

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 8, 2008

+ + + + +

The Regular Public Meeting
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 LOUD, Board Member
SHANE L. DETTMAN, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MICHAEL G. TURNBULL, FAIA, Commissioner
(AOC)

OFFICE OF ZONING STAFF PRESENT:

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

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.
SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEVEN COCHRAN

The transcript constitutes the
minutes from the Public Meeting held on
January 8, 2008.

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

2 10:37 a.m.

3 CHAIRPERSON MILLER: This meeting
4 will please come to order.

5 Good morning, ladies and
6 gentlemen. Happy New Year. This is the
7 January 8th Public Meeting of the Board of
8 Zoning Adjustment of the District of Columbia.

9 My name is Ruthanne Miller. I'm
10 the Chair of the BZA. To my left is Mr. Marc
11 Loud, Mr. Shane Dettman, Board Member, and
12 next to him is Mr. Clifford Moy from the
13 Office of Zoning, Lori Monroe, Office of
14 Attorney General and Ms. Beverley Bailey from
15 the Office of Zoning.

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

19 We do not take any public
20 testimony at our meetings unless the Board
21 asks someone to come forward.

22 Please be advised that this

1 proceeding is being recorded by a court
2 reporter and is also webcast live.
3 Accordingly, we must ask you to refrain from
4 any disruptive noises or actions in the
5 hearing room. Please turn off all beepers and
6 cell phones.

7 Does the Staff have any
8 preliminary matters?

9 MR. MOY: No, Madam Chair.

10 CHAIR MILLER: Okay. Then let's
11 proceed with the agenda.

12 MR. MOY: Good morning, Madam
13 Chair, Members of the Board. The first case
14 for a decision is a request for a Modification
15 of approved Plans to Application Number 17682,
16 pursuant to Section 3129 of the Zoning
17 Regulations. This modification is to the
18 originally approved Application Number 17682
19 of Bill and Nicola Renison pursuant to 11 DCMR
20 3104.1 for a special exception to allow a rear
21 addition to an existing single-family dwelling
22 under Section 223, not meeting the rear year

1 (Section 404) requirements in the R-1-B
2 District at premises 3222 Stephenson,
3 Stephenson, yes, Stephenson Place, N.W.,
4 Square S-2017, Lot 801.

5 On December 4th, 2007, the Board
6 received a request from the Applicant to
7 modify approved plans. This is a letter dated
8 December 2nd, 2007 and it is identified in
9 your case photos as Exhibit 25.

10 In a subsequent filing, the
11 Applicant noticed service of plans to parties
12 and that letter is dated December 10th, 2007
13 received in the Zoning Office December 12th.
14 That is identified as Exhibit 28.

15 The Staff will conclude by saying
16 that the Board is to act on the merits of the
17 requested modification of plans.

18 Thank you.

19 CHAIRPERSON MILLER: Thank you,
20 Mr. Moy.

21 This seems like a fairly
22 straightforward request for modification of

1 plans pursuant to 3129 of our regulations. It
2 appears that the plans have been modified to
3 add two traditional-size colonial windows to
4 the second floor of the addition on the side
5 of the new addition and this actually enhances
6 the exterior aesthetics. I don't think it
7 does a lot necessarily for the Applicant per
8 se. I think that these are windows actually
9 on walk-in closets.

10 Other changes on the plans as a
11 result of adding these windows are that the
12 roof line is slightly altered to maintain
13 appropriate design proportions.

14 Office of Planning and the ANC
15 were served and neither has responded within
16 the ten days allowed pursuant to 3129.4.

17 So, our standard for minor
18 modifications are set forth at 3129.7 which
19 says approval of requested modifications of
20 approved plans shall be limited to minor
21 modifications that do not change the material
22 facts the Board relied upon in approving the

1 application and 3129.5 says that the plans
2 shall be made or request for modification of
3 the plans shall be made by the Board on the
4 basis of the written request, the plans
5 submitted therewith and any responses thereto
6 from other parties to the original
7 application. I think that this modification
8 is quite minor.

9 If I recall in this case and in
10 many cases, sometimes they're -- they don't
11 put windows on the sides because they're
12 thinking they're doing their neighbors a favor
13 by giving them more privacy, but, in fact,
14 it's often aesthetically displeasing and that
15 appears to be what happened in this case that
16 the Applicant has made the changes in response
17 to neighbors' concerns and he indicates that
18 this was discussed, you know, with the
19 neighbors and the changes were a result of
20 that and also, there's no adverse impact as a
21 result of adding these windows and it doesn't
22 really change our analysis in the case as far

1 as I'm concerned.

2 Others? Okay. In which case,
3 then I would move to grant the motion for
4 modification of approved plans to Application
5 Number 17682 pursuant to Section 3129 of the
6 Zoning Regulations.

7 Is there a second?

8 MEMBER LOUD: Second.

9 CHAIRPERSON MILLER: Further
10 deliberation? All those in favor say aye.

11 (Ayes.)

12 CHAIRPERSON MILLER: All those
13 opposed? All those abstaining?

14 And, Mr. Moy, would you call the
15 vote please?

16 MR. MOY: Yes, Madam Chair, the
17 Staff would record the vote as 3 to 0 to 1.
18 This on a motion of the Chair Ms. Miller to
19 approve. Seconded by Mr. Loud. In support of
20 the motion, Mr. Dettman. We have no other
21 Board Member participating.

22 Madam Chair, we also have an

1 absentee ballot from Mr. Gregory Jeffries
2 who's also participated on the case and his
3 absentee ballot is to vote for the
4 modification. So, that would support the
5 motion and would give a final vote of 4 to 0
6 to 1.

7 CHAIRPERSON MILLER: Thank you and
8 I believe this could be a summary order as
9 there is no opposition in this case.

10 MR. MOY: Yes, thank you.

11 CHAIRPERSON MILLER: Thank you.

12 MR. MOY: The next for decision,
13 Madam Chair, is another request for or rather
14 request for another modification of approved
15 plans, but this is to Application Number 17617
16 pursuant to Section 3129 of the Zoning
17 Regulations.

18 If the Board would recall, this
19 modification is to the originally approved
20 application of First Congregational United
21 Church of Christ, et al., pursuant to 11 DCMR
22 3103.2 and 3104.1 for a variance from the off-

1 street loading facility requirements under
2 Section 2201, a special exception from the
3 roof structure requirements under Sections 411
4 and 770.6 and a special exception for a waiver
5 of the rear yard requirements under Section
6 774 to allow the construction of a mixed-use
7 church and residential development in the
8 DD/C-4 District at premises 945 G Street,
9 N.W., Square 375, Lot 823.

10 On December 7th, 2007, the Board
11 received a request from the Applicant for a
12 modification of the approved plans and that is
13 identified in the case photos as Exhibit 33.
14 The record -- there are no other filed
15 comments in the record other than the ANC 2
16 report which is an attachment to the
17 Applicant's filing.

18 The Board is to act on the merits
19 of the requested modification pursuant to the
20 requirements of Section 3129.

21 Staff also notes for the Board
22 that in the request for modification that the

1 previously approved special exception zoning
2 relief from the roof structure requirements
3 under Section 411 is no longer needed.

4 And that concludes the Staff's
5 briefing, Madam Chair.

6 CHAIRPERSON MILLER: Thank you,
7 Mr. Moy.

8 So, this is also a motion for
9 modification, minor modification, except this
10 one seems just a little bit more complicated
11 than the one we just discussed.

12 On June 15th, 2007, we granted
13 variance relief and special exception relief
14 in this case.

15 What's changing is -- one of the
16 things that's changing is use. The project's
17 changing from a mixed-use as the church
18 residential development to mixed-use church
19 office development.

20 Both developments include the
21 church and church's social services facilities
22 on the first two floors and then the upper

1 floor is what's changing with respect to the
2 use.

3 There's also some minor
4 modification to the layout of the building and
5 that actually requires less relief though than
6 what was granted in our previous order. I
7 think as Mr. Moy I believe said it no longer
8 needs special exception relief from the roof
9 structure requirements and it no longer needs
10 relief from the 55-foot berth requirement
11 because that was tied to residential use under
12 2201.

13 It stills needs relief from
14 loading requirements for the same reasons as
15 the original project related to the necessary
16 configuration of the ground floor for the
17 church and its related activities and it still
18 needs waiver from 774.1.

19 So, again, when we're looking at
20 these regulations, we need to determine, first
21 of all, 3129.7. I mean it's just a minor
22 modification that does not change the material

1 facts that the Board relied upon in approving
2 the application.

3 It is minor with respect to the
4 layout. The question is is the use change a
5 major modification and I think we have to look
6 at that in the context of the relief that we
7 gave and I actually looked back at the
8 transcript and that really wasn't a factor in
9 our analysis how the upper floors were being
10 used. The fact that they were residential
11 didn't really have an impact on our analysis
12 when we were looking at the loading berth and
13 the roof structure.

14 However, I think that we do need
15 to make sure that the change to office use
16 doesn't have some adverse impact that we're
17 not aware of because that wasn't at issue in
18 the hearing and Mr. Cochran is here from the
19 Office Planning and I think that it would be
20 a good idea to open this meeting up just for
21 taking in his comments.

22 Before we do that, I believe that

1 the ANC is on record as supporting the
2 modification.

3 So, I would like to ask Mr.
4 Cochran if he could identify himself for the
5 record and address perhaps if the Office of
6 Planning has a position on the request for
7 minor modification and if, in fact, he has
8 talked to DDOT as well.

9 MR. COCHRAN: Sure. For the
10 record, my name is Steven Cochran from the
11 Office of Planning.

12 OP doesn't have a written report
13 as you know because we learned of the proposed
14 modification last week from -- so, but based
15 on the information provided by the Applicant,
16 we have no objection to the request for
17 modification.

18 As you've pointed out, it's
19 essentially the same massing and appearance as
20 the previous structure. There's a decrease of
21 one floor, but -- because it goes from
22 residential to office, but it's still the same

1 height.

2 You've pretty well summarized the
3 table that they've provided on page 4 for --
4 to compare the reliefs. It's the same rear
5 yard relief needed. The loading requirement
6 is less as you've pointed out because it goes
7 from residential to commercial, but it's still
8 needed because there -- because part of the
9 loading would be provided in the alley.

10 There is a covenant that's being
11 -- the alley has already been closed. There
12 is a covenant that's being worked out between
13 the Applicant and the Office of Property
14 Management to insure they're going to be able
15 to use that alley for the loading purposes.

16 The roof structure formerly had
17 been steps. So, it needed a requirement.
18 Now, it's fully zoning compliant. So, that
19 relief isn't needed.

20 As you pointed out again, the ANC
21 voted to support the application. OP will
22 continue to work with both the Applicant and

1 the Office of Property Management on the
2 covenant that's needed for the alley and for
3 the design of that stub end of the -- of the
4 former alley that's nearest G Street to see if
5 we can't work something out so that it looks
6 better and maybe is better used either by the
7 library or not.

8 That concludes our quick report.
9 Oh, excuse me. No, it doesn't.

10 We talked to DDOT and DDOT has no
11 objection. It actually has less of an impact
12 now than it had previously. So, our
13 conversations with DDOT indicated no problem.

14 CHAIRPERSON MILLER: Thank you.
15 Other questions from other Board Members?

16 Okay. That fully addresses my
17 questions.

18 MR. COCHRAN: Great.

19 CHAIRPERSON MILLER: Based on my
20 analysis then and what Mr. Cochran has added
21 to our information, I believe that this can
22 fall within 3129.7 as a minor modification

1 because it doesn't change the material facts
2 that this Board relied up in approving the
3 application and does not appear to have any
4 adverse impacts related to that change.

5 Any other comments?

6 Okay. In which case, then I would
7 move to grant the motion for modification of
8 approved plans to Application Number 17617
9 pursuant to Section 3129 of the Zoning
10 Regulations.

11 Do I have a second?

12 MEMBER LOUD: Second.

13 CHAIRPERSON MILLER: Further
14 deliberation? All those in favor say aye.

15 (Ayes.)

16 CHAIRPERSON MILLER: All those
17 opposed? All those abstaining?

18 And would you call the vote, Mr.
19 Moy?

20 MR. MOY: Yes, Madam Chair, the
21 Staff would record the vote as 2 to 0 to 2.
22 The Zoning motion of the Chair Ms. Miller to

1 approve the modification request. Seconded by
2 Mr. Loud. We also have an absentee ballot
3 from Anthony Hood, Mr. Hood, who also
4 participated and his vote is to approve the
5 modification which would give a resulting vote
6 of 3 to 0 to 2. The 2 being no other Board
7 Members participating.

