

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

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TUESDAY
JULY 31, 2007

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The Special 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 Chair
CURTIS ETHERLY, JR. Vice Chair
MARC LOUD Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLEY BAILEY Sr. Zoning Specialist
ESTHER BUSHMAN General Counsel

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Special Public Meeting held on July 31, 2007.

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

10:37 a.m.

VICE-CHAIRPERSON MILLER: Good morning. This meeting will please come to order. This is the July 31, 2007, public meeting of the Board of Zoning Adjustment of the District of Columbia. My name is Ruthanne Miller. I am the Chair of the BZA.

To my right is Mr. Curtis Etherly who is the Vice-Chair. To my left is Mr. Marc Loud, mayoral appointee. To his left is Cliff Moy with the Office of Zoning, Lori Monroe, Office of Attorney General, and Esther Bushman, Office of Attorney General - I mean, Office of Zoning. Excuse me. And Beverley Bailey with the Office of Zoning.

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

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

6 Does the staff have any
7 preliminary matters?

8 MR. MOY: Yes, ma'am, we do but we
9 can handle it case by case.

10 VICE-CHAIRPERSON MILLER: Okay.
11 Then now let's proceed with the agenda.

12 MR. MOY: Good morning, Madam
13 Chair and members of the Board. The first
14 case for decision is Application No. 17627 of
15 RIA, LLC, pursuant to 11 DCMR 3103.2 for a
16 variance from the lot occupancy provisions
17 under Section 403 and a variance from the
18 parking space requirements under Subsection
19 2117.4 and pursuant to 11 DCMR 3104.1 for a
20 special exception allow the conversion and
21 addition to an existing building to permit a
22 new eight-unit apartment house under Section
23 353. This is in the R-5-A District at

1 premises 1007 Rhode Island Avenue, N.E.
2 (Square 3870, Lot 49).

3 On June 26, 2007, the Board
4 completed public testimony, closed the record,
5 and scheduled it on July 31, 2007. The Board
6 requested post-hearing documents from the
7 applicant and also kept the record open to
8 allow response from ANC-5B.

9 ANC-5B did submit a filing and
10 that is identified in your case folders as
11 Exhibit No. 35. I want to note that this is
12 ANC-5B-03, the single member district. The
13 filing from the applicant takes two forms.

14 It's first filing was on July 20,
15 2007, and is Exhibit 34. There is a
16 supplemental letter that was filed yesterday,
17 July 30th, addressing the revised plans and is
18 identified as Exhibit 38. Staff's
19 understanding is that it goes towards the
20 rooftop element.

21 Finally, staff would like to add
22 that at the last Board hearing on June 26th
23 there was discussion that the applicant would

1 address additional relief to the driveway isle
2 width under Section 2117 and the parking space
3 dimensions under Section 2115. This is
4 regarding the isle width of 17 feet instead of
5 requiring 20 feet and the parking space
6 dimensions of 9 by 16 rather than 9 by 19.

7 So staff should act on the merits
8 of the application for the special exception
9 to Section 353 in the multiple variance zoning
10 relief. That completes the staff's briefing.

11 CHAIRPERSON MILLER: Thank you.
12 I'm not sure whether you said this or not but
13 I think there were two documents that came in
14 yesterday or pretty recently. One is the July
15 30th letter from the applicant. We need to
16 waive that into the record.

17 MR. MOY: That's correct. That's
18 Exhibit 38.

19 CHAIRPERSON MILLER: Is there any
20 other one we need to waive into the record?
21 The other ones were timely?

22 MR. MOY: The others were timely.

23 CHAIRPERSON MILLER: Okay. Mr.

1 Loud, do you have any concern with waiving
2 this into the record?

3 MR. LOUD: No.

4 CHAIRPERSON MILLER: Okay. I
5 think there is good cause and no prejudice to
6 any party so we should waive that into the
7 record.

8 Okay. Starting with this, the
9 relief has changed a little bit throughout
10 this proceeding but not that much. I would
11 like to go over the relief somewhat. It's for
12 variances and special exception pursuant to
13 353.

14 The variances, as I see it, the
15 first is lot occupancy. Forty percent is
16 allowed and they would be up to 42 percent as
17 calculated with the addition. Then the other
18 variances go to parking requirements set forth
19 in chapter 21.

20 Mr. Moy mentioned some of them,
21 2117.4 regarding access to streets or alleys
22 for all required parking. This gets to the
23 required parking and, just to touch upon it,

1 eight is required for this apartment building
2 and only six can fit on the property. We can
3 address that later with respect to the issue
4 of crediting or variance.

5 That would also go to 2101 if we
6 count that eight or required and only six are
7 provided. Then there were variances under
8 2117.5 with the respect to the drive isle.
9 Twenty feet is required and they would be
10 providing 17. And 2115.1, parking dimensions,
11 nine feet width by 19 feet length was required
12 and it would be 19 by 6.

13 I just want to say with respect to
14 some of these parking requirements, also they
15 weren't initially advertised per se but they
16 were all brought up in the hearing and the
17 Board said that the applicant could address
18 them. The community was on notice at the
19 hearing and also about the parking in general
20 being an issue.

21 With respect to variance, I think
22 I would just before we start our analysis also
23 just lay out the standards that we're looking

1 at. One is is there something unique or
2 exceptional about the condition.

3 Specifically that there be
4 exceptional narrowness, shallowness, or shape
5 of a specific piece of property at the time of
6 the original adoption of the regulations or by
7 reason of exceptional topographical conditions
8 or other extraordinary exceptional situation
9 or condition of a specific piece of property;
10 Practical difficulties that would arise out
11 of this exceptional condition were the
12 regulations to be strictly applied.

13 In particular, strict application
14 of any regulation would result in peculiar and
15 exceptional practical difficulties to or
16 exceptional and undue hardship upon the owner
17 of the property. If the relief were granted,
18 there wouldn't be substantial detriment to the
19 public or impairment of the intent, purpose,
20 integrity of the zone plan.

21 I would suggest that we look at
22 the lot occupancy situation first. Applicant
23 says there is a conflict of factors in the

1 Gill Martin case and the Court of Appeals
2 certainly recognizes the situation with the
3 conflict of factors often where there is an
4 existing structure on the property and other
5 situations.

6 In this case there is an existing
7 structure on the property that was used as a
8 boarding house and there is a nonconforming
9 side. That nonconforming side yard, which is
10 3.9 feet, actually counts towards the lot
11 occupancy in this case.

12 The fact that there is an existing
13 structure also limits the options for the
14 applicant to convert this property and the use
15 as a boarding house is not supported by the
16 community is outdated and is something the
17 community does support.

18 Often the exceptional situation
19 rolls into the practical difficulty. I think
20 the applicant made a good case showing that
21 they had to make the apartments of a
22 reasonable size in order to market them and
23 that they are still under the FAR. To add on

1 in another way they could add to the height.
2 That would be very expensive and require a
3 significant alteration of the structure.

4 Because the nonconforming side
5 yard is counted to lot occupancy when they
6 actually do their proposed addition, it is
7 actually less square feet than the side yard
8 is. There is not a substantial detriment
9 there.

10 I think it's consistent with the
11 comprehensive plan to do this kind of housing.
12 It's consistent with the zone plan in that the
13 building footprint is 39 percent lot
14 occupancy. It's just that you can't include
15 the side yard. I mean, the side yard is
16 included in the lot occupancy but you can't
17 build on it.

18 So I think that the applicant
19 actually showed they are not actually making
20 a profit in this case. In the additional
21 submittals they showed that actually they may
22 break even. I think they made a good case for
23 practical difficulty in this case.

1 I don't know if you want to add on
2 to this aspect before we go to parking.

3 MR. LOUD: Madam Chair, I'll just
4 wait until you conclude your summary.

5 CHAIRPERSON MILLER: Okay. Let's
6 go to parking. Again, in the parking
7 situation we have an existing situation. We
8 have an existing structure and, therefore,
9 there is only so much space for parking.

10 They have shown that the physical
11 space that is constrained by their rear yard
12 dimensions and the lot width and the structure
13 on the property will only allow for six
14 parking spaces that are zoning compliant
15 basically.

16 The applicant basically made two
17 arguments with respect to counting the number
18 of parking spaces. The first was the property
19 should be credited with four spaces because
20 the previous use as a boarding house only
21 required four spaces and the spaces aren't
22 lined or marked in any way.

23 When questioned further about what

1 other evidence is there that, in fact, these
2 parking spaces were waived or credited by
3 anyone in authority, there really wasn't any.
4 I am not comfortable with accrediting
5 argument.

6 However, I am comfortable with a
7 variance argument which they also raised at
8 the hearing and the alternative in the
9 prehearing statement that because of the
10 current exceptional condition, that being, as
11 I said, the dimensions of the property back
12 there in the existing structure, they cannot
13 provide more than six. That really does go to
14 the practical difficulty as well.

15 DDOT looked at this parking plan
16 and didn't find any substantial detriment to
17 the community and found that it would provide
18 adequate spaces for the neighborhood. I would
19 be comfortable with granting a variance for
20 those two additional spaces.

21 Then they went into -- they had to
22 get subvariances and the dimensions of the
23 parking spaces as well as the drive isle in

1 order to create landscaping buffers for the
2 neighboring properties and to accommodate
3 trash on the property in a way that would have
4 an adverse impact on the neighbors. That was
5 all very positive.

6 Again, DDOT has approved this and
7 OP approved the parking plan. I think they
8 have met their case for that as well. They
9 are also near a metro so they don't -- it's
10 even in line with some of DDOT's policies
11 these days to encourage mass transit.

12 I think it's also significant that
13 the single member district commissioner had
14 been opposed to the application and then
15 submitted that Exhibit 35, the letter saying
16 that their concerns were addressed. He said
17 his community fully supports the project now
18 that the changes as been made.

19 So I think that covers it for me.
20 Mr. Loud, if you want to add anything.

21 MR. LOUD: I'll just add that your
22 summary was excellent. I think your
23 articulation of the three-prong test for

1 variance speaks for itself. To me some of the
2 variances needed seemed almost amenable but
3 the party carried the case, 42 percent on lot
4 occupancy and 40 percent is what's allowed.
5 Eight parking spaces required and only six
6 being provided but, as you said, the land
7 cannot accommodate more than that, etc.

8 I'm glad you mentioned Exhibit 35.
9 At the hearing I was concerned about several
10 of the issues raised by Mr. Chandler. For me
11 his, I believe, July 28th letter that states
12 that those issues have been resolved,
13 particularly with respect to the rooftop being
14 removed, the parking issue, and some of, I
15 guess, steps that will be taken to address
16 privacy issues that Mr. Chandler and others
17 raised at the hearing. I think it's very
18 instructive for me so I support this
19 application.

20 CHAIRPERSON MILLER: Okay. I just
21 covered the variances thoroughly. I didn't
22 touch upon the 353 yet but I think that's
23 pretty straightforward. Office of Planning

1 does a good job in running down requirements.

