

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

APRIL 10, 2007

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:09 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER	Chairperson
CURTIS ETHERLY, JR.	Vice-Chairperson
MARC LOUD	Board Member
JOHN A. MANN, II	Board Member(NCPC)

ZONING COMMISSION MEMBER PRESENT:

MICHAEL TURNBULL	Commissioner(AOC)
ANTHONY HOOD	Commission Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

STEVE COCHRAN  
ARTHUR JACKSON  
MATT JESICK  
JOHN MOORE

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Hearing held on April 10, 2007.

<u>AGENDA ITEM</u>	<u>PAGE</u>
<u>CALL TO ORDER:</u>	
Ruthanne Miller . . . . .	4
<u>442 M STREET, LLC</u>	
<u>APPLICATION NO. 17586 ANC-2C</u> . . . . .	5
<u>VOTE TO DENY REQUEST FOR PARTY STATUS</u> . . . . .	12
<u>VOTE TO APPROVE THE APPLICATION</u> . . . . .	59
<u>SHAWN AYIZE SABATER</u>	
<u>APPLICATION NO. 17587 ANC-1B</u> . . . . .	60
<u>VOTE TO APPROVE THE MOTION</u> . . . . .	93
<u>THALIA, LLC</u>	
<u>APPLICATION NO. 17588, ANC-2F</u> . . . . .	94
<u>VOTE TO APPROVE THE APPLICATION</u> . . . . .	136
<u>AFTERNOON SESSION:</u>	
<u>PRELIMINARY MATTER</u>	
<u>NOREEN MARCUS AND JAY SUCHELSKY</u>	
<u>APPLICATION NO. 17590, ANC-3C</u> . . . . .	143
<u>RESCHEDULED</u> . . . . .	150
<u>W STREET, S.E., 38/42-43, LLC</u>	
<u>APPLICATION NO. 17562</u> . . . . .	151
<u>VOTE TO APPROVE THE APPLICATION</u> . . . . .	190
<u>SALVATORE GORGONE</u>	
<u>APPLICATION NO. 17589, ANC-2B</u> . . . . .	192
<u>ADJOURN</u> - Ruthanne Miller . . . . .	407

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

2 10:09 a.m.

3 CHAIRPERSON MILLER: I would like  
4 to call to order our public hearing for April  
5 10, 2007. We have already done the  
6 introductions but the procedures are a little  
7 bit different for a public hearing so I am  
8 going to go through that.

9 Copies of today's hearing agenda  
10 are available to you and are located to my  
11 left on the wall bin near the door. Please be  
12 advised that the proceeding is being recorded  
13 by a court reporter and also webcast live. I  
14 have already asked you to turn off your cell  
15 phones.

16 When presenting information to the  
17 Board please turn on and speak into the  
18 microphone first stating your name and home  
19 address. When you are finished speaking,  
20 please turn your microphone off so that your  
21 microphone is no longer picking up sound or  
22 background noise.

1 All persons planning to testify  
2 either in favor or in opposition are to fill  
3 out two witness cards. These cards are  
4 located to my left on the table near the door  
5 and on the witness tables. Upon coming to  
6 speak to the Board, please give both cards to  
7 the reporter sitting to my right.

8 The order of procedure for special  
9 exceptions and variances is: (1) Statement and  
10 witnesses of the applicant; (2) Government  
11 reports including Office of Planning,  
12 Department of Public Works, Transportation,  
13 etc.; (3) Report of the Advisory Neighborhood  
14 Commission; (4) Parties or persons in support;  
15 (5) Parties or persons in opposition; (6)  
16 Closing remarks by the applicant.

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

1 in opposition including witnesses, 60 minutes  
2 collectively. Individuals, three minutes.

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

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

22 The Sunshine Act requires that the

1 public hearing on each case be held in the  
2 open before the public. The Board may  
3 consistent with its rules of procedure and the  
4 Sunshine Act enter executive session during or  
5 after the public hearing on a case for  
6 purposes of reviewing the record or  
7 deliberating on a case.

8 The decision of the Board in these  
9 contested cases must be based exclusively on  
10 the public record. To avoid any appearance to  
11 the contrary the Board request that persons  
12 present not engage the members of the Board in  
13 conversation. Please turn off all beepers and  
14 cell phones at this time so not to disrupt  
15 these proceedings.

16 The Board will now consider any  
17 preliminary matters. Preliminary matters are  
18 those which relate to whether a case will or  
19 should be heard today such as request for  
20 postponement, continuance, or withdrawal, or  
21 whether proper and adequate notice of the  
22 hearing has been given. If you are not

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

5 Does the staff have any  
6 preliminary matters?

7 MS. BAILEY: Madam Chair, good  
8 morning. Mr. Etherly, Mrs. Miller,  
9 congratulations. Warm welcome to Mr. Cloud.  
10 To everyone good morning and staff does not  
11 have any preliminary matters at this time.

12 CHAIRPERSON MILLER: Thank you.  
13 Then would all individuals wishing to testify  
14 today please rise to take the oath. Ms.  
15 Bailey, would you administer the oath, please.

16 (Whereupon, the witnesses were  
17 sworn.)

18 CHAIRPERSON MILLER: Thank you.  
19 Would you call the first case, please.

20 MS. BAILEY: The first case is  
21 Application No. 17586 of 442 M Street, LLC,  
22 pursuant to 11 DCMR 3103.2, for a variance



1 from the prohibition of creating a second  
2 principal structure on a single lot under  
3 Subsection 3202.3, and a variance from the  
4 rear yard requirements under Section 404, to  
5 allow the renovation of an existing row  
6 dwelling into six residential units and the  
7 conversion of the second floor of an existing  
8 historic carriage house in the rear of the  
9 subject property located at 442 M Street, N.W.  
10 The property is zoned DD/R-5-B.

11 Madam Chair, there was a request  
12 for party status as a proponent of this  
13 project.

14 CHAIRPERSON MILLER: Thank you.  
15 Is that the Foxes, Jonathan and Jessica Fox?  
16 Are they in the hearing room today?

17 Okay. Are you aware of this party  
18 request? Why don't you introduce yourselves  
19 for the record.

20 MR. TUMMONDS: Good morning, Madam  
21 Chair. I am Paul Tummonds with the law firm  
22 of Pillsbury, Winthrop, Shaw, Pittman. With

1        regards to the request for party status, I  
2        believe when you look at the form that the  
3        Foxes filled out, they seem to be in  
4        opposition to the project but I think they  
5        checked the wrong box with regards to being a  
6        proponent or opponent.

7                We believe that we haven't had any  
8        discussions with them.     I don't believe  
9        they're here this evening.   This is a case  
10       where we were on the ANC's agenda in both  
11       March and April.   Both of those meetings were  
12       canceled so there was no ANC review of this  
13       application.

14               With regards to the specifics of  
15       their party status request, I would note they  
16       live on the north side of M Street.   Our  
17       application is for the carriage house on the  
18       south side of our project so they can't see  
19       the carriage house from their property because  
20       they see the main building on 442 M Street.  
21       In large part, for that reason, I don't  
22       believe that they satisfy the standards for

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 party status at present and we would oppose.

2 CHAIRPERSON MILLER: Okay. Thank  
3 you.

4 Is a member of the ANC here today?  
5 Okay. All right. I just want to make a few  
6 comments on this party status application as  
7 well. Since they are not here, they are not  
8 able to really elaborate more fully how they  
9 would participate in the case as a party and  
10 that is what this means, participate as a  
11 party and they are not here.

12 It's not inconceivable that  
13 someone could participate in a case as a party  
14 if they fully address the legal issues even  
15 though they couldn't be here. That's not the  
16 case with respect to this party status  
17 application so I don't need to go further in  
18 suggesting that we deny party status. I'll  
19 hear from others.

20 VICE-CHAIR ETHERLY: I would  
21 agree, Madam Chair. I think on the face of  
22 the application itself, as has been indicated,

1 the level of discussion, if you will, with  
2 regard to some of the more pertinent inquiries  
3 of the party status application in relevant  
4 portion, Item No. 6 which deals with how the  
5 person's interest will be more significantly  
6 distinctively or uniquely affected in  
7 character or kind.

8 While there are, of course,  
9 pertinent points that are raised, the level of  
10 discussion, in my opinion, also does not rise  
11 to the level of satisfactorily demonstrating  
12 party status. It would be my agreement to  
13 move forward in the direction that you have  
14 laid out. I would move to deny the party  
15 status application of Jonathan and Jessica Fox  
16 and would invite a second.

17 CHAIRPERSON MILLER: Second. All  
18 those in favor say aye.

19 ALL: Aye.

20 CHAIRPERSON MILLER: Those  
21 opposed? I would also suggest -- do you want  
22 to call the vote, Mr. Moy? We are not always

1 this formal about it. Or Ms. Bailey?

2 MS. BAILEY: Madam Chair, the vote  
3 is five zero zero to deny the request for  
4 party status. The motion was made by Mr.  
5 Etherly, seconded by Mrs. Miller. Mr. Mann,  
6 Mr. Turnbull, and Mr. Loud are in agreement.

7 CHAIRPERSON MILLER: Thank you. I  
8 would suggest, as we usually do, that we  
9 accept the representations made on the party  
10 status application as testimony in the case  
11 and enter it as evidence.

12 Okay. Mr. Tummonds, would you  
13 like to proceed with your case?

14 MR. TUMMONDS: Sure. Absolutely.  
15 I think we have a very straightforward case  
16 here. There is no opposition here. We have  
17 submitted for the record three letters of  
18 support this morning from residents of the 400  
19 and 500 blocks of M Street.

20 There is a letter of report from  
21 Office of Planning in support as well. With  
22 that, I think we can give an abbreviated

1 presentation and then we would rest  
2 predominately on our satisfaction of the three  
3 prongs of the variance test in our prehearing  
4 statement.

5 Again, we are seeking to do is  
6 create the single residential unit in the  
7 second floor of an existing carriage house  
8 which is located in an historic district in an  
9 R-5-B zone, a district which allows multi-  
10 family housing.

11 We are not making any changes to  
12 the footprint or the height of the carriage  
13 house and there will be no change to the  
14 overall lot occupancy or FAR of the project  
15 with the introduction of this residential  
16 unit.

17 It is through the introduction of  
18 this residential unit that we are creating a  
19 new principal structure to this carriage  
20 house. While the carriage house will have all  
21 the same appearances as really an accessory  
22 structure to the main structure, the mere

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 introduction of that unit requires us to be  
2 here seeking variance approval to allow two  
3 principal structures on a single record lot.

4 In addition, once we have the  
5 magic of making that become a principal  
6 structure, that structure needs to have a  
7 required rear yard. We don't satisfy that  
8 rear yard. The irony here is if that was an  
9 accessory structure and we didn't have the  
10 residential unit in that structure, that would  
11 be fine. We would not have the need for  
12 relief from the rear yard variance, the rear  
13 yard standards in this variance that we are  
14 seeking today.

15 I would like to now have Mr. Julio  
16 Murillo, the applicant, discuss briefly his  
17 discussions with the community and his goals  
18 for this project.

19 MR. MURILLO: Good morning and  
20 congratulations, Ms. Miller, and Mr. Etherly.  
21 Let me start by describing briefly what our  
22 development process consist of initially by

1 pointing out that we have a long history of  
2 historic renovation work in the District of  
3 Columbia.

4 We have been doing this since  
5 1984. Some notable projects that we have  
6 recently completed include the Egyptian  
7 Ambassador's residence as well as the Turkish  
8 Ambassador's residence which are being  
9 featured in multiple historic releases.

10 We feel we have quite a bit of  
11 experience in this area and we enjoy doing  
12 this. It is the kind of work that we look for  
13 in our own projects. Since we started our  
14 development business we have been  
15 predominately present in transitional  
16 neighborhoods and bringing new development,  
17 new safety, new different product types to new  
18 communities to try to establish a better  
19 community in those locations.

20 We understand the need for  
21 additional housing of different types. We  
22 understand the need for additional safety. We



1 understand the need for our participation in  
2 the community to make these communities  
3 succeed.

4 In doing so in every project the  
5 way we approach it is we deal very closely  
6 with the neighbors. We deal closely with the  
7 ANCs of the neighborhoods. We deal very  
8 closely with the HPO and the HPRB to make sure  
9 that these properties and these projects are  
10 developed in accordance with those guidelines.

11 As a result of these efforts, we  
12 have obtained support from the neighbors from  
13 the HPO and the HPRB and the Office of  
14 Planning, as Mr. Tummonds has said.

15 We feel that we do make a  
16 difference and we feel that this particular  
17 case is a fairly simple one in that we are  
18 asking to take a dilapidated second floor of  
19 a carriage house which is on the other side of  
20 an alley to a 300-unit building that is being  
21 built on New York Avenue.

22 We feel that the alley itself will

1 require a more human presence, bring vitality  
2 to the Mt. Vernon Square, Mt. Vernon Triangle  
3 area. In that light, we would like to get  
4 into the technical aspects of the project and  
5 I'll defer to Mr. Bonstra for that testimony.

6 CHAIRPERSON MILLER: I just want  
7 to interrupt you for one second before you  
8 move to a different topic because you made  
9 mention to the fact that you work closely with  
10 the ANCs but we don't have an ANC report in  
11 this case.

12 Is there anything else you can put  
13 on the record as to how you worked with this  
14 ANC even though there is no ANC report if that  
15 did happen?

16 MR. MURILLO: At the initial  
17 outside we did work with the ANC and we did  
18 have a vote from them in the original  
19 conceptualization of the project before the  
20 HPRB hearing.

21 CHAIRPERSON MILLER: They  
22 supported your project before HPRB?

1 MR. MURILLO: That's correct.

2 CHAIRPERSON MILLER: And it hasn't  
3 changed since then?

4 MR. MURILLO: It has not changed,  
5 no.

6 CHAIRPERSON MILLER: Okay.

7 MR. MURILLO: Like Mr. Tummonds  
8 said, we have attempted two meeting  
9 presentations with the ANC in March and April.  
10 Both were canceled for various reasons so we  
11 have not been successful in presenting our  
12 specific case regarding the carriage house to  
13 them on this round.

14 CHAIRPERSON MILLER: Okay. When  
15 they voted on your project for HPRB did they  
16 understand that you wanted to use the carriage  
17 house for a residence on the second floor?

18 MR. MURILLO: Yes.

19 CHAIRPERSON MILLER: They did  
20 understand that?

21 MR. MURILLO: Yes.

22 CHAIRPERSON MILLER: Okay. Thank

1       you.

2                       Good morning.

3                       MR. BONSTRA:   Good morning.   Bill  
4       Bonstra, Bonstra Haresign Architects. I would  
5       also like to add on the community note that we  
6       met with the Mt. Vernon Square Civic  
7       Association, I believe, and presented the  
8       project to them early on as well explaining  
9       the zoning as well as the historic  
10      implications for the project.

11                      I'm just going to touch briefly.  
12      I'll give you an overall understanding of the  
13      project, the massing, and where the buildings  
14      are located. These are the facade pictures  
15      that we submitted. This is the front facade  
16      of the building. Very wonderful and elegant  
17      historic structure.

18                      This is a shot of the carriage  
19      house at the rear from the alley. Looking on  
20      the site plan the BZA 1 drawing that you have,  
21      this is the main house which has 16 units by  
22      right. I'm sorry? Did I say 16? Six units.

1 We would be here for more relief, wouldn't we?  
2 Six units, a rear yard, and this is the  
3 carriage house then.

4 Two-story carriage house is the  
5 contributing structure to the historic  
6 district. There are unique characteristics of  
7 this site. The topography is quite steep from  
8 high to low at the alley. It is also a very  
9 deep site, 183 to 189 feet deep which is  
10 uncharacteristically deep. The alley Brown's  
11 Court is 30 feet wide so that is an unusual  
12 situation as well.

13 This is a section then of the  
14 carriage house if it existed as a two-story  
15 carriage house. We have four parking spaces,  
16 two parking spaces that are zoning required  
17 spaces but we do have parking for four cars at  
18 the lower level.

19 Then the upper level is more like  
20 a loft with a stair from the front. We also  
21 have access from the front of the property  
22 which is a nice accommodation in order to make

1       that unit conform to building code in terms of  
2       access from the front of the property.

3               CHAIRPERSON MILLER:    I just want  
4       to interrupt you for a second before you move  
5       off parking.   I know you are not here for a  
6       parking variance but could you explain the two  
7       spaces that you have, the two that are  
8       required and the four, exactly where they are?

9               MR. TUMMONDS:       In fact, this  
10       project will obtain a parking waiver from the  
11       historic so this property does not have any  
12       required parking spaces because it was deemed  
13       to be a renovation contributing building in  
14       the historic district.   We are providing four  
15       spaces.

16              Two of those spaces would be  
17       deemed to be zoning compliant 9 by 19 non-  
18       stack spaces but, again, I think one of the  
19       reasons why this project has received, and  
20       when you read the letters in support of the  
21       community having four spaces for the seven  
22       units was important to the community.   The

1 short answer, zoning regulations are satisfied  
2 because we've got the parking waiver.

3 CHAIRPERSON MILLER: Where exactly  
4 are they, though? Are two of them in the  
5 garage?

6 MR. TUMMONDS: The first floor of  
7 the carriage house.

8 CHAIRPERSON MILLER: That holds  
9 two spaces. Then the other two are outside  
10 it?

11 MR. TUMMONDS: No. Actually this  
12 is all inside.

13 CHAIRPERSON MILLER: Four inside?

14 MR. TUMMONDS: They are all inside  
15 the garage.

16 MR. BONSTRA: So there is no  
17 parking on the outside. Mr. Tummonds talked  
18 about the rear yard issue. As you can see  
19 here, we have, I believe, a five-foot rear  
20 yard when that becomes a primary structure  
21 which we hope you will vote to support.

22 Then we ask for relief from the

1 rear yard requirement by the nature of the  
2 existing location of the building. There are  
3 no physical alterations other than windows and  
4 stairs and what have you to that structure.

5 CHAIRPERSON MILLER: I have one  
6 other question on the parking. I understand  
7 the waiver because it's historic but if it  
8 weren't historic and you didn't have a waiver,  
9 how many parking spaces would be required with  
10 this number of units?

11 MR. BONSTRA: We have seven units  
12 so we would have to have three.

13 CHAIRPERSON MILLER: Three. Okay.

14 MR. BONSTRA: Non-tandem spaces.

15 CHAIRPERSON MILLER: Okay. You  
16 have four tandem spaces.

17 MR. BONSTRA: Correct.

18 CHAIRPERSON MILLER: Okay. Thank  
19 you.

20 MR. MANN: Madam Chair, I have a  
21 couple of questions. Prior to the carriage  
22 house becoming a principal structure, from



1       what point to what point was the rear yard  
2       previously measured?

3               MR. TUMMONDS:   It was measured to  
4       the rear of the main building because the  
5       carriage house is deemed to be an accessory  
6       structure so you can have accessory structures  
7       in your required rear yard.

8               MR. MANN:     So does that go from  
9       the -- all right.   The yard would have gone  
10      from the rear of the main building to the  
11      alley?

12              MR. TUMMONDS:   Yes.

13              MR. MANN:     I see.   Is that still  
14      counted -- is that entire length still counted  
15      as the rear yard for that one structure or  
16      does the rear yard stop at where the second  
17      structure begins now?

18              MR. TUMMONDS:   Right now if we  
19      were to create a theoretical lot, I guess, for  
20      that it would start where the face of the  
21      carriage house begins.

22              MR. MANN:     But that doesn't need

1 to be considered because we are not doing  
2 that. Is that right?

3 MR. TUMMONDS: That's my  
4 understanding.

5 MR. MANN: I see. Okay. Thanks.

6 CHAIRPERSON MILLER: Do you have  
7 more for your presentation?

8 MR. TUMMONDS: No. As I said, we  
9 would rest. We think we have thoroughly  
10 discussed the satisfaction of three prongs of  
11 the area variance in our prehearing statement.  
12 I can tough on it briefly if you would like.

13 Mr. Bonstra alluded to the fact  
14 that we are subject to an extraordinarily  
15 exceptional situation or condition due to the  
16 lot's topography, its size, the fact that we  
17 do have structures on this lot that are deemed  
18 to be contributing to the historic district.

19 With regards to the second prong  
20 of the variance test, we think we are faced  
21 with a practical difficulty and it is  
22 unnecessarily burdensome to not be allowed to

1 have this residential unit. We note in the  
2 Gilmartin case the test that one can look at  
3 to determine this include the amount of  
4 variance really for question and the severity  
5 of the denial of that variance relief.

6 As we noted here, this is a  
7 residential zone. If we are not allowed to  
8 have a residential unit in this second floor  
9 of the carriage house, it can basically be  
10 used for storage or, as the Office of Planning  
11 pointed out, an artist studio. Realistically  
12 I think an artist studio would have more of a  
13 detrimental impact to the surrounding  
14 neighborhood.

15 There would be more use. There  
16 would be more flow of goods and people coming  
17 in there than if it was to be a residential  
18 unit. We think the introduction of  
19 residential unit is entirely appropriate and  
20 in keeping with this R-5-B multi-family  
21 dwelling zone.

22 Then, finally, with regards to the

1 third prong of the test that granting this  
2 variance will not impair the intent or  
3 integrity of the zone plan, we think of the  
4 true benefits of this is not just the  
5 renovation of this historic structure bringing  
6 it back as a true benefit to the people who  
7 walk down Brown's Court and that alley and  
8 that neighborhood, but also having eyes on the  
9 street, eyes on the alley in this case.

10 There is a lot of activity back in  
11 that alley now certainly with the development  
12 of the Yalestein Laundry project to the south.  
13 We think that 30-foot alley gets a lot of  
14 traffic. Having people back there is a  
15 benefit. Again, the zoning district permits,  
16 allows multi-family dwellings.

17 We think that having seven units  
18 in total on this project including a unit over  
19 the carriage house is consistent with the  
20 comprehensive plan designation for this  
21 property and also the zoning regulation's  
22 goals for development in the R-5-B zone

1 district.

2 CHAIRPERSON MILLER: Let me ask  
3 you about your uniqueness practical difficulty  
4 test. Do you think that the argument that you  
5 are making with respect to the fact that it is  
6 certainly historic, and I understand it is on  
7 the land and is already improved with that and  
8 you have to work around it or whatever, and  
9 its use is limited, is that not true for all  
10 historic carriage houses?

11 MR. TUMMONDS: I think that is why  
12 there have been, as we noted in our prehearing  
13 statement, a number of instances in which the  
14 BZA has approved this sort of area variance  
15 relief. As we noted in 2002, on this block  
16 420 M Street there was a carriage house  
17 renovation, introduction of residential unit  
18 in that carriage house, and the BZA again  
19 accepted that view that it does meet the  
20 practical difficulty standard.

21 The answer is yes and I think the  
22 BZA has followed that test on a number of

1 occasions. There is a practical difficulty  
2 with having that space be brought to a  
3 contributing use to the area, to the lot, to  
4 the six residents of the main building.

5 Having that just be storage, is  
6 that unnecessarily burdensome to have the  
7 developer of this property only have that use?  
8 I believe that it would satisfy that test. I  
9 think the nature of the relief we are  
10 requesting, the other prong of the test, the  
11 diminimus nature, again we are just seeking to  
12 introduce residential use, use that is  
13 permitted in the zone and permitted on this  
14 property.

15 CHAIRPERSON MILLER: Was there a  
16 reason that it wasn't permitted in a carriage  
17 house in a residential zone?

18 MR. TUMMONDS: I think maybe the  
19 distinction there would be a lot of times  
20 residential carriage houses were not  
21 necessarily in R-5-B zone districts so a lot  
22 of times you have a carriage house in an R-1,

1 R-2 zone district which are more of a single  
2 family district so I could understand the  
3 distinction there.

4 In a multi-family dwelling in a  
5 district like the R-5-B district, I think it  
6 makes sense to be able to allow that  
7 additional residential unit whereas if it was  
8 a carriage house in an R-1-A zone, then it is  
9 really going against the notion of single  
10 family home districts are 1-A or 1-B.

11 CHAIRPERSON MILLER: Did you  
12 actually consider -- I mean, did the applicant  
13 actually consider the uses which are allowed  
14 for that space?

15 MR. TUMMONDS: The stable?  
16 Probably not. The parking garage on the  
17 second floor, probably not.

18 CHAIRPERSON MILLER: I mean, it  
19 gets to the point where identifying  
20 specifically the, you know what I mean, the  
21 difficulty. I mean, artist studio, okay. Is  
22 there really a market for that or it doesn't

1 make sense in this case? I mean, how did you  
2 arrive at that?

3 MR. MURILLO: We approached it  
4 specifically, as Mr. Tummonds said, as a way  
5 of increasing the presence on the alley for  
6 safety reasons. We think that the structure  
7 itself is a wonderful structure. I think it  
8 lends itself to a dwelling unit. I think Mr.  
9 Tummonds is right. In an artist studio type  
10 of use you would have a different feel and  
11 element in the alley.

12 There are a lot of dwelling units  
13 on that block. Certainly with the Yalestein  
14 Laundry project there will be more. Including  
15 the loft section of that project it's all in  
16 keeping with the same concept which is a  
17 restored historic structure turned into  
18 dwelling.

19 We really only approached it in  
20 that way and working, again, with the  
21 neighbors and with the ANC in the early stages  
22 as well as with the HPRB and reiterated by the



1 Office of Planning I guess our thinking sort  
2 of became one track minded, if you will,  
3 thinking that is the best use given the zone.  
4 Does that answer your question?

5 CHAIRPERSON MILLER: I mean, just  
6 reading into it I don't think you provided  
7 evidence on this but you mentioned it. I  
8 mean, if you didn't use it as a residence, it  
9 would be an economic impact. Is that right?

10 MR. MURILLO: It would certainly  
11 have an economic impact at the same time as  
12 most likely this particular space would go to  
13 storage probably for the rest of the units in  
14 the building. Not that storage is in ample  
15 supply in the city but we really felt that  
16 given what is happening in that area and given  
17 the type of activity that we see in the 30-  
18 foot alley that a dwelling was the best use.

19 The practical difficulty, I think,  
20 is precisely because it is an historic  
21 structure and reconfiguring it or moving it or  
22 building it someplace else didn't really enter

1 our thoughts because we know we have to comply  
2 with those guidelines.

3 MR. TUMMONDS: Would you be able  
4 to renovate the carriage house to the same  
5 level of detail financially if you didn't have  
6 that residential unit in that carriage house?

7 MR. MURILLO: Probably not. I  
8 mean, we would certainly renovate and improve  
9 it but I think it is one thing to build a  
10 storage facility and quite different to build  
11 a dwelling which people will live and enjoy a  
12 certain life standard.

13 CHAIRPERSON MILLER: I have one  
14 other question. Mr. Tummonds, do you know the  
15 rationale for the regulation that there  
16 shouldn't be two principal structures on a  
17 single lot?

18 MR. TUMMONDS: I think this is  
19 somewhat of a guess on my part but I think it  
20 probably has a lot more to do with much larger  
21 lots than rowhouse lots in the 400 block of M  
22 Street. I think it probably has a lot more to

1 do with the ability to subdivide large lots.

2 I think this also really kind of  
3 runs into the 2516 cases, the cases where we  
4 have the theoretical lot subdivision where we  
5 go through on subdividing lots to show how  
6 multiple structures could satisfy the zoning  
7 requirements even though they may technically  
8 be on a single record lot.

9 I don't think the 3202.3 was --  
10 that section, the two principal sections on  
11 single record lots, were really thought of as  
12 addressing a situation like this. I think  
13 this is somewhat of an anomaly because, as I  
14 said, it looks like an accessory structure.  
15 To all people who would walk by it, I think  
16 they would think of it as an accessory  
17 structure.

18 I don't think anyone walking down  
19 the alley is going to say, "Oh, that must be  
20 a principal structure. It still has the same  
21 feel. I don't think we are detracting from  
22 the area by having that residential unit in

1       there. I think people take it for what it is.

2               It's a carriage house. It looks  
3       like an accessory structure to the main  
4       structure. Just by putting that residential  
5       use in that second floor, I don't think we  
6       take away from that feel, that appearance of  
7       that neighborhood.

8               CHAIRPERSON MILLER: Okay. I'm  
9       sorry. I have one more question.

10              MR. TUMMONDS: That last one was  
11       tough.

12              CHAIRPERSON MILLER: I think  
13       you're up to the challenge. Okay. You cited  
14       a lot of carriage house cases but you didn't  
15       attach them. I'm wondering if you want to  
16       highlight any of the facts of the cases that  
17       you think are similar to this.

18              MR. TUMMONDS: I think the main  
19       one would be the 420 M Street. I believe this  
20       application was approved in 2002. It is four  
21       or five lots to the east of this project. The  
22       interesting thing there is that I think we

1 have a much more compelling case because I  
2 think that case at one time they looked at  
3 having a connection between the two buildings  
4 so they would get away from the notion of it  
5 being truly an accessory structure and the  
6 main structure.

7           You have a trellis that's one  
8 structure. I think this is a case where it  
9 looks like an accessory structure. We are  
10 maintaining it as an accessory structure. I  
11 think that is why HPRB approved it. I think  
12 that is how we were able to satisfy the  
13 standards here.

14           I think the introduction of a  
15 carriage house on this same block that fronts  
16 on this same alley and the fact that that was  
17 approved has, to a large degree, a bearing on  
18 this case to think that these types of  
19 residential uses on the alley are appropriate  
20 in this block. I do think that they will  
21 provide a level of safety for that alley that  
22 is not there now.

1 CHAIRPERSON MILLER: There are  
2 instances, though, in which the zoning  
3 regulations don't favor residences on alleys.  
4 Is that right? How is this different?

5 MR. TUMMONDS: Those are cases in  
6 which an alley is less than 30 feet wide. To  
7 have properties with buildings on an alley you  
8 have to show that there are 30-foot wide  
9 alleys. I think that has a lot to do with  
10 making sure that there aren't substandard  
11 units on narrow alleys that don't have the  
12 proper amount of light and air that are being  
13 provided for residential uses.

14 I think in this case we can show  
15 that with the 30-foot wide alley with a  
16 significant amount of space between this main  
17 building, this accessory structure.

18 Because we do have this very deep  
19 lot, as Mr. Bonstra said, we are providing a  
20 significant amount of light and air to that  
21 residential unit and I think that is one of  
22 the main issues that dictate the ability to

1 have residential uses in an alley, the amount  
2 of light and air that is provided.

3 MR. BONSTRA: If I could just add,  
4 as I mentioned before, this is not access off  
5 the alley. The distinction is that we do have  
6 a way from the public, from the front of the  
7 building to this structure through the  
8 existing townhouse.

9 That is a distinction I think  
10 needs to be made. One comes in the front  
11 door, goes through the building, down the  
12 stair and out the back in order to get to this  
13 so it's not accessed from the alley.

14 CHAIRPERSON MILLER: Okay. I keep  
15 saying I have one more question but I do. As  
16 far as the topography goes, I think that you  
17 made reference to the topography being unique  
18 and I'm not sure I got how it's unique and how  
19 it relates to the practical difficulty here.

20 MR. TUMMONDS: I would put the  
21 topography in a confluence of factors.

22 CHAIRPERSON MILLER: Okay. Thank

1       you.

2                   Are there any other questions?

3       Yes, Mr. Turnbull.

4                   MR. TURNBULL:    Thank you, Madam  
5       Chair.  I just had one question.  The alley  
6       elevation of the carriage house looks fairly  
7       straightforward.  You are using the existing  
8       openings that are there and you are in-filling  
9       with new windows and a new garage door.  Talk  
10      to me about the garden elevation of the  
11      carriage house.  There is an awful large  
12      expanse of glass.  Is that opening there?

13                  MR. BONSTRA:     These are the  
14      elevations -- this is the elevation at the  
15      rear of the carriage house.  This is the  
16      interior elevation.  What exist now since the  
17      carriage house had fallen into disrepair a  
18      large area of the facade facing the courtyard  
19      had actually been in-filled with concrete  
20      block, CMU, in order to keep the carriage  
21      house intact.

22                   What we are simply doing is



1 removing that errant fabric that is not part  
2 of the contributing structure and we are  
3 filling that in with glass so there will be  
4 access visually to a wonderful garden as I  
5 showed on the site plan between the two  
6 buildings.

7 MR. TURNBULL: So there is  
8 extraneous block new CMU that goes all the way  
9 up to where you have the steel?

10 MR. BONSTRA: That whole facade  
11 had been filled in with concrete block, yes.

12 MR. TURNBULL: And the rest of the  
13 structure is brick?

14 MR. BONSTRA: That's correct.  
15 This was also presented to the HPRB and we  
16 have approval for that. They understood the  
17 condition of the building and that has been  
18 approved on historic grounds.

19 MR. TURNBULL: Okay. Thank you.

20 MR. LOUD: Madam Chair. I figured  
21 out how to work the microphone. Just one  
22 quick question for clarification if I can.

1 First let me commend your team for talking to  
2 the immediate neighbors next door. It looks  
3 like from information we were presented with  
4 this morning that the neighbors at 440 and 446  
5 support the project so that is very important.  
6 I just wanted to clarify is 446 an immediate  
7 next door neighbor or is it two properties  
8 over?

9 MR. MURILLO: It's two properties  
10 over.

11 MR. LOUD: Were you able to speak  
12 with the neighbor that has the immediate  
13 property?

14 MR. MURILLO: Actually, we have a  
15 very good relationship with that neighbor.  
16 It's a multi-unit building. I believe it's  
17 four units. On the west side of our property  
18 is an abandoned building so there is no  
19 neighbor on that side.

20 MR. LOUD: All right. Thank you  
21 again. Just want to commend your team.

22 MR. MURILLO: Thank you.

1 CHAIRPERSON MILLER: Thank you.  
2 Any other questions? Okay. We can go to the  
3 Office of Planning.

4 MR. JESICK: Thank you, Madam  
5 Chair, members of the Board. My name is Matt  
6 Jesick. The applicant in this case is seeking  
7 variance from two sections of the zoning  
8 regulations, Section 3202.3 which permits only  
9 one principal structure per lot, and Section  
10 404 which governs rear yard requirements.

11 When looking at variance relief,  
12 of course, we have the three-part test. The  
13 first part is the property in any way unique  
14 or is there some other extraordinary or  
15 exceptional situation on the property. In the  
16 view of the Office of Planning there is.

17 One factor is that this is a two-  
18 story carriage house and that fact combined  
19 with that the structure cannot be  
20 significantly altered due to its contributing  
21 nature to the Mt. Vernon Square historic  
22 district makes this an extraordinary

1 situation.

2 The second part of the test is  
3 there a practical difficulty resulting from  
4 that extraordinary situation. Again, we think  
5 there is. When you look at the range of uses  
6 that could potentially go on that second floor  
7 of the carriage house, they are very limited  
8 so that fact does rise to the level of  
9 practical difficulty in the view of the Office  
10 of Planning.

11 If the relief were to be granted,  
12 the third part of the test asks would there be  
13 a detriment to the public good or the intent  
14 of the zoning regulations. I think clearly  
15 there would be no detriment to the public  
16 good.

17 The carriage house would be  
18 renovated to improve the appearance of the  
19 alley and hopefully the safety of the alley as  
20 well. There would be no impairment to light  
21 or air, no extraneous noise or orders  
22 resulting from a residential unit in that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 location. The size of the carriage house is  
2 not being expanded at all.

3           Regarding the intent of the zoning  
4 regulations, while Section 3202.3 does say not  
5 more than one principal structure per lot, we  
6 feel it was not the intent of the zoning  
7 regulations to penalize someone for renovating  
8 an historic structure and complying with  
9 historic district guidelines. We feel that  
10 was not the intent of the zoning regs.

11           OP has not received any letters of  
12 support or opposition to the case. We are  
13 recommending approval of the requested  
14 variances. For the rest of my testimony I  
15 would just rest on the record. Thank you.

16           CHAIRPERSON MILLER: Mr. Jesick,  
17 how unique is this type of carriage house,  
18 two-story carriage house?

19           MR. JESICK: There are certainly  
20 other carriage houses even in this immediate  
21 neighborhood. I couldn't quantify the exact  
22 number but we do see similar cases around the

1 city. It is somewhat unique, I would say.

2 CHAIRPERSON MILLER: Okay. We're  
3 not talking about hundreds of carriage houses  
4 and we are also talking about carriage houses  
5 that are on the property that can't be changed  
6 and that is an exceptional situation anyway.  
7 I was just wondering how prevalent this was.  
8 It's not that prevalent.

9 MR. JESICK: It's not that  
10 prevalent. If the Board would like, I can  
11 certainly ask that question of historic  
12 preservation.

13 CHAIRPERSON MILLER: That's okay.  
14 I just wanted to get a general idea here. I  
15 hear what you're saying and I think that is  
16 really an important issue that applicants  
17 shouldn't be penalized for preserving historic  
18 treasures like a carriage house. I think  
19 there may be some kind of a balancing here.

20 I don't know whether things have  
21 changed or not or whether Office of Planning  
22 is of the view at this point that some of the

1 uses that were allowed in it before are now  
2 becoming more outdated.

3 MR. JESICK: That's what I was  
4 going to reference. We think an artist studio  
5 might be an acceptable use here. It's a  
6 question of the market. Again, there are  
7 potential impacts to the alley. When talking  
8 about does this rise to the level of practical  
9 difficulty, I think that is certainly the  
10 question I struggled with. I feel that it  
11 does rise to that level given the very, very  
12 limited range of uses that could possibly go  
13 in that space.

14 CHAIRPERSON MILLER: Thank you.  
15 Are there any other questions?

16 MR. TUMMONDS: No questions.

17 CHAIRPERSON MILLER: You have a  
18 copy of the Office of Planning Report?

19 MR. TUMMONDS: Yes, I do.

20 CHAIRPERSON MILLER: Okay. Has  
21 the ANC come in the meantime to the  
22 proceeding? I don't see them. Okay. Are

1       there any other persons who wish to testify on  
2       this case either in support or opposition?  
3       Okay. Not hearing from any one then I think  
4       it's time for your closing, Mr. Tummonds.

5               MR. TUMMONDS:     Thank you very  
6       much. We believe with the materials that we  
7       filed in the prehearing statement, the  
8       testimony we provided today, we have shown  
9       that we have satisfied the area variance  
10      standards for having a second principal  
11      structure on the slot as well as area variance  
12      relief from the rear yard requirement for that  
13      second principal structure. I think we would  
14      ask for your approval at your earliest  
15      convenience.

16              CHAIRPERSON MILLER:   Thank you.  
17      Okay. The Board is ready to deliberate on  
18      this now.

19              VICE-CHAIR ETHERLY:   Madam Chair,  
20      if it's appropriate I am more than comfortable  
21      moving forward with a motion to move approval  
22      of Application 17586 of 442 M Street, LLC



1       pursuant to 11 DCMR Section 3103.2 for  
2       variance from the prohibition of creating a  
3       second principal structure on a single lot  
4       under Subsection 3202.3 and a variance from  
5       the rear yard requirements under Section 404  
6       to allow the renovation of an existing row  
7       dwelling into six residential units and the  
8       conversion of the second floor of an existing  
9       historic carriage house in the rear of the  
10      subject property at premises 442 M Street N.W.  
11      and I would invite a second.

12               MR. MANN:    Second.

13               CHAIRPERSON MILLER:   Second.

14               VICE-CHAIR ETHERLY:    I love it  
15      when we have competing seconds.  Madam Chair,  
16      I think the record is very full and complete.  
17      I definitely agree with the thrust of your  
18      questions as related to the spirit of 3202.3  
19      with regard to creation of a second principal  
20      structure.

21               As sometimes I am known to do, I  
22      will actually take the variance test in

1 reverse because I think when we speak to the  
2 issue of no harm to the public good or to the  
3 zoning plan, I think that is perhaps where it  
4 is most applicable to talk about the spirit of  
5 3202.3.

6 I think this has been discussed by  
7 the applicant at length. The manner in which  
8 the applicant has chosen to approach this  
9 carriage house, I think, is very respectful of  
10 the spirit of 3202.3 and, as been indicated by  
11 the Office of Planning, I think is in keeping  
12 with this notion that the intent, if not  
13 necessarily in reality, I think at least in  
14 application is not to penalize property owners  
15 for endeavoring to make productive use of what  
16 are indeed architectural gems in our city.

17 This Board often times has dealt  
18 in both this arena and other arenas with the  
19 challenge of how do you articulate our alleys,  
20 if you will, but do it in a way that is  
21 respectful of the street scape.

22 Perhaps it is somewhat difficult

1 to think of a street scape in an alley setting  
2 but these are increasingly becoming more  
3 vibrant parts of many of our communities,  
4 especially when we talk about our historic  
5 districts where alleys perhaps in another era  
6 were, indeed, utilized more aggressively  
7 sometimes to the detriment of the community  
8 perhaps as tenements or other types of  
9 substandard housing options.

10 Clearly that is not the case here  
11 but I am comforted by the fact that when we  
12 speak to the issue of no harm to the public  
13 good as the applicant has indicated, the scope  
14 and the massing with which they are trying to  
15 approach this dwelling is not in any  
16 significant way being altered or expanded in  
17 terms of how they are treating the  
18 articulation of the rear.

19 They are remaining very true to  
20 what is already in existence, if you will. I  
21 was very pleased to hear Mr. Bonstra note that  
22 we are not introducing any type of new

1 entryway to the rear portion of the property  
2 but rather it is going to be primarily  
3 accessed from the front of the address itself  
4 coming through what is the rear yard of the  
5 other structure.

6 Those are all factors which I  
7 think are very much in keeping with the spirit  
8 of 3202.3 while at the same time making a very  
9 creative use of this particular property. As  
10 we move to kind of the front portion and then  
11 I'll come to the middle of the sandwich, if  
12 you will.

13 As we move to the front portion of  
14 the variance test, clearly I think there is an  
15 extraordinary or exceptional situation here  
16 and that is the contributing historic nature  
17 of the carriage house itself. Again, the  
18 challenge is how do you maintain what is an  
19 architectural asset of a contributing  
20 structure, but, at the same time, use it in  
21 what is a productive way, if you will.

22 I think the exceptional situation

1 clearly is the existence and uniqueness of the  
2 carriage house and the fact that it is a  
3 contributing structure and that you have to  
4 keep it. You can't tear it down. You can't  
5 demolish it in part and perhaps make it more  
6 in keeping with today's modern standards. You  
7 have to be respectful of it. You have to keep  
8 it so what do you do with it?

9 I think it would, indeed, be an  
10 incongruous result if we were to simply say  
11 the zoning regs simply dictate that you have  
12 to use it as storage. It's going to be high-  
13 priced and very nice storage but storage  
14 nevertheless. I think the approach that the  
15 applicant is taking is a very creative one and  
16 one that gets you four parking spaces in  
17 there.

18 It's going to be interesting to  
19 see how it works in practice but you're going  
20 to get them in there. I think what has been  
21 presented to us has indeed been a very nice  
22 way of trying to stay true to the spirit of

1 the regs without doing any harm or damage to  
2 it.

3 With respect to the second prong  
4 in terms of practical difficulty, I think the  
5 factors as I've already discussed them really  
6 kind of answer that question very clearly.  
7 The practical difficulty is that you are not  
8 left with a whole lot of options with regard  
9 to use of this particular aspect of the  
10 property. If you do not get the variance  
11 relief and, again, I think you are going at  
12 the relief in a very creative and  
13 conscientious manner.