8 CHAIRPERSON MILLER: Thank you and
9 I believe this can be a summary order as well.
10 There's no opposition in this case.

11 Okay. Thank you very much and
12 we're ready for the next case when you are.

13 MR. MOY: The next case, Madam
14 Chair, is Application Number 17685 of Komsam,
15 Inc. pursuant to 11 DCMR 3104.1 for a special
16 exception to allow a construction of a new
17 17-unit apartment building under Section 353
18 in the R-5-A District at premises 5000 block
19 of Drake Place, which is Queens Stroll Place,
20 S.E. That's in Square 5321, Lot 35.

21 At its special public meeting on
22 December 18th, 2007, the Board convened the

1 application and deliberated the merits of the
2 requested post-hearing documents.

3 After discussion, the Board
4 rescheduled its decision to January the 8th.
5 The Board left the record open for filings
6 from the Applicant regarding the issue of the
7 landscape plan pursuant to Section 2117.11.

8 The filing was submitted
9 yesterday, Monday, January the 7th, Madam
10 Chair, and it's in your case folders
11 identified as Exhibit 33. The Board is to act
12 on the merits of the application.

13 That concludes the Staff's
14 briefing.

15 CHAIRPERSON MILLER: Thank you
16 very much.

17 Yes, I think we decided to
18 postpone deliberation on this case until we
19 received the revised landscaping plans which
20 were to show whether they could meet the 5
21 percent minimum landscaping requirement
22 pursuant to Section 2117.11 or whether they

1 needed relief and they have submitted a
2 landscaping plan that purports to show that
3 now the percentage of parking area devoted to
4 landscape is 17 percent and I think I'm going
5 to defer to my other Board Members at this
6 point to discuss this landscaping plan. That
7 if they find, in fact, that it also meets the
8 requirement and whether or not this
9 application meets the requirements under 353
10 in general.

11 MEMBER DETTMAN: I'd be happy to
12 speak to that, Madam Chair.

13 Not quoting the regulations word-
14 for-word, but 2117.11 requires the Applicant
15 to commit a minimum of 5 percent of the area
16 dedicated to parking to landscaping and
17 screening.

18 In previous submissions of the
19 plans, the Applicant had proposed actually a
20 brick-wall enclosure around the area and in
21 the previous hearing, we did not see where the
22 5 percent -- while there was landscaping on

1 the site, we didn't see where the 5 percent
2 parking area landscaping requirement was
3 fulfilled.

4 In our last meeting when we had
5 sort of deferred back to the Applicant asking
6 for sort -- sort of addressing the 5 percent
7 landscaping issue, the Board provided a little
8 bit of guidance and said that, you know, there
9 could be a -- instead of brick wall, there
10 could be sort of a green treatment that could
11 satisfy the 5 percent landscaping requirement.

12 The latest submission which Mr.
13 Moy mentioned was submitted yesterday.
14 Revised plans sort of indicate that instead of
15 a brick-wall enclosure there has been a
16 landscaping treatment around the outside of
17 the parking requirement and, in fact, the
18 percentage of the parking area devoted to
19 landscaping right now is shown as being 17
20 percent.

21 It appears so that the
22 requirements under 2117.11 have been

1 fulfilled.

2 CHAIRPERSON MILLER: Okay. Would
3 you like to address 353 in general? Whether
4 those requirements have been fulfilled.

5 MEMBER DETTMAN: Under 353 which
6 deals with new residential developments in R-
7 5-A which are allowed as a special exception,
8 353.1 states that all new residential
9 developments except those comprising of one-
10 family detached shall be reviewed by the Board
11 under special exception.

12 Ah, 353.2

13 states that the Board shall refer the
14 application to the Board of Education.

15 Just looking for my DC OP report
16 here. I don't believe we have a report from
17 the Board of Education.

18 Looking at the DC Op report and
19 the evidence in the record, it doesn't appear
20 as if we have a submission from the Department
21 of Education.

22 CHAIRPERSON MILLER: I think

1 that's now an infrequent case and that Office
2 of Planning then makes an analysis.

3 MEMBER DETTMAN: That's right. In
4 the OP report for the requirement under 353.2,
5 OP states that it has not received comments
6 from the Board of Education regarding the
7 ability of the area public schools to
8 accommodate students.

9 However, there are a number of
10 public schools within one mile of the proposed
11 development to accommodate future students
12 that may reside at this development.

13 Ah, 353.3 states that the Board
14 shall refer the application to the Department
15 of Transportation.

16 Do we have a DDOT report?

17 CHAIRPERSON MILLER: I don't
18 recall that DDOT had any concerns in this
19 case.

20 MEMBER DETTMAN: The OP report
21 states that the Applicant's parking and
22 landscaping plan has been to DDOT for analysis

1 and to DHCD.

2 It appears as if 353.3 has been
3 satisfied and if we do have a DDOT report --

4 CHAIRPERSON MILLER: We do have a
5 report from DHCD in support.

6 MEMBER DETTMAN: Okay.

7 CHAIRPERSON MILLER: That's
8 Exhibit 28.

9 MEMBER DETTMAN: Okay, 353.4
10 states that the Board shall refer the
11 application to the Office of Planning. The
12 Office of Planning has submitted a report,
13 Exhibit 26 and recommends approval for the
14 proposal.

15 Finally, 353.5 deals with the
16 submission requirements to the Board which
17 have been satisfied.

18 So, it appears that all of the
19 requirements under 353 have been met for this
20 application.

21 CHAIRPERSON MILLER: I would
22 concur with you and I don't believe there were

1 any adverse impacts presented to us. That
2 this was a good project.

3 Any other comments?

4 We also have an ANC report in this
5 case. That's Exhibit Number 22. They had a
6 public meeting on this and they had no issues
7 of concern about the application related to
8 the Zoning Regulation.

9 Okay. Anything else?

10 MEMBER DETTMAN: Madam Chair, I
11 believe we had one party in this case. It was
12 a woman representing the residents of the
13 condominium association behind this particular
14 proposal.

15 If I remember correctly, most of
16 the concerns had to do with landscaping and
17 screening of the parking and safety and with
18 the most recent version of the plans that were
19 submitted yesterday, I think that those
20 concerns have been addressed with the new
21 parking lot enclosure.

22 CHAIRPERSON MILLER: Okay. Right.

1 We did have some concerns expressed by the
2 Pellegrino Condominium Association.

3 MEMBER DETTMAN: That's right.

4 CHAIRPERSON MILLER: I don't
5 believe they were a party to the case though.
6 Were they?

7 MEMBER DETTMAN: I may be
8 mistaken. I remember stepping through the
9 process of determining whether or not they
10 qualified as party status, but I don't quite
11 remember if they were granted party status.

12 MS. BAILEY: Madam Chair, the
13 record is not showing that we have a party in
14 this case.

15 MEMBER DETTMAN: Okay.

16 CHAIRPERSON MILLER: Right.
17 Right. That's what I see in this file as
18 well.

19 MEMBER DETTMAN: Okay.

20 CHAIRPERSON MILLER: So, yes, I
21 mean we often have concerns brought to our
22 attention by organizations or persons or

1 community members without them necessarily
2 being a party to the case.

3 So, they did express concerns as
4 Mr. Dettman stated in the letter. It looks
5 like a letter or testimony to the Board with
6 respect in particular to the screening and the
7 landscaping and the Board has some concerns
8 about that.

9 Also, with respect to the
10 regulation requiring the 5 percent in the
11 parking lot. So, that has been addressed and
12 anything else? Okay.

13 Do we have a motion on this? I'll
14 move then. I move to approve Application
15 Number 17685 of Komsam, Inc. pursuant to 11
16 DCMR 3104.1 for a special exception to allow
17 the construction of a new 17-unit apartment
18 building under Section 353 in the R-5-A
19 District at premises 5000 block of Drake Place
20 (Queens Stroll Place), S.E.

21 Do I have a second?

22 MEMBER DETTMAN: Second.

1 CHAIRPERSON MILLER: Further
2 deliberation? All those in favor say aye.

3 (Ayes.)

4 CHAIRPERSON MILLER: All those
5 opposed? All those abstaining?

6 Mr. Moy, would you call the vote
7 please?

8 MR. MOY: Yes, ma'am, Staff would
9 record the vote as 3 to 0 to 2. This is on a
10 motion of the Chair Ms. Miller to approve the
11 application. Seconded by Mr. Dettman. Also
12 in support of the motion Mr. Loud and we have
13 no other Board Member nor Zoning Commission
14 Member participating.

15 CHAIRPERSON MILLER: And as we
16 were discussing before, there is no party in
17 the case. This can be a summary order. Okay.

18 And we're ready for the next case
19 when you are, Mr. Moy.

20 MR. MOY: The next case for the
21 Board's decision is Application Number 17679
22 of Jemal's TP Land, LLC pursuant to 11 DCMR

1 3104.1 for special exemptions under Section
2 353 and 2516 to permit the construction of a
3 new residential development (two multiple
4 dwellings each containing 38 dwelling units)
5 in the R-5-A District at premises 6923-6953
6 Maple Street, N.W. and 6916 to 6926 Willow
7 Street, N.W. That's in Square 3347, Lots 26
8 through 29, 40, 808, 811, 814, 815, 818, 819,
9 820, 824, 825, 840 and 843.

10 The application request also
11 includes the amendment to include special
12 exception relief under Section 411 regarding
13 roof structure.

14 On November 13th, 2007, the Board
15 completed public testimony, closed the record
16 and scheduled its decision at its public
17 meeting on January the 8th. The Board
18 requested and agreed upon revised landscape
19 plan in coordination with the community as
20 well as draft findings of fact and conclusions
21 of law.

22 Both those filings were submitted

1 into the record. They're identified in your
2 case folder as Exhibit 42 and 43 respectively.

3 The Board is to act on the merits
4 of the special exception request.

5 And that completes the Staff's
6 briefing, Madam Chair.

7 CHAIRPERSON MILLER: Okay. Thank
8 you.

9 I'd like to welcome Mr. Turnbull
10 here who's joining us from the Zoning
11 Commission and he participated on this case as
12 well.

13 So, This case was presented to us
14 as a special exception and at the end of the
15 hearing, we did ask for a revised landscaping
16 plan which addressed our concerns about the
17 landscaping. I think there was reference to
18 a plan being improved for HPRB and since our
19 regulations also called for examination of
20 landscaping, in consideration of that, we had
21 asked them to provide that to us and they did.

22 I think they have made a good case

1 for special exception here, but before we
2 actually deliberate on that, one of our Board
3 Members noticed that there may be a need for
4 a different sort of relief with respect to the
5 penthouse and -- penthouses in this case and
6 I'm going to ask Mr. Dettman to articulate
7 that concern and then we will discuss how
8 we're going to proceed in this case given that
9 concern.

10 MEMBER DETTMAN: Thank you, Madam
11 Chair.

12 In sort of reviewing this
13 application and preparing for this meeting
14 today, I noticed something in particular to
15 the request -- the special exception relief
16 request for -- with respect to roof structures
17 and if I could just sort of point -- point the
18 Board's attention to Section 411.11 because I
19 think the request for special exception relief
20 from the penthouse setback requirements sort
21 of falls under here based on your
22 interpretation and so, I'll read 411.11 and

1 it's a little bit lengthy. So, I'll just need
2 a minute.

3 Ah, 411.11 states that where
4 impractical because of operating difficulties,
5 size of building lot or other conditions
6 relating to the building or surrounding area
7 that would tend to make full compliance unduly
8 restrictive, prohibitively costly or
9 unreasonable, the Board of Zoning Adjustment
10 shall be empowered to approve a special
11 exception under 3104, the location, design,
12 number and all other aspects of such structure
13 regulated under 411.3 through 411.6 even if
14 such structures do not meet the normal setback
15 requirements of 400.7, 530.4, 560.4, 770.6,
16 840.3 and 930.3 when applicable and to approve
17 the material on closing construction used if
18 not in accordance with 411.3 and 411.5
19 provided that the intent and purpose of this
20 chapter and this title shall not be materially
21 impaired by the structure and the light and
22 air of adjacent buildings shall not be

1 affected adversely.

2 The roof structure relief that the
3 Applicant is seeking has to do with the
4 setback requirements, the number of roof
5 structures. I believe that there's two here
6 as well as varying heights of the roof
7 structures.

