

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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REGULAR PUBLIC HEARING

+ + + + +

WEDNESDAY

OCTOBER 14, 2020

+ + + + +

The Regular Public Hearing of the District of Columbia Board of Zoning Adjustment convened via Videoconference, pursuant to notice at 9:41 a.m. EDT, Frederick L. Hill, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

FREDERICK L. Hill, Chairperson
LORNA JOHN, Vice-Chair
CHRISHAUN SMITH, Board Member

ZONING COMMISSION MEMBER PRESENT:

ROBERT MILLER, Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
PAUL YOUNG, Zoning Data Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

DANIEL BASSETT, Esquire

The transcript constitutes the minutes from the Regular Public Hearing held on October 14, 2020

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

(9:41 a.m.)

CHAIRPERSON HILL: All right. The hearing will please come to order.

Good morning, ladies and gentlemen. We are convening and broadcasting this public hearing by videoconference. This is the October 14th, 2020, public hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Fred Hill, Chairperson. Joining me today is Lorna John, Vice-Chair; Chrishaun Smith, Board Member; and representing the Zoning Commission is Rob Miller.

Today's hearing agenda is available to you on the Office of Zoning's website. Please be advised that this proceeding is being recorded by a court reporter, and is also webcast live via Webex and YouTube Live.

The webcast video will be available on the Office of Zoning website after today's hearing. Accordingly, everyone who is listening on Webex or by telephone will be muted during the hearing, and only persons who have signed up to participate or testify will be unmuted at the appropriate time.

Please state your name and home address before providing oral testimony or your presentation. Oral presentations should be limited to a summary of your most important points. When you are finished speaking, please mute your audio so that your microphone is no longer picking up sound or background noise.

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1 If you are experiencing difficulties using Webex or with
2 your telephone call-in or if you have forgotten to sign up 24
3 hours prior to this hearing, then please call our OZ hotline
4 number, I'll repeat the number, at 202-727-5471. Once again, 202-
5 727-5471 to sign up to testify and to receive Webex login or call-
6 in instructions.

7 All persons planning to testify either in favor or in
8 opposition should have signed up in advance. They will be called
9 by name to testify. By signing up to testify, all participants
10 completed the oath or affirmation, as required by Subtitle Y
11 408.7.

12 Requests to enter evidence at the time of an online
13 virtual hearing, such as written testimony or additional
14 supporting documents other than live video, which may not be
15 presented as part of the testimony, may be allowed pursuant to
16 Subtitle Y 103.13, provided that the person making the request to
17 enter an exhibit explains how the proposed exhibit is relevant,
18 the good cause that justifies allowing the exhibit into the
19 record, including an explanation of why the requester did not file
20 the exhibit prior to the hearing pursuant to
21 Y 206, and how the proposed exhibit would not unreasonably
22 prejudice any parties.

23 The order of special exceptions and variances is in
24 Y 409. The order of procedures for appeals is in Y 507. At the
25 conclusion of each case, an individual who is unable to testify

1 | because of technical issues may request -- may file or request for
2 | leave to file a written version of the planned testimony to the
3 | record within 24 hours following the conclusion of public
4 | testimony in the hearing.

5 | If additional written testimony is accepted, then
6 | parties will be allowed a reasonable time to respond, as
7 | determined by the Board. The Board will then make its decision at
8 | its next meeting, but no earlier than 48 hours after the hearing.

9 | Moreover, the Board may request additional specific
10 | information to complete the record. The Board and the staff will
11 | specify at the end of the hearing exactly what is expected and the
12 | date when persons must submit the evidence to the Office of
13 | Zoning. No other information shall be accepted by the Board.

14 | The Board's agenda may include previous cases set for
15 | decision after the Board adjourns the hearing. The Office of
16 | Zoning, in consultation with myself, will determine whether a full
17 | or summary order may be issued. A full order is required when the
18 | decision -- when the decision it contains is adverse to a party
19 | including an affected ANC. A full order may also be needed if the
20 | Board's decision differs from the Office of Planning's
21 | recommendation.

22 | Although the Board favors the use of summary orders
23 | whenever possible, an applicant may not request the Board to issue
24 | such an order. The District of Columbia Administrative Procedures
25 | Act requires that the public hearing on each case be held in the

1 open before the public. However, pursuant to Section 405(b) and
2 406 of that Act, the Board may, consistent with its Rules of
3 Procedures and the Act, enter into a closed meeting on a case for
4 purposes of seeking legal counsel on a case, pursuant to D.C.
5 Official Code Section 2-575(B)(4), and/or deliberating on a case
6 pursuant to D.C. Official Code Section 2-575(B)(13), but only
7 after providing the necessary public notice and, in the case of an
8 emergency closed meeting, after taking a roll call vote.

9 Preliminary matters are those which relate to whether a
10 case will or should be heard today, such as request for a
11 postponement, continuance, or withdrawal, or whether proper and
12 adequate notice of the hearing has been given. If you are not
13 prepared to go forward with the case today, or if you believe that
14 this Board should not proceed, now is the time to raise such a
15 matter.

16 Mr. Secretary, do we have any preliminary issues?

17 MR. MOY: Good morning, Mr. Chairman, and members of the
18 Board. I do have one announcement for the record. And that is
19 that case application number 20286 of Williams and Brittany
20 Williams has been withdrawn by the Applicant. Other than that,
21 there were other preliminary matters, but I would suggest that the
22 Board address those when I call the case.

23 CHAIRPERSON HILL: Okay. Thank you, Mr. Moy.

24 Well, good morning everyone. Nice to see everyone.

25 Mr. Moy, you may call our first case when you have a

1 moment.

2 MR. MOY: Thank you, Mr. Chairman. That would be Case
3 Application No. 20264 of Sledmere, LLC. Caption advertised for
4 special exceptions under Subtitle E, Section 5201 from the rear
5 addition requirements under Subtitle E, Section 205.5. This would
6 construct a three-story rear addition to an existing attached
7 principal dwelling unit and convert it into a flat in the RF-1
8 Zone at premises 1952 2nd Street Northwest, Square 3087, Lot 818.
9 And Mr. Chairman, there is a request by the Applicant to postpone
10 under Exhibit 40 which was filed yesterday, October the 13th.

11 CHAIRPERSON HILL: Okay. Let's see. Is it Gayll
12 Worsley?

13 MS. WORSLEY: Yes. Gayll Worsley, 607 Quincy Street
14 Northwest, Washington, D.C.

15 CHAIRPERSON HILL: Okay.

16 MS. WORSLEY: I'm the architect for the project.

17 CHAIRPERSON HILL: Okay, Ms. Worsley. Your camera is
18 not on, which is totally fine.

19 MS. WORSLEY: Oh.

20 CHAIRPERSON HILL: I just want to make sure you know.

21 MS. WORSLEY: Yeah. I'm not sure how to turn it on.
22 I'm a novice to this.

23 CHAIRPERSON HILL: That's okay. On the screen, if you
24 put your cursor over the screen, the little video thing will pop
25 up in the bottom.

1 MS. WORSLEY: Let's see.

2 CHAIRPERSON HILL: Like start video or --

3 MS. WORSLEY: Sorry.

4 CHAIRPERSON HILL: That's okay.

5 MS. WORSLEY: I can't find it. It's in the middle of
6 the screen? I'm sorry.

7 CHAIRPERSON HILL: It's at the bottom of the screen, or
8 it should be at the bottom of the screen.

9 MS. WORSLEY: Okay. Start video. There it is. Sorry.
10 I seem to be having trouble with my video. I apologize.

11 CHAIRPERSON HILL: It doesn't matter. I can hear you.
12 We can hear you. Okay. Before we start -- and again, I just
13 heard you introduce yourself for the record. Thank you very much.

14 There was some procedural issues that -- concerning
15 posting. And this -- I'm just kind of mentioning this for the
16 record, that it appears that the notice for the hearing was not
17 published in the D.C. Register more than 40 days in advance as
18 required by Y 402.1(a). It also appears that the 40-day
19 requirement has not been met -- well, anyway, so the 40-day
20 requirement hasn't been met in the D.C. Register.

21 I guess what we have done in terms of notice, all the
22 other notice requirements has been made, meaning that the notice -
23 - well, the notice was published, I guess, 19 days before the
24 hearing on September 25th, 2020. And then the other provisions
25 which are in Subtitle Y 402 have been satisfied including the

1 notice to the Applicant, the notice to the affected ANC, the
2 notice to the Office of Planning and other relevant District
3 agencies, the notice to the 200-Footers, and posting on the
4 property.

5 As far as what I think the intent of Subtitle Y 402, I
6 believe it has been satisfied in terms of all the different public
7 notices and that there has been adequate constructive notice given
8 of the public hearing. And I don't think that this will prejudice
9 any of the parties.

10 And so before I make a motion to waive the requirements
11 of this subtitle and then see if my fellow colleagues would agree,
12 Ms. Worsley, do you understand everything I said? And do you have
13 any objection to the notice requirements that I'm going to waive?

14 MS. WORSLEY: No, I do not. And I understand. Yes, I
15 understand, and I don't have any objection.

16 CHAIRPERSON HILL: Okay. Great.

17 So then I'm going to go ahead and make a motion to waive
18 the requirements of Subtitle Y 402.1(A) pursuant to Subtitle Y
19 101.9 and Subtitle Y 402.11.

20 And I guess ask for a second, Ms. John.

21 VICE CHAIR JOHN: Second.

22 CHAIRPERSON HILL: Mr. Moy, we're going to go ahead and
23 take a roll call on these.

24 And for anyone else that's listening to today's hearing,
25 this is the same issue on the other cases for today. And so I'll

1 be kind of walking through this as well and talking to all the
2 applicants about that.

3 Mr. Moy, would you take a roll call vote?

4 MR. MOY: Yes. Thank you, Mr. Chairman. So when I call
5 your names, if you would please respond with a yes, no, or abstain
6 to the motion made by Chairman Hill to waive the requirements.
7 This is the submission to the D.C. Register, it's untimeliness, I
8 suppose. Seconding the motion is Vice Chair John to the motion.
9 So let's see. Zoning Commissioner Robert Miller?

10 COMMISSIONER MILLER: Yes to waive.

11 MR. MOY: Mr. Smith?

12 MR. SMITH: Yes to waive.

13 MR. MOY: Vice Chair John?

14 VICE CHAIR JOHN: Yes to waive.

15 MR. MOY: Chairman Hill?

16 CHAIRPERSON HILL: Yes to waive.

17 MR. MOY: Staff would record the vote as 4-0-1. And this
18 is on the motion of Chairman Hill to waive, seconded by Vice Chair
19 John, and also supported by Mr. Smith, and Zoning Commissioner
20 Robert Miller. And we have a board seat vacant. The motion
21 carries, sir.

22 CHAIRPERSON HILL: Okay. Great. Thank you, Mr. Moy.
23 All right.

24 So Ms. Worsley, can you hear me again?

25 MS. WORSLEY: Yes, I can.

1 CHAIRPERSON HILL: Okay. So you have requested a
2 postponement. Can you explain why, please?

3 MS. WORSLEY: Yes. We've been -- we've presented to
4 ZPD, the Le Droit Park Community Association, and they both asked
5 us to revisit some of the aspects of the building. We're also
6 working with HPRB on the design. And we're sort of in limbo. So
7 we're updating drawings as we redesign the façade and take into
8 account their comments from both committees.

9 CHAIRPERSON HILL: Okay. Do you know how long a
10 postponement you might need?

11 MS. WORSLEY: I'm going to say at least a month. But
12 I'd rather reach out to Brendan Myer at HPRB to make sure that
13 we've got everything acceptable and finalized before committing to
14 an actual date.

15 CHAIRPERSON HILL: Okay. And then you can reach back
16 out to Mr. Moy?

17 MS. WORSLEY: Yes, I will.

18 CHAIRPERSON HILL: Okay. So one of the things -- and
19 then I'll let my Board members have any questions if they have
20 before we move on here. I didn't really see a light and shadow
21 exhibit. And so --

22 MS. WORSLEY: Okay.

23 CHAIRPERSON HILL: -- that might be something you want
24 to add. And then I don't know -- I guess there were some amended
25 plans and something about 60 percent versus 60.1 percent?

1 MS. WORSLEY: Yeah. We've reduced that down -- we took
2 two inches off of the back deck. So we're under the 60 percent
3 now. But I'll be updating all of the drawings and some of the --
4 the height of the building will change slightly as well. So there
5 are some things that will be pertinent to this case as well as for
6 BZA.

7 CHAIRPERSON HILL: Okay. All right. And then if you
8 need to amend your application, you'll also do that as well?

9 MS. WORSLEY: Yes. Absolutely.

10 CHAIRPERSON HILL: Okay. All right. I don't have any
11 issues with the postponement.

12 Does my fellow Board members have any questions and/or
13 issues with the postponement? And if so, raise your hand, all of
14 you. Okay. All right.

15 So Ms. Worsley, go ahead.

16 And Mr. Moy, I'll just -- does that sound good to you?
17 She will reach -- the Applicant will reach out to you in terms of
18 after speaking with who they need to speak to, to reschedule?

19 MR. MOY: Yes, sir. The only thing I would add, Mr.
20 Chairman, is that Ms. Worsley was suggesting it may be a month.
21 But given the schedule that the Board is on, the last hearing in
22 November is the -- is November 18th. So after that -- the reason
23 is because then you are into the Thanksgiving holidays. So after
24 November 18th, the next hearing for the Board would be December
25 the 2nd.

1 MS. WORSLEY: Okay. Thank you for that.

2 CHAIRPERSON HILL: And what's our caseload on December
3 2nd?

4 MR. MOY: You have four applications and one appeal. One
5 little appeal.

6 CHAIRPERSON HILL: Okay. All right. Okay. All right.
7 Ms. Worsley, let's see what happens.

8 MS. WORSLEY: Okay. Thank you so much. I'll let you
9 know as soon as possible.

10 CHAIRPERSON HILL: Okay. Thank you.

11 MS. WORSLEY: Thank you so much.

12 MR. MOY: Mr. Chairman, just to let you know, the staff
13 is -- once we learn of which of these two hearing dates, we'll
14 submit -- the staff will submit a OZ memo on the record clarifying
15 what the hearing date is, when the hearing date is. Okay?

16 CHAIRPERSON HILL: Okay. Mr. Moy, do you need the
17 Applicant anymore, or can I move on?

18 MR. MOY: We can move on.

19 CHAIRPERSON HILL: All right.

20 Ms. Worsley, thank you so much.

21 MS. WORSLEY: Thank you so much. Have a great day.

22 CHAIRPERSON HILL: You, too. All right.

23 Mr. Moy, you can call our next one if you like.

24 MR. MOY: Thank you, Mr. Chairman. This would be Case
25 Application 20285 of Bryce Jacobs. Caption advertised for special

1 exceptions under Subtitle E, Section 5201 from the lot occupancy
2 requirements of Subtitle E, Section 304.1 and the rear yard
3 requirements of Subtitle E, Section 306.1. This would construct a
4 second-story rear deck addition to an existing principal attached
5 dwelling unit in the RF-1 District at premises 1833 Ontario Place,
6 Northwest, Square 2584, Lot 828.

