

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA
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BOARD OF ZONING ADJUSTMENT
+ + + + +
SPECIAL PUBLIC MEETING
+ + + + +
TUESDAY
DECEMBER 18, 2007
+ + + + +

The Special Public Meeting
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 10:25 a.m., Ruthanne G. Miller,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER, Chairperson
MARC LOUD, Mayoral Appointee
SHANE DETTMAN, Commissioner (NCPC)

ZONING COMMISSION MEMBER PRESENT:

CURTIS L. ETHERLY, Jr., Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

The transcript constitutes the
minutes from the Special Public Meeting held
on December 18, 2007.

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P R O C E E D I N G S

10:25 a.m.

CHAIR MILLER: This meeting will please come to order. Good morning, ladies and gentlemen. This is the December 18th Public Meeting of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller. I'm Chair of the BZA. Joining me today is Mr. Marc Loud and Mr. Shane Dettman of the BZA, and next to him is Sherry Glazer from the Office of Attorney General and Beverley Bailey from the Office of Zoning. We'll have other staff joining us in a little bit as well.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door. We do not take any public testimony at our meetings, unless the Board asks someone to come forward.

Please be advised that this proceeding is being recorded by a court reporter, and is also webcast live.

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1 Accordingly, we must ask you to refrain from
2 any disruptive noises or actions in the
3 hearing room. Please turn off all beepers and
4 cell phones. Does the staff have any
5 preliminary matters?

6 MS. BAILEY: Members of the Board,
7 to everyone good morning. Staff does not at
8 this time.

9 CHAIR MILLER: Ms. Bailey, are you
10 prepared to start us on the applications that
11 are on our meeting agenda, or are we waiting
12 for Mr. Moy at this point?

13 MS. BAILEY: I'm prepared to get
14 started, Madam Chair.

15 CHAIR MILLER: Okay, thank you.

16 Application 17689

17 MS. BAILEY: The first case is
18 Application No. 17689 of Taiwo Demuren,
19 pursuant to 11 DCMR 3401.1, for a special
20 exception to allow the construction of a new
21 four-unit apartment building under Section
22 353. The property is zoned R-5-A. It's

1 located 5139 Astor Street, S.E., Square 5309,
2 Lot 13.

3 The Board heard this case on
4 December 4th, 2007, and it's before the Board
5 for decision at this time.

6 CHAIR MILLER: Thank you. Yes, I
7 believe that we had a full hearing on this
8 case, and there were a few issues that the
9 Applicant was going to be coming back to us
10 on, and revising the plans in accordance with
11 those issues.

12 I'm just going to ask at this
13 point, Mr. Dettman, I know that you and Mr.
14 Turnbull, I believe, have some concerns, and
15 I'm wondering if they're addressed.

16 MR. DETTMAN: I'd be happy to do
17 that, Madam Chair. Yes. Since the hearing
18 that we had two weeks ago on this case, Case
19 17690, the Applicant has revised or has
20 submitted revised plans, and that's indicated
21 on Exhibit No. 28 of our record.

22 The two issues that were brought

1 up by the Board during the hearing, one had to
2 deal with the location and access to the trash
3 enclosure in relation to the access stairway
4 down to the basement unit, and the second
5 issue had to deal with the proposed retaining
6 wall that was surrounding the open parking
7 spaces, the four open parking spaces in the
8 rear of the building, and more specifically
9 what that retaining wall was going to be
10 constructed of.

11 As I said, Exhibit No. 28 is the
12 Applicant's revised plans for this case, which
13 does provide clarity on the location and the
14 access to the trash enclosure. So that issue
15 seems to be resolved.

16 With respect to the material make-
17 up of the retaining wall that surrounds the
18 four open parking spaces, that issue also
19 seems to be resolved. According to the
20 revised site plan, the retaining wall that
21 surrounds the four parking spaces will be
22 constructed of brick, solid brick.

1 According to the regs, I believe
2 it's -- it is 2117.12, stipulates that any
3 open parking space needs to be surrounded by
4 either a solid brick or stone wall.

5 So 2117.12 does appear to be
6 satisfied in the revised plans. Those were
7 the only two issues that were brought up by
8 the Board for this case, Madam Chair.

9 CHAIR MILLER: Thank you, and if I
10 recall, there was no opposition to this case.
11 We do have an ANC report dated October 15th,
12 2007, and --

13 MR. LOUD: Dated October 11, Madam
14 Chair.

15 CHAIR MILLER: Oh thank you, and
16 in that report, did they take a position on
17 this case?

18 MR. LOUD: In fact, they don't.
19 Mr. Igboe (ph) did provide the ANC with the
20 information, and they did meet on it. But by
21 their report dated October 11th, they don't
22 have a specific recommendation.

1 So we did review it, but there's
2 no great weight consideration to be given to
3 the case.

4 CHAIR MILLER: Okay. I think that
5 this one is pretty straightforward. The
6 Office of Planning submitted a report, and
7 showed how they met the requirements of 353,
8 and the issues that we had have been
9 addressed.

10 Does anyone have any further
11 comments on this application?

12 (No response.)

13 CHAIR MILLER: Okay. Then at this
14 point then I would move approval of
15 Application No. 17689, of Taiwo Demuren,
16 pursuant to 11 DCMR Section 3104.1, for a
17 special exception to allow the construction of
18 a new four-unit apartment building under
19 Section 353 in a R-5-A district, at premises
20 5139 Astor Street, S.E. Do I have a second?

21 MR. LOUD: Second, Madam Chair.

22 CHAIR MILLER: Further

1 deliberation?

2 (No response.)

3 CHAIR MILLER: All those in favor
4 say aye?

5 (Chorus of ayes.)

6 CHAIR MILLER: All those opposed?

7 (No response.)

8 CHAIR MILLER: All those
9 abstaining?

10 (No response.)

11 CHAIR MILLER: Would you call the
12 vote please?

13 MS. BAILEY: Madam Chair, the vote
14 is recorded as 3-0-2, to grant the
15 application. Mrs. Miller made the motion; Mr.
16 Loud seconded it.

17 Mr. Dettman supports the motion.
18 Mr. Turnbull was a commissioner and his vote
19 is unknown at this time, and the fourth BZA
20 member is not present and not voting.

21 CHAIR MILLER: Thank you, and this
22 will be a summary order then, as there's no

1 opposition to this.

2 MS. BAILEY: Thank you.

3 CHAIR MILLER: We're ready for the
4 next case, please.

5 Application 17690

6 MS. BAILEY: The second case of
7 the morning is Application No. 17690, of Taiwo
8 Demuren, pursuant to 11 DCMR 3104.1, for a
9 special exception to allow the construction of
10 a four-unit apartment building under Section
11 353. The property is zoned R-5-A. It's
12 located at 5131 Astor Street, S.E., Square
13 5309, Lot 9.

14 The Board heard this case on
15 December 4th, 2007. Additional information
16 was requested from the Applicant. That
17 information did come in, and the case is ripe
18 for decision at this time.

19 CHAIR MILLER: Thank you. Again,
20 as I recollect, this case was fairly similar.
21 We heard them the same day, and I think in
22 this case also there were a few issues that we

1 had that the Applicant has responded to.

2 So again, I would ask Mr. Dettman,
3 does the Applicant's revised plan address the
4 issues that we were concerned with?

5 MR. DETTMAN: As you said, Madam
6 Chair, this application is almost exactly the
7 same application as the previous one we just
8 deliberated.

9 The two issues that were raised
10 once again dealt with the access and location
11 of a trash enclosure, as well as the screening
12 of the four open parking spaces in the rear of
13 the building.