8 The two latter relief requests
9 relating to the number of roof structures as
10 well as the height, they do fall under special
11 exception review under 411.11. However, my
12 reading of 411.11 does not include the special
13 exception relief from the rood setback, the
14 penthouse setback requirements that are
15 articulated in 400.7.

16 Ah, 411.11 states that, you know,
17 you are eligible for special exception relief
18 under 411.3 and 411.6 even if your setbacks do
19 not comply with 400.7, but it does not -- my
20 reading of 411.11 does not state that the
21 setback requirements required in 400.7 do fall
22 under special exception of the Board of Zoning

1 Adjustment. So, it appears to me that relief
2 from 400.7 is still necessary in this
3 application.

4 CHAIRPERSON MILLER: And the way
5 I'm looking at it I thought the issue was that
6 411.11 lists special exception relief for
7 aspects of the structure regulated under 411.3
8 through 411.6 and that the penthouses in this
9 case, they fall within 411.2 and in fact, the
10 Applicant has stated that it needs relief from
11 411.2. I notice in their proposed order at
12 21, it's listed as the roof structures will
13 not be set back from all exterior walls a
14 distance equal to their height above the roof
15 (411.2).

16 So, even though -- I mean I saw
17 that 400.7 was listed in 411.11. The fact
18 that 411.2 is not listed there seems to mean
19 that you can't get special exception relief
20 perhaps from 411.2. That a variance relief
21 may be required.

22 MEMBER DETTMAN: I would agree

1 with that that 411.2 does not fall under
2 special exception relief under 411.11, but
3 also, I'll just add that I'm not so sure that
4 411.2 is a provision that you can get relief
5 from.

6 To me, 411.2 just states that no
7 matter how high your building is and no matter
8 the location of the penthouse whether it be
9 below the roof level, at the same roof level
10 or above the top story of any building, that
11 the setback requirements of 400.7 apply no
12 matter how high the building is and no matter
13 how high the penthouse is and so, I think the
14 appropriate relief here is from 400.7 which
15 you're correct would be an area variance.

16 CHAIRPERSON MILLER: Okay. Well,
17 I just want to make one comment and Mr.
18 Turnbull can weigh in, too, if he wants to and
19 then talk about procedure, but, you know,
20 always, you know, I'm wary when someone says
21 that you can't get relief from a certain
22 provision because I usually -- that's when you

1 do seek variance relief when there's a, you
2 know, an affirmative statement made or
3 whatever or prohibitive, but that's when
4 variance relief could be provided unless its
5 prohibited by some other provision such as the
6 Height Act or something like that, you know.

7 But -- so, I'm not clear that you
8 couldn't get variance relief from 411.2 and
9 I'm not sure. That's why I think that -- and,
10 you know, and I want to let Mr. Turnbull weigh
11 in, too, but I think that we might want to
12 open this up for the parties to brief as it's
13 an issue that we're spotting now after the
14 hearing.

15 Mr. Turnbull, did you want to
16 comment?

17 COMMISSIONER TURNBULL: Well, I
18 guess I'm a little bit confused because I
19 thought we have given relief on certain
20 things. I know in the -- when we have a PUD
21 on the Zoning Commission, we've often given
22 relief to those items. So, I'm not -- I guess

1 I'm not quite sure on how you read this.

2 CHAIRPERSON MILLER: Well, I think
3 I'm agreeing with you that it may be just a
4 different type of relief. That it may not all
5 within special exception relief that's set
6 forth in 411.11 because it's -- 411.2 is not
7 listed there, but that perhaps variance relief
8 can be given from the Board.

9 But, I think that that's -- I
10 think we'd like to hear from the parties and
11 have this briefed before we, you know, go
12 there on this.

13 COMMISSIONER TURNBULL: Okay.

14 CHAIRPERSON MILLER: Would you
15 agree?

16 MEMBER DETTMAN: I would agree
17 with that and that's for -- I mean it's not a
18 matter of whether or not relief has been
19 granted for setback requirements or not.
20 You're right, Madam Chair. It's the type of
21 relief that's being sought.

22 But, just to follow-up on the

1 relief from 411.2 versus 400.7 and I don't
2 want to belabor this point, but I'm not
3 exactly sure what relief would be sought under
4 411.2.

5 It states that the setback
6 requirement applies no matter, you know, where
7 the penthouse is located either below, at the
8 same level or above the top story, but really
9 the requirement is laid out -- for this
10 application, it's laid out in 400.7 and so, to
11 me, 400.7 is the appropriate provision for
12 relief.

13 CHAIRPERSON MILLER: You know, I
14 think that's where the uncertainty is because
15 when I looked at 411.11, you know, it listed
16 relief from 400.7, but listed that in
17 conjunction with 411.3 through 411.6. So,
18 that's why I thought perhaps relief was needed
19 with respect to 411.2. But, it's an open
20 question at this point.

21 So, I would request that we put
22 this out to the parties to brief whether or

1 not additional relief would be required other
2 than special exception relief or whether
3 special exception relief is appropriate under
4 411 and I think that the two provisions --
5 well, the provisions we're looking at are
6 411.11 and 411.2 and 400.7.

7 I know there are some parties
8 here. I don't know if there are other
9 parties. We don't want to hear any briefing
10 on this. We want the parties to look at it.
11 I just want to -- and think about it and then
12 just respond to that issue.

13
14 I'm thinking that we could pick
15 this up again at our next decision meeting and
16 perhaps give the -- I wonder if the Applicant
17 should go first with addressing this issue and
18 then the ANC could respond.

19 COMMISSIONER TURNBULL: Well,
20 Madam Chair --

21 CHAIRPERSON MILLER: What do you
22 think?

1 COMMISSIONER TURNBULL: In Exhibit
2 43, the Applicant has on page 5 special
3 exception from roof structure requirements of
4 Section 411. Number 20 addresses their
5 concern.

6 Are we asking -- I'm looking back
7 to see if there's anything -- I don't know if
8 they've listed anything on 400.7.

9 I guess their last sentence, the
10 Board may approve deviations from roof
11 structure requirements provided the intent and
12 purpose of Chapter 400 in the Zoning
13 Regulations are not materially impaired by the
14 structure and the light and air of adjacent
15 buildings shall not be adversely -- shall not
16 be affected adversely.

17 CHAIRPERSON MILLER: Yes, I mean I
18 think that's true, but I think the question
19 here is they've listed at number 21 following
20 that --

21 COMMISSIONER TURNBULL: Yes.

22 CHAIRPERSON MILLER: -- I believe

1 -- well, this is only for special exception
2 relief and they've listed 411.2.

3 COMMISSIONER TURNBULL: Yes.

4 CHAIRPERSON MILLER: And Mr.
5 Dettman has noticed that 411.2 wasn't listed
6 in 411.11 which talks about relief from the
7 setback requirements of 400.7.

8 Therefore, the question is, I
9 believe, whether variance relief would be
10 required.

11 So, this is the first time I'm
12 looking at that issue and maybe all of us.
13 So, because of that, I think it would be good
14 just to get further input from the parties.

15 MEMBER DETTMAN: Madam Chair, just
16 quickly, you're last comment is absolutely
17 correct. 411.2 is not listed or incorporated
18 into 411.11 which says that the Board can
19 grant special exception relief from a
20 collection of some of these roof structure
21 requirements laid out under 411. 400.7 under
22 411, 400.7 is only referred to as sort of a

1 place to go to find out what the requirement
2 is -- the setback requirement is.

3 My reading of 411 does not say
4 that 400.7 -- the requirement under 400.7 --
5 relief from 400.7 is not allowed -- is allowed
6 as a special exception. It doesn't say that.
7 It just sort of points the reader in a
8 direction to go to 400.7 to find out what the
9 requirement is.

10 Again, that's why, I'll just sort
11 of reiterate my point, is that even if --
12 411.2 is not actually the provision that you
13 need relief from. 411.2 just basically points
14 you to 400.7 to find out what the setback
15 requirement is and under 400.7 in this
16 particular zoning district, it is a one-to-one
17 requirement based on the height of the roof
18 structure.

19 CHAIRPERSON MILLER: Okay. Well,
20 we've heard your opinion on that and I think
21 it raises a good question. I do. I'm not
22 sure how to interpret all this at this point.

1 So, why don't we set a schedule for the
2 parties to brief this and they can take into
3 account what they've heard today and then
4 we'll take into account their briefing on
5 this.

6 So, I want to see -- make sure I
7 review. We do have a party in this case that
8 was granted. We have someone who was granted
9 party status and then we would have the
10 Applicant and ANC and actually we could even
11 get the Office of Planning if they wanted to
12 weigh in. They could have that option.

13 Okay. I tend to think that the
14 Applicant should go first on this. So, if we
15 are allocating a month until our next decision
16 making, I guess we could have the Applicant
17 file within two weeks or so and then the other
18 parties and OP in response in enough time for
19 us to consider those points before our next
20 meeting.

21 Ms. Bailey, do you have a proposed
22 schedule or Mr. Moy?

1 MS. BAILEY: I think Mr. Moy's
2 working on this, Madam Chair.

3 CHAIRPERSON MILLER: Okay.

4 MR. MOY: Madam Chair, my sense is
5 the Applicant can respond pretty quickly on
6 this. Probably a week which would give me
7 until January the -- Monday, January the 14th.

8 CHAIRPERSON MILLER: Well, you can
9 come forward then. Why don't we do that?
10 Whoever is here if -- we're not getting into
11 any substantive because all the parties aren't
12 here, but we want to talk schedule, why don't
13 we hear from the Applicant? Anybody else here
14 on this case?

15 Ms. Wheeler, are you here for the
16 ANC or -- okay. Ms. Wheeler's not going to
17 come up because she's not necessarily
18 representing the ANC on the case at this
19 point. So, she is a Commissioner.

20 You're coming up?

21 COMMISSIONER WHEELER: Sure.

22 CHAIRPERSON MILLER: Okay. Why

1 don't we hear from the Applicant with respect
2 to the schedule proposed?

3 MR. FREEMAN: Good morning,
4 Members of the Board. Kyrus Freeman of
5 Holland & Knight and to my immediate left is
6 Steven E. Sher, Director of Zoning and Land
7 Use Services also of Holland & Knight.

8 We could file a response today.

9 CHAIRPERSON MILLER: Okay.
10 Really?

11 MR. FREEMAN: And we would -- yes.

12 CHAIRPERSON MILLER: Ms. Wheeler,
13 though, maybe you can tell us when the next
14 ANC meeting is so we can take that into
15 account. Do you know that?

16 COMMISSIONER WHEELER: It is --

17 CHAIRPERSON MILLER: Can you come
18 to the table actually? It would be good for
19 you to get --

20 COMMISSIONER WHEELER: Sorry.

21 CHAIRPERSON MILLER: I think
22 you're okay representing the ANC at least on

1 that question.

2

3 COMMISSIONER WHEELER: Thank you.

4 Yes. I could certainly do that with the date.

5 The date is -- I believe it's
6 January 25. I don't have a calendar in front
7 of me. It's the fourth Thursday of January.
8 Is that correct, Mr. Moy, or whoever?

9 MR. MOY: That's correct. That's
10 right.

11 COMMISSIONER WHEELER: January 25.
12 Yes.

13 MR. MOY: Twenty-fourth. January
14 24th is a Thursday.

15 COMMISSIONER WHEELER: Twenty-
16 fourth. Thank you.

17 CHAIRPERSON MILLER: Okay. And,
18 Mr. Werner, do you want to introduce yourself
19 for the record?

20 MR. WERNER: I am Jack Werner,
21 resident 6908 Willow Street, party.

22 I would just defer to the same

1 date with the ANC in terms of review.

2 CHAIRPERSON MILLER: Well, I mean
3 it just appears to me that what would be
4 important is as soon as the Applicant could
5 get their response to the other parties, then
6 they'd have time to look at it and we could
7 consider that issue and then how to proceed at
8 the February -- it looks at the February 5th
9 meeting because the ANC doesn't meet until
10 January 25th.

11 Is there some -- any other
12 comments on that schedule?

13 MR. SHER: Only that the Applicant
14 would desire to proceed as quickly as
15 possible. We had the case held over from the
16 December meeting until today in order to
17 accommodate schedules and get the landscaping
18 plan done and so forth.

19 If this issue had been noted,
20 obviously, we could have addressed it, but,
21 however, we would beg the Board's
22 indulgence for as quick a decision on this as

1 we can.