7 CHAIRPERSON HILL: Is Ms. Jacobs there?

8 MS. JACOBS: I'm here. Hi. Good morning.

9 CHAIRPERSON HILL: Good morning. Could you introduce
10 yourself for the record, please?

11 MS. JACOBS: Bryce Jacobs. I live at 1833 Ontario Place
12 Northwest.

13 CHAIRPERSON HILL: All right.

14 And is a Mr. Blake there?

15 MR. BLAKE: I'm here. Michael Blake. 242 10th Street,
16 Northeast.

17 CHAIRPERSON HILL: Okay. If you could --

18 MR. BLAKE: I'm the architect.

19 CHAIRPERSON HILL: Okay. Great.

20 MR. BLAKE: I'm the architect on the project.

21 CHAIRPERSON HILL: Okay. Wonderful.

22 If you could both just mute your microphones when you're
23 not speaking, because it just kind of gets kind of loud. Let's
24 see. And I'm going to go through -- I don't know if you saw the
25 last one. I'm going to go through this again.

1 But there was a procedural error that is affecting the
2 cases scheduled for the hearing today. For the hearings today, it
3 was not published in the D.C. Register with 40 days in advance as
4 required by Y 402.1(A). And there's just been some technical
5 things I think because of, like, the virtual hearings and how, you
6 know, the pandemic has been affecting some things. But we do
7 believe -- or I believe that the criteria has been satisfied,
8 because the other provisions in Subtitle Y 402 have been satisfied
9 including notice to the Applicant, notice to the affected ANC,
10 notice to the Office of Planning and other relevant District
11 agencies, notice to the 200-Footers and posting on the property.
12 I think that the intent of Subtitle Y 402 has been satisfied, and
13 I don't think that this is going to prejudice any parties. Again,
14 it was published 19 days before the hearing on September 25th,
15 2020.

16 So before I make a motion and again see if any of my
17 colleagues have any issues with waiving this notice requirement,
18 Ms. Jacobs, do you have any objection to waiving the notice
19 requirement?

20 MS. JACOBS: No.

21 CHAIRPERSON HILL: Okay. All right. Then let's see.

22 I'm going to go ahead and make a motion to waive the
23 notice requirements of Subtitle Y 402.1(A).

24 MR. BASSETT: Chairman Hill, before you make that
25 motion, might I suggest that you invite the other Appellant

1 witness in to see whether they have any objections even though
2 they're not a party at this point?

3 CHAIRPERSON HILL: I guess that's interesting that
4 you're saying that. I mean, is that an -- and I guess now we're
5 having this discussion. I mean, if there were 15 witnesses, would
6 I be inviting all 15 witnesses to give their opinion?

7 MR. BASSETT: I think that could be up to you.
8 Certainly, I think one of the issues that comes up for me is that
9 19 days -- the difference between 19 days and 40 days would be
10 enough for a witness to submit a motion for party status and be
11 (audio interference). So if they were to argue that they didn't
12 have enough time to submit that motion because they didn't have
13 enough time in the Register, that could be an issue. But --

14 CHAIRPERSON HILL: Okay. That's fine.

15 MS. JACOBS: Can I just say that we've been talking with
16 the neighbors --

17 CHAIRPERSON HILL: Ms. Jacobs --

18 MS. JACOBS: -- for months.

19 CHAIRPERSON HILL: Ms. Jacobs, it's okay. This one's
20 not you. Thanks. Let's see.

21 Vice Chair John, what do you have to say about this
22 thought?

23 VICE CHAIR JOHN: I don't think that -- I don't think it
24 would hurt. But I could go either way, Mr. Chairman. I'm sorry,
25 I'm not much help.

1 CHAIRPERSON HILL: That's all right. We could -- we
2 could --

3 VICE CHAIR JOHN: I think there is enough notice,
4 constructive notice, so that anyone wanting to seek party status
5 could have. But out of an abundance of caution, I guess it really
6 would not hurt. Perhaps --

7 CHAIRPERSON HILL: I'm kind of torn because I don't --
8 I do think that, you know, Y 402.1(A) has been satisfied, you
9 know. And so I'll see what Commissioner Miller has to say, and
10 I'll see what Mr. Smith has to say. And then we can totally bring
11 in the one witness that is going to testify and see what that
12 person has to say. But whether or not -- even if that person
13 objects, it doesn't necessarily mean we're going to listen to that
14 one person.

15 So Commissioner Miller?

16 COMMISSIONER MILLER: Thank you, Mr. Chairman. I agree
17 that constructive notice has been given sufficiently, that the 19-
18 day Register notice would not prejudice the parties. But is ANC -
19 - 1C is it? They're not in the audience, are they? I know they
20 issued kind of a conditional support report. Are they here? If
21 they were here, I'd want to hear from them. But I don't think
22 they're here. I don't know if anybody can confirm --

23 CHAIRPERSON HILL: Sure. Sure. John, you don't have
24 anybody, right?

25 (Audio interference.)

1 MR. YOUNG: -- person signed up for this case.

2 CHAIRPERSON HILL: Right. But it's not -- yeah, I know
3 who that is. It's not the ANC.

4 MR. YOUNG: No. No ANC.

5 MS. JACOBS: John Zottoli was supposed to be here from
6 the ANC.

7 CHAIRPERSON HILL: Somebody from the ANC was supposed to
8 be here, Ms. Jacobs; is that what you said?

9 MS. JACOBS: Correct. John Zottoli.

10 MR. YOUNG: Just ask for the record whether anyone from
11 the ANC is -- in this case is here.

12 CHAIRPERSON HILL: That's fine. Mr. John Zottoli, do
13 you see him, Mr. Young, on the list anywhere?

14 MR. YOUNG: I do not.

15 CHAIRPERSON HILL: Okay. All right. So he hasn't come
16 in. All right. I guess -- go ahead and bring in the --

17 Mr. Smith, I'm just going to bring in the witness and
18 see what the witness has to say real quick, and then we can
19 determine whether or not we're going to move on.

20 You want to bring in the witness?

21 Mr. Robertson, can you hear me?

22 MR. ROBERTSON: Yes, I can. Can you hear me?

23 CHAIRPERSON HILL: Yeah. So were you able to follow all
24 that?

25 MR. ROBERTSON: Yeah, I was. You know, I think -- you

1 know, I am sort of opposed to continuing on those grounds and
2 correct what the Applicant said. We have not been discussing this
3 for months. Ms. Jacobs had actually reached out to me --

4 CHAIRPERSON HILL: Mr. Robertson? Mr. Robertson, I'm
5 trying to figure out whether you followed what we were just
6 talking about in terms of the notice.

7 MR. ROBERTSON: Yes. Yes.

8 CHAIRPERSON HILL: And everything that I've read, okay?
9 Do you have any objection to us continuing with this hearing?

10 MR. ROBERTSON: Yes.

11 CHAIRPERSON HILL: Why?

12 MR. ROBERTSON: That's what I was trying to say. We
13 have not been discussing this for months. We've been trying to
14 catch up as Ms. Jacobs has been pursuing the process. The notice
15 has not been adhered to, and we oppose the project and, therefore,
16 oppose proceeding (audio interference) until she goes through the
17 (indiscernible) period.

18 CHAIRPERSON HILL: It's not her issue. It's that we
19 didn't post in the Register in the appropriate time. You've been
20 notified. The 200-Footers have been notified. All of the other
21 issues concerning the posting has been done. The only thing that
22 hasn't happened is the 40 days in the D.C. Register.

23 MR. ROBERTSON: Sure. That's fine. Then fine. We're
24 okay proceeding.

25 CHAIRPERSON HILL: Okay. All right. Mr. Robertson,

1 we'll come back to you when we hear from the witnesses, okay? All
2 right. Thank you. All right.

3 So Ms. Jacobs --

4 Mr. Young, could you please excuse Mr. Robertson?

5 Ms. Jacobs?

6 So let's see. So what we'd like to hear from you is why
7 you're meeting the standard for the application and why you
8 believe we should grant the relief that's being requested. And I
9 don't know if Mr. Blake is going to be doing the presentation or
10 you. Is it Mr. Blake?

11 MS. JACOBS: Mr. Blake will be giving a presentation,
12 and I can address the neighbor issues after he gives his
13 presentation.

14 CHAIRPERSON HILL: Okay.

15 MR. BASSETT: Sorry. Chairman Hill, it's Dan Bassett,
16 OAD. You were in the midst of making a motion when I interrupted
17 you to invite the other witness in.

18 CHAIRPERSON HILL: Okay. Thank you, Mr. Bassett.
19 You've been very helpful Mr. Bassett. All right. Okay.

20 I'm going to go ahead and make a motion to waive the
21 posting requirements -- or the one posting requirement, I should
22 say, of the 19 -- you know, we've published this for 19 days in
23 the Register, in the D.C. Register. All other requirements for
24 notice under Y 402 have been satisfied. I'm waiving the one item
25 there for the 19 days. And I'm going to ask for a second. Ms.

1 John?

2 VICE CHAIR JOHN: Second.

3 CHAIRPERSON HILL: The motion is made and seconded.

4 Mr. Moy, could you take a vote, please?

5 MR. MOY: Thank you, Mr. Chairman. So when I call your
6 names, if you would please respond with yes, no, or abstain to the
7 motion made by Chairman Hill to waive the requirements of Section
8 402.1 (A), attend at the D.C. Register requirements. Seconding
9 the motion is Vice Chair John. Also -- yeah. So starting with
10 Commissioner Robert Miller?

11 COMMISSIONER MILLER: Yes.

12 MR. MOY: Mr. Smith?

13 MR. SMITH: Yes to waive.

14 MR. MOY: Vice Chair John? Okay. Let the record show
15 that Vice Chair John raised her thumb up in agreement to waive.
16 Chairman Hill?

17 CHAIRPERSON HILL: Yes to waive.

18 MR. MOY: The staff would record vote as 4-0-1. And
19 this is on the motion to waive -- motion made by Chairman Hill and
20 seconded by Vice Chair, and also in support Mr. Smith and
21 Commissioner Robert Miller. We have a board seat vacant. The
22 motion carries.

23 CHAIRPERSON HILL: Okay. Great. Thank you. All right.

24 Mr. Blake, if you want to go ahead and walk us through
25 your application or your client's application as to why you're

1 meeting the criteria for us to grant your request for relief. And
2 I'm going to put 15 minutes on the clock, and you can begin
3 whenever you like.

4 MR. BLAKE: Okay. And I did send a PowerPoint
5 presentation to Mr. Young this morning and would like to request
6 that that be brought up on the screen. Okay.

7 So, again, my name is Michael Blake, and I'm
8 representing Bryce Jacobs and Matthew Myers (ph) for this project
9 which proposes to construct a rear yard addition at the second
10 level and a rear yard deck at the first level of this single
11 family row structure. Next slide, please.

12 We are requesting a rear yard setback of 4.11 and three-
13 quarter inches in order to push the deck beyond a rear yard
14 addition that was recently constructed on the adjacent property
15 and impacting the existing deck's access to light and air. We're
16 also requesting a lot occupancy of 70 percent, which as you'll see
17 in the drawing is mainly used for circulation required to connect
18 the main level of the house to the rear yard deck that's been
19 pushed back farther towards the alley. Next slide, please.

20 The property is a single property home row structure
21 located in an RF-1 Zone with the rear yard alley being shared with
22 the RA-2 District. As you can see from this image, the alley is
23 pretty built up. There's a five-story apartment building right up
24 against the lot line of the alley directly across from this
25 property. And there's the other one, the yellow one that Google

1 Earth kind of has a big hole in. But there's another apartment
2 building along the alley as well. So there is significant build-
3 up along this alley, including also two doors down, this three-
4 story structure that was also recently constructed. Next slide,
5 please.

6 So there -- we also have with this five-story apartment
7 building, there's windows that are just on the other side of the
8 alley right up against the lot line facing the proposed deck.
9 It's a 15-foot wide alley but are windows right on that line.
10 Next slide, please.

11 The homeowner's goal in this project and what they
12 approached me about was trying to -- is trying to regain their
13 rear yard deck's access to light and air from the construction
14 that was done at 1831 Ontario Place Northwest, that's the -- you
15 can see the gray outline here, plan north. So we are proposing to
16 push the deck, which was once directly off of the kitchen right
17 off the main level, push it towards the alley. It will be 9-foot
18 10-inches. It will start 9-foot 10-inches beyond the line of the
19 addition that was constructed at 1831 Ontario and connected by
20 this kind of bridge structure which I previously mentioned is
21 taking up a fair amount of lot occupancy just to reach that deck.

22 We're also proposing at Level 02 to replace a small
23 balcony with a rear yard addition to basically just close that
24 space to make the rear bedroom a little bit more useable. It
25 aligns with the landing outside of the kitchen that you see here

1 on this proposed Level 01 drawing. The -- so the addition at the
2 second level aligns so that we're not taking up any more lot
3 occupancy. So it's a very small addition, but just trying to gain
4 as much useable space in that bedroom as possible. We have -- we
5 have pushed everything to get to the 70 percent lot occupancy that
6 is allowable by special exception. Next slide, please.

7 We have included in the record a list of changes that
8 have been made to the design and drawings that have been updated.
9 One of the major ones that is apparent in this section -- it's on
10 the left-hand side here. We had originally proposed a seven-foot
11 tall screen wall instead of just a railing, 36-inch high railing,
12 in order to provide some privacy from those windows in the
13 apartment building right across from the alley. But in speaking
14 with the neighbor, the witness that you'll hear from later, we
15 agreed to reduce that to a 36-inch tall open railing to try to
16 minimize impact to their light and air.

17 The property also has an existing parking spot on the
18 property but in the alley where you can see this retaining wall.
19 And so that -- you know, we're trying to maintain that parking
20 spot and lifting that deck up as minimal as possible to still
21 provide the parking spot. Next slide, please.

22 The deck railing that we're proposing will be, you know,
23 kind of your standard pressure treated wood railing. We have made
24 it as -- you know, the code minimum, three feet tall, and as open
25 as possible. There is requirements for the spacing of the

1 verticals that the code does require. But in response to
2 conversations with the neighbor, we have tried to make -- we've
3 made that as open as we possibly can and still maintain air with
4 code compliance.

5 This drawing on the right shows the -- so this is 1835
6 on the right-hand side. You see the subject property in the
7 middle. The right-hand side is 1835. And there is an existing
8 fence that is 7-foot 11-inches off of their grade. We are
9 proposing to go up -- it will be about 1-foot 11 and three-
10 quarters is the deck structure, and then three feet above that is
11 the handrail that, again, is required by code. Next slide,
12 please.