14 The revised plans, Exhibit No. 27
15 in our record, submitted on December 7th by
16 the Applicant, does provide clarity on both
17 those issues. Access and location of a trash
18 enclosure has been clarified, and seems to be
19 adequate, as well as the retaining wall.

20 Clarification was provided that
21 the retaining wall will be constructed of
22 brick, which is in conformance with 2117.12.

1 CHAIR MILLER: Thank you. I
2 believe also that we have an ANC report in the
3 file that's similar to the other ANC report.
4 Mr. Loud, do you have that in front of you?

5 MR. LOUD: That would be, Madam
6 Chair and Mr. Dettman, that's Exhibit No. 22,
7 and as Mr. Dettman alluded to, it's almost
8 identical to the previous case. A full quorum
9 met. They voted 6 to 0.

10 However, they didn't make a
11 specific recommendation. So although we take
12 it into consideration in review, the exhibit
13 is not accorded great weight.

14 CHAIR MILLER: And there are no
15 issues, then, for the Board to address; is
16 that correct?

17 MR. LOUD: Not with respect to
18 that.

19 CHAIR MILLER: Okay, and I don't
20 believe there's opposition in this case
21 either. Also Office of Planning is supportive
22 of the application and they did their full

1 analysis in their report, which I think that
2 we can just accept.

3 We went through that pretty
4 thoroughly at the hearing. So I believe that
5 it also meets the standard set forth in 353.
6 Are there any other comments on this
7 application?

8 (No response.)

9 CHAIR MILLER: In which case then
10 I would for approval of Application No. 17690
11 of Taiwo Demuren, pursuant to 11 DCMR Section
12 3104.1, for a special exception to allow the
13 construction of a new four-unit apartment
14 building under Section 353 in the R-5-A
15 district at premises 5131 Astor Street, S.E.
16 Do I have a second?

17 MR. LOUD: Second, Madam Chair.

18 CHAIR MILLER: Further
19 deliberation?

20 (No response.)

21 CHAIR MILLER: All those in favor
22 say aye.

1 (Chorus of ayes.)

2 CHAIR MILLER: All those opposed?

3 (No response.)

4 CHAIR MILLER: All those
5 abstaining?

6 (No response.)

7 CHAIR MILLER: Would you call the
8 vote please?

9 MR. MOY: Yes, Madam Chair. The
10 vote is 3 to 0 to 1 on the motion of the
11 Chair, Ms. Miller, to approve the application,
12 seconded by Mr. Loud. For the motion is Mr.
13 Dettman, and of course we have no other Board
14 member participating on this case.

15 We do have an absentee ballot from
16 Mr. Turnbull, and his absentee vote is to
17 approve, with such conditions as the Board may
18 impose. That would give a final vote of 4 to
19 0 to 1.

20 CHAIR MILLER: Thank you, and this
21 would also be a summary order, as there's no
22 opposition and the ANC had no wishes to

1 address. Thank you.

2 MR. MOY: There's also, Madam
3 Chair, on the preceding case, if I may go back
4 to the Application No. 17689, the previous
5 case that was voted, did the Board record the
6 absentee ballot from Mr. Turnbull?

7 CHAIR MILLER: I don't believe so.

8 MR. MOY: Well if not, if I may,
9 we can reopen that momentarily.

10 CHAIR MILLER: Yes, please.

11 MR. MOY: Because there is also an
12 absentee ballot which I have here from Mr.
13 Turnbull, and his vote is to also approve the
14 application, which would give a resulting
15 vote, I believe, of 4 to 0 to 1.

16 CHAIR MILLER: Thank you very
17 much.

18 Application 17685

19 MR. MOY: The next application for
20 decision-making, I believe Madam Chair, is
21 Application No. 17685, of Komsam, Inc.,
22 pursuant to 11 DCMR 3104.1, for a special

1 exception to allow the construction of a new
2 17-unit apartment building under Section 353
3 in the R-5-A district, at premises 5000 block
4 of Drake Place, or under the new name Queens
5 Stroll Place. That's in Southeast Washington,
6 D.C., Square 5321, Lot 35.

7 On November 20th, 2007, the Board
8 completed public testimony, closed the record
9 and scheduled its decision at a special public
10 meeting on December 18th.

11 The Board requested post-hearing
12 documents from the -- primarily from the
13 Applicant. That was filed and is in your case
14 folders, identified as Exhibit 32, which
15 includes a letter of authorization, a copy of
16 a DDOT letter, as well as the revised drawings
17 as requested by the Board.

18 The Board is to act on the merits
19 of the zoning relief for special exception
20 under Section 353. That completes the Board's
21 briefing, Madam Chair.

22 CHAIR MILLER: Thank you, Mr. Moy.

1 This is also is an application under Section
2 353, in which we have a hearing and ask the
3 Applicant to make some revisions, provide some
4 more information in respect to concerns that
5 were raised by the Board and Office of
6 Planning.

7 I think that the application did
8 respond to Office of Planning concerns.
9 However, I want to go through some of those
10 aspects that we inquired about, and check off
11 what actually came in.

12 We did ask for a lighting plan, I
13 believe, and I think that the lighting is
14 reflected on the plans that's been provided.
15 We asked for a letter of authorization from
16 the property owner, and we did get that.

17 However, the one aspect that had a
18 lot of discussion at the hearing, and I was
19 surprised didn't seem to get responded to,
20 concerned providing the percentage of
21 landscaping for the parking area in the plan.

22 What the Applicant did was provide

1 us the percentage of landscaping for the whole
2 lot, and I believe it was around 14 percent,
3 but not for the parking lot area.

4 I want to bring the Applicant's
5 attention again to our regulations, which call
6 for that. It's 2117.11. It says "Landscaping
7 with trees and shrubs shall be provided for
8 all open parking spaces provided on a lot,
9 where there are more than ten open parking
10 spaces, provided collectively as accessory to
11 any building or structure," which is the case
12 here.

13 "The landscaping shall cover a
14 minimum of five percent of the total area
15 devoted to parking, including aisles and
16 driveways. The landscaping shall be
17 maintained in a healthy growing condition."

18 The landscaping plan doesn't
19 indicate what percentage is for the parking
20 lot. It does show where there is landscaping
21 and it does show the percentage for the whole
22 lot, but not for the parking lot.

1 So I would propose that we give
2 the Applicant one more chance to address that,
3 to either -- first of all to either give us
4 the numbers, like what percentage is it at,
5 can he bring it up to the five percent and if
6 not, they may need to seek relief or do a
7 revision. I don't know.

8 But we don't even have the numbers
9 to evaluate whether that requirement has been
10 met. So I would like to propose that we leave
11 the record open and continue this decision-
12 making to our next decision-making, which will
13 be December 8th.

14 Before hearing from other Board
15 members, I also want to say that we left the
16 record open for a DDOT report, which did come
17 into the file, and DDOT had no objections to
18 the proposal. Others?

19 MR. LOUD: I think it's a
20 reasonable recommendation, Madam Chair. He
21 complied with most of the outstanding actions,
22 and it's a new 17-unit in an area where we're

1 trying to encourage that landfill development.

2 So no harm, no foul. I think this would make
3 sense.

4 MR. DETTMAN: I also go with your
5 recommendation. If I remember correctly,
6 during our hearing, there was a little sort of
7 confusion on what constitutes five percent and
8 where the five percent needs to be.

9 So I think providing the Applicant
10 with another opportunity to comply with
11 2117.11 is a good idea, and without being too
12 prescriptive, because I don't know if that's
13 --

14 The Board has the authority to be
15 prescriptive on design, the revised plans that
16 were submitted, Exhibit No. 32, indicates that
17 a 42-inch high, 12-inch thick brick wall will
18 surround the parking area.