2 MR. FREEMAN: And not to testify
3 here, but the ANC voted to support I believe
4 all roof structure relief required. So, I'm
5 not sure what additional presentation or
6 briefing the ANC would made on this issue.

7 MS. MONROE: Madam Chair, may I
8 say one thing which might help speed things up
9 a little if you're looking for -- you don't
10 really need the Applicant to file and then
11 respond because it's a legal question. How do
12 you interpret 411? Does it apply? It's not
13 like -- they can both -- everybody can
14 respond. Just send something in at the same
15 time. It's a briefing issue. They can both
16 send it in and then you read it and you
17 decide.

18 CHAIRPERSON MILLER: No, that's
19 true, but the Applicant's ready to send it in
20 today, but the ANC --

21 MS. MONROE: Well, okay, but in a
22 week. It doesn't have to be today is all I'm

1 saying. The ANC --

2 CHAIRPERSON MILLER: The ANC
3 doesn't meet until the 25th.

4 MS. MONROE: But, I don't know if
5 they need to meet to discuss this. I mean
6 they can -- they can send something in
7 writing. I don't know if you want to put it
8 off for that. So.

9 CHAIRPERSON MILLER: Okay. Ms.
10 Wheeler, do you want to say something?

11 COMMISSIONER WHEELER: In terms of
12 an ANC decision, the only way the ANC can make
13 a decision is in a public meeting. That's by
14 law, D.C. law.

15 MR. FREEMAN: But, it's not a
16 decision, Madam Chair. It doesn't require a
17 vote.

18 CHAIRPERSON MILLER: Why not?

19 MR. FREEMAN: They vote on how to
20 interpret a section of the Zoning Regulations?

21 CHAIRPERSON MILLER: It's taking a
22 position in the case, but see Ms. Wheeler's

1 not authorized to represent the ANC. So, we
2 don't have the ANC here, but often in the ANC
3 representations, an ANC commissioner or the
4 chair can be designated to represent the ANC
5 in the case consistent with the resolution
6 that was passed and so, I do think it's
7 possible that whoever was designated, be it
8 the -- I'd have to look back in the record,
9 but to say most likely the chair, the chair
10 perhaps could say that they don't intend to
11 take a position on this or they do. They want
12 to have a vote or you know and that would
13 expedite things if they don't intend to do
14 that.

15 Do you have an opinion on that
16 either way?

17 COMMISSIONER WHEELER: I really
18 don't. I don't have any direction in that
19 regard except I believe it was Commissioner
20 Jones who would be representing as our normal
21 procedure.

22 CHAIRPERSON MILLER: Okay.

1 COMMISSIONER WHEELER: And she is
2 the commissioner of the SMD.

3 CHAIRPERSON MILLER: Okay. I mean
4 I do believe that, you know, they don't take
5 a vote necessarily on every single pleading
6 that might be filed in a case. You know, I
7 understand what you're saying, but we at least
8 need the designee who is a party to be able to
9 articulate on behalf of the ANC whether or not
10 they want to even take a position.

11 Mr. Werner, if your position --
12 now, if the ANC doesn't take a position,
13 what's your position with respect to this?

14 MR. WERNER: Well, you know, I'm
15 just taking a look at this right now also.
16 So, it's first time to look at it.

17 CHAIRPERSON MILLER: Um-hum.

18 MR. WERNER: The two issues we had
19 had before were both setback issues and roof
20 height issues and this seems to be falling
21 into these issue areas again. So, we do need
22 to take a look at it and see what, you know,

1 what's required here. So, it -- you know,
2 it's going to require, you know, a few days to
3 take a look at this.

4 CHAIRPERSON MILLER: Okay. You
5 know, we always have to balance, you know, the
6 time constraints versus -- on the Applicant
7 versus the due process to the ANC and the
8 community. So, I mean I think we can be --
9 maybe we can be a little bit flexible here and
10 that we can, you know, set a schedule that --
11 that goes beyond the ANC meeting, but if the
12 ANC and Mr. Werner were to say that they don't
13 need all that time, we could -- we would be
14 able to put this on our agenda earlier.

15 But, I think we would need to give
16 the parties time to address the legal issue.

17 MR. WERNER: This is Jack Werner.
18 I would find that acceptable because I would
19 like to just see what they're going to present
20 and talk to them some more about it and go
21 through it before, you know, a decision is
22 made.

1 CHAIRPERSON MILLER: Okay.

2 MR. FREEMAN: With all due
3 respect, Madam Chair, I think the question
4 here is a legal issue which doesn't require --
5 not that we don't want to talk to Mr. Werner,
6 but I don't think it requires a meeting or a
7 presentation with the community. It just
8 requires our interpretation of Section --
9 whether in a -- as I understand it to be a
10 very narrow issue whether relief is required
11 from Section 400.7 as opposed to 411.2. I
12 don't --

13 CHAIRPERSON MILLER: The bigger
14 question is whether you need variance relief
15 and not just special exception relief.

16 MR. FREEMAN: Whether you need a
17 variance from Section 400.7 or special
18 exception from 411.2 for a roof structure
19 setback.

20 CHAIRPERSON MILLER: No, I'm not
21 sure that's quite it. I want you to look at
22 411.2 because there could be variance relief

1 in 411.2. It could be variance relief from
2 411.11 because it doesn't list 411.2. It
3 could be, you know. That's what we want you
4 to look at.

5 MR. FREEMAN: And under any of
6 those scenarios, I don't know if we would
7 necessarily make a community presentation on
8 that or require --

9 CHAIRPERSON MILLER: I don't -- we
10 don't require community presentations. I
11 mean, in general, you've already done your
12 presentation with respect to the project and
13 so, that's not the concern that I'm worried
14 about. It's a legal filing. We could have
15 asked for this legal filing at the end of the
16 hearing. You know, we didn't notice this
17 issue until recently. So, that wouldn't have
18 required a public hearing, but the ANC would
19 have an opportunity. We just don't have the
20 designee to see whether they feel they need an
21 -- they need a hearing to have the authority
22 to take a position now on this question.

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1 That's all.

2 MR. WERNER: This is Jack Werner.
3 In all due respect the Jemal representatives
4 as a party to the case, I think their
5 interpretation of this is no more -- maybe
6 weighed that much stronger than what mine
7 might even be in terms of my doing the review
8 as well.

9 Again, it does come back to the
10 commission or to the Board here in terms of
11 the decision, but I think we both should be
12 able to make our review and whether or not
13 their review is and their interpretation of
14 this is the same as my interpretation. I
15 don't think they can say that at this point
16 and I can't say that my interpretation will be
17 the same as theirs of these laws.

18 CHAIRPERSON MILLER: But, my
19 question is so -- but, see you don't have that
20 constraint that oh, you have to wait until
21 January 25th until there's an ANC meeting. I
22 mean perhaps you could address this issue

1 within ten days or something and --

2 MR. WERNER: That I can do.

3 CHAIRPERSON MILLER: So, that's
4 really the only question. It's just the
5 schedule. So, I think depending on whether
6 the Board Members whether they agree with me
7 or not, I think to be cautious we could set it
8 to after the ANC meeting. But, I would
9 request perhaps that the ANC -- you know,
10 that, Ms. Wheeler, maybe you can bring this to
11 the attention of the chair and see whether or
12 not they can get back on this question sooner
13 given than the Applicant has some concerns
14 about the project being delayed. Given that
15 the ANC supported the project in particular.

16 And it is a legal issue and it may
17 not be one that the ANC even cares to get
18 involved with.

19 So, I guess I would say that we
20 would set this for the February 5th, but the
21 Board might be willing to move this up a
22 couple of weeks if all papers are in, you

1 know, within two weeks and all parties are
2 agreeable to that.

3

4 Does that sound acceptable? Any
5 questions about that?

6 MR. SHER: No, we're --

7 CHAIRPERSON MILLER: Okay.

8 MR. SHER: -- we're prepared to
9 file promptly. Can I just ask one other
10 question just to sort of get it on the table?
11 Does the Board have any other issues that it
12 has contemplated that we need to address so
13 that we don't come back a month from now and
14 have to do this again?

15 CHAIRPERSON MILLER: I guess the
16 question would be if the Board were to
17 determine that you needed variance relief. If
18 you wanted to think about whether you wanted
19 to seek that in this case or whether you
20 wanted to -- you disagreed and you were just
21 going to -- well, I don't know what you would
22 do in that case. That would be the next step

1 whether you were to seek it.

2 MR. SHER: Okay.

3 CHAIRPERSON MILLER: Okay. I mean
4 we may not be there, but that's where it could
5 possibly go. This it self-certified. So, it
6 would be in your court how you would want to
7 proceed. Okay.

8 Mr. Moy, do you have a --

9 MR. MOY: I don't have a question.
10 I just -- I was going to recap as to the
11 Staff's understanding of what just occurred.

12 So, on the record, this has been
13 rescheduled to its public meeting of February
14 5th. However, one, the Applicant's going to
15 file as soon as possible, perhaps today or
16 tomorrow and second, the Board will be waiting
17 to hear back from ANC as to their filing and
18 if it turns out that their filing is much
19 sooner than their meeting of January of 24th,
20 then the Board may reschedule a special public
21 meeting at an earlier Tuesday in January.

22 Correct?

1 CHAIRPERSON MILLER: That's
2 correct if the parties agreed including Mr.
3 Werner and also, that the Applicant would
4 serve Office of Planning.

5 But, the Board is certainly
6 willing to entertain the question of having a
7 special public meeting earlier than the 5th if
8 all the papers are in and there's no good
9 reason to delay it until the 5th and the good
10 reason identified would just be the ANC
11 meeting. If that's not going to occur, then
12 we would be happy to consider it earlier.

13 Okay. Any other questions? Okay.
14 Thank you.

15 Okay. Let me just say this.
16 Accordingly, then in this case, we're going to
17 deliberate the full case after that issue is
18 resolved. Okay. So, this case is now being
19 continued.

20 We're going to take a very quick
21 break and then come back to deliberate the
22 next case.

1 (Whereupon, at 11:36 a.m., off the
2 record until 11:47 a.m.)

3 CHAIRPERSON MILLER: We're back on
4 the record. We had to take a break before we
5 take on this case. Right? Okay. Mr. Moy,
6 whenever you're ready.

7 MR. MOY: Yes, Madam Chair, the
8 next case is the decision on Appeal Number
9 17657 of 1231 Morse Street, Inc. pursuant to
10 11 DCMR 3100 and 3101 from the decision of the
11 Zoning Administrator to deny a building permit
12 application for revisions to an existing
13 building permit allowing for the
14 reconstruction of collapsed walls for a
15 single-family dwelling with an addition and a
16 conversion to an 11-unit apartment building
17 in the R-4 District at premises 1233 Morse
18 Street, N.E. That's in Square 4069, Lot 130.

19 On December 4th, 2007, the Board
20 convened the appeal to begin deliberation on
21 the merits of the appeal. After preliminary
22 discussion, the Board by consensus decided

1 that the record was not full for the Board to
2 further deliberate and make its decision.

3 The Board requested that parties
4 file briefs addressing the issue of estoppel
5 and latches. These were filed by the
6 Appellant and the Appellee. These documents
7 are identified in your case folders as Exhibit
8 40 and 41 respectively.

9 The Board is to act on the merits
10 of the appeal as well as to act on the
11 previous motions that were held in abeyance
12 and that's going to complete the Staff's
13 briefing, Madam Chair.

14 CHAIRPERSON MILLER: Thank you
15 very much.

16 Okay. There's a lot going on in
17 this case and I would suggest that we start
18 with the preliminary matters of those motions
19 that we held in abeyance and then we can get
20 into the substance of the case.

21 The first motion that we held in
22 abeyance that I know is Appellee's motion to

1 disqualify Toye Bello as the Appellant's
2 expert witness and to strike his testimony.
3 I believe that was presented to us in Exhibit
4 31.

5 DCRA basically argues that Mr.
6 Bello's testimony is prohibited under the
7 Ethics in Government Act and the D.C. Employee
8 Code of Conduct and that prohibits
9 participation in matters for which a person
10 was responsible such as a civil servant and --
11 is responsible in their capacity as a civil
12 servant and that there's case law that they
13 cited precluding testimony of an expert who
14 was previously retained by an adverse party in
15 the same litigation and apparently had
16 received confidential information in a
17 capacity as a civil servant.

