

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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REGULAR PUBLIC HEARING

+ + + + +

WEDNESDAY

JANUARY 26, 2022

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The Regular Public Hearing of the District of Columbia Board of Zoning Adjustment convened via Video Teleconference, pursuant to notice at 9:30 a.m. EST, Lorna L. John, Vice Chair, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LORNA L. JOHN, Vice Chair (NCPC)
CARL H. BLAKE, Board Member
CHRISHAUN S. SMITH, Board Member

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD, Chair

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
PAUL YOUNG, Zoning Data Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Regular Public Hearing held on January 26, 2022.

C-O-N-T-E-N-T-S

Appeal No. 20580 of NL 1271 5th St, LLC 3
Appeal No. 20572 of Saint Vincent's Home School . . . 123

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

2 (10:33 a.m.)

3 VICE CHAIRPERSON JOHN: Mr. Moy, can you call us
4 back out?

5 MR. MOY: Yes, thank you, Madam Vice Chair. The
6 Board is back in its public hearing session and the time is
7 now 10:33 a.m.

8 VICE CHAIRPERSON JOHN: Thank you. Please call
9 the first appeal.

10 MR. MOY: The first appeal before the Board is,
11 as captioned or advertised as -- this is to Appeal Number
12 20580 of NL 1271 5th Street, LLC. This appeal is captioned
13 and advertised as an appeal pursuant to Subtitle X, Section
14 1100, from the decisions made on July 11, 2021 by the Zoning
15 Administrator, Department of Consumer and Regulatory Affairs
16 concerning requisite conditions of a PUD, Planned Unit
17 Development, that was approved by the Zoning Commission under
18 Zoning Commission Case Number 16-05 in the MU-9 Zone.

19 Again, this is an appeal of the decision made on
20 June 11, 2021 by the Zoning Administrator, that an easement
21 recorded to provide access to a private alley in the Planned
22 Unit Development was in compliance with Condition Number A-5
23 in the Zoning Commission Order that approved the PUD.

24 As to preliminary matters, Madam Vice Chair, as
25 you are well aware, there is a filing from ANC 5-D from what

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1 I believe it was an email from the SMD, 5-D-01 that was sent
2 about 9:30 p.m. last night, I believe, from Commissioner
3 Sebrena Rhodes. She is in attendance and her is limited.
4 I just want to remind the Board of that.

5 The other preliminary matters include from the
6 Appellant proffering an expert witness, number one.

7 Number two, the Appellant is also requesting that
8 the Board allow a DDOT to testify in today's hearing.

9 And, let's see, the only other thing to add, as
10 a reminder, the Board last heard this appeal and addressed
11 preliminary matters that was on September 15, 2021 where the
12 Board voted to grant a motion by the Appellant to amend the
13 appeal, number one.

14 And, number two, it denied the Appellant's motion
15 to stay the C of O.

16 That's it.

17 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy. Will
18 the parties please introduce themselves, starting with the
19 Appellant?

20 MS. MOLDENHAUER: Good morning.

21 MR. CHOWFLA: Good morning, Members of the Board,
22 my name is Schael Chowfla with NL 1271.

23 VICE CHAIRPERSON JOHN: Thank you. Ms.
24 Moldenhauer?

25 MS. MOLDENHAUER: Good morning, Vice Chair John

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1 and members of the Board. I am here on behalf of the
2 Appellant, NL 1271 5th Street, LLC, a subsidiary of Eden's.
3 I am here today with Eric DeBear, if he could also be raised
4 a panelist, Cozen O'Connor. Mr. Chowfla just introduced
5 himself. And then, there are also here with Mr. David Cox
6 from Jackson and Campbell.

7 VICE CHAIRPERSON JOHN: Okay, thank you. And, Mr.
8 Freeman, who is here with you today?

9 MR. FREEMAN: Good morning, I'm Kyrus Freeman of
10 the law firm of Holland & Knight. I think my colleague,
11 Chris Cohen, if he could be allowed to participate here on
12 behalf of the property owner, LCOR.

13 VICE CHAIRPERSON JOHN: Thank you. Did he sign
14 up to participate? Oh, he's a property owner? Okay. Is he
15 present how?

16 MR. FREEMAN: Let's see, Chris is just an
17 associate. Chris is one of the associates who's working with
18 me on this case.

19 VICE CHAIRPERSON JOHN: Okay. That was not the
20 question.

21 MR. FREEMAN: He's on here.

22 VICE CHAIRPERSON JOHN: Thank you. He's here,
23 then?

24 MR. FREEMAN: He's not the owner, at least not
25 yet.

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1 MR. GREEN: Good morning, Vice Chair John, members
2 of the Board, Hugh Green, attorney with DCRA.

3 VICE CHAIRPERSON JOHN: Okay, thank you. Is Mr.
4 LeGrant here as well?

5 MR. LEGRANT: Yes, good morning, Vice Chair John
6 and members of the Board. Matthew LeGrant, Zoning
7 Administrator, DCRA.

8 VICE CHAIRPERSON JOHN: Thank you, okay. So,
9 let's proceed with the preliminary matters. And I think I'll
10 take the ANC first.

11 Mr. Moy, I would like to see what the ANC filed,
12 so could you add that to the record?

13 MR. MOY: Yes, ma'am.

14 VICE CHAIRPERSON JOHN: And so, I'm having
15 technical difficulties, if you can just email that to me,
16 please.

17 MR. MOY: Okay, I'm doing that now so if you'd
18 wait momentarily.

19 VICE CHAIRPERSON JOHN: Thank you. So, while
20 we're waiting to do that, I think I'll go ahead then and
21 discuss the other preliminary matters. I'll start with
22 Appellant's request to offer the testimony of David Cox as
23 an expert in real estate transactions and property and
24 related matters.

25 So, Ms. Moldenhauer, I've read the record and I

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1 don't believe that the Board needs testimony on that. And
2 I wanted to note that the property owner objects based on the
3 relevance of Mr. Cox's testimony.

4 I am inclined to deny the request pursuant to
5 Subtitle Y, Sections 506.1 which grants the presiding officer
6 authority to exclude immaterial or irrelevant testimony. The
7 issue before the Board is not whether the terms of the
8 easement are sufficient but whether the property owner
9 complied with the conditions of the PUD order for recording
10 the easement and unilaterally that the action of the Zoning
11 Administrator was erroneous.

12 So, I wanted to hear from the Board members.

13 (Pause.)

14 VICE CHAIRPERSON JOHN: No comments from the Board
15 members? Okay. So, Ms. Moldenhauer, I will deny that
16 testimony. Okay? Go ahead.

17 MS. MOLDENHAUER: I believe if there is a motion
18 to deny that the Appellant would have an opportunity to make
19 an argument as to why it is relevant. I'd ask the Board to
20 give me a few minutes to provide that testimony before you
21 make a deliberation.

22 VICE CHAIRPERSON JOHN: The presiding officer has
23 the authority to do that, Ms. Moldenhauer, but fine, go
24 ahead. If you do that, then I have to give Mr. Freeman an
25 opportunity to respond. So, this is a very long day, I'll

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1 hear what you have to say.

2 MS. MOLDENHAUER: So, we submit and we request
3 that the Board does grant Mr. Cox the ability to testify as
4 he is relevant. In administrative law proceedings, the Board
5 typically errs on the side of admitting all evidence. Expert
6 testimony in this case we believe would be helpful and
7 relevant information regarding the reading of the PUD Order
8 and the PUD conditions.

9 An expert witness, if they have the specific
10 knowledge, experience, or training, or education, may testify
11 to their -- and provide testimony that may be helpful to the
12 trier of fact in understanding the evidence. This has been
13 found true in cases like Motorola v. Murray as well as Bob
14 Burkhardt v. Washington in which the courts have found that
15 an expert witness can provide testimony on specific issues
16 if they qualify.

17 And two, if their information is capable of
18 assisting the trier of fact. Mr. Cox's resume is in the
19 record and he, obviously, has ample experience, knowledge in
20 his over 40 years as an attorney in real estate transactions.
21 Mr. Cox would provide a brief ten minute testimony that would
22 review the order, the condition, and the easements.

23 Mr. Cox's testimony would aid the Board as the
24 central legal question before the Board is whether the ZA
25 erred in accepting the easements as compliant with the Order.

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1 It is only proper that given Mr. LeGrant will testify on
2 behalf of DCRA as to his reading of the Order and the
3 condition and the easement that we be permitted to introduce
4 evidence regarding how a real estate transaction community
5 may also view these legal documents.

6 Given the nature of this condition which requires
7 an easement would be recorded in the land records, this would
8 affect title to the property for which Mr. Cox could testify
9 directly to and provide relevant information.

10 This has been found true in other cases like
11 Economides v. the D.C. Board of Zoning, which is found in 954
12 A 2nd 427. This is in which the Board found it relevant to
13 accept expert testimony regarding construction of a retaining
14 wall under the Zoning Regulations. There have been many
15 times in which this Board accepts expert testimony and we
16 believe the same is true here.

17 Finally, in Daubert v. Merrell Dow Pharmacy 509
18 U.S., it has been found and should be supported by this Board
19 that the Board should admit any relevant testimony and not
20 exclude testimony, but allow vigorous cross-examination and
21 presentation of contrary evidence by the opposing party as
22 opposed to a method of weighing the evidence rather than
23 excluding it specifically.

24 To the extent LCOR disagrees with Mr. Cox's
25 analysis such as an argument that would go to the question

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1 of weight, not admissibility of his testimony. Furthermore,
2 it is typically seen in administrative procedures that the
3 agencies would view admission of evidence on a broad
4 perspective and allow this into the record.

5 Based on the above, we believe the Mr. Cox would
6 provide a limited but helpful testimony and we would ask the
7 Board to admit him as an expert and allow him to testify.

8 VICE CHAIRPERSON JOHN: Thank you.

9 Mr. Green, do you want to respond?

10 MR. GREEN: Yes, very briefly, Vice Chair. No,
11 the Board is very capable of reading the conditions in the
12 order as well as the easements themselves. It's laid out
13 very clearly in both our brief and the owner's filings. No
14 special expertise is needed. And I think it -- I agree with
15 the owner that this testimony is irrelevant in respect to
16 these matters. The Board is very capable of looking and
17 determining whether or not the Zoning Administrator erred or
18 not in this case. Thank you.

19 VICE CHAIRPERSON JOHN: Thank you. Mr. Freeman?

20 MR. FREEMAN: Thank you, Madam. I'll stick with
21 Madam Chair today.

22 A couple things, I think I heard Ms. Moldenhauer
23 say that Mr. Cox is going to provide expert testimony about
24 how to read the PUD Order, how to read a PUD condition, and
25 how to read the easement. I don't see anything in Mr. Cox's

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1 testimony that indicates he has any specific knowledge,
2 training, or expertise to tell you how to read a PUD Order
3 or how to read a PUD condition. There's nothing in his
4 resume that provides any expertise for that.

5 Secondly, where I think they really want Mr. Cox
6 to talk about, as their brief says, they want -- Mr. Cox's
7 testimony will provide legal insight regarding easement
8 agreements and how such agreements can impact development
9 from a transactional perspective. And, I get it; they want
10 to make this case all about the easement agreement. But
11 that's not what this case is about.

12 This case is about what the PUD condition says or
13 doesn't say. It has nothing to do with Mr. Cox's expertise
14 or experience or how easements affect development or
15 financing, et cetera.

16 He may very well be an expert in those things, but
17 it's completely irrelevant to what the Board has to decide
18 today. And, therefore, I don't think we need his expertise
19 today. Thank you.

20 VICE CHAIRPERSON JOHN: Thank you. I think I've
21 got everyone. I believe the ANC is here, Commissioner
22 Rhodes?

23 MS. RHODES: Commissioner Rhodes, good morning,
24 Madam Chair.

25 VICE CHAIRPERSON JOHN: There you are. So, just

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1 so everyone knows, I reviewed the email from Commissioner
2 Rhodes and she basically wants to have a statement introduced
3 into the record, so, Mr. Moy, I'll go ahead and allow it.

4 So, did you have a comment in what you've heard
5 so far, Ms. Rhodes?

6 MS. RHODES: I do have --

7 VICE CHAIRPERSON JOHN: Only about the expert
8 testimony.

9 MS. RHODES: About the expert testimony, that will
10 help me to understand as far as the easement portion of this
11 case because I'm not that literate on knowing what an
12 easement is.

13 I did go over the case and I understand what the
14 issue is, but I want to know for myself exactly what is wrong
15 and what is right.

16 VICE CHAIRPERSON JOHN: Okay. Thank you, Ms.
17 Rhodes.

18 So, I appreciate your request. And I typically
19 err on the side of being very liberal but I truly do not
20 believe that Mr. Cox as an expert would provide any great
21 assistance to the Board in reading the conditions of the PUD.

22 And so, I'm going to continue to exclude the --
23 not qualify Mr. Cox as an expert. However, he's welcome to
24 testify as part of the Appellant's case. We're just not
25 qualifying him as an expert because the proffer that was

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1 made, it has nothing to do with whether or not the easement
2 was recorded in compliance with the conditions of the PUD
3 order.

4 So, Ms. Moldenhauer is welcome to introduce him
5 and have him testify as an expert and he will be able to
6 assist you to the extent you needed in understanding the
7 information.

8 MS. RHODES: I understand, I understand. Thank
9 you for that clarification.

10 VICE CHAIRPERSON JOHN: Thank you. So, okay, the
11 next issue was -- so we have admitted the -- oh, I'm sorry,
12 one more thing. Are you the SMD representative or are you
13 speaking on behalf of the full ANC?

14 MS. RHODES: I'm the SMD 5D-01, yes, ma'am.

15 VICE CHAIRPERSON JOHN: Okay, thank you. All
16 right, so, we'll move on now to the other preliminary issue
17 which was the request to --

18 MR. FREEMAN: Madam Chair, I'm sorry, could you --
19 I didn't see the ANC submission. I don't know if Mr. Moy can
20 upload that or email it to everyone.

21 VICE CHAIRPERSON JOHN: It should have been
22 uploaded by now. Mr. Moy, is it there?

23 MR. MOY: That is correct, it's in the case record
24 now.

25 VICE CHAIRPERSON JOHN: What exhibit, please?

1 MR. FREEMAN: Thank you.

2 MS. MOLDENHAUER: I just refreshed, it's there.

3 VICE CHAIRPERSON JOHN: Thank you. Okay, the
4 request to have DDOT testify on behalf of the Appellant. And
5 so, I am excluding that testimony as well because the intent
6 of the Zoning Commission in drafting the conditions of the
7 easement and whether the easement is recorded is not
8 something that DDOT can testify to as to the intent of the
9 Commission.

10 So, I will hear you briefly, Ms. Moldenhauer. Of
11 course, DDOT can testify as a witness, oh, I'm sorry, cannot
12 testify as a witness.

13 Ms. Moldenhauer, did you have anything to say
14 briefly?

15 MS. MOLDENHAUER: We would just object. We
16 believe that, you know, it's our burden and we should be
17 permitted to provide testimony and have any party that may
18 potentially provide information that may be helpful. And,
19 I'll end it there.

20 VICE CHAIRPERSON JOHN: Thank you. Mr. Freeman?

21 MR. FREEMAN: Yes, I will just point out the
22 DDOT's report is Exhibit Number 28 in the record. So, to the
23 extent that DDOT has anything to say, it's already in the
24 record and we can evaluate their report as we kind of go
25 through the hearing. So, I'm not sure that their testimony

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1 would add to what's already in Exhibit 28.

2 VICE CHAIRPERSON JOHN: Mr. Green?

3 MR. GREEN: Yes, DCRA is not taking a position
4 with respect to DDOT's testimony, whether they want to
5 participate.

6 VICE CHAIRPERSON JOHN: Okay. So, thank you for
7 that feedback. And so, I will exclude DDOT's testimony for
8 now.

9 So, before we proceed, I just wanted to say that
10 this is really a very full day. We have two appeals. And
11 so I'm going to ask the parties to focus on the essential
12 issues which, as I see it, is: what did the PUD condition
13 require? What did the Zoning Administrator do that was
14 erroneous?

15 And so I will ask you to begin, Ms. Moldenhauer.
16 I have asked Mr. Young to put 15 minutes on the board and
17 we'll see where we go from there.

18 MS. MOLDENHAUER: Thank you, Vice Chair John. We
19 timed out our presentation, it will take about 30 minutes but
20 that's obviously not our full 60 minutes. And just so we're
21 clear on the timing, I want to make sure you know we have
22 looked at our time and it should take about 30 minutes. We
23 appreciate that.

24 VICE CHAIRPERSON JOHN: All right.

25 MS. MOLDENHAUER: I'll first turn to Mr. Chowfla

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1 to provide testimony and then Mr. Cox will provide testimony
2 and then I'll provide a brief argument.

3 MR. CHOWFLA: Good morning, Madam Chair John and
4 members of the Board. My name is Sohael Chowfla and I'm a
5 Director of Development at Edens. Edens is the parent
6 company of the owner of the property at 1271 5th Street,
7 Northeast, located in the Union Market neighborhood.

8 If there's a slide presentation, Meridith, how do
9 we call that up?

10 MS. MOLDENHAUER: I think you just did that.
11 Somebody in the office will be pulling it up right now.

12 MR. CHOWFLA: Thank you.

13 MS. MOLDENHAUER: Thank you, Mr. Young. This
14 Holland & Knight.

15 VICE CHAIRPERSON JOHN: Oh, that's not the one.
16 What's the exhibit?

17 MR. CHOWFLA: You're looking for Exhibit 33,
18 Meridith.

19 MS. MOLDENHAUER: Yes, 33. Mr. Young, while
20 you're finding Exhibit 33, Sohael, if you want to just go
21 ahead and start with the first portion, I think you have a
22 little bit of testimony before you get to that first image,
23 just trying to save time.

24 MR. CHOWFLA: Of course, sorry for the technical
25 issues. I was hoping to have a slide to sort of explain.

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1 Maybe it'll come up as I speak.

2 So, as I mentioned, we are the parent owner of the
3 property at 1271 5th Street, Northeast. Next slide, please.
4 In the Union Market neighborhood. And next slide? Yes.

5 So, that's our property in blue and it's
6 relatively small with only 90 feet in width on the street.
7 And, our property in the square have no public alley, as you
8 can see. And, our property has no existing curb cut on 5th
9 Street, Northeast.

10 To the immediate south of our property, we share
11 a lot line with LCOR's property which is the subject of this
12 appeal. And, as part of Zoning Case 16-05, LCOR obtained
13 approval for a mixed use project with 280 residential units
14 and 20,000 square feet of ground floor retail and commercial
15 space.

16 To the north and east, our property abuts two
17 large parcels co-owned by Gallaudet University and JBG Smith
18 which are also subject of pending approvals for large mixed
19 use buildings. As you can see in the images, these are the
20 massing from the PUDS.

21 Next slide, please. Here is a zoomed in plan that
22 shows the alley in question. So, the crux of this appeal is
23 a condition of approval for LCOR's project in Zoning
24 Commission Case 16-05.

25 As part of the PUD case, LCOR proposed a shared

1 alley that would provide loading access for future
2 developments by all three owners in the square, namely LCOR,
3 Edens and JBGS, Gallaudet.

4 LCOR also proposed underground access to parking
5 garages on both Edens and JBG's properties. You can see the
6 alley in this image which runs up the middle of property from
7 Morse Street between the blue box and the red box and to the
8 south up into the gray T that you can see that would be on
9 Edens and JGB Smith's property.

10 And then, on the right side of the image, you can
11 see an arrow pointing down the parking garage ramp that heads
12 from 6th Street, Northeast down into the parking garage.

13 What's important to note is that LCOR specifically
14 proffered these as public benefits in the PUD because the
15 shared alley and parking would efficiently serve the loading
16 and parking needs of all properties in a high-density square
17 where no public alley existed.

18 From a transportation and planning perspective,
19 the shared alley and parking would also reduce curb cuts to
20 promote the pedestrian-friendly nature of the Union Market
21 District neighborhood. And, thus, DDOT and OB publically
22 supported the concept and accepted the creation of this
23 network as a public benefit.

24 Next slide, please. Here are some pictures just
25 to sort of describe what's there on the ground. LCOR has

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1 completed construction and this image is taken in the middle
2 of the alley looking towards our property to the north that
3 is the subject to this appeal. And, on the left, as we --
4 and so, our property is the one on the left. And, in the
5 distance, you can see the Union Market building that is also
6 owned by Edens.

7 Next slide, please. This image is taken with your
8 back to the Edens property looking towards Morse Street. You
9 can see the 280 unit building sits on top of the alley and
10 the alley goes through the LCOR building with a small portal
11 off of Morse Street.

12 Next slide, please. And, actually, you can -- I
13 think the next slide is blank. So, I'll just speak directly
14 to you all.

15 So, given our properties adjacency and the
16 existing challenges with access, Edens has a vested interest
17 in LCOR's PUD case. During the pendency of that case, we had
18 multiple discussions with LCOR regarding the shared alley.
19 As such, Edens chose not to participate in the PUD case on
20 reliance on LCOR's private statements and its filings to the
21 Zoning Commission.

22 We assumed LCOR would make good on the shared
23 alley and provide perpetual access to a future development
24 at Edens property as required in the Zoning Commission Order.

25 Unfortunately, LCOR did not make good on its

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1 proffer to the Zoning Commission and to the community. After
2 the PUD Order was issued, Edens and LCOR exchanged emails and
3 drafts of the easement agreements, but LCOR stopped engaging
4 and never finalized the negotiation of the agreements.

5 We started talking with the Zoning Administrator
6 because LCOR was getting close to finalizing its construction
7 and had still not finalized the easement agreement with us.

8 We wanted to make sure that Mr. LeGrant did not
9 authorize the Certificate of Occupancy without the proper
10 easements being recorded. LCOR never communicated with us
11 about the easements in the months or days leading up to them
12 recording the easements. Instead, we found out about the
13 recorded easements from DCRA Council Mr. Green.

14 So, after two years of discussions, LCOR
15 unilaterally recorded deficient easements that are
16 inconsistent with the condition in the PUD Order.

17 For the sake of your time, I want to focus on the
18 two most fundamental deficiencies that are inconsistent with
19 the PUD Order.

20 First, the easement agreements give LCOR the
21 unilateral authority to amend easements at any time. As you
22 might imagine, this leaves Edens with a substantial amount
23 of uncertainty over whether it will be able to use the
24 private alley and access its parking and loading in the
25 future.

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1 Given the high-density mixed use nature of the
2 neighborhood, any future development of Edens' property must
3 have reliable and perpetual loading and parking access. And,
4 given LCOR's unilateral authority to amend Edens' rights for
5 access, Edens simply cannot rely on the easement for loading
6 and parking purposes.

7 Yet, we have no viable alternatives for loading
8 and parking as our property is too narrow to support a new
9 curb cut and driveway. And, a new curb cut and driveway is
10 also undesirable from a transportation and planning
11 perspective as it will introduce another point of conflict
12 in a neighborhood that is active and pedestrian-friendly.

13 Secondly, the easement agreements will terminate
14 arbitrarily after 75 years. While we recognize that this is
15 a long period of time, new buildings are constructed with a
16 useful life well beyond 75 years. By tying the termination
17 of the easement agreements to a fixed and arbitrary 75-year
18 time period, Edens simply cannot rely on the perpetual access
19 through the private alley or to the underground parking
20 garage.

21 These deficiencies are clearly inconsistent with
22 the condition language in the PUD Order which calls for LCOR
23 to, quote, to share the alley for purposes of reciprocal
24 ingress and egress to loading and service areas and emergency
25 access to such areas, end quote. For other owners in the

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1 square, including Edens, there are no caveats, there are no
2 exceptions.

3 We filed this appeal because we believe the PUD
4 condition is clear and that the Zoning Administrator erred
5 by refusing to enforce the condition by accepting LCOR's
6 easement agreement language.

7 The remedy to this error is not complicated.
8 Edens simply requests that DCRA require LCOR to amend the
9 easement agreements so that the rights granted to Edens are
10 consistent with the clear language in the PUD Order. This
11 means that the easements cannot be unilaterally amended by
12 LCOR and will not be terminated on a date certain.

13 We also ask for the terms regarding upkeep,
14 insurance, and timing and knockout panels for construction
15 access to be amended as outlined in our Statement of Appeal.

16 With respect to providing perpetual and reliable
17 access over the alley and to parking, these obligations come
18 at no further cost to LCOR.

19 This relatively simple matter has been
20 unnecessarily drawn out due to the deficient easement
21 agreements and the failure of LCOR to work with its
22 neighbors.

23 We respectfully ask the BZA to exercise its appeal
24 authority to review the Zoning Administrator's decision with
25 respect to the PUD Order condition and make this simple fix.

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1 Thank you for your time and I'm available for any
2 questions.

3 VICE CHAIRPERSON JOHN: Thank you.

4 MS. MOLDENHAUER: Thank you so much. We now turn
5 to Mr. Cox for his testimony as a witness. Mr. Cox, I
6 believe you're on mute still. Mr. Cox is having some
7 technical difficulties and he's going to call in. His video
8 is obviously working -- here he goes, okay, never mind.
9 Thank you for your indulgence.

10 MR. COX: Thank you, I appreciate it and I
11 apologize, it just happened.

12 Good morning, my name is David H. Cox and I am
13 currently of counsel at the law firm of Jackson & Campbell
14 here in Washington. I have focused my private practice of
15 almost 44 years on real estate matters in the District of
16 Columbia. In that time, I've represented both buyers and
17 sellers of a variety of real estate interests including
18 office buildings, multi-family housing, and mixed use
19 projects such as the Watergate Complex.

20 I've also represented title insurers in
21 determining whether an interest in real estate may be bound
22 and insurable and either the dominant or servient estate
23 holders in the easement, when disputes erupt, when an
24 interest is not clearly stated, or the rights are not
25 described with sufficient detail for the specific project

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1 involved.

2 Much of my time is centered on the drafting,
3 enforcing, and interpreting of various legal documents
4 impacting real estate interests, including easements. I've
5 reviewed in excess of 400 easements and I've been involved
6 with drafting in excess of 100 easements.

7 I've been qualified as a real estate expert
8 witness in two D.C. Superior Court matters and I agreed, at
9 the request of Edens, to review the background documents and
10 the PUD Order and the related exhibits in this specific
11 matter.

12 When I'm starting to look at a situation like
13 this, based on my experience, I make sure that I have a
14 complete final version of any instrument along with any
15 associated documents like the emails and correspondence that
16 relate to the creation of the instrument. I try to have a
17 complete understanding of what the parties are or were at
18 least trying to accomplish by creating any instrument and the
19 estate and land being created.

20 I review the instrument as a whole, consider the
21 associated documents as providing context, and then, focus
22 on the detailed language used by the parties to the
23 instrument.

24 If, as in this case, the easement is being created
25 as part of a court or administrative order, I try to assemble

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1 the associated background documents like testimony or filings
2 to get a better understanding of what the parties or the
3 agency was trying to create through the final document being
4 reviewed.

5 As you're aware, easements are the functional
6 equivalent of deeds in that they create an interest in the
7 land owned by two parties and have a long-term effect on the
8 use and value of the affected properties.

9 As part of my specific analysis in this matter,
10 I was provided with the Statement of Appeal and the
11 referenced exhibits filed by Edens along with the DCRA pre-
12 hearing statement and the Brief in Opposition filed by LCOR
13 along with its referenced exhibits.

14 In particular, I reviewed the PUD case before the
15 Zoning Commission, the representations of LCOR as part of
16 that case related to the need for this easement in this
17 particular square that benefitted all the owners within that
18 square, and the language of the easement unilaterally
19 recorded by LCOR to see if the easement satisfied the various
20 concerns of the owners in Square 3, 5, 9, 1.

21 I should note that neither my law firm nor I were
22 involved in any of these matters and I was asked to review
23 the easement as an independent third-party with considerable
24 experience in drafting, reviewing, and analyzing easements
25 in D.C.

1 Based on my review, I can easily discern why LCOR
2 offered and the Zoning Commission was intent on creating an
3 easement for the benefit of the public and all the owners in
4 that square. There is no existing easement or public alley
5 in the square and creating one would help reduce street
6 traffic and parking as well as provide access for parking and
7 loading facilities and emergency vehicles.

8 LCOR noted in its submission that the proposed
9 easement will benefit all surrounding property owners and the
10 functionality would be enhanced by working with its neighbors
11 in the square. I noted in my review that both the Office of
12 Planning and DDOT publically supported the shared easement
13 as well.

14 If we can look at Slide 7, if that's available?
15 If that slide is not coming up, I'm going to go ahead.

16 The Commission expressly conditioned its approval
17 in its Order upon such an easement. The easement was to be
18 recorded and the other owners within the square, if they
19 elected to do so, were to be parties to the easement
20 agreement.

21 I'm advised that there were efforts made by both
22 sides and you've heard a description of them earlier, to
23 negotiate the terms. But LCOR unilaterally recorded its two
24 proposed forms of easement, which I'll just refer to as
25 easements, to satisfy the conditions imposed by the

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1 Commission.

2 In my opinion to a reasonable degree of legal
3 certainty, certain key terms of the LCOR easement simply do
4 not meet the conditions by the Order and violate basic
5 principles of real property law in several respects.

6 Why are they deficient? As echoed by DDOT in its
7 letter to the Zoning Administrator, the principle reasons why
8 the easement failed or the principle reason why the easement
9 fails is because it simply doesn't meet the fundamental
10 purposes of why the easement condition was imposed in the
11 first place, to create an efficient and reasonable private
12 alley network.

13 If any of the slides are available, this would be
14 a good time put one up.

15 The first deals with the perpetual issue. All
16 right, well, while there is no express condition that the
17 easement be perpetual, that is the usual and customary term
18 for permanent easements, both in D.C. and throughout the
19 United States.

20 Instead, the LCOR form has a term of 75 years.
21 While --

22 MS. MOLDENHAUER: Mr. Young, could you bring up
23 the slide, please? Sorry, I don't know if Mr. Young heard
24 your request for the slide.

25 MR. COX: Next one? Oh great, can you move on to

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1 the next one, please? Thank you very much.

2 So, this is the actual language in the easement
3 agreement that you're looking at. And, you'll note it has
4 a term for 75 years. And, while temporary construction
5 easements are certainly used to deal with short-term shared
6 access, this PUD created easement is no such creature. The
7 aberrational nature of such a term ultimately diminishes the
8 value of any affected property because its utility is
9 limited.

10 Title insurers and lenders will take note of the
11 limited term of this critical feature. They'll also take
12 note of the inconsistency in the document between the use of
13 the term perpetual in Section 3(a), which was actually the
14 correct term, and the 75-year term stated in Section 8(s)
15 which is the one at variance with good common sense and basic
16 principles of real estate.

17 It is clear from the PUD and the contextual
18 documents that only a perpetual easement would satisfy the
19 conditions. Getting this corrected is an easy fix.

20 If we can turn to the next slide? Thank you.

21 Second, the concept that one party retains the
22 right to unilaterally amend the instrument in an unrestricted
23 fashion is contrary to the basic principle of the law of
24 easements because an easement creates two interests in the
25 affected land, the dominant estate and the servient estate.

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1 If the servient estate holder, which is LCOR in
2 this case, could simply amend the easement at its whim, then
3 the supposed easement is simply illusory. The easement
4 should be corrected to be consistent with the estates and
5 land being created. Either party has the right to amend an
6 easement without the consent of all parties to that easement
7 and any such amendments must be reduced to writing and
8 acknowledged by the parties. And that is just standard
9 operating procedure not just in the District but throughout
10 the United States.

11 If we can turn our attention to slide ten, the
12 next slide, please? Thank you.

13 While it is usual and customary that parties would
14 share an easement will bear the proportionate obligation for
15 upkeep, repair, and replacement. That obligation is limited
16 to the truly shared aspects of the easement. It does not
17 include sharing costs for features or aspects that only
18 benefit one party.

19 The language selected by LCOR in Section 2(d) is
20 simply too broad and is a commercially unreasonable feature
21 of the easement. In short, the language simply needs to be
22 tailored to be more precise.