13 Also included the solar studies for winter and summer
14 solstice as well as the spring and fall equinox. The -- we're
15 only showing the summer solstice studies because the summer months
16 are the only time that the sun path is far enough in the northern
17 sky to impact the rear yard. And that's taking into account the
18 existing masking of the neighboring structures.

19 I'm showing you both the existing and proposed
20 conditions to illustrate the fact that the proposed construction
21 really has no impact on the neighboring property's access to light
22 and air. The biggest impact really is that the new deck will put
23 some shade on the parking spots of 1831 Ontario Place in the
24 afternoons for an hour or two, but it's not in their yard. They
25 have a -- they also have the apartment spots in the alley, and

1 that's in the area that will be getting any -- that will be
2 impacted by this next structure.

3 So that's -- that concludes the presentation. And I can
4 answer any questions.

5 CHAIRPERSON HILL: Okay. Can you go ahead, Mr. Blake --
6 I'm sorry.

7 Mr. Young, can you just pull up that first slide?

8 So Mr. Blake -- and I will speak to Ms. Jacobs in a
9 second about this. The neighbor is the one to the left of the
10 deck, correct?

11 MR. BLAKE: No. So they are -- you have the taller
12 building here in this rendering, that's to the right of the
13 subject property. And they are in the lower unit which occupies
14 the grade level that you can't see. It's behind this fence with
15 the overhead door in it.

16 CHAIRPERSON HILL: It's in -- it's in front of the
17 garage?

18 MR. BLAKE: Correct. Yeah. Within the plane of this
19 building. And they're on the lower level of the first level.

20 CHAIRPERSON HILL: And -- that's all right. That's
21 okay. I'm going to look at your elevations over here, because I
22 got a little confused as to where they were. But we can -- we can
23 speak with them when we have an opportunity. I actually -- I see
24 it in your Exhibit 36. I guess it's AO4 is what seems to -- I'm a
25 little confused. Okay. Anyway. Oh, that's a roller door.

1 That's a roller door.

2 MR. BLAKE: Yes.

3 MS. JACOBS: It's also actually seven feet tall. So
4 it's actually much higher than our proposed deck. Just --

5 CHAIRPERSON HILL: Okay.

6 MS. JACOBS: This doesn't show that.

7 CHAIRPERSON HILL: Okay. I got the A04. It's okay. So
8 -- all right.

9 Does anybody have --

10 Mr. Young, you can pull that slide deck down if you want
11 to so I can see everyone. Thank you.

12 Does the Board have any questions for --

13 And Ms. Jacobs, I'll get to you in a second because I
14 have a couple questions for you.

15 But does the Board have any questions for the architect?
16 Okay.

17 So Ms. Jacobs, before I turn to the Office of Planning,
18 in terms of the ANC, you guys went before the ANC, and it seemed
19 as though it was an odd conditional -- I don't even know what to
20 really make of it exactly. And I know that the witness, your
21 next-door neighbor, is going to have some comments about the ANC
22 meeting. And so can you tell me what you took from that ANC
23 meeting?

24 MS. JACOBS: I can. I can also read to you an email
25 that I received from John Zottoli who was supposed to be here

1 today. So --

2 CHAIRPERSON HILL: Before you read it, I am going to ask
3 one thing about that.

4 So Mr. Bassett, can you hear me?

5 MR. BASSETT: Yeah.

6 CHAIRPERSON HILL: So this part I am confused about. So
7 in terms of, like, if a witness wants to read something, can they
8 read something like that?

9 MR. BASSETT: I don't think -- I think your rules
10 prohibit offering live video evidence, and I wouldn't consider
11 that to be live video evidence. But I don't think that there is
12 any problem with reading something.

13 CHAIRPERSON HILL: Okay. But does that mean -- so the
14 person isn't necessarily testifying on behalf of that person?

15 MR. BASSETT: No. I wouldn't consider anything that Ms.
16 Jacobs reads to be a statement from Mr. Zottoli.

17 CHAIRPERSON HILL: Okay.

18 MR. BASSETT: She could always -- she could always
19 submit that evidence to the record, and you could look at it.
20 Also, if you wanted a copy of the PowerPoint presentation, that
21 hasn't been submitted to the record either. So you could -- these
22 pieces of evidence could be offered into the evidence at the
23 hearing, and you could make a judgment as to whether you wanted to
24 have those added to the record.

25 CHAIRPERSON HILL: Okay. Okay. Okay.

1 So, again, as I had read about during the hearing and
2 because of all this virtual stuff that's going on, I mean, I would
3 like to have the PowerPoint put into the record unless anyone has
4 any opposition to it from my fellow Board members. And if you do
5 so, please raise your hand. Okay.

6 And then, Ms. Jacobs, rather than just reading what the
7 email sent from the Commissioner, just tell me what happened at
8 the ANC meeting.

9 MS. JACOBS: I'll do both. So the ANC heard from
10 Michael Blake, the architect, and from me and from the neighbors,
11 and they did agree to support 500, this request. They agreed that
12 our -- we should be in a good faith effort to negotiate a common
13 ground solution with the neighbors which we have been going back
14 and forth about for many weeks now. We have been trying to make a
15 compromise.

16 From my perspective, I have offered many things to
17 appease them. They only want us to remove all of the trees which
18 we are unwilling to do. And so the ANC wanted to make it clear
19 that they are approving this, and they're supporting it. It is
20 not contingent on finding an agreement with the neighbors, but in
21 trying to have a good --

22 CHAIRPERSON HILL: I see their point. I see their
23 point. I see the good faith effort. It's in the report from the
24 ANC. Okay.

25 Does the Board have any questions for the Applicant?

1 MS. JACOBS: I also have testimony, if you want that now
2 or later. I'm not sure if you want me to make a statement.

3 CHAIRPERSON HILL: Testimony from yourself?

4 MS. JACOBS: Yeah.

5 CHAIRPERSON HILL: Sure. Go ahead.

6 MS. JACOBS: Okay. Great. Thank you. So since 2004,
7 my family and I have owned and lived in this property, 1833
8 Ontario Place. And through the years as our family has grown with
9 another one on the way, we have wanted to stay in the
10 neighborhood. We have done two renovations to our home, both
11 times were considered "by-right" construction. We followed all
12 the rules and regulations. We're active citizens in the
13 neighborhood, and we attend ANC meetings and are involved in the
14 community and we'd like this to be our forever home.

15 In the past four years, many of our neighbors, including
16 the ones on each side adjacent to our property, have undergone
17 significant changes as you've seen in the drawings. On one side
18 at 1831 Ontario Place, the owners constructed the largest addition
19 on the whole block and illegally built over two feet of home
20 construction that severely compromised our light and air. On the
21 other side, at 1835 Ontario Place, a single-family home was
22 converted to a two-unit dwelling with a third story addition, also
23 much larger than our home.

24 In order to meet the needs of our expanding family and
25 our desire to remain in the neighborhood that we love, we are

1 asking to extend our smallest bedroom by 42 inches, which is still
2 smaller than each property on either side of our house. We're
3 also asking to add a rear yard deck over our parking pad which is
4 consistent with approximately over 90 percent of the homes on our
5 block. In fact, we're asking to build much smaller than the
6 others surrounding us.

7 This open deck will cause no adverse effects to the
8 light and air of either property adjacent to ours. The property
9 directly across the alley is an abandoned falling down apartment
10 building. And we have secured many letters of support from
11 surrounding neighbors which we submitted to the ANC.

12 As you know, the neighbors on the ground-floor cellar
13 unit of 1835 Ontario Place are contending that the trees in our
14 yard are causing moisture and mosquitos on their property.
15 However, there is no evidence for this. The trees that are on our
16 property have been there since approximately 2005. The previous
17 owners of 1835 Ontario Place had no issues with moisture on the
18 property. The current owners moved in in January of 2020.

19 Additionally, John Zottoli from ANC said that moisture
20 issues usually arise from improper drainage on the ground-floor or
21 improper draining from the roof, and the neighbors might want to
22 look into those issues on their own property. As I understand it,
23 trees actually help mitigate moisture issues since they drink the
24 water, and we want to keep them. Concerning the mosquitos, this
25 is a whole neighborhood-wide issue, not relegated just to our

1 | home.

2 | An open deck with a low railing will have no impact on
3 | their access to light and air. You can see the shade studies.
4 | And the lower railing, which we have agreed to, is even lower than
5 | the neighbor's existing fence and garage door.

6 | However, in order to meet the neighbors' concerns, we
7 | have agreed to lower the height of the railing significantly. Our
8 | original plans had it as a seven-foot railing. It is now three
9 | feet. We have agreed to adhere to a mosquito spring schedule at
10 | our own cost as well as remove one of the three trees on our
11 | property and to keep to a tree-trimming schedule. As a gesture of
12 | good will, we have already trimmed the trees severely and sprayed
13 | for mosquitos three times.

14 | All parties have seen these amended plans which included
15 | the lower deck railing. And before we decided to lower the deck,
16 | I did mistakenly say that we would consider removing our trees.
17 | But then once we -- I spoke to my family, I spoke to the other
18 | neighbors, and we lowered the deck railing, we decided we really
19 | needed to keep the trees because of the lower railing, the access
20 | to the alley, the view into our home from the apartment building
21 | as well as some of our own concerns with removing trees and having
22 | moisture issues.

23 | And so we believe that we've really tried to meet the
24 | neighbors more than halfway. And we're not asking to build
25 | anything that is out of sorts with the rest of the block or that

1 will affect any other neighbors. And as you see, the ANC
2 supported this. It is not contingent on reaching an agreement.
3 We believe that we've offered a reasonable compromise. And we
4 hope we consider this as a reasonable request. Thank you so much.

5 CHAIRPERSON HILL: Okay. All right. Thank you.

6 Does the Board have any questions for the Applicant?

7 COMMISSIONER MILLER: Thank you, Mr. Chairman. And
8 thank you, Ms. Jacobs, for your presentation.

9 The trees question, just out of curiosity, what kind of
10 trees are they? And how tall are they? And --

11 MS. JACOBS: One is a crepe myrtle. One is an
12 evergreen. We have agreed to remove the evergreen. And one is --
13 I really actually don't know. It's a leafy tree. They're about
14 nine feet tall.

15 COMMISSIONER MILLER: Okay. And the two trees that the
16 Applicant -- that the neighbor, the downstairs neighbor wanted
17 removed, they overhang that property? The branches overhang, I
18 assume, some of the property.

19 MS. JACOBS: Well, we severely trimmed them when they
20 asked us to. We had not -- we thought that people liked trees.
21 Actually, their upstairs neighbors like the trees.

22 COMMISSIONER MILLER: Right. It's very unusual to have
23 a request that --

24 MS. JACOBS: Correct. So once they alerted us that they
25 thought that the trees were a problem, we immediately got a

1 landscaper out and trimmed the trees. And so the one closest to
2 their property no longer hangs over their property. It is now
3 trimmed back severely so that nothing touches their property or
4 overhangs their property.

5 COMMISSIONER MILLER: Okay. Thank you very much. I
6 appreciate your presentation.

7 MS. JACOBS: You're welcome.

8 VICE CHAIR JOHN: Thank you, Mr. Chairman. Ms. Jacobs,
9 which of the trees -- I'm looking at Exhibit 36. So the crepe
10 myrtle is the one in the center.

11 MS. JACOBS: No. The crepe myrtle is the one closest to
12 the neighbor's property.

13 VICE CHAIR JOHN: Okay. And that's the one that's been
14 trimmed back so that none of the branches overhang the neighbor's
15 property?

16 MS. JACOBS: Correct.

17 VICE CHAIR JOHN: And anticipating what the neighbor
18 will say because I've read the neighbor's testimony, is it your
19 plan to keep that tree trimmed so that it does not -- the leaves --
20 - I'm sorry, the limbs don't overhang the neighbor's property?

21 MS. JACOBS: We offered that. We offered a regular tree
22 trimming schedule, you know, when we were in the good faith
23 efforts to negotiate. That was -- though they wouldn't oppose
24 this, we did not come to such agreement. I don't think that that
25 is satisfying them. I think -- I don't want to make enemies with

1 neighbors. So I, you know, would have agreed to continue trimming
2 it if that will make them happier.

3 VICE CHAIR JOHN: Okay. And so also Exhibit 36. So
4 it's the evergreen that you're planning to -- that has been
5 removed or you're planning to remove?

6 MS. JACOBS: I offered to remove it, again, on condition
7 that they didn't oppose, but they are opposing. So, again, I am
8 willing to be a nice neighbor. But this was all in good faith of
9 them not opposing our construction.

10 VICE CHAIR JOHN: Okay. So right now, your proposal is
11 not to remove any trees?

12 MS. JACOBS: Well, I'd say that I -- if it will make
13 everybody be good neighbors, I am willing to do my part to have a
14 friendly neighborhood and keep to my agreement that I offered,
15 even though they previously rejected it.

16 VICE CHAIR JOHN: Okay. Thank you, Ms. Jacobs.

17 MS. JACOBS: Thank you.

18 CHAIRPERSON HILL: Okay. Can I turn to the Office of
19 Planning?

20 MS. MYERS: Hello. Crystal Myers from the Office of
21 Planning. The Office of Planning is recommending approval of this
22 case. I will note -- because I know that's there are issues when
23 it comes to the privacy and enjoyment question with the adjacent
24 neighbors. So I'll just note that we felt that the shadow study
25 did not show that there was an (audio interference) impact on the

1 neighbors. We felt that the impacts are mostly related to the
2 parking areas. And the same thing with privacy and enjoyment.
3 The Applicant has organized the deck in a way so that the bulk of
4 it is mostly built on the parking area which we felt was a way to
5 reduce its impact. And, again, the RF Zone does not have a side
6 yard requirement.

7 So with those understandings, we were able to determine
8 that there wasn't an undue impact on light, air, and privacy, and
9 enjoyment to the adjacent neighbors. And with that, Mr. Chairman,
10 (audio interference) questions.

11 CHAIRPERSON HILL: Does the Board have any questions for
12 the Office of Planning?

13 I'm going to take a quick two-minute break if that's all
14 right with everybody. And I'll be right back.

15 (Whereupon, the above-entitled matter went off the
16 record and then resumed.)

17 CHAIRPERSON HILL: We only have the one witness, right?
18 Mr. Robertson?

19 MR. YOUNG: Correct.

20 CHAIRPERSON HILL: Could you go ahead and bring him in?

21 MR. YOUNG: Yeah.

22 CHAIRPERSON HILL: Mr. Robertson, can you hear me?

23 MR. ROBERTSON: Hi, Mr. Hill. How are you?

24 CHAIRPERSON HILL: Good. Thank you. If you could
25 please introduce yourself for the record?

1 MR ROBERTSON: Sure. My name is Jefferson Carroll (ph)
2 Robertson. And I am a resident of 1835 Ontario Place Northwest,
3 Apartment 1.