18 I mean it's hard to capture their
19 whole argument, but they also say -- they cite
20 Brown v. BZA in which it stands for the
21 proposition that the BZA has the authority and
22 the responsibility to regulate its practice

1 and that it should apply conflict of interest
2 rules and principles where there's a question
3 of violations of the Ethics in Government Act
4 and I believe that the test there is whether
5 the party participated personally and
6 substantially in the matter at issue as a
7 Government employee.

8 So, you know, I think that the
9 first question is, you know, do we apply this
10 act to our proceedings? Do we consider that?
11 And then if we do, did Mr. Bello participate
12 personally and substantially in the matter
13 that is before us as a Government employee.

14 Mr. Bello testified that he
15 participated in subdivision approval on
16 February 23rd, '05 and that he left the
17 Government May 15th, '05.

18 The building permit was issued
19 July 6th, '05 and Mr. Bello stated that he had
20 no knowledge about the future use of the
21 property when he was participating in the
22 subdivision approval decision.

1 DCRA said basically that I guess
2 that it's common practice that they -- that
3 that kind of information is divulged and that
4 he would have known about the future activity
5 that was planned for that property.

6 I guess my opinion in looking at
7 this is that the expert testimony that we
8 heard from him with respect to how to
9 interpret the regulations and vesting and
10 330.5(c), that that was unrelated to his
11 approval of the subdivision in my view and
12 that, therefore, I think the subdivision, the
13 building permit issues are separate and I
14 don't see that his testimony was colored by
15 his participate in a subdivision. So, I would
16 be inclined to deny that motion. I don't see
17 a clear conflict.

18 I don't see evidence that he used
19 confidential information that he gained in his
20 capacity when he approved the subdivision in
21 this proceeding or that we should, therefore,
22 strike the testimony.

1 Others?

2 We heard his testimony. We could
3 strike it and not consider it.

4

5 MEMBER LOUD: I agree with your
6 analysis and conclusion, Madam Chair.

7 CHAIRPERSON MILLER: Okay.

8 MEMBER DETTMAN: I'd agree with
9 your opinion as well, Madam Chair.

10 CHAIRPERSON MILLER: Okay.

11 COMMISSIONER TURNBULL: I would
12 concur also, Madam Chair.

13 CHAIRPERSON MILLER: Okay. Then
14 we also have Appellee's motion to dismiss the
15 appeal, Exhibit 19, and Appellant's motion for
16 summary judgment. I would also recommend that
17 we deny these.

18 We did hear the case on the
19 merits. The motion to dismiss was based on
20 failure to state a claim and there's clearly
21 a claim here that DCRA erred in revoking the
22 permits and in denying the application for the

1 revised permit and then revoking the
2 demolition permit. So, I see no grounds for
3 motion to dismiss.

4 And summary judgment is
5 appropriate when there are no material facts
6 in dispute and I think after certainly our
7 long hearings on this, we heard material facts
8 in dispute such as the cause of the collapse
9 of the walls of the existing structure,
10 whether or not Applicant may have
11 misrepresented his intentions on the
12 application.

13 In any event, I don't think
14 they're appropriate for summary judgment and
15 we have a full record and I think, therefore,
16 we should decide on the full record.

17 Others?

18 MEMBER LOUD: I agree again with
19 Madam Chair.

20 COMMISSIONER TURNBULL: I would
21 concur also with your summary.

22 MEMBER DETTMAN: I concur as well.

1 CHAIRPERSON MILLER: Okay. I
2 believe that takes care of the preliminary
3 matters if I'm not mistaken.

4 Are there any other pending
5 motions? Okay.

6 Okay. Now, we get into the meat
7 of this case. In trying to get my arms around
8 this, I was first trying to identify what was
9 the error alleged here and basically, there's
10 an error alleged with respect to denial of the
11 revised building permit and the replication of
12 the original building permit and the emergency
13 demolition permit.

14 In general, the Applicant has said
15 that they violated the Zoning Regulations.
16 They were abusive and in bad faith. Okay.
17 But, when you get to the specific legal issues
18 that I think are argued here, I think that the
19 Applicant is arguing that it was error for the
20 ZA to revoke the original permit and deny the
21 application for the revised plans because
22 there rights had vested when the original

1 building permit was issued and that's the
2 first issue I think that we should address.

3 The ZA determined that in revoking
4 the original building permit and in denying
5 the revised application for building permit,
6 that the original building permit was issued
7 as a conversion to a pre-1958 structure and a
8 conversion was no longer possible because
9 there was no pre-1958 structure to convert and
10 the Appellant is arguing that the right to
11 build the 11-unit apartment building vested
12 with the issuance of the original building
13 permit.

14 I think there are only a few key
15 facts that need to be put on the table for
16 this one and when we get to the estoppel
17 arguments, that's when we get into a lot of
18 other facts.

19 But, basically, the original
20 building permit was issued September 6, '05
21 pursuant to 330.5(c) as a matter of right to
22 convert an existing single-family dwelling to

1 a 11-unit building. That's what the permit
2 was issued pursuant to and then in the midst
3 of the construction activities for whatever
4 reasons, the structure that existed before May
5 12th, 1958 no longer existed in February 2006
6 I think that is and due to whatever causes and
7 those causes are in dispute as to, you know,
8 why walls fell down or whatever.

9 But, the situation then was did
10 the Applicant have a right that was vested to
11 proceed with building this 11-unit apartment
12 building when there was, in fact, no longer a
13 pre-existing structure that dated back before
14 May 12, 1958 given that the authorization to
15 construct was premised -- was pursuant to the
16 provisions that specifically says it's allowed
17 as a conversion.

18 So, then we had extensive briefing
19 by the parties on the question of vesting of
20 rights. When do these rights vest? What
21 rights vested?

22 And I believe that -- I found that

1 -- I think that DCRA made a compelling case
2 that the vesting goes to when there's a change
3 in the law. That a party's right to construct
4 pursuant to the original permit is vested and
5 in this case, there wasn't a change in the
6 law. There was a change in circumstances in
7 and in facts.

8 The Appellant has said that their
9 rights vested pursuant to 3202.4 I think is
10 one of the provisions that they noted which
11 says that any construction authorized by a
12 building permit may be carried to completion
13 pursuant to the provisions of this title in
14 effect on the date that the permit is issued.

15 The problem here is that the
16 provisions of the title in effect on the date
17 that the permit is issued, that hasn't
18 changed. That's the same and DCRA's point is
19 that there's no building there for them to be
20 converting from. So, it's not that the law
21 has changed. It's that they can't comply with
22 that provision anymore.

1 The Applicant has also made the
2 argument that 2001.6 allows a nonconforming
3 building to be reconstructed. Specially, it
4 says if a casualty or act of God results in
5 damage to a extent of 75 percent or less of
6 the cost of reconstructing the entire
7 structure, the structure may be restored or
8 reconstructed to its previous condition or to
9 a more conforming condition provided that the
10 construction or restoration shall be started
11 within 24 months of the date of the
12 destruction and continued diligently to
13 completion.

14 The Appellant says that because a
15 nonconforming property can do this certainly
16 a conforming property should be able to
17 rebuild.

18 However, I think that this is not
19 just any conforming property. It's subject to
20 a very specific provision and that's 350.5(c)
21 which specifically ties it to a conversion
22 from a building that existed pre-1958 and

1 that's a very specific regulation and then
2 often when -- if there does appear to be
3 inconsistent regulations, that you really look
4 to the more consistent -- the more specific
5 one that's applicable here and I think that is
6 350.5(c).

7 MEMBER LOUD: Madam Chair --

8 CHAIRPERSON MILLER: Yes, go
9 ahead.

10 MEMBER LOUD: -- I believe you're
11 saying 350.

12 CHAIRPERSON MILLER: Oh, am I
13 saying -- I mean 330.5(c).

14 MEMBER LOUD: I think it's 330.
15 Okay.

16 CHAIRPERSON MILLER: Thank you
17 very much.

18 And then I think I'll open it up
19 to others in a minute to comment on this.
20 There were other concepts, theories, well,
21 rationales for the vesting argument that was
22 set forth. Certainly, the Applicant said that

1 they incurred substantial expense, but I don't
2 believe that there were cases that were cited
3 that were really appropriate to the
4 circumstance here because there wasn't a
5 zoning ordinance change that prohibited the --
6 you know, the Applicant's intended use of this
7 property as in those other kinds of cases that
8 were cited. I think for that concept there
9 wasn't any change in the law which I think is
10 basically what the vesting goes to.

11 The Applicant could still -- you
12 know, the law's the same. It's just that the
13 Applicant cannot take advantage of that law
14 anymore because the situation that gave rise
15 to it no longer exists.

16 Do others have comments on this?

17 MEMBER LOUD: Madam Chair, thank
18 you for sort of laying out I think what all of
19 us struggled with in trying to reach an
20 appropriate conclusion on the case.

21 My framework was a little bit
22 different with respect to the case. The

1 driver for me was not necessarily the vesting
2 argument.

3 Let me just sort of back up and
4 walk briefly through how I looked at the case.

5 First, it seems to be me that the
6 entire case hinged on the wall collapse in
7 February of '06. I think everybody would have
8 been more than willing to continue to bless
9 the original September '05 permit whether it
10 was right or whether it was wrong had not the
11 wall collapse in February of '06 and so,
12 that's like the starting point for my -- for
13 how I'm looking at this.

14 But, the wall did collapse. We
15 obviously have a lot of testimony in that
16 regard and so, the framework or the issue that
17 I then looked at is the basis of the denial of
18 the amended permit application and with
19 respect to the record, the basis presented to
20 us was that there was a misrepresentation made
21 with respect to the application or a false
22 statement that was made and so, as I'm

1 struggling with this and believe me it was a
2 real struggle because I'm not necessarily
3 coming out where I want to come out.

4 But, as I reviewed the record and
5 struggled with this issue regarding
6 misrepresentation, I've not seen the evidence
7 compelling or even suggestive that the
8 collapse of the wall was part of the a larger
9 intention scheme of misrepresentation or that
10 subs were ordered or directed to destroy that
11 wall or that there was any kind of intentional
12 raising or destruction of the wall. To me,
13 there's no causal link that goes back to the
14 Appellant that again, as I said, authorized,
15 directed or in anyway ordered destruction of
16 the wall.

17 Had it been my case and it wasn't
18 my case, I may have tried to bring in a sub.
19 I may have tried to get some kind of affidavit
20 from someone that suggested that -- that tied
21 the Appellant directly to the collapse of the
22 wall and here, there's a huge lack of a

1 smoking gun in that regard.

2 So, I don't think that the
3 collapse was intentional. I don't think that
4 there was a misrepresentation and so, if that
5 was the basis for denial of the amended permit
6 application, I'm looking and struggling in the
7 record to see where that's supported.

8 What I do find and what I do agree
9 with is that there was some kind of either
10 shoddy work or neglect or an act of God that
11 caused the wall to collapse and it could have
12 been bits and pieces of each of those things.

13 So, in that case, in the case of
14 an unintentional collapse, my inclination is
15 to search the record for some expert testimony
16 that could guide me with respect to resolving
17 the issue of whether when you have an
18 unintentional collapse if there is in our regs
19 some guidance that would allow you to rebuild
20 the collapsed wall which I think in this case
21 is -- if I understand the facts and the
22 proceedings, which is what the Appellant tried

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1 to do.

2 The amended permit application was
3 to rebuild the collapsed wall and with respect
4 to that issue, there was some testimony from
5 the expert that the Appellants brought on, and
6 you alluded to it, essentially where they
7 tried to make the case that -- and I'm sort of
8 paraphrasing here Mr. Bello, that -- let me
9 just see if I can quote him actually. His
10 testimony was that "Zoning Regs cannot be
11 interpreted so as to be more restricted on a
12 conforming structure than a nonconforming
13 structure."

14 I specifically asked him, you
15 know, you have any cases. Is there a statute?
16 Any regulatory section here or somewhere else
17 that we can borrow from? He was real candid
18 and said no, there isn't, but nonetheless,
19 he's our expert. He's someone that we
20 qualified as an expert. It was his expert
21 opinion that the interpretation that we would
22 give to this case that would make it more

1 restrictive on a conforming use and
2 nonconforming would, in his expert opinion, be
3 inconsistent with how the regs out to be
4 interpreted and I credited that.

5
6 I was looking the record for a
7 counter-balancing expert opinion that dealt
8 directly with that issue and didn't find
9 anything of that magnitude or at least that
10 could counter-balance that particular opinion
11 of Mr. Bello.

