for a variance from the housing requirements on this site, a member of the Commission suggested that if the property owner

experienced difficulties as a result of the present regulations, a text amendment would be the appropriate process to address those difficulties.

There was no testimony in opposition to the proposed amendment. ANC-2C did not testify, but submitted a letter to the record in support of the amendment.

The legal representative for the Market Square East-West Condominimum Association and the Pennsylvania Avenue Condominimum Association submitted a letter in opposition to a set down of the case. However, he testified in support of the application at the public hearing.

During closing remarks, the applicant's representative summarized testimony, and requested the Commission to decide the case from the bench or as soon as possible. He reminded the Commission that the application has the support of ANC-2C, the OP, the residents of nearby apartment buildings and Councilmember Jack Evans. He added that Square 456 Associates is anxious to go forward with this project.

The Commission reviewed, discussed and evaluated all evidence, testimony and information provided at the hearing and submitted to the record of this case, and was persuaded that a bench decision to approve the proposed amendment was justified. At the close of the public hearing on June 26, 1995, the Commission took proposed action to approve the application from the bench.

A notice of proposed rulemaking was published in the D.C. Register on September 1, 1995. The notice of proposed rulemaking was also referred to the Zoning Administrator, the OP and to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self-Government and Governmental Reorganization Act.

The NCPC, by report dated July 27, 1995, found that the proposed amendment would not adversely affect the Federal Establishment or other Federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital.

The Zoning Commission has accorded the ANC the "great weight" to which it is entitled.

The Zoning Commission believes that its decision to approve the text amendment provides for uniform treatment of properties in the Downtown Historic District that are governed by provisions of the Downtown Development District.

The Zoning Commission believes that its decision to approve the text amendment is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act and is not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the following amendment to the Zoning Regulations.

Add a new Paragraph 1707.4(w) to read as follows:

*1707.7(w) Square 456, lots 34, 37, 857 and 868.

Vote of the Commission taken on June 26, 1995 3-0: (Maybelle Taylor Bennett, John G. Parsons and Jerrily R. Kress, bench decision to approve - William L. Ensign, not voting, not having participated in the case).

This order was adopted by the Zoning Commission at its public meeting of November 13, 1995 by a vote of 3-0: (John G. Parsons, Maybelle Taylor Bennett and Jerrily R. Kress, to adopt - William L. Ensign, not voting, not having participated in the case).

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register; that is on February 9, 1996 **.

JERRILY R. KRESS
Chairperson
Zoning Commission

MADELIENE H. DOBBINS
Director
Office of Zoning

**This order appears in the February 9, 1996 edition of the D.C. Register which was published on February 26, 1996.

zco787/VCE/MHD/LJP

*Should read 1707.4(w)

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

JANUARY 18, 2005

+ + + + +

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

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Zoning Specialist
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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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 we 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. Jacobs 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 perspective 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 feet 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 has 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: It 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 great 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 created 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 perhaps 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 acting 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 precise 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, there 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, and 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 uniqueness 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 in 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



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January 3, 2005

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Mr. Geoffrey H. Griffis, Chairman
Board of Zoning Adjustment
Office of Zoning, District of Columbia
441 4th Street NW; Suite 210 South
Washington, D.C. 20001

Re: BZA Case 17271 - JBG/Louisiana
51 Louisiana Avenue NW
Opposition to Requested Variance from Building Height Limitation

Dear Chairman Griffis,

Mr. George Dove of WDG Architects contacted my office regarding a proposed addition to an existing building at 51 Louisiana Avenue, NW. It is my understanding that the owner will request a variance from the current 110' height restriction for that site. The proposed variance would allow the applicant to build to the maximum height established by the 1910 Height of Buildings Act, which is 130' for Louisiana Avenue. The penthouse of the addition would rise an additional 18' - 6" above the 130' level.

As you know, the proposed addition is adjacent to the Senate park section of the Capitol Grounds. We have reviewed the proposed addition and the height variance with the Senate Sergeant at Arms and have been advised that they strongly object to the variance. The lines of sight that would be created from the roof and penthouse of the proposed structure would present a serious security risk to the Senate wing of the Capitol

Therefore, we strongly urge you to deny the requested height variance and maintain the existing zoning envelope allowed for this site.

