

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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SPECIAL MEETING
1119TH MEETING SESSION (11TH OF 2001)

+ + + + +

THURSDAY

JULY 26, 2001

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The Special Meeting of the District of Columbia Zoning Commission convened at 6:00 p.m. in the Office of Zoning Hearing Room at 441 4th Street, Northwest, Washington, D.C., Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY J. HOOD	Vice Chairperson
JOHN G. PARSONS	Commissioner

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COMMISSION STAFF PRESENT

Alberto P. Bastida, Secretary, ZC

OTHER AGENCY STAFF PRESENT:

Ellen McCarthy, Deputy Director,
Office of Planning
David McGhettigan, Office of Planning
Arthur Rodgers, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Alan Bergstein, Esq.
Marie Sansone, Esq.

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

6:06 p.m.

CHAIRPERSON MITTEN: Good evening, ladies and gentlemen. This is a Special Public Meeting of the Zoning Commission for Thursday, July 26, 2001. I think agendas are available at the back if you're interested in following along, and let me apologize for not starting promptly at 5:15, but we were having an executive session to try and get organized because of the complexity of the issues before us.

What we'll begin with is Zoning Commission Case Number - well, let me say first, my name is Carol Mitten, and I'm joined this evening by Vice Chairman Anthony Hood and Commissioner John Parsons.

We'll begin with Zoning Commission Case Number 00-30TA, Part 1, which relates to the FAR restrictions and recreational space requirements in the downtown development district overlay.

What occurred on Monday, July 16th was that there were amendments made to what had been a proposed - or what had been a final rule-making as it relates to Part 1 of this case, and what we have found since is that by not being - by not taking final action on the 16th, that that is causing a problem for a developer who had anticipated taking advantage of the provisions of this

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1 order, and that was an unintended consequence.

2 So, what we would like to do instead is to
3 rescind the previous vote and take final action on the
4 order as it had been written and as it had been voted
5 on in the proposed rule-making, and then take proposed
6 action on the modified language, and that way, the order
7 will be enforced, and we will have the started the process
8 on incorporating the amendments.

9 So, what I'd like to do, because we are going
10 to rescind this vote, the motion was made by Mr. Parsons,
11 and therefore, I have to ask you as the maker of the
12 original motion to move to rescind the vote that was taken
13 on 00-30TA, Part 1 on the 16th.

14 COMMISSIONER PARSONS: So moved.

15 VICE CHAIRPERSON HOOD: Second.

16 CHAIRPERSON MITTEN: It's been moved and
17 second, and to rescind the vote as it relates to 00-30TA,
18 Part 1, is there any discussion? All those in favor,
19 please say aye.

20 COMMISSIONER PARSONS: Aye.

21 VICE CHAIRPERSON HOOD: Aye.

22 CHAIRPERSON MITTEN: Aye. Those opposed,
23 please say no. Mr. Bastida?

24 SECRETARY BASTIDA: Madam Chairman, the staff
25 will record the vote three to zero. Mr. Parsons moved

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1 and Mr. Hood second and Ms. Mitten are voting in the
2 affirmative.

3 CHAIRPERSON MITTEN: And do we have a proxy
4 from Mr. Franklin?

5 SECRETARY BASTIDA: No, we do not.

6 CHAIRPERSON MITTEN: Okay, thank you. Now,
7 what we have before us is a notice of final rule-making,
8 Order Number 943 in Zoning Commission Case Number 00-30TA,
9 Part 1, which we had before us for our July 16th meeting,
10 and so this is without the amendments that were
11 incorporated on the 16th. I would move approval of this
12 order.

13 COMMISSIONER PARSONS: Second.

14 CHAIRPERSON MITTEN: We have a motion and a
15 second to approve Zoning Order Number 943. All those
16 in favor, please say aye.

