

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY,

JANUARY 29, 2008

+ + + + +

The Public Hearing convened in
Room 220 South, 441 4th Street, N.W.,
Washington, D.C. 20001, pursuant to notice at
9:30 a.m., Ruthanne G. Miller, Chairperson,
presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER	Chairperson
MARC D. LOUD	Vice Chairman
SHANE L. DETTMAN	Board Member (NCPC)
MARY OATES WALKER	Board Member

ZONING COMMISSION MEMBER PRESENT:

MICHAEL G. TURNBULL Commissioner

OFFICE OF ZONING STAFF PRESENT:

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

OFFICE OF PLANNING STAFF PRESENT:

MAXINE BROWN-ROBERTS
ARTHUR JACKSON

This transcript constitutes the
minutes from the Public Hearing held on
January 29, 2008.

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

2 9:40 a.m.

3 CHAIRPERSON MILLER: This hearing
4 will, please, come to order. Good morning,
5 ladies and gentlemen. This is the January
6 29th Public Hearing of the Board of Zoning
7 Adjustment of the District of Columbia. My
8 name is Ruthanne Miller, I'm the Chair of the
9 BZA, and to my right is Marc Loud, who is the
10 Vice Chair, and next to him is Mr. Michael
11 Turnbull from the Zoning Commission, to my
12 left is Ms. Mary Oates Walker and Shane
13 Dettman, and next to him is Mr. Clifford Moy
14 from the Office of Zoning.

15 Copies of today's hearing agenda
16 are available to you and are located to my
17 left in the wall bin near the door. Please,
18 be advised that this proceeding is being
19 recorded by a Court Reporter and is also
20 webcast live. Accordingly, we must ask you to
21 refrain from any disruptive noises or actions
22 in the hearing room.

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

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

16 The order of procedure for special
17 exceptions and variances is as follows: One,
18 statement and witnesses of the applicant.
19 Two, Government reports, including Office of
20 Planning, Department of Public Works, DDOT,
21 etcetera. Three, report of the Advisory
22 Neighborhood Commission. Four, parties or

1 persons in support. Five, parties or persons
2 in opposition. Six, closing remarks by the
3 applicant.

4 Pursuant to Section 3117.4 and
5 3117.5, the following time constraints will be
6 maintained: The applicant and persons and
7 parties, except an ANC, in support, including
8 witnesses, 60 minutes collectively. Persons
9 and parties, except an ANC, in opposition,
10 including witnesses, 60 minutes collectively.
11 Individuals 3 minutes.

12 These time restraints do not
13 include cross examination and/or questions
14 from the Board. Cross examination of
15 witnesses is permitted by the applicant or
16 parties. The ANC within which the property is
17 based is automatically a party in a special
18 exception or variance case.

19 Nothing prohibits the Board from
20 placing reasonable restrictions on cross
21 examination, including time limits and limits
22 on the scope of cross examination.

1 The record will be closed at the
2 conclusion of each case, except for any
3 material specifically requested by the Board.
4 The Board and the staff will specify at the
5 end of the hearing exactly what is expected
6 and the date when the persons must submit the
7 evidence to the Office of Zoning. After the
8 record is closed, no other information will be
9 accepted by the Board.

10 The Sunshine Act requires that the
11 Public Hearing on each case be held in the
12 open before the public. The Board may,
13 consistent with it's rules of procedure and
14 the Sunshine Act, enter Executive Session
15 during or after the Public Hearing on a case
16 for purposes of reviewing the record or
17 deliberating on the case.

18 The decision of the Board in these
19 contested cases must be based exclusively on
20 the public record. To avoid any appearance to
21 the contrary, the Board requests that persons
22 present not engage the Members of the Board in

1 conversation.

2 Please, turn off all beepers and
3 cell phones, at this time, so as not to
4 disrupt these proceedings.

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

15 Does the staff have any
16 preliminary matters?

17 MS. BAILEY: Madam Chair, Members
18 of the Board, to everyone, good morning. Yes,
19 we do. And it has to do with the first two
20 cases this morning. The first of which is
21 Application No. 17709, there is a request for
22 postponement, Patricia Rosenman. Please, have

1 a seat at the table.

2 MS. ROSENMAN: I am Patricia
3 Rosenman. I reside at 3425 Garrison Street,
4 N.W., Washington, D.C. I have asked for a
5 postponement to have additional time to
6 negotiate further with the National Park
7 Service and to try to develop alternative
8 plans, as well as to get approval from the
9 ANC-4.

10 The ANC-4 voted 4-3 against the
11 current plan and the Office of Planning has
12 informed me that they have recommended against
13 the current plan. I am currently in
14 discussions with the architect and the ANC-4
15 Chair to attempt to work out other solutions.

16 CHAIRPERSON MILLER: Okay. How
17 much of an extension of time do you have in
18 mind?

19 MS. ROSENMAN: I would say,
20 because I'm going to be away for a time,
21 probably until June or July.

22 CHAIRPERSON MILLER: Okay. And

1 nobody else is here on this case, I assume.

2 MS. ROSENMAN: The ANC is here.

3 CHAIRPERSON MILLER: Oh, the ANC
4 is here? Do you want to come up for one
5 minute? Could you just identify yourself for
6 the record?

7 MS. SOLOMON: Sure. I'm Jane
8 Solomon. I'm the Chair of ANC-3F.

9 CHAIRPERSON MILLER: You don't
10 have any objections to the request for
11 postponement?

12 MS. SOLOMON: No, I think it's a
13 wise idea.

14 CHAIRPERSON MILLER: Okay. So we
15 will look at our calendar for June or July.
16 Do you have a preference between the two?

17 MS. ROSENMAN: Probably July.

18 CHAIRPERSON MILLER: Okay.

19 MS. SOLOMON: Well, actually, if I
20 may ask a question just based on your
21 experience if Mrs. Rosenman is going to enter
22 into, as you know this is a special exception

1 to a side yard variance, just based on your
2 experience --

3 CHAIRPERSON MILLER: Okay.

4 MS. SOLOMON: -- you know,
5 negotiating with the National Park Service, do
6 you think that's a reasonable time?

7 CHAIRPERSON MILLER: I can't say I
8 have real experience in this, so just to give
9 you a good answer, we can put it on the
10 calendar for July and then if it looks like
11 you're going to need more time, you can put in
12 another request, unless you want to just hedge
13 your bets further and go further out. But we
14 are -- we have availability in July for sure.
15 So, yeah, I don't know.

16 MS. SOLOMON: Okay.

17 MS. ROSENMAN: Okay. Thanks.

18 CHAIRPERSON MILLER: Sometimes we
19 have a Zoning Commissioner from the Park
20 Service, but we don't have that today.

21 MS. ROSENMAN: Let's try for July
22 and if things bog down, then I will let you

1 know and we'll see if we can reschedule.

2 CHAIRPERSON MILLER: Okay. Mr.
3 Moy, do you have dates in July?

4 MR. MOY: Yes.

5 CHAIRPERSON MILLER: Or, Ms.
6 Bailey?

7 MR. MOY: Yes, I don't have my
8 calendar with me. I think Ms. Bailey does.
9 I was going to suggest either the first
10 hearing in July maybe for the afternoon or
11 late morning.

12 CHAIRPERSON MILLER: All right.

13 MS. BAILEY: July 8th, Madam Chair,
14 in the afternoon. And the reason is because
15 that's your first hearing, as Mr. Moy
16 indicated, and so the morning is usually
17 reserved for your meetings.

18 CHAIRPERSON MILLER: Okay. Would
19 you like that date, July 8th, first in the
20 afternoon at 1:00?

21 MS. ROSENMAN: July 8th at 1:00
22 sounds fine. Thank you.

1 CHAIRPERSON MILLER: Okay.

2 MS. SOLOMON: Thank you.

3 CHAIRPERSON MILLER: Thank you
4 very much. Do we have another case requesting
5 postponement, Ms. Bailey?

6 MS. BAILEY: It is, Madam Chair,
7 and it's Application No. 17008, Negussie
8 Giorgis.

9 MR. GIORGIS: Good morning. My
10 name is Negussie Giorgis. My address is at
11 2239 10th Street, N.W., Washington, D.C.

12 CHAIRPERSON MILLER: Okay.

13 MR. SPALDING: Phil Spalding
14 representing ANC-1B.

15 CHAIRPERSON MILLER: Thank you.

16 MR. GIORGIS: I'm requesting the
17 time change. My architect is out of the
18 country, so he would be back by February the
19 5th or the February the 12th if possible.

20 CHAIRPERSON MILLER: Okay. He is
21 available on both those dates?

22 MR. GIORGIS: Yes.

1 CHAIRPERSON MILLER: Correct?

2 MR. GIORGIS: Yes.

3 CHAIRPERSON MILLER: Mr. Spalding,
4 do you have a position on this request?

5 MR. SPALDING: We have no
6 difficulty with coming back on the 5th or the
7 12th.

8 CHAIRPERSON MILLER: Okay. Good.
9 And do either of you have any information
10 about the Office of Planning? As I understand
11 it, we don't have a report from them yet and
12 I'm not sure if I see anybody in the room from
13 Office of Planning.

14 MR. SPALDING: I have not talked
15 to Office of Planning about this specific
16 request. It's in line with a number of
17 decisions of the Board and Office of Planning
18 in the past has supported these requests. I
19 would expect, but that's only my conjecture,
20 that they are supporting, but I haven't spoken
21 to anyone.

22 MR. GIORGIS: No.

1 CHAIRPERSON MILLER: Okay. I
2 believe this was a fairly straightforward
3 case. So I think what we will do is I'll try
4 to fit you in next week on the 5th.

5 MR. GIORGIS: I will be out of the
6 country tomorrow.

7 CHAIRPERSON MILLER: Oh.

8 MR. GIORGIS: Sorry.

9 CHAIRPERSON MILLER: Wait a
10 second. Am I wrong that that's next week?

11 MR. GIORGIS: Yes, but he will be
12 my agent, so he will -- if you write him a
13 letter, so he will be well-informed or I will
14 inform Mr. Jeff, the architect. He is my
15 agent.

16 CHAIRPERSON MILLER: So you'll be
17 out of the country, but he will be here to
18 represent you?

19 MR. GIORGIS: Yes.

20 CHAIRPERSON MILLER: Okay. And
21 you don't have any problems with not being
22 here for your hearing, right?

1 MR. GIORGIS: No.

2 CHAIRPERSON MILLER: If he is
3 representing you?

4 MR. GIORGIS: Yes.

5 CHAIRPERSON MILLER: Okay. Okay.
6 Okay. I think, Mr. Moy, what I would like to
7 do is schedule this for the 5th, first in the
8 afternoon.

9 MR. MOY: That's doable.

10 CHAIRPERSON MILLER: Okay. We do
11 have a busy day next week, but this seems like
12 a pretty straightforward case and your
13 representative will be here, correct?

14 MR. GIORGIS: Yes.

15 CHAIRPERSON MILLER: Okay.

16 MR. GIORGIS: Thank you.

17 CHAIRPERSON MILLER: Thank you.

18 MS. BAILEY: Madam Chair,
19 hopefully the Office of Planning is watching
20 this and will be able to file a report in by
21 that time or prior to that time.

22 CHAIRPERSON MILLER: I think

1 perhaps our office can inform the Office of
2 Planning of what we have said and I expect
3 they should be able to file their report.

4 MS. BAILEY: Thank you.

5 CHAIRPERSON MILLER: Okay. I
6 think that's it for preliminary matters. And
7 at this point, whenever you are ready, Ms.
8 Bailey, to swear in the witnesses.

9 Would all individuals wishing to
10 testify today, either in support or in
11 opposition to any application, please, rise to
12 take the oath?

13 MS. BAILEY: Would you, please,
14 raise your right hand?

15 (Whereupon, the witnesses were
16 sworn.)

17 MS. BAILEY: Thank you. Madam
18 Chair, for the record, the property was posted
19 for five days. As you know, 15 days are
20 required. Secondly, the applicant did amend
21 the application. And then lastly, we do have
22 two letters of support in the record, but we

1 have since received another letter. And this
2 letter is from the National Education
3 Association, so I'll be passing that out, at
4 this time.

5 CHAIRPERSON MILLER: Okay. Why
6 don't we start with introductions?

7 MR. COLLINS: Good morning, my
8 name is Chris Collins with the Law Firm of
9 Holland and Knight. And seated to my left is
10 Jeffrey Johnson of our office. To my
11 immediate right is Mr. Franck Arnold. Mr.
12 Arnold is the general manager of the hotel,
13 The Jefferson Hotel.

14 And to my far right is Mr. Paul
15 Hodges with Forrest Perkins Architects. Mr.
16 Hodges is the project manager for this
17 project. And seated behind us is Ms. Pamela
18 Blom from Oehrlein and Associates, the
19 historic preservation architects for this
20 project.

21 CHAIRPERSON MILLER: And why don't
22 we then just have you address the posting

1 issue?

2 MR. COLLINS: Yes. With regard to
3 posting, we have -- I discovered last week on
4 Thursday, that the property wasn't posted. We
5 have a very comprehensive and extensive system
6 in place to make sure that postings are done
7 on time. And on this it just didn't happen
8 and we don't know why, but I would like to
9 explain the situation.

10 Well, we are looking into that to
11 make sure the procedures are proper in the
12 future. Section 3113.13 of the Zoning
13 Regulations lists the requirements for notice
14 to the public. And the notice was provided,
15 in this case, under 3113.13, that is notice in
16 the DC Register, mailing the notice to all
17 owners within 200 feet, mailing to the ANC and
18 posting a calendar in the Office of Zoning.

19 Section 3113.14 lists as
20 "additional notice" the requirement that the
21 applicant provide 15 days posting of the
22 property. That was not met, but I would like

1 to tell you the other six things that were
2 done by the applicant to provide notice that
3 we believe is in -- far exceeds what the
4 effective notice would be had we simply posted
5 the property.

6 3113.14 is the 15 day notice
7 requirement for posting. It does -- the
8 regulations also stipulate that the applicant
9 must make a reasonable effort to check the
10 posting every five days, at least every five
11 days. If a sign was posted on day 15, before
12 the hearing, and either came down or was
13 defaced, as long as the applicant checked the
14 sign on day 10 and reposted, that would
15 satisfy the requirement.

16 If it happened again, it came down
17 or was defaced again with weather or whatever,
18 on day 5, if you put up another sign, that
19 would meet the requirement. So as long as the
20 sign was posted at least 3 days out of 15,
21 this would meet the posting requirement.

22 What we did here on day 5 before

1 the hearing, we posted that day and we
2 maintained every day since that time. And we
3 have the Affidavit of Maintenance to indicate
4 that we posted and maintained every day since
5 last Thursday. And I would like to submit
6 those for the record.

7 In addition, we did six other
8 things. We -- the ANC is required to receive
9 a copy of the notice of the application. We
10 sent the ANC the application itself in July,
11 July 27th. We amended the application in --
12 on November 30 to add an additional area of
13 relief. We sent the ANC the additional
14 notice.

15 The applicant, Mr. Arnold,
16 specifically has met with the ANC four times.
17 We have gone to two meetings at the ANC and
18 then had an on-site meeting with ANC
19 representatives to walk them through the
20 project, explain the situation and then we
21 went to the ANC one last time and got their
22 vote of support.

1 The ANC representative -- oh, and
2 that letter of support is in the record. And
3 the ANC representative is on his way to
4 testify in this case today.

5 With regard to the neighbors
6 within 200 feet, they received the notice from
7 this Board on the original application. When
8 we amended the application, we again sent a
9 revised notice, which included the original
10 notice plus the addition to all owners within
11 200 feet and that is in the record as well.

12 What I think is significant is
13 that not a single notice was returned, which
14 is unusual, as you know. As good as the
15 Office of Tax and Revenue keeps the records,
16 sometimes people move and sell their
17 properties before they are updated. But in
18 this case, not a single notice was returned.
19 So everyone who was supposed to get the 200
20 foot notice received it.

21 The applicant's representative,
22 again, Mr. Arnold, he personally discussed the

1 case with the surrounding property owners:
2 The National Geographic to the south, the
3 National Education Association to the east,
4 American Chemical Society to the southeast
5 across the intersection, the University Club,
6 which is next to the American Chemical
7 Society, and Boston Properties, which owns the
8 building to the west, as well as the National
9 Association of Negro Women to the north. We
10 contacted them. They did not respond for
11 whatever reason.

12 We have, as indicated, three
13 letters in the record in support. We have two
14 additional letters, which we received
15 yesterday, which we will be, at the
16 appropriate time, handing in. I have a
17 graphic I would like to submit to the record,
18 which shows in orange the property of the
19 applicant and in green the owners of all the
20 property, I'll hold it up as it's being
21 submitted, within 200 feet with whom Mr.
22 Arnold has spoken directly. And we have the

1 letters of support or no objection. In one
2 case, it's a letter of no objection, which
3 will -- the summary in the record, we will
4 submit the rest at the appropriate time.

5 And as part of the Historic
6 Preservation Review, the project was discussed
7 with the Dupont Circle Conservancy. This
8 project did go through Historic Preservation
9 Review. None of the exterior additions to the
10 building rose to the level of needing review
11 by the board itself at a public hearing. It
12 was all handled at the staff level, but
13 nonetheless, we did talk with the Dupont
14 Circle Conservancy.

15 Also, we spoke with the Office of
16 Planning and the Department of Transportation
17 and we have those support letters in the file.

18 So in this case, we spoke to the
19 community organizations, the property owners,
20 the city agencies, all who would have any
21 interest in this case, and we feel that with
22 all that information, we have gone above and

1 beyond the requirements of simply posting 15
2 days.

3 We certainly regret the lack of
4 posting, but we do believe that we have, given
5 the totality of the circumstances, adequately
6 notified everyone involved. And in this case,
7 we have no indication of any opposition to the
8 case whatsoever.

9 CHAIRPERSON MILLER: Okay. And
10 this Board has authority to waive most of our
11 regulations, not all of them, but this one
12 included upon finding of good cause and no
13 prejudice to any party. And also, as you
14 point out, we have various types of notice
15 requirements built into the regulations, so
16 that if one falls in the cracks, hopefully the
17 surrounding community and interested parties
18 get notice other ways.

19 And so I think you have made a
20 very strong case in this case that all the
21 surrounding community, the ANC, the neighbors,
22 interested owners have all gotten notice of

1 this application. So I would recommend that
2 we waive our rules and waive the posting
3 requirement in this case. Okay. And that's
4 the consensus of the Board.

5 MR. COLLINS: Thank you.

6 CHAIRPERSON MILLER: Okay.

7 MR. COLLINS: Thank you.

8 CHAIRPERSON MILLER: Are most of
9 the surrounding owners institutions or not all
10 of them? I was just looking at your green
11 marks and how to read that and you named some
12 organizations.

13 MR. COLLINS: The green marks
14 indicate those owners that Mr. Arnold reached
15 out to. He spoke to everyone, with the
16 exception of the property owner directly to
17 the north, I mean, they never responded. The
18 National Association of Negro Women owns a
19 townhouse directly to the north and they never
20 responded, so we tried. The orange is the
21 applicant's property there.

22 CHAIRPERSON MILLER: My question

1 was, and I could review the list of owners
2 within 200 feet, but I don't have that right
3 in front of me at this moment, I was just
4 wondering are most of the owners within 200
5 feet institutions?

6 MR. COLLINS: Oh, yes.

7 CHAIRPERSON MILLER: Yeah.

8 MR. COLLINS: Yes, with one small
9 exception on the very -- if you look at the
10 map, on the very top right hand corner, there
11 is a building that fronts on Rhode Island
12 Avenue, which is owned by an institution, but
13 it's an apartment house. It's the Louise
14 Home.

15 CHAIRPERSON MILLER: Um-hum.

16 MR. COLLINS: And they are
17 oriented more toward the avenue and so we
18 reached out to those who would be kind of
19 within sight of the property, those whose
20 front doors face the property and certainly
21 Boston Properties right next door to the west
22 that we share an alley with them.

1 CHAIRPERSON MILLER: Okay. Thank
2 you. So you can proceed on your application,
3 as amended. I think it's considered amended.
4 You have gone through all the right steps in
5 providing notice before the hearing and
6 everything.

7 MR. COLLINS: Yes.

8 CHAIRPERSON MILLER: Okay.

9 MR. COLLINS: So I have already
10 introduced the parties, the people in front of
11 you. This is an application for a special
12 exception to allow an addition of what totals
13 about 850 square feet to the hotel. It's a
14 very minor addition to the hotel.

15 We amended the application to --
16 for the roof structure issue, because the roof
17 structure enclosures, which do not strictly
18 comply with the regulations, we had in the
19 past with previous Zoning Administrators
20 gotten rulings in certain instances where we
21 did not believe -- rulings in certain
22 instances where what we are asking for today

1 would not have been required to be a special
2 exception, but out of an abundance of caution,
3 we added them to the case.

4 Here is the situation. There are
5 two existing roof structures. They were built
6 prior to 1958. They don't meet the
7 regulations, because they are too tall for the
8 distance from the setback.

9 We are adding a screened wall
10 around the entire thing that goes up a
11 distance equal to its height from the setback.
12 The height equals the setback. What doesn't
13 comply is that now we have roof structures of
14 unequal height.

15 The Zoning Administrator
16 previously has ruled, a previous Zoning
17 Administrator has previously ruled, that if
18 you have that situation, as long as the new
19 complies with the regulations, the fact you
20 had existing that doesn't comply did not
21 require you to get a special exception.

22 We have another situation where we

1 have the northern most portion --

2 CHAIRPERSON MILLER: Are these
3 orders that are in the record or are you --

4 MR. COLLINS: No, they are not in
5 the record.

6 CHAIRPERSON MILLER: This is just
7 Zoning Administrator --

8 MR. COLLINS: They are letters
9 that deal with other properties.

10 CHAIRPERSON MILLER: Oh, okay.

11 MR. COLLINS: And rather than take
12 a chance that you might not accept them, we
13 just added the application, out of an
14 abundance of caution, and talked to the ANC,
15 talked to the neighbors, everyone about that
16 issue, as if we need to do it.

17 So we have a footnote in our
18 pleadings that says "To the extent that we
19 need this relief, we are asking for it."

20 We discussed the project, as I
21 mentioned, with the ANC, the Dupont Circle
22 Conservancy, the surrounding neighbors, the

1 Office of Planning and DDOT. The additions
2 when you break them down, the kitchen addition
3 is 403 square feet. We are putting skylights
4 over to existing open areas on the ground
5 level at the entrance, at the lobby level, and
6 that adds FAR, because we're putting the
7 skylight over an open area and that's 306
8 square feet.

9 And then we are adding two, we
10 call them, bridges between the eight-story
11 building and the four-story building at the
12 third and fourth levels for fire egress
13 purposes, that adds 142 square feet. It's not
14 occupiable space. It's a passageway. But
15 nonetheless, it adds FAR, and we're adding
16 that.

17 DDOT's support in this case was
18 premised on a revised site plan that the
19 applicant submitted to DDOT. We did not get
20 notice from DDOT that they accepted it or that
21 they approved the application, based on that,
22 until their letter was filed in the record the

1 day of our submission, our previous
2 submission, so it was not included in our
3 prehearing submission.

4 But for the record, I would like
5 to submit that revised site plan that DDOT
6 refers to in their report. It's the site plan
7 known as Sheet 0.03A. It's a revision that
8 incorporates changes pursuant to DDOT's
9 request, principally to provide landscaping in
10 the public space where there is currently
11 paving in the public space next to the loading
12 area. So we have done that. We have -- and
13 so that's being handed around by Ms. Bailey
14 now.

15 We have two special exceptions
16 here. Section -- special exception it's under
17 section 512 for an addition to the hotel and
18 under section 411.11 for the roof structure
19 setback and the uniform height requirements.
20 We believe that the applicant meets all
21 requirements for special exception relief.

22 If you -- unless there are any

1 questions, at this point, I would like to go
2 to my first witness, Mr. Franck Arnold of
3 Jefferson Hotel and Ogden CAP.

4 CHAIRPERSON MILLER: Okay. I just
5 am curious, how you are going to be
6 proceeding. Are you going to address the
7 hotel additions questions first and then the
8 roof structures or are you just going to roll
9 it all together in your presentation?

10 MR. COLLINS: Well, Mr. Arnold is
11 going to give some background about the hotel.
12 And then Mr. Hodge is going to speak to the
13 two special exceptions.

14 CHAIRPERSON MILLER: Okay. Thank
15 you.

16 MR. COLLINS: Mr. Arnold, would
17 you, please, identify yourself for the record
18 and proceed with your testimony.

19 MR. ARNOLD: Good morning. My
20 name is Franck Arnold. I'm the general
21 manager of the Jefferson Hotel. I reside in
22 Chevy Chase, 3314 Coquelin Terrace. I have

1 been with the Jefferson Hotel and Ogden CAP
2 Properties since 2005, where I took over the
3 position of general manager.

4 At that time, the hotel, although
5 still a very nice and very pictorial hotel in
6 the place of Washington, D.C., was suffering
7 from its conditions, at that time. And new
8 ownership decided that in order to be
9 competitive for the years to come, we had to
10 undertake a full scale renovation.

11 So we closed the hotel in March
12 '07 and -- to undertake to start this -- with
13 this project. In 2005, the property was
14 acquired by an independent company. And truly
15 in order to be competitive at that level, we
16 decided that we had to undergo a full scale
17 that would enable us to compete at the five
18 star level when we reopen some time this year
19 or next year.

20 We have been thoroughly working
21 with the community in order to share with our
22 direct neighbors the nature of the project and

1 try to involve them in the -- in what we
2 believe is the right thing for the hotel, but
3 also for the community and Paul Hodges will
4 describe further those changes.

5 We have, as Chris Collins
6 mentioned, gathered some more letters of
7 support from our neighbors that are here. We
8 have only received very positive comments from
9 all our neighbors, surrounding neighbors and
10 to my knowledge no opposition to the project.

11 So I would like to introduce you
12 to Paul Hodges from the firm, from the
13 Architectural Firm Forrest and Perkins, who is
14 going to go further into the details.

15 MR. HODGES: Hello, my name is
16 Paul Hodges. I live at 1205 Saugus Court in
17 Great Falls, Virginia. I'm here representing
18 -- I am the project manager for Forrest
19 Perkins, who is the architect of record for
20 this job.

21 Chris has pretty much covered the
22 scope of the work, but I'll walk you through

1 the details of it. I'm going to start with
2 the additions.

3 The first one of notice would be
4 the kitchen addition. And actually, I'm going
5 to stand and get a microphone, it will be
6 easier for me. Okay. Thank you.

7 The kitchen addition, the 403 some
8 odd square feet relief, this is -- represents
9 this area right here.

10 MR. COLLINS: Mr. Hodge, could you
11 identify the plan that you are looking at?

12 MR. HODGES: I'm sorry, thank you.
13 This is the first floor plan of the hotel.
14 The hotel itself, the eight-story structure,
15 is a U-shaped --

16 MR. COLLINS: Excuse me for
17 interrupting. Is it 0.07? Is that the sheet
18 number that you are referring to right now?

19 MR. HODGES: Yes.

20 MR. COLLINS: For the record.

21 MR. HODGES: Thank you. 0.07A.

22 MR. COLLINS: Thank you.

1 MR. HODGES: Okay. The kitchen
2 addition is a one-story structure which will
3 adjoin the existing one-story kitchen
4 structure that abuts the alley on the west.
5 The extension wall itself will be at the same
6 height and the same material as the existing
7 structure that it is adjoining to.

8 The primary reason for doing this
9 kitchen addition is very crucial to our
10 attempt to have a world class restaurant.
11 It's all about circulation and flow through
12 the back of the kitchen. It's clean food
13 coming out of the heart of the kitchen, dirty
14 food going in to this. This will be the dish
15 washing area. It's all about the circulation,
16 all centered around the primary weight
17 station. It's to have a perfectly smooth
18 flowing kitchen.

19 In addition to the kitchen
20 addition, not adding FAR, we are improving the
21 existing service yard enclosure that will
22 house the dumpsters and this somewhat stems

1 from the DDOT request. DDOT was referring to
2 their approval to the site plan, which is
3 Drawing 0.03A. The existing right now, this
4 is all hard paving, including this portion
5 here, which we are now going to landscape.
6 That was a specific request of the Office of
7 Planning.

8 While we were going through the
9 process, at our own initiative, we decided to
10 add an 8 foot brick screened wall around the
11 service yard, so that it would conceal all the
12 dumpsters.

13 I'm going to change drawings.
14 This gives a little bit more detail about the
15 addition itself. This is Drawing 2.04. This
16 is showing the kitchen extension. The
17 elevation facing the alley. And I want to
18 note a bit, the height difference that's going
19 on here, this brick addition is added to the
20 existing brick wall that -- at the existing
21 kitchen and that was provided to meet the
22 screening requirements for new rooftop

1 equipment being placed on the existing roof.

2 So we had to raise this one up
3 about 4 feet. This height is matching the
4 existing kitchen wall as it stands right now
5 and this is what was approved by HPRB for a
6 new addition. And they were very sensitive
7 that we not encroach any further south than
8 this bay window projection and that we not go
9 any higher than the existing kitchen wall.
10 Therefore, that's how the design worked itself
11 out.

12 These are shallow recesses in the
13 wall, simply to mimic the architectural
14 pattern of the windows above. Again, another
15 HPRB request.

16 This is the 8 foot brick enclosure
17 around our dumpsters and the service yard.
18 Again, done to -- somewhat at the request of
19 Office of Planning, but also to improve the
20 area for our neighbors.

21 As one note, we are adding -- we
22 are not putting a roof over this service yard,

1 but we are adding a cosmetic visual screen.
2 Essentially, it's a louver that is more than
3 50 percent open. It's, essentially, any rain
4 coming through will go all the way down to the
5 bottom. It's simply to provide a visual
6 screen. This is the hotel here looking down
7 into the alley, so that the guests won't be
8 looking down and looking right into the
9 dumpsters.

10 I believe that is everything I
11 would like to say, unless there are any
12 questions about the kitchen addition itself.

13 CHAIRPERSON MILLER: The service
14 area you were just talking about with the
15 screen on top.

16 MR. HODGES: Um-hum.

17 CHAIRPERSON MILLER: Does it have
18 walls too or just posts or how is that service
19 area enclosed?

20 MR. HODGES: Does it have what?

21 CHAIRPERSON MILLER: Walls.

22 MR. HODGES: Yes. I mean, it's

1 enclosed. Can I have the plan of it, please?
2 It's enclosed with walls on all, essentially,
3 four sides. There is a sliding barn style
4 door here where the actual dumpsters will be
5 wheeled out into the alley when they need to
6 be serviced by the trash truck. It is closed
7 all the way around to this point. This is
8 about a 4 foot high wall. Basically, you have
9 access coming down from the kitchen staff.

10 There is a bit of a fence right
11 here that is not a brick wall that's at the
12 end of the stair at the landing, but
13 effectively, all four sides of it have the 8
14 foot brick wall.

15 CHAIRPERSON MILLER: Thank you.

16 MR. HODGES: Thank you. All
17 right. The second part of the adding FAR is
18 the enclosure of the two existing courtyards.
19 And can I, please, have the photo again?
20 Thank you. These two courtyards, this is the
21 main entry off 16th Street. You walk into the
22 foyer of the hotel. This area and this area

1 are existing open to sky courtyards.

2 We would like to put skylights
3 above the two of them and capture that as
4 interior space, thus adding FAR, 306 square
5 feet. This is a section cut through those
6 courtyards showing the addition of the new
7 skylights. This is Drawing 1.01 in your set.

8 And of course, you know, we would
9 like to capture the space for the function of
10 the restaurant itself. This will be dining
11 space, but also it compliments the existing
12 barrel vaulted skylight that was in place back
13 when the building was first erected in 1923.
14 Over the years, it had been covered up with an
15 opaque roof deck and a plaster ceiling.

16 We were able to convince the
17 ownership to open that back up and turn it
18 back into another skylight. It doesn't affect
19 our application here today. It's just a
20 little history of what's going on there.

21 That's all I have for the atrium
22 enclosures, unless you have any questions.

1 Okay.

2 The bridge additions, I don't have
3 any presentation plans to show you. I can
4 refer you to something in the booklet though.
5 Let's start with Drawing 0.08. I'm sorry,
6 0.09, we'll start with that one, that's the
7 second floor. The existing hotel has one
8 spiral fire stair, which is located here on
9 the plan. As the second means of egress, it
10 has an exterior fire escape ladder that's
11 mounted on the north facade of the building.

12 We are eliminating that exterior
13 fire escape and we're creating a new internal
14 staircase, a fire stair coming down from the
15 eighth floor. It comes down actually to the
16 fourth floor and from the fourth floor, we are
17 connecting across. This little piece right
18 here is what I'm calling the bridge expansion.

19 So essentially, our new fire stair
20 comes down to the fourth floor. It connects
21 over to the annex where it goes to an existing
22 fire stair and then takes everybody down and

1 out of the building. That bridge addition is
2 solely for improvement of life safety egress.

3 That is essentially all the --
4 concludes my discussion about the additional
5 FAR. I would like to move on to the roof
6 screen, if there are no questions. Okay.

7 CHAIRPERSON MILLER: Thank you.
8 So, I mean, basically, what I understand
9 you've shown us, the renovations you're doing
10 and why they increase the FAR and they are all
11 very minor, but special exception relief is
12 triggered just because you are adding
13 additional space to the hotel?

14 MR. HODGES: Yeah, and hotel is
15 permitted by special exception in the SP Zone
16 and because these elements of the hotel were
17 not there, are not there, we need to, even
18 though it's only 150 square feet, ask for the
19 special exception for this addition to the
20 hotel.

21 CHAIRPERSON MILLER: If you were
22 making renovations that didn't add to FAR or

1 lot area or anything like that, would you say
2 that you wouldn't need to seek special
3 exception relief?

4 MR. HODGES: That's correct.

5 CHAIRPERSON MILLER: Okay. Any
6 questions?

7 MR. HODGES: Okay. The rooftop
8 screens. These -- this is Plan 0.23 in your
9 drawing set. These two penthouses are
10 existing. This is for the primary passenger
11 elevators and the other one is a service
12 elevator and the fire stair that -- the
13 existing fire stair that goes up to the roof.

14 This area in and amongst these two
15 penthouses is where we are adding our new
16 mechanical equipment and the perimeter screen
17 wall that goes around that equipment. The
18 tallest portion of that screen wall, I
19 believe, is 10 foot 10 inches, which equals
20 the 1:1 setback from our building wall 10 foot
21 1 inches or 10 foot 10 inches, 10 x 10.

22 The problem is we cannot match the

1 -- this is our 10 foot 10 new screen wall.
2 These are the existing penthouses. We cannot
3 match the height of the two penthouses. One of
4 them is 6 feet 8 setback. They are,
5 approximately, what 11.5 feet. The other
6 setback is 9 foot 7.

7 We are asking for relief,
8 basically. Yes, we could have made this
9 setback 11 foot 6 or so to match that existing
10 penthouse structure, even though it is
11 nonconforming, but the resulting service yard
12 would have resulted -- would have been so
13 narrow that we couldn't have put our equipment
14 up there.

15 We sized the equipment per the
16 needs of the hotel renovation and this was the
17 distance that we needed. We made it as close
18 as we could and achieved that 10 foot 10
19 setback. We're asking for the relief simply
20 to -- that we can't match the existing
21 penthouse heights. That's the one item.

22 The second is --

1 CHAIRPERSON MILLER: I'm sorry, I
2 didn't totally get that. Maybe could you go
3 over that again? There is existing penthouses
4 that are setback a certain distance or the
5 walls are only a certain height?

6 MR. HODGES: Yes, the existing --
7 look at this one. The existing penthouse, I
8 believe, is 11 feet 6 or something like that,
9 11 feet 6 inches tall. Its current setback is
10 only 6 feet 8 inches. It really should be 11
11 feet 6 inches setback. The other one is not
12 quite as bad. It's 9 feet 7 inches setback,
13 but at the same 11 foot 6 height.

14 Our new structure that we are
15 building does satisfy the 1:1 height to
16 setback ratio on both sides. The only thing
17 that we are asking for -- exception for is
18 that we can't match the height of the existing
19 penthouse. We can't go up to -- we can't have
20 an 11 foot 6 setback and still have this
21 service yard be functional for the needs of
22 our equipment.

1 MR. COLLINS: When you say service
2 yard, you mean the area within the enclosure?

3 MR. HODGES: Yes. The screened in
4 mechanical area on the roof.

5 CHAIRPERSON MILLER: Okay. You
6 can't have the 11 feet 6 inch setback, because
7 you don't have enough space for that
8 equipment. What is the setback that you are
9 proposing?

10 MR. HODGES: What we are proposing
11 is 10 feet 10.

12 CHAIRPERSON MILLER: 10 feet 10.

13 MR. HODGES: Yeah.

14 CHAIRPERSON MILLER: With a 10
15 feet 10 enclosure?

16 MR. HODGES: The 10 foot 10 will
17 completely conceal the existing equipment,
18 looking at it in pure elevation. The second
19 part of this rooftop screen exception is on
20 the north wall. Again, the equipment
21 relocation right now currently coming up the
22 building. There are two large exhaust fans

1 that serve the kitchen down below. They are
2 located here on the corner of the building.

3 They are not screened at all. And
4 in our remodel, we -- in our new equipment, we
5 placed them within the screened in service
6 yard or mechanical room, whatever you want to
7 call it. Because of the clearances, the air
8 clearances that are required around this
9 equipment, we had to go to a 9 foot 4 setback
10 instead of the 10 foot 10.

11 The annex portion of the hotel is
12 immediately adjacent to this north wall that
13 we are setting back from. It is not our
14 neighbors to the north. It's still part of
15 the hotel. And we are asking for an exception
16 for this 9 foot 4 setback. It's not 10 feet
17 10, it's 9 feet 4.

18 MEMBER DETTMAN: Specific to the
19 portion that you just presented, is there
20 something, you may have already answered this
21 question with your comment about air
22 clearances, but, that is preventing you from

1 building that portion of the enclosure to 9
2 foot 4?

3 MR. HODGES: Well, it's actually
4 10 foot 10. One of the other requirements is
5 that you have a uniform height around your
6 whole yard.

7 MEMBER DETTMAN: Right. But you
8 are requesting relief from that anyways as a
9 special exception under 411.11?

10 MR. HODGES: Yeah. If we were to
11 match the existing penthouse, we would have to
12 be the 11 foot 6 setback instead of 9 foot 4.

13 MEMBER DETTMAN: Right.

14 MR. HODGES: Which -- yes.

15 MEMBER DETTMAN: Well, I guess
16 I'll try to rephrase my question. Right now,
17 on that north portion of the enclosure you
18 have a 10 foot 10 enclosure, but only a
19 setback of 9 foot 4 inches?

20 MR. HODGES: Yes.

21 MEMBER DETTMAN: Is there
22 something that is preventing you from actually

1 building that portion of the enclosure to 9
2 foot 4? Maybe you need a vertical clearance
3 between the air handler and the ceiling of the
4 enclosure.

5 MR. HODGES: We could lower the
6 wall, yes.

7 MEMBER DETTMAN: You could?

8 MR. HODGES: But then it would not
9 be equal to the height of all the rest of it.

10 MEMBER DETTMAN: Right.

11 MR. HODGES: Right.

12 MEMBER DETTMAN: Okay. The
13 existing duct work that services the kitchen,
14 is that a pre-existing condition? You're not
15 changing the duct work at all?

16 MR. HODGES: We're totally
17 changing the duct work.

18 MEMBER DETTMAN: You are, okay.

19 MR. HODGES: The existing location
20 of these two units is here on the corner.

21 MEMBER DETTMAN: Okay.

22 MR. HODGES: Not screened at all.

1 MEMBER DETTMAN: Currently, they
2 are not enclosed, but you are deciding to
3 enclose them?

4 MR. HODGES: Yes.

5 MEMBER DETTMAN: Okay.

6 MR. COLLINS: Mr. Hodge, you are,
7 in fact, trying to improve the situation, the
8 existing situation. Is that correct?

9 MR. HODGES: Yes, we are.

10 MEMBER DETTMAN: I agree it's an
11 improvement. I'm just wondering if you could
12 actually come into conformance with the 1:1
13 setback from the exterior walls if you were to
14 just modify that small northern portion of the
15 enclosure to 9 foot 4 inches. And what I'm
16 hearing is that that might be possible.

17 MR. COLLINS: If I could just
18 address that point. It's an either or
19 situation. We either could have made them as
20 uniform and kept the bumps and humps on the
21 roof to a minimum or we could have met that
22 setback. And we determined to keep the bumps

1 and humps to a minimum and not meet the
2 setback, because the area where we don't meet
3 the setback, it's a setback, we are the
4 neighbor there, essentially.

5 What this plan doesn't show is
6 that all the equipment is on the eighth foot--
7 the eight-story building. The neighbors, the
8 four-story building, that's us. And it abuts
9 the courtyard and that's -- it's an interior
10 courtyard and that's what doesn't comply.

11 So, in our view, in designing
12 this, it was a minor deviation. More minor,
13 less major than having unequal heights and a
14 more hodgepodge looking roof. That was the
15 idea.

16 MEMBER DETTMAN: Okay.

17 MR. COLLINS: So we either could
18 do one or the other and --

19 MEMBER DETTMAN: I see.

20 MR. COLLINS: -- it's up to the
21 Board to decide which one we should do, but we
22 can do either one.

1 MEMBER DETTMAN: Thank you.

2 MR. COLLINS: Sure.

3 CHAIRPERSON MILLER: Let me ask
4 you this just you can't -- you need to do the
5 10 feet 10 inches in order to have the space
6 that goes, you know, for the setback, for the
7 mechanical equipment or whatever, correct?
8 Right?

9 MR. COLLINS: Yes.

10 CHAIRPERSON MILLER: So when we go
11 back to that one, then you are getting -- then
12 you have existing an 11 foot 6 inch enclosure.

13 MR. COLLINS: Yes.

14 CHAIRPERSON MILLER: Is that
15 right? So you already have an equal heights?

16 MR. COLLINS: Yes.

17 CHAIRPERSON MILLER: Okay.

18 MR. COLLINS: We're trying to
19 minimize the number of jumps, that's all.

20 CHAIRPERSON MILLER: Okay. So
21 obviously, what you are saying is if you did
22 9 feet 4, you're getting an additional unequal

1 height.

2 MR. COLLINS: Yes.

3 CHAIRPERSON MILLER: Even if you
4 did 10 x 10 there, you're still not going to
5 be in compliance with the equal heights,
6 because of the 11 foot 6. Okay.

7 MR. COLLINS: The 9 foot 4, if we
8 went to that height, that would be abutting
9 the higher one, the existing higher one.

10 CHAIRPERSON MILLER: Okay.

11 MR. COLLINS: So it would be a
12 greater difference.

13 CHAIRPERSON MILLER: Oh, I see.
14 Okay.

15 MR. COLLINS: So you would have --
16 you know, if you're looking at it from 16th
17 Street, you would have the high one, then you
18 would have going down to 10 feet 10 and then
19 you have the higher one and then we go down 10
20 feet 10 again. This way, we would have the
21 higher one down at 10 feet 10, higher and then
22 down to 9 feet 4. You just have a -- it's the

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1 appearance.

2 CHAIRPERSON MILLER: Right. Okay.

3 MR. COLLINS: It's, you know, 6 of
4 1 and a half a dozen of the other. You know,
5 however you like to think about that.

6 CHAIRPERSON MILLER: Okay.

7 MR. COLLINS: We thought this was
8 the lesser of two evils to do it this way.

9 CHAIRPERSON MILLER: Right. When
10 you look at it in the context of what's on the
11 roof already.

12 MR. COLLINS: Yeah.

13 CHAIRPERSON MILLER: Okay.

14 Thanks.

15 MR. COLLINS: Thank you.

16 COMMISSIONER TURNBULL: I guess
17 one question you can ask is can all the new
18 screen walls be at 9 foot 4?

19 MR. HODGE: They would not
20 adequately conceal this unit. This is the
21 tallest unit and it's the one that is driving
22 the 10 foot 10.

1 COMMISSIONER TURNBULL: How high
2 is that one?

3 MR. HODGE: This unit is 10 feet
4 10 inches tall.

5 COMMISSIONER TURNBULL: Oh, it is?

6 MR. HODGE: And that's what's the
7 driving factor for all the rest of the height
8 of the screen wall.

9 COMMISSIONER TURNBULL: Okay.
10 Thank you.

11 MEMBER DETTMAN: Have you looked
12 at whether or not the existing as well as the
13 proposed 10 foot 10 additional enclosure, the
14 new construction, is it going to be visible
15 from 16th Street? Because it looks like there
16 is a pretty substantial setback from the 16th
17 Street wall. I mean, it looks like it.

18 MR. HODGE: Only -- I believe only
19 if you were way off at a 45 degree angle would
20 you be able to see that. The setback we were
21 having to comply with is this recessed
22 courtyard, not the 16th Street facade itself.

1 VICE CHAIR LOUD: Mr. Hodge, one
2 quick question before you move forward. If
3 for some reason you decided that you want to
4 pursue the scenario where you do the drop down
5 to 9 foot 4, would HPRB staff have to re-
6 review your application plan again?

7 CHAIRPERSON MILLER: If you're
8 going to testify, yes, come.

9 MR. HODGE: She's not a witness.

10 CHAIRPERSON MILLER: She can be,
11 but --

12 MS. BLOM: Pamela Blom with
13 Oehrlein and Associates, 3701 Massachusetts
14 Avenue. I don't think that HPRB would object
15 to the height variation. They know that there
16 already is a variation in height. We have
17 been working very closely with Steve Calcott,
18 so that's my opinion.