23 If we can turn to the next slide, please? Thank
24 you.

25 Fourth, well, again, it's not unusual to have some

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1 insurance requirements stated in the easement among shared
2 commercial entities, the language selected unilaterally by
3 LCOR is unnecessarily vague and could be misconstrued by
4 other parties, including lenders, as applying to all the
5 insurance requirements of an owner that is a party to this
6 agreement.

7 Some parties, and sometimes the insurance markets
8 themselves, depending upon the market, may favor deductibles
9 greater than \$25,000 for certain coverages.

10 If we can turn to the last slide? Thank you.

11 Fifth, while there is no express condition
12 addressing this topic, it is fairly implied and consistent
13 with established principles of the law of easements that the
14 easement was intended to support construction related
15 activities of the other parties within the square as they
16 begin and complete their development. Simply put, a mutually
17 agreed to easement should have been placed -- should have
18 been in place prior to the issuance of Certificate of
19 Occupancy to LCOR and its full creation was not to be
20 dependent upon the existence or timing of construction
21 activities by the dominant estate holder, that is, all the
22 other owners within the square.

23 As a consequence, Section 2©, with its definition
24 of, quote, participating adjacent owner, end quote, is
25 nonsensical and fords a fundamental purpose of why the

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1 easement is being created.

2 The desire for certainty dictates that the
3 easement be amended to expressly permit such use at the
4 outset and that an agreed upon form of easement be in place.

5 So, how is this particularly harmful to LCOR?
6 Well, for example, the limited duration -- excuse me, Edens,
7 excuse me, for example, the limited duration of this easement
8 will be noted and taken into account by title insurers and,
9 more importantly, by perspective lenders in the pricing of
10 risk attendant to a diminishing term of years and the
11 possible loss of an important access to the property. And,
12 that's if they get over the inherent language inconsistency
13 between the word perpetual and then having a stated term of
14 75 years.

15 Second, for purposes of attracting investors and
16 favorable financing, the retained right of life of LCOR to
17 amend unilaterally the recorded easement will likely be
18 viewed as creating a totally illusory right of access and
19 utility, and that's totally contrary to the letter and spirit
20 of the conditions imposed under the PUD.

21 Finally, anything that creates ambiguity in a
22 recorded instrument poses a risk of conflict and
23 enforceability along with spending major resources in
24 obtaining a final court order that can all be avoided by a
25 more careful drafting of a recorded instrument intended to

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1 affect estates and land for years to come. The fixes as I've
2 outlined are relatively easy and straightforward.

3 I thank you for your time and, if you have any
4 questions, I'll try and address them at this point. Thank
5 you.

6 VICE CHAIRPERSON JOHN: Thank you.

7 Ms. Moldenhauer, how much time do you have left?

8 MS. MOLDENHAUER: If the slide can be taken down,
9 Mr. Young? I just have a quick argument. I know that we
10 lost a few minutes because of the slides, but I'll walk
11 through my oral argument for you now.

12 VICE CHAIRPERSON JOHN: Okay, thank you.

13 MS. MOLDENHAUER: On the appeal, the Board steps
14 into the shoes of the Zoning Administrator pursuant to the
15 Zoning Regulations Subtitle X, 1100.1. Based on the facts
16 presented, it must be determined if the ZA has erred.

17 Here, we submit that, based on the PUD Order, the
18 specific findings and facts and conclusions of law referenced
19 in it, the PUD conditions, the background, and supplemental
20 communication from DDOT that the ZA erred in accepting the
21 easement and issuing a Certificate of Occupancy.

22 The Zoning Regulations under Subtitle A 303 set
23 forth obligations for compliance with conditions and orders.
24 Subtitle A 303.2 states specifically, if the order of the
25 Zoning Commission conditions the issuance of a building

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1 permit or a Certificate of Occupancy upon the recordation of
2 a covenant, then the purpose of Subtitle A 303.4 and 303.5
3 each term and condition in the covenant shall be treated as
4 a condition to the issuance of a building permit or a
5 Certificate of Occupancy.

6 That is the language that we wish for you to focus
7 on today. In reviewing this appeal, the question Board
8 Members must ask yourselves are, based on everything in the
9 record, do you believe the easement meets the obligation of
10 the PUD? Do you believe the ZA erred in complying with its
11 obligations under Subtitle 303?

12 We think this falls into three categories. One,
13 given Edens status as the abutting owner who worked with LCOR
14 during the PUD process and specifically benefits from the
15 shared alley, would you question the easement's consistency
16 with the condition? Would you ignore the fact that LCOR
17 engaged with Edens and exchanged terms of the easement back
18 and forth?

19 Then for LCOR to unilaterally conclude their
20 communication and unilaterally record something and now argue
21 that they have absolutely no obligation to work with the
22 adjacent property owner, which is directly in conflict with
23 the statements in the Zoning Commission and which is in
24 statements in the PUD Order.

25 This leads you to believe a review of the easement

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1 terms are necessary or the ZA didn't assert that he reviewed
2 the easement and found that it was acceptable. He asserted
3 that these are business issues and beyond his scope.

4 The second category, after hearing witness
5 testimony from Mr. David Cox in which he stated that his
6 professional experience is that, if a term is not stated, an
7 easement is assumed to be perpetual.

8 He also identifies a specific conflict in the
9 recorded document that needs to be resolved and the fact that
10 easements are typically signed by all parties. How would the
11 Zoning Administrator look at the easement with a term of 75
12 years that can be unilaterally changed at any period of time
13 and consider this to be consistent with the PUD?

14 Last, would you allow a proffered public benefit
15 that alleviates traffic, traffic concerns in a pedestrian-
16 friendly Union Market area to be diminished by an easement
17 that does not live up to the requirements of that public
18 benefit? Would you disregard DDOT's multiple letters to the
19 Zoning Administrator which provided DDOT's insight regarding
20 work that they did with LCOR to create this private alley as
21 a public benefit? And, DDOT specific statement that it did
22 not believe the easement was consistent with the PUD.

23 We submit that after asking yourselves these
24 questions, you will determine to affirm the appeal and at
25 least send this back to the Zoning Administrator for further

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1 review of the easement.

2 LCOR and the Zoning Administrator argue in their
3 submission that the express language of Condition A-5 does
4 not require the Zoning Administrator or the Board to look
5 beyond the words of Condition A-5.

6 I submit that Condition A-5 does, in and of
7 itself, obligate LCOR to grant a written easement to the
8 owners on the square and that this easement must be perpetual
9 and reciprocal thus entered into by all parties for the
10 purpose of creating this shared alley.

11 The Zoning Commission does not include every
12 single term or contract language into its condition. For
13 example, when subjecting a PUD to, let's say, affordable
14 housing covenants or a DOEE covenant, it doesn't include all
15 of that language. The Zoning Commission requires that the
16 Zoning Administrator comply with its requirement under
17 Subtitle A and confirm compliance with each potential
18 respective agency and then applies a general institutional
19 norm that it must be incorporated.

20 To require the Zoning Commission to include every
21 single term would result in an extraordinary cumbersome order
22 and is unnecessary.

23 Furthermore, the PUD Order is read
24 comprehensively. The Zoning Administrator is required to
25 only approve permits or Certificates of Occupancy that are

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1 consistent with the Order. Under Subtitle A, it says the
2 order, its terms and conditions.

3 LCOR in its pre-hearing statement submits that the
4 language of the PUD and the PUD condition, quote, does not
5 require the Zoning Administrator to review or approve the
6 substance of either easement. We disagree and believe the
7 Board should disagree as well.

8 LCOR wishes the Board to put blinders on and only
9 read the PUD condition A-5 as if it is a legal standalone
10 document. It is not. The Zoning Administrator is required
11 by the Zoning Regulations to ensure that a building permit
12 or subsequent Certificate of Occupancy is compliant with the
13 obligations of the PUD Order.

14 This Order here that we are discussing, 16-05 is
15 29 pages. It contains 61 filings of facts, including
16 reference exhibits, 12 conditions of law, a decision with 17
17 guidelines, conditions, and standards which are all subject
18 to its approval.

19 LCOR and DCRA should submit filings and present
20 arguments that wish to disregard and give zero value to this
21 comprehensive 29-page document which we believe shows the
22 underlying error.

23 The ZA must, pursuant to the Zoning Regulations,
24 affirm the Applicant has complied with the PUD Order. Here,
25 despite objections raised by an abutting property owner, and

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1 by DDOT, the Zoning Administrator stated that he would not
2 review the content of the easement. And, LCOR, the Applicant
3 in the PUD, asserts that the Zoning Administrator is not
4 required to.

5 We submit that clearly it is in violation of the
6 Zoning Administrator's obligations. And we ask the Board to
7 require the Zoning Administrator to conduct a full review of
8 the easement and confirm its compliance.

9 Last, we ask the Board to grant the appeal. And
10 granting the appeal does not require extraordinary measures
11 as LCOR has alluded to in their filing, but rather, is a
12 really easy fix. The Board has the authority to require DCRA
13 to enforce the PUD Order which is all we ask and require LCOR
14 to show proof of an amended easement.

15 On appeals, this Board typically reviews building
16 permits and you're looking at dimensions and your decisions
17 either affirming or denying such appeals actually could
18 require a property owner to go and have to now file an eight-
19 month BZA case. Right? Or potentially modify building
20 permits and substantially change a structure because of an
21 appeal decision.

22 Those such changes are hard and it requires
23 physical changes potentially to square footage. Granting
24 this appeal does not. All it requires is LCOR to amend a
25 recorded piece of paper, no physical changes to the building,

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1 no changes to the status quo, this is just a fix that is
2 simple but should not be diminished because of how
3 significant it is and how important it is and how complex it
4 is.

5 The Board has heard directly from Mr. Chowfla and
6 Mr. Cox of the long-term adverse impacts of the failure to
7 amend the easement now for Edens as well as for loading,
8 traffic, and pedestrian experiences in Union Market. Edens
9 has long worked to protect the Union Market area and asks
10 that the Board review this testimony.

11 We are now available for any questions and also
12 we reserve the right for rebuttal.

13 VICE CHAIRPERSON JOHN: Thank you, Ms.
14 Moldenhauer.

15 Mr. Young, how much time does the Appellant take?

16 MR. YOUNG: I believe around 35 minutes.

17 VICE CHAIRPERSON JOHN: Thirty-five minutes?

18 Okay, thank you very much. Are there any questions from the
19 Board?

20 Okay. And so, let's --

21 ZC CHAIR HOOD: Madam Chair?

22 VICE CHAIRPERSON JOHN: Yes?

23 ZC CHAIR HOOD: Madam Chair, I know I'm going to
24 have some questions, but I'll just wait until everyone
25 presents.

1 VICE CHAIRPERSON JOHN: Okay. So, I'll go to
2 DCRA. Mr. LeGrant, do you have any questions or cross
3 examination?

4 MR. GREEN: No, no questions, thank you.

5 VICE CHAIRPERSON JOHN: Okay. Mr. Freeman,
6 questions or cross examination?

7 MR. FREEMAN: I do, thank you, Madam Chair. I
8 have two questions and I'd ask if Mr. Young could pull up
9 Exhibit -- our presentation which is Exhibit -- or if you
10 have the Appellant's PowerPoint up, I guess their slide 7
11 which is really the crux of this case, it's a PUD condition.
12 Thank you.

13 So, my question for -- mainly to Mr. Cox, a couple
14 questions and a yes or no would be great. Number one, were
15 you involved in any discussions between Edens and LCOR?

16 MR. COX: No.

17 MR. FREEMAN: Were you involved in the underlying
18 PUD?

19 MR. COX: No.

20 MR. FREEMAN: Were you involved in any discussions
21 with the Zoning Administrator regarding this condition?

22 MR. COX: No.

23 MR. FREEMAN: Great. You use a number of phrases,
24 you used the words fundamental purposes, reasonable and
25 customary, standard operating procedures, commercially

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1 reasonable or unreasonable. Can you show me where those
2 words appear in this condition?

3 MR. COX: I don't know that the words, those exact
4 words appear in this particular condition.

5 MR. FREEMAN: Do any of those words appear in this
6 condition?

7 MR. COX: Well, in --

8 MR. FREEMAN: And that's a yes or a no.

9 MR. COX: Yes.

10 MR. FREEMAN: Where do the words reasonable and
11 customary appear in this condition?

12 MR. COX: You asked a series of different words.

13 MR. FREEMAN: Fair enough. Where does reasonable
14 and customary appear in this condition?

15 MR. COX: I sure hope that's implied.

16 MR. FREEMAN: Not implied.

17 MR. COX: No, I wouldn't expect you need to state
18 that. So, it probably does not appear, those particular
19 words.

20 MR. FREEMAN: So, I'll take it, no, it doesn't
21 appear.

22 MR. COX: Yes, yes, you --

23 MR. FREEMAN: Does the word commercially
24 reasonable appear in this condition?

25 MR. COX: No.

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1 MR. FREEMAN: Okay. I listened closely to your
2 testimony, but I think I heard you say twice this phrase,
3 while no express condition in the PUD condition requires X,
4 Y, and Z, did I hear you correctly that you said while no
5 express condition requires X, Y, and Z?

6 MR. COX: What I was talking about, the answer is
7 yes, and I was talking particularly like the perpetual nature
8 of the easement.

9 MR. FREEMAN: Okay, so --

10 MR. COX: The condition doesn't expressly state
11 that this easement that's supposed to run with the land is
12 supposed to be perpetual.

13 MR. FREEMAN: That answers my question. The
14 condition does not require what you just said in terms of a
15 perpetual term. Okay.

16 MR. COX: The precise language of the condition
17 does not.

18 MR. FREEMAN: Correct. I think you used that
19 phrase, while no express condition, a little later in your
20 testimony. What, but I missed what came after that. Could
21 you remind us what you said? You used it at least twice.

22 MR. COX: Yes, I'm not sure what you may be
23 alluding to, but it certainly, with respect to the duration,
24 the condition does not expressly provide what historically
25 and good common practice would include which is perpetual

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1 nature.

2 And, as I alluded to, there's actually an
3 inconsistency within the easement document itself between
4 being perpetual, which it recites at the beginning --

5 MR. FREEMAN: All right, but I'm asking about the
6 PUD condition.

7 So, my last question, you went through a lot of
8 slides and I know that you can negotiate easements. I think
9 you said you negotiated 400 or a 100 easements. Perfect.

10 Is there anything in this condition that requires
11 the Zoning Administrator to look at the terms of the
12 easement?

13 MR. COX: No, I --

14 MR. FREEMAN: Because that's what this case --

15 MR. COX: Actually, I don't know what the Zoning
16 Administrator's specific function is with respect to the
17 easement. In my judgment, the easement doesn't measure up
18 to what the conditions are but I have no idea what the Zoning
19 Administrator is supposed to do or not do. I'm not a zoning
20 lawyer.

21 MR. FREEMAN: So, how do you -- so, you don't take
22 a position that the Zoning Administrator erred, is that what
23 you're saying?

24 MR. COX: I don't know what the Zoning
25 Administrator's exact role is with respect to that process.

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1 MR. FREEMAN: Okay. Yes or no, do you -- have you
2 reviewed anything that suggests that the Zoning Administrator
3 erred?

4 MR. COX: If this --

5 MS. MOLDENHAUER: I believe he's already answered
6 the question and he said that --

7 MR. FREEMAN: Fair enough, fair enough, fair
8 enough, fair enough.

9 Last question, is there anything in this PUD
10 condition that specifically indicates what terms have to be
11 in the easement?

12 MR. COX: No, I mean, there's not, it doesn't
13 outline -- it doesn't go into that sort of detail, that is
14 correct.

15 MR. FREEMAN: Thank you. No further questions.

16 VICE CHAIRPERSON JOHN: Thank you. Who did I
17 miss? Ms. Rhodes from the ANC, are you still here?

18 (No response.)

19 VICE CHAIRPERSON JOHN: Okay. So, does the Board
20 have questions? I believe you mentioned you had a question,
21 Commissioner Hood?

22 ZC CHAIR HOOD: Yes. Have we heard from
23 everybody? So, Madam Chair, let me just ask this, are we
24 going to hear from the ZA as well?

25 VICE CHAIRPERSON JOHN: I don't know, but you can

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1 hold your questions if you would like.

2 ZC CHAIR HOOD: Yes, I wanted to wait until I hear
3 from everyone before I start, for what I'm going to throw out
4 there.

5 VICE CHAIRPERSON JOHN: Okay.

6 ZC CHAIR HOOD: Thank you, Madam Chair.

7 VICE CHAIRPERSON JOHN: Thank you. Mr. Blake?

8 MR. BLAKE: Yes, I just want -- a couple questions
9 really quickly for Mr. Cox as well.

10 You mentioned as Mr. Freeman pointed out a variety
11 of usual, customary, standard practice, et cetera, I just
12 wanted to be clear that can an easement, based in your
13 experience, can an easement have a term, can an easement be
14 granted without signatories and would adjoined to suffice to
15 do that, and is it possible to record an easement that can
16 be amended? Is it possible to do any of those things?

17 MR. COX: Number one, is it possible to have a
18 term that's less than perpetual, the answer is yes. We
19 usually see those in the, you know, short-term construction
20 projects and the like. But, you know, the overwhelming
21 majority of easements for purposes of creating long-term
22 access are perpetual.

23 Your second question, I think was, can you record
24 an easement that's only signed by one party but purports to
25 basically affect another? And, the answer is, no. Any time

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1 -- an easement has to be viewed, as I said before, like a
2 deed. And, there have to be really two parties to a deed and
3 there have to be at least two parties to an easement
4 agreement, technically. Because you're creating two
5 different interests in the real estate. One is the dominant
6 estate, the one that's benefitted by the easement and then
7 the servient estate which is the owner whose land is being
8 burdened, if you will, by that easement. So, it really has
9 to be bilateral and there really has to be a mutuality.

10 And then, this, I think your question is, can you
11 record an easement that is capable of being amended. And,
12 yes, I mean, typically, there would be language in any, you
13 know, even a deed, certainly, but certainly in an easement.

14 You would -- the customary language would be, you
15 know, this document can be amended in writing as long as it's
16 agreed to by both parties, it's signed, and then, you record
17 that amendment.

18 So, it is possible, it's just -- the missing
19 ingredient here is there's no mutuality.

20 MR. BLAKE: The ability to sign the joinder, does
21 that have the mutuality component?

22 MR. COX: It does. If, in fact, the terms were
23 agreeable to the party who has the right to join, and at
24 least in this square, there are at least two other parties
25 that could very well join, if the terms were acceptable, yes,

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1 they could join but the question -- that still begs the
2 question of whether the terms that you're asking them to join
3 are acceptable either to them or to lenders or title
4 insurers.

5 So, but, yes, that begins to introduce that topic
6 of mutuality but then you're back to the question of, well,
7 gee, do I want to join in an easement that has provisions
8 that I know my title insurer or lender are going to object
9 to?

10 MR. BLAKE: And then, I have one question for Ms.
11 Moldenhauer. In the easement agreement that you have -- that
12 has been filed, there were negotiations with other people in
13 the square or other owners in the square. I assume that they
14 -- did they agree to those terms? Did they have any
15 objections to those terms? I understand they're not part of
16 this, but are they in agreement with those terms? Have they
17 -- were they participating in devising those terms?

18 MS. MOLDENHAUER: So, Mr. Chowfla can maybe speak
19 a little more because there has been extensive back and forth
20 between JBG and LCOR and Edens. And, Mr. Chowfla can explain
21 that there have been communications back and forth where MOUs
22 were exchanged, proposed easements were exchanged, and then,
23 they were turned by counsel on either side, communicating
24 both -- either between Edens and JBG and then JBG with LCOR.

25 But one of the unique things here is that JBG,

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1 while a named party, is not an owner. They are, and Mr.
2 Freeman can confirm this, there's actually documentation in
3 the record that says this, Gallaudet is the owner of that
4 property and so, they had challenges, obviously, dealing with
5 the sign the document because they were not the owner.

6 Edens has always been the owner and is still the
7 owner and has the ability to sign and enter into this and to
8 mutually finalize terms with LCOR.

9 MR. FREEMAN: Yes, Mr. Blake, I can just add --

10 VICE CHAIRPERSON JOHN: Okay, this is a lot of
11 cross talk. Okay? So --

12 MR. FREEMAN: I'm sorry, Ms. Moldenhauer, can I
13 just add one thing to that?

14 VICE CHAIRPERSON JOHN: Go ahead.

15 MR. FREEMAN: I just want to be clear, we're not
16 making representations on behalf of JBG Smith. They're not
17 a part to this appeal. So, I'd rather not make any
18 assertions or representations about their views as it relates
19 to the appeal.

20 VICE CHAIRPERSON JOHN: Thank you.

21 Are you finished, Ms. Moldenhauer?

22 MS. MOLDENHAUER: If Mr. Blake would like Mr.
23 Chowfla, I think, could provide some additional dates and
24 communications personally from his personal experience. Mr.
25 Chowfla?

1 MR. CHOWFLA: Mr. Blake, would you like that?

2 MR. BLAKE: I think I'm okay for now, but I
3 believe probably need to follow up with that after we hear
4 from the other speakers, thank you.

5 MR. CHOWFLA: Okay.

6 VICE CHAIRPERSON JOHN: I have a question for Miss
7 -- oh, does any other Board member have questions?

8 (No response.)

9 VICE CHAIRPERSON JOHN: So, I have a question for
10 Mr. Cox. So, you described a situation with an easement
11 that's entered into by two willing private parties. So, what
12 we have here is slightly different. This is an order,
13 because the PUD is -- the order was issued by the Commission,
14 Zoning Commission, pursuant to a PUD Order which has the
15 force and effect of a regulation. And, it directed the party
16 to enter into an agreement for the benefit of these other
17 users on the block.

18 So, how is that type of arrangement different from
19 what you have described?

20 MR. COX: Yes, it is a little different, but
21 substantively, it really is the same. I mean, I understand
22 that the need for the easement was part of the Order and the
23 Order was, we want this easement to be there as a shared
24 alleyway basically for the benefit of, not only the parties,
25 but the public at large and to, you know, minimize certain

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1 disruptions.

2 But if you -- the condition also, and the Order,
3 makes it very clear this is to be a mutual arrangement. I
4 mean, that's in its essence, this is supposed to be a
5 reciprocal arrangement and that's consistent with basic
6 easement law. In other words, if what you're trying to do
7 is, you know, make sure that the parties have the document
8 that embodies what it is they are trying to achieve.

9 So, in this case, well, the burden is first, it
10 seems to me looking at the documents, the burden was first
11 on LCOR to, you know, begin that process. Ultimately, what
12 the Order and the condition talked about is that there be
13 reciprocal agreements and the other people are to join in
14 this.

15 So, it was always intended to be bilateral. It's
16 just that it was required as a condition of their being able
17 to, when I say they, LCOR, to use their and build on their
18 property is that they had to accomplish this task of getting
19 an easement that benefitted all the owners in the square and
20 that's right from the condition and the Order itself.

21 VICE CHAIRPERSON JOHN: Are you saying that the
22 Order did not do that?

23 MR. COX: I'm saying the easement did not do that.

24 VICE CHAIRPERSON JOHN: The easement did not do
25 that? It did not make the square, I'm sorry, make the alley

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1 accessible to the owners in the block if they paid the costs,
2 which you, I understand you don't think that's a good
3 description, as you say, it's too vague, but hasn't LCOR done
4 that?

5 MR. COX: I don't believe so. What would make it
6 mutual, and this goes back to the question that was asked
7 earlier about the joinder, if the terms were such that any
8 other owner within the block, excuse me, within the square
9 could join, then I agree with you. If it was mutually
10 agreeable and they joined, then we wouldn't be having this
11 discussion.

12 But the question is, that comes up is, really as
13 a commercial owner, you can't joint in an instrument that has
14 terms that you know are problematic. And so, no, I don't
15 think LCOR honored the condition of having an easement that's
16 recorded that could then be joined in, so it could truly be
17 mutual, when it had these flaws in it.

18 And, the flaws just, maybe it's because I deal
19 with it all the time, but some of these flaws are just so key
20 and fundamental to real estate law and easements, that, no,
21 I can't say that LCOR complied at all with that requirement.

22 VICE CHAIRPERSON JOHN: Okay. So, we're going to
23 way beyond the scope here. But thank you for your
24 discussion.

25 MR. COX: You're welcome.

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1 VICE CHAIRPERSON JOHN: So, my next question is
2 for Ms. Moldenhauer. And that goes to the status of the
3 Commission's Order as a regulation. And, what I'm trying to
4 understand is, what is the Zoning Administrator's Order --
5 authority to amend that Order? Because what you're asking,
6 in effect, is that the Administrator, by changing the
7 easement, or reading into the easement terms that were not
8 there would be amending the Zoning Commission's Order? And,
9 should your client have gone back to the Zoning Commission
10 to seek relief?

11 MS. MOLDENHAUER: So, I don't totally agree with
12 how you are phrasing this. I think I'd want -- no, two
13 things.

14 One, we're not asking the Zoning Administrator to
15 amend the condition. We're asking that the Board hold the
16 Zoning Administrator to his obligations under Subtitle A 3030
17 which require that he make sure that each condition and the
18 condition in the covenants. So, as I said, there is a point
19 on the PUD Order that includes many findings of facts that
20 identify that LCOR is supposed to be working collaboratively
21 with abutting owners and they failed to do so. And we
22 believe that the easement condition, A-5, read in concert
23 with everything as required under A 303, is not sufficient.

24 But to your second question about the ZA's
25 authority, so, the ZA has very limited authority to amend

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1 building permits or approvals once the Zoning Commission
2 issues an Order. There are specific sections in the Zoning
3 Regulations about his ability to do minor flexibility, giving
4 only 2 percent flexibility in certain instances.

5 And then, from there, there's also instances in
6 which he has the obligation, if he believes that a
7 substantial matter that goes to the underlying reason why the
8 PUD was approved is being changed, that he needs to send that
9 back to the Zoning Commission. It goes to questions of
10 whether it's a modification of consequence or a modification
11 of significance.

12 If the Zoning Administrator had, in his opinion,
13 any question that there were questions from potentially DDOT
14 or the abutting property owner, that this condition was maybe
15 not being complied with. He could have then said, I don't
16 know if this is a substantially consistent with the PUD
17 condition and this needs to go back to the Zoning Commission.

18 He didn't find that and we're not saying that
19 that's the case. We think that the Zoning Administrator
20 could, in and of himself, say, I need to look at this PUD
21 Order. I need to see that the PUD Order requires and has
22 references to the pre-hearing statement, has references to
23 this is a public benefit. It was a substantial part of a
24 public benefit package, literally quotes from LCOR in their
25 statement. And, I need to make sure that this was done

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1 correctly.

2 VICE CHAIRPERSON JOHN: Okay, all right. Thank
3 you.

4 MEMBER BLAKE: And, Vice Chair, just a quick
5 follow up.

6 So, Ms. Moldenhauer, to the extent that that did
7 happen, who then would make the decision that the Zoning
8 Administrator had satisfactorily read that and completed?
9 From what we're hearing, he has. What I'm asking you, what
10 would then -- where would be the person or what body would
11 then decide, you have read it adequately and you have -- it
12 met the test? Where would we -- how do we test that?

13 MS. MOLDENHAUER: Well, I think that these are
14 some of my questions on cross examination for the Zoning
15 Administrator. You know, trying to understand how he reviews
16 other conditions that require IZ Covenants and who determined
17 that that's sufficient?

18 There are requirements, Orders that require DOEE
19 Covenants, does the Zoning Administrator dive into those?

20 So, I think, you know, I think your question is
21 very appropriate and I look forward to kind of hearing from
22 the Zoning Administrator about how he typically does that.

23 And, you know, following up on that maybe with you
24 on rebuttal.

25 VICE CHAIRPERSON JOHN: Thank you. Let's move on

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1 to Mr. LeGrant. Mr. LeGrant, would you like to provide your
2 statement now?

3 MR. GREEN: Yes, Vice Chair, it's Green, by the
4 way.

5 VICE CHAIRPERSON JOHN: Green, oh, I'm so sorry.

6 MR. GREEN: Yes, that's okay. Thanks a lot very
7 much. Yes, we can begin.

8 You know, thanks, again, for everyone's time. You
9 know, good morning, members of the Board. And let's be very
10 clear, this appeal is based on not any genuine error by the
11 Zoning Administrator but by the Appellant's own
12 dissatisfaction with the easements.

13 And so I think if we frame that in that
14 perspective, much of the discussion has been based on the
15 easements themselves, not necessarily an issue by the Zoning
16 Administrator, so that's very clear.

17 A couple of things just at the outset, the issue
18 that the Appellant has raised is that the Zoning
19 Administrator refused to enforce the condition in Zoning
20 Commission Order 16-05.

21 And, two, the Appellant claims that the recorded
22 easements failed to comply with conditions set forth in ZC
23 Order 16-05. So, that's the basis of their challenge.

24 And, just to reiterate again, the Appellants
25 believe there are terms which the Zoning Administrator should

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1 have required the property owner include in the easements.
2 Again, unilateral authority to amend, the 75-year
3 termination, upkeep, insurance, timing of knockout panels,
4 and construction access, which is all articulated and in the
5 filings.

6 However, as has been noted, none of those terms
7 or conditions are expressly stated in the Zoning Commission
8 Order or in the Condition 5-A. Nor are they required by the
9 Zoning Regulations. Nor has the Appellant cited to any
10 provision in the Order or the Regulations in which the Zoning
11 Administrator failed to adhere to.

12 A couple of points before we get to the -- before
13 I ask the Zoning Administrator questions is that, the
14 Appellant points to DDOT reports in support of its position.
15 And, you know, with all due respect to DDOT, the reports
16 don't attribute any error to the Zoning Administrator.

17 In fact, they don't identify any particular
18 provision of the Order or a Zoning Regulation, but merely
19 say, provide aspirational requests about what they would like
20 to see in them. But, you know, including moving forward what
21 they would probably recommend when these come up in the
22 future. But, Again, there was no definitive statement that
23 there was an error by the Zoning Administrator.

24 Lastly, I want to bring this up, you know, when
25 you talk about closing, I think one of the issues is like

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1 from a pragmatic respect or even a policy perspective, if the
2 Board agrees that the Zoning Administrator erred and these
3 terms must be included, then is the Zoning Administrators
4 Office now required to look for these specific provisions
5 which -- that are articulated by the Appellant in this case
6 into all other easements that come out of the Zoning
7 Commission or in connection with a Zoning Commission case?
8 And I would argue no.

9 Are there other implied terms that now the Zoning
10 Administrator is required to somehow check for? I can
11 understand that there would be other Appellants who also may
12 be dissatisfied with easements coming out of other cases in
13 which they now want to attribute error to the Zoning
14 Administrator because they weren't included. And, quite
15 frankly, I think that's problematic from a general
16 perspective especially for the Zoning Administrator's Office
17 in general, but we'll get into that as we go forward.

18 And, the argument that the, lastly before we get
19 to the Zoning Administrator, I think there's some interesting
20 points made in the Appellant's position about the Zoning
21 Administrator failing to adhere to general institutional
22 norms or getting DDOT's great weight.

23 Again, as submitted in our filings, I don't think
24 any of that is either relevant or accurate in terms of (audio
25 interference).

1 VICE CHAIRPERSON JOHN: Can you hear us, Mr.
2 Green?

3 (No response.)

4 VICE CHAIRPERSON JOHN: We seem to have lost Mr.
5 Green. So, let's give him a couple seconds.

6 MR. LEGRANT: Madam Chair, I received an internal
7 message that my attorney, Mr. Green, is having some technical
8 difficulties and he's trying to get those fixed.

9 VICE CHAIRPERSON JOHN: Okay, thank you, Mr.
10 LeGrant.

11 So, let's take two minutes, that just means you
12 can turn off your video for two minutes. As soon as Mr.
13 Green comes on, we'll start again.

14 (Whereupon, the above-entitled matter went off the
15 record at 11:57 a.m. and resumed at 12:00 a.m.)

