

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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STATUS HEARING

+ + + + +

CASE NO.
98-02M/97-17C89-17C

+ + + + +

THURSDAY

MAY 29, 2003

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice, at 7:30 p.m., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSIONERS PRESENT:

CAROL J. MITTEN, Chairperson
ANTHONY J. HOOD, Vice Chairperson
PETER G. MAY

COMMISSION STAFF PRESENT:

Alberto P. Bastida, Secretary, ZC

OTHER AGENCY STAFF PRESENT:

Ellen McCarthy, Deputy Director, OP
Jennifer Steingasser, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Corey Buffo, Esq.

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

(7:30 p.m.)

CHAIRMAN MITTEN: Good evening, ladies and gentlemen. This is status hearing which is a little bit different for us, for the Zoning Commission of the District of Columbia for Thursday, May 29, 2003. My name is Carol Mitten, and joining me this evening are Vice Chairman Anthony Hood and Commissioner Peter May.

This is a status hearing in Zoning Commission Case No. 98-02M/97-17C89-17C. We scheduled the status hearing tonight in response to a letter from the Washington Development Group dated December 13, 2002. The letter requested that the Commission confirm that the previously approved PUD in this case remains valid and that the application for extension and modification of the PUD remains active, though on hold, pending litigation over site control of the subject property.

In light of the fact that there has been no action by the Commission on this matter since March 15, 1999, we would like to hear from the parties regarding the status of the PUD and the application for the modification to the PUD.

This hearing is for information purposes only so that the Commission can determine what its

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1 next action should be. This is not a fact finding
2 hearing, so there will be no sworn testimony, and
3 there will be no cross examination permitted.

4 Each party will be given five minutes to
5 state any information relevant to the status of the
6 PUD and the proposed modification to the PUD and to
7 indicate what action the Commission should next take.

8 I'd just remind everyone that we've read your
9 submissions, so make your five minutes count.

10 Then we will direct questions to the
11 parties. So, the order that we will go in is the
12 Applicant will have the first five minutes, and then
13 the HCD can go next, and then the ANC and then the
14 remaining parties, we'll call them up. So, if the
15 representatives of the Applicant would like to come
16 forward at this time.

17 Would you turn on your microphone for me,
18 please? Thank you.

19 MS. SCHNEIDER: Good evening, Madame
20 Chair, members of the Commission. I'm Pauline
21 Schneider. I'm with the law firm of Hunton &
22 Williams, and I represent the Applicant, the
23 Washington Development Group, and with me is my
24 colleague.

25 MR. AGULIA: Richard Agulia.

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1 MS. SCHNEIDER: We thank you for holding
2 this hearing this evening on the status of this
3 tortured PUD, and the Applicant's request for an
4 extension and a modification. I know that at least
5 two of you were not on this Commission when this
6 matter came before this body sometime ago.

7 It is one of those perhaps sad and
8 difficult stories of how difficult it is to get things
9 done that I think leads to where we are this evening.

10 Hopefully, we can ultimately get a very satisfactory
11 resolution, one that will be a benefit to the District
12 and to the residents of the District, but it very much
13 depends on where we come out on whether this
14 application for an extension and modification is alive
15 or whether it is not.

16 I heard you in saying that you had read
17 our submissions, and I will assume that. I think what
18 is important for you to understand and what is
19 probably not as clear in our submissions because this
20 matter is in litigation, is sort of where we are in
21 that matter and why resolution of this issue is so
22 important to the Applicant.

23 Because of a dispute between The
24 Washington Development Group and the District of
25 Columbia, primarily the Council, the District took

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1 certain actions which the Applicant has alleged in
2 court pleadings interfered with his contractual rights
3 and his Constitutional rights.

4 It has made it impossible for him to
5 develop this site. It has made it impossible for him
6 to even assign his interests, if there are any, in
7 this site. It has made it impossible for the District
8 to get any potential benefit from this site while the
9 matter is in litigation.

10 What prompted our request to you this
11 evening was an attempt to resolve some of the matters
12 in litigation, hopefully to reach a settlement in that
13 litigation, but what was at the crux of trying to
14 reach a settlement was whether there was something of
15 value alive, PUD, and an application for modification
16 and extension of that PUD.

17 If the District's action had caused that
18 application to lapse, the possibility of a settlement
19 was pretty remote. If in fact that application is
20 alive, the potential for a settlement then is very
21 significant.

