

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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REGULAR PUBLIC HEARING

+ + + + +

TUESDAY

MARCH 29, 2022

+ + + + +

The Regular Public Hearing of the District of Columbia Board of Zoning Adjustment convened via Videoconference, pursuant to notice at 2:00 p.m. EDT, Frederick L. Hill, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

FREDERICK L. HILL, Chairperson
LORNA JOHN, Vice Chairperson
CARL BLAKE, Board Member
CHRISHAUN SMITH, Board Member (NCPC)

ZONING COMMISSION MEMBER[S] PRESENT:

ANTHONY HOOD, Chairperson

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
PAUL YOUNG, Zoning Data Specialist

OFFICE OF PLANNING STAFF PRESENT:

ANNE FOTHERGILL, Development Review Specialist
JENNIFER STEINGASSER, Deputy Director, Development Review & Historic Preservation

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from
the Regular Public Hearing held on March 29, 2022.

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

2:09 p.m.

CHAIRPERSON HILL: Good afternoon, ladies and gentlemen, and the Board of Zoning Adjustment. Today's date is 3/29/2022. This special public hearing will come to order. My name is Fred Hill, I'm Chairperson of the District of Columbia Board of Zoning Adjustment.

Joining me today is Lorna John, Vice Chair, Board Member Chrishaun Smith, and Zoning Commissioner Anthony Hood. Today's hearing agenda is available on the Office of Zoning's website. Please be advised this proceeding is being recorded by a court reporter and is also webcast live via WebEx and YouTube Live.

The video's webcast will be available on the Office of Zoning's website after today's hearing. Accordingly, anyone who is listening on WebEx or by telephone will be muted during the hearing.

At the conclusion of the decision meeting sessions, I shall in concert with the Office of Zoning determine whether a full summary order may be issued. A full order is required when a decision contained therein is adverse to a party including in effect in ANC.

A full order is different from the Office of Planning's recommendation. Although the Board favors these summary orders whenever possible, an Applicant may not

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1 request the Board grants such an order. In today's hearing
2 session, everyone who is listening to on WebEx or by
3 telephone will be muted the appropriate time.

4 The only person to have signed up to participate
5 or testify will be unmuted. Please state your name and home
6 address before providing oral testimony or your presentation.
7 Oral presentations should be limited to a summary of your
8 most important points.

9 When you're finished speaking, please mute your
10 audio so that your microphone is no longer picking up sound
11 or background noise. All persons planning to testify either
12 in favor or opposition should have signed up in advance.

13 They will be called by name to testify and all
14 participants should have completed the oath or affirmation
15 as in Subtitle Y 408, requesting that your time in online
16 virtual hearings such as written testimony or additional
17 supporting documents other than live video, which may not be
18 presented as part of testimony, may be allowed in Subtitle
19 Y 103.13.

20 Provided that persons may either request to enter
21 exhibits, explain how the proposed exhibit is relevant, the
22 good cause to justify entering the exhibit into the record
23 including an explanation of why the request and why they did
24 not file the exhibit prior to the hearing pursuant to Y206,
25 and how the proposed exhibit would not reasonably prejudice

1 any parties.

2 The order of special exceptions and variances are
3 pursuant to Y409.

4 At the conclusion of each case, an individual who
5 is unable to testify because of technical issues may file a
6 request for leave to file a written version of the planned
7 testimony within the requisite 24 hours following the
8 conclusion of public testimony in the hearing.

9 If additional written testimony is accepted then
10 parties will be allowed a reasonable time to respond as
11 determined by the Board. The Board will then make the
12 decision after the meeting session but no earlier than 48
13 hours after the hearing.

14 Moreover, the Board may request additional
15 specific information to complete the record. The Board and
16 Staff will testify at the end of the hearing exactly what is
17 expected and the date that the evidence must be submitted to
18 the Office of Zoning.

19 No other information shall be accepted by the
20 Board. Finally, District of Columbia Administrative
21 Procedures Act requires that a public hearing on each case
22 be held in the open before the public.

23 However, pursuant to Section 405B and 406 of that
24 act, the Board may consistent with its rules of procedures
25 and the act enter into a closed meeting for purposes of

1 seeking legal counsel in a case pursuant to D.C. official
2 code Section 2-5005B4 and/or deliberate in our case pursuant
3 to D.C. affiliated code Section 2-575B13.

4 But in order to find the administrative public
5 notice and in the case of an emergency, a closed meeting is
6 taken with roll call.

7 Mr. Secretary, do we have any preliminary matters?

8 MR. MOY: We do on this one case but I can address
9 that for the Board when I call the case.

10 CHAIRPERSON HILL: Good afternoon, everyone, thank
11 you for taking the time on what is normally not our day. And
12 let's see, I guess Mr. Moy, do you want me to do the
13 preliminary matters ahead of time if I know what the
14 preliminary matters are?

15 Or would you prefer that I go ahead and do it once
16 you call the case?

17 MR. MOY: I'll follow your lead but I need to call
18 the case first.

19 CHAIRPERSON HILL: Go ahead and call the case and
20 let everybody in.

21 MR. MOY: Good afternoon, Mr. Chairman, Members
22 of the Board, the one and only application before the Board
23 is Case Number 20505 of Michael Farquhar.

24 This is an application that is a special exception
25 subcertified as amended from the matter of right special uses

1 of Subtitle use Section 250 pursuant to Subtitle U Section
2 253.4 and Subtitle X Section 901.2.

3 This would construct a detached two-story
4 accessory apartment in the rear of an attached two-story
5 principal dwelling unit in the R20 zone, property located at
6 1963 39th Street NW, Square 1310, Lot 808. As the Board is
7 aware, this was last before the Board at its hearing on March
8 9th where the Board addressed preliminary matters.

9 Other than that, when the Applicant comes to the
10 table, I'd like to ask the Applicant to confirm that this is
11 the correct relief that's before the Board.

12 CHAIRPERSON HILL: Thank you. Ms. Moldenhauer,
13 can you hear me? Could you introduce yourself for the
14 record?

15 MS. MOLDENHAUER: Good morning or Good afternoon,
16 Chairman Hill, Members of the Board, Meridith Moldenhauer,
17 Counsel here on behalf of the Applicant.

18 CHAIRPERSON HILL: Ms. Ferster, are you there?
19 I can see you but I can't hear you.

20 MS. FERSTER: Yes, I'm here.

21 CHAIRPERSON HILL: Could you introduce yourself
22 for the record?

23 MS. FERSTER: Andrea Ferster, Counsel for Richard
24 Hall, opposing party.

25 CHAIRPERSON HILL: I see Mr. Hall, is Mr. Rueda

1 going to be speaking as a witness also?

2 MS. FERSTER: Yes, he will be our expert witness.

3 CHAIRPERSON HILL: Is it just Mr. Hall and Mr.
4 Rueda with you?

5 MS. FERSTER: No, we will have four witnesses
6 today.

7 CHAIRPERSON HILL: Who are the others?

8 MS. FERSTER: Patterson Clark and George
9 Weidenfeller, and Mr. Weidenfeller cannot log on until about
10 an hour or so, so he's not here at the moment. I do see him,
11 actually.

12 CHAIRPERSON HILL: We'll get to your people when
13 we get to your case. Commissioner, can you hear me?

14 COMMISSIONER PUTTA: This is Kishan Putta, yes,
15 I can, Chairman, how are you?

16 CHAIRPERSON HILL: Good, thank you, do you want
17 to go ahead and introduce yourself for the record?

18 COMMISSIONER PUTTA: Sorry, I didn't expect to.
19 I am Kishan Putta, ANC 2E01, I represent the District where
20 this property is located.

21 CHAIRPERSON HILL: Welcome back. So, what we're
22 going to do is we're going to hear from the Applicant, we're
23 going to hear from the party in opposition, we're also going
24 to hear from the ANC in terms of giving presentations.
25 Everyone is going to get an opportunity to ask questions of

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1 everyone.

2 We'll also hear from the Office of Planning and
3 the Board will get to ask questions of everyone as well. I'm
4 looking to my fellow Board Members real quick on a couple of
5 motions, and I'm just looking at my Board Members right now,
6 just to get some feedback.

7 There's one that's a motion to strike and there's
8 a motion to dismiss. I've read both of the motions and I
9 don't have any interest in approving either one of the
10 motions.

11 I think we should go ahead and hear the case and
12 I would go ahead and look at my fellow Board Members. You
13 all can let me know if you have any issues with my motion
14 that could deny the motion to strike and also deny the motion
15 to dismiss.

16 And I'm looking to my fellow Board Members and if
17 you all have any questions you can raise your hands. I'm
18 going to go ahead and make a motion to deny the motion to
19 strike and make a motion to deny the motion to dismiss and
20 ask for a second, Ms. John?

21 VICE CHAIRPERSON JOHN: Second.

22 CHAIRPERSON HILL: Mr. Moy, the motion has been
23 made, if you want to go ahead and take a roll call vote?

24 MR. MOY: When I call each of your names, if you
25 would please respond, yes, no, or abstain to the motion made

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1 by Chairman Hill to deny the motion to strike as the Chairman
2 cited. The motion was seconded by Vice Chair John.

3 Zoning Commission Chair Anthony Hood?

4 ZC CHAIR HOOD: Yes to the motion.

5 MR. MOY: Mr. Smith?

6 MEMBER SMITH: Yes, to the motion.

7 MR. MOY: Vice Chair John?

8 VICE CHAIRPERSON JOHN: Yes.

9 MR. MOY: Chairman Hill?

10 CHAIRPERSON HILL: Yes.

11 MR. MOY: Staff would record the vote as four to
12 zero to one and this is one the motion made by Chairman Hill
13 to deny, seconded by Vice Chair John, also in support of the
14 motion to deny is Zoning Commission Chair Anthony Hood and
15 Mr. Smith.

16 Of course, Vice Chair John and Chairman Hill, we
17 have a Board Member not participating. The motion carries
18 on a vote of four to zero to one.

19 CHAIRPERSON HILL: Thank you. I want to thank the
20 Applicant and the party status people and everyone who is on
21 this call here for their understanding as to how long that
22 hearing went when you guys were scheduled for that day.

23 I'm sure you would agree not to be at the end of
24 that hearing, which means you guys probably would have been
25 with us until 10:00 p.m. and you would have not gotten the

1 full mental capacity of the Board, which is what I'm sure you
2 guys would all rather have.

3 And then also I want to thank my fellow Board
4 Members for actually participating in this hearing today,
5 which is not our normal day, and I understand that you had
6 to take away from your busy scheduled to be with us. So,
7 thank you so much.

8 Ms. Moldenhauer, I'm going to go ahead and turn
9 to you first and let you go ahead and start your client's
10 presentation as to why you believe your client is meeting the
11 standard for which we should grant the relief requested.

12 And then the only thing I really have, I'm sure
13 you know all of the different items that have been brought
14 up concerning the party status in opposition's arguments, as
15 well as we have had an opportunity to look at it.

16 And the one that I know, and I'll let my fellow
17 Board Members, if they want to speak up, anything different
18 from what I'm about to say, and you can raise your hand, but
19 even with regards to the things the party status individual
20 has brought forward, I am interested in the covenant and
21 learning a little bit more about that and how that plays into
22 it.

23 I know how you would be speaking to that as well
24 in some capacity but I just want to highlight that. Is there
25 anything the Board would like to highlight before the

1 Applicant begins? Chairman Hood?

2 ZC CHAIR HOOD: I think the party in opposition,
3 Mr. Chairman, brings up a lot of issues that I would like to
4 see addressed. And I was going to wait to say this but I'm
5 looking forward to the Applicant to address a lot of the
6 issues about the secondary principal building.

7 I'm looking to hear what the Applicant has to say,
8 so if you could hit those points, I'm sure you've already
9 reviewed the opposition's letter and I think that's very
10 important. Thank you.

11 CHAIRPERSON HILL: Thank you, anyone else? Ms.
12 John, did you raise your hand? I couldn't tell.

13 VICE CHAIRPERSON JOHN: Yes, I did. This goes to
14 everyone who is presenting. I think the Board is more
15 interested in the zoning issues rather than the building code
16 issues that have come up.

17 So, the issue is the criteria for approving a
18 special exception, not deciding on whether the building will
19 meet building code requirements.

20 CHAIRPERSON HILL: Anyone else? Mr. Young, can
21 you start the clock moving up? Is that what you've done for
22 me now? Ms. Moldenhauer, you can begin whenever you'd like.

23 MS. MOLDENHAUER: I was just looking in the
24 record, we filed our comps last night, at 8:06 p.m. I got a
25 confirmation from the ISA system, it was thank you for

1 submitting. But I don't see it in there.

2 CHAIRPERSON HILL: I don't have any issue with
3 putting that into the record if it hasn't been put in the
4 record because I want to be able to take a look at it at the
5 same time. And normally, if we again were live in person you
6 would just be giving a presentation anyway before us.

7 So, this is something that's more handy for us as
8 well as all those participating online.

9 So, if the Staff could please draft that into the
10 record and then Ms. Moldenhauer, I think Mr. Young has that
11 so he can bring it up and then we'll just wait for it to drop
12 into the record as you're speaking so we can take a look at
13 it as you go along.

14 MR. YOUNG: If it's different than the one that
15 was previously submitted then I don't have it.

16 MS. MOLDENHAUER: It had a couple of changes since
17 the previously asked questions about the covenants that were
18 part of our most recent filing. It was a little different
19 and again, I have the email. Eric in my office filed it last
20 night at 8:06 p.m. and I got an email from the system saying
21 thank you for the submission.

22 MR. MOY: It should be in the record now. Mr.
23 Young can find it there too unless we send it to him
24 directly.

25 CHAIRPERSON HILL: Thank you, Mr. Moy, let me just

1 look here. Whenever we actually do get live I would like to
2 have two screens and a computer and a mouse. You all can go
3 ahead and begin whenever you'd like. Mr. Young, if you would
4 pull that up also?

5 MS. MOLDENHAUER: Thank you so much, Mr. Young.
6 We are seeking relief for an ADU, next slide.

7 The Board has identified this case has been
8 postponed numerous times to work with the ANC and the request
9 of the opposition party, and that the relief for the dwelling
10 ADU being located on both the first and second floor was
11 removed and it is fully located now on the second floor.
12 Other preliminary matters have already been addressed by the
13 Board.

14 Next slide. I'd like to turn it over to the
15 Applicant to quickly just introduce himself and the property.
16 Mr. Farquhar?

17 MR. FARQUHAR: Yes, am I on?

18 CHAIRPERSON HILL: Yes, if you could introduce
19 yourself for the record and actually, everyone who comes on
20 from now on if you would introduce yourself for the record
21 when you first speak? Thank you so much. Mr. Farquhar?

22 MR. FARQUHAR: Hi, Michael Farquhar, 1961 39th
23 Street NW. I'd like to, if you don't mind, read a brief
24 introduction because I can't keep my thoughts together.
25 Chair Hill and Members of the Board, thank you for carving

1 this day out to hear my case, I truly appreciate it.

2 Please excuse my reading this, it's the best way
3 to keep my thoughts organized. My name is Michael Farquhar,
4 I am a fifth generation Washingtonian on both sides of my
5 family. I love this city and I love my neighborhood. I was
6 born and raised in Berlitz at 3724 T Street, my parents'
7 first house.

8 It was an enchanted place to be a child, with the
9 surrounding woods, a haven of nonstop adventure and
10 discovery. In 1996 I moved back to the neighborhood when I
11 purchased my first home right around the corner at 1961 39th
12 Street.

13 Then almost three years ago I was fortunate enough
14 to acquire the home right next door at 1963, which I have
15 begun to carefully renovate and restore. Having grown up
16 here and owned my house on 39th Street for 26 years, I care
17 about the area and have met and befriended many neighbors
18 over the years.

19 Many changes have unfolded since I first arrived
20 in 1964. The rolling fields of the Archibald Estate have
21 become Hillendale. Western High School is now Duke
22 Ellington. The cloisters have been carved out of the convent
23 for visitation, and the Convent of the Good Shepherd is now
24 the Washington International School.

25 The corner grocery stores are gone and many of the

1 area homes now feature third floors. Change, in short, is
2 ever unfolding and not always embraced by everyone. When I
3 purchased 1963 39th Street, I dreamed of the day when I could
4 build an accessory structure and move to a small cozy place
5 while remaining on the street I love.

6 I am a writer and historian, first at the
7 Washington Post and subsequently I published seven books of
8 popular history. Writers don't require much space. I am
9 here asking for relief to allow an ADU in my proposed quaint
10 two-story accessory building in my backyard.

11 I have devoted much time and careful consideration
12 to the design and planning of this building inspired by
13 historic Williamsburg and would never contemplate pursuing
14 anything that I thought would harm Berlitz. Yet I get that
15 some people just don't like the idea.

16 What I don't understand is the way some have
17 pursued their objections. I would like to correct some
18 misrepresentations. For example, the size of the building
19 I propose. While its height and footprint conform precisely
20 to the zoning regulations, some have said that it is larger
21 than the primary dwelling.

22 This is simply not true. The fact is, and the
23 actual numbers don't lie, the square footage of the proposed
24 backyard structure is significantly smaller than the main
25 house. Others have expressed concern over green space that

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1 they say will be inevitably gobbled up as a result of my
2 proposal being approved, that a slippery slope will be set
3 in motion.

4 Again, this is just not true. I purchased my
5 property at 1963 knowing its unique lot configuration and the
6 possibilities it presented. Unlike every other home on 39th
7 Street Alley, 1963 consists of one contiguous lot connected
8 to 39th Street.

9 The others are all divided into two lots separated
10 by the alley. Thus only 1963 meets the inescapable legal
11 requirement that an ADU be constructed on the same lot as the
12 primary dwelling.

13 I believe myself to be a good and trustworthy
14 neighbor and my stated intention from the beginning of this
15 process has been to reside in the ADU.

16 Not only has it been my desire to live in a
17 smaller space of my design but the law requires that I live
18 on the property if an ADU is constructed. This will allow
19 me to rent out the primary residence and will help me as I
20 age in place.

21 In conclusion, I want nothing more than to
22 continue to live in peace and harmony with my neighbors with
23 the firm belief that my proposal will do nothing to detract
24 from the beauty of Berlitz. Thank you for your time and
25 consideration.

1 MS. MOLDENHAUER: So, as Mr. Farquhar explained
2 and as shown in this image, Lot 78 is 1961 in which Mr.
3 Farquhar lives, it was not subject to this case. I'm just
4 noting that for the purpose -- Lot 808 is the property that
5 is shown in light green. That is subject to the case which
6 was subdivided from Lot 79 and Lot 80.

7 As indicated, Lot 79 has always been one
8 contiguous lot. Lot 80 is obviously a separate alley lot.
9 Next slide. The proposal of the project is a new two-story
10 by-right accessory structure. The accessory structure
11 complies with the R20 zone.

12 The ADU is proposed only on the second level and
13 the only relief that we're seeking today is a special
14 exception relief needed for the ADU. As the Applicant
15 indicated, Michael intends to live in the new ADU with only
16 storage located on the first level or whatever other uses are
17 submitted by the regulation.

18 Next slide. Here's an image that's showing the
19 block to provide you a little bit more context, where is
20 property is. Given that it's all the way at the end, you can
21 see in the right image 39th Street dead ends right at his
22 property.

23 And then his lot is the last lot along the alley
24 as well. Next slide. Community outreach, obviously, this
25 case has got a lot of individuals involved and discussions.

1 We've had lots of planning support from the beginning of this
2 application. The ANC had many back and forth on long
3 hearings and discussions with community members.

4 And the ANC indicated a letter of support. We
5 obviously are aware of the opposition but there's also
6 letters of support and opposition in the record. Here is an
7 image of the property, you can see at the top left the
8 existing building that is located with no intended changes
9 to the existing building.

10 As you can see there is this unique cul-de-sac of
11 a circle alley that cuts in the middle of the property, and
12 then the accessory dwelling unit would be located on the back
13 half of the lot with the ADU located on the second floor.
14 Next slide.

15 The proposed plan is a first level that is open
16 with no kitchen and no living space. This would be storage
17 as permitted under the zoning regulations. You would walk
18 in, walk up the stairs and you could be on the right-hand
19 side of the second floor.

20 The second floor has a full bath. In the upper
21 righthand corner you can see that bubbled out as a change
22 that was made in connection to communication with the ANC and
23 reducing that relief. Next slide.

24 The proposed structure is not part of the
25 application, we're still just identifying that it is

1 compliant as to the height and that this line, as Michael
2 indicated, is a design that he believes in with the architect
3 would be attractive to the neighborhood and the community.

4 Here are some additional images of the well
5 thought out design.

6 You can see the roof is compliant with some of the
7 requirements, it does not include any access or any roof
8 access and also you can see from the windows notated on all
9 of the plans, there's no balconies or anything to that effect
10 on the second level where the ADU is located, again in
11 compliance with the special exception.

12 Next slide.

13 We are here for special exception relief under
14 Subtitle U 253.4, that section indicates in the R19 and R20
15 unlike in all of the other zones in the District, and
16 accessory dwelling unit cannot be obtained by right but
17 rather it may be permitted by a special exception in either
18 a primary dwelling or an accessory building.

19 Here are the accessory structures by right but we
20 are seeking relief for the ADU on that second level. The
21 Board is very familiar that in reviewing an application for
22 special exception relief, quote, the Board's discretion is
23 limited to a determination of whether the exception sought
24 meets the requirements of the regulations as confident in the
25 First Baptist Church of Washington.

1 Next slide. The opposition party and the ANC's
2 resolution of support did indicate that they wanted to
3 confirm that the property did meet the definitions and the
4 requirements of an accessory building and accessory
5 apartment.

6 An accessory building is defined under the
7 regulations as a subordinate building located on the same lot
8 as the principal building and the use of which is incidental
9 to the use of the primary building.

10 Also, an accessory apartment is a dwelling unit
11 with a secondary to the principal single dwelling home unit
12 in terms of gross floor area, intensity of use, and physical
13 character.

14 Next slide. We walk through here for the Board
15 the numbers, as Michael indicated, the numbers don't lie.
16 The accessory building is subordinate to the principal
17 building, here is the principal building.

18 It's 26 feet in height, the accessory building is
19 21 feet and 10 inches in height, less than the Board has
20 defined in less terms is lower, lesser, inferior.

21 It does not need to be a majority lesser, it just
22 needs to be lesser. The same is true, you have two stories
23 plus a full cellar. The cellar, as you can see from some of
24 the images in the record, is a full level above grade in the
25 rear on a three-story in the rear to a two-story structure.

1 The footprint is 678 square feet for the primary
2 residency and 450 square feet for the accessory building, all
3 being lesser or subordinate as required under the
4 regulations. Next slide.

5 The accessory apartment is subordinate to the
6 primary home as well in regard to GSA, intensity of use, as
7 the definition states. The principal home has 1604 square
8 feet of livable space as compared to 389 square feet of
9 livable space in the ADU.

10 The primary home is three levels, as compared to
11 one level for the ADU and from the intensity of use, the
12 primary home has three bedrooms, two baths, and the ADU has
13 one bedroom and one bath. The primary home would be able to
14 house up to four inhabitants compared to one inhabitant in
15 the ADU as intended.

16 So, given all these factors we think it's clear
17 the application meets the definition, next slide. The Board
18 has asked us to walk through the covenant and we have filed
19 a detailed submission addressing the covenant. I will
20 briefly walk through and touch on some of the primary issues
21 today for the Board.

22 The covenant is found in 84-year-old Platt and
23 Deed. The covenant language was not specifically referenced
24 in Michael's deed when he purchased Lot 80. The covenant
25 language in the Platt referenced in the 1938 deed says,

1 quote, I hereby certify that the lots created by the
2 subdivision not having affronted on 19th Street and not be
3 used for residential purposes.

4 There is no stated intent in this one-line
5 statement. Over the last two weeks I have read hundreds of
6 restrictive covenant cases, unfortunately, and I have
7 reviewed the cases that are also quoted and referenced by the
8 opposition party.

