

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Zoning
Board of Zoning Adjustment

PUBLIC MEETING
OF THE BOARD OF ZONING ADJUSTMENT

10:01 a.m. through 1:56 p.m.
Tuesday, September 20, 2011

441 4th Street, N.W.
Jerrily R. Kress Memorial Room
Second Floor Hearing Room, Suite 220-South
Washington, D.C. 20001

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

Board Members:

NICOLE SORG, Vice-Chairperson
(Acting Chairperson)
LLOYD JORDAN, Mayoral Appointee
JEFFREY L. HINKLE, National Capital Planning
Commission Designee
KONRAD W. SCHLATER, Zoning Commission

Office of Planning:

STEPHEN MORDFIN
ARTHUR JACKSON

Also Present:

CLIFFORD W. MOY, Secretary to the Board
SHERRY GLAZER, ESQ.,
Office of Attorney General
JOHN NYARKU, Zoning Commission

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

2 VICE-CHAIRPERSON SORG: The hearing will
3 please come to order. Good morning, ladies and
4 gentlemen. We are located in the Jerrily Kress
5 Memorial Hearing Room at 441 4th Street, N.W.
6 This is the September 20th Public Hearing of the
7 Board of Zoning Adjustment of the District of
8 Columbia.

9 My name is Nicole Sorg, Vice-Chairperson.
10 Joining me today Mr. Lloyd Jordan, Mayoral
11 Appointee; Mr. Jeffrey Hinkle, representing the
12 National Capital Planning Commission; and
13 representing the Zoning Commission is Mr. Konrad
14 Schlater.

15 Copies of today's hearing agenda are
16 available to you and are located to my left in
17 the wall bin near the door.

18 Please be advised this proceeding is
19 being recorded by a court reporter and is also
20 webcast live. Accordingly, we must ask you to
21 refrain from any disruptive noise or actions in
22 the hearing room. When presenting information to

1 the Board, please turn on and speak into the
2 microphone, first stating your name and home
3 address. When you are finished speaking, please
4 turn your microphone off, so that your microphone
5 is no longer picking up sound or background
6 noise.

7 All persons planning to testify either in
8 favor or in opposition are to fill out two
9 witness cards. These cards are located to my
10 left on the table near the door and on the
11 witness tables. Upon coming forward to speak to
12 the Board, please give both cards to the court
13 reporter sitting to my right.

14 Also, if you wish to file written
15 testimony or additional supporting documents
16 today, please submit 12 copies to the Secretary
17 for distribution. If you do not have the
18 requisite number of copies, you can reproduce
19 copies on a machine in the Office of Zoning,
20 located across the hall.

21 The order of procedure for special
22 exception and variances is: one, statement of

1 the Applicant and of Applicant's witnesses; two,
2 parties and persons in support; three, parties
3 and persons in opposition; four, government
4 reports, including the Office of Planning,
5 Department of Transportation, Office of the State
6 Superintendent for Education, and the Department
7 of Public Works; five, report of the Advisory
8 Neighborhood Commission; and six, rebuttal and
9 closing statement by the Applicant.

10 Pursuant to Sections 3117.4 and 3117.5,
11 the following time constraints will be
12 maintained. The Applicant, Appellant, persons
13 and parties, except an ANC in support, including
14 witnesses, are allotted 60 minutes collectively;
15 Appellees, persons and parties, except an ANC in
16 opposition, including witnesses, also allotted 60
17 minutes collectively. Individuals are allotted 3
18 minutes and organizations 5 minutes.

19 These time restraints do not include
20 cross-examination and/or questions from the
21 Board. Cross-examination of witnesses is
22 permitted by the Applicant or parties. The ANC

1 within which the property is located is
2 automatically a party in a special exception or
3 variance case. Nothing prohibits the Board from
4 placing reasonable restrictions on
5 cross-examination, including time limits and
6 limitations on the scope of the
7 cross-examination.

8 The record will be closed at the
9 conclusion of each case, except for any material
10 specifically requested by the Board. The Board
11 and the staff will specify at the end of the
12 hearing exactly what is expected and the date
13 when the persons must submit the evidence to the
14 Office of Zoning. After the record is closed, no
15 other information will be accepted by the Board.

16 The Sunshine Act requires that the public
17 hearing on each case be held in the open and
18 before the public. Pursuant to Section 405(b)
19 and 4056 [sic] of the Open Meetings Act, the
20 Board may, consistent with its rules and
21 procedures and the Open Meetings Act, enter into
22 a closed meeting on a case for purposes of

1 seeking legal counsel on a case per Section
2 405(b)(4) and/or deliberating on a case per
3 Section 405(b)(13) of the Open Meetings Act, but
4 only after providing the necessary public notice
5 and in the case of an emergency closed meeting
6 after taking a roll call vote.

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

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

15 The Board will now consider any
16 preliminary matters. Preliminary matters are
17 those which relate to whether a case will or
18 should be heard today, such as requests for
19 postponement, continuance or withdrawal, or
20 proper and adequate notice of the hearing has
21 been given.

22 If you are not prepared to go forward

1 with a case today or if you believe that the
2 Board should not proceed, now is the time to
3 raise such a matter.

4 Mr. Secretary, do we have any preliminary
5 matters?

6 MR. MOY: Good morning, Madam Chair.

7 There are a few items for me to report.
8 First is there are party status requests in two
9 of the applications in the morning, Application
10 No. 18246 and Application 18248. As well,
11 Application 18248, there is also a motion for a
12 continuance.

13 **Application No. 18114**

14 MR. MOY: And finally, my last item is
15 that for the record, Application No. 18114, the
16 Appeal of Ward 5 Improvement, was rescheduled to
17 next week, September 27th at one o'clock p.m.

18 VICE-CHAIRPERSON SORG: Okay, thank you.

19 Before we decide how we are going to go
20 through the preliminary matters, why don't we
21 swear in the folks that are here today. So all
22 individuals wishing to testify today, please rise

1 to take the oath.

2 Mr. Secretary, would you please
3 administer the oath.

4 MR. MOY: Do you solemnly swear or affirm
5 that the testimony you are about to present at
6 this proceeding is the truth, the whole truth,
7 and nothing but the truth?

8 [Witnesses sworn en masse.]

9 MR. MOY: Ladies and gentlemen, you may
10 consider yourself under oath.

11 VICE-CHAIRPERSON SORG: Thank you very
12 much.

13 I think the first thing I'd like to do is
14 -- because we have a motion for continuance in
15 this case, which is the Application of Abdo
16 Development LLC, Case No. 18248, can we get a
17 show of hands on who is here for that case?

18 [Show of hands.]

19 VICE-CHAIRPERSON SORG: One only -- two.

20 All right. Well, I was hoping that we might be
21 able to talk to you guys first, but it looks like
22 we have got some people left to arrive, so we

1 will stick with our original order instead of
2 trying to deal with their continuance first.

3 So, Mr. Secretary, can you call the first
4 case.

5 **Application No. 18248**

6 MR. MOY: Good morning, Madam
7 Chairperson, members of the Board.

8 VICE-CHAIRPERSON SORG: Oh, I see the
9 attorney for this case coming.

10 MS. PRINCE: Allison Prince of Goulston &
11 Storrs, here on behalf of Abdo Development.

12 We advised all of the parties of our
13 request for postponement and served notice on
14 everyone, and that's why nobody is here, and we
15 have no opposition to the request for party
16 status, but we simply wanted additional time to
17 work through our issues with the neighbors.

18 VICE-CHAIRPERSON SORG: Certainly. And
19 we received your request for a continuance, but
20 the request for continuance isn't the only
21 preliminary matter that we were going to go
22 through today. We were also going to go through

1 the request for party status, so --

2 MS. PRINCE: But the parties will not --

3 VICE-CHAIRPERSON SORG: -- if they are
4 not appearing --

5 MS. PRINCE: Right, because they knew
6 that it was postponed.

7 VICE-CHAIRPERSON SORG: All right. Well,
8 if what you are saying is on the record that you
9 have served all of the parties that filed
10 applications for party status, of which I think
11 we had four in addition to the automatic parties
12 and other folks that you would generally serve, I
13 guess my opinion, having reviewed the request for
14 postponement and the filings in the case, I
15 believe that we can go ahead and for good cause
16 shown postpone the hearing in this matter, and I
17 think that we will actually do so for more than
18 60 days.

19 Are there comments from other Board
20 members?

21 [No audible response.]

22 VICE-CHAIRPERSON SORG: Okay. Seeing

1 none, let's find a suitable date for this
2 hearing, unless there's comments from Office of
3 Zoning?

4 MR. MOY: No. Just to help you as you're
5 going through your paperwork, Madam Chair.

6 VICE-CHAIRPERSON SORG: All right.

7 MR. MOY: The Applicant is asking for 60
8 days. We are looking at either the 15th of
9 November, which there is an opening in the
10 afternoon, or the 29th of November in the
11 afternoon as well.

12 VICE-CHAIRPERSON SORG: Ms. Prince, do
13 you have a preference?

14 MS. PRINCE: No preference.

15 VICE-CHAIRPERSON SORG: No preference.

16 It looks like the 29th of November is a
17 little bit lighter, so why don't we put them
18 there.

19 MR. MOY: Thank you, Madam Chair.

20 VICE-CHAIRPERSON SORG: Thank you very
21 much. So this hearing is scheduled for the
22 afternoon session of November 29th, and of

1 course, you seem to already have taken this note,
2 but to make sure to serve all your filings on all
3 those interested parties, and hopefully, you will
4 get some of those issues resolved.

5 MS. PRINCE: Thank you.

6 VICE-CHAIRPERSON SORG: Thank you very
7 much.

8 MS. GLAZER: Madam Chair, there was also
9 one other issue, the service issue on the unit
10 owners.

11 VICE-CHAIRPERSON SORG: Oh, right. Thank
12 you very much.

13 What we would like to do -- thank you.
14 Call you before you left the room, Ms. Prince.
15 What we would like to do in one of our filings,
16 it was indicated that notice of the hearing had
17 not gone to all of the members of the adjacent
18 condominium building, as is required, and so one
19 thing that we would also request, that the
20 Applicant serve notice on each of the unit owners
21 of that particular condominium, and I will -- I
22 believe that is the Willison.

1 Is that something you can agree to?

2 MS. PRINCE: We will do that.

3 VICE-CHAIRPERSON SORG: Great. Thank you
4 very much.

5 And with that, let us go ahead and call
6 our first case, when you're ready, Mr. Secretary.

7 **Application No. 18246**

8 MR. MOY: Yes. Thank you, Madam
9 Chairperson. Good morning, also to members of
10 the Board.

11 That first application is Application No.
12 18246 of PNH 14th Street and R LLC, pursuant to
13 11 DCMR 3104.1 and 3103.2 for a variance from the
14 floor area ratio requirements under Subsection
15 771.2, a variance from the lot occupancy
16 requirements under Section 772, a variance from
17 the nonconforming structure provisions under
18 Subsection 2001.3, and a special exception from
19 the roof structure provisions under Subsection
20 411.5, and the penthouse height limitations under
21 Subsection 1902.1. This is to convert an
22 existing commercial building to multifamily

1 residential with ground floor retail in the
2 Arts/C-3-A District at premises 1401 R Street,
3 N.W., formerly known as 1700 14th Street, N.W.,
4 property located in Square 207, Lot 110.

5 VICE-CHAIRPERSON SORG: Thank you very
6 much, Mr. Secretary.

7 I believe we have one preliminary matter
8 in this case, and that is a request for party
9 status I received from a Mr. John Dodds.

10 Is Mr. Dodds in the audience?

11 [No audible response.]

12 VICE-CHAIRPERSON SORG: Okay. That being
13 said, I guess by nature of his failing to appear,
14 then this request for party status is withdrawn,
15 and we can go ahead --

16 MS. GLAZER: I'm sorry. It would be
17 denied, not withdrawn.

18 VICE-CHAIRPERSON SORG: My mistake.
19 Thank you for the correction.

20 Then this request is denied for party
21 status, and we can go ahead and have the
22 Applicant who has joined us at the table

1 introduce themselves for the record, please.

2 MS. BROWN: Good morning, Madam
3 Vice-Chair. Carolyn Brown from the law firm of
4 Holland & Knight, here on behalf of the Applicant
5 PNH 14th and R LLC, which is an affiliate of the
6 PN Hoffman companies.

7 To my right is Bao Vuong, with the PN
8 Hoffman companies, and to his right is Eric
9 Colbert of Eric Colbert and Associate Architects.
10 We also have Mr. Paul Nassetta from PN Hoffman
11 here to answer any questions.

12 If the Board is ready, I can go into my
13 presentation.

14 VICE-CHAIRPERSON SORG: Please go ahead.
15 Thank you.

16 MS. BROWN: Thank you.

17 We're very pleased to be here this
18 morning for a wonderful project to convert a
19 really lovely historic building from commercial
20 to residential use.

21 The C&P Telephone Company Building was
22 constructed in phases over a period of time in

1 the early half of the 20th century, and it has a
2 fantastic potential as a residential building.
3 At the same time, it has many significant
4 hurdles, because it was constructed for telephone
5 equipment and offices. So we are here today
6 seeking relief in order to proceed with this
7 conversion.

8 Our statement has set forth in great
9 detail each of the areas of relief that we have
10 requested and how we meet the burden of proof.
11 We have the full support of the Office of
12 Planning, and we support their recommendation for
13 approval.

14 We have been to the Historic Preservation
15 Review Board. They are also supportive of the
16 proposed alterations to allow this conversion.