17 COMMISSIONER PARSONS: Aye.

18 VICE CHAIRPERSON HOOD: Aye.

19 CHAIRPERSON MITTEN: Aye. Those opposed,
20 please say no. Mr. Bastida?

21 SECRETARY BASTIDA: The staff will record the
22 vote to approve Ms. Mitten's movement and Mr. Parson's
23 second and Mr. Hood voting in the affirmative.

24 CHAIRPERSON MITTEN: Thank you. Now, we also
25 have in front of us a notice of proposed rule-making in

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1 Zoning Commission Case Number 00-30TA, Part 1, and there
2 is a strikeout in Section 1706.7(b), which is the
3 modification that had been voted on previously and
4 subsequently rescinded. I would move approval of this
5 notice of proposed rule-making.

6 VICE CHAIRPERSON HOOD: Second.

7 CHAIRPERSON MITTEN: We have a motion and a
8 second to approve the notice of proposed rule-making as
9 modified for Zoning Commission Case Number 00-30TA, Part
10 1. All those in favor, please say aye.

11 COMMISSIONER PARSONS: Aye.

12 VICE CHAIRPERSON HOOD: Aye.

13 CHAIRPERSON MITTEN: Aye. Those opposed,
14 please say no. Mr. Bastida?

15 SECRETARY BASTIDA: The staff will record the
16 vote three to zero. Ms. Mitten's movement and Mr. Hood's
17 second and Mr. Parson voting in the affirmative.

18 CHAIRPERSON MITTEN: Thank you. Now we will
19 move to Part 2 of 00-30TA as it relates to the combined
20 lot development provisions, and this is what was causing
21 us the delay in coming out, and we appreciate the efforts
22 of everyone in this case. It's very complex, and we have
23 a report from the Office of Planning dated July 16th -
24 or I guess it's dated July 20th, actually, two days, it
25 has two days. Right.

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1 It was received in the Office of Zoning on
2 July 20th, and it was requested by the Commission that
3 the Office of Planning attempt to reconcile some
4 submissions that had been received - some detailed
5 submissions that had been received from Nate Gross and
6 Jacques Depuy, as well as to get feedback from the folks
7 who have been participating in this discussion all along,
8 and we also - one of the reasons why this was complicated
9 for us to get organized is because the point of departure
10 in the Office of Planning report is the original zoning
11 text, as opposed to the proposed rule-making that we had.

12 So, in an effort to sort of bridge all that
13 together, what we've discovered is it's very difficult
14 to reconcile all of this, and we also have some comments
15 from the Office of the Corporation Counsel related to
16 things that have been proposed by the Office of Planning
17 that may not be legally sufficient and so on.

18 So, what we would like to do is because there
19 are a couple of large issues that have been brought up
20 by the Office of Planning Submission, we'd like to deal
21 with the large issues and give direction, and then have
22 - and we understand that there was not a sufficient amount
23 of time allotted to get all this done, and we appreciated
24 the efforts on everyone's part, and by giving this
25 direction, we hope that the additional time between now

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1 and when we would take final action would be towards
2 fine-tuning the language, but we'd like to give you that
3 direction, and the two areas that we want to discuss are
4 whether or not there will be a provision that would allow
5 for release of the escrow money to the Housing Production
6 Trust Fund, which is a departure.

7 The Office of Planning had departed from
8 their original recommendations and from the proposed
9 rule-making in suggesting that the escrow money should
10 remain with the receiving lot in perpetuity, and then
11 the other issue is related to the notion of the formula
12 and minimum consideration, and I guess we'll take up the
13 first issue that I mentioned first, which is whether or
14 not it's appropriate to leave the escrow money with the
15 receiving lot in perpetuity.

16 My thought is that one of the reasons why
17 - one of the reasons why the combined lot development
18 provisions were written the way that they were written
19 originally is to provide leverage in order to get the
20 residential component built, so that it was tied - the
21 commercial components certificate of occupancy was tied
22 to completion of the residential component, and I think
23 the leverage that is afforded to the process by the idea
24 that the escrow money would be released at some time to
25 the Housing Production Trust Fund is significant, and

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1 I would urge us to maintain the provisions that were in
2 the proposed rule-making, related to allowing, I guess,
3 a total of eight years before the money could potentially
4 be released to the trust fund, but that it would, in fact,
5 if the development had not been 50 percent completed by
6 that time, it would be released.

