

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,
MARCH 1, 2005

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W. Washington, D.C. 20001, pursuant to notice at 2:09 p.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary, BZA
BEVERLEY BAILEY	Zoning Specialist

OFFICE OF THE ATTORNEY-GENERAL STAFF PRESENT:

LISA MONROE, ESQ.

This transcript contains the entire minutes of the public hearing held on Tuesday, March 1, 2005.

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

2:09 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order the afternoon public hearing of the Board of Zoning Adjustments of the District of Columbia. It is still the 1st of March, 2005. My name is Geoff Griffis, Chairperson. Joining me today is Ms. Miller, the Vice Chair, and also Mr. Etherly.

Representing the National Capital Planning Commission is Mr. Mann. Representing the Zoning Commission with us on this field case this afternoon is Mr. Hildebrand. Copies of today's hearing agenda are available for you. They are not that interesting today because you all know why you're here but you can pick one up if you would like.

There are several very important things that I will go through in the opening statement, the first of which is all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions. First, the court reporter who is sitting on the floor to my right. Secondly, we are being broadcast live on the Office of Zoning's website.

Attended to both of those there are

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1 several specific things that we require. First of
2 all, I would like to ask everyone to turn off cell
3 phones and beepers so we don't interrupt any sort of
4 transmission or the attention of those giving
5 testimony before us.

6 Also, I would ask, and actually require
7 according to our regulations, that we maintain a
8 certain matter of decorum in the room so obviously any
9 sort of disruptive noises or actions will not be
10 appropriate but I don't think that will be a
11 difficulty for us this afternoon.

12 Lastly on this issue, before coming to
13 speak to the Board or present any testimony or
14 evidence you are to fill out two witness cards.
15 Witness cards are available for you -- used to be
16 close to the door where you came in, but there are
17 always cards in front where you will provide
18 testimony. Those two cards are to be filled out prior
19 to coming forward and given to the recorder sitting to
20 my right.

21 When first addressing the Board you will
22 need to state your name and your address for the
23 record. You only need to do that once. Obviously
24 that will get the transcript correctly put in.

25 The order of procedure for the appeal will

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1 be as follows: First, we'll hear statement of
2 witnesses of the appellant. Second, we will hear the
3 Government's case presentation. Third, we'll hear
4 from the property owner.

5 Fourth, we'll hear from the ANC within
6 which the property is located. Fifth, we'll hear
7 other intervenor cases if intervenors are established
8 in this case. Sixth, and finally, we will hear
9 rebuttal and closing statements by the appellant.

10 Pursuant to Sections 3117.4 and a whole
11 lot of other regulatory sections, we have control over
12 certain things. First of all, we will establish times
13 set for each case presentation and I'll get into that
14 specifically as soon as we know the direction we are
15 going to take, but also how many intervenors are
16 actually involved.

17 Time constraints and direct and cross
18 examine if also within our jurisdiction to set. We
19 will as we start to address things give any indication
20 of staying on point for cross examination, or perhaps
21 other issues of specificity when we get into it.

22 The ANC, of course, who is a party or intervenor
23 in this case and will be allowed to conduct cross
24 examination as any other intervenors that are
25 established.

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1 The record will be held closed at the end
2 of the hearing on this case except for any material
3 that the Board request and we will be very specific on
4 additional material that we want submitted into the
5 record and when it is to be submitted into the Office
6 of Zoning.

7 It should be absolutely understood and
8 clear that when the hearing ends on this the record
9 only remains open for that information for which the
10 Board requested. Of course, after that information is
11 received, no other information would be accepted into
12 the record.

13 The Sunshine Act requires that this Board
14 conduct all its hearings in the open and before the
15 public. This Board may enter into executive session
16 both during or after a hearing on a case and that
17 would be for the purposes of deliberating on a case or
18 for review of a case. This would be in accordance
19 with our rules and regulations and procedures. It
20 would also be in accordance with the Sunshine Act.

21 Attended to the Sunshine Act we ask that
22 people present today not engage Board Members in
23 private conversations so that we do not give the
24 appearance of receiving information outside of the
25 public record.

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1 We will make every effort to conclude this
2 case, perhaps even today. I will update you as we get
3 close to the 6:00 hour. We will perhaps be hitting
4 some scheduling problems with all of you and with
5 Board members if we go beyond that. Again, I want to
6 get quickly into this so we can utilize the time we
7 have and we will address that specifically as we move
8 forward.

9 At this time the Board will consider any
10 preliminary matters. Preliminary matters are those
11 which relate to whether a case will or should be heard
12 today such as a request for postponements,
13 withdrawals, or whether proper and adequate notice has
14 been provided for this case.

15 If you believe that there is a case
16 scheduled before us today that is not ready to go
17 forward, or you are not ready to move forward, I would
18 ask that you come forward and have a seat at the table
19 in front of us as an indication of having a
20 preliminary matter.

21 Before I go to the others, I will say a
22 very good afternoon to Ms. Bailey from the Office of
23 Zoning who is sitting who is sitting on my very far
24 right. Mr. Moy closer to me on my right also with the
25 Office of Zoning. And Ms. Monroe representing the

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Office of the Attorney General is with us today.

Ms. Bailey, Mr. Moy, a very good afternoon. Does the staff have any preliminary matters for the Board's attention for this afternoon's schedule?

MS. BAILEY: Mr. Chairman, and to everyone, good afternoon. Mr. Chairman, swearing in the witnesses may be a preliminary matter you may want to take up at this time. As you can see, the participants also have preliminary matters to bring to the Board's attention.

CHAIRPERSON GRIFFIS: Indeed, I do assuming that we have two attorneys sitting at the table in front of us. Let me ask all those here that are thinking about testifying or will perhaps be called as witnesses if you would please stand and give you attention to Ms. Bailey, she is going to swear you in.

MS. BAILEY: Please raise your right hand. Do you solemnly swear or affirm that the testimony you will be giving this afternoon will be the truth, the whole truth, and nothing but the truth?

ALL: I do.

CHAIRPERSON GRIFFIS: Very well. Why don't we start on my right if you wouldn't mind

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1 introducing yourself for the record.

2 MR. AGUGLIA: Richard Aguglia. My address
3 is Rockville, Maryland. My office is 1900 K Street.
4 I'm representing the property owners and I have a
5 preliminary matter to move to dismiss the appeal as
6 untimely and for lack of standing.

7 CHAIRPERSON GRIFFIS: Okay. Yes, sir.

8 MR. CAROME: Good afternoon. I'm Patrick
9 Carome, the appellant. I live at 4747 Fulton Street,
10 N.W. I also am -- my law firm is representing me as
11 well and I'm a partner there. The address of the firm
12 is Wilmer, Cutler, Pickering, Hale, and Dorr, 2445 M
13 Street, N.W., Washington, D.C. 20037.

14 I have a preliminary matter which is that
15 we have identified within the last 20 hours an
16 additional ground that we want to assert for the
17 appeal which is that based on the tree and slope
18 protection overlay district which covers, certainly,
19 the area where trees were illegally destroyed, and may
20 well cover the owner's property as well. For that
21 reason we wish to argue that additional ground as
22 well.

23 CHAIRPERSON GRIFFIS: Okay. So we have
24 the first motion to dismiss and the second is to amend
25 the appeal. I think both of them are appropriate to

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1 be heard as we call the case and not just preliminary
2 matters.

3 Ms. Bailey, if you would not mind calling
4 the case for the afternoon.

5 MS. BAILEY: This is an appeal and the
6 number is 17285 of Patrick J. Carome, pursuant to 11
7 DCMR 3100 and 3101, from the administrative decision
8 of the Zoning Administrator of the Department of
9 Consumer and Regulatory Affairs. Appellant alleges
10 that the Zoning Administrator erred by issuing a
11 Building Permit (No. B460927, dated April 23, 2004)
12 allowing the construction of a masonry retaining wall
13 serving a single-family detached dwelling.

14 Appellant contends that the retaining wall
15 violates the Zoning Regulations, including the side
16 yard requirements (section 405), rear yard
17 requirements (section 404), and structures in open
18 space requirements (section 2503). The subject
19 premise is located within the Tree and Slope/Wesley
20 Heights/R-1-A District and is located at 4825 Dexter
21 Terrace, N.W. (Square 1381, Lot 806).

22 CHAIRPERSON GRIFFIS: Very well. Let me
23 take up first for our procedural preliminary matter
24 any request for intervenor status. I understand -- I
25 know Exhibit No. 36 from the U.S. Department of

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1 Interior requesting intervenor status. Is that
2 correct? Okay. If you wouldn't mind just coming
3 forward and introducing yourself as representative of
4 the National Park Service.

5 MR. MURPHY: Good afternoon, Mr. Chairman.

6 My name is David Murphy. I am representing the
7 National Park Service. My office is 1100 Ohio Drive,
8 S.W. Washington, D.C.

9 CHAIRPERSON GRIFFIS: Mr. Murphy, a very
10 good afternoon to you. If you wouldn't mind, just
11 briefly state in a sentence for us the position of why
12 you are requesting an intervenor status in this case.

13
14 MR. MURPHY: Thank you. In accordance
15 with paragraph 3112.15 of the D.C. Municipal
16 Regulations we are asking for the position of
17 intervenor. Because this property's retaining wall is
18 immediately adjacent to U.S. Reservation 529, part of
19 the National Park System of the Nation's Capital, we
20 want to present certain pertinent facts concerning the
21 setting of the structure, proximity to Park Service
22 resources, the concerns this agency has about the
23 structure itself, and the existing and anticipated
24 damaged Park resources and Park management that this
25 will result in.

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1 CHAIRPERSON GRIFFIS: So you're interested
2 based on the proximity.

3 MR. MURPHY: The design, height, and
4 proximity of the wall.

5 CHAIRPERSON GRIFFIS: I see. Okay. Board
6 members, questions? Ms. Miller.

7 VICE CHAIR MILLER: Will you be addressing
8 whether DCRA made an error with respect to issuing the
9 permit for the retaining wall?

10 MR. MURPHY: It is our understanding of
11 the regulations of the District of Columbia that there
12 is high potential for an error in the issuance of a
13 permit for this wall.

14 CHAIRPERSON GRIFFIS: High potential?

15 MR. MURPHY: We believe they are in error.

16 CHAIRPERSON GRIFFIS: All right. That's
17 more definitive. I mean, if there is high potential,
18 then we could perceivably be out of here very quickly.
19 Let's -- well, there it is. Obviously an intervenor
20 status is sufficient at this time.

21 Any other Board questions? I'm going to
22 hear from everybody that is participating in this so
23 we are going to start, first of all, with the
24 appellant's opinion on this establishing an intervenor
25 status. We'll just have you turn your microphone on.

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1 MR. CAROME: I apologize. I not only
2 consent but strongly support the intervention because
3 clearly --

4 CHAIRPERSON GRIFFIS: Indeed. Thank you.
5 Yes.

6 MR. AGUGLIA: On behalf of the property
7 owners I object. First of all, it's not timely. It
8 doesn't meet the 14-day rule. It's not as if the Park
9 Service suddenly became aware of this. Mr. Joseph
10 Kish of the Park Service was on the site at least
11 once, twice, perhaps three times a month beginning
12 when it was started in June of 2004 until the time it
13 was completed at the end of October 2004.

14 CHAIRPERSON GRIFFIS: And --

15 MR. AGUGLIA: Also --

16 CHAIRPERSON GRIFFIS: Go ahead.

17 MR. AGUGLIA: That's unfair to me because
18 I haven't had time to review anything that he has to
19 say and he hasn't submitted any evidence with it.
20 Also, he's in the wrong forum. What he's arguing in
21 his letter here for intervention is that the structure
22 may be unsafe. If it may be unsafe, his recourse is
23 to go to DCRA and file a complaint under the Building
24 Code Regulations Title 12.

25 CHAIRPERSON GRIFFIS: I don't disagree

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1 with you. Believe me, we are going to spend a brief
2 moment but we are going to be very succinct on what
3 the substance of this appeal is.

4 MR. AGUGLIA: I believe it's in the wrong
5 forum.

6 CHAIRPERSON GRIFFIS: So what you brought
7 up is two actual points. One is timeliness, that his
8 request for intervenor status is not timely. Second
9 is his case presentation won't be substantive. I
10 don't believe that the substance of the case
11 presentation will go to whether we can establish
12 intervenor or not. I'll hear from other Board members
13 to see if they concur or oppose that position. Where
14 would you point the Board in terms of looking at
15 timeliness for the establishment or request of
16 intervenor status?

17 MR. AGUGLIA: I believe that under the
18 rules, under 3113.8 if he's intervening --

19 CHAIRPERSON GRIFFIS: Let me draw your
20 attention to 312.15, "At the time of the hearing on
21 the appeal the Board in its discretion for good cause
22 shown may permit persons to have specific right or
23 interest that will be affected by action of the appeal
24 to intervene in an appeal for such general or limited
25 purposes as the Board may specify."

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1 It seems to me in that reading and,
2 frankly, the Board has looked at this prior to coming
3 out, I have not been pointed to where a timeliness
4 would be an issue in terms of establishing an
5 intervenor status. Board comments? Ms. Miller.

6 VICE CHAIR MILLER: I would concur. I
7 think that Mr. Aguglia was referencing a provision for
8 party status for applications and that's different
9 from intervenors for appeal.

10 MR. AGUGLIA: Well, 312 -- I understand
11 your point. I'm at 3112.10. If they are going to
12 intervene, is he intervening as a party? What is his
13 role as intervenor? Is he intervening as a party who
14 wants to present evidence that the wall is unsafe?
15 First of all, again, I say he's in the wrong forum.

16 Secondly, he hasn't met -- he is
17 essentially taking on the same role as the appellant.
18 He hasn't given me sufficient time. That's why we
19 have the rules.

20 CHAIRPERSON GRIFFIS: It seems to be in a
21 bit of a conflict if we establish an intervenor. Yet,
22 they can't present a case because it wouldn't be
23 timely and that's your point. Is that correct?

24 MR. AGUGLIA: That's correct.

25 CHAIRPERSON GRIFFIS: Okay. Yes?

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1 MR. CAROME: I would like to be heard on
2 the question of whether this is the correct forum
3 which Mr. Aguglia has raised.

4 CHAIRPERSON GRIFFIS: It wouldn't be
5 appropriate to discuss that at this time.

6 MR. CAROME: If that were to be a basis
7 for denying intervention, I would like to address it.

8 If that's not going to be a basis, then I don't need
9 to address it now.

10 CHAIRPERSON GRIFFIS: No, and I don't
11 think it is. Forgive me if I wasn't direct on that.
12 I believe that going into the substance of the case is
13 not pertinent to establishing intervenor status or not
14 or whatever.

15 Okay. Does the ANC present have an
16 opinion or statement on establishing the intervenor?
17 Then we're going to go to the Government if they have
18 an opinion.

19 MS. GATES: The ANC would support
20 intervenor status.

21 CHAIRPERSON GRIFFIS: Supports it.
22 Excellent. Does the Government have a position?
23 We'll waive our ticket fee and get you a front row
24 seat.

25 MS. BELL: Good afternoon. Actually, the

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1 Government does object to the intervenor motion for
2 one specific reason. If the purpose of the National
3 Park Service is to be here to give testimony as to the
4 high potential of an error by agency, let me
5 underscore that they are not the code official for the
6 purposes of the construction code and for the zoning
7 regulations.

8 The code official would be, whether they
9 like it or not, DCRA. DCRA has approved the
10 certification of the wall so with regard to the
11 structure, it is not appropriate for the National Park
12 Service to provide testimony.

13 I might also add as a sort of backhanded
14 way to go back to our preliminary matter we also don't
15 think the structure of the wall really is at issue
16 before the Board in this particular appeal.

17 CHAIRPERSON GRIFFIS: Okay. Understood.
18 But address just the basis of proximity and concern of
19 how they might be aggrieved or whether they are
20 aggrieved in terms of being an intervenor or
21 establishing intervenor status in this case. Is there
22 any objection on that?

23 MS. BELL: I'm in the same position as Mr.
24 Aguglia. I just discovered coming in here today that
25 they intended to ask for intervenor status and I just

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1 got a copy from the Office of Zoning, the letter. As
2 I understand it, they are saying that the wall is a
3 foot inside --

4 CHAIRPERSON GRIFFIS: So do we.

5 MS. BELL: They are saying the wall is a
6 foot inside the property line but it would still have
7 some bearing on the National Park Service. I don't
8 know if that has to do with the soil sediment surface
9 or if it has to do with the loss of density of tree
10 foliage which is something that the appellant has
11 raised, or if it is something to do with the drainoff.

12 It's just a little unclear at this time what their
13 basis is other than to say that they perceive that it
14 would have some affect on the park land. My
15 concern --

16 CHAIRPERSON GRIFFIS: Okay. I understand
17 that. We're not asking them to outline their entire
18 case presentation. We'll get to that but I think just
19 what we're addressing is whether there is a legitimate
20 concern of the Park Service in looking at this.
21 You're not definitive in being supportive of that
22 position.

23 MS. BELL: We are also uncomfortable that
24 we have to come here today and learn from the National
25 Park Service about their concerns with regard to the

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1 wall in that we had not been contacted prior to this.

2 We are an agency. We would have liked to work with
3 them to the extent that they had some concerns.

4 CHAIRPERSON GRIFFIS: I'm not sure we can
5 help you with that.

6 MS. BELL: Okay.

7 CHAIRPERSON GRIFFIS: Good. All right.
8 Board members, we've heard from -- have I heard from
9 everyone standing in the case? We have a big roster
10 so don't let me forget anyone if I move ahead very
11 quickly.

12 Ms. Miller.

13 VICE CHAIR MILLER: I would be in favor of
14 granting party status. I think if we look at the
15 language in 3112.15 that the National Park Service has
16 noted here that it is a party with a specific right or
17 interest that will be affected by the action on the
18 appeal. They are bordering the property.

19 As far as what they end up testifying to,
20 that is something that we can get to later with
21 respect to relevance. But as far as party status
22 goes, I think they have made their case and that there
23 isn't any requirement for appeal that I see with
24 respect to a 14-day notice.

25 CHAIRPERSON GRIFFIS: Very well. Any

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1 other comment on that? Very well. Any opposition to
2 establishing the Park Service as an intervenor? Okay.

3 We'll take that as a consensus of the Board then to
4 move ahead. We now have established the entire --
5 unless there are other entities, persons present that
6 believe they should request intervenor status. Not
7 noting any indication of that, let's move ahead then.

8 Mr. Murphy, thank you very much. Let's
9 move to a motion to dismiss at this time. While the
10 Board pulls together all the information that has been
11 recently submitted and submitted in the past, let me
12 just underscore what we have now said a couple of
13 times. Once we establish whether this appeal moves
14 ahead or not, we will take time to define the specific
15 and very narrow scope of what this appeal will
16 encompass.

17 This Board has very limited -- much to our
18 dismay very limited jurisdiction and authority and,
19 therefore, it is wasting our time and all of your time
20 if we get into long and lengthy discussions, cross
21 examination, testimony, or briefings on issues that we
22 will have little or absolutely no control over.

23 That being said, let's go to the motion we
24 have. Let me just reiterate, or rather clarify the
25 submission. The last submission that I have is

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1 February 28th. It's the appellant's submission
2 regarding timeliness of the appeal in standing. Is
3 everyone in receipt of that? Mr. Aguglia, are you in
4 receipt of that?

5 MR. AGUGLIA: Yes.

6 CHAIRPERSON GRIFFIS: You submitted it.
7 Correct?

8 MR. AGUGLIA: I'm the submitter. There
9 also is a volume of exhibits that was submitted
10 together with that.

11 CHAIRPERSON GRIFFIS: Yes, I'll say.

12 MR. AGUGLIA: It's volume No. 3.

13 CHAIRPERSON GRIFFIS: I've gotten lost on
14 the volumes of exhibits. We are up to over 90. 93 to
15 be exact, I believe. We'll get to those, too, with
16 great interest. Okay. Board members, do you have
17 initial questions on this or a proposed process?

18 MR. ETHERLY: Mr. Chair, I would like to
19 suggest I feel fairly strongly that the written
20 submittals are fairly clear and comprehensive as it
21 relates to the issue of timeliness. I'll also note,
22 of course, that we are in receipt of the DCRA
23 submittal which was received by my watch perhaps about
24 15 to 20 minutes ago to further add to the already
25 voluminous list of submittals.

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1 With that being said, Mr. Chair, I can't
2 be unequivocal enough. I think the written
3 submissions are fairly clear and very strong on the
4 issue of timeliness. It would be my preference
5 perhaps to get right into Board questions as it
6 relates to the issue of timeliness just to give you an
7 indication of where my posture is on that.

8 CHAIRPERSON GRIFFIS: Excellent. Thank
9 you. Others?

10 VICE CHAIR MILLER: In fact, I feel
11 somewhat differently because we got a barrage of
12 filings just this afternoon on timeliness and I think
13 it would help me, at least, if they could focus their
14 main issues before we ask questions.