14 I think as was indicated by Mr.  
15 Loud, you've gotten very positive feedback  
16 from some of your adjacent neighbors, the  
17 treatment of some of the other wall space as  
18 was indicated in a little bit of the exchange  
19 with Mr. Turnbull suggest that clearly you are  
20 sensitive to some of the aesthetic impacts  
21 that could conceivably be at issue had you  
22 decided to be much more aggressive with some

1 of the other facing on the carriage house  
2 structure.

3 With all of that, Madam Chair, I  
4 think this is very ripe to move forward. I  
5 think the case has been more than adequately  
6 made and laid out and I am very comfortable  
7 that because of some of those key factors that  
8 were discussed and that I have laid out under  
9 the prong of the test that speaks to whether  
10 or not there is a harm to the public good or  
11 the zoning plan, I am comfortable that there  
12 is still a very clear bar that would have to  
13 be met by similar projects in other areas of  
14 our city.

15 As was indicated by counsel for  
16 the applicant, it is not necessarily a  
17 frequent occurrence that you see this type of  
18 structure in this particular residential zone  
19 but they do happen. You clearly will see them  
20 in other residential zones, R-1s and what have  
21 you.

22 Some of the other projects that

1 we've seen where there has been perhaps a much  
2 more aggressive approach to use of the  
3 carriage house, I think that is where the  
4 zoning regulations begin to really step up and  
5 say let's just be careful that we don't go  
6 overboard.

7 The idea here is not to create the  
8 Helmsley Palace or the Mayflower Hotel on our  
9 alleys but, again, how do we balance what the  
10 zoning regs are trying to get at without at  
11 the same time penalizing property owners from  
12 doing something productive.

13 In my book a residential use is  
14 always -- again, I'm not speak from the zoning  
15 reg standpoint but just in terms of the spirit  
16 of the regs the introduction of a residential  
17 use here, I think, is more than appropriate  
18 and has been done in a very measured and  
19 deliberate way.

20 Thank you, Madam Chair. I'm out  
21 of breath.

22 CHAIRPERSON MILLER: Thank you,



1 Mr. Etherly. I think you very fully covered  
2 it. I'm just going to add a little icing.  
3 Just going through the test, I think the case  
4 is certainly made for uniqueness and  
5 exceptional condition that there is an  
6 historic carriage house on this property along  
7 with some other historic buildings. It can't  
8 be demolished or substantially altered. BZA  
9 and the courts have found that to be an  
10 exceptional condition in and of itself to  
11 begin with.

12 Now we get to the question of  
13 practical difficulty. I think that really  
14 went to use of that second floor, what is left  
15 given the restricted uses that were there  
16 before. We give Office of Planning great  
17 weight.

18 Office of Planning certainly has  
19 weighed in on this one saying that they  
20 consider those uses that would have been  
21 allowed not to have very much value, I guess,  
22 in this context in this day and in this place.

1       Therefore, there was a practical difficulty  
2       for this applicant.

3               That is not necessarily always the  
4       case but I think it was found to be here. It  
5       might often be the case. It might often be an  
6       outdated regulation but we are not in the  
7       business of rewriting the regulations but when  
8       we interpret their application, we can  
9       determine they may be outdated in this spot  
10      and that is creating a practical difficulty  
11      for the applicant.

12             I think in this one it is economic  
13      somewhat and I think Office of Planning really  
14      basically characterized, as did the applicant,  
15      that the resulting use would be almost  
16      unusable, just storage space.

17             I thought it was also very  
18      impressive that the Office of Planning made  
19      that statement about not penalizing applicants  
20      for complying with historic regulations. That  
21      is an important issue, I think, these days.

22             Of course, in this particular case

1       there were no adverse impacts that have been  
2       brought to our attention. In fact, it's only  
3       positive. It's the renovation of historic  
4       treasures, eyes on the alley, and increased  
5       residence in a residential area.

6               For those reasons, I would support  
7       this as well. Anybody else have any comments?  
8       Okay. Then I think we are ready to vote on  
9       the motion. All those in favor, say aye.

10              ALL: Aye.

11              CHAIRPERSON MILLER: All those  
12       opposed? All those abstaining? Would you  
13       call the vote, please?

14              MS. BAILEY: Madam Chair, the vote  
15       is called as five zero zero to grant the  
16       application. Mrs. Miller made the motion, Mr.  
17       Etherly -- I'm sorry, Mr. Etherly made the  
18       motion and Mrs. Miller seconded. Mr. Mann,  
19       Mr. Loud, and Mr. Turnbull support the motion.

20              CHAIRPERSON MILLER: Thank you. I  
21       would also move at this point to waive our  
22       rules and regulations for issuing findings of

1 fact and conclusions of law and issue a  
2 summary order in this case given there is no  
3 party in opposition.

4 MS. BAILEY: Thank you.

5 CHAIRPERSON MILLER: Okay. Thank  
6 you very much.

7 MR. JESICK: Thank you.

8 CHAIRPERSON MILLER: You can call  
9 the next case, please.

10 MS. BAILEY: Application No. 17587  
11 of Shawn Ayize Sabater, pursuant to 11 DCMR  
12 3103.2, for a variance from the floor area  
13 ratio requirements under Section 771 to allow  
14 an addition to an existing commercial  
15 building. The property is zoned C-2-A and  
16 it's located at 2616 Georgia Avenue, N.W.,  
17 Square 2884, Lot 34.

18 Madam Chair, I think it has been  
19 discovered that the property is zoned C-2-A  
20 and R-4. Perhaps that is a preliminary  
21 matter. In addition to that, the applicant is  
22 requesting relief from Section 2514.2 and

1       there is a request for party status in this  
2       application as well from Milton Weinstein.

3               CHAIRPERSON MILLER:     Thank you.  
4       Why don't we start with introducing yourselves  
5       for the record, please.

6               MR. SABATER:     Good morning.     I'm  
7       Ayize Sabater.     Congratulations, Ms. Miller  
8       and Mr. Etherly.

9               CHAIRPERSON MILLER:     Thank you.

10              MS. WALSH:     I'm Meghan Walsh and  
11       I'm     the     architect     for     Ayize     Sabater.  
12       Congratulations to all of you, too.

13              CHAIRPERSON MILLER:     Okay.     Is Mr.  
14       Weinstein here?     Okay.     Are you familiar with  
15       request for party status?     No?     We have  
16       Exhibit 30.     It's a request by Mr. Milton  
17       Weinstein at 1155 Regal Oak Drive, Rockville,  
18       Maryland.     Are we sure it's the right case?  
19       Is that what you're saying?

20              When you see the address, I know.  
21       Actually, it says it would greatly improve the  
22       property.     I don't know.     It has the number on

1 it. I think, again, it's similar to the last  
2 case where we had a request for party status  
3 application.

4 It's very brief and the person is  
5 not here to participate in the case or  
6 indicate in any manner in which they would be  
7 participating by writing. I would suggest  
8 that we deny party status application for Mr.  
9 Weinstein and accept this document in the  
10 record as testimony.

11 MR. MANN: Madam Chair, I would  
12 note that in item 3 it does say that he owns  
13 2608 Georgia Avenue.

14 CHAIRPERSON MILLER: Thank you.

15 VICE-CHAIR ETHERLY: I would  
16 agree, Madam Chair, with your proposed  
17 direction that we just receive it as testimony  
18 in support of the application.

19 CHAIRPERSON MILLER: Correct.  
20 Right. Thank you. Okay. I guess we have  
21 another preliminary matter perhaps that Ms.  
22 Bailey brought up about amending the

1 application to seek special exception pursuant  
2 to 2514.2. Is this what you want to do to  
3 extend the regulations for C-2-A District 33  
4 feet into an R-4 district?

5 MS. WALSH: Yes. That's what we  
6 want to do.

7 CHAIRPERSON MILLER: Okay. I have  
8 no problem with that. Okay. Then it is  
9 amended to include that relief. Just so we  
10 understand the relief, I know you get  
11 different options also in your briefs or  
12 whatever.

13 One option is that plus just a  
14 variance from 771.2 to increase the maximum  
15 FAR for other permitted use from 1.5 to 1.9  
16 for private school use. My understanding is  
17 that is what Office of Planning was analyzing  
18 as well. Are you comfortable going forward on  
19 those two avenues of relief?

20 MS. WALSH: Yes. That would be  
21 our choice.

22 CHAIRPERSON MILLER: Okay. Fine.

1 Then you can proceed.

2 MS. WALSH: Okay. The project  
3 that we are applying for is a project called  
4 Mommies TLC which is currently -- actually, I  
5 would like to defer to my client to describe  
6 the nature of the project and what they do but  
7 I will talk about the property and what we are  
8 intending to do.

9 The address at 2616 Georgia Avenue  
10 is dually zoned, the back half of it being R-4  
11 and the front half of it being C-2-A. The  
12 back 33 feet of it is R-4 and the proposed  
13 addition and renovation will take about two-  
14 and-a-half feet. It will go two-and-a-half  
15 feet into that R-4.

16 The zoning regulations allow by  
17 matter of course for the property to be  
18 considered of the more restrictive zoning so  
19 they would allow us to consider it to be R-4  
20 but that would present some other hardships  
21 for us in complying, particularly with the use  
22 of the property which will be Montessori



1 private school.

2 Our other option was to apply for  
3 the special exception to allow it to be  
4 considered C-2-A across the entire property  
5 and in which case we still need some relief  
6 which would be in the form of an area variance  
7 to allow us to go to an FAR of 1.9.

8 The reasons for our justification  
9 for that would be because we are trying to  
10 achieve a couple of things with the building.  
11 We are bringing the building into ADA  
12 compliance so we would be adding an elevator  
13 and creating handicapped accessible bathrooms  
14 which, of course, take up some additional  
15 space.

16 Additionally, we are also going to  
17 be applying for LEED certification which is  
18 the U.S. Green Building Council's set of  
19 standards to meet the environmental impact of  
20 the building. Some of the things that we are  
21 adding into the building, the entire roof will  
22 be a green roof system and outdoor teaching

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 classroom.

2 We'll have rainwater collection  
3 tanks on the roof. We have brought a model  
4 here if anybody is interested. There are also  
5 photos of that model in your packet. A lot of  
6 those things when added together would also  
7 reduce the FAR. I did the calculations as  
8 such to remove those elements, just the LEED  
9 elements by themselves, and that would bring  
10 it to 1.7. If then I were to take out space  
11 that we didn't need to make it ADA compliant  
12 we could actually bring the FAR down.

13 My understanding from most  
14 people's point of view would be that those  
15 things would be positive things for a  
16 Montessori school, particularly and in  
17 general. We are trying to use this building  
18 as kind of a model for an intercity school  
19 that can meet the requirements of schools that  
20 might have more space.

21 We are in a very small lot and  
22 while LEED does not give credit for that, that

1 actually is a more environmentally friendly  
2 approach is using a smaller piece of property  
3 to achieve your goals.

4 Those are the reasons why we are  
5 applying We also are going to be preserving  
6 the front facade which is sort of a unique  
7 condition on Georgia Avenue. The site sits  
8 back about 25 feet from the sidewalk so there  
9 is kind of a plaza that is in front of that  
10 block of buildings.

11 While being zoned C-2-A would  
12 allow us to go forward and build whatever we  
13 wanted to into that section, that would  
14 certainly destroy that line of building  
15 facades. If you look at older maps, some of  
16 the adjacent properties actually did that.  
17 They did go ahead and build right up to the  
18 property line. The one right next to us, in  
19 fact, did that.

20 We would like to stay in  
21 compliance with that. Part of the Montessori  
22 teaching philosophy is also to have kind of a

1        tacit understanding by just being in the  
2        building. You are learning about history.  
3        You are learning about structure. You are  
4        learning about the environment.

5                Part of our approach is to provide  
6        diagrams throughout the building for young  
7        children, even at two-and-a-half years old, to  
8        start to understand the principles, the  
9        history, and why we preserved this building  
10       and how did we do that. What happens when you  
11       put a steel lintel in and how the load is  
12       carried to the ground.

13               These things will be sort of a  
14       whimsical way of bringing the children into a  
15       better understanding of architecture or  
16       history planning, the environment, etc. I'm  
17       going to turn it over to Ayize for him to tell  
18       you more about the details of their program.

19               CHAIRPERSON MILLER: I just want  
20       to ask you a question unless it's more  
21       appropriate for Mr. Sabater. Could you just  
22       refresh my memory? I can't remember why this

1 building? Why are you in this particular  
2 small lot to begin with?

3 MR. SABATER: We are a non-profit  
4 organization. We have utilized the current  
5 structure. Our office has been there for the  
6 last six years and our program has grown. We  
7 currently operate our program in the basement  
8 of a church and the church is looking to  
9 reclaim their space and renovate it. Even in  
10 addition to that, our program has grown so we  
11 actually would have probably had to move out  
12 of the church.

13 We recently observed some of our  
14 neighbors expanding their property on Georgia  
15 Avenue and we realize that we could actually  
16 use the space that we already have and not  
17 just use it for office space but we can  
18 actually run our program right out of a space  
19 that we already have site control over.

20  
21 Even though our program as a non-  
22 profit is growing, we still are placed out of

1 the market that has just astronomically jumped  
2 in terms of the value of property. We already  
3 have site control here. We would still be  
4 growing within our means and it wouldn't break  
5 the back of the non-profit organization to  
6 grow right here at this site.

7 CHAIRPERSON MILLER: Isn't there  
8 also something really important about your  
9 urban location, to be in an urban setting and  
10 that you also be near Howard University or  
11 something like that?

12 MR. SABATER: No doubt that given  
13 that our target population is at-risk  
14 children, particularly the population in Ward  
15 1 which is primarily African American.  
16 Howard University being the capstone of black  
17 education would allow us quite unique  
18 positioning for our program as we hope to be  
19 a model for urban schools across the country.

20 CHAIRPERSON MILLER: Thank you.  
21 Okay. You can go on with what you were going  
22 to say. Thank you very much.

1                   MR. SABATER:   Thank you.   Again,  
2                   our organization is a non-profit organization.  
3                   Our mission is to nurture the genius of  
4                   children. For the last six years we have been  
5                   running an after-school program in Columbia  
6                   Heights, Ward 1, where we've had the chance to  
7                   work with the council member on a number of  
8                   years.

9                   We've had a chance to work with  
10                  many ANC representatives as well as many other  
11                  community-based organizations providing a  
12                  high-quality after-school program, a high-  
13                  quality summer camp. We do a lot in the  
14                  community.

15                 We actually had our children  
16                 involved in the renovation of the entire  
17                 Girard Street playground. We involved our  
18                 children even in the renovation project they  
19                 are in. We are really excited about the  
20                 opportunity to expand and operate right here  
21                 across from Howard University.

22                 CHAIRPERSON MILLER:   Thank you.

1 Do you have any questions? Okay. We can go  
2 to the Office of Planning now unless you have  
3 anything else you want to do at this point.  
4 Okay.

5 Good morning, Mr. Cochran.

6 MR. COCHRAN: For the record, my  
7 name is Steven Cochran with the Office of  
8 Planning. The Office of Planning strongly  
9 supports this project and recommends that the  
10 Board approve the special exception to extend  
11 the C-2-A District for a distance of 33 feet  
12 into the R-4 zone district at the rear of the  
13 lot and that you support the variance to  
14 increase the FAR for other permitted uses from  
15 1.5 to 1.9 for private school use.

16 Other than this, we rely on the  
17 record but, of course -- excuse, on our  
18 report. I'll be happy to answer any questions  
19 that you might have.

20 CHAIRPERSON MILLER: Thank you.  
21 That was an excellent report. My only  
22 question I believe so far is you site the



1 Draft Comprehensive Plan 2006. My question is  
2 is that law at this point, the provision that  
3 you cited?

4 MR. COCHRAN: Actually, I had a  
5 conversation with someone you know quite well  
6 about that just two days ago. It is law.  
7 There were certain elements that the National  
8 Capital Planning Commission had some issues  
9 with. Those are not part of the comprehensive  
10 plan yet but as of March 8th the comprehensive  
11 plan with the exception of what NCPC took  
12 exception to is law.

13 CHAIRPERSON MILLER: So certainly  
14 with what has been said here with respect to  
15 the greening of the city and things like that.  
16 That provision is now in effect.

17 MR. COCHRAN: Yes. This is not  
18 inconsistent with that by any means.

19 CHAIRPERSON MILLER: Okay. I  
20 don't have any other questions. Is the ANC  
21 commissioner here for this case? Okay. Are  
22 there any persons in the audience either in

1 support or opposition of this case? Not  
2 seeing any. Are there any other questions by  
3 the Board?

4 MR. TURNBULL: Madam Chair.

5 CHAIRPERSON MILLER: Yes.

6 MR. TURNBULL: Ms. Walsh, in your  
7 testimony you talked about ADA and  
8 accessibility but I see at the front of the  
9 site there are stairs going up but on the plan  
10 I don't see any ramp or anything.

11 MS. WALSH: We are going to use an  
12 outdoor lift for that because if you put a  
13 ramp there, you wouldn't be able to get enough  
14 ramp to go all the way up to the front door to  
15 do that. We are just going to use a regular  
16 lift.

17 MR. TURNBULL: Did you also  
18 mention that there was an elevator?

19 MS. WALSH: Yes, there is an  
20 elevator.

21 MR. TURNBULL: I didn't see it on  
22 these plans.

1 MS. WALSH: The long bar along the  
2 south side is all the service kind of so there  
3 are stairs. If you look at the back the next  
4 thing over is the elevator. There is an X  
5 there.

6 MR. TURNBULL: Okay.

7 MS. WALSH: You may have an older  
8 plan because we submitted an earlier copy  
9 which had a space that was for potentially  
10 putting an elevator in later when my client  
11 was able to raise funds for that.

12 MR. TURNBULL: Okay. I guess --

13 MS. WALSH: But I submitted a  
14 secondary set of plans.

15 MR. TURNBULL: I see a set of  
16 stairs and I see the mechanical room, a set of  
17 washrooms, then an isolation area, and then I  
18 see the other stairs.

19 MS. WALSH: There is supposed to  
20 be an elevator right -- if you look at that  
21 stair in the back, there is one right next to  
22 it. That's supposed to be an elevator that

1 goes all the way up to the roof.

2 MR. TURNBULL: Okay. I guess  
3 maybe it's just not shown on the plan I'm  
4 looking at but they are dated 3/27. Okay.  
5 You're saying there is an elevator?

6 MS. WALSH: Yes.

7 MR. TURNBULL: It goes all the way  
8 up to the roof?

9 MS. WALSH: Yes, it does.

10 MR. TURNBULL: Okay.

11 MS. WALSH: I apologize if it it's  
12 not on there but there is an elevator. We've  
13 had that in there for a while. I'm not sure  
14 why it's not on that.

15 MR. TURNBULL: Maybe I'm just  
16 looking at it -- maybe it's just not quite  
17 updated. I'm just curious. To what -- oh,  
18 that's the reason. Oh, I see. Oh, it's  
19 ghosted. I guess that is where the  
20 isolation --

21 MS. WALSH: Yeah. What I had done  
22 we made the space. We are making the whole

1 framing plan so that the elevator can go into  
2 that space but we had some concerns about the  
3 cost of the elevator and when my client would  
4 be able to afford to put that in so we needed  
5 to make a plan so that if there were a need  
6 to, we would cover that space until we could  
7 put the elevator in.

8 MR. TURNBULL: Thank you. It's a  
9 very exciting program. I think your  
10 introduction of the architecture to the kids  
11 at an early age is kind of unique. It's  
12 fascinating. I think you are to be commended  
13 on that.

14 Just curious. To what level of  
15 LEED certification? Are you going for just  
16 LEED certification?

17 MS. WALSH: Well, we are hoping to  
18 get as much LEED certification as we can get  
19 but that process is a tricky process so as  
20 much as we can comply with, we intend to and  
21 then some because we have some other creative  
22 ideas that we are implementing such as having

1 a stationary bike that the kids can power the  
2 lights with. Things that they will really get  
3 a visual understanding.

4 It's more important -- I mean, the  
5 LEED certification is certainly important also  
6 to bring attention to the school as being the  
7 sort of premiere school but what is even more  
8 important is the educational understanding  
9 that the children will have through that  
10 process.

11 MR. TURNBULL: That is very  
12 commendable. Thank you.

13 CHAIRPERSON MILLER: I have just a  
14 couple more questions. Are there existing  
15 nonconforming courts that are going to  
16 disappear with respect to the construction of  
17 this project?

18 MS. WALSH: Yes. I love talking  
19 about that. Those are going to disappear  
20 through this addition. Currently the scene  
21 back there is not so nice. When I went to  
22 take pictures I had to act really naive that

1 I couldn't really smell what was being smoked  
2 back there.

3 It's a pretty bad dirty scene back  
4 there right now. This project not only will  
5 get rid of some bad conditions to do with  
6 light and air, but also some of the issues of  
7 the drugs that are being sold back there.

8 CHAIRPERSON MILLER: Okay. With  
9 respect to the operations of the program I  
10 think that you addressed this but could you  
11 just refresh our memories with respect to  
12 parking and drop-offs for the students and  
13 employees?

14 MS. WALSH: Sure. We have met the  
15 parking requirements but we also are aware  
16 that the neighbors might have some concerns  
17 about the pickup and drop off of children at  
18 various times of day. We are exploring  
19 several things right now.

20 We have actually been in  
21 communication with the Department of  
22 Transportation to see if we might put a sign

1 out for people to slow down during certain  
2 times of day. Also we are exploring remote  
3 pickup and drop-off locations. They have a  
4 van so that there would be one parking space  
5 in the back dedicated just to that van.

6 CHAIRPERSON MILLER: I know you  
7 fulfilled the parking requirements but what  
8 are they and what do you have?

9 MS. WALSH: The parking  
10 requirements are one for each of the four  
11 employees. We have five employees so that  
12 means we would need 1.25 spaces and we have  
13 two spaces.

14 CHAIRPERSON MILLER: The van  
15 counts? I mean, the van is taking up one of  
16 the spaces now.

17 MS. WALSH: Yeah, the van counts.

18 CHAIRPERSON MILLER: The van  
19 counts for the employee?

20 MS. WALSH: Well, there are two  
21 spaces so there's one separate space that  
22 would be -- I mean, nobody has talked to us



1 about what would count or what wouldn't count  
2 in terms of which vehicle but we already have  
3 one space that would meet the needs of the  
4 employees and then we have another space.

5 CHAIRPERSON MILLER: Okay. You  
6 may not use that as totally dedicated to an  
7 employee. Is that what you are saying? You  
8 may not need it but it's two spaces for the  
9 employees but perhaps the van may use it some  
10 of the time. Okay. Just to drop off or  
11 whatever.

12 MS. WALSH: Technically we are  
13 supposed to have 1.25. I mean, I don't know  
14 what you would do with .25 of a parking space  
15 but we have an additional .25 if we needed to  
16 prove that we have that space.

17 CHAIRPERSON MILLER: Okay. Okay.  
18 That's not before us. I think it's possible  
19 you round it down or up or whatever but it's  
20 not before us. I was just looking into -- we  
21 consider adverse impact so that is one of the  
22 impacts of the school, the parking, the drop

1 off. That is the reason I was exploring what  
2 you had and things like that.

3 MS. WALSH: Right.

4 CHAIRPERSON MILLER: Okay. Any  
5 other comments? I just want to say before you  
6 do your closing argument, and I want to also  
7 say who else submitted letters of support,  
8 that I am familiar with Sidwell Friends green  
9 building and it's phenomenal. It's an amazing  
10 learning experience so the fact that you can  
11 be offering that in the city in well is  
12 incredible.

13 Okay. I do want to note the ANC  
14 representative is not here but Exhibit 29 is  
15 a report from the ANC unanimously supporting  
16 seven zero this application and it meets the  
17 great weight requirements. It shows that it  
18 was at a regularly scheduled meeting and there  
19 was a quorum and a vote, etc. We will be  
20 giving that great weight. Council Member Jim  
21 Graham has submitted a letter in support.  
22 That is Exhibit No. 33. Do you have a copy of

1       that?

2                   MS. WALSH:   Yes.

3                   CHAIRPERSON     MILLER:           Okay.

4       Pleasant Plains Civic Association, Exhibit No.

5       32 has submitted a letter in support.

6       District of Columbia grassroots empowerment

7       project, Exhibit No. 15, has submitted a

8       letter in support.

9                   Malapi Sibolai, who has a child in

10       the Mommies After-School Program, has

11       submitted a letter of support. That is

12       Exhibit No. 13. Have you seen all of these?

13       They are very nice. Okay. Good. Do we have

14       anything else? Okay. Then I am going to

15       leave it to you for closing argument.

16                   MS. WALSH:   I don't have too much

17       to say outside of the fact that I think the

18       school can add a lot to the area. I actually

19       live a few blocks down from there as well and

20       I'm very excited about it. Additionally, I

21       think it will help to spur along some of the

22       improvements that are beginning to happen

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 along Georgia Avenue.

2 We were at a Pleasant Plains Civic  
3 Association meeting that Mayor Fenty came to  
4 and everyone there the things that they were  
5 talking about were crime. They were talking  
6 about the improvements of Georgia Avenue and  
7 opportunities for children, particularly for  
8 after-school programs. This project addressed  
9 all three of them and we presented it to the  
10 Pleasant Plains Civic Association right after  
11 that and people seemed really intrigued and  
12 excited.

13 The idea of bringing in some of  
14 these, a lot of them are not so high-tech  
15 techniques of bringing the environment into  
16 the architecture and making people understand  
17 how to reuse and recycle and all that I think  
18 will also be very beneficial for the area. We  
19 have talked at times about having open houses  
20 for people just to see those things. I am  
21 hoping that you will support the application.  
22 Thanks.

1 CHAIRPERSON MILLER: Thank you.  
2 We are going to deliberate on your application  
3 now. I would like to make a motion to approve  
4 the application of Shawn Ayize Sabater -- I  
5 hope I pronounced that all right -- for a  
6 special exception pursuant to 2514.2 of Title  
7 11 DCMR to extend the regulations of the C-2-A  
8 District 33 feet into the R-4 district at the  
9 rear of the lot.

10 And (2) a variance of 771.2 of  
11 Title 11 DCMR to increase the maximum floor  
12 area ratio for "other permitted use" from 1.5  
13 to 1.9 for property located on the west side  
14 of Georgia Avenue, N.W. between Euclid and  
15 Fairmont Streets.

16 MR. TURNBULL: Second.

17 CHAIRPERSON MILLER: Thank you.  
18 And that other permitted use is use as a  
19 private school. I just want to start that I  
20 think that the record is very full here. It  
21 is a very, very worthwhile project and some of  
22 our analysis is on the dry side with respect

1 to meeting the variance test. I am just going  
2 to go through some of those prongs.

3 The first test being that there be  
4 a unique or exceptional condition. I would  
5 just like to highlight on some of what I see  
6 in this in that we have a building here that  
7 your non-profit has been using, that you are  
8 settled in this community and it is very  
9 important where you are located.

10 You are located near Howard  
11 University. You are located near the at-risk  
12 children that you will be serving. This  
13 building is a residential rowhouse built in  
14 1910 prior to the enactment of the zoning  
15 regulations. Therefore, it needs a lot of  
16 retrofittings, particularly if you are going  
17 to do it for a school.

18 I think one of the practical  
19 difficulties is also if you look at the  
20 topography, or at least where the building is  
21 located on the land right now, as you stated,  
22 you could go forward but that would ruin the

1 frontage on the building lines. Therefore,  
2 you need to go back. Actually, we are not  
3 even just dealing with a variance but we are  
4 also dealing with that special exception  
5 provision that I will get to as well.

6 Just sticking with the variance  
7 test for right now, that is the unique or  
8 exceptional condition as I see it. At least,  
9 some of the aspects of it. Then the practical  
10 difficulties. In order to use it as a school  
11 and retrofit it, you really don't have very  
12 much room to move.

13 It's a small lot and, therefore,  
14 in order to make it ADA compliant and to  
15 achieve the green goals, which is a really,  
16 really worthy educational purpose, you need to  
17 build out in the way that you are doing it.  
18 There really isn't any other options in order  
19 to do that. There is no substantial detriment  
20 that I have seen in the record.

21 You are actually removing a  
22 nonconforming aspect of the property and

1       that's the courts. In doing so you are  
2       addressing some not so pleasant situations  
3       that occur on that property because of the  
4       nonconforming courts. This is a benefit to  
5       the children and to the community at large.

6               In your papers, we didn't get into  
7       all that much here, but you actually discussed  
8       how you are going to be opening a lot of this  
9       project up to the general public as well with  
10      a lot of other activities. It is consistent  
11      with the zone plan because you are going to be  
12      using it as a private school which is a matter  
13      of right use.

14             It's not inconsistent with the  
15      comprehensive plan. In fact, Office of  
16      Planning cited language in the new  
17      comprehensive plan that goes to one of the  
18      goals of greening the city and this is a  
19      fantastic way to do that. You have the  
20      support of the community. There is just no  
21      adverse impact.

22             I think before I move on, I do



1 think I need to pull 2514.2 and say you are  
2 reaching that unless someone wants to add to  
3 the variance test right now while I'm looking  
4 for that. Actually, Office of Planning also  
5 has addressed how you reached that.

6 2514.2 is the regulation which  
7 allows the Board to extend the regulations  
8 applicable to that portion of the lot located  
9 in a lesser restricted use zone district that  
10 controls the use, height, and bulk of  
11 structures and the use of land to that portion  
12 of the lot in a more restricted use zone  
13 district.

14 You fulfilled that requirement  
15 because the first requirement is that you can  
16 only exceed it up to 35 feet and you have 33  
17 feet so you are fine with that. To authorize  
18 an extension the Board shall require  
19 compliance with 2514.1(d) which says that the  
20 Board may impose requirements pertaining to  
21 design, appearance, screening, location of  
22 structures, lighting, or any other requirement

1 it deems necessary to protect adjacent or  
2 nearby property.

3 Office of Planning has not made  
4 any recommendations that the Board do this.  
5 I will leave this open to see if any other  
6 Board member has a recommendation. I don't at  
7 this point.

8 The extension shall have no  
9 adverse impact upon the present character and  
10 future development of the neighborhood.  
11 Again, I have gone through those factors, I  
12 think, and it has only positive benefits.

13 For these reasons, I think that  
14 the applicant has met the requirements for a  
15 special exception pursuant to 2514.2 and a  
16 variance from 771.2 to use it as a private  
17 school. Any comments from other Board  
18 members? Okay.

19 MR. TURNBULL: Madam Chair, I  
20 agree with you that the applicant has met the  
21 test. Not only has met the test but I think  
22 has taken several steps off the ladder to come

1 up with a design that is very exciting and  
2 challenging. It contextual with the  
3 neighborhood. I know that can be an overused  
4 term but I think in this case I think it's  
5 very meritorious.

6 CHAIRPERSON MILLER: I would  
7 agree. I think it is also very pioneering and  
8 admirable. I can't see any downside to this  
9 whatsoever physically or programmatically.

10 Mr. Turnbull, you don't have any  
11 concerns with respect to the plans either that  
12 have been submitted in the record?

13 MR. TURNBULL: No. My only  
14 question was on my plan here it doesn't  
15 clearly show the lift but mine may not be the  
16 updated one. The X is there for the elevator  
17 so I'm convinced they are obviously trying to  
18 do it. It's just that there have been a  
19 series revisions here along the way. I feel  
20 confident that the plan has merit.

21 CHAIRPERSON MILLER: Okay, because  
22 the order will be reflecting the plans as

1 presented in the case. Are there any other  
2 comments?

3 VICE-CHAIR ETHERLY: I'll just say  
4 very briefly, Madam Chair, I would like to  
5 whole heartedly associate myself with the  
6 remarks of both the maker of the motion and  
7 Mr. Turnbull. I think the project has been  
8 very well conceived and helps to articulate a  
9 small corner of Georgia Avenue that is ripe  
10 for additional energy.

11 As has been indicated in the  
12 applicant's filing, you are in the vicinity of  
13 the historic HBCU Howard University, Banneker  
14 High School, a couple of other key landmarks  
15 along Georgia Avenue. As our new colleague  
16 Mr. Loud knows, we are talking about a very  
17 vibrant corridor that at certain portions of  
18 it is not as best taken advantage of as it  
19 could be. You go through very great lengths  
20 to do that in terms of animating your  
21 building.

22 The use of the roof is just

1 absolutely dynamic and it would perhaps be  
2 remiss for me not to highlight. As some of  
3 my colleagues know, oftentimes when we talk  
4 about school applications they don't normally  
5 go as easily as this.

6 They don't normally go as quietly.  
7 Sometimes you would not believe the level of  
8 discourse that we have, albeit valid issues  
9 and concerns that are raised whether it is  
10 transportation, number of students, what have  
11 you.

12 The evidence here on the record of  
13 the support that you have is a testament to  
14 the work that you have already done in terms  
15 of your program. I just commend you on what  
16 you are doing and wish you all the best in the  
17 future. Thank you, Madam Chair.

18 CHAIRPERSON MILLER: Thank you.  
19 Any other comments? Then at this point I  
20 think we can take the vote. All those in  
21 favor say aye.

22 ALL: Aye.

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

3 Would you call the vote, please.

4 MS. BAILEY: The vote is recorded  
5 as five zero zero to grant the application as  
6 amended. The motion was made by Mrs. Miller,  
7 seconded by Mr. Turnbull. Mr. Etherly, Mr.  
8 Mann, and Mr. Loud support the motion.

9 CHAIRPERSON MILLER: Thank you.  
10 At this time I think I would also move that we  
11 waive our rules and regulations to issue an  
12 order with findings of fact and conclusions of  
13 law and issue a summary order in this case as  
14 there is no party in opposition. Okay,  
15 consensus of the Board.

16 Okay, then. Thank you very much  
17 and best of luck.

18 You can call the next case, Ms.  
19 Bailey. Thank you.

20 MS. BAILEY: Application No. 17588  
21 of Thalia, LLC, pursuant to 11 DCMR 3103.2,  
22 for a variance from the parking space size

1 requirements under Subsection 2115.1, a  
2 variance from the parking space vertical space  
3 requirements under Subsection 2155.5, and a  
4 variance from the parking space accessibility  
5 requirements under Subsection 2117.4, to  
6 construct a new office building in the DD/C-2-  
7 C District of premises 1307 through 1311 L  
8 Street, N.W. The property is also known as  
9 Square 247, lots 858, 859, 860, and 861.

10 CHAIRPERSON MILLER: Thank you.  
11 Good morning. Would you like to introduce  
12 yourself for the record, please?

13 MS. BROWN: Good morning, Madam  
14 Chair, and members of the Board. I am Carolyn  
15 Brown with the law firm of Holland & Knight.  
16 With me here today on my left is Harry  
17 Moshovitis. He is a representative of the  
18 owner of Thalia L Street, LLC.

19 To my right is Steve Sher,  
20 Director of Zoning and Land Use Services at  
21 Holland & Knight, our expert witness today.  
22 Setting up the easels is Mark Arnold, the

1 architect for the project with Hickok Cole  
2 Architects.

3 We are very pleased to be here  
4 today to present a very innovative solution to  
5 what is a difficult problem. We are providing  
6 an automated parking system on a lot that is  
7 too small to provide standard size spaces.

8 We believe this alternative  
9 approach fully satisfies the intent of the  
10 zoning regulations and, in fact, sets a new  
11 standard for buildings in the city. While  
12 it's not the first in the city, the first, I  
13 believe is the United Mine Workers building at  
14 15th and I Streets, it nevertheless, I think,  
15 will encourage other building owners to seek  
16 out this really great solution for parking on  
17 smaller lots.

18 We are here today seeking relief  
19 from the minimum depth of a parking space, the  
20 vertical clearance, and the accessibility  
21 requirements. As the record amply  
22 demonstrates, we meet the test for variance

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 relief. We have support from the ANC and that  
2 is Exhibit 24 in the record.

3 We have the support of the  
4 abutting owner, the National Association for  
5 the Education of Young Children. That is No.  
6 25 in the record. We also have a positive  
7 report from the Office of Planning.  
8 Accordingly, we would propose to make a very  
9 abbreviated presentation this morning and then  
10 be available for questions.

11 With that I would like to turn to  
12 our first witness, Steve Sher. Again, the  
13 representative of the owner is here if you  
14 have questions for him but I think we'll just  
15 skip by and get to the meat of the  
16 presentation. Thank you.

17 CHAIRPERSON MILLER: Thank you.

18 MR. SHER: Good morning, Madam  
19 Chair, and members of the Board. For the  
20 record, my name is Steven E. Sher, Director of  
21 Zoning and Land Use Services with the law firm  
22 of Holland & Knight.

1           As you have heard already, we are  
2           here asking for three variances, all related  
3           to parking in the building. The use, the  
4           height, the FAR, and all the other aspects of  
5           the building comply with the regulations.  
6           What we hear about is parking.

7           When we looked at this case  
8           initially, we thought we had two options. One  
9           would have been just to ask for a parking  
10          variance. The other would have been to say,  
11          "Okay, we can put parking in here but how do  
12          we get to it?" The constraints of that are  
13          evident when you look at the property.

14          We have on the easels before you  
15          two drawings. The one on the left is the  
16          first-floor plan. What this shows is that the  
17          property is basically rectangular with a  
18          little bit that sticks back at the end here.  
19          It has only 58 feet of frontage on L Street  
20          and it's only 58 feet wide.

21          When you look at how you could  
22          possibly lay out a building of this sort, and

1 this building is about a 55,000 square-foot  
2 office building so it has a requirement for 29  
3 off-street parking spaces, it has a  
4 requirement for one 30-foot off-street loading  
5 berth and one 20-foot service delivery space.  
6 Basically the only access to the property  
7 comes from the public alley located at the  
8 northwest corner of the site at the rear.

9 When you put in a 30-foot loading  
10 berth and a 20-foot service delivery space,  
11 there is practically no way to get two parking  
12 spaces in the lower level because you would  
13 ordinarily think you would have a ramp coming  
14 in at this point at the northwest corner where  
15 you enter from the alley and go down to a  
16 lower level but you can't get there because  
17 you need to be able to be at grade to get to  
18 the service delivery space and to get to the  
19 loading berth.

20 Furthermore, when you look at how  
21 that garage would conceivable lay out, there  
22 would need to be access to the garage if it

1 were an occupied garage so we need to have an  
2 elevator, we need to have exit stairs going  
3 down.

4 When you look at the width of the  
5 lot, when you look at that combined with where  
6 the core would be which is essentially at the  
7 east side of the building, and then when you  
8 think about how do you get ramps that go down  
9 there that meet the turning radius that meet  
10 the grades that meet the width requirements,  
11 you just don't get there.

12 Okay. What do we do? Well, what  
13 we did at Mr. Moshovitis' instigation was to  
14 look at alternatives to how to park this  
15 building. While they are not particularly  
16 common in the United States in terms of  
17 systems to park cars, they are common in terms  
18 of warehouse type situations where material is  
19 stored on upper levels and access by lifts of  
20 one sort or another.

21 Parking garages like this are  
22 actually more common in Europe where a lot of

1 these systems were developed. What we have is  
2 a system where if you look at the parking  
3 layout this is essentially typical for all  
4 three layouts. We've got three levels of  
5 parking going down in the building.

6 The two lower levels can hold 15  
7 cars. The upper level holds 13 cars because  
8 you need to have a space open to accommodate  
9 the pallets that are moving on these lifts and  
10 so we wind up being able to provide 43 spaces  
11 in the garage where only 29 spaces are  
12 actually required under the regulations.

13 Okay. Why are we here? Well, No.  
14 1, the regulations require that parking spaces  
15 be accessed by an all weather driveway, etc.,  
16 with concrete and whatever and we don't have  
17 that. We have a lift that takes the cars down  
18 and shuttles them along in a horizontal method  
19 to find an open parking space.

20 No. 2, the space is required to be  
21 nine feet wide by 19 feet deep. We have nine  
22 feet wide but because the width of the lot is

1 58 feet when you take out the thickness of the  
2 walls on either side, you wind up with a  
3 dimension from one side to the other that  
4 accommodates 18'3" which is the size of the  
5 pallet that the automobile actually fits into  
6 with an 18'3" wide space in the middle because  
7 the pallet basically comes down and then can  
8 move either to the east or the west once it  
9 has reached that layer and finds an open  
10 parking space.

11 We are nine inches -- not nine  
12 feet but nine inches short on the length of  
13 the space but there is really no maneuvering  
14 room required for any of this. The car is  
15 placed on a pallet when it comes into the  
16 garage and we can get into the operation of  
17 that if you need to know more detail about  
18 that.

19 It is placed on a pallet. There  
20 are actually two elevators that take it down  
21 and then the car doesn't move once it's on the  
22 pallet. The pallet moves so you don't need to

1 worry about turning radius for the vehicles in  
2 the garage.

3 It slides over and it slides in so  
4 it's almost a turn that you couldn't make in  
5 a car but the pallet can move that way.  
6 Again, we have pallets that are 18'3" long  
7 instead of 19 feet so we need nine inches on  
8 the length of the space.

9 On the vertical clearance we have  
10 two levels that are at 5'7" and one level that  
11 sits 6'10" so the 6'10" meets the 6'6" clear.  
12 The other two do not. Again, this is a  
13 function of the nature of the mechanics that  
14 take these things down. They don't need to be  
15 any higher.

16 You don't need to worry about  
17 somebody having enough clearance to stand up  
18 there because nobody actually takes the car  
19 down. The garage is basically unoccupied.  
20 You drive onto the pallet, the pallet drops,  
21 the lift takes it down.

22 Nobody goes in the garage so we

1 don't need any access stairs, we don't need  
2 any elevators for humans going down there.  
3 All we need is the lift that takes the cars  
4 down there. The reason for the clearance at  
5 5'7" we just don't need the 6'6" given the  
6 nature of the mechanics of what is going on  
7 here.

8 The exceptional condition is the  
9 width of the property, the location of access  
10 at the northwest corner, the location of the  
11 core and how that affects the layout of the  
12 building inside. The practical difficulty is  
13 that we couldn't get both required loading and  
14 required parking in the building because there  
15 is only one way to get in there and that is at  
16 the one corner so if we didn't have a  
17 variance, we basically couldn't develop any  
18 parking on the property.

19 Our consistency with the zone plan  
20 basically we are providing the number of  
21 spaces that are required so we have all that  
22 is required. We are at the end of the alley



1 system in the square so that there is no  
2 potential interference with anybody else who  
3 might be concerned and we don't believe there  
4 would be any issue there in any event.

5 We meet all the other requirements  
6 of the regulations. We have the support of  
7 the ANC and the Office of Planning.  
8 Therefore, we think we have met the test of  
9 the regulations and that the application could  
10 be granted.

11 We can go into more detail in  
12 explaining how this garage system works if the  
13 Board wants to know that. We have submitted  
14 some of that information in the prehearing  
15 statement on specifications from the  
16 manufacturer but it is an innovative way to  
17 deal with providing parking on the site.

18 CHAIRPERSON MILLER: I have a  
19 question about you are at the end of an alley  
20 or something. Do you think where the building  
21 is positioned results in this device not  
22 having an adverse impact on the surrounding

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 area or what?