7 COMMISSIONER PARSONS: Well I'm - I guess I'd
8 like to have a bit of a conversation with Ellen or
9 whoever's come up with this, because at first blush, it
10 made sense to me, and then it - to have a lot encumbered
11 in perpetuity with this account hanging out, because my
12 fear is that if it goes to the trust fund, somehow it'll
13 escape outside the DD, and the funds will be used
14 elsewhere, and I guess the problem I have with tonight
15 is these brand new ideas that have come forward, as opposed
16 to an editorial process, and I don't know how to engage
17 in the time we've got in why.

18 Why these new ideas and obviously, it's a
19 product of extensive negotiation that you've had or
20 something, but it certainly goes way beyond where I
21 thought we'd be tonight.

22 I was looking at Depuy and Gross and coming
23 up with some edits, and there's three big new ideas on
24 the table tonight, and did you know that when we talked
25 about this on the 16th. Have you not slept since then.

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1 (Laughter.)

2 I mean, what's going on here? It almost
3 seems like we're starting over with the need for new
4 hearings and so forth.

5 DEPUTY DIRECTOR MCCARTHY: Well, this is
6 actually not a new concept because it was in what the
7 Office of Planning had given as a - it was discussed in
8 more detail I think in the report that the Office of
9 Planning had given to the Commission before the Commission
10 adopted the proposed rule-making.

11 And the idea was it's a risk for any housing
12 developer to say - for any potential housing developer,
13 potential owner of a receiving site, to say okay, I am
14 going to add an additional housing requirement on my site
15 now, not knowing for sure what the market is going to
16 be like when I intend to bring this housing to market,
17 although we certainly hope to encourage anybody that's
18 doing a combined lot to look to find a receiving site,
19 a housing developer that is as close to ready to go as
20 possible, but you know, very frequently, the amount of
21 money to be transferred from the sending site to the
22 receiving site - I mean, sorry, the amount of square
23 footage to be transferred may not be enough to meet the
24 full - you know, in other words, if you're in Housing
25 Priority Area B, and you are entitled to 6.5 FAR

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1 Commercial, and you have a 3.5 FAR Housing Requirement.

2 Depending on the size of your site, and given
3 that we now have this density bonus so the housing
4 developer can be looking a potential for ten, even higher
5 FAR on the site, even if they had identical sites, the
6 3.5 FAR that would be transferred in the way of a housing
7 requirement onto that receiving site, may not be enough
8 for the housing developer to actually get started, and
9 he may have to do more than one combined lot transaction
10 in order to get as much receiving - as much sent housing
11 as he's looking to do in order to start the project.

12 So, given that there is a risk to the housing
13 developer, the receiving site, that when they accept that
14 additional FAR requirement now, on their site, they've
15 changed the zoning on their site, so they're now not only
16 required to do 3.5 FAR housing, they're now required to
17 do whatever full amount they've accepted from the office
18 developer, and I realize I just made a mathematical error
19 in the example I gave you before, but at any rate, the
20 risk is still the same.

21 So, our thought was since we want to
22 encourage housing developers to do these deals, to make
23 it even more onerous because the housing developer knows
24 that should he just be on the wrong side of a market wave,
25 and the housing market, the interest rates start going

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1 up or the housing market is going into a down time, he
2 only has eight years in which to consummate a project,
3 to do a project on that site, and then the money will
4 disappear, and based on our conversations with housing
5 developers and zoning attorneys in a couple different
6 roundtables since the proposed rule-making, and then
7 several meetings before the proposed rule-making, we felt
8 that this was adding one more unnecessary level of risk
9 to the prospective receiver, the housing developer to
10 being with.