2 Let's see if we need to highlight any.

3 I think 353.1 gives us review over
4 this development. 353.2 says to refer to D.C.
5 Board of Education. OP did refer it but
6 didn't receive any comments. In their
7 assessment this development could accommodate
8 any future students there. It's not that big
9 of a development.

10 And DDOT has weighed in approving
11 the application. DHCD I believe weighed in
12 but it was an earlier plan so they really
13 didn't address the latest plan but it is, in
14 OP's opinion, consistent with the
15 comprehensive plan. I don't think we need to
16 go through the whole 353 but they did also
17 find no adverse impacts here.

18 I would say that the last letter
19 that we received from the applicant makes
20 reference to an intent to remove the roof deck
21 and that the plans that we have before us
22 don't reflect that yet. I would suggest that
23 any order wait to be issued until we receive

1 plans consistent with the applicant's
2 representations in that letter of July 30,
3 2007.

4 MR. LOUD: I agree with that.

5 CHAIRPERSON MILLER: Okay. If
6 there is nothing else that we need to address,
7 I would move to grant the Application No.
8 17627 of RLA, LLC, pursuant to 11 DCMR Section
9 3103.2 for the variance from the lot occupancy
10 provisions under Section 403 and a variance
11 from the parking space requirements under
12 Subsection 2117.4.

13 Let me just go back for a minute
14 and reference the exact provisions we are
15 granting relief from. 2117.4, just to be safe
16 2101.1, 2117.5, and 2115.1. I believe that
17 covers the lot occupancy and parking
18 requirements, drive isle, parking dimensions.

19 Also relief under 353 for a
20 special exception allowing the conversion in
21 addition to an existing building to become a
22 new eight-unit apartment house at premises
23 1007 Rhode Island Ave., N.E., in the R-5-A

1 zone. Do I have a second?

2 MR. LOUD: Second, Madam Chair.

3 CHAIRPERSON MILLER: All those in
4 favor, say aye.

5 ALL: Aye.

6 CHAIRPERSON MILLER: All those
7 opposed? All those abstaining?

8 Mr. Moy, do we have any absentee
9 ballots in this case?

10 MR. MOY: Yes, ma'am. Let me
11 record that the Board voted two to zero to one
12 on the motion of the Chair, Ms. Miller, to
13 approve the application under the relief as
14 cited. Seconded by Mr. Loud. We have a Board
15 member not participating.

16 Indeed, we do have two absentee
17 ballots. First being an absentee ballot from
18 Mr. Mann and his vote is to approve the
19 application. Second absentee ballot is from
20 Mr. Turnbull and his vote is also to approve
21 with such conditions as the Board may impose.

22 I would like to read for the
23 record, Madam Chair, Mr. Turnbull's comments

1 and they read as follows. "As per letter from
2 Holland & Knight of July 30, 2007, stating
3 that the deck and the rooftop enclosure have
4 been removed, I will approve.

5 I am concerned about the three
6 different colors on the cement panels. This
7 needs to be reviewed for appropriateness of
8 the scheme. I can't quite get the design
9 rationale that three horizontal colors helps
10 this ungainly structure fit into the
11 neighborhood."

12 For the Board's reference, in the
13 latest submittal from the applicant dated July
14 26, on the drawing, sheet No. A300 entitled
15 "North and South Elevation" you'll note that
16 there are three horizontal bands of colors and
17 the colors, according to the legend, are
18 colors to be determined. I think that is the
19 reference that Mr. Turnbull is making
20 reference to.

21 That would give a resulting vote
22 of four to zero to one. Staff would also note
23 for the Board that although the applicant is

1 stating that the rooftop and the rooftop
2 enclosure will be removed, we don't have any
3 revised drawings to that effect.

4 CHAIRPERSON MILLER: Thank you.
5 That goes to my point earlier but I would
6 reiterate it that the order granting the
7 relief in this case will be held until we get
8 the revised plans reflecting the
9 representations made in that letter.

10 Also, there is no opposition in
11 this case so, therefore, Mr. Loud, would you
12 have any concern with issuing a summary order
13 in this case?

14 MR. LOUD: I would not, Madam
15 Chair.

16 CHAIRPERSON MILLER: Okay. I
17 think we have an option here. We have a full
18 order that's been presented by the applicant.
19 We can take a look at it and see. In any
20 event, I think that an order could be issued
21 very soon after we receive the revised plans.

22 Thank you very much. We can call
23 the next case.

1 MR. MOY: The next application for
2 discussion is, in fact, a request for
3 modification of approved plans and waiver of
4 the six-month time requirement to Application
5 No. 17033-A of Washington Drama Society,
6 pursuant to Section 3129 of the Zoning
7 Regulations.

8 For the Board's reference the last
9 approved application of the Washington Drama
10 Society was Application No. 17033 which was
11 approved by the Board on July 8, 2003. That
12 application was pursuant to 11 DCMR 3103.2 for
13 a variance from the building height
14 requirements under Section 930 to permit the
15 redevelopment of an existing theater in the W-
16 1 District at premises 1101 6th Street, S.W.

17 In that application the applicant
18 requested modification to the height variance
19 approved in BZA order 16933-A. 16933-A was
20 approved by the Board on October 29, 2002, for
21 multiple variance relief.

22 On June 15, 2007, the applicant
23 filed a request for the modification of

1 approved plans and waiver of the six-month
2 time requirement pursuant to Section 3129.
3 That exhibit is in your folder identified as
4 Exhibit 34.

5 The applicant also submitted a
6 supplemental filing on July 12, 2007, which is
7 identified as Exhibit 35. Staff understands
8 that filing included letters of support from
9 the U.S. Commission of Fine Arts and the
10 Historic Preservation Review Board.

11 The only other filing in the record is a
12 report from the Office of Planning dated July
13 24, 2007, and that is identified as Exhibit
14 36.

15 Finally, the staff would just say
16 that the Board should act on the merits of the
17 request for modification of approved plans,
18 waiver of the six-month time requirement
19 pursuant to Section 3129. That completes the
20 staff's briefing.

21 CHAIRPERSON MILLER: Thank you.
22 Before we get into the merits of the motion
23 for modification, I think we need to just rule

1 on the waiver requirement in that it is well
2 beyond the six-month period of time.

3 I just want to remind the Board
4 that the standard for that is good cause and
5 no prejudice to any party and not prohibited
6 by law so I would suggest that we do waive the
7 time period, that there is good cause here.

8 It is apparent they have run into
9 some budgetary issues and they certainly
10 couldn't have anticipated those within the
11 first six months and no prejudice to any
12 party.

13 MR. ETHERLY: No objection, Madam
14 Chair.

15 CHAIRPERSON MILLER: Okay. Then
16 hearing no objections, then we can get into
17 the merits. Mr. Etherly.

18 MR. ETHERLY: Thank you very much,
19 Madam Chair. I'll be more than happy to
20 proceed in our discussion. I'll just being by
21 taking a point of personal privilege in that
22 I'm very happy to see what continues to be an
23 anchoring asset in the community of Ward 6 and

1 Southwest and the Waterfront, that being Arena
2 Stage as one of the participating members on
3 the case.

4 Some of our older more veteran
5 colleagues will recall the pride and the
6 beauty with which we spoke of this project as
7 it appeared before us and I am more than happy
8 to continue to echo those sentiments as we move
9 forward.

10 As was indicated in the staff's
11 summary, there are a number of minor changes
12 that have resulted in either the elimination
13 or the reduction of previously approved
14 variance relief that are, therefore, the basis
15 for this modification in relevant portion.

16 As was indicated, there has been
17 the removal of residential uses, therefore
18 eliminating the need for rear yard relief from
19 a variance standpoint, and also, of course,
20 lot occupancy provisions of 11 DCMR 932.

21 The FAR of the proposed modified
22 design is now within what is permitted as a
23 matter of right which, therefore, eliminates

1 the need for variance relief from 11 DCMR 931.

2 Finally, because the variance
3 relief for the height requirements remain, the
4 proposed height, however, is now less than
5 what was approved in the BZA Case No. 17033.
6 As has been indicated in the applicant's
7 submittal, there are, therefore, a number of
8 eliminations or reductions with respect to
9 relief and that is, again, the grounds for the
10 modification as presented to the Board.

11 As referenced by the staff's
12 summary, Section 3129 governs the BZA's review
13 in this case so I'll just walk through very
14 quickly relevant portions with respect to
15 3129.2. The request, of course, is in writing
16 with respect to 3129.3 which sets forth that
17 the Board should review such modifications
18 within six months.

19 The Board has, of course, moved to
20 waive that requirement. Section 3129.4, of
21 course, requires that the request be served
22 upon all parties which has been demonstrated.
23 Section 3129.6 references, of course, the

1 participating Board members continuing to
2 participate in the case which we have.

3 Finally, 3129.7 in relevant
4 portion, the modification is a minor
5 modification that does not change material
6 facts upon which the Board relied in approving
7 the original application.

8 I would submit, Madam Chair, that
9 by virtue of the applicant's submittal at
10 Exhibit No. 34 the Office of Planning's report
11 at Exhibit No. 36 the record is full and
12 complete with regard to supporting a finding
13 that the modifications are, indeed, minor and,
14 in fact, result in the elimination or
15 reduction of previously approved variance
16 relief, Madam Chair. I believe the
17 modification is right and proper before us and
18 should be granted.

19 Madam Chair, with your guidance if
20 you would like, I can proceed to discussing
21 some of the appropriate relevant language or
22 perhaps would suggest that we move forward
23 under a motion at this time, whichever may be

1 your pleasure.

2 CHAIRPERSON MILLER: I think we
3 should move forward under motion and then we
4 can discuss the motion.

5 MR. ETHERLY: Thank you, Madam
6 Chair. I would, therefore, approve the
7 request for modification of approved plans and
8 waiver of six-month time requirement.
9 Actually, I'll omit the waiver of six months
10 since we have already done that but I would
11 move approval of the request for modification
12 of approved plans to Application No. 17033-A
13 of Washington Drama Society pursuant to
14 Section 3129 of the Zoning Regulations. I
15 would invite a second.

16 CHAIRPERSON MILLER: Second.

17 MR. ETHERLY: Thank you very much,
18 Madam Chair.

19 I would like to direct my
20 colleagues' attention to Exhibit 34 which is
21 the supplemental of the applicant by counsel
22 and relevant portion at what is immediate
23 following tab A, page No. 2 of what is

1 referred to as a corrected summary order.
2 There is suggested language provided by the
3 applicant with regard to this minor
4 modification.

5 In particular, I would like to
6 suggest what I believe are modest changes that
7 better reflect the Board's thinking and
8 posture with respect to the modification at
9 point No. 1.

10 Point No. 1 reads as follows in
11 its current iteration suggested by the
12 applicant. "The applicant may modify the
13 design of the building as may be approved by
14 the Historic Preservation Review Board and/or
15 the Commission of Fine Arts provided that
16 those changes do not increase any of the areas
17 of relief granted by the Board of Zoning
18 Adjustment."