Sincerely,

Alan M. Hantman, FAIA
Architect of the Capitol

cc: Mr. William H. Pickle, Senate Sergeant at Arms
CMR: 04-12-29-13-01

BZA
Case No. 17271
Exhibit No. 21

THE COMMISSION OF FINE ARTS

ESTABLISHED BY CONGRESS 17 MAY 1910

NATIONAL BUILDING MUSEUM
401 F STREET NW., SUITE 312
WASHINGTON, D.C. 20001-2728

202-504-2200
202-504-2195 FAX

6 December 2004

Dear Mr. Jacobs:

During its meeting of 18 November 2004, the Commission reviewed and approved the proposed concept (S.L. 05-009) for a new 12-story office building to replace the existing 4-level parking garage at 51 Louisiana Avenue, NW. The Commission appreciates the clarity of the design and encourages the strong statement of contemporary design with the inclusion of environmentally-conscious features. The Commission looks forward to more information regarding this project including the development of the elevations and the roof configuration.

The Commission recommends submission of a revised concept as the project develops. Our next meeting is scheduled for Tuesday the 25th of January 2005, with a submission deadline on the 6th of January. As always, the staff is available should you require guidance.

Sincerely,

Frederick J. Lindstrom
Acting Secretary

Mr. Benjamin R. Jacobs
The JBG Companies
4445 Willard Avenue, Suite 400
Chevy Chase, MD 20815-3690

cc: Lord Richard Rogers, Richard Rogers Partnership

Government of the District of Columbia
Advisory Neighborhood Commission 6C

December 16, 2004

Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Application No. 17271 of JBG/Louisiana Avenue, L.L.C.
51 Louisiana Avenue, N.W., Square 631, Lot 17

Dear Mr. Griffis:

At its regularly held meeting on December 8, 2004, with a full quorum of 5 Commissioners present and proper notice having been provided, Advisory Neighborhood Commission 6C (the "Commission") considered BZA Application No. 17271 of JBG/Louisiana Avenue, L.L.C. (the "applicant") for an area variance from the height restrictions so as to allow the construction of an addition at the subject property – 51 Louisiana Avenue, N.W., Lot 17 in Square 631 (the "Property").

The Planning and Zoning Committee (the "Committee"), which met on December 1, 2004, with a full quorum present, unanimously recommended that the Commission support the applicant with the condition that the BZA condition its approval on the applicant obtaining LEEDs certification. The Committee had found the Property is unique due to the following features.

- Its oddly shaped lot -- the lot is five (5) sided– with larger than usual public space surrounding the property.
- Irregular V shape of the existing improvements.
- Historic nature of the building -- The building is subject to a standstill agreement with DCPL entered into by the prior owner and thus effectively treated as a historic landmark.
- Extremely high floor plates of fifteen feet (15') in the existing building.
- Tiber Creek combined storm sewer running underneath the property
- Metro tunnel underneath and adjacent to the property

The Committee further found that the uniqueness results in practical difficulties in developing the property if the zoning regulations are strictly applied and that there will be no harm to the public good done by the granting of the application, with the condition of the LEEDs certification requirement.

Present for the applicant at the ANC meeting was: Jeannine Rustad, Esquire, Robins, Kaplan, Miller & Ciresi L.L.P.; Dean Cinkala, Kai Reynolds and John Wilkinson of JBG/Louisiana Avenue, L.L.C ("JBG") and George Dove, WGD Architects. After questions of the applicant from the Commission, the Commission voted unanimously to support the applicant with the condition that the applicant be required by the BZA to obtain LEEDs certification This recommendation to the BZA is based on the Commission's determining that:

1. The Property is unique due to: (a) its odd shape, (b) the irregular V shape of the existing improvements; (c) historic nature of the building and standstill agreement with DCPL; (d) extremely high floor plates of fifteen feet (15') in the existing building; (e) Tiber Creek combined storm sewer running underneath the Property and the Metro tunnel underneath and adjacent to the property.

2. The uniqueness of the Property results in practical difficulties in developing the property if the zoning regulations are strictly applied. It was noted that, even with the additional height requested, the total development on the lot would not meet the maximum density of 6.5 FAR.

3 There will be no harm to the public good by the granting of the application with the condition of the LEEDs certification requirement.