17 We have the ANC support as well as DDOT
18 support.

19 The one party that had registered for
20 party status in opposition obviously has
21 withdrawn and has decided not to appear, because
22 Mr. Vuong spoke with him, explained what a great

1 project this is, and he said, "Yeah, I agree,"
2 and so that is why he is not here today in
3 opposition.

4 Because we believe the record is so full,
5 we are prepared to stand on the record, unless
6 you would prefer a short presentation.

7 VICE-CHAIRPERSON SORG: I actually think
8 that given the nature of the project and its
9 significance, I think that it would be a good
10 idea to go ahead and do a short presentation.

11 MS. BROWN: Absolutely.

12 VICE-CHAIRPERSON SORG: Thank you.

13 MS. BROWN: As you know, we are asking
14 for several special exceptions and area
15 variances.

16 The first is that this is a nonconforming
17 building with respect to height. The Arts
18 Overlay restricts height to 75 feet. The
19 building is already at 80 feet, and we are
20 proposing to have roof structures to allow
21 rooftop access for some of the units and also an
22 elevator override. So, just by the very nature

1 of having a nonconforming structure, it puts us
2 here before the Board.

3 The building also is at 100-percent lot
4 occupancy, which is permissible for a commercial
5 building, but once it's converted to residential,
6 it now exceeds the permissible lot occupancy, so
7 we need relief from that as well.

8 We are also seeking special exceptions to
9 allow an increase in the penthouse height in the
10 Arts Overlay District as well as variance to
11 increase the FAR. Interestingly, the FAR is not
12 a function of the roof structure increase. It is
13 simply to insert sleeping lofts into this
14 building. It is a very narrow building,
15 particularly given its depth, and the only way to
16 get some adequate light and air into the units is
17 to insert these sleeping lofts.

18 So there is numerous exceptional,
19 extraordinary conditions inherent in the property
20 that support the variance test that create the
21 practical difficulties, and there will be no harm
22 to the Zone Plan because of these proposed

1 changes. Similarly, we meet the special
2 exception test.

3 And with that, I'd like to turn it over
4 to our first witness, Mr. Bao Vuong from PN
5 Hoffman.

6 MR. VUONG: Good morning, and thank you
7 for taking the time to listen to our case.

8 My name is Bao Vuong, and I am a
9 development manager with PN Hoffman.

10 For those of you not familiar with PN
11 Hoffman, the firm started in 1993, and we're a
12 local developer focused on urban mixed-use
13 projects.

14 Over the past 18 years, PN Hoffman has
15 successfully completed over 35 projects, with the
16 majority of them in the District. Most recently,
17 we completed Union Row, which is located at the
18 corner of 14th and V Street. This project helped
19 to solidify the revitalization of U Street and
20 the 14th Street corridor.

21 In March of 2010, we purchased 1401 R
22 Street, which sits on the northwest corner of

1 14th and R Street, N.W., from Verizon. It's
2 currently an unfriendly, five-story, historic
3 limestone and brick structure, with many
4 practical redevelopment difficulties.

5 I would like to note that we do not own
6 the taller six-story structure which is on the
7 north side of our building, and that building
8 continues to be owned and occupied by Verizon.

9 From our building's original construction
10 in 1902 through its sale in 2011, it has served
11 as a switching station and a telephone equipment
12 facility for some of the country's largest
13 telephone companies.

14 This site present a unique opportunity to
15 transform what is currently a dead, hard corner
16 into a lively, welcoming building that
17 contributes to the great character of the 14th
18 Street neighborhood.

19 Our current plan is to renovate the
20 historic structure into 36 residential units,
21 with approximately 1,100 square feet of ground
22 floor retail space.

1 Our design leverages the existing
2 historic structure and the tall floor-to-ceiling
3 heights, ranging from approximately 14 to 16
4 feet.

5 In addition, we'd like to soften the
6 hardscape, restore some of the structure's
7 historic stature, and reconnect the building with
8 the neighborhood through the reintroduction of
9 storefronts.

10 We are proposing what we feel is a
11 thoughtful redevelopment solution for a difficult
12 site, given the building's historic status, the
13 size and shape of the lot, and the need for
14 Verizon to continue to occupy the majority of the
15 first floor space and much of the seller level,
16 which our architect will discuss in more detail.

17 These difficulties create a need for the
18 variances and the special exceptions that we are
19 requesting today.

20 In creating this plan, we were sensitive
21 to the surrounding community. As Carolyn
22 mentioned, over the past few months, we've met

1 with property neighbors, the ANC, the Historic
2 Preservation Office, the Office of Planning,
3 DDOT, Dupont Circle Conservancy, and the Logan
4 Circle Community Association. We received
5 unanimous support for our project from all of
6 these groups, including Mr. John Dodd who filed
7 for party status.

8 In conclusion, I am requesting that you
9 grant this application, and I thank you for your
10 time.

11 MS. BROWN: We would like now to turn to
12 Mr. Eric Colbert, our architect.

13 MR. COLBERT: Good morning, Madam
14 Chairperson, members of the Board. My name is
15 Eric Colbert, and I am very happy that PN Hoffman
16 chose me to do this project.

17 As you just heard, we do have several
18 practical difficulties that are a component of
19 this project. This second sheet in the
20 submission shows the original building, which is
21 actually one story less in height, and as you can
22 see on the ground floor, there are these

1 beautiful old show windows that no longer exist,
2 and that's been a real detriment to the
3 community, because that corner has been just kind
4 of a dead zone, kind of fortress-like feeling.
5 So, as part of our work with the Historic staff
6 and also the Conservancy, we have agreed to
7 reopen this and provide more life and landscaping
8 on the R Street side and also bay windows, show
9 windows on the 14th Street side.

10 Another element is you can see this very
11 beautiful cornice, and that go stripped away when
12 they added the fifth floor. And so we are
13 working with Historic Division to replace
14 something that is very similar to that as part of
15 our redevelopment of the building.

16 Part of our practical difficulty has to
17 do with the fact that the depth of the building
18 is not really in keeping with what you'd normally
19 want to have for residential use.

20 This dimension from north to south is 45
21 feet, and also we have the existing building that
22 we cannot use on the north side that basically

1 blocks off the whole north side for having any
2 potential for windows and therefore dwelling
3 units.

4 Typically, a new apartment building wants
5 to be about 60-feet deep from a double-loaded
6 corridor, which would make the units themselves
7 between 25 and 30 feet, but since this is an
8 existing 45-foot dimension that we have to work
9 with, it presents lots of challenges for how to
10 get light into the building. Also because of the
11 historic nature of the structure, we didn't have
12 any potential to add additional windows for the
13 apartments.

14 Because of the fact that the building
15 occupies 100 percent of the lot and is historic,
16 we didn't have any opportunity to create parking,
17 and also part of that is due to the fact that
18 Verizon is keeping more than half of the first
19 floor for their equipment. They are also keeping
20 the whole cellar area, so another aspect of the
21 practical difficulty has just been the way we had
22 to work around their utilities.

1 The fact that we don't have parking led
2 to a marketing strategy that it was very critical
3 to be able to develop units that were on the
4 smaller side. So, basically, most of these units
5 have just one window or maybe two windows at the
6 most. Fortunately, these windows are very large,
7 but as Bao testified, we do have these high
8 ceilings, between 14 and 16 feet, so the only way
9 we could capture a little extra area was in
10 putting a little mezzanine area that people could
11 use for storage or maybe a little home office or
12 something, so that it would just add about a
13 relatively small percentage to the unit area, but
14 it would take advantage of some of the extra
15 ceiling height.

16 As part of our development program, we
17 are proposing to add a penthouse, and working
18 with the Historic folks and the neighbors and the
19 ANC, we have put together a development plan for
20 that penthouse that shows -- this is the site
21 line from across the street, and the new
22 penthouse is well within -- or below the ability

1 from someone to see its existence across the
2 street, and particularly, again, I was mentioning
3 the fact that we were putting this new cornice
4 back on the building to relate it back to the
5 original historic look.

6 Part of the special exception involves
7 the fact that we have this elevator override, as
8 Carolyn mentioned, and there is an element in the
9 Zoning Regulations stating that all penthouses
10 have to be of equal -- you know, all parts of the
11 penthouse have to be of equal height, but there
12 is no reason for us to have the main part of the
13 penthouse be as high as the elevator is.

14 Now, the main function of this penthouse
15 is to give the people that have units on the top
16 floor a stairway access to the roof, so that they
17 could have roofdecks for the beautiful views that
18 are available to the downtown. And we worked
19 with the Office of Planning to develop that.
20 Originally, we were asking if we couldn't maybe
21 put like a study or something up at the penthouse
22 level, and they said no, so we eliminated that

1 from our program.

2 Again, here you see the new storefront
3 windows that we are planning on putting on R
4 Street, and then we will have landscape area in
5 the remainder of it.

6 There was a bike share station that was
7 here and then got moved across 14th Street.
8 We'll probably end up putting that back as part
9 of our program, and in addition to that, we have
10 a bike storage area in the back of the building
11 to help offset the lack of parking spaces. There
12 also is a car share facility right across the
13 street, so that combined with the small units, we
14 think is a really workable program, and the
15 community is very happy that we're kind of
16 reclaiming this land and putting it to good use
17 and having a little commercial space there on the
18 corner with the potential for a sidewalk cafe.
19 We don't have a room for a full-size restaurant,
20 but it could be a shop or something like that.

21 Thank you.

22 MS. BROWN: Madam Chair, that concludes

1 our direct presentation. We are happy to take
2 any questions that you have now.

3 VICE-CHAIRPERSON SORG: Thank you very
4 much.

5 Do other Board members have questions at
6 this time?

7 [No audible response.]

8 VICE-CHAIRPERSON SORG: I have a couple.

9 The first, I guess I will start where we
10 left off, to Mr. Colbert. Just a couple of quick
11 questions. What is the general ceiling height in
12 the sleeping lofts that you are creating?

13 MR. COLBERT: It varies from floor to
14 floor, but it would be about 7 feet.

15 VICE-CHAIRPERSON SORG: 7 feet, okay.

16 And in the penthouse, it's only for roof
17 access. There is no habitable space; is that
18 correct?

19 MR. COLBERT: There is no habitable
20 space. That's one thing we changed to comply
21 with the requirements of the Office of Planning.

22 We do have a small room there for the --

1 you know, there are the units on the top floor
2 that have their own stairway access to the roof.
3 It's only the stairway that's in there, but then
4 on the east side of the building, there is a
5 small room for the other residents on the other
6 floors, so that they can have an intermediate
7 space before they go out onto their roofdeck,
8 facing the east side of the building.

9 VICE-CHAIRPERSON SORG: And that's
10 communal space, as you say?

11 MR. COLBERT: Communal, yes.

12 VICE-CHAIRPERSON SORG: Okay. Thank you.

13 One other question, back to Ms. Brown, I
14 guess. You have seen and reviewed the DDOT
15 letter that was received into the file, and they
16 had a couple -- obviously, they were, as you
17 mentioned, in support of the project, but it
18 sounded like they had a couple of questions. I
19 wondered if you wanted to address any of those or
20 if you had had further discussions with DDOT
21 since receiving this.

22 MS. BROWN: Yes. First and foremost, we

1 fully comply with the Zoning Regulations with
2 respect to parking and loading. We are not
3 seeking any variance relief from that. We are
4 fully compliance.

5 So the recommendations that they have are
6 not germane necessarily to this proceeding;
7 nevertheless, we have agreed to implement some
8 incentives for car sharing or bike programs and
9 Metro fare cards for the parking aspect, and
10 we've also worked with them on some loading
11 aspects, but we expect that we will continue to
12 work with DDOT at the appropriate time on those
13 particular issues.

14 VICE-CHAIRPERSON SORG: Thank you.

15 Yes. I mean, I did notice that what
16 we're talking about here is not relief from those
17 sections, but in addition, they had a question
18 regarding the entrance. I guess that's also not
19 under question here, as it's in public space, but
20 have there been significant changes to the plans
21 as a result of that, of any changes that were
22 made there? That might be something that we

1 needed to know about.

2 MS. BROWN: To the extent that we do need
3 to make any changes as a result of discussions
4 with DDOT, we would still need to go back to the
5 Historic Preservation Review Board. So, to that
6 extent, we may need to request flexibility to
7 accommodate that, but we don't anticipate having
8 to do much moving of the entrances, because it's
9 fairly fixed, given the historic status of the
10 building.

11 VICE-CHAIRPERSON SORG: Okay, thank you.
12 That's all for my questions.

13 Do other Board members have questions for
14 the Applicant?

15 [No audible response.]

16 VICE-CHAIRPERSON SORG: Okay. Then we
17 will turn to the Office of Planning, please.

18 MR. MORDFIN: Good morning, Chair and
19 members of the Board. I am Stephen Mordfin with
20 the Office of Planning.

21 The subject property is unique in that it
22 was constructed prior to the adoption of the

1 access to the roof in conformance with the
2 requirements of ADA and the Building Code.

3 These variance requests would facilitate
4 the use of the building, as encouraged by the
5 Arts Overlay, with an expanded housing supply and
6 the introduction of new commercial space.

7 The special exception for the additional
8 height of the roof structures and the special
9 exception for roof structures of two different
10 heights would allow for the adaptive reuse of the
11 building and minimize the visibility of roof
12 structures to the extent possible. Therefore,
13 the proposed roof structures would not adversely
14 affect the use of neighboring property.

15 Therefore, the Office of Planning
16 recommends that the Board grant the variance and
17 special exception requests. Thank you.