19 CHAIRPERSON MILLER: But would it
20 need to go back for their review?

21 MS. BLOM: Everything that we have
22 done with them has been, you know, person-to-

1 person email and so forth, so I think it would
2 just be a matter of me providing the drawings
3 to them and saying yes or no. So, you know,
4 it's not a hearing issue, it's a staff level
5 approval. So I think it could be, you know,
6 determined pretty quickly.

7 MR. HODGE: I might want to add
8 that Boston Properties, which is our neighbor
9 immediately to the west across the alley, did
10 request to see plans of our new roof
11 construction. I believe that they had one --
12 their top floor level is a little bit taller
13 than our building, which means that their top
14 partially. I guess we would have to run this
15 back by them as well.

16 Now, technically, the rooftop
17 equipment is no longer completely screened.

18 MR. COLLINS: Of course, the final
19 decision is up to the Board. I'm not sure we
20 have to go back to them if the Board mandated
21 that we do something different. But that's
22 what they were presented with.

1 MEMBER DETTMAN: I guess this is a
2 question for Mr. Collins and this is, I guess,
3 as good a time as any to bring this up. You
4 are seeking relief from the roof structure
5 setbacks as a special exception, so that you
6 are requesting relief from 530.4 as a special
7 exception pursuant to 411.11. And I'm aware
8 that historically, maybe in the past 25 years,
9 situations like this have been treated as
10 special exceptions, both by the Zoning
11 Commission, the BZA and in times when cases
12 come before my agency.

13 But my reading of 411.11 is a bit
14 different. I'm leaning towards thinking that
15 this case -- the relief from the setback
16 requirements is a variance instead of a
17 special exception. I was just wondering if
18 you could sort of walk me through your reading
19 of 411.11 and how you believe this should be
20 a special exception instead of a variance?

21 MR. COLLINS: Sure. I'd be happy
22 to. I think first and foremost the plain

1 reading of the regulation itself, with all due
2 respect, answers the question. It does say,
3 and I'm quoting from section 411.11, that --
4 indicating that "This Board is empowered to
5 approve as a special exception the location,
6 design, number and all other aspects of such
7 roof structures, even if such roof structures
8 do not meet the normal setback requirements
9 and to improve the material of enclosing walls
10 if not used in accordance with," etcetera.

11 So this provision has been in the
12 regulations since the 1970s and before. It
13 does say that the Board is empowered to
14 approve as a special exception the location,
15 design, number and all other aspects, even if
16 such structures do not meet the normal setback
17 requirements.

18 To me, to the Zoning Commission,
19 to the Board of Zoning Adjustment, to the
20 Zoning Administrator, to the Office of
21 Planning over many, many years that has meant
22 that this -- what we are asking for today, the

1 type of relief that we're asking for today, is
2 a special exception.

3 I'm aware that my colleagues have
4 submitted to the Board in a previous case
5 17679 a very comprehensive explanation on that
6 issue and I would like to adopt that, this
7 submission, this January 9, 2008 submission
8 from Holland and Knight, the subject line of
9 the letter is "Discussion of Roof Structure
10 Setback Relief." I would like to adopt that
11 as part of the record in this case.

12 I do think that there is really no
13 question, I think, that over the course of
14 many, many years, the Zoning Commission, who
15 had opportunities to change this, their most
16 recent was 1985 was the last time they changed
17 the roof structure regulations. They
18 reaffirmed that provision. The Zoning
19 Commission even in PUDs where they approve --
20 they may approve things as a special exception
21 as you may or may not know.

22 They approve roof structure

1 setback variations as a special exception an
2 they make those statements in their PUD
3 orders. This Board has consistently over the
4 years taken that interpretation. The Zoning
5 Administrator when he refers or she refers
6 applications to this Board, refers roof
7 structures as special exceptions.

8 The Office of Planning when they
9 review applications before this Board and
10 modifications to PUDs before the Zoning
11 Commission refers to these as special
12 exceptions. So I think there has been a
13 consistent pattern of interpretation. And as
14 this Board is certainly empowered to change
15 that interpretation, if they would choose to
16 do so, but it must be done prospectively.
17 There must be some notice, an opportunity for
18 people to come into compliance.

19 Right now, the way the regulations
20 are, the way the regulations have been
21 consistently interpreted, it has been a
22 special exception and that's the way -- the

1 reason we are proceeding this way.

2 CHAIRPERSON MILLER: I just want
3 to note for the record that the Board itself
4 hasn't actually received that document, though
5 we will in our other case. It just hasn't
6 been handed to the Board yet.

7 MR. COLLINS: Oh, I see.

8 CHAIRPERSON MILLER: So we haven't
9 read it yet.

10 MR. COLLINS: Okay. It is a
11 January 9th letter. You will --

12 CHAIRPERSON MILLER: We will read
13 it.

14 MR. COLLINS: -- forward to --

15 CHAIRPERSON MILLER: Right.

16 MR. COLLINS: It's the size of a
17 phone book for the record, I'm holding up,
18 it's got many, many tabs and indicates cases,
19 including, with all due respect, a case that
20 was decided by this Board in its current
21 makeup as a special exception, with the
22 exception of Ms. Walker.

1 MEMBER DETTMAN: Madam Chair, I
2 guess just sort of a comment for the record.
3 And the reason why I bring this up is that
4 again, I guess I'll echo Mr. Collins' comment
5 that historically 411.11 has been interpreted
6 to include special exception relief from the
7 roof setback requirements.

8 His statement about 411 -- the
9 plain reading of 411.11, I guess that my plain
10 reading of it sees it a little bit
11 differently. And the current general counsel
12 and other staff members at NCPC are sort of
13 leaning in the direction of it being a
14 variance.

15 I would probably say the reason
16 why we would rather see this as -- treated as
17 a variance is that it's potential conflict
18 with the Height of Buildings Act. And that we
19 tried to -- when two pieces of legislation are
20 sort of seen to potentially be in conflict, we
21 try to read them and sort of postpone those
22 two pieces of statute clashing for as long as

1 you possibly can.

2 I believe it was the Kalorama
3 case, I don't exactly know the BZA
4 application, maybe Belmont Towers case, but,
5 you know, the BZA affirmed that when two
6 pieces of legislation could -- potentially are
7 in conflict, the more strict shall govern.

8 The Zoning Administrator has
9 affirmed that the Height of Buildings Act
10 actually provides no flexibility. That could
11 be a detriment, it could be a good thing. But
12 it does provide no flexibility, which would
13 make you think that that's the more strict
14 statute. And that if the Zoning Regulations
15 are sort of crafted in a way to allow relief
16 from the roof setback requirements, as a
17 special exception, which is sort of the lowest
18 standard that the BZA analyzes cases for, I
19 would say that most likely the NCPC would have
20 a little bit of an issue with that.

21 That the lowest standard is
22 applied by the BZA to provide setback -- to

1 provide relief from the setback requirements
2 from something that potentially could conflict
3 with the Height of Buildings Act. And this
4 issue is being analyzed by DCOP, NCPC, the
5 Zoning Administrator in detail as I'm saying
6 what I'm saying.

7 And so it's sort of unclear where
8 the Height of Buildings Act would come in.
9 Can you grant relief without violating the
10 Height of Buildings Act? But so just again
11 for the record, I think NCPC is leaning right
12 now that this should be treated as a variance
13 instead of a special exception, despite its
14 historical treatment as a special exception.

15 MR. COLLINS: Well, I'll just make
16 one point on that. And thank you for that
17 explanation, because I was not aware of that
18 concern. The good news, in this case, is that
19 in any respect, this roof structure would not
20 conflict with 1910 Height Act, because, as you
21 mentioned, as you pointed out, it's very far
22 setback from 16th Street and from M Street, so

1 it doesn't come in. It's far beyond the 1:1
2 setback from the streets, as what the -- as
3 the 1910 Height Act governs.

4 So in this case, we don't have to
5 reach that issue or, in my view, respectfully,
6 you would not have to reach that issue.

7 MEMBER DETTMAN: I guess in
8 addition, again, talking to the unclarity of
9 the Height Act and some of these
10 interpretation issues that are currently
11 trying to be worked out, in this situation,
12 the building and the height of the penthouse
13 is actually underneath the maximum allowable
14 height that's allowed by the Height Act.

15 I think the Height Act would allow
16 a height of 130 feet, based on the width of
17 16th Street. To the north, it appears that,
18 you know, it's abutting a court, a current
19 nonconforming court, where based on the Zoning
20 Administrator's interpretation of what would
21 be an exterior wall, they would constitute
22 that as an exterior wall. It's a wall that is

1 removed from the property line, if my reading
2 is correct.

3 And so it's unclear whether or not
4 the north portion of that enclosure would
5 constitute a violation of the Height Act. But
6 based on the Zoning Administrator's
7 interpretation of what constitutes an exterior
8 wall, that's clearly in violation of the
9 Zoning Regs, which you are applying for relief
10 from as a special exception.

11 MR. COLLINS: If I can just take
12 issue with that? I don't -- I think that the
13 Zoning Administrator probably would not call
14 this an exterior wall, because the Zoning
15 Administrator in the past has called walls on
16 lot lines interior walls. This is not a
17 property line, because the hotel includes the
18 eight-story portion and four-story portion.

19 What we are asking for is a
20 setback from the, what is in essence, enclosed
21 court. And again, another Zoning
22 Administrator, in a previous case, different

1 set of facts, would interpret this or had --
2 would by extrapolation of interpretation is
3 not requiring relief either, because that
4 exterior -- that enclosed -- that court would
5 not be an exterior wall.

6 We had that decision in a previous
7 case down in southwest DC. But also the WETA
8 case that I know NCPC was very involved with
9 many years ago, the NCPC was concerned
10 primarily with the setbacks from the street
11 frontages and not the sides. And we are way
12 far setback from the street frontages on 16th
13 and M.

14 So again, and given the height
15 that would be allowed by 16th Street, height
16 of 130 feet, we don't -- we would certainly if
17 -- if the 1910 Height Act interpretation was
18 applied to this case, we would be well within
19 that. So again, with all due respect, I don't
20 think the Board needs to reach that issue in
21 this case.

22 MEMBER DETTMAN: Just a couple of

1 other comments. Your last comment about
2 whether or not the setback requirements apply
3 to a building and penthouse that fall below
4 the maximum level height of the Height Act,
5 it's still sort of unclear. That is one of
6 the issues that whether or not the 1:1 setback
7 applies when both the building and the
8 structures are below the maximum level height
9 is an issue that is being worked out and it's
10 still sort of unclear.

11 MR. COLLINS: Well, I think the
12 regulations are clear that it does apply, the
13 Zoning Regulations.

14 MEMBER DETTMAN: The Zoning
15 Regulation? In that respect, the Zoning
16 Regulations are a little bit more --
17 potentially, could be a little bit more strict
18 than the Height Act.

19 MR. COLLINS: Exactly.

20 MEMBER DETTMAN: But with respect
21 to the abutting court, are you saying that
22 that wall, the 9 foot 4 inches, that

1 particular wall wouldn't be considered an
2 exterior wall because it actually -- because
3 the neighboring property to the north is also
4 you?

5 MR. COLLINS: That's right.

6 MEMBER DETTMAN: Okay.

7 MR. COLLINS: That's right.

8 MEMBER DETTMAN: Okay.

9 MR. COLLINS: It's certainly
10 exterior in that when it rains it gets wet.

11 MEMBER DETTMAN: Um-hum.

12 MR. COLLINS: But in terms of --
13 my understanding is the Zoning Administrator
14 uses the same definition of exterior wall as
15 the Building Code and that is walls that face
16 out to other properties. And since this is an
17 enclosed court, that is -- you know, an
18 enclosed court and all sides are our property,
19 this wouldn't be deemed exterior wall.

20 In another situation, another set
21 of circumstances, another building, another
22 part of town, was deemed not to be an exterior

1 wall. But again, in an abundance of caution,
2 we're here asking for the relief.

3 MEMBER DETTMAN: Out of caution
4 you are requesting the relief just in case
5 this Board is to -- would consider that
6 particular wall an exterior wall?

7 MR. COLLINS: For all the roof
8 structure relief, that we don't need the
9 exterior wall issue for that part of it,
10 certainly, the north part, and then the
11 unequal heights for the rest of it, because in
12 another case, where I mentioned before, where
13 we have -- had -- there were existing roof
14 structures and new additions that were lower,
15 the Zoning Administrator, previous Zoning
16 Administrator, previous building, different
17 part of town, said that you did not need to
18 comply with the setback for the existing,
19 because it's an existing condition.

20 As long as the new complied, you
21 could have the unequal heights.

22 MEMBER DETTMAN: Right.

1 MR. COLLINS: Without needing to
2 come to the Board.

3 MEMBER DETTMAN: I would
4 absolutely agree with you that the pre-
5 existing condition is exactly that. And that
6 the new construction should conform and it
7 wouldn't apply to the pre-existing condition.
8 And I'm sorry if I keep going back to this 9
9 foot 4 inches, but, essentially, it sounds
10 like, based on your argument, in terms of what
11 that particular wall is, interior wall/
12 exterior wall/party wall, it looks like this
13 particular section of the enclosure wouldn't
14 be in violation of the Zoning Regs. Because
15 your argument is that it's not an exterior
16 wall.

17 MR. COLLINS: That's my view.

18 MEMBER DETTMAN: Okay.

19 MR. COLLINS: But that's not -- I
20 don't have a Zoning Administrator decision to
21 back that up for this project here, so that's
22 why we asked for the special exception.

1 MEMBER DETTMAN: The Kalorama case
2 actually I referenced is Appeal No. 17109.

3 MR. COLLINS: Um-hum.

4 MEMBER DETTMAN: And just reading
5 just a section of it it says "While the term
6 exterior walls has been interpreted more
7 broadly under the Zoning Regulations to
8 include a wall setback from the property line
9 that abuts a yard or a court, as opposed to a
10 street or alley, it has not been interpreted
11 to apply to a sidewalk constructed to the lot
12 line of an abutting property. This type of
13 wall has been considered a party wall."

14 MR. COLLINS: Yes.

15 MEMBER DETTMAN: This is an
16 interesting situation, because it is abutting
17 a property line, which the applicant also
18 owns, but there is also this existing court,
19 which the court is actually removed from the
20 property line. So whether it is an exterior
21 wall or a party wall remains sort of the
22 question.

1 MR. COLLINS: Yeah. It is an
2 interesting issue. I think it's not a
3 property line, because we own all the
4 property. And as a matter of fact, it is all
5 now subdivided into one single record lot. So
6 there is no longer any lot line that there was
7 previously. And I did read the Kalorama
8 Heights case that talks about the courtyard.
9 So just that's why we added it, there's enough
10 uncertainty that we added it as a special
11 exception for the Board to review.

12 MEMBER DETTMAN: So to a certain
13 extent, you are requesting special exception
14 relief, basically, from the pre-existing
15 conditions and not anything that's newly
16 constructed? Based on your argument that that
17 particular wall is not an exterior wall.

18 MR. COLLINS: That would be my
19 view, but again, there is enough uncertainty
20 given that language in the Kalorama case that
21 we thought, again, out of an abundance of
22 caution, we would ask for the whole thing.

1 MEMBER DETTMAN: Thank you.

2 MR. COLLINS: Sure. Thank you.

3 CHAIRPERSON MILLER: Mr. Collins,
4 none of the roof structures exceed the
5 limitations of the Height Act, do they?

6 MR. COLLINS: No, they do not.

7 CHAIRPERSON MILLER: Okay. So in
8 your opinion, the Height Act is not triggered
9 in this case?

10 MR. COLLINS: Not at all.

11 CHAIRPERSON MILLER: So we're only
12 looking at 411?

13 MR. COLLINS: Yes.

14 CHAIRPERSON MILLER: With respect
15 to the roof structures and then the provisions
16 cited there?

17 MR. COLLINS: I would agree with
18 that.

19 CHAIRPERSON MILLER: Okay. Thank
20 you. Okay. Do we have anything else on --

21 MR. COLLINS: I would like -- we
22 have -- in our prehearing submission, we have

1 gone through in detail how the application
2 meets the specific sections of the regulations
3 and I could have Mr. Hodges go through that,
4 if you would like, or I could ask him if he
5 would adopt the statement as his testimony.
6 I could do it either way.

7 CHAIRPERSON MILLER: I think it
8 was pretty straightforward in the application
9 and wouldn't need to be repeated. Do others
10 have a different view or have concerns about
11 any of the specific regulations that they are
12 showing how they meet? Okay.

13 I mean, I asked you earlier. I
14 think my basic question was this is pretty
15 minor in general with respect to adding onto
16 the hotel. And, you know, your needing to
17 come in on 512 and that the reason is because
18 there is some addition to FAR or lot area.
19 And if it was just internal renovations, you
20 wouldn't need to be here.

21 MR. COLLINS: That's correct.

22 CHAIRPERSON MILLER: Okay.

1 Anybody have questions on that aspect? Okay.
2 We haven't heard of any adverse impacts. I
3 don't think there are any issues we really
4 need to explore further with respect to the
5 addition to the hotel.

6 With respect to roof structures,
7 in general, I think you may have said this,
8 but this is really a basic -- you know, one of
9 the roof structures has to go to 10 feet 10,
10 one is 9 foot 4. What's going on there that
11 is driving those heights? What's the, you
12 know, equipment that's necessary that, you
13 know, is different, just for a more general
14 understanding?

15 MR. COLLINS: I'm going to allow
16 Mr. Hodges to explain.

17 CHAIRPERSON MILLER: Okay.

18 MR. COLLINS: There is different
19 pieces of equipment and the regulations do
20 require that the screening wall be as high as
21 the equipment. So, Mr. Hodge, would you
22 explain the difference between the 10 foot 10

1 equipment and 9 foot 4 equipment?

2 CHAIRPERSON MILLER: I mean, that
3 makes sense, Mr. Collins, but what
4 regulations? Is that in our Zoning
5 Regulations or in the --

6 MR. COLLINS: It's in section 411.

7 CHAIRPERSON MILLER: 411 requires
8 that they be as high as the structures they
9 are enclosing? Okay. I mean, I don't know if
10 you still want to look for it. I mean, it may
11 or may not be there. I think it makes sense.

12 MR. COLLINS: It's here.

13 CHAIRPERSON MILLER: But perhaps
14 that's what enclosure means. But in any
15 event, I'm also looking at before we actually
16 get to what's in there, because I think what's
17 in there goes to the whole how it would be
18 impractical if it was another height or
19 whatever or, you know, why it has to be that
20 way.

21 But then there is, where is it,
22 411.3 that goes to the point of harmonizing

1 and character, architectural character
2 material and color and I think a lot of this
3 regulation goes to that, as well as practical
4 difficulties.

5 MR. COLLINS: I know it's here.
6 It says, 411.6, "When consisting solely
7 mechanical equipment, the equipment shall be
8 enclosed fully as prescribed." So I think it
9 has always been interpreted that the equipment
10 cannot extend above the level of the
11 enclosure.

12 CHAIRPERSON MILLER: No, I think
13 that makes sense, so we don't have to get
14 stuck on this.

15 MR. COLLINS: All right. Okay.

16 CHAIRPERSON MILLER: I just
17 thought when you said that, oh, where is it?
18 Did I miss that regulation, you know?

19 MR. COLLINS: I'm sure I've seen
20 it before, but I don't know. I can't put my
21 finger on it.

22 CHAIRPERSON MILLER: But just, you

1 know, it may be in your pleadings, but just in
2 general, like what's going on that you
3 actually have these unequal heights happening
4 on the roof?

5 MR. COLLINS: Well, there is
6 different equipment.

7 CHAIRPERSON MILLER: Different
8 equipment.

9 MR. COLLINS: Different types of--
10 yeah, there is the -- Mr. Hodge, maybe you
11 could explain what is the equipment right
12 between the two existing that is the 10 foot
13 10.

14 MR. HODGE: Okay. This piece of
15 equipment here is the one that is driving the
16 10 foot 10 height. It is 10 feet 10 inches
17 tall. If you look at Drawing 3.01, there is
18 a section cut through the central portion of
19 the mechanical yard. It shows that piece of
20 equipment. Based upon its structural needs
21 and the curve that had to be built around it
22 and the physical height of the equipment

1 itself, it all equaled out to 10 feet 10
2 inches.

3 CHAIRPERSON MILLER: What is it?
4 I mean, what is it?

5 MR. HODGE: What is it?

6 MR. COLLINS: What's the piece of
7 equipment? What's it do?

8 MR. HODGE: This is the primary
9 air handler for all of the fresh air makeup
10 that will be going into the guest tower. It
11 is providing all the fresh air to all the new
12 guest rooms and -- from the second floor to
13 the eighth, which is required by current code.

14 The existing building does not
15 have fresh air supply. We are adding that
16 component in compliance with the existing
17 Building Code.

18 CHAIRPERSON MILLER: Okay. So you
19 are providing this air handler to comply with
20 existing code. And as I would understand it
21 then, it's not like you could have one that
22 was shorter that would comply with code.

1 MR. HODGE: No.

2 CHAIRPERSON MILLER: Right. Okay.
3 Thank you. How about the other two?

4 MR. HODGE: The other two are the
5 exhaust fans from the kitchen unit and again,
6 they were sized based upon the load of the
7 kitchen itself. And I'm sure they were not
8 oversized, but they were sized to meet the
9 engineering requirements. They also do not --
10 just in terms of their height, but they also
11 have required setbacks, because they -- there
12 is grease laden air in their discharge and it
13 has to be a certain distance away from an
14 existing structure, which, in this case, is
15 the penthouse.

16 So we had to push them a little
17 further closer to the north, which pushed our
18 enclosure a little closer to the north. So
19 again, it's -- we're kind of -- it's the
20 engineering requirements and then meeting the
21 Building Code requirements and that's what
22 resulted where the screened wall is.

1 CHAIRPERSON MILLER: And what's
2 the other one? Is that the same? The third
3 one.

4 MR. HODGE: No, that's --

5 CHAIRPERSON MILLER: It's what
6 exists, the third one is what exists? Is that
7 correct?

8 MR. HODGE: This one here?

9 CHAIRPERSON MILLER: Well, there
10 are three penthouses that are setback.

11 MR. HODGE: Oh, that's an existing
12 penthouse.

13 CHAIRPERSON MILLER: Right.

14 MR. HODGE: For the passenger
15 elevators. This is an existing penthouse from
16 the service elevator and the fire stair.
17 Those are the only two penthouses on the high
18 roof currently. Does that answer your
19 question?

20 CHAIRPERSON MILLER: Okay. Well,
21 all right. I thought we were talking about
22 three different heights, 11 foot 6, 10 foot 10

1 and 9 foot 4.

2 MR. HODGE: No, we only have two
3 heights. The existing penthouses are,
4 approximately 11.5 feet tall. Our new screen
5 wall is 10 feet 10. There are not three
6 heights. I believe the 9 foot 4 possible
7 height was brought in at the discussions with
8 Mr. Dettman.

9 CHAIRPERSON MILLER: Okay. The 10
10 foot 10, is that enclosing -- it's not
11 enclosing something new?

12 MR. HODGE: The 10 foot 10 is
13 enclosing all the new equipment on the roof.
14 And it comes -- it wraps around and it does
15 abut into the existing penthouses.

16 CHAIRPERSON MILLER: Well, what's
17 the 11 foot 6 we were referring to? Is there
18 something in height that is 11 foot 6 that's
19 being enclosed also?

20 MR. HODGE: Both these existing
21 penthouses.

22 CHAIRPERSON MILLER: The existing

1 ones. Okay.

2 MR. HODGE: Are, approximately,
3 11.6.

4 CHAIRPERSON MILLER: Okay.

5 MR. HODGE: I mean, ideally, if
6 everything was satisfied, our new screen wall
7 would be 11 feet 6 inches tall and our
8 setbacks would be 11 feet 6 inches from every
9 exterior wall.

10 MR. COLLINS: You say ideally, but
11 you can't meet that. Is that correct?

12 MR. HODGE: No, we cannot.

13 MEMBER DETTMAN: Essentially, what
14 I have heard is that the decision to -- you
15 know, sort of excluding the existing 11 foot
16 6 inch penthouses, which is a pre-existing
17 condition that can't be changed, the decision
18 to maintain a height of 10 foot 10 inches on
19 all of the newly constructed enclosure was
20 that that decision was made for aesthetic
21 purposes to minimize the number of variations
22 in the height of the roof structures.

1 And that potentially, the northern
2 portion of the enclosure could be dropped.
3 You can't gain 10 foot 10 inches from the
4 north wall. But you potentially could from an
5 engineering perspective, from a functional
6 perspective for those two air ducts, air
7 intakes, you could potentially drop that
8 height of the enclosure to 9 foot 4 inches, so
9 that now you are in -- now that all of the
10 newly constructed enclosure would be in
11 compliance with the 1:1 setback.

12 MR. COLLINS: We could do that.
13 If you look at -- on the easel to the left,
14 Drawing 3.01, and, Paul, if you would just
15 gesture to the upper left, yeah. Where he is
16 pointing there, that's the part that is 10.10
17 that could be lowered to 9.4. And you can see
18 it would result in several bumps. But it's a
19 bump of a foot and a half. And it's really up
20 to the Board to determine if that's what you
21 would like us to do.

22 Just require -- that we would then

1 be required to go back to the HPRB staff and
2 review that with them.

3 CHAIRPERSON MILLER: You would
4 then be out of compliance with the regulation
5 that says that enclosures have to be of equal
6 heights.

7 MR. COLLINS: On that issue we
8 would be out of compliance with equal height
9 requirement.

10 CHAIRPERSON MILLER: On that one.

11 MR. COLLINS: But we would be in
12 compliance with the setback requirements. So
13 again, it's one versus the other. And when we
14 chose which one to do, we thought the lesser
15 of two evils was to keep them all at equal
16 height and just not adhere to the setback,
17 because it was our own property that we're
18 setting back -- that we don't meet the setback
19 from. And it's a court. And you can see from
20 the roof plan that it's far setback and really
21 no one can probably see it. They couldn't
22 tell the difference between the 9.4 and the

1 10.10 setback at that part of the roof.

2 CHAIRPERSON MILLER: Okay.

3 MEMBER DETTMAN: But because of
4 the pre-existing condition, the 11 foot 6 inch
5 penthouses, you are already out of compliance
6 with the uniform height.

7 MR. COLLINS: Correct.

8 MEMBER DETTMAN: Okay.

9 MR. COLLINS: Right. We're trying
10 to minimize the degree of nonconformity by
11 only having two heights instead of three.
12 That was the logic.

13 CHAIRPERSON MILLER: Well, and
14 then in looking at the regulations, if you
15 have only two heights using the 10.10, do you
16 believe you are more in compliance with 411.3
17 than you would be if you dropped to 9.4?

18 MR. COLLINS: Well, it would
19 certainly -- 411.3 requires they all be in one
20 enclosure, which they would be. And
21 harmonized with the main structural
22 architectural character, material and color,

1 that would really be -- that is something
2 that, in this case, would be up to you to
3 decide if we dropped to 9.4.

4 We think they are in character,
5 material and color, their harmony -- in
6 harmony with the existing as designed.

7 CHAIRPERSON MILLER: I guess my
8 question is do you think it's -- was part of
9 your purpose in doing it that way because you
10 think it is more in harmony if it were 10.10?

11 MR. COLLINS: That was the reason
12 we did it that way.

13 CHAIRPERSON MILLER: Okay.

14 MR. COLLINS: To try and keep it,
15 yes.

16 CHAIRPERSON MILLER: Okay.

17 MR. COLLINS: As much as possible
18 harmonized.

19 MEMBER DETTMAN: Madam Chair, I
20 guess, I could offer up what I think is more
21 in compliance and not in less of compliance.
22 It would be my position, right now as it is

1 drawn up, you are sort of -- you are in
2 nonconformance with two particular regs. It's
3 the setbacks and it's the uniform heights.

4 If that portion of the enclosure
5 was dropped to 9 foot 4 inches, and it's found
6 that you can do that from a functional
7 perspective, you may have to shift that double
8 door, the location of that double door, I'm
9 not sure. But that, essentially, eliminates
10 any violation of the 1:1 setback of the regs.
11 And depending upon your reading of the Height
12 Act, it, essentially, eliminates any
13 possibility of a violation of the Height Act
14 as well.

15 And so, essentially, yes, you are
16 increasing the magnitude of your
17 nonconformance of 411.5, yes, 411.5, you are
18 increasing the nonconformity from 411.5.
19 However, you would be removing any sort of
20 nonconformity that is specific to the 1:1
21 setback requirements.

22 CHAIRPERSON MILLER: And what

1 would be gained from that, besides your view
2 that there shouldn't be this setback? I mean,
3 what would be -- would there be an improvement
4 in the impact and the harmony and the
5 architectural character? It seems to me your
6 only point is your concern about this setback
7 and the Height Act. Am I correct?

8 MEMBER DETTMAN: I mean, that is
9 one of my concerns. However, I also think
10 that, and I think I stated earlier, the 1:1
11 setback requirements -- the setback
12 requirements in general do not fall under
13 411.11 as a special exception.

14 And so I -- there are two issues
15 here for me. It's the violation of the Zoning
16 Regulations and how that's treated and the
17 Height Act. I understand the applicant's
18 decision to try to maintain as much harmony in
19 the uniform height levels. Instead of having
20 three different heights, they have two
21 different heights.

22 I am actually sympathetic to that

1 argument. However, in this particular case,
2 dropping that small portion by a foot and a
3 half, given its distance from 16th Street,
4 which I'm questionable on whether or not that
5 would actually be seen if you drop it a foot
6 and a half. It may actually disappear from
7 the 16th Street elevation.

8 But also, I think the architect's
9 comment was that you could actually see the
10 penthouse enclosure if you were from an
11 extreme angle, maybe north on 16th street.
12 Where the neighboring property, which is also
13 owned by the applicant, actually drops down by
14 four floors. You have an eight floor and then
15 a four floor.

16 And so the chances of maybe seeing
17 the penthouse enclosure is greater from that
18 extreme angle. And so potentially by dropping
19 that small portion down to 9 foot 4 inches,
20 could potentially improve the views from that
21 extreme angle north on 16th Street.

22 And so I think there is a

1 possibility that --

2 CHAIRPERSON MILLER: Well, the --

3 MEMBER DETTMAN: -- by dropping
4 it, there could be an improvement in the
5 aesthetic nature of --

6 CHAIRPERSON MILLER: Whose views
7 are you talking about? Whose views are going
8 to be improved? The people on 16th Street?
9 Who?

10 MEMBER DETTMAN: Right. The
11 visibility of the roof structure enclosures
12 from 16th Street. Those are the views I'm
13 speaking of.

14 CHAIRPERSON MILLER: What does
15 that mean the northern most angle on 16th
16 Street?

17 MEMBER DETTMAN: I think the
18 architect -- when I inquired on whether or not
19 the 10 foot 10 inch enclosure is visible from
20 16th Street, because I had mentioned that it
21 looks like the enclosure is setback
22 significantly from the 16th Street frontage of

1 the building. And I was wondering if well --

2 CHAIRPERSON MILLER: I heard that
3 and so, but I'm just trying to get a, you
4 know, impact. If you are talking about views
5 from the street under the Height Act, that's
6 one thing. If you're talking about views from
7 the street as an adverse impact on a view,
8 then I would say, you know, what are we
9 talking about? What adverse impact is that,
10 you know, versus the harmonized architectural
11 character?

12 I mean, those are, you know,
13 special exception kind of considerations. So
14 is that really something we're talking about
15 weighing? This northern most angle on 16th
16 Street or are we only talking about that
17 because of your concern about the Height Act?

18 MEMBER DETTMAN: I think the
19 applicant's decision to maintain the 10 foot
20 10 inch for the new constructed was for
21 aesthetic purposes, for views from 16th Street
22 up to the roof of this building, which I had

1 said I can understand that.

2 I don't think that by taking a
3 portion of that roof and -- roof structure
4 enclosure and dropping it to 9 foot 4 inches
5 is going to significantly increase, you know,
6 the -- or decrease -- significantly diminish
7 the views from 16th Street, because now
8 instead of two different heights, you have
9 three different heights.

10 I'm even questionable of whether
11 or not if you drop it to 9 foot 4 inches you
12 are even going to see that portion of the roof
13 structure. But from an aesthetic purpose, I
14 don't think actually dropping it to 9 foot 4
15 inches is actually going to have an adverse
16 impact to the views up to this penthouse.

17 And additionally, by doing that,
18 you become in compliance with the regs and, if
19 you so choose, the Height Act, but more
20 importantly in this case, the regs. Because
21 you meet the 1:1 setback requirements from all
22 exterior walls on all new construction of an

1 enclosure. Not considering the pre-existing
2 condition.

3 COMMISSIONER TURNBULL: I thought
4 the Height Act -- I thought we had already
5 said that the Height Act does not come into
6 play on this case. Why are we going back to
7 the Height Act? I mean, I don't understand.

8 CHAIRPERSON MILLER: I think Mr.
9 Dettman is not convinced yet. Some of us may
10 be convinced, but I'll let you speak for
11 yourself.

12 MEMBER DETTMAN: No. Well, in
13 this particular case, the height -- my reading
14 of the Height Act is it does not apply to this
15 particular case. As I mentioned that, but
16 that's still unclear in that there are
17 agencies that are currently negotiating and
18 trying to figure out a common interpretation
19 of the Height Act.

20 Mr. Turnbull, I guess your comment
21 here, you are correct. The Height Act does
22 not apply here, depending on your reading. My

1 reading is it doesn't apply here. However,
2 the northern portion of the enclosure is still
3 in violation of the 1:1 setback requirement,
4 of the regulations, of the Zoning Regulations.

5 And that what I'm hearing is that
6 it's possible to drop that little portion to
7 9 foot 4 inches and this setback issue sort of
8 goes away.

9 COMMISSIONER TURNBULL: Yes, but
10 then you have to play a game with the west
11 elevation of the -- the western elevation of
12 that penthouse is at 10 foot 10 to conceal the
13 mechanical equipment in the center between the
14 two existing penthouses. So if that western
15 wall or I'm sorry, the east -- no, it's not
16 the east.

17 MEMBER DETTMAN: You're right the
18 western wall.

19 COMMISSIONER TURNBULL: The
20 western wall is at 10 foot 10, as it meets the
21 northern wall, now it has got to jog down. It
22 just seems like it's a practical -- it's not

1 a difficult thing. They can do it, but I
2 think it's going to look like hell. I just
3 think it would be more consistent from an
4 architectural point.

5 I mean, you know, you can look at
6 the -- the roof is the fifth elevation. And
7 whether people are looking at it from
8 buildings around there, I think they are
9 trying to make it as consistent as possible.
10 I think it makes sense to keep it at 10.10,
11 just from an over all consistency standpoint.

12 And I think my own feeling, Mr.
13 Dettman, I think the applicant has made a case
14 and based upon previous history on the
15 interpretation of that wall and I guess I
16 think it's just more gymnastics to do
17 something that really I don't believe is
18 really needed. I think they are satisfying
19 the intent.

20 MEMBER DETTMAN: Okay. Sort of
21 from the standpoint of maintaining aesthetic
22 consistency, I would absolutely agree with

1 you. Less variation is preferable. I guess
2 what I'm looking for is to try to minimize the
3 number of Zoning Regulations that are in
4 nonconformance.

5 We have sort of gotten away from
6 the special exception versus variance issue.
7 If that portion was to be dropped, the special
8 exception versus variance issue goes away.
9 And also right now as designed, you have the
10 pre-existing condition as well as the northern
11 portion of that enclosure that doesn't meet
12 the setback requirements.

13 I think I have already stated that
14 my reading of 411.11 is that this particular
15 relief request should be handled as a
16 variance. If you were to drop that portion to
17 9 foot 4 inches, you only have the pre-
18 existing condition to argue as a variance.
19 And although you are requesting a special
20 exception, in one of your submissions, it
21 doesn't have an exhibit number, but on page 9,
22 you essentially lay out a variance case.

1 You speak to unusual shape of
2 building. You speak to location of existing
3 masonry penthouses on the roof. You speak
4 about strict application of the roof structure
5 setback requirements, in this case it would be
6 impractical. I felt that I was reading a
7 variance case, even though in this particular
8 case you are seeking a special exception.

9 There have been numerous cases
10 that the Board has heard for a variance that
11 granted the relief based on a pre-existing
12 condition. And so if you were to come back or
13 argue a variance today, in my opinion, you
14 would actually meet the test.

15 VICE CHAIR LOUD: Excuse me, I
16 want to weigh in, first, by just commending
17 Mr. Dettman. I think at least for me he has
18 made me think about some things that I
19 probably would not have thought about and
20 thought about in a different way. And that
21 has been very helpful.

22 At the same time though, I want to

1 associate myself with Mr. Turnbull's comments.
2 I think that we kind of owe it to our citizens
3 where we have been very, very clear about what
4 the standard is. Where, for example, the
5 plain language identifies the standard as a
6 special exception under 411.11, and then to
7 some how remove that certainty from citizens
8 as they process their applications forward
9 through BZA.

10 It just seems like it's
11 counterproductive and it's unfair to those
12 citizens. The plain language to me of 411.11
13 makes it very clear that relief from the 1:1
14 setback ratio, relief from the height, uniform
15 height requirements, etcetera, can be
16 accomplished through special exception, at
17 least that's how I'm reading it.

18 And I think Mr. Collins put it
19 best in articulating that if there is going to
20 be some change that becomes final, then it
21 should be -- it should have application
22 prospectively not retroactively to persons

1 that are already in the system.

2 I agree with a lot of Mr.
3 Dettman's arguments about why the applicant
4 may have considered a different way to
5 approach the special exception, but it was
6 their option, I think, under our regs to
7 decide which way they were going to do it.

8 And they decided that the way that
9 they wanted to pursue it was to emphasize the
10 harmonizing the height of the roof structures,
11 prioritizing that over necessarily the 1:1
12 setback from the north wall. And I think that
13 they were well within their rights to do that,
14 even though one of us may have approached it
15 a little bit differently.

16 So I just think it's important
17 that citizens and applicants have some
18 certainty in the process when they are sitting
19 down and they are reviewing what these
20 regulations provide. And I think, for me,
21 this is just a first year law student case of
22 plain language. It's very, very clear that

1 this type of relief is -- can be processed
2 through the special exception application.

3 And while there may be discussions
4 about changing that in other quarters, those
5 discussions haven't been communicated to the
6 public through the Register notice and that
7 whole process that we go through. So I think
8 folks ought to be able to rely on what our
9 regulations say is the process.

10 So again, I want to commend Mr.
11 Dettman. You always make me think in these
12 proceedings, but I really want to associate
13 myself with Mr. Turnbull's comments that we
14 don't have a Height Act issue here. I think
15 you conceded that in your most recent
16 comments. And that we ought to look at this
17 from the standpoint of the special exception
18 and recognize that the applicant has the
19 option to select which of the two scenarios
20 they want to seek relief from and they have
21 done that.

22 MEMBER DETTMAN: I appreciate your

1 comments, Mr. Loud. I mean, I'm in agreement
2 with you regarding the Height Act. I'm in
3 agreement with you and Mr. Turnbull in terms
4 of the aesthetic nature and trying to minimize
5 the variation on the enclosure.

6 I'll also add that, you know, I
7 think that I'll commend the applicant for a
8 very well-thought out, a well-designed
9 project. And I commend you on trying to
10 improve the situation on the roof by enclosing
11 those two air handlers.

12 I still, based on my reading of
13 411.11 and this will be the last thing I say,
14 actually do think that this particular
15 situation, the roof setback requirements,
16 relief can be granted only as a variance.

17 CHAIRPERSON MILLER: Okay. Let me
18 suggest something here. As everybody knows in
19 this case that this issue was raised in a
20 previous case with your firm and they have
21 prepared a full briefing for the Board that
22 you just referenced that we haven't seen yet.

1 And that decision on that case is scheduled
2 for next week.

3 And so I mean, I've been on this
4 Board for five years. I have interpreted this
5 section a certain way. I don't think that I'm
6 likely to change. However, when Mr. Dettman
7 brought it to my attention, it certainly
8 caused me to look very carefully at how the
9 different provisions intertwine.

10 But in any event, I think the
11 proper thing to do would be to put this case
12 off for decision for next week as well, when
13 we have had an opportunity to read all the
14 documents that are being provided to us by the
15 parties in that case. And then come back and
16 make a decision on this case.

17 Is there any objection to that? I
18 certainly also -- you haven't had your final
19 arguments yet, Mr. Collins. I mean, I want to
20 certainly allow you that opportunity. I just
21 wanted to interpose this right now, because I
22 didn't think that the Board was going to,

1 unless the people feel otherwise, decide it
2 actually today.

3 I think we have aired a lot of
4 concerns that you can address or have
5 addressed, but that the final decision really
6 should be next week after we have read the
7 documents that are being provided to us in the
8 other case. Do the parties have other -- I
9 mean, does the Board have other thoughts on
10 this?

11 VICE CHAIR LOUD: I support that
12 approach, Madam Chair. On the other hand, I'm
13 not sitting in on that case, I don't believe.

14 CHAIRPERSON MILLER: Oh, okay.

15 VICE CHAIR LOUD: So it would be--

16 CHAIRPERSON MILLER: Okay.

17 VICE CHAIR LOUD: Well, I was just
18 going to say it would be helpful to me, while
19 Mr. Collins is here, if there is a distinction
20 factually between that case and this case, I
21 know there was a lot of discussion about the
22 open courtyard and the exterior wall, but if

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1 there is a real quick distinction you want to
2 make, while you're here, between the two
3 cases, I'm going to read that part of the
4 briefing in the other case that I'm not a part
5 of, but that would be helpful to me.

6 CHAIRPERSON MILLER: My
7 understanding is, and Mr. Collins isn't
8 necessarily on that case either, but I think,
9 this is the same issue whether or not a
10 variance is required for the setback pursuant
11 to 411.11 or whether it is by special
12 exception. Isn't that the issue that was
13 briefed?

14 MR. COLLINS: That's the main
15 issue.

16 VICE CHAIR LOUD: Are the facts
17 the same? Do the facts line up identically in
18 the two cases? I'm just looking for if there
19 is a distinction factually --

20 MR. COLLINS: The facts may be
21 different.

22 VICE CHAIR LOUD: -- between the

1 two cases that would drive a different
2 conclusion.

3 MR. COLLINS: Yeah. No, I think,
4 the issue that was briefed, the issue that was
5 posed by the Board in that case was whether
6 that issue -- as I understand it, was whether
7 the relief would be by special exception or
8 variance. And the issue is the same in this
9 case as well.

10 MEMBER WALKER: What is the case
11 number?

12 CHAIRPERSON MILLER: Of the other
13 case actually?

14 MR. COLLINS: It is 17679.

15 CHAIRPERSON MILLER: Any other
16 Board comments at this point or questions? Do
17 you want to make some closing remarks, Mr.
18 Collins?

19 MR. COLLINS: Well, the Office of
20 Planning is not here. The ANC Chair is here
21 and would like to say a few words. He came
22 down to support the application.

1 CHAIRPERSON MILLER: Oh, I think
2 we can reflect the Office of Planning is not
3 here. I don't know why. It's unusual, but
4 they are in support.

5 MR. MOY: Madam Chair?

6 CHAIRPERSON MILLER: Yes?

7 MR. MOY: If I can interrupt, if
8 this is the appropriate time, I just wanted to
9 convey to the Chair and the Board that the
10 Office of Planning conveys their apologies.
11 They were not able to make the hearing today.
12 And to convey to the Board that they stand on
13 the record.

14 CHAIRPERSON MILLER: And that is
15 in support?

16 MR. MOY: That's correct.

17 CHAIRPERSON MILLER: Okay. Thank
18 you. Is there someone from the ANC here?
19 Good morning.

20 MR. FARRAR: Good morning. My
21 name is Curtis Farrar. I am the ANC
22 Commissioner for 2B01. The Jefferson is not

1 in my Single Member District. At the time
2 this case came up, there was no Commissioner
3 for that District. And accordingly, I, and
4 several others actually, took an interest in
5 this case and I was designated to represent
6 the ANC-2B in dealing with it.

7 We made a visit in December, four
8 of us, and then the case was presented to the
9 ANC at its regular meeting on December 12,
10 2007. And a resolution was supported
11 unanimously, which I will read to you,
12 although we have sent it in a letter of
13 January 7th, so that you would have it for the
14 record.

15 ANC-2B supports BZA Application
16 No. 17706, DC CAP Hotelier LLC, for special
17 exceptions under section 512, to allow small
18 additions to the building, and under section
19 411.11, to allow construction of new roof
20 structure enclosures at the Hotel Jefferson.

21 Our -- the case was presented more
22 briefly that you have heard it, but,

1 essentially, in the same way. No opposition
2 was heard from the community and the ANC voted
3 unanimously to support this resolution.

4 Basically, that's what I have to
5 say, Madam Chairman, although I would be glad
6 to take questions, if you have them.

7 CHAIRPERSON MILLER: Thank you.
8 Are there any questions? No questions.

9 MR. FARRAR: Thank you.

10 CHAIRPERSON MILLER: Thank you
11 very much for coming down and testifying.

12 MR. FARRAR: Not at all.

13 CHAIRPERSON MILLER: Anybody else
14 in the audience who wishes to testify in
15 support or opposition to the application?
16 Okay. Not hearing from anyone, any other
17 Board questions? Okay. Mr. Collins, do you
18 want to make some closing remarks?

19 MR. COLLINS: Sure. Just a few
20 brief statements. We do believe that we have
21 presented a full and complete case for special
22 exception relief under section 512 and section

1 411.11. I do note that we -- that there are
2 five letters of support in the record by
3 abutting neighbors, the ones that we
4 submitted, in addition to the ones that you
5 had previously.

6 They are consistent with the map
7 that I submitted with the orange and the green
8 that shows the location of those abutting
9 neighbors. We have had a tremendous amount of
10 community outreach on this case. We have a
11 tremendous amount of support in the community
12 for this case.