22 That is why we made this simple request,
23 to try to determine the status. It was our
24 understanding, because we had requested in June of
25 1999 a continuance, because we could not establish for

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1 you what you had asked us to establish, and that was
2 that we had site control. Because there had been
3 legislation first as policy and District legislation
4 that ended the Comprehensive Plan, and the
5 subsequently, actual litigation that was specifically
6 to exclusive rights agreement on 51(b), that the
7 litigation ensued. So, what's really at stake tonight
8 is whether this matter will continue in litigation in
9 the courts or whether there's a possibility I think of
10 settlement.

11 Now, I will make it clear to you that our
12 firm is not representing The Washington Development
13 Group in the litigation. We are only representing
14 them on the zoning matter. Therefore, I am not privy
15 to all of the nuances if what the negotiations might
16 be and what the potential for a settlement are.

17 CHAIRMAN MITTEN: I need you to summarize
18 now.

19 MS. SCHNEIDER: Okay. However, I think
20 the filing by the District of Columbia government and
21 the DHCD makes clear that they believe that the issue
22 of the status of this application is crucial to
23 reaching a settlement in this matter. Thank you.

24 CHAIRMAN MITTEN: Thank you. Any
25 questions for Ms. Schneider or Mr. Agulia? I'd like

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1 to know, absent the issue of site control, is the
2 Applicant prepared to go forward on the merits of the
3 modification and/or the merits of the PUD extension
4 request?

5 MS. SCHNEIDER: Yes.

6 CHAIRMAN MITTEN: Okay. I'd just ask you
7 to stay with us as we go through the different parties
8 because we may have some additional questions for you
9 after we have heard.

10 MS. SCHNEIDER: We'd be happy to do that.
11 Thank you very much.

12 CHAIRMAN MITTEN: Thank you. All right,
13 then we'll have the representatives from DHCD come up.

14 MR. PARKER: Good evening, members of the
15 Board. My name is Arthur Parker. I'm an assistant
16 corporation counsel assisting the Department of
17 Housing and Community Development in this matter.
18 With me are two of their representatives.

19 MR. CAGER: Lawrence Cager, deputy
20 director of development finance division.

21 MR. THACKABERRY: And James Thackaberry,
22 an architect with the development finance division.

23 MR. PARKER: I brought these gentlemen
24 with me because I wasn't sure of the context of the
25 meeting or the hearing, but I think given how things

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1 are proceeding, I think I can proceed and lay out the
2 position, which is essentially what we stated in our
3 March 20, 2003 letter.

4 Ms. Schneider has, I think, reasonably
5 laid out the context of why this matter was brought
6 back before the Commission for guidance on this
7 matter. The history, of course, is that there is a
8 lease that was signed between the DHCD and The
9 Washington Development Group for the development of
10 the Air Rights lease parcel, and at some point, there
11 was a dispute between the parties that resulted in
12 litigation in which the District is trying to re-
13 acquire possession of the parcel, but in that
14 litigation, The Washington Development Group has
15 raised claims and counterclaims, and until that
16 litigation is resolved, The Washington Development
17 Group has a possessory interest in the Air Rights
18 parcel and in the lease.

19 In other words, we cannot divest them of
20 their ownership interest until we get a judgment in
21 court. That, of course, there is a trial set on that
22 matter for late November, but that would be just the
23 first step in the litigation, and what one could
24 expect would be fairly lengthy appeals.

25 So, in the efforts to try to come to a

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1 negotiated settlement in this matter, the parties have
2 engaged in settlement negotiations and identified one
3 of the issues that needs to be resolved is the current
4 status of the PUD that governs the Air Rights lease
5 parcel and whether the amendment process to remove the
6 residential component from the Air Rights PUD.

7 When the PUD was initially granted to the
8 Air Rights lease, there was a residential housing
9 component. The amendment is to remove that component,
10 and it was originally located at this Parcel 51(b).
11 As our letter indicates, if that parcel is not
12 currently available, we would support their ability to
13 identify a new parcel or some other equivalent
14 amenity.

15 That's our position, and I think that
16 probably states our full position on this matter.

17 CHAIRMAN MITTEN: Okay. In your letter,
18 you state that the position that you're taking
19 relative to the zoning case is somewhat contrary to
20 your litigation position. I would say it's completely
21 contrary to your litigation position.

22 So, I'm going to ask you, you continue to
23 join with The Washington Development Group in the PUD
24 application? You're supporting the application as the
25 owner of the property?

