

## GOVERNMENT OF THE DISTRICT OF COLUMBIA

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## BOARD OF ZONING ADJUSTMENT

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## PUBLIC MEETING

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TUESDAY

SEPTEMBER 15, 2015

+ + + + +

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

## BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairperson  
JEFF HINKLE, Board Member (NCPC)  
FREDERICK HILL, Board Member

## ZONING COMMISSION MEMBER[S] PRESENT:

ANTHONY HOOD, Chairperson  
MARCIE COHEN, Vice Chairperson

## OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary  
JOHN NYARKU, Zoning Specialist

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.  
LAWRENCE FERRIS, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

ANNE FOTHERGILL  
KAREN THOMAS

The transcript constitutes the minutes from the  
Public Meeting held on September 15, 2015.

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C O N T E N T S

<u>AGENDA ITEM:</u>	<u>PAGE</u>
NO. 18985, APPLICATION OF DAVID BENSON ..... (Withdrawn by the Applicant)	6
NO. 19047, APPEAL OF MICHAEL CUSHMAN ..... (Postponed to September 22, 2015)	5
NO. 19061, ANC-5D, APPLICATION OF ..... 1106 MONTELLO LLC (Postponed to October 27, 2015)	6
NO. 19004, ANC-5D, APPLICATION OF ..... 1933 MONTANA AVE LLC (Postponed to October 20, 2015)	6
NO. 19029, ANC-1B, APPLICATION OF ..... ERIC PIERSMA (Continued to October 6, 2015)	6
NO. 19063, ANC-8A, APPLICATION ..... OF WOINSHET MEKONNEN (Postponed to October 27, 2015)	6
APPEAL NO. 18980 OF CONCERNED CITIZENS ..... OF ARGONNE PLACE	6
APPLICATION NO. 19065 OF JEREMY AND ..... RACHEL ROBINSON	13
APPEAL NO. 19027 OF RIMA CALDERON AND ..... WILLIAM SAWICKI	14

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

(9:47 a.m.)

CHAIRPERSON JORDAN: Good morning. Would you please come to order.

We're located at the Jerrily R. Kress Memorial Hearing Room at 441 4th Street, N.W. And we are here for today's meeting of the Board of Zoning Adjustment. Today is September 15, 2015. My name is Lloyd Jordan, Chairperson. To my right is Jeffrey Hinkle, Member of the Board. To my left Fred Hill, Member of the Board. To his left Marcie Cohen, a Member of the Zoning Commission sitting in for one of our cases today.

Please be advised that today's proceeding is being webcast live and also being recorded by a court reporter. So, therefore, I'm going to ask you to refrain from any disruptive noises here in this hearing room today. That's your signal to please turn off any ringing, buzzing, devices that may buzz loudly.

If you are going -- if you're not familiar with our hearing procedures or meeting procedures, there should be a pass-out at the back door to my left that will help you to understand how we process cases here at the Board.

If you're going to present any testimony, read any statement or take these witness chairs in any role or manner today I'm going to need you to do two things. If you're going to address the Board in any manner today, read a letter, be

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1 a witness in a case, I'm going to need you to do two things,  
2 the first of which is to complete two witness cards per person.  
3 And prior to giving that testimony, please give those witness  
4 cards to the court reporter who is seated to my right. So  
5 that's complete two witness cards per person and give those  
6 cards to the court reporter who is seated to my right.

7 The second thing I'm going to need you to do is to now  
8 stand and take the oath which will be administered by Mr. Moy,  
9 Secretary to the Board.

10 SECRETARY MOY: Good morning.

11 (Witnesses sworn.)

12 SECRETARY MOY: Ladies and gentlemen, you may be seated  
13 placed under oath.

14 CHAIRPERSON JORDAN: For the record, you have to  
15 understand my second glass of the most expensive water in the  
16 District.

17 Okay, let's move on to today's docket. Let's handle our  
18 meeting cases. Can we do 18980, Mr. Moy.

19 SECRETARY MOY: All right. May I go over some  
20 preliminary matters for the record, Mr. Chairman?

21 CHAIRPERSON JORDAN: Absolutely. Thank you.

22 SECRETARY MOY: Just for the record, for the transcript  
23 of cases that are not on the docket for today, first,  
24 Application Number 18985 of David Benson was withdrawn by the  
25 Applicant.

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1           Number two, Appeal Number 19047 of Michael Cushman has  
2 been continued to September 22nd.

3           The next two cases have been continued, postponed and  
4 continued to -- or rescheduled to October 27th. These cases  
5 are 19061 of 1106 Montello LLC and 19063 of Mekonnen or  
6 Mekonnen(pronouncing).