2 MR. SHER: No one would be going  
3 past our property to get to some other  
4 property because we are at the dead-end end of  
5 an alley. Vehicles enter the site at that  
6 point, the northwest corner, and then if they  
7 are trucks they go into one of the two loading  
8 facilities or, if they are vehicles, they go  
9 into the turntables and the lifts that take  
10 them down. The only people coming at this  
11 point on the alley are those who are destined  
12 for that location.

13 If there were a concern that this  
14 is not a ramp where you would sort of have a  
15 free-falling situation going down into the  
16 building, we don't anticipate any backup given  
17 the speed with which this stuff occurs but if  
18 there were any concern that cars might be  
19 backing up past the entrance to the building,  
20 there isn't going to be any adverse affect on  
21 anybody else but nobody else is back there but  
22 us.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON MILLER: Thank you.

2 Okay.

3 VICE-CHAIR ETHERLY: If I could,  
4 Madam Chair, just a very, very quick question.  
5 It's not so much on the firm zoning piece.  
6 Part of me also just wants to add, man, can I  
7 just park here on a regular basis even though  
8 I work nowhere near the location?

9 MR. SHER: No.

10 VICE-CHAIR ETHERLY: Okay. Darn.

11 MR. SHER: If you work in the  
12 building, you can park there. It's going to  
13 be, in effect, a private garage. Because of  
14 the way this works you need to have access  
15 codes and a card to be able to get access to  
16 the garage. It's not going to be a garage  
17 open to the public on a general basis.

18 VICE-CHAIR ETHERLY: Thank you for  
19 allowing me to digress ever so briefly but I  
20 just thought I would ask.

21 MR. SHER: Sorry about that.

22 VICE-CHAIR ETHERLY: Let me,

1       however, kind of veer a little bit into,  
2       again, this is not squarely on the zoning  
3       inquiry but just it is more probably just a  
4       lay person's question, the issue of fire  
5       safety in the event that you do have any kind  
6       of emergency situation inside the guts of the  
7       mechanical operation, if you will.

8               Perhaps the Office of Planning  
9       will jump in at the appropriate time, if not  
10      now. Has there been any dialogue or exchange  
11      with fire, EMS, other emergency personnel  
12      around how the space is accessed just for  
13      those purposes? Again, not squarely on the  
14      zoning issue but just from the standpoint of  
15      practice.

16             MR. ARNOLD: Other than the fact  
17      that it would be enclosed in a fire rated  
18      enclosure and sprinkler for a condition that  
19      would be typical in any parking garage there  
20      has been no other discussions for that.

21             VICE-CHAIR     ETHERLY:        Okay.  
22      Excellent.   That's all I wanted to know.

1 Thank you.

2 CHAIRPERSON MILLER: How long has  
3 the other garage that has the same parking  
4 mechanism been operating with it. Do you  
5 know?

6 MR. SHER: I guess about 10 years.

7 CHAIRPERSON MILLER: And it's been  
8 successful?

9 MR. SHER: It's a residential  
10 building rather than an office building. It  
11 also has two lifts in the building as opposed  
12 to just one and that parking is not required  
13 parking under the regulations which is why  
14 they didn't need to come get any relief.

15 That building was an addition to  
16 an historic landmark so no parking was  
17 required for the addition at the time so they  
18 were able to put the parking in there and not  
19 need relief from the Board for the reasons  
20 that we are here today.

21 We have seen it. I know Harry has  
22 been out a few times and inspected it to be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1       sure that it would be something that a system  
2       similar to that would meet his needs for his  
3       tenants. As far as we know, it is a very  
4       efficient and successful and productive  
5       operation.

6               CHAIRPERSON MILLER: Thank you.  
7       Is there more to your presentation?

8               MS. BROWN: We are prepared to  
9       rest on the record unless you want us to --

10              CHAIRPERSON MILLER: I don't think  
11       we need to hear all the details. We have read  
12       it all in the papers. Is there anybody here  
13       from ANC? Okay. Then we can go to the Office  
14       of Planning.

15              MR. MANN: Madam Chair, can I  
16       ask --

17              CHAIRPERSON MILLER: I'm sorry.

18              MR. MANN: That's all right.

19              CHAIRPERSON MILLER: Go ahead, Mr.  
20       Mann.

21              MR. MANN: Couple of questions.  
22       Does the system turn the car around so that it

1 faces in a different direct when you are done?

2 MR. SHER: Yes. The pallet you  
3 can see the diameter on the first floor plan  
4 here. The car goes in face in and comes out  
5 face out.

6 MR. MANN: Is there any  
7 restriction on the type of car or the size of  
8 the vehicles that can be parked versus what  
9 you might find in a self-park garage?

10 MR. SHER: There is a restriction  
11 in the sense that we have two levels that have  
12 the 5'7" clearance and one level that has the  
13 6'10" inch clearance. When you drive your car  
14 onto that pallet there are sensors that  
15 actually measure the height and the width of  
16 the vehicle and it determines if there is the  
17 space available that will accommodate that  
18 size vehicle so it's going to put a normal  
19 passenger car vehicle in the levels that have  
20 the 5'7" clearance and it is going to keep the  
21 6'10" level for vans and SUVs and so forth.

22 If somebody attempted to drive a

1 dump truck in there that was well in excess of  
2 6'10" the sensor would not allow it in and not  
3 take it down. If you attempted to drive a  
4 dump truck into a normal parking garage with  
5 a 6'6" clearance, you wouldn't be able to  
6 drive it in and take it down either so, in  
7 effect, it's really no different than that.

8 MR. MANN: Okay. You said that  
9 you had a choice of going for a parking  
10 variance in its entirety or the variances that  
11 you are seeking today. How do you go about  
12 making the decision on what you are going to  
13 see?

14 MR. SHER: We actually went and  
15 met with staff at the Office of Planning and  
16 said we can do this either way and they urged  
17 us to go the way that we've come. They  
18 thought that would be a project that would be  
19 useful almost as a kind of demonstration  
20 project that you can actually meet the parking  
21 requirements in a way that is nontraditional  
22 and that if others found it to be a reasonable



1 way to proceed might ultimately lead to an  
2 amendment to the regulations to allow for a  
3 mechanical means of access to a required  
4 parking space rather than the normal paved  
5 driveway and parking ramp.

6 We had a case and, I guess, I was  
7 here last Tuesday where we were talking about  
8 a variance on parking requirements because of  
9 the narrowness of the lot. We had parking but  
10 they were in the vault so we couldn't count  
11 them. We could have gone another way on that  
12 one, too, and we could have gone that way on  
13 this one. What we thought here was since 29  
14 spaces are required and we can actually  
15 provide 32, we have the right number of spaces  
16 but we would seek the variance on the other  
17 aspects.

18 MR. MANN: And that leads directly  
19 to my last question. Is this going to be the  
20 wave of the future? Do you think we are just  
21 going to see this on these unusual cases where  
22 the lot is really narrow or other unusual

1       circumstances?

2                   MR. SHER:   There are examples of  
3       properties in Europe, large office buildings  
4       that accommodate parking this way.  It can be  
5       done.  I think there will probably be some,  
6       what do I want to say, market resistance to  
7       the cost of having to do this.  It's not cheap  
8       but because it's the only way to do it here,  
9       we really didn't have much of a choice.  The  
10      constraints of the site almost required us to  
11      go that way.

12                   Whether we are going to come back  
13      here with a 300,000 square foot office  
14      building and a lot of parking spaces and I  
15      don't know how many elevators or lifts would  
16      be required to serve that, I don't know at  
17      this point.  We did think it was a practical  
18      solution to this project.

19                   I have had others clients look at  
20      elevators or mechanical lifts as a means to  
21      provide parking in situations where in one it  
22      was a building that would not have had the

1 parking required so we could have used it and  
2 not needed a variance. The project didn't go  
3 forward. We had other people looking at it  
4 but they pretty much have been for small to  
5 mid-size garages.

6 MR. MANN: Thank you.

7 MR. LOUD: Madam Chair, couple  
8 quick questions. These questions are pretty  
9 much off the zoning issues. I find it is  
10 very, very fascinating so I want to take  
11 advantage of the opportunity to sort of pick  
12 your brain. Are you able to share what the  
13 added cost was to the project to have to go  
14 this particular route? Did you recoup some or  
15 all those costs by adding about 13 extra  
16 parking spaces?

17 MR. MOSHOVITIS: It's very  
18 expensive. We haven't gotten the final price  
19 tag yet but you save some money because you  
20 don't have to have the slabs for each floor so  
21 you save some money there. You save some  
22 money on the HVAC and, consequently, you save

1 more and you don't have to worry about the  
2 emissions coming out of the building. It's  
3 more of a greener building to begin with.  
4 This building will be LEED as well. It's more  
5 expensive than typical slab construction. How  
6 much I'm not sure yet.

7 MR. LOUD: Okay. Do you know if  
8 there are any federal dollars available, I  
9 guess, related to transportation issues for  
10 these kind of projects?

11 MR. MOSHOVITIS: I do not know.

12 MR. LOUD: Then, finally, adding  
13 the additional 13, 14 parking spaces, did that  
14 help you in any significant way to recoup some  
15 of those costs?

16 MR. MOSHOVITIS: Yes.

17 MR. LOUD: Is that the reason why  
18 you added the extra parking spaces?

19 MR. MOSHOVITIS: You're in the  
20 river spending the money. You might as well  
21 add the extra spaces.

22 MR. LOUD: Thank you much. Did

1 they explain how this works when I stepped  
2 away?

3 CHAIRPERSON MILLER: Yes, with the  
4 lifts and pallets and stuff. It's not  
5 different from what's in our files. Do you  
6 have a specific question you want to ask?

7 MR. LOUD: What time do we break?

8 CHAIRPERSON MILLER: When we're  
9 finished.

10 MR. LOUD: Could you in layman the  
11 two-minute version just explain for me as  
12 someone who is a tenant at this 300,000 square  
13 foot project, and I've got my automated card  
14 or whatever, how does this actually work? The  
15 two-minute version.

16 MR. SHER: The two-minute version.  
17 You pull into the area and if the lift is  
18 available, there will be a door that is open.  
19 You pull your car in. There are sensors that,  
20 as I said, measure the height and width of the  
21 vehicle to make sure that it will fit in the  
22 spaces that are below. You get out, you exit

1 the vehicle. There are motion detectors to  
2 make sure that there is nobody left in the  
3 car.

4 Once those checks have been gone  
5 through, the system determines where there is  
6 an empty pallet below. If it is, again, sort  
7 of a standard sedan or automobile, it takes it  
8 to one of those 5'7" clear levels. If it's a  
9 larger vehicle, it takes it down to the lowest  
10 level which has the greater clearance.

11 The pallet goes down, slides into  
12 the middle of the row between the spaces.  
13 When it gets to the empty space it delivers  
14 the car in there and then returns to the  
15 surface to await another vehicle.

16 If you are retrieving your car in  
17 the evening, the way we tentatively have this  
18 set up is you would swipe your card in the  
19 elevator on your way down and that will tell  
20 the system that you are coming down to get  
21 your car.

22 As one of those two lifts is

1 available, it will drop down to the level  
2 where -- to the space where your vehicle is  
3 located, slide it out onto the life, take it  
4 back up, bring it up to the top, and then  
5 rotate it 180 degrees so that it's facing out  
6 and you can just drive it straight out as you  
7 come off the pallet.

8 MR. LOUD: So, for example, let's  
9 say it's 5:30 and everybody is leaving around  
10 the same time. There would be some small line  
11 of folks waiting because there are two of  
12 these?

13 MR. SHER: Right. We estimate  
14 that a round trip for a pallet is somewhere  
15 about two minutes so there's not a lot of wait  
16 time. It might be less time than you were  
17 waiting if you parked your car in a valet  
18 garage and you had to hand your ticket to the  
19 valet and they had to go down and get your car  
20 and bring it up and then take the next guy's  
21 ticket, go down and bring his up.

22 Arrival and departure times tend

1 to be staggered somewhat. Not everybody is  
2 generally leaving at the same time or arriving  
3 at the same time. There might be some small  
4 amount of wait time involved but we don't  
5 think that is likely to be very long.

6 MR. LOUD: Thank you.

7 CHAIRPERSON MILLER: And also, for  
8 Mr. Loud's benefit, you also said the entrance  
9 is located at the end of an alley or something  
10 so even if there were a backup it wouldn't  
11 interfere with other traffic. Is that  
12 correct?

13 MR. SHER: That's correct.

14 CHAIRPERSON MILLER: Okay.

15 MR. TURNBULL: Madam Chair.

16 CHAIRPERSON MILLER: Yes.

17 MR. TURNBULL: Obviously this is a  
18 very unique solution to a difficult problem as  
19 long as you don't have to give the machine a  
20 tip. Mr. Sher, do you see the 43 percent  
21 extra cars as a problem in the alley for the  
22 neighbors?



1                   MR. SHER: No. There is no limit  
2                   on the number of parking spaces that any  
3                   building in this square could provide. The  
4                   main entrance to the alley is located further  
5                   to the west on L Street. It's actually west  
6                   of the NAUIC building which is the next  
7                   building over.

8                   You go into the middle of the  
9                   square, turn east, and then turn south to get  
10                  back to the entrance to this garage. There  
11                  are other buildings in the square. There are  
12                  actually some alley lots in the center of the  
13                  square that use the alleys for access. Some  
14                  of the other buildings have their access right  
15                  off the street and don't use the alley system.

16                  It's not a large building no  
17                  matter how you look at. The buildings on  
18                  either side are considerably larger. In fact,  
19                  this is the smallest office building lot in  
20                  this square so it's going to have the least  
21                  a m o u n t           o f           i m p a c t .  
22

1           MR. TURNBULL: Part of my concern  
2           is that I think it is an appropriate solution.  
3           It is unique. My concern is in the future  
4           these systems being in and there's going to be  
5           a hardship that says we can't put a system in  
6           unless we get 50 percent more or 100 percent  
7           more to make the system viable.

8           Then all of a sudden we have  
9           created a traffic impact by allowing in what  
10          would normally have very limited parking now  
11          will have maximized parking. I see it as a  
12          very creative solution. I think it is a very  
13          positive one. I also see it being overused at  
14          some point to an extent where there could be  
15          an hardship or an impact on neighborhoods.  
16          That is my only concern.

17          Again, I think it's a creative  
18          one. I think it's a very positive one and you  
19          have worked hard with OP, I understand. My  
20          only concern is the viability of a system like  
21          that reaching the proportions where you will  
22          have an impact on the neighborhood.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1           MR. SHER: One thing to keep in  
2 mind is that the zoning regulations establish  
3 a minimum number of parking spaces for uses  
4 but do not in any zoned district or for any  
5 use establish a maximum so if someone wanted  
6 to dig down deeper or expand the number of  
7 spaces that could be provided, that is  
8 something that the regulations would not  
9 preclude.

10           Again, in this particular  
11 situation we have a relatively small number of  
12 spaces even with the extra levels of spaces  
13 that we can get more in three levels than we  
14 could get -- well, we can't get any in three  
15 levels here. Anything we get here is more  
16 than we can do as of right.

17           We get more in three levels  
18 because of the efficiency you get using the  
19 pallets and the mechanical lifts than you  
20 would if you put this space into a typical  
21 parking garage. We don't think in this case  
22 that is going to cause any particular impact.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1           As I said, if I bought you a  
2   300,000 square foot office building that had  
3   a lot more parking spaces in it, I'm not sure  
4   I know what the impact of that is at the  
5   moment but that's not what we have here.

6           MR. TURNBULL: Thank you. My only  
7   concern is from a zoning and urban planning  
8   standpoint that we now have the ability to  
9   solve these problems and how we solve them,  
10   again, maybe it's a regulatory issue that we  
11   need to think about because we have often  
12   talked about metro and buses and trying to get  
13   people to other means. Although we always see  
14   the automobiles never going away, we would  
15   like to be able to control them. That is my  
16   only concern.

17           MS. BROWN: Mr. Turnbull, just to  
18   follow-up briefly, you heard the parking  
19   waiver discussion last night at the zoning  
20   commission. The automated parking was  
21   considered being thrown in there but Office of  
22   Planning said, "No, we need to study it," for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 the very reasons that you raised.

2 MR. TURNBULL: It's only a talking  
3 point. I'm just speaking hypothetically of  
4 this danger. I'm a little frightened by it  
5 but I see here it's a very unique solution.

6 CHAIRPERSON MILLER: I just want  
7 to comment that I think that is like the  
8 difference between what we hear here and what  
9 you do on the Zoning Commission because we  
10 look at this one instance. In this case there  
11 isn't an adverse impact that I'm seeing from  
12 the 43 spaces nor hearing that they did that  
13 and it was the only viable means to implement  
14 this. We also hear from DDOT a lot this  
15 tradeoff between having more parking or less  
16 parking. I think that is a policy issue that  
17 the Zoning Commission will probably get into.

18 MR. TURNBULL: It's a balance.

19 CHAIRPERSON MILLER: Yeah.

20 MR. TURNBULL: Definitely a  
21 balance.

22 CHAIRPERSON MILLER: Okay. Any

1 other comments right now? I think we are  
2 ready to move to the Office of Planning.

3 MR. JACKSON: Good morning, Madam  
4 Chair, and Mr. Vice-Chair and the rest of the  
5 Board. My name is Arthur Jackson. I'm  
6 Development Use Specialist with the District  
7 of Columbia Office of Planning. You have a  
8 copy of our report before you and I will  
9 briefly go through our analysis.

10 We think that the applicants did  
11 make a good case that the proposed development  
12 on this site presents some unique challenges.  
13 We think the practical difficulty has been  
14 established. Essentially we've got a system  
15 that has certain dimensions and that is  
16 automated but we have regulations that are  
17 designed for a parking garage that involves  
18 actually driving cars to spaces.

19 We also note that the main impact  
20 of this proposal will be to increase the  
21 amount of parking on site in a situation where  
22 under the regulations and given the

1 constraints of the site they would not be able  
2 to nearly meet or come close to the  
3 requirement. Therefore, we agree that the  
4 reference regulations present the practical  
5 difficulty to utilizing a system that is  
6 engineered for parking cars automatically.

7 We also think that granting the  
8 relief would not impose any -- would not  
9 impair the intent, purpose, or integrity of  
10 the zone map or the zoning regulations. We  
11 note that the comprehensive plan is consistent  
12 with this proposal in terms of high-density  
13 office uses on the site.

14 We also refer this proposal to the  
15 Department of Transportation for their  
16 comments. The representative indicated that  
17 they do support this proposal. Based on that,  
18 the Office of Planning recommends approval of  
19 the requested variances and we are available  
20 to answer questions.

21 CHAIRPERSON MILLER: Thank you. I  
22 think you did an excellent job on your report.

1 Is there any elaboration you want to make on  
2 what the Department of Transportation said or  
3 just that they support it?

4 MR. JACKSON: They said they were  
5 going to look at the site. They looked at the  
6 other activities going on around the property.  
7 There is a major development going -- well,  
8 there is a big hole in the ground essentially  
9 for a large office building that is  
10 immediately to the west and a new office  
11 building has just been opened, I guess, in  
12 that last few months on the corner to the  
13 east.

14 All of these buildings will have  
15 their own parking services. I believe the  
16 building to the south will have more direct  
17 access to L Street in terms of ingress and  
18 egress of parking.

19 They noted that they had seen  
20 other examples of these systems being  
21 installed in the District and, to their  
22 knowledge, there haven't been any problems



1 with them. That was really their concern  
2 along with the fact that there would be  
3 adequate access along this alley.

4 Of course, you know in the plat  
5 the alley is 30-feet wide and it does have  
6 several exits onto major streets. They did  
7 not anticipate that this would create any  
8 problems and, as such, they made no  
9 expressions of concern.

10 CHAIRPERSON MILLER: Great. Thank  
11 you very much. Any questions? Do you have a  
12 copy of the Office of Planning Report?

13 MS. BROWN: Yes, we do. We fully  
14 support it.

15 CHAIRPERSON MILLER: Okay. Great.  
16 Anybody here yet from the ANC? Okay. Anybody  
17 here in support or opposition of this  
18 application? Okay. Do we have any other  
19 questions from Board members? All right.  
20 Then I'll leave it to you for closing.

21 MS. BROWN: Thank you, Madam  
22 Chair. Based on the evidence of record and

1 the testimony you heard today, I believe we  
2 have met our burden of proof demonstrating  
3 that we meet the test for a variance relief.  
4 If you are so inclined, we would appreciate a  
5 bench decision and, if appropriate, a summary  
6 order. Thank you.

7 CHAIRPERSON MILLER: Thank you. I  
8 want to note for the record, if we haven't  
9 already, that we have an ANC report, Exhibit  
10 No. 24, in the record unanimously supporting  
11 the application and meeting the great weight  
12 requirements.

13 We have a letter in support also  
14 from the National Association for the  
15 Education of Young Children. They are located  
16 at 1313 L Street immediately adjacent to the  
17 subject property.

18 Okay. I think we are probably  
19 ready to deliberate on this one. Are we not?

20 VICE-CHAIR ETHERLY: Madam Chair,  
21 if it's appropriate, I would be more than  
22 happy to move approval of Application No.

1 17588 of Thalia, LLC pursuant to 11 DCMR  
2 3103.2 for variance from the parking space  
3 size requirements under Subsection 2115.1 of  
4 the variance from the parking space vertical  
5 space requirements under Subsection 2115.5 and  
6 a variance from the parking space  
7 accessibility requirements under Section  
8 2117.4 to construct a new office building at  
9 premises 1307 through 1311 L Street, N.W. and  
10 would invite a second.

11 CHAIRPERSON MILLER: Second.

12 VICE-CHAIR ETHERLY: Thank you  
13 very much, Madam Chair. I believe the record,  
14 continuing a wonderful trend this morning, is  
15 very full and complete on this application.

16 It seems as though in fairly  
17 recent memory over the last couple of weeks we  
18 have started to see a number of different  
19 applications each in their own individual way  
20 begins to evoke some of the newer challenges  
21 that our zoning regulations now face with  
22 respect to technology, with respect to, as we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 discussed earlier this morning, articulation  
2 and animation of our alley street scapes, if  
3 you will.

4 This is probably yet another  
5 example of a very interesting but good  
6 challenge that our zoning regs may begin to  
7 see more in the future and that is as  
8 technology begins to enable us to make use of  
9 automation in one of those areas that perhaps  
10 at first blush wouldn't necessary seem to be  
11 such a ripe candidate for automation. As Mr.  
12 Turnbull indicated jokingly, the fact that we  
13 may not any longer have to tip the machine or  
14 an attendant to help move our car from  
15 driveway to parking spot.

16 All that being said, as we deal  
17 with the issue of the extraordinary and  
18 exceptional conditions here on the site, it  
19 has been more than adequately laid out that we  
20 are talking about a very narrow site that has  
21 substantial restrictions on its layout.

22 As you begin to talk about the

1 return on investment that you get by having to  
2 excavate to the deep that would probably have  
3 to be reached in order to secure relevant  
4 parking under the zoning regulations, you just  
5 begin to see diminishing returns almost fairly  
6 quickly, maybe even with the first shovel into  
7 the ground. Clearly there are constraints on  
8 this building that prevent the applicant from  
9 reaching the relevant parking.

10 Those extraordinary and  
11 exceptional conditions clearly lead to the  
12 practical difficulties that you are talking  
13 about here. Were you to do that, you are  
14 going to run into additional issues around  
15 turning radius and grade changes.

16 It simply cannot be done under the  
17 current framework that the zoning regulations  
18 envision. As OP discussed with respect to the  
19 intent, purpose, and integrity of the zone  
20 plan, you are providing your parking. You are  
21 doing that. There's not going to be a  
22 negative impact.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1           I think there were some very  
2 important questions raised as it pertained to  
3 looking down the line. Do we envision any  
4 long queuing lines. Do we envision any  
5 additional traffic impacts. There has been no  
6 evidence presented that there would be with  
7 regard to any weights or any issues entering  
8 and exiting the alley plan there. I think  
9 just in short, Madam Chair, and my colleagues,  
10 I think the case has been more than adequately  
11 made.

12           I'm just surprised that we don't  
13 have a cadre of parking attendants in  
14 attendance here because this could indeed be  
15 the first of the death nail, if you will, for  
16 parking attendants throughout the land.  
17 Perhaps that is a good thing and I will stop  
18 there, Madam Chair.

19           I'm ebullient and effusive this  
20 morning because it is, indeed, a new term in  
21 the Board's movement and we have a new member  
22 so I'm just giddy. I apologize to my

1 colleagues but I'm more than happy to move  
2 forward with this application.

3 CHAIRPERSON MILLER: Thank you.  
4 Thank you. I'll be pretty short then. I  
5 think you basically covered it. It is  
6 interesting because this is very similar to a  
7 case we had just a little while ago with  
8 respect to the same kind of situation, a very  
9 narrow small lot where it was really basically  
10 practically impossible to put the parking in.

11 As Mr. Sher mentioned, that was  
12 one where they had access to both space and  
13 that was the solution. Here we have a very  
14 innovative solution that our regulations just  
15 didn't contemplate considering they were  
16 written a long time ago before this solution  
17 even existed. We definitely have an  
18 exceptional situation. We have practical  
19 difficulty in parking, we have this innovative  
20 solution that wasn't contemplated.

21 I just want to add that we also  
22 have in addition to no adverse impacts that

1 Mr. Etherly mentioned, we have the very  
2 positive environmental impacts here. The  
3 applicant went into a lot of depth in the  
4 papers really about the admissions and how  
5 this is so much better and healthier for the  
6 environment and for people in general.

7 What I think is interesting is we  
8 have this morning two cases which were going  
9 for LEED and the greening of the city. Then  
10 we have also a new comprehensive plan that has  
11 this new provision that says that is one of  
12 our goals.

13 This case actually is quite  
14 consistent with that goal. Are there any  
15 other comments? Okay. We have a motion and  
16 we have a second. I think we can take a vote  
17 at this point. All those in favor, say aye.

18 ALL: Aye.

19 CHAIRPERSON MILLER: All those  
20 opposed? All those abstaining?

21 We also have another situation  
22 where we have no party in opposition and so,



1       therefore, I would recommend we waive our  
2       rules and regulations for issuing an order  
3       with findings of fact and conclusions of law  
4       and issue a summary order in this case. Is  
5       that the consensus of the Board? Okay. Thank  
6       you very much.

7               MS. BAILEY: Madam Chair, just for  
8       the record, the vote is five zero zero. The  
9       motion was made by Mr. Etherly and it was  
10      seconded by you and all of the other Board  
11      members support the motion.

12             CHAIRPERSON MILLER: Thank you,  
13      Ms. Bailey.

14             We are going to adjourn this  
15      public hearing now and we will return for the  
16      afternoon session in an hour. Thank you.

17             (Whereupon, at 12:19 p.m. off the  
18      record for lunch to reconvene at 1:32 p.m.)  
19  
20  
21  
22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

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

1:32 p.m.

CHAIRPERSON MILLER: Good  
afternoon, ladies and gentlemen. This is the  
April 10, 2007, public hearing of the Board of  
Zoning Adjustment of the District of Columbia.  
My name is Ruthanne Miller. I am Chair of the  
BZA. To my right is Mr. Etherly who is Vice-  
Chair of the BZA. Mr. Hood will be joining us  
soon representing the Zoning Commission.

To my left is Mr. Marc Loud who is  
our newest Mayoral appointee. We welcomed him  
this morning but we welcome him again. Then  
we have Mr. John Mann representing NCPC. Mr.  
Clifford Moy just stepped away representing  
the Office of Zoning. Lori Monroe and Esther  
Bushman from OHE and Beverley Bailey from the  
Office of Zoning.

Copies of today's hearing agenda

1 are available to you and are located to my  
2 left on the wall bin near the door. Please be  
3 advised that the proceeding is being recorded  
4 by a court reporter and also webcast live.  
5 Accordingly, we must ask you to refrain from  
6 any disruptive noises or actions in the  
7 hearing room.

8 When presenting information to the  
9 Board please turn on and speak into the  
10 microphone first stating your name and home  
11 address. When you are finished speaking,  
12 please turn your microphone off so that your  
13 microphone is no longer picking up sound or  
14 background noise.

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

22 The order of procedure for special

1 exceptions and variances is: (1) Statement and  
2 witnesses of the applicant; (2) Government  
3 reports including Office of Planning,  
4 Department of Public Works, Transportation,  
5 etc.; (3) Report of the Advisory Neighborhood  
6 Commission; (4) Parties or persons in support;  
7 (5) Parties or persons in opposition; (6)  
8 Closing remarks by the applicant.

9 The order of procedure for appeal  
10 applications will be as follows: (1)  
11 Statement and witnesses of the appellant; (2)  
12 The Zoning Administrative or other Government  
13 official's case; (3) Case for the owner,  
14 lessee, or operator of the property involved  
15 if not the appellant; (4) The ANC in which the  
16 property is located; (5) Intervenors case if  
17 permitted by the Board; (6) Rebuttal and  
18 closing statements by appellant.

19 Pursuant to Section 3117.4 and  
20 3117.5, the following time constraints may be  
21 maintained. The applicant, appellant, persons  
22 and parties except an ANC in support including

1 witnesses, 60 minutes collectively.  
2 Appellees, persons and parties except an ANC  
3 in opposition including witnesses, 60 minutes  
4 collectively. Individuals, three minutes.

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

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

1 accepted by the Board.

2 The Sunshine Act requires that the  
3 public hearing on each case be held in the  
4 open before the public. The Board may  
5 consistent with its rules of procedure and the  
6 Sunshine Act enter executive session during or  
7 after the public hearing on a case for  
8 purposes of reviewing the record or  
9 deliberating on a case.

10 The decision of the Board in these  
11 contested cases must be based exclusively on  
12 the public record. To avoid any appearance to  
13 the contrary the Board request that persons  
14 present not engage the members of the Board in  
15 conversation. Please turn off all beepers and  
16 cell phones at this time so not to disrupt  
17 these proceedings.

18 The Board will make every effort  
19 to conclude the public hearing as near as  
20 possible to 6:00 p.m. If the afternoon cases  
21 are not completed at 6:00 p.m., the Board will  
22 assess whether it can complete the pending

1 case or cases remaining on the agenda.

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

9 If you are not prepared to go  
10 forward with the case today or if you believe  
11 that the Board should not proceed, now is the  
12 time to raise such a matter. Does the staff  
13 have any preliminary matters?

14 MS. BAILEY: Madam Chair, good  
15 afternoon. To members of the Board and to  
16 everyone, good afternoon as well. There is,  
17 Madam Chair, and it has to do with Application  
18 No. 17590. There is a request from the ANC  
19 and from the applicant for postponement of  
20 this application.

21 CHAIRPERSON MILLER: Okay. Then  
22 what I would suggest is that you swear in

1 everyone who will be testifying today and then  
2 we can hear the preliminary matter.

3 MS. BAILEY: Sure.

4 CHAIRPERSON MILLER: Would all  
5 individuals wishing to testify today please  
6 rise to take the oath.

7 MS. BAILEY: The gentleman in the  
8 back of the room, are you testifying today?  
9 Please stand. Please raise your right hand.

10 (Whereupon, the witnesses were  
11 sworn.)

12 CHAIRPERSON MILLER: Good  
13 afternoon, Mr. Gell.

14 MR. GELL: Good afternoon. Madam  
15 Chair, congratulations on the election. Mr.  
16 Etherly, the same, and Mr. Loud.

17 I requested a postponement of the  
18 case partially because when the ANC took up  
19 the matter, the Suchelskys had a long-standing  
20 obligation, actually something they took on to  
21 go to Mississippi and build houses and they  
22 didn't feel that they could postpone that.



1 The ANC was quite understanding and is joining  
2 with us in requesting this postponement of the  
3 case. It involves a parking pad in front of  
4 their house. That's 17590.

5 CHAIRPERSON MILLER: Okay. We  
6 have read your request and the ANC report also  
7 where they support the postponement. I just  
8 have a question for you. It looks like the  
9 notice went out in January and I'm wondering  
10 was there any attempt to accommodate the  
11 applicant at a different ANC meeting?

12 MR. GELL: I'm not sure what you  
13 mean.

14 CHAIRPERSON MILLER: Well, I mean  
15 it is a very good reason to postpone in my  
16 view the fact that they didn't have an  
17 opportunity to present at the meeting. That  
18 is very important. I'm just wondering whether  
19 there was an attempt to try to accommodate  
20 them earlier. Why didn't that happen?

21 MR. GELL: I think probably  
22 because there was not sufficient contact prior

1 to the meeting which they were going to take  
2 this up. Had we thought about it, had I known  
3 that they were going to be out of town for  
4 that period of time and when the ANC meeting  
5 was, obviously we might have talked to the ANC  
6 and said, "Can you deal with this a little bit  
7 earlier?" I guess the time just slipped by  
8 and we didn't think we had to do anything that  
9 early.

10 CHAIRPERSON MILLER: Okay. I was  
11 just wondering. I don't know if my Board  
12 members have any problems with postponing for  
13 this reason. No? Okay. It's a very good  
14 reason. We have looked at our calendar and we  
15 have an opening on May 15th in the afternoon.  
16 Are you available then do you know?

17 MR. GELL: May 15th will be okay  
18 with us but the ANC did ask specifically for  
19 time. I don't know how that fits in with  
20 their own schedule for their next meeting.  
21 They were very concerned that they wouldn't  
22 have sufficient time to have their meeting and

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 then get advice into the BZA.

2 VICE-CHAIR ETHERLY: Mr. Gell,  
3 very quickly, what is your understanding about  
4 the next meeting date for the ANC at this  
5 point, if any?

6 MR. GELL: I would have to look in  
7 my files to see what their last meeting date  
8 was.

9 CHAIRPERSON MILLER: We have their  
10 report here.

11 MR. GELL: Do you?

12 CHAIRPERSON MILLER: It says that  
13 the regularly scheduled public meeting on  
14 March 19th they voted to approve this motion  
15 to support the postponement of this case. It  
16 seems to me they would probably have another  
17 meeting in April. They have one every month.

18 MR. GELL: Right. That's true so  
19 it would be the third -- what was March 19th?  
20 Tuesday or a Wednesday.

21 CHAIRPERSON MILLER: Right.

22 MR. MANN: Madam Chair, it appears

1 that the third Monday of April would be April  
2 16th and the third Monday or May would be May  
3 21st.

4 CHAIRPERSON MILLER: Right.

5 VICE-CHAIR ETHERLY: My  
6 inclination, Madam Chair, would be that we  
7 probably move forward with the date and  
8 perhaps if the ANC hasn't moved forward in  
9 terms of completing their process, I'm sure I  
10 wouldn't have any objection to, shall we say,  
11 being somewhat accommodating if we run into an  
12 issue where the ANC's action is imminent put  
13 perhaps hasn't been finalized or if they  
14 produce a report at the last minute.

15 Again, I can't speak for my  
16 colleagues but I probably wouldn't have any  
17 objection to waiving the rules and accepting  
18 the report if it comes in at the last minute.

19 MR. GELL: I understand that. I  
20 just wonder is there another possible date,  
21 another possible opening that would be a  
22 little later?

1 CHAIRPERSON MILLER: I'm just not  
2 following why this should be a problem.

3 MR. GELL: I'm not sure it would  
4 be a problem. I think the anticipation was  
5 that there would be more time between now and  
6 when the hearing would take place. Obviously  
7 if you set it on that date, we'll make that  
8 date.

9 CHAIRPERSON MILLER: We can look  
10 further. I mean, if we are going to be  
11 prejudicing anybody it would be the applicant  
12 if you want to go further out. It just  
13 happens we had a withdrawal on that date so we  
14 could fit you in. I guess June 26th if you  
15 want to go all the way to June.

16 MR. GELL: That would be okay.  
17 There's one other advantage and that is in May  
18 I think there is a meeting of the Public Space  
19 Committee which is going to consider this  
20 matter as well. By then we will have some  
21 sense about whether Department of  
22 Transportation is willing to allow it. If

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 they don't, obviously there won't be any need  
2 to go any further.

3 CHAIRPERSON MILLER: Why don't we  
4 do that then.

5 MR. GELL: That might be good. We  
6 did work very hard to get our application in  
7 by March 30th for the May meeting. I think  
8 that might be good for all of us if we were to  
9 do that. July 26?

10 CHAIRPERSON MILLER: It was June  
11 26.

12 MR. GELL: June 26. As far as I  
13 know that's a good date.

14 CHAIRPERSON MILLER: Okay. Mr.  
15 Moy, that is the date that is available?  
16 Okay. Then we will schedule you -- morning or  
17 afternoon? Does it matter?

18 MS. BAILEY: Afternoon.

19 CHAIRPERSON MILLER: Afternoon.  
20 Okay. Mr. Gell, that's okay with you, June  
21 26th in the afternoon?

22 MR. GELL: Yes. Thank you so

1 much.

2 CHAIRPERSON MILLER: Okay. Thank  
3 you.

4 Ms. Bailey, do you want to call  
5 the next case?

6 MS. BAILEY: The next case, Madam  
7 Chair, is a limited public hearing. The Board  
8 had on two previous occasions heard this case.  
9 It is Application No. 17562 of W Street, S.E.,  
10 38/42-43, LLC.

11 It is pursuant to 11 DCMR 3104.1  
12 for special exception to construct six row  
13 dwellings under Section 353 at premises 1749  
14 through 1759 W Street, S.E. I think that  
15 number has been revised from six three-unit  
16 row dwellings to five three-unit row  
17 dwellings. The property is zoned R-5-A, Madam  
18 Chair, and the continuation is at this time.

19 CHAIRPERSON MILLER: Thank you.

20 Good afternoon.

21 MR. BLANCHARD: Good afternoon,  
22 Madam Chair, and members of the Board of

1 Zoning Adjustment. My name is Lyle Blanchard.  
2 I'm with Greenstein, DeLorme & Luchs. I am  
3 representing the applicant in this case, W  
4 Street.

5 I have just given Ms. Bailey what  
6 she is distributing to you, a drawing which  
7 shows in greater detail the retaining wall at  
8 the front of the property and also a somewhat  
9 clearer copy of the rendering that we  
10 submitted on April 4th with our last  
11 supplemental filing so that reads somewhat  
12 clearer than the rendering we submitted before  
13 which was an enlargement and it was a little  
14 murky.

15 CHAIRPERSON MILLER: Okay.

16 MR. BLANCHARD: We have attempted  
17 in our letter of April 4th to respond to the  
18 questions raised by the Board at its meeting  
19 of March 6th. In particular, addressing OP's  
20 concerns from its last supplemental report  
21 prior to that meeting in March providing the  
22 Board with detail on the retaining wall area

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 and responding to the letter filed by Mrs.  
2 Chapman which was Exhibit 37 in the record.

3 The Board had allowed that to come  
4 in at the meeting on March 6th. With that, I  
5 am just going to turn to Mr. Anthony  
6 Washington who is representing the -- who is  
7 the applicant. He just wants to put in the  
8 record a couple of brief comments and then  
9 we'll respond to any questions.

10 CHAIRPERSON MILLER: Okay. Thank  
11 you.

12 MR. WASHINGTON: Anthony  
13 Washington, 4502 17th Street, N.W., D.C. As  
14 Lyle said, I am here to sort of make some  
15 clarifications to some of the things that were  
16 submitted on March 6th. We didn't have enough  
17 time to submit floor plans for the duplex  
18 units that will be in lieu of on March 6th we  
19 submitted a plan showing 20 units spread  
20 amongst the five buildings.

21 We responded to Ms. Chapman's  
22 concerns and OP's concerns and reduced that

1 down to 15 units, the bottom two units  
2 comprising duplexes. You will notice in the  
3 submission that is one of the changes. We do  
4 now have floor plans that are included.

5 One of the other very minor  
6 changes, and this was based on a comment that  
7 was made by the Board about symmetry. We  
8 switched around one of the bay fronts and  
9 added some additional gables to give more  
10 balance to the project and hopefully address  
11 the concern over symmetry.

12 As Lyle mentioned, we have just  
13 now submitted a more detailed drawing of the  
14 front retaining wall. There seemed to have  
15 been some questions about how it was going to  
16 look, how big it was going to be, whether it  
17 was going to be level all the way across. As  
18 I recall, there was a request by the ANC that  
19 the retaining wall have a decorative quality  
20 to it and what you will see there is our  
21 attempt to address those concerns.

22 There was also a question about

1 the water runoff in the rear because, as you  
2 recall, there are some steep slopes and  
3 purportedly some water issues with the  
4 properties that are being built down below.

5 What we have attempted to do is  
6 address that with a very short retaining wall  
7 in the back but, more importantly, with a  
8 storm water management plant that includes  
9 grading of the lot, the impervious surface  
10 towards the middle.

11 In other words, as water collects  
12 in the rear of the property it would be  
13 channeled towards the middle of the parking  
14 lot into a drain and then funnelled back out  
15 to the front. We feel like this approach will  
16 greatly minimize any potential for water  
17 runoff down the back of the property.

18 I also wanted to point out the  
19 coloring in the rendering. It's just for  
20 illustrative purposes. I realize everybody  
21 has got specific taste about these things. I  
22 don't want the Board to feel like we are

1 locked into those specific colors at this  
2 time.

3 Finally, I guess, the materials  
4 that we are going to use we are going to make  
5 every attempt to stay away from vinyl or metal  
6 siding. The siding we would like to go with  
7 at this time is hardy plank which is as close  
8 to wood as you can get.

9 CHAIRPERSON MILLER: I'm sorry.  
10 Can you speak a little louder? I missed what  
11 you said about the materials.

12 MR. WASHINGTON: There was a  
13 question about what kind of materials we were  
14 going to use in terms of the siding. At this  
15 time we plan on using hardy plank which we  
16 feel is a step above the vinyl or metal that  
17 you see a lot in those areas now.

18 I think that is it in terms of the  
19 statements and I would welcome any questions  
20 from the Board or any other interested  
21 parties.

22 CHAIRPERSON MILLER: Okay. Thank

1       you.     I have a question.     This is an  
2       application under 353 and 353.5 calls for some  
3       specific filing requirements.    I thought we  
4       might have mentioned that last time.   One of  
5       them in particular that is mentioned here that  
6       I don't think you have submitted as a  
7       landscaping plan.   If you look at 353.5 I  
8       think I'll read it for the record.

9                "In addition to other filing  
10       requirements the developer shall submit to the  
11       Board with the application four site plans and  
12       two sets of typical floor plans and  
13       elevations, grading plans, existing and vinyl  
14       landscaping plans, and transfer all new  
15       rights-of-ways and easements."

16               MR. BLANCHARD:     Madam Chair, I  
17       believe we submitted a landscaping plan, Plan  
18       L1.

19               CHAIRPERSON MILLER:   Okay.

20               MR. BLANCHARD:     It's dated August  
21       10th of '06.   I'm going to look through my --

22               CHAIRPERSON   MILLER:       Is that

1 attached to an exhibit number do you know?

2 MR. BLANCHARD: I believe it was  
3 filed as part of the applicant's prehearing  
4 statement.

5 MR. MOY: Madam Chair, it's  
6 Exhibit No. 9.

7 CHAIRPERSON MILLER: Okay. Thank  
8 you. In your view have you submitted all the  
9 filings called for in 353.5?

10 MR. BLANCHARD: Yes, we have.

11 CHAIRPERSON MILLER: And in that  
12 number, do you know? We can fix this. I  
13 mean, did you submit four site plans? Yes,  
14 they are in the record. Fine. With respect  
15 to Ms. Chapman's concerns and the ANC  
16 concerns, I don't think they are here today.

