GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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EXCERPT ONLY OF APPLICATION 17302

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TUESDAY

APRIL 12, 2005

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 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
ANTHONY HOOD, Board Member

COMMISSION STAFF PRESENT:
BEVERLEY BAILEY, Zoning Specialist
CLIFFORD MOY, Deputy Secretary
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL:
SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:
JOHN NYARKU, Office of Planning
JOHN MOORE, Office of Planning
TRAVIS PARKER, Office of Planning

ZONING COMMISSION
CASE No. 05-14
EXHIBIT No. 2

ZONING COMMISSION
District of Columbia
CASE NO.05-14
EXHIBIT NO.2

MR. STEHLE: Thank you.

CHAIRPERSON GRIFFIS: Appreciate it. Appreciate the thoroughness of the application that has allowed us to move so expeditiously through it. Good luck.

MR. STEHLE: Thanks very much.

CHAIRPERSON GRIFFIS: Indeed. Let's call the next case of the morning if we're ready.

MS. BAILEY: Application No. 17302 of Nonprofit Community Development Corporation of D.C. pursuant to 11 DCMR 3103.2, for a variance from the maximum height requirements under subsection 770.1 to construct a new 7-story condominium building with ground floor commercial in the C-2-B District at 2750 14th Street, N.W., Square 2667, Lot 73, also known as 849.

CHAIRPERSON GRIFFIS: You know, Board members, let me just also open it up here. Fourteen years living in Columbia Heights and I haven't seen so many applications come through. Here we are again, another Columbia Heights application. I would reiterate my statement previously.

I don't have any additional information or knowledge but this is in my neighborhood. I'm not within a 200-foot radius but I would throw it out

there if anyone has any difficulty in me continuing on this case.

If there is no objection from the Board, I will have the applicants introduce themselves and they can also address if they would have any difficulty in me as a committed, dedicated Columbia Heights -- oh, I probably shouldn't say all that, should I? In any case, if you have any difficulty in me continuing on this case. Let me have you introduce yourselves for the record, please.

MS. OWENS: Michelle Owens. You want my address?

CHAIRPERSON GRIFFIS: Sure.

MS. OWENS: 8523 Cameron Street, Silver Spring, Maryland.

MR. HENDERER: My name is Peter Henderer and I'm from McCandish Holton at 1111 East Main Street, Suite 1500, Richmond, Virginia 23219. My home address is 4506 Hanover Avenue, Richmond, Virginia 23221.

CHAIRPERSON GRIFFIS: And you are what to the applicant?

MR. HENDERER: I'm counsel for the project.

CHAIRPERSON GRIFFIS: Okay.

MR. MORRIS: My name is I liam Morris. I'm the architect for the project. I am at 60 Market Street, Gaithersburg, Maryland 20878.

CHAIRPERSON GRIFFIS: Good. Okay. Anyone have difficulty in me continuing on this case?'

MS. OWENS: No.

CHAIRPERSON GRIFFIS: Any questions of me?

MS. OWENS: No.

CHAIRPERSON GRIFFIS: Okay. Let's move ahead then. I'll turn it over to you to open up and present the case.

MS. OWENS: Again, I'm Michelle Owens. I'm the managing director of NPCDC. As you know, we are a nonprofit corporation engaged in neighborhood revitalization through construction and renovation of housing in at-risk neighborhoods in D.C.

Since '94 our projects have involved the renovation of over 350 units of housing, single family and apartments, Anacostia Petworth, Upper Georgia Avenue and now Columbia Heights. Our projects have been exclusively affordable housing units. We are here today to request a height variance at the Columbia Heights location.

We feel that the variance is necessary to accomplish the mission of both the RLA Revitalization

Corporat. and NPCDC. As you met, : e with me today is Bill Morris, our architect, and Peter Henderer, our attorney. Both of them can speak about the details of our request. I thank you for your consideration of our petition and that should cover about the first three pages of what we gave you and Peter can take it from here.

MR. HENDERER: We have some copies of our remarks for your review.

CHAIRPERSON GRIFFIS: Excellent.

MR. HENDERER: I will not read through them word for word but I will summarize them and get through them quickly. If there are any questions that you have, please feel free to interrupt me and ask them.

CHAIRPERSON GRIFFIS: Good.

MR. HENDERER: We'll start by telling you a little bit about the development at Parcel 5. Parcel 5 is located at 2750 14th Street, N.W. and Columbia Heights. The development plan calls for 77 parking spaces in the subsurface parking deck, 19,770 square feet of commercial space on the ground level, and 56 residential condominium units in the seven-story building.

The property is currently zoned C-2-B for

the zoni map. It has 24,000 squar eet of area. The plan is to do a contemporary type structure to house all of these features.

NPCDC purchased the property from the RLARC. In doing so they entered into a Land Development Agreement, the LDA, which consistent with the nonprofit purpose of the developer calls for having 50 percent of the residential condominium units to be affordable dwelling units which will be for sale to households earning less than 50 percent -- earning at different levels below the area median income as defined by the U.S. Department of Housing and Urban Development.

One of the challenges that NPCDC has encountered now that the project is underway and under construction is that as they have gotten into the preleasing phase on the commercial space they have discovered that the building is not as attractive to high quality retail tenants when they have eight-foot high ceilings in the commercial space.

In order to fit all of the desired units into the building, one of the limitations that they had to do was create a eight-foot ceiling in the ground floor commercial space. One of the things that they have discovered at this point is that the high

quality . ail tenants are not as in ested in eight-foot high ceilings.

There is a letter in our package from Vanguard Realty Group which is the project realtor that provides some testimony to that effect. And we have the project manager here today who can testify to that effect as well.

This only came up during the construction and preleasing phase because the nonprofit NPCDC is primarily a housing developer and focused on housing issues and creating the right mix of affordable units and so simply discovered this issue in the development process.

Before proceeding with this variance request it considered other alternatives. One of the alternatives was to remove a floor of the building and to try to raise the ceiling height. Unfortunately, by raising the ceiling we would have to eliminate an entire floor of residential units and that was unfortunate and would jeopardize the transaction and the desired goal of providing as many affordable dwelling units to the neighborhood.

Additionally, one of the concerns was pursuing a PUD process which was a very thoughtful suggestion that the Office of Planning put forward.

Unfortun ly, the PUD process will e longer than our construction schedule permits. By the time the PUD process is completed we will probably be on the 4th floor of the building rendering the PUD decision fairly moot. The variance seems to be the only route that we could go to achieve the desired relief that we would like to do.

Obviously the goal here is to try to get the 12-foot high ceiling so that we can have higher quality of life in the neighborhood and provide the higher quality of tenant that the nonprofit really believes the neighborhood deserves, that it would be consistent with the Land Development Agreement, and the nonprofit's desire to produce the highest quality neighborhood amenities possible for the social revitalization of Columbia Heights.

I would like to talk a little bit about the criteria for the variance and why we believe that this project meets the criteria for the variance. I have quoted the statute for you but I will not recite it for you because I'm sure you all know the statute. Obviously there are four prongs here. One is the issue that the property be subject to an extraordinary or exceptional situation or condition.

We believe that the property here is

subject an extraordinary or exceptional situation or condition because it is incumbered by the Land Development Agreement which requires the 50 percent ADUs and there is actually a daycare center that is required as well.

We have signed a lease for a daycare center to take up a significant component of the commercial space. The combination of the Land Development Agreement and the nonprofit purpose of the developer in tandem together to create a situation that is quite unique amongst properties. The 50 percent ADU requirement is exceptionally high amongst comparable developments so that makes for a very high level of ADUs and something that really distinguishes this property from other properties.

We are aware that the OP has asserted that the LDA alone is not sufficient to create a unique purpose to the property, a unique quality, but we believe that, in fact, the combination of two factors, both the restricted covenants of the LDA combined with the nonprofit purpose of the developer, go to making the property unique and that is manifested in the 50 percent ADUs and the childcare center on the property.

The second criteria is that the property be subject to practical difficulty on the property.

Obviously the practical difficulty is the ability to create the kind of socially beneficial development that we would like to create.

The interest that we have had from tenants in the eight-foot ceiling space has been really substandard tenants that we fill don't contribute fully and efficiently to the kind of neighborhood that we would like to create in the Columbia Heights area.

The premium retail tenants really require the 12-foot high ceiling. Obviously our leasing agents can testify to that but we really believe that presents a practical difficulty. I note that it is not an economic hardship issue. It is really a practical difficulty.

We could get the rent from other tenants but they are not the kind of socially desirable tenants that we would like to see in that space to meet the nonprofit purpose and our goal of doing community revitalization in the neighborhood and providing the right kind of street scape that would be attractive and beneficial for the neighborhood.

Finally, we note that the relief can be granted without substantial detriment to the public good. The ANC is here and has provided a letter to that effect saying that it would not have an adverse

impact o he neighborhood. The Off of Planning did not seem to feel that it would have an adverse impact in the neighborhood if granted.

We believe that clearly having the additional height in the building will provide better quality of commercial tenant in the neighborhood and contribute positively to the neighborhood if the variance is granted.

The next prong obviously is that it will not substantially impair the intent, purpose, and integrity of the zone plan. In this case we believe that the relief that would be granted would be minor enough by the additional eight feet on the building that it would not substantially impact the neighborhood.

The building is adjacent to a five-story building on one side and a six-story building on the other so an additional eight feet on a seven-story building will not really change the roof line of the neighborhood. Our project architect has some illustrations to that effect so that you can see a mockup of what that additional height would look like so that you can see that it would not have an adverse impact on the zone plan.

We do note that the OP suggested that by

granting e variance it would actua weaken the variance requirements. We disagree with that. We obviously think that the granting of the variance is appropriate in this instance because it's the only remedy that can be provided in this situation under the time frame that we have.

We feel that there may be some concern that granting this variance would create unwanted future precedence for other variances that might be requested in the future. We would suggest to you that the uniqueness of the property would make that a nonconcern for the BZA.

Because the property has 50 percent ADUs, because there is an LDA in place, and the nonprofit purpose of the developer with the 50 percent ADUs and the daycare center, that makes the property sufficiently unique that other applicants simply wouldn't have that same combination of circumstances making their properties unique.