4 CHAIRPERSON HILL: Okay. Can you see the clock on the
5 board there?

6 MR. ROBERTSON: I don't know that I can. Where -- is it
7 on the screen? Oh, yeah. I got it.

8 CHAIRPERSON HILL: So you'll have three minutes to give
9 your testimony, and I'm pretty sure we're going to have some
10 questions for you. And you can begin whenever you like.

11 MR. ROBERTSON: Sure. Yeah. My name is Jeff Robertson.
12 Thank you very much for taking the time to hear the concerns that
13 my wife and I have about the Applicant's request to get a variance
14 on the setback and lot coverage for their deck.

15 To clarify exactly what our opposition is, it is not to
16 ameliorate an existing condition why we want the trees removed.
17 We want the trees removed and we oppose the development because
18 we're trying to further protect the degradation of our existing
19 access to fresh air on our site. We understand that the solar
20 study showed that there's not a shadow impact, but we're really
21 concerned about fresh air. And as we submitted in the PDF, you
22 can see that the deck that they want to put in directly impacts a
23 fair amount of the -- sort of the plane, visual plane, where air
24 flows down that alley, it's going to block our access to fresh
25 air.

1 We also want to be good neighbors. And to that end, we
2 proactively reached out to the Applicant before the ANC meeting to
3 discuss this issue. When she mentioned talking to the neighbors,
4 she did not at any point reach out to us directly. We did that of
5 our own accord. And during those discussions, we asked and she --
6 we agreed to two things. One, to reduce the height of the back
7 fence which she has reflected in this submittal, and two, to
8 remove the trees to, again, make up for the degradation and the
9 access to fresh air that the deck would create.

10 Again, trying to be good neighbors during the ANC
11 hearing, we suggested the ANC vote in favor of the application
12 that she was suggesting but with the understanding that we would
13 pursue good faith efforts to come to a resolution. And, you know,
14 in our opinion, you know, going back on something that we, you
15 know -- that she had verbally agreed to before the meeting, which
16 was in our mind what we were basically agreeing to during the
17 hearing, going back on that is not the definition of good faith.
18 So we, again, are not trying to ameliorate existing conditions
19 which is what the Applicant, you know, voiced -- which she
20 indicated. We are trying to protect the further degradation. We
21 think that removing those trees opens up the air flow from the end
22 of the alley to our second-floor balcony and our first-floor
23 patio. We think that's a reasonable compromise. That's something
24 that she verbally agreed to do before the hearing. And, you know,
25 we are okay with her proceeding on the development but subject to

1 | what she already agreed to. And if not, we think that extending
2 | into the 20-foot setback is an undue -- has an undue effect on our
3 | access to fresh air, and we, therefore, oppose the development.

4 | And can you put the exhibit up of the deck? We
5 | submitted a two-page PDF exhibit. That's the current view from
6 | our second-floor balcony. If you go to the second page. I'm not
7 | an architect, I didn't use CAD software for this. But, you know,
8 | this is our best estimate of exactly what the deck will create.
9 | You can see that in our basement right behind where that crepe
10 | myrtle is, that we're requesting removed is the main air source of
11 | air flow in the alley. The deck blocks about a third of that
12 | access that we currently have. And so to ameliorate that, we're
13 | asking that the Applicant remove the big crepe myrtle and the
14 | second tree behind it to compensate for that reduction in air
15 | flow. We think that's a fair compromise and one that the
16 | Applicant agreed to prior to the ANC meeting.

17 | I think that's about the sum of my initial testimony.
18 | Thank you very much.

19 | CHAIRPERSON HILL: Thank you.

20 | Does the Board have any questions for the witness?

21 | VICE CHAIR JOHN: I have a question. Is that a six-foot
22 | or a seven-foot wall next to your property or at the property
23 | line?

24 | MR. ROBERTSON: I have not measured that. So I don't
25 | know. It seems to be --

1 MS. JACOBS: Seven feet. I measured it. It's seven
2 feet. I measured it.

3 CHAIRPERSON HILL: Ms. Jacobs, just give it a second.
4 Mr. Robertson is asking the question. Thanks.

5 MR. ROBERTSON: To answer your question, I'm not sure.
6 I have not measured the fence.

7 VICE CHAIR JOHN: Okay. Thank you.

8 CHAIRPERSON HILL: Okay. Ms. Myers, are you there?
9 Thanks. Just since --

10 Mr. Robertson, if you wouldn't mind muting your line
11 there? Thank you.

12 The -- what is your thought about the witness and the
13 light -- I'm sorry -- and the air flow that has been brought up?

14 MS. MYERS: We didn't feel that there was an undue
15 impact on the air flow to the adjacent neighbor. We were
16 satisfied with the way the propose is designed, that it would have
17 limited, if any, impact on their air flow. They -- they still
18 have a bit of a rear yard. There's a rear yard. This is a deck.
19 It should not have a significant impact from our point of view.

20 CHAIRPERSON HILL: Okay. All right. Thank you, Ms.
21 Myers.

22 I guess, Mr. Robertson, I'm just going to ask you a
23 couple of things. So this would kind of go into the -- you went
24 to the ANC meeting, I assume?

25 MR. ROBERTSON: Correct.

1 CHAIRPERSON HILL: Okay. And then the -- so in terms of
2 the good faith effort, in terms of the discussions that have been
3 going on, like they did lower the railing, I guess, or they had
4 something to do with the railing. And then you all did talk at
5 some point, I guess, about their removal of the trees. And I'm
6 just trying to understand how far along this went. The removal of
7 the trees, and then the spraying of the mosquitos, and then the
8 trimming of the trees and all that. And your -- all that was
9 discussed, or what you're saying was discussed was removing the
10 trees.

11 MR. ROBERTSON: We discussed removing the trees and a
12 lowering of the rear fence at the end of the deck. We did not
13 discuss trimming of the trees or the treatment of mosquitos. I
14 believe the trimming of the trees, Ms. Jacobs brought up after the
15 fact. The spraying of mosquitos was an unrelated topic that we
16 had done on our lot, and we actually offered to do it for the
17 Jacobs family just to try to help the overall neighborhood. But
18 that's unrelated --

19 CHAIRPERSON HILL: So they did -- they did lower the
20 fence is what I'm trying -- the railing?

21 MR. ROBERTSON: Yes.

22 CHAIRPERSON HILL: Okay. All right. Okay.

23 MR. ROBERTSON: Just to clarify, though, they agreed to
24 do both prior to the ANC meeting, not just the fence.

25 CHAIRPERSON HILL: Okay. All right.

1 Does anybody have anything else for the witness? Okay.

2 Mr. Robertson, I'm going to excuse you, but you might
3 want to stick around. Okay?

4 MR. ROBERTSON: Okay.

5 CHAIRPERSON HILL: Okay. Thanks.

6 All right. Does anybody have any further questions for
7 the Applicant? Okay. All right.

8 Ms. Jacobs, do you have anything else you'd like to add
9 at the end?

10 MS. JACOBS: I could refute his timeline, but I don't
11 think that's necessary.

12 CHAIRPERSON HILL: Okay. All right.

13 Mr. Blake, are you done?

14 MR. BLAKE: Yes.

15 CHAIRPERSON HILL: Okay. I'm going to go ahead and
16 close the hearing. You guys are also excused, but you might want
17 to stick around if you want to.

18 We can deliberate. Okay. Does somebody else want to
19 start?

20 VICE CHAIR JOHN: Okay. I'll start the discussion. So
21 I reviewed the record and listened to the testimony. And I'm
22 going to give OP's analysis great weight in terms of the -- in
23 terms of how the application meets the criteria. I don't think
24 there's any adverse impact in terms of light and air and air flow.
25 The deck is at the rear of the property, and there's a seven-foot

1 fence. And so the seven-foot fence is an existing condition in
2 terms of impact on light and air. And I'm persuaded by the shadow
3 studies, as was OP, that there really is no adverse impact because
4 of the deck. And I think the 36-inch railing certainly makes a
5 difference and is part of the Applicant's attempt to give
6 consideration to the neighbor's concerns.

7 So with respect to the tree. The trees, in my view,
8 don't impact light and air -- well, let me say this a different
9 way. The deck right now would not add -- would not impact the
10 light and air to the property any more than what is there right
11 now. And so I don't think that -- I don't think that it is
12 necessary to remove the trees, but I think that because the
13 Applicant has agreed to a regular tree trimming schedule that, to
14 the degree that there might be some adverse impact, then regular
15 tree trimming would certainly help to mitigate that. So that's
16 just my thought, you know, to start the discussion.

17 CHAIRPERSON HILL: Thanks.

18 Mr. Miller?

19 COMMISSIONER MILLER: Thank you, Mr. Chairman. Yeah. I
20 concur generally with the arguments made by Vice Chair John. You
21 know, in general, trees are a beneficial impact upon both the city
22 and upon neighboring properties. I mean, if you live in a city,
23 your trees that you have, you want to keep healthy. And the trees
24 that my neighbor have that overhang our yard, even though we're
25 not in an RF Zone, I want to keep them as long as they're healthy.

1 And if I ever needed to trim them on our side, we would probably
2 do it and just ask the neighbor -- let the neighbor know that
3 we're going to do it because it's impacting us, and there probably
4 wouldn't be a problem.

5 So anyway, I don't think -- I agree that the existing
6 condition is really no different in terms of impact on light and
7 air than the deck that's being proposed. You know, there's a
8 premium on outdoor private space always, and certainly in the
9 times that we're living in. And I always want to not make it
10 difficult for city dwellers to increase their private outdoor
11 space as long as it doesn't adversely impact neighbors. And I
12 don't think it does in this case any more than the existing
13 conditions. So I'm in favor of moving forward with this
14 application, Mr. Chairman.

15 CHAIRPERSON HILL: Mr. Smith?

16 MR. SMITH: Mr. Chairman, I concur with my fellow board
17 members. I do believe being that this is an open deck, the
18 Applicant has -- seems to have taken into consideration the
19 concerns of the opposition, redesigned the railings of the deck in
20 order to in some way reduce impact. I do believe -- on top of
21 offering that it is an open deck. I do not believe, again
22 concurring with my other colleagues, that this open deck would
23 impair light and air to the adjacent property owner.

24 Concerning the tree -- one of the trees, the tallest
25 tree looks like the crepe myrtle, is a deciduous tree. It's not

1 very tall. It's about 9 feet or so based on testimony. So I do
2 not believe that this open deck would impair light and air. I
3 give great weight to the OP report. So I would be in support of
4 the request by the Applicant.

5 CHAIRPERSON HILL: Okay. Great. Thank you. All right.

6 Well, then I'm going to go -- I agree and concur with
7 everything that my colleagues just said. I don't need to repeat
8 what you went through. I'm going to make a motion to approve
9 Application No. 20285 as captioned and read by the secretary and
10 ask for a second.

11 Ms. John?

12 VICE CHAIR JOHN: Second.

13 CHAIRPERSON HILL: Sorry, Mr. Smith.

14 The motion to make -- is seconded.

15 Mr. Moy, would you please take a roll call?

16 MR. MOY: Thank you, Mr. Chairman. When I call your
17 name, if you would please respond with a yes, no, or abstain to
18 the motion made by Chairman Hill to approve the application for
19 the relief requested. Seconding the motion is Vice Chair John.
20 Zoning Commissioner Rob Miller?

21 COMMISSIONER MILLER: Yes.

22 MR. MOY: Mr. Smith?

23 MR. SMITH: Yes.

24 MR. MOY: Vice Chair John?

25 VICE CHAIR JOHN: Yes.

1 MR. MOY: Chairman Hill?

2 CHAIRPERSON HILL: Yes to approve.

3 MR. MOY: The staff would record the vote as 4-0-1. And
4 this is on the motion made by Chairman Hill to approve, seconded
5 by Vice Chair John and also supported by Mr. Smith and Zoning
6 Commissioner Rob Miller. We have a Board seat vacant. Motion
7 carries.

8 CHAIRPERSON HILL: Okay, great. So I know we took just
9 a quick, quick break. But do we want to take a ten-minute break
10 now, and then we'll come back at 11:00?

11 MR. MOY: I do.

12 CHAIRPERSON HILL: Okay. All right. Then I'll see you
13 all at 11:00. Thank you.

14 (Whereupon, the above-entitled matter went off the
15 record and then resumed at 11:00 a.m.)

16 CHAIRPERSON HILL: Mr. Moy, are you there? Okay. Thank
17 you. You can call us back and call our next case when you get an
18 opportunity.

19 MR. MOY: Thank you, Mr. Chairman. The Board is back in
20 session after a quick -- after a quick recess. And the time is at
21 or about 11:05. And the next case for the Board, the last for the
22 day, is Appeal No. 20292 of ANC 8A. Caption advertised as the
23 appeal from the decision date on February 6, 2020 of the
24 Department of Consumer and Regulatory Affairs, that determined the
25 construction on the property is compliant with the approved plans

1 in the RA-2 Zone at premises 1401 22nd Street Southeast, Square
2 4556, Lot 66. And there are preliminary matters in this appeal,
3 Mr. Chairman.

4 CHAIRPERSON HILL: Okay. Thank you, Mr. Moy. I don't
5 see any Appellant.

6 (Audio interference.)

7 CHAIRPERSON HILL: -- introducing people.

8 Ms. Moldenhauer, could you begin, please?

9 MS. MOLDENHAUER: Good morning. My name is Meridith
10 Moldenhauer from the law firm of Cozen O'Connor. I'm here today
11 representing the property owner, Pal DC Storage, LLC.

12 CHAIRPERSON HILL: Thank you.

13 Mr. Green, you want to go next? Mr. Green?

14 MR. GREEN: I apologize. Good morning. My name is Hugh
15 Green, G-R-E-E-N, attorney for the D.C. Department of Consumer and
16 Regulatory Affairs.

17 CHAIRPERSON HILL: Thank you.

18 Mr. LeGrant, would you like to introduce yourself?

19 MR. LEGRANT: Yes. Good morning, Chairman Hill and
20 members of the Board. Matthew LeGrant, Zoning Administrator,
21 DCRA.

22 CHAIRPERSON HILL: Okay.

23 Is it Ms. Muhammad?

24 MS. MUHAMMAD: Yeah. It's Commissioner Holly Muhammad.

25 CHAIRPERSON HILL: Oh, hi, Commissioner.

1 MS. MUHAMMAD: ANC 8A.

2 CHAIRPERSON HILL: Hi, Commissioner.

3 MS. MUHAMMAD: Hi.

4 CHAIRPERSON HILL: I'm sorry. Could you introduce
5 yourself again for the record?

6 MS. MUHAMMAD: Commissioner Holly Muhammad, Advisory
7 Neighborhood Commission 8A. My Single Member District is 01, and
8 that's where the building is located.