19 I would just want to point the
20 Applicant towards 2117.12. There is another
21 alternative, a sort of green alternative, to
22 providing screening for open parking spaces,

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1 which may or may not assist the Applicant in
2 providing the five percent coverage of the
3 parking area.

4 You know, it looks tight. With a
5 17-unit building, this is tight, because you
6 need to provide one to one parking spaces and
7 24 inch drive aisles. So I think there's a
8 couple of alternatives that the Applicant
9 could look at, to provide the five percent.

10 CHAIR MILLER: Thank you, and I
11 recollect also at the hearing, a lot of
12 landscaping was being put on a tot lot, and
13 there was an issue about whether you would
14 have to give up the tot lot.

15 I think that you're right, that
16 the Applicant has options, and I wouldn't say
17 they necessarily have to take out the tot lot
18 in order to provide parking landscaping.

19 But he has to at least, you know,
20 show us the numbers, show how he can meet it
21 and if there's a good reason not to meet it,
22 then to seek relief for not meeting it. So I

1 think if he has any questions, he should check
2 with either Office of Planning or Office of
3 Zoning.

4 But you know, it looks like a good
5 plan otherwise, and therefore I think we ought
6 to give him one more chance to address this
7 issue. Any other comments?

8 Okay. Then we will continue
9 decision-making on this for January 8th, 2008,
10 and leave the record open for the Applicant to
11 either revise the plan, or seek relief with
12 respect to the five percent provision set
13 forth in 2117.11.

14 Okay. Thank you. I think that's
15 all for this case.

16 Application No. 17446-A

17 MR. MOY: Yes, yes, very good.
18 Thank you, Madam Chair. The next case for
19 decision is the Board to take up, which was
20 originally the Motion for Reconsideration of
21 Application No. 17446-A, pursuant to Section
22 3126 of the zoning regulations.

1 The original application of 17446
2 of Pauline Ney, was pursuant to 11 DCMR
3 3104.1, for variances from lot occupancy
4 requirements under Section 403 and non-
5 conforming structure provisions under
6 Subsections 2001.3 and 2002.4, to construct
7 four residential units above existing one-
8 story retail structure in the R-5-B district
9 at premises 2160 through 2162 California
10 Street, N.W.

11 That's in Square 2530, Lots 99 and
12 100. At its limited focused public hearing on
13 November 20th, 2007, the Board completed
14 public testimony by the parties, and scheduled
15 this decision at a special public meeting on
16 December the 18th.

17 The other action on November 20th
18 of the Board was to dismiss or deny the
19 request by the ANC, who filed to dismiss the
20 application. That was on a Board vote of 3 to
21 0 to 2.

22 The Board requested post-hearing

1 documents, including findings of fact and
2 conclusions of law, that would be based on the
3 revised plans that were filed by the Applicant
4 on November 20th.

5 That filing was submitted into the
6 record and is identified in your case folder
7 as Exhibit 132. Findings of fact and
8 conclusions of law from the opposition parties
9 was also allowed into the record. That
10 deadline from the opposition was -- had a
11 deadline of December the 10th.

12 That was filed timely, and is
13 identified in your case folders as Exhibit
14 133. So the staff would just end, Madam
15 Chair, by saying that the Board is to act on
16 the merits of the filings. That completes the
17 status briefing.

18 CHAIR MILLER: Thank you, Mr. Moy.
19 This has been somewhat of a long and difficult
20 case. I think I want to just go back to at
21 least where we started for getting here, and
22 that's with the Motion for Reconsideration.

1 The Motion for Reconsideration was
2 granted on July 3rd, 2007, based on new
3 information that the Board found might affect
4 the Board's decision of May 4th, 2007.

5 That new information was that
6 there was residential use in the basement at
7 2162 that was previously represented as non-
8 conforming commercial use.

9 We had a hearing on this, and as
10 it progressed, the Applicant admitted that at
11 least part of the basement was used
12 residentially. Then there came a dispute as
13 to whether more of that basement was
14 residential or non-conforming.

15 Then we got to the point where
16 rather than asking the Board to decide that
17 factual issue, the Applicant submitted revised
18 plans, changing areas of use within the
19 building, so that basically this would no
20 longer be an issue.

21 Then in the process, there had
22 been allegations of unclean hands, that the

1 Applicant intentionally defrauded the
2 community and the Board, and on the other
3 side, there were allegations of trespassing by
4 the community. So this has been a lively
5 case.

6 The Board is now left with what
7 issues, zoning issues we should be deciding
8 today. Let's see if anyone wants to jump in
9 at least with the first -- I think I would say
10 there are really basically three issues.

11 One is the reconfiguration, has
12 that alleviated a need for relief in this
13 case, and then the unclean hands doctrine, and
14 are there any new issues that the Board may
15 have seen in the process of looking at this
16 case over and over again.

17 So why don't we start with the
18 reconfiguration of the interior space by the
19 Applicant, whether or not that does alleviate
20 the relief, any additional relief that might
21 be needed, that was argued by the opponents.
22 Mr. Dettman, are you prepared to address this?

1 MR. DETTMAN: I think I can take a
2 shot at this. As you've already mentioned,
3 Madam Chair, the reconsideration came about by
4 the discovery of this residential unit in the
5 basement of 2162, and what I thought was
6 helpful or might be helpful to the other Board
7 members is I'm reading from Exhibit No. 132,
8 that it just basically articulates what the
9 Board limited the rehearing to, and it was
10 whether the basement had been converted to
11 residential use.

12 You've already mentioned that. I
13 don't think that's contested. If so, how long
14 of a residential use -- how long has the
15 residential use occupied the building. I
16 think it was established that it was at least
17 ten years, and then whether or not the
18 residential unit's existence had any material
19 impact on the Board's decision in Application
20 17446.

21 At least I guess it appears to me
22 that the presence of that residential unit in

1 the basement didn't have any material impact
2 on the relief that was granted by the Board,
3 and I believe that was relief from 403, the
4 lot occupancy requirements and non-conforming
5 structure provisions under Subsections 2001.3
6 and 2002.4.

7 However, it did raise another
8 issue, and it dealt with the sort of extension
9 of a non-conforming use into an area that had
10 been reverted back to a conforming use, the
11 residential apartment.

12 So working through that issue, the
13 Applicant submitted a couple of versions of
14 revised plans. The latest version of those
15 revised plans was submitted at the least
16 rehearing, which I can't recall the date.

17 However, the latest plans on
18 record, which I believe in our last hearing
19 both the opposition and the Applicant agreed
20 -- at least the Applicant agreed that these
21 were the plans that they were going to go
22 with, appears to have cleared up that issue as

1 well.

2 The most recent plans show that in
3 the basement level, no area that's been
4 converted to residential use is being sort of
5 extended into by a new non-conforming use.

6 As a matter of fact, according to
7 the new plans, the entire basement of 2162 is
8 proposed to be used for residential purposes;
9 that is, a residential fitness area -- and I'm
10 reading directly from the plans -- a
11 residential fitness area, scooter parking, as
12 well as labeled "apartment building management
13 and maintenance office."

14 I know that there were a couple of
15 issues brought up by the opposition related to
16 those uses in the basement, which if you'd
17 like me to address, I can.

18 CHAIR MILLER: If they're relevant
19 to our decision-making, would you just briefly
20 touch upon them?

21 MR. DETTMAN: Briefly, you know,
22 maybe in a sentence. The opposition had

1 stated in Exhibit No. 133, I believe, yes,
2 that the Applicant hadn't demonstrated that
3 the residential fitness area, as well as the
4 management and maintenance offices, would not
5 be used for commercial purposes.

6 For example, that the Applicant
7 wouldn't sell memberships for the fitness
8 area, and that it didn't demonstrate that it
9 would specifically be used for the residential
10 area.

