

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,

JANUARY 12, 2010

+ + + + +

The Public Hearing convened in
Room 220 South, 441 4th Street, N.W.,
Washington, D.C. 20001, pursuant to notice at
10:30 a.m., Marc D. Loud, Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD	Chairman
SHANE L. DETTMAN	Vice Chairman (NCPC)
MERIDITH MOLDENHAUER	Board Member

ZONING COMMISSION MEMBERS PRESENT:

KONRAD SCHLATER	Commissioner
MICHAEL G. TURNBULL,	FAIA, Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Spec.
JOHN NYARKU	Zoning Specialist

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Board of Zoning Adjustment
District of Columbia
CASE NO. Transcript
EXHIBIT NO. null

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.
MARY NAGELHOUT, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

ARTHUR JACKSON
MATT JESICK
KAREN THOMAS

This transcript constitutes the
minutes from the Public Hearing held on
January 12, 2010.

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

10:28 a.m.

CHAIRMAN LOUD: And we're going to go directly into the hearing calendar. We're going to call, when we get to that point, the 18020 case first, which is going to be continued, so that if anyone here is waiting for that, we can get that out of the way.

This morning's hearing calendar will, please, come to order.

Ladies and gentlemen, this is the January 12th Public Hearing of the Board of Zoning Adjustment of the District of Columbia.

My name is Marc Loud, Chairperson. Joining me today are Vice Chair, Shane Dettman, representing the National Capital Planning Commission, Meridith Moldenhauer, Mayoral Appointee.

To her left is Mr. Clifford Moy, Secretary of the BZA walking in as I speak and representing the Zoning Commission is Mr. Michael Turnbull. Good morning, Mr. Turnbull.

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1 And Ms. Sherry Glazer, Office of the Attorney
2 General, and Ms. Beverley Bailey, Zoning
3 Specialist in the Office of Zoning.

4 Copies of today's hearing agenda
5 are available to you and are located to my
6 left in the wall bin near the door.

7 I think Ms. Glazer is leaving and
8 Ms. Lori Monroe will join us from the Office
9 of the Attorney General.

10 Please, be advised that this
11 proceeding is being recorded by a Court
12 Reporter and is also webcast live.
13 Accordingly, we must ask you to refrain from
14 any disruptive noises or actions in the
15 hearing room.

16 When presenting information to the
17 Board, please, turn on and speak into the
18 microphone, first, stating your name and home
19 address. When you are finished speaking,
20 please, turn your microphone off, so that your
21 microphone is no longer picking up sound or
22 background noise.

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1 All persons planning to testify
2 either in favor or in opposition are to fill
3 out two witness cards. These cards are
4 located to my left on the table near the door
5 and on the witness tables. Upon coming
6 forward to speak to the Board, please, give
7 both cards to the reporter sitting to my
8 right.

9 The order of procedure for special
10 exceptions and variances is as follows:
11 Statement and witnesses of the applicant;
12 Government reports, including the Office of
13 Planning, the Department of Public Works,
14 etcetera; The report of the Advisory
15 Neighborhood Commission; Parties or persons in
16 support; Parties or persons in opposition; and
17 finally, Closing remarks by the applicant.

18 Pursuant to Sections 3117.4 and
19 3117.5, the following time constraints will be
20 maintained this morning: The applicant,
21 appellant, persons and parties, except an ANC,
22 in support, including witnesses, no more than

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1 60 minutes collectively. The appellee,
2 persons and parties, except an ANC, in
3 opposition, including witnesses, no more than
4 60 minutes collectively. And finally,
5 individual witnesses 3 minutes. Witnesses
6 that represent organizations 5 minutes.

7 These time restraints do not
8 include cross examination or Board questions.

9 Cross examination is permitted by the
10 applicant or parties only. The ANC within
11 which a property is located is automatically a
12 party.

13 Nothing prohibits the Board from
14 placing reasonable restrictions on cross
15 examination.

16 The record will be closed at the
17 conclusion of each case, except for any
18 material specifically requested by the Board.

19 The Board and the staff will specify at the
20 end of the hearing exactly what is expected
21 and the date when the persons must submit the
22 evidence to the Office of Zoning. After the

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1 record is closed, no other information will be
2 accepted by the Board.

3 The decision of the Board in
4 contested cases must be based exclusively on
5 the public record. To avoid any appearance to
6 the contrary, the Board requests that persons
7 present not engage the Members of the Board in
8 any conversation.

9 Please, turn off all beepers and
10 cell phones, at this time, so as not to
11 disrupt these proceedings.

12 The Board will now consider any
13 preliminary matters. Preliminary matters are
14 those which relate to whether a case will or
15 should be heard today, such as requests for
16 postponement, continuance or withdrawal or
17 whether proper and adequate notice of the
18 hearing has been given. If you are not
19 prepared to go forward with a case today or if
20 you believe that the Board should not proceed,
21 now would be the time to raise such a matter.

22 Does the staff have any preliminary

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1 matters?

2 MS. BAILEY: Mr. Chairman, Members
3 of the Board, to everyone, it's a little late
4 in the year, but Happy Belated New Year.
5 There is a request and it is for postponement
6 of Application 18020 of the District of
7 Columbia Department of Real Estate Services,
8 Mr. Chairman.

9 Is the applicant here for that
10 case? Would you, please, have a seat at the
11 table?

12 CHAIRMAN LOUD: Good morning. If
13 you could state your name for the record?

14 MS. MISRA: Is it on? My name is
15 Sanjukta Misra. I am in the General Counsel's
16 Office for the Department of Real Estate
17 Services. I think you needed the home
18 address?

19 CHAIRMAN LOUD: Yes.

20 MS. MISRA: Or would you like the
21 office address? My home address is 122 11th
22 Street, N.E., Washington, D.C.

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1 CHAIRMAN LOUD: Thank you. Good
2 morning. Is the ANC here this morning? I
3 don't believe so.

4 I believe, I think, we can go
5 straight to the heart of the matter. There is
6 a request to continue the case for a date
7 after January 25, 2010?

8 MS. MISRA: That's correct.

9 CHAIRMAN LOUD: Is that still the
10 case? And I think we have looked at our
11 calendar and could offer up February 2nd in the
12 afternoon?

13 MS. MISRA: That would work.

14 CHAIRMAN LOUD: Would that work for
15 you?

16 MS. MISRA: Sure.

17 CHAIRMAN LOUD: Okay. I don't
18 believe that there was an Affidavit of Posting
19 in the file, which is required by Rule
20 3113.19, 3113.20. It has to be submitted five
21 days before the hearing, so you may want to
22 confer internally with your team there and try

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1 to make sure that is filed before the February
2 2nd hearing date.

3 MS. MISRA: Yes, sir.

4 CHAIRMAN LOUD: Okay. Is there
5 anything further on this, Ms. Bailey, or
6 colleagues?

7 MS. BAILEY: No, Mr. Chairman, not
8 from me.

9 CHAIRMAN LOUD: Okay.

10 MR. MOY: Mr. Chair, I'm assuming
11 this would be February 2nd in the afternoon?

12 CHAIRMAN LOUD: In the afternoon.

13 MR. MOY: All right. Thank you.

14 CHAIRMAN LOUD: Yes. Okay. We
15 look forward to seeing you on February 2nd in
16 the afternoon.

17 MS. MISRA: Thank you, Chairman.
18 Thank you, Board.

19 CHAIRMAN LOUD: And, Ms. Bailey,
20 when you are ready, you can call the next
21 case.

22 MS. BAILEY: Mr. Chairman, is this

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1 a good time to swear the witnesses in?

2 CHAIRMAN LOUD: Yes.

3 MS. BAILEY: All persons wishing to
4 testify today, would you, please, stand to
5 take the oath? All persons wishing to testify
6 today.

7 (Whereupon, the witnesses were
8 sworn.)

9 MS. BAILEY: Yes, thank you.

10 The first application is No. 18019
11 of Ming Zheng, and it is pursuant to 11 DCMR §
12 3104.1, for a special exception for a fast
13 food restaurant that is a carry-out under
14 section 733, at premises 6215 Georgia Avenue,
15 N.W., Square 2979, Lot 39. The property is
16 Zoned C-2-A.

17 CHAIRMAN LOUD: Good morning.
18 Apparently the requirement for witness cards
19 was not satisfied, so the witnesses, the
20 parties have to fill out witness cards and
21 give them to the Court Reporter, who is all
22 the way on your left. That helps to ensure

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1 the correct spelling of their name in the
2 transcript.

3 MR. MOY: Mr. Chairman, at this
4 point, I just want to --

5 CHAIRMAN LOUD: Yes, sir?

6 MR. MOY: -- remind the Board that
7 we have a translator.

8 CHAIRMAN LOUD: Okay.

9 MR. MOY: Assigned with this case.

10 CHAIRMAN LOUD: Thank you. And we
11 have been, as promised, joined by Ms. Lori
12 Monroe from the Office of the Attorney
13 General.

14 I think, Mr. Moy or Ms. Bailey, let
15 me just ask in terms of the interpreter, is
16 there any particular procedure that I need to
17 follow to initiate that process? Okay.

18 Well, then why don't we have
19 everyone at the table introduce yourselves for
20 the record? I don't think your microphone is
21 on. The green light will come on when it is
22 being operated correctly.

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1 MR. MOY: It's at the base. There
2 is a button at the base.

3 INTERPRETER TSANG: Okay. My name
4 is Yinglee Tsang. I'm interpreter.

5 CHAIRMAN LOUD: Good morning.

6 MS. ZHENG: Good morning. My name
7 is Yueping Zheng.

8 CHAIRMAN LOUD: Good morning.

9 MR. ZHENG: Good morning. My name
10 is Ming Zheng.

11 CHAIRMAN LOUD: Very well. Good
12 morning to each of you. And it's going to
13 take me a few minutes to get all the names
14 correctly, but what we have at the table then
15 are the applicants and the business owners?

16 INTERPRETER TSANG: Yes.

17 CHAIRMAN LOUD: Okay. Very well.
18 The ANC did not file a report. They are not
19 in the room, so I'm not going to even bother
20 to ask them to step forward.

21 I do believe that we have a full
22 record in the case and I'll open it up to my

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1 colleagues for their weigh in. I think the
2 record is full. I think it's a special
3 exception request for a fast food carry-out in
4 the C-2-A where you can only do that by
5 special exception.

6 I think the Office of Planning in
7 its report makes a very compelling case for
8 the grant of a special exception along with
9 your submission in support of your case.
10 There are no persons that have appeared, up to
11 this point, who are in opposition to it, as
12 indicated. That the ANC has not filed a
13 report.

14 I think what I would like to
15 suggest, as a process, is rather than go
16 through each requirement of the test for
17 special exception or rather than get a lot of
18 history about the restaurant and its
19 background and so on and so forth, which we
20 have from the record, perhaps if the Board
21 Members could ask you the specific questions
22 that they have regarding some of the things in

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1 the record that present gaps, we may be able
2 to truncate the hearing somewhat and have a
3 more speedy process this morning.

4 So let me just confirm that my
5 Board Members are with me with respect to
6 that. Okay. Yes, and Mrs. Moldenhauer is
7 definitely making a good point for me to stop
8 and make sure that I'm being understood as I
9 speak.

10 So when the interpreter comes back.
11 Mrs. Moldenhauer just made the very excellent
12 point that as I speak or all of us speak to
13 make sure that we are giving you the
14 opportunity to interpret what we are saying
15 correctly.

16 INTERPRETER TSANG: Yes.

17 CHAIRMAN LOUD: Do you need me to
18 repeat what I just said regarding the
19 suggested procedure for this morning?

20 INTERPRETER TSANG: No, I don't.
21 Yes, she understand what we talk about this.
22 She basically has a very good comprehension of

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1 the language. So I'll only assist her when
2 she doesn't understand.

3 CHAIRMAN LOUD: Okay.

4 INTERPRETER TSANG: So she
5 understand whatever, yes, all the things you
6 just say.

7 CHAIRMAN LOUD: Okay. Very well
8 then. So as I suggested, I think that each of
9 us may have some questions regarding aspects
10 of the application. And I'm going to open it
11 up to Board Members to jump right in. We will
12 fill in the background and the details from
13 what is a very full record of submissions,
14 both from you and from the Office of Planning
15 with respect to the particular features of the
16 project.

17 And with that, I'll just open it up
18 to Board Members. And we can ask the
19 applicant specific questions regarding some of
20 what may be perceived as gaps in the record
21 and then we will turn to the Office of
22 Planning.

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1 COMMISSIONER TURNBULL: Mr. Chair,
2 good morning and Happy New Year to all of you.

3 I really don't have any problem
4 with this application, except that I don't --
5 it's the way the enclosure for the dumpster is
6 facing. And although we have the aerial map
7 that shows where everything is, I can't
8 picture where the enclosure is in the back of
9 this and what the back of the restaurant is in
10 that little alley space.

11 So I'm having a difficult time
12 trying to, and maybe Mr. Jackson can help on
13 this too, when we get to him, but I'm just
14 trying to, picture. A lot of times we will
15 get a little drawing that shows the back of
16 the restaurant or shows where the dumpster is
17 going to go, so that we have a pretty good
18 view of the impact that it will have on the
19 residential neighborhood.

20 And so I don't understand. When I
21 look at the aerial view, it looks like there
22 is a fairly decent space on the -- it looks

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1 like you come out of the back of your
2 restaurant, down a little narrow corridor to a
3 bigger open area where I'm assuming the
4 dumpster is or the dumpsters are for several
5 of these places.

6 And I'm just wondering how we can -
7 - I'm not trying to make this difficult. I'm
8 just trying to figure out the layout. The way
9 the particular things are situated. And if
10 somebody could explain or help draw something
11 on that, that would be, for my benefit, a lot
12 more clear to see where this thing goes.

13 MR. JACKSON: Mr. Chairman, I could
14 attempt to explain it. Looking at the aerial,
15 first, I want to point out that the China
16 Taste Carry-Out is within the red square, red
17 rectangle that is along Georgia Avenue. So
18 there is really no direct connection from the
19 China Taste Carry-Out through the building to
20 the rear.

21 COMMISSIONER TURNBULL: Oh, I mean,
22 the aerial view sort of shows like a little

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1 sliver and I thought that was like a little
2 walkway.

3 MR. JACKSON: No. No, it actually
4 -- the China Taste Carry-Out is a leased space
5 that is --

6 COMMISSIONER TURNBULL: Oh, so it's
7 totally isolated from the back?

8 MR. JACKSON: Yes.

9 COMMISSIONER TURNBULL: Okay.

10 MR. JACKSON: So that the, correct
11 me if I'm wrong, trash is collected in the
12 restaurant and then it is rolled around the
13 building to the back. I guess the super cans,
14 which are the large plastic dumpsters on
15 wheels.

16 The super cans you will see in the
17 back of the restaurant, the back of the
18 building to the left of the irregular-shaped
19 dashed area isn't a courtyard where you see a
20 truck is parked. A truck is parked.

21 COMMISSIONER TURNBULL: It looks
22 like a white van of some sort.

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1 MR. JACKSON: Yes, it's a white
2 van.

3 COMMISSIONER TURNBULL: Okay.

4 MR. JACKSON: That is within a
5 courtyard.

6 COMMISSIONER TURNBULL: Right.

7 MR. JACKSON: But the China Taste
8 Restaurant has no access to this courtyard.

9 COMMISSIONER TURNBULL: Oh.

10 MR. JACKSON: The courtyard
11 actually serves a furniture store in the front
12 and some other retail uses that are along the
13 parking lot, such that now if you look at the
14 -- okay, if you will follow --

15 COMMISSIONER TURNBULL: So is it
16 closer to the alley then?

17 MR. JACKSON: It's right next to
18 the alley.

19 COMMISSIONER TURNBULL: Right next
20 to the alley.

21 MR. JACKSON: The dumpster is right
22 next to the alley. Now, to point that out,

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1 looking right from the white van toward the
2 alley --

3 COMMISSIONER TURNBULL: Right.

4 MR. JACKSON: -- the corner of the
5 building, the dark shape roof line, right at
6 the dark -- where the alley -- where the
7 courtyard runs toward the alley, their
8 dumpster is parked right there at the corner
9 of the building. And when I say parked, it
10 just stands there.

11 Okay. So again if you --

12 COMMISSIONER TURNBULL: Looking at
13 the building with the van, the building just
14 adjacent to the white van --

15 MR. JACKSON: Right. The --

16 COMMISSIONER TURNBULL: -- if I
17 follow that line all the way down --

18 MR. JACKSON: The dark shape. Yes.

19 COMMISSIONER TURNBULL: -- then
20 there is the red dashed line that sort of cuts
21 across. Is there like a fence there or
22 something?

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1 MR. JACKSON: Well, not right
2 there.

3 COMMISSIONER TURNBULL: Okay.

4 MR. JACKSON: The fence -- but that
5 is the wall. That red line is along the rear
6 wall of that dark shape. The dumpster, their
7 super cans are standing right behind that
8 wall. So it's not in the courtyard. It is
9 right on the edge of the building.

10 Now, as you -- and that's the -- at
11 the western end of that dashed line. Now, if
12 you go to the opposite side that is next to
13 the alley, there is a fence that is along the
14 alley. And it seems to -- but it is generally
15 open. But the fence encloses the area behind
16 the dark shape, which I guess used to be a
17 theater. I think it is a CVS now or a
18 pharmacy, a drug store.

19 INTERPRETER TSANG: Family Dollar.

20 MR. JACKSON: Family Dollar store.
21 Okay. So the fence extends behind the Family
22 Dollar store and comes down and encloses a --

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1 when it is closed, it encloses that entire
2 area.

3 Most of the time it is open. So
4 there is now a 7 or 8 foot tall metal chain
5 link fence that is in that area that is
6 generally open. And so in our report, we make
7 a reference to the fact that that fence
8 exists. It currently has some vinyl mesh on
9 top of it, which seems to have not been tied
10 down.

11 And we think the only issue that--
12 well, I'm getting to my case. But I was
13 just --

14 COMMISSIONER TURNBULL: All right.

15 MR. JACKSON: I just wanted to
16 point out that, in fact, if you look at this
17 aerial again, there is a dark rectangular-
18 shape that is within the red broken line, that
19 appears to be a vehicle that is parked there.

20 If that's the case, then just north of the
21 vehicle is where the dumpsters are parked.
22 And I think there are two trash dumpsters,

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1 trash cans, two super cans.

2 COMMISSIONER TURNBULL: Mr.
3 Jackson, let me just take a minute. I'm going
4 to step by you and I want you to point it out
5 here and then I'll show it to the rest of
6 them.

7 MR. JACKSON: Oh, sure. Yes, the
8 applicant confirmed that there are just two
9 trash cans. They are just oversized and tall,
10 but they are essentially super cans.

11 COMMISSIONER TURNBULL: Yes.

12 MR. JACKSON: Now, what I would
13 point out was that during the day this fence
14 is open, but I'm assuming in the evening it is
15 closed. And once it is closed, so they have a
16 wall behind it, the dumpsters are against the
17 wall, but there is no way to put a wall in
18 front of it.

19 Well, there is, but it doesn't seem
20 like this is -- this is the collection area
21 for all the other users in the building. So
22 it seems that the issue for us was the

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1 screening of the dumpster and that the
2 screening could be accomplished by putting the
3 mesh down on the fence.

4 The applicant indicated that they
5 could not build -- I'm sorry, I'm getting to
6 my case. I didn't mean to, so I'll stop at
7 that point.

8 CHAIRMAN LOUD: I'm sorry.

9 COMMISSIONER TURNBULL: Basically,
10 just trying to summarize what you said is that
11 there is an existing fence along the edge of
12 the alley.

13 MR. JACKSON: Yes.

14 COMMISSIONER TURNBULL: There is an
15 opening which is somewhat centered on that
16 courtyard.

17 MR. JACKSON: Correct.

18 COMMISSIONER TURNBULL: And the
19 applicant's dumpster or dumpsters is back
20 beyond that at the end of another building.
21 It's in the corner of that.

22 MR. JACKSON: It's really behind

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1 the Family Dollar store, which is the dark
2 roof building.

3 COMMISSIONER TURNBULL: Dark,
4 gotcha.

5 MR. JACKSON: But they are located
6 right next to the courtyard.

7 COMMISSIONER TURNBULL: And is
8 there one or two?

9 MR. JACKSON: Two.

10 COMMISSIONER TURNBULL: There's
11 two. Okay. So in just looking, if you are in
12 the alley, they are screened from the
13 residents?

14 MR. JACKSON: Well --

15 COMMISSIONER TURNBULL: Sort of?

16 MR. JACKSON: -- no.

17 COMMISSIONER TURNBULL: Okay.

18 MR. JACKSON: The residences are
19 across the alley.

20 COMMISSIONER TURNBULL: Right.

21 MR. JACKSON: Such that if the mesh
22 was down and the fence was closed, it would be

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1 screened. But at this point, they are not
2 screened, because the mesh is not down and the
3 fence is generally open during the day.

4 COMMISSIONER TURNBULL: Well, this
5 is an area for everybody's dumpsters?

6 MR. JACKSON: Yes. So --

7 COMMISSIONER TURNBULL: This is
8 really the owner of the property's
9 responsibility?

10 MR. JACKSON: Yes. This is the --
11 and we contacted the property manager and
12 asked them about it and indicated this was a
13 concern. Unfortunately, we got the general
14 manager and the specific manager for this
15 property never got back to us. But I did send
16 them a copy of our report with the
17 recommendation, but I haven't got any comments
18 from them.

19 COMMISSIONER TURNBULL: Okay.
20 Thanks, Mr. Jackson.

21 CHAIRMAN LOUD: I believe there is
22 at least one other or at least there used to

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1 be one other food establishment in this strip
2 mall.

3 MR. JACKSON: I noted the Family
4 Dollar store and the furniture store. I'm not
5 sure about the other, if there is another
6 restaurant. But now, one thing about the
7 property is that there are multiple lots that
8 are not within the lot of the shopping center.

9 CHAIRMAN LOUD: Yes.

10 MR. JACKSON: They seem to be -- in
11 total, they constitute the shopping center,
12 but as you go north from the boundary line,
13 there are other properties that are outside
14 the boundary of the actual shopping center
15 proper.

16 CHAIRMAN LOUD: But this property
17 is within the boundary of the shopping center?

18 MR. JACKSON: Yes, this is.

19 CHAIRMAN LOUD: Is it north of the
20 Dollar Value?

21 MR. JACKSON: No, it's immediately
22 south of it.

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1 CHAIRMAN LOUD: Immediately south,
2 okay.

3 MR. JACKSON: Now, if you look at
4 the architecture of the building, my guess is
5 that the Dollar Store used to be a theater.
6 And that when they built -- when they turned
7 it into -- at some point, there was infill
8 construction that was on both sides of the
9 theater entrance. And that infill
10 construction was turned into lease space. And
11 that lease space is where -- one of the lease
12 spaces is where their restaurant is. And
13 there is another lease space north of that.

14 As such, that lease space backs
15 right up to what probably was a solid wall at
16 one time.

17 CHAIRMAN LOUD: Yes.

18 MR. JACKSON: The front of the
19 theater.

20 CHAIRMAN LOUD: What would be, in
21 your opinion, the impediment to creating a
22 three-sided enclosure around their garbage?

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1 MR. JACKSON: Well, I had recently
2 talked to them about putting a three-sided
3 enclosure inside of the courtyard, but then I
4 was told the courtyard really is not their --
5 they have no control over. That's for Family
6 Dollar and the other stores that actually are
7 adjacent to it.

8 I thought that the screening of the
9 property -- because of the way it is kept, it
10 is very clean. It is very well-maintained.
11 There was no evidence of any garbage on the
12 ground. I was very pleased by that. No
13 smell.

14 I thought the visual screening
15 would be sufficiently addressed if they just
16 put down the mesh. The issue of creating an
17 enclosure still would be possible, but based
18 on the circumstances on the ground, it
19 appeared that using the mesh would meet the
20 intent of the regulations, in that it would
21 visually screen the residences from the
22 dumpsters.

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1 But that was just a supposition
2 from the Office of Planning. And that's why
3 we recommended that the BZA consider accepting
4 the screening as an option. The mesh had the
5 option to screening the dumpsters.

6 CHAIRMAN LOUD: And with the
7 location of the dumpsters where they are now
8 and that gate always being open, if you are
9 living in a residence across the alley and you
10 are looking, you know, straight to the rear of
11 the strip mall, are you looking at dumpsters
12 or are the dumpsters recessed from the gate?

13 MR. JACKSON: They are recessed
14 from the gate.

15 CHAIRMAN LOUD: Okay.

16 MR. JACKSON: They are actually
17 against the building. And I would note if you
18 look at the aerial, once again, that you are
19 not -- the residents are not going to be
20 looking directly at the dumpsters.

21 The one thing I would note is that
22 you see that the residences to the north,

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1 facing north from the 50 foot wide alley, all
2 have frontage on the street to the north. The
3 residences to the south along Rittenhouse Road
4 all have frontage, all front on Rittenhouse
5 Road.

6 So that these dumpsters actually
7 face rear yards and alley space, so that I
8 don't think there is any direct detriment on
9 the nearby residents, only because they are
10 not looking at the dumpsters. If anything,
11 they would be looking at this fence. They
12 might not even notice the dumpsters.

13 But again, that is the standard.
14 And we felt that it should be addressed at
15 least in the -- consistent with the intent of
16 the regulations, which we would feel is to
17 address the issue of smell and visibility and
18 they screen with the mesh would deal with the
19 visibility. But again, we have no response
20 from the management to indicate whether or not
21 they would agree to go along with this of
22 tying the mesh down. Because we have no

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1 knowledge of why it's not tied down now. It's
2 just sitting there.

3 CHAIRMAN LOUD: So if we impose
4 that as a condition and the applicant, the
5 tenant were not able to get the owner to do
6 that, they would not meet that condition and
7 would not secure their permit or would it
8 simply become an enforcement issue?

9 MR. JACKSON: Both. It would be an
10 enforcement issue if they could not -- they
11 would have to secure that agreement. The mesh
12 would have to be in place before they could be
13 issued the Certificate of Occupancy to occupy
14 the site.

15 CHAIRMAN LOUD: Okay. And is it
16 your thinking that the mesh would go the
17 entire length of that fence or just the part
18 that the dumpsters are behind?

19 MR. JACKSON: Well, the part the
20 dumpsters are behind. Although, it's a
21 continuous -- it appears to be a continuous
22 swath of mesh that goes the entire way, so

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1 it's not like it is in pieces. Well, I assume
2 it probably is in pieces. But what we are
3 talking about is screening the dumpsters that
4 are associated with this use. So it would
5 just be that piece.

6 CHAIRMAN LOUD: That would be kind
7 of strange, wouldn't it? I mean, if you are
8 driving north in the alley, you would be able
9 to see the dumpsters driving north, say coming
10 from Rittenhouse until you got right to the
11 point of the mesh. And then, you know, if you
12 glanced over, you wouldn't be able to see it
13 then.

14 MR. JACKSON: Well, in all honesty,
15 the dumpsters are really not that visible from
16 the alley.

17 CHAIRMAN LOUD: Okay.

18 MR. JACKSON: Again, they are
19 standing right against the wall. They are
20 fairly tall, but they are not deep.

21 CHAIRMAN LOUD: Yes.

22 MR. JACKSON: And so the impact of

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1 the mesh would not be apparent, unless the
2 gate was closed. So the -- in summary, it
3 would be possible to build a wall for these
4 two dumpsters right there at the corner. The
5 fence could -- putting the mesh on the fence
6 would serve the same purpose with regard to
7 screening.

8 However, it would only be -- have
9 the impact when the fence was closed.
10 Otherwise, they would still be visible.

11 CHAIRMAN LOUD: Okay.

12 MEMBER MOLDENHAUER: Mr. Jackson,
13 could I just ask a quick question? If we find
14 that they potentially have no control over
15 this area and they could not satisfy that
16 condition, do you think that, based on these
17 facts, the applicant could then -- there would
18 be the ability to satisfy a variance to excuse
19 them from this condition, because of the fact
20 that this is, obviously, unique giving the
21 fact that they don't have control over that
22 property?

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1 They actually currently have to
2 walk around. They are sharing dumpsters with
3 other retail spaces, something to that effect.

4 MR. JACKSON: Yes. I just wanted
5 to check the regulations to see whether or
6 not, 733. I think it would be within the
7 Commission's purview to accept this condition
8 and not enforce that provision. So I don't
9 think you would actually have to grant a
10 variance, but I'm going to double check.

11 MEMBER MOLDENHAUER: I believe OAG
12 -- OP just stated that he believes it is in
13 our purview to just not -- to grant the
14 special exception without that condition, but
15 I believe OAG has stated that we have to
16 actually grant a variance on that.

17 MR. JACKSON: Okay.

18 MS. MONROE: You know,
19 unfortunately, I don't think there is a hard
20 and fast rule, but I was just speaking with
21 Member Moldenhauer and in the past what the
22 Board has done when they are stuck with the

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1 special exception that has multiple, you know,
2 parts to it, and say one part can't be met,
3 but clearly the special exception is otherwise
4 met, that a variance sometimes has been
5 granted from that one particular part.

6 I don't think -- I mean, I'm
7 speaking off the top of my head here. I
8 haven't researched this, but I don't think you
9 can grant the special exception unless all of
10 the parts are met. And if one of them isn't
11 met, you would have to perhaps give a
12 variance.

13 I mean, or come up with an
14 alternative as Mr. Jackson said somehow
15 screening or something to somehow meet the
16 spirit of that part of the special exception.

17 I don't know how you feel about a
18 variance. And I know the applicant hasn't
19 asked for it, but it would be one way to deal
20 with this, because I do believe they -- and I
21 think that you should translate some of this.

22 I think this should be explained,

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1 okay. I don't think they have control over
2 where the entrance to the dumpster enclosure
3 is. It has nothing to do with their
4 particular business. And I realize it's in
5 the special exception, but it might not be too
6 applicable to the special exception, which is
7 why I brought up the fact that maybe a
8 variance would be the way to go.

9 MEMBER MOLDENHAUER: Well, let's
10 ask the applicant. Can we ask the applicant?

11 MS. MONROE: And I think, yes, this
12 should be --

13 MEMBER MOLDENHAUER: Can we ask the
14 applicant some questions?

15 CHAIRMAN LOUD: Well, before we do
16 that, I just wanted to respond very briefly to
17 Ms. Monroe.

18 MEMBER MOLDENHAUER: Okay.

19 CHAIRMAN LOUD: I understand what
20 you're saying and I think normally I would,
21 obviously, be in agreement with you. I think
22 what may be different about 733 as a special

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1 exception is that there is a specific sub-part
2 of 733 that says if sections, I'm just going
3 to make this up, X through Z of 733 cannot be
4 satisfied, the Board is empowered to modify
5 those sections.

6 MEMBER MOLDENHAUER: Oh.

7 CHAIRMAN LOUD: And that -- huh?

8 MEMBER MOLDENHAUER: Okay.

9 CHAIRMAN LOUD: And that's a part
10 of 733, so I don't know if we --

11 MEMBER MOLDENHAUER: 733.12.

12 CHAIRMAN LOUD: 733.12. So I don't
13 know if we necessarily would have to go
14 through a variance.

15 MS. MONROE: Okay. You don't need
16 the variance. You just go with a modification
17 rather.

18 CHAIRMAN LOUD: Okay. That was my
19 thinking.

20 MS. MONROE: That will work.

21 CHAIRMAN LOUD: I think the other
22 option is to not require the mesh at all. I

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1 mean, that's an option, too. But anyway, we
2 can sort of hash that out as we get to that
3 point.

4 I'm sorry, Mrs. Moldenhauer, I
5 think you wanted to explain something to the
6 applicant.

7 MEMBER MOLDENHAUER: Well, you have
8 a very good point. I was just looking at that
9 and it does say under 733.12 that "The Board
10 may modify any of the conditions required
11 under 733.2 through 33.4." And 733.4 is the
12 requirement to have the dumpsters housed in a
13 three-sided brick enclosure. So we could then
14 modify that, if we so chose.

15 But my question to the applicant is
16 have you seen the OP report, the Office of
17 Planning report prior to today that discussed
18 the issue of the dumpster? Can you -- you
19 have to say yes or no into the mike.

20 MS. ZHENG: Yes.

21 MEMBER MOLDENHAUER: And had you
22 had a chance to talk to your landlord about

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1 what options your landlord would be willing to
2 modify that dumpster area for you?

3 MS. ZHENG: Actually, I talked to
4 my landlord like since after he talked to me.

5 And he talked to me, then I talked to my
6 landlord. And then but he didn't give me any
7 notice that what he is going to do with it. I
8 did talk to him about the, talked to my
9 landlord, dumpsters and all that, but he
10 didn't reply to me.

11 MEMBER MOLDENHAUER: So did he
12 acknowledge that he was going to do something
13 or he didn't respond at all?

14 MS. ZHENG: He didn't respond at
15 all.

16 MEMBER MOLDENHAUER: Okay. I have
17 no other questions.

18 COMMISSIONER TURNBULL: I just have
19 one. How long has the business been there?

20 MS. ZHENG: The business been there
21 for maybe about more than 10 years. Well, we
22 just took over, that's why we came to this

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1 hearing.

2 COMMISSIONER TURNBULL: Right.

3 MS. ZHENG: Yes.

4 COMMISSIONER TURNBULL: You took
5 over when?

6 MS. ZHENG: September 1st.

7 COMMISSIONER TURNBULL: September
8 1st. But before that, it had been a similar
9 operation?

10 MS. ZHENG: Yes, the same
11 operation. It's just --

12 COMMISSIONER TURNBULL: Just
13 different owners?

14 MS. ZHENG: Right.

15 COMMISSIONER TURNBULL: Okay.

16 CHAIRMAN LOUD: Are there any
17 additional questions from the Board? If not,
18 and I'm sorry, okay, then let me ask the
19 applicant, do you have any questions of Board
20 Members?

21 MS. ZHENG: No, I don't.

22 CHAIRMAN LOUD: Okay. Then what we

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1 will do is turn to the Office of Planning. I
2 think you can sort of walk through the
3 pertinent parts of your report, certainly not
4 the entire thing, but I think you make some
5 recommendations there. What you have not
6 already covered.

7 MR. JACKSON: All right. You said
8 you have before you the Office of Planning
9 report. And we basically stand on the record
10 with regard to the issues that we raised in
11 the report.

12 We have complimented the applicant
13 on submitting a complete summary with regard
14 to meeting -- an explanation about how the
15 tests are met. Then coming back with
16 additional information when we raised issues
17 about some of the information that was
18 provided initially.

19 We did attempt to contact the
20 property owner to see if they could clarify
21 what could be done on the site with regard to
22 screening the area, but our understanding is

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1 that construction of an enclosure in the
2 courtyard was not acceptable.

3 And the issue about construction,
4 we didn't pursue the issue about constructing
5 an enclosure along the back wall, choosing
6 instead to look at using the existing facility
7 in terms of the fencing and the mesh as
8 meeting the intent of the regulations.

9 After going through the standards,
10 we think that our recommendation was in lieu
11 of the trash enclosure standard set forth in
12 section 733.4, we recommended accepting the
13 existing fenced in trash area with the
14 attachment of the vinyl mesh as an acceptable
15 alternative.

16 Of course the status of that
17 request with the applicant is -- with the
18 owner is unclear.

19 We note that the application was
20 referred to the ANC. The ANC met once with
21 the applicant present, but chose not to take
22 any action at that time.

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1 Based on the information that is
2 provided in our analysis, we would recommend
3 approval of the special exception, but we also
4 included a recommendation, the thought that
5 the attachment of the screening would address
6 any potential issues raised by the neighbors.

7 I would note that there is no
8 record -- when we looked at the record of this
9 case, we saw no letters of opposition from
10 either the neighbors or the ANC with regard to
11 the operations of the management of this
12 facility.

13 That concludes the brief summary of
14 the Office of Planning report and we are
15 available to answer questions.

16 VICE CHAIRMAN DETTMAN: Thank you,
17 Mr. Jackson. I have a couple of questions and
18 then perhaps I can turn it back over to the
19 Chairman or other Board Members.

20 One is that you note that parking
21 is provided on-site and it is provided per the
22 lease agreement. What is the parking

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1 requirement for this particular business? And
2 then could you just kind of clarify what you
3 mean by per the lease agreement? Are there a
4 certain number of spaces allocated in the
5 parking lot?

6 MR. JACKSON: Well, the lease --
7 the applicant sent me a copy of a portion of
8 the lease agreement which says that the
9 parking for the tenants would be allocated by
10 the management. Once again, the applicant
11 indicated that they do park their car in the
12 parking lot and that serves as their delivery
13 vehicle, too.

14 But I was not able to get any
15 confirmation, any clarification from the
16 management as to how many spaces had been
17 assigned to the applicant. But since they
18 haven't been towed away, as the lease
19 indicated, we assume that their parking on-
20 site is acceptable to management.

21 And with regard to the parking
22 requirement, the shopping center has a set

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1 floor area. And the use is part of that floor
2 area. So that the parking on-site is part of
3 the parking allocated to the overall use,
4 which is the shopping center.