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1 MR. PARKER: Yes. We are supporting their
2 ability to continue the process, and the other thing
3 we put in the letter is we indicate that if the
4 process is to continue, that there be some guidance as
5 to how long that process is going to continue. That's
6 the only other thing that we requested in the letter,
7 is that there be some certainty as to how this will
8 play out.

9 To resolve this case, we have to have some
10 knowledge as to what is the state of the zoning on the
11 parcel.

12 CHAIRMAN MITTEN: I understand.

13 MR. PARKER: You know, and that's -- and
14 it is -- just today I was in a settlement conference
15 where the judge was pointing out to one of the parties
16 that although you can litigate in one position, when
17 you're in settlement mode, you may have positions that
18 are different from your litigation positions, and it's
19 not necessarily completely incongruent. That's what I
20 was trying to point out in the letter.

21 CHAIRMAN MITTEN: Okay. Could you point
22 out to us, from our perspective, which is we have a
23 case that has been lingering, and in what way does it
24 serve the Zoning Commission to respond to this desire
25 that you and The Washington Development Group have to

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1 just allow this thing -- I mean, it seems like you're
2 really not asking for closure. You're asking for a
3 continued state of limbo to use to whatever settlement
4 purposes you may have, but how does that serve us?

5 MR. PARKER: Well, maybe I should make our
6 position clear. We're not asking for a continued
7 state of limbo. We're asking that the process go
8 forward. In other words --

9 CHAIRMAN MITTEN: So you're asking us to
10 move forward to decide whether the modification has
11 been -- whether the application for modification is
12 complete and whether or not we will approve the
13 modification, and whether or not we will approve the
14 PUD extension. Is that correct? You want us to
15 decide, or you're saying you support the Applicant in
16 what they're seeking, because those are two different
17 things.

18 MR. PARKER: I understand the Applicant to
19 be seeking the ability to go forward with the process
20 of an amendment process to the PUD, and that's what we
21 support. We don't support a declaration that this is
22 in place and it to be stayed.

23 CHAIRMAN MITTEN: Okay.

24 MR. PARKER: We want the process to -- we
25 want them to have an opportunity to propose an

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1 amendment to this PUD so that -- and a recognition
2 that the PUD still exists.

3 CHAIRMAN MITTEN: Okay, but you don't just
4 want a decision. You want a positive outcome. Is
5 that what you're saying?

6 MR. PARKER: Right, because without that
7 definitive -- at the minimum, what we need is a
8 definitive outcome as to whether the PUD is still in
9 place, and we would like the process to go forward on
10 the amendment, because that would serve the purposes
11 of what we're trying to achieve, which is a settlement
12 of the litigation.

13 Why is that something the Zoning
14 Commission should care about, because frankly, the
15 best chance of having that parcel moved forward and be
16 developed in a timely manner is through some sort of a
17 settlement between the parties. Otherwise, it's
18 liable to be tied up for years and years in
19 litigation. I think that serves all of the Commission
20 and the citizens of the District's interests.

21 CHAIRMAN MITTEN: Okay. Mr. May, did you
22 have some questions?

23 COMMISSIONER MAY: Yes. Just so I
24 understand exactly what you're saying, if the
25 Commission were to go ahead and do as you've

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1 requested, and schedule or accept the extension and
2 modification application and schedule a hearing for
3 that, would DHCD be here testifying in favor or in
4 support of that modification and extension, or do you
5 just want the matter to get resolved, you simply want
6 an answer?

7 MR. PARKER: As I understand what our
8 obligation would be, is that if there's a
9 clarification of the PUD status in the process goes
10 forward, we would support the amendment process to
11 move the residential component off of the Air Rights
12 lease parcel. That's what we'd be prepared to do.
13 That's what we always had agreed to do within the
14 DHCD.

15 CHAIRMAN MITTEN: But you're not prepared
16 to support it moving to 51(b), right?

17 MR. PARKER: We don't have control over
18 51(b).

19 CHAIRMAN MITTEN: Who controls 51(b)?

20 MR. PARKER: The RLA Revitalization
21 Corporation.

22 CHAIRMAN MITTEN: Okay. Did you have
23 something else? Any questions?

24 VICE CHAIRMAN HOOD: I may have some at
25 the end. I just kind of wanted to hear all the parts.

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1 CHAIRMAN MITTEN: Okay. Thank you, Mr.
2 Parker.

3 MR. PARKER: Thank you.

4 CHAIRMAN MITTEN: Mr. Doctor, I think
5 we're ready for the ANC's position. That's fine. Ms.
6 Dwyer?

7 MS. DWYER: For the record, Maureen Dwyer
8 with Shaw Pittman, representing Georgetown University
9 Law Center, which was one of the original parties in
10 opposition to this case.