Thank you for your consideration

Sincerely,

Mark Dixon (KW)

Commissioner Mark Dixon
Chairman, ANC 6C

✓ cc: Jeannine Rustad, Esquire

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

ZONING COMMISSION

+ + + + +

SPECIAL PUBLIC MEETING
1180th MEETING SESSION (8th OF 2005)

+ + + + +

MONDAY

May 16, 2005

+ + + + +

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 2001, pursuant to notice, at 6:00 p.m., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice Chairman
KEVIN HILDEBRAND	Commissioner
GREGORY JEFFRIES	Commissioner

OFFICE OF ZONING STAFF PRESENT:

SHARON SCHELLIN	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:
STEPHEN MORDFIN

OFFICE OF THE D.C. ATTORNEY GENERAL
JACOB RITTING, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on May 16, 2004

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

6:08 p.m.

CHAIRPERSON MITTEN: Good evening, ladies and gentlemen. This is a Special Public Meeting of the Zoning Commission of the District of Columbia for Monday, May 16, 2005.

My name is Carol Mitten. And joining me this evening are Vice Chairman Anthony Hood and Commissioners Kevin Hildebrand and Greg Jeffries.

Copies of the meeting agenda are available to you, and they're in the wall bin by the door. We only have two items.

I'd like to remind folks that we don't take any public testimony at our meetings unless the Commission specifically requests someone to come forward.

Please be advised that this proceeding is being recorded by a court reporter and is also being webcast live. And therefore, we ask that you refrain from making any disruptive noises or actions in the hearing room during this special public meeting.

And I'd ask you now to turn off all beepers and cell phones.

Ms. Schellin, do we have any preliminary matters?

MS. SCHELLIN: No, ma'am.

CHAIRPERSON MITTEN: All right. Then the first for proposed action is Case No. 05-13, and this is a sua sponte review that the Zoning Commission voted to undertake regarding JBG/Louisiana Avenue LLC, which was a BZA case. And I'll let Mr. Hildebrand start.

COMMISSIONER HILDEBRAND: Thank you, Madam Chairman.

You'll recall that 51 Louisiana Avenue is a case that the applicant was requesting a variance from the height limit to go from 110 feet using transfer development rights to 130 feet for a proposed addition to 51 Louisiana Avenue.

When we initiated the sua sponte review it was to determine if the Board's decision was based on a full and adequately supported record regarding the security concerns of the Capitol. And to determine if the variance tests had been adequately meet, and that the ascertain that the compliance with the Zoning regulation would render development of the property economically and feasible did not seem to be supported in the original order.

I think given the import of the latter aspect of the review, I think we should perhaps

address that first.

In reviewing the record there were several things that caught my attention. In the applicant's pre-hearing statement they asserted on page 15 that this is not a situation where the applicant has sought to manufacture unique conditions. To be certain, the unique conditions of the property make it physically impossible to design an addition that fully complies with the Zoning regulations.

After reading the record I am not convinced that this is correct. While there are aspects of the existing site that must be dealt with, it seems more accurate to state that the applicant's program for the development makes it physically impossible to design an addition that complies with regulations.

For example, the applicant proposes a parking garage with 443 spaces, even though only 301 are required by the regulations. That represents a parking surplus of 47 percent. And yet the applicant asserts that the cost of this surplus parking should be considered as a practical difficulty that would render the development of the property economically infeasible without relief.

pkg

Wouldn't a variance to reduce the amount

of parking required on the site be more appropriate relief, given the testimony in the case and the proximity of the project to two Metro stations?

Also, the architect of the applicant, Mr. Ivan Harbor testified on transcript page 213 lines 17 through 21 that it would be technically acceptable to bring the rectangular building up against the triangular one and maybe consequently reduce its height and build the same overall floor area. To me that's the architect for the applicant was stating that they could build the same building within the zoning envelop, and yet there's been a design choice to create a grand atrium space, a vibrant focal point at the cost of useable FAR.

The architect states on page 211 lines 15 through 17 "What is pushing us up is the desire to create sensible volume within an overall perimeter that we can say is this sort of vibrant focal point."

The architect goes on further regarding the atrium on page 214 lines 4 through 8. "We have got something that breathes easier and allows the building to look forward to the future rather than working with the unsubtly of just floor space, FAR and that sort of statistic, I guess."

Those are aspects that concern me in

reading the transcript.

I think another issue is the relative impact of the private standstill agreement on the property and enforceability and import on the Zoning regulations. And I think it's something that we've dealt with in looking at the impact of Monaco on other properties that's a similar kind of idea. And it seems to me that while the owner of the property may have willingly accepted the mantle of that agreement, they also would have negotiated the cost impact of that into the purchase price of the property. So to suddenly say that it's a practical difficulty seems to me like it's almost double dipping.