13 This is going to allow the
14 revitalization and the upgrading of the
15 Jefferson Hotel to be a world class hotel.
16 And we would, respectfully, request your
17 approval at the earliest convenience.

18 CHAIRPERSON MILLER: Okay. I
19 think that will be next week.

20 MR. COLLINS: Thank you.

21 CHAIRPERSON MILLER: I just have
22 one follow-up question.

1 MR. COLLINS: Sure.

2 CHAIRPERSON MILLER: I recall
3 someone saying that you were working with a
4 certain neighbor, was it Boston Properties or
5 something, with respect to the roof plan?

6 MR. COLLINS: That's right, Boston
7 Properties.

8 CHAIRPERSON MILLER: Okay.

9 MR. COLLINS: And Boston
10 Properties' letter, which you will see, says
11 they do not object. They didn't say support,
12 but they are the closest neighbor. They are
13 right across the 10 foot alley and there was
14 back and forth at several levels, mostly with
15 the facility manager, but also it bumped up to
16 their legal office and other things. So but
17 they, in essence, have no opposition.

18 CHAIRPERSON MILLER: And were any
19 of their concerns relevant to what we are
20 considering with respect to the height of the
21 enclosures?

22 MR. COLLINS: Actually, their

1 issues were primarily having to do with the
2 roof structures and they are satisfied with
3 what we have shown them.

4 CHAIRPERSON MILLER: Okay.
5 Anything else? Okay. Thank you very much.

6 MR. COLLINS: Thank you.

7 CHAIRPERSON MILLER: Ms. Bailey,
8 do we have anything else on the agenda for the
9 morning?

10 MS. BAILEY: No, Madam Chair.

11 CHAIRPERSON MILLER: Okay. Then
12 we will reconvene at 1:00 and this hearing is
13 adjourned.

14 (Whereupon, the Public Hearing was
15 recessed at 11:31 a.m. to reconvene at 1:14
16 p.m. this same day.)

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

2 1:14 p.m.

3 CHAIRPERSON MILLER: This hearing
4 will, please, come to order. Good afternoon,
5 ladies and gentlemen. This is the January 29,
6 2008 Public Hearing of the Board of Zoning
7 Adjustment of the District of Columbia. My
8 name is Ruthanne Miller, I'm the Chair of the
9 BZA, to my right is Mr. Marc Loud, he is our
10 Vice Chair, and on my left is Mary Oates
11 Walker and next to her is Shane Dettman.

12 And also joining us is Beverley
13 Bailey of the Office of Zoning and most likely
14 Mr. Clifford Moy will be joining us as well
15 and he is with the Office of Zoning.

16 Copies of today's hearing agenda
17 are available to you and are located to my
18 left in the wall bin near the door. Please,
19 be aware that this proceeding is being
20 recorded by a Court Reporter and is also
21 webcast live. Accordingly, we must ask you to
22 refrain from any disruptive noises or actions

1 in the hearing room.

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

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

17 The order of procedure for special
18 exceptions and variances is as follows:
19 First, statement and witnesses of the
20 applicant. Second, Government reports,
21 including Office of Planning, Department of
22 Public Works, DDOT, etcetera. Three, report

1 of the Advisory Neighborhood Commission.
2 Four, parties or persons in support. Five,
3 parties or persons in opposition. Six,
4 closing remarks by the applicant.

5 The order of procedure for appeal
6 applications will be as follows: One,
7 statement and witnesses of the appellant.
8 Two, the Zoning Administrator or other
9 Government official's case. Three, case for
10 the owner, lessee or operator of the property
11 involved, if not the appellant. Four, the ANC
12 within which the property is located. Five,
13 intervenor's case, if permitted by the Board.
14 Six, rebuttal and closing statements by
15 appellant.

16 Pursuant to Section 3117.4 and
17 3117.5, the following time constraints will be
18 maintained: The applicant, appellant, persons
19 and parties, except an ANC, in support,
20 including witnesses, 60 minutes collectively.
21 Appellees, persons and parties, except an ANC,
22 in opposition, including witnesses, 60 minutes

1 collectively. Individuals 3 minutes.

2 These time restraints do not
3 include cross examination and/or questions
4 from the Board. Cross examination of
5 witnesses is permitted by the applicant or
6 parties. The ANC within which the property is
7 located is automatically a party in a special
8 exception or variance case.

9 Nothing prohibits the Board from
10 placing reasonable restrictions on cross
11 examination, including time limits and
12 limitations on the scope of cross examination.

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

22 The Sunshine Act requires that the

1 Public Hearing on each case be held in the
2 open before the public. The Board may,
3 consistent with it's rules of procedure and
4 the Sunshine Act, enter Executive Session
5 during or after the Public Hearing on a case
6 for purposes of reviewing the record or
7 deliberating on the case.

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

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

17 The Board will make every effort
18 to conclude the Public Hearing as near as
19 possible to 6:00 p.m. If the afternoon cases
20 are not completed at 6:00, the Board will
21 assess whether it can complete the pending
22 case or cases remaining on the agenda.

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

12 Does the staff have any
13 preliminary matters?

14 MS. BAILEY: Madam Chair, good
15 afternoon, to everyone, good afternoon as
16 well, no, staff does not.

17 CHAIRPERSON MILLER: If not, okay,
18 then let's proceed with the agenda. Would all
19 individuals wishing to testify today, please,
20 rise to take the oath?

21 MS. BAILEY: Would you, please,
22 raise your right hand?

1 (Whereupon, the witnesses were
2 sworn.)

3 MS. BAILEY: Thank you.

4 CHAIRPERSON MILLER: Would you
5 call the first case, please?

6 MS. BAILEY: Thank you, Madam
7 Chair. And that is Application No. 17711 of
8 Yaulanda D. Powell, pursuant to 11 DCMR 3104.1
9 and 1202.1, for a special exception to operate
10 a bed and breakfast facility, that's six
11 sleeping rooms, under subsection 203.8(c) and
12 203.10(b). The property is located in the
13 CAP/R-4 District at premises 612 3rd Street,
14 S.E., Square 795, Lot 57.

15 CHAIRPERSON MILLER: Good
16 afternoon. Would you identify yourself for
17 the record, please?

18 MS. POWELL: Good afternoon. I'm
19 Diane Powell, Yaulanda Powell. And I live at
20 612 3rd Street, S.E.

21 CHAIRPERSON MILLER: Just to be
22 clear, did you say you are known by two

1 different ways, Yaulanda or Diane, is that it?

2 MS. POWELL: My official name is
3 Yaulanda Diane Powell and I go by Diane.

4 CHAIRPERSON MILLER: Okay. Thank
5 you.

6 MS. POWELL: Um-hum.

7 CHAIRPERSON MILLER: Is anybody
8 here from the ANC? Okay. All right. I just
9 wanted to make sure, because they are a party
10 to the case and they can participate if they
11 are here, but they are not here. Okay.

12 So we have the files in front of
13 us. Do you want to make a general
14 presentation of your case?

15 MS. POWELL: Sure.

16 CHAIRPERSON MILLER: Okay.

17 MS. POWELL: I have owned and
18 operated a bed and breakfast for two bedrooms
19 at 612 3rd Street since spring of 2004. And
20 now, pursuant to 11 DCMR 203.10, I am
21 requesting the special exception to go to six
22 bedrooms. I am the owner of the property. I

1 live there with my husband and my son and it
2 is a primary residence.

3 There is no construction or any
4 additional changes to the property interior or
5 exterior that are necessary. The residence
6 has a total of seven sleeping rooms and one
7 bathroom per sleeping room. And the only meal
8 that is served is a continental breakfast,
9 keeping with the requirements of the DC Code.

10 Usually about 75 percent of my
11 guests arrive by Metro or by taxi. In 2007,
12 actually, 18 percent were the only ones that
13 required a parking permit, but most of the
14 people arrive by taxi or Metro.

15 The only time that there is a real
16 issue, I mean, Capitol Hill is difficult to
17 park, but it's a little more difficult,
18 because I'm close to Results Gym, so between
19 6:30 and 8:30 when they have aerobics classes
20 at night, that's probably the very difficult
21 part.

22 But for the most part, bed and

1 breakfast guests arrive, they check in, they
2 go out and they tour, they come back and they
3 go to dinner in the neighborhood and then they
4 come back and they are usually in bed by
5 10:00. They are really not a partying crowd.

6 There is only a 12 x 12 sign on
7 the front of the house that indicates the name
8 of the establishment. In the past three
9 years, I have had no complaints from neighbors
10 about noise or parking or any disturbances
11 from guests. I don't have any employees.
12 It's myself, my husband and my son that run
13 the place.

14 There are no sales that are
15 conducted on the property. We don't store any
16 kind of materials or finished products
17 outside. And the building is maintained
18 according to the requirements of the Capitol
19 Hill Preservation Society.

20 I believe you have everything. I
21 have letters from the Bed and Breakfast
22 Association supporting this. I have six

1 letters from neighbors supporting this. We
2 are a little house on -- that faces 3rd Street
3 and there are only two other single houses on
4 that street, and I have letters from both of
5 those and there is an old apartment building
6 that has just been turned into a condo unit
7 and I have a letter from the vice president of
8 the condo unit up there. So those are the
9 only ones that actually face 3rd Street.

10 The property is a large property
11 and pursuant to the requirements of sending a
12 letter to anybody who is within 200 feet, I
13 had to send it to the entire block, so 50
14 neighbors got the letter and had the
15 opportunity to have a comment. I also have
16 letters of support from the Capitol Hill
17 Restoration Society and Capitol Hill -- and
18 also from the DC Office of Planning.

19 So that's about it. It's pretty
20 simple.

21 CHAIRPERSON MILLER: Okay. And we
22 have your written filing, which addresses the

1 points very thoroughly. So maybe we can just
2 ask you a few questions.

3 MS. POWELL: Sure.

4 CHAIRPERSON MILLER: In the house,
5 there are seven sleeping rooms? Is that what
6 you said?

7 MS. POWELL: That's right.

8 CHAIRPERSON MILLER: So how many
9 would you be using for your personal use?

10 MS. POWELL: Well, right now, my
11 son still lives with me and my husband and I
12 have a bedroom there. According to the code,
13 you can go for 2, 4, 6 and so I wanted to go
14 ahead, because it's such a kind of drawn out
15 process, and get the authority to have six for
16 when my son goes to college in a couple of
17 years, then his room may become a bed and
18 breakfast room.

19 CHAIRPERSON MILLER: I see. Okay.

20 MS. POWELL: So that's what it's
21 for.

22 CHAIRPERSON MILLER: Thank you.

1 And the parking, how many parking spaces do
2 you have in the back, three?

3 MS. POWELL: In the rear there are
4 about three.

5 CHAIRPERSON MILLER: And how many
6 do you use?

7 MS. POWELL: Um, I actually park
8 on the street a lot, just because it's a
9 little more convenient than going through the
10 gate. Sometimes I park in the back, it just
11 depends on the weather and groceries and that
12 sort of thing. I also do have the waiver from
13 the Historic Preservation for that.

14 CHAIRPERSON MILLER: All right.
15 So you are not required to add additional
16 parking.

17 MS. POWELL: That's right.

18 CHAIRPERSON MILLER: I was just
19 wondering just with respect to the general
20 situation.

21 MS. POWELL: Sure.

22 CHAIRPERSON MILLER: There hasn't

1 been a problem for those that arrive by car to
2 find a parking space. Is that correct?

3 MS. POWELL: No.

4 CHAIRPERSON MILLER: Because you
5 have spaces in the back?

6 MS. POWELL: No.

7 CHAIRPERSON MILLER: Because the
8 street has a lot of spaces?

9 MS. POWELL: They usually just
10 park on the street.

11 CHAIRPERSON MILLER: Now, why is
12 it that your street has a lot of spaces
13 available?

14 MS. POWELL: Well, it's because
15 there are -- there is a park across the street
16 and so there is only houses on one side of the
17 street. And there are only three single-
18 family homes on that street and then addition
19 with the condo unit. So there are 13 parking
20 spaces there and it just depends if it is in
21 the middle of the day, there are a lot more
22 parking spaces in the evening it's tighter.

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1 Aerobics time it's really tight.

2 CHAIRPERSON MILLER: All right.
3 Okay. And with respect to the ANC, I think
4 that we got a letter in opposition. Do you
5 know why they oppose the application? And did
6 you appear before them?

7 MS. POWELL: I did. There were
8 several neighbors that were in opposition.
9 Let's see, I think they finally decided that
10 the -- what they were going to go with was
11 that it would not be in harmony with the
12 historic neighborhood, historic feel of the
13 neighborhood.

14 CHAIRPERSON MILLER: We have the
15 report that was filed here.

16 MS. POWELL: Okay. What did they
17 say?

18 CHAIRPERSON MILLER: Let's wait
19 for the sirens. They said that allowing six
20 sleeping rooms would not be compatible with
21 the residential neighborhood in which it is
22 located. Additionally, the neighbors are

1 strongly in opposition to this action. Do you
2 have a response to that?

3 MS. POWELL: I have a response
4 that I asked six neighbors to give me letters
5 of support and I have those. I could have
6 asked more. I didn't. If people have
7 concerns, they can come talk to me. One of
8 the neighbors was concerned that the telephone
9 pole was in my yard for the entire
10 neighborhood. It is. I can't control that.

11 There were other comments, so a
12 couple of them are here, I would just say
13 listen to them.

14 CHAIRPERSON MILLER: Okay. We
15 will get to them later. I didn't ask, you
16 know, who else was here on this case, except
17 for parties. So that's fine, if there are
18 people here that are going to speak to that
19 themselves, that's better than your trying to,
20 you know, portray their views.

21 Okay. That's all of my questions.
22 Do others have questions?

1 MEMBER WALKER: Is the parking on
2 your block unrestricted or do you need a Zone
3 sticker?

4 MS. POWELL: You have to have a
5 Zone sticker. And what I usually do is just
6 go to the police department and ask for a two-
7 day or something like that. Most guests only
8 are there a night, two nights, three nights at
9 the max. Rarely do they come anywhere over
10 that, unless someone is coming for a training
11 session or something.

12 Most of my guests are guys that
13 are a few tourists, some nonprofit people that
14 come in to go visit Capitol Hill and the
15 lobbyists, that sort of thing. I don't accept
16 kids, so I don't have families. When I say
17 tourists, now I would say they are probably
18 seniors, you know, 60-ish.

19 I have people from the
20 neighborhood that all of a sudden Capitol Hill
21 has a lot of children, so grandparents that
22 are coming in, those are kind of my guests on

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1 the weekends. So people in the neighborhood,
2 their families stay with me.

3 MEMBER WALKER: How many vehicles
4 do you and your husband own and your son?

5 MS. POWELL: We have three.

6 MEMBER WALKER: You have three.

7 VICE CHAIR LOUD: Good afternoon.

8 MS. POWELL: Hi.

9 VICE CHAIR LOUD: A couple quick
10 questions for you on sort of the, I guess,
11 layout of specifically where you are and your
12 most immediate neighbors. It sounds like the
13 Commission itself is not supportive, but it
14 also sounds like the neighbors closest to you
15 might be supportive. So I'm trying to figure
16 out where they are in relationship to the B&B.

17 MS. POWELL: Okay.

18 VICE CHAIR LOUD: You mentioned
19 that there -- on your block, there are only
20 three single-family residences?

21 MS. POWELL: That's right. Do you
22 have -- which one --

1 VICE CHAIR LOUD: Is there a map?

2 MS. POWELL: Do you have the
3 Office of Planning picture or do you have
4 the --

5 VICE CHAIR LOUD: I do have the
6 Office of Planning picture. Okay. And help
7 me figure out what I'm looking at.

8 MS. POWELL: Yes. Let me give you
9 this, too.

10 VICE CHAIR LOUD: You have to take
11 that to Ms. Bailey.

12 CHAIRPERSON MILLER: Do you want
13 to show that to us?

14 MS. POWELL: Yes. This is our
15 house.

16 VICE CHAIR LOUD: You have to be
17 on the microphone as you speak, so that the
18 Court Reporter can pick up what you are
19 saying.

20 CHAIRPERSON MILLER: Ms. Powell,
21 do we have that in the record? We can look at
22 the record while you are --

1 MS. POWELL: No, but you do have a
2 picture of the block, the square, I believe.

3 VICE CHAIR LOUD: And we might be
4 able to do this without a picture, if you can
5 just sort of layout for me what specifically
6 is on your block. I understand it's across
7 the street from the square.

8 MS. POWELL: A park, that's right.

9 VICE CHAIR LOUD: A park, right.
10 So there is no residential --

11 MS. POWELL: I think here's
12 something like that that --

13 VICE CHAIR LOUD: -- directly
14 opposite you?

15 MS. POWELL: Do you have something
16 that looks like that maybe?

17 CHAIRPERSON MILLER: I have
18 Exhibit 11 kind of shows. Is this the same or
19 different?

20 MS. POWELL: Yes, I think that's
21 the whole square. Is that right? Right.
22 Okay. So if you have that, then if you look

1 at the thing that's blacked out, that is my
2 house. That's my property.

3 VICE CHAIR LOUD: Okay.

4 MS. POWELL: And it's 180 feet
5 deep to the -- if you are facing 3rd Street,
6 to the right is the apartment building and
7 that lot is 50 feet wide. And then to the
8 right of those are two smaller houses and
9 those are 12 -- I guess it looks like they are
10 about 12 feet wide.

11 So it's my house and then it's got
12 a 25 and a 26, those are the three private
13 homes that face 3rd Street.

14 VICE CHAIR LOUD: And -- I'm
15 sorry, go ahead.

16 MS. POWELL: And then there is the
17 apartment building there in the middle.

18 VICE CHAIR LOUD: So looking at
19 this diagram that we are all holding right
20 now, Exhibit 11, to the south of your property
21 there is no residential dwelling?

22 MS. POWELL: That house faces G

1 Street.

2 VICE CHAIR LOUD: Okay.

3 MS. POWELL: And so where you see
4 it says 100 and then 1800?

5 VICE CHAIR LOUD: Um-hum.

6 MS. POWELL: That's a backyard.

7 VICE CHAIR LOUD: Okay.

8 MS. POWELL: That is kind of a
9 hill sloped thing, so there is no building
10 there. There is no structure there. The 300
11 and that person is -- actually, that's a
12 rental property now. The owner resides in
13 Guam.

14 VICE CHAIR LOUD: Okay. A couple
15 of quick follow-up questions. Now, the owner
16 of what's marked as 26 and 25.

17 MS. POWELL: That's right.

18 VICE CHAIR LOUD: Are those owners
19 that have submitted letters in support?

20 MS. POWELL: That's right.

21 VICE CHAIR LOUD: Okay. Thank
22 you.

1 MS. POWELL: That's right.

2 VICE CHAIR LOUD: And to your --
3 to the immediate north of your property is the
4 condo, correct?

5 MS. POWELL: That's right.

6 VICE CHAIR LOUD: And you said
7 that the vice president of that association
8 submitted a letter of support?

9 MS. POWELL: That's right.

10 VICE CHAIR LOUD: Did he identify
11 himself as the vice president in the letter?

12 MS. POWELL: I don't think he did.
13 He was identified as Marc Pochetti.

14 VICE CHAIR LOUD: I did see the
15 letter from Mr. Pochetti, but it doesn't
16 identify him as the vice president.

17 MS. POWELL: Right.

18 VICE CHAIR LOUD: So you are
19 saying he is the vice president of the condo?

20 MS. POWELL: He is.

21 VICE CHAIR LOUD: Is he speaking
22 for his -- the co-owners there or is he

1 speaking in an individual capacity?

2 MS. POWELL: I couldn't say.

3 VICE CHAIR LOUD: You don't know.

4 Okay.

5 MS. POWELL: He is the only one
6 that I have ever really met. It's a condo
7 unit, but I think five of them have not sold,
8 so there are several renters there.

9 VICE CHAIR LOUD: Are you aware of
10 there being any opposition from other condo
11 association owners?

12 MS. POWELL: Not at all.

13 VICE CHAIR LOUD: Okay.

14 MS. POWELL: Like I said, I hardly
15 ever -- I've seen Marc and I've seen a couple
16 other faces to say hello, but I don't know any
17 of their names. But there has been no
18 opposition. A couple of them have asked me,
19 you know, if their parents could stay with me
20 when they come in, but I have never had any
21 business with them.

22 VICE CHAIR LOUD: Okay. And

1 again, looking at Exhibit No. 11, I'm just
2 trying to gauge the sort of looking at the
3 Commission opposition versus your immediate
4 neighbors, are you aware of neighbors that are
5 opposed to this application that would be, for
6 example, located on South Carolina Avenue near
7 what is marked 301, 303, 305?

8 MS. POWELL: 301, the man's
9 concern was that the telephone pole was in my
10 backyard and that he could not get phone
11 service. And I told him any time he needs to
12 get to the telephone pole, just knock on my
13 door and I would be happy to let him in.
14 There is a resident here from South Carolina
15 Avenue.

16 VICE CHAIR LOUD: Okay. Then I
17 can take that up with that resident.

18 MS. POWELL: Okay.

19 VICE CHAIR LOUD: Is that 303 or
20 304?

21 MS. POWELL: No, it's 313.

22 VICE CHAIR LOUD: Okay, 313.

1 Going back to 303 and/or 305, have you been
2 contacted with -- by any of those residents
3 with concerns?

4 MS. POWELL: No.

5 VICE CHAIR LOUD: Okay. And now,
6 let's go toward the bottom of Exhibit 11 where
7 you had pointed out that 814 is on G Street,
8 I think.

9 MS. POWELL: That's right.

10 VICE CHAIR LOUD: Have you been
11 contacted by any of those residents?

12 MS. POWELL: No. 814 lives in
13 Guam. 813 now lives in South or North
14 Carolina. He rents that place. And I have a
15 letter of support from 304, which is 812
16 there.

17 VICE CHAIR LOUD: Okay.

18 MS. POWELL: And their property --
19 actually, they have a little back gate that
20 opens into my property and I have a letter of
21 support from them.

22 VICE CHAIR LOUD: Okay. Thank you

1 very much with respect to those questions. I
2 did have one question for you regarding the,
3 I guess, structure itself.

4 MS. POWELL: Um-hum.

5 VICE CHAIR LOUD: It has seven
6 bedrooms total?

7 MS. POWELL: Right.

8 VICE CHAIR LOUD: Okay. And you
9 would be proposing, at some point, to live out
10 of one of those bedrooms?

11 MS. POWELL: That's right.

12 VICE CHAIR LOUD: And six would be
13 set aside for B&B.

14 MS. POWELL: That's right.

15 VICE CHAIR LOUD: Would that make
16 the primary use, the predominant use of the
17 structure change from residential, in your
18 assessment?

19 MS. POWELL: No. And when I spoke
20 with Mr. Nero, we talked about that.

21 VICE CHAIR LOUD: Um-hum.

22 MS. POWELL: And he said no. As

1 long as you are living there, and that's your
2 residence, then you can have a home occupation
3 permit that you can run a bed and breakfast,
4 that it is considered secondary.

5 VICE CHAIR LOUD: Okay. I'll have
6 a chance to ask the Office of Planning about
7 that as well.

8 MS. POWELL: Okay.

9 VICE CHAIR LOUD: Thank you.

10 MEMBER DETTMAN: I just have a
11 quick question related to the issue that was
12 brought up about the telephone pole. It's --
13 is it located between the original structure
14 and the addition?

15 MS. POWELL: One of the --

16 VICE CHAIR LOUD: Or is it --

17 MS. POWELL: -- I have three. I'm
18 the proud owner of three telephone poles on my
19 property.

20 MEMBER DETTMAN: Congrats.

21 MS. POWELL: So if you have a
22 phone or a cable, I'm it. There is one that

1 is -- if you look at the property, it's right
2 behind 811 there, 811 that faces G Street
3 there, you see? There is a telephone pole
4 there. And then I have two, one at each
5 corner of the back of my property.

6 MEMBER DETTMAN: When you say
7 back, do you mean where it says open area?

8 MS. POWELL: That's right.

9 MEMBER DETTMAN: And in terms of
10 accessibility to those, if the utility company
11 needs to get to those for a neighboring
12 property, is there an issue with accessibility
13 to those?

14 MS. POWELL: No.

15 MEMBER DETTMAN: They are directly
16 accessible from the alley?

17 MS. POWELL: They come through the
18 alley.

19 MEMBER DETTMAN: Okay. And so the
20 one that is behind 811, that's the one that
21 really has the issue?

22 MS. POWELL: No, I think they all

1 -- you know, I was looking the other day on
2 Capitol Hill, because I was walking to the
3 Metro, thinking am I the only one with
4 telephone poles? But apparently, they are all
5 in the middle of the block.

6 MEMBER DETTMAN: Um-hum.

7 MS. POWELL: My -- I just have an
8 unusual property, that it was so big, that --
9 and it was vacant for a very long time, they
10 just put the telephone poles there.

11 MEMBER DETTMAN: Right. So
12 accessibility to all three of these poles is
13 not a problem if a utility company needs to
14 get to them?

15 MS. POWELL: No. I have had
16 several neighbors come to me and say can I get
17 -- I have Verizon coming or the cable guy
18 coming and I own the key -- I own the gate on
19 4th Street and all they do is I'll give them a
20 key or I leave it open --

21 MEMBER DETTMAN: Okay.

22 MS. POWELL: -- for the Verizon

1 guy to come in.

2 MEMBER DETTMAN: Okay.

3 MS. POWELL: I have never had a
4 problem with that at all.

5 MEMBER DETTMAN: Okay. So
6 accessibility to the three poles does not
7 change?

8 MS. POWELL: No, no.

9 MEMBER DETTMAN: If we were to,
10 you know, increase the number of rooms that
11 you have?

12 MS. POWELL: It has nothing to do
13 with it.

14 MEMBER DETTMAN: It remains the
15 same?

16 MS. POWELL: Yeah. It has nothing
17 to do with it at all. And if you can figure
18 out a way to get those telephone poles off my
19 property, I will really like you. I mean, I
20 guess one of them could even be considered
21 that it is next to the apartment building's
22 property, you know, so it's kind of right

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1 there on the corner.

2 CHAIRPERSON MILLER: I don't see
3 how the telephone poles have anything to do
4 with the application.

5 MS. POWELL: Nothing at all.

6 CHAIRPERSON MILLER: Okay.

7 MS. POWELL: Nothing at all.

8 CHAIRPERSON MILLER: Did you
9 address your proximity to Metro?

10 MS. POWELL: It's about a 10 --

11 CHAIRPERSON MILLER: Or are you?

12 MS. POWELL: -- minute walk.

13 CHAIRPERSON MILLER: Okay.

14 MS. POWELL: And I'm actually
15 surprised at how many people take the Metro
16 from Reagan to Capitol South and then walk
17 down with their suitcases, about 10 minutes.
18 But a lot of them have roller bags, so it's
19 not that big a deal.

20 CHAIRPERSON MILLER: Can you tell
21 me why -- how you started keeping this parking
22 record?

1 MS. POWELL: Oh, sure. Just
2 because I keep records kind of on everything
3 that the guests do or what they want. What
4 takes my time, you know, what they eat, all
5 kinds of things like that.

6 CHAIRPERSON MILLER: So you keep a
7 record on any complaints that might have been
8 made?

9 MS. POWELL: Of the -- by the
10 guests or by neighbors?

11 CHAIRPERSON MILLER: By neighbors.

12 MS. POWELL: Oh, sure.

13 CHAIRPERSON MILLER: And you said
14 you haven't had any?

15 MS. POWELL: Not at all.

16 CHAIRPERSON MILLER: Okay.

17 MS. POWELL: Not a single one.

18 CHAIRPERSON MILLER: And I think
19 the Office of Planning stated that you might
20 be seeking relief from the provision that
21 limits the number of clients on your property
22 to eight. Is that correct?

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1 MS. POWELL: Well, if I go for six
2 rooms, then, and there are two people sleeping
3 in each room, then that would be 12.

4 CHAIRPERSON MILLER: Okay. So you
5 haven't thought that through? It's just --
6 did you see Office of Planning's report?

7 MS. POWELL: I did. I did see
8 that. And I had actually talked with a bed
9 and breakfast in -- at Dupont Circle that had
10 recently done this. And they suggested that
11 I ask for that.

12 CHAIRPERSON MILLER: Did they
13 suggest you ask for 14 or 12 or what are you
14 asking for? I think Office of Planning, we
15 will get to the Office of Planning next, but
16 has put in their report 14. Are you on hold
17 on that answer until you hear from Office of
18 Planning?

19 MS. POWELL: Yeah, yeah. They
20 have just suggested that I ask for 14. I
21 don't take children, so it's usually two
22 people per room, but, you know, every once in

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1 a while someone will show up and they've got
2 a friend there with them, not staying in the
3 room, but, you know, they may sit down and
4 have a cup of coffee or whatever.

5 CHAIRPERSON MILLER: That's true.
6 This provision actually talks about on the
7 premises at one time.

8 MS. POWELL: Right.

9 CHAIRPERSON MILLER: I believe as
10 opposed to just guests who are sleeping there.

11 MS. POWELL: Right.

12 CHAIRPERSON MILLER: Okay. So we
13 will ask Office of Planning why they think 14
14 is a good number.

15 MS. POWELL: Okay.

16 CHAIRPERSON MILLER: Any other
17 questions?

18 VICE CHAIR LOUD: Just one quick
19 follow-up question. Did you attend the ANC
20 meeting?

21 MS. POWELL: I did.

22 VICE CHAIR LOUD: You did. Did

1 any of the persons that submitted letters on
2 your behalf attend the meeting?

3 MS. POWELL: No.

4 VICE CHAIR LOUD: They did not.

5 MS. POWELL: I didn't ask them to.

6 VICE CHAIR LOUD: Okay. All
7 right. Thank you.

8 CHAIRPERSON MILLER: Okay.
9 Anything else before we move on to Office of
10 Planning? And you do have a copy of their
11 report?

12 MS. POWELL: Um-hum.

13 CHAIRPERSON MILLER: Okay. Good.
14 Okay. We're ready for you.

15 MR. JACKSON: Good afternoon,
16 Madam Chair and Members of the Board. My name
17 is Arthur Jackson. I'm a Development and Use
18 Specialist of the District of Columbia Office
19 of Planning. And I will briefly summarize the
20 Office of Planning's report.

21 Better yet, I'll stand on the
22 record. And we are available to answer

1 questions regarding the details in the report
2 and any other conclusions therein. That
3 concludes my summary of the Office of Planning
4 report.

5 CHAIRPERSON MILLER: Well, I would
6 like to ask you just to follow-up on what we
7 were just talking about, the number of persons
8 allowed on the premises at one time.

9 MR. JACKSON: Um-hum.

10 CHAIRPERSON MILLER: That you
11 reference in your report, that it be allowed
12 to increase to 14 guests.

13 MR. JACKSON: Well, actually --

14 CHAIRPERSON MILLER: That would be
15 under 203.4(m).

16 MR. JACKSON: Well, actually, I
17 would just say that the applicant will request
18 flexibility to accommodate up to 14 guests.
19 And I believe that was based on, again, these
20 grants of another bed and breakfast, which
21 asked for the same provision. And I think it
22 would be logical to expect that you might have

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1 as many as two people per room.

2 However, the limitation of eight
3 is -- particularly, since you are talking
4 about the premises at any one time, so we
5 would support some flexibility in that area in
6 that it's not really predicated on the people
7 staying at the location, just visiting, and
8 leave it to the Board to decide whether or not
9 the range between -- the increase, if any,
10 should be 14 or something less.

11 CHAIRPERSON MILLER: So based on
12 your experience, that number has worked out
13 fine with respect to another one that has six
14 rooms?

15 MR. JACKSON: Well, and in all
16 honesty, we haven't done any bed and
17 breakfasts, but our understanding was that a
18 previous application had come before the BZA
19 had been, I guess, almost, the word was,
20 encouraged to increase the number that they
21 were proposing, based on the circumstances of
22 that application.

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1 So we cannot state with any
2 knowledge that we have -- because we have not
3 done many of these cases, I can say that this
4 would -- it seems logical, given the
5 circumstances, however, we have no actual
6 knowledge of the numbers we increased and the
7 results there that happened on the site
8 afterwards.

9 CHAIRPERSON MILLER: With respect
10 to the parking, I understand the applicants
11 made the case and I believe that it's true
12 that, you know, they are not required to have
13 additional parking, because they are in a
14 historic property.

15 MR. JACKSON: Well, we actually
16 state two issues in our analysis. We talk
17 about that under the requirement, they would
18 be required to have three spaces. And we know
19 that the rear yard appeared to be large enough
20 to accommodate three spaces and more.

21 If you look at the aerial of the
22 site that's attached to your report, the lot

1 where the property is located has two cars on
2 it. And there appears to be sufficient space
3 in there to add additional vehicles, so that
4 I don't think three cars per se would be a
5 problem on the site.

6 At the same time, we also note
7 that this probably could be eligible for a
8 parking waiver under the Zoning Regulations,
9 although we also note that there is -- the
10 following provision requires that if there is
11 an increase in development -- of intensity on
12 the property related to the number of -- a
13 unit that is recognized under the Zoning
14 Regulations, then parking regulations -- in
15 the parking regulations, there are provisions
16 that deal with rooming units.

17 So depending on your
18 interpretation, that could mean that they
19 would be subject to the three car requirement
20 per the following section. And I can quote
21 that section if you want to find it. So we
22 think they can accommodate the parking in the

1 back. We think there is sufficient space to
2 accommodate additional parking, at least three
3 spaces, and we also think that it may be
4 subject to the waiver.

5 The provision I'm referring to is
6 2100.6.

7 MEMBER DETTMAN: What provision
8 was that?

9 MR. JACKSON: 2100.6. "When the
10 intensity of a building or structure existing
11 before May 12, 1958 is increased by an
12 addition of employees, dwelling units, gross
13 floor area of seating capacity" and so on,
14 then it is subject to -- "or any unit of
15 measurement specified under 2101." And if you
16 turn to page 21-8, sorry, 21-9, there is a
17 reference to rooming house or boarding house
18 in all Districts and it refers to rooming
19 units.

20 So whether or not if rooming units
21 would be considered to be equivalent to
22 bedrooms, then it could be subject to a

1 provision of -- that could be considered
2 increasing units and intensity, based on the
3 2100.6. However, if not, then they would be
4 subject to the waiver. But having secured the
5 waiver, I guess that whole discussion is moot.

6 CHAIRPERSON MILLER: Okay. I'm
7 looking at the regs and I know there has been
8 a recent amendment to the regs, but as far as,
9 you know, if we look at 2100.6, that's still
10 the same, right?

11 MR. JACKSON: I --

12 CHAIRPERSON MILLER: Or you don't
13 know?

14 MR. JACKSON: -- have no knowledge
15 of any change to that regulation.

16 CHAIRPERSON MILLER: In 2100.6?

17 MR. JACKSON: Yes.

18 CHAIRPERSON MILLER: Okay. So I'm
19 just looking at it. It says "When the
20 intensity of use of a building or structure
21 existing before May 12, 1958 is increased by
22 an addition of employees," that's not the case

1 here. Okay.

2 MR. JACKSON: No.

3 CHAIRPERSON MILLER: "Dwelling
4 units." They are not -- do you think that --

5 MR. JACKSON: No, no.

6 CHAIRPERSON MILLER: No. Okay.

7 MR. JACKSON: No.

8 CHAIRPERSON MILLER: "Gross floor
9 area," that's not the case.

10 MR. JACKSON: No. It's that
11 last --

12 CHAIRPERSON MILLER: "Seating
13 capacity," no.

14 MR. JACKSON: It's that last
15 phrase.

16 CHAIRPERSON MILLER: "For other
17 unit or measurement specified in 2101."

18 MR. JACKSON: Right.

19 CHAIRPERSON MILLER: Okay. Then
20 where do you take us?

21 MR. JACKSON: To 21- -- page 21-9,
22 on the rooming or boarding house, it talks in

1 terms of rooming units. And the question is
2 whether rooming units would be equivalent to
3 bedrooms.

4 MEMBER DETTMAN: Madam Chair, I'm
5 looking at Zoning Commission Order 06-33,
6 which are the new -- the amendments that are
7 specific to parking for historic buildings.
8 And actually, 2100.6 was amended as well.
9 It's essentially the same working, except
10 placed before the original text it says
11 "except as provided in 2120.3."

12 2120.3 says "A historic resource
13 and any additions thereto are exempt from the
14 requirement of 2100.4 to provide additional
15 parking as a result of a change of use and
16 from the requirement of 2100.6 to provide
17 additional parking as a result of an increase
18 in intensity of use, except that parking shall
19 be required for any addition where the gross
20 floor area of the historic resource is being
21 increased by 50 percent." There is no change
22 to the gross floor area in this case.

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1 And the parking requirement
2 "attributable to the increase in gross floor
3 area is at least four spaces." So both (a)
4 and (b) wouldn't apply in this case. So it
5 seems to me that this application would fall
6 under 2120.3 and that 2100.6 is not applicable
7 here.

8 MR. JACKSON: I stand corrected.

9 CHAIRPERSON MILLER: Thank you
10 very much, Mr. Dettman. Okay. So I think
11 that that settles the issue with respect to
12 parking, that no further parking is required.
13 Okay. Any other questions from the Board for
14 Office of Planning?

15 VICE CHAIR LOUD: Just one quick
16 question. In the analysis section of your
17 report at the very beginning of the discussion
18 under Regulation 203.4(a) where you talk about
19 the predominant use of the property, that of
20 a single-family residence, in your assessment,
21 does using six of the seven rooms as boarding
22 rooms, does that change fundamentally the

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1 nature of the residence?

2 MR. JACKSON: Based --

3 VICE CHAIR LOUD: And if you can
4 just elaborate a little, so I'll understand a
5 little bit better.

6 MR. JACKSON: Sure. All right.
7 Well, based on the Zoning Regulations, no,
8 because the Zoning Regulations stipulate that
9 only in the case where this is a contributing
10 building and only in the case where certain
11 standards are met are you allowed to have six
12 bedrooms occupied as a bed and breakfast. And
13 furthermore, that if those stipulations are
14 met and you have the capacity to do so, then
15 it's still considered to be an accessory use.

16 Accessory use to the principal
17 use, which is -- remains single-family
18 dwelling. So under -- based on the writing of
19 the Zoning Regulations, I would say no.

20 VICE CHAIR LOUD: Did I miss it or
21 what? Was that discussion in your report?

22 MR. JACKSON: No, it was not.

1 VICE CHAIR LOUD: What section is
2 that that you are referring to now?

3 MR. JACKSON: The --

4 VICE CHAIR LOUD: Just again, so
5 I'll have a good handle on it the next time it
6 comes up.

7 MR. JACKSON: 203 -- the actual
8 section that we're talking in terms of --

9 CHAIRPERSON MILLER: 203.8, in
10 particular.

11 MR. JACKSON: Yes.

12 VICE CHAIR LOUD: Okay.

13 MR. JACKSON: Because,
14 essentially, what it is explaining is this
15 entire section, 203, home occupations,
16 outlines what types of uses and the extent of
17 those uses that can be allowed to be
18 considered a home occupation. And if we
19 assume that at some point -- well, and this is
20 usually based on past experience, but, of
21 course, one of the things that the regulations
22 has been very supportive of is to make sure

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1 that older buildings that may be somewhat
2 large, but who we want to maintain as in
3 keeping the integrity of Historic Districts in
4 place, would be -- could be utilized in a
5 manner that would not be inconsistent with the
6 neighborhood character or historic character.

7 And to that end, it allows certain
8 flexibilities with regard to the extent to
9 which of the building -- to the extent that an
10 older building, which we would assume would be
11 somewhat larger than a normal new residence,
12 can be used for what might otherwise be
13 considered a principal use.

14 So I think the intent of the
15 regulations is to allow more flexibility only
16 in instances where we have a historic building
17 or a contributing building, such that we have
18 here.

19 VICE CHAIR LOUD: But if I look at
20 the section it says "the maximum." I'm
21 looking at 203.8(c).

22 MR. JACKSON: Right.

1 VICE CHAIR LOUD: "The maximum
2 number of sleeping rooms shall be two, except"
3 and then under subheading (I) "It can be
4 increased to four," not necessarily increased
5 by four.

6 MR. JACKSON: Um-hum. But again,
7 that was our increase to four in a regular
8 residence. That's not in a Historic District.
9 The only way you get into the large number is
10 that you are in a contributing building.

11 VICE CHAIR LOUD: Okay.

12 MR. JACKSON: That is, predates
13 the regulations, essentially, and that is of
14 certain character that -- and apparently has
15 the capacity. Again, we're looking at
16 historic building, normally, you don't -- you
17 wouldn't anticipate that it would be by that
18 much, but that has capacity to grow,
19 accommodate up to six bedrooms.

20 VICE CHAIR LOUD: Okay.

21 MR. JACKSON: Now, what makes this
22 project also unique is that we do have an

1 addition, but the addition in its entirety,
2 what is considered to be consistent with the
3 goals of the Historic District, they have been
4 approved by -- it was reviewed and approved by
5 the -- as being compatible for Historic
6 District. And even the waiver for the
7 additional bedrooms was not seen as being
8 detrimental to the character of the area that
9 they are trying to preserve.

10 So based on that information, we
11 would not think this would be incompatible
12 with the intent of the regulations.

13 CHAIRPERSON MILLER: Mr. Loud, I
14 just want to make sure that you see the
15 provision that Mr. Jackson is referring to.
16 It's 203.8 and it does say "can increase to
17 four," in the first part, but then in the
18 second part of that sentence, if you keep
19 going, it says "to six, if it's contributing
20 to character of Historic District."

21 VICE CHAIR LOUD: I see that.

22 CHAIRPERSON MILLER: Okay. Good.

1 Okay. Okay. Any other Board questions for
2 Office of Planning? Ms. Powell, do you have
3 any questions for the Office of Planning?

4 MS. POWELL: No. And it does say
5 in that that a bed and breakfast can only be
6 done in a single-family home.

7 CHAIRPERSON MILLER: Okay. I'll
8 ask again, I know some people have come into
9 the room, but I don't think they are with the
10 ANC, but I'll just double check. Anybody here
11 with the ANC on this case? Okay. Not hearing
12 from anyone, at this point then, is there
13 anyone here who would like to testify in
14 support of the application?

15 Okay. We do have, I believe, six
16 letters in support of the application from
17 neighbors. And I would also reference we do
18 have a letter from Capitol Hill Restoration
19 Society Zoning Committee that voted
20 unanimously to support the application.

21 Okay. I believe that there are
22 some individuals here who are ready to testify

1 in opposition to the application. You can
2 come forward now to the table, if you are.
3 Did you want to testify? Sure, there's room
4 for both of you, um-hum. So can you start
5 again with your mike on?

6 MS. KNUTSON: Sure.

7 CHAIRPERSON MILLER: Okay.

8 MS. KNUTSON: My name is Marcia
9 Knutson. I live at 549 4th Street, S.E., and
10 I also have a parking space, a 15 x 25 space,
11 in that alley.

12 CHAIRPERSON MILLER: What do you
13 mean you have a space in an alley?

14 MS. KNUTSON: Well --

15 CHAIRPERSON MILLER: How do you
16 have it?

17 MS. KNUTSON: -- if you -- it's a
18 separate lot number. It's a separate piece of
19 property. It's 15 x 25 and I park in it.

20 CHAIRPERSON MILLER: So you own --

21 MS. KNUTSON: I own that, right.

22 CHAIRPERSON MILLER: -- a part of

1 the alley?

2 MS. KNUTSON: Yeah. I don't have
3 that map in front of me.

4 CHAIRPERSON MILLER: Okay.

5 MS. KNUTSON: But you know, the
6 entrance, there is the entrance to that space
7 in the middle of the block is actually on 4th
8 Street. Are you following me here?

9 CHAIRPERSON MILLER: I'm going to
10 look at the diagram as you talk.

11 MS. KNUTSON: Okay. This is
12 between 535 and 537 4th. There is an alley.

13 CHAIRPERSON MILLER: Got it.

14 MS. KNUTSON: Okay. And in that
15 alley are parking spaces that are -- some of
16 the parking spaces belong to the same -- are
17 the same lot and square as 535. And then
18 there are -- four of the houses on 4th Street
19 also have a space in that -- back there and
20 I'm one of those four.

21 CHAIRPERSON MILLER: Okay. It's a
22 private alley to begin with.

1 MS. KNUTSON: It's a private
2 alley.

3 CHAIRPERSON MILLER: Okay.

4 MS. KNUTSON: And that's the
5 famous phone call issue, which has absolutely
6 nothing to do with any of this. But I have
7 lived there for actually quite some time. And
8 the previous owner to 535 4th and the current
9 owner to -- at 537 4th, in other words, the
10 two houses that abut that alley, just put up
11 an iron gate some time ago, because of, I
12 think there was, a vandalism problem with
13 people getting back in there and it was dark
14 and so that's why they put up that gate.

15 And so that's what that is about.
16 And those of us who have -- I have a key,
17 because I have a parking space back there.

18 CHAIRPERSON MILLER: Okay. And
19 you have a concern though with respect to Ms.
20 Powell's increasing the number of guest rooms?

21 MS. KNUTSON: I do.

22 CHAIRPERSON MILLER: And that is?

1 MS. KNUTSON: I -- my primary
2 concern is the parking. And it is with the --
3 I just beg to differ with her that it is a
4 huge, huge, huge problem in our area. The gym
5 -- it is -- it is particularly a nightmare
6 between about 6:00 and 8:30 when the people
7 come home from work. They go to the gym. The
8 gym does have a parking lot. It fills up and
9 people park on the street.

10 But it's a problem all the time,
11 because if people can park on the street,
12 they're not going to -- you know, they don't
13 necessarily go into the parking lot. It's a
14 problem on weekends. It's a problem all the
15 time. And there -- it's, obviously, not as
16 bad during the day, because people go to work
17 and people don't go to the gym as much, but it
18 is a huge, huge problem in our area, which is
19 why I had to buy that park -- I was fortunate
20 to find that off-street parking place, which
21 I bought, because I couldn't park my car in
22 the street.