17 MR. BLANCHARD: I don't see them  
18 in the audience.

19 CHAIRPERSON MILLER: Can you just  
20 briefly address them or how you have addressed  
21 them?

22 MR. BLANCHARD: Briefly, I believe

1 the concerns of Ms. Chapman and the ANC were  
2 mostly about parking in the front yard. As  
3 originally submitted, the parking lot was  
4 located in the front of the property.

5 At the urging of OP, the ANC, and  
6 Mrs. Chapman, who is probably the most vocal  
7 of the neighbors, and has a very nice house  
8 across the street so we want to be nice to  
9 her, the applicant has moved and relocated the  
10 parking lot to the rear of the property and  
11 brought the buildings up to the front but  
12 allowing sort of a front yard setback, I  
13 believe, of eight to 10 feet.

14 It is similar to what is normal  
15 for other properties on that block. The  
16 retaining wall was also an issue. They wanted  
17 that replaced and we have done that. The  
18 neighbors were concerned about, I don't want  
19 to call it density, but maybe occupancy load,  
20 the number of people who could reside in all  
21 of these condominium units.

22 We started at 18 and went up to 20

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 and we scaled back to 15 and that is where we  
2 are now. I think that scaling back shows good  
3 responsiveness to the neighbor's concerns and  
4 t h e A N C ' s c o n c e r n s .

5 The neighbors were also concerned  
6 about parking on the street. By having the  
7 parking lot in the back and the number of  
8 spaces that we are providing I think allows  
9 for more than adequate parking.

10 CHAIRPERSON MILLER: What is the  
11 number you have?

12 MR. WASHINGTON: Twenty-one.

13 CHAIRPERSON MILLER: Twenty-one  
14 for 15 units? Okay.

15 MR. WASHINGTON: It includes one  
16 handicap space.

17 CHAIRPERSON MILLER: And one  
18 handicap space? Okay.

19 MR. BLANCHARD: That is more of a  
20 building code issue.

21 CHAIRPERSON MILLER: Do my Board  
22 members have any questions?



1                   MR. MANN:       Madam Chair, in  
2 response to your concerns regarding the  
3 landscape plan, the landscape plan that I see  
4 is in our Exhibit No. 22 dated 16 January  
5 2007. It's the last attachment. It is dated  
6 August 10, '06, as was indicated.

7                   It is, however, a landscape plan  
8 for when the parking was located in the front.  
9 I don't know if another landscape plan was  
10 submitted or not but depending on how loosely  
11 you want to interpret that, it may or may not  
12 satisfy your requirements for a landscape  
13 plan. We also have, I believe, the same  
14 landscape plan on Exhibit 41 dated February  
15 14, 2007, which looks like it might be the  
16 updated one. Okay. All right. So there is  
17 an updated one.

18                  MR. BLANCHARD: With the parking  
19 in the rear.

20                  MR. MANN: Okay.

21                  MR. BLANCHARD: Which I think  
22 shows more planning. It also shows the

1 existing trees on that rear slope that the  
2 applicant has tried to maintain -- retain, not  
3 cut down.

4 MR. MANN: I directed you towards  
5 the wrong landscaping plan but it does look  
6 like there is an updated one that satisfies  
7 what you are looking for.

8 CHAIRPERSON MILLER: Can you just  
9 briefly address what the landscaping plan does  
10 just in words with respect to you have  
11 switched -- you know, what kind of landscaping  
12 do you have in front in general and in back  
13 around the parking lot.

14 MR. WASHINGTON: Right. There is  
15 roughly a five-foot buffer strip between the  
16 front retaining wall and the stairway and the  
17 walkways leading up to the houses. What we  
18 tried to do was fill in that five-foot strip  
19 with the types of shrubs that would add to the  
20 aesthetics of the project and fit in well with  
21 what is there on the street now.

22 Because it's only five-feet wide

1 you can't go with trees that are too tall  
2 because of the root systems and so forth.  
3 You've got some small trees, some evergreens,  
4 and some deciduous shrubs in that five-foot  
5 strip. It is not shown on here but there will  
6 be some mulching in the area where the shrubs  
7 and plantings will be.

8 As you go to the rear, as Lyle  
9 said, the very back of the property represents  
10 a pretty severe slope. What we tried to do  
11 was maintain the trees that are actually on  
12 the slope, maintain them, do not disturb, but  
13 at the very top right up to where the parking  
14 lot ends maybe put some small plantings there.  
15 When you look at the legend you have both some  
16 proposed evergreens and then it tells you the  
17 existing trees that are to remain.

18 One of the other things that we  
19 showed on this landscaping plan that is not  
20 related to the actual plantings is the  
21 lighting that is going to go into the rear  
22 parking lot. That was something that was

1       omitted on the very first plan we submitted in  
2       January.    The lighting is designed to not  
3       disturb the tenants while at the same time  
4       providing enough light to provide security and  
5       functionality to the people that are parking  
6       there.

7                   CHAIRPERSON MILLER:    So you are  
8       going to have the parking lot lit all night or  
9       what?

10                  MR. WASHINGTON:   I don't know yet.  
11       I'm not sure whether there is a code  
12       restriction against that or what.  We have to  
13       look into that.

14                  CHAIRPERSON MILLER:    But you are  
15       having certain kind of lighting that is going  
16       to put enough light on the lot but not bother  
17       the tenants.

18                  MR. WASHINGTON:   Correct.  Direct  
19       it down and not out.

20                  CHAIRPERSON MILLER:    Okay.

21                  MR. WASHINGTON:    Because of the  
22       elevation relative to the properties in the

1 rear it should not affect the people down at  
2 the bottom of the hill at all.

3 CHAIRPERSON MILLER: Do you have  
4 anything else to add?

5 MR. BLANCHARD: Chairperson  
6 Miller, I believe that sums it up. We have  
7 addressed all the concerns.

8 CHAIRPERSON MILLER: Okay. Good  
9 afternoon, Mr. Moore.

10 Mr. Moore is here from the Office  
11 of Planning.

12 MR. MOORE: Good afternoon Madam  
13 New Chair and congratulations to you and the  
14 Vice-Chair and Mr. Loud, and the other Board  
15 members, of course.

16 The applicant has basically  
17 satisfied concerns raised by OP in its  
18 supplemental filing. I was pretty well  
19 pleased until I got the rendering yesterday  
20 and I've had discussions with the applicant  
21 about the first rendering that we got given  
22 the designer's selection and choice of colors

1 on this.

2 We've had a discussion about that  
3 and there has been a resubmittal of it. It  
4 didn't show the detail for the retainer wall.  
5 That has now been introduced to you. With  
6 what the applicant has done now we want to,  
7 first of all, congratulate them for working  
8 with the Office of Planning in many, many  
9 meetings on this project.

10 That actually came from, as the  
11 applicant indicated, 20 units down to 15. We  
12 are rather proud of the applicant's boldness  
13 in terms of how they are going to address the  
14 first and basement level as one unit. We  
15 believe it is going to be extremely remarkable  
16 and in the future will probably build some of  
17 the same kind of houses there. I don't know  
18 about the apartment buildings above that.

19 We are pleased that they did work  
20 with us in terms of modifying the project to  
21 be what we consider to be suitable and, of  
22 course, adding some value to the community as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1       opposed to being thought of as the apartment  
2       building that the community thought it would  
3       be in the first concept. With that, we are  
4       still in support of the project.

5               CHAIRPERSON MILLER: So they have  
6       addressed all of OP's concerns. Is that  
7       correct?

8               MR. MOORE: Yes. There is one  
9       which was their choice at this Board's  
10      instruction. If you recall in our  
11      supplemental filing, our preference was that  
12      since you are reducing the unit to 15, simply  
13      do what the regulations call for, one-to-one  
14      parking space thereby freeing up some  
15      additional green space in the back of the  
16      property because we thought it lacked green  
17      space. It was his choice, of course, to stick  
18      to the parking that they originally proposed.

19              I think he said it allowed them  
20      some flexibility in terms of when there is  
21      visitors given what the community is saying  
22      about the scarcity of parking on the public

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 space. Again, that was their choice. Ours  
2 would have been to create green spaces as  
3 opposed to provide more parking.

4 CHAIRPERSON MILLER: How about the  
5 landscaping plan? Do you think it addresses  
6 it somewhat?

7 MR. MOORE: Yes. As a matter of  
8 fact, we had a lot of influence on the  
9 landscape plan, especially as the applicant  
10 talked about, the five-foot buffer space in  
11 front. We asked that they put in some  
12 attractive bucolic uses there given the view  
13 from the north side, Mrs. Chapman's side of  
14 the block. As they look onto the project it  
15 should be attractive to them. I think they  
16 basically addressed that.

17 CHAIRPERSON MILLER: I think the  
18 applicant pretty accurately characterized from  
19 the evidence that I heard that the greatest  
20 concern from the community was having a  
21 parking lot in the front yard and that was  
22 alleviated when they moved it to the back?



1                   MR. MOORE:     That was alleviated  
2     but that was not the greatest concern of the  
3     community. The community is still concerned  
4     about the density of the project.

5                   CHAIRPERSON MILLER:     That was  
6     going to be my next question, yeah.

7                   MR. MOORE:     They find the 15 units  
8     would be more palpable than, of course, the 20  
9     in the first concept. I have talked to both  
10    the representative of the ANC and Ms. Chapman  
11    and I have a better feel about, again, the  
12    treatment of the first and basement level of  
13    the building because it is going to look like  
14    ownership houses that sort of mirror the  
15    rowhouses that they live in on the other side  
16    of the block.

17                  CHAIRPERSON MILLER:     Okay. My  
18    question about density. I guess I have two.  
19    One was in the ANC report they talk about  
20    wanting detached homes with front yards  
21    basically. If I recall correctly, I think  
22    your testimony was that this type of density

1 is -- well, this is a special exception  
2 because it is development but this is allowed  
3 in the zone. This is appropriate for this  
4 zone district.

5 MR. MOORE: It is the developer's  
6 choice. It is permitted in the R-5-A. What  
7 is in essence an apartment building that they  
8 developed this in, that the use is going to be  
9 condominiums and private ownership. It was  
10 the applicant's choice to do that or to build  
11 single family or semi-attached dwellings.  
12 They chose not to build what the community  
13 wanted to see built. Of course, they are  
14 within their right according to the  
15 regulations to do so.

16 CHAIRPERSON MILLER: Okay. The  
17 other hearing was a while ago so this may be  
18 a recap but I also understood you to say that  
19 this was in character with the neighborhood.

20 MR. MOORE: The facade of the  
21 buildings somewhat match the facade of  
22 buildings on the other side of the block which

1 are row houses. Of course, on the building  
2 also on the west side of this property there  
3 is a large apartment building and there are  
4 others large apartment buildings along the  
5 block.

6 At the east end of the block there  
7 are two single-family houses so the  
8 neighborhood is mixed with respect to  
9 residential. Obviously their use would match  
10 the fabric of the neighborhood.

11 CHAIRPERSON MILLER: So it's not  
12 even just the facade but the density is also  
13 in character.

14 MR. MOORE: The reduced density is  
15 more in character.

16 CHAIRPERSON MILLER: As it is now  
17 to 15 units.

18 MR. MOORE: Yes.

19 CHAIRPERSON MILLER: Okay.  
20 Anything else you want to add?

21 MR. MOORE: No.

22 CHAIRPERSON MILLER: Okay. Any

1 other questions for the Board? Anything else  
2 you want to add?

3 MR. BLANCHARD: No, other than  
4 just to reiterate our request for some  
5 flexibility. In our letter of the 4th you  
6 will recall back at the hearing former Chair  
7 Griffis asked about whether this would be  
8 modular construction and the applicant hopes  
9 that is possible.

10 With modular construction there is  
11 a little bit of variance about what the actual  
12 size is, what the dimensions will be, so as  
13 long as we don't exceed what is the parameters  
14 for residential under the zoning regulations.  
15 We would ask for minor flexibility there to be  
16 reflected in the Board's order.

17 CHAIRPERSON MILLER: Right. Okay.  
18 It would basically look like what you  
19 presented to us.

20 MR. BLANCHARD: Yes, definitely.

21 CHAIRPERSON MILLER: I'm just  
22 curious with respect to color. Do you have an

1 idea of what the colors are going to be?

2 MR. WASHINGTON: I don't but we  
3 will -- it's going to be sort of a team  
4 decision, you know, the people that do the  
5 marketing, people that are doing the -- we're  
6 going to hire somebody to do staging for the  
7 units. We are going to bring those people in  
8 and get a consensus before we actually pick a  
9 color.

10 CHAIRPERSON MILLER: Okay. Thank  
11 you.

12 MR. MOORE: I must add at this  
13 point that whatever the team come up with it  
14 should be in character with the existing  
15 structures on that block.

16 MR. WASHINGTON: I totally agree.

17 CHAIRPERSON MILLER: Right. Okay.

18 MR. ETHERLY: Madam Chair, if it's  
19 appropriate, I would be more than comfortable  
20 to move forward with the motion for approval  
21 and perhaps we can talk through some of the  
22 elements that have been communicated in our

1 hearing today.

2 I think the application is ripe  
3 for moving forward so I would move approval of  
4 application No. 17562 of W Street, S.E.,  
5 38/42-43, LLC pursuant to 11 DCMR 3104.1 for  
6 a special exception to construct 15 row  
7 dwelling units under Section 353 at premises  
8 1749 through 1759 W Street, S.E., and would  
9 invite a second.

10 CHAIRPERSON MILLER: Second.

11 MR. ETHERLY: Thank you very much,  
12 Madam Chair, for seconding the motion. I  
13 think we have had some very useful  
14 developments as we have moved forward from the  
15 initial conception of the project to where we  
16 are today.

17 I think they have been part and  
18 parcel as a result of the applicant's  
19 willingness to talk both with members of the  
20 general community as well as the ANC and, of  
21 course, as was indicated in the Office of  
22 Planning's presentation, with OP itself around

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 a number of the concerns that were raised, a  
2 number of these issues were not necessarily  
3 major issues for me at the outset but that is  
4 not the point of the proceeding.

5 The point of the proceeding before  
6 this body is to address where possible  
7 concerns that evoke zoning considerations. I  
8 think as we move through the various  
9 evolution, if you will, of this project from  
10 the original proposal of 18 units to 15, I  
11 think the applicant has done very well to  
12 address that issue.

13 I think the applicant has done  
14 very well to address the issue of parking and  
15 concerns about the impact of parking. Most  
16 clearly, perhaps, from an aesthetic standpoint  
17 in terms of the location of the parking spaces  
18 on the subject property from their initial  
19 placement at the front of the property to the  
20 rear.

21 But I think also with regard to  
22 some of the design considerations as related

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 to what was discussed earlier, some of the  
2 roofing, some of the approach to the roofing  
3 lines, the symmetry of the presentation of the  
4 proposed project at its front, and then, of  
5 course, some of the concerns that we have and  
6 discussion that we have had with regard to  
7 retaining walls and other related issues.

8 I think at the end of the day,  
9 Madam Chair, I feel fairly comfortable that  
10 the evolution of this project has, indeed,  
11 moved in more than appropriately in the right  
12 direction. With respect to the discourse  
13 between DDOT, again with OP, I think the  
14 evolution has moved us to a project may not --  
15 that will not necessarily answer everybody's  
16 concerns.

17 By that I'm speaking most directly  
18 to some of the concerns that were raised by  
19 the community. As the applicant has  
20 indicated, and I think from some of the  
21 questions my colleagues have raised, we are  
22 oftentimes in many of our communities feeling

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 the pressure of new in-field development.

2 What do we do with vacant  
3 properties? What do we do in terms of  
4 balancing the challenge of bringing these  
5 properties back into productive use but doing  
6 it in such a way that minimizes clearly any  
7 deleterious zoning impacts but, more broadly  
8 speaking, that maintains a sense of character  
9 and a sense of connection to the already  
10 existing residential fabric of the particular  
11 community in question.

12 I think that was discussed in the  
13 Office of Planning's presentation and I think  
14 the applicant has done a very good job to be  
15 respectful of that. Clearly this Board heard  
16 testimony that nevertheless evidenced concern  
17 about impacts.

18 I think at the end of the day I  
19 haven't seen enough testimony to tip the scale  
20 in any measurable way towards a belief that  
21 this project is going to put this immediate  
22 community over the edge in terms of parking

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 impact, in terms of residential impact.

2 As a starting point for my motion,  
3 Madam Chair, I really wanted to kind of speak  
4 more contextually in terms of where I believe  
5 we are with all the additional submittals, all  
6 the additional work that has been done by the  
7 applicant to get us where we are.

8 My colleagues will recall that at  
9 first blush when we looked at this project  
10 again we were looking at 18 units and we had  
11 a number of community members, ANC including,  
12 that were somewhat concerned by that. Again,  
13 I think the applicant has done very well to  
14 address some of these concerns and work with  
15 OP in terms of addressing some of the major  
16 issues here.

17 With respect to the particular  
18 aspects of 353 which is special exception test  
19 that we are looking at here, I think as we  
20 look at all of the key elements of 353.1, at  
21 minimum 353.2, I think clearly these  
22 particular issues have been discussed with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 specificity.

2 I would submit for my colleagues  
3 with exacting attention to detail, if you  
4 will. We've gotten pursuant to 353.3 response  
5 from the Department of Transportation as it  
6 relates to the issue of the parking placement.  
7 I think we've had, again, very good back and  
8 forth as the parking is now moved to the rear  
9 of the property versus where it was at the  
10 outset.

11 We've gotten positive support from  
12 the Department of Housing and Community  
13 Development. As we move into 353.4 and we  
14 begin to look at some of the specific as it  
15 relates to site plan arrangement of buildings  
16 and structures, provisions of light, air,  
17 parking, recreation, landscaping, I would tend  
18 to side with the applicant in terms of -- I  
19 will perhaps invite some response from my  
20 colleagues as to how we get at the issue of  
21 flexibility, if you will.

22 I understand what the applicant --

1 I believe I understand what the applicant is  
2 trying to get at in terms of desiring a little  
3 bit of flexibility with respect to perhaps the  
4 details around presentation.

5 We've heard some of the discussion  
6 about some of the coloring and I think the  
7 applicant was very clear in the remarks today  
8 at our limited hearing that the  
9 representations that they are providing us  
10 today are fairly spot on but, at the same  
11 time, they are meant to be, at the same time,  
12 representative but there is some flexibility  
13 that is desired in terms of what the final  
14 product is here.

15 I am comfortable with the  
16 landscaping and the grading as it has been  
17 presented to us so I'm not necessarily of the  
18 mind set that we need to move towards perhaps  
19 any specific conditions but, again, I'm open  
20 to discussion from my colleagues if there is  
21 a need to parce some of that out into greater  
22 detail.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1           Again, as it relates to the issue  
2           of grading and retaining walls, I'm satisfied  
3           with what I've seen as indicated on the  
4           revised plans and the renderings. I haven't  
5           heard anything to suggest any impacts that  
6           need to be mitigated as related to light and  
7           air with regard to the subject property.

8           W Street is a very tight and  
9           intimate little thoroughfare as we have heard  
10          both in the presentation of the applicant and  
11          through some of the testimony of residents on  
12          that street and the ANC but I don't see this  
13          project as it is currently structured creating  
14          any adverse impacts around the issue of light  
15          and air.

16          I think, again, architecturally  
17          the plans as they are currently set forward to  
18          me seem to be very much in keeping with the  
19          character and the scope, if you will, of the  
20          immediate community. Parking here clearly I  
21          think is being addressed and I think it was a  
22          useful discussion that led us to moving the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 parking from the front to the rear.

2 As my colleagues, perhaps not Mr.  
3 Loud having just joined us, but I think as  
4 some of my longer-serving colleagues will  
5 recall, our past year often time we were quite  
6 concerned about the impact of front-base  
7 parking, if you will, in terms of what it does  
8 to the aesthetic street scape of coming down  
9 a street of residential properties and all of  
10 a sudden you see a collection of cars and  
11 headlights.

12 I think any of us who live in the  
13 District perhaps at times have to deal with  
14 the impact of seeing headlights kind of stream  
15 across your wall as a car is pulling into a  
16 driveway or as it is turning a street corner.  
17 To an extent, that is part and parcel of  
18 living in an urban environment but I think the  
19 applicant should be commended for what they  
20 have done in terms of moving the parking from  
21 the front to the rear.

22 As we have talked about -- we

1 haven't talked a whole lot about the issue of  
2 recreation but I think it has been indicated  
3 in the application Forsand Park is within one  
4 block of the site here. It is a vibrant and  
5 growing residential community with sidewalks  
6 that I think are going to do well and be well  
7 served by the additional foot traffic of new  
8 residents.

9 Again, I'm comfortable with the  
10 landscaping as we have discussed it but I'm  
11 open to more discussion if my colleagues feel  
12 that we need to be a little more specific  
13 about that. I have been satisfied with regard  
14 to the issue of retaining walls.

15 With that, I think clearly the  
16 special exception from my standpoint is in  
17 harmony with the general purposes and intent  
18 of the zoned regulations and map. Adverse  
19 impact, I simply haven't seen it. I have  
20 heard and I am sensitive to the discussions  
21 that were raised by both the ANC and the  
22 residents but I think the project as it is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 currently proposed does very well to address  
2 those concerns.

3 With that, I am going to pause  
4 here and open it up for my colleagues for  
5 additional comments but I appreciate the  
6 second and look forward to moving forward on  
7 deliberations today on this case. Thank you,  
8 Madam Chair.

9 CHAIRPERSON MILLER: Thank you,  
10 Mr. Etherly. I think you very thoroughly  
11 covered this and I am just going to add my two  
12 cents here. First of all, I think this is a  
13 case that has very much evolved in a very  
14 positive direction.

15 When we first got the case they  
16 were seeking variance relief for a parking lot  
17 in the front yard which was certainly  
18 distressing to the community. That is the  
19 most major change that has occurred that it  
20 was put in the back.

21 Other changes were made in  
22 response to Office of Planning who has



1 indicated they have worked very closely with  
2 the applicant and I think have come up with a  
3 much better product that is in harmony, I  
4 would agree, with the character of the  
5 neighborhood and which doesn't seem to create  
6 adverse impacts.

7 I just want to go to the  
8 regulations, the provision now that we are  
9 looking at for relief in this case and that is  
10 now only special exception relief and that is  
11 why we are talking about adverse impacts and  
12 harmony.

13 That's 353, new residential  
14 developments. 353.1 says, "In an R-5-A  
15 District all new residential developments  
16 except those comprising all one-family  
17 detached and semi-detached dwellings shall be  
18 reviewed by the Board of Zoning Adjustment as  
19 special exceptions under 3104."

20 There is a remaining part that  
21 references 410 but that has been revoked by  
22 the Zoning Commission. Our standard is 3104.

1 I think Mr. Etherly really touched upon almost  
2 all of it. I think the biggest affront was  
3 the parking lot in the front and that is now  
4 moved to the back. I am persuaded by the  
5 Office of Planning has worked closely with you  
6 on the landscaping. I don't have any issues  
7 with what at this point.

8 I don't know if it is the  
9 community but some neighbors and the ANC did  
10 talk about density just to a certain extent.  
11 They would prefer more green space, I think.  
12 People often prefer more green space but I  
13 don't think that rises to the level of an  
14 adverse impact in this case considering the  
15 testimony of the Office of Planning that this  
16 amount of density is in character with parts  
17 of its neighborhood.

18 The ANC did file a report opposing  
19 the application and we give great weight to  
20 the ANC which means we do address their issues  
21 but I think that is exactly what we have been  
22 doing. I think that their main concern as

1       stated here was that the proposed development  
2       detracts from quality of life because the  
3       homeowners directly facing those lots would  
4       have to view a parking lot instead of a  
5       continuous home landscape.

6               I do believe that was their major  
7       concern and that has been rectified. In fact,  
8       the plans that you've shown plus the  
9       landscaping appear quite attractive so I don't  
10      think they rise to any level of adverse  
11      impact.

12             353.2 calls for the Board to refer  
13      the application to D.C. Board of Education.  
14      I'm sure that's been done. It was referred to  
15      Department of Transportation and Housing and  
16      Community Development for comment. I believe  
17      DDOT originally was opposed because of the  
18      parking lot in the front.

19             When you made that change they  
20      announced support of the application. I  
21      believe that the DHCD is supportive as well.  
22      "The Board shall refer the application to the

1       O f f i c e       o f       P l a n n i n g . "

2                       That certainly was done for  
3 comment and recommendation on the site plan  
4 arrangement of buildings and structures and  
5 provisions of light, air, parking, recreation,  
6 landscaping, and grading as they relate to the  
7 future residents of the project and the  
8 surrounding neighborhood.

9                       That certainly was done. You  
10 certainly worked very closely with the Office  
11 of Planning and made changes specifically in  
12 response to concerns put forth by the Office  
13 of Planning including reducing the density  
14 from 20 to 15 units. And in working with them  
15 on the retaining walls and the landscaping,  
16 and really all the issues that I think were  
17 raised at the hearing so I am comfortable with  
18 that.

19                      Finally, 353.5, I already read  
20 that with respect to the requirements for your  
21 submittals of floor plans and site plans and  
22 landscaping plans, etc., and that these are in

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 the record. I think that you have met the  
2 requirements.

3 I would also like to acknowledge  
4 the Office of Planning's recommendation that  
5 if we vote to approve this that we do indicate  
6 that the final design be in accordance with  
7 the character of the neighborhood with respect  
8 to the applicant's concern that there be some  
9 flexibility in design as related to the  
10 requirements for modular houses that aren't  
11 contrary to the relief that is being granted  
12 in this case.

13 CHAIRPERSON MILLER: Mr. Mann.

14 MR. MANN: Just to add onto your  
15 final comment regarding the minor flexibility  
16 in response to Mr. Etherly's comments  
17 concerning that as well. I also feel  
18 comfortable allowing that sort of flexibility  
19 because the applicant has been working with  
20 Office of Planning and I would hope that sort  
21 of cooperative relationship wouldn't end now.  
22 If there were questions, they would continue

1 to go to Office of Planning.

2 Of course, we do have the other  
3 sort of filter, if you will, the Zoning  
4 Administrator's Office, who will exercise some  
5 judgment in determining whether or not  
6 something is minor or not. I think there are  
7 some built-in mechanisms there to ensure that,  
8 indeed, that flexibility is minor.

9 CHAIRPERSON MILLER: Great. Okay.  
10 Any other comments on the motion? Okay. All  
11 those in favor, say aye.

12 ALL: Aye.

13 CHAIRPERSON MILLER: All those  
14 opposed? All those abstaining? Would you  
15 call the vote, please?

16 MS. BAILEY: Madam Chair, the vote  
17 is recorded as three zero two to approve the  
18 application as amended. Mr. Etherly made the  
19 motion, Mrs. Miller supports, Mr. Mann  
20 supports the motion as well. Mr. Loud did not  
21 sit on this case and there is not a Zoning  
22 Commission member who participated. Full

1 order or summary order, Madam Chair?

2 CHAIRPERSON MILLER: This will be  
3 a full order because we have a party in  
4 opposition, that being the ANC.

5 MS. BAILEY: Full order it is.

6 CHAIRPERSON MILLER: Mr.  
7 Blanchard, I just want to give you the option.  
8 In order to expedite the process in any way,  
9 if you would like to submit a proposed order  
10 for our consideration, we would look at that  
11 if you would like. It's optional.

12 MR. BLANCHARD: I would welcome  
13 that, Madam Chair, because even though there  
14 is a party in opposition, I believe that the  
15 issues aren't that involved in this particular  
16 case.

17 CHAIRPERSON MILLER: Correct.  
18 Right. Sometimes that helps to expedite the  
19 process. Okay. Would you like to do that?

20 MR. BLANCHARD: Yes, I would.

21 CHAIRPERSON MILLER: Do you have  
22 any idea when the Board might expect it? It's

1 not a requirement so I don't want to impose a  
2 deadline on you but if you have any idea you  
3 would like to throw out.

4 MR. BLANCHARD: I will try and  
5 draft something in the next week.

6 CHAIRPERSON MILLER: Okay. Thank  
7 you very much.

8 MR. BLANCHARD: Thank you.

9 CHAIRPERSON MILLER: Okay. I guess  
10 we are ready for the next case, Ms. Bailey.

11 MS. BAILEY: The last case of the  
12 day is an appeal and the number is 17589 of  
13 Salvatore Gorgone, pursuant to 11 DCMR 3112,  
14 from the administrative decision of the Zoning  
15 Administrator, Department of Consumer and  
16 Regulatory Affairs, to deny the issuance of a  
17 Certificate of Occupancy permit for a Gourmet  
18 Shop because the prior delicatessen use was  
19 discontinued for more than three years  
20 pursuant to 11 DCMR 2005. The property is  
21 located in the Dupont Circle R-5-E District at  
22 premises at 1417 17th Street, N.W., Square



1 181, Lot 149.

2 Madam Chair, if I'm not mistaken,  
3 there are many requests for party status in  
4 this application.

5 CHAIRPERSON MILLER: Thank you,  
6 Ms. Bailey. When you are ready you can  
7 identify yourselves for the record and then  
8 we'll pick up the party status applications.

9 MR. OSNOS: Good afternoon, Madam  
10 Chair, and members of the Board. My name is  
11 Simon Osnos, O-S-N-O-S. I'm the attorney for  
12 the appellant. The appellant, Salvatore  
13 Gorgone, is seated to my right.

14 Excuse me?

15 CHAIRPERSON MILLER: She wants to  
16 know if you filled out a witness card.

17 MR. OSNOS: For Mr. Gorgone we  
18 did. No, I did not.

19 MS. BAILEY: Sir, if you just give  
20 a business card, that would suffice.

21 CHAIRPERSON MILLER: Do you want  
22 to introduce yourself for the record?

1 MR. GREEN: Yes. Good afternoon,  
2 Madam Chairman. My name is Matthew J. Green,  
3 Jr. To my immediate right is Mr. Bill Crews,  
4 Zoning Administrator. I'm the Assistant  
5 Attorney General stationed at the Department  
6 of Consumer and Regulatory Affairs.

7 CHAIRPERSON MILLER: Thank you. I  
8 understand we have some request for party  
9 status and I am wondering if any of those  
10 individuals are here. I see Exhibit No. 19,  
11 the Richmond Condominium Association, Jennifer  
12 Waldman, President.

13 Can you come to a mic? Come to a  
14 mic and then you will be on the record.

15 MR. BJORGE: Good afternoon, Ms.  
16 Miller. Jennifer Waldman is unfortunately  
17 unable to attend. She has classes at  
18 Georgetown University that conflict with this  
19 hearing.

20 CHAIRPERSON MILLER: Did you  
21 identify yourself? I'm sorry.

22 MR. BJORGE: Ms. Miller, my name

1 is Mark Bjorge. I am the ANC Commissioner in  
2 whose single member district the subject  
3 property resides.

4 CHAIRPERSON MILLER: Okay. Fine.  
5 Are you here on behalf of yourself or on  
6 behalf of the ANC?

7 MR. BJORGE: Well, that would be  
8 an interesting point. I am the designated ANC  
9 representative. I have also sought party  
10 status for myself as my property adjoins the  
11 party wall with Mr. Gorgone's property. That  
12 might be a matter that you would like to  
13 comment upon.

14 CHAIRPERSON MILLER: Okay. Let's  
15 just see who is here. With respect to Ms.  
16 Waldman, did she indicate how she wanted to  
17 proceed with respect to participating in this  
18 case at all?

19 MR. BJORGE: Well, Ms. Waldman  
20 wanted to put the objections of the Richmond  
21 Condominium Board of Directors on the record.  
22 They did take a vote and voted to object to

1 the continuation of the use in question. I  
2 also have letters from the prior Board of  
3 Director President dating back to 2005 when he  
4 sought party status in this case for the  
5 Richmond.

6 CHAIRPERSON MILLER: So the vote  
7 that is on the record that you are making  
8 reference to, is that in writing somewhere  
9 that you are going to submit?

10 MR. BJORGE: If you would be kind  
11 enough to leave the record open I could get  
12 her to fax over a copy of that vote. I do  
13 believe that her party status application made  
14 reference to it. If I am mistaken I, of  
15 course, can ask that she send over a document  
16 stating this.

17 CHAIRPERSON MILLER: Okay. At  
18 this point I'm just trying to determine the  
19 extent to which she wants to participate as a  
20 party right now. We have an application  
21 before us so I just wanted to get as much  
22 information on that as possible. Did she ask

1 you to speak for her or anything like this or  
2 what?

3 MR. BJORGE: Yes, she did, but as  
4 her elected representative, not as a separate  
5 party status class individual.

6 CHAIRPERSON MILLER: Right. Okay.

7 MR. BJORGE: I don't have power of  
8 attorney from her or anything.

9 CHAIRPERSON MILLER: All right.  
10 Let's go through some of these and then we'll  
11 see who we are left with. Anne Marchand. Is  
12 she here? Hi. Is there a seat for you at the  
13 table? Yeah. Okay. I'm going to get back to  
14 you in a minute. Do we have any others? Is  
15 that it? Is there anybody else here who  
16 requested party status in this case whose name  
17 I haven't called? Okay. Let's deal with who  
18 is here now. We have Ms. Marchand and we have  
19 Mr. Bjorge. Is that how you pronounce it?

20 MR. BJORGE: Bjorge.

21 CHAIRPERSON MILLER: Bjorge.  
22 Okay. And then we have Richmond Condominium

1 Association who is not here. Okay. Just  
2 wanted to turn to the provision that we are  
3 looking at to measure whether or not any or  
4 all of you should be afforded party status.  
5 I don't think this was given to you in the  
6 notice and I just want to tell you the  
7 regulation we are looking at by which we  
8 judge, what the rule is.

9 It's 3112.15. It says, "At the  
10 time of the hearing on the appeal the Board in  
11 its discretion and for good cause shown may  
12 permit persons who have a specific right or  
13 interest that will be affected by action and  
14 on the appeal to intervene in the appeal for  
15 such general or limited purpose as the Board  
16 may specify."

17 So we are looking at what specific  
18 limited or general purpose would be the reason  
19 to allow you to participate in this  
20 proceeding. Appeals are a little bit  
21 different from special exceptions and  
22 variances because in those cases you pretty

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 much get party status if you are going to be  
2 impacted by the project that is next door to  
3 you or whatever. There's traffic, light, air,  
4 whatever.

5 Okay. In this case we are deal  
6 with a legal question, whether or not the ZA  
7 legally revoked this Certificate of Occupancy.  
8 It's a legal question. However, it also  
9 brings into question certain facts in the  
10 case.

11 The way I perceive this case, in  
12 any event, from my initial reading of it, you  
13 might be able to offer certain knowledge of  
14 facts that would be germane to this legal  
15 determination such as how long a business  
16 might have been continuing at that place or  
17 what kind of business was it.

18 I mean, in some cases it is how  
19 this decision would affect you but I'm not  
20 sure I see that really in this particular  
21 case. I'll hear from others. I'll hear from  
22 the ZA and I'll hear from you but it sounds

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1       like a question involving a discontinuance and  
2       the timing of that and what kind of businesses  
3       were there.

4               That being said, I think we'll  
5       look at each of these individually. We can  
6       look at Ms. Marchand. I think that you're  
7       here and we'll let you speak. I know I'm  
8       doing a lot of speaking but we are familiar  
9       with this so I want to give you the benefit of  
10      where we are coming from. It looks to me that  
11      you live very close by so you have knowledge  
12      about maybe what's been going on on the  
13      premises at issue.

14              MS. MARCHAND: Yes.

15              CHAIRPERSON MILLER:       So my  
16      question to you is -- you see, some of this  
17      sounds like special exception. I think if you  
18      are concerned about the impact of a certain  
19      type of business being next to you, I'm not  
20      sure that is really the issue in this case.

21              If we were to let you participate  
22      -- I'm not making a judgment yet but if we



1 were to let you participate for the wrong  
2 reason, then we get sidetracked into you are  
3 cross examining the ZA on a reason that won't  
4 have anything to do with our decision. That  
5 is why we are trying to zero in on, okay, now  
6 you live next door.

7 Yes, you bring some knowledge  
8 here. What about that knowledge. What would  
9 you contribute to this hearing. I'm going to  
10 give you a couple of options, too. One is if  
11 you are a party -- I think a lot of people  
12 don't understand this as well in the community  
13 because why would you unless you had  
14 participated in these hearings.

15 If you are a party, that means  
16 that you take on the obligations like the  
17 appellant, like the ZA. It would mean you  
18 would want to file a paper. You might want to  
19 cross examine or call a witness. That is a  
20 big obligation. That is No. 1 that you could  
21 be a party.

22 No. 2, if somebody else were a

1 party such as the ANC or so on, they could  
2 call you as a witness if all you wanted to do  
3 was give some testimony that is related to the  
4 issue at hand. That's about it. Special  
5 exceptions and variances we let everybody  
6 testify. In an appeal it's not like that.  
7 It's really a very legal argument based  
8 proceeding. Okay.

9 MR. BLANCHARD: I can be called as  
10 a witness by the ANC?

11 CHAIRPERSON MILLER: If the ANC is  
12 admitted as a party. The ANC is not here. We  
13 have an ANC commissioner. Let's hold you in  
14 abeyance because you could certainly be part  
15 of his case. All right. Now is the time to  
16 really address. After I did that big spiel  
17 about how I see these issues in this case and  
18 it's a legal case, how do you see your  
19 participation, Mr. Bjorge?

20 MR. BJORGE: Well, as somebody who  
21 owns property and has owned property for many  
22 years and even before that has resided in

1 property next to the subject address, I do  
2 have a good deal of factual knowledge and  
3 documentation and sworn statements and, in  
4 fact, affected neighbor or approximate  
5 neighbor who would be able to provide our  
6 sense of the time line regarding the facts in  
7 this case.

8 Whether or not that is best done  
9 from a private party status or as the ANC  
10 commissioner in the District, I guess I view  
11 the facts as very likely to be the same  
12 regardless so it doesn't make a whole lot of  
13 difference to me.

14 CHAIRPERSON MILLER: Okay. The  
15 ANC is automatically a party but you are not  
16 representing the ANC. Did the ANC take a  
17 position on this?

18 MR. BJORGE: Yes, sure. There was  
19 a formal vote and a letter was submitted.

20 CHAIRPERSON MILLER: Were you  
21 named?

22 MR. BJORGE: I was named as the

1 representative, yes.

2 CHAIRPERSON MILLER: Oh, there we  
3 go. I'm sorry. Let me pull that. Okay.  
4 I'll say this for my colleagues and see if you  
5 agree, but the ANC is automatically a party in  
6 this case so if you are going to represent the  
7 ANC, we don't have to grant you party status.  
8 You just have it as the ANC. You can present  
9 whatever witness you want in which case --

10 Do you want to make a comment?

11 MR. MANN: No, I just want to make  
12 sure that we address Mr. Bjorge's question  
13 earlier as to whether or not as a  
14 representative of the ANC he would be able to  
15 adequately represent himself. I wanted to  
16 make sure that he gets that opportunity.

17 MR. BJORGE: That is somewhat of a  
18 point of concern. I understand that a person  
19 granted separate party status has potential  
20 future legal recourse that a nonparty status  
21 may not have.

22 CHAIRPERSON MILLER: You mean in

1 the court?

2 MR. BJORGE: In the court, yes,  
3 the ANC can't sue but a private party status  
4 person can. That's my understanding of the  
5 law anyway.

6 CHAIRPERSON MILLER: I know. I  
7 think they are looking into changing that. I  
8 have to look at the ANC report again. Do they  
9 want to be represented as a party in this  
10 case?

11 MR. BJORGE: Yes. They do. The  
12 ANC has been active in this case for eight or  
13 nine years.

14 CHAIRPERSON MILLER: Okay. I  
15 think you could actually possibly do both in  
16 the sense that it seems to me that there may  
17 be some knowledge that the ANC has or some  
18 interest that the ANC has as a whole which  
19 represents a larger area and that you have a  
20 personal interest. What you are saying is  
21 that you have knowledge of certain facts like  
22 I was referring to that will be relevant to

1       this case which would, I think, allow you  
2       to --

3               MR. BJORGE:   It does predate my  
4       time on the ANC by two ANC-2B chairs and two  
5       commissioners so the ANC actually does have  
6       some knowledge that certainly has nothing to  
7       do with me being on the ANC or even  
8       necessarily had me involved in creating that  
9       knowledge.

10              MR. ETHERLY:   If I may, Madam  
11       Chair, just through you perhaps to the Office  
12       of Attorney General, I just want to be sure --  
13       or counsel for the Office of Zoning I just  
14       want to be sure that I'm clear because I think  
15       Mr. Bjorge makes an excellent distinction.  
16       One, because he's looking to wear a couple of  
17       different hats, two essentially.

18              One is the designated ANC rep  
19       which is very clear and I understand that and  
20       that is not at issue. But also in your own  
21       individual capacity such that you can afford  
22       yourself the ability depending on what the

1 outcome is here perhaps take additional action  
2 at a subsequent point in time. Perhaps if I  
3 could, Madam Chair, through you to the Office  
4 of Attorney General, it would be great to  
5 perhaps just clarify.

6 I think I understand it and I  
7 think I would tend to agree that if he were to  
8 participate as a party, that would grant a  
9 party participant the opportunity to move for  
10 reconsideration or make a motion before the  
11 Board, whereas if they didn't participate they  
12 would not be able to do that.

13 MS. BUSHMAN: Just to be clear,  
14 D.C. official code, Section 2-510 grants any  
15 aggrieved person standing -- aggrieved by an  
16 official act of the District of Columbia the  
17 standing to then go to the court on appeal.  
18 It is not a requirement that a person be a  
19 party to this process in order to have that  
20 standing.

21 MR. ETHERLY: Okay.

22 CHAIRPERSON MILLER: I hear both

1 of you, though, and I understand. I believe  
2 that it's true, though, that if you are not a  
3 party, you can't do a motion for  
4 reconsideration before this Board after our  
5 decision. That's what Ms. Bushman is saying,  
6 that anybody can appeal to the court, any  
7 person or whatever. I understand what you're  
8 saying, Mr. Bjorge, but ANCs really aren't  
9 authorized as ANCs to appeal but you could as  
10 a person.

11

12 MR. BJORGE: Would an ANC be able  
13 to file a motion of reconsideration?

14 CHAIRPERSON MILLER: A motion for  
15 reconsideration?

16 MR. BJORGE: Yes.

17 CHAIRPERSON MILLER: Yes, because  
18 they are automatically a party.

19 MR. BJORGE: Then I don't need  
20 separate party status. I will take it one  
21 step at a one.

22 CHAIRPERSON MILLER: You could



1 still appeal later if you needed to. Okay.

2 You could offer Ms. Marchand as a witness.

3 MR. BJORGE: In either capacity.

4 CHAIRPERSON MILLER: Okay. Why  
5 don't we just deal with this first. Do we  
6 want to admit -- no, you are automatically a  
7 party so we don't have an issue here. The ANC  
8 is a party. Ms. Marchand can participate as  
9 a witness as your colleague. Okay. We have  
10 one more.