15 I would propose that the mover of the
16 motion make a brief highlighting his argument and then
17 the appellant responds. DCRA has filed something on
18 this issue as well so I guess at least those three
19 parties. I don't know if our fourth party is going to
20 address it. I guess those three parties who have been
21 participating.

22 CHAIRPERSON GRIFFIS: Very well. I think
23 we are going to split it down the middle. We are
24 going to be very succinct in the fact that we did try
25 to get through and review everything that was

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1 submitted in. As Mr. Etherly well said, when we are
2 handed documents coming out it's hard to be prepared
3 fully for this.

4 Let's move ahead. We are going to have
5 everyone talk very briefly. When I say briefly, I
6 think we're talking about two minutes apiece. You
7 need to just generally highlight your aspects.
8 Believe me, the Board is not shy in asking questions
9 and we'll get to that which may lend itself to moving
10 in other directions.

11 Mr. Aguglia, we'll start with you.

12 MR. AGUGLIA: Thank you. Under Section
13 3112.2 in order to file an appeal as Mr. Carome has he
14 must be an aggrieved party. I would note his home is
15 not within 200 feet of the retaining wall. Our
16 information is that he is more than 300 feet based
17 upon discussions with the surveyor as well as the
18 public space office.

19 He is not an adjacent property owner. By
20 his own admission he has not gone into the park since
21 2002 since the tree cutting incident. He has also
22 said that for roughly seven months of the year he
23 can't see the wall because of the dense vegetation.
24 That's one of his arguments why he's timely. That
25 means what we have is before you roughly five months

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1 of what he considers to be an unaesthetic view from
2 the front of his house.

3 I'm submitting to you that this would be
4 only temporary because if, in fact, you find that this
5 is dismissable or we should have went on the merits,
6 the owners in conjunction with the Park Service intend
7 to plant Virginia Creepers on the property on the wall
8 so, therefore, it will be completely meshed in with
9 the vegetation and that is considered to be the best
10 -- what I'm told by the Park Service is the best
11 planting for that wall.

12 This is a very temporary unaesthetic
13 experience for Mr. Carome. That is not enough to meet
14 the Supreme Court case test that is a concrete injury.

15 In fact, one of the cases that I'm citing, Sierra
16 Club v. Morten, 405 U.S. 727, is where the Supreme
17 Court found that --

18 VICE CHAIR MILLER: Can I interrupt you
19 just for a second so I can follow your argument?

20 MR. AGUGLIA: Yes.

21 VICE CHAIR MILLER: It's my understanding
22 that we were just doing the motion to dismiss based on
23 timeliness.

24 MR. AGUGLIA: It can't stand.

25 CHAIRPERSON GRIFFIS: He wanted to combine

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1 the two.

2 VICE CHAIR MILLER: Oh, okay.

3 MR. AGUGLIA: So on the standing issue,
4 all the cases say there must be a concrete and
5 particularized or invasion or a legally protected
6 interest. Mr. Carome has not shown that. All he has
7 shown is he going to have a bad view for five months
8 and I think that is going to be very temporary once
9 the ivy is planted.

10 Now, with respect to the timeliness issue,
11 all right, under the rules and under the same
12 regulation that I cited, he must appeal within 60 days
13 of the decision that he is appealing. That is the
14 issuance of the permit. The permit was issued in
15 April of 2004. That is not to be confused with the
16 DCRA investigation. You cannot prolong the statute of
17 limitations by asking for an investigation and then
18 subsequently saying, "I can make an appeal for that
19 time period."

20 CHAIRPERSON GRIFFIS: Good. Being of
21 simple detailed mind, you just indicated that in 2004
22 the appeal was issued. It was issued when, 23rd
23 April, 2004?

24 MR. AGUGLIA: The permit was issued April
25 23rd, 2004.

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1 CHAIRPERSON GRIFFIS: See how fragile my
2 mind is?

3 MR. AGUGLIA: The application was filed in
4 February. It was approved by DCRA for zoning
5 structure and --

6 CHAIRPERSON GRIFFIS: You are setting up
7 the initial milestone of when the clock starts as the
8 23rd of April.

9 MR. AGUGLIA: Yes.

10 CHAIRPERSON GRIFFIS: Because clearly no
11 one would know in the general public when an
12 application went in for permit. Correct?

13 MR. AGUGLIA: That's correct. I would
14 agree with that.

15 CHAIRPERSON GRIFFIS: So that's our first
16 date. We have 23rd April '05.

17 MR. AGUGLIA: The construction on the wall
18 started in June and finished in late October.

19 CHAIRPERSON GRIFFIS: Do we have a date of
20 construction start in June?

21 MR. AGUGLIA: According to Exhibit 1
22 sometime in June.

23 CHAIRPERSON GRIFFIS: So the second half
24 of June we're talking.

25 MR. AGUGLIA: Mid to late June.

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1 CHAIRPERSON GRIFFIS: Good.

2 MR. AGUGLIA: And finished in late
3 October. That's an exhibit that I submitted today, an
4 amendment to our affidavit.

5 CHAIRPERSON GRIFFIS: Finished. You mean
6 the work finished? Completed in late October?

7 MR. AGUGLIA: Yes, the last cap was put on
8 the wall in late October. All right. Now, here is
9 some of the background. In 2002 the house was razed.

10 CHAIRPERSON GRIFFIS: I don't think we
11 need background. I think that's what we need. It's
12 timeliness, right? You are asserting in the fact of
13 the matter that the appeal was filed on the 12th of
14 December of 2004.

15 MR. AGUGLIA: December 13th.

16 CHAIRPERSON GRIFFIS: The 13th. Indeed.
17 So the 13th it was filed.

18 MR. AGUGLIA: This is the 10-day rule
19 because it is a "structure" which we deny. It was
20 capped and, therefore, under roof and, therefore, he
21 misses the 10 days.

22 CHAIRPERSON GRIFFIS: So you're saying
23 based on the intent of the 10 days in terms of
24 completeness that has passed.

25 MR. AGUGLIA: That has passed.

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1 CHAIRPERSON GRIFFIS: And the 60 days?

2 MR. AGUGLIA: And the 60 days. He's eight
3 months past the issuance of the permit. There was
4 work going on between June and October so he's well
5 past the June date in terms of 60 days. But the
6 background, some of the background needs to be
7 explained and that is that this wasn't a simple
8 construction development that the neighbors and the
9 ANC were all over this house beginning in late 2002
10 because they didn't like what was going on for issues
11 other than the retaining wall.

12 CHAIRPERSON GRIFFIS: So as part of the
13 house permit construction there were public issues
14 involved.

15 MR. AGUGLIA: Correct. This is a very
16 well run ANC, 3-D. They know what's going on in their
17 neighborhood all the time. One of the affidavits --

18 CHAIRPERSON GRIFFIS: You don't want to
19 show any favoritism here.

20 MR. AGUGLIA: Okay.

21 CHAIRPERSON GRIFFIS: Keep it straight.

22 MR. AGUGLIA: All right. One of the
23 affidavits that Mr. Carome himself submitted indicates
24 that many of the neighbors were aware of what was
25 going on with the house as early as 2002.

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1 CHAIRPERSON GRIFFIS: When we talk about
2 the ANC, the ANC was involved, how were they involved?
3 Was there a relief sought for the house and you had
4 to go and present to the ANC?

5 MR. AGUGLIA: I believe the ANC and the
6 neighbors were responsible for having several stop
7 work orders issued on the house in 2003.

8 CHAIRPERSON GRIFFIS: Okay. Was this
9 during construction? You are giving us background.
10 Was it ever on the scheduled ANC meeting or was it
11 ever on schedule for an ANC meeting? Was it publicly
12 announced?

13 MR. AGUGLIA: I do not know.

14 CHAIRPERSON GRIFFIS: Go ahead.

15 MR. AGUGLIA: But, again, one of Mr.
16 Carome's own affidavits indicates that many of the
17 neighbors were watching the house during the raze
18 period. The original house was razed. There was an
19 investigation into tree cutting allegations also in
20 2002.

21 In 2003 there were stop work orders issued
22 on the house. Then we come to April of '04 when the
23 permit was issued for the retaining wall so this is
24 just not something that has come out of the blue.
25 This was on the radar screen of the neighbors. My

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1 point is that Mr. Carome can't bury his head in the
2 sand and say, "Oh, by the way, I didn't see this until
3 the leaves feel off the trees and, therefore, you
4 should give me 60 days from that time period."

5 CHAIRPERSON GRIFFIS: Okay. But how do
6 you address the fact -- so you've given us that
7 background and there's a lot of activity on that but
8 this appeal is going directly to the permit for the
9 retaining wall.

10 MR. AGUGLIA: That is correct.

11 CHAIRPERSON GRIFFIS: Whatever happened in
12 2002, 2003, why is that relevant?

13 MR. AGUGLIA: Because the house was under
14 constant scrutiny from the neighborhood and there were
15 many neighbors who knew that a retaining wall was
16 going up.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. AGUGLIA: So for Mr. Carome --

19 CHAIRPERSON GRIFFIS: So you're saying
20 that the overall scope of the work should have been
21 known because there was so much attention on it that
22 didn't subside.

23 MR. AGUGLIA: Exactly. It did not
24 subside.

25 CHAIRPERSON GRIFFIS: 2002, 2003, up into

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1 2004. April a new permit was applied for. It should
2 have been no surprise to anybody.

3 MR. AGUGLIA: That's correct.

4 CHAIRPERSON GRIFFIS: I gotcha. Okay.

5 MR. AGUGLIA: It was almost cause celebre.

6 CHAIRPERSON GRIFFIS: Oh, I like that.

7 MR. CAROME: I'm going to go to time
8 limits right away because I have a difficult time
9 thinking that standing is an issue.

10 CHAIRPERSON GRIFFIS: Good, because I
11 don't think we need to spend a lot of time on standing
12 whether one is aggrieved and bringing any appeal so
13 let's move ahead.

14 MR. CAROME: Yes. This appeal clearly is
15 timely under Section 311.2. It was filed on December
16 13, 2004. That was less than 60 days from my first
17 knowledge of the permit. It was less than 60 days
18 from when I should have had reasonable knowledge of
19 the permit. It was during the course of DCRA reviews
20 and stop work orders that I filed the appeal. It was,
21 in fact, before the completion of the administration
22 process on this permit that I filed the appeal. This
23 administration process did not end until December 16th
24 or 17th, 2004.

25 The under roof argument, frankly, I would

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1 suggest is silly. They claim that there was a capping
2 off of the structure. I don't know whether the Board
3 is aware of it. Within the last 24 hours they have
4 switched their dates as to when this occurred. In the
5 affidavit they filed on Friday the stone mason
6 asserted that the capping off happened on November 14,
7 2004.

8 He has now, I think, because he recognized
9 that would have been illegal because of the pendency
10 of the stop work orders, conveniently submitted a
11 brand new affidavit saying that he has reviewed the
12 situation and, as a result, has decided that the wall
13 was capped off in late October just before the stop
14 work order was interposed. He says that he recalls
15 that. I don't know whether the Board even has that
16 new affidavit that was handed to me by Mr. Aguglia
17 just before the hearing began.

18 CHAIRPERSON GRIFFIS: Was that submitted
19 in?

20 MR. AGUGLIA: I submitted the original
21 last time.

22 MR. CAROME: In any event, I don't think
23 -- since that only goes to the under roof issue, which
24 I think is silly, I'm not sure that too much needs to
25 be done. I do want to explain, though, for the

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1 Board's purpose, and I'm going to stand up and address
2 it.

3 CHAIRPERSON GRIFFIS: Just one direction.

4 You have to be on a microphone so wherever you're
5 comfortable if you want to stand, that's fine but I'm
6 going to need you just to be close to a microphone.
7 The recorder is going to give an indication if you go
8 off mike and you're going to have to get closer to it.

9 Let me just get some clarification while
10 you get set up there. You made a quick statement
11 about a time period or a milestone that when you
12 should have known or could have known. What was that?

13 MR. CAROME: Well, I learned that the wall
14 was present there in late October. There were two
15 events that --

16 CHAIRPERSON GRIFFIS: How did you learn
17 that it was present, by looking at it?

18 MR. CAROME: Yes. I could not see the
19 wall from my house during the summertime because there
20 is a thickly wooded forest there which is the Wesley
21 Heights Park. It's a little less thickly wooded now
22 that the damage has occurred from this wall but it was
23 nonetheless in such a state last summer that one could
24 not see the wall from my home or really from the
25 exterior of Wesley Heights Park.

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1 CHAIRPERSON GRIFFIS: What is your
2 opinion? Is this a fairly big construction job
3 building this retaining wall? Small?

4 MR. CAROME: I think it was a very
5 substantial construction job that was hidden from the
6 neighborhood behind a huge house and behind a large
7 forest which is right here in this area. I would like
8 to --

9 CHAIRPERSON GRIFFIS: Mr. Moy is going to
10 give you a handheld.

11 MR. CAROME: Thank you. Going to the
12 question of --

13 CHAIRPERSON GRIFFIS: Wait. Now I'm back
14 onto this somewhat how you are impacted by this. You
15 are indicating that this is some huge construction job
16 but you weren't aware of it until it was actually
17 finished. We have April, May, June, July, August,
18 September. That's six months of construction that has
19 been laid out here.

20 MR. CAROME: That's inaccurate, Mr.
21 Griffis. Their own affidavit, which I have serious
22 reason to be suspect as to its accuracy, says that the
23 construction began at the end of June so we don't have
24 that much time.

25 CHAIRPERSON GRIFFIS: I'm sorry. That's

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1 what he indicated.

2 MR. CAROME: In fact, it's the end of June
3 is what they assert.

4 CHAIRPERSON GRIFFIS: We're talking a week
5 here or there. Even still you had four good months,
6 three and a half months of construction.

7 MR. CAROME: There are a whole host of
8 reasons that I would like to get to that I have
9 briefed on this. If I could, I would like to --

10 CHAIRPERSON GRIFFIS: Okay. I won't
11 interrupt your flow.

12 MR. CAROME: -- address the timeliness --
13 I'm sorry, the under-roof question. This is a scale
14 model of the site in question. This is the 4825
15 Dexter Terrace lot. This is the new house that is
16 under construction there now. That is the old house
17 that was razed illegally without any permit and
18 subject to a fraudulently created permit.

19 CHAIRPERSON GRIFFIS: All right. Cut down
20 the embellishments here.

21 MR. CAROME: These are all important facts
22 and they go to timeliness.

23 CHAIRPERSON GRIFFIS: I know but let's not
24 interject all these illegal or whatever it is.

25 MR. CAROME: The whole structure -- I've

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1 got to put the microphone down for one second.

2 CHAIRPERSON GRIFFIS: Nice looking model.

3 MR. CAROME: The whole structure is not
4 just the wall. It is the entire terrace that is
5 supported by the wall and the wall also supports.
6 Now, just on this model just the other important
7 details. There is a line going down here which shows
8 the no-build lines, the side lines, and the no-build
9 line for the rear lot line.

10 This is Wesley Heights Park here. It goes
11 much further and this is not to scale, this part of
12 it. This is the stream that runs through the middle
13 of Wesley Heights Park. These brown things represent
14 silt damage flowing off the wall into the park.

15 Just to be clear -- again, I'm going to put this
16 down.

17 MR. AGUGLIA: We, of course, have to
18 object to the fact that this model was never --
19 pictures of the model or any notice of the model were
20 not part of this case. This is totally new on the
21 spot.

22 CHAIRPERSON GRIFFIS: Right.

23 MR. AGUGLIA: He says it's drawn to scale
24 and then he says it's not drawn to scale. We really
25 object to the use of this for lack of any notice

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1 whatsoever.

2 MR. CAROME: This is a visual aid for the
3 hearing. I do have pictures of it which I'm happy to
4 share. You've got visual aids for your presentation
5 as well I'm sure.

6 MS. BELL: If I could get a word in
7 edgewise -- thank you -- I have two concerns. First
8 of all, with regard to the under roof, there isn't
9 even a wall shown here for the purposes of --

10 CHAIRPERSON GRIFFIS: You mean on the
11 model he's not showing a wall.

12 MR. CAROME: I'm holding it in my hand.

13 MS. BELL: Okay. If you could put that
14 down so we could take a look because we're from behind
15 so I apologize.

16 CHAIRPERSON GRIFFIS: Believe me, we are
17 going to slow this down a little bit even though we've
18 gotten into a great speed so far. If there are
19 concerns that you haven't seen something that is
20 showing and all that, I understand. Just bring it to
21 our attention and we'll make sure we run through it a
22 couple of times.

23 We do have the objection of this and we
24 could require you to make 20 copies to submit into the
25 record. Nonetheless, I think we are going to move

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1 ahead and I think the importance of where we go with
2 this model is useful to the Board. I need you to get
3 focused right into the time limits because we are
4 getting off direction here in terms of the actual
5 time limits walking through an awful lot of different
6 elements to it.

7 Let's get back to it very quickly. If you
8 wouldn't mind when you're finished just remind
9 yourself -- I'll try to remind you or whatever -- put
10 it back together and show obviously DCRA and the
11 Government what the finished model is that you are
12 proposing.

13 MR. CAROME: Certainly. My wife didn't
14 finish this until about 4:00 last night. I have
15 photographs of this because --

16 CHAIRPERSON GRIFFIS: We will have to have
17 documentation in the record, of course, but we'll get
18 to that.

19 MR. CAROME: Just on the timeliness point,
20 the assert that the -- I wish I hadn't pulled the wall
21 off -- they assert --

22 CHAIRPERSON GRIFFIS: You've got all these
23 people here to help you.

24 MR. CAROME: Why don't you put the wall
25 back on. They assert that the roof of that structure

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1 are the tiny little capstones on top of the wall.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. CAROME: I assert that the roof on
4 this structure -- it's not here yet because it would
5 be green -- the roof on this structure, of course, is
6 the top of the terrace surface of the structure.

7 CHAIRPERSON GRIFFIS: So you're saying the
8 grading is the last thing that actually defines the
9 retaining wall?

10 MR. CAROME: Actually, well, it's the last
11 thing that defines this structure. I mean, these
12 outer walls might be themselves retaining walls but
13 obviously they are attached to an enormous structure
14 called a --

15 CHAIRPERSON GRIFFIS: Okay. So to follow
16 your argument, for us to find that it is timely
17 because it actually isn't topped out, we have to
18 establish the fact that this isn't a retaining wall
19 but actually a structure or a platform and the
20 platform is not finished.

21 MR. CAROME: Well, no. I don't think
22 that's right. I think there are two responses to
23 that. One, I don't think that there is an under-roof
24 requirement with respect to a retaining wall or a
25 wall. That is something that applies to buildings. I

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1 think there are aspects -- I do assert, although I am
2 not even making them in my top ten arguments -- I do
3 assert that this is in some respects a building the
4 roof of which is this terrace.

5 I'm not pressing that and I certainly
6 don't mean to press it now. In any event, Mr.
7 Aguglia's point is that this is not a building and he
8 can't have it both ways on that. I don't think there
9 is a roof requirement at all, an under-roof aspect at
10 all that affects the wall.

11 CHAIRPERSON GRIFFIS: Then let's look at
12 the intent. Forget the roof stuff because I think it
13 is getting to be a little absurd if we're talking
14 about a roof on a retaining wall. Let's talk about
15 the intent then. The intent as it's indicated in the
16 regulations is 10 days prior to topping out or putting
17 a roof on. It means finished.

18 MR. CAROME: Well, yes, and finished
19 here --

20 CHAIRPERSON GRIFFIS: Or enclosed, at
21 least.

22 MR. CAROME: Finished here happened in
23 approximately the third week of December. Maybe the
24 second week of December.

25 CHAIRPERSON GRIFFIS: Why do you get that

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1 date?

2 MR. CAROME: I have photographs that show
3 that there was not any grass on top of the --

4 CHAIRPERSON GRIFFIS: Okay. What about
5 the masonry element that was part of the focus of this
6 appeal? I mean, isn't the intent of the regulation --
7 tell me if you differ -- the intent of the regulations
8 is, my gosh, by the time this thing is out of the
9 ground, by the time they are laying shingles on it,
10 you pretty much are past the time where you could see,
11 anyone could see, where there might have been an error
12 made. We've got to stop the clock somewhere. All
13 right, we'll give you a week after it's finished.
14 You're saying this masonry wall, the finishing of
15 which is actually the grading for the site.

16 MR. CAROME: I'm saying that the finishing
17 of it is the grass sod surface. Let me back up. I
18 think it is important, you are correct, that overall
19 for this appeal it is important that we understand
20 what is the structure here. My position is that it is
21 a 400 foot wall supporting a quarter acre terrace.