12 And so, in light of that, and I
13 know there are a lot of meandering issues in
14 the case, but in light of the very specific
15 representation by DCRA that this amended
16 permit application was denied because of a
17 false representation, a false statement, a
18 misrepresentation, et cetera, I don't see it
19 in the case and so, I don't think that their
20 defense withstands the attack by the Appellant
21 that the denial was inappropriate in the first
22 instance.

1 CHAIRPERSON MILLER: Okay.

2 MEMBER LOUD: And I'm looking
3 forward to hearing how others view some of
4 those same issues.

5 CHAIRPERSON MILLER: Okay. I just
6 want to address a couple.

7 One is that -- and I have to pull
8 all the documents before me, but the reason
9 for denying the revised permit that was given
10 by DCRA was not just that there were
11 misrepresentations, but specifically that it
12 was no longer a matter of right to do that
13 because there was no longer a structure that
14 could be converted.

15 So, it was not based solely on
16 allegations of misrepresentation.

17 I mean I'm looking right now at a
18 letter from the Zoning Administrator Bill
19 Crews dated March 6th, '07 that says that the
20 building permit for -- okay. DCRA has
21 reviewed the January 19, 2007 building permit
22 application for a revision to building permit

1 B477039 for the premises at 1243 Morse Street,
2 N.E. Your revised application was to
3 reconstruct collapsed walls of an existing
4 structure.

5 It goes on to say that the
6 District's February 27th, 2006 inspection
7 revealed that the existing structure had been
8 raised. Once an existing structure has been
9 raised, it can no longer be considered a
10 reconstructed building.

11 Furthermore -- I'm skipping, but
12 furthermore, without an existing structure,
13 there can be no conversion to an apartment
14 building in the R-4 District pursuant to 11
15 DCMR 330.5(c).

16 This one does not get into
17 misrepresentations. I know that that is
18 alleged in another denial. I do recall what
19 you're talking about.

20 But, with respect to this that I
21 certainly have been before me, it's based on
22 the law. It's not based on

1 misrepresentations. It's based on the clear
2 issue that we were talking about. Did the
3 rights vest or did they not vest?

4 MEMBER LOUD: Or take a look at
5 that in a moment, but again, to me, it kind of
6 begs the question if the permit application
7 was to rebuild the collapsed walls.

8 To me, we're sort of dancing
9 around the meat of the question. If the
10 strategy of the Appellant was to rebuild the
11 collapsed walls that had been destroyed by an
12 act of God so that he would have this pre-'58
13 structure and the Appellant argues that he had
14 the right to do that because zoning
15 interpretations should not disfavor conforming
16 properties, then we're not addressing -- we're
17 not directly addressing that particular issue
18 by concluding as a tautology almost that
19 because the building was no longer there,
20 there's nothing to attach to to build an
21 addition to which would then qualify it for
22 the conversion if that makes sense.

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1 But, I also want to take a look --
2 re-look at that exhibit. I'm looking at a
3 different exhibit that goes a lot into the
4 misrepresentation which sort of kind of
5 undergirded a lot of what DCRA's testimony
6 here was.

7 CHAIRPERSON MILLER: I think we --
8 we sent some time at the hearing asking them
9 specifically, you know, was there anything
10 left of the pre-1958 structure and the
11 Applicant admitted that there was nothing
12 left. So, therefore, factually, there wasn't
13 anything to convert and, therefore, factually
14 as a matter of law, that's why DCRA came to
15 the conclusion that they weren't -- they
16 couldn't do this as a matter of law anymore.

17 That they couldn't -- the law
18 hadn't changed. It's just that their
19 circumstances wouldn't allow them to take
20 advantage of it anymore because there was
21 nothing to confer it.

22 MEMBER DETTMAN: Madam Chair, I

1 just wanted to offer up a couple of comments.

2 In looking at your comments about
3 -- concerning vesting in your reading of
4 3202.4, I think I'm in absolute agreement. I
5 think your comment that 3202.4 sort of
6 protects the Applicant or the Appellant
7 against changes in the Zoning Regulations, I
8 would absolutely agree with that.

9 There was sort of -- briefly
10 mentioned during the hearings, the issuance of
11 what was called a provisional certificate of
12 occupancy and that was brought up with respect
13 to the arguments concerning vesting and
14 3203.11 is where there's motion about a
15 provisional certificate of occupancy. Stating
16 that the subsection shall govern the issuance
17 of a certificate of occupancy. Saying that at
18 the time of issuance of a building permit
19 required by this subsection, the propose use
20 shall be designated in a provisional
21 certificate of occupancy and the use
22 designated in the provisional certificate of

1 occupancy shall comply with all provisions of
2 this title in effect on the date of which the
3 permit was issued.

4 And it was briefly mentioned, I
5 just wanted to touch upon it sort of. My
6 reading of that particular regulation, 3203.11
7 is that to my -- my knowledge of a certificate
8 of occupancy is that it remains valid as long
9 as that particular use remains in compliance
10 with the Zoning Regulations at all times. At
11 anytime if a particular use falls out of
12 compliance, I think that certificate of
13 occupancy becomes invalid.

14 With this particular use, an
15 apartment building in an R-4 District is
16 contingent upon the existence of a building
17 that predates May 12th, 1958. When that
18 building disappeared, essentially was razed
19 for whatever reason and I think eventually
20 we'll get to that, but as it stands right now,
21 that building no longer exists. Not one piece
22 of it and so, without the existence of a pre-

1 1958 structure, the provisional certificate of
2 occupancy for an apartment building in an R-4
3 is now invalid.

4 Again, that's my opinion of
5 3203.11.

6 COMMISSIONER TURNBULL: Madam
7 Chair, let me just add a little bit to what
8 Mr. Dettman had -- I guess I was troubled.
9 There are several things which bothered me
10 from the very day -- first day of when we
11 started the hearings and I remember I asked
12 some very specific questions to Mr. Demuren at
13 the time.

14 When looking at the drawings, when
15 I think of a conversion or an addition, I
16 think of something left of the existing
17 building that you could at least tell and I
18 know I struggled and finally saw in the
19 basement plan some walls poshay that said
20 existing, to remain.

21 But, when I asked about what walls
22 on the first floor, any stud work to remain,

1 I don't know whether it's a difference of
2 communication, language, you know, between us,
3 but I never got a real clear answer to knowing
4 how much -- there's nothing indicated on the
5 first floor that showed how much of existing
6 walls to remain although it sounded like there
7 was going to be some incorporation. Although,
8 you really couldn't tell from the drawings.

9 So, I struggled from day one to
10 figure out how much of the existing structure
11 is going to be really there.

12 As we went through this process
13 and we found -- we had, you know, stormed the
14 demolition, still trying to determine what
15 walls were there, what walls weren't there.
16 Some of the neighbors testified that basically
17 they thought the whole building was gone.
18 They didn't really see anything. Some said
19 well, the area over by the site which was the
20 sunroom was left at the time just before the
21 storm and it turns out that it was the sunroom
22 which is going to be demolished anyway.

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1 So, the question of
2 misrepresentation, who's actually knowing
3 what's on the site is a little bit in
4 question. But, it -- from the walls
5 collapsing and then the whole idea of well,
6 you're suppose to rebuild to a certain point
7 and then we find the building totally razed.
8 Not -- I mean razed. The foundations are all
9 gone. There's all new foundations.

10 I struggle with again after
11 hearing the testimony of some of the neighbors
12 as to how much of the extent of the existing
13 building that was going to be reused was
14 actually there.

15 So, again, maybe misunderstanding
16 from the workmen. I'm not sure, but
17 essentially, we got what Mr. Dettman has said.
18 We have a razed building which then brings
19 into question we had a minimally standing
20 building that was going to be incorporated
21 anyway and now, we have none.

22 Again, not pointing fingers at

1 anyone, but trying to look at this from a
2 technical zoning issue and looking at it from
3 what's there and trying to incorporate how
4 rights would vest and go forward, there's
5 nothing there and I really question how you
6 could go beyond that. I mean I -- again, not
7 wanting to offer any -- again, it's hard to go
8 through all the testimony and say this
9 happened, that happened, but it does bring
10 into a question how much of the "building" is
11 -- how much -- can you really vest anything
12 that really isn't there?

13 CHAIRPERSON MILLER: I think the
14 other thing is that we don't have case law in
15 this in our jurisdiction that I recall, but
16 DCRA did cite I think it was a Colorado case
17 or something Service Oil Company v. Rhodus in
18 which it stood for the proposition that the
19 grandfather status allowing the conversion is
20 destroyed, you know, when something like this
21 happens and that the Applicant would then --
22 he's still the owner of the unimproved

1 property, but he can be restricted as to its
2 use in the same way basically as anybody else.
3 That he doesn't have that special right now to
4 building an 11-unit apartment building which
5 is not allowed as a matter of right in R-4.

6
7 MEMBER DETTMAN: Just to follow up
8 on Mr. Turnbull's comments, you know, it's
9 this question of -- and it was asked during
10 the hearing of the Appellant, you know, to
11 what extent can you demolish a building and
12 still have it be considered a pre-1958 or a
13 pre-1980 or whatever your structure.

14 Without any clear guidance or
15 history on that, I guess you could say well,
16 you could completely demolish it. You could
17 take it down to the foundation. Which without
18 a clear articulation in this case is to the
19 scope of the demolition permit.

20 I know verbally it was said to
21 bring them down to the safe -- bring the walls
22 down to a safe height, but it doesn't say that

1 on the permit or the application to our
2 knowledge.

3 So, you could potentially say that
4 you could demolish a building down to its --
5 just down to the foundation and it could still
6 be considered a pre-1958 structure.

7 However, in this case, be it by an
8 act of God or whatever circumstances, we don't
9 even have the foundation. It appears to be
10 razed. There's -- and the Appellant said
11 that. Saying that there isn't one speck of
12 the pre-1958 structure left anywhere in the
13 existing improvements and so, it's not longer
14 a question of to what extent can you demolish
15 the building. It's been demolished. It's
16 been razed. Every speck of that building has
17 been removed from the site.

18 CHAIRPERSON MILLER: I also want
19 to comment further on Mr. Loud's concern with
20 respect to 2001.6 and Mr. Bello's testimony
21 about nonconforming properties being able to
22 be rebuilt if a casualty or act of God results

1 in damage to an extent of 75 percent of less
2 of the cost of reconstructing the entire
3 structure.

4 First of all, I guess my point
5 before which I already said was that I think
6 that 330.5(c) is a very specific regulation
7 and that it shouldn't be treated like just any
8 conforming property. Because Mr. Bello's
9 point was well, if a nonconforming property
10 can be treated this way, a conforming property
11 can be treated this way.

12 But, second, I think and I didn't
13 feel in my analysis I to go there, but if you
14 do, I'm not convinced that the Applicant made
15 the case that this was -- the demolition or
16 the collapse was totally due to a casualty or
17 act of God. I think that there was, you know,
18 testimony on both sides and I couldn't say at
19 this point that I'm convinced that the
20 Appellant did all that he could have done to
21 necessarily brace the walls. That was an
22 issue. So, I think you would have to reach

1 that conclusion as well.

2 Further comments on the vesting
3 issue?

4 I mean the way I understand the
5 law is that, let's see, if the rights vested,
6 then we would grant the appeal and just stop
7 here, but if we don't believe that the rights
8 vested to build the 11-unit apartment
9 building, then we would address the questions
10 of estoppel and latches.

11 So, I'm of the view that the
12 rights vested. Do others want to weigh in on
13 this at this point?

14 COMMISSIONER TURNBULL: I'm sorry,
15 Madam Chair.

16 CHAIRPERSON MILLER: I mean do not
17 vest. Do not vest. I'm of the view that the
18 rights do not vest. Sorry.

19 COMMISSIONER TURNBULL: That's
20 what I was going to question. All right.

21 I would be of that same opinion
22 that the rights did not vest.

1 CHAIRPERSON MILLER: You want to
2 weigh in on the record before we move?

3 MEMBER DETTMAN: I'd agree with
4 your opinion.

5 CHAIRPERSON MILLER: Okay. Mr.
6 Loud, do you have an opinion right now or you
7 want to dwell -- think about this further?

8 MEMBER LOUD: No, I think as I
9 tried to say earlier, I agree that the rights
10 did not vest and my areas of concern are a
11 little bit different. But, I agree that the
12 rights did not vest in that original. We're
13 talking about the September '05 building
14 permit?

15 CHAIRPERSON MILLER: Yes, it's --
16 I think it's the same argument in both the
17 original building permit and the denial of the
18 revised permit.