11 We have filed some detailed papers which I
12 will summarize in a moment, but I want to start by
13 saying that no one is here tonight disputing that this
14 case is complicated or that there is litigation, but
15 we do disagree as to the role of the Zoning
16 Commission. We do not believe that it is your role to
17 settle the litigation between the District of Columbia
18 and this Applicant.

19 What this case is about is the Applicant's
20 failure to comply with the basic filing requirements
21 of the PUD regulations. Back in March of 1999, the
22 Zoning Commission suspended the hearing because the
23 Applicant had failed to meet the basic filing
24 requirements. They did not know the plans for the
25 residential component that was going to be on the

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1 north parcel. They did not have any proof of title.
2 They did not have the required parties at the hearing.

3 The Commission went through and identified
4 11 things, 11 pieces of missing information, that the
5 Applicant had to file. One of them was a statement or
6 showing of good cause as to why they had not proceeded
7 forward with the PUD over the two-year time period.

8 Granted, the Applicant is here today
9 saying there's been litigation, but there's no reason
10 that they could not have filed all of the other
11 requests for information. They could have filed a
12 complete set of plans. They could have filed all of
13 the information that every other Applicant is required
14 to file, and they did none of that.

15 Not only did they not file that
16 information, but they did not, even if you assume that
17 by having the hearing, the Commission somehow granted
18 an extension of the PUD. A PUD extension is two
19 years. They did not come back two years later and say
20 we need an additional two years, because we're still
21 in the middle of litigation.

22 They didn't put anything into the record
23 and serve it on the other parties that would give this
24 Commission and the other parties an opportunity to say
25 what is going on with this site and what is the role

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1 for the Commission and the other parties to play.

2 DHCD wants knowledge, as they say, as to
3 the state of zoning, and they want it quickly. The
4 quickest way to give them a reading as to where this
5 case is is for the Commission to decide today that the
6 application should be dismissed. It does not meet any
7 of the basic filing requirements. That was what the
8 Commission found in March of 1999, and that's what
9 this Commission could find today.

10 To go forward with this case in the hopes
11 of somehow resolving the District's litigation with
12 The Washington Development Group would be wrong. If
13 the Commission were to go forward with this case, this
14 case is going to end up in litigation because there is
15 nothing in the record to support a finding that the
16 application has been properly filed and met all of the
17 requirements.

18 So, this is going to end up in litigation
19 if it goes forward. There is no "easy way" to solve
20 DHCD's issues, and I would point out that as DHCD
21 makes clear in their letter, The Washington
22 Development Group does not control the rights to the
23 parcel that the housing is supposed to go to. So,
24 once again, we have an application for a continuation
25 of a PUD and a modification without any control of the

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1 so-called receiving site without any plan showing what
2 that housing is going to look like, without any clear
3 statement that The Washington Development Group has
4 control, even of the Air Rights parcel.

5 If you look at DHCD's letter in footnote
6 one, they point out that The Washington Development
7 Group is in default of the lease. They have not made
8 any of the required payments. You have subsequent
9 city council legislation that invalidates an ERA that
10 has not been finalized with the agency. You have a
11 Comprehensive Plan changed that suggested to the city
12 and recommended that the Air Rights parcel be
13 revisited.

14 You have so many things that are wrong
15 with this application at this point in time, and I
16 don't know why, in the interest of solving litigation
17 that is not your litigation, that is not the subject
18 of the PUD, but separate litigation over title, that
19 this Commission should be asked to step in and to
20 approve a PUD in the case of this Applicant that meets
21 none of the requirements.

22 I can go through the PUD regulations, but
23 I think you're familiar enough with them in terms of
24 the information that's to be filed, the requirement
25 for good cause in order to get an extension. There

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1 are many other cases where Applicants come before you
2 and say market conditions have changed. I'm in the
3 middle of litigation. There are issues beyond my
4 control. They make their case to you, and that's what
5 they're required to do.

6 We don't have to wait four years and then
7 have a letter filed in the record that says by the
8 way, simply confirm that everything is okay, and this
9 will solve the litigation issues that we have in
10 another forum. It's up to the court to solve the
11 litigation issues, to let the parties get into
12 settlement discussions, or to have the trial that has
13 been postponed at least once to our knowledge, and
14 allow The Washington Development Group and the city to
15 resolve that issue.