19 That is the language that has been
20 proffered by the applicant. I would suggest
21 the following language for consideration by
22 the Board, again, which I believe is modest in
23 nature. "The applicant may modify the design

1 of the building as necessary to gain the
2 approval of the Historic Preservation Review
3 Board and/or the Commission of Fine Arts
4 provided that any such modifications do not
5 increase any of the areas of relief granted by
6 the Board of Zoning Adjustment or create new
7 areas of relief."

8 Essentially, I believe, it is
9 consistent with the applicant's request to
10 have, if you will, leeway and flexibility with
11 regard to any subsequent review steps. I
12 believe it clarifies a little more
13 distinctively that any such modification
14 should not create new areas of relief or
15 increase any of the areas of relief that have
16 already been granted by the Board of Zoning
17 Adjustment. That would be my suggested
18 language, Madam Chair.

19 CHAIRPERSON MILLER: I think
20 that's excellent. I would concur with that.

21 MR. ETHERLY: Excellent. Thank
22 you very much, Madam Chair. With that, again,
23 I believe the record is very full and complete

1 in terms of the submittal of the applicant for
2 the modification. Again, I just can't say
3 enough about what a wonderful asset this may
4 be.

5 At times one worries about whether
6 or not they should recuse themselves because
7 they've taken part in enjoying arena stage and
8 all that it has to offer having myself lived
9 in the immediate area for a number of years
10 and, again, as a patron of the facility.

11 I can't say enough about what a
12 wonderful artistic and cultural institution
13 Arena Stage is and what it brings and what it
14 will continue to bring in its newest iteration
15 to both Southwest, the District of Columbia,
16 and the arts community throughout the region
17 and the country. With that, Madam Chair, I
18 think we are prepared to move forward.

19 CHAIRPERSON MILLER: Thank you
20 very much. I just want to make a couple of
21 comments. One is basically to commend the
22 Office of Planning for filing a very
23 comprehensive helpful report. We haven't

1 really had these reports for motions for
2 modifications in the past and this is really
3 quite impressive including drawings of the
4 differences between the previous design and
5 the new design. They show that the new design
6 is still in the spirit of the previous orders.
7 It's beautiful and it is quite an asset.

8 Also, I want to just reference for
9 the record that HPRB has given concept
10 approval and CFA has also approved the design.
11 With that, that's all I need to add. Do you
12 have anything further?

13 MR. ETHERLY: I'll just simply
14 note for the record that there was, shall we
15 say, a modest disagreement I had with the
16 Office of Planning and this, again, is not
17 substantive or material in nature. That is
18 that I do, shall we say, miss the inclusion of
19 the water feature.

20 As you indicated in the Office of
21 Planning's report it was very detailed in
22 terms of laying out the rationale for a number
23 of changes, many of which are very clear on

1 their -- all of which are very clear on their
2 face.

3 Just from a romantic standpoint I
4 shall miss the inclusion of the water feature
5 but, as has been indicated by the Office of
6 Planning and the applicant, there are a number
7 of budgetary considerations and perhaps, most
8 importantly, there are a number of very
9 practical considerations from an upkeep
10 standpoint and the ability of maintaining the
11 beauty of the water feature during the winter
12 months which constitute the bulk of Arena
13 State's programming.

14 Shall we say that winter months
15 are not kind to a water feature. With that
16 being said, I'll just take a moment of silence
17 to mourn the water feature and thank you
18 again, Madam Chair.

19 CHAIRPERSON MILLER: Are you ready
20 to vote?

21 MR. ETHERLY: Yes, Madam Chair.

22 CHAIRPERSON MILLER: Okay. Those
23 in favor, say aye.

1 ALL: Aye.

2 CHAIRPERSON MILLER: All those
3 opposed? Those abstaining?

4 MR. MOY: Staff would record the
5 vote two to zero to two on the vote of Mr.
6 Etherly to approve the modification with the
7 modified language as read into the record by
8 Mr. Etherly. Seconded by Ms. Miller. We have
9 two Board members not participating.

10 Madam Chair, we also have an
11 absentee ballot vote from Mr. John Parsons who
12 participated on the application. His vote is
13 to approve the modification and his comment
14 reads as follows: "It looks better without
15 the apartments on the rooftop." I guess the
16 final resulting vote of three to zero to two.

17 CHAIRPERSON MILLER: Thank you. I
18 think this can be a summary order as well. No
19 party in opposition? Okay. Thank you.

20 We are ready for the next case
21 when you are.

22 MR. MOY: The next application for
23 decision is Application No. 17646 of District-

1 Properties.com, LLC, pursuant to 11 DCMR
2 3104.1 for a special exception to allow the
3 construction of a new 16-unit apartment
4 building under Section 353 in the R-5-A
5 District at premises 5126 Bass Place, S.E.
6 That's in Square 5310, Lots 22, 23, and 24.

7 On July 24, 2007, the Board
8 completed public testimony, closed the record,
9 and scheduled its decision on July 31st. The
10 Board requested the applicant to submit final
11 revised plans. The record was also kept open
12 for filings from ANC-7 and the Office of
13 Planning for any additional comments.

14 The applicant made it's filing on
15 July 26 of final revised plans and is
16 identified in your case folders as Exhibit 31.
17 The Board is also in receipt of a supplemental
18 report from the Office of Planning which is
19 identified as Exhibit 32.

20 Finally, staff also notes that the
21 application as filed by the applicant has made
22 changes in the number of units reducing from
23 16 units to 12 and the number of parking

1 spaces being reduced from 16 to 12 as well.

2 The Board is to act on the merits
3 of the application for special exception under
4 provisions of Section 353 for new residential
5 development. That completes the staff's
6 briefing, Madam Chair.

7 CHAIRPERSON MILLER: Thank you.
8 Mr. Loud, do you want to start this one?

9 MR. LOUD: Thank you, Madam Chair.
10 Let me thank the applicant for following
11 through and providing the final revised plan
12 on July 26. I'm just going to give a summary
13 of where we are to date and beg everyone's
14 indulgence if I repeat Mr. Moy in any material
15 respects.

16 This is an application for new
17 construction of what now is a 12-unit
18 building, three stories, in an R-5-A zone on
19 vacant land about 12,000 square feet in the
20 Marshall Heights area of Washington, D.C., far
21 N.E. Twelve parking spaces are being provided
22 along the rear property line. The parking
23 spaces according to the record meet the

1 minimum nine feet by 19 feet required by
2 regulations.

3 There's a one-way drive isle that
4 meets the minimum 20-foot wide requirement
5 between parking areas for maneuverability. Per
6 the plans landscaping is about 8.8 percent of
7 the parking lot area which meets our
8 requirements of at least 5 percent.

9 The Office of Planning did submit
10 a report recommending approval finding that
11 the multi-family project was consistent with
12 the general intent of the comprehensive plan
13 Zoning Regulations, and the zoning map.

14 And going further in indicating
15 that the project further's object is at the
16 far northeast and southeast area element by
17 providing in-field development and noting that
18 the project would attract families, all of
19 which is in OP's report.

20 The ANC did provide testimony, I
21 believe, Mr. Inoue, ANC-7E. In Mr. Inoue's
22 testimony he indicated there were
23 approximately 12 properties on the 5100 block

1 of Bass Place, S.E., ten of which were single-
2 family residential properties and two of which
3 were multi-family properties.

4 It was not known by the Office of
5 Planning or Mr. Inoue whether any of the two
6 multi-family projects had as many as 16 or, in
7 the revised case, now 12 units. DHCD did
8 submit a report as well on July 6th and they
9 recommended approval as well.

10 Madam Chair, as you know,
11 colleagues as you also know as well, our
12 regulations under 353.1 provide that all new
13 residential developments in R-5-A are reviewed
14 by the Board of Zoning Adjustment as special
15 exceptions and granted if in the Board's
16 judgment the special exception is in harmony
17 with the general purpose and intent of the
18 Zoning Regs and the zoning map and will not
19 tend to adversely affect the use of
20 neighboring properties in accordance with
21 Zoning Regs and map.

22 In addition to which under Section
23 350.2 in an R-5-A only a low height and

1 density is permitted. Section 402.4 further
2 delineates that the FAR in an R-5-A is .9 and,
3 in this case, the FAR's .88

4 As you know, I struggled
5 significantly with this case, Madam Chair, for
6 a number of reasons. First of which is that
7 this project finds itself on a block where an
8 overwhelming majority of the properties are
9 single-family residential, I believe, 10 of
10 the 12, and only two of which are currently
11 multi-family properties.

12 In addition to which the Office of
13 Planning was gratuitous enough to identify in
14 their report supporting this project that the
15 far N.E. and S.E. elements of the comp plan
16 favored low density developments in this area
17 and provided opportunities, very rare
18 opportunities in this city, to build three and
19 four-bedroom homes suitable for families.

20 The report went on to note that
21 this area of Washington, D.C. far N.E.
22 Marshall Heights could and should support new
23 low density residential development, specially

1 one and two families.

2 In the case at hand we have 12
3 units which have been downsized from the
4 original 16 units that were proposed but,
5 nonetheless, they are still two-bedroom units.
6 There was considerable concern on my part that
7 the direction in which this project was moving
8 found itself a bit inconsistent with the
9 discussion about the far N.E. element plans
10 which was contained in OP's own report.

11 Nonetheless, Madam Chair, I have
12 not found and was not advised by counsel of
13 any particular provision upon which one could
14 rest a solid legal opposition to this project.
15 The operative legal provision being that in
16 order to disapprove it would have to be found
17 not in harmony with the general purpose and
18 intent of Zoning Regulations and the zoning
19 map, or that it would tend to adversely affect
20 the use of neighboring properties.

21 Formerly, as I understand, Section
22 410 allowed this body to take into
23 consideration whether or not projects like

1 this would be out of character with the
2 existing neighborhood. Certainly to my way of
3 looking at this, this property would certainly
4 have been out of character with the status quo
5 on that block if not in all of R-5-A or the
6 immediate neighborhood.

7 That being said, Madam Chair, I
8 would like to defer you for some feedback and
9 your observations on this. Then we can
10 resume.

11 CHAIRPERSON MILLER: Thank you.
12 That was excellent. You have basically
13 covered the topics. I think at the hearing I
14 was, as well as you and other Board members,
15 very concerned that this may not be in the
16 character of the neighborhood and we were
17 asking the Office of Planning about all the
18 citations to the comprehensive plan which
19 seemed to call for single family dwellings in
20 this area.

21 Actually, the ANC relied on
22 410.12(b) that the development not affect
23 adversely the present character or future

1 development of the neighborhood. However, 410
2 has been repealed and, therefore, we cannot
3 consider, as far as I can tell, in our
4 authority that argument stemming from 410 with
5 respect to the character of the neighborhood.

6 Therefore, our standard for review
7 are the provisions in 353 and then the general
8 3104.1 special exception which has us look at
9 whether or not the project would affect
10 adversely the use of neighboring property in
11 accordance with the Zoning Regulations and
12 zoning map and whether or not it would be in
13 harmony with the general purpose and intent of
14 the Zoning Regulations and zoning maps.

15 In looking at the plan, especially
16 as revised, it seems to be, or I would
17 conclude that it is in conformance with all
18 the Zoning Regulations including the parking.
19 That's been changed, that layout.