CHAIRPERSON MITTEN: Anything else?

COMMISSIONER HILDEBRAND: No.

CHAIRPERSON MITTEN: Well, I think you've captured a lot of the issues that were giving me concern in your summation.

I agree with you that there hasn't been the nexus created between the conditions that were described as being problematic below grade between the Tiber Creek and the Metro tunnel adjacency, and then how that has been the problem as it exists that the relief requested does not address the problem. In fact, the design of the building exacerbates the

problem.

So clearly that nexus has not been created. And I think that there needs to be a consideration given to the extent to which the applicant is creating their own hardship by the design.

And further, what you've described in terms of this being program driven, I think that was the interesting thing between comparing the written pre-hearing submission and the testimony. I think it became very clear in the testimony that this was being driven by the desires of the occupant. And even the fact that the buildings are connected --

COMMISSIONER HILDEBRAND: Right.

CHAIRPERSON MITTEN: -- is being driven by the desires of the occupant.

And I also thought it was interesting that there's a lot of discussion about lead, and in fact the support of the ANC, they wanted -- I don't know if it was a condition, but they were very desirous of the building being recertified, which is the kind of thing that you see in a PUD where you're saying we need some design flexibility because we want to design a better building, and here are some of the things that we're offering in return.

ANC/ LEEDS

COMMISSIONER HILDEBRAND: Right.

CHAIRPERSON MITTEN: I think it sounds just like a PUD.

And also this notion of creating the sensible volume, which I know that at least one of the BZA members was swayed by. But I think there was a lot of focus on the design and not on actually giving serious consideration to each of the discreet steps of the three prong test for the variance relief.

And finally on the point that you raised about the standstill agreement. I think it's very troubling when we have private agreements that are being treated -- I mean, in this it's the property's being treated as if there has been an historic designation imposed.

COMMISSIONER HILDEBRAND: Right.

CHAIRPERSON MITTEN: When in fact there has not.

So those are the things that cause me concern that I think that the BZA just didn't hold the applicant to the standard that's required.

And then I guess the other point that you raised about economic infusibility which was lifted right out of the pre-hearing statement and made its way into the order. There isn't anything in the

record that speaks to economic infusibility. It doesn't speak to economics at all in any kind of holistic way. And so to draw the conclusion that without the relief, the project would be infeasible, there is no evidence to support that.

COMMISSIONER HILDEBRAND: Yes.

CHAIRPERSON MITTEN: So anyone else want to weigh in?

COMMISSIONER HILDEBRAND: Yes. I also wanted to speak just for a moment on the security aspect, too, because that was the primary driver when I initially brought this to the Commission. And after reviewing the record I think it's clear that the record is incomplete without rebuttal testimony to the applicant's security analysis. And I think for that reason alone there should be substantial import to send it back to the Board for additional hearing on that subject matter alone.

So with that in mind, does anyone else have further comment on that?

VICE CHAIRMAN HOOD: I just want to make sure, and that was one of the things I've been grappling with, the security issue.

I believe there was a mix up about whether--coming in from the BZA and they had another

meeting, I think, at the same time. I just want to make sure that we afford or accord the ANCs and community groups this same opportunity when that happens to them. I just think we're going down a -- if that's one of the reasons we're remanding it back, then any neighborhood group or applicant or whoever can come in and say "Look, I missed the window, so now I can come down, let's see if this can work for me, too." That's the only thing that gives me pause.

Well, I agree with you.

COMMISSIONER HILDEBRAND: Right.

VICE CHAIRMAN HOOD: But I want to make sure that we're across the board when those ANC and those neighborhood groups come down here and say the same thing. And I just want to make sure that we're not opening up a Pandora's Box.

That's all. I just wanted to put that on the record.

COMMISSIONER HILDEBRAND: Certainly.

VICE CHAIRMAN HOOD: So that when I bring it back up, we'll all remember.

COMMISSIONER HILDEBRAND: I certainly do appreciate that comment. And I think that this is such a unique condition where the applicant concurrently meeting with the Sergeant at Arms while

the hearing was taking place. I think that was the only basis for my real objection.

So I would make a motion that we -- oh, sorry.