5 We didn't do the actual calculation
6 on that, but we would put forth that we think
7 the applicant -- the parking on-site is
8 consistent with what was required for the
9 property at the time it was constructed.

10 If you take the use by itself, the
11 square footage of the -- the 700 square feet
12 is not sufficient to, by itself, trigger a
13 parking requirement. So we think that the
14 requirement for parking that would be
15 associated with this use is included in the
16 overall shopping center, which is parked on-
17 site.

18 VICE CHAIRMAN DETTMAN: Okay.
19 Finally, just quickly going to the rear of the
20 property, the fence that exists, is this a
21 permanent fence or is it one of those chain
22 link fences that are in concrete blocks?

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1 MR. JACKSON: It's permanent.

2 VICE CHAIRMAN DETTMAN: It's
3 permanent.

4 MR. JACKSON: And it appears to be
5 new.

6 VICE CHAIRMAN DETTMAN: And it
7 appears to be new. Okay. So it's well-
8 maintained, in good condition?

9 MR. JACKSON: Yes, it was nice and
10 shiny.

11 VICE CHAIRMAN DETTMAN: And I can't
12 really visualize the vinyl mesh. Are you
13 saying that it exists, but it's kind of like
14 flopped over the top?

15 MR. JACKSON: It's gathered on the
16 top of the fence. And it's a light green and
17 it seems brand new. But for some reason, it's
18 just there and it's the length of the fence
19 itself. So I'm not sure if it was installed
20 with plans to bring it down or it was brought
21 down and put up.

22 Again, everything looks fairly new,

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1 but I should note that the entire shopping
2 center is currently under renovation. They
3 have done extensive work with the painting,
4 different type style on the signage around it
5 and they're doing a nice job in renovating it.

6 So this is a work in progress.

7 Our assumption is that the fence--
8 at some point, the mesh will come down, but,
9 at this point, we weren't able to get
10 confirmation from the management about exactly
11 what the plans are for it.

12 VICE CHAIRMAN DETTMAN: Okay.
13 Thank you.

14 MR. JACKSON: Okay.

15 CHAIRMAN LOUD: Are there any
16 further questions from the Board for Mr.
17 Jackson?

18 COMMISSIONER TURNBULL: No. Well,
19 Mr. Chair, it's just a comment. I mean, you
20 know, many times when we have had these
21 situations with an applicant, you know, the
22 owner of the property usually is here too or

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1 has said something.

2 But as Mr. Jackson says, if it's
3 under construction, I don't know whether you
4 can assume right or wrong that the vinyl is
5 going to come down. But the fence is new?

6 MR. JACKSON: It appears to be new,
7 yes.

8 COMMISSIONER TURNBULL: Kind of a
9 quandary as to, you know, the regulations,
10 looking at the strict interpretation of it and
11 the fact that what is there and they really
12 don't have any control over it. So I'm just
13 troubled by whether, you know, saying yes, the
14 owner ought to be here, too, but, at the same
15 point, this thing has existed for over 10
16 years and without a fence apparently.

17 So I don't know how far you want to
18 push the envelope on this.

19 CHAIRMAN LOUD: Well, let us see if
20 the applicant, first of all, understands and
21 has been able to interpret for her clients
22 today all that has sort of transpired. And if

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1 that's the case, if the applicants have any
2 questions for the Office of Planning.

3 And then I think we probably, after
4 the applicant does a closing statement, could
5 go into deliberation perhaps and discuss some
6 of the finer points of it. I think we have
7 got a full enough record to sort of hash it
8 out.

9 So why don't I turn to the
10 applicant and just see if there are any
11 aspects of what we have discussed that would
12 require some further interpretation for your
13 clients?

14 INTERPRETER TSANG: My client will
15 understand all the perspectives that you have
16 discussed today, so she has no further
17 questions.

18 CHAIRMAN LOUD: Okay. And no
19 questions for the Office of Planning either?

20 INTERPRETER TSANG: No.

21 CHAIRMAN LOUD: Okay. Then
22 normally what we do, at this point, is

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1 entertain a report from the ANC, which is ANC-
2 4B, which has not submitted a report. And
3 then if there were persons who were wishing to
4 testify in support or opposition, we would
5 call them up. And seeing none in the
6 audience, then we turn back to you and your
7 client, the applicant, for any closing
8 remarks.

9 INTERPRETER TSANG: My client has
10 no further comments.

11 CHAIRMAN LOUD: Okay.

12 INTERPRETER TSANG: And no
13 questions.

14 CHAIRMAN LOUD: Okay. All right.
15 Thank you very much. I think we're going to
16 see right now if we're ready to deliberate
17 this case and render a decision today or if we
18 find any reason to postpone the decision on it
19 until a point in the future.

20 If we do postpone it, it won't be
21 for very long. And we note that you have got
22 a temporary C of O that will carry you well

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1 into August and we would not dare postpone it
2 to any length of time that would get you
3 anywhere near August.

4 But my thoughts, colleagues, are
5 that I could be persuaded to deliberate today
6 and be persuaded to vote on it today. I can
7 understand the reason why Mr. Jackson
8 recommended the vinyl mesh and am leaning in
9 support of that.

10 And the only reason I wouldn't vote
11 today, I guess, would be to give the applicant
12 an opportunity to get this confirmation from
13 the owner that the vinyl mesh would be
14 installed. And given the degree of investment
15 that is underway on the property, in terms of
16 the upgrade, I think it's the whole block even
17 that is being upgraded, and the existence of
18 the mesh there already, I can't see the owner
19 not agreeing to that condition.

20 I also can't see them risking
21 losing a tenant because not only this tenant,
22 but no tenant that does food would be able to

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1 come into that spot without this enclosure.
2 So I would be willing to put it off briefly,
3 so that that step could be completed. But
4 again, I'm open to what others think about
5 this issue.

6 VICE CHAIRMAN DETTMAN: I would be
7 in favor of that, Mr. Chairman. And I'll just
8 note that I don't know how much time you are
9 considering, but if we do get that
10 confirmation, I don't see the deliberation
11 taking too long on this case. And we are
12 graced with Mr. Turnbull's presence next week,
13 so perhaps we can schedule a Special Public
14 Meeting if that would be okay?

15 MS. MONROE: Mr. Chairman? I want
16 to add one thing. If you are going to the
17 landlord, there should also be a statement
18 saying that he is authorizing the applicant to
19 seek the special exception.

20 VICE CHAIRMAN DETTMAN: We have
21 that.

22 MS. MONROE: That's as the property

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1 owner.

2 MEMBER MOLDENHAUER: We already
3 have that actually.

4 MS. MONROE: Oh, is there one in
5 there? Oh, I didn't see it.

6 MEMBER MOLDENHAUER: It's Exhibit
7 23.

8 MS. MONROE: I just looked. Okay.
9 Good.

10 MEMBER MOLDENHAUER: So, yes.

11 MS. MONROE: Okay.

12 MEMBER MOLDENHAUER: But I agree
13 with Chairman Loud and Mr. Dettman. I think
14 that one thing that I think we should just be
15 clear on is if we are asking for just the mesh
16 to be secured against the fence, then we are
17 all, obviously, under agreement that we would
18 then be modifying the requirement of the
19 three-sided enclosure.

20 And that, you know, right now what
21 we're doing is we're saying that we all are
22 pretty much in agreement that we would be

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1 willing to vote to modify that three-sided
2 enclosure, but we would want a condition/
3 modification to require that the mesh is
4 secured against the entire length of the
5 fence. And something from the owner/
6 management company confirming that that would
7 be done and maintained.

8 CHAIRMAN LOUD: Yes, that's
9 generally the direction I was headed in and
10 would agree with both of you. Mr. Dettman,
11 that I don't think we -- you know, it wouldn't
12 take long to deliberate. It shouldn't take
13 long to get this confirmation.

14 And I agree with you, Mrs.
15 Moldenhauer, that we're just talking about
16 modifying that three-sided enclosure
17 requirement, having the mesh as a condition.
18 Go ahead, Mr. Jackson.

19 MR. JACKSON: Mr. Chairman, not to
20 interrupt, but the --

21 CHAIRMAN LOUD: Yes.

22 MR. JACKSON: For the sake of

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1 clarity, would it be for the Office of
2 Planning to draft a letter just explaining
3 what is required and asking that the applicant
4 send back a letter for the record for this
5 case? Because communications might not --
6 might be -- they have already heard from me in
7 terms of the report.

8 So probably following up with what
9 the recommendation actually is might encourage
10 them to be more responsive.

11 CHAIRMAN LOUD: That makes all the
12 sense in the world to me. I don't know if,
13 you know, BZA normally makes those kind of
14 recommendations to OP, but I think a property
15 owner receiving it from -- you know, on OP
16 letterhead sort of carries a different
17 connotation than perhaps getting it from the
18 tenant.

19 That leads to the question of
20 whether or not that can be accomplished within
21 the next seven days or do we need further --

22 MR. JACKSON: Well, I have their

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1 fax number, so I can actually write it and fax
2 it back to them to provide it today.

3 CHAIRMAN LOUD: Okay. Well then
4 unless there is something that is a bit
5 unclear or unless Board Members have any
6 additional questions or AG or staff, then, I
7 think, what we should do is postpone the
8 decision on this until next Tuesday.

9 We can do it next Tuesday morning
10 and it will be our being able to come out and
11 render a decision will be contingent upon us
12 receiving between now and Monday written
13 confirmation from the owner of the property
14 that it is willing to install the mesh along
15 the perimeter fence that's in the rear of the
16 property, that fence that separates the,
17 essentially, property from the Residential
18 District across the alley.

19 And if we get that in writing, we
20 will be prepared to vote next Tuesday.

21 MS. BAILEY: Mr. Chairman, did you
22 want the Office of Planning to file a copy of

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1 that letter that they're sending to the
2 property owner in our records?

3 CHAIRMAN LOUD: I think what is
4 important is to get that letter from the
5 owner, but, you know, I think that's really of
6 prime importance to make our decision.

7 COMMISSIONER TURNBULL: So, Mr.
8 Jackson, we just -- Exhibit 23 came from Ralph
9 Hale, is that the gentleman you would be --

10 MR. JACKSON: Yes.

11 COMMISSIONER TURNBULL: -- dealing
12 with?

13 MR. JACKSON: I understood that he
14 is general manager, but then there is a person
15 that is actually assigned to this property and
16 that's the person I haven't been able to
17 contact.

18 COMMISSIONER TURNBULL: Okay.

19 MR. JACKSON: So I will send this
20 to his attention, but indicating that the
21 applicant's case is pending receipt of
22 information from them regarding providing the

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1 mesh.

2 COMMISSIONER TURNBULL: The status
3 of the mesh and if it is coming down?

4 MR. JACKSON: Right.

5 COMMISSIONER TURNBULL: Okay. And
6 that we need that letter back by Friday?

7 MR. JACKSON: By Friday?

8 CHAIRMAN LOUD: Yes. It would be
9 great to have it in our file by Friday, but I
10 think because the case is not all that
11 complicated, even if we got it Monday --

12 COMMISSIONER TURNBULL: On Monday.

13 CHAIRMAN LOUD: -- some time we
14 could probably come in Tuesday and --

15 MR. JACKSON: Well, Monday is a
16 holiday.

17 CHAIRMAN LOUD: Monday is a
18 holiday, yes.

19 COMMISSIONER TURNBULL: That's
20 right.

21 MR. JACKSON: So it needs to be in
22 by Friday.

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1 CHAIRMAN LOUD: Yes, so by Friday.

2 MR. JACKSON: Okay. I'll inform
3 them then.

4 CHAIRMAN LOUD: Yes, definitely. I
5 mean, he could actually extend this out to
6 August if he wanted to, because he could get
7 some rent until August really. But let's hope
8 that that's not the case. Put pressure on
9 him.

10 Okay. Unless there is anything
11 further? Ms. Monroe?

12 MS. MONROE: I just want to be
13 sure, does the applicant know?

14 CHAIRMAN LOUD: Thank you, Ms.
15 Monroe.

16 MS. MONROE: Do they understand?
17 This is a legal thing. We have to make sure
18 everybody is clear of what is being asked.

19 INTERPRETER TSANG: My client is
20 asking if she should be present here next
21 Tuesday for the hearing?

22 CHAIRMAN LOUD: No, she does not

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1 have to be present. We are simulcast on the
2 web at, I think it is, www.dc.oz. You can
3 find out the exact web address, but you can
4 watch it from a remote location. And there is
5 no testimony at all.

6 INTERPRETER TSANG: Is there any
7 way she can get a correct website address for
8 her reference?

9 VICE CHAIRMAN DETTMAN: It is
10 dcoz --

11 INTERPRETER TSANG: Dcoz.

12 VICE CHAIRMAN DETTMAN: -- .dc --

13 INTERPRETER TSANG: Dc.

14 VICE CHAIRMAN DETTMAN: -- .gov.
15 Mr. Moy, is that right?

16 MR. MOY: That's correct.

17 MEMBER MOLDENHAUER: Yes.

18 MS. MONROE: But my question is --
19 I'm sorry. I want to be sure that the
20 applicant understands that OP is going to
21 write a letter, I guess, to the landlord
22 asking him to, please, unroll the mesh, right,

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1 to cover the back and that he has to say yes.

2 That's how the Board is saying in order for
3 the Board to grant the special exception.
4 Because it is contingent upon what he says,
5 that's the thing, right, I mean?

6 MEMBER MOLDENHAUER: And so your
7 landlord has to send the letter back to OP and
8 our office by Friday, this coming Friday, the
9 15th. And if we don't get that letter, then
10 when we make our deliberation on Tuesday, we
11 won't be able to -- that's a required
12 condition on our approval of your application.

13 I just want to make sure you that you
14 understand that.

15 So if you can speak into the mike
16 and make sure that you understand what the
17 Board has said thus far?

18 MS. ZHENG: Yes, I understand.

19 MEMBER MOLDENHAUER: Okay.

20 MS. ZHENG: And I will do it.

21 MS. MONROE: Because OP isn't the
22 applicant. I mean, yes, OP should do

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1 everything to help, but I just want to make
2 sure that you guys know what is going on, so
3 you know what's happening. Okay.

4 MEMBER MOLDENHAUER: Thanks.

5 CHAIRMAN LOUD: Thank you, Ms.
6 Monroe. And with that, I do believe that we
7 are ready to adjourn this case and, indeed,
8 this morning's calendar.

9 If there are no further questions
10 for any of us regarding the next steps in this
11 matter, no further questions from Board
12 Members or staff, I think we are adjourned.

13 Any additional questions?

14 INTERPRETER TSANG: Hold on.

15 CHAIRMAN LOUD: Okay.

16 INTERPRETER TSANG: Excuse me. My
17 client has a question. If a decision has been
18 rendered next Tuesday, will she -- if she --
19 will she receive any written approval later,
20 approval later, later on?

21 CHAIRMAN LOUD: Yes, she will
22 receive a written decision. I think we will

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1 be able to waive our requirements for the long
2 written decision and we will issue what is
3 called a summary order and that should be
4 available from the Office of Zoning, I think,
5 in a couple of days from our decision, so
6 there will be a written decision.

7 INTERPRETER TSANG: My client has
8 no further questions.

9 CHAIRMAN LOUD: Okay. Thank you.
10 All right. So we are adjourned. Is there
11 anything further, Ms. Bailey?

12 MS. BAILEY: No, Mr. Chairman. I'm
13 sorry. I was looking for the afternoon cases,
14 but that's in the afternoon. No, Mr.
15 Chairman, that's it.

16 CHAIRMAN LOUD: Thank you, Ms.
17 Bailey. And yes, we will take this up next
18 Tuesday. Thank you.

19 MS. MONROE: Thank you all.

20 (Whereupon, the Public Hearing was
21 recessed at 11:23 a.m. to reconvene at 1:40
22 p.m. this same day.)

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

2 1:40 p.m.

3 CHAIRMAN LOUD: Good afternoon.

4 This hearing will, please, come to order.

5 Ladies and gentlemen, this is the
6 January 12, 2010 Public Hearing of the Board
7 of Zoning Adjustment of the District of
8 Columbia. My name is Marc Loud, Chairperson,
9 and joining me today are Vice Chair, Shane
10 Dettman, representing the National Capital
11 Planning Commission, Mr. Konrad Schlater,
12 representing the Zoning Commission, Board
13 Member Meridith Moldenhauer, Mayoral
14 Appointee.

15 To her left is Mr. Clifford Moy,
16 Secretary of BZA, Ms. Lori Monroe, Office of
17 the Attorney General and on the far end, Ms.
18 Beverley Bailey, specialist here in the Office
19 of Zoning.

20 Copies of today's hearing agenda
21 are available to you and are located to my
22 left in the wall bin near the door. Please,

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1 be aware that this proceeding is being
2 recorded by a Court Reporter and is also
3 webcast live. Accordingly, we must ask you to
4 refrain from any disruptive noises or actions
5 in the hearing room.

6 When presenting information to the
7 Board, please, turn on and speak into the
8 microphone, first, stating your name and home
9 address. When you are finished speaking,
10 please, turn your microphone off, so that your
11 microphone is no longer picking up sound or
12 background noise.

13 All persons planning to testify
14 either in favor or in opposition are to fill
15 out two witness cards. These cards are
16 located to my left on the table near the door
17 and on the witness tables. Upon coming
18 forward to speak to the Board, please, give
19 both cards to the reporter sitting to my
20 right.

21 The order of procedure for special
22 exceptions and variances is as follows:

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1 Statement and witnesses of the applicant;
2 Government reports, including the Office of
3 Planning, the Department of Transportation,
4 etcetera; Report of the Advisory Neighborhood
5 Commission; Parties or persons in support;
6 Parties or persons in opposition; and finally,
7 Closing remarks by the applicant.

8 The order of procedure for appeal
9 applications is as follows: The statement and
10 witnesses of the appellant; the Zoning
11 Administrator or other Government official;
12 Case for the owner, lessee or operator of the
13 property involved, if not the appellant; the
14 ANC within which the property is located;
15 Intervenor's case, should we decide that the
16 intervenor will be allowed in this afternoon;
17 and then rebuttal and closing by the
18 appellant.

19 Pursuant to Sections 3117.4 and
20 3117.5, the following time constraints will be
21 maintained this afternoon: The applicant,
22 appellant, persons and parties, except an ANC,

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1 in support, including witnesses, no more than
2 60 minutes collectively. The appellee,
3 persons and parties, except an ANC, in
4 opposition, including witnesses, no more than
5 60 minutes collectively. Individual witnesses
6 no more than 3 minutes and witnesses
7 representing organizations no more than 5
8 minutes.

9 These time restraints do not
10 include cross examination by the Board. Cross
11 examination of witnesses is permitted by the
12 applicant or parties. The ANC within which
13 the property is located is automatically a
14 party in a special exception or variance case.

15 Nothing prohibits the Board from
16 limiting cross examination, including time
17 limits and limitations on the scope of cross
18 examination.

19 The record will be closed at the
20 conclusion of each case, except for any
21 material specifically requested by the Board.

22 The Board and the staff will specify at the

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1 end of the hearing exactly what is expected
2 and the date when the persons must submit the
3 evidence to the Office of Zoning. After the
4 record is closed, no other information will be
5 accepted by the Board.

6 The decision of the Board in
7 contested cases must be based exclusively on
8 the public record. To avoid any appearance to
9 the contrary, the Board requests that persons
10 present not engage the Members of the Board in
11 conversation.

12 Please, turn off all beepers and
13 cell phones, at this time, so as not to
14 disrupt these proceedings.

15 The Board will make every effort to
16 conclude the Public Hearings on this
17 afternoon's calendar as near as possible to
18 6:00 p.m. If the afternoon cases are not
19 completed by 6:00 p.m., the Board will assess
20 whether we can complete the pending case or
21 cases remaining on the agenda tonight or
22 whether it would be more appropriate to

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1 continue the balance of the case or cases
2 until the first available date on our
3 calendar.

4 At this time, the Board will
5 consider any preliminary matters. Preliminary
6 matters are those that relate to whether a
7 case will or should be heard today, such as
8 requests for postponement, continuance or
9 withdrawal or whether proper and adequate
10 notice of the hearing has been given. If you
11 are not prepared to go forward with a case
12 today or if you believe that the Board should
13 not proceed, now is the time to raise such a
14 matter.

15 Does the staff have any preliminary
16 matters?

17 MS. BAILEY: Mr. Chairman, Members
18 of the Board, to everyone, good afternoon.
19 Staff does not, Mr. Chairman.

20 CHAIRMAN LOUD: Thank you, Ms.
21 Bailey. Then why don't we call forward all
22 witness who are wishing to testify this

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1 afternoon, so that they might take the oath?

2 And Ms. Bailey will administer the oath.

3 MS. BAILEY: Would you, please,
4 raise your right hand?

5 (Whereupon, the witnesses were
6 sworn.)

7 MS. BAILEY: Thank you.

8 CHAIRMAN LOUD: And just by show of
9 hands, I would be interested in seeing how
10 many of those who just stood and took the oath
11 are going to be testifying in one of the two
12 Sikder cases? That answers my question.

13 Let me say before we get started
14 with calling the first case, Ms. Bailey, I
15 just wanted to note that on next Tuesday's
16 calendar, January 19th, there is a Case No.
17 18013, Franklin Commons Child Development
18 Center, and I just want to note on the record
19 that that case will go forward next Tuesday,
20 January 19th as it appears on the calendar.

21 I think there had been some
22 discussion about whether the BZA had

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1 jurisdiction. That discussion is terminated
2 and the case will move forward next Tuesday.

3 I also wanted to thank all of the
4 Members of the BZA in my absence. I have been
5 out since about December 5 with a personal
6 family emergency. I especially want to thank
7 Mr. Shane Dettman, Vice Chair, who took over
8 and did an outstanding job as Chair during
9 that period of time.

10 So, Ms. Bailey, when you are ready?

11 MS. BAILEY: Mr. Chairman, the
12 first application this afternoon is of M.
13 Sikder and it is No. 18015. The application
14 is pursuant to 11 DCMR § 3103.2, for a
15 variance from the off-street parking
16 requirements under subsection 2101.1, to allow
17 the construction of a new one-family row
18 dwelling. The property is Zoned R-3. It is
19 located at 2237 14th Street, S.E., Square 5793,
20 Lot 1019.

21 CHAIRMAN LOUD: Thank you, Ms.
22 Bailey. Point of privilege. If we can do

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1 this, I would like to see if we could call
2 18016, first, and then we will come back to
3 18015.

4 MS. BAILEY: Mr. Chairman, that's
5 Application No. 18016, Application of Mr.
6 Sikder as well. And it is pursuant to 11 DCMR
7 § 3103.2, for a variance from the lot area
8 requirements under subsection 401.3, a
9 variance from the side yard requirements under
10 section 405, to allow the construction of a
11 new one-family semi-detached dwelling in the
12 R-2 District at premises 1514 23rd Street,
13 S.E., Square 5577, Lot 27.

14 CHAIRMAN LOUD: Thank you, Ms.
15 Bailey. And good afternoon.

16 MR. SIKDER: Good afternoon.

17 CHAIRMAN LOUD: All right. If you
18 could introduce yourself for our record?

19 MR. SIKDER: My name is Mohammad
20 Sikder and my address is 6660 Tennyson Drive,
21 McLean, Virginia.

22 CHAIRMAN LOUD: Good afternoon, Mr.

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1 Sikder. Is a representative here from the
2 ANC-8A? And seeing none, I think that we are
3 going to go ahead and start in your case.

4 I think the reason why we wanted to
5 call this case first is that we have reviewed
6 the file. It is a very full record. You have
7 the support of the Office of Planning. There
8 are no witnesses that we have been made aware
9 of that oppose the application.

10 The ANC does not oppose the
11 application. And we believe that this case is
12 a case that is ripe for us to rest on the
13 record. Meaning that the Board Members think
14 that between your submissions and the
15 submission of the Office of Planning, that a
16 case was made for the relief requested.

17 So without belaboring that point,
18 I'm going to ask Board Members if they have
19 any specific questions of you, if you have
20 anything specific that you would like to say
21 or to clarify for us. And if not -- if so,
22 certainly we will do that. If not, then we

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1 will move to adopt the report of the Office of
2 Planning and prepare ourselves for decision on
3 this case today.

4 MR. SIKDER: Yes.

5 CHAIRMAN LOUD: The record is full
6 from your vantage point as well?

7 MR. SIKDER: Yes.

8 CHAIRMAN LOUD: Okay. Then I think
9 we will turn to the Office of Planning. It
10 was a very thorough report. It is our Exhibit
11 23, dated January 8, 2010. As I understand
12 it, you are in support of the application for
13 relief.

14 MR. JESICK: Good afternoon, Mr.
15 Chairman, Members of the Board. My name is
16 Matt Jesick. Yes, the Office of Planning does
17 support the variance relief.

18 I would note that after we
19 submitted our report, we received new plans
20 from the applicant. And I believe they
21 address all the proposed conditions that we
22 had listed on page 1 of our report.

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1 So we support the revised plans.
2 And like I said, we support the variance
3 relief required.

4 CHAIRMAN LOUD: Thank you. Mrs.
5 Moldenhauer just corrected me that it is
6 Exhibit 22 for your report in this case, so I
7 stand corrected with respect to that.

8 Board Members, were there any
9 questions for the Office of Planning? Okay.
10 None. Mr. Sikder, did you have any questions
11 for the Office of Planning?

12 MR. SIKDER: No.

13 CHAIRMAN LOUD: Okay. I don't
14 believe, but I'll have to ask anyway, if there
15 are witnesses who have shown up since we
16 started this hearing that are either in favor
17 or in opposition to this application, now
18 would be the time to come up. You would be
19 given 3 minutes to offer your testimony.

20 Seeing none, then we would turn
21 back to you, Mr. Sikder. I had already
22 mentioned that the ANC-8A is automatically a

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1 party, but they have not submitted a report.
2 So we turn back to you for any closing
3 statement that you might want to offer.

4 MR. SIKDER: At this moment, if you
5 have any particular question, I would like to
6 explain, otherwise maybe I don't need to say.

7 CHAIRMAN LOUD: I'm not seeing
8 where Board Members have any questions in your
9 case, so I think we are ready to deliberate on
10 the case. And I would be more than happy to
11 start us off.

12 And I think it's a case that speaks
13 for itself. There is a tremendous amount of
14 evidence in the record that would support the
15 request for variance relief from the lot area,
16 lot width, lot occupancy, the minimum side
17 yard requirement and section 405.3, which
18 addresses the issue of single-family semi-
19 detached units that are constructed without
20 sharing a common wall.

21 With respect to what is in the
22 record, the Office of Planning report, as Mrs.

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1 Moldenhauer indicated, Exhibit 22, walks us
2 through a variance analysis and the three
3 prongs of the test with respect to all of the
4 areas of relief that you requested and does a
5 good job of it.

6 I'm not going to repeat it. I'm
7 just going to incorporate it by reference into
8 my support for the project. I'll note that
9 the ANC did not submit anything in response to
10 the application, that the conditions that had
11 been identified by the Office of Planning
12 regarding showing a revised 6 foot cast iron
13 fence, relocating the parking pad on the south
14 side away from Park Place, using brick on the
15 north and west facades have all been complied
16 with with your latest submission.

17 So I think that you met all the
18 requirements that the Office of Planning had.

19 And, colleagues, I would support our granting
20 relief in this application.

21 Is there further? Okay. Then I
22 would like to move for approval of Application

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1 No. 10816 for variance relief from the lot
2 area and side yard requirements to construct a
3 one-family semi-detached dwelling in the R-2
4 at 1514 23rd Street, S.E. as is reflected in
5 the application of Mr. Sikder.

6 COMMISSIONER SCHLATER: Second.

7 CHAIRMAN LOUD: Okay. The motion
8 has been made and seconded. Is there further
9 deliberation?

10 Hearing none, all those in favor,
11 please, say aye.

12 ALL: Aye.

13 CHAIRMAN LOUD: Is there any
14 opposition or abstentions? All right. Ms.
15 Bailey, can you read back the vote, please?

16 MS. BAILEY: Yes, Mr. Chairman. I
17 just did not hear who seconded the motion.

18 CHAIRMAN LOUD: Mr. Schlater.

19 MS. BAILEY: Mr. Schlater, thank
20 you. Mr. Chairman, the vote is recorded as 4-
21 0-1 to grant the application. Mr. Loud made
22 the motion, Commissioner Schlater seconded the

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1 motion, Mr. Dettman, Mrs. Moldenhauer support
2 the motion. The third Mayoral Appointee is
3 not sitting at this time.

4 And for clarification, Mr.
5 Chairman, the application is granted in
6 addition to the relief that the Office of
7 Planning recommended, meaning lot width,
8 percentage of lot occupancy and for a semi-
9 detached dwelling to be constructed by itself.

10 Is that correct, sir?

11 CHAIRMAN LOUD: That is correct.

12 MS. BAILEY: Thank you.

13 CHAIRMAN LOUD: Is there anything
14 further on this case? I think we can waive
15 the full decision and do a summary --

16 MS. BAILEY: Yes, sir.

17 CHAIRMAN LOUD: -- decision in this
18 case.

19 MS. BAILEY: Thank you.

20 CHAIRMAN LOUD: Okay.

21 MS. BAILEY: Thank you.

22 CHAIRMAN LOUD: Thank you. Is

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1 there anything further?

2 MS. BAILEY: Not for this case, Mr.
3 Chairman.

4 CHAIRMAN LOUD: Okay. Then now we
5 can go back to the initial case that you were
6 going to call, the other Sikder case.

7 MS. BAILEY: Mr. Chairman, did you
8 want me to call that again or once is
9 sufficient?

10 CHAIRMAN LOUD: I think just for
11 purposes of clarity, you might as well call it
12 a second time.

13 MS. BAILEY: Application 18015 of
14 M. Sikder and it is pursuant to 11 DCMR §
15 3103.2, for a variance from the off-street
16 parking requirements under subsection 2101.1,
17 to allow the construction of a new one-family
18 row dwelling at premises 2237 14th Street, S.E.
19 The property is Zoned R-3. It is located in
20 Square 5793 on Lot 1019.

21 CHAIRMAN LOUD: Thank you, Ms.
22 Bailey. And again, Mr. Sikder, if you could

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1 state your name and address for our record?

2 MR. SIKDER: Good afternoon, Mr.
3 Chairman and Board Members. My name is
4 Mohammad Sikder and my address is 6660
5 Tennyson Drive, McLean, Virginia.

6 CHAIRMAN LOUD: And again, I don't
7 believe we have been joined by anyone
8 representing ANC-8A. However, if they have
9 joined us, you are welcome to come up to the
10 table as well. And seeing no one, Mr. Sikder,
11 I do believe that the record is full on this
12 case.

13 I don't know if it is necessarily
14 as clear cut, but it's certainly full and I
15 don't think we are going to go through each
16 formal step of the hearing process for a
17 variance. I think that one or more Board
18 Members may have questions for you.

19 So why don't -- if you have
20 something you would like to say to sort of
21 frame the case, you can do that. If not, we
22 can go directly into questions.

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1 MR. SIKDER: Yes, that would be
2 ideal. I appreciate that. If you have any
3 specific questions, I would answer that. And
4 in addition to that, regarding the ANC
5 meeting, we -- I attended the meeting. And
6 they were very supportive and approved our
7 case.

8 But they are supposed to send you
9 the approval, approved letter, but I don't
10 know if you received it.

11 CHAIRMAN LOUD: We did not. As of
12 the time that we came out for the hearing,
13 there had not been a submission from the ANC.

14 So we will note for our record that you have
15 indicated you attended. However, because it
16 is not in the record, we won't be able to give
17 a great weight credit to the ANC report.

18 Let me stop now and just see if
19 Board Members have very specific targeted
20 questions for you regarding your application.

21 MEMBER MOLDENHAUER: Good
22 afternoon. I just have one question. When

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1 reviewing OP's report and your submissions, I
2 wasn't really sure if the lack of an alley
3 would be sufficient to be unique. And so I
4 wanted to ask you about the width of the
5 property and whether or not you looked into or
6 you talked to Historical Preservation about
7 potentially building a below-grade front-load
8 parking garage in the basement of the
9 property?

10 And if you did, what aspects of
11 practical difficulty you analyzed?

12 MR. SIKDER: You mean -- no, first
13 of all, Historic District would not allow any
14 parking in -- from the front side, because
15 that would be -- there are no -- I mean, in
16 the neighboring houses, there are no garages
17 from the front. And Historic District would
18 not allow to have those types of parkings from
19 the front. We discussed with them and they
20 don't allow that.

21 MEMBER MOLDENHAUER: Okay. Thank
22 you. That's it.

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1 CHAIRMAN LOUD: Thank you, Mrs.
2 Moldenhauer. Let me turn now to the Office of
3 Planning. Good afternoon.

4 MS. THOMAS: Good afternoon, Mr.
5 Chairman, Members of the Board. The Office of
6 Planning is recommending approval of this
7 variance relief from the parking requirements.
8 We do believe the lack of an alley creates a
9 practical difficulty in providing parking in
10 the Historic District.

11 OP would not support a curb cut
12 along the street to provide parking from the
13 front. So we do support the waiver request
14 and I would be happy to take any questions.

15 CHAIRMAN LOUD: Thank you. Board
16 Members, any questions for Planning? Mr.
17 Sikder, any questions for Planning?

18 MR. SIKDER: No.

19 CHAIRMAN LOUD: All right. Then
20 again, if the ANC is here, this would be the
21 time to come up. They are not here, so if
22 there are persons in the audience who are in

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1 support of or in opposition to the
2 application, now would be the time to come up.

3 You would be allotted 3 minutes.

4 Seeing none, we would now turn back
5 to you, Mr. Sikder, if you have a closing set
6 of remarks.

7 MR. SIKDER: That's okay, I don't
8 have no remarks.

9 CHAIRMAN LOUD: Okay. All right.
10 Then I think we are ready to deliberate this
11 case. I think it will be a very brief
12 deliberation. And we will vote it up or down
13 one way or the other.

14 This is a request for variance
15 relief, I'll start us off, from the parking
16 requirements of 2101.1. I think there is a
17 requirement for one parking space for
18 construction of a single-family dwelling in
19 the R-3 on a vacant lot.

20 There is no alley in the rear. The
21 lot itself, I think, is fairly narrow. I
22 believe it is about 20 feet. But nonetheless,

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1 because there is no alley in the rear, it
2 creates an exceptional situation in terms of
3 trying to provide parking.

4 To create parking, I think, as Mrs.
5 Moldenhauer sort of went into with the
6 applicant, would not -- to create parking in
7 the front would not meet the support of the
8 Historic District based on the conversations
9 that Mr. Sikder had with them nor would it get
10 the support of the Office of Planning in terms
11 of the need for a curb cut.

12 That creates a practical difficulty
13 of trying to satisfy the parking requirement.

14 In addition to which, narrowing the structure
15 itself to provide parking would create an
16 unmarketable structure for the applicant.

17 The Office of Planning's report
18 indicates that there is no substantial
19 detriment to the public good nor is the Zone
20 Plan impaired.

21 As indicated, the ANC has not
22 submitted a report, but the applicant's

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1 testimony is that he went to the ANC meeting,
2 that they were supportive of it and indicated
3 to him that they would be filing a report. We
4 don't have a report, but nonetheless, there is
5 no evidence to suggest that there would be
6 substantial detriment to the public good.

7 In light of that, I'm inclined to
8 support the application and I'll open it up
9 for other Board Members. And yes?

10 MEMBER MOLDENHAUER: I agree with
11 your assessment. I was concerned, at first,
12 about the issue of exceptional circumstances
13 or uniqueness, but I believe based on the
14 Historical Preservation requirement to not
15 permit any front-loaded parking in a garage
16 style design provides the uniqueness.

17 I think at the same time OP's
18 statement that they would not support a curb
19 cut provides for the satisfaction of the
20 variance requirements.

21 CHAIRMAN LOUD: Thank you, Mrs.
22 Moldenhauer. And those were excellent points

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1 to raise. And some of the relief requested
2 might not be eligible in a different kind of
3 neighborhood where Historic District concerns
4 would be raised. So I think those were great
5 questions to bring out.

6 With that as the backdrop, I would
7 like to move us forward and vote on this. I
8 would like to move approval of Application No.
9 18015 for variance relief from the parking
10 requirements of section 2101.1 to construct a
11 one-family row dwelling in the R-3 at 2237 14th
12 Street, S.E.

13 MEMBER MOLDENHAUER: I second.

14 CHAIRMAN LOUD: The motion has been
15 made and seconded. Is there further
16 discussion?

17 Hearing none, all those in favor
18 say aye.

19 ALL: Aye.

20 CHAIRMAN LOUD: All those who
21 oppose or any abstentions? And, Ms. Bailey,
22 can you read back the vote, please?

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1 MS. BAILEY: Mr. Chairman, the vote
2 is recorded as 4-0-1 to grant the application.

3 Chairman Loud made the motion, Board Member
4 Moldenhauer supported the motion or seconded
5 the motion, I should say, Commissioner
6 Schlater and Mr. Dettman support the motion as
7 well. The third Mayoral Appointee is not
8 sitting at this time.