9 In most of these covenants, there are typically
10 seven to ten paragraphs outlining an intent, an architectural
11 review, an overall general plan.

12 And I'll turn to looking at some of the cases that
13 were quoted by the opposition party as the covenant that
14 controls the decision here contains Paragraph 2, 4, 5, and
15 8 of a restrictive covenant, a much more comprehensive
16 general plan that does not exist in this case.

17 And another case talks about having a covenant
18 where they're analyzing Paragraph 16B and in another covenant
19 it references that was quoted by the opposition party, they
20 do hereby adopt the following protective covenants, as
21 referenced in the property, and they go through and outline
22 Items 1, 2, 3, 7, 18 and 26.

23 Outlined in this language, there is no stated
24 intent, there is no general plan for purpose of development,
25 there is no stated restriction on subdivision and there is

1 no stated restriction on ADUs. There is also no stated
2 restriction for garages or any other structures or any other
3 building.

4 And as the law of restrictive covenants goes, the
5 provisions of a covenant are to be strictly construed against
6 the would-be enforcer. And any doubts have to be resolved
7 in favor of the free use of property. Next slide.

8 We believe that in our filing today it is clear
9 there is reasonable doubt and that reasonable doubt exists.
10 Obviously, the reasonable doubt would need to be determined
11 if an enforcer did pursue a case at the D.C. Superior Court.

12 But we believe it is clear reasonable doubt exists
13 and it should be resolved in favor of free use of property.
14 I'm going to walk through a couple of examples of this. One,
15 the plain reading. The covenant directly states that it only
16 applies to lots not having fronted on 39th street.

17 This is a conditional if-and statement. If that
18 condition is no longer a factor, it is then not applicable.
19 The subject property has fronted on 39th Street due to the
20 subdivision and the covenant does not restrict the ability
21 to subdivide, which is again, distinguishable from all of the
22 cases referenced by the opposition party where those
23 covenants actually had specific intended development plans.

24 And the law said you cannot change an intended
25 development plan. Here, the law actually says if you have

1 no intended development plan there is a question as to
2 whether or not the covenant is even enforceable on its own.

3 So, we believe again there is multiple elements
4 of doubt that can be raised. The second element of doubt
5 that can be raised is an ADU is not a separate variable and
6 thus is dependent on the primary dwelling.

7 After that, I went back and I looked at the U.S.
8 Department of Housing and Urban Development Office of policy
9 and development and they did a study on accessory dwellings.
10 It was done in June of 2008 and is available on the HUD U.S.
11 user.gov website.

12 And the federal case studies went through and
13 discussed the history and origins of ADUs and how they
14 emerging in the early 1960s but not until the 1970s and 1990s
15 when the municipalities actually adopted ADU programs to
16 permit the construction of them.

17 In the District we did not really allow specific
18 ADUs until the 2016 regulation following the re-writes. It
19 is clear that if an ADU or the concept of one did not emerge
20 until the 1960s or 1980s, then there was no intent for Ms.
21 Fuller if an enforceable covenant does exist to have
22 restricted an ADU.

23 And that creates additional challenges. In
24 addition, an ADU is not an alley dwelling. Alley dwellings
25 are separate, independent uses that can be sold and

1 transferred and that is an independent residential use.

2 Even the opposition admits in their response to
3 filing that, quote, it is clear that the intent of the
4 restrictive covenant was to prohibit residential use of alley
5 dwellings regardless of what the law currently provided.

6 This is not an alley dwelling, this is not a
7 separate property and thus, this covenant and restrict does
8 not apply. There are also other potential reasons for the
9 covenant to be invalidated as we indicated, and more research
10 would need to be pursued if this was enforced or attempted
11 to be enforced.

12 Next slide. Based on this, how does the covenant
13 then play in to the BZA standards? Because that's where we
14 are, we're obviously here before you as the BZA.

15 We believe that the cases quoted by the opposition
16 are cited Zoning Commission cases that are clearly
17 distinguishable in this case today, one, as we have Chairman
18 Hood on the Board.

19 He can tell you that the Zoning Commission
20 evaluates cases differently than the BZA, they have more
21 flexibility, they're considering public benefits, and they're
22 considering different standards.

23 Two, the covenant referenced were proffered by the
24 Applicant as either a public benefit in those Zoning
25 Commission cases or those covenants were proffered as

1 mitigation for an adverse impact.

2 This is a different situation, this is a question
3 of is this covenant, one, valid, two, is it enforceable, and
4 three, does it specifically restrict the relief we're asking
5 for? And so we believe that the special exception standard
6 focused on that and the Board will review whether those
7 conditions are met.

8 We believe that we have met those conditions.
9 Next slide. Under the special exception conditions, is the
10 relief that we're requesting harmonious with the zoning
11 regulations? We believe that it is but ADU is permitted by
12 a special exception.

13 This is a very large lot, it's 3517 square feet
14 so it will comfortably house a principal dwelling and an ADU.
15 It is consistent with the R20 standard, the ADU unit will be
16 located on the second level only with storage on the first.

17 In addition, Mayor Bowser is actually recently
18 initiated a residential accessory apartment program
19 encouraging a pilot program to be able to make and build ADUs
20 easier, make the process easier and to increase the housing
21 supply.

22 Next slide. No adverse effect. This is a one-
23 bedroom dwelling so you're not increasing the intensity of
24 use by more than one person. It is consistent with the 22
25 feet in height, it's actually less than 22 feet in height.

1 In addition, the unique dead-end aspect of the
2 properties at the end means that it abuts only one lot. It
3 has obviously four lines on the north and the east side of
4 the alley that has an alley lot to the south.

5 And then there is 40 feet of separation because
6 of the cul-de-sac which obviously is bigger than the 16-foot
7 alley but there's 40 feet of separation from any other facing
8 39th Street home. The city services for the ADU have always
9 been assessing the rear view's home along the alley.

10 There would be no additional city services, that
11 would be the first time of someone coming back into the
12 alley. There's no legal entitlement to a view across the
13 property and so that would not be a valid adverse impact.

14 And then we do know there have been points raised
15 in their filings about building code violations or building
16 code concerns or in-fill concerns.

17 We would just note those are outside the scope of
18 the Board's review as referenced in the two quoted cases
19 where the Board has said, as John mentioned earlier, that
20 building code issues are not relevant to the zoning code
21 regulations and aren't considered for adverse impacts.

22 Next slide. There will be no adverse effects to
23 the national park land. As indicated in our filing, the
24 Zoning Commissioner confirmed there is no setback requirement
25 under the zoning regulations and that we are providing one

1 foot of clearance.

2 The portion of the park abutting the property is
3 forest land that is currently overrun by an invasive bamboo
4 species that we've seen grow hearty. As people know, bamboo
5 is hearty and we've provided some protection to the national
6 park lands.

7 In addition, Mr. Farquhar recently has redone and
8 improved his front porch which also abuts the national park
9 land at the front of his house. And that was done with
10 respectful communication and we believe that this will be
11 true here. Next slide.

12 The specific conditions for a Subtitle U 253 are
13 as follows, and we believe we meet all of them. 253.5
14 requires that you use a principal dwelling for the accessory
15 apartment unit shall be owner occupied during the duration
16 of the accessory unit and the ADU would be owner occupied by
17 Mr. Farquhar as intended.

18 Under Section 253.6, the regulation states that
19 the total number of persons may occupy the accessory
20 apartment building shall not exceed three except in the R19
21 or R20 zone where the maximum number of persons may occupy
22 the home including a principal dwelling shall not exceed six.

23 We do not intend to exceed six, nor would it
24 exceed six. Next there is a specific under 23.8 condition
25 for an ADU in the R19 and R20 zones for which we comply. A

1 is that there shall be a permanent access to the accessory
2 dwelling unit in the rear apartment access to the alley, the
3 public alley. That's in Platt.

4 B, that the dwelling use of the accessory building
5 shall be contemporaneous with the permanent access here, the
6 ADU does border the public alleys complying with this
7 section. Under Section C3, it requires the permanent access
8 then within 300 feet of a 15-foot wide alley.

9 It's 16 feet and is within 300 feet. D is an
10 accessory dwelling of a house shall not be used
11 simultaneously for any accessory other than a private
12 vehicular garage, an artist studio, or storage for a dwelling
13 unit on the lot. And we have identified that we would comply
14 with that and the plans show compliance.

15 E, as I showed you in the plans earlier, there
16 would be no roof deck. 253.9A, it shall only be permitted
17 on the second story of the detached accessory building. As
18 indicated, we changed the plans so we are compliant with this
19 and not asking for flexibility on that item.

20 And then 253.9B, no balconies and as I showed in
21 the plans as well, there are no balconies and that complies
22 as well.

23 Next slide. The last element is the question of
24 the U253.8F, which either can be questioned as to whether it
25 applies. If the Board determines it complies, we believe it

1 requires evidence that we have submitted into the record that
2 is adequate for the Board to find that there is adequate
3 public utilities for the health and safety of the residents.

4 Residents adheres to the standard of the residence
5 of the ADU, not the neighboring property owners. The Office
6 of Planning's report said, quote, the addition of a single
7 unit would not typically result in a significant impact on
8 the existing utilities.

9 We also entered into the record evidence from our
10 contractor who also concurs that this would be able to be
11 done with no impact from a health or safety perspective and
12 that the ADU would connect to water and sewers through the
13 basement of the principal home.

14 And the site goes under Mr. Farquhar's property
15 to the ADU. This would not impact public space but would
16 stay on Mr. Farquhar's property. PEPCO would also run an
17 electrical line and all HVAC and hot water and utilities
18 would be consistent. There would be no gas lines.

19 We just submit that in regard to evidence of
20 public utilities that a by-right vertical addition on the
21 principal house would have the same utility impact as the ADU
22 or any other increases so we believe this is compliant and
23 we have satisfied this standard. Next slide.

24 That concludes our presentation and we are happy
25 to answer any questions for the Board.

1 CHAIRPERSON HILL: Thank you, those other slides,
2 those are just from previous presentations?

3 MS. MOLDENHAUER: Those are back-of-the-deck
4 slides so if you had a question that was not -- I could add
5 and show you some extra slides.

6 CHAIRPERSON HILL: Does the Board have questions
7 of Applicant? Mr. Smith?

8 MEMBER SMITH: I have one for now. There were
9 some questions that came up from the National Park Service
10 about the location of the ADU adjacent to their land to the
11 north. They requested that you reconsider the siting of the
12 ADU preferably to set it back three feet.

13 My question was are you aware the opposition to
14 the siting and was there some attempt to move it to address
15 the terms?

16 I guess that's not necessarily a D.C. Zoning
17 question but just to be a good neighbor and concerning the
18 fact that if you would have to do maintenance on it, you may
19 be required to get a permit from the National Park Service.

20 I don't know how easy of a lift that is but I'm
21 just wondering what's your position?

22 MS. MOLDENHAUER: We had conversations and Michael
23 and I did talk about this, I think at this stage we were
24 comfortable leaving that back at one foot and obviously, I
25 think as I indicated in the file in the presentation, Mr.

1 Farquhar had worked with the National Park Service on getting
2 his porch renovated.

3 And I think that was some of the back-of-the-deck
4 slides showing you how the porch is close to, obviously, his
5 property line, on that front. And you can look at the survey
6 to see how close that porch is.

7 And he works with them in connection with that
8 work and he feels as though he can work amicably with them
9 based on one foot.

10 MEMBER SMITH: I think another ancillary question
11 is you had brought up utilities. Is the accessory dwelling
12 unit going to be separately metered from the primary
13 residence for all utilities?

14 MS. MOLDENHAUER: I don't know the answer to that.

15 MR. FARQUHAR: The answer will be electricity
16 would be separately metered. Sewage and water will probably
17 be combined with the main residence.

18 MEMBER SMITH: Thank you.

19 CHAIRPERSON HILL: Anyone else? Chairman Hood?

20 ZC CHAIR HOOD: Ms. Moldenhauer, after looking,
21 you just recited a lot of Subtitle U 253 accessory
22 apartments.

23 I get that. Is it your testimony -- in your
24 slides I think you had it in Slide 5 -- that you all meet if
25 not all the requirements that are applied to this

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1 application, do you all meet all of that as far as the
2 standard reviewed in Subtitle U Section 253?

3 Was that what you were conveying to the Board?

4 MS. MOLDENHAUER: Yes.

5 ZC CHAIR HOOD: Let's cut straight to the chase.
6 I saw a lot of the opposition. What is the major thrust of
7 the problem, as the Applicant sees it or as you see it?
8 Maybe I should ask that now.

9 MR. FARQUHAR: Thank you for the opportunity to
10 address that, Chair Hood. I think the main gist of the
11 entire problem goes back to the very beginning which is my
12 neighbors don't want a structure there, period.

13 They've indicated in any number of ways including
14 a poll representing 22 feet high, that's the entire gist as
15 I see it of the opposition. Everything else has evolved and
16 developed as this case has proceeded but number one is nobody
17 next to me wants a structure, period.

18 ZC CHAIR HOOD: I'll be waiting to hear from
19 others. Thank you, Mr. Chairman.

20 CHAIRPERSON HILL: Anyone else from my colleagues?
21 Ms. Ferster, do you have any questions for the Applicant?

22 MS. FERSTER: Yes, thank you. I'm going to start
23 by renewing my motion to dismiss. The Applicant has
24 presented a case with one witness, Mr. Farquhar, who has
25 testified only to his use and his history with the site.

1 There's no architect, there's no witness addressing the issue
2 of the utilities or adverse impact.

3 There's no witness other than the statements made
4 by Counsel who is not a witness. So, I have a series of
5 questions that I wanted to ask about the utility issue.
6 Nobody testified, no witness testified on utilities, no
7 witness really addressed those issues.

8 So, how am I going to cross-examine anybody on the
9 adequacy of utilities, which is part of this standard, if
10 there's no witness? So, I would submit that application
11 should be dismissed because they simply failed their burden
12 of proof.

13 We have one letter from a contractor saying
14 summarily that the utilities are adequate and there's nobody
15 here to cross-examine to ask questions about that.

16 CHAIRPERSON HILL: Ms. Ferster, I think there are
17 enough people here that you are able to ask your questions.
18 You might disagree with me but I think you can also ask the
19 Office of Planning if you have any other questions about some
20 of the issues that you have.

21 The motion was made and it was seconded and it was
22 voted on, you can bring it up again for dismissal, which you
23 seem to be doing. I'll just look at my fellow Board Members.
24 Does anyone want to change their original mind as to what was
25 already said?

1 I see Mr. Smith shaking his head no, I will just
2 leave it if anybody wants to raise their hand? Chairman
3 Hood?

4 ZC CHAIR HOOD: I hear Ms. Ferster's request to
5 us.

6 I'm not necessarily in the plan of changing my
7 mind. I think if it's applicable or if it's doable then I
8 have no problems with maybe the Applicant going out to get
9 somebody to answer the question if it's in line with the
10 Zoning, as everybody here as already mentioned.

11 I think we need to afford her that opportunity,
12 whether it be today or at a later time. But I'm not willing
13 to change my mind, I think we can move forward and we want
14 to make sure she has a party in opposition.

15 We have every resource that she needs to be able
16 to ask the questions as long as it's the Board of Zoning
17 Adjustment's domain. That's just my thought, whether we do
18 it today or later, that's just where I am.

19 CHAIRPERSON HILL: So, the motion remains denied.
20 Ms. Ferster, do you have any questions for the Applicant?

21 MS. FERSTER: I do and I will ask all the
22 questions that I had including those relating to utility
23 issues even though Mr. Farquhar did not address them in his
24 statements. But perhaps he can address them now since they
25 are part of this case.

1 He does need to make that case. So, Mr. Farquhar?

2 MR. FARQUHAR: Yes?

3 MS. FERSTER: I'm going to start with a series of
4 questions about the utility issues because that is part of
5 the legal standard showing there are adequate utilities that
6 serve the ADU. So, my first question is how will the ADU be
7 heated?

8 MR. FARQUHAR: Electrically.

9 MS. FERSTER: And how will the electricity be
10 delivered to the ADU?

11 MR. FARQUHAR: PEPCO.

12 MS. FERSTER: And how will you connect to the
13 electrical system, overhead wires, underground wires?

14 MR. FARQUHAR: To be determined by PEPCO, they've
15 given two options.

16 MS. FERSTER: And where will those wires go, do
17 you know?

18 MR. FARQUHAR: Alongside the house.

19 MS. MOLDENHAUER: Chairman Hill, I'm just going
20 to object. The question under the regulation is adequacy for
21 the safety. There's no questions that she's asking that go
22 to the question of whether it's adequate for the safety of
23 the resident.

24 And some of these are also then building code
25 issues. The questions aren't relevant, as I've already

1 indicated in this part of our record.

2 CHAIRPERSON HILL: Give me a second. I think some
3 of these questions would be better off directed to the Office
4 of Planning. It seems somewhat straightforward as to how
5 you're trying to get the power and everything. I'm not
6 really sure whether Mr. Farquhar is an expert as to how the
7 power is going to get to his ADU.

8 And as I'm looking through the Office of
9 Planning's report, they speak to when they're meeting the
10 regulations as to they didn't think the number of people that
11 were in that dwelling were necessarily going to tax the
12 system.

13 However, I don't know how to stop this line of
14 questioning necessarily.

15 Ms. Ferster, you want to go ahead and continue and
16 just see where we get, and if it gets a little bit too
17 complicated and/or if some of my Board Members have thoughts,
18 they're welcome to raise their hand since we're not in
19 person, which one day I hope we are again.

20 Mr. Ferster, what's your next question?

21 MS. FERSTER: Let me just say the regulation
22 doesn't specify which residents' health and safety to
23 address, it says the residents and that would encompass the
24 neighboring property owners.

25 So, their concerns are relevant about how the

1 utilities are located and its impact on their health and
2 safety.

3 So, let me just continue with the questions. Have
4 you consulted with an electrician to see whether you have
5 enough amperage in the main house to share with your ADU?

6 MR. FARQUHAR: Yes.

7 MS. FERSTER: And you do?

8 MR. FARQUHAR: Yes.

9 MS. FERSTER: And do you know whether any of the
10 utility lines will be located on the narrow portion of the
11 lot of the northern lot line which abuts National Park
12 Service property?

13 MR. FARQUHAR: Are you talking about electricity?

14 MS. FERSTER: Any utilities.

15 MR. FARQUHAR: That's the way they all run,
16 underneath my property in the back.

17 MS. FERSTER: And that's that narrow isthmus on
18 the northern border abutting the Park Service property?

19 MR. FARQUHAR: Narrow is not how I would describe
20 it.

21 MS. FERSTER: How wide would you say that portion
22 is?

23 CHAIRPERSON HILL: That's the way it's going to
24 come, correct?

25 MR. FARQUHAR: Yes.

1 CHAIRPERSON HILL: That's the way it's going to
2 come?

3 MR. FARQUHAR: Correct, underneath my property at
4 the end of the alley, the end of the actual circle, Chair
5 Hill.

6 MS. FERSTER: And how wide is that strip?

7 MR. FARQUHAR: I have the flat right here. It
8 varies in size because of the nature of the circle.

9 MEMBER SMITH: Chairman Hill?

10 CHAIRPERSON HILL: Who just spoke up?

11 MEMBER SMITH: Mr. Smith.

12 CHAIRPERSON HILL: Go ahead.

13 MEMBER SMITH: I want to also reiterate something
14 that Ms. Moldenhauer just stated, that a lot of these
15 questions that are being asked by Ms. Ferster are building
16 questions that do relate to when he applied for a building
17 permit, how electricity or utilities would service these
18 three dwelling units that would come up between the District
19 of Columbia and PEPCO and any other utility that would
20 service that.

21 So, I don't get how this line of questioning that
22 Ms. Ferster is asking gets to any zoning questions that we're
23 attempting to address right now.

24 CHAIRPERSON HILL: Ms. Ferster, do you have an
25 answer for Mr. Smith?

1 MS. FERSTER: We're all talking about Subtitle U-
2 253.AF2, which is the Applicant who has the burden of proof
3 here has to provide evidence of their adequate public
4 utilities for the health and safety of the residents as part
5 of the subsection standard.

6 So, that's why my questions go to the utilities
7 and there are also concerns we have about the impact of
8 utility installation on adjoining property owners and
9 particularly the abutting National Park Service property
10 which you, Mr. Smith, have alluded to and that is obviously
11 relevant to the special exception.

12 MEMBER SMITH: And I disagree, Ms. Ferster. We
13 don't regulate federal land here at the Board of Zoning
14 Adjustment and I'm getting a lot of questioning about how a
15 utility will access the accessory dwelling. This does not
16 relate to zoning concerns.

17 They are building code concerns and when the
18 Applicant applies for a building permit, there will be
19 questions as part of the application for a building permit
20 in how it may impact the adjacent property owners. So,
21 again, all of the line of questioning does related to a
22 building permit.

23 (Simultaneous Speaking.)

24 MS. FERSTER: Thank you, Mr. Smith, I'll ask Mr.
25 Hill if he would like me to not ask any more questions about

1 utilities, in which case I will proceed to my other
2 questions.

3 CHAIRPERSON HILL: I'm just trying to allow you
4 the opportunity to ask the questions you need to and want to,
5 and Mr. Smith is just trying to get -- because, again, you're
6 trying to provide us information so that we can decide
7 whether or not they're meeting what's required under the
8 standard.

9 And I'm looking at the standard right now that
10 you're speaking to and again, I don't see how it relates to
11 how the utilities are getting there but I do understand
12 there's nothing that you see that you can specifically speak
13 to in terms of the utilities, which is something that I guess
14 we can also reach to speak with at the Office of Planning
15 when they have an opportunity to give their report.

16 So, I would again just suggest that you continue
17 to ask your questions in a way that you believe is going to
18 help the Board understand whether or not these guys are
19 meeting the standard request for the relief requested.

20 So, I don't know if that answered your question
21 or not, Ms. Ferster, but go ahead with your next question.

22 MS. FERSTER: This is actually my last question
23 about the utilities issues and that is for Mr. Farquhar, will
24 there be plumbing lines serving the first level of the new
25 building?

1 MR. FARQUHAR: I'm not sure what you mean. There
2 will be plumbing that will be underground coming from the
3 main house to the accessory structure.

4 MS. FERSTER: And will it serve the first floor
5 level of the building? That is an issue relating to the
6 special exception, its use of the first-floor level. So, my
7 question is will there be plumbing that will serve the first
8 level?

9 MS. MOLDENHAUER: I just want to object. Mr.
10 Farquhar doesn't have construction plans yet.

11 CHAIRPERSON HILL: That's okay. We're trying to
12 also find out whether or not that first floor is going to get
13 used and so I think it's a fair question. Mr. Farquhar, do
14 you know if the second floor is going to have plumbing?

15 MR. FARQUHAR: The second floor is going to have
16 plumbing, the first floor has no reason to have plumbing
17 because there's no livable space down there.

18 CHAIRPERSON HILL: So, the answer to the question
19 is yes?

20 MR. FARQUHAR: Yes for the plumbing on the second
21 floor.

22 CHAIRPERSON HILL: That's what the question was.

23 MS. FERSTER: No, my question was on the first
24 floor, will there be plumbing serving the first floor?

25 MR. FARQUHAR: The answer is no.

1 MS. FERSTER: How about HVAC? Will there be HVAC
2 serving the first floor area?

3 MR. FARQUHAR: Actually, the honest answer I
4 really don't know, it depends on the nature of how the
5 building itself will be heated and cooled. I don't know what
6 that will involve at this point, I don't know whether it's
7 going to be a split system.

8 I know there's many systems available.

9 CHAIRPERSON HILL: We'll get Ms. Johns in here in
10 a second. Whether or not your storage gets heated or cooled,
11 I don't know --

12 VICE CHAIRPERSON JOHN: It's not relevant.

13 CHAIRPERSON HILL: You can answer the question and
14 not worry about getting stuck if you know the answer.
15 Everybody has their hands up. Mr. Smith?