7           Two other cases, 19029 of Eric Piersma has been  
8 postponed to October 6th.

9           And Case Number 19004 of 1933 Montana Avenue LLC has been  
10 rescheduled to October 20th.

11           And that concludes my statements, Mr. Chairman.

12           CHAIRPERSON JORDAN: Okay, thank you, Mr. Moy.

13           So would you call 18980 for decision.

14           SECRETARY MOY: Yes. All right that, that's  
15 Application Number 18980. This is the Appeal of Concerned  
16 Citizens of Argonne Place. And this has been scheduled for  
17 decision by the Board.

18           APPEAL NO. 18980 OF CONCERNED CITIZENS OF ARGONNE PLACE

19           CHAIRPERSON JORDAN: Okay. Is the Board ready to  
20 deliberate in this case? I think this is, there's a couple  
21 motions pending in this matter.

22           There's a request from DCRA to submit a late filing.  
23 And then there is a motion to submit additional late evidence.

24           I'm inclined to grant the motion of DCRA to allow for  
25 the late filing and to deny the request for any new evidence.

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1 We've heard this case and we're well beyond the time to submit  
2 any additional evidence in this case. And otherwise we have  
3 to reopen this case and go back through hearing, et cetera,  
4 for any late evidence.

5 So the ruling will be that we will grant DCRA's -- unless  
6 the Board, any member of the Board has any anything that we  
7 need to hear about the material or deny them.

8 Yes, please.

9 MS. COHEN: No, I think that's my understanding is it  
10 is one day late.

11 CHAIRPERSON JORDAN: Yes. So we --

12 MS. COHEN: So it's really, no, de minimis on the --

13 CHAIRPERSON JORDAN: Correct. And we're going to act.  
14 And I was indicating that the Chair would grant that, would  
15 accept that.

16 So then unless there is anything else, then we will grant  
17 the late filing from DCRA by one day and deny the other motion  
18 to waive requirements for submission of additional evidence  
19 and additional documents.

20 We'll move into the decision of this case. This is a  
21 matter which there were some other preliminary motions in this  
22 case to dismiss other things as not being timely. The Board  
23 made a ruling that dismissed part of this case. And part of  
24 the case remained, that being the parking space, the retaining  
25 wall and the rear grade as the issues. So that's what's before

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1 us.

2 So regarding the retaining wall, does anybody want to  
3 start or? But regarding the retaining wall, then I would look  
4 at the retaining wall.

5 Again the DCRA provided evidence that the retaining wall  
6 was necessary and served as restraining the lateral  
7 displacement of soil. And that was not contradicted during  
8 the hearing. In fact, the Board asked the Applicant directly,  
9 Is this retaining wall being used to restrain soil  
10 displacement? And there was really no response given. Kind  
11 of side-stepped it.

12 So I would offer that the Board find that the retaining  
13 wall serves a legitimate purpose to prevent the soil erosion  
14 as what you normally would use with a retaining wall. And I  
15 would find that the Board, I would offer that the Board find  
16 that they established that the adjacent finished grade at the  
17 rear of the building at the top of the retaining wall and soil  
18 is held up by the retaining wall. And that the cellular --  
19 the cellar is less than 4 feet and, therefore, should not count  
20 towards the GFA and to the FAR.

21 And so then I would suggest that the Board would sustain  
22 the Zoning Administrator's decision regarding the second  
23 revised permit.

24 Regarding the parking I would offer the Board this, in  
25 my estimation, in my view that during the hearing DCRA provided

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1 testimony that there was no regulation that provided  
2 regulations for a driveway serving as a parking space. The  
3 Appellant countered that and argued that 2115.1 did restrict  
4 such use.

5 I would offer that the Board find that to be correct,  
6 that the Appellant was correct in regard to 2115.1 provides  
7 that required parking space shall be a minimum of 9 feet in  
8 width and 19 feet in length, exclusive, as stated in 2115,  
9 exclusive as in drives, aisles, ramps, columns, office work  
10 areas, et cetera. And so I would offer that the Board would  
11 overrule the decision of the Zoning Administrator regarding  
12 this particular driveway as being a valid parking space.

13 Regarding the 12 percent grade, I would offer that the  
14 Board should find that under 2117.B -- 2117.8 that the 12  
15 percent grade is allowed. And I would offer that the Board  
16 issue an order that the Zoning Administrator take actions in  
17 compliance with what this order would be as a finding of the  
18 Board.