16 The issue before you is very simple. You
17 have a PUD that was never properly filed, an extension
18 that was never properly extended. There was no
19 finding or showing of good cause. You don't have
20 plans that meet the requirements. You have two sides
21 that do not meet the contiguous requirements for a
22 PUD. You have a major change to a project by moving
23 the housing out of it. You lack one of the required
24 parties, which is NCRC, which now controls the
25 receiving site, and I don't think you have any basis

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1 to go forward with this case.

2 If Mr. Moss is able to get control of the
3 sites and to come up with a set of plans that meet the
4 requirements, he can refile the plans, and we will all
5 be back down there to look at the project and evaluate
6 what is being proposed, but we don't have that before
7 you now, and I don't see any basis for the Commission
8 to approve either an extension, a modification, or
9 even a continuation of this case.

10 CHAIRMAN MITTEN: Thank you, Ms. Dwyer.
11 Any questions for Ms. Dwyer? All right, thank you.

12 Are you ready now, Mr. Doctor?

13 MR. DOCTER: Thank you, Chairman Mitten
14 and Commissioner Hood and Commissioner May. I had
15 wanted Georgetown to go first because I figured they
16 would make the right arguments as to why this is not
17 before you anymore, because as it has been stated,
18 it's been a tortured PUD. Actually, if you let this
19 go forward, it is a real perversion of the PUD
20 process.

21 This PUD has been pending for 15 years,
22 and that's not the way Planned Unit Developments are
23 supposed to work. That is one of the things that is
24 very much in the ANC's mind in opposing this.

25 In addition to that, the Applicant

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1 obtained this property not in the way an Applicant
2 would obtain property today in this world in the
3 District of Columbia that is public property. There
4 would be a meeting of the stakeholders and the
5 planners and consultants to decide what to do with a
6 valuable site that is right practically at the foot of
7 the Capitol. Here, it was a private deal with no
8 bidding or input from the neighbors, the stakeholders,
9 the ANC, and we're going forward with it, it seems.

10 Now, what I don't understand is I think
11 the ANC 6-C is a party, and Mr. Parker never sent us a
12 copy of that letter of May 20, 2003, and I don't know
13 what it says, but if it says that somehow Mr. Moss is
14 going to get the site and transfer it to somebody else
15 if he can get the PUD, I have a lot of comments on
16 that, but since I haven't seen the letter, I can't
17 very well comment as to that, but I would be very
18 interested if the letter says something to that
19 effect.

20 It seems to me as an attorney that what is
21 happening here, the corporation counsel thinks they
22 have to settle the lawsuit that the council asked them
23 to go forward with. As an attorney who has practiced
24 in D.C. over 45 years, I think that if corporation
25 counsel really thinks they have to settle, there are a

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1 lot of other ways that you can settle a case, but not
2 in this particular way, to let this bad development of
3 public property proceed and have it all as office
4 buildings.

5 Our ANC wants some residences there
6 because this will help develop the neighborhood. One
7 of the ways they could settle it is to pay something
8 to the developer if they really think he's got a case,
9 although it is true, as far as we can tell, nothing
10 has been paid by the developer to the city, or if
11 there has been under this lease, it's been very
12 little.

13 At our ANC planning and zoning committee,
14 we asked the developer's attorney how much money had
15 been put up. He said he didn't know. We said when we
16 have our full ANC committee and you come to that
17 meeting, please let us know how much money has been
18 put up to the city. He never came, and we still don't
19 know how much money has been put up. All we have is
20 our suspicion that it's very little.

21 Now, if in fact, this particular
22 settlement has something to do with the assignment of
23 the interest in real estate that Mr. Moss may have to
24 another developer, it could be handled so as to
25 incorporate the present process that we have of good

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1 development with the old system. We could have a
2 public process.

3 We would only permit the assignment of the
4 title if there's a public process on uses and
5 development requirements which process will include
6 the ANC, the neighbors, the stakeholders, and proper
7 consultants paid for by OP or the other agencies in
8 the cities to come up with a development formula for
9 uses of the property, and then of course, it might
10 even be able to include the extension of the property
11 because there's about 150 feet south of E Street that
12 was not included in the Air Rights, even though that's
13 very plainly part of the Air Rights.