11 And number two, there was a concern on the
12 part of the housing advocates that were that money to
13 go into the Housing Production Trust Fund, even if we
14 said it would be ear-marked for housing, we didn't have
15 a fail-safe mechanism to make sure - even though we said
16 it'd be ear-marked for housing downtown, there was no
17 fail-safe mechanism to make sure it was really going to
18 go to make housing happen downtown.

19 It could end up going to an entirely
20 different section of the city, or if the fund is not well
21 managed, it could end up going for administrative expenses
22 or other things not even produce any housing.

23 COMMISSIONER PARSONS: Well, how do you jump
24 from eight years to perpetuity? That's - there's no
25 incentive then. You just - I mean-

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1 DEPUTY DIRECTOR MCCARTHY: Well, see, we felt
2 much more strongly about the eight years before the
3 Commission adopted the minimum requirement. In most
4 instances, I think we felt confident that the market could
5 take care of it because if you have parties which are
6 at arm's length, and they're doing a market transaction,
7 nobody is going to agree to accept that housing
8 requirement and the escrow money that goes along with
9 it, unless they intend to do housing on their site.

10 Our concern had been those instances where
11 maybe there was a less than arm's length transaction,
12 in which case when we didn't have any minimum amount,
13 which was the case before the Commission adopted the
14 proposed rule-making, there was no minimum escrow, there
15 wasn't anything to make sure that that was a real deal,
16 but our feeling was once you had a minimum escrow, you
17 had that guarantee, you had that safety mechanism.

18 It's not - you know, it's not a hundred
19 percent, absolutely sure guarantee, but it certainly made
20 - was a substantial effort toward making sure that it
21 was a real deal, and that once we had that in effect,
22 we didn't need the eight-year requirement anymore.

23 We left the eight years in our text because
24 we felt - even though we took out the sanctions, we thought
25 it was one more thing where if the receiving lot knew

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1 if they didn't put up housing in eight years, they were
2 going to have to come back to the commission and explain
3 why they hadn't done housing on the site.

4 That was one more incentive for them to get
5 going, and when we talked to the residential developers,
6 who, of course, are looking to have that contribution
7 only go to other housing developers who are real, and
8 who are relatively ready to go, they liked the idea of
9 having the eight years in there as just one more thing
10 to help make sure that combined lot transactions didn't
11 go to housing developers that weren't serious, but they
12 - they, the housing developer, didn't want to have that
13 extra risk factor of the money potentially disappearing
14 in eight years. So-

15 COMMISSIONER PARSONS: What I meant was how
16 do you get past 12 years, 15 years, 20 years, 30 years
17 to perpetuity?

18 DEPUTY DIRECTOR MCCARTHY: Well, you're
19 picking an escrow amount, which is based on the one
20 combined lot transaction that's been done before without
21 the flexibility in these regulations.

22 The amount that we're talking about is - they
23 did a deal for around \$20 a square foot. We're talking
24 about in a similar housing priority area, something that's
25 about six or seven dollars a square foot, based on our

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1 chart.

2 So, our feeling was when you've got something
3 that's close to a third of what the market transaction,
4 the total market transaction is going to be tied up in
5 escrow, you've helped to make sure that this is a real
6 deal, and not just something that's - you know, you're
7 talking about - if you look at our chart, for a typical
8 transaction in a Housing Priority Area B, you're talking
9 about a half million dollars, basically, that's put into
10 an escrow account to make sure that this is a real
11 transaction, and that's sitting there.

12 The housing developer knows that money is
13 sitting there, and the office developer has got to cough
14 up that half million dollars. We thought that that was
15 sufficient to make sure that this was a real deal.

16 COMMISSIONER PARSONS: I guess I'm not making
17 my point. What if I proposed to you that we have five
18 years with three years extension by this Commission after
19 explanation, as opposed to perpetuity. I'm not proposed,
20 I'm trying to get that question-

21 DEPUTY DIRECTOR MCCARTHY: Right, well that's
22 what we had originally proposed, but at that point, there
23 was no minimum escrow amount.