16 VICE CHAIRPERSON JOHN: Hello, Mr. Green.

17 MR. GREEN: Yes, sorry.

18 VICE CHAIRPERSON JOHN: That's okay.

19 MR. GREEN: Sorry about that, thank you. Can you
20 hear me now?

21 VICE CHAIRPERSON JOHN: Yes, I can hear you.

22 MR. GREEN: Okay, whenever you're ready, we can
23 move on, sorry.

24 VICE CHAIRPERSON JOHN: Ms. Moldenhauer? Let's
25 just wait for Ms. Moldenhauer. Mr. Freeman?

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1 MR. FREEMAN: I'm here.

2 VICE CHAIRPERSON JOHN: Okay, very well. Go
3 ahead, please, Mr. Green.

4 MR. GREEN: Sure, I mean, I'd like to, if that's
5 okay, to move this further just to ask that Mr. LeGrant, you
6 know, participate now. I'm going to call him, if that's
7 okay.

8 VICE CHAIRPERSON JOHN: Thank you.

9 MR. GREEN: Mr. LeGrant, you there? Can you hear
10 me?

11 MR. LEGRANT: Yes, I am.

12 MR. GREEN: Hi, Mr. LeGrant, sorry, can you please
13 state your name for the record, sir?

14 MR. LEGRANT: Yes, Matthew LeGrant, Zoning
15 Administrator, DCRA.

16 MR. GREEN: So, Mr. LeGrant, just to move this
17 into kind of -- can you please explain in your own words your
18 review of the easement as well as the determination of the --
19 whether or not they satisfied Condition 5-A of the Zoning
20 Commission Order at issue today? Can you talk about that?

21 MR. LEGRANT: Absolutely. So, when I was doing
22 the Certificate of Occupancy Application, the counsel for the
23 property, Mr. Freeman, contacted me about that application.
24 He had represented that his client had satisfied Condition
25 5-A of the subject PUD Order. He was asking for the C of O

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1 to be issued.

2 MR. GREEN: And so, what did you, when he reached
3 out to you, what did -- what was that communication and what
4 did you review?

5 MR. LEGRANT: Yes. So, there was an email and
6 attachments that were filed in this case before the Board.
7 Mr. Freeman had provided copies of the recorded easements
8 that, one, served the alley and the other, a garage entrance,
9 and a letter from the bordering property owner, JBG, that
10 although it did not -- it had executed the easements, it
11 didn't, because it did not have a ground lease for the
12 property, it nonetheless, expressed satisfaction with the
13 easements and the joinder mechanism.

14 MR. GREEN: And, in your review of the easements,
15 did you also review the PUD Order?

16 MR. LEGRANT: Yes, I did.

17 MR. GREEN: Okay. And, in review of your emails
18 and the attachments and the documents, did you draw any
19 conclusions? And, what were they?

20 MR. LEGRANT: Yes, yes, I was satisfied the
21 easements had met the condition, although JBG did not yet
22 execute the letter that was provided to me from JBG said they
23 were satisfied. And, because it allowed property owners that
24 had egress to the alley and the garage, that easement spoke
25 of the allowed property owners egress to the alley and to the

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1 garage, it also allowed the owners to execute a joinder
2 agreement.

3 MR. GREEN: And, now, I want to draw your
4 attention to some of the terms and provisions which the
5 Appellant said should have been included. And, I've already
6 read then off, I'll just read them briefly.

7 And the questions, so, let me ask you this,
8 unilateral authority to amend. Before I -- actually, let me
9 back up a second.

10 So, you read along with the conditions and terms
11 that the Appellant says you ought to have required the
12 property owner include in the easement, are any of these
13 terms or conditions that the Appellant cited, is that
14 anything that the -- have you ever had to require a property
15 owner include these terms or have you seen these terms before
16 prior to the appeal today in your --

17 MR. LEGRANT: No.

18 MR. GREEN: -- other easements? I guess that's
19 really the question is, are these terms you're familiar with
20 and have you reviewed these before that?

21 MR. LEGRANT: Right, right. So, yes, there's
22 suggestion that certainly things were implied or suggested,
23 but I am constrained from only enforcing the language of the
24 Order itself. And, you know, the language of the condition
25 of an Order, and that's the Condition 5-A, it lays out the

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1 requirement and any elaboration on that, and like inferred
2 or implied, that just goes beyond my authority.

3 MR. GREEN: Okay. So, and then, just to clarify,
4 so, the terms -- were any of the terms and conditions that
5 the Appellant says should be included, were they expressly
6 stated in the Condition 5-A in the PUD Order?

7 MR. LEGRANT: No.

8 MR. GREEN: To your knowledge, were they included
9 in the PUD Order at all, that that was something you had to
10 -- that was a condition that must be satisfied?

11 MR. LEGRANT: I don't believe so, but let me also
12 expand that, as counsel for the Appellant noted, PUD Orders
13 can be quite lengthy, and I think this one was recorded as
14 29 pages. And, sometimes, they contain findings of fact that
15 lay out some of the information that the Commission used in
16 doing its analysis and review.

17 But my office does not enforce findings of fact.
18 It enforces conditions of a PUD, of a respective order.

19 MR. GREEN: Okay. A couple more questions. So,
20 you know, after reviewing the easements, the terms and
21 conditions of the PUD Order, did you make a determination as
22 to whether the easement satisfied the condition 5-A?

23 MR. LEGRANT: I did.

24 MR. GREEN: And what was your determination?

25 MR. LEGRANT: Yes, I concluded that it did meet

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1 the requirement, that the condition was satisfied. At that
2 point, I felt I had no further basis to deny the application
3 for the Certificate of Occupancy.

4 MR. GREEN: And, lastly, just to reiterate, one
5 of the named entities which, in this case, in our filings is
6 JBG, was to execute the easement and they didn't. So, in
7 terms of that requirement, can you explain -- can you just
8 elaborate again or reiterate your position with regards to
9 their -- because that wasn't -- they did not execute it, how
10 you determine that it was satisfied?

11 MR. LEGRANT: No, no, the -- it was represented
12 by the counsel for JBG, which has the ground lease for that
13 portion of the block, that they were satisfied, even though
14 the easement had not yet been executed. They were satisfied.
15 And that was just, I think, information that the property
16 owner's counsel provided to me as background in this regard.

17 MR. GREEN: You know, I don't think I have any
18 further questions at this time. We'd be open to -- thanks
19 a lot, Mr. LeGrant, for your time. And then, we're open for
20 questions. I reserve the right to redirect or rebuttal, as
21 the case may be. So, thank you.

22 MR. LEGRANT: Thank you.

23 VICE CHAIRPERSON JOHN: Thank you, Mr. Green. So,
24 I have one quick question for Mr. LeGrant before we move on.
25 And can you explain what your authority is to modify a Zoning

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1 Commission Order, which has the force and effect of a
2 regulation? And does the Zoning Commission typically
3 indicate where it needs the Zoning Administration to have
4 discretion to implement a condition, for example?

5 MR. LEGRANT: Yes, thank you, Chairman John.

6 First of all, let me start with the regulations.
7 The regulations let -- set forth the parameters of my
8 authority to deviate from what the Zoning Commission has
9 approved and those are specified in I believe it's Section
10 A 304 of the Zoning Regulations and it sets forth the
11 parameters of certain margins that can be approvable.

12 Furthermore, the main portions of deviation from
13 a Commission Order, Commission Orders specify on a regular
14 basis that they're approved, including reference to a set of
15 plans, referred to as exhibits. And then, deviations from
16 those plans, Again, the Zoning Regulations themselves speak
17 to my authority and the Commission then specifically, as a
18 routine matter, they specify those parameters or my authority
19 to deviate from the approved plan set, you know, in the
20 language that I think all the Members of the Board today
21 know, you know, deviate from certain materials and things
22 that may have to be changed because of building code
23 requirements and so forth.

24 So, it's very specific in the order between the
25 regulations expressing my authority and then the deviation

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1 from plans. And, on that latter point, and I explained to
2 Applicants over and over and over Again, there's like three
3 buckets, if it's with my authority to allow certain
4 deviations from those plans, we can approve it
5 administratively.

6 Other deviations that are in, I call the moderate
7 extent my office can approve administratively with Notice to
8 the Commission, and there's a specified time frame that the
9 Commission gives oversight and it's placed on the Commission
10 agenda and they have a 45-day window to take that matter up
11 to see if they agree with that or not.

12 And finally, those things that are beyond my
13 authority of either the first two classes, and I have to tell
14 Applicants it's beyond my authority. You have to go back to
15 the Commission and seek a modification. And that, then, it's
16 beyond my office's authority, it has to go back to the
17 Commission for its own picking up of a modification.

18 VICE CHAIRPERSON JOHN: So, for this particular
19 easement, were you granted authority, Condition 5, were you
20 granted authority in the Commission Order, Zoning Commission
21 Order, to modify either the easement or any of the conditions
22 in the Order?

23 MR. LEGRANT: No.

24 VICE CHAIRPERSON JOHN: All right. So, thank you,
25 Mr. LeGrant.

1 So, I'm going to go to Mr. Freeman. I'm sorry,
2 Ms. Moldenhauer.

3 MS. MOLDENHAUER: Oh, sorry, I thought Mr. Freeman
4 would go first.

5 VICE CHAIRPERSON JOHN: No, I'm sorry, I made a
6 mistake, it would be you, Ms. Moldenhauer.

7 ZC CHAIR HOOD: Madam Chair, can I interrupt and
8 ask a question?

9 Are they doing questions now because I do have
10 some comments.

11 VICE CHAIRPERSON JOHN: Well, please go ahead,
12 Commissioner.

13 ZC CHAIR HOOD: Okay, thank you, thank you, Madam
14 Chair.

15 First, before -- I know I'm going to sound like
16 a broken record. Following me for years, you know, I've
17 always had a problem with these kind of cases when the Zoning
18 Commission, especially four out of five Members are still
19 there, and I understand from the legal folks on the call
20 that, I mean, on this proceeding is that, I understand
21 there's no conduit to come back because four of the five
22 Commissioners are still there.

23 I think this whole exercise is a waste of time.
24 I believe that the Zoning Commission Order is clear and I've
25 said this previously, that Order A-5 says exactly what's

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1 supposed to be done. Those three entities should be working
2 together, that's what the Commission direction was. I don't
3 know how we get here and waste the Government's time, we're
4 wasting everybody's time, I don't know how we get here. It
5 specifically says in there, and I don't care whether you're
6 LCOR, JBG, or Edens, it says specifically how you're supposed
7 to be working together.

8 And, I'm going to say this like I said the other
9 night at the hearing, I have a fundamental problem when we
10 can't get an access of something that is supposed to be
11 jointly done. And, I think Ms. Moldenhauer done make a
12 point, we need to work that out together. And, we've got
13 people right around the corner who are dying and we can't
14 even get an access right.

15 I think I have some serious problems with this.
16 I know this is not relevant, but I think, you know, it's hard
17 when we sit there at night on the Commission, and I think I
18 can speak for all my colleagues on the Commission, is when
19 we work to try to make things work and work them out and we
20 put them in the Order. We have hearings; we spend time at
21 night; and then, we come back here and this is what we end
22 up with.

23 We were trying to figure out another case
24 recently, who was going to get this case? Unfortunately, I
25 got it. But I can just tell you that I think this is a waste

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1 of the Government's time. I really do. Now, I know the
2 Board has a job to do, I'm willing to go down this line, but
3 I think we could be doing things more creative than this.

4 Now, Mr. LeGrant, let me ask you, typically when
5 we have problems like this, and I can't remember the
6 circumstances, you always send a letter or notify the Board.
7 And, I know, and I haven't heard from Mr. Freeman yet, but
8 I know we LCOR's probably not going to get involved, but it
9 got their approval, but they got their approval as far as I'm
10 -- as far as this Commission's concerned of being able to
11 work with the other property owners in tandem, the joinder.
12 That's how they got their condition as far as I'm concerned
13 in 2017 or whatever year it was, '15 or whatever.

14 But Mr. LeGrant, when -- why were we not notified?
15 Is this one of those cases where you usually let us know that
16 something's going on and, you know, kind of kick it back to
17 us to see if we need to do some refining or something?
18 Because I think the condition is clear.

19 MR. LEGRANT: Thank you, Commissioner Hood. So,
20 the instances where I do send things back to the Commission
21 and regularly do, is deviations from plans. There is a
22 specific wording the regulations that say, hey, if a plan
23 deviates by a certain parameter, then, although I'm
24 authorized to approve that administratively, I have to give
25 Notice to the Commission.

1 So, in those instances, and those that you and
2 your fellow Commissioners see that, you see it up on your
3 agenda and then you get oversight over my administrative
4 decision to say, oh, you can leave it alone or take it up,
5 which means my administrative decision would stand or, which
6 on occasion, the Commission has said, wait a second, we want
7 to take this up ourselves. So, I want to be specific, it's
8 deviations from plans, those are matters that go before the
9 Commission.

10 I would also add, if somebody came to me and said,
11 or let's say it's not related to the plans and I feel that
12 it's not within -- it's not in the condition, I tell them,
13 you know what? This is something that you have to go to the
14 Commission and file for a modification.

15 So, those have been scenarios in the past in which
16 matters that started with me, usually the building permit or
17 C of O stage that I sent things back to the Commission.

18 ZC CHAIR HOOD: Okay, thank you, Zoning
19 Administrator. I will say that, I know you have a hard job,
20 I'm not being critical. I've been around a while, you've
21 outlasted all other ZAs that I've been around, so I do know
22 that you have a hard job.

23 But I'll just tell you, I'm very perplexed at why
24 we're even here, why we're even here and I'll just leave it
25 at that. I think -- I'll just leave it at that and I'll

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1 follow this proceeding.

2 Thank you, Madam Chair.

3 VICE CHAIRPERSON JOHN: Thank you. So, I'm going
4 to suggest, Mr. Blake?

5 MEMBER BLAKE: Yes, I just have one question for
6 Mr. LeGrant while we have his attention, if you please.

7 MR. LEGRANT: Yes.

8 MEMBER BLAKE: And that question would be, in the
9 spirit of what Commissioner Hood was talking about, and you
10 had two potential signatories to the agreement and you
11 indicated that you got a note from JBG that said they were
12 comfortable, it couldn't sign, but you did have the other
13 component there which would be Edens who could have said
14 something and their signature would have certainly validated,
15 you did not get that. Can you explain why you did not feel
16 that was required?

17 MR. LEGRANT: Well, let me just say this, in terms
18 of the counsels for the other parties, first of all, they
19 were not required to sign the Order and I took the tact,
20 that, hey, this is between the parties, they need to work it
21 out.

22 Now, both the counsel for LCOR and Edens have, and
23 I'll be up front, I'll just be blunt, they have pointed
24 fingers at each other. You're not cooperating with this or
25 they're not cooperating with us. And, at that point, it's

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1 like, you know, they're saying that they're not returning
2 each other's phone calls and things. This is not the matter
3 that's before me, it's the matter between those parties.

4 MEMBER BLAKE: Okay, thank you.

5 VICE CHAIRPERSON JOHN: Okay, Ms. Moldenhauer?

6 MS. MOLDENHAUER: Thank you. So, Mr. LeGrant,
7 just kind of staying on some of the questions posed by Mr.
8 Hood, are you, I know you are familiar, you're familiar with
9 Section 703.5 of the Zoning Regulations? I don't know if you
10 want to pull them up since we can't like, we can't pass you
11 a copy of something these days, but I know we all have our
12 computers.

13 This describes what a modification of significance
14 is to a Zoning Commission Order. You're familiar with that
15 section?

16 MR. LEGRANT: I am.

17 MS. MOLDENHAUER: And does that section say a
18 modification to a contested Order or approval plans of
19 greater significance, a modification, and a modification of
20 consequence, and that they can be typically under Section
21 703.6. Zoning Regulations actually give you some examples.
22 Is an example of this a change to a proffer of public
23 benefit?

24 MR. LEGRANT: Yes, I believe so.

25 MS. MOLDENHAUER: So, do you believe that given

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1 the fact that one of the parties that was benefitting from
2 this public benefit then asserted that they did not believe
3 this public benefit to be sufficient, could you have, under
4 the Zoning Regulations, deferred this to the Zoning
5 Commission to say, I'm not getting involved, go defer this
6 to the Zoning Commission, let them deal with it because you
7 were trying to potentially change a proffered benefit and the
8 Zoning Commission needs to deal with this?

9 MR. GREEN: Madam Chair, can I just say I have to
10 object to the question in terms of relevance? It's very
11 clear what Ms. Moldenhauer said wasn't included. Now, she
12 wants to go to other sections of the code about what he could
13 have done. In this case, we're talking about what was done
14 or what was not done. So, I would object to the question in
15 general as irrelevant, actually, to the scope of this appeal.

16 MS. MOLDENHAUER: I would submit it's actually
17 still relevant. We believe that he still erred under the
18 same requirement. This is more of a question of remedy.
19 What could the Board do as an action today? They could
20 direct, depending upon what Mr. LeGrant says, this is an
21 option. So, I'm asking him if this is an option. I think
22 it's relevant.

23 VICE CHAIRPERSON JOHN: Can I respond to that?
24 Are you now introducing a new regulation into the appeal to
25 say that Mr. LeGrant violated this section? Can you repeat

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1 it for me because I don't know if that was in your initial
2 statement or in any of your slides. So, what's the name of
3 that section?

4 MS. MOLDENHAUER: First, I'm not changing our
5 appeal.

6 VICE CHAIRPERSON JOHN: Okay.

7 MS. MOLDENHAUER: I still believe that he erred
8 under A 303.

9 VICE CHAIRPERSON JOHN: A 303.

10 MS. MOLDENHAUER: I'm asking the question of what
11 we filed originally, I'm asking a question of what could be
12 the remedy here? And, how could the Board -- the Board,
13 obviously, can grant or deny an appeal and they can also step
14 into the shoes and say to the Zoning Administrator, we think
15 you erred and this is what we're going to recommend you to
16 do.

17 I'm asking him a question about, is this an option
18 that could be done? It has nothing to do with the substance
19 of the appeal.

20 VICE CHAIRPERSON JOHN: Ms. Moldenhauer --

21 MR. FREEMAN: Madam Chair?

22 VICE CHAIRPERSON JOHN: May I finish? Just one
23 second.

24 What is the regulation you just cited? I did not
25 get that.

1 MS. MOLDENHAUER: Yes, sorry. It is Subtitle Y
2 703.6.

3 VICE CHAIRPERSON JOHN: Which says?

4 MS. MOLDENHAUER: Sorry, I read in both 703.5 and
5 703.6.

6 VICE CHAIRPERSON JOHN: Okay. It says that the
7 BZA steps into the shoes of the Administrator? Is that the
8 section you're reading from?

9 MS. MOLDENHAUER: I'm sorry, no, that's A 303.

10 VICE CHAIRPERSON JOHN: Okay. I don't have the
11 section in front of me. What does it say?

12 MS. MOLDENHAUER: The hypothetical question of how
13 could this be resolved is under Section Y 703.5 and 703 --
14 sorry, Z, Z, I apologize, this is where it happens.

15 VICE CHAIRPERSON JOHN: Okay.

16 MS. MOLDENHAUER: I'm looking at two screens. Z,
17 the little D --

18 VICE CHAIRPERSON JOHN: Which -- just a second,
19 I'm just trying to see what section Ms. Moldenhauer is
20 stating and whether that goes to the authority of the BZA or
21 the authority of the ZA, which one are we talking about?

22 MS. MOLDENHAUER: It has to do with referrals to
23 the Zoning Commission and modifications to a PUD Order.

24 VICE CHAIRPERSON JOHN: Okay. All right, so, Mr.
25 Green, thank you. Mr. Green wanted to address this issue?

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1 MR. FREEMAN: Yes, I'm confused, because, one,
2 you're right.

3 VICE CHAIRPERSON JOHN: Mr. Freeman, I'm sorry.

4 MR. FREEMAN: There was no -- this is a whole new
5 line of argument, so I may be out of place here.

6 Number two, Section 04 talks about, if I as the
7 developer want to modify a condition of the Order, then I
8 will file that application with the Zoning Commission as the
9 Applicant asking the Zoning Commission to modify the
10 condition on the Order.

11 It in no way empowers the Zoning Administrator to
12 say, because Edens doesn't like something, you, LCOR, has to
13 file a Modification Application with the Zoning Commission.
14 I mean, it's totally taking this provision out of context.
15 But I don't know where we're going with this.

16 VICE CHAIRPERSON JOHN: Okay, thank you. So, Ms.
17 Moldenhauer, can you move on?

18 MS. MOLDENHAUER: Yes, with your indulgence, let
19 me go back and kind of walk through the questioning and, you
20 know, Mr. LeGrant opened the door and asked questions about
21 three buckets. Mr. LeGrant, did you talk about the three
22 buckets of how you look at an order?

23 VICE CHAIRPERSON JOHN: Ms. Moldenhauer, what he
24 said was that he would refer things to the Commission. What
25 is the question that you want to ask?

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1 MS. MOLDENHAUER: When a PUD public benefit is
2 changed, does it get referred to the Commission?

3 VICE CHAIRPERSON JOHN: Okay. Mr. LeGrant, can
4 you answer that?

5 MR. LEGRANT: The basic answer is, if I had, in
6 this case or another case, felt that the public benefit had
7 changed, I could tell the property owner, they'd have to go
8 seek a modification.

9 It was my judgment that this was not the case
10 here.

11 VICE CHAIRPERSON JOHN: Next question?

12 MS. MOLDENHAUER: As the Zoning Administrator, you
13 -- it is part of your purview to review permit plans to
14 confirm compliance with a PUD Order?

15 MR. LEGRANT: Yes.

16 MS. MOLDENHAUER: And when you're reviewing those
17 permit plans, how do you confirm that like the FAR and the
18 height are compliant? Where is that found in an Order.

19 MR. GREEN: Just objection, in terms, again, on
20 terms of relevance. We're talking about the specific issue
21 on appeal, we're not talking about FAR and other aspects of
22 --

23 MS. MOLDENHAUER: I'm trying to lay a foundation.

24 MR. GREEN: May I please finish the objection and
25 let the -- can I just finish? That it's absolutely

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1 irrelevant to what is at issue. Thank you.

2 VICE CHAIRPERSON JOHN: Thank you. Ms.
3 Moldenhauer, could you please ask the question that you want
4 Mr. LeGrant to answer? It's a long day, we have two appeals.
5 We can't do this, please ask the question.

6 MS. MOLDENHAUER: So, more directly, do you look
7 at the findings of facts and exhibits that are referenced in
8 there to confirm FAR and height and other documentation in
9 an Order?

10 MR. GREEN: Same objection.

11 VICE CHAIRPERSON JOHN: Please move on, Ms.
12 Moldenhauer.

13 MS. MOLDENHAUER: Mr. LeGrant testified
14 specifically that he does not look at the findings of facts,
15 and only the conditions. I think that this is very important
16 to the elements of this case.

17 VICE CHAIRPERSON JOHN: Would you ask the specific
18 question with respect to Condition 5? That's what's before
19 the Board. You should be trying to help the Board to
20 understand your case. This is not helpful.

21 MS. MOLDENHAUER: So, Mr. LeGrant, when you're
22 looking at a condition, in this condition, are you looking
23 at the overall PUD to understand what's happening and when
24 you reference an alley, how did you understand what alley it
25 referred to?

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1 MR. GREEN: Objection in terms of the scope of the
2 question, including it's compound and --

3 MS. MOLDENHAUER: I'm trying to race along and if
4 you keep on objecting, this is --

5 VICE CHAIRPERSON JOHN: Ms. Moldenhauer --

6 MR. GREEN: Ms. Moldenhauer, respectfully, are you
7 arguing with me? But I'm still trying to make the objection.
8 So, I would just ask you to pause because I will to hear your
9 answer and as well as the Board.

10 But I would object in terms of the scope of the
11 question as well as how it has -- can she focus her question
12 as to something that's relevant? Thank you.

13 VICE CHAIRPERSON JOHN: Okay, let's all take a
14 deep breath. Ms. Moldenhauer, I'm going to allow the
15 question, a little bit of latitude. Ms. Moldenhauer, could
16 you please refine your question?

17 MS. MOLDENHAUER: When you look at Condition A-5,
18 it refers to an alley. How do you understand the context of
19 what that means?

20 VICE CHAIRPERSON JOHN: And, what's the relevance
21 of that question, Ms. Moldenhauer?

22 MS. MOLDENHAUER: I'm asking the Zoning
23 Administrator if he read the entire Order? And, does he read
24 the entire Order?

25 VICE CHAIRPERSON JOHN: So, answer that question,

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1 please, Mr. LeGrant. Did you read the entire Order?

2 MR. LEGRANT: Yes.

3 VICE CHAIRPERSON JOHN: Okay. What's your next
4 question?

5 MS. MOLDENHAUER: An, do you read, then, all of
6 the findings of facts and understand the conditions as they
7 relate to the entire Order?

8 MR. GREEN: Objection. He already answered that
9 he read the entire Order. She's just repeating the question.

10 MS. MOLDENHAUER: I'm asking the question about
11 a condition. How does he understand the condition if he
12 doesn't understand what's happening in the case?

13 MR. GREEN: He just said he read the order.

14 VICE CHAIRPERSON JOHN: Okay, the Board has two
15 appeals today, so please limit your cross examination and
16 questions to the issue. The issue is Condition 5. What were
17 the elements of Condition 5? And, what was the error that
18 Mr. LeGrant committed? And, what was the Regulation he
19 violated?

20 MS. MOLDENHAUER: Mr. LeGrant, under A 303
21 requires that you look at the whole Order. You said that you
22 read the Order, correct?

23 MR. LEGRANT: Correct.

24 MS. MOLDENHAUER: Did you not find sections of the
25 filing of fact and exhibits conflicting with your

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1 interpretation?

2 MR. LEGRANT: No, I did not.

3 MS. MOLDENHAUER: Did you not find your
4 determination that that there was no need to have a mutual
5 agreement among the parties not conflicting with findings of
6 fact and exhibits referenced in the Order?

7 MR. LEGRANT: If there has been a requirement for
8 a mutual agreement between the parties, the Commission would
9 have put it in the language of the condition.

10 MS. MOLDENHAUER: And do you not read the word
11 reciprocal to require a mutual understanding?

12 MR. LEGRANT: That was not a specific requirement
13 of the condition.

14 MS. MOLDENHAUER: So, do DOEE conditions require
15 them to occur perpetually?

16 MR. GREEN: Objection, what does a DOEE condition
17 perpetual have to do with Condition 5-A? Objection,
18 relevance.

19 MS. MOLDENHAUER: It is an example, I'm asking a
20 question.

21 MR. GREEN: It's a hypothetical, same objection.

22 VICE CHAIRPERSON JOHN: Okay. Can you rephrase
23 that, Ms. Moldenhauer? How much more -- how many more
24 questions do you have, Ms. Moldenhauer?

25 MS. MOLDENHAUER: A few. So, when reviewing a

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1 condition as the Zoning Administrator, do you ever look to
2 agencies to assist in confirming compliance?

3 MR. GREEN: Objection. Confirm -- objection,
4 confirming compliance with what? Please clarify?

5 MS. MOLDENHAUER: Confirm in compliance with the
6 condition? The Zoning Administrator is here on behalf of
7 providing his global review. He stated that this is what he
8 does. I'm asking him how he does it. I'm asking him how he
9 does it is not irrelevant.

10 MR. GREEN: It's a genuine question. What
11 condition of 5-A was he supposed to refer to another agency?
12 Objection.

13 VICE CHAIRPERSON JOHN: Can you refine that
14 question, Ms. Moldenhauer?

15 MS. MOLDENHAUER: Under Condition 5-A, do you look
16 to the findings of fact that reference that LCOR and Edens
17 and JBG were all supposed to be working together
18 collectively?

19 MR. GREEN: Objection.

20 MS. MOLDENHAUER: Collaboratively?

21 MR. GREEN: Objection, that's not what 5-A says,
22 relevance.

23 MS. MOLDENHAUER: Five-A references the owners.
24 Who are the owners, Mr. LeGrant?

25 MR. LEGRANT: The owners on the square?

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1 MS. MOLDENHAUER: The owners on the square?

2 MR. LEGRANT: There is your client, Edens, it's
3 LCOR, and there is Gallaudet University has a ground lease
4 with JBG.

5 MS. MOLDENHAUER: Do ground leases, are they
6 owners or are they simply ground leases?

7 MR. GREEN: Objection, relevance.

8 MS. MOLDENHAUER: It's relevant as to how could
9 they the document? It's very relevant.

10 MR. GREEN: No, it's -- we're still -- I still
11 have an objection, Vice Chair.

12 VICE CHAIRPERSON JOHN: Mr. Green? Mr. Green,
13 let's not do this crosstalk. What is the question concerning
14 JBG/Gallaudet? Are you suggesting, Ms. Moldenhauer, that JBG
15 or the owner are not represented in the easement?

16 MS. MOLDENHAUER: There's two different terms I'm
17 trying to understand. There's the owners and then there's
18 a separate reference to a JBG entity. I'm trying to
19 understand and get Mr. LeGrant to testify as to his
20 understanding of the difference between the two.

21 VICE CHAIRPERSON JOHN: And what is the relevance
22 --

23 MR. GREEN: Exactly.

24 VICE CHAIRPERSON JOHN: -- to whether or not the
25 easement makes Mr. LeGrant complied with the easement?

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1 MS. MOLDENHAUER: It has to do with his direct
2 testimony that he earlier said that JBG was satisfied and,
3 thus, he felt that he could approve. I'm curious if JBG is
4 an actual owner?

5 VICE CHAIRPERSON JOHN: Okay. Mr. LeGrant, can
6 you answer that question? Is JBG an actual owner?

7 MR. LEGRANT: JBG holding a ground lease is
8 empowering in that that lease with the owner to take certain
9 actions on behalf of the owner. That is -- was my
10 assumption.

11 MS. MOLDENHAUER: And do you have documentation
12 that that ground lease was executed or any way that could
13 make that assumption?

14 MR. FREEMAN: Ms. Moldenhauer, I will object and
15 I will respectfully object.

16 Madam Chair, the condition which we keep kind of
17 adding words to and paraphrasing and not citing correctly
18 doesn't say anything about ground lease. It doesn't say
19 anything about ownership. It says, joinder and related
20 easement to be recorded by the Applicant and JBG 6th Street
21 Associates, LLC.

22 So, it specifically says JBG. So, I'm not --

23 MS. MOLDENHAUER: Mr. Freeman, it actually defines
24 owner. I'm trying to understand who owners are.

25 VICE CHAIRPERSON JOHN: Excuse me.

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1 MR. FREEMAN: Not JBG, it's your client.

2 MS. MOLDENHAUER: I'm not asking you, I'm asking
3 Mr. LeGrant.

4 VICE CHAIRPERSON JOHN: Let's have a little
5 decorum.

6 Okay, let's take five minutes, no, two minutes.
7 I'm going to turn my video off so everyone can collect
8 themselves.

9 (Whereupon, the above-entitled matter went off the
10 record at 12:36 p.m. and resumed at 12:27 p.m.)

11 VICE CHAIRPERSON JOHN: Ms. Moldenhauer, you may
12 continue, please.

13 Mr. Green, are you back?

14 MR. GREEN: Yes, ma'am. Can you hear me? Sorry.
15 Can you hear me?

16 MR. LEGRANT: Yes.

17 MR. GREEN: Okay, sorry. I'm down there.

18 VICE CHAIRPERSON JOHN: You may continue, Ms.
19 Moldenhauer.

20 MS. MOLDENHAUER: Mr. LeGrant, did you engage in
21 conversations with Edens' counsel, myself, in connection with
22 this decision?

23 MR. LEGRANT: Yes.

24 MS. MOLDENHAUER: And you understood Edens'
25 counsel in this conversation, that he was the budding

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1 property owner? Edens.

2 MR. LEGRANT: Yes.

3 MS. MOLDENHAUER: Did you believe Edens to be a
4 beneficiary of the shared alley?

5 MR. LEGRANT: Yes.

6 MS. MOLDENHAUER: Did you understand the shared
7 alley to be a public benefit proffered in the PUD?

8 MR. LEGRANT: Yes.

9 MS. MOLDENHAUER: Did Edens reference sections of
10 the finding of fact and exhibits of the findings of fact that
11 referred to, quote, the private alley will also be shared by
12 the adjacent owners and will be shared with adjacent owners
13 --

14 MR. GREEN: Objection. Can I object really
15 quickly? What is the question? Legitimately. You just read
16 off an email, so what's the question?