18 VICE-CHAIRPERSON SORG: Thank you very
19 much.

20 Do Board members have questions for the
21 Office of Planning?

22 [No audible response.]

1 VICE-CHAIRPERSON SORG: Seeing none, does
2 the Applicant have any questions for the Office
3 of Planning?

4 MS. BROWN: No, we do not. Thank you.

5 VICE-CHAIRPERSON SORG: Thank you very
6 much.

7 And now we will see if there are any
8 persons in support of the application in the
9 audience wishing to testify.

10 [No audible response.]

11 VICE-CHAIRPERSON SORG: Seeing no one, we
12 will see if there are any persons in opposition
13 wishing to testify.

14 [No audible response.]

15 VICE-CHAIRPERSON SORG: And also seeing
16 no one, I will note for the record that we have
17 received in our Exhibit No. 24, a letter from
18 ANC-2F, which meets our standard for great weight
19 and in which ANC-2F recommends approval of this
20 application.

21 Is there anyone from ANC-2F in the
22 audience?

1 [No audible response.]

2 VICE-CHAIRPERSON SORG: There is not.

3 Then we will go ahead, and if there are not any
4 further questions from the Board, then we will go
5 ahead and turn back to the Applicant for any
6 closing statements.

7 MS. BROWN: Thank you, Madam Vice-Chair.

8 Based on the testimony that you've heard
9 today and the evidence of record, we believe we
10 have demonstrated that we have met our burden of
11 proof for the variance relief and special
12 exceptions in the application, and we
13 respectfully request that you grant the
14 application.

15 Thank you.

16 VICE-CHAIRPERSON SORG: Thank you very
17 much.

18 I think that we've heard a good deal
19 today regarding the project, and also, as the
20 Applicant mentioned, the filings were pretty
21 complete in what we received earlier, so I think
22 that we can go ahead and deliberate today, unless

1 there are any issues.

2 [No audible response.]

3 VICE-CHAIRPERSON SORG: Okay. Then I
4 can go ahead and start us off. We have a number
5 of areas of relief that this Applicant is
6 requesting.

7 First to the variances -- with regard to
8 the variances first, requesting relief from the
9 floor area ratio from 4.5 permitted to 6.02 which
10 is proposed, lot occupancy, and in addition to
11 nonconforming structure which is devoted to a
12 conformed use under 2001.3, I think that with
13 regard to the first prong in what is an area
14 variance and unique -- the first prong regarding
15 uniqueness, I think that there is a confluence of
16 factors here.

17 I think we've heard that primarily the
18 long and narrow lot does make the adaptive reuse
19 of this project somewhat more difficult. As Mr.
20 Colbert testified, every developer, I think,
21 wants a 60-foot lot with nothing on the other
22 side, that you can have a perfect double-loaded

1 corridor. Clearly, that's not the case here,
2 which makes the access and layout of the units
3 rather difficult and getting adequate light and
4 air into them similarly difficult.

5 I think that clearly there is a
6 contributing historic building, obviously, which
7 has been improved by HPRB, but has limitations
8 and guidelines for the design under that
9 approval. In specific, I would reference that
10 they request that no new window openings be
11 allowed.

12 In addition, contributing to the
13 uniqueness, the tall and varying floor heights,
14 as well as the zoning history leading to the
15 nonconforming height and lot occupancy, as well
16 as there being no opportunity for adding light
17 and air from the north -- similarly, I think with
18 regard to the ground floor layout and the cellar
19 that the collocation of the Verizon equipment
20 also adds a challenge and certainly a uniqueness
21 in this case.

22 With regard to the practical difficulties

1 and the lot occupancy, to me it's pretty clear
2 based on the fact that I think this project
3 hurdles over the uniqueness, that it, of course,
4 I think, would be impossible to reduce the
5 footprint, so there, you've got the lot
6 occupancy.

7 With regard to the FAR, I think that the
8 manner in which the project proposes to
9 accomplish the adaptive reuse in the units there
10 is actually pretty smart, and so I would be in
11 support of the FAR relief as well. And I think
12 that based on the testimony as well as the
13 support of the ANC, OP, and the withdrawal of any
14 question of opposition from the neighboring
15 community that we can see there would be no harm
16 from the public good.

17 I think similarly that with regard to the
18 special exceptions requested that both relate to
19 the roof structures, that the same configuration
20 of the property, making a small and narrow roof,
21 as well as the requirement to introduce an
22 elevator and other things under ADA and Building

1 Code gets us over the request for special
2 exception relief.

3 I think also based on what we can see in
4 the elevations that were submitted, they ask that
5 they be held back and not terribly -- not visible
6 really from the street, especially given that the
7 neighbor is still taller than would be, I
8 believe, the highest of the roof structures.

9 I think that the Applicant has addressed,
10 to the extent that it's relevant, the comments
11 that we got from DDOT, and so that being said, I
12 would be in support and would open up for future
13 deliberation.

14 MR. JORDAN: Madam Vice-Chair, I could
15 support this application and this request,
16 particularly this building. It easily appears to
17 be difficult to do anything else with this
18 building, and it has a number of limitations, and
19 I think the recommended use makes a lot of sense.

20 MR. SCHLATER: Madam Chair, I'm happy to
21 support this application. It's a great use of an
22 old historic structure. There are many

1 challenges with the property, and I think the
2 Applicant has proposed a good building that is
3 going to improve that corner significantly, and
4 it would be good for the area.

5 VICE-CHAIRPERSON SORG: Thank you.

6 So that being said, if there is no
7 further deliberation, then I will submit a motion
8 to approve Application No. 18246, application of
9 PNH 14th and R LLC, pursuant to 11 DCMR 3104.1 and
10 3103.2, for a variance from the floor area ratio
11 requirements under Section 771.2, variance from
12 the lot occupancy requirements under Section 772,
13 variance from the nonconforming structure
14 provisions under Subsection 2001.3, and special
15 exceptions from the roof structure provisions
16 under Subsection 411.5, and penthouse height
17 limitations under Subsection 1902.1, to convert
18 an existing commercial building to multifamily
19 residential, ground floor retail in the
20 Arts/C-3-A District at what was 1700 14th Street,
21 N.W., and was now 1401 R Street, N.W.

22 A motion has been made. Is there a

1 second?

2 MR. JORDAN: Second.

3 VICE-CHAIRPERSON SORG: Motion has been
4 made and seconded. All those in favor, say
5 "aye."

6 [Chorus of ayes.]

7 VICE-CHAIRPERSON SORG: Mr. Secretary,
8 can you please read back the vote?

9 MR. MOY: Yes, Madam Chair.

10 The staff would record the vote as 4 to 0
11 to 1. This is on the motion of Chairperson Sorg
12 to approval the application with the zoning
13 relief as she stated. Second the motion, Mr.
14 Schlater. Also in support of the motion, Mr.
15 Jordan and Mr. Hinkle. No other Board members
16 participating. Again, the final vote is 4 to 0
17 to 1. The motion carries.

18 VICE-CHAIRPERSON SORG: Thank you very
19 much, and I think we can call for a Summary Order
20 in this case.

21 MS. BROWN: Madam Vice-Chair?

22 VICE-CHAIRPERSON SORG: Yes.

1 MS. BROWN: One quick point. We
2 mentioned the flexibility for HPRB or DDOT. I
3 don't know that it's necessary, but since you
4 raised it, it's probably prudent if the Board is
5 so inclined.

6 VICE-CHAIRPERSON SORG: I think that we
7 can include flexibility for minor modifications
8 as a result from the requirements for public
9 space and further from HPRB. Thank you for that
10 note.

11 MR. MOY: Thank you.

12 VICE-CHAIRPERSON SORG: And as I was
13 saying, we can request a Summary Order.

14 [Pause.]

15 **Application No. 18247**

16 MR. MOY: The next application for Board
17 action is Application No. 18247. This is the
18 application of Big City Development LLC, pursuant
19 to 11 DCMR 3103.2, for a variance from the floor
20 area ratio requirements under Subsection 771.2, a
21 variance from the rear yard requirements under
22 Section 774, variance from the off-street parking

1 requirements under Subsection 2101.1, variance
2 from the loading requirements under Subsection
3 2201.1. This is to allow the development of a
4 new restaurant in the HS/C-2-A District at
5 premises 1309 and 1311 H Street, N.E., property
6 located in Square 1027, Lot 88 and Lot 89.

7 VICE-CHAIRPERSON SORG: Thank you very
8 much, Mr. Secretary.

9 I see we have got the Applicants joining
10 us at the table. Why don't you go ahead and
11 introduce yourselves for the record, please.

12 MR. FREEMAN: Good morning, members of
13 the Board. For the record, my name is Kyrus
14 Freeman. I am a partner with the law firm of
15 Holland & Knight, representing the Applicant in
16 this case.

17 To my immediate right is Mr. Otis Lance
18 London on behalf of the Applicant. To his right
19 is Mr. Steve Sher, the Director of Zoning and
20 Land Use at Holland & Knight, and we'd like to
21 submit him as an expert in zoning and land use
22 planning.

1 Arranging our boards is Mr. Rick Conrath,
2 a principal with GTM Architects, which is a
3 well-known architectural firm in the city. You
4 have Mr. Conrath's résumé in front of you. He's
5 testified before the Board and the Zoning
6 Commission in a number of cases, and we would
7 like to submit him as an expert in architecture
8 and design.

9 And on the first row is also Tori Gordon,
10 an associate with the firm of Holland & Knight,
11 here to assist.

12 VICE-CHAIRPERSON SORG: Okay, thank you.

13 Let's go to your request for expert
14 witnesses first. I know that we have -- oh,
15 there it is. Okay, thank you. I know that we
16 have Mr. Sher in our records as an expert, and I
17 think we can agree once again to that request.

18 MR. HINKLE: I think we need to take a
19 look at it.

20 VICE-CHAIRPERSON SORG: You want to go
21 through that? You want to go through that
22 résumé?

1 And I am looking quickly at Mr. Conrath's
2 résumé. I don't believe that we have approved
3 him as an expert previously, to my knowledge, and
4 I don't see my binder.

5 MR. FREEMAN: I can just cite two cases.
6 One is BZA Case No. 17983. One is Zoning
7 Commission Case 05-36.

8 VICE-CHAIRPERSON SORG: Okay.

9 MR. FREEMAN: That might have been a
10 little before you guys started to keep the
11 binder, but --

12 VICE-CHAIRPERSON SORG: I think it was,
13 but I see no reason not to approve Mr. Conrath as
14 an expert as a registered architect with 30 years
15 of experience and all the requisite degrees and
16 money paid to hire institutions of higher
17 education.

18 Are there any other comments from the
19 Board in that regard?

20 MR. HINKLE: I agree with that
21 determination.

22 VICE-CHAIRPERSON SORG: Okay. So

1 approved.

2 [Pause.]

3 VICE-CHAIRPERSON SORG: Before you begin
4 your presentation, I guess there's a couple of
5 questions on the areas of relief that I thought
6 we may want to discuss first.

7 The easy one, I think, is OP suggests
8 that the relief requested from the rear yard
9 requirement may not be necessary. Do you have an
10 opinion on that?

11 MR. FREEMAN: We believe the relief from
12 the rear yard is necessary. The Office of
13 Planning indicates it's not. Based on our belief
14 that we think the relief is necessary and that we
15 meet the standard, the variance standard for that
16 rear yard relief, we'd like to have that
17 included, such that if we're incorrect and the
18 Office of Planning is right, then we have an
19 extra area of relief.

20 VICE-CHAIRPERSON SORG: Sure.

21 MR. FREEMAN: However, we do believe rear
22 yard relief is required, and we meet the

1 standard.

2 VICE-CHAIRPERSON SORG: Okay. That's
3 fine with me. Better safe than sorry, I suppose,
4 is your stance.

5 MR. FREEMAN: Right.

6 VICE-CHAIRPERSON SORG: Okay. Now, in
7 your prehearing submissions, you treat the
8 variance request as an area variance, and Office
9 of Planning in their report determines, their
10 opinion is that it's a use variance.

11 MR. FREEMAN: Right.

12 VICE-CHAIRPERSON SORG: They, of course,
13 in their report believe that you meet the
14 variance test under both requirements, and while
15 it wouldn't be an amendment to your application,
16 because both -- with regard to the areas of
17 relief requested because it's still a variance
18 request, did you have a comment on the area
19 variance versus use variance?

20 MR. FREEMAN: Right. I guess I'd start,
21 one, as you said they recommend approval of the
22 application, so I think we ultimately get to the

1 same conclusion, just a different way.

2 We believe it's an area variance. I have
3 a number of cases -- I can cite them or submit
4 them -- in which the Board has determined that
5 variances from the FAR -- in fact, the case you
6 just decided was a variance from the FAR -- are
7 properly treated as area variances, including
8 variances that increase the amount of
9 nonresidential FAR. I have a case as recently as
10 July of 2011 and going back for 20 years.

11 There is a case cited. I'd say there
12 perhaps has been some ambiguity in how the Board
13 has treated it, but we clearly have a number of
14 precedents including, again, precedents from as
15 recently as this year that indicate it's an area
16 variance.

17 And we meet the standard for the area
18 variance, and I think, as the Office of Planning
19 suggested, we meet the standard for use variance
20 as well.

21 So, ultimately, again, given that we come
22 out at the same place, whether they view it as an

1 area variance or a use variance, again, we all
2 agree that the project should be approved;
3 however, we do think it's an area variance.