11 MR. ETHERLY: And I would tend to  
12 agree with that direction. I think the  
13 Chairman's comments at the outset were very  
14 important that it is a very specific inquiry  
15 that we are going to be confronted with today.

16 It may, in part, touch briefly  
17 upon some of the deeper more day-to-day  
18 concerns that you have about the property as  
19 it currently operates and you may have,  
20 indeed, some important experiences to share  
21 about that but it may not necessarily keep us  
22 as focused on task as the appeal needs to have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 us.

2 That being said, as witnesses you  
3 would still have the ability to be sure that  
4 you have your day in court, so to speak, or  
5 your day before the Board of Zoning  
6 Adjustment, so to speak, and provide some  
7 invaluable insight into what has been  
8 happening in terms of the operations.

9 As I think has been correctly  
10 indicated, there would be additional recourse  
11 should an outcome occur that the ANC is not in  
12 support of. There would be an opportunity for  
13 further action on the part of the ANC so I  
14 think that would be the appropriate way to go.

15 As you were starting to indicate,  
16 Madam Chair, that, of course, leaves the  
17 Richmond Condominium Association and Jennifer  
18 Waldman, its president, as kind of the third  
19 party status application to be dealt with.

20 I don't know if the ANC would also  
21 be desirous and I couldn't recall if they were  
22 present today, if the Condominium Association

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 was present today in the form of Mrs. Waldman  
2 or another representative, but if the ANC is  
3 desirous of incorporating them as a witness,  
4 too, I would be supportive of that direction  
5 just so we can move forward.

6 MR. BJORGE: The ANC would support  
7 that.

8 CHAIRPERSON MILLER: The ANC would  
9 be amenable to that?

10 MR. BJORGE: Yes.

11 CHAIRPERSON MILLER: Do the other  
12 parties have a comment on the party status  
13 application for the Richmond Condominium  
14 Association?

15 MR. GREEN: The Government has no  
16 objection.

17 MR. OSNOS: My position would  
18 simply be that any of the association members  
19 can testify as witnesses as part of the ANC's  
20 case before the Board. I don't see why party  
21 status should be accorded to the Condominium  
22 Association for the reason that you have set

1       forth.   Namely this is not so much a fact-  
2       finding hearing as it is an appellate review  
3       of the legality of the Zoning Administrator's  
4       decision.

5                   CHAIRPERSON MILLER:    Thank you.  
6       Any comments from Board members?   I guess my  
7       view would be in line with Mr. Etherly's.  
8       Looking at the party status application it is  
9       not clear to me how they rise to a level of  
10      party status showing for what purpose they  
11      would intervene and they are not here at this  
12      time.   Since the ANC is amenable to presenting  
13      evidence on their behalf, I would be inclined  
14      to leave the record open for them to submit  
15      through the ANC any information that is  
16      relevant to this hearing.

17                   MR. BJORGE:   Thank you.

18                   CHAIRPERSON MILLER:   Okay.   Do we  
19      all agree?   Okay.   All right.   By consensus of  
20      the Board we will deny party status to the  
21      Richmond Condominium Association.   The ANC has  
22      party status as a matter of right and Mr.

1 Bjorge will be representing the ANC and Ms.  
2 Marchand may be called as a witness. You are  
3 withdrawing your application for party status?  
4 Okay. On that representation that you'll be  
5 allowed to participate as a witness. Okay.

6 MR. HOOD: Let me make sure I  
7 understand. Mr. Bjorge also has individual  
8 party status and he is withdrawing that, too?

9 MR. BJORGE: Yes, sir.

10 MR. HOOD: Okay. Thank you.

11 CHAIRPERSON MILLER: Thank you,  
12 Mr. Hood, for that clarification. I think we  
13 are ready to start with the appeal. I think  
14 it is most appropriate probably to start with  
15 the appellant's case and then -- hold on. I  
16 think that's what the rules provide. And then  
17 go to -- yes?

18 MR. GREEN: Madam Chairman, just  
19 one question. Can we address maybe one or two  
20 preliminary matters?

21 CHAIRPERSON MILLER: Sure. Why  
22 don't you tell us what they are? We can

1 proceed in the most expeditious way we want  
2 to.

3 MR. GREEN: Certainly. One, we  
4 just question whether or not the parties that  
5 are before us are the proper parties. It  
6 appears that the appellant is not the lessee,  
7 shall we say, of the delicatessen in question,  
8 No. 1.

9 No. 2, we question whether or not  
10 the appeal was timely filed. As we understand  
11 it, the Zoning Administrator issued a denial  
12 in July, and I have it right here, of July 11,  
13 2003. The notification was sent to a Mr. Ming  
14 Jin Zhang -- I might be mispronouncing his  
15 name -- located at 410 N Street, N.W.,  
16 Washington, D.C. Now --

17 CHAIRPERSON MILLER: Excuse me.  
18 What denial was issued? Can you refer to an  
19 exact decision?

20 MR. GREEN: Yes. One moment.  
21 There was a notice of revocation of -- I'm  
22 sorry, disapproval of his application for use

1 as a Chinese food carry out facility. Now,  
2 that was issued pursuant to DCMR 11 350.4. It  
3 is our understanding that this decision by the  
4 Zoning Administrator was never appealed from.

5 We've gotten no notice of any kind  
6 indicating that this particular document was  
7 contested in any way. That being the case, it  
8 would appear that -- let's see, this is July  
9 11, '03, and we are here in '07, so the  
10 question then becomes when did the applicant,  
11 or the appellant, file some notification with  
12 the Board of Zoning Adjustment appealing from  
13 the decision of the Zoning Administrator?

14 We don't have anything at all that  
15 even comes close to a 60-day requirement that  
16 the Board's rules require. Perhaps someone  
17 can explain that to us.

18 CHAIRPERSON MILLER: Would the  
19 appellant like to respond to that?

20 MS. MONROE: Madam Chair, can I  
21 just interrupt for one second? The document  
22 that you have, is that in our record in this

1 case? I'm trying to understand because we  
2 don't know what's going on unless we know what  
3 document to refer to and what the dates are in  
4 that document.

5 MR. GREEN: Okay.

6 MS. MONROE: It's a preliminary  
7 matter.

8 MR. GREEN: I can give you a copy  
9 of it right now and that will resolve it right  
10 now, Madam Chairman.

11 CHAIRPERSON MILLER: Does the  
12 appellant have a copy of this?

13 MR. GREEN: We will give him a  
14 copy, too.

15 CHAIRPERSON MILLER: Give the ANC  
16 a copy of it?

17 MR. GREEN: We give everyone a  
18 copy. We have enough for everyone.

19 CHAIRPERSON MILLER: Good. Okay.  
20 Mr. Moy, do you want to accept it? I don't  
21 see Ms. Bailey here right now.

22 MR. MOY: I can take that.



1 CHAIRPERSON MILLER: Thank you.

2 MR. GREEN: Thank you.

3 CHAIRPERSON MILLER: Mr. Green,  
4 are you making a motion to dismiss based on  
5 timeliness?

6 MR. GREEN: Yes, I am, Madam  
7 Chairman.

8 CHAIRPERSON MILLER: And did the  
9 appellant have any advance notice that you  
10 were going to be making this motion?

11 MR. GREEN: I don't believe that  
12 he did, Madam Chairman. But, then again, the  
13 succession of notices as it related to this  
14 particular enterprise and if they wanted  
15 something done, they could have addressed it.

16 We also have prior counsel, a  
17 gentleman by the name of Mr. Stephen Gell, who  
18 on May 11, 2004, indicated to this Board, a  
19 copy of which you have, that he was dismissing  
20 his application for a variance.

21 This is not the first time that  
22 they have come before this body seeking relief

1 of some sort. The last time they made  
2 application they withdrew it and that was in  
3 the May 11, 2004, notification that was sent  
4 to Chairman Griffis at the time, Madam  
5 Chairman.

6 CHAIRPERSON MILLER: Thank you.  
7 Is the appellant ready to address this or do  
8 you need more time or what would you like to  
9 do?

10 MR. OSNOS: Of course, what we are  
11 appealing is the Zoning Administrator's  
12 decision or denial of an occupancy permit  
13 occupation. The denial was issued September  
14 22, 2006. That is the application which is  
15 under review today, not anything else.

16 Now, the issues that are to be  
17 decided here today have been set out, I hope,  
18 for the Board's review in the memorandum that  
19 I filed on March 26th. That memorandum, I  
20 think, explains why we are here today.

21 We are here today because the  
22 Zoning Administrator has decided that the

1 prior delicatessen use of the property was, in  
2 fact, not a delicatessen use and, therefore,  
3 the nonconforming use, nonconforming  
4 delicatessen use, has been terminated. As a  
5 result, the Zoning Administrator denied this  
6 application, the one that is here for review  
7 today, for an occupancy permit for a  
8 delicatessen.

9 Now, it is certainly true that Mr.  
10 Gell at an earlier time applied for a variance  
11 because he thought that was the best way to  
12 deal with the Zoning Administrator's position  
13 that the then existing delicatessen was in  
14 violation of its occupancy permit and was not,  
15 in fact, a delicatessen.

16 Mr. Gell, as I indicated,  
17 determined that he should apply for a variance  
18 so that the use would be permitted. But that  
19 doesn't mean that the appellant here is bound  
20 by principles of res judicata or the law of  
21 the case or anything of that nature.

22 We are not here to litigate

1 whether or not a variance should be granted to  
2 operate a delicatessen at this property. We  
3 are here to determine whether the Zoning  
4 Administrator has correctly decided that the  
5 delicatessen use at the property was, in fact,  
6 outside the permitted bounds of the  
7 nonconforming use and was, therefore,  
8 discontinued.

9 His decision was manifest in his  
10 denial of out tenant's occupancy permit on  
11 September 22, 2006. We timely appealed that  
12 denial. We are not to be penalized. We are  
13 not bound in any way by the fact that a prior  
14 application for variance was denied or  
15 withdrawn or was considered in any way by this  
16 Board.

17 That is simply not the issue here  
18 today. The position that we take today is  
19 that we don't need a variance. We have  
20 legitimate established nonconforming use as a  
21 delicatessen. The Zoning Administrator was  
22 100 percent wrong to determine that that use

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 had been exceeded or violated and that it was  
2 terminated and we are here to set that right.  
3 We timely filed the appeal so I don't think  
4 that the current motion to dismiss has legal  
5 sufficiency.

6 CHAIRPERSON MILLER: Thank you.  
7 Does the ANC have an opinion on this?

8 MR. BJORGE: The ANC has no  
9 opinion on this particular matter but will  
10 point out that it was party to the case back  
11 in 2005.

12 CHAIRPERSON MILLER: Thank you.  
13 Okay. The Board is ready to address this  
14 issue. We would agree with the appellant that  
15 the decision that is being appealed is the  
16 September 22, 2006, decision and that the  
17 appeal is timely.

18 With respect to the other events,  
19 they may go to the merits of this appeal but  
20 I don't believe that decision with respect to  
21 another tenant years ago controls the timing  
22 of this appeal. You can proceed on the

1 merits.

2 I just want to say also that there  
3 are a lot of dates floating around that I  
4 don't think are very well pinned down for us  
5 in the papers, so when you are addressing this  
6 if you want to highlight, for instance, you  
7 know, some of the stuff like specifically when  
8 we are talking about a three-year period  
9 whether discontinued or not.

10 You may end up supplementing the  
11 record, I don't know, but to the extent you  
12 can do it today, it would be helpful. For  
13 instance, you know, specific dates when  
14 certain things happened because this seems  
15 somewhat date oriented when you are talking  
16 about a three-year period for discontinuance  
17 as one of the issues, I believe, that is at  
18 issue. Right?

19 MR. OSNOS: I think it will turn  
20 out to be a non-issue.

21 CHAIRPERSON MILLER: Okay. Then  
22 that would be great, too.

1 MR. OSNOS: I do want to --

2 CHAIRPERSON MILLER: Are there any  
3 other preliminary issues? Otherwise, we can  
4 proceed with the appellant.

5 MS. MONROE: Madam Chair, can I  
6 just ask a question? This is for my own  
7 benefit. I see that you refer to the  
8 September 22, 2006, decision of the Zoning  
9 Administrator to deny the C of O. Is that in  
10 the record? Did you attach it?

11 MR. OSNOS: I did not attach, no.  
12 I assumed that --

13 MS. MONROE: I just wanted to make  
14 sure it --

15 MR. OSNOS: I didn't insert it in  
16 the record. I assume perhaps Wally did  
17 because this is the appeal of the Zoning  
18 Administrator's decision that my appeal would  
19 automatically bring that order forward for  
20 review. Of course, I have a copy.

21 MS. MONROE: That's up to you.  
22 It's just that I didn't see it and I thought

1 maybe I -- because, see, I was confused on the  
2 dates, too.

3 CHAIRPERSON MILLER: Exactly.

4 MR. GREEN: Madam Chairman, we  
5 don't have that either.

6 CHAIRPERSON MILLER: I don't think  
7 that impairs you from proceeding today. I  
8 think it's something we all should have in the  
9 record. It was a wrong assumption so you have  
10 a copy and you can put it in the record,  
11 right? Do you need to look at it? Would you  
12 like to look at it if he has it right now?

13 MR. GREEN: Yes.

14 CHAIRPERSON MILLER: Okay. Could  
15 you do that, give us a copy? We'll all take  
16 a look at it. You can have Ms. Bailey make  
17 copies of that. Okay. Could you do that, Ms.  
18 Bailey?

19 MS. BAILEY: Sure.

20 CHAIRPERSON MILLER: For the Board  
21 and for the parties. Thank you.

22 Are the parties in a position to



1 proceed or do we need to take a five-minute  
2 break? A five-minute break would be helpful?  
3 Okay. We'll take a quick break while the  
4 papers are being copied. Any other concerns  
5 that we need to address during this five-  
6 minute break?

7 MR. OSNOS: I don't think so, no.

8 CHAIRPERSON MILLER: Okay. All  
9 right. Then why don't we do that. We'll be  
10 back in five minutes.

11 (Whereupon, at 3:10 p.m. off the  
12 record until 3:27 p.m.)

13 CHAIRPERSON MILLER: I think Mr.  
14 Etherly will be here momentarily. I just want  
15 to back up for one minute. Mr. Green, I  
16 believe you actually raised two issues. One  
17 was timeliness and then the other was whether  
18 this was the right party to appeal and I want  
19 to know whether you are still raising that  
20 issue and then before we get into the merits  
21 again we can just resolve that issue.

22 MR. GREEN: After a reflection,

1 Madam Chairman, I'm not going to continue with  
2 that particular objection. Thank you.

3 CHAIRPERSON MILLER: Okay. Thank  
4 you. Is the appellant ready to proceed?

5 MR. OSNOS: We are, Madam  
6 Chairman.

7 CHAIRPERSON MILLER: Okay. Then  
8 the Board just wants to clarify the document  
9 that was just circulated. It says -- it's  
10 hard to read the top but it's DCRA's  
11 application of Certificate of Occupancy. It  
12 is a form and on the second page there is an  
13 X for denied reason, previous nonconforming  
14 use was discontinued for more than three  
15 years. Is this the decision that is being  
16 appealed in this case?

17 MR. OSNOS: Yes.

18 CHAIRPERSON MILLER: Okay. My  
19 next question is looking at this, which we  
20 haven't really seen one of this particular  
21 document type before, there is a date of  
22 9/22/06 written a few times on it. Is it

1 clear on here somewhere that is the date it  
2 was denied?

3 MR. OSNOS: I think Mr. Crews can  
4 best respond to that.

5 CHAIRPERSON MILLER: Okay. It  
6 certainly was either 9/22 or sometime  
7 thereafter, not earlier. Is that why you  
8 picked this date?

9 MR. OSNOS: If you look at the  
10 second page, I assume that the initials in the  
11 very middle of the page appear to be BC, Bill  
12 Crews, and there is a date there 9/22/06.  
13 Now, I'm going to suggest what happened for  
14 the Board's consideration.

15 In fact, the named applicant, Paul  
16 Luna, applied for a Certificate of Occupancy  
17 for this same use eight or nine months before  
18 in January of February of 2006. Mr. Crews  
19 never took action on that application for  
20 reasons that really only he can explain.  
21 Subsequently, Mr. Luna wanted to get his  
22 security deposit back from Mr. Gorgone and I

1 believe in order to do that he needed to  
2 procure a denial from the Zoning Administrator  
3 as to his proposed use.

4 He went back to the Zoning  
5 Administrator on September 22 which is the  
6 date of his signature and procured the denial  
7 from Mr. Crews on that same date as I think is  
8 reflected on the second page of the  
9 application.

10 CHAIRPERSON MILLER: Okay. Thank  
11 you. This is the decision you are appealing?

12 MR. OSNOS: Yes.

13 CHAIRPERSON MILLER: Okay.

14 Mr. Crews, did you need to add  
15 anything to this? Okay. Then I would suggest  
16 that you proceed with your argument.

17 MR. OSNOS: May I presume that the  
18 Board has read the brief that the appellant  
19 filed?

20

21 CHAIRPERSON MILLER: You can  
22 presume that the Board has read every piece of

1 -- every document that is in the file.  
2 However, don't presume that the Board has a  
3 total grasp of the arguments being made. That  
4 is part of what your role should be here to  
5 highlight your argument for the Board with all  
6 these dates and different decisions and things  
7 like that.

8 MR. OSNOS: All right. Then I  
9 think I will take this opportunity to go back  
10 over the fundamental facts of the appeal. The  
11 building in question, the property in  
12 question, is a four-story townhouse. It is  
13 residentially zoned. The English basement or  
14 ground floor.

15 Mr. Gorgone can indicate whether  
16 it's an English basement or a true ground  
17 floor. It has been used for perhaps 50 years  
18 as a retail food service establishment. The  
19 definitions of different food service uses in  
20 the District become important as I will  
21 explain.

22 At any rate, there has been a food

1 service nonconforming use there I think as  
2 long as 50 years. We have submitted some  
3 comments that were prepared by the Office of  
4 Planning in connection with the previous  
5 application for variance that was submitted by  
6 Mr. Gell. I believe that application was  
7 submitted in 2004. The comments of the Office  
8 of Planning indicate the longstanding use of  
9 the ground floor as a food service facility.

10 Now, Mr. Gorgone, I would proffer,  
11 and he may testify, purchased the property in  
12 1994. At that time the ground floor was  
13 occupied by a food service business. It was  
14 a carry out. We have submitted copies of  
15 prior certificates of occupancy including the  
16 one that had been issued for the tenant in  
17 place at that time and subsequent occupancy  
18 permits and prior occupancy permits.

19 They all authorize a delicatessen  
20 use with no seating. That is what Mr. Gorgone  
21 found when he bought the building in 1994, a  
22 delicatessen, but the nature of the business

1 was a carry out serving Chinese food with no  
2 seats. That use continued through 2005.

3 Due to concerns, I guess, of the  
4 neighbors the Zoning Administrator -- let me  
5 back up. The Department of Consumer and  
6 Regulatory Affairs issued a notice of intent  
7 to deny a license renewal for the  
8 delicatessen. This was in 2005. That letter  
9 has been attached to my brief. The letter has  
10 a footnote. It says, "You may be operating  
11 outside the scope of the Certificate of  
12 Occupancy issued to you on June 4, 1998."

13 Thereafter, sometime after October  
14 17th of 2005, Mr. Crews revoked the occupancy  
15 permit on the grounds that the food service  
16 business was not a delicatessen. At  
17 attachment 3 to my brief I believe the letter  
18 from Bill Crews revoking the occupancy permit  
19 has been attached.

20 The then owner of the Chinese  
21 carry out, Mr. Ming Zhang, who had come in in  
22 1998, was forced out of business. He couldn't

1       renew his delicatessen license because his  
2       occupancy permit was revoked. Mr. Gorgone  
3       located a new tenant, Paul Luna, who is the  
4       applicant on the application that is under  
5       review here today.

6               Mr. Luna was going to have a good  
7       service business there that he termed a  
8       gourmet shop. We don't know what he applied  
9       for in early 2006, in January or February, but  
10      we assume it was a delicatessen.

11             That application has apparently  
12      been lost by the Zoning Administrator's  
13      office. What we are left here today with is  
14      the September 22, 2006, application to operate  
15      a gourmet shop and Mr. Crews' denial based on  
16      continuance.

17             Now, I think that Mr. Crews has to  
18      defend his position here today. What we have  
19      submitted with our exhibit list are copies of  
20      licenses issued by the District, food service  
21      licenses in addition to occupancy permits  
22      authorizing the use of the premises as a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 delicatessen with no seating. We also have  
2 attached copies of licenses issued by DCRA,  
3 business licenses authorizing food service use  
4 as a delicatessen.

5           When we have occupancy permits and  
6 we have delicatessen licenses from DCRA and we  
7 have Mr. Crews saying this is not a  
8 delicatessen, we have to wonder why. Really  
9 what this case is about is to resolve the  
10 question when is a delicatessen not a  
11 delicatessen. That is really the crux of the  
12 issue here today.

13           I've spoken many times with Mr.  
14 Crews to figure out what he thinks a  
15 delicatessen is. I believe I know what he  
16 thinks it is and I believe his opinion to be  
17 wrong. He is looking at the dictionary  
18 definition of a delicatessen and he is saying  
19 that a carry out, a Chinese food carry out  
20 that does not serve sandwiches as we associate  
21 with a traditional Manhattan style  
22 delicatessen cannot be considered a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 delicatessen under the zoning regulations.

2 I am certain that he will tell you  
3 today that the reason he thinks the  
4 delicatessen use was discontinued at this  
5 property is because the Chinese carry out was  
6 operating as a Chinese carry out and could not  
7 be considered a delicatessen because it didn't  
8 have the requisite variety of delicatessen  
9 offerings that he thinks is necessary in order  
10 to be a delicatessen under the zoning law.

11 Now, the reason that Mr. Crews is  
12 wrong is -- well, there are a number of  
13 reasons why he's wrong. Of course, I want to  
14 rely primarily on the brief I've submitted and  
15 encourage the Board to look at that again but  
16 there is a longstanding interpretation, I  
17 guess, of what a delicatessen is under former  
18 23 DCMR 2499.1.

19 That volume of the D.C. Municipal  
20 Regulations, which is now the D.C.  
21 Administrative Code, but the D.C. Municipal  
22 Regulations had definitions for food service

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 facilities and it said a delicatessen is any  
2 business with food, drink, or refreshment are  
3 cooked, prepared, and sold for consumption  
4 other than on the premises.

5 It does not say that a  
6 delicatessen has to serve sandwiches. It does  
7 not say that a delicatessen has to have any  
8 specified variety of foods in order to be  
9 considered a delicatessen. It does not say  
10 what type of cuisine must or must not be  
11 offered.

12 CHAIRPERSON MILLER: Can I ask you  
13 a question before you go further?

14 MR. OSNOS: Yes.

15 CHAIRPERSON MILLER: I think it  
16 would help us. Help me anyway. Just an  
17 understanding of your threshold argument. Are  
18 you saying that the ZA erred in characterizing  
19 the carry out as a deli and, therefore --

20 MR. OSNOS: No.

21 CHAIRPERSON MILLER: -- was wrong  
22 to -- okay. What is your basic premise?

1                   MR. OSNOS: He said the carry out  
2                   was not a deli notwithstanding the fact that  
3                   it had a valid license and occupancy permit  
4                   with the name delicatessen on them. He said  
5                   notwithstanding the license and  
6                   notwithstanding the occupancy permit, this  
7                   Chinese carry out is not a delicatessen.  
8                   Therefore, the delicatessen nonconforming use  
9                   has been lost because this Chinese carry out  
10                  is not a deli. That is the basis for his  
11                  decision.

12                 CHAIRPERSON MILLER: Okay. That  
13                 is the basis for your argument.

14                 MR. OSNOS: That is the basis for  
15                 the argument, that the Zoning Administrator is  
16                 basically reinterpreting the zoning ordinance  
17                 in a way that, No. 1, contradicts decades of  
18                 prior interpretation by the food service  
19                 regulators at DCRA. It contradicts decades of  
20                 established practice at the occupancy  
21                 division.

22                 It constitutes a rulemaking which

1 Mr. Crews has no authority to undertake. Even  
2 if it is not a rulemaking, it has a certain  
3 aspect of retroactivity because he is  
4 invalidated a nonconforming that existed for  
5 50 years based on his personal interpretation  
6 of what a delicatessen is and what a  
7 delicatessen is not.

8 CHAIRPERSON MILLER: But it wasn't  
9 the exact same type of food service business  
10 for 50 years, right?

11 MR. OSNOS: That is correct but it  
12 was always a delicatessen under the occupancy  
13 permit. I contend it was always a  
14 delicatessen under the food service  
15 regulations because, as I've indicated in my  
16 brief, and certainly Mr. Crews has the ability  
17 to bring someone from DCRA to contradict me or  
18 clarify what the situation is.

19 The way in which DCRA regulates  
20 food service businesses is simple. They call  
21 them restaurants which is any food service  
22 facility where a majority of the income is

1 derived from sale of food for on-premises  
2 consumption.

3 A typical restaurant where we go,  
4 sit down at a table, and get table service.  
5 Or a business is a delicatessen and a  
6 delicatessen was defined under the former  
7 Municipal Regulations as any food  
8 establishment that prepares food for off-  
9 premises consumption.

10 The other types of food service  
11 licenses that the district issued were grocery  
12 licenses and a grocery license authorized the  
13 sale of produce and food products but not  
14 prepared food like a delicatessen.

15 The last category of food service  
16 establishment was a food product licensed  
17 establishment. A food product license  
18 authorized the sale of prepackaged food  
19 products. Those are essentially snacks, candy  
20 bars, chips, any wholly prepackaged food.

21 So to go again in reverse order,  
22 you had the food products license which would

1 cover your simple wrapped prepackaged, I guess  
2 you would almost maybe call them vacuum  
3 wrapped goods, although you could sell, I  
4 think, wrapped sandwiches if they were made  
5 off premises and brought on. You had your  
6 wrapped foods, prepackaged. That's a food  
7 products license.

8 Then you would move up the scale  
9 to a grocery license which allowed the sale of  
10 produce and fresh foods. Then if you wanted  
11 to serve prepared food you go a step further  
12 up to a delicatessen which also authorized the  
13 sale of grocery and food service products.  
14 Then if you had a sit-down dining  
15 establishment, you would get a restaurant  
16 license.

17 Those are the four licenses that  
18 have been in effect in the District for the  
19 past 25 years at least because that is how  
20 long I have been practicing law in the  
21 District. Food products, grocery,  
22 delicatessen, restaurant.

1 All carry outs in the District,  
2 and by carry out I mean a place that serves  
3 prepared food which does not have seating, any  
4 place that serves prepared food but does not  
5 have seating is a carry out. There is no  
6 license and there never has been a license  
7 issued by the food service regulators for  
8 carry outs.

9 Those establishments, what we  
10 think of a carry out where you go in and get  
11 an order and take your food out, those have  
12 been delicatessens for as long as I know, 25  
13 years at least.

14 What Mr. Crews is doing now is he  
15 is saying, "Carry outs cannot be considered  
16 delicatessens unless I say they are." He's  
17 got a definition that he applies. It's kind  
18 of vague. We know that Blimpies and Subways  
19 are delicatessens. We now know that Chinese  
20 carry outs are not delicatessens. Why this is  
21 so we do not know.

22 MR. HOOD: Madam Chair, can I ask

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 a question?

2 CHAIRPERSON MILLER: Sure.

3 MR. HOOD: You mentioned -- I  
4 think you've taken it from your submittal from  
5 March 23rd. You mentioned a definition of  
6 delicatessen. You got it from I guess Title  
7 23?

8 MR. OSNOS: Yes, sir.

9 MR. HOOD: Help me because I deal  
10 with titles of U.S. code all the time. What  
11 is Title 23. Help me.

12 MR. OSNOS: Food service  
13 establishments.

14 MR. HOOD: Okay. That's good.  
15 I've got another question. Hold tight for me  
16 because I want to make sure I follow where I'm  
17 going here.

18 Madam Chair, through you if I  
19 could, I will ask the Office of the Attorney  
20 General, maybe Ms. Bushman, for the zoning  
21 regulations. It talks about what is not a  
22 restaurant and fast foods. When it does not

1 specifically spell out what a definition of a  
2 delicatessen is, are we allowed to go to  
3 another title to deal with that? Where do we  
4 go?

5 MS. BUSHMAN: Are you asking me?

6 MR. HOOD: Ms. Bushman or whoever  
7 wants to help with that.

8 MS. BUSHMAN: Certainly the OAG  
9 can also chime in but it's my understanding  
10 that where there is no definition of a  
11 particular term of art that we go to Webster's  
12 Dictionary for that throughout the 11 DCMR.

13 MR. HOOD: Thank you. That is  
14 very helpful.

15 Madam Chair, I'm not sure -- did  
16 you want to comment, Ms. Monroe?

17 MS. MONROE: I don't have any  
18 further comment. Can I ask a question on this  
19 topic? I just want to clarify. You are  
20 talking about the four definitions. You kept  
21 saying used to be that way. Is it still? At  
22 relevant times of this appeal was it that way?

1 I just want to know if we are dealing with the  
2 right time frame.

3 MR. OSNOS: It is still that way  
4 but I must explain further.

5 MS. MONROE: I don't want to drag  
6 you guys where you don't want to be. The only  
7 thing I would say is yes, you are supposed to  
8 go to Webster's but I would certainly be  
9 informed by other titles but you have no  
10 jurisdiction over any title other than Title  
11 11 is the only thing you can interpret?

12 MR. HOOD: That's going to lead to  
13 my question when we get to Mr. Crews so I'll  
14 hold off. Thank you, Madam Chair.

15 CHAIRPERSON MILLER: I just want  
16 to chime in a little bit, too. The provisions  
17 in ARCO that we have jurisdiction over in 11  
18 DCMR and we certainly have in Chapter 199.1  
19 definition of restaurant, and it may not be  
20 explicitly defined within our definition but  
21 I think that we have to recognize these  
22 regulations and see how to deal with that

1 within these regulations and see how the  
2 Zoning Administrator should enforce our zoning  
3 regulations.

4 I think we will hear from Mr.  
5 Crews to the extend that other regulations  
6 come into play. I don't know. We have to  
7 weigh what impact they should have. They may  
8 have an impact with what has been the practice  
9 for many years or all sorts of issues.

10 MR. OSNOS: I want to make this  
11 point. Obviously the definitions that I'm  
12 referring to in former 23 DCMR are not  
13 contained within the zoning ordinance.  
14 However, since the word delicatessen is not  
15 defined in the zoning ordinance, I do think  
16 that this Board has the authority and the duty  
17 to look at longstanding interpretations by  
18 other District agencies, particularly in this  
19 case where the agency is directly in charge of  
20 the day-to-day operation of these  
21 establishments.

22 I'm not saying that DCMR

1 definition if dispositive but I'm saying it's  
2 important to look at it because it's important  
3 to look at longstanding administrative  
4 precedent in the District. I don't think the  
5 Board --

6 CHAIRPERSON MILLER: I understand  
7 what you're saying.

8 MR. OSNOS: Don't look at this in  
9 a vacuum.

10 CHAIRPERSON MILLER: What I'm also  
11 trying to say is that just because it's not  
12 defined in our regulations doesn't mean that  
13 we don't look at longstanding practices as to  
14 how a deli has been interpreted if it has been  
15 in the context of our own regulations.

16 MR. OSNOS: Yes. I don't know  
17 where-- well, I don't see in this Board's  
18 regulations any statement anywhere as to what  
19 a deli is. The only way that we know under  
20 the zoning code that there is any such thing  
21 as a deli is because there are definitions of  
22 a restaurant and a fast food restaurant.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1           The     fast     food     restaurant  
2     definition specifically says a fast food  
3     restaurant does not include a delicatessen.  
4     That is the only way that word ever comes into  
5     the zoning ordinance as far as I am aware. I  
6     don't know that it is mentioned anywhere else  
7     other than in the fast food definition.

8           The     fast     food     definition, the  
9     current site is 11 ADC 199. Right after  
10    restaurant is restaurant/fast food. It just  
11    says, "This definition does not include an  
12    establishment known as a retail grocery, a  
13    convenience store and ice cream parlor, a  
14    delicatessen or other business selling food or  
15    beverages as an accessory use or for off-  
16    premises preparation and consumption.

17           The reason for that is because  
18    fast food restaurants -- well, as I'm sure the  
19    Board knows, they are permitted in a C-2-A  
20    zone only by special exception. So many of  
21    the commercial corridors in the District are  
22    in C-2-A zones.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 I should bring that up. If you  
2 want to talk about this Board's precedent, if  
3 the Board decides that a Chinese carry out is  
4 not a delicatessen under the zoning ordinance,  
5 then there will be many, many, many carry outs  
6 throughout C-2-A zones that have been  
7 instantly rendered either illegal or  
8 nonconforming in some way.

9 I think the Zoning Administrator's  
10 practice has always been to licensed carry  
11 outs or to issue occupancy permits for carry  
12 outs under the name delicatessen. I don't --

13 CHAIRPERSON MILLER: Let me just  
14 say this. Just in looking at these  
15 regulations carry out and fast food are not  
16 the same in these definitions. According to  
17 what I'm reading here, and I've looked at it  
18 before, if a restaurant has a certain amount  
19 of carry out, it's not a fast food. They are  
20 not interchangeable.

21 MR. OSNOS: No, but --

22 CHAIRPERSON MILLER: Just because

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 it's a carry out doesn't mean it's fast food.

2 MR. OSNOS: I think Mr. Crews is  
3 almost at that point because he says a carry  
4 out is a fast food restaurant. He definitely  
5 says a carry out is not a delicatessen unless  
6 it serves certain types of food or has a  
7 certain variety of foods that only he knows.

8 CHAIRPERSON MILLER: At issue is  
9 this Chinese carry out. Is that correct?

10 MR. OSNOS: And whether that --

11 CHAIRPERSON MILLER: Is it a  
12 delicatessen.

13 MR. OSNOS: That somehow did not  
14 conform to what we would consider to be a  
15 delicatessen. When I say we, I mean you, of  
16 course.

17 CHAIRPERSON MILLER: Would you say  
18 the Chinese carry out was a fast food or not  
19 a fast food?

20 MR. OSNOS: That's not the issue.  
21 It couldn't be a fast food restaurant because  
22 a fast food -- first of all, it couldn't be



1 because you go to the fast food restaurant  
2 definition. A restaurant is considered fast  
3 food restaurant if it has a drive-thru. Okay.  
4 This doesn't have a drive-thru.

5 A restaurant will be considered a  
6 fast food restaurant if the floor space  
7 allocated and used for customer queuing, for  
8 self-service, for carry out, and on-premises  
9 consumption is greater than 10 percent of the  
10 total floor space on any one floor that is  
11 accessible to the public.

12 Well, the occupancy permits that  
13 we have submitted as exhibits that cover this  
14 space indicate that no seating is allowed so  
15 we are not worried about the seating component  
16 here but we are concerned with the space  
17 allocated and used for customer queuing. I  
18 don't know how Mr. Crews knows what space was  
19 used for customer queuing.

20 Of course, the reason we don't  
21 know is because he never issued a letter  
22 decision telling us what he had decided. If

1 10 percent of these premises -- not premises  
2 but 10 percent of the public floor area. We  
3 don't include the behind the counter space.

4 We don't include the employee  
5 bathroom. We don't include storage. We  
6 really don't know. If we had 10 percent of  
7 the public floor space reserved for customer  
8 queuing, then the Chinese carry out would be  
9 a fast food restaurant if (a) at least 60  
10 percent of the food was prepared or packaged  
11 before the customer places an order.

12 I'm going to proffer that Mr.  
13 Gorgone would testify that is not the case.  
14 This was all prepared to order. Most Chinese  
15 restaurants you call up and order and it's  
16 prepared. You don't go and get your  
17 prewrapped Lo Mein or Chicken Szechuan.

18 The alternative test if 60 percent  
19 of the food items were not already prepared  
20 before the order is placed is that the  
21 establishment primarily serves it food and  
22 beverages in disposable containers.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1           And -- and provides disposable  
2     tableware. I don't know if Mr. Crews has any  
3     evidence that this was the case that this  
4     establishment was, in fact, a fast food  
5     restaurant. But, as I said, I think that is  
6     what he is trying to do is make every carry  
7     out a fast food restaurant unless it meets  
8     what he considers to be his personal test for  
9     a deli. Sandwiches. Has to have sandwiches.

10           Was it a fast food restaurant?  
11     Well, how do we know? Where is there any  
12     written decision anywhere that summarizes the  
13     evidence that this was, in fact, a fast food  
14     restaurant?

15           CHAIRPERSON MILLER: Is this all  
16     the reason you know that is on this decision  
17     that you are appealing, previous nonconforming  
18     use was discontinued for the reason that it  
19     was discontinued -- that it was denied?

20           MR. OSNOS: That's my assumption.  
21     That is my thinking. I believe based on some  
22     conversations with Mr. Bjorge that maybe he

1 thinks that some work was done in there to  
2 expand the cooking facilities or the kitchen  
3 facilities that was not done according to  
4 permit. I don't know what that has to do with  
5 t h e z o n i n g i s s u e .

6 From where I sit, what I have told  
7 you is all I know about the District's  
8 decision making in this case.

9 Now, the reason that I can  
10 characterize what I believe to be Mr. Crews'  
11 thinking on the matter is that I have  
12 submitted many other occupancy permit  
13 applications for delicatessens in different  
14 zones of the city.

15 I have talked with them several  
16 times and based on statements that he's made,  
17 I think I have accurately summarized his  
18 thoughts on the matter. I may be wrong. I do  
19 apologize to Mr. Crews if I'm wrong about his  
20 thinking.

21 CHAIRPERSON MILLER: Okay. I  
22 think you basically covered it. I just want

1 to ask you one question. I know you probably  
2 already said it and I just want to see where  
3 you were at, though. Are you saying because  
4 -- there is no definition of delicatessen in  
5 our zoning regulations under restaurant or  
6 whatever.

7 It refers to delicatessens and  
8 that's it. But there are other licenses that  
9 DCRA issues that deals with delicatessens.  
10 Did you say that there are definitions there  
11 or just that they have issued licenses for  
12 this type of place?

13 MR. OSNOS: There are definitions.  
14 Delicatessen was a defined term in 23 DCMR.  
15 I've cited 23 and 25. I think it's 25. I'm  
16 sorry. I do think it's 25. I'm sorry about  
17 that. 25 DCMR 2499.1 does have a definition  
18 of delicatessen. The definition is any  
19 business where food, drink, or refreshments  
20 are cooked, prepared, and sold for consumption  
21 other than on the premises.

22 But from the Zoning

1 Administrator's perspective, carry outs have  
2 continuously been authorized under occupancy  
3 permits which bear the designation  
4 delicatessen.

5 I rarely see an occupancy permit  
6 which says carry out, although I have seen  
7 them. Carry out, as far as I know, is also  
8 not a defined term under the zoning  
9 regulations so this is sort of an ad hoc  
10 system that has been in place for quite a  
11 while.

12 Now, I just want to make the point  
13 that these definitions from 25 DCMR 2499.1 I  
14 do not think are contained any longer in the  
15 municipal code and that is because of  
16 something called the Streamlining Regulation  
17 Act of 2003 which I have discussed at page 5  
18 of my brief.

19 Basically now there is a master  
20 business license or basic business license and  
21 the designations, food products, delicatessen,  
22 restaurant, and grocery are now subendorsement

1 designations that are printed on the license  
2 but the basic license is called a retail food  
3 establishment license. Still these  
4 subendorsements follow the categories that I  
5 mentioned, food products, grocery,  
6 delicatessen, and restaurant.

7 CHAIRPERSON MILLER: Thank you.  
8 Do the Board members have any questions right  
9 now?

10 MR. LOUD: One question, Madam  
11 Chair.

12 Mr. Osnos, can you articulate what  
13 you understood -- and I think you just did it  
14 but I just want to make it clear. I  
15 understand it -- what you understood the  
16 regulation to be September '06 at the time of  
17 Mr. Crews' denial of the C of O? It is my  
18 understanding that you don't believe it to  
19 have been either 23 DCMR or 25 DCMR.

20 MR. OSNOS: It's 25. I misspoke  
21 when I said 23. There was a typographical  
22 error in my brief. I'm quite sure that it's

1 25 because it follows the ABC regulations  
2 which I used to look at all the time and still  
3 do and that was 25 DCMR. So it is 25 DCMR  
4 2499.1. Now, your question is what was in  
5 effect on September '06.

6 MR. LOUD: At least your  
7 understanding of it.

8 MR. OSNOS: Well, if you go to 25  
9 ADC 9901 there is a new definition and it is  
10 just a food establishment. It says a food  
11 establishment is simply an operation that  
12 relinquishes possession of food directly to a  
13 consumer.

14 Such operations include a  
15 restaurant, a grocery store, a convenience  
16 store, a bakery, a delicatessen, a caterer, or  
17 a hotel or a bed and breakfast operation where  
18 food is provided. The former regulations are  
19 no longer in effect but I think they are  
20 reflective of the long standing practice at  
21 DCRA of classifying carry outs as  
22 delicatessens.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1           And still a carry out would  
2     receive a retail food establishment basic  
3     business license with a subendorsement  
4     containing the designation delicatessen. I  
5     acknowledge that there is some tension between  
6     the zoning ordinance and these other  
7     regulations. Also the dictionary definition  
8     of the term delicatessen.

9           MR. GREEN:     Excuse me, Madam  
10    Chairman, if I might interrupt. We have been  
11    here for a long period and it appears that  
12    counsel is testifying. If that's the case,  
13    obviously he should be put under oath. Second  
14    of all, will we be given an opportunity to  
15    cross examine?

16           CHAIRPERSON MILLER:     I don't  
17    really hear testimony. I mean, I don't know.  
18    I'm hearing a description of the legal  
19    provisions at play. You could but I'm not  
20    sure. We didn't really -- I think you should  
21    be able to cross examine on evidentiary stuff  
22    such as facts, when certain things happened,

1 and if you question what establishment was in  
2 place in 2005. All that kind of stuff is  
3 fine. If you want to address the legal --

4 MR. GREEN: You're right, Madam  
5 Chairman, in that you brought out the fact of  
6 evidentiary matters and testimonial and so  
7 forth. But in our listening it seems that a  
8 lot of conversation has been addressed as to  
9 what Mr. Crews did or said or thought or felt  
10 or so forth. He spoke it with such clarity  
11 and such authority it seems to me that we  
12 should be given the opportunity to cross  
13 examine him on that in light of the fact that  
14 Mr. Crews is here.

15 CHAIRPERSON MILLER: That is  
16 correct. You have been very patient and I  
17 think we are really just about to turn to you.  
18 I can leave it up to you as to how would like  
19 to address the issues most efficiently. Mr.  
20 Crews is right here to testify exactly to what  
21 he did and how he thinks and whatever. If you  
22 want to spend time cross examining the

1       appellant --

2                   MR. GREEN:   I don't want to talk  
3       to the attorney.   I want to talk to his  
4       witness.

5                   CHAIRPERSON   MILLER:       But   his  
6       witness didn't testify.

7                   MR. GREEN:    I understand.    He  
8       didn't but he is giving testimony.  He hasn't  
9       been sworn or any of the niceties associated  
10      with an administrative process.