17 MS. MOLDENHAUER: It wasn't an email. I was
18 trying to engage in a conversation to try to get to a certain
19 point and then finish this up. They typically provide just
20 a little bit of decorum to have get to the point.

21 MR. GREEN: I'm asking what the question is. It's
22 a legitimate question.

23 VICE CHAIRPERSON JOHN: Ms. Moldenhauer, Mr.
24 Green, and Ms. Moldenhauer. I'm not going to do this today.
25 Ms. Moldenhauer, we don't have to play 50 questions. Please

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1 just ask a question. This is the Board. Five people can
2 figure out what's going on --

3 MS. MOLDENHAUER: Was it in your opinion that the
4 Applicant was not required to work --

5 VICE CHAIRPERSON JOHN: Can you get to the point?

6 MS. MOLDENHAUER: Oh, sorry. Can you hear me?

7 MR. LEGRANT: Yes.

8 MS. MOLDENHAUER: Okay. Is it your interpretation
9 that the Applicant was not required to work collaboratively
10 or jointly with Edens?

11 MR. LEGRANT: Well, I wouldn't add the word,
12 collaboratively. It was between parties to work together,
13 I understand that.

14 MS. MOLDENHAUER: And you accepted that the
15 confirmation that JBG was satisfied but knowing that Edens
16 was not?

17 MR. LEGRANT: It was wording of the condition.
18 I can point out the section if you'd like, of the condition.
19 In the middle of the condition, sub point two, joinder into
20 the related agreement shall be recorded by Applicant and JBG
21 6-3 Associates LLC right there.

22 MS. MOLDENHAUER: Despite the fact that DDOT and
23 the Agency and other sections in the findings of fact in the
24 record referenced that all three parties were supposed to be
25 working together, you interpreted this to require only party?

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1 Only one non-owner?

2 MR. LEGRANT: Because that's what the condition
3 says.

4 MS. MOLDENHAUER: No further questions.

5 (Pause.)

6 VICE CHAIRPERSON JOHN: Thank you. Does the Board
7 have any questions before we move on?

8 Okay, Mr. Freeman, would you please go ahead.

9 MR. FREEMAN: I did have a couple of quick --
10 you're going in and out, Madam Chair.

11 I have a couple quick questions. Hopefully, it
12 should be quick.

13 Mr. Young, could you please pull up -- let's go
14 to our exhibit -- I think it's Exhibit 32 in the record. I
15 think it's important, again, to make sure we're looking at
16 what the condition actually says.

17 Mr. Young, I'm looking for Exhibit 32 in the
18 record. I think it's Slide 3 of Exhibit 32. Thank you.
19 Slide 3. Thank you.

20 Again, this is the condition we're talking about.
21 Mr. LeGrant, a couple quick questions for you. Yes or no is
22 completely fine. Do you see anything in this condition that
23 requires you to assess whether the term of the easement is
24 appropriate? Or the duration of the easement is appropriate?

25 MR. LEGRANT: No, there's no specification of term

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1 or length of time.

2 MR. FREEMAN: Thank you. Do you see anything in
3 this easement that requires you to assess whether to upkeep
4 provision of the easement is appropriate?

5 MR. LEGRANT: No.

6 MR. FREEMAN: Do you see anything in this
7 condition that requires you to assess whether the insurance
8 provision of the easement is appropriate?

9 MR. LEGRANT: I'm sorry. Repeat the last --

10 MR. FREEMAN: Whether the insurance provision of
11 the easement is appropriate.

12 MR. LEGRANT: No.

13 MR. FREEMAN: Do you see anything in this easement
14 that requires you to assess the reasonableness of the timing
15 ??? of knockout panels?

16 MR. LEGRANT: There's mention of knockout panels,
17 but not the timeframe.

18 MR. FREEMAN: Right. Is there anything in this
19 condition that requires you to make sure that DDOT is happy
20 with the terms of the easement?

21 MR. LEGRANT: No, there's no reference to DDOT.

22 MR. FREEMAN: Thank you. Is there anything in
23 this condition that requires you to make sure that other the
24 appellant, who is Edens or the owner, that they are happy
25 with the terms of this easement?

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1 MR. LEGRANT: No.

2 MR. FREEMAN: Last question. Is there anything
3 in this condition or any other condition that you have seen
4 that authorizes you to add to or add requirements that are
5 not in this language? Is there a finding of fact that says,
6 Zoning Administrator, you can make sure the easements are
7 mutually acceptable to everybody. Is that anywhere in this
8 condition or any place in the order?

9 MR. LEGRANT: Not that I'm aware of.

10 MR. FREEMAN: Thank you.

11 No further questions.

12 VICE CHAIRPERSON JOHN: Thank you, Mr. Freeman.

13 Does the Board have any questions before I ask Mr.
14 Freeman to present his testimony?

15 Commissioner Hood, is your hand up?

16 (No response.)

17 VICE CHAIRPERSON JOHN: Okay. Please go ahead,
18 Mr. Freeman.

19 MR. FREEMAN: Mr. Young, if you could pull that
20 Exhibit 32 back up. Slide 2. This is Slide 3. If you could
21 go to Slide 2, that'd be great.

22 I'll start with the standard of review here. In
23 order to win this appeal, the Appellant has to demonstrate
24 that the Zoning Administrator either did something that he
25 was not authorized to do or did not something that he was

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1 required to do. It's the Appellant's burden of proof to
2 demonstrate that.

3 How do we figure out if the Zoning Administrator
4 erred? We do that by looking at the PUD condition. Not kind
5 of what people think or what DDOT thinks or expert thinks.
6 But actually what the PUD condition says.

7 You've seen that the Appellant's goal is to say
8 Zone Administrators got to look at everything, but they don't
9 really want to focus on what the condition says.

10 Let's go to the next slide. Let's walk through
11 what the condition actually says and how the Applicant
12 complied with that condition. Long condition, so we divided
13 it into parts. There's essentially five parts.

14 Next slide, please.

15 The first part says the Applicant shall construct
16 a service alley segment running north-south across the
17 property, a related curb cut and a ramp as shown on these
18 pages, and it's referenced in an exhibit. It doesn't
19 reference a finding of fact. It doesn't reference anything
20 else.

21 LCOR constructed the service alley segment,
22 constructed the curb cut on Morse Street, constructed the
23 ramp into the entrance. There's nothing there today that
24 will block or impede anyone from utilizing the alley or the
25 ramp or the curb cut. So today, there's no impediments to

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1 anyone using those facilities.

2 Next slide, please.

3 MS. MOLDENHAUER: Objection. Evidence not in the
4 record that actually with conflicts with evidence in the
5 record.

6 MR. FREEMAN: I'm sorry. There's nothing that --

7 VICE CHAIRPERSON JOHN: Ms. Moldenhauer, please
8 do not do that.

9 MS. MOLDENHAUER: I'm stating an objection. Mr.
10 Green has stated multiple objections during my testimony.

11 (Simultaneous speaking.)

12 MS. MOLDENHAUER: I'm just stating one objection
13 for the record.

14 VICE CHAIRPERSON JOHN: So then you make an
15 objection, then I will rule on the objection. Continue. You
16 can cross examine later or ask questions, whatever.

17 Go ahead, please, Mr. Freeman.

18 MR. FREEMAN: So the second part, the Applicant
19 shall permit other property owners on the block bounded by
20 Morse, 5th, Neal, and 6th to share the alley for purposes of
21 reciprocal ingress and egress, loading and emergency access
22 to such areas upon such owners. In this sentence, owners
23 refers to the Appellant.

24 Extension of the alley so that it is accessible
25 from their respective property and joinder into the related

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1 easement agreement to be recorded by the Applicant, i.e.,
2 LCOR and JBG in accordance to the terms thereof.

3 LCOR recorded an alley easement in their land
4 record. I think we all agree to that. The easement
5 references a PUD order that grants access to the alley. It
6 allows other parties to join by executing the joinder in an
7 assumption agreement.

8 I think what you've heard incorrectly throughout
9 is that this condition requires the Applicant to enter into
10 an easement with the Appellant. It does not. It requires
11 the Applicant, LCOR, to enter into an easement with JBG Smith
12 and Edens can join that easement that has been negotiated
13 between LCOR and JBG Smith. That's what the order says.

14 It doesn't say that LCOR has to negotiate an
15 agreement directly with Edens. That joinder and assumption
16 is made available to anyone, including the Appellant.

17 Next slide.

18 Part 3. The Appellant shall permit JBG Smith and
19 any other owners who may access their parking garage through
20 the garage entrance to share a garage entrance, so it's a
21 separate easement. There's an alley easement, there's a
22 garage easement.

23 Completion of the parking garage, which is
24 accessible and joinder, again, into a related easement
25 agreement to be recorded by the Applicant and JBG Smith, not

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1 Edens, in accordance with the terms thereof.

2 LCOR recorded the garage easement. The easement
3 specifically refers to the PUD order. Grants access to the
4 garages and allow other property owners to join that easement
5 pursuant to the joinder and assumption, including the
6 Appellant.

7 Next slide.

8 In the event that an owner constructs a parking
9 garage that is not accessible to the entrance due to knockout
10 panels, such owners shall be permitted to share the alley for
11 ingress and egress to such parking garage, condition upon
12 such owner joinder into the related easement. Again, joinder
13 is the key word here.

14 I'll just jump to our bullets. Again, the alley
15 easement includes a joinder and assumption, and an owner is
16 able to join that document.

17 Next slide, please.

18 Cost of maintenance and repair of the areas
19 subject to such easements may be allocated proportionally
20 based upon the relative size, the type of use, both easements
21 include an Exhibit C that address cost of upkeep and
22 participated adjacent owners pro rata share costs are
23 allocated based on a specific formula.

24 Next slide, please. This is favorite slide.

25 Here's the crux, right. Here's what this appeal

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1 boils down to. The Appellant has to say the Zoning
2 Administrator that he didn't do something that he was
3 required to do or that he was required to do something that
4 he didn't do.

5 The PUD condition nowhere requires the Zoning
6 Administrator to review or approve the terms of either
7 easement. The PUD condition nowhere does not require the
8 Zoning Administrator to determine that the easement satisfy
9 the, quote-unquote, intent of the PUD order.

10 The PUD condition does not provide any specific
11 terms that must be included in either easement. I would add
12 a point here. We've heard the Appellant say the Zoning
13 Administrator has to review the order. He's got to review
14 the findings of facts. He's got to look at the record. He's
15 got to look at the exhibits.

16 I haven't seen anything in this record yet that
17 they specifically point to that says the Zoning Administrator
18 has to review the terms of the easement. They haven't
19 pointed to anything yet. This appeal has been pending since
20 August that specifically says he's got to do any of this
21 stuff that they're claiming he was required to do. Today,
22 they just skipped over the order. They didn't want to talk
23 about that.

24 Number four, the PUD condition does not require
25 the Zoning Administrator to confirm that other property

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1 owners in the block approve the terms of the easement.
2 That's essentially what they're asking you to do.

3 They're essentially saying, Zoning Administrator,
4 go back and make sure that everybody loves the terms of this
5 easement before you can issue a Certificate of Occupancy.
6 The PUD condition does not identify the Appellant as the
7 required party to the easement.

8 Again, the only required party's signatory is JBG.
9 They can join a joinder, which is a separate document. The
10 PUD condition does not require the Zoning Administrator to
11 consult with DDOT or to confirm that DDOT approves the terms
12 of the easement.

13 The PUD condition does not require the easement
14 to be negotiated with, approved by, or otherwise address any
15 specific terms for the benefit of the Appellant. I would add
16 specific business terms of the Appellant because that's
17 really what we're talking about, the business terms at issue
18 here, and using this process to get leverage on business
19 terms.

20 Last but not least, the PUD condition does not
21 provide any language authorizing the Zoning Administrator,
22 respectfully the BZA, or any other entity other than the
23 Zoning Commission to add to, modify, or otherwise change the
24 language of the PUD condition.

25 Here's what the appellant is asking you to do,

1 BZA. The BZA should -- I'm paraphrasing. They're asking you
2 to do this. They're asking you to impose a requirement on
3 the Zoning Administrator to review each provision of the
4 easements.

5 They're asking you to make sure that the Zoning
6 Administrator ensures that each provision is acceptable and
7 beneficial to the appellant. They're asking you to make sure
8 that the ZA gets the DDOT approval of the Zoning
9 Administrator's decision. And they're saying if Edens and/or
10 DDOT do not approve the terms of the easement, then the
11 Zoning Administrator can't issue a Certificate of Occupancy.

12 By the way, the Certificate of Occupancy has been
13 issued. People live in the building, so the request to put
14 the Certificate of Occupancy on hold, not sure what that
15 means at this point. I could go on, but given the time, that
16 concludes our presentation. It's actually pretty
17 straightforward and simple. Thank you.

18 VICE CHAIRPERSON JOHN: Thank you.

19 Does the Board have any questions?

20 ZC CHAIR HOOD: Yes, Madam Chair. I do have a
21 question.

22 Mr. Freeman, I noticed that you mentioned a lot
23 about what's in the condition. Would you say in the reading
24 of the Condition A.5 that the Zoning Commission intent -- no,
25 we don't want to go with intent, but a lot of times that's

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1 the way it's done. It's the intent.

2 Would you say the intent was to make this easement
3 work? Because here's what I noticed you left out, at least
4 I believe you did. I stand to be corrected. It says,
5 Applicant shall permit JBG 6th Street, and I think it was
6 Slide 3 or whatever, parking garage.

7 A lot of it says associated with the garage
8 entrance to share the garage entrance -- let me find the
9 place. Oh, applicant shall permit JBG 6th Street, Associates
10 LLC, and any other owners who may access their parking. Most
11 of it says, and any other owners.

12 So it's not exclusive to just JBG. It says, and
13 any other owners, the way I interpret it. But I noticed
14 we're making this conducive for our arguments, which is
15 typically I think how these things go. But would you agree
16 with me that the intent of the Zoning Commission in this
17 condition was to make it work, period?

18 MR. FREEMAN: Mr. Young, if you could pull up the
19 condition again. That would be great. If you could go to --
20 I just want to make sure, Mr. Chairman, that I'm seeing the
21 part that you're referring to.

22 ZC CHAIR HOOD: Okay. I think it's Number 3. I
23 believe it's in there, but I was looking at the order.

24 MR. FREEMAN: Sure. Maybe it's Slide 6? I
25 certainly did not intend to leave it out --

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1 (Simultaneous speaking.)

2 MR. FREEMAN: It says the Applicant shall permit
3 JB and any other owners who may access their parking garage
4 due to garage entrance to share the garage entrance upon such
5 owners completion of a parking garage, which is accessible
6 to the garage easement, so that completion of the parking
7 garage is something that the other side would have to do, and
8 joinder into the related easement agreement to be recorded
9 by the Applicant and JBG Smith in accordance with the terms
10 thereof.

11 So that part means the other owner can join the
12 easement that's signed between LCOR and JBG Smith. It
13 doesn't mean that the Applicant has to enter into a document
14 that has all of these other provisions. Here's what I would
15 add to that, Mr. Chairman. You asked why are we here today.
16 I want to focus on what's important. But I would say this.
17 I would say we were in the middle of negotiations, then this
18 appeal was filed. That's where we are now.

19 ZC CHAIR HOOD: So that process never took its
20 course? Okay, we're here today --

21 MR. FREEMAN: That's where we are now.

22 ZC CHAIR HOOD: Okay. All right. Thank you.

23 Thank you, Madam Chair.

24 VICE CHAIRPERSON JOHN: Does any other Board
25 member have a question? I can't see everyone for some

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1 reason.

2 Okay, Ms. Moldenhauer? I don't believe you cross
3 examine Mr. Freeman, but you can certainly ask a couple
4 questions.

5 MR. FREEMAN: I don't know that we can cross
6 examine another lawyer (simultaneous speaking) --

7 VICE CHAIRPERSON JOHN: So you're not cross
8 examining, Mr. Freeman.

9 MR. FREEMAN: Okay.

10 VICE CHAIRPERSON JOHN: You can ask for
11 clarification.

12 MR. FREEMAN: Sure.

13 MS. MOLDENHAUER: Yes, I agree with Mr. Freeman.
14 We typically don't cross examine other attorneys, and Mr.
15 Freeman is obviously -- I do believe they tried to enter some
16 facts into the record that I believe are not appropriate from
17 entered facts that are not in the record, and I'd like to
18 clarify those maybe on rebuttal.

19 VICE CHAIRPERSON JOHN: Okay, you can do it on
20 rebuttal. I am aware that you don't cross examine, and I was
21 giving you the latitude, but we won't. We will go to the
22 rebuttal and go through that.

23 Okay, the next one up is DCRA. There are no
24 witnesses, so I guess you have nothing, Mr. Green.

25 MR. GREEN: No, nothing further.

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1 VICE CHAIRPERSON JOHN: Does the Board have any
2 questions?

3 (Pause.)

4 VICE CHAIRPERSON JOHN: Okay, Ms. Moldenhauer, you
5 may give rebuttal.

6 MS. MOLDENHAUER: I was just remembering as I was
7 just clicking through the participants. Did the ANC, do they
8 next before rebuttal? I forget the order sometimes with
9 appeals.

10 VICE CHAIRPERSON JOHN: No, the ANC did not submit
11 information from the full ANC authorizing Ms. Rhodes to
12 testify on behalf of the full ANC. She was here in her
13 capacity as the -- what was it. I forget. The single member
14 district. She's not participating -- the ANC is not
15 participating as a witness in this hearing because we don't
16 have anything officially from the ANC.

17 MS. MOLDENHAUER: Okay. That had not been
18 clarified earlier. I didn't hear that.

19 VICE CHAIRPERSON JOHN: Just before she left.

20 MS. MOLDENHAUER: Ms. Rhodes is still on the panel
21 group if you scroll to the right. I just was scrolling to
22 the right and I saw that. I don't know.

23 VICE CHAIRPERSON JOHN: My understand was she had
24 to leave early. She's still there. Ms. Rhodes?

25 MS. RHODES: I'm still here. I had another

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1 meeting, but I'm still in the video.

2 VICE CHAIRPERSON JOHN: Okay. I was not aware
3 that she was still here. I was made to understand you would
4 have been leaving early. Did you submit anything from the
5 ANC --

6 MS. RHODES: I'm multitasking and I'm sorry, I did
7 not.

8 VICE CHAIRPERSON JOHN: Okay. So did you come
9 here as the SMD representative? Okay. All right, thank you.

10 MS. RHODES: I am.

11 VICE CHAIRPERSON JOHN: Thank you.

12 MS. RHODES: Mm-hmm.

13 MS. MOLDENHAUER: So we're back up on rebuttal?

14 VICE CHAIRPERSON JOHN: Yes.

15 MS. MOLDENHAUER: I'd like to ask Mr. Chowfla to
16 answer some quick questions.

17 MR. CHOWFLA: So members of the Board,
18 Commissioner Hood or Chairperson Hood, you had asked about
19 negotiations and discussions that had occurred between Edens
20 and LCOR on this specific easement, so I wanted to provide
21 some more background and also to you, Mr. Blake, for your
22 earlier question.

23 We first approached LCOR in January of 2019, three
24 years ago, in connection with a construction and underpinning
25 agreement. In April of 2019 -- at their request, which is

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1 something they needed to build their building. And at their
2 request, we sent them a draft of that underpinning agreement,
3 and we also included access and easement terms. Putting them
4 on notice for their obligations in the PUD order.

5 We never really heard back. And in July of 2019,
6 we sent a draft memorandum of understanding to LCOR and to
7 JBG, so it was all three parties, to outline the terms of an
8 easement with a shared alley and parking. We actually traded
9 several redline versions of this memorandum of understanding
10 with LCOR and with JBG.

11 In that memorandum of understanding, the easement
12 was perpetual. There were no red marks or marks from LCOR
13 saying that it would be 75 years. In that memorandum, it was
14 clearly understood that the easement would be recorded and
15 signed by all three parties.

16 MR. FREEMAN: I don't mean to interrupt here, but
17 respectfully, hearsay. He's making representations on behalf
18 of LCOR. He's making --

19 MS. MOLDENHAUER: He's a signed witness that is
20 testifying under oath. The Board asked --

21 (Simultaneous speaking.)

22 MS. MOLDENHAUER: -- documentation, we can provide
23 emails.

24 MR. FREEMAN: I'm sorry. The reality is this
25 appeal isn't about the MOU or the seven versions that

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1 redlined of this agreement. This appeal is what the PUD
2 condition requires.

3 If we want to have a conversation about who did
4 what, when, where, we can have a continued hearing. I can
5 have LCOR come. We have JBG come. And we can have everybody
6 point fingers about who did what or didn't do what. I don't
7 know if that's helpful to the Board. Again, I don't --

8 MS. MOLDENHAUER: The questions raised by the two
9 Board member who are just answering questions and
10 supplementing the timeline. And you specifically --

11 MR. CHOWFLA: I will say that --

12 MS. MOLDENHAUER: -- stated that this appeal only
13 occurred because negotiations ceased. That's just not true,
14 so we're actually refuting a comment that you made, Mr.
15 Freeman.

16 MR. FREEMAN: You said --

17 MR. CHOWFLA: Mr. Freeman, if I may, please.

18 VICE CHAIRPERSON JOHN: Okay, excuse me. Excuse
19 me.

20 MR. CHOWFLA: In February of 2020 --

21 VICE CHAIRPERSON JOHN: Excuse me, may I say
22 something --

23 MR. CHOWFLA: I'm sorry. Yes, of course.

24 VICE CHAIRPERSON JOHN: -- to everyone?

25 MR. CHOWFLA: Please go ahead.

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1 VICE CHAIRPERSON JOHN: You can go ahead and give
2 this testimony. We can stay here all night, but it's not
3 relevant to the issue. The issue is what condition did the
4 Administrator fail to implement in Condition 5. What is it
5 that the Administrator failed to do? So we can listen to all
6 of this irrelevant testimony all night. The Board has
7 another appeal that's as involved as this one.

8 Ms. Moldenhauer, please put your -- go ahead. I'm
9 not going to interrupt. You can rebut it if you'd like.

10 MS. MOLDENHAUER: we would like to just put this
11 in the record. I think it goes to a question of, what did
12 LCOR understand Condition A.5 to mean? This communication
13 goes to that question and then goes to further conversations
14 and references here. I think that's really important as
15 well.

16 I'd like your deference. We'll move through the
17 timeline. The record can always stay open for additional
18 documentation, but I think it's important to go to that --

19 MR. FREEMAN: I think what I'm saying is your
20 witness can't testify --

21 VICE CHAIRPERSON JOHN: Mr. Freeman --

22 MR. FREEMAN: -- about what my client understood.

23 VICE CHAIRPERSON JOHN: Mr. Freeman --

24 MS. MOLDENHAUER: He's testifying the
25 communications directly back and forth. He's not intending

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1 to provide anything else. If you want to have your witness
2 present and have someone from LCOR, you could have.

3 MR. FREEMAN: You just said he's testifying as to
4 what LCOR understood the condition to mean. I think that's
5 exactly what you just said. What I'm saying is your client
6 cannot testify as to what my client understood a condition
7 to mean, number one. Number two,

8 (Simultaneous speaking.)

9 MR. FREEMAN: -- the issue is what the Zoning
10 Administrator.

11 VICE CHAIRPERSON JOHN: Okay, we don't have a
12 gavel. Oh, gosh. I miss live and in-person meetings because
13 we would have a gavel and we would cut the mic. Okay. I'm
14 going to sustain that objection. Please remember that this
15 issue is what the condition require.

16 I don't see anything in that condition that
17 mentions Edens in terms of drafting the easement. Mr.
18 Freeman just had it up on the screen, so I don't see anything
19 that says that Mr. Edens should have been a party to the
20 easement -- should have assisted in the drafting of the
21 easement.

22 It mentioned JBG Properties. Please direct your
23 rebuttal to the central issues that the Board had to decide.
24 This is not helpful. You can make a record for appeal if
25 you'd like, but it's helping the Board to decide.

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1 VICE CHAIRPERSON JOHN: Ms. --

2 MS. MOLDENHAUER: Can you just focus a little bit
3 maybe give a little -- focus also on the understanding of
4 owner versus JBG and your understanding of that.

5 MR. CHOWFLA: Ms. John, the reason that condition
6 even mentions JBG in addition to the owners is because JBG
7 is not an owner. They are not an owner of that property.
8 Edens owns an adjacent property. They are an owner on the
9 square.

10 That university owns an adjacent property.
11 They're an owner on the square. LCOR owns the property in
12 question. They're an owner on the square. The owners
13 collectively are Gallaudet, Edens, and LCOR. JBG 6th Street
14 and Associates is an and. They're an appendage. They are
15 not an owner.

16 They are simply a ground leased purchased --
17 they're a contract purchaser. They don't even have an
18 executed document that's commenced.

19 VICE CHAIRPERSON JOHN: Respectfully, they're
20 mentioned in the order from the Zoning Commission. The
21 Zoning Commission is the body that should have clarified all
22 of that. There's nothing in the regulations that says that
23 contract purchaser has no authority in this situation, so
24 let's leave that issue alone. JBG Properties was mentioned
25 in the order. Okay, I don't know where we are at this point

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1 because we're all over the place.

2 Once again, Ms. Moldenhauer, the issue is what
3 does the condition say and what did the Administrator not do.
4 I don't want to hear anything else that's not related to
5 those questions. Everything else is irrelevant.

6 MS. MOLDENHAUER: One more question for Mr.
7 Chowfla. On behalf of Edens, back in 2018, 2019, when you
8 were first talking to LCOR, had you reviewed the Condition
9 A.5?

10 MR. CHOWFLA: We had not reviewed any specific
11 details on this.

12 MS. MOLDENHAUER: I'm asking you to try. What is
13 your understanding. I know you're not the Zoning
14 Administrator, but what is your understanding that was
15 intended by the requirements of Condition A.5?

16 VICE CHAIRPERSON JOHN: My understanding was
17 clear. The condition requires that an easement be recorded
18 for the mutual benefit of all parties on the square and
19 mutually agreed to by all parties on the square. And that
20 jointly the parties work together to create a public benefit
21 from this PUD.

22 This is a public benefit that essentially has a
23 75-year time limit on it. If a public benefit such as a park
24 is proffered and you put a lock and key on it, is it a public
25 benefit?

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1 If you proffer a community room in a building as
2 a public benefit and then say that I can modify the terms of
3 access to that community room so instead of 24/7, it's from
4 11:00 a.m. to 11:59 a.m. and I can turn the lights off in
5 those 59 minutes. Is it a public benefit?

6 This is a public benefit granted to the citizens
7 of the District so that there's a better environment in Union
8 Market so that the streets are free of loading and of
9 congestion, and the public benefit has not been granted.
10 This is a public benefit in exchange for density, and this
11 benefit was not granted.

12 MS. MOLDENHAUER: Thank you. Two questions for
13 Mr. Cox. I will conclude our rebuttal.

14 Mr. Cox, I want to make sure that you're there and
15 you're unmuted. If Mr. Young could pull up the PowerPoint.

16 (Pause.)

17 MS. MOLDENHAUER: Mr. Cox?

18 (No response.)

19 MS. MOLDENHAUER: Am I on mute? No, I'm not on
20 mute. Mr. Cox, are you unmuted? I just want to make sure
21 you can hear my questions and I can hear you. I cannot hear
22 you.

23 (Pause.)

24 MR. COX: Okay, it's working now.

25 MS. MOLDENHAUER: You're great. Thank you.

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1 Pulling and looking at specifically Condition A.5.
2 In reading this, is the benefit of the shared alley supposed
3 to go to the owners or is to go to only JBG 6th Street?

4 MR. COX: It says it very expressly. I'm looking
5 at the second sentence. Anyway, Applicant shall permit other
6 property owners, friend of, quote, owners, unquote, on the
7 block alley by Morse Street, et cetera, the block to share
8 the alley for purposes of reciprocal ingress and egress to
9 loading and service areas and emergency access to such areas
10 upon such owners' extension of the alley so that it is
11 accessible from their respected property and joinder into a
12 related easement to be recorded by the Applicant and JBG 6th
13 Street associates, et cetera. So, yes, to me there's zero
14 ambiguity. It's intended to be shared by all the owners.

15 MS. MOLDENHAUER: If JBG 6th Street was not an
16 owner at the time of this condition, could they bind the
17 ownership property?

18 MR. COX: Not that I'm aware of. I heard Mr.
19 LeGrant testify that. I think he assumed -- that's the only
20 thing I can base out of it. He assumed that JBG might have
21 had such authority to bind Gallaudet, but I haven't seen
22 anything that suggests that JBG was the attorney-in-fact for
23 Gallaudet or had some other power. If they did, it just
24 wasn't shared.

25 MS. MOLDENHAUER: looking at this document, it is

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1 your understanding that there should be a -- there's the
2 word, reciprocal. So it says to share alley purposes of
3 reciprocal ingress and egress. The term of art -- Reciprocal
4 Easement Agreement, an REA. What's your understanding of
5 Reciprocal Easement Agreement? Is that something that one
6 party files or multiple owners file to bind a property?

7 MR. COX: No. The latter. It's multiple parties,
8 usually. But these two that enter into this agreement for
9 their mutual benefit. This reciprocal here would mean
10 obviously that LCOR would have the right, if it needed to,
11 to even go across the extended easement that is being,
12 possibly, constructed by the owners in the block. This is
13 not rocket science. It's pretty clear what a reciprocal
14 easement is in the world of commercial real estate in
15 Washington D.C.

16 MS. MOLDENHAUER: Let me make it very simple for
17 myself. Your understanding is that one document, an
18 easement, should have been signed by the owners?

19 MR. COX: Right. That's what should have
20 happened, but even if it didn't happen, if you wanted, you
21 can use the joinder concept as long as the terms of the
22 easement were terms that everybody had agreed to and
23 negotiated. And then you would join it. That would actually
24 be a perfectly appropriate mechanism. What's missing is the
25 fact that the terms actually have to be mutually agreeable.

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1 MS. MOLDENHAUER: I'm trying to understand --
2 could this referenced joinder -- because JBG couldn't sign
3 the document potentially at the time of the Certificate of
4 Occupancy because they were just the contract purchaser?

5 MR. COX: Yes. That's entirely possible that
6 that's really want that means is that they were authorized
7 to bind the owner and, therefore, later on there'd be a
8 joinder. That's possible.

9 MS. MOLDENHAUER: You heard, kind of, testimony
10 that there's no term specified here. Isn't that also saying
11 that there's no term that indicates that 75 years is
12 acceptable as well?

13 MR. COX: Yes. I guess you also have the
14 undeniable problem of the inconsistency between the perpetual
15 early in the easement and then 75-year term at the end. Even
16 if you were reading for a specific term, one would hope
17 somebody would notice, woops, one section says perpetual and
18 then one says 75 years.

19 But clearly from a common sense standpoint, the
20 clear intent here was for this particular easement to be
21 perpetual. Just imagine if, from what I heard, if Mr.
22 LeGrant saw that the easement was for 17 minutes or three
23 weeks or 27 days, whatever it might be, what I was hearing
24 was he has no responsibility to check that. That just
25 doesn't make any sense to me, but I'm not sure who's job that

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1 is. Maybe it's not his job to make sure that it actually
2 makes sense, but there's got to be somebody --

3 MS. MOLDENHAUER: I don't want to go beyond what
4 the Board wants to hear. Those are all my questions on
5 rebuttal. Thank you.

6 MR. COX: Thank you. I believe I have to allow
7 cross rebuttal. If not, somebody will correct me.

8 MR. GREEN?

9 MR. GREEN: No questions, thank you.

10 VICE CHAIRPERSON JOHN: Okay.

11 Mr. Freeman?

12 MR. FREEMAN: No. No questions. Thank you.

13 VICE CHAIRPERSON JOHN: Okay. Let's go to closing
14 arguments.

15 Ms. Moldenhauer?

16 MS. MOLDENHAUER: I believe I'm last.

17 VICE CHAIRPERSON JOHN: Let me check our rules
18 here.

19 (Pause.)