14 CHAIRMAN MITTEN: You need to close it out
15 now.

16 MR. DOCTER: Okay. And I think that if in
17 fact something like that occurred, the public process
18 could be incorporated in the settlement, if that's
19 what they have to do, and require that as part of the
20 transfer of the property, this be a condition as to
21 the development in the future. To keep this PUD in
22 effect is a real -- I mean, it's not a good signal in
23 any planning works in the city in the future because
24 this means you can abuse the PUD process in any way
25 you want, as long as the corporation counsel comes in

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1 and says it's okay.

2 Thank you.

3 CHAIRMAN MITTEN: Thank you, Mr. Docter.
4 Any questions for Mr. Docter? Thank you. We didn't
5 have any questions.

6 MR. DOCTER: I guess I should open myself
7 to questions. Pardon me.

8 CHAIRMAN MITTEN: I don't think we have
9 any.

10 MR. DOCTER: Oh, okay.

11 CHAIRMAN MITTEN: Thank you.

12 MR. DOCTER: I'll be glad to answer them.

13 CHAIRMAN MITTEN: Ms. Thornhill, are you
14 going to be representing the church?

15 MS. THORNHILL: Thank you, Madame
16 Chairman. Good evening, Chairman Mitten and members
17 of the Zoning Commission. My name is Carrie L.
18 Thornhill. I'm the director of community outreach at
19 Mt. Carmel Baptist Church. I have served as
20 spokesperson for the church on this case since 1998.
21 I have again been authorized by the pastor, Reverend
22 Joseph Norman Evans and the board of trustees of Mt.
23 Carmel to appear this evening and offer the views of
24 our church on the question before the Commission. The
25 chairman, vice chairman of the board of trustees

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1 present to show their support, participate as needed,
2 and to observe this proceeding.

3 The next page-and-a-half of my testimony,
4 or statement if you will, gives background on our
5 church, the property that we own, the community
6 outreach program of our church, and the interest that
7 we have in advancing and furthering the residential
8 development of the vicinity around our church, a
9 commitment that we made as a part of the Center Leg
10 Freeway project back in 1968.

11 But what I'd like to proceed to say is
12 that Mt. Carmel opposes any further continuation or
13 involvement of the Zoning Commission with regard to
14 this case on several grounds, and we would hope that
15 you would make a decision tonight to dismiss or deny
16 this case.

17 First, although Mt. Carmel initially was
18 supportive of the Center Leg Free Air Rights Project,
19 it did so on the basis that development on the south
20 side of Massachusetts Avenue would be beneficial to
21 the redevelopment of the Mt. Vernon Place community.
22 When in 1999 the Applicant attempted to extend the PUD
23 application to Lot 803, 831, and parts of 7000, Mt.
24 Carmel went on record at that time in this proceeding,
25 objecting to the Applicant's proposal to shift the

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1 residential components of the PUD development to the
2 north side of Massachusetts Avenue.

3 Such a large scale development would
4 isolate the church and eliminate any opportunity for
5 the additional parking and space for program
6 expansion, which Mt. Carmel views essential for its
7 future.

8 Second, the Applicant has retained
9 development rights for over 15 years without anything
10 positive to show for it. The only thing which the
11 Applicant has accomplished to date is to prevent
12 anyone else from accomplishing anything with this
13 land. The PUD modification is a poorly disguised
14 attempt to extend this blocking effect to additional
15 land adjacent to our church.

16 Third, Section 1138.1 of the D.C.
17 Comprehensive Plan, amended in 1998, proclaims as
18 policy in support of public action objectives, states,
19 explore the termination of the lease between the
20 District of Columbia and The Washington Development
21 Corporation, Incorporated for development of the Air
22 Rights above the Center Leg Freeway.

23 The city council unmistakably has decided
24 that this Applicant's proposed project is not
25 consistent with the city's planning objectives, even

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1 before the Applicant sought to expand the geographic
2 extent of the project. The PUD expansion ought to be
3 rejected on the grounds of the Comprehensive Plan.

4 Fourth, Mt. Carmel is actively engaged in
5 working with the local developer and has submitted a
6 proposal to NCRC to utilize Lot 831 in a coordinated
7 development along both sides of Third Street, N.W.
8 For Mt. Carmel, this project, if accepted, will
9 provide the contiguous land and financial means to
10 build a school and a parking structure dedicated to
11 the church's uses.

12 With limited land available, this
13 opportunity is a way to secure Mt. Carmel's future
14 viability into the next century. For Mt. Carmel, the
15 pattern of delay and administrative amnesia which have
16 characterized this PUD application, actively works
17 against its interest.

