

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,

FEBRUARY 28, 2012

+ + + + +

The Regular Public Hearing convened in the Jerrily R. Kress Memorial Hearing Room 220 South at 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Meridith Moldenhauer, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MERIDITH MOLDENHAUER	Chairperson
NICOLE SORG	Vice Chairperson
LLOYD JORDAN	Board Member
JEFFREY HINKLE	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MARCIE COHEN, Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
JOHN NYARKU	Zoning Specialist
STEPHEN RICE	Zoning Specialist

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Board of Zoning Adjustment
District of Columbia
CASE NO. Transcript
EXHIBIT NO. null

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN MORDFIN
KAREN THOMAS
MAXINE BROWN-ROBERTS
ARTHUR JACKSON

DISTRICT DEPARTMENT OF TRANSPORTATION
STAFF PRESENT:

BRYON WHITE

This transcript constitutes the
minutes from the Regular Public Hearing held
on February 28, 2012.

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

2 9:44 a.m.

3 CHAIRPERSON MOLDENHAUER: This
4 hearing will, please, come to order.

5 Good morning, ladies and
6 gentlemen. We are located in the Jerrily R.
7 Kress Memorial Hearing Room located at 441 4th
8 Street, N.W.

9 This is February 28, 2012, a
10 Public Hearing of the Board of Zoning
11 Adjustment for the District of Columbia.

12 My name is Meridith Moldenhauer,
13 Chairperson. Joining me today to my left is
14 Vice Chair Nicole Sorg, Mayoral Appointee, to
15 my far left is a representative of the Zoning
16 Commission, Marcie Cohen, and to my right is
17 Jeffrey Hinkle, a representative of the
18 National Capital Planning Commission.

19 Copies of today's hearing agenda
20 are available to you and are located to my
21 left in the wall bin near the door.

22 Please be advised this proceeding

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1 is being recorded by a court reporter and is
2 also being webcast live. Accordingly, we must
3 ask you to refrain from any disturbing noise
4 or actions in the hearing room.

5 When presenting information to the
6 Board, please, turn on your microphone, first
7 stating your name and home address. When you
8 are finished speaking, please, turn off your
9 microphone, so that your microphone is no
10 longer picking up any sounds or background
11 noise.

12 All persons planning to testify
13 either in favor or in opposition are to fill
14 out two witness cards. These witness cards
15 are located to my left on the table near the
16 door and on the witness tables in front of
17 you.

18 Upon coming forward to speak to
19 the Board, please, give both witness cards to
20 the court reporter sitting to my right.

21 Also, if you wish to file any
22 written testimony or any additional supporting

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1 documentation today, please, submit an
2 original along with 12 copies to the Secretary
3 for distribution. If you do not have the
4 requisite number of copies, you can reproduce
5 copies on the machine in the Office of Zoning
6 located across the hall.

7 The order of procedure for special
8 exceptions and variances are as follows: One,
9 statement of the applicant and applicant's
10 witnesses; two, parties and persons in
11 support; three, parties and persons in
12 opposition; four, reports of the ANC; five,
13 Government reports; and six, rebuttal and
14 closing statements from the applicant.

15 The order of procedure for an
16 appeal application are as follows: One,
17 statement of the appellant and appellant's
18 witnesses; two, the Zoning Administrator or
19 the Government official's case; three, a case
20 of the owner, lessee, operator or intervenor;
21 four, other intervenors in the case, if
22 permitted by the Board; five, the ANC within

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1 which the property is located; and then six,
2 rebuttal and closing statements from the
3 appellant.

4 Pursuant to ' 3117.4 and 3117.5,
5 the following time constraints will be
6 maintained: The applicant, appellant, persons
7 and parties, except the ANC, in support,
8 including witnesses will be given 60 minutes
9 collectively.

10 Appellees, persons and parties,
11 except an ANC, in opposition, including
12 witnesses will be given 60 minutes
13 collectively.

14 Individuals will be given 3
15 minutes and organizations will be given 5.

16 These time restrictions do not
17 include cross-examination or questions from
18 the Board. Cross-examination of a witness is
19 permitted by the applicant or the party. The
20 ANC within which the property is located is
21 automatically a party to a special exception
22 or variance case.

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1 Nothing prohibits the Board from
2 placing reasonable restrictions on cross-
3 examination, including the limitation on time
4 and the scope of cross-examination.

5 The record will be closed at the
6 conclusion of each case, except for any
7 material specifically requested by the Board.

8 The Board and the staff will specify at the
9 end of each hearing exactly what is expected
10 and the date when that information must be
11 presented to the Office of Zoning.

12 After the record is closed, no
13 other information will be accepted by the
14 Board.

15 The District of Columbia's
16 Administrative Procedures Act requires that a
17 public hearing on each case be held in the
18 open and before the public. Pursuant to '
19 405(b) and 406 of the Act, the Board may,
20 consistent with the rules and procedures of
21 the Act, enter into a closed meeting on a case
22 for purposes of seeking legal counsel on a

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1 case pursuant to D.C. Code ' 2-575(b)(4)
2 and/or deliberating on a case pursuant to D.C.
3 Code ' 2-575(b)(13), but only after providing
4 the requisite public notice and in the case of
5 an emergency closed meeting after taking a
6 roll call vote.

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

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

16 The Board will now consider any
17 preliminary matters. Preliminary matters are
18 related to whether a case will or should be
19 heard today, such as a request for
20 postponement, continuance or withdrawal or
21 whether proper adequate notice of a hearing
22 has been given.

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

5 Mr. Secretary, do we have any
6 preliminary matters?

7 MR. MOY: Madam Chairperson, there
8 are preliminary matters, but staff would
9 suggest that it would be appropriate for the
10 Board to address these matters when each of
11 the cases are called individually.

12 CHAIRPERSON MOLDENHAUER: Yes,
13 thank you.

14 Then, at this point in time, all
15 individuals wishing to testify, if you can,
16 please, stand and the oath will be
17 administered?

18 (Whereupon, witnesses were sworn.)

19 MR. MOY: Ladies and gentlemen,
20 you may consider yourself under oath.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you, Mr. Moy. If you can call the first case?

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1 MR. MOY: Yes, good morning, Madam
2 Chairperson and Members of the Board.

3 The first case for Board action is
4 Application No. 18256. This is the appeal of
5 the Advisory Neighborhood Commission 1C. And
6 as advertised, this is how the caption reads:

7 Pursuant to 11 DCMR 3100 and 3101,
8 from a May 13, 2011, decision by the Zoning
9 Administrator, Department of Consumer and
10 Regulatory Affairs, to issue a Certificate of
11 Occupancy, C054337, allowing a fast food
12 establishment, the Peking Garden Carry Out,
13 and food delivery in the C-2-A District at
14 premises 2008 18th Street, N.W. The property
15 is located in Square 2555, Lot 47.

16 If the Board will recall, this
17 appeal has been before the Board two previous
18 occasions. The first one on October 25, 2011
19 and January 17, 2012. In each case, the
20 appeal has been postponed.

21 There are three motions before the
22 Board. There is a Motion to Dismiss the

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1 appellant's opposition to the motion and a
2 motion by the appellant to appeal, to amend
3 the appeal.

4 And that completes the staff's
5 briefing, Madam Chair.

6 CHAIRPERSON MOLDENHAUER: Thank
7 you very much, Mr. Moy.

8 I'll look to the parties to
9 introduce themselves starting on my left with
10 the appellant.

11 MR. ROTH: Good morning, Madam
12 Chairperson and Members of the Board. My name
13 is Alan Roth and I represent ANC-1C. I'm
14 accompanied by Commissioner Stacey Moye, who
15 is the Vice Chair of ANC-1C.

16 MS. MOYE: Good morning.

17 CHAIRPERSON MOLDENHAUER: Good
18 morning. Thank you.

19 MR. THOMAS: Good morning. I'm
20 Bradley Thomas. I'm representing Mr. James
21 Washington, the landlord or interested party.

22 MR. SURABIAN: Assistant Attorney

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1 General Jay Surabian on behalf of the
2 Department of Consumer and Regulatory Affairs.

3 CHAIRPERSON MOLDENHAUER: Mr.
4 Thomas, do we have any written submission from
5 you entering your appearance or indicating
6 your representation of the property owner or
7 the landlord?

8 MR. THOMAS: Yeah, I believe so.

9 CHAIRPERSON MOLDENHAUER: If you
10 are -- actually if you can hit the record?

11 MR. THOMAS: Yes, I believe from
12 the October hearing there should have been an
13 entry of appearance, at that time.

14 CHAIRPERSON MOLDENHAUER: I'm just
15 pulling up my old record and trying to see if
16 I can find something. Mr. Moye, do we have
17 anything? I'm just looking at our exhibits.
18 I see Exhibit 20 from the initial hearing, but
19 in my exhibit list I've got nothing from Mr.
20 Thomas.

21 MR. MOY: Yes, I'm scanning this
22 as quickly as I can. It doesn't catch my eye.

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1 No.

2 CHAIRPERSON MOLDENHAUER: Mr.
3 Thomas, do you know when you submitted it? Do
4 you have a copy of it?

5 MR. THOMAS: I thought it was on
6 that initial day. If not, I can submit. I
7 thought I did it that day of the initial
8 hearing.

9 CHAIRPERSON MOLDENHAUER: I'm just
10 not seeing anything in my record and I don't
11 believe Mr. Moy is finding anything in our
12 official case file. If you could, please,
13 submit something just on the record, so we
14 have that --

15 MR. THOMAS: I'll do that.

16 CHAIRPERSON MOLDENHAUER: --
17 moving forward? Thank you.

18 And since I don't have it written
19 down, if you can just confirm with me the
20 client that it is that you represent?

21 MR. THOMAS: It is Mr. James M.
22 Washington, who is an interested party, and

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1 who is the landlord of the premises at issue.

2 CHAIRPERSON MOLDENHAUER: Okay.

3 So he is the landlord obviously and owner of
4 the property?

5 MR. THOMAS: Yes.

6 CHAIRPERSON MOLDENHAUER: Okay. I
7 understand. Thank you.

8 MR. ROTH: Madam Chair?

9 CHAIRPERSON MOLDENHAUER: Yes?

10 MR. ROTH: According to the, at
11 least, Tax Assessors' records, the property is
12 also owned by Mr. Barry Washington. Does Mr.
13 Thomas also represent Mr. Barry Washington?

14 MR. THOMAS: Mr. Barry Washington
15 is not an owner of the property.

16 CHAIRPERSON MOLDENHAUER: Is that
17 the tax records or is that the land records?
18 Because lots of times the land records and the
19 tax records don't always mesh. So are you
20 referring to the tax records?

21 MR. ROTH: I'm referring to both
22 tax records and to building permits posted on

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1 the property.

2 CHAIRPERSON MOLDENHAUER: Okay.

3 MR. THOMAS: Mr. Barry Washington
4 has often acted as the agent of his father in
5 these -- with regard to the property and
6 that's where the confusion has arisen that the
7 tax billings may go out to his address and may
8 have his name on them, but the land records
9 are -- clearly indicate that Mr. James
10 Washington is the sole owner.

11 And that issue has come up before
12 in other matters, so I'm very familiar with
13 that.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 At this point in time, I think that we can --

16 MR. ROTH: Okay.

17 CHAIRPERSON MOLDENHAUER: -- we
18 will take that for face value and, obviously,
19 Mr. Thomas' representation we will take as
20 accurate and we will move on, at this time, in
21 that regard.

22 We have our initial issues as Mr.

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1 Moy indicated. We have got pretty much three
2 motions pending. An initial Motion to Dismiss
3 in opposition and then a Motion to Amend the
4 Appeal by ANC-1C.

5 The first issue that I think we
6 will bring up is the Motion to Dismiss. And
7 the issue that was raised by DCRA was
8 timeliness. And then that was, I think, then
9 also further addressed in regards to what
10 exactly is the issue on appeal to make sure we
11 understand potentially what time frame.

12 And I think that there initially
13 was a potential concern in regards to a claim
14 to be appealing the actual 2003 C of O, but I
15 think that that has been clarified.

16 And in regard to the Motion to
17 Amend the Appeal to clarify the relief that is
18 being sought, that it's not an actual appeal
19 of the C of O, but rather an appeal of the
20 failure to act by the ZA in his May 13, 2011
21 email and subsequent omissions potentially for
22 lack of investigation.

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1 And so based on that, I find that
2 the Motion to Dismiss in regards specifically
3 to untimeliness is not proper, at this time.
4 I'll see if any Board Members have any other
5 comments about that issue? No.

6 But then I want to just make sure
7 that we address all of the issues and then for
8 the Motion to Amend the Appeal, I believe that
9 that should be granted. I'll see if any Board
10 Members have any other comments on that issue?

11 My then question is, and I think
12 that this was raised in the Motion to Dismiss,
13 as to the potential issue of whether the case
14 is timely or is ripe, based on whether or not
15 what actions potentially have occurred or
16 maybe are occurring currently by the ZA.

17 I don't see the ZA present here,
18 but I'm going to open up the floor and ask a
19 question to counsel, Mr. Surabian, as to are
20 there or do you know of any current
21 investigation or is there any current
22 enforcement action that is occurring to

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1 follow-up from that May 13th letter right now?

2 MR. SURABIAN: Well, I am
3 expecting the ZA this morning. I'm not sure
4 why he isn't here. I just called his office
5 and he didn't pick up and maybe he is on his
6 way.

7 What I can say is that the Zoning
8 Administrator has never authorized Peking
9 Garden to operate a food delivery service in
10 any manner. He has never issued a C of O for
11 them to be a food delivery service. And he
12 has never determined that they are acting as
13 a food delivery service now.

14 CHAIRPERSON MOLDENHAUER: Let me
15 ask a question. Has the ZA authorized an
16 investigation into that, into this issue?

17 MR. SURABIAN: The ZA has taken
18 some preliminary steps in looking into in
19 light of the materials Mr. Roth submitted in
20 his appeal, in his complaint. He has taken
21 some preliminary steps.

22 But I don't think it's appropriate

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1 to really get into that, as I still think that
2 the case should be dismissed on a
3 jurisdictional basis.

4 That, essentially, first looking
5 into the Motion to Dismiss, I think that the
6 issues that were raised in the appeal and then
7 the prehearing statement by Mr. Roth all go to
8 the issuance of the 2003 C of O and whether or
9 not that was appropriate, issues of lapse and
10 that it was -- whether it was a nonconforming
11 use and whether or not the use had been
12 discontinued.

13 All of those issues are untimely.

14 And so I -- and since I filed the Motion to
15 Dismiss, there has been sort of a radical
16 change here in what he is saying he is
17 appealing and what he is saying is that it's
18 now the Zoning Administrator's lack of action.

19 So I don't think it's appropriate
20 for the Board to say that the Motion to
21 Dismiss is inappropriate. I think that it is
22 in that all of those issues should be deemed

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1 to be untimely.

2 CHAIRPERSON MOLDENHAUER: Let me
3 rephrase. One, we have already decided on the
4 Motion to Dismiss, saying that we are not
5 going to dismiss the case.

6 But I will provide a clarification
7 for everybody, especially, if we move forward
8 into a hearing for Mr. Roth that the case is
9 no longer discussing anything about
10 nonconforming use, the 2003 C of O, lapses of
11 use, any of that issue.

12 All we are simply talking about is
13 the potential information that was presented
14 and then whether or not that information led
15 to an error by the ZA for his failure to
16 investigate or his failure to act. Omissions
17 or failure to act on the ZA as something that
18 the Board does have jurisdiction on.

19 MR. SURABIAN: All right.

20 CHAIRPERSON MOLDENHAUER: And so,
21 obviously, we are limiting, while we are not
22 granting your Motion to Dismiss, we are

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1 obviously, based on the Motion to Amend the
2 Appeal, making sure that all parties are very
3 clear in regards to the limitation of what
4 this case is about and what we understand from
5 the submission that we just received on, I
6 think it as, the 14th from the applicant, our
7 Exhibit No. 24, the supplemental prehearing
8 statement, where they have refined that
9 argument and focused simply on that issue and
10 not on those other issues that they had raised
11 earlier.

12 MR. SURABIAN: So now, we are
13 talking about this new issue that has been
14 raised. The fact is that --

15 CHAIRPERSON MOLDENHAUER: It's in
16 the original. I just want to make sure. It's
17 not a new issue. It was in their original
18 appeal, it's maybe refined and limited now,
19 but it's not a new issue.

20 MR. SURABIAN: The fact is that
21 the May 13th email doesn't contain any refusal
22 by the Zoning Administrator to enforce the

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1 regulations or investigate, no subsequent --

2 CHAIRPERSON MOLDENHAUER: And
3 that's why I asked if the ZA has actually --
4 if you can tell me, and I feel like you
5 haven't --

6 MR. SURABIAN: Yes.

7 CHAIRPERSON MOLDENHAUER: -- you
8 could have said to me yes, the ZA is doing a
9 formal investigation. It was started on this
10 date. Then I would have said, well, maybe we
11 should stay this case, because it may not be
12 ripe.

13 And so, but you haven't said that.
14 You said he has taken preliminary steps.

15 MR. SURABIAN: Right.

16 CHAIRPERSON MOLDENHAUER: And to
17 me, and I don't know about other Board
18 Members, doesn't reach the threshold of
19 satisfying my belief in regards to the fact
20 that well, maybe the relief we would be
21 granting would be moot.

22 I mean, in my view, the only

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1 relief we could grant on this case, which was
2 I think the question Mr. Jordan had, he can't
3 be here this morning, but in regards to what
4 relief is available, and I think the only
5 relief we could grant here is not a
6 determination as to what the use is, that is
7 not the Board's jurisdiction.

8 The only thing that we could
9 determine here is simply did the ZA fail to
10 investigate and we then could rule to require
11 the ZA to investigate, if he has not already
12 done that.

13 And again, I haven't heard you
14 say, Mr. Surabian, he has started an
15 investigation on this date.

16 MR. SURABIAN: Well, what I'll say
17 is that the Board -- if the issue is that the
18 investigation is taking too long or is not
19 being done in the manner that the appellant is
20 satisfied with, and that, essentially, is the
21 issue, that's not within the Board's
22 jurisdiction.

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1 The Board only has jurisdiction
2 where there is an error in the interpretation
3 of a Zoning Regulation. And I just -- and I
4 saw that again in the Board's order that just
5 came out last week in the AppleTree case.

6 That the Board has no authority to
7 hear an appeal that is not based on an
8 interpretation of a Zoning Regulation.

9 And so if what we are talking
10 about is just the Zoning Administrator, his
11 administration of his office, it's not a
12 refusal to investigate, based on his
13 interpretation of some regulation that exists.

14 CHAIRPERSON MOLDENHAUER: Well, I
15 don't think --

16 MR. SURABIAN: The Board --

17 CHAIRPERSON MOLDENHAUER: -- we
18 know that. I think that you are testifying on
19 behalf of the ZA. I think that that's
20 something that we would have to, obviously --

21 MR. SURABIAN: Right.

22 CHAIRPERSON MOLDENHAUER: I think

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1 at this point in time, you have informed me
2 about what we need to be informed of as to
3 whether or not we can potentially resolve this
4 case quickly and indicate that, okay, there is
5 an investigation going on. We will hold off
6 to rule on this until later. The appellant
7 could potentially wait to see what is
8 addressed.

9 I'm not hearing that and I think
10 that the issue before us is is this a decision
11 that is appealable? What occurred in that
12 email and have testimony from both sides in
13 regards to that issue. And I think,
14 obviously, you are going down and you are
15 arguing with respect to the actual merits of
16 the case.

17 MR. SURABIAN: Yes.

18 CHAIRPERSON MOLDENHAUER: And I
19 think that why don't we then just get started,
20 unless any Board Members have any comments
21 prior to jumping into the actual testimony or
22 presentation of the appellant and the

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1 District?

2 MR. SURABIAN: Madam Chair, if I
3 can clarify. My point is that there has been
4 no decision for the Board to even take up as a
5 case. There has been no allegation by the
6 appellant that there is some Zoning Regulation
7 that the Zoning Administrator was wrong in
8 interpreting that led to his refusal.

9 MR. ROTH: Madam Chair? And as an
10 initial point, there has been no refusal.

11 CHAIRPERSON MOLDENHAUER: I think
12 let him provide a counterargument.

13 MR. ROTH: I hesitate to look a
14 gift horse in the mouth. So let me say first,
15 I appreciate the Board's denial of the Motion
16 to Dismiss.

17 But in the course of your denial,
18 I would hope you would consider clarifying
19 something that you said in the narrowness of
20 your interpretation of the ANC's position.

21 I will make this concession. And
22 it is completely consonant with your statement

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1 of the ANC's reframing of its position and its
2 appeal in the amendment, in the proposed
3 amendment, which is we are no longer taking
4 the position that the Board should or that the
5 Zoning Administrator should revoke the C of O
6 that was issued in 2003.

7 That we concede Mr. Surabian's
8 point that if that had been the position that
9 we wanted to take, the time to have done that
10 would have been back in 2003.

11 And so at least with respect to
12 that point, we concede that that argument now
13 would be untimely.

14 Similarly, with respect to the
15 argument that there had been a lapse, which we
16 argued that that point was untimely.

17 Now, on the other hand, with
18 respect to the issue of nonconformance,
19 nonconforming use, we made the point in our
20 appeal that what the Zoning Administrator's
21 determination on May 13th did was to say this
22 -- what we alleged was a nonconforming use was

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1 not a nonconforming use, but rather it was
2 conforming, because of the definition of
3 nonconforming use in ' 199.1.

4 However, in that May 13th
5 determination, what the Zoning Administrator
6 did was completely ignore, in fact, not only
7 ignore, but failed to quote the entirety of
8 that definition. The entire definition has
9 conditions on that definition of nonconforming
10 use.

11 It says in order to qualify to be
12 a conforming use, you are subject to ' 3104.2
13 and 3104.3. The Zoning Administrator ignored
14 and never quoted those provisions. And those
15 provisions are the provisions that, basically,
16 say you can't just expand and enlarge your
17 uses beyond what your specific approved uses
18 were from back in 1979 or back in 1958.

19 The Zoning Administrator just
20 forgot conveniently to quote those things,
21 quote those provisions. That was an error in
22 the Zoning Administrator's determination.

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1 So we don't want to just, at this
2 point, relinquish that claim, because we think
3 that was an error in the Zoning
4 Administrator's determination with regard to
5 the definition of nonconforming use.

6 We would like to hold on to that
7 argument for purpose -- and we don't think
8 that that argument is untimely with respect to
9 the May 13th determination.

10 And we think that arguments
11 related to whether or not his assertion that
12 this is not a nonconforming use, but rather
13 it's conforming, are open to question, because
14 he failed to take into account those
15 conditions in the definition of nonconforming
16 use that would otherwise make this conforming
17 had Peking Garden adhered strictly to the uses
18 that were in its Certificate of Occupancy,
19 which it has failed to do.

20 So we would like to be able to at
21 least survive the Motion to Dismiss to be able
22 to put on evidence that demonstrates they

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1 exceeded what was in their Certificate of
2 Occupancy.

3 If they had strictly adhered to
4 their Certificate of Occupancy, they might be
5 a conforming use pursuant to the definition,
6 but they forfeited the right to be considered
7 a conforming use. And that determination on
8 May 13th was erroneous for that reason and,
9 therefore, we are not untimely by filing our
10 appeal in June, based on a May 13th
11 determination.

12 So with respect to that argument,
13 we would like to keep that alive and we would
14 like to keep issues flowing from that
15 determination alive, because that was an
16 erroneous determination as of that date.

17 And the issues that we are arguing
18 flow from that determination only came to the
19 ANC's attention as of the 1st of May.

20 Second, with respect to the issue,
21 Madam Chair, that you raised with respect to
22 the Zoning Administrator's investigation, it

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1 is now February 28th.

2 Essentially, what counsel is
3 arguing on the other side, and I think this
4 goes to the point that you are making with
5 regard to rightness, is that an official of
6 the District of Columbia Government, in this
7 case DCRA specifically, can endlessly,
8 endlessly, endlessly deny an ANC the ability
9 to come before this Board simply by running
10 the clock, simply by dragging out endlessly
11 the conduct of his job.

12 That by never actually getting
13 around to conducting an actual investigation
14 and pursuing the claims, the valid claims that
15 you yourselves can see in the evidence
16 presented in our prehearing statements,
17 photographic evidence and other testimonial
18 evidence that we will put on today, by never
19 having an investigator actually show up, by
20 never having an investigator show up after
21 5:00 p.m., that the ANC can never actually
22 come before this Board and seek redress,

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1 because the Zoning Administrator never has to
2 actually get around to making a determination.

3 The statute -- the regulations
4 provide for our ability to come before you to
5 appeal not just the determination, but a
6 refusal. And we would put this in the
7 category of at least a constructive refusal to
8 make a decision.

9 CHAIRPERSON MOLDENHAUER: Let me
10 ask a question to make sure that I'm clear on
11 the issues.

12 The C of O is for carry out. It
13 is not for a fast food establishment. It's
14 simply for a carry out. And the ANC's
15 position was that they brought to the
16 attention the potential expansion of the use
17 into maybe what may be a fast food
18 establishment.

19 MR. ROTH: No, a --

20 CHAIRPERSON MOLDENHAUER: The ZA--

21 MR. ROTH: -- delivery service.

22 CHAIRPERSON MOLDENHAUER: A

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1 delivery service, you know, or fast food. And
2 there is, obviously, the question delivery
3 service or fast food establishment.

4 And so the ZA then provided a
5 response in regards to the fact that there may
6 be a permitted use for a fast food
7 establishment in his May 13th email, even
8 though it's not on the C of O. So we are
9 talking about something that is really kind of
10 not even -- because this doesn't state that.
11 It only says carry out on the C of O.

12 MR. SURABIAN: Right. The carry
13 out was replaced by a fast food establishment.

14 Did I say that?

15 CHAIRPERSON MOLDENHAUER: But it
16 was never changed on the C of O. And that
17 determination --

18 MR. ROTH: But I mean, that's --
19 we are actually talking about three steps.
20 The original C of O in 1979 said delicatessen.

21 CHAIRPERSON MOLDENHAUER: I love
22 these. We have a delicatessen case this

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1 afternoon.

2 MR. ROTH: Then the C of O issued
3 in 2003 said carry out, because it was no
4 longer a delicatessen. And now, the Zoning
5 Administrator is saying well, a carry out was
6 replaced by a fast food establishment, even
7 though that is not on the 2003 C of O.

8 CHAIRPERSON MOLDENHAUER: And I --

9 MR. SURABIAN: When the Zoning
10 Commission changes the language, we don't
11 require every C of O holder to come in and get
12 a new C of O. So we interpret carry out as
13 fast food establishment now. And there are
14 hundreds of C of Os as a carry out out there
15 existing.

16 MR. ROTH: But what we are
17 asserting is that this place has morphed into
18 a delivery service.

19 CHAIRPERSON MOLDENHAUER: Exactly.
20 So your argument is that it is a
21 nonconforming use because it has morphed into
22 something that is not permitted under the C of

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1 0?

2 MR. ROTH: We are asserting that
3 putting aside whether it is conforming or
4 nonconforming, separate and apart from that,
5 at the very least, it has enlarged and
6 expanded way beyond -- it has enlarged and
7 expanded its use way beyond a carry out.

8 CHAIRPERSON MOLDENHAUER: And thus
9 being something -- and again, I think the only
10 issue then that we can look at is and the only
11 relief that we could potentially seek, we
12 cannot -- I don't believe, at this point in
13 time at this juncture, the Board has the
14 jurisdiction to just jump in and make that
15 determination.

16 I know that's probably what the
17 ANC would like for us to step in and hear all
18 the evidence and hear why you believe that it
19 is a delivery service and not a carry out. I
20 don't think that we have the jurisdiction to
21 do that.

22 I think that all we have the

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1 jurisdiction to do right now is based on the
2 May 13th email, depending upon, obviously, the
3 testimony and the arguments before us, would
4 be to potentially enforce or provide an order
5 requiring the ZA to take more timely and
6 actually finalize an investigation and then
7 come to a determination.

8 At the final conclusion of that
9 determination, if the ANC then again disagreed
10 or had a challenge to that decision, they
11 could then appeal that as a secondary
12 decision.

13 And I do think that the Board has
14 the authority, because I believe that it is a
15 -- the language indicates that, let me hold
16 this up here, the Board has the authority to--
17 I just had it a second ago and then I moved my
18 page, "Any person aggrieved by any order,
19 requirement, decision, determination or
20 refusal made by the administrative body," and
21 I think that the argument here, and that's
22 where we, obviously, have to have a full

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1 hearing and hear both arguments from both
2 counsels, is the question of whether or not,
3 and obviously I understand Mr. Surabian's
4 argument as a counter to this, the time frame
5 here and the lack of action was a refusal and
6 whether or not that gives rise to the Board
7 taking action and then asking for relief that
8 the Board has authority to do.

9 So that being said, I think unless
10 the Board Members -- I'm not going to hear
11 from any other attorneys, at this point, I'm
12 going to ask Board Members if they are in
13 agreement as to the course of action to move
14 forward as to permitting both counsels to
15 provide arguments?

16 Okay. That being said --

17 VICE CHAIRPERSON SORG: Sorry,
18 Madam Chair.

19 CHAIRPERSON MOLDENHAUER: Please,
20 I want to make sure that I'm not --

21 VICE CHAIRPERSON SORG: Just
22 jumping in. I mean, I agree with where you

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1 are going here in the sense of -- okay. Just
2 I agree with sort of Mr. Surabian's argument
3 that the carry out in the change in the
4 Zoning, you know, Regulations to a fast food,
5 you know, allows this as a fast food
6 establishment as conforming.

7 And I agree that the question here
8 is is this a fast food establishment or are
9 they operating outside of that C of O, which
10 would be conforming under its grandfathered
11 use in this location or are they operating as
12 a food delivery service?

13 And I agree -- I mean, I also do
14 agree that, yes, you know, it makes sense to
15 hear the arguments now, but I do think that
16 really this is a matter of math. Are they
17 doing more delivery than they are seating
18 people in the restaurant or walking in, you
19 know? People walking in and carrying out and
20 so forth.

21 But I just think that an answer to
22 the question -- as a clearer answer to the

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1 question as to an investigation, because
2 that's what provides us with the data that we
3 would need to make this determination, I think
4 makes sense to have more clarity on that
5 question before we begin with the ANC's
6 argument, with the appellant's arguments and
7 so forth.

8 And, I mean, just reading from the
9 Zoning Administrator's May 27th email, he says
10 "I know expect to be able to report the
11 investigation results by June 9th.

12 So my -- I think it would be
13 instructive to get some clarity on what
14 happened there, if it's possible, from a
15 procedural standpoint before we launch into
16 the hearing. That's my only point. Thank
17 you.

18 CHAIRPERSON MOLDENHAUER: Thank
19 you for that point. We will --

20 MR. ROTH: Well, Madam Chair,
21 nothing happened. That's the evidence we
22 would like to put on.

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1 MR. SURABIAN: Well, what I'll say
2 is if the Board is going to -- I don't think
3 that this is the right path. I still don't
4 think that the Board has jurisdiction to take
5 up a case where there has been no refusal
6 based on the interpretation of a regulation or
7 decision based on the interpretation of a
8 regulation.

9 Essentially what the Board is
10 doing is going to -- it is delving into an
11 area that is in the absolute discretion of the
12 DCRA and that's the Board's language from
13 Appeal 16950 of the West End Citizens
14 Association, enforcement matters is in the
15 absolute discretion of DCRA.

16 And the reason being is that there
17 is no regulation as to how long an
18 investigation should take or what steps the
19 Zoning Administrator should take or in what
20 order he should take them. And if there
21 isn't, the Board's expertise is in
22 interpreting the Zoning Regulations. It's not

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1 in how long or what should be done to
2 investigate a use.

3 If the Zoning Administrator gets a
4 complaint and says well, this doesn't seem
5 credible and I'm not saying that this happened
6 in this case, but this doesn't seem exactly
7 quite right. I'm going to put this on the
8 back burner and I'm going to deal with this
9 matter first. This one might have to wait a
10 while.

11 The Board I don't think should get
12 into that, into that business of evaluating
13 whether that was appropriate, because it's not
14 based on the Zoning Regulations.

15 And the fact is, you know, if we
16 are going to go down this path and have a
17 hearing, unless Mr. Roth can prove that they
18 actually are a food delivery service, then I
19 don't see how there could be any error.

20 So if he can't do that today, then
21 I don't see what we are going to have a
22 hearing on.

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1 MR. ROTH: Well, Madam Chair, I'm
2 asking for the opportunity to put on evidence
3 to prove it, because in addition to the
4 photographic evidence that we have submitted,
5 we have witness testimony that will help prove
6 that.