11 I think the Applicant is right, I
12 think the opposition is right, that the
13 Applicant didn't point that out. However, I
14 think that would fall under the sort of
15 purview of more of an enforcement issue, and
16 that if it was discovered that the Applicant
17 is providing memberships for this very small
18 fitness area, I think that would be an issue
19 that would be raised with DCRA.

20 CHAIR MILLER: Oh yes. I think
21 those are relevant issue, because I think the
22 opponents seem to be raising a question of

1 whether those would be commercial uses or
2 residential uses.

3 I think because they are accessory
4 to the residential use that they're not
5 commercial, unless they go ahead and do what
6 you're saying, and then sell memberships or
7 something.

8 But again, it would be an
9 enforcement issue. Okay. The same is true
10 with the management office, I believe, is
11 there not? There was an issue about that,
12 whether or not that was a residential use.

13 I would also say that that's
14 another accessory use to the residence. So
15 that wouldn't be a commercial use. Is there
16 another one? Oh, the scooter parking I think
17 was the same kind of issue.

18 I think that they felt that maybe
19 there were more spaces than required. But I
20 don't think it at all raises to the level that
21 it shows that they would be renting these
22 spaces out. Again, if they did, that would be

1 an enforcement issue. Okay.

2 MR. DETTMAN: Just one last point,
3 and I probably should have described this
4 earlier on, is that just to -- I'll try to
5 describe verbally what's shown in the latest
6 plans with respect to the basement level, in
7 terms of what's there today and what's
8 proposed to be there tomorrow.

9 At 2162, currently the entire
10 basement of 2162 is used for storage of the
11 grocery store that's located at 2160. The new
12 plans for 2160 show that half of it, roughly
13 half of it would be used for commercial
14 storage for the grocery store, and the other
15 half of the basement of 2160 will be used for
16 residential purposes.

17 So basically you're going from 100
18 percent non-conforming to 50 percent non-
19 conforming storage and 50 percent residential.
20 So reverting back to conforming.

21 With respect to the basement of
22 2162, where we had this issue of the

1 residential unit, the most recent plans in the
2 record indicate that the proposal is to use
3 the basement of 2162 in its entirety for
4 residential purposes.

5 So today, we know for a fact that
6 a portion of it, I think it was about 700
7 square feet, a portion of that basement is
8 used for residential purposes, and there was
9 maybe still a little unclarity on the rest of
10 it, whether it was reverted to residential
11 storage or commercial storage.

12 However, the latest plans in the
13 record have completely converted the basement
14 of 2162 to residential purposes.

15 CHAIR MILLER: Okay. Does that
16 resolve the opponents' concerns with respect
17 to that issue? Okay.

18 MR. DETTMAN: Yes. I think the
19 issue with respect to the proposal, sort of
20 reconverting the residential -- a section of
21 the residential back into a non-conforming use
22 has been addressed by the Applicant by

1 converting the entire basement of 2162 into a
2 residential use.

3 CHAIR MILLER: Okay. Then I think
4 perhaps we could move into the argument about
5 the unclean hands doctrine. I don't know if
6 anybody else wants to address that. I did say
7 a few words about it before, and I would like
8 to hear from my other Board members.

9 As far as I know, this doctrine
10 has not been used in zoning cases heretofore
11 in the District of Columbia. So we don't have
12 the Court of Appeals of the District of
13 Columbia to give us specific relief on that,
14 specific guidance on that.

15 I think that we need to tread
16 carefully in that area, since we don't have
17 that guidance from the Court of Appeals, and
18 we don't have any guidance or any authority
19 specifically with respect to that in our
20 regulations, or in the statute.

21 I did generally say that I think
22 that there's been issues of misconduct or I

1 don't know how to characterize it, but perhaps
2 on both sides.

3 So I'm not at this point convinced
4 by at least the arguments that were made by
5 the opponents that this, that the actions on
6 the part of the Applicants have risen to such
7 a level that we don't grant them relief in
8 this case at all.

9 I mean I think what we did do was
10 reopen the case when we heard that there might
11 have been some misrepresentation of fact, and
12 we have been taking a look at the application
13 on correct facts.

14 So whether or not the facts have
15 been so egregious as to rise to the level of
16 us not granting relief pursuant to the zoning
17 regulations, with respect to revised plans,
18 I'm not sure that I'm ready to go there. But
19 I would like to hear from other Board members.

20 MR. DETTMAN: Thank you, Madam
21 Chair. I would agree wholeheartedly with your
22 comments as it relates to unclean hands.

1 On this particular issue, it is
2 perhaps again important to reference what you
3 stated at the outset of our conversation
4 regarding this case, and that is that this has
5 been an awesomely meandering and exhaustive
6 sojourn on this particular case over I forget
7 how many months we've had to deal with this.

8 Because of that length of time,
9 that's probably why we're talking about
10 unclean hands. But I think more or less this
11 really revolves around simply not the best job
12 being done in terms of disclosing exactly what
13 was happening in that basement area.

14 I agree with you, that I don't
15 believe that that lack of clarity, that lack
16 of disclosure arises from bad faith or an
17 attempt to overtly conceal something that
18 should have otherwise been disclosed to the
19 Board. I just simply think it was just a very
20 poor presentation of the necessary facts that
21 this Board needed to get to, to deal with the
22 questions that were raised by what was

1 happening in that basement and other portions
2 of the building.

3 But I agree with you, that with
4 respect to applying the unclean hands doctrine
5 here, in the absence of clear proof that there
6 was actual misconduct, willful misconduct or
7 willful concealment, if you will, I just don't
8 find that the record supports that outcome in
9 this particular instance. Thank you, Madam
10 Chair.

11 CHAIR MILLER: Thank you. Did you
12 have any further comment? Okay. I think that
13 we have addressed the opponents' concerns, and
14 I want to move into another area before we get
15 to -- I know that the Applicant is requesting
16 flexibility, etcetera, and there were issues
17 about that.

18 In looking at these plans, the
19 revised plans, and in looking at these
20 regulations dealing with non-conforming uses,
21 it appears that the swapping of the uses in
22 this case, which has gone in in order to --

1 well, there have been different swapping of
2 uses in order to deal with the non-conforming
3 uses and conforming uses issues.

4 But actually there was a swapping
5 beforehand that we just noticed with respect
6 to the regulations, and I want to bring this
7 to the attention of the parties, because we
8 think that there may be one more issue here of
9 relief that the Applicant may need.

10 So what I want to do is have the
11 Board discuss it, and I don't know if all the
12 parties are represented here or not. If they
13 are, we may ask you to come to the table one
14 more time.

15 But this is the issue. There is
16 going to be, under the revised plan, a
17 swapping of non-conforming uses from one part
18 of the building to another, and I want to just
19 back up for a second, because I am referring
20 to these two structures as one building.

21 I want to bring to the attention
22 of the parties a finding of fact No. 14 that

1 the Board made, that wasn't addressed by the
2 parties in their discussions.

3 But at that finding, the Board
4 said that the Applicant proposes to add two
5 new floors on top of the two existing
6 buildings, and the ground floors of each will
7 be reconfigured and connected, making the
8 buildings one building for zoning purposes.

9 So the Board has found that the
10 project in this application would be one
11 building. So I'm going to be referring to it
12 as one building in any event.

13 We have a provision under 2002,
14 non-conforming uses within structures.
15 2002.3, "A non-conforming use shall not be
16 extended to portions of a structure not
17 devoted to that non-conforming use at the time
18 of enactment or amendment of this title, or to
19 another structure."

20 It appears to me, and I believe
21 other Board members, that the swap that is
22 going to happen here, of the grocery store

1 going to where the real estate office is,
2 falls in this category.