18 We implore the Zoning Commission to put an
19 end tonight to 15 years of inaction. If the
20 Commission is not prepared to dismiss the PUD tonight,
21 then it should adopt a fixed schedule for expeditious
22 resolution of the issue at your July meeting.

23 I thank you very much for this opportunity
24 to make this brief statement.

25 CHAIRMAN MITTEN: Thank you, Ms.

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1 Thornhill. Sir?

2 MR. KEYS: I'm George Keys. I'm counsel
3 to Mt. Carmel, and I think we've got a minute and 18
4 seconds left.

5 CHAIRMAN MITTEN: Okay.

6 MR. KEYS: I just wanted to add that Mt.
7 Carmel would certainly associate itself with the
8 analysis of the situation offered by Georgetown
9 University Law Center.

10 MS. THORNHILL: That's correct.

11 MR. KEYS: But we would ask the Commission
12 to note the irony for the church of this gratuitous
13 effort to reach new territory by modification which
14 itself was untimely, on land which the developer has
15 dubious questionable control over.

16 That is something that as it spins out and
17 as it waits for this litigation to resolve, has a very
18 damaging effect on the prospects for the church in
19 utilizing the last piece of land that's really in its
20 vicinity.

21 CHAIRMAN MITTEN: Thank you. Any
22 questions for Ms. Thornhill or Mr. Keys?

23 MS. THORNHILL: Thank you very much.

24 CHAIRMAN MITTEN: All right. Thank you
25 both for coming down.

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1 Is there anyone here representing St.
2 Baptist Church? Anyone for Second Baptist Church?

3 Okay, I don't believe there are any other
4 parties. I didn't miss anybody, did I?

5 MR. BASTIDA: That is correct, Madame
6 Chairperson. You have taken care of all of the
7 parties.

8 CHAIRMAN MITTEN: Okay. What I would like
9 to do at this point is ask you to indulge us for a few
10 minutes, allow us to go into executive session, to
11 plot out our options, and then we'll come out and
12 deliberate about how we want to proceed. Thank you.

13 (Whereupon, the foregoing matter
14 went off the record at 8:12 p.m.
15 and went back on the record at
16 8:35 p.m.)

17 CHAIRMAN MITTEN: All right, thank you for
18 giving us a few moments to discuss this.

19 I think we're a little bit reluctant to
20 act on the motion to dismiss the proposal entirely,
21 and somewhat in deference to the circumstances that
22 were created by actions of the Zoning Commission in
23 1999 in not bringing to closure the proposal at that
24 point, and seemingly granting a continuance by their
25 actions, if they didn't overtly grant a continuance by

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1 taking a vote, and they didn't continue the issue of
2 the modification and the extension to a date certain.

3 So, I think what I would like to recommend
4 to my colleagues is that we do a few things, basically
5 picking up on the advice that Ms. Thornhill gave us,
6 and that we do a couple of things. The first would be
7 that we give a deadline to the Applicant for
8 submission of the materials required, and those would
9 be the materials that were requested by the Zoning
10 Commission four years ago to complete the application
11 for the modification.

12 In so doing, I would like to recommend
13 that we not accept any alternative sites as it relates
14 to the housing amenity for which the Applicant does
15 not have site control. So, we understand there's an
16 issue regarding the PUD site itself, but we don't want
17 any aspects of the modification to be in question.
18 So, we would not accept any alternative sites for
19 which the Applicant did not have site control, and
20 we'll set a schedule for all of this.

21 In addition to responses from the parties
22 on that modification as well as from the Office of
23 Planning, we would entertain requests from the parties
24 for an additional hearing on the modification. There
25 has already been one hearing on the modification. We

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1 would at that point entertain requests for an
2 additional hearing. That's the first thing I would
3 recommend that we do.

4 The second is that we require the
5 Applicant to make a submission that would meet their
6 burden of proof for the extension of the PUD, and I
7 would suggest that the Applicant actually has two
8 burdens of proof. This touches on what Ms. Dwyer
9 suggested, which is at the time the request for the
10 extension was made in 1999, there was a set of
11 circumstances that prompted the request for the
12 extension, and there's a burden of proof related to
13 that.

14 Now we have further extension that would
15 basically be beyond now, and there's a burden of proof
16 related to that as well. Again, we would ask for
17 responses from the parties as well as from the Office
18 of Planning to weigh in on this.

19 I have great concern about one of the
20 burdens for the Applicant because of the amount of
21 time that has passed in this case, and it relates to
22 the requirements of 2408.10(b) regarding substantial
23 changes in the material facts upon which the
24 Commission based its original decision.