19 That was just -- anyone else?

20 MS. COHEN: Yes, Mr. Chairman. I concur with your  
21 finding with regard to the retaining wall and the issues  
22 surrounding that. I evaluated and reviewed the record and the  
23 appeals that were made subsequent to the panel hearing, and  
24 I concur with your opinion on the retaining wall.

25 As far as the parking space, I don't see any -- I didn't

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1 see any problem using -- I think it's not as specific an issue  
2 stated or as clear cut with regard to the driveway. And then  
3 here I think it could be used as parking without any detriment  
4 to the neighborhood. However, I would like to hear from my  
5 colleague to see if he approves. Because I think the Zoning  
6 Administrator did make a proper finding.

7 MEMBER HINKLE: Yes, thank you. I tend to agree as well  
8 on the issue of the retaining wall and how that relates to the  
9 cellar issue and the FAR.

10 I tend to agree with the Chairman in regards to the  
11 parking issue. I struggled with the idea of the driveway being  
12 parking spaces. And that's been a difficulty for me with this  
13 case.

14 CHAIRPERSON JORDAN: Yes, and regarding that -- and I  
15 understand there's a practical aspect of it until I went back  
16 and looked at 2115.1. You know, certainly there's a practical  
17 aspect. And I think as the testimony from DCRA came, that we  
18 are really going to start running into some problems throughout  
19 on this parking. But it seems like it's very clear when 2115.1  
20 states, except as otherwise provided in this section, a  
21 required automobile parking space shall be a minimum of 9 feet  
22 in width, 19 feet in length, exclusive of access of drives,  
23 aisle, ramps, columns, et cetera. And it also defines how the  
24 spaces are supposed to be lined and striped. But that was kind  
25 of what pushed me over.

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1           So I don't know if that helps in any way in regards to  
2 the parking per se.

3           So then I would move that the, based upon what I  
4 indicated in my rambling here, which I hope will be part of  
5 the order as being specific why we rule one way or the other,  
6 is that the Board sustains the decision of the Zoning  
7 Administrator regarding the retaining wall and overrules the  
8 decision regarding the parking -- oh, excuse me -- sustain the  
9 Zoning Administrator regarding the retaining wall and the  
10 permission of the 12 percent grade, and that we would overrule  
11 the decision regarding the parking space.

12           MEMBER HINKLE: I'll second.

13           CHAIRPERSON JORDAN: Motion made and seconded.

14           Any further discussion? All those in favor of the  
15 motion, aye.

16           (Chorus of ayes.)

17           CHAIRPERSON JORDAN: Those opposed, nay.

18           (No response.)

19           CHAIRPERSON JORDAN: The motion carries.

20           Mr. Moy.

21           SECRETARY MOY: Staff would record the vote as 3 to 0.  
22 This is on the motion of Chairman Jordan to approve in part  
23 and reverse the decision of the ZA on the other part. Second  
24 to the motion by Mr. Hinkle. Also in support, Ms. Cohen. And  
25 we have Ms. -- Vice Chairperson Heath not present, not voting.

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1 The motion carries 3 to 0, sir.

2 CHAIRPERSON JORDAN: All right, thank you. Thank you,  
3 Mr. Moy.

4 MS. COHEN: I would just suggest that on the Board of  
5 Zoning Adjustment filing that their paragraph 6 is very  
6 confusing that they word smith it to make it clearer. It's  
7 on their order, the proposed order.

8 CHAIRPERSON JORDAN: Oh, oh. Well, the order is going  
9 to be that which we have just kind of put forth. We are not  
10 adopting in total anybody's submitted findings of fact and  
11 conclusions of law which we really do and don't do.

12 MS. COHEN: Okay.

13 CHAIRPERSON JORDAN: Thank you.

14 Thank you. And thank you for being with us this  
15 morning.

16 MS. COHEN: Oh, my pleasure.

17 CHAIRPERSON JORDAN: You know, the sacrifices of the  
18 Zoning Commissioners, they come in just sometimes for one case  
19 and disrupt their days as well as doing their normal duties.  
20 Thank you.

21 MS. COHEN: Thank you.

22 CHAIRPERSON JORDAN: Mr. Moy, while Mr. Hood is coming  
23 out would you call the 19065.

24 SECRETARY MOY: Yes. Okay, the only case on the  
25 expedited review calendar is Application Number 19065 of

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1 Jeremy and Rachel Robinson. Again, Mr. Chairman, as the Board  
2 is aware, this is a request for a special exception under  
3 Section 223 at 2131 Observatory Place, N.W.

4 APPLICATION NO. 19065 OF JEREMY AND RACHEL ROBINSON

5 CHAIRPERSON JORDAN: And we're honored to have join us  
6 today for the remaining part of the day, the Chairman of the  
7 Zoning Commission Anthony Hood.