20 VICE CHAIRPERSON JOHN: It is in the order, which
21 I cannot find. Ms. Nagelhout? Am I correct?

22 MS. NAGELHOUT: I'm looking for the rule, too.
23 I think it's something the presiding officer can adjust.
24 Whatever the regs say, you can choose your own order now.

25 VICE CHAIRPERSON JOHN: Okay.

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1 MS. MOLDENHAUER: Typically, prosecution goes
2 last. The appellant goes last.

3 VICE CHAIRPERSON JOHN: I don't believe that's
4 what the order says, but if the other parties don't object.

5 Mr. Freeman?

6 MR. FREEMAN: No objection.

7 VICE CHAIRPERSON JOHN: Mr. Green?

8 MR. GREEN: None. No objection.

9 VICE CHAIRPERSON JOHN: Okay, fine.

10 Mr. Green, would you like to begin?

11 MR. GREEN: Yes, just very briefly. Members of
12 the Board and all the witnesses, certainly thank you for your
13 testimony contributions. Just very, very briefly. It's
14 clear from the evidence the submission by all the parties,
15 it's been demonstrated the Zoning Administrator did not err
16 in this case.

17 It's certainly been a very contentious appeal so
18 far as the disagreement over what the easements could have
19 said, but there is no conflict between what the easement
20 state, the requirements, as well as the PUD order. In this
21 case, the Zoning Administrator did not err in anyway.

22 The terms and conditions that the Appellant
23 requires or believes the Zoning Administrator ought to have
24 require the owner to include were not expressly provided in
25 the PUD or the zoning regulations.

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1 Therefore, the Appellant hasn't carried its burden
2 in demonstrating how in any way, shape, or form how the
3 Zoning Administrator was incorrect in zoning (audio
4 interference.) With that being said, I think that we ask
5 respectfully based on the evidence and the testimony today
6 that the Board deny this appeal and thank you for your time.

7 VICE CHAIRPERSON JOHN: Thank you. Mr. Freeman?

8 MR. FREEMAN: Thank you. We also believe the
9 record is actually very clear. The record is clear that this
10 appeal should be denied because the Appellant has in no way
11 met their burden of proof. The issue here is what does the
12 PUD condition require.

13 I understand Mr. Cox and they want to talk about
14 what the easement says, what it doesn't say, fatal flaws,
15 critical omissions, and I get it. I understand that.
16 Hopefully at some point, we may be able to address it. But
17 this is not the forum for that.

18 This forum Board is to say you, Zoning
19 Administrator, did something wrong. Take away the easement.
20 You, Zoning Administrator, did something wrong. They have
21 not identified anything in the order, the condition. They
22 referenced the order. They haven't even identified anything
23 in the order that requires the Zoning Administrator to review
24 or approve the terms of the easement. Nothing.

25 They have not identified anything that requires

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1 him to look at the intent. They haven't provided anything
2 that says X, Y, Z has to be included in this easement. They
3 haven't provided anything that says, Zoning Administrator,
4 you got to make sure that -- what did they say? Owner,
5 property owners, JBG, Appellant, none of that. It doesn't
6 say that he has to make sure that everybody loves the
7 document.

8 They haven't pointed to anything. They said it
9 and haven't pointed to anything in the order that requires
10 it. They talked about what's commercially reasonable. I get
11 all of that, but they haven't provided anything that points
12 how the Zoning Administrator specifically erred in enforcing
13 that condition.

14 They haven't said anything, hardly did anything,
15 that requires the Zoning Administrator to (audio
16 interference.) In other words, respectfully, that they
17 haven't provided any evidence that support their case. I
18 think this appeal should be dismissed.

19 That concludes my closing. Thank you.

20 VICE CHAIRPERSON JOHN: Thank you, Mr. Freeman.

21 Ms. Moldenhauer, I consulted the Regulation
22 Y507.1, and the order is the Appellant, DCRA, and then the
23 owner. But please go ahead.

24 MS. MOLDENHAUER: I stand corrected, and I
25 apologize. Thank you.

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1 VICE CHAIRPERSON JOHN: That's fine.

2 MS. MOLDENHAUER: In closing, I'll take a few
3 minutes to summarize the facts and the evidence that is in
4 the record.

5 The record reflects that Mr. Chowfla testified as
6 a witness and that the DDOT both confirmed that Edens, back
7 in 2016 and '17 when LCOR filed their PUD, was working
8 together to design and agree on a shared alley.

9 Mr. Chowfla testified that he understood Edens
10 would receive a reliable, non-terminating, stable, non-
11 unilaterally modifiable easement. Edens did not participate
12 in the LCOR PUD because it believed that all parties were on
13 the same page. Maybe it did happen to be different, but we
14 are not there today.

15 Now, we are before the BZA and not the Zoning
16 Commission asking for you to review the Zoning
17 Administrator's decision to accept the easements as compliant
18 with the order. Even after the PUD was approved, Edens and
19 LCOR engaged in a back and forth discussion, which can be
20 provided and supplemented in the record, there was never
21 documentation that said, stop, we aren't required to do that,
22 despite their arguing that they are not required to do that
23 today.

24 Mr. Chowfla testified that it came to a point
25 where Edens had engaged with the Zoning Administrator and

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1 then subsequently LCOR unilaterally filed this deficient
2 easement after that communication. The Zoning Administrator
3 and the point of this discussion today is that the Zoning
4 Administrator is required under (a)303 to confirm that the
5 Certificate of Occupancy is consistent with an order.

6 In the regulations under (a)303 referenced the
7 word, order. Also under a(303) it states that if an order
8 of the zoning conditions and issuance of the permit or
9 Certificate of Occupancy upon the record of covenant, each
10 term and condition in that is required.

11 We did not go through painstakingly so every
12 finding of fact and every conclusion of law, but those are
13 in our written filing. And we do reference the fact that the
14 order, as you said it's 29 pages, it includes findings of
15 facts 3, 28, 29, 34, 36, 38, conclusions of law 5, 7, 9. All
16 that reference this public benefit document and shared alley.

17 We didn't think it was necessary to try to
18 painstakingly go through all of those with you today because
19 the order speaks for itself. We believe it is clear that
20 this was what is intended. DDOT report says this is what is
21 intended. Edens as a shared owner said this is what was
22 intended.

23 The Conclusion of Law 5 says, quote, further, the
24 shared alley and parking entrance system is deemed to provide
25 a great degree of a public benefit. So not only is this a

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1 condition, Condition A.5, it was also a substantial element
2 that the Zoning Commission considered in granting this PUD,
3 which we believed elevates the Zoning Administrator's
4 obligation to review all of the requirements.

5 The Zoning Administrator when reviewing a PUD
6 project has to look at the order. The order includes
7 findings of facts, it includes conclusions of law. Those
8 conclusions of law reference exhibit. That's how we know
9 what the FAR is, what the project is, if it's consistent with
10 the plans.

11 Here, when you look at the holistic project and
12 the overall PUD, all of the findings of facts and the
13 conclusion of law and the language in Condition A.5, it is
14 clear that there's an obligation for the parties to work
15 together and to record a perpetual, but most importantly a
16 reciprocal, meaning mutual. A reciprocal agreement together.

17 Here, the benefitting party, Edens, voiced
18 concerns over the validity of the easement. DDOT, a
19 participant, voiced concerns if the ZA refused to review
20 these what we believed to be blatant flaws.

21 Putting aside anything else, the conflicting
22 language in the easement between a reference to perpetual and
23 a reference to a 75-year term and the ability to unilaterally
24 edit, we believe are easy non-business terms that can be
25 reviewed to confirm that it is not consistent with the order

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1 and not consistent with the public benefit proffered.

2 The ZA erred in reviewing the easement and LCOR's
3 argument of Condition 5.A (sic) does not require a mutual
4 signature and agreement on the easement by the adjacent
5 owners on the block is plainly wrong.

6 We believe the testimony you've heard from Mr. Cox
7 identifies the need for -- not every term is required, nor
8 does the Zoning Commission have to provide every specific
9 term in its order, but that when is a silence -- there is a
10 silence here as to terms. If that is a question, then that
11 should be elevated.

12 Or if not, it should be obviously be on the burden
13 of the Zoning Administrator to confirm of the terms is what
14 was the intent, and having DDOT and having one or the other
15 adjacent property owners argue that this is not the intent,
16 we believe shows that there is an error.

17 The Board should review the full order, which
18 includes substantial references to the proffered conditions,
19 and repeatedly identify the collaboration of the parties.
20 A successful long-term, reliable shared alley was the
21 substantial benefit. Yet, the zoning decision, if not
22 overturned, would not allow this benefit that was
23 contemplated, actually could be in jeopardy.

24 LCOR did not coordinate efforts as we believe is
25 required. We are here today to ask that this Board provide

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1 a simple solution, which is within your power. Your power
2 is to settle issues with the Zoning Administrator and can
3 require either additional review as referenced, require a
4 deferral to the Zoning Commission as the Zoning Administrator
5 has the ability to do.

6 But we believe Mr. Cox provided an explanation as
7 to the potential long-term impacts for this failure as well
8 as the concerns of this public benefit not being fully
9 obtained. We believe that based on the specific findings of
10 facts that are in the record, the fact that benefitting
11 property owner who's benefitting from the public benefit
12 indicated that they did not believe this was sufficient, and
13 the reference for the Zoning Administrator that he was
14 satisfied by JBG given the fact that JBG is not an owner.

15 And there is no evidence in the record to date
16 that JBG actually has still an interest in the property prior
17 to having signed agreement with Gallaudet. We believe that
18 there is plenty of evidence to support the Board asking the
19 Zoning Administrator to review this again and remand it back
20 to him. Thank you.

21 VICE CHAIRPERSON JOHN: Thank you, Ms.
22 Moldenhauer.

23 First, I want to thank you all for your testimony
24 and your presentations. It was a little difficult at times
25 and a bit bumpy, but I think we got to the end. I don't know

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1 what the other Board members think, but I'm not in a position
2 to decide this case today. I would like to hear from the
3 other Board members.

4 Commissioner Hood?

5 ZC CHAIR HOOD: Madam Chair --

6 VICE CHAIRPERSON JOHN: I'm sorry, I forgot. I
7 need to excuse the witnesses and close the record. Thank
8 you.

9 MR. COX: Thank you.

10 (Pause.)

11 VICE CHAIRPERSON JOHN: Okay. Am I missing
12 someone? No? Was Mr. Smith on this case? Yes.

13 ZC CHAIR HOOD: Yes, he's on.

14 VICE CHAIRPERSON JOHN: He's on?

15 ZC CHAIR HOOD: Yes.

16 VICE CHAIRPERSON JOHN: Okay. As I was saying,
17 I don't believe I'm in a position to decide today. I wanted
18 to see if anyone else had any thoughts?

19 ZC CHAIR HOOD: Madam Chair, I would agree with
20 we need to digest. We got a lot of information today, so I
21 would suggest we digest it, all those arguments. But I also
22 want to commend you too for the patience to be able to plow
23 through that. Hats off to you as well, but I would agree it
24 was successful.

25 VICE CHAIRPERSON JOHN: Thank you, Commissioner

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1 Hood.

2 Anyone else?

3 (Pause.)

4 VICE CHAIRPERSON JOHN: It's decided, then. I
5 don't see any hands up, so we'll go ahead and continue this
6 case for decision. Just to make it clear, the record was
7 closed.

8 Mr. Moy, are you nearby?

9 (Pause.)

10 VICE CHAIRPERSON JOHN: I think we have lost --
11 okay. Mr. Moy?

12 MR. MOY: I'm here.

13 VICE CHAIRPERSON JOHN: Do we have a decision?

14 MR. MOY: Yes. Madam Vice Chair and the Board,
15 I'm not clear how much time you need, but if you want this
16 to be fresh in your mind, of course we can set this for a
17 decision next week, which would be February of the 2nd. If
18 you feel you need more time, then we could set it for either
19 February the 9th or February the 16th. In terms of the
20 docket size, they're about the same.

21 VICE CHAIRPERSON JOHN: Thank you. I'm fine with
22 February 2nd.

23 What do the other Board members think?

24 MEMBER SMITH: I agree with February 2nd.

25 VICE CHAIRPERSON JOHN: Okay. I forgot to thank

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1 you all for your help as usual.

2 Mr. Moy, we'll set this for February 2nd.

3 MR. MOY: Very well.

4 VICE CHAIRPERSON JOHN: Okay, thanks. And it's
5 for a decision.

6 MR. MOY: That's correct.

7 VICE CHAIRPERSON JOHN: Okay. Thank you very
8 much. Now, we need to address the issue of lunch. I think
9 everyone needs a nice, long break. Is 2:15 okay? 2:15? And
10 we're not serving dinner tonight, just so you all know.

11 ZC CHAIR HOOD: Madam Chair, let me just mention
12 what I do have -- if we're not finished by 6:30, I do have
13 ANC elections and that I have to run tonight. I don't expect
14 them to be long, so I may have to leave and come back if
15 we're here until 9:00 or 10:00. I don't expect that, but if
16 we are.

17 VICE CHAIRPERSON JOHN: We're not doing 9:00 or
18 10:00. Those days are over. Maybe when the Chairman returns
19 since he likes those long days, but I hope the next case will
20 go a little more smoothly. So 2:15?

21 (Whereupon, the above-entitled matter went off the
22 record at 1:36 p.m. and resumed at 2:22 p.m.)

23 VICE CHAIRPERSON JOHN: Okay, call us back in
24 Mr. Moy?

25 MR. MOY: Yes, thank you, Madam Vice Chair. The

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1 Board is back in its hearing session. And the end the time
2 is at or about 2:22 p.m.

3 VICE CHAIRPERSON JOHN: And you call that when
4 you're ready, Mr. Moy.

5 MR. MOY: I am ready. Thank you, Madam Vice
6 Chair. So, the next and last case before the Board today at
7 today's hearing is Appeal No. 20572 of Saint Vincent's Home
8 School. This appeals is captioned and advertised as -- is
9 advertised as an Appeal of Saint Vincent's Home School
10 regarding the Zoning Administrator's determination dated June
11 24, 2021, regarding off-street parking requirements of
12 ZC Order No. 66-68 and BZA Order No. 10035.

13 The property is -- let's see, is located at the
14 Edgewood Commons Campus, including the Edgewood IV Building,
15 at Square 3630, Lots 2, 5, 803, 805, 807, & 810-813 with
16 street addresses of 401-425, 601, 611, 615, & 635 Edgewood
17 Street, NE, in the RA-4 Zone.

18 Let's see, and they're, with regards to
19 preliminary matters, Madam Vice Chair, as you're aware. As
20 a reminder, there is a motion to dismiss the appeal from both
21 the property owner and DCRA under Exhibits 30 and Exhibit 37,
22 respectively.

23 And the appellant has filed a response to those
24 motions to dismiss. And finally, the property owner filed
25 a waiver of the 21 day filing deadline to allow supplemental

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1 evidence into the record. That's it, Madam Vice Chair.

2 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy. Mr.
3 Young, are all the parties in? Let's see.

4 MR. YOUNG: Yes, they are.

5 VICE CHAIRPERSON JOHN: Okay. Mr. Williams, are
6 you presenting?

7 MR. WILLIAMS: Yes.

8 VICE CHAIRPERSON JOHN: Okay.

9 MR. WILLIAMS: Good afternoon, Madam Chair.

10 VICE CHAIRPERSON JOHN: Yes, please introduce
11 yourself for the record.

12 MR. WILLIAMS: Madam Chair, members of the Board.
13 My name is Zach Williams. I'm a land use attorney with
14 Venable and representing the appellant today, St. Vincent's
15 Homeschool.

16 With me is my colleague, Dave Feinberg, also with
17 Venable. And our witness today, as part of the appellant's
18 case, is Mr. John Conley. He will, who will be speaking on
19 behalf of the appellant owner, and he's also with us today
20 on the panel.

21 VICE CHAIRPERSON JOHN: Thank you. Mr. Green, are
22 you here?

23 MR. GREEN: Yes. Good afternoon, to the members
24 the Board. Hugh Green with, attorney with DCRA.

25 VICE CHAIRPERSON JOHN: Thank you. And Mr.

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1 Sullivan, please introduce yourself.

2 MR. SULLIVAN: Yes. Thank you, Madam Chair.
3 Marty Sullivan, and I'm here representing the property owner,
4 Enterprise Community Development.

5 VICE CHAIRPERSON JOHN: Okay. Thank you. So
6 there are a few preliminary matters. And the first thing I
7 need to address is the late filing by the appellant. And so
8 this is a motion to waive the 21 day filing.

9 And the appellant states that there's good cause
10 for the late filing because the email was recently obtained
11 pursuant to a FOIA application. I believe it was filed with
12 DCRA. And Mr. Sullivan, I don't believe you object? I've
13 seen any objection. Is that a yes or no?

14 MR. SULLIVAN: Well, no objection to the lateness
15 of it.

16 VICE CHAIRPERSON JOHN: Okay, that's it. And Mr.
17 Green?

18 MR. GREEN: Yes, we'd object in general if they,
19 basically, the request has been made that it's critical.
20 There's no articulation of why it's critical and relevant to
21 the particular letter that's under appeal.

22 VICE CHAIRPERSON JOHN: Thank you. So the Board
23 tends to be sort of lenient with these matters. So I believe
24 the rest of the Board would like to see the information. So
25 I'll go ahead and let it in.

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1 Now, as to the other motions. So there's the
2 motion to dismiss filed by the DCRA, and the property owners
3 motion to dismiss and responses were filed. So in going over
4 this case and looking at the submissions, I think it doesn't,
5 it doesn't seem to be a common set of facts.

6 And so, I'm going to propose that we defer a
7 decision on the motions to dismiss until after the case is
8 heard. And then, in this case, just to streamline the
9 presentation, here's my approach that the appellant will
10 present its case, then DCRA would present its case, including
11 the argument about why the appeal should be dismissed.

12 The property owner will present its case,
13 including its arguments about why the appeal should be
14 dismissed. The appellant presents rebuttal, including its
15 response to the motions, and then closing arguments from each
16 party. I don't know if you all were listening earlier, but
17 I'm hoping not to repeat the kind of contention we had
18 before.

19 So I would just say that please be reminded that
20 the issue before the Board in appeal, in an appeal, is
21 whether the ZA's decision was clearly erroneous or
22 inconsistent with the zoning regulations.

23 So I'm going to ask the parties to focus the
24 arguments on that issue. Please be mindful that we have read
25 your submissions. And, so basically, we need you to

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1 highlight the essential arguments that will help us to decide
2 the case.

3 Personally, I'm not interested in who shot John,
4 or who might not have, who might have misrepresented
5 information to the Zoning Commission because the Board
6 doesn't have the capacity to evaluate that. And so, I'm
7 going to ask Mr. Williams to begin.

8 MR. WILLIAMS: Thank you, Madam Vice Chair. And
9 if we can pull up the, Mr. Young, the appellant's
10 presentation, please.

11 VICE CHAIRPERSON JOHN: And before you begin,
12 Mr. Williams, how much time will you need?

13 MR. WILLIAMS: I think, I just, well, we just have
14 a presentation by myself and then some testimony from
15 Mr. Conley. I think we're looking at probably about 30 or
16 so minutes for case in chief.

17 VICE CHAIRPERSON JOHN: Okay.

18 MR. WILLIAMS: And then the remainder on rebuttal.

19 VICE CHAIRPERSON JOHN: Okay

20 MR. GREEN: Vice Chair, it's Hugh Green, DCRA.

21 VICE CHAIRPERSON JOHN: Go ahead.

22 MR. GREEN: I, Judge, I, sorry Vice Chair. It's
23 understandable that this is how you wish to proceed and I
24 just, from a procedural perspective, DCRA was hoping to have
25 motion to dismiss first, but obviously you decided that

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1 that's, you don't want to proceed in that fashion.

2 I was just going to say that I think there's some
3 relevant points that should be, I think, disposed of before
4 going into, going into the merits. But nevertheless, if
5 you've decided as to where you want to go, that's fine. I
6 just wanted to at least bring that at the outset before we
7 begin.

8 VICE CHAIRPERSON JOHN: Thank you, Mr. Green.
9 Frankly, I read all of your submissions and the facts, they,
10 the information is all over the place. So I think it's, it's
11 to your benefit to, for the Board to understand what the
12 facts are, to see if we can have a common set of facts.

13 Then we can know if we should have a dismissal.
14 So it was -- Mr. Williams, you were going to start and I'm
15 going to ask Mr. Young to put 30 minutes on the Board so we
16 can see where we are.

17 MR. MOY: Madame Vice Chair, I thought
18 Mr. Sullivan wanted to raise a question.

19 VICE CHAIRPERSON JOHN: I didn't see his hand.
20 Sorry, Mr. Sullivan.

21 MR. SULLIVAN: That's okay. I'm sorry. I think
22 what Mr. Green may have been referring to is that it's not
23 really clear, because there was never a statement of issues
24 filed with the appeal, it's not really clear what the alleged
25 error is.

1 And so, some discussion on the motion might better
2 frame what's coming up. But I realized the Board can do that
3 as well. So that's, I think that's, I just wanted to say
4 that because it's, it's not really clear what exactly is
5 alleged. So maybe if they asked the appellant to start off
6 with that, it might be helpful. Thank you.

7 VICE CHAIRPERSON JOHN: Okay. Thank you. So I
8 did ask the parties to focus on the error that the
9 administrator is alleged to have made, and that will sort of
10 help us. Okay. But please go ahead, Mr. Williams.

11 MR. WILLIAMS: Thank you, Madam Vice Chair. And
12 Mr. Young, if we could pull up on a presentation, the
13 appellant's presentation. Right. Before we get into the
14 presentation, Madam Chair, members of Board, thank you for,
15 for hearing us today.

16 And I know we've been through a long day already,
17 and we'll try to keep this brief and efficient. To answer
18 the question, I going to sort of boil this down to a
19 paragraph or so.

20 This appeal is at its essence about a series of
21 contradictory zoning determinations. And those zoning
22 determinations allowed one party, namely Enterprise Community
23 Development, to develop its parcel in a PUD. And then, block
24 another party, also in a PUD, from building its zone.

25 Specifically in 2020, Enterprise sought and

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1 received a zoning determination from the Zoning Administrator
2 stating that the PUD required 132 spaces. This was necessary
3 to facilitate the Enterprise Project.

4 Then a year later, after getting its PUD approved,
5 Enterprise requested and received a second determination
6 stating the exact opposite. That the PUD required suddenly
7 554 spaces. This was solely in order to block St. Vincent's
8 project.

9 When St. Vincent sought clarification from the
10 Zoning Administrator regarding these conflicting
11 determinations, the Zoning Administrator refused. And then
12 cited a third parking requirement of 423 spaces that was at
13 odds with his prior determination.

14 This served and continues to serve to block my
15 client, St. Vincent, from developing its property. My
16 argument in this case is that the Zoning Administrator's
17 third letter was erroneous. It should be reversed, and we'll
18 go over the reasons why in our appeal today. Next slide,
19 please.

20 So just to kind of break down what we're talking
21 about here, the St. Vincent's property is owned by Catholic
22 Charities. St. Vincent's Homeschool is a subsidiary of
23 Catholic Charities. It's located within the Edgewood Commons
24 Campus planned unit development.

25 Enterprise owns all of the parcels in that PUD

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1 except for the St. Vincent's property. However, Catholic
2 Charities originally owned all of these parcels, and over
3 time, they were conveyed to Enterprise in a series of
4 easements and other agreements that were made to facilitate
5 development.

6 Enterprise used this particular piece of property
7 at issue today to satisfy a portion of its required off
8 street parking, for the Edgewood 4 building. It's a series
9 of, a number of affordable housing development and senior
10 buildings in the campus since the 1970s.

11 Now, touching upon what I just stated in my
12 overview, in 2020 Enterprise filed a PUD modification and
13 they sought to build a new building in that campus. But
14 before they did that, they needed to get a Zoning
15 Administrator determination that declared that the campus had
16 surplus parking, namely 132 parking spaces.

17 The reason for that is because Enterprise didn't
18 want to have to build all of its required parking for its new
19 building. Enterprise specifically sought from the Zoning
20 Administrator confirmation that only 132 spaces were
21 required.

22 And the Zoning Administrator agreed in a written
23 determination, which was the late filed document that the
24 Board just admitted to the record that we had to FOIA the
25 city to get.

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1 Then, in an effort to block St. Vincent's, for
2 reasons that we still don't understand, Enterprise a year
3 later, after getting its PUD approved, wrote a letter that
4 it asked the Zoning Administrator to confirm and sign, which
5 he did do, stating that the campus now required 554 spaces,
6 over 100 spaces more than the campus even has.

7 St. Vincent's first got involved after that second
8 letter came out. This is important. St. Vincent's first got
9 involved at that point in time and asked the Zoning
10 Administrator to clarify what was going on here.

11 He refused and instead cited a third parking
12 requirement of 423 spaces. Next slide, please. So this is
13 the St. Vincent's property. As I said, it's one parcel
14 within the overall PUD, which is outlined in red here, Square
15 36030. It's lot 803. You'll hear some reference to Lot 803.
16 That's the St. Vincent's property and you can see it outlined
17 here on this exhibit. Next slide, please.

18 It's within the Edgewood Commons Campus, for folks
19 that are familiar with the Edgewood neighborhood. This is
20 just steps away from the Rhode Island Metro Station in a
21 rapidly developing area. It's just north of the new Brian
22 Street development that was recently completed by MRP. Next
23 slide, please.

24 This is the site plan, and this shows a little bit
25 more detail. The St. Vincent's property, highlighted in red

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1 there, and you can see that the St. Vincent's property is a
2 parking lot. It is currently a parking lot improved with 114
3 spaces.

4 And just to the left of the St. Vincent's property
5 is Edgewood 4. That's the Edgewood 4 building, which has
6 been using the St. Vincent's property to satisfy a portion
7 of its parking requirement for decades, since the 1970s.

8 Now you can also see here the, where you can see
9 to the left of the Edgewood 4 building proposed site, that
10 was the new building that Enterprise was seeking to build
11 went in for its PUD modification. Next slide, please.

12 So let's walk through this, and this is important.
13 Now I want to make it clear, we are not appealing the 2020
14 determination. But these three determinations work in
15 tandem. In 2020 Enterprise's former land use counsel emails
16 the Zoning Administrator.

17 And specifically asks him to confirm something
18 very important, which is that under the zoning regulations
19 that currently exist today, the parking requirement for this
20 PUD is 132 spaces. I have highlighted this.

21 This is specifically from the email that
22 Mr. LeGrant wrote to the land use counsel for Enterprise.
23 And he confirmed 132 spaces, and that the campus provides at
24 least 159 more spaces than required.

25 Now this is important. Why was the Zoning

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1 Administrator being asked what the parking requirement was?
2 Well, because for reasons unknown to anyone, the original
3 parking requirement has been lost.

4 We don't know where it is. It was on an exhibit
5 that the city doesn't have, that the Zoning Administrator
6 doesn't have, that Enterprise doesn't have, that we don't
7 have, and no one's been able to find it.

8 And so, Enterprise went in and said, look we don't
9 know what the requirement originally was so we're asking you
10 to confirm that it's 132 spaces because that's what the
11 requirement would be today. Next slide, please.

12 So after receiving that letter, that
13 determination, Enterprise used it in its PUD modification
14 application. In fact, in its statement of support, in that
15 record, it's cited that determination and quoted
16 Mr. LeGrant's language.

17 It stated that the campus was only required to
18 have 1032 parking spaces, per a zoning determination from the
19 Zoning Administrator. It stated that Enterprise had so much
20 extra parking on the campus that it didn't need to build all
21 its required parking for the new building.

22 It included a study that was reviewed by DDOT that
23 showed that 103 of the spaces on the campus were not even
24 used on a daily basis. The Office of Planning accepted that
25 recommended approval, and the Zoning Commission ultimately

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1 approved the case. Next slide, please.

2 Now, here's the statement from Enterprise to the
3 Zoning Commission and its statement of support. Don't take
4 it from me. This is straight out of their application. You
5 can see it shows up again.

6 The parking required for the existing units is 132
7 spaces, per a determination from the Zoning Administrator.
8 Next slide, please. Now after the approval of the PUD, this
9 is where things started to get weird.

10 St. Vincent's saw what Enterprise had represented
11 and realized, well hold on a second. St Vincent's is
12 providing 114 spaces the Enterprise just represented it
13 doesn't need, and the Zoning Administrator agreed.

14 So St. Vincent's, as you'll hear today from Mr.
15 Conley, sought to work with Enterprise to terminate a parking
16 easement, which is reliant on the parking requirements and
17 zoning regulations, to be able to develop its own affordable
18 Senior Living Project on this Metro accessible property.

19 Only then did Enterprise take a different tact,
20 reverse course. And stated that no, no, no, actually it
21 needs those spaces. But it actually went a step further than
22 that without us even knowing.

23 It wrote to the Zoning Administrator, with new
24 counsel, and asked him, in fact drafted a letter for him,
25 stating that the parking requirement was now 554 spaces.

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1 More spaces than the PUD even has. The PUD has 423 spaces.
2 And the Zoning Administrator signed that letter.

3 Only then did St. Vincent's get involved. We got
4 the letter and was sent to us by Enterprise's counsel like
5 two months later. We got the letter, having no idea that
6 this was going on behind the scenes.

7 So we wrote to the Zoning Administrator, and we
8 asked him to clarify. How could this be? How could this be
9 that you wrote one determination which the Zoning Commission
10 heard, and now there's another determination stating the
11 exact opposite? This can't, this must have been a mistake.
12 We assumed it was.

13 Next slide. Here's the March 29 letter I was just
14 referring to. I want to highlight, again, don't take it from
15 me. This is straight from the letter. This is in the
16 record.

17 Mr. LeGrant stating, while my office does not have
18 Exhibit 44-A, which was the original parking requirement,
19 quote, Exhibit 16 indicates the parking requirement approved
20 for the campus is 554 spaces. Now he's referring to the
21 original PUD approval back in the 60s, which he had already
22 found a year earlier didn't apply.

23 Next slide, please. And here's the conclusions
24 from his March letter which, because we did a FOIA, we found
25 had been written by counsel for Enterprise, which is not

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1 necessarily something out of the ordinary. However, the
2 conclusions in that particular letter were accepted verbatim.
3 We ran a blackline, not a single word was changed. And these
4 conclusions were --

5 MR. GREEN: Excuse me. Vice Chair, I hate to
6 interrupt Mr. William's, Mr. William's presentation, but he
7 said this repeatedly. And this is the only thing I'm going
8 to say.

9 The fact that he's, the fact that this, he says
10 the red lines, it has no real relevance to the analysis of
11 the letter itself. I'm just raising that now. And I'm going
12 to raise it again, and I would ask that, that the suggestion
13 of lack of independent judgment be clarified.

14 VICE CHAIRPERSON JOHN: Mr. Green --

15 MR. GREEN: Let me tell you, I apologize.

16 VICE CHAIRPERSON JOHN: Mr. Green, we allow
17 parties to present their testimony. There's ample time for
18 cross-examination and rebuttal, so. And the Board can
19 evaluate witness testimony and presentation. So I note your
20 objection, but I'm going to recommend that we hold those
21 objections until after the presentation.

22 MR. WILLIAMS: Thank you. Vice Chair, let me just
23 say, this is a good opportunity for me to say that we are not
24 trying to impugn the Zoning Administrator or make him look
25 bad. Rather, we think he was provided erroneous information.

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1 We think that another party was working to block
2 our development and basically used his authority to do it
3 without him knowing. Or he wasn't aware of what was going
4 on. This is not meant to impugn him. Rather, I think the
5 other side has impugned his authority.

6 VICE CHAIRPERSON JOHN: And Mr. Williams, this is
7 a good time for me to add. The Board cannot evaluate whether
8 someone's trying to block a development or impugn someone's
9 character. So please just --

10 MR. WILLIAMS: Yes.

11 VICE CHAIRPERSON JOHN: -- state what happened.
12 Who shot John, let's try to do --

13 MR. WILLIAMS: Understood.

14 VICE CHAIRPERSON JOHN: -- that.

15 MR. WILLIAMS: Understood.

16 VICE CHAIRPERSON JOHN: Okay, thank you.

17 MR. WILLIAMS: Next slide, please. So in response
18 to our request for clarification, this is the next
19 determination letter from the Zoning Administrator. June 4,
20 this is the issue in this appeal. This is what is being
21 appealed.