COMMISSIONER JEFFRIES: I've had some concerns after reading the record here about a lot of what you state, Commissioner Hildebrand. I'm sort of torn here and I have some ambivalence because, you know, as I look over sort of the kind of relief that's being requested, additional 20 feet, I just don't think it has sort of the magnitude of problem as relates to the existing area. And I'm just sort of torn here as it relates to -- and the shape of the site is relatively odd. And while Chairwoman Mitten commented about the whole discussion around sort of the underground, the Metro station and the existing sewer; that whole discussion not really making the case, it does represent some level of encumbrance on the applicant.

So I'm not quite there as it relates to making the case to definitely sort of reverse this case. I would probably like to hear some more of record. It would probably give me a lot more comfort if we moved down the road of, perhaps, remanding it back to the BZA and just getting some additional

information on the record.

COMMISSIONER HILDEBRAND: I actually agree with you.

COMMISSIONER JEFFRIES: Yes. Yes.

COMMISSIONER HILDEBRAND: Very much so.

As to the unique configuration and size of the site, I think that was an interesting aspect that I noticed as well. And I think if it wasn't for the fact that the site wasn't entirely square, an entire block, and that the proposed development that was resulting from this site was rectangular or triangular; I mean pure geometric shapes, it didn't seem to bear the same weight. Or the impact of the site shape at that scale didn't seem to bear the same weight to me if it would have, perhaps, on a smaller lot that was in a block that was multiple parcels on the same square. And that's just my opinion.

CHAIRPERSON MITTEN: Could I just weigh in on this? Because this is a very important point and I think it's one that's lost sight of from time-to-time. And if you read what the test is supposed to be, it's "where by reason of exceptional narrowness" so and so forth "strict application results in a peculiar and exceptional practical difficulty." By reason of this thing, not once you establish that there's a

unique condition that the door is open for whatever someone wants to ask for, just on this issue that we've chosen to focus on for conversation right now, which is the odd shape.

Unless someone proves that that odd shape gives rise to the peculiar or exceptional practical difficulty, then the odd shape is irrelevant, even though it may be unique.

COMMISSIONER JEFFRIES: Yes. But what I would say is that in terms of designing an office building, that requires a core and a certain level of circulation that in fact super imposing a floor plan, a typical office floor plan could onto such an unusual shaped site could bring about hardship to that particular developer.

COMMISSIONER HILDEBRAND: Right.

CHAIRPERSON MITTEN: I understand.

COMMISSIONER JEFFRIES: So I'm just sensitive as it relates to that.

I mean, there are certain shapes that just don't lend themselves to office design of a sort and you might need some additional height in order to accommodate a particular tenant. So that's where I'm at.

CHAIRPERSON MITTEN: I think what's been

missing throughout this particular case, I don't know if I want to call it like a chain or the thread. You know, we have this laundry list of things that make this site unique, but we don't then have the thread that gets us to the exceptional practical difficulty. And then to the relief that's being requested. And I think that's what we need to get in this case.

COMMISSIONER HILDEBRAND: Yes.

CHAIRPERSON MITTEN: So you were saying, Mr. Hildebrand. I'm sorry.

COMMISSIONER HILDEBRAND: Madam Chairman, thank you. I was going to move that we remand this case back to the BZA for an additional hearing to explore -- unfortunately, I didn't write a list of all these items as we went through them. But to basically explore the things we've been discussing here on the dias.

I think one was the aspect that the current site is undevelopable under the current Zoning regulations. That that is, in fact, infeasible.

That there is a nexus between the difficulties that the applicant has purported and the relief that is given by the BZA, i.e., would another relief be more appropriate such as a parking relief for the difficulties that the applicant has claimed

exist under the site.

Madam Chair, were there other things that you would like to suggest?

CHAIRPERSON MITTEN: I think we also want them to address the degree to which they should rely on the standstill agreement as sort of fixing the historic status of the property.

And I guess this is just more of a clarifying point, but I would like the BZA to attempt to divorce themselves from the programmatic desires of this applicant and have this be a more neutral presentation about what is possible. Not what do they want, but what can you do. Because that's what should drive a variance case is what is possible, not what would you like.

So I don't know how to capture all that. But I think what would happen is we would draft an order and then --

COMMISSIONER JEFFRIES: Can you expound on that just a minute? I just want to be perfectly clear.

You want a development program that is almost generic in nature that does not actually target a particular tenant type? I guess I'm not clear. Could you just help me out here?