19 MEMBER LOUD: I'm in agreement
20 with the majority. That that argument that
21 the rights vested is not one that I buy into.

22 CHAIRPERSON MILLER: Okay.

1 Actually, before we go to estoppel, I think
2 that we don't have to reach the question about
3 the misrepresentation as the basis for denial
4 of the revision or anything like that. I
5 think that as a matter of law if they didn't
6 vest, then it was -- then the ZA did not err
7 in revoking the original permit and denying
8 the application for the revised permit.

9 I don't think we have to -- Mr.
10 Loud raised some issues before about he wasn't
11 sure that the Applicant had -- Appellant had
12 made misrepresentations. I don't think we
13 have to reach that.

14 Okay. I think we also should
15 briefly touch upon the revocation of the
16 emergency demolition permit because that's
17 raised in the appeal. It's tied in with the
18 decision to, I believe, to deny the
19 application for approval of the revised plans.
20 That was one decision.

21 I think that the aspect of the
22 emergency demolition permit may be moot

1 because I don't think there's any live
2 controversy remaining to that. The structure
3 was already demolition and razed and I wasn't
4 clear that there was even a zoning issue
5 involved because the violation that was cited
6 was 12A DCMR 10501-7 outside the scope of the
7 permit which is a building code issue and I
8 think -- oh, in that one, there was
9 allegations of a false statement or
10 misrepresentation as well.

11 But, I don't think that -- I think
12 we can just say that it's moot and move on
13 from there.

14 Acceptable? Okay. I don't think
15 we have to get too involved in that one.

16 Okay. So, that really brings us
17 then to equitable estoppel and laches and
18 these are affirmative defenses that would bar
19 the enforcement of the regulations against the
20 Applicant.

21 You know, what I was saying before
22 was even if the rights didn't vest that if

1 these defense are found to be appropriate
2 here, then the Appellant could then still
3 proceed with the 11-unit apartment building.

4 I want to say that in general the
5 courts disfavor estoppel and latches in zoning
6 cases because they have found that there's an
7 important general public interest in the
8 enforcement of the Zoning Regulations and
9 estoppel has been applied in the District in
10 limited situations and that's when the
11 equities are strongly in favor of the party in
12 invoking the doctrine. This is in the Wieck
13 v. District of Columbia Board of Zoning
14 Adjustment case, Court of Appeals 1978.

15 And latches are rarely applied
16 except in the clearest and most compelling
17 circumstances and latches goes to, you know,
18 when -- if the District was sitting on its
19 rights. If it sits on its right too long,
20 then it can lose them and that's been held in
21 cases where they have, you know, taken years
22 to bring an enforcement action for instance.

1 Both the -- both parties set forth
2 the elements of estoppel from the Bannum Case
3 and so, what I'd like to do is set forth those
4 six elements and then we can analyze the facts
5 in this case in that context.

6 The first is, you know, extensive
7 and permanent improvements made in good faith
8 and justifiable and reasonable reliance upon
9 affirmative acts of District Government
10 without notice that the improvements might
11 violate the Zoning Regulations and the
12 equities strongly favor the petitioner.

13 So, I think the first issue is,
14 you know, were there expensive and permanent
15 improvements and what we certainly saw before
16 us was a fairly built structure. The
17 Applicants said that they spent \$225,000 since
18 the first stop work order was issued. I think
19 they said that they spent \$550,000 in
20 construction costs and we don't know exactly
21 over what period and DCRA says that only 30
22 percent of the work was completed prior to the

1 stop work order.

2 I think the point here is -- first
3 of all, is we look at how much was spent, but
4 then how much was spent after they had notice
5 that there was a problem here.

6 Certainly, I kind of was impressed
7 when Mr. Turnbull said well, you know, when
8 they were considering whether they could
9 proceed as the conversion once the building
10 was razed, that there was nothing there. So,
11 it seems to me that they didn't have to spend
12 all that money and build this 11-unit
13 apartment building. At that point, they had
14 some notice from the District Government that
15 there might be a problem at least from the
16 first stop work order which was in February.
17 If we can locate the exact date.

18 It seems to me that they -- that
19 the collapse of the walls was around January
20 20th, 2006 and then the stop work orders were
21 in February. I have in my notes February
22 21st, 2006, DCRA inspected and determined that

1 the building had been razed in violation of
2 the emergency demolition permit and after that
3 -- emergency demolition permit was issued
4 February 14th. Okay. And then -- does
5 somebody have the exact date of the first stop
6 work order? But, I believe they were February
7 and March.

8 In any event, I think it's
9 important to look at how much was spent, you
10 know, after the stop work order. Certainly,
11 they had clear notice that the District had an
12 issue.

13 And all of these elements are
14 really tied to each other. Back to that. I
15 think -- the second is -- the second element
16 is made in good faith.

17 Were these expensive and permanent
18 improvements made in good faith and I think
19 this is hard for this Board, I mean, normally
20 to get into intent or did he intend to
21 misrepresent? You know, did the Applicant --
22 was the Applicant negligent with respect to

1 the walls coming down? I think there are a
2 lot of questions raised in this case about
3 good faith.

4 We have the testimony of neighbors
5 such as Ms. Lee that the property wasn't
6 secured when the work was stopped over the
7 weekend before the walls collapsed.

8 We had Mr. Demuren stating that he
9 didn't plan on keeping that sitting room which
10 was the only part left of the existing
11 structure. That an architect told him it
12 would have to be removed when it was an
13 apartment building.

14 We have the allegation of the DCRA
15 that the Applicant went beyond the scope of
16 the demolition permit and illegally razed the
17 structure.

18 I don't think that we have to make
19 a finding as to these, but they certainly
20 raised questions so that I think there is a
21 question about good faith in this case and I
22 think that there's a question about the fact

1 that they made all these extensive and
2 permanent improvements when there was actually
3 notice that there was an issue.

4 Is it still reasonable for the
5 Applicant to be relying on the original permit
6 when they were getting stop work orders?

7
8 Oh, I see in my notes that the
9 first stop work order I think was February
10 28th, 2006.

11 And this isn't a case of like a
12 surprise. I mean the situation had changed in
13 that the building -- there was no building
14 anymore. You know, this isn't something that
15 was not known to the Appellant. I mean in
16 some cases we do get situations where parties
17 rely on DCRA and they don't know about certain
18 things and there's no reason that they should
19 have known. In this case, he knew that there
20 was no building there anymore.

21 I think we also get to the
22 question about, you know, did the District

1 Government lead the Appellant on, you know,
2 with respect to, you know, told him he could
3 demolish it and then he did that and he
4 thought he was complying with the District and
5 then there was a lower level zoning approval
6 of the application for revised plans and then
7 Mr. Crews overruled that.

8 I don't think this is a strong
9 case for reliance on the government either
10 because he certainly was getting a lot of
11 messages from the District Government that
12 there was an issue here with the stop work
13 orders and Mr. Crews' overruling was like one
14 day after the Zoning official made the initial
15 decision I believe.

16 MEMBER DETTMAN: Madam Chair, I'll
17 just --

18 CHAIRPERSON MILLER: Yes, pipe in.

19 MEMBER DETTMAN: Yes, just offer
20 up a couple observations with respect to
21 estoppel.

22 I think that expensive and

1 permanent improvements have been made to the
2 site and significant improvements have been
3 made to the site since the first stop work
4 order. I think it's clear that the Appellant
5 continued to rely upon the original building
6 permit despite the fact that there were
7 multiple stop work orders issued. Now, the
8 first stop work order I believe was sort of
9 rescinded or revoked by the Office of
10 Administrative Hearings based on a technical
11 issue and so, I could see and I think it was
12 demonstrated that construction was -- it
13 actually ceased when the stop work order was
14 issued, but then after it was overturned, it
15 commenced for a short period and so, I guess
16 at that point, the Appellant is relying upon
17 the original building permit.

18 However, they continued to rely
19 upon that original building permit after stop
20 work orders 2, 3 and 4 were issued which are
21 still pending I think and I don't think that
22 the original building permit at that point in

1 time is the appropriate document to rely on.
2 I think that probably the latest stop work
3 order and to rely upon the fact that it's
4 clear that DC Op does not want construction to
5 continue until some issues are resolved.

6 I think that's sort of a clear
7 statement to make.

8 CHAIRPERSON MILLER: When do you
9 think that was clear that they didn't want
10 construction to continue?

11 MEMBER DETTMAN: Well, I think if
12 DCRA is going to issue a stop work order, they
13 want work to stop and they did it with stop
14 work order number 1, but not on a substantive
15 issue but I think a technicality. It was
16 overturned by OAH.

17 In response to that, DCRA turned
18 around and issued stop work orders 2 and 3
19 which were revoked or not revoked. That's a
20 bad word to use. But, pulled back because of
21 a technicality and now we have stop work order
22 number 4 which it appears has been issued

1 correctly and again, I think those stop work
2 orders are pending before OAH because of the
3 hearing before this Board.

4 But, I guess my main point is that
5 the Appellants continued reliance upon the
6 original building permit and continuing to
7 make improvements to the site despite the fact
8 that multiple affirmative actions by the
9 District Government were taken after the
10 building permit was issued, the multiple stop
11 work orders, is just sort of a bad decision by
12 the Appellant to continue to rely upon this
13 building permit that it's clear that the city
14 wants to put a stop to.

15 COMMISSIONER TURNBULL: Madam
16 Chair, if I continue on with Mr. Dettman's
17 line of discussion.

18 I think that when there is
19 evidence that there is a problem that the city
20 sees with a project and an Applicant continues
21 to do work on a project even though there is
22 these issues, I think he does so at his own

1 risk. I think that is not reliance upon. I
2 think that is ignoring the issues that have
3 surfaced and not trying to resolve them. So,
4 I'm -- I would think that the onus is on the
5 Applicant to address the situation and to come
6 to terms with the problems that have been
7 raised.

8 CHAIRPERSON MILLER: So, I mean I
9 would agree that it appears that the Appellant
10 spent a substantial amount of money and
11 continued building even though there was
12 notice from DCRA that DCRA thought that was
13 illegal.

14 Looking at the elements, number 5
15 is without notice that the improvements might
16 violate the Zoning Regulations and it seems to
17 me that in this case there was a lot of notice
18 from DCRA that the improvements might violate
19 the Zoning Regulations in the form of the stop
20 work orders, in the form of the denial of the
21 revised building -- approval of the revised
22 building plans.

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1 And then the last element is that
2 the equities strongly favor the petitioner and
3 I don't think that's been shown here at all.
4 That this was an innocent petitioner that, you
5 know, wasn't on notice that he was violating
6 any regulations and relied on DCRA for good
7 reason. I just don't -- I don't see that
8 here.

9 Others? And the thing about this
10 estoppel is that you have to make a showing of
11 all of these elements. It's not a balancing.
12 It's not some of them. It's all of them. So,
13 I think that clearly this isn't the case here.

14 MEMBER DETTMAN: I'd agree with
15 that, Madam Chair.

16 CHAIRPERSON MILLER: Okay. Let's
17 cover latches and as I was saying before,
18 latches is a different variation of an
19 equitable theory in which it's an admission to
20 assert a right for an unreasonable and
21 unsatisfactorily explained length of time
22 under circumstances prejudicial to the party

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1 asserting the claim and I got that also out of
2 the Court of Appeals Case of Wieck.

3 The party has to show that it's
4 been prejudiced by the delay and that the
5 delay was unreasonable.

6 So, first of all, I think you have
7 to look at was there what would -- what we
8 would consider a delay here, you know, by DCRA
9 in taking action once, you know, it was aware
10 that there was a problem and it looks to me
11 the first action I believe DCRA took was
12 issuing a stop work order on February 28th,
13 2006 and according to my notices, the walls
14 had collapsed on February 20th, 2006 if I'm
15 right. So, that's a very short time I think
16 in taking action and also, the Zoning
17 Administrator overruled the lower level zoning
18 official's approval of the revised plans as
19 soon as he heard of it which I think was one
20 day later on March 6th, 2007.

21 In the Wieck case in which there
22 was a finding of laches, there was a delay of

1 6½ years.

2 So, I don't see anything coming
3 near to that in this case. I don't even see
4 a delay at all on the part of DCRA in bringing
5 the matter to the Appellant's attention or in
6 taking action.

7 Also in Wieck just for comparison,
8 there were prior enforcement orders that
9 weren't pursued and in this case, I don't see
10 that we have that kind of situation at all
11 where DCRA is not enforcing.