9 CHAIRPERSON HILL: Okay. Commissioner, are you choosing
10 not to use your camera -- which is fine. I just want to make sure
11 it's not working -- or working.

12 MS. MUHAMMAD: It's working.

13 CHAIRPERSON HILL: Okay. You're just going to go with
14 audio?

15 MS. MUHAMMAD: I prefer to, but I --

16 CHAIRPERSON HILL: That's fine. Just go with audio.
17 That's fine. You don't have to use your camera. I just want to
18 make sure if it were something -- that if it was a technical
19 issue, it was clarified. So you can just stay on audio. That's
20 fine. Is there anyone joining you, Commissioner?

21 MS. MUHAMMAD: Yes. Laura -- I'm sorry. Hold on one
22 second.

23 CHAIRPERSON HILL: Sure.

24 MS. MUHAMMAD: Laura should be -- she was on --

25 CHAIRPERSON HILL: I see. Yeah. She hopped in. Yeah.

1 Ms. Richards, can you hear me? Perhaps, Ms. Richards.
2 Can you hear me? Oh, maybe. Is that you, Ms. Richards?

3 MS. MUHAMMAD: No, that was me. I'm sorry.

4 CHAIRPERSON HILL: Oh, that's okay. That's all right.
5 Commissioner, you might want to mute your line, and then we'll see
6 if Ms. Richards can -- we can hear her.

7 MS. MUHAMMAD: Okay.

8 CHAIRPERSON HILL: Okay. Ms. Richards, can --

9 MS. RICHARDS: I was just unmuted.

10 CHAIRPERSON HILL: No problem. Can you hear me now, Ms.
11 Richards?

12 MS. RICHARDS: I can hear you. Can you hear me?

13 CHAIRPERSON HILL: Yes. Could you please --

14 MS. RICHARDS: Okay. I was just unmuted.

15 CHAIRPERSON HILL: Okay. No problem. Can you introduce
16 yourself for the record?

17 MS. RICHARDS: Come again?

18 CHAIRPERSON HILL: Could you introduce yourself for the
19 record?

20 MS. RICHARDS: Yes. I'm Laura Richards, attorney for
21 ANC 8A.

22 CHAIRPERSON HILL: Okay. Great. All right. Well,
23 welcome everyone. I don't know whether -- Ms. Richards, have you
24 been watching all day?

25 MS. RICHARDS: Yes, I have.

1 CHAIRPERSON HILL: Okay. So there is a notice issue
2 that I'm going to read through some of this, and then I can hear
3 whether or not any of the parties have any concerns. And if so,
4 we can talk about it. But one of them would be that -- I don't
5 know when the next time to reschedule this might have been if we
6 end up at that point.

7 So just to be here clear on the record -- so it has been
8 brought to my attention that the notice requirement of the 40-day
9 D.C. Register, because of some technical issues, did not happen.
10 So it's something that happened on our end. It has nothing to do
11 with the Appellant or the Property Owner or DCRA. And so it was
12 posted on September 25th. So it's only 19 days before the hearing
13 whereas it's supposed to be 40 days before the hearing. However,
14 all of the other notice requirements were satisfied that are in Y
15 402, meaning the notice to the parties, the notice to the affected
16 ANC's, the notice to the Office of Planning and other relevant
17 District agencies, the notice to the 200-Footers and posting --
18 you know, posting, and postings were something that were taking
19 place, but in an appeal it's not.

20 And so I don't -- and I'll let my colleagues also speak.
21 But I'm also going to go through with the applicants have any
22 concerns about notice. And if so, I guess I can walk around the
23 table and see. And if, you know, there was -- because what we're
24 having here is kind of not necessarily a limited scope. We're
25 talking, I guess, first about the motions before us in terms of

1 dismissal. And then probably what was going to happen is whether
2 or not we got to a decision with those today, whether or not we
3 would then be setting a date for the appeal again in terms of it
4 actually being argued. So we're kind of in a preliminary item
5 right now.

6 My question to you, Ms. Richards, and then I'm going to
7 go to the Commissioner, is do you have any concerns about the D.C.
8 Register notice?

9 MS. RICHARDS: No, I do not. No, I have no objection.

10 CHAIRPERSON HILL: Okay. Great.

11 Commissioner Muhammad?

12 MS. MUHAMMAD: No objection.

13 CHAIRPERSON HILL: Okay. Ms. Moldenhauer?

14 MS. MOLDENHAUER: No objections.

15 CHAIRPERSON HILL: Mr. Green?

16 MR. GREEN: No objections.

17 CHAIRPERSON HILL: Okay. So then I'm going to make a
18 motion to waive the requirements of Subtitle Y 402.1 (A) pursuant
19 to Subtitle Y 101.9 and Subtitle Y 402.11 and ask for a second,
20 Ms. John?

21 VICE CHAIR JOHN: Second.

22 CHAIRPERSON HILL: That motion's been made and seconded.

23 Mr. Moy, could you just take a vote on the waiver?

24 MR. MOY: Thank you, Mr. Chairman. So if I call your
25 name, if you would please respond with yes, no, or abstain to the

1 motion made by Chairman Hill to waive the requirements of Section
2 402.1 (A) intended to notice the D.C. Register, and the motion was
3 seconded by Vice Chair John. Starting with Commissioner Rob
4 Miller?

5 COMMISSIONER MILLER: Yes to waive.

6 MR. MOY: Mr. Smith?

7 MR. SMITH: Yes to waive.

8 MR. MOY: Vice Chair John?

9 VICE CHAIR JOHN: Yes.

10 MR. MOY: Mr. Chairman Hill?

11 CHAIRPERSON HILL: Yes to waive.

12 MR. MOY: The staff will record the vote as 4-0-1. This
13 is on the motion of Chairman Hill to waive, seconded by Vice Chair
14 John, and also supported by Mr. Smith and joined with Commissioner
15 Rob Miller. We have a Board seat vacant. Motion carries.

16 CHAIRPERSON HILL: Okay. Great. All right.

17 So what I'd like to do now is kind of go through the
18 preliminary matters in terms of the motions, and I'll hear from
19 all of the parties.

20 I'd like to start with the attorney for the Property
21 Owner, Ms. Moldenhauer, in terms of it being your motions, I
22 guess. As I understand it, you have two motions that are before
23 us. One is dismissal for timeliness, and the other one is
24 dismissal for -- I want to say it was -- you can give me the
25 second one again. Do you want to go ahead and walk us through

1 your discussion about the dismissals?

2 MS. MOLDENHAUER: I sent Mr. Young a copy of a
3 PowerPoint that follows the same arguments that we have in our
4 brief. I think it's just kind of sometimes helpful to walk
5 through. So --

6 CHAIRPERSON HILL: Okay. Before you do -- and I'm going
7 to do this a couple of times. So this is something that's going
8 to have to happen again before --

9 Can you drop the presentation real quick, Mr. Young?

10 So again, Ms. Moldenhauer, this is just a PowerPoint
11 going over what you had submitted before, right? The testimony
12 that was given before. And it's being presented so that we can
13 walk through what your argument is?

14 MS. MOLDENHAUER: Correct. And so I would ask that the
15 Board accept it as an exhibit pursuant to Y 103.13(G).

16 CHAIRPERSON HILL: Right. So again, I -- and this is
17 something that we're going to have to kind of figure out moving
18 forward or with the attorneys, I guess, in terms of the
19 PowerPoints that are coming in the day of the hearing. I mean, I
20 always like to see the PowerPoints because it's easier for the
21 Board to understand the arguments. And so I would request that it
22 get submitted into the record, and we have an opportunity to go
23 through this PowerPoint.

24 Does the Board have any objections to that? And if so,
25 could you raise your hand? Okay. All right.

1 Ms. Moldenhauer, we'll go ahead and put that into the
2 record for you.

3 And so if you can go ahead, Mr. Young, and bring up the
4 PowerPoint?

5 And Ms. Nagelhout, again, I do want to kind of next time
6 we talk about this, talk about the PowerPoint presentations, and
7 just to kind of work through those in the future.

8 MS. NAGELHOUT: Okay.

9 CHAIRPERSON HILL: Thank you.

10 And so is this your (audio interference) again, Ms.
11 Moldenhauer?

12 MS. MOLDENHAUER: This is just the preliminary matters.

13 CHAIRPERSON HILL: Okay.

14 MS. MOLDENHAUER: There was the joint request. Mr.
15 Richards from the Appellant as well as DCRA all conceded or agreed
16 to, consented to, a joint request for a limited scope hearing
17 today. That was the very matter. But then obviously, as you
18 indicated, Chairman Hill, we have the motion to dismiss. So we
19 could move forward. And next slide.

20 This starts our presentation. So I'm going to review
21 just some quick facts to start off and to go through a quick
22 timeline for the BZA. First, this project originally obtained a
23 building permit on October 24th, 2017. Then on July 5th, 2018,
24 the ANC filed an appeal of that building permit. Then on October
25 3rd, 2018, the ANC heard that appeal and dismissed it as untimely.

1 In October of 2019, the project foundation had been completed.
2 This appeal was then filed in on April 3rd, 2020. In July 2020,
3 construction was completed. And just to provide the Board with an
4 update, the certificate of occupancy was issued by the District of
5 Columbia on September 30th, 2020. And the site is open.

6 This image is not an image of the actual site. I think
7 I had actually sent Mr. Young an updated PowerPoint with the
8 updated image, but we do have images of the actual site. This is
9 just a concept image from CubeSmart. Next image.

10 I'll be going through three main points with the Board
11 today. I'll be making an argument that the case should be
12 dismissed, and that the Board should support that case dismissal
13 based on lack of jurisdiction. The fact that the ANC does not
14 challenge a zoning decision or an application of the actual zoning
15 regulations. I'll also discuss in more detail that the wall check
16 asserted by the ANC is not a new zoning decision and that no
17 subsequent decisions modify the original 2017 building permit, and
18 that the letter from the director, again, was not a new decision
19 as we'll go through in more detail. And then finally, that the
20 original building -- original appeal, Appeal No. 19839, was
21 determined to be untimely because at that time the Board found
22 that the building permit was the first writing. The ANC, in their
23 reply to our motion, concedes that if the Board does not find that
24 there is a new decision that then they are collaterally estopped,
25 meaning from moving forward. Next slide.

1 So as we kind of jump into the question of whether the
2 Board has jurisdiction, we look specifically at the BZA zoning
3 regulations. And the zoning regulations pursuant to D.C. Code in
4 Section Y 1100.3 identify that the Board has no jurisdiction to
5 hear and decide any appeal or portion of an appeal where the
6 order, requirement, decision, determination, or refusal was not
7 based in whole or in part on the zoning regulations or the map.
8 Next slide.

9 So what we have here is we want to go to the actual --
10 the language of the ANC's appeal. This is the ANC's own words.
11 This is what they filed. That's Exhibit No. 2 in the record
12 before the Board. And they themselves, in their own words, do not
13 reference any zoning regulations. And they say in that first
14 paragraph that they are challenging and questioning whether the
15 building is being built in accordance with the plans. As we'll go
16 into more detail, whether the building is built in accordance with
17 the plans is an inspection issue and not a zoning question. The
18 plans are the same and that there is no new decision.

19 Furthermore, you can see in the next paragraph, they
20 indicate that they are appealing, on the third line of the second
21 paragraph here, a failed wall check and that foundation is
22 potentially visibly extending into the ground subsurface. And
23 they go into detail. The question of whether or not there is --
24 whether a wall check occurred or did not occur is obviously --
25 it's obvious the wall checks occurred. But a wall check is not a

1 zoning decision. And in their own language, this is what the BZA
2 -- what they are appealing to the BZA. Next slide.

3 So the ANC in their filing, in their own words, makes no
4 reference as to actual zoning regulations. And the zoning
5 regulations, if you do a wordsmith or a word check, make no
6 reference to wall check processing procedures. The wall check
7 procedures are specifically identified and concluded in the D.C.
8 building code. In our brief, we quote and reference Section 12A
9 of the DCMR, 109.3.12, which is the building code. And that is
10 where you find the procedures for a wall check, not in the zoning
11 regulations.

12 Furthermore, as we just saw a moment ago in the prior
13 image, the ANC is challenging a potential encroachment.
14 Encroachments into public space are issues that DDOT reviews in
15 the course of a building permit and, again, is not a zoning issue.

16 And so the zoning regulations and this Board do not have the
17 jurisdiction to review a DCRA building and special process, or the
18 specific issues that the ANC is asking you to discuss. Next
19 slide.

20 The Board has existing, you know, many case preferences
21 that talk about -- and precedent that talks about what the Board's
22 restriction is. A lot of times in BZA applications, neighbors
23 bring up questions of construction. And this Board has repeatedly
24 stated that the D.C. building code requirements, whether somebody
25 -- something is stamped by a structural engineer or whether there

1 are questions about construction is not within the BZA's
2 authority. And you can see here in Case 19211, the BZ's order,
3 this is a full order written by the Office of Attorney General,
4 confirms that, you know, as of the concerns related to the D.C.
5 Building Code, the Board finds that these issues are not related
6 to the zoning relief requested and are not legally relevant.

7 In that case, at the time Chairman Lloyd Jordan
8 confirmed, and said as well during the testimony, that
9 construction-related issues are not within the Board's control or
10 jurisdiction. And then in another BZA order where ANC
11 resolutions, which the Board gives great weight to, referenced
12 concerns about environmental impact or construction, and the Board
13 again reaffirmed that those are not related to the zoning
14 regulations themselves. And so here, a question of a wall check
15 is part of the building construction inspection process and is not
16 under the jurisdiction and authority of the Board. Next slide.

17 So Ms. Richards, in her reply, argues that the wall
18 check is a quote, "de facto amended permit." We disagree with
19 that. We submit that the director's letter and the wall checks in
20 no way modify or create a new zoning decision. And we look to
21 zoning regulation Subtitle Y, 302.5, which says, "No subsequent
22 document including the building permit or certificate of occupancy
23 may be appealed unless the document modifies or reverses the
24 original decision or reflects a new decision." Next slide.

25 So we look then to what are the issues that are, you

1 know, being discussed? The DCRA inspections. It is the public
2 inspection process. That does not modify the underlying building
3 permit. Inspections are required by DCRA during construction to
4 simply compare what's being constructed to the original building
5 permit. And again, here, the original building permit that was
6 issued back in 2017. In addition to that, the wall check. Wall
7 checks are required by the building code and do not modify the
8 building permit, but rather they check the consistency of the
9 construction to the physical walls and aspects of a project.

10 Finally, an encroachment. An encroachment does not
11 modify a building permit and does not modify or create any new
12 decision. And none exists that obviously would not -- or not
13 consistent with the building permit. Next slide.