22 CHAIRPERSON GRIFFIS: How is that not a
23 retaining wall?

24 MR. CAROME: The outer exterior wall
25 portion may be retaining wall but that is -- there is

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1 obviously, as I was holding up there, much more to
2 that. The term structure is defined in the zoning
3 code to include a number of things. One thing it
4 includes is a retaining wall. Another thing it
5 includes is a platform. A platform is defined in
6 Websters to include a terrace.

7 A terrace is defined in Websters to
8 include an elevated area that is either natural or
9 constructed that is either paved or has plantings on
10 top of it. And so what we have here even if you
11 assume arguendo, for the sake of argument, that the
12 wall is a retaining wall, that's not the whole
13 structure. If that was filled with concrete --

14 CHAIRPERSON GRIFFIS: So how deep is this
15 terrace? How tall is it above the grade? Is it
16 allowed in the rear yard?

17 MR. CAROME: I would ask one of my
18 assistants to bring up that photograph. It is taller
19 than -- it is 30 feet now at this point and this
20 point. Of course, a fence of some sort is going to
21 have to be erected on it and the plans call for a
22 fence and it's not up yet. That's another reason why
23 this is not finished. The engineering plans show that
24 a fence will be here. The building code requires that
25 there be a fence there for safety. Somebody who fell

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1 here would die in the bottom of the park.

2 It is approximately 30 feet from the park
3 land here at this point. At this point it towers over
4 the Tate's house which is not quite that close to it
5 but it certainly is the only thing they can see out of
6 the back of the window. It is less than 30 feet at
7 other points. As you can see, it's graded. It is
8 steeply graded. This used to be a ravine which has
9 now been filled with a terrace.

10 When I picked this thing up everything I
11 pick up was not there before. You can see people and
12 those are real to scale. That's what people are --
13 maybe it's hard for you to see them. Those people are
14 to scale. This is a huge structure.

15 CHAIRPERSON GRIFFIS: Okay. It gives us
16 some proportion to it.

17 MR. CAROME: So to answer your question
18 how tall is it, I think I've probably given a too long
19 answer. I apologize.

20 VICE CHAIR MILLER: Did you say when the
21 grading was done? I mean, you consider that to be the
22 roof. Isn't that correct?

23 MR. CAROME: That was not finished until I
24 believe after the appeal was filed. It certainly was
25 not finished -- the key date for the 10-day under-roof

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1 rule is December 1st. That would have been 10 days
2 beforehand because the 11th and 12th were weekend
3 days.

4 VICE CHAIR MILLER: Why is the key date
5 December 1st?

6 MR. CAROME: Because under the 10-day
7 rule, which I don't believe applies at all because --

8 VICE CHAIR MILLER: So that's your first
9 argument, it doesn't apply. But if it does?

10 MR. CAROME: If it does, I would have to
11 have filed it within 10 days. If it was under roof on
12 December 1st or earlier, I would have filed more than
13 10 days. The reason it's the 13th the 11th and 12th
14 were Saturday and Sunday so my 10th day -- if the 10-
15 day clock was running it would have run out and the
16 structure was under roof as of the 1st, then I would
17 be out of luck.

18 I have a photograph here that shows -- in
19 Exhibits 33 and 40 in my bound volumes are both
20 photographs. One was taken on December 2nd closer
21 than 10 days which clearly shows that there is no sod
22 or other completed grading going on. It still has a
23 huge pile of muck all over. If you look at Exhibit 40
24 that pictures was taken on December 2, 2004.

25 That does not look under roof to me if

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1 we're talking about a roof. It doesn't look completed
2 to me. If you look at Exhibit 33 you will see what it
3 looks like in February and what it would have looked
4 like some time in mid-December. That's what it now
5 looks like with the sod on top of it, Exhibit 33.

6 I'm going to move off of -- I guess the
7 last point about the under-roof point is that under
8 their original affidavit they asserted that the
9 capping off happened on November 14th. I'm very
10 suspicious of an affidavit that comes in from that
11 affiant which suggest, "No, I really meant that it
12 happened before October." I can suggest the
13 reason why they have done that is there would be --

14 CHAIRPERSON GRIFFIS: What do you mean?

15 MR. CAROME: This goes to timeliness.

16 CHAIRPERSON GRIFFIS: Are you going to
17 suggest the reason that someone took other action?

18 MR. CAROME: No, I won't but I will say
19 it's highly significant here because if they did, in
20 fact, as their original affidavit stated, finished the
21 capping of the roof on the 14th of November as their
22 stone mason said in the affidavit submitted on Friday.

23 That would have been a crime and I would suggest, and
24 I argued in my brief, that the commission of a crime
25 cannot at the same time be the event that disqualifies

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1 the timeliness of someone else's rights.

2 Now I'm going to move onto the other
3 timeliness arguments, that I am timely under the 60-
4 day component of the timeliness rule. The Economides
5 have given three reasons in their brief filed on
6 Friday as to why I'm wrong about that. Their first is
7 that I should have known -- that I did know about the
8 illegal tree cutting and the illegal razing which
9 occurred in the middle -- the illegal tree cutting
10 which resulted in both a federal and a D.C.
11 proceeding. Those were done in the spring of 2002.
12 And I did have some, but only some, vague knowledge
13 about that. I did, in fact, become aware.

14 CHAIRPERSON GRIFFIS: How did you become
15 aware?

16 MR. CAROME: I became aware by going into
17 the park which I used to go through quite a bit and
18 seeing the trees that Mr. Economides tree service had
19 cut down on the federal park land.

20 CHAIRPERSON GRIFFIS: Okay. And that was
21 2002?

22 MR. CAROME: That was sometime in the
23 spring of 2002. There are exhibits in the record from
24 both the Department of Health and the Federal U.S.
25 versus Economides prosecution.

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1 CHAIRPERSON GRIFFIS: Even a couple of
2 press releases.

3 MR. CAROME: Yes.

4 CHAIRPERSON GRIFFIS: So you were aware
5 that stuff was happening in 2002. Okay.

6 MR. CAROME: Yes, of that event. By the
7 way, there was no permit at all for that which was one
8 of the reasons --

9 CHAIRPERSON GRIFFIS: That's not our issue
10 today.

11 MR. CAROME: Well, then he says that I
12 also knew about the illegal razing of the house. That
13 is true. I did because that began on December 15th,
14 2002. I was having a Christmas party at my house on a
15 Sunday afternoon and, lo and behold, they began to
16 wreck the house. I saw a refrigerator fly out through
17 the backdoor.

18 CHAIRPERSON GRIFFIS: And that wasn't also
19 a holiday party?

20 MR. CAROME: I don't think so. The house
21 actually had been vacant at that point for quite for
22 some time, I think. In any event, that event, and I
23 think this is important to timeliness, and I'm sure
24 that the Board is going to be a little -- well, that
25 event was done again without a permit and, in fact,

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1 there is in the DCR record --

2 CHAIRPERSON GRIFFIS: I'm sorry because
3 I'm going to have to keep interrupting you but clearly
4 you brought an appeal on a single permit.

5 MR. CAROME: That's correct.

6 CHAIRPERSON GRIFFIS: Okay. So --

7 MR. CAROME: I'm responding to his
8 argument that what happened in 2002 should have put me
9 on notice about what happened in 2004.

10 CHAIRPERSON GRIFFIS: I don't want to go
11 too far into this whole illegal permits and all that.

12 MR. CAROME: I will just for the record
13 state that there is in the DCR record a clearly
14 fabricated permit for an emergency razing.

15 CHAIRPERSON GRIFFIS: You've done a lot of
16 writing on that.

17 MR. CAROME: It's at Exhibits 53 and 54.
18 If you compare those two documents you will see --

19 CHAIRPERSON GRIFFIS: We've seen them.

20 MR. CAROME: All right.

21 CHAIRPERSON GRIFFIS: Let's move ahead.

22 MR. CAROME: Well, then, I would say that
23 what essentially the argument here about these events
24 in 2002, I did see the razing. I didn't know anything
25 about whether there was a permit or not. That is

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1 something I learned about around Christmas time 2004.

2 CHAIRPERSON GRIFFIS: You knew stuff was
3 happening on the site.

4 MR. CAROME: Yes. So what he is
5 essentially arguing is that two events that neighbors
6 did know about two years earlier, which were illegal
7 acts without permits should mean that I should have
8 concluded in 2004 if somehow I knew there was
9 construction going on in terms of construction of that
10 wall, not construction of a house, that I should then
11 be on notice that permits are being issued. The fact
12 is --

13 CHAIRPERSON GRIFFIS: -- understanding how
14 in 2002 you knew of tree removal. 2003 there was a
15 period of other work that was going on. Then all of a
16 sudden there was a blackout and it has to come back to
17 2004 upwards to the end of summer that you suddenly
18 understand that there's more work going on there?

19 MR. CAROME: Yes. I mean, I think we
20 should focus the question. The question is not
21 whether I knew work was going on there. The question
22 is whether I knew of the administration decision I am
23 challenging. It is often assumed, I think, perhaps in
24 some circumstances accurately, that when someone sees
25 construction activity happening, a light should go off

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1 in their head and say, "Aha, there must have been a
2 permit for that.

3 If I care about this, I should go and
4 look." Here is a different situation. It's been a
5 continuous construction site since this illegal razing
6 of trees back in 2002. Then a number of other things
7 are going on. I'm not -- I am not -- he says I'm
8 continuously monitoring this. That's not true. I was
9 not focused on this in the least.

10 I had stopped using the park after the
11 illegal raising of the trees. That used to be where I
12 would go for walks. I stopped doing it because it was
13 really terrible what it did to that area. I never
14 knew or heard about the permit before mid-October and
15 I was not aware of the construction of a wall back
16 there before mid-October.

17 I was not monitoring this construction
18 site and I couldn't see through the forest. I don't
19 think that the illegal acts in 2002 somehow put me on
20 notice of a permit in 2004. They certainly don't
21 prove that I was closely monitoring the site. In
22 fact, my testimony is that I wasn't closely monitoring
23 the site.

24 CHAIRPERSON GRIFFIS: We are looking at a
25 couple of thresholds. I understand it's not just

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1 construction. In the same respects it's not always
2 that you have to wait until the entire thing is built
3 before you see where the error is. The other aspect
4 of our review of timeliness is should have known.
5 Could you reasonably have known.

6 MR. CAROME: That's correct.

7 CHAIRPERSON GRIFFIS: But what I hear you
8 setting up is over and over, emphasizing, emphasizing
9 illegal actions, illegal actions. It seems like you
10 put yourself on notice and said, "My gosh, I've got to
11 be aware."

12 MR. CAROME: I didn't know that the razing
13 of the house was illegal until 2004. I had no idea
14 that was illegal. They pretended that it was legal.
15 I think that they still pretend today that it was
16 legal. All I did was see a house go down. That
17 doesn't mean that I'm closely monitoring construction
18 activity on the house after that.

19 By the way, we're talking about not was
20 there general construction going on there. I mean, a
21 lot of permits have been issued on this property. The
22 question is did something happen that made, you know,
23 Mr. Carome across the forest can't see things that
24 made him aware not just that general construction was
25 going on up there.

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1 That's not what's important. That a new
2 permit had been issued, that something new and
3 different was going on there from what was permitted
4 or not permitted but, in any event, was going on
5 otherwise.

6 The question is, you know, was I put on
7 notice that there was a retaining wall permit issued.

8 I wasn't. I didn't know there was this wall
9 structure going up until within 60 days of when this
10 was filed.

11 Their second reasons -- let me --

12 CHAIRPERSON GRIFFIS: Let me tell you what
13 I'm thinking and I have a question from a Board member
14 for you, a couple of questions. The mikes are going
15 wild. The first threshold that I look at in terms of
16 timeliness is the issuance of the permits. What we're
17 asking you to do is show us how you move away from the
18 23rd of April, how you are different, how you could
19 not have known that a publicly issued permit that is
20 posted on the property -- I'll make an assumption and
21 get assurances.

22 MR. CAROME: That was my next point.

23 CHAIRPERSON GRIFFIS: I'm speaking
24 generally in terms of the timeliness argument, how we
25 should give now more time rather than starting the

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1 clock right then. Put that aside for a moment and
2 we'll start with Ms. Miller's question. I'm sorry.
3 Let me just take questions.

4 VICE CHAIR MILLER: Let me just see if I
5 can just focus this a little bit. I would like to
6 know rather than just defending why you shouldn't have
7 known way back from information that was available in
8 2002, I would like to know when did you first know
9 about this permit and what led you to know about it?
10 What was it that happened? When would you start the
11 clock running and why?

12 MR. CAROME: My wife, Elsie Carome, went
13 down to the permit office on October 13th, 2004.

14 VICE CHAIR MILLER: Why did she go to the
15 permit office?

16 MR. CAROME: I believe she was concerned
17 about noise. I think that she may have possibly had
18 concerns about what was going on up there. I frankly
19 was working very hard and did not see this. She was
20 concerned about noise coming from the site and she
21 went down. I didn't learn that she went down there
22 until some period of time after that.

23 In any event, she went down there. I
24 think she saw the permit files and she got, I think,
25 copies of the front pages of the permit files.

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1 Sometime after that in mid to late October she brought
2 to my attention that she had done that. I didn't know
3 that she had done it at the time. Then through that I
4 went over and saw the wall.

5 VICE CHAIR MILLER: Was something going on
6 in October, construction that was creating the
7 specific noise that she responded to?

8 MR. CAROME: She has told me that there
9 was loud noise during the day from bulldozers going on
10 at the site.

11 VICE CHAIR MILLER: Is this related to the
12 retaining wall or other construction?

13 MR. CAROME: I don't know. By the way --
14 I don't know. I do assume that it may well have had
15 something to do with the retaining wall. What you
16 have to -- you've got to put yourself in the owner's
17 shoes here. I mean, this has been an ongoing vacant
18 house with ongoing construction. One might have
19 assumed that there would have been a permit issued for
20 the whole thing.

21 Of course, they did it very piecemeal here
22 and they did it with many, many false and misleading
23 statements in the permit files. I don't know how an
24 owner, somebody who is always away from the property
25 but can see it during the winter months, how it is

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1 that one can identify that a permit got filed just
2 from activity that one can't see.

3 Mr. Chair, you raise the question about
4 the posting of permits. They said I must have known
5 that the -- this is their second argument on the 60-
6 day prong, that I must have known about the permit
7 being issued back in April because they say the permit
8 was posted from April and who do they rely on for
9 that.

10 They have put in the affidavit of a stone
11 mason. If that stone mason is in this room, I would
12 like to take his cross examination at some point.
13 They put in a statement by the stone mason that the
14 permit was posted when he started work in June.

15 CHAIRPERSON GRIFFIS: Why do you think it
16 wasn't posted?

17 MR. CAROME: Well, because they were not
18 posted in November or --

19 CHAIRPERSON GRIFFIS: How do you know?

20 MR. CAROME: Because I've got photographs
21 that are in the record showing that the place that
22 they show them to be. I think this is a worthwhile
23 exercise. If you could compare his Exhibit E, the
24 10th page, with my Exhibit 74. Unfortunately, we are
25 going to have to sort of pace through it to see if

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1 this will be worth your time.

2 CHAIRPERSON GRIFFIS: I've got to go to
3 volume 3.

4 MR. CAROME: Here is Exhibit E, the 10th
5 page. It looks like this. It has a big -- this is
6 what they submit as their evidence of the permits
7 being posted. It says "Mr. Permit" up in the top.
8 It's 10 pages into Exhibit E. If you compare that
9 with my Exhibit 74, and you're going to have to go
10 back towards the back of that, it's the 17th page.
11 It's about five pages from the back there's a very
12 similar picture of my Exhibit 74.

13 CHAIRPERSON GRIFFIS: Okay. What are we
14 looking at?

15 MR. CAROME: Exhibit E he cites that in
16 his brief as support for the proposition that the
17 permits were posted starting in April. This picture
18 that I've taken here in my Exhibit 74 I took yesterday
19 morning. If you look at the Mr. Permit file, they
20 assert that this is evidence of posting in April. The
21 Mr. Permit up in the upper left-hand corner if you go
22 to the next page, that is a closer-up image of that
23 same picture.

24 CHAIRPERSON GRIFFIS: How is your's
25 difference than his?

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1 MR. CAROME: Pardon me?

2 CHAIRPERSON GRIFFIS: What are you trying
3 to tell us?

4 MR. CAROME: I'm going to point you to the
5 fax footprint at the top of the next page, this page
6 here. You have to get -- it's the page after -- in
7 Exhibit 74 after mine. It's obviously the very same
8 document but it has a fax footprint of December 13th,
9 2004.

10 Obviously that picture that they have
11 submitted as evidence of posting in April could not
12 have been there because it's got a fax footprint on it
13 of December 13th, 2004. I think there are other
14 aspects of that document that also show that it's a
15 different kind of permit all together. What do we
16 know from that? From that we know at least that this
17 picture, undated picture --

18 CHAIRPERSON GRIFFIS: They have the same
19 windows. We know that for sure.

20 MR. CAROME: Yeah. We do know that. So
21 what else do we know about why permits weren't posted?
22 If you look at Exhibit 73 --

23 CHAIRPERSON GRIFFIS: I'm sorry. In all
24 seriousness here, that is covering most of the permit.
25 What you're saying --

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1 MR. CAROME: I'm just saying that their
2 evidence that they offered of the posting of a permit
3 in April.

4 CHAIRPERSON GRIFFIS: What permit are we
5 looking at?

6 MR. CAROME: They put those together in
7 their Exhibit E.

8 CHAIRPERSON GRIFFIS: What permit does
9 this go to?

10 MR. CAROME: Here is what happened. There
11 were no permits posted in that place.

12 CHAIRPERSON GRIFFIS: I have a very direct
13 question. What is this permit for?

14 MR. CAROME: The Mr. Permit permit?

15 CHAIRPERSON GRIFFIS: Yeah.

16 MR. CAROME: That is for -- I believe it
17 has to do with putting a dumpster in the public space
18 in front of the street.

19 CHAIRPERSON GRIFFIS: So why are we
20 looking at that?

21 MR. CAROME: Because I'm simply pointing
22 out, Mr. Chair, that the evidence that they have
23 submitted here of permits posted in that window is
24 evidence that is dated from December.

25 CHAIRPERSON GRIFFIS: You're saying the

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1 fact that they gave a picture that shows the permit
2 supposedly dated, that you are rebutting that because
3 you have a picture of another window with a permit
4 that has a later date?

5 MR. CAROME: They have -- it's the same
6 window and that Mr. Permit is in their exhibit as
7 well.

8 CHAIRPERSON GRIFFIS: I'm getting so
9 confused.

10 MR. CAROME: I'm sorry.

11 CHAIRPERSON GRIFFIS: I started with a
12 very direct question. How do you -- what is your
13 assertion that --

14 MR. CAROME: I have other --

15 CHAIRPERSON GRIFFIS: Let me finish -- the
16 specific retaining wall permit wasn't posted?

17 MR. CAROME: One piece of evidence is I
18 have just disproved that one of their two pieces of
19 evidence of posting, which is an undated photo, I
20 believe that I have now established that undated photo
21 certainly they put two pictures here together.

22 CHAIRPERSON GRIFFIS: So your saying that
23 their evidence of posting is incorrect but now tell
24 me --

25 MR. CAROME: Yes. Okay.

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1 CHAIRPERSON GRIFFIS: I'm so simple of
2 mind, see, I've got to get them very distilled down.
3 Tell me why you don't believe they were posted because
4 their picture is incorrect. Did you -- is there
5 anything else?

6 MR. CAROME: I have photos from November
7 2004 which show no permits at all in the same windows.
8 I also have in the record there is -- I would like
9 him to come up and testify, Adrian Sanders.

10 CHAIRPERSON GRIFFIS: I'm sorry. You have
11 pictures of November of that window that the retaining
12 wall permit was not posted.

13 MR. CAROME: That's correct.

14 CHAIRPERSON GRIFFIS: Wasn't it
15 complete --

16 MR. CAROME: There were no permits posted.

17 CHAIRPERSON GRIFFIS: But wasn't it
18 complete in October? Why would it have to be in the
19 window in November? I don't really care whether it
20 was there in November or not. I want to know whether
21 -- do you know whether it was posted on the 24th of
22 April?

23 MR. CAROME: I don't know but I think
24 that --

25 CHAIRPERSON GRIFFIS: If you don't know,

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1 that's all I need.

2 MR. CAROME: I think it's extremely
3 unlikely that it was because --

4 CHAIRPERSON GRIFFIS: That just confuses
5 me when you --

6 MR. CAROME: I apologize.

7 CHAIRPERSON GRIFFIS: -- make assumptions
8 here. When did you see it first in the window?

9 MR. CAROME: I first saw the permit in the
10 window sometime in December of 2004.

11 CHAIRPERSON GRIFFIS: And how did you come
12 to see that permit?

13 MR. CAROME: I'll tell you. By November
14 and --

15 CHAIRPERSON GRIFFIS: You were walking by
16 the property?

17 MR. CAROME: Yes. I mean, Mr. Aguglia
18 points out that, "Mr. Carome knows all about this."
19 Well, I did once I recognized what was going on here.