11                  CHAIRPERSON    MILLER:        That's  
12      correct.  I think --

13                  MR. GREEN:     If he is giving  
14      testimony, he should be sworn and we should be  
15      given the opportunity of cross examining him.  
16      If not, then let him put his witness on, put  
17      his evidence on, and we'll move on as you  
18      normally do, Madam Chair.

19                  MR. OSNOS:    I do have a very, very  
20      brief direct examination for Mr. Gorgone.  It  
21      makes no difference to me whether I'm sworn,  
22      unsworn, cross examined, unexamined.  It makes

1 absolutely no difference.

2 CHAIRPERSON MILLER: Why don't you  
3 get sworn. What I would say is let's use our  
4 time most efficiently. We are really trying  
5 to figure out the legal question as to what is  
6 a deli, that kind of thing.

7 MR. GREEN: Counsel can't do it.  
8 Mr. Crews perhaps can.

9 CHAIRPERSON MILLER: Mr. Crews  
10 would be -- that's why he's here. I think we  
11 would love to hear from Mr. Crews. Let me  
12 just say the procedures are, though, that we  
13 are going to finish with the appellant's case.  
14 I think we are almost finished. We have let  
15 you argue for quite a long period of time.  
16 You have a witness you want to ask questions  
17 of?

18 MR. OSNOS: Very briefly, yes.

19 CHAIRPERSON MILLER: Who would be  
20 subject to cross examination. Is that going  
21 to take very long?

22 MR. OSNOS: No. Mr. Gorgone has

1       been sworn.

2                   CHAIRPERSON MILLER: Mr. Crews, do  
3       you have something to add?

4                   MR. CREWS: We weren't here when  
5       the afternoon session started so I have not  
6       personally been sworn in yet. I don't know if  
7       anybody else needs to be.

8                   MR. GREEN: Neither has counsel.

9                   CHAIRPERSON MILLER: Okay. Why  
10       don't -- whoever hasn't been sworn in, get  
11       sworn in.

12                   (Whereupon, the witnesses were  
13       sworn.)

14                   MR. OSNOS: Mr. Gorgone, why don't  
15       you come over and join me at the microphone  
16       here. Let me just ask you a couple questions.  
17       Are you the owner of the property at 1417 17th  
18       Street, N.W.?

19                   MR. GORGONE: Yes.

20                   MR. GREEN: When did you buy the  
21       property?

22                   MR. GREEN: Excuse me, Madam

1 Chairman. I'm not trying to be the dealer of  
2 the wheel here but I don't recall the witness  
3 being sworn. I mean, maybe he has. Has he?

4 MS. BAILEY: He was sworn earlier.

5 MR. GREEN: Ah, okay. I'm sorry.  
6 Thank you.

7 MR. OSNOS: Mr. Gorgone, when did  
8 you purchase the property?

9 MR. GORGONE: In 1994.

10 MR. OSNOS: I want you to speak  
11 up. Come on, speak up. In 1994 what kind of  
12 business was there on the ground floor?

13 MR. GORGONE: The same Chinese  
14 place that has been there all the time.

15 MR. OSNOS: What kind of Chinese  
16 place was there in 1994?

17 MR. GORGONE: They call it carry  
18 out. I don't know.

19 MR. OSNOS: Were there any seats  
20 in there?

21 MR. GORGONE: No. No seats. Just  
22 carry out.

1                   MR. OSNOS: All right. So what  
2 kind of menu did they have?

3                   MR. GORGONE: They have menu that  
4 was about maybe five or six different things  
5 by order.

6                   MR. OSNOS: By order?

7                   MR. GORGONE: Yes.

8                   MR. OSNOS: All right. Since 1994  
9 -- well, let me ask you this. Did their come  
10 a time when the carry out operation stopped?

11                  MR. GORGONE: In January of 2006.

12                  MR. OSNOS: And between 1994 when  
13 you bought the property --

14                  CHAIRPERSON MILLER: I'm sorry.  
15 It was hard to hear. Did you say it stopped  
16 in 2006?

17                  MR. GORGONE: Yeah, that's when  
18 they got out.

19                  MR. OSNOS: You've got to talk up,  
20 man.

21                  MR. GORGONE: Yeah, that's when  
22 they got out in 2006. I think it was January

1 8th he gave me the keys.

2 MR. OSNOS: So from 1994 until  
3 January 2006 was there any change in the kind  
4 of business that was operating on the ground  
5 floor?

6 MR. GORGONE: No. Same business.

7 MR. OSNOS: Thank you. Oh, one  
8 more question. From 1994 until January of  
9 2006 was the Chinese carry out operated  
10 continuous?

11 MR. GORGONE: Yes.

12 MR. OSNOS: Thank you.

13 MR. OSNOS: No further questions.

14 CHAIRPERSON MILLER: Okay. Now,  
15 Mr. Green, do you have any cross examination?

16 MR. GREEN: One moment, Madam  
17 Chair, please.

18 CHAIRPERSON MILLER: Okay. Do  
19 Board members have any questions for the  
20 witness? Okay. We'll wait for you.

21 MR. GREEN: Mr. Gorgone, is that  
22 not right?



1 MR. GORGONE: Yes, sir.

2 MR. GREEN: Can you tell me please  
3 in this area that you have familiarity with,  
4 how much of the floor space was utilized for  
5 queuing?

6 MR. GORGONE: I don't understand  
7 the word queuing.

8 MR. GREEN: All right. How much  
9 of the public area was available for people to  
10 stand in line to get served, if you know?

11 MR. GORGONE: I could guess. I  
12 didn't measure but I could guess. You mean  
13 from the counter to the door?

14 MR. GREEN: Yes, sir.

15 MR. GORGONE: Probably would it be  
16 5 by 6 foot roughly.

17 MR. GREEN: Is that all the space  
18 available for the people who are standing in  
19 line to get service?

20 MR. GORGONE: Yes. They can still  
21 order by phone.

22 MR. GREEN: So there was no other

1 space available for the public as you  
2 understand it. Is that right?

3 MR. GORGONE: Up in front there is  
4 like a patio before the entrance of the door.  
5 There is a nice patio there, big space.

6 MR. GREEN: Okay. Sir, can you  
7 tell me how were the vegetables prepared, the  
8 service?

9 MR. GORGONE: There was another  
10 cook there. I never was there to see the  
11 actual guy cook but he cooked in a pan. He  
12 boiled with the water.

13 MR. GREEN: Sir, can you tell me  
14 if the vegetables were cut up before they were  
15 boiled in the pan?

16 MR. GORGONE: I don't know. They  
17 could have been. It depends how you buy. If  
18 you buy small, maybe you don't cut. If you  
19 buy big bunch of it, you cut.

20 MR. GREEN: Roughly how long, sir,  
21 did it take to prepare these vegetables that  
22 you observed?

1                   MR. GORGONE: I have to guess. I  
2 don't know. I actually didn't cook but it  
3 probably would have taken five or 10 minutes.

4                   MR. GREEN: Did you ever place an  
5 order with this establishment, sir, to make a  
6 purchase?

7                   MR. GORGONE: No, but I ate the  
8 food sometimes.

9                   CHAIRPERSON MILLER: I'm sorry.  
10 Could you repeat your answer?

11                  MR. GORGONE: I said I never  
12 ordered by phone but when I was there one time  
13 he offered me food and I taste it.

14                  CHAIRPERSON MILLER: Okay. Thank  
15 you.

16                  MR. GREEN: How much of these  
17 vegetables were preprepared before they were  
18 actually stir fried and served to the  
19 customer, if you know?

20                  MR. GORGONE: I don't know, sir.  
21 As I said, there was another cook. I went  
22 there once in a while but I didn't keep track.

1 MR. GREEN: One moment.

2 CHAIRPERSON MILLER: What's  
3 happening here, Mr. Green?

4 MR. GREEN: I'm trying to make  
5 sure I get enough copies for the panel.

6 CHAIRPERSON MILLER: What are you  
7 passing out?

8 MR. GREEN: I'm going to ask that  
9 this be marked as an exhibit.

10 CHAIRPERSON MILLER: You might  
11 need to go on microphone. I know you have a  
12 really strong voice but I think the court  
13 reporter needs you on microphone.

14 MR. GREEN: Mr. Gorgone, are you  
15 familiar with a May 11, 2004 letter sent to  
16 then Chairman Griffis of the Board of Zoning  
17 Adjustment?

18 MR. GORGONE: Yes.

19 MR. GREEN: Is it not a fact, sir,  
20 that the content of this letter was to request  
21 that the Board dismiss the application for a  
22 variance?

1                   MR. GORGONE: I don't know. Mr.  
2 Stephen never told me about that. I know that  
3 he did, I think, but it was with the tenant.

4                   MR. GREEN: Now, on this letter,  
5 May 11, 2004, I direct your attention to the  
6 lower left-hand quadrant of it, or in the  
7 corner, if you will. Is that your name, sir?

8                   MR. GORGONE: Salvatore Gorgone,  
9 yes.

10                  MR. GREEN: Uh-huh.

11                  MR. GORGONE: But I didn't hire  
12 that lawyer. He was not my lawyer.

13                  MR. GREEN: He was not your  
14 lawyer?

15                  MR. GORGONE: He was hired from  
16 the tenant but he contacted me.

17                  MR. GREEN: But he sent you this  
18 letter. Is that not right, sir?

19                  MR. GORGONE: Who send me this  
20 letter?

21                  MR. GREEN: Mr. Gell.

22                  MR. GORGONE: I don't recall but

1 it's possible that he did.

2 MR. GREEN: I didn't understand  
3 you, sir.

4 MR. GORGONE: I don't remember but  
5 obviously he did.

6 MR. GREEN: All right.

7 MR. GORGONE: I know that he did  
8 submit something to the Board.

9 MR. GREEN: But it was notice that  
10 the person he did represent was withdrawing  
11 their application or dismissing a motion  
12 before the Board of Zoning Adjustment, sir.  
13 Is that not right?

14 MR. GORGONE: Whatever the letter  
15 say but I didn't do it personally.

16 MR. GREEN: I understand that but  
17 you were given notice, sir, that an  
18 individual, your tenant, through his lawyer,  
19 was withdrawing his motion before the Board of  
20 Zoning Adjustment. is that not right?

21 MR. GORGONE: No.

22 MR. GREEN: All right. All right.

1 But that is your name on the bottom?

2 MR. GORGONE: Yes.

3 MR. GREEN: Okay. Just one more  
4 question, sir. This Mr. Zhang referred to in  
5 the letter, is it not a fact that he was a  
6 tenant in your building?

7 MR. GORGONE: Yes, sir.

8 MR. GREEN: And your building is  
9 located at 1417 17th Street, N.W.?

10 MR. GORGONE: Yes, sir.

11 MR. GREEN: Thank you.

12 I don't have any other questions.

13 Thank you, ma'am.

14 CHAIRPERSON MILLER: Thank you.

15 Does the ANC have any questions?

16 MR. BJORGE: Yes. Thank you,  
17 Madam Chair.

18 Referring to the Zoning exhibit  
19 just entered, I actually was present at that  
20 hearing. To Mr. Gorgone, are you sure that  
21 Mr. Gell did not represent you in this matter?

22 MR. GORGONE: No. I was with him,

1 yes, but he didn't represent me. He wasn't  
2 paid from me. The tenant did.

3 MR. BJORGE: Did Mr. Gell speak  
4 with you at that hearing about representing  
5 you so that you would be able to obtain status  
6 at that hearing?

7 MR. GORGONE: No, he represented  
8 the tenant.

9 MR. BJORGE: And were you co-party  
10 to the case with the tenant?

11 MR. GORGONE: I'm the owner of the  
12 business.

13 MR. BJORGE: So you were co-party  
14 to the case with the tenant sharing the same  
15 lawyer?

16 MR. GORGONE: yes.

17 MR. BJORGE: Thank you.

18 CHAIRPERSON MILLER: I don't think  
19 this is very clear. I'm sorry. I'm not sure  
20 that he understood because I think I heard  
21 contradictory answers. It sounded like on the  
22 one hand he wasn't involved in the case and



1 then, on the other hand, he said he was  
2 represented as a co-party in the case.

3 MR. BJORGE: This is cross  
4 reference time. I can't really give testimony  
5 at this time.

6 CHAIRPERSON MILLER: Okay. Fine.  
7 I do want to clarify --

8 MR. OSNOS: Madam Chair, first of  
9 all, I can communicate quite easily with Mr.  
10 Gorgone and I can explain in plain English his  
11 answers. My concern is that we are  
12 investigating an area which has no relevance  
13 to the proceedings here today.

14 CHAIRPERSON MILLER: That's fine.  
15 Okay. Let's not spend too much time with it.  
16 We have in the public record whether or not he  
17 was a party. It's in our record. This was  
18 before the BZA. We could look it up. I just  
19 was concerned because I wasn't sure he  
20 understood the question.

21 MR. GORGONE: Sorry. My English  
22 is not that good. I'm sorry for that.

1 CHAIRPERSON MILLER: Okay. If he  
2 doesn't want to clarify now, let's just leave  
3 it and the record can be supplemented by just  
4 checking the public record. Okay. Any other  
5 questions?

6 MR. BJORGE: Mr. Gorgone, as you  
7 know, I own the property next to you and they  
8 are nearly identical in construction. Can you  
9 tell to the Board what the aggregate square  
10 footage of the basement unit is, please?

11 MR. GORGONE: I think 720 square  
12 feet.

13 MR. BJORGE: According to your  
14 estimate, or your direct knowledge, it's 720  
15 square feet. Are you pretty confident? I  
16 mean, have you ever measured it?

17 MR. GORGONE: I know when I pay  
18 the tax that's what the square foot is.

19 MR. BJORGE: So your estimate of  
20 the basement square footage is based on the  
21 tax records?

22 MR. GORGONE: Yes.

1                   MR. BJORGE:     Okay.     Would it  
2     surprise you if I were to say that your  
3     basement interior wall to wall is 13.5 feet  
4     wide and 42 feet long?   Would that surprise  
5     you?   It could lower your tax bill.

6                   MR. GORGONE:   Did you measure?

7                   MR. BJORGE:     I've measured mine  
8     and they are almost identical.

9                   MR. GORGONE:   I never measured.

10                  MR. BJORGE:     Okay.     All right.  
11     You have no position on whether that would be  
12     surprising.   Mr. Gorgone, how far back from  
13     the front door would you say the counter of  
14     the previous Chef's Express was?   How many  
15     paces?   When you walk in the door pass the two  
16     stools for seating how many paces back would  
17     that have been?

18                  MR. GORGONE:     Excuse me, Ms.  
19     Chair.   I don't understand.   I want to know if  
20     he's a lawyer or who is he?

21                  CHAIRPERSON MILLER:   He  
22     represents --

1                   MR.    GORGONE:           Why    is    he  
2   interrogating me?

3                   CHAIRPERSON MILLER:   He is a party  
4   and he has the right to participate as a  
5   party.  I'm a little bit concerned with this  
6   line of questioning and I understand that Mr.  
7   Green went the same way but cross examination  
8   is usually about what they testify on in their  
9   case and he didn't testify as to knowledge  
10  about any of these issues.

11                  MR.  BJORGE:    He testified as to  
12  the aggregate square footage available for  
13  public service and queuing.

14                  CHAIRPERSON MILLER:   He did in  
15  response to Mr. Green's question.

16                  MR.  BJORGE:    Oh, so I can't follow  
17  up on that?

18                  CHAIRPERSON MILLER:   I mean, I'll  
19  let Mr. Green ask that question, too.  I feel  
20  like we are getting way off track here.  Maybe  
21  you have a point but he is having trouble  
22  answering these questions, I think, in part

1 because they are not the basis of his  
2 testimony so he has to reach for knowledge.

3 It is already 4:30. If there is a  
4 compelling reason to ask a question, you can  
5 do it but that's my concern. You may have an  
6 argument to make with respect to all of that  
7 in your case in chief.

8 MR. BJORGE: Thank you. I'll take  
9 your advice.

10 CHAIRPERSON MILLER: All right.  
11 Okay. Thank you. I think we are really ready  
12 to hear DCRA's case unless my Board members  
13 have other questions.

14 MR. GREEN: We're going to --  
15 Madam Chairman, we would prefer if you would  
16 allow us to have the ANC go first before us.  
17 We think there is certain factual information  
18 that can clarify some of the confusion before  
19 the Board much easier with the ANC's first  
20 presentation because then DCRA will react to  
21 the case in chief of the appellant.

22 We think it would make the matter

1 much easier and flow much faster. I know that  
2 Madam Chairman and the Board want to hear the  
3 facts first so that this matter won't drag on.  
4 We think that will happen in this particular  
5 process and we want to facilitate that.

6 CHAIRPERSON MILLER: Does the ANC  
7 have a problem with that?

8 MR. BJORGE: No, Madam Chair.

9 CHAIRPERSON MILLER: Okay. I just  
10 want to say that it seems that what Mr. Green  
11 is saying is you are in a position to flush  
12 out the factual issues better than they can at  
13 this point and then they'll respond, but I  
14 would just ask you when you are addressing the  
15 factual issues and you tie it to the legal  
16 issue which is why the denial that's on appeal  
17 was an error.

18 MR. ETHERLY: Madam Chair, if I  
19 may, I would most certainly agree with that  
20 desire. This is not to disparage the ANC's  
21 case in any way but I was hopeful that would  
22 come more so from DCRA's presentation. I am

1 perhaps inclined to hear DCRA's argument first  
2 before the ANC because I'm worried the ANC  
3 might take us too far afield.

4 Again, not speaking disparagingly  
5 over your presentation but I'm kind of looking  
6 for the pay off from Mr. Green and DCRA.  
7 That's the part of the show that I've been  
8 holding my breath for.

9 CHAIRPERSON MILLER: The same. I  
10 mean, I think we don't have the basic answer  
11 to this question which I'm sure the ANC  
12 doesn't have which is why did the DCRA deny  
13 the application for the Certificate of  
14 Occupancy on the basis that the previous  
15 nonconforming use was discontinued. That is  
16 so basic.

17 MR. GREEN: I hear what the  
18 Chairman and the Vice-Chair are asking and we  
19 will comply. I call as my first witness then  
20 Mr. Crews who has been previously sworn.

21 Mr. Crews, can you tell us for the  
22 record exactly by whom are you employed?

1                   MR. CREWS:        I'm the Zoning  
2 Administrator for the District of Columbia  
3 under the Department of Consumer and  
4 Regulatory Affairs.

5                   MR. GREEN:    Sir, did there come a  
6 time when you made a decision to take a  
7 certain action with respect to 1417 17th  
8 Street, N.W., Washington, D.C.?

9                   MR. CREWS:    Actually, at least a  
10 couple times.

11                  MR. GREEN:    And can you tell us  
12 the first time?

13                  MR. CREWS:    The first time was  
14 shortly after I started where I continued the  
15 prosecution of complaints against a Chinese  
16 carry out at 1417 17th Street, N.W., a  
17 prosecution that had been going on since 1999  
18 for the Chinese carry out operating under a  
19 Certificate of Occupancy for a delicatessen,  
20 had been since 1999 by the Department of  
21 Consumer and Regulatory Affairs.

22                               My predecessors as the Zoning



1 Administrators been told by operating the  
2 Chinese carry out with a delicatessen  
3 Certificate of Occupancy that they were  
4 operating outside the scope of that  
5 delicatessen Certificate of Occupancy.

6 In other words, that the  
7 delicatessen had a specific meaning and, as  
8 defined by operation of the zoning regs, from  
9 the definition in Webster's Dictionary, and  
10 that my predecessors had already made a  
11 determination that there was a distinction and  
12 use between a delicatessen and a Chinese carry  
13 out, and that the Chinese carry out could not  
14 fall under the scope of a delicatessen  
15 Certificate of Occupancy.

16 MR. GREEN: So you made --

17 MR. CREWS: Wait. I guess my  
18 first action was to revoke the Certificate of  
19 Occupancy of Chef's Express, the tenant  
20 operating the Chinese carry out. That was my  
21 first action on this that was not appealed by  
22 either the applicant or the property owner to

1 this Board.

2 And the determination then became  
3 that based on the fact that the Department had  
4 been telling -- I could do a little chronology  
5 of the Department's action if you would like,  
6 Mr. Green.

7 MR. GREEN: Yes. Please do so.

8 MR. CREWS: I have copies here of  
9 a violation notice dated October 28, 1999.  
10 Location of the violation 1417 -- excuse me  
11 while I hide the originals so we don't get  
12 them mixed up. Location of the violation 1417  
13 17th Street, N.W., business name Chef's  
14 Express.

15 At the above location a zoning  
16 inspection was performed and the inspection  
17 revealed the following violations. The  
18 section code was 11 DCMR Section 3203.1 which  
19 requires a Certificate of Occupancy. The  
20 corrective action listed was to obtain a  
21 Certificate of Occupancy for a restaurant.  
22 Then on --

1 CHAIRPERSON MILLER: What is this  
2 that you just passed out? Oh, a violation  
3 notice? Because what, they didn't have a  
4 Certificate of Occupancy?

5 MR. CREWS: What we are trying to  
6 establish is that in -- and as our factual  
7 witness will collaborate was that in 1958 when  
8 the zoning regs became effective there was a  
9 delicatessen there. There was a sandwich shop  
10 there. Again, remember this is a residential  
11 district so none of these operations, whether  
12 it be a delicatessen or a carry out, are  
13 matter of right.

14 The delicatessen became a  
15 grandfathered nonconforming use. Under  
16 Section 2000.5 if that nonconforming use is  
17 discontinued for more than three years, then  
18 it goes away as nonconforming uses and  
19 structures are hoped to do under the zoning  
20 regs.

21 Our factual witness will indicate  
22 that there had been a series of sandwich shops

1 and later on we will explain how I follow my  
2 predecessor's determination in terms of the  
3 difference between delicatessens and carry  
4 outs contrary to the testimony of Mr. Osnos  
5 that it's all me. This occurred in 1999.

6 Again, I have a second violation  
7 notice dated March 7, 2003, zoning inspection,  
8 same address, 1417 17th Street, N.W., Chef's  
9 Express, business name. While it is hard to  
10 read, I apologize, you can make it out.  
11 Again, the same section is cited 3203.1  
12 meaning the requirement for a Certificate of  
13 Occupancy. The corrective action again in  
14 2003 was must obtain a Certificate of  
15 Occupancy for a carry out.

16 Note your current C of O for a  
17 deli does not allow or does not permit  
18 cooking. That is the definition that we have  
19 used, my predecessors in this case, and me  
20 more generally as testified by Mr. Osnos that  
21 based on the circumstances and situations that  
22 this Board has even participated in in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 determination of the differences between  
2 restaurants and fast food restaurants,  
3 specifically the Blimpie case on H Street  
4 decided around the time that I became Zoning  
5 Administrator.

6 The definition of delicatessen in  
7 the dictionary that I believe somebody has  
8 provided in the record of prepared foods,  
9 processed meats, relishes, condiments, and  
10 sandwiches is why we have determined that  
11 using that definition is appropriate because  
12 the scheme of the zoning regs is that allowing  
13 less intensive uses in the District and then  
14 building up, just the whole scheme of any use  
15 is that you go from residential to  
16 neighborhood commercial to large scale  
17 commercial to industrial.

18 In a C-1 zone a restaurant is  
19 allowed and a restaurant is defined as  
20 primarily for on-premise consumption. All  
21 carry out functions shall be clearly  
22 subordinate to on-premise consumption.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1           The idea in a small neighborhood  
2       commercial district like a C-1 is that type of  
3       establishment creates less impacts on the  
4       neighborhood than a fast food restaurant which  
5       is first allowed as a special exception in a  
6       C-2-A.

7           Then the definition for the fast  
8       food restaurant that includes these exceptions  
9       including a delicatessen or an ice cream  
10      parlor or a retail food store is the idea that  
11      these types of establishments are exempted  
12      from the fast food regulations because they  
13      create less impacts in these small  
14      neighborhood commercial areas than a fast food  
15      restaurant with attended odors, smells, trash  
16      and traffic.

17          It is very clear to me that why  
18      there is a distinction in the zoning  
19      regulations between a fast food restaurant and  
20      a delicatessen. That is why we have used the  
21      definition in the dictionary that limits it to  
22      items that have already preprepared that you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 are slicing meat, you have prepared salads  
2 that doesn't involve a lot of cooking. That  
3 is the definition that we've used, again, in  
4 this particular case since 1999.

5 And why as our factual witness  
6 will talk about the switch from sandwich  
7 making to Chinese carry out and why then once  
8 that switch occurred why we needed to take  
9 action. Again, it's that distinction that  
10 needs to be understood.

11 So, therefore, we are back to  
12 these violation notices where we have told the  
13 operators of Chef's Express --

14 MR. ETHERLY: If I could interrupt  
15 for a moment because I think that was very  
16 helpful and perhaps you are really kind of  
17 beginning to move to the bulls eye here. Is  
18 the difference between delicatessen and  
19 restaurant the dividing line that the minute  
20 you introduce some type of preparatory  
21 equipment, stove or oven or similar type of  
22 acrutraments you are out of delicatessen? Is

1       that the way you're looking at it?

2                   MR. CREWS: I'm looking at it more  
3       in terms of the overall impact of the impacts  
4       of the facility on the neighborhood, the  
5       external impacts. It comes down to the amount  
6       of food being cooked and the external impacts.  
7       The preparation of salads doesn't have a lot  
8       of external impacts in terms of odors and  
9       that. It talks about that in the definition  
10      of delicatessen.

11                   The same thing with sandwiches.  
12      Now, I have in the interest of full disclosure  
13      when I look at the sandwich shops in the city  
14      and determined they are delicatessens because  
15      the definition specifically calls out the  
16      making of sandwiches. They can toast their  
17      bread, Quiznos, Potbellies. Now even Subway  
18      I think has some toasted or some warm things  
19      but they are not doing a lot of cooking that  
20      has the external effects.

21                   I think if you have been following  
22      the Zoning Commissions activities that you can



1 see where based on this definition and then  
2 based also on the legitimate -- hopefully not  
3 against our case here because different rules  
4 need to be understood differently but when Mr.  
5 Osnos says that the business licenses and the  
6 health department licenses talk about carry  
7 outs as delicatessen, he's right.

8 But we are talking here about the  
9 zoning regs and the zoning regs in my opinion,  
10 and hopefully in the opinion of the Board, are  
11 the foundation for all of those other licenses  
12 that you must first meet the zoning regulation  
13 definitions and, again, based on our system of  
14 governance in the District, our nation's  
15 capital, with the zoning regs determined  
16 solely by the Zoning Commission and not  
17 subject to all of the other processes that  
18 other regulations occur in terms of adoption  
19 by the council and then potential veto by the  
20 Congress that it is -- it should be all of our  
21 positions that the zoning regs are the  
22 foundation and that you must first meet the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 zoning regs.

2 The zoning regs are by themselves  
3 determinant. In this particular case we did  
4 not look at other definitions used by other  
5 rules or other regulations because the zoning  
6 regulations of themselves say that if it is  
7 not defined in the zoning regulations that we  
8 go to the dictionary.

9 I believe the dictionary is very  
10 clear and dovetails, as I mentioned, the  
11 impacts that the zoning was attempting to  
12 control, the use impacts so that it is  
13 appropriate to use the dictionary definition  
14 of not a lot of cooking, not a lot of external  
15 impacts for the zoning definition of  
16 delicatessen. That is contrary to the other  
17 municipal regulations. Again, I think that we  
18 have to go with ours based on what we have.

19 MR. ETHERLY: So it would be your  
20 sense then that you were in receipt of  
21 credible factual information a significant  
22 portion of which we will discuss today, but

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1     you were in receipt of credible information  
2     that demonstrated there was a substantial --  
3     there was a greater amount of activity  
4     underway on sight than what a delicatessen  
5     would evidence.

6             At this point all I have seen, and  
7     I know I'm kind of jumping into the flow here,  
8     but I want to be sure I kind of put a pin in  
9     this. In the submittal of the appellant at  
10    Exhibit No. 17 about midway through we are in  
11    receipt of what was the Office of Planning  
12    Report pursuant to BZA Case No. 17075.

13            It is about midway through the  
14    submittal and, again, I'm looking at Exhibit  
15    No. 17 which was the memorandum of the  
16    appellant. In that Office of Planning Report  
17    at page 3 it references what is referred to as  
18    Attachment 2 in their submittal so in  
19    Attachment 2 of the appellant's submittal,  
20    which is the Office of Planning Report dated  
21    February 24, 2004, in BZA Case No. 17075.

22            Page 3 of that report refers to

1 the Webster's 9th Collegiate Dictionary  
2 definition of a delicatessen as follows, and  
3 I am reading directly from the report, "Ready-  
4 to-eat food products -- and then in  
5 parentheses -- (as cooked meats and prepared  
6 salads."

7 Now, it's a fairly short slice of  
8 the definition, no pun intended, but that is  
9 what the Office of Planning referred to in its  
10 report back in 2004. Is that definition  
11 familiar to you or is it one that appears to  
12 track closely what DCRA has been relying on in  
13 interpreting delicatessen?

14 MR. CREWS: Right. If I could  
15 only just point out the difference that the  
16 Office of Planning was using Webster's 9th  
17 Collegiate Dictionary that undoubtedly has  
18 what they've written. The sentence before  
19 that reference to the 9th Collegiate  
20 Dictionary talked about the meaning given to  
21 Webster's Unabridged Dictionary. The  
22 unabridged dictionary has a bit more

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 extensive. It includes at the end a  
2 parenthetical phrase "as in making sandwiches."  
3 That is why I pulled that out in terms of  
4 distinguishing the sandwich vendors from other  
5 food establishments that are most likely fast  
6 food restaurants.

7 MR. ETHERLY: So as you look at --  
8 I'll use another term of art that I invoked  
9 last weekend in a case. The lawyers are  
10 familiar with it. It's totality of the  
11 circumstances. Essentially the comparison or  
12 the baseline for you is what is involved in  
13 preparing a sandwich. The further you veer  
14 from the preparation of a sandwich motif, the  
15 further away you are getting from delicatessen  
16 and getting into other operations that the  
17 zoning regs attempt to get at in different  
18 more extensive ways.

19 MR. CREWS: Right. In terms of  
20 minimizing those external impacts in these  
21 small neighborhood commercial areas.

22 MR. ETHERLY: I see. Okay.

1                   MR. CREWS:       Cooking odors,  
2 additional trash, and traffic.

3                   MR. ETHERLY:    Okay.    Excellent.  
4 Thank you. I appreciate you allowing me that  
5 interruption as I can of walked through that.  
6 Thank you, Madam Chair. That concludes my  
7 questioning on that portion.

8                   CHAIRPERSON MILLER: Okay. I want  
9 to get real basic. I would think you should  
10 be able to articulate that a Chinese carry  
11 out, or this particular Chinese carry out, is  
12 not a delicatessen because what? I would  
13 certainly think you would start with our  
14 regulations which are in 199. Is that  
15 correct? With our zoning regulations. Can  
16 you lead us through that systematically?

17                   MR. CREWS:    As I just did with  
18 Board member Etherly, why it's not a  
19 delicatessen because it involves much more  
20 cooking than making sandwiches or prepared  
21 salads and selling processed cooked meats.

22                   CHAIRPERSON MILLER: All right.

1 Now, you are saying it is not a delicatessen  
2 because it involves more cooking than sandwich  
3 making or salad assembly or something like  
4 that.

5 MR. CREWS: Right.

6 CHAIRPERSON MILLER: Okay.

7 MR. CREWS: I think when you say  
8 ready-to-eat food products as cooked meat,  
9 they are talking about, again --

10 CHAIRPERSON MILLER: Wait. Where  
11 are you going now?

12 MR. CREWS: This, again, is the  
13 definition of delicatessen in the dictionary.

14 CHAIRPERSON MILLER: Okay.  
15 Because of the definition in the dictionary.

16 MR. CREWS: Right, of the  
17 definition in the dictionary of delicatessen.  
18 Cooked meats, again, ready-to-eat food  
19 products means that they have already been  
20 cooked. For example, at the deli counter at  
21 Giant you have a lot of cooked meat there but  
22 it has already been cooked and it is just

1 being sliced and sold or put on sandwiches.

2 CHAIRPERSON MILLER: Okay. So  
3 I --

4 MR. CREWS: I think that it could  
5 be that a sandwich shop in this location could  
6 possibly an operator of that sandwich shop  
7 under a delicatessen could have cooked the  
8 turkey at home and brought it into the  
9 sandwich shop. I believe we might have  
10 testimony of that actually occurring to prior  
11 operators of this space. It really goes back  
12 to what you are looking at in terms of the  
13 external impacts of why we are making this  
14 distinction.

15 CHAIRPERSON MILLER: Where do you  
16 find direction to look at the external  
17 impacts?

18 MR. CREWS: I think that is just  
19 embedded in the nature of why we do zoning is  
20 that we lump like uses together so that you  
21 have a knowledge that is why we put -- that is  
22 why we segregate out commercial areas from



1 residential areas because there is -- I would  
2 hope the Board could like notice of the fact  
3 that commercial areas have more external  
4 impacts than a residential area on their  
5 neighbors. There's more traffic, there's more  
6 in and out.

7 That is what we are working to do  
8 here is to make those distinctions that you  
9 can have, for example, dry cleaners in the  
10 smaller commercial areas. You can have a  
11 smaller dry cleaner, an actual plant  
12 operating.

13 As you get into the more dense  
14 commercial areas you can have a larger dry  
15 cleaner. Again, one of the things of dry  
16 cleaning is extra-low impact just as you have  
17 in terms of trash and rodents and traffic and  
18 odors as you increase the amount of cooking.

19 CHAIRPERSON MILLER: Okay, okay,  
20 okay.

21 MR. CREWS: Then if you would look  
22 at the definition in 199 of fast food

1 restaurant that, again, Mr. Osnos detailed but  
2 seemed to lose his ability to really  
3 articulate an answer. When you go through the  
4 definition in Chapter 100 -- let me see if I  
5 can turn to it real quick, "A place of  
6 business devoted to -- well, first of all,  
7 it's not a restaurant. Let's make that clear.  
8 It's not a restaurant because that is a place  
9 of business.

10 This, again, is in Chapter 1,  
11 Section 199.1, "Restaurant is a place of  
12 business where food, drinks, or refreshments  
13 are prepared and sold to customers primarily  
14 for consumption on the premises." I don't  
15 think we have any indication that is the case  
16 here.

17 The last sentence says, "In a  
18 restaurant any facilities for carry out shall  
19 be clearly subordinate to the principle use of  
20 providing prepared foods for consumption on  
21 the premises." We can rule out restaurant.

22 Then we go to fast food

1 restaurant. "A place of business devoted to  
2 the preparation and retail sale of ready to  
3 consume food or beverages for consumption on  
4 or off the premises." Again, here it is that  
5 they are preparing and selling to customers  
6 cooked Chinese food.

7 CHAIRPERSON MILLER: Do you think  
8 a deli is a fast food restaurant?

9 MR. CREWS: No, because as we get  
10 to it it's in the parenthetical phrase of  
11 Subsection B --

12 CHAIRPERSON MILLER: It is.

13 MR. CREWS: -- the definition does  
14 not include --

15 CHAIRPERSON MILLER: This  
16 definition B, though, I mean, I'm not sure  
17 that means that a deli is not a fast food  
18 restaurant. I think we look at these  
19 regulations and they are difficult to decipher  
20 but it's mentioned under fast food but then it  
21 seems to say that B may not apply to a deli or  
22 retail grocery store. I'm just throwing that

1 out.

2 MR. HOOD: Madam Chair, I don't  
3 understand your point. I'm trying to get your  
4 point.

5 CHAIRPERSON MILLER: Okay. I'll  
6 make another point that I think might help.  
7 I will ask Mr. Crews if he knows what this is.  
8 The way these regulations are written like you  
9 don't know whether that parenthetical applies  
10 to the whole definition of fast food or  
11 whether it applies to B because in order to  
12 meet the requirements for fast food, you have  
13 to meet the requirements in that paragraph and  
14 then one of the following two of A and B.  
15 Then under B they say this doesn't include a  
16 deli. I think the way it's written I don't  
17 know. I could still fall under fast food.

18 MR. CREWS: Exactly, because let  
19 me give you my interpretation of why I think  
20 it applies to the whole definition, because  
21 the parenthetic phrase starts out, "This  
22 definition." It doesn't distinguish between

1 just Subsection B but it talks about this  
2 definition which I say the plain meaning of  
3 that would be the definition restaurant fast  
4 food.

5 You can obviously disagree with me  
6 but, then again, that's my interpretation of  
7 why that parenthetical phrase applies to the  
8 whole definition of fast food and why it  
9 exempts those particular uses whatever they  
10 might be defined as. But that is my  
11 interpretation that when it says "this  
12 definition" it refers to the definition which  
13 is restaurant fast food.

14 CHAIRPERSON MILLER: Which is why  
15 the Zoning Commission is rewriting these  
16 regulations.

17 MR. CREWS: Bingo.

18 MR. HOOD: I think the Zoning  
19 Administrator is definitely on point. It does  
20 encompass the whole definition. I think the  
21 Zoning Commission I know, and I haven't always  
22 been there, if there was a difference, I think

1     you would have saw it. It would have been  
2     highlighted and it would have been bold. I'm  
3     not defending the Zoning Commission but  
4     because that's not my role but I think that  
5     the Zoning Commission is exactly right.

6                 CHAIRPERSON MILLER: But we know  
7     that the Zoning Commission is looking at these  
8     because they will be a lot better which is the  
9     point here why we even have these appeals  
10    because of some of the regs. You didn't write  
11    it in 1958. You didn't write these.

12                MR. HOOD: Some of them I may  
13    have.

14                CHAIRPERSON MILLER: Or maybe.  
15    Then they refer to 32 DCR 4374-4375. Do you  
16    know what that is?

17                MR. CREWS: No, I'm afraid I do  
18    not. I'm just assuming that all of those were  
19    previous iterations of these but I have not  
20    had an opportunity to figure out what that is.  
21    Wait, wait, wait, Oh, excuse me. The DCR is  
22    the Register. Excuse me. That was where --

1       excuse me.

2                   Actually the fast food restaurant  
3       was an amendment to the zoning regulations, I  
4       think, in 1989 but don't hold me to that,  
5       please. What this references to Volume 32 of  
6       the District of Columbia Register, pages 4374-  
7       4375 where the amendment was published in the  
8       register and, therefore, became effective.

9                   CHAIRPERSON MILLER:     Thank you.  
10       Okay. I want to pick up on the appellant's  
11       point about definitions in other parts of DCRA  
12       that talk about delicatessens and why we  
13       shouldn't look at those definitions.

14                  MR. CREWS:       Let me repeat, I  
15       guess, the fact that it seems to me that there  
16       is enough information within the parameters of  
17       the Zoning Regulations themselves to determine  
18       that.

19                  And that similar to, I think,  
20       where the Office of Planning Report was going  
21       in 2003 or 2004 or whenever they made their  
22       application and withdrew in February '04, was

1       that if we went to those other definitions  
2       which clearly, quite frankly, a little bit to  
3       the chagrin of a bureaucrat, that we do have  
4       these inconsistent appearances of definitions  
5       and use of terms.

6               That was factored in while the  
7       Office of Planning and myself and my deputy  
8       were involved along with others in drafting  
9       the potential text amendments that are before  
10      the Commission and why we couldn't just use  
11      those other definitions for delicatessen that  
12      they use as delicatessen, basically a Chinese  
13      carry out, is because of the impacts that that  
14      broader use would have on neighborhood  
15      commercial areas.

16             That is why we didn't look at the  
17      other regulations because I felt there was  
18      enough here to give us a determination and as  
19      my predecessors have done and we have exhibits  
20      in terms of other previous predecessors to me  
21      making it a distinction between the term  
22      delicatessen and carry out.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1           That goes to the heart of our  
2 matter here is that in 1958 this was operating  
3 as a sandwich shop. Sometimes thereafter it  
4 changed from sandwich shop to Chinese carry  
5 out but still operating under a delicatessen.  
6 These certificates of occupancy as owners of  
7 the business change, they would come in for a  
8 change of ownership and say there was no  
9 change in use.

10           As we have mentioned before to  
11 this Board, at the time we didn't routinely  
12 inspect change of ownership certificates of  
13 occupancy. As a matter of fact, the Title 12,  
14 the construction code, tends to make it fairly  
15 clear that it needs to switch without a change  
16 if it's a legitimate use.

17           That is why we are now because of  
18 these cases, and because of the confusion that  
19 we found that delicatessens have changed  
20 ownerships and when they really are carry outs  
21 or, in my definition, a carry out is a fast  
22 food restaurant.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 I'm not sure if I've explain this  
2 to the Board or not but that the base of the  
3 Blimpie's case the test for fast food  
4 restaurant in terms of the queuing, this Board  
5 indicated that the customer queuing for self-  
6 service for carry out and on-premise  
7 consumption is greater than 10 percent, that  
8 this Board in the Blimpie case said that was  
9 both self-service for carry out, standing in  
10 line, queuing for self-service for carry out,  
11 and the space for on-premise consumption,  
12 i.e., the tables and chairs.

13 I guess it was in Cluck-U where I  
14 made this presentation to the Board in terms  
15 of how the Blimpie decision indicated you lump  
16 those both together and, therefore, that  
17 particular test fits every restaurant  
18 practically. If you include -- again, another  
19 reason why I think the Zoning Commission is  
20 looking for a text amendment.

21 CHAIRPERSON MILLER: Did you go  
22 through that exercise with respect to this

1 restaurant?

2 MR. CREWS: We didn't need to do  
3 this because I think our factual people that  
4 have been there will tell you that there was  
5 no other use for -- I mean, that is the only  
6 space, 100 percent of the space allocated in  
7 terms of -- what am I looking for? In terms  
8 of the space available to the public that's  
9 all there was in this --

10 CHAIRPERSON MILLER: So your  
11 factual people are going to --

12 MR. CREWS: We'll say that is all  
13 there was was just a place to stand in line  
14 and order and then wait for your food. It  
15 meets that as a fast food restaurant. Then it  
16 has to be either one of the two following  
17 characteristics: (a) At least 60 percent of  
18 the food items are already prepared or  
19 packaged before the customer places an order.  
20 Again, this is also very difficult.

21 This is also very difficult to  
22 interpret and enforce in terms of what is

1 already prepared. I think, again, even in  
2 some of the finest restaurants in town that a  
3 lot of the food is already somewhat prepared  
4 in one way or another and ready to just be put  
5 together or finally finished and then served.

6 To me, again, almost everything  
7 falls under that. The Section B is really a  
8 distinction. Even again with this definition  
9 whether it just applies to this is that it is  
10 disposable tableware or disposable containers.

11 Even if you said that that  
12 parenthetical phrase only applied to Subsection  
13 B, there is still a reason there to have that  
14 distinction in terms that obviously a  
15 delicatessen, an ice cream parlor, convenience  
16 stores, retail groceries are going to be using  
17 disposable containers, and yet they don't have  
18 the impact that a full-fledged fast food  
19 restaurant has on the neighborhood so they are  
20 exempted.

21 As I have mentioned before, to me  
22 as you follow through all these things based

1 on both the difficulty in determining prepared  
2 food, the ruling in Blimpies where everything  
3 is greater than 10 percent, that you basically  
4 come down to paper or plastic, as I like to  
5 say.