We also note that the nonprofit will not profit from the variance. Not only does the LDA restrict the profits but obviously as a nonprofit if their commitment is to plow their proceeds back into the community and this is not something that they are doing simply to gain additional revenue out of the

project . merely to enhance the qu ty of life in the neighborhood and to build the best possible development that they can at the location.

Just to summarize our arguments then as to the legal requirements of the variance, we believe there is an exceptional situation or condition in the form of the restrictive covenants combined with the nonprofit purpose of the developer that is manifested in the 50 percent ADUs and the childcare center that make the property unique.

There's an exceptional situation or condition that would create a practical hardship on the NPCDC by impairing their ability to develop the highest possible quality of life development for the neighborhood.

The proposed additional height would not have an adverse impact on the neighborhood and the additional height is not inconsistent with the zoning plan. We have a few people here who can provide some additional testimony on this issue. I think Arnie Litman would like to say something to that effect.

Arnie, do you want to come up?

CHAIRPERSON GRIFFIS: Good. Before we move on to have them adopt that testimony, let me ask you a couple of legal analysis questions and

clarific. ons. You made a broad st ment that would jeopardize a transaction, certain elements. You've also just stated restrictive covenants. The restrictive covenants and the transaction come out of the award from NCRC and the LDA that was signed, right?

MR. HENDERER: Yes.

CHAIRPERSON GRIFFIS: Which was basically the contract which ratifies everything that is required. My first question is didn't then the NCRC put out an RFP and award something that was unrealistic and was unable to be built?

MR. HENDERER: No, they didn't. The question is not whether it's economically viable. The project is economically viable. The question is the quality of life, the quality of tenants.

CHAIRPERSON GRIFFIS: What I'm hearing you say is that if you build it as it was awarded and NCRC required it, then you actually don't have a retail base. You have something that's going to be boarded up or just empty because no one wants it. It does seem to be fairly unrealistic to go 30, 60, 80 AMI units and expect it all to work.

MR. HENDERER: Well, there can be other tenants other than retail in the space but we believe

that it's the retail tenants that will provide the higher quality of life for the neighborhood.

CHAIRPERSON GRIFFIS: Where is the retail tenants proposed to be, on the 14th Street or the Girard Street side?

MR. LITMAN: Both.

CHAIRPERSON GRIFFIS: So where's the daycare center?

MR. LITMAN: The daycare center is taking some of the retail space on Girard Street and some below grade space on the Girard Street side.

CHAIRPERSON GRIFFIS: Okay. Did you want to state your name and address for the record?

MR. LITMAN: Yes. Arnie Litman, 3331 22nd Street, S.E., Washington, D.C.

CHAIRPERSON GRIFFIS: Okay.

MR. LITMAN: Though I am the project manager, I'm speaking here today as a real estate broker with 30 years experience doing commercial leasing in both downtown office buildings and retail shopping centers throughout the city.

My experience in leasing this space has been that the more typical quality tenants, whether you like them or not, a Starbuck's, dry cleaners, different banks that we talked to, Dunkin Donuts,

Caribou fee. These people are re y interested in a higher ceiling. Even the ceiling we have here today is eight feet, six inches so you've got to imagine walking into a restaurant or some other establishment where the ceiling is kind of impinging upon certainly a taller person.

The dry cleaners aren't interested because they can only get one layer of clothes while in a 12-foot ceiling they can actually get two layers of clothes and a conveyor belt so they really are substantially increasing their space.

What I have found is that tenants who don't object to any ceiling height have been Cash 2 go, First Cash, Ace Check Cashing. They just want to be in the neighborhood because they feel there is a real draw there.

I have met with several Chinese restaurants, mostly carry-out variety, not sit-down. And food providers who have really had no experience in the business. I have also met with three people who want to open up a liquor store in the area.

The problem is not economic. The problem is that we made a commitment to Council Member Graham and to Mayor Williams when we met with him when we first adopted this project. We made a commitment to

NCRC tha e would bring them qualit_ enants and we have made a commitment to the ANC when we first met them that we were going to try to improve the neighborhood, improve the quality of life of everybody that lives there now.

We even made a commitment that out of the profit that would be made in this, $250,000 would be st aside to establish a subsidy so a neighborhood business could move into the shopping -- in the retail area. We have several retail people. Two of them are already in the area. Their leases are up in two years and they want to relocate to our property.

The problem that we faced in talking to them was they are now in areas that have 12 and 14-foot ceilings. For them to come into an establishment now that has an eight-foot ceiling they are really giving up storage space and display space and an ability to make money for themselves.

These other tenants that I mentioned, the check cashing, the carry-out restaurant, the liquor stores, they are all willing to pay our rents. It's not a matter of the place is going to end up being boarded up. We don't believe they are going to end up being boarded up.

It's a matter of the commitment that we

made to NCRC, to Mayor Williams, to Council Member Graham, and to the ANC of bringing in quality tenants and somebody that was going to enhance and improve the neighborhood. We just don't feel that with the lower heights that we could have.

I know in the back of your minds it's like, "Gentlemen, shouldn't you have seen this earlier?" Yes. The building was designed by an architect. He passed away in the middle of the development. We caught it kind of late in the game and OPD did offer us an out. However, we are now 30 feet deep into the ground.

We are laying our infrastructure next week. We are pouring the concrete base within two weeks. There is no stopping us. The bank commitments are there. The money is being spent. The contract commitments are there for the contractor. The project is well underway. It has strict deadlines, strict adherences. We have other commitments, not just banks but to NCRC to complete the project.

We are sorry. There is no turning back. We are just looking for this variance because it is our only way out to bring the quality tenant we feel we need and are committed to bringing to Columbia Heights.

CHAIRPERSON GRIFFIS: Gc Thank you. If I understand you correctly, your testimony to the fact of the ceiling height goes to one, the flexibility which obviously opens up the opportunity of differing retailers and that is today and perhaps give years from now when leases are up.

MR. LITMAN: And forevermore.

CHAIRPERSON GRIFFIS: Right. And so it limits your ability and breadth of who might be interested in that so that the flexibility obviously goes into, as I understand you saying, the quality of type of retailer that would go in there.

MR. LITMAN: Correct. And I know that OPD supports that position because I know they are working with other developers to increase retail height. Our problem is coming to you now late in the game. But we know that throughout the city the DCBIA, other developers are all after the increased height. We know that. This is just late in the game and that's why we seek the variance.

CHAIRPERSON GRIFFIS: I understand what you're saying. They are all after the increase in height. DCBIA is an association, not a developer. Am I correct?

MR. LITMAN: Yes.

CHAIRPERSON GRIFFIS: And so what you're saying, if I understand -- tell me if my understanding is correct. Because we are so height-impinged in this city, if you raise the first floor in order to, if I understand you correctly, get high quality or flexibility of retailers, if you raise that first floor to 16 or 20 feet, it would give you also a clarification in egression.

You may be looking at the ceiling height but that doesn't go to what the slab height is because you've got two feet above this drop ceiling. If you go to raising that retail, well, you are obviously losing something above it because you are at your height restriction.

Is that what you're saying? DCBIA and other folks in the city and the Office of Planning are working on increasing the availability of higher retail on the first floor without impacting what might be above without losing a floor of the building?

MR. LITMAN: Yes. In our case in this scenario, we are seeking four feet for the retail space which takes from eight to 12 feet. As well as since we have the ability, the additional four feet would be spread over the other six floors of residential. Again, the thinking there was we have 50

percent ordable units. There is other development in Washington, D.C. that is offering 50 percent affordable housing as well as 50 percent market.

The idea there was that we have this ability to enhance not just market units but everybody who is buying in this building. There was an opportunity to increase a product for the less wealthy as well as the wealthy across the board. It just seemed like the right thing to do.

CHAIRPERSON GRIFFIS: Okay. Is the Zoning Commission taking up any of this in terms of overlays or text amendments looking at retail height on buildings? Are you aware of that? Is that happening?

MR. LITMAN: I believe it's happening but it's not something that we're involved in. We are single-building purpose.

CHAIRPERSON GRIFFIS: Sure. Sure. I'm just wondering whether you had any understanding of them actually looking at it. I'm sure the Office of Planning probably knows.

MR. LITMAN: I have third-hand knowledge that there is some kind of proposal whereby by increasing the retail height in a building it will not affect the overall height of a building's restriction.

CHAIRPERSON GRIFFIS: Ri ..

MR. LITMAN: I don't --

CHAIRPERSON GRIFFIS: Well, we've touched and danced on it a couple of times. Certainly we have retail in arts overlays that require 50 percent or more of a first floor. It's certainly not something that the Zoning Commission is unaware of and the difficulties in making that are what you lose obviously if you have a double height space on the first floor.

But let's move ahead. Ms. Miller, questions?

MS. MILLER: I have a few questions. The issue with the higher ceilings not being anticipated earlier. Was it not anticipated before you entered into the LDA?

MR. LITMAN: Before we went to --

MS. MILLER: Before you entered into the LDA.

MR. LITMAN: That's correct. The original architect had drawn it so that we could maximize the height and every floor was eight feet. Bill Morris had taken over in mid-stream and it's just something that the not-for-profit and myself really didn't focus on because we were more focused on the 50 percent

affordab .ty component and how we w : going to mix in the condominium documents and how that mix was going to arrange. Then as soon as we began talking to retail tenants, this problem began to appear.

CHAIRPERSON GRIFFIS: Let's not get too far into it. Let's get very simplistic here in the chronology. Were the CDs 100 percent when the LDA was signed?

MR. LITMAN: Were the CDs 100 percent? No, they were not.

CHAIRPERSON GRIFFIS: Exactly. The issue, to direct the question back to Ms. Miller which I think she's exploring, you signed the contract on this before the actual documentation was 100 percent complete.

MR. LITMAN: Correct.

CHAIRPERSON GRIFFIS: They were in locked program financing setup and then you started completing your documents and design.

MR. LITMAN: Correct.

CHAIRPERSON GRIFFIS: Okay.

MR. LITMAN: And we had no leasing activity prior to construction.

CHAIRPERSON GRIFFIS: Sure.