CHAIRPERSON MITTEN: A lot of what has been described in the record about why the building needs to be a certain way; why it needs to be connected, why there needs to be this amount of parking, why the building needs to go up because typically for a law firm you have the back of the house space that's on the first basement level. And because they're trying to cram more parking in there, that's pushing those support functions up into the building. You know, those things are very specific to the proposed user.

You know, they don't have to look at a design, but they have to analyze, but they have to analyze what's being requested not in light of this specific user. But, for instance, why couldn't one just build a separate building on the footprint of the parking garage?

COMMISSIONER JEFFRIES: Okay. And I guess so basically you want the applicant to really address the whole notion of an office user versus some other user because --

CHAIRPERSON MITTEN: Right.

COMMISSIONER JEFFRIES: Because, obviously, I mean there's financial institutions that have back office space that can really make the same

case that a law firm could make. So you want to make certain that there's really a very generic view, I mean some delineation between office versus some other user --

CHAIRPERSON MITTEN: Right.

COMMISSIONER JEFFRIES: -- that creates hardship for the particular applicant in doing the development at this site?

CHAIRPERSON MITTEN: Yes.

COMMISSIONER JEFFRIES: Okay.

CHAIRPERSON MITTEN: And there's things in the record here that just simply -- and I'm not sure I'm going to be able to find them. But there were things in the record about parking in particular that said that if they couldn't provide the amount of parking at a certain ratio, that the building was not marketable or something along those lines. Well, that's just simply not true. We have historic buildings in the city that have lower than typical parking ratios and they get among the highest rents in the city. So making those assertions is just simply not helpful and shouldn't be just blanketedly without challenge accepted by the BZA.

So I think the standstill agreement was the only thing I would add to you, Mr. Hildebrand.

COMMISSIONER HILDEBRAND: Okay.

CHAIRPERSON MITTEN: And I would second your motion.

COMMISSIONER JEFFRIES: Will someone be able to walk through exactly what it is that we're asking for, because I would hope that in terms of what we're asking them to look for, just the top two or three and it's fairly narrow in terms of -- I mean, now we're not giving them a long list and there's going to be clarity as to what they need to do. Because my hope is that this can be moved fairly quickly through the BZA.

CHAIRPERSON MITTEN: Let me try and restate the motion then. And, as I said, you know we'll have an order that we can all review so that we can tighten it up to the extent that we're not being as articulate as we might right here.

That this case would be remanded to the BZA for an additional hearing and through that hearing the BZA would glean more information and establish with that information, if it's supportive, what is the basis for the assertion that it would be economically infeasible to develop the site without the requested relief.

To explore the relationship between the

below ground conditions and the relief being sought in terms of height, and why in fact parking relief would not be more appropriate.

Address their reliance on the standstill agreement as being accepted almost like a de facto designation of the property as being historic.

And then I just added on almost like a side consideration that because its pervasive in the record, that this is very much being driven by Jones Day's program that we advise them that they try and free their minds of the program driven desires and look at this more generically as an office building site.

Is that a fair summation?

COMMISSIONER HILDEBRAND: Yes.

COMMISSIONER JEFFRIES: But I would imagine that the applicant can cover that lost point in a -- I mean basically saying that sort of walk us through sort of why this would really apply to any office user if they wanted to go there. I mean, it's no need to rewrite anything, but really just talk about their intent?

CHAIRPERSON MITTEN: Well, maybe they can dispose of it in a paragraph. But it was very clear throughout the record that the design is very much

being driven by Jones Day.

COMMISSIONER JEFFRIES:

CHAIRPERSON MITTEN: Okay. Is there any further discussion.

MR. RITTING: Perhaps at this point I just wanted to remind you that Rule 3128.3 requires that the Commission not reverse or modify any decision, or order without affording the parties to the case an opportunity to present memoranda to the Commission.

CHAIRPERSON MITTEN: Okay.

MR. RITTING: And perhaps that might be a vehicle to bring some clarity to the discussion that you've had.

CHAIRPERSON MITTEN: Okay. So we can't bring this to a vote you're saying?

MR. RITTING: Well, you can signal a proposed action, as you already have. But you can't take final action.

CHAIRPERSON MITTEN: Okay. Okay.

MR. RITTING: Until you've afforded that opportunity.

CHAIRPERSON MITTEN: Okay. So well how do we do that given that -- what do you want to do? I don't know. What should I do?

COMMISSIONER HILDEBRAND: Well, could we

do it just as a consensus? We've come to a consensus.

CHAIRPERSON MITTEN: Okay. Okay. Would you withdraw your motion first?