16 MEMBER SMITH: I was just going to second what I
17 think Ms. John was going to say, this question about
18 utilities running through the construction is fairly
19 irrelevant. You can plumb, you can run electrical, you can
20 put HVAC in a shed in the District of Columbia.

21 So, it's fairly irrelevant about the utilities,
22 this line of questioning. I'm just going to reiterate again
23 that these questions about building codes, these building
24 code questions, I'm failing to see the relevance.

25 I'm just going to leave it at that.

1 CHAIRPERSON HILL: Ms. John, you had your hand up?

2 VICE CHAIRPERSON JOHN: I was about to say the
3 same thing because we're wasting a lot of time on these
4 really irrelevant questions.

5 CHAIRPERSON HILL: Okay, Ms. Ferster.

6 MS. FERSTER: He didn't answer my question, so
7 that's fine.

8 VICE CHAIRPERSON JOHN: With all due respect, it's
9 not fair to the Applicant to ask the Applicant to answer
10 questions right now because those issues will be determined
11 at the permitting stage.

12 We handle these routinely where once the permit
13 is applied for, the building administrator's office will
14 determine if that first floor is indeed habitable space, I'm
15 sorry, part of the dwelling use.

16 And so this is really taking up a lot of
17 unnecessary time right now.

18 MEMBER SMITH: Agreed.

19 MS. FERSTER: I will move on then. Board Members,
20 I hear you and I will move on.

21 VICE CHAIRPERSON JOHN: Thank you.

22 MS. FERSTER: I'm going to ask Mr. Farquhar some
23 different questions about his use of the space. You've
24 indicated that you own both 1961 and 1963 39th Street and you
25 currently reside in 1961 39th Street, correct?

1 MR. FARQUHAR: That's correct.

2 MS. FERSTER: Are you the sole occupant of 1961
3 39th Street?

4 MR. FARQUHAR: No, I have somebody living
5 downstairs.

6 MS. FERSTER: How many people do you have living
7 downstairs?

8 MR. FARQUHAR: One.

9 MS. FERSTER: Do you have a residential business
10 license for your tenant downstairs?

11 MS. MOLDENHAUER: This property is his own house,
12 it's not even the property that's the application that's
13 before us. You're talking about the property at 1961, the
14 application is for 1963.

15 CHAIRPERSON HILL: I agree. Ms. Ferster, I don't
16 know, sometimes I get a little confused myself, I'm just
17 trying to be fair and also understanding as to your line of
18 questioning.

19 I'm trying to figure out again with this property
20 that we're asking questions about, you're trying to figure
21 out whether or not he's actually going to live in the
22 building?

23 I'm just trying to understand what you're trying
24 to -- could you ask the questions about the property that is
25 currently before us?

1 MS. FERSTER: Regarding the proposed ADU then, you
2 indicated that you will be the sole occupant of the new ADU,
3 you'll move from 1961 39th Street to the ADU?

4 MR. FARQUHAR: That's correct.

5 MS. FERSTER: How long do you intend to live
6 there?

7 MR. FARQUHAR: I can't tell you that right now.
8 My intention is to move there and live there, I cannot
9 predict what circumstances are going to be down the road.

10 CHAIRPERSON HILL: You got an answer. How many
11 questions do you have, Ms. Ferster?

12 MS. FERSTER: Not many more. How many people
13 currently live in the principal dwelling at 1963 39th Street?

14 MR. FARQUHAR: Two people.

15 MS. FERSTER: The drawings on file with the BZA
16 describe the first level floor being used for recreation but
17 now the PowerPoint shown by your Counsel indicates that the
18 first level will be used for storage.

19 Have you filed corrected drawings that formally
20 change this label or do you intend to file drawings that
21 change this label, making that correction?

22 MR. FARQUHAR: I'm sorry, I don't understand your
23 question.

24 MS. MOLDENHAUER: The label has been referenced
25 in the PowerPoint and that is part of the record. It's been

1 clearly noted in all of our filings that it will be storage.
2 And again, this is not the special exception application for
3 an ADU, not relief for a building to be constructed.

4 So, it's the ADU that would be approved, not
5 connected to a building plant.

6 CHAIRPERSON HILL: So, storage, Ms. Fester, I
7 guess is the answer.

8 MS. FERSTER: Ms. Moldenhauer's slide, and she
9 testified, well, she stated so I just want to ask you this
10 question.

11 What she stated was the occupant of the ADU, who
12 will be you, will reside on the second floor but the only way
13 to enter your second-floor dwelling will be to go into the
14 front door on the first floor.

15 There's no exterior access to the second floor,
16 is that correct?

17 MS. MOLDENHAUER: I would object to a
18 misrepresentation of the facts. There's an exterior access
19 that leads right to the stairs, you go up the stairs to this
20 ADU.

21 MS. FERSTER: Mr. Farquhar, if you could just
22 explain to me then the question? I don't understand what the
23 problem with the question is. How do you intend to access
24 the second level of the building where you live?

25 MR. FARQUHAR: By walking in the front door and

1 going upstairs.

2 MS. FERSTER: So, you will need to go into the
3 front door, into the first level and go up the stairs to the
4 second level?

5 MR. FARQUHAR: That's correct.

6 MS. FERSTER: So, the PowerPoint that was shown
7 by your Counsels didn't really show the structure that I've
8 seen on your architectural plans that looks like and is
9 called a deck. Is it correct there will be a structure on
10 the rear that is characterized as a deck?

11 MR. FARQUHAR: That's correct.

12 MS. FERSTER: And how many feet off the ground is
13 this structure or will this structure be?

14 MR. FARQUHAR: I can't answer that, I don't know
15 the height from the depth of the hill, the bottom of the hill
16 to the top. It will be a cantilevered deck.

17 MS. FERSTER: And on the rear it appears to me
18 there appears to be a projecting window next to the front
19 door and on that side with the deck-like structure, is that
20 correct?

21 MR. FARQUHAR: I'm confused by your question. The
22 front door or the deck-like structure?

23 MS. FERSTER: In the rear of the ADU there are
24 French doors and a deck-like structure, there also is a
25 window and that appears to be a projecting window, is that

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1 correct?

2 MR. FARQUHAR: I believe that's correct, yes.

3 MS. FERSTER: And when you occupy the second level
4 of the ADU, how will you access that cantilevered structure
5 that you described in the rear?

6 MR. FARQUHAR: By walking out the door to it.

7 MS. FERSTER: So, you go down to the first floor
8 levels and then walk out the French doors?

9 MS. MOLDENHAUER: I think Ms. Ferster is putting
10 words into my client's mouth, trying to reference things like
11 the French doors which she knows are farther than the stairs.
12 I would object to the line of questioning.

13 The plans are what the plans are and they show the
14 property.

15 CHAIRPERSON HILL: I'm trying to also understand.
16 You're trying to get to the fact that they're walking through
17 that storage area to get to those doors, is that what your
18 questions are about?

19 MS. FERSTER: That's correct.

20 CHAIRPERSON HILL: This is what I'm going to
21 figure out later, whether or not you're allowed to walk to
22 your storage, I guess you're allowed to walk to your storage,
23 I don't know.

24 So, you're saying, Mr. Farquhar, in order to get
25 to that deck you're going to walk through your storage area,

1 correct?

2 MR. FARQUHAR: That's correct.

3 CHAIRPERSON HILL: That's all I needed. Ms.
4 Ferster, what's your next question?

5 MS. FERSTER: Your original plans, Mr. Farquhar,
6 included laundry facilities on the first level, so that label
7 has now been eliminated. Will there be any laundry
8 facilities in the ADU? And if so, where will they be
9 located?

10 VICE CHAIRPERSON JOHN: I'm going to interject
11 again. All of that will be decided at permitting. If it's
12 not allowed, BZA will remove it from the plans and all of
13 this discussion about occupancy of the ADU is a matter of
14 enforcement.

15 The BZA can't enforce whether or not the
16 appropriate number of people live there, BZA will enforce it.

17 CHAIRPERSON HILL: Ms. Ferster, I can see my Board
18 Members are getting a little frustrated with --

19 MS. FERSTER: That was my last question.

20 CHAIRPERSON HILL: I think you've already gotten
21 them to the point where they're worn out a little bit and so
22 I guess it's now your opportunity to give your presentation
23 as to why you believe they're not meeting the criteria for
24 us to grant this application.

25 And so I'm going to go ahead and give you your

1 time here to go ahead and give your presentation, and then
2 we'll hear from the ANC as well as the Office of Planning.
3 Ms. Moldenhauer, you have your hand up?

4 MS. MOLDENHAUER: When this was going to start,
5 there was a proffered expert, Mr. Guillermo Rueda, and we
6 hadn't yet qualified him as an expert. I don't know what
7 he's an expert in and so I would just ask that we address
8 that before turning it over to her.

9 CHAIRPERSON HILL: I think Mr. Rueda has been
10 before us already a ton of times. Ms. Ferster, what are you
11 claiming Mr. Rueda is an expert in?

12 MS. FERSTER: Mr. Rueda, who is on your list of
13 experts, has been qualified a number of times as an expert
14 in both architecture and zoning and we would ask to have him
15 qualified as an expert because he has been so qualified on
16 many occasions before.

17 CHAIRPERSON HILL: Mr. Moy, you can take a look.
18 I know Mr. Rueda's been qualified as an expert in
19 architecture, whether or not he's an expert in zoning I can't
20 remember. Mr. Moy, can you take a look?

21 MR. MOY: We'll double-check as you continue your
22 hearing. That's clearly for architecture but I'll
23 double-check on the zoning aspect.

24 CHAIRPERSON HILL: I appreciate what you all are
25 asking about the experts and we're quasi judicial and we take

1 everybody's testimony.

2 So, them being considered an expert, I don't know
3 exactly how that in the regulations gives different weight
4 to everything the we hear and so I'm kind of opening that up
5 for every time somebody comes before us and tells me they're
6 an expert in something.

7 But in any case, Mr. Rueda has definitely been an
8 expert in architecture before. So, Mr. Rueda, we will listen
9 to you as an expert in architecture and then we'll come back
10 and determine whether or not you're an expert in zoning. But
11 we're still going to listen to your testimony.

12 Mr. Moy?

13 MR. MOY: I just got confirmation with the Staff,
14 he's listed also as an expert in zoning as well.

15 CHAIRPERSON HILL: Mr. Rueda made that argument
16 before then at some point, I can tell. Ms. Ferster?

17 MS. FERSTER: Yes, I have either an opening or a
18 closing statement, and preference would be as a closing
19 statement.

20 CHAIRPERSON HILL: That's all right.

21 Normally what we do, not normally what we do, in
22 the regulations I think, and I can't remember whether the
23 attorneys are going to pop in and tell me this or not, the
24 only person who gets a conclusion is usually the Applicant,
25 I think the Applicant, in the regulations.

1 I like to get a conclusion from everybody but it's
2 not an opportunity to re-argue your case, it's just basically
3 something that's supposed to highlight things so the Board
4 can understand what your argument was.

5 And Ms. Ferster, I've been here long enough now
6 and I've seen you a lot, we've both seen each other, we've
7 all seen each other, everybody is in this little square,
8 we've all seen each other. So, the conclusions for me are
9 helpful if, again, it re-highlights what you're trying to
10 argue.

11 If you want to make your opening statements, you
12 can do it whatever way you want, is I guess what I'm trying
13 to articulate here. Whatever you think would be most helpful
14 to the Board because that's really what this is all about.

15 Everybody is trying to make this helpful to Board
16 to understand. So, either way, it doesn't matter, Ms.
17 Ferster, whether you want to do it in the opening or whether
18 you want to do it in the conclusion, as long as, again, the
19 conclusion is not --

20 The conclusion is not supposed to be 10 minutes
21 long is what I'm basically getting at. I got 30 minutes it
22 looks like here right now for your case so you can do
23 whatever you'd like to do with that time.

24 MS. FERSTER: The most important thing is
25 obviously for our witnesses to testify and we absolutely have

1 30 minutes of testimony. We have 4 witnesses. So, I would
2 like to address the covenant issue but that's also well set
3 out in our opposition and we could also submit a supplemental
4 paper.

5 But the important thing for you and for the record
6 we want to create is our witnesses. So, I will start with
7 the witnesses and if you would like to hear closing from me
8 to talk about some of the covenant issues and respond to some
9 of the covenant issues the Counsel or the Applicant has
10 raised, I would be happy to do that.

11 Let's start with our witnesses because they are
12 the most important people for you to hear from. We're going
13 to start with Mr. Rueda, followed by Richard Hall and then
14 Patterson Clark and George Weidenfeller.

15 And Mr. Young I think should have a PowerPoint for
16 Richard Hall who will be the second witness, so maybe you can
17 locate or he can locate that PowerPoint while Mr. Rueda was
18 testifying.

19 Mr. Rueda does not have a PowerPoint so he's just
20 going to deliver his testimony.

21 CHAIRPERSON HILL: Mr. Rueda, do you want to go
22 ahead and introduce yourself for the record? Welcome back.

23 MR. RUEDA: Can you hear me?

24 CHAIRPERSON HILL: I can hear you.

25 MR. RUEDA: Hi, my name is Guillermo Rueda and I

1 have been previously qualified as you found out. I resided
2 on a case with Ms. Moldenhauer at this very board so I'm
3 disappointed that she didn't remember that.

4 My name is Guillermo Rueda --

5 CHAIRPERSON HILL: You don't have to be
6 disappointed, they fight everybody, even if everybody is a
7 next-door neighbor and they've all known each other for
8 years, it's just how it works.

9 MR. RUEDA: I don't feel special then, thank you.

10 CHAIRPERSON HILL: You shouldn't feel special,
11 they'd fight me if I said I was an expert in zoning. Go
12 ahead, Mr. Rueda, sorry.

13 MR. RUEDA: Anyway, I appreciate the ability to
14 testify on behalf of the Halls.

15 They're concerned that an accessory building as
16 proposed would be built effectively as a second residency on
17 the adjoining lot, which is barred by the covenant, as you
18 heard, from residential uses such as the proposed accessory
19 dwelling unit.

20 Of course, there are additional regulatory
21 restrictions that require residential uses and accessory
22 buildings to be approved by this board as the special
23 exception. My review of the application assess the impacts
24 of the proposed accessory building and its planned
25 residential use.

1 An accessory apartment is not permitted as a
2 matter of right in R20 zones and the Halls' expressed
3 concerns highlight the incompatible size and location of the
4 accessory building on the site, the unsuitability of the site
5 for construction --

6 MS. MOLDENHAUER: I'll object one time and I won't
7 object again but I just want to have it on the record that
8 I object to the most that's focusing on the accessory
9 building. The relief we're seeking here is not about the
10 building but about the ADU.

11 MR. RUEDA: That's fine but the application does
12 not really satisfy the requirements for accessory building
13 which houses an ADU. So, both are intertwined as far as I'm
14 concerned.

15 CHAIRPERSON HILL: Ms. Moldenhauer got on the
16 record what she wanted to get on the record and, Mr. Rueda,
17 I'm just trying to look at it, as we all are, and I know that
18 everyone has their reasons for being here and we all
19 understand what those reasons are.

20 I'm just actually trying to look at the
21 regulations and understand whether or not this application
22 is meeting the regulations. So, Mr. Rueda, I'm listening
23 very intently to specifically where you're citing to the
24 regulations and why this is not meeting the regulations.

25 So, go ahead, please.

1 MR. RUEDA: There's a variety of reasons why this
2 application does not meet the regulations and I've got five
3 points that I'm going to go through.

4 CHAIRPERSON HILL: That would be great if you hit
5 them fast, Mr. Rueda.

6 MR. RUEDA: It always comes down to rushing
7 through the points. But obviously, the application from my
8 perspective ignores key questions and concerns. It doesn't
9 provide enough graphic material required for special
10 exception relief.

11 And in my opinion, the proposed accessory fails
12 to meet standards for accessory buildings, and more
13 importantly, the special exception request to allow an
14 accessory apartment cannot be approved as currently proposed.

15 My testimony is separated into five points.
16 Number one, the Applicant has not been satisfied the
17 submission requirement for projects requesting special
18 exception relief under D5201.4D.

19 The representation of the work does not
20 demonstrate compliance with how they meet the requirements
21 for light and air, privacy, for character and pattern of
22 provisions in the subsection.

23 The topography of the lot, which opposition
24 testimony today demonstrated is significant, has impact onto
25 the building and has been described and reflected in the

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1 Applicant's documents. The accessory building that's
2 proposed spans across two record lots, 39 and 80, to achieve
3 a significant size.

4 And the drawings fail to graphically describe this
5 height or mass in context with the principal dwelling or for
6 that matter the adjoining neighbors across the alley.

7 There are no three-dimensional drawings of
8 sketches, no sections through the site showing the existing
9 building of the proposed structures, how the slope interacts
10 with it, and the location of the ADU relative to the property
11 lines in the site plan.

12 The accessory building is 25 feet wide on a square
13 characterized by narrow, 16-foot-wide lots and buildings, and
14 without question fail to conform to the character, scale, and
15 patterns of the buildings in these neighborhoods.

16 It should be noted this would be the only
17 accessory building along this alley. The increasing lot and
18 building size through the proposed combination of lots would
19 dramatically change the character of the square that borders
20 the federal park land.

21 In this proposed location of the site, it will
22 eliminate parking availability and constrain available use
23 of the alley by guests blocking the light and will
24 demonstrably restrict views from the adjoining home towards
25 the north and east and will remodel the pronounced slope of

1 the site for the elimination of green space in the forest.

2 The application cannot be approved as it will have
3 a substantially adverse effect on the adjoining property.

4 Point number 2, the proposed accessory building
5 will not conform to all of the requirements of Subtitle U 253
6 of accessory apartments in the R zone and the project will
7 require additional variance relief under 253.12.

8 First, I'd like to address the Applicant's
9 argument that they don't have to meet the requirements of
10 253AF if they meet all the height conditions applicable to
11 accessory apartments and other zones through 253A through E.

12 I'll note that the OOP's report has rejected the
13 interpretation of the regulation. On Page 8 they state,
14 note, conditions of Sections 2535 through 253A apply to
15 special exception request in the R19 and R20 zone for
16 activities in 3.9, which is obviously a special exception
17 request.

18 As such, 253AF stipulates that, one, requests must
19 include evidence of the building so as not to be
20 objectionable to the other properties because of traffic,
21 parking or other objectionable conditions, and two, that
22 there be evidence of down public utilities, which obviously
23 has been hashed out a little bit, available for the health
24 and safety of the residents.

25 The submission only casually refers to this and

1 the one point that I will make that I think is significant
2 in terms of availability is the availability of sewer.
3 Because of the location of this site on the slope and because
4 of the location of the ADU, it's probably not going to allow
5 for flow, if you will, towards 39th Street.

6 I bring into question the fact that sewer has not
7 been highlighted as part of their application, which whether
8 or not it's a building permit, the availability for the
9 health and safety of these residents obviously is a big
10 consideration under the zoning regulations.

11 More importantly, the accessory building cannot
12 be cited as shown because it does not conform to the
13 regulations of Subtitle D, which requires that accessory
14 buildings be located at a maximum of 5 feet from the rear
15 property line.

16 The identification of necessary utilities for the
17 Applicant does not equal the ability to provide this utility.
18 I'm going to restrict some of this and say that -- I
19 appreciate your time so I'm trying to be a little more
20 focused on some of these points.

21 Anyway, the Applicant purports not to request a
22 waiver of 2539A, which requires that an accessory apartment
23 is limited to the second floor of the accessory building and
24 the design of the residential building on the lot by
25 establishing this cause-like ability.

1 Anyway, contrary to the requirements of 253.10,
2 which is to maintain the single household character of the
3 residential zone.

4 The application violates 93A, which permits an
5 accessory apartment only on the second level. Because the
6 Applicant is no longer requesting a waiver does not mean the
7 building is being proposed as a residential use on both
8 levels.

9 CHAIRPERSON HILL: Mr. Rueda, it is actually being
10 proposed right now as residential only on the second floor,
11 that's how it's being proposed.

12 MR. RUEDA: Correct, and to the point that Ms.
13 Ferster brought up, the entry is open to the storage --

14 CHAIRPERSON HILL: It's okay, I'm just trying to
15 get you guys focused so that you can help your client in that
16 again is something that's going to happen with permitting,
17 whether or not that first floor is being used as storage or
18 is not.

19 We can only do what we're told currently. We're
20 the Board, we're going to ask the questions, but currently
21 it is listed as storage, it is going to be used as storage.
22 So, arguing it another way I don't think is necessarily
23 helpful. But go ahead, please.

24 Basically, you're just saying they're not going
25 to use it as storage but I don't know how you can continue

1 to say that.

2 MR. RUEDA: I can say that pretty easily because
3 the application is asking you to access a balcony out the
4 back, a projecting bay, portrait windows looking to the views
5 in the storage area. And these residential elements are all
6 accessed through this storage area.

7 CHAIRPERSON HILL: Mr. Rueda, you're not
8 understanding me so I'm going to stop even interrupting you
9 then. Go ahead and make your presentation.

10 ZC CHAIR HOOD: Let me just say this, Mr.
11 Chairman. I think I think the key for us is help us to see
12 it your way, that's where we're at, help us to get to where
13 you are in our evaluation of this case. That's all I'll say
14 on it, thank you.

15 MR. RUEDA: I appreciate that.

16 The fact that 5310 speaks specifically to not
17 creating a design that replicates or creates an additional
18 residential unit on the lot is noteworthy in terms of when
19 you consider accessory apartments, they're typically a garage
20 or some sort of other feature that is distinct in its
21 character from the main building.

22 And the apartment occupies a part of this. Now,
23 they're saying at this point they're all going to occupy the
24 second story and that's fine, but there is no enforcement
25 vehicle, other than reliance on the neighbors, as to whether

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1 there's 10 people in the place, as to whether or not it's
2 being used.

3 And what I guess my analysis shows is that by
4 showing a balcony off the back of the building, by showing
5 a bay window and by showing these portrait windows, the first
6 floor, the intended use is just as similar, if not better
7 than what's proposed on the second story.

8 And as an architect, I think interpretation of
9 plans is key to understanding what the proposed use is going
10 to be.

11 And so I don't think that if you have a building
12 that shows a storage space open to all these other areas,
13 it's actually going to be used for anything other than
14 putting two boxes down potentially if you want to say you're
15 complying with the law. And then having the rest of the
16 building open to use as repose and recreation.

17 So, I guess the point of this is to say that even
18 though the waiver is not being requested, we feel it is in
19 fact appropriate still and we also feel like under 253 10C
20 there's clearly a requirement given that the proposed design
21 enhances the reading of the accessory building.

22 You've thrown me off, I apologize. The reading
23 of the accessory building can only be the second residential
24 building on the lot. The ADU approximates the principal
25 dwelling in size and design.

1 It conveys the appearance of a second residential
2 building on the lot by incorporating elements such as the
3 roof dormer's double glass doors, elements such as the rear
4 projecting window and balcony deck structure of the lower
5 level. These are all elements that require special exception
6 under 253.11.

7 These things all reinforce the interpretation of
8 the building as a resident's in use at both levels. 25311
9 has described requires special exception relief for balconies
10 and for projected windows. The design incorporates both.

11 Just so you understand, the balcony is defined be
12 Webster's as a platform that projects from the wall of a
13 building and is enclosed by a parapet or rail. I'm sorry,
14 I didn't mean to interrupt you.

15 CHAIRPERSON HILL: Mr. Rueda, I'm just smiling
16 because I understand what you guys are saying and I'm waiting
17 until we get to an opportunity to interview, ask questions,
18 whatever, about that first floor. And Ms. Ferster, are you
19 there?

20 MS. FERSTER: Yes, I'm here.

21 CHAIRPERSON HILL: I'm totally fine with Mr. Rueda
22 taking up time but I just wanted to make sure you get all
23 your people.