7 And we have other evidence to help
8 prove that and I don't know what more I can be
9 asked to do if the Zoning Administrator
10 declines to do his job. If the Zoning
11 Administrator isn't doing the job the way Mr.
12 Roth wants him to, he is not left without an
13 option.

14 He can -- the Zoning Regulations
15 allow an aggrieved neighbor to go get an
16 injunct of relief, that's spelled out in the
17 Zoning Regulations.

18 And the other thing is that you
19 can just -- if he is not happy with the Zoning
20 Administrator, complain to the Zoning
21 Administrator's boss. I mean, he will hate me
22 for saying that, but that's a reality. That

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1 if you don't like the way someone is working,
2 there is ways to -- that you can address that.

3 Mr. Surabian invited me to put on
4 evidence.

5 MR. SURABIAN: Absolutely.

6 MR. ROTH: And I was ready to take
7 him up on his offer.

8 MR. SURABIAN: Sure. Go to
9 Superior Court, get injunct of relief if you
10 don't like the path that the District is
11 taking. The fact is the Zoning Administrator
12 has never refused to enforce regulations. But
13 as we are sitting here today, if there is
14 evidence that this -- that they are operating
15 as a food delivery service, we don't have it.

16 And if photos of a couple of cars
17 parking in front, don't show a lot to me.

18 MS. COHEN: Madam Chairwoman, may
19 I make a statement? Because this is only my
20 second time appearing on this Board, but one
21 of the things that appears to be in these
22 arguments is that there is evidence, I think,

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1 on file is my recollection, that it is a
2 service delivery.

3 However, it also appears to me
4 that the problem is that the owner or the
5 Peking people are taking advantage of the
6 alleyway and making it very inconvenient for
7 people to use that alley.

8 Has there been any efforts to talk
9 about this to actually come to any kind of
10 agreement? Because I don't think it is a
11 problem is you are a delivery service. It's
12 just a matter of how you are carrying out your
13 business, which is apparently a tremendous
14 inconvenience and disturbance to the
15 surrounding property owners.

16 MR. ROTH: There have been
17 multiple efforts along those lines. I am not
18 sure -- I don't want to overstep my bounds
19 here by getting into -- I mean, typically
20 speaking, settlement discussions are not
21 admissible, so I don't want to open the door
22 to that.

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1 But there have been multiple
2 efforts to have conversations both in a
3 friendly and not so friendly way with both the
4 owners and counsel for the owner of the
5 establishment. They really have not gotten to
6 a place that we're susceptible of resolution
7 of the problem.

8 MS. COHEN: Thank you.

9 CHAIRPERSON MOLDENHAUER: I want
10 to make sure that we also kind of stay on
11 point in regards to being clear as to what is
12 being appealed and I think that there is
13 potentially two issues.

14 And the question is, one, the
15 question of the investigation and then, two,
16 I'm just looking back at the last paragraph of
17 the May email and it says that there is a
18 caveat and it says "Except for the
19 investigation, I have determined that the fast
20 food establishment use at Peking," so the ZA
21 is also making a final determination that
22 despite any potential investigation, he is

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1 finalizing the determination that it is a fast
2 food establishment and not a food delivery
3 service or something else that is beyond the
4 scope of the C of O.

5 And he is outlining the
6 opportunity to appeal, you know, that
7 decision. I think that, you know, Mr.
8 Surabian indicated a second ago that,
9 obviously, it's then in the appellant's, you
10 know, court to potentially prove that it is a
11 food delivery service.

12 MR. SURABIAN: Madam Chair, if I
13 could cover it? At that time in May, you
14 know, I'm sure you have read the whole
15 correspondence, Mr. Roth was actually arguing
16 that it was a fast food establishment back
17 then. And he -- and so what the Zoning
18 Administrator is saying is that, and he is
19 saying that the 2003 C of O was invalid, so he
20 is saying that -- he is essentially saying
21 that that C of O was valid and that they can
22 operate as a fast food establishment.

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1 He is not saying you can be a food
2 delivery service. And if they -- if we found
3 out that they were, that would not be allowed.

4 MR. ROTH: Well, let's get -- I
5 think it is important that the Board get some
6 sequencing of facts and events and
7 personalities in order here.

8 CHAIRPERSON MOLDENHAUER: Well,
9 let's hold off, because I feel like we are
10 going at this in a very disorganized kind of,
11 you know, onsey-twosey fashion.

12 MR. ROTH: Yes.

13 CHAIRPERSON MOLDENHAUER: Let's
14 provide the appellant your 60 minutes to
15 present your argument. I think that we have
16 clarified that the Motion to Dismiss has been
17 denied. All Board Members have agreed by
18 shaking their heads and the Chair has the
19 authority to move forward.

20 We are going to move forward, so
21 that there is no more confusion in this
22 regard. We will provide the appellant with 60

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1 minutes to present their case.

2 Are you going to need the full 60
3 minutes?

4 MR. ROTH: I don't think so.

5 CHAIRPERSON MOLDENHAUER: Okay.

6 And then we will provide D.C. an opportunity
7 to rebut that -- I don't see Mr. LeGrant here.

8 I think it is important that he hear what
9 they are potentially presenting to then have
10 an opportunity to provide adequate responses
11 to that.

12 Do we --

13 MR. SURABIAN: Yes, let me call
14 him again maybe before he gets -- begins his
15 presentation. I can -- let's have a two
16 minute recess.

17 CHAIRPERSON MOLDENHAUER: What do
18 we have? I mean, maybe we should go on to
19 another case, because, I mean, I obviously
20 don't want to -- again, I think that it is
21 very crucial that he is present to start
22 listening to the arguments to then be able to

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1 provide his responses or his testimony.

2 That being said --

3 MR. SURABIAN: I think the Board--
4 can the Board clarify exactly, you know, what
5 the issues that we are going to -- that we
6 will hear and what will be the burden of proof
7 for Mr. Roth exactly? Is it that --

8 MR. ROTH: Madam Chair, if it's
9 all right with the Board and maybe it will be
10 helpful to Mr. Surabian, let me recite the
11 specific provisions of the Zoning Regulations
12 that I believe are our burden to attempt to
13 prove are at issue here.

14 MR. SURABIAN: I don't think that
15 would be helpful.

16 MR. ROTH: I have already conceded
17 that we are giving up two of the claims we
18 originally made. And if will be helpful, I'll
19 cite the other provisions that I believe are
20 still, from our standpoint, on the table.

21 And they would be that ' 3104.2
22 and 3104.3 --

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1 MR. SURABIAN: I think the Board
2 has already concluded those arguments are
3 untimely. Those five points --

4 MR. ROTH: No.

5 MR. SURABIAN: -- in the -- in
6 both the prehearing statement and the original
7 appeal all go to the issuance of the 2003 C of
8 O and they have all been deemed untimely.

9 MR. ROTH: Well, I don't think the
10 Board necessarily did conclude that.

11 MR. SURABIAN: I would -- if they
12 didn't, I would want to raise it again.

13 MR. ROTH: That I made the
14 argument at least that the ' 3104.2 and 3104.3
15 are conditions to the definition of conformity
16 or conforming use that the Zoning
17 Administrator ignored in his May 13th
18 determination, which made the May 13th
19 determination erroneous. That ' 3203.8(c)
20 "Require any amendment of the use authorized
21 by the C of O to comply with current law."

22 I think that the same argument

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1 made with respect to whether or not the Zoning
2 Administrator's failure to cite the conditions
3 of 3104.2 and 3104.3 raised the question of
4 whether, in effect, that the ability to take
5 advantage of that conformance provision in the
6 definition of nonconforming use was forfeited
7 also raises an issue of ' 2005 and 3 are
8 discontinuance provisions, essentially being
9 revived.

10 Those would be the four provisions
11 I think would still be on the table in
12 addition to the issue of whether or not the
13 Zoning Administrator, in effect, has refused
14 to pursue the investigation of the expansion,
15 extension, enlargement, if you will, of the
16 improper use of their existing C of O as a
17 food delivery service.

18 CHAIRPERSON MOLDENHAUER: I'm just
19 trying to get my head around this. I feel
20 like it's a circular argument, which is why
21 it's --

22 MR. ROTH: There is a lot of

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1 circularity here.

2 CHAIRPERSON MOLDENHAUER: Because
3 you are saying that --

4 MR. ROTH: But --

5 CHAIRPERSON MOLDENHAUER: -- the
6 first two sections that you quoted have to do
7 with expansion of use.

8 MR. ROTH: The Zoning
9 Administrator is saying that there is not a
10 nonconforming use, because the Zoning
11 Regulations --

12 CHAIRPERSON MOLDENHAUER: But he--

13 MR. ROTH: -- make this a
14 conforming use.

15 CHAIRPERSON MOLDENHAUER: Okay.

16 MR. ROTH: But the Zoning
17 Administrator --

18 CHAIRPERSON MOLDENHAUER: But he
19 said he hadn't --

20 MR. ROTH: -- fails to cite --

21 CHAIRPERSON MOLDENHAUER: -- made
22 a determination yet as to whether it was or

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1 was not a food delivery service, because he
2 needed to conduct an investigation.

3 MR. ROTH: Which he refused to do.

4 CHAIRPERSON MOLDENHAUER: So I
5 think that in that regard, he has not yet made
6 a determination as to whether this is an
7 expanding use or a conforming or nonconforming
8 use, because right now he is saying the only
9 thing that I know is that it's a fast food
10 establishment and that's permitted. And I'll
11 investigate the issue of whether it is a food
12 delivery service. I mean --

13 MR. ROTH: I think we are saying
14 he is -- after all of these months, this was
15 initially brought to his attention a year ago.

16 CHAIRPERSON MOLDENHAUER: So you
17 are arguing that because he has failed --

18 MR. ROTH: He has refused to --

19 CHAIRPERSON MOLDENHAUER: -- to
20 make this determination --

21 MR. ROTH: -- conduct an
22 investigation.

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1 CHAIRPERSON MOLDENHAUER: Okay. I
2 think it goes back to the issue of the
3 investigation and the refusal to act.

4 MR. ROTH: But the issue is that--
5 right.

6 CHAIRPERSON MOLDENHAUER: And the
7 refusal to enforce.

8 MR. SURABIAN: And is Mr. Roth
9 alleging that that refusal is based on an
10 interpretation of a Zoning Regulation?

11 MR. ROTH: It --

12 MR. SURABIAN: If he is not, the
13 Board does not have jurisdiction.

14 MR. ROTH: When the Zoning
15 Administrator in his determination quotes a
16 section of a definition and omits the most
17 relevant provision --

18 MR. SURABIAN: Mr. Roth, please,
19 look at the May 13th email again. You will
20 see he quoted it in full. Look at it again.
21 Thank you.

22 MR. ROTH: Maybe the proper way

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1 to --

2 CHAIRPERSON MOLDENHAUER: Why
3 don't we do this? We're going to take a five
4 minute break. Mr. Surabian, can you find out
5 where Mr. LeGrant is? And then we will come
6 back in five minutes.

7 MR. SURABIAN: Okay.

8 CHAIRPERSON MOLDENHAUER: Just a
9 five minute break as of right now and we will
10 come back in five minutes.

11 (Whereupon, at 10:34 a.m. a recess
12 until 10:46 a.m.)

13 CHAIRPERSON MOLDENHAUER: Just
14 before we get back to this case, I just want
15 to provide some comments.

16 Right now, we are trying to find
17 out for the Evermay case, the party status.
18 And individual had to leave due to a medical
19 emergency. We are calling him right now to
20 see if he can come back this afternoon.

21 So we will -- since it was a
22 formal party status request and he did appear

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1 here this morning, we are going to see if
2 that's possible.

3 So just to put you on notice that
4 we may hold the case for the afternoon,
5 obviously, since our docket is already moving
6 forward. Then if not, we may have to then
7 just formally postpone the case to another
8 date.

9 If that's the case, then maybe if
10 you want to go and try to find Cliff to
11 coordinate, because he is calling the party
12 status individual right now to see if he can't
13 come back. Okay. So, otherwise, and then
14 other than that, we will try to resolve. We
15 will handle this case.

16 And then just to kind of see
17 hands, who is here for the Bozzuto case? And
18 let's actually see, are there any party
19 oppositions for the Bozzuto case? Everyone is
20 actually a party, okay. Fantastic.

21 Then what we are going to do is
22 we're going to get back on this, because I'm

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1 just trying to get an idea of where we are for
2 our cases that we still have to do.

3 Let me then take a look at Mr.
4 Surabian. Did you get in touch with mr.
5 LeGrant?

6 MR. SURABIAN: He is on his way.
7 I was out looking for him.

8 CHAIRPERSON MOLDENHAUER: ETA?

9 MR. SURABIAN: 15 minutes.

10 CHAIRPERSON MOLDENHAUER: Okay.
11 Then why don't we hold on this case. We will
12 call the Bozzuto case and that's what we are
13 going to do, because we have to be efficient.

14 And so, we will call the Bozzuto.

15 MR. ROTH: May I ask, I guess I
16 would call it a -- make a request or ask a
17 favor of both of the Board and Mr. Surabian.
18 Commissioner Moye has a work obligation and
19 she was going to have to leave by 11:30. Her
20 report for the ANC, she has in the form of an
21 affidavit as opposed to a --

22 CHAIRPERSON MOLDENHAUER: Oral

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1 testimony.

2 MR. ROTH: -- oral testimony.
3 Could she either present it now orally or
4 could we have the Board's leave and Mr.
5 Surabian --

6 CHAIRPERSON MOLDENHAUER: I mean,
7 the question, obviously, Mr. Surabian, would
8 be wouldn't have an opportunity for cross-
9 examination, which on an affidavit would not
10 be possible.

11 MR. ROTH: Right.

12 CHAIRPERSON MOLDENHAUER: And
13 there is another question as to the scope of
14 the affidavit in regards to maybe there may be
15 some objections as to different issues that
16 are being brought up.

17 MR. SURABIAN: There is an ANC
18 resolution in the record already. Is this
19 something different?

20 MS. MOYE: The affidavit,
21 basically, is just that I -- yes, it's
22 basically a restatement of our ANC report

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1 formalizing that we took appropriate
2 procedures to initiate this action and if I
3 wasn't able to provide just an oral summary of
4 it.

5 CHAIRPERSON MOLDENHAUER: I mean,
6 I think that based on -- the major issue in
7 this case is going to be a legal argument
8 issue on appeal, not really as much of an
9 issue in regards to factual evidentiary
10 issues. So I think that if you have to leave,
11 I think that, obviously, we will accept the
12 affidavit.

13 If you have already reviewed it
14 and it's really not --

15 MR. SURABIAN: No, I haven't. I
16 haven't.

17 CHAIRPERSON MOLDENHAUER: No, no,
18 but I'm saying -- all you're saying is it's
19 just a summary of what is already in her ANC
20 resolution.

21 MR. SURABIAN: Well, I would like
22 to see it, you know.

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1 CHAIRPERSON MOLDENHAUER: Do you
2 have a copy of the affidavit?

3 MR. ROTH: I do.

4 CHAIRPERSON MOLDENHAUER: Okay.

5 MR. ROTH: It's in that file
6 there.

7 CHAIRPERSON MOLDENHAUER: Why
8 don't you provide that to Mr. Surabian. Mr.
9 Surabian can take a look at it. We are going
10 to call the Bozzuto case right now, so you
11 guys can actually just step back.

12 Mr. Moy, if we can call that case?

13 MR. MOY: Madam Chair, before we
14 hold this case off temporarily, I just wanted
15 to note for the transcript, for the record,
16 that there is no official filing from Mr.
17 Thomas in our record. That's for the record.

18 CHAIRPERSON MOLDENHAUER: Thank
19 you very much.

20 MR. THOMAS: I'll get it.

21 CHAIRPERSON MOLDENHAUER: So this
22 case will be continued for a few minutes.

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1 I know we have another case which
2 is Redshift, but that case is just going to
3 have to wait. We are going to first call
4 Bozzuto. So, Mr. Moye, if we can call that
5 case?

6 MR. MOY: Yes, that would be
7 Application No. 18317, application of Bozzuto
8 Homes, Inc., on behalf of Meridian Hill
9 Baptist Church, pursuant to 11 DCMR 3103.2.
10 This is for a variance from the rear yard
11 requirements under subsection 404.1, and a
12 variance from the court width requirements
13 under subsection 406.1, to allow an addition
14 to and renovation of, an existing building for
15 residential use in the R-5-D District at
16 premises 3146 16th Street, N.W., property
17 located in Square 2595, Lot 831.

18 CHAIRPERSON MOLDENHAUER: If the
19 applicant can introduce themselves?

20 MR. FREEMAN: Good morning,
21 Members of the Board. For the record, my name
22 is Kyrus Freeman. I'm a partner with the Law

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1 Firm of Holland & Knight here on behalf of the
2 applicant.

3 Seated to my immediate right is
4 Mr. Clark Wagner with Bozzuto on behalf of the
5 applicant, Mr. Thomas Johnson, a principal
6 with Martinez & Johnson Architects. And we
7 would like to introduce Mr. Johnson as an
8 expert in architecture and design. I have his
9 résumé which I'll get up there in a second.

10 And Mr. Steven E. Sher to our far
11 right and we would like to submit him as an
12 expert in zoning and land use analysis.

13 CHAIRPERSON MOLDENHAUER: Okay.
14 Does the applicant desire to present a full
15 case or are you going to rest on the record
16 and then provide the Board an opportunity to
17 ask questions?

18 MR. FREEMAN: We believe the
19 record is thorough. Our prehearing submission
20 clearly indicates how we meet the standard of
21 relief for the rear yard and court.

22 As you know, we have Office of

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1 Planning support and ANC support, so we are
2 prepared to rest on the record and respond to
3 any questions.

4 CHAIRPERSON MOLDENHAUER: Okay.
5 Thank you. Then I think we will just move
6 forward to questions. One of my questions is
7 I would like you or Mr. Johnson maybe to just
8 take a look at the plans and just kind of
9 point out and walk us through the open court
10 relief. It doesn't have to be extensive. You
11 know, a brief we can use of these plans that
12 we all have copies of and you can just point
13 us to the requisite sections.

14 VICE CHAIRPERSON SORG: Madam
15 Chair, I don't want to interrupt your line of
16 questioning, but I'm not sure whether
17 procedurally you want to deal with their
18 request, sorry, for expert witnesses? I have
19 no issues with either one. Sorry.

20 CHAIRPERSON MOLDENHAUER: Okay.
21 No, no, since we just got these, I was
22 actually just going to procedurally leave that

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1 as an undetermined issue, since we could just
2 go through the questioning. But --

3 VICE CHAIRPERSON SORG: Mr. Sher,
4 of course, has been here many times.

5 CHAIRPERSON MOLDENHAUER: -- Mr.
6 Sher as been many times and he may not even
7 need to testify, so we may -- since they
8 rested on the record, I didn't think it was
9 necessary to identify him as an expert if he
10 wasn't going to testify.

11 VICE CHAIRPERSON SORG: Okay.

12 CHAIRPERSON MOLDENHAUER: The only
13 issue is Mr. Johnson and --

14 VICE CHAIRPERSON SORG: I would
15 say I have reviewed his résumé and also I'm
16 aware of his work and I would agree to that
17 designation.

18 CHAIRPERSON MOLDENHAUER: Then I
19 will agree with you and I'll take a quick look
20 at his résumé as well and so we will identify
21 him as an expert and move forward with
22 questioning.

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1 MR. JOHNSON: Will this stay on if
2 I -- okay. We had a more extensive
3 presentation for you all, but we will spare
4 you that.

5 I think in our booklet, it's my
6 page 8, but I think it's 0.1 of the materials
7 that you have where we show the site survey of
8 the existing building.

9 And I think much of the issues
10 about -- many of the issues about this
11 particular project come about with the site
12 complications that are created by the existing
13 historic resource that is on the building and
14 that our developed scheme is a product of
15 consultation both of the ANC, but primarily
16 with Historic Preservation Office.

17 And the entire scheme is
18 determined by the views from 16th Street and
19 particularly to the north to Lamont Street.
20 And we are preserving, in its entirety, the
21 walls and the volume of the church, which, as
22 you can see on this site, takes up a good bit

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1 of the building.

2 There is an opportunity to remove
3 the rear portion of the building. The church
4 actually was built in two phases, but the
5 limestone piece on 16th Street we would be
6 saving in its entirety.

7 I'll refer you to the next
8 picture, which is 0.2 in your program, which
9 demonstrates the way we were solving the site
10 issues and trying to dispose the volume on the
11 site. Some of this is coming from a request
12 from Historic Preservation not to have a very
13 high building and to have a building that is
14 distinct and certainly behind the church.

15 And they counseled us that instead
16 of having height, we -- you know, having a
17 building that reads as part of the sort of
18 constellation of apartment houses on 16th
19 Street would be the way to do it. So it
20 almost reads as two separate buildings.

21 But this site shows how the
22 building would be -- the site plan shows how

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1 the building is disposed on the site and
2 relates to the church itself.

3 The alley or the side yard to the
4 north is now closed off and we have created a
5 court situation. We have also tried to
6 respect the historic resource on the south
7 creating another court situation.

8 The other thing that I would call
9 your attention is how we are sitting back from
10 the property line to the west or on the left
11 side if your sheet.

12 In our consultations with the ANC,
13 they asked us to not have any building at all,
14 you know, within the first 6 feet of the
15 building and we are coming -- you know, the
16 main rear portion of rear wall is 15 feet
17 back, which is the minimum in this zone, but
18 the height that the building has, at this
19 point, is one of the reasons that we are here
20 to see you all today.

21 There is a portion of the building
22 at the -- these are -- almost if you take my

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1 word for it, but I'll show you that the
2 drawing on 3.0, we have a stair coming out of
3 our parking level and that is within the area.

4 It is more than 6 feet back, but less than 15
5 feet back. It's a small one-story piece that
6 resides behind the wall that goes over or the
7 fence that goes across the back portion of the
8 site.

9 I would be happy to walk you
10 through the scheme of the -- the various
11 floors of the building, but I think in terms
12 of where we are, it's essentially the same
13 parte or concept all the way up for eight
14 floors.

15 The building changes, of course,
16 when we get above the church. There is an
17 idea about breaking the scale down in respect
18 to the church, but I think I probably
19 eliminated the salient issues that would
20 concern you and we certainly invite questions.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you. Do any other Board Members have

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1 questions?

2 MEMBER JORDAN: Yes, thank you,
3 Madam Chair. Just a point of clarification on
4 the existing site survey, 0.1. Is there a
5 portion of the building that currently goes
6 all the way to the rear or west lot line?

7 MR. JOHNSON: Yes, yes. Yeah,
8 it's generally about 5 feet back from the
9 property line, but there is a portion of the
10 building that actually engages the property
11 line.

12 We also -- it should be noted that
13 we are backing up against historic resources
14 that are currently off the property line. I
15 don't know if that's important to you or not,
16 but they would probably go through the same
17 process that we are going through today if
18 they were to maximize their site.

19 MR. FREEMAN: On Sheet 1.9, the
20 roof plan shows in yellow the two courts and
21 there is also a yellow line that shows the
22 boundary of the existing portion to be

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1 removed. So you can see --

2 CHAIRPERSON MOLDENHAUER: Our
3 copies are not in color, just so you know.
4 You must not have provided us with color
5 copies, so we don't have the easy read of the
6 yellow lines. Okay. But we have good eyes
7 and we can figure out where it says court.

8 MR. FREEMAN: Okay.

9 MR. JOHNSON: This being, of
10 course, the historic resource. This being the
11 property line across the back, the yellow
12 shows the portion of the building that we
13 would be looking to remove and there is a
14 piece of it that actually engages the property
15 line. In general, the existing church
16 building is 5 feet off of the property line.

17 This constitutes our new
18 construction and the two yellow geometric
19 shapes are the courts in question.

20 CHAIRPERSON MOLDENHAUER: Yes.
21 Mr. Hinkle, do you have any other questions?

22 MEMBER HINKLE: No, Madam Chair.

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1 CHAIRPERSON MOLDENHAUER: Okay.

2 MS. COHEN: Thank you, Madam
3 Chair. How many IZ units are we getting on
4 this -- from this project?

5 MR. WAGNER: Clark Wagner with
6 Bozzuto Homes. It will be, approximately,
7 four units according to the regulations.

8 MS. COHEN: Are they distributed
9 throughout the property?

10 MR. WAGNER: Yes.

11 MR. FREEMAN: Mr. Moy has a color
12 copy of our PowerPoint presentation that we
13 were going to present today. Sorry about
14 that.

15 CHAIRPERSON MOLDENHAUER: No,
16 that's fine. Any other questions from Board
17 Members? Seeing none, no more at this time,
18 then we will turn to the audience to see if
19 there is any individuals in support or in
20 opposition of this case?

21 Seeing none, then we will turn to
22 the Office of Planning for their report.

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1 MS. BROWN-ROBERTS: Thank you,
2 Madam Chairman and Members of the BZA. I'm
3 Maxine Brown-Roberts from the Office of
4 Planning.

5 As in my report, I will stand on
6 the record today, but outlined in our report,
7 you will see that the applicant has met all
8 the requirements of the requested variance
9 relief and we do recommend approval of the
10 requested relief. Thank you, Madam Chairman.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you very much. Does the applicant have any
13 questions of the Office of Planning?

14 MR. FREEMAN: No, Madam Chair.

15 CHAIRPERSON MOLDENHAUER: Do any
16 Board Members have any questions of the Office
17 of Planning?

18 Thank you very much for your
19 thorough report and I appreciate that.

20 Then, at this point in time, we
21 will turn to see if there is anybody in the
22 audience from ANC-1D in conjunction with this

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1 application?

2 Seeing no one, I'll just indicate
3 we have Exhibit 24 in our record, which
4 indicates that at a properly noticed and duly
5 held meeting, that the ANC met and voted to
6 submit a resolution that they have no concerns
7 pertaining to the substantial detriment of the
8 public good. And that the ANC supports an
9 approval of this application.

10 That ANC letter would receive
11 great weight in support of this application.

12 We also have in our record a DDOT
13 letter which indicates that they have reviewed
14 the application and that they recommend
15 approval. They are recommending certain
16 loading management and trash pick-up.

17 However, those don't specifically
18 relate to the relief that is being sought
19 here, so while -- we will take that under
20 advisement and consideration. I'll just make
21 that comment for the record.

22 At this point in time then, we

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1 will turn back to the applicant for any
2 closing remarks or closing statements.

3 MR. FREEMAN: Madam Chair, thank
4 you for squeezing us in. We think the record
5 clearly demonstrates that we meet the
6 standards for relief and we would request your
7 approval, so that we can move forward as
8 quickly as possible. Thank you.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you. I'll see if there is any final questions
11 from Board Members.

12 VICE CHAIRPERSON SORG: I just,
13 Madam Chair, have one question, I guess, for
14 Mr. Johnson.

15 I'm looking at the plans that were
16 submitted earlier and then also the
17 perspective that is here in the documents that
18 were submitted today.

19 I'm just curious, perhaps for my
20 own edification, about what's main entry that
21 is going to be used here? Is it going to be
22 up the stairs under the colonnade? Because

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1 you are also showing doors on the sidewalk
2 level.

3 MR. JOHNSON: Right. I understand
4 your confusion. No, it has been very
5 important to us to maintain the ceremonial or
6 monumental entrance, that's the primary way to
7 get into the building. Again, we are trying--
8 you can probably notice from that same drawing
9 they have there, there is very little on the
10 roof of the building. And what does come up
11 is the elevator tower, which is pushed as far
12 back in the corner as we can.

13 And it just goes up 5 feet above
14 the roof. And so there is an elevator
15 entrance back there, so we created an
16 accessible ground level sort of convenience
17 entrance primarily for the use of the tenants.

18 But -- and it would be -- there would be a
19 gate at the street that would be locked off.

20 We would like to encourage people
21 to come in the main steps, but, obviously,
22 there are going to be some people who will be

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1 challenged to do so. So that's what the two
2 entrances are all about.

3 VICE CHAIRPERSON SORG: The
4 elevator is in the new portion?

5 MR. JOHNSON: Yes.

6 VICE CHAIRPERSON SORG: Right?

7 MR. JOHNSON: Virtually all the
8 vertical circulation is on the new portion.

9 VICE CHAIRPERSON SORG: Right.

10 MR. JOHNSON: It sort of takes
11 from the preservation pressure off of the
12 resource.

13 VICE CHAIRPERSON SORG: Okay.
14 That's sort of what I was getting at. You're
15 right as to the activation of that sort of
16 ceremonial entrance.

17 MR. JOHNSON: Yes.

18 VICE CHAIRPERSON SORG: Okay.
19 Thank you.

20 MR. JOHNSON: Yes.

21 CHAIRPERSON MOLDENHAUER: Any
22 other questions from Board Members? Seeing

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1 none, then thank you very much.

2 At this time, we will conclude the
3 hearing. We will enter into deliberation on
4 this case.

5 We are here for two requests for
6 variance relief. One for rear yard and one
7 for an open court requirement. The applicant
8 has submitted, I think, substantial
9 documentation for providing the relief and
10 satisfying the standards of a variance.

11 I'll incorporate, for the record,
12 the Office of Planning report and their
13 analysis and recommended approval. We have
14 ANC approval in the case. And I think that
15 the applicant has satisfied the standards.

16 I'll open it up the floor to any
17 additional deliberation before we move
18 forward.

19 VICE CHAIRPERSON SORG: Madam
20 Chair, I agree with your analysis. To note
21 with regard to the, you know, relief that is
22 being requested, I think with regard to the

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1 rear yard, as you can see, in the site plan
2 they really are lining up pretty closely the
3 rear of the proposed building with those of
4 the neighbors to the north and south. It
5 seems appropriate.

6 And I think the court width is
7 sensible as per the testimony with regard to
8 the historic resource. So I would be in
9 support as well. Thank you.

10 CHAIRPERSON MOLDENHAUER: Thank
11 you. Any other comments from Board Members?
12 Seeing none, then if we are prepared, at this
13 time, I'll submit a motion, a motion to
14 approve Application 18317 of Bozzuto Homes,
15 Inc. on behalf of the Meridian Hill Baptist
16 Church, pursuant to 11 DCMR 3103.2, for a
17 variance from the rear yard requirement under
18 subsection 404.1, and a variance from the
19 court width requirement under subsection
20 406.1, to allow an addition to and the
21 renovation of, an existing building for
22 residential use in the R-5-D District at

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1 premises 3146 16th Street, N.W.

2 A motion has been made. Is there
3 a second?

4 MEMBER HINKLE: Second.

5 CHAIRPERSON MOLDENHAUER: The
6 motion has been made and seconded.

7 All those in favor say aye.

8 ALL: Aye.

9 CHAIRPERSON MOLDENHAUER: Mr. Moy,
10 if you can read back the vote?

11 MR. MOY: Staff would record the
12 vote as 4-0-1. This is on the motion of
13 Chairperson Moldenhauer to approve the
14 application for the two variance -- requested
15 variance relief for rear yard and court width.

16 Seconding the motion is Mr. Hinkle. Also in
17 support of the motion are Ms. Cohen and Ms.
18 Sorg. And we have one Member not present, not
19 participating.

20 So again, the final vote is 4-0-1.

21 The motion carries.

22 CHAIRPERSON MOLDENHAUER: Thank

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1 you very much, Mr. Moy.

2 Seeing that there is no opposition
3 in this case, we would like to waive our
4 requirements and ask that a summary order be
5 issued.

6 MR. MOY: Very good. Thank you,
7 Madam Chair.

8 CHAIRPERSON MOLDENHAUER: Thank
9 you.

10 MR. MOY: Also for the record, for
11 the staff's edification, I believe the
12 recorded plans are identified under Exhibit
13 10. And I just took a quick scan of the
14 drawings that were just submitted today and
15 they appear to be the same construction
16 drawings, because they are dated February the
17 14th. Is that correct? Perfect. Thank you.

18 CHAIRPERSON MOLDENHAUER: Let's
19 just do a little bit of procedural
20 housekeeping, since we are at 11:00. We are
21 going to go into a hearing on this case before
22 us, but why don't we first call -- so you guys

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1 actually can step back for a second while we
2 do some housekeeping.

3 And why don't we call Evermay and
4 we will address that case and potentially
5 determine the timing for that and then we will
6 call Redshift. Redshift is definitely going
7 to have to be postponed to this afternoon,
8 because we have a -- this is going to go for--
9 we have got 60 minutes for each party to be
10 able to present.

11 Then we have a 1:00 case that has
12 to be called in regards to transcripts. And
13 so I mean, we are not hearing Evermay right
14 now. We are going to postpone their case as
15 well. We haven't skipped. We haven't, you
16 know, skipped over anybody's case, because it
17 was a case that we could address quickly.

18 And we cannot -- and it's within
19 our discretion to hear a case as it is. Your
20 case is not going to be a rest on the record
21 case and, thus, we had to, you know, provide
22 efficiency for everybody.