24 Our feeling is the minimum escrow amount
25 helps make sure that it's a bona fide deal, but doesn't

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1 subject the housing developer who's accepting this extra
2 requirement on their site. You know, if you remember,
3 it's not like the PUD's, it's not like CR, where it was
4 sort of optional if you wanted to do that.

5 Whoever puts that extra housing requirement
6 on their site, it's a requirement. If they sell it, it's
7 a requirement. The combined lot covenant is recorded
8 with the land.

9 So, our feeling was that was sufficient
10 guarantee. The escrow amount helped to make sure the
11 sending site was legit. The requirement on the site
12 helped to make sure that the receiving site was legit.

13 CHAIRPERSON MITTENS: When you speak of the
14 sender and the receiver, you speak of them as though
15 they're always different people, and there's, you know,
16 like this residential developer, who's the receiver and
17 of course, they're not going to want to encumber their
18 site with this obligation and without feeling fairly
19 confident that this would go forward, and that they would
20 have access to escrow money, but let's - since you're
21 so pessimistic about the Housing Production Trust Fund,
22 let's be pessimistic about what the deal could look like,
23 which is that it's a developer who owns both ends of the
24 transaction and it means enough to them to be able to
25 buy out of their residential requirement by shoving it

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1 off in some lousy corner of Housing Priority Area A or
2 something like that, where it means enough to them that
3 they're willing to tie up that money, and if it's in
4 perpetuity, fine, they can sell it someone else.

5 They could, in effect, transfer the escrow
6 to someone else, and in the short term, they get to build
7 a commercial project and not be bogged down by a
8 residential requirement.

9 So how does - if we take that pessimistic
10 view, how does this idea of having the escrow remain with
11 the receiving site in perpetuity, how does that help us?

12 DEPUTY DIRECTOR MCCARTHY: Well, if you are
13 talking about an area - if you're talking about an area
14 in which the housing site would be an insignificant cost
15 to acquire simply to put a housing requirement -
16 additional housing requirement and permit the office
17 developer to go, you're talking about Housing Priority
18 Area A for one thing.

19 At the point in time in which commercial
20 development becomes attractive enough in Housing Priority
21 Area A for it to be worth contemplating doing that, you
22 are also - in some ways right now, in Housing Priority
23 A, the market is stronger for housing than it is for
24 commercial, except for possibly that band along Mass Ave,
25 although as we're finding, from the PUD's that we've

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1 looked at, even the band along Mass Ave, on both sides
2 north and south, people are looking at residential
3 development, or in the case of the Salvation Army site
4 residential and hotel together.

5 So, it's first of all, unlikely, given that
6 our housing priority areas aren't that big that you can
7 find a site which is so cheap that you can afford to just
8 basically throw it away, acquire it, put a housing
9 requirement on it and just forget about it, and know that
10 that site, you can't flip it to anybody for a commercial
11 value, because it's got now an additional housing
12 requirement over and above the housing - the 4.5 FAR that
13 it already had, because most likely it's C2C.

14 CHAIRPERSON MITTEN: Right, but you would be
15 effectively saying I'm willing to, in effect, re-zone
16 this receiving site to be all residential, in exchange
17 for being freed up - I mean, it's not that it's never
18 going to be developed, it's not that you're throwing it
19 away, it's that you don't need to be serious about
20 developing it, if your priority is getting freed up for
21 the commercial, and I'm suggesting that the additional
22 leverage that you maintain by providing for the loss of
23 escrow is - that makes people be serious and not just
24 willing to be land speculators or to take - I mean, let's
25 face it, some sites, whether it's in Housing Priority

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1 Area - even I'll go so far as to say C, B or A.

2 There are some sites that are just not ever
3 going to be developed with office buildings. They're
4 not appropriate, they're not big enough, they have
5 historic structures that provide some complication.