3 So then we were looking at the
4 regulations further, and 2003 goes to changing
5 uses within structures.

6 2003.1 provides that a non-
7 conforming use may be changed to a use that is
8 permitted as a matter of right in the most
9 restrictive district in which the existing
10 non-conforming use is permitted, as a matter
11 of right subject to the conditions set forth
12 in this section.

13 Then it goes through various
14 provisions, which talk about no adverse
15 impact, etcetera. So both of these uses of
16 the real estate office and the grocery store
17 are both permitted as a matter of right in the
18 C-1 district.

19 Since they are the same, they can
20 be swapped under this provision. But it does
21 seem to require special exception relief.

22 Though we don't always tell

1 applicants what relief they might need, we
2 thought that it was appropriate, before we
3 ruled on this issue, before we ruled on this
4 order, to put this issue out there, since
5 there has been so much attention by the
6 parties and by the Board, as to the uses here,
7 and whether or not they are allowed as a
8 matter of right.

9 So even though the opponents
10 didn't raise this point, we have concerns with
11 it. So therefore, before putting this case to
12 rest one more time, we would first of all like
13 to know if representatives of both parties are
14 here today, because I would -- you can come
15 forward, I guess, because we do open it up for
16 testimony. I don't see Ms. Brown here.

17 But let me just ask the -- I think
18 we could ask the opponents anyway. Why don't
19 you introduce yourselves for the record, and
20 then I'll tell you where I'm going with this?

21 MS. BEGGS: Kathleen Beggs for the
22 opponents.

1 MS. STARR: Helen Starr from the
2 Woodrow.

3 CHAIR MILLER: Okay. If you have
4 copies of the regulations with you.

5 MS. BEGGS: Beg your pardon?

6 CHAIR MILLER: Do you have copies
7 of the regulations with you?

8 MS. BEGGS: No, we don't.
9 However, the point that you just raised was in
10 the opponents' conclusions of law at pages 14
11 -- I'm sorry, 12 to 14.

12 We raised the 2002.3 issue. We
13 didn't raise the Section 2003 issue, because
14 that allows them to return a non-conforming
15 use to a conforming use, as I read that
16 regulation.

17 CHAIR MILLER: We don't read it
18 that way.

19 MS. BEGGS: No, I understand.
20 You're reading it more favorably to us than we
21 did. But and so I accept that reading.

22 CHAIR MILLER: Well, you don't

1 have to. We're going to give you -- you know,
2 you can have time to look at these.

3 MS. BEGGS: Well, I wanted to also
4 bring to the Board's attention an issue, and
5 unfortunately we only relegated it to a
6 footnote, that discusses the point that the
7 new plan in fact requires structural
8 alterations to the basement that are not
9 permitted under -- let me look.

10 (Simultaneous discussion.)

11 CHAIR MILLER: This is a decision
12 meeting. We can't get into arguing.

13 MS. BEGGS: What I'm wondering is
14 whether we should put this over, because I
15 know Ms. Brown is not here, and we should
16 restrict the briefing to this. I mean it's
17 two pages in our brief. It's not going to be
18 longer than that.

19 CHAIR MILLER: All right. This is
20 my question. This is exactly my question.
21 You don't have 2003 before you, but it
22 basically talks about -- it's allowed, as long

1 as --

2 Well, I can read you certain parts
3 of it, "as long as it shall not adversely
4 affect the present character or future
5 development of this around the area, or create
6 any deleterious external effects," whatever.

7 There's a few different -- okay,
8 there are different criteria in this, and what
9 we wanted to ask, and you're probably the
10 right parties to ask on this anyway, but we
11 can certainly leave the record open to ask Ms.
12 Brown.

13 We're of the opinion that we don't
14 really, looking at this regulation, think that
15 it would be necessary to have another hearing
16 to resolve this issue.

17 However, before we go in that
18 direction, we wanted to hear from you whether
19 or not -- and we can leave the record open for
20 you to look at this and file something, as to
21 whether you think another hearing is required,
22 or whether or not you can address this on the

1 record.

2 The reason that we think there may
3 not be a need for a hearing, but we're not
4 going to -- the reason there could be a need
5 for hearing is because there's new relief
6 we're talking about, okay, under another
7 provision.

8 However, the reason we think there
9 may not be a really need for a hearing -- it's
10 a question of will this grocery store moving
11 to the other location cause these adverse
12 impacts.

13 In the previous plans that were
14 approved by the Board, as I understand it, the
15 grocery store was there in that location, and
16 we had a hearing that went to any adverse
17 impacts from the project.

18 You may need a little time to
19 digest this. So therefore, I think what we
20 may do, and I'll hear from my colleagues, is
21 leave the record open for the parties to
22 address this issue in writing, whether or not

1 special exception relief -- oh, okay.

2 We're going to take a pause here.
3 I understand Ms. Brown is on her way. So this
4 would be much better.

5 MS. BEGGS: First time ever.

6 CHAIR MILLER: This would be much
7 better addressed with her here, okay. So if
8 you want in the meantime, since Ms. Brown is
9 probably more familiar with the regs than you
10 are, but I don't know, you might take a look
11 in this break at 2003, changing uses within
12 structures.

13 It sets forth this criteria that
14 the Board will use to make a determination on
15 that issue. When we come back, we want to see
16 whether the parties want to address this issue
17 in writing, or whether they believe that a
18 hearing is required.

19 Of course that leaves open the
20 question also whether you agree with the
21 Board, that this relief is necessary to
22 address. You don't have to give us a

1 definitive answer today. What we want to do
2 today is schedule one more time either a date
3 for filings or a date for a hearing.

4 MS. BEGGS: Could I just raise one
5 issue that --

6 CHAIR MILLER: I don't know. No.
7 Actually, I would say no. Ms. Brown is on her
8 way. So just think about this and you can
9 raise your issues when she's here.

10 MS. BEGGS: Okay, very good.
11 Thank you.

12 CHAIR MILLER: Thank you. So we
13 will set this off for a few minutes until Ms.
14 Brown comes.

15 (Pause.)

16 CHAIR MILLER: We'll move into
17 other matters and we're going to wait for the
18 opposing counsel to get here.

19 (Off the record.)

20 CHAIR MILLER: We're back on the
21 record, and we're in the middle of Case 17446-
22 A, and the Board had done part of its

1 deliberations.

2 I don't know -- we were waiting
3 for Ms. Brown to get here. Would the parties
4 in that case please come up to the table?

5 (Pause.)

6 CHAIR MILLER: Ms. Brown, would
7 you introduce yourself for the record? Have
8 the other introduced themselves for the
9 record. Okay, yes.

10 MS. BROWN: Yes, Carolyn Brown
11 from Holland and Knight, on behalf of the
12 Applicant, Pauline Ney.

13 CHAIR MILLER: Thank you, Ms.
14 Brown. We were saying that I'm not sure
15 whether you may have been listening to our
16 deliberations.

17 MS. BROWN: Yes, I have.

18 CHAIR MILLER: We went through the
19 issues that the opponents had raised pretty
20 much, and we got to the point where having
21 looked at these plans so many times and
22 revisions, and the Board wanting to in the end

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1 issue an order that clearly addressed the
2 revised plans that were before it, spotted an
3 issue that we would like the parties to
4 address.

5 I don't know if we could take a
6 few minutes to see if you have any thoughts on
7 that, and where we might go. But the issue
8 was that the swapping of the grocery store and
9 the realtor office seemed to trigger 2002 and
10 2003, and we know that this was in the -- I
11 believe this was in the original plan.

12 So there already was a hearing
13 about the grocery store being in that
14 location, but it wasn't raised in the context
15 of 2003, which the Board on preliminary review
16 thinks may raise a need for special exception
17 relief under that provision.