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1 Redshift will be heard in the
2 afternoon. It will be the second case after
3 our first case of 1:00. If you would like a
4 continuance, we will bring you up after we
5 address this first case as a continuance.

6 Mr. Moy, if you can, please, read
7 the introduction for this case?

8 MR. MOY: Yes, Madam Chair. That
9 would be Application No. 18315. This is the
10 application of Evermay Georgetown LLC on
11 behalf of S & R Foundation, pursuant to 11
12 DCMR 3104.1, for a special exception to
13 establish a nonprofit use under ' 217. This
14 is in the R-1-B District at premises 1623 28th
15 Street, N.W., property located in Square 1285,
16 Lot 815.

17 And there is, in the record, Madam
18 Chair, a request for a party status. And I
19 can go into that with a bit more description,
20 if you would like.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you, Mr. Moy. I do know that we have a party

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1 status and we had a party status individual
2 present here, but he had to leave for
3 emergency purposes.

4 I'll let the applicant introduce
5 herself and counsel.

6 MS. BROWN: Thank you, Madam
7 Chair. Carolyn Brown with the Law Firm of
8 Holland & Knight. I am here with Alice Haase,
9 also from Holland & Knight, the applicant
10 Evermay, LLC and the S & R Foundation, Dr.
11 Sachiko Kuno is here as one of our witnesses
12 and Mr. Erwin Andres is our transportation
13 witness.

14 We are fully prepared to go
15 forward today, but we await your direction on
16 the matter.

17 CHAIRPERSON MOLDENHAUER:
18 Obviously, I understand that you are prepared
19 to go forward, but we do have a party status,
20 that is a properly requested party status and
21 did appear today. Based on that fact, what we
22 are trying to do is we are trying to see if he

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1 can't come this afternoon, so that you can
2 have this case be heard today.

3 We are waiting to hear back from
4 him. I will leave this to you, since we have
5 not heard that he is still available this
6 afternoon. You can either, I guess, take the
7 risk of him saying he is not available this
8 afternoon and making the determination this
9 afternoon as to whether we go forward with
10 this case then or you can pick a day that is
11 convenient for you and we can set this for a
12 continuance on that day.

13 And, obviously, we will then hear
14 the case whether or not that is convenient for
15 the party status individual. And, obviously,
16 encourage him to make himself available at the
17 BZA's convenience.

18 MS. BROWN: Thank you, Madam
19 Chair. We, obviously, would very much want to
20 proceed today.

21 CHAIRPERSON MOLDENHAUER: Okay.

22 MS. BROWN: We have worked very

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1 hard with the neighbors. We have unbelievable
2 support from people that were in serious
3 opposition the last time this case was before
4 the Board, a use for the Evermay.

5 And we have really just about
6 unanimous support, but one. And we did speak
7 with Mr. Opalack at an ANC informal meeting.
8 He did not show up at the formal ANC meeting
9 and his issues deal with traffic and parking.

10 We understand that, but they have
11 been fully addressed in the application. So
12 with that, I think it's important for us to
13 move forward because of commitments that we --
14 you know, we wouldn't want to count our
15 chickens before they are hatched.

16 CHAIRPERSON MOLDENHAUER: Then
17 let's do this. I hear from you. I'm just
18 trying to move things along and I appreciate
19 that. We will push you off until this
20 afternoon. What we will do is we have, again,
21 a 1:00 case that has a transcript -- sorry, a
22 translator requirement, so that case will be

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1 heard first.

2 Then we will go into our morning
3 cases that we have not yet finished. So,
4 obviously, you can coordinate with Mr. Moy to
5 determine whether or not -- hopefully we will
6 hear back from the party status individual,
7 but we will address this case whether he can
8 come or not and we will go from there.

9 We do have some written
10 documentation from him that he did leave with
11 us. So at this point in time, this case will
12 be continued to the afternoon.

13 MS. BROWN: Thank you.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 Thank you very much.

16 Then now, Mr. Moy, if we could
17 read or if we could call the Redshift case?

18 MR. MOY: That would be
19 Application No. 18314, application of
20 Redshift, LLC, pursuant to 11 DCMR 3103.2, for
21 a variance from the off-street parking
22 requirements under subsection 2101.1, for a

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1 flat, a two-unit dwelling, in the R-4 District
2 at premises 701 10th Street, N.E., property
3 located in Square 959, Lot 37.

4 For the record on this
5 application, Madam Chair, I believe, that
6 there is no Affidavit of Posting in the
7 record.

8 CHAIRPERSON MOLDENHAUER: Good
9 morning. If the parties can, please,
10 introduce themselves for the record? I'm
11 sorry, if you can push the button? Thank you.

12 MR. COOPER: My name is Peter
13 Cooper and I'm here representing Redshift,
14 LLC. I'm not an attorney, but I'm a person
15 that has knowledge about the history of this
16 situation and our appeal for relief. So I'm
17 here to speak for Redshift.

18 CHAIRPERSON MOLDENHAUER: Okay.

19 MR. RONNEBERG: My name is Drew
20 Ronneberg. I'm the ANC Commissioner for ANC-
21 6A02 that represents this area.
22 Unfortunately, because of the need to continue

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1 this case, there were two community members
2 who were going to come and speak in support of
3 this application and they had to leave.

4 CHAIRPERSON MOLDENHAUER: Okay.
5 And I, obviously, feel and I understand that
6 community members take time off of their jobs.

7 They take time out of their personal days to
8 come down and to present, but we have, you
9 know, obligations to hear certain cases and
10 this was, you know, in our line-up and we have
11 to move forward through.

12 You know, we had an appeal this
13 morning, which, obviously, you know, had been
14 postponed from another date to today. And it
15 unfortunately happens, but we are going to
16 hear this case this afternoon. And we will go
17 through the unique aspects of the curb cut and
18 OP's -- and this is not a straightforward
19 case, which is why we could not hear this case
20 quickly this morning.

21 There are issues in regards to
22 OP's report and in regards to DDOT and this of

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1 that effect that need to be clarified for ten
2 Board in moving forward with this request.

3 So again, due to timing and due to
4 the fact that we have a case before that is
5 taking more time this morning, we are going to
6 postpone this case to the afternoon.

7 MR. RONNEBERG: And can I make a
8 request?

9 CHAIRPERSON MOLDENHAUER: Yes.

10 MR. RONNEBERG: I will not be --
11 if this is the second case that is heard in
12 the afternoon, I will not be able to make it.
13 If it's the first case heard in the
14 afternoon, I would be able to make it. I have
15 to drive down to National Harbor and so --

16 CHAIRPERSON MOLDENHAUER: We have
17 a translator that has to present at the 1:00
18 case. So it would be potentially the second
19 case, at best. That first case may go
20 quickly, but I can't guarantee the time frame.

21 But there is going to be -- if Mr. Cooper on
22 behalf of the applicant would like to

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1 postpone, so that the ANC can be present, you
2 know, you can do that.

3 It is not the ANC's -- it is a
4 question of the applicant has the choice to
5 potentially indicate that you would like to
6 maybe push this off to another day.

7 MR. COOPER: I would like to
8 present the case this afternoon and I'll do so
9 alone.

10 CHAIRPERSON MOLDENHAUER: Okay.

11 MR. COOPER: We are all on the
12 same page, so --

13 MR. RONNEBERG: And I would like
14 to -- the ANC is in full support of this. If
15 there is any -- I know that full -- you know,
16 I would just ask that if the Board has any
17 questions that Mr. Cooper, for whatever
18 reason, cannot answer, that the ANC could
19 provide written comments later?

20 CHAIRPERSON MOLDENHAUER:
21 Absolutely. I mean, we will definitely -- you
22 know, we want to make sure the ANC is heard.

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1 I understand the, as I said, unique aspect of
2 this case, kind of the desire to make sure
3 that, you know, this is resolved without
4 potentially maintaining the curb cut and
5 things of that effect.

6 So we will ensure that if there is
7 a need to provide any additional supplemental
8 documentation from the ANC, we will do that
9 prior to making any decision. And I
10 appreciate you being here and I'm sorry that
11 we can't accommodate your schedule with our
12 afternoon requirements as well as this
13 morning's requirements.

14 MR. RONNEBERG: Thank you, Madam
15 Chair.

16 CHAIRPERSON MOLDENHAUER: Thank
17 you very much. So this case will be heard in
18 the afternoon. Thank you.

19 Okay. So now, we are back with
20 ANC Appeal 1C. So if those parties can,
21 please, step forward?

22 Okay. Before we let anybody jump

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1 back in here, I will make a very clear
2 statement. I hope it will be very clear. And
3 then we will look to both parties and we will
4 get started with the case on the merits and
5 provide the appellant his time frame to
6 present its legal argument. And then we will
7 turn to the District and then we will turn to
8 the property owner.

9 That being said, what the Board
10 sees as being presented here is really a legal
11 issue and it's not an issue that the Board
12 will look at lightly, because it is a very
13 sticky issue. And I don't see this as being a
14 factual question.

15 We are not going to hear testimony
16 as to whether or not this is a food delivery
17 service.

18 What we will hear, and I know that
19 this is -- you know, this is why I'm trying to
20 be very clear about this, what we will hear is
21 a question as to whether or not under 3112.2,
22 the lapse of time by the ZA equates to a

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1 refusal to take enforcement action under the
2 Zoning Regulations.

3 And this is a case of first
4 impression in regards to that issue. We
5 cannot jump into investigating this on our
6 own, which is if we were to hear testimony as
7 to whether this is or is not a food delivery
8 service, that would then be what we are doing.

9 And the ZA has not made a specific
10 determination, in our minds, that this is or
11 is not a food delivery service. So we cannot
12 then evaluate that issue today.

13 All we can do is look to see
14 legally whether or not a lapse of time or
15 potential inaction equates to a refusal under
16 the section 3112.2 in regards to whether that
17 is an aggrieved issue in both the
18 administration and/or the language says
19 enforcement of the Zoning Regulations.

20 So that being said, I will turn to
21 the appellant to present their case. We will
22 give you 60 minutes.

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1 If you don't need all of the 60
2 minutes, we will, obviously, move forward, but
3 I'll turn to you to present your case.

4 MR. SURABIAN: Madam Chair, if I
5 could just ask one question on what you just
6 said? So if the Board determines that given
7 the length of time that it is a refusal under
8 that jurisdictional provision, doesn't it also
9 have to be an error? Be an error? Doesn't
10 that refusal have to be an error? Right?

11 CHAIRPERSON MOLDENHAUER: The
12 refusal would be an error, because they have
13 failed to enforce a question as to whether or
14 not there is an action that is going beyond
15 the scope of the C of O.

16 MR. SURABIAN: And but to get to
17 that point, we would have to know that it's a
18 food delivery service.

19 CHAIRPERSON MOLDENHAUER: There
20 would have to be reasonable evidence that was
21 presented to the ZA and this goes to the
22 question of -- obviously, I don't want to put

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1 words into Mr. Roth's mouth, but they are,
2 obviously, going to present that they
3 presented reasonable evidence that the ZA
4 should have potentially relied upon --

5 MR. SURABIAN: Yes.

6 CHAIRPERSON MOLDENHAUER: -- that
7 showed that there was reason to believe --
8 they can't prove it. There is no way that an
9 appellant can prove a calculation aspect of
10 the percentage of whether a restaurant is
11 working as a food delivery service.

12 It's a mathematical equation. And
13 so I think that -- not that they can't. I
14 think that it would be challenging to do that.

15 It's never good to make any absolutes.

16 But the issue here is whether the
17 ZA erred in refusing, and this is again the
18 question, to take enforcement action based
19 potentially on reasonable evidence that there
20 was -- and I don't know the answer to that.
21 That's obviously where we have to hear
22 testimony.

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1 Obviously, we wanted to hear, you
2 know, testimony. You have already presented
3 potential arguments that I think, you know, we
4 will hear from now. And comments from, you
5 know, Mr. LeGrant in regards to, you know,
6 those issues. And that that's where we are
7 going and we have to hear that testimony to
8 then make a decision.

9 MR. SURABIAN: Yes.

10 CHAIRPERSON MOLDENHAUER: There is
11 no decision -- I can't tell you what is going
12 to happen --

13 MR. SURABIAN: Okay.

14 CHAIRPERSON MOLDENHAUER: --
15 because we need to first hear the arguments.
16 So that being said, we will turn back to the
17 appellant.

18 MR. ROTH: Madam Chair, thank you.
19 You have sort of thrown me for a loop. I was
20 scrambling to dig out 3112.2 to take a quick
21 read and listen to your discussion and try to
22 figure out where to go from here, because most

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1 of our prepared testimony and evidence is
2 related to food delivery service aspects of
3 this business.

4 And so if I could have the Board's
5 permission, as I stated before, Commissioner
6 Moyer had a business obligation starting -- she
7 was going to have to leave at 11:30. We
8 consulted with Mr. Thomas and Mr. Surabian
9 during the break and what I was going to ask
10 your permission to do was to allow her to
11 present the ANC report prior to appellant's
12 case in chief.

13 Most of what she had prepared was
14 based upon what we had believed ahead of time
15 was going to be our case. If I could ask your
16 permission and allow her to present what she
17 had originally prepared as the ANC's report,
18 because that's what the ANC had originally
19 voted on, I will attempt in the meantime to
20 give some thought to adjusting our
21 presentation to fit within the boundaries of
22 what you just described.

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1 I'm not sure that there is much
2 more that I would present or have us present
3 beyond what we have already submitted in the
4 form of the exhibits we have submitted to you,
5 most especially including a series of emails
6 that proceeded Mr. LeGrant's May 13th emails
7 and subsequent emails to May 13th.

8 And maybe some discussion
9 particularly because you point out primarily a
10 legal issue of the definition of what is a
11 food delivery service.

12 CHAIRPERSON MOLDENHAUER: My --

13 MR. ROTH: It will certainly
14 shorten the day.

15 CHAIRPERSON MOLDENHAUER: Your
16 desire right now is to put on testimony from
17 Ms. Moss and I'm --

18 MR. ROTH: Ms. Moye.

19 CHAIRPERSON MOLDENHAUER: Ms.
20 Moye, I'm sorry, thank you. I'm more than
21 willing to let her testify, but I do think
22 that there may be some objections in regards

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1 to the relevancy, based on the specific issue
2 at hand.

3 And so if you would like to start
4 the testimony, I'll then, you know, listen for
5 any potential objections and we will have to
6 just address those as they go.

7 MR. ROTH: Okay. It's the ANC's
8 appeal and I'm hoping there would be some
9 latitude allowed for that. I appreciate any
10 latitude you and opposing counsel will allow
11 on that. And thank you.

12 MS. MOYE: Good morning. Thank
13 you for the opportunity to appear before you
14 today. My name is Stacey Moye and since 1997
15 I have resided at 1810 California Street,
16 N.W., which is located in Advisory
17 Neighborhood Commission Single Member District
18 1C01.

19 And since 2009, I have represented
20 that SMD where the business that is the
21 subject of this proceeding, Peking Garden, is
22 located.

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1 And I am appearing before you
2 today in my role as Vice Chair of ANC-1C for
3 the exclusive purpose of delivering the ANC's
4 report in support of our appeal in this
5 matter.

6 And our counsel, Mr. Roth, will
7 further present the issues and evidence within
8 the framework that has been now revised today.

9 And so my remarks will be brief.

10 But I just wanted to reiterate
11 that ANC-1C's report to the Board was adopted
12 by a vote of 8-0 by the ANC at a properly
13 noticed public meeting and was filed on
14 January 5, 2012 with this Board.

15 Our report, as well as our other
16 briefs and materials we previously filed,
17 provide a clear and detailed narrative of the
18 historical background facts and our rationale
19 for initiating this appeal.

20 I just wanted to state that
21 constituent service for ANCs is one of the
22 most, if not the most, important function of

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1 ANCs. And our involvement, the ANC's
2 involvement, in this matter arose from a
3 desire to assist a constituent, Mr. Roth, with
4 resolving some serious problems that he and
5 his partner and other neighbors encountered
6 involving the expanded food delivery
7 operations at the establishment.

8 And Mr. Roth sought the ANC's
9 assistance only after his own exhaustive
10 attempts to reach a resolution with Peking
11 Garden's owners and then with DCRA officials,
12 including Zoning Administrator LeGrant ended
13 in frustration.

14 And so when a constituent first
15 reaches out to an ANC for help, generally, the
16 first thing that we will do is we will go to
17 the appropriate agency to try and seek
18 resolution. And frequently, all it takes is a
19 simple request for a status report to get a
20 problem resolved.

21 ANC-1C at least doesn't ordinarily
22 file an action immediately upon hearing about

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1 a problem. We try to work it out before
2 escalating.

3 And referring back into Exhibit 27
4 in our prehearing statement, you will see the
5 chain of correspondence that we really tried
6 to seek a good faith resolution in this matter
7 as to Mr. Roth prior to filing this appeal.
8 So I just wanted to emphasize that that we
9 didn't come running in filing this appeal the
10 first thing.

11 And but we did want to
12 respectfully disagree with the Zoning
13 Administrator in his May 13th email that he,
14 basically, ended his inquiry just by asserting
15 that I'm going to do an ongoing investigation
16 and that's it. And then we never heard
17 anything else about it.

18 So, basically, in order to
19 preserve our right to appeal, the ANC-1C voted
20 on June the 6, 2011 at a duly noticed
21 regularly scheduled public ANC meeting to
22 initiate this matter and to authorize Mr. Roth

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1 to serve as our counsel.

2 And the separate investigation
3 that is referenced in the May 13th email by
4 Mr. LeGrant, he indicates in that email that
5 the investigation into the expansion of food
6 service delivery was ongoing, but we have yet
7 to receive any indication that such an
8 investigation was even conducted, must less
9 receive any conclusions from this
10 investigation or notice that any enforcement
11 action has been -- happened, has taken place,
12 rather.

13 Meanwhile, the evidence that we
14 were going to introduce today, it makes it
15 clear that an expansive food delivery
16 operation is being run out of Peking Garden's
17 premises.

18 So skipping ahead, I had just sort
19 of a restatement of some evidence, but I will
20 skip over that. Members of the Board are
21 aware that ANCs have no authority to enforce
22 the Zoning Regulations and so we rely on

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1 regulatory officials, such as the Zoning
2 Administrator, to do this.

3 And we hope to present clear cut
4 unemotional evidence that a violation of the
5 regulations had taken place.

6 But in conclusion, our report, our
7 previously filed briefs and our presentation
8 before the Board today would clearly show that
9 Peking Garden's current operations have
10 morphed well-beyond the carry out or fast food
11 designation into a delivery service.

12 And we respectfully request that
13 the Board enforce the law against what we feel
14 is an obviously illegal expansion of the
15 business. Thank you very much.

16 CHAIRPERSON MOLDENHAUER: Does
17 that complete your witness' testimony?

18 MR. ROTH: Yes, Madam Chair.

19 CHAIRPERSON MOLDENHAUER: Mr.
20 Surabian, do you have any cross-examination?

21 MR. SURABIAN: Ms. Moye, you
22 received the Zoning Administrator's May 13th

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1 email, right?

2 MS. MOYE: Yes.

3 MR. SURABIAN: And after you
4 received that, did you respond back to him?

5 MS. MOYE: I personally did not.
6 I don't believe I responded back to him
7 personally, other than to -- when somebody
8 says I'm doing something or an official --
9 just sort of generally speaking, if I respond
10 back to them and they say that they are doing
11 something, I'll say thank you and I,
12 basically, await the results of your
13 investigation.

14 But there were other officials who
15 were involved who were copied on the emails.
16 And my colleague, Wilson Reynolds, who is
17 Chair of ANC-1C, I believe he also sent an
18 email.

19 MR. SURABIAN: I was just asking.
20 I mean, I just want to know what you did.

21 MS. MOYE: I don't believe that I
22 responded directly.

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1 MR. SURABIAN: Okay. Thank you.
2 And so after the May 13th email, you
3 personally have not corresponded with the
4 Zoning Administrator on this matter?

5 MS. MOYE: I don't believe so.

6 MR. SURABIAN: Okay. I don't have
7 any further questions.

8 CHAIRPERSON MOLDENHAUER: Mr.
9 Thomas, do you have any cross-examination
10 questions? You need to make sure your
11 microphone is on. If you can press the --

12 MR. THOMAS: There you go. Ms.
13 Moye, you are familiar with the block that the
14 Peking Gardens is located in?

15 MS. MOYE: Yes.

16 MR. THOMAS: Are there other
17 businesses in that block?

18 MS. MOYE: There are.

19 MR. THOMAS: How many other
20 businesses, would you say?

21 MS. MOYE: There is next door a
22 bar Bobby Lu's, there is a restaurant, the

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1 diner and then there is another restaurant,
2 L'Enfant.

3 MR. THOMAS: Have you observed any
4 of them to receive deliveries and so forth?

5 MS. MOYE: Deliveries?

6 MR. THOMAS: In other words, is
7 there traffic going to the other
8 establishments as well?

9 MS. MOYE: Those -- they are not
10 delivery services. If you are talking about
11 commercial --

12 CHAIRPERSON MOLDENHAUER: Mr.
13 Thomas is --

14 MS. MOYE: -- delivery --

15 CHAIRPERSON MOLDENHAUER: I'm just
16 going to jump in here. I want to make sure
17 that we stay on point in regards to the
18 relevancy of this appeal.

19 MR. THOMAS: Yes.

20 CHAIRPERSON MOLDENHAUER: I don't
21 believe that your questions are relevant to
22 the specific limit and nature of the appeal.

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1 So if you maybe want to go to maybe the next
2 topic of conversation, if you have any other
3 questions, and just focus on the issue on
4 appeal.

5 MR. THOMAS: All right. I'm just
6 laying a little background before I -- well,
7 I'll hold off those.

8 CHAIRPERSON MOLDENHAUER: I mean,
9 you will have an opportunity to present your
10 case in chief in opposition, so right now, if
11 there is any cross-examination of the witness
12 that is relevant to what here testimony was.

13 MR. THOMAS: Okay.

14 CHAIRPERSON MOLDENHAUER: I'll
15 give you a moment to make sure to see if you
16 have any other questions.

17 MR. THOMAS: I have no other
18 questions, at this point.

19 CHAIRPERSON MOLDENHAUER: All
20 right. Do Board Members have any questions
21 for Ms. Moye?

22 MR. ROTH: Madam Chair? I have

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1 redirect on Mr. Surabian's questions of Ms.
2 Moyer.

3 CHAIRPERSON MOLDENHAUER: I think
4 Board Members may first have questions and
5 then at the end of the Board Questions, we
6 will see if you have any final redirect.

7 Board Members?

8 VICE CHAIRPERSON SORG: Thank you,
9 Madam Chair.

10 I guess what would be useful for
11 me to understand, based on the questions that
12 we are looking at right now, is the last email
13 that we have here is from May 27th.

14 You answered Mr. Surabian's
15 question regarding whether or not you
16 responded to Mr. LeGrant's email, but as a
17 representative of the ANC, can you talk a
18 little bit about what communication or steps
19 chronologically sort of have been gone through
20 by you or Mr. Reynolds or the ANC between the
21 May 27th and, you know, we are just about nine
22 months after that to this time.

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1 MS. MOYE: Sure. So after,
2 subsequent to the May 13th email where we --
3 Mr. LeGrant stated that he is going to conduct
4 an investigation into the expansion of the
5 food delivery service. We haven't heard
6 anything back and my colleague Wilson
7 Reynolds, who chairs ANC-1C, he -- and this is
8 contained in our Exhibit 27 in our prehearing
9 statement.

10 So the May 23rd email from Mr.
11 Reynolds it just says hey, I'm just checking
12 in, just wanted to see where this
13 investigation is going. So that's point of
14 contact, too. So then we have a response, the
15 May 27th email from Administrator LeGrant.

16 And subsequent to that, I have not
17 seen any follow-up come back from Mr. LeGrant
18 or anyone in his office with regard to that.
19 I believe that there were -- well, I
20 personally did not respond to the May 27th
21 email to Mr. LeGrant.

22 And at this time, we were very

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1 focused on preserving our right to appeal,
2 because we were concerned about timeliness
3 issues and when the ANC was officially
4 notified and our 60 day time period, so we
5 were very focused on -- I believe the date was
6 May the 1st.

7 And so that's when we started
8 bringing it through the process of -- the ANC-
9 1C's process. We have committees in ANC-1C,
10 so the first thing, the first step in our ANC
11 is that you go before the Planning, Zoning and
12 Transportation Committee and discuss it. The
13 committee votes it out, then it goes to the
14 full ANC for consideration.

15 And it was -- at that time, we
16 were also looking at the other issues that the
17 Board has already made a determination about
18 the 2003 -- the actual issuance of the 2003
19 Certificate of Occupancy.

20 MR. ROTH: Ms. Sort?

21 VICE CHAIRPERSON SORG: So with
22 regard to -- just to be a little bit more

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1 specific, any additional requests or
2 communication regarding the investigation by
3 the Zoning Administrator in specific that you
4 can recall?

5 MS. MOYE: Not from me personally
6 and so I personally can't recall further.

7 VICE CHAIRPERSON SORG: And if you
8 are aware on the part of the ANC in an
9 official capacity or Mr. Reynolds, if you
10 happen to know?

11 MR. ROTH: Ms. Sorg, I'm not aware
12 of any.

13 MS. MOYE: I'm not aware.

14 MR. ROTH: If I may, I guess I
15 have to be careful here about walking the line
16 between being a witness and being counsel, but
17 if I can direct your attention backwards in
18 this chain of emails to April 7th, let me try
19 to explain for you why the 60 day issue was
20 important.

21 VICE CHAIRPERSON SORG: I
22 understand why the 60 day issue was important.

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1 I'm just trying to get from this current
2 testimony, current witness just an
3 understanding about her recollections and
4 actions with regard to communications on the
5 investigation.

6 I'm interested in those other
7 facts as well.

8 MR. ROTH: Yes, right.

9 VICE CHAIRPERSON SORG: But the
10 Chair can discuss whether or not she thinks
11 that is appropriate at the time or not. But
12 thank you.

13 MR. ROTH: Thank you.

14 CHAIRPERSON MOLDENHAUER: I've got
15 a question. Just looking at the email chain,
16 we have -- and I know we have looked through
17 the emails starting, you know, from a specific
18 request on April 7th to request an
19 investigation and then the back and forth, the
20 May 13th email. The last email that we have
21 in the chain is from Mr. LeGrant indicating on
22 May 27th that there is a continuing

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1 investigation that he expects to have a result
2 on June 9th.

3 Ms. Moye, do you know if you
4 received anything on June 9th?

5 MS. MOYE: No.

6 CHAIRPERSON MOLDENHAUER: You --

7 MS. MOYE: I have no recollection
8 of receiving any -- even an email just
9 checking in on June the 9th saying we are
10 still running behind that would have --

11 CHAIRPERSON MOLDENHAUER: Did you
12 or any member of the ANC or on behalf of the
13 ANC contact Mr. LeGrant around or after June
14 9th to follow-up?

15 MS. MOYE: I did not and I have to
16 say I don't have recollection of colleagues
17 being copied.

18 CHAIRPERSON MOLDENHAUER: You're
19 talking our counsel, too, to follow-up after
20 June 9th?

21 MS. MOYE: We may have talked
22 about it, but I have no recollection of

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1 additional follow-ups subsequent to this
2 email.

3 CHAIRPERSON MOLDENHAUER: And to
4 date, have you received any report of an
5 investigation?

6 MS. MOYE: No.

7 CHAIRPERSON MOLDENHAUER: Okay. I
8 have no other questions. Mr. Roth, if you
9 have any follow-up on redirect?

10 MR. ROTH: No. Ms. Sorg brought
11 out or Ms. Moye brought out in response to Ms.
12 Sorg the one point that I wanted to raise
13 which is that Mr. Reynolds is the Chair of the
14 ANC, so he was following up on behalf of the
15 ANC in his email to Mr. LeGrant.

16 CHAIRPERSON MOLDENHAUER: Okay.
17 Then at this point in time, we will turn back
18 now to you, Mr. Roth, to see if there is any
19 presentation or any other witnesses that you
20 have.

21 MR. ROTH: Thank you.

22 MS. MOYE: If I'm finished, I

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1 would like to be excused.

2 CHAIRPERSON MOLDENHAUER: I'll
3 just turn to Mr. Surabian and Mr. Thomas to
4 confirm that there is no other questions?

5 MR. SURABIAN: No other questions.

6 CHAIRPERSON MOLDENHAUER: Okay.
7 Then thank you very much.

8 MR. ROTH: Thank you. Let me come
9 back for a moment to the point that we were
10 just discussing about April 7th, May 13th June
11 6, June 9th. In Mr. Surabian's original
12 Motion to Dismiss, he was attempting to
13 attribute to me as opposed to the ANC
14 knowledge that went back as far as February.

15 I submitted an affidavit in
16 response to the Motion to Dismiss, in which I
17 said, the first time the ANC knew about this
18 or any knowledge that I had was May 1st.

19 But in the context of discussions
20 that we had at the Planning, Zoning and
21 Transportation Committee on May 2nd, I raised
22 with them the fact that I had received from

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1 Mr. Bello and Mr. LeGrant's office this April
2 7th email, in which Mr. Bello, for lack of a
3 better word, purports to make, in effect, a
4 determination.

5 I didn't know whether that
6 constituted a determination of the Zoning
7 Administrator or not. But one of the things
8 that I was concerned about was not that I knew
9 or should have known back on February 28th,
10 but that somehow or other some knowledge might
11 be attributed to me or to the ANC going back
12 to April 7th.

13 And so it was important, I
14 thought, that we get the ANC's appeal filed,
15 if possible prior to 60 days running from
16 April 7th. So the ANC met in early June and
17 we had that appeal filed by June 6th.

18 And the -- I'm not sure I can -- I
19 wouldn't even attempt to get into the head of
20 the Zoning Administrator or the Zoning
21 Administrator's office to know whether or not
22 the termination of any activity or whether

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1 related to the fact that we filed an appeal on
2 June 6th or whether or not any activity had
3 begun prior to June 6th and ceased after the
4 filing of the appeal or whether or not any
5 activity had even begun prior to June 6th or
6 whether or not any activity was ever intended
7 to occur or whether or not any activity would
8 ever have occurred.

9 I don't know the answer to those
10 questions and I don't claim to have any
11 special insight into those questions. What we
12 do know is that there is no indication that
13 any serious investigation ever appears to have
14 occurred if anything ever actually occurred.

15 It is now more than a year later
16 since the initial inquiries began. And I
17 suppose what I would say is we would like to
18 offer into evidence this chain of emails that
19 is attached as Exhibit 27 to our prehearing
20 statement as the best evidence that the Zoning
21 Administrator knew more than a year ago that
22 there were complaints being registered in the

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1 community and by the ANC, at least beginning
2 last May, that there was a problem here.

3 And that there were serious
4 allegations being made not just by one or two
5 individual complaining neighbors, but by the
6 ANC that this establishment had vastly
7 expanded beyond what was listed in its
8 Certificate of Occupancy and had become more
9 than just a nuisance, but a vast delivery
10 service.

11 And that the Zoning Administrator
12 now nine months later, more than nine months
13 later, to the best of our knowledge, has still
14 not done anything about it.

15 In the definitions in the Zoning
16 Regulations, there is a percentage listed, 75
17 percent, under which an establishment will be
18 considered a food delivery service in all
19 cases. That's a non-rebuttable situation.

20 But that's not the only situation
21 in which an establishment will be considered a
22 food delivery service. You can also be a food

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1 delivery service if seating tables are
2 provided for customers -- I should say seating
3 and tables for customers may or may not be
4 provided for on-premises consumption, but if
5 present, are clearly subordinate to the
6 principal use of preparing food for delivery
7 to off-site customers.

8 Food delivery service as defined
9 here is "A restaurant, prepared food shop or
10 fast food establishment in which the principal
11 use is production of prepared food for
12 delivery to customers located off business
13 premises."

14 It doesn't require 75 percent. It
15 doesn't even necessarily, by my reading,
16 require 50.1 percent. It says the principal
17 use. And I'm not sure that that's 50.1
18 percent, because I can envision a situation in
19 which 45 percent is a principal use if the
20 other uses are split up amongst other things.

21 And so if we today cannot put on
22 evidence that is represented by all the

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1 photographs we have given you and by testimony
2 of neighbors about what they see on a daily
3 basis coming and going, and about the fact if
4 we can't put on evidence that says on a daily
5 basis people walk by there and they almost
6 never see anybody actually walking in,
7 standing at the counter, waiting to take-out
8 food as a carry out would ordinarily be seen
9 serving people, if we can't put on evidence
10 that's represented by the photographs you have
11 already seen, and instead we can only rely on
12 the four corners of the definition of a food
13 delivery service and whether or not the Zoning
14 Administrator has or hasn't done his job by
15 following through on the complaints that he
16 was sent by neighbors and the ANC going back
17 months and months and months ago, then I would
18 say he has refused to do the job that he was
19 asked to do, not just by a couple of
20 complaining neighbors, but by a unanimous vote
21 of the Adams Morgan Advisory Neighborhood
22 Commission.