22 The history is important, but this is the letter
23 that's being appealed. In this order, Mr. LeGrant refused
24 to clarify what had happened previously. But he did say,
25 what he did say was that the matter is, in his opinion, in

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1 his interpretation, in his determination, had been decided
2 by the Zoning Commission.

3 And that the parking requirement was now 423
4 spaces. Okay, and he cited a section from the order. We'll
5 get to that. That's essentially the main contention of this
6 appeal. Next slide.

7 So that order, Zoning Commission Order 66-68-A is
8 what the Zoning Administrator was trying to interpret, I
9 suppose, in arriving at that number. Here's the issue and
10 this is sort of the crux of the appeal.

11 The decision portion of that order contains no
12 condition with respect to parking requirements. We heard a
13 lot about this in the last appeal. There's no explicit
14 condition about parking requirements for the PUD in that
15 decision. Anywhere in that order.

16 Second, the decision talks about the approval for
17 the new building and that the new building's required to have
18 five parking spaces. That's it. There's no other mention
19 of parking in the decision.

20 The order doesn't make any statements or
21 determinations or conditions regarding parking requirements
22 for the whole PUD, and only in a finding of fact, and in a
23 conclusion of law with respect to the ANC, did the number 423
24 spaces show up. There's no determination it was made by the
25 Zoning Commission as to that number. Next slide, please.

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1 So what we asked for the BZA to do is to state
2 that the Zoning Administrator Enterprise were originally
3 correct. The campus requires 132 spaces. Attempting to
4 arbitrarily select a different number is contrary to D.C.
5 law, as we said in our papers, and the zoning request
6 regulations today require 132 spaces.

7 Even with the removal of our parking lot, the
8 campus will still be overbuilt by hundreds of spaces. This
9 is a Metro accessible PUD. Further, Enterprise zone
10 transportation experts have agreed 100, over 100 spaces are
11 not even used on the campus on a daily basis and St.
12 Vincent's seeks to build its own senior affordable living
13 project on this property.

14 And whatever parking, obviously, it's required to
15 provide, it will provide as part of that project. Next
16 slide. I want to just finish up with one last point, which
17 is there's an ANC 5-E letter, but we argue that it shouldn't
18 be given great weight for a couple reasons.

19 First, the matter was never placed on the ANC's
20 agenda as it's required to be under the D.C. code section on
21 great wait. Now we were never notified of it. The ANC made
22 a decision without allowing us to present or even giving us
23 notice that they were going to consider this case.

24 ANC, in the letter, has erroneous facts such as
25 that our lot has 52 spaces on it, which is not correct and

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1 appears in an Enterprise brief. It's also incorrect, but
2 it's not correct and I think we can all agree on that. And
3 the letter doesn't address any of the issues in the appeal.

4 So for all those reasons under D.C. law, the ANC
5 letter should not be given great weight. And with that, I'm
6 going to hand it over to my colleague, Mr. Feinberg, to
7 receive testimony from Mr. Conley.

8 MR. FEINBERG: Hello, everyone. St. Vincent's
9 calls as it's witness Mr. John Conley.

10 VICE CHAIRPERSON JOHN: Thank you.

11 MR. FEINBERG: That's Mr. Conley on the screen.
12 Hello, Mr. Conley. Can you say hello to the members of the
13 Board and please introduce yourself?

14 MR. CONLEY: Hey, sorry about that. I just
15 unmuted. Hi, my name is John Conley. I am a local D.C.
16 developer. I've been operating in the D.C. market for over
17 10 years now. Born and raised in D.C. and live in Northwest
18 D.C., as well.

19 MR. FEINBERG: Thank you, Mr. Conley. Now, I
20 understand you're here representing St. Vincent's, LLC,
21 correct?

22 MR. CONLEY: Correct.

23 MR. FEINBERG: And tell the members of the Board
24 who St. Vincent's LLC is.

25 MR. CONLEY: St. Vincent's LLC is a joint venture

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1 between me and Catholic Charities to develop the two acre
2 parcel that we're talking about today.

3 MR. FEINBERG: Let's take a look at that parcel.
4 Mr. Young, if you wouldn't mind in the same exhibit going to
5 page 5, just several pages behind you, page 5. Almost there,
6 there we are. Thank you, Mr. Young. Now, Mr. Conley, you
7 recognize this overhead view, right, sir?

8 MR. CONLEY: Yes.

9 MR. FEINBERG: And let me direct your attention
10 to the area in red, red boxes. What is that?

11 MR. CONLEY: That is a parking lot in the District
12 of Columbia.

13 MR. FEINBERG: And who's parking lot is it?

14 MR. CONLEY: Catholic Charities?

15 MR. FEINBERG: And approximately how many spaces
16 are in that parking lot?

17 MR. CONLEY: About 114.

18 MR. FEINBERG: Okay, and does that the parking lot
19 that we're here for today?

20 MR. CONLEY: Yes, sir.

21 MR. FEINBERG: Do you have any plans to develop
22 this parcel, sir?

23 MR. CONLEY: Yes. So well, let me give you some
24 backstory on how we found this parcel. So a few years back,
25 I was looking through the tax lien records to see if there

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1 was any interesting properties that were coming out for a tax
2 sale that we could develop and create value on.

3 When I noticed about two weeks before the auction
4 that this particular parcel was going up for auction and that
5 Catholic Charities owned the parcel. And as it turns out,
6 one of my uncle's best friends from high school was also the
7 priest that married my older brother, my little brother, me
8 and baptized all of our children, was the head of Catholic
9 Charities at the time.

10 And I sent him a quick note and said hey, do you
11 know that you have a parcel going to auction, you need to pay
12 off that lien ASAP otherwise someone's going to try to take
13 it from you.

14 And it kind of kicked off this whole storm where
15 they didn't even know that they owned it, only to find out
16 that they did know that they own it, but they think there's
17 any value to it.

18 And so what happened is we kind of dug through the
19 record, figured out they really did own it in title and
20 looked at the easements and realized that there was a higher
21 and better use to the property than a parking lot in today's
22 market.

23 So we created a joint venture Catholic Charities
24 is not a real estate development arm. Their mission is
25 helping people, you know, whether it's homeless, immigrants,

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1 people down on their, on their luck, and they try to get back
2 on their feet.

3 So they're not kind of smart, savvy real estate
4 people, nor can they afford to spend the money that it takes
5 to put one of these pieces of land into production. So we
6 created a joint venture where I kind of took on that
7 responsibility and spent all the capital to develop this
8 property. And that's kind of how we got here today is
9 through those efforts.

10 MR. FEINBERG: And is the development that you're
11 planning intending to help people, John?

12 MR. CONLEY: Yes. You know, consistent with the
13 mission of Catholic Charities, the intention is some sort of
14 affordable and or senior living slash affordable project in
15 the future.

16 MR. FEINBERG: Now, let me switch topics. The
17 Board here is very interested in some mistakes, some errors
18 that were made. Let's focus in on those errors, okay? So
19 my first kind of question is, from your perspective, from St.
20 Vincent's perspective, why are we here today?

21 MR. CONLEY: I think when we kind of came into
22 this process, Enterprise had, unbeknownst to me, already had
23 been working on a PUD modification. And we were trying to
24 figure out ways to unlock value and to get around the
25 easement that covers across the property.

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1 And when we saw their application for
2 modifications of PUD, we saw what we thought was the case,
3 which was that the campus in today's regulations had more
4 spaces than they truly needed.

5 And that the term of the easement, which is the
6 private agreement between our two parcels, would be
7 terminated if, you know, the zoning and regulations change
8 or otherwise.

9 And so, when we saw the applications of
10 modification of PUD, we said great, they're making the same
11 argument that we're making. So we approached Enterprise to
12 negotiate an orderly wind down of the easement.

13 We were going to be years behind them in terms of
14 process. And, you know, just to get on the same page and not
15 have, you know, be good neighbors, all that kind of stuff and
16 create like a win, win, win for everyone. And that's kind
17 of what led us up to here because then we have this other
18 zoning determination letter was in direct conflict to your
19 application of PUD modification.

20 MR. FEINBERG: Well, let's go step by step. So
21 you saw Enterprise's PUD application, you approached them for
22 an orderly wind down of their parking easement on your
23 property. What happened next?

24 MR. CONLEY: After we approached them, we saw that
25 I think the March letter from the Zoning Administrator saying

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1 that there's 554 spaces were required on the parking, on the
2 campus.

3 MR. FEINBERG: And what was your reaction to
4 seeing that requirement?

5 MR. CONLEY: That was a lot more than the 123
6 parking spaces that Enterprise had claimed in their PUD.

7 MR. FEINBERG: Okay, did you do anything in
8 response?

9 MR. CONLEY: That's when we actually asked Jack
10 to reach out to the Zoning Administrator to get a sense for
11 what's going on here. And, you know, obviously, or so we
12 thought that there was just a mistake that had happened and
13 asked the Zoning Administrator hey, did you check these four
14 things? And that was the next step that we took.

15 MR. FEINBERG: Got it. Zach is Mr. Williams?

16 MR. CONLEY: Yes.

17 MR. FEINBERG: The guy who was just speaking a few
18 minutes ago?

19 MR. CONLEY: Yes.

20 MR. FEINBERG: Okay. And so what did Zach then
21 do? He wrote to the Zoning Administrator?

22 MR. CONLEY: Yes. He then asking him to clarify
23 a couple, couple of contradictions that we saw between the
24 two zoning determination letters?

25 MR. FEINBERG: Were those contradictions ever

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1 clarified?

2 MR. CONLEY: No, I believe the Zoning
3 Administrator chose to kind of defer, and said that that, to
4 the Zoning Commission, said that this has already been
5 handled and then that's when we saw that 423 parking space
6 number.

7 MR. FEINBERG: That's the letter that's dated on
8 or about June 4, 2021, correct?

9 MR. CONLEY: Yes.

10 MR. FEINBERG: Okay. Now, let me ask you just a
11 couple of questions to wind down. Is there any impact on St.
12 Vincent's cause by this June 4, 2021, letter?

13 MR. CONLEY: Yes. So, you know, the problem with
14 the letter is that now we can't build on this property. Even
15 the Office of Taxing revenue is charging us taxes every year.
16 It will assess in the value of a parking lot because they say
17 that there's a higher and better use for that parking lot
18 than a parking lot.

19 And we can't pay those taxes, or the Catholic
20 Church can't pay those taxes because there's no income being
21 generated from it. And so the, Catholic Charities is going
22 to lose the land because they don't have the resources to
23 just pay off those taxes and pay taxes for land that they're
24 really not utilizing.

25 The parking lot was to the benefit of Edgewood 4's

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1 off street parking requirement, which, if you don't need it
2 anymore, then, you know, we can put the land in production
3 and put it to better use for everyone.

4 MR. FEINBERG: Got it. Got it. And so you just
5 said Edgewood 4. Here on the screen is the overall, the
6 bird's eye view. Is Edgewood 4 the building that's gray in
7 a sort of L shape that says EW-4?

8 MR. CONLEY: Yes.

9 MR. FEINBERG: And that's right next to your
10 parking lot?

11 MR. CONLEY: Correct.

12 MR. FEINBERG: So if the parking determination is
13 something less, then you can put your land into production
14 and not have to have parking from EW-4. Is that correct?

15 MR. CONLEY: Correct. Yes.

16 MR. FEINBERG: Okay. Those are all the questions
17 I have for you right now, Mr. Conley. Maybe Mr. Sullivan or
18 another one of the counsel has questions for you. Thank you.

19 VICE CHAIRPERSON JOHN: So mister, give me a
20 second. Mr. Williams, have you concluded your presentation?

21 MR. WILLIAMS: Yes, Madam Vice Chair, and we
22 reserve the remainder of our time for rebuttal.

23 VICE CHAIRPERSON JOHN: Okay, thank you. Does the
24 Board have any questions? I'm trying to see if there any
25 hands up. Okay, Mr. Green, do you have any questions?

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1 MR. GREEN: No, no questions.

2 VICE CHAIRPERSON JOHN: The ANC isn't here, right?
3 So we're back to Mr. Sullivan. Do you have any questions?

4 MR. SULLIVAN: Yes. Thank you, Madam Chair. Just
5 two questions, I think. For Mr. Conley, if the, if this
6 easement, if the parking easement did not exist, would you
7 have any concern at all with what the parking requirement is
8 for Edgewood Commons?

9 MR. CONLEY: Sorry, if the easement didn't exist,
10 would we have concern about the parking requirement for the
11 whole campus?

12 MR. FEINBERG: Objection, hypothetical.

13 MR. SULLIVAN: If there, if there was no easement,
14 okay, but for the easement, do you have any concern at all
15 about the parking requirements for Edgewood Commons?

16 MR. FEINBERG: Objection, hypothetical. There is
17 an easement. He's assuming counter factually that one
18 doesn't exist when one does exist.

19 MR. SULLIVAN: Madam Chair, everything we've heard
20 so far up to this point is basically irrelevant to the
21 decision before us, so I see you're giving latitude and so
22 I'm asking for latitude on this question.

23 VICE CHAIRPERSON JOHN: I'm going to allow the
24 question,

25 MR. CONLEY: So just so I understand, you're

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1 saying --

2 MR. SULLIVAN: So Mr. Conley, I'm asking you a
3 question. I'm sorry.

4 VICE CHAIRPERSON JOHN: This case, gentlemen --

5 MR. SULLIVAN: The question is, if there was, if
6 there was no subject easement, would you have any concern at
7 all about what the actual parking requirement was for
8 Edgewood Commons?

9 MR. FEINBERG: I have an objection.

10 MR. CONLEY: I believe, you know, if we're
11 Catholic Charities and we're developing the land, and we had
12 modified the PUD, we're going to be subject to the parking
13 requirements. So what exists in, what it requires, you know,
14 affects the land and what you can do with it.

15 MR. SULLIVAN: But you wouldn't be stopped from
16 developing it with, except for the easement.

17 MR. FEINBERG: Same objection.

18 MR. SULLIVAN: Okay, so I'll move on. So when you
19 saw that the Zoning Commission that issued an order on
20 June 4, 2021, which stated, rather unequivocally, in a
21 conclusion of law, not in a finding of fact, but in a
22 conclusion of law, that the parking requirement was 423
23 spaces.

24 And that would be sufficient to address the
25 concerns of the Advisory Neighborhood Commission, and that

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1 there was a condition which stated that the PUD would be
2 built according to the plans attached, and one of those plans
3 was a site plan showing 114 parking spaces on Lot 803.

4 When you saw that order come out and read that,
5 did that clear it up for you? That the parking requirement
6 was 423 spaces or were you still confused by the information
7 that was previously available?

8 MR. FEINBERG: Objection, mischaracterizes the
9 evidence.

10 VICE CHAIRPERSON JOHN: Okay, can you just
11 rephrase that, Mr. Sullivan? The question is, did you --

12 MR. SULLIVAN: Sure --

13 VICE CHAIRPERSON JOHN: -- okay, let me help you
14 here. Did your client see the order? And did your client
15 understand that the parking requirement stated 114 spaces on
16 his property? That's the question.

17 MR. SULLIVAN: Sure. Yes, yes. That's, I'll try
18 to make it succinct. He stated that he was very confused by
19 the, by the pronouncements that had come out prior to the
20 Zoning Commission order.

21 And so, I was just asking him if it cleared it up
22 for him when he saw that the Zoning Commission had settled
23 it was 423 parking spaces, pursuant to the order issued on
24 June 4.

25 MR. FEINBERG: Objection, mischaracterization --

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1 MR. SULLIVAN: And I'll wait for the objection.

2 MR. FEINBERG: Same objection, mischaracterizes
3 the evidence.

4 VICE CHAIRPERSON JOHN: That's a yes or a no
5 question. Did it clarify your, your understanding, or did
6 it not?

7 MR. CONLEY: Well, not exactly. I think one of
8 the reasons why we're here is the original exhibit that
9 governed the parking on campus was lost. It's back like from
10 like the 1960s.

11 And so, you know, when Enterprise went in for, to
12 start working on their PUD, they met with the Zoning
13 Administrator to determine what was the parking requirement
14 back then, and what would it be today, so that they had some
15 clarification of how to proceed and plan for their project.

16 So we kind of see that their modification of PUD,
17 and then we see this letter of determination saying 554
18 spaces, which is not what was in their modification of PUD.
19 So then it's, the 423 doesn't exactly solve everything
20 because we're like, how did you get to that number?

21 VICE CHAIRPERSON JOHN: Please continue with --

22 MR. SULLIVAN: Just one more question. Did you
23 file an appeal of the Zoning Commission Order 66-68A?

24 MR. CONLEY: I file an appeal of the Zoning
25 Committee, is that modification of PUD?

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1 MR. SULLIVAN: Yes, the one that listed 423
2 spaces.

3 MR. CONLEY: We did not file an appeal on the
4 modification of PUD because we felt like it stated what we
5 thought was favorable to us, which was 123 parking spaces
6 were required.

7 MR. SULLIVAN: You thought the Zoning Commission
8 order stated that 123 spaces were required?

9 MR. CONLEY: The Zoning Commission was presented
10 the modification of the PUD, which bases some of the
11 recommendations on the zoning determination letter from the
12 Zoning Administrator.

13 MR. SULLIVAN: No further question.

14 VICE CHAIRPERSON JOHN: Thank you, Mr. Sullivan.
15 Mr. Green?

16 MR. GREEN: I'm sorry, you broke off there.
17 Sorry. Did, was it for further questions or could begin the
18 presentation? Sorry, I couldn't hear you.

19 VICE CHAIRPERSON JOHN: You can begin your
20 presentation. You didn't have any cross-examination?

21 MR. GREEN: No, I didn't have any. So thank you.
22 Thank you, you know what, can I get, can I get two minutes?
23 I apologize. Can I get just two minutes?

24 VICE CHAIRPERSON JOHN: Sure.

25 MR. GREEN: Just for a break, and I'll be back.

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1 Sorry. Thank you.

2 VICE CHAIRPERSON JOHN: We'll take two minutes.

3 (Whereupon, the above-entitled matter went off the
4 record at 3:05 p.m. and resumed at 3:11 p.m.)

5 VICE CHAIRPERSON JOHN: Go ahead.

6 MR. GREEN: Sorry. Thank you. Good afternoon.
7 Good afternoon members of the Board. I'm Hugh Green,
8 attorney for the DCRA. So yes, as a preliminary matter, we
9 have filed a motion to dismiss in this, in this regard
10 because, in looking at the documents including the letter
11 that's being appealed, the June 4 letter by Mr. LeGrant,
12 there is no final determination.

13 So as an initial matter, let me, I would ask that
14 Mr. Young could bring up our slides for basically our, our
15 PowerPoint presentation. And if I could just go to the March
16 29 letter, if you could? Mr. Young there?

17 MR. YOUNG: Yes, sorry. I just have to --

18 MR. GREEN: Sorry.

19 MR. YOUNG: -- the exhibit. Give me one minute.

20 MR. GREEN: Basically, I'm sorry. I just wanted
21 to make sure my mic was on. It sounded like, I don't know
22 if anyone heard me. Okay. All right, thank you. Thanks,
23 Mr. Young.

24 And so, just to just to continue, so we're dealing
25 with basically three communications, and looking either at

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1 them collectively or together, there is no final
2 determination between the appeal, and therefore it warrants
3 a dismissal in this case under 302.1.

4 The Board is familiar with the, certainly the
5 disclaimers, but I'd like to focus in two things in terms of
6 our motion. It's laid out fairly clearly. If you take a
7 look at page 2.

8 Mr. Young, of that, one more page, fourth page,
9 sorry, trying to do this as well. The fourth page, the
10 letter, keep going. Okay, fair, fair enough. We're at the
11 last, like the last portion.

12 So if you can, as you can tell from the March,
13 I'll referred to it as the March 2021, the letter to the
14 disclaimer that is at the bottom, which says that this is not
15 an appealable order.

16 It's interesting to note the appellant clearly
17 understands, and concedes in its own filings that this, this,
18 this letter could not be appealed. So they chose the June
19 4 letter.

20 And that's really the subject of this appeal, is
21 what was wrong with the June 4 letter, but we'll get there
22 in a minute. As we go further down, what was ultimately said
23 in this letter, in the, in this March letter.

24 In the interim, it has been has been discussed,
25 it's in the filings, the PD application was pending and the

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1 commission, Zoning Commission order had not yet been issued,
2 I believe.

3 And it became final on June 4. So the March
4 letter is issued, and what is in the record is the subsequent
5 letter by the appellant asking for clarification by the
6 Zoning Administrator regarding this letter, so that would be
7 the second letter, second, second communication at issue
8 here.

9 And if we could scroll, Mr. Young, and I'll get
10 this for you to the file page, which actually becomes
11 important. Actually, all the way down, I'll get you to the
12 actual page but I'll just, so in this case, we're dealing
13 with page 21, Mr. Young, page 21. Sorry, I'm, it's 21 on
14 mine, could you scroll up one page?

15 Okay, so here is the June 4 letter, which is under
16 appeal. And the Board has read and it's very, very clear
17 that this is what is the subject of the appeal here. So if
18 indeed we're looking at the whole letter, it clearly asks,
19 it's clearly his response.

20 However, again, this letter is in response to a
21 request by the appellant for clarification of the March 29
22 letter, which the appellant concedes cannot be appealed
23 because of the disclaimer.

24 And what does Mr. LeGrant say in this letter? If
25 you go to the second page, which is really a key point, the

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1 last page of this letter, Mr. Young. So and it begins there,
2 and I'll just read it.

3 In light of the ZC order, I believe these matters
4 have been answered by the Zoning Commission. That Commission
5 concluded, and he's quoting, this is the Zoning Administrator
6 quoting the actual order that there will be sufficient
7 parking available on the LSPD site to handle the demand of
8 the building.

9 Because the LSPD site provides 223 spaces,
10 approximately 103 of which are available on a daily basis,
11 as noted in the DDOT report. And he refers to the Zoning
12 Commission order. Four hundred and twenty three spaces is
13 not Mr. LeGrant's number, it's the Zoning Commission's order.
14 That's what he's referencing.

15 So if indeed the challenge is that's wrong, the
16 appellant's, the appellant's really issue is with the order
17 itself, not with what Mr. LeGrant said. And then, as he says
18 again, as I stated, I'm just going to read it briefly and
19 then I'll get to my point here.

20 As I stated in the March letter, I concluded the
21 parking easement was create an order to fulfill off street
22 parking. But ultimately, the question for, and it goes on
23 to the end. Ultimately, the appeal that the appellants want
24 was, is 132 spaces. They want this letter overturned, okay?

25 And the Board to say that there are 132 spaces.

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1 However, that's not what the order says and that's not what,
2 so Mr. LeGrant's 423 is not a number that he came up with.
3 It came out of the order itself.

4 So the question becomes, what is the
5 determination? Mr. LeGrant merely referred to the Zoning
6 Commission order. And now, what the appellants are claiming
7 is okay, well, because it didn't have the disclaimer, that's
8 the basis in which he can appeal it.

9 Well, I would argue that there is, they couldn't
10 appeal the March 29 letter, and this points to the Zoning
11 Commission's own order, and the fact that it doesn't have a
12 disclaimer, if you look at it in either separately or
13 conjunction, there really is no final determination.

14 Mr. LeGrant is pointing to the Zoning Commission
15 order which identified those numbers. So if you look at it
16 from a global perspective, this really warrants a motion to
17 dismiss because there is no final determination.

18 The mere fact that the disclaimer wasn't on here
19 is referring back to the prior, which -- sorry, the prior
20 letter, which the appellants concede can't be appealed, and
21 that's stated in their old filings.

22 But they're somehow saying that this is Mr.
23 LeGrant's determination and his number, and that's not the
24 case. So we believe that, DCRA's position is that this is
25 not, this, this letter can't, is not an appealable decision.

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1 It's not a final determination by the Zoning Administrator
2 because it's merely referring to the Zoning Commission's own
3 order.

4 So if indeed a response like this is something
5 that can be appealed, then I think that that is a, that thing
6 is, I think that's a challenge for both the Zoning
7 Administrator and the Board of just referring to the, the
8 order and then this is somehow a final determination by the
9 Zoning Administrator, and that's not the case.

10 So as a basis, we would ask that this case be
11 dismissed on those grounds, and it's laid out in our appeal.
12 I'm not going to belabor that point, but I would like to
13 bring that to the Board's attention.

14 Going to the merits of the case, it's fairly cut
15 and dry. The, if we look at the letters, both the March and
16 the June letter, and we're narrowed to the June 4 letter,
17 let's make no mistake, there is no error.

18 It's referring back to the Fordham 23 spaces which
19 is articulated specifically in the Zoning Commission order.
20 So it really, there, it's strange credulity that the, that
21 the appellants are claiming that there is some error by the
22 Zoning Administrator.

23 Nevertheless, in order to give us a holistic view,
24 I'm going to call Mr. LeGrant so we can better understand
25 both the, to understand it in the full sense. So I ask that

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1 Mr. LeGrant be called to testify now. Mr. LeGrant, can you
2 hear me, sir?

3 MR. LEGRANT: Yes.

4 MR. GREEN: Okay. So, Mr. LeGrant, can you please
5 state your name for the record?

6 MR. LEGRANT: It's Matthew LeGrant, Zoning
7 Administrator, DCRA.

8 MR. GREEN: Okay. So, Mr. LeGrant, let me, let
9 me, let me ask Mr. Young to go back to page 1 of the March
10 letter, if you could. And it's several pages long, but I
11 want to begin our, our discussion here. Wait until we get
12 to it.

13 And so, you're obviously familiar with this
14 letter, Mr. LeGrant. So there's pages and pages of, what I
15 want to ask you is this, this March 29 letter was directed
16 at Mr. Sullivan and several pages, and an extensive
17 exposition on the original LSPD order from 1966.

18 So, rather than going to each and every, an entire
19 analysis, can you provide the Board an understanding what,
20 what your analysis is in this letter --

21 MR. LEGRANT: Sure.

22 MR. GREEN: -- with respect to parking and how it,
23 how it, how your analysis was determined and what
24 determination you made?

25 MR. LEGRANT: Yes. Okay, yes, thank you. So I

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1 will approach to review the parking requirements for Edgewood
2 Commons. The challenge there was the information was pulled
3 from a 1977 order in Exhibits for further processing by order
4 the BZA in 1970. And I came up with the number, I came up
5 with a number that was based on the information and stated
6 in my letter 554 spaces.

7 MR. GREEN: So is it fair, so when you say it was
8 554 spaces, do you believe that number was, was a number a
9 definitive number? Was it completely accurate? Or what was,
10 what was your, how did you come up with that number of 554?

11 MR. LEGRANT: It was a reasonable calculation
12 based on the then available material.

13 MR. GREEN: Okay. Okay. Fair enough. So one of
14 the other points to that letter, this is the March letter,
15 is that your, the letter also references that Enterprise also
16 had an application for an LSPD modification, which was
17 pending at the time in Zoning Commission case 6668. So can
18 you explain how that application, how that's relevant to your
19 analysis or and the --

20 MR. LEGRANT: Sure.

21 MR. GREEN: -- parking requirement?

22 MR. LEGRANT: Sure. Well, thank you. Yes, so as
23 I stated in that letter, the March 9 letter, the final
24 decision regarding parking for the campus, with off campus
25 and the new building, lies with the Zoning Commission and the

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1 final order, which had at that point in time had not been
2 issued.

3 MR. GREEN: So would the final order from the
4 Zoning Commission in 60, in PUD 6668, would that potentially
5 that alter your analysis?

6 MR. LEGRANT: Yes, yes, I was. You know, I think
7 I was trying to be clear to defer to the commission. I knew
8 there was this pending case, and that case, once it was
9 decided and published, then they have, they have the say,
10 they have the say about this. And so I deferred to them.

11 MR. GREEN: Okay, can you just bear with me one?
12 I'm sorry, I'm trying to pull up the screen, but I, I'm
13 having some technical difficulties. I wanted to refer to
14 Footnote No. 7 of this letter because I want to ask you a
15 question about it.

16 Mr. Young, just give me one minute. Okay, so
17 Mr. Young, could you go to page 3, which begins Footnote 7?
18 Page 3 of the slides. I'll try to get through this quickly.
19 It's, the print is very small, but I'm going to read it into
20 the record.

21 So let's go to the bottom of the page, it's
22 smaller. It says the Zoning Commission approved the
23 modified, the Zoning Commission approved the modification
24 application in a final action on December 17, 2020.

25 That decision does not become effective until a

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1 modification order is published in the D.C. register, which
2 next page, bottom of the page. Page 8. As of the date of
3 this letter, has not happened. My office was asked to make
4 a determination as whether or not the Zoning Commission
5 eliminated the off street parking requirement for the
6 Edgewood 4 building.

7 As part of the modification case, I have had to
8 wait until the final rule was published in the D.C. register
9 before considering such a determination. So the reason why
10 I wanted ask you this is how is, how is this, how is this
11 relevant to the case at hand?

12 MR. LEGRANT: Sure. Sure. What I mentioned
13 previously, the Zoning Commission order had not been
14 published, so any analysis of the off street parking that we
15 revealed in light of the order because that order would speak
16 to its determination.

17 MR. GREEN: And since, so the, let me, let me move
18 on. Let me, let me ask you this. Has your office been
19 formally been asked to make a determination after the ZC
20 order has been issued and final with respect to parking?

21 MR. LEGRANT: No, it has not.

22 MR. GREEN: Okay. Let me move on to the June 4
23 letter. And I apologize, Mr. Young, for having you jump
24 around, but we're going back down to number 21. Page 21 of
25 this, so wait until you get that, so 21. There we go. So,

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1 again, Mr. LeGrant, you're familiar with this June 4 letter?

2 MR. LEGRANT: Yes.

3 MR. GREEN: Okay. So, help, help, can you help
4 the Board understand, what was your basis for issuing this
5 particular letter?

6 MR. LEGRANT: Sure. So, as it was stated in
7 DRCA's filing, it was his response to the counsel for St.
8 Vincent's requesting clarification of my March letter.

9 MR. GREEN: And, and so did something happen in
10 the interim between the March letter and June 4 with respect
11 to the Zoning Commission case?

12 MR. LEGRANT: Well, they, the order's publication.
13 I believe at this point in time, the order had not been
14 published March, the March letter, and this letter now was
15 reiterating that it depends on the Zoning Commission order.

16 MR. GREEN: Okay, so I'd like to go the page 22,
17 which is the concern of this appeal. And I've read it in the
18 record. And so in here, just to summarize, you, you identify
19 the site being, having 423 spaces. So can you tell me how,
20 where you came with, came up with that number?

21 MR. LEGRANT: Again, on March 4, the Zoning
22 Commission's order was final. My prior March letter was
23 based on this 50 year old partial information but the
24 Commission's previous order settled the parking space number
25 423 and I referred in my March, on June 4 letter, I referred,

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1 saying this is counsel to the Zoning Commission order.

2 MR. GREEN: All right. So Mr. LeGrant, I got a
3 couple more questions because the this video's kind of
4 important. The appellant argues in its appeal that your,
5 that this June 4 letter is incorrect, and the number of
6 spaces is 132, or should be 132. And what is your response
7 to that, that figure and in relationship to your June 4
8 letter?

9 MR. LEGRANT: Well, the appellant's assertion is
10 not correct. I just, again, after I defer them, and
11 everybody takes the Zoning Commission order which completed,
12 in the I believe in the finding of fact that campus had 423
13 spaces. I put that in both the March and the June 4 letter.
14 Parking requirements were determined by the commission. And
15 that, in my mind, settled the matter.

16 MR. GREEN: Very well. And then, and last well,
17 I guess the last question. In light of, you've obviously
18 reviewed all of the filings in this case, have you not?

19 MR. LEGRANT: Repeat that.

20 MR. GREEN: You review the filing. My only
21 question is has your, has your opinion changed with respect
22 to your understanding of the Zoning Commission order
23 regarding the space those parking requirements or parking
24 spaces for them?

25 MR. LEGRANT: No, no. I will defer to the

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1 Commission as I'm supposed to. It's like whether the
2 commission in its determinative order specify, they specified
3 the parking requirement, 423, that is what is relevant.