20 Starting in the very end of October and the beginning
21 of November and December I became -- I'm sure Mr.
22 Economides would say -- obsessed with what was
23 happening here so I was not missing anything. I was
24 taking pictures frequently.

25 CHAIRPERSON GRIFFIS: Okay. I think we

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1 can move on pretty quickly because, I mean, we're just
2 establishing the basic understanding of these dates
3 here. It's not when somebody got up or was away for a
4 year abroad and then came back to the neighborhood and
5 said, "Oh, my God. Would you look at that. Well, I
6 wasn't around so I couldn't have known so my appeal is
7 timely."

8 What we are trying to assess here how --
9 what were the availabilities of a person to have
10 knowledge that this was going forward and there was an
11 error created. From your knowledge right now
12 essentially December is when you were first aware that
13 the permit was posted. Correct?

14 MR. CAROME: That was the first time it
15 was, in fact, posted.

16 CHAIRPERSON GRIFFIS: How do you know
17 that?

18 MR. CAROME: I know that it was not posted
19 in November because there was a stop work order.

20 CHAIRPERSON GRIFFIS: December '04 we're
21 talking about. Right?

22 MR. CAROME: '04.

23 CHAIRPERSON GRIFFIS: So by that point
24 it's kind of moot. You can take your permits down as
25 far as I understand.

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1 MR. CAROME: The work was not done. In
2 fact, if you look at Exhibit No. 73 it's a December
3 15th letter to the Economides from the Acting Chief,
4 Building Inspection Division. Second paragraph reads,
5 "You will recall a stop work order was issued November
6 2, 2004 by Inspector Juan Scott for working without
7 posting the proper permits."

8 Also, if you look at Exhibit 76, it's a
9 letter from the Economides to Theresa Lewis at DCRA.
10 I'll just read the first paragraph. "On November 2,
11 2004, Mr. Juan Scott and other inspectors came to
12 review the permits associated with the construction of
13 our home.

14 Recently we were robbed at the trailer
15 twice in a week and we were in process of returning
16 the office back to normal. As a consequence, the
17 related permits were not available and, therefore, the
18 project was shut down until we could provide to you
19 and Juan Scott all the permits pertaining to this
20 property."

21 CHAIRPERSON GRIFFIS: That's all the
22 permits on the property.

23 MR. CAROME: So there were no permits
24 posted. There were no permits. There are photographs
25 that are in the record --

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1 CHAIRPERSON GRIFFIS: No permits posted in
2 December.

3 MR. CAROME: No, there were no permits
4 posted in November. The project was still underway.
5 They had to put -- there was a stop work order on this
6 wall that wasn't lifted until December 20th.

7 CHAIRPERSON GRIFFIS: Do you have that in
8 your submission?

9 MR. CAROME: Yes, I do. The existence of
10 the stop work order -- you'll have to bear with me for
11 just a second.

12 CHAIRPERSON GRIFFIS: Take your time.

13 MR. AGUGLIA: We disagree and believe that
14 is incorrect.

15 MR. CAROME: Exhibit 73, that's what we
16 were just looking at, that is the stop work order for
17 working without posted permits. The Exhibit 51 is the
18 permit file for this property. It says right on it
19 "stop work."

20 CHAIRPERSON GRIFFIS: Stop work on the
21 retaining wall?

22 MR. CAROME: Yes, on the retaining wall
23 permit application. Also, Exhibit 66 is a letter --
24 an e-mail from Elizabeth Carter of the DCRA to my wife
25 regarding the situation at 4825 Dexter Terrace. In

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1 here it is made very clear that stop work orders are
2 site-wide.

3 They cover the entire site. That's
4 certainly what we were being told. If you look at the
5 second last paragraph in the middle, "Inspector Scott
6 will continue to monitor this site to ensure no
7 further construction activity takes place until the
8 property owner has taken the corrective actions as
9 required."

10 There was a site-wide stop work order. It
11 was in part there because there had been no
12 inspections on the wall and because there was, as DCRA
13 admits, a major problem. Also because there were no
14 permits posted for the wall so all construction
15 activity was required to be stopped at that time.

16 If you look at Exhibit 80, I'll have to
17 take you pretty far. This, unfortunately, has a lot
18 of pages in it but it's towards the very end of 80.
19 Exhibit 80 is an exhibit of all the correspondence
20 back and forth between my wife and I and DCRA and
21 other Government officials about this starting at the
22 beginning of November 2004.

23 If you go seven pages from the back, for
24 the record I'll note in the lower right-hand corner it
25 bears a bates number of DCRA FOIA 00427. At the top

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1 it says Scott, Juan. It's a printout obviously of an
2 inspector's e-mail. What I'm interested in is the e-
3 mail from Collin Burrell at the Department of Health.

4 He is explaining why some very limited
5 work was permitted at the site. It included some very
6 limited emergency grading work. He says, "The request
7 single exception was granted by DCRA at a meeting on
8 11/30/04 between DCRA and Department of Health
9 officials and Mr. and Mrs. Economides."

10 It's very clear from this document as well
11 that there was a site-wide all construction activity
12 on the site, including the as yet completed as of --
13 that was put in place in November.

14 CHAIRPERSON GRIFFIS: Okay. But we are
15 still bumping around in November and December. That
16 pretty much establishes you were aware. You were
17 communicating with DCRA.

18 MR. CAROME: Oh, absolutely. I told you
19 that I became aware --

20 CHAIRPERSON GRIFFIS: I know. I'm just
21 stating the obvious just to be redundant.

22 Ms. Miller, you have a question?

23 VICE CHAIR MILLER: I'm hearing a lot
24 about how the stop work order covered all construction
25 going on on the property but how do we know that the

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1 wall wasn't completed before then?

2 MR. CAROME: If you look at my December
3 2nd picture that we looked at earlier with the sod,
4 and I also would suggest the more reliable of the two
5 stone mason affidavits is the one that was submitted
6 that indicated that the last stones were laid on the
7 top of the wall on November 14, 2004. That was after
8 the stop work order as well.

9 The grading was still going on in December
10 and the sod was not obviously from the photo we looked
11 at before of the bear dirt with the huge pile of dirt
12 on top of it. The sod didn't go up until 2004.
13 Again, it's obviously important to my position here
14 that the structure here is the overall structure that
15 I've shown in the model.

16 VICE CHAIR MILLER: I understand. We are
17 just trying to get the dates right for the 60-day
18 analysis. At least I am anyway. I just want to be
19 clear. I think you are saying if you go by one stone
20 mason's affidavit November 14th is the date that the
21 wall was capped off.

22 MR. CAROME: Yes.

23 VICE CHAIR MILLER: But then you're saying
24 there's more to it, that you then go to grading work
25 and things of that nature.

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1 MR. CAROME: That's correct. That's
2 correct. Then --

3 CHAIRPERSON GRIFFIS: Hold on. Mr.
4 Etherly, did you have a question?

5 MR. ETHERLY: No. Let's continue.

6 CHAIRPERSON GRIFFIS: Okay. Let's
7 continue.

8 MR. CAROME: The last reason that Mr.
9 Aguglia on behalf of the Economides asserts in
10 addition to -- the three reasons were, one, I should
11 have known about things from the events in 2002. The
12 second one is about the permits. The permits weren't
13 posted I submit. The third is because I've written an
14 extremely detailed brief here with lots of facts about
15 this, that must show that I was 60 days out I must
16 have been obsessively monitoring the activity.

17 CHAIRPERSON GRIFFIS: You need to address
18 that one then.

19 MR. CAROME: Okay.

20 CHAIRPERSON GRIFFIS: Go back to it
21 because I thought you were going to say when you laid
22 this out you had three other. Maybe it's just the
23 way --

24 MR. CAROME: I do have other arguments
25 here which is --

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1 CHAIRPERSON GRIFFIS: Your administrative
2 process was not complete.

3 MR. CAROME: Yes.

4 CHAIRPERSON GRIFFIS: Is that based on the
5 stop work orders?

6 MR. CAROME: It's based -- it is partly
7 based on the stop work orders but it is also based on
8 the fact that on the 15th of December, two days after
9 I filed my appeal, the DCRA in writing, and this is
10 Exhibit 73, advised the Economides that because
11 required inspections had not been done during the
12 course of the construction of the wall, and also I
13 believe --

14 CHAIRPERSON GRIFFIS: Wait a minute.
15 That's an issue for timeliness. You've already filed
16 an appeal.

17 MR. CAROME: Well, but I'm telling you if
18 I've appealed something and the administration
19 decision I'm appealing had not yet finished the last
20 thing, maybe someone can accuse me of being premature
21 but you can't accuse me of being too late.

22 CHAIRPERSON GRIFFIS: The error we're
23 talking about in this appeal is the issuance of the
24 permit. Is it not?

25 MR. CAROME: Yes, but one of the things --

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1 CHAIRPERSON GRIFFIS: The official
2 decision by the zoning administrative of issuing the
3 permit wasn't finished because inspections of
4 construction hadn't been completed.

5 MR. CAROME: And because a required pre-
6 permit engineering certification of the plans had
7 never been submitted. If you go to -- let's first
8 look at Exhibit 73.

9 MR. AGUGLIA: You will give me a minute
10 opportunity when he's finished to hit the fine points,
11 please.

12 CHAIRPERSON GRIFFIS: Absolutely.

13 MR. CAROME: Exhibit 73 is a letter from
14 Abdullahi Barrow if DCRA to the Economides. The
15 second paragraph says, "You will recall a stop work
16 order was issued November 2nd by Juan Scott working
17 without posting the proper permits."

18 Then on the second page, page 2, second
19 paragraph, it also says, "Please be further advised
20 that because the construction of the retaining wall
21 was not inspected in stages of construction, this
22 letter serves as notice that you are required to
23 provide a structural certification from a D.C.
24 registered professional engineer stating that all
25 walls have been constructed in accordance with

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1 approved plans and that the retaining wall is
2 structurally sound."

3 Now, they are saying two things, I think,
4 and it will become clearer that they are saying two
5 things there. One, they are saying required
6 inspections were not done. They are also saying that
7 there has never been a certification from an engineer
8 of the plans for the wall. What do they do the next
9 day? What does DCRA do the next day?

10 Then on the 16th of December -- this is
11 Mr. Economides' exhibits -- the DCRA faxes to the
12 Economides a blank form that they are supposed to fill
13 out. This is Exhibit K of Mr. Economides' filing.
14 They faxed to him, to Frank Economides, from DCRA a
15 form to be filled out. "Attached structural
16 certification should be sealed and signed by D.C.
17 registered professional engineer regarding the
18 retaining wall. The form --

19 CHAIRPERSON GRIFFIS: Okay, all of this,
20 how does this go to the zoning administrator?

21 MR. CAROME: What I'm saying is they faxed
22 to him two days after my appeal --

23 CHAIRPERSON GRIFFIS: To the zoning
24 administrator?

25 MR. CAROME: The DCRA faxed to --

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1 CHAIRPERSON GRIFFIS: Okay, DCRA but even
2 within DCRA we had zoning issues. Zoning issues come
3 to us.

4 MR. CAROME: Yes.

5 CHAIRPERSON GRIFFIS: How is the
6 structural integrity of this wall whether there was
7 construction inspections or whether there --

8 MR. CAROME: This is going to the
9 timeliness question. This is going to the question of
10 whether a permitting decision was --

11 CHAIRPERSON GRIFFIS: But you cannot take
12 on all the elements and the aspects of the
13 construction and everyone reviews. For goodness
14 sakes, if the plumbing wasn't signed off on the base
15 building permit, it doesn't toll the time for you to
16 come in for a zoning issue. That's a very direct
17 question. Is there anything zoning related in these
18 two pieces of evidence that you are showing us?

19 MR. CAROME: Yes.

20 CHAIRPERSON GRIFFIS: What is it?

21 MR. CAROME: A retaining wall can be built
22 in the required rear or side yards only if it is
23 constructed in accordance with the D.C building code.
24 That is a code provision.

25 CHAIRPERSON GRIFFIS: So how is the

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1 issuance of the permit -- the issuance of the permit
2 in error if this is a means and methods, if it's
3 constructability?

4 MR. CAROME: Well --

5 CHAIRPERSON GRIFFIS: If it's not built in
6 accordance with the building codes, how did the zoning
7 administrator know or what was -- how was his error to
8 issue the permit before he could tell that when this
9 was built it wouldn't be built correctly?

10 MR. CAROME: There is a requirement before
11 a permit is issued that an engineer --

12 CHAIRPERSON GRIFFIS: A zoning
13 requirement?

14 MR. CAROME: Well, I think it is a zoning
15 requirement in this respect because for it to be a
16 properly located structure in the rear yard and if
17 it's just a retaining wall, even still it has to be
18 constructed in accordance with the building code.

19 CHAIRPERSON GRIFFIS: And you're saying to
20 require a procedure, the zoning administrator has to
21 receive a structural engineer's report for retaining
22 wall prior to doing it or as part of his zoning
23 analysis.

24 MR. CAROME: As part of the overall permit
25 process and if it relates to a retaining --

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1 CHAIRPERSON GRIFFIS: Are you asserting
2 that?

3 MR. CAROME: Yes, I am asserting that.

4 CHAIRPERSON GRIFFIS: Good.

5 Mr. Aguglia, opinion on that?

6 MS. BELL: Actually --

7 CHAIRPERSON GRIFFIS: I didn't see you
8 sneaking up on us. Why don't you come up to the
9 table.

10 MS. BELL: Thank you. Unfortunately, we
11 are getting increasingly concerned about how this is
12 going far afield with regard to the question at hand.

13 It is not a requirement that an engineering report be
14 provided to have a permit issued for a retaining wall.

15 I'm not quite sure --

16 CHAIRPERSON GRIFFIS: Just part of the
17 zoning review.

18 MS. BELL: With regard to the retaining
19 wall permit.

20 CHAIRPERSON GRIFFIS: I know, but let's
21 talk about it. The engineer report -- the structural
22 engineer's submission, which has just been stated, you
23 just indicated that it's not required as part of the
24 permit review.

25 MS. BELL: That's correct, for the

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1 retaining wall as the appellant has noted.

2 CHAIRPERSON GRIFFIS: Okay. So it's not
3 just zoning. It's for the entire process.

4 MS. BELL: With regard to the letter that
5 he is point out, there was a concern about inspections
6 being done by BLRA officials with regards to the wall.
7 That was why they asked for the engineering report
8 because they did not conduct interim inspections.

9 CHAIRPERSON GRIFFIS: But supporting your
10 thought of not going too far afield, let's not.

11 MS. BELL: Okay.

12 MR. CAROME: What the DCRA asked the
13 Economides to do was to fill out a form that is --
14 they actually didn't ask -- they asked them to fill
15 out a form that was required to be submitted as part
16 of the permitting process and that was not submitted
17 as part of the permit process.

18 CHAIRPERSON GRIFFIS: But you haven't
19 shown me how it was part of the zoning approval or
20 review or how it actually constitutes an error of the
21 zoning administrator.

22 MR. CAROME: Without that form they could
23 not have made a conclusion that the retaining wall, if
24 that's what it was, was constructed in accordance with
25 the D.C. building code. That language "constructed in

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1 accordance with the D.C. building code" is part of the
2 zoning code, one of the exceptions for what could be
3 put in a rear yard or side yard.

4 CHAIRPERSON GRIFFIS: You're telling me
5 they couldn't tell by the structural engineer's
6 stamped drawings of the retaining wall that it
7 complied with the building code?

8 MR. CAROME: That's correct.

9 CHAIRPERSON GRIFFIS: Because they needed
10 another --

11 MR. CAROME: There is a required form.

12 CHAIRPERSON GRIFFIS: What's the form?

13 MR. CAROME: It is the form that they
14 faxed to him that I was just pointing to you which is
15 Exhibits K and L of Mr. Aguglia's file.

16 CHAIRPERSON GRIFFIS: You're saying that
17 every retaining wall that goes in has to fill this
18 form out?

19 MR. CAROME: Yes, I am. There is a
20 requirement whenever there are -- if you look at the
21 form, it's actually Exhibit L is the form they asked
22 him to fill out.

23 CHAIRPERSON GRIFFIS: Okay. So you are
24 asserting the fact that the zoning administrator in
25 looking -- if he has a checklist as he does this, as

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1 he is going down to check off, one of those aspects
2 should be completed section 111.5.1 of the
3 construction code supplement of 1992 as amended from
4 the structural engineer. It's going to say in or out.

5 Is that right?

6 MR. CAROME: Yes.

7 CHAIRPERSON GRIFFIS: Okay. Is that the
8 process?

9 MS. BELL: Actually, I'm terribly confused
10 about what exactly --

11 CHAIRPERSON GRIFFIS: Mr. Bello is
12 sneaking up on you and maybe he'll be able to answer.

13 MS. BELL: He can. The reason why I'm
14 confused is this is supposed to be an appeal of the
15 permit that was issued, not what forms or other forms
16 may have been needed.

17 CHAIRPERSON GRIFFIS: No, I understand
18 that. We're hanging on a very thin line here but the
19 line is this. In the zoning regulations it does say
20 in order for a retaining wall to be in compliance -- I
21 think it's 733.3 or something like that -- it talks
22 about that it would be in compliance with the building
23 code.

24 Now, that doesn't mean our zoning
25 regulations adopt the entire building code but we are

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1 being pointed to the fact of part of a required
2 process for the permit and the zoning review and
3 approval would be that it was in some sort of
4 compliance. We now have this section of the building
5 code. The quick question is is it a requirement?

6 MS. BELL: Here is my concern. My concern
7 is the 60-day rule or the issue of timeliness, which
8 DCRA also has with regard to this appeal, goes to when
9 he had notice or when the Board wants to infer that he
10 had constructive notice that this wall was going up or
11 when the actual permit was issued.

12 Now, I can appreciate he is saying he
13 didn't know when the permit was issued in April so he
14 subsequently found out when he observed it in October
15 and then he has a number of other dates that he's
16 discussing.

17 MR. ETHERLY: But, Mrs. Bell, the simple
18 question is the implication is is there some aspect of
19 the permit process that was incomplete because of what
20 is being referenced now. Simple question. Let's go
21 to Mr. Bello so we can get resolution.

22 Is there something about the process that
23 is not complete if this piece here isn't checked off?

24 MR. BELLO: Absolutely not. At the time
25 of the issuance of the building permit the signature

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1 of the in-house structural engineer actually closes
2 that door.

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

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. BELLO: Toye Bello.

6 MR. CAROME: I would like an opportunity
7 at some point to cross examine Mr. Bello.

8 CHAIRPERSON GRIFFIS: On that statement?

9 MR. CAROME: Yes.

10 MS. BELL: Could I just interject two more
11 small points? I know that you've heard a lot about
12 this today but even if we assume just for the sake of
13 argument that the appellant had no knowledge about
14 until October, this appeal was filed December 13th
15 which is still more than the 60 days from when he
16 admits that he learned about the actual wall in
17 October.

18 He's saying that he learned in October
19 that the wall existed, that he didn't see before that
20 until the leaves fell from the tree. I think Mr.
21 Aguglia's point and certainly the agency's point is
22 there has been ample evidence on the record that
23 suggest he would have known about this before because
24 of the progress of the construction site and because
25 of the various letters and correspondence with the

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1 city council, as well as press releases and a number
2 of other things.

3 There is a lot of that in the record and
4 you've already heard that. You've already had the
5 papers. Our point is even when the appellant
6 acknowledges that he was aware that he had a problem
7 with this wall, he still waited more than two months
8 before he filed this appeal. I don't think it's even
9 important that we need to analyze the under-roof rule
10 or when the actual cap-off existed. I think it's
11 enough to say what reasonable notice is and the 60-day
12 rule.

13 CHAIRPERSON GRIFFIS: Understood. Ms.
14 Gates, would you mind coming forward? Don't go too
15 far. Ms. Gates, I know you wanted to say something.
16 Go ahead and state your name and address for the
17 record.

18 MS. GATES: My name is Alma Gates.

19 CHAIRPERSON GRIFFIS: Excellent. Can I
20 ask you a question first before you get to your
21 points? Did the ANC take this up at all in terms of
22 an issue? No, I don't want to ask that right now. I
23 want to ask you does DCRA provide you with permits
24 that are issued, a list? Any sort of announcement?

25 MS. GATES: We get them occasionally.

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1 They have now begun and I have just received the first
2 one, an actual paper list. Before they were coming
3 periodically through e-mail but they were not done on
4 a regular basis. There was a period during the
5 summer, I think, when -- they come through Denzel
6 Noble and I believe there was a period this summer
7 when we didn't get any.