4 VICE-CHAIRPERSON SORG: Okay. I know
5 that this is something that the Board has --
6 different Boards have gone different ways on, and
7 it's something that maybe there will be groans.
8 But it's something that I'm interested to hear
9 your opinion on in cases in your presentation or
10 however you want to do that.

11 But I agree that we can go ahead and go
12 forward and with the merits of the case and get
13 to how the Board views the variance request,
14 whether it's a use variance or area variance, in
15 our deliberations.

16 If there's any other comments from the
17 Board on that?

18 [No audible response.]

19 VICE-CHAIRPERSON SORG: Okay. Then why
20 don't we --

21 MS. GLAZER: Madam Chair, just to
22 interject. I'm sorry. There is one problem with

1 that approach, I think. If the Board is likely
2 to determine that it is a use variance, the
3 Applicant is going to have to adjust its
4 presentation in accordance with that.

5 VICE-CHAIRPERSON SORG: It sounds like
6 the Applicant may be prepared to do so, but --

7 MR. FREEMAN: As we go through the
8 presentation, you will see that the nature of
9 facts that establish or indicate how we meet the
10 standard of proof for the area variance, i.e.,
11 the practical difficulties associated with
12 meeting the area variance, are very similar and
13 would drive -- would result in an undue hardship,
14 which is the standard for the use variance.

15 So Ms. Glazer is right. We will
16 definitely need to point out what causes --
17 what's a practical difficulty, what's an undue
18 hardship, but ultimately, it's a function of the
19 site. It's a function of the proposed -- the
20 character of H Street. It's a function of what's
21 happening out there and a function of layout and
22 design of the building, which our architect will

1 talk about when he goes through his presentation.

2 VICE-CHAIRPERSON SORG: Ultimately, I
3 mean, if -- I feel comfortable going forward, but
4 if other Board members would like to indicate
5 whether we want to agree on whether to treat it
6 as a use variance or area variance now, before
7 the Applicant begins their presentation, then we
8 can entertain that as well.

9 MR. JORDAN: I do have some uneasiness
10 about going forward under both tests, but I
11 appreciate that the Applicant is willing to do
12 so. But I think just because it's this Applicant
13 -- and at some point, we need to address this,
14 because we have to send the right signals, so
15 people are properly prepared and that we as a
16 Board are properly prepared.

17 So I don't know if we're ready to do it
18 here today. Maybe we can have some other
19 deliberations about it at some point down the
20 line, so that we can really get our arms around
21 this, especially if we just recently flipped the
22 other way and we have cases here the other way

1 that was done just recently, also, so it's just a
2 concern that I'm having.

3 VICE-CHAIRPERSON SORG: Then I would ask
4 you, Mr. Jordan, how you would treat the case.

5 MR. JORDAN: No, I just want that for the
6 record. I think we can go ahead and proceed as
7 you've defined, but I think it's something that
8 we shouldn't just pass on.

9 VICE-CHAIRPERSON SORG: Oh, I agree,
10 absolutely, and that's actually why I would like
11 to go forward in this matter.

12 Are there other comments?

13 [No audible response.]

14 VICE-CHAIRPERSON SORG: Everybody feels
15 comfortable, good, happy with how we're going
16 forward, including Ms. Glazer?

17 MS. GLAZER: I'm still not sure if the
18 Applicant is going to present the case as a use
19 variance or an area variance based upon the
20 discussion.

21 MR. FREEMAN: We are going to present --
22 and why don't I just -- just to kind of do this

1 quickly, we are going to present our case as an
2 area variance, because based on the cases that
3 we're handing out, the Board has clearly stated,
4 in our view, at least in these 10 cases, that
5 relief from the FAR requirement, including relief
6 that would extend the amount of nonresidential
7 use, is properly viewed as an area variance.

8 MR. JORDAN: Have you briefed that?

9 MR. FREEMAN: I have these 10 cases. We
10 can definitely go through them. I mean, we can
11 do it pretty quickly. Most of them are Summary
12 Orders. I can do that in 2 minutes, 1 minute, if
13 that's what the Board determines.

14 In terms of the difference between an
15 area and a use variance, I think it's been well
16 established in both the D.C. Court of Appeals,
17 and I have some cases and treatises, that an area
18 variance is a variance in which you are changing
19 something about the building envelope, lot
20 occupancy, height, parking, loading. Those are
21 generally area variances. Whereas, a use
22 variance is a variance in which you are

1 attempting to create a use that is not otherwise
2 permitted in that zone.

3 For example, if you're in a residential
4 zone and you want to build an office building,
5 that is a use variance. In this particular
6 situation, residential and commercial is
7 permitted in this zone. We are just asking to
8 build more commercial than -- we are asking to
9 build more than 1.0 commercial.

10 So commercial is permitted. We're not
11 asking to put a use in the building that is not
12 otherwise permitted. Again, in this zone,
13 commercial is permitted, so it's not in our view
14 and as we believe, the courts and the treatises
15 would support, as well as the prior Board
16 precedents would support, that is an area
17 variance, because the use is permitted.

18 MS. GLAZER: Madam Chair, I feel I must
19 interject here. There's no secret OAG has
20 advised the Board that a nonresidential FAR
21 variance is a use variance and has been treated
22 as such by the Board.

1 Now, I don't doubt that Mr. Freeman is
2 correct, that there are probably cases that he's
3 dug up that say the reverse, but I will say that
4 we did a quick review of this, and the most
5 recent cases that directly address the point,
6 which is the Sweeden case, the most recent case
7 cited in OP's report, and there's a footnote that
8 says that it's treated as a use variance.

9 Now, whether the Board was right or
10 wrong, the Board has treated it most recently as
11 a use variance, and I think if they want to go
12 the other way now, they should get a briefing on
13 this from the Applicant and then explain in the
14 decision why it's -- why they are changing their
15 mind and it's an area variance.

16 MR. FREEMAN: If I might, the most recent
17 --

18 MR. JORDAN: If I can ask, why do you
19 consider it a use variance? Why are you
20 considering it a use variance, other than the
21 cases?

22 MS. GLAZER: I'm not saying I consider it

1 a use variance. I'm saying that the Board has
2 treated it as such, and I'm going by what Board
3 precedent is.

4 My opinion might be different, but I'm
5 just saying that in terms of adhering to
6 precedent, the Board squarely addressed it in the
7 Sweeden case. There are a lot of Summary Orders
8 where it was treated as an area variance. I
9 agree with Mr. Freeman, but the Board didn't
10 directly address it there.

11 But even under Mr. Freeman's principles
12 about FAR variance, I think it probably is a use
13 variance, because you are dealing with a change
14 in use. A nonresidential FAR variance has to do
15 with use. It doesn't have to do with density.
16 Most FAR variances have to do with density, and
17 they are treated as an area variance for that
18 reason.

19 MR. FREEMAN: If I could just cite, just
20 make one point, with all due respect, Ms. Glazer,
21 the most recent case that we cited is from June
22 of 2011, in which an increase in the

1 nonresidential FAR was treated as an area
2 variance. That's July -- I'm sorry. That's June
3 2011.

4 The Sweeden case that they cite is from
5 December of 2010. So, again, the most recent
6 precedent treated an FAR variance over the
7 permitted nonresidential FAR as an area variance.

8 MS. GLAZER: Could I make a suggestion?
9 Perhaps Mr. Freeman would be willing to submit
10 the cases.

11 MR. FREEMAN: Oh, absolutely.

12 MS. GLAZER: The Board could take a few
13 moments and review them.

14 MR. FREEMAN: I'm sorry.

15 VICE-CHAIRPERSON SORG: I agree. That's
16 what we were requesting. Yeah.

17 MR. FREEMAN: I'm sorry.

18 MR. JORDAN: What's the name of the case,
19 the case number and the name of the case?

20 MR. FREEMAN: Well, the Embassy of
21 Sweeden case that they cite --

22 MR. JORDAN: No, the June 2011.

1 MR. FREEMAN: That's Case No. 18227 of
2 the Corcoran Gallery of Art, and that was a case
3 in which -- and we're familiar with that case,
4 because we handled that case, in which the
5 Applicant was increasing the amount of commercial
6 FAR in the SP-2 Zone, and that was treated as an
7 area variance.

8 MS. GLAZER: I just looked at it. Mr.
9 Freeman is exactly correct; however, that's a
10 Summary Order. And when I said the most recent
11 case, I was really referring to a case where the
12 Board squarely addressed the legal issue, and
13 that doesn't happen in a Summary Order.

14 MR. FREEMAN: I think that was a Summary
15 Order in Sweeden, and that was a footnote, so I
16 don't know if I'd say that was addressing the
17 issue. I'd just say that the Board has
18 determined that something is an area variance,
19 and even in a Summary Order, the Board has made a
20 determination. Otherwise, there would have been
21 a footnote that said this is a use variance.

22 So, again, with all due respect to OAG

1 and OP, I think the precedents are clear that
2 it's an area variance. To the extent that it's
3 unclear and there needs to be some clarity, then
4 that clarity should be made moving forward, so
5 that the next Applicant -- so that everybody is
6 aware moving forward what the standards are going
7 to be, such that we're not today treated at an
8 unfair -- I hate to use the word "fair" -- such
9 that this determination is made proactively, not
10 retroactively, so that Applicants in the future
11 will be aware of what the position is, because
12 you -- with all due respect, again, you cannot
13 say that this is clearly a use variance, because
14 the history of the Board's treatment of that
15 issue does not support that.

16 Tab 1. Again, June 2001. That's an area
17 variance.

18 Tab 2. The same exactly thing, a
19 variance from the nonresidential FAR. To
20 increase, to have commercial on the first,
21 second, and third floor. October of 2010. So I
22 understand that the Sweeden case was December

1 2010, but the regulations haven't changed since
2 then. Again, the same exact thing, to have
3 commercial FAR on the first floor, the second
4 floor, and the third floor, area variance, which
5 is what we're doing today, what we're asking for
6 relief for today.

7 Tab 3. Variance from the FAR. And I've
8 underlined the portions and put a flag by the
9 portions to make it easy for you. A variance
10 from the FAR for the renovation and expansion of
11 an existing building, housing, fitness, pool,
12 restaurant, and beauty salon, again, all
13 commercial uses.

14 Tab 4. This is interesting. Tab 4 is a
15 case right on H Street, the same block that we're
16 in, subject to the same FAR limitations. To
17 allow the renovation of, and a third floor
18 addition to, an existing building for office use
19 in an HS/C-2-A District. The highlighted portion
20 says the Applicant will exceed the proportion of
21 nonresidential FAR permitted both under the
22 regulations governing the C-2-A, and under the H

1 Street Overlay. Again, those facts are -- that
2 is exactly what we are here for today. That's an
3 area variance.

4 And again, not to beat the point, but
5 you'll see each of those tabs are area variances.
6 They are doing the same exact thing, increasing
7 a nonresidential FAR, all of which have been
8 treated as area variances.

9 I don't know what happened in the Embassy
10 of Sweeden case. From what I understand, the
11 Board said we think it's an area variance, you
12 meet the standard, we're ready to approve the
13 case -- I'm sorry -- we think it's a use
14 variance, you meet the standard, we're ready to
15 approve your case. So they said, "Okay, fine.
16 It's a use variance. As long as you're going to
17 approve it, we're happy with that."

18 So the precedential value of that, if you
19 will, there wasn't a briefing on the issue.
20 There wasn't a conversation about the issue. It
21 was just stated and they moved forward.

22 In this case, again, we think it's the

1 precedents that specifically talk about what the
2 Applicant was doing in that particular case
3 definitely favor us.

4 If we're incorrect, again, I think
5 prospectively, you can make that determination
6 for the next Applicant.

7 VICE-CHAIRPERSON SORG: I think that your
8 point about wanting to make sure this case is
9 treated on its own merits instead of as an
10 example is, of course, what we are intending to
11 do, so I thank you for these cases.

12 Why don't we take about 5 minutes for the
13 Board to review these, even though you did do
14 your 2 minutes, and then we'll come back and talk
15 about it on the record.

16 MR. FREEMAN: Thank you.

17 VICE-CHAIRPERSON SORG: Okay.

18 MS. GLAZER: I just want to point out to
19 the Board, there are additional cases that OAG is
20 prepared to give to the Board where it's been
21 treated as a use variance. Not to beat a dead
22 horse, but in these cases, the Board expressly

1 addressed the issue and treated it as a use
2 variance. They were not Summary Orders.

3 [Pause.]

4 MR. SCHLATER: I think we're going to
5 find precedent on both sides of this case. I
6 don't think you're going to find clear-cut case
7 law that's going to lead you to one decision or
8 another.

9 I think our best effort is to read the
10 regs and determine which one we think is the
11 right way to move forward, set a clear standard,
12 put it in the record, and just go for it.

13 MR. SCHLATER: Thank you, Mr. Schlater.

14 I agree. So I think among the Board
15 members that are here, why don't we go ahead and
16 see if we can agree on how to move forward, what
17 type of variance, if we agree to whether this is
18 an area variance or a use variance.

19 MR. SCHLATER: May I ask the Office of
20 Planning to weigh in on it?

21 VICE-CHAIRPERSON SORG: Yes. I think
22 that is a good idea. My mistake.

1 MR. JACKSON: Good morning, Madam
2 Chairman and members of Board. My name is Arthur
3 Jackson with the D.C. Office of Planning, and I
4 will briefly state that we raised the question
5 and to the Office of Attorney General, and our
6 report is based on their recommendation, because
7 we were advised that it really is a legal
8 question, and our Zoning Regulations do not
9 specifically explain a particular difference. So
10 we defer to them and you.