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1 The other issue is the character
2 of the neighborhood. I don't -- I think -- I
3 don't think anybody has a problem with a two
4 bedroom bed and breakfast, but I think a six
5 room bed and breakfast is an entirely
6 different matter. It's just not a small
7 little B&B any more. Most of the neighbors
8 think of it more as a small hotel.

9 And another thing, the houses on
10 3rd Street, there is a condo unit there and
11 there are several units in there and they have
12 no off-street parking at all. So all of those
13 people park on the street, in addition to the
14 three private individual houses. So the -- I
15 don't know what the address of that building
16 is, but it's an apartment converted to condos.
17 Those people all park on the street.

18 And the 3rd Street side where the
19 park is, there is no parking on that side of
20 the street at all. It's prohibited. So there
21 are --

22 CHAIRPERSON MILLER: It's

1 prohibited on the side where the park is?

2 MS. KNUTSON: Yes, there's no
3 parking.

4 CHAIRPERSON MILLER: No parking?
5 Do you know why?

6 MS. KNUTSON: Well, the street is
7 not wide enough.

8 CHAIRPERSON MILLER: Oh, okay.

9 MS. KNUTSON: So that's -- so
10 there is less parking there than you might
11 think. And the other thing, I know that she
12 has been getting visitor permits for the
13 parking, but I understood at the ANC meeting
14 that that is actually not appropriate. And,
15 you know, you go to the police station, so I
16 don't think that's -- I just think there is --
17 I realize not all of her customers would be
18 driving, but one more car in that neighborhood
19 is just, frankly, one car too many.

20 CHAIRPERSON MILLER: What do you
21 mean it's not appropriate?

22 MR. KENNEDY: It's commercial.

1 CHAIRPERSON MILLER: What?

2 MR. KENNEDY: It's for commercial
3 use.

4 MS. KNUTSON: Those permits are
5 for, you know, just for residences.

6 MR. KENNEDY: Yes.

7 MS. KNUTSON: And guests.

8 CHAIRPERSON MILLER: They are for
9 residents and guests. She is a resident
10 though. You mean they are not for paying
11 guests? Is that what you're saying? Is
12 that --

13 MS. KNUTSON: That's what the
14 police said at the ANC meeting.

15 CHAIRPERSON MILLER: Oh, okay.
16 I'm sorry, what did you say?

17 MS. POWELL: It was a neighbor
18 that said that. I've gone to the police
19 department and told them I have guests and
20 they see me often, so it hasn't been a
21 problem. But like I said, in 2007, only 18
22 percent of the people -- that was 27 people

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1 throughout the entire year that I had to even
2 go and get a parking sticker for.

3 CHAIRPERSON MILLER: 27 in the
4 year 2007?

5 MS. POWELL: Right.

6 CHAIRPERSON MILLER: Is that what
7 you said? Out of how many guests, do you
8 know?

9 MS. POWELL: Um --

10 CHAIRPERSON MILLER: 27 people
11 over 12 months or whatever. Okay.

12 MS. POWELL: 27 out of 12 guests.

13 CHAIRPERSON MILLER: Not 12
14 guests.

15 MS. POWELL: 27 guests. Where am
16 I parking -- parkers. Yes, I don't know.
17 Yes, maybe out of 120 guests, I'm not sure.
18 Whatever, it was 18 percent.

19 CHAIRPERSON MILLER: 18 percent of
20 your guest.

21 MS. POWELL: Um-hum.

22 CHAIRPERSON MILLER: Okay. Okay.

1 Anything else? All right. Any other
2 questions for Ms. Knutson? Okay. And did you
3 want to testify as well, sir?

4 MR. KENNEDY: Yes.

5 CHAIRPERSON MILLER: Okay.

6 MR. KENNEDY: My name is Jerry
7 Kennedy. I'm at 313 South Carolina Avenue.
8 I had faxed a statement to Mr. Moy yesterday,
9 but fairly late, so I don't know if you have
10 that in front of you, but I can submit that.

11 I'm very troubled by some of the
12 things that I have heard today, based both on
13 the facts that aren't, as far as I can tell,
14 entirely accurate or are half true about what
15 is already occurring and what I think and fear
16 will happen in the future.

17 I think that this application has
18 not met the burden of, as a matter-of-right,
19 operating a bed and breakfast in an R-4 Zone.
20 The problems, there are already problems. I
21 feel that the approval of a special exemption
22 would only exacerbate the problems that

1 already exist.

2 Vice Chairman Loud looked at the
3 map, which I don't have in front of me, but
4 looked at the support letters from houses on
5 3rd Street. Well, the impact on the houses on
6 3rd Street is fairly minimal, because they
7 don't really face the giant new structure in
8 the back that is the bed and breakfast.

9 Those houses are the ones on South
10 Carolina and on G and on 4th Street. Now, at
11 the ANC hearing, there were many of the
12 neighbors who attended and who made comments
13 to the ANC about the various problems that
14 already exist, but, frankly, a two bedroom bed
15 and breakfast is not a major problem for most
16 of us.

17 In fact, when the addition to the,
18 what I would say is the, historic structure
19 was made, some of us did not object. I did
20 not object. However, what has resulted is a
21 small two bedroom townhouse that faces 3rd
22 Street with a walkway connecting to a three-

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1 story, very large structure with seven
2 bedrooms.

3 Well, as a resident, if somebody
4 wants seven bedrooms, I guess, I can live with
5 that. But it would appear to me that this
6 whole process from the get go has been a giant
7 trojan horse around the zoning process. And
8 I fear what might happen with the granting of
9 the special exemption.

10 Another issue that was brought up
11 at the ANC was the ownership of a four bedroom
12 house on 4th Street in the name of the spouse
13 of the applicant. This house abuts the 3rd
14 Street house in the middle of the block. Once
15 again, this is a fairly unique block. One, it
16 was never taken to grade. Two, there is no
17 alley that goes through it. So this property,
18 this large property from the 3rd Street and 4th
19 Street both meet in the middle.

20 The 4th Street house has a swimming
21 pool, which has been used by the B&B guests.
22 So would this 4th Street house become a part

1 of the B&B? Now, obviously, the regulations
2 require that there be an owner-occupier for it
3 to be a B&B. Well, at this current time, the
4 3rd Street original structure is a rental
5 property.

6 The applicant does not reside in
7 the 3rd Street house, but in the addition.
8 The 3rd Street house has a kitchen, as does
9 the addition. Under the regulations --

10 CHAIRPERSON MILLER: What addition
11 are you referring to?

12 MR. KENNEDY: The 3rd Street house.

13 CHAIRPERSON MILLER: That's before
14 us?

15 MR. KENNEDY: The original house.

16 CHAIRPERSON MILLER: It's one
17 house.

18 MR. KENNEDY: That is connected to
19 the addition.

20 CHAIRPERSON MILLER: But it's one
21 house, is it not?

22 MR. KENNEDY: By a colonnade.

1 CHAIRPERSON MILLER: It's one
2 house.

3 MS. KNUTSON: Not really.

4 MR. KENNEDY: It's two structures.

5 CHAIRPERSON MILLER: It's two
6 structures, but it's one. We're talking about
7 the same residence. We're not talking about--

8 MR. KENNEDY: Yes.

9 CHAIRPERSON MILLER: -- another
10 one?

11 MR. KENNEDY: Correct. No.

12 CHAIRPERSON MILLER: Okay. We're
13 talking about what --

14 MR. KENNEDY: But it is a --

15 CHAIRPERSON MILLER: Okay.

16 MR. KENNEDY: -- new structure.

17 It is what, three years old? It is not a
18 historic structure. There is nothing historic
19 about it. It is not aesthetically pleasing.
20 It is a giant yellow box. There is nothing
21 historic about the property. It's new. And
22 I expect that's very pleasing for seven

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1 bedroom suites, as the property was originally
2 built.

3 Now, it appears to me, and I think
4 it wouldn't take a genius to figure out, that
5 it was built as a bed and breakfast. Now, I
6 wasn't -- it was not -- the original approval
7 of the new structure, which I'm sure came
8 before this Board and the Planning Board, it
9 was approved. And I didn't object.

10 I mean, as far as I'm concerned,
11 if a family lives in that house, however, big
12 it is, that is appropriate on our block. But
13 there are no commercial businesses on our
14 block. It is a residential block. It is a
15 very unique and very nice residential block.

16 Approving the special exemption
17 would change the nature of our block. It
18 would diminish the quality of life for the
19 residents. Now, I said it was a trojan horse.
20 Well, over the last year, as the B&B has been
21 operating, a large structure has been built
22 between the 3rd Street and 4th Street property.

1 Large enough to park at least three or maybe
2 four cars.

3 The applicant does park there and
4 sometimes parks when there is overflow in her
5 backyard. Now, this is not aesthetically
6 pleasing. It's not consistent with the block.
7 When the new addition was built, what was in
8 the yard before? Trees. There was a lot of
9 green space in the middle of the block. How
10 many trees are there now? Zero.

11 When the excavation was made for
12 the new structure, it was -- the pile was put
13 into the yard, what is now the condominium.
14 Were there trees there then? Yes. How many
15 are there now? Zero. So a green space that
16 was there is not there any more.

17 CHAIRPERSON MILLER: Mr. Kennedy?

18 MR. KENNEDY: Yes?

19 CHAIRPERSON MILLER: Okay. You're
20 supposed to have three minutes.

21 MR. KENNEDY: Oh, I'm sorry.

22 CHAIRPERSON MILLER: And we're not

1 exactly keeping track, but --

2 MR. KENNEDY: Well, I would like
3 to, if I have a moment --

4 CHAIRPERSON MILLER: Okay.

5 MR. KENNEDY: -- to comment on
6 both Mr. Jackson and Mr. Dettman's comments.
7 One, this does, in fact, exceed the regulation
8 that you were reading. The structure doubles
9 or triples the size, so I do think that the --
10 that that requirement would apply to the
11 structure.

12 MEMBER DETTMAN: Excuse me. Madam
13 Chair, can I ask a question? I don't --
14 according to the DCOP report, in 2002, which
15 is prior to the applicant's ownership of the
16 property, is that correct? In 2002, the
17 previous owner secured approval from HPRB to
18 construct a large addition.

19 MS. POWELL: No, excuse me, that
20 was me.

21 MEMBER DETTMAN: That was you?

22 MS. POWELL: Right. That's right.

1 And there were no required variances or
2 special exceptions, everything was according
3 to zoning.

4 MEMBER DETTMAN: Okay.

5 MS. POWELL: I followed all the
6 rules, dealt with DCRA. They were wonderful.
7 Everything went fine.

8 MEMBER DETTMAN: And so this sort
9 of time line is in 2002. You are the owner.
10 You get approval to build the addition.

11 MS. POWELL: That's right.

12 MEMBER DETTMAN: In 2004, you get
13 the home occupancy permit to operate a two
14 bedroom or a two sleeping room B&B. And now,
15 we are here to look at the increase from two
16 to six. Is that right?

17 MS. POWELL: That's right.

18 MEMBER DETTMAN: Okay.

19 MS. POWELL: And in 2004, I had
20 three children and my husband had a daughter
21 that sometimes spent the weekends with us.

22 MEMBER DETTMAN: But --

1 MS. POWELL: So and two of those
2 children have moved now.

3 MEMBER DETTMAN: -- prior to 2004,
4 when you received approval for the addition,
5 it was, essentially, an addition to a single-
6 family dwelling. So I'm not -- just to
7 address your parking comment.

8 MR. KENNEDY: Well, actually, I
9 haven't mentioned parking, but that's --

10 MEMBER DETTMAN: The gross floor
11 area of the existing B&B is not increasing.
12 We're not increasing gross floor area
13 whatsoever. The increase in gross floor area
14 actually occurred in 2002 when we were
15 building an addition to a single-family
16 dwelling. And so the parking requirement
17 associated with a home occupancy in a --

18 MR. KENNEDY: The single-family
19 dwelling is --

20 MEMBER DETTMAN: -- historic
21 structure --

22 MR. KENNEDY: -- now a rental

1 property. And it's not part of the existing
2 B&B.

3 MEMBER DETTMAN: Okay.

4 MR. KENNEDY: It is rented out --

5 MEMBER DETTMAN: But in terms of
6 the parking requirement --

7 MR. KENNEDY: -- to another --

8 MEMBER DETTMAN: -- associated
9 with a home occupancy, a B&B located --

10 MR. KENNEDY: If you take the
11 property --

12 MEMBER DETTMAN: -- in a historic
13 structure --

14 MR. KENNEDY: -- and divide it --

15 MEMBER DETTMAN: We're not
16 increasing gross floor area here.

17 MR. KENNEDY: Well, increasing the
18 gross floor area of -- no, I'm saying that
19 they are now separable properties.

20 CHAIRPERSON MILLER: Okay. Let me
21 just say something, all right?

22 MR. KENNEDY: Yeah.

1 CHAIRPERSON MILLER: Okay. The
2 addition and the original house are considered
3 one property, one B&B.

4 MR. KENNEDY: Okay.

5 CHAIRPERSON MILLER: They can't --
6 they are not divided. And I can hear your
7 concerns about, you know, this building having
8 been put in the back yard --

9 MR. KENNEDY: Well, I know that --

10 CHAIRPERSON MILLER: -- but that
11 was another issue.

12 MR. KENNEDY: Okay.

13 CHAIRPERSON MILLER: We're not
14 considering whether another addition could be
15 built or not. It was built according to
16 zoning, as far as we understand, and now we
17 look at the whole house, which is the
18 original, plus the addition.

19 MR. KENNEDY: But the original
20 house is a single-family residence, I didn't
21 object to when it was built. I'm saying as
22 changing the character to a hotel,

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1 particularly with the property on 4th Street,
2 the swimming pool and the parking structure
3 between them, which I don't know whether you
4 approved that or not, and the fact of the
5 coverage of the lot, that this has changed.
6 The character has changed incredibly from what
7 was --

8 CHAIRPERSON MILLER: Okay.

9 MR. KENNEDY: -- there in 2002.

10 CHAIRPERSON MILLER: That may be
11 true.

12 MR. KENNEDY: Or 2004.

13 CHAIRPERSON MILLER: But all we
14 have before us is allowing four of the
15 bedrooms to be now used as guest rooms.

16 MR. KENNEDY: Yes. And I'm saying
17 that the --

18 CHAIRPERSON MILLER: And that's
19 all.

20 MR. KENNEDY: -- special exemption
21 should not be granted for that on the basis of
22 the regulations, because this would be

1 violative of the regulations --

2 CHAIRPERSON MILLER: The
3 regulation --

4 MR. KENNEDY: -- of a bed and
5 breakfast.

6 CHAIRPERSON MILLER: It doesn't
7 appear to me that it violates the regulations.
8 Which regulation does it violate?

9 MR. KENNEDY: Well, there is a
10 regulation that "there shall not be a separate
11 cooking area with the rooms," that's in your
12 regulations. There would be. There is a
13 requirement for a health inspection. There
14 has not been one. I mean, I'm just reading
15 what is in the D.C. --

16 CHAIRPERSON MILLER: How do you --

17 MR. KENNEDY: -- bed and
18 breakfast.

19 CHAIRPERSON MILLER: -- there
20 hasn't been a health inspection?

21 MR. KENNEDY: She said -- well,
22 I'm sorry, she told me at the hearing there

1 had not been a health inspection. But that's
2 still required, that there be a health
3 inspection.

4 MS. POWELL: We don't cook.

5 MR. KENNEDY: Or that there be a
6 sign saying that there is not a health
7 inspection. I mean, I have the regulations if
8 you need them.

9 CHAIRPERSON MILLER: See, we look
10 right at our regulations, okay. I mean, I see
11 one that says "No cooking facility shall be
12 permitted in any of the rented rooms." I
13 don't think that's happening in this case.

14 MR. KENNEDY: Is it, I mean?

15 CHAIRPERSON MILLER: Is it? Do
16 you know otherwise?

17 MR. KENNEDY: At the ANC meeting
18 she said she wanted to use those two rooms as
19 part of the B&B. There is cooking in those
20 rooms. There would be cooking available. You
21 would have a kitchen.

22 MS. POWELL: At the ANC meeting, I

1 was asked about that. My guests are not
2 allowed to cook. My insurance requires that.
3 You would never let anybody else cook. They
4 don't cook in my kitchen. The rooms are
5 bedrooms. They have a bathroom in them. They
6 have a television. People do not cook.

7 The only thing that my guests eat
8 is down in the kitchen area. There is a bar
9 area that we serve muffins and toast and
10 orange juice. It's a continental breakfast.
11 Nobody cooks.

12 CHAIRPERSON MILLER: Okay. Got
13 it. I have one other question for you, Mr.
14 Kennedy.

15 MR. KENNEDY: Sure.

16 CHAIRPERSON MILLER: I think I
17 heard you say that the current problems would
18 be exacerbated.

19 MR. KENNEDY: Yes.

20 CHAIRPERSON MILLER: And I just
21 want to make sure I understand what problems
22 you are referring to. And is that the parking

1 problems?

2 MR. KENNEDY: That's one.

3 CHAIRPERSON MILLER: And do you
4 know that the parking --

5 MR. KENNEDY: Well, I mean, I
6 think that the --

7 CHAIRPERSON MILLER: Wait. Who --

8 MR. KENNEDY: -- changing --

9 CHAIRPERSON MILLER: Can I ask
10 about the parking problem?

11 MR. KENNEDY: -- the nature from
12 commercial to a residential area. The
13 Planning Board and others have said that
14 preserving residential property and stopping
15 the encroachment of commercial property is the
16 goal of the Office of Planning of the District
17 of Columbia. This is exactly, exactly the
18 camel's nose under the tent.

19 There is plenty of people who want
20 to commercialize Capitol Hill. There is a new
21 baseball stadium going in. It's much cheaper
22 to put a commercial activity in a residential

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1 R-4 block. Doing it as a matter-of-right
2 under a home occupation is just a ruse around
3 your regulations.

4 CHAIRPERSON MILLER: Okay. We got
5 it.

6 MR. KENNEDY: Okay.

7 CHAIRPERSON MILLER: And I do want
8 to say this, that Ms. Powell is before us
9 because she is not doing this as a matter-of-
10 right. And in our consideration --

11 MR. KENNEDY: No, she is asking
12 for special exemption.

13 CHAIRPERSON MILLER: Special
14 exception is not matter-of-right, that's why
15 she has to get --

16 MR. KENNEDY: No. She started
17 with a two bedroom as a matter-of-right.

18 CHAIRPERSON MILLER: Okay. But
19 that's not before us. What is before us, I'm
20 just saying, we do consider adverse impacts in
21 our analysis of whether or not to grant a
22 special exception. Okay. Any other

1 questions?

2 MEMBER DETTMAN: I thought I heard
3 a statement that 612 3rd Street, S.E., is
4 actually not the principal residence of the
5 applicant.

6 MR. KENNEDY: It's rented.

7 MEMBER DETTMAN: I would --

8 MR. KENNEDY: The front --

9 MEMBER DETTMAN: -- actually like
10 to hear that from the applicant.

11 MR. KENNEDY: Okay.

12 MEMBER DETTMAN: Could you tell
13 the Board what your principal residence is?
14 The address of your principal residence?

15 MS. POWELL: 612 3rd Street, S.E.
16 is a single-family residence. It is two
17 structures. It is one residence. The front
18 area, I have had renters in there, because
19 it's a separate area. In order -- when I
20 first applied to build the addition, I went in
21 asking to put the addition connected to the
22 front house. You know, just an addition.

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1 Zoning, at that time, a man named
2 Toye Bello looked at it and he said that
3 structure will not look good. Move it back
4 and create a courtyard and connect it with the
5 colonnade. And so it is a single structure.
6 It cannot be separated. I live there. I have
7 a bed and breakfast. And I have had no
8 complaints from my neighbors.

9 CHAIRPERSON MILLER: The two parts
10 are one residence. You rent out part of your
11 residence, which is the front part?

12 MS. POWELL: I have done that.
13 Right now, I'm going -- and that's what this--
14 I need this also to create -- turn those into
15 bed and breakfast rooms. Those are two. He
16 stated that I have seven rooms in the
17 addition. I don't. There are five bedrooms
18 in the addition. There are two in the
19 original part of the house. So there are a
20 total of seven bedrooms.

21 CHAIRPERSON MILLER: Okay. Let me
22 ask you this and I may ask Office of Planning

1 as well, but my understanding is that if you--
2 if we grant you the special exception --

3 MS. POWELL: Right.

4 CHAIRPERSON MILLER: -- to have
5 six rooms for bed and breakfast guests and
6 then your room for you and your son and your
7 husband --

8 MS. POWELL: Right.

9 CHAIRPERSON MILLER: -- there
10 won't be other renters.

11 MS. POWELL: No, no.

12 CHAIRPERSON MILLER: So it's --
13 but as of now, you are -- it's both? It's
14 both, you are renting --

15 MS. POWELL: I had rented that
16 original front part, yes.

17 CHAIRPERSON MILLER: And you had
18 oh, two rooms.

19 MS. POWELL: Right.

20 CHAIRPERSON MILLER: Okay.

21 MS. POWELL: Right.

22 MR. KENNEDY: And a group house on

1 4th Street.

2 CHAIRPERSON MILLER: Well, that's
3 irrelevant. Okay.

4 MR. KENNEDY: It is relevant.

5 CHAIRPERSON MILLER: So --

6 MS. KNUTSON: Could I just add --

7 CHAIRPERSON MILLER: Two our --
8 okay.

9 MS. KNUTSON: There are two
10 separate structures and, in fact, they are
11 connected, but they are also -- could serve as
12 two stand alone homes, because they each have,
13 you know, a kitchen and bathrooms and bedrooms
14 in stuff. So they are two. You know, you
15 could count them as two homes.

16 CHAIRPERSON MILLER: Okay.

17 MR. KENNEDY: Well, in English
18 basically.

19 CHAIRPERSON MILLER: Okay. Any
20 other questions for Mr. Kennedy? Okay. Well,
21 thank you very much.

22 MR. KENNEDY: Thank you.

1 CHAIRPERSON MILLER: If you could
2 shut the microphone off when you go?

3 MR. KENNEDY: Um-hum.

4 MR. MOY: Madam Chair, staff would
5 advise that the -- would suggest that if Mr.
6 Kennedy would, if he so desires to, submit his
7 testimony in writing. And second, just for
8 the record, I didn't receive an email from Mr.
9 Kennedy.

10 MR. KENNEDY: I think it was a
11 fax, but I'll get you a copy.

12 CHAIRPERSON MILLER: Okay. We
13 want to ask you about the swimming pool issue
14 that was raised. In the context that I think
15 the typical bed and breakfasts that have come
16 before the Board don't have swimming pools,
17 that we have seen. Not to say that they don't
18 exist. And so your neighbors raised a
19 question about perhaps if you also own the
20 house with a pool, then is this going to be
21 available to all the guests and, therefore,
22 create impacts, adverse impacts on the

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1 neighbors, basically, from noise and from use
2 of the pool or whatever, which wouldn't
3 normally be the case.

4 MS. POWELL: As I stated before, I
5 don't accept children. And I don't know how
6 much you travel, but I work at NASA and I
7 travel once or twice a month. I haven't been
8 in a hotel swimming pool in a long, long time,
9 because I just don't have time when I'm
10 traveling.

11 None of my guests have ever used
12 that swimming pool. And at a point, you know,
13 I might want to say can you -- do you want to
14 use it? I've got to check that out with my
15 insurance company. I'm not even sure it's
16 going to be worth it to do that, because that
17 just opens up a whole new area.

18 The area has got a lot of
19 mosquitos. I mean, as far as people being
20 concerned about noise and the pool. At night,
21 I can understand that if they were out there
22 at midnight, but I'm certainly -- I've never

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1 gotten in that pool past 5:00, because of the
2 mosquitos are so bad on Capitol Hill.

3 CHAIRPERSON MILLER: So you do own
4 the house behind?

5 MS. POWELL: I do. I do.

6 CHAIRPERSON MILLER: That has the
7 pool?

8 MS. POWELL: I do.

9 CHAIRPERSON MILLER: Okay. I have
10 a personal residence. It's a personal
11 residence right now, is that right?

12 MS. POWELL: I have renters in
13 that house.

14 CHAIRPERSON MILLER: You have
15 renters in that house?

16 MS. POWELL: Yes. I was very
17 lucky to be able to buy that house also. And
18 when I built my house on Capitol Hill, this
19 addition, many of the neighbors thought that
20 it was very ugly. I would have loved to have
21 put windows on the sides of the structure, but
22 I followed the zoning rules. And so it's a

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1 sheer building and people think it's ugly.

2 I would be happy to paint a mural
3 or plant trees or whatever, but I don't own
4 it. So there is nothing I can do about that.
5 It's a new structure and people are anything
6 new in any neighborhood causes issues.

7 CHAIRPERSON MILLER: Thank you.
8 Mr. Jackson, did you have any concerns about
9 the swimming pool?

10 MR. JACKSON: No. But I would
11 like to clarify one point that I think you
12 said. For the record, you have a bed and
13 breakfast that where you are renting two
14 rooms. The two rooms that are being rented
15 for the bed and breakfast in the older portion
16 of the house. So the rooms you are renting
17 out are the bed and breakfast bedrooms in the
18 older portion of the house?

19 MS. POWELL: No. Currently, I
20 actually do do two rooms in the newer -- in
21 the addition. But I have also rented the
22 older structure. But now, after talking with

1 zoning, I found out that what I have to do is
2 to do this. And that's why I also want the
3 bed and breakfast.

4 It's -- I need the six rooms for--
5 but there would -- then I would be doing two
6 rooms in the old house and then I could go up
7 to four rooms in the addition, so that would
8 give me six rooms.

9 MR. JACKSON: So you have a
10 boarding house in the front?

11 MS. POWELL: I don't --

12 MR. JACKSON: Or do you have two
13 apartments in the front?

14 MS. POWELL: No, it's just two
15 bedrooms and I have rented it to a couple.

16 MR. JACKSON: Okay. Well, Madam
17 Chair, I'm wondering if that would be more
18 than one use on the site?

19 CHAIRPERSON MILLER: You know,
20 I've been looking at the regs, too, to see
21 about that, but from what I understand, that's
22 not what is before us today. That's why I was

1 asking her. I think what is before us today
2 is to allocate it fully as a bed and
3 breakfast.

4 MS. POWELL: And that's what I
5 want.

6 CHAIRPERSON MILLER: Yes.

7 MS. POWELL: I don't want to have
8 to do a rental or anything like that. I don't
9 want to go against any of the rules.

10 MR. JACKSON: Okay. In light of
11 that, Madam Chairman, just for clarity, 203.12
12 does state that there should be some
13 consideration of whether or not there is more
14 than one home occupation. So for the record,
15 if this is clearing up that it would just be
16 one bed and breakfast of six bedrooms on the
17 site, I think that would be good to put in the
18 final order.

19 That is to say that the order
20 would address the condition that the applicant
21 has said of this application is that her
22 intent is to only run a bed and breakfast on

1 the property and not have bed and breakfast
2 and rent separate rooms.

3 CHAIRPERSON MILLER: Oh, I would
4 go further and just say that the authorization
5 is only for bed and breakfast, six rooms.

6 MR. JACKSON: We wholeheartedly
7 support that recommendation.

8 MEMBER DETTMAN: I'm still a
9 little unsure on one thing. 203.8(g) says
10 that "The dwelling shall be owned and occupied
11 as the principal residence of the operators."

12 MS. POWELL: That's right.

13 MEMBER DETTMAN: And from what I--
14 the historic building, the original piece, how
15 many total buildings -- bedrooms are in that?

16 MS. POWELL: Two.

17 MEMBER DETTMAN: Two. So you want
18 to operate those two bedrooms as part of the
19 bed and breakfast. You have six bedrooms in
20 the addition that you want to operate as the
21 bed and breakfast as well? Four, four, I'm
22 sorry.

1 MS. POWELL: Correct. And it's
2 one structure now.

3 MEMBER DETTMAN: That's right.

4 MS. POWELL: So four in the new
5 addition and two in the old part.

6 MEMBER DETTMAN: Right.

7 MS. POWELL: So that's a total of
8 six.

9 MEMBER DETTMAN: And any of those
10 six bedrooms, assuming that the addition and
11 the historic part are all one structure --

12 MS. POWELL: Right.

13 MEMBER DETTMAN: -- which they
14 are, are any of those bedrooms your principal
15 residence?

16 MS. POWELL: No.

17 MEMBER DETTMAN: Or do you -- at
18 night when you go home, do you go home to a
19 different residence?

20 MS. POWELL: No. I go to the
21 third floor.

22 MEMBER DETTMAN: You go to the

1 third floor.

2 MS. POWELL: I live on the third
3 floor.

4 MEMBER DETTMAN: Okay. Thank you.

5 MS. POWELL: The four rooms are on
6 the second floor of the addition and the two
7 rooms are on the second floor of the original
8 part of the house.

9 MEMBER DETTMAN: Okay. Thank you.

10 MEMBER WALKER: And what is the
11 address of the property on 4th Street that you
12 own?

13 MS. POWELL: 535 4th Street.

14 MEMBER WALKER: So is it the case
15 that you own the alley?

16 MS. POWELL: That's right. And I
17 own the gate and that's why anybody that needs
18 to get back there, you know, all they have to
19 do is come and ask me for a key. I mean,
20 actually, I try and leave the gate open most
21 of the time, but I think because of the other
22 parkers and the other people that have their

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1 backyards back up, they want it locked.

2 MEMBER WALKER: Okay. So what is
3 the total number of parking spaces in this
4 alley?

5 MS. POWELL: Um, Marcia, are there
6 four or five neighbors?

7 MS. KNUTSON: There are four
8 separate --

9 MEMBER WALKER: You're going to
10 need to --

11 CHAIRPERSON MILLER: You need to
12 come --

13 MEMBER WALKER: -- approach --

14 MS. POWELL: Four neighbors. Four
15 neighbors have parking spaces that they own
16 those 15 x 25 foot spots.

17 MS. KNUTSON: Two of the four
18 spots are physically -- I'm sorry. Two of the
19 four spots are physically part of those homes,
20 squares or lots. Okay. Does that make sense?
21 The configuration of their lot includes the
22 parking space. Then there are two additional

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1 separate lots, one of which belongs to me, and
2 one of which belongs to another person on 4th
3 Street.

4 The rest of the parking is part of
5 535 4th. It's part of their actual lot. So
6 it's not really a separate parking place like
7 mine is. But there is space. But it's other
8 space. It's not the space, you know, where
9 these little -- there are four specific
10 official little square places for parking and
11 then the rest are associated with her two
12 homes.

13 Does that make sense? I can show
14 you on a map.

15 CHAIRPERSON MILLER: That's okay.

16 MS. KNUTSON: Okay.

17 CHAIRPERSON MILLER: It wasn't my
18 question.

19 MS. KNUTSON: Oh.

20 CHAIRPERSON MILLER: Since you are
21 up here, do any of the parking problems that
22 you are concerned about, are they specifically

1 related to her guests?

2 MS. KNUTSON: No.

3 CHAIRPERSON MILLER: A lot of them
4 are related to Results Gym?

5 MS. KNUTSON: I'm just --

6 CHAIRPERSON MILLER: We heard
7 that.

8 MS. KNUTSON: -- concerned about
9 the overflow, the overabundance of people
10 parking in our neighborhood.

11 CHAIRPERSON MILLER: Right.

12 MS. KNUTSON: From, you know,
13 24/7.

14 CHAIRPERSON MILLER: Right. So
15 you haven't noticed any from the two rooms,
16 but you are concerned that there might be if
17 there are six rooms? Is that it?

18 MS. KNUTSON: I think there have
19 been a couple of times when I have sensed a
20 few cars from there, but I don't consider that
21 a real issue.

22 CHAIRPERSON MILLER: Mr. Dettman,

1 did you have further questions or anybody
2 else? Thank you. Okay. Would you like to
3 make any closing remarks?

4 MS. POWELL: Do you want to ask me
5 again how my ANC meeting was?

6 CHAIRPERSON MILLER: No.

7 MS. POWELL: No. I have a great
8 house on Capitol Hill. And I have -- I enjoy
9 doing the bed and breakfast. And I think I
10 provide a service to my neighbors and I will
11 do anything I can to work with my neighbors
12 that are unhappy. I can't do anything about
13 the color of my house or the way they like it
14 look -- the way they think it looks or the
15 parking at Results Gym.

16 But I have not had any comments,
17 any complaints from my neighbors over the past
18 four years. And the neighbors that, I think,
19 would be really concerned are the ones that
20 face 3rd Street and they support me. So I
21 would just ask that you support this special
22 exception.

1 CHAIRPERSON MILLER: Thank you.

2 MS. POWELL: I would like to say
3 that Mr. Nero and the Office, I don't know if
4 they work with you at all, but they have been
5 really good and really kind about just walking
6 me through the steps and kind of explaining
7 everything. And I have been very pleased with
8 every office that I have dealt with in the
9 D.C. Government. They have been wonderful.

10 CHAIRPERSON MILLER: That's very
11 nice to hear. Thank you. We're just going to
12 take a moment and determine whether we are
13 going to deliberate this today or put this off
14 for next week.

15 (Whereupon, at 2:37 p.m. a recess
16 until 2:42 p.m.)

17 CHAIRPERSON MILLER: Okay. We've
18 decided that we are going to try to deliberate
19 this fairly quickly, since we have two other
20 cases. However, we are ready to decide it.
21 So I'm going to start it under motion, but
22 certainly, we are going to be discussing it.

1 And then we'll see how the vote goes.

2 I would move approval of
3 Application No. 17711 of Yaulanda D. Powell,
4 pursuant to 11 DCMR 3104.1 and 1202.1, for a
5 special exception to operate a bed and
6 breakfast facility, six sleeping rooms, under
7 subsection 203.8(c) and 203.10(b), at premises
8 612 3rd Street, S.E. Do I have a second just
9 for deliberation, at this point?

10 VICE CHAIR LOUD: Second, Madam
11 Chair.

12 CHAIRPERSON MILLER: Okay.
13 Basically, we have a bed and breakfast that's
14 in an Historic District. And under our
15 regulations, 203.10 provides that an applicant
16 can come and seek special exception to, well,
17 203.8 also, to increase the number of sleeping
18 rooms to six. That's 203.8(c)(I) is to
19 increase it to six.

20 And also, the applicant would also
21 like the flexibility to allow 14 clients or
22 customers on the premises at one time and that

1 is also an exception that is allowed pursuant
2 to 203.4(m), is where the limitation of eight
3 persons is.

4 And 203.10 says so much. It
5 basically allows the Board to modify two of
6 the required conditions. And so those are the
7 two that would be modified. Now, in so
8 deciding whether to allow that by special
9 exception in which we consider that there be
10 no adverse impacts or not unduly adversely
11 impact neighbors and it be in harmony with the
12 character of the neighborhood and the Zone
13 Plan.

14 We have a case here were also,
15 because it's historic, the applicant does not
16 have to meet any increased parking, if that
17 were even to be found to be necessary. So we
18 didn't really have to look at that carefully.
19 However, in considering whether or not there
20 are adverse impacts that would ensue from
21 increasing the density of the guests that
22 would be allowed here, we do consider any kind

1 of adverse impacts.

2 I think that could include no
3 parking or noise, garbage, things like that.
4 And also, changing the character of the
5 neighborhood. And what I heard today was a
6 concern about parking from some neighbors, but
7 everything that I heard in the testimony
8 really went to parking problems that was
9 created by the Results Gym and not by the
10 guests of this bed and breakfast.

11 And that the applicant had kept
12 careful records of parking and cars and I
13 think she indicated that only 27 cars came in
14 a year in 2007. So I don't think that there
15 is a parking concern really that is going to
16 be exacerbated by increasing the number of
17 rooms that can be used for guests.

18 Also, she is near a Metro, a 10
19 minute walk. So I don't think that that was
20 an adverse impact.

21 I understand people's concerns
22 that an increase in density can lead to a

1 commercialization of a neighborhood. However,
2 I didn't hear any really specific evidence or
3 indicia of why that would necessarily happen,
4 particularly in this case. It just seemed
5 like a normal anxiety that neighbors might
6 have, but that to me there wasn't any concrete
7 evidence at all that that would actually
8 result in that kind of commercialization.

9 And I have heard Office of
10 Planning say that, you know, in other cases,
11 it doesn't and that's why the Zoning
12 Regulations are framed the way they are to
13 allow just by special exception this kind of
14 an increase in density.

15 So do others have comments? I
16 think that's where I'm at right now.

17 VICE CHAIR LOUD: Thank you, Madam
18 Chair. I just wanted to voice support for the
19 application as well. I have reviewed the
20 concerns raised here today by Mr. Kennedy and
21 Mrs. Knutson along with the ANC and balanced
22 that against the Office of Planning's report.

1 I was particularly concerned going into the
2 hearing about whether or not the increase to
3 six would fundamentally change the character
4 from a primarily residential dwelling to
5 primarily a commercial structure.

6 And the Office of Planning
7 provided some real insight for me in
8 203.8(c)(I), which authorizes the increase to
9 six, provided that the structure is in an
10 Historic District and contributing to the
11 character of the Historic District. So that
12 ameliorated that concern a bit.

13 I am a little concerned that the
14 ANC vote was unanimously against it and wished
15 the ANC had been here today, so that one could
16 have explored with them to a greater depth
17 what some of the concerns were. But even in
18 the context of the ANC opposition, there
19 appears to be some cleavage between the
20 neighbors who live immediately in proximity to
21 the bed and breakfast and the larger
22 Commission itself.

1 And the applicant did provide
2 support letters from Ivy Estabrooke, this is
3 Exhibit 26, and Andrew Paige, which were
4 addressed to the ANC leader, also at Exhibit
5 27, from Ryan C. Craig a support letter,
6 another 3rd Street resident, Exhibit 32, Mr.
7 Marc Pochetti, who lives directly next door to
8 the proposed project, Exhibit 28, that would
9 be Michael J. Conathon, who lives on G Street
10 around the corner, as well as Exhibit 29, Mona
11 Butterfield and R. Ian Butterfield, who also
12 live on G Street around the corner, and
13 Exhibit 25 and that would be Armand Leone,
14 PhD, who lives on 4th Street.

15 So there appears, to me, to be
16 tremendous support right there on 3rd Street.
17 There was some testimony from those that did
18 not live on 3rd Street, I believe living on
19 South Carolina Avenue and on 4th Street, in
20 opposition, but again, just referencing the
21 exhibits I went over, there was also some
22 support from folks on 4th Street and off of 3rd

1 Street as well.

2 So when one weighs the balances,
3 the sense of OP that this contribute to the
4 Historic District, the testimony of the
5 neighbors right there on 3rd Street and the
6 neighbors on 4th Street and on G Street in
7 support of the project, I believe that the
8 adverse impact has not been demonstrated. And
9 so I, too, will be supporting the application.

10 MEMBER DETTMAN: Madam Chair, I'm
11 also in support of the application and just
12 sort of listening to the two persons in
13 opposition in this and the issues that they
14 raised, specifically, I think Mr. Kennedy
15 mentioned that the views from his property to
16 the rear addition are sort of unsightly.
17 That's -- this isn't a situation that's sort
18 of brought up by the increase of the four
19 rooms.

20 It was more of an issue when the
21 addition was being proposed back in 2002. And
22 I think Mr. Kennedy actually said that he

1 didn't oppose the construction of the
2 addition. You know, but also it's a situation
3 that's not going to worsen as a result of the
4 additional four sleeping rooms.

5 That sort of goes -- that's sort
6 of the same with respect to the utility pole
7 issue, accessibility of the utility poles and
8 use and access of the private alley in the
9 rear and the additional parking spaces. Those
10 are also situations that are not going to
11 worsen as a result of the four plus sleeping
12 rooms.

13 The only issue I could see that
14 could potentially have a negative impact is
15 the impact of the four sleeping rooms and on
16 the parking in the surrounding neighborhood.
17 I think it has been demonstrated that Results
18 Gym has an impact on the parking. And I can't
19 see how an additional four sleeping rooms
20 would have such an impact on the neighborhood
21 with respect to street parking that would
22 prevent this application from going forward.

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1 CHAIRPERSON MILLER: Okay. I also
2 would like to give the ANC great weight and,
3 therefore, read their concern. They oppose
4 the application 801, and they said "The
5 Commission is taking this action, because it
6 is of the opinion that allowing six sleeping
7 rooms would not be compatible with the
8 residential neighborhood in which it is
9 located. Additionally, the neighbors are
10 strongly in opposition to this action."

11 Okay. It's not clear to us, at
12 least who are supporting this, at this point,
13 why it's not compatible with the residential
14 neighborhood. They really didn't give us any
15 specific facts to look at as to how it is not
16 compatible. So, therefore, I couldn't come to
17 the conclusion that that's true.

18 And I think our record shows that
19 there are neighbors both in support and in
20 opposition. And I'm not sure whether we
21 mentioned this or not, but I'll say it just in
22 case, that we also do have the support of the

1 Capitol Hill Restoration Society. And that is
2 an organization, I think, that cares very much
3 about preserving the character of the
4 neighborhoods on Capitol Hill. And they voted
5 unanimously to support the application.

6 Okay. Is there anything else
7 anyone wants to add? Office of Planning
8 supports the application. And I would -- oh,
9 I do want to say that -- you know, we will
10 make clear that this -- if this is approved,
11 that it would be for bed and breakfast for the
12 six bedrooms and not any other occupational
13 use.

14 Okay. Anything else? Okay. Then
15 there is a motion that has been seconded.

16 All those in favor say aye.

17 ALL: Aye.

18 CHAIRPERSON MILLER: All those
19 opposed? All those abstaining?

20 VICE CHAIR LOUD: Madam Chair, I'm
21 sorry, I was distracted as you were calling
22 the vote. I would like the opportunity to

1 vote.

2 CHAIRPERSON MILLER: You didn't
3 vote? Okay.

4 VICE CHAIR LOUD: I did not.

5 CHAIRPERSON MILLER: Please do.

6 VICE CHAIR LOUD: Mr. Jackson was
7 trying to get my attention to make a point,
8 I'm not sure what it was.

9 MR. JACKSON: Just a point of
10 clarification. Now, the issue of eight as
11 opposed to 14 or eight or a larger number? I
12 didn't know whether you wanted to address that
13 or not in your deliberations.

14 CHAIRPERSON MILLER: Thank you
15 very much. Okay. I think I might have stated
16 that in my explanation, but I didn't make that
17 clear at all. So we are voting on, right,
18 there are two modifications. One is to allow
19 up to six guest rooms and then the other is to
20 allow up to 14 persons, guests or clients on
21 the premises at one time.

22 So why don't we re-vote? That is

1 the way the approval would be granted. Does
2 anybody have any concerns with either of
3 those? Any further deliberation on either of
4 those points?

5 VICE CHAIR LOUD: I'm not certain
6 why an increase to 14 would be necessary. The
7 applicant testified that, I believe she
8 testified that, she doesn't accept children.
9 With six additional rooms, you're assuming two
10 persons per room. The most of an increase that
11 would be needed would be 12.

12 CHAIRPERSON MILLER: That's for
13 sleeping and that's all that would be
14 sleeping, that's for sleeping, but so we would
15 have to go actually for her to fill the rooms
16 would be -- they are in one of the rooms, so
17 it's six rooms. Is that what we're talking
18 about, six?

19 VICE CHAIR LOUD: Six rooms.

20 CHAIRPERSON MILLER: 6 x 2 is 12,
21 so we would have to go from 8 to 12. What Mr.
22 Jackson suggested was a little flexibility.

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1 It's for like visitors. So, you know, if your
2 grandparents are there and, you know, the
3 grandparents' daughter is coming with two kids
4 or, you know, you never know, it could add up
5 to more than 14.

6 VICE CHAIR LOUD: Is that what
7 it's for? Okay.

8 CHAIRPERSON MILLER: It's like
9 guests on the premises at one time. It's not
10 for sleeping.

11 VICE CHAIR LOUD: All right.
12 Well, with that clarification in play, I'll
13 withdraw the concern about it being 14.

14 CHAIRPERSON MILLER: Okay.

15 VICE CHAIR LOUD: With the
16 understanding we're not talking about 14
17 sleeping.

18 CHAIRPERSON MILLER: No, we're
19 not.

20 VICE CHAIR LOUD: Okay.

21 CHAIRPERSON MILLER: And as I
22 understand it, it's only sometimes that there

1 might possibly happen to be 14 there, you
2 know, because of visitors.

3 VICE CHAIR LOUD: Okay.

4 CHAIRPERSON MILLER: Okay. All
5 those in favor -- let's re-vote. All those in
6 favor say aye.

7 ALL: Aye.

8 CHAIRPERSON MILLER: All those
9 opposed? All those abstaining? Would you
10 call the vote, please?

11 MS. BAILEY: Madam Chair, the vote
12 is recorded as 4-0-1 to grant the application.
13 Mrs. Miller made the motion. Mr. Loud
14 seconded. Mr. Dettman, Mrs. Walker support
15 the motion. A Zoning Commission Member is not
16 present, at this time, and the application is
17 granted. The modifications made by the Board
18 is to allow up to six guest rooms at the
19 premises and to allow no more than 14 clients
20 at the premises at any one time.

21 CHAIRPERSON MILLER: Yes, we might
22 just phase it a little bit differently, but it

1 is the 14. It is the 14, however, we end up
2 writing it up.