20 Fortunately it has gotten smaller
21 so I think that is a good thing. There isn't
22 any evidence in the record really of any
23 adverse impact on neighboring property or not

1 being in accordance with Zoning Regulations
2 and the zoning map.

3 That being said, I would have to
4 concur that there wouldn't be grounds for
5 denying this application. However, I think
6 there was reference at the hearing that there
7 may be action on the part of the Zoning
8 Commission or the Office of Planning making
9 changes in the zoning to implement the
10 comprehensive plan with respect to single-
11 family dwellings in this area.

12 One other point, though. Office
13 of Planning did make a recommendation
14 previously that the east facing windows be
15 oriented to not align with the existing
16 windows of the neighboring property to respect
17 possible privacy concerns.

18 From the drawings that were
19 submitted I'm not sure that's been done. I
20 would want to include that as a condition if
21 we grant the application.

22 MR. LOUD: I think that's an
23 excellent point, Madam Chair, and I support

1 that.

2 CHAIRPERSON MILLER: I just wanted
3 to take one more quick look at the ANC letter
4 to which we give great weight. I'm not sure
5 if this is -- this doesn't look like a letter
6 that necessarily meets all those requirements
7 but Mr. Inoue did a good job in bringing the
8 issues to our attention.

9 I just want to make sure that we
10 have addressed them. I think they were
11 concerned with parking regulations as well and
12 the definition of a basement and cellar. The
13 plans have been changed since the hearing so
14 these are no longer issues. I believe it's
15 all in accordance with the regulations.

16 MR. LOUD: I think like you. Mr.
17 Inoue did an outstanding job. I don't see
18 anyone from the ANC here but I think he
19 probably and the ANC should be credited for
20 the revision that we saw following the close
21 of the hearing where it was reduced from 16
22 units to 12 units. I think they made a very
23 compelling case.

1 CHAIRPERSON MILLER: Okay. Do we
2 have anything else on that? Then I would move
3 to grant the application of District-
4 Properties.com, LLC, Application No. 17646,
5 pursuant to 11 DCMR Section 3104.1 for special
6 exception to allow the construction of 12
7 units at this point. Is that -- yes, 12-unit
8 apartment building under Section 353 in the R-
9 5-A District at premises 5126 Bass Place, S.E.
10 as conditioned. Do I have a second?

11 MR. LOUD: Second, Madam Chair.

12 CHAIRPERSON MILLER: And further
13 comment? Okay. All those in favor, say aye.

14 ALL: Aye.

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

17 MR. MOY: Staff would record the
18 vote as two to zero to one. This is on the
19 motion of the Chair, Ms. Miller, to approve
20 the application with the condition regarding
21 the placement of the windows on the side of
22 the building. Seconded by Mr. Loud.

23 We also have two absentee ballots,

1 Madam Chair. The first is from Mr. Mann who
2 participated on the application. His vote is
3 to deny the application. The second ballot is
4 from Mr. Parsons and his vote is to approve
5 the application with such conditions as the
6 Board may impose.

7 His comment reads as follows:
8 "Approval is based on revised plans which
9 eliminate the cellar four units and the four
10 parking spaces." That would give a resulting
11 vote of -- redo my math here -- three to one
12 to one, three in favor of the application, one
13 to deny, and one Board member not
14 participating.

15 CHAIRPERSON MILLER: Thank you. I
16 want to just correct myself basically. After
17 taking another look at the ANC letter it does
18 look like even though it is written by the ANC
19 single-member district, it does make reference
20 to an official meeting and what the vote was.
21 We did give it great weight anyway. I bring
22 this up because it was in opposition so,
23 therefore, this would be a full order.

1 MR. MOY: Well done.

2 CHAIRPERSON MILLER: Okay. Ready
3 for the next case.

4 MR. MOY: The fourth decision of
5 the Board this morning is a motion to clarify
6 the language in BZA Order No. 17602 of
7 National Presbyterian Church. If the Board
8 will recall, this is to the original
9 application which was pursuant to 11 DCMR
10 3104.1 for special exception to establish a
11 child development center under Section 205.

12 This was for 16 children ages
13 infant to four years and five staff in the R-
14 1-B District on the first floor of the multi-
15 purpose building at premises 4101 Nebraska
16 Avenue, N.W. That's in Square 1724, Lot 805.

17 On June 5, 2007, the applicant
18 submitted a request to clarify the language in
19 this order No. 17602. This is identified in
20 your case folders as Exhibit 36. According to
21 the applicant, when in reference to the level
22 of preference be given to applications for
23 consideration to the child development center,

1 the third tier is not limited only to
2 residents of ANC-3E but is open to the general
3 public.

4 Finally, the staff notes the
5 applicant has served the parties and there
6 have been no other filings submitted into the
7 record as of this writing. The applicant did
8 submit proposed language and the Board is to
9 act on the motion to clarify language in order
10 17602. That concludes the staff's briefing,
11 Madam Chair.

12 CHAIRPERSON MILLER: Thank you.
13 This one is really straightforward. Basically
14 at the hearing we asked them if they had a
15 policy with respect to giving preferences
16 because the ANC had sought, I believe, certain
17 amounts of spaces to be reserved for ANC
18 families which the applicant was not going to
19 do and we weren't going to require them to do
20 that. Basically there was a witness that came
21 forward and explained that their policy would
22 be with respect to having these three tiers.

23 I looked back at the transcript

1 and basically the way I see it is what
2 applicant is proposing here really mirrors
3 what their witness said was their plan, their
4 three tiers. I believe that when I had ended
5 the hearing I kind of summarized what I
6 thought was the three tiers and I said it
7 differently with respect to the third tier.

8 However, what I would propose is
9 that we absolutely put in the wording the way
10 the applicant has suggested it because all we
11 were intending to do was to put in there
12 representation of what their policy will be.
13 We were not in anyway deciding what the policy
14 should be.

15 I don't know if people have other
16 comments. My suggestion would be if this is
17 the correct form to put the language in and
18 issue a corrected order that reflects the
19 language as submitted by the applicant. Any
20 comments?

21 MR. LOUD: If that's a motion, I
22 would support it. I think you stated it and
23 captured it clear. It's clear that we did not

1 intend to impose our own sort of unilateral
2 set of criteria. We support their three-tier
3 approach when Madam chair makes the
4 appropriate motion.

5 CHAIRPERSON MILLER: I would move
6 to grant applicant's request for an amended
7 order which we can call an amended order or
8 corrected order. In any event, to substitute
9 the language that they proposed to reflect
10 their enrollment policy.

11 MR. LOUD: I would second the
12 motion.

13 CHAIRPERSON MILLER: Any further
14 comments? All those in favor, say aye.

15 ALL: Aye.

16 CHAIRPERSON MILLER: Opposed?
17 Abstaining?

18 MR. MOY: Staff would record the
19 vote as three to zero to one, this on the
20 motion of the Chair, Ms. Miller, to grant the
21 motion to clarify the language in BZA order
22 17602. Seconded by Mr. Loud. Also in support
23 of the motion Mr. Etherly.

1 That proposed language staff would
2 just like to read in the record. It would
3 read as follows: "The third tier will consist
4 of children from the general public with
5 preference given to children of families
6 residing within the boundaries of ANC-3E."

7 We also have an absentee ballot
8 from Mr. Mann who participated in the original
9 application. His vote is to approve and that
10 would give a resulting vote of four to zero to
11 one.

12 CHAIRPERSON MILLER: Thank you
13 very much. Thank you for reading in the
14 language, too, for the record. I would
15 suggest that this be a summary order as there
16 are no parties in opposition. Hearing no
17 objection, summary order.

18 Then we are ready for the next
19 case.

20 MR. MOY: The next application and
21 final application for the Board's decision
22 this morning is Appeal No. 17631 of the
23 Advisory Neighborhood Commission 3E pursuant

1 to 11 DCMR 3100 and 3101 from the decision of
2 the zoning administrator to issue building
3 permit Nos. 101584, 101585, 101583, and 101588
4 to allow the construction of four single-
5 family dwellings, allegedly not meeting
6 driveway (Section 2116), parking (Section
7 2101), lot dimension (Section 401), and lot
8 occupancy (Section 403) in the R-2 District at
9 premises 4319, 4319 1/2, 4321, and 4321 1/2
10 Fessenden Street, N.W.. That's in Square
11 1655, Lots 17, 18, 19, and 20).

12 On July 10, 2007, the Board
13 completed public testimony, closed the record,
14 and scheduled its decision on July 31, 2007.
15 The Board requested a number of post-hearing
16 documents from all parties. This includes the
17 appellant, the appellee, DCRA, the intervener,
18 the property owner, as well as responses and
19 draft findings of fact and conclusions of law
20 from all parties. These were all filed in a
21 timely way.

22 To go over the following submitted
23 into the record for the Board, the appellant

1 filed its submission which is identified in
2 your case folders as Exhibit 24. DCRA, the
3 appellee, filed responding to the Board's
4 request. The document is identified as
5 Exhibit 25. As well as Exhibit 26 which DCRA
6 filed reduced the drawing of a map showing the
7 lots and squares of the site and adjacent
8 areas.

9 The Board is also in receipt of
10 proposed findings of fact and conclusions of
11 law from the appellant and the intervenor and
12 they are identified in your case folders as
13 Exhibit 27 and Exhibit 28 respectively.

14 The staff will also note two
15 preliminary matters. The Zoning Office also
16 received a filing from the intervenor which is
17 their response to the appellant's response to
18 the Board. This document was not requested in
19 the Board post-hearing punch list.

20 That is identified as Exhibit 29
21 dated July 26. Second, the appellant's reply
22 to the intervenor's filing of this Exhibit 29.
23 Their document is identified as Exhibit 30.

1 Staff is going to conclude its
2 briefing at this time, Madam Chair.

3 CHAIRPERSON MILLER: So, Mr. Moy,
4 as a preliminary matter we need to determine
5 whether the last two filings, Exhibit 29 and
6 30, should be accepted into the record because
7 they weren't requested. Isn't that correct?

8 MR. MOY: That's correct, Madam
9 Chair.

10 CHAIRPERSON MILLER: They are also
11 late, after the deadline that we put in the
12 record. Is that correct?

13 MR. MOY: That's correct as well.

14 CHAIRPERSON MILLER: Okay. Well,
15 I want to make a few comments first and then
16 we can discuss this and then decide.
17 Basically I think in general there has to be
18 an end. You can't keep fighting your legal
19 arguments back and forth and back and forth
20 and back and forth and then this gets to us
21 late.

22 On the other hand, they both have
23 done it so I'm not sure there is any prejudice

1 to any party in that they both have come in
2 with late arguments. I'm not sure there's
3 good cause. That's what we talk about good
4 cause prejudice.

5 I have had a chance to look at
6 them. I don't think that the arguments in
7 here are different from what I saw before.
8 Maybe they are just developed a little bit
9 more. I throw out those observations to my
10 colleagues to see whether we want to accept it
11 into the record or whether you've had an
12 opportunity to even review these.