11 VICE-CHAIRPERSON SORG: All right, then.
12 Thanks.

13 MS. GLAZER: I just want to add that OAG
14 specifically advised Mr. Jackson and discussed
15 two additional cases, 18028 and 18111. These are
16 the cases where the Board found that it was a use
17 variance, in addition to the Sweeden case.

18 [Pause.]

19 VICE-CHAIRPERSON SORG: Okay. I think we
20 have had some time to review the comments and
21 additional documents that we have received, and I
22 think that the Board can go ahead and discuss how

1 we want to treat this particular case.

2 My view is really that, as Mr. Schlater
3 stated, there are decisions and there is
4 precedent on both sides of this issue, and I
5 think there are kind of arguments to be made for
6 treating requests for additional -- in this case,
7 commercial FAR as a use variance or as an area
8 variance.

9 I would be inclined in this case, seeing
10 being as they are -- and to treat this and ask
11 the Applicant if they are prepared to go forward
12 and treat this as a use variance.

13 Are there other comments from Board
14 members?

15 MR. JORDAN: I just think it's the route
16 that we should use at this point, and I think
17 that that way, the variance, it's covered, and
18 there couldn't be any other question about it.

19 VICE-CHAIRPERSON SORG: Is the Applicant
20 prepared to go forward in presenting this as a
21 use variance today?

22 MR. FREEMAN: We are prepared. Again, I

1 started by saying I think we meet the standard
2 for both an area variance or a use variance, so
3 it is really a legal question.

4 Obviously, again, we think it's an area,
5 but we are prepared. We think we meet the
6 standard for the use variance standard. The
7 Office of Planning states we meet the use
8 variance standard.

9 So, ultimately, at the end of the day, I
10 hope to be able to get us at the same place, but
11 I think it was definitely worthwhile to have that
12 conversation in the beginning.

13 VICE-CHAIRPERSON SORG: I agree. So I
14 think with that, we can go ahead and have you
15 begin your presentation.

16 MR. FREEMAN: So what I would like to do
17 then, given the time -- again, we have the
18 support of the Office of Planning marked as
19 Exhibit 24 in the record.

20 We have the support of the ANC marked as
21 Exhibit 6A -- I'm sorry -- ANC-6A marked as
22 Exhibit 25 of the record, and they indicate that

1 they are excited about the project, and that we
2 meet the standards of relief, and they are happy
3 to see us move forward.

4 Mr. London is here to answer any
5 questions. He is the Applicant.

6 Mr. Conrath is the architect who can walk
7 us through the plans.

8 But maybe it might just be a little more
9 effective just to kind of go through how we meet
10 the areas of relief, and we'll have Mr. Sher walk
11 us through that for the parking, the loading, the
12 FAR, and the --

13 MR. SHER: Good morning, Madam Vice
14 Chair, members of the Board. For the record, my
15 name is Steven E. Sher, the Director of Zoning
16 and Land Use Services with the law firm of
17 Holland & Knight, and since this is essentially a
18 legal question, we'll have the planner answer it.

19 Let me put a little bit of context on the
20 case and then get to the heart of the matter.

21 This is a property located on the south
22 side of H Street, between 13th and 14th Streets.

1 It's now two record lots, each of which is
2 975-square-feet wide. They are 15-feet wide by
3 65-feet deep, but it is the Applicant's intention
4 to combine them into a single lot, operate a
5 single business on the subdivided lot, so we're
6 going to treat it as if it were one lot, even
7 though in fact it's two.

8 And if we stood back and actually kept
9 this as two lots, I think the hardship and all
10 the other things would be even more manifest than
11 they are, because you've got a 15-foot-wide lot,
12 which you're then trying to do something with,
13 but we're going to treat this as if it's a
14 30-foot-wide lot, 65-feet deep, total land area
15 1,950 square feet.

16 The east lot, 1311 H Street, is improved
17 with a three-story-plus partial cellar building,
18 and the west lot, 1309 H Street, is improved with
19 a one-story-plus partial cellar building, both of
20 them built prior to 1958, both of them currently
21 unoccupied.

22 And in the plan setting, you can see some

1 of the photographs that we have up on the board.

2 In the plans that you have in front of you,
3 there is a photograph, an inventory of what those
4 blocks look like today.

5 The H Street Corridor is essentially a
6 commercial use, predominantly moderate density
7 area. Along both sides of the street, there are
8 sites that have been approved for development
9 with higher -- new apartment houses, but not any
10 in the immediate vicinity or, when I say that,
11 within a block or so of this site.

12 The property is zoned C-2-A in the H
13 Street Commercial Overlay District. C-2-A allows
14 the maximum of 2-1/2 FAR, of which no more than 1
15 1/2 may be nonresidential or commercial. The
16 overlay further restricts that to one FAR of
17 nonresidential, so that's what the overlay does.

18 There are a number of other requirements
19 of the overlay, most of which we meet, some of
20 which are not applicable, and all of that is
21 explained in the outline.

22 As I said before, what we're going to do

1 is combine the two existing buildings into a
2 single building on a new record lot that would be
3 three stories high across the whole lot, except a
4 portion of the third floor would not be covered,
5 so it wouldn't count on FAR. It would actually
6 not be enclosed within the building. So our
7 overall FAR would be 2.67 for the combined lot.

8 The height of the building would be 38
9 feet, 6 inches. That would be less than the
10 maximum permitted, and we have no off-street
11 parking and loading, and I will get back to that
12 in a minute. So we need relief on that as well.

13 Okay. What relief do we need? We need a
14 variance from the floor area ratio requirements.

15 We are over the maximum permitted FAR for
16 commercial uses, and so we need a variance on
17 that.

18 We need a variance from the rear yard
19 requirement. The minimum requirement is normally
20 15 feet. We don't have any. The existing
21 buildings don't have any, so we're not going to
22 have any when we're done, and so we need a

1 variance for 15 feet.

2 We need a variance from the off-street
3 parking requirements, because the existing
4 buildings don't have any parking. And I left out
5 one point earlier. These are interior lots.

6 They have frontage only on H Street. There is no
7 alley at the rear. They abut privately owned
8 property on either side on the east and the west.

9 So the only way you could actually get into this
10 site is from H Street, and nobody is going to
11 give us a curb cut across H Street, because they
12 just won't, and so there isn't any way we could
13 put parking and loading on this site, even if we
14 wanted to, which we don't.

15 And we also need a variance from the
16 loading requirements, and I'll get back to that.

17 We need one berth, and we don't have any.

18 So the four areas of relief, FAR, rear
19 yard, parking, loading, I'm going to assume for
20 the moment that the variances on rear yard,
21 parking, and loading are area variances, and the
22 variance on the FAR is a use variance, but all

1 this gets wrapped together anyhow.

2 Okay. I think we all know what the
3 standards for a variance are. Exceptional,
4 narrowness, shallowness, or other extraordinary
5 or exceptional situation or condition, strict
6 application resulting in either practical
7 difficulty or undue hardship, in this case both,
8 and that the relief can be granted without
9 substantial detriment to the public good and
10 without impairing the intent, purpose, and
11 integrity of the Zone Plan.

12 Okay. How do we get at that? What is
13 the exceptional situation? Okay. We have two
14 lots that are small and narrow. When you combine
15 them, they are still small and narrow. They are
16 improved with buildings, which occupy 100 percent
17 of the lot, leaving no open space at the rear.

18 The building at 1309 H Street is now a
19 one-story building between two story -- I'm sorry
20 -- between three-story buildings on either side,
21 and in fact, that building was built as a
22 three-story building, but the second and third

1 floors were demolished by a fire back in about
2 1939. So it's been a one-story building for
3 quite sometime, but looking at the photograph --
4 where is the one that shows our site?

5 You can see -- I hate the analogy, but
6 the missing tooth. There is a three-story
7 building on the left. There's a three-story
8 building on the right, and we've got this little
9 piece of arcade in the middle.

10 We are bordered further to the east by
11 the Atlas Performing Arts Center, and again, I
12 mentioned before, the lots, interior lot, the
13 building -- have no frontage on any public space
14 other than H Street at the front.

15 How do we get to practical difficulty and
16 hardship? Okay. It's not possible to increase
17 the area of the lots. There is no other
18 privately owned property that the Applicant can
19 purchase to add to this property to make it
20 bigger.

21 If we are limited to one FAR overall for
22 commercial, the size of the second- and

1 third-floor additions would not be sufficient to
2 accommodate seating area for a restaurant after
3 the space required for the stairs, the kitchen,
4 the service functions, and so forth.

5 The Board has heard cases like that
6 before. Mr. Freeman and I were part of one at
7 the corner of 4th and H about a year ago, similar
8 situation, one-story building, wanted to put a
9 restaurant in it, and by the time you look at
10 what gets taken out for circulation and other
11 things, there just wasn't enough room for
12 seating.

13 The back of the house functions and
14 circulation take up more than half of the total
15 proposed floor area, where a more normal
16 proportion would be something in the range of 35
17 to 40 percent.

18 There is no way to access this site for
19 off-street parking and loading. Again, you can't
20 come in off H Street, because DDOT won't give you
21 a curb cut there with all the things that will be
22 going on, on H Street, and that's the only access

1 that we have.

2 But beyond that, if you were actually
3 able to get a curb cut to cross H Street, you got
4 this 30-foot-wide building, and if you had to put
5 16 parking spaces and a loading berth in there,
6 that takes up your whole building. So there is
7 no practical way to put parking or loading in the
8 building, even if you could get across the
9 sidewalk to the front of the building.

10 Providing a 15-foot rear yard would
11 reduce the available square footage per floor by
12 about 450 square feet. That's 23 percent of the
13 total. So, again, this is only a 65-foot-deep
14 lot. When you slice 15 feet off the back of it,
15 there's not a whole lot left.

16 We believe, and I believe, that the
17 property is too small and unsuitable to be
18 devoted to mixed uses, including residential.
19 The amount of space required for upper story
20 residential, if we were going to try and do that,
21 you've got to bring your stairs down through the
22 first floor. You've got to have fireproof

1 corridors to get you out of the building. You
2 got to have a trash room for the residential,
3 separate from the trash room for the retail, the
4 restaurant. All of that would be substantial and
5 would compromise the space available for the
6 restaurant on the first floor.

7 There is on outdoor open space available
8 on this lot. We occupy 100 percent of the lot,
9 and with only potentially three units, which is
10 about what we figured in theory you could get on
11 a site, you don't have enough density to support
12 amenities like you heard in the previous case,
13 where you got a whole bunch of units and a big
14 enough building where you can provide for the
15 residential tenants in the building. In this
16 case, you've got only the potential for three
17 units if you only could use one FAR.

18 There is already more than one FAR on
19 that site in the existing buildings, and there
20 would have been more if we had been before 1939
21 when we lost the top two floors to fire, but it
22 is what it is.

1 In terms of the character of H Street, in
2 that 1300 block of H Street between 13th and 4th
3 Street, on both sides of the street, there are 51
4 lots. Only one of those 51 lots has any
5 potential appearance to have any residential in
6 it. It is all commercial, and again, you can see
7 that in the photographs that are on the board.
8 There are other photographs in the package that
9 show what the character of H Street is.

10 And if you look at the plat of the south
11 side of H Street -- that's reverse direction from
12 the way it normally would be -- the subject
13 square is outlined in the dashed area.

14 The site is located at the right-hand
15 corner, and everything else along that whole
16 block frontages all commercial, and some of it is
17 significantly sized commercial, including the
18 Atlas Performing Arts Center.

19 These are two little lots in a sea of
20 commercial uses along H Street and in particular
21 the block between 13th and 14th Street.

22 If you had enough money, if you could do

1 anything you wanted to and it didn't matter what
2 it cost and you could say, "Okay. We're going to
3 throw enough money at this to put a very small
4 restaurant on the first floor and three
5 residential units above," what would you get?
6 Not a very good situation. You would wind up
7 with three residential units in that sea of
8 commercial that don't belong there, frankly. It
9 would be a hardship on the Applicant to have to
10 try and product units like that, and then what do
11 you do with them once you've produced them?

12 If you were on G street, if you were on
13 Maryland Avenue, if you were on 13th Street, that
14 would be different. The context is very
15 different on H Street, and trying to devote this
16 building to the use ratio established by the
17 Zoning Regulations would be a hardship for the
18 Applicant.

19 The site is well served by transit.
20 You've got the trolley running right up H Street.
21 You've got frequent bus service. The restaurant
22 expects to draw primarily from the local area.

1 Loading is required only because of the
2 cellar area. If you didn't have to count the
3 cellar, we wouldn't be over the threshold for
4 loading, and the cellar is all kitchen storage
5 and things like that. It's not generating any
6 extra seating or any extra demand for loading
7 that otherwise would be coming from the
8 restaurant itself.

9 And this kind of use is consistent with
10 the goals of the H Street Strategic Development
11 Plan upon which the H Street Overlay was based,
12 which calls for the eastern end of the Corridor
13 to be the arts area, as a destination for
14 restaurants, cafes, galleries, and other
15 arts-related and activity-generating uses.

16 So we think from the point of view of
17 being consistent with the intent and purposes of
18 the regulations and having no substantial
19 detriment that we can say that -- and a
20 restaurant of this size and at this location
21 would be consistent with planning goals and what
22 the regulations intended to encourage.

1 So, in summary, I would say the property
2 is small and improved with buildings that occupy
3 the whole lot. This building is different from
4 other properties in the vicinity. The practical
5 difficulty or hardship results from the need to
6 create sufficient space to accommodate the
7 restaurant, with all the other things that need
8 to happen with it. There is no room on the lot
9 to provide parking or loading for this use or any
10 other use for that matter.