MS. MILLER: Okay. And then the LDA was

part of larger master plan for the revitalization of the 14th Street corridor and Columbia Heights. Correct?

MR. LITMAN: That's correct.

MS. MILLER: So if you didn't have the restrictions of the LDA and you were deciding how you could build this building without getting a variance, what would your option be? Would one of them be less affordable housing units? I know you just addressed the issue of taking off one floor which wouldn't be economically viable.

MR. LITMAN: Speaking as a capitalist and not for the not-for-profit, yes, I would advocate fewer affordable dwelling units and more market units. However, the not for profit is the developer. They are the ones that hired me to assist them in this and that is their mission. That is their commitment and it's one that I really do support in spite of my previous statement.

MR. HENDERER: It's also worth noting that the affordable units in the project are not sequestered into one portion of the project. They are marbled throughout the building. The building contains a mixture on each floor of one-bedroom, two-bedroom, and three-bedroom units so that you don't

have all ıe three bedroom unıts tog ıer.

You don't have all the two-bedroom units together. They are all mıxed. The affordable and market rate are mixed because the project goal ıs to provide that certaın mix of dıfferent famıly sızes, different ıncomes ın one project.

CHAIRPERSON GRIFFIS: Is this the basis of your beıng awarded the property do you believe?

MR. HENDERER: It was a significant component of it, I believe, yes.

CHAIRPERSON GRIFFIS: Okay. What's the master plan you were talking about?

MR. LITMAN: The master plan?

CHAIRPERSON GRIFFIS: Yeah. I mean, ıt's ın the wrıtten submıssion, too, that this ıs ın accordance with the master plan for the area. What is that?

MR. LITMAN: That is somethıng that the cıty has drawn up for development ın Columbia Heıghts. As you are well aware, NCRC or RLARC has many parcels of land ın Columbıa Heıght that they are ın the process of developing now or have issued RFPs for and developers in developing Columbia Heights.

MS. MILLER: What does that mean the cıty has drawn up?

MR. LITMAN: I think the city has an overall master plan of development and where they would like to see it. I think an agency like NCRC is an instrument unto which the city gets these parcels of land developed whether by themselves or through --

CHAIRPERSON GRIFFIS: I think we are going to take OP task and see if they have this master plan.

MS. MILLER: Right.

MR. LITMAN: Of course, with the assistance and direction of --

CHAIRPERSON GRIFFIS: Let's move ahead then. So you weren't actually noting a specific plan that you were looking at or it was your understanding that this was fitting into?

MR. LITMAN: No.

CHAIRPERSON GRIFFIS: Okay.

MS. MILLER: Could you just also -- I'm sorry.

MR. LITMAN: Except that I do note that the mayor is committed to creating a lot of affordable housing in the city and the not-for-profit was -- one of its guiding missions was to cooperate with that initiative from the mayor's office.

MS. MILLER: I guess I have two other follow-up questions. The commitments that you made

reference to to Council Member Graham and the mayor, are these written commitments, verbal commitments? What are you alluding to?

MR. LITMAN: In meetings we had with the mayor's economic development branch and with Council Member Graham himself we told them when we were getting their support for this exactly what our commitment was. If you read the LDA it is specific in there about bringing neighborhood businesses in and rental subsidy to enable these rental businesses to come in and be able to afford the rents.

I was just handed a note that says that the 14th Street urban renewal area is part of the city's master plan that you asked me about earlier.

MS. MILLER: Okay. And my last question is can you elaborate how the height increase is not inconsistent or is consistent with the zone plan?

MR. HENDERER: I think Bill can answer that. Do you have some pictures, Bill, that you can show us?

MR. MORRIS: We have the picture -- I'm sorry. Again, I'm Bill Morris, the architect. There are some photographs in the application packet which show context of some of the neighboring buildings some of which are 10 stories in height. I would say, yes,

the prop ed height is in conformanc with the context and the height of the surrounding area.

CHAIRPERSON GRIFFIS: What are some of the heights of the adjacent buildings, photographs or not? If you go south on 14th Street, which is the adjacent building, how tall is that?

MR. MORRIS: The adjacent building is approximately 65 feet from my counting bricks. It's six stories of 10-foot stories.

CHAIRPERSON GRIFFIS: Okay. So you have approximately 65. This would be a little bit higher than that. What about across the street? Is it a shorter building? A taller building?

MR. MORRIS: Across the street there is a 10-story building which is taller than our proposed higher building. It is, I would say, approximately 70 to 80 feet without doing an exact measurement.

CHAIRPERSON GRIFFIS: Wow. Is that a new building?

MR. MORRIS: It's a 10-story building that has been there some number of years.

MR. LITMAN: There's also a nine-story building in the area adjacent to that one.

CHAIRPERSON GRIFFIS: The one across the street, is it residential?

MR. MORRIS: Yes.

CHAIRPERSON GRIFFIS: Is there anything else in it?

MR. MORRIS: There is ground-floor retail.

MR. LITMAN: Yes. In the new Amsterdam building there's four retail tenants. In the building to the south of us it's all residential.

CHAIRPERSON GRIFFIS: When was the Amsterdam built, do you think? Or do you know?

MR. LITMAN: I don't know but my guess would be -- I know it was renovated within the last 20 years.

CHAIRPERSON GRIFFIS: In your knowledge of projects and development does it look like some of that was built in the last 20 years?

MR. LITMAN: No.

CHAIRPERSON GRIFFIS: Okay. So contextually if we are talking about it, this building is 10 stories is what your testimony was? It's considerably higher than 60 feet. Is that correct?

MR. MORRIS: Correct.

CHAIRPERSON GRIFFIS: And it has retail on the first level?

MR. LITMAN: Yes.

CHAIRPERSON GRIFFIS: So .'s comparable to the product that you're looking at putting here. Does it look like an original building in the corridor, do you think? Over 30, 40 years old?

MR. LITMAN: Yes, it does.

CHAIRPERSON GRIFFIS: I see. Okay. Any other questions?

MR. ETHERLY: Yes, Mr. Chair. Just briefly on the issue of the Amsterdam, how would you describe the ceiling heights on the Amsterdam retail spaces?

MR. LITMAN: They are between 12 and 16-feet high in the retail spaces. It is one of the new Amsterdam tenant whose lease is up in two years that is contemplating coming over. It's a convenience store. I believe their's is 16-feet high. For them to go from 16-foot to 8-foot ceiling won't work.

MR. ETHERLY: Considerably unworkable. It's indicated in the submittal at Exhibit No. 6, which is the February 4th submittal outlying the variance request, a number of the entities that have already either shared a -- have given you a rejection with regard to the request for retail space. Have those rejections come in the form of letters or have they been primarily verbal.

MR. LITMAN: Verbal. I ı name some.

MR. ETHERLY: It's ındıcated ın the record, Starbuck's, 7-Eleven, Subway, Quiznos, Montgomery Donuts, H&R Block, Gambrel Kıdney Dıalysis Center, and a score of other users. Would you be able to, Mr. Litman, give a rough estimate or ballpark figure in terms of how many rejections you have?

The reason I'm asking ıs I just want to kind of naıl down the fact. I think I'm ın agreement with you that you are runnıng into some difficulty but I just want to make sure that we are very clear ın terms of establishing that. How many rejectıons would you say you've received?

MR. LITMAN: I would say we're at about 15 rıght now.

MR. ETHERLY: About 15. And most of these rejections have been handled by herself personally. Correct?

MR. LITMAN: Yes.

MR. ETHERLY: Okay. It would be your testimony that one of the clear ratıonales or one of the clear reasons that you're hearıng these rejectıons has been the healing site -- I'm sorry, the ceıling height. That has been specifically referenced to you?

MR. LITMAN: Absolutely.

MR. ETHERLY: Okay. Is your testimony that were the ceiling height to be raised you would perhaps be able to resuscitate some of these current tenants -- some of these perspective tenants who currently have said no to the space?

MR. LITMAN: Absolutely.

MR. ETHERLY: Okay. Let me get a sense also that there is another subtle issue here that I wanted to kind of explore that I think also goes to the ceiling height piece. Clearly the retail piece is a big component of this but there is another aspect of the discussion that was included in the February 4th letter and that involves what you're going to be doing with some of the additional height in terms of spreading it out through the rest of the building.

In particular those residential units on floors two through 7. One, I want to be sure in terms of the overall design of the building it's noted on what would be page 3 of the February 4th letter, and I'm reading the second sentence of the paragraph under "Residential Challenges" that, "There is no distinction between units as to size, location, ceiling height, or building amenity."

No. 1, that means that with respect to your affordable dwelling units versus your market rate

units th :'s no difference in terms . size and amenity. They are all mere images of one another.

MR. LITMAN: Correct.

MR. ETHERLY: With respect to the additional space that you would have to "play with" were your variance applications successful, that additional space would that get spread out equally among the affordable dwelling units or would it go more to the market rate units?

The reason I'm asking, and then I'll be quiet and let you answer because you all are chomping at the bit, but there is a discussion about because of the high percentage of affordable dwelling units you are recognizing or asserting that you may encounter challenges with respect to the sales of the market rate units so you are trying to really bulk up as much of the amenity conversation as possible with respect to this property.

I want to be sure I'm not reading that to mean you are going to take all that space and throw it into the market rate units as a way of just trying to make them as strong as possible for perspective purchasers or tenants.

MR. LITMAN: Thank you for bringing it up because I didn't want my only emphasis in height to be

in the r ıll space. What we have f ıd, and we are totally committed to the 50 percent affordabılity. What we are fındıng in talking to some market people, not all but there are some who say, "I can move up the street for roughly the same dollar per square foot and have 20 percent affordable."

The affordable, as you can imagıne, as some negative connotation to it. We are addressing ıt you can look at these units and you would not know whıch are affordable and which are market. They are all going to be ındıstınguishable from each other. One of the arguments we want to make for addıng this extra space to all the units ıs not just to make the market unıts better but to make the affordable dwellıng unıts better for two reasons.