8 CHAIRPERSON GRIFFIS: Did you receive an
9 announcement for this specific permit for the
10 retaining wall?

11 MS. GATES: I don't recall. However --

12 CHAIRPERSON GRIFFIS: How about for the
13 base building? How about for the house?

14 MS. GATES: I don't remember that either.

15 I do have a copy of a paper that was received by the
16 commission. The date of this is 12/6/04. We would
17 have received this with our January mailing. Now,
18 remember, 12/6/04. It is notice of the raze permit
19 for 4825 Dexter Terrace, N.W.

20 CHAIRPERSON GRIFFIS: That's not an issue
21 today, is it?

22 MS. GATES: Well, I think it is an issue
23 in the sense that a lot of things go on in
24 neighborhoods. I heard Mr. Aguglia say that we should
25 have known this. There are houses going up, coming

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1 down all the time.

2 CHAIRPERSON GRIFFIS: Okay. But you also
3 want to have to rely on an administrative procedure
4 when you pull a permit for your house. Correct?

5 MS. GATES: Yes.

6 CHAIRPERSON GRIFFIS: I mean, you don't
7 want to have it always endless and open. We are
8 balancing both sides. We fully understand that there
9 is a lot that goes on. Not everyone can know
10 everything else that goes on in the neighborhood. But
11 in the same respect, there has to be a process of
12 which we can rely on. Correct?

13 MS. GATES: However, I think you would
14 agree, and I heard this in the Logan case, the
15 neighbors should not be expected to go down to DCRA
16 and come through the permit files.

17 CHAIRPERSON GRIFFIS: Interesting. Who
18 did you hear that from? But let's not bring in the
19 other cases. Let's talk about this one specifically.

20 Ms. Miller, you had a question of Ms.
21 Gates?

22 VICE CHAIR MILLER: Well, okay. I have a
23 couple questions. One is that you said you got notice
24 of the raze permit December 6.

25 MS. GATES: I'm using that as an example.

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1 VICE CHAIR MILLER: I know, but just to go
2 one step further with that, what was the date of that
3 permit that it was issued? I mean, it sounds like you
4 got this permit fairly late. Is that your point?

5 MS. GATES: This is just for the
6 application. I don't know when it was issued. I
7 haven't seen it.

8 VICE CHAIR MILLER: Okay. I think also
9 with respect to that other case, that Logan case, we
10 did hear a lot about discussions at an ANC meeting or
11 discussions at some community groups and then it was
12 written up in the neighborhood newspaper. Was there
13 anything of the sort happening with respect to this
14 retaining wall?

15 MS. GATES: This first came to the
16 attention of ANC-3D in November of '04.

17 VICE CHAIR MILLER: What happened to bring
18 it to your attention then?

19 MS. GATES: Mrs. Carome and Caroline
20 Quandt, both residents of the community, came to raise
21 the issue with the construction that was going on.

22 CHAIRPERSON GRIFFIS: Anything else? You
23 wanted to address something?

24 MS. GATES: Well, I just wanted to say
25 that I live right down the street from this house as

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1 well. I was not aware this wall was there. I was
2 aware of the house. I was not aware of this wall
3 until the leaves came off the trees. All the work was
4 done on top. It was not done from 49th Street so that
5 if you were on 49th Street --

6 CHAIRPERSON GRIFFIS: Understood.

7 MS. GATES: Okay.

8 VICE CHAIR MILLER: When would you say
9 that the leaves came off the trees?

10 MS. GATES: I don't think they were off
11 until November. I was actually thinking about that
12 today, Ms. Miller. I don't think they were off until
13 sometime in November.

14 VICE CHAIR MILLER: Thank you.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. CAROME: I would like to make some
17 viewpoints, please.

18 CHAIRPERSON GRIFFIS: Yes. Go ahead.

19 MR. CAROME: I have other points on
20 timeliness that I would like to --

21 CHAIRPERSON GRIFFIS: Indeed, most of
22 which have been submitted in writing. Correct?

23 MR. CAROME: Yes. There's one that hasn't
24 been in writing.

25 CHAIRPERSON GRIFFIS: What is it?

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1 MR. CAROME: There is no permit required
2 for a retaining wall that is lower than four feet.
3 Therefore, one would have to know -- I mean, I didn't
4 know at all about this but just if you want to get
5 into constructive knowledge, one would have to know
6 not just that a wall was being constructed there. One
7 would have to somehow be on notice of some
8 administrative decision.

9 One would have to know that a wall was
10 there and was going to be higher than four feet. I
11 don't know when this wall first got higher than four
12 feet. We know that it was at the end, the very end of
13 June that any construction of any sort began. I don't
14 know what that was. I don't know whether that was
15 clearing dirt.

16 There's nothing in the record as to when
17 the first stone was put anywhere here. I assume that
18 actually digging the foundation and the below-surface
19 things is one of the most time consuming aspects of
20 the building of a structure like this so I have no
21 idea when this thing that started at the very end of
22 June got to be four feet tall.

23 It would have to at least have gotten
24 there before there would even be any possible
25 reasonable person to know that a permit must have been

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1 issued here. I raise that because that's one thing
2 that we did not put into our papers. I do have other
3 points. I was not finished, for example, of addressing
4 this structural certification.

5 CHAIRPERSON GRIFFIS: That's true.
6 However, I think we've heard enough unless the Board
7 has questions on it. I think we fully understand.
8 Believe me, we've read everything except for the
9 volume that came in this afternoon and all of the
10 exhibits so we are pretty well understood on this.
11 Let's go to -- did you have a follow-up question?

12 VICE CHAIR MILLER: I have a question for
13 Ms. Bell if she doesn't mind coming back. It may be
14 in your papers but your papers came in this afternoon.

15 You made a reference as to how the appellant had to
16 have known about this retaining wall because of all
17 these letters to the council or whatever. I'm just
18 wondering if you could state what you were referring
19 to because we haven't heard about that here in this
20 proceeding this afternoon.

21 MS. BELL: Okay. Well, if you take a look
22 at his exhibits, and I'll go back and get one,
23 apparently Cathy -- at some point they contacted Cathy
24 Patterson, the city council member, who also started
25 monitoring --

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1 CHAIRPERSON GRIFFIS: That's in the
2 appellant's submission.

3 MS. BELL: That's right.

4 CHAIRPERSON GRIFFIS: Is that what you're
5 talking about?

6 MS. BELL: That's correct.

7 CHAIRPERSON GRIFFIS: That they didn't pay
8 any attention until they called the council member.

9 MS. BELL: No, I'm not saying he was
10 paying attention. What I'm saying --

11 CHAIRPERSON GRIFFIS: No, but that's what
12 he said.

13 MS. BELL: Oh, okay. His argument is that
14 he did not -- he sort of overlooked the process for
15 half the year so what I was saying is even if you look
16 at his documents, his exhibits, it would show that
17 somebody was monitoring and he was aware that it was
18 being monitored.

19 Now, this is the first time, I guess, he's
20 indicated that he only walked by in October but Cathy
21 Patterson agreed to get daily or monthly reports from
22 DCRA about the progress of that particular lot. Also,
23 since 2002 there was a lot of discussion about the
24 possibility of criminal prosecution through our Office
25 of Attorney General. He has indicated that he thought

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1 the Office of Attorney General is different than DCRA.

2 VICE CHAIR MILLER: Are you referring to
3 progress reports with respect to construction of the
4 site in general?

5 MS. BELL: That's correct.

6 VICE CHAIR MILLER: Anything specific with
7 respect to the retaining wall?

8 MS. BELL: No. And he had indicated that
9 he thought there was somehow something different. He
10 seems to believe that agency officials were somehow
11 colluding with the property owner and that other
12 agency people such as the Office of Attorney General,
13 are not, are independent. What he doesn't seem to
14 understand is that it's been a hand-to-hand process.

15 We've also been working and the agency has
16 been working with OAG as well as the police and other
17 agencies to sort of bring the property into
18 compliance. That was one of the things that I wanted
19 to raise with regard to this process, that it's been
20 an ongoing process since 2002 for everyone.

21 MR. CAROME: May I address that?

22 CHAIRPERSON GRIFFIS: Does that complete
23 your answer?

24 MS. BELL: Yes.

25 VICE CHAIR MILLER: Thank you.

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1 MR. CAROME: May I address that?

2 CHAIRPERSON GRIFFIS: Sure.

3 MR. CAROME: There was no process
4 whatsoever here prior to late October of 2004. There
5 was no -- the complaints -- well, there was no process
6 relating to the wall before then. I don't know about
7 what Ms. Bell is referring to. There were weekly
8 reports started to be delivered to Cathy Patterson's
9 office. The first weekly report related to this
10 property was December 13th, 2004, the day I filed my
11 appeal.

12 CHAIRPERSON GRIFFIS: Okay. What were you
13 talking about then that differs from his
14 understanding?

15 MS. BELL: I have an earlier date but I
16 have to go back and check my records.

17 CHAIRPERSON GRIFFIS: But basically it
18 also pertains to the retaining wall?

19 MS. BELL: Well, actually just the site,
20 not just the retaining wall because our --

21 CHAIRPERSON GRIFFIS: Ms. Gates, you don't
22 have to hold your hand up, you're an intervenor. I'll
23 get you addressed if you have something to do. I'm
24 hopefully going to skip back in a reasonable order but
25 if you want to just come forward.

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1 Go ahead.

2 MS. BELL: I understand that his argument
3 is that he did not know specifically about the wall.
4 My comment with regard to my brief is similar to Mr.
5 Aguglia's, that the entire process of construction was
6 a source of community involvement or interest for
7 quite a period of time. That is the basis for which
8 we impugn some sort of constructive notice to him,
9 notwithstanding the fact that it was physically --

10 CHAIRPERSON GRIFFIS: Okay. I think the
11 Board fully understands that the construction process
12 started in 2002 and there were issues. The community
13 was somewhat aware. We don't need to revisit that or
14 have it addressed at all. What we have to decide then
15 is does that give constructive knowledge and should he
16 have known of another permit that was issued for the
17 retaining wall.

18 Ms. Gates, do you have something on this?

19 MS. GATES: I would just like to correct
20 Ms. Bell's calendar a little bit. As I told you, they
21 came to the ANC in November. Both --

22 CHAIRPERSON GRIFFIS: And this property
23 hadn't been before the ANC prior to November?

24 MS. GATES: No, sir. Based on what was
25 happening with this wall, letters were written to

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1 Cathy Patterson. I sent Ms. Patterson an e-mail
2 asking for her support and help to see if we couldn't
3 get something done to get this whole project somewhat
4 under control.

5 CHAIRPERSON GRIFFIS: Okay. And that's
6 November. Right?

7 MS. GATES: That's November. Then we have
8 the only weekly report that was ever issued. If you
9 look at it, I think it lays out --

10 CHAIRPERSON GRIFFIS: Why do you call it a
11 weekly report then?

12 MS. GATES: That was their choice of term.
13 I think if you look at that weekly report, which is
14 Exhibit 65, just take a minute and look at it, you'll
15 see that it is -- it backs up what Mr. Carome has
16 said, that a lot of things were happening. It was
17 pretty much out of control but nothing happened from
18 my perspective from the community perspective with
19 Cathy Patterson until late November.

20 MR. ETHERLY: Mr. Chair, if I may, let me
21 just explore one particular question on this issue of
22 correspondence and then I'll implore my colleagues to
23 help me ascertain why there shouldn't be a call for
24 the question at this particular juncture in time.

25 That being said, with respect to this

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1 issue of correspondence, there is a January 10th
2 correspondence that we appear to have that is Exhibit
3 21-C related to -- that's going to be under tab 69, I
4 believe it is. Maybe 68. It's the January 10, 2004,
5 letter and that letters appears to be a letter from
6 yourself, Mr. Carome, and I believe your wife to a
7 number of individuals, Mr. Clark, Ms. Theresa Lewis,
8 Mr. Noble, and Ms. Carter.

9 It would appear from my perusal of the
10 letter that the letter is fairly broad in terms of its
11 scope so my question is not necessarily getting to
12 whether or not this letter is directly grounds for
13 charging you with notice, actual or otherwise as
14 relates to the retaining wall.

15 I think perhaps the biggest question here
16 in my mind continues to be your level of awareness
17 with regard to something afoot, something amiss in
18 Denmark relative to this property. We have a letter
19 that's dated January 10, 2004. That letter in part
20 suggest to me that you were aware that, once again,
21 something was afoot here.

22 Maybe not necessarily the retaining wall
23 at this particular juncture but it suggest to me that
24 you knew something was a little smelly to you relative
25 to this property.

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1 I think I'm struggling with the same thing
2 that the Chair is struggling with and that is are you
3 asking this Board to buy the argument that there was a
4 blackout period at some point where you became so
5 disaffected, so dissatisfied with what was happening
6 that you just tuned out, which can happen from time to
7 time when one interacts with the District government.

8 I'm sensitive to that.

9 That's not a rub but I'm sensitive to the
10 frustration. But all that being said, I'm being
11 somewhat satirical here because it's a hard pill to
12 swallow with respect to not knowing that you should at
13 least take a look to see whether or not there is a new
14 development at any point after January 10, 2004.

15 MR. CAROME: I can understand entirely why
16 you feel that way and there is a very clear
17 explanation for it. As I often do when I write checks
18 at the beginning of the year, this letter was written
19 January 10, 2005. You will see that it refers in the
20 first paragraph to a November 24, 2004 --

21 MR. ETHERLY: I withdraw my question.

22 MR. CAROME: Thank you.

23 MR. CAROME: I apologize. We noticed that
24 just before the hearing and it was on my list of
25 things to clear up.

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1 MR. AGUGLIA: I would like to make my few
2 points.

3 CHAIRPERSON GRIFFIS: Yes. We're going to
4 give you the last word on this. I want to hear from
5 Mr. Murphy. I think we've covered all the points, Mr.
6 Carome, so let's move on with this.

7 Mr. Murphy.

8 MR. MURPHY: Thank you, Mr. Chair. It
9 occurs to me while I've been hearing this debate that
10 there may be something that you are not aware of.
11 This retaining wall that has the name retaining wall
12 is a rather unusual animal. It does not have a fixed
13 foundation which the D.C. code requires.

14 In other words, a poured slab or earth
15 beam or something like that. It is not capable of
16 supporting itself as a stand-alone structure simply
17 because it relies on the earth behind it to support
18 it. In fact, it depends on that at a compacted level
19 to hold retaining cables or wires or geofabric.

20 This is an unusual structure. So unusual
21 that we have not found it to date in the D.C. building
22 code so that when we tried to understand the provision
23 for a retaining wall in a rear yard that is built
24 according to district code, we have not found that
25 yet.

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1 CHAIRPERSON GRIFFIS: Okay. So your
2 analysis is that it doesn't fit to the building code
3 so your assumption is that it doesn't and, therefore,
4 the zoning administrator shouldn't have signed off on
5 the zoning aspect of this because he didn't verify, in
6 fact, that there was compliance with the D.C building
7 code even though the structural engineer had signed
8 off on this within DCRA.

9 MR. MURPHY: Yes. Some states --

10 CHAIRPERSON GRIFFIS: Okay,

11 MR. MURPHY: Some municipalities recognize
12 these walls --

13 CHAIRPERSON GRIFFIS: I don't care about
14 other municipalities frankly.

15 MR. MURPHY: -- and others don't.

16 CHAIRPERSON GRIFFIS: Anything else on
17 that issue, Mr. Murphy?

18 MR. MURPHY: No, thank you.

19 CHAIRPERSON GRIFFIS: Good. Thank you
20 very much. Okay. Let's go. Mr. Aguglia.

21 MR. AGUGLIA: Again, the focus of the
22 issue is did he know or should he have reasonably
23 known from April 23rd '04 that this wall was in the
24 process of being constructed and did he fail to meet
25 the 60-day rule. That's the test we're looking at.

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1 I agree with Mr. Etherly that where
2 there's smoke there's fire. This was a cause celebre.

3 I point out to you that while Mrs. Gates said that
4 she didn't get the raze permit or notice of the
5 application until 2004, Mr. Carome's Exhibit No. 2 is
6 an affidavit from her husband, first of all, saying
7 that the residents several blocks away from the
8 subject property, but also saying in paragraph four,
9 "As was the case for many persons in our general
10 neighborhood, I was aware that the house at 4825
11 Dexter Terrace was demolished starting sometime in
12 December of 2002."

13 I guarantee you that this house was the
14 focus and all the construction that was going on from
15 this house was the focus of the attention in this
16 neighborhood since mid 2000 when the treecutting
17 incident took place and the razing of the house. It
18 was under an intense scrutiny and microscope. Now,
19 what Mr. Carome is saying is even though this is the
20 Great Wall of China I didn't know about it until the
21 leaves started falling.

22 What he has testified today is the first
23 material evidence that we have that his wife on
24 October 13th went down to DCRA and started looking at
25 the permits. All right? Obviously she had to know

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1 before October 13th that something was awry in terms
2 of a retaining wall, especially noise. The neighbors
3 were complaining terribly about the noise from the
4 bulldozers.

5 Clearly he's not meeting the 60-day test.

6 If he wanted to he could have filed his appeal at
7 that point, but he chose not to. The affidavit that I
8 have at my Exhibit I is from the stone mason. He is
9 the gentleman who actually built the wall. What he
10 says is, "When I came onto the property in late June
11 to start building the wall, the first thing I did was
12 look to see if the permit was on the -- if the permit
13 was on the wall -- on the front of the house."

14 It was on the window. He remembers it
15 distinctly because there was a crack next to the
16 window. That affidavit has changed. When he went
17 there in June he wanted to make sure as the
18 construction supervisor and as the mason that that
19 permit was up on the wall and he was doing his job
20 correctly.

21 MR. ETHERLY: Mr. Aguglia, if I can ask
22 you this. You are, of course, aware that under case
23 law there is an opportunity for extenuating
24 circumstances to be demonstrated by someone claiming
25 lack of notice or failure to adhere to the 60-day

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1 rule.

2 Are you aware of any circumstances that
3 would contribute to any extenuating circumstances?
4 For example, in reference to some type of break-in or
5 some type of issue that might have for some period of
6 time led to the permits not being displayed. Are you
7 aware of any such period in which the permits were not
8 displayed?

9 MR. AGUGLIA: Let me put this in
10 perspective. The wall was finished at the end of
11 October and that's my amended affidavit. In fact, Mr.
12 Carome's volumes of information including late last
13 night, which I got, refreshed the mason's memory and
14 that was we don't have any --

15 MR. ETHERLY: The stone mason has been
16 refreshed?

17 MR. AGUGLIA: The stone mason, yes, is
18 refreshed.

19 MR. ETHERLY: We have stone masons and we
20 have the Great Wall of China. This is great.

21 MR. AGUGLIA: Yes. This is the Supreme
22 Court of retaining wall cases right here. He says, "I
23 now remember that the wall was finished in late
24 October." Finished and graded, the whole geogrid
25 structure. All the sod that was put on in December

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1 was the result of DOH saying, "You better put sod up
2 there for extra sediment." That had nothing to do
3 with the retaining wall and the geogrid surface. The
4 grading was all done at the end of October.

5 MR. ETHERLY: Let's cut to the chase.

6 MR. AGUGLIA: Okay.

7 MR. ETHERLY: Any period of time during
8 which the permits were not on that window.

9 MR. AGUGLIA: All right.

10 MR. ETHERLY: That you are aware of.

11 MR. AGUGLIA: All right. So then there
12 was no obligation after the wall was finished to keep
13 it up.

14 MR. ETHERLY: So sometime in late October
15 the permits came down.

16 MR. AGUGLIA: I would say probably perhaps
17 November. I'm not certain but I do know this. When
18 the stop work orders were issued, they took all the
19 permits off. DCRA took the permits from them. When
20 there is reference to these fax copies with the
21 December '04 date being up on the windows, my
22 information is that is when they were allowed to start
23 work back up again that they had to put up a fax copy
24 because the originals had been confiscated as part of
25 the stop work order.

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1 MR. ETHERLY: And would you agree or
2 disagree that the stop work order acts as some type of
3 pause, if you will, in the totally of the 60-day rule?

4 MR. AGUGLIA: Not at all because there was
5 no stop work order issued for the retaining wall.

6 MR. ETHERLY: Thank you. Thank you, Mr.
7 Chair.

8 MR. AGUGLIA: That's my basic point.

9 CHAIRPERSON GRIFFIS: Thank you.

10 MR. CAROME: May I address --

11 VICE CHAIR MILLER: I have a question. Do
12 you have any idea when the wall went over four feet?

13 MR. CAROME: When the wall went over four
14 feet?

15 VICE CHAIR MILLER: Right. During the
16 period of construction and when the time would have
17 been.

18 CHAIRPERSON GRIFFIS: Hold on.

19 MR. ARDON: My name is Hugo Ardon and I'm
20 the stone mason who built the wall. The wall was
21 built in steps. We started at the lowest point and as
22 you went up it was done by sections. The fourth
23 section at the highest point it was built within two
24 weeks from starting the job about four feet high or
25 more. We started on the small section at the bottom.