4 MR. GREEN: Okay, I don't have any further
5 questions for Mr. LeGrant. We're available for other
6 questions. We reserve the right to, for rebuttal or for the
7 questions as the evidence develops, thank you.

8 VICE CHAIRPERSON JOHN: Does the Board have any
9 questions? I don't see any hands up. Okay, then I'll go to
10 the appellants. Mr. Williams, do you have any questions?

11 MR. FEINBERG: Now this is Dave Feinberg. I do
12 have some questions for Mr. LeGrant. Mr. Young, would you
13 mind putting up that exhibit again? Please. Same page is
14 fine.

15 Scroll down just a little bit, please, Mr. Young.
16 Thank you very much. Okay Mr. LeGrant. Hi, Dave Feinberg.
17 Nice to meet you. I'm with the Venable Law Firm. Now let
18 me ask --

19 MR. LEGRANT: Yes, hello.

20 MR. FEINBERG: -- pleasure to meet you, sir. Let
21 me ask you a few follow up questions on this. Now are --

22 MR. LEGRANT: Sure.

23 MR. FEINBERG: -- you testifying to the Board that
24 the Zoning Commission established a parking requirement of
25 423 spaces on the campus? Or are you saying that the

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1 Commission stated that there were 423 parking spaces on the
2 campus?

3 MR. LEGRANT: Well, the commission established
4 there was 423 spaces on campus available toward the parking
5 requirements.

6 MR. FEINBERG: Got it. You're not telling us that
7 the Zoning Commission established a parking requirement of
8 423 spaces, right?

9 MR. LEGRANT: It's, it's, ultimately the
10 Commission, as in the case of any PUD, would speak to what
11 the parking requirement is. PUD, or in this case, you know,
12 it's this older instrument, large parcel. The 1966 version
13 of PUDs.

14 MR. FEINBERG: Well, let me, let me try it again.
15 Maybe we'll have to go to the actual document. You're not
16 telling this zoning Board that the Zoning Commission back in
17 June of last year established a 423 parking space requirement
18 for the Enterprise campus. You're not saying that, right?

19 MR. LEGRANT: I'm saying if the Commission in
20 reviewing this matter, they, they ultimately spoke to what
21 is the parking, based on information that was given to them
22 and they concluded that the parking was provided and what was
23 required.

24 MR. FEINBERG: Okay, I guess you're saying it, the
25 Zoning Commission did establish a 423 parking space

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1 requirement. Let's take a look at the document to see if you
2 are correct.

3 MR. LEGRANT: Okay.

4 MR. FEINBERG: Mr. Young, this is Exhibit 6.
5 Exhibit 6. This is the PUD Order 66-68-A. I'm looking, I'm
6 just waiting for Mr. Young. Thank you, Mr. Young. If we
7 could go to page 16 of the PDF.

8 Okay, perfect. We just, there we are. Perfect.
9 Thank you very much. Now let's focus your attention on the
10 numeral 14 paragraph, which is above the word decision. You
11 see that, Mr. LeGrant?

12 MR. LEGRANT: I do.

13 MR. FEINBERG: And you'll agree with me that this
14 is the area that you were quoting from your June 4 2021
15 letter, correct?

16 MR. LEGRANT: I believe so.

17 MR. FEINBERG: Yes. And you'll agree that at the
18 first bullet point, it says the commission concludes that
19 there will be sufficient parking available on this site, the
20 LSP, LSPD site, to handle the demand of the building because
21 the LSPD site provides 423 parking spaces, approximately 103
22 of which are available on a daily basis. As noted in the
23 DDOT report. See that?

24 MR. LEGRANT: I do.

25 MR. FEINBERG: Do you agree with me, the word

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1 requirement is nowhere in that bullet point. Right, sir?

2 MR. LEGRANT: I agree that there's, the word
3 requirement is not there.

4 MR. FEINBERG: And you'll agree with me that you
5 were here this morning for a prior appeal that was, that
6 wrapped up a little bit before two o'clock East Coast time.
7 Right, sir?

8 MR. LEGRANT: Yes, I don't see how that's relevant
9 to this. But yes.

10 MR. FEINBERG: We'll get there. I promise, sir.
11 I promise I'm not here to waste your time. In that case, I
12 heard you testify, and I believe you testified that you were
13 constrained by the decision and the conditions that appear
14 in Zoning Commission orders. Am I correct?

15 MR. LEGRANT: Yes.

16 MR. FEINBERG: Yes. And you'll agree with me that
17 what you just read right there is neither a decision nor a
18 condition of a Zoning Commission order. Right, sir?

19 MR. LEGRANT: Well, but you over --

20 MR. FEINBERG: Hold on for one second --

21 (Simultaneous speaking)

22 VICE CHAIRPERSON JOHN: Mr. Feinberg?

23 MR. FEINBERG: Yes, ma'am.

24 VICE CHAIRPERSON JOHN: Please allow the
25 administrator to answer.

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1 MR. FEINBERG: Okay.

2 MR. LEGRANT: Yes --

3 VICE CHAIRPERSON JOHN: I'm going to direct Mr.
4 Young to turn off your mic if we can't control this hearing.
5 I'm not having it this afternoon.

6 MR. LEGRANT: Okay, yes. The original order
7 represents the decision of the commission. It's, it's or
8 the, you know, you can't pick and choose and say, you know,
9 what did the Commission did. The Commission's order speaks
10 to what they did.

11 MR. FEINBERG: You'll agree with me that you
12 testified earlier today that you are constrained by the
13 language that's in a Zoning Commission decision and the
14 conditions of that decision. Yes.

15 MR. LEGRANT: Well, let me put it this way. As
16 I testified in the previous case, and in other cases, the
17 conditions are what's enforceable for any order. The order
18 of the Board, order of the Commission.

19 The information in the overall order, we inform
20 those if there's not, if there's not clarity in the
21 condition, then they inform me in making a determination or
22 a judgment.

23 MR. FEINBERG: You'll also agree with me that you
24 testified earlier today that you are not free to infer or
25 imply something that is not stated in the decision and in the

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1 conditions of that decision. Agree?

2 MR. LEGRANT: Well, let me put it this way, in all
3 due respect, Mr. Feinberg, if there's, if the, no one's going
4 to hear the case because the case, but in this case, whenever
5 there's, I'm reading a condition, if it's not clear, does
6 anything else in the order help inform me? And the other
7 situation, if it wasn't relevant, there wasn't anything in
8 the order that I felt had to inform me about the condition.

9 It was pretty cut and dry. So here, you know, and
10 I don't know if you have a specific question of a specific
11 condition of this order, I would look at it and see there's
12 something that would help inform me in the rest of the order.

13 MR. FEINBERG: Okay, let's try it that way.
14 You'll agree with me that nowhere in the decision or in any
15 of its conditions is there a 423 parking space requirement
16 spelled out. Agree?

17 MR. LEGRANT: Well, no, let's, let's, why don't
18 we, first of all, if Mr. Young could blow this up a little
19 bit. These are tiny, tiny, and we can scroll through the
20 decision and see if that's the case.

21 MR. FEINBERG: Okay.

22 VICE CHAIRPERSON JOHN: Okay, Mr. Feinberg, maybe
23 I can help you with this. Let's turn to the first part of
24 the order. Page, top of page 2. I don't know if this is
25 helpful to you.

1 Paragraph 6 where the PUD mentioned mentions what
2 was required at the time the project was constructed in 1976.
3 Thee approved LSPD included seven buildings, and it goes
4 through the GFA of FAR, the lot occupancy.

5 Seven hundred ninety two residential units, 200
6 units restricted to seniors, 59, 592 units restricted to
7 households and 423 parking spaces in an above ground garage.
8 So is that helpful?

9 MR. FEINBERG: Mr. Young, could you go down a
10 little bit? I think we missing the rest of that text.

11 VICE CHAIRPERSON JOHN: Okay, what's missing?

12 MR. FEINBERG: We're just looking at page by page,
13 madam.

14 VICE CHAIRPERSON JOHN: Okay. Just point me to
15 something that's, you know, relevant.

16 MR. FEINBERG: Okay.

17 VICE CHAIRPERSON JOHN: That your think the Board
18 should consider.

19 MR. FEINBERG: Yes. Well, there Your Honor, so
20 here at Item No. 7, we see that there's 423 parking spaces
21 in and above ground garage right there. Right?

22 VICE CHAIRPERSON JOHN: Yes.

23 MR. FEINBERG: Mr. LeGrant?

24 VICE CHAIRPERSON JOHN: So there is at least 423
25 parking spaces. So let's continue.

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1 MR. FEINBERG: Yes, and Mr. LeGrant, there's no
2 parking deck, no parking garage on St. Vincent's land,
3 correct?

4 MR. GREEN: Objection, relevance. We're talking
5 about the June 4 letter, which is subject to the, he's not
6 testifying as to whether it has a parking deck or not. I
7 would object to relevance.

8 MR. FEINBERG: Mr. LeGrant, do you know whether
9 there's a 400, there's a parking lot on mister, St. Vincent's
10 lot?

11 MR. GREEN: Objection.

12 VICE CHAIRPERSON JOHN: Mr. Feinberg, when's your
13 property, would your client know that?

14 MR. FEINBERG: Yes, I'm just asking if Mr. LeGrant
15 knows that?

16 VICE CHAIRPERSON JOHN: So let's move on.

17 MR. FEINBERG: Okay. So can we go down to the
18 decision part of the document, Mr. Young? Which is on page
19 16 of 21. And so let's pause there. Maybe we can just focus
20 in on this part of the decision. You'll agree with me, Mr.
21 LeGrant, that there is no 423 parking space requirement in
22 this part of the decision that you can see on your screen.
23 Correct, sir?

24 MR. GREEN: Objection, can we -- objection. The
25 order says what it says. Why do we have to walk through the

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1 order? Can we, is there any, is there any point to what
2 we're trying to get to?

3 MR. FEINBERG: That's a good point, Mr. Green.
4 Will you stipulate that the decision of this Zoning
5 Commission order, in the decision section has, says zero
6 about a 423 parking space requirement? If you will, no
7 problem.

8 MR. GREEN: Mr. Feinberg, respectfully, it says
9 what it says. What is it, and I'm just respectful, I'm
10 trying to be respectful, but is there? Is there, is there,
11 is there a point to the where we're headed? That's all.

12 MR. FEINBERG: Yes, I do have a point. Can I, can
13 I ask you again, would you be willing to stipulate that in
14 the decision part of this order, there is nothing mentioned
15 at all about a 423 parking space requirement.

16 MR. GREEN: It doesn't say, it doesn't say
17 anything about a parking requirement.

18 MR. SULLIVAN: I wouldn't stipulate, for the
19 record, the property owner.

20 MR. FEINBERG: Okay. So DCRA will stipulate.
21 We'll accept that stipulation on DCRA's --

22 MR. SULLIVAN: I would also point out that I don't
23 think DCRA stipulated either. So Mr. Feinberg's putting
24 words in their mouth at this point.

25 MR. FEINBERG: I'm sorry, mister, Mr. Hugh. Can

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1 I call you Hugh? Hugh, do you stipulate? Do you not?

2 VICE CHAIRPERSON JOHN: Mr. Feinberg --

3 MR. GREEN: No, no, I, no.

4 VICE CHAIRPERSON JOHN: Not again. Mr. Feinberg
5 may interject here. The Board can read the order, just so
6 you know.

7 MR. FEINBERG: Okay.

8 VICE CHAIRPERSON JOHN: Okay. So what is the
9 point you're trying to make?

10 MR. FEINBERG: The point I'm trying to make is
11 that there's no requirement of a 423 parking space
12 requirement anywhere in the decision and then the only thing
13 that the decision does say about parking is that they're
14 supposed to be five spaces. Five spaces for the new
15 building. Capital B, building, which is defined at the
16 bottom of that page right there on this screen.

17 VICE CHAIRPERSON JOHN: And that is page?

18 MR. FEINBERG: 16 of the PDF, Your Honor.

19 VICE CHAIRPERSON JOHN: Okay. You don't have to
20 call me Your Honor. That's fine.

21 MR. FEINBERG: Okay, Ms. John.

22 VICE CHAIRPERSON JOHN: Okay.

23 MR. FEINBERG: Do you prefer Ms. John?

24 VICE CHAIRPERSON JOHN: That's fine.

25 MR. FEINBERG: Okay, Ms. John. So that's my

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1 point. So Mr. LeGrant, you'll agree with me that the only
2 mention of parking in this decision document is the
3 requirement for five spaces for the building. Not anything
4 sitewide. Right, sir?

5 MR. GREEN: Well, objection. It's not what he
6 testified to?

7 MR. FEINBERG: I'm asking the question now,
8 Mr. Green.

9 MR. GREEN: Thank you.

10 MR. LEGRANT: Well, I don't remember. You said,
11 there is a requirement for five spaces for the new building.
12 And there's, yes, they, I'm just going to repeat. The
13 Commission's concluded there will be sufficient parking
14 available on the site and for the building because the site
15 provides 423 spaces, 103 of which are available on a daily
16 basis. And you're right, the order requires five.

17 MR. FEINBERG: Got it.

18 MR. LEGRANT: Does that, does that speak to it?

19 MR. FEINBERG: Can you repeat that, please? You
20 kind of cut in and out. Did anybody else have a hard time
21 hearing Mr. LeGrant? Could you repeat that again, Mr.
22 LeGrant? Maybe I'm the only one here I had a hard time
23 hearing you.

24 MR. LEGRANT: Okay. As the Commission concluded
25 in the order, there will be sufficient parking available on

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1 this, this LSPD site to handle the demand of the building
2 because the LSPD site provides 423 spaces, parking spaces,
3 approximately 103 which are available on a daily basis, as
4 noted in the DDOT report.

5 MR. FEINBERG: Got it. Thank you. Now, going
6 back for something that you also testified about, I think you
7 agreed that you've never seen the original parking order
8 66-68. Right?

9 MR. LEGRANT: I nor any other party to my
10 knowledge has never seen the exhibit to that 1966 order.

11 MR. FEINBERG: Got it. And you'll agree with me
12 that, as you saw in the appellant's presentation, you don't
13 have any dispute that Mr. Sullivan corresponded with you in
14 January of 2020 asking, sorry, that Enterprise corresponded
15 with you in January of 2020 asking you to find that the
16 applicable parking requirement for current regulations was
17 132 spaces, right?

18 MR. LEGRANT: I'm sorry. Could you repeat that?

19 MR. FEINBERG: Sure.

20 MR. LEGRANT: That happened in January 2020, with
21 the, with a different counsel representing, yes.

22 MR. FEINBERG: Yes, you're on the right track.
23 You'll agree with me in January 2020, Enterprise reached out
24 to you and said nobody knows where this parking order is.
25 Under the current regulations, though, you'll agree that the

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1 site only requires 132 spaces. You agree with me about that,
2 right?

3 MR. LEGRANT: Based on the information I had at
4 the time.

5 MR. FEINBERG: Got it. You're saying that you
6 got some additional information after, after that to change
7 your mind. Is that what you're saying?

8 MR. LEGRANT: Yes, additional information was
9 brought to my attention.

10 MR. FEINBERG: Got it. And that, the person that
11 brought that into your attention was Mr. Sullivan, right?

12 MR. LEGRANT: Yes.

13 MR. FEINBERG: And you'll agree with me that at
14 no time have you ever seen the underlying order, 66-68,
15 right?

16 MR. LEGRANT: I've seen the order but not the
17 exhibits to the order.

18 MR. FEINBERG: Got it, and that no, got it. And
19 you also, the Zoning Commission never saw that this 554
20 parking space requirement that you came up with in March of
21 2021, right?

22 MR. LEGRANT: Yes, that the Zoning Commission,
23 that the Zoning Commission signed?

24 MR. FEINBERG: Right. It was, that was never put
25 before the Zoning Commission, correct?

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1 MR. LEGRANT: I don't know if it was before the
2 Zoning Commission. I am not a party to cases that go before
3 the Zoning Commission.

4 MR. FEINBERG: Okay. That's fair enough. And I
5 guess what you're saying is you also don't know whether any
6 of this information relating to the 554 spaces ever got to
7 the Zoning Commission when it entered its order in June,
8 right?

9 MR. LEGRANT: I'm not going to speak for the
10 commission.

11 MR. FEINBERG: I'm saying to your knowledge, you
12 don't know that it got any of that information when rendered
13 its opinion in June?

14 VICE CHAIRPERSON JOHN: Can you repeat that
15 question for me, Mr. Feinberg? I'm not understanding. What
16 is the question?

17 MR. FEINBERG: Yes, yes. I'm just
18 getting at, so Mr. LeGrant, based on what you know, only on
19 what you know, Enterprise never brought this 554 space
20 requirement information up to the Zoning Commission. You
21 don't know anything about that, right?

22 VICE CHAIRPERSON JOHN: Mr. Feinberg, you can ask
23 that of the Enterprise Party. They're here.

24 MR. FEINBERG: Yes, I will, Your Honor. Sorry,
25 Ms. John. I'm just saying, as far as Mr. LeGrant knows, he

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1 doesn't if anything like that ever happened.

2 VICE CHAIRPERSON JOHN: You know, mister, Mr.
3 LeGrant?

4 MR. LEGRANT: I do not know either way.

5 MR. FEINBERG: Got it. As far as you know,
6 Mr. LeGrant, only, you know, what you know, the only thing
7 that Enterprise brought up to the Zoning Commission was the
8 132 space requirement, right?

9 MR. LEGRANT: I was not privy --

10 MR. GREEN: Objection.

11 MR. LEGRANT: -- to the Enterprise filing to the
12 Zoning Commission. That's part of the record that was
13 presented to the Zoning Commission, not me.

14 MR. FEINBERG: Got it. Got it. I think that's
15 all the questions I have for you today, Mr. LeGrant. Thanks
16 for your time.

17 MR. LEGRANT: Certainly.

18 VICE CHAIRPERSON JOHN: Thank you. Mr. Sullivan,
19 do you have any questions?

20 MR. SULLIVAN: I have just one question for the
21 Zoning Administrator, if I may. Mr. LeGrant, if
22 Mr. Feinberg's apparent proposition is correct that PUD order
23 66-68A said nothing of substance regarding the parking
24 requirement and did not alter the parking requirement, then
25 wouldn't the parking requirement then be whatever was

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1 originally decided and is still existing in 66, Order 66-68?

2 MR. LEGRANT: Yes, I would agree.

3 MR. SULLIVAN: Thank you. That's all have.

4 VICE CHAIRPERSON JOHN: Okay, so I have a couple
5 questions that perhaps you can help me with Mr. Green or
6 Mr. LeGrant. There is an exhibit I, it might be with the
7 easement or I'm not quite sure.

8 But it's Edgewood Terrace Apartments and its
9 appears to allocate parking spaces according to the sections.
10 And I'm looking at Sections 1 and 2 that include parking
11 spaces under the old scheme for Edgewood for Section 1 and 2.

12 Five hundred fifty four parking spaces and under
13 the new scheme in the final data, decided on August 11, 1970,
14 it's 554 spaces. And it appears to have been a part of the
15 original PUD and it's supposed to be exit, Exhibit 16 or
16 something. I wish I could show it to you, but there is a 564
17 parking requirement there.

18 MR. LEGRANT: Board Member John, or Vice Chair
19 John, you're referring to the easement language.

20 VICE CHAIRPERSON JOHN: Okay, it's a document with
21 three columns. I wish I could show it to you. Okay, we can
22 move on. Maybe some other Board member has seen it and can
23 remind me where it's to be found. I believe it's, me check
24 Exhibit 16.

25 ZC CHAIR HOOD: Madam Chair, could I ask the

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1 person while you're doing that?

2 VICE CHAIRPERSON JOHN: Yes, please go ahead,
3 Commissioner.

4 ZC CHAIR HOOD: I'm acting always, remember
5 appeals. I don't sit on them often but Mr. Feinberg, I
6 wanted to follow up on some of your question. Obviously, you
7 kept referring to it, and I may have gotten lost, you kept
8 referring to the June, either the June letter or the June
9 order. Help me, Mr. Feinberg.

10 MR. FEINBERG: Yes, Your Honor, or Mr. --

11 ZC CHAIR HOOD: I'm Commissioner Hood. I'm not
12 Your Honor.

13 MR. FEINBERG: Okay, Commissioner.

14 ZC CHAIR HOOD: I'm glad for the promotion.

15 MR. FEINBERG: Commissioner Hood, so there's a
16 letter that Mr. LeGrant wrote on June 4, 2021, and there's
17 also the June 4, 2021, order that the Zoning Commission
18 entered on Enterprise's PUD application.

19 They came out the same day. And so, if I was
20 talking about the order, that's the Zoning Commission. The
21 Zoning Commission order. We were just looking at it a minute
22 ago --

23 ZC CHAIR HOOD: Which is the date? Tell me the
24 date, I want to make sure that --

25 MR. FEINBERG: They're both June 4 of 2021.

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1 ZC CHAIR HOOD: I've been searching for that again
2 and I thought I saw it. Does anybody know exhibit that is
3 right off?

4 MR. FEINBERG: So the order is Exhibit 6,
5 Commissioner.

6 ZC CHAIR HOOD: Okay. I looked at that one. Yes,
7 that's what I'm looking at. Okay. I'm just confused about
8 the June date because when I looked at the, when I sign, I'm
9 looking at the top of the order, the date is December the,
10 maybe I'm not, maybe I'm not looking at the right thing, but
11 I believe I'm right.

12 MR. FEINBERG: I think you're right, Commissioner.
13 Here, let me see if I can explain a little bit. So we're on
14 the same page --

15 ZC CHAIR HOOD: Okay.

16 MR. FEINBERG: -- and at the very top, you're
17 looking at the order, and it says December 17, 2020.

18 ZC CHAIR HOOD: Right.

19 MR. FEINBERG: But it doesn't become effective
20 until it's published in the D.C. register, and it was
21 published for the first time on June 4, 2021. So sorry for
22 the confusion. That's, that's what I meant by the June
23 order.

24 ZC CHAIR HOOD: So I see that, and I actually, I'm
25 trying to figure out where it's been from December, but

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1 anyway, that's a whole other issue not pertaining to this
2 case.

3 But when the Commission, and I'm just asking, I'm
4 throwing it out there, Mr. Feinberg to kind of go down these
5 lines and kind of what you were talking about the 423 and the
6 requirement, but when the Commission does a modification of
7 significance, would you agree that there are limited things
8 that Commission looks at? Or the Commission looks at? Not
9 that Commission, but the Commission looks at.

10 MR. FEINBERG: You know, my colleague,
11 Mr. Williams, might be able to give you the best answer. If
12 you have no objection to that, can Mr. Williams, would you
13 answer?

14 ZC CHAIR HOOD: I actually know the answer, but
15 I just wanted to hear from you since you were going down
16 those lines. But let me go to your colleague. Let me hear
17 what your colleague has to say.

18 MR. FEINBERG: Okay.

19 ZC CHAIR HOOD: Mr. Williams?

20 MR. WILLIAMS: Yes, Commissioner Hood. Answer to
21 the question is yes. It's limited to what the relief that
22 is sought, modification application.

23 ZC CHAIR HOOD: So everything else, and I think
24 I heard Mr. Sullivan. Interesting, I agree with some. I
25 think I heard Mr. Sullivan say that everything else still

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1 stands. Is that correct?

2 MR. WILLIAMS: That is correct.

3 ZC CHAIR HOOD: Okay. That's all the questions
4 I have. Thank you, Madam Chair. And thank you all for
5 indulging me for my questions.

6 VICE CHAIRPERSON JOHN: So Mr. Chairman,
7 Commissioner Hood, you have sort of helped me because the
8 exhibit I was looking for is an attachment to the March 29
9 letter from the Zoning Administrator, and it's Exhibit 16.

10 And the statement is that while my office does not
11 have Exhibit 44-A from the LSPD Zoning Commission case,
12 Exhibit No. 16 indicates that the parking requirement
13 approved for the campus is 554 spaces, and that's Exhibit B
14 to the March 29 letter.

15 So, Mr. LeGrant, can I go back to you then and
16 following up on Commissioner Hood's question, do I understand
17 then that unless the Zoning Commission change this parking
18 requirement of 554 space, it would continue to exist? It
19 would continue to be the requirements unless modified?

20 MR. LEGRANT: Vice Chair John, that question's for
21 me, right?

22 VICE CHAIRPERSON JOHN: Yes, that was for you --

23 MR. LEGRANT: Yes. Yes. I would agree, yes.

24 VICE CHAIRPERSON JOHN: Okay. And Mr. LeGrant,
25 you did not participate, okay, you, you obviously do not sit

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1 on the commission. So, the commission, this 423 number was
2 included in the modification of significance. Is that your
3 recollection?

4 MR. LEGRANT: The, as stated in the order, it was
5 referred, the 423 was referred to as the spaces provided.

6 VICE CHAIRPERSON JOHN: Right. But you wouldn't,
7 it would not be within your authority to modify that 554
8 spaces to 423 spaces.

9 MR. LEGRANT: I would agree.

10 VICE CHAIRPERSON JOHN: Okay, thank you. So can
11 we move on then? I forget who, we're taking Board question.

12 ZC CHAIR HOOD: Madam Chair, what exhibit, when
13 I opened it up, unless I'm on the wrong case, I thought that
14 was the, you said Exhibit 16 --

15 VICE CHAIRPERSON JOHN: It can be found at Exhibit
16 42 which is and attachment --

17 ZC CHAIR HOOD: 42, okay.

18 VICE CHAIRPERSON JOHN: -- to DCRA's presentation.
19 DCRA's --

20 ZC CHAIR HOOD: Okay.

21 VICE CHAIRPERSON JOHN: -- PowerPoint
22 presentation.

23 ZC CHAIR HOOD: And that was Exhibit 42?

24 VICE CHAIRPERSON JOHN: Yes.

25 ZC CHAIR HOOD: Okay. Thank you, Madam Chair.

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1 VICE CHAIRPERSON JOHN: Okay. Does anybody, any
2 other Board member have questions? Okay, I believe Mr.
3 Sullivan, are you ready to make your presentation?

4 MR. SULLIVAN: I am. Thank you, Madam Chair.

5 VICE CHAIRPERSON JOHN: Okay.

6 MR. SULLIVAN: Thank you. Marty Sullivan with
7 Sullivan and Barrows on behalf of the property owner. A
8 little context here. Of course, the appellant's challenging
9 my client's parking requirement, and oddly enough, asking for
10 it to be lowered, not higher.

11 And so, it's not a question of parking or traffic
12 impact or any other zoning related issue, actually, it's just
13 that the appellant's subject to an easement that they created
14 that must remain in place until Edgewood Commons no longer
15 has the parking requirements.

16 And it applies primarily to the improvements on
17 Edgewood 4. So and now the appellant wants to sell that
18 property and develop it and so it's inconvenient for them
19 that the easement is still around and so they need this BZA
20 to declare the parking requirement as 132 spaces so that they
21 can create what I believe they think would be evidence to
22 then try to terminate the easement.

23 So I go through the motions quickly. There's
24 three, they're based on three rationales. And a quick note,
25 I want to, there have been some things stated and in the

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1 PowerPoint, that are a little bit of a misrepresentation and
2 an attempt to flip the script.

3 My client is painted as a big bad developer trying
4 to stop this altruistic project next door, when in fact my
5 client is the largest 501(c)(3) nonprofit housing developer
6 in the mid-Atlantic region, and one of the largest in the
7 nation.

8 And there's been a lot of discussion about need
9 and surplus parking versus parking requirement. And so I'm
10 going to clear that up real quick. Surplus parking for the
11 entire campus does not equal a parking requirement. Also,
12 surface, surplus parking for the entire campus does not equal
13 a need for the Edgewood 4 building.

14 Sure, all three of those things are totally
15 different things. It's not relevant, otherwise we could
16 submit plenty of evidence to that effect but I'm not going
17 to and since that's not supposed to be a part of this, we
18 haven't done that.

19 We're happy to do that, if that becomes the issue.
20 So if I could have the PowerPoint, Mr. Young, please. And
21 I'll try to be a lot more brief than the PowerPoint is
22 because it's, so much of this has been discussed already.

23 Motion to dismiss for jurisdiction is just saying
24 that this is not an appealable decision. In the PowerPoint
25 for the appellant, they stated that they're challenging the

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1 Zoning Administrator's failure to clarify the March 29
2 letter.

3 Now, I think in the course of this hearing, I
4 think we finally got to what the real issue is. They're
5 challenging the fact that the Zoning Administrator is basing
6 his estimation of the parking requirement for Edgewood
7 Commons on the PUD order.

8 And they're saying that the PUD order 66-68-A did
9 not provide a parking requirement. So I'll get more into
10 that in the substantive part of it, but just to note that the
11 parking requirement is whatever the Zoning Commission says
12 it is, under these PUD orders, whether it's still what was
13 stated in 66-68 and not revised or how it was revised in
14 66-68A.

15 But the motion to dismiss for jurisdiction is, is
16 because there's no decision here that has any impact on
17 anything. There's no building permit application coming out
18 of this. There's no CFO application. This is preliminary
19 advice, a request of the Zoning Administrator. What is our
20 parking requirement?

21 And the reason why Enterprise needs to know its
22 parking requirement is because about a year ago, Mr. Feinberg
23 sent a letter to them telling them that the easement was
24 going to be terminated.

25 And so, Enterprise is looking after the residence

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1 of Edgewood 4 and pursuing this determination from the Zoning
2 Administrator. For standing. The appellant is not aggrieved
3 by any decision of the Zoning Administrator.

4 If you take the easement out of this, and remember
5 the easement's not a condition of the original PUD order.
6 It's not ever mentioned by the Zoning Commission. Unlike the
7 previous case, where the Zoning Commission asked for an
8 agreement, that was not asked for.

9 All the Zoning Commission did in 66-68 is levy a
10 parking requirement, and to meet that parking requirement,
11 this easement was established and recorded in 1973. So if
12 you take that easement out of it, the Zoning Administrator
13 telling Edgewood Commons that they have a parking requirement
14 of x has absolutely no impact on the owner of Lot 803.

15 And for timeliness, the appellant stated, and this
16 is a quote, St. Vincent's merely states the indisputable fact
17 that Enterprise both requested and drafted the erroneous
18 March 29 letter that caused this entire dispute.

19 So if the entire dispute is based on the March 29
20 letter, they filed for months too late. And the March 29
21 letter is, was actually mooted by the June 4 Zoning
22 Commission order, so.

23 And that's why I made a comment at the beginning
24 about nothing you had heard yet was relevant because, as of
25 June 4, the Zoning Commission put an end to all the

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1 confusion.

2 That was a result of a 50 year old PUD order. On
3 March 29, certain information was available to the Zoning
4 Administrator. On June 4, the evaluation of all that
5 information became irrelevant because now we had the PUD
6 order stating, clearly, that the requirement was 423 spaces.

7 Regarding that, I think it's an interesting
8 argument by the appellant that the PUD order was written in
9 such a way as to just make an observation that there happened
10 to be 423 spaces.

11 And to make that over observation in response to
12 concerns of the Advisory Neighborhood Commission as to the
13 sufficiency of parking, but then to turn around and say,
14 well, it's not really a requirement.

15 You don't really have to have any parking spaces
16 here. Or we leave it to the Zoning Administrator. Nobody,
17 I don't think, could rationally interpret the Zoning
18 Commission order to be saying that.

19 It is, they stated it's in the findings of fact.
20 It's not in the findings of fact. It is in the conclusions
21 of law. Let's be clear about that. It's conclusion of law
22 number 14, where it lists the number of spaces. And in
23 condition 1-A, Exhibit 3-H-1, page 8.

24 Let's see if we could go to that page now. Mr.
25 Young, if you go down about six slides. And I didn't want

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1 to go through most of this PowerPoint because it's, it's, and
2 the argument's changed based on what's, one more. Next
3 slide.

4 There's site plan on page 6 or 7. Actually page
5 9. Page 8. Go up one page, please. The other direction.
6 It should be the page before this, page 7. This is the site
7 plan underlying the first condition PUD order 66-68A,
8 specifically listing all the parking spaces.