14 Finally, the question -- the Board has looked at and
15 heard other cases where there are either zoning memorandums or, in
16 this case, a letter from the director. And the Board has stated
17 that such memos in Case 19049 do not contain new information. And
18 if they are merely a clarification of the same zoning issue, then
19 it does not give rise to a new zoning appeal. And here, the
20 director's letter and the normal typical process of construction,
21 which are inspections and wall checks, do not give rise to a new
22 decision and contain no new information. Also, in Case 18980, the
23 Board, you know, confirmed as well that, you know, if there is
24 merely a reiteration or reiterate of the zoning decision embodied
25 in the document, that as well does not change -- does not create a

1 new zoning decision. Next slide.

2 So again, we look at the actual language. What did the
3 director's letter say? The director's letter simply stated that
4 during the normal course of construction, the DCRA building
5 inspector, Jeffrey Reiss, went to the property. He inspected the
6 property. He confirmed that the project was built in accordance
7 with the plans. He reviewed the wall checks and found them to be
8 -- last line, "Inspections noted no observed violations.
9 Everything was consistent with the permits and consistent with the
10 approved plans." This does not create a new decision or a
11 modified decision of the original building permit. And thus,
12 there is no jurisdiction to hear the case. Next slide.

13 We then looked to the zoning regulations and whether or
14 not, obviously, if everything relates back to the building permit,
15 but look at Subtitle Y 302.5, and the zoning regulations state
16 that, "A zoning appeal may only be taken from the first writing
17 that reflects the administrative decision complained of which the
18 Appellant had notice on." Next slide.

19 So the original BZA Case 19389 which was filed in 2018
20 evaluated that the building permit was the first writing and that
21 that appeal had been untimely. Thus, the ANC is collaterally
22 estopped from challenging that first writing again. Even though
23 they are saying that they are challenging the wall check or an
24 inspection, those inspections are simply looking to -- if you look
25 through them, they are looking to the building permit to confirm

1 that that is consistent with the building permit. And that is
2 what the director's letter stated. And thus, this appeal, Appeal
3 20292 is untimely. Next slide.

4 Through this -- this obviously -- we do not have an
5 order yet for that case, so these are transcript references of the
6 Board's confirmation that the original permit showed all of the
7 zoning decisions, and that at that time when the application was
8 filed and the appeal was filed many days later, the Board found
9 that it was untimely. And they found that the building permit was
10 the first writing showing and reflecting all of the zoning
11 decisions at that time during that Zoning Commission hearing in
12 2018. Next slide.

13 We have submitted in our argument, and as I said, ANC
14 has indicated that they concede that, if this relates back only to
15 the building permit, that they are untimely and that the case
16 obviously cannot move forward and the laws of collateral estoppel
17 would apply to the agency, to this Agency, the BZA. If they find
18 that they are -- that there is a bar to relitigate an issue if it
19 is the same issue that is being litigated and that there was a
20 final decision made. So next slide.

21 We would just reiterate that, you know, the ANC would be
22 collaterally estopped from challenging the underlying first
23 writing which was the building permit because BZA Case 19839 did
24 confirm that the building permit was the first writing. The Board
25 dismissed it as untimely. It made that final decision and that

1 ruling, and that the ANC challenges that argument. Obviously,
2 they had the opportunity to challenge it back in 2018. They
3 submitted an opposition and that this would be relitigating the
4 question of what is the first writing at this time. Next slide.

5 We've -- just in summary, we believe that the Board
6 should dismiss this appeal as untimely. And we believe that it is
7 untimely because the Appellant has failed to state the claim upon
8 which relief can be given because the Board lacks jurisdiction.
9 They lack jurisdiction because the issues raised in the ANC's own
10 opinion regarding a wall check, a DCRA inspection or even
11 encroachments are not under the authority of the BZA, and they are
12 not new decisions. Those are reviews and inspections that confirm
13 compliance with the building permit, and that building permit is
14 the underlying zoning decision.

15 Again, whether or not the case is reviewed even in the
16 light most favorable to the (audio interference) party here, the
17 ANC, the court -- the United States court case of Bell Atlantic
18 Corporation confirms that although for the purpose of a motion to
19 dismiss, we must take all of the factual allegations of the
20 complaint as true, we are not bound to accept as true legal
21 confusions couched as factual allegations. And I believe that is
22 currently here. And, finally, that we must have evidence to
23 support the argument. And there is nothing here to support that
24 there is any valid claim that the Board would need to dive into on
25 the merits. Next slide.

1 Finally, public policy would support dismissal. The
2 building permit was issued almost three years ago on October 24th,
3 2017.

4 (Audio interference.)

5 MS. MOLDENHAUER: -- October 14th, 2020. The
6 certificate of occupancy for the project has been issued. The
7 building is open. They're having leases. They're servicing the
8 community. And despite the owner's diligent work, they have
9 constantly been working over the last three years with DCRA, the
10 ANC has, you know -- had the opportunity to voice concerns. The
11 DCRA has properly reviewed those concerns, addressed them, and
12 confirmed that the building had always been built in accordance
13 with the building permit. This -- you know, there is a 60-day
14 appeal period. It is intended to provide a level of finality and
15 predictability for everybody and to allow for this application to
16 move forward which is over, you know, almost three years from when
17 the building permit, the first rating, was issued and that
18 original decision was made would grossly expand the Board's
19 purview beyond what the zoning regulations allow for.

20 With that, we conclude our presentation but are
21 available for questions. We reserve any time for rebuttal. Thank
22 you.

23 CHAIRPERSON HILL: Mr. Young, can you pull the slide --
24 thank you. All right. Okay.

25 Let's see. So does the Board have any questions of the

1 Applicant? You can just raise your hand whenever you're ready.

2 I got a question for the zoning administrator. I'll
3 just ask my question first then.

4 So Mr. LeGrant, in terms of construction code issues of
5 the wall check, you know, why is it that this is not like a, you
6 know, de facto amended permit? Like, you know, how could that --
7 you understand the argument. Can you explain to me why it's not
8 an amended permit?

9 MR. GREEN: Mr. Hill?

10 CHAIRPERSON HILL: Yeah. Mr. Green.

11 MR. GREEN: Just for the benefit -- I just have to say,
12 for the record, we're clearly dealing with preliminary matters.
13 And I understand the Board is interested in asking Mr. LeGrant
14 questions. However, I want to just make the objection for the
15 record that really preliminary matters are preliminary. And I
16 understand the Board's interest in hearing from Mr. LeGrant.
17 However, I have to state that really Mr. LeGrant's presence really
18 isn't for substantive testimony, but maybe for clarification
19 purposes. So I understand you want to ask him questions, but I
20 feel the need to make this objection generally that this is really
21 a hearing on a motion to dismiss whether or not they have met
22 their burden to sustain this appeal.

23 But, nevertheless, I just wanted to make that clear
24 before Mr. LeGrant starts to talk because I understand that's the
25 purpose of this hearing. So I just wanted to say that at the

1 outset. But I will then stop and allow you to question Mr.
2 LeGrant for the purposes of maybe getting some understanding. But
3 that's my point of raising it now. Do you have any questions on -
4 - I mean that's --

5 CHAIRPERSON HILL: Mr. Green, that's fine. I got you.
6 It's okay.

7 MR. GREEN: Okay.

8 CHAIRPERSON HILL: My asking the question was, again, to
9 kind of understand the motion to dismiss, right? And so it wasn't
10 necessarily the merits of the appeal. It was more, you know, is
11 this something that is part of the motion to dismiss.

12 So I'll go back, Mr. LeGrant, again to the question.
13 Is -- how could this be a de facto amended permit? Mr. LeGrant?

14 MR. LEGRANT: Hello?

15 CHAIRPERSON HILL: Yeah.

16 MR. LEGRANT: Okay. This -- the wall check process in
17 no way is an amendment to the permit because it is a process
18 (audio interference) is noted, is part of the construction code to
19 ensure that construction and (audio interference) it is occurring
20 in compliance with the permit. I think it's illustrative if in
21 the instance a wall check failed, which is not the case here
22 because the (audio interference). But in the case of a wall test
23 that had failed, then the recourse would be for DCRA to require an
24 amendment to the permit or removal of the offending construction.
25 It would not in any way involve rezoning regulations. It's up to

1 the owner to correct.

2 CHAIRPERSON HILL: Okay. All right.

3 Does anybody have any questions of anybody before I turn
4 to the Appellant? Okay.

5 Mr. LeGrant, you want to hit your mute button there?

6 Ms. Richards, can you hear me?

7 MS. RICHARDS: Yes, I can.

8 CHAIRPERSON HILL: Okay. Well, Ms. Richards, I think
9 I've met you a couple of times at least. I can't remember whether
10 you've testified before. But, again, welcome back. And I realize
11 that you have the pleasure of serving in the Zoning Commission; is
12 that correct?

13 MS. RICHARDS: It was actually the Board of Zoning
14 Adjustment on which you sit. So, yes. I was once in your chair.
15 But it's been so long that "the memory of man runneth not to the
16 contrary," is what my (audio interference) used to say. But let
17 me --

18 CHAIRPERSON HILL: Do you --

19 MS. RICHARDS: Let me address the jurisdictional issue
20 first.

21 CHAIRPERSON HILL: Sure.

22 MS. RICHARDS: Can you hear me clearly?

23 CHAIRPERSON HILL: Before you give your presentation,
24 may I ask, do you have any questions of the presentation? Or
25 would you rather go straight to your presentation?

1 MS. RICHARDS: I would rather go straight to the
2 presentation at this time.

3 CHAIRPERSON HILL: Okay.

4 MS. RICHARDS: Very good. And firstly, we'll address
5 the jurisdictional issue. The ANC alleges that the failed wall
6 check gave rise to a reasonable belief that the storage building
7 cannot meet the setback requirements of Subtitle J of the zoning
8 regulations. Since we had stated in our complaint that there was,
9 to our belief, an encroachment in the public space, you know, that
10 would automatically implicate the zoning regulations because the
11 regulations established these setback rules. And then under the
12 regulations, an initial permit could not have been issued if the
13 building was dependent upon an encroachment outside the setback
14 rules.

15 Our complaint plausibly alleges a subsurface
16 encroachment beyond the foundation perimeter established in the
17 building permit. And this encroachment is not cured by the
18 subsequent determinations that the at grade wall check complied
19 with the permit's perimeter. And our complaint contains instances
20 and other cases where -- not BZA cases, but cases where a building
21 was compliant above ground and non-compliant below the surface.
22 If the storage unit can achieve at grade stability and permit
23 compliance, at grade only by a subsurface encroachment, then the
24 flawed permit falls within the purview of the Board of Zoning
25 Adjustment because relief from Subtitle J would be required.

1 Now, POW (ph) contends that the DCRA affirms the
2 construction is consistent with the building permit. And we say
3 that contention goes too far. DCRA found that the December and
4 January wall checks were compliant but never reconciled those two
5 with the failed wall check in October. And our complaint states
6 the failed wall check was filed. A stop-work order ensued. The
7 ANC and neighbors were informed by a DCRA official that the issue
8 would require lengthy rectification. We would be permitting --
9 presenting witness testimony on that point. When the ANC
10 representative and neighbors visited DCRA and were referred to the
11 zoning administrator, our testimony would indicate that he was
12 told he knew what the matter was about and had taken care of it.
13 A subsequent review by DCRA, made at the behest of the ANC and
14 neighbors, resulted in a cursory letter to the ANC stating without
15 explanation that DCA -- DCRA found no problems based on three
16 factors: it's own inspection, an explanation tendered by POW, and
17 an analysis by the zoning administrator.

18 An arbitrary decision with no explanation based in part
19 on information available to only one of the parties is a
20 nonconclusive basis to forestall this appeal. That is especially
21 the case when the most relevant information is in the hands of the
22 public body that is a party to this suit. The ANC must be given
23 an opportunity to develop the record, present its fact and expert
24 witnesses, and cross-examine relevant officials. Only on the
25 basis of a fully developed record can this body reach a

1 determination as to whether the permit has been complied with, and
2 that will also determine the jurisdictional issue because this is
3 one of those cases where the facts of the jurisdiction are tied up
4 together. If we prove our facts, encroachment, then you have
5 jurisdiction. If we don't, then you don't. You don't have
6 jurisdiction.

7 So the motion to dismiss is simply premature at this
8 point. All the facts aren't in the record for you to determine
9 either the merits or the threshold issue of the jurisdiction.

10 CHAIRPERSON HILL: Okay. Does -- thank you, Ms.
11 Richards.

12 Ms. John, Mr. Smith, Commissioner Miller, do any of you
13 have questions for Ms. Richards?

14 Ms. Moldenhauer, do you have any questions for Ms. --
15 oh, sorry. Hold on, Ms. Moldenhauer.

16 Vice Chair John, do you have a question?

17 VICE CHAIR JOHN: So just one question. You cited a
18 regulation, J something. I missed the citation, Ms. Richards.

19 MS. RICHARDS: That would be -- that would be J-207.
20 That's the -- that was the regulation that governs setbacks for
21 industrial buildings that abut residential areas. And earlier, we
22 had challenged another aspect of those regulations. But right
23 now, we're just interested in the overall setback requirements.
24 And obviously, as we have pleaded, a failed wall check indicates
25 that there is non-compliance at some point with the -- with the

1 permit's building line requirements. And that's what we wish to
2 explore.

3 VICE CHAIR JOHN: Okay. Thank you.

4 CHAIRPERSON HILL: Okay. I got -- okay.

5 Mr. Miller? Commissioner Miller?

6 COMMISSIONER MILLER: Thank you, Mr. Chairman. Thank
7 you, Ms. Richards, for your presentation. Can you briefly explain
8 why you are not appealing this matter to Office of Administrative
9 Hearings or some other body on the wall check construction?

10 MS. RICHARDS: Because we think that this goes
11 ultimately to a matter of setbacks and those are within your
12 purview. You establish the setbacks.

13 COMMISSIONER MILLER: Okay. Thank you.

14 CHAIRPERSON HILL: Okay.

15 MS. RICHARDS: Every setback -- I should just say every
16 encroachment, subsurface or not, would not necessarily run afoul
17 of zoning regulations. But we think that this one does because of
18 the -- well, I guess the rather generous setback requirements in
19 J, you can build right up to, you know, to the line with certain
20 requirements applicable to these. And it's those particular
21 setback rules in your regs that I think are at issue.

22 CHAIRPERSON HILL: Okay. Thanks, Ms. Richards.

23 Mr. LeGrant, I have a question for you again. And then -

24 -

25 I'll get to you, Ms. Moldenhauer.

1 The -- I guess, Mr. LeGrant, what I'm trying to figure
2 out -- so what the Appellant is arguing is that the argument as to
3 whether or not there was something that is a zoning regulation
4 error is in the testimony that we're going to hear later, right?
5 And I'm paraphrasing. But is that -- my question to you, I
6 suppose, is if there was an -- what would possibly lead this to be
7 a new permit that needs to be issued? And, therefore, if a new
8 permit would be issued, they would therefore be timely on that new
9 permit. I mean, can you just give me a hypothetical as to how
10 this permit would be revoked and a new permit would be issued
11 based upon any of the construction codes or any of the violations
12 that perhaps the Appellant is putting forward?