8 No, I always kid you. I know you always give me a hard  
9 time but that wasn't the reason. I really, I really appreciate  
10 it.

11 So did you -- so we just lost him. That was a quick --  
12 Okay, so we just called 19065 for decision. Is the  
13 Board ready to deliberate on that case? It's an expedited  
14 review case which everyone has, all the interested parties have  
15 supported the request of relief. And it's for a deck.

16 Anybody have any issues with this? Any discussion?

17 (No response.)

18 I would move that we grant the relief in 19065.

19 MEMBER HINKLE: I'll second.

20 CHAIRPERSON JORDAN: Motion made and seconded.

21 Any discussions?

22 (No response.)

23 Seeing none, all those in favor signify by saying aye.

24 (Chorus of ayes.)

25 Those opposed, nay.

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1 (No response.)

2 The motion would carry. Mr. Moy?

3 MS. COHEN: Staff would record the vote as 4 to 0 based  
4 on the motion of Mr., or rather Chairman Jordan to approve the  
5 application for special exception relief. Seconding the  
6 motion Mr. Hinkle. Also support by Mr. Hood and Mr. Hill. And  
7 no other member present today. So the motion carries, sir.

8 CHAIRPERSON JORDAN: Okay. Summary please?

9 SECRETARY MOY: Thank you.

10 CHAIRPERSON JORDAN: All right. I guess then our last  
11 decision case is 19027, Mr. Moy.

12 SECRETARY MOY: Yes. This is Appeal Number 19027 of  
13 Rima Calderon and William Sawicki. And it's an appeal case  
14 appealing the decision of the Zoning Administrator to issue  
15 a building permit. And this is at property 1731 New Hampshire  
16 Avenue, N.W.

17 APPEAL NO. 19027 OF RIMA CALDERON AND WILLIAM SAWICKI

18 CHAIRPERSON JORDAN: Mr. Moy, do we have sufficient  
19 participation for this case to be a decision?

20 SECRETARY MOY: Let's see. We have --

21 CHAIRPERSON JORDAN: Do you have her absentee?

22 SECRETARY MOY: We have three members, or you're  
23 actually correct, it's yourself, Mr. Hood and Ms. Heath. I  
24 do not have an absentee ballot from her.

25 CHAIRPERSON JORDAN: Okay, we're going to have to --

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1 SECRETARY MOY: Unfortunately.

2 CHAIRPERSON JORDAN: Yes. And we're going to have to  
3 move this.

4 SECRETARY MOY: To next week, sir?

5 CHAIRPERSON JORDAN: Yes.

6 SECRETARY MOY: Thank you.

7 MEMBER HOOD: And for the record, I'm going to be  
8 submitting an absentee ballot on that.

9 CHAIRPERSON JORDAN: Okay, good. Thank you. I'm  
10 sorry.

11 MEMBER HOOD: So I've been here for that discussion but.

12 SECRETARY MOY: Do you want to just, you want to discuss  
13 it anyway?

14 CHAIRPERSON JORDAN: Let's go ahead and discuss it.

15 MEMBER HOOD: Yes.

16 CHAIRPERSON JORDAN: If there's something you want to  
17 put on the record.

18 MEMBER HOOD: For me, you know, I think the first issue  
19 was the timeliness. And I'm not sure, you know, I would like  
20 to hear from definitely Board Member Heath and yourself, but  
21 for me it seems like we need to get into the merits of the appeal  
22 because the discussion about the timeliness, when the original  
23 person should have known, for me it's a lot influx, especially  
24 when they talk about what the Deputy Director of the Office  
25 of Zoning told them. I know it's credibility, but that's not

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1 necessarily in the record.

2           So I think for me -- and I'm not sure where you two stand  
3 -- but we get beyond the point of the timeliness and when the  
4 person should have known because I think it was 2013 as opposed  
5 to some issues happened in 2014. As to the issuance of the  
6 October 2014 permit, if the Board finds that it does not address  
7 the renovations challenged, challenged here, and again it goes  
8 back to the regulation where you can only renovate, and I think  
9 it 's three -- just a second -- yes, 350.4(e). And I think  
10 clearly, at least from the merits of the way I interpreted it,  
11 this regulation was extended because it says an existing hotel  
12 may be repaired, renovated, remodeled or structurally altered.  
13 And I think it increases the use of the FAR.

14           But anyway, that's the discussion from my point. I will  
15 send in a proxy but I, you know, I would like to have had that  
16 discussion because I was kind of curious of where everybody  
17 else was. At least that's what I interpreted from what I read.