25 So, I think it's appropriate in this case

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1 that we have the extension before us as -- I don't
2 want to say preliminary matter in the sense that we
3 typically take up preliminary matters, but as a
4 threshold question. Then after we decide that, we'll
5 take up the issue of the modification and whether or
6 not at that point it is even -- it would even be
7 before us. I think we can do that in July, since our
8 meeting is at the end of the months.

9 I would ask my colleagues for their input.

10 VICE CHAIRMAN HOOD: Madame Chair, I would
11 agree. I would hope that we would move as
12 expeditiously as possible on this request. I do not
13 want, as the only member here tonight that served on
14 the Commission previously, I want to get rid of this
15 administrative amnesia. I think that the Commission,
16 the way we left it, I'm not saying it was on us, but I
17 think the trigger should have come from the Applicant.

18 While I would agree to this, the way we're
19 moving, I'm not 100 percent agreeable, but to try to
20 move this process forward and give the Applicant a
21 chance, I would agree with your comments.

22 I would just say that we need to move with
23 this as soon as possible.

24 CHAIRMAN MITTEN: Thank you. Any
25 comments, Mr. May?

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1 MR. MAY: I pretty much second what
2 Commissioner Hood said.

3 CHAIRMAN MITTEN: All right. Mr. Bastida,
4 can you give us some dates that would get this on our
5 July 31 meeting?

6 MR. BASTIDA: Yes. I would suggest that
7 the Applicant file the requested documentation by July
8 3, which is a Thursday, by 3:00. At the time that
9 they file, they have to serve it on all the other
10 parties. Then the other parties have until July 18,
11 and serve it not only on the parties but on the Office
12 of Planning.

13 Then the Office of Planning and all the
14 other parties will have until July 18, which is a
15 Friday, at 12:00 noon, to file their responses. That
16 way, that could be in front of the Commission on July
17 31 for some type of action.

18 CHAIRMAN MITTEN: Is there anyone who is
19 not clear about what we've requested? Mr. Docter,
20 could you come forward and get on the mike, please?

21 MR. DOCTER: What we're talking about
22 right now is simply the motion for extension, is that
23 correct?

24 CHAIRMAN MITTEN: What we will do is at
25 our meeting in July, we will take up first the

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1 question regarding the extension, and then, depending
2 on what the disposition of that question is, we will
3 take up the request for a modification, provided that
4 the application is complete at that time.

5 If it is not complete, then the motion to
6 dismiss is back on the table.

7 MR. DOCTER: In other words, both the
8 application for modification and the motion for
9 extension of time has to be filed by the 3rd?

10 CHAIRMAN MITTEN: Yes.

11 MR. DOCTER: And answers the 18th, and the
12 hearing on the 31st?

13 CHAIRMAN MITTEN: Yes.

14 MR. BASTIDA: No, it would be a meeting,
15 not a hearing.

16 CHAIRMAN MITTEN: Yes, right, thank you.
17 Meeting.

18 Any other questions? I don't want anyone
19 to leave not being clear.

20 MS. McCARTHY: Madame Chair?

21 CHAIRMAN MITTEN: Yes.

22 MS. McCARTHY: The Office of Planning just
23 had a question. Given how complicated this case is,
24 we typically have until ten days before the hearing to
25 file, and if you're meeting is the 31st, I'm wondering

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1 if we could just set the deadline of the 21st instead
2 of the 18th.

3 CHAIRMAN MITTEN: For you only?

4 MS. McCARTHY: To file our report, yes.

5 CHAIRMAN MITTEN: Yes, I'm sure that's not
6 going to be a problem.

7 MS. McCARTHY: Okay.

8 CHAIRMAN MITTEN: Okay, last chance for
9 questions.

10 MS. DWYER: I just want to clarify. So,
11 what the Applicant will be filing is a complete PUD
12 application.

13 CHAIRMAN MITTEN: For the modification.

14 MS. DWYER: For the modification, that's
15 consistent with what they had presented at the hearing
16 back in 1999, and response to all of the requests for
17 information that the Commission had at that time?

18 CHAIRMAN MITTEN: Yes.

19 MS. DWYER: Okay.

20 CHAIRMAN MITTEN: Okay. Well, I thank you
21 all for helping us out this evening to add some
22 clarity to this matter, and we look forward to
23 reaching some kind of at least next steps in July.

24 Thank you.

25 (Whereupon, the above-referenced matter

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1 was adjourned at 8:44 p.m.)
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