9 CHAIRMAN LOUD: Thank you, Ms.
10 Bailey. I do believe that in the absence of
11 any opposition from the ANC we can do a
12 summary order in this case. So let's do a
13 summary order.

14 MS. BAILEY: Thank you, Mr.
15 Chairman.

16 CHAIRMAN LOUD: And thank you, Mr.
17 Sikder. Also, I just want to indicate that
18 before we move forward with the next case on
19 the calendar, I think there was a request for
20 some set-up time for some equipment.

21 So we will break for about five
22 minutes.

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1 MS. BAILEY: Yes, sir.

2 CHAIRMAN LOUD: Okay. Let's say 10
3 minutes, give everybody enough time to set-up
4 everything. So we will break for 10 minutes
5 and we will come back and we will call the
6 final case for this afternoon's calendar.

7 (Whereupon, at 2:04 p.m. a recess
8 until 2:38 p.m.)

9 CHAIRMAN LOUD: Good afternoon. If
10 we can, please, come back to order? The
11 afternoon hearing calendar is back in session.
12 And I believe that we have everything set-up
13 that we wanted to have set-up.

14 Let me say good afternoon to
15 everybody. And I believe, Ms. Bailey, you
16 were getting ready to call the final case for
17 today.

18 MS. BAILEY: Yes, Mr. Chairman, and
19 that is an Appeal and the number is 18027. It
20 is the appeal of Mehmet Kocak and Philly Pizza
21 & Grill, Inc. and it is pursuant to 11 DCMR §
22 3100 and 3101, from an October 14, 2008 Notice

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1 to Revoke Certificate of Occupancy No.
2 0800124, by the Zoning Administrator,
3 Department of Consumer and Regulatory Affairs,
4 for a restaurant in the C-2-A District at
5 premises 1211 Potomac Street, N.W., Square
6 1207, Lot 124.

7 This is a continuation, Mr.
8 Chairman, from the November 17, 2009 meeting.

9 This is a Public Hearing, but previously a
10 Public Meeting was held on this case.

11 As a preliminary matter this
12 afternoon, Mr. Chairman, there is a request
13 for intervenor status. It's from the Potomac
14 Street Intervenors and those members are Lynn
15 Schubert, Anne Alonzo and Alex Meeraus. The
16 attorney representing the forenamed persons
17 are Mr. Marty Sullivan.

18 And with that, Mr. Chairman, I'll
19 now turn it over to you.

20 CHAIRMAN LOUD: Thank you, Ms.
21 Bailey. Why don't we do this? I think there
22 are some potential witnesses that have not

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1 been sworn in that may have come in after.
2 And if I'm wrong, I'm wrong, but if there are
3 persons who are intending to provide testimony
4 that came in after Ms. Bailey swore witnesses
5 for the afternoon session, now would be the
6 time to stand up and Ms. Bailey would swear
7 you in as a witness.

8 (Whereupon, the witnesses were
9 sworn.)

10 CHAIRMAN LOUD: And why don't we
11 have everyone who is at the table, at any of
12 the three or four tables up front, just
13 introduce yourselves. And we can start on my
14 far right and work our way to my far left.

15 MS. MADDOX-LEVINE: Good afternoon,
16 Members of the Board. My name is T. Gail
17 Maddox-Levine, Assistant Attorney General on
18 behalf of the Department of Consumer and
19 Regulatory Affairs and the Zoning
20 Administrator.

21 MRS. BOLLING: Good afternoon. My
22 name is Melinda Bolling. I'm Acting General

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1 Counsel for DCRA here on behalf of the ZA
2 today.

3 MR. BROWN: Patrick Brown from
4 Greenstein, DeLorme and Luchs. I'm here on
5 behalf of the appellant. Also behind me is
6 Kate Olsen from my office who will be helping
7 me.

8 MR. KOCAK: Good afternoon,
9 Chairman and Members of the Board. My name is
10 Mehmet Kocak. I am the owner of the Philly
11 Pizza and Grill.

12 MR. LEWIS: Good afternoon. My
13 name is Ron Lewis. I chair ANC-2E.

14 MR. SULLIVAN: Good afternoon. My
15 name is Martin Sullivan. I'm here on behalf
16 of Lynn Schubert, Anne Alonzo and Alex
17 Meeraus, the intervenor movants.

18 MR. STARRELS: Good afternoon.
19 Commissioner Bill Starrels and I'm from Single
20 Member District 2E05.

21 CHAIRMAN LOUD: Good afternoon to
22 everyone. I think that we have a couple of

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1 preliminary matters to address, including the
2 motion for intervenor status, which we will
3 get into very shortly.

4 I think I wanted to start by maybe
5 drawing some distinctions between, very
6 briefly, this afternoon's hearing as opposed
7 to the November 17 hearing, just so that we
8 will have an understanding, at least we will
9 all be on the same page, regarding the type of
10 evidence that is germane to this hearing, vis-
11 a-vis what was shared at the November 17th
12 hearing.

13 I think most of us know it, but
14 again, just so that we are all on the same
15 page and can be respectful of your time this
16 evening, to state on the record again, that
17 hearing was for a TRO, what's known as
18 equitable relief. And there is a standard for
19 granting a TRO that involves whether there is
20 a likelihood of success on the merits, where
21 there is irreparable harm, whether the public
22 interest will be served by granting the TRO

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1 and so forth.

2 And those standards call for a
3 certain type of evidence that relates to those
4 particular elements, particularly with respect
5 to the public harm element. It calls for a
6 certain type of testimony regarding some of
7 what we saw in the record pertaining to
8 alleged patrons of the business and trash and
9 urination and complaints from neighbors and so
10 on and so forth that are very germane for TRO
11 type hearings or equally germane for section
12 733, special exception application to operate
13 a fast food establishment in a C-2-A.

14 Those types of questions are not
15 relevant to the type of hearing that we are
16 having today. This hearing is limited to
17 whether or not the Zoning Administrator erred
18 in issuing a Notice to Revoke the C of O of
19 the appellant in this case, based on its
20 investigation, which I believe their evidence
21 may show was conducted over four or five days
22 in August of 2009.

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1 And so really what we are looking
2 at in this afternoon's hearing is the evidence
3 that pertains to whether or not there was an
4 error in the Zoning Administrator's
5 determination. A very different set of
6 criteria.

7 So for example, with respect to the
8 motion to intervene, I think the relevant
9 issue and evidence that would be supportive of
10 that issue is, of course, whether there is a
11 specific right to participate in the
12 proceeding. But then if the motion to
13 intervene is granted, the type of evidence
14 that would be relevant to the further conduct
15 of the hearing would be pertinent to this
16 whole question of whether the establishment is
17 a restaurant or the establishment is a fast
18 food carry-out, so on and so forth, not
19 whether the types of adverse impacts that you
20 would see and would have as part of the TRO
21 are part of the special exception.

22 That type of evidence would not

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1 necessarily come into play. There may be some
2 narrow exception to that and if there are, we
3 will address them as they surface during the
4 context of the hearing.

5 But I wanted to lay that out first,
6 just so that we can again be respectful of
7 everyone's time this afternoon. We have got a
8 lot of witnesses and we want to make sure that
9 everybody that has been waiting has an
10 opportunity, and that is qualified and has
11 some relevant evidence, to come before us this
12 afternoon.

13 The second thing I wanted to do at
14 the outset, and then we will move into the
15 request for intervention status, is to clarify
16 the issue of the multiple C of Os, the
17 multiple Notices to Revoke. Apparently there
18 is a September '08 Certificate of Occupancy.
19 There is a September '09 Certificate of
20 Occupancy. There were two Notices of
21 Revocation that were issued in October and, I
22 believe, November.

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1 We are talking about the exact same
2 building. We are talking about the exact same
3 operation. We are talking about the exact
4 same set of allegations regarding whether this
5 establishment is a restaurant or a fast food
6 establishment.

7 So the BZA has previously addressed
8 this issue by virtue of our November 17 order
9 in such a way that we hope clarifies that we
10 are only talking about one C of O. I don't
11 believe you can have two simultaneous C of Os
12 at the same time.

13 So we hope that that does not
14 become a side issue that detracts from the
15 main focus of today's hearing. If there are
16 some pertinent issues surrounding that that
17 need to be clarified, we're more than happy to
18 hear your concerns about that and to clarify
19 that.

20 But we absolutely want to make
21 clear that moving forward, there is currently
22 a stay on, at least as we enter this hearing,

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1 revoking the C of O at that building for the
2 purposes of interrupting the business
3 operations. And we don't want to get into a
4 lot of fine dancing around and really cutesy
5 stuff around what C of O we are talking about.

6 That's the second point.

7 The third point is that when we
8 issued the November 17 Order to Stay, we were
9 very clear on a couple of things and I just
10 want to mention two of those at the outset.

11 One of which is that the period of
12 time that we're focused on and that is germane
13 is the period of time that was a part of what
14 the ZA reviewed in order to make its
15 determination. And we said in our order that
16 the operation of the appellant's business,
17 since the notice was issued, is not germane.
18 And that's at page 4 and 5 of the order.

19 Now, there may be an argument that
20 is made or can be made that suggests that the
21 pattern of operation subsequent to that, let
22 us say, November 2009 so strongly correlates

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1 to what was going on in August 2009, that it
2 warrants our review of that evidence. And we
3 will determine how probative that evidence is.

4 But the larger point, I think, that
5 I'm trying to make and I'm going to open it up
6 for colleagues to weigh in as well, as we try
7 to set the framework here, is that we are
8 really not looking at whether after August
9 2009 the establishment has been operated as a
10 restaurant or the establishment has been
11 operated as a fast food establishment.

12 We are looking at during the period
13 of time that the ZA rendered its
14 determination. So we will only look at
15 evidence post-August if it has a strong enough
16 correlation to the period of time that we are
17 talking about to suggest that the pattern
18 post-August is consistent with what would have
19 happened prior to August.

20 So I hope we are clear on that
21 point. Again, the nuancing of that discussion
22 we can have as the hearing proceeds forward.

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1 Finally, I want to -- and this is
2 going to take a few minutes, but I think
3 saying this all out at the beginning is
4 helpful to keeping us on track throughout the
5 proceeding.

6 So I think in terms of the
7 analytical framework that we are seeking to go
8 through, I'm going to suggest a framework and
9 as part of doing that, I'm going to end up
10 literally reading the statute that is in play
11 here, so that we can all be very, very focused
12 on what type of evidence is going to be most
13 helpful.

14 The threshold question, once we get
15 beyond the preliminary issues of the motion to
16 intervene and the like, will be is this a fast
17 food establishment? And if it is determined
18 that it is a fast food establishment, then
19 clearly that means a certain outcome in terms
20 of the appeal for the appellant.

21 If it is not a fast food
22 establishment, then the question becomes is

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1 this a restaurant with facilities for carry-
2 out, clearly subordinate to the principal use
3 of providing prepared foods for consumption on
4 the premises, clearly subordinate.

5 Now, a restaurant is defined as a
6 place of business that does not meet the
7 definition of a fast food establishment or a
8 prepared food shop. In this case, I don't
9 think that there are any suggestions that this
10 is a prepared food shop, so I think the
11 options, what we are looking at, are fast food
12 establishment or a restaurant.

13 The establishment would be
14 considered a fast food restaurant if, at the
15 time the ZA made his decision, food is
16 prepared on the premises and sold to customers
17 for consumption and at least one of the
18 following conditions apply:

19 (1) The premises include a drive-
20 through.

21 (2) Customers pay for the food
22 before it is consumed. One characteristic

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1 that would satisfy this element would be
2 building permit plans that depict a service
3 counter without seating, unless the applicant
4 certifies that the intended principal use is
5 for a restaurant or grocery and that the
6 counter is part of a carry-out service, that
7 is clearly subordinate to the principal use.

8 (3) Or food is served on/in
9 anything other than non-disposable tableware.

10 Characteristics that would satisfy this
11 element include, but they are not limited to,
12 the building permit plans that do not depict a
13 dishwasher or do depict trash receptacles in
14 public areas.

15 That framework provides guidance, I
16 think, for our review and our evaluation of
17 what will be acceptable as relevant evidence
18 and then how we would tend to evaluate whether
19 that evidence meets the requirement of
20 determining whether the ZA erred with respect
21 to its decision.

22 I hope that is helpful. If there

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1 are gaps, certainly feel free to bring those
2 to our attention as we move forward. And with
3 that, I think I would like to open it up to
4 Board Members to see if there are additional
5 suggestions for setting a clear framework for
6 what we are going to do.

7 And once that concludes, then we
8 can move into the motion to intervene and hear
9 from the parties as well as the movant on that
10 motion. Okay. All right.

11 So I think where we will go now is
12 the motion to intervene, which has been filed.

13 I believe it is our Exhibit 31. And as I
14 understand the motion, the motion raises a
15 number of allegations regarding specific right
16 to participate in the proceeding, as well as
17 making a representation that if approved, that
18 the movant would be willing to work with the
19 ANC in terms of consolidating time and work
20 within the one hour that would be allotted the
21 ANC, as I understood the pleading, to combine
22 those times, so that there would still be

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1 collectively one hour.

2 And I'm assuming that would also
3 involve some collaboration regarding witnesses
4 and the like. So is that the representation
5 that is made?

6 MR. SULLIVAN: Yes, that's correct.

7 We are actually going to call the Single
8 Member District representative as part of our
9 case and then I think Chairman Lewis expects
10 to speak for a minute or so tops.

11 CHAIRMAN LOUD: Okay. And so
12 that's good to know. I think it is very
13 helpful in terms of sort of sorting out the
14 time lines that we are talking about. But I
15 think the preliminary question is whether the
16 test for intervention status is met and you
17 are familiar with the test based on your
18 pleading.

19 So why don't we go into that and
20 then we will, after hearing from you, hear
21 from Mr. Brown and then DCRA if they would
22 like to weigh in on your motion?

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1 MR. SULLIVAN: Thank you, Mr.
2 Chairman and Members of the Board. I won't
3 rehash the entire written motion. You have in
4 detail there the specific interest that the
5 intervenors have in the outcome of this
6 hearing.

7 Particularly, they have a right to
8 the enjoyment of their property and they have
9 a right to expect that the District will
10 enforce its Zoning Laws properly.

11 Secondly, to address your point
12 about relevant testimony, we intend to offer
13 testimony that is directly on point indicating
14 that there is clear indicia of a fast food
15 establishment use and a large amount of carry-
16 out use and to show that this is not a
17 restaurant and it is, in fact, a fast food
18 establishment.

19 I happen to agree with Mr. Brown
20 that this is a narrow legal issue actually,
21 but he has submitted fact witnesses, written
22 submissions. He has got a fact witness here

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1 today. Officer Culp was here at the last
2 hearing. So he can't have it both ways.

3 Is it a narrow legal issue or is
4 this a fact case? My understanding is, at
5 this point, the Board will be considering
6 factual evidence to determine whether or not
7 they were operating in August 2009 as a fast
8 food establishment or as a restaurant.

9 That's the issue. Is appellant
10 operating as a restaurant?

11 My clients are uniquely positioned
12 to observe the appellant's operation. They
13 have done so. And if they are denied the
14 right to speak here, the Board will not be
15 fully informed.

16 Finally, and I think the Board has
17 noted this in past decisions, the fact that
18 they have gone through the trouble of hiring
19 land use counsel and that they intend to fully
20 participate and make use of that party status,
21 that that is a factor in favor of intervenor
22 status.

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1 And I want to briefly address
2 appellant's opposition to our motion. They
3 cited two cases in which the Court of Appeals
4 said that the Board acted arbitrarily in
5 denying intervenor status. I'm not sure how
6 that helps them.

7 And despite the long explanation on
8 the Sisson case, in the end the appellant
9 ended with the conclusion that the neighbors
10 in that case were granted intervenor status.

11 So there is a precedent there.
12 Neighbors can get intervenor status. My
13 question is if neighbors can get intervenor
14 status, what case would you find neighbors
15 that are more directly harmed by the
16 misapplication of the Zoning Laws?

17 The appellant goes even further
18 then in that argument and suggests that my
19 clients don't even have the right to speak
20 here.

21 Finally, he claims that the
22 negative impacts are irrelevant. I agree

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1 that's true. But the negative impacts are the
2 result of the fast food establishment use.
3 And that's what my clients are here to testify
4 about today.

5 The bottom line is my clients have
6 lived with this failure of the city to enforce
7 its Zoning Laws for a year and a half now.
8 They have fought hard to get the city and DCRA
9 to notice this and investigate it. They are
10 spending money for representation. They will
11 present testimony that is critical and
12 relevant to the Board's decision. And they
13 are entitled to be heard. Thank you.

14 CHAIRMAN LOUD: Just very briefly,
15 I think you mentioned it in your pleadings,
16 Exhibit 31, can you just identify where each,
17 you have three clients, right, of the three
18 live in relation to the pizza establishment?

19 MR. SULLIVAN: Yes. Lynn Schubert
20 is at 1220 Potomac Street. It is across the
21 street and about two doors to the north. Anne
22 Alonzo is at 1216 and it is directly across

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1 the street. And Alex Meeraus is at 1217,
2 which is directly across the alley on the same
3 side of the street as Philly Pizza. So it's
4 10 feet away.

5 CHAIRMAN LOUD: Thank you. Yes,
6 why don't we move to Mr. Brown, if that's okay
7 with the Board? And then we will reserve a
8 time where the Board can ask questions of all
9 of you.

10 MR. BROWN: Mr. Chairman, thank you
11 very much. And, one, I think, you responded
12 yourself to one of the issues raised by Mr.
13 Sullivan about the scope of our inquiry today.

14 And yes, in fact, Officer Culp was here last
15 time in the context of a very different
16 situation.

17 And that doesn't open the door to
18 the kind of testimony that, quite frankly,
19 that's all his brief is about. And I'm not
20 trying to, you know, minimize their interests
21 or the importance of it.

22 But again, we are in a context of

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1 an appeal. The Board's rules are strict and
2 the Court of Appeals. My apologies, but we
3 got the Motion to Intervene late and you
4 should have gotten my written opposition,
5 which I hope you did, but the case I cited is,
6 and Mr. Sullivan, obviously, spins it his way,
7 clear that while the Board, and God love her,
8 Carrie Thornhill, your predecessor back from
9 years ago, was faced with 22 potential
10 intervenors and she said without discussion,
11 I'm not going to hear from any of you.

12 The Court of Appeals said that was
13 arbitrary and capricious. But then they
14 turned around in the next sentence literally
15 and said having acted improperly from a
16 procedural standpoint by not hearing what the
17 potential intervenors had to say or proffer
18 and the qualification to intervene, the Board
19 -- the Court said but having done that, it's a
20 harmless error, because those intervenors were
21 talking strictly in terms of matters that were
22 better left in the context of a variance or

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1 special exception and proceeded to define the
2 procedural error harmless, affirm the case
3 without changing the Board's decision on
4 intervention.

5 We have a very similar situation
6 here, except for the Board is listening to the
7 intervenors. But if you look at what they
8 have submitted, both in their Motion to
9 Intervene and in their more lengthy
10 opposition, there is nothing in there that,
11 quite frankly, in the way of evidence, that
12 the Board is even prepared to hear today.

13 They have got a bunch of pictures
14 of the street scene on Potomac Avenue. And I
15 think it is pretty clear the Board is not
16 interested in hearing that today. Yet, there
17 is a total absence of any articulation of a
18 direct legal interest in this appeal.

19 And I draw the distinction to the
20 Sisson case, which was very important, because
21 the people who were allowed to intervene in
22 that case and the footnote in the Board's

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1 order in the third of the three Sisson cases
2 made it clear that the neighbors were being
3 allowed to intervene for a very limited
4 purpose and weren't even referred to as
5 intervenors.

6 And that interest was again that
7 having brought the original appeal and having
8 participated as a party in the subsequent
9 application case that was denied, that that
10 participation and the right to have those
11 orders enforced in the context of the later
12 appeal, gave them a direct legal interest that
13 allowed them, for that very narrow purpose, to
14 enter into the case. And that's how they
15 participated.

16 That doesn't exist here. And so
17 that from a legal standpoint, there isn't any
18 basis to intervene. And what they are
19 offering is not such that the Board wants to
20 hear it or is interested in hearing it.

21 And if there is anything they can
22 add, it doesn't necessarily have to be in the

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1 context of an intervenor. If they have
2 anything to add, one, I would have expected
3 they would have put it in their opposition,
4 but they are certainly free to testify in
5 somebody else's case.

6 So I think that the intervention is
7 unjustified and really opens the door to the
8 exact type of situation this Board doesn't
9 want to have happen in this case, which is
10 opening it up to discussions that are pretty
11 far afield from what our focus needs to be on.

12 CHAIRMAN LOUD: Thank you, Mr.
13 Brown.

14 MRS. BOLLING: Chairman Loud, the
15 District does not oppose the intervenor's
16 motion.

17 CHAIRMAN LOUD: Does the DCRA have
18 an opinion or reflection on whether the movant
19 has a specific right, as the rule authorizes,
20 that would warrant its participation as an
21 intervenor?

22 MRS. BOLLING: The District has not

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1 responded in writing to that particular issue.

2 Off the top of my head, the District did
3 receive complaints from the neighbors that go
4 to the facts that also are supported by the
5 investigation of our investigator who is here
6 to testify later about evidence we say that
7 support a fast food establishment versus a
8 restaurant.

9 But as to the legal question, I'm
10 not ready to speak on that right now.

11 CHAIRMAN LOUD: Let's see if Board
12 Members have any questions for any of the
13 three of you, the movant, Mr. Brown and DCRA?

14 CHAIRMAN LOUD: Was there any
15 desire to respond to what had been brought out
16 by Mr. Brown or Mrs. Bolling?

17 MR. SULLIVAN: Yes. Well first of
18 all, I think the Board can decide for
19 themselves what kind of testimony they want to
20 hear. And I'm assuming, since this is a
21 question of how this business was operating,
22 that they would want testimony and evidence

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1 about how this business was operating.

2 And my clients live with this
3 operation. They see it every day all day
4 long. They are going to present factual
5 testimony to support DCRA's investigation and
6 to refute the testimony that is going to be
7 provided by the appellant.

8 Secondly, if the -- we have no
9 intention of testifying about the nuisance
10 aspect of this. But if that was germane to
11 the TRO hearing, I don't know why my clients
12 were shut out of that hearing. So they didn't
13 get a chance to speak at all there. And now,
14 I think they rightly deserve a chance to
15 speak.

16 Finally, the conclusion from the
17 opposition's brief to our motion cites a case
18 where the Court of Appeals said that the issue
19 was whether the proposed use was permissible
20 as a matter-of-right.

21 I don't think that's the issue
22 here. I don't think we are asking is

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1 restaurant permissible as a permissible use as
2 a matter-of-right. No. We're asking what was
3 going -- what were the facts? What was going
4 on in August 2009? Was this place operating
5 as a restaurant or was it not?

6 And my clients, besides having a
7 specific legal right, have the information the
8 Board needs to make a fair and full
9 determination on that point.

10 MR. BROWN: Can I interject, Mr.
11 Loud? One, the case I cited Brentwood,
12 Concerned Citizens of Brentwood, is very much
13 the same type of case. It only differs when
14 the decision was being made. The question
15 before the Board then was whether a proposed,
16 in that case, operation was one thing or
17 another and whether, in fact, it was permitted
18 as a matter-of-right.

19 It was pre-operation. It is very
20 much the same legal question, different
21 circumstances that the Board faces now. The
22 language in the statute or in the regulation

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1 and the rules and how the court has approached
2 it, it's pretty clear. It's very clear that
3 the fact that these neighbors may be good
4 witnesses is not the standard.

5 The standard is do they have a
6 direct legal interest in the appeal? Mr.
7 Sullivan hasn't articulated one. The fact
8 that they are interested in the enforcement of
9 the Zoning Regulations, that applies to
10 everybody in this room. And that's not a
11 direct legal interest that the Board should
12 recognize.

13 And particularly if you look at
14 Brentwood, who the people in Brentwood were in
15 the exact same position as the neighbors are,
16 they have concerns about the operation and the
17 impacts of that. That didn't give them
18 standing under the intervention restrictions
19 and it shouldn't in this case.

20 If they are good witnesses, there
21 are opportunities for those witnesses to
22 provide evidence as limited by the Board

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1 without being an intervening party, with the
2 right to cross examine and all that comes with
3 it.

4 So I'm not saying that the
5 witnesses should be excluded, but party
6 intervening is a higher level of
7 participation, which they haven't proven the
8 right to have.

9 CHAIRMAN LOUD: Thank you, Mr.
10 Brown. Board Members, any reflections? On
11 second thought, I think we might be able to
12 move to a discussion regarding the movant's
13 application and I'm more than happy to start
14 us off, unless there are some questions?

15 Okay. Let me thank you, Mr.
16 Sullivan, thank you, Mr. Brown, thank you,
17 Mrs. Bolling. And I did have an opportunity
18 to review the pleadings.

19 I'm supportive of granting the
20 Motion to Intervene. I think, yes, Mr. Brown,
21 some of these witnesses may be helpful, they
22 may not be helpful. We don't know yet what

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1 they are going to say. And I think the Board
2 is certainly going to be capable of limiting
3 the witness contribution to the legal standard
4 that we talked about at the outset.

5 But these witnesses are a little
6 different, in that they don't just have
7 something that might be helpful to the legal
8 standard that we are talking about. They live
9 in very close proximity to the property that
10 we are talking about and have, through their
11 pleadings and just inferentially, suggested
12 some interest that would set them apart, I
13 think, from just good witnesses.

14 You mentioned some of the nuisance
15 issues. I think in some of the pleadings they
16 talked about personal threats being made
17 against them in connection with allegedly some
18 of the patrons of the business. That could
19 include their interest and their concern about
20 property values.

21 That would certainly set them apart
22 from persons that would just be adversely

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1 impacted by patronizing the business. So I
2 think that there is enough there to suggest
3 that these movants have some interest that
4 would allow them to participate in the
5 proceeding.

6 On the other hand, I agree with you
7 that we are, and that is a point of sort of
8 setting the framework early on, very
9 interested in limiting the participation of
10 the intervenors, if the Board Members support
11 that, to the specific legal standard in
12 question and not allowing it to go into
13 adverse impacts that don't have any bearing on
14 whether or not it is a restaurant or fast food
15 establishment and so forth.

16 And the fact that the witnesses
17 were not able to testify on November 17 has no
18 bearing on the scope of what they might be
19 able to testify to this afternoon, given the
20 much narrower focus of the proceeding.

21 So I understand the objections, but
22 not withstanding those, I would still be

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1 supportive of allowing the movant in.

2 MEMBER MOLDENHAUER: Chairman Loud,
3 I agree with you. I think that there is
4 sufficient evidence to show that the
5 intervenors have a very significant and a
6 distinct interest, rather than the general
7 public.

8 One, their proximity and, two, the
9 nature of this dispute. And at the same time,
10 while this is a legal question as to whether
11 or not the establishment falls under a fast
12 food definition or a restaurant definition, I
13 think that based on all of the prehearing
14 statements, there is a lot of factual issues
15 that are not in agreement right now.

16 We have a lot of facts in dispute.

17 And I think that by permitting the intervenor
18 in their interests, we can also potentially
19 provide additional testimony that may be able
20 to clarify these facts that are in dispute
21 that will allow us to determine whether or
22 not, this legal issue, the establishment is a

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1 restaurant or a fast food establishment.

2 VICE CHAIRMAN DETTMAN: Mr.
3 Chairman, I'm in agreement with my colleagues
4 here. And I am supportive of granting the
5 Motion to Intervene.

6 As Ms. Moldenhauer stated, I share
7 her opinion. I do see a specific right or
8 interest. But insofar as the standard says
9 that the Board shall limit the intervenors'
10 participation in the hearing, as much as they
11 see fit, just looking at our exhibit, the
12 actual Motion to Intervene, what I was able to
13 glean from that is a few things.

14 One, there was a little bit of
15 mention about adverse impact and you have
16 already set up the standard that we are not
17 here to analyze that.

18 There were some legal argument
19 which the intervenor can make, but really, to
20 me, I see that as DCRA's responsibility to
21 kind of lay out the legal argument with
22 respect to what is a restaurant, what is a

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1 fast food establishment.

2 But as stated by Mr. Sullivan, I do
3 see the intervenor providing the Board with
4 some very valuable information, hands-on
5 information with respect to how this business
6 was operating during the time that the ZA was
7 conducting his analysis.

8 And so I think it is that
9 information that is going to inform the Board
10 in order to allow us to reach a decision on
11 this.

12 COMMISSIONER TURNBULL: Mr. Chair,
13 I would concur with all three of you. I
14 think, if anything, I would rather err on
15 being more inclusive in this particular case
16 than negating the fact of these neighbors. So
17 I would go along with your decision for
18 intervenor status.

19 CHAIRMAN LOUD: Thank you,
20 colleagues. And I think by consensus, I don't
21 think we have to vote, but let me know if I'm
22 incorrect on that, Ms. Bailey or Ms.

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1 Nagelhout, if we need to affirmatively vote on
2 the Motion to Intervene?

3 MS. BAILEY: By consensus.

4 CHAIRMAN LOUD: By consensus.

5 MS. BAILEY: Yes, sir.

6 CHAIRMAN LOUD: Okay. So by
7 consensus, I think we all are saying that:
8 (A) That we think the movant has made the case
9 for intervention status; and that (B) We would
10 like to make really clear that the
11 participation is limited to evidence that is
12 germane to the period of time (A) that the
13 DCRA investigation took place.

14 So if we are talking about
15 incidents and witnesses that are going to talk
16 about something that happened three or four
17 years ago, that would clearly be beyond this
18 period of investigation that we are talking
19 about.

20 If we are talking about incidents
21 that happened last week or two weeks ago, I
22 think that would also be beyond what we are

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1 talking about in terms of the investigation.

2 As we proceed forward and the
3 proffers come forward regarding the evidence,
4 we will be able to determine on a case-by-case
5 basis if it is too remote to be considered.

6 But I think, generally, what we are
7 saying is that the time period needs to be
8 relevant to the investigation that we are
9 talking about and the scope needs to be
10 relevant to the legal standard.

11 Okay. So with that said, I think
12 we are ready to move into the case. And we
13 would begin with the statement and the
14 witnesses of the appellant.

15 MR. BROWN: Mr. Chairman, before we
16 start?

17 CHAIRMAN LOUD: Yes?

18 MR. BROWN: If I could clear up a
19 couple of housekeeping matters, so I think we
20 are all on the same sheet of music?

21 You referred to only one
22 Certificate of Occupancy being an issue. And

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1 so that I don't misunderstand, you were
2 talking about the latest, most recent
3 September 2009 Certificate of Occupancy, which
4 is tied to the later Notice to Revoke? I'm
5 asking that question.

6 CHAIRMAN LOUD: I think what I was
7 attempting to say is that to the extent that
8 that superseded the Certificate of Occupancy
9 that had been issued in September '08 and
10 revoked by the October notice, then that would
11 be the relevant C of O that we are talking
12 about.

13 But I do think that both C of Os
14 are talking about the exact same set of
15 circumstances, the exact same set of
16 allegations, so we want to be really clear
17 that we are fully addressing the issue of the
18 operation of that establishment through a
19 single C of O.

20 MR. BROWN: And two other matters.
21 One, on Friday in very close order, last
22 Friday, I received DCRA's opposition statement

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1 as well as Mr. Sullivan on behalf of the now
2 intervenors.

3 While I appreciate receiving them
4 before the hearing, I did not have an
5 opportunity to respond to them in writing.
6 And I would like to reserve the right to do
7 so. I think that's a fairly typical practice
8 before the Board is that one written statement
9 can be responded to. Generally, we're talking
10 in the seven day time frame, which I,
11 obviously, didn't have time to accomplish
12 before the hearing.

13 So I would make that request and we
14 can revisit that at the end of the hearing,
15 which I suspect there may be further
16 instructions.

17 And the last -- and I understand
18 the Board's interest in focusing in on the
19 period of time when DCRA conducted their
20 investigation, and we are certainly prepared
21 to proceed along the lines of the Board's
22 interest, but recognizing that does put my

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1 client at a certain disadvantage because this
2 undercover surveillance, their terms not mine,
3 occurred without my client's knowledge.

4 In fact, did not know about it
5 until October. So our ability to have
6 contemporaneous information, documentation for
7 that time period for when they did not know an
8 investigation was under way, obviously, they
9 didn't have the opportunity to collect
10 evidence contemporaneous with the
11 investigation that they didn't know was going
12 on.

13 And you will see that in a number
14 of ways. One, we certainly can't provide any
15 photos for that time period, because we
16 weren't collecting evidence. And two, the
17 limitation once we knew about this and we have
18 been tracking transactions for the restaurant
19 by the various categories since we knew it was
20 an issue, but we have not been able to go back
21 to that period.

22 So that that evidence, if we had

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1 known about it, could have been created for
2 that time period. We are not able to recreate
3 that. So again, that's another handicap we
4 are under.

5 So that I think some leeway to
6 provide evidence of a more current nature is
7 absolutely essential to my client, because,
8 again, we didn't have the ability to collect
9 evidence in the time frame that you are
10 focusing in on.

11 I hope the Board understands those
12 caveats.

13 CHAIRMAN LOUD: I certainly don't
14 want to speak for all of the Board. Board
15 Members may have some reflections on what you
16 just said and I'll let them speak directly.
17 And I have a couple of thoughts as well.

18 MEMBER MOLDENHAUER: Our order
19 specifically stated that we were going to
20 focus on pre-revocation documentation. And I
21 think that the only way that any evidence or
22 documentation or photographs can be taken

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1 post-revocation time frame would be if there
2 can be sufficient -- if you can lay the ground
3 work to provide sufficient evidence to show
4 that that documentation would most likely then
5 reflect a similar type of business practice as
6 to what was happening during the investigation
7 or before the revocation.

8 And I think that there is
9 potentially even some conflicting statements
10 in your pre-statement hearing because there
11 has been some information on some changes that
12 have potentially occurred and that may mean
13 that we may not be able to weigh newer
14 documentation, newer figures as strongly,
15 because it will not potentially reflect what
16 was happening at the time of the investigation
17 or pre-revocation.

18 So I think that, you know, and I
19 have to obviously, see what the rest of the
20 Board thinks, but in my opinion, you know, we
21 have to limit it for pre-revocation or if we
22 allow anything in post-revocation, you need to

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1 lay the ground work to show us that this is
2 substantially a similar business practice as
3 previously.

4 And if it's not, we need to know
5 what factors have changed, so that we can
6 determine how then to weigh that information.

7 MR. BROWN: And I understand that.

8 But again, obviously, I read your Stay Order,
9 and even finding out that was dated November
10 25th, again, we come back to the -- that I'm
11 really and my client is greatly handicapped
12 because something was going on from the middle
13 of August until the middle of October, until
14 he had any knowledge of it when he first
15 received the Notice to Revoke.

16 At that time, he did not have the
17 ability nor did -- you know, when your order
18 came out November 25th, to reach back and
19 collect that information. So he is really
20 being handicapped in his ability to make his
21 case and defend himself.

22 So with that, you know, again, I

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1 want to make sure that that concept is firmly
2 planted in the Board's mind, because,
3 otherwise, we're having a one-sided
4 discussion, because it is pretty clear now
5 that the intervenors and the neighbors and
6 DCRA were in the business of collecting
7 information at a time when my client was
8 totally unaware of this issue and that puts
9 him at an enormous disadvantage from a proof
10 standpoint.

11 I'll leave it at that. I think the
12 Board understands that concept.

13 COMMISSIONER TURNBULL: Mr. Brown,
14 I might ask or let me just question you. If
15 your client was in compliance, why would he be
16 concerned? I mean, if you are running a
17 compliant restaurant operation and an
18 inspector is coming out and looking, even
19 though you don't know, why would you be
20 concerned?

21 MR. BROWN: Well, I mean, I think
22 that's the point. My client had no reason to

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1 be concerned. He had been issued a
2 Certificate of Occupancy. Well, going back.
3 He had completed his building permit plans
4 showing improvements to basement, first and
5 second floor, for which he built-out in
6 accordance with those plans in the manner that
7 the restaurant existed then as well as now.

8 He had gotten his C of O. And he
9 had gone about operating business. As part of
10 obtaining the C of O, he provided the eating
11 establishment questionnaire which was
12 approved. So again, he has done everything he
13 was supposed to do. And so from when he
14 opened his door, I believe, in August or
15 September of '08 to a year later, he has no
16 reason to believe, because again he had no
17 communications with DCRA, no knowledge of a
18 complaint, so he had no reason to think that
19 he was anything other than operating a
20 business as usual in compliance.

21 Only, you know, six, seven weeks
22 later, actually, two months later, again mid-

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1 August investigation, mid-October Notice to
2 Revoke, during that period, he had no reason
3 to believe that he was in violation.

4 COMMISSIONER TURNBULL: But I guess
5 what I'm saying is that if he had no reason to
6 believe that he was operating as what his
7 operation is, if DCRA comes out and says hey,
8 there is something funny going on here, we
9 need to look at this, I mean, that's not -- I
10 mean, they don't have to raise their hand and
11 come in and say oh, by the way, we think you
12 are not doing this and this right.