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1 And that this Board is empowered
2 to say, Zoning Administrator, you acted
3 erroneously. And I would refer you back to
4 the Economides case in which the D.C. Court of
5 Appeals, basically, said they believe this
6 Board has the power to refer cases like this
7 back to the Zoning Administrator and to DCRA
8 and to other units of D.C. Government to say
9 we expect you to do your job.

10 We don't have to tell you exactly
11 how to do it, but we expect the law to be
12 enforced by the appropriate agencies of the
13 D.C. Government and the Board of Zoning
14 Adjustment has the authority and the power to
15 refer these cases back to the Zoning
16 Administrator and to DCRA and say do your job.

17 And Exhibit 27 would be the best
18 piece of evidence we have for that. So with
19 that, I'll conclude our case. Thank you. We
20 appreciate your hearing this.

21 CHAIRPERSON MOLDENHAUER: I'm
22 going to open it up to Board questions. And

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1 I'll actually start us off here.

2 One thing you said was that, you
3 know, there is -- the only evidence you have
4 is the email exchange. And I guess one of my
5 questions is did you conduct a FOIA request to
6 see what potential action or inaction the ZA
7 has taken between, you know, April, May and
8 now?

9 MR. ROTH: We did not conduct a
10 FOIA request from that question.

11 CHAIRPERSON MOLDENHAUER: Okay.
12 Have you, and I guess as a representative of
13 the appellant, inquired are there any
14 additional documentations or is there -- have
15 you followed up with between May and now
16 inquiries in regards to the status of any
17 potential investigation?

18 MR. ROTH: Madam Chair, I guess I
19 would say this. Maybe I'm naive in this
20 respect, but I would like to be able to rely
21 on good faith -- on the good faith of the
22 people and other attorneys and believe that if

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1 there were such activities going on, opposing
2 counsel would have told me about them in the
3 course of conversations.

4 I'm not a close friend of Mr.
5 Surabian. We have had two or three
6 conversations about this case. I would have
7 hoped that in the course of the last several
8 months in the two or three conversations we
9 have had, he might have said something if
10 there really were something going on to
11 indicate that we are pursuing this, but I have
12 never heard that there is such a thing going
13 on.

14 And I guess --

15 CHAIRPERSON MOLDENHAUER: So I
16 guess you're saying that -- lack of
17 information.

18 I guess my other question would be
19 considering the extent of responsibilities and
20 things that flow through the, you know, Zoning
21 Administrator's office, can you explain to me
22 or present an argument to me as to why nine

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1 months, pretty much is what we're talking
2 about, would be potentially unreasonable or is
3 a period of time where, you know, that lapse
4 would then be deemed a refusal to investigate?

5 MR. ROTH: Well, I think when
6 information -- well, one of the reasons I wish
7 you had permitted us to put on additional
8 types of evidence this morning is that I think
9 we could have put on evidence that would have
10 discussed endangerment to life and health and
11 safety.

12 CHAIRPERSON MOLDENHAUER: Okay.
13 Was that communicated to Mr. LeGrant?

14 MR. ROTH: I think --

15 CHAIRPERSON MOLDENHAUER: Or his
16 office?

17 MR. ROTH: -- in part it was in
18 the chain of emails. And I think we could put
19 that evidence on or could have put that
20 evidence on today in the form of oral
21 testimony and written testimony.

22 But there certainly have been

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1 circumstances in this case in which
2 endangerment to life and health and safety has
3 been an issue. And it has been brought to the
4 Zoning Administrator's attention. And I think
5 it cries out for attention.

6 And I think I, frankly, was
7 troubled by language in a Motion to Dismiss
8 that characterized this appeal as oh, you
9 know, they are just bad neighbors, so what.

10 Well, the first time a child or a
11 pet dies on account of bad behavior from a bad
12 neighbor or the first time somebody is trapped
13 inside a burning building because a fire door
14 is blocked --

15 MR. SURABIAN: Objection. I'm
16 going to object here. The fact is that he is
17 talking about his complaints with the use of
18 the alley, which really is not related to this
19 case.

20 MR. ROTH: It's related to the use
21 of the alley as a delivery service that is not
22 permitted from a business that is not

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1 permitted to be a delivery service.

2 MR. SURABIAN: I mean --

3 MR. THOMAS: I would say --

4 CHAIRPERSON MOLDENHAUER: Your
5 microphone is not on, Mr. Thomas.

6 MR. THOMAS: I would say Mr.
7 Surabian opened the door to this in his Motion
8 to Dismiss, in the language of his Motion to
9 Dismiss.

10 MR. SURABIAN: The fact is that a
11 fast food restaurant can make deliveries and
12 the use of the alley is not relevant to
13 whether they are a food delivery service or
14 not.

15 MR. THOMAS: And I was going to
16 say I join in that objection, since the Board
17 has specifically indicated that we will not be
18 inquiring into these matters.

19 CHAIRPERSON MOLDENHAUER: Yes. I
20 mean, I see that -- I think that there are
21 different issues in regards to one general
22 health and safety versus, two, talking simply

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1 about the alley, which is not within our
2 purview.

3 MR. ROTH: I understand.

4 CHAIRPERSON MOLDENHAUER: Even --

5 MR. ROTH: I'm just --

6 CHAIRPERSON MOLDENHAUER: -- if
7 this case was determined to be for whatever
8 use, the use of the alley or the improper use
9 of the alley is, unfortunately, not something
10 that we have control over.

11 MR. ROTH: I agree. I was just
12 responding to your question about why I felt
13 it was unreasonable for the Zoning
14 Administrator not to place a higher priority
15 on this matter.

16 CHAIRPERSON MOLDENHAUER: I guess
17 another question to you, Mr. Roth, is why do
18 you think it is within our purview to review
19 this issue of enforcement and it potentially
20 would not be more appropriate to file
21 something like a Writ of Mandamus?

22 MR. ROTH: In our view, in the

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1 ANC's view, the establishment had expanded and
2 enlarged its use of the premises beyond what
3 was permitted in its C of O. In doing so, it
4 was violating the Zoning Regulations.

5 The appropriate place to turn for
6 remedy there was to the Zoning Administrator
7 and the Zoning Administrator's determination
8 and/or refusal to enforce the Zoning
9 Regulations we felt the appropriate place to
10 turn to appeal that determination and/or
11 refusal was to the BZA.

12 CHAIRPERSON MOLDENHAUER: Okay.
13 I'm going to turn to see if other Board
14 Members have questions.

15 Seeing none, then at this point in
16 time, we will turn to Mr. Surabian to present
17 your case.

18 MR. SURABIAN: Thank you. Thank
19 you, Madam Chair. There is one thing that Mr.
20 Roth said that stuck out here for me is that
21 he wants to put before the Board to make sure
22 that the Zoning Administrator follows through

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1 on this complaint. That's not what the Board
2 is here for and that's not the Board's
3 jurisdiction.

4 The Board is here to interpret the
5 Zoning Regulations. And if there is an error
6 made with respect to interpreting those
7 regulations, the Board is here to adjudicate
8 that error. The Board is not here to make
9 sure the Zoning Administrator follows through
10 on any particular aspect of his job.

11 And if he receives a complaint,
12 it's his responsibility to follow through on
13 it. If once he takes some action he has made
14 an error with respect to some provision of the
15 regulations, the Board has jurisdiction to
16 correct him and say we have the expertise on
17 interpreting the regulations and your
18 interpretation was wrong.

19 But the fact is that the Zoning
20 Administrator has never said that -- has never
21 made some interpretation of a regulation that
22 is at issue here. And Mr. Roth has never

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1 alleged that the Zoning Administrator's
2 refusal or lack of investigation was based on
3 the interpretation of some regulation.

4 And so, therefore, I don't think
5 it's appropriate for the Board to hear this
6 case.

7 That being said, there was no
8 refusal. The May 13th email, he says that he
9 will investigate. The fact is that it's just
10 that the investigation that -- has not been
11 completed in the manner that the appellant
12 wants it to be. But that does not give rise
13 to an appeal.

14 And there is good reason for this.

15 It's that the handling of enforcement matters
16 is an executive function. It's best handled
17 by DCRA. And the Board has said before that
18 it is in the absolute discretion of the Zoning
19 Administrator and there is good reason for
20 that.

21 But there are elements of
22 prosecutorial discretion, which have nothing

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1 to do with the Zoning Regulations. There are
2 different types of factors that the Zoning
3 Administrator or DCRA can consider in
4 evaluating what complaints to follow-up on,
5 which ones not to, how much investigation must
6 be done, where the investigation should stop.

7 But the fact is that unless there
8 is an allegation here that there was -- that
9 the lack of investigation was based on some
10 Zoning Regulation, the Board has to dismiss
11 this case.

12 And as to discussing things that
13 have occurred and have not, I'm not
14 comfortable doing that. I see this as a case
15 that is a potential enforcement case in the
16 future and to discuss -- I just don't think
17 it's appropriate to discuss on the record in a
18 public forum what has been done or what steps
19 DCRA takes in looking at these cases.

20 So now that the appellant has
21 completed their presentation, I would like to
22 make a Motion to Dismiss for lack of

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1 jurisdiction.

2 MR. ROTH: Madam Chair?

3 CHAIRPERSON MOLDENHAUER: Yes?

4 MR. ROTH: May I be heard on the
5 motion?

6 CHAIRPERSON MOLDENHAUER: Yes, you
7 may.

8 MR. ROTH: I feel like we have
9 been around and around and we have ended up in
10 the same place we started this morning when
11 the Board initially denied a Motion to
12 Dismiss, for lack of jurisdiction.

13 CHAIRPERSON MOLDENHAUER: Well,
14 actually, let me clarify. Mr. Surabian, are
15 you filing again another motion for lack of
16 jurisdiction or are you filing it based on --

17 MR. SURABIAN: We have heard the
18 appellant's case in chief and seen their
19 exhibits. There is no allegation that based
20 on the interpretation of the Zoning Regulation
21 that there was some error.

22 CHAIRPERSON MOLDENHAUER: So you

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1 are indicating that or you are actually
2 arguing that appellant has failed to meet its
3 burden and that there is no relief that can be
4 granted?

5 MR. SURABIAN: I guess I'm arguing
6 that they have failed to state a claim.

7 CHAIRPERSON MOLDENHAUER: Okay.
8 So I think that they are providing a different
9 argument here.

10 MR. SURABIAN: It's not --

11 CHAIRPERSON MOLDENHAUER: And if
12 the claim --

13 MR. SURABIAN: -- timeliness.

14 CHAIRPERSON MOLDENHAUER: Is there
15 a failure to state the claim is based on
16 failure to provide any evidence, assuming as
17 well potentially --

18 MR. SURABIAN: Right.

19 CHAIRPERSON MOLDENHAUER: -- you
20 know --

21 MR. SURABIAN: That -- there needs
22 to be -- the Board is here to adjudicate

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1 errors in the Zoning Regulations.

2 CHAIRPERSON MOLDENHAUER: I --

3 MR. SURABIAN: And I understand
4 that a refusal to investigate could be a
5 refusal, just as refusing to issue a C of O,
6 but it needs to be based on the interpretation
7 of a Zoning Regulation. And it can't be based
8 on anything else. He has not alleged that it
9 was based on --

10 CHAIRPERSON MOLDENHAUER: Do you
11 have a case that actually quotes that
12 language?

13 MR. SURABIAN: Yes, I do.

14 CHAIRPERSON MOLDENHAUER: Can you
15 actually provide us with that case?

16 MR. SURABIAN: Yes. It's long-
17 standing, but it was just reissued last week
18 in Appeal 18239.

19 CHAIRPERSON MOLDENHAUER: Can you
20 give me the name of the appeal?

21 MR. SURABIAN: 18241 of ANC-6A and
22 Northeast Neighbors for Responsible Growth.

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1 It's the AppleTree case. It's a consolidated
2 -- two appeals consolidated, 18239 and 18241.

3 CHAIRPERSON MOLDENHAUER: And what
4 did --

5 MR. SURABIAN: And the Board --
6 the exact quote is "The Board has no authority
7 to hear an appeal that is not based on an
8 interpretation of a Zoning Regulation."

9 CHAIRPERSON MOLDENHAUER: I think
10 wasn't that related to a building code issue?

11 MR. SURABIAN: Yes. And in that
12 case the --

13 CHAIRPERSON MOLDENHAUER: I mean,
14 it didn't have to do -- I mean, it was --

15 MR. SURABIAN: In that case, the
16 decision was based on an interpretation of the
17 building code.

18 CHAIRPERSON MOLDENHAUER: Of the
19 building code.

20 MR. SURABIAN: Right.

21 CHAIRPERSON MOLDENHAUER: And this
22 is talking about the interpretation of, you

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1 know, the specific issue, okay, is this a fast
2 food establishment or is this a delivery
3 service. And, you know, is an investigation
4 going to occur evaluating that Zoning
5 Regulation?

6 MR. SURABIAN: But the --

7 CHAIRPERSON MOLDENHAUER: So isn't
8 that different then than ANC-6A, that appeal?

9 MR. SURABIAN: It's not. There
10 needs to be an error made with respect to
11 interpreting a regulation. If there isn't, I
12 don't understand why the Board would be
13 involved.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 But then my question is what would you say is
16 the proper procedure of redress for any member
17 of the public --

18 MR. SURABIAN: Yes.

19 CHAIRPERSON MOLDENHAUER: -- if
20 there is a reasonable request made to ask for
21 an investigation and no investigation occurs?
22 And then there is no specific refusal, what

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1 would be the proper redress in your opinion if
2 it's not?

3 MR. SURABIAN: Yes.

4 CHAIRPERSON MOLDENHAUER: You are
5 alleging that it is not -- the proper redress
6 is not to come to the Board.

7 MR. SURABIAN: Yes.

8 CHAIRPERSON MOLDENHAUER: So my
9 question to you then is what would be the
10 proper redress?

11 MR. SURABIAN: Zoning Regulations
12 allow for -- to get injunctive relief, based
13 on -- if the use does not conform with what is
14 allowed, you can seek --

15 CHAIRPERSON MOLDENHAUER: No, no,
16 but I'm not asking --

17 MR. SURABIAN: -- injunctive
18 relief.

19 CHAIRPERSON MOLDENHAUER: -- about
20 the use. I mean, if it's actually the issue
21 of the use, then that would be --

22 MR. SURABIAN: Well, their issue--

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1 they are saying --

2 CHAIRPERSON MOLDENHAUER: No.

3 They are saying that there is -- that the ZA
4 has --

5 MR. SURABIAN: Yes.

6 CHAIRPERSON MOLDENHAUER: This is
7 their opinion, not -- that the ZA has erred
8 because he has refused by having a lapse of
9 time to take an investigation to take action.

10 My question to you is if that
11 occurs and if it's not the authority of the
12 BZA --

13 MR. SURABIAN: Yes.

14 CHAIRPERSON MOLDENHAUER: -- what
15 is their redress? They are not going to seek
16 an injunction. Maybe as I ask the appellant a
17 Writ of Mandamus --

18 MR. SURABIAN: Right.

19 CHAIRPERSON MOLDENHAUER: -- what
20 would it be?

21 MR. SURABIAN: Exactly. The Writ
22 of Mandamus, okay, that's one. The other is

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1 what I'm saying is their complaint is that
2 they are saying it's a food delivery service.

3 And the food delivery service is not what is
4 approved, so that would be a violation of the
5 Zoning Regulations.

6 They can -- if they believe that
7 that's the case, you can go to Superior Court
8 and try to get an injunction. That would be--
9 that would address their complaint.

10 MR. ROTH: Madam Chair? May I may
11 to characterize our own claims instead of
12 having opposing counsel try to characterize
13 our claims?

14 CHAIRPERSON MOLDENHAUER: Well, I
15 mean, I think opposing counsel is making an
16 argument in regards to potentially a Motion to
17 Dismiss.

18 MR. SURABIAN: Right.

19 CHAIRPERSON MOLDENHAUER: But I'll
20 let you provide your opposition or your
21 argument to that.

22 MR. ROTH: Well, I conceded this

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1 morning that there were two specific Zoning
2 Regulation sections that we were giving up. I
3 also cited four specific Zoning Regulation
4 sections that we were not giving up, that I
5 believe that the Zoning Administrator had
6 violated.

7 That his determination decision
8 and/or refusal, however you want to
9 characterize his May 13th email, was erroneous
10 with respect to four specific sections.

11 And when we came back after the
12 break, part of my reason for saying I was sort
13 of thrown for a loop was because our evidence
14 -- the evidence that we had planned to put on
15 was predicated upon our belief that those four
16 specific sections were violated. And again,
17 they were 3104.2, 3104.3 being the primary
18 ones.

19 And Mr. Surabian was right, I
20 should not have used the word --

21 CHAIRPERSON MOLDENHAUER: See, I
22 don't --

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1 MR. ROTH: -- omitted in his
2 decision. I should have used the word
3 ignored. In his decision he ignored the
4 import of those two sections in his
5 characterization of what is a conforming
6 versus a nonconforming use.

7 CHAIRPERSON MOLDENHAUER: But see,
8 I don't agree with you and I'm not --
9 obviously, I don't know what the other Board
10 Members think, but I think that this is not a
11 question of is this an expansion or not. It's
12 a question of is this either a proper use
13 under a fast food establishment or is it an
14 illegal use, because they are actually running
15 a food delivery service?

16 If it's a food delivery service,
17 it's not an expansion. That's actually just
18 another use entirely.

19 MR. ROTH: Yes.

20 CHAIRPERSON MOLDENHAUER: Which
21 would then mean that they are illegally
22 operating under the improper C of O.

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1 MR. ROTH: Yes.

2 CHAIRPERSON MOLDENHAUER: So
3 that's where I disagree with you. And I don't
4 find your arguments to be as persuasive in
5 that regard.

6 MR. ROTH: Yes.

7 CHAIRPERSON MOLDENHAUER: Because
8 I think that, to me, because it's either a
9 valid use or an invalid use, the question is
10 just simply does our Board, and I think that
11 there are questions here, have the authority
12 to request or require the ZA to take action
13 over a period of nine months if there has been
14 this potential, you know, omission or error of
15 not enforcing the Zoning Regulations.

16 And I think it is a very
17 challenging question, because I think that
18 there -- you know, it's an area where we step
19 softly.

20 MR. ROTH: Yes.

21 CHAIRPERSON MOLDENHAUER: But
22 there is some precedent in regards to the

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1 Board diving into enforcement issues,
2 obviously, in different realms. We had, you
3 know, the Philly Pizza case where there was a
4 complaint made by the neighbors. There was
5 then an investigation conducted by the Zoning
6 Administrator.

7 Then there was a determination
8 made and his C of O was revoked. And then
9 there was an appeal of that revocation.

10 MR. ROTH: Yes.

11 CHAIRPERSON MOLDENHAUER: Here,
12 obviously, one of the challenges is that we
13 are much earlier on in the process.

14 MR. ROTH: Exactly.

15 CHAIRPERSON MOLDENHAUER: And that
16 was one of the questions why we were asking
17 DCRA is if you guys are in the middle of an
18 investigation, tell us. Because if you can
19 tell us that you are in the middle of an
20 investigation, and I know obviously there is
21 potential issues of, you know, ambiguity in
22 regards to conducting investigations, but if

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1 there is an investigation that is actively
2 pending and there is action being taken, then
3 we can indicate that whatever relief we would
4 recommend, which is if we were to make that
5 decision, which we, obviously, aren't ready to
6 make, whatever relief we would give, would be
7 moot because it is already occurring.

8 VICE CHAIRPERSON SORG: But, Madam
9 Chair -- okay.

10 CHAIRPERSON MOLDENHAUER: But Mr.
11 Surabian has indicated that you are not
12 willing to kind of inform the Board of that.

13 VICE CHAIRPERSON SORG: But, Madam
14 Chair, I don't want to -- respectfully, it
15 seems to me that Mr. Surabian's argument is
16 that it's not our business --

17 CHAIRPERSON MOLDENHAUER: I can
18 see this.

19 VICE CHAIRPERSON SORG: -- whether
20 or not they are conducting --

21 MR. SURABIAN: I want to be as
22 respectful to the Board as possible.

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1 VICE CHAIRPERSON SORG: And I do
2 think that that's the challenge exactly.

3 MR. SURABIAN: Well --

4 MR. ROTH: Can I make two points?

5 MR. SURABIAN: I just don't -- I
6 want to be respectful to the Board.

7 CHAIRPERSON MOLDENHAUER: Let me
8 let --

9 MR. SURABIAN: I just don't --
10 okay.

11 CHAIRPERSON MOLDENHAUER: Okay.
12 Let me let Mr. Roth make a comment and then
13 I'll turn to Mr. Surabian to address these
14 issues.

15 MR. ROTH: Let me make two points.
16 One with regard to the power of the Board
17 under the zoning statute and the other with
18 regard to the question of what is and isn't
19 your business, if you will.

20 The zoning statute gives the Board
21 several options for action on an appeal. And
22 it is a very flexible set of options.

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1 "The Board may reverse or affirm,
2 wholly or partly, or it may modify the
3 determination, decision or refusal appealed
4 from or it may make such order as may be
5 necessary to carry out its decision and to
6 that end, shall have all the powers of the
7 officer or body from whom the appeal is
8 taken." That's what the statute says.

9 Now, with regard to whose business
10 it is, the logical outcome of Mr. Surabian's
11 argument that it's none of the Board's
12 business and that he doesn't really want to
13 have to tell you whether any investigation is
14 going on or not or what status it has or where
15 it is in the process, is that not just this
16 Zoning Administrator, but any Zoning
17 Administrator can, basically, drag out
18 endlessly forever a request from not just this
19 ANC, but any ANC, any citizen, anybody, any
20 request for an investigation no matter how
21 valid, now matter how blatant can just for
22 whatever reason just drag on and on and on and

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1 on and on any request for an inquiry and never
2 be subject to this Board's oversight. Never
3 be subject to this Board's appeal.

4 There has got to come a point
5 where that constitutes a refusal that this
6 Board can reverse. There has got to come a
7 point where this Board says that constitutes a
8 refusal.

9 CHAIRPERSON MOLDENHAUER: Okay.
10 I'm going to turn now to Mr. Surabian and
11 provide you an opportunity to address some of
12 the questions and comments or whatever.

13 MR. SURABIAN: Okay. I guess what
14 I'm saying is that even if the Board
15 determines that there is a refusal, that still
16 does not give rise to an appeal. It needs to
17 be based on the interpretation of a Zoning
18 Regulation.

19 The Zoning Administrator has never
20 said I interpret X regulation to mean such and
21 such and so I'm not going to investigate. He
22 has never said that. If he hasn't and it is--

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1 then I don't see why the Board would delve
2 into this issue.

3 If -- and I mean, until DCRA has
4 taken some action, I don't see how it would be
5 appropriate to discuss what steps in the
6 investigation have been taken.

7 And I want to be as transparent as
8 possible with the Board, but it's just not
9 appropriate if the Board doesn't have the
10 jurisdiction to hear the case to begin with.

11 CHAIRPERSON MOLDENHAUER: Mr.
12 Surabian --

13 MR. SURABIAN: The danger here is
14 that, you know, any, you know, sort of delay
15 or, you know, Zoning Administrator didn't
16 return my phone call kind of stuff is going to
17 come before the Board here. I mean, that's --

18 CHAIRPERSON MOLDENHAUER: And
19 believe me, that's why -- I mean, I think it's
20 pretty obvious that this is a very challenging
21 potentially, you know, point of first
22 impression before the Board.

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1 MR. SURABIAN: The first phone
2 call problem here.

3 CHAIRPERSON MOLDENHAUER: Because
4 I don't think we have an issue. Yes, we are
5 not in the issue of one phone call, but I
6 think the question, you know, is is it 11
7 months? Is it a year? Is it two years?

8 MR. SURABIAN: Yes.

9 CHAIRPERSON MOLDENHAUER: You know
10 --

11 MR. SURABIAN: In my --

12 CHAIRPERSON MOLDENHAUER: -- your
13 argument is even if it was five years, the
14 Board still shouldn't be involved.

15 MR. SURABIAN: That's exactly
16 right.

17 CHAIRPERSON MOLDENHAUER: And I
18 hate the word shouldn't be involved. The
19 Board does not have the proper jurisdiction to
20 adjudicate this issue.

21 MR. SURABIAN: Exactly right.

22 CHAIRPERSON MOLDENHAUER: And so I

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1 think that the reality is is that the Board --
2 I'm going to let Mr. Thomas to see if Mr.
3 Thomas has any additional arguments on this
4 point.

5 And then what we are going to do
6 is we are -- Mr. Surabian, are you not going
7 to present any testimony on your behalf?
8 Because I think what we are going to do is
9 we're going to hold --

10 MR. SURABIAN: Yes.

11 CHAIRPERSON MOLDENHAUER: I'm
12 going to allow Mr. Thomas to present and I'm
13 going to see if you have finished
14 presentations.

15 MR. SURABIAN: Yes, I made my
16 legal argument on that issue. I think that's
17 what you were looking for.

18 CHAIRPERSON MOLDENHAUER: I think
19 it is. I'm just curious if you had any or if
20 you desired to present any witnesses?

21 MR. SURABIAN: Not at the moment.

22 CHAIRPERSON MOLDENHAUER: Okay.

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1 Yes, I'll open it up for questions from Board
2 Members and then we will turn to Mr. Thomas
3 and then we will take the motion and issues
4 under advisement. Ms. Cohen?

5 MS. COHEN: Again, I'm fairly new
6 sitting up here, but what would be the remedy
7 then for action?

8 MR. SURABIAN: The remedy -- well,
9 like I said, the Zoning Administrator -- I
10 mean, the Zoning Regulations allow an
11 aggrieved party to seek injunctive relief at
12 Superior Court to stop the illegal use that
13 they are complaining of.

14 If you don't like the way the
15 Zoning Administrator has handled that, that
16 would be a viable option.

17 MS. COHEN: But are there any
18 other options?

19 MR. SURABIAN: Well, I mean, as
20 the ANC, I think that they should try to work
21 with the business owners in their community.
22 If this is really about the alley, you can

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1 work with the property owner. I have heard
2 that -- they have said that that doesn't work,
3 but, you know, as -- I think the ANC could --
4 I don't know what efforts they made, but if
5 they are misusing the alley, call MPD, call
6 DDOT, whoever has jurisdiction over that.

7 I mean, there are many ways to get
8 -- but DCRA doesn't have jurisdiction over
9 that alley or what's occurring there.

10 MS. COHEN: Thank you.

11 CHAIRPERSON MOLDENHAUER: At this
12 point in time then, we will turn to Mr. Thomas
13 to see if you have any arguments that you
14 would like to present.

15 MR. THOMAS: I don't have much to
16 add to that. I agree with Mr. Surabian's
17 position that if the regs don't establish some
18 time limit for the Zoning Administrator to
19 conclude the investigation and they don't
20 establish some benchmarks that he has to
21 report certain stages along the way, I don't
22 know how the Board can make a determination

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1 that there has been an appealable violation.

2 CHAIRPERSON MOLDENHAUER: Thank
3 you. Let me see if any Board Members have any
4 final questions for any of the attorneys or
5 parties.

6 VICE CHAIRPERSON SORG: Thank you,
7 Madam Chair. Maybe we went over this and it
8 got lost in the going around.

9 MR. SURABIAN: Yes.

10 VICE CHAIRPERSON SORG: To Mr.
11 Surabian, do you agree that a determination
12 was made in the May 13th email or do you not
13 believe a determination was made?

14 MR. SURABIAN: Well, I would
15 summarize the email saying the Zoning
16 Administrator is saying that DCRA has
17 authorized a fast food establishment and
18 that's what they are allowed to operate as and
19 confirming that the issues that Mr. Roth
20 raised with respect to the 2003 C of O, that
21 that C of O is valid in his eyes. That it was
22 appropriately issued and that we are -- and

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1 that they can operate as a fast food
2 establishment.

3 VICE CHAIRPERSON SORG: So, okay.
4 Is a determine -- so was a determination made
5 in the language of that email with respect to
6 the operation of the business?

7 MR. SURABIAN: No.

8 VICE CHAIRPERSON SORG: Okay.
9 Thank you.

10 CHAIRPERSON MOLDENHAUER: Then at
11 this point in time, we are going to conclude
12 the hearing. We are going to take the motion
13 under advisement.

14 I think that what we are going to
15 do, since we have a decision day scheduled for
16 next week, I think we are going to put this
17 down on decision for next week. It will give
18 us a week to really mull over this, work with
19 our attorneys to try to evaluate some of the,
20 I think, very hot button topics that are being
21 raised by this case.

22 That being said, I think that

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1 there are -- that I believe maybe the
2 operators in the audience and I just would
3 like to take this opportunity while it is very
4 clear we don't have the jurisdiction, but we
5 all live in the city and we all need to work
6 with each other as neighbors.

7 And there is, obviously, a concern
8 from the ANC. I think Ms. Cohen was kind of
9 getting at this as well. You know, if there
10 is illegal use by employees or other people
11 that maybe you can or can't control,
12 obviously, I would encourage that you work
13 with people to make sure that it's a safe
14 environment in which you run a business.

15 And in which, you know, people of
16 the city are trying to provide maybe more of
17 an amicable environment amongst everybody,
18 rather than having to come down here and have
19 three lawyers sitting at a table fighting it
20 out, trying to argue different issues, when
21 maybe, you know, the ability to just be a good
22 neighbor and work with the ANC and work with

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1 some concerns would potentially maybe have
2 resolved this many, many, many months ago.

3 So that's just a hopeful comment
4 to other people that, you know, live in our
5 community and work with our community that,
6 you know, we can hopefully try to find some
7 nonadjudicatory resolution to this.

8 But that being said --

9 MR. THOMAS: If I could address
10 that, I mean --

11 CHAIRPERSON MOLDENHAUER: It's
12 just --

13 MR. THOMAS: -- we were told not
14 to get into that, but there was --

15 CHAIRPERSON MOLDENHAUER: I'm just
16 making a general comment here and I think that
17 I know, obviously, there is two sides to every
18 story.

19 MR. THOMAS: Yes.

20 CHAIRPERSON MOLDENHAUER: And I
21 understand that. And I'm just saying, you
22 know, I hope that, obviously, you know,

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1 everyone can work together, because there are
2 two sides to every story, but there is
3 typically also a way to resolve them and
4 hopefully meet some sort of joint resolution.

5 And obviously, there is not a
6 joint resolution that has come to terms,
7 because people are still here and you are
8 trying to get a resolution from us. And so
9 that's all I'm saying.

10 MR. THOMAS: I just didn't want
11 her to leave here thinking that she is being
12 told by the Board that she is not making any
13 efforts.

14 CHAIRPERSON MOLDENHAUER: No.

15 MR. THOMAS: And that's not the
16 case.

17 CHAIRPERSON MOLDENHAUER: I'm not
18 saying that at all. And I understand that
19 there is two sides. I'm just saying though
20 that I'm hopeful that people can maybe try to
21 work things out. And I think that that's
22 obviously all that I'm saying.

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1 MR. THOMAS: Thank you.

2 CHAIRPERSON MOLDENHAUER: That
3 being said, this case will be set for a
4 decision next week, which I believe is March--

5 MR. MOY: Madam Chair?

6 CHAIRPERSON MOLDENHAUER: Yes?

7 MR. MOY: It's March 13th.

8 CHAIRPERSON MOLDENHAUER: March
9 13th, so in two weeks. Two weeks. I'm
10 getting ahead of myself. It gives us some
11 more time. So March 13th this case will be
12 set for decision.

13 MR. ROTH: Thank you very much,
14 Madam Chair. Members of the Board, appreciate
15 the time you have taken today. Thank you.

16 MR. THOMAS: Thank you.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you very much. Thank you everybody.

19 MR. SURABIAN: Thank you.

20 CHAIRPERSON MOLDENHAUER: Thank
21 you. Okay.

22 That then concludes our morning.

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1 We will be back here promptly at 1:00, which
2 is a half hour, so we are off the record.

3 (Whereupon, the Public Hearing was
4 recessed at 12:30 p.m. to reconvene at 1:20
5 p.m. this same day.)
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

1:20 p.m.

CHAIRPERSON MOLDENHAUER: This hearing will, please, come to order.

Good afternoon, ladies and gentlemen. We are located in the Jerrily R. Kress Memorial Hearing Room located at 441 4th Street, N.W.