13 MR. ETHERLY: Thank you for your
14 comments, Madam Chair. I, too, am of a very
15 similar mind. I don't necessarily see any
16 prejudice or other complications related to
17 accepting the two submittals which I agree are
18 just, in my opinion, further expansion, if you
19 will, upon legal argument that has already
20 been made for the sake of clarity and probably
21 cleanliness.

22 Just from the standpoint of the
23 record, I probably would support not allowing

1 them into the record as I don't believe they
2 necessarily bring forward additional argument.
3 That wouldn't be my rationale. My rationale
4 would simply be they were beyond the scope of
5 what the Board requested and also were
6 submitted late. I don't think there is
7 necessarily good cause in existence for taking
8 these into the record.

9 Again, I think they are fairly
10 benign in terms of their content to just
11 further legal argument. But, again, for the
12 sake of clarity and just orderliness, if you
13 will, I probably would just err on the side of
14 not accepting them into the record and moving
15 forward with deliberation as we have on the
16 record as it currently exist.

17 MR. LOUD: I would tend to agree
18 with Mr. Etherly. I did have a chance to
19 review them, although I reviewed them late
20 because I got them, I believe, yesterday and
21 was out of my office for a good chunk of
22 yesterday but they seemed to be like replies
23 to the opposition to the reply to the

1 opposition. It was just sort of point
2 counter-point type discussion. It doesn't add
3 a whole lot as I think Mr. Etherly captured as
4 well.

5 CHAIRPERSON MILLER: I just want
6 to say I don't see a big harm, any harm
7 actually, in letting them in in this case.
8 It's just not good for our own precedent maybe
9 for people to think that they can still keep
10 arguing. Anyway, I might lean the other way
11 but if the two of you feel like we should
12 exclude it, I don't see any harm either.

13 Okay. We have a lot of argument
14 that was made in the record and, again, I
15 would say that I think I did, and I would
16 assume the other Board members really spent a
17 lot of time on the legal arguments which are
18 probably the same that were presented earlier
19 in the post-hearing documents, submissions at
20 the hearing, the prehearing documents. I
21 think the record is full even without those
22 two documents.

23 I just want to note a couple of

1 things preliminarily. One is it seems like I
2 see on this hearing as it's often referred to
3 as Appeal of Advisory Neighborhood Commission
4 3E. Actually, it is also an appeal by Mr.
5 Todd Boley who has done extensive work in this
6 case so I just want to make sure that's
7 reflected. I'm sure it will be in the
8 decision in any event.

9 Then as another preliminary matter
10 Mr. Boley raised an objection at the hearing
11 to the Zoning Administrator being given expert
12 witness status given his specific interest in
13 this case.

14 Then he has withdrawn that
15 objection after looking at case law,
16 specifically Liberty Mutual Insurance Company
17 which is a D.C. Circuit case and has requested
18 in accordance with that case that we consider
19 his interest in the case when we weigh his
20 testimony which is appropriate.

21 That being said, also before we
22 get into the merits, I just want to say that
23 there was also a letter in the record in

1 support of the appeal by Mr. David Frankel
2 whose rear property line is 70 feet from the
3 development. He basically spoke to the
4 negative impact with respect to massiveness
5 and scale that this application would have.

6 What we are looking at in general
7 is whether there was an error in the
8 administration or enforcement of the Zoning
9 Regulations which is our jurisdiction for
10 appeal cases as set forth in 3100.2.

11 In general the appellants are
12 alleging that the ZA erred in approving the
13 issuance of four building permits for the
14 construction of four single-family dwellings.
15 The alleged violations are of 2116 driveway,
16 2101 parking, 401 lot dimension, and 403 lot
17 occupancy.

18 I think that the basis of the
19 appellant's arguments is that there were these
20 easements that were created that redefine the
21 lot lines for zoning purposes. They argue the
22 compliance with the zoning regulations must be
23 determined on how the owner would use the

1 property.

2 We heard specific testimony by the
3 ZA at the hearing and also in the post-hearing
4 submission in which he explained why there
5 were no violations of the Zoning Regulations
6 and in general says that the uses allowed by
7 the easements do not result in noncompliance
8 with the Zoning Regulations.

9 I think that's kind of in a
10 nutshell what this case is about. I think the
11 Zoning Administrator did a very methodical job
12 at the hearing in going through each alleged
13 violation.

14 I think that is probably a good
15 place for us to start as well since we need to
16 evaluate whether the Zoning Administrator made
17 any errors. I think if we look at certainly
18 his rationale in each of those instances,
19 that's a good place to start. Then we could
20 consider the general easement issue after
21 that.

22 I'm going to put in front of me,
23 at least, Exhibit 25 which is DCRA's position

1 statement. He goes through seriatim each of
2 the allegations of zoning violations. I would
3 suggest that we start with that and we can
4 also look at the visual that was presented to
5 us as we did at the hearing and then see if we
6 disagree with the Zoning Administrator at
7 least in that exercise.

8 Do you have that in front of you,
9 Mr. Loud?

10 MR. LOUD: Exhibit 25.

11 CHAIRPERSON MILLER: Okay. I'm
12 looking at page 3 of his position statement.
13 Okay. No. 1. The ZA sets forth the
14 allegation of violation one. "Zoning
15 Regulation Section 401.6 requires that each
16 lot have a street frontage of at least 14
17 feet. Lot 18 on paper includes a panhandle or
18 rat tail with 14-foot street frontage.

19 However, that frontage has from
20 the outside been subject to perpetual use
21 easement from developer to itself for the
22 exclusive benefit of Lot 19 but apparently to
23 be used for storm water management for the

1 entire property. As a result, Lot 18 has not
2 street frontage. This violates 401.6."

3 Well, just looking at this, which
4 is what I believe the ZA did, looking at this
5 without the issue of the easement he found
6 that Lot 18 does have frontage and the
7 frontage, as you can see, even though it's a
8 funny shape, does go to the street.

9 I can see that and he went through
10 this with us officially. I think that we are
11 going to have to put on hold the question of
12 easements. As far as the way the lot is drawn
13 and shown and showed, I looking at Exhibit D2,
14 though I'm sure we can look at it in different
15 places, but this is from the Office of the
16 Surveyor so I think that is a good document to
17 look at. The lot itself does show 14 feet of
18 street frontage.

19 Would you agree, Mr. Loud? Have
20 you got it?

21 MR. LOUD: What I'm looking at
22 doesn't actually show it.

23 MR. ETHERLY: I would say, Madam

1 Chair, as we continue that, that I am
2 definitely in agreement. I would be more than
3 comfortable verging into -- again, I have no
4 objection to our approach to sorting out what
5 are a lot of very complicated issues and
6 arguments that were presented by the appeal.
7 I'm more than happy even at this early stage
8 to verge into that larger discussion of
9 easements.

10 I think at the end of the day
11 while there was a great deal of argument, I
12 think the pertinent interpretation that has
13 been offered by the Zoning Administrator, the
14 Acting Zoning Administrator, with respect to
15 the long-standing practice of how that office
16 dealt with the issue of easements I think is
17 fairly simple.

18 Again, I am more than happy to
19 just proceed and we could perhaps at the close
20 provide over-arching comments on easements but
21 I'm comfortable verging into that landscape
22 even now because I think the answer based on
23 the argument based on what I've heard in

1 testimony is fairly clear and straightforward
2 and it will be, of course, a recurring
3 argument as my colleagues know with respect to
4 all of the lots and the interpretation of lot
5 width.

6 CHAIRPERSON MILLER: That's fine
7 with me. I didn't realize we were going to
8 bump into it so quickly.

9 MR. ETHERLY: It's sitting right
10 there.

11 CHAIRPERSON MILLER: That's fine.
12 Yeah.

13 MR. ETHERLY: I would say right
14 off the bat that I believe the Zoning
15 Administrator's testimony was very credible
16 with respect to both long-standing practice
17 and the interpretation of this Board has it
18 pertains to how easements are treated with
19 respect to the treatment, if you will, of lot
20 width and street frontage.

21 As my colleagues will recall, we
22 entertained quite a bit of argument with
23 respect to how easements have been interpreted

1 both from the standpoint of, shall we say,
2 just traditional easements as well as utility
3 easements which has in relevant portion also
4 been noted by the appellant as a concern for
5 how the required lot width should be read.

6 In relevant portion as it pertains
7 to the Zoning Administrator's response at page
8 3 to that first count, if you will, the
9 presence of an easement on that portion of Lot
10 18 that fronts on Fessenden Street does not
11 extinguish that lot's approved frontage. The
12 14-foot approved frontage does meet 11 DCMR
13 Section 401.6.

14 I would agree with that
15 interpretation. My rationale for that
16 agreement would be completely consistent with
17 what has been offered both by DCRA in terms of
18 its own interpretation but also the owner of
19 the property at both Exhibit 28 and also
20 Exhibit 18.

21 Exhibit 18 is the original
22 opposition of property owner Dunn Whisky, LLC,
23 to the appeal at page 8. The owner gets into

1 relevant portion of the fact that existing
2 long-standing Zoning Administrator
3 interpretations support a finding that shared
4 driveway easements do not reduce required lot
5 widths nor render them nonconforming.

6 Citing as support for that
7 statement a number of cases that this Board
8 has dealt with in the past in terms of its own
9 juris prudence including, but not limited to,
10 the Rosedale site in Cleveland Park.

11 I will note just to be consistent
12 and complete in terms of our discussion here
13 that the Rosedale case was subject to review
14 by the Mayor's agent for historic preservation
15 large tract review.

16 It was not necessarily a BZA
17 proceeding but there are other BZA cases which
18 were offered by the owner as support for the
19 rationale that shared driveway easements do
20 not reduce required lot widths, nor the street
21 frontage interpretation as argued by the
22 appellant.

23 I would say for the purposes

1 definitely of point No. 1 with regard to
2 approved street frontage as the ZA
3 demonstrated with respect to long-standing
4 interpretation such easements do not
5 extinguish the lots approved frontage.

6 I would agree with the ZA's
7 finding that the 14-foot approved frontage
8 does meet 11 DCMR Section 401.6 and is not
9 encumbered or limited by the easement as
10 argued by the appellant.

11 CHAIRPERSON MILLER: I would agree
12 with you. What I've seen on the Board
13 certainly is that we have never considered
14 easements as a factor in compliance with these
15 types of area Zoning Regulations. I read all
16 the cases that were submitted to us and the
17 ones that the appellant submitted were other
18 jurisdictions interpreting their own zoning
19 ordinances.

20 They primarily dealt with public
21 streets and alleys. I don't think they are so
22 applicable to our own. We do have a history.
23 I was looking at in particular BZA Application

1 No. 12591 in which as a finding of fact it was
2 stated that No. 9, "Vehicular access and
3 parking for the units is at the rear of the
4 property. Each unit is supplied with concrete
5 parking pad.

6 Access is by way of a concrete
7 driveway which will be provided through
8 easement. Access to the easement is from
9 Morris Road, S.E. The parking area for the
10 two center units are located within the
11 parking access easement."