6 So, those sites are going to be residential
7 sites, and if you just let some - or I should say they're
8 never going to be commercial sites. They're never going
9 to be traditional commercial sites.

10 So, if you let somebody kind of shunt off
11 their residential requirement to this sort of orphan site,
12 and there are such sites, then I think you need something
13 more than just having some amount of money tied up. I
14 think you need for them to know that money is tied up,
15 and you'll lose it, because I thought the big push was
16 to get housing built sooner as opposed to later.

17 DEPUTY DIRECTOR MCCARTHY: You know, that's
18 definitely the case, and you know, were somebody really
19 intent on trying to get around the regulations, they could
20 do it that way, and the housing - we don't know for sure
21 when the housing could be developed, but it basically
22 requires somebody paying for acquiring a site in Housing
23 Priority Area A, all of which basically has values that
24 are increasing at this point in time, not only putting
25 up the money to buy the site in Housing Priority Area

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1 A, but then putting up for a 20,000 square foot site,
2 for example, a half million dollars and just having that
3 sit in escrow for however many years they sit on the
4 project and don't do the housing, and I guess we felt
5 the risk of that happening balanced against the risk of
6 the potential loss of that money after eight years, having
7 a chilling effect on a housing developer willing to do
8 a deal on a site was a risk worth accepting.

9 If we saw that what was happening was the
10 people weren't moving on housing, we could come back and
11 change the regulations if necessary. We could up the
12 amount of money that has to go in escrow. We could make
13 some adjustments after that fact, but we thought that
14 at this point, what we were trying to do was to provide
15 an alternative mechanism to make this more flexible and
16 to encourage housing to go forward.

17 We were at a point in time in which the market
18 is relatively strong for housing in Housing Priority A
19 and Housing Priority B. We've got the Council ready to,
20 at this point in time, with proposed tax incentives
21 definitely for Housing Priority A and possibly for Housing
22 Priority Area B, and that all of those things made the
23 possibility of somebody just leaving a site fallow, a
24 lot less than it would have been especially with the
25 minimum escrow contribution.

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1 CHAIRPERSON MITTEN: Well, I guess the thing
2 is that we don't want to keep tinkering with the ordinance,
3 so this is supposed - let's assume it's going to carry
4 us forward ten years, and what we've been told repeatedly
5 - mostly in the context of the discussion of these text
6 amendments is how tenuous the market is for residential,
7 and so, it could change at any time. You know, there's
8 this window of opportunity, you know, these are the things
9 that we've been told.

10 So, if that's true, then the likelihood is
11 that if we're thinking long term, and the commercial
12 market has shown a much - to be a much stronger overall
13 and it has more staying power downtown, let's put it that
14 way, then the likelihood that if the general real estate
15 market goes down, then all of a sudden the window of
16 opportunity for residential is closed, and so we're back
17 to a more traditional posture of commercial being the
18 preferential, sort of, development to pursue.

19 So, I mean, I hear what you're saying, but
20 I think if you take just a tiny bit longer view of things,
21 and if you incorporate what we have been led to believe,
22 is that I think there's every reason to expect that
23 somebody would seek to - or could seek to use this
24 provision really to just buy out of their housing
25 requirement with not a real serious thought to seeing

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1 that their housing got built in a timely manner.

2 I mean, we have leverage now. It was always
3 thought - it was thought originally when the downtown
4 development district overlay was put in place, that it
5 was the leverage of the commercial that would get the
6 residential built, not exclusively, that the residential
7 would be built when the market was right.

8 It wasn't - that's not what the intent was.

9 It was to use it as, you know, as a subsidy of sorts
10 if you want. So, I guess I'm reluctant to sacrifice that.

11 DEPUTY DIRECTOR MCCARTHY: The other part
12 of that that we were concerned with was the legal risk
13 that we do a deal in which the consideration - there are
14 two parties, and legally, there is a receiving party,
15 and that party, in