11 There is sufficient alternatives to
12 driving such that lack of parking is not likely
13 to be a problem. Loading and service can be
14 accommodated through an easement across the
15 property at the rear, but in any event, whether
16 you call it an area variance or a use variance,
17 whether the standard is practical difficulty or
18 undue hardship, which I guess it's both, we think
19 the application should be granted.

20 MR. FREEMAN: We'll stop with that, and
21 if you have any questions, we'll be happy to
22 answer those questions.

1 VICE-CHAIRPERSON SORG: Okay, thank you.
2 Do Board members have questions for the
3 Applicant?

4 MR. JORDAN: One question I had was the
5 parking and the deliveries. That street is very
6 busy, and I thought I understand there is some
7 type of arrangement worked out with the -- is it
8 the church? Is that a formal arrangement, or is
9 that just --

10 MR. FREEMAN: We have an easement with
11 the church. That easement has been recorded in
12 the land records. That easement will provide two
13 things: one, the egress in the event of a fire;
14 and two, access to 13th Street for trash and
15 delivery. So that easement has been recorded in
16 the land records.

17 VICE-CHAIRPERSON SORG: So trash and
18 deliveries are not going to be made on H Street?

19 MR. FREEMAN: Correct.

20 MR. SCHLATER: I have a quick question.
21 What's going to be the commercial occupancy of
22 the restaurant? How many people will be in it at

1 any one time?

2 MR. FREEMAN: I think Mr. Conrath could
3 probably --

4 MR. CONRATH: I don't know that we've
5 done a final calc, calculation, but we are trying
6 to occupy all three floors. I want to say we're
7 probably in the range of maybe 200 people, 250,
8 something along that, but I'd rather that not be
9 sort of written down, because, as I say, we just
10 did a very rough space plan and idea of what was
11 going on in the restaurant, how our cores were
12 starting to work, and how the restaurant might
13 program itself out, and so I don't have a final
14 count.

15 MR. SCHLATER: Is it clear that this is
16 going to be a restaurant space and not a club or
17 a bar? Is there a distinction being made there?

18 MR. FREEMAN: Mr. London can talk about
19 the fact that it is absolutely going to be a
20 restaurant.

21 MR. LONDON: Hi. My name is Mr. Otis
22 London, and I thank you guys for coming today and

1 listening to our case.

2 I am the owner and proprietor of
3 something called the Carolina Kitchen, which is
4 in Prince George's County, and I've been there
5 for 7 years, and really look forward to come into
6 the Washington, D.C., area. Northeast where 8th
7 Street, which is kind of like -- it's being
8 rejuvenized in a big way, because I grew up and
9 went to school there, the elementary school
10 there, and got excited. And I came and saw it
11 and fell in love with the building.

12 I consulted with my team here, and I went
13 on to purchase the building to put a beautiful
14 sit-down restaurant.

15 After going around talking to the
16 neighbors, the ANC, and showing them what my
17 plans were, they got super excited, and as you
18 know, this Saturday was 8th Street Festival Day,
19 and we stood out in front of the building and
20 explained to everyone what we were doing, and
21 they are ecstatic. We couldn't believe how much
22 excitement, and I'm still excited. I haven't

1 slept. I'm losing sleep over just getting
2 started and being a part of the community and
3 adding to the beautiful new landscape of H
4 Street.

5 And again, I'd just like to thank you
6 guys for being here and just listening to what it
7 is that we're presenting to you, but it's
8 definitely no nightclubs. I don't like
9 nightclubs. It's going to be a sit-down
10 restaurant.

11 MR. SCHLATER: I'm a little disappointed
12 you didn't bring any food with you.

13 [Laughter.]

14 MR. SCHLATER: Okay. I asked the
15 question on the occupancy just to get a sense of,
16 I think, traffic impacts from the restaurant,
17 parking impacts are both a concern, but it's not
18 a concern that's unique to your situation. I
19 think it's H Street-wide and something that needs
20 to be looked at through a broader lens, but this
21 certainly looks like a great reuse of a site that
22 is currently, woefully underutilized.

1 So I have no further questions.

2 VICE-CHAIRPERSON SORG: Thank you.

3 I have a couple of follow-up questions.
4 Quickly for Mr. London, so you are planning to
5 bring a branch of your same restaurant, or is it
6 a different concept, or you're not sure?

7 MR. LONDON: Yes, ma'am. Well, I'm
8 planning to bring a low country, kind of like
9 founding farmers, kind of like B. Smith's, but
10 hopefully better.

11 [Laughter.]

12 MR. LONDON: Not to put down. It's a
13 great restaurant. A really nice -- not quite
14 white tablecloth for everyone, but really nice
15 sit-down restaurant.

16 I plan on also having an assortment of
17 desserts and different events and having a venue
18 for people in the neighborhood to have, you know,
19 everything from birthday parties to wedding
20 parties to just having a place to meet up. Of
21 course, we're going to have a bar in there, but
22 it's going to be mainly a restaurant, a sit-down,

1 beautiful restaurant.

2 Right now, presently in that corridor,
3 they have I think two sit-down restaurants, so we
4 will be a third.

5 VICE-CHAIRPERSON SORG: Great. Thank
6 you.

7 And then I suppose to Mr. Conrath, I
8 think a good portion of what we read in the
9 prehearing statements that were submitted is
10 predicated on the idea that with the ancillary
11 uses for the restaurant taking up 50 percent of
12 the space, that keeping it one FAR, it would be
13 unreasonable as a size of a restaurant.

14 So can you talk to me a little bit about
15 what is a reasonable size of a sit-down
16 restaurant? I mean, how are you calculating
17 that?

18 MR. CONRATH: Well, it's sort of -- this
19 is based on my experience of having done
20 restaurants.

21 VICE-CHAIRPERSON SORG: That's why I'm
22 asking you.

1 MR. CONRATH: Yeah. And I think that as
2 a function of this size of a restaurant, roughly
3 a 5,000-square-foot restaurant, that one would
4 anticipate in a sit-down restaurant that you
5 might be looking at in a normal situation where,
6 say, the restaurant was on a linear plain and
7 wasn't multistory, probably 30 percent of that
8 restaurant would be devoted to, say, back of
9 house and kitchen.

10 In this particular instance, since we
11 have dual stairs to handle the zoning or the
12 requirements of the Building Code, we have to
13 have egress from -- two independent means of
14 egress from each floor, and the relative narrow
15 width, the fact that we need rest rooms on the
16 floors, handicapped rest rooms, we are looking at
17 probably, like I say, close to 50 percent of the
18 space devoted to the restaurant is ancillary.
19 It's kitchen, storage, egress going in and out of
20 the building. So it's a lot higher than one
21 would normally see.

22 Plus, the efficiencies of everything

1 being on multiple floors, it's less efficient.

2 We have to -- because of the handicapped code, we
3 have to duplicate facilities on the first floor.

4 We have to have facilities for handicapped. So
5 we can't vary the use all that much as well. We
6 have to keep a similar use on the first floor as
7 we do on the second floor.

8 VICE-CHAIRPERSON SORG: Okay. Thank you.

9 One other question -- and I think it was
10 something that was actually not quite clear to me
11 until I read most of the application, and OP sort
12 of points this out as a point of clarification in
13 their report. It has to do with whether this is
14 being replaced or renovated, and I think it's
15 important to get that a little bit on the record.

16 MR. FREEMAN: Rick can talk to this in
17 more detail.

18 The building now has been vacant for
19 quite sometime, and portions of it are severely
20 deteriorated on the interior. So the plan is to
21 retain as much of the existing features of the
22 site.

1 For example, you can see the elevations.

2 We're trying to retain as much of the existing
3 facade, because they really like the brickwork.
4 Once you get in there -- and again, Rick can
5 speak to this -- the floors are not necessarily
6 in the best shape. Some of the walls are not,
7 particularly with respect to the rear yard, are
8 not in the best shape.

9 Again, we are trying to retain, restore,
10 replace, reuse, whichever word you like to use,
11 as much of the existing structure as we can
12 that's there, but the reality, once we get in
13 there and start, once they get in there and start
14 doing work, you might lose some of that.

15 VICE-CHAIRPERSON SORG: Thank you for the
16 clarification.

17 It does seem from the sketches that you
18 submitted, I can see that on the facade. On some
19 of the area photographs that you've submitted,
20 you can kind of see a little bit of the rear, and
21 I wonder if you can kind of talk about what's
22 going on back there. It looks like you have

1 constructed something. It's a little hard to
2 tell.

3 MR. CONRATH: Well, on the rear yard --
4 the building basically backs up on the property
5 line and faces the church lot, and what we're
6 proposing to do -- and I have a drawing. I think
7 it may be actually in the packages. That we
8 would use that purely for our easement for the
9 restaurant and then probably put a window, maybe
10 an opening into that.

11 So where we can reuse as much of the
12 existing rear wall as we can, I mean, the
13 existing condition is not the greatest. We don't
14 know when we get into construction, what is going
15 to happen, but I think it's our intention with
16 this building to reuse as much of the existing
17 building as possible from the facade, also to the
18 rear.

19 VICE-CHAIRPERSON SORG: Okay. Thank you.

20 Final question that I had has to do with
21 conversations with DDOT. I don't think we, to my
22 knowledge, received a report in this application

1 from DDOT. So, if you can talk on the record a
2 little bit about your interactions?

3 MR. FREEMAN: Not to speak for OP, I know
4 that they reviewed the application. They didn't
5 have any formal comments.

6 We've had some communications with them
7 about how we're going to manage loading. For
8 example, we're going to commit that no loading
9 will occur from H Street. We are going to commit
10 that all loading will be via the alley and from
11 13th Street, that we're going to have somebody,
12 like a loading manager on staff who is
13 responsible for scheduling and coordinating
14 loading and deliveries during certain hours,
15 non-peak hours of the day. So we have had
16 communications with them. We just have not
17 finalized those details yet.

18 A lot of them are things we'll finalize
19 once the building is built and actually
20 operational.

21 VICE-CHAIRPERSON SORG: Okay, thank you.

22 Are there any other Board questions at

1 this time?

2 [No audible response.]

3 VICE-CHAIRPERSON SORG: Okay. Then let's
4 move to the Office of Planning, please.

5 MR. JACKSON: Good morning again. My
6 name is Arthur Jackson, and I will briefly go
7 through the Office of Planning's report.

8 You have before you and as we --
9 obviously, we are in support of this application.
10 We think the proposed use of the property is
11 very much in line with what the H Street Overlay
12 is intent -- and hoping to see in the area. Of
13 course, it would be nice if he included some
14 housing, but I think the Applicant sent a good
15 case of why in this instance. Housing may not be
16 appropriate on this site.

17 Regarding the request for variance relief
18 for the parking, we concur that the lot is
19 completely developed, and the narrowness and the
20 lack of access to public right-of-way would make
21 it extremely difficult, if not impossible, to
22 provide on-street parking or low grade parking to

1 address that requirement. We support that
2 relief.

3 With regard to loading, we know that the
4 Applicant has in their application made some
5 reference to the issues, how they would address
6 that issue. We also know that there have been
7 communications with DDOT.

8 The clarifications had to do with where
9 loading was going to occur, and I think it was
10 agreed that it wouldn't be on H Street.

11 The one thought I had, though, was --
12 well, the Applicant probably could confirm
13 whether or not there was some discussion of
14 conditions related to that, this case, but I
15 wasn't sure where that was.

16 But we recognize that the site is not
17 available if the church would give the land to
18 the -- their land to the restaurant, they would
19 have access to full loading and deliveries, but
20 that's unlikely. So, in that instance, we
21 support that relief, because we don't see that
22 can work otherwise.

1 We appreciate the fact that the Board
2 deliberated on the issue of the use variance, and
3 we support that.

4 We approached it a slightly different way
5 from the Applicant in that we were strictly
6 looking at the requirements related to the
7 stairs, vertical access to all the floors, and
8 the requirements for the water closets. We
9 didn't consider that the additional space for
10 back of house or for space for the dining areas
11 really was a function of zoning, but that in the
12 past, the Board has dealt with other cases in
13 which -- for example, Historic Preservation
14 required that the existing stairwell be retained
15 as being historic, so the Board has granted
16 relief, so that the Applicant could reclaim the
17 space that they would normally have used for that
18 stairwell in other parts of the building, or
19 where the Applicant had a circumstance where the
20 Building Code required them to build a larger
21 stair in a small building that exceeded the
22 allowable floor area. So the Board granted

1 relief, so that they could reclaim that space
2 that was lost to the new stair in addition to
3 other places.

4 So there are examples in the record where
5 the Board has granted relief for circumstances
6 where the requirements, current requirements took
7 away substantially from the available building
8 area, because the Applicant bought the building
9 or purchased the site in anticipation of using
10 that area.

11 And this is a case clearly along that
12 line. So, in the report, we did our calculation
13 based -- just generally based on our best
14 approximation of what the plan showed, and after
15 we did the calculation for the area that would be
16 lost for the requirements and the logical
17 extensions of the third floor to meet the stair,
18 because I assume if you got off of the third
19 floor, you would rather not go outside and go
20 back inside on the third floor, we came up with
21 essentially the same that the Applicant did, and
22 so we support the variance relief in that case.

1 So, essentially, we did determine that
2 over half of the floor area, available floor area
3 now would be eliminated if the Applicant was
4 required to meet the current Building Code
5 requirements for access to three floors and water
6 closets, which we think would present an undue
7 hardship on the Applicant .