24 MS. FERSTER: Let me just say that, Mr. Rueda, he
25 is now proceeding beyond the question of whether or not that

1 first floor is storage and he's talking about additional
2 provisions of the requirement of an ADU, which are not met
3 specifically.

4 And he was just getting into the facts of an ADU,
5 they need to ask for a special exception if they have either
6 a projecting window or a balcony. So, his testimony is going
7 to address that separate issue of 253.11. I would like to
8 him to proceed on those issues at this point.

9 ZC CHAIR HOOD: I'm just trying to follow Mr.
10 Rueda's testimony. Bear with me, I think I'm following it
11 to a point. You mentioned 253.10, you said C, which in turn
12 also mentions 253.11 and I guess I probably should let you
13 finish, as Ms. Ferster mentioned.

14 I think where you're going now next is 253.12.
15 I think that's where you're going but let me be quiet now.
16 I'm just trying to follow your chronology of the points
17 you're trying to make.

18 Help us to see what you're trying to convey to us
19 and I'll be quiet this time, thank you.

20 MR. RUEDA: I appreciate you, you're tracking
21 perfectly.

22 The idea that 9.9A is not being requested as a
23 waiver ties into all these other elements, which if you look
24 at the design, support the idea that 10C also requires
25 waiving because all of these elements that are being

1 introduced into this accessory building reinforce the idea
2 that it is residential in nature from top to bottom.

3 And because they incorporate, that's 10C as you
4 mentioned, a balcony and a projecting window, those are both
5 elements, and I wasn't clear in the regulations but 25311
6 both point out they require special exception relief under
7 Section 253.

8 CHAIRPERSON HILL: I got you, I just want to make
9 sure the Office of Planning is listening because I am going
10 to ask these questions when we get to the Office of Planning.
11 Go ahead, Mr. Rueda.

12 MR. RUEDA: As you alluded, this ties into 253.12,
13 which I feel the application modifies more than two
14 provisions of 253 and actually requires variance relief under
15 the section, given the fact that 253AF is not clearly met,
16 given the fact that 2539 to me is clearly not met, given that
17 10C also needs modification, and given the fact that you have
18 the balcony.

19 Those are all modifications under 253 that would
20 require variances. My third point is that an additional area
21 variance is required to establish the record lot for this
22 property.

23 There's been comment that they're just going to
24 record this a lot but meanwhile, OP confirms the tax lot,
25 even though these two laws were subdivided in the tax lot,

1 they're not a record lot and OP confirmed that Subtitle D
2 1202.1 is not met for width.

3 And even with the addition of the alley lot, the
4 new lot does not satisfy the requirements for 1202.

5 And similarly, 10B DCMR 2701.2 specifically
6 provides that where a lot of record is subdivided, for the
7 purpose of creating another lot of record it shall be
8 affected in the manner as not to violate any provisions of
9 this chapter or any other D.C. regulations.

10 Point 4, the proposed accessory building --

11 CHAIRPERSON HILL: Mr. Rueda, I'm going to tell
12 you one last time, Ms. Ferster, I will give you a couple more
13 minutes because we keep interrupting you a little bit but
14 this hearing has to end at 6:00 p.m. because it just is going
15 to have to end at 6:00 p.m.

16 And so I'm just letting you all know. I have to
17 keep you all somewhat on time so I'm just letting you know.
18 Go ahead, Ms. Ferster.

19 MS. FERSTER: Mr. Rueda actually has his testimony
20 written as well so if it would be helpful to you, he can
21 submit it in writing so that while he's speaking to the main
22 points he can also give you the written version.

23 CHAIRPERSON HILL: I don't want to say yes yet
24 because I don't know what's going to happen at the end of
25 this hearing. So, if we do need to have your written

1 testimony, Mr. Rueda, we will ask for it but at this point
2 I still think it's important for you to hit the points you
3 want to hit.

4 Ms. Ferster, I'm going to let you guide this
5 because what I'm trying to get to is I don't know what's
6 going to happen at the end of this hearing, whether we get
7 to a decision or whether or not we get more information on
8 the record, I don't know.

9 So, I can't say that.

10 MS. FERSTER: I would ask that Mr. Rueda finish
11 his testimony. He has several more points and they are
12 important points that he can get to but if you are concerned
13 about time, he can submit it in writing.

14 MR. RUEDA: I have no problem submitting it in
15 writing.

16 CHAIRPERSON HILL: I am concerned with time.
17 Submitting in writing won't do me any good if we vote on it
18 today, that's what I'm trying to get at. So, go ahead, Mr.
19 Rueda, with your testimony.

20 MR. RUEDA: The third point was probably the most
21 difficult point and the fourth point is pretty simple. The
22 accessory building does not comply with the development
23 standards for R20 zone and I believe it would require a
24 variance for its current siting.

25 When you look at the plans, the buildings should

1 be located for 1209.2 no more than five feet from the rear
2 property line. That's it, the proposed location ignores this
3 prevention and sets back from the rear property line more
4 than 36 feet, presumably to avoid building at the bottom of
5 the slope, which is far down.

6 The accessory building is characterized as
7 secondary to the principal dwelling but in fact, I think that
8 if you interpret the regulations and not invoke livable space
9 or other terms not defined by the zoning regulations, you
10 would find the footprint of the two buildings are almost
11 identical when you consider the lot occupancy.

12 The heights are almost equal, 22 feet versus 26
13 feet, and when you look at the actual gross floor area of the
14 2 buildings they are very similar because the lower level is
15 a cellar and a large portion of that lower level is a garage.

16 So, to talk about livable space obviously makes
17 their point, which is fine, and if you look at Zillow,
18 actually, their numbers are probably more aligned with what
19 the gross floor area, which is like 1000 square feet.

20 And they do list four bedrooms and two baths,
21 which maybe the building isn't being used that way.

22 All told, the ADU is not compatible with the
23 purpose of the R20 zone and more specifically, with Subtitle
24 1201D, which is to limit permitted grounds coverage of new
25 and expanded buildings and other construction to encourage

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1 a general compatibility between the siting of a newer
2 expanded building and the existing neighborhood.

3 Therefore, the special exception violates X901.2A
4 because it's not in harmony with the zoning plan.

5 In conclusion, I guess I would just say that apart
6 from the additional special exception which would be for the
7 balcony and potentially another one for the projecting
8 window, there are three variances that I think would be
9 required for this project to be approved by this board.

10 Thank you for your time and attention.

11 MS. FERSTER: Our next witness is Richard Hall and
12 I assume you want to ask questions of all the witnesses, have
13 all the testimony and then --

14 CHAIRPERSON HILL: Give me a second. Ms. John,
15 you want to wait until the end or you want to ask Ms. Rueda
16 now?

17 VICE CHAIRPERSON JOHN: No, I need to follow up
18 because I wasn't able to follow a lot of Mr. Rueda's
19 testimony. So, in terms of the development requirements, do
20 you have a copy of the Office of Zoning OP report?

21 MR. RUEDA: Yes.

22 VICE CHAIRPERSON JOHN: So, in terms of the lot
23 width, there's no change, right? It's still at 16.19 feet?

24 MR. RUEDA: That's correct.

25 VICE CHAIRPERSON JOHN: And the lot area, there's

1 no change.

2 (Simultaneous Speaking.)

3 Let's just go down the list and I'll ask OP about
4 the same thing as well. Lot occupancy existing is 19.29 and
5 it will increase to 32.1 percent. The regulation allows 22
6 feet and 2 stories and that's what's being proposed.

7 The accessory building area under 1209.4 is a
8 maximum of 450 square feet which is being proposed. So,
9 you're saying this is incorrect?

10 MR. RUEDA: What I'm saying is if you look at the
11 OP report, they confirm the property as it exists, they're
12 considering the tax lot, right? And they're saying the tax
13 lot does not conform for width.

14 And so if they were actually to try to subdivide
15 that, Mr. Legrant would send you to BZA because the combined
16 lot does not meet the requirements for lot width. That's
17 what I'm saying.

18 So, I'm agreeing with the Office of Planning and
19 what I'm saying is the part they don't mention is that
20 conversion of this tax lot would require variance relief at
21 the record lot.

22 VICE CHAIRPERSON JOHN: I understand your point
23 now, thank you. But not that the accessory structure itself
24 does not comply?

25 MR. RUEDA: And in addition, yes, OP fails to

1 mention the provision under Subtitle D 1209 that requires
2 accessory building to be located no more than five feet from
3 the rear property line. So, I am contending that there is
4 a problem with the development there, as it's currently
5 cited.

6 VICE CHAIRPERSON JOHN: You mean the fact that OP
7 did not mention the rear yard requirement?

8 MR. RUEDA: That requirement has not been pointed
9 to by the Office of Planning. It is clearly stated under
10 Subtitle D1209.

11 VICE CHAIRPERSON JOHN: Thank you.

12 MR. RUEDA: You're welcome.

13 CHAIRPERSON HILL: Go ahead, Ms. Ferster.

14 MS. FERSTER: Should we proceed with our next
15 witness, Mr. Hall?

16 CHAIRPERSON HILL: Sure.

17 MS. FERSTER: He does have a PowerPoint, could
18 that be loaded?

19 CHAIRPERSON HILL: Sure, Mr. Hall, can you hear
20 me?

21 MR. HALL: Hello, yes.

22 CHAIRPERSON HILL: Can you introduce yourself for
23 the record?

24 MR. HALL: My name is Richard Hall. My wife,
25 Linda, and I live at 1959 39th Street next door to the

1 Applicant. I was born in D.C., grew up --

2 CHAIRPERSON HILL: I'm sorry to interrupt you,
3 just give me one second because I'm trying to deal with
4 timing. Mr. Ferster, how many witnesses do you have after
5 Mr. Hall?

6 MS. FERSTER: We only have one witness after Mr.
7 Hall.

8 CHAIRPERSON HILL: Mr. Hall, just so you know, I'm
9 going to try to get us around the right time so I'm going to
10 time you to eight minutes, okay?

11 MR. HALL: Thank you. I was born in D.C., grew
12 up on the 2800th block of 39th Street and attended school.
13 I then relocated back to 39th Street eight years ago. My
14 wife Linda and I are in opposition to the building proposed
15 by BZA application 20505 with many neighbors.

16 You see the map that you've seen before on this
17 slide and the Applicant's ADU is in orange in the circle.
18 Every homeowner on 39th Street within the 200-foot radius has
19 written a letter of opposition to the Applicant's proposal.

20 In addition, three more homeowners on the alley
21 below the radius have expressed opposition. One alley
22 homeowner living outside the radius has written in support.
23 14 or 15 homeowners in Upper 39th Street represent an
24 extraordinary block of opposition.

25 And among these people there are homeowners who

1 have invested their livelihoods in their homes and their
2 opposition is strong. Next slide, please. This is the two
3 lots next to my shed on the right.

4 Next slide, please. This is something of the
5 objection --

6 MS. MOLDENHAUER: I need to put a formal objection
7 on the record, I object to this image as an illustrative
8 image that is more misleading than accurate given --

9 MR. HALL: It's 25 feet across, it is to scale.
10 There are no other structures on 39th Street that present a
11 25-foot facade either on the alley or on the street. It is
12 irregular by a long shot, more than 50 percent greater in its
13 facade.

14 Next slide, please. This is an attached ADU, in
15 Berlitz the only one exists through an exception and variance
16 in October 2019. It has a residence on the second floor,
17 non-residents on the first floor. There's no window on the
18 first floor.

19 There's a separate entrance providing direct
20 access to the residents on the second floor. In other words,
21 the ADU was designed to limit residential use solely to the
22 second floor. That is the intention of the zoning
23 regulations.

24 BZA in October of 2018 allowed the ADU to be built
25 but carefully stressed. And I quote, the BZA has conclude

1 that the Applicant's case is unique and will not result in
2 widespread granting of similar zoning reliefs throughout the
3 R20 zone, that's BZA order to Application 19521.

4 We encourage the BZA to remain faithful to that
5 assurance. Next slide, please. Represented here in blue are
6 the primary residents on the left and the ADU with the
7 proposed balcony on the right.

8 The footprint of the primary residence and the ADU
9 are essentially equal. 675 for the accessory residence, 678
10 square footage for the primary residence. In addition, the
11 accessory residence violates Code 5201.

12 Our home is the third dwelling on this slide, Lot
13 77. We will lose 30 to 40 percent of the view of the
14 National Park land because of the 25-foot structure that is
15 the ADU. Next slide, please.

16 This is the restrictive covenant on the 1938 deed.
17 Size of the accessory residence is bound up in very close
18 relation to the restriction of the covenant. There wouldn't
19 be a size issue if the Applicant were not intending to build
20 on a restricted lot, former Lot 80.

21 The deed restriction has clear relevance to this
22 application for an ADU facing 25 feet on the LE. Next slide.
23 I'll eliminate much of this but the issue of storage on the
24 first floor is, from the perspective of those of us who know
25 the habits of the Applicant such as the Applicant's habits,

1 the storage on the first floor simply doesn't portray what
2 would have to be the case with this structure.

3 The Applicant --

4 MS. MOLDENHAUER: I would object to argumentative
5 and trying to make a --

6 (Simultaneous Speaking.)

7 CHAIRPERSON HILL: Mr. Hall, give me two seconds.
8 What Ms. Moldenhauer is saying is that you can't testify as
9 to what this person's habits are and so that's what you're
10 trying to testify to. By the way, I think the information
11 in your slide deck is pretty good, I'm flipping through it.

12 And so I want you to get through it and also, I
13 don't know whether or not that building -- I understand the
14 argument that you guys are making by the way and I don't
15 think that you're not making the correct arguments.

16 I'm just trying to also clarify what I understand
17 to be the understanding, which is that I don't think that
18 little house there is to scale either, I'm just letting you
19 know. But whether or not it is doesn't matter, I'm just also
20 giving my opinion.

21 Now, you're at Slide 7, right?

22 MR. HALL: No, I'm on 8. Let's advance to the
23 next slide. You see the NPS, National Park Service, land on
24 the north and the east. Next slide, please. The Applicant
25 is focusing on a retaining wall, this retaining wall

1 stretches 25 feet on the north side and wraps around the 16
2 feet.

3 Next slide, please. Retaining wall is not 18
4 inches tall, made of 1 layer of brick, 1 layer of concrete
5 block, and some kind of a concrete forum that's not going to
6 do much retaining at all.

7 The point is adverse effect to National Park land
8 and erosion of the land itself for the property of Lot 808,
9 and very likely erosion to neighboring properties.

10 Next slide, please. Just a point about utilities,
11 this is the isthmus. You see that it slopes well before 4
12 feet, which is what we measured to be the distance between
13 the concrete, that squared off concrete line, and the front
14 line of the National Park Service.

15 It begins to slope if the contractor wants to dig,
16 he's going to start taking foliage and he's going to start
17 creating erosion to the slope and that occurs all the way
18 around.

19 If PEPCO is going to bring a line from the street
20 forward, please, PEPCO is going to bring a line around the
21 northern part of the house, that's national park property and
22 will need a special use.

23 Again, it poses the threat of adverse effect on
24 national property. Next slide, please. You see the rear of
25 1961 on the left and 1963 on the right. Mr. Farquhar owns

1 both houses. The apartment in the basement of 1961 is a
2 separate residence.

3 If Mr. Farquhar occupies the accessory residence,
4 then he exposes himself to a catch-22. If he lives in the
5 residence across the alley from 63, he would no longer be the
6 owner-occupant of 1961, which has its own ADU.

7 And he would be in violation of the code that
8 requires owner occupancy of an ADU in R20. If he returns to
9 1961 he would no longer be the owner-occupant of primary
10 residence 63 on Lot 808.

11 MS. MOLDENHAUER: I'm just going to object to
12 speculation.

13 MR. HALL: What assurance do we have that at some
14 date in the future the first level of accessory residence
15 will not turn from storage to full residential use? The
16 first level is being built as a living area.

17 Preventing that transition seems unlikely,
18 particularly if the property at 808 will at some point in the
19 future change hands. Thank you.

20 CHAIRPERSON HILL: Ms. Ferster?

21 MS. FERSTER: We have one more witness because
22 I've been informed that Mr. Weidenfeller is not able to
23 testify. Our next witness is Patterson Clark and he does
24 also have a PowerPoint.

25 CHAIRPERSON HILL: Mr. Clark, can you hear me?

1 MR. CLARK: Yes.

2 CHAIRPERSON HILL: Mr. Clark, unfortunately, you
3 don't have a lot of time. I'm going to give you five
4 minutes, Mr. Clark.

5 MR. CLARK: I'll get through it.

6 MS. MOLDENHAUER: Before Mr. Clark starts, I've
7 reviewed his PowerPoint presentation and I would just provide
8 a global objection to foundation of what his experience is
9 to be able to talk about construction issues and in-fill, and
10 the fact that construction issues and in-fill are also not
11 part of the zoning standard.

12 I'll let the Board make their decision, I just
13 want to put it on the record. I'm done, thank you.

14 MR. CLARK: Can I make a statement, please?

15 The Applicants speculates about a possible racial
16 motivation for the covenant and what I'm trying to do here
17 is present a possible geophysical motivation for the
18 covenant, which would protect not only the lots but the
19 people who want to build on it themselves.

20 CHAIRPERSON HILL: I'm not trying to make it
21 difficult for you all to make your case, I'm really not, I'm
22 just trying to understand everything. I think you guys have
23 made some good points, we're going to ask some questions.

24 But I've flipped through your deck real quick and
25 I again don't know whether it's completely relative to what

1 we're talking about here. I'm going to go ahead because it's
2 just a time limit here.

3 Four hours for one case is way beyond what the
4 Board normally does and I'm trying to make sure we get the
5 case in. I've still got questions, I've still got the Office
6 of Planning, I've still got other people that might be here
7 for witnesses.

8 There's a lot of testimony that still has to be
9 taken and a lot of it might not necessarily get to zoning,
10 but again, you guys don't necessarily know that or not.

11 You're trying to give your argument which I
12 understand and I don't want to necessarily try to figure out
13 how to parse through this because it seems to take up more
14 time to try to hone people into what we necessarily are
15 supposed to be looking at.

16 Sir, if you can go ahead? I'm going to put five
17 minutes on the clock and I just want to let you know, try to
18 adhere to the five minutes.

19 MR. CLARK: Thank you, Chairman Hill, and Members
20 of the Board. My name is Patterson Clark, I live at 1955
21 39th Street NW, just three doors down the alley from the
22 proposed ADU.

23 I was a GIS data and graphics reporter and editor
24 at Politico for 6 years and held a similar position at the
25 Washington Post for 20 years.

1 I've been a friend and neighbor of Michael
2 Farquhar for nearly 25 years and have been mostly supportive
3 of his projects. I'm gravely concerned about this one.

4 I fear the site's unstable swell and precarious
5 slopes, neither of which are mentioned in the application,
6 present a threat of collapse, either from the weight of the
7 proposed structure or from erosion.

8 Such a collapse would threaten adjacent properties
9 including National Park Service land. Approval of this
10 project would encourage other owners along the alley to build
11 their own permanent structures such as garages, which might
12 further degrade the hillside and suffer from detrimental
13 settlement.

14 Unstable soil and steep slopes are a plausible
15 reason for the covenant protecting these lots. In the 1800s,
16 the future site of our block was on the steep eastern slope
17 of what was known as Red Hill. Next slide.

18 In the 1930s, when developers excavated footprints
19 for the town houses on our block, they pushed this excess
20 soil down the eastern slope to pour in the backlots across
21 the alley from our houses.

22 The eastern face of the back is even steeper than
23 the natural slope. I've built terraces along my section of
24 that 45-degree slope and have firsthand pick and shovel
25 experience with just how loose and vulnerable to erosion that

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1 soil can be.

2 Next slide. The Applicant wants to build a house
3 at the precipice of this slope right along the boundary of
4 the national park, where there's another steep slope just to
5 the north. Next slide.

6 This LIDAR image from DCGIS was generated from a
7 system using laser light that penetrates tree cover to reveal
8 soil elevation. Notice on the shaded relief map of the
9 natural slope of the hill to the north of 39th Street, and
10 artificially steep slope of the back-fill lots.

11 Next slide. When I bought my house in 1997, the
12 title company told me that a covenant prohibited building
13 residential porters on my back lot, nothing about why, just
14 that I'd never be able to get a permit to do it.

15 Next slide. Here the T Street and 38th Street
16 back lots do support permanent structures such as these
17 garages highlighted in yellow. None of these properties have
18 covenants that restrict building on their back lots.

19 Next slide. The Applicant wants to build a house
20 at the steepest and perhaps the least stable corner of the
21 back lots with precipitous drop-offs both to the east and to
22 the north.

23 Next slide. Here's the proposal superimposed on
24 a contoured map of the site, which clearly illustrates the
25 relationship of the proposed house to both slopes.

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1 I haven't seen in the application any assessment
2 by a soil or foundation engineer confirming the feasibility
3 of building on such an unstable spot. Next slide. The
4 architectural plans submitted to you make no reference to the
5 soil and barely hint at the adjacent slopes.

6 Next slide. Erosion of the soil is apparent in
7 this image of a shallow retaining wall running along the
8 northern edge of the Applicant's lot, abutting NPS property.
9 Notice how erosion of the loose soil has undermined the
10 wall's concrete footer.

11 A steel pipe has apparently been driven into the
12 ground to lend a little lateral support. Next slide. Here's
13 the eastern slope as seen from the north along the artificial
14 trail through the national park. Next slide.

15 This view from national park property looking to
16 the northwest approximates the location of the ADU and its
17 cantilevered deck. Next slide, please. I'm going to skip
18 over the building codes which required significant setbacks
19 from slopes like this.

20 Can we go to the next slide and the next slide?
21 And we're going to skip over building code setbacks and go
22 to the next slide. Let me catch up here. A fixed stand of
23 weed-invasive plants obscures the precipice and the steep
24 slope.

25 Anyone making a cursory investigation of the site

1 might mistakenly conclude that the flat terrain of Lot 808
2 extends beyond the thicket. We are notably missing a photo
3 from the back of the deck probably to, who knows, maybe it
4 reveals how steep the slope is.

5 That concludes my presentation.

6 CHAIRPERSON HILL: Thank you so much and thank you
7 for being efficient. Does the Board have questions? Ms.
8 Ferster, that's it for your witnesses, correct?

9 MS. FERSTER: Yes, and I will just say that Mr.
10 Weidenfeller who was not able to testify has submitted a
11 letter in the record already. So, that is there for you to
12 review.

13 CHAIRPERSON HILL: Thank you, I'll note that to
14 the Board. I'm now going to have a bunch of questions when
15 the Office of Planning comes through and I'm going to get
16 back to my questions for the Applicant as well as everybody
17 else.

18 But Mr. Chairman, you had your hand up?

19 ZC CHAIR HOOD: I'll wait for the appropriate time
20 to ask questions. I do have some questions of Mr. Patterson,
21 Mr. Hall, and the first or second gentleman, I forgot. Mr.
22 Rueda I believe his name is.

23 I'll ask the questions but I'll follow your lead.
24 I know you're trying to get through this.

25 CHAIRPERSON HILL: Ms. Moldenhauer, how many

1 questions do you have?

2 MS. MOLDENHAUER: To be honest I don't think I
3 have any questions. At the end of the day, this opposition
4 is based on the accessory building, not the ADU.

5 CHAIRPERSON HILL: Somebody is going to yell at
6 me. It's rebuttal and that's rebuttal.

7 MS. MOLDENHAUER: No rebuttal.

8 CHAIRPERSON HILL: Now I'm back to the Board.
9 Chairman Hood, do you have some questions?

10 ZC CHAIR HOOD: Yes, I do and forgive me if I'm
11 wrong, it won't be the first time. Mr. Hall, let me go to
12 Mr. Hall first. I hear that you said that the covenant with
13 the land says that you couldn't have property in the backyard
14 or I forgot exactly how you phrased it.