Today is February 28, 2012. This is a Public Hearing of the Board of Zoning Adjustment for the District of Columbia.

My name is Meridith Moldenhauer. Joining me today to my right is Jeffrey Hinkle, a representative of the National Capital Planning Commission, to my far right is Lloyd Jordan, Mayoral Appointee, to my left is Nicole Sorg, Vice Chairperson, and to my far left is Marcie Cohen, a representative of the Zoning Commission.

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

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1 Please be advised this proceeding
2 is being recorded by a court reporter and is
3 also being webcast live. Accordingly, we must
4 ask you to refrain from any disturbing noise
5 or actions in the hearing room.

6 When presenting evidence to the
7 Board, please, turn on your microphone, first
8 stating your name and home address. When you
9 are finished speaking, please, turn off your
10 microphone, so that your microphone is no
11 longer picking up any sounds or background
12 noise.

13 All persons planning to testify
14 either in favor or in opposition are to fill
15 out two witness cards. These witness cards
16 are located to my left on the table near the
17 door and on the witness tables in front of
18 you.

19 Upon coming forward to speak to
20 the Board, please, give both cards to the
21 court reporter sitting to my right.

22 Also, if you wish to file written

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1 testimony or additional supporting documents
2 today, please, submit an original along with
3 12 copies to the Secretary for distribution.
4 If you do not have the requisite number of
5 copies, you can produce copies at the machine
6 across the hall at the Office of Zoning.

7 The order of procedure for special
8 exceptions and variances are as follows: One,
9 statement of the applicant and applicant's
10 witnesses; two, parties and persons in
11 support; three, parties and persons in
12 opposition; four, reports of the ANC; five,
13 Government reports; and then six, rebuttal and
14 closing statement.

15 Pursuant to ' 3117.4 and 3117.5,
16 the following time constraints will be
17 maintained: The applicant, persons and
18 parties, except the ANC, in support, including
19 witnesses will be given 60 minutes
20 collectively.

21 Appellees, persons and parties,
22 except an ANC, in opposition, including

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1 witnesses will be given 60 minutes
2 collectively.

3 Individuals will be given 3
4 minutes and organizations will be given 5.

5 These time restrictions do not
6 include cross-examination or questions from
7 the Board.

8 The ANC within which the property
9 is located is automatically a party to a
10 special exception or a variance case.

11 Nothing prohibits the Board from
12 placing reasonable restrictions on cross-
13 examination, including the time limitation and
14 limitation on the scope of cross-examination.

15 The record will be closed at the
16 conclusion of each case, except for any
17 material 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 that material must be
21 submitted to the Board.

22 After the record is closed, no

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1 other information will be accepted by the
2 Board.

3 The District of Columbia's
4 Administrative Procedures Act requires that a
5 public hearing on each case be held in the
6 open and before the public. Pursuant to '
7 405(b) and 406 of the Act, the Board may,
8 consistent with the rules and procedures in
9 the Act, enter into a closed meeting on a case
10 for purposes of seeking legal counsel on a
11 case pursuant to D.C. Code ' 2-575(b)(4)
12 and/or deliberating on a case pursuant to D.C.
13 Code ' 2-575(b)(13), but only after providing
14 the requisite public notice in a case and in
15 the case of an emergency closed meeting after
16 taking a roll call vote.

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

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1 Please, turn off your cell phones
2 and beepers, at this time, so as not to
3 disturb these proceedings.

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

11 If you are not prepared to go
12 forward with a case today or if you believe
13 the Board should not proceed, now is the time
14 to raise such a matter.

15 Mr. Secretary, do you have any
16 preliminary matters?

17 MR. MOY: Madam Chairperson, there
18 are preliminary matters, but staff would
19 suggest that the Board address those matters
20 when the case is called.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you. Then all individuals wishing to testify

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1 today, if you can, please, rise and the oath
2 will be administered.

3 (Whereupon, witnesses were sworn.)

4 MR. MOY: You may consider
5 yourself under oath.

6 CHAIRPERSON MOLDENHAUER: Thank
7 you very much, Mr. Moy. If we can call the
8 first case for the afternoon?

9 MR. MOY: Yes, good afternoon,
10 Madam Chairperson and Members of the Board.

11 That would be Application No.
12 18320. This is the application of Jose Silva,
13 pursuant to 11 DCMR 3104.1, for a special
14 exception for a one story rear addition to an
15 existing one-family detached dwelling under '
16 223, not meeting the lot occupancy ' 403, rear
17 yard ' 404, and nonconforming structure
18 subsection 2001.3 requirements in the R-4
19 District at premises 4029 Gault Place, N.E.,
20 property located in Square 5077, Lot 39.

21 Madam Chair, we have a Spanish
22 Interpreter as well on this application.

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1 CHAIRPERSON MOLDENHAUER: Thank
2 you very much. I'll hopefully provide enough
3 time and if I'm speaking too quickly, please,
4 let me know, so that you can adequately
5 interpret for the case.

6 Okay. At this point in time, I'll
7 ask all parties to introduce themselves for
8 the record. You need to make sure his
9 microphone is on. Push it. Bright green.

10 MR. SILVA: Okay. First, good
11 afternoon to everybody.

12 CHAIRPERSON MOLDENHAUER: Good
13 afternoon.

14 MR. SILVA: Okay. My name is Jose
15 Silva and my address is 4029 Gault Place,
16 N.E., Washington, D.C., ZIP Code 20019.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you.

19 INTERPRETER FABARA-NUNEZ: Yes,
20 good afternoon. My name is Maria Fabara-
21 Nunez. I'm a Spanish Interpreter.

22 MR. CARRASCO: Hi, I'm Hernan

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1 Carrasco. I'm an architect in the District.
2 And I did the plans and I'll help Mr. Jose to
3 prepare all the stuff to be here.

4 CHAIRPERSON MOLDENHAUER: All
5 right. At this point in time in the
6 proceeding, we would turn to the applicant and
7 let him provide any information he has that
8 goes forward in regards to relief he is
9 requesting, any supporting documents that he
10 would like to present to the Board.

11 MR. SILVA: Yes.

12 CHAIRPERSON MOLDENHAUER: All
13 right. Actually, I think we have a file
14 already.

15 MR. CARRASCO: Yes.

16 CHAIRPERSON MOLDENHAUER: Okay.
17 We have on the record -- we have already a
18 full file of everything that has been
19 submitted.

20 INTERPRETER FABARA-NUNEZ: He is
21 asking what you don't have that he is going to
22 give it to you.

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1 CHAIRPERSON MOLDENHAUER: And when
2 he has it, he can provide it to Mr. Moy.

3 MR. SILVA: Okay.

4 CHAIRPERSON MOLDENHAUER: Is there
5 anything else that the applicant would like to
6 say to the Board or provide that --

7 INTERPRETER FABARA-NUNEZ: He
8 think that you have all the information.

9 MR. SILVA: I was wondering
10 whether you have the petitions?

11 CHAIRPERSON MOLDENHAUER: We do.
12 We have all the letters from his neighbors and
13 the petition in support.

14 MR. SILVA: Okay. So you have all
15 the information.

16 CHAIRPERSON MOLDENHAUER: Okay.
17 Then I'll just ask Board Members if they have
18 any specific questions for the applicant.

19 Seeing none, then at this time, we
20 would like to ask if there is anybody in the
21 audience in support or in opposition of the
22 case? If there is anybody in -- okay. If she

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1 wants to come forward, can you, please, come
2 forward and sit at the table?

3 MR. SILVA: She is in support.

4 CHAIRPERSON MOLDENHAUER: Okay.
5 And then, obviously, you can provide
6 interpretation.

7 INTERPRETER FABARA-NUNEZ: No
8 problem.

9 CHAIRPERSON MOLDENHAUER: Okay.
10 If you can state your name and home address?
11 Okay.

12 MS. AVELLAMADA: My name is
13 Teresa, Maria Teresa Avellamada. I live 4044
14 Gault Place, N.E., Washington, D.C. The ZIP
15 Code is 20019. I live to for 32 years.

16 CHAIRPERSON MOLDENHAUER: Okay.
17 And then if you want to say why you are in
18 support or, you know --

19 MS. AVELLAMADA: He is nice
20 person. I don't know what happened. I don't
21 know, maybe they -- the people don't like the
22 Spanish. I never have a problem to them, but

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1 you know some people is -- maybe don't like to
2 Spanish people.

3 CHAIRPERSON MOLDENHAUER: Okay.

4 And so you have no problem with the --

5 MS. AVELLAMADA: No.

6 CHAIRPERSON MOLDENHAUER: Okay.

7 MS. AVELLAMADA: Not to the
8 addition. I been 32 years to in my house. I
9 have my apartment. No, no, I don't have any
10 problem for to my --

11 CHAIRPERSON MOLDENHAUER: Okay.

12 Thank you very much for coming down.

13 MS. AVELLAMADA: You're welcome.

14 CHAIRPERSON MOLDENHAUER: If there
15 is nobody else in the audience, then, at this
16 time, we turn to the Office of Planning for
17 their report.

18 MS. THOMAS: Madam Chair, good
19 afternoon. Karen Thomas with the Office of
20 Planning. The applicant is requesting a rear
21 addition to his nonconforming residence in the
22 R-4 Zone. And we basically would rest on the

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1 record. We -- he meets the test of ' 223 and
2 I will be happy to take any questions. Thank
3 you.

4 CHAIRPERSON MOLDENHAUER: Thank
5 you very much. Does the applicant have any
6 questions for the Office of Planning?

7 MR. SILVA: No, no.

8 INTERPRETER FABARA-NUNEZ: No, he
9 doesn't have any questions.

10 CHAIRPERSON MOLDENHAUER: Okay.

11 INTERPRETER FABARA-NUNEZ: He is
12 saying.

13 CHAIRPERSON MOLDENHAUER: Thank
14 you. I just want to make sure, has the
15 applicant or -- you have received the Office
16 of Planning report?

17 MR. SILVA: Yes.

18 CHAIRPERSON MOLDENHAUER: And have
19 you read it and you understand what it says?

20 INTERPRETER FABARA-NUNEZ: There
21 are some things that apparently he didn't
22 understand.

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1 MR. SILVA: I do understand it
2 about the zoning requirements.

3 INTERPRETER FABARA-NUNEZ:
4 Apparently, Hernan has been helping him and
5 since it is presented in a different way, he
6 get a little bit confused and now he explain
7 to him what is existing, what is proposed and
8 what is going to be and he understands it
9 better.

10 MR. SILVA: Because he is the
11 architect. He is the one that developed the
12 plans.

13 CHAIRPERSON MOLDENHAUER: Office
14 of Planning went through the standard and then
15 indicated that based on the standard, they
16 recommend approval of the application.

17 Can you translate?

18 MR. SILVA: Okay. Then thank you.

19 CHAIRPERSON MOLDENHAUER: Now,
20 I'll see if Board Members have any questions
21 for the Office of Planning.

22 Seeing none, then I'll ask if

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1 anybody is present today from ANC-7D?

2 Seeing nobody present, I'll
3 indicate that we have Exhibit 26 and Exhibit
4 26 indicates that on January 3, 2012, there
5 was a regularly scheduled meeting with a
6 quorum present and that they voted 4-0-0 to
7 support the application. Do that.

8 MR. SILVA: Apparently, you have
9 the letter.

10 INTERPRETER FABARA-NUNEZ: He has
11 shown me the letter that you probably have.

12 CHAIRPERSON MOLDENHAUER: Yes.
13 I'm just reading this letter and I'm
14 indicating that it satisfies our requirements
15 and we will give it great weight. If you can
16 translate that.

17 INTERPRETER FABARA-NUNEZ: Okay.

18 MR. SILVA: Okay.

19 CHAIRPERSON MOLDENHAUER: Okay.
20 That being said, we also have in our record
21 the letters of support from the neighbors and
22 the petition of support.

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1 At this point, we would turn back
2 to the applicant for any closing remarks. And
3 we'll ask Mr. Silva if he has any final
4 comments he would like to provide to the
5 Board?

6 MR. SILVA: No. It has been very
7 difficult for me as a matter of time or of
8 money. Hopefully everything will come out
9 great.

10 CHAIRPERSON MOLDENHAUER: Okay.
11 Well, thank you very much.

12 At this point, you can just
13 translate, we are going to conclude the
14 hearing and enter into deliberation.

15 MR. SILVA: That's fine. Thank
16 you, thank you.

17 CHAIRPERSON MOLDENHAUER: At this
18 point in time, based on the record, seeing
19 recommendations from many neighbors, seeing
20 letters of support from the ANC and from
21 Office of Planning and no objection from DDOT,
22 I would recommend approval of the application

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1 and I'll see if there is any additional
2 comments from Board Members.

3 VICE CHAIRPERSON SORG: No
4 additional comments. I would support a motion
5 for approval.

6 CHAIRPERSON MOLDENHAUER: Then I
7 submit a motion to approve Application 18320,
8 pursuant to 11 DCMR 3104.1, for a special
9 exception for a one story rear addition to an
10 existing one-family detached dwelling under '
11 223, not meeting the lot occupancy, rear yard,
12 nonconforming structure requirements under R-
13 4.

14 A motion has been made. Is there
15 a second?

16 MS. COHEN: Second.

17 CHAIRPERSON MOLDENHAUER: A motion
18 has been made and seconded.

19 All those in favor say aye.

20 ALL: Aye.

21 MR. MOY: Staff would record the
22 vote as 5-0-0. This is on the motion of

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1 Chairperson Moldenhauer to approve the special
2 exception relief under section 223, not
3 meeting lot occupancy, rear yard and
4 nonconforming structure provisions, seconding
5 the motion is Ms. Cohen. Also in support of
6 the motion are Ms. Sorg, Mr. Hinkle and Mr.
7 Jordan.

8 CHAIRPERSON MOLDENHAUER: Based on
9 the fact that there is no opposition, we would
10 like to ask that a summary order be issued and
11 that we waive our requirements.

12 MR. MOY: Thank you, Madam Chair.

13 CHAIRPERSON MOLDENHAUER: If you
14 can explain that? We said for a summary
15 order, which is a faster time frame in order
16 for him to get the final order and be able to
17 start construction.

18 MR. SILVA: Thank you.

19 CHAIRPERSON MOLDENHAUER: You're
20 welcome. Have a good day.

21 INTERPRETER FABARA-NUNEZ: Thank
22 you very much.

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1 CHAIRPERSON MOLDENHAUER: Mr. Moy,
2 we can then call the next case for the
3 afternoon.

4 MR. SILVA: Thank you for
5 everybody. Thank you, everybody.

6 MR. MOY: Okay. I believe the
7 next case before the Board is Application No.
8 18315. This is the application of Evermay
9 Georgetown from this morning's session.

10 And I believe I had already read
11 the advertisement, but I'll do so again.

12 That would be Application No.
13 18315, application of Evermay Georgetown LLC
14 on behalf of S & R Foundation, pursuant to 11
15 DCMR 3104.1, for a special exception to
16 establish a nonprofit use under ' 217, in the
17 R-1-B District at premises 1623 28th Street,
18 N.W., property located in Square 1285, Lot
19 815.

20 CHAIRPERSON MOLDENHAUER: Good
21 afternoon. If the parties can, please,
22 introduce themselves for the record?

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1 MS. HAASE: Good afternoon. I'm
2 Alice Haase with the Law Offices of Holland &
3 Knight and with me today is Steve Sher, who I
4 believe is a very familiar face.

5 CHAIRPERSON MOLDENHAUER: No.

6 MS. HAASE: And Dr. Sachiko Kuno,
7 who is President of the S & R Foundation, the
8 applicant and owner of the Evermay estate
9 along with her husband. And then we have a
10 traffic consultant, Mr. Erwin Andres, who
11 apparently is stuck in traffic.

12 MR. SHER: Now, we didn't really
13 say that part.

14 MS. HAASE: But will be here
15 momentarily.

16 CHAIRPERSON MOLDENHAUER: I think,
17 Mr. Moy, maybe you can provide a brief summary
18 on an update we have in regards to a party
19 status individual, which we identified from
20 this morning's hearing, who was here, but then
21 had to leave for emergency reasons. I think
22 that there has been an update in regard to

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1 that that we have received maybe orally or I
2 don't know if we have gotten a written
3 confirmation.

4 MR. MOY: Yes, yes, I would be
5 happy to, Madam Chair.

6 CHAIRPERSON MOLDENHAUER: Thank
7 you.

8 MR. MOY: Since this morning, I
9 have been in personal contact by telephone and
10 text message with Mr. Paul Opalack, who had
11 filed for -- had requested party status. For
12 medical reasons, he is unable to join the
13 Board this afternoon.

14 He did tell me that he has
15 withdrawn his request for party status and I
16 should be receiving that by email shortly.

17 Secondly, before he left this
18 morning, he provided the Board with his
19 written comments, which I have not passed to
20 the Board yet, so I'll do that shortly.

21 So in brief, that's my update to
22 the Board.

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1 CHAIRPERSON MOLDENHAUER: Thank
2 you very much. So what we will do is we will
3 deem the party status individual withdrawn
4 and, obviously, we will also wait and make
5 sure that that is part of our record though as
6 well.

7 But we will, at the point in time
8 in which we hear three minute testimonies,
9 review and either maybe review or read into
10 the record the statement of that individual.

11 Actually, Mr. Moy, can you make
12 sure that the applicant has a copy of this as
13 well? I don't know if they have received a
14 copy of this. I want to make sure that
15 everyone has got an opportunity to review it.

16 And that's a submission from Paul Opalack.

17 That being said, we will now move
18 forward to turn to the applicant. I don't
19 know if we need a full report on the case. I
20 think, obviously, most of the issues are in
21 regards to traffic, so I don't know if we -- I
22 don't know what the ETA may be, because I

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1 think there was maybe some specific questions
2 the Board has.

3 MS. HAASE: ETA is three minutes.

4 CHAIRPERSON MOLDENHAUER: Okay.
5 Oh, perfect. Well, then I'll let you present
6 maybe a summary of the case and then maybe the
7 Board will have some general questions for the
8 applicant and we can move forward.

9 MS. HAASE: Okay.

10 CHAIRPERSON MOLDENHAUER: And
11 we'll work around it.

12 MS. HAASE: Well, the first thing
13 I would like to do is to have Mr. Andres
14 qualified as an expert in transportation. I
15 know he is a frequent visitor here and has
16 been qualified already this year, I believe,
17 on January 24th.

18 We have submitted his resume for
19 the record and ask that he be qualified again
20 today.

21 CHAIRPERSON MOLDENHAUER: Yes, we
22 have reviewed his record and he has been

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1 qualified in the past, so he is deemed an
2 expert.

3 MS. HAASE: Excellent. This has
4 been such a pleasure to work on this case
5 because it has been one where there has been
6 such collegial collaboration with the
7 immediate neighbors. And I would be remiss if
8 I did not mention some of them.

9 Steve and Ellen Steury, who live
10 directly across the street from Evermay; some
11 of their neighbors on R Street; Avery Miller,
12 David Petrou, these are neighbors that either
13 abut or are immediately opposite them.

14 We began meeting with these
15 immediate neighbors back in August when we had
16 two meetings at Dr. Kuno and Dr. Ueno's home
17 and we followed that by email contact and we
18 had another meeting at Evermay in December, so
19 they could see the progress of the renovations
20 and be brought up to date.

21 Then we met with a couple of the
22 ANC Commissioners at the home of the Steurys

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1 and then the Commissioners held an
2 informational meeting at Georgetown Library
3 for public and then, of course, we followed at
4 the ANC meeting with a unanimous vote of
5 support.

6 So it has just been a wonderful
7 experience. And other than Mr. Opalack, we
8 are unaware of any opposition. So we are here
9 and he is not opposed, which is a good thing
10 and a very nice surprise.

11 But we are here today to seek one
12 special exception to permit the S & R
13 Foundation to locate the nonprofit offices,
14 the historic Evermay property, in the
15 Georgetown neighborhood and Historic District.

16 This nonprofit office and use will
17 not allow -- will not require any alterations
18 or expansion of the property in any way.

19 What it will do it will allow
20 Evermay or the S & R Foundation to locate its
21 offices on the property and for the foundation
22 to host associated events and activities there

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1 as well.

2 What you have before you is a 10-
3 year plan and I just wanted to talk about that
4 a little bit, because when you look at the
5 conditions, there are quite a number of
6 events. But the foundation has a mission to
7 find talented young artists and to address
8 global resilience and, therefore, they would
9 like to grow their program.

10 And so what you see before you is
11 really a 10-year forecast plan. For instance,
12 the conditions allow for nine employees to
13 locate at Evermay, but when they locate their
14 offices there, they will do so with only five
15 employees, including Dr. Kuno.

16 When they start to hold their
17 concerts and exhibits, we have provided for
18 quite a few, but for 2012, there, at this
19 point in time, are only six planned. So
20 again, when you look at this, it's really a
21 forecast, a forecast for 10 years for the S &
22 R Foundation.

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1 Then there are three civic events
2 allowed or fundraising events allowed per
3 year. And the one thing that we have done is
4 be able to plan for two of those which one
5 will hopefully, not to jump ahead of myself,
6 be the grand opening of the S & R Foundation
7 at Evermay and then their annual awards
8 dinner.

9 So those are the only three things
10 -- two things planned for this year. And then
11 the fellows meetings, which gather the
12 renowned professionals to address global
13 resilience and this management of hazard risk
14 are planned for only five this year. Four of
15 which would be the short one-day meetings and
16 only one which would be a five day meeting.

17 So we hope to grow and five years
18 when we are back, we hope that we have more
19 events planned than today. But it is a
20 forecast program.

21 I had asked Dr. Kuno to tell you a
22 little bit about the foundation and with your

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1 indulgence, she will do that now.

2 MS. KUNO: Thank you, Alice.
3 Thank you so much for giving me the
4 opportunity to be here today and to talk about
5 the foundation.

6 And my husband, Dr. Ryuji Ueno and
7 I moved to the United States in 1996 to
8 establish our own biopharmaceutical company
9 named Sucampo Pharmaceuticals. And the both
10 of us have the scientific background and
11 researchers also the business person, 200
12 biopharmaceutical companies in Japan as well
13 as in the United States.

14 And since 1996, we had permanent
15 residence, a green card and holder and I think
16 more than 90 percent we live in the United
17 States, especially in this Greater Washington
18 area.

19 And we really appreciate the
20 people around here in Greater Washington area
21 support us since we moved to the United States
22 to grow our own pharmaceutical company, so

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1 that we would actually give some contribution
2 back to our society here and in order to do
3 that, we established S & R Foundation in 2000.

4 Since then, we have two functions
5 through the S & R Foundation. One is a
6 programming function and through that we have
7 S & R Washington, our board, to support young
8 artists. And every year we have selected one,
9 two, three young talented artists worldwide,
10 especially who has -- there are some
11 ambassadors between the United States and
12 other countries that includes Japan.

13 And the other programming function
14 we have is -- that is also the various
15 accessory done in the past 10 years, that's in
16 the collaboration with American Physiological
17 Society and we have the winner of all to
18 support young scientists every year will be
19 given the studies and the tools to the young
20 scientist and that organization that young
21 scientists belong to and it's to support their
22 -- to facilitate their research.

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1 So in addition to these
2 programming functions, we have funding
3 function that is supporting to other 501(c)(3)
4 nonprofit organizations that includes Johns
5 Hopkins University and Howard University of
6 North Carolina or Washington and the Kennedy
7 Center, National Opera and some things like
8 that.

9 And last year, the foundation's
10 board of directors decided to expand our
11 function to cover more social science area
12 that include global audience studies. The one
13 with was the reason why we came to this idea
14 is after seeing the many national disaster --
15 natural disasters, that includes Hurricane
16 Katrina and Haiti earthquake and Japan's
17 earthquake last March and we -- that includes
18 myself, the foundation board of director has--
19 really would like to contribute some
20 exchanging information or knowledge or idea or
21 strategy worldwide.

22 So that is a new mission that the

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1 foundation is thinking right now.

2 And also, I have much -- because I
3 stepped down from the CEO position at the
4 pharmaceutical company now, so I have more
5 time to focus on the S & R Foundation. So I
6 would like to expand S & R Foundation for 10
7 years length, so I am now in the process to
8 make a strategic plan for the long-term
9 planning of 10 years.

10 So the Evermay project is one that
11 is also 10 years, a long-term strategic plan.

12 So Evermay and the usage of the Evermay and
13 operation at the Evermay would be based upon
14 that 10 year planning, so that they still in
15 the process however.

16 I really would like to use Evermay
17 as a headquarter over at S & R Foundation and
18 to have scholars and researchers to get
19 together there and to exchange knowledge and
20 idea to prevent -- to facilitate recovery from
21 natural disasters like earthquake.

22 MS. HAASE: Too much.

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1 MS. KUNO: Maybe too much. I'm
2 sorry.

3 MS. HAASE: Okay.

4 MS. KUNO: Yes, I think we have
5 ideas, especially the years. But anyhow, the
6 main reason why we decided to purchase Evermay
7 is the preservation of the historic house and
8 gardens and that is one of the most beautiful
9 building and the garden in the Georgetown or
10 maybe in the Washington, too, so that is my
11 main reason.

12 And second reason is what I
13 mentioned right now is S & R Foundation could
14 contribute to the society. Thank you so much.

15 CHAIRPERSON MOLDENHAUER: Thank
16 you very much for your presentation. I'll see
17 if Board Members have any questions.

18 MS. COHEN: Is this going to be
19 your principal residence in the District of
20 Columbia?

21 MS. KUNO: No. I think that we
22 are going to use Evermay as a secondary

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1 residence. You have the primary residence in
2 Maryland.

3 MS. COHEN: Evermay I have only
4 been there once. I attended a wedding and it
5 was most beautiful.

6 MS. KUNO: Yes, yes.

7 MS. COHEN: Yet, I noticed that,
8 you know, of all of the listings of what is
9 going to take place there, there is no
10 opportunity for the neighbors or people who
11 live in Washington, D.C. to visit this
12 beautiful garden.

13 Are there any plans to at least
14 have, you know, one open day for the
15 neighborhood or people in Georgetown on a
16 garden tour, because, you know, it is a local
17 treasure. It's a resource, yes. Is that
18 possible?

19 MS. KUNO: Yes. So far we haven't
20 yet decided whether we would open that garden
21 to the public or not, but, yes, we really
22 appreciate neighbors support you the idea of

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1 that and S & R Foundation is now thinking that
2 you use Evermay as a property. So I think I
3 would like to think about that possibility and
4 to Evermay -- to show the Evermay to the
5 public.

6 But I think the same thing,
7 traffic signal we need to think about how to
8 handle the traffic that day, if we do the open
9 garden or the open house, too, I think that
10 might be sudden on people and it would come to
11 Evermay, so that we carefully handle the how
12 to elect the people to come to the Evermay and
13 not disturb our neighbors, traffic around
14 there.

15 Yes, that is my thought, yes.

16 MS. COHEN: Yes. And I understand
17 and appreciate that, because there is nowhere
18 to find parking in Georgetown, but people do
19 walk as well. And one day a year to
20 inconvenience some people is not a great
21 burden, in my opinion.

22 MS. KUNO: Yes, thank you.

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1 CHAIRPERSON MOLDENHAUER: Thank
2 you. I think we have other questions. Mr.
3 Jordan?

4 MEMBER JORDAN: And I'm not real
5 clear. I was going to say how close is the
6 nearest living residence, but I know the back
7 side is a cemetery. But how close is the
8 nearest residence where there is a live body?

9 MS. HAASE: If I may answer that,
10 just to the south of the property there are
11 three residences that directly abut Evermay
12 and then directly across the street at the
13 corner of 28th Street there is someone, the
14 Steurys.

15 MEMBER JORDAN: And those events
16 that you plan to have, are they going to be
17 contained inside the property or outside the
18 property?

19 MS. HAASE: One of the wonderful
20 features about Evermay is that it has 3.57
21 acres of land, which I believe is rather
22 unique in Georgetown. And all the parking,

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1 all the events, everything can be contained
2 right on the property.

3 And one of the conditions is that
4 there would be no amplified music outdoors.

5 VICE CHAIRPERSON SORG: Actually,
6 I will ask one question, Madam Chair.

7 CHAIRPERSON MOLDENHAUER: Yes.

8 VICE CHAIRPERSON SORG: It turns
9 out I live around the corner, so I walk my dog
10 by Evermay just about every day.

11 MS. KUNO: You scoop?

12 VICE CHAIRPERSON SORG: Of course
13 I scoop. Everybody does.

14 MS. COHEN: It's the law.

15 VICE CHAIRPERSON SORG: And it's
16 the law. I noticed the preservation work that
17 is going on and as well in the applicant's
18 filings the plans for the office portion that
19 are in the former domestic help residence, is
20 there plans to renovate the gatehouse as well?

21 MS. HAASE: The gatehouse has been
22 spruced up. The entire property has been

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1 spruced up.

2 VICE CHAIRPERSON SORG: Is there--
3 certainly, certainly. Is there a use that is
4 planned for the gatehouse?

5 MS. HAASE: No more than --

6 VICE CHAIRPERSON SORG: For the
7 organization, I suppose.

8 MS. HAASE: I think it has just
9 been put back into one large room and I don't
10 think there are any plans. I think, you know,
11 there is a landscape staff that is at Evermay.

12 MS. KUNO: Staff, yes, there is --

13 VICE CHAIRPERSON SORG: Okay.

14 MS. KUNO: -- that would be there,
15 yes.

16 MS. HAASE: Evermay uses that.

17 VICE CHAIRPERSON SORG: Okay.
18 Just curious. Thank you.

19 MS. HAASE: And you should stop by
20 some time, it's really quite well there.

21 CHAIRPERSON MOLDENHAUER: I guess
22 one other question about -- and I know that

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1 the request is not for a home occupation,
2 because, obviously, they are not residing
3 there primarily. So this really is
4 potentially then changing this from
5 residential, 100 percent residential to a
6 nonprofit use.

7 I guess the application on the
8 prehearing statement on page 4, you indicate
9 that their intent is to retain use of the
10 property for residential purposes.

11 And I guess that's where there is
12 just maybe some confusion as to how this
13 interplay is going to occur. We heard
14 testimony that, from the applicant, this isn't
15 going to be their primary residence.

16 So I guess, one of the concerns
17 would be, you know, just being a part of the
18 community and maintaining that relationship,
19 if it was a residence or at least that would
20 be part of the use, you know, that encourages
21 the concept of, you know, being part of the
22 community and things to that effect, which I'm

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1 not hearing that that is going to occur, so
2 I'm just curious to kind of see.

3 You are saying that they are going
4 to retain the use of the property for
5 residential purposes. If you can elaborate on
6 that and tell me what the goal is or how that
7 interplay is going to occur?

8 MS. HAASE: If I may?

9 CHAIRPERSON MOLDENHAUER: Sure.

10 MS. HAASE: The doctors, as we
11 affectionately call them, will have quarters
12 in the house and they do intend to stay there.
13 It is just their primary residence is not in
14 that house and they have several residences,
15 but this will be one of them and they will
16 stay there. They are very proactive when it
17 comes to their foundation.

18 When there are events, they are
19 always there. Evermay is beautiful and I'm
20 sure they are going to want to be there in
21 residence and entertain their friends.

22 So they do have and will maintain

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1 a presence in Georgetown. They currently have
2 a residence in Georgetown, but I think this
3 will become their primary Georgetown
4 residence.

5 MS. KUNO: Yes, I think so. I'm
6 sorry that you are confused here, confusing
7 you, but because we have several houses and so
8 that I was obviously confused whether I should
9 say that primary or secondary. So but I think
10 we really are likely to move to the Georgetown
11 and to stay there primarily as a residence.
12 So I think that I should have said a primary,
13 but I really confused. I'm sorry about that.

14 CHAIRPERSON MOLDENHAUER: No, no
15 worries. It's obviously not as clear cut as
16 some people may have it in their lives.

17 So that being said, do any other
18 Board Members have any other questions of this
19 witness? Okay. Then at this point in time, I
20 think that you probably have testimony from
21 your next witness?

22 MS. HAASE: The missing Mr.

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1 Andres?

2 CHAIRPERSON MOLDENHAUER: Yes. I
3 assume that's where you were going to go as
4 your next, but I figured I would let you
5 indicate.

6 MS. HAASE: That's correct.

7 MR. ANDRES: Good afternoon,
8 Chairwoman Moldenhauer and Members of the
9 Board. My name is Erwin Andres. I'm a
10 principal with the Gorove/Slade Associates.
11 As part of our scope of work, we have worked
12 with our planning and development team to
13 identify the scope and do some coordination
14 with the reviewing agencies, that include
15 Office of Planning and DDOT.

16 With respect to what we have done,
17 we have actually submitted a traffic study
18 dated January 12, 2012, which DDOT had
19 reviewed and had commented on in their review
20 letter dated February 21, 2012, both of which
21 you should have in the record.