6 Basically if you using disposable  
7 tableware and containers, then it's a fast  
8 food restaurant unless it's exempted by the  
9 delicatessen, ice cream, retail, convenience  
10 store, and that sort of thing.

11 CHAIRPERSON MILLER: Okay.

12 MR. CREWS: Sorry. It seems like  
13 I'm going around.

14 CHAIRPERSON MILLER: But in Cluck-  
15 U we had a lot of evidence that the DCRA went  
16 out there and inspected and they saw this and  
17 they saw that. So far, I don't know, it seems  
18 like all we have is this denial.

19 MR. ETHERLY: I think you hit it  
20 right on the head. This discussion has been  
21 very, very helpful. Initially the struggle  
22 was how -- I think part of what the

1     appellant's argument is here is that there is  
2     no clarity or protection for a business owner  
3     who is looking to establish this use then  
4     because there is no definition. Perhaps there  
5     is no insight into what is in the ZA's head  
6     around how you make that determination.

7             Our conversation has been very  
8     helpful in illuminating exactly what you went  
9     through. One, there is no definition so, as  
10    the zoning regs say, you go to Webster's.  
11    You, in fact, did that and you are informing  
12    how you go about doing that, rest assured for  
13    the appellant and for counsel.

14            Of course, you are going to cross  
15    examine and we'll dig deeper into this so I'm  
16    taking it as a fait accompli but I'm just kind  
17    of walking through what I've heard thus far  
18    from the ZA.

19            Additionally, and it would have  
20    been helpful to have had this ahead of time.  
21    I'm sure the appellant's counsel is going to  
22    dig right into it. I'm beginning to get the

1 full picture because you are saying, "By the  
2 way, in 1999 we gave you a heads up. In 2003  
3 we gave you a heads up. Then finally, in '05  
4 we gave you notice of intent to deny the  
5 license renewal."

6 I'm beginning to see a little bit  
7 of the factual basis for DCRA's analysis here.  
8 I think the Chair's comment is right on  
9 target. We really didn't have a feel for that  
10 just based on the submittals. Now it is  
11 beginning to come together again. Counsel for  
12 the appellant is going to jump into this and  
13 probably really try to chew through it.

14 Of course, we will still have some  
15 feedback and comment from the ANC and their  
16 witnesses. I just want to share the Chair's  
17 concern here that the factual basis is  
18 beginning to emerge but we didn't have a sense  
19 of it as I think we were simply looking at the  
20 file.

21 That's perhaps more of a comment.  
22 I'm not going to invite a reply from Mr. Crews

1 on that or DCRA but just kind of a comment.  
2 This has been helpful but it took some work to  
3 get here. That's okay. That's what the point  
4 of the proceeding is. Thank you, Madam Chair.

5 CHAIRPERSON MILLER: But I don't  
6 think we are really there yet unless there's  
7 evidence coming in. We talked about the type  
8 of evidence that you would look at but for  
9 this particular restaurant, I mean, you didn't  
10 put on a factual witness yet.

11 MR. CREWS: Right. That was in  
12 order to accommodate you all for us to go  
13 first.

14 CHAIRPERSON MILLER: Right.  
15 That's fine.

16 MR. CREWS: Okay. All right. We  
17 still have some additional exhibits to enter.

18 CHAIRPERSON MILLER: Okay.

19 MR. CREWS: In terms of the next  
20 one --

21 CHAIRPERSON MILLER: Can we just  
22 finish with this first?



1 MR. CREWS: Oh, I'm sorry.

2 CHAIRPERSON MILLER: I think I  
3 have two more questions. One is, first of  
4 all, maybe later can you supplement the record  
5 with a better copy of this notice of violation  
6 because I can't really read it.

7 MR. CREWS: Okay.

8 CHAIRPERSON MILLER: My question  
9 is I think you gave this property a notice of  
10 violation with respect to the business that  
11 was there in 1999. What happened in 1999  
12 through 2005? They are still operating the  
13 same kind of business for -- you weren't  
14 there. How do we know they didn't correct the  
15 situation? What was going on?

16 MR. CREWS: Again, that will be  
17 our factual witness.

18 CHAIRPERSON MILLER: That will be  
19 your factual witness. Okay. That I would be  
20 interested in hearing. Then my last comment  
21 is in BZA Case No. 17075 in the Office of  
22 Planning Report, which was attached to the

1       appellant's filing No. 17, OP says that the  
2       existing    700    square    foot    space    has  
3       accommodated various kinds of retail food  
4       operations prior to 1958. No changes to the  
5       use have been recorded since 1958. That was  
6       in 2004.

7                   MR. CREWS: I would respectfully  
8       disagree with that and I think our factual  
9       witness will indicate that there was a change  
10      from a sandwich shop to a Chinese carry out.

11                   CHAIRPERSON MILLER: And when?

12                   MR. CREWS: Previous to --

13                   CHAIRPERSON MILLER: The date of  
14      this report is February 24, 2004.

15                   MR. CREWS: Right, but I don't  
16      think it's specific enough in terms of -- it  
17      just says that the Office of Planning cannot  
18      establish the present use of the property as  
19      different from previous operations. That  
20      doesn't tell me that they consider the  
21      importance of the distinction between a  
22      delicatessen and a Chinese carry out.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON MILLER: They are both  
2 nonconforming uses. Right?

3 MR. CREWS: Right, but they are  
4 not -- my interpretation is that the  
5 delicatessen is allowed in -- if it's not a  
6 fast food restaurant it must be closer to a  
7 restaurant and, therefore, is allowed in a C-1  
8 zone where a fast food restaurant is not  
9 allowed as a matter of right until a C-2-B and  
10 there only if it meets certain separation  
11 requirements from a residential district.

12 Under the Chapter 20 and changing  
13 of one nonconforming use to another you can  
14 only change to a use that is also allowed in  
15 that first zone that the current use is  
16 allowed.

17 CHAIRPERSON MILLER: Thank you.

18 MR. LOUD: Madam Chair, I've got a  
19 question for Mr. Crews. Good afternoon.

20 MR. CREWS: Hello. Welcome.

21 MR. LOUD: Thank you for  
22 illuminating a very complex set of

1 interlocking factors here. Let me tell you  
2 what I hear and then you give me some feedback  
3 on it and then I'll share an observation. It  
4 sounds like what I'm hearing is that you could  
5 have a chain that operates in the city that  
6 could qualify to operate a deli/carry out in  
7 one section of town because the underlying  
8 zoning would permit it matter of right.

9 That same chain would then try to  
10 open up an identical satellite operation in  
11 another part of town and they could not do it  
12 as a deli because it would be a zoning hurdle  
13 to go through.

14 MR. CREWS: It would just be the  
15 opposite. They could not do it as a carry out  
16 but the deli might be allowed because the deli  
17 is allowed in the more restrictive districts  
18 than the carry out which is synonymous in my  
19 argument as a fast food restaurant.

20 MR. LOUD: I stand corrected but  
21 the same outcome.

22 MR. CREWS: Exactly. You could

1 have an auto repair garage in some districts  
2 but not in others.

3 MR. LOUD: I've heard about that  
4 case. Okay. Observation and question. In  
5 your experience as a regulator who enforces  
6 regulations, is it common for the city as a  
7 whole, the regulatory machinery as a whole, to  
8 offer such inconsistent definitions for  
9 something as basic as a delicatessen such that  
10 someone who is trying to operate that  
11 enterprise would not be clear on what a  
12 delicatessen is without resort to conferring  
13 a hierarchy almost of regulations that have  
14 nothing to do with food operations.

15 MR. CREWS: First of all, zoning  
16 is the foundation of all uses within the  
17 district no matter whether they are regulated  
18 or not. I think the zoning stands out as a  
19 primacy in terms of comparative to other  
20 regulations.

21 As I mentioned earlier about the  
22 foundation of other business licenses require

1 compliance with zoning, it's not that zoning  
2 requires compliance with the business license.  
3 It's that the business license requires  
4 compliance with zoning. There is definitely  
5 that hierarchy contemplated.

6 The gist of your question in terms  
7 of these inconsistencies is I think somewhat  
8 difficult to answer in a meaningful positive  
9 way in terms of the history of governance,  
10 District governance in this city, has really  
11 let much to be desired and I'm testimony of  
12 the fact of the desire to improve that  
13 governance to make the inconsistencies -- to  
14 lessen the inconsistencies, to be more  
15 consistent, to be more plain language, to be  
16 clearer.

17 I mean, as you -- I mean, this  
18 zoning reg is difficult. I guess I'm trying  
19 to be a little bit more professional and not  
20 resort to some sort of flippant remark here  
21 but this is a very difficult convoluted  
22 regulation to begin with but it's what we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 have. It is, again, my belief that it is the  
2 foundation for other regulatory bases in the  
3 city.

4 I think we've mentioned before the  
5 text amendment in front of the Zoning  
6 Commission and that is a direct effort based  
7 on not just myself and being in this position  
8 but Advisory Neighborhood Commissions  
9 throughout the city of the industry, the  
10 eating establishment industry being concerned  
11 about this and trying to work towards a better  
12 set of regulations that are clearer, more  
13 consistent with other regulations but we're  
14 not there yet.

15 MR. LOUD: Thank you. I guess the  
16 final question. Would you characterize your  
17 agency's response to this land use as one of  
18 discovering facts in 1999 roughly that  
19 required you to define what a delicatessen was  
20 or would you characterize it as your agency  
21 clarifying the policy in 1999 for what a  
22 delicatessen was?

1           In other words, what was the drive  
2           in 1999 for the redefinition of delicatessen  
3           or the use of Webster's Dictionary as the  
4           defining element for this regulation? Was it  
5           a set of facts that you discovered or was  
6           there a policy shift around that time?

7           MR. CREWS: I would definitely  
8           have to say it was a set of facts but, again,  
9           the record isn't clear of the nature of  
10          District government or the status maybe of  
11          District government.

12          What happened was that there was a  
13          use change from a sandwich shop to a Chinese  
14          carry out causing more impacts on the  
15          neighborhood and the Department operating  
16          enforcement wise primarily on a complaint  
17          basis investigating complaints of this change  
18          of use from sandwich making to Chinese carry  
19          out that caused the Department to take a look.

20          There is not much of the record  
21          here other than the fact that in 1999 there  
22          was a determination that this wasn't a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 delicatessen, that they needed a Certificate  
2 of Occupancy for a restaurant. The same thing  
3 happened in 2003. I have a memo that I would  
4 like to put into --

5 MR. GREEN: One moment, Madam  
6 Chair.

7 CHAIRPERSON MILLER: I just want  
8 to -- is there a definition that you are  
9 relying on in the record? I know you keep  
10 referring to Webster's. Is it cited somewhere  
11 for us to look at as to the words that define  
12 delicatessen that you are relying on? I think  
13 -- I'm sorry but I'm just thinking about this  
14 whole problem with these words.

15 How do you have to define every  
16 single word? We're saying why isn't there a  
17 definition for delicatessen in our  
18 regulations? Then I'm thinking I guess when  
19 they start filling in a category, people think  
20 they know what delicatessen is or you could  
21 look it up in the dictionary. When I'm  
22 thinking common knowledge what is a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 delicatessen, I don't necessarily think of  
2 prepared foods, carry out. I mean, there are  
3 plenty of restaurants that one can think of as  
4 a delicatessen.

5           Anyway, my point is you've got to  
6 go to something so you went to the dictionary  
7 which is what our regs do say. You can go to  
8 the dictionary. Is that in the record or can  
9 you put it in the record?

10           MR. CREWS: We definitely will put  
11 it in the record.

12           CHAIRPERSON MILLER: So we are  
13 just looking at what you looked at because  
14 there are different versions of the  
15 dictionary. Okay.

16           MR. GREEN: Madam Chairman, may I  
17 make further inquiry? Perhaps it will help  
18 clarify.

19           Mr. Crews, were any internal memos  
20 that discussed the concept of delicatessen  
21 vis-a-vis the carry outs?

22           MR. CREWS: Yes. There was a memo

1 on May 30, 2003, from Yvonne Rockett, Zoning  
2 Inspector, to Denzil Noble, the administrator  
3 at the time of the Building and Land  
4 Regulation Administration that indicates that  
5 the former Zoning Administrator Robert Kelly  
6 determined that there is a distinction between  
7 delicatessen and carry out.

8 Therefore, the use of the  
9 property, and this in regard, excuse me, to  
10 Chef's Express, although it has a mistake in  
11 the address of 1717 17th instead of 1417.  
12 Again, this is capturing the effort based on  
13 the complaint of the change of use from  
14 delicatessen to Chinese carry out in this R-5  
15 zone that a predecessor of mine had also  
16 determined that there is a distinction between  
17 delicatessen and carry out.

18 I think that part of what the  
19 appellant has tried to portray here is that  
20 this was my change. What I'm trying to say is  
21 that it wasn't. I have followed it and  
22 believe in it but that it wasn't my change

1 recently. Again, this goes back to 1999,  
2 2003.

3 Finally, in 2005 I think it's in  
4 appellant's record of the notice of revocation  
5 for Chef's Express that the reason why is that  
6 it was operating as a Chinese carry out, not  
7 a delicatessen. I think that is what this  
8 memo is trying to portray is that this has  
9 been ongoing -- especially when it comes to  
10 this property an ongoing consistent  
11 determination by the Department and by my  
12 predecessors as Zoning Administrator.

13 CHAIRPERSON MILLER: And when was  
14 the Certificate of Occupancy revoked?

15 MR. CREWS: It was effective  
16 November 17, 2005.

17 CHAIRPERSON MILLER: Thank you.

18 MR. CREWS: Just to kind of  
19 finalize, I think, the paper trail here, we  
20 have a letter from Faye Ogunneye who some of  
21 you might recall was Chief of the Zoning  
22 Review Branch and, at times, prior to my

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 appointment as Acting Zoning Administrator, so  
2 we have a July 11, 2003 letter to Mr. Zhang  
3 where they had attempted to apply for a  
4 Certificate of Occupancy as a Chinese food  
5 carry out and were denied. Again, that was  
6 not appealed.

7 Finally, a Notice of Infraction  
8 dated August 21, 2003, for 1417 17th Street.  
9 The nature of the infraction, operating a  
10 carry out without a Certificate of Occupancy.  
11 Again, all of this is to go from the legal  
12 standpoint they had a nonconforming use as a  
13 delicatessen. They were making sandwiches.  
14 The factual thing will come through.

15 They switched to Chinese carry  
16 out. The big thing is they never showed any  
17 intent to not discontinue the delicatessen by  
18 going back. They attempted to get a C of O  
19 for a carry out and were denied. They started  
20 a process of getting a variance for a carry  
21 out and pulled back on that.

22 Obviously the wheels of the

1 Department grind slowly, if that is the right  
2 -- but, you know, I think the case law is well  
3 set that the enforcement of the zoning  
4 regulations is very important to public good.  
5 That was why I made a determination in  
6 September of last year to deny the request,  
7 even if it had been a delicatessen that the  
8 nonconforming use, which is designed to go  
9 away for discontinuation, had been  
10 discontinued because the previous operators  
11 had operated from 1999 through 2005, a period  
12 of longer than three years with ample time of  
13 notice that they were operating outside the  
14 scope.

15 They manifest no intent to not  
16 abandon that nonconforming use. That is kind  
17 of in a nutshell why we denied this  
18 application, that the grandfathered  
19 nonconforming use had been discontinued.

20 MR. HOOD: Madam Chair, I want to  
21 ask a question.

22 CHAIRPERSON MILLER: Yes.

1                   MR. HOOD: Mr. Crews, we just were  
2 handed a Notice of Infraction because of  
3 nonconforming use and operating without the  
4 correct C of O. At least, that's what it says  
5 here in the notice. How often is this done  
6 because this is in the amount of \$500. I'm  
7 just curious how often do you issue an  
8 infraction? From 1999 to, I figured, to 2005,  
9 how often would you say typically should they  
10 have gotten a Notice of Infraction?

11                  MR. CREWS: Again, that kind of  
12 goes back to prior to my time and not wanting  
13 to be too demeaning, I guess, of the efforts  
14 and unknowing of the situation, but I think  
15 this is obviously the best the Department  
16 could do in this particular case. We struggle  
17 now just with maintain the workload. Again,  
18 I don't know what the workload is but --

19                  MR. HOOD: The reason I'm asking  
20 this is because of another issue. People  
21 don't take these things seriously because I  
22 know for a fact, and this is before your time

1 and when I was out there in the civic, which  
2 I still am, these infractions don't get paid  
3 so, therefore, why should I worry about making  
4 a change if it's not even being paid. I'm  
5 just curious in your tenure. I'm not sure how  
6 long --

7 MR. CREWS: Eighteen months.

8 MR. HOOD: Eighteen months. How  
9 often would -- in this case have you issued an  
10 infraction on this? I guess you have. When  
11 was this, 2003?

12 MR. CREWS: I revoked the  
13 Certificate of Occupancy shortly after I  
14 started. Again, that was not appealed.

15 MR. HOOD: Okay. All right. I'm  
16 just curious. I don't know, Madam Chair, if  
17 this is even -- I'm just curious if this, in  
18 fact, was ever even paid.

19 CHAIRPERSON MILLER: I think it's  
20 a good point. It's good to understand what is  
21 going on. You revoked the Certificate of  
22 Occupancy but I assume the business is still



1 operating?

2 MR. CREWS: Oh, no.

3 CHAIRPERSON MILLER: It's not  
4 operating?

5 MR. CREWS: No. It was testified  
6 that they stopped in January of '06.

7 CHAIRPERSON MILLER: Okay. That  
8 happened that they didn't appeal. Okay.

9 MR. CREWS: I mean, again, just to  
10 bring up another case, it took 16 years to  
11 shut down Curry Brother and they got -- I  
12 mean, until I showed up with the police, they  
13 were thinking it was the same way as  
14 Commissioner Hood is indicating. "So DCRA  
15 gave me a citation."

16 MR. HOOD: They're not going to  
17 collect it.

18 MR. CREWS: It's just so -- but,  
19 again, you know, I think the case law is that  
20 the enforcement of the zoning regulations is  
21 of paramount importance to the public good.  
22 They are not in play here today. At least

1 they haven't been raised in the appellant's  
2 case, in his primary case, that estoppo and  
3 latches are not looked at favorably.

4 It's not to say that they aren't  
5 sometimes considered but they aren't looked at  
6 favorably in zoning things because of the  
7 court's recognition of the importance of  
8 zoning to the public good.

9 CHAIRPERSON MILLER: I think you  
10 said this and I think we are probably ready to  
11 move on but from what I understand is that in  
12 your denial here and in the case here you are  
13 saying you didn't have to prove that they  
14 weren't a delicatessen because that was a  
15 nonconforming use that has been discontinued  
16 and that is your case, that's has been  
17 discontinued. When was the date, 1999, or  
18 three years when they switched to a use that  
19 was more adverse?

20 MR. CREWS: It's hard to tell but  
21 this denial was in September of '06 and  
22 everything -- I think everything other than

1 the revocation of the actual Certificate of  
2 Occupancy there was plenty of notice in and  
3 out I think demonstrating a pattern that they  
4 were not going to -- they had no intent to  
5 continue the delicatessen after these  
6 warnings.

7 Certainly by September of '03 they  
8 had not changed. They didn't apply to change  
9 their use, or they didn't change their use.  
10 They applied for C of O as a carry out before  
11 September of 2003 because you have the denial  
12 letter dated before that. That, to me, is  
13 intent to discontinue the use.

14 MR. LOUD: Very quick question,  
15 Mr. Crews. Are you aware of any use of the  
16 basement unit now?

17 MR. CREWS: No.

18 MR. GREEN: Madam Chairman, I  
19 don't have any other questions of this  
20 witness. I would at this point move into  
21 evidence, all the documents presented by the  
22 Department.

1 CHAIRPERSON MILLER: Thank you.

2 Mr. Mann.

3 MR. MANN: I'm sorry. I was just  
4 indicating that you need to turn on your  
5 microphone.

6 CHAIRPERSON MILLER: I was just  
7 wondering if there were any questions of any  
8 Board members at this time? Okay. Then I  
9 think it is time for cross examination. Does  
10 the appellant have any cross?

11 MR. OSNOS: Mr. Crews, if I  
12 understand you correctly, the distinction  
13 between a delicatessen and a carry out is  
14 based on two sources. The first source would  
15 be the Webster's Dictionary definition that  
16 you have often referred to which indicates  
17 that a delicatessen is a place where ready-to-  
18 eat food products may be purchased. The  
19 definition contains the illustration "such as  
20 sandwiches."

21 Is that the first source of, I  
22 guess -- how can I put this? The first prong

1 on which your determination that a business is  
2 or is not a deli rests. Is that the first  
3 prong that you look at, whether it meets the  
4 Webster's Dictionary definition?

5 MR. CREWS: I use the dictionary  
6 definition as directed by the zoning regs,  
7 yes.

8 MR. OSNOS: That is kind of the  
9 primary emphasis or the primary factor in your  
10 determination as to what an establishment is  
11 is whether or not it meets that Webster's  
12 Dictionary definition.

13 MR. CREWS: Yes.

14 MR. OSNOS: All right. And how  
15 long would you say that the Zoning  
16 Administrator has relied on this definition to  
17 determine whether or not to issue an occupancy  
18 permit or whether or not to revoke an  
19 occupancy permit.

20 MR. GREEN: Madam Chair, I'm going  
21 to ask that this compound question be broken  
22 up.

1                   MR. OSNOS: Why don't we break it  
2 down and make it simple. How long has the  
3 Zoning Administrator used the Webster's  
4 Dictionary definition of delicatessen in its  
5 decisions to revoke or issue Certificates of  
6 Occupancy? Is that question understandable to  
7 you?

8                   MR. CREWS: It is. It's just that  
9 I'm not aware of a lot of the actions of my  
10 predecessors, I guess, so I can't really  
11 answer. I would assume that all the previous  
12 Zoning Administrators have complied with the  
13 regulations that call on undefined words to  
14 use Webster's Dictionary.

15                   As we have put in as an Exhibit  
16 May 30, 2003, memo indicating that a former  
17 Zoning Administrator had determined that there  
18 was a distinction between delicatessen and  
19 carry out but that is about as close as I get  
20 to having been able to give any pinpoint  
21 response.

22                   MR. OSNOS: Where other than this

1 property at issue today has this definition  
2 been applied to revoke or issue an occupancy  
3 permit?

4 MR. CREWS: It's been used  
5 extensively in the issuance of Certificates of  
6 Occupancy in almost every instance where it  
7 applies. Since I have been here I have been  
8 operating on change of ownerships for  
9 delicatessens. We have actually been going  
10 out and seeing if it really does meet the  
11 definition.

12 If it doesn't meet the definition  
13 on a change of ownership for someone coming  
14 in, a new purchaser of a business, we have  
15 been giving them a temporary certificate of  
16 occupancy for one year in order for them to  
17 come before this Board and seek either a  
18 special exception or a variance to continue  
19 operating as a fast food restaurant if we  
20 determine that instead of actually operating  
21 as a delicatessen they have been operating as  
22 a fast food restaurant.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1                   MR. OSNOS:    So for the past 18  
2                   months you have been implementing this  
3                   definition that you find in Webster's by  
4                   sending inspectors out to check each  
5                   establishment which applies for a transfer of  
6                   ownership and applies for a new delicatessen  
7                   occupancy permit.

8                   MR. CREWS:   Pretty much, yes.

9                   MR. OSNOS:    Do you have any  
10                  knowledge of whether these inspections were  
11                  ever conducted by your office before your  
12                  tenure?

13                  MR. CREWS:    I have the evidence  
14                  here of these notices of violation and this  
15                  memo in terms of indicating from the  
16                  inspector.

17                  MR. OSNOS:    Other than this one  
18                  location do you have any knowledge that the  
19                  Zoning Administrator ever conducted the types  
20                  of inspections which you started under your  
21                  tenure to determine whether carry outs did or  
22                  did not constitute delicatessens as defined by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 Webster's Dictionary?

2 MR. CREWS: What was the start of  
3 the question?

4 MR. OSNOS: Other than this one  
5 location, 1417 17th Street, N.W. do you have  
6 any evidence that any of your predecessors  
7 ever conducted the type of inspection that you  
8 initiated at the beginning of your tenure to  
9 determine whether carry outs did or did not  
10 constitute delicatessens under the Webster's  
11 Dictionary definition on which you now rely?

12 MR. GREEN: Again, I hate to be  
13 obstreperous, Madam Chairman, but I would ask  
14 that counsel simplify his question. He'll get  
15 a straight answer from the Zoning  
16 Administrator. He doesn't have to give  
17 testimony. He can get a straight answer.  
18 Just ask a straight question.

19 MR. OSNOS: I would like to know  
20 if anyone had any difficulty understanding the  
21 question.

22 CHAIRPERSON MILLER: I didn't have

1 difficulty. It was long.

2 Mr. Crews, did you have  
3 difficulty?

4 MR. CREWS: I think I understand  
5 the gist of the question. My ponderance is  
6 mainly trying to recall both, again, the  
7 difficulty exactly knowing what all my  
8 predecessors did but I do know that the  
9 discussions did occur on several  
10 establishments on H Street, N.E., before I  
11 became Zoning Administrator.

12 I'm sure that others occurred but  
13 primarily the H Street comes to mind right now  
14 in terms of previous Zoning Administrators  
15 inspecting and determining whether things were  
16 delicatessens and/or fast food restaurants.

17 MR. OSNOS: What specific cases on  
18 H Street are you referring to?

19 MR. CREWS: Blimpies, Taste of  
20 Jamaica, Cluck-U Chicken, Birdland. Is that  
21 what it was, Birdland? I think it was  
22 Birdland.

1                   MR. OSNOS:   So those are the four  
2                   that you recall, Blimpies, Taste of Jamaica,  
3                   Cluck-U, Birdland?

4                   MR. CREWS:   Um-hum.

5                   MR. OSNOS:   And I assume Blimpies  
6                   was determined to be a delicatessen.  Is that  
7                   correct?

8                   MR.   CREWS:       I   think   it   was  
9                   determined to be a fast food restaurant.

10                  MR. OSNOS:   By whom?

11                  MR. CREWS:   By this Board.

12                  MR. OSNOS:   And the other cases  
13                  that you mentioned?

14                  MR. CREWS:   Cluck-U was determined  
15                  to be a restaurant.   Birdland had been  
16                  determined by my office to be a restaurant.  
17                  The appeal of that decision was withdrawn  
18                  based on Cluck-U.  Taste of Jamaica's appeal  
19                  was withdrawn also.

20                  MR. OSNOS:   You are familiar with  
21                  each of these four cases.  Is that correct?

22                  MR. CREWS:   Somewhat, yes.

1           MR. OSNOS:   How did these cases  
2           arise?   How did they come before the Board?

3           MR. CREWS:   They came before the  
4           Board on appeals of the issuance of a  
5           Certificate of Occupancy.

6           MR. OSNOS:   All four cases that  
7           you've mentioned were appeals of Certificate  
8           of Occupancy denials?

9           MR. CREWS:   Of issuance of  
10          Certificates of Occupancy.

11          MR. OSNOS:   Right.   These were  
12          appeals of denials, or are you saying some  
13          were issued an appeal?

14          MR. CREWS:   They were issued an  
15          appeal.   Right.   They were appealed by other  
16          parties.

17          MR. OSNOS:   All of these were  
18          issued.

19          MR. CREWS:   Yes.

20          MR. OSNOS:   And all were appealed.

21          MR. CREWS:   Yes.

22          MR. OSNOS:   Okay.   And were all of

1       these initially permitted as delicatessens by  
2       the Zoning Administrator? In other words, was  
3       a permit issued by the Zoning Administrator  
4       for delicatessen use?

5               MR. CREWS: No, they were issued  
6       as restaurants.

7               MR. OSNOS: So Blimpies, Taste of  
8       Jamaica, Cluck-U, and Birdland all obtained  
9       restaurant licenses?

10              MR. CREWS: Yes.

11              MR. OSNOS: So what do those cases  
12       have to do with a delicatessen or the  
13       definition of what is a delicatessen under the  
14       zoning ordinance?

15              MR. CREWS: Because I think in the  
16       consideration of what is the appropriate way  
17       of characterizing the actual use is that you  
18       have to look at the totality of the  
19       definitions. That was what was looked at. It  
20       just didn't come out as this.

21              MR. OSNOS: But the totality of  
22       the definition that was being examined in

1       those cases was the restaurant and fast food  
2       restaurant definition.  Correct?

3               MR. CREWS:  Which includes the  
4       exemption for delicatessens.

5               MR. OSNOS:  All right.  But these  
6       were all Certificate of Occupancy that were  
7       issued for restaurant use which were appealed  
8       by other parties?

9               MR. GREEN:  Madam Chairman, I'm  
10       going to object.  Two objections.  One is  
11       relevance.  Two, the questions have been asked  
12       and answered.

13              CHAIRPERSON MILLER:  I agree it's  
14       been asked and answered.  Is your relevance  
15       to --

16              MR. OSNOS:  The relevance is  
17       simply to indicate or demonstrate that there  
18       simply is no longstanding or established  
19       agency practice of the Zoning Administrator's  
20       Office.

21              CHAIRPERSON MILLER:  You're  
22       saying --

1                   MR. OSNOS:   With respect to the  
2                   application of the Webster's Definition to  
3                   delicatessens and carry outs throughout the  
4                   city. As far as I can tell, so far, based on  
5                   Mr. Crews' testimony, the application of the  
6                   definition to existing carry outs and  
7                   delicatessens began with his tenure 18 months  
8                   ago.

9                   That is the point of my cross  
10                  examination. Now, Mr. Crews testified that  
11                  prior administrators had developed some  
12                  reliance on this definition and I asked him in  
13                  what cases. He listed these cases. It now  
14                  turns out these are restaurant cases, not  
15                  delicatessens. Somehow indirectly through, I  
16                  guess, intuition the public is supposed to  
17                  know that really these are about delicatessens  
18                  but I will move on with my questioning.

19                 MR. GREEN:   Madam Chairman, I ask  
20                 that the last comments be stricken as totally  
21                 unhelpful to the Board in its determination  
22                 process. If he wanted to get into the thought

1 pattern of how the Zoning Administrator  
2 arrives at the decision process, the Zoning  
3 Administrator has already done that.

4 He said among other things  
5 Webster's, certain memos that are related to  
6 this, historicity as it related to this  
7 location. We have gone back to 1958. We've  
8 come forward. Thank you.

9 CHAIRPERSON MILLER: I would say  
10 that we don't strike remarks for the record  
11 but I think that the Board heard Mr. Crews and  
12 knows what Mr. Crews testified to and won't be  
13 relying on appellant's counsel to determine  
14 what that was.

15 MR. GREEN: Give testimony.

16 CHAIRPERSON MILLER: Okay. Are  
17 there any other cross examination questions?

18 MR. OSNOS: Yes. Mr. Crews, the  
19 first prong, or the first factor that the  
20 Zoning Administrator utilizes in determining  
21 whether a business is or is not a delicatessen  
22 is the Webster's dictionary definition.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1 Right? I think you agree to that. Correct?

2 CHAIRPERSON MILLER: I'm sorry but  
3 this was asked and answered. I think it's  
4 getting late.

5 MR. OSNOS: All right. Now, Mr.  
6 Crews, the second issue that you look at, as  
7 I understand it, in conjunction with Webster's  
8 definition is how much cooking is actually  
9 done at the premises because the amount of  
10 cooking done on the premises determines how  
11 much impact the use has on the neighboring  
12 community.

13 MR. CREWS: Correct. I think  
14 that's the intent of the regs in determining  
15 what uses can go in what districts from the  
16 most restrictive down is to limit impacts on  
17 neighbors.

18 MR. OSNOS: Okay. Here's my  
19 question. Do you have any evidence that any  
20 of your predecessors looked at the amount of  
21 cooking or the amount of kitchen equipment  
22 located within any given premises in making a

1 determination whether or not to issue or  
2 revoke an occupancy permit for delicatessen  
3 use?

4 MR. CREWS: I don't know what they  
5 did because the record is relatively skimpy on  
6 their motivation. All I know is that they  
7 have consistently since 1999 said that this  
8 particular operation as a Chinese carry out  
9 was operating outside the scope of the  
10 Certificate of Occupancy as a delicatessen.

11 MR. OSNOS: Are you aware of any  
12 other cases in the city where the city has  
13 taken the position that a delicatessen is  
14 operating or was operating outside the  
15 permitted scope of its occupancy permit  
16 because it was operating as a carry out? Are  
17 you aware of any other case other than this  
18 Chinese restaurant or this Chinese carry out  
19 at 1417 17th Street, N.W.?

20 MR. CREWS: None comes to mind but  
21 if something does come to mind, I would hope  
22 that we might be able to if the record is left

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 open.

2 CHAIRPERSON MILLER: We can do  
3 that.

4 MR. OSNOS: No more questions for  
5 Mr. Crews but I do have a question for the  
6 Board. Unfortunately the garage where I put  
7 my car closes at 7:00 so I ask the Board  
8 whether we are likely to go on toward 7:00.  
9 If so, I would like to make sure that I get  
10 leave to go take care of my car.

11 CHAIRPERSON MILLER: I would hope  
12 we would not go beyond 7:00. I mean, how far  
13 away is your car, within 10 minutes?

14 MR. OSNOS: Yeah, but I've got to  
15 exit the building. I mean, I want to leave  
16 here by 20 to 7:00 just to be safe.

17  
18 CHAIRPERSON MILLER: Let me see.  
19 We've heard from the appellant, the appellee.  
20 How long do you think you are going to be?

21 MR. BJORGE: Depending on the  
22 nature of the testimony that the Board permits

1 I can be fairly brief. If it's developing a  
2 simple time line, I can be very brief. I  
3 don't know what cross would take. If it's  
4 necessary to speak to impacts of disparate  
5 uses, I could go on to next week.

6 CHAIRPERSON MILLER: Okay. I  
7 think we should be able to finish. I mean, I  
8 think the issues have been framed here as I  
9 see it and then you can object if you see  
10 otherwise. First of all, Mr. Crews is saying  
11 they made their decision based on the  
12 assessment that the nonconforming use as a  
13 deli was discontinued in 1999 so certainly by  
14 2006 it had been more than three years. Is  
15 that correct, Mr. Crews?

16 MR. CREWS: Yes.

17 CHAIRPERSON MILLER: So, I mean,  
18 if you have facts that show other that would  
19 address that issue as to were they operating  
20 as a deli in 2004 and was he wrong that they  
21 were operating as a carry out, for instance.  
22 That would be relevant. As far as disparate

1 impacts, I could hear your argument if you  
2 feel you need to --

3 MR. BJORGE: If it's not directly  
4 germane to the case at hand, I feel no need to  
5 rehash.

6 CHAIRPERSON MILLER: I don't think  
7 it is. Do any of the parties believe that it  
8 is? Board members? Okay.

9 MR. LOUD: Madam Chair, I would  
10 love, and this is just a thought, if there  
11 could be a proffer from the witness of the  
12 scope of his testimony. It doesn't sound to  
13 me like there will be a big factual dispute in  
14 this case relevant to the legal considerations  
15 of what is prepared food versus, I guess,  
16 unprepared food. Perhaps we can offer some  
17 guidance to the witness about the testimony  
18 that would tend to keep it relevant to the  
19 legal question if I understand the issues.

20 MR. BJORGE: What I have at hand  
21 are letters from people that have known the  
22 character of the establishment going all the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 way back actually to the '50s and '60s and  
2 going forward to when it finally closed. I  
3 can really develop a time line for when what  
4 happened.

5 MR. HOOD: So basically it's in  
6 tune with your ANC report pretty much, your  
7 testimony?

8 MR. BJORGE: It is a bit more  
9 detailed because I took the trouble to seek  
10 out people who actually grew up in the  
11 neighborhood and are now grandparents  
12 themselves.

13 CHAIRPERSON MILLER: You have that  
14 in writing to submit into the record as well.  
15 Correct?

16 MR. BJORGE: Yes. It's only three  
17 pages.

18 CHAIRPERSON MILLER: Oh, it's only  
19 three pages. Okay. Fine. Have you shared  
20 that with the appellant and DCRA?

21 MR. BJORGE: I have not shared it  
22 with anyone so far. I could enter it into the

1 record and I would be happy that they have  
2 copies.

3 CHAIRPERSON MILLER: Is this your  
4 testimony or is this your evidence? If it's  
5 your evidence, you might need to give it to  
6 them now. If it's testimony, we can give it  
7 to them afterwards.

8 MR. BJORGE: Well, I think it  
9 would have to be evidence, yes.

10 CHAIRPERSON MILLER: Okay. Can we  
11 make a quick copy of that while we are  
12 discussing it? I think the longer we spend  
13 discussing how long we are going to take we  
14 are eating up our time. Do you think that --  
15 it sounds like we can finish in this period of  
16 time. I think we have fleshed out most of the  
17 issues and you are going to really be now  
18 addressing the facts that fit those issues.

19 MR. BJORGE: I would be able to  
20 speak firsthand for 1992 forward.

21 CHAIRPERSON MILLER: Do other  
22 parties need to see this right now or do you

1 want to show it to them and they can assess?

2 MR. OSNOS: I can see it later.

3 CHAIRPERSON MILLER: Then it would  
4 save time if we didn't have to Xerox it right  
5 now and just let you address those facts.

6 MR. GREEN: We can also wait,  
7 Madam Chairman.

8 CHAIRPERSON MILLER: Okay. Good.  
9 Okay. Then you can proceed.

10 MR. BJORGE: Well, to the goal of  
11 expediency, do you just want a short summary  
12 of the events that I have observed in terms of  
13 change of use? Is that what you're looking  
14 for?

15 CHAIRPERSON MILLER: Okay. What I  
16 would say is, yes, a summary but enough so  
17 that they know what you are putting into the  
18 record so they have an opportunity right now  
19 to cross you on anything that would be  
20 important or address anything there.

21 MR. BJORGE: Of course. I hope  
22 not to leave anything that would be useful



1 out.

2 CHAIRPERSON MILLER: You will  
3 submit it in the record so it will all be in  
4 the record.

5 MR. BJORGE: I first moved to the  
6 location that I still own and maintain as a  
7 residence and a rental property in 1992 as a  
8 GW student. At that time there was an exiting  
9 enterprise operating out of the basement of  
10 the adjoining property to my north 1417 17th  
11 Street.

12 As a student I actually frequented  
13 that establishment fairly often. I would buy  
14 sodas and cigarettes and sandwiches and such  
15 there for my study sessions. In 1997 I  
16 acquired the building that I had been renting  
17 in. In the mid '90s there were several  
18 changes of owners.

19 The sandwich shop and cold case  
20 and drink case and cigarette dispensing case  
21 all left and there was some experimentation  
22 with cooking but none of the infrastructure

1 was there and it frankly wasn't all that  
2 successful. In 1998/99 there was a huge  
3 renovation that took place.

4 The structural evidence of that is  
5 still present today and I have photographs  
6 that I can also enter in to show the fume  
7 hoods and exhaust vents and just a massive  
8 c o o k i n g e n t e r p r i s e .

9 When I first moved there the trash  
10 and the garbage were carried out the front and  
11 the food was carried in the front. By the  
12 time Chef's Express had ramped up fully there  
13 was a really large dumpster in the back.

14 There were large deliveries of  
15 bagged onions and, you know, 50 pound bags of  
16 rice and such being brought in. The raw food,  
17 the bulk food was purchased and prepared,  
18 cooked, diced, chopped. I could hear it  
19 through my walls in that renovation.

20 I can just say what was there last  
21 was a different in degree to make a different  
22 in kind. There is absolutely no comparison.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 If any comparison could possibly be made, it  
2 would be almost as if your neighbor was one  
3 day flying a kite and the on the next day they  
4 had purchased a helicopter. Both are flying  
5 implements but really they are not at all  
6 relatable.

7 The rough dates, '92 it was still  
8 a sandwich shop. '95, '96, '97, very small  
9 scale cooking introduced. '98, '99 full-blown  
10 commercial kitchen with all of the commiserate  
11 impacts.

12 CHAIRPERSON MILLER: Just from  
13 your experience the '95/'97 change, that  
14 didn't have a big impact on you even though  
15 there was some cooking?

16 MR. BJORGE: Well, no. It was  
17 almost like they had sort of introduced an  
18 amendment to the menu. It wasn't really a  
19 complete reconceptualization of the space. I  
20 mean, it was actually -- I was friends with  
21 all the business owners and operators.

22 I even used to do deliveries for

1       them back in that day the area east of 16th  
2       Street. There used to be little old ladies  
3       running it. It just wasn't safe for them to  
4       do deliveries so I would do it. I did part-  
5       time work as a bike messenger and I had no  
6       problem with it. No, no.

7               CHAIRPERSON MILLER: What kind of  
8       business was it in '95 and '97?

9               MR. BJORGE: Well, there was the  
10       sandwich. There was the little sort of  
11       portable stove with no ventilation where I  
12       don't even really know what was prepared at  
13       that time. There was definitely some chili  
14       oil, though, prepared in that time because  
15       they had no ventilation and the customers  
16       would be driven out the front door by the  
17       burning chilies. It was pretty severe.

18              CHAIRPERSON MILLER: So now they  
19       have big ventilation?

20              MR. BJORGE: It's absolutely huge.  
21       Absolutely huge. I don't know how to describe  
22       it other than to show you pictures.

1 CHAIRPERSON MILLER: You have  
2 pictures?

3 MR. BJORGE: Oh, yeah. These  
4 ducts are like that big and they go up and  
5 there are huge fans up top that have the heavy  
6 duty armor cable leading up to power them.  
7 It's an amazing thing and that renovation I  
8 was around for it. It occurred roughly 11:00,  
9 12:00 at night and just sort of happened.

10 CHAIRPERSON MILLER: Mr. Crews  
11 referred to different external effects with  
12 different types of businesses such as carry  
13 out or whatever. What are the external  
14 effects that you experienced?

15 MR. BJORGE: The worst external  
16 effect is actually an internal effect. The  
17 buildings that we are talking about are all  
18 1885. They are essentially one structure,  
19 although they are legally three separate  
20 structures. You understand and are familiar  
21 with old fashioned rowhouse construction.

22 They share walls and the walls

1       aren't exactly to modern standards.     Rats  
2       would go back and forth.   The smells would go  
3       back and forth.   The sounds would go back and  
4       forth.   All of this would be on the inside of  
5       the buildings and in bedrooms.     It was  
6       terrible.

7               I have other letters of former  
8       tenants that wrote about this so I could  
9       submit if necessary to speak to impacts.   Then  
10      there is also a difference in kind engendered  
11      by a difference in degree in the types of  
12      garbage that a place that sells sandwiches and  
13      cigarettes produces versus a place where they  
14      bring in 50 pound bags of rice and onions and  
15      cook it on the premises.   One wonders where  
16      the grease goes because there's no grease  
17      barrels out back.

18              That garbage would be stored in  
19      the rear in a commercial dumpster and toted  
20      across a three-foot easement across my  
21      property, across my neighbor Ann's property  
22      and into an alley which was strictly

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 residential except for a grandfathered  
2 sandwich shop.

3 It became a commercial environment  
4 not only the exterior environment with  
5 commercial, with motor scooters on the  
6 sidewalk and illegal curb cuts and such, but  
7 the interior environment and our homes became  
8 a commercial environment because of the  
9 smells, the noise, etc., the rats.