18 So how we thought -- what we
19 wanted to do was just get a little bit of
20 -- just a very little bit of feedback from the
21 parties, whether or not -- the issues we're
22 looking at are whether relief is required that

1 we think it is, at this point.

2 But we would hear from the parties
3 whether or not the application could meet
4 those requirements. Then whether basically
5 today we wanted to see if you have any strong
6 feelings one way or the other, whether a
7 hearing is necessary.

8 We recognize that it is a new area
9 of relief. On the other hand, we recognize
10 that there was a full hearing on the grocery
11 store being in that location as part of the
12 original application.

13 So if we could just hear briefly.
14 Okay, Ms. Brown.

15 MS. BROWN: Yes. Thank you, Madam
16 Chair. That issue actually was addressed at
17 the first hearing, and at the hearing on March
18 14th, 2006, and if you look at the transcript
19 at page 310 to 311, there's testimony from our
20 expert witness, Mr. Sher, describing how the
21 building is technically one building for
22 zoning purposes under Section 3202.3, so that

1 the moving around of uses is permitted under
2 that section.

3 So it was an issue that was raised
4 at that time, answered and apparently I flip
5 through the order previously and it doesn't
6 seem that there was a finding on that matter.
7 But I know that it was addressed.

8 If it's helpful, I can read to you
9 the provision from that section if you recall
10 --

11 CHAIR MILLER: We're looking at
12 the section. We just were of a different
13 conclusion, that what we're saying is there
14 was one non-conforming use changed to another
15 non-conforming use in this building could
16 trigger this need for special exception
17 relief.

18 We could leave that for briefing,
19 but I think you weren't here when I read that
20 2002.2, 2002.3 says a non-conforming use shall
21 not be extended to portions of a structure not
22 devoted to that non-conforming use at the time

1 of enactment or amendment of this title, or to
2 another structure.

3 Then it was the Board's view that
4 then we look at 2003.1, which seems to allow
5 the swapping of these two uses, because
6 they're both allowed first, as a matter of
7 right in C-1 district and then if they're the
8 same, there's the same standard right there,
9 the C-1, C-1, that it could be switched.

10 But that it seemed to call for an
11 examination of the requirements under 2003.
12 Now we don't have to argue this whole point
13 today, unless there's something brief. But
14 that's one of the issues that we thought could
15 be briefed.

16 But if you get to the point where
17 you think okay, you have to meet 2003, do we
18 still need another hearing, because we already
19 have a record which addressed this location in
20 the original hearing. It's not under this
21 -- not necessarily under these standards, but
22 under the variance application.

1 MS. BROWN: But I guess the issue
2 is one, if it was raised at the initial
3 hearing, this particular issue about whether
4 or not the issues, uses could be switched
5 within one building, and the question was
6 raised about whether it triggered the
7 provisions of Section 2002-2003.

8 You all had apparently decided not
9 to -- that it was not triggered, although
10 there was no finding. But looking at the
11 transcript, that issue certainly came up. If
12 you're now saying that you want to revisit
13 that, that's fine. We can address it in a
14 brief.

15 I don't think it would trigger a
16 new hearing, but if you want -- and if it's
17 appropriate to rule on the issues that you've
18 decided today and then hold this one in
19 abeyance, it shouldn't -- however you want to
20 handle it.

21 CHAIR MILLER: Okay, thank you.

22 MS. BEGGS: To be sure, the

1 provisions of 3200 have been brought up
2 before.

3 CHAIR MILLER: We're not talking
4 about 3200, okay. We're just talking about --

5 MS. BEGGS: Perhaps Ms. Brown just
6 was.

7 CHAIR MILLER: No, but I basically
8 -- I really want to limit this to what we're
9 talking about, because I will say that the
10 Board has found in its finding of fact No. 14,
11 which I read, that there is one building, and
12 that's not at issue.

13 What's at issue is just whether or
14 not this special exception relief is required,
15 and if so, whether a hearing is required, at
16 least in your view.

17 MS. BEGGS: And what I want to get
18 back to is our last hearing on November 20th,
19 and there's two things about that. Our ANC
20 representative, chairperson is here today.
21 But the last meeting of the ANC was on
22 November 19th.

1 We were sprung with the new plans,
2 as the Board will recall, on November 20th.
3 They were slapped on our desk here without any
4 prior notice. So our ANC has not had a chance
5 to --

6 CHAIR MILLER: Okay, let me just
7 remind you, okay. We are only talking about
8 this one issue, and it was in the original
9 plans, whether or not -- and the Board, maybe
10 the Board touched upon it back then and then
11 never addressed it afterwards, and we're
12 concerned about it now.

13 But this is only talking about
14 swapping the use that's now of the law office
15 with the grocery store. That's always been in
16 the plans for that location, as I understand
17 it.

18 MS. BEGGS: And we've objected to
19 that from the very first --

20 CHAIR MILLER: You object to the
21 swapping?

22 MS. BEGGS: We objected to the

1 swapping at the very first hearing. Kindy
2 French's testimony clearly states that that
3 was not permissible. So that's been in the
4 record from the get-go.

5 CHAIR MILLER: Do we need another
6 hearing then is my question?

7 MS. BEGGS: I think we do, and I
8 think that there's a second issue that gets
9 raised, and that was one of the things, Madam
10 Chair, that you suggested that we could do, is
11 after we had had a chance to digest the plans,
12 we could see what other problems we have with
13 them.

14 The new plan that was served on us
15 on November 20th also proposes to make
16 structural alterations --

17 CHAIR MILLER: But that's
18 addressed -- that has been addressed in your
19 proposed findings and conclusions of law. We
20 saw that. It's not that we have not seen
21 that, and that is an area we'll address.

22 MS. BEGGS: But that would require

1 them to make a new application. They're
2 asking for a variance that they didn't ask
3 for.

4 CHAIR MILLER: We are talking
5 about one issue and one issue alone, okay,
6 because we were in decision meeting.

7 We've come out to this one finite
8 issue, and that is whether or not if the Board
9 is of the view that this special exception
10 relief may be required, we would let you
11 address that issue, and whether or not a
12 hearing is required, on only that issue.

13 MS. BEGGS: So is it the finding
14 -- let me just ask so I'm clear. Is it the
15 finding of the Board that they didn't need to
16 ask, apply for a structural alteration, in
17 that the new plans that were delivered on
18 November 20th requires such a thing?

19 CHAIR MILLER: Let me say this.
20 We're in deliberation. We were addressing the
21 issues in this case. We are not in a
22 conversation about, you know, what the Board

1 believes on certain issues.

2 We have gone through a couple of
3 the points, and we think that this point needs
4 to be addressed before we do the rest of the
5 deliberation on any flexibility, any
6 conditions, whatever.

7 This is the only issue that we are
8 asking you to comment on now, is the special
9 exception relief that the Board believes may
10 be necessary.

11 MS. BEGGS: Okay. Well then in
12 that regard, first I'd like to thank Ms.
13 Bailey with providing me with a set of the
14 regulations over the break, while Ms. Brown
15 could get here.

16 It seems to me that we do need to
17 have additional evidence on the 2003.3 issue,
18 as to whether the proposed use creates any
19 deleterious external effects. I stress the
20 word "any."

21 I had not had a chance to research
22 this particular provision over the break, but

1 I think that that probably does require some
2 limited amount of evidence, and certainly we'd
3 like to be heard in writing on this issue.

4 CHAIR MILLER: Well, I'm not
5 asking that you need to say it right now, but
6 I would ask you to think about it, but it's
7 not clear from the papers really that the
8 opponents have a concern with the grocery
9 store being located where it's located.

10 That is the only issue, of the
11 grocery store taking over the office space of
12 the realtor.

13 MS. BEGGS: I'm not sure that I
14 can answer that right now. I haven't had a
15 chance to --

16 CHAIR MILLER: I just want you to
17 know that that's the only issue that we're
18 talking about, the use of that space by the
19 grocery store instead of the realtor.