COMMISSIONER HILDEBRAND: Yes. Then I will withdraw my motion.

CHAIRPERSON MITTEN: Okay. So --

MR. RITTING: Perhaps you could state the consensus of the Board.

CHAIRPERSON MITTEN: Okay.

MR. RITTING: And maybe that might be another way to try to reorder and restate the direction that you'd like to take.

CHAIRPERSON MITTEN: Okay. Well, I concur with Mr. Hildebrand's recommendation that we remand this for an additional hearing before the Board. And would be looking for others, too.

COMMISSIONER HILDEBRAND: I would concur also.

CHAIRPERSON MITTEN: Commissioner Jeffries, you're the last one?

COMMISSIONER JEFFRIES: Yes, I will concur.

CHAIRPERSON MITTEN: Okay. So then we need to have a briefing schedule. I don't know if we have a sense of how long that would take. But perhaps

we could work that out, and then while the Commission goes forward with the second case for proposed action, then we can come back and announce what the briefing schedule is going to be? Okay.

And I'm going to turn it over to Commissioner Hood, inasmuch as I didn't sit on the Catholic University case.

VICE CHAIRMAN HOOD: Okay. The next item on our special public meeting is Zoning Commission Case No. 04-25 is the Catholic University Map Amendment only.

Ms. Schellin?

MS. SCHELLIN: I don't have anything additional for you. We're just ready for proposed action.

VICE CHAIRMAN HOOD: Okay. Okay. Thank you.

MS. SCHELLIN: Thank you.

VICE CHAIRMAN HOOD: And again, Commissioners, we're using the Map Amendment only for the process. If it's zoned from unzoned to R-5-A, which is being requested by the applicant, I just have two things that I wanted to put on the record and I'm not sure if this is the time or maybe I should put it on at the further processing. But let me just mention

that I think that what I have in front of me, the proposed order, is that testimony in opposition I think we need to add a little more. There was a little more explained by the Michigan Parks Citizens Association. They talked about the use of materials that were going to be in the yard. I want to say yard because I don't have it right here in front of me. I guess it was recycling center or whatever it was called. I think we need to expand a little bit more when they say it's a testimony in opposition.

Even to the point, and this may go into the final of the further processing order, but even to the point that the materials that are going to be used in the recycling center I think should be at least named. Not specifically but in general.

And that's all I have to add. Anything else?

COMMISSIONER HILDEBRAND: My recollection of the discussion was that this was envisioned as a yard to store mulch and landscaping products as opposed to a recycling center that would otherwise be used to recycle computers or dormitory furniture or other items from the campus. I'm not sure that I understood that correctly, but that was the impression I've been left with from the hearing.

VICE CHAIRMAN HOOD: Anything else?

I would agree, and I'm hoping that staff would work with the applicant to make sure that those things are done before final action.

So with that, I would move the Map Amendment for Zoning Commission Case No. 04-25 of Catholic University of America, and ask for a second.

COMMISSIONER HILDEBRAND: Second.

VICE CHAIRMAN HOOD: It's moved and seconded. Any discussion? All those in favor?

ALL: Aye.

VICE CHAIRMAN HOOD: Any opposition? So ordered.

Ms. Schellin, would you record the vote and the proxy?

MS. SCHELLIN: Yes. We have an absentee ballot from Mr. Parsons approving the case also. So staff will record the vote four to zero to one to approve Case No. 04-25. Commissioner Hood moving, Commissioner Hildebrand seconding, Commissioner Jeffries in favor and Commissioner Parsons in favor by absentee ballot. Commissioner Mitten not voting, not having participated.

CHAIRPERSON MITTEN: Thank you.

Do we have a schedule for the briefing?

MS. SCHELLIN: Yes, ma'am. The applicant's attorney has represented that he could provide a brief by June 7th.

CHAIRPERSON MITTEN: Okay.

MS. SCHELLIN: Which would allow us time to put it on the June 13th agenda.

CHAIRPERSON MITTEN: Okay. That sounds good.

MS. SCHELLIN: Okay.

CHAIRPERSON MITTEN: And if there's nothing further for the special public meeting?

MS. SCHELLIN: Nothing further.

CHAIRPERSON MITTEN: Okay. Then the Special Public Meeting is adjourned. And we'll take a three minute break and then we'll convene the regular hearing.

Thank you.

(Whereupon, at 6:39 p.m. the Special Public Meeting was adjourned.)