12 Others?

13 COMMISSIONER TURNBULL: I would
14 concur with your assessment, Madam Chair.

15 MEMBER DETTMAN: I'd also concur.

16 CHAIRPERSON MILLER: You know
17 there are a lot of issues and facts in this
18 case. So, if anybody wants to take a minute
19 and see if there's anything else they want to
20 address, we can do that.

21 I guess we can look at the issue
22 as to whether there was a delay that was

1 unreasonable for the time that it took DCRA to
2 issue the notice to revoke the building permit
3 and emergency demotion permit. That was dated
4 July 19th, 2007 and it says in that because
5 the structure had been razed citing DCRA's
6 inspection of the property on February 27th,
7 2006.

8 So, maybe to be thorough, we
9 should, yes, look at what was going on in
10 between that. Whether there were stop work
11 orders being issued or whether there was any
12 mixed messages being sent to the Appellant.

13 I don't recall that there were
14 mixed messages being sent, but I think it's
15 worth just taking a quick look at the dates.

16 I mean it appears that certainly
17 in March and April there were stop work orders
18 being issued and there was -- well, through
19 May. There was activity before OAH appealing
20 these.

21 Actually, I think the Appellant
22 has a good chronology and it's in the Exhibit

1 Number 40, Appellant's supplemental memorandum
2 in support of its claims of estoppel and
3 latches against DCRA and it lists what was
4 going on throughout all those months leading
5 up to the notice to revoke permits.

6 It seems to me that there's a full
7 activity of stop work orders and challenges
8 before OAH and so, even without the revocation
9 notice, there's certainly notice of DCRA's
10 finding that continued construction was
11 unauthorized.

12 So, I would concur with Mr.
13 Turnbull. You know, regardless of what it is,
14 that Appellant was proceeding at its own risk
15 during this period.

16 So, I don't think that -- and I
17 don't think that DCRA was necessarily -- was
18 sitting on its rights to enforce.

19 Anything else? All right. Okay.

20 Then in which case, I'll make a
21 motion and then if there's further
22 deliberation we can entertain it and I would

1 move to deny appeal number 17657 of 1231 Morse
2 Street, Inc. pursuant to DCMR Sections 3100
3 and 3101 from the decision of the Zoning
4 Administrator to deny a building permit
5 application for revisions to an existing
6 building permit allowing for the
7 reconstruction of collapsed walls for a
8 single-family dwelling with an addition and
9 conversion to an 11-unit apartment building in
10 the R-4 District at premises 1233 Morse
11 Street, N.E.

12 Do I have a second?

13 COMMISSIONER TURNBULL: Second.

14 CHAIRPERSON MILLER: Further
15 deliberation?

16 All those in favor say aye. Aye.

17 MEMBER DETTMAN: Aye.

18 CHAIRPERSON MILLER: All those
19 opposed?

20 MEMBER LOUD: Aye. I oppose.

21 CHAIRPERSON MILLER: Opposed?

22 MEMBER LOUD: Yes.

1 CHAIRPERSON MILLER: Okay.

2 MEMBER LOUD: I oppose.

3 CHAIRPERSON MILLER: Any
4 abstentions?

5 And would you call the vote
6 please?

7 MR. MOY: Yes, Madam Chair, the
8 vote is 3 to 1 to 1 based on the motion of the
9 Chair Ms. Miller to deny the appeal. Seconded
10 by Mr. Turnbull. Also, in support of the
11 motion, Mr. Dettman. Opposed to the motion
12 Mr. Loud and we have no other Board Members
13 participating. So, again, the vote is 3 to 1
14 to 1 to deny.

15 CHAIRPERSON MILLER: Thank you.
16 That concludes this case.

17 Okay. We're ready for the next
18 case.

19 MR. MOY: Yes, Madam Chair, the
20 Staff's understanding is that the next case is
21 a motion -- is on the Board's -- on motion for
22 reconsideration of Application Number 17681

1 pursuant to Section 3126.7 of the Zoning
2 Regulations and for the record, this is to
3 Application 17681, of course, of Jose Cruz
4 which was pursuant to 11 DCMR 3104.1 for a
5 special exception to allow a rear porch
6 addition to an existing single-family dwelling
7 under Section 223 not meeting the open court
8 requirements under Section 406 in the R-4
9 District at premises 4110 13th Street, N.W.,
10 in Square 2822, Lot 59.

11 The Board acted on this
12 application on November 13th, 2007, completed
13 public testimony and dismissed the
14 application.

15 At this point, the Staff will
16 leave the rest of this with the Chair and the
17 Board.

18 CHAIRPERSON MILLER: Thank you,
19 Mr. Moy.

20 I want to start by saying that
21 we're taking this up pursuant to 3126.7 which
22 says that the Board on its own motion made not

1 later than ten days following the filing of
2 the final decision in the record may decide to
3 reconsider or rehear an application or appeal
4 and that every once in a while this Board when
5 it is reviewing a decision that is rights as
6 opposed to a summary order, in looking at and
7 writing out the arguments, sometimes realizes
8 that on its own that it made a mistake and
9 that is -- that's the case here and in this
10 instance, the Board is still of the view that
11 Mr. Cruz should be allowed the rear porch
12 addition. But, it has come to the
13 determination that we made a mistake in
14 determining that he was entitled to build this
15 porch as a matter of law and didn't need a
16 special exception which he had sought at our
17 hearing.

18 And what happened in this case is
19 that the Applicant came in for a special
20 exception under 223 for not meeting the court
21 requirements and the court in this case was
22 very or is very similar, quite similar to a

1 side yard and the Board applied the same law
2 that is allowed under the side yard provision,
3 405.8, to the nonconforming court. It took on
4 the exact same attributes, but, in fact, was
5 not a side yard, but was actually a court
6 because the front of the house went from
7 property line to property line.

8
9 In any event, in reviewing our
10 decision, we determined that we ought to give
11 it the appropriate relief under the law which
12 would be special exception and not -- that
13 it's not entitled as a matter of right because
14 the provision we were looking to was 405.8
15 which is a side yard provision and so,
16 therefore, we have just decided to convene
17 this case and look at it as a special
18 exception as it should be under the
19 regulations as they are written. That we
20 would actually have been expanding the
21 regulations which is not in our purview.
22 That's really up to the Zoning Commission.

1 So, I think that this was --
2 basically since it also looks just like a side
3 yard, we treated it just like a side yard on
4 the alley. The Zoning Commission had found
5 that that was a matter of right because it
6 never or for the most part didn't create any
7 adverse impacts and that's why it was allowed
8 as a matter of right.

9 But, like that, this case I think
10 if we just briefly look at the elements of
11 223, finds that it doesn't affect the privacy,
12 of use and enjoyment of neighboring
13 properties, that it's in harmony with the
14 neighborhood, the zone plan and that the it
15 should be granted relief under 223. That
16 Office of Planning was in support of this and
17 that there was also no opposition.

18 Would others like to make any
19 comments? Okay.

20 So, to set the record straight
21 then, I'm going to move that we reconsider
22 granting -- dismissing this case finding that

1 there was no relief required and that we grant
2 special exception relief pursuant to 223.

3 COMMISSIONER TURNBULL: Second.

4 CHAIRPERSON MILLER: All those in
5 favor say aye.

6 (Ayes.)

7 CHAIRPERSON MILLER: All those
8 opposed? All those abstaining? Okay.

9
10 And would you call the vote
11 please, Mr. Moy.

12 MR. MOY: Yes, Staff would record
13 the vote as 3 to 0 to 2 on the motion of the
14 Chair Ms. Miller. Seconded by I believe Mr.
15 Turnbull. In support of the motion, Mr.
16 Dettman and two other Board Members not
17 participating.

18 CHAIRPERSON MILLER: And this will
19 be a summary order as well.

20 MR. MOY: Perfect.

21 CHAIRPERSON MILLER: Thank you.

22 MR. MOY: Thank you.

1 CHAIRPERSON MILLER: I think that
2 concludes cases that we have on the agenda for
3 this morning. Is that correct, Mr. Moy?

4 MR. MOY: That's correct, Madam
5 Chair.

6 CHAIRPERSON MILLER: Okay. And
7 that we do have the one more matter on our
8 agenda and that is pursuant to 3101.3 of our
9 regulations say that the Board shall elect its
10 chairperson and vice-chairperson at its first
11 meeting held in January of each calendar year.

12 So, that's where we are at our
13 first meeting of 2008. So, at this meeting,
14 we will be electing our vice-chair and chair.

15 And I want to say that there has
16 been quite a turnover in the Board starting in
17 2008 and we will be having one other member
18 joining us next week, Mary Walker. So, we
19 have on this Board both experience and change
20 and in the spirit of our democratic process.

21 So, however, this is really a --
22 this isn't exactly a policy board. So, I

1 don't expect to see a lot of changes that way.

2 But, I very much welcome my new
3 Board Members and look forward to working with
4 them in the coming year and I very much
5 appreciate the regular Zoning Commission
6 Members who will be joining us as Mr. Turnbull
7 is weekly.

8 So, at this point not belaboring
9 this, I guess I would ask if we have any
10 motion. I think the first would be a motion
11 to elect the chair and the second would be a
12 motion to elect the vice-chair.

13 MEMBER DETTMAN: I would be happy
14 to make a motion to elect Ms. Ruthanne Miller
15 to this chairperson position for the D.C.
16 Board of Zoning Adjustment.

17 CHAIRPERSON MILLER: And is there
18 a second?

19 COMMISSIONER TURNBULL: Second.

20 CHAIRPERSON MILLER: And does
21 anyone want to speak to the motion?

22 I think that I would just say that

1 not to belabor this, I have kind of somewhat
2 already spoken to this, but I am happy to
3 serve as chair again. That I have served for
4 a short period as chair in 2007 and I'm happy
5 to continue.

6 So, what I think I will do is I
7 think that I will make a motion for vice-chair
8 and then we can vote on both motions at the
9 same time.

10 And I would like to move to elect
11 Mr. Marc Loud as our new vice-chair. Mr. Loud
12 came on board in the spring and he's a lawyer
13 with great experience in the community and has
14 been a great asset on this Board.

15 I do want to say also that every
16 member contributes uniquely and fully to the
17 Board and, however, the vice-chair does take
18 on a special position particularly if the
19 chair is not able to preside, the vice-chair
20 will preside.

21 So, that being said, I would -- I
22 have moved. Do I have a second?

1 MEMBER DETTMAN: Second.

2 CHAIRPERSON MILLER: Any further
3 comments?

4 MEMBER LOUD: Just to say that I'd
5 be honored to serve and like you, Madam Chair,
6 find myself surrounded by a lot of talent.
7 Not just the Board, but the Staff and I'm
8 looking forward to the opportunity.

9 CHAIRPERSON MILLER: Okay. Then
10 all those in favor of the motion to elect the
11 chair and vice-chair as stated say aye.

12 (Ayes.)

13 CHAIRPERSON MILLER: Opposed?
14 Abstaining? Okay.

15 Mr. Moy.

16 MR. MOY: Yes, Madam Chair, that
17 resulting vote is 4 to 0 to 0 on the
18 nomination of Ms. Miller to continue as chair.
19 Staff would also like to say that there is --
20 Staff in receipt of an absentee ballot from
21 Ms. Mary Oates Walker stating that in the
22 event that Ms. Miller is nominated as chair

1 that she would cast her vote for Ms. Miller as
2 chair. So, that would give a full vote of 5
3 to 0 to 0.

4 CHAIRPERSON MILLER: Okay. Thank
5 you.

6 Anything else on the agenda for
7 this morning?

8 MR. MOY: Also, I should add, too,
9 that I can see that we've consolidated this.
10 That her vote also is for the vice-chair.
11 That if Mr. Loud was nominated that her -- she
12 would cast her vote for Mr. Loud as vice-
13 chair.

14 MEMBER LOUD: Thank you. I was
15 wondering about that.

16 CHAIRPERSON MILLER: I was, too.
17 Good thing to hear.

18 MR. MOY: So, that makes it a
19 unanimous vote as 5 to 0 to 0 all the way
20 around. Congratulations.

21 CHAIRPERSON MILLER: Okay. Then
22 if there's no other business on our morning's

1 agenda, then this meeting's adjourned and I
2 think that we should come back in an hour for
3 our hearing. So, that would be 2:00 or a
4 little thereafter.

5 (Whereupon, the meeting was
6 concluded at 1:06 p.m.)
7
8
9