13 I mean, they are following up their
14 plans for inspecting the business that should
15 be a restaurant and finding that it's not a
16 restaurant, or according -- their feeling is
17 that it's not a restaurant.

18 I mean, I don't --

19 MR. BROWN: Well, but --

20 COMMISSIONER TURNBULL: -- think
21 there is anything in there.

22 MR. BROWN: -- I understand your

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1 point making. But you take that concept that
2 DCRA certainly has the right to investigate,
3 but you take that concept, marry it with the
4 fact that my client had no knowledge of it and
5 then you limit his ability to, by just the
6 passing of the calendar and how you want to
7 approach evidence, present evidence that is
8 contemporaneous with an investigation he
9 didn't know was occurring, and you have really
10 put him at a disadvantage.

11 MEMBER MOLDENHAUER: Wait. Can I
12 just jump in? Because I don't think that we
13 are putting him at a disadvantage. I think
14 that unfortunately the way that he ran his
15 business, he did not keep records in a certain
16 procedure or methodology.

17 Once he became aware of this, he
18 changed his methodology of keeping his records
19 and now he has that information.

20 And so I think that if he had every
21 ability or every right to potentially keep his
22 records in a certain way that would have

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1 allowed him, at any point in time, even if it
2 was an anonymous investigation, to go back and
3 look at them and say okay, this is then, what,
4 you know, I was doing, you know, in 2006 and
5 2004.

6 All the technology, all that, the
7 systems are available for him to have kept
8 certain types of records. He chose not to.
9 And now we are at a point where we are having
10 to look back into the past. And I think we
11 are just saying that because he didn't have
12 that system in place, he is limited, since he
13 has this new system, to show us that that
14 business -- that the system in place now when
15 he has records is of a similar nature and
16 style to what it was at the time that he has
17 no documentation to show us.

18 MR. BROWN: And again, I
19 understand. But the point you make that
20 really concerns me is that my client, who is a
21 small businessman, should have been,
22 basically, living in fear that somebody was

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1 going to ask him to produce documentation.

2 I mean, he was running -- he is
3 running a business. He is selling food. And
4 I don't think his business was keeping records
5 to satisfy this type of situation. But I'll
6 leave it at that.

7 Can I -- I would like to -- Mr.
8 Dettman, I'm sorry to interrupt you.

9 VICE CHAIRMAN DETTMAN: Yes. It
10 appears as if we are ready to move on and I
11 certainly am as well.

12 But Ms. Moldenhauer makes a very,
13 very good point. It's that, you know,
14 although the Board kind of set out the
15 boundaries of the hearing and said this is the
16 information we are looking for, we're going to
17 limit this information this way or the other,
18 the Board certainly doesn't want to limit the
19 amount of information that is in the record
20 that is going to prevent us from making an
21 informed decision on this case.

22 But what the Chairman said at the

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1 outset is that we are going to take it on a
2 case-by-case basis. And we want to make sure
3 that if there was information that was
4 collected post-revocation, we need to see a
5 clear connection between that information and
6 the way the business was operating pre-
7 revocation.

8 That's all we have said. But in
9 enforcing that, we are not going to handcuff
10 ourselves in making an informed decision. But
11 to say that your client shouldn't have to live
12 in fear of a potential investigation, it says
13 it right on the Certificate of Occupancy that
14 your client is responsible for carrying out
15 the business in accordance with what it says
16 in the C of O and all applicable District Laws
17 and Regulation.

18 So no, your applicant should not
19 live in fear of a potential investigation, but
20 your applicant should carry out the business
21 in a way that has a carry-out that is
22 currently subordinate, requires customers to

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1 pay after they consume the food.

2 So, you know, I understand your
3 statement, Mr. Brown. But clearly your client
4 is not 100 percent a victim here. They have
5 responsibilities as well.

6 CHAIRMAN LOUD: Thank you, Mr.
7 Dettman. I think one of the things you
8 mentioned, Mr. Dettman, is the value of trying
9 to sort of evaluate this on a case-by-base
10 basis as the evidence comes up, which would
11 give us an opportunity, I think, to allow the
12 parties in the case to weigh in on whether a
13 specific evidence that we are talking about,
14 the November 2009 software data, for example,
15 is admissible or not admissible.

16 And I like the way you suggested,
17 because I think we can process it that way and
18 keep the case moving forward.

19 I happen to agree with Mrs.
20 Moldenhauer that we ought not handcuff you as
21 well and just have a real clear line in the
22 sand that everything after August 2009 is not

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1 admissible. So we will just see on a case-by-
2 case basis what objections come up and whether
3 you can sustain your position that it is
4 admissible.

5 I'm supportive of that.
6 Nonetheless, I'm not totally persuaded that
7 your client could not have come up with some
8 kind of evidence, direct mail lists, lists of
9 clients that a small business would normally
10 keep that could be then outreached to identify
11 potential witnesses that would come in and
12 testify in support regarding the standard that
13 we are looking at.

14 But that be that as it may, I'm
15 pushing that aside, I'm supportive of
16 generally where you want to go with this. And
17 just as long as we can sort of tie it to Mrs.
18 Moldenhauer's framework regarding making sure
19 it establishes the predicate for a pattern,
20 then I think, you know, we will take it up on
21 a case-by-case basis.

22 MR. BROWN: All right. If I could

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1 before I get started, maybe this is a good
2 time to do it, I have proposed Mr. Bello, Toye
3 Bello as my expert witness in zoning matters.

4 And attached to my prehearing statement is
5 his CV.

6 Just briefly, what 20 years of land
7 use zoning experience, including several terms
8 as the Zoning Administrator in the District.
9 He has appeared as an expert witness before
10 this Board on at least a handful of occasions,
11 most of which I was involved in.

12 So I don't want to belabor the
13 point, but I would like to have him recognized
14 as an expert in zoning issues.

15 CHAIRMAN LOUD: Let's hear from
16 DCRA and then we will hear from the intervenor
17 and if Board Members have any questions.

18 MRS. BOLLING: DCRA has no
19 objection to Mr. Bello being recognized as an
20 expert in zoning.

21 CHAIRMAN LOUD: Thank you for your
22 brevity. Mr. Sullivan?

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1 MR. SULLIVAN: Potomac Street
2 Intervenors have no objection.

3 CHAIRMAN LOUD: Okay. Board
4 Members? Okay.

5 MR. BROWN: And at the time, Mr.
6 Bello wasn't in the room. He will need to be
7 sworn, but we will maybe perhaps move on.

8 CHAIRMAN LOUD: By consensus -- I
9 think we just formally have to do this for the
10 record. By consensus then we accept Mr.
11 Bello's qualifications as an expert.

12 MR. BROWN: And I would briefly,
13 before my client, Mr. Kocak speaks briefly,
14 like to focus the Board briefly. This all
15 appears in my prehearing statement.

16 One, the Board has clearly
17 indicated that the issue before us is whether,
18 in fact, DCRA was right in characterizing this
19 building -- this business as a fast food
20 establishment when they issued the first or
21 the second Notice to Revoke.

22 Another point that I made that I

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1 think is critical is that --

2 CHAIRMAN LOUD: Mr. Brown, I'm
3 sorry to interrupt you. Are you entering your
4 case for the purposes of our --

5 MR. BROWN: Yes.

6 CHAIRMAN LOUD: -- keeping track of
7 the time? Well, why don't we do this? Why
8 don't we swear Mr. Bello in, so that we don't
9 have to stop the clock for that?

10 MR. BROWN: Certainly.

11 CHAIRMAN LOUD: Okay. And then you
12 can formally start your case and we will start
13 the clock.

14 (Whereupon, the witness was sworn.)

15 CHAIRMAN LOUD: I'm sorry. When
16 you are ready then, you can start your case.
17 And we can start the clock.

18 MR. BROWN: One of the first points
19 I have raised is the authority of the Zoning
20 Administrator to issue the Notices to Revoke.
21 The building code clearly provides that the
22 Code Official is the Director of the

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1 Department of Consumer and Regulatory Affairs
2 and that that individual, the Director, the
3 Code Official, is the one authorized to issue
4 a Notice to Revoke a Certificate of Occupancy.

5 Now, the Code Official under the
6 building code can delegate that authority.
7 The question is and nobody -- and perhaps I
8 was making it too easy, but the answer to that
9 is yes, in fact, the Director has delegated
10 that authority to the Zoning Administrator.

11 But neither DCRA nor the
12 intervenors have provided that documentation.

13 And I would like to present to the Board.
14 And it has got to be done. If you are going
15 to delegate authority and I have an opinion
16 from Mr. Bergstein to DCRA in the context of
17 delegating authority under the building code
18 to zoning inspectors from 2001, which clearly
19 states that yes, you can delegate the
20 authority, but you actually have to do it.

21 And the absence of any delegation
22 having been provided would indicate that that

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1 delegation doesn't exist and that the Zoning
2 Administrator was not, in fact, authorized to
3 issue the Notice to Revoke. And as a result,
4 it is invalid.

5 Mr. Bello, in his testimony, will
6 also talk about limitations and the Zoning
7 Administrator's authority in the building
8 code. But for purposes of this point, which
9 is important, there has been no proof that the
10 Zoning Administrator was authorized to take
11 this action, in which case it is invalid and
12 we have wasted a lot of time and effort here.

13 If I could, and I'm sending up a
14 2001 opinion letter from Mr. Bergstein to
15 Denzil Noble, who, at the time, was the Acting
16 Building and Land Regulation Administrator at
17 DCRA. And then it goes through, again under
18 the building code, that he says as far as the
19 delegation, thus, if the Director, if he at
20 the time, has not already done so, may
21 delegate his authority to issue Stop Work
22 Orders under section blah, blah, blah, to

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1 zoning inspectors.

2 And then it says here "If the
3 Director has not delegated his authority, oral
4 delegations do not include the Zoning
5 Division, and an appropriate internal
6 delegation to include the Zoning Division or
7 zoning inspectors is required."

8 So it's pretty clear that their own
9 legal advice from Mr. Bergstein, who we all
10 know, required that a delegation exist. And
11 to this point, certainly no proof of that.

12 If I could -- and a great deal of
13 burden has been put on my client to respond to
14 an August 2009 investigation that he didn't
15 know was going on, but if you look at the DCRA
16 undercover investigation, and we will get into
17 this in more detail, particularly, this
18 investigation was flawed from the beginning to
19 end.

20 One, there has been no paperwork,
21 no reports, no photographs, no documentation
22 provided by DCRA. They opposed my prehearing

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1 statement, which made this point clear, yet,
2 there has been no documentation presented to
3 support their investigation, so that while I'm
4 under a burden to provide contemporaneous
5 information about something I didn't know was
6 going on, they provided no information about
7 their own investigation.

8 One, their investigation occurred
9 over five days. There is no indication about
10 the duration of the five visits. But one can
11 expect -- and again they will have to tell us,
12 this is a business that's open 110 hours a
13 week. And to make a judgment about a business
14 that is open that period of time in five
15 probably very short, in this case,
16 undocumented visits, strains credibility for
17 the Board as far as the validity and
18 thoroughness of the investigation.

19 I mean, this restaurant has been
20 open since August/September 2008. It has been
21 open 16 months, 64 weeks. And to try to focus
22 in on a business in a few short visits that

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1 aren't documented, I'm not so sure, and I have
2 provided documentation over a nine week
3 period, that accurately can portray a business
4 that, you know, goes on 110 hours a week, 52
5 weeks of the year.

6 But certainly, I don't think that
7 DCRA can capture the real essence of that
8 business, based on their investigation.

9 I also note that mid to late August
10 in Washington, D.C. in this area is a terrible
11 time to determine what a restaurant is all
12 about.

13 One, I don't think anybody
14 disagrees that this restaurant is popular with
15 students. The students were on summer break
16 and weren't back until the 30th of the month.

17 Also, we all live in August --
18 lived in Washington for a long time. August
19 in Washington, those of us who are fortunate
20 aren't here. We are not here eating in
21 restaurants. We are not here buying in
22 stores. So again, to focus your investigation

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1 on a business of this nature during that
2 period of time, added on top of that the lack
3 of documentation, seems inappropriate and
4 almost destined to provide an incorrect or
5 incomplete answer.

6 The other points I think I'll
7 leave. I have laid them out in more detail.
8 I think a lot of these points depend in large
9 measure on what DCRA has to say and they have
10 said very much of nothing so far about their
11 investigation.

12 I would, and again, make the point,
13 and I haven't had a chance to respond in
14 writing, DCRA tries to make the point to the
15 Board that in looking at a restaurant that the
16 Zoning Commission imposed a 25 Percent Rule on
17 carry-out and cites -- and attaches the Zoning
18 Commission transcript.

19 And I believe, Mr. Turnbull, you
20 were involved in that discussion. They
21 include the transcript from April of '07.
22 Certainly, at that point, they are correct. A

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1 single ANC Commissioner attempted to suggest a
2 25 Percent Rule.

3 The Zoning Commission met
4 subsequently in June and, I believe, July of
5 '07 to take final action. And the Zoning
6 Commission specifically rejected any limit or
7 guidance, whether 25 percent or other, in
8 establishing the new definitions for
9 restaurants.

10 So I want to clear up that point
11 that there was never a 25 percent standard
12 imposed on the carry-out portion of the new
13 definitions for restaurant.

14 With that, I would like to let Mr.
15 Kocak speak. He has a brief written
16 statement, which we will give you copies of.
17 It's just a few minutes long. He would like
18 to show you some pictures.

19 It is written in the present tense,
20 but he can certainly draw the -- and it is
21 written in the present tense because his
22 ability to provide evidence is only

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1 contemporaneously. But he certainly is in the
2 position, because at all times he has owned
3 and operated this restaurant to try to take
4 you back to the August 2009 time frame.

5 With that, Mr. Kocak. And we would
6 like to put some pictures up that he will
7 refer to at some point. He will probably need
8 a hand-held microphone.

9 CHAIRMAN LOUD: Just again in the
10 interest of time, and we are all agreeing that
11 given the number of witnesses, we do want to
12 make sure that we are respecting everyone's
13 time, it sounds like the pictures to me are
14 more in the way of demonstrative evidence, at
15 this point? They are an example of what -- I
16 haven't seen them.

17 MR. BROWN: They are.

18 CHAIRMAN LOUD: But are they an
19 example of what a restaurant interior setting
20 probably would have looked like for him in
21 August? In that sense, it's demonstrative.

22 MR. BROWN: I mean, I'll be honest

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1 with you.

2 CHAIRMAN LOUD: Okay.

3 MR. BROWN: And in his testimony,
4 he makes it clear that he has put some paint
5 on the walls, some different paint on the
6 walls. He has bought new tables and chairs.
7 But certainly he can testify that,
8 essentially, you know, the tables were there.
9 The people were eating at the tables. The
10 people were eating and the --

11 CHAIRMAN LOUD: Okay.

12 MR. BROWN: -- menus, the plates,
13 the real silverware, which, by the way, were
14 confiscated by security coming into the
15 building this morning, this afternoon.

16 CHAIRMAN LOUD: Oh.

17 MR. BROWN: But he can certainly--

18 CHAIRMAN LOUD: The reason I
19 mentioned it is as demonstrative evidence, I
20 mean, typically demonstrative evidence is most
21 helpful to help you visualize something that
22 is hard to visualize.

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1 In this case, I think, because all
2 of us probably can visualize what the inside
3 of a restaurant looks like when it is dine-in
4 and all of that, that it may be helpful to not
5 show every single picture, if that is all that
6 we are talking about is just demonstrative
7 evidence about a restaurant.

8 MR. BROWN: Oh, and they are on a
9 montage, so you can look at a board with
10 several pictures on it.

11 CHAIRMAN LOUD: Okay.

12 MR. BROWN: One of the important
13 things and this is true, whether it is today
14 or August of 2009 being made, is that -- and I
15 think this restaurant has been unfairly
16 portrayed as exclusively the playground of
17 Georgetown University students.

18 And one of the points of these
19 pictures, the same would be true whether it
20 was August of '09 or now is that he has a
21 diverse clientele and that they are eating and
22 using the restaurant as most of us think of a

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1 restaurant, as opposed to trying to
2 conceptualize college students.

3 It looks and feels and acts like a
4 restaurant and I think that's an important
5 distinction.

6 Why don't we show the pictures? I
7 don't think they are going to be alarming to
8 anybody but the intervenors, but -- and let
9 Mr. Kocak -- it's a very brief statement,
10 three pages, large print. And I think it will
11 give an opportunity for you to ask him
12 questions.

13 MR. SULLIVAN: Excuse me, if I
14 could just clarify? These are -- so these are
15 pictures from the time period after August of
16 2009? Is that correct? And they are being
17 accepted?

18 CHAIRMAN LOUD: Yes. It's my
19 understanding that this is demonstrative
20 evidence. It's to help illustrate what
21 typically may have been going on during the
22 period of the investigation. It's not actual

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1 evidence that this was going on. And that's
2 the purpose for which it is being proffered by
3 Mr. Brown.

4 MR. SULLIVAN: Okay. I just want
5 to reserve the right for the intervenors to
6 submit photos around the same time period that
7 would tend to contradict this information or
8 show another side of it.

9 CHAIRMAN LOUD: Okay. When we get
10 to that --

11 MR. SULLIVAN: It reserves the
12 right to --

13 CHAIRMAN LOUD: -- point in the
14 case, then --

15 MR. SULLIVAN: -- request.

16 CHAIRMAN LOUD: Okay. All right.
17 We will cross that bridge a little bit later
18 when we get to it.

19 Board Members, any -- all right.
20 So why don't we go into the statement and the
21 pictures?

22 MR. BROWN: Oh, sorry?

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1 CHAIRMAN LOUD: Yes, I think we are
2 ready for your client to give his statement.

3 MR. BROWN: Yes.

4 MR. KOCAC: Good afternoon,
5 Chairman Loud and Members of the Board. My
6 name is Mehmet Kocak. I am the owner of the
7 Philly Pizza & Grill. Thank you for allowing
8 me to speak to you today about my restaurant.

9 I have worked in local restaurants
10 more than 10 years, but I am very proud of
11 that this is the first restaurant that I have
12 owned.

13 I have invested my life savings and
14 borrow a lot of money to open this restaurant.

15 Based on approved plans and permits
16 issued by DCRA, I make extensive and expensive
17 renovation to the basement, first floor and
18 second floor of this 1825 building to convert
19 into a restaurant. This approved renovation
20 cost at least \$220,000.

21 My restaurant opened in September
22 2008 and employs seven or eight people, who

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1 depend on their job.

2 I have put a lot of time and energy
3 and care into my -- making my restaurant a
4 place where people of all ages and
5 nationalities would like to eat on premises.

6 Having only been open for 16
7 months, I am still learning and improving.
8 Despite it's name Philly Pizza, my restaurant
9 offers full menu of which we cook fresh daily
10 on the premises, including fresh dough to make
11 the pizzas.

12 I have people come from all over
13 the area experience to real Turkish meal,
14 including my Turkish Gyro, which is unique in
15 Georgetown.

16 My restaurant is also known for its
17 homemade ranch dressing.

18 I had always intended for people to
19 dine in my restaurant and I have continued to
20 make improvement in order to encourage people
21 to do so. I enjoy meeting my customers and
22 getting to know them.

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1 People dining in the restaurant all
2 hours of the day and night. We have very
3 diverse group of customers, including
4 families, student and people who work at
5 nearby Georgetown businesses.

6 They compliment me on how fresh my
7 food is and how clean my restaurant is. These
8 things are very important to me.

9 I recently hired an interior
10 designer to help me to make the restaurant as
11 inviting as possible in order to further
12 increase my dining customers. I have
13 purchased new tables, paint the walls and
14 installed the new fixtures as you can see in
15 these pictures.

16 I have even hired my own security
17 guard to stand outside and make sure that
18 people do not loiter and litter during the
19 late night/weekend hours. I have also set up
20 some trash cans outside on the street. Also,
21 I take upon myself to clean up trash on the
22 street after we close.

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1 I clean up all kinds of trash, even
2 the trash that has nothing to do with my
3 restaurant. Nobody require me to do -- hire
4 security or to take measures to cut down trash
5 outside. I do these things because it is
6 responsible things to do.

7 Also, the better area around my
8 restaurant looks, the more inviting it becomes
9 for my customers.

10 I have seen pictures that very
11 recently submitted into the court which do not
12 accurately and fairly show exterior of my
13 restaurant for several reasons.

14 September 2006 -- 2009 was the
15 Saturday night Georgetown Homecoming weekend.

16 Every eating establishment in the area had
17 many more customers that weekend. Every
18 eating establishment in the area had many more
19 customers that weekend.

20 Second, that even in one of the --
21 our oven was broken, which made it very
22 difficult to serve extra customers. I

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1 remember this very well, since I receive a
2 call on my honeymoon in Turkey telling me
3 about this.

4 The other set of pictures was taken
5 on December 19, 2009, the day after class
6 ended Georgetown, which not surprisingly as an
7 unusual busy time.

8 I am constantly trying to improve
9 my restaurant. I do this because I care about
10 my business, my reputation, my neighborhood.
11 The first year of any restaurant is always
12 difficult challenging period, but the success
13 of my restaurant is increasing along with the
14 number of eat-in customers.

15 I am proof of what we have been
16 able to accomplish and try to be a good
17 neighbor. I am surprised and I cannot
18 understand how by following my building
19 permits and Certificate of Occupancy I may
20 forced to shut down my restaurant.

21 Before receiving the Notice to
22 Revoke, no one from DCRA told me there was a

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1 problem or how should correct that problem.
2 They never ask me more information or allow me
3 to respond. I was surprised and scared and
4 had no choice to hire a lawyer to save my
5 restaurant.

6 I have support from many area
7 businesses who have signed letters on my
8 behalf, I bring it. I'm presenting copies of
9 those letters to the Board today.

10 I respectfully ask that you find
11 that since I am operating a restaurant, not a
12 fast food place/establishment. DCRA's Notice
13 to Revoke my Certificate of Occupancy were
14 issued in error.

15 Thank you very much for your time
16 and understanding. Appreciate it.

17 MR. BROWN: Okay. Mr. Kocak, can
18 you go over and, one, turn on your microphone?

19 MR. KOCAC: Yes.

20 MR. BROWN: Okay. And let's try to
21 do this in an organized fashion. The picture
22 there, the front of your restaurant.

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1 MR. KOCAK: Yes.

2 MR. BROWN: It looked that way in
3 August of 2009?

4 MR. KOCAK: It was the same, but I
5 had the sign because we opened the new -- the
6 pizza sign was there, but I take off, because
7 awning is not permitted. I just learned later
8 on it's not -- you can't put it, that's why I
9 take it off. This the same way outside.

10 MR. BROWN: The pictures you have
11 there showing families, the picture in the
12 middle there, that family.

13 MR. KOCAK: Yes.

14 MR. BROWN: Are they a good example
15 of people who come to your restaurant from
16 outside the area?

17 MR. KOCAK: Yes. Those pictures
18 come from the Virginia Herndon and Fairfax,
19 because we had -- as you see, the gyro that we
20 have, the Gyro Turkish meal is we have unique
21 in Georgetown, the area also. The special
22 need comes from the Pennsylvania.

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1 And those -- it's every two weeks
2 they come in with the kids. They coming to
3 eat.

4 MR. BROWN: So putting aside the
5 fact that you have painted and bought new
6 tables and chairs, is this a reasonable
7 depiction of how the restaurant looked in
8 August of 2009?

9 MR. KOCAK: Yes, it's also
10 increasing my customers and it was really the
11 same.

12 MR. BROWN: Okay. In August of
13 2009, you obviously had people who were eating
14 at tables on these types of plates?

15 MR. KOCAK: Yes, yes.

16 MR. BROWN: And the silverware that
17 you gave me, the security guard took away,
18 they were using silverware --

19 MR. KOCAK: Yes.

20 MR. BROWN: -- in August 2009?

21 MR. KOCAK: Yes.

22 MR. BROWN: So that as shown in

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1 these pictures and your description, your
2 operations haven't changed between August
3 2009?

4 MR. KOCAK: No. It's nothing
5 changed, just we have a diverse group lunch,
6 diners, late night, but it's the same way we
7 acting. There's no change. Nothing has
8 changed. It's same way we do, just I'm trying
9 to be careful, more careful when I got the
10 pressure on me, that's the only things. I
11 didn't change any food, any prep, anything.
12 Same way we did before and after.

13 MR. BROWN: And we will show the
14 plans later, but you got your building permit
15 in 2009?

16 MR. KOCAK: Yes.

17 MR. BROWN: And that provided for
18 the renovations to the basement, the first
19 floor and the second floor?

20 MR. KOCAK: That's right.

21 MR. BROWN: And then you made those
22 renovations in accordance with the plans?

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1 MR. KOCAK: Yes.

2 MR. BROWN: And all three floors
3 were for the restaurant?

4 MR. KOCAK: Yes.

5 MR. BROWN: And tell me what is in
6 the basement?

7 MR. KOCAK: The basement is a prep
8 section. All the meat we getting from
9 restaurant depot and other places, the
10 Pennsylvania, we prepare ourself and then the
11 dough, which is the very important, the daily
12 fresh dough we making in the basement. We
13 have machines, mixers.

14 MR. BROWN: And then in the
15 basement, that's where you wash?

16 MR. KOCAK: Yes, we have a three
17 compartment sink.

18 MR. BROWN: And on the first floor,
19 you have had how many tables and chairs, going
20 back to --

21 MR. KOCAK: The first floor has
22 seven and second floor has six. And total is

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1 13 seats we have.

2 MR. BROWN: And people who dine in,
3 they order and their food is delivered to the
4 table?

5 MR. KOCAK: That's right.

6 MR. BROWN: And they pay after they
7 have eaten?

8 MR. KOCAK: Yes. Who comes a
9 family, they just -- we just showing as we
10 have the -- she standing the counter tops and
11 she just -- we have the counters and then say
12 would you like -- you want to dine in? Would
13 you like to eat here or you want it to go?

14 And if they say yes, then we taking
15 the menus, please, you can sit. We will bring
16 it to you.

17 MR. BROWN: When you found out that
18 -- about the Notices to Revoke, that was the -
19 - prior to that, you did not track your type
20 of transactions. Is that correct?

21 MR. KOCAK: Yes. I mean, I didn't
22 know the 25 percent and the -- or 75 percent.

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1 I always -- my goal was to open that kind of
2 stuff to lunch and dinner. And I didn't know
3 anything about it, you know, the tracking. I
4 had numbers, the total numbers, but I didn't
5 have the separate tracking.

6 MR. BROWN: And once you did know
7 that that was important --

8 MR. KOCAK: Yes.

9 MR. BROWN: -- you modified your
10 computer system?

11 MR. KOCAK: Yes.

12 MR. BROWN: And you are now able--
13 and the numbers that we have submitted are
14 based on your contemporaneous record keeping?

15 MR. KOCAK: Yes.

16 MR. BROWN: And how does that work?

17 MR. KOCAK: We had three kinds of -
18 - when we take orders, it's come up three
19 option: Carry-out, delivery or dine-in. And
20 then if it's dine-in, we push the dining and,
21 you know, we keeping how many tables we use,
22 we ask like four people, five people? We just

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1 put in that and then the table was open when
2 the customer leaving and then we just take in
3 the numbers and put in again as existing
4 numbers. And then we just closing the ticket.

5 MR. BROWN: And while you weren't
6 keeping track specifically in August of 2009,
7 but you are now, are the numbers similar,
8 putting aside, you know, seasonal differences?

9 I mean --

10 MR. KOCAK: Actually, it's not
11 similar. It's getting -- the dining is
12 getting much better. There is more increase
13 in the numbers. I mean, before because only
14 16 months, that's why many people know we have
15 a unique food and people know and the
16 neighbors, nearby Georgetown businesses, all
17 the recommendation and then my lunch and
18 getting better and better.

19 MR. BROWN: Would you like to ask
20 him some questions?

21 CHAIRMAN LOUD: I'll see if Board
22 Members have any questions for him and then I

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1 think we can turn to -- you are through with
2 the witness? We can turn to the parties to
3 see if they have any questions. Okay.

4 I think the Board Members don't
5 have any questions right now. I just have one
6 question for you and you can take your seat
7 for the question.

8 And it concerns how customers pay
9 for their food/merchandise.

10 MR. KOCAK: The customers when they
11 entrance the -- when they come in and then we
12 -- we can feel that they want to sit or they
13 want to, you know, carry-out. If it's -- they
14 asking hey, I want to get -- you have menu.
15 If only they asking, because normally right
16 now, only way we can serve this. They can
17 look at it.

18 Even he wants to take it out, he is
19 just standing and look at it or if he knows
20 what he wants, he just directly asking me.
21 And we asking also the lady would you like to
22 sit? Do you want to, you know, eat here or to

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1 go. And then if they say yes, and then we
2 show them the table and then we serving the
3 silver and after that waiting like -- the
4 customer waiting for the food.

5 CHAIRMAN LOUD: Okay. Let me just
6 make sure I understand, because you said a
7 lot.

8 MR. KOCAK: Yes.

9 CHAIRMAN LOUD: So if a customer
10 comes in, is there a waiter or waitress?

11 MR. KOCAK: Yes, we do.

12 CHAIRMAN LOUD: You do have
13 waiters, okay. And so they want to eat there,
14 they will sit down?

15 MR. KOCAK: Yes.

16 CHAIRMAN LOUD: They will order the
17 meal.

18 MR. KOCAK: Yes.

19 CHAIRMAN LOUD: Okay. And then
20 they will consume the meal. And do they pay--

21 MR. KOCAK: No.

22 CHAIRMAN LOUD: -- afterwards or do

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1 they pay beforehand?

2 MR. KOCAK: No, after the paying.
3 When they finish, when they leaving.

4 CHAIRMAN LOUD: Okay.

5 MR. KOCAK: And then we have the,
6 what do we call it, we putting the ticket and
7 then we dropped it. When they leaving, they
8 pick it up and if they pay in cash, if it's
9 not, we can see the credit card. You know, we
10 taking and charging them and bring it back to
11 them. They sign it. After that, they
12 leaving.

13 CHAIRMAN LOUD: Very good. So a
14 waiter or waitress does --

15 MR. KOCAK: Yes.

16 CHAIRMAN LOUD: -- all of that?

17 MR. KOCAK: Yes.

18 CHAIRMAN LOUD: Are there occasions
19 where customers come in, perhaps they stand in
20 a queue of some sort and you're not able to
21 distinguish between whether they are carry-out
22 or dine-in, and they order from a cash

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1 register, pay and then sit down and get their
2 meal?

3 MR. KOCAK: For the take-out
4 customers?

5 CHAIRMAN LOUD: No, these would be
6 customers that would be coming in.

7 MR. KOCAK: Yes.

8 CHAIRMAN LOUD: Join a queue that
9 they already see in progress and just sort of
10 instinctively getting in line, coming up to
11 the front of the line, ordering their food,
12 paying for it and then --

13 MR. KOCAK: If they --

14 CHAIRMAN LOUD: -- taking a seat
15 and waiting for the food.

16 MR. KOCAK: Yes. If they --

17 CHAIRMAN LOUD: Only if they carry-
18 out?

19 MR. KOCAK: Yes, only carry-out.

20 CHAIRMAN LOUD: Okay.

21 MR. KOCAK: We taking money and we
22 giving ticket, because we don't want to, you

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1 know, misunderstand the food. Whatever he
2 got, he got the ticket if it's carry-out.

3 CHAIRMAN LOUD: Okay.

4 MR. KOCAK: I mean, he take the
5 ticket.

6 CHAIRMAN LOUD: And so once it is
7 known to you that a customer wants to eat-in--

8 MR. KOCAK: Yes.

9 CHAIRMAN LOUD: -- if I understand
10 your testimony --

11 MR. KOCAK: Definitely.

12 CHAIRMAN LOUD: -- you don't accept
13 the money. You show them to a seat?

14 MR. KOCAK: Yes, definitely.

15 CHAIRMAN LOUD: And following their
16 meal, okay. And then secondly, your attorney
17 lifted up, I think, some red tableware. And
18 this is the type of tableware that customers
19 that eat-in are served on?

20 MR. KOCAK: Yes, yes. This
21 appetizer, the small appetizers, other one for
22 the subs and pastas, calzones.

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1 CHAIRMAN LOUD: Okay.

2 MR. KOCAK: The gyros.

3 CHAIRMAN LOUD: And was that the
4 case during the period of the investigation by
5 DCRA?

6 MR. KOCAK: Yes. I had it. I have
7 them. I was serving this.

8 CHAIRMAN LOUD: So it's your
9 testimony under oath --

10 MR. KOCAK: Yes.

11 CHAIRMAN LOUD: -- that this is the
12 only type of tableware that you use for dine-
13 in customers?

14 MR. KOCAK: Yes, only, yes.

15 CHAIRMAN LOUD: Have you ever used
16 non-disposable tableware for your dine-in
17 customers?

18 MR. KOCAK: Only the late nights.
19 I didn't know anything about it for that time
20 I did it, but the 99 percent we were using the
21 -- this tables.

22 CHAIRMAN LOUD: Okay.

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1 MR. KOCAK: And 12 inch boxes
2 instead of the 10 inches.

3 CHAIRMAN LOUD: Okay.

4 MR. KOCAK: The box for the carry-
5 out, not the dine-in.

6 CHAIRMAN LOUD: That's just for the
7 carry-out.

8 MR. KOCAK: Yes.

9 CHAIRMAN LOUD: All right. And do
10 we have a sample of that?

11 MR. BROWN: Pictures of these are
12 in my presentation.

13 CHAIRMAN LOUD: Yes, pictures of
14 those. We don't actually have a plate?

15 MR. BROWN: I can submit it into
16 the record. I took photographs of them. I'm
17 not so sure Beverley would forgive me if I
18 tried to put it --

19 CHAIRMAN LOUD: I guess as long as
20 it is a good -- I mean, since that's one of
21 the prongs of the test, as long as it's a good
22 photograph, I think we can probably use it.

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1 If I were to see a photograph of that --

2 MR. BROWN: It must be a good
3 photograph.

4 CHAIRMAN LOUD: Okay.

5 MR. BROWN: We are happy to do
6 that. And also, this picture of the
7 silverware. A picture of a fork, knife and
8 spoon wrapped in a napkin, that's how you
9 would see it in the photos.

10 CHAIRMAN LOUD: Okay.

11 MR. KOCAK: And then also, I'm
12 ordering the special order from the oversea.
13 The -- for this special for the back for the
14 dining customers, but it didn't come yet. I'm
15 still waiting more than three months. I
16 already ordered the special. It's very nice,
17 it's very good, but by now --

18 CHAIRMAN LOUD: Okay. Thank you.
19 I don't have any further questions.

20 COMMISSIONER TURNBULL: Mr. Chair,
21 I've just got one. Mr. Kocak, you say your
22 dine-in numbers are getting better. And I

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1 guess the only numbers we have to rely on are
2 in the prehearing statement. And I guess we
3 are looking at an aggregate of about 45
4 percent of your total customers are dine-in.

5 And I'm wondering back in August
6 then, were they less than 45? I mean, I'm
7 guessing you have got less than half of your
8 people.

9 MR. KOCAK: I wasn't -- because the
10 system has not allowed me to do this, I was
11 just making the tickets, that's the only
12 thing. But my customers, they -- when I was
13 trying to open the restaurant, they already
14 knew I'm opening the place. And then the
15 first day we had a unique food. And the first
16 day we had some -- the burritos, some wraps
17 and those are the people who knew it. I
18 really advertised to them. Hey, please, come,
19 enjoy.

20 And then it was -- I had a diner.
21 I have a dining customers before, but when I
22 got the revoked Certificate of Occupancy, I

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1 really talked to Mr. Brown and then we -- I
2 called the company, the computer company and
3 went over the system. And then we -- I asked
4 them, hey, I have a -- I need this one. And
5 then they try like one or two days actually.
6 And they really work hard and they make the
7 different numbers.

8 Like 500, they said hey, this is
9 the tables. And 800, this is the carry-out.
10 And then we made it after that.

11 COMMISSIONER TURNBULL: So you --

12 MR. KOCAK: I had the customers.

13 COMMISSIONER TURNBULL: I guess
14 again, I mean, the numbers are less than 50
15 percent for dine-in. But at any time, nobody
16 from DCRA came and stopped by and said you
17 have a problem. We think you need to --

18 MR. KOCAK: No, sir.

19 COMMISSIONER TURNBULL: -- remedy?

20 MR. KOCAK: No, sir. Nobody,
21 nobody remind me I'm doing wrong. Nobody tell
22 me anything about this. I didn't feel, I

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1 didn't see. If I see directly I'm going to
2 concern, because so much things we put there.

3 I don't want to lose it. I don't want to
4 burn my bridges. And I try the best I can,
5 which is I did it.

6 COMMISSIONER TURNBULL: All right.

7 Thank you.

8 CROSS EXAMINATION

9 MRS. BOLLING: Good afternoon, Mr.
10 Kocak. So at no time in August, except for, I
11 think you said, really, really late at night
12 did customers ever use disposable tableware?
13 Is that your testimony? We believe in August
14 people used throw-away plates and forks at
15 your restaurant.

16 I believe your testimony was that
17 didn't happen, except really, really late at
18 night and you didn't know. Is that true?