22 As part of our coordination, we

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1 have identified what the impacts are during
2 the peak hours and given that the foundation
3 has taken deliberate steps to make sure that
4 all of the meetings associated with the
5 foundation and all of the events and concerts
6 and various social functions are scheduled
7 outside of the peak hours.

8 If you notice, the events are not
9 scheduled -- there are no events scheduled
10 between 4:00 p.m. and 7:00 p.m., which is the
11 commuter peak period in the evenings. And
12 that was done intentionally to avoid those
13 commuter peaks and to avoid the traffic
14 circulation that is consistent along both R
15 Street, Q Street and 28th Street.

16 As many of you may know, the route
17 from Dupont Circle to Georgetown, you know, a
18 lot of people use P Street and Q Street to go
19 back and forth to get north on Wisconsin
20 Avenue to get to Glover Park and areas north.

21 A lot of people -- a lot of commuter traffic
22 goes from P and Q Street up 28th around R

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1 Street past De Martin Nodes and all the way up
2 to Wisconsin Avenue.

3 And that's if you look at the
4 traffic volumes, there are volumes that
5 confirm that. But given that we are
6 scheduling all of our events, whether they are
7 the small events that consisted of a few
8 people to some of the larger events that occur
9 a few times a year, they are scheduled ahead
10 of time and they are scheduled off peak.

11 Given that, we have also committed
12 to a Transportation Management Plan that looks
13 at how we do accommodate those larger events
14 as well as looking at how they accommodate
15 their employees. There is very little traffic
16 impact in the mornings and the afternoons
17 associated with the employees, because they
18 are staggered.

19 What has also been identified in
20 our transportation management plan is a valet
21 parking service that ensures that when patrons
22 do come -- excuse me, guests do come for those

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1 events, that they are shuttled into the site
2 as quickly as possible and all of the parking
3 is accommodated on-site.

4 So given that, I am available for
5 questions and, as I mentioned before, DDOT has
6 confirmed our findings in their February 21st
7 report.

8 CHAIRPERSON MOLDENHAUER: Thank
9 you very much. I'll open up the floor for
10 Board questions.

11 VICE CHAIRPERSON SORG: Just one
12 clarification. This 109 spaces number is for
13 valet spaces, correct?

14 MR. ANDRES: Yes, that's correct.

15 VICE CHAIRPERSON SORG: Okay.

16 CHAIRPERSON MOLDENHAUER: Let me
17 kind of follow-up on that. Your assessment is
18 based on 200 guests maximum and every one of
19 those guests, I guess except for a few, being
20 double occupancy?

21 MR. ANDRES: Yes, that's correct.

22 It has been our experience looking at social

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1 events for facilities like this throughout the
2 District, normally for social functions, many
3 people don't come alone. They usually bring
4 one person or more than one person and it
5 averages out to roughly two per -- two persons
6 per vehicle.

7 There is a level of taxi service
8 that would take place, especially given some
9 of the local guests that the foundation would
10 draw from. So there will be people coming to
11 park -- to drive and park as well as taxi
12 activity associated with that.

13 And then those in the area who can
14 -- who are familiar with the bus system, there
15 is the D Bus Lines that run up and down that
16 provide efficient service through that
17 corridor as well.

18 So there are different options for
19 guests and patrons to come to the site.

20 CHAIRPERSON MOLDENHAUER: So it
21 would be very interesting to see the
22 statistics of a guest to an event like this

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1 that would be taking the bus, but that being
2 said, is there the opportunity for, let's just
3 say, potentially maybe worst case scenario
4 that you don't have a two occupancy, what
5 would be the overflow?

6 I mean, I see your parking
7 strategy. I mean, you are not obviously --
8 you are using each parking lot. You are not
9 using the drive aisles. Is there an overflow
10 percentage that could provide for, let's say,
11 if there were 10 cars more than 109?

12 MR. ANDRES: Yes, absolutely.

13 CHAIRPERSON MOLDENHAUER: If you
14 could provide that information to me?

15 MR. ANDRES: That is a great
16 point.

17 CHAIRPERSON MOLDENHAUER: And the
18 street parking?

19 MR. ANDRES: Chairwoman
20 Moldenhauer, that's a great point. And it is
21 actually taken into account in our plan. The
22 109 spaces are the spaces that can be

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1 accessed, they can access a 9 x 19 stall. As
2 is commonly practiced by many of the valet
3 parking companies throughout the District,
4 they can take a lot and be able to, yes,
5 double park. It has been our experience that
6 in a situation like that where it is called
7 attended assisted where they actually park in
8 the aisles, you can -- in an efficient
9 situation, you can probably pick up to an
10 additional 30 percent additional capacity.

11 In a situation like this where
12 there is -- you know, the lots are a little
13 bit smaller than one big surface lot, so, it's
14 my professional opinion, you would probably
15 pick up in the range of about 15 to 20
16 percent. So probably about 20 more cars
17 within the parking lot.

18 CHAIRPERSON MOLDENHAUER: And can
19 you just talk a little bit on the record about
20 the likelihood and I think that there is
21 enough of space in regards to once they access
22 the property in regards to pulling through,

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1 but if you can just walk through the plan, so
2 that you don't have a lot of queuing or
3 explain how potentially you are reducing the
4 queuing on 28th Street during an event for the
5 valet service.

6 MR. ANDRES: Yes, absolutely. You
7 know with -- actually, it's -- well, with
8 respect to the management plan, the applicant
9 will engage a parking valet company to help
10 them with the valet activities. And the
11 intent is to have staff located actually out
12 at the entrance of the property to make sure
13 that when patrons do arrive, that there is a
14 presence out on 28th Street that engages them
15 and gets them into the site.

16 In addition to that, the
17 invitations associated with the events will
18 specify that there will be free parking on-
19 site that is convenient. So in essence, even
20 before patrons get there, they know that they
21 don't have to be circulating around the
22 neighborhood for a site and they can just go

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1 directly into the site.

2 Now, once they are met at the
3 site, there will be staff at the gate to usher
4 them into, basically, this area right in here
5 where you can probably fit and arrange about
6 four or five cars before you get to the gate
7 where the ushers would then receive the
8 vehicles and I guess would proceed into the
9 building, at which point the vehicles can be
10 brought down into the valet parking areas.

11 At times when there are peak
12 arrivals and you need additional stacking,
13 then that can also take place up in and near
14 the circle.

15 CHAIRPERSON MOLDENHAUER: Thank
16 you. Are there any other questions from Board
17 Members?

18 Seeing none, at this time, then
19 I'll turn back to the applicant for any
20 potential closing remarks or any additional
21 presentation.

22 MS. HAASE: I'll just close by

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1 saying that we have a report from the Office
2 of Planning that is very supportive, which we
3 appreciate and that, you know, we will rest on
4 the record, but we do meet the standards for a
5 special exception pursuant to the Zoning
6 Regulations.

7 CHAIRPERSON MOLDENHAUER: Thank
8 you. Then at this point in time, I'll look to
9 the audience to see if there is any
10 individuals in support or in opposition of
11 this case?

12 Seeing none, I will indicate that
13 we have in our record and we are accepting in
14 our record the letter from Mr. Paul Opalack,
15 who was originally requesting opposition party
16 status, but then agreed to withdraw that, but
17 presented this letter which identified some of
18 his concerns about changing the property to a
19 single -- to a commercial use or a nonprofit
20 use, his concerns about parking and just a
21 large detrimental change.

22 That being said, we, obviously,

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1 have all reviewed this and I'll make sure
2 Board Members have had an opportunity to take
3 a chance and take a look at that.

4 Seeing nobody else in the
5 audience, we will then turn to the Office of
6 Planning for their report.

7 MR. MORDFIN: Good afternoon,
8 Chair. I'm Steven Mordfin with the Office of
9 Planning. The subject application is in
10 conformance with the criteria for the granting
11 of the special exception, because the
12 applicant is a nonprofit organization and the
13 main building on the property is in excess of
14 10,000 square feet of gross floor area.

15 Use of the property by the
16 applicant should not adversely affect use of
17 neighboring properties if the list of
18 conditions is agreed upon by the applicant
19 meant to minimize the impact on surrounding
20 properties is implemented.

21 The amount and arrangement of
22 parking on-site is sufficient, provided the

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1 applicant provides valet parking if more than
2 50 guests would be in attendance. No parking
3 is permitted off-site and events are scheduled
4 not to coincide with peak travel times.

5 Nothing would be sold on-site
6 except for the possible sale of materials
7 related to the organization.

8 The Old Georgetown Board had no
9 objection to construction at the proposed
10 garage building. The proposal would be in
11 harmony with the intent of the Zoning
12 Regulations and Maps as it would permit the
13 use of historic structure by a nonprofit
14 organization.

15 And the proposal would not tend to
16 adversely affect the use of neighboring
17 properties because of its large size abutting
18 nonresidential uses and the condition of
19 approval as agreed upon by the ANC and the
20 applicant.

21 Therefore, the Office of Planning
22 recommends approval of the application,

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1 subject to the conditions as contained within
2 the report. Thank you.

3 CHAIRPERSON MOLDENHAUER: Thank
4 you very much, Mr. Mordfin, and I think that
5 your report, obviously, was also very
6 thorough. I'll see if the applicant has any
7 questions for the Office of Planning.

8 MS. HAASE: We do not.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you. Do any Board Members have any questions
11 for the Office of Planning?

12 I would just ask a question in
13 regards to your Condition No. 3. And I know,
14 obviously, a lot of the conditions that you
15 provided were kind of mirrored by the
16 applicant and by the ANC, so I'm sorry that
17 I'm putting you on the spot versus anybody
18 else.

19 But one of the things I was just
20 curious, we, obviously, sometimes have a
21 concern about putting specific restrictions in
22 regards to uses for properties and here you

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1 are trying to restrict the use to these
2 specific fields of nonprofit focus.

3 Would this be something that if
4 the Board deemed was improper to add, does the
5 Office of Planning have any objection to that
6 removal of that condition?

7 MR. MORDFIN: I have no objection
8 to the removal of that condition.

9 CHAIRPERSON MOLDENHAUER: Okay.
10 Just figured I would go there and follow-up on
11 that issue.

12 That being said then, if there is
13 no other questions from Board Members, I
14 believe we have a representative from DDOT, so
15 we will turn to DDOT for their presentation.

16 MR. WHITE: Thank you, Madam
17 Chair. My name is Bryon White with the
18 Department of Transportation.

19 We have no objection to the
20 special exception contingent upon the
21 following conditions:

22 The applicant applies their stated

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1 TDM strategies to minimize the neighborhood
2 traffic impacts.

3 The applicant schedules their
4 events during off peak hours, as proffered.

5 The applicant contains all their
6 parking on-site.

7 And finally, the applicant were to
8 verify the effectiveness of their assumptions
9 and their TDM strategies for large events.

10 CHAIRPERSON MOLDENHAUER: Thank
11 you very much. Does the applicant have any
12 questions for DDOT?

13 MS. HAASE: No.

14 CHAIRPERSON MOLDENHAUER: No. Do
15 any Board Members have any questions for DDOT?

16 No. Thank you very much for weighing in on
17 this. I think that, obviously, you know,
18 there is a lot of times where traffic is very
19 much a concern. And I think that this has
20 been addressed and I appreciate you coming
21 down and presenting, not just your written
22 report, but also your oral testimony today.

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1 That being said then, we will see
2 if there is anybody present from the ANC today
3 here? Seeing none, hold on I've got to find
4 my file that we will read into the record.

5 Okay. This document is not an
6 exhibit specifically individually, but it is
7 27H provided by the applicant, which indicates
8 that ANC-2E had a public meeting on January
9 30, 2012 that was duly noticed and with seven
10 Commissioners present, I'm sorry, actually it
11 is also Exhibit 25 of our record, thank you,
12 indicating that with a quorum present, they
13 unanimously voted for the resolution to have
14 no objection to the application for the
15 provided proposal, with an exception for a
16 five year period and with the understanding
17 that the property would not be used for rental
18 for any purposes.

19 They then provide additional
20 information, which is part of our record.
21 This letter would receive great weight in
22 support of the application.

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1 That being said, at this point in
2 time, we will turn back to the applicant for
3 any potential closing remarks or any final
4 statements.

5 MS. HAASE: Sorry, I don't have a
6 hard enough push. Madam Chair, we would like
7 to rest on the record. And we appreciate your
8 time and hopefully support today.

9 CHAIRPERSON MOLDENHAUER: Well,
10 thank you very much.

11 Then, at this point in time, we
12 will conclude the hearing and we will enter
13 into deliberation.

14 We have before us, I think, a very
15 unique, a very beautiful property that is part
16 of our city and I think we have an applicant
17 that is, you know, going to -- from all of the
18 dedication I have seen in the application,
19 both with the support and, you know, with
20 personal presence here today, I think that
21 there is, you know, a lot of positive aspects
22 of this project in regards to maintaining the

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1 property.

2 Taking the time to obtain
3 Georgetown's ANC support, which is, I think, a
4 great tribute, especially considering some of
5 the other, you know, projects that we have
6 seen in the past, and the active nature of the
7 ANC in this area, so it's really great to see
8 the support of OP, support of DDOT and the
9 support of the ANC for this project.

10 There is a great deal of
11 conditions that are provided that have been
12 agreed to, which is also something where we
13 are not having to debate conditions and kind
14 of go through that at this point.

15 There was the concerns of Mr. Paul
16 Opalack; however, I think that while there are
17 some specific concerns, there is a standard
18 under the Zoning Regulations to permit such a
19 use. It is a special exception standard.

20 The applicant, I believe, has
21 provided sufficient documentation to show that
22 they fall within that requirement and that

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1 they are also taking all the efforts to
2 address any potential impact on parking.

3 And I think that that has been
4 presented regarding the Gorove/Slade's report,
5 Office of -- Department of Transportation's
6 support of this as well.

7 And all of the various conditions
8 trying to limit potential events to times when
9 it will have the least impact on the
10 neighborhood and on the area.

11 And that being said, while we have
12 considered his concerns, I think that they are
13 not something that, in my view, would go to or
14 rise to the level of not being able to support
15 this application.

16 I see no reason why we couldn't
17 move forward and recommend support of the
18 application. I'll open up the floor to
19 additional deliberation and comments from
20 Board Members.

21 VICE CHAIRPERSON SORG: Thank you,
22 Madam Chair. I agree with your analysis and

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1 would note for the record that I, too,
2 appreciate the engagement with the
3 neighborhood. As you alluded to, it can
4 sometimes be difficult to work in Georgetown.

5 I think we can look forward,
6 hopefully, with this applicant and this owner
7 to a stewardship of the property. And I
8 personally appreciate the owner's sentiments
9 with regard to encouragement under the ages of
10 the foundation of the exchange of ideas and
11 critical global topics. I think that is
12 something in general that we want to encourage
13 in the city as well as other philanthropic
14 efforts.

15 I would also note that I would
16 also be in favor in the potential conditions
17 over removing that third condition, as you
18 mentioned in your questioning to the Office of
19 Planning. Thank you.

20 MEMBER HINKLE: Thank you, Madam
21 Chair. I'm in agreement as well with your
22 assessment on this.

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1 I wanted to note a comment that
2 Mr. Opalack made in his letter to us and that
3 is that, you know, his concern that if and
4 when this property is sold that the special
5 exception would go along with that property.

6 And my understanding is that it's
7 true, but the conditions as well would run
8 with that property as well. So if there is a
9 different entity that purchases this property
10 in the future, I think there is an opportunity
11 for the neighborhood to readdress what those
12 conditions are and how the property operates
13 at that point.

14 So I just wanted to, you know,
15 hopefully make that clear to Mr. Opalack in
16 that regard.

17 And again, just like Ms. Sorg, I
18 would be in support of removing that Condition
19 No. 3 related to the 501(c)(3) referenced.

20 CHAIRPERSON MOLDENHAUER: Thank
21 you very much. I think seeing no other
22 comments, then I would submit a motion, a

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1 motion to approve Application 18315 for the
2 Evermay Georgetown LLC on behalf of S & R
3 Foundation, pursuant to 11 DCMR 3104.1, for a
4 special exception to establish a nonprofit use
5 under ' 217 in the R-1-B District at premises
6 1623 28th Street. And this motion is made
7 subject to the conditions that are identically
8 provided in both OP and in Tab E of Exhibit 27
9 with an extraction of the third condition that
10 is provided on those conditions.

11 A motion has been made. Is there
12 a second?

13 MS. COHEN: Second.

14 CHAIRPERSON MOLDENHAUER: A motion
15 has been made and seconded.

16 All those in favor say aye.

17 ALL: Aye.

18 MR. MOY: Staff would record the
19 vote as 5-0-0. This is on the motion of
20 Chairperson Moldenhauer to approve the
21 application for special exception relief under
22 217 with conditions as contained in the OP

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1 report, pages 1 and 2, and also in the
2 applicant's Tab E, Exhibit 27, with the
3 removal of Condition No. 3.

4 Seconding the motion Ms. Cohen.
5 Also in support of the motion Ms. Sorg, Mr.
6 Hinkle, Mr. Jordan. The approved plans would
7 be as shown in Exhibit 10 and Exhibit 27, Tabs
8 A and G. It's a final vote of 5-0-0, the
9 motion carries.

10 CHAIRPERSON MOLDENHAUER: Thank
11 you very much, Mr. Moy. And seeing that the
12 party status has withdrawn, there is no party
13 opposition and so we would like to waive our
14 requirement and ask that a summary order be
15 issued.

16 MR. MOY: Very good. Thank you,
17 Madam Chairperson.

18 I believe the next application
19 before the Board for Board action is
20 Application No. 18314. This is the
21 application of Redshift LLC, pursuant to 11
22 DCMR 3103.2, for a variance from the off-

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1 street parking requirements under subsection
2 2101.1, for a flat, a two unit dwelling in the
3 R-4 District at premises 701 10th Street, N.E.

4 The property is located in Square 959, Lot
5 37.

6 CHAIRPERSON MOLDENHAUER: Good
7 afternoon. Thank you for your patience. If
8 the parties can, please, introduce themselves?

9 MR. COOPER: My name is Peter
10 Cooper and I'm here to represent Redshift LLC
11 in this application. I'll restate, I'm not an
12 attorney, but a person very familiar with the
13 subject matter and the history of this
14 problem.

15 CHAIRPERSON MOLDENHAUER: We're
16 not all lawyers either. Thank you very much,
17 Mr. Cooper. And I'll also ask --

18 MR. RONNEBERG: I'm Drew
19 Ronneberg, the ANC Commissioner for this area.
20 I was able to get a reprieve for a few
21 minutes and so I was able to come back.

22 CHAIRPERSON MOLDENHAUER:

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1 Wonderful. Thank you. So I'll turn to the
2 applicant and if you can walk us through, I
3 know, obviously, there is, like I said earlier
4 this morning, some, you know, unique aspects
5 of the case. If you could just give us a very
6 brief summary and then maybe mostly focusing
7 on the Office of Planning report, which I'm
8 assuming that you have reviewed and maybe
9 address their statements that you would not
10 need the relief, based on DDOT's waiver.

11 And if you can just talk to those
12 issues, I think that would kind of help us.

13 MR. COOPER: Thank you, Madam
14 Chair. I would first like to address a
15 problem which arose today after Mr. Moy
16 indicated that there had not been a document
17 in the file that should be there, and that
18 would be the Affidavit of Posting.

19 We don't understand how this
20 happened, except to say it was just
21 carelessness. The owner of the property
22 retrieved the posters in a timely fashion,

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1 posted them at the property in a timely
2 fashion and took pictures and for some reason
3 failed to file the affidavit.

4 He is in a medical situation right
5 now with his son in Bethesda, so he couldn't
6 resign an affidavit to get here in time, but
7 we've got some very poor pictures of what is
8 the posting of the signs on the building and
9 these very same pictures have been sent to
10 your submission's email, so you will all get
11 them at some point in time.

12 But we don't have this document
13 today. And I apologize for that, but, as I
14 said, it's carelessness. So before I go out
15 and fall on my sword, I would like to ask for
16 bearance of the Board to give us some time so
17 that we can have that document in the file
18 tomorrow certified by the owner.

19 CHAIRPERSON MOLDENHAUER: Well,
20 maybe we can do one better than that. The
21 Board has the authority to waive the
22 requirement of the actual affidavit.

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1 Obviously, I'm hearing you under oath testify
2 that the affidavit --

3 UNIDENTIFIED SPEAKER: This is the
4 Affidavit of Posting. It just got here.

5 CHAIRPERSON MOLDENHAUER: Oh, look
6 at that. Fantastic. Look at that, what do
7 you know. Well, we will accept a late filing.

8 I won't even go down the first line of
9 comments. This is actually not the affidavit.

10 This is simply just the photos showing that
11 it was posted, but so we would actually still
12 need to waive our requirement, because we
13 actually need not just the pictures, but we
14 also need a signed affidavit indicating the
15 date when it was posted confirming that it was
16 actually posted 15 days prior to our hearing.

17 But that being said, the Board has
18 the authority to waive its requirement, so
19 long as we hear testimony that it was actually
20 posted and that there was actual notice.

21 We have ANC representation here
22 that can confirm that maybe they saw it.

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1 MR. RONNEBERG: I live around the
2 corner and I can confirm it was posted every
3 day for the period of posting.

4 CHAIRPERSON MOLDENHAUER: So
5 wonderful. So based on your testimony and
6 confirmation of actual notice by neighbors and
7 by the ANC, we will waive our requirements and
8 we can move forward and get to the merits of
9 the case.

10 MR. COOPER: And I thank you and I
11 get to survive the day.

12 MEMBER JORDAN: Madam Chair, if I
13 may?

14 CHAIRPERSON MOLDENHAUER: Yes?

15 MEMBER JORDAN: I'm still kind of
16 wondering why we are hearing the case if the
17 issue -- if I'm understanding properly that it
18 may be moot, then --

19 CHAIRPERSON MOLDENHAUER: Well, I
20 think that's what I'm asking Mr. Cooper to
21 address, OP's comments, and that was kind of
22 my first statement to Mr. Cooper. Because I

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1 don't think it's moot. I think that there is
2 just two ways to skin a cat here, is my
3 understanding of the case. And that's what
4 I'm asking, I would ask Mr. Cooper, at this
5 point.

6 MEMBER JORDAN: But if there is
7 two ways to skin a cat, then it's a waste of
8 our time to go through a process, because if
9 we rule -- just hypothetically, if we ruled
10 against, he could still go ahead and do it
11 anyway.

12 So I'm just kind of -- that's what
13 I'm kind of wondering.

14 CHAIRPERSON MOLDENHAUER: I think
15 it's an issue of it's the neighborhood's
16 desire to not have the curb cut. And the
17 applicant's desire to maybe not provide the
18 parking if they don't have to. And I'm
19 obviously speaking now on behalf of the
20 applicant, which is why I was asking the
21 applicant to answer the question first, but I
22 think that that's the issue here is that if

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1 they had to, they could, obviously, with
2 DDOT's waiver.

3 But I think that's one of the
4 things I want to hear from the applicant as to
5 why they want this and explain this unique
6 circumstance to why we are here for this
7 relief.

8 So let's let the applicant talk
9 and then I think, Mr. Jordan, obviously, I'll
10 look to you to ask any questions and kind of
11 see, you know, if you have any follow-up
12 questions after that.

13 Mr. Cooper?

14 MR. COOPER: Thank you, Madam
15 Chair. I would just like to give a very brief
16 history of how we arrived at this point.

17 The prior owner of the property,
18 Greenbelt One, LLC, acquired the property in
19 March 2005 and immediately filed application
20 to build this flat in this R-4 Zone, which, at
21 that time, required one parking space for that
22 type of facility.

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1 They filed and obtained a building
2 permit to build this structure, but with an
3 application that had indicated that there was
4 existing parking on the site, that was an
5 erroneous statement. And that -- with that
6 document, the then owner obtained his building
7 permit to build the structure.

8 About a year after that, perhaps a
9 bit less, some time in maybe mid-2006, the
10 applicant then went to DDOT and filed an
11 application for a curb cut and a parking apron
12 to cross public space, after they had already
13 filed a building permit application the year
14 prior stating that they had parking.

15 So there were these two anomalies
16 in this process which took them to the point
17 of DDOT making a determination that they could
18 have this apron and curb cut for reasons that
19 are not understandable by anybody here. And
20 the ANC had been against this curb cut from
21 day one, had objected to it during the DDOT
22 process and had subsequently filed an appeal

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1 seeking to overturn that DDOT ruling. And
2 that appeal is still very active today. It
3 has not been fully adjudicated.

4 In 2009, Redshift acquired this
5 property in foreclosure. And there was no
6 indication that there was anything amiss in
7 the file and they proceeded to obtain a
8 building permit in 2009 to finish up what the
9 previous owners did not finish and to then
10 refurbish and sell the properties.

11 During this process, there was not
12 one hint that there was any objection from the
13 building/zoning people or from DDOT regarding
14 any matter pertaining to the property.

15 However, towards the end of -- I'm
16 sorry, I will say towards the end of 2010, one
17 year later, we were in the process of getting
18 condo documents for the property and it was at
19 that point that the ownership hit the wall
20 with DDOT and the Zoning Administrator,
21 because there was a determination that there
22 was a construction of this building on public

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1 space and there was certainly the outstanding
2 appeal issue for the curb cut, which was out
3 there and active.

4 We knew none of this at the time.

5 And so we began the process of trying to
6 remedy these two problems and both of them
7 were going to require the input from the ANC-
8 6A. We went through the process of the front
9 impingement on public space first, because if
10 that was going to be denied, the building was
11 going to have to come down on that front
12 section and the other aspect would be rendered
13 moot.

14 We took about a year to resolve
15 that front space problem, the impingement on
16 the front of the building and DDOT granted
17 relief and the Zoning Administrator pulled off
18 the hold on the C of O that was in place, so
19 that we could partially proceed to get our
20 Certificate of Occupancy.

21 The active appeal by the ANC was
22 still outstanding. And the ANC's position was

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1 simply that this curb cut was built illegally,
2 because of an illegally applicant -- illegal
3 application and an issued permit for the
4 building. And then there was some serious
5 missteps by DDOT in issuing the public space
6 permit that ultimately allowed them to build
7 that curb cut.

8 It is not in compliance, according
9 to the appeal. And the appeal is ongoing. We
10 need to achieve closure on this issue. And we
11 would be giving up the one parking space that
12 would be available to us, if we were to retain
13 a curb cut, but there is no downside for the
14 community, because the community is losing two
15 parking spaces on the street to accommodate
16 this curb cut that exists now.

17 And so it seems to me that it
18 makes more sense to end this problem by
19 eliminating our necessity for the parking on-
20 site and give back the two spaces to the
21 street, so that the neighbors could have that.

22 The curb cut itself is constructed

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1 in a fashion that does not meet the setback
2 requirements from the corner and the
3 neighborhood's viewpoint and perhaps even OP's
4 viewpoint is somewhat dangerous to the
5 neighborhood and the pedestrian traffic that
6 accesses the community center and the various
7 schools.

8 So it seemed to be the path of
9 least difficulty to come back and ask the city
10 for bearance on this parking requirement, so
11 we can put to rest the problem in the
12 neighborhood, the legal aspects and we can
13 move on with our desire to sell the property.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you. I'm going to open up the floor to Board
16 questions and I'll start and see if Mr. Jordan
17 has any.

18 MEMBER JORDAN: Yes, I think you
19 cleared it up for me. So the appeal is still
20 pending?

21 MR. COOPER: Pardon?

22 MEMBER JORDAN: The appeal of the

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1 ANC, the ANC's appeal is still outstanding?

2 MR. COOPER: That's what we
3 understand, yes.

4 MEMBER JORDAN: Okay. So it's not
5 at rest. Okay. Okay.

6 CHAIRPERSON MOLDENHAUER: Any
7 other Board questions? I just have a point of
8 clarification. Do you know when the original
9 building -- is this a brand new construction
10 that occurred?

11 MR. COOPER: Yes.

12 CHAIRPERSON MOLDENHAUER: From
13 ground up?

14 MR. COOPER: Yes.

15 CHAIRPERSON MOLDENHAUER: With the
16 prior owner?

17 MR. COOPER: Yes.

18 CHAIRPERSON MOLDENHAUER: Okay.
19 So it was not a building that was built
20 previously and was then renovated?

21 MR. COOPER: No, it was not.
22 There had been structures there in the past,

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1 but they have been condemned and demolished.
2 And so this was brand new construction in
3 2005.

4 CHAIRPERSON MOLDENHAUER: Okay.
5 That being stated, then I don't have any other
6 questions for the applicant and I don't see
7 any other Board questions, at this time. At
8 this point in time, we would turn to see if
9 there are any individuals in the audience in
10 support or in opposition of this case?

11 We will then turn to OP and then
12 afterwards to the ANC. So we'll turn to OP
13 for their report.

14 MR. JACKSON: Good afternoon,
15 Madam Chair and Members of the Board. My name
16 is Arthur Jackson with the D.C. Office of
17 Planning. I'm here today to give a brief
18 summary of the Office of Planning's report.

19 And you have it before you and I
20 think the applicant, basically, went through
21 the same information that was in the report,
22 so we will stand on the record and just

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1 indicate that we, the Office of Planning, is
2 not opposed to this request to waive the
3 parking requirement for the corner lot for the
4 flat use, noting that the requirement for a
5 flat is -- a parking requirement for a flat is
6 the same parking requirement for a single-
7 family dwelling.

8 So there would be no difference
9 there. And as we noted, if the applicant had
10 withdrawn the application, we were
11 recommending that they reduce the width of the
12 driveway, but that didn't occur, so that --
13 the caveat does not apply in this case.

14 And that concludes a brief summary
15 of the report and we are available to answer
16 questions.

17 CHAIRPERSON MOLDENHAUER: Okay.
18 Do any Board Members have any questions for
19 the Office of Planning? Seeing none, does the
20 applicant have any questions for the Office of
21 Planning? If you can just put that on the
22 record, please?

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1 MR. COOPER: No, Madam Chair.

2 CHAIRPERSON MOLDENHAUER: Thank
3 you. Then at this point in time, we will turn
4 to the ANC for their report.

5 MR. RONNEBERG: Not much to
6 report. Mr. Cooper did a good job. This
7 property is kitty-cornered to a rec center.
8 When it was built, we did have an application
9 for a curb cut. It was unanimously opposed by
10 the ANC. We felt that they should have
11 required a -- they should have obtained a
12 variance at the time, so there wouldn't be a
13 curb cut.

14 So, in essence, Mr. Cooper is
15 retracing the steps of what the previous owner
16 should have done, I believe, five years ago.

17 I think, if anything, this case
18 highlights cracks between the agencies and how
19 unscrupulous developers can get around things.

20 Clearly, the plans that were submitted to
21 DCRA were fraudulent, because they claim that
22 there was an existing parking space there.

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1 That's why it became matter-of-right instead
2 of required approval of a special exception.

3 We have testified in front of the
4 Zoning Commission for the Zoning Rewrite that
5 this case illustrates that when an applicant
6 comes before the Zoning Administrator, they
7 should show that all public space applications
8 -- public space permits are in order, so we
9 don't have this crack in the future.

10 So with that, I'll just take
11 questions from the Board.

12 CHAIRPERSON MOLDENHAUER: Thank
13 you very much for coming down and providing
14 your testimony and your support of the
15 application.

16 Are there any questions of Board
17 Members? Seeing none, then, at this point in
18 time, we will turn back to the applicant for
19 any closing remarks.

20 MR. COOPER: I have nothing to
21 add, except that closure would be wonderful.

22 CHAIRPERSON MOLDENHAUER: Thank

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1 you very much.

2 Then, at this point in time, we
3 will close the hearing and we will enter into
4 deliberation.

5 And I will just kind of go
6 through. This is an application for a
7 variance, which is one of our higher
8 standards. And I do think though this is
9 actually a very unique situation, obviously,
10 that there is exceptional circumstances really
11 not actually, unfortunately, on the lot
12 itself, which may have been one of the
13 problems that the prior owner had.

14 If they had come before the Board,
15 there may have been a different situation,
16 obviously, because I think the uniqueness
17 here, in my view, is the history of the
18 property. And the history, unfortunately, of
19 this negative effect and the fact that there
20 was an illegal curb cut that was obtained;
21 however, but then was obviously, now is no
22 longer legal, because there was a waiver

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1 granted, but he waiver is uniquely under
2 appeal now by the ANC, which is being
3 challenged.

4 So there is, obviously, a lot of
5 factors here which would make satisfying the
6 standards practically difficult for the
7 applicant, especially, potentially in the time
8 frame and the financial constraints of having
9 to wait for resolution.