15 But that you couldn't have a structure back there.
16 There's a lot of things in this city where covenants are.
17 When you said that, I thought my father bought a house and
18 you say African Americans, it had a different word but I'm
19 going to clean it up.

20 But those things changed and when I look at the
21 square that you showed in your presentation, I saw something
22 further down the street in that same square that looked like
23 it was a unit in the back. Can we put that back up right
24 quick, Mr. Young?

25 I saw it and it caught my attention because there

1 is something going on back there.

2 MR. HALL: I'm sorry, I don't know what image
3 you're referring to.

4 ZC CHAIR HOOD: That's why I asked Mr. Young to
5 put it back up. I figured you may forget so I wanted to help
6 you, remind you. If we're able to, Mr. Young? Let's get
7 through --

8 MR. HALL: This is Mr. Clark's?

9 ZC CHAIR HOOD: I mean Mr. Hall's. Go forward,
10 Mr. Young.

11 MR. HALL: That's the end.

12 ZC CHAIR HOOD: It showed the relationship of the
13 National Park Service, you were showing the relationship and
14 it showed the whole square. There it is right there. See
15 down below, there's a structure back there, correct? Look
16 down the street.

17 MR. HALL: There's R20 in orange. The letter R20,
18 that's the zone.

19 ZC CHAIR HOOD: I got that but what I'm saying is,
20 and I wish I had my pointer, if you look at the circle in the
21 middle --

22 MR. HALL: I think I know what you're talking
23 about. That's a garden shed that somebody put up.

24 ZC CHAIR HOOD: Can you put your hand on it, is
25 that you? Go down, keep coming, right there, go up a little

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1 bit. I think everybody can see it now, it's to the right,
2 to the left, Paul, go up a little bit.

3 MR. HALL: Just above the turnaround?

4 ZC CHAIR HOOD: Right, just above the turnaround
5 to the right.

6 MR. HALL: Mr. Clarke says that's a garden shed.

7 ZC CHAIR HOOD: Let me ask this question, Mr.
8 Hall, is it that you don't want to change or is it that --
9 hold tight, let me make sure I ask this right.

10 Is that you want some predictability that the
11 Applicant is going to do exactly what he says, essentially
12 when you showed the first one that was approved by the BZA
13 back in 2018.

14 Is it a design issue? If it's a design issue, if
15 the Applicant changed to more of a design issue of that
16 nature, that's why I've always pushed for the design in the
17 BZA cases but we haven't gotten there yet.

18 Is it more of a design issue, which would be more
19 acceptable? Just tell me, I'm trying to figure all this out.

20 MR. HALL: There is a size issue which is design
21 but the size of 25 feet, that touches on the covenant. The
22 design is not an ADU such as the one on F street that I
23 showed a slide of. The design speaks to residents on two
24 floors.

25 That was the original plan that has been changed

1 to have residents on the second floor, but the residence on
2 the second floor seems quite unlikely.

3 ZC CHAIR HOOD: Let me just cut you off for time.
4 I've heard a number of different things, so help
5 us get to where you are.

6 I came with my own analysis, it sounds like you
7 don't want change, it sounds like there is a trust factor and
8 some of this might not even have anything to do with what the
9 Board has in front of it.

10 So, that's what it sounded like to me. I may be
11 wrong and I stand to be corrected but again, that's why I was
12 trying to get everyone to help us get to where you were and
13 this whole thing about what will never go back there,
14 eventually, stuff will be changed all the time.

15 So, that's where I am, if I'm wrong, I stand to
16 be corrected. That's all I have, Mr. Chairman, thanks.

17 MR. HALL: The restriction on the deed is what
18 concerns neighbors because their property also has that
19 restriction in order for it not to be violated. The design
20 is not in keeping with the neighborhood and the two floors
21 really represent residents.

22 So, it doesn't seem to us to qualify for the
23 exception that is requested.

24 ZC CHAIR HOOD: And I follow the secrets of the
25 regulations of 253.10, 253.11, I followed that argument and

1 I have more questions for the Office of Planning on that.
2 Thank you, Mr. Hall, Mr. Clarke and others, I appreciate your
3 response to my questions.

4 Thank you, Mr. Chairman.

5 CHAIRPERSON HILL: Anyone else from the Board?
6 Commissioner Putta, can you hear me?

7 COMMISSIONER PUTTA: Yes, I can.

8 CHAIRPERSON HILL: Do you have any testimony you
9 would like to give the Board?

10 COMMISSIONER PUTTA: Yes, I do. Hello, give me
11 just a second. Thanks, Chairman Hill and Mr. Hood, Mr.
12 Smith, Ms. John, I don't have much experience with these
13 issues but listening today I'm reminded that BZA doesn't get
14 thanked by ANCs enough for doing this work.

15 But thanks for having me, this project in the
16 first District of our ANC Commission, it's actually garnered
17 more letters from neighbors than any in my District in my
18 time in the Commission.

19 I'm not a lawyer or a zoning expert at all but I
20 was elected by my neighbors and I've spoken with dozens of
21 them about this project over the past six month, maybe more
22 by now, and in person.

23 And I've visited the various locations as well.
24 I definitely do understand why several neighbors are
25 concerned and I've gotten lots of comments pro and con. As

1 my neighbor, Mr. Hall, mentioned, just a few blocks away
2 there is already one approved detached ADU accessory
3 apartment building in Berlitz.

4 It's a small, second-floor apartment on S Street.
5 It was approved by the Zoning Board in 2018 over the ANC
6 Commission's opposition before I was elected. This
7 application is also for a small second-floor apartment.

8 And no, it's not the same situation or location.
9 In the other one it was built above a garage. In this case,
10 there is no garage and it doesn't seem like just because
11 someone doesn't have a garage, they shouldn't be able to have
12 an ADU I think.

13 But in any case, I have asked all the neighbors
14 on S Street over where the other one was built a few years
15 ago, no one has any concerns about that ADU apartment, at
16 least no one as written -- at least one immediate neighbor
17 has actually written to support this project.

18 Even those who were previously concerned over it
19 no longer are and I spoke to the owner there and he confirmed
20 it is not an easy undertaking and does not predict this is
21 going to be a lot of people doing this, because it's been
22 very hard for him to actually build it as well.

23 And in the four years since, no other home in my
24 District has built a detached ADU accessory apartment until
25 this proposal. I do agree this case is a little different

1 and deserves careful consideration by the Zoning Board.

2 Our ANC Commission voted last month 4 to 1 on a
3 resolution that I can read but the gist of it was that if you
4 all think this is according to the code an accessory
5 building, building an accessory apartment, then you should
6 approve the project as it's in Berlitz and it's not a
7 historic District.

8 And we did also ask you to consider the impacts
9 on utilities and national park land, and it sounds like
10 you're doing so. I'll mention two other things.

11 We got so many letters from neighbors, as you've
12 been hearing, but I'll just mention in addition to the ADU
13 that was built down the street, the neighborhood actually had
14 a formal vote in 2016 on historic designations. You may or
15 may not know, the Berlitz neighborhood was considering
16 historic designation.

17 And so our citizens' associated issued a very
18 formal survey that was done I think by paper actually, not
19 online. And the thing was, what I've been noticing is many
20 of the goals and arguments in favor of that effort are
21 similar to many of the points made by the opponents on this
22 project.

23 Not all of them but some of them are similar.
24 While I have not had a chance to do a vote of the neighbors,
25 I will just refer to that vote a few years ago, where an

1 overwhelming majority, 76 percent, said no to historic
2 designation to preserve things in accordance and conformity.

3 And lots of the goals and arguments were similar,
4 but I know this is a different situation. And just lastly,
5 I would be remiss if I didn't quickly mention one last issue,
6 the history of my neighborhood.

7 I love Berlitz, I love my neighborhood but
8 according to our own Berlitz citizen's Association website,
9 when the neighborhood was first developed just 90 years ago,
10 many or most of the homes had covenants that stated that the
11 houses could not be, quote, sold, rented, or leased to those
12 of negro blood.

13 So, for these historic reasons, the neighborhood's
14 diversity has been less than it would otherwise have been.
15 The Biden Administration, the Bowser Administration, many
16 cities nationwide have been supporting and promoting ADUs to
17 help address affordable housing as well as housing
18 opportunities for those who have had fewer opportunities in
19 the past, including people of color, to live in such
20 neighborhoods such as mine.

21 And I know being a person of color in our
22 neighborhood. I know it's not directly relevant but I felt
23 it must be said and that is basically all I wanted to say
24 except for our resolution, which I hope you do have and I did
25 summarize. And I'm happy to read it if that's what you'd

1 like me to do.

2 CHAIRPERSON HILL: It's okay, Commissioner, I
3 don't think you need to read that resolution, we have it here
4 and I appreciate you taking the time to come out here and
5 it's kind of you to talk about the work that you do. It's
6 very hard, all the work that you guys do in terms of the ANC.

7 And so continue with being thankful that there are
8 Commissioners and that you guys are doing the work that
9 you're doing. So, thank you as well. Commissioner, I
10 neglected to ask, did you have any questions of the Applicant
11 or the party status in opposition?

12 COMMISSIONER PUTTA: No, I don't. I think they've
13 been asked and answered. Initially, this was for a two-floor
14 residential unit, which if I'm not mistaken, is allowed
15 everywhere but our zone, the two zones 19 and 20.

16 And from what I understand, that might be changed
17 in the future but in any case, it's not allowed in our zone
18 without a waiver. And initially, they applied for a waiver
19 and ANC thought about it and said this is the first one of
20 its kind, let's not go with that waiver.

21 And they withdrew the waiver and of course, the
22 questions are being asked and the Applicant is stating that
23 he's only living on the top floor and I understand that's a
24 matter of enforcement. That's why our ANC didn't weigh in
25 on that question of whether or not we would be living on the

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1 first floor.

2 But you may wish to.

3 CHAIRPERSON HILL: Does the Applicant have any
4 questions of the Commissioner?

5 MR. FARQUHAR: No, thank you, Commissioner Putta.

6 CHAIRPERSON HILL: I was talking to your counselor
7 but that's okay. I'm glad, I guess, Counsel, you don't have
8 any questions?

9 MS. MOLDENHAUER: I agree with my client. Thank
10 you for your time, especially given how contentious this was.
11 I appreciate working with you.

12 CHAIRPERSON HILL: Ms. Ferster?

13 MS. FERSTER: We have no questions.

14 CHAIRPERSON HILL: Commissioner Putta, did you
15 have a question?

16 COMMISSIONER PUTTA: No, I was saying thanks.

17 CHAIRPERSON HILL: Chairman did have a question.
18 Are you going to hang around, Commissioner, or are you going
19 to go?

20 COMMISSIONER PUTTA: I can hang out for a few.

21 CHAIRPERSON HILL: Because the Office of Planning
22 is next, just FYI. Chairman Hood?

23 ZC CHAIR HOOD: All I was going to simply say is
24 Commissioners Putta, thank you of us an the residents that
25 you serve are well served so thank you.

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1 COMMISSIONER PUTTA: I appreciate you for all
2 you're doing.

3 CHAIRPERSON HILL: Can I turn to the Office of
4 Planning?

5 MS. FOTHERGILL: Yes, although I can't get my
6 camera on. Can you hear me?

7 CHAIRPERSON HILL: Yes, but you know what, Ms.
8 Fothergill, can we all just take five minutes real quick?
9 Let's all take five minutes real quick and come right back.
10 Thank you.

11 (Whereupon, the above-entitled matter went off
12 the record at 4:33 p.m. and resumed at 4:42 p.m.)

13 BZA CHAIR HILL: Okay, great. All right, let's
14 all come back together. Mr. Moy, I'm calling us back, okay?
15 We're at 4:41. Okay.

16 MR. MOY: Okay, that's fine. Thank you.

17 BZA CHAIR HILL: Okay, great. Thank you. Let's
18 see. Ms. Fothergill, could you please introduce yourself and
19 give us your report?

20 MS. FOTHERGILL: Happily. Good afternoon,
21 Chairman Hill and Members of the Board. I'm Anne Fothergill
22 with the Office of Planning for BZA Case 20505. The Office
23 of Planning has recommended approval of this special
24 exception for an accessory apartment use in the R-20 zone.

25 I will note that when the OPR report was filed in

1 September the Applicant has requested a waiver to allow two-
2 story residential use. And that has been withdrawn. So the
3 recommendation of approval is just for the special exception
4 for the accessory apartment use without any waivers.

5 I also will note that the accessory building, if
6 it meets certain criteria, are matter of rights. Would be
7 matter of right in its zone. And it in fact meets those
8 criteria related to size and height. So it's 450 square foot
9 footprint maximum and 22 feet and two-story maximum.

10 So this accessory building can constructed as a
11 matter of right. And it can be used as an accessory
12 apartment that needs a special exception in the R-20 zone.

13 There was specific review criteria for the special
14 exception under Subtitle U, Section 253. And then there are
15 also the general special exception criteria.

16 And I am happy to go through the review criteria.
17 I know you all have seen the OPR report. I also could rest
18 on the record and take questions. Whatever you prefer.

19 BZA CHAIR HILL: That's probably good. Just go
20 ahead and rest on the record and questions for now because
21 I think we've all read through the report quite extensively.

22 Let's see. Does the, I'm going to do the
23 Applicant and the party status first and then I'm going to
24 go to the Board. Does the Applicant have any questions of
25 the Office of Planning?

1 MS. MOLDENHAUER: No. Thank you for your report.

2 BZA CHAIR HILL: Ms. Ferster, do you have any
3 questions of the Office of Planning?

4 MS. FERSTER: No questions.

5 BZA CHAIR HILL: All right. Does the Board have
6 any questions of the Office of Planning? Sure, go ahead, Ms.
7 John.

8 VICE CHAIRPERSON JOHN: Thank you. So there was
9 a question raised about whether the, a separate building
10 could be built on the tax lot. Did you have a response to
11 that?

12 MS. FOTHERGILL: So I saw that question in the
13 filings. And this is a self-certified application so we
14 review what the Applicant has determined the new relief for
15 and the criteria that are applicable.

16 They would, my understanding is they would need
17 to convert the tax lot to a record lot. And my understanding
18 is that that process of creating the record lot has,
19 standards would have to be met. And I don't know the answer
20 about whether or not this nonconforming lot width would meet
21 the criteria.

22 But the Applicant has self-certified that they
23 don't, they didn't request that relief. They can request
24 that relief later if they went to the subdivision process and
25 found that they needed it. It's also possible that the

1 Applicant has had a meeting with the Zoning staff at DCRA and
2 has an answer to that question. But it was not part of this
3 application.

4 VICE CHAIRPERSON JOHN: Okay, thank you.

5 BZA CHAIR HILL: Ms. Moldenhauer, do you have an
6 answer to that? Has he met with the Zoning staff and you
7 think that you guys are going to get a record lot?

8 MS. MOLDENHAUER: We have met with Zoning staff
9 and we do believe that record lot could be obtained by right.
10 We've reviewed the regulations and the regulations indicate
11 that we would not be increasing any non-conformities. The
12 lot width is -- the lot width is known and will not be
13 changed by the subdivision of lot.

14 BZA CHAIR HILL: Okay. So the answer was yes to
15 that one. Mr. Smith, you had a question?

16 MEMBER SMITH: Okay. I had two questions. And
17 I think the first question that I have is based on some
18 testimony that we heard a little earlier regarding size of
19 the accessory building, even before we get to this question
20 about the special exception.

21 Under Subtitle D, Chapter 50, regulating accessory
22 buildings within residential zones, it does speak to about
23 how large an accessory building can be relative to a primary
24 structure. Can you speak on that?

25 The size of this accessory building even before

1 you get to this question about accessory dwelling unit, vis-
2 a-vis the principal building?

3 MS. FOTHERGILL: Yes. In this case the accessory
4 building would be located behind the principal building.
5 Behind an entire row of row dwellings. So out of site from
6 the street.

7 It is smaller in square footage. It is lower in
8 height. And we don't, there are no calculations for
9 determining that sort of --

10 MEMBER SMITH: What subordinate means? That's
11 what you --

12 MS. FOTHERGILL: Yes, secondary subordinate. But
13 in this case it would seem to -- those general criteria of
14 square footage, height, location on the site. And so, yes.
15 That's --

16 MEMBER SMITH: So can I ask a sub-question of
17 that, just to get into some additional facts on what you just
18 state. What is the square footage of the principal building
19 and what's the square footage of the accessory building in
20 question?

21 MS. FOTHERGILL: I do have that somewhere. And
22 it may be that the Applicant has it at their fingertips. The
23 accessory building has a footprint of 450. And the second
24 story is smaller. So it's under 900. I think it's
25 something, eight something. But if someone knows the exact

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1 number, if they can chime in. And then the principal
2 dwelling is over 1,000 square feet.

3 MEMBER SMITH: Over 1,000 square. So relative,
4 what, 40 percent of the size of the principal building.
5 Okay.

6 My next question deals with 253.8, because it does
7 say that under U, 253.9 that an accessory apartment within
8 the R-19, R-20 should be subject to the restrictions of
9 Subtitle U, 253.5 through 253.8, including those Subsections
10 A and D.

11 My question relates to the design of the interior
12 first floor space. Labeled, as labeled on the plans it says
13 that it's recreational. In the analysis of the Office of
14 Planning, does that still meet the provisions of the
15 accessory building regulations?

16 MS. FOTHERGILL: So we also had that question.
17 The plans now show a storage. But we actually did discuss
18 this with the zoning administrator to determine if in fact
19 they needed the waiver from 253., I'm sorry, the one that
20 says second story only. Oh, 253.9(a). And the zoning
21 administrator confirmed that it would not need a waiver.

22 MEMBER SMITH: Okay. Did he elaborate on the
23 reason why?

24 MS. FOTHERGILL: Well, he said that the accessory
25 apartment living area is only on the second floor of the

1 building.

2 MEMBER SMITH: Okay. My next question is, also,
3 maybe the zoning administrator had interpretation of that.
4 Does that second floor living space, can it be accessible via
5 the interior of the first floor?

6 MS. FOTHERGILL: We also noted that in our
7 communication with him and again, he determined that it would
8 not need a waiver, that it met that criteria.

9 MEMBER SMITH: Okay. All right. That's all the
10 questions that I have for now. Thank you.

11 BZA CHAIR HILL: Okay. Ms. Fothergill, what about
12 the whole thing about the windows and the balcony? How --

13 MS. FOTHERGILL: I --

14 BZA CHAIR HILL: -- the windows in the balcony,
15 particularly that bump out?

16 MS. FOTHERGILL: So I heard that discussion.
17 Again, these regulations that we are reviewing today for the
18 special exception are specifically about the apartment use.
19 And so in this case the applicant has stated that the
20 apartment use is in the second floor.

21 So I don't know that the windows on the first
22 floor fall under this category. They're a part of the
23 accessory building, but not the accessory apartment.

24 BZA CHAIR HILL: So I guess then maybe this is a
25 question for the zoning administrator, I don't know. I mean,

1 so you could have a balcony and windows on a storage level
2 but not on the apartment level without a waiver?

3 MS. FOTHERGILL: The zoning administrator saw the
4 plan.

5 BZA CHAIR HILL: Okay.

6 MS. FOTHERGILL: You know, again, it's self-
7 certified when they --

8 BZA CHAIR HILL: That's all right, I got you.
9 It's okay. All right. I love the legal answers that I get
10 from everybody.

11 Okay. And that the first floor has to be owner
12 occupied, correct?

13 MS. FOTHERGILL: The accessory apartment and the
14 principal dwelling, the owner has to live in one or the
15 other.

16 BZA CHAIR HILL: Right. Right. Okay. Got it.
17 Okay. All right. And, Ms. Moldenhauer, and this is one that
18 I'm a little confused on as well and I'm going to ask you,
19 I might do OAG, I'm sorry, not OAG, I might actually do legal
20 now at some point and whoever has to go to 6:00, we'll see
21 what happens or wherever this goes because I am a little
22 curious now as to how much we do get to ask about other
23 properties and things.

24 In order for this to work your client has to live
25 on that first floor. In order to meet the regulations,

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1 right?

2 And so it confuses me, and this is what I'm not
3 sure either, and I can ask you, I can ask the client. I
4 mean, your client owns the one next door, right?

5 And currently your client is living in the one
6 next door and is using the ADU, I'm sorry, gets to rent out,
7 he gets to rent out, he gets to rent out the one below, I
8 guess I'm asking a question, gets to rent out the one below
9 because he lives in that building? You're on mute.

10 MS. MOLDENHAUER: I'm on mute. What the intent
11 of my client is, is to move out of the building he currently
12 lives in, rent that entire building as a single-family home
13 and then move into the ADU and rent out the principal
14 dwelling as his property. The property.

15 And then he would get the revenue, the whole
16 intent of ADU is to have the revenue from both the house that
17 he lives in now, as a single-family home, rent that out, and
18 then the rental of the principal dwelling for him to be able
19 to then live and retire on. And live in the ADU.

20 BZA CHAIR HILL: Got it. And this is totally
21 fine. I just want to make sure the Board understands what's
22 going on, right? Okay. And again, what your client
23 currently is doing. And so, okay. That's all I kind of, a
24 little bit, had a question on.

25 Does the Board have more questions of the Office

1 of Planning? Okay.

2 All right. Does the Applicant, oh dear, I already
3 did that. Commissioner, did you have any questions of the
4 Office of Planning? Did I ask, I can't remember. I can't,
5 sorry.

6 COMMISSIONER PUTTA: Thanks for asking. No. I
7 really did appreciate all the work on this.

8 BZA CHAIR HILL: Okay. Mr. Young, is there anyone
9 where who wishes to testify?

10 MR. YOUNG: Yes, we do.

11 BZA CHAIR HILL: And how many do we have, Mr.
12 Young?

13 MR. YOUNG: We have five.

14 COMMISSIONER PUTTA: Oh, could I just ask one
15 quick question?

16 BZA CHAIR HILL: Sure. Go ahead, Commissioner.

17 COMMISSIONER PUTTA: I apologize. Ms. Fothergill,
18 I really appreciated you talking to me about this in the
19 early days because it was very confusing. Specifically the
20 fact that just this zone, correct me if I'm wrong, is this
21 the only zone in all of D.C. where you can't live on both
22 floors? Is that right?

23 MS. FOTHERGILL: The R-19 and R-20. Two zones.

24 COMMISSIONER PUTTA: Right. Right. And R-19 is
25 right in my neighborhood as well. In my ANC.

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1 Basically my ANC 2E is the only place in all of
2 D.C. where you can't live on both floors, right?

3 So the thing about being forced to live on the top
4 floor, it never made sense to me, Chair Hill and the other
5 Members of the Board, if you have, and, sir, Mr. Hood, you're
6 on Zoning Commission, you all write the rules, please
7 consider this in future stuff. What if you like have a
8 broken leg or you can't climb stairs very well, you're
9 required to live on the second floor. Is that right, Ms.
10 Fothergill?

11 Unless you get a waiver, which is -- unless you
12 get a waiver, you must live upstairs and climb stairs. You
13 are not allowed to live on the first floor of an ADU in R-19
14 and R-20 anywhere in R-19 or R-20.

15 You can't live on the first floor, even if you
16 have a broken leg or if you can't climb stairs, unless you
17 get a waiver. Is that right? You're on mute. You're on
18 mute.

19 MS. FOTHERGILL: So sorry. Yes, that is correct.
20 It's the regulatory that you'll only be permitted on the
21 second story of a detached accessory building.

22 COMMISSIONER PUTTA: It's just so strange. I
23 don't know if it escaped notice or what, Mr. Hood and Mr.
24 Hill and everybody else. Ms. John and Mr. Smith. If you
25 could just consider that for a moment and consider that for

1 the future as well. Thank you. Chairman Hood.

2 ZC CHAIR HOOD: Yes, I didn't want to say
3 anything, Commissioner Putta, because I wanted my, I saw that
4 Ms. Fothergill, how did we get to that. Because I can't
5 remember everything we did in the ZR.