19 MR. KOCAK: No. I know you have to
20 use this tableware. But the certain time it
21 was the homecoming weekend. It was extremely
22 busy. That's why I used the paper plates.

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1 Extremely busy in Georgetown, that's why I
2 used the paper plates. Other than -- I never
3 used those -- the paper plates, because even
4 it looks cheap restaurant to me when I can.

5 MRS. BOLLING: So other than
6 Georgetown's Homecoming weekend, which was in
7 September --

8 MR. KOCAK: Yes.

9 MRS. BOLLING: -- after our
10 investigation, that's the only time that
11 customers that dined in --

12 MR. KOCAK: Yes.

13 MRS. BOLLING: -- used disposable
14 plates? That's your testimony?

15 MR. KOCAK: Yes.

16 MRS. BOLLING: Okay. Do you recall
17 ever meeting any DCRA staff at your restaurant
18 and having a conversation with them?

19 MR. KOCAK: About the dine -- the
20 restaurant or fast food or different issues?

21 MRS. BOLLING: An investigator from
22 DCRA. You can tell us all of the meetings you

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1 have had with DCRA.

2 MR. KOCAK: I think I got for the
3 mechanical inspectors came. They look at,
4 because I -- one -- it was very close. I
5 tried to get more information. I said who
6 called you? I said hey, I got the complaining
7 your roofing and then they want to look at it.

8 And then the next day, the -- nine
9 times the Health Department came, nine times,
10 we counted. Bill Starrels send it, the ANC
11 Commissioner. And what happened said hey,
12 man, we know you. We know the restaurant, but
13 we got complaining, that's why we came. We
14 want to look at it.

15 And then they look at it from
16 basement to top floor. They look at
17 everything. They couldn't found it. They
18 said okay, I had to do this and then they sign
19 it and they left.

20 After that I sign up the company,
21 the -- I'm sorry, the pest controllers. And
22 I'm paying top money. I don't want to involve

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1 any stuff for the rats and stuff. And I sign
2 up for them. And I make sure right now it's
3 every week they come and they look at it and
4 they checking late at night, like after 3:00,
5 between 3:00 to 5:00 they come in and they
6 inspect the building.

7 MRS. BOLLING: So, Mr. Kocak, other
8 than DOH, which you say came out nine times,
9 and a mechanical DCRA person, you have never
10 had any other conversation yourself with DCRA
11 staff at your site?

12 MR. KOCAC: No, ma'am.

13 MRS. BOLLING: Could you stand up?
14 Is it your testimony you have never had a
15 conversation with this investigator at your
16 restaurant?

17 MR. KOCAC: He -- I think he come -
18 - he dropped the papers, the revoke of -- the
19 paper he dropped it to me.

20 MR. BROWN: The Notice to Revoke?

21 MR. KOCAC: Yes. He said you had -
22 - I told him I remember exactly he said -- I

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1 said what I'm going to do? What should I do?

2 He said only call your lawyer. That's the
3 things only he told me. Call your lawyer and
4 then he was really straight. Call your
5 lawyer. I was shock. How come? He said call
6 your lawyer, that's it.

7 MRS. BOLLING: I believe I heard
8 your testimony that you have some use of the
9 basement in your building. Is that correct?

10 MR. KOCAK: Basement?

11 MRS. BOLLING: The bottom floor?

12 MR. KOCAK: Yes.

13 MRS. BOLLING: And how do you use
14 the basement?

15 MR. KOCAK: We prepare chicken,
16 meat and the dough, the unique deli dough for
17 the -- because we have a homemade bread. We
18 are not getting the sub bread, the gyro bread/
19 wrap. We make every day 9:00 to 11:00, we
20 making our own bread. And the wings and the
21 chicken, all the meats we prepare ourself.

22 MRS. BOLLING: I want you and your

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1 counsel to turn to Exhibit D, as in dog, from
2 your prehearing, I think what's what you
3 called it, statement.

4 MR. BROWN: Are you referring to
5 the September 21, 2009 Certificate of
6 Occupancy?

7 MRS. BOLLING: I am, counsel.

8 MR. BROWN: All right. Okay.

9 MRS. BOLLING: Okay. And, Mr.
10 Kocak, on the Certificate of Occupancy that
11 we're looking at and the description of
12 occupancy, do you see where it says "second
13 floor, 13 seat restaurant, seven seats on
14 first floor and six seats on second floor?"

15 MR. KOCAK: Yes, ma'am.

16 MRS. BOLLING: And you see there is
17 no mention of use of a basement, correct?

18 MR. KOCAK: Yes, ma'am.

19 MRS. BOLLING: Okay.

20 MR. KOCAK: Um, I want to add.
21 When I got the Certificate of Occupancy, as a
22 small -- this is my first restaurant I have.

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1 I don't have -- I been involved with different
2 restaurants and I had no idea. I just know
3 you have to have a Certificate of Occupancy to
4 run the restaurant. This the only thing I
5 know.

6 When I apply, they give it to me,
7 Certificate of Occupancy. I didn't check. I
8 didn't know and I had no idea this is the
9 first floor or second floor, because they
10 inspected. Inspector came, they inspected
11 basement, first floor and second floor. They
12 inspected.

13 It's not like something I hided
14 from them and they didn't inspect it after I
15 tried to use it to take advantage. The whole
16 building was there. All the basement was
17 there. All the second floor. They inspect
18 it. They write it and then also one of the
19 electric permits, they denied, because I have
20 to do some other things and then recall the
21 electric guy. He change it. And then second
22 time I -- they approve my electric permits.

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1 MR. BROWN: And Mr. Kocak is at an
2 unfair disadvantage. It's important in the C
3 of O application here that was submitted that
4 we will submit to the record, which, quite
5 frankly, he did not, I don't believe,
6 processed.

7 But the application calls for
8 floors to be occupied: Basement, first and
9 second floor. So clearly, we have got plenty
10 of these and we will submit them in the
11 record, he applied for the C of O for
12 basement, first and second floor. And it
13 appears that the inspections were done on that
14 basis and the C of O was issued.

15 We will submit that. But it's a
16 little unfair to Mr. Kocak the question, so I
17 wanted to come to his assistance. So we are--

18 VICE CHAIRMAN DETTMAN: Mr. Brown,
19 could you just clarify how it is unfair again?

20 MR. BROWN: She was asking him a
21 question about a piece of paper for which he
22 couldn't answer the question accurately

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1 without referring to another piece of paper.
2 So and I don't think Mr. Kocak holds himself
3 out as an expert in obtaining Certificates of
4 Occupancy.

5 So I think he has the right to
6 respond fully, you know, and the documentation
7 is important. I mean, the Board wants --

8 VICE CHAIRMAN DETTMAN: I was just
9 wondering if you were insinuating that it was
10 unfair because your client filled out the
11 application and indicated that he desired to
12 use the basement, first and second floor, but
13 the C of O only said first and second floor?

14 MR. BROWN: Well, that's a
15 different question. He applied for the three
16 levels. It was inspected on the three levels.
17 I can't tell you nor can my client tell you
18 why DCRA only issued it for the first and
19 second floor.

20 But certainly, that's what he
21 applied for and that was what was inspected.
22 And Mr. Bello in his testimony can certainly

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1 elaborate on that. My client is not
2 responsible for how DCRA does or doesn't
3 operate properly.

4 VICE CHAIRMAN DETTMAN: What would
5 be the governing document in terms of what was
6 approved?

7 MR. BROWN: I think you need to
8 take the application and the document that was
9 approved, because again they are cross-
10 referenced. They are based on -- in this
11 case, they weren't based on plans, but in the
12 permit setting they are based on plans.

13 So the whole package becomes the
14 picture that was created. It's why DCRA keeps
15 the records and cross-references the C of O.
16 You will see here this being approved with the
17 C of O number on the application. And the
18 whole process where it is approved.

19 There is a reason why DCRA keeps a
20 record of this and again, because this paints
21 the entire picture.

22 VICE CHAIRMAN DETTMAN: In terms of

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1 the Board getting a sense of the entire
2 picture, how would you suggest the Board
3 analyze the C of O, the application for the C
4 of O and the food establishment questionnaire
5 that was provided by you in Exhibit N, that
6 states "Does the proposed or existing eating
7 establishment include having customers pay for
8 products before they are consumed?" The
9 answer is "yes."

10 "Food served in or on disposable
11 tableware?" The answer is "yes."

12 MR. BROWN: Let me get to -- I need
13 to get to that exhibit. Which one is that?

14 VICE CHAIRMAN DETTMAN: Exhibit N.
15 In cases where the answer to Question 5 is
16 no, "Is there going to be an automatic
17 dishwasher for cleaning customer's tableware?"
18 The answer is "yes." But in your filings and
19 in testimony, there is no dishwasher.

20 MR. BROWN: And --

21 VICE CHAIRMAN DETTMAN: Yes, oh,
22 yes.

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1 MR. BROWN: Let me ask Mr. Kocak.
2 When -- and you completed this?

3 MR. KOCAK: Yes, I completed.

4 MR. BROWN: And in Question No. 2,
5 "Carry-out or to-go food?" And you indicated
6 that there would be 25 percent --

7 MR. KOCAK: Yes.

8 MR. BROWN: -- of that. And then
9 Question 3, "Having customers pay before
10 products are consumed?"

11 MR. KOCAK: Well, this is being
12 honest. The application when I was trying to
13 fill it out, I couldn't do it. And then the
14 lady, she helped me for the DCRA fill it out.

15 MR. BROWN: And that would be Xoan
16 Mac?

17 MR. KOCAK: Yes.

18 MR. BROWN: Who signed the form?

19 MR. KOCAK: I didn't really
20 mention, because I didn't mention exactly what
21 was the application for that. The basic
22 question she asked me and we fill it out

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1 together. But I'm not trying to do something,
2 you know -- (A) I did it, but I wasn't -- I'm
3 not familiar with this paper, the application.

4 I just left. I took the permits, because it
5 was I tried to get the permits, because
6 Certificate of Occupancy it was I tried to
7 open it because of the time frame was getting
8 late.

9 And then I got to open this. I
10 just run to DCRA and then they give me to say
11 you have to fill it out, this, and then we
12 prepare ourself together, the lady helped me
13 out in that. We just done it a couple of
14 minutes.

15 CROSS EXAMINATION

16 MS. MADDOX-LEVINE: Good afternoon,
17 Mr. Kocak. Just a few additional questions,
18 please.

19 MR. BROWN: If I could follow-up
20 before you ask the question? Sorry, if you
21 look at -- and again, this is the same woman
22 who helped him prepare the form. She then

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1 approves the form as a prepared food shop.
2 I'm just pointing that out.

3 Now, I mean, I think that's the one
4 thing we agree that this isn't. But I think -
5 -

6 VICE CHAIRMAN DETTMAN: That was
7 the use that was indicated on the first C of
8 O. Is that correct though? I mean, whether
9 or not that's the right determination is
10 another question. But that is the use that
11 was on the first C of O, correct?

12 MR. BROWN: No, because I think the
13 first C of O that was issued -- hold on. Can
14 we do this so we don't -- the C of O in the
15 original application, I would like to submit
16 them in the record, so that we keep a flow of
17 information.

18 And then we have -- let me go back
19 to the original C of O. Kate, do you have the
20 original C of O? Okay.

21 We have copies of that as well as
22 the application to that. Where it says in

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1 description of occupancy, "Restaurant seven
2 seat prepared food shop." And if you go, we
3 need to pass these out before we go through
4 that, because again, you will see, I believe
5 it is, Xoan Mac's handwriting revising the
6 application form.

7 VICE CHAIRMAN DETTMAN: Thank you.

8 CHAIRMAN LOUD: We're going to
9 continue through the hearing, only because
10 there have been a number of erroneous fire
11 alarms today. And if they announce that this
12 is a real fire alarm, obviously, we will not
13 continue. But I just wanted to let you know,
14 so that you understand why we're not jumping
15 up out of our seats.

16 ANNOUNCEMENT: May I have your
17 attention, please? May I have your attention,
18 please? A fire emergency has been reported in
19 the building. Please, leave the building by
20 the nearest exit. Do not use the elevators.

21 CHAIRMAN LOUD: Ms. Bailey, did Mr.
22 Moy go to check on the status of that fire

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1 alarm? Okay. Ms. Bailey is going to go
2 check. Obviously, if we smell smoke before
3 she comes back, we'll have an answer.

4 MR. BROWN: It's going to mess up
5 the transcript.

6 CHAIRMAN LOUD: But I do think this
7 is probably about the fourth or fifth one
8 today, so I think we will be okay, and we can
9 proceed forward.

10 MR. BROWN: And we have sent up the
11 2008 C of O and the application. And you will
12 see, although, Mr. Kocak signed it in relevant
13 places, including the proposed use of the
14 premises, proposed occupancy load and floors
15 to be occupied, those were filled in by Xoan
16 Mac, who --

17 CHAIRMAN LOUD: I'm told that we
18 will know within the next 60 seconds whether
19 that is a real fire alarm or not, so just be
20 patient a little further.

21 MR. BROWN: Mr. Loud, if we could,
22 on the application --

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1 CHAIRMAN LOUD: Are you in the '09
2 C of O or the '08? Okay.

3 MR. BROWN: Would you like to go
4 back to the -- well, let's start with the '08.

5 CHAIRMAN LOUD: No, wherever you
6 are, I just want to make sure we're on the
7 same page.

8 MR. BROWN: If you go and -- the
9 first section, information on proposed
10 business, Mr. Kocak filled out. In the second
11 section, information on occupancy, Item 10, 13
12 and 12 were filled out by Xoan Mac, who is the
13 zoning reviewer.

14 And then if you turn to the
15 following page, as -- she did this, the review
16 and approval and then signed off it and issued
17 the building permit. And at that point, the
18 form references there was an eating
19 establishment questionnaire attached. We have
20 not been able to find that document. The one
21 we provided in the -- was -- and this is 2008.

22 We provided one from 2009, that is

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1 in the record. So I think --

2 VICE CHAIRMAN DETTMAN: Mr. Brown,
3 your Exhibit No. N or your Exhibit Letter N is
4 dated 2008. And it is pretty consistent
5 with --

6 MR. BROWN: Which? Hold on one
7 second here. My apologies, Mr. Dettman.

8 VICE CHAIRMAN DETTMAN: Not a
9 problem.

10 MR. BROWN: Oh, I'm sorry. Okay.
11 So that is the one. But there was another one
12 done in 2009, I believe, because -- I'll
13 correct, it was done in 2008.

14 Would it be helpful -- we had
15 planned at the time Mr. Bello was going to
16 testify to introduce the 2008 building permit
17 and plans that were approved. Again, showing
18 approved work in the basement, first and
19 second floor.

20 MS. MADDOX-LEVINE: At this point,
21 DCRA has not completed its cross examination.
22 And I think if we could, I would request from

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1 the Board if we could, stay kind of somewhat
2 in the process, it would be a little bit more
3 helpful.

4 CHAIRMAN LOUD: Yes, I think that's
5 a very legitimate point. I was going to raise
6 it myself, so I don't know if you had fully
7 responded to Board Member Dettman's concerns.

8 VICE CHAIRMAN DETTMAN: I think we
9 can flesh it out.

10 CHAIRMAN LOUD: Okay. All right.

11 VICE CHAIRMAN DETTMAN: Maybe a
12 little bit more later on. But I think that in
13 order to stay on track --

14 CHAIRMAN LOUD: Excellent. Okay.
15 So let's do that.

16 MS. MADDOX-LEVINE: Thank you, Mr.
17 Chairman.

18 CROSS EXAMINATION

19 MS. MADDOX-LEVINE: Good afternoon
20 again, Mr. Kocak. You testified partially
21 from a prepared written statement that is
22 entitled "Statement of Mehmet Kocak,

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1 Appellant." Is that correct? You read this
2 statement?

3 MR. KOCAK: Yes.

4 MS. MADDOX-LEVINE: On the record?

5 MR. KOCAK: Yes.

6 MS. MADDOX-LEVINE: Is this the
7 statement you prepared?

8 MR. KOCAK: Yes.

9 MS. MADDOX-LEVINE: You typed this
10 yourself?

11 MR. BROWN: I don't understand if
12 that's relevant.

13 MS. MADDOX-LEVINE: You prepared
14 this statement yourself without assistance.
15 Is that correct?

16 MR. BROWN: I object to the
17 question.

18 CHAIRMAN LOUD: What's the
19 objection?

20 MR. BROWN: Is it leading to any
21 relevant information?

22 CHAIRMAN LOUD: She just wants to

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1 know if he prepared the statement himself.
2 You want to know if it's his statement? Is
3 that the point?

4 MS. MADDOX-LEVINE: Yes. Usually
5 as counsel is well-aware, when you have
6 testimony given by a party, then it is either
7 based on their actual knowledge or something
8 that they have firsthand knowledge of. And
9 I'm asking him if the statements that are
10 represented in this statement are his
11 statements or were they prepared by someone
12 else? That's a simple direct question.

13 CHAIRMAN LOUD: It's not
14 prejudicial or harmful, I mean.

15 MR. KOCAK: I'm a Bachelor degree.
16 I finish University of Russia back in '99.
17 And I know exactly my instinct I'm trying to
18 put outside. It's sometime if you are not
19 born, this country is really hard. I made it
20 all things. I told him every single thing.
21 Hey, I want to do this. I want to do this.
22 And then he said I understand. I understand.

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1 And then we made it. But every
2 single word, I couldn't say the premises, but
3 he put the right things there. But I -- the
4 90 percent, 95 percent, everything I try
5 explain to him day-by-day and finally, you
6 know, I made this. Okay. But I'm a Bachelor
7 degree and I made it my own statement.

8 MS. MADDOX-LEVINE: Okay. And you
9 have made reference to he and him. To whom
10 are you referring? You said someone -- you
11 explained your statement to someone. Who did
12 you explain that to that prepared that
13 statement?

14 MR. BROWN: Again, let me make it
15 easy. I'm his lawyer. And he and I consulted
16 and I assisted him in drafting the document.
17 It's on our computer, because he is not in the
18 business of word processing.

19 But this is borderline offensive to
20 my client, because it somehow is questioning -
21 - I think, he needed some assistance to
22 communicate effectively using English. And I

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1 provided that assistance. But it's his
2 statement. He made it. And I don't -- we're
3 going down a path that isn't going to lead
4 anywhere.

5 If there is some inaccuracy she
6 wants to ask him about, then by all means she
7 should.

8 MS. MADDUX-LEVINE: Counsel, I
9 think you have answered my question. If I
10 could go to the next question in the interest
11 of time?

12 Mr. Kocak, you testified about
13 events that occurred September 26, 2009, which
14 is a Saturday night of Georgetown University's
15 Homecoming weekend. But that is not the time
16 frame that we are here discussing today, when
17 DCRA came to inspect your property. Is that
18 correct?

19 MR. BROWN: I object. He was
20 responding to evidence that was submitted by
21 the intervenors. He is certainly allowed to
22 say that.

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1 CHAIRMAN LOUD: I'm sorry, I was
2 actually entering something on my computer up
3 here and did not hear the question. I just
4 heard the objection, so I wanted to have the
5 opportunity to --

6 MS. MADDOX-LEVINE: I was asking
7 the person who allegedly testified if, in
8 fact, the statement he made regarding
9 September 26, 2009 about the Georgetown
10 Homecoming weekend, was that the time frame
11 that is relevant to when the Notice to Revoke
12 was issued? And I think it required a yes or
13 no answer.

14 CHAIRMAN LOUD: Okay. Again, I
15 don't see any -- that's not prejudicial. It's
16 not harmful. I talked about that at the
17 outset of the case. It's a yes or no answer.
18 The weight to be given to it, somehow I think
19 everybody can sort out or be rehabbed on.

20 I also encourage counsel for both
21 parties to show the degree of respect that we
22 would want to have shown to us, probably

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1 unnecessarily into attorney/client privilege
2 and attorney or product privilege that doesn't
3 necessarily bear anything of relevance to the
4 case. I think it's not something that any of
5 us would want to have done to us.

6 So if we could just sort of cool
7 passions out just a little bit and just stay
8 focused on moving everybody forward in the
9 hearing, I think it will be very helpful.

10 MS. MADDOX-LEVINE: Thank you,
11 Chairman.

12 And in your statement you also
13 indicated that you were surprised about the
14 issue being raised about your Certificate of
15 Occupancy. Is that right? On page 3, you
16 indicated that you were surprised. Is that
17 correct?

18 MR. KOCAK: Yes. I surprised
19 because when DCRA didn't tell me anything,
20 they didn't remind me anything. And then they
21 didn't any notes. They just come, just give
22 me letter by hand. Hey, I'm going to close

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1 you down.

2 MS. MADDOX-LEVINE: Okay. And you
3 hold a basic business license in the District.
4 Is that correct?

5 MR. KOCAK: Yes.

6 MS. MADDOX-LEVINE: And you also
7 hold at least, that we are aware of or you
8 have held, two Certificate of Occupancies in
9 the District. Is that correct?

10 MR. BROWN: I don't think he
11 understands. And one of the problems I'm
12 having is I need to be very careful, because
13 I'm not so sure at all times whether it is the
14 wording of the questions or whether my client
15 totally understand what is being asked of him.

16 And so we need to be careful. I
17 think the question being asked, have you had
18 two Certificates of Occupancy in D.C.? Is
19 that -- because he doesn't -- he is looking at
20 me, so he doesn't understand the question.

21 MS. MADDOX-LEVINE: I can repeat
22 the question. My first question was, do you

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1 hold a basic business license in the District
2 of Columbia?

3 MR. BROWN: And I don't think he
4 understands the question.

5 MS. MADDOX-LEVINE: All right.

6 MR. KOCAK: I had it. I had one
7 business license, just one.

8 MS. MADDOX-LEVINE: Okay.

9 MR. KOCAK: Yes.

10 MS. MADDOX-LEVINE: Thank you.

11 MR. BROWN: I think --

12 CHAIRMAN LOUD: If the witness
13 doesn't understand the question, he can say he
14 doesn't understand the question. I think when
15 the witness looks at the --

16 MS. MADDOX-LEVINE: Well, he --

17 CHAIRMAN LOUD: Excuse me for just
18 one second. When the witness looks at his
19 counsel after every question, it can create
20 the impression that he is looking to counsel
21 for an answer. I don't think that's the case.

22 But I think the attorney for DCRA can simply

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1 ask the witness if he understands the
2 question.

3 If he doesn't understand the
4 question, she can try to restate it without
5 the intervention of counsel. And if he can't
6 answer the question, if he just doesn't know,
7 then that would be the testimony that goes
8 into the record, he just doesn't know.

9 I think that if you feel we are
10 reaching a point where an interpreter would be
11 helpful, then we can talk about that. I can--

12 MR. BROWN: But the other question
13 is -- we need to be careful about the
14 relevancy of some of these questions. To ask
15 Mr. Kocak if he has two Certificates of
16 Occupancy, they are in the record. And I
17 don't see why that is -- or the basic business
18 license, where that is leading us, given our
19 narrow focus.

20 Certainly neither one of those, the
21 basic business license, not the grounds of
22 this case.

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1 CHAIRMAN LOUD: But I think again
2 if we stop counsel after every single raindrop
3 and make her demonstrate the relevance of each
4 single question to a larger question, we're
5 going to be here all night.

6 MR. BROWN: We don't want that.

7 CHAIRMAN LOUD: If she is invasive,
8 I think you can object and we can weigh the
9 objection. But some of her questions are -- I
10 think, her style is to be lay a foundation to
11 be very detailed. Some of her questions lead
12 up to a larger question.

13 And I don't think that she is
14 badgering the witness or hitting him with a
15 lot of irrelevant questions, at this point.

16 Do you think that, Mr. Brown?

17 MR. BROWN: I --

18 CHAIRMAN LOUD: I will take the
19 delay --

20 MR. BROWN: She is asking questions
21 that, one, really, in the context of where we
22 are, are irrelevant or have been asked or

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1 answered. And more importantly, from the
2 looks I'm receiving from my client, he doesn't
3 understand the question. And that's the most
4 important point.

5 CHAIRMAN LOUD: Okay. Well, let's
6 try to keep the proceeding moving then at a
7 fairly appropriate pace. Again, as I said, if
8 the witness doesn't understand, he can say
9 that and she can try to restate the question.
10 We can try to keep moving forward.

11 MS. MADDOX-LEVINE: Thank you,
12 Chair.

13 Mr. Kocak, are you aware that as a
14 Certificate of Occupancy holder in the
15 District that you are required to obey the
16 laws of the District of Columbia?

17 MR. KOCAK: I didn't understand.
18 I'm sorry.

19 MS. MADDOX-LEVINE: Do -- okay. I
20 can rephrase it. It's okay.

21 MR. KOCAK: Yes.

22 MS. MADDOX-LEVINE: Are you aware

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1 that there are certain laws and regulations in
2 the District of Columbia that you, as a
3 Certificate of Occupancy holder or a business
4 owner, are obligated to follow?

5 MR. KOCAK: Yes.

6 MS. MADDOX-LEVINE: Okay. And are
7 you aware that one of those regulations is to
8 allow -- to know that an inspector or
9 investigation can be conducted at your
10 business at any time?

11 MR. KOCAK: Yes, ma'am.

12 MS. MADDOX-LEVINE: Okay. So
13 therefore, it should be --

14 MR. KOCAK: Why I understand. An
15 inspector can come ask me any questions and
16 they can check it. I know.

17 MS. MADDOX-LEVINE: Yes.

18 MR. KOCAK: Yes.

19 MS. MADDOX-LEVINE: And they can
20 check your business records --

21 MR. KOCAK: Yes.

22 MS. MADDOX-LEVINE: -- or they can

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1 look at your --

2 MR. KOCAK: Yes.

3 MS. MADDOX-LEVINE: --

4 establishment to see --

5 MR. KOCAK: Yes.

6 MS. MADDOX-LEVINE: -- if you are
7 in compliance. Is that correct?

8 MR. KOCAK: Yes.

9 MS. MADDOX-LEVINE: Okay. So
10 therefore, it should be no surprise to you
11 that an investigation took place at your
12 establishment in August of 2009. Is that
13 correct?

14 MR. BROWN: I object. I mean, that
15 requires him to make a leap from -- that they
16 had the right to do something to they actually
17 did it. I mean, that's an inappropriate
18 question. Just because they have the right to
19 inspect, doesn't mean that they actually did
20 it.

21 And then she is asking him, well,
22 aren't you surprised or you shouldn't be

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1 surprised that they conducted an
2 investigation. Very different questions,
3 particularly given my client's --

4 MS. MADDOX-LEVINE: At this point,
5 I would address the Board and state simply
6 that it was the appellant who raised the issue
7 of surprise. And on cross, I am more than
8 entitled to ask about why he would be
9 surprised if, in fact, he is put on notice by
10 the laws and regulations of the District of
11 Columbia that an inspection could be had at
12 any reasonable time of his establishment.

13 So I don't think it's
14 inappropriate. I certainly don't think it is
15 outside the scope of appropriate cross. And I
16 think that I should be allowed to continue my
17 cross examination without interruption.

18 MR. BROWN: Because he was -- and
19 again --

20 CHAIRMAN LOUD: Thank you. I think
21 as the presiding official --

22 MR. BROWN: -- that implies --

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1 CHAIRMAN LOUD: Mr. Brown? Mr.
2 Brown? As the presiding official, who gets to
3 rule on these issues, and I think you have set
4 forth your argument and she has set forth her
5 argument, I'm going to overrule the objection.

6 You can note it for the record, in terms of
7 what you might want to do with that.

8 I request that the witness answer
9 the question. Were you surprised or not? We
10 understand the value to be given to his
11 response in terms of how you articulated it,
12 Mr. Brown, but I think it's a legitimate
13 question. Was he surprised or was he not
14 surprised?

15 So objection overruled. If you
16 could proceed with the question?

17 MR. KOCAK: The letter coming to me
18 by hand that means we're going to shut you
19 down. If before the -- before him, some
20 inspectors came. They checked the Health
21 Department and then the mechanical roofing.
22 Every couple days they come. They look every

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1 day. Every day they come look at it, look at
2 it. And then finally, I got one of the
3 letters by hand saying hey, we're going to
4 shut you down. You have to call your lawyer.

5 This is surprise me. It's not
6 something hey, you do wrong. You should do
7 this. You are -- it doesn't matter. They
8 said they have to give the letter. But they
9 are saying that your tracking is more than --
10 your carry-out is more. You should do
11 something for this. Other than, we're going
12 to come back to you. We're going to check
13 you.

14 It didn't come like this letter.
15 Letter saying call your lawyer. 10 days
16 you're done, that's it. I have all my
17 savings. What am I going to do? I'm going to
18 say okay, thank you or I'm going to surprise.

19 MS. MADDOX-LEVINE: Okay. Thank
20 you. And you indicated in your direct
21 testimony that you used the basement for food
22 preparation purposes. Is that correct?

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1 MR. KOCAK: Yes, ma'am.

2 MS. MADDOX-LEVINE: But on neither
3 the Certificate of Occupancy that was issued
4 in September of '08 or the one that was issued
5 in September of '09 allows for you to use the
6 basement for food preparation services. Is
7 that correct?

8 MR. KOCAK: The first one to '08
9 and '09, it's -- the application was never
10 change. When I got the letters or when I got
11 the second C of O. It used to be same way and
12 the second C of O apply same way I did it. I
13 don't know really detail of Certificate of
14 Occupancy.

15 What was I can do, because all I
16 got first time, I can use basement, first
17 floor and second floor. I didn't really
18 mention exactly what is in there.

19 MS. MADDOX-LEVINE: Okay. But an
20 application is what you submit to DCRA,
21 correct?

22 MR. KOCAK: Yes.

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1 MS. MADDOX-LEVINE: And what DCRA
2 gives to you as approval is the Certificate of
3 Occupancy, correct?

4 MR. KOCAK: Yes.

5 MS. MADDOX-LEVINE: Okay. So the
6 approval that was issued to you in the form of
7 a Certificate of Occupancy did not authorize
8 you to use the basement. Is that correct?

9 MR. KOCAK: No, ma'am. Because
10 application was the basement. I really don't
11 -- I didn't mention that much for the basement
12 or second floor. When the guy came for the
13 inspectors, they said you have to -- this
14 should be writing seven seats and six seats
15 and basement, he didn't tell me. I don't
16 know.

17 And then I went back and we
18 corrected. Because it depends whatever I had,
19 it was all the plans, blueprint. It was using
20 by basement, first floor and second floor.

21 MS. MADDOX-LEVINE: Okay. And in
22 your prehearing statement submission, and I

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1 believe it is the Exhibit J that has all of
2 the spreadsheets that detail weekly
3 transaction totals, are you there with me?

4 MR. KOCAK: Yes.

5 MS. MADDOX-LEVINE: Okay. And if
6 you look at all of those, you're familiar with
7 these spreadsheets. Is that right?

8 MR. KOCAK: (No audible answer.)

9 MS. MADDOX-LEVINE: Okay. And
10 looking at those, it shows that less than half
11 of all of your transactions were for dine-in
12 customers. Is that correct?

13 MR. KOCAK: The carry-out and
14 delivery?

15 MS. MADDOX-LEVINE: Yes.

16 MR. KOCAK: Yes.

17 MS. MADDOX-LEVINE: No. I'm sorry,
18 the dine-in customers, people who sat down and
19 ate inside your restaurant totalled less than
20 50 percent of your total transactions? That
21 includes like if you took your carry-out, you
22 took your delivery and you took your dine-in,

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1 dine-in was less than 50 percent. Is that
2 correct?

3 MR. KOCAK: After that when I found
4 that this -- but the numbers was changing.

5 MS. MADDOX-LEVINE: Okay.

6 MR. KOCAK: The numbers was
7 changing a lot, because the Georgetown is more
8 -- one day the weather is good and then
9 everybody is coming and they want to go out.
10 But some days, like the weekends, Friday,
11 Saturday, is -- the Georgetown University,
12 they coming the late nights.

13 But mostly it depend on the weather
14 for the -- Georgetown is very up and down, the
15 numbers. But it's getting more dine-in.

16 MS. MADDOX-LEVINE: Okay. But you
17 indicated in your testimony that this -- these
18 numbers were similar to what you would have
19 been doing in August when DCRA did --

20 MR. KOCAK: Yes.

21 MS. MADDOX-LEVINE: -- its
22 inspection, correct?

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1 MR. KOCAK: Yes.

2 MS. MADDOX-LEVINE: Okay. And I
3 only have a couple more questions. Thank you
4 for your indulgence.

5 As far as the pictures that you
6 showed, if I could draw your attention to --
7 and they are not labeled. However, there is a
8 picture with a young lady in a white jacket
9 sitting with another lady in a black jacket.
10 And they are eating. This is in your
11 establishment?

12 MR. KOCAK: Yes, ma'am.

13 MS. MADDOX-LEVINE: Okay. And they
14 have sodas and paper --

15 MR. KOCAK: Not paper.

16 MS. MADDOX-LEVINE: -- napkins and
17 cans, soda cans. I'm sorry. Soda cans that
18 are disposable, correct?

19 MR. KOCAK: Yes, I'll take a look
20 at.

21 MS. MADDOX-LEVINE: And then
22 pointing -- directing your attention to --

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1 again, it's not labeled, but it's a picture.
2 It looks like there is some -- four people
3 sitting at a table. They are with paper cups.
4 Is that correct? It's maybe a young lady and
5 three men?

6 MR. KOCAK: Because normally I'm
7 not serving paper cups. And in case -- it was
8 white cups, if you look at it, white. Is that
9 right?

10 MS. MADDOX-LEVINE: No. These are
11 orange. It appears to be orange paper cups.
12 This is the picture I'm talking about.

13 MR. KOCAK: No, no, not carry-out.
14 Those are -- but see we have in the back if
15 they really asking, we have them, because they
16 are sharing the sodas. But I don't have these
17 cups. But we have certain we keep in the
18 back.

19 MS. MADDOX-LEVINE: Okay. And here
20 is another picture where it looks like, I'm
21 sorry, it's a young lady dressed in white
22 sitting with a man in a tan coat.

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1 MR. KOCAK: It's my regular
2 customers, yes.

3 MS. MADDOX-LEVINE: Your regular
4 customers.

5 MR. KOCAK: Regular customers.

6 MS. MADDOX-LEVINE: And they appear
7 to be also using paper cups. Is that correct?

8 MR. KOCAK: Paper cups if they ask,
9 yes.

10 MS. MADDOX-LEVINE: Okay. And you
11 indicated that, I think you said, the paper
12 cups were only utilized on September 26th for
13 the homecoming weekend. Is that correct?

14 MR. KOCAK: Yes. We -- I'm not
15 allowed to use the paper cups. Definitely
16 it's not like something major I'm using paper
17 cups.

18 MS. MADDOX-LEVINE: Yes.

19 MR. KOCAK: That's the period.

20 MS. MADDOX-LEVINE: Okay.

21 MR. KOCAK: Because only when they
22 ask, then I'm giving to them, because I have

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1 bottled water and the cans, sodas I'm keeping.

2 MS. MADDOX-LEVINE: Thank you, Mr.
3 Kocak. No further questions.

4 CHAIRMAN LOUD: Thank you. We will
5 turn now to the intervenor to see if there are
6 any questions for the witness?

7 MR. SULLIVAN: Yes. Thank you.

8 CROSS EXAMINATION

9 MR. SULLIVAN: Martin Sullivan for
10 the Potomac Street Intervenors.

11 Mr. Kocak, you stated in your
12 testimony that having only been open for 16
13 months, "I am still learning and improving."
14 Is that correct?

15 MR. KOCAK: Yes.

16 MR. SULLIVAN: Okay. And you never
17 operated a business in D.C. before that 16
18 months. Is that correct?

19 MR. KOCAK: I was a manager. I
20 didn't -- nothing in my own name.

21 MR. SULLIVAN: So you had no
22 connection to the Philly Pizza that operated

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1 on 34th Street?

2 MR. KOCAK: No. I was --

3 MR. SULLIVAN: Prior to this?

4 MR. KOCAK: -- the manager.

5 MR. SULLIVAN: You were only the
6 manager?

7 MR. KOCAK: Yes.

8 MR. SULLIVAN: You had no ownership
9 interest in that?

10 MR. KOCAK: No, no, no.

11 MR. SULLIVAN: Okay.

12 MR. KOCAK: That's why everything
13 comes up right now.

14 MR. SULLIVAN: Thank you. How long
15 would you estimate it takes to turn over a
16 table? For a group of people to come in, sit
17 and eat and leave? From the time they get in
18 the restaurant to the time they leave, how
19 long would you estimate it takes?

20 MR. KOCAK: Sometimes 5 minutes, 10
21 minutes, 15 minutes. I mean, Georgetown is --
22 because I don't have liquor.

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1 MR. SULLIVAN: So in 5 minutes they
2 sit down and then they get a menu and then a
3 waitress comes up and takes their order?