10 And I think that, you know, there
11 is, obviously, no detriment, I think, to the
12 public good. And the fact that the public,
13 the ANC, the community is actually in support
14 of this application and the Office of Planning
15 has also indicated that they have got no
16 objection to the waiver of the parking
17 requirement, saying that they would have no
18 issue with negative impacts on the Zone Plan.

19 So that being said, I see no issue
20 with this application satisfying the variance
21 standard and recommending support. I'll see
22 if any Board Members have any additional

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1 comments.

2 MEMBER JORDAN: I would just say I
3 agree with everything you said. In fact,
4 there is a plus one to the neighborhood, a
5 plus two to the neighborhood, so, yes, I agree
6 with that.

7 CHAIRPERSON MOLDENHAUER: That
8 being said, I think, at this point in time, if
9 there is no other comments, I'll just indicate
10 that we have ANC support of the application.
11 We have, as I said, a DDOT letter in this
12 application indicating that there would be no
13 negative impact and that they have no
14 objection to this request, and that's our
15 Exhibit 26.

16 I will recommend approval of
17 Application 18314, pursuant to 11 DCMR 3103.2,
18 for a variance from the off-street parking
19 requirement under subsection 2001.1, from a
20 flat in an R-4 District at premises 701 10th
21 Street, N.E.

22 A motion has been made. Is there

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1 a second?

2 VICE CHAIRPERSON SORG: Second.

3 CHAIRPERSON MOLDENHAUER: A motion
4 has been made and seconded.

5 All those in favor say aye.

6 ALL: Aye.

7 MR. MOY: Staff would record the
8 vote as 5-0-0. This is on the motion of
9 Chairperson Moldenhauer to approve the
10 application for variance relief from off-
11 street parking requirements under ' 2101.1,
12 seconding the motion is Ms. Sorg. Also in
13 support of the motion are Ms. Cohen, Mr.
14 Jordan and Mr. Hinkle.

15 So again, the vote to approve is
16 5-0-0. The motion carries, Madam Chair.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you very much, Mr. Moy. And seeing that there
19 is no opposition in this case, the Board would
20 like to waive its requirements and ask that a
21 summary order be issued.

22 MR. MOY: Yes, indeed. Thank you.

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1 CHAIRPERSON MOLDENHAUER: Thank
2 you. Thank you very much. Thank you.

3 MR. MOY: The next application
4 before the Board for action, I believe, is
5 Application No. 18319. This is the
6 application of Estelle Goldman on behalf of 7-
7 Eleven, Inc., pursuant to 11 DCMR 3104.1, for
8 a special exception to allow the continued
9 operation of a retail grocery/delicatessen
10 store with basement storage as a nonconforming
11 use under subsection 2003.1, pursuant to the
12 conditions established in BZA Order No. 17632,
13 with a one-year trial period for 24-hour
14 operations in the FB/R-3 District at premises
15 912 New Hampshire Avenue, N.W., property
16 located in Square 28, Lot 122.

17 And I believe, Madam Chair, there
18 is on this application a request for party
19 status.

20 CHAIRPERSON MOLDENHAUER: Good
21 afternoon. If the applicant could, please,
22 introduce themselves?

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1 MR. BROWN: Good afternoon, Madam
2 Chair and Members of the Board, Patrick Brown
3 from Greenstein, DeLorme and Luchs on behalf
4 of the applicant. To my right is Michael
5 Crist, the market manager for this District
6 for 7-Eleven. Next to me on my left is Kate
7 Olson from Greenstein, DeLorme and Luchs. And
8 at the end is Sam Motamedi, who is the
9 franchisee. He and his family have run since
10 1991 the 7-Eleven store.

11 MR. CRIST: The application is
12 under the name of Estelle Goldman?

13 MR. BROWN: Ms. Goldman is the
14 owner of the property. The property is leased
15 to 7-Eleven and then operated under that lease
16 by the franchisee.

17 CHAIRPERSON MOLDENHAUER: Okay.

18 MR. MOY: Madam Chair?

19 CHAIRPERSON MOLDENHAUER: I'm not
20 on the record. I always yell at everybody
21 else, but I'm not on the record. Thank you
22 very much.

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1 So we have a party applicant. Is
2 Mr. Kyle in the audience?

3 MR. BROWN: I think it's Ms.
4 Klein.

5 CHAIRPERSON MOLDENHAUER: Ms.
6 Klein, sorry.

7 MR. BROWN: I don't believe she is
8 here.

9 CHAIRPERSON MOLDENHAUER: Ms.
10 Klein, no? So Ms. Klein is not present, then,
11 obviously, we cannot take under consideration
12 her party status request, so we will move on.

13 That being said, I will look to
14 Mr. Brown. You can start off presenting the
15 case. I think it is a fairly full record. I
16 think that, you know, one of the potential
17 questions would be, you know, just addressing
18 the 24-hour issue in regards to OP's comment
19 and, you know, obviously, Ms. Klein is not
20 here, but she did indicate some concerns
21 about, you know, noise and aspects of the
22 property that may impact the neighborhood, so

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1 you can address those as well.

2 MR. BROWN: Certainly. Madam
3 Chair, Members of the Board, this case really
4 has two elements to it. The first is the
5 scheduled and routine renewal of the special
6 exception under which the 7-Eleven store has
7 operated for 30 years now.

8 So the operation has been under a
9 series of trial periods, which, quite frankly,
10 and this is my third visit on behalf of this
11 operation, they have always passed with flying
12 colors.

13 And so I think the renewal of the
14 existing operation, subject to the existing
15 conditions, is a very well-established matter.

16 We come to you asking for, as a
17 second element of this case, a one-year trial
18 period for 24-hour operations. And again,
19 going back to the track record that this
20 franchisee and 7-Eleven have established, they
21 are more than willing to prove that they can
22 operate 24-hours a day, seven days a week in a

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1 manner that doesn't negatively impact the
2 community.

3 I think it is important to note
4 that we wouldn't be here today asking for the
5 expanded hours of operation if it hadn't been
6 for the ANC-2A and their support of that
7 application and really based on resident and
8 customer demands in the area.

9 So I think the first part of the
10 case is relatively easy. I would note that I
11 think the confidence that the applicant and
12 the franchisee have established, Mr. Mordfin
13 and the Office of Planning have suggested that
14 the five-year time period on these approvals
15 be dropped. So I think that that's an
16 indication of the excellent long-term track
17 record that has been established.

18 With that, I would like to
19 introduce Mr. Crist. He can explain from 7-
20 Eleven's perspective the need and desire and
21 the importance and the negative -- the lack of
22 impacts that this unit would have for 24-hour

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1 operations.

2 MR. CRIST: Thanks, Pat. Madam
3 Chair and Members of the Board, my name is
4 Mike Crist. I'm a market manager for 7-
5 Eleven. I have the privilege of overseeing
6 110 stores in the D.C. area and surrounding
7 counties. 32 of which are in D.C.

8 The store that we are talking
9 about is the only one that is not operated as
10 a 24/7 store, 24-hours a day, seven days a
11 week. Our guests' expectation is 7-Eleven is
12 a 24-hour store. And based upon the input
13 from the ANC and from Sam's neighbors, we are
14 asking that this go to a 24/7 store.

15 A lot has changed in the
16 neighborhood since we first opened. The
17 hospital has really grown and expanded. As
18 you know, in hospitals, the needs of family
19 members, doctors, nurses, to be able to run
20 out and grab something past what is available
21 at the hospital is there.

22 Also, in the area, the grocery

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1 stores recently closed and the neighbors have
2 a greater need for those things at the last
3 minute, the over-the-counter medicines, the
4 paper products, grocery items, early morning
5 coffee and donuts for those that commute to
6 the -- out of the neighborhood into their
7 jobs.

8 As Pat said, Sam and his mom have
9 been great franchisees with no, absolutely no,
10 complaints in the community the way they
11 operate the store. We do not sell alcohol in
12 the store and this is one of the few, if not
13 only, stores in the D.C. Metro area that
14 doesn't offer lottery as well.

15 It is walk-up traffic only. If
16 you happen to be by the store, there is no
17 place to park in front. And we just think it
18 makes sense based upon the input of the
19 community and our guests.

20 CHAIRPERSON MOLDENHAUER: Thank
21 you. Do Board Members have any questions for
22 this witness?

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1 MS. COHEN: Can you tell me who
2 lives in the pink house adjacent to the 7-
3 Eleven?

4 MR. CRIST: Oh, sorry.

5 MS. COHEN: Is that where --

6 MR. CRIST: That's not where Ms.
7 Klein lives.

8 MS. COHEN: No. I --

9 CHAIRPERSON MOLDENHAUER: And you
10 just -- I don't think you are on.

11 MR. CRIST: That's not where Ms.
12 Klein lives. Sam, do you know who lives
13 there?

14 MR. MOTAMEDI: You mean next door
15 or --

16 CHAIRPERSON MOLDENHAUER: I don't
17 think --

18 MS. COHEN: No, the pink house
19 that is just right next door.

20 MR. MOTAMEDI: Oh, the pink house.
21 The pink house is another neighbor that lives
22 there.

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1 MS. COHEN: Okay.

2 MR. MOTAMEDI: And they mostly
3 rent it to --

4 MS. COHEN: Students?

5 MR. MOTAMEDI: -- students, yes.
6 And that's about it, yes, and the next one is
7 a doctor's office professional building. And,
8 basically, we are located on the corner.

9 MS. COHEN: Mr. Crist, is that
10 correct? You said that there were 32 24/7 7-
11 Elevens.

12 MR. CRIST: In the D.C. Metro.

13 MS. COHEN: In D.C. And
14 apparently, they are operating without any
15 major issues, that you are aware of?

16 MR. CRIST: Not that I'm aware of.
17 None that have been brought to my attention.
18 No. We are very -- especially in those areas
19 where we abut up against neighborhoods, we are
20 very cognizant of the fact of noise,
21 loitering, things like that. Many of our
22 stores are drop-bys for the D.C. Police

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1 Department. We have a good police department
2 at most of our stores, so we don't have
3 problems.

4 MS. COHEN: Okay. Thank you.

5 VICE CHAIRPERSON SORG: Just a
6 quick follow-up question for Mr. Crist. What
7 do you think is the financial impact on this
8 store of the difference in its operations?

9 MR. CRIST: Well, we are a for-
10 profit organization, so absolutely we know
11 that we are going to increase our business.
12 As we take a look at similar stores that fit
13 Sam's area, we think probably from 10:00 or
14 11:00 at night until 7:00 in the morning when
15 we are not open right now, we're going to see
16 about 200 guests daily. You know, it all
17 depends. We are not sure what the mix is
18 going to be or the product selection. We are
19 hoping it is food and things like that, but we
20 are not sure. But we guesstimate 200 guests
21 during that time period.

22 VICE CHAIRPERSON SORG: And this

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1 is also the only 7-Eleven, I think I recall
2 this from the filing, that doesn't sell
3 lottery tickets?

4 MR. CRIST: That's correct.

5 VICE CHAIRPERSON SORG: And do all
6 the other ones in the District sell alcohol,
7 alcoholic beverages?

8 MR. CRIST: No.

9 VICE CHAIRPERSON SORG: No?

10 MR. CRIST: None of them do.

11 VICE CHAIRPERSON SORG: None of
12 them do, right?

13 MR. CRIST: No, no.

14 VICE CHAIRPERSON SORG: Okay. I
15 forget whether it is Maryland or D.C., who
16 knows. Okay. And clearly, I guess I'm not
17 buying my wine from 7-Eleven. All right.
18 Thank you.

19 CHAIRPERSON MOLDENHAUER: Okay.
20 Are there any other Board questions?

21 Seeing none, then I'll just turn
22 back to the applicant to see if there is any

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1 additional witnesses or any last comments
2 before we move on with the procedure.

3 MR. BROWN: Well, I would like to
4 let Sam, who he and his family have run it
5 since 1991, and I think he can tell you very
6 briefly how they keep a very close eye on what
7 goes on and maintain a positive environment
8 inside and outside the store.

9 MR. MOTAMEDI: Yes. Actually, as
10 Pat said, me and my mother or family, my mom
11 has retired, used to run and have been running
12 this business for over 20 years. I actually
13 started working this store when I was going to
14 the university across the street, so it was
15 really convenient for me.

16 And I have become a part of this
17 neighborhood. We have been there for 20
18 years. After I finished school, I kept my job
19 at the store and I'm running it currently.
20 And for 20 years, we basically kept all the
21 trucks, everything the same and stuck with our
22 agreement to the neighborhood. One of the

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1 reasons we don't sell Lotto is because if the
2 jackpot goes high, we don't want the crowd,
3 you know, and we don't have the room. So in
4 case if there is too much crowd, people would
5 complain.

6 So we don't do that. And as they
7 said, I mean, you are within the university
8 campus and in D.C. we don't sell alcohol. And
9 nobody does in D.C.

10 And the neighborhood I have built
11 a special relationship with the charities and
12 the university, also with the neighborhood.
13 We also try to be there for our neighbors. We
14 deliver items for them if the neighbor is
15 unable to come to the store due to illness or
16 some other reason. They will call us and we
17 deliver for them as well, which you don't see
18 any other store doing that in the
19 neighborhood.

20 And my customers, my neighbors
21 support me and I will try to return the favor
22 to them, you know, and serve the community as

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1 best as I can. And any concern that the
2 neighborhood has, every day I work at this
3 store, so they can see me. They can talk to
4 me. I'm always available and the employees
5 over there, they been there for over 10 years.

6 And all the neighbors know the employees and
7 we know the neighbors by names.

8 And mostly, it's the residents,
9 it's the professionals in the hospital that
10 come over there and, for example, we open at
11 7:00 to 11:00 currently and they want coffee,
12 they want to get some essentials or some of
13 the neighbors that he was telling, he was like
14 sick last week, wanted to get over-the-counter
15 medicine. However, since Safeway in Watergate
16 is closed, there is no other store in that
17 area on that side. Everything is on the other
18 side of the circle, basically, Metro Station.

19 And, basically, we request that
20 the Board, with the support of the
21 neighborhood, grant us this request as a try
22 basis. And pretty much we have a police work

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1 station in this store in the basement. They
2 have a desk. They can do their reports they
3 want. And they are visible throughout the
4 community.

5 And it brings out a safety issue
6 of, for example, you know, when the police is
7 there, and we are currently getting a high
8 tech security system as well, instead of, you
9 know, at nights when we close at 11:00, that
10 corner of that site is dark. We close and go.

11 But with us being 24-hours, it
12 gives the neighborhood a well-lit area that
13 they can pass by and we also have police and
14 stuff and security forms, they can use it in
15 case of emergency. Stop by the store if, you
16 know, they feel like somebody is following
17 them or they are scared of anything.

18 It's a corner that is well-lit by
19 the store being open and the police presence
20 is going to be there, too. And I'm going to
21 try to do my best for the neighborhood as I've
22 been doing the past 20 years. Thank you very

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1 much.

2 CHAIRPERSON MOLDENHAUER: Thank
3 you very much for your testimony.

4 MR. BROWN: And I think the record
5 is complete, so I don't want to belabor the
6 point. I would point out that there is a
7 gentlemen here in support whose family ran
8 this when it was a deli before it became the
9 7-Eleven. So I think there is a long history
10 of family operations at this location. And
11 hopefully you will have time to hear from the
12 gentleman.

13 CHAIRPERSON MOLDENHAUER: We will
14 go to that right now, if there is no more
15 comments from the applicant.

16 MR. BROWN: Okay.

17 CHAIRPERSON MOLDENHAUER: So we
18 will turn to individuals in support or in
19 opposition of the case. If you can come down,
20 you will turn on your microphone, first
21 stating your name and home address.

22 MR. DIAVATIS: My name is Dennis

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1 Diavatis. I live at 2406 I Street, N.W. I've
2 been a resident since 1959 from a small boy.
3 My father had it before it was 7-Eleven with
4 Tom Skindaris and Mr. Nick. I have known him
5 a long time. He is excellent, a very good
6 friend, a very kind manager.

7 I also have three cats and in the
8 middle of the night when they want their cat
9 food and I don't have it, I'm in trouble. So,
10 basically, that's all I wanted to say. Thank
11 you.

12 CHAIRPERSON MOLDENHAUER: Well,
13 thank you very much for coming down and
14 providing your testimony in support.

15 If there is no other individuals
16 in support or in opposition of this case, then
17 we will turn to the Office of Planning for
18 their report.

19 MR. MORDFIN: Good afternoon,
20 Chair and Members of the Board. I'm Steven
21 Mordfin with the Office of Planning. And the
22 subject application is in conformance with the

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1 criteria for the granting of a special
2 exception to continue a grocery and
3 delicatessen within the R-3, because the
4 application is a request to continue the
5 grocery and delicatessen as first permitted by
6 the Board in 1982.

7 The proposal should not adversely
8 affect the surrounding residential
9 neighborhood or have any deleterious effects,
10 provided that it does not operate 24-hours a
11 day.

12 The ANC recommended the use
13 continue indicating that it does not adversely
14 affect the neighborhood.

15 Therefore, OP concludes that the
16 conditions of approval be continued with the
17 exception of the time limit, which OP
18 concludes is no longer needed. No changes to
19 the use are proposed from when it was first
20 permitted in 1982.

21 The Board first found the use to
22 be a neighborhood facility in 1982 and it

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1 would continue to be so primarily serving the
2 surrounding area. OP cannot recommend that
3 the hours be expanded to 24-hours a day,
4 because it would not enhance the residential
5 character of the neighborhood, one of the
6 purposes of the Foggy Bottom Historic
7 District.

8 The request would be in harmony
9 with the purpose and intent of the Zoning
10 Regulations and would not tend to adversely
11 affect the use of neighboring property,
12 provided the operation is not increased to 24-
13 hours a day.

14 Therefore, the Office of Planning
15 recommends that the Board approve their
16 request to continue the use, subject to the
17 conditions of approval contained within the
18 report. And OP cannot recommend approval of
19 the request to expand the hours to 24-hours a
20 day. Thank you.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you. Does the applicant have any questions

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1 for the Office of Planning?

2 MR. BROWN: No.

3 CHAIRPERSON MOLDENHAUER: Do any
4 Board Members have any questions for the
5 Office of Planning?

6 MEMBER JORDAN: I do, Madam Chair.
7 You are saying that you are against the 24-
8 hours and you also want to -- you are against
9 the 24-hours? OP is against the 24-hours --

10 MR. MORDFIN: Yes.

11 MEMBER JORDAN: -- one-year trial?
12 And you want to take away the five-year
13 status period and just to unlimited? Is that
14 what I'm understanding?

15 MR. MORDFIN: That's correct.

16 MEMBER JORDAN: Okay. That's it.

17 MS. COHEN: Madam Chairman, I have
18 a couple of questions. For purposes of
19 consistency, there are 32 other 7-Elevens in
20 the city, presumably, not all in commercial
21 areas, but a number of them in residential
22 areas.

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1 How do you balance that when some
2 have, you know, 24/7 operations and this one
3 doesn't? I don't quite understand that
4 thinking.

5 MR. MORDFIN: Okay. I don't know
6 how any of the other 32 are zoned. But by
7 looking at this one, it is Zoned R-3 and it is
8 also within the Foggy Bottom Overlay District,
9 which one of its purposes is to maintain the
10 residential character.

11 And I understand that this is
12 across the street from the hospital, but then
13 that's also within the George Washington
14 University Campus Plan and this site is not.

15 And a lot of it has to do with the
16 presence of that overlay and the R-3. But the
17 overlay to enhance the residential character,
18 OP does not think that a 24-hour commercial
19 operation enhances the residential character.

20 MS. COHEN: But OP is currently
21 doing a Zoning Rewrite, which is going to be
22 encouraging more neighborhood retail in

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1 residential areas. And many of these smaller
2 stores probably need, you know, more flexible
3 hours because of economic reasons.

4 You know, they are there for a
5 convenience for residents. And I don't see,
6 again, any difference with what -- this
7 particular commercial neighborhood-serving
8 store. Again, it sounds to me that there is
9 this discrepancy in how we are interpreting
10 things now and in the future. Can you
11 comment, please?

12 MR. MORDFIN: Yes. We are not
13 against this operating as a neighborhood
14 corner store, which is what it is doing and we
15 recommend that it continue to operate as such.
16 It is the overnight hours that are
17 potentially problematic within a residential
18 neighborhood.

19 And, you know, not during the day,
20 but it's the evening hours, the nighttime
21 hours and that is the basis for OP not being
22 able to support that request.

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1 MS. COHEN: Well, I suggest in the
2 Zoning Rewrite you look into the hours,
3 because, again, a lot of these neighborhood
4 retails will then go dark because they can't
5 support themselves. It's just an economic
6 issue. I don't think you and I are going to
7 agree today, but a lot of these stores are
8 going to have to maintain more flexible hours.

9 CHAIRPERSON MOLDENHAUER: Are
10 there any other Board questions of the Office
11 of Planning? I just have one, Mr. Mordfin.

12 One of the reasons why you are not
13 supporting the 24-hours is based on the
14 overlay. I understand that going towards the
15 issue of residential character. And I guess
16 my comment is that with the ANC, which we are
17 going to be getting to the ANC report after
18 your report, with their support of that, does
19 that not lead you to believe that it is
20 potentially residential in character
21 considering that?

22 Again, this is kind of like, you

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1 know, Georgetown. The Foggy Bottom ANC is a
2 very active ANC and seeing that they are in
3 support of that, I'm just wondering if that
4 has any impact on Office of Planning's, I
5 guess, analysis to review of the overlay?

6 MR. MORDFIN: I think that it
7 indicates is -- well, obviously, we don't
8 agree, but it indicates that the ANC sees that
9 potentially this could be okay or not, that's
10 why they want the one-year. And we just
11 disagree with them, although, you know, they
12 are going to recommend what they think is most
13 appropriate.

14 But we still feel that for the
15 residential character overnight that it --
16 there are potential issues with that that we
17 wanted to make sure that that didn't come
18 about.

19 CHAIRPERSON MOLDENHAUER: Okay.
20 Thank you. If there is no other questions,
21 then, at this time, we will move on. As I
22 indicated, if there is anybody present from

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1 ANC-2A? Seeing no one, I'll indicate we have
2 Exhibit No. 10 in our record, which states
3 that on July 20, 2011, at a properly noticed
4 and regularly scheduled meeting, with a quorum
5 present of five of six Commissioners, the ANC
6 voted unanimously 5-0 to support a resolution,
7 which includes that they support the renewal
8 of the application to continue on as a grocery
9 store and that they also support the
10 application to seek an extension to operate
11 for 24-hours.

12 And that support letter meets all
13 of our requirements and would receive great
14 weight.

15 We also have a report in our
16 record from the agency of the Department of
17 Transportation indicating, Exhibit No. 32,
18 that they have no objection to this special
19 exception as well.

20 That being said, we will turn back
21 to the applicant for any closing remarks.

22 MR. BROWN: Two things. First,

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1 and I think with respect to the Office of
2 Planning, that the ANC and the neighbors who
3 appeared before the ANC have spoken very
4 clearly about what they think the residential
5 character of the neighborhood will support and
6 allow. And also prudently said let's take a
7 look at this on a one-year trial period.

8 And I think my client, 7-Eleven,
9 and Sam and his family are willing to accept
10 that challenge and prove that they can operate
11 24/7 in a manner that is a positive, not a
12 negative to the community.

13 And certainly, I think since
14 everybody seems, with the exception of the
15 Office of Planning, to be in agreement, we
16 ought to let everybody have a trial period.
17 And if a year from now it hasn't worked, we
18 will know and we will move on to a different
19 plan. If it works or it needs tweaking, we
20 can revisit it that way and that has worked
21 over time.

22 Again, this has been on a five-

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1 year trial period for 30 years and they have
2 never stumbled. So I expect will follow
3 through with that.

4 Logistically, there is a question
5 about how we do this. And my suggestion would
6 be that the application was to renew the
7 existing approval for five-years. The Office
8 of Planning has indicated they would be
9 willing to drop that. I think for the time
10 being, we leave the five-year period in place.

11 We also established the one-year
12 trial period and make it clear that in a year,
13 it will be the applicant's responsibility to
14 come back and request a modification to that
15 one-year trial period to either extend it
16 further, which I think is very unlikely, to
17 somehow reduce it or even eliminate it
18 altogether.

19 So that we could do that in the
20 context of the existing application without,
21 quite frankly, starting at the beginning and
22 also paying an additional fee, which seems to

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1 be unwarranted in this case.

2 CHAIRPERSON MOLDENHAUER: I thank
3 you for that. I think that there would be a
4 potential question as to whether this would be
5 a modification. I think that might be
6 something that may have to be addressed with
7 the Board in a year from now, if that's
8 approved, whether this would be considered a
9 modification at that time or whether the Board
10 would require or request that it be a full
11 application potentially to revise that
12 condition, since that condition would then
13 potentially be removed completely if it was
14 only a one-year temporary period.

15 But I think that's something that
16 we can discuss during deliberation.

17 MR. BROWN: And also, I think we
18 could do that in the context of hopefully a
19 bench decision and summary order, given the
20 status we are at, at this moment.

21 CHAIRPERSON MOLDENHAUER: We will
22 jump into that. I just have one preliminary

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1 matter if we move forward on this case. Since
2 delicatessen is no longer a recognized term, I
3 want to make sure that there is no issue in
4 regards to the C of O, and I don't think that
5 there is, if we just were to approve this
6 application. You're just identifying it as a
7 grocery, right?

8 MR. BROWN: The only problem and
9 this came up in the context of other 7-Elevens
10 is that they do have a food service element.
11 Most, I think, would be defined as kind of the
12 successor to a deli, which is a prepared food
13 shop. So I wouldn't have any objection to
14 modernizing the language, but I think it would
15 be important to maintain the grocery store and
16 the --

17 CHAIRPERSON MOLDENHAUER: And
18 prepared food shop?

19 MR. BROWN: Some sort -- because
20 they are serving food. It's not a restaurant.
21 We have all been down that road before. It's
22 not a restaurant, but it's a prepared food

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1 shop where, in this case, almost 100 percent
2 of it is being --

3 CHAIRPERSON MOLDENHAUER: They
4 meet the requirements of a prepared food shop?
5 I know prepared food shops have very specific
6 definitions. I don't have my regs, but in
7 order to what materials or equipment is used.

8 MR. BROWN: Well, if you go into a
9 7 -- think about going into a 7-Eleven and the
10 food is not being cooked from scratch. It is
11 being warmed either through the hot dog
12 rollers or microwave or you are brewing
13 coffee. So you are not --

14 CHAIRPERSON MOLDENHAUER: I'm just
15 asking you though legally that you are
16 confident that your clients are not using any
17 equipment that are beyond the scope of a
18 prepared food shop?

19 MR. BROWN: I'm comfortable with
20 that.

21 CHAIRPERSON MOLDENHAUER: Okay.
22 Then I'm just going to hold on a moment and we

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1 will -- we are talking about it. I know that
2 there is a case that we have decided in the
3 last year maybe two, that had a specific
4 language that said we deem that there was no
5 need for relief for a prepared food shop as an
6 additional use, because it was understood in
7 the definition of a grocery that prepared food
8 was part of a subsidiary use of a grocery
9 store.

10 And so, you know, such as, you
11 know, that like Whole Foods doesn't need a
12 grocery store license and a prepared food shop
13 license that they can provide both under the
14 term of grocery as it is now being used and as
15 people understand a grocery store to include.

16 I don't even know if actually in
17 this situation, and I know OAG is just running
18 out to double check this issue right now, that
19 it may not even be necessary, based on some
20 case precedent that we have to include that.

21 MR. BROWN: I'm not overly
22 concerned.

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1 CHAIRPERSON MOLDENHAUER: Are you
2 on the mike? I just can't hear. Sorry.

3 MR. BROWN: I'm not overly
4 concerned. Again, we have got the mother of
5 all paper trails here as far as what the Board
6 has approved and so I think I'm comfortable.
7 And one of the reasons why we kept the word
8 delicatessen in is just for consistency.

9 CHAIRPERSON MOLDENHAUER: Yes. I
10 mean, I think that we see it so many times and
11 it creates so much confusion at times when it
12 is no longer part of the regs. And so if we
13 are here, one thing I like to do is just clean
14 the record. And so that's one thing. I mean,
15 we will just -- I think we can just wait a few
16 minutes. OAG, I think, will be back and then
17 if there is any --

18 MS. COHEN: Grocery is not defined
19 in our definition.

20 CHAIRPERSON MOLDENHAUER: No, it's
21 not, but we have case precedent that talks
22 about it.

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1 MS. COHEN: Okay.

2 CHAIRPERSON MOLDENHAUER: And
3 there has been -- as I said, there is a case
4 and I don't know the name of it, but there was
5 a case that we had about a year or year and a
6 half ago where we specifically on the record
7 discussed the issue of subsidiary use of a
8 grocery store and that it was considered part
9 of that use.

10 MR. BROWN: Up to a certain
11 percentage ==

12 CHAIRPERSON MOLDENHAUER:
13 Percentage.

14 MR. BROWN: -- of sales. And so
15 the inclusion of it --

16 VICE CHAIRPERSON SORG: The way
17 that we talked about it in that case, which I
18 believe was for a 7-Eleven on H Street, but
19 OAG will correct us or be more specific, had
20 to do with whether or not the prepared food
21 shop would, as a use, be part of the overall
22 grocery store use, based on what was offered

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1 and the methods of cooking and so forth, as
2 opposed to it as an additional use.

3 And so I think the Chair makes a
4 good point about wanting to make sure that we
5 are consistent there.

6 CHAIRPERSON MOLDENHAUER: We will
7 just wait a few more minutes and then we will
8 go back on the record.

9 (Whereupon, at 3:22 p.m. a recess
10 until 3:25 p.m.)

11 CHAIRPERSON MOLDENHAUER: Okay.
12 Yes, we are just now referencing Appeal 18146,
13 which this is actually a little different.
14 Every case is always a little different. But
15 this is about a neighborhood that was trying
16 to potentially appeal a market C of 0 or a
17 grocery C of 0, which -- stating that they
18 believed it was being used as a fast food
19 establishment.

20 And here, the Board concluded that
21 it was a grocery and did not require any
22 additional type of use or relief because the

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1 use for a fast food establishment could not
2 actually co-exist with a grocery.

3 And so I know, obviously, you were
4 talking differently about a prepared food
5 shop, but I think that they are
6 simultaneously, that it's really the same
7 thing. I mean, a fast food establishment
8 would just be a higher standard. And so if
9 the higher standard is inclusive, then why
10 would a prepared food shop not be?

11 So that being said, if there is
12 any additional comments from the applicant or
13 we will move on to deliberation.

14 MR. BROWN: By all means, go forth
15 and deliberate.

16 CHAIRPERSON MOLDENHAUER: Okay.
17 So the case is concluded and we will enter
18 into deliberation.

19 I'll start us off. I think that,
20 you know, we have got OP's support in regards
21 to renewing this, as the applicant indicated,
22 long-standing, I think, 30 some odd year

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1 relief that has been granted for this site.

2 The ANC is in full support. DDOT
3 is in support.

4 Really, the only question under
5 review or really major discussion, I think to
6 me, is whether or not to permit the
7 applicant's request for a one-year trial
8 period. The ANC-2A has actually supported
9 that request. He heard from one of the
10 neighbors who was, you know, very much in
11 support of this service as a resident in the
12 community.

13 And I think that while OP does not
14 believe that that use is in conjunction with
15 the overlay and the residential character
16 requirement of the Overlay District, I think
17 that based on ANC's support and the complete
18 lack of any opposition in this case, I feel
19 comfortable granting this requirement and
20 providing a temporary period for a one-year
21 24-hour operation.

22 I'll see what other Board Members

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1 have to say.

2 VICE CHAIRPERSON SORG: Madam
3 Chair, I agree with your analysis. I also
4 agree I would be in support of offering the
5 one-year trial period for the 24-hours. And
6 also, I would hope that we could craft any
7 order or procedure that would be possible for
8 the applicant to come back to potentially
9 extend those hours of operation, should they
10 be successful as a modification as opposed to
11 as a new application. Thank you.

12 MS. COHEN: Madam Chair, I'm also
13 in support of extending the hours and
14 reviewing it after the year is up.

15 CHAIRPERSON MOLDENHAUER: Okay.
16 Any other Board Members have any comments?

17 MEMBER HINKLE: No. I'll say that
18 I too am in support of the 24-hour trial --
19 one-year trial period.

20 CHAIRPERSON MOLDENHAUER: All
21 right.

22 MEMBER HINKLE: I think it makes

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1 sense. You know, I'm not quite sure what the
2 Foggy Bottom Overlay District says in terms of
3 residential character, but, to me, having a
4 convenience store is part of a residential
5 area. And I would certainly be in support of
6 having that convenience available for 24-hours
7 and see how it works.