9 You can go to page 6, please, Mr. Young. Project
10 Development Plans includes the plans and elevations marked
11 as Exhibit 3-H-1, 3-H-4. The page that I just showed you is
12 3-H-1. It's in the conclusion. It's in a condition. Next
13 slide, please. Next slide, please.

14 This is also in the order. No building permit
15 shall be issued for the project until the applicant has
16 recorded a covenant. Such covenant shall bind the applicant
17 and all successors entitled to construct and use the property
18 in accordance with this order or amendment thereof by the
19 Commission. Next slide, please.

20 The Zoning Administrator shall not approve a
21 permit application unless the plans conform in all respects
22 to the plans approved by the Commission. And the orders of
23 the Commission issued in accordance with this chapter shall
24 have all the force of this title and violation shall be
25 prosecuted in accordance with provisions of Subtitle A.

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1 So my client, the property owner, has the concern
2 of not having enough parking for Edgewood 4 building. And
3 again, I can submit evidence of the dire need for parking for
4 that particular building.

5 And also getting a zoning violation. If these
6 spaces are removed, they're in violation of Order 66-68A.
7 To the extent that the specific requirement, as Mr. Feinberg
8 purports, is not satisfactorily identified for him, then that
9 leaves whatever requirement existed at the time.

10 The Zoning Commission certainly didn't eradicate
11 the requirement. They didn't remove any parking requirement.
12 So any reasonable review of this Zoning Commission order
13 shows the requirement is 423 spaces. And I think that's all
14 I have. I just want to make sure I didn't miss some of my
15 notes from some of the things that were stated.

16 I don't think that, I don't know if the Board
17 needs to hear this. But when there was discussion about the
18 number of parking spaces, there's 132. The Zoning
19 Administrator, and the applicant and their lawyer at that
20 time, would of course evaluate the new building in the
21 context of what today's zoning regulations are.

22 And when Mr. Williams had his PowerPoint up, he
23 didn't highlight the word current zoning regulations. He
24 just highlighted the word that this is what you would use.
25 It said under the current zoning regulations, it would be 132

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1 spaces.

2 The Zoning Commission uses that information to
3 compare the need for parking under today's standards. But
4 they still noted 423 spaces regardless of that. So that's
5 all I have. The, yes, I think I've covered everything. So,
6 I have nothing further. Thank you.

7 VICE CHAIRPERSON JOHN: Thank you, Mr. Sullivan.
8 So does the appellant have any, no, Mr. Green, do you have
9 any questions? No? Okay, we didn't have any witnesses.

10 MR. WILLIAMS: I have some questions, Vice Chair
11 John.

12 VICE CHAIRPERSON JOHN: Very briefly, very briefly
13 because this is, there's no, there are no witnesses so you
14 can't cross examine.

15 MR. WILLIAMS: I'm not going to cross examine.
16 I just have some questions for clarification.

17 VICE CHAIRPERSON JOHN: I will allow you to ask
18 that.

19 MR. WILLIAMS: Yes. Mr. Sullivan, when your
20 client received the March zoning determination letter finding
21 that the requirement was 554 spaces on the campus, did your
22 client, Enterprise, or you go back to Chairman Hood in the
23 Zoning Commission to advise them that the prior zoning
24 determination that your client had submitted was incorrect?

25 MR. SULLIVAN: I don't have any personal knowledge

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1 of that. I'm sure we wouldn't have because that would be an
2 ex parte communication but the, my client is represented by
3 a different lawyer in the zone, in the PUD case.

4 MR. WILLIAMS: Okay, so you were not aware of
5 whether they went back, and that would have been between when
6 the Zoning Commission made its decisions December 2020, and
7 the decision was published in June of 2021.

8 So you're not aware of your client seeing that
9 zoning determination and correcting the record for the Zoning
10 Commission? You don't have any knowledge of that? I just
11 want to make clear.

12 MR. SULLIVAN: I have no knowledge one way or the
13 other about that.

14 MR. WILLIAMS: And you didn't, or are you aware
15 whether your client told Commissioner Hood or told anyone
16 that this zoning determination in March would have rendered
17 the whole PUD in violation, since it only has 423 spaces, but
18 the determination was it required 554?

19 MR. SULLIVAN: No, I wouldn't say anything like
20 that because that's not true that a determination letter
21 would control a Zoning Commission order.

22 MR. WILLIAMS: But the order wasn't published yet,
23 was it? There was no order. All that we had was the
24 zoning --

25 MR. SULLIVAN: It was your question I was

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1 answering.

2 MR. WILLIAMS: -- that the PUD, according to
3 Mr. LeGrant in March of 2021, was in violation because it had
4 over 100 spaces less than he said it needed.

5 VICE CHAIRPERSON JOHN: Mr. Williams --

6 MR. SULLIVAN: So I object to the only, the
7 question come to myself because it's irrelevant.

8 VICE CHAIRPERSON JOHN: Yes.

9 MR. WILLIAMS: Okay. I just, I'm just very
10 confused about how you can, you could request a zoning
11 determination finding that your own property is in violation.

12 MR. SULLIVAN: So, Madam Chair, I mean, I,
13 Mr. Williams made it clear that he didn't want to impugn the
14 character of the Zoning Administrator, just Enterprise
15 Community Development and their counsel.

16 And this has been the sort of the strategy
17 throughout. I think we've narrowed it down to now we're just
18 down to Zoning Commission order and whether or not the Zoning
19 Commission has the authority to have a parking condition and
20 whether or not the Zoning Administrator read the zoning order
21 correctly.

22 So anything that happened prior to June 4 is
23 irrelevant. And there's an explanation for it all and we
24 could talk about it for hours, but it has nothing to do with
25 the parking requirement.

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1 MR. WILLIAMS: I don't have any further questions.
2 Thank you. Vice Chair John.

3 VICE CHAIRPERSON JOHN: Okay. I think, does the
4 Board have any questions? Mister, Mr. Sullivan, I'm curious
5 about that attachment to DCRA's Exhibit, which shows the 554
6 parking spaces. Did you have a comment on that?

7 MR. SULLIVAN: Yes. So 554 was what was in the
8 original, my understanding, in the original PUD order 66-68.

9 VICE CHAIRPERSON JOHN: Okay.

10 MR. SULLIVAN: Which was in, issued in the 60s.
11 I can't remember exactly what year it came out. At the time,
12 and it wasn't a PUD order, it was an LSPD order because it
13 pre-dates PUDs, and there was a further processing component
14 to LSPD orders.

15 And so, there's in the, I don't know if these are
16 in the record or not, but there are a couple of further
17 processing orders from the Board of Zoning Adjustment, and
18 they may have lowered that requirement pursuant to some
19 authority for them to do that.

20 I'm not certain about that. And that might have
21 been documents that were missing at the time as well, that
22 we've seen, and there's been, it's throughout the timeline,
23 it's more documents have become available, or more
24 information has been gleaned, it's really confusing. And not
25 so much confusing. It's complicated because there's some

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1 pieces of the puzzle missing.

2 VICE CHAIRPERSON JOHN: Okay.

3 MR. SULLIVAN: My point is that on June, on June
4 4, the Zoning Commission ended all that, put the pieces back
5 in the puzzle and said regardless of anything that has gone
6 up to this point, it's 423 spaces.

7 VICE CHAIRPERSON JOHN: Okay, thank you.

8 MR. SULLIVAN: It may have been related to the
9 campus not being completely built out according to the
10 original order. We think that's what it is because there was
11 supposed to be some mixed use space in there that's not
12 there. But that's, that's all just supposition.

13 VICE CHAIRPERSON JOHN: Okay, so if there are no
14 questions from the Board, I will allow the rebuttal by the
15 appellant.

16 MR. WILLIAMS: Thank you, Vice Chair John, and
17 members of the Board. I would like to first touch upon some
18 of the issues that we just heard and then get into the motion
19 to dismiss. There is a lot of confusion about a couple of
20 different numbers out there and I want to get into the 554.
21 That number is not in a PUD order.

22 That comes from a BZA further processing order
23 that happened years after the original PUD was approved and
24 related to a project that would have had a lot more buildings
25 built on it than were ever built. We are here today to

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1 interpret a Zoning Commission decision. So the 554 spaces
2 has nothing to do with the original order, or the subsequent
3 orders. It's not in any order that's actually issued by the
4 Zoning Commission. Actually, Mr. Sullivan just touched on
5 that.

6 VICE CHAIRPERSON JOHN: Excuse me. Let me just
7 clarify that, because I don't understand what you're saying.

8 MR. WILLIAMS: Yes.

9 VICE CHAIRPERSON JOHN: So you're saying there
10 might have been further processing by the BZA, but that
11 further processing would have no legal effect?

12 MR. WILLIAMS: Right. The Zoning Commission
13 speaks with the force of law. The Zoning Commission orders
14 are the zoning regulations. We have a BZA further processing
15 order that came out years after the original Zoning
16 Commission order, the LSPD order, that has a site plan number
17 of 554 spaces on it. But that's not the PUD requirement, and
18 that is the whole reason why Mr. LeGrant held, in January of
19 2020, in response to Cary Kadlecek, Goulston & Storrs
20 attorney's request, that the requirement should be 132.

21 So that wasn't new information that was provided.
22 That's always been out there. Mr. LeGrant found -- this is
23 what's leading us here. We have an enterprise going with the
24 zoning determination where Mr. LeGrant says one thing. They
25 get their PUD approved. After they get it approved they seek

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1 a different zoning determination to stop us from getting our
2 project approved. That's just fundamentally unfair. Forget
3 the zoning issues. I mean, it's just fundamentally unfair
4 what's happened here.

5 Now, just asking for clarification from Mr.
6 LeGrant, we end up with this obfuscation of issues and
7 parking requirements and this order, this letter is
8 irrelevant, everything that happened is irrelevant. That's
9 not how this is supposed to work, respectfully, the zoning
10 process in the city.

11 When it's unclear what the requirement is you go
12 to the zoning administrator, the lead authority, the lead
13 agency authority on zoning in the city, and you request a
14 determination and parties rely on that. They rely on that
15 to get financing. They rely on that to build expensive
16 projects. They rely on that when they go to the Zoning
17 Commission. To have that just arbitrarily change mid-stream
18 after one party gets approval but before the other one is
19 ready to develop, this is fundamentally unfair. It's not the
20 way the process is supposed to work. I just want to respond
21 to that point.

22 VICE CHAIRPERSON JOHN: Mr. Williams, I have to
23 stop you again.

24 MR. WILLIAMS: Yes.

25 VICE CHAIRPERSON JOHN: Was there a PUD order that

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1 determined that there was a parking requirement?

2 MR. WILLIAMS: The original PUD requirement.

3 VICE CHAIRPERSON JOHN: In 2020 the Zoning
4 Administrator refers to in this order.

5 MR. WILLIAMS: Yes.

6 VICE CHAIRPERSON JOHN: Is that a valid order?

7 MR. WILLIAMS: Letter? I'm sorry.

8 VICE CHAIRPERSON JOHN: The latest order from the
9 Zoning Commission.

10 MR. WILLIAMS: That would be the one in June of
11 2020. That's the most recent.

12 VICE CHAIRPERSON JOHN: June 4, 2020.

13 MR. WILLIAMS: Correct.

14 VICE CHAIRPERSON JOHN: There is a parking
15 requirement establishing that order, right?

16 MR. WILLIAMS: We disagree. In fact, this is my
17 next topic so if I could bring up that document, Exhibit 6,
18 please, Mr. Young.

19 VICE CHAIRPERSON JOHN: Let me follow up with you
20 because I had the same issue this morning. If you disagree
21 with the order of the Commission, what is the authority of
22 the BZA to amend a regulation of the Commission?

23 MR. WILLIAMS: We don't disagree with the order
24 of the Commission. We think the Commission got it right.
25 We disagree with Mr. LeGrant's interpretation of that order.

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1 VICE CHAIRPERSON JOHN: And could you explain to
2 me why you disagree with the Zoning Commission's order as
3 interpreted by Mr. LeGrant?

4 MR. WILLIAMS: Because Mr. LeGrant found -- Mr.
5 LeGrant determined in his June 4th letter, which was the same
6 date that the Zoning Commission order was effective, June 4
7 -- that the Zoning Commission had found -- had established
8 a parking requirement for 423 spaces. Our position, which
9 is what we're trying to get the BZA to agree with in this
10 appeal, is it did nothing of the sort.

11 The Zoning Commission observed that the PUD had
12 423 spaces but it never issued an explicit condition that
13 said this PUD must maintain 423 spaces which, as we all know,
14 it does all the time in Zoning Commission orders. When the
15 Zoning Commission wants to explicitly require parking that
16 is different from the zoning regulations, it says so
17 explicitly in a condition.

18 VICE CHAIRPERSON JOHN: Okay. So let's stop
19 there. Let's stop there. So we heard that -- Commissioner
20 Hood said that on a modification of significant consequence
21 only the modification is addressed in terms of the specific
22 order.

23 MR. WILLIAMS: Yes.

24 VICE CHAIRPERSON JOHN: Then I attempted to
25 discuss the order with your colleagues in terms of the

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1 foundational statements in the order. I'm not sure --
2 anyway, it's your case so please go ahead.

3 MR. WILLIAMS: No, I want to make sure I answer
4 your questions. That's the most important part of the case.

5 VICE CHAIRPERSON JOHN: No, go ahead.

6 MR. WILLIAMS: Yeah. So the issue is that
7 Enterprise came in and sought a minor mod -- well,
8 modification in consequence of this PUD to build a new
9 building. It didn't seek to change the parking requirement
10 in the campus. Why? Because Enterprise took the Zoning
11 Administrator's determination and said we don't need to. The
12 parking requirement is 132 and this PUD has almost 300 more
13 spaces than that.

14 Now, if the Zoning Administrator had said it was
15 554, they would have had to go in to Commission Hood and the
16 commissioners and seek specific relief for parking because
17 they would have been under parked. Instead, they took Mr.
18 LeGrant's letter and said we don't need to seek that relief
19 because we've got so much extra parking.

20 Think about that. They have 300 more spaces next
21 to the Metro than they are required to have. 300 more
22 spaces. Their argument today is even though the Zoning
23 Commission order in June might not specifically say they are
24 supposed to maintain that, BZA should still find that this
25 PUD next to the Metro should have 300 extra spaces on it

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1 instead of an affordable housing senior living development.

2 Even though the order doesn't specifically say
3 that, we can sort of read into it that's what they were
4 saying which is the exact opposite of what Mr. LeGrant said
5 in the prior appeal today. You can't infer, you can't imply.
6 You can only look at what the actual words of the PUD are.

7 Can we bring that up, Mr. Young, Exhibit 6? So
8 we looked at this portion of the order because it's the most
9 important, the decision. I want to hit on this first because
10 I want to respond to a point that Mr. Sullivan made. If we
11 could just scroll down very slightly, Mr. Young.

12 Now, this decision states in line 3 that the
13 Commission approves the application for, as Commissioner Hood
14 made this point, a modification of significance to revise the
15 order, right? That's what is being approved. Then under the
16 two bullets, the last two lines, it says, "To authorize the
17 construction of a new residential building `the building' on
18 lot 812 `the project site.'" Just so everyone knows, St.
19 Vincent's lot is lot 803. It's not 812.

20 What the Zoning Commission was approving had
21 nothing to do with lot 803. Mr. Sullivan is trying to say,
22 well, they are approving this project pursuant to the plans
23 and the plans happen to show a site plan that shows your lot
24 with parking. That's not what this condition is. That's not
25 what this says. It says that we are approving your project

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1 on lot 813 subsequent to the plans.

2 Scroll down a little bit, Mr. Young. Again, A1.
3 Here we are on condition A1 again, just like earlier. The
4 building shall be built in accordance with bullet 1, the
5 plans. The building should be built in accordance with the
6 plans. The building is on lot 812. That's what the
7 condition actually says.

8 It doesn't say that all of the parking spaces in
9 the PUD have to be maintained and 423 is the number, which
10 we all know the Zoning Commission does all the time when
11 there's a parking requirement. It will say what the
12 requirement is. Here it doesn't say that, nowhere in this
13 decision part of the order. Mr. Green, I think he agreed and
14 then he tried to retract it. Nowhere does that come up.

15 Rather what we have is -- if we could scroll
16 backwards in this document, Mr. Young. What we have is --
17 go to the last -- right before the decision.

18 What we have is an observation. This is before
19 the decision. This is what this is all about. I'm sorry to
20 harp on it but this is the most important part of the
21 argument. We have the Commission observing and the
22 Commission concludes there will be sufficient parking
23 available -- and this is 14, bullet 1 -- because the site
24 provides 423 parking spaces approximately 103 which are
25 available. Okay?

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1 So that is the linchpin of the other side's
2 argument. They're saying, well, there it is. They have a
3 requirement that the PUD has to have 423 spaces and there it
4 is. That's the reason, St. Vincent, that you have to keep
5 114 parking spaces on your Metro accessible lot instead of
6 a new building. That's it. We disagree. We disagree that
7 the Zoning Commission says there you are required to have 423
8 parking spaces.

9 You are required to have 300 more than the zoning
10 regulations require. In my view and, again, that is a very
11 onerous parking requirement, 300 more than required at the
12 Metro. In my view, again, I mean, benefit of the doubt, the
13 Zoning Commission if it meant -- this is what we are all here
14 to interpret -- if it meant to impose a condition that
15 onerous, it would have said so explicitly.

16 That's our whole argument in this case. You can't
17 just take that and say, well, we think that's what that
18 means. You have to have 423 spaces. No. Especially when
19 they made this decision, Commissioner Hood and his fellow
20 commissioners, based on Mr. LeGrant's determination, which
21 we all respect, by the way.

22 Mr. LeGrant is the chief zoning authority in the
23 city. He determined that the campus only required 132 spaces
24 because we don't know what the original requirement was. We
25 don't know what it was. What number are we going to choose?

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1 The best number we can come up with is what do the zoning
2 regulations require? That's what he did. So the Zoning
3 Commission is presented with that and approves this
4 application.

5 All we're asking for is the same treatment. We
6 have a parcel in the same PUD. We would like to come to the
7 Zoning Commission with the same basic facts presented as
8 Enterprise did a year ago. We don't want to have to come to
9 the Commission with this parking requirement that is
10 different from what the Zoning Commission just heard on
11 another case for no reason.

12 We've yet to understand the reason why this
13 changed. It's beyond -- it makes no sense. It makes no
14 common sense why this change other than Enterprise trying to
15 block this project. I don't know why else they would seek
16 a zoning determination that placed their PUD in violation.
17 I mean, as soon as Mr. LeGrant issued that letter for 554
18 spaces, this PUD was in a zoning violation. How could that
19 be? Makes no sense. It just makes no common sense.

20 I would like to quickly hit the motions for a few
21 minutes and then I will wrap up. Couple points.
22 Jurisdiction and timeliness. I don't think either of those
23 arguments have been disposed of for the most part. Everyone
24 seems to agree that we are appealing the June 4th letter, not
25 the March letter. The March letter clearly wasn't final.

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1 The June 4th letter was.

2 The reason is that the Baskin case, which DCHA
3 cited, tells us when there's a final decision that is
4 appealable, the question is: is there a signal from the
5 agency official that it's the final decision. Here we have
6 Mr. LeGrant's statement in the June 4th letter that he
7 considers this matter closed. I can't think of a more
8 unequivocal statement that that's the final decision than
9 that.

10 As for jurisdiction, clearly the BZA has purview
11 over regulations and the interpretation of PUD orders and
12 whether the Zoning Administrator has made a mistake. That's
13 a classic BZA appeal and that's what this is. Clearly the
14 BZA has jurisdiction to review this.

15 I don't understand this argument. St. Vincent has
16 a lot within the PUD over which parking is required. Clearly
17 it's impacted them. As you heard from Mr. Connelly you can't
18 build this project. Catholic Charities is paying taxes as
19 though it's got a high value and developable piece of land
20 that it can't develop and may lose the property based on
21 that. It clearly aggrieved to have standing based on this
22 errant parking determination that came through after the
23 Zoning Commission order.

24 There was one other argument that was made by DCRA
25 that the June 4th letter is irrelevant because, according to

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1 DCRA, the Zoning Commission order supersedes it. That
2 doesn't make sense because the two orders not only came out
3 on the same day, June 4th, but the Zoning Administrator
4 specifically interpreted the June 4th letter which Mr.
5 LeGrant testified earlier he had never been asked to
6 interpret that order. That is fundamentally incorrect.

7 If you could pull up, Mr. Young, one last exhibit
8 I'm going to look at here. It is Exhibit 13. That's the
9 June 4th letter. Mr. Young, thank you. If you could scroll
10 down to page 2. Zoom in a little bit, please.

11 In this June 4 letter Mr. LeGrant references the
12 questions I had asked him to clarify. No. 4 is quoted from
13 my letter to him. "4. When the final order on the
14 application is published in the DC Register under the Zoning
15 Regulations invoked by Enterprise in its application, the
16 parking requirement for the campus will be no more than 264
17 spaces and, per application of Section 701 and 702, no fewer
18 than 132."

19 That was pulled directly from his prior
20 determination cited by enterprise and presented to the Zoning
21 Commission. I asked that question and he didn't answer it,
22 or he answered it wrong. It's clearly a relevant letter
23 because this is the last decision on what the parking
24 requirement is. It's not the Zoning Commission, it's Mr.
25 LeGrant is making the last decision on what the parking

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1 requirement is.

2 Our argument is he's making a decision the Zoning
3 Commission never made. He's imposing a very onerous parking
4 condition that's preventing the city from getting another
5 housing development based on a condition that doesn't exist
6 in the order. That's the basis of our case. That concludes
7 my remarks and rebuttal. If anyone has any questions, I
8 sincerely respect and thank all of you for listening to, not
9 one, but two zoning appeals today so thank you.

10 VICE CHAIRPERSON JOHN: Thank you, Mr. Williams.
11 I have no questions.

12 Does any Board member have questions?

13 ZC CHAIR HOOD: Yes, Madam Chair. I would like
14 to follow up with Mr. Williams. I know why we're here today,
15 but, Mr. Williams, you're talking about affordable housing.
16 You're talking about a lot of parking by the Metro station.
17 Why can't we do this another way?

18 I mean, you have all the -- this, to me, again, I hate to say
19 it about this one, too, I wonder sometime -- and I'm up to
20 doing the job but I wonder sometime why we wasting time?

21 Why don't we just come back to the Commission and
22 do some changing, because I think those are very valid
23 issues, instead of going back and forth like this. I think
24 there are other ways to do it. We've taken now three hours
25 on this and four hours on the other one. It probably could

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1 have been done in 30 minutes, both of them together.

2 MR. WILLIAMS: Yeah. To answer your question,
3 Commission Hood, the problem we have here is that we don't
4 own all the land in the PUD, just on our parcel. So
5 otherwise we would have been before you showing you a new
6 project but we can't. We have to get this decision made.

7 MR. SULLIVAN: If I may, I could help answer that
8 as well.

9 VICE CHAIRPERSON JOHN: Let's just have a free for
10 all. Let's go for it. I have another half hour.

11 MR. SULLIVAN: The concept of need was introduced
12 and I could present 50 affidavits from the residents of
13 Edgewood IV saying how desperately they need this parking,
14 including some who have lived on other parts of the campus
15 and they said I didn't have a problem when I lived on that
16 part of the campus. Now when I come home from my nightshift,
17 I have to sit there and wait for an hour waiting for a
18 parking space.

19 Talk about impugning or conferring motives on
20 Enterprise, it's just wanting to block development which has
21 been represented to us in other conversations as it's going
22 to be a market-based thing so they are just doing that for
23 the benefit of this Board.

24 So, yeah, that would be the path, Chairman Hood.
25 It would be you have an easement and this easement provides

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1 those parking spaces and they agreed to the easement. They
2 did the easement in 1973. They are subject to it. The path
3 is modify the PUD and come to terms with Enterprise and
4 somehow find parking spaces for the residents of Edgewood IV.

5 But to take away 114 parking spaces from them
6 which is solely devoted -- that's all Edgewood IV has. There
7 are parking spaces all over but they only use the parking
8 spaces on this lot -- you would eliminate parking spaces for
9 all those residents.

10 MR. WILLIAMS: Yeah, Edgewood IV has a significant
11 amount of spaces on its own lot, too, just to be clear. I
12 would say if Enterprise is so concerned about parking, why
13 did they ask to build not all the required parking they had
14 to build for the new building, the same campus? It just
15 doesn't -- it doesn't pass the smell test. If you're so
16 concerned --

17 VICE CHAIRPERSON JOHN: Mr. Williams, where are
18 we going there? Why are they going there? Why are you going
19 there? I mean, you're before the Board asking the Board to
20 do something that, you know, the Board can't do in my view.
21 I mean, I'm getting a little punchy.

22 MR. WILLIAMS: I understand.

23 ZC CHAIR HOOD: I just think, Madam Chair, I hear
24 a lot of this a lot of times. I think if you put all that
25 down and, like you say, turn the camera off about two

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1 minutes, we all are going to understand Mr. Williams got all
2 the property but I think there's a win/win for everybody,
3 especially the residents of the city.

4 Enterprise can get what they need. You can get
5 what you need. There's a way to work all this out. I don't
6 know how sometimes we get to this. Some of us because of
7 personalities. I don't want to say it's greed. I don't want
8 to say it's greed, but I think we can compromise and we can
9 get a full -- we'll probably get a whole lot more out of it.
10 I'm not lecturing but we'll get a whole lot more out of
11 compromising than anything else. I'll leave it there. Thank
12 you, Madam Chair. Sorry.

13 VICE CHAIRPERSON JOHN: Okay. I think that's it
14 for today. I want to thank the parties.

15 Mr. Sullivan, did I see your hand?

16 MR. SULLIVAN: I don't think DCRA or myself had
17 the opportunity for a closing.

18 VICE CHAIRPERSON JOHN: Oh, that's right. My
19 apologies.

20 Mr. Grant.

21 MR. GREEN: I'll be brief. I just want to bring
22 a couple of points home. In terms of the motion to dismiss,
23 it's clear there is no final determination to be appealed as
24 you look in the letter. It's in our filings. It's fairly
25 clear cut. The Board has looked at these issues before and

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1 has found that in terms of the final determination it has
2 dismissed other cases and this is one that's warranted.

3 As for the actual substance, the merits of the
4 case, I appreciate the passion by the parties but, in one
5 sense, it became a bit of a screed, but the point is there
6 really is no -- if we're looking at the June 4th letter,
7 there is no error by the Zoning Administrator by referring
8 to the Zoning Commission order.

9 As has been said in the filings, the appellants'
10 disagreement over the contents of the order could have been
11 brought before the Zoning Commission and it wasn't and so the
12 fact that they are upset about that, the Zoning Administrator
13 referring to that order is somehow inappropriate, is wrong.
14 The Zoning Administrator in this case did not err in the
15 letter. There is nothing in that letter which, quite
16 frankly, the Board could find is in error. In that case, if
17 the Board seeks to proceed and determine the merits, we'd ask
18 that it be denied. Thank you.

19 VICE CHAIRPERSON JOHN: Thank you, Mr. Green.

20 Mr. Sullivan.

21 MR. SULLIVAN: Thank you, Madam Chair. Just to
22 try to tie this up, this has come down to one issue and it's
23 whether or not the Zoning Administrator erred in identifying
24 the parking requirement as 423 spaces, when the Zoning
25 Commission order specifically identified 423 spaces.

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1 To be clear, the only one obfuscating is the
2 appellant. That's all the issue is and that's all I would
3 have talked about today if I could have. The Zoning
4 Administrator did not disavow the March 29th letter. We did
5 not disavow that letter. The letter became obsolete. The
6 letter was outdated on June 4, 2021. It was outdated, it was
7 obsolete.

8 By the most clear, concise, simple determination
9 by the Zoning Commission that there is 423 spaces, to say
10 that the word "required" wasn't next to that 423 is just
11 splitting hairs to an unbelievable level. It's on the site
12 plan, our conditions. It's in the conclusion of law
13 responding to the ANC who had serious concerns about the
14 amount of parking.

15 So you're going to go to the ANC and say, oh,
16 well, I know you really wanted a lot of parking and I know
17 the Zoning Commission addressed your concerns by saying,
18 don't worry, there's 423 spaces, but it turns out that was
19 just an observation and those spaces can go away. No
20 rational review of that Zoning Commission order could say
21 that 423 spaces is not required.

22 On the motions, I mean, they all sort of tie in
23 together. They are not aggrieved simply because the easement
24 is the reason they're aggrieved. Completely private
25 agreement. Because they don't want to work out that easement

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1 or the terms of that easement, they are going this way and
2 trying to reduce my client's parking requirement which
3 typically would have nothing to do with them.

4 That's all I have. To the extent that 66 and 68A
5 is unclear and it leaves something, on 2 or 3 of the order
6 it notes that there was -- it was constructed according to
7 the LSPD and the approved LSPD had 423 spaces. It's not
8 going below 423 and the Zoning Commission order certainly
9 didn't reduce that number. That's all I have. Thank you.

10 VICE CHAIRPERSON JOHN: Okay. Thank you, Mr.
11 Sullivan.

12 So, again, let me thank you all for your
13 testimony. I think I'm going to excuse all of the witnesses
14 at this point and speak to the Board. I appreciate your
15 patience. Thank you.

16 MR. WILLIAMS: Thank you.

17 VICE CHAIRPERSON JOHN: Thank you, Mr. Williams.
18 Thank you, Mr. Feinberg.

19 MR. WILLIAMS: Thank you.

20 VICE CHAIRPERSON JOHN: Okay. So as in the former
21 case, I'm going to recommend we set this for a later date.
22 A lot has been said today and I would like to go back and
23 look at the exhibits again and look at the testimony and try
24 to see where I am. I wanted to hear from the other Board
25 members. Hello?

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1 MEMBER SMITH: Chair John, I completely agree with
2 you on this. There was a lot stated. We have a full record
3 with this case and I think we have an even bigger record
4 bursting at the seams with the testimony here. I would
5 welcome the additional time to review the record.

6 VICE CHAIRPERSON JOHN: Thank you, Board Member
7 Smith.

8 Commissioner Hood, Commissioner Blake, I just need
9 one person to say it's okay. Okay, thank you. I see a bunch
10 of nodding heads.

11 Mr. Moy, do we have a date sooner than later
12 because these cases are hard to review three times.

13 MR. MOY: Unless I missed it, I assume that the
14 Board --

15 VICE CHAIRPERSON JOHN: The record is closed.

16 MR. MOY: Okay.

17 VICE CHAIRPERSON JOHN: The record is closed.
18 Thank you.

19 MR. MOY: I just wanted confirmation on that.

20 VICE CHAIRPERSON JOHN: Thank you, Mr. Moy.

21 MR. MOY: You're very welcome.

22 VICE CHAIRPERSON JOHN: It is continued for a
23 decision.

24 MR. MOY: Yes. So as I had teed it up for the
25 last appeal, again I think this could also apply for this

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1 appeal if you want to return to this appeal next week, which
2 would be February 2nd, or the following week of February 9th
3 or February 16th. You have three options, ma'am.

4 VICE CHAIRPERSON JOHN: So, Mr. Moy, how many
5 cases do we have on the 2nd?

6 MR. MOY: On the 2nd seven new cases, one
7 expedited. And, of course, you have the decision for the
8 last appeal, the NL appeal.

9 VICE CHAIRPERSON JOHN: I think that's okay.

10 MR. MOY: Okay. I can set it --

11 VICE CHAIRPERSON JOHN: That would be nine cases.

12 MR. MOY: Yeah.

13 VICE CHAIRPERSON JOHN: But no more.

14 MR. MOY: You can handle it. This is a good
15 Board. Okay. So this is scheduled for decision making next
16 week, February 2nd.

17 VICE CHAIRPERSON JOHN: Thank you. Thank you,
18 Board members. I will see you next week, and hopefully
19 Chairman Hill will be back. Have a good week.

20 ZC CHAIR HOOD: All right. Good job.

21 VICE CHAIRPERSON JOHN: Thank you. Thank you for
22 your time. Bye.

23 (Whereupon, the above-entitled matter went off the
24 record at 4:53 p.m.)

25

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: DC BZA

Date: 01-26-22

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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