4 MR. KOCAK: Yes.

5 MR. SULLIVAN: And their food is
6 prepared already when they order or is it
7 prepared after they order?

8 MR. KOCAK: It depend on what they
9 order.

10 MR. SULLIVAN: Okay. And then they
11 eat their food.

12 MR. KOCAK: Yes.

13 MR. SULLIVAN: And then they get a
14 bill.

15 MR. KOCAK: Yes.

16 MR. SULLIVAN: Is that correct?

17 MR. KOCAK: Yes.

18 MR. SULLIVAN: And then they pay
19 the bill. Do they give it to the waitress or
20 do they pay at the counter?

21 MR. KOCAK: (No audible answer.)

22 MR. SULLIVAN: Okay. And that

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1 happens in 5 minutes?

2 MR. KOCAK: Because this is very
3 small place. It's not like something you're
4 going long way. We can see the customers
5 right in front of you. We just do right away.

6 Because --

7 MR. SULLIVAN: So they pay when
8 they order the food?

9 MR. KOCAK: No.

10 MR. SULLIVAN: Okay.

11 MR. KOCAK: After the paying.

12 MR. SULLIVAN: Yes. You said that
13 you did no tracking before November of 2009.
14 Is that right? No tracking of your breakdown
15 between carry-out, delivery?

16 MR. KOCAK: No breaking, yes.

17 MR. SULLIVAN: And then when you
18 realized that you have to show that you have a
19 sufficient number of dine-in patrons, you
20 began to track your numbers. Is that correct?

21 MR. KOCAK: Called my computer
22 company and they made it separate. I mean, it

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1 was three unit, three option: Dine-in, carry-
2 out, but the ticket goes one number.

3 MR. SULLIVAN: Okay.

4 MR. KOCAK: Then they divide it.

5 MR. SULLIVAN: So when you -- when
6 somebody orders food or when somebody dines-in
7 or when somebody orders delivery, you hit a
8 button on the cash register?

9 MR. KOCAK: Yes.

10 (Whereupon, at 5:00 p.m. the Public
11 Hearing continued into the evening session.)
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1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 5:00 p.m.

3 MR. SULLIVAN: So you were aware
4 when you started tracking your numbers that if
5 you showed too many carry-out numbers or too
6 many delivery numbers and not enough dine-in
7 numbers, that your Certificate of Occupancy
8 might be at risk. Is that right?

9 MR. BROWN: I'm wondering the
10 relevancy of that question.

11 MR. SULLIVAN: I'm trying to -- he
12 has represented these numbers and I'm trying
13 to establish the credibility or the lack of
14 credibility of those numbers.

15 MR. BROWN: Then ask him if the
16 numbers are accurate.

17 CHAIRMAN LOUD: Let me just ask
18 this question. Did the witness go, I know
19 it's in the prehearing statement and cross is
20 limited to what was brought out on direct, but
21 I don't recall him going into detail regarding
22 the tables that are in the prehearing

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1 statement in his direct. Did he do that, Mr.
2 Brown?

3 MR. BROWN: We talked about the
4 process for when he started tracking them and
5 how he tracks them.

6 CHAIRMAN LOUD: Yes.

7 MR. BROWN: He did not provide an
8 analysis of those.

9 CHAIRMAN LOUD: Okay. Well, you're
10 trying to show bias, potential bias on the
11 part of the witness?

12 MR. SULLIVAN: Yes.

13 CHAIRMAN LOUD: That he would have?

14 MR. SULLIVAN: Yes, frankly, yes.

15 CHAIRMAN LOUD: Okay. I think he
16 can answer the question. I think we should
17 continue to --

18 MR. SULLIVAN: Well, I'm trying to
19 establish --

20 CHAIRMAN LOUD: -- move on with the
21 discussion.

22 MR. SULLIVAN: -- that he --

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1 CHAIRMAN LOUD: I mean, it's clear
2 that he has an interest in the outcome of the
3 case, if that's what you're trying to
4 establish. But whether that means he would
5 fabricate records or fabricate testimony is a
6 different conclusion to be drawn.

7 MR. SULLIVAN: Not -- I'm not
8 making conclusions. I'm asking that he knew
9 at the time he started tracking numbers that
10 if he didn't have a sufficient number of dine-
11 in patrons, that he might not be in compliance
12 with his Certificate of Occupancy.

13 MR. KOCAK: Even I didn't know
14 exactly. Still after that when I talked to
15 Mr. Brown. Maybe second time I met him, he
16 told me this is the requirements for this.
17 The definition of fast food or definition of
18 the restaurant. I only -- I believe I want
19 customer satisfaction. When people come, I
20 try the best I can. Dine-in or carry-out?

21 I did it this way. And when
22 everything is come up hey, you have a

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1 restaurant license, you cannot do carry-out,
2 then I check myself. Hey, what is -- what I
3 have and then what I can do. Then I called
4 the company. We just divide it. It's not I
5 knew it.

6 I didn't know before the definition
7 of restaurant. I was -- the definition was my
8 restaurant before and after.

9 MR. SULLIVAN: So if you had known
10 what was required of the definition of
11 restaurant, you certainly would have complied
12 with it?

13 MR. KOCAK: The -- I just called
14 the company, the system and then they just --

15 MR. BROWN: I don't think he
16 understands the -- by his answer, he doesn't
17 understand the question.

18 CHAIRMAN LOUD: Can you restate the
19 question, Mr. Sullivan?

20 MR. SULLIVAN: Sure. You said that
21 nobody reminded you that you must do certain
22 things to operate as a restaurant. Is that

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1 correct?

2 MR. KOCAK: Yes.

3 MR. SULLIVAN: Okay. And if they
4 had reminded you, you certainly would have
5 operated as a restaurant then, right --

6 MR. KOCAK: Definitely.

7 MR. SULLIVAN: -- in that case?

8 MR. KOCAK: And --

9 MR. SULLIVAN: Thank you.

10 MR. KOCAK: -- the paper --

11 MR. SULLIVAN: Thank you. You said
12 the numbers change, the dine-in percentages
13 change a lot. Is that correct?

14 MR. KOCAK: Yes.

15 MR. SULLIVAN: But in the seven
16 weeks after the stay proceeding on your list
17 of transactions, Week 2 and Week 3 and Week 4,
18 5, 6 and 7, they are always less than 50
19 percent. Is that correct?

20 MR. BROWN: You have to be -- I'm
21 not so sure he understands that question.

22 MR. SULLIVAN: Okay. Well, I can

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1 actually point to the exact column, the final
2 column on each week's spreadsheet. The first
3 line, the dine-in percentage, that number is
4 always less than 50. Is that correct?

5 MR. KOCAK: Yes.

6 MR. SULLIVAN: Thank you. On
7 November -- let me just take one of these
8 days, you had 53 carry-out transactions on
9 November 15th. Is that correct? Or better
10 yet, Thursday, November -- what day were the
11 pictures taken? Yes, hold on. Excuse me one
12 second, please.

13 Okay. Let's go with November 15th.
14 You have 151 dine-in transactions. So you
15 turn over -- so you --

16 MR. BROWN: I'm sorry, we weren't
17 paying attention.

18 MR. SULLIVAN: Okay. I'm sorry.

19 MR. BROWN: I'm sorry.

20 MR. SULLIVAN: On Sunday, November
21 15th. My first question is what is a day? Is
22 it from 12:01 a.m. until 11:59 or is it from

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1 opening at 11:00 a.m. until close at 3:30 or
2 whenever you close, on the spreadsheet?

3 MR. KOCAK: Okay. The dining is
4 the certain hours. Yes, it's changing.
5 Because the --

6 MR. SULLIVAN: No. I'm sorry. I'm
7 just wondering the breakdown. When it says
8 Friday, Saturday or Sunday, is that a calendar
9 day? Is that from -- and please, I don't
10 object to your help.

11 MR. BROWN: Yes. I mean --

12 MR. SULLIVAN: I'm just wondering
13 if it is a --

14 MR. BROWN: And can I? When you
15 look at a day.

16 MR. KOCAK: Yes.

17 MR. BROWN: You are starting --

18 MR. KOCAK: One day.

19 MR. BROWN: Today.

20 MR. KOCAK: Yes.

21 MR. BROWN: You are keeping track
22 for today.

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1 MR. KOCAK: Okay.

2 MR. BROWN: So you open. Today is
3 Tuesday. So you opened at 11:00 a.m.?

4 MR. KOCAK: Yes.

5 MR. BROWN: So you start counting
6 then. And for that day, you stop counting
7 when you close business at -- today is
8 Tuesday, so that would be 2:00, 2:30?

9 MR. KOCAK: Yes, 2:30.

10 MR. BROWN: So that whole period is
11 a day?

12 MR. KOCAK: Yes.

13 MR. BROWN: Is that --

14 MR. KOCAK: The operation hours.

15 MR. BROWN: Yes.

16 MR. SULLIVAN: Thank you. So on
17 Sunday or on Saturday, Saturday the 14th, you
18 have 55 carry-out transactions.

19 MR. KOCAK: Yes.

20 MR. SULLIVAN: Is that typical?

21 MR. KOCAK: Because the --

22 MR. SULLIVAN: It seems like it is

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1 a typical number for carry-out transactions.
2 My question is do all of those people, all of
3 those carry-out patrons dine in the street or
4 do some of them actually take the food away
5 from the property?

6 MR. BROWN: I object to the
7 question. He doesn't have the ability to
8 answer that question. And it's also
9 inflammatory.

10 CHAIRMAN LOUD: Yes. What would be
11 the relevance of the question --

12 MR. SULLIVAN: I don't mean to be
13 inflammatory. I'm just trying --

14 CHAIRMAN LOUD: -- to the
15 restaurant standards?

16 MR. SULLIVAN: -- to understand the
17 breakdown between -- we're going to present
18 testimony that there is people in the street
19 eating pizza. I'm just trying to determine,
20 based on his carry-out numbers, if they are
21 reason based on the observations of people
22 eating pizza in the street.

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1 If he -- I would like to know what
2 percentage of people that -- of this carry-out
3 number eat in the street and don't eat in the
4 street. I don't think it is inflammatory at
5 all. It's just --

6 VICE CHAIRMAN DETTMAN: Well, Mr.
7 Sullivan, that's actually -- it's irrelevant
8 to the question that the Board needs to answer
9 here. We need to determine what percentage of
10 this operation is carry-out versus dine-in.
11 Whether or not they are going out and eating
12 on the street, eating at home, eating on the
13 roof, it doesn't matter.

14 MR. SULLIVAN: Agreed. I'm trying
15 to understand whether or not these carry-out--
16 this representation of this carry-out number
17 is reasonable.

18 VICE CHAIRMAN DETTMAN: Compared to
19 the overall business of that day?

20 MR. SULLIVAN: I can go in another
21 direction.

22 If your carry-out number is around

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1 40 to 50 each day, how many hours do you
2 operate in a day?

3 MR. KOCAK: It depends on the day.

4 MR. SULLIVAN: 12?

5 MR. KOCAK: Monday we close 2:00.
6 The weekends 3:30. But 3:30 we close.

7 MR. SULLIVAN: So it's about four
8 or five carry-out patrons an hour, you would
9 estimate, based on your numbers?

10 MR. BROWN: I object because he is
11 asking him to make a broad, you know, analysis
12 or generalization. And if you look at the
13 numbers here, the carry-out in one week ranges
14 from 20 in one day to a high of 195 on another
15 day. And this is the week of November 16th.

16 So if you want to ask him about a
17 specific day, but I'm not so sure he is in a
18 position to answer that question accurately.

19 CHAIRMAN LOUD: Objection
20 sustained. Can we move on? I think the
21 record speaks for itself also.

22 MR. SULLIVAN: Okay.

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1 CHAIRMAN LOUD: Once you narrow the
2 question, you can find what the average is per
3 hour.

4 MR. SULLIVAN: Thank you. Sorry.
5 You mentioned that you hired security guards
6 to quell the carry-out patron traffic outside
7 the restaurant. Is that correct?

8 MR. KOCAK: Yes.

9 MR. SULLIVAN: Are they there every
10 day?

11 MR. KOCAK: Friday, Saturday. If I
12 need it, Thursday.

13 MR. SULLIVAN: Okay. I have no
14 further questions.

15 CHAIRMAN LOUD: Thank you, Mr.
16 Sullivan. Is there redirect of the --

17 MR. BROWN: Maybe I'm -- is ANC
18 deferring entirely to Mr. Sullivan?

19 CHAIRMAN LOUD: That was my
20 understanding, but, yes, yes.

21 MR. SULLIVAN: Yes.

22 MR. BROWN: I think we will stand

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1 where we are for the time being. We will have
2 the opportunity on rebuttal.

3 CHAIRMAN LOUD: Very good. Board
4 Members, are there any -- I was going to ask
5 the Board if they had one final set of
6 questions for the witness before I think we're
7 going to move on to your next witness. Okay.

8 MEMBER MOLDENHAUER: I have one
9 question.

10 CHAIRMAN LOUD: Mrs. Moldenhauer,
11 who stepped out momentarily, but has returned
12 and will read the record for the portion she
13 stepped out.

14 MEMBER MOLDENHAUER: Yes, I will
15 read the record.

16 CHAIRMAN LOUD: Has some questions.

17 MEMBER MOLDENHAUER: I just have a
18 few questions and I'm sorry if they are going
19 to be repeated. And if they are, just let me
20 know and I can just read the record on those
21 issues.

22 You say that you have, in your pre-

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1 trial statement that I was just breezing
2 through, seven to eight employees?

3 MR. KOCAK: It depends on their
4 job. Like --

5 MEMBER MOLDENHAUER: How many
6 employees do you have working at the
7 establishment at one given time?

8 MR. KOCAK: Oh, five, minimum five.

9 MEMBER MOLDENHAUER: Minimum of
10 five.

11 MR. KOCAK: Yes.

12 MEMBER MOLDENHAUER: Okay. And
13 have you already stated what those five
14 individuals are doing? No? Okay. Can you
15 state what those five individuals do?

16 MR. KOCAK: Yes. One of them, she
17 standing front taking the customers and clean
18 up the tables and fill out the drinks and
19 checking the first floor and second floor and
20 restroom.

21 And then the two is behind and all
22 the pizza section. I have two sections, one

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1 pizza, one is in the sundae section. And then
2 also the one is also the basement, if we need
3 anything. Because we have a small place,
4 prepare section in the basement. Because it's
5 hard to use the first floor for everything.
6 That's why we keeping on basement. It's
7 easier, that's why we keeping extra people
8 basement to, you know, bring stuff.

9 And then also we have drivers.

10 MEMBER MOLDENHAUER: Drivers.

11 MR. KOCAK: This is the delivery
12 I'm keeping.

13 MEMBER MOLDENHAUER: Okay. So you
14 have one waitress/cashier.

15 MR. KOCAK: Yes.

16 MEMBER MOLDENHAUER: Two people who
17 are food preparers?

18 MR. KOCAK: Yes.

19 MEMBER MOLDENHAUER: A third who is
20 a food preparer in the basement?

21 MR. KOCAK: Four, yes.

22 MEMBER MOLDENHAUER: And then a

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1 driver?

2 MR. KOCAK: Yes, ma'am.

3 MEMBER MOLDENHAUER: Okay.

4 MR. BROWN: I think he said two
5 drivers.

6 MEMBER MOLDENHAUER: Did you say
7 two drivers --

8 MR. KOCAK: One, no.

9 MEMBER MOLDENHAUER: -- or one
10 driver?

11 MR. KOCAK: No, it depends on the
12 day job. The one driver.

13 MEMBER MOLDENHAUER: Okay. At a
14 minimum, this is a minimum of five and
15 potentially you have --

16 MR. KOCAK: Yes. The minimum five.

17 MEMBER MOLDENHAUER: Okay. And so
18 when you go up -- and do you ever go up above
19 five? And if you do, at what time or do you
20 normally staff more than five people?

21 MR. KOCAK: Evening time.

22 MEMBER MOLDENHAUER: Okay. And

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1 then what's the breakdown of that time?

2 MR. KOCAK: Evening like 5:00 to
3 11:00. If it's weekends, I'm putting more.

4 MEMBER MOLDENHAUER: More what, I
5 guess is the question?

6 MR. KOCAK: More front, like the
7 waiters and try more people on the front to
8 helping more customers.

9 MEMBER MOLDENHAUER: Okay. So you
10 would have more waitresses or more servers?

11 MR. KOCAK: Waitresses, more cook.

12 MEMBER MOLDENHAUER: More cooks?

13 MR. KOCAK: Yes, ma'am.

14 MEMBER MOLDENHAUER: Okay. And
15 now, has that been your system since you
16 opened or has that system changed?

17 MR. KOCAK: No, it's been before.
18 Same.

19 MEMBER MOLDENHAUER: So you have--
20 so that's the same number of employees --

21 MR. KOCAK: Yes.

22 MEMBER MOLDENHAUER: -- you have

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1 employed the whole time?

2 MR. KOCAK: Yes.

3 MEMBER MOLDENHAUER: Okay.

4 MR. KOCAK: The operation, it
5 didn't change before and after. The same way
6 we operated. But I was more careful when I
7 got the letters.

8 MEMBER MOLDENHAUER: Okay.

9 MR. KOCAK: I can say that same
10 food, same thing. When I got the letters, the
11 location and I know I have to take it
12 seriously what I'm doing. And then I really
13 want definition of my business. And I change
14 it. Every single thing what I'm doing and I'm
15 trying to focus on really dine-in customers.

16 MEMBER MOLDENHAUER: Okay.

17 MR. KOCAK: When I did it.

18 MEMBER MOLDENHAUER: And then you
19 are the one that prepared, I may have stated
20 this again, I'm sorry, I apologize, the
21 figures in Exhibit J, which are the weekly and
22 the daily customer transactions?

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1 MR. BROWN: The numbers.

2 MR. KOCAK: Yes, I am. But I have
3 manager, but I am the charge for the whole
4 thing.

5 MEMBER MOLDENHAUER: Okay. And
6 maybe again, if you have already talked about
7 this, I'll read the transcript. But did you
8 describe how you differentiate between a
9 carry-out person and a delivery when you are
10 identifying the two different types?

11 MR. KOCAK: We ordinarily ask the
12 customers. What I understand from you, we ask
13 the customer would you like to dine-in or
14 carry-out? If it's dine-in, we put in the
15 dining option. If it's carry-out, we put in
16 the carry-out option.

17 MEMBER MOLDENHAUER: Okay.

18 MR. BROWN: And she has asked about
19 delivery.

20 MEMBER MOLDENHAUER: Yes.

21 MR. BROWN: And how do you
22 distinguish.

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1 MR. KOCAK: Same. Delivery also
2 different option we put in.

3 MEMBER MOLDENHAUER: All right. So
4 you are asking the customer -- I guess my
5 question is is it possible for a customer to
6 walk in your door and say I would like a
7 delivery?

8 MR. KOCAK: Yes, like some of them
9 they do.

10 MEMBER MOLDENHAUER: Okay.

11 MR. KOCAK: Yes.

12 MEMBER MOLDENHAUER: All right.
13 And so then that would be categorized as a
14 delivery?

15 MR. KOCAK: Yes, I do delivery.

16 MEMBER MOLDENHAUER: And is there
17 times where somebody categorizes, they say I'm
18 going to walk in and then do they then walk
19 out with the pizza box or with the pizza?

20 MR. KOCAK: If they want to carry-
21 out. I didn't get it. I'm sorry.

22 MEMBER MOLDENHAUER: No, that's

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1 okay. That's okay. If somebody comes up to
2 you at the cashier or your waitress and they
3 say I'm going to dine-in, so you then
4 categorize it now as a dine-in. Do you see in
5 your --

6 MR. KOCAK: Yes.

7 MEMBER MOLDENHAUER: -- running of
8 the business --

9 MR. KOCAK: I see.

10 MEMBER MOLDENHAUER: -- people
11 dining in or do they sometimes then carry the
12 food out after they have told you that want to
13 dine-in?

14 MR. KOCAK: They do.

15 MEMBER MOLDENHAUER: They do what?

16 MR. KOCAK: They do carry-out.
17 They sitting.

18 MEMBER MOLDENHAUER: Okay.

19 MR. KOCAK: And eating with the
20 box.

21 MEMBER MOLDENHAUER: Okay. Oh, so
22 you're saying it happens vice-versa?

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1 MR. KOCAK: Yes.

2 MEMBER MOLDENHAUER: Sometimes they
3 will say --

4 MR. KOCAK: It happens a lot.

5 MEMBER MOLDENHAUER: -- carry-out
6 and then they sit down with the box?

7 MR. KOCAK: Yes. They sitting with
8 the box and eating. I can't do anything with
9 this. I mean, small boxes, when I see he open
10 it and start eating or using the stuff on the
11 table, parmesan cheese, whatever they adding,
12 you know. And by the time they just taking
13 one bite, this is happening mostly late
14 nights, not lunch and dinners.

15 MEMBER MOLDENHAUER: Okay. And in
16 regards to your carry-out business, is that
17 mostly in the evening time frames on weekends
18 or does that --

19 MR. KOCAK: Friday is good, lunch.
20 Monday, Tuesday, Wednesday, Thursday lunch is
21 good. And Wednesday, Thursday, Friday dinner
22 is good. But the Friday -- Thursday one hour,

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1 Friday two hours, Saturday two hours is late
2 nights is carry-out.

3 MEMBER MOLDENHAUER: It's more
4 carry-out.

5 MR. KOCAK: Six hours carry-out
6 more other than the rest of this is --

7 MEMBER MOLDENHAUER: Is more dine-
8 in during lunches?

9 MR. KOCAK: Yes, ma'am.

10 MEMBER MOLDENHAUER: Okay.

11 MR. KOCAK: Yes.

12 MEMBER MOLDENHAUER: All right.
13 Thank you.

14 CHAIRMAN LOUD: I just want to ask
15 one quick follow-up question, based on Mrs.
16 Moldenhauer's question about the waitresses.
17 I think you testified in response to a
18 question that I asked earlier that you do have
19 a waitress, but that that person is not your
20 cashier. And is that -- is your waitress and
21 your cashier the same person?

22 MR. KOCAK: Same person.

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1 CHAIRMAN LOUD: Okay. Your
2 waitress and your cashier are the same person.

3 MR. KOCAK: Most of the time. On -
4 - I have a manager and then me sharing hours
5 working. Right now, I'm working 60 hours, but
6 at minimum 40 hours, 45 hours we are there.
7 And we taking all the cashier. We are the
8 cashiers. If you count it, because we are on
9 behalf of the --

10 CHAIRMAN LOUD: So you --

11 MR. KOCAK: Yes.

12 CHAIRMAN LOUD: So if the cashier
13 who is also the waitress steps from behind the
14 counter, because she has a customer that
15 arrives that wants --

16 MR. KOCAK: Yes.

17 CHAIRMAN LOUD: -- to dine-in and
18 she has to go, according to your testimony
19 earlier, and take the order at the table --

20 MR. KOCAK: Yes.

21 CHAIRMAN LOUD: -- she then leaves
22 the cash register?

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1 MR. KOCAK: She leaves the cash
2 register. But somebody is there.

3 CHAIRMAN LOUD: There would be
4 people in the queue.

5 MR. KOCAK: Yes.

6 CHAIRMAN LOUD: And the somebody
7 that is there, that would be you? Is that
8 your testimony?

9 MR. KOCAK: Me or my manager.

10 CHAIRMAN LOUD: Okay.

11 MR. KOCAK: Yes.

12 CHAIRMAN LOUD: So then you have at
13 least one waitress on all shifts?

14 MR. KOCAK: Yes.

15 CHAIRMAN LOUD: Okay. Thank you.

16 MEMBER MOLDENHAUER: Can I just
17 jump on? So you have the five employees then
18 plus yourself? You didn't include --

19 MR. KOCAK: Manager.

20 MEMBER MOLDENHAUER: -- yourself or
21 your manager when I went through the five
22 employees? So you always have about seven

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1 people then on?

2 MR. KOCAK: Six people.

3 MEMBER MOLDENHAUER: Six. So
4 either -- oh, so it's either you or your
5 manager plus the five employees?

6 MR. KOCAK: Yes.

7 MEMBER MOLDENHAUER: Okay. Thank
8 you.

9 CHAIRMAN LOUD: I think we are
10 ready for your next witness when you are.

11 MR. BROWN: And we would like to
12 have Mr. Bello testify. But before we do
13 that, I want to make sure that -- because some
14 of the things that he will be testifying to
15 refer to documents.

16 We have gotten both the C of O and
17 their applications in the record?

18 MS. BAILEY: Yes, Mr. Brown.

19 MR. BROWN: Okay. And then we
20 would like to submit his written testimony,
21 just for the record. He's not going to read
22 it all. And we would also like to submit the

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1 building permits and the building permit plans
2 for the record, which he will refer to. And
3 we would also like to submit -- we have
4 updated the numbers since the prehearing
5 statement to reflect just another week of
6 activity.

7 MEMBER MOLDENHAUER: I'm sorry, Mr.
8 Brown, I just asked Chairman Loud if a certain
9 topic had been discussed and it hadn't been
10 that I have questions on for the applicant
11 again.

12 So since it hasn't been addressed
13 at all, I would like to ask a couple
14 additional questions. I'm sorry.

15 I guess there was testimony earlier
16 about the fact that you have the equipment for
17 a dishwasher, but you don't use it. Is that
18 correct?

19 MR. KOCAK: There is -- the lady
20 when I -- because I'm not familiar, because
21 this my only first place.

22 MEMBER MOLDENHAUER: Yes.

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1 MR. KOCAK: And then I don't know
2 really the detail of the Certificate of
3 Occupancy when I went, because the -- it was a
4 delay. We have to be -- I want to open,
5 because so much things behind me, promises.
6 And I got the -- all the permits, electric,
7 whatever the fire marshal permits and then I
8 grab it and, you know, I run it.

9 I exactly remember this day. And
10 then when I see the papers and then the lady
11 she helped me. We fill it out together.

12 MEMBER MOLDENHAUER: Yes.

13 MR. KOCAK: And then also you can
14 see she also write it. You can see the
15 application.

16 MEMBER MOLDENHAUER: Okay. So I
17 guess the application, I'm asking you if you
18 have a dishwasher?

19 MR. KOCAK: No. I have --

20 MEMBER MOLDENHAUER: So you have
21 the --

22 MR. KOCAK: -- a three compartment

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1 sink.

2 MEMBER MOLDENHAUER: Okay.

3 MR. KOCAK: Not a dishwasher.

4 MEMBER MOLDENHAUER: So no
5 dishwasher?

6 MR. KOCAK: No dishwashers.

7 MEMBER MOLDENHAUER: But do you
8 have the ability to put a dishwasher in? Is
9 that what you are talking about with the
10 permits?

11 MR. KOCAK: I can.

12 MEMBER MOLDENHAUER: Okay. And so
13 now, I guess my question is then kind of going
14 back to the employee list. Where is the sink
15 that you have?

16 MR. KOCAK: Basement.

17 MEMBER MOLDENHAUER: In the
18 basement.

19 MR. KOCAK: Three compartment sink
20 with the disposal.

21 MEMBER MOLDENHAUER: Oh, the guy in
22 the basement, does he, you know, wash the

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1 dishes and also then handle any additional
2 prep work for food?

3 MR. KOCAK: It's two person.

4 MEMBER MOLDENHAUER: Okay.

5 MR. KOCAK: Yes.

6 MEMBER MOLDENHAUER: So at the same
7 time, there's two people in the basement?

8 MR. KOCAK: Yes, the cook. The
9 upstairs cook.

10 MEMBER MOLDENHAUER: Yes.

11 MR. KOCAK: Also the main guy, you
12 know, and they sharing the job.

13 MEMBER MOLDENHAUER: Okay. And so
14 do you know or would your manager know about
15 how many dishes then they wash? I mean, is it
16 -- do you go through a lot of dishes in a day?
17 I mean, I hate washing dishes, so I think I
18 probably have an idea.

19 MR. KOCAK: I believe I have 30, 35
20 -- between 30 to 40, I have, plates.

21 MEMBER MOLDENHAUER: Okay.

22 MR. KOCAK: And we are not keeping

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1 every -- the dishes dirty and then after. We
2 just keep --

3 MEMBER MOLDENHAUER: Keep cleaning
4 them up?

5 MR. KOCAK: Clean up, yes.

6 MEMBER MOLDENHAUER: Okay. So when
7 one is done, then it gets sent downstairs?

8 MR. KOCAK: It is getting
9 downstairs one or two hours.

10 MEMBER MOLDENHAUER: Okay. Okay.
11 Thank you.

12 COMMISSIONER TURNBULL: Let me just
13 continue. One to two hours for what?

14 MR. KOCAK: The plates. We have--
15 we don't have that much the plates to put the
16 dirty dishes.

17 COMMISSIONER TURNBULL: Right.

18 MR. KOCAK: When it's like 5 or 10,
19 we just take them downstairs quickly, right
20 away.

21 COMMISSIONER TURNBULL: Well, do
22 you find that a handicap to -- I mean, you

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1 said one night you had to go to paper plates,
2 because --

3 MR. KOCAK: The paper plates.

4 COMMISSIONER TURNBULL: You had to
5 go to paper plates because you couldn't handle
6 the crowd. Do you find that happening quite
7 frequently that you have to go to paper
8 plates, because you don't have the plates and
9 silverware to --

10 MR. KOCAK: Yes, when I -- the
11 Friday, Saturday nights and it wasn't enough,
12 that's why I used the paper plates.

13 COMMISSIONER TURNBULL: But does
14 that happen all the time?

15 MR. KOCAK: No. Right now, we
16 completely cut it, paper plates. No more
17 paper plates. Just 10 inch boxes or plates,
18 that's it.

19 COMMISSIONER TURNBULL: And you
20 don't have any glasses? No glassware?

21 MR. KOCAK: No glassware. I'm
22 trying to put the glass, because right now

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1 it's -- people asking more glass, because they
2 want to share. I have 10. I didn't count it,
3 10, 15 I have. But I'm trying to get more.

4 COMMISSIONER TURNBULL: Okay.

5 CHAIRMAN LOUD: I think, Mr. Brown,
6 we are ready to proceed. I believe you may
7 have asked me a question that I did not hear
8 right before Mrs. Moldenhauer.

9 MR. BROWN: Going hand-in-hand with
10 Mr. Bello's testimony.

11 CHAIRMAN LOUD: Yes.

12 MR. BROWN: One, we are making sure
13 that the things we discuss are already in the
14 record, which they are. And we are presenting
15 a number of things into the record that will
16 go with his testimony.

17 First, his actual testimony, which
18 he is not going to read, but it will be there
19 in a written form. The building permits and
20 the approved plans are being submitted, as
21 well as current numbers.

22 The prehearing statement,

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1 obviously, cut off when it was filed, but we
2 have, in the two weeks since then, updated it
3 to give you, you know, the most current
4 numbers.

5 CHAIRMAN LOUD: Are the numbers
6 something that Mr. Bello is going to testify
7 to?

8 MR. BROWN: Yes. Particularly as
9 to the meaning of the numbers and how to
10 interpret them, yes.

11 CHAIRMAN LOUD: Okay. And let me
12 just open it up to DCRA and Mr. Sullivan in
13 terms of the latter issue of the additional
14 set of numbers, for their response, and then
15 we can move forward.

16 MR. BROWN: Well, and can I
17 clarify, just so maybe -- I don't want to set
18 alarm bells off. In our submission, we
19 submitted weekly counts, Monday through
20 Sunday. And then we were running a cumulative
21 report.

22 What we have done is add weekly

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1 reports for the last two weeks, since the
2 prehearing statement, and updated the
3 cumulative report to reflect those two weeks.

4 And then also based on Mr. Bello's
5 testimony, we have taken those numbers and
6 reformatted them. Again, the numbers haven't
7 -- we are using the same numbers, just how we
8 present them.

9 MRS. BOLLING: Pat, I'm trying to
10 understand, so I don't have to object. I'm
11 looking at this long spreadsheet you just gave
12 out that says "Weekly Totals of Consumer
13 Transactions 11/13/09 through January 10,
14 2010," right?

15 MR. BROWN: Yes.

16 MRS. BOLLING: And on the front
17 sheet, Week 1. Let's just look at Week 1.
18 Dine-in says 357, right?

19 MR. BROWN: Yes.

20 MRS. BOLLING: Carry-out says 142.
21 But you left off delivery.

22 MR. BROWN: And if you go to the

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1 next page, we have the same chart showing it
2 with delivery.

3 MRS. BOLLING: And why -- can you
4 proffer why you want to take out delivery when
5 we are looking at -- I mean, our legal
6 argument is clearly subordinate adding carry-
7 out and delivery. So why would you take off
8 delivery? What's the importance of that?

9 MR. BROWN: Well, the regulation
10 reads that carry-out is subordinate. What we
11 have done is given you the information, both
12 with and without delivery. The top one
13 without delivery is in keeping with Mr.
14 Bello's testimony about the proper way to
15 interpret and apply the statute.

16 And then the second page is just a
17 continuation of what we have given you, so you
18 have all of the numbers. But Mr. Bello's
19 opinion is going to be based on focusing in on
20 the first page.

21 And then the third page is just
22 Week 9. It's the latest week, which is the 4th

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1 of January through last Sunday, the 10th.

2 MRS. BOLLING: So you are saying
3 because the definition for prepared food shop
4 doesn't have the word delivery, you excluded
5 it and want us to count it as if it was dined
6 in?

7 MR. BROWN: No. We have excluded
8 the delivery from this table.

9 MRS. BOLLING: But I mean, you have
10 included it in dine-in.

11 MR. BROWN: No, we have not. We
12 have --

13 MRS. BOLLING: Well, the percentage
14 adds up to 100 percent.

15 MR. BROWN: Yes. But if you look
16 at the following page, which breaks it down,
17 we've got 357 -- this is Week 1. 357 dine-in
18 transactions that week, 142 carry-out.

19 MRS. BOLLING: Oh, I'm sorry. You
20 reduced total transactions by the delivery.

21 MR. BROWN: That's correct. We
22 just --

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1 MRS. BOLLING: Oh, I gotcha.

2 MR. BROWN: -- carved that out on
3 the top page.

4 MRS. BOLLING: Okay. I object.
5 You have excluded some evidence and I don't
6 think it is relevant to exclude evidence. And
7 I think you have already had your owner
8 testify that his numbers are coming from his
9 new system. He has testified on cross and
10 direct that he believes they are accurate and
11 reflect what happened in August.

12 And for us to funny around with
13 these numbers and take out delivery, I think
14 is just inappropriate and wrong.

15 MR. BROWN: Well, we're not funning
16 around with them. We are -- because they are
17 all presented on the second page. We are not
18 pretending delivery doesn't occur. We are
19 just presenting them in a fashion where we are
20 only calling out dine-in and carry-out for Mr.
21 Bello's analysis.

22 And again, let Mr. Bello make the

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1 analysis and then it's information. And
2 whether you agree with it or not, it's
3 information and it comports with his, Mr.
4 Bello's, analysis.

5 MRS. BOLLING: But as you will
6 know, in a Court of Law, if evidence is not
7 admissible, then you don't let your witness
8 refer to it. And I'm just saying that your
9 owner has already testified to his delivery
10 service. It's information and it's improper
11 to exclude it. And that's all. And I won't
12 argue any more.

13 MR. BROWN: Well --

14 VICE CHAIRMAN DETTMAN: And, Mr.
15 Chairman, I would say at this point that maybe
16 the Board can take a position on this first
17 sheet. As I understand it, the next two
18 sheets are pretty much exactly the same
19 numbers that are before us, except for the
20 addition of two weeks, two additional weeks of
21 data.

22 The exclusion of delivery, it's my

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1 opinion that I don't think that's appropriate.

2 The standard here, one of the standards here,
3 is that food is prepared for consumption on
4 the premises. By excluding food that has been
5 prepared in the operation of this
6 establishment, but it goes elsewhere, we are
7 excluding data.

8 I don't think that's appropriate.
9 I think that --

10 CHAIRMAN LOUD: I just wanted to--
11 go ahead, I'm sorry.

12 VICE CHAIRMAN DETTMAN: -- carry-
13 out and delivery should be considered
14 collectively as food that is prepared for
15 consumption off the premises. It is excluded
16 in this first table. I don't think that we
17 should admit this first table.

18 COMMISSIONER TURNBULL: Mr. Chair,
19 I would concur with Mr. Dettman --

20 CHAIRMAN LOUD: Okay.

21 COMMISSIONER TURNBULL: --
22 wholeheartedly.

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1 CHAIRMAN LOUD: All right. I did
2 want to give Mr. Sullivan an opportunity to
3 weigh in before we ultimately decide the
4 issue. But let's turn to Mrs. Moldenhauer,
5 since we started down this path and then, Mr.
6 Sullivan, you can weigh in on it.

7 MEMBER MOLDENHAUER: Unfortunately,
8 I actually disagree with the two other Board
9 Members. I would like to at least first hear
10 what type of analysis Mr. Bello has. I may
11 potentially, after his analysis, say I don't
12 think it's relevant, but I would like to at
13 least hear it.

14 It's the ability of a party to
15 manipulate the numbers potentially to make a
16 legal argument. And I think that potentially
17 he may be able to link it to a definition or
18 his opinion, expert opinion, since we have
19 allowed him to be an expert on the numbers.

20 Obviously, all parties would then
21 be able to challenge those as potentially
22 excluding relevant information or not

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1 excluding relevant information. But that's my
2 opinion. I guess we will hear from the
3 parties. But if the Board agrees with my
4 view, we can have him discuss that.