No. 1, ın 20 years -- whıch sounds like a lıfetıme to some but ıt's the blink of an eye to others -- in 20 years these affordable dwelling units and the owners of these affordable dwelling unıts have all restrictıons lifted and they can sell those. They can't flip them ın the meantıme. They can't make greater than a five percent profit per year for 20 years but at the end of 20 years free and clear they all become market units so it's got that 20-year component.

We want all the units to , the same. We don't want somebody to say up and down units or anything else. They are indistinguishable from each other. What we're finding is that in order to entice some of the market purchasers now to buy these, we do need to give them something better than what they can buy up the street for the same dollar per square foot cost.

While that doesn't sound like a lot, I think it's eight inches per unit that we're adding, while it doesn't seem like a lot, it does enable us to give larger window openings. It does give a more open feeling. It does enable us to do some other, which I'll defer to the architect, architectural things that can be done in the unit to make it better. Every single unit, every single purchaser has advantages of these benefits bar none.

MR. ETHERLY: Any of the other panelists want to respond to that?

MR. MORRIS: I think Arnie said it quite well but, just to reiterate, every single unit, all affordable units, all the market units, benefit equally. Since we have 50/50 all floors benefit and we have affordable units on every single floor including the top floor of the building.

MR. ETHERLY: Okay. Let me come back to a question, and I apologize momentarily for using your first name, Peter, but I did not catch your last name.

MR. HENDERER: It's Henderer.

MR. ETHERLY: Henderer?

MR. HENDERER: Henderer, yes.

MR. ETHERLY: Mr. Henderer, from the standpoint of the variance test, of course, you spoke briefly to the Office of Planning's concern about the couching of the variance analysis or your argument within the terms of what you're stuck with based on your agreement with RLA.

I recall, and I don't have the case site in front of me, but let me start broadly. You've taken a look at some of the variance case law. Correct?

MR. HENDERER: Yes.

MR. ETHERLY: Has there been -- I'm recalling case law but I could be mixing apples and oranges here and I might invite my colleagues to help me out as well, regarding the issue of nonprofit purposes being used as part of rationale or as part of satisfying one particular prong of the variance test. It could be the Monaco case that I'm thinking of but I'm not certain about that.

What I'm curious about i n those particular cases I'm hazarding a guess whether or not those cases involved nonprofits that were utilizing the property itself for their own purposes. For example, in the Monaco case was it a nonprofit that was inhabiting the subject property and had very particular nonprofit purposes that went to how they were utilizing the property.

Here we have something a little different. Clearly we're not talking about the Nonprofit Community Development Corporation going into the property. You're not looking to utilize office space or create any kind of space in this property for yourself. It's clearly a part of your mission and it's very much a part of the agreement that you have with RLA, if not in terms clearly in terms of the spirit of the conversation.

Is there any way to kind of melt those two? It's a little bit of, I won't say, a softball question but it might be a little bit of a stretch but do you see any type of consistency there in terms of perhaps that thinking?

MR. HENDERER: To a certain extent but I would like to emphasize that it is really a combination of factors that make this the exceptional

situatio. hat it is, and that is it the combination of the developer having the nonprofit purpose and the desire through its organizational structure to create the high quality environment that they desire create to the development combined with the development agreement through the LDA which is a set of restrictive covenants which encumbers the property which together produce the exceptional situation on the property.

MR. ETHERLY: And it's your sense that the LDA if we were to -- I think part of your written submission anticipated the concern that some board members might have that doesn't this open up a slippery slope if you accept as grounds for a variance a contractual kind of corner that you painted yourself into.

Does that open up the door to further applicants down the line saying, "Wait, I have a contract and it's saying I have to do this and, as a result, I should get a variance." Part of your response to that, I'm thinking, or I'm reading, is it's very unusual to have such a high percentage of affordable dwelling units.

Help me understand a little bit of that and perhaps this comes back to Mr. Litman, or even

perhaps ,k to the nonprofit, Ms. O s. With respect to the number of affordable dwelling units that you typically might see in terms of this type of project, what --

MS. OWENS: Ten to 20 percent.

MR. ETHERLY: Ten to 20 percent. And you are currently at?

MS. OWENS: Fifty.

MR. ETHERLY: Fifty percent. Okay. Are there any other 50 percent LDAs or developments out there that you know of presently or possibly in the pipeline even?

MR. LITMAN: None.

MR. ETHERLY: Okay. Thank you. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly. Others?

MS. MILLER: Just following up on that. I kind of asked this question before but separate from the LDA could the goals of the "master plan" be accomplished without seeking a variance in this case or a PUD? It would mean less affordable housing or you just couldn't do it at all or what would it result in?

MR. HENDERER: Well, I think the challenge

is what d of quality of life do w ant to provide in the 14th Street development corridor. The question is going to be do we create something at this point in time that provides for not only higher quality of retail and commercial tenant today but also in the future, or do we simply have a lower quality tenant and we accept that sacrifice as part of the development plan. Of course, you can continue to revitalize the 14th Street redevelopment corridor. However, this would be -- it would not as strong.

It would not provide the same kind of quality of life that we believe that we can provide if we take this measure now. We really believe that we're at an important juncture in the opportunity to develop something here that is particularly special and particularly high quality to provide a lastly positive social impact on the neighborhood.

MS. MILLER: And just to clarify, it's 50 percent affordable housing and this is unique within the city?

MR. HENDERER: Yes, it is. Most of the other LDAs out there are in the 10 to 20 percent ADU range. However, because we have a nonprofit developer here, we are not looking to make a big profit on this. The profit that any surplus revenue from this gets

plowed b. into the nonprofit purpo of the nonprofit most of it going into the neighborhood. That is the reason why we're at 50 percent AUDs and that's part of the unique component of the property.

MS. MILLER: Thank you.

CHAIRPERSON GRIFFIS: Anyone else?

MR. MANN: I have a question. Can you explain to me again why you can't or don't want to seek the PUD?

MR. HENDERER: The PUD process is a very thoughtful suggestion put forward by the Office of Planning but, unfortunately, we're in the construction process right now and the PUD process would take long enough, probably in the six to 12-month range, that by the time the PUD process would reach its conclusion, we would be at about the 4th floor construction and the decision would be rendered moot.

MR. MANN: So you anticipate seeking relief from BZA is the quicker way to go? That's the reason for doing this?

MR. LITMAN: It's not just quicker but because of the predicament we're in where we are already under construction, it truly is the only relief that we can seek. It's not expedious. It's the only avenue that we have at this point in time.

CHAIRPERSON GRIFFIS: Yo point is if you went through the PUD the time it takes to get all that set down to the hearing, when you say it would be moot, the point is the first level would be built so even if they granted you a 100-foot variance to the building, it wouldn't change the first floor because it's done. You don't have the time to pursue relief.

MR. LITMAN: Correct.

CHAIRPERSON GRIFFIS: Anything else? It's a difficult situation. I want to just see if I'm clear. You keep throwing around this socially and, in fact, in the written submission you also say politically and economically important fascinating descriptions of development scenarios. Obviously it's part of the uniqueness that's here.

Let's explore a little bit more of the retail and in terms of the height it's socially and I think what you're touching upon in a lot of sense and throwing around some of the importance of 14th Street. Aren't you talking about animating the area around it to the impact that this building brings to the neighborhood itself? That goes to what kind of retailers you have, what kind of utilization, what kind of activities on the sidewalk. Those are important aspects. Am I correct?

MR. HENDERER: Absolutel The nonprofit recognizes that the commercial space fronting on both 14th Street and Girard is the way that the building interacts with the public on the sidewalk. It is the public's interface with the building so it's very important to have high quality retail in those spaces and high quality commercial tenants because that's what shapes the neighborhood. That's what shapes the foot traffic. That's what help form the character of the neighborhood for many, many years to come.

CHAIRPERSON GRIFFIS: That's what is so important about the quality or type or flexibility of the retail tenants that you can accommodate in this trial.

MR. HENDERER: Absolutely.

CHAIRPERSON GRIFFIS: I see. Okay.

Mr. Etherly.

MR. ETHERLY: Thank you, Mr. Chair. Let me come back again real quickly to the LDA and just ensure that I understand this particular process. When the Nonprofit Community -- I'll say Nonprofit CDC just for shorthand purposes. When you came to this project was there -- how was this parcel made available? It was in the hands of RLA, correct?

MS. OWENS: What was it called then?

MR. LITMAN: Yes. The R :C and CRC had issued an RFP. It was open for any developer to submit. There was a public hearing. I believe they called it a serrate. Many developers came up and presented their ideas.

MR. ETHERLY: Okay.

MR. LITMAN: And we were just one of many who presented our ideas but we were the only one that has such a high component of affordable dwelling units.

MR. ETHERLY: Okay. And all of the conditions that you've referenced, some specifically, some very broadly, all of the restrictive covenants, all of the requirements that attach to the partial were part of the RLA's or NCRC's RP, if you will. All of that was included as part of the -- the logical end of my question is if there were different developers sitting at this table they would be dealing with the same requirements as well?

MR. LITMAN: No. The RFP was such that they said, "We are looking for some affordability component."

MR. ETHERLY: Okay.

MR. LITMAN: And we are the ones that ultimately negotiated the 50 percent affordability

componen ıth the NCRC.

MR. ETHERLY: Okay.

MR. LITMAN: We believe -- well, let's put all the cards on the table. Thıs was not the strongest developer bidding for thıs parcel. I absolutely belıeve that one of the reasons -- not one of but the reason that this weaker development, and I'm talking economically, this weaker developer was granted thıs award was because of this hıgher component of affordable dwelling unıts and the commıtment they had shown in the past to not just say ıt but to live up to ıt.

MR. ETHERLY: So whıle ıt might not be correct to say that the 50 percent affordable dwelling unıt or affordable housing requirement was part of the requirement, RLA's or NCRC's RP wanted affordable housıng as part of a proposal.

MR. LITMAN: Yes.

MR. ETHERLY: Wanted a mıxed development, so to speak, ın terms of affordable and market rate and wanted a retail component.

MR. LITMAN: Correct. And wanted some abılity to brıng ın neıghborhood retail. They didn't just want chaıns but they wanted somebody from the neighborhood who either had an establıshed business

and need to be relocated because s of the other buildings were being torn down or leases were up and looking for a better establishment. Somebody from the neighborhood.