8 That's why we support additional floor
9 area to basically replace what would be lost,
10 based on the Building Code requirements and
11 others that we have outlined, and that's why we
12 support a use variance for the FAR as presented
13 in this case.

14 That concludes a brief summary of the
15 Office of Planning's report, and -- oh. And we
16 would note also that the Advisory Neighborhood
17 Commission voted on -- at a regularly scheduled
18 meeting on September 18th and unanimously,
19 unanimously recommended approval of this
20 proposal.

21 That concludes the Office of Planning's
22 summary, and we are available to answer

1 questions.

2 VICE-CHAIRPERSON SORG: Thank you very
3 much.

4 So, in your table on page 5, when you get
5 your tabulation to 1,800 square feet, you are
6 saying that that is the equivalent to the
7 additional request for FAR?

8 MR. JACKSON: Well, we calculated it
9 slightly differently, but you note that the
10 Applicant's request is a similar number in terms
11 of additional floor area, so that's why we said
12 -- and again, ours was based on the Applicant's
13 plans that were submitted.

14 Obviously, their architect would have
15 more information about the exact dimensions that
16 are being calculated there, so we deferred to
17 their numbers, and luckily, we were all in the
18 same ball park.

19 VICE-CHAIRPERSON SORG: Do Board members
20 have questions for the Office of Planning?

21 [No audible response.]

22 VICE-CHAIRPERSON SORG: I guess I would

1 just additionally ask you about your opinion and
2 your analysis on the rear yard.

3 As we've seen, the Applicant wants to
4 include it.

5 MR. JACKSON: Yes.

6 VICE-CHAIRPERSON SORG: But I'm curious
7 to hear your opinion.

8 MR. JACKSON: Well, my opinion is --
9 well, actually, what we did was -- early in this
10 case, we saw that -- this issue coming up, so we
11 asked the Zoning Administrator how they would
12 treat it. The Zoning Administrator's opinion was
13 -- it's pretty much what we reflect in our
14 report, so we're deferring to the Zoning
15 Administrator on that stand.

16 But if they want to use the belt and
17 suspenders approach on that issue, we are not
18 opposed to that. We just want to outline that in
19 case they wanted to not necessarily ask for that
20 relief.

21 VICE-CHAIRPERSON SORG: Okay, thank you.

22 Does the Applicant have any questions for

1 the Office of Planning?

2 MR. FREEMAN: No.

3 VICE-CHAIRPERSON SORG: Okay. Then we
4 will turn to see if there are any persons in the
5 audience in support of this application who wish
6 to testify.

7 Yes. Please come forward and take a
8 seat.

9 MR. FREEMAN: She's just here in general
10 support. She doesn't intend to testify in
11 support.

12 VICE-CHAIRPERSON SORG: She looks like
13 she intends to testify.

14 [Laughter.]

15 VICE-CHAIRPERSON SORG: Well, then we
16 will note one individual standing in support for
17 the record, and if she wishes to testify, of
18 course, she's more than welcome, but seeing no
19 movement, I will move on and see if there are any
20 persons in the audience who wish to testify in
21 opposition to the subject application.

22 [No audible response.]

1 VICE-CHAIRPERSON SORG: And seeing no
2 one, I will move on to note our Exhibit No. 25, a
3 letter from ANC-6A, which meets our requirements
4 for great weight in support of this application.

5 Are there any final Board questions for
6 the Applicant?

7 [No audible response.]

8 VICE-CHAIRPERSON SORG: Seeing none, we
9 turn back to the Applicant for any closing
10 statements.

11 MR. FREEMAN: Thank you. Thank you again
12 for allowing us to present our case. It was a
13 little longer than we anticipated, but I think we
14 talked through all the issues. And I think we
15 indicated or at least demonstrated today how we
16 meet all of the standards for relief, for the
17 requested relief, whether you view it as an area
18 variance or a use variance.

19 I think what you heard today about the
20 existing conditions of the site, the practical
21 difficulties, and undue hardships associated with
22 whether it's all commercial or some commercial,

1 some residential, I think we covered all of that.

2 I think as the Office of Planning said,
3 they think we meet the standards. We have the
4 ANC in support. We have folks on H Street that
5 were apparently just waiting for the restaurant
6 to come, and we have a person standing in support
7 here today.

8 So we think that the record is full and
9 complete and that it indicates clearly that we
10 meet the standards for relief. We are excited to
11 move forward with the project, and therefore, we
12 would request the Board's consideration and
13 potential deliberations on the application at the
14 soon as possible time.

15 Thank you.

16 VICE-CHAIRPERSON SORG: Thank you very
17 much.

18 I think that we've heard and discussed a
19 good day on the relevant zoning issues, and so I
20 would be prepared to move forward with
21 deliberations.

22 Is there any concurrence from the Board?

1 I am seeing head-nodding. Okay. So I
2 think I can start us off in deliberations.

3 What we have in this application is a
4 request for several variances to renovate, to a
5 large extent, an existing property on H Street,
6 N.E., for use as a restaurant.

7 In the way that I'll treat my analysis,
8 we are looking at three area variances and one
9 use variance.

10 With regard to the uniqueness of the
11 property, I think that the Applicant in their
12 testimony and in their filings demonstrated very
13 well the unique aspects of this property.

14 I think in particular, particularly
15 compelling for me, I will just note one area --
16 is that even with these two lots combined at 30
17 feet by 65 feet, they remain some of the smallest
18 in the square with H Street frontage, and I think
19 that speaks to kind of the uniqueness in terms of
20 the configuration of the lot and what this
21 property wants to be, given its placement on H
22 Street.

1 And additional factors, I think the
2 configuration of the lot as well as the existing
3 building and how that affects the efficiency of
4 the ancillary and support spaces of the
5 restaurant commercial use.

6 With regard to the parking and loading,
7 to me that is very clear. There is just no
8 access in the rear.

9 Regarding the practical difficulty and
10 undue hardship, I think one of the things that I
11 found particularly compelling in that regard is
12 the Applicant's discussion of the mixed-use
13 possibilities. The H Street Overlay tells us
14 that, you know, this is what we want to do, is
15 mixed-use options in this area of the city, and I
16 think the discussion of what would be required
17 and what you would gain if you were to go down
18 that line shows to me that the undue hardship of
19 meeting that particular regulation.

20 In addition, I think both the Applicant's
21 calculations in their filing showing the
22 requirements for ancillary spaces as well as

1 ingress and egress and other facilities to meet
2 the necessities of a restaurant, as well as ADA
3 and Building Code, both that combined with -- for
4 me OP's tabulation of the same, only -- only
5 looking at what's required regarding the stair
6 and toilet and so forth, configurations to meet
7 the Building Code and ADA, and that being
8 basically where the Applicant is in their request
9 for additional FAR, I think I also found
10 particularly compelling.

11 I think that OP does a pretty good job in
12 laying these things out in their report, so I
13 will incorporate that at our Exhibit 26 for the
14 record in my analysis.

15 Also, it is pretty clear that there is
16 certainly no opposition in the community to this
17 application, and indeed support not only from the
18 ANC, but as to the testimony of the property
19 owner, a good amount of excitement. I think this
20 sounds like a positive addition to the H Street
21 Corridor, and I can be in support of the
22 application.

1 Any further deliberations from other
2 Board members?

3 MR. HINKLE: Thank you, Madam Chair, and
4 I am certainly in agreement with your analysis
5 there.

6 And I just wanted to quickly touch base
7 on the issue of the use variances. I think the
8 Applicant has shown that really there is a
9 practical difficulty in meeting the residential
10 requirements, but certainly through the
11 discussions, we also heard that there would be a
12 true hardship to try to reach that use
13 requirement as well, so I just wanted to put that
14 out there.

15 VICE-CHAIRPERSON SORG: Thank you for
16 that clarification, and I agree.

17 Further comments from other Board
18 members?

19 [No audible response.]

20 VICE-CHAIRPERSON SORG: Okay. Seeing
21 none, then I will submit a motion to approve
22 Application No. 18247, application of Big City

1 Development LLC, pursuant to 11 DCMR 3103 for a
2 variance from the floor area ratio requirements
3 under Section 771.2, area variances from the rear
4 yard requirements under Section 774, from the
5 off-street parking requirements under Section
6 2101.1, and from the loading requirements under
7 Subsection 2201.1, to allow the new restaurant in
8 the HS/C-2-A District at 1309 and 1311 H Street,
9 N.E.

10 A motion has been made. Is there a
11 second?

12 MR. HINKLE: Second.

13 VICE-CHAIRPERSON SORG: The motion has
14 been made and duly seconded. All those in favor,
15 say "aye."

16 [Chorus of ayes.]

17 VICE-CHAIRPERSON SORG: Mr. Secretary,
18 can you please read back the vote?

19 MR. MOY: Yes, Madam Chair, with
20 pleasure.

21 The staff records the vote, and it's 4 to
22 0 to 1. This is on the motion of Chairperson

1 Sorg to approve the application per the variance
2 relief as cited. Second the motion. Mr. Hinkle.
3 Also in support of the motion, Mr. Jordan and
4 Mr. Schlater. No other Board members
5 participating. Again, the final vote is 4 to 0
6 to 1 to approve. The motion carries.

7 VICE-CHAIRPERSON SORG: Thank you very
8 much.

9 And in this case, I would request a
10 hybrid order summary with a short -- a twist.

11 [Laughter.]

12 VICE-CHAIRPERSON SORG: With a short
13 discussion addressing what was on the record
14 today regarding the use versus area variances
15 included in the order.

16 MR. MOY: Yes.

17 VICE-CHAIRPERSON SORG: Thank you.

18 MR. FREEMAN: Thank you, members of the
19 Board.

20 If I could just make a quick question,
21 comment. So, in terms of the Summary Order, in
22 the Sweeden case, there is just a footnote that

1 said the Board determined that the relief from
2 the FAR was a use variance an don't an area
3 variance. Is that sufficient in this case, or
4 are you expecting more? Because we kind of want
5 the order relatively soon. I just want to make
6 sure that we're all clear on what that's going to
7 say.

8 VICE-CHAIRPERSON SORG: I would suggest a
9 short paragraph, and whether that is in -- I
10 think that can be included in a footnote.

11 MR. JORDAN: What's a short paragraph?

12 MS. GLAZER: A hybrid order takes
13 slightly longer than Summary Order, but it
14 shouldn't take very long.

15 MR. MOY: We're not looking at 60 days.

16 VICE-CHAIRPERSON SORG: I think that
17 should be sufficient. Everyone can go home
18 happy. Good. Thank you.

19 MR. LONDON: Thanks a lot. Thank you.
20 Thank you. Thank you so much.

21 VICE-CHAIRPERSON SORG: And good luck.

22 [Pause.]

1 VICE-CHAIRPERSON SORG: This concludes
2 our morning public meeting, and we will adjourn
3 to return at 1 p.m.

4 [Recess taken.]

5 VICE-CHAIRPERSON SORG: Good afternoon.
6 I'm going to fake everyone out, all right?

7 As Vice-Chairperson of the Board of
8 Zoning Adjustment for the District of Columbia
9 and in accordance with Section 407 of the Open
10 Meetings Act, I am going to move that the Board
11 of Zoning Adjustment hold a closed emergency
12 meeting on today, September 20th, prior to the
13 opening of our afternoon session for the purpose
14 of seeking legal advice from our counsel on Cases
15 No. 18293, Appeal of Advisory Neighborhood
16 Commission 6A, and Case No. 18241, Appeal of the
17 Northeast Neighbors for Responsible Growth, per
18 Section 405(b)(4) of the Opening Meetings Act.

19 Is there a second?

20 MR. HINKLE: Second.

21 VICE-CHAIRPERSON SORG: Will the
22 Secretary please take a roll call vote on the

1 motion before us, now that it has been second --
2 seconded?

3 MR. MOY: Yes. Thank you, Madam Chair.

4 When I state the name on the roll call
5 vote, the members can respond either yes or no or
6 yea or nay.

7 Ms. Moldenhauer is absent.

8 Ms. Sorg?

9 VICE-CHAIRPERSON SORG: Yea.

10 MR. MOY: Mr. Jordan?

11 MR. JORDAN: Yeah.

12 MR. MOY: Mr. Hinkle?

13 MR. HINKLE: Yes.

14 MR. MOY: Mr. Schlater?

15 MR. SCHLATER: Yes.

16 MR. MOY: The roll call is unanimous,
17 Madam Chair.

18 VICE-CHAIRPERSON SORG: As it appears
19 that the motion has passed, I hereby give notice
20 that the Board of Zoning Adjustment will recess
21 this proceeding at this time to hold a close
22 emergency meeting in the Office of Zoning

1 conference room, pursuant to the Open Meetings
2 Act. A written copy of this notice will be
3 posted at this time.

4 As a note to those people who are here
5 for the afternoon's case, we are likely to be
6 back in just about 30 minutes or less.

7 Thank you very much.

8 [The Board of Zoning Adjustment met in
9 closed session.]

10 VICE-CHAIRPERSON SORG: The hearing will
11 please come to order. Good afternoon, ladies and
12 gentlemen. We are located in the Jerrily R.
13 Kress Memorial Hearing Room at 441 4th Street,
14 N.W. This is the September 20th Public Hearing
15 of the Board of Zoning Adjustment of the District
16 of Columbia.