6 COMMISSIONER PUTTA: Right.

7 ZC CHAIR HOOD: Because it took us nine years to
8 get it written.

9 COMMISSIONER PUTTA: Right.

10 ZC CHAIR HOOD: I do know at some point, at some
11 point I believe, Commissioner Putta, I believe that the
12 reasonable accommodations may come into place like if you're
13 handicapped. But that's something I would have to, we would
14 have to research.

15 But I often too, Ms. Fothergill, I want to put
16 that in my parking lot. I think look at the legislative
17 history of how we even did that and why we did that. I
18 wasn't going to ask that, but since you brought it up I
19 figured I would ask.

20 I didn't want to ask because I was wondering,
21 well, who thought of that. Then I said, well, I was on the
22 commission so obviously we did it for some reason. But I
23 don't know.

24 COMMISSIONER PUTTA: We were talking about it
25 amongst ourselves on here and we were thinking maybe it had

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1 something to do with assuming there were garages and so you
2 kept the parking space or something. But I mean, not
3 everybody has a garage. And you should not be able to do an
4 ADU just because you don't have a garage.

5 ZC CHAIR HOOD: And I wonder if the public or some
6 of your neighbors or not, I don't know, somebody must have
7 advocated for it. I don't know, we'll figure out how we got
8 there.

9 COMMISSIONER PUTTA: Perfect. That's also what
10 we figured.

11 BZA CHAIR HILL: Ms. Moldenhauer, why did you guys
12 pull asking for the waiver for the first floor?

13 MS. MOLDENHAUER: Because the ANC told us that
14 they would not support it.

15 BZA CHAIR HILL: Right.

16 COMMISSIONER PUTTA: My colleagues have -- saying
17 that they were seeing for the first time a brand new
18 building. And they weren't sure of what the implications
19 would be and all.

20 And we put, I told them that you're willing, you
21 can push for it, but our ANC has reservations so they told
22 us no.

23 BZA CHAIR HILL: Okay. So that's number one. And
24 then, Ms. Moldenhauer, if you did have that first floor then
25 you wouldn't have to be worried about the balcony or the

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1 window issue that's in the regulations, or at least the
2 question that I've been asking, correct?

3 MS. MOLDENHAUER: If you're jumping to me for,
4 because I would like to answer some of those questions that
5 have come up. I can show you on the slides how that's
6 compliant.

7 BZA CHAIR HILL: That's okay. My question was,
8 I've answered my own question I think. Which is that, if you
9 had not pulled the waiver request, one second commissioner,
10 if you hadn't pulled the waiver request for the first floor,
11 than the issue about the balcony and the window would not be
12 in play, and I think that's accurate.

13 Commissioner Putta, what did you have?

14 COMMISSIONER PUTTA: On last thing. Mr. Hood and
15 everyone else, one other very strange thing about this
16 restriction in our zone is, not only do you have to live on
17 the second floor, you have to climb the stairs and go up, but
18 you also can't build a one floor ADU.

19 If someone wanted to just make a one floor ADU,
20 a very small living space in their backyard, they're not
21 allowed to and live in it. Isn't that right, Ms. Fothergill?

22 You can't build just one floor. So please
23 consider this for the future. It's very strange. That's
24 right, right, Ms. Fothergill?

25 MS. FOTHERGILL: I mean, the regulations allow

1 two-story structure. And allow 22 feet in height. But they
2 do say that an accessory apartment shall only be put on the
3 second story.

4 COMMISSIONER PUTTA: Yes.

5 ZC CHAIR HOOD: So again, Commissioner, Mr.
6 Chairman for you, Commissioner Putta, I'm going to ask Ms.
7 Fothergill to help me remember. I do want to go back to the
8 team that put these together, and I was part of it.

9 I don't want us to read, I always like when
10 Commissioners come down and we find things that may
11 potentially be a problem or an issue. And let's look at
12 that. Let's revisit that. And I would ask Ms. Fothergill
13 and Ms. Steingasser as well to, let's work on that. And
14 let's look at the legislative history of why we did that.
15 There had to have been a reason. So why did we do that.
16 It's a good one. Thank you.

17 COMMISSIONER PUTTA: Thank you.

18 MS. MOLDENHAUER: To Mr. Hood, Hill's question,
19 not Hood, sorry Commissioner Hood, Mr. Hill's question about
20 the balcony. I don't think with or without the waiver it
21 changes anything. B says, any balcony. There is no
22 balconies on the project. There is a patio, but not a
23 balcony.

24 And then, or projecting windows. Meaning like a
25 projection that creates livable space outside of the

1 footprint. In the city you can have a bay projection and you
2 can have your, part of your living room in the bay projection
3 that kind of hovers over public space. The whole point is
4 that you can't make the space bigger than the 450 by creating
5 a projection or a balcony.

6 And then also then the section says, shall not
7 face a principal building. The small bay window is facing,
8 not the principal building. And even the lower level step
9 is not facing the principal building. So no matter what,
10 253.9(b) is compliant.

11 BZA CHAIR HILL: Ms. Fothergill.

12 MS. FOTHERGILL: Yes.

13 BZA CHAIR HILL: So, 253.11, right? That's what
14 I'm asking about.

15 MS. FOTHERGILL: Yes.

16 BZA CHAIR HILL: And they are compliant with
17 253.11. There are no balconies or projecting windows
18 proposed for the accessory apartment, correct?

19 MS. FOTHERGILL: That is what they are stating is
20 self-certified. But yes, the accessory apartment is the
21 second floor and it does not show balcony --

22 BZA CHAIR HILL: Right. And I'm sorry, maybe I'm
23 being confused with a balcony like deck, you know. When I
24 saw the plans I thought it was a projecting window on the
25 first floor, which is currently storage. But the fact that

1 I'm looking, Ms. Fothergill, the fact that it's storage means
2 that it's not an accessory apartment and therefore is
3 compliant. Is that what the Office of Planning is trying to
4 tell me?

5 MS. FOTHERGILL: That is sort of, as you connect
6 the dots, yes. Because the accessory apartment use, which
7 is what you're reviewing here, is the second floor. And the
8 window, which may or may not be considered a project window,
9 and the deck, which may or may not be considered a balcony,
10 are on the first floor.

11 BZA CHAIR HILL: Got it. Okay. And the zoning
12 administrator will determine whether or not they are in,
13 whether those are balconies and projecting windows?

14 MS. FOTHERGILL: As this goes through permitting
15 all of this will be reviewed. And if anything doesn't comply
16 they would need to return to the BZA. But it is self-
17 certified. And the application did not request a relief
18 from.

19 BZA CHAIR HILL: Okay. And the Office of Planning
20 originally, when they were requesting relief, I'm sorry,
21 requesting a waiver for the first floor, the Office of
22 planning was in support of that waiver, correct?

23 MS. FOTHERGILL: That is correct.

24 BZA CHAIR HILL: And that is what this design, the
25 design hasn't changed, meaning they, basically it hasn't

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1 changed, right? In terms of --

2 MS. FOTHERGILL: Yes.

3 BZA CHAIR HILL: -- is still there, the projecting
4 window, or whatever you want to call it, was still there,
5 correct?

6 MS. FOTHERGILL: Yes. Only on the interior has
7 it changed.

8 BZA CHAIR HILL: Got it. And right. And so,
9 okay. All right. So I don't have any more, oh yes, that's
10 right, we were at public testimony.

11 All right. Mr. Young --

12 MS. FERSTER: Mr. Chair? Chairman Hill?

13 BZA CHAIR HILL: Sure.

14 MS. FERSTER: If I may, can I ask the OP a follow-
15 up question to your question?

16 BZA CHAIR HILL: You can ask, Ms. Ferster. Sure.

17 MS. FERSTER: Yes. Thank you. Ms. Fothergill,
18 I understand that your position is that the regulation, it
19 says that you can't have a projecting window or balcony is
20 not applicable because they are only requesting an ADU on the
21 second floor use.

22 So, just to transpose that, then it would be
23 applicable if there were, if they were asking for a waiver
24 and requesting that the full two-story be used as a accessory
25 dwelling unit?

1 MS. FOTHERGILL: I think it comes down to, as the
2 Applicant's Counsel said, the balcony and projecting window,
3 whether or not qualify as those features. And then whether
4 or not they need a waiver for that.

5 MS. FERSTER: Correct. But just assuming they do
6 qualify, that the deck is more than, you know, meets the
7 definition of what they call a patio, meets the definition
8 of a balcony and that the window that appears to be
9 projecting is in fact projecting.

10 If the first level, if no waiver requested, then
11 they would also need a special exception to have those
12 features?

13 MS. FOTHERGILL: It is up to the zoning
14 administrator for interpretation. And I can't really answer
15 it. So self-certified applications, they didn't request
16 relief from it. They have now in fact limited the apartment
17 use to the second story. But ultimately, when it got
18 reviewed in permitting, that is when it would be reviewed by
19 DCRA.

20 MS. FERSTER: Okay, thank you.

21 BZA CHAIR HILL: Ms. Moldenhauer, what are on
22 those other back lots? Are they just, are there a bunch of
23 sheds back there, are there people don't have sheds?

24 And Mr. Farquhar might be able to answer that
25 better, I don't know. You're on mute, Mr. Farquhar.

1 MR. FARQUHAR: I'm happy to answer that, Chair
2 Hill. It's -- the majority of back lots have sheds.

3 BZA CHAIR HILL: Okay.

4 MR. FARQUHAR: Of varying sizes.

5 BZA CHAIR HILL: Okay. Okay. Let's see. All
6 right, Mr. Young, could you bring in the witnesses. And, Mr.
7 Young, are they all in one way? Is everybody on the same,
8 support or opposition, you don't know?

9 MR. YOUNG: They are all in opposition.

10 BZA CHAIR HILL: Is there anybody here in support?

11 MR. YOUNG: No.

12 BZA CHAIR HILL: Okay. Can you give me their
13 names when you bring them in please? Just their last name.

14 MR. YOUNG: Tremaine Gregory, Lenore Rubino, David
15 Bachner, Kathy Spencer, who is calling in on the phone, and
16 Ann Carper.

17 BZA CHAIR HILL: Carper?

18 MR. YOUNG: Carper.

19 BZA CHAIR HILL: Carper, got it. Yes. All right,
20 let's do Ms. Spencer first because she is on the phone. If
21 you can let her in, Mr. Young.

22 Ms. Spencer, can you hear us? Ms. Spencer? Ms.
23 Spencer? Mr. Gregory, can you hear me?

24 MS. GREGORY: Yes, I can hear you.

25 BZA CHAIR HILL: Is this Gregory or Spencer?

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1 MS. GREGORY: No, my name is Tremaine Gregory.
2 I'm a woman.

3 BZA CHAIR HILL: Oh, great. Okay, Ms. Gregory.
4 Can you go ahead and give me your name and address for the
5 record? And then you'll have three minutes to testify.

6 MS. GREGORY: Okay. I don't know how to put on
7 my video, I'm sorry.

8 BZA CHAIR HILL: That's all right.

9 MS. GREGORY: Okay. Anyhow. Yes, my name is
10 Tremaine Gregory and my husband and I owe 1937 39th Street
11 with our two children. We live with our two children. One
12 is 2 years old and the other is 6 years old. And I'm here
13 to make a statement in opposition to this project.

14 So our house is within the 200 foot radius of the
15 proposed dwelling. We bought our house four years ago,
16 moving from nearby Grover Park.

17 We were not planning to buy, or sorry, we were not
18 planning to buy a different house than the one we were living
19 in, but when on a whim my husband came to see 1937 and saw
20 the back lot, he insisted they come see the house next day.
21 And when we arrived and saw the back lot we actually saw our
22 neighbor, one gardening on one side and another playing with
23 their kids on the other side, I told my husband that we
24 should probably see the inside of the house to make sure it
25 was in good enough shape, but that I was already sold. This

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1 was the kind of place where I wanted to raise our kids.

2 And just to comment a little bit more on what Mr.
3 Farquhar described as the back lots, it's full of sheds, but
4 it's all green space. I mean it's, we can see the Washington
5 Monument from the backs of our house. It just looks out into
6 no buildings. It's really a spectacular and very, very
7 unique place. We're not talking about just any other block.
8 And that's really why we choose to buy a house back there.

9 So when we purchased the house we understood that
10 we essentially entered into a contract of sorts with our
11 neighbors via the green space covenant. And I'm actually a
12 wildlife biologist by profession, so forgive me if I'm using
13 any of the wrong vocabulary.

14 But I really appreciate green space. And I
15 appreciate the buck that we saw the other day out the lot
16 back window. The foxes that run back and forth in the alley.

17 And so, as far as I understood it, that contract,
18 that covenant, prohibited any of us from building residential
19 buildings on the land behind the houses without the consent
20 of the others within the covenant to break the covenant. So
21 in this case, this project would break that covenant against
22 the will of the other nine parties within the covenant, and
23 against the wills of four out of the five neighbors within
24 the other, the covenant on the other side of the alley.

25 So what I don't understand is why the covenant,

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1 concept of this covenant exists in the first place if there
2 is no way to uphold it. Why did we buy a house with green
3 space for our kids and a quiet alley where they can learn how
4 to ride their bikes based on the understanding that another
5 row of houses could be built behind it, when that was indeed
6 a possibility. So how is it that merely by subdividing one
7 can make that contract completely void.

8 And I find the statement that this project will
9 not create a precedent very (technical difficulties.) We
10 have received several requests from unknown buyers in the
11 mail recently to buy our back lots. And surely those are,
12 those buyers are waiting the breaking of the covenants to
13 start buying up and developing the back lots.

14 I think that Mr. Farquhar said that this is not
15 creating a precedent, and I deeply, deeply disagree. They
16 can easily build houses all along these back lots. Some are
17 a lot flatter than others and will not have the same slope
18 issues that are at the very northern part of the alley where
19 Mr. Farquhar lives.

20 So another argument has been made about this
21 proposal that it provides affordable housing. Something that
22 he obviously needs. Let's be realistic about this. This is
23 not going to be affordable housing.

24 BZA CHAIR HILL: Ms. Gregory, just to let you
25 know, you're running out of time so I just want to make sure

1 that --

2 MS. GREGORY: Okay.

3 BZA CHAIR HILL: -- we get into your testimony
4 there. You've ran out of time.

5 MS. GREGORY: Okay. Well, I'm sorry, I don't
6 think that this will be affordable housing. And I just want
7 to say that, I wanted to address Mr. Hood's question about
8 why are we upset about this. And I think you can hear it in
9 my voice.

10 I bought this house to have a green space for my
11 children. And Mr. Farquhar is taking that away from us. I
12 want my neighbors to be happy. I voted against the
13 historical designation because I think people should be
14 allowed to do what they want on their property. But this
15 breaks an agreement that we have as neighbors. And I
16 disagree.

17 BZA CHAIR HILL: Okay.

18 MS. GREGORY: Thank you.

19 BZA CHAIR HILL: Thanks, Ms. Gregory, for your
20 testimony. Let's see, Mr. Rubino or Ms. Rubino.

21 MS. GREGORY: Oh, here's my face.

22 BZA CHAIR HILL: There you go. All right. Better
23 late than never. Mr. Rubino, Ms. Rubino? We can't see you.

24 MS. RUBINO: Hi there.

25 BZA CHAIR HILL: Hi. Can you introduce yourself

1 for the record please?

2 MS. RUBINO: Yes. My name is -- good afternoon,
3 Chairman Hill and Board Members of the BZA. My name is
4 Lenore Rubino and I have lived at 1955 39th Street, a few
5 doors down from the Applicant, for 24 years. I'm a former
6 certified public account and currently a licensed real estate
7 agent. Lastly, I was president of the Burleith Citizens
8 Association for almost ten years.

9 BZA CHAIR HILL: Ms. Rubino, I got you. I see
10 where you're living. I just want to make note of the time
11 for your testimony. That's all I wanted to mention to you.

12 MS. RUBINO: Okay. I have sold over 70 Burleith
13 homes over the course of my career. In addition, I have sold
14 and leased a number of houses on the 1900 Block of 39th
15 Street, which we are discussing here today.

16 My experience in the neighborhood runs deep.
17 Appraisers call me to discuss the value of the Burleith
18 properties they are appraising. Over the course of my career
19 I have come to know the unique value of each block of
20 Burleith.

21 For example, the 3500 Block of S & R Street enjoys
22 a bump up in value due to their proximity to Georgetown.
23 Likewise, the 1900 Block of 39th Street enjoys a bump up in
24 value for buyers that value nature green space, peace and
25 tranquility.

1 The 1900 Block of 39th, 38th and west of 37th each
2 have separately deeded lots, green lots, behind their houses.
3 Only the lots on the 1900 Block of 39th Street carry the non-
4 buildable restrictive covenants. Any buyer purchasing here,
5 in part, does so because of the restriction which maintains
6 the green lots.

7 One only needs to look at Exhibit 93 from the
8 Cohen's, who recently purchased 1947 39th, and Exhibit 62
9 from Kathy Spencer, who just purchased 1941 39th to see they
10 purchased in part because the green space would be preserved
11 in perpetuity.

12 In the last six months I have represented the
13 sellers of 1941 39th, 1919 and 1936 38th. And the additional
14 green lots are something many buyers comment on adding to the
15 value of their properties.

16 The restrictive covenants is something the
17 settlement company must inform a buyer of when homes are
18 purchased. It is a settlement companies do to research
19 title, covenants, restrictions, et cetera, especially before
20 title and insurance can be purchased. Or issued.

21 Number of attorneys, including settlement
22 attorneys, informed me that no uncertain terms that covenants
23 run with the land. Even if lots are combined, as the
24 applicant has done.

25 Please see Exhibit 94 for Attorney Reed Sexter's

1 letter to the Applicant informing him that the majority of
2 the owners of the green lot intend to sue to enforce the
3 covenant. We hope it will not come to that, and the members
4 of the BZA will recognize the legitimacy of the covenant as
5 title insurers and their attorneys have.

6 The back lots remain free of residential buildings
7 as an important part of their value. I urge you not to
8 approve the applicant building a house on the rear green lot,
9 which clearly violates the restrictive covenant and the
10 benefit of the green space that we all not only enjoy, but
11 paid considerable sums for. Thank you.

12 BZA CHAIR HILL: Thank you, Ms. Rubino. Let's
13 see. Ms. Bachner, Bachner, Mr. Bachner?

14 MR. BACHNER: Yes. It's David Bachner.

15 BZA CHAIR HILL: Great. Can you introduce
16 yourself for the record please, sir?

17 MR. BACHNER: Yes, certainly. My name is David
18 Bachner. And I am speaking on behalf of my wife, Forrest
19 Bachner, and myself.

20 BZA CHAIR HILL: All right, Mr. Bachner, you will
21 have three minutes to give your testimony.

22 MR. BACHNER: Okay. For more than 40 years we
23 have owned our home at 3818 B Street Northeast, a half block
24 from 39th Street and a three minute walk from the property
25 under discussion. Prior to that, in the 1970's, we each

1 lived in separate homes on the 39th Street Block where the
2 Applicant's property is located. A block noteworthy for
3 undeveloped back lots that are subject to the restricted
4 covenant stating that "all lots not facing 39th Street will
5 not be used for residential purposes."

6 From our personal experiences living there,
7 Forrest and I well understand the enjoyment that views of
8 Rock Creek Park, as well as the recreational and gardening
9 opportunities provided by these underdeveloped lots offered
10 to the block's residents, we would hate to see this green
11 space violated. Not only for the sake of the people who live
12 there, also for the wider Burleith community that many
13 pedestrians crossing between reliefs in Glover Park and
14 hikers walking from 37th, Street up through the park trial
15 to the upper park, and 39th Street.

16 More specifically, we object to the proposed
17 project as it would essentially invalidate the terms of a
18 legal document of covenants governing the use of private
19 property. If that legal document can be invalidated, than
20 what is to stop the invalidation of other legal documents
21 governing private properties throughout Burleith and the
22 district in general.

23 Finally, given the very existence of the covenants
24 we question why this application for a project in apparent
25 violation of the covenant is being considered at all. Thank

1 you for your attention.

2 BZA CHAIR HILL: Thank you, Mr. Bachner. Let's
3 see, Ms. Spencer, did we get a chance to get you on line?

4 MS. SPENCER: Hi. I'm here.

5 BZA CHAIR HILL: Great. Could you introduce
6 yourself for the record please?

7 MS. SPENCER: Yes. I'm Kathy Spencer. And I --
8 (Simultaneously speaking.)

9 MS. SPENCER: -- would like to --
10 (Simultaneously speaking.)

11 BZA CHAIR HILL: -- you --

12 MS. SPENCER: -- at 1941 39th Street.

13 BZA CHAIR HILL: Okay.

14 MS. SPENCER: Northwest. Okay. Thank you, Mr.
15 Chairman and Members of the Board. Five months ago I
16 purchase the home on 39th Street, which borders the National
17 Park. And such a unique green space for the homes in
18 Burleith. More importantly, the purchase of my home also
19 included the deeded green lot protected by the longstanding
20 covenant.

21 I want to speak to the common discriminatory
22 language and many of the covenants at the time. I asked the
23 lawyer to look for discriminatory language in the covenant
24 for 39th Street and it was found that the 39th Street
25 covenant in no way referred to raise the restrictions on any

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1 group of persons for any reasons. And it is racially
2 neutral.

3 I strongly opposed the building of any apartments
4 or dwellings on the green lots behind each of our homes. The
5 domino effect that could result from one house being built
6 on the lot would be heretofore unimaginable consequences of
7 a breach of our protected deeded covenant.

8 The alley behind our home would become a congested
9 and busy, dangerous street with cars coming and going behind
10 our homes. And it would be especially dangerous for
11 children.

12 And like others, I bought my property with the
13 knowledge of the covenant. And that the covenant would be
14 enforced. And the belief that no residential use could be
15 made of the properties with no frontage on 39th Street. And
16 I wouldn't have purchased this property if this covenant were
17 not present and enforceable.

18 So, allowing residential use of lots not fronting
19 39th Street will change the character of the neighborhood in
20 ways I would not have agreed to allow. D.C. law will enforce
21 covenants unless there exists a valid legal reason not to do
22 so. That if covenants are old, they are outdated and should
23 be, not be enforced. D.C. law does not take that position.
24 And neither do I. Thank you for your time.

25 BZA CHAIR HILL: Thank you, Ms. Spencer. Let's

1 see, Mr. Carper? Or Ms. Carper. Can you hear me?

2 MS. CARPER: Yes, I can. Can you hear me?

3 BZA CHAIR HILL: Yes. Could you introduce
4 yourself for the record please?

5 MS. CARPER: Yes. Thank you. My name is Ann
6 Carper. My partner, Beth McKinnon and I live at 1935 39th
7 Street, which she bought 25 years ago in 1997, in part
8 because of the restrictive covenants.

9 Our October 2021 letter of opposition to the
10 Applicant is Exhibit 65. Our house is one house beyond the
11 200 foot limit required for BZA neighborhood notification.
12 The five houses at our end of the alley, opposite from the
13 Applicant's end, are governed by similar, but separate
14 covenants, dating from 1940, that also prohibits residential
15 construction across the alley.

16 We have been following this case with interest,
17 and frankly with trepidation. And we have plenty of company.
18 Of the 15 homeowners south of the Applicant's combined
19 properties, 13 of us have written in opposition. A 14th has
20 expressed his opposition to me verbally.

21 Approval of the Applicant's alley house will set
22 a precedent for residential construction all along the alley
23 that can never be undone. Last year the Applicant told me
24 that the other alley lots are large enough to accommodate
25 ADUs, hence we have nothing to fear from the slippery slope.

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1 But as we know, anyone is free to request a special exception
2 to existing zoning regulations and to purchase and combine
3 the alley lots since they are separately deeded.

4 Since the Burleith Citizens Association began
5 tracking special exception requests in 2017, all of the one
6 in Burleith have been approved by the BZA, thus we reasonably
7 fear that approval of this application will set a precedents.
8 We cannot imagine the congestion, total change of character
9 and loss of trees and green space if the current owners sell,
10 new owners potentially build up to 15 permanent dwellings
11 across the alley. An alley I should mention the dead ends
12 at both ends, and is acceptable only by a short and narrow
13 alley perpendicular to 39th Street.