MR. ETHERLY: So let me turn back to --

MR. LITMAN: As well as childcare center. That was very definitely one of the require -- well, yes, requirements that they wanted in the development.

MR. ETHERLY: Okay. Let me then turn back to counsel. Have you come across in your assessment or your survey of variance case law, have you come across instances where, as you've said, restrictive covenants or other such conditions like this have been used as grounds for satisfaction of that first prong?

In particular, I'm getting at the issue of would you agree or disagree that typically that first prong speaks to a physical condition of the property or would this type of condition satisfy that first prong?

MR. HENDERER: Well, the first prong is fairly broad and you're right. In the broader sense it does talk about exceptional narrowness, shallowness, shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional typographic conditions.

But it continues to say, "or other extraordinary or exceptional situation or condition." We think this is one of those other extraordinary or exceptional situations or conditions. While the other criteria there described physical attributes of the lot, we believe that this is one of those other extraordinary or exceptional situations or conditions.

MR. ETHERLY: Okay. But you would not be in a position to say that you have come across case law that necessarily explores that last half of it?

MR. HENDERER: No, I have not.

MR. ETHERLY: Understood. Understood. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: This might be a good seque then to Ms. Miller. Ms. Miller.

MS. MILLER: I wonder if you could elaborate a little bit further on the restrictive covenants that are binding the property.

MR. HENDERER: The restrictive covenants are embodied in the LDA. I believe we have copies of that. Don't we?

CHAIRPERSON GRIFFIS: We have the LDA.

MS. MILLER: We did get that this morning. Maybe you can tell us where it is or touch upon what --

MR. HENDERER: The entir DA is of record and forms the entire body of it is a set of restrictions on the property. It governs what can be developed on the property including the 50 percent ADUs, including the childcare center. It governs --

MS. MILLER: Okay. I didn't know if there was separate from the LDA. So you're saying the LDA contains all these restrictions which are covenants.

MR. HENDERER: Yes. Everything in the LDA is of record and it imposes requirements upon the developer in terms of how the property is developed and what is to be developed and what the developer may take out of the property which is limited. There is a limited profit but, of course, a lot of that has to be put back into the property.

CHAIRPERSON GRIFFIS: Good.

MS. MILLER: Okay. If you could just explain one thing then. How is this -- you characterize it as LDA is a set of restricted covenants. How is that different from a sales contract or a regular agreement?

MR. HENDERER: Well, a sales contract obviously isn't of record. The LDA is of record and forms an encumbrance on the property. An ordinary sales contract or other unrecorded document is not an

encumbra on the property because s not of record in the land records.

This is a component of the property. Any successor owner and title would obviously be subject to this encumbrance on the land and encumbrance on the fee ownership of the land. It does form a component part of the character of the land because it is of record.

MS. MILLER: Thank you. That answers my question. If you want to add something, go right ahead.

MR. LITMAN: If it answers your questions, I'll remain silent.

MS. MILLER: Okay. Thank you.

CHAIRPERSON GRIFFIS: Weren't you going to go to the court citation that also spoke to restrictive covenants or other elements of the nonprofit?

MS. MILLER: I'll be happy to reference it.

Are you familiar with the case of Monaco versus. D.C. Board of Zoning Adjustment, 1979 Court of Appeals case?

MR. HENDERER: Not entirely, no.

MS. MILLER: It is a case that involves a

nonprofi nd it also involves coven s. It addresses how these factors are different and allows more flexibility for the Board in considering a variance. Covenants do add to the uniqueness analysis.

CHAIRPERSON GRIFFIS: Good. Mr. Etherly and Ms. Miller are talking about the same court case which is often cited for this Board. Monaco is a very important case in establishing numerous things of which now govern how we process variances. Specifically looking at that was the nonprofit and the courts found that nonprofits in that particular case, and the Board has evolved in looking at it in an expanded form.

As Ms. Miller has just briefly touched on is the fact of the lessening burden or the lessening threshold of establishing uniqueness based on the performance or the product of which the nonprofits do. Mr. Etherly is absolutely correct that most applications of this or utilizations of this court case go to the expansion, the physical expansion of a nonprofit in a certain building.

They are expanding their own programs and, therefore, are having a hard time and need to expand the building that they are in and the uniqueness may

not absolutely be there. This is another form or iteration not totally unheard before but one that I think may fit, at least, our understanding of the utilization of Monaco.

MS. MILLER: I would also add that this case, as well as some other court of appeals cases, do say that when we're considering the uniqueness of the property that we can indeed consider conditions and situations that affect the property, not just the topography of the property.

CHAIRPERSON GRIFFIS: Okay. Exceptional situations. Very well. Anything further for the applicant? Any questions? Why don't we move ahead then and get through the other aspects of the case presentation. We obviously will return to the applicant for any other closing unless they have anything further they want to present at this time.

MR. HENDERER: I think we are complete.

CHAIRPERSON GRIFFIS: Good. Let's move ahead then. Let's go to the Office of Planning who is with us, Mr. Parker.

MR. PARKER: Good morning, Chairman Griffis, members of the Board. I'm Travis Parker with the Office of Planning. The project that's in front of you right now, the building that is proposed as a

variance is a wonderful project on corridor. It has an excellent retail component as proposed, unheard of ratio of affordable housing that is very desirable.

While there is no specific plan for the 14th Street corridor that the Office of Planning has, it is part of a housing priority area. This is a project that has a lot of amenities that the city would like to see. It also proposes a density that is larger than what is allowed in the zoning district. The combination of those two is exactly what a PUD process was designed to accomplish. There is nothing unique about the property itself that allows for additional height.

The NCPC when they put out the request for proposals for this site had an excellent agenda in asking for a high level of affordable housing and asking for ground floor retail and getting this exact project. The project that was designed and LDA that was signed was exactly what the city and NCPC would like to see.

CHAIRPERSON GRIFFIS: NCRC.

MR. PARKER: NCRC. Excuse me. I'm sorry. Unfortunately, NCRC does not have the authority to require the BZA to approve variances on a property. this project is one that should be going through the

PUD proc , as a review of its ameni s in exchange for increased density.

It's inconceivable that when this project was designed the amount of experience in the design team and architecture and commercial real estate and residential real estate did not know that a seven-story building in a six-story district would have to be designed in a substandard way, that eight-foot retail and eight-foot residential were substandard and very difficult to lease.

In fact, members of OP met with the nonprofit last year well before this was designed and this was submitted and when the project was in the design phase to discuss ways to get extra height. This is a situation where the applicant has chosen to design a substandard building, submit building permit requests for a substandard building and start construction and come before the Board of Zoning Appeals when it's too late to go through the PUD process.

While it is now difficult to go through that PUD process, it's important to find other ways to accomplish what we would all like to see in this building. We would all like to see this retail and we would all like to see it at 12 feet. We would like to

see good es in there. OP would li to come up with ways to do that but we cannot recommend a variance in order that we circumvent a PUD process.

I'll go through the individual variance tests. Clearly any LDA, any sales contract in and of itself is not a hardship or is not a unique situation. If for-profit developers were developing 50 percent ADUs, they would be able to make the same arguments. Simply because we have a nonprofit status there should absolutely be some leeway design. However, it's what results from the project.

Nonprofits do provide great projects like this one that provide large amounts of affordable housing. Regular developers don't do that. Or, if they do, they get credit for it through the PUD process. This is the same sort of situation that should result when a nonprofit comes before us. OP does not support circumventing this process by coming to the Board to expediently and more inexpensively approve what should be a PUD.

CHAIRPERSON GRIFFIS: Thank you very much. We appreciate the directness of your report.

Ms. Miller, questions?

MS. MILLER: I have a few questions. What is the public policy behind a project like this going

through PUD process instead of t variance process?

CHAIRPERSON GRIFFIS: Public policy.

MS. MILLER: Well, what is it that makes that important?

MR. PARKER: The PUD process is designed to take into account amenities that a project like this one provides to the community at large. Wonderful retail space. A large, large percentage of affordable housing and grant extra density. In this case an extra floor, a 7th floor in a six-story district.

Whereas a variance procedure, as everyone here well knows, is designed to take into account negative things about the property, reasons why it can't be done in an acceptable way. The fact that there is already a building permit issued on this lot and that the building is under construction defeats that purpose and shows that the project can be done on the lot as it exist today.

MS. MILLER: We've had cases before where they could have gone either route. I'm not sure if you are aware of it. One of the ones I'm thinking of is the Fort Lincoln case which is theoretical lots. Office of Planning, I think, advised the applicant

that the ught to go the PUD route they instead chose the variance route. Office of Planning, in my recollection, ended up supporting that, I gather, because -- I don't know, because there was no adverse impact by doing that or it wasn't contrary to public interest.

MR. PARKER: I would assume that there were unique situation to the property and that there was a practical difficulty to doing it as a matter of right. Whereas, in this situation the building is under construction as a matter of right and could be built as a matter of right.

Now, clearly, we are willing to find ways to make this project happen. I think sinking the first floor while it doesn't create the most optimum retail space would allow 12-foot ceilings. No request has been made to just grant a three or four-foot variance for the ceiling heights in the retail. Instead it's a 10-foot story to apply to the whole building.

The residential would still be viable at its current heights and perhaps some compromise could be made but we don't support the entire project going through as it is as it should have been done in a planned-unit development. I think there are

compromi ; that can be made to find at is best for everyone here.

MS. MILLER: Is there some regulation or statute that precludes going for a variance where the applicant might also go for a PUD?

MR. PARKER: You can always apply for either one but what I'm saying is they are different standards. There's a positive standard to a PUD where you are applying for extra density in exchange for wonderful amenities like this project contains.

MS. MILLER: It just sounds to me like if they can apply to either one and they apply for a variance and they meet the variance test --

MR. PARKER: What I'm saying is this doesn't meet the variance test.

MS. MILLER: You're saying it doesn't meet the variance test.

MR. PARKER: Clearly not.

MS. MILLER: Not just because it could go for a PUD?

MR. PARKER: No. It should go for a PUD because it can meet the PUD standards and clearly does. It clearly does not meet the variance standards.