17 My name is Nicole Sorg, Vice-Chair.
18 Joining me today is Mr. Lloyd Jordan, Mayoral
19 Appointee; Mr. Jeffrey Hinkle, representing the
20 National Capital Planning Commission; and
21 representing the Zoning Commission is Mr. Konrad
22 Schlater.

1 Copies of today's hearing agenda are
2 available to you and are located to my left in
3 the wall bin near the door.

4 Please be advised this proceeding is
5 being recorded by a court reporter and is also
6 webcast live. Accordingly, we must ask you to
7 refrain from any disruptive noises or actions in
8 the hearing room. When presenting information to
9 the Board, please turn on and speak into the
10 microphone, first stating your name and home
11 address. When you are finished speaking, please
12 turn your microphone off, so that your microphone
13 is no longer picking up sound or background
14 noise.

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

22 Also, if you wish to file written

1 testimony or additional supporting documents
2 today, please submit 12 copies to the Secretary
3 for distribution. If you do not have the
4 requisite number of copies, you can reproduce
5 copies on a machine located in the Office of
6 Zoning across the hall.

7 The order of procedure for appeal
8 applications will be as follows: one, statement
9 of the Appellant and the Appellant's witnesses;
10 two, the Zoning Administrator and other
11 government officials -- case -- three, case for
12 the owner, lessee, or operator of the property
13 involved, the intervenor, if not the Appellant;
14 four, others in this case if permitted by the
15 Board; five, the ANC within which the property is
16 located; and six, rebuttal and closing statements
17 by the Appellant.

18 Pursuant to Sections 3117.4 and 3117.5,
19 the following time constraints will be
20 maintained. The Applicant, Appellant, persons
21 and parties, except an ANC in support, including
22 witnesses, are allotted 60 minutes collectively.

1 Appellees, persons and parties, except an ANC in
2 opposition, including witnesses, are also
3 allotted 60 minutes collectively. Individuals
4 are allotted 3 minutes, organizations 5 minutes.

5 These time restraints do not include
6 cross-examination and/or questions from the
7 Board. Cross-examination of witnesses is
8 permitted by the Applicant or parties. The ANC
9 within which the property is located is
10 automatically a party in a special exception or
11 variance case. Nothing prohibits the Board from
12 placing reasonable restrictions on
13 cross-examination, including time limits and
14 limitations on the scope of cross-examination.

15 The record will be closed at the
16 conclusion of each case, except for any material
17 specifically requested by the Board. The Board
18 and the staff will specify at the end of the
19 hearing exactly what is expected and the date
20 when the persons must submit the evidence to the
21 Office of Zoning. After the record is closed, no
22 other information will be accepted by the Board.

1 The Sunshine Act requires that the public
2 hearing on each case be held in the open before
3 the public. Pursuant to Section 405(b) and 406
4 of the Open Meetings Act, the Board may,
5 consistent with its rules of procedures and the
6 Open Meetings Act, enter into a closed meeting or
7 a close emergency meeting on a case for purposes
8 of seeking legal counsel on a case per Section
9 405(b)(4) and/or deliberating on a case per
10 Section 405(b)(13) of the Act, but only after
11 providing the necessary public notice and taking
12 a roll call vote.

13 The decision of the Board in these
14 contested cases must be based exclusively on the
15 public record. To avoid the appearance to the
16 contrary, the Board requests that persons present
17 not engage the members of the Board in
18 conversation.

19 Please turn off all beepers and cell
20 phones at this time, so as not to disrupt the
21 proceedings.

22 The Board will now consider any

1 preliminary matters. Preliminary matters are
2 those which relate to whether a case will or
3 should be heard today, such as requests for
4 postponement, continuance or withdrawal, or
5 proper and adequate notice of the hearing has
6 been given.

7 If you are not prepared to go forward
8 with a case today or if you believe that the
9 Board should not proceed, now is the time to
10 raise such a matter.

11 Mr. Secretary, do we have any preliminary
12 matters?

13 MR. MOY: I'll just say, Madam Chair,
14 that staff's understanding of the Board will be
15 addressing such matters.

16 VICE-CHAIRPERSON SORG: That's correct.

17 Let's go ahead, and all individuals
18 wishing to testify today, please rise and take
19 the oath.

20 And, Mr. Secretary, would you please
21 administer the oath?

22 MR. MOY: Do you solemnly swear or affirm

1 --

2 VICE-CHAIRPERSON SORG: If you are -- if
3 you are not a lawyer and you are planning to
4 testify, then you may as well. Better safe than
5 sorry. How was that?

6 MR. MOY: Do you solemnly swear or affirm
7 that the testimony you are about to present in
8 this proceeding is the truth, the whole truth,
9 and nothing but the truth?

10 [Witnesses sworn en masse.]

11 MR. MOY: Ladies and gentlemen, you may
12 consider yourself under oath.

13 VICE-CHAIRPERSON SORG: Thank you very
14 much.

15 And, Mr. Secretary, we can call both
16 cases for the afternoon.

17 **Application No. 18239**

18 **Application No. 18241**

19 MR. MOY: For the two appeal cases for
20 the afternoon session are as follows, the first
21 is Appeal No. 18239. This is the Appeal of the
22 Advisory Neighborhood Commission 6A, pursuant to

1 11 DCMR 3100 and 3101, from a February 24, 2011,
2 decision by the Zoning Administrator, Department
3 of Consumer and Regulatory Affairs, to withdraw
4 the revocation of the Building Permit No. B -- B
5 as in Bravo -- 1010205, allowing the construction
6 of a public charter school. This is the
7 AppleTree Institute in the R-4 District at
8 premises 128 12th Street, N.E., property located
9 in Square 988, Lot 820.

10 The other appeal application is
11 Application No. 18241. This is the Appeal of the
12 Northeast -- Northeast? Northwest? Northeast?
13 Thank you. Northeast Neighbors for Responsible
14 Growth, pursuant to 11 DCMR 3100 and 3101 from a
15 February 24, 2011, decision by the Zoning
16 Administration, Department of Consumer and
17 Regulatory Affairs, to withdraw the revocation of
18 Building Permit No. B -- B as in Bravo --
19 1010205, allowing the construction of a public
20 charter school. This is the AppleTree Institute
21 in the R-4 District at premises 138 12th Street,
22 N.E., property located in Square 988, Lot 820.

1 VICE-CHAIRPERSON SORG: Thank you very
2 much, Mr. Secretary.

3 There are a few preliminary matters.
4 Before we do anything, though, I will ask that
5 those people who have joined us at the table to
6 please introduce themselves, starting from my
7 left.

8 MR. DINAN: Donald Dinan of the law firm
9 of Roetzel & Andress for the Northeast Neighbors
10 for Responsible Growth.

11 MS. HAUN: My name is Ashley Haun. I
12 represent the petitioner in Appeal No. 18240,
13 Northeast Neighbors for Responsible Growth.

14 MR. HOLMES: David Holmes, Chairman,
15 ANC-6A.

16 MR. ALBERTI: Nick ALberti, Commissioner,
17 ANC-6A.

18 MR. AILER: Guss Ailer [ph] from Gibson,
19 Dunn & Crutcher, representing AppleTree Institute
20 for Education Innovation.

21 MR. MENDRO: Good afternoon. I'm Jason
22 Mendro from the law firm of Gibson Dunn. I'm

1 here today on behalf of AppleTree Institute for
2 Education Innovation.

3 MR. Le GRANT: Good afternoon. I am
4 Matthew Le Grant. I am the Zoning Administrator
5 with the Department of Consumer and Regulatory
6 Affairs.

7 MR. SURABIAN: Good afternoon. This is
8 the Attorney General, Jay Surabian, on behalf of
9 DCRA.

10 MS. BOLLING: Good afternoon. Melinda
11 Bolling, General Counsel for DCRA.

12 VICE-CHAIRPERSON SORG: Good afternoon,
13 everyone.

14 Okay. So we have a few preliminary
15 matters to get through.

16 The first thing that we are going to do,
17 as we've got two cases that have been called
18 simultaneously, we are going to go ahead, and on
19 the Board's own motion, we will resolve to
20 consolidate these two cases based on the fact
21 that both involve identical facts in law, the
22 only difference being that the two cases were

1 filed a few days apart, one on April 22nd and one
2 on April 25th.

3 I think we can resolve that by consensus
4 of the Board, and so those two cases are hereby
5 combined.

6 Secondly, there is a motion to dismiss
7 pending in this case, and the Board does not
8 believe that oral arguments are necessary, as the
9 filings in this case are extremely voluminous;
10 therefore, the Board will go straight into the
11 deliberation on the preliminary motion to
12 dismiss.

13 And I can start us off, or if -- I will
14 start us off today.

15 Based on reading of the filings, an
16 understanding of what is involved in the
17 preliminary matter here, the motion to dismiss,
18 under the Zoning Act, the Board can hear an
19 appeal if two elements are satisfied, the first
20 element being that there is an administrative
21 decision, the second element being that that --
22 and if the first element is satisfied, the second

1 element being that that administrative decision
2 was based in whole or in part on the Zoning
3 Regulation or Map adopted under Chapter 11.

4 For the purposes of considering this
5 motion, we can treat, I believe, the withdrawal
6 of the notice of revocation that is under
7 discussion in this case, in fact, as an
8 administrative decision. If we do that, then for
9 the purposes of looking into the crux of what is
10 the motion to dismiss under subject-matter
11 jurisdiction, then we go to whether or not this
12 notice of revocation -- withdrawal of notice of
13 revocation is in fact based in whole or on part
14 on any Zoning Regulation, and that becomes our
15 question.

16 My finding is that facially there is no
17 Zoning Regulation involved in the withdrawal of
18 the revocation of the building permit referenced
19 in this case, and based on the reading of the
20 notice to revoke itself, the notice to revoke,
21 Building Permit No. B1010205, the language of
22 which says that the permit was issued in error.

1 Here, the Construction Code does not allow an
2 extension of the exiting building permit beyond a
3 total of 18 months from the original building
4 permit, B989587, which was issued on October
5 26th, 2007.

6 Here, the notice is stating the reasons
7 for the revocation. The reasons, in my opinion,
8 for the revocation fall squarely underneath Title
9 12, the Construction Code; therefore, the
10 withdrawal of that notice of revocation would
11 similarly fall squarely under Title 12, the
12 Construction Code. And in my opinion, therefore,
13 the Board would have no subject-matter
14 jurisdiction over hearing an appeal based on that
15 withdrawal of the notice of revocation.

16 And with that, I will open it up to other
17 Board members for their deliberations.

18 Thank you.

19 MR. SCHLATER: Madam Chair, I think I
20 concur with your reasoning on this. My read of
21 the revocation notice and all of the filings was
22 that what we're asked to address here is a

1 Construction Code issue, not a Zoning issue, and
2 I read all of the filings. I couldn't find
3 anything under DCMR Title 11 that was relevant in
4 this case. And because DCRA's decision was not
5 base in whole or part on any Zoning Regulation, I
6 believe the Board lacks subject-matter
7 jurisdiction to hear and decide this appeal and
8 must dismiss it.

9 VICE-CHAIRPERSON SORG: Further
10 deliberation?

11 MR. JORDAN: I was just taking a look at
12 the filings in the underlying permit and the
13 basis of the argument, and I see that it's a
14 Chapter 12 regulation matter.

15 I'm just trying to wonder how we get to
16 hearing this matter since that it's not a Title
17 11 -- Chapter 11 matter, but a Chapter 11 matter
18 that's being sought, a Construction Code matter.

19 I think that you are correct, Madam
20 Chair, that this is a matter that -- it's not
21 before us. There's nothing that we have control
22 over.

1 VICE-CHAIRPERSON SORG: Thank you very
2 much, Mr. Jordan.

3 Are there any additional comments from
4 Board members?

5 MR. HINKLE: I'll certainly put in my 2
6 cents. I'm in agreement with the rest of the
7 Board. I think we lack subject-matter
8 jurisdiction in this case.

9 VICE-CHAIRPERSON SORG: Thank you, Mr.
10 Hinkle.

11 With those comments being made, then I
12 will submit a motion to dismiss the combination
13 of Cases No. 18241, Application of Appeal of
14 Northeast Neighbors for Responsible Growth, and
15 Case No. 18239, Application of Appeal of Advisory
16 Neighborhood Commission 6A.

17 A motion has been made. Is there a
18 second?

19 MR. SCHLATER: Second.

20 VICE-CHAIRPERSON SORG: A motion has been
21 made and seconded. All those in favor say "aye."

22 [Chorus of ayes.]

1 VICE-CHAIRPERSON SORG: Mr. Secretary,
2 can you please read back the vote?

3 MR. MOY: Yes, Madam Chair. The staff
4 would record the vote as 4 to 0 to 1. This is
5 the motion of Ms. Sorg to dismiss the two
6 appeals, Appeal No. 18241 and 18239. Second --
7 for lack of subject-matter jurisdiction. Second
8 the motion, Mr. Schlater. Also in support of the
9 motion, Mr. Jordan and Mr. Hinkle. We have no
10 other Board members participating. Again, the
11 final vote is 4 to 0 to 1 to dismiss, and the
12 motion carries.

13 VICE-CHAIRPERSON SORG: Thank you very
14 much, and I believe that was the only matter on
15 our calendar for this afternoon.

16 ATTENDEE: May I speak for the record?

17 VICE-CHAIRPERSON SORG: I'm sorry. The
18 case has been dismissed, and the Board is not
19 able to take any comments for the record.

20 We thank you all for your time and your
21 effort, and this concludes this afternoon's
22 public hearing.

1 [Whereupon, at 1:56 p.m., the Public
2 Hearing was adjourned.]

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