14 In closing, this case is not about Burleith's
15 racial covenants of the past, which my ANC Commissioner
16 weirdly persists in linking with this case in which never
17 applied to our alley. It is also not about increasing
18 affordable housing, which is the goal of the Mayor's new
19 residential accessory apartment program.

20 If the Applicant moves from its current house into
21 his alley house he will be able to rent out his current home
22 for upwards of \$4,500 a month. And this is not about
23 NIMBYism, rather it is about relying on promises made more
24 than 75 years ago to protect and preserve the natural
25 environment across our alley. A goal in keeping with the

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1 Mayor's sustainable D.C. 2.0 plan. Please do not approve
2 this applicant. Thank you.

3 BZA CHAIR HILL: Okay, thanks, Ms. Carper. Hey,
4 Ms. Carper, I've been meaning to ask. It's a paved alley
5 back there, correct?

6 MS. CARPER: Yes, it's paved. And then also, D.C.
7 Water has installed green alley paving for part of it on each
8 side of that, of the dumbbell.

9 BZA CHAIR HILL: Okay. Okay. Okay. All right,
10 let's see. Mr. Young, you said you had one more person?

11 MR. YOUNG: That's correct. I brought her on.
12 That's Carolyn Ehardt.

13 BZA CHAIR HILL: Ehardt?

14 MR. YOUNG: Yes.

15 BZA CHAIR HILL: Ms. Ehardt, can you hear us? Ms.
16 Ehardt?

17 MS. EHARDT: Okay, unmute. Okay.

18 BZA CHAIR HILL: No, we can hear you.

19 MS. EHARDT: All right.

20 BZA CHAIR HILL: Can you hear us?

21 MS. EHARDT: Yes. Can you hear me?

22 BZA CHAIR HILL: Yes. Could you go ahead and
23 introduce yourself for the record with your address? And
24 then you'll have three minutes to give your testimony.

25 MS. EHARDT: Okay. I am Carolyn Ehardt. My

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1 husband and I are retired senior citizens who own our home
2 at 1943 39th Street. And our additional restricted use lot
3 across the alley.

4 When we purchased what may very well be our final
5 home in 2012 we knew there were binding restrictions on the
6 use of our property. And that of homeowners around us in the
7 neighborhood.

8 But we view these not as restrictions, but as
9 legal protections for the uniqueness of our property in the
10 neighborhood, as well as our property value. And I can talk
11 in personal terms about how important the uniqueness of our
12 neighborhood is and these protected qualities. Including how
13 valuable those have been to our well-being over the last two
14 years for two senior citizens who have been isolated in our
15 home because of the pandemic.

16 But I want to focus, as my other neighbors have,
17 I think importantly, on this restrictive covenant. That we
18 believe to be a priority in this case.

19 We believe that the legal protections attached to
20 all of our rear lots, included that of the Applicants,
21 prohibit even consideration of the application because it is
22 for construction of an illegal structure. A residents in
23 terms of use.

24 The preexisting verified standing restrictive
25 covenant expressly forbids residential building by any of us.

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1 And therefore this application, a priority, appears to us to
2 be nonconforming with legally binding use restrictions on the
3 property.

4 So with all due respect, we believe that should
5 the BZA approve this application, this would be done with
6 fully cognizant that this is sanctioning an illegal use. And
7 by doing so, knowingly ignoring at best, or willfully
8 overriding the protections provided to all of us collectively
9 as owners of these restricted use lots.

10 In researching this I spent a lot of time looking
11 at zoning regulations trying to understand them, trying to
12 educate myself. And one of the things that I came across are
13 the rules of ethics which govern the activities of the BZA.
14 And I think they're relevant here. And I hope that they can
15 be considered.

16 And please, I do not, in any form or fashion, want
17 to be perceived as preaching to you. I do not want to. It's
18 simply that I believe the rules of the ethics of the BZA
19 apply here.

20 It's stated that Members of the Board should avoid
21 all actions which might result in or create the appearance
22 of a list of potential outcomes. One of these, E, is making
23 a government decision outside of official channels. Although
24 this rule is difficult for us, or maybe anybody to precisely
25 interpret, certainly in one possible interpretation of this

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1 rule shouldn't overriding legal standing land use
2 restrictions without legal due process be outside the scope
3 of the BZA?

4 Secondly, it is our view that decision to even
5 consider this application, much less approve it would "effect
6 adversely the competence of the public and the integrity of
7 government." Can those of us who purchased our properties
8 with expectations that the protections under a legal deed
9 restriction would be binding, have confidence in our
10 government if legal rights attached to our property can be
11 ignored or superseded without due process?

12 At the very least, should it not be the burden of
13 this Applicant to successfully remove, through legal process,
14 binding use restrictions on the property before BZA even
15 considers approval of a residential building --

16 BZA CHAIR HILL: Mr. Ehardt?

17 (Simultaneously speaking.)

18 BZA CHAIR HILL: Ms. Ehardt, can I just interrupt
19 you --

20 MS. EHARDT: I will stop. I will stop. Thank
21 you. Thank you for listening. And thank you for your
22 consideration.

23 BZA CHAIR HILL: Thank you. Ms. Carper, can you
24 hear me?

25 MS. CARPER: Yes, I can. Yes, I can.

1 BZA CHAIR HILL: What, it's okay, I'm just asking,
2 what's behind your house in your lot?

3 MS. CARPER: I have a vegetable garden that's,
4 there is a deer fence surrounding the raised beds. So I'm
5 looking at right now at my neighbor Tremaine's garden. And
6 then I have a garden. And then there is some, you go down
7 some steps and then there is another lot. And there is more
8 greenery that belongs to the people that live on 38th Street.

9 BZA CHAIR HILL: I understand. The reason why,
10 I was kind of tying into Chairman Hood's question about there
11 was a shed. Like somebody has got a shed, is that right?

12 MS. CARPER: Yes. There is some sheds. A couple
13 of people park there. Some people have play areas. I use
14 mine for garden --

15 BZA CHAIR HILL: All right.

16 MS. CARPER: -- as do, as does Tremaine.

17 BZA CHAIR HILL: Got it.

18 MS. CARPER: But she has a shed there too.

19 BZA CHAIR HILL: Got it. Okay, great. Thank you.

20 MS. CARPER: You're welcome.

21 BZA CHAIR HILL: All right. Does anybody have any
22 questions for anybody? From my Board. All right. Does
23 anybody have any questions for anybody from the Applicant?

24 MS. MOLDENHAUER: No questions.

25 BZA CHAIR HILL: Ms. Ferster, do you have any

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1 questions of anybody?

2 MS. FERSTER: No questions.

3 BZA CHAIR HILL: Okay. All right, Mr. Young, if
4 you could please excuse everyone. Thank you all very much
5 for coming to testify. I hope it was mildly entertaining.
6 Excuse me, it's not entertaining at all it's very stressful
7 now that I think about it.

8 MR. YOUNG: It is.

9 BZA CHAIR HILL: All right. Okay, I hate to the
10 -- yes, Chairman Hood.

11 ZC CHAIR HOOD: Real quick, Mr. Chairman. I don't
12 know who I'm to pose this to, maybe our Counsel or somebody
13 else. Normally in situations like this, whatever supersdes,
14 I believe, and I'm trying to figure this out, I'm looking it
15 up, the most restrictive applies. So that's where I think
16 I need to start.

17 So I'm just throwing that out there. I want to
18 ensure if that's the right time, but I said it where I was
19 ceasing the moment. Thank you.

20 BZA CHAIR HILL: Okay. So what I was going ask
21 for you guys, I actually want to meet with legal. And so I
22 haven't done the emergency close meeting today, but I'm going
23 to do it today because I have some questions. Okay.

24 And so, I'm going to make a motion, as Chairperson
25 of the Board of Zoning Adjustment and in accordance with

1 Section 407 of the District of Columbia Administrative
2 Procedures Act, I move that the Board of Zoning Adjustment
3 hold a closed meeting on March 29th, 2022 for purposes of
4 seeking legal counsel from the case on Case Number 20505, but
5 not deliberate upon or vote on this case. Is there a second,
6 Ms. John?

7 VICE CHAIRPERSON JOHN: Second.

8 BZA CHAIR HILL: Mr. Secretary, the motion has now
9 been made and seconded. Can you please take the roll call?

10 MR. MOY: Yes. When I call each of your names if
11 you would please respond with a yes or no or abstain to the
12 motion made by Chairman Hill to hold a emergency closed
13 meeting. The motion was seconded by Vice Chair John.

14 Zoning Commission Chair Anthony Hood?

15 ZC CHAIR HOOD: Yes.

16 MR. MOY: Mr. Smith?

17 MEMBER SMITH: Yes.

18 MR. MOY: Vice Chair John?

19 VICE CHAIRPERSON JOHN: Yes.

20 MR. MOY: Chairman Hill?

21 BZA CHAIR HILL: Yes.

22 MR. MOY: We have a Board Member not
23 participating. Staff would record vote as 4-0-1. This is
24 on the motion made by Chairman Hill to set an emergency
25 closed meeting. Motion was seconded by Vice Chair John.

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1 Also in support of the motion, Zoning Commission Chair
2 Anthony Hood, Mr. Smith, and then of course the Vice Chair
3 and the Chairman. The motion carries, sir.

4 BZA CHAIR HILL: Thank you. Okay -- oh, I'm
5 sorry, Ms. Moldenhauer?

6 MS. MOLDENHAUER: I just have some rebuttal that
7 go to some of the points that have been raised regarding the
8 covenant, regarding the oppositions. And I think that it
9 might be helpful for me to make these arguments in rebuttal
10 before you talk with your counsel, or your counsel can at
11 least hear some of the legal decisions that we're making.
12 If that's the --

13 BZA CHAIR HILL: Yes. I appreciate it. It would
14 just be -- I'm going to go ahead, and we're going to stick
15 to the order that we got. And if they, if my fellow Board
16 Members want to do it again we can do it again. You know.

17 MS. MOLDENHAUER: We'll get rebuttal, then I guess
18 we will start rebuttal after you come back?

19 BZA CHAIR HILL: Pardon me?

20 MS. MOLDENHAUER: We'll start rebuttal after you
21 come back?

22 BZA CHAIR HILL: Yes, we're going to do rebuttal
23 when we get back. Okay? All right, I think Mr. Young sent
24 out an invitation. I'll see you guys on the other call.
25 Thank you. Bye-bye.

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1 Oh I'm sorry, hold on, Ms. Ferster is trying to
2 talk.

3 MS. FERSTER: Yes. When do we come back? At what
4 time should we come back?

5 BZA CHAIR HILL: Ms. Ferster, I'm hoping it's not
6 going to take more than ten minutes.

7 MS. FERSTER: Okay.

8 BZA CHAIR HILL: Okay. You're just going to have
9 to wait. Sorry, I don't know.

10 MS. FERSTER: I was just, if it was a little more
11 than an hour or something.

12 BZA CHAIR HILL: Oh no, no. God no. Okay, bye-
13 bye.

14 (Whereupon, the above-entitled matter went off the
15 record at 5:35 p.m. and resumed at 6:00 p.m.)

16 MR. MOY: The Board is back in its public hearing
17 session after convening an emergency closed meeting. And the
18 time now is at or about 6 o'clock p.m.

19 BZA CHAIR HILL: Okay, great. Thanks. Ms.
20 Moldenhauer, are you there? It's so funny, we get -- oh,
21 there we go.

22 MS. MOLDENHAUER: I was putting back on my blazer,
23 I felt bad.

24 BZA CHAIR HILL: No, no, I'm sorry. Like the
25 Board gets to come back whenever we want and everybody else

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1 has to be ready. But that's the way it works.

2 Okay. All right, Ms. Moldenhauer, so you're going
3 to do rebuttal. And then Ms. Ferster, if you can just ask
4 questions of Ms. Moldenhauer's rebuttal. And then we might
5 have questions, the Board might have questions at the end.
6 I don't know. It's possible.

7 And then Ms. Ferster, I'll give you a brief
8 conclusion, and then I'll give Ms. Moldenhauer a brief
9 conclusion as well. And then we'll see what, if anything,
10 the Board needs. I don't think we're going to do a decision
11 today, so we'll see what happens with what the Board needs.
12 And we might lose Chairman Hood at some point because I know
13 he has to go to another hearing.

14 ZC CHAIR HOOD: Mr. Chairman, let me just let
15 everyone know that I will be reading the record from this
16 point on. I have a very important vote that I have to take
17 as soon as they come on.

18 So I wanted to make sure that everybody knows that
19 I will, even though I may have some questions, but I'll
20 figure that out. I'll see how I can work it. But I want you
21 to know that I will take, watch the rest of this, this
22 evening. Thank you.

23 BZA CHAIR HILL: Chairman Hood, do you have to
24 leave right now?

25 ZC CHAIR HOOD: No, not right now. They haven't

1 even started yet. But I have to go in a moment.

2 BZA CHAIR HILL: Do you want to ask any questions?

3 ZC CHAIR HOOD: Yes. I wanted to ask Ms.
4 Moldenhauer. Unfortunately I haven't heard her yet, and
5 maybe Ms. Ferster wants to opine on it, but I wanted to talk
6 about the covenant and the restricted, most restrictive.

7 I believe that in any legal situation the most
8 restrictive applies. And I want to hear both of them comment
9 on that. And that's where I was. To sum up.

10 BZA CHAIR HILL: Okay. Ms. Moldenhauer, do you
11 want to -- Chairman Hood, who do you want to hear from first?

12 ZC CHAIR HOOD: I guess Ms. Moldenhauer first and
13 then Ms. Ferster.

14 MS. MOLDENHAUER: I'll address that question. So,
15 in zoning, in the world of zoning, typically the most
16 restrictive applies. Right? I think that's kind of the
17 world that we typically live in.

18 When it comes to a restrictive covenant, a
19 restrictive covenant is something where you are telling
20 somebody they can't do something. It's very different.

21 And in the world of a restrictive covenant the law
22 says that yes, private parties can agree to terms and can put
23 restrictions greater than what the law is. Right? The law
24 would allow you to build an ADU, but we can put a covenant
25 on here that says, no, you can't.

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1 However, because you're restricting the free use
2 of property, the law says that the restrictive covenants has
3 to be interpreted against the enforcing party. So it is --
4 we're narrowly evaluated to only restrict that which is
5 clearly and specifically articulated.

6 And so, there is multiple cases, as I think I said
7 at the beginning of this that I read where a restrictive
8 covenant might say, you know, only for a single-family
9 dwelling. And there is analysis that, well, they didn't say,
10 no short-term rental. Well so then you can do short-term
11 rental. It didn't say, you know.

12 So I had one case I read where it said, only one
13 dwelling. Or one, only one building. And it said, well, you
14 can build an apartment building because it's only one
15 structure.

16 It's a different standard here on a restrictive
17 covenant. And the research that I found is there is no hard
18 and fast rule, but that it must have a general development
19 plan. And the intent of the covenant must be so clear that
20 no doubt exists that would, in order to determine what is or
21 is not limited.

22 So, one of the things that we're going to argue
23 here, Chairman Hood, is that this doesn't say no sheds, sheds
24 are allowed. It doesn't say no gardening or only for green
25 space. It's very, very limited in what it says. And you

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1 have to interpret it as narrowly as possible.

2 ZC CHAIR HOOD: Okay, thank you. I will look at
3 that again and see what's in that covenant versus what the
4 Zoning Commission, well, what the BZA has to deal with. And,
5 Ms. Ferster, did you have anything that you wanted to add?

6 MS. FERSTER: Yes. So, I think the restrictive
7 interpretation of the zoning regulations is probably you're
8 referring to the provisions in Subtitle A, 101.101. Which
9 talks about how zoning regulations should be interpreted in
10 a restrictive fashion to provide for adequate light and air
11 and have sufficient protection. The maximum degree of
12 protection.

13 So I think that's certainly an important
14 consideration for this Board to understand in dealing with
15 the issues of the restrictive covenant.

16 As to Ms. Moldenhauer's arguments about the
17 interpretation of covenants generally, as the courts would
18 apply. I could not more strenuously disagree with the
19 argument she has advanced. All of which she says, she says
20 she has found authority for but she cites none in her
21 supplemental filings.

22 There is absolutely nothing in the law that I have
23 been able to find that says that a restrictive covenant isn't
24 valid just because it doesn't, just because it is not
25 lengthy. Which is basically the argument she made. Just

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1 because it is not detailed as to what is restrictive.

2 Here we have a very clear restriction. It cannot,
3 in use, as opposed to buildings, it cannot be used for
4 residential purposes. And there could be nothing clearer.
5 And no amount of detail or length in the restrictive covenant
6 could make that more clear.

7 The issue of the enforcement of the restrictive
8 covenant is certainly something that they can take to the
9 court if they do want to apply it. But I think for this
10 Boards, if they want to contest its applicability, but for
11 this Board's purpose, this is a valid restrictive covenant
12 that is unambiguous and clear on its face.

13 And I'll have some more responses to the
14 Applicant's arguments in the covenants as I close. But
15 that's my response to your specific question.

16 ZC CHAIR HOOD: Okay, I thank you both. And I
17 thank everyone for indulging me. Thank you, Mr. Chair. I'm
18 cutting out as soon as they come on. Thank you.

19 BZA CHAIR HILL: Okay, great. Thanks, Chairman
20 Hill. Okay, you guys, we, the Board, have a lot of
21 information here to chew on. And so, again, in your
22 conclusions please let's not reargue stuff, okay? Just
23 highlight the points that you want us to think about. All
24 right?

25 Ms. Moldenhauer, do you have rebuttal?

1 MS. MOLDENHAUER: I do. If Mr. Young could bring
2 up the slides? We'll start on Slide 5.

3 BZA CHAIR HILL: Okay. How much time do you think
4 you need for rebuttal?

5 MS. MOLDENHAUER: Give me 15 minutes. I'll don't
6 know if I'll use all of it, but 15.

7 MS. FERSTER: Can I interrupt for a minute? Is
8 there a witness who is going to present rebuttal because if
9 it's just Ms. Moldenhauer who is Counsel, than her recitation
10 should go toward a closing. Rebuttal is for witnesses not
11 for closing argument.

12 BZA CHAIR HILL: I've always had, hold on.
13 Everybody -- Ms. Ferster, they've always, every time that I
14 have been here the Attorney has done the rebuttal. So I
15 don't know what else to do than what I've always done before.
16 And when I say what I've always done before is the past seven
17 years.

18 So, Ms. Nagelhout, have I been doing it wrong?

19 MS. NAGELHOUT: No. The way you do it is what's
20 in the Board's purview.

21 BZA CHAIR HILL: Okay. So, sorry, Ms. Ferster.
22 So I'm going to go ahead and do it the way I've been doing
23 it. Which is the one person is going to give rebuttal. And
24 then, Ms. Ferster, you can ask her the questions upon
25 rebuttal. Or I'm sorry, you can ask your questions about

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1 rebuttal.

2 Ms. Moldenhauer, what did you want?

3 MS. MOLDENHAUER: Oh, the PowerPoint. My
4 PowerPoint from Mr. Young please.

5 BZA CHAIR HILL: Okay. And again, for rebuttal --
6 (Simultaneously speaking.)

7 BZA CHAIR HILL: And again for rebuttal, this is
8 just rebuttal, we're not testifying again, right?

9 MS. MOLDENHAUER: Yes. I literally point out
10 things that were said during the various testimonies. Either
11 from individuals or from Ms. Ferster. And I'm basically
12 responding to those.

13 BZA CHAIR HILL: Okay. Which slide deck did you
14 want? Did Mr. Young hear you, I'm sorry.

15 MS. MOLDENHAUER: Mr. Young has gotten it. Okay.

16 BZA CHAIR HILL: Okay, good. Which one did you
17 pull up so I know?

18 MS. MOLDENHAUER: My slide deck which is, I think,
19 Exhibit 112.

20 BZA CHAIR HILL: Okay, great. Thank you.

21 MS. MOLDENHAUER: So Exhibit 112, Slide Number 5.
22 We're focusing in on the right-hand side of this image.
23 Here.

24 BZA CHAIR HILL: Yes.

25 MS. MOLDENHAUER: Also, show the left-hand side.

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1 You can kind of see on the left-hand side right before the
2 tree-line where the center of the alley, kind of the
3 beginning of like, what I'm going to call the dumbbell, you
4 can see some other little images of white, which are some
5 sheds.

6 On the right-hand side of the image there was
7 things that were raised about slipper slop arguments and
8 having this not, you know, slip away. If you look at all the
9 alley lots on the right-hand side and you look at the, kind
10 of the size and the shape of all of the homes along 39th
11 Street, the majority of these homes have a building restrict
12 line, which was clearly dated in the deeds and in the
13 covenant. And that pushes all the houses back.

14 There is very little space, and you can look at
15 this image here, behind those primary structures, to build
16 a second accessory structure for an ADU. So, that is one.

17 The inability to actually, on the principal lot
18 that has frontage to create an accessory dwelling unit that
19 is a separate structure, those, all those front lots are --

20 BZA CHAIR HILL: Okay, go on. All those front
21 lots?

22 MS. MOLDENHAUER: Are very small and have very
23 small rear yards.

24 BZA CHAIR HILL: Okay. I just want to know the
25 rebuttal part. The rebuttal part is the slippery slop part.

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1 MS. MOLDENHAUER: Yes. I believe it was a comment
2 made by Ms. Gregory, as well as Ms. Bachner about slippery
3 slope and that this is going to happen, loads of more alley
4 dwellings are going to occur.

5 BZA CHAIR HILL: Okay.

6 MS. MOLDENHAUER: The second thing is that all of
7 these other alley lots that are subject to the covenant have
8 the public alley in between them. So you can see the White
9 public alley. Our lot is the only lot that connects the rear
10 portion to the front-facing portion.

11 None of the other lots connect and the only way
12 they could connect is if they went to like the D.C. Council
13 and tried to close the alley, you know, but that's not
14 happening.

15 So the alley stops and that would mean that the
16 only thing that they could build, they could never build an
17 ADU. None of the other homes on 39th Street could build an
18 ADU in practical speaking terms. They would have to build
19 an alley dwelling.

20 One of our -- So, yes, so I just wanted to point
21 out that that would be different. An alley dwelling, as you
22 know, is a sellable, ability to sell that as a separate
23 dwelling, also you could have it on the first and second
24 floor, versus an ADU which has to be a primary structure
25 which is dependent and it's such -- So now I go to a rebuttal

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1 argument on accessory.

2 Restrictive covenants can only be enforced if they
3 clearly and positively by the terms of the expressed inhibit
4 or otherwise state what is being restrictive.

5 Here, all of these homeowners are using their rear
6 lots for accessory uses. Ms. Burd, Ms. Carpenter, and Mr.
7 Hall acknowledge that they are being used for sheds and for
8 gardening and for garages and other accessory uses.

9 Even under Subtitle B 200.2(b) agricultural,
10 residential is an accessory use as described in that section
11 as, you know, gardening --

12 (Simultaneous speaking.)

13 BZA CHAIR HILL: So you guys I am actually really
14 running out of time now. I had no idea. Like if you guys --
15 And by the way you might not come back until who knows when
16 now, okay.

17 So I am just realizing how far we are. Like your
18 rebuttal again -- And I'm just trying to move this along.
19 Your rebuttal is a slippery slope.

20 MS. MOLDENHAUER: There are multiple points. Just
21 now I am going to address the accessory and the fact that
22 there has been accessory use and that because an ADU is not
23 a separate saleable use, but rather an accessory use, it is
24 the same as having an accessory garden or an accessory
25 garage.

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1 BZA CHAIR HILL: Got it. Okay.