8 CHAIRPERSON MOLDENHAUER: Okay.
9 Well, if there is no other -- oh, Mr. Jordan,
10 please.

11 MEMBER JORDAN: Oh, thank heavens.

12 CHAIRPERSON MOLDENHAUER: So that
13 being said then, I think we will move forward
14 for a motion, a motion to approve Application
15 18319 for Estelle Goldman on Behalf of 7-
16 Eleven, Inc., pursuant to 11 DCMR 3104.1, for
17 a special exception to allow the continued
18 operation of a retail grocery store with
19 basement storage as a nonconforming use under
20 subsection 2003.1, pursuant to the conditions
21 established in the BZA Zoning Order 17632,
22 continuing with the five-year period for

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1 approval.

2 And permitting a one-year trial
3 period for 24-hour operation starting at the
4 granting of the order, and that at the
5 conclusion of the trial period, the applicant
6 will be permitted to come back and request a
7 minor modification to extend that trial
8 period.

9 A motion has been made. Is there
10 a second?

11 MS. COHEN: Second.

12 CHAIRPERSON MOLDENHAUER: A motion
13 has been made and seconded.

14 All those in favor say aye.

15 ALL: Aye.

16 MR. MOY: Staff would record the
17 vote as 5-0-0, this is on the motion of
18 Chairperson Moldenhauer to approve the special
19 exception relief under 2003.1, with the
20 conditions as shown in Order 17632, with a
21 change as cited by the Chairperson. Seconding
22 the motion is Ms. Cohen. Also in support of

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1 the motion, Ms. Sorg, Mr. Hinkle and Mr.
2 Jordan.

3 And again, the final vote is 5-0-
4 0. The motion carries.

5 CHAIRPERSON MOLDENHAUER: Thank
6 you very much, Mr. Moy. Since there is no
7 opposition, the Board would like to waive
8 their requirements and ask that a summary
9 order be issued.

10 MR. MOY: Yes, thank you.

11 MR. BROWN: Thank you very much.

12 CHAIRPERSON MOLDENHAUER: There
13 was another.

14 MR. MOY: Okay. The next and
15 final application before the Board for action
16 is Application No. 18271. This is the
17 application of Bricklayers Masons Helpers
18 Building Union, pursuant to 11 DCMR 3103.2 and
19 3104.1, for a variance. And I'm reading the
20 original advertisement for this application.

21 This is for a variance from the
22 rear yard requirements under ' 774, a variance

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1 from the side yard requirements under
2 subsection 775.5, a variance from the closed
3 court width and area requirements under ' 776,
4 and a special exception for reduction in the
5 number of required parking spaces under
6 subsection 2108.1, to permit additions to an
7 existing building for use as a business trade
8 school, 128 students and eight staff in the
9 FT/C-3-A District. This is at premises 5332
10 1st Place, N.E., property located in Square
11 3071, Lots 82 and 83.

12 The only other item staff notes
13 for the Board is that there were some filings
14 that were entered into the record yesterday,
15 on Monday, from the applicant and, I believe,
16 Office of Planning. No, not from the Office
17 of Planning, not yet.

18 That completes the staff's
19 briefing, Madam Chair.

20 CHAIRPERSON MOLDENHAUER: Thank
21 you very much. I'll ask if the applicant can,
22 please, introduce themselves?

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1 MS. BETHEL: Good afternoon, Madam
2 Chair and Members of the Board. I am Pamela
3 Bethel and to my right is Mr. Toye Bello. He
4 is our zoning consultant. And to my left is
5 Mr. Anthony Frederick and he is the business
6 manager for Local 657, who is the proposed
7 user of the project. And to his left is mr.
8 Rob Hofmann, who is the architect of this
9 project.

10 A couple of -- well, the first
11 preliminary matter I would like to call to the
12 attention of the Board is that the
13 recommendation that proceeded to this Board in
14 January was changed on Friday by the Office of
15 the Zoning Administrator and I would like to
16 draw the attention of the Board to the revised
17 recommendation.

18 We got a copy on Friday. I think
19 it was actually issued on Friday, the 24th.
20 Is it in the record, ma'am?

21 CHAIRPERSON MOLDENHAUER: Yes. We
22 have that documentation, February 24th. We

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1 have reviewed that. We also have your late
2 filing which then addresses those comments
3 which we received yesterday, which we will
4 admit into the record as well.

5 MS. BETHEL: Okay. Thank you very
6 much. The applicant's position with respect
7 to the revised recommendation from the Zoning
8 Administrator is that we do not contest the
9 issue with respect to the rear yard.

10 We do contest the requirement that
11 we seek a variance for the side yard issue.
12 Actually, we have three points I would like to
13 make.

14 The first point is that we
15 disagree, that we feel that the decision that
16 we need a variance is due to a misread of the
17 Zoning Regulations, a combination of the
18 Overlay Regulations when compared with the
19 general regulations. We feel that a variance
20 is required that would meet the standard.

21 However, in an effort to expedite
22 this process, the client or the union was able

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1 to meet yesterday and they made a
2 determination that they would eliminate the
3 side yard issue. I have a new filing I would
4 like to make that takes the side yard issue
5 down to zero.

6 Our interpretation of the
7 regulations is that you only need the 6 feet
8 if there is a side yard. If there is no side
9 yard, zero is permitted. I have had
10 discussions with the Office of Planning that I
11 believe concurs with that, that is not
12 inconsistent with the Zoning Administrator's
13 opinion and I would like to, if the Chair
14 grants permission, provide that revised
15 position to the Board.

16 CHAIRPERSON MOLDENHAUER: Yes, I
17 mean, you can present that. I think there is
18 just a lot of kind of last minute documents.
19 You can provide copies. You have the
20 requisite number of copies?

21 MS. BETHEL: I have the requisite
22 number.

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1 CHAIRPERSON MOLDENHAUER: Okay.
2 If you can provide that to Mr. Moy and Board
3 Members will have a quick chance to review it.
4 Obviously, I don't know if we will be able
5 to --

6 MS. BETHEL: Okay. The winner is
7 -- yes.

8 MEMBER JORDAN: You know, Madam
9 Chair, I just have some reservations about
10 doing what we are in the process of doing.
11 Having a chance to look at this and digest
12 this. I mean, I wish we had it earlier,
13 because I think the meat is there, but I just
14 don't like to rush looking at things and
15 thinking we might have missed something or
16 make a decision and we're not fully informed.
17 I just wanted to add that.

18 CHAIRPERSON MOLDENHAUER: No, and
19 I totally agree with you. You know, we have
20 already been with this case, you know, rushed
21 to review a document last night that was 26
22 pages before this morning and now we are

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1 getting, you know, receiving more
2 documentation, which is totally changing the
3 relief.

4 And, you know, I absolutely agree
5 with you, Mr. Jordan. And, you know, but at
6 the same time, I just think that, you know,
7 the question will be whether we have to
8 continue the case or whether we, you know, put
9 it on decision. We may not feel comfortable
10 putting it on decision. We may require her to
11 continue the case and have a longer
12 opportunity. I think we will have to just
13 play that by ear with Board Members and see
14 how they feel.

15 MS. COHEN: Can we have the
16 hearing and then make our decision based on
17 that?

18 CHAIRPERSON MOLDENHAUER: Yes,
19 exactly. We can see whether the Board would
20 like to, you know, hold off and continue and
21 have additional questions at a later date
22 after having an opportunity to review.

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1 MS. COHEN: Madam Chair, there may
2 be other issues that we need to reflect on and
3 get some additional clarification.

4 CHAIRPERSON MOLDENHAUER: Yes, I
5 think that that is accurate.

6 So I'll turn now to the applicant
7 to present, obviously, hopefully, an in depth
8 understanding of what we are looking at orally
9 as well as, you know, I would say start off
10 with your argument as to why there is no
11 variance needed, relief needed in regards to
12 these new plans, whether that is, you know,
13 Mr. Hofmann presenting that or however you
14 deem is appropriate.

15 MS. BETHEL: Yes. I would like to
16 address the timing of the production. We were
17 here in January and the applicant immediately
18 began to seek to obtain the office -- excuse
19 me, the Office of the Zoning Administrator's
20 revised position. We received that on Friday.
21 Our response was generated as quickly as
22 possible after receipt of the revised

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1 position.

2 With respect to the issue of the
3 applicant's position on the variance, I'm
4 going to ask Mr. Toye Bello to respond to
5 that.

6 MR. BELLO: Madam Chair, good
7 afternoon. Actually what the revised position
8 has done is really just simply file the
9 application before the Board. The revised
10 referral from the Zoning Administrator has
11 pared down the areas of relief to two.

12 One for special exception from the
13 rear yard setback of the Overlay District.

14 And the other from the variance
15 from the side yard setback requirement.

16 What the applicant has done very
17 quickly in conjunction with discussions with
18 the Office of Planning was to eliminate the
19 need for a side yard variance by revising the
20 footprint of the proposed addition to be
21 constructed to the side property lot line.

22 In the underlying C-3-A Zone, a

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1 side yard is not required, unless provided.
2 So the affect of the revised position is
3 really to limit the relief before the Board to
4 one single relief of special exception, which,
5 in my view, simplifies the application for the
6 Board.

7 CHAIRPERSON MOLDENHAUER: Maybe
8 Mr. Hofmann can show us visually what was
9 changed in the plans, because I'm looking
10 right now at the plans that we received on the
11 27th and the plans that we just received today
12 and I don't see a difference.

13 MR. HOFMANN: The storage shed
14 moved to the side yard another 4 feet. We
15 don't have a visual. I would be happy to come
16 up and point that out.

17 CHAIRPERSON MOLDENHAUER: You have
18 to sit, I'm sorry, because everyone needs to
19 be able to see the same thing, so --

20 MR. HOFMANN: I can try --

21 CHAIRPERSON MOLDENHAUER: But you
22 also know you have to be on the mike. There

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1 is a mike that is -- yes, Mr. Bello has it.
2 Thank you.

3 MR. HOFMANN: Okay.

4 CHAIRPERSON MOLDENHAUER: And if
5 you want, you can stand over by the --

6 MR. HOFMANN: Easel?

7 CHAIRPERSON MOLDENHAUER: --
8 easel. Thank you.

9 MR. HOFMANN: Okay.

10 CHAIRPERSON MOLDENHAUER: Because
11 there is actually a camera that can record it
12 for recording purposes.

13 MR. HOFMANN: Okay. Gotcha.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you. I appreciate that.

16 MR. HOFMANN: Okay. What it is
17 here is, let me get this turned the correct
18 way, the addition is -- this is the main
19 building here. This is the storage addition
20 here. The old plan had this wall about 4.5
21 feet this way and we just extended it right to
22 the property line down. So we increased the

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1 square footage and the footprint of that
2 storage building, that's the addition.

3 And you can see it follows the
4 property line. We have -- it was a square
5 building before, 30 foot x 30 foot. Now, you
6 can see it has an angle here following the
7 property line right on around. So we
8 increased it by about 30 x 4, about 120 square
9 feet. If that's understandable.

10 CHAIRPERSON MOLDENHAUER: I see it
11 now. I'm wondering if other Board Members --
12 that was going to be my question. I guess
13 this may be more for Mr. Bello. I don't know,
14 Mr. Hofmann, maybe you can answer this, but
15 wouldn't it be required that that -- that
16 actually to remove the rear yard or the side
17 yard requirement, wouldn't it be required to
18 go the entire width of the property? Not just
19 this one little snippet? Because right now,
20 you've got the parking lot, you know, as a
21 portion of it.

22 MR. BELLO: Yes.

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1 CHAIRPERSON MOLDENHAUER: So you
2 are not taking away the side yard completely.
3 You are only taking away the side yard for a
4 small portion of the building.

5 MR. BELLO: For the depth of the
6 addition. If you refer to the definition for
7 a side yard, there would have to be a setback
8 of the building for the depth of the side
9 yard. So, in fact, by constructing to the
10 property line, there no longer is a side yard.

11 By definition, a side yard is open
12 from grade to the sky for the depth of a side
13 property lot line, that's by definition.

14 VICE CHAIRPERSON SORG: So because
15 of that, it's no longer a side yard?

16 MR. BELLO: That's correct.

17 VICE CHAIRPERSON SORG: All right.

18 CHAIRPERSON MOLDENHAUER: I'm
19 looking up these definitions. I'll see if any
20 other Board Members have any questions while
21 I'm reviewing. If not, we will just all take
22 a moment to review.

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1 VICE CHAIRPERSON SORG: With
2 regard to the storage shed, is there a reason
3 that it should be separated from the principal
4 building?

5 MS. BETHEL: Mr. Hofmann?

6 MR. HOFMANN: Yeah, we separated
7 from the building to have the access and we
8 wanted to provide windows on that side of the
9 building for inside the building to get
10 natural light and we have a stair tower for
11 exiting purposes in that corner and that would
12 block the exiting of that. So that's why we
13 separated it.

14 VICE CHAIRPERSON SORG: Okay. The
15 new plans that were submitted today are not
16 dimensioned, but judging from the previous --
17 oh, here are some that are dimensioned.

18 MR. HOFMANN: Right on the --

19 VICE CHAIRPERSON SORG: Yes.

20 MR. HOFMANN: -- second page
21 should have some dimensions.

22 VICE CHAIRPERSON SORG: Yes. My

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1 mistake. So did you consider just -- what was
2 the decision making between -- this is about
3 1,000 square foot storage area, that's like
4 about as big as the space that I live in. I
5 don't know what you are storing in there.
6 It's very important. I know you have
7 machinery.

8 Did you consider if you were to
9 provide the 6 foot side yard then you would
10 end up with like an 870 square foot storage
11 area. I'm curious about the rationale behind
12 moving it versus reducing its size to provide
13 the side yard.

14 MS. BETHEL: Well, let me take the
15 first shot at that. It was just a
16 consideration in terms of maximum usable
17 space. This is a training center for
18 construction trade and the maximum amount of
19 space that we can maintain in terms of storage
20 and equipment that is the goal for the
21 applicant.

22 MS. COHEN: What type of equipment

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1 will go into that storage shed?

2 MR. FREDERICK: Bobcat would be --

3 MS. COHEN: Yes.

4 MR. FREDERICK: Bobcat would be
5 there. We do asbestos, so there will be
6 respirators. Most -- we do like -- the
7 Woodrow Wilson Bridge, we was -- we actually
8 helped to do the Woodrow Wilson Bridge, the
9 Gaylord. We helped to do the Gaylord. We do
10 a wide variety of training, in other words, in
11 concrete, tunnel. We specialize in tunnel
12 work. We -- rail work, so, you know, we just
13 do a large variety of training. Whatever the
14 contractors needs, so that's why we try to
15 have the space.

16 CHAIRPERSON MOLDENHAUER: I'm just
17 going to go back maybe to Mr. Bello and make
18 sure that I understand the issue of the side
19 yard. And I guess, let me make sure if I can
20 just understand this correctly.

21 Since there is a breezeway between
22 the storage shed and the main building, it is

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1 all considered one building. If it was a
2 separate building, then I think under the
3 definition, since it says the full depth of
4 the building or structure, you could then
5 potentially argue that that there would need
6 be two different potential side yard
7 requirements for this one building, the main
8 building.

9 But since there is a breezeway,
10 unless it's considered one building, is that
11 the rationale?

12 MR. BELLO: That is correct, Madam
13 Chair. For all intents and purposes, because
14 the existing building is connected to the
15 proposed addition by a canopy, you are -- in
16 essence, by definition have one single
17 building on what is to be a single lot of
18 record.

19 CHAIRPERSON MOLDENHAUER: Okay.
20 Thank you. Go ahead, Ms. Sorg.

21 VICE CHAIRPERSON SORG: And you
22 are going all the -- I can't quite see where

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1 is the property line to the north. You are
2 going all the way to the property line there
3 also?

4 MR. BELLO: The property line at
5 the north is the existing building the pre-'58
6 building.

7 VICE CHAIRPERSON SORG: Okay.

8 MR. BELLO: So we are talking
9 about the southwesterly --

10 VICE CHAIRPERSON SORG: Right.
11 I'm aware of that. I'm just making sure.
12 Okay. Thanks.

13 CHAIRPERSON MOLDENHAUER: Any
14 other Board questions from any of the
15 applicants or applicant's witnesses?

16 Seeing none, then, at this point
17 in time, if the applicant doesn't have any
18 additional information they would like to
19 submit, we will move on to see if there is any
20 individuals in the audience in support or in
21 opposition. Any individuals in the audience
22 in support or in opposition?

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1 Seeing none, then we will move on
2 to the Office of Planning's report.

3 MR. JACKSON: Good afternoon,
4 Madam Chair and Members of the Board. This is
5 a case that has been before you before. And
6 I'll give you a bit of history to put this in
7 context.

8 There is a memorandum from the
9 Zoning Administrator back in June 28th, that
10 was dated June 28th, that identified various
11 relief for this proposal. The Office of
12 Planning has some questions about that relief
13 and tried to contact the applicant's
14 representatives and the Zoning Administrator
15 clarified the relief that was required.

16 There was no communication on that
17 regard, so the Office of Planning submitted a
18 report that identified that relief that was
19 considered to be necessary for it.

20 Now, the -- so the Board requested
21 that the applicant and the Office of Planning
22 work with the Zoning Administrator to refine

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1 the relief that's required. The Zoning
2 Administrator refined that relief, but
3 unfortunately our response didn't come back
4 until last Friday.

5 The Office of Planning was not
6 able to do a supplemental report, but we will
7 note that the special exception requirements
8 and the standards for that requirement were
9 identified in the original Office of Planning
10 report that was submitted on this case that
11 was dated, let's see, January, okay, 9th.

12 Well, they are in the first Office
13 of Planning report. I'm wondering if you have
14 that in your file. The first Office of
15 Planning submission on this application.
16 There was a report on the first case. Do you
17 have that in your record?

18 CHAIRPERSON MOLDENHAUER: Yes, we
19 have that, yes.

20 MR. JACKSON: Okay. Well, in that
21 report --

22 CHAIRPERSON MOLDENHAUER: Sorry,

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1 Mr. Jackson.

2 MR. JACKSON: No problem. I know
3 there is a lot of paper. So let me walk you
4 through this.

5 Okay. Going back to the Office of
6 Planning's report of November, we identified
7 in that report that there was relief required
8 for the variance and relief required for the
9 special exception to take care of the rear
10 yard requirements and the screening
11 requirements.

12 If you look further in that
13 report, and I think page 3, we explain why the
14 application meets that standard. And we also
15 -- for the special exception relief. And we
16 also -- in both cases. And we also explain
17 what the applicant could do to get rid of the
18 variance relief for the side yard. Well,
19 maybe we really wanted go to the architects
20 for the applicant's representatives, but we
21 weren't able to communicate.

22 Our recommendation would have --

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1 was to expand the building to eliminate the
2 side yard. The reason is that, in our
3 opinion, it is difficult to find a practical
4 difficulty in providing the 6 foot setback.

5 If they had gone with the angled
6 rear yard, our discussions with the Zoning
7 Administrator meant that they would have to --
8 the building would have to mimic the rear
9 yard. So if they sat back 6 feet, the
10 building would still have to be angled 6 feet.

11 So, ultimately, they would have to seek -- to
12 meet the requirement, they have to sit the
13 building back 12 feet, so we have to deal with
14 the rear yard.

15 So to simplify the application and
16 not deal with having to get some sort of
17 relief in regards to what they did, we
18 suggested they build the building out to the
19 side yard. The applicant was agreeable. They
20 made that change.

21 With regard to the special
22 exception required, the relief required for

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1 the rear yard setback and the landscaping and
2 fencing requirements under the regulations,
3 our November report explains why this project
4 is eligible for that relief.

5 It is an education project. It is
6 providing education for workers in our city.
7 And that is an obvious benefit to the
8 community and as such, it merited the relief.

9 Also the issue of its location, this was
10 intended to allow this -- the overlay, the
11 Fort Totten Overlay was intended to encourage
12 local employment and expansion of existing
13 nonresidential uses, but not impact adjacent
14 residential developments and residential
15 properties.

16 The adjacent property is the
17 National Park Service. The Park Service is
18 not about to turn this over for housing, as
19 far as we know. So beyond that, the applicant
20 has taken the -- made the effort to improve
21 the design, so we know what they are
22 proposing. And I think what is being proposed

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1 is a very attractive building that would not
2 detract from anything that is there now or
3 that could be developed in the future.

4 So we think overall, the basic
5 response of the applicant, we think that they
6 meet the standards for the special exception
7 relief that is requested that was originally
8 identified in the Office of Planning's report
9 and as has been highlighted in the submission
10 by the Zoning Administrator.

11 We also understand that since the
12 -- because the Zoning Administrator's referral
13 no longer states anything about parking, that
14 the applicant's computation of the parking
15 credit for the existing use of 31 spaces was
16 accepted by the Zoning Administrator. That
17 also was identified in the original Office of
18 Planning report.

19 Okay. So there is no parking
20 requirement. We think they meet the standards
21 for special exception approval with regard to
22 the setback requirement and the landscaping

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1 requirement and they have addressed -- they
2 have modified the design so it addresses the
3 side yard requirement.

4 In conclusion, we believe the
5 applicant has met the standards for special
6 exception approval and that is the only
7 remaining issue for this application. That
8 concludes our brief summary of the Office of
9 Planning -- well, not a brief summary, but a
10 recounting of the Office of Planning's
11 previous reports and we are available to
12 answer questions.

13 CHAIRPERSON MOLDENHAUER: Thank
14 you very much for that thorough kind of recap,
15 since, obviously, we don't have a supplemental
16 report, I do appreciate that walk through of
17 your prior November 8th report no matter how
18 that now applies to the current relief.

19 Does the applicant have any
20 questions for the Office of Planning?

21 MS. BETHEL: Yes. I would like to
22 say that in addition to the fact that the

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1 Office of Zoning Administrator's report on
2 Friday does not mention parking. I confirmed
3 with --

4 CHAIRPERSON MOLDENHAUER: Wait,
5 wait.

6 MS. BETHEL: -- the Zoning
7 Administrator that, in fact, they had accepted
8 the applicant's application of the historical
9 parking credits.

10 CHAIRPERSON MOLDENHAUER: Okay. I
11 was asking though if you had any questions for
12 the Office of Planning.

13 MS. BETHEL: Oh, I'm sorry.

14 CHAIRPERSON MOLDENHAUER: Do you
15 have any questions for the Office of Planning?

16 MS. BETHEL: Oh, no, I do not.

17 CHAIRPERSON MOLDENHAUER:
18 Questions. Okay.

19 MS. BETHEL: No, I do not.

20 CHAIRPERSON MOLDENHAUER: Okay.
21 Does any Board Member have any questions for
22 the Office of Planning?

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1 MS. COHEN: Yes. Does the Office
2 of Planning have a special type of fencing
3 that they like to see on some of these deals?

4 MR. JACKSON: Not in this case.

5 MS. COHEN: Not in this case?

6 MR. JACKSON: No.

7 MS. COHEN: Okay.

8 MR. JACKSON: Because if you look
9 at the existing development around them,
10 across -- south of the -- there is an -- the
11 alley does not actually exist. It is shown on
12 the map, but does not exist. But across the
13 alley to the south are antennas, which are
14 basically surrounded by barbed wire.

15 To the west of the property are
16 the National Park Service land is undisturbed,
17 so it's very thick. There is no visibility.
18 There is very little visibility through there
19 even this time of year.

20 And I would also -- again, looking
21 at the more detailed plans that were provided
22 by the architect, this is going to be a very

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1 attractive building. It's going to really
2 make -- be an upgrade over what is existing
3 now, which is much more industrial. The new
4 building as proposed seems to be almost
5 educational.

6 So I don't think the fencing that
7 was probably intended more to screen a truly
8 industrial use from future residences would be
9 as -- would be an attraction. It would be an
10 attractive addition to the neighborhood. And
11 so I don't think any fencing and screening
12 would be subject to -- would be appropriate
13 here.

14 And I think in our November
15 report, we highlighted we didn't recommend any
16 additional improvements beyond what was
17 proposed. But the difference between now and
18 then is, at the time, the applicant had not
19 provided any illustration of what the addition
20 would look like and that's one of the things
21 we asked in our Office of Planning report was
22 more information about what the addition would

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1 look like once it was constructed.

2 MS. COHEN: Thank you. Just so
3 you know, I hate chain link.

4 CHAIRPERSON MOLDENHAUER: Are
5 there any other questions from Board Members?

6 Seeing none, then, at this time,
7 we would turn to see if there is anybody
8 present from the ANC. I don't believe we have
9 an ANC report.

10 Does the applicant have any
11 information on the ANC?

12 MS. BETHEL: Yes, we do. We were
13 at the -- I and other representatives from the
14 union were at the ANC meeting and it was a
15 unanimous recommendation in support of the
16 application.

17 CHAIRPERSON MOLDENHAUER: Did you
18 work with them to make sure that we had a copy
19 or that they submitted a copy?

20 MS. BETHEL: I asked and asked. I
21 have not gotten a copy. No. I thought that
22 they had sent it in to Mr. Moy, but I do not

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1 have a copy.

2 CHAIRPERSON MOLDENHAUER: Well,
3 obviously, you know, we can take your
4 testimony, but we can then not provide great
5 weight to that.

6 That being said, at this point in
7 time, we will turn back to the applicant for
8 any closing remarks.

9 MS. BETHEL: Oh, yes, I would like
10 to have Mr. Frederick talk a little bit about
11 the vision of what the project is to
12 accomplish.

13 VICE CHAIRPERSON SORG: Can I ask
14 a question? I'm sorry to interrupt.

15 MS. BETHEL: Okay.

16 VICE CHAIRPERSON SORG: Before you
17 begin, is this organized under a nonprofit?

18 MS. BETHEL: It's the union. I'm
19 not sure when you say nonprofit, if you mean
20 501(c)(3), no. But they have their own 501
21 designation.

22 VICE CHAIRPERSON SORG: Okay.

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1 MS. BETHEL: Which is --

2 CHAIRPERSON MOLDENHAUER: Hold on.

3 MS. BETHEL: Profit or nonprofit.

4 MEMBER JORDAN: It's a not for
5 profit.

6 VICE CHAIRPERSON SORG: Under
7 unions, right?

8 MS. BETHEL: Yes.

9 VICE CHAIRPERSON SORG: And when
10 they --

11 MEMBER JORDAN: It's an
12 institution.

13 VICE CHAIRPERSON SORG: It has to
14 be a 501(c)(3) to be a nonprofit.

15 MS. BETHEL: Correct.

16 VICE CHAIRPERSON SORG: 501(c)(3)
17 is a very specialized type of nonprofit, but
18 there are many different types of nonprofits
19 that don't go out and pursue 501(c)(3) status

20 MS. BETHEL: Right. But if you
21 are asking is this a for profit? It is
22 clearly not for profit.

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1 VICE CHAIRPERSON SORG: Right.

2 Okay.

3 MEMBER JORDAN: So, well --

4 CHAIRPERSON MOLDENHAUER: Mr.

5 Jordan, do you have a question?

6 MEMBER JORDAN: No, I thought you
7 were going to lead with this is an
8 institutional use and need and all that.

9 CHAIRPERSON MOLDENHAUER: Well,
10 because if there is no variance --

11 MS. BETHEL: Yes.

12 CHAIRPERSON MOLDENHAUER: -- Mr.
13 Jordan, I think --

14 MEMBER JORDAN: No variance any
15 more, so it's -- yes.

16 VICE CHAIRPERSON SORG: Yes,
17 there's no variance, but I was just curious
18 that it is possible that this applicant could
19 have come under the lower standard of relief
20 if they were --

21 CHAIRPERSON MOLDENHAUER: The
22 Monaco.

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1 VICE CHAIRPERSON SORG: -- under
2 Monaco for the relief, but you are not
3 requesting any variance relief any more, so it
4 hardly matters.

5 MS. BETHEL: That is correct.

6 CHAIRPERSON MOLDENHAUER: If you
7 would like to present some additional
8 testimony, that is fine. I don't know if it's
9 necessary, but if you would like to,
10 obviously, you know, we are very encouraging
11 of the training programs, which is this. So
12 I'll leave it up to you, if you would like to
13 provide some additional comments.

14 MS. BETHEL: No, thank you.

15 CHAIRPERSON MOLDENHAUER: Okay.
16 Then, at this point in time, we will conclude
17 our hearing. We will enter into deliberation.
18 We are deliberating on the proposed addition
19 to an existing auto repair and warehouse to be
20 converted into a business training school of
21 two stories for the Local Union Labor Society,
22 labor location, 657, which has been indicated

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1 that, obviously, there is going to be training
2 construction workers and providing
3 construction laborers, which obviously we have
4 a great need for that in the District, to
5 promote, you know, the apprenticeship programs
6 and the First Source programs in the District
7 of Columbia.

8 So I definitely commend that. I
9 know a lot of Board Members are very
10 supportive of the overall concept here. I
11 think that, obviously, by reducing the relief
12 -- clarifying the relief, first of all,
13 providing the accurate drawings and now
14 reducing the relief allows us to kind of have
15 a very simple review of this application.

16 It's, you know, simply a special
17 exception for a rear yard setback under the
18 Fort Totten Overlay District. And I think
19 under the special exception standard as
20 outlined on page 3 of OP's November 8th
21 report, I'll incorporate that for reference.

22 I believe the applicant does

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1 satisfy those standards and I don't really
2 have anything else to add. I'll see if any
3 other Board Members have any other comments on
4 the relief that is being sought here.

5 MEMBER JORDAN: Madam Chair?

6 CHAIRPERSON MOLDENHAUER: Yes?

7 MEMBER JORDAN: I just want to say
8 I agree with you and I am a lot more
9 comfortable now after hearing the testimony,
10 particularly that testimony of OP, to
11 understand what is going on as opposed to what
12 we were just being presented initially. But I
13 still caution that in the future.

14 CHAIRPERSON MOLDENHAUER: Yes. I
15 agree and I appreciate that. Ms. Sorg?

16 VICE CHAIRPERSON SORG: I agree
17 with your analysis and, yes, we are looking at
18 a much smaller area of relief now.

19 Two comments. I would agree,
20 first of all, with the Office of Planning that
21 I think the design is actually handsome and
22 really fitting for this kind of use, number

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1 one, so I would commend the applicant on that.

2 Secondly, as someone who is
3 involved in the building industry, you know,
4 you see many more of these types of uses in
5 Prince Georges and so forth and to have that
6 establishment in the District, I think, is a
7 wonderful thing.

8 Just to share a little feeling
9 about this application, you know, it did take
10 us a while to get here and I think the
11 applicant is doing a great thing. I wish that
12 we would have heard a little bit more about
13 program necessity, rather than looking at the
14 areas of relief as some kind of moving target,
15 as something to whittle away and whittle away,
16 when I think this is an important use.

17 And I think that the program
18 itself and what it is providing for the
19 community could have perhaps withstood other
20 areas. Granted though, of course, I mean, you
21 know, we have got a small area now.
22 Obviously, I'm in support and a good building

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1 that I think should provide a good home for
2 these activities.

3 CHAIRPERSON MOLDENHAUER: Any
4 other comments from Board Members? Then if
5 there is no other comments, I'll submit a
6 motion, a motion to approve Application 18271
7 for the Laborers Union Local 657, for special
8 exception from 1564.1 to permit an addition to
9 an existing structure without meeting the
10 minimum requirements for the rear yard setback
11 in the FT/C-3-A Commercial Zone District with
12 the Fort Totten Overlay under subsection 3104.

13 A motion has been made. Is there
14 a second?

15 MS. COHEN: Second.

16 VICE CHAIRPERSON SORG: Second.

17 MEMBER JORDAN: Third.

18 MEMBER HINKLE: Four, five.

19 CHAIRPERSON MOLDENHAUER: Woohoo,
20 a motion has been made and seconded times
21 three.

22 Now, all those in favor say aye.

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1 ALL: Aye.

2 MR. MOY: Staff would record the
3 vote as 5-0-0. This is on the motion of
4 Chairperson Moldenhauer to approve the
5 application for special exception relief under
6 1564.1. Seconding the motion Ms. Cohen, since
7 she is the closest to me.

8 MS. COHEN: And the loudest.

9 MR. MOY: Also in support of the
10 motion Ms. Sorg, Mr. Hinkle and Mr. Jordan.

11 Again, the final vote is 5-0-0.
12 The motion carries.

13 CHAIRPERSON MOLDENHAUER: Thank
14 you very much, Mr. Moy. And seeing that there
15 is no opposition in this case, the Board would
16 like to waive the requirements and ask that a
17 summary order be issued.

18 MR. MOY: Thank you, Madam Chair.

19 CHAIRPERSON MOLDENHAUER: Thank
20 you. Thank you.

21 That concludes our hearings for
22 today.

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1 We will reconvene next Tuesday.

2 Thank you.

3 (Whereupon, the Public Hearing was
4 concluded at 4:08 p.m.)

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