13 MR. GREEN: Mr. Chairman, now just briefly, I know. I
14 just want to object about the broad hypothetical. But I'll let
15 Mr. LeGrant speak to it. I wanted to put it on the record. A
16 broad hypothetical like that, I don't think is particularly fair
17 to the DCRA. But Mr. LeGrant --

18 CHAIRPERSON HILL: No, no. I -- I don't mind your
19 objection because I also want to then specify a little bit more
20 clearly, I suppose, right?

21 Forget about, you know, if aliens land and you have to
22 like, you know, take the permit away. Is there some way in which
23 -- because we're just trying to -- I'm just trying to figure out
24 whether or not we're going to hear this, right? And so I'm trying
25 to understand -- and I don't want you to make the Appellant's case

1 for them. I'm just trying to understand where there might be a
2 situation where this permit would get reissued, and therefore, it
3 would be timely. Please, Mr. LeGrant.

4 MR. LEGRANT: Thank you, Mr. Chairman. The only
5 scenario that I can believe would result in a new permit would be
6 if for example the wall check failed, and DRCA informed the
7 Property Owner that they failed the wall check, their options
8 typically are to remove the offending construction to bring it
9 back into compliance. Or if they wanted to say, well, we are
10 going to keep what we built that (audio interference) and if that
11 first instance was incorrect, they would have to revise their
12 permit. At that point, a revised permit would then be open to a
13 new analysis. And then we would have to come to a conclusion
14 whether the revised permit was in compliance prior to any
15 issuance.

16 CHAIRPERSON HILL: Okay. All right. Thank you, Mr.
17 LeGrant. All right.

18 Does anybody else have any questions before I move over
19 to the Property Owner? Okay.

20 Ms. Moldenhauer, you had some questions. And also,
21 thank you for your service to the BZA, you know, however long ago
22 that was.

23 We're all BZA alumni. So let's all play nicely
24 together.

25 So Ms. Moldenhauer, what questions do you have?

1 MS. MOLDENHAUER: So Ms. Richards, Section J-207, that
2 was the issue that you appealed in 2018?

3 MS. RICHARDS: That's right. Different aspect.

4 MS. MOLDENHAUER: But it was the same zoning section; is
5 that correct?

6 MS. RICHARDS: Same zoning section, but a different
7 section of that rule. We're not -- this appeal does not concern
8 the setback required with regard on the alley. The other set --
9 the other appeal concern is setback on the alley insurance. This
10 is not. This is a wholly different element of the project.

11 MS. MOLDENHAUER: But it's the same zoning section, the
12 same zoning decision?

13 MS. RICHARDS: Well, I would say that they're
14 sufficiently substantively different. But they are not --

15 MS. MOLDENHAUER: This is a different zoning section.
16 Was it not J-207 that was decided in 2015?

17 MS. RICHARDS: J-207, yes, but a different subsection of
18 J-207.

19 MS. MOLDENHAUER: But the umbrella section was J-207 --

20 CHAIRPERSON HILL: Ms. Moldenhauer, she answered your
21 question. And I think she clarified what the difference is. So
22 what's your next question?

23 MS. MOLDENHAUER: The question that is if the Board were
24 to grant the approval for review, wouldn't then all inspections
25 become subject to BZA review, all DCRA inspections?

1 MS. RICHARDS: Well, I think that -- and that's a rather
2 broad question. But off the top of my head, no. The answer is
3 no. It would have to be shown that an inspection in some way had
4 a facial claim to invoking a zoning regulation that would be
5 affected. There are all kinds of inspections, plumbing, heating,
6 blah blah. You know. And there have been many other inspections
7 that have taken place on this project, and, you know, there have
8 been other stop-work orders when they had a water leakage problem.
9 And, you know, the neighbors raised those, but they never -- they
10 didn't implicate zoning. So no, not every inspection.

11 MS. MOLDENHAUER: And do you agree that they -- if there
12 is anything that is below grade is obviously not a zoning issue?
13 Zoning impacts property that is above grade.

14 MS. RICHARDS: It impacts it if it's necessary for the
15 above-grade building to be compliant with the permit. If they
16 have to, like, jut out the encroached subsurface in order to get
17 the building like where it is above surface, then that affects
18 zoning. If they had submitted -- let's say that the original
19 permit had been submitted with an encroachment. It wouldn't have
20 been approved.

21 MS. MOLDENHAUER: Have you actually reviewed the
22 original permits and found that there is a distinction here
23 between the 2017 permits that were filed?

24 MS. RICHARDS: Well, we --

25 MS. MOLDENHAUER: Those permits are publicly available

1 and were filed in the prior record, were they not?

2 MS. RICHARDS: Right. But now we're getting into the
3 record. Now we're getting into the substance of this matter, you
4 know. And you're asking me to, like, argue a factual case that
5 it's the proper purview of bringing in an expert. We're basing
6 this on a public document that says failed wall check
7 encroachment. That document exists. It was said to present a
8 problem. Then it was said not to present a problem. Those are
9 the facts of record. Also -- it's also a fact of record that no
10 explanation was given for why it was a problem --

11 MS. MOLDENHAUER: No, Ms. --

12 MS. RICHARDS: -- and then --

13 MS. MOLDENHAUER: This is an opportunity for me to ask
14 you a question. Is there a section in the zoning regulation that
15 requires DCRA to explain their permitting process to the ANC? Is
16 there a zoning section?

17 MS. RICHARDS: No. There is an overarching requirement
18 or obligation on all public bodies to be -- yes, to be rational
19 and not to be arbitrary --

20 CHAIRPERSON HILL: Ms. Moldenhauer?

21 MS. MOLDENHAUER: There is no section --

22 CHAIRPERSON HILL: Ms. Moldenhauer? Ms. Moldenhauer,
23 how many questions do you have?

24 MS. MOLDENHAUER: Just that last one as to whether or
25 not there is a zoning -- Ms. Richardson (sic), one of the appeal

1 statements says that the DCRA did not provide her with an answer
2 or an understanding. And I'm asking if the zoning regulations
3 actually require that, if there's a section in the zoning
4 regulations.

5 MS. RICHARDS: Yeah. When it -- when it issues a
6 decision that we argue affects the zoning and where there is a --
7 remember, there was an analysis by the zoning administrator, the -
8 - the final letter from DCRA states that the zoning administrator
9 analyzed the explanation --

10 MS. MOLDENHAUER: I'm asking if there's a section.

11 MS. RICHARDS: -- provided by --

12 MS. MOLDENHAUER: You're not referencing a section.

13 CHAIRPERSON HILL: Hey. Okay. Guys --

14 MS. RICHARDS: Overall obligation of administrative due
15 process.

16 CHAIRPERSON HILL: Okay. I hear the answers that Ms.
17 Richards gave. All right.

18 Mr. Green, do you have any questions?

19 MR. GREEN: No, not for the Appellant. No.

20 CHAIRPERSON HILL: Okay.

21 MR. GREEN: I think good points have been fairly made.
22 I -- thank you.

23 CHAIRPERSON HILL: Okay.

24 I mean, again, before us Board members, which is what
25 we're here for -- and I'm talking to Mr. Smith, Vice Chair John,

1 and Mr. Miller is what is the preliminary matters, right? And so
2 we're not having an argument about the appeal or the merits of the
3 appeal. We're trying to figure out whether or not we're going to
4 hear the appeal. And so I'm going to ask my fellow Board members
5 if they have any questions for anybody to try to figure out
6 whether or not these two motions --

7 And I guess, Ms. Moldenhauer, in terms of like
8 clarification, there's, like, kind of the timeliness motion,
9 right, or argument. And then the other is that there's no real
10 zoning error that's being put forward; is that correct?

11 MS. MOLDENHAUER: Yes. There's three issues. There's
12 one, that there's no zoning section that's being referenced and
13 that they're challenging inspections and a wall check --

14 CHAIRPERSON HILL: Right.

15 MS. MOLDENHAUER: -- and that --

16 CHAIRPERSON HILL: The timeliness was one. And I said
17 the other one. What's the third one that I'm missing?

18 MS. MOLDENHAUER: Well, the timeliness, I think you're
19 kind of looking at that. That's more what we're phrasing as
20 collateral estoppel. Is that what you're referencing with the
21 timeliness?

22 CHAIRPERSON HILL: Okay.

23 MS. MOLDENHAUER: And then there is the fact that
24 there's no jurisdiction. The jurisdiction goes to the fact that
25 there's no new zoning decision.

1 CHAIRPERSON HILL: Got you. Got you.

2 MS. MOLDENHAUER: That if the Board were to open this
3 up, that they would open up the ability for the Board to evaluate
4 every inspection because an inspection just makes sure --

5 CHAIRPERSON HILL: Okay. I understand. I'm sorry. I
6 was asking if you --

7 MS. MOLDENHAUER: -- (audio interference) permit.

8 CHAIRPERSON HILL: Okay. I was going to ask -- okay.
9 All right. So never mind. I got it again. Never mind. Okay.
10 Thank you.

11 So Ms. John, Commissioner Miller, Mr. Smith, do you have
12 any questions for anybody? Okay. Okay.

13 Oh, I'm sorry. Ms. John?

14 VICE CHAIR JOHN: Yeah. I'm still unclear about the J-
15 207 issue. And what is -- and I guess I go back to Ms. Richards.
16 What are the two sections that you're referencing? You keep
17 saying that the first appeal was based on one section, and that
18 the second appeal and this appeal is based on another section.

19 MS. RICHARDS: Yes. Just a second. I'm pulling up J-
20 207. Okay. J-20 -- the one -- we've challenged before 207.5.
21 This time, we are looking at 207. -- let's see, 1, 2, and 3. And
22 these are -- these establish the 25-foot setback from each lot
23 line directly abutting a residential zone, 35-foot lot line from
24 the rear, and -- well, that wouldn't be involved here. The 15-
25 foot lot front setback from the street less than 70 feet. So

1 | those are the setbacks. So we're not looking at all of the one we
2 | raised before. 207.5 is not at issue.

3 | VICE CHAIR JOHN: So you're now appealing 207.1, 2, and
4 | 3?

5 | MS. RICHARDS: Right. We're saying that if this is --
6 | if there is an encroachment beyond the, you know, the permitted
7 | things, then the building does not meet the setback requirements.

8 | VICE CHAIR JOHN: So --

9 | MS. RICHARDS: Or even if it meets them at the surface,
10 | if it does so only by means of an encroaching foundation, then the
11 | permit is invalid.

12 | VICE CHAIR JOHN: Okay. So could you have appealed
13 | 207.1, 2, and 3 -- did anything change in the permit that you
14 | appealed? Is it the same permit?

15 | MS. RICHARDS: It's the same -- remember the question at
16 | issue was ought it to have been amended? And that's a question of
17 | fact.

18 | VICE CHAIR JOHN: I'm not -- I'm not following. Please
19 | give me some (audio interference) Mr. Hill. I'm really confused.
20 | So you could have appealed 207.1, 2, and 3 because there's been no
21 | change in the permit?

22 | MS. RICHARDS: No, ma'am. We contend that the -- the
23 | flaw arose during the course of construction. I believe as Mr.
24 | Hill or Mr. LeGrant was saying earlier, under what are the
25 | circumstances under which an inspection might give rise to -- not

1 an inspection but a circumstance discovered during the course of
2 construction might give rise to the need for an amended complaint?
3 And we're saying that based on the public documents saying failed
4 wall check, a circumstance appears to have arisen during the
5 course of construction which we contend may require an amended
6 permit. That's the argument.

7 VICE CHAIR JOHN: Okay. I'll stop there. Thank you,
8 Mr. Chairman.

9 CHAIRPERSON HILL: Okay. One moment.

10 Okay. Let's see. Mr. Smith or Mr. Miller? Okay.

11 So I'm kind of curious -- Ms. Nagelhout, can you hear
12 me?

13 MS. NAGELHOUT: Yes.

14 CHAIRPERSON HILL: So this, like -- we're going through
15 a motion, right? So this is a preliminary matter. And so what
16 I'm just trying to figure out is, you know, the process and the
17 procedures. I've basically been treating this as a mini appeal,
18 right? I mean, we're going through -- everybody's giving their
19 presentation. Everybody's gotten to, like, answer questions. And
20 now I'm just trying to figure out whether there has to be a
21 conclusion or not, or if there's rebuttal or something that, you
22 know, the applicant -- not applicant. That the Property Owner
23 would get rebuttal -- and this is where you just have to help me.
24 I'm sorry. Because it's the Appellant's appeal. And so I always
25 get a little bit confused as to who gets rebuttal when, and if

1 | that would be the case now because at the end of the day, we're
2 | just trying to be fair.

3 | And Mr. Miller has his finger up in one second.

4 | But Ms. Nagelhout, could you tell me what your opinion
5 | is?

6 | MS. NAGELHOUT: Well, what you're doing now is hearing
7 | legal argument on the motion. So there's no -- there's not really
8 | testimony from witnesses. So you don't need rebuttal testimony
9 | from witnesses. But you could ask the parties to basically give
10 | you a closing statement just on the arguments relative to the
11 | motion just to wrap things up.

12 | CHAIRPERSON HILL: Okay. And you know what order I
13 | would do that in?

14 | MS. NAGELHOUT: I would -- I would go the same order you
15 | have been. Start with the Property Owner, then DCRA, then the
16 | Appellant.

17 | CHAIRPERSON HILL: Okay. Thank you.

18 | Mr. Miller, Commissioner Miller, you got a --

19 | COMMISSIONER MILLER: Yes. Yes, Mr. Chairman. Have we
20 | heard from DCRA, their legal argument on the motion to dismiss? I
21 | know you asked some questions of them, and I know what their
22 | argument is since we have it in the record. But have we actually
23 | asked them here in this hearing on this preliminary motion to
24 | dismiss for their legal argument? If not, can we just hear their
25 | brief statement that they, I guess, agree with the Property Owner?

1 CHAIRPERSON HILL: Sure. Thank you, Commissioner.

2 Mr. Green?

3 MR. GREEN: Yes. Good afternoon, or good morning.
4 Tuesday afternoon. Yes. We filed (audio interference) joining in
5 the motion. But very briefly, Mr. Miller, the Board lacks
6 jurisdiction for this matter. It's clear. The Appellant has
7 raised issues with regard to the construction code, and the
8 purview for that -- the jurisdiction for that, where that should
9 be addressed is in the Office of Administrative Hearings under 12,
10 DCMR A, 112.2.1 in which construction code matters are to be
11 determined there and not before this Board. There has been no
12 amended permit. There has been no decision which has altered the
13 permit since its issuance.