2 MS. MOLDENHAUER: Okay. That was that point.

3 BZA CHAIR HILL: Yes, next.

4 MS. MOLDENHAUER: Next --

5 BZA CHAIR HILL: Because I'm leaving at 6:30. I
6 got to let you know. Unless, Ms. John, you're going to run
7 it because you're going to lose now two people.

8 MS. MOLDENHAUER: Okay. Now it's -- Sorry. I am
9 trying to adjust here. Now if we can go to Slide Number 8.
10 Okay. So if you look on the second image here the windows
11 on the second floor are within the same footprint as the
12 lower level.

13 And so you go to the next image, Chrishaun, you
14 can see on the left hand the south elevation. The second
15 floor windows do not project beyond the face of the facade
16 and so they are compliant with 253.9(b).

17 BZA CHAIR HILL: Okay.

18 MS. MOLDENHAUER: The bay window on the first
19 floor is a bay window and as Ms. Fothergill from OP indicated
20 it is not object to or it is not a design violation of
21 253.9(b) because it is not part of the ADU use, that second
22 level use that we are asking for.

23 BZA CHAIR HILL: Okay. Accordingly what the
24 Zoning Administrator may or may not have determined, but,
25 yes. Okay.

1 MS. MOLDENHAUER: And so in Case Number BZA 19521
2 that Mr. Hall referenced and asked you to give, you know, him
3 a great weight to the S Street case.

4 In that case the Office of Planning nor the BZA
5 evaluated or analyzed 253.8 for utility. So in that case,
6 which is the only other accessory dwelling unit under this
7 section, BZA Case 19521, the utility issue was never
8 evaluated as is not being relevant.

9 We put out an argument that it may not be
10 relevant, but we also think that we satisfy the standard if
11 it is deemed to be relevant, but I also want to identify that
12 there is another case where it didn't consider it or evaluate
13 it.

14 BZA CHAIR HILL: Okay. What's next?

15 MS. MOLDENHAUER: I am -- Under Section 253.8(d),
16 so some of the questions have come up about, you know, why
17 are there windows on this lower level, you know.

18 Going to a question of what is permitted by right
19 and what is permitted under the zoning regulations in regards
20 to uses, 253.8(d) says that an accessory building that houses
21 an apartment shall not be used simultaneously for an
22 accessory use other than, and these are the only things that
23 it could be used for, a private garage, an artist studio, or
24 storage.

25 We are proposing storage, but under the

1 regulations we could use it for an artist studio if my client
2 so chose, which would obviously be benefitted from the
3 natural light that windows would provide.

4 I am not saying that that's obviously, you know,
5 like our proposal, our plan, but I am just trying to say like
6 what the zoning allows and not being overly restrictive on
7 design because at the end of the day, you know, we can comply
8 with zoning.

9 The goal is storage, a plan for storage, you know,
10 but I just want to point out that section of the regulation.
11 Okay. There is multiple sections that Mr. Rueda referenced
12 in regards to the accessory building, his assertion that
13 there are three variances, and all of those, this is a self-
14 certified application -- Sorry, can I -- I am looking at this
15 plan here.

16 Maybe I should have a different image. Can you
17 go up one? Up one more. No. I'm sorry, can you go up to
18 Slide 7? The back deck, if you are able to look at this
19 image, can also be accessed by walking around the edge of the
20 property. There is a six-foot opening on the side of the
21 property.

22 So there was questions about whether you would
23 need to walk through the storage or not. We will comply with
24 what the Zoning Administrator and building codes require, but
25 you can also see that that back deck, you know, is accessible

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1 either to the principle dwelling owner or to the, you know,
2 to anybody else via walking around.

3 There is nothing in the zoning regulations that
4 say because you are building an ADU you can't use any other
5 portion of your property. You know, people have patios
6 between their primary homes and their garages, you know.

7 The use of that space in there is up to them as
8 to what they use it for and not.

9 There was arguments regarding adverse effect on
10 erosion, on the national park land and the retaining wall.

11 My rebuttal would be that all of that is
12 speculative and goes to building code issues as well as the
13 fact the arguments regarding the soil, potentials for
14 collapse, all is speculative and goes to building code issues
15 or construction issues.

16 Finally, I would just simply, if you want to queue
17 them the slide deck. Thank you very much. Oh, sorry,
18 actually, if you could pull that back up. Oh, sorry. Shoot.
19 I was just -- That's fine, you can --

20 Looking at slide deck Slide Number 15, I will just
21 point you to the second prong, or the second bullet point
22 here. This is the only language that identifies what is
23 restrictive.

24 The lots created by subdivision not having
25 frontage on 19th Street will not be used for residential

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1 purposes. This does not say it is protected from green
2 space. It does not stop any building from being built and
3 it does not stop an ADU from being constructed.

4 That concludes my rebuttal.

5 BZA CHAIR HILL: All right. Thank you, Ms.
6 Moldenhauer. Ms. John? You're on mute, Ms. John.

7 VICE CHAIRPERSON JOHN: All right. So just a
8 quick follow-up question. What do you understand by the term
9 "residential purposes?"

10 MS. MOLDENHAUER: I understand that to be a
11 separate, independent residential home, a home that could be
12 an alley dwelling that would be able to be sellable and
13 transferrable and not dependent on a principle use, or a
14 primary, or another principle use.

15 VICE CHAIRPERSON JOHN: I don't know how you got
16 all of that in there. So if it were separate it would not,
17 it would be residential, but if it was joined to the main
18 building it would not be? I'm not -- I can't follow that
19 reasoning.

20 MS. MOLDENHAUER: Well it needs to say that the
21 covenant does not provide an intent. And there is a case
22 Burt versus Hellman, just in the absence of a general plan
23 or scheme of development where a covenant has a certain
24 building restriction that does not provide the grantor with
25 this information, there is nothing that shows that it should

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1 be enforced.

2 I am just paraphrasing, but like the question is
3 that there is no way for us to really know what Ms. Fuller
4 intended, you know. Did she intend to restrict alley
5 dwellings? She couldn't have intended to restrict ADUs
6 because they didn't exist at the time.

7 And so the concept of restrictive covenants is
8 that you are not going to err on the side of restricting the
9 free use of property if you don't have a clear understanding
10 of what was required.

11 VICE CHAIRPERSON JOHN: So would it be possible
12 to say residential, it meant residential purposes as opposed
13 to commercial purposes? Do you think that's what might have
14 been intended?

15 MS. MOLDENHAUER: Again, I don't know and I think
16 it's up to a court to decide and to hear the different
17 arguments.

18 I think that, you know, there could -- Again, in
19 our brief we stated there are many potential defenses against
20 this covenant being enforced, not all which are being
21 articulated right now.

22 The question is, well, an ADU is actually part of
23 a concept of creating revenue for the principle dwelling
24 homeowner, right, it's to create that opportunity to be able
25 to rent a portion of your house.

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1 So, you know, is that then, you know, allowing
2 this to be a commercial use because we are able to rent the
3 front portion of my house? I mean --

4 VICE CHAIRPERSON JOHN: Well, commercial use as
5 described in our zoning regulations would be opposed to
6 residential uses.

7 So there couldn't be, you know, let's say a
8 garage, not a garage, a store behind there or something like
9 that, or a restaurant, as opposed to a dwelling, any kind of
10 dwelling, because didn't your own materials describe alley
11 dwellings in that area?

12 MS. MOLDENHAUER: Yes. I mean I think that the --
13 These were all alley lots and at the end of the day the
14 intent was to either not to allow alley lots or not to allow
15 low cost housing that was mostly at the time occupied by
16 African-Americans and to restrict that as the intent
17 potentially.

18 VICE CHAIRPERSON JOHN: Well, that's sort of, you
19 know, questionable because even your materials suggest that,
20 you know, the make-up changed.

21 At one time it was mostly, you know, not
22 minorities who occupied those buildings and it was changed
23 and it has changed several times.

24 I don't remember what the condition was at the
25 time the covenant was written. Anyway, I know it's late and

1 everyone wants to go on, I mean to leave.

2 So I was mainly interested in how you would
3 distinguish between residential and commercial or something
4 else. So I have no other questions.

5 BZA CHAIR HILL: Okay. Ms. Ferster, can you hear
6 me?

7 MS. FERSTER: Yes. I have one question.

8 BZA CHAIR HILL: Sure. Go ahead.

9 MS. FERSTER: Okay. Ms. Moldenhauer, my clients
10 tell me that the lots in the back of the addresses 1929,
11 1927, and 1925 39th Street, which are subject to the
12 restrictive covenant and are quite large lots, actually, they
13 are as large as your Tax Lot 808, and are not separated by
14 the alley.

15 So they are attached on the -- They could be
16 combined with the principle dwelling. So there is a slippery
17 slope argument, isn't there, because those lots could be
18 combined and there could be ADUs at 1929, 1927, and 1925 39th
19 Street, correct?

20 MS. MOLDENHAUER: You know, I literally just
21 roughly counted. There are 20 lots that are subject to the
22 same. Three is not a slippery slope. There is one on the
23 end, which is our client, and then there are the ones that
24 you just mentioned, so out of 20.

25 The center of the lots have a different condition

1 than the edges of the lots, of the properties. So the
2 majority, in 20 out of 20, the majority have the public alley
3 separating them.

4 MS. FERSTER: Correct. So --

5 (Simultaneous speaking.)

6 MS. MOLDENHAUER: And the building --

7 MS. FERSTER: Yes?

8 MS. MOLDENHAUER: The building restriction, the
9 covenant, does not restrict building. It --

10 BZA CHAIR HILL: Okay, I have a question. I have
11 a question. I have a question. So, I know, so Ms. Ferster,
12 Ms. Moldenhauer does not agree to three of the slippery
13 slopes. Can you tell me what the three are again just so I
14 can look at them?

15 MS. MOLDENHAUER: If you pull up the --

16 BZA CHAIR HILL: No, I was asking Ms. Ferster.
17 I'm sorry, Ms. Moldenhauer.

18 MS. MOLDENHAUER: Oh.

19 BZA CHAIR HILL: Ms. Ferster, just tell me what
20 the numbers are, the addresses.

21 MS. FERSTER: Yes. They are, let's see, 1929,
22 1927, and 1925 39th Street, the lots behind, those lots. If
23 you look at the plat on Slide 1 of Mr. Hall's presentation
24 that will show that those are the lots at the end of the
25 block.

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1 BZA CHAIR HILL: Got it. Okay, I was just
2 curious. Okay. So was that your only question, Ms. Ferster?

3 MS. FERSTER: Right. You know, I can address the
4 other points on rebuttal but that was my only question.

5 BZA CHAIR HILL: Okay. I don't think you get
6 rebuttal. I think you get a --

7 MS. FERSTER: No, I'm sorry. I meant closing.

8 BZA CHAIR HILL: No, that's all right. Okay, so
9 -- I wish I went to law school. Actually I don't, sorry, no
10 offense to the lawyers.

11 All right, let's see. Okay, Ms. Ferster, do you
12 want to give your closing, please. And if you could keep it
13 to five minutes because I really got to go.

14 MS. FERSTER: Okay. So I am absolutely not going
15 to summarize the testimony, but there is one point that I do
16 want to make with respect to the special exceptions standard,
17 and that is is that Mr. Rueda testified that the ADU exceeds
18 the maximum five-foot setback requirement specified by the
19 development standards for accessory buildings in Subtitle D-
20 1209.2 and no one rebutted that.

21 No one argued that they had satisfied that
22 requirement so that point remains unrebutted that they have
23 not satisfied a development condition for accessory buildings
24 in Subtitle D-1209.2.

25 Now turning to the covenant issue, I have made

1 some notes about the Applicant's arguments that I want to
2 address beyond what was addressed in our supplemental filing.

3 I mean I think I said at the first argument that
4 their argument that if you have a restrictive covenant that
5 does not have a detailed development plan or doesn't be very
6 specific about what particular structures are barred it's
7 somehow invalid.

8 I, you know, have never heard a case and cannot
9 conceive of a case that would not look at this restrictive
10 covenant and say it is clear on its face, it's simple because
11 it's so clear, and it should be validly enforced.

12 They also argue that when they combine the lots
13 the covenant will not apply because the lot will then have
14 street frontage, and they are referring to Tax Lot 808.

15 And let me make clear, and this is also pointed
16 out by Mr. Rueda, in that the Zoning Administrator
17 Interpretation ZA-022 completely dismisses the notion that
18 the tax lot obviates the need to combine record lots, and I
19 think the Applicant has conceded that point because they have
20 acknowledged they will need to combine Record Lots 79 and 80.

21 And so, you know, their future intent to combine,
22 you know, Lots 79 and 80 just simply cannot remove a
23 restrictive covenant. If that were the case then no
24 restrictive covenant could ever survive because the owners
25 could circumvent them by creatively combining lots.

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1 The case law that we have cited in our
2 supplemental memo supports the idea that you cannot
3 circumvent a restrictive covenant by lot combination.

4 Third, they argue that the 1938 covenant somehow
5 didn't intend to restrict ADUs, or alley dwellings, because
6 those particular terms, which are zoning terms, were not used
7 in the restrictive covenant.

8 You know, obviously, there was no such thing as
9 an ADA, ADU, or, you know, even a zoning concept of an alley
10 dwelling when the restrictive covenant was drafted and put
11 in the deeds in 1938.

12 The restrictive covenant instead is crystal clear
13 that they don't want residential purposes as a use of these
14 lots, which means not necessarily that you are going to build
15 stores on them, but you use them for structures and gardens
16 and play areas, exactly as the residents are using them now.

17 And then, third, their argument, you know, that
18 this Board should disregard the covenant is also without
19 legal authority and it's the legal authority that they cite
20 themselves actually supports and confirms that this Board
21 should take into consideration the restrictive covenant.

22 They note that Zoning Commission Order 12-02
23 specifically acknowledges that without an expressed easement
24 or restrictive covenant they would be concerned about, they
25 are not concerned about the impacts on view, sheds, or

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1 property values.

2 Here, however, there is restrictive covenant and
3 you have heard from the neighbors and all the lot owners who
4 have testified here that they have testified that they are
5 bound by the restrictive covenant.

6 They have relied on the restrictive covenants
7 investing in this neighborhood and in their property and they
8 have complied with the restrictive covenant. And so to say
9 that it should be now disregarded completely ignores, you
10 know, the impact of this special exception on those neighbors
11 who have relied on that.

12 And, you know, I guess I am just reluctant to wade
13 into this whole bit of slander that have been injected into
14 the interpretation of this covenant, but except to say that
15 it is offensive to suggest that an obviously neutral worded
16 restrictive covenant is a covenant that has a racial
17 restriction in it simply because the early Citizens
18 Association, you know, had a racial animus.

19 You cannot connect, you know, a third party
20 citizens organization with the intent of the grantor in this
21 case. There is no connection, they haven't tried it, and
22 it's quite frankly offensive for them to be saying that.

23 That would conclude my closing remarks.

24 BZA CHAIR HILL: Okay. Ms. Moldenhauer, do you
25 want to give us your conclusion?

1 VICE CHAIRPERSON JOHN: Can I ask a question
2 before we move on?

3 BZA CHAIR HILL: Sure. Go ahead, Ms. John.

4 VICE CHAIRPERSON JOHN: So are you saying that --
5 Well, we know there are sheds back there. So are you saying
6 that the regulations wouldn't allow an accessory building
7 with no accessory dwelling in it, is that your argument, and
8 that only gardening and those uses would be appropriate? I
9 think that's what you said.

10 MS. FERSTER: No. No, I said of course they were
11 intended to allow exactly how these lots are used now, which
12 is for sheds and gardens and play structures, and they would
13 also be allowed a garage and another type of accessory
14 structure.

15 VICE CHAIRPERSON JOHN: Okay.

16 MS. FERSTER: But it's any residential use of the
17 lot that is plainly restricted by the covenant.

18 VICE CHAIRPERSON JOHN: So the regulations now
19 allow a studio, an artist studio, and it could be, I believe,
20 someone will correct me if that's not correct, but it could
21 be 22 feet high and meet the 450 square foot requirement as
22 an artist studio. Wouldn't that be appropriate?

23 MS. FERSTER: You know, I think it's entirely
24 possible that an artist studio would not violate the
25 restrictive covenant because it's not a residential use, so,

1 you know, off the top of my head I would say it's not a
2 residential use if the artist didn't live there.

3 VICE CHAIRPERSON JOHN: So the objection is just
4 to having people back there?

5 MS. FERSTER: People who live there with --

6 THE COURT: People who live there.

7 MS. FERSTER: Yes, with cars and trash and parties
8 and going out on the patio with cell phones and talking, et
9 cetera, all of the impacts that you have, parking, traffic,
10 by additional residential uses in this property.

11 You know, the size is a big issue, but I don't
12 think if it were just an artist studio they would not build
13 it that big. It would not be a 2-level artist studio.

14 VICE CHAIRPERSON JOHN: You don't know.

15 MS. FERSTER: I don't know, no, and that's an
16 application that's not before us. There could be zoning
17 problems with an artist studio. I don't know.

18 VICE CHAIRPERSON JOHN: Thank you. Sorry, Mr.
19 Chairman. Oh, Commissioner Hood has a question.

20 ZC CHAIR HOOD: Mr. Chairman, very quick. I just
21 want to -- I did inquire -- I just wanted the Commissioner
22 to know that, as I thought, the Zoning Commission ADUs and
23 accessory zones are done that way in that area and for the
24 simple reason that's what the community advocated for.

25 So I'll leave it at that. We can do further

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1 discovery later, but the community advocated for that. Thank
2 you, Mr. Chairman.

3 BZA CHAIR HILL: All right. Ms. Moldenhauer, do
4 you want to give us your conclusion?

5 MS. MOLDENHAUER: Thank you. We are here today
6 asking for an accessory dwelling on the second floor of a
7 building.

8 The substantial portion of Mr. Rueda's testimony,
9 the individuals in opposition testimony, and Ms. Ferster, had
10 to do with the building, the accessory building.

11 The opposition that you are hearing is not about
12 the ADU, despite Ms. Ferster's reference to it now. Since
13 2:00 today the comments have been focused on objecting to the
14 accessory building.

15 If we disregard those objections to the accessory
16 building, which is self-certified as compliant, and if the
17 Zoning Administrator disagrees we would be back here for
18 other additional relief.

19 But to take the standard of it being self-
20 certified, that would include being self-certified as to
21 1209, which Ms. Ferster indicated was not refuted, however,
22 we did refute it by saying everything is self-certified.

23 We focus then on what are we asking. We are
24 asking for a studio, one-bedroom, to allow somebody who has
25 lived here for 26 years be able to rent his home and live in

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1 a house or in an accessory structure that he built.

2 The standard then for that special exception
3 release, you know, articulates harmony with the zone plan,
4 which is supported by the Office of Planning and is supported
5 by the record.

6 The standard then articulates different
7 conditions, which we have walked through and shown how the
8 application complies with each of those individual sub-
9 conditions and, you know, I said we have gone through and
10 exhausted, you know, all of the sub-conditions under U-253.

11 The assertion that the lower level would be used
12 has been refuted by not only the plans in the record but also
13 the Applicant's, Mr. Farquhar, testimony that it would not
14 be used and that it would be used for storage as is
15 specifically called out and allowed under this section.

16 We have shown in the building plan that there are
17 no balconies, no projections, and that we comply with those
18 sections. If in the building permit section the Zoning
19 Administrator determined that there are they would obviously
20 then, you know, have a separate issue.

21 We understand that the opposition has argued that
22 we have not satisfied the burden under the Section 4 adequacy
23 of public utilities, but we believe that the letter in the
24 record, support from the Office of Planning on that point as
25 well, and the small size of the ADU would not overly tax or

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1 create any health or safety issues with the residence.

2 The term is "residence." The zoning regulations
3 use the words "neighboring properties" in many, many, many
4 other sections.

5 They did not use the words "neighboring
6 properties" here, they used the word "residence"
7 intentionally because they are talking about the safety of
8 Applicant's property, and we believe that we have met that
9 burden.

10 Finally then the question comes down to the
11 argument about the covenant and whether or not the covenant
12 would somehow restrict this Board from making a decision.

13 We believe we have brought up enough ambiguity and
14 issues of reasonable doubt under the standard and we have
15 quoted case law in our submissions as well as quoted sections
16 and if there is reasonable doubt and ambiguity that there is
17 a possibility that the covenant is not enforceable.

18 We understand that that makes a lot of these
19 neighbors upset. They thought they were buying a restriction
20 for, you know, a green area. Nothing in the covenant says
21 you can't build a structure, that you have to preserve the
22 green area.

23 But the question becomes, you know, if this Board
24 were to approve the BZA case and the neighbors were to then
25 go to enforce the covenant and the Court of Appeals, the D.C.

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1 Superior Court, said the covenant is valid, then your order
2 would be moot.

3 But it doesn't mean that obviously that the
4 question before this Board is what is the standard and how
5 does that apply. Now I think that there are multiple cases
6 and I can, you know, there are personal deeds quoted, you
7 know, there is 616 Southwest 3rd 333 that talks about the
8 Court of Missouri going all the way up to the Superior Court
9 analyzing the word "residential purpose."

10 This is not a straightforward issue and we believe
11 that the question of an accessory residential purpose is what
12 is at issue here. This is not an independent residential
13 purpose.

14 This is accessory to a principle building just
15 like gardening is an accessory, just like parking is
16 accessory. It's not a separable, saleable dwelling unit, but
17 is an accessory ADU.

18 Literally that's what the term says, right,
19 accessory dwelling unit, and that an accessory residential
20 purpose would be allowed.

21 BZA CHAIR HILL: Are you almost done, Ms.
22 Moldenhauer?

23 MS. MOLDENHAUER: I was just about to conclude.

24 BZA CHAIR HILL: Okay. How long?

25 MS. MOLDENHAUER: Which is why -- We have one

1 sentence which says based on all of this we believe that, you
2 know, the Board should support this special exception.

3 BZA CHAIR HILL: Okay. All right. Okay. All
4 right, thank you all very much for the testimony. I really
5 thank my fellow Board Members for the day. I thank you for
6 coming outside of your normal day to volunteer for the city
7 in order to give the next day of your lives to this.

8 I do really appreciate all of the testimony that
9 we took and all of the participants because, obviously, it's
10 very important to those who live in the area and our job is
11 to look at the regulations and try to determine what we
12 think, which is what is always difficult when people aren't
13 on the same side.

14 Does anyone have anything final they would like
15 to add before I close the hearing and the record and we set
16 the time for a decision?

17 (No audible response.)

18 BZA CHAIR HILL: Mr. Chairman Hood, did you have
19 anything to say? Ms. John or Mr. Smith, do you all -- Does
20 anybody need anything? I'll ask that first, does anybody
21 need anything?

22 (No audible response.)

23 BZA CHAIR HILL: I think the record is pretty full
24 and that we have 4-1/2 hours of testimony, so I think we're
25 good. Okay, then I am going to go -- Thank you very much Ms.

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1 Moldenhauer and Ms. Ferster. Thank you. So nice to see you
2 guys. You all have a nice evening.

3 I am going to close the hearing and the record and
4 then we will determine when we are going to decide this,
5 okay.

6 I don't know -- Yes, I don't know if I am going
7 to need more or not now that I think about it, but I guess --
8 Do you guys think you can do this next week?

9 (No audible response.)

10 BZA CHAIR HILL: All right, Ms. -- I got one, Ms.
11 John saying yes. I got one Chairman Hood saying yes. Then
12 I guess I got, I don't know, Mr. Smith?

13 MEMBER SMITH: Sure.

14 BZA CHAIR HILL: Okay. So we'll put it on for a
15 decision next week. Mr. Moy, do you hear me?

16 MR. MOY: I'm here. Next Wednesday would be April
17 6th.

18 BZA CHAIR HILL: Okay. Okay, great. All right.
19 You guys have a nice evening. Thank you all so very much,
20 okay. We stand adjourned. Bye-bye.

21 (Whereupon, the above-entitled matter went off the
22 record at 6:47 p.m.)

23

24

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: 03-29-22

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was duly recorded and accurately transcribed under
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