3 MS. BAILEY: Okay. Thank you.

4 CHAIRPERSON MILLER: Okay.

5 MS. BAILEY: And that's a full
6 order, Madam Chair?

7 CHAIRPERSON MILLER: Well, we
8 don't have our Assistant Attorney General
9 here. It will be an order that will at least
10 address the ANC's concern, so it will -- I'm
11 not sure how full an order it will be exactly.
12 So anyway, it's a modification of 203.4(m) to
13 allow up to 14 clients or customers on the
14 premises in any one hour period, I guess, is
15 the way the regulation is.

16 MS. BAILEY: Okay.

17 CHAIRPERSON MILLER: Okay.

18 VICE CHAIR LOUD: I'll agree to
19 that.

20 CHAIRPERSON MILLER: I think that
21 does it for this case. Thank you very much.
22 And then we'll be ready for the next case, Ms.

1 Bailey, when you are.

2 MS. BAILEY: The next case is
3 Application No. 17712 of District-
4 Properties.com, pursuant to 11 DCMR 3103.2,
5 for variances from the lot width and lot area
6 requirements under section 401, to allow the
7 construction of a one-family row dwelling in
8 the R-4 District at premises 615 16th Street,
9 N.E., Square 4540, Lot 83.

10 CHAIRPERSON MILLER: Whenever you
11 are ready, you can introduce yourself for the
12 record. This is a pretty straightforward
13 application, I believe. You are not going to
14 give us a whole PowerPoint presentation, are
15 you?

16 MR. SIKDER: No problem.

17 CHAIRPERSON MILLER: I don't know.
18 This seems really straightforward. Is it? So
19 but if we need help visualizing, then maybe.

20 MR. SIKDER: Actually, that would
21 be easier for me explain, because I don't
22 remember exactly what's the content, so if you

1 allow me to use the PowerPoint.

2 VICE CHAIR LOUD: Well, we could
3 do that or we could ask you some key
4 questions.

5 MR. SIKDER: Oh, yeah.

6 VICE CHAIR LOUD: I mean.

7 MR. SIKDER: Definitely. That
8 will be no problem.

9 VICE CHAIR LOUD: Okay. I think
10 as I understand the record, which is pretty
11 full before, so you've got an application to
12 build a two-story row house on a vacant lot?

13 MR. SIKDER: That's right.

14 VICE CHAIR LOUD: And it's too
15 small to meet the lot size requirement, which
16 is 1,800 square feet. Your lot is about 1,360
17 square feet? Is that right?

18 MR. SIKDER: Yes.

19 VICE CHAIR LOUD: Okay. In
20 addition to which the lot itself is about 17
21 feet wide and the minimum required is --
22 requirement rather is 18 feet wide.

1 MR. SIKDER: Yes.

2 VICE CHAIR LOUD: That's correct.

3 And so you would need variances for both of
4 those reasons.

5 MR. SIKDER: Yes.

6 VICE CHAIR LOUD: Okay. Have I
7 missed anything?

8 MR. SIKDER: No.

9 VICE CHAIR LOUD: Okay. And in
10 terms of -- and this is where some testimony
11 could be a little helpful and you could
12 probably do it as briefly as you would like,
13 in terms of justification for the variances
14 under our section 3103, can you just walk us
15 through the unique exceptional circumstances,
16 the practical difficulty? And you have been
17 here before, so you can probably do that
18 relatively easy.

19 I think we have -- sort of all
20 understand why you are here and the kind of --
21 the nature of the relief that you need today.

22 MR. SIKDER: Right. Yes, I mean,

1 as you mentioned that the requirement is 1,300

2 -- I mean, 1,800 square feet.

3 MS. BAILEY: Sir, would you,
4 please, speak directly into the microphone?
5 We're having difficulty hearing you.

6 MR. SIKDER: Yes. We are seeking
7 -- I mean, under -- I mean, special exception
8 3103.2 for the -- we 1 foot shortage of the
9 width of the lot and about -- and the lot is
10 1,360 square feet, while it requires about
11 1,800 square feet under R-4 Zone.

12 And we don't -- having this
13 variance, we cannot build any building in this
14 lot. And that would be our -- the difficulty
15 is to build this construction. And I believe
16 that making this project, it will not make any
17 adverse -- I mean, impact the community,
18 actually, that would make even harmony to the
19 neighboring houses, because we are making the
20 same like two-story building.

21 We are not exceeding to that
22 level. And we also have a parking lot in the

1 back of the -- this house, because that is an
2 alley. So that would not be also extra
3 burden. And there's only -- that's the two
4 requirements we require, this width and the
5 lot, shortage of the lot square footage.

6 If you have any questions, then I
7 can answer to them.

8 VICE CHAIR LOUD: Just in terms of
9 adverse impact, I'm sorry, in terms of one of
10 the variance elements, not causing substantial
11 detriment to the public good. Are you aware
12 of whether or not the ANC opposes the
13 application?

14 MR. SIKDER: We get all the ANC
15 meeting and he is here.

16 VICE CHAIR LOUD: Oh, the ANC is
17 here? I'm sorry.

18 MR. SIKDER: Yes.

19 VICE CHAIR LOUD: Okay. Well, we
20 can ask them directly. He will have a chance
21 to speak.

22 MR. SIKDER: There was a concern

1 about this, let me show you, window next to
2 our lot. You can see. No, it is not shown
3 here. Oh, here. As you can see it here, this
4 is our lot. And right inside the house has
5 window.

6 VICE CHAIR LOUD: Um-hum.

7 MR. SIKDER: And that window
8 actually was built illegally anyway, because
9 in any R-4 Zone, should not be any windows on
10 the side windows, unless it is on the corner
11 lot. And the ANC meeting they asked me to
12 contact the owner and get some kind of
13 feedback or also what we need to do. And they
14 asked me to write a letter, which I did, and
15 they didn't return my call or they didn't
16 respond to my letter.

17 And Drew asked me to -- I mean, we
18 went there the other day to see the building
19 and is there any other filings given from this
20 house, neighboring house. So I guess he is
21 going to talk about that. So that was the ANC
22 meeting. I mean, they asked me to contact

1 this owner, which I did. And I didn't hear
2 anything from him.

3 CHAIRPERSON MILLER: Anything
4 else?

5 MR. SIKDER: No.

6 CHAIRPERSON MILLER: Okay. Any
7 other questions from the Board? Would you
8 introduce yourself for the record, please?

9 MR. RONNEBERG: Madam Chair, my
10 name is Drew Ronneberg. I'm going to speak in
11 two roles today. One is on behalf of the ANC
12 and one is on behalf of myself.

13 CHAIRPERSON MILLER: But all I
14 want to say is I want you to introduce
15 yourself for the record. We got that.

16 MR. RONNEBERG: Okay.

17 CHAIRPERSON MILLER: And then you
18 could -- did you have any questions for the
19 applicant, at this point?

20 MR. RONNEBERG: No, I do not.

21 CHAIRPERSON MILLER: Okay. So
22 then we will get to you after we get to the

1 Office of Planning. Okay. All right. We're
2 ready for Office of Planning, I think.

3 MS. BROWN-ROBERTS: Good
4 afternoon, Madam Chairman and Members of the
5 Board. I am Maxine Brown-Roberts from the
6 Office of Planning. I think this is a pretty
7 straightforward application and, therefore,
8 I'm going to stand on the record.

9 I would also like to just make one
10 correction to the report, in which it states
11 that the variances were from section 330.1 and
12 330.5. In fact, that was incorrect and it's
13 from 401.3. So I'm sorry about that.

14 We think that the application for
15 the lot area and the lot width, the variances,
16 the applicant is not able to meet those
17 requirements and there is no way of expanding
18 the lot, because the two adjacent lots are
19 already developed.

20 We did look at the windows on the
21 adjacent building. Those are already
22 compromised windows and, therefore, the

1 applicant is allowed to build over them. I
2 don't think -- there are other windows to the
3 rear of that lot, so I think that they will be
4 able to have light and air get into the
5 building, plus if there are any concerns about
6 fire, there is the second access out the back
7 and the front. So I didn't think there was a
8 problem with that.

9 I think it's important that this
10 lot be developed. It's sort of a sore within
11 the community. People throw trash in it and
12 that sort of thing, so I think the development
13 of the site will be consistent with the Zoning
14 Regulations and with the -- and no negative
15 impact on the community. And, therefore, we
16 recommend approval of the requested variances.

17 Thank you, Madam Chairman.

18 CHAIRPERSON MILLER: Did you talk
19 to either of the neighbors abutting this lot?

20 MS. BROWN-ROBERTS: No, I did not,
21 but I have been in contact with the applicant
22 and asking him and he conveyed to us that he

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1 wasn't able to contact them, but there was no
2 independent trying from our side.

3 CHAIRPERSON MILLER: Any other
4 Board questions? Does the applicant have any
5 questions for Office of Planning?

6 MR. SIKDER: No, no questions.

7 CHAIRPERSON MILLER: Mr.
8 Ronneberg, you do?

9 MR. RONNEBERG: Yes.

10 CHAIRPERSON MILLER: Okay.

11 MR. RONNEBERG: Just a question of
12 clarification. What do you mean by a
13 compromised window?

14 MS. BROWN-ROBERTS: Usually in the
15 row house or row house dwellings, it is
16 expected that the houses are going to abut
17 each other, because that's a row house
18 district in the R-4. And if someone comes and
19 builds a window on their side of the lot, then
20 that precluded the other neighbor.

21 It would preclude the other
22 neighbor with having to do a setback or

1 something like that. It would reduce the
2 area, the developable area of that lot. So I
3 think it's a building -- it's in the Building
4 Code.

5 MR. RONNEBERG: Do you mean as in
6 an illegal window?

7 MS. BROWN-ROBERTS: Basically,
8 yes.

9 MR. RONNEBERG: All right. Thank
10 you.

11 CHAIRPERSON MILLER: Okay. I
12 guess now you can testify for the ANC. You're
13 going to testify in two different capacities?

14 MR. RONNEBERG: Yeah.

15 CHAIRPERSON MILLER: All right.

16 MR. RONNEBERG: First of all --

17 CHAIRPERSON MILLER: Now is the
18 time to testify for the ANC.

19 MR. RONNEBERG: Okay.

20 CHAIRPERSON MILLER: Is there a
21 report or no?

22 MR. RONNEBERG: I can give you

1 minutes. The ANC, we -- it's -- I can show
2 you the minutes of the meeting and I can show
3 you a draft letter, but there was a mistake
4 and the letter was never sent to the BZA. So
5 I -- ultimately, the ANC will take no position
6 on this, so does anyone want to see the
7 documents?

8 CHAIRPERSON MILLER: No. It's
9 just if we were going to give great weight to
10 something, we would want to --

11 MR. RONNEBERG: No.

12 CHAIRPERSON MILLER: -- see a
13 report. But if you're not submitting a
14 report, that's fine.

15 VICE CHAIR LOUD: I guess that's
16 what I wanted to make sure I heard. The ANC
17 is not going to take a position on this?

18 MR. RONNEBERG: That's correct.

19 VICE CHAIR LOUD: Okay.

20 MR. RONNEBERG: And then as a
21 private citizen, I'll give you some background
22 and why I support this particular application.

1 There are two concerns that the ANC expressed.
2 Mr. Mohammad got to one of them that he sent
3 a letter and he got no responses and we wanted
4 to see letters of support.

5 I also sent letters asking what
6 the neighbors thought and I also received no
7 response from the adjacent neighbors. So I
8 also -- Ms. Sandy Swingen and myself went and
9 talked to -- we were able to speak to the
10 neighbors on the south side and many of the
11 concerns, they are renters, but it's a lot
12 that attracts a lot of trash, a lot of
13 problems.

14 And the people who live in that
15 would like to see it occupied by a building.
16 I think it will help stabilize the
17 neighborhood.

18 The other concern among the
19 members of the ANC was whether if building
20 this building would cause a fire hazard to
21 jump across and Mr. Mohammad has showed the
22 plans where they would be cinder block walls

1 and so, therefore, that does not appear to be
2 any more concern than anywhere else in the row
3 house in this area.

4 So for those reasons, I'm -- my
5 person concerns are satisfied and I think that
6 this building, I think, design wise, it works
7 in the community and I think it would be a
8 very positive addition for the neighborhood.

9 CHAIRPERSON MILLER: Thank you.
10 Is this within your Single Member District?

11 MR. RONNEBERG: No, it's not.

12 CHAIRPERSON MILLER: Oh, okay.
13 Any Board questions? Does the applicant have
14 any questions?

15 MR. SIKDER: No.

16 CHAIRPERSON MILLER: Okay. Is
17 there anybody here who wishes to testify in
18 support of this application? Anybody who
19 wants to testify in opposition to this
20 application? Okay. Not hearing from any,
21 then any closing remarks by the applicant?

22 MR. SIKDER: In remarks, I would

1 like to say that the building will make it --
2 it will enhance the community. It will look
3 much better and it will not be any adverse
4 effect to this community. It will be harmony
5 in the -- in general. So I request you to
6 approve this project.

7 VICE CHAIR LOUD: Thanks.

8 CHAIRPERSON MILLER: Okay. Thank
9 you.

10 VICE CHAIR LOUD: All right.
11 Madam Chair, I would like to move approval of
12 BZA Application No. 17712 regarding premises
13 615 16th Street, N.E., the application -- I'm
14 sorry, Square 4540, Lot 83. The application
15 seeks variances from our sections 401 and 405,
16 401.3, specifically, regarding lot width and
17 405 regarding side yard variance.

18 This is for a new two-story row
19 house wherein the lot area does not meet
20 minimum lot area size, which is 1,800 square
21 feet, for this project it's 1,360 square feet,
22 nor does it meet minimum lot width, the

1 requirement is 18 feet, this project is 17
2 feet wide.

3 With respect to the variance test,
4 I think the record before us is -- has been
5 briefed very sufficiently by both the
6 applicant as well as the Office of Planning
7 and I would like to incorporate by reference
8 and rest on their representations before the
9 BZA.

10 I would also like to add that we
11 give the Office of Planning's report great
12 weight. There is no opposition from the ANC
13 in this matter. And I think that I'll rest on
14 the record before us.

15 CHAIRPERSON MILLER: Thank you.
16 You didn't say side yard, did you? I thought
17 I heard you say side yard, but it might have
18 been a misstatement. I don't know. I just
19 want to make sure. We're talking about lot
20 area and lot width.

21 VICE CHAIR LOUD: And I said side
22 yard?

1 CHAIRPERSON MILLER: You might
2 have. You said lot area and lot width also,
3 though.

4 VICE CHAIR LOUD: Excuse me if I
5 did.

6 CHAIRPERSON MILLER: That's okay.
7 So just for the record, it's lot area and lot
8 width. I just want to add that in doing the
9 variance analysis that this is considered an
10 exceptional condition because it's a
11 substandard lot that was in existence prior to
12 the enactment of the Zoning Regulations and it
13 can't possibly meet the requirements, the
14 width required is 18 feet and it is only 17
15 feet. And the lot area required is 1,800
16 square feet and it only has 1,360 square feet.

17 And sometimes lots can be
18 increased in order to meet the requirements,
19 but in this case, both lots on either side are
20 owned by different owners. And so that can't
21 happen and there is no adverse impact here.
22 It is in-fill development. We have heard that

1 there are adverse impacts from it being vacant
2 and we haven't heard any adverse impacts from
3 the in-fill development.

4 So that's my two cents. Anybody
5 else want to add to this? Okay. We have a
6 motion on the table. It has been seconded.

7 All those in favor say aye.

8 ALL: Aye.

9 CHAIRPERSON MILLER: All those
10 opposed? All those abstaining?

11 MS. BAILEY: Mrs. Miller, you
12 seconded the motion?

13 CHAIRPERSON MILLER: I think so.

14 MS. BAILEY: The Board has voted
15 4-0-1 to grant the application. The motion
16 was made by Mr. Loud, seconded by Mrs. Miller.
17 Mr. Dettman and Mrs. Walker support the
18 motion. A Zoning Commission Member is not
19 present, at this time. The vote is 4-0-1.
20 Summary order?

21 CHAIRPERSON MILLER: Yes, summary
22 order. There's no opposition and the ANC

1 didn't submit a report.

2 Okay. I believe we have one more
3 case on the agenda and the Board would like to
4 take just a five minute break or so before we
5 start that case.

6 (Whereupon, at 3:20 p.m. a recess
7 until 3:51 p.m.)

8 CHAIRPERSON MILLER: We're back on
9 the record. And, Ms. Bailey, would you call
10 the next case when you are ready?

11 MS. BAILEY: Madam Chair, the last
12 case of the day is an appeal and the number is
13 17677 of L. Napoleon Cooper, pursuant to 11
14 DCMR 3100, from the decision of the Zoning
15 Administrator, to allow off-premises alcoholic
16 beverage sales as an accessory use to a Harris
17 Teeter Grocery Store.

18 Appellant alleges that the use
19 violates subsection 1401.1(b) of the Zoning
20 Regulations at premises 1641 Kalorama Road,
21 N.W. The property is Zoned Reed-Cooke C-2-B
22 District. It's located in Square 2572 on Lot

1 36.

2 And just for the record, Board
3 Members, as you know, this is a concurrent
4 case associated with Application No. 17675,
5 the same property, although these cases are
6 being heard separately. And if I'm not
7 mistaken, there are a couple of motions before
8 the Board prior to the start of the actual
9 testimony on this case.

10 CHAIRPERSON MILLER: Thank you.
11 Why don't we start with introductions?

12 MR. GLASGOW: Go ahead, Melinda.

13 MS. BOLLING: Good afternoon,
14 Melinda Bolling, Assistant Attorney General
15 from DCRA.

16 ZONING ADMIN. LeGRANT: Matthew
17 LeGrant, Zoning Administrator.

18 MR. GLASGOW: Norman M. Glasgow,
19 Jr. of the Law Firm of Holland and Knight
20 representing the property owner.

21 MR. COOPER: Good afternoon,
22 Napoleon Cooper representing appellants,

1 17677.

2 CHAIRPERSON MILLER: Yes, Mr.
3 Glasgow?

4 MR. GLASGOW: Hi, thank you.
5 Madam Chair, I think we had a motion to argue
6 with respect to the untimeliness of Mr.
7 Cooper's filing. I can go through that and
8 the factual background briefly.

9 MR. COOPER: May I?

10 CHAIRPERSON MILLER: Yes.

11 MR. COOPER: A point of order, a
12 point of inquiry. The Chair made a
13 determination during the initial hearing that
14 the agreement between the parties was that we
15 would not argue. There were not be further
16 oral argument on the motion. And that the
17 Board would rule on the motion at the
18 conclusion of the proceedings.

19 CHAIRPERSON MILLER: Okay. What I
20 said at the last hearing was that I wouldn't
21 hear oral argument on the motion that day,
22 because you hadn't had an opportunity to file

1 a written response. And, therefore, we
2 allowed you to file the written response. And
3 we can hear briefly about the motions to
4 dismiss.

5 Do you have an objection to that,
6 because, I don't see how you could. Unless it
7 was a misunderstanding, and I'm sorry if that
8 was the case.

9 MR. COOPER: Yes.

10 CHAIRPERSON MILLER: But we don't
11 intend to hear a lot. I think there are some,
12 you know, very basic facts. When did you
13 know? You know, what were you appealing?
14 When should you have appealed it?

15 MR. COOPER: Okay.

16 CHAIRPERSON MILLER: Really basic.

17 MR. COOPER: No problem.

18 CHAIRPERSON MILLER: We went
19 through this in great detail with respect to--

20 MR. COOPER: No problem.

21 CHAIRPERSON MILLER: -- Reed-
22 Cooke. Okay.

1 MR. COOPER: No problem.

2 MR. GLASGOW: All right. Madam
3 Chair, briefly, with respect to the BZA, I'll
4 just go back down through the dates and why we
5 think that the motion -- that the appeal was
6 untimely filed in Appeal No. 17677.

7 With respect to BZA Application
8 17395, dealing with the Citadel property, that
9 was filed July 1, 2005. There was public
10 notice of that. Beer and wine sales were
11 noted on the front page of the application.
12 That was all a matter of public record.

13 Harris Teeter filed its beer and
14 wine ABC application August 11, 2005. Mr.
15 Getachew filed a protest before the ABC Board
16 on October 11, 2005. There was a BZA Hearing
17 on Application No. 17395 on November 29, 2005.
18 The issue of the sale of beer and wine sales
19 was raised at the Public Hearing by RCNA at
20 that proceeding.

21 Mr. Cooper and others filed a
22 protest of the beer and wine sales December

1 16, 2005.

2 CHAIRPERSON MILLER: What date is
3 that?

4 MR. GLASGOW: December 16, 2005.

5 CHAIRPERSON MILLER: Thank you.

6 MR. GLASGOW: BZA voted January
7 10, 2006 to grant the application. That's BZA
8 Application No. 17395. March 27, 2006,
9 construction commenced on the site pursuant to
10 issued permit by the District of Columbia.
11 BZA issued its order --

12 CHAIRPERSON MILLER: I'm sorry,
13 could you -- you may have this even in your
14 motion, but what date did construction begin?

15 MR. GLASGOW: March 27, 2006.

16 CHAIRPERSON MILLER: Okay.

17 MR. GLASGOW: Construction
18 commenced on the site. That would have been
19 the interior demolition work and other work.
20 BZA issued its order June 12, 2006. September
21 11, 2006, the applicant filed for a building
22 permit for further interior work. That's the

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1 permit application where the beer and wine
2 sales area was shown on the plans.

3 November 13, 2006, that building
4 permit was issued and construction had been
5 ongoing on the site continuously.

6 CHAIRPERSON MILLER: Sorry, could
7 you repeat that date?

8 MR. GLASGOW: Sure, November 13,
9 2006, that's when the building permit was
10 issued showing the beer and wine on the
11 premises, that sales area. The order denying
12 reconsideration of the opponents to the BZA
13 application was issued December 14, 2006.

14 The letter from the Zoning
15 Administrator was issued in March 2007 and
16 then that was, as we had testified, issued in
17 response to a request from counsel for Harris
18 Teeter in the ABC case. And then the appeal
19 was filed by Mr. Cooper May 25, 2007.

20 And it is our position that under
21 section 3112.2(a) that when there is
22 construction -- when there is a permit that

1 has been issued and the appellants have 60
2 days to file their appeal, and this is way
3 outside the time period for the appeal.

4 CHAIRPERSON MILLER: All right. I
5 want to look at what you are referring to.

6 MR. GLASGOW: Sure. Section
7 3112.2(a).

8 CHAIRPERSON MILLER: 3112.2(a)
9 says "An appeal shall be filed within 60 days
10 from the date the person appealing the
11 administrative decision had notice or
12 knowledge of the decision complained of or
13 reasonably should have had notice or knowledge
14 of the decision complained of, whichever is
15 earlier."

16 MR. GLASGOW: Right. And with
17 respect to building permits, that's 60 days
18 from the issuance of the building permit.
19 Now, under section 3112.2(b)(I), now, of
20 course, this building was always under roof,
21 but you have 10 days when a building is under
22 roof. "No appeal shall be filed later than 10

1 days after the date on which the structure or
2 part thereof in question is under roof."

3 CHAIRPERSON MILLER: What do you
4 mean the building was always under roof?

5 MR. GLASGOW: Well, the building
6 was always under roof, so we have used the
7 more liberal standard of 60 days from the
8 building permit, not the 10 days, because this
9 building was always under roof. There has
10 always been a roof on the Citadel Building.

11 CHAIRPERSON MILLER: Okay. That's
12 3112(b)?

13 MR. GLASGOW: Yes.

14 CHAIRPERSON MILLER: "If the
15 decision complained of involves the erection,
16 construction, reconstruction, conversion or
17 alteration of a structure or part thereof, the
18 following subparagraph shall establish the
19 latest date on which an appeal may be filed."

20 MR. GLASGOW: Right.

21 CHAIRPERSON MILLER: Okay. You
22 know, we heard this before, so basically,

1 you're saying that the time runs from when the
2 building permit was issued, basically?

3 MR. GLASGOW: That is correct.

4 CHAIRPERSON MILLER: And I believe
5 Mr. Cooper is going to be saying that the time
6 runs from the letter of the Zoning
7 Administrator that he is appealing. Is that
8 correct?

9 MR. COOPER: That's a safe
10 assumption.

11 CHAIRPERSON MILLER: Okay. Just
12 to cut to the chase.

13 MR. GLASGOW: Yes, that's right.

14 CHAIRPERSON MILLER: Okay.

15 MR. GLASGOW: But we wanted -- we
16 were -- remember, we had no objection to
17 consolidating these. There was the statement
18 that they needed to all be on the record
19 separately and so we are doing that.

20 CHAIRPERSON MILLER: Well, that's
21 fine. I just think that we bring to this
22 hearing also, you know, our knowledge of all

1 the issues that we discussed the last time.
2 So I don't think that we need to rehash them
3 too much here, you know, again. Unless
4 there's not an understanding of something, you
5 know, by any of the Board Members or you have
6 something more to add.

7 MR. GLASGOW: No, we wanted to --
8 needed to get that on to the record, because
9 the cases were bifurcated.

10 CHAIRPERSON MILLER: Right. Okay.

11 MS. BOLLING: Madam Chair, also,
12 as opposed to Reed-Cooke, Mr. Cooper's was
13 more than 60 days from the March 21st letter,
14 so we did want to state that on the record
15 today.

16 CHAIRPERSON MILLER: Okay.

17 MS. BOLLING: That's the
18 difference between the two appeals, the
19 timeliness.

20 CHAIRPERSON MILLER: Did you file
21 a motion to dismiss on timeliness, also?

22 MS. BOLLING: I did.

1 CHAIRPERSON MILLER: Okay. Good.

2 MR. GLASGOW: Yes, they have a
3 motion also.

4 CHAIRPERSON MILLER: Is there more
5 that you want to say, Mr. Glasgow?

6 MR. GLASGOW: I think everything
7 is reflected in the written documents that we
8 have submitted on the motion to dismiss.

9 CHAIRPERSON MILLER: Okay.

10 MR. GLASGOW: And then also, there
11 were a couple of administrative things that we
12 were going to want to make sure were covered
13 today, just because of the nature of how the
14 procedure --

15 MR. COOPER: Do I get to respond?

16 CHAIRPERSON MILLER: You respond
17 last. You get to respond to both of them, so
18 we're just going to -- I'm just going to get
19 the arguments here and then you can respond.

20 MR. COOPER: Right.

21 CHAIRPERSON MILLER: But I know
22 there are other issues. There is standing,

1 whatever, but, I think that was raised, let's
2 just deal with timeliness right now.

3 MR. GLASGOW: All right.

4 CHAIRPERSON MILLER: Is that it
5 for timeliness?

6 MR. GLASGOW: Yes.

7 CHAIRPERSON MILLER: For you, Mr.
8 Glasgow?

9 MR. GLASGOW: Yes, yes.

10 CHAIRPERSON MILLER: Okay. For
11 DCRA, I understand now. We didn't need some
12 reminders of what the positions are. So it
13 was clear that their position is the time runs
14 from the building permit and it was way beyond
15 when the building permit was issued. And what
16 you are saying is, okay, Mr. Cooper filed
17 later than Reed-Cooke Overlay.

18 Is your position that the time
19 runs from the building permit or from the
20 Zoning Administrator's decision in March of
21 2007?

22 MS. BOLLING: Our position is it

1 runs from the building permit. But if the
2 Board doesn't want to rely on that, he is
3 still late, because he was more than 60 days
4 past the March 21st, which we call
5 confirmation letter versus a termination
6 letter, but nonetheless, the letter from Bill
7 Crews.

8 CHAIRPERSON MILLER: Okay. Was he
9 four days late? Do you know how many days?

10 MS. BOLLING: It's about --

11 CHAIRPERSON MILLER: Or just that
12 he was beyond 60?

13 MS. BOLLING: I think it's about
14 four days, Madam Chair.

15 CHAIRPERSON MILLER: Okay. Is
16 there anything you want to say on that, else,
17 before I move to Mr. Cooper?

18 MS. BOLLING: Well, the Board has
19 discretion to allow a late appeal, but there
20 are requirements and I would say that his
21 pleadings do not meet those requirements,
22 which are the two prongs, there has to be

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1 exceptional circumstances and you also have to
2 balance the harm to the tenant and the
3 landlord, and none of those were pled in his
4 pleading, and, therefore, he fails to meet the
5 exception for this Board to grant a late
6 appeal. Therefore, we believe it should be
7 denied as untimely.

8 CHAIRPERSON MILLER: Okay. Mr.
9 Cooper, I'm going to turn to you in one
10 second. I just want to say that the way --
11 that's true that, you know, we get to the
12 exceptional circumstances once we decide it's
13 late.

14 But first, we have to decide
15 whether it is late and if we're talking about
16 the Zoning Administrator's letter, then it's
17 not as obvious or certain that it is late,
18 because it's when he knew or reasonably should
19 have known. So there is a little window there
20 as to whether he should reasonably should have
21 known earlier. Okay.

22 Did you have anything to add on

1 that?

2 MS. BOLLING: No. I was going to
3 say yes, Madam Chair.

4 CHAIRPERSON MILLER: What, yes,
5 you agree? Okay. You're not going to address
6 the facts whether he reasonably should have
7 known earlier? Okay. I guess we're ready to
8 turn to Mr. Cooper then.

9 MR. COOPER: Thank you. With
10 respect to the argument counsel is putting
11 into the record, Appeal 17677 relies on the
12 law of the case established by the Board in
13 its ruling relative to Reed-Cooke, which --

14 CHAIRPERSON MILLER: Can I say
15 something? I'm not sure there was a law of
16 the case last time, because we didn't have a
17 majority vote either way. You are -- I mean,
18 the motion to dismiss against Reed-Cooke
19 failed for lack of majority.

20 MR. COOPER: Right. Okay.

21 CHAIRPERSON MILLER: So it's not
22 necessarily the law of the case, is what I'm

1 trying to say.

2 MR. COOPER: So you're saying the
3 -- now that there are the same -- it looks
4 like the same setup to me here. And maybe the
5 wording law of the case is inappropriate. But
6 I'm relying on the conclusions reached by the
7 Members who reached them at the time on the
8 same set of facts as raised with respect to
9 these -- the issues counsel just added to the
10 record for purposes of the split cases.

11 And with respect to the issues,
12 dates unique to me, timing, counsel cannot
13 hold secret discussions with the Government,
14 produce a document outside of public
15 knowledge, spring it on the public with the
16 dates notice and at ABC Board hearing a week
17 later and expect to clock the time to run for
18 purposes of appeal from the time they
19 consummated their conspiracy to produce the
20 letter.

21 They may have produced the letter
22 on March 21st, but they kept it deliberately

1 from the public and the appellants. Our first
2 opportunity to learn what had -- the collusion
3 that had taken place was when the letter was--

4 MR. GLASGOW: Madam Chair, I am
5 going to object to a number of the
6 characterizations. He can give the dates.

7 MR. COOPER: I can present my case
8 the way I choose. You made yours. I didn't
9 interrupt you.

10 CHAIRPERSON MILLER: Mr. Cooper,
11 but you're making --

12 MR. GLASGOW: I made a comment to
13 the Chair.

14 CHAIRPERSON MILLER: --
15 allegations against them.

16 MR. COOPER: Well, this is --

17 CHAIRPERSON MILLER: You know, of
18 collusion.

19 MR. COOPER: -- a fact.

20 CHAIRPERSON MILLER: Okay. But
21 let's just --

22 MR. COOPER: We didn't know.

1 CHAIRPERSON MILLER: Okay. Let's
2 just focus on --

3 MR. COOPER: Okay.

4 CHAIRPERSON MILLER: -- the facts
5 you need to show.

6 MR. COOPER: Yeah, all right.
7 Well, the fact is --

8 CHAIRPERSON MILLER: When did you
9 know of --

10 MR. COOPER: Let's -- excuse me.
11 May I be heard? The fact is this letter was
12 produced by non-public discussions between the
13 property owner's agent and the Zoning
14 Administrator. That's a fact. We did not
15 learn of the result of this. I characterize
16 it as collusion. You can characterize it. He
17 can characterize it. The property owner can
18 characterize it as they wish.

19 CHAIRPERSON MILLER: Let's just
20 say the decision. The test is when did you
21 know or reasonably should have known about the
22 decision, this letter. When did you know

1 about it?

2 MR. COOPER: I learned of the
3 letter maybe a month or so after, because I
4 came into all of this on an active basis, at
5 that time. But for purposes of the argument
6 being put forward by the Government, I will
7 accept that I should have known when the
8 letter was made public at a hearing with one
9 day's public notice, March 28th.

10 If you calculate from March 28th
11 and there was no opportunity for appellants to
12 know about the letter prior to March 28th, you
13 calculate from that date, appellants 17677 are
14 not late. I think it's 58, 56 days something
15 to that effect.

16 CHAIRPERSON MILLER: Okay. Right.
17 We can pinpoint some dates, right? You filed
18 on May 25, 2007, I believe.

19 MR. COOPER: Yes.

20 CHAIRPERSON MILLER: But the
21 decision is dated March 21, 2007. And I
22 believe you are saying that this letter became

1 public at a ABC meeting.

2 MR. COOPER: ABC Board hearing.

3 CHAIRPERSON MILLER: March 28th.

4 MR. COOPER: March 28th.

5 CHAIRPERSON MILLER: So you
6 believe that the date should run from March
7 28th?

8 MR. COOPER: That was --

9 CHAIRPERSON MILLER: And that you
10 are within the 60 days from March 28th.

11 MR. COOPER: Absolutely. There
12 was no opportunity for appellants to learn of
13 the existence of the letter prior to it being
14 made public March 28, 2007.

15 CHAIRPERSON MILLER: Okay. Thank
16 you. Are there any questions? Okay. I think
17 that we are ready to deliberate on that
18 motion. As Mr. Cooper has noted, we split at
19 the last hearing on the same issue with
20 respect to Reed-Cooke as to when the -- which
21 decision the time should run from.

22 I believe Mr. Loud and I were of

1 the opinion that it runs from the date of the
2 Zoning Administrator's letter on interpreting
3 whether or not beer and wine could be sold at
4 the grocery store. And if I'm not mistaken,
5 Mr. Dettman thought that the time should run
6 from the building permit.

7 So I'm of the same view as I was
8 before.

9 VICE CHAIR LOUD: I am, too, Madam
10 Chair.

11 CHAIRPERSON MILLER: And, Mr.
12 Dettman?

13 MEMBER DETTMAN: I have the same
14 position.

15 CHAIRPERSON MILLER: So I'm just
16 going to follow this through and then we can
17 vote and have it probably go both ways. I'm
18 also of the view that if the time runs from
19 the date of the letter, which I think it
20 should, but that's the zoning decision that's
21 being appealed, and we went through all of the
22 reasons the last time, so I don't want to eat

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1 into this proceeding too much on that.

2 I don't think that it was
3 reasonable for the public to have known, to
4 notice it in the plans and it wasn't at issue
5 in our BZA case and it wasn't noticeable upon
6 construction and that the ZA decision letter
7 of March 21st actually specifically addressed
8 the issue that is being appealed.

9 Okay. So if that's the case, I
10 think that also Mr. Cooper has made a good
11 case that he didn't know and shouldn't have
12 reasonably been expected to know before March
13 28th when the letter became public at an ABC
14 Board meeting.

15 I don't know if you are of the
16 same view, Mr. Loud, we could vote on it and
17 then do the reverse vote. And the vote would
18 go to denying the motion to dismiss for
19 untimeliness.

20 VICE CHAIR LOUD: Um, to answer
21 both questions, yes, I'm of the same view and
22 would follow the procedure you outlined. I

1 think his testimony, Mr. Cooper's, is that he
2 really, at least his testimony said, didn't
3 know until about a month or so after the March
4 letter. He is willing to concede for purposes
5 today that he knew or should have known at the
6 ABC hearing on March 28th. So my position
7 hasn't changed.

8 CHAIRPERSON MILLER: Okay. So I'm
9 going to move to deny the applicant and DCRA's
10 motions to dismiss on grounds of untimeliness.
11 Do I have a second?

12 VICE CHAIR LOUD: Second.

13 CHAIRPERSON MILLER: I don't think
14 we need further deliberation.

15 All those in favor say aye.

16 CHAIRPERSON MILLER: Aye.

17 VICE CHAIR LOUD: Aye.

18 CHAIRPERSON MILLER: Opposed?

19 MEMBER DETTMAN: Opposed.

20 CHAIRPERSON MILLER: Abstaining?

21 Okay. Would you call the voter, please?

22 MS. BAILEY: Madam Chair, the vote

1 is 2-1-2 to deny. The Board's motion is to
2 deny the motion because it was untimely filed.
3 Mrs. Miller made the motion, Mr. Loud
4 seconded. Mr. Dettman is opposed to the
5 motion. The fourth BZA member is not present
6 and no Zoning Commission is present, at this
7 time.

8 So again, the motion failed for
9 lack of a majority concurrent vote.

10 CHAIRPERSON MILLER: Okay. And
11 just to cross our Ts and dot our Is, Mr.
12 Dettman, do you want to move an affirmative
13 motion?

14 MEMBER DETTMAN: I'll move to
15 grant the motion to dismiss the Appeal of
16 17677 for untimeliness.

17 CHAIRPERSON MILLER: And I'll
18 second it for purposes of voting.

19 All those in favor say aye.

20 MEMBER DETTMAN: Aye.

21 CHAIRPERSON MILLER: All those
22 opposed?

1 CHAIRPERSON MILLER: Opposed.

2 VICE CHAIR LOUD: Opposed.

3 CHAIRPERSON MILLER: Abstaining?

4 MS. BAILEY: That motion, Madam
5 Chair, is 1-2-2. Mr. Dettman's motion was to
6 grant to dismiss the motion. Mr. Dettman made
7 the motion, Mrs. Miller seconded. Mr. -- I'm
8 sorry, let me do that again.

9 Mr. motion -- Mr. Dettman made the
10 motion. It was seconded by Mrs. Miller. The
11 opposing parties are Mrs. Miller and Mr. Loud.
12 Mr. Dettman, obviously, supports the motion.
13 The vote is 1-2-2. And it failed for lack of
14 a majority concurrent vote again.

15 CHAIRPERSON MILLER: Okay. Thank
16 you. Okay. So I think that disposes of the
17 motion for untimeliness.

18 Do we have another motion?

19 MR. GLASGOW: Not a motion, but we
20 were asked at the -- and this is whenever the
21 Chair and the Board wants to receive the
22 information, we were asked to prepare a chart

1 concerning the grocery stores and what grocery
2 stores had ABC Licenses. I think Board Member
3 Loud asked for that. We have that to submit
4 into the record, at this time, and we can give
5 a copy to the parties. Has that been filed?

6 CHAIRPERSON MILLER: How many
7 copies do you have for us? Just one or more?
8 Okay. I think we will probably get into this
9 maybe a little bit when we get to the merits
10 again. I just want to make sure we don't have
11 any other preliminary issues. Do we have a
12 subpoena question, Mr. Cooper?

13 MR. GLASGOW: Okay. The only --
14 well, the only other issue --

15 CHAIRPERSON MILLER: Right.

16 MR. GLASGOW: -- matter that we
17 had --

18 CHAIRPERSON MILLER: Okay.

19 MR. GLASGOW: -- with respect to
20 our motion to dismiss, we also pled that the
21 District is now not able -- it is estopped
22 from denying us a Certificate of Occupancy,

1 based on the building premise that we have.
2 That is in our pleadings and that was a
3 separate matter. And I don't think -- and the
4 Board can take it up later.

5 But we also said that the District
6 is estopped from, at this point in time,
7 should the Board so determine, and that would
8 be if the Board adversely ruled against the
9 applicant on the merits, that given the
10 permits that were issued and our justifiable
11 reliance that it's too late to be in a
12 position to say you can't get a Certificate of
13 Occupancy, your building permit was issued in
14 error.

15 CHAIRPERSON MILLER: Okay. Wait a
16 second. It's in the pleadings?

17 MR. GLASGOW: Yes.

18 CHAIRPERSON MILLER: Okay.

19 MR. GLASGOW: It's in the
20 pleadings.

21 CHAIRPERSON MILLER: Are they
22 estopped from disallowing the sale of wine and

1 beer?

2 MR. GLASGOW: From -- with respect
3 to -- from a zoning standpoint, but the ABC
4 Board has not issued its determination. If
5 the ABC Board were not to grant the license,
6 we have two things. And that's, obviously,
7 part of the reason why we have been saying
8 everybody has known for years what it is that
9 we have intended on the site.

10 We have had ABC hearings that have
11 been going on for several years on this site.
12 And then we -- and an order has not been
13 issued yet.

14 And then we have the zoning issue
15 here. Two separate issues and an order. And
16 we're saying we have the permit on one that
17 shows the beer and wine sales and whatever,
18 and we proceeded under that. So that to
19 technically answer your question, if the ABC
20 Board were to deny the application, then we
21 can't sell beer and wine.

22 But we are saying now this has

1 gone on so long and so much money has been
2 spent and there's such justifiable reliance on
3 behalf of the applicant, that if the ABC Board
4 rules in our favor, that the District is
5 estopped from saying that you -- now, you
6 can't finish up the construction and
7 everything that you have done.

8 CHAIRPERSON MILLER: Okay.

9 MR. COOPER: Madam Chair?

10 CHAIRPERSON MILLER: Now, wait. I
11 know. But that's not a preliminary issue, is
12 it? It's not a preliminary issue for us to
13 consider.

14 MR. COOPER: Well, I want to be
15 heard on it.

16 CHAIRPERSON MILLER: Well, you
17 will be heard on it, yeah.

18 MR. GLASGOW: Yeah.

19 CHAIRPERSON MILLER: I'm just
20 trying to get through the preliminary issues.

21 MR. GLASGOW: All right. Well, we
22 -- we --

1 CHAIRPERSON MILLER: If you don't
2 have any other motions to dismiss then --

3 MR. GLASGOW: -- offered that as a
4 motion to dismiss this.

5 CHAIRPERSON MILLER: Oh, motion to
6 dismiss based on estoppel?

7 MR. GLASGOW: Yes.

8 CHAIRPERSON MILLER: Oh.

9 MR. GLASGOW: Okay. We have it in
10 there, in the pleading. And if we have
11 closing arguments, we can go through that. I
12 just wanted to make sure that I didn't lose
13 out anything that we had in the motion to
14 dismiss.

15 CHAIRPERSON MILLER: Okay. I
16 would just say this.

17 MR. COOPER: I'll be brief.

18 CHAIRPERSON MILLER: I don't think
19 we are going to treat it as a preliminary
20 issue. I'm sorry, if it was in your motion to
21 dismiss, but that is an argument we'll
22 consider. Okay. Mr. Cooper, did you have a

1 request for a subpoena or something?

2 MR. COOPER: I would like to be
3 heard to the extent he was on this issue. I
4 understand what you said, that we're not going
5 to deal with it, but --

6 CHAIRPERSON MILLER: Okay.

7 MR. COOPER: On this issue --

8 CHAIRPERSON MILLER: Thank you.
9 I'm saying, you're going to get your full day
10 in court, that's why we're having this
11 hearing. I just wanted --

12 MR. COOPER: Right, but --

13 CHAIRPERSON MILLER: I just wanted
14 -- I said that's not a preliminary issue. I
15 just want to clear the deck of any preliminary
16 issues, so we can just focus on the merits.

17 MR. COOPER: I do, too, but I
18 don't want him to get away with putting
19 something on the record and I don't have 30
20 seconds to put what I have.

21 CHAIRPERSON MILLER: But you are
22 going to. You need to do it right now as

1 opposed to --

2 MR. COOPER: To his motion. This
3 is --

4 CHAIRPERSON MILLER: I told you we
5 weren't going to deal with it as a motion, a
6 preliminary motion.

7 MR. COOPER: All right. Well, I
8 responded in my pleadings to that argument.

9 CHAIRPERSON MILLER: I want you to
10 respond. I just want to --

11 MR. COOPER: Yeah, I've -- it is
12 ancient history, but I did respond.

13 CHAIRPERSON MILLER: Okay.

14 MR. COOPER: I did basically say
15 you need good faith. They didn't act in good
16 faith.

17 CHAIRPERSON MILLER: Okay.

18 MR. COOPER: They have no basis to
19 argue estoppel.

20 CHAIRPERSON MILLER: I'm just
21 trying to --

22 MR. COOPER: I understand.

1 CHAIRPERSON MILLER: -- keep to
2 our procedure a little bit.

3 MR. COOPER: I understand.

4 CHAIRPERSON MILLER: So I saw that
5 there was a motion for a subpoena. It sounds
6 like you are not pursuing that or are you?
7 That's what I'm trying to find out if there is
8 any other motion.

9 MR. COOPER: I received a response
10 -- opposition from the Government Friday.
11 Basically, setting forth that the Board
12 doesn't have the authority to compel that
13 subpoena issue to Mr. Crews. And I can
14 understand why they wouldn't want to testify,
15 so I know -- I see no -- the Board doesn't
16 have the authority. I don't want to waste
17 your time.

18 CHAIRPERSON MILLER: Okay. I
19 would clarify that we don't have the
20 authority. So I guess that's a consensus of
21 the Board to deny that. Okay.

22 All right. At this point then, if

1 we have no more preliminary issues, you are
2 the appellant and now is the time that you can
3 make your case as to why the Zoning
4 Administrator erred in his determination, in
5 that March 21, 2007 letter.

6 MR. COOPER: Thank you, Madam
7 Chair and Members, for this opportunity, can
8 you hear me, to appear and to present our
9 appeal. Our view of the case is summed up
10 with a single assertion. But before I get to
11 that, let me say that I will read briefly from
12 an opening statement. I am prepared to submit
13 it for the record and 20 copies, if that would
14 be helpful, otherwise --

15 CHAIRPERSON MILLER: It would be
16 helpful.

17 MR. COOPER: -- it won't be.

18 CHAIRPERSON MILLER: Why don't you
19 give it to Ms. Bailey.

20 MR. COOPER: Our appeal. We
21 object to how the Zoning Administrator's
22 letter of March 21, 2007 was obtained. We

1 object to how the Zoning Administrator's
2 letter was used in the ABC Board application
3 process context. And we assert that the
4 Zoning Administrator's letter of March 21,
5 2007 erred in what it concluded as a matter of
6 law.