5 CHAIRMAN LOUD: Why don't we hear
6 from Mr. Sullivan and then I think we probably
7 are prepared to make a decision on it. Yes,
8 sir?

9 MR. SULLIVAN: I have just an
10 objection to the last two weeks. If we are
11 talking about August and determining what was
12 going on in August and we are talking about
13 these numbers, because they were in the
14 prehearing statement and they may relate back.

15 But to just continue adding on
16 weeks when it's not relevant to your
17 determination, doesn't seem necessary or it
18 doesn't seem permissible in this case.

19 CHAIRMAN LOUD: Thank you, Mr.
20 Sullivan. I think I was kind of where you are
21 Mr. Sullivan and perhaps where Mrs.
22 Moldenhauer is.

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1 These numbers, you know, it is what
2 it is. And you take it for what it's worth
3 that counsel would be aggressive presenting
4 their case. The numbers on the first page,
5 basically, portray a perception of a much
6 greater percentage of dine-in than the rest of
7 the spreadsheets. And it is part of an effort
8 on the part of counsel to project information
9 as if 71 percent during November 13th were
10 dine-in and, you know, 66 percent, 71 percent,
11 63 percent.

12 All it does is suggest to the
13 person evaluating the evidence that these are
14 real numbers. But I think it is clear from
15 the record and totality as a whole, as to
16 whether or not these are real numbers or just
17 looking at page 2, whether they are real
18 numbers because a significant chunk of the
19 data has been subtracted out on page 1.

20 I'm not troubled by inclusion of
21 the information. I think we can evaluate that
22 appropriately. I think at some point though

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1 we have to stop how much data comes in after
2 August. And we are moving the ball further
3 and further away from August by including
4 information from January 2010, December 28,
5 2009, December 21, 2009.

6 Is there a proffer as to why this
7 information would not be pile on and redundant
8 of what has already been submitted?

9 MR. BROWN: Well, by definition,
10 given the circumstances, I can't provide you
11 these numbers for August of 2009. I wasn't
12 aware of the need and we weren't able to
13 recreate the numbers.

14 I think there is some value, some
15 significant value to the Board looking at the
16 numbers, not just in a snapshot, but over a
17 period of time, both measured and days of the
18 week and weeks of the year.

19 Because -- and you can look at
20 these numbers and we have, obviously, given
21 you rolling averages. But the business
22 changes by day of the week. It changes by

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1 week of the month. It changes as a result of,
2 you know, holidays. You know, he wasn't busy
3 Thanksgiving week.

4 He wasn't busy Christmas week or as
5 busy as he would be otherwise. So I mean,
6 those are all things that I think are
7 important for you to understand, because one
8 of the great risks is -- and the point I had
9 made, the zoning inspector or the inspector
10 went out five days in August.

11 And he is making a judgment based
12 on a business that has been in operation for
13 16 months, based on those five days in August.

14 And not even the whole days, I'm sure. So I
15 think it is important to show some context.
16 Because, you know, this business has been in
17 business 16 months, 110 hours a week, you
18 know, 64 weeks or more since then.

19 And I think he is entitled to some
20 broader context and that's what I'm attempting
21 to do.

22 CHAIRMAN LOUD: Let's hear from

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1 DCRA, Mr. Sullivan one last time and then we
2 can make a decision. At the end of the day
3 though, you're still at 40, you know, you're
4 less than 50 percent. That is if we allow in
5 all of the weeks that you are talking about.

6 You know, I'm looking at page 2,
7 and you average it out at your final column.
8 It says totals 46 percent fit into this
9 category that is called dine-in, which really
10 is kind of what it was back in November
11 anyway, so the --

12 MR. BROWN: But --

13 CHAIRMAN LOUD: -- additional weeks
14 don't really --

15 MR. BROWN: -- one of the risks,
16 Mr. Loud, again, is this kind of snapshot
17 view. I can point to days and weeks where the
18 number is significantly higher than 50
19 percent. And I can show you days when it is
20 significantly lower.

21 And I just don't think that it is
22 appropriate. One, I don't view 50 percent as

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1 the absolute, you know, end of discussion,
2 because taking the totality, applying the
3 harshest standard, which Mr. Bello certainly
4 isn't prepared to do, that just because on any
5 given day or over a period of time he may slip
6 slightly below 50 percent, that doesn't make
7 this not a restaurant.

8 And it certainly doesn't make it a
9 fast food establishment, which is what DCRA is
10 claiming. And certainly the Zoning Commission
11 refused to impose any bright line standards,
12 whether for carry-out or otherwise. So
13 context is important.

14 CHAIRMAN LOUD: Mrs. Bolling?

15 MRS. BOLLING: Well, we agree with
16 the Chairman. We think this information is
17 like a dog pile situation. One, we're not
18 sure Georgetown was back in school on January
19 4th, which is --

20 MR. BROWN: It wasn't.

21 MRS. BOLLING: Okay. So it doesn't
22 help, which is what your argument was in

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1 August. That was a bad time, so this is a bad
2 time.

3 MR. BROWN: I'm not saying it's a
4 bad time, but it's --

5 MRS. BOLLING: It's not indicative
6 of --

7 CHAIRMAN LOUD: Mrs. Bolling, why
8 don't we let Mrs. Bolling finish and then we
9 will --

10 MRS. BOLLING: You're saying it's
11 not a --

12 CHAIRMAN LOUD: We'll get back to
13 you, Mr. Brown.

14 MRS. BOLLING: You're saying it's
15 not indicative of operations. Well, this
16 isn't indicative of operations. And it's not
17 a snapshot. The Chairman was referring to the
18 overall compilation of all the weeks, which
19 was less than 50 percent. So it's not a one-
20 time look. It's looking at in total.

21 So, yes, we think that this new
22 week should be excluded. Thank you.

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1 CHAIRMAN LOUD: You just think the
2 one new week should be excluded?

3 MRS. BOLLING: Well, definitely the
4 one new week. And I still don't like this
5 front sheet, but we will let it go at that.

6 CHAIRMAN LOUD: Okay.

7 MRS. BOLLING: Thank you.

8 CHAIRMAN LOUD: Thank you. And,
9 Mr. Sullivan?

10 MR. SULLIVAN: I pointed out in my
11 prehearing statement that they were 45 percent
12 and that that does not make them a restaurant.
13 And magically, the numbers went up the last
14 two weeks over 50 percent.

15 My question is if there is a
16 continuation of this proceeding, do you think
17 he will get that number up over 50 percent or
18 can we stop it here? Because he is still
19 under 50 percent. So it's really not material
20 actually when arguing whether or not he is
21 operating a restaurant.

22 For him to say he may slip below 50

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1 percent every now and then, is kind of odd,
2 because it's always below 50 percent. The
3 average is well below 50 percent. But you
4 have my objection.

5 CHAIRMAN LOUD: Okay.

6 MR. SULLIVAN: If you decide to
7 take those numbers, then clearly we can't go
8 any further than that if this proceeding goes
9 to another date.

10 CHAIRMAN LOUD: Thank you, Mr.
11 Sullivan.

12 MR. BROWN: And one, Mr. Loud, if
13 you look at the numbers in the Weeks 1 through
14 9, it varies rather substantially. 54 percent
15 one week, 36 percent the following week, 49.74
16 percent one week, 53 percent, 52 percent. I
17 mean, I think that that context is important.

18 And to say that, one -- well, you
19 can't say that this is a fast food restaurant
20 based on these numbers, because that's not how
21 the matter is defined.

22 But to say that on the week of

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1 November 16, '09 where 36.45 percent of his
2 transactions there are dine-in, that that week
3 he is not a restaurant, but Week 8 where he is
4 53.87 he is a restaurant, I mean, that is -- I
5 don't think the Zoning Regulations were
6 intended to have that kind of on-again/off-
7 again determination.

8 I mean, nobody could operate that
9 way. And in Week 7, 49.43 percent. It is
10 57.57 percent below 50? Is he not a
11 restaurant that week?

12 CHAIRMAN LOUD: Okay.

13 MR. BROWN: I mean, I mean --

14 CHAIRMAN LOUD: Some of this sounds
15 a little bit like closing argument.

16 MR. BROWN: But --

17 CHAIRMAN LOUD: But --

18 MR. BROWN: -- it has to do with
19 the evidence.

20 CHAIRMAN LOUD: I understand,
21 because you're going to close from the
22 evidence that's in the record, so I

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1 understand. What I would suggest, colleagues,
2 that we do is sort of a two-two split, I would
3 recommend that we allow this document in.

4 I think Mr. Sullivan hit the nail
5 on the head in saying in some respects it is
6 immaterial. We allow this document in. The
7 probative value of it is something that would
8 be attached to it by us, so that we would
9 allow it in. We cut it off at the end of
10 calendar year 2009.

11 I don't see any reason to just keep
12 it open-ended as Mr. Sullivan has suggested.
13 And thirdly, that before we allow Mr. Bello,
14 this is more, I think, in the interest of
15 time, to go through a really detailed column-
16 by-column analysis of what is on the first
17 page, that we are really clear as to the
18 relevance of not having all of the data
19 presented.

20 I think we can see what is on the
21 first page and we can draw our own conclusions
22 for it. But to spend a whole lot of time

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1 going through Week 1 72 percent and Week 2 50
2 percent, Week 3 67 percent without being
3 really clear as to why we are doing that, I
4 think will just make the hearing a little bit
5 longer than necessary.

6 MR. BROWN: Trust me, he is not
7 going to do that.

8 CHAIRMAN LOUD: All right. Okay.
9 So --

10 COMMISSIONER TURNBULL: Mr.
11 Chairman?

12 CHAIRMAN LOUD: Yes, sir?

13 COMMISSIONER TURNBULL: I would
14 object to that, if you are going to call both
15 of these sheets the same thing. They both say
16 "Weekly Totals of Customer Transactions."
17 Which one is right?

18 This first sheet has got to be
19 annotated in some way to differentiate itself
20 from what is the true count on the second
21 page. It either has to be annotated or our
22 records are worthless.

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1 You can't have the same title for
2 both sets of documents. You've got to label
3 this an annotated version or whatever you want
4 to call it of the real data. The real data,
5 as I see it, is page 2. So somehow he has got
6 to annotate this.

7 MR. BROWN: Well --

8 COMMISSIONER TURNBULL: This has
9 got to be called something different.

10 MR. BROWN: -- Mr. Turnbull, and I
11 understand. Can I suggest that the first page
12 we call Weekly Transactions, Dine-In and
13 Carry-Out Only?

14 COMMISSIONER TURNBULL: Whatever.
15 But it has got to be clear as to what it
16 really is about. Because the way it is now,
17 it is saying this is what his business is,
18 which is the same as -- I mean, it totally
19 refutes page 2.

20 So I think it has to be annotated
21 somehow so that in the record people 10 years
22 from now looking back will understand what the

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1 hell this is.

2 CHAIRMAN LOUD: I think it's a good
3 point. It sounds like Mr. Brown accepts that
4 point calling it or changing it to "Weekly
5 Transactions, Dine-In and Carry-Out" and I
6 think --

7 COMMISSIONER TURNBULL: Only.

8 CHAIRMAN LOUD: Only. And I think
9 on that note, we might be able to move
10 forward. Okay. So why don't we then move
11 forward and again, as the witness begins to
12 give his expert interpretation of the statute,
13 it would be helpful to explain how we can take
14 out the entire category for delivery. Just
15 very briefly go over that.

16 MR. BELLO: Thank you, Mr. Chair,
17 Board Members, good afternoon. Toye Bello,
18 again for the record.

19 In the interest of time, I think
20 that my submissions on the question of the
21 authority of the Zoning Administrator to
22 revoke a C of O by invoking a specific section

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1 of the construction codes, I will let that
2 stand on the record without going in detail,
3 since it is submitted in written form.

4 DCRA has proffered in their
5 submissions that the Certificate of Occupancy,
6 and I refer to the most current one, is being
7 revoked for two reasons. One, because it
8 exceeds the scope of the authorized floors
9 that it can occupy. And the second, the fact
10 that on the face of the revocation letter,
11 that Philly Pizza operates as a fast food
12 restaurant.

13 On the first issue, Philly Pizza
14 establishes use of the subject premises by
15 obtaining a building permit to establish the
16 use in the premises, which involved a change
17 of use of the premises.

18 So by extension, the records of
19 that building permit application, which the
20 Board is very familiar with section
21 3203.11(b), that "At the time of the issuance
22 of a Certificate of Occupancy, the Zoning

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1 Administrator actually issues a provision or a
2 Certificate of Occupancy."

3 The record would reflect that those
4 plans are approved for occupancy on all
5 floors, the basement, first and second floor.

6 So to the extent that the previous
7 Certificate of Occupancy or for that matter
8 the current Certificate of Occupancy that is
9 the subject of appeal here is defective with
10 respect to an administrative error of the
11 Zoning Administrator of DCRA, that in itself
12 cannot be invoked as a basis for revocation of
13 a Certificate of Occupancy.

14 Not only because the revocation
15 would then benefit an error that was DCRA's,
16 but also the error can be corrected by
17 administrative means simply by applying for a
18 corrected Certificate of Occupancy.

19 With respect to the second issue,
20 by its very definition, an establishment which
21 seeks to operate as a restaurant must
22 establish the following facts:

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1 (A) That it does not meet the
2 definition of a fast food restaurant.

3 (B) That it does not meet the
4 definition of a prepared food shop.

5 (C) That the food, drinks or
6 refreshments are prepared and sold to on-site
7 customers primarily for consumption on
8 premise.

9 (D) That the facilities for carry-
10 out are clearly subordinate to the principal
11 use to provide and prepare food for
12 consumption on the premises.

13 Philly Pizza does not meet the
14 definition of a fast food establishment for
15 the following reasons:

16 (A) The premises does not include a
17 drive-through, that's very obvious.

18 (B) Except for food prepared and
19 sold to on-site customers for carry-out,
20 customers do not pay for the food before it is
21 consumed.

22 (C) Further, the building permit

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1 plans upon which approval of a building permit
2 was granted do not depict a service counter
3 without seating.

4 The "facility" referred to in the
5 definition of a restaurant, which may be
6 relied upon to form the basis of the evidence
7 of clear subordination is intrinsic in the
8 physical layout of the establishment and
9 whether such facilities are designed to
10 facilitate the carry-out of a greater
11 proportion of the food prepared on premise and
12 sold to on-premise customers for off-premise
13 consumption.

14 Food sold on-site, food served to
15 on-site customers primarily for on-premise
16 consumption is served on non-disposable
17 tableware. It certainly is not unreasonable
18 that the portion of the food prepared on-
19 premise for carry-out as an integral part or
20 component of a restaurant use is served in
21 disposable packaging.

22 The definition of a fast food

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1 establishment goes further to clearly state
2 that a restaurant providing carry-out service
3 clearly subordinate to its principal use of
4 preparing food and selling same to on-site
5 customers, primarily for on-premise
6 consumption shall not be deemed a fast food
7 restaurant.

8 I think we can make a quick
9 disposition of the fact that Philly Pizza is
10 not a prepared food shop, because it clearly
11 prepares food in other than microwave or
12 toaster.

13 Philly Pizza's food, drinks or
14 refreshments are prepared and sold to on-site
15 customers primarily for consumption on-
16 premise.

17 The empirical evidence of the
18 breakdown of transactions at Philly Pizza
19 supports the conclusion that the food, drinks
20 or refreshments prepared and sold to on-site
21 customers is for consumption primarily on-
22 premise.

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1 The concept of analyzing the
2 transactions of a restaurant in the context of
3 sale of prepared food to customers who are
4 present on-site or deemed on-site customers to
5 determine whether an establishment principally
6 operates as a restaurant as defined, that
7 concept is not new in the Zoning Regulations.

8 The concept is espoused in the
9 definition of food service delivery, which is
10 set forth in section 199.1. That definition,
11 in pertinent part, distinguishes a restaurant,
12 prepared food shop or fast food establishment
13 in which the principal use is a production of
14 prepared food for delivery to customers
15 located off the business premises and that
16 seating and tables for customers may or may
17 not be provided for on-premise consumption.

18 But if present, clearly subordinate
19 to the principal use of preparing food for
20 delivery to off-site customers.

21 Clearly, as the term off-site
22 customers is used in the Zoning Regulations,

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1 they are the clear opposite to that. And that
2 clear opposite is the fact that clients who
3 actually physically visit an establishment are
4 the determinant factor in terms of the
5 relationship of how much of the carried food,
6 the carry-out food is taken off-premise and
7 how much is consumed on-site.

8 Clearly, Philly Pizza is not a
9 restaurant that is a food delivery service,
10 because it derives significantly less than 75
11 percent of the sales from delivery orders to
12 off-site customers.

13 The facilities for carry-out are
14 clearly subordinates to the principal use
15 providing food for consumption on-premises.
16 As aforementioned, the only facility for
17 carry-out within the establishment is the
18 service counter, which occupies a
19 proportionately insignificant portion of the
20 establishment.

21 The establishment is otherwise
22 largely occupied by facilities such as

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1 kitchen, storage and incidental uses in the
2 basement, dining tables and chairs on the
3 first and second floors, all indicative of the
4 principal activity providing food for
5 consumption on-premise.

6 It is very important to make the
7 distinction that a carry-out is not a distinct
8 or distinguishable use in the Zoning
9 Regulations. Rather, it is a functional
10 component of any of the eating establishments
11 defined in the Zoning Regulations.

12 Therefore, a carry-out component of
13 a restaurant does not in and of itself
14 constitute an accessory use in the context of
15 the defined term. As such, a carry-out
16 function need not be subject to the test of an
17 accessory use, which may be some other use,
18 not the principal use, which is customarily
19 incidental and subordinate to the principal
20 use.

21 In other words, a carry-out is an
22 integral part of a restaurant. It is not a

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1 defined use in the Zoning Regulations
2 whatsoever.

3 So the only relevant test,
4 therefore, is whether by its physical layout a
5 restaurant provides facilities which
6 culminates in empirical evidence that a
7 majority of the food prepared on-premise and
8 sold to on-site customers is carried out or
9 consumed on-premise.

10 This is clearly not the case with
11 respect to Philly Pizza's operation.

12 Similarly, a food delivery service
13 as defined is not an independent use, since it
14 must be one of the three kinds of eating
15 establishments. It's either going to be a
16 restaurant, a prepared food shop or a fast
17 food restaurant.

18 The issuance of the C of O in the
19 instant appeal is a culmination of a process
20 which began with the issuance of the building
21 permit in conjunction with an approved
22 building permit plan, which authorized the

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1 restaurant use on all floors of the existing
2 building.

3 I think the crux of the issue in
4 this case cannot be fully understood without
5 examining the import of the text amendment of
6 the definition for fast food restaurants and
7 restaurants adopted under Zoning Commission
8 Case No. 06-23.

9 The original fast food restaurant
10 amendments to the regulations were
11 specifically adopted to respond to the advent
12 and the proliferation of your fast food
13 chains. Even though they were not mentioned
14 specifically, they could not be mentioned
15 legally, but that definition was tailored to
16 your McDonalds, your Kentucky Fried Chicken.

17 And that definition says "a place
18 of business," we all know what it is in
19 section 199. But most importantly, the
20 definition excluded establishments known as
21 retail grocery store, convenience store, ice
22 cream parlor, deli or other business selling

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1 food or beverages as an accessory use for off-
2 premise preparation and consumption.

3 In the old definition for a
4 restaurant, a pertinent part of that old
5 definition, which I think would speak to
6 uncover the kind of operation that Philly
7 Pizza has here, clearly states that "The term
8 shall not include, but not be limited to, an
9 establishment known as a cafe, a lunch
10 counter, a cafeteria or other similar
11 businesses."

12 Well, when you look at the
13 distinction between those two previous
14 definitions, it is very clear on its fact that
15 the regulations made a distinction between
16 your fast food chains and small operations of
17 the like that Mr. Kocak runs at Philly Pizza.

18 The import of the new definition is
19 that that definition, basically, now
20 encompasses all of this type of operations.

21 And most importantly, the new
22 definition for a fast food establishment, in

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1 pertinent part, says "The proposed or existing
2 establishment meeting the definition shall not
3 be deemed to constitute any other use
4 permitted under the authority of these
5 regulations, except that a restaurant, grocery
6 store, movie theater or other providing carry-
7 out service that is clearly subordinate to its
8 principal use shall not be deemed a fast food
9 restaurant."

10 Clearly from this definition,
11 subsection (b) says, one of the points in
12 which the Zoning Administrator may apply in
13 determining whether an establishment is a fast
14 food restaurant, that "Customers pay for the
15 food before it is consumed."

16 Well, Mr. Kocak has testified that
17 only the carry-out component of his operation
18 pay for before the food is consumed.

19 But then that goes on to say "The
20 one characteristic that would satisfy this
21 element would be building permit plans that
22 depict a service counter without seating,

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1 unless the applicant certifies that the
2 intended principal use is for a restaurant or
3 grocery store."

4 My read of this section is that the
5 determination of what is a fast food
6 restaurant, technically, is made at the time
7 of a building permit application. And one of
8 the characteristics that the Zoning
9 Administrator may rely upon is whether the
10 plans for an establishment depict a service
11 counter without seating.

12 The plans on the record clearly
13 depict seating along with a service counter.

14 Subsection (c) says "The food is
15 served on and in anything other than a non-
16 disposable tableware." Well, a fast food
17 restaurant is also allowed a carry-out
18 function. So clearly, in any of the eating
19 establishments uses where a carry-out function
20 is allowed, there will be disposable
21 tableware, reasonably.

22 And I think I'll rest my testimony

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1 here.

2 CHAIRMAN LOUD: Thank you, Mr.
3 Bello. Let us do a couple of things. First,
4 I want to remind everyone that it is 6:00 p.m.

5 And as I indicated when we started the
6 hearing, we were going to make an assessment
7 around this time as to whether we thought we
8 could finish up today or whether we would be
9 needing to postpone, I shouldn't say postpone,
10 but continue the parts of the case that we are
11 not going to be able to finish up today to the
12 first available date on the calendar.

13 I know we are going to lose some
14 Board Members at 7:00. I think 7:00 might be
15 a very appropriate time to take a break in the
16 case and see how soon we can get this case
17 back on the calendar, either next week or the
18 week following that, so we can think about
19 that over the next few minutes as we move
20 forward with some of the testimony.

21 Secondly, I have some questions for
22 Mr. Bello just in terms of understanding a lot

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1 of what was said. And some of the Board
2 Members may have some.

3 So what I would suggest is that
4 Board Members get an opportunity to ask some
5 questions and then we can open it up for cross
6 examination.

7 All right. Let me just see if I
8 understand the real clear gravamen of your
9 testimony. Some of what you testified to is
10 fact stuff and it's not expert and so I want
11 to sort out the difference between the two.

12 When you start talking about the
13 definition of a fast food establishment and a
14 restaurant, and you go over the criteria that,
15 you listed a lot, I'm just going to go over it
16 very briefly.

17 For example, the establishment is
18 considered fast food if, and then you talk
19 about, okay, the premise includes a drive-
20 through. Well, that's a fact. We don't need
21 an expert for that. I mean, it is what it is.

22 Customers pay before the food is

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1 consumed. We don't really need an expert for
2 that, that's sort of fact testimony.

3 You then went on to say that one
4 characteristic, the definition doesn't say the
5 only way to measure it, but one
6 characteristic, would be the building permit
7 plans and whether they depict a service
8 counter, so on and so forth.

9 And are you saying that if the
10 building plans permit a service counter --
11 depict, I'm sorry, a service counter, that
12 from that point forever more, that
13 establishment would tend to be a fast food
14 establishment or are you simply saying that
15 that's a characteristic that the reviewer can
16 look at to help him or her determine whether
17 or not it meets the criteria?

18 MR. BELLO: No. It is a
19 characteristic that the reviewer can look at.

20 CHAIRMAN LOUD: Okay. Is it
21 possible that subsequent to that, the
22 establishment could become by virtue of the

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1 operator not complying with the provision?

2 MR. BELLO: Oh, absolutely.

3 CHAIRMAN LOUD: Okay. So that
4 would not necessarily be ultimately decisive
5 whether or not the building permit plans
6 depict a service counter.

7 Then you talked about the facility,
8 that the facilities for carry-out are clearly
9 subordinate to the principal use of providing
10 prepared food for consumption on the premises.

11 And I think this gets into an area where
12 there could be some expert testimony, at least
13 room to disagree on the interpretation of
14 that.

15 And your interpretation of that
16 section is that the facilities for carry-out
17 are what, the service counter?

18 MR. BELLO: Well, the word
19 facilities used there actually goes to the
20 physical layout --

21 CHAIRMAN LOUD: Okay.

22 MR. BELLO: -- of the

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1 establishment.

2 CHAIRMAN LOUD: Okay. And what
3 would that be in your interpretation? It says
4 facilities for carry-out, not just facility
5 sort of in a global kind of way, but
6 specifically for carry-out. So in terms of
7 your interpretation of this section, what
8 would those facilities consist of?

9 MR. BELLO: Well, clearly, if you
10 have a service counter without any seating at
11 all, that would be one criteria that would
12 deem you to be a fast food establishment.

13 CHAIRMAN LOUD: I've been in some
14 restaurants that have a clear carry-out or
15 fast food establishment section where, for
16 example, the entrance is different.

17 MR. BELLO: Absolutely.

18 CHAIRMAN LOUD: Would that be an
19 example of a facility for carry-out?

20 MR. BELLO: That would.

21 CHAIRMAN LOUD: Okay.

22 MR. BELLO: Any of the physical

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1 components and the layout of the establishment
2 that lend themselves to promoting the carry-
3 out function of a restaurant.

4 CHAIRMAN LOUD: Okay. And I have
5 been in facilities where the area that you pay
6 for the food is not the same as the area that
7 you would pay for the food at the restaurant
8 part, at the dine-in part. So that would also
9 be an example of a facility for carry-out?

10 MR. BELLO: Absolutely.

11 CHAIRMAN LOUD: Okay. Now, in this
12 case where the facility for carry-out is
13 pretty much the same as the facility for dine-
14 in, that is, as I understand it, the counter
15 is used by both types of patrons, would that
16 be consistent with the language here in your
17 interpretation of it?

18 MR. BELLO: With what language?

19 CHAIRMAN LOUD: That the facilities
20 for carry-out are clearly subordinate to the
21 principal use.

22 MR. BELLO: That's exactly my point

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1 that the layout of the establishment and its
2 physical facilities which lend to the carry-
3 out function is subordinated by design.
4 Because the primary and principal use of the
5 establishment is the dine-in component.

6 CHAIRMAN LOUD: But wouldn't that
7 be a function of the transactions at the
8 counter? In other words, whether it is
9 clearly subordinate or not clearly subordinate
10 seems to me where the same counter is used for
11 both types of transactions to turn on the
12 types of transactions that are occurring at
13 that, to use their word, facility. Is that a
14 fair statement?

15 MR. BELLO: Well, that is a fair
16 statement. And I'm not suggesting that the
17 Zoning Administrator doesn't have the
18 authority to go even further to establish
19 additional empirical information, for
20 instance, to make a determination as to
21 whether the carry-out function in an
22 establishment is the predominant principal

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1 use.

2 But as I understand it, there is no
3 empirical evidence here in this case.

4 CHAIRMAN LOUD: I'm sorry, there is
5 no empirical evidence of the break --

6 MR. BELLO: Upon which the
7 revocation --

8 CHAIRMAN LOUD: -- down --

9 MR. BELLO: -- was based.

10 CHAIRMAN LOUD: Okay. So you are
11 saying that they lacked the type of evidence
12 that you and your team were proffering
13 regarding the breakdown of transactions that
14 were dine-in and carry-out?

15 MR. BELLO: As I understand it, it
16 was never requested.

17 CHAIRMAN LOUD: It was never
18 requested. But if they had some information
19 like that, if we have some evidence that
20 addressed that issue, that would help clarify
21 for us whether the facilities for carry-out,
22 in this case, are clearly subordinate to the

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1 principal use?

2 Because at the end of the day, the
3 analysis is basically the percentage of
4 transactions.

5 MR. BELLO: Well, it is one of the
6 components in reaching that determination.

7 CHAIRMAN LOUD: Do you have an
8 expert opinion on what percentage would
9 qualify as being clearly subordinate?

10 MR. BELLO: Well, in my view, if
11 the predominant activity is the dine-in
12 component of the use, then that is the
13 principal use.

14 In this case, because a carry-out
15 function is an integral part of the
16 restaurant, it cannot be viewed in the context
17 of an accessory use. A carry-out is not a
18 defined use in the Zoning Regulations.

19 So the fact goes to, yes, the ZA
20 may request empirical evidence to reach a
21 conclusion, in addition to other information.

22 CHAIRMAN LOUD: I'm not sure if you

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1 answered my question though, but let's say the
2 ZA does request that empirical information.
3 He or she gets that empirical information. Do
4 you have an expert opinion as to how to
5 measure whether the information obtained by
6 the ZA either fits within the definition of a
7 clearly subordinate use or exceeds what would
8 be clearly subordinate?

9 MR. BELLO: Well, I would say that
10 if you have a 51/49 percent ratio, then in
11 addition to the layout, the physical layout of
12 the establishment, that that does not
13 necessarily lend itself to the conclusion that
14 the establishment seeks to operate as a fast
15 food establishment.

16 CHAIRMAN LOUD: Again, let me just
17 make sure I understand. So your testimony
18 would be that if 51 percent of the
19 transactions were carry-out or let's say --

20 MR. BELLO: Dine-in.

21 CHAIRMAN LOUD: Dine-in. 51
22 percent were dine-in, then the 49 percent that

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1 were not are clearly subordinate to -- and
2 that's your testimony?

3 MR. BELLO: That's correct.

4 CHAIRMAN LOUD: Okay.

5 MR. BELLO: In addition to the fact
6 of the physical layout of the establishment.

7 CHAIRMAN LOUD: But I think one of
8 the questions I had was in terms of the
9 physical layout. If the transactions are
10 occurring at the same counter, where there is
11 no separate facilities for carry-out and for
12 dine-in, that the only way to then measure
13 whether or not we are talking about dine-in or
14 carry-out would be the breakdown of
15 transactions from that counter.

16 MR. BELLO: Yes.

17 CHAIRMAN LOUD: Okay. Thank you.
18 I don't have any further questions.

19 VICE CHAIRMAN DETTMAN: It's sort
20 of in line with the questions that the
21 Chairman just asked, Mr. Bello.

22 Your testimony focused very much on

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1 the physical layout, pointing to the building
2 permit, saying that it depicts a service
3 counter and the relative size of that service
4 counter in relation to the overall
5 improvements show that it is subordinate,
6 clearly subordinate.

7 Looking at the definition for fast
8 food establishment, however, it does mention
9 that one of the ways you can satisfy this is
10 that building permits depict a service counter
11 without seating.

12 I look at the building permits. I
13 don't see any kind of notation on there. I do
14 see the counter, but it's not clearly
15 indicated on there.

16 However, it goes on further to say
17 that the counter is part of a carry-out
18 service that is clearly subordinate to that
19 principal use. If you look at the physical
20 layout that is on the building permits, how do
21 you discern that that counter is part of a
22 carry-out service that is clearly subordinate

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1 to the principal use?

2 MR. BELLO: Well, you've got two
3 floors of seating in this establishment. And
4 I think that the nexus is that it is very
5 difficult to separate this issue from my
6 testimony to the fact of the origins of the
7 original definition for a fast food restaurant
8 in terms of the relationship between the
9 percentage of queuing area devoted to carry-
10 out function.

11 So the adoption attempts to create
12 a new definition, but it doesn't do so very
13 well. And I think that is what is creating
14 the confusion.

15 So with respect to your question,
16 when you take the totality of the two floors
17 and you work out a percentage of the potential
18 area in front of the counter that would allow
19 queuing for carry-out function, clearly,
20 anybody who is in that establishment to buy
21 carry-out food doesn't sit down, mostly,
22 unless they are waiting for their order. They

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1 go right to the counter, buy it and get out.

2 VICE CHAIRMAN DETTMAN: Right. But
3 by reviewing the plans that are associated
4 with the building permit --

5 MR. BELLO: Yes.

6 VICE CHAIRMAN DETTMAN: -- how
7 would one be able to demonstrate that the
8 service counter that is portrayed on the plans
9 is part of a carry-out service that is clearly
10 subordinate to the approved principal use?
11 Solely by using the physical layout of the
12 building.

13 MR. BELLO: Well, by facting how
14 much of the counter space and the space in
15 front of the counter in terms of the
16 percentage of the totality of the
17 establishment.

18 VICE CHAIRMAN DETTMAN: So if, just
19 hypothetically, if I was to open a business
20 and only 10 percent of my square footage was
21 occupied by the service counter and the rest
22 of it was for restaurant use, however, my

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1 operation, 90 percent of my sales was for
2 carry-out, your interpretation would be that I
3 would still be a restaurant, based on the
4 physical layout of my space?

5 MR. BELLO: No, not necessarily,
6 because my testimony responds to Mr. Loud's
7 question. Was that you've got to take the
8 totality of factors and all facts. You can't
9 just rely on one. So you look at the physical
10 space.

11 And clearly, if you have empirical
12 evidence that 90 percent of the transactions
13 go towards carry-out, then that's very clear
14 on its face.

15 VICE CHAIRMAN DETTMAN: Okay. I
16 don't have any more questions.

17 CHAIRMAN LOUD: Okay.

18 MEMBER MOLDENHAUER: I have got a
19 couple of questions. Just staying on this
20 point, you went back and you talked about kind
21 of the history of the definition of a fast
22 food restaurant.

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1 MR. BELLO: Right.

2 MEMBER MOLDENHAUER: And you said
3 that something like that the definition was
4 tailored, in the current definition that we're
5 applying right now, more towards like a
6 McDonalds.

7 MR. BELLO: No, the previous.

8 MEMBER MOLDENHAUER: Previously, it
9 was tailored more towards a McDonalds?

10 MR. BELLO: Correct.

11 MEMBER MOLDENHAUER: So then but it
12 also included -- but it previously included
13 different exceptions, such as the cafe or a
14 lunch counter, things like that, but it
15 doesn't currently include?

16 MR. BELLO: The previous
17 definition?

18 MEMBER MOLDENHAUER: The previous
19 definition did?

20 MR. BELLO: Yes. The previous
21 definition for a fast food restaurant excluded
22 ice cream parlors, delicatessens and the

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1 definition for a restaurant, which are the two
2 critical definitions here. Excluded
3 establishments, such as a cafe, a lunch
4 counter, a cafeteria or other similar
5 businesses.

6 So I think that the regulations
7 recognize that in neighborhood commercial
8 overlays that are mapped in close proximity to
9 residential zoning, that you would have mom
10 and pop operations of delis and cafe lunches,
11 which are not necessarily big restaurants.

12 But that fast food restaurants, by
13 their manner of operations, are not conducive
14 to location in those zone districts without
15 some other provisions of the special
16 exceptions, which if you read those previous
17 provisions go to screening, protection or for
18 plans to separate a residential zone from.

19 MEMBER MOLDENHAUER: But then that
20 changed and then we have the current
21 definition.

22 MR. BELLO: That's right.

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1 MEMBER MOLDENHAUER: Which does not
2 include the cafe, lunch counter exceptions.
3 It only includes the retail grocer and
4 restaurant exceptions?

5 MR. BELLO: Correct.

6 MEMBER MOLDENHAUER: So now under
7 this definition for fast food, would you then
8 say that more types of establishments fall
9 into the fast food category because of the
10 change in the definition?

11 MR. BELLO: Well, let me point you
12 to a very interesting portion of the new
13 definition for a fast food establishment. And
14 that pertinent section says "A proposed or
15 existing establishment," so therefore, I think
16 that by virtue of this definition that a great
17 burden may be placed on the Zoning
18 Administrator to actually retroactively go
19 enforce on existing establishments that may
20 similarly be operating in this manner.

21 One of which we --

22 MEMBER MOLDENHAUER: So that the

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1 answer is yes, it's a broader definition now
2 than it was before?

3 MR. BELLO: Much broader.

4 MEMBER MOLDENHAUER: Okay. So then
5 in this broader definition, and I'm just going
6 to throw out a hypothetical, I think it's just
7 the easiest way to cut to the chase of, you
8 know, what exactly is a fast food.

9 Because we are talking about, I
10 think, two different issues. Physical layout
11 and then how do you pay prior to -- whether
12 you pay prior to consuming the food. Is that
13 correct? Kind of the two major issues on how
14 you define a fast food restaurant?

15 MR. BELLO: Well, what it says is
16 that, subsection (b) says that "Customers pay
17 for food before it is consumed" period.

18 MEMBER MOLDENHAUER: Yes, okay.

19 MR. BELLO: All right?

20 MEMBER MOLDENHAUER: Okay.

21 MR. BELLO: So you either pay for
22 food before it is consumed or you don't.

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1 MEMBER MOLDENHAUER: Okay.

2 MR. BELLO: Then it goes further to
3 say "One characteristic," one, "that would
4 satisfy this element would be building permit
5 plans that depict a service counter without
6 seating."