12 It goes on and on but this is one
13 case that was submitted by the owner and it
14 does represent, I believe, what has been the
15 history in this jurisdiction. There is no
16 case law in this jurisdiction otherwise.

17 That didn't make sense to me as
18 far as how access goes in these cases why that
19 would interfere with the lot dimensions. I
20 just don't think there is authority for ruling
21 in favor of the appellants on this easement
22 question.

23 Also, we have seen shared

1 driveways certainly before as well. We have
2 also seen storm water management. I don't
3 know the cases in general but they are
4 underground and really don't have anything to
5 do with lot dimensions, at least with respect
6 to applying our Zoning Regulations.

7 MR. LOUD: I would just add that I
8 found the testimony of the ZA accredited. I
9 mean, he was qualified as an expert and
10 rendered an expert.

11 I thought the argument to the
12 contrary was very, very creative legally but
13 beyond that it didn't make a lot of sense from
14 a practical standpoint in terms of why one
15 would lose that amount of square footage just
16 because we are now calling it an easement. It
17 was not articulated to me the rationale for
18 why that would make sense.

19 MR. ETHERLY: I would say, Madam
20 Chair, just as we continue to discuss the
21 issue of the 14-foot street frontage, in my
22 discussion I mixed both discussions of the lot
23 width and the 14-foot frontage so I just

1 wanted to track clearly that 14-foot street
2 frontage argument as was noted in the owner's
3 proposed -- I just want to make sure I keep my
4 colleagues tracking with me.

5 At Exhibit No. 38 the owner's
6 proposed order at page 7, I think,
7 convincingly denotes in the first full
8 paragraph. I'll just read in relevant
9 portion, "Similarly, the appellant
10 misinterprets the regulation under his forth
11 claim relating to Section 401.6. Appellant
12 urges the Board to measure frontage once the
13 common driveway turns east. Record Exhibit
14 No. 15 at 3.

15 The lot frontage by definition
16 cannot be measured at the interior of the
17 property. Instead, this dimension is measured
18 at the street and easements play no role. The
19 Board concludes that at the street Lot 17 and
20 18 have lot frontage of 14 feet and, thus, do
21 not violate Section 401.6."

22 I think that simply says very
23 succinctly and very directly what was

1 testified to by the Zoning Administrator that
2 long-standing interpretation takes the
3 measurement from the street frontage, not from
4 an interior point and that easements have
5 traditionally or historically played no role
6 in that interpretation.

7 I think the record is fairly clear
8 and un rebutted. I think Mr. Loud put it well
9 and that is not to diminish the appellant's
10 argument but when Mr. Loud termed it creative,
11 I think that is indeed a very apropos
12 characterization of the argument.

13
14 There simply was nothing testified
15 to by Mr. LeGrant in his capacity as Acting
16 Zoning Administrator and his experience in
17 zoning matters that would suggest that
18 easements have at some time prior to this been
19 taken into account for the purposes of
20 determining street frontage.

21 I think that allegation of the
22 appeal has been fairly well put to rest and I
23 am hopeful that as the Board continues its

1 discussion we will be as equally clear in
2 terms of our interpretation of how this issue
3 has been dealt with.

4 I would suggest that this,
5 therefore, also speaks to point No. 2 which is
6 in relation to Lot 17. Again, I'm returning
7 to the Chairman's suggestion that we use
8 DCRA's position statement at Exhibit 25 as the
9 guide for our conversation.

10 I would suggest that for Lot 17
11 also based on this rationale there not be a
12 violation of 401.6. As you measure the street
13 frontage from the frontage of the street and
14 not take into account the easement, that there
15 is the appropriate 14-foot approved frontage
16 that does indeed comply with 11 DCMR Section
17 401.6.

18 CHAIRPERSON MILLER: I would agree
19 with you. I also want to say as we go along
20 that I thought it was very educational
21 listening to Mr. LeGrant explain these things
22 because I can certainly understand how the
23 community would look at these lots and think,

1 "They're not on the street." Actually, that
2 portion is on the street that needs to be on
3 the street. As Mr. LeGrant explained, they
4 meet the Zoning Regulations.

5 MR. ETHERLY: Just to put a pin in
6 this, I'll come back again to Mr. Loud's use
7 of the term creative and highlight that I
8 believe it was very clear to the Board what
9 the appellant was endeavoring to argue.

10 What you, in fact, had was a
11 creative approach to the Zoning Regs and the
12 relevant requirements by the developer such
13 that that approach, if not in actual
14 substance, perhaps in spirit contrasted with
15 the Zoning Regulations.

16 Again, I think what was presented
17 by both the Zoning Administrative through it's
18 testimony and its demonstration of practice
19 and interpretation, long-standing
20 interpretation, is that what the developer has
21 done is, indeed, consistent with how the
22 Zoning Regulations have been interpreted.

23 I just want to be very clear as we

1 walk very slowly through this and I think it's
2 a very important walk. I agree, Madam Chair,
3 it definitely was a very educational
4 discussion.

5 All of the creativity aside, I
6 think at the end of the day we are left with
7 what has been the practice, what has been the
8 case law approach, if you will, to the
9 interpretation of this particular provision
10 and the issue determining the measurements for
11 frontage and where you start that process.

12
13 Again, I believe the ZA's
14 testimony was very compelling and not rebutted
15 sufficiently enough to find for the appellant
16 on these two counts.

17 CHAIRPERSON MILLER: Okay. Should
18 we go through this seriatim?

19 MR. ETHERLY: Certainly

20 CHAIRPERSON MILLER: Okay. Then I
21 think we're up to No. 3. "The driveway
22 established by this ingress/egress easement
23 would appear to be only 13 feet wide because

1 the storm water management facility the
2 developer will install and what is ostensibly
3 Lot 18 will encroach upon the width of the
4 driveway. This also violates Section 401.6."

5 All right. I think we have
6 already agreed that easements don't play a
7 role in determining compliance with the Zoning
8 Regulations. The ZA has said that the minimum
9 driveway width is 12 feet pursuant to 2117.8.
10 I'm repeating this but I would agree.

11 Then it's a separate issue for the
12 easement width which we have already said is
13 true. In any event, it exceeds the minimum by
14 one foot. To me as this rest on an easement
15 argument, it appears that it fails on that
16 grounds alone.

17 MR. ETHERLY: I would agree, Madam
18 Chair, and, again, I'm just going to be very
19 consistent as I refer both to the ZA's
20 testimony and that of the owner here.

21 There simply was nothing presented
22 which suggested that in this jurisdiction
23 easements of a utility nature, easements of

1 any nature much less easement of a utility
2 nature, in anyway interfere with lot lines
3 established through subdivision as was argued
4 by the owner in its submittal any more than
5 fences, retaining walls, sheds, or other
6 structures would.

7 I believe it is very compelling
8 that, as the owner argued, if utility
9 easements were read to affect lot dimensions
10 and lot lines, we would, in fact, have some
11 rather absurd consequences. I'm reading
12 directly from the owner's submittal at Exhibit
13 No. 18. I think that is absolutely spot on.

14 I'll note just as we continue our
15 discussion my colleagues will recall some of
16 our conversation in executive session and I
17 think it's important to set the definition of
18 lot firmly in front of us as we move through
19 this discussion because I think it is
20 instructive, especially with the fact that we
21 had quite a bit of extensive recitation and
22 referencing of out-of-state juris prudence.

23 I want to emphasis that this Board

1 is no stranger to out-of-state juris prudence
2 and at times may, indeed, find it instructive.
3 It is mostly certainly nothing more than that.
4 Instructive, not precedential on this Board,
5 but it at times can be helpful in terms of
6 offering interpretations.

7 I think the definition of lot is
8 very instructive as it pertains to how this
9 jurisdiction deals with lots. I'm reading
10 from the definition of Title 11 with respect
11 to lot.

12 It is defined as, "The land
13 bounded by definite lines that when occupied
14 or to be occupied by a building or structure
15 and accessory buildings includes the open
16 spaces required under this title. A lot may
17 or may not be -- that is my emphasis being
18 added -- a lot may or may not be the land so
19 recorded on the records of the surveyor of the
20 District of Columbia."

21 At significant points, of course,
22 during this appeal we've had in front of us
23 varying wall test surveys, the overall survey

1 as presented by both the appellant, the owner,
2 DCRA. I think, again, this definition in
3 relevant portion is very, very instructive.
4 A lot may or may not be the land so recorded
5 on the records of the surveyor.

6 As we look at the surveyor's plats
7 in this case, we see no representation as it
8 pertains to easements either of a utility
9 nature or any of the other private easements
10 that were argued by the appellant to be
11 essentially between the developer and himself,
12 if you will.

13 I think the argument simply falls
14 on its face with regard to interpretation that
15 the utility easements would affect the lot
16 dimensions. Thank you, Madam Chair.

17 CHAIRPERSON MILLER: Okay. My
18 understanding, though, is that we are looking
19 at lots as determined by the Office of the
20 Surveyor such as in D2 that established Lots
21 17, 18, 19, and 20.

22 MR. ETHERLY: Indeed. I simply
23 offered the definition as support for the

1 discussion that when we look especially at
2 some of the out-of-state juris prudence that's
3 been offered by the appellant, what I think is
4 a very important distinguishing factor here is
5 that our definition, our being the District of
6 Columbia, by virtue of Title 11 of the Zoning
7 Regs is fairly expansive and may, in fact,
8 materially differ from many of the
9 jurisdictions that have been cited be it New
10 Jersey, be it the state of Maryland, or other
11 jurisdictions that have dealt with similar
12 issues, similar easements of a utility nature
13 or of a private nature.

14 I simply wanted to offer that just
15 as further consideration as we move through
16 what I know will be a recurring theme
17 throughout this appeal and throughout our
18 deliberation.

19 I agree with you. I think, again,
20 the surveyor's plat is very clear on its face
21 as has been presented to us and as you have
22 highlighted, Madam Chair, and in no relevant
23 place highlights easements or with respect to

1 any of its measurements for the driveways, for
2 lot width or anything along those lines.

3 Thank you, Madam Chair.

4 CHAIRPERSON MILLER: Thank you.
5 So where are we, No. 4? The allegation was,
6 "If one ignores the way the easements define
7 the lots, the frontage for both rear lots
8 presumably required for the purpose of
9 providing ingress and egress to their garages
10 becomes only about 11 feet when each lot's rat
11 tail turns east to provide garage access.
12 This violates 401.6."

13 The Zoning Administrator says,
14 "Lot 18 does narrow to 11 feet. However, 11
15 DCMR Section 401.6 specifies the minimum
16 street frontage with measurement along the
17 street of not less than 14 feet which the
18 approved subdivision does show. Therefore,
19 it's not a violation."

20 MR. ETHERLY: Again, Madam Chair,
21 I would submit that this is a recurring
22 argument which we have already touched upon.
23 The appellant is encouraging -- employing the

1 Board, if you will, to take the measurement of
2 street frontage at the point where the
3 driveway or the rat tail, if you will, turns
4 east.