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1 CHAIRPERSON GRIFFIS: Understood. Two
2 weeks after the issuance of the permit on the 23rd of
3 April?

4 MR. ARDON: After we started the job.

5 CHAIRPERSON GRIFFIS: And when was the
6 date that you started?

7 MR. ARDON: I don't recall the exact date
8 but mid June.

9 CHAIRPERSON GRIFFIS: Mid June.

10 MR. ARDON: Yes.

11 VICE CHAIR MILLER: Since you're here
12 before us, I just want to ask you one other question.
13 How was the noise related to this job and does it
14 vary from the beginning to the end?

15 MR. ARDON: I think it was loud at the
16 beginning because we were up closer at the bottom. As
17 we were working our way up the noise was being cut
18 down. If anybody would have known, it would have been
19 at the beginning because we have bulldozer, we have
20 bobcats and all type of equipment working in the
21 bottom.

22 VICE CHAIR MILLER: Okay. Thank you.

23 PARTICIPANT: One further question. You
24 actually started at the park side and constructed the
25 lowest part of the wall first and then built your way

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1 back towards the house?

2 MR. ARDON: We started at the owner's
3 property side.

4 PARTICIPANT: All if it is on the owner's
5 property side.

6 MR. ARDON: It's a pie shell. It's a very
7 pointy area. We started at the longest part of the
8 property which allow us to have material in the bottom
9 without being on the private property at the
10 beginning. That would allow us to dig up towards the
11 house as we went up with the wall.

12 MR. AGUGLIA: This is reference to Carome
13 Exhibit 23.

14 MR. ARDON: This being the property we
15 started at the low point right at the bottom which is
16 the highest point of the wall that allows this corner
17 to store materials when we started the excavation for
18 the wall and work our way along this side over here.

19 VICE CHAIR MILLER: Where is the park in
20 relation to this?

21 MR. ARDON: The park is along the bottom,
22 along this side and up to this corner right here.
23 This is the property line.

24 MR. ETHERLY: Mr. Chairman, one final
25 question for Mr. Aguglia. Just as I pressed the

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1 button it jumped right out of my head. There was a
2 reference in the appellant's submittals regarding BZA
3 case P.O. No. 15129 of Richard B. Netler, BZA 1989.

4 It references what appears perhaps to be a
5 set of facts involving an incident where an appellant
6 was unable to -- thank you very much -- where an
7 appellant was unable to view construction on the site
8 eight months prior to the filing of his appeal.

9 Have you had an opportunity to review that
10 case or are you familiar with that case? The reason
11 why I'm asking is I just wanted to probe just very
12 briefly this issue of sight line and the ability of
13 Mr. Carome to see the subject wall.

14 MR. AGUGLIA: I think I got that last
15 night around 9:00. I have not had a chance to review
16 the case.

17 MR. ETHERLY: Mr. Carome, can you speak to
18 it in any greater detail on the facts of that case as
19 it relates to the obstruction of that appellant's
20 sight line?

21 MR. CAROME: One second, please.

22 MR. ETHERLY: For the benefit of my
23 colleagues, it's a reference on page 7 of the March
24 1st submittal entitled, "Appellant's submission
25 regarding timeliness of appeal in standing."

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1 CHAIRPERSON GRIFFIS: Yes.

2 MS. BELL: I just wanted to note that was
3 before the rules had changed and before the proposed
4 rule, the 60-day rule. Before that it was the issue
5 of reasonable doubt as to how that should be
6 construed. I understand you are interested in the
7 facts.

8 MR. CAROME: Okay. In answer to Mr.
9 Etherly question, yes, that case very simply, I think,
10 simply stated that because there was an absence of a
11 sight line and unable to see it from the appellant's
12 property, the appeal was timely even though there had
13 been that much time passed.

14 MR. ETHERLY: Thank you. Thank you, Mr.
15 Chair.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. CAROME: I -- before the gentleman
18 sitting on my left leaves, I believe I have a right to
19 cross examine him now that he has stepped forward. I
20 believe I had that right even when he submitted an
21 affidavit. I would like to --

22 CHAIRPERSON GRIFFIS: Yes, but we're
23 talking about -- we're in the motion so you can cross
24 him on the two aspects that he just talked about in
25 the testimony that has been provided. Let's go ahead

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1 with that if you have questions.

2 MR. DONOVAN: David Donovan from Wilmer,
3 Cutler, Pickering, Hale, and Dorr. I have just a
4 couple of questions if I might.

5 CHAIRPERSON GRIFFIS: Are you a pitch
6 hitter?

7 MR. DONOVAN: I'm less than that actually.
8 For the moment we can call me that. Mr. Ardon, is
9 that your name?

10 MR. ARDON: Yes.

11 MR. DONOVAN: Are you employed by the
12 Economides?

13 MR. ARDON: No, I'm not.

14 MR. DONOVAN: What is Kohoko, Inc.?

15 CHAIRPERSON GRIFFIS: You are way beyond
16 any sort of testimony that we heard. Any cross
17 examination on the testimony that he just provided?
18 We're not even in the appeal yet. The fun may start
19 soon. We're in this simplistic motion of timeliness
20 so let's get to it.

21 MR. DONOVAN: In the affidavit that you
22 submitted last night you said that based on a review
23 of the records you wanted to change --

24 CHAIRPERSON GRIFFIS: No, he didn't
25 testify to that under this motion. We're crossing two

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1 issues, when did the wall reach four feet high and --
2 what was your other question? I don't know. Oh, what
3 caused the noise. We're crossing on that at this
4 point.

5 MR. CAROME: On the noise, Mr. Ardon, you
6 testified that it was only at the beginning that you
7 were doing work near the park. Isn't it correct that
8 as each new layer of dirt had to be interspersed with
9 new layers of geogrid material that you had to make an
10 entirely flat surface over and over again not just
11 back near the house but right up at the wall and if
12 that happened --

13 MR. AGUGLIA: Objection. How is that
14 relevant?

15 CHAIRPERSON GRIFFIS: I don't see the
16 relevance.

17 MR. CAROME: I'm just correcting an error
18 in the witness' testimony.

19 CHAIRPERSON GRIFFIS: No, his testimony
20 was that the nosiest part was at the very beginning.

21 MR. CAROME: That's correct.

22 CHAIRPERSON GRIFFIS: Okay. Is that
23 correct or was it actually noisy all the way up or was
24 it more noisy at the top?

25 MR. ARDON: It's noisy at the bottom in

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1 relation to the neighbors because it's closer to them.

2 As we go up, we went toward the house and it moves
3 away.

4 CHAIRPERSON GRIFFIS: Okay. Is there a
5 difference in terms of what is being done in the means
6 and methods in the construction?

7 MR. ARDON: No, it's not. It's all the
8 same system as it goes up.

9 CHAIRPERSON GRIFFIS: Okay. So for our
10 understanding conceivable the noise level that is
11 created is similar all the way up.

12 MR. ARDON: It's similar. I would say it
13 would be noisier for the neighbors because it is
14 closer to them.

15 CHAIRPERSON GRIFFIS: Okay. I understand
16 that differentiation. Next question.

17 MR. CAROME: No further questions at this
18 time. I do believe that this witness should be
19 available for cross examination.

20 CHAIRPERSON GRIFFIS: Who, Mr. Bello?

21 MR. CAROME: No, Mr. Ardon. He has
22 submitted an affidavit which has been relied on.

23 CHAIRPERSON GRIFFIS: No, I understand
24 that. We've got to get into the appeal before cross
25 examination.

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1 MR. CAROME: It's solely related to the
2 timeliness issue.

3 CHAIRPERSON GRIFFIS: You want to cross on
4 that, the affidavit.

5 MR. CAROME: Yes.

6 CHAIRPERSON GRIFFIS: Okay. Let's go.
7 Not too far into it. Let's get to the heart of the
8 matter, the real zinger.

9 MR. DONOVAN: I'll try to keep it as short
10 as I possibly can.

11 CHAIRPERSON GRIFFIS: Why do you have two
12 affidavits?

13 MR. DONOVAN: That was my first question.

14 CHAIRPERSON GRIFFIS: I know. I beat you
15 to it. I didn't even go to law school.

16 MR. ARDON: When I signed the first
17 affidavit I tried to recall the dates of the steps of
18 the process but the closest I could remember was early
19 mid November. But going back when I saw -- he gave me
20 a copy to read of the papers filed and I can remember
21 Juan Scott's name because on November 2nd he came to
22 the job to review the plans.

23 I know he issued some stop work orders.
24 On that date the first thing he came in and checked
25 was the wall. He asked me for the set of plans first

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1 which I gave to him. After we go over the plans he
2 asked me to walk with him to the wall and measure the
3 wall with him after it was finished at that time.
4 That's why I remember that the work was finished
5 because we went and measured the wall.

6 CHAIRPERSON GRIFFIS: Okay. So as Mr.
7 Aguglia said, the factual submissions in evidence now
8 refreshed the exact dates and the events and that sort
9 of thing.

10 MR. ARDON: I remember that particular
11 incident.

12 CHAIRPERSON GRIFFIS: Next question.

13 MR. DONOVAN: And you reviewed these
14 documents last evening?

15 MR. ARDON: I was just going through and I
16 happened to see his name and I remembered that
17 particular moment.

18 CHAIRPERSON GRIFFIS: Was this last night?

19 MR. ARDON: Last night.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. DONOVAN: And did counsel for the
22 Economides suggest to you that you review those
23 materials?

24 CHAIRPERSON GRIFFIS: That's all right.
25 We don't --

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1 MR. ARDON: He gave me a copy to read. I
2 was going on the subway because of the snow and he
3 said, "Here is stuff to read in the meantime." I was
4 reading and I remembered this part and now my date is
5 actually inaccurate.

6 MR. DONOVAN: What time did you leave work
7 to get on the subway?

8 MR. ARDON: I didn't leave work. I came
9 to his office to sign -- I mean, to get the paperwork
10 because Mr. Economides worked nearby and I was doing
11 the job for them at the time so I was nearby and he
12 told me to get that when I came by.

13 MR. DONOVAN: And that's when you signed
14 the affidavit?

15 MR. ARDON: No, I signed it this morning.

16 MR. DONOVAN: Was it drafted when you came
17 to his office last night?

18 MR. ARDON: Drafted?

19 MR. DONOVAN: Was it already written when
20 you came to his office last night?

21 MR. ARDON: No. This morning. I didn't
22 sign anything until this morning.

23 MR. DONOVAN: With respect to -- I am
24 permitted to go into the substance of the affidavit.
25 Correct? A little bit?

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1 CHAIRPERSON GRIFFIS: As it goes to
2 timeliness.

3 MR. DONOVAN: Oh, just as it goes to
4 timeliness. Okay.

5 In your affidavit you say that in June
6 2004 you saw the affidavit posted in the window.

7 MR. ARDON: Yes, I did.

8 MR. DONOVAN: When --

9 MR. AGUGLIA: Correction. He saw the
10 permit.

11 MR. DONOVAN: I'm sorry. I apologize, the
12 permit posted in the window. When was the permit
13 taken out of the window?

14 MR. ARDON: I don't remember. I know the
15 permit was there when Juan Scott came in on November
16 2nd and it was there all of November. When I was
17 doing the wall I never had any stop work orders from
18 anybody because we always had the permit.

19 MR. DONOVAN: So the permit was there when
20 you started the job in June 2004 and the permit was
21 there on June 2, 2004?

22 MR. ARDON: For the wall.

23 MR. DONOVAN: For the wall. And in
24 between you don't know whether or not the permit was
25 posted?

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1 MR. ARDON: I passed by regularly and I
2 saw it. I mean, I didn't go in on any particular day
3 and just look at the window but I passed in front of
4 the window regularly and saw the permit.

5 MR. DONOVAN: Were there other permits
6 posted as well?

7 MR. ARDON: Yes.

8 MR. DONOVAN: All the permits?

9 MR. ARDON: Well, I don't know all the
10 permits. I wasn't concerned about anything else. I
11 was worried about the wall. There were other people
12 doing other jobs and subcontractors.

13 MR. DONOVAN: Did the number of permits
14 change over time?

15 MR. AGUGLIA: I object. We are beyond.

16 CHAIRPERSON GRIFFIS: Right. Okay.

17 MR. DONOVAN: That's it. Thank you.

18 MR. CAROME: I would like to point out
19 that one of the reasons that DCR has given the stop
20 work order was issued on November 2nd, 2004, was there
21 were no permits available including posted.

22 CHAIRPERSON GRIFFIS: Right. We got that.
23 Okay. I think we're ready. Board members, anything
24 else you need? Anything that's lacking? Fabulous. I
25 need some blood in my legs so we are going to take a

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1 five-minute break, recess, and then we'll be back.

2 (Whereupon, at 4:19 p.m. off the record
3 until 4:40 p.m.)

4 CHAIRPERSON GRIFFIS: Very well. Let's
5 resume. Board members, we have before us a motion to
6 dismiss based on timeliness and what has been labeled
7 essentially standing or aggrieved in our regulations.
8 I'll open it up for discussion or motion.

9 VICE CHAIR MILLER: Mr. Chairman, I would
10 move to deny the motion to dismiss the appeal based on
11 standing and timeliness. I guess I could -- do you
12 want to proceed with a second or do you want me to --

13 CHAIRPERSON GRIFFIS: Sounds like a proper
14 procedure. Is there a second to the motion?

15 MR. MANN: Second.

16 CHAIRPERSON GRIFFIS: Thank you, Mr. Mann.
17 Let's move ahead.

18 VICE CHAIR MILLER: First taking the
19 question of standing, the movement argued that the
20 court requires a certain degree of impact that the
21 appellant doesn't arise to. I want to state basically
22 without going into what the court cases say that I
23 think that we are really bound by our regulation
24 3112.2 which merely states that a person be aggrieved
25 by an order, requirement, decision, determination, or

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1 refusal made by an administration officer or body.
2 That is set forth in the zoning act as well. In this
3 case I think it's pretty clear that the appellant
4 meets that standard.

5 The appellant lives near the retaining
6 wall that's at issue. I think the appellant is
7 concerned about protecting the overlay and lives
8 within the overlay and uses the park that is right
9 behind the retaining wall. In my view, the appellant
10 has standing in this case. I don't know if any Board
11 member wants to say anything otherwise. Okay.

12 The next question goes to timeliness.
13 There were a couple of issues raised. One is this
14 question about the appeal being filed no later than 10
15 days after the date on which a structure or a part
16 thereof in question is under roof.

17 I think in this case there is a question
18 at issue whether this retaining wall is a structure
19 but if it is considered a structure, I was persuaded
20 that the roof would be the sod on top if we are going
21 to consider this whole thing a structure and that the
22 sod was -- that this appeal was certainly filed within
23 the 10 days before that sod was completed.

24 I'm not saying that I'm buying necessarily
25 that is necessarily a structure and it does have a

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1 roof but if it does, the time from when the sod was
2 put on, as far as that runs, the appeal was timely. I
3 really think the basic issue then is was it filed
4 within 60 days of the permit and, if not, within 60
5 days of when the appellant should have known that the
6 permit was issued.

7 The permit was issued in April and the
8 appeal was filed in December so it wasn't filed within
9 60 days of when the permit was issued but I think we
10 then go to the real heart of this question as to
11 should the appellant have known of the permit before
12 October 13th basically which was 60 days before he
13 filed the appeal.

14 Based on what we heard today, in my view,
15 we don't really have evidence that he should have
16 known about that permit. At least there was enough
17 evidence to show that maybe he should necessarily have
18 known. The ANC didn't know. We didn't have other
19 neighbors who knew. There was a lot going on on this
20 site since 2002 but I don't think that gives rise to
21 them having known something is occurring in 2004 that
22 was illegal or questionable.

23 CHAIRPERSON GRIFFIS: Sounds good.

24 VICE CHAIR MILLER: I'm trying to think if
25 I'm missing something else.

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1 CHAIRPERSON GRIFFIS: Someone else will
2 find it.

3 VICE CHAIR MILLER: Let's say this. I
4 think the one date that we got was October 13th when
5 Mr. Carome's wife went down to investigate about the
6 permit and then the appeal was filed within 60 days of
7 that date.

8 We did hear vague information such as,
9 "Well, since she went down on the 13th she should have
10 known before." I'm not sure how we could assume that
11 and I don't think we should. She could have found out
12 on the 13th and gone down on the 13th. We didn't
13 really get any affirmative information to the
14 contrary.

15 CHAIRPERSON GRIFFIS: Good. Thank you.
16 Others?

17 MR. ETHERLY: Mr. Chair, I'm going to
18 speak against the motion. It's going to be very, very
19 brief because that will allow us to move on. I think
20 the motion as it relates to the question of standing
21 is right on target. I agree in part with the
22 underlying motion.

23 But as it relates to the issue of
24 timeliness, I think this is a critical issue and I
25 think although it was, God knows, a long time of

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1 discussion this afternoon, that was very important
2 discussion because is, as has been indicated
3 previously, a fairly new rule that only in recent
4 years has come into play. I think it's a very
5 important issue so we needed to have the kind of
6 discussion that we had on it.

7 That being said, I think the language as
8 it relates to timeliness within Section 3112.2 60-day
9 rule is very, very clear. I'll just note to my
10 colleagues that section reads, "An appeal shall be
11 filed within 60 days from the date the person
12 appealing the administrative decision had notice or
13 knowledge of the decision, complained of, or
14 reasonable should have had notice or knowledge of the
15 decision complained of, whichever is earlier."

16 I think what is very critical there in
17 that particular section is that phrasing "whichever is
18 earlier" because that to me suggest that this is not
19 necessarily an instance where, so to speak, the tie
20 kind of goes to the runner. I think there is perhaps
21 a presumption within that section that the sooner you
22 should have known, or could have known that something
23 is of concern to you, you should get in the door.

24 I am hopeful that for those of you who
25 make a living out of listening to us, God forbid if

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1 there are a lot of you in the room who do that, but in
2 the discussion that we had around earlier cases, in
3 particular Sailor comes to mind, I hope my colleagues
4 recall that I spoke very pointedly about the issue.

5 I think for the sake of clarity and for
6 the sake of understanding that balance that the
7 chairman spoke to earlier, that balance being that
8 there are many of us who will at times find ourselves
9 in the position of wanting to complete a home or
10 wanting to build a structure here in this city and
11 there needs to be some sense of clarity that there is
12 a point in time when that structure is safe, safe from
13 attack, safe from harm, safe from appeal, and you can
14 move forward.

15 That's not to suggest that appeals or
16 questions about the validity of the process are not
17 appropriate questions to be raised. They, indeed, are
18 and my opposition to this motion should not be taken
19 to suggest that Mr. Etherly feels there shouldn't be
20 an opportunity for questions to be raised about a
21 particular project.

22 I believe the spirit and the purpose of
23 the regulations speak to a desire that need has to be
24 balanced with the need of some certainty that a
25 project can go forward without threat of further

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1 molestation.

2 I think what we have here is a situation
3 where clearly -- I won't say clearly but I feel that
4 while it's a relatively close question based on the
5 facts, I felt there was enough information here to
6 suggest that there was a strong awareness that an
7 appeal should have been undertaken and then you let
8 the BZA sort it out.

9 Get your appeal in the door early and then
10 we'll sort it out. I said in the earlier case and
11 I'll say it again here, I would rather err on the side
12 of having appeals come in earlier and we'll sort it
13 out. Often times I hear the spirit of potential
14 appellants saying, "We want to be sure that we have
15 enough information, that the appeal is right, that we
16 have valid grounds for it."

17 I understand that and I appreciate that
18 desire. But in this particular instance because of
19 the importance of that balance, I would assume say,
20 hey, I'm more than happy to take it upon the shoulders
21 of myself and my colleagues to sort it out for you.
22 If you think there's a basis in fact for appealing
23 something, get in the door and we'll sort it out.

24 Get in the door sooner rather than later.

25 That's why I think that language in the context of

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1 3112.2 has it relates to whichever is earlier I think
2 is so very important here. I think, once again, it
3 was a close factual case here but I felt there was
4 enough knowledge on the part of the appellant for us
5 to move forward.

6 I'm not going to stand on the sword for
7 lengthy time. I just wanted to note the reason for my
8 voting against the motion but I'm prepared to move
9 forward, Mr. Chairman.

10 CHAIRPERSON GRIFFIS: Thank you.

11 VICE CHAIR MILLER: Mr. Chair, I just want
12 to add two other points that I think were significant
13 in today's testimony. One does go to whether it was
14 reasonable that they didn't notice this until after
15 the summer and after the leaves had fallen down. I
16 think it was corroborated by the ANC and the fact that
17 this retaining wall is next to park land where
18 there are trees and behind the home where the
19 applicant could view it.