7 Again, our view of the case can be
8 summed up in a single assertion, namely, that
9 the law is what it says. The law is what it
10 says. That said, and to the extent appellants
11 are informed by the pleadings of other parties
12 to this appeal, that simple statement, the law
13 is what it says, means that the law is how it
14 reads in simple English.

15 Accordingly, as the law is what it
16 says should be read to mean the law is how it
17 reads. Appellants assert that the Reed-Cooke
18 Overlay District Zoning provision is the law.
19 And that the words of that provision read
20 "prohibited use" and allow for an exception if
21 granted by this Honorable Board, the District
22 of Columbia Board of Zoning Adjustment,

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1 exclusively.

2 The law does not say that an
3 exception may be granted by the Zoning
4 Administrator, the Office of Planning or by
5 any other official who has not been
6 specifically delegated the authority to do so
7 by the Board of Zoning Adjustment.

8 Further, even in an instance where
9 another such official may have been delegated
10 the authority by the Zoning Administrator to
11 grant such an exception and which to the
12 appellant's knowledge has not been the case
13 here, said grant of exception of authority by
14 the delegation of the BZA would not -- would
15 need to have to have been made consistent with
16 applicable Reed-Cooke Overlay District
17 Municipal Regulations.

18 That is following a public hearing
19 and issued consistent with the purposes for
20 which the Reed-Cooke Overlay District exists.

21 Accordingly, to the extent the
22 building permit issued by the Zoning

1 Administrator, Matthew LeGrant, purporting to
2 authorize off-premises alcohol beverage sales
3 from the subject property of Douglas Jemal,
4 that permit is invalid for purposes of alcohol
5 beverage sales.

6 Further, while the validity of
7 that permit and any derivative thereof for
8 other purposes is not the focus of BZA Appeal
9 17677. The future or continuing validity of
10 that permit or any derivative thereof for any
11 other purpose may, in the future, be
12 challenged based on admitted disqualifying
13 Consumer and Regulatory Affairs Rules and
14 Violations alleged to have been engaged in by
15 the property owner, its tenant or tenants
16 and/or by agents on their behalf.

17 That is alleged rules violations
18 and conspiracy to commit said rules violations
19 that, if proven, are punishable in the
20 District of Columbia by disqualifying
21 imprisonment, fines or both.

22 Appellant's assertions made herein

1 are based on a reading of applicable District
2 of Columbia Zoning Law, the District of
3 Columbia Official Code and District of
4 Columbia Municipal Regulations and are derived
5 from the premise that the law is what it says.

6 Again, appellant's reading of
7 applicable laws and regulations is informed by
8 pleadings filed with this Honorable Board on
9 January 25, 2008 in this case by Jill Stern,
10 General Counsel of the Department of Consumer
11 and Regulatory Affairs, Melinda Bolling,
12 Assistant Attorney General and by Doris
13 Parker-Woolridge, Assistant Attorney General,
14 namely, the following:

15 "When interpreting a statute or
16 regulation, you first look to the language of
17 the Act. See, McDonald v. United States, 496
18 A2.d 274, 276 (DC 1985). And when the
19 language is unambiguous and does not produce
20 an absurd result, you do not look beyond its
21 plain meaning. See, Citizens Association of
22 Georgetown v. District of Columbia Board of

1 Zoning Adjustment. The plain language of the
2 DC Official Code and the DCMR."

3 Accordingly, to the extent that
4 the law is what it says and how it reads
5 today, not tomorrow, a plain reading of the
6 law supports appellant's assertion that the
7 proposed use is prohibited without the grant
8 of a BZA exception.

9 In fact, in order for the property
10 owner, Douglas Jemal, and/or for his tenant,
11 Harris Teeter, Inc., to engage in the proposed
12 use at 1631 or 1641 Kalorama Road, N.W., the
13 Reed-Cooke Overlay District provision would,
14 instead of how it reads today, need to read as
15 it does in the Matter of Zoning Commission
16 Case 07-33, a proposed text amendment to the
17 Reed-Cooke Overlay District provision.

18 Otherwise, it would, indeed, be
19 absurd to read into the meaning of the current
20 Reed-Cooke Overlay District provision law, an
21 interpretation that would permit an almost
22 40,000 square feet new business operation to

1 engage in off-premises alcohol beverage sales
2 within Reed-Cooke, the Reed-Cooke Overlay
3 District, without an exception having been
4 granted by the Board of Zoning Adjustment.

5 Further, appellants assert that
6 the law must be adhered to in all instances
7 involving parties and uses in the Reed-Cooke
8 Overlay District, be they new, existing or
9 proposed.

10 Finally, jurisdiction over and the
11 duty to make determinations going to the
12 appropriateness of any use prohibited or any
13 other determination required by Reed-Cooke
14 Overlay District Law rests solely with the
15 District of Columbia Board of Zoning
16 Adjustment.

17 The remainder of this statement I
18 won't read. And I request it be entered into
19 the record.

20 CHAIRPERSON MILLER: It is in the
21 record.

22 MR. COOPER: Okay.

1 CHAIRPERSON MILLER: Because you
2 handed it in and we all have it.

3 MR. COOPER: All right.

4 CHAIRPERSON MILLER: Yes.

5 MR. COOPER: So I basically have
6 just a few questions and we'll be done.

7 CHAIRPERSON MILLER: You have some
8 questions for whom?

9 MR. COOPER: The -- Mr. LeGrant
10 and Mr. Sher.

11 CHAIRPERSON MILLER: Okay. Just
12 so we're clear what we are doing here, because
13 it was confusing with how we're dealing with
14 two cases.

15 MR. COOPER: Um-hum.

16 CHAIRPERSON MILLER: From what I
17 understand, and the applicant and DCRA can
18 correct me if I'm wrong, that you weren't
19 going to be repeating the testimony that you
20 gave before and, therefore, Mr. Cooper, it
21 would be incorporated by reference into this
22 proceeding. Okay. So he would be cross

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1 examining you, correct, on that.

2 However, I don't believe that you
3 are precluded from any additional testimony in
4 this case. Unless you all think so. I don't.
5 I mean, so the order would be --

6 MR. COOPER: Well, no, I would be
7 allowed to put on an affirmative case.

8 CHAIRPERSON MILLER: You are
9 putting on an affirmative case. I'm saying
10 they are the appellees. I mean, you are the
11 appellee.

12 MR. COOPER: Yes, it's my case.

13 CHAIRPERSON MILLER: You are the
14 intervenor. In a case where an appeal is
15 made, they have an opportunity to testify.

16 MR. COOPER: Yes.

17 CHAIRPERSON MILLER: Put on a
18 case. They have already put on. What I'm
19 saying is you've already put on part of your
20 case. You are welcome to incorporate that by
21 reference here and you don't have to repeat
22 it. If there is something additional you want

1 to testify to in this case, I don't believe
2 there would be any reason to exclude that.

3 MR. COOPER: I see what you're
4 saying.

5 CHAIRPERSON MILLER: Yes, that's
6 what I'm saying.

7 MR. COOPER: Okay.

8 CHAIRPERSON MILLER: So it
9 wouldn't be time to cross them yet.

10 MR. COOPER: Okay.

11 CHAIRPERSON MILLER: Unless they
12 are resting their case.

13 MR. COOPER: Yes, they do this
14 every day. This is -- that's --

15 CHAIRPERSON MILLER: Well, this is
16 kind of confusing, too. We don't even do this
17 every day. So if you've finished, at this
18 point, then you are subject to cross
19 examination under our procedures.

20 MR. COOPER: Fine.

21 CHAIRPERSON MILLER: Did we swear
22 people in? I mean, I think you are playing a

1 dual role here, because on the one hand you
2 are advocating --

3 MR. COOPER: I didn't testify.

4 CHAIRPERSON MILLER: You didn't
5 testify?

6 MR. COOPER: I read my opening
7 statement.

8 CHAIRPERSON MILLER: Okay.

9 MR. COOPER: As a representative
10 for Appellants 17677.

11 CHAIRPERSON MILLER: Do we have
12 any witnesses here, because I think we ought
13 to back up and --

14 MR. GLASGOW: Well, Madam Chair,
15 then he is saying that he has no testimony in
16 support of his appeal?

17 CHAIRPERSON MILLER: He is saying
18 he has just legal argument, is what I
19 understood. And, you know, for an appeal, it
20 is a legal question. So if he has no
21 testimony, evidence in support, he doesn't.
22 That doesn't mean the case fails.

1 MR. GLASGOW: Pardon me?

2 CHAIRPERSON MILLER: I don't think
3 that's the end of the case.

4 MR. GLASGOW: I just want to
5 understand where we are in the process.

6 CHAIRPERSON MILLER: Okay. Well,
7 I'm sorry. Did we swear anybody in?

8 MR. COOPER: With this, what I
9 wanted was the Zoning Administrator.

10 CHAIRPERSON MILLER: Okay.

11 MR. COOPER: Crews.

12 CHAIRPERSON MILLER: Two things.
13 One is Ms. Bailey is saying, you know, again,
14 we're carrying some of the old case, the other
15 case into this case, so that if there were
16 people who were sworn in before, that can
17 carry into this case.

18 MR. COOPER: I don't have any --

19 CHAIRPERSON MILLER: If anybody
20 has concerns, we can --

21 MR. COOPER: -- witnesses to --

22 CHAIRPERSON MILLER: Okay.

1 MR. COOPER: -- swear in. My
2 witness could not be compelled to come. He
3 would not come voluntarily for understandable
4 reasons.

5 CHAIRPERSON MILLER: Okay. So
6 fine. So, you know, if it's a legal argument,
7 are you concerned? Because I don't think that
8 -- Mr. Glasgow, you look a little concerned.

9 MR. GLASGOW: No, I just want to
10 understand the process. If he is going to
11 finish up his case and then he can finish up
12 his case and we can cross, if we're going to
13 cross, at that time.

14 CHAIRPERSON MILLER: I think
15 that's where we are. And that's why it had
16 occurred to me that you weren't sworn in, but
17 you are saying it's all argument and no
18 evidence.

19 MR. COOPER: My witness isn't
20 here.

21 CHAIRPERSON MILLER: Okay. Then
22 is there cross for argument?

1 MR. GLASGOW: Not cross for
2 argument. I want to save cross until the end
3 of his case. I guess if he is going to cross
4 examine Mr. LeGrant and -- or whoever, then I
5 guess he should -- I would suggest he probably
6 ought to do that now. Because in the normal
7 process, he would have cross examined that
8 witness.

9 I want to find out is he going to
10 finish his case and then do his cross
11 examination of the witnesses that testified
12 previously or how are we doing this?

13 MR. COOPER: I understand that in
14 the normal process. I make my opening
15 statement. I put on my witnesses. If I don't
16 have witnesses, they make their counter to my
17 -- to the case that I put on. And since I
18 didn't have witnesses, they don't get to
19 cross. And then it comes --

20 CHAIRPERSON MILLER: Is this -- he
21 will have rebuttal at the end, that's it.
22 Closing argument rebuttal. This is his case.

1 MR. COOPER: So are we ready to
2 proceed?

3 CHAIRPERSON MILLER: But let me
4 just --

5 MR. COOPER: Okay.

6 CHAIRPERSON MILLER: -- review.

7 MR. COOPER: All right.

8 CHAIRPERSON MILLER: And then in
9 the case of an appeal, No. 1, statement and
10 witnesses of the appellant. That's what just
11 has been done. No. 2, the Zoning
12 Administrator or other Government officials
13 case. No. 3, case for the owner, lessee or
14 operator of the property involved, if not the
15 appellant. 4, the ANC. Okay. 5,
16 intervenor's case, if permitted by the Board.
17 6, rebuttal and closing statement by
18 appellant.

19 So we're now at DCRA. Unless you
20 have cross examination, but I don't believe
21 that's necessarily appropriate for argument.
22 There has been no testimony as to facts.

1 MR. GLASGOW: Well, there have
2 been some assertions, but I assume that we
3 will all be able to respond to those for the
4 record.

5 CHAIRPERSON MILLER: Okay.

6 MS. BOLLING: So, Madam Chair --

7 CHAIRPERSON MILLER: So -- yes?

8 MS. BOLLING: I understand
9 mistakes or errors that Mr. Cooper made in his
10 view of the case. I don't correct now or I do
11 correct.

12 CHAIRPERSON MILLER: You do.

13 MS. BOLLING: I do correct now.
14 Okay.

15 CHAIRPERSON MILLER: Yes, this is
16 your time.

17 MS. BOLLING: Okay.

18 CHAIRPERSON MILLER: Um-hum.

19 MS. BOLLING: All right. Mr.
20 Cooper, hi. Drawing your attention to page 2
21 of your view of the case.

22 CHAIRPERSON MILLER: Wait a

1 minute, I want to interrupt you for one
2 second. Are you an attorney, Mr. Cooper?

3 MR. COOPER: No.

4 CHAIRPERSON MILLER: All right. I
5 think you probably should be sworn in then,
6 because attorneys are like already sworn. But
7 she is going to be asking you questions, so
8 you probably -- you are actually going to be
9 testifying somewhat. So I would just suggest
10 that --

11 MR. COOPER: Well, why does she
12 get to examine me and I don't get to examine
13 her?

14 CHAIRPERSON MILLER: You get to
15 cross examine Mr. LeGrant.

16 MR. COOPER: No. She gets to
17 cross examine my witness. She doesn't get to
18 cross examine my witness' representative.

19 CHAIRPERSON MILLER: What she is
20 saying is you've made assertions --

21 VICE CHAIR LOUD: Your mike is
22 off.

1 CHAIRPERSON MILLER: -- in your
2 statement. She is saying you have made
3 assertions in your statement. And they may be
4 not legal argument.

5 MR. GLASGOW: That's what we were
6 -- that's what I was trying to drive at.

7 CHAIRPERSON MILLER: Okay.

8 MR. GLASGOW: She has done it a
9 lot more articulately than I have. There are
10 a lot of things here that are, basically,
11 factual and other types of allegations.

12 CHAIRPERSON MILLER: Right.

13 MR. GLASGOW: Part of what he
14 didn't read stating about an illegal action
15 and that they of thing and we want to sort
16 that out --

17 MR. COOPER: As --

18 MR. GLASGOW: -- in some fashion.
19 We either need to do it now in question or we
20 need to have an opportunity to do it in
21 writing. One or the other.

22 CHAIRPERSON MILLER: Okay. Let's

1 just do --

2 MR. GLASGOW: And Mr. Cooper isn't
3 an individual appellant in this case.

4 MR. COOPER: This is what I'm
5 prepared to do. I'm prepared to entertain any
6 question from the Government or counsel as if
7 I were asking them a question.

8 CHAIRPERSON MILLER: Okay.

9 MR. COOPER: So fire away.

10 CHAIRPERSON MILLER: Mr. Cooper,
11 you know, you don't make the rules here.
12 Okay?

13 MR. COOPER: No, I was just saying
14 what I was prepared to do.

15 CHAIRPERSON MILLER: Okay. But if
16 you want to participate in this proceeding,
17 I'm going to suggest or I'm going to require
18 that you be under oath, because that's what
19 our rules require, except for attorneys making
20 legal arguments. So it's not a big deal. Ms.
21 Bailey will swear you in.

22 MS. BAILEY: Mr. Cooper, would

1 you, please, stand?

2 MR. COOPER: Well, it's a demeanor
3 question. I am going to comply, but I will,
4 when it is my turn, put them in the same
5 position. I don't care if they are sworn or
6 not, as long as I have my -- an opportunity to
7 put them where they put me to examine them, to
8 question them, to inquire about them, that's--
9 that would be my preference. That would be
10 equitable and if I don't have that
11 opportunity, I don't think I am being given a
12 fair opportunity to defend the appeal we are
13 putting forward.

14 Now, I'm prepared to stand, unless
15 you are not ready for me.

16 CHAIRPERSON MILLER: Is there
17 anybody else who -- I think forget about the
18 last case. Why don't we just start fresh
19 here. Who is going to be testifying today,
20 please, come forward and take the oath with
21 Mr. Cooper, so we just don't have any
22 questions.

1 MS. BAILEY: Would you, please,
2 raise your right hand?

3 (Whereupon, the witnesses were
4 sworn.)

5 MS. BAILEY: Thank you.

6 MS. BOLLING: Mr. Cooper, you are
7 not appealing any decision from Matthew
8 LeGrant, are you?

9 MR. COOPER: I stated Matthew
10 LeGrant issued the zoning permit. I stated on
11 the record what we were appealing. I will
12 repeat it for you. I said in my pleadings on
13 behalf of Appellants 17677 that we are basing
14 -- we are taking appeal from the Zoning
15 Administrator's letter of March 21, 2007, that
16 we object to how that letter was obtained, how
17 that letter was used in the context of the ABC
18 Board application process and the assertion
19 that that letter -- and we assert that that
20 letter erred in the conclusion reached
21 therein.

22 Now, I don't know if that answers

1 your question, but that's my answer to your
2 question.

3 MS. BOLLING: Matthew LeGrant
4 didn't write the letter of March 21st, did he?

5 MR. COOPER: Did I say he did?

6 CHAIRPERSON MILLER: Can we cut to
7 the chase? What's being appealed is the March
8 21, 2007 letter.

9 MR. COOPER: Yeah.

10 CHAIRPERSON MILLER: Okay. By the
11 Zoning Administrator.

12 MR. COOPER: Yeah.

13 CHAIRPERSON MILLER: Who, I
14 believe, was Bill Crews, at the time. We all
15 know what -- that's what is being appealed.
16 However, I would say that there are a lot of
17 things you say that you are appealing that may
18 not be within our jurisdiction. And what's in
19 our jurisdiction is whether or not there was
20 an error in his determination in that letter.
21 Not how it was used and all that kind of
22 stuff.

1 MR. COOPER: Well, let me say
2 this. If I understand the Government and the
3 property owner's case, at least from their
4 pleadings on the motion to dismiss, they are
5 arguing that they have authority to sell beer
6 and wine, based on the zoning permit issued by
7 Matthew LeGrant. I mean, the building permit
8 issued by Matthew LeGrant.

9 And that Bill Crews' letter was a
10 mere validation or interpretation of the fact
11 of that grant of authority. An interpretation
12 that his building permit, which the property
13 owner is relying on to say it has been granted
14 the authority to sell beer and wine.

15 Mr. LeGrant, you did issue the
16 building permit in question, did you not?

17 CHAIRPERSON MILLER: Wait, wait.

18 MS. BOLLING: I'm doing cross
19 exam.

20 CHAIRPERSON MILLER: That's right.
21 Let me just say this. Really, what the Board
22 is going to be deciding is whether or not that

1 was an error or not. That's all this Board is
2 going to be deciding. That's all this Board
3 is going to be looking at.

4 MR. COOPER: Right. And --

5 CHAIRPERSON MILLER: So it doesn't
6 matter who, whether it was Matthew LeGrant or
7 Bill Crews. It doesn't matter.

8 MR. COOPER: But the --

9 CHAIRPERSON MILLER: We know what
10 the issue is, do we not?

11 MR. COOPER: -- letter Bill Crews
12 issued affirms the issue of the building
13 permit and a grant of authority under that
14 permit issued by Mr. LeGrant. Is that not the
15 case? Isn't that what the --

16 CHAIRPERSON MILLER: It doesn't
17 matter to us. Really, what I'm saying is what
18 is before this Board is to interpret the
19 provision in the Reed-Cooke Overlay dealing
20 with sale of off-premises of alcoholic
21 beverages. That's all we're looking at.

22 MR. COOPER: I understand that.

1 And I appreciate that. And when we say the
2 March 21st letter erred in its conclusions, it
3 erred when it recognized the authority of
4 Deputy Zoning Administrator, at the time I
5 believe, issuance of a building permit that
6 conferred authority to sell beer and wine to
7 the property owner.

8 That's what his letter is
9 purported to be opining on. And I don't need
10 to go into it beyond that, but we have to have
11 a foundation for the decision somewhere. His
12 letter affirms the validity of the permit
13 having granted authority to sell beer and
14 wine.

15 We say that affirmation is an
16 error, because the Deputy Zoning Administrator
17 does not have authority in the context of
18 Reed-Cooke to grant beer and wine sales
19 permission if the Reed-Cooke Overlay District
20 provision is applied and the facility is in
21 the Reed-Cooke Overlay District, no one can
22 grant that exception, including the Deputy

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1 Zoning Administrator.

2 That's a prerogative under the
3 jurisdiction exclusively of the Board of
4 Zoning Adjustment.

5 CHAIRPERSON MILLER: Okay. That's
6 fine. I think we're spending too much time
7 arguing about this, because this Board, what's
8 before this Board that was brought to us by
9 Reed-Cooke Neighborhood Association and you is
10 the interpretation of what is meant under the
11 prohibited uses section of 1401.1 when it
12 mentions, where is it, off-premises alcoholic
13 beverages sales.

14 MR. COOPER: Yeah.

15 CHAIRPERSON MILLER: Okay.

16 MR. COOPER: It's --

17 CHAIRPERSON MILLER: Then we got
18 it.

19 MR. COOPER: Yes, that's
20 prohibited use and --

21 CHAIRPERSON MILLER: You say it's
22 prohibited use. It says prohibited use. You

1 say it's the plain meaning of the regulation.

2 That's your case.

3 MR. COOPER: Right. Well, I --

4 CHAIRPERSON MILLER: Okay.

5 MR. COOPER: -- am responding to
6 the Government.

7 MS. BOLLING: Madam Chair, we
8 won't give any other questions to Mr. Cooper.
9 There are very serious mistakes that he has
10 made in his view of the case.

11 MR. COOPER: Yeah, well, that's
12 your --

13 MS. BOLLING: And we don't want
14 the Board to rely on without a response from
15 the District. And it's a very difficult
16 proposition that we're in today to try to make
17 those when he hasn't really testified to
18 those, so we wanted to point out that with our
19 questioning that Matthew LeGrant did not
20 approve the building permit. There was
21 another individual and that DCRA issued it,
22 not the Zoning Administrator.

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1 MR. COOPER: It's --

2 MS. BOLLING: And others specific
3 to that.

4 MR. COOPER: -- that the witness,
5 Matthew LeGrant, testified in the transcript
6 of these proceedings that he issued the
7 building permit. I can go to the page if you
8 would like.

9 CHAIRPERSON MILLER: You know
10 what, maybe you guys can address this in
11 writing, because this really isn't very
12 significant to us.

13 MR. COOPER: Well, but they --

14 CHAIRPERSON MILLER: We are
15 looking at how --

16 MR. COOPER: -- Matthew LeGrant --

17 CHAIRPERSON MILLER: -- do we
18 interpret the Zoning Regulations?

19 MR. COOPER: Yeah.

20 CHAIRPERSON MILLER: How do we
21 interpret, you know --

22 MR. GLASGOW: Madam Chair?

1 CHAIRPERSON MILLER: -- 1401.1?

2 MR. GLASGOW: Right. I had
3 suggested a while ago that we were prepared
4 just to respond to this in writing, but we
5 wanted to have the opportunity to respond.

6 CHAIRPERSON MILLER: Okay. I
7 think that would be just fine. I think that
8 would make better use of everybody's time if
9 you want to submit something after the hearing
10 in writing.

11 MS. BOLLING: That's fine, Madam
12 Chair.

13 CHAIRPERSON MILLER: Okay. Good.

14 MR. COOPER: If you would like the
15 cite in the record, in the transcript of the
16 witness saying he issued the building permit,
17 I can get it for you. I have it right here.

18 CHAIRPERSON MILLER: Okay. Does
19 DCRA have further testimony?

20 MS. BOLLING: No.

21 CHAIRPERSON MILLER: Okay. I
22 think the Board -- I think we have some

1 questions for DCRA. Given that these two
2 cases are fairly related and we have had time
3 in between the cases to look at the
4 regulations some more and consider some of the
5 arguments that were made before, I would like
6 to say that I was looking back at the
7 regulations for C-2 Districts, which then sent
8 me back to C-1 matter-of-right uses.

9 ZONING ADMIN. LeGRANT: Yes.

10 CHAIRPERSON MILLER: So I noticed
11 701.4 and I would like to bring this to your
12 attention and see if you can add anything to
13 it. 701.4 says "The following retail
14 establishments shall be permitted in a C-1
15 District as a matter-of-right." And I'm just
16 going to skip ahead for people who aren't that
17 used to how our regulations work.

18 721.1 says "Uses as a matter-of-
19 right C-2." And as I understand, the Reed-
20 Cooke Overlay is an overlay on the C-2-B
21 District, correct?

22 ZONING ADMIN. LeGRANT: Um-hum.

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1 CHAIRPERSON MILLER: So it would
2 be appropriate to be looking at the uses that
3 are allowed in C-2, not affected by the
4 overlay, I mean.

5 ZONING ADMIN. LeGRANT: Right.

6 CHAIRPERSON MILLER: Okay.

7 ZONING ADMIN. LeGRANT: Yes.

8 CHAIRPERSON MILLER: So I mean the
9 overlay was placed upon these uses.

10 ZONING ADMIN. LeGRANT: Right.
11 The Overlay District has a set of regulations
12 on top of the C-2 Base Zone Regulations.

13 CHAIRPERSON MILLER: Okay. Yeah,
14 so correct me if this is not relevant. So
15 when I was looking at uses as a matter-of-
16 right, C-2, 721.1 says "Any use permitted in
17 C-1 Districts under 701 shall be permitted in
18 a C-2 District as a matter-of-right."

19 So I went back to 701.4 which
20 talks about "The following retail
21 establishments shall be permitted in the C-1
22 District as a matter-of-right." And I noticed

1 (u) says "off-premises alcoholic beverages
2 sales." And (l) says "food or grocery store."
3 And 701.5 says "Other service or retail use
4 similar to that provided to in 701.1 and
5 701.4, including assemblage and repair,
6 clearly incidental to the conduct of a
7 permitted service or retail establishment on
8 the premises shall be permitted in a C-1
9 District as a matter-of-right."

10 Now, I'm going kind of quickly,
11 but my point is that I'm wondering, I looked
12 at the prohibited uses in the Reed-Cooke
13 Overlay originally the way the appellants are
14 looking at it.

15 ZONING ADMIN. LeGRANT: Okay.

16 CHAIRPERSON MILLER: That it says
17 it is what it is. I mean, it says
18 "prohibited, off-premises alcoholic beverage
19 sales." The argument the appellant was making
20 the last time and DCRA was making was that
21 well, that doesn't include incidental uses.
22 And I couldn't really follow that that well

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1 when Mr. Sher was doing the explanation.

2 But when I look at 701.4, it looks
3 to me that off-premises alcoholic beverages
4 sales is a retail establishment, because it
5 says the following retail establishments. So
6 to me, that does lend credence to the argument
7 that that refers to a primary use, a liquor
8 store.

9 ZONING ADMIN. LeGRANT: Um-hum.

10 CHAIRPERSON MILLER: And then you
11 have a grocery store separately listed as a
12 matter-of-right use. And then you have this
13 incidental uses part in 701.5 that Mr. Sher
14 was bringing our attention to, I think, in
15 other parts of the regulations.

16 So, No. 1.

17 ZONING ADMIN. LeGRANT: Yes.

18 CHAIRPERSON MILLER: I just want
19 to throw that out, because that seemed to
20 support the argument that the prohibition went
21 to primary uses or retail establishments as
22 opposed to including incidental uses.

1 ZONING ADMIN. LeGRANT: Well, I --

2 CHAIRPERSON MILLER: Is it
3 apparent anywhere else in the regs, you know?

4 ZONING ADMIN. LeGRANT: Well,
5 again, the -- to me, the test is we looked at
6 the overlay, the uses enumerated in 1401 were
7 treated as primary uses. So is the primary
8 use that are listed that are prohibited under
9 that section present? And the determination
10 of Mr. Crews, the previous Zoning
11 Administrator, in which I have, upon my
12 independent re-review of the situation, and I
13 concur, is that primary use that was
14 prohibited is not present in the subject case.

15 CHAIRPERSON MILLER: I think
16 though we were stuck on how do we know it only
17 applied to primary uses? Because the way the
18 prohibition reads, it just says prohibited, A,
19 B, C, D, E.

20 ZONING ADMIN. LeGRANT: Right.
21 And I believe the testimony that I presented
22 went through the logic of what treatment that

1 we -- that the Zoning Administrator does
2 uniformly looking at enumerated uses to treat
3 them as primary uses and then what
4 characteristics distinguished this as an
5 incidental use in terms of floor area, 4
6 percent of the floor area and then what
7 contributing evidence there was as an
8 incidental use that the class of ABC license
9 is not to exceed 15 percent under the Class B
10 License. And then finally, some case law that
11 or a similar case that came to the same
12 conclusion.

13 CHAIRPERSON MILLER: I think the
14 question was though how do we know that 1401.1
15 doesn't include incidental uses?

16 ZONING ADMIN. LeGRANT: Well, why
17 it is not -- well, the --

18 CHAIRPERSON MILLER: How do we
19 know it is not?

20 ZONING ADMIN. LeGRANT: How do we
21 know that?

22 CHAIRPERSON MILLER: I think it

1 might not be, because of the regulatory
2 framework.

3 ZONING ADMIN. LeGRANT: Um-hum.

4 CHAIRPERSON MILLER: When I look
5 back at 701 and see it listed as a retail
6 establishment.

7 ZONING ADMIN. LeGRANT: Okay.

8 CHAIRPERSON MILLER: And then I
9 see language following that about incidental
10 uses.

11 ZONING ADMIN. LeGRANT: Okay.

12 CHAIRPERSON MILLER: I don't know
13 if that means anything to you or if you have
14 anything else?

15 ZONING ADMIN. LeGRANT: Well, only
16 that every portion of the Zoning Code is in
17 some context. It's not -- there is not one
18 sentence of regulations that apply.
19 Certainly, you can read one section of the
20 ordinance, but if, for example, it was a
21 nonconforming use, you -- that modifies how
22 one regulates.

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1 MR. COOPER: Do I, at any point,
2 get to join in this discussion?

3 CHAIRPERSON MILLER: You will.
4 But since the Zoning Administrator's decision
5 is on appeal and they are testifying right
6 now, that's --

7 MR. COOPER: Okay.

8 CHAIRPERSON MILLER: -- why --

9 MR. COOPER: Sorry.

10 CHAIRPERSON MILLER: Yeah, that's
11 okay.

12 MR. COOPER: Sorry.

13 CHAIRPERSON MILLER: Okay. Did
14 you have anything else to add?

15 ZONING ADMIN. LeGRANT: No.

16 CHAIRPERSON MILLER: Did you?

17 VICE CHAIR LOUD: Yes, I just
18 wanted to ask and I'm not certain who on your
19 side of the table to answer the question.
20 What are the fallacies that you see in the
21 legal argument being advanced by Mr. Cooper?
22 And I think that I understand your arguments

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1 from the earlier hearing that we had.

2 And it sounds like that's -- it
3 hasn't varied. You still have pretty much the
4 same argument, that grocery store is a matter-
5 of-right use and that under section 722 or
6 section 701, that the off-premises sales would
7 be an incidental connection to the primary use
8 or an accessory use to the primary use, if I
9 understood correctly.

10 ZONING ADMIN. LeGRANT: Right. I
11 had seen nothing in the argument today that I
12 think I could elaborate on the central part of
13 the Zoning Administrator's decision
14 distinguishing primary from incidental uses.
15 I see nothing that I -- in the hearing and
16 reading the statement today that I think I
17 could elaborate that would speak to that
18 issue.

19 VICE CHAIR LOUD: Well, just help
20 me out, because part of, I think, what I'm
21 trying to do anyway is look through an
22 analytical framework that just focuses on the

1 legal arguments.

2 ZONING ADMIN. LeGRANT: Okay.

3 VICE CHAIR LOUD: And I think I
4 hear Mr. Cooper saying pretty much hogwash.
5 The real way to look at this is, I just had
6 the -- I just had his cite. But the real way
7 to look at it under his analysis would be that
8 it's the BZA through the special exception
9 process alone that would be the body that
10 could grant the kind of relief that Mr. Crews
11 granted in his March 21 letter.

12 And he sort of is ignoring the
13 whole fabric of argument that your side of the
14 table here advanced at the hearing. And has
15 adopted again today, I think. And again, that
16 may not be a question for you. It might be
17 for counsel. And if it's not -- if my
18 question is not clear, let me know.

19 ZONING ADMIN. LeGRANT: Okay.

20 Well, my counsel can join me to say that if he
21 -- he doesn't either address or he objects to
22 premise, that what you need to do is look at

1 that language in isolation and then apply that
2 to the situation.

3 When I'm faced with that, my only
4 response can be well, if we -- we have an
5 appeal process, and that's why we're here, to
6 have the Board examine that did the Zoning
7 Administrator err? I think reasonable people
8 can come to different conclusions. And if
9 that's what the Board tells us, tells me, that
10 no, you erred, it needs BZA relief, I will
11 certainly accept that decision.

12 MS. BOLLING: Mr. Loud?

13 VICE CHAIR LOUD: Yes.

14 MS. BOLLING: From a legal
15 standpoint, the way that we approach it, is
16 the former Zoning Administrator started with
17 the plain language there. However, there was
18 no specification that spoke specifically to
19 either principal or to accessory. So he
20 looked to case law. And as Madam Chair has
21 alluded to, there is also the overriding
22 regulatory framework there that would guide a

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1 matter-of-right, off-sale -- off-premises sale
2 of alcoholic beverages allowed there
3 regardless.

4 And so when he looked, when former
5 Zoning Administrator Bill Crews looked to the
6 case law and saw what this jurisdiction held
7 as incidental, and from the plans that have
8 been submitted and the limitation that was
9 going to be imposed by the ABC of the number
10 of alcoholic sales there, all of this
11 information came to guide his zoning decision
12 that this was acceptable.

13 VICE CHAIR LOUD: Um-hum.

14 MS. BOLLING: And it was in
15 conformance with the Zoning Regulations. So
16 even though it doesn't say specifically
17 principal or accessory, he is saying none and
18 the analysis is more than that. It's the
19 overall --

20 VICE CHAIR LOUD: Okay.

21 MS. BOLLING: -- framework and
22 case law and the jurisdiction taken in.

1 VICE CHAIR LOUD: So to your --
2 you know, it's why we're looking at it
3 favorably to you, you would say well, at a
4 minimum, we have case law on our side and we
5 have the plain language of the regulatory
6 framework? And then one might ask Mr. Cooper
7 the same question, what -- apart from just
8 cerebral interpretation, what support would he
9 have for the arguments he is making?

10 MS. BOLLING: Yes.

11 VICE CHAIR LOUD: Okay.

12 MR. GLASGOW: And Members, on
13 behalf of the property owner, we had concurred
14 with the District's analysis, obviously. I
15 mean, it was in our favor. And in our
16 presentation on this appeal, we can certainly
17 have Mr. Sher go through, because he did
18 analyze with respect to the --

19 VICE CHAIR LOUD: I remember that.

20 MR. GLASGOW: -- Reed-Cooke
21 Overlay that everyone of those uses --

22 VICE CHAIR LOUD: Right.

1 MR. GLASGOW: -- is stated as the
2 Chair was talking about as a principal use
3 somewhere. Because otherwise, I think, Mr.
4 Loud, as you analyze this in the framework of
5 the Zoning Regulations, you get to the point
6 where you are reading accessory uses out of
7 the regulations. And if accessory uses were
8 permitted, there would be no reason to say
9 that principal, incidental uses are permitted,
10 because they otherwise wouldn't be permitted
11 in that Zoning District or you don't need the
12 concept of accessory uses.

13 Because they don't need to be
14 permitted twice. They don't need to be stated
15 permitted matter-of-right and listed
16 somewhere. They have to be something that's
17 customarily an incidental and that got back to
18 the chart with respect to the grocery stores
19 and how many have ABC licenses and that type
20 of thing to show that yes, this is indeed an
21 accessory use under the District's and the
22 property owner's position.

1 Then if it's a permitted accessory
2 use, then it's permitted and we didn't need to
3 go to the Board of Zoning Adjustment.

4 VICE CHAIR LOUD: Thanks and I do
5 appreciate the follow-up on the chart.

6 MR. GLASGOW: Thank you.

7 CHAIRPERSON MILLER: Maybe Mr.
8 Sher should come up here, since he is so
9 familiar with that.

10 MR. GLASGOW: Mr. Sher?

11 CHAIRPERSON MILLER: Here is a
12 question for you. You know, I started looking
13 in the index under prohibited uses and I
14 started looking at other provisions where
15 there were prohibited uses like there are in
16 the overlay. And in some of those cases, I
17 believe, it said well, incidental uses are
18 still allowed or something. I've got to go
19 look at it specifically. But I think it did.

20 And this one doesn't, so I'm
21 wondering if you interpret, I'll look that up
22 specifically, the overlay as prohibiting

1 accessory uses related to the primary uses
2 here, number one, and if grocery store is a
3 permitted use, so, therefore, it's not
4 covered. Their incidental use, their
5 incidental sales wouldn't be covered under the
6 prohibited uses, correct?

7 MR. SHER: For the record, my name
8 is Steven Sher, Director of Zoning and Land
9 Use Services of the Law Firm of Holland and
10 Knight. That was the analysis that I went
11 through and that I tried to lay out for the
12 Board the last time, perhaps not articulately
13 enough.

14 The grocery store has a lot of
15 different components. And it sells things
16 that -- it encompasses things that might be
17 still called a butcher shop or a florist shop
18 or a film development shop or a liquor store
19 or a drug store. It sells all those things.
20 But it has a Certificate of Occupancy and it
21 says grocery store.

22 And all of those things are

1 included within the concept of a grocery
2 store. And so when I looked at the framework
3 of the regulations as you have been talking
4 about, going back to the C-1 and C-2
5 Districts, because C-2 incorporates all of the
6 uses of C-1, and then you look at that list of
7 uses that is prohibited in the Reed-Cooke
8 Overlay in section, whatever it is, 140 --
9 sorry.

10 CHAIRPERSON MILLER: 1401.

11 MR. SHER: 1401.1. Every one of
12 those uses, with one exception, is listed as
13 a principal permitted use in either C-1 or C-
14 2, as either a retail or service use. Every
15 one. The only one that is not was the video
16 game parlor, that's just not listed anywhere.

17 So as -- my conclusion was what
18 the Reed-Cooke Overlay was talking about was
19 prohibiting as -- even though it doesn't say
20 it, it's not on the plain black and white of
21 the book, that when it said the following uses
22 shall be prohibited, in my mind that means the

1 following principal uses shall be prohibited.

2 The Reed-Cooke doesn't write out
3 of the underlying zone the basic authority to
4 have accessory uses, that's still there. And
5 it doesn't say that any use, whether it is a
6 grocery store or a bank or anything else, you
7 know, could a bank have a travel agency in it
8 and could that be incidental? You can do
9 almost anything in a bank these days, but a
10 bank is not prohibited, so it's probably not
11 an issue to spend a great deal of time
12 worrying about it in this context.

13 What my point is, I think, that
14 the principal uses that are permitted have not
15 been deprived by the overlay of the
16 opportunity to have customarily, incidental
17 and subordinate uses within the overlay. And
18 that the list of uses that are prohibited are
19 all specified as principal uses back in the C-
20 1 and C-2 District Regulations, sections 701
21 and 721.

22 And I went back and forth in the

1 book looking at each one of those and that's
2 how I reached that conclusion.

3 CHAIRPERSON MILLER: Okay. This
4 is what I'm seeing. First of all, that off-
5 premises alcoholic beverage sales, I think
6 this is what you have been saying, is a
7 principal use in 701. It's a retail
8 establishment and, therefore, the prohibition
9 goes to a retail establishment, not the sale
10 as an incidental use to something that's not
11 prohibited by the overlay. Is that correct?

12 MR. SHER: Yes. What this
13 establishment is is a grocery store. And a
14 grocery store is not prohibited. It's
15 permitted. It's permitted in C-1, therefore,
16 in C-2 and, therefore, in Reed-Cooke, because
17 it's not prohibited. So if a grocery store is
18 permitted, what rides along with the grocery
19 store is also permitted. You have all of the
20 indicia of a grocery store.

21 VICE CHAIR LOUD: But you need
22 section 722.3 to get you where you want to go,

1 right?

2 MR. SHER: Yes.

3 VICE CHAIR LOUD: Okay.

4 MR. SHER: Yes, that's the
5 section.

6 VICE CHAIR LOUD: You still have
7 to have that?

8 MR. SHER: "Other accessory uses,
9 customarily, incidental and subordinate to the
10 uses permitted in C-2 District shall be
11 permitted in the C-2 District."

12 VICE CHAIR LOUD: Okay.

13 MR. SHER: So if I can have a
14 grocery store in the C-2 District, then I can
15 have all the incidental uses that go along
16 with a grocery store.

17 VICE CHAIR LOUD: Okay.

18 MR. SHER: That is not withdrawn
19 or proscribed or somehow lifted out of the
20 regulations by the Reed-Cooke Overlay, at
21 least that's my opinion.

22 MEMBER DETTMAN: Mr. Sher, I just

1 think I'm finally following your argument that
2 over time the sale of alcoholic beverages has
3 sort of become a customarily and incidental to
4 a grocery store over time. You had mentioned
5 the butcher shop and the cheese shop or
6 whatever.

7 I guess I just want to throw this
8 out there and get your reaction given your
9 expertise is that a very, very strict reading
10 of the Reed-Cooke Overlay considering the
11 regulatory framework that's set up in the
12 regs, I guess maybe one could try to make the
13 argument that the exclusion of an accessory
14 use provision in the overlay might suggest
15 that accessory uses are not allowed in the
16 overlay.

17 I guess the other one would be
18 that since it's not there, the accessory use
19 is of the underlying zoning are still in tact.
20 And so you could just say that the latter
21 argument is the one that prevails or you could
22 have some additional information.

1 MR. SHER: Well, the latter
2 argument was what I said just before you asked
3 your question. I don't see -- if you read the
4 Reed-Cooke Overlay, you know, it talks about
5 the Reed-Cooke Overlay and the underlying
6 Districts shall together constitute the Zoning
7 Regulations for this particular area.

8 And the overlay applies to more
9 than just C-2-B. It's R-5 and other Districts
10 that it applies to, but you've got to take the
11 two together. And I don't see the overlay
12 taking out of the regulations, the allowance
13 for accessory uses that is permitted in the
14 underlying C-2-B. That's my view.

15 CHAIRPERSON MILLER: Okay. Not
16 hearing any -- do you have more questions?
17 No. Let's see, where are we? You will get a
18 chance to cross examine. Well, let's see.
19 You finished your case?

20 MS. BOLLING: Yes, Madam Chair.

21 CHAIRPERSON MILLER: And we asked
22 Mr. LeGrant some questions. And then we asked

1 Mr. Sher to come up. So we didn't give Mr.
2 Cooper yet an opportunity to cross examine Mr.
3 LeGrant. Is that correct? I think that's
4 where we are in the process. Is your
5 microphone on?

6 MR. COOPER: That's part of where
7 we are, but this is a legal issue and a legal
8 argument that I'm also direct to the arguments
9 of counsel as well. That aside, let me -- my
10 first response --

11 CHAIRPERSON MILLER: You will get
12 rebuttal, too, you know that.

13 MR. COOPER: I mean, eventually,
14 I'm going to be down to nothing to say here on
15 these relevant issues. I don't want to be --
16 well, part of the -- the biggest part of the
17 problem is you have lay people in this
18 complicated process who have some passion
19 behind their purpose of their being here. And
20 we're looking at counsel and the property
21 owner making legal arguments one way when the
22 law favors when the interpretation is

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1 convenient, and quite another way when being
2 held to the requirements of the law.

3 CHAIRPERSON MILLER: Mr. Cooper,
4 it's the time to ask any questions on the
5 testimony. You'll get a chance for rebuttal
6 at the closing argument.

7 MR. COOPER: Well, what part of it
8 was testimony?

9 CHAIRPERSON MILLER: Well,
10 certainly, Mr. Sher testified as to why he was
11 interpreting the regulations.

12 MR. COOPER: Okay.

13 CHAIRPERSON MILLER: That's what
14 this is mainly legal.

15 MR. COOPER: All right, all right.
16 Okay. All right.

17 CHAIRPERSON MILLER: There may not
18 be cross.

19 MR. COOPER: Let's cut to the
20 chase. First of all, this argument is
21 academic. My position is that the decision
22 was not the Zoning Administrators to make

1 under any basis. Flipping back and forth from
2 702, 706, whatever or whatever other argument
3 they have to make, it's the Board of Zoning
4 Adjustment's argument.

5 CHAIRPERSON MILLER: Is this your
6 closing argument?

7 MR. COOPER: No. Let --

8 CHAIRPERSON MILLER: Because this
9 is time for cross examination.

10 MR. COOPER: All right, all right.
11 Let me say to Mr. Sher. Mr. Sher, you said
12 sometimes things are written in the case of
13 legislative language in a way that perhaps the
14 drafter didn't intend them to apply, but
15 that's what they say and that's what we must
16 follow. The law we are stuck with.

17 I think that's on page 257/258,
18 lines 18.6 of the transcript. Counsel in
19 their pleadings argue.

20 CHAIRPERSON MILLER: Mr. Cooper,
21 is this leading to a question?

22 MR. COOPER: Okay. Let's -- okay.

1 Then let's go to rebuttal.

2 CHAIRPERSON MILLER: No, we're not
3 -- we will let you know when we're at
4 rebuttal. I have to make sure we're finished
5 with the other parties.