7 MEMBER MOLDENHAUER: Okay. But I
8 guess my question is this, because I don't --
9 as the appellant's expert, I'm just trying to
10 understand as much as possible about that
11 position.

12 Because this case is not just a
13 single room with a counter. We understand
14 that. There are tables. There is tables on
15 the first floor and there is tables on the
16 second floor.

17 MR. BELLO: Correct.

18 MEMBER MOLDENHAUER: So and then--
19 but it's also not a larger McDonalds or like a
20 Fuddruckers where you have a lot of tables
21 and, you know, at the same time, they clearly
22 take cash before you sit down and eat your

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1 food. So it's kind of in this gray area.
2 Would you agree with me on that?

3 MR. BELLO: Yes, I do.

4 MEMBER MOLDENHAUER: Okay. So in
5 analyzing this gray area, what takes more
6 precedent if the physical layout is gray --

7 MR. BELLO: Yes.

8 MEMBER MOLDENHAUER: -- how do you
9 then distinguish, in your opinion, that of a
10 fast food restaurant? That it would be a fast
11 food or it would not be a fast food
12 restaurant.

13 MR. BELLO: Well, one of the
14 components to look, obviously, at the
15 transactions --

16 MEMBER MOLDENHAUER: Okay.

17 MR. BELLO: -- that have occurred.

18 But my testimony though is that there is a
19 particular impact involved in the end use of
20 the seating establishment.

21 MEMBER MOLDENHAUER: All right.

22 MR. BELLO: And then the percentage

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1 relationship is actually between those
2 visitors and the number of them that take food
3 out and the number of them that sit in. And
4 when you take the totality of that, in the
5 case of Philly Pizza, you are looking at
6 probably a 65/35 ratio, 65/35 percent
7 relationship.

8 So if you take the fact of the
9 physical layout of the establishment and the
10 fact of the cases of transactions in this way,
11 then it is clearly not a fast food restaurant.

12 MEMBER MOLDENHAUER: Okay. Just
13 one other question. You had referenced the
14 building permit provides for all floors
15 initially and that was one of the issues in
16 your testimony that you can look at the
17 building permit and see that it was
18 identifying all floors. Is that correct?

19 MR. BELLO: I believe so, yes.

20 MEMBER MOLDENHAUER: Okay. I'm
21 looking at the building permit, the second
22 document in your building permit B119148?

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1 MR. BELLO: Yes.

2 MR. BROWN: Which date are you
3 referring to?

4 MEMBER MOLDENHAUER: Issuance date
5 May 29, 2008. Is that the correct permit that
6 you are referencing?

7 MR. BELLO: Are you talking about
8 the actual building permit or the --

9 MEMBER MOLDENHAUER: Yes, I'm
10 looking at the actual building permit that was
11 provided --

12 MR. BELLO: Okay.

13 MEMBER MOLDENHAUER: -- as an
14 additional exhibit.

15 MR. BELLO: Correct.

16 MEMBER MOLDENHAUER: And I don't
17 see on here where it says all floors or two
18 floors. I thought that was your testimony and
19 I'm just trying to look at the document and
20 see where it says that.

21 MR. BELLO: Okay. A building
22 permit is not issued in a vacuum. It is

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1 issued in conjunction with an approved set of
2 plans. So in and of itself it's not a stand-
3 alone document to the effect that there may be
4 administrative defects to that building
5 permit.

6 And I can point to other defects on
7 this building permit. It doesn't reflect the
8 Zoning District. It doesn't reflect the
9 square. It doesn't reflect the --

10 MEMBER MOLDENHAUER: So you're just
11 saying that this is attached to the plans we
12 have and the plans show three floors,
13 including the basement?

14 MR. BELLO: The plans are
15 controlling.

16 MEMBER MOLDENHAUER: Okay.

17 MR. BELLO: Because that's the
18 document that was approved.

19 MEMBER MOLDENHAUER: Okay. That
20 answers my question. I was just --

21 MR. BELLO: Okay.

22 MEMBER MOLDENHAUER: -- trying to

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1 see what document to point to to support that.

2 Thank you. No other questions.

3 VICE CHAIRMAN DETTMAN: Mr.
4 Chairman, I would just like to follow-up on
5 one question I did ask.

6 Mr. Bello, when you were responding
7 to my last question, I think you had said
8 that, you know, in addition to the physical
9 layout, which you focused on, you have to
10 really take in the totality here.

11 So some consideration needs to be
12 given to the intended operation of the
13 establishment? Would you agree with that?

14 MR. BELLO: That's correct.

15 VICE CHAIRMAN DETTMAN: You also
16 said in your testimony that, in your expert
17 opinion, the determination of what a
18 particular establishment is, whether it be
19 fast food or restaurant, happens at the
20 building permit stage. I think that was your
21 exact testimony.

22 MR. BELLO: That's true. That's --

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1 VICE CHAIRMAN DETTMAN: So at the
2 building permit stage, how would one get a
3 sense of this totality of the use? How would
4 the person processing the building permit,
5 processing the physical layout of the space,
6 get a sense of what is the intended use of the
7 space?

8 MR. BELLO: Well, first of all, I
9 believe the Zoning Administrator uses the
10 Eating Establishment Affidavit to reach this
11 conclusion, because that has specific
12 questions that go to operations.

13 In this particular case, and I
14 don't know that the record reflects is, there
15 are, in fact, two eating and drinking
16 establishment documents. And I don't know
17 whether the other one is here.

18 But I want to point out that the
19 one that is on the record, that's dated 2008,
20 was probably dated then, because my
21 recollection is that that document did not
22 exist at the time of the original issuance of

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1 the building permit. It was a different kind
2 of Eating and Drinking Establishment
3 Affidavit, which really did not speak to these
4 definitions as they exist today.

5 But subsequently, in going back to
6 the DCRA to correct some of the administrative
7 errors in the original building permit, the
8 gentleman was, obviously, made to fill out
9 another Eating and Drinking Establishment
10 Affidavit and I thin it probably was
11 completely out of his league with respect to
12 completing that accurately.

13 VICE CHAIRMAN DETTMAN: Let me make
14 sure I understand this though. So the Exhibit
15 N in the prehearing statement that you
16 provided or that the appellant provided,
17 that's the Eating and Drinking Establishment
18 Questionnaire dated 2008. Was this filled out
19 at the building permit stage or was it filled
20 out at the C of O stage?

21 MR. BELLO: No, this was completed
22 at the second C of O stage, because there was

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1 insistence that he did that. But in fact, at
2 the time of the original issuance of the
3 building permit to establish the use as part
4 of the review process in the Zoning
5 Administrator's Office for an eating and
6 drinking establishment in this particular
7 zone, you cannot obtain a building permit
8 without completing the Eating and Drinking
9 Establishment Affidavit.

10 VICE CHAIRMAN DETTMAN: So you are
11 saying that although this is dated 2008, this
12 was filled out for the second C of O?

13 MR. BELLO: Can we see the C of O
14 application for the C of O? That's where the
15 application is. If you look at the back of
16 the application for the original Certificate
17 of Occupancy --

18 VICE CHAIRMAN DETTMAN: Yes.

19 MR. BELLO: -- the portion of the
20 Official Use Only?

21 VICE CHAIRMAN DETTMAN: Yes.

22 MR. BELLO: See the notation EE.

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1 So one was actually completed at the time of,
2 I think, this --

3 VICE CHAIRMAN DETTMAN: At the time
4 of the original C of O?

5 MR. BELLO: Actually, the Eating
6 and Drinking Establishment is required to be
7 filled out at the time of the building permit
8 application, because the Zoning Administrator
9 uses that instrument to make a determination
10 based on this definition whether you are a
11 fast food restaurant or not.

12 VICE CHAIRMAN DETTMAN: Okay. And
13 what I think you testified to is that the
14 questionnaire that we have on file that is
15 associated with this C of O application was
16 not filled out at the building permit stage.
17 It was filled out along with this?

18 MR. BELLO: With the new C of O.

19 VICE CHAIRMAN DETTMAN: Or
20 essentially the --

21 MR. BELLO: Whether there are two
22 Eating and Drinking Establishments. One that

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1 was completed and filled out at the time of
2 the original issuance of the building permit.

3 VICE CHAIRMAN DETTMAN: Do we have
4 that?

5 MR. BELLO: I actually tried to get
6 a copy of it, but I think we can supply it to
7 the record if the Board allows that.

8 VICE CHAIRMAN DETTMAN: I think
9 that would be informative.

10 COMMISSIONER TURNBULL: Mr. Chair,
11 I have a couple of questions. Mr. Bello, you
12 make reference to the floor plan for the
13 building permit. But the facility, the
14 existing establishment really doesn't look
15 like that. The photographs would indicate
16 that the counter is curved somehow, rather
17 than straight.

18 So I mean, it's a fine point. All
19 I'm saying is that when you ask us to look at
20 this, it's not accurate. We're looking at --
21 and it may be very well the same size, but the
22 photographs that we are provided show a curved

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1 counter.

2 And I notice on one of them there
3 is a big stack of paper cups underneath.

4 MR. BROWN: Well, going back to
5 kind of the -- sorry. The pictures are now
6 and, you know, there have been some
7 reconfiguration. But in August of 2009 when
8 the undercover surveillance was occurring --

9 COMMISSIONER TURNBULL: It looked
10 like this?

11 MR. BROWN: Like the plans.

12 COMMISSIONER TURNBULL: You are
13 certifying that it looked like this in August,
14 basically?

15 MR. KOCAK: Yes.

16 COMMISSIONER TURNBULL: Let me --
17 the applicant is nodding his head saying yes.
18 So let me -- I'm not, obviously, a restaurant
19 operator or know anything about how people
20 operate restaurants. But if you are having a
21 restaurant and you are having -- and you are
22 waiting on people and you are having

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1 tableware, there is obviously a factor that
2 you figure in how many you need, your turnover
3 and how you go about in storing those.

4 And lack of a dishwasher, to me, is
5 sort of indicative that you are not planning
6 that carefully on a restaurant operation.
7 Maybe I'm wrong. But if you have got 18 seats
8 total or something like this, you must be
9 figuring out what your turnaround is.

10 And if Mr. Kocak is right, he is
11 turning over every five minutes, which I think
12 is wrong, but you've got to have a lot of
13 plates and silverware and he doesn't provide
14 glassware. He has either got tin cans and
15 paper cups or bottles.

16 But there has still got to be a
17 factor on how many plates and silverware
18 you've got to have to make that turnaround to
19 keep it as a restaurant.

20 It sounds like he runs out fairly
21 quickly. So I'm wondering, I guess what
22 bothers me, is this simply a token gesture

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1 toward a restaurant use? I mean, how does he
2 figure out how much tableware he needs? It
3 sounds like oh, I need more glasses. I'm very
4 concerned that from an operational standpoint,
5 he isn't meeting the burden of proof as a
6 restaurant.

7 I mean, there has got to be a way
8 to -- someone has got to be able to figure out
9 what that turnover is and how you figure out
10 what you need to operate it. And I'm very
11 concerned that I don't see that kind of data
12 coming forth.

13 I mean, he has got paper cups, we
14 realize that. So he doesn't have glasses or
15 if he has glasses, he has got like 10, which
16 may last an hour. And then you've got to go
17 wash them. And he testified earlier it takes
18 two hours to get things washed, because you've
19 got to take them downstairs and someone has
20 got to do them in a sink.

21 And I'm just concerned that what
22 I'm hearing doesn't make me feel warm and

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1 comfy that as a restaurant operation he is
2 really taken in account everything that he
3 needs to operate this.

4 And I mean, Item C says a
5 dishwasher. It says hey, that's one of the
6 basic things you've got to have to do a
7 restaurant. So I'm looking for some input on
8 how his operation satisfies this.

9 MR. KOCAK: This is the restaurant.
10 I'm trying to act restaurant. It's not
11 something I'm trying to do something else and
12 doing fast food and trying to act as a
13 restaurant. This is a restaurant.

14 And all the prep as restaurant, all
15 we prepare. But the only issue is here why my
16 table -- the dish -- the silverware is not
17 enough because of the Friday and Saturday
18 nights, only like five hours. That's why I
19 said it's not some -- it's not enough, then I
20 was using.

21 But the lunch, the dinner, after
22 like 12:00, 1:00, we have perfectly fine.

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1 This goes -- is enough for us to keep it. But
2 between 1:30 to 2:30 or 2:00 to 3:30, 3:15,
3 it's two hours or one and a half hours is
4 become -- because the potential -- the
5 Georgetown they come in because the Potomac
6 Street, that's why it wasn't enough.

7 But normally, it's enough for us to
8 hold my patrons.

9 COMMISSIONER TURNBULL: But I
10 thought, and maybe I'm wrong, you said that in
11 those later hours a lot of that is carry-out.
12 Am I wrong?

13 MR. KOCAK: It's not -- many people
14 comes. They want to sit. If there's not
15 enough tables, they want to take home or they
16 want to take -- most of the Georgetown
17 University kids take home and they want to
18 take it out. I said okay. If they want to
19 sit, they can sit.

20 But it's a little bit we rushed
21 that time, that's why I was using the paper
22 plates. But other than the -- except those

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1 hours, I was using my regular -- it's enough
2 for us to use.

3 COMMISSIONER TURNBULL: So you are
4 saying in August, you had tableware?

5 MR. KOCAK: Yes.

6 COMMISSIONER TURNBULL: And if
7 anybody from DCRA came in, they would have
8 seen that?

9 MR. KOCAK: Yes. It was there.

10 COMMISSIONER TURNBULL: Okay.
11 Thank you.

12 MR. KOCAK: Certain hours.

13 CHAIRMAN LOUD: Thank you, Mr.
14 Turnbull. We are now at about 6:40 and should
15 probably go about 20 more minutes. I think
16 that we can get through as much of the cross
17 of the expert as we are allowed to get through
18 and then after that, I think, we have taken a
19 look at the calendar and it looks like the
20 next available date certain, particularly with
21 Mr. Turnbull back with us is February the 9th
22 in the afternoon. And I believe we can put it

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1 on as the first case in the afternoon.

2 There is currently only one case
3 scheduled in the afternoon. I think we have a
4 discretion to order the sequence of cases.

5 MR. BROWN: It will be when?

6 CHAIRMAN LOUD: So that would be
7 February the 9th, Tuesday, February the 9th.

8 MRS. BOLLING: Chairman Loud?

9 CHAIRMAN LOUD: In the afternoon.
10 Yes?

11 MRS. BOLLING: DCRA is going to be
12 here in the morning for an appeal.

13 CHAIRMAN LOUD: Yes.

14 MRS. BOLLING: And we are here for
15 the Francis Field appeal.

16 CHAIRMAN LOUD: Yes.

17 MRS. BOLLING: And we will also be
18 here for the Philly Pizza appeal on the same
19 day. I just wanted to bring that to your
20 attention.

21 MR. BROWN: Well, Mr. Kocak, who I
22 think is the guest of honor, is not going to

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1 be in the country. I think that's right?

2 MR. KOCAK: Yes.

3 MR. BROWN: Could we -- he --

4 MR. KOCAK: I can do it.

5 CHAIRMAN LOUD: I think we were
6 sort of throwing back some dates as you were
7 doing the same. It looks like the only other
8 date that we would have really would be
9 January 26th in the afternoon. It would be the
10 only hearing case for that afternoon. We
11 would have two decisions to go through to
12 start off the afternoon and could probably
13 start the hearing close to 2:00.

14 MR. BROWN: I'm sorry?

15 CHAIRMAN LOUD: I think we are
16 looking at February the 9th as an option. You
17 said your client would be out of the country.
18 I mean, it's your call as to whether he
19 absolutely needs to be here.

20 MR. BROWN: Well --

21 CHAIRMAN LOUD: We would certainly
22 be through with his part of the presentation.

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1 But nonetheless, you said that and I respect
2 that. And then January 26th, which would be a
3 couple of weeks down the road. I think Mrs.
4 Bolling had some comments on that. But what
5 were you looking at?

6 We don't want to continue it out,
7 you know, beyond the next couple of weeks
8 really.

9 MR. BROWN: The afternoon of the
10 26th?

11 CHAIRMAN LOUD: This would be the
12 afternoon of the 26th. I think we have a very
13 full morning.

14 MR. BROWN: This isn't about me,
15 but that is, for me personally, very
16 problematic, given an obligation I have for my
17 daughter.

18 MR. SULLIVAN: Excuse me. We don't
19 -- we have a key witness out that day, too,
20 one of our intervenors.

21 CHAIRMAN LOUD: On the 26th?

22 MR. SULLIVAN: On the 26th, yes.

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1 MRS. BOLLING: And, Chairman Loud,
2 I thought we had a hearing for Kuyan on the
3 26th in the afternoon or is that a decision?

4 CHAIRMAN LOUD: I think that's a
5 decision.

6 MRS. BOLLING: A decision, okay.
7 I'm sorry.

8 CHAIRMAN LOUD: Correct, that's a
9 decision.

10 MRS. BOLLING: Okay.

11 CHAIRMAN LOUD: So I mean, you
12 wouldn't even have to show up.

13 MRS. BOLLING: We've got to come.

14 MR. BROWN: Mr. Chairman, could you
15 --

16 CHAIRMAN LOUD: I just want -- yes?

17 MR. BROWN: -- give me -- what was
18 it February 9th?

19 CHAIRMAN LOUD: February the 9th.

20 MR. BROWN: In the afternoon?

21 CHAIRMAN LOUD: In the afternoon.

22 MR. BROWN: Is that --

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1 CHAIRMAN LOUD: February 9th in the
2 afternoon.

3 MR. SULLIVAN: February 9th is fine
4 with us.

5 CHAIRMAN LOUD: It's fine with the
6 intervenor. Mrs. Bolling said it's already
7 fine for her.

8 MRS. BOLLING: Well, no. I wanted
9 to know does that mean Francis Field is
10 bumped?

11 CHAIRMAN LOUD: It's not bumped.
12 It's just --

13 MRS. BOLLING: That means I'm going
14 to be here like from 9:30 in the morning until
15 9:00 at night? Is that what Chairman Loud is
16 saying?

17 CHAIRMAN LOUD: Yes.

18 MRS. BOLLING: Great. Thank you
19 very much.

20 CHAIRMAN LOUD: You will be in good
21 company, because we'll be here with you. It
22 won't be bumped. I mean, obviously, we're

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1 going to try to honor the cases that have
2 already been noticed and everything. It will
3 be a long day.

4 You are on all of the -- which
5 morning cases are you on?

6 MRS. BOLLING: William Reaves. Is
7 that the name of it? Oh, it may be a square
8 lot or an address. It's William Reaves, 4908
9 Quarles.

10 CHAIRMAN LOUD: 23, a variance,
11 yes. Well, I mean, I'm pretty clear you will
12 not have to show up at 9:30 a.m., because
13 we've got three cases before we get to Reaves.

14 MRS. BOLLING: Okay. Thank you,
15 Chairman.

16 CHAIRMAN LOUD: But you will have a
17 long day. So we're looking at February 9, it
18 looks like?

19 MR. BROWN: Yes, that works.

20 CHAIRMAN LOUD: Okay. All right.

21 MR. SULLIVAN: So that's set,
22 right? That's -- I have a -- I would like to

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1 consult with my --

2 CHAIRMAN LOUD: Sure.

3 MR. SULLIVAN: -- clients for just
4 30 seconds.

5 CHAIRMAN LOUD: Okay. Sure. Yes,
6 sir, Mr. Sullivan, I think we stepped away for
7 you to confirm with your clients.

8 MR. SULLIVAN: Thanks. The
9 discussion was based on the delay and the
10 further continuation and the fact that the use
11 continues. We were discussing whether or not
12 we should request that the Board lift the
13 stay, based on the evidence that they have
14 heard today.

15 And we don't want to be
16 unreasonable, but we understand it could get
17 continued at the next hearing, too. So at
18 some point, we think that decision should be
19 revisited. But if there can be some
20 compromise where they would close their doors
21 at 11:00 p.m., then we would not request that
22 the Board lift the stay. And we would be fine

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1 until the next hearing date, otherwise, we
2 will ask that the Board consider that briefly,
3 if possible.

4 CHAIRMAN LOUD: Let's see what they
5 have to say and then, first things first.
6 Let's make sure we are confirmed for February
7 the 9th and that all parties can make it. We
8 are not going to be able -- I mean, everyone
9 understands it's not an option. We are not
10 going to be able to finish tonight.

11 There are three major parts of the
12 proceeding that have not been heard. So the
13 Zoning Administrator, the ANC, the intervenor.

14 So let's bring that to closure. Then I think
15 we can talk about the second issue.

16 MR. SULLIVAN: Excuse me, I'm
17 sorry. The 9th, is that the morning or the
18 afternoon?

19 CHAIRMAN LOUD: That would be the
20 afternoon of the 9th.

21 MR. SULLIVAN: Thank you.

22 CHAIRMAN LOUD: So then it looks

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1 like we are confirmed for the afternoon of
2 February 9. And again, we will calendar it as
3 the first case on the afternoon calendar,
4 which I think would allow us to get through
5 the entire case that day.

6 Why don't we do this, it's about
7 6:50. And I think we may have one additional
8 issue to spend some time on very briefly.
9 We're still going to adjourn around 7:00 p.m.,
10 maybe a little after 7:00.

11 Why don't we take a five minute
12 break and come back in about five minutes?
13 Did you have something before the break?

14 MR. BROWN: No, no.

15 CHAIRMAN LOUD: Okay. Okay. So
16 why don't we take about a five minute break,
17 come back in five minutes and then we will
18 wrap up for today. Thank you.

19 (Whereupon, at 6:50 p.m. a recess
20 until 7:17 p.m.)

21 CHAIRMAN LOUD: This hearing is
22 back in session. I think we were at the point

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1 of concluding for the afternoon. We had
2 agreed on February 9 in the afternoon as a
3 continuation date for the case.

4 And there had been raised by, I
5 think, Mr. Sullivan the question of the stay
6 that is currently in effect. And I think we
7 did want to spend a few moments on that.

8 I don't want to spend a whole lot
9 of time on it. I think we are at the point of
10 wrapping up for today and this is a perfect
11 place to do it, in terms of saving cross for
12 February 9th and then getting into the ZA's
13 case and the intervenor's case.

14 Why don't we start with you, Mr.
15 Sullivan, if you would like to very briefly
16 just take us through what you had begun to
17 share when we went off the record?

18 MR. SULLIVAN: Thank you. Based on
19 what we have heard. Well, based on what was
20 filed in the prehearing statement, the
21 appellant admitted that over an extended
22 period of time, 45 percent on-premises dining,

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1 55 percent off-premises dining.

2 The appellant also admitted in his
3 testimony or on cross examination that that
4 number is probably higher than it was at the
5 relevant time being considered in this appeal.

6 Appellant's counsel has stated some
7 weeks he is a restaurant, some weeks he is not
8 a restaurant.

9 MR. BROWN: I object. I never said
10 that. I mean --

11 CHAIRMAN LOUD: Objection noted.

12 MR. BROWN: If you're putting words
13 in my mouth, let's put the right ones. I
14 mean, I certainly never said that.

15 CHAIRMAN LOUD: Objection noted.

16 MR. SULLIVAN: Okay. I disagree.
17 I think he said that exactly. And we can
18 check the transcript later. But at any rate,
19 he said something to the effect that some
20 weeks he meets the requirements, based on this
21 calculation, some weeks he doesn't, based on
22 this calculation.

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1 I would argue, in that case, you
2 need a Certificate of Occupancy and you need
3 to operate every week as a restaurant.

4 So I think whether or not the
5 appellant is likely to prevail on the merits
6 has changed considerably from your
7 consideration at the stay proceeding.

8 And also, I think the -- on the
9 issue of the public interests getting harmed,
10 this is not a situation where a business owner
11 is being unfairly put upon by the Government.

12 This is a situation where a business owner
13 has gotten a free pass for a year and a half
14 to operate a use that requires a special
15 exception.

16 He has gotten away with it for a
17 year and a half. It has harmed my clients.
18 And it continues. So I would just -- I don't
19 see any reason why the stay should not be
20 lifted.

21 However, since it is only a month
22 away and we have come this far, that's why we

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1 have proposed some sort of reasonable
2 accommodation where the appellant would agree
3 to limit his late night hours. And then my
4 clients would not object to that and would not
5 ask that the stay be lifted.

6 CHAIRMAN LOUD: Okay. And just so
7 I'm clear on what you are proposing. I'm not
8 saying I support it or that Mr. Brown will go
9 for it. But you are saying modify the late
10 night hours every night of the week or
11 weekends only or modify it as to carry-out
12 only, modify it as to restaurant?

13 MR. SULLIVAN: Every night.

14 CHAIRMAN LOUD: Every night. As to
15 just the carry-out or the all inclusive, both
16 the restaurant and the carry-out?

17 MR. SULLIVAN: Yes, just close at
18 11:00 everything.

19 CHAIRMAN LOUD: Close at 11:00,
20 okay. All right. Well, just so everybody
21 understands what is being said.

22 Mr. Brown?

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1 MR. BROWN: One, I don't see any
2 reason to disturb the stay. One, we haven't
3 revisited that issue in any detail.

4 Two, I in no way have admitted that
5 my client is not operating as a restaurant.
6 And in fact, based on the Board's position,
7 the information I'm providing is useful, but
8 not determinative, because you are looking at
9 a period of August '09.

10 We still very much maintain as we
11 did earlier that he is operating as a
12 restaurant.

13 Well, first, he is not operating as
14 a fast food establishment and that he is, in
15 fact, operating as a restaurant. There is no
16 need to disturb the stay.

17 Quite frankly, if you look at what
18 DCRA has submitted in this case, justifying
19 their action, other than a few pages from a
20 discussion of a Zoning Commission case long
21 before the decisional element, it's hard to
22 believe that DCRA had any basis for taking

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1 this action.

2 Again, assuming they are providing
3 all the information they have, which is their
4 obligation, so I think I might, quite frankly,
5 come out of this as my case is stronger. I've
6 got an expert witness. I've got nothing from
7 DCRA. They can't even prove that the Zoning
8 Administrator has the delegated authority to
9 issue the Notice to Revoke.

10 So I think there is no reason to
11 disturb the stay.

12 Having said that, 11:00, my client
13 closing at 11:00 seven days a week, you might
14 as well revoke his C of O anyhow. Boeymonger
15 at the corner, which I assume nobody objects
16 to, closes at least at midnight. 11:00 is
17 suicide for my client.

18 He would agree --

19 MR. SULLIVAN: We'll agree to
20 midnight.

21 MR. BROWN: What? What?

22 MR. SULLIVAN: We'll agree to

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1 midnight.

2 MR. BROWN: My client would agree
3 to on all nights close at 2:30, door shut, no
4 patrons. And he would be allowed to continue
5 his carry -- delivery, sorry, delivery on
6 Friday and Saturday until 3:30 using the back
7 door as he does now.

8 But he is also under an early
9 closing scenario. He is going to remove his
10 security in the evenings, because given the
11 time frame involved, it is no longer for
12 purposes of his business.

13 So those -- that's where we stand.

14 CHAIRMAN LOUD: Thank you, Mr.
15 Brown. And, Mrs. Bolling?

16 MRS. BOLLING: The District
17 believes that from the testimony from the
18 appellant, he has not shown a likelihood of
19 success on the merits. We believe the prong
20 for irreparable harm is in his favor. But
21 there is also great harm to the opposing
22 parties, being the community and to the

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1 Government, in the interest of enforcing the
2 Zoning Regs.

3 And we also believe that the public
4 interest is in the Government's favor in
5 denying the stay or lifting the stay as it
6 were, because of the ongoing operations that
7 are in violation of the Zoning Regs.

8 And the District hasn't had a
9 chance to present its case to speak to the
10 issues that Mr. Brown has spoken about about
11 the delegation of authority from the Director.
12 And our investigation -- we had our
13 investigator here to testify, but time ran
14 out. But I'll just put that on the record.

15 CHAIRMAN LOUD: Thank you very
16 much. And thank all of you for both your
17 patience this afternoon, the arguments on the
18 latter issue of the stay as well as making it
19 through up to this point of the hearing.

20 I'll give you my take on where we
21 are, I think, and then open it up to
22 colleagues. I think when we issued our order

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1 on November 17th, one of the things that we
2 said in the order was that the, and it was a
3 very far ranging hearing, specifically on the
4 question of a stay, that took in evidence
5 pertinent to a stay, unlike what we considered
6 here today.

7 One of the things we said was that
8 the stay would be granted up to and through
9 the completion of a hearing, including any
10 bench decision on the appeal of the
11 administrative decision to issue the notice
12 now scheduled for January 12, 2010.

13 I think our intent in wording it
14 thusly was that the stay would remain in
15 effect until the completion of the hearing.
16 And we are not completing the hearing. We are
17 simply continuing the hearing until February
18 the 9th.

19 In addition to that, I think Mr.
20 Sullivan mentioned some concerns about us
21 continuing to continue the case and postponing
22 it and allowing the appellant to remain open

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1 during that period.

2 I don't think it is our intention
3 that this case would be continued at all past
4 February 9. We are doing everything that we
5 possibly can to make sure that this case was
6 heard today and again on February 9. We
7 wanted, in fact, to hear it as early as next
8 week, we just couldn't schedule it.

9 So I don't think that it is our
10 intention or our willingness to allow this to
11 be continued ad infinitum. I think we want to
12 see this brought to closure as soon as we
13 possibly can.

14 Thirdly, I don't think that we have
15 had a hearing here today on TRO-related
16 criteria. And to render a decision like that
17 and reopen the whole case, reopen the entire
18 issue of the stay when we have clearly said in
19 the order that the stay is going to remain in
20 effect through a certain period, but to now
21 reopen it without having heard all of the
22 testimony, it seems a bit premature.

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1 I mean, conceivably, DCRA could
2 present its case and it would have so many
3 holes in it that one would not know until
4 after that whether or not there would be a
5 substantial likelihood of success on the
6 merits. We don't know one way or the other.

7 But my point is that we are sort of
8 midway between the proceeding and I think it
9 is a premature point to reach a conclusion
10 about a likelihood of success on the merits.

11 So overall, I think, what I'm
12 taking away from this is that we had a very
13 focused, very specific hearing on the TRO. We
14 allowed as much evidence in as was pertinent.

15 And we reached a decision.

16 And in reaching that decision, said
17 that it would remain in effect through the
18 completion of the hearing. We are pushing it
19 as hard as we humanly can to make sure that
20 this is done very, very promptly. And so I'm
21 very much in support of our keeping the stay
22 in effect until the conclusion of the hearing,

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1 which I think will take place on February the
2 9th.

3 And if for some reason we get to
4 February 9th and it appears as though there is
5 another need to continue, I think that we need
6 to address the stay at that time and not
7 necessarily tonight. That's where I am on it,
8 colleagues.

9 VICE CHAIRMAN DETTMAN: I'm in
10 agreement, Mr. Chair.

11 CHAIRMAN LOUD: Okay.

12 COMMISSIONER TURNBULL: I concur
13 also, Mr. Chair.

14 MEMBER MOLDENHAUER: That makes it,
15 I guess, a unanimous decision.

16 CHAIRMAN LOUD: Then I think what
17 we will do is we will leave the stay, that's
18 the subject of the November 17 order, in
19 effect until, as its terms state, the
20 completion of the hearing on that date. And
21 at the completion of the hearing on that date,
22 the order would terminate.

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1 I don't think anybody is entitled
2 to a stay for the rest of their life. So it
3 is, by its term, going to terminate by its
4 terms.

5 Secondly, I wanted to move to the
6 question of Mr. Brown filing a response to the
7 prehearing statement of the appellant -- I'm
8 sorry, of the appellee in this case. And
9 having had an opportunity to reflect on how we
10 have proceeded from the point that you first
11 requested that and where we are in the
12 proceedings, I don't think it is like a motion
13 where you have, you know, an absolute right to
14 respond to it.

15 In addition to which, we are now
16 going to have about a two week break where you
17 will have an opportunity to review the
18 transcript, marshal the evidence and effect
19 anything that you would put into such a
20 response, you can do it as part of your
21 closing or as part of your further
22 presentation of the case.

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1 So I'm not in favor of allowing you
2 an opportunity to do that. I don't know how
3 my colleagues feel. Okay.

4 And thirdly, I think that there was
5 a request by Mr. Dettman for some additional
6 records and I don't know if you have resolved
7 how you want to move forward on that?

8 VICE CHAIRMAN DETTMAN: I think you
9 are referring to the Eating Establishment
10 Questionnaire?

11 CHAIRMAN LOUD: Questionnaire, yes.

12 VICE CHAIRMAN DETTMAN: That was
13 supposedly or perhaps prepared for at the
14 building permit stage in 2008. And from what
15 I gather from the testimony today, it seems
16 that a questionnaire should have been prepared
17 for the 2009 C of O. Maybe it was, maybe it
18 wasn't.

19 But I wouldn't -- maybe I'm not
20 requesting it to be provided to us prior to
21 the continuance of the hearing, but ask the
22 parties that if you do have access to those

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1 documents, that would be very, very helpful
2 for the Board. They should be in DCRA's
3 files, so maybe DCRA can come prepared with
4 those documents.

5 I think the Board is going to want
6 to see those.

7 CHAIRMAN LOUD: Very good.

8 MR. BROWN: Mr. Chairman, if I
9 could ask and I certainly, I think, concur on
10 the filing response. We will wait and see on
11 that as far as going forward on the hearing,
12 rather than a response.

13 The one thing that concerns me is a
14 kind of related matter. I have heard several
15 times today that DCRA is going to, through its
16 testimony or otherwise, establish certain
17 things, particularly the Director's delegation
18 and, you know, reports about their
19 investigation.

20 I would hate for us to sit around
21 and wait until February 9th and not have the
22 Board and the parties an opportunity to look

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1 at those things. We don't have discovery
2 before the Board, but, in the past, the Board
3 has often asked various parties to provide
4 information.

5 And I think that would be
6 extraordinarily helpful to the Board, myself,
7 the intervenors, if that documentation was put
8 forward.

9 CHAIRMAN LOUD: Is there a rule
10 requiring the appellee to do that?

11 MR. BROWN: No. No, there isn't a
12 rule. But in this case, the intervenors have
13 certainly put together what amounts to a
14 prehearing statement. DCRA put together a
15 prehearing statement in opposition, but
16 provided no documentation.

17 And it just seems to me maybe it
18 doesn't exist. In fact, at this point, I have
19 to presume it doesn't. But if it does, it
20 certainly would be helpful to the process if
21 they provided it.

22 CHAIRMAN LOUD: Well, I'll give you

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1 my take on it and, obviously, I'm just one of
2 several. I think we have had this issue come
3 up in another case. And I think the appellant
4 has a duty to produce that information a
5 number of days before the hearing.

6 I don't think the appellee does.
7 I'm not positive. And I don't want -- I
8 wouldn't support ordering the appellee to do
9 something that the rules doesn't require the
10 appellee to do.

11 I think I'm hearing you loud and
12 clear on the whole surprise issue. And then
13 sort of having access to records that by
14 virtue of the fact that they are a Government
15 Agency, that you can't get access to. But
16 again, I don't want to go further than what
17 the rules require in a setting like this.

18 MR. BROWN: Okay. Well, I'm not
19 relying on the rules that, you know, say 14
20 days before the hearing I need to file. There
21 is a great big black hole in the rules as it
22 relates to DCRA or the Government in these

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1 cases, but which we have had before.

2 But certainly the Board -- and you
3 have asked me to provide certain documentation
4 having to do with things and have done so in
5 many other occasions in cases, not just for
6 one party or the other, but, you know, things
7 that you needed to have to make your decision.

8 And I think it is within your authority to do
9 that and to avoid surprises.

10 CHAIRMAN LOUD: Mrs. Bolling, did
11 you want to respond to Mr. Brown?

12 MRS. BOLLING: No, I concur with
13 Chairman Loud. The rules don't require us to,
14 so we didn't.

15 CHAIRMAN LOUD: Okay. As I
16 indicated, I think I'm supportive of not
17 requiring the appellee to do something that
18 the rules don't compel the appellee to do.
19 And clearly, if anything is filed and made a
20 part of the record, you would know to serve
21 the appellant and the intervenor in the case.

22 MRS. BOLLING: Absolutely.

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1 CHAIRMAN LOUD: Okay. Is there
2 anything further, colleagues? All right.
3 Anything further from the staff on the case?

4 MS. BAILEY: Are we finished now
5 with the appellant's case, Mr. Chairman? So
6 when we start next time, we will start with
7 DCRA?

8 CHAIRMAN LOUD: Well, finished in
9 the sense that they are through directing, but
10 we are going to cross. There needs to be a
11 cross and then there may be a rehab after the
12 cross --

13 MS. BAILEY: Okay. Thank you.

14 CHAIRMAN LOUD: -- of the
15 appellant's witnesses and then we will go into
16 the Zoning Administrator. Okay.

17 Thanks to each of you. Again,
18 appreciate your patience. And I do look
19 forward to seeing everybody on February 9th.
20 And some of you for all day on February 9th.

21 This meeting is adjourned. Let's
22 go if we can, Ms. Bailey, let's go back on.

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1 So this meeting is adjourned.

2 (Whereupon, the Public Hearing was
3 concluded at 7:37 p.m.)
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