CHAIRPERSON GRIFFIS: Let me make

absolute clear Mr. Parker I don't hear him stating, and correct me, that because they could have gone for a PUD then you can't grant them a variance but rather looking at the analysis of a variance, you don't believe that they make that test. And on all the elements they are trying to make the test of the variance it fits appropriately within a PUD review and approval.

MR. PARKER: That is correct.

CHAIRPERSON GRIFFIS: And a PUD is a vehicle which looks at the entire zoning of that area. It looks at the adjacent zoning and kind of throws it all into a mix to do something unique and it is to be a higher quality of urban design and architectural design and provide amenities to the area.

With the balance of providing amenities there is kind of a melting of the massing of a building so you may have a little bit extra lot occupancy or little extra height that is accommodated in order to effect an amenities package. Okay.

MS. MILLER: Okay.

CHAIRPERSON GRIFFIS: But there is nothing requiring one to go for one or the other.

MS. MILLER: Okay. Well, I'm glad we had that --

MR. PARKER: Different s ıdards.

MS. MILLER: So while we are discussıng the varıance then, I thınk that one of your points that you consıder the LDA a sales agreement and they have characterized it as a set of covenants whıch encumber the property.

MR. PARKER: Self-imposed covenants. They weren't on the property before the sales contract was signed.

MS. MILLER: Okay. So would you say that is a self-imposed hardshıp?

MR. PARKER: Indeed.

MS. MILLER: Are you famılıar with the Monaco case?

MR. PARKER: I'm not.

MS. MILLER: Okay. Well, I thınk we mıght have mentıoned ıt to you before in the context of standards for varıance beıng more flexıble wıth nonprofıts because of their mıssion. It also makes reference to covenants being an exceptıonal condition on the property.

CHAIRPERSON GRIFFIS: Aren't those historıc restrictive covenants in Monaco?

MS. MILLER: Well, that may be a distınction which Mr. Parker is makıng that is self-

imposed.

MR. PARKER: I think that is a distinction. I think that also there still needs to be a basic address -- a basic meeting of the test that I don't believe even for a lower standard applies to this case. I think there clearly is no physical characteristic involved and a sales contract in and of itself does not apply even to a lower standard for an exceptional situation.

CHAIRPERSON GRIFFIS: It's an interesting point. Mr. Parker, I think, is very persuasive and this whole thing is appropriately brought by the Office of Planning. I'm glad we have it. Let's look at the past proceedings of the Board in other applications.

Ms. Miller, you brought up Fort Lincoln and it was also stated, and I believe that was also an NCRC award. Look at the impact and what we are trying to do here and we've got all this commercial going here and we have all this residential. The point we were pushing them to do a PUD is what do they have, like 50 variances on the property? In all reality it was six or seven or maybe nine.

When you start adding up all those variances you kind of wonder why aren't they going

through whole review process and a HD standard. It seems to me, I don't think any other Board members sat on it, but the incinerator site in Georgetown which we had actually an FAR variance for.

It was the same issue as they were built, or at least starting to be built and it was an award through a Government agency, I believe. DACD was involved and maybe the RLA. Here was an issue of tenants that had fallen out economically and it was falling apart.

In order to fulfill the obligation with the city award of this and to fulfill the development, there was a variance brought. I think we have proof shown and we denied a lot so it is, I think, an important deliberation and information for the Board to look at this.

MS. MILLER: I have one other question for Mr. Parker. You don't find it a unique situation with respect to this property that a nonprofit organization is trying to accomplish a goal of the city of providing affordable housing to a unique extent 50 percent and do it in a way that also combines good retail for the area in accordance with the city's goals as well?

MR. PARKER: I think what you're getting

into is ding amenities for densit What you're talking about is exactly what the Zoning Commission looks at.

MS. MILLER: I understand that but we were saying the Zoning Commission can look at the same thing in a different context. Looking at it in the variance context in which we're looking at it, it seems unique to me at this point.

MR. PARKER: I think the unique or special situation that the Board of Zoning Appeals looks at is what exist before the project happens. What the Zoning Commission looks at is what is going to exist after the project happens. Is that a good way to look at it?

MS. MILLER: It doesn't answer it to me.

MR. PARKER: Okay.

MS. MILLER: I just wonder why if this isn't unique, I can't imagine the same thing happening --

MR. PARKER: That when we come for variances we're looking at existing unique situations, not what the end product is going to be. A variance should address a unique situation that exist now that prevents something from happening as it should. Whereas this is something that we want to happen and

we want change our standards to allow to happen. I guess that's the way that OP would look at it.

MR. MANN: You said that as far as OP was concerned there were potential compromises that could have been made?

MR. PARKER: And still could. I think this building could be designed to allow a 12-foot retail height either by sinking the first floor, which does lower the quality of the retail but it would allow different uses. If the Board is leaning towards approval, I would suggest an approval for just the commercial rather than the full 10-foot and allowing for a complete extra story.

MR. MANN: And with that compromise then that would still require some variance. Would it not?

MR. PARKER: Absolutely.

MR. MANN: Okay. But just not the full variance.

MR. PARKER: Not a 10-foot variance.

MR. MANN: I see.

MS. MILLER: And why is that? I'm sorry to interrupt you. I just want to make sure we understand that. Why are you recommending that?

MR. PARKER: Well, it seems that although arguments that have been made by the applicant in

terms of actical difficulty have b for the type of retail that will come in and the residential has been addressed to a lesser degree.

MR. MANN: Did OP discuss these proposals with the applicant?

MR. PARKER: Yes.

MR. MANN: So maybe the --

MR. PARKER: I think the applicant can make a -- yeah. Absolutely. Well, I apologize. We may not have discussed a compromise in the amount granted. We did discuss lowering the ground floor.

MR. MANN: But those are the two that --

MR. PARKER: Absolutely.

MR. MANN: Okay. Thank you.

CHAIRPERSON GRIFFIS: Anything else? Anything else from the Board?

MS. MILLER: Just one follow-up. It sounds like your suggestions would decrease the quality of the building or the quality of life for the tenants or whatever. I'm wondering why would you recommend that?

MR. PARKER: We are trying to maintain the integrity of the zoning regulations.

MS. MILLER: Because of the height? How high it is is impacting the zoning?

MR. PARKER: We would li' to see this building built as it's proposed and if the Board chooses to do that, we will accept that. We don't support the precedent that is created and the situation that exist and do not feel this is the appropriate arena for this application.

CHAIRPERSON GRIFFIS: Anything else? Cross examination of the Office of Planning?

MR. HENDERER: We have no cross examination but we would like to offer a few points to address some of the points raised by the Office of Planning.

CHAIRPERSON GRIFFIS: Good. We'll take it up at conclusions. If there is no cross of the Office of Planning, then, Mr. Parker, thank you very much, unless the ANC has any cross of the OP. None. Very well. Let's move ahead then to other Government reports or agencies that are addressed in the application. I don't have any other notes except ANC-1B which is Exhibit No. 23 so let's move ahead to the ANC presentation at this time.

MR. SPALDING: Phil Spalding representing ANC-1B. I live at 1929 13th Street. I think the applicants have done a remarkable job this morning of explaining their situation and the building and their

reason f coming before you. We'll and on the letter that we have submitted to you. If you have any questions, I would be glad to answer them.

CHAIRPERSON GRIFFIS: Good. Thank you very much. Any other Board members have any questions of Mr. Spalding? Does the applicant have any cross examination of the ANC? Any cross?

MR. HENDERER: No.

CHAIRPERSON GRIFFIS: Let me ask you then in this hearing can you recount any of the kind of testimony or reaction to this as they discuss the building?

MR. SPALDING: On the part of the commission?

CHAIRPERSON GRIFFIS: Yeah.

MR. SPALDING: The commissioners were very strongly supportive of this building and this specific design. They were very resident with the problem of the height of the commercial space. In our neighborhood, which you're familiar with, Chairman Griffis, we have a mixture of older buildings and newer buildings and we have a mixture of older shorter retail spaces and a lot of contemporary taller retail spaces. We have a mixture of businesses.

Unfortunately, in a lot of the spaces we

do have orter retail spaces and th have collected retail tenants that have not been an amenity to the community. Specifically increasing the space, the height, in this commercial part of the building would, indeed, we believe attract the kind of retail client that can help serve and develop the community.

The commission was also very resonant with the difficulty of doing so at the expense of losing any of the affordable housing component. Affordable housing is just a touch zone to each and every member of our commission. We are in a part of the city that is developing very quickly.

We are doing everything we can to accommodate transit oriented development, higher density, anything that we can do. In doing so we are constantly looking for any opportunity to maintain and also increase the supply of affordable housing. The idea of increasing the commercial space at the cost of the affordable housing did not sit well with the commission. They want both.

CHAIRPERSON GRIFFIS: Thank you. Anything else? Any other questions? Good. Thank you very much again. We appreciate it. I think that is very informative.

Okay. Let's move ahead then. Let me ask

if there here present today perso to provide testimony in Application 17302, persons in support of the application? Persons in opposition to the application? No further testimony then. Very well. Let's turn it over to you for any closing or summations.

MR. LITMAN: It's going to come at you in two parts if it's okay. In some of the questions that have been raised by Office of Planning and Development there's a couple of things that need to be brought up. No. 1, you were informed about a meeting that took place before.

One of the members of the not-for-profit had met with OPD in regard to some transferable development rights from the studio theater to add two stories to the building. It had nothing to do with the additional retail space. It had nothing to do with making any of the units any larger. It was specifically in the TDR in regarding to adding two floors to the building.

CHAIRPERSON GRIFFIS: Is this a receiver zone?

MR. LITMAN: Pardon?

CHAIRPERSON GRIFFIS: Is this --

MR. LITMAN: We did not.

CHAIRPERSON GRIFFIS: Bu s this a receiver zone? Could you use TDRs on this project?

MR. LITMAN: Well, no is the short answer.

CHAIRPERSON GRIFFIS: Good, because I don't like long answers.

MR. LITMAN: No is the only answer. There was a long process that was involved and we had time frames that we had to live up to with NCRC or we would be in violation of our LDA at that point in time. That meeting took place but it was strictly to add two floors to the building and the determination was made it could not be done timely and perhaps not even overtime. That's No. 1.