5 As 401.6 states and, again, this
6 is simply as you read directly from the Zoning
7 Administrator's submittal, the measurement is
8 taken from the street frontage and is found to
9 be 14 feet and, therefore, in compliance with
10 401.6.

11 The Zoning Administrator's
12 testimony is that long-standing interpretation
13 is that the measurement is taken from the
14 street and not from some other point. I think
15 to deviate from that would deviate, if you
16 will, from long-standing interpretation both
17 by the Zoning Administrator and in this
18 Board's prior juris prudence.

19 CHAIRPERSON MILLER: I think also
20 the specific language of the reg which defines
21 street frontage. Any other comments on that?

22 MR. LOUD: No, I agree with Mr.
23 Etherly. I think unless the party were to

1 identify something other than Section 401.6,
2 which is what they identify, it's pretty
3 clear. It's black and white that it's
4 measured from the street, not from the rat
5 tail or some interior point on the lot.

6 CHAIRPERSON MILLER: All right.
7 The regs say, "You shall have a street
8 frontage measured along the street." Okay.

9 No. 5, "Allegation of Zoning
10 Regulations 2117.4 requires that each separate
11 required parking space -- one is required for
12 each lot -- be accessible via its own driveway
13 by virtue of a perpetual nonexclusive ingress
14 and egress easement from the developer to
15 itself for the benefit of all four lots. No
16 lot's required parking space is accessible via
17 the lot's own driveway. This violates 2117.4"

18 Okay. Separating the easement
19 issue, which we have already addressed, the ZA
20 also says that, "11 DCMR Section 2117.4 says
21 that each parking space is to be accessible by
22 its own driveway."

23 It doesn't say that. The Section

1 says, "Each required parking space shall be
2 accessible at all times directly from improved
3 streets and alleys...via graded and
4 unobstructed private driveways that form an
5 all-weather impervious surface. Improved
6 streets or alleys providing access to required
7 parking spaces shall have a minimum width of
8 ten feet..."

9 Okay. In any event, it doesn't
10 say in the regs that each required parking
11 space has to have an exclusive driveway. The
12 appellants have read that into 2117.4. It
13 says that, "Each required parking space shall
14 be accessible at all times" from a private
15 driveway.

16 It doesn't say it's own private
17 driveway. That's the bottom line here. I
18 think an interpretation in accordance with the
19 ZA's interpretation of this language is
20 consistent with that Board decision I actually
21 referenced earlier.

22 MR. ETHERLY: I would agree, Madam
23 Chair. With respect to other argument that

1 was presented on this point in addition to
2 Order No. 12591 which you cited, Application
3 No. 13223, Order No. 13235, again the
4 previously mentioned Rosedale site in
5 Cleveland Park, all dealt with the issue of
6 shared driveway access to multiple single-
7 family dwellings.

8 Again, the case precedent and
9 long-standing interpretations of the ZA in
10 this regard simply don't support the
11 appellant's argument in this regard. To do so
12 would require, as the ZA indicated, reading
13 language into 2117.4 that simply is not there.

14 CHAIRPERSON MILLER: I agree. I
15 think you said this but I just want to make
16 sure that the record is clear on that, that we
17 recognize that the Rosedale case is not one in
18 which there is a Board decision or court
19 decision but it was certainly a ZA decision
20 and it was looked at by other bodies.

21 I also want to make one other
22 comment, too, that hasn't been made on this
23 easement question. That is the appellant

1 refers to this as an easement with himself as
2 the property owner and, therefore, it's not
3 even an easement. We're saying it's not even
4 a consideration anyway with respect to our
5 Zoning Regulations but I didn't read it that
6 way.

7 I read the easement as being with
8 future property owners on that property as
9 well. I don't think it's just something that
10 is just with himself. In any event, it's a
11 minor point because it's not really affecting
12 our decision on whether it's in compliance
13 with the Zoning Regulations.

14 We are up to 6. "If one ignores
15 the way the easement defines the law, there is
16 no means of ingress and egress to the required
17 parking spaces for Lots 19 and 20. This
18 violates Section 2117.4."

19 Zoning Administrator's response
20 is, "Ignoring the easements provided for
21 driveway and parking access would violate the
22 recorded easement requirement. It would be a
23 civil matter enforceable by the property

1 owners of Lots 17 through 20 themselves.
2 Preserving the easements does allow for the
3 required driveway ingress and egress so as to
4 comply with the 11 DCMR Section 2117.4."

5 MR. LOUD: Madam Chair, as you
6 flipped through the citation I actually found
7 myself agreeing with everybody on this one but
8 I don't think we need to spend a lot of time
9 on it. I think they're right, if you ignore
10 the easement there is no means of ingress and
11 egress. The point is why would you ignore the
12 easement?

13 I think what has been said is that
14 the easement is not factored into a
15 calculation of lot dimension, not that you
16 ignore the fact of the easement. It's a point
17 made without any real substance to it.

18 CHAIRPERSON MILLER: I agree. I
19 mean, this section goes to making sure that
20 spaces are accessible. That's what the
21 easement goes to, making sure they are
22 accessible. I think it's in compliance.

23 "Zoning Regulations 2116.1

1 requires all parking spaces to be located on
2 the same lot with the building they are
3 intended to serve. Perpetual exclusive
4 parking easements from developer to itself,
5 however, Lot 18 has one and Lot 17 has two
6 parking spaces, other than on the same lot as
7 the house the parking space will serve. This
8 violates Section 2116.1."

9 Zoning Administrator's response,
10 "Each lot has at least one off-street parking
11 space for the house it serves which does
12 comply with 11 DCMR Section 2101.1. There is
13 no prohibition to allow additional off-street
14 parking spaces beyond the requirement, beyond
15 other lots, if so arranged by easement. No
16 violation has occurred."

17 I mean, I would agree that it
18 meets having a parking space for required
19 parking. I was just thinking about this. Why
20 couldn't you allow somebody to park on your
21 lot? There's no prohibition against that by
22 easement or otherwise.

23 No. 8, "Zoning Regulation

1 2116.2(b) bars any parking space within a
2 front yard but it would appear that in
3 addition to the garages for Lot 17 and 18
4 additional open air parking will be available
5 in the front yards of those properties. This
6 violates 2116.2(b)."

7 ZA's response, "There is front
8 yard requirement in the subject R2 District
9 and, therefore, no front yards are required of
10 the subject lots. The parking shown on the
11 approved plat for Lots 19 and 20 is in the
12 rear yard.

13 11 DCMR Section 2116.4 prohibits
14 parking between a building line and lot line
15 abutting a street and no parking is approved
16 for this area. The plan complies and no
17 violations are found for 11 DCMR Section
18 2116.2(b) or 2116.4."

19 I would say 2116.2(b) is an
20 affirmative requirement and he's saying that
21 if they each are required to have one space
22 that they have it in an area where it's
23 allowed. Then I think the appellants looked

1 at the properties and assumed a front yard
2 there but by definition there is no front yard
3 requirement or no front yard necessarily
4 identified by any definition.

5 What the ZA has done he has looked
6 at the prohibition in 2116.4 between a
7 building line and a lot line abutting a street
8 and they didn't approve parking in that area.

9 MR. ETHERLY: At page eight for my
10 colleagues of Exhibit No. 18 in relevant
11 portion, the owner notes that the southern
12 line of Lot 18 does not demarcate public and
13 private property, nor does it relate to a
14 building restriction line. Therefore, as the
15 owner contends, the Board should conclude that
16 the additional parking space on Lot 18 does
17 not violate the provisions of Section 2116.2.

18 This is consistent with the ZA's
19 reading that no parking -- of course, parking
20 according to 2116.4 between a building line
21 and a lot line abutting a street is, indeed,
22 prohibited but there is no such parking as
23 argued by the appellant, again, because with

1 respect to the interpretation of the -- I was
2 looking for my cite for what I just read.

3 Again, there is no lot line -- I
4 apologize. I just had my cite turn the page on
5 me. Again, I just simply think that the ZA's
6 argument is consistent with long-standing
7 interpretation and that there is no violation
8 of 2116.2(b) here.

9 CHAIRPERSON MILLER: Okay. If you
10 look at -- I'm not sure which diagram this is.
11 It's the survey or diagram I'm looking at
12 attached to the opposition of property owner
13 to the appeal, Exhibit 18, and then at Tab B.
14 If you look at this you can see a rear yard is
15 identified here for lots 17 and 18.

16 It's certainly natural for the
17 appellant to assume the other side is the
18 front yard but it's not in the definition.
19 Also, the other side, though, is where there
20 is the parking is not a space between the
21 building line and the lot abutting the street.
22 That's why there is no violation.

23 MR. ETHERLY: Absolutely. You see

1 it exactly how I meant to say it, Madam Chair.

2 CHAIRPERSON MILLER: Okay, No. 9.
3 "Zoning Regulation 401.3 requires a minimum
4 lot size of 300 square feet. By virtue of
5 perpetual exclusive parking easements from
6 developer to itself for the benefit of Lots 17
7 and 18, Lot 19 is not 3,024 square in area but
8 rather 2,494 square feet. This violates
9 Section 401.3."

10 The ZA's response is, "The
11 provisions of easements do not subtract areas
12 from lot size calculations. OZA does not
13 deduct these areas as there is no regulation
14 specifying for such deduction. Therefore, no
15 violation of 11 DCMR Section 401.3 lot size
16 has occurred.

17 I think that goes along with what
18 we are saying which is the same thing about
19 easements. They don't enter into these kind
20 of calculations.

21 No. 10, "Zoning Regulation Section
22 404.1 requires a rear yard with a minimum
23 depth of 20 feet by virtue of perpetual

1 exclusive parking easements from developer to
2 itself for the benefit of Lots 17 and 18. The
3 depth of Lot 19's rear yard is a fraction less
4 than 20 feet. This violates Section 404.1"

5 Zoning Administrator's response,
6 "The provisions of easements do not subtract
7 areas from rear yard calculations and OZA does
8 not deduct these areas as there is no Zoning
9 Regulation specifying for such deductions.
10 Therefore, no violation of 11 DCMR Section
11 404.1 rear yard has occurred." For the same
12 reason I would agree with the ZA.

13 No. 11, "Zoning Regulation Section
14 403.2 requires that the building on Lot 19
15 occupy no more than 40 percent of the lot. By
16 virtue of perpetual exclusive parking
17 easements from developer to itself for the
18 benefit of Lots 17 and 18 the portion of Lot
19 19 occupied by the building is at least 45
20 percent. This violates Section 403.2."

21 ZA response, "Easements do not
22 subtract areas from lot occupancy
23 calculations. Therefore, no violation of

1 403.2." Same rationale.

2 No. 12, "Even if the land granted
3 by easement for the benefit of the other lots
4 is included in the area of Lot 19, the
5 building occupies including its bay window in
6 the front about 42.5 percent of the lot in
7 violation of Section 403.2. The same is true
8 with regard to Lot 20 which includes no land
9 subject to the easements."

10 ZA's response, "According to the
11 wall test report dated 3/22/07 for Lot 19 I
12 calculated the actual lot occupancy at 39.34
13 percent which complies with the 40 percent lot
14 occupancy limit set forth for R2 District.