20 MS. BEGGS: Again, I want to --
21 and I know you don't want to hear me say this,
22 but I'm sort of concerned that we have not

1 really had a chance to weigh in on the
2 neighborhood concerns on the new plan.

3 Our ANC has not had a chance to
4 meet on it, and they won't meet again until I
5 think it's January 14th. We have not had a
6 really good chance to meet and confer on this.

7 As I say, the plans were sprung on
8 us, notwithstanding the fact that they were a
9 month old. They were just served on us at the
10 hearing.

11 CHAIR MILLER: Wait, hold it,
12 because we have others waiting. But I was not
13 aware that the ANC had a concern about the new
14 plans, they didn't have enough time. I'm not
15 aware that there's anything in the record on
16 that point.

17 MR. ETHERLY: Madam Chair, if I
18 may, just to jump in. I think we're going
19 down a slippery slope on a banana peel, and I
20 think it's probably just appropriate for us to
21 go ahead and schedule another date to get into
22 the issue that you very carefully identified.

1 I know that there are a couple of
2 other issues that are perhaps percolating to
3 the surface, and we can perhaps talk about
4 clear guidance to the parties on what we will
5 do at the next hearing.

6 But I think that's probably going
7 to be the most appropriate step here, Madam
8 Chair, or else we're going to be talking for
9 a while. That's not to cut off anyone, but
10 clearly this is just another chapter in the
11 saga that just won't die.

12 CHAIR MILLER: Okay. I would
13 agree with Mr. Etherly. I would need to tell
14 you what I think we would take into record, at
15 least on this one issue. I think it's
16 important that Ms. Brown raised the fact that
17 maybe this was even addressed at the hearing,
18 which was a long time ago.

19 I think that the parties should do
20 a filing that addresses the Board's interest
21 in whether relief is required under 2003,
22 2002.3, leading to relief under 2003, for the

1 swapping of two different non-conforming uses.

2 Then whether or not that meets the
3 requirements under 2003, and then finally,
4 whether a hearing is necessary, and then the
5 Board would consider that.

6 But I think, you know, without
7 hearing from the parties and we're certainly
8 open to it, it does seem to me that,
9 especially if this was raised before, that
10 there was nothing advertised, I would think
11 that the evidence may be in the record, on
12 whether or not this location, changing the
13 location of the grocery store has an adverse
14 impact.

15 I don't ever recall hearing that
16 in the hearings, if that ever was an issue
17 that was actually changing the location, which
18 is the only thing we're talking about, would
19 really have an adverse impact on the
20 community. I don't think that's what's the
21 community's concerns are really about.

22 But you certainly should have the

1 opportunity to address that, address whether
2 the evidence is in the record, whether you
3 need a hearing, or whether you even want to
4 pursue that this shouldn't happen because from
5 what I remember, the grocery store was
6 something the community embraced, and I'm not
7 sure whether -- I don't recall hearing that it
8 made a difference whether it was located on a
9 different place.

10 But you'll have that opportunity
11 to address that in writing, and then the Board
12 will determine whether or not a hearing is
13 required or necessary or would be fruitful.

14 So we just need a date now, first
15 of all. Then we'll get to the ANC issue,
16 unless somebody wants to add something else on
17 this issue. Board members?

18 (No response.)

19 CHAIR MILLER: Why don't we just
20 get feedback. I know we're entering the
21 holiday season, so what date would be, would
22 work for submitting that brief?

1 MS. BEGGS: Might I just request
2 that --

3 CHAIR MILLER: Do you have a
4 position on the brief?

5 MS. BEGGS: No. What I'd like to
6 request is that we have it after our ANC
7 meeting, which is on January 14th. So I'd
8 like to be able to give that input to the
9 Board. I see that our ANC chairman has -- she
10 had to go back to work.

11 CHAIR MILLER: Okay, and I think
12 the Board will want to review our records,
13 because we usually give the ANC an opportunity
14 to respond prior to closing the record and
15 going to deliberation.

16 That's why I was surprised by what
17 you were saying. But we would take a look at
18 the record in this case. So yes. When is the
19 ANC meeting?

20 MS. BEGGS: I understood from
21 Sandy Perlmutter, who is our chair, that it's
22 on the 14th of January is when they next meet.

1 CHAIR MILLER: Okay, okay. Maybe
2 it would make sense then that the Board would
3 deal with this issue next at its February 5th
4 public meeting.

5 So working backwards, Ms. Bailey,
6 I think again that these can be simultaneous
7 pleadings, okay. I see that the parties are
8 nodding. All right. So when would the Board
9 need to receive those?

10 MS. BAILEY: Madam Chair I would
11 suggest the 18th, Applicant file by January
12 18th, and then the parties could respond by --

13 CHAIR MILLER: We're going to do
14 simultaneous pleadings. So they could both
15 file a little bit later.

16 MR. MOY: I would suggest, Madam
17 Chair, if the Board is going to be deciding
18 this on February 5th, to give ANC time to put
19 its -- after their 14th. Let me ask, is a
20 week appropriate, or do you need two weeks
21 after the ANC meeting of the 14th?

22 MS. BEGGS: More time is always

1 better.

2 MR. MOY: Because then I would
3 suggest to the Board that possibly either
4 Friday, January the 25th for all parties, or
5 Monday, the 28th of January.

6 MS. BEGGS: Either way is
7 acceptable with us.

8 MS. BROWN: The 25th would be my
9 preference.

10 CHAIR MILLER: Okay, the 25th.

11 MS. BEGGS: Could I ask as a
12 procedural matter, is the Applicant going to
13 put in an application for a special exception,
14 or does the Board's deliberations mean that
15 that requirement is deemed not to be
16 applicable in this case?

17 CHAIR MILLER: Okay. They don't
18 have to put in an application. In the middle
19 of consideration of an application, we can
20 give leave for them to amend, which I think we
21 would do if we were of the view that it was
22 required at this point.

1 But then the next point is the
2 question of a hearing, and then you'd get into
3 a hearing and notice to the community if we
4 needed a big hearing, you know, and things
5 like that.

6 But that's what would happen.
7 They wouldn't have to do -- it would be an
8 amendment.

9 MS. BEGGS: Very well. As I've
10 said on many occasions, I'm not familiar with
11 the Board's procedures.

12 CHAIR MILLER: Okay, and we will
13 take a look at what happens with the ANC.
14 Okay. Any other questions? Okay. Thank you
15 very much, then. I can look forward to your
16 filings, and we'll continue this later. I
17 believe we have one more case on the meeting
18 agenda.

19 Application 17632

20 MR. MOY: Yes ma'am. There is one
21 final matter for the Board, and that pertains
22 to Application No. 17632, Simon and Robyn

1 Hinson-Jones, pursuant to 11 DCMR 3103.2, for
2 a variance from the lot occupancy requirements
3 under Section 403, a variance from the rear
4 yard requirements under Section 404, a
5 variance from the court requirements under
6 Section 406, and a variance from the non-
7 conforming structure provisions under Section
8 2001.3, to allow an addition to an existing
9 single family row dwelling, in the CAP/R-4
10 district at premises 320 South Carolina
11 Avenue, S.E. That's in Square 794, Lot 13.

12 As the Board will recall, at its
13 public meeting on December 4th, this
14 application was deliberated by the Board. The
15 Board rescheduled its decision at its December
16 4th meeting, to make a decision at its special
17 public meeting today, December the 18th.

18 The Board allowed the record, kept
19 the record open to allow the Applicant, if he
20 so chose, to make revisions to the plans to
21 address the Board's concern as to the storage
22 container, which was proposed to be located on

1 the balcony.