6 MR. COOPER: Yes, but at what
7 point do I get to rebut these --

8 CHAIRPERSON MILLER: At rebuttal.

9 MR. COOPER: -- arguments?

10 CHAIRPERSON MILLER: At rebuttal.
11 You get the last word.

12 MR. COOPER: Okay.

13 CHAIRPERSON MILLER: Do you have
14 any -- the Board has had an opportunity to ask
15 questions that were on its mind, I think. Is
16 there more that you all want to add? DCRA,
17 you have rested your case, right?

18 MS. BOLLING: Yes, Madam Chair.

19 CHAIRPERSON MILLER: Okay.

20 MR. GLASGOW: We're not finding
21 the quote.

22 CHAIRPERSON MILLER: Well, forget

1 it right now. Now, we are back to -- because
2 I couldn't tell that there was really a
3 question there and so, therefore, we're not --

4 MR. GLASGOW: I agree --

5 CHAIRPERSON MILLER: -- going to--

6 MR. GLASGOW: -- Madam Chair. We
7 just want to have that that was attributed as
8 a statement of Mr. Sher. I don't know where
9 it was leading, but I want it stricken from
10 the record at least for right now.

11 CHAIRPERSON MILLER: Okay. It's
12 applicant's case right now. Other than Board
13 questions, I want to see if you had any other
14 testimony.

15 MR. GLASGOW: We are seeing
16 something similar on page 259, but it's not a
17 quote.

18 CHAIRPERSON MILLER: Okay.

19 MR. GLASGOW: Right. The
20 transcript -- Mr. Sher says it right, the
21 transcript is what it is.

22 CHAIRPERSON MILLER: Right.

1 MR. GLASGOW: Page 259, the Board
2 can read it.

3 CHAIRPERSON MILLER: Exactly,
4 exactly. Okay.

5 MR. GLASGOW: All right.

6 CHAIRPERSON MILLER: I have a
7 question for Mr. Sher, and that is, is there
8 any other analogous situation in the
9 regulations you would want to point to, you
10 know, to this situation? You know, where
11 there is an overlay and there are uses allowed
12 and then uses prohibited by the overlay.

13 I mean, that would be helpful to
14 the issue at hand. I know there are overlays
15 and, you know, the restricted uses that are
16 allowed in the underlying zones.

17 MR. GLASGOW: Right. I guess if
18 we can't find it right here, we can submit it
19 for the record.

20 CHAIRPERSON MILLER: Okay.

21 MR. GLASGOW: Because my initial
22 reaction was CR, but as Steve says, CR is a,

1 you know, limited zone, but it's not an
2 overlay.

3 CHAIRPERSON MILLER: Okay. I
4 mean, because what we're doing here is trying
5 to make sense of this regulation in the
6 context of other regulations of the regulatory
7 framework. And so if there was another
8 regulatory framework that showed that we were
9 interpreting it correctly, that would be
10 great. I mean, it may not.

11 MR. GLASGOW: We're looking at the
12 DD District right now. It has got its own set
13 of definitions, you know, in the back in 1799,
14 so it may not be as applicable. We can look
15 rather than spend time right now. We can look
16 and get and submit for the record, if that
17 would be the Board's preference.

18 MR. COOPER: A point of
19 information. When I was attempting to get to
20 some questions, it was deemed argument. When
21 I say okay, let's go to argument, they go back
22 into presenting, advocating on their behalf,

1 for their side.

2 CHAIRPERSON MILLER: No, Mr.
3 Cooper.

4 MR. COOPER: It keeps me --

5 CHAIRPERSON MILLER: Okay.

6 MR. COOPER: -- sidelined and all
7 of this sophistic fluff is put in the record
8 without any response.

9 CHAIRPERSON MILLER: Mr. Cooper,
10 you raised in your appeal a question about
11 interpreting the regulations and that's what
12 the Board now job is to do. And we are trying
13 to gather as much expertise on that question
14 as we can. We asked them the question, that's
15 why they are responding.

16 MR. COOPER: Yeah, okay. All
17 right. Well --

18 CHAIRPERSON MILLER: This is the
19 last hearing and this is the last opportunity
20 for someone to verbally communicate about how
21 to interpret our regulations.

22 MR. COOPER: Yeah. Other than

1 plain English, you mean.

2 CHAIRPERSON MILLER: There's plain
3 English, but there's also -- that doesn't
4 always fly --

5 MR. COOPER: Well --

6 CHAIRPERSON MILLER: -- in these
7 regulations.

8 MR. COOPER: -- the cases I just
9 cited that the Government cited --

10 CHAIRPERSON MILLER: I know what
11 you are saying. I'll just say that I have
12 been there. I have been there interpreting
13 the plain meaning of the words only to have
14 that not be the case.

15 MR. COOPER: Well --

16 CHAIRPERSON MILLER: So according
17 to the Court of Appeals, so it's not always --

18 MR. COOPER: I don't believe --

19 CHAIRPERSON MILLER: -- the exact
20 plain meaning of the words.

21 MR. COOPER: One of the cases the
22 Government cited is the Court of Appeals.

1 They say the plain meaning of the law, the
2 language, they used it to rebut my request for
3 a subpoena. Now, they are backing away from
4 it. If the requirement applies to my request
5 for a subpoena --

6 CHAIRPERSON MILLER: Okay.

7 MR. COOPER: -- it should apply to
8 their fallacious interpretation --

9 CHAIRPERSON MILLER: We're going
10 to let you --

11 MR. COOPER: -- of this provision.

12 CHAIRPERSON MILLER: Okay.

13 MR. COOPER: It's English.

14 CHAIRPERSON MILLER: Mr. Cooper,
15 you're going to get your closing remarks --

16 MR. COOPER: Okay.

17 CHAIRPERSON MILLER: -- when we
18 get to closing.

19 MR. COOPER: Okay. I'm about to
20 have a senior moment. May I step out for five
21 minutes?

22 CHAIRPERSON MILLER: Sure.

1 MR. COOPER: Thank you.

2 CHAIRPERSON MILLER: So I think we
3 all should break in that case for five
4 minutes.

5 (Whereupon, at 5:21 p.m. a recess
6 until 5:41 p.m.)

7 CHAIRPERSON MILLER: Okay. We're
8 back on the record. I believe we are with the
9 intervenor, right? Did you have more of your
10 case that you want to make or did you --

11 MR. GLASGOW: No, I think what we
12 were going to focus on today, the Board has
13 asked the questions on, so we are finished.

14 CHAIRPERSON MILLER: Okay. Good.
15 I don't think we have any other questions.
16 Okay. Now, we are at Mr. Cooper for closing
17 argument, I believe.

18 MR. COOPER: One quick question
19 before I get into that. Who has the last word
20 in my appeal, in terms of argument?

21 CHAIRPERSON MILLER: You do.

22 MR. COOPER: Okay.

1 CHAIRPERSON MILLER: Is the ANC
2 here? Let me see, I'm sorry, we're not ready
3 for rebuttal yet.

4 MR. COOPER: Okay.

5 CHAIRPERSON MILLER: Are you
6 planning to testify in this case?

7 MR. REYNOLDS: Yes, ma'am.

8 CHAIRPERSON MILLER: Well, come on
9 forward then. It's your turn.

10 MR. REYNOLDS: Oh.

11 CHAIRPERSON MILLER: Sorry, Mr.
12 Cooper, I didn't realize the ANC was here.

13 MR. COOPER: Um-hum.

14 CHAIRPERSON MILLER: Would you
15 introduce yourself for the record, when you
16 are ready?

17 MR. REYNOLDS: Good evening. My
18 name is Wilson Reynolds and I am with ANC-1C
19 and I'll reintroduce that in the testimony
20 itself, also.

21 CHAIRPERSON MILLER: Sorry, what
22 did you say, you will what?

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1 MR. REYNOLDS: It's also stated in
2 the testimony.

3 CHAIRPERSON MILLER: That was just
4 handed out to us?

5 MR. REYNOLDS: Yes, ma'am.

6 CHAIRPERSON MILLER: Okay. Could
7 you just clarify for us, we remember somewhat
8 of an issue as to whether you were authorized
9 to speak on behalf of the ANC in the companion
10 case.

11 MR. REYNOLDS: Oh, that's also in
12 my testimony.

13 CHAIRPERSON MILLER: Oh, okay.

14 MR. REYNOLDS: But I'll address it
15 right now or I'll go into the testimony,
16 whatever you would prefer.

17 CHAIRPERSON MILLER: Well, is it
18 going to get you off track if you address it
19 now?

20 MR. REYNOLDS: Not at all.

21 CHAIRPERSON MILLER: Okay.

22 MR. REYNOLDS: It's in the very

1 beginning.

2 CHAIRPERSON MILLER: All right.

3 So that's good, so then we will understand
4 where you are coming from. Okay.

5 MR. REYNOLDS: Okay. And may I
6 say that I congratulate the Board on your
7 stamina. I've been watching you since the
8 hearings you were conducting this morning on
9 4th Street. It's quite impressive.

10 CHAIRPERSON MILLER: Thank you.

11 MR. REYNOLDS: Madam Chair and
12 Members of the Board, thank you again for the
13 opportunity to come before the Board on the
14 case involving the March 21, 2007
15 correspondence by then Zoning Administrator
16 Bill Crews and off-premise alcoholic beverage
17 sales within the Reed-Cooke Overlay District
18 as appealed by the Reed-Cooke Neighborhood
19 Association.

20 My name is Wilson Reynolds and I
21 am here today representing Advisory
22 Neighborhood Commission 1C of Adams Morgan and

1 Ward 1. In addition, I have the privilege of
2 being Chair of ANC-1C Planning, Zoning and
3 Transportation Committee, otherwise known as
4 the PZT Committee, and I serve the voters of
5 Single Member District 07, which is the
6 District where the applicant, Harris Teeter,
7 will conduct food sales and seek permission to
8 sell off-premise alcoholic beverages.

9 As you will recall at the
10 proceedings before the Board on December 18th
11 past and upon instruction of the Board, I did
12 present correspondence to the Board of action
13 taken by ANC-1C to act as intervenor in this
14 case. A copy is attached to this testimony.
15 And by the way, the original was left with you
16 on December 18th.

17 The correspondence authorizes my
18 presentation before you today and shares with
19 the Board the text of a motion passed at a
20 general session of ANC-1C.

21 MR. GLASGOW: Madam Chair, can I
22 ask one clarification? This is not the Appeal

1 of the Reed-Cooke Neighborhood Association.
2 We recognize he was -- he had authorization to
3 appear at that. I didn't know that he had
4 authorization to appear in this appeal as
5 opposed to the Appeal of Reed-Cooke
6 Neighborhood Association.

7 MR. REYNOLDS: If I may respond?

8 CHAIRPERSON MILLER: Absolutely.

9 MR. REYNOLDS: I was given the
10 opportunity to speak at the first appeal with
11 instructions to come back and clarify ANC-1C's
12 position on this, which I did. So I may have
13 put the cart before the horse, but I merely
14 tried to follow instructions.

15 MR. COOPER: But what you're
16 saying now is that you are here in reference
17 to the AN -- to the Reed-Cooke Appeal. This
18 is the Appellants 17677 proceeding. I had a
19 question about that, too.

20 MR. REYNOLDS: That is absolutely
21 correct. However, on December 18th, I was not
22 given the opportunity to put on a case then.

1 MR. COOPER: Well --

2 CHAIRPERSON MILLER: Wait. Did we
3 forget about you on the 18th? Is that what
4 you're saying or no, because you weren't
5 authorized?

6 MR. REYNOLDS: I wouldn't go --

7 CHAIRPERSON MILLER: I don't
8 remember.

9 MR. REYNOLDS: -- that far. I was
10 here.

11 CHAIRPERSON MILLER: Yeah.

12 MR. REYNOLDS: But, however, the
13 discussion and the intensity of the questions
14 being raised about being able to continue the
15 case and the fact that, as you may recall, it
16 had been a long day and we were quite late in
17 to the evening, and events seemed to have
18 accelerated a little bit, but I was able to at
19 least present the original of the
20 correspondence.

21 MR. COOPER: But the -- my
22 question is he is continuing the Reed-Cooke

1 Appeal in the middle of my appeal?

2 MR. REYNOLDS: I would object to
3 that.

4 MR. COOPER: I'm just -- for
5 clarification, I'm just trying to figure that
6 out. Is that what we're doing here? Because
7 as he introduced himself, he said he was
8 speaking in the Reed-Cooke Appeal. I'm not
9 saying he shouldn't have an opportunity to
10 speak on the Reed-Cooke Appeal, but we're in
11 the middle of --

12 CHAIRPERSON MILLER: I understand
13 that the issue that you will be speaking to is
14 the exact same issue. Is that correct?

15 MR. REYNOLDS: Yes, ma'am.

16 CHAIRPERSON MILLER: As the
17 previous.

18 MR. REYNOLDS: And at that time,
19 the only appeal that had been put on had been
20 the Reed-Cooke Appeal. There was no
21 opportunity to take action as an ANC on Mr.
22 Cooper's appeal, because, frankly, we did not

1 know what it was.

2 MR. COOPER: And I understand he
3 is entitled to do whatever he would like with
4 respect to the Reed-Cooke Appeal, but we're in
5 the middle of my appeal right now.

6 CHAIRPERSON MILLER: Okay.

7 MR. COOPER: And I would like that
8 out of the way and then --

9 CHAIRPERSON MILLER: My
10 understanding of --

11 MR. COOPER: -- whatever --

12 CHAIRPERSON MILLER: -- the law is
13 that the ANC is a part as a matter-of-right in
14 the appeal in their jurisdiction. So he can
15 testify in this case for the ANC. And if the
16 question is whether or not your testimony is
17 authorized for this appeal as opposed to the
18 other appeal, and you say it is, but it's not
19 written here, you can submit an authorization
20 from the ANC afterwards, after the hearing
21 confirming that your testimony represents the
22 position of the ANC.

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1 MR. COOPER: On this appeal?

2 CHAIRPERSON MILLER: On this
3 appeal. If we don't get that, then we won't
4 give the ANC the great weight, because we will
5 not have gotten that confirmation. That is
6 allowed to -- that it be submitted after the
7 hearing.

8 MR. COOPER: So if he just
9 restates that he is talking about this appeal
10 and not the Reed-Cooke Appeal, that covers it?
11 That's the Board's -- that's the way the Board
12 sees that? It's fine with me. But what he
13 said so far is he is talking about the Reed-
14 Cooke Appeal. I don't want to agree with --

15 CHAIRPERSON MILLER: No.

16 MR. COOPER: -- Mr. Glasgow, but I
17 do --

18 CHAIRPERSON MILLER: Mr. Glasgow,
19 what --

20 MR. COOPER: -- have the same
21 question.

22 CHAIRPERSON MILLER: No. Well,

1 there are two different issues. One is is he
2 authorized to speak on behalf of the ANC in
3 this appeal?

4 MR. COOPER: I would concede that.

5 CHAIRPERSON MILLER: Well, I don't
6 know that Mr. Glasgow would.

7 MR. REYNOLDS: However, if it
8 would be of assistance to the Board in these
9 deliberations, because I realize this has
10 become rather lengthy and complex, if the
11 Board would prefer that I wait until this
12 section of the proceedings are finished and
13 then come back and start over and be able to
14 make this statement into the record on behalf
15 of the Reed-Cooke Appeal, I'll be happy to do
16 that, if that would be of assistance.

17 CHAIRPERSON MILLER: No, this is
18 the time. And I think that -- I don't recall,
19 you know, it has been a while, exactly what
20 happened in the last proceeding, why you
21 didn't give testimony on behalf of the ANC,
22 but my point is you are speaking to an issue.

1 It's the same issue in both cases.

2 MR. REYNOLDS: It is the same
3 issue, ma'am. And I believe --

4 CHAIRPERSON MILLER: And you have
5 been authorized to speak to that issue,
6 correct?

7 MR. REYNOLDS: Correct.

8 CHAIRPERSON MILLER: All right.
9 So if there is a question whether you are
10 authorized to speak to the issue in this
11 particular case, I think that the rules allow
12 you to submit a confirmation from your ANC
13 that, yes, they, in fact, authorized you to
14 present the testimony in this case.

15 MR. REYNOLDS: I would view that
16 in the matter of a technical correction.

17 CHAIRPERSON MILLER: Exactly.

18 MR. REYNOLDS: All right.

19 CHAIRPERSON MILLER: So we can
20 leave the record open for that. Now, do you
21 have any other concerns?

22 MR. GLASGOW: No, that's fine. I

1 just wanted to understand what I was reading.
2 You know, where we were in the process. And
3 if he has a letter to confirm that to be
4 submitted to the record, that's fine.

5 CHAIRPERSON MILLER: Okay. Now, i
6 haven't read through your testimony, but,
7 basically, you are going to be, I assume,
8 addressing how to interpret 1401.1 as it
9 applies to the sale of, whatever, off-premises
10 sale of alcoholic beverages.

11 MR. REYNOLDS: Off-premises
12 alcohol in the Reed-Cooke Overlay and --

13 CHAIRPERSON MILLER: Okay.

14 MR. REYNOLDS: -- that is my
15 intention, ma'am.

16 CHAIRPERSON MILLER: Okay.

17 MR. REYNOLDS: So I may continue?

18 CHAIRPERSON MILLER: Yes.

19 MR. REYNOLDS: Thank you. There
20 was a motion passed by ANC-1C held on December
21 5th on the issue, which I outlined, regarding
22 sales and the Reed-Cooke Overlay and the

1 Zoning Administrator, Bill Crews, letter. I
2 will then pick up from the paragraph.

3 I will not repeat the entire
4 motion, but will reference the germane section
5 as voted on and passed on, the motion clearly
6 states the position of ANC-1C in this case.
7 However, the entire correspondence is at the
8 back here as an exhibit, but I'm only
9 referencing a portion of it.

10 "ANC-1C does endorse the validity
11 of the Reed-Cooke Overlay District Chapter 14,
12 Title 11 DC Municipal Regulations and
13 specifically section 1400.4 of Chapter 14, as
14 clear and irrefutable justification by the
15 Board of Zoning Adjustment to instruct the
16 applicant, Harris Teeter Incorporated, to seek
17 permission to sell alcoholic beverages by
18 seeking a special exception as stated in
19 section 1403 of Chapter 14 as said DCMR Title
20 11."

21 There is typo there. "Events have
22 overtaken this correspondence to now include

1 action by the applicant, Harris Teeter, Inc.,
2 to amend the Reed-Cooke Overlay District
3 before the full Zoning Commission. This
4 attempt to rewrite the RC Overlay through the
5 good offices of the Office of Planning is
6 again an attempt to seek permission to sell
7 alcohol, but not seek a special exception
8 before this body.

9 On December 11, 2007, the legal
10 firm of Holland and Knight presented to the
11 Board correspondence to postpone the
12 proceedings of December 18th, pending the
13 decision by the Zoning Commission of Case 07-
14 33. The proposed text amendment to the Reed-
15 Cooke Overlay. The Board denied the
16 postponement. The Board was right.

17 Again, from the position of ANC-
18 1C, the Board's decision was correct and
19 reflects the language of the motion of
20 December 5th by stating that 'ANC-1C does
21 endorse the validity of Chapter 14 as clear
22 and irrefutable justification by the Board of

1 Zoning Adjustment to instruct Harris Teeter
2 Incorporated to seek a special exception as
3 stated in section 1403 of Chapter 14.'

4 ANC-1C does urge the Board to
5 continue in these efforts to educate the
6 applicant."

7 During the BZA proceedings in
8 November of 2007, Mr. Chip Glasgow of Holland
9 and Knight proffered case law referencing
10 Arizona Court of Appeals 1969 case of Sevilla
11 v. Sweat as relevant to these proceedings,
12 since the decision was to allow a grocery to
13 sell off-premises beer and wine. A copy of
14 the case is attached to this testimony.

15 I submit for your consideration
16 that Sevilla v. Sweat is, in fact, not
17 relevant case law for the case under
18 consideration today. I submit this on two
19 grounds. First, the Phoenix, Arizona case
20 dealt with a grocery store that due to zoning
21 changes in 1955 and 1962 was operating as a
22 nonconforming use. And if permission was

1 allowed or not allowed for beer and wine sales
2 for a nonconforming grocery store, no
3 provision of the Reed-Cooke Overlay District
4 prohibits a grocery store as a use provision
5 under section 1401.1.

6 It may actually encourage under
7 the purposes of the RC Overlay District under
8 section 1400.2(a)(III) to encourage small
9 scale business development that will not
10 adversely affect the residential community.
11 Although, an argument can be made that a
12 37,450 square foot business is not exactly
13 "small scale or that it will not adversely
14 affect the residential community" or perhaps
15 come into conflict with sections 1400.2(b) and
16 (c). Nevertheless, a grocery store is a
17 conforming use inside the Reed-Cooke Overlay
18 District.

19 Second, Sevilla v. Sweat does not
20 bear relevance to the case before us because
21 the grocery store in Phoenix, Arizona case was
22 well-established and operating since 1951.

1 This is not the condition with Harris Teeter
2 as the grocer in this scenario has yet to open
3 and could have filed for special exception as
4 early as February 18, 2005.

5 Members of the Board, I must
6 confess to you that I am not a trained
7 attorney. In preparing to represent the ANC,
8 I did, however, attempt to work and
9 familiarize myself with the complexities of
10 this case.

11 I reviewed the transcripts of the
12 BZA November 2005 case where certain zoning
13 variances were debated, but no application was
14 made for a special exception to sell beer and
15 wine. I have reviewed the above referenced
16 Sevilla v. Sweat case. I enlightened myself
17 reading briefs from Holland and Knight.

18 Yet, in the attempts at cerebral
19 improvement, I was not able to get to the
20 center of the most important issue until I re-
21 read the summary posted for this case. "From
22 a decision of the Zoning Administrator to

1 allow off-premise alcoholic beverage sales as
2 an accessory use to a grocery store."

3 This took me to page 25-20 and 25-
4 21 of Title 11 of DC Municipal Regulations
5 section 2522 entitled "Minor Flexibility by
6 Zoning Administrators Ruling." I am certain
7 the Board is familiar with this section. I
8 was not. However, it is clear that the
9 "flexibility" allowed to Zoning Administrator
10 is limited, dealing with deviations of lot
11 area, lot occupancy, roof structure setback
12 and other dimensional definitions.

13 Viewed through the prism of
14 section 2522, Mr. Bill Crews' March 21, 2007
15 correspondence is revealed for what it really
16 and truly is. It is merely an opinion on
17 official stationery. It is not a decision or
18 a ruling allowed under section 2522. A copy
19 is attached for your review, that is of 2522.

20 In his own words, Mr. Crews states
21 "This is to confirm the substance of our
22 discussion on Thursday, January 18, 2007,

1 concerning the above referenced project,"
2 referencing Harris Teeter.

3 In short, Mr. Crews and Mr.
4 Glasgow, the recipient of the letter, had a
5 conversation. Mr. Crews put down on paper
6 what they talked about. Again, at the end of
7 the correspondence, Mr. Crews writes
8 "Accordingly, I concur that the subordinate
9 sale of beer and wine for off-premises
10 consumption is an allowable accessory use for
11 a retail grocery store and that the
12 restriction in section 1401(b) applies to
13 principal uses only and not to accessory sales
14 within a grocery store."

15 Again, in short, Mr. Crews and Mr.
16 Glasgow had a conversation. Mr. Crews agrees
17 with Mr. Glasgow. I concur on the accessory
18 alcohol sales issue, that's where it ends.
19 Nowhere in the correspondence does Mr. Crews
20 declare that this letter is a ruling or a
21 decision. Nowhere did Mr. Crews use language
22 such as under the authority granted to me

1 under section, etcetera, I am authorized to
2 grant, etcetera.

3 Mr. Crews does not take a formal
4 action in writing, because he does not have
5 the authority and knows he does not have the
6 authority. He does do what he is completely
7 entitled to do, render an opinion, which is
8 his position -- which his position and office
9 allow.

10 The authority for a ruling and the
11 reason ANC-1C does recommend that the Board
12 rule on this case to enjoin Harris Teeter,
13 Inc. to follow the rules does like clearly and
14 squarely in section 1403.1 of the Reed-Cooke
15 Overlay. The legal and appropriate procedure
16 to seek a special exception in the Reed-Cooke
17 Overlay District when granted by the true and
18 legal authoritative body for this procedure,
19 you, the Board of Zoning Adjustment of the
20 District of Columbia.

21 In conclusion, ANC-1C respectfully
22 requests that the Board of Zoning Adjustment

1 support the appeal of the Reed-Cooke
2 Neighborhood Association in this case. This
3 concludes my presentation. Thank you for your
4 patience as I shared these comments with you.
5 I'll be happy to answer any questions.

6 CHAIRPERSON MILLER: Does the
7 Board have any questions? Were you involved
8 with the overlay at all, with the Overlay
9 Regulations?

10 MR. REYNOLDS: In the creation of
11 them?

12 CHAIRPERSON MILLER: Um-hum.

13 MR. REYNOLDS: No, I was not.

14 CHAIRPERSON MILLER: Okay.

15 MR. REYNOLDS: I do have knowledge
16 of them and I have met and talked and had
17 meetings with the founders of the Overlay
18 District, one of whom is sitting in this room
19 right now. And if I may, Madam Chair, there--
20 if I could make a comment regarding the
21 discussion that was taken place regarding
22 ancillary uses and accessory uses and

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1 incidental uses on this, which I believe
2 speaks to the question you were just asking me
3 now about my involvement with the Reed-Cooke
4 Overlay District, based on my involvement with
5 this issue and the Reed-Cooke Overlay and the
6 number of years that I have been living in
7 that community itself, I truly believe that
8 1400.2(b) is the true purpose and intention of
9 what the founders and drafters of the Reed-
10 Cooke Overlay were speaking about.

11 To ensure that new nonresidential
12 uses served the local community, by providing
13 retail goods, personal services and other
14 activities that contribute to the satisfaction
15 of unmet social, service and employment needs
16 in the Reed-Cooke and Adams Morgan community.

17 I also believe that there are some
18 sections here which do come into play that are
19 also significant 1400.3, "shall constitute the
20 Zoning Regulations," but significant to the
21 point of discussion about ancillary sales or
22 accessory sales, I would gently urge you to

1 seek the guidance, and I think this is
2 critical and very important, of 1400.4 "Where
3 there are conflicts between this chapter and
4 the underlying Zone District, the more
5 restrictive regulation shall apply."

6 This to me has been a beacon of
7 direction and guidance, as I have tried to
8 understand these many issues before us.

9 CHAIRPERSON MILLER: I guess my
10 question is if we were to read the regulations
11 as DCRA and the intervenors suggest, I'm not
12 sure there is a conflict.

13 MR. REYNOLDS: There's a number of
14 ways I could answer that. If you could just,
15 please, help me understand.

16 CHAIRPERSON MILLER: Okay. For
17 instance, I think if we were to read the
18 interpretation, if we were to interpret the
19 overlay as prohibiting liquor stores, you
20 know, primary use, primary sale of alcoholic
21 beverages, is that in direct conflict with
22 allowing a grocery store to sell beer and wine

1 as an incidental product?

2 MR. REYNOLDS: I'm not sure I
3 would declare that as being a conflict. The
4 issue being a liquor store versus a grocery
5 store with ancillary sales. I believe the
6 issue is simply more fundamental and basic.
7 There is a statement in the Reed-Cooke Overlay
8 that says alcohol won't be sold. There is
9 another statement that says if you want an
10 exception to this, here is the people you go
11 to to get it.

12 There is another section 1400.4
13 that says "if there is conflict," and I think
14 this is a friendly group of people, so I
15 wouldn't quite categorize it as a conflict,
16 but if there is an issue, "look to the more
17 restrictive uses." To me, that's simple and
18 direct and provides the kind of guidance that
19 I have needed as I've tried to understand.

20 I hope that's satisfactory to your
21 question.

22 CHAIRPERSON MILLER: Well, you

1 answered it. I mean, I don't know that I
2 would necessarily agree with your conclusion.

3 MR. REYNOLDS: Okay.

4 CHAIRPERSON MILLER: But, you
5 know, you have responded to how you see, you
6 think that there may be a conflict. Any other
7 Board questions? Any cross examination?

8 MS. BOLLING: Not from the
9 District, Madam Chair.

10 MR. GLASGOW: Madam Chair, I don't
11 have any cross, but I would like to just
12 clarify the record. We did not submit the
13 Sevilla application.

14 CHAIRPERSON MILLER: Okay. I know
15 that was submitted by DCRA.

16 MR. GLASGOW: It was submitted by
17 DCRA.

18 CHAIRPERSON MILLER: Um-hum.

19 MR. GLASGOW: And but I think it
20 is instructive in a lot of different ways when
21 the Board has the opportunity to read the
22 case. It does talk -- it is nonconforming,

1 but it also says that that's a permitted use
2 within a grocery store use, which is, I think,
3 what the point was.

4 CHAIRPERSON MILLER: Okay. I have
5 had a chance to look at the case.

6 MR. REYNOLDS: I would apologize
7 for that misquote.

8 CHAIRPERSON MILLER: You know, I
9 would apologize to not calling you up earlier
10 and offer you the opportunity to ask any cross
11 examination on any of the witnesses that
12 testified so far. Do you have any?

13 MR. REYNOLDS: Again, I am just
14 simply impressed at your stamina and I thank
15 you for allowing me this opportunity.

16 CHAIRPERSON MILLER: Thank you.
17 Okay.

18 MR. GLASGOW: Madam Chair, would
19 we also be able to --

20 CHAIRPERSON MILLER: Yes?

21 MR. GLASGOW: -- submit comments
22 on, for instance, the citation to section 2522

1 of minor flexibility of the Zoning
2 Administrator? We don't believe that has
3 anything to do with this and we can cite to
4 the Board what the Zoning Administrator's
5 authority is with the reorganization orders to
6 make decisions under the regulations, which is
7 what this is about, not section 2522.

8 CHAIRPERSON MILLER: Right. Let's
9 just keep track of what we want to keep the
10 record open for and then when we get to the
11 end, we'll go over that. Mr. Cooper, do you
12 have cross examination for Mr. Wilson?

13 MR. COOPER: I have a basic
14 question, Mr. Reynolds. I thought I heard in
15 your presentation a suggestion that the Zoning
16 Administrator -- let me put it this way. In
17 the letter written by Mayor Fenty dated June
18 19th, he asserts that the Zoning Administrator
19 had no authority to intervene in the ABC
20 process with the March 21st letter.

21 CHAIRPERSON MILLER: Is this in
22 his testimony? Are you crossing Mr. Wilson on

1 his testimony?

2 MR. COOPER: Well, I'm asking --

3 CHAIRPERSON MILLER: That's what
4 cross examination is. You have some questions
5 based on what he testified.

6 MR. COOPER: If -- what do I do,
7 just not speak? I mean, here's the thing. He
8 suggested that -- I'm asking him the question
9 is his presentation suggesting the Zoning
10 Administrator did not have authority to issue
11 a ruling or that his March 21st letter was not
12 a ruling? And it depends on how he answers,
13 I am going to ask well, when the Mayor said he
14 didn't have jurisdiction, do you agree or
15 don't you?

16 MR. REYNOLDS: My testimony did
17 clearly state that it is -- the letter from
18 Mr. Crews was not a ruling. It was an
19 opinion. It was a statement of a confirmation
20 of a telephone call, frankly, that's what it
21 really is. To me, it did not have the
22 language or the context that said that in his

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1 capacity he was making an official declaration
2 on this matter.

3 MR. COOPER: I have a follow-up
4 question. In that connection, given the
5 representation of the property owner's counsel
6 that the letter originated with an appeal from
7 the tenant's counsel to have something to
8 present to the ABC Board, because of
9 complaints from protestants, that the ABC
10 Board did not have authority to grant a
11 license for beer and wine sales when the
12 applicants proposed use conflicts with a
13 specific Zoning Regulation or law, i.e., Reed-
14 Cooke Overlay District.

15 That being the case, would you
16 agree that as the Zoning Administrator's
17 letter does not constitute an opinion, it is
18 of no value for the Board of Zoning -- for the
19 ABC Board complying with this requirement not
20 to issue a beer and wine license, sales
21 license, because a determination has not been
22 made on whether to do so would violate Zoning

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1 Regulations?

2 Now, I don't -- did you follow
3 that?

4 MR. REYNOLDS: I did follow that.

5 MR. COOPER: All right.

6 MR. REYNOLDS: However, I do not
7 feel comfortable in bringing up ABC matters in
8 this for a couple of reasons. One, it wasn't
9 in my testimony and two, this isn't the ABC
10 Board. But I will say this, at the end of
11 what you posed in your question, what it comes
12 down to is, again, the applicant did not come
13 before this body to seek a special exception
14 to be allowed to sell beer and wine and then
15 go to the ABC Board and seek a license to sell
16 beer and wine.

17 MR. COOPER: Well, we have no
18 disagreement there.

19 MR. REYNOLDS: The submission of
20 the Bill Crews' letter was not accepted by the
21 Reed-Cooke Neighborhood Association as being
22 a ruling with the same weight. The ANC did

1 not weigh in on this matter. At that
2 juncture, the ANC having signed the voluntary
3 agreement with the applicant.

4 CHAIRPERSON MILLER: Okay. I
5 mean, I don't know if you want to go there.
6 I mean, I understand it's your opinion about
7 this letter not being a decision, but --

8 MR. REYNOLDS: Understood.

9 CHAIRPERSON MILLER: -- that's
10 what is being appealed in this case. And I
11 think that's why the applicant wanted to
12 dismiss the case, because they don't consider
13 it a decision either. And what happened with
14 this Board is we were split and so we didn't
15 have a majority, you know, to rule one way or
16 the other.

17 So but anyway, it is what it is.
18 And so therefore, we're interpreting the
19 regulation, that's what we're doing right
20 here. That's the only thing that's germane at
21 this point to the proceedings.

22 MR. COOPER: Okay. In the context

1 of why we appealed, we appealed as ABC
2 protestants, because the letter was used
3 represented as an opinion by the Zoning
4 Administrator affirming that under Zoning
5 Regulations, the tenant may sell beer and
6 wine.

7 The ABC Board accepted it as a
8 basis for going forward with the ABC
9 application on the grounds that that was an
10 official Government interpretation of the
11 zoning law.

12 Our case is that under Reed-Cooke,
13 that was a determination to be made by the
14 Board of Zoning Adjustment and not the Zoning
15 Administrator. That's our position. Do you
16 want more?

17 CHAIRPERSON MILLER: No, but then
18 it goes to whether the ZA erred or not, goes
19 to how we interpret this regulation and that's
20 where we're at.

21 MR. COOPER: Plain -- the
22 Government agrees, based on their pleading of

1 January 25th on how the law should be read.
2 The zoning expert presented by the property
3 owner in effect agrees with his representation
4 that the law as written may not read as it was
5 intended, may say something that was not
6 intended, but we are all in agreement that we
7 are stuck with the words on the page in plain
8 English.

9 Prohibited, exception by authority
10 of the Board of Zoning Adjustment exclusively.
11 All of this other stuff is obfuscation,
12 sophistry to complicate the issue flipping
13 back and forth. The plain English of the law
14 says "prohibited use," not prohibited use
15 principal, etcetera, prohibited.

16 And to the extent there is any
17 question as that is such a strict
18 interpretation, and that is taking into
19 consideration the regulatory apparatus and any
20 other zoning law, Reed-Cooke says it is
21 supreme. It reigns supreme. So if the plain
22 English reading of the Reed-Cooke Overlay

1 District says prohibited and some other
2 fanciful interpretation, based on the
3 regulatory regime or any other zoning law,
4 hints otherwise, it's irrelevant.

5 The law is what it says. The law
6 says prohibited use, exception by authority of
7 the Board of Zoning Adjustment exclusively.
8 I don't see any other way to read the law.
9 They, the Government argues in their pleadings
10 when applied to the law they enjoy. Read it
11 like you see it.

12 Testimony of the zoning expert in
13 effect says the same thing. Despite your good
14 intentions or whatever you were trying to
15 accomplish, the law -- we have to follow what
16 it says on the page. Conflict the two and
17 there is a conflict with any other
18 interpretation of those words.

19 According to the law, that
20 conflict must be settled in favor of the law,
21 Reed-Cooke Overlay District. I don't see any
22 wiggle room around that. And I know you're

1 trying to wrap up.

2 CHAIRPERSON MILLER: Well, I
3 guess, you know, I kept holding you back for
4 your closing argument and then it sounds like,
5 you know, because I had a question or two
6 here.

7 MR. COOPER: Okay.

8 CHAIRPERSON MILLER: But I was
9 going to give you the last word, but it sounds
10 like you are -- that was your closing
11 argument.

12 MR. COOPER: Well, you have
13 questions, I can say that wasn't my closing
14 argument.

15 CHAIRPERSON MILLER: No. I just
16 have -- okay. We're just going to -- I think
17 we are ready to wrap up. Are we not? Do you
18 have a question?

19 VICE CHAIR LOUD: Just one.

20 CHAIRPERSON MILLER: We have a few
21 questions.

22 VICE CHAIR LOUD: Just one

1 question for Mr. Cooper.

2 MR. COOPER: All right.

3 VICE CHAIR LOUD: Sometimes Mr.
4 Cooper counsel will, as a part of the advocacy
5 process in assessing their case and reflecting
6 on it, load up on arguments and, you know,
7 sort of go through more than one in the event
8 that the one that they are really pushing the
9 hardest does not prove fruitful.

10 Now, if, in this case, the Board
11 is not persuaded by the plain language
12 argument that you are making, is there a
13 separate fallacy that you see with the
14 argument being advanced by DCRA and the
15 property owner?

16 MR. COOPER: Yes, there is.

17 VICE CHAIR LOUD: Okay. And what
18 would that be?

19 MR. COOPER: That argument would
20 be that the decision made on whatever basis
21 was not the Zoning Administrators to make. It
22 was the Board of Zoning Adjustment's decision

1 to make in context of an application for an
2 exception.

3 CHAIRPERSON MILLER: Let me just
4 address that though, because, you know, we
5 have inherited the system we have inherited
6 and we don't have a situation where applicants
7 come in for a legal opinion from the Board.
8 They didn't think they needed a liquor -- they
9 didn't think they were prohibited. They
10 couldn't come in and say necessarily, could
11 you give us an opinion on whether or not we
12 are prohibited.

13 The way we are set up is that does
14 go to the Zoning Administrator. They do have
15 to come in when they are required to get a
16 special exception for something. They do have
17 to come to us, but their position was they
18 weren't required, so that's why they weren't
19 coming to us.

20 MR. COOPER: And I understand
21 that. And I'm saying that when they went to
22 the Zoning Administrator, Reed-Cooke requires

1 that he come to you for a specific delegation
2 to make -- grant the exception under Reed-
3 Cooke or he pass that decision to the Board.
4 That for him to read into the law what the law
5 does not say in plain English is exceeding of
6 his authority.

7 Otherwise, why would we have Reed-
8 Cooke? Why would we have the Board of Zoning
9 Adjustment to adjudicate such matters, if they
10 can all be handled by some subordinate agency
11 without delegation of the Board of Zoning
12 Adjustment of its statutory public duty to
13 make determinations going to these issues?

14 Reed-Cooke is a hollow piece of
15 paper. The Overlay District is an empty
16 vessel with no substance, no meaning and Wal-
17 Mart or anyone else can come into our
18 neighborhood and call themselves a grocery
19 store or whatever and avoid the obligation to
20 seek an exception when the law in plain
21 English says prohibited use.

22 Where do we get relief as

1 residents?

2 CHAIRPERSON MILLER: Okay. We'll
3 wrap this up.

4 MR. COOPER: Under the --

5 CHAIRPERSON MILLER: Under the
6 law, this is how you are getting relief.
7 You've got a decision you didn't like from the
8 Zoning Administrator. You came to the Board.
9 This is how you're getting the relief. The
10 Zoning Administrator doesn't have the
11 authority to grant special exceptions or
12 variances and doesn't do that.

13 But if somebody believes that they
14 don't require that, they can ask his opinion.
15 And if his opinion is something that others
16 disagree with, then they appeal to the Board.
17 And that's what happened here.

18 MR. COOPER: That's what we're
19 doing.

20 CHAIRPERSON MILLER: And that's
21 what happened here.

22 MR. COOPER: That's what we're

1 doing. That's how we got here.

2 CHAIRPERSON MILLER: Exactly,
3 exactly.

4 MR. COOPER: And a basis for our
5 appeal is he didn't have the authority to make
6 the determination that effectively it
7 validated the Reed-Cooke Overlay District.
8 The plain law of the Reed-Cooke Overlay
9 District. A decision of that magnitude, if
10 you read -- if you take the plain meaning of
11 the law, rests with the Board of Zoning
12 Adjustment.

13 Now, if you did it, I disagree
14 with you, too, but he didn't have that
15 authority.

16 CHAIRPERSON MILLER: Okay. Why
17 don't we wrap up with final questions? I
18 wanted to ask Mr. Glasgow about this list of
19 grocery stores now that you submitted at the
20 beginning of the hearing.

21 MR. GLASGOW: Yes, we submitted
22 that.

1 CHAIRPERSON MILLER: Just so that
2 we understand the best way to appreciate the
3 information that's in here, I know that Mr.
4 Loud asked for this list. I just am wondering
5 does it matter? I don't think you show like
6 what Districts they are in or what Zoning
7 Districts they are in or anything like that.
8 It's just --

9 MR. GLASGOW: We can -- this was--
10 is -- a grocery store is beer and wine sales,
11 customarily incidental use. And I think
12 that's what we have shown. We have a list of
13 65 grocery stores that have a C of O for a
14 grocery store. And you will see that none of
15 them have a C of O for a liquor store in
16 there.

17 In fact, it's just not mentioned
18 anywhere in their Certificate of Occupancy.
19 So when you see the C of O number, you look
20 down there at the uses approved, described in
21 the -- you will see grocery store. Most of
22 them just say grocery store/delicatessen,

1 retail grocery, retail food, drug store and
2 deli, but all of these ones that are listed
3 all have an ABC License. They all have Class
4 B Licenses. I think one has a Class A
5 License.

6 CHAIRPERSON MILLER: So then is it
7 where a grocery store sells beer and wine,
8 you're saying it's not reflected in the
9 Certificate of Occupancy, correct?

10 MR. GLASGOW: That is correct.

11 CHAIRPERSON MILLER: It's the only
12 place that it's reflected in the drawings of
13 the layout?

14 MR. GLASGOW: You would have the
15 drawings of the layout, which are required
16 under the ABC statute as to where are you
17 selling beer and wine. That would be shown,
18 should be shown in the plans. I -- we haven't
19 gone and looked at every one of these plans,
20 but we know what C of Os they have. We know
21 that they all have an ABC License and what the
22 ABC License number is.

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1 CHAIRPERSON MILLER: Well, let me
2 ask Mr. LeGrant then just to understand the
3 process. When grocery stores sell beer and
4 wine --

5 ZONING ADMIN. LeGRANT: Yes.

6 CHAIRPERSON MILLER: -- is it just
7 not reflected anywhere?

8 ZONING ADMIN. LeGRANT: Well, once
9 you --

10 CHAIRPERSON MILLER: I don't mean
11 anywhere. We saw in this case it was on the
12 plans.

13 ZONING ADMIN. LeGRANT: Right,
14 right. What it -- when the Certificate of
15 Occupancy stage comes to us, people identify
16 the use. They might not even inform us there
17 is alcohol sales, but they would represent on
18 a C of O application what the use would be.
19 And again, we have a list of uses between
20 grocery store/delicatessen that would be the
21 primary label.

22 Historically, the Certificate of

1 Occupancies have been very brief in their
2 representation of use. Today, Certificates of
3 Occupancy that come before us have not only
4 the label for the use, then we have a
5 description of use that we might elaborate
6 further.

7 But the primary use listing, as
8 shown here, accepting this information would
9 be the grocery store use.

10 CHAIRPERSON MILLER: So if this is
11 an incidental use, it's not required in any
12 way to be reflected on the certificate of
13 occupancy. Is that right?

14 ZONING ADMIN. LeGRANT: That's
15 correct. Now, if somebody -- the converse if
16 somebody came and said what are we going to
17 do? A liquor store. Okay. We will go back
18 and look at that being the primary use to what
19 are the regulations that apply. In most
20 Districts, Commercial Districts where a
21 grocery store -- off sales alcohol use is
22 permitted by right, we may confirm that, okay,

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1 it's permitted this use in those Districts
2 where the primary use is limited or
3 prohibited, then oh, well, you can't do it
4 here. You need to go get a special exception.

5 CHAIRPERSON MILLER: Did you just
6 so when you are considering a Certificate of
7 Occupancy, you would look at prohibited uses
8 and make sure it's not there? Is that what
9 you're saying?

10 ZONING ADMIN. LeGRANT: We would
11 ask -- on the Certificate of Occupancy
12 application, there are places to describe your
13 use. And then we look at that. We also may
14 ask the applicant for more information. If
15 it's in the context of a new -- a first time
16 established use, then we have a process that
17 informs us of the most recent building permit
18 and then we may do analysis. We may look
19 further into the floor plans and so forth.

20 CHAIRPERSON MILLER: Your light is
21 on. I didn't know if you were going to say
22 anything.

1 MR. GLASGOW: No. I think if
2 there is more information that you want from
3 this list, we can get it, but we think what it
4 does is it stands for the proposition that you
5 have grocery stores and they routinely have
6 beer and wine sales.

7 CHAIRPERSON MILLER: I was just
8 thinking about the case as a whole and
9 wondering where in the process this issue
10 comes to the Zoning Administrator's attention.
11 You know, let's say it's prohibited or there
12 is a question whether it is prohibited.

13 MR. GLASGOW: Right.

14 CHAIRPERSON MILLER: You know,
15 when does the Zoning Administrator look at
16 that?

17 MR. GLASGOW: When you have
18 prohibited uses, during the --

19 CHAIRPERSON MILLER: In this case.

20 MR. GLASGOW: In the building
21 permit phase. When you go in for -- and
22 you're getting a building permit, you have to

1 depict the uses on your plans. That's why we
2 focused on that with respect to our earlier
3 presentation, because when they are reviewing
4 and that's where you can have a problem if you
5 don't properly put your uses down on your
6 plans.