15 The cited bay window feature
16 projects into public space off Fessenden
17 Street and is not counted as part of the
18 subject lot occupancy calculation. This is
19 true for Lot 20. Therefore, no violation of
20 11 DCMR 403.2 has occurred."

21 Well, I would concur that public
22 space is not counted as part of lot occupancy.
23 I don't see any reason to question his

1 calculation. I mean, the accuracy of it.

2 Mr. Loud, do you have any comment
3 on this one?

4 MR. LOUD: Just to add that the
5 wall test report spoke to, I guess, the lot
6 occupancy calculation. I'm not certain what
7 Dunn Whisky had based its calculations on in
8 this case. I don't remember there being a
9 report of some sort.

10 CHAIRPERSON MILLER: Well, I don't
11 either but what we have before us is whether
12 the ZA erred in issuing the building permits
13 and it appears that he relied on the wall test
14 calculations which are these. For us to find
15 an error we would have to see something here
16 that we disagree with.

17 MR. ETHERLY: Just for comparison
18 sake, at Exhibit No. 28, page 7, in the
19 owner's discussion of 403.2, the owner denotes
20 that Lot 19 by its measurements occupies 39.4
21 percent of the lot which, of course, would be
22 a relatively diminimus difference from the
23 39.34 percent which is highlighted by the

1 Zoning Administrator.

2 Again, the rationale for those
3 measurements are both the same that the
4 easement does not diminish the size of Lot 19,
5 nor by virtue of the Zoning Regulations is the
6 bay window projection into public space
7 considered. Again, therefore, the building on
8 Lot 19 occupies 39.4 percent of the lot
9 meeting the 40 percent maximum requirement
10 under 403.

11 CHAIRPERSON MILLER: Thank you.
12 No. 13, "Zoning Regulations 405.9 requires
13 each lot to have a side yard at least eight
14 feet wide. Each building has an outside
15 stairway to the basement built into the
16 foundation of the structure. Each stairway
17 takes up about half the width of what
18 otherwise would be an eight-foot barely side
19 yard for each building. This violates 405.9."

20 I noticed on the plans that what
21 the appellant calls stairways the plans call
22 areaways. The Zoning Administrator says that,
23 "An areaway with a side yard, an areaway being

1 an opening to the ground below grade, does not
2 violate side yard or any yard requirements.
3 Yard requirements apply to buildings and
4 structures four feet or more above grade. No
5 violation of 11 DCMR 405.9 has occurred."

6 I agree with the Zoning
7 Administrator's reasoning here. I don't see
8 any error. I may be going out on a limb here
9 but it also looks like it's covered under
10 2503.4, stairs leading to the ground floor, if
11 this is that, from a door located on the story
12 in which the principal entrance of the
13 building is located and may occupy any yard
14 required under provisions of this title. I'm
15 not sure if this is that as well but I just
16 throw that out.

17 I think the Zoning Administrator
18 when we look at what he determined, which is
19 that areaways being an opening to the ground
20 below grade does not violate side yard or any
21 yard requirements, I would agree with that.

22 MR. ETHERLY: I would agree, Madam
23 Chair. As we were going through the earlier

1 portions of our discussions as it pertained to
2 403.2 on the easements, I was looking for my
3 cite. I would tend to agree with you that I
4 think the Zoning Administrator's
5 interpretation goes directly to -- I would
6 think goes directly to 2503.2 but I would
7 agree with his interpretation of the areaway.

8 CHAIRPERSON MILLER: What we've
9 done is gone through the ZA's rationale for
10 finding no violations and showing his
11 rationale for his decisions. I don't see any
12 error there. I want to see if there are any
13 other final points that we want to make with
14 respect to any other arguments that were made
15 before us on this case.

16 MR. ETHERLY: As I return to
17 Exhibit No. 15, Madam Chair, which is the
18 prehearing memorandum of Todd Boley, in
19 relevant portion there were 13 alleged
20 violations by virtue of the Zoning
21 Administrator's decision.

22 I would submit that I believe we
23 have gone through using Exhibit No. 25 as our

1 guideline, if you will. We have gone through
2 all 13 allegations or all 13 alleged
3 violations I think in fairly great
4 specificity.

5 With respect to just the
6 consideration of the full record and the
7 evidence that has been submitted, Madam Chair,
8 I would argue that I think our deliberation
9 has been incredibly detailed, and rightly so,
10 but also in a very specific nature with
11 respect to what I think are very broad issues,
12 broad important issues that were raised by the
13 appellant.

14 That is, one, the treatment of
15 easements in terms of interpreting lot width,
16 the treatment of easements as they relate to
17 the calculation of street frontage, the
18 treatment of width as they relate to driveway
19 access, discussion even of projections in the
20 side yard.

21 I think clearly for those
22 questions as they relate to easements and the
23 calculations of street frontage, I am hopeful

1 that this deliberation is fairly clear in its
2 guidance for future consideration. It has
3 been long-standing practice as demonstrated by
4 the Zoning Administrator as to how easements
5 are factored and not factored into the zoning
6 calculations for lot width and other
7 measurements.

8 I think the clear testimony, the
9 clear practice of the Zoning Administrator,
10 and consistent with both this Board's juris
11 prudence and, again, my opt-cited Rosedale
12 illustration, even though it is not BZA
13 decision, but rather came under review in
14 another form, demonstrates that this city is
15 no stranger to these types of multi-single-
16 family-dwelling developments.

17 These types of shared common
18 driveways are just that, common, and not
19 unusual and no stranger to our Zoning
20 Regulations and that the Zoning Administrator
21 is very familiar and very skilled in dealing
22 with them in the appropriate way.

23 Again, I'll come back to Mr.

1 Loud's excellent use of the word creative. I
2 understood exactly what the appellant was
3 endeavoring to argue here, that there was a
4 creative approach which resulted in some
5 significant impacts to their quality of life.

6 The Board will recall, my
7 colleagues will recall, that there were a
8 number of pictures presented which showed what
9 the landscape looked like before many of these
10 structures were introduced to the area and
11 what it now looks like. That is, indeed,
12 often times at the heart of what this Board
13 deals with.

14 I believe the Zoning
15 Administrator, DCRA, has demonstrated very
16 compellingly that the Zoning Regulations deal
17 with these types of easements and these types
18 of arrangements in very specific and clear
19 ways.

20 I believe that many of the
21 arguments that were presented by the applicant
22 would require reading either new terms that do
23 not exist into the Zoning Regs, or adopting

1 interpretations that would clearly be at odds
2 with long-standing practice. I believe the
3 record simply did not support taking those two
4 precipitous steps in this appeal.

5 MR. LOUD: I think we've covered
6 everything fairly exhaustively and I would
7 agree with Mr. Etherly regarding the
8 appellant's approach to easements and the
9 impact it would have on lot occupancy and lot
10 dimension and the like and the Zoning
11 Administrator's very, very careful and well-
12 reasoned and supported articulation of each of
13 those issues. I feel that we have been fully
14 responsive to the arguments that were made and
15 I am prepared upon motion to vote on this.

16 CHAIRPERSON MILLER: Thank you. I
17 just want to make a general comment also. I
18 can appreciate that the ANC and some of the
19 neighbors were quite concerned in this case
20 about what appeared to be a great increase in
21 density to what was happening in the rest of
22 their neighborhood.

23 Again, I think we just can't

1 consider the character of the neighborhood.
2 What we had to consider here was whether there
3 were any errors committed by the Zoning
4 Administrator which we didn't find.

5
6 If there is a problem here it may
7 be with a zoning issue that should be brought
8 before the Zoning Commission. But based on
9 what was before us, it's not the Zoning
10 Regulations per se that were cited here.

11 MR. ETHERLY: I would agree Madam
12 Chair, and just perhaps one final pin. As my
13 colleagues are aware there were, again, a
14 number of cases that were submitted by the
15 appellant which from other jurisdictions
16 reached different outcomes.

17 In particular, the Love Ladies
18 Property Owners Association vs. Baragat City
19 Service Company, a New Jersey cite out of
20 1960, which dealt with the issue of private
21 easements and perhaps reached an interpretive
22 outcome that is somewhat different from what
23 we are reaching here.

1 Again, I think the precedence and
2 the long-standing interpretation of our Zoning
3 Regs and, in fact, the specific text of our
4 Zoning Regs mandate the outcome that I believe
5 we are reaching here. I wanted to simply be
6 sure to highlight that this Board looked at
7 all of those cases.

8 I think when you weigh those cases
9 relative to what our practice and what the
10 actual text of our Zoning Regulations speak
11 to, alternative or contrary outcomes to those
12 that we are, I believe, going to be reaching
13 today would simply not be consistent with the
14 text and the long-standing interpretive
15 practice of our Zoning Regs in the District of
16 Columbia.

17 I agree with you that there may,
18 indeed, in other forms or in other revenues
19 may be opportunities to discuss whether or not
20 a departure from the treatment of easements
21 is, indeed, necessary or required but I simply
22 don't think that is before this Board today.

23 CHAIRPERSON MILLER: Okay. I just

1 want to clarify that I wasn't really going
2 there. I was really thinking perhaps that the
3 zoning needs to be changed perhaps. It
4 shouldn't be R2 perhaps. You know, something
5 for their neighborhood. The Zoning Commission
6 can look at it or whatever.

7 Okay. Any other comments? Okay.
8 Then I would like to move to deny Appeal No.
9 17631 of Advisory Neighborhood Commission 3E
10 and Todd Boley pursuant to 11 DCMR Section
11 3100 and 3101 from the decision of the Zoning
12 Administrator to issue building permits Nos.
13 101584, 101585, 101587, and 101588 allowing
14 the construction of four single-family
15 dwellings allegedly not meeting driveway,
16 parking, lot dimension, and lot occupancy
17 requirements in the R2 District at premises
18 4319, 4319 1/2, 4321, and 4321 1/2, Fessenden
19 Street, N.W. Do I have a second?

20 MR. ETHERLY: Second, Madam Chair.

21 CHAIRPERSON MILLER: Further
22 discussion? All those in favor, say aye.

23 ALL: Aye.

1 CHAIRPERSON MILLER: All those
2 opposed? All those abstaining?

3 MR. MOY: Staff would record the
4 vote as three to zero to one. This on the
5 motion of the Chair, Ms. Miller, to deny the
6 Appeal No. 17631, seconded by Mr. Etherly.
7 Also in support of the motion Mr. Loud.

8 Madam Chair, we also have an
9 absentee ballot from Mr. Mann who also
10 participated on the appeal and his absentee
11 vote is to deny the appeal which would give a
12 resulting vote of four to zero to one.

13 CHAIRPERSON MILLER: Thank you.
14 Do we have any other business for this
15 morning?

16 MR. MOY: No, ma'am.

17 CHAIRPERSON MILLER: Then I would
18 suggest that we reconvene at 1:30 for our
19 afternoon session. This hearing is adjourned
20 -- meeting is adjourned.

21 (Whereupon, at 12:37 p.m. the
22 meeting was adjourned.)

23