20 Second I think is significant also. As
21 Mr. Murphy from National Park Service said, this is
22 something that is so unusual that perhaps the
23 appellant couldn't have anticipated that there was
24 going to be such a structure of this kind so I think
25 that is another factor I just wanted to put on the

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1 record.

2 CHAIRPERSON GRIFFIS: Mr. Hildebrand, did
3 you have anything? Very well. Others? Any others to
4 speak to the motion?

5 MR. AGUGLIA: Could I add one very quick
6 fact?

7 CHAIRPERSON GRIFFIS: No. Actually, I
8 cannot have you speak as we are in deliberation under
9 a motion. Let's move ahead then on further comments
10 if there are any. As always, timeliness, I think,
11 what Mr. Etherly is pushing towards, is really looking
12 for that kind of bright line and security and
13 insurance of what is the process of which everyone on
14 each side can rely and have some understanding. I
15 absolutely agree with that.

16 I think in this particular case it's not
17 strongly persuasive either way in its ambiguity.
18 However, I tend to agree with Mr. Etherly in the fact
19 that if you look at the chronology of what has been
20 laid out to us, some anecdotal, some factual, some
21 photographic aspects to it, there was a happenstance
22 walk to DCRA on the 13th of October.

23 Although the community and the awareness
24 even from the appellant started in 2002, not of this
25 specific wall which raises some question in my mind,

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1 but certainly an awareness of things going on. The
2 fact that this would take an awful lot of machinery to
3 start building, it seems to me leaves or no leaves,
4 there was awareness and certainly by the appellant a
5 great sensitivity to anything that happens in or
6 adjacent to the park.

7 I cannot imagine that one wouldn't have
8 spent a good deal of time trying to figure out what
9 was actually going to happen rather than shutting the
10 curtains on one's house and not paying attention to it
11 after having been aware sometime prior. I don't think
12 this is the strongest case either, as I've indicated.

13 However, I think I'm more persuaded with
14 the arguments in the documentation that's been
15 submitted in terms of the dates of the appeals, the
16 communication with the overall community. Again,
17 we're not establishing the specific of when one person
18 specifically knew or didn't know but rather more
19 generally when they should have known or when they did
20 know.

21 I think that it should have been known
22 clearly on or about, from my estimation of the
23 schedule that was done, I would say in July, August.
24 We have an assurance of even further dates of that
25 into September and October. That being said, let's

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1 let it open for anybody else. We do have the motion
2 before us and has been seconded.

3 Ms. Miller, did you want to restate your
4 motion? The motion is to deny the motion to dismiss
5 on timeliness. Is that correct?

6 VICE CHAIR MILLER: Timeliness and
7 standing.

8 CHAIRPERSON GRIFFIS: And standing. Very
9 well. I would ask that all those in favor of the
10 motion signify by saying aye.

11 BOARD MEMBERS: Aye.

12 CHAIRPERSON GRIFFIS: Opposed?

13 BOARD MEMBERS: Opposed.

14 CHAIRPERSON GRIFFIS: Abstaining? Very
15 well. Mr. Moy, if you wouldn't mind recording the
16 vote. Ms. Bailey.

17 MS. BAILEY: The Board has voted three to
18 zero to deny the motion to dismiss the application
19 based on timeliness and standing. Mrs. Miller made
20 the motion, Mr. Mann seconded. Mr. Hildebrand is in
21 support. Mr. Griffis and Mr. Etherly are opposed to
22 the motion.

23 CHAIRPERSON GRIFFIS: Excellent. Thank
24 you very much, Ms. Bailey. So that means we are going
25 ahead. We've got about 65 more minutes left in our

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1 day today to process this. I think we can get
2 everything done in that time. In all seriousness,
3 let's establish, first of all, the process of which we
4 are going to take.

5 The appellant is going to present first.
6 I would imagine we will get through the appellant's
7 case today and then we'll set for a new schedule. We
8 will be looking at the schedule now and when we can
9 continue this to.

10 Laying it out, of course, as I indicated
11 at the very beginning of this, we are going to now
12 define the scope of this appeal as it has been filed
13 and based on the information and evidence that we
14 have.

15 Mr. Carome, how many witnesses are you
16 going to be calling in your case do you anticipate?
17 Turn on your microphone when you get that. I don't
18 need exact. I'm not going to old you to it. I just
19 need a ballpark. Sixteen, 1,600, one?

20 MR. CAROME: I will call -- I'm the
21 principal witness. My evidence principally is what is
22 in the exhibits. Am I permitted to call Mr. and Mrs.
23 Economides who are here today?

24 CHAIRPERSON GRIFFIS: As your witnesses?

25 MR. CAROME: Yes, to cross examine them.

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1 CHAIRPERSON GRIFFIS: Certainly you can
2 cross examine after they're presented if they are
3 presented as witnesses.

4 MR. CAROME: And I would like the stone
5 mason, Mr. Ardon.

6 CHAIRPERSON GRIFFIS: Okay. But I'm
7 saying about your case.

8 MR. CAROME: No. I'm sorry.

9 CHAIRPERSON GRIFFIS: You're just
10 presenting the case. Is that correct?

11 MR. CAROME: That's correct.

12 CHAIRPERSON GRIFFIS: Okay. Good. In
13 which case we're going to do this. I'm going to set
14 out times first so that we all know what we're dealing
15 with here. We are going to set times for case
16 presentation from the appellant and the appellee and
17 Mr. Aguglia as the intervenor and property owner have
18 30 minutes apiece.

19 We will have the Park Service as the
20 intervenor will be given the same amount of time if
21 needed. And the ANC, of course, will proceed with the
22 time that they need. Of course, our questions and any
23 cross examination doesn't count against that time so
24 you have for your opening case in chief and closing 30
25 minutes.

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1 To be absolutely clear, Mr. Aguglia, you
2 are going to have that all in one deal as with the
3 other intervenors. You should open and you should
4 close all within that 30 minutes. The appellant is
5 given an opportunity to conclude at a separate time of
6 which we will address when we get there.

7 Let's go to defining the --

8 MR. ETHERLY: Mr. Chairman, I'm sorry.
9 Can we just run over time again very quickly so I'm
10 clear and understand the delineations that you're
11 setting forth? Thirty minutes for the appellant?

12 CHAIRPERSON GRIFFIS: That's correct.

13 MR. ETHERLY: And then all of the
14 intervenors, that would be DCRA, National Park Service
15 30 minutes combined. I'm sorry, Mr. Aguglia, 30
16 minutes combined with those three?

17 CHAIRPERSON GRIFFIS: Actually, I'm not
18 doing a combined on that. I'm anticipating that Mr.
19 Murphy wouldn't necessarily need to utilize 30 minutes
20 but do want to afford certainly the appellee the equal
21 amount of time. Then the intervenor as the property
22 owner, I think, is also judicial in affording the
23 equal amount of time.

24 MR. ETHERLY: Okay. Thank you, sir.

25 CHAIRPERSON GRIFFIS: And the ANC is not

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1 timed in their case presentation. That being said,
2 what it does come down to, and I'll be very basic with
3 it because that helps, this appeal has been brought
4 forth appealing the issuance of the permit for what is
5 referred to as the retaining wall.

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

(5:00 p.m.)

CHAIRPERSON GRIFFIS: The appeal must establish that there was an error by the zoning administrator in issuing this permit. There are two clear pieces that I've seen in the submission that go directly to that point. This entire appeal will always go back to that point. The issue is that in the DCRA and in the zoning administrator's review and approval it was not properly reviewed for the overlay within which it is located, the Wesley Heights Tree and Slope Overlay.

There is also an argument that goes to the zoning issue as I have read it that this is not a retaining wall but actually something totally different. If it is something totally different, it should have been reviewed differently and maybe should not have been approved but clearly there was an error in the zoning administrator's review and approval based on the fact that this is not a retaining wall as is defined or as is viewed and processed in the zoning regulations.

What is not under the jurisdiction of this appeal as I see it going forward, and I lay these out for Board comments and everyone else's, of course,

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1 issues of the FOIA and a responsiveness to DCRA unless
2 it can go directly to how it actually establishes an
3 error with the zoning administrator.

4 Any issue of quality of construction, any
5 issue of means and methods of workmanship, any actions
6 by the owner itself in pursuing that went beyond a
7 permit or beyond that which was approved for
8 construction, we have great interest perhaps but
9 absolutely no authority or jurisdiction to decide and,
10 therefore, that's no reason to hear.

11 Any issues that go off the property line
12 would have to be sufficiently established for us to
13 understand our jurisdiction, any aspects that would
14 deal with things that were beyond that which was the
15 construction in the property line and the tenants of
16 the zoning issues.

17 This is different than a variance. We are
18 not looking at impacts. We are not looking at --
19 that's what it is. The adverse impacts be it the soil
20 runoff, be it the structural integrity, be it anything
21 else that might come up.

22 We also need to decide and deal with the
23 letters that have been submitted into the record.
24 There are individuals both in support and in
25 opposition to the appeal. I'm going to leave it to

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1 those involved as intervenors and appellant and
2 appellee whether they want to adopt those as testimony
3 in their case presentations.

4 You should be aware that if you do not
5 adopt those letters, they are not going to be kept in
6 the record and certainly won't be deliberated on by
7 the Board. There is no vehicle for us to take
8 testimony or person's testimony. Therefore, there's
9 no vehicle for us to accept letters either in support
10 or in opposition to an appeal.

11 Even more than our area variances and
12 special exceptions goes to the heart of the, well,
13 frankly, the legal issue of whether there was a
14 mistake or not a mistake. Impacts of environmental
15 damage, building code issues, again, would have to be
16 very succinctly and quickly but very strongly proven
17 how they would relate directly to any of the zoning
18 issues that are before us today.

19 I think that is enough said. But what I
20 would like to do is just give an example of a couple
21 of things that I do not believe that the Board will be
22 deliberating on in terms of the appellant's
23 submission. First and foremost, I don't see the
24 relevancy to Exhibits 11 through 18. These are
25 obviously just DCMR codes, Title 12, which is the

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1 building code.

2 One, you don't need to submit all those
3 and that's fine that they're in but it gives an
4 example of the fact that I don't see where the
5 relevancy would be. I know you may well try to
6 establish out of the zoning regulations relevancy of
7 the building code and that's fine.

8 More importantly, though, going to, as
9 I've indicated, anything from Exhibit 33 to 46 it's
10 photographs of existing conditions and the impacts of
11 the existing conditions, the cracks in the walls, the
12 soil erosion, anything of that nature. There is also
13 testimony regarding whether footings were put in
14 properly or not put in properly. Again, I'm not sure
15 you want this Board to be deciding whether it was
16 properly constructed or not. Be that as it may, we
17 cannot.

18 Exhibits 47 through 50, criminal
19 complaints proceeding against the homeowner, is not
20 germane to this appeal. I'm not being inclusive of
21 all these aspects. I'm trying to give more examples
22 than anything else.

23 Okay. Let me take any procedural
24 questions on those issues. Yes.

25 MR. CAROME: One procedural question goes

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1 to the amount of time. I was anticipating an hour or
2 60 minutes which I thought was the presumptive amount
3 of time under the regulations. There are many issues
4 here and I would ask that I be allowed to have at
5 least an hour of time to present this. I will do my
6 darndest to do it faster than that but I would ask for
7 at least that.

8 CHAIRPERSON GRIFFIS: I appreciate that
9 request. So as not to appear, because it certainly
10 isn't arbitrary in my allegation of time, based on the
11 entire readings and the submissions and, again, I'll
12 underscore the fact that this entire Board has read
13 everything that was submitted. Some of us got an hour
14 of sleep last night.

15 Nonetheless, I think the record is
16 sufficient and complete. What we're really looking at
17 is very pointed and decided presentations directed to
18 the fact -- if we get to the point, I'll leave it open
19 and extent the time but I really don't see the
20 necessity for that. Again, I think you've seen
21 limitedly this morning the ability of all the Board
22 members to ask questions. That will probably triple
23 your time as we go through.

24 Other procedural questions?

25 MR. CAROME: I do have a second one. It's

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1 the question that I raised at the very beginning about
2 the additional ground of the tree slope overlay
3 protection which --

4 CHAIRPERSON GRIFFIS: Oh, right. You
5 wanted to amend your items?

6 MR. CAROME: I want to expand the grounds
7 for appeal to include the tree slope protection
8 overlay.

9 CHAIRPERSON GRIFFIS: I don't see any
10 difficulty with that. I mean, frankly, it was
11 somewhat assumed by the Board, I think I can say, but
12 certainly by myself in terms of your speaking and your
13 submission about the Wesley Heights Overlay of which
14 the tree and slope --

15 MR. CAROME: Well, this is a different
16 overlay.

17 CHAIRPERSON GRIFFIS: Is this property
18 within that overlay?

19 MR. CAROME: There is some question as to
20 whether or not the 4825 Dexter Terrace property is
21 within the overlay. There is certainly no question,
22 though, that the Wesley Heights Park is within the
23 overlay and because Mr. Economides had six trees cut
24 down within the park to make way for this wall, I
25 believe that brings into play whether or not his own

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1 property is involved. He did cut down six trees in
2 that overlay district and that --

3 CHAIRPERSON GRIFFIS: Okay. So to get
4 back to the initial question then, what would be the
5 error that you are asserting?

6 MR. CAROME: Failure to -- well, if he did
7 do that without a proper permit, if he violates that
8 overlay, he is not entitled to any permit whatsoever
9 for the next seven years and that happened in 2002.

10 CHAIRPERSON GRIFFIS: That's well
11 expanding this afield.

12 MR. CAROME: Well, I'm just saying the
13 law. It may -- yes, it does expand the appeal. It is
14 DCRA's failure to take into account that zoning issue.

15 CHAIRPERSON GRIFFIS: Okay. That puts it
16 more succinctly. Again, the caution is we cannot add
17 an appeal of the owner's action to this whether it's
18 right or wrong. You brought the appeal of the
19 issuance of the permit so we need to hold it under
20 that.

21 MR. CAROME: That's right.

22 CHAIRPERSON GRIFFIS: Okay. Anything
23 else?

24 MR. CAROME: No.

25 CHAIRPERSON GRIFFIS: Okay. Question?

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1 All set?

2 MR. CAROME: Yes.

3 MS. BELL: I want to raise a question
4 about time. Is it my understanding that you
5 anticipate the appellant making his presentation and
6 cross examination and then we would be recessing for
7 another time?

8 CHAIRPERSON GRIFFIS: Yes. We are going
9 to try and hit the 6:00 hour. I know a lot of folks
10 have obligations to get to.

11 MS. BELL: And is it my understanding that
12 you intend to add his additional basis with regard to
13 the tree and slope to the area?

14 CHAIRPERSON GRIFFIS: Unless there is
15 disagreement from the Board in doing that in terms of
16 the review of the tree and slope which would
17 establish that the zoning administrator should have
18 reviewed and enforced.

19 MS. BELL: Since we were not aware of it
20 we haven't briefed that point.

21 MR. AGUGLIA: There is a misunderstanding
22 and I would object to that. He's expanding the
23 appeal. Here we are about to give his presentation
24 and he's adding an entire new argument.

25 CHAIRPERSON GRIFFIS: Okay. Two

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1 objections. Comments?

2 VICE CHAIR MILLER: Well, I don't know,
3 just in thinking, the other parties are going to have
4 a chance to address it because we're not going to do
5 that today. You are going to have time until the next
6 hearing. Perhaps if they need time to do their cross
7 later on that particular issue, maybe we could allow
8 that.

9 CHAIRPERSON GRIFFIS: Maybe. I wouldn't
10 count on it.

11 MR. ETHERLY: I'd love perhaps to get some
12 feedback from the Office of the Attorney General as to
13 the expansion of the appeal on those grounds.

14 CHAIRPERSON GRIFFIS: Good idea. Do you
15 have an opinion of expanding on those grounds?

16 MS. MONROE: All I can say is we actually
17 checked to see and try to figure out whether the tree
18 and slope overlay applied to the property. I don't
19 think it applies to the property itself but it is
20 mapped over the park obviously. I guess there is a
21 nexus and what you're trying to say is that if he cut
22 down trees in the park, he shouldn't be given any
23 permit at all and they should have looked at that
24 fact. I think it's up to the Board. I hate to say
25 that because there's a nexus as to the permit issue.

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1 CHAIRPERSON GRIFFIS: It absolutely should
2 be.

3 MR. MANN: Our argument is that's the
4 wrong forum.

5 CHAIRPERSON GRIFFIS: There's no question.
6 Let's not get into the substance of the case.

7 MS. MONROE: I was just going to say the
8 trees are Park Service trees and that --

9 CHAIRPERSON GRIFFIS: I think it's
10 articulated very well. That's exactly the way I
11 understood it. It seems to be very clear to me. I
12 have no difficulty in expanding the appeal. I do not
13 believe it's going to take very long for us to hear
14 the case presentation and to hear the opposition to
15 that position.

16 MR. ETHERLY: But does it in any way
17 prejudice? Does it prejudice in any way? I'm just
18 concerned about whether or not it creates any
19 prejudice to the appellees, the intervenors in this
20 instance.

21 MR. AGUGLIA: Of course because, first of
22 all, he's not been convicted. He's been charged with
23 it. He's not going to be able to testify to that, nor
24 would I ask him to testify to that because it's a
25 federal -- because there's a federal case going on.

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1 That's an issue not for this forum.

2 CHAIRPERSON GRIFFIS: Well, let's
3 establish now whether it's substantive or actually
4 relevant then. You're talking about an action by the
5 property owner that was off his property. Is that
6 correct?

7 MR. CAROME: It was a clearing of land and
8 of trees that was both on and off his property.

9 CHAIRPERSON GRIFFIS: But which ones would
10 have been covered under the tree and slope?

11 MR. CAROME: Certainly the six trees that
12 he was charged with destroying.

13 CHAIRPERSON GRIFFIS: Which are not on his
14 property or on his property?

15 MR. CAROME: Not on his property but they
16 were clearly cut down for purposes to prepare this
17 site. I don't think they could have gotten that wall
18 up without doing that. It certainly was to prepare
19 this site for purposes of this structure.

20 CHAIRPERSON GRIFFIS: What persuasive
21 statement can you tell us that the zoning
22 administrative, one, would have known that he would
23 have had to have cut down trees off his property?

24 MR. CAROME: That was a matter of public
25 record as of that time.

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1 CHAIRPERSON GRIFFIS: What was a matter,
2 that he did?

3 MR. CAROME: The fact that he had cut
4 those --

5 CHAIRPERSON GRIFFIS: But we're talking
6 about the issuance of a permit. You've got drawings
7 in front of you. You're telling me that the zoning
8 administrator should have looked at this, looked off
9 the property for the zoning analysis whether approved
10 or not, looked off the property and it said, "Oh, you
11 know what? You are going to be cutting down those
12 trees and that is covering a whole other slope and
13 overlay. Therefore, I need to review this with that
14 overlay because the impact is off this property for
15 this particular project." Is that what you are
16 asserting?

17 MR. CAROME: I think that is partly what I
18 am asserting. I don't think that is entirely what I'm
19 asserting. I am asserting that his act was a matter
20 of public because he was fined for that.

21 CHAIRPERSON GRIFFIS: Who was, the
22 homeowner?

23 MR. CAROME: Mr. Economides.

24 CHAIRPERSON GRIFFIS: Okay. But I'm
25 concerned about the DCRA's act.

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1 MR. CAROME: Once that act took place --

2 CHAIRPERSON GRIFFIS: But the permits were
3 issued when that act took place.

4 MR. CAROME: No, no. This was before the
5 permits were issued.

6 CHAIRPERSON GRIFFIS: I see.

7 MR. CAROME: This was in 2002. In the
8 spring of 2002 Mr. Economides paid a tree company. He
9 specifically hand-marked particular trees including
10 six that were on the property of the park, bordering
11 that area, for destruction and they were cut down.
12 There was a Department of Health -- which is part of
13 the record, Department of Health decision on that in
14 which he was fined for doing that. There was further
15 a --

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. AGUGLIA: That's wrong. That's wrong.

18 CHAIRPERSON GRIFFIS: Okay. Where were
19 we? Yes.

20 MS. BELL: The problem with this issue is
21 that that we're talking about the BZA jurisdiction and
22 the real issue is whether or not the building permit
23 was issued in error, not conduct that may or may not
24 have been illegal outside of his property, or even
25 with regard to the main house because as you can tell

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1 from my pleadings, the issue about whether or not the
2 raze permit should have been issued or wasn't issued
3 or whether it's fraudulent, those are all outside of
4 this forum and this very narrow appeal.

5 I think what keeps happening is they are
6 sort of like a bootstrapping here. Well, these
7 illegal things happened and this corruption was here
8 so all of these other things related to the retaining
9 wall is a problem.

10 CHAIRPERSON GRIFFIS: Would the cutting
11 down of the trees off the property precluded or
12 prohibited a permit being issued on the site?