18           CHAIRPERSON JORDAN: Yes, this is kind of a very  
19 difficult case. And just so you get -- and I don't know if  
20 Mr. Hinkle wants to talk about any of these issues now. We  
21 can observe. But just so you get the benefit of what I was  
22 thinking, I've wound back and forth on this thing.

23           Regarding the timeliness, Mr. Hood, I don't think that  
24 -- I think this Board has said, and I think there's some cases  
25 that even support it, but as one of the things I've talked about

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1 or we've talked about as a board is that we need to put some  
2 hard, some hard spots in regards to "knew" or "should have  
3 known" because the fact that some decisions are in somebody's  
4 file doesn't mean that the -- that the public generally knows  
5 about it.

6 The other thing I, issue that I find is that  
7 determination letters can change. You know, if it's just the  
8 Zoning Administrator's based upon what he had in front of him  
9 at the time he's making a decision, he's not making a decision  
10 -- he says, look, everything as is and it doesn't change, this  
11 is what I, well, what I may do at the time you submit a permit  
12 application or when I have to make the final decision.

13 So I think it becomes hard for the public to really grab  
14 those determination letters saying this is the one to run with.  
15 But hearing me say that, I would say anybody is aware with a  
16 determination letter that you don't like and they need to  
17 continue to try to challenge it, so you don't want to have a  
18 problem later. But that, there was a determination letter  
19 July 24, 2013.

20 Subsequent to that, the Appellants did become aware of  
21 that in a lot of different forums. And concluding that there's  
22 a lot of forums, even the admission by the Appellants that they  
23 did receive that in October 25, 2013, and that they had a  
24 meeting December 3, 2013, with Richard Nero of this office,  
25 who may have given some not great advice. And that's not

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1 necessarily his role and responsibility.

2 But moving all of that aside, because I still think the  
3 determination letter should not necessarily run the clock.  
4 But that's just my personal opinion on it. But where my issue  
5 came down on timeliness, taking all that other stuff out, that  
6 October 28, 2014, DCRA issued a Permit Number B1404914 that  
7 provided for all the relief that is being challenged in the  
8 appeal. And then as of -- then a revised permit came out of  
9 November 13, 2014 -- well, excuse me, November 13, 2014, the  
10 Appellants became aware of that permit.

11 Subsequently, on about March 19, 2014, DCRA issued a  
12 revised permit but did not change anything that was contained  
13 in that original permit November 13, 2014. Then this appeal  
14 was not filed until April 17, 2015. That's where I would have  
15 a problem. I believe that there was sufficient notice from  
16 the permit that was given in October 2014 of the things that  
17 are grieved in the appeal. And so filing the appeal of April  
18 17, 2015, is -- would be untimely.

19 But in light of that, and I don't think we necessarily  
20 go into the merits, and if we did do that and go into the merits  
21 I think this would be -- I would offer that this would be a  
22 decision where we would rule on the motion to dismiss as go  
23 into the merits so that we have a proper record and don't have  
24 to put anybody through further burden coming back and forth,  
25 so that if this matter is appealed that it would be well within

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1 the Court of Appeals to make a complete adjudication of the  
2 matter.

3 MEMBER HOOD: I can go along with that. I guess I was  
4 trying to get to the merits. And I realize that folks attended  
5 the ANC meeting. I think this Board, at least the way I read  
6 it, and I don't do a lot of determination letters, but I think  
7 that this Board in the past has said the determination letters  
8 do not start the clock, from what I read. So I would take your  
9 thoughts on how we move forward. The only issue is -- you know  
10 what, I'll be here for this next week.

11 CHAIRPERSON JORDAN: Yes. You know, and I mean beside  
12 the determination letter but I mean with the actual permit that  
13 was issued. That's what --

14 MEMBER HOOD: Right. I saw that. I saw that. So I  
15 will --

16 CHAIRPERSON JORDAN: If we can put this first on the  
17 docket next week.

18 SECRETARY MOY: Okay. Will do.

19 CHAIRPERSON JORDAN: Thank you.

20 Mr. Hinkle, do you want to?

21 MEMBER HINKLE: I'm fine.

22 CHAIRPERSON JORDAN: All right. So and still we have  
23 to hear from Ms. Heath. And she might persuade the Board one  
24 way or the other. But these are certainly my initial thoughts  
25 and Mr. Hood's initial thoughts on face. So and I'm glad to

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1 hear that you're going to be here because I think this case  
2 deserves, you know, debate.

3 (Whereupon, the hearing went off the record at 10:15  
4 a.m.)