14 Therefore, not only is this untimely, but the Board
15 should dismiss this outright. And so we both join the Property
16 Owner. And I wanted to put those other points as well which were
17 made by Ms. Moldenhauer to the front as well.

18 CHAIRPERSON HILL: Mr. Green, what did you cite again
19 for (audio interference)?

20 MR. GREEN: Yes. So for the appeal under the
21 construction codes if you were going to appeal it, it would be
22 under 12, DCMR A, and it's 112.2.1. And that's appeal -- it has
23 to do with the appeal of a decision of a code official under the
24 construction codes. There's a process for that. And --

25 CHAIRPERSON HILL: Okay. You said 12, DCMR A, 112 --

1 MR. GREEN: 112. -- sorry. I'll start again. I spoke
2 over you, Mr. Chairman. 112.2.1.

3 CHAIRPERSON HILL: Okay.

4 MR. GREEN: And the wall check falls under 12 -- sorry.
5 I'll read it off. 12 DCMR. It's also cited by the Appellant.
6 12, DCMR, Subtitle A, 109.3.1.2.

7 CHAIRPERSON HILL: Okay.

8 MR. GREEN: Thank you.

9 CHAIRPERSON HILL: Okay. Ms. Richards, do you have any
10 questions for Mr. Green?

11 MS. RICHARDS: I have no questions for Mr. Green at this
12 time. I will -- I have, like -- like a responsive argument in my
13 closing statement.

14 CHAIRPERSON HILL: Ms. Moldenhauer, do you have any
15 questions for Mr. Green?

16 MS. MOLDENHAUER: No questions for Mr. Green.

17 CHAIRPERSON HILL: Okay. I am looking back to my Board
18 members again. I was going to have people give a conclusion, a
19 wrap up. If you have any other questions, please raise your hand
20 before I ask the people to do that in the order that was
21 prescribed.

22 So Ms. Moldenhauer, can you go ahead and give us kind of
23 a summation?

24 MS. MOLDENHAUER: Thank you. The Board should dismiss
25 this claim because there is no jurisdiction, and there is no new

1 decision. The legal argument presented by the ANC is flawed. The
2 argument that if there was some level of underground encroachment
3 that that would have an impact on the setback, the setback has not
4 changed. The setback was the specific issue that was argued in
5 2018 that this Board found to be untimely at that time. We are
6 now three years later from that decision, even. Construction has
7 gone underway fully in compliance with the building code.

8 DCRA's director, in his letter, acknowledges that the
9 building was being built in accordance with the permit plans.
10 There is nothing that has been done that is not to the T on this
11 project. DCRA has confirmed that in multiple communications with
12 the ANC, confirming that the wall checks were accepted, and in the
13 issuance of a certificate of occupancy just on September 30th of
14 last month.

15 Finally, the references to the setback, the ANC includes
16 in Exhibit 10, which is the at-grade, which shows the at-grade
17 wall check, all of the setbacks that are required and that were
18 permitted and complied with. An assertion that the Board should
19 be analyzing inspections and analyzing surveys for something that
20 is below grade or part of an inspection process is wholly outside
21 of the purview and would, you know, create a slippery slope for
22 all of a sudden the Board's jurisdiction to go well beyond what it
23 is required. And the fact that what -- if you take Ms. Richards's
24 argument on face value, her assertion is that the setbacks somehow
25 were impacted. Those setbacks were built pursuant to the plans

1 that the ANC had copies of back in 2017, over 890 days ago.
2 Nothing has changed. There is no change in the permit. There is
3 no change in the construction. And this case should be dismissed
4 as lack of jurisdiction and the fact that any questions about the
5 permit have already been adjudicated by this Board as untimely.

6 CHAIRPERSON HILL: Okay. Thank you, Ms. Moldenhauer.

7 Mr. Green?

8 MR. GREEN: We will reiterate very, very briefly, Mr.
9 Chairman. We join in the Property Owner's statements. I think
10 what is also equally compelling is the fact that in terms of
11 collateral estoppel, all of the possible issues that should have
12 been raised, could have been raised, when it was originally heard.
13 And you can't then go and raise new ones subsequent thereto.
14 That's the purpose of collateral estoppel. You have an
15 opportunity to bring all your claims at once, and you fail to do
16 it.

17 But, again, it goes back to the crux of the issue, which
18 is really the Board's lack of jurisdiction in terms of this
19 particular construction code issue. And, quite frankly, the DCRA
20 did exactly what it should do. It investigated. It determined.
21 And there was no decision by the zoning administrator in this
22 regard, which is implicated, and the Board should dismiss this
23 matter. And that's our presentation. Thank you.

24 CHAIRPERSON HILL: Thank you.

25 Ms. Richards?

1 MS. RICHARDS: Thank you. The ANC strongly objects to
2 any contention that we are reasserting old issues and that this
3 could have been raised. The said facts at issue are not the ones
4 that were litigated before. And as with regard to the permit, we
5 are saying that there is an allegation -- a credible allegation of
6 changed circumstances which putatively required an amended permit.
7 The fact that an amended permit was not issued is not conclusive
8 on the issue of whether one should have been.

9 There was a zoning analysis under which there was a
10 decision that the construction was in compliance with the permit
11 because the director's letter states that Mr. LeGrant performed an
12 analysis. So there -- the DCRA itself indicates that there is a
13 zoning implication because the zoning administrator was involved
14 in analyzing the ANC's questions about this. This -- as we have
15 said, if we establish (audio interference) permit on merits based
16 on facts that developed in the course of construction, then we are
17 timely. If we did not establish it, then fine. Then the above on
18 the timeliness and the merit, we cannot prevail. However, it is
19 premature to make that determination at this time because you do
20 not have the fully developed record you need to make it.

21 CHAIRPERSON HILL: Okay. Ms. Richards, I just have a
22 question for you. You had cited 207.1, 207.2, and 207.3. Is
23 there something in the record where you guys are -- because I was
24 looking earlier -- is there something in the record where you are
25 saying that that is the error that you're appealing?

1 MS. RICHARDS: No, it's -- I didn't put it -- I didn't
2 put it in the complaint because I thought, well, you know, it was
3 obvious. I was citing the foundational, you know, regulations
4 which are building code regulations, but which implicate the --
5 which implicate the zoning -- the validity of the permit under the
6 zoning regulations. But yes, it would -- it would be Subtitle J.

7 CHAIRPERSON HILL: You cited 207 somewhere then?

8 MS. RICHARDS: Only in my argument. In my arguments
9 today, I did. Yes. They are not in the complaint itself. They
10 would've been, you know, had we gone forward with this matter.
11 You know, for a complaint, I wasn't pleading. You only need a
12 short and simple statement of the facts which -- and the facts
13 support allegation of a violation --

14 CHAIRPERSON HILL: Okay. Thank you, Ms. Richards.

15 MS. MOLDENHAUER: I would just object to Ms.
16 Richardson's (sic) modifying her appeal. Zoning regulations
17 specifically do not allow an appeal to be modified.

18 CHAIRPERSON HILL: Okay. All right.

19 So let's see. Did anybody have -- and again, I'm not
20 asking the witnesses or anybody for a question. I have OAG.

21 And so Ms. Richards, if you could just mute your
22 microphone there for a second?

23 MS. RICHARDS: Oh, certainly.

24 CHAIRPERSON HILL: That's all right. Thank you.

25 So Ms. Nagelhout, this is where I was trying to get

1 clarification on the whole 207 thing. I know that you can't add
2 to the argument later. And so I'm just trying -- I just want to
3 understand if this at least is in the argument somewhere that this
4 is the error that the zoning administrator perhaps could have made
5 or -- can you help me with what I'm trying to struggle with?

6 MS. NAGELHOUT: Unfortunately, no, I don't think I can.
7 The appeal, as you said, doesn't claim any error of the zoning
8 regulations as it initially was filed. Now, they're mentioning
9 207, which is what was at issue before, but they're claiming it's
10 a different aspect of 207 which could be possible. But I'm still
11 not understanding what their claim of error is.

12 CHAIRPERSON HILL: Okay. I don't want to get --

13 And by the way, I'm not asking for anybody's opinion
14 other than OAG right now. So I'm not interested in anybody from
15 (audio interference).

16 And so, again, the thing that I'm kind of just
17 struggling with again right, Ms. Nagelhout, as you know is adding
18 -- it seems like it's a little gray, right, as to whether or not
19 this was in the argument or not already. At least that's what I'm
20 taking with it, and I'm going to go with that. So all right.

21 Let's see. The Board members do not have anything it
22 looks like. I don't know what to do. So I guess we can let
23 everybody go, and then we can see where we get in terms of whether
24 we're going to have a discussion today about this or whether we're
25 going to come back to it. I guess what I'm trying to get at my

1 fellow Board members, and then I'm going to take a quick break if
2 that's all right with you guys, is that do you have any final
3 questions for anybody before we start to talk about the
4 preliminary motions? No? Okay. All right.

5 Well, Ms. Richards, Ms. Moldenhauer, Mr. Green, Mr.
6 LeGrant, thank you all very much. If you wouldn't mind, I don't
7 know whether we're going to bring you back or not, but I'm going
8 to close the hearing, this portion of the hearing, and excuse you
9 all. So thank you all very much.

10 Oh, and also, Commissioner, thank you all very much.
11 Bye, bye.

12 My fellow Board members, I'm taking a quick break, if
13 that's all right. Just like five minutes if that's all right.
14 And I'll be right back. And you all can take a break.

15 And Mr. Miller, you should apply some sunscreen.

16 (Whereupon, the above-entitled matter went off the
17 record and then resumed at approximately 12:23.)

18 CHAIRPERSON HILL: Mr. Moy, are you there?

19 MR. MOY: I'm back.

20 CHAIRPERSON HILL: I didn't know whether you have to
21 call us back, but just call us back, if you don't mind.

22 MR. MOY: All right. Thank you, Mr. Chairman. So the
23 Board is back in hearing session, and the time is now about 12:23.

24 CHAIRPERSON HILL: Okay. Okay. I don't know what to
25 do. So you guys can kind of help me figure out what do you all

1 want to do? I mean, either deliberate now, postpone, deliberate,
2 talk about it.

3 Commissioner, I'm going to start with you as to kind of
4 like where you think, whatever you think, because I don't know
5 what to say.

6 COMMISSIONER MILLER: Thank you, Mr. Chairman. I think
7 we've been presented with legal arguments as on the motion to
8 dismiss regarding a lack of jurisdiction and timeliness and
9 collateral estoppel. And we've heard from the Appellant as to why
10 those -- that motion to dismiss should be denied, and we should
11 proceed to a discussion about the merits of the appeal. They are
12 kind of intertwined. But I think we have enough information to
13 rule -- to deliberate and rule on the motion to dismiss. But I'll
14 hear whatever my colleagues have to say on that point.

15 CHAIRPERSON HILL: Okay. I'll go around the table and
16 see whether or not -- so Mr. Miller, does that mean you're ready
17 to have a discussion now? You're on mute, Mr. Miller.

18 COMMISSIONER MILLER: Thanks. Yes, I'm prepared to have
19 a discussion and deliberation now on the motion to dismiss. But
20 I'll, you know, defer to the majority of my colleagues if we have
21 a majority of my colleagues on that.

22 CHAIRPERSON HILL: Okay. Okay. I mean, I'll let you
23 know, like, you know, I'm happy to start talking about it and see
24 if we get to a decision. So that's fine with me.

25 Ms. John, where are you? Do you want to have a

1 discussion now, or do you need more time?

2 VICE CHAIR JOHN: So we can have a discussion now.
3 There might be some merit in deliberating next week just to -- I
4 just want to be sure that I've really looked at the regulation
5 that the Appellant raised and the argument that the substance of
6 the regulation is contained in the appeal. But I believe that the
7 Property Owner and DCRA have made a very strong argument that
8 there is no jurisdiction because the Appellant's arguments in the
9 record, not what was presented today, appear to center on the wall
10 check itself, which is a matter that's subject to the construction
11 code and is not within the jurisdiction of the Board.

12 So that's what I'm thinking initially. But I would not
13 be opposed to continuing the deliberations to next week.

14 CHAIRPERSON HILL: Okay.

15 VICE CHAIR JOHN: Decision next week.

16 CHAIRPERSON HILL: Okay. Mr. Moy, what --

17 And I'm kind of -- I mean, I can go either way. And I
18 think that, you know, I'm fine with that as well.

19 Mr. Smith, before I get to you --

20 Mr. Moy, what does next week look like for us?

21 MR. MOY: Next week, which is the hearing on October
22 21st, the Board is scheduled to hear six cases, but one of which I
23 believe there's going to be -- I noticed recently a request to
24 postpone. So there may be five applications for review next week.
25 So if you wanted to, you could add this either to a decision

1 meeting or a continued hearing.

2 CHAIRPERSON HILL: Mr. Miller, can you join us for a
3 decision meeting in the morning next Wednesday?

4 COMMISSIONER MILLER: Yes, I can. That would be fine.
5 I don't think we need a continued hearing. I didn't think Ms.
6 John was asking for that, but I'll let her speak for herself.
7 Yes, I'm available for whatever, whether it's a decision meeting
8 or a continued hearing, although I don't think we need a continued
9 hearing. I'm available next week.

10 CHAIRPERSON HILL: I don't think Ms. John was
11 recommending a continued hearing. She was just saying a decision
12 meeting.

13 Mr. Smith are you fine with we'll decide this next week?

14 MR. SMITH: Yes, I'm fine with that.

15 CHAIRPERSON HILL: Okay. All right.

16 So then, Mr. Moy, let's go ahead and put this on the
17 meeting calendar for next week, and we'll deal with the
18 preliminary motions -- I mean -- sorry, the motion to dismiss at
19 that time.

20 MR. MOY: Yes, sir.

21 CHAIRPERSON HILL: Okay. All right. So that would be
22 10/21.

23 MR. MOY: Okay. Okay.

24 CHAIRPERSON HILL: All right. Okay. Well, then I hope
25 you all have a nice day. Let's see.

1 Mr. Moy, is there anything else left for us, for the
2 Board?

3 MR. MOY: No, sir. Nothing from the staff and I. I
4 thank the Board for all your comments today.

5 CHAIRPERSON HILL: Okay. All right.

6 Everybody, we stand adjourned.

7 VICE CHAIR JOHN: Thank you.

8 CHAIRPERSON HILL: Have a nice week.

9 VICE CHAIR JOHN: Bye.

10 CHAIRPERSON HILL: Thank you. Bye, bye.

11 MR. SMITH: See you, everyone.

12 (Whereupon, the above-entitled matter went off the
13 record at 12:29 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Public Hearing

Before: DCBZA

Date: 10-14-20

Place: Teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



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