13 MS. BELL: Since he has not been
14 completely adjudicated since he hasn't been convicted
15 of anything at this point, it would be an allegation.
16 The problem is it's an allegation and what the
17 appellant is trying to say --

18 CHAIRPERSON GRIFFIS: I understand. Is
19 that your position?

20 MR. AGUGLIA: Exactly right. The
21 reference to the Department of Health fine was to
22 dumping. It had nothing to do with cutting the trees.
23 Cutting the trees is an allegation that has not been
24 proved.

25 CHAIRPERSON GRIFFIS: There is nothing

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1 legally or regulatorily, if that is a word, that
2 precluded the zoning administrator from issuing this
3 permit based on that. Okay.

4 MR. CAROME: May I --

5 CHAIRPERSON GRIFFIS: I'll get to you.

6 MR. CAROME: I'm sorry to be so eager.
7 I'll try to do better.

8 CHAIRPERSON GRIFFIS: Keep this rolling.

9 MR. CAROME: I'm referring to 1514, 11
10 DCMR 1514. "Where removal or cutting of trees has
11 occurred that would have been prohibited by the
12 section..." which clearly that's what happened here.
13 Some removal of trees that was prohibited by the
14 section occurred. "...no building permit shall be
15 issued for a period of seven years from such removal
16 or cutting unless the Board of Zoning Adjustment
17 grants a special exception pursuant to Section 1515."
18 There is no requirement that there be a conviction of
19 a federal crime of destroying the trees.

20 MR. HILDEBRAND: Isn't that restriction on
21 the property itself? It's not talking about on the
22 zoning property.

23 MR. CAROME: No.

24 MR. HILDEBRAND: It's for issuance of a
25 building permit on that piece of property.

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1 MR. CAROME: I don't believe that's how it
2 is --

3 MR. HILDEBRAND: That's how it's worded.

4 MR. CAROME: Is there a particular
5 language --

6 CHAIRPERSON GRIFFIS: Not only worded.
7 It's the intent was the fact that you don't want
8 someone coming in pulling a permit for a small
9 demolition to build a shack and removing all the trees
10 illegally and then pulling the permit the next week
11 for the new house that they actually anticipated.
12 It's a moratorium to stop any activity that is
13 purposely illegal.

14 MR. CAROME: Well, I think that if the
15 project entailed the destruction of trees, whether
16 they were on the property or not, it's a question of
17 whether the project in question was on the property.

18 CHAIRPERSON GRIFFIS: I don't see where
19 that is.

20 MR. CAROME: If I could just have a moment
21 to look at the provision in front of me. I think a
22 relevant part of the provision is 1514(f), "Where
23 removal or cutting of trees has occurred that would
24 have been prohibited by this section if an application
25 for a building permit had been contemporaneously

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1 filed, where that has happened no building permit
2 shall be issued for a period of seven years
3 thereafter."

4 Now, what I'm saying is that he went and
5 cleared those trees without a permit in order to
6 prepare the site for this platform wall structure. He
7 didn't have a permit to do that. He wasn't allowed to
8 do it because it violated the tree slope protection
9 overlay.

10 CHAIRPERSON GRIFFIS: Could he have pulled
11 the permit for the adjacent property where the trees
12 were?

13 MR. CAROME: He apparently needed to.
14 This was a project that apparently needed that.

15 CHAIRPERSON GRIFFIS: Could he have in
16 your understanding?

17 MR. CAROME: I don't think he could have.
18 I would expect that he couldn't have because, among
19 other things, it would have been a violation of this
20 overlay.

21 CHAIRPERSON GRIFFIS: How about the fact
22 that he doesn't own the property, too.

23 MR. CAROME: Well, I mean, there is a lot
24 that has happened on this property in connection with
25 this that shouldn't have happened but it did.

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1 Apparently it had to happen. I think that --

2 CHAIRPERSON GRIFFIS: Okay. Last go
3 around. Mr. Murphy, you wanted to address this
4 briefly?

5 MR. MURPHY: Well, Mr. Chair, the National
6 Park Service has on occasion issued permits for
7 removal of trees after a careful and balanced
8 analysis.

9 CHAIRPERSON GRIFFIS: Issued permits to
10 who?

11 MR. MURPHY: To adjoining property owners.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. MURPHY: However, in this case these
14 trees were removed on park land, from park land
15 lacking any permit and that has been deemed a trespass
16 on national park land.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. HILDEBRAND: Mr. Murphy, do you know
19 if the tree and slop overlay applies to the national
20 park land?

21 MR. MURPHY: It is shown on the zoning map
22 as applying to it and we are taking the zoning map and
23 the public record of the zoning regulations as the
24 basis for our defense of park lands throughout the
25 District.

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1 MR. HILDEBRAND: Is it typical the
2 Government property is zoned?

3 MR. MURPHY: It's very unusual. We do not
4 have access as yet to the record as to explaining why
5 that occurred at this site.

6 MR. HILDEBRAND: Is there any other case
7 where a park like this is under a zoning ordinance?

8 MR. MURPHY: I do not know of another one.

9 MR. HILDEBRAND: Thank you.

10 MR. AGUGLIA: The subject property is not
11 under the TSP and it is a case in court to be
12 determined by that court, not here.

13 CHAIRPERSON GRIFFIS: Good. I think we've
14 got enough to decide this. I don't see the relevancy
15 of expanding the appeal based on this issue. I think
16 based on, first of all, the oral briefings that we've
17 gotten right now and the Board's understanding, first
18 of all, the TSP and, secondly, the federal land and
19 the zoning.

20 It appears probably more to the fact that
21 it's a graphic mistake on the zoning map that was done
22 that laid this in. Even with that, or without it if
23 it's not a mistake, where I begin and I end is a fact
24 of Section 1500. In the entire zoning regulations if
25 this Board, and I know it is well aware, when we get

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1 applications we look within the property lines and
2 that is where the zoning begins and ends.

3 The calculations, the regulations, the
4 setback all of which the impact on surrounding or, one
5 might say, the importance of the adjacent property if
6 it is to be reviewed in the zoning regulations is
7 specifically set out and articulated. It is far and
8 few between where the regulations move this Board,
9 certainly in our jurisdiction the zoning regulations
10 themselves off the property line.

11 I think the fact that there was action
12 taken previously to the issuance of this particular
13 permit and is, as has been somewhat talked about
14 today, under totally different processes. I haven't
15 been persuaded the fact that there was compelling
16 jurisdiction for us or to bring an appeal based on
17 that action. I think we ought to move on as was
18 previously submitted.

19 Ms. Miller.

20 VICE CHAIR MILLER: With all due respect,
21 I don't disagree with your conclusion based on what
22 we've heard today on interpreting that provision but I
23 think that what the appellant needs to show only at
24 this point is that he is alleging an error that the ZA
25 didn't consider this provision. Whether or not we

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1 weren't persuaded at this moment to agree that an
2 error occurred I think is different from whether or
3 not he should be able to present a case on that.

4 I guess I'm of a different view that he
5 should be able to. I think I said previously that I
6 don't think that the other parties are really
7 prejudiced by that. I think that this case is going
8 to be continued to another day in which they would be
9 able to cross.

10 CHAIRPERSON GRIFFIS: Good. Well said.
11 Just for clarity, I put this in the matter of all the
12 quality of construction elements. I put this in the
13 matter of environment concerns, means, and methods and
14 aspects that happen outside of the property. That is
15 where it begins and ends. I don't see us taking
16 everyone's time, ours included, going through a long
17 presentation of something that I think is, frankly, a
18 nonstarter for jurisdiction of the Board. Let me hear
19 from others.

20 MR. MANN: I would say only that I agree
21 with you, Mr. Chairman. I don't think that we should
22 allow that to be considered.

23 CHAIRPERSON GRIFFIS: Okay. Ms. Gates, do
24 you want to talk about this issue very briefly, or not
25 briefly? Excellent. Let's get through this and then

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1 we'll move on to that point of clarification and
2 decision. Does everyone want to state their opinion?

3 If we need a motion then, I suppose we can take it up
4 as the motion to the appellants to amend the
5 application and I would, therefore, move to deny the
6 motion to amend and ask for a second.

7 MR. ETHERLY: Second, Mr. Chairman.

8 CHAIRPERSON GRIFFIS: Thank you, Mr.
9 Etherly. I'll open it up for any further deliberation
10 on the motion. Not noting any indication of further
11 deliberation, I would ask for all those in favor
12 signify by saying aye.

13 BOARD MEMBERS: Aye.

14 CHAIRPERSON GRIFFIS: And opposed?

15 VICE CHAIR MILLER: Opposed.

16 CHAIRPERSON GRIFFIS: Excellent. Thank
17 you. Ms. Gates.

18 MS. GATES: Mr. Chairman, I readily admit
19 I am a neophyte when it comes to zoning issues. I
20 understood you to say that we would not be looking at
21 Title 12.

22 CHAIRPERSON GRIFFIS: It's a good point to
23 bring up. I would say we are going to be asking for
24 great discretion or, rather, we are going to ask for a
25 very persuasive reasoning why we should be looking at

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1 Title 12.

2 MS. GATES: Here's my confusion. When we
3 talk about fence heights, they are determined, I
4 believe, in Title 12.

5 CHAIRPERSON GRIFFIS: Um-hum.

6 MS. GATES: So why then if you look at --
7 do you have Title 12?

8 CHAIRPERSON GRIFFIS: Only that which was
9 submitted in this record.

10 MR. CAROME: You have the relevant parts.

11 MS. GATES: Section 101.2.3, the scope,
12 says, "These regulations -- this is Title 12 -- shall
13 control matters concerning the construction,
14 alteration, addition, repair, removal, demolition,
15 use, location, movement, enlargement, occupancy, and
16 maintenance of all buildings and structures." We, I
17 believe, have discussed the term "structure" today so
18 I think that we should be permitted where appropriate
19 to bring in Title 12. Again, I'm asking for guidance
20 on this. Thank you.

21 CHAIRPERSON GRIFFIS: Certainly.

22 MR. CAROME: If I could be heard on that
23 as well.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. CAROME: I believe that because the

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1 provision regarding the construction of retaining
2 walls --

3 CHAIRPERSON GRIFFIS: Right, 2503.

4 MR. CAROME: Yes, to be within that
5 exception. It's not just that it's just a retaining
6 wall. It's that it is a retaining wall constructed in
7 accordance with the code. In that respect, I think,
8 unfortunately, for the Board it does here add to the
9 burden of the Board here to actually ensure that it is
10 a structure and was permitted as a structure that
11 would be in accordance with the building code. If it
12 wasn't, that was a zoning violation and is clearly
13 within this Board's jurisdiction.

14 MR. AGUGLIA: May I be heard?

15 CHAIRPERSON GRIFFIS: Yes.

16 MR. AGUGLIA: I agree with Mr. Bello.
17 Once he is presented with the design plans for the
18 wall that are prepared by a structural engineer who is
19 certified and accepted in the District of Columbia the
20 zoning matter is over.

21 If Mr. Carome has a problem with the
22 structural soundness, then you go to Section 115 of
23 Title 12 which gives him his opportunity to go to make
24 a claim to DCRA that it's an unsafe structure and then
25 the burden is on DCRA to go out and to see if, in

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1 fact, it's an unsafe structure.

2 If they deem it to be unsafe, then they
3 issue a notice to cure to the property owners. If
4 they deem it safe, then I believe Mr. Carome would
5 probably then be relegated to go to court because this
6 Board is not going to be able to sit and say, "Oh, let
7 me see. That footer was wrong or the gravel should
8 have been here or the radiant park should have been
9 this way instead of at an angle."

10 CHAIRPERSON GRIFFIS: Right.

11 MR. AGUGLIA: I can't do that and I don't
12 think you were supposed to do that either.

13 CHAIRPERSON GRIFFIS: Okay.

14 MS. MONROE: Can I weigh in on that?

15 CHAIRPERSON GRIFFIS: After my statement,
16 of course, so you can correct me. I tend to agree
17 actually further. The fact that the building code is
18 cited within the zoning regulations does not mean that
19 the zoning regulations adopt the entire building code
20 regulation. Within Title 11 is not the entire Title
21 12 just because it's cited.

22 Therefore, our jurisdiction doesn't spread
23 into that either. It may well be analogous to other
24 applications that have to be reviewed by other
25 agencies and we have to provide that they are approved

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1 or could be approved by those agencies or those health
2 standards.

3 It certainly doesn't make us the judicial
4 body or the appeal body for all issues relating to
5 that. I think this is a very straightforward aspect
6 to our zoning regulations, specifically when we get
7 into whether and how the zoning administrator would
8 have reviewed and would have correctly or incorrectly
9 reviewed for compliance with the building code.

10 That is about where we would get into it.

11 Reviewing entire aspects or compliance with building
12 codes based on the construction or based on any sort
13 of the structural elements, I think, is well beyond
14 what we are doing.

15 Ms. Monroe.

16 MS. MONROE: I guess I'm just reiterating
17 but this Board has no authority to interpret anything
18 in Title 12. You are a Board of limited jurisdiction
19 from the 1938 Zoning Act and you can give appeal under
20 the zoning regulations but you can't go outside of
21 that and decide what Title 12 means and when something
22 is properly constructed pursuant to Title 12 or
23 anything else.

24 CHAIRPERSON GRIFFIS: She keeps us from
25 getting into trouble.

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1 MR. CAROME: May I speak to this briefly?

2 CHAIRPERSON GRIFFIS: Sure.

3 MR. CAROME: I think there are two
4 different things that you may be talking about and I
5 think there may be one that I would like to clarify
6 that we would be in agreement on. For example, the
7 building code says that a fence wall cannot be higher
8 than seven feet.

9 I take it that when the zoning code says
10 it has to be a structure built in accordance with the
11 building code, if the plan said and the application
12 said it's going to be 30 feet, that would be -- and
13 DCRA said that's fine, that would be a clear instance
14 of having constructed it not in accordance with the
15 building code. There may be other things like that
16 but maybe that is just a clear example that we could
17 just get clear that at least that would not be a
18 problem. Otherwise, we would have taken out --

19 CHAIRPERSON GRIFFIS: -- if you want to
20 assert that. I don't want to go through and take all
21 the substance of these things. That's part of it and
22 we'll move ahead. We'll take it on and I'll be very
23 direct if we think we're going the wrong way.

24 What is of great importance to me is not
25 to waste your time in presenting things and not to

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1 waste ours in having to deal with them when at the end
2 of the day the attorneys will say, "That would be
3 great if you want to do that but you're not allowed to
4 do that." Our attorney said that. I'm not sure what
5 you guys would say. Okay. We'll take it up issue by
6 issue. I think we have a firm understanding of the
7 narrowness of the scope of this.

8 Ms. Miller.

9 VICE CHAIR MILLER: I just want to say
10 generally that sometimes some terms are not defined in
11 our regulations, for example, if we were to say
12 retaining wall and that we can look to other places be
13 it the dictionary in that particular case, to 12 DCMR,
14 you know, to a certain extent.

15 CHAIRPERSON GRIFFIS: We have yet in my
16 experience on this Board, and I think it's an
17 important aspect. Certainly the Websters would go to
18 any undefined terms in the regulations but I have yet
19 or cannot recall where we have been definitive in
20 adopting a definition from the building code. I think
21 it's informative. I want to add to your comment to
22 make sure that everyone is clear.

23 If you find a definition in the building
24 code, the utilization of terms in the building code
25 may well be very different for that which it is

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1 utilized in the zoning regulations. Okay. Enough of
2 us talking. Why don't we hear from other people. Are
3 we ready to go? Everyone clear on what we're doing?

4 MR. CAROME: Yes.

5 CHAIRPERSON GRIFFIS: Excellent. Thank
6 you very much. We'll see you back here shortly. Do
7 you need a couple minutes to get ready?

8 MR. CAROME: Yes, that would be very
9 helpful.

10 CHAIRPERSON GRIFFIS: We'll give five
11 minutes and then we'll start.

12 MR. CAROME: Great. Thank you very much.

13 (Whereupon, at 5:32 p.m. off the record
14 until 5:44 p.m.)

15 CHAIRPERSON GRIFFIS: I had two things
16 brought seriously to my attention. The first being I
17 am the worse in my estimation of how long things take.
18 The second is, is the Government representative here?
19 Is your legal representation here? I want to assess.
20 We're at quarter of 6:00 and there are folks that are
21 involved in this that have child care issues, me being
22 one of them. My daughter will be showing up shortly,
23 hungry, too.

24 I want us to be kind of rational with the
25 whole aspect of this and whether we get into this

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1 tonight or start fresh when we all have had a day or
2 so to look at it. While we are getting the
3 Government's attorney back in, can I have people check
4 schedules for the 15th in the afternoon. Oh, wow.

5 Come forward. If I could have the
6 Government at the table also. Let me just assess
7 going way past 6:00 is a difficulty this evening?

8 MS. BELL: No, I have made some
9 arrangements.

10 CHAIRPERSON GRIFFIS: Okay. We can't
11 count on you then.

12 MS. BELL: Well, I would actually prefer
13 if we continue to another day.

14 CHAIRPERSON GRIFFIS: Let's look at the
15 15th.

16 Mr. Carome, difficulties with the first
17 case in the afternoon on the 15th?

18 MR. CAROME: I don't believe so.

19 CHAIRPERSON GRIFFIS: Okay.

20 Mr. Aguglia.

21 MR. AGUGLIA: I have to go out of town
22 because I have a close relative who is seriously sick
23 so I won't be back until late the 13th. I'm leaving
24 Wednesday to visit him, Wednesday of that week. Is
25 the 22nd, the following Tuesday in the afternoon not

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1 available?

2 MS. BELL: I also want to mention I think
3 the 15th is ETW because I think I have to be here for
4 that. I don't know how long you think that might
5 take.

6 MR. AGUGLIA: It appears I will make due
7 with the 15th in the afternoon.

8 CHAIRPERSON GRIFFIS: Okay. Yes, we have
9 another appeal scheduled for that afternoon. We're
10 slipping this in first as it came to the schedule
11 first. We are making a lot of people happy all at
12 once.

13 MS. GATES: Mr. Chairman, may I ask what
14 time the St. Patrick's case is scheduled for the 15th?
15 That's my single member district.

16 MS. BAILEY: Mr. Chairman, April 12th is
17 when I'm showing St. Patrick School.

18 CHAIRPERSON GRIFFIS: Yeah, I don't have
19 it in March either.

20 MS. GATES: Thank you. I'm fine.

21 CHAIRPERSON GRIFFIS: Okay. I think we
22 need to utilize that time then. I think that would be
23 good for everybody's schedule. I think that would be
24 a little bit more rational than starting it this
25 evening. I imagine cross is going to go a little bit

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1 of time over 30 and Board questions. Is there any
2 objection to continuing it then to the first case in
3 the afternoon on the 15th?

4 MS. GATES: That's 1:00?

5 CHAIRPERSON GRIFFIS: Yes, 1:00.

6 MR. CAROME: No objection.

7 CHAIRPERSON GRIFFIS: Okay. It looks like
8 we have a fairly rational morning as much as I can
9 predict it at this point so we would anticipate
10 starting on time. It will be a long day for the
11 Board. We will split the afternoon. We will go
12 beyond 6:00 that Tuesday so I would anticipate we
13 would have a good three hours to get into this case
14 and maybe finish it so we'll utilize the time that we
15 have at that point. Questions from the Board?
16 Concerns?

17 Beverley -- Ms. Bailey, rather, forgive
18 me, Mr. Moy, do we have any indication of when we
19 rescheduled the Phillips case?

20 MS. GATES: Next week.

21 CHAIRPERSON GRIFFIS: Is it next week?

22 MS. GATES: I think so.

23 CHAIRPERSON GRIFFIS: There it is.
24 Excellent. Okay. I don't think we have any other
25 difficulties then.

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1 MS. GATES: What time is the Phillips case
2 because I wasn't here?

3 CHAIRPERSON GRIFFIS: Hang out with us
4 afterwards. I'll hand over the entire schedule. It
5 looks like it is the first in the afternoon on March
6 8th.

7 MS. GATES: Thank you.

8 CHAIRPERSON GRIFFIS: It looks like we're
9 okay. Can I answer any other procedural questions at
10 this time then? Very well. When we come back, of
11 course, then we'll start on the appeal of the case
12 starting with the appellant. We'll get through as
13 much as we can at that time and we'll move on from
14 there. Good. Thank you all very much. Appreciate
15 your time this afternoon.

16 Ms. Bailey, any other business for the
17 Board this afternoon?

18 MS. BAILEY: No, Mr. Chairman.

19 CHAIRPERSON GRIFFIS: Very well. If there
20 is no other business for the Board we will adjourn the
21 afternoon session of the 1st of March.

22 (Whereupon, at 5:50 p.m. the hearing was
23 adjourned.)
24

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