2 The deadline for that filing was
3 December the 10th. That filing is in your
4 case folder, as well as allowing a response to
5 that filing by the opposition party, which had
6 a deadline date of December the 17th.

7 That filing was also made into the
8 record by Mr. Jeffrey Marx. The Board is to
9 act on the merits, and that completes the
10 staff's briefing, Madam Chair.

11 CHAIR MILLER: Thank you, Mr. Moy.
12 I think, Board members, that we can do this
13 one fairly quickly. I know we have people
14 here waiting for their hearings, and we
15 actually did a fairly extensive deliberation
16 on this case already.

17 However, what we found after going
18 through our analysis was that the revised plan
19 that the Applicant submitted, to try to
20 accommodate concerns of his neighbor, actually
21 seemed to create more concerns from the Board,
22 more problems that it solved.

1 So we did allow the Applicant an
2 opportunity to revise once more his plan, as
3 it seemed to meet most of the test. It seemed
4 to meet the test, actually, of the relief that
5 was required.

6 However, a storage container was
7 somewhat of an oddity that we just thought did
8 create possibly more problems.

9 So I would ask Mr. Dettman if he
10 would like to address the revised drawings in
11 this application.

12 MR. DETTMAN: Thank you, Madam
13 Chair. As you said in our deliberations on
14 December 4th, we stepped through the three-
15 pronged test and found that the application
16 did meet all three prongs.

17 The issue that was raised during
18 the hearing had to deal with privacy issues
19 brought up by the neighboring property.

20 The revised plan submitted for the
21 December 4th deliberation did address,
22 successfully address the privacy issues by

1 pulling the balcony and railing back, which
2 prevented anyone going out to the balcony from
3 going so far over that they could actually
4 look into the neighboring house.

5 However, as you mentioned, it
6 raised another issue, and that issue was that
7 by pulling the railing back, it sort of freed
8 up some space on the roof, where the Applicant
9 had proposed a permanent storage container.

10 That sort of raised a design
11 issue, and so we had indicated to the
12 Applicant that we had some issues related to
13 the storage container.

14 Since then, the Applicant has
15 submitted revised plans, and it's indicated in
16 Exhibit No. 41, received by the Office of
17 Zoning on December 10th. The permanent
18 storage container has been removed, so that
19 alleviates that concern, the design concern.

20 There's been a slight
21 reconfiguration of the balcony railing.
22 However, the balcony railing still

1 successfully addresses the privacy issues of
2 the neighboring property.

3 So with respect to the privacy
4 issues brought up by the neighboring property,
5 those have been successfully dealt with, as
6 well as the December 4th sort of design
7 concern that was brought up by the Board.
8 That's been successfully dealt with.

9 CHAIR MILLER: Thank you. So as
10 we went through the variance test already, I
11 don't think that we need to repeat it again,
12 especially with people waiting here.

13 I do want to note that the Office
14 of Planning is in support of this application,
15 and they indicated that ANC 6B voted 7 to 0 to
16 1 in support of the original proposal, and we
17 haven't had comments from them on the
18 revisions. But I don't think that that really
19 would affect their report. Other comments?

20 MR. DETTMAN: Just a couple of
21 extra comments, Madam Chair. For the record,
22 I just wanted to mention that the neighbor,

1 actually a party to the case, Mr. Jeffrey
2 Marx, who resides at 322 South Carolina
3 Avenue, was provided with the latest revised
4 plan, and submitted a letter into the record,
5 which I can't make out.

6 I believe it was received by the
7 Office of Zoning on December 17th, just sort
8 of reaffirming his opposition to the
9 application.

10 Secondly, the participating
11 members on this application, I believe, are
12 yourself, Mr. Turnbull as well as me. At the
13 appropriate time, I can mention -- read the
14 absentee ballot that Mr. Turnbull has
15 submitted.

16 CHAIR MILLER: That would be
17 great, okay. Really, the concern of the
18 neighbor was that the Applicant would lean
19 over the balcony and somehow kind of look into
20 their window on the side of their house; isn't
21 that correct?

22 MR. DETTMAN: That's correct. I

1 believe he had privacy issues related to views
2 into his home, as well as into his backyard.
3 The standard is that the proposal wouldn't
4 have an undue impact or, you know, unduly
5 impact the neighboring properties.

6 It doesn't mean that it can't have
7 any impact. It just means that the Board
8 needs to find whether or not it would be
9 unduly.

10 I think that the design, the
11 latest design submitted by the Applicant, to
12 the maximum extent possible, addresses any
13 privacy issues and impacts to any neighboring
14 properties.

15 CHAIR MILLER: I would agree with
16 that. Any other comments?

17 (No response.)

18 CHAIR MILLER: I think the Office
19 of Planning also noted that they got two
20 letters in support and three letters in
21 opposition. However, we don't need to
22 necessarily address all those.

1 We're obligated to address
2 certainly the ANC's concerns, and Office of
3 Planning's, and you did go through that whole
4 analysis of the three-pronged test.

5 So I think that we have addressed
6 this one sufficiently. Did you want to read
7 Mr. -- well, let's see. Why don't we make a
8 motion, and then we can hear from Mr. Turnbull
9 through his absentee ballot on the
10 deliberation of that motion? Is there a
11 motion?

12 MR. DETTMAN: Madam Chair, I'd
13 like to make a motion to approve Application
14 No. 17637, of Simon and Robyn Hinson-Jones,
15 pursuant to 11 DCMR 3103.2, for a variance
16 from the lot occupancy requirements under
17 Section 403, a variance from the rear yard
18 requirements under Section 404, a variance
19 from the court requirements under Section 406,
20 and a variance from the non-conforming
21 structure provision under 2001.3, to allow an
22 addition an existing single family row

1 dwelling the CAP/R-4 district at premises 320
2 South Carolina Avenue, S.E.

3 CHAIR MILLER: Second. Further
4 deliberation?

5 Why don't we hear what Mr. Turnbull said?

6 MR. DETTMAN: Board member
7 Turnbull submitted an absentee ballot this
8 morning, and he voted to approve with such
9 conditions as the Board may impose.

10 His comments were that the revised
11 drawings indicated that the Applicant has
12 removed the storage box on the balcony, and
13 has placed the railing in such a way as to
14 preserve the privacy concern relating to the
15 residence at 322 South Carolina Avenue.

16 CHAIR MILLER: Thank you. Further
17 deliberation? Mr. Moy, did you have -- I saw
18 your microphone was on. Okay. Then all those
19 in favor say aye?

20 (Chorus of ayes.)

21 CHAIR MILLER: All those opposed?

22 (No response.)

1 CHAIR MILLER: All those
2 abstaining?

3 (No response.)

4 CHAIR MILLER: Would you call the
5 vote please?

6 MR. MOY: Yes, Madam Chair. With
7 the absentee vote of Mr. Turnbull, that would
8 give a resulting vote of 3 to 0 to 2, to
9 approve the application on a motion by Mr.
10 Dettman, seconded by Ms. Miller. We have two
11 other Board members not participating on this
12 application.

13 CHAIR MILLER: Okay, and we also -
14 - we have a party in opposition in this case,
15 isn't that correct, Mr. Marx?

16 MR. MOY: That's correct.

17 CHAIR MILLER: Then this will be a
18 full order.

19 MR. MOY: That's correct.

20 CHAIR MILLER: Do we have any
21 other items on the agenda for this morning's
22 meeting?

1 MR. MOY: No ma'am. That
2 completes the special public meeting.

3 CHAIR MILLER: Okay. Then this
4 meeting is adjourned. I'll be calling the
5 hearing momentarily.

6 (Whereupon, at 12:09 p.m., the
7 Special Public Meeting was adjourned.)
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