No. 2 is we did discuss with OPD the option of going down to add retail space. From a retail standpoint we object to that because it's just not a good environment when you are walking downstairs to enter an establishment. It's obviously the safety and all that. There is a loss of integrity when you are going down a space to enter into it for retail.

But more importantly is the fact that our building is adjacent to metro. We had to have meetings with metro and get some special exceptions and understandings with metro in order to build the building as deep as we are building it because we are

going th stories down, two levels parking, and one for below-grade office space.

To add any additional space there is a term it's an area of influence. To go down any deeper would cause metro major concerns so that was just ruled out from the beginning and I thank the architect for bringing that to my attention because I had forgotten that when they meet with OPD and we did talk about that.

The only last thing I'm going to add is OPD had mentioned that we are trying to add 10 feet to the building. That's incorrect. We are only trying to add eight feet to the building. All the other comments I'm going to let Peter Henderer close with.

CHAIRPERSON GRIFFIS: What's your current floor-to-floor design on the residential?

MR. MORRIS: The current design is 8'9" floor to floor.

CHAIRPERSON GRIFFIS: And that would give you a clear ceiling height of what on the interior?

MR. MORRIS: 8'0".

CHAIRPERSON GRIFFIS: So you have 8 feet. Now you are proposing to 9'5" and 10'9" on the top floor so 9'5" which gives you a ceiling height of what?

MR. WARREN: 8'9".

CHAIRPERSON GRIFFIS: Okay. Let's go ahead.

MR. WARREN: I'm sorry, Mr. Chairman. That is 8'8". Quick math.

CHAIRPERSON GRIFFIS: Okay. And that is when you were testifying to the fact of adding eight inches to every unit and it doesn't matter what it was, the 20, 30, 80 market, everyone gets it.

MR. WARREN: Correct.

CHAIRPERSON GRIFFIS: Okay.

MR. HENDERER: Thank you. That's very helpful. I would also like to note that the characterization of the LDA is merely a sales contract. It's not entirely accurate. It is a set of covenants. It's a full-land development agreement. That's what LDA means. It is a commitment to develop a particular piece of property in a particular manner.

When the RLA sells a property they do enter into a land development agreement with the developer although some of the terms of that are negotiated certainly. Certainly there are components of that which are standard. While some of that is negotiated, some of that is not. Obviously we did negotiate for 50 percent ADU. That is a very

important component towards winning that project. I have been passed a note here to describe some comparable projects.

Tivoli Square at 40 units is 20 percent ADU. Keynon Square at 153 units is 20 percent ADU. Highland Park with 250 units is 20 percent ADU. Barcelona at 33 units is 20 percent ADU. Verona at 30 units is 20 percent ADU. Heights of Columbia, our project, is 50 percent ADU so we are dramatically over the other comparable projects which really adds to the uniqueness of the property.

So just to summarize, I believe we do meet the criteria for a variance. We do have an exceptional situation or condition in the combination of the restricted covenants of the LDA combined with the nonprofit purpose. We have the exceptional situation of condition which creates a practical hardship by impairing the ability to provide the highest quality of life through the development, through the selection of tenants.

The proposed additional height would not have an adverse on the neighborhood and the proposed additional height is not inconsistent with the zoning plan. We respectfully appreciate the Board of Zoning Adjustment's consideration this morning and thank you

for your me.

CHAIRPERSON GRIFFIS: Good. Thank you very much. Let me just clarify what I think the Board should be looking at and I believe the Board's understanding of this LDA is. First of all, the LDA is essentially the contract of purchase. As the Office of Planning stands, it is very understandable to me and they are saying, "Well, look. Okay, so you all got together and you decided what to do. Why is that a practical difficulty? You all created it."

Not their words but I'm trying to be very extreme in understanding this. From the Board perspective this is not a market purchase so it's not as if Wiker put this on and you guys responded and were the highest bidder and now you are saying, "But, look, we paid too much for this project. We've got to do all these things."

There's a unique program that was part of the award of this and that's what the LDA is memorializing. That aspect of all these pieces of the design, the urban design, the social impact, the mix of unit types and affordability, and also providing in the retail.

I think that's what the Board has to take under consideration whether that raises to the level

of practical difficulty and also whether it obviously goes to the uniqueness or the special circumstance. Out of that, is it appropriate for us to award a variance. Obviously we can go into the public good.

Then the critical aspect I hear Office of Planning putting forth is, my gosh, the zone plan. We've got to look at the zoning regulations. We've got a height restriction here. How can you do away with that when, in fact, it would be of bad precedential value.

What is to stop someone else and that is really the way we look at this and what we are having to deliberate on is what we have to look at is if we were to approve this, could the person across the street come in and say, "You have to give us this height because you gave the variance to them." I mean, the basis of which we could not deny somebody else because they have the same circumstance.

That's why we always start with uniqueness and then build upon it. I think it's all out for us here and the question now is to the Board whether we are ready to proceed today, whether we need additional information, or whether we need additional time to deliberate.

Before I get a response to that, quickly

we have spoken of could you not change the dimension. Could you not go for the eight foot. Again, we are not a PUD process. We are not going to design it with you here. You came in for 8 feet and it's 8 feet up or down unless you wanted to amend your application right now and I haven't heard that come from the applicant.

I think if we wanted to have different varieties of heights looked at, then we could ask for more time and have that put into the record. I think it's pretty clear what we are looking at. I'm prepared to go however the Board would like to proceed today.

Mr. Etherly, you have a comment?

MR. ETHERLY: Thank you very much, Mr. Chair. Just a comment in response to inquiry. I would also be very comfortable in moving forward today. I want to be very clear with respect to the appreciation I have for the Office of Planning's analysis of this particular application. I don't take the Office of Planning's analysis in a negative way.

I take it very simply as perhaps highlighting that there is a better or clearer process for this particular application which may, in essence, be true but I don't necessarily think it's completely

determir ive of our abilıty to move orward today. I'm prepared to move forward today, Mr. Chair.

CHAIRPERSON GRIFFIS: Good.

MR. ETHERLY: I simply wanted to once again note that I do appreciate the Office of Planning's report and Mr. Parker is sticking by his guns.

CHAIRPERSON GRIFFIS: Indeed. It's an excellent analysis as we have come to expect. Let me digress for two seconds. I wanted to note on the public record Exhibit No. 22 which was another filing that was from SoCo Heights, the neighborhood association within which this property is actually located.

It's one of the associations that is expressing their support of the request. It is signed by Mr. Ventura, the president. I know we have all reviewed that. Okay. What else? Let me hear from others. Proceed today? Are we ready to roll?

MS. MILLER: I'm ready.

MR. MANN: I'm really on the fence about this. If we want to proceed today, then I'm certainly going to make a decision today but I'm less certain, I think, than other Board members.

CHAIRPERSON GRIFFIS: Okay. Very well.

Let's mo ahead.

MS. MILLER: Okay. At this point then I would like to move to approve Application No. 17302 of Nonprofit Community Development Corporation of D.C. pursuant to 11 DCMR Section 3103.2 for a variance from the maximum height requirements under subsection 770.1 to construct a new seven-story apartment (condominium) building with ground floor commercial premises -- with ground floor commercial at premises 2750 14th Street, N.W.

MR. ETHERLY: Second, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you both very much. Ms. Miller.

MS. MILLER: With respect to our analysis for a variance, I would suggest that this is clearly a unique situation in which we have a nonprofit corporation attempting to build a project in accordance an LDA which has restrictive covenants in it and which is in accordance with a revitalization plan of the District of Columbia.

The applicant has shown a practical difficulty in being able to provide 50 percent affordable housing which was the key component of the LDA and also a practical difficulty in providing quality retail.

They have shown that the have tried to get quality retail and have been rejected, I believe, at least in 15 circumstances. By getting the relief they seek they will be able to attract quality retail which will benefit not only the tenants of the building but the neighborhood as a whole.

They will also be able to attract tenants for the building and allow them to make all of the units equally attractive. Further, I believe it's not inconsistent with the public interest. It's not inconsistent with the zone plan and that the height is in the context of other buildings around it.

Office of Planning did not object on that basis. It's clearly in the public interest. I think that one only has to have listened to the counsel discussing even with Office of Planning how we are going to get more affordable housing in this city. Here we have a project that is unique and that it is offering the highest amount of affordable housing, that being 50 percent. It's clear that this project is certainly in the public interest.

I think that Office of Planning raised the issue of the fact that the covenants were entered into voluntarily and that might be considered a self-inflicted hardship. However, when we do our analysis

for area variances, undue hardship, self-imposed hardships are not a factor. That may be a factor in a use variance but it's not a factor in an area variance.

I understand that Office of Planning has some concern that this might be a way for parties to circumvent the PUD process in the future and that would undermine the whole zoning regulations. However, I think that this is a unique situation. It doesn't open the door for that.

We've had two situations, I think, since I've been on the board where it could have gone either way. One was Fort Lincoln and this case. There may have been another one. In any event, I don't think it has opened the door, our considering variances, where the application might go forward as a PUD instead. I think that covers it for me as far as my initial comments.

CHAIRPERSON GRIFFIS: Mr. Etherly.

MR. ETHERLY: Thank you very much, Mr. Chair. I would definitely associate myself with the remarks of Mrs. Miller in all of the aspects of her analysis. I think she hit it right on the head. I would note additionally that I believe Monaco does offer us a little bit of a ledge, if not a full-

fledged er, if you will, with rega to looking at nonprofits in particular.

I am very, very sensitive to the concerns of the Office of Planning as it relates to perhaps taking that first fledgling step down a slippery slope but I don't think we are necessarily there just yet. I think Monaco, once again, speaks to the uniqueness often times that a nonprofit brings to the table with respect to zoning and land use.

I think this is a very surgical and conservative use of Monaco as we look at the issue of uniqueness and practical difficulty here. Clearly as Mrs. Miller has indicated, I think the case has been made with respect to the difficulties that have been encountered by the applicant as it relates to the leasing of retail space which is clearly pursuant to the LDA a very critical part of this particular property.