7 And then you get a building permit
8 and then the District says well, wait a
9 minute. That isn't what you showed on your
10 plans. That's when you run into the problem.
11 That's why those regulations were structured
12 the way they were, that when you get the
13 building permit, it's -- there were a couple
14 of things that were being done when the regs
15 were changed with respect to when you have to
16 take appeals and timing and all of that thing.

17 That's so that when you get a
18 building permit and you put down everything
19 you are doing on your plans, you have a safe
20 harbor after a period of time. Because we
21 were getting in the situation, you know, with
22 the Board and otherwise with the District

1 where people were coming in and appealing
2 things months after construction was underway
3 and everything else and it would -- and it got
4 out of hand.

5 And the Commission had to step in
6 and had some rules and, in fact, the Court of
7 Appeals, at one case, said, you know, you have
8 to have some rules here as to when people can
9 come in and --

10 CHAIRPERSON MILLER: I understand
11 that.

12 MR. GLASGOW: -- have an appeal.

13 CHAIRPERSON MILLER: And not to
14 reargue that point, but I think that --

15 MR. GLASGOW: No, no, I'm not
16 trying to do that.

17 CHAIRPERSON MILLER: Is it --

18 MR. GLASGOW: But that's where
19 that all came from.

20 CHAIRPERSON MILLER: Right. I
21 just wondered where it does come in in the
22 process, but I think what --

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1 MR. GLASGOW: Right.

2 CHAIRPERSON MILLER: -- some of us
3 were observing was that the -- it was hard for
4 the public to know that, you know.

5 MR. GLASGOW: I don't disagree.

6 CHAIRPERSON MILLER: Okay.

7 MR. GLASGOW: And that's not how
8 it was set up.

9 CHAIRPERSON MILLER: Yeah.

10 MR. GLASGOW: It was set up if you
11 do something and you don't represent on your
12 drawings correctly with the District and they
13 can come back and they can void the permit and
14 you've got those issues.

15 VICE CHAIR LOUD: I have a
16 question. One final question. I think before
17 I do that final question for DCRA and the
18 property owner's rep, but before I do that, I
19 wanted to clarify at least why I asked for the
20 follow-up list. And it had to do with DCRA
21 and the property owner, basically, riding, I
22 thought, section 722.3 across the finish line,

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1 in terms of their argument.

2 And part of the qualifying
3 language in 722 speaks to it being customarily
4 incidental. When we had the first hearing, I
5 think, Mr. LeGrant talked about his
6 experiences in the Bay Area, San Francisco Bay
7 Area. And I think even maybe Virginia and
8 Maryland.

9 So I wanted to get a sense of
10 right here in the District --

11 ZONING ADMIN. LeGRANT: Right.

12 VICE CHAIR LOUD: -- the extent to
13 which it was customarily incidental. And I
14 appreciate there are 18 -- there are a bunch
15 of stores here, but there are 18 what appear
16 to be like supermarkets, like Giant or Safeway
17 or something like that. And 17 of them have
18 the B License. I think one has the A License.
19 So that's very helpful.

20 I wanted to ask your side of the
21 table as well, that is DCRA and the property
22 owner side of the table, and I think Madam

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1 Chair may have asked this question earlier.
2 Within our regulations, are there any other
3 Overlay Districts with which familiar prohibit
4 -- I'm sorry, with which similar prohibition
5 sections prohibit accessory uses?

6 Do I need to reword the question?

7 ZONING ADMIN. LeGRANT: Well, if I
8 understand your question, are there any
9 Overlay Districts that prohibit a specified
10 accessory use or a blanket that no other
11 accessory use is permitted more general? Is
12 that the question or both?

13 VICE CHAIR LOUD: Well, it seems
14 to be part of the argument you're making here
15 is that I think 1401.1, even though it doesn't
16 say primary uses, that the prohibitions go to
17 -- speak specifically to primary uses.

18 ZONING ADMIN. LeGRANT: That's --

19 VICE CHAIR LOUD: And that's the
20 interpretation being made.

21 ZONING ADMIN. LeGRANT: Yeah.

22 VICE CHAIR LOUD: And so what I'm

1 asking is by comparison, if you look at other
2 Overlay Districts that these regulations
3 govern, are there instances where those
4 Overlay Districts prohibit accessory uses? So
5 that for comparison purposes, I can --

6 ZONING ADMIN. LeGRANT: Right,
7 okay.

8 VICE CHAIR LOUD: -- kind of gauge
9 the analysis being advanced here today.

10 ZONING ADMIN. LeGRANT: Yes. I'm
11 not aware of any off-hand myself. I'm not.

12 VICE CHAIR LOUD: And is that
13 something that customarily you would be aware
14 of if they existed?

15 ZONING ADMIN. LeGRANT: Well, if
16 they would specify in the regulation, I guess,
17 if it were to exist, and I do not know if it
18 exists, in this Overlay District in addition
19 to these prohibitions of primary uses, the
20 following -- any accessory use shall be
21 subject to special exception or any other
22 accessory use that is listed is subject to

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1 prohibition or other relief.

2 We would certainly look to that,
3 but I'm not aware of any present regulation
4 that has that. I might be incorrect on that,
5 but I'm not aware of any.

6 VICE CHAIR LOUD: Okay.

7 MS. BOLLING: Mr. Loud, we would
8 be more than happy in our supplemental filings
9 with the Board to give you an analysis of that
10 for your question.

11 VICE CHAIR LOUD: Thank you.

12 MR. GLASGOW: We would do the
13 same. We would submit for the record.

14 VICE CHAIR LOUD: Thanks a lot.
15 Appreciate it.

16 CHAIRPERSON MILLER: Okay. Any
17 other questions? Okay. So now, we are at the
18 point where we are going to identify what we
19 are leaving the record open for and then we
20 will set a decision date.

21 MR. COOPER: Didn't you say I get
22 the last word?

1 CHAIRPERSON MILLER: You were so
2 anxious to do your closing argument, I let you
3 do your closing argument. Do you need one
4 other word? Short? That's why I didn't cut
5 you off before, because I kept trying to and
6 then --

7 MR. COOPER: Okay. Let me --

8 CHAIRPERSON MILLER: Microphone.

9 MR. COOPER: -- see here. Oh,
10 okay. In a minute, a summary. I have said
11 that this decision requires a plain reading of
12 the law. I have said the Zoning Administrator
13 did not have authority to make the decision.
14 I have said the decision he did make was
15 wrong. I have said the Mayor's letter says he
16 didn't have authority to use the letter in the
17 context it was used.

18 And I'll just argue in conclusion
19 that at some point this Board has to take
20 responsibility for its public duty to make
21 determinations on issues as are raised by this
22 appeal. And when a zoning law is brought into

1 question that rests so much responsibility
2 with the Board of Zoning Adjustment, there
3 should be a separate proceeding with a Public
4 Hearing specified in the law and that a
5 decision be made consistent with the purpose
6 for which the Reed-Cooke Overlay District
7 exists.

8 Absent that opportunity, the
9 community does not have an opportunity to
10 defend a provision in the zoning laws that
11 exist specifically to protect its nature and
12 character. It's your duty, as I see it, under
13 the Reed-Cooke Overlay District to make
14 determinations in conflict, and these are in
15 conflict, regarding where we live.

16 We are putting small businesses
17 out of business. A direct specific
18 contradiction of the Reed-Cooke Overlay
19 District, specifically, stated specifically
20 even for purposes of exception that has to be
21 considered.

22 I know everybody needs to get

1 home, so I'll leave it at that.

2 CHAIRPERSON MILLER: Thank you. I
3 think we did get your points. And I don't
4 want to debate, but I do want to say that we
5 are dealing with the regulations that we have,
6 the process that we have, but there is also a
7 process going on to re-evaluate the
8 regulations to see if they should be changed
9 to, you know, better suit certain
10 circumstances.

11 MR. COOPER: But that's like
12 saying --

13 CHAIRPERSON MILLER: And that's
14 not --

15 MR. COOPER: -- Madam Chairman,
16 that -- and now that you bring that up.

17 CHAIRPERSON MILLER: Sorry, I just
18 was trying to --

19 MR. COOPER: Now that you bring
20 that up, if the law allowed the conduct, the
21 prohibited use to be engaged in as proposed,
22 why then are they seeking to have the law

1 amended to drastically change the reading of
2 the law to allow such conduct, specifically
3 tailored to the point of it being a private
4 amendment for this property owner?

5 If the law allowed them to do what
6 they are proposing to do, why do they need the
7 law changed to read in plain English to allow
8 them to do what they say, their fanciful
9 interpretation of the law, allows them to do?

10 CHAIRPERSON MILLER: Okay. Okay.

11 MR. COOPER: What good is the
12 contradiction?

13 CHAIRPERSON MILLER: Okay. Mr.
14 Cooper?

15 MR. COOPER: What's that about?

16 CHAIRPERSON MILLER: Mr. Cooper?

17 MR. COOPER: Okay. I'm done.

18 CHAIRPERSON MILLER: I'm not going
19 to get into that.

20 MR. COOPER: I'm done.

21 CHAIRPERSON MILLER: I didn't mean
22 to open the door.

1 MR. COOPER: Yeah, well, you --

2 CHAIRPERSON MILLER: You know, I
3 think I have given you like at least --

4 MR. COOPER: Yeah.

5 CHAIRPERSON MILLER: -- two
6 closing arguments.

7 MR. COOPER: Yeah, okay. Well, I
8 got that in, so --

9 CHAIRPERSON MILLER: You got that
10 in.

11 MR. COOPER: Yeah.

12 CHAIRPERSON MILLER: Okay. Why
13 don't we go over --

14 MR. GLASGOW: Madam Chair?

15 CHAIRPERSON MILLER: Do you want
16 to respond to that, Mr. Glasgow?

17 MR. GLASGOW: I was --

18 CHAIRPERSON MILLER: Okay.

19 MR. GLASGOW: -- thinking about
20 responding. The only thing that I want to
21 deal with is just that with respect to our
22 motion to dismiss, we will want -- any further

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1 items that we want to address on that. And
2 specifically, was one thing that the Chair was
3 mentioning, that if the Zoning Administrator's
4 letter is not any type of ruling, that's an
5 appealable ruling, which I think both the ANC
6 and Mr. Cooper were discussing that it was not
7 a letter, not a ruling that --

8 MR. COOPER: I was not.

9 MR. GLASGOW: The transcript will
10 -- the record will speak for itself --

11 MR. COOPER: I do not --

12 MR. GLASGOW: -- on that.

13 MR. COOPER: -- assert that the
14 Zoning Administrator's letter is not a ruling.
15 It is a ruling. The ABC Board interprets it
16 as a ruling.

17 MR. GLASGOW: That's not what was
18 said earlier.

19 MR. COOPER: The Appellants 17677
20 interprets it as a ruling for which we are
21 taking -- from which we are taking an appeal.
22 If that is the ANC's position, that's the

1 ANC's position, that's not our position.

2 CHAIRPERSON MILLER: Okay.

3 MR. GLASGOW: All right. Well,
4 I'm glad he clarified that. I didn't
5 understand it that way, with everything that
6 was being said. With respect to the ANC,
7 obviously, if you take the ANC's position, I
8 think then the only thing that's left then is
9 the ruling for the issuance of the building
10 permit, which has a much earlier date than Mr.
11 Crews' letter.

12 CHAIRPERSON MILLER: Okay. I
13 think where the Board is at is that we didn't
14 have a majority on the motion to dismiss, so,
15 therefore, we're considering the challenged
16 regulation and interpreting that.

17 MR. GLASGOW: Understood.

18 CHAIRPERSON MILLER: Okay.

19 MEMBER DETTMAN: Madam Chair, I
20 just have a quick question and it's more of a
21 procedural matter. With respect to Mr.
22 Reynolds' testimony, are we going to be

1 accepting this into the record for both
2 appeals? And are we clear that he has
3 authorization from the ANC to speak to both
4 appeals?

5 CHAIRPERSON MILLER: Okay. With
6 respect to Mr. Cooper's appeal today, my
7 understanding was that the Board was
8 authorizing him to speak for the ANC, with the
9 proviso that he would supplement the record
10 with an express authorization in writing from
11 the ANC that he was authorized to present that
12 testimony in this hearing, correct?

13 MR. REYNOLDS: Yes, ma'am.

14 CHAIRPERSON MILLER: Okay. Now,
15 with respect to the previous case, are you
16 asking for, and I don't know if Mr. Moy can
17 help me out on this or you all have better
18 memories, I don't remember what we left the
19 record open for in that case, are you asking
20 that it's the same issue, it's going to be
21 decided, you know, the same way, but do you
22 want your testimony accepted in that case as

1 well? Do you want us to open the record for
2 that testimony or not?

3 MR. REYNOLDS: I don't believe
4 that's going to be necessary.

5 CHAIRPERSON MILLER: Okay.

6 MR. REYNOLDS: What the ANC needs
7 to say has been said and I think it has been
8 clear enough. I think you understand where we
9 are coming from and what we're trying to say.

10 CHAIRPERSON MILLER: Fine. So
11 does that suit you?

12 MR. COOPER: So will his -- his
13 representation that the Zoning Administrator's
14 letter is not a ruling prejudices our case,
15 but doesn't prejudice the Reed-Cooke Overlay
16 District case. Is that how that works? In
17 this great weight business. We wouldn't
18 agree.

19 CHAIRPERSON MILLER: I don't think
20 -- I know that. I don't think it's a big
21 prejudice, because, as I just said, the Board
22 is going to interpret the regulation. And

1 what Mr. Cooper is concerned about is that
2 your argument actually could defeat our
3 undertaking consideration of an appeal of the
4 letter.

5 If it's not an appealable order,
6 then we wouldn't have jurisdiction over it.
7 And case dismissed. But we have already
8 decided not to do that. So --

9 MR. COOPER: Thank you.

10 CHAIRPERSON MILLER: Okay. That's
11 the one thing we have already decided. We are
12 going to be deciding on the interpretation of
13 the regulation. Okay.

14 VICE CHAIR LOUD: Also, I just
15 want to add that I think under section 3115
16 that when we give great weight to an ANC, it
17 has to be the written report of the ANC and
18 the motion that was passed and the quorum,
19 etcetera, etcetera. And that the -- and Mr.
20 Reynolds went beyond that to offer, you know,
21 typewritten testimony that exceeded what we
22 would give great weight consideration to in

1 terms of the ANC. And I think our rules speak
2 to that.

3 MR. COOPER: Thank you.

4 CHAIRPERSON MILLER: Right. And
5 our great weight means that we will address
6 with particularity the issues raised in the
7 report, so that we would not necessarily be
8 required, we are not required, to address all
9 of your testimony, but we heard it. And then
10 we can factor it in however, you know, it
11 works.

12 The great weight requirement means
13 that we actually address the ANC concerns that
14 are in the written report. All right. So why
15 don't we go through the list of what we're
16 leaving the record open for and then we will
17 decide on the time.

18 So the first thing we just said
19 was an ANC authorization letter in this case
20 for Mr. Wilson's testimony and presentation of
21 the report.

22 Ms. Bailey, do you have a list or

1 should we just ask the parties?

2 MS. BAILEY: Madam Chair, I can
3 repeat what I have and perhaps the Board can
4 help me with what I'm missing. I believe Mr.
5 Glasgow requested the Board's approval to
6 provide documentation concerning analogous,
7 I'm sure I'm mispronouncing that word,
8 situations that says that one thing in the --
9 where the reg says one thing, however, it's
10 applicability is assessed or analyzed in
11 another way.

12 I think you had requested that Mr.
13 Glasgow look at that situation.

14 CHAIRPERSON MILLER: Okay. Okay.
15 Let's just take it in general. I think that
16 the parties are going to have an opportunity
17 to supplement any discussion about analogous
18 regulations or, you know, regulations that
19 might shed light on interpreting these
20 regulations. Am I correct basically? Okay.

21 MR. COOPER: And everyone is
22 copied on everybody's filing?

1 CHAIRPERSON MILLER: Yes.

2 MR. COOPER: Good. Okay.

3 Opportunity to respond?

4 CHAIRPERSON MILLER: We're going
5 to set the schedule after we identify what is
6 coming in.

7 MR. COOPER: All right.

8 MS. BAILEY: Should I continue,
9 Madam Chair?

10 CHAIRPERSON MILLER: Yes, please.

11 MS. BAILEY: The parties are to
12 assess whether there are other Overlay
13 Districts in the Zoning Regulations that
14 prohibits the sale of off-premises alcoholic
15 beverages. Of course, as identified in the
16 Reed-Cooke, but are there other Overlay
17 Districts that prohibitly -- that specifically
18 prohibits the use?

19 CHAIRPERSON MILLER: Okay.

20 MR. COOPER: As accessory.

21 CHAIRPERSON MILLER: I just want
22 to --

1 MR. COOPER: As accessory.

2 MS. BAILEY: As accessory.

3 VICE CHAIR LOUD: Yeah.

4 MS. BAILEY: Yes, sir.

5 CHAIRPERSON MILLER: Okay.

6 VICE CHAIR LOUD: And if that was
7 a reference -- I'm sorry.

8 CHAIRPERSON MILLER: Well, what I
9 want to say is, I mean, these were ideas that
10 we were talking about and it's certainly not
11 required. And I think the point is only that
12 if there are other parts of the regulations,
13 the same kind of thing, that are analogous or
14 shed light on how to interpret these
15 regulations, that the parties should feel free
16 to bring that to our attention.

17 MR. COOPER: Okay. That was Mr.
18 Loud's question. Were you going to say
19 something on that?

20 VICE CHAIR LOUD: I'm sorry?

21 CHAIRPERSON MILLER: I don't think
22 Mr. Loud is coaching from you, Mr. Cooper.

1 VICE CHAIR LOUD: It's late.

2 Thank you, Ms. Chair. I appreciate your --

3 MR. COOPER: Yes, I'm sorry.

4 VICE CHAIR LOUD: -- support.

5 MR. COOPER: I'm just -- I was
6 interested in what you had to say.

7 VICE CHAIR LOUD: Well, if the
8 other Chair is finished with her comments.

9 MR. COOPER: I'm sorry. I
10 apologize.

11 VICE CHAIR LOUD: That's okay.

12 MR. COOPER: I apologize.

13 VICE CHAIR LOUD: I did want to
14 say to Ms. Bailey that specifically what I
15 requested was not restricted to off-premises
16 alcohol sales. It was sort of as Madam Chair
17 was saying, analogous provisions unique to
18 Overlay Districts and interpretation of
19 Overlay Districts where the use prohibitions
20 didn't deal specifically with primary use.
21 Okay.

22 MR. COOPER: My apology, Mr. --

1 Member Loud. I was very curious of that
2 answer myself. I wanted, you know, it out
3 there.

4 CHAIRPERSON MILLER: Okay. Do we
5 have more, Ms. Bailey?

6 MS. BAILEY: You've discussed,
7 Madam Chair, the ANC's authorization. The
8 only other thing that I have and perhaps it
9 was mentioned and I'm just refreshing
10 memories, the ANC's written testimony, I think
11 there was a request to respond to some of the
12 statements that are -- were identified in the
13 ANC's written testimony.

14 At least I have that written down.
15 I'm not sure if that's something that the
16 Board wants.

17 CHAIRPERSON MILLER: That sounds
18 like something that a party might have
19 requested.

20 MR. COOPER: Mr. Glasgow said
21 something about that.

22 MR. GLASGOW: Right. I wanted to

1 have the opportunity to respond to both the
2 ANC's testimony and to Mr. Cooper's testimony.

3 MS. BOLLING: And the District
4 wanted an opportunity as well.

5 MR. COOPER: Right.

6 CHAIRPERSON MILLER: I don't know.
7 I mean, I recall that Mr. Cooper's testimony
8 had some kind of accusations in them and stuff
9 and we decided that we weren't going to use
10 this hearing to get into that.

11 MR. GLASGOW: Right. We were
12 going to respond.

13 MR. COOPER: I didn't make any --

14 CHAIRPERSON MILLER: The Board
15 decided that.

16 MR. COOPER: I didn't make any
17 accusations.

18 CHAIRPERSON MILLER: And but I'm
19 not clear about the response to the ANC
20 testimony. Why? What is it that you would
21 need to respond to? We don't usually do that.

22 MR. GLASGOW: Oh, I said that we

1 wanted to have the opportunity to provide --
2 specifically, I said, their statements about
3 section 2522 and what the Zoning
4 Administrator's authority is and the
5 reorganization order and all of that instead
6 of getting into that tonight, respond to that
7 in writing.

8 CHAIRPERSON MILLER: Okay. Well,
9 that's more specific. That's correct. You
10 want to address the legal points made there
11 with respect to 2522 and the Zoning
12 Administrator's authority regarding minor
13 flexibility?

14 MR. GLASGOW: Yes.

15 CHAIRPERSON MILLER: Okay.

16 MR. GLASGOW: That and just the
17 Zoning Administrator's authority overall,
18 because I don't think it's -- we have a
19 different view of what --

20 CHAIRPERSON MILLER: Okay.

21 MR. GLASGOW: -- the Zoning
22 Administrator is permitted to do under the

1 regulations and the reorganization orders.

2 CHAIRPERSON MILLER: Okay. So
3 it's a legal argument?

4 MR. GLASGOW: Yes.

5 CHAIRPERSON MILLER: Okay.

6 MR. COOPER: May I address this
7 point? You brought it up as something I said
8 or did as testimony. I argued in my opening
9 statement, I made a statement of fact that
10 there are alleged rule violations that I said
11 were not a focus of this appeal.

12 But that's not -- that's a
13 statement of fact. In the ABC Board
14 proceedings, if proven it is a disqualifying--
15 it is a disqualifier for purposes of the
16 building permit and derivative building
17 permits, continuing in effect, that was a
18 statement of fact. If that's testimony, fine,
19 but I just want to be clear about that.

20 That's in the official record.
21 Based on testimony of their own witnesses,
22 there has been a formal allegation of rules

1 violations.

2 CHAIRPERSON MILLER: Okay. I'm
3 going to stop you right there, because we
4 don't want to take up Board time with that.
5 But I understand the applicant's position that
6 regardless of whether you say it's fact or
7 not, it sounds derogatory, disparaging,
8 whatever and they are going to have an
9 opportunity to respond.

10 MR. COOPER: I welcome their
11 response.

12 CHAIRPERSON MILLER: I think they
13 -- okay, fine.

14 MR. COOPER: No problem at all.

15 CHAIRPERSON MILLER: Not that --
16 most of that is not relevant really to what
17 the Board is going to be deciding it sounds
18 like.

19 MR. COOPER: And I did say that.

20 CHAIRPERSON MILLER: But I --
21 yeah. But, you know, I understand parties
22 position when information is put in the record

1 that might be disparaging to them, they don't
2 want it to go unanswered. So I think that's
3 legitimate.

4 MR. COOPER: Sure.

5 CHAIRPERSON MILLER: Okay. But I
6 don't want to encourage a lot of that kind of
7 discussion, because the Board is not going to
8 be paying too much attention to it. What the
9 Board is going to be paying attention to is
10 interpreting that provision in the overlay
11 that deals with off-premises sale of alcoholic
12 beverages.

13 MR. COOPER: Yes, ma'am.

14 CHAIRPERSON MILLER: So okay. And
15 so the record is open for all those things.
16 Nothing is required, except for the ANC to get
17 great weight, the authorization would be
18 required. Now, what we usually do is set a
19 decision date and then --

20 MR. MOY: Madam Chair?

21 CHAIRPERSON MILLER: Yes?

22 MR. MOY: For staff's

1 clarification and understanding, the
2 supplemental that has just been articulated,
3 staff understands would go towards Appeal No.
4 17677 or -- and there are no other
5 supplemental filings to Appeal 17675. Is that
6 correct?

7 CHAIRPERSON MILLER: Come on up.
8 Let's get this straight, because I don't know
9 if you have had a chance to check the record,
10 because I don't remember how we left the
11 record in the other case. The issues are the
12 same, but we have heard different testimony.
13 Yes?

14 MR. LYDEN: I'm Peter Lyden.

15 CHAIRPERSON MILLER: Would you
16 introduce yourself for the record?

17 MR. LYDEN: Peter Lyden.

18 CHAIRPERSON MILLER: Have a seat.

19 MR. LYDEN: Reed-Cooke
20 Neighborhood Association, 1675 -- 7 whatever.
21 We have not submitted our final comments,
22 because they were held open until Mr. Cooper

1 completed his case. And we would like the
2 opportunity to do that.

3 CHAIRPERSON MILLER: Well, that
4 makes sense. Do you remember how we left the
5 case?

6 MR. LYDEN: Left it open.

7 CHAIRPERSON MILLER: How we left
8 the record open?

9 MR. LYDEN: It was just open. We
10 would not submit them until Mr. Cooper
11 finished his presentation and then we would
12 submit our findings of fact and conclusions of
13 law.

14 MR. REYNOLDS: Madam Chair, I
15 would concur from that. I remember language
16 that is used as to the proceedings being
17 bifurcated, I believe is the word that's used,
18 and, therefore, there would be continuation of
19 the opportunity to be able to file additional
20 comments.

21 CHAIRPERSON MILLER: Okay. Let me
22 say this. It sounds to me except for the

1 motions to dismiss that the merits of both
2 cases are the same. So we might as well just
3 have a briefing scheduling and I'm not sure
4 why they wouldn't apply to both cases. Do you
5 all have a different opinion? I mean, this
6 was a weird kind of parallel track. We let
7 some testimony of last case come into this
8 case.

9 So why wouldn't it be the same?

10 MR. GLASGOW: We don't have any
11 objection to a joint briefing schedule. You
12 know, if you want to have two sets of
13 documents, one that says the Appeal No. 1 and
14 the other appeal number, so that they have
15 separate places to go when they get here. I
16 mean, it's fine with us. But it will,
17 essentially, be the same documents. And by
18 having the schedule be on the same day, is
19 fine with the property owner.

20 MS. BOLLING: It's fine with the
21 District as well.

22 CHAIRPERSON MILLER: Okay. I

1 mean, I think it should be pretty much a
2 merger, because it is the exact same issue.
3 We are just interpreting the same regulation.
4 So when you separate, you know, timeliness,
5 which may be different for the different
6 appellants, other than that, when we are
7 dealing with the merits, it's the same.

8 So I would, yeah, put --

9 MR. LYDEN: Madam Chair?

10 CHAIRPERSON MILLER: -- the two
11 case --

12 MR. LYDEN: We have --

13 CHAIRPERSON MILLER: Put the --

14 MR. LYDEN: We now have a copy of
15 the transcript, so we will base our comments
16 from that.

17 MR. COOPER: The transcript is
18 available.

19 MR. LYDEN: The transcript from
20 our hearing is open and we will submit it
21 under our appeal number. Okay?

22 MR. MOY: Those transcripts are

1 available.

2 CHAIRPERSON MILLER: Okay. We
3 have to set a date. But if the date is far
4 enough out, then the transcript from this case
5 would be available, too. But I think that you
6 could put -- you probably should put both case
7 numbers on the supplemental pleadings, because
8 except for the fact, Mr. Glasgow, when you are
9 like responding, maybe perhaps to just Mr.
10 Cooper's testimony or the ANC testimony in
11 this particular case, then it would just apply
12 to this case.

13 But all the substantive arguments
14 that go to the merits of each case, I would
15 think they are the same. And that the Board
16 would be considering that issue and applying
17 it to both cases.

18 Okay. So I don't hear any
19 disagreement. I'm not sure of the time
20 context here with respect to the opening of
21 the supermarket. I thought that it was
22 preferable if there was a decision from this

1 Board before the C of O was issued. I don't
2 know when that is expected to be.

3 MR. COOPER: The C of O?

4 CHAIRPERSON MILLER: Certificate
5 of Occupancy. Even though Mr. LeGrant just
6 said that they don't -- you wouldn't
7 necessarily put this use on a Certificate of
8 Occupancy, but --

9 MR. GLASGOW: Right.

10 CHAIRPERSON MILLER: -- is that
11 the next event really that affects the
12 decision of this case?

13 MR. GLASGOW: I've been told that
14 the opening of the store is April 23rd. Now,
15 when they get a C of O and start going in
16 there and putting everything in the store, you
17 know --

18 CHAIRPERSON MILLER: Yes, but
19 we're really talking about the sale, whether
20 or not they can sell beer.

21 MR. GLASGOW: Yes.

22 CHAIRPERSON MILLER: Okay.

1 MR. GLASGOW: Right.

2 CHAIRPERSON MILLER: So that's
3 really not going to be a real issue until
4 April. Is that right?

5 MR. GLASGOW: Or late March,
6 because I don't know when they start ordering
7 everything to have it stocked and up and
8 running and doing their test runs and
9 everything.

10 CHAIRPERSON MILLER: Okay.

11 MR. GLASGOW: For when they get,
12 you know, the public in there.

13 CHAIRPERSON MILLER: All right.
14 Well, we --

15 MR. COOPER: A point of
16 information?

17 CHAIRPERSON MILLER: Yes.

18 MR. COOPER: I don't want to
19 promise, but I can anticipate the certificate
20 -- the issuance of the Certificate of
21 Occupancy would be challenged. And that's for
22 your information, if that would interfere one

1 way or the other.

2 CHAIRPERSON MILLER: Yeah, all
3 right. Well, let me say this. I think what
4 the Board might suggest is that we schedule
5 this case for decision on March 4th, which is
6 our second decision meeting after this
7 hearing. Our first one is next week, which I
8 think is too soon in order to get all the
9 documents in that you all want to get in and
10 look at the transcript or anything like that.

11 So would there be anticipated a
12 Certificate of Occupancy before March 4th?

13 MR. GLASGOW: I don't know. I
14 would have to submit that information to the
15 Board.

16 CHAIRPERSON MILLER: Okay.

17 MR. GLASGOW: I just haven't been
18 dealing with that part of it.

19 CHAIRPERSON MILLER: Okay. Well,
20 we are not saying that that's the deciding
21 document anyway. The decision would be going
22 to whether the grocery store can sell it and

1 the store is not open yet, so it would be
2 before the store would be selling it. So
3 okay.

4 MR. COOPER: When you say whether
5 the store can sell, you're saying whether they
6 need an exception or not to sell? Is that --
7 that's the decision we're --

8 CHAIRPERSON MILLER: Yes, yes,
9 yes.

10 MR. COOPER: Yes?

11 CHAIRPERSON MILLER: That's right.

12 MR. COOPER: Okay.

13 CHAIRPERSON MILLER: That's right.

14 MR. COOPER: Now, you had asked
15 whether they need to ask permission. Okay.

16 CHAIRPERSON MILLER: Okay. So
17 that gives us, I guess, five weeks in order to
18 do a briefing schedule, which should be
19 sufficient, should it not?

20 MR. GLASGOW: It's sufficient from
21 the applicant's standpoint.

22 CHAIRPERSON MILLER: Okay.

1 MR. COOPER: It's sufficient.

2 MS. BOLLING: Yes, Madam Chair.

3 MS. BOLLING: Madam Chair?

4 CHAIRPERSON MILLER: And there
5 will be an ANC meeting before then, right,
6 five weeks?

7 MR. REYNOLDS: Um, Madam Chair,
8 may I ask a question? Someone in the
9 proceedings is -- you know, is the ANC allowed
10 to make any kind of a closing statement?

11 CHAIRPERSON MILLER: Okay. You
12 know what, I read these directions all the
13 time and I can tell the people like to an
14 amount, you know, and they don't pay
15 attention. But I go through the order of
16 procedure in this case and the ANC doesn't
17 have closing argument.

18 The ANC gets to make its case at
19 the time, like that I turned to you and said
20 this is your case. You presented it. That
21 was your case.

22 MR. COOPER: We will get a notice

1 on the --

2 CHAIRPERSON MILLER: Wait a
3 second. I don't think Mr. Wilson is --

4 MR. REYNOLDS: No, no, Madam --

5 MR. COOPER: I'm sorry.

6 MR. REYNOLDS: Madam Chair?

7 CHAIRPERSON MILLER: You just
8 wanted to know?

9 MR. REYNOLDS: I appreciate what
10 you are saying, but there were some statements
11 that were made after the conclusion of my
12 testimony and I wanted to make a response to
13 it, but if it's not appropriate, I completely
14 understand and I thank you.

15 CHAIRPERSON MILLER: Okay. Two
16 things. We do have an order of procedure that
17 I read. Okay. And that gives the last -- the
18 last is rebuttal and closing statement by
19 appellant. Now, Mr. Cooper didn't exactly
20 stick to that. He kind of did it earlier and
21 then there were other questions and then he
22 did it again.

1 We have, basically, finished, but,
2 you know, the Board has discretion. If there
3 is something, you know, that is so compelling
4 that you feel you've got to get in the record.

5 MR. REYNOLDS: It is not my
6 intention to delay these proceedings. I
7 wanted to share some comments, but I will
8 happily stand down. Thank you.

9 CHAIRPERSON MILLER: Okay. Well,
10 let me just say this. What we are doing is
11 leaving open the record for final submissions.
12 So if you want to say something else, you
13 didn't have a chance to do it, you want to
14 address something, maybe you can just give us
15 an indication what it is you would like to
16 address and then we can really decide.

17 If you're going to just say it
18 right here, we have time to hear it right here
19 and now, but otherwise, you can put it in
20 writing.

21 MR. REYNOLDS: Would I be allowed
22 to submit it in writing with the resolution

1 regarding Case 77?

2 CHAIRPERSON MILLER: What do you
3 mean?

4 MR. REYNOLDS: From the ANC. In
5 other words, you requested that I go back to
6 the ANC and receive clarification that I be
7 allowed to present on that issue or that the
8 ANC was weighing in also on that case. Could
9 I submit any comments, at that time, when I
10 send in the letter of approval from the ANC?

11 CHAIRPERSON MILLER: I'm sorry,
12 I'm not -- I must be getting tired.

13 MR. REYNOLDS: You asked me for an
14 authorization letter regarding Mr. Cooper's
15 case. When I send that in, may I also,
16 please, send in some additional comments?

17 CHAIRPERSON MILLER: You may send
18 in additional comments, I would say, but get
19 those authorized by the ANC, because in an
20 appeal, you know, it's the ANC that is allowed
21 as a matter-of-right. It's not you as an
22 individual.

1 MR. REYNOLDS: Understood.

2 CHAIRPERSON MILLER: So that would
3 be -- unless the parties have an objection,
4 you know, if the ANC has another word to say
5 on this, I would leave the record open for
6 that.

7 MR. REYNOLDS: Thank you.

8 CHAIRPERSON MILLER: Okay. Any
9 objections?

10 MR. GLASGOW: No.

11 CHAIRPERSON MILLER: Okay.

12 MS. BOLLING: No objections.

13 CHAIRPERSON MILLER: When is the
14 next ANC meeting?

15 MR. REYNOLDS: I believe the date
16 is Wednesday, February the 5th. It is the
17 first Wednesday of the month.

18 CHAIRPERSON MILLER: Okay.

19 MR. REYNOLDS: Then whatever the
20 first Wednesday is. Would that be February
21 the 6th?

22 MR. COOPER: Yes, Tuesday is the

1 5th.

2 CHAIRPERSON MILLER: Okay. Now,
3 one more question. I think that we've talked
4 about the ANC getting that in. And then we
5 have talked about further discussion on
6 interpreting the regulations. And then we
7 talked about some case specific responses to
8 testimony.

9 I think that we can have all of
10 these come in on the same time, but I'm not
11 sure. I want to get a response from the
12 parties, whether we really need to have
13 response -- two rounds, you know, of filing
14 and responses. We've got five weeks in here.

15 Is it the preference of the
16 parties to have that kind of briefing schedule
17 set up where we have, you know, initial
18 filings and then responses? Okay. A briefing
19 schedule is I say we're having this decided on
20 March 4th. So on February 18th, this is just
21 hypothetical. I don't know which day. That's
22 a holiday.

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1 February 19th all parties file the
2 documents we talked about if they are going
3 to. Any commentary on the rules, the ANC
4 report, updated report, etcetera.

5 And then do parties want an
6 opportunity to respond to each other's
7 filings? The first question is do you want a
8 two tiered schedule or do you just want
9 everybody file and comment on that and that's
10 it or do you want to respond to each other?
11 In which case, Ms. Bailey is going to set it
12 up, so that initial filings are one day,
13 responses are another day and then we have our
14 decision.

15 MR. COOPER: I wouldn't be
16 comfortable letting these guys go without a
17 shot at them.

18 CHAIRPERSON MILLER: And you would
19 like a response date?

20 MR. COOPER: Yeah.

21 CHAIRPERSON MILLER: Any others?
22 Do you all --

1 MS. BOLLING: The District would
2 like one round, Madam Chair.

3 CHAIRPERSON MILLER: One round,
4 everybody file at once.

5 MR. COOPER: I could do one round.

6 MR. LYDEN: Reed-Cooke would like
7 one round.

8 CHAIRPERSON MILLER: Okay. One
9 round is sufficient on this question. Okay.

10 MR. LYDEN: Set a date, close the
11 record.

12 CHAIRPERSON MILLER: Okay.

13 MR. COOPER: Is the round to
14 response or just shoot?

15 CHAIRPERSON MILLER: What do you
16 mean? I thought you meant -- what did you
17 mean? Did you mean response or no?

18 MS. BOLLING: No, no.

19 CHAIRPERSON MILLER: One filing?

20 MS. BOLLING: One filing.

21 CHAIRPERSON MILLER: You want one
22 filing?

1 MS. BOLLING: One filing.

2 CHAIRPERSON MILLER: Does the
3 applicant have a position?

4 MR. COOPER: Yeah, I --

5 CHAIRPERSON MILLER: No, I'm
6 asking the applicant.

7 MR. COOPER: Oh, sorry.

8 MR. GLASGOW: The property owner.

9 CHAIRPERSON MILLER: I'm sorry,
10 there's no applicant.

11 MR. GLASGOW: The property --

12 CHAIRPERSON MILLER: I'm sorry.
13 It's the appellant.

14 MR. GLASGOW: We have no position.
15 Whatever the Board says we will do. If it's
16 one round, if it's two rounds, whatever.

17 MR. REYNOLDS: Madam Chair, I
18 would concur with that.

19 CHAIRPERSON MILLER: Mr. Lyden?

20 MR. LYDEN: The pleasure of the
21 Board.

22 CHAIRPERSON MILLER: All right.

1 MR. LYDEN: We are going to be
2 getting ready for our February 21st Zoning
3 Commission hearing on why we have to change
4 the rules on something that is not necessary.
5 But we won't go there.

6 MR. COOPER: What is that, the
7 amendment to Reed-Cooke?

8 MR. LYDEN: Yeah.

9 MR. COOPER: Is that it? Is that
10 what you are talking about?

11 MR. LYDEN: Yeah.

12 MR. COOPER: What's the date on
13 that?

14 MR. LYDEN: The 21st.

15 CHAIRPERSON MILLER: Okay. This
16 is what we're going to do.

17 MR. COOPER: Okay. The words --
18 spoken words coming.

19 CHAIRPERSON MILLER: We're going
20 to set a schedule for initial filings,
21 everybody file that date. We're going to
22 leave the record open for another date to

1 allow responses, if you want. None of this is
2 required, except the ANC letter in order to
3 give great weight to the ANC.

4 If you have nothing to say about
5 the regulations, fine. We have heard a lot
6 today. We have heard plenty. If you have
7 something more that is useful, we would like
8 to hear it. If another party wants to respond
9 to somebody else's interpretation of the regs,
10 fine.

11 I would just -- we don't want to
12 make you do a lot of -- we're not asking you
13 to do a lot of work, per se. We're leaving
14 the record open to respond to specific things,
15 if you would like to. I understand, Mr.
16 Cooper, your position is plain meaning of the
17 words. There may not be much more to say than
18 that, you know, and you wouldn't have to.

19 MR. COOPER: And the likelihood is
20 that I won't restate what I have said.

21 CHAIRPERSON MILLER: Exactly.
22 That would -- I would encourage you on not to

1 restate.

2 MR. COOPER: Right.

3 CHAIRPERSON MILLER: Necessarily.

4 You are welcome to, but --

5 MR. COOPER: (Speaking off mike.)

6 Is there any opportunity to state what --

7 CHAIRPERSON MILLER: Okay. No,
8 let me say one thing though. I do want to
9 say. I don't want to -- I'm not -- I'm going
10 to separate these, Ms. Bailey. I don't want
11 tit for tat on this who said what.

12 You know, Mr. Cooper said
13 something about the intervenor and Mr. Glasgow
14 is having an opportunity to respond to that
15 and that's it. We're not going to have
16 responses to that. Okay. He just wants to,
17 you know, get in the record his side and
18 that's fine. I don't need responses. That's
19 right.

20 So we're not going to have another
21 response to that. Everything else, I believe,
22 involves legal interpretations. So that, you

1 know, if one party says a certain legal
2 interpretation and another party wants to show
3 why that is flawed, we want to give that
4 opportunity.

5 Okay. So let's start with what
6 the first date would be, Ms. Bailey.

7 MS. BAILEY: February 11th, Madam
8 Chair.

9 CHAIRPERSON MILLER: And then the
10 second filings would be?

11 MS. BAILEY: February 25th.

12 CHAIRPERSON MILLER: And the
13 decision would be March 4th.

14 MR. COOPER: Can you repeat that
15 for me?

16 MS. BAILEY: The submissions are
17 to be filed by February 11th. The responses
18 as articulated by the Chair will be February
19 25th. And then the decision is March 4th.

20 MR. GLASGOW: Findings of fact and
21 conclusions on the 25th also?

22 CHAIRPERSON MILLER: Mr. Glasgow,

1 I'm not sure if that's necessary, but why
2 don't we discuss that. I think what is
3 necessary for the Board's purposes is
4 interpreting that regulation correctly.
5 That's what we are going to be focused on.

6 And so I'm not sure whether it
7 would be a good use of everybody's time to get
8 into all these proposed finding and
9 conclusions of law. It is my understanding
10 that our order, you know, will be somewhat
11 subsumed by the Zoning Commission later on in
12 a few months or something.

13 I think it is important that we
14 issue a decision, you know, as soon as we can,
15 which is March, before the store operates.
16 But ultimately, the Zoning Commission is going
17 to have the last word on this, because this is
18 before the Zoning Commission as well.

19 So I mean, I understand the Zoning
20 Commission is going to be clarifying it one
21 way or another, but they are not going to be
22 clarifying it that quickly.

1 So unless I'm mistaken, at some
2 point down the road, our decision may be moot,
3 because we will have the Zoning Commission,
4 which is our superior body, clarifying the
5 regulation. So, you know, usually proposed
6 findings and conclusions of law where you are
7 setting forth all of those facts and stuff are
8 very useful for a full written order.

9 And what I'm saying is by the time
10 we would issue a full written order, I'm not
11 sure. Unless it would expedite the full
12 written order. Is that your point, that there
13 would be a full written order before the
14 Zoning Commission acts?

15 MR. GLASGOW: I just wanted to
16 make sure that we weren't spending time
17 preparing something that was expected, not
18 expected or whatever. And so I just wanted to
19 know if the Board doesn't, at this point in
20 time, think that getting findings of fact and
21 conclusions of law, I'm not interested in
22 having our staff, you know, spend a lot of

1 time getting that all together.

2 And I can understand in this case
3 with all the legal argument that there has
4 been, that findings and conclusions may or may
5 not be useful to the Board in reaching its
6 decision on March 4th. And so if they are not
7 useful to the Board, I'm not interested in
8 submitting them, at this point in time.

9 We can always make a request if
10 the Board, after rendering its decision, said
11 if the prevailing party wants to submit
12 findings of fact and conclusions, at that
13 point in time, you know, you can do that. You
14 know, the courts do that all the time.

15 CHAIRPERSON MILLER: Yes. I mean,
16 I think that, yeah, what we are focusing on is
17 the decision. And I don't know, Mr. LeGrant,
18 whether or not DCRA would be waiting for a
19 written decision from this Board, in which
20 case we would need to expedite it or whether
21 or not our decision on March 4th would affect
22 your -- that doesn't sound like that would

1 affect your Certificate of Occupancy.

2 ZONING ADMIN. LeGRANT: Well, I
3 think any decision of March 4th would
4 certainly be informative. If I had a pending
5 C of O application then before me, you know,
6 I would, of course, seek advice of my counsel
7 before making any decision on that Certificate
8 of Occupancy.

9 CHAIRPERSON MILLER: Okay. We
10 don't have our Assistant Attorney General here
11 today, but, I mean, our point is, you know,
12 we're not sitting on this. We're not waiting
13 for the Zoning Commission. We want to come
14 out and give everyone an answer as to how we
15 interpret these regulations as quickly as
16 possible, but allowing the same time of due
17 process for everyone to submit whatever they
18 need to submit in the record.

19 And March 4th does that. And now,
20 I'm just pausing whether -- the only reason
21 your proposed findings and conclusions of law
22 would be useful would be only for expediting

1 an order later. So I don't think we have to.
2 We don't need it for our decision on March
3 4th. So why don't we leave it at this, that
4 we're going to be focusing on the substance of
5 interpreting that regulation by March 4th.

6 And at that day, if we think it
7 would be useful to have proposed findings and
8 conclusions of law for a written order, we
9 will ask then.

10 Okay. Anything else? Everybody
11 understand the schedule? If you have any
12 questions, you can, after this hearing, ask
13 Mr. Moy. Okay. Thank you very much.

14 MR. COOPER: Thank you.

15 MR. GLASGOW: Thank you.

16 VICE CHAIR LOUD: Thank you.

17 (Whereupon, the Public Hearing was
18 concluded at 7:13 p.m.)
19
20
21
22