10 CHAIRPERSON MILLER: Mr. Etherly,  
11 do you have a question?

12 MR. ETHERLY: Thank you very much,  
13 Madam Chair. So as I gather, let's kind of  
14 break this up into what sounds like three  
15 distinct phases. There is essentially kind of  
16 the 1992 to '97 phase, so to speak. Let's say  
17 there is 1992 to 1995. Then there's the  
18 transition period of roughly 1995 to 1997.

19 It sounds as though from 1998  
20 onward we are in kind of this current phase  
21 essentially. What I would like to do is --  
22 I'm just using this as an artificial kind of

1 organizing point.

2 MR. BJORGE: I don't want you to  
3 hold me to these specific years.

4 CHAIRPERSON MILLER: Sure. No  
5 problem.

6 MR. BJORGE: It's been over a  
7 decade.

8 CHAIRPERSON MILLER: No problem.  
9 Let's just say for the sake of discussion that  
10 we break it up in that manner. That first  
11 phrase. Let's talk about that first phase for  
12 a moment. When you walked into the premises  
13 can you describe briefly what you observed?  
14 You indicated, as I picked up, sandwiches,  
15 cigarettes.

16 There was a cold case of some type  
17 or dispensing case, if you will, where you  
18 would gather beverages. In terms of the  
19 sandwiches were the sandwiches prewrapped  
20 sandwiches? These were already made  
21 sandwiches?

22 MR. BJORGE: Oh, no, no. They



1       were made to order. The people who run it  
2       would roast, as Mr. Crews alluded to earlier,  
3       turkey at home. They would carve it on site.  
4       There was a cold case. There was a glass-door  
5       refrigerator. There was a small counter area  
6       for condiments and the like.

7               MR. ETHERLY:     Okay.     As you  
8       indicated, based on what you observed trash  
9       deliveries were on a small scale that  
10      typically went out the front door. I should  
11      say trash removal.

12             MR. BJORGE:     Almost everything  
13      went in or out the front door because I can  
14      remember being rather -- it was striking  
15      seeing garbage coming out of the basement  
16      rather than out the back door so it very much  
17      sticks out in my mind.

18             MR. ETHERLY:     Okay.     Then in that  
19      transitional period where you began, to use  
20      your words, you said there was some  
21      experimentation underway. I just want to be  
22      kind of clear as to what was happening in that

1 time frame. You began to see little tweaks to  
2 how things were prepared, the types of goods  
3 that were carried in the space?

4 MR. BJORGE: Yes. Exactly so. It  
5 was not a 100 percent clear and day/night  
6 transition from one day to the next. It was  
7 a rather gradual evolution until '98/'99 when  
8 all of the additional infrastructure was put  
9 in and a new menu was created out of whole  
10 cloth. That was a very dramatic occurrence.

11 MR. ETHERLY: Okay. And with  
12 respect to that final phase where you talked  
13 about the introduction of significant or huge  
14 renovations, the exhaust vents, the fans, kind  
15 of a massive cooking enterprise was one of the  
16 terms that I picked up, you began to observe  
17 more what you termed as -- well, what I wrote  
18 down. These probably were not your words,  
19 bulk food deliveries essentially. Larger  
20 scale food preparation on site.

21 MR. BJORGE: Yes. I mean, it  
22 became rather than what I would have thought

1 of as like a little mom and pop shop, and  
2 granted the moms and pops changed, it became  
3 a very professional high-volume restaurant.  
4 I mean, it was clearly being run by very good  
5 business people.

6 MR. ETHERLY: And in terms of the  
7 contrast between the food that was prepared on  
8 site and available for selection by patrons,  
9 what was the difference, that last phase  
10 versus essentially the first phase?

11 MR. BJORGE: Well, the first phase  
12 it really very much was a sandwich shop. The  
13 last phase is aptly represented by a menu  
14 which I think -- I mean, this menu is nice as  
15 anything that anyone could want anywhere, you  
16 know, front and back.

17 MR. ETHERLY: Okay. And for  
18 contrast purposes in terms of the volume and  
19 scope of what you could select in that first  
20 phase when it was kind of a smaller scale  
21 operation?

22 MR. BJORGE: Much more limited. I

1 think I could choose between Cools, Camel  
2 Lights, and Marlboro Reds and perhaps three or  
3 four different types of soda. The turkey  
4 sandwich is what we went for because it was  
5 the best.

6 MR. ETHERLY: Okay. At the close  
7 that's the menu that you had at your disposal?

8 MR. BJORGE: Yes.

9 MR. ETHERLY: Okay. Thank you.

10 Thank you, Madam Chair.

11 CHAIRPERSON MILLER: Could you eat  
12 at this sandwich shop or was that also "carry  
13 out" or pickup?

14 MR. BJORGE: Theoretically it has  
15 always been no seating but D.C. being D.C.  
16 people are always trying to bring things a  
17 little bit. There was a small counter perhaps  
18 three feet long with two stools that I suppose  
19 if an inspector was in the building the  
20 workers would be sitting in those stools but  
21 if no one was around, the patrons could sit  
22 there.

1           There was a little television. The  
2           kind of sort of homey comforts that somebody  
3           who was in their own business all day might  
4           use themselves but would not begrudge a  
5           visitor in a calm moment. There was an  
6           attempt to put in a fully functional outdoor  
7           cafe which had an awning and a tiled front  
8           yard.

9           That was removed rather quickly.  
10          I mean, that is an obviously exterior element  
11          and didn't stand very long. Although if you  
12          were to go there today, you would still see  
13          the tile marks on the concrete when it did  
14          exist.

15                 CHAIRPERSON MILLER:       When was  
16          that?

17                 MR. BJORGE: Mid '90s. I think it  
18          was one of the sort of interim owners between  
19          the sandwich owning family and the full-blown  
20          Chinese restaurant family.

21                 CHAIRPERSON MILLER:       And why did  
22          that fail?

1 MR. BJORGE: Well, I wasn't on the  
2 ANC at the time but I can only imagine my  
3 ANC's ire at an illegal public sidewalk cafe.  
4 We are not known as being particularly  
5 friendly towards existing ones all the time.

6 CHAIRPERSON MILLER: Okay. Thank  
7 you.

8 Any other questions? Before we do  
9 the cross, Ms. Marchand, is she going to be  
10 testifying as well or just you at this point?

11 MR. BJORGE: She could speak to  
12 much the same history.

13 Ann, you moved in in '97? '96?  
14 She could talk to the tail end of what I have  
15 spoken to. She could also talk to impacts if  
16 the Board feels that it is necessary.

17 CHAIRPERSON MILLER: It's up to  
18 you.

19 MR. BJORGE: I feel that I have  
20 summarized it pretty well.

21 CHAIRPERSON MILLER: Okay.

22 MS. MARCHAND: I could give just a

1       few more details on the same impacts.

2                   MR. BJORGE:   Chewed wiring.   She  
3       had her car chewed through a couple of times.  
4       We've all had air conditioning wiring chewed  
5       through.   We've all had rats die in our walls.  
6       Same thing.

7                   CHAIRPERSON MILLER:    Okay.    I  
8       don't know if she got pick up by the court  
9       reporter but -- she did?   Okay.   Just for the  
10      record, she did indicate that she would say  
11      similar things as you are saying and so  
12      doesn't feel a need to testify herself at this  
13      point.

14                  MR. BJORGE:   I could also enter a  
15      number of letters from people who would say  
16      the same thing, some of whom are still around  
17      and living in Dupont.   Some of whom left a long  
18      time ago.

19                  CHAIRPERSON MILLER:   Okay.   We are  
20      going to allow the record to be open for  
21      whatever letters you want to put in.

22                  Okay, cross.   Does the appellant

1 have cross?

2 MR. OSNOS: Mr. Bjorge, you  
3 indicated in '98 or '99 a massive hood was put  
4 in. Is that correct?

5 MR. BJORGE: Yeah. There was an  
6 exhaust vent. I don't want to be precise with  
7 dimensions but perhaps one by two feet that  
8 ran up the back of the house and up onto the  
9 roof. This is a picture of the top of it  
10 here.

11 MR. OSNOS: I don't need to see a  
12 picture. My question is this. Are you aware  
13 of whether or not there were two smaller hoods  
14 in the premises prior to the time of this hood  
15 installation in '98 or '99 that you are  
16 referring to?

17 MR. BJORGE: I am not aware,  
18 although I will say that there was a smaller  
19 hood that I found on my roof when I was doing  
20 roof repairs this spring, actually. I will  
21 say that the venting and duct work is brand  
22 new. That definitely happened in '98/'99.



1 CHAIRPERSON MILLER: Mr. Hood has  
2 a question.

3 MR. HOOD: They alluded to some --  
4 I'm not sure how to put the procedures. They  
5 alluded to some pictures. Since he mentioned  
6 it, are we going to get copies of those  
7 pictures?

8 CHAIRPERSON MILLER: We are going  
9 to get copies. Is that right? What we  
10 decided was we weren't going to take up time  
11 copying them right now because we are under  
12 time pressure unless you need them.

13 MR. HOOD: No. I just wanted to  
14 make sure we get them. Thank you.

15 MR. OSNOS: I don't have any  
16 further questions.

17 CHAIRPERSON MILLER: Does the DCRA  
18 have any questions?

19 MR. GREEN: Yes, just a couple.  
20 Mr. Bjorge, you indicated -- I'm sorry if I'm  
21 mispronouncing your name. Please forgive me.

22 MR. BJORGE: That's quite all

1 right. It's Norwegian. It's difficult.

2 MR. GREEN: Bjorge?

3 MR. BJORGE: Bjorge.

4 MR. GREEN: Bjorge?

5 MR. BJORGE: Yes.

6 MR. GREEN: All right. You  
7 indicated you had letters from individuals who  
8 can speak to the conditions going back to  
9 1958, I believe, and coming forward. How do  
10 you know these people?

11 MR. BJORGE: Well, living in the  
12 neighborhood since 1992 really you just have  
13 occasion to meet people who are in the  
14 neighborhood. One of the best places is Java  
15 House. It's the local coffee shop. Almost  
16 anyone comes through there if you sit there  
17 long enough. In particular Mr. Stafford  
18 Darcy-Irwin who grew up in the neighborhood  
19 and lived on Corcoran for some time and raised  
20 his family in the neighborhood. I met him.

21 MR. GREEN: So the people that you  
22 -- the letters that you've gotten are from

1 folks that you met over the years. Is that  
2 not right?

3 MR. BJORGE: That's correct.  
4 Completely independent of this, yeah.

5 MR. GREEN: And you knew them when  
6 you were in your college years and so forth?

7 MR. BJORGE: Yes, actually.

8 MR. GREEN: All right. You  
9 indicated in your testimony that there was  
10 some wire chewing on cars. How did this  
11 happen?

12 MR. BJORGE: Well, the wire  
13 chewing on cars is something that rats do.  
14 They seem to be attracted to the insulation.  
15 It taste sweet to them so I hear. In  
16 particular since I've not owned a car and I  
17 was speaking of Ann's car, the wire chewing in  
18 my HVAC system happened when according to Ed  
19 Cock Trapping the rats would come through the  
20 walls from Chef's Express into my basement  
21 unit. The HVAC system was along that wall on  
22 my side and the rats, I guess, ate through the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 wiring.

2 MR. GREEN: Oh. You used the term  
3 HVAC. I don't know if the Board is familiar  
4 with it. What's that?

5 MR. BJORGE: That's the heating  
6 and cooling system. My structure was  
7 completely renovated in the '80s to what was  
8 then modern code with individually metered and  
9 cooled and heated and all that units, four  
10 units.

11 MR. GREEN: When did these rats  
12 start the process of eating if you know?

13 MR. BJORGE: I had been in that  
14 building since 1992 and I had not noticed any  
15 rat problems up until 1999.

16 MR. GREEN: What specifically  
17 happened in '99?

18 MR. BJORGE: The renovation next  
19 door.

20 MR. GREEN: I see. So, in other  
21 words, the coming of the rats took place when  
22 the change or transition, as you have alluded

1 to, took place. Is that not right?

2 MR. BJORGE: Yes, sir. I actually  
3 attribute it to a combination of damage done  
4 through unpermitted construction and an  
5 intensification of the use. That's my own  
6 personal attribution.

7 MR. GREEN: All right. Thank you.  
8 I don't have any other questions, Madam  
9 Chairman.

10 CHAIRPERSON MILLER: Thank you.  
11 Did the rat problem continue or was it just  
12 related to the construction?

13 MR. BJORGE: No, ma'am. The rat  
14 problem continued unabated until the  
15 restaurant closed and I haven't had a rat  
16 problem since.

17 CHAIRPERSON MILLER: Okay. I have  
18 a question for Mr. Crews.

19 He described what was a sandwich  
20 shop use. Where does that fall in our  
21 regulations? Do you think that was a  
22 discontinuation of the deli use or do you

1 think that it is less intensive and,  
2 therefore, not a discontinuation at that  
3 point?

4 MR. CREWS: Well, I consider the  
5 sandwich making as a delicatessen.

6 CHAIRPERSON MILLER: As a deli.

7 MR. CREWS: Yeah, because that's  
8 the part where we provide you with the  
9 unabridged --

10 CHAIRPERSON MILLER: Which I don't  
11 have.

12 MR. CREWS: Excuse me. I'm sorry.

13 CHAIRPERSON MILLER: You don't  
14 have to sit down to be a deli? You don't have  
15 to -- oh, they had two seats? Is that why you  
16 think you could sit down?

17 MR. CREWS: You don't need -- I  
18 mean, again, whether you eat there or take it  
19 out, it's based on the intensity of the  
20 impacts, not eating there or taking it out.  
21 The deli could have a lot of carry out using  
22 the term generically.

1 CHAIRPERSON MILLER: That's what  
2 I'm wondering.

3 MR. CREWS: It's the intensity of  
4 the use and the type of thing that is  
5 happening. Just because it says a  
6 delicatessen on the C of O doesn't mean that  
7 a Chinese carry out is operating correctly.

8 That's why I've said in the  
9 administration that I've been trying to do in  
10 order to implement the zoning regs, that's one  
11 of the reasons in terms of allowing the  
12 sandwich shops, the Subways or so, is because  
13 they don't have a lot of cooking and they make  
14 sandwiches and the definition has a  
15 parenthetical phrase that specifically refers to  
16 making sandwiches.

17 CHAIRPERSON MILLER: Okay. Thank  
18 you. Are there any other questions by the  
19 Board? Okay. According to our procedures, we  
20 are at the final step where the appellant can  
21 make a closing statement and any rebuttal if  
22 you have any.

1 MR. OSNOS: Yes. First of all,  
2 Madam Chair, at paragraph 23 on page 6 of the  
3 brief that I submitted to you, there is, I  
4 think, the definition from Webster's Third New  
5 International Dictionary that Mr. Crews  
6 probably relies on. He can certainly look at  
7 paragraph 23 of my brief, Exhibit 17. I  
8 probably should have brought that to the  
9 Board's attention earlier.

10 CHAIRPERSON MILLER: Okay. I  
11 mean, that's here for us to reference but I  
12 think it would be good to have in the record  
13 the exact language that the Zoning  
14 Administrator relies on. It would be good to  
15 know if he agrees with that.

16 MR. OSNOS: The definitions there  
17 Mr. Crews, I suppose, can supply the  
18 definition that the agency relies on. What we  
19 kind of come back to is the reality that until  
20 Bill Crews decided what a delicatessen is, no  
21 one in the city knew. We can't apply new  
22 rules and definitions without a rulemaking and



1 we can't apply them retroactively.

2 That is really something for the  
3 Board, I think, to determine whether Mr.  
4 Crews' explorations into the meaning of the  
5 word delicatessen can be allowed to invalid an  
6 existing use that has been there for 50 years.  
7 I understand there is a difference in  
8 intensity between what may at one time have  
9 been primarily or exclusively a sandwich and  
10 what morphed into a Chinese food carry out.

11 Nonetheless, these operations were  
12 licensed as delicatessens by the food service  
13 regulators and these uses were permitted by  
14 the Zoning Administrator under the  
15 delicatessen designation. According to Mr.  
16 Crews, there may not be an other location in  
17 the city where a carry out has been deemed to  
18 be something other than a delicatessen.

19 This literally appears to be the  
20 only circumstance where a delicatessen  
21 occupancy permit has been revoked for  
22 operating as a carry out. This is unique. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 think this is a rulemaking.

2           Clearly, Mr. Crews' rulemaking he  
3 has decided that this definition in the zoning  
4 regulations is pretty ambiguous and convoluted  
5 and he is taking it upon himself rightly or  
6 wrongly to straighten it out by adopting the  
7 Webster's Dictionary definition as his  
8 starting point and conducting inspections to  
9 now determine whether all and sundry carry  
10 outs in the city are delicatessens or, as he  
11 said, carry outs that are given a grace period  
12 to come to the Board and ask for a variance or  
13 a special exception.

14           One of the issues here it's not  
15 really latches or estoppel but it is whether  
16 the Zoning Administrator has sort of carved  
17 out some new territory here that is not based  
18 on existing precedent or existing decisions.  
19 I think that is exactly what is going on here.

20           We have, of course, some other  
21 issues. I don't think that the intensity of  
22 food preparation alone even under Mr. Crews'

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 adoption of the Webster's Dictionary  
2 definition is the primary determinant. I  
3 don't think that cooking intensity really  
4 factors into that definition. I mean, we  
5 don't have any precedent.

6 Again, there are no decisions.  
7 There's no prior regulatory practice. Nothing  
8 where an individual can come in and say, "I  
9 know that what I've got is not a delicatessen  
10 because I've got a big hood system," or a  
11 range or a cook top.

12 You know, I understand the idea  
13 that the intensity of cooking use should be  
14 something that the zoning regulations account  
15 for but they don't and they haven't up to  
16 date. I see a fundamental fairness issue here  
17 with taking an establishment that the city  
18 licensed as a delicatessen and essentially  
19 making this the first case.

20 I think Mr. Crews' testimony is  
21 clear this is the first case where you are  
22 revoking a delicatessen occupancy permit

1 because it's a carry out. As I said, I think  
2 that's a rulemaking. It's not anything that  
3 any landlord or any tenant could know about in  
4 advance.

5           There is nowhere to go and look to  
6 in the city's rules or regulations to say, "Am  
7 I within the law or am I not within the law?  
8 What is my establishment? What am I? I'm a  
9 carry out but so what? Am I a delicatessen?  
10 Am I okay? Am I not okay?"

11           Furthermore, I don't know that  
12 there is any evidence that this establishment,  
13 even if it is a Chinese carry out, I mean,  
14 there is no indication that it's a fast food  
15 restaurant. My suggestion is if it's not a  
16 fast food restaurant, it has to be a  
17 delicatessen.

18           It can't exist out in space as its  
19 own unique planet. If it is not a fast food  
20 restaurant, then I don't care if it's a  
21 Chinese carry out or a Mongolian carry out or  
22 an Indian carry out. It has got to be a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 delicatessen if it is not a fast food  
2 restaurant. I don't find that there is any  
3 evidence in the record that this establishment  
4 is a fast food restaurant as that term is  
5 defined in the zoning ordinance.

6 We've got, I think, at this time  
7 the best available evidence that maybe there  
8 was 30 square feet of floor area available for  
9 customer lineup. There is no evidence how  
10 much of the space was customarily used for  
11 patron queuing. There is no evidence that any  
12 particular part of the floor area was  
13 allocated or used for customer queuing.

14 Those are the terms in the zoning  
15 ordinance. Ten percent of the floor area must  
16 be used and allocated. Allocated and used.  
17 There's no indication that there is any lines  
18 on the floor or any stations or rows or areas  
19 that are marked off for customer queuing or  
20 that there is a line in front of the cashier  
21 or the cash registers.

22 There's nothing here. There is no

1 precise estimates either as to the amount of  
2 floor area. Mr. Gorgone indicated that it's  
3 about 720 square feet but that is the gross  
4 floor area. Office of Planning said 700  
5 square feet. Mr. Bjorge said it's about 567  
6 square feet.

7 The issue of how much is public  
8 space and nonpublic space has not been  
9 addressed and that is a necessary factor in  
10 calculating whether the queuing area would  
11 make this a fast food restaurant. I just find  
12 that there is no evidence that this Chinese  
13 carry out is a fast food restaurant.

14 If it's not, then it has got to be  
15 a delicatessen. We do get to a sort of  
16 conundrum here about the ordinance definition  
17 of a fast food restaurant. It appears to be  
18 directed at restaurants that prepare a whole  
19 bunch of food in advance and you come in and  
20 you pick the food up because it has already  
21 been preprepared like a McDonald's or any  
22 other places where you've got food and a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 warming bin and you just order it and it's  
2 there right away.

3 This whole denial from Mr. Crews  
4 and the reworking of the definitions is kind  
5 of standing the fast food issue on its head  
6 and now we are saying that if you make all the  
7 food according to the customer order, you are  
8 a fast food restaurant. As Mr. Crews himself  
9 put it, it comes down to plastic and paper and  
10 I can't believe that is what it really comes  
11 down to. With that I guess I conclude my  
12 remarks.

13 CHAIRPERSON MILLER: Thank you. I  
14 have one question for Mr. Crews again.

15 I don't think we have this  
16 capacity but I'm wondering if we do. For  
17 instance, does DCRA have some type of database  
18 where if you put in deli Certificates of  
19 Occupancy you would pull up all the businesses  
20 that have one?

21 MR. CREWS: No, unfortunately we  
22 cannot sort our database by use for the

1 Certificate of Occupancy.

2 CHAIRPERSON MILLER: Okay. That  
3 would be interesting to see if there were any  
4 Chinese food carry outs other than this one.

5 MR. CREWS: It would be.

6 CHAIRPERSON MILLER: Okay.

7 MR. CREWS: Well, there are. I  
8 can say that over the 18 months I've been  
9 here, and I know counsel for the appellant  
10 would have to agree because several of them  
11 were his clients, that we have done a lot of  
12 carry outs where we've done inspections and  
13 realized that they really are fast food  
14 restaurants.

15 On change of ownerships we have  
16 given them a temporary certificate, as I  
17 mentioned earlier, in a sense of fairness and  
18 balance to come before you all in an effort as  
19 your process allows to have neighborhood  
20 impact through the ANC and to be able to place  
21 conditions to minimize external impacts but  
22 hopefully not shut down a vast quantity of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701



1       hardworking folk.

2                   CHAIRPERSON MILLER:     These were  
3       deli Certificates of Occupancy?

4                   MR. CREWS:   Right.  They were deli  
5       Certificates of Occupancy.  It's really more  
6       than 100.  It has to be more than 100 but  
7       we've done in the 18 months I've been here.  
8       Now, the question you're asking why aren't  
9       they coming in front of us because you're not  
10      getting this deluge.

11                  Well, that would be our next step  
12      is to remind these folks that they have a  
13      temporary Certificate of Occupancy and they  
14      need to put their application in here to  
15      continue on.  This case is not a case of --  
16      this case is not in a commercial area but as  
17      a nonconforming use case in terms of  
18      residential use where they changed the use.

19                  I define it as changing the use  
20      from -- I mean, the factual evidence was that  
21      changing the use for a sandwich shop to a  
22      Chinese carry out from a zoning definition was

1 a change of use from a delicatessen which was  
2 a grandfathered use to a fast food restaurant.  
3 I believe in my testimony I did go through the  
4 elements and indicate why I thought this was  
5 a fast food restaurant.

6 CHAIRPERSON MILLER: Okay. Maybe  
7 it's getting late but to me that seems fairly  
8 relevant to the appellant's concern that there  
9 weren't any other situations that were similar  
10 and that you were picking them out for  
11 enforcement here.

12 MR. CREWS: Again, our evidence  
13 showed that it was in 1999. I had just moved  
14 to the city and didn't even know about ANCs  
15 let alone this journey I've been on. Again,  
16 in 2003 we have the memo from my predecessor  
17 that also indicated a distinction between  
18 delicatessen and carry out.

19 CHAIRPERSON MILLER: Okay. I  
20 don't know whether I'm missing something but  
21 we are going to leave the record open for  
22 certain submissions. It sounded like you were

1 saying that there were other similar  
2 situations where the Certificate of Occupancy  
3 was up because of a change in ownership or  
4 something like that.

5 You were indicating that they  
6 would need changed from a certain type of  
7 restaurant to carry out or whatever as it came  
8 up. I think I would be interested in seeing  
9 some of that in the record.

10 Okay. Maybe we can review at this  
11 point, Ms. Bailey, what the -- I'm so sorry.

12 MR. ETHERLY: That's okay. I was  
13 quietly chomping at the bit. Just very  
14 quickly because I have two very poignant  
15 follow-up questions. I just want to be sure  
16 that I am very clear. I think the exchange  
17 between the Chair and Mr. Crews kind of hit  
18 upon it. For the appellant are you in receipt  
19 or in possession of any Certificate of  
20 Occupancy for anything other than a  
21 delicatessen that is more recent than 1998?

22 MR. OSNOS: Oh, yes. Yes, sir.

1       There was, I think -- I'm sorry. Let me --

2               MR. ETHERLY: What I have now --

3               MR. OSNOS: I misunderstood your  
4       question. More recent licenses.

5               MR. ETHERLY: At Exhibit 16 the  
6       most recent Certificate of Occupancy appears  
7       to be the June 4, 1998 C of O which is for  
8       delicatessen, no seats, not sexually oriented.

9               MR. OSNOS: That's for Ming Zhang?

10              MR. ETHERLY: Yes, sir.

11              MR. OSNOS: That is the most  
12       recent occupancy permit, yes.

13              MR. ETHERLY: Okay. Okay. Second  
14       question, and I'm hesitant to toss it out  
15       there because this perhaps gets at the crux of  
16       the issue, but as we kind of walk through this  
17       now, what I'm kind of left struggling with,  
18       and I think Mr. Crews hit upon it, is we have  
19       what now appears to be a fairly unrebutted  
20       chain of correspondence between DCRA that  
21       indicates there's a concern going back as far  
22       as 1999, I believe, being the earliest one and

1 the most recent one being the application for  
2 Certificate of Occupancy which is denoted as  
3 being denied and apparently dated somewhere on  
4 or about September 22, '06.

5 It appears to me as though there  
6 was some clear notice that there was an issue,  
7 that there were concerns on DCRA's part about  
8 what was happening here and notice that is  
9 consistent with the factual presentation that  
10 has been provided by the ANC. I am perhaps  
11 looking to maybe not get into this particular  
12 issue because, again, I think this is probably  
13 the crux of the case but that is what I'm kind  
14 of left struggling with now.

15 MR. OSNOS: I think the crux of  
16 the case, the arguments that I've put forth  
17 and the arguments that Mr. Crews as put forth,  
18 I mean, the question is which of us is right.  
19 If I'm right, then these previous notices  
20 don't mean anything.

21 MR. ETHERLY: They have no effect.  
22 But if you're wrong, then it begs the question

1       why take on city hall and lose.

2                   MR. OSNOS:   Wait a minute.

3                   MR. ETHERLY:   I'm being somewhat  
4       kind of rhetorical and facetious with the  
5       question because that is the purpose of why  
6       you're here.  You are here to appeal because  
7       you're taking on city hall.

8                   MR. OSNOS:   I'm here to take on  
9       city hall.

10                  MR. ETHERLY:   I understand.

11                  MR. OSNOS:   I wasn't involved in  
12       it before.  I mean, I'm here now because he  
13       stands to lose a lot of money.

14                  MR. ETHERLY:   Understood.  He has  
15       significant interest at issue here.

16                  MR. OSNOS:   A tenant went out of  
17       business.  At best -- at best the city's  
18       position is based on a whole history of  
19       regulation that is convoluted and unclear.

20                  MR. ETHERLY:   Gotcha.

21                  MR. OSNOS:   There was never any  
22       notice that any rational person could look to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 and say, "Oh, yes. I understand that by  
2 having lots of Chinese carry out food I'm  
3 definitely not a delicatessen anymore."

4 MR. ETHERLY: So in your thinking  
5 is there a point at which a delicatessen stops  
6 becoming a delicatessen because you hear the  
7 argument. At a certain point somewhere around  
8 1998/98 we began to see more extensive  
9 operations underway.

10 Perhaps to you the rhetorical law  
11 school question, hypothetical question which  
12 we all hate as lawyers but we get them all the  
13 time, is, "When do you stop becoming a  
14 delicatessen and you become something else?"

15 MR. OSNOS: I have the answer for  
16 you. When the Zoning Commission promulgates  
17 clear regulations to tell people what they can  
18 and can't do.

19 MR. ETHERLY: I see.

20 MR. OSNOS: I'm being pretty  
21 serious because all carry outs were licensed  
22 by the city as delicatessens. I haven't heard

1 Mr. Crews give any convincing evidence that  
2 prior to his tenure when an applicant went  
3 into apply for a delicatessen occupancy permit  
4 that the city would go out and look at how  
5 much cooking equipment was there to decide if  
6 the use was too intense and whether it was  
7 really a carry out, not a delicatessen.

8 This is something that started  
9 with Mr. Crews except for the one notice, the  
10 '99 and, I guess, the '03 notice at this  
11 property. Even though notices aren't very  
12 clear. It just says you are exceeding or you  
13 are operating outside the scope of your  
14 occupancy permit. It doesn't say why.

15 It doesn't say because you've got  
16 too much cooking equipment or because you are  
17 a carry out or you are not serving the right  
18 kind of food. The preparation is too intense  
19 and, therefore, the impact is too severe on  
20 the surroundings. There's no way that anybody  
21 could have seen this coming or known about it.

22 MR. ETHERLY: I understand the



1 argument. I absolutely understand the  
2 argument. I think it's very clear to me now.  
3 Again, I have said it before during this  
4 proceeding the oral argument has been  
5 extraordinarily helpful.

6 I think what I'm beginning to see  
7 from DCRA here, and granted there is a lack of  
8 clarity, if you will, but if you start with  
9 the fact that there is no definition of  
10 delicatessen and you move to Webster's as the  
11 Administrator has endeavored to do and has  
12 discussed in the course of his testimony,  
13 recall that very clearly in Section 101 of the  
14 zoning regs under Interpretation and  
15 Application it says the following:

16 "In their interpretation and  
17 application the provisions of this title shall  
18 be held to be the minimum requirements adopted  
19 for the promotion of the public health,  
20 safety, morals, convenience, order,  
21 prosperity, and general welfare to (a) provide  
22 adequate light and air." We are not debating

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1       that here.

2               "Prevent undue concentration of  
3       population and the overcrowding of land and  
4       provide distribution of population, business,  
5       and industry." So forth and so on. There is  
6       that catch-all portion in the preamble, if you  
7       will, of the zoning regs that begins to grab  
8       at everything else.

9               If there is not some specificity  
10       otherwise in the zoning regs, there is this  
11       preamble which says, "Interpret and apply  
12       these regulations in such a manner as to do  
13       the following."

14              To an extent I'm hearing a little  
15       bit of the argument from DCRA that we might  
16       not have as clear specificity as we want in  
17       terms of delicatessen but I'm applying this in  
18       such a way to be consistent with Section 101.  
19       And it dictates -- I read from 101.1, by the  
20       way.

21              As I began to look at what has  
22       been added to the subject property in terms of

1 some of the factual elements that have come  
2 out that at this point haven't been rebutted,  
3 and that is considerable exhaust, venting, and  
4 other types of investments in the property to  
5 create a more sizable operation and scope of  
6 menu offerings.

7 That seems to be kind of the heart  
8 of where DCRA is trying to get to, albeit  
9 somewhat with a little bit of, I don't want to  
10 say struggle. It wasn't the cleanest  
11 application but as we walk through it, I think  
12 that is going to be the bar that you're going  
13 to have to hurdle here, that you are going to  
14 have to clear here --

15 MR. OSNOS: But you also have to  
16 consider the legal issue whether this new  
17 struggle by Mr. Crews to figure out what the  
18 regulations mean and implement them in a  
19 practical manner according to the goals of the  
20 zoning code. You've got to decide whether  
21 this new endeavor really is a rulemaking.  
22 It's going against years and years of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 established practice.

2 MR. ETHERLY: I think that is a  
3 valid point to raise. I'm not going to  
4 indicate perhaps where I am on that but I will  
5 say that I do think it's a valid question to  
6 talk about because at the outset I did  
7 struggle with and perhaps I'm still struggling  
8 somewhat with the notion of how does a  
9 business operator have notice, if you will, or  
10 some indication that this is the direction  
11 that DCRA may move in.

12 Again, the zoning regs at Section  
13 101 in the absence of other specificity, more  
14 specific subsections, Section 101 is that  
15 broad sword that at the end of the day the  
16 zoning regs are there to enact and utilize if  
17 necessary.

18 I appreciate you engaging in that  
19 dialogue, and I perhaps kind of went far  
20 afield on you in terms of some of the  
21 philosophical stuff, but I appreciate it. I  
22 understand the argument and I appreciate the

1 presentation. Thank you, sir.

2 Thank you, Madam Chair.

3 MR. LOUD: Madam Chair, really  
4 quick question.

5 Mr. Osnos, based on the record --  
6 let me back up. I have a very practical kind  
7 of question for you and your client. What  
8 does your client stand to gain out of this  
9 appeal? The property has been vacant for over  
10 a year based on what's in the record. The  
11 tenant left January of '06. I guess what is  
12 at stake for your client in this matter?

13 MR. OSNOS: First of all, our  
14 tenant applied in February. As reflected in my  
15 submission, my brief, I spent months and  
16 months and months contacting Bill Crews who  
17 promised me for months and months that we  
18 would have a formal denial.

19 He told me that it was being  
20 circulated to the DCRA counsel's office for  
21 review and I fully expected a detailed  
22 explanation of the decision that we could

1 appeal. We've got until September. We didn't  
2 let this thing drag on.

3 It took until September 22nd to  
4 even get a denial from the Zoning  
5 Administrator. The only reason that came out  
6 is because Paul Luna, the tenant, wanted to  
7 get a security deposit back. He went in and  
8 prevailed upon -- he submitted a new occupancy  
9 application in September and he got Mr. Crews  
10 to deny it and then we appealed it.

11 We would have appealed this thing  
12 eight, nine, ten months before had a denial  
13 been properly issued at the time. Mr. Crews  
14 adverted to the fact that he was going to deny  
15 this based upon a discontinuance argument for  
16 months and months and months and months. You  
17 don't know how many times I called him and e-  
18 mailed him and tried to get him to act on this  
19 so that we could bring this matter to the  
20 Board.

21 It is not in any way our choice  
22 that this matter has sort of lain without

1 resolution for over a year. What is to be  
2 gained? If the Board rules in our favor, my  
3 client, Mr. Gorgone, is a former restaurant  
4 owner and operator, he will go back in and he  
5 will open up a delicatessen. We would hope  
6 that based on the ruling here if it goes in  
7 our favor that the Zoning Administrator this  
8 time would not deny his application and we  
9 would open and operate a functioning business  
10 down there, or another tenant could.

11 This is his retirement income. We  
12 had a lease of \$2,700 a month for that space.  
13 That's over \$30,000 a year. It's an amenity  
14 for the neighborhood although obviously how  
15 it's operated has a considerable bearing on  
16 whether it's a detriment or an amenity, but in  
17 general terms a delicatessen would be an  
18 amenity. Specifically what he stands to gain  
19 is the ability to generate either rental  
20 income or directly engage in business at the  
21 space.

22 MR. LOUD: You don't have to

1 elaborate. I just wanted to get a sense of  
2 whether this was a moot point or not. Clearly  
3 it's not.

4 MR. OSNOS: In no way is it a moot  
5 point. No, sir. I mean, obviously if the  
6 property can't be used for that nonconforming  
7 commercial use, it's going to have to be  
8 converted back to residential. That is going  
9 to require a very considerable expense  
10 obviously. I mean, it's a major, major  
11 undertaking.

12 CHAIRPERSON MILLER: I do just  
13 have one question based on what I thought you  
14 said.

15 MR. OSNOS: Yes.

16 CHAIRPERSON MILLER: Maybe you can  
17 clarify. Did you say that all carry outs got  
18 Certificates of Occupancy as delis?

19 MR. OSNOS: Yes.

20 CHAIRPERSON MILLER: Up until  
21 when? Up until now?

22 MR. OSNOS: Up until -- I mean, up



1 until Mr. Crews decided that some carry outs  
2 can't get a delicatessen occupancy permit, up  
3 until 18 months ago.

4 CHAIRPERSON MILLER: Okay. Is  
5 there evidence of that in the record?

6 MR. OSNOS: I mean, I don't have  
7 subpoena authority. I can't get DCRA here but  
8 the Board could request Mr. Crews.

9 CHAIRPERSON MILLER: I'm just  
10 wondering what that statement is based on.

11 MR. OSNOS: Twenty-five years of  
12 experience --

13 CHAIRPERSON MILLER: Your personal  
14 experience?

15 MR. OSNOS: -- representing small  
16 business owners. Yes.

17 CHAIRPERSON MILLER: Okay. Okay.

18 MR. OSNOS: Just hundreds and  
19 hundreds of small business food operators.

20 CHAIRPERSON MILLER: Okay. I know  
21 time is running.

22 Mr. Hood.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1                   MR. HOOD:       I just have one  
2 question. I want to make sure you get your  
3 car by 7:00. You mentioned that it took you  
4 so many months, I forget what you said, to get  
5 a denial from Mr. Crews. Why was that?

6                   MR. OSNOS: I have absolutely no  
7 idea. In the original application --

8                   MR. HOOD: Let me ask you, Mr.  
9 Crews. I understand that you spend four hours  
10 in your office and you don't take any calls or  
11 e-mails. You just deal with issues so why is  
12 that an issue?

13                  MR. CREWS: Well --

14                  MR. HOOD: Well, first is that  
15 true that you don't calls during the day for  
16 about four or five hours from any residents  
17 and you deal with just issues?

18                  MR. CREWS: Well, I take calls as  
19 I can but there is a tremendous workload. The  
20 issue here was the matter of a discussion of  
21 what would be the most appropriate way to deal  
22 with Mr. Luna's application.

1           It took a long time a resolve but  
2           the response is we thought it best to actually  
3           deny a Certificate of Occupancy rather than do  
4           some sort of notice of discontinuation which  
5           is what I had proposed in order to give the  
6           property owner a notice sooner.

7           Mr. Luna was out of the area for  
8           quite some time during that time and we had  
9           misplaced the original application of his so  
10          when he came back in, then we did move fairly  
11          quickly.

12          MR. HOOD:   Okay.   And you do have  
13          a staff.   Right?

14          MR. CREWS:   Yes.

15          MR. HOOD:   Thank you.

16          MR. OSNOS:   I should make clear  
17          I'm not really trying to personally blame Mr.  
18          Crews for anything but the reason that it was  
19          delayed so long in coming here is because we  
20          couldn't get his office to issue the denial  
21          but I don't mean to personally blame him or --

22          MR. HOOD:   I asked that because I

1 do believe when people deal with the  
2 Government it should be predictable. I will  
3 tell you that so that was why I asked that  
4 question to find out if you had a staff and if  
5 what other people are saying out here in the  
6 city is true because it's a small town. Thank  
7 you.

8 CHAIRPERSON MILLER: Any other  
9 questions? Okay. I just think we need to go  
10 over what we said we would leave the record  
11 open for.

12 Ms. Bailey, do you want to start  
13 and I'll jump in or do you want me to start?

14 MS. BAILEY: I'll start, Madam  
15 Chair.

16 CHAIRPERSON MILLER: Okay.

17 MS. BAILEY: DCRA is to provide a  
18 clear copy of the Notice of Violation. DCRA  
19 is to put into the record the definition of  
20 delicatessen that Mr. Crews used. The record  
21 was left open for Ms. Jennifer Waldman to file  
22 additional written comments. This was the

1 lady who applied for party status from the  
2 Richmond Condominium Association.

3 Mr. Bjorge, ANC Commissioner 2B-05  
4 was to file additional written documents  
5 including photographs and letters from the  
6 neighbors. DCRA is to file documentation to  
7 identify those establishments where temporary  
8 one-year Certificates of Occupancy were issued  
9 to continue to operate as a deli until they  
10 receive, I'm assuming, approval from the Board  
11 to operate as a carry out.

12 Madam Chair, I'm not sure if you  
13 want findings of facts and conclusions of law.  
14 Those are the documents that I have.

15 CHAIRPERSON MILLER: Okay. Thank  
16 you. I don't have any other documents.

17 Mr. Crews, was it that specific,  
18 delis to another type of restaurant? Okay.  
19 Great.

20 Do other Board members feel they  
21 need proposed findings and conclusions of law?  
22 I don't think so. I think you have fully

1       briefed it. Is there anything else that the  
2       parties feel we missed that they want to put  
3       into the record or ask us about?

4               MR. OSNOS:       At the risk of  
5       prejudicing my case, I'm going to say no  
6       because I'm kind of petrified I'm not going to  
7       get my car out.

8               CHAIRPERSON MILLER:   Okay.

9               MR. OSNOS:       I've got about 12  
10       minutes to get over there and it will take  
11       about 10.

12              CHAIRPERSON MILLER:   Okay.

13              MR. OSNOS:       I just want to thank  
14       everybody on the panel today for a very  
15       professional attitude and the questions. I  
16       appreciate it.

17              CHAIRPERSON MILLER:   Thank you.  
18       You can check with the Office of Zoning as to  
19       the final remarks here. We are going to be  
20       setting it for decision making and setting a  
21       time when these documents will be coming into  
22       the record. Those are the only two things

1 that I think are left to be done.

2 MR. OSNOS: Can I call Mr. Nero  
3 and find out about that? I'll contact the  
4 Office of Zoning. Thank you.

5 CHAIRPERSON MILLER: Okay.

6 MR. OSNOS: Thanks. I'm sorry.

7 CHAIRPERSON MILLER: You can  
8 contact Mr. Moy who is right here.

9 MR. OSNOS: Okay.

10 CHAIRPERSON MILLER: Okay. Thank  
11 you. Good night.

12 You two are the ones who are  
13 submitting the documents so when should we  
14 expect them? Within the week?

15 MR. BJORGE: Yes, within a week.

16 CHAIRPERSON MILLER: By next  
17 Tuesday? Okay. 3:00 or what time do you like  
18 to receive them, Ms. Bailey?

19 MS. BAILEY: Next Tuesday by 3:00  
20 would be fine. The date of next Tuesday is  
21 April 17th.

22 CHAIRPERSON MILLER: Okay. And

1       then I think we ought to set this for decision  
2       making perhaps at our next public meeting  
3       which is May 1st. Persons and parties don't  
4       need to ge present at our public meeting. The  
5       Board will be deliberating it and not taking  
6       any further evidence.

7               If you are interested in following  
8       it, you can either watch it live on the  
9       website or come down or find out later what  
10      happened. Okay. Thank you very much. Do we  
11      have any other business --

12             MR. BJORGE: Thank you.

13             CHAIRPERSON MILLER: -- on the  
14      agenda?

15             MS. BAILEY: No other business,  
16      Madam Chair.

17             CHAIRPERSON MILLER: Okay. Oh,  
18      yes, Mr. Green.

19             MR. GREEN: Thank you very much  
20      for your time and attention.

21             CHAIRPERSON MILLER: Thank you.  
22      Okay. Let meeting is adjourned.



1 (Whereupon, at 6:48 p.m. the  
2 meeting was adjourned.)  
3  
4  
5  
6  
7