I think the real key aspects of the variance test have been satisfactorily met here. As Mrs. Miller indicated with respect to substantial detriment and integrity of the zoning regulations I think that aspect of it in keeping with the upcoming opening of the National's home stand here, that's the home run part as far as this piece goes.

I've been kind of in a c .a mode over the last few weeks so I'll continue that trend and just kind of make a comment as it relates to not necessarily the substance here, but I think this Board is perhaps going to be confronted with the dilemma that the Office of Planning was very good to point out, when we are confronted with applications that perhaps might be better suited for PUDs, P-U-Ds, if you will.

But I think this is a very useful step for this Board to take because as this city continues to grapple with questions around inclusionary zoning and other tools or arrows in the quiver, if you will, to continue to facilitate affordable housing, especially in this market which is a very dynamic and very fast-paced one.

I think it's an important step to have some type of, I don't want to call it an outlet valve because that perhaps minimizes the importance that, I think, this body will have to play in the resolution of some of those very critical questions for the city. I think this is a very appropriate step and use of the zoning regulations. None of that is necessary to get to the outcome that I'm reaching so with a nod towards Mr. Parker, I'm not attempting to set a new precedent

or new s dard here.

I want to be very clear about that. I say that also for my colleagues. Just speaking very broadly I think as we deal with the issue of affordable housing, we have a project here which clearly has as its fundamental aim the creation of affordable housing in a way that doesn't create any artificial divisions, if you will. We are talking the same exact unit.

Whether you're talking market rate or affordable dwelling unit, we're talking the same amenities for all of the tenants. We're not talking about a building that is going to have two classes, if you will, of spaces for tenants. We are talking about the addition of amenities that will make this building a competitive building from a market standpoint and also, of course, for those tenants in the affordable dwelling units.

I think this is precisely the type of thinking and the type of project that we need to see more of in the city. Not only in the 14th Street corridor but throughout our city and it's going to be a challenge that many developers and many builders for profit and nonprofit are going to face. I'm very pleased that my colleagues are open to considering

avenues, eatively or otherwise, to lp facilitate this process. With that, Mr. Chair, I'm prepared to move forward. Thank you.

CHAIRPERSON GRIFFIS: Others? Mr. Mann.

MS. MILLER: Go ahead.

MR. MANN: No, go ahead.

MS. MILLER: All right. I just wanted to add one other comment that was important to me. I looked at this case even like separate from the LDA, was there a practical difficulty in accomplishing the mission here of providing the 50 percent affordable housing and quality retail for a neighborhood that clearly needs it.

I find that certainly the applicant addressed the question of going down deeper and brought to our attention the fact that this was not possible because of metro and they are already going down. There really was nowhere else to go it seems but up the way they have.

CHAIRPERSON GRIFFIS: Mr. Mann.

MR. MANN: I am probably inclined to go ahead and support this case but not because the applicant had a particularly strong case actually. I thought that actually the questions and the deliberation of the Board members has convinced me

more tha he applicant's strong cas There were too many questions I had and too many things that I didn't understand when we started this. Were it not for particularly the arguments that Ms. Miller, I don't know that I would have been able to go that way so I would like to thank you for kind of providing some insight that wasn't otherwise provided that should have been.

CHAIRPERSON GRIFFIS: Good. Appreciate that, Mr. Mann. Very well. We've heard from the Board. I think it's fairly clear where it's going. Let me just conclude then with a couple of statements. First of all, I think Mr. Parker made a very convincing and strong case and very technical analysis of which is very important for us to look at.

It is, as always, one of the elements of which we need to take into account and address whether we agree or disagree and how we move about. I'm sure of the fact -- we've talked about the NCRC and this is the RLARC, the predecessor -- shares some responsibility in this. First of all, this was, as is in the record, and as of the other properties that we've seen come through this Board, a public process.

It was an award that was made of which the LDA program was all established. Why wasn't there a

point at ich the reality of what t impact is in terms of providing this good product? The reality of the process wasn't taken into account and fully addressed and moved ahead. Maybe it was the PUD.

Maybe there are better things that could have come out of it. I don't want to see this in terms of process setting a precedent of, "Look, it's easy enough. Just come in and it's a fast way to get through things." Or to have a great reliance on the NCRC or RLARC in saying, "Look, if we award it they'll give it to you," because that's clearly not the case.

Mr. Mann, I think you're absolutely right that the Board has taken a lot of time to try and make this successful based on what we have before us and based on the reality of how we are able and the jurisdiction of which we are able to approve things.

I think the uniqueness, as Ms. Miller has laid out and I think articulated perhaps a little differently, that this is unique in the aspects of the special circumstances around it. We do have a public award. It is based on a specific program and it's based on a developer that is not looking to add a floor for profit but rather add a floor in order to accommodate the reality of the cost of building a building and 50 percent.

If we look at 20 -- we d ı't get ınto thıs, but I think the Board is fairly familıar with 20, 30, 60, 80 percent of AMI and what that means in terms of a sale or rental of a unit havıng had that argument successfully and unsuccessfully before numerous tımes and know kind of the unıverse that we're talking about.

This is a huge project to be putting on, especıally in a condo market of today's situatıon in the city and looking at the difference between 8' and 8'8" in terms of what that means for residentıal units. That wasn't as persuasıve as the success of the retail on the first floor. We are fighting a heıght lımit here.

In order to really make that useful and to accommodate not just ın addition to the requirements of the LDA but I think ın terms of the importance of 14th Street, there wasn't a lot of talk about the surroundıng area and the commercıal corrıdor of which 14th Street used to be and what it ıs now goıng to be.

I mean, what haven't we seen that is happenıng up there? I mean, the Tivoli was mentioned which was a PUD which we didn't see but we have seen every sıngle other of those parcels. Thıs ıs parcel 5. We've seen 24, 15, 27. I mean, you know, all the

others a probably on their way. T point of all this talk about the rejuvenation.

Actually it's kind of the return of what it used to be which is interesting that the building across the way which is probably original character or some period before. The point is the character is what was able to be built there and what is successful and trying to return it in order to accommodate the quality of retail and the liveliness of the street and the design aspect. It's very persuasive to look at how difficult that is or the practical difficulty that arises out of that.

Very well. Let me end with that. Mr. Etherly.

MR. ETHERLY: Thank you, Mr. Chair. I just wanted to highlight also as we talked about retail I wanted to note that Mr. Parker did note that if the Board was amenable to moving forward he had suggested perhaps a different height stipulation.

I wanted to just kind of come back to the chair's earlier point about not wanting to kind of further tinker with the project in terms of kind of trying to second guess, I think, what has been very credible testimony with regard to the issue of retail experience.

I wanted to note that Mr Miller had touched on the issue of going deeper into the ground. I think what also was very clear through the presentation was the importance of street front retail in particular.

As the Chair talked about, the historic character of 14th Street from a retail standpoint and where we are now heading hopefully towards a revival of that character I think is very important that the retail be maintained at the street level to help continue to encourage that pedestrian traffic.

I think, last but not least, I said it obliquely but I want to be sure to say it very clearly that the Nonprofit Community Development Corporation is to be applauded for being so aggressive with that affordable housing unit component.

As was clearly stated, 50 percent is a very high number and not one that is very frequently talked about in today's real estate parlons, once again, nonprofit or for-profit, so the organization is definitely to be commended along with the entire development team for setting such a bar. I'm very hopeful that others will continue to rise to that bar that you have established. Thank you Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you. Anything

else? V well. We have a motion ore us that has been seconded. Let me ask for all those in favor of the motion signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: Opposed? Abstaining? Excellent. Ms. Bailey, if you wouldn't mind recording the vote.

MS. BAILEY: Mr. Chairman, the vote is recorded as four, zero, one to approve the application. Mrs. Miller made the motion, Mr. Etherly seconded, Mr. Mann and Mr. Griffis are in agreement. There is not a Zoning Commission member here at this time. Are we doing a full order, Mr. Chairman, or summary order?

CHAIRPERSON GRIFFIS: Unless Board members object, I think we can issue a summary order on this. I just want to make absolutely clear obviously any order that we issue first condition, stated or not, would be the approval is based on the plans that were submitted in the application.

The applicant's submitted plans do show a 16-foot slab-to-slab of the first and then the 9'5" floor-to-floor height except for the top level which was of an increased height of 10'9". In the application the overall height then provided would be

the 74.2 eet.

I think just for clarity, Board members, there was some back and forth. OP was saying it's 10 feet and the applicant indicated it's actually 8 feet. We are looking at the total height variance to 74.25 which is kind of split in between. It's 9.245' as the 65 feet is the allowable height of it. What else was I saying?

MS. BAILEY: Mr. Chairman, just for clarity, are you saying that we should add a condition indicating that Exhibit No. 10 are the plans that accompany this approval?

CHAIRPERSON GRIFFIS: No. It would be -- every condition obviously in our orders are that it is to be built based on the plans that were submitted and reviewed and approved so, no, I'm not saying we are actually writing a condition but I'm just clarifying for the Board and perhaps the applicant's perspective that this is what would obviously go down to the zoning administrator for process on this.

MS. BAILEY: Thank you.

CHAIRPERSON GRIFFIS: Okay. Anything else then? I believe we did indicate we would waive our regulations and requirements and issue a summary order unless there is any objection from the Board members.

Any objection, Ms. Miller? You want to say that?

MS. MILLER: No objection.

CHAIRPERSON GRIFFIS: Thank you. I'm not afraid of hanging out there on my own but it's always fun to have people with me. Very well. I think that's it then. We'll issue a summary order on this. Anything else for the Board at this time, Ms. Bailey? Any other business for the Board in the morning session?

MS. BAILEY: No, Mr. Chairman.

CHAIRPERSON GRIFFIS: Does the applicant have any questions on process or procedure at this point?

MR. HENDERER: No further questions. Thank you for your time.

CHAIRPERSON GRIFFIS: We thank you very much. We appreciate you putting the time and effort in making a case for us today. Good luck. I think the Board is looking forward to seeing this come to fruition.

That being said, no other business, I would like to adjourn the morning session of the Board of Zoning Adjustments.

(Whereupon, at 12:06 p.m. off the record for lunch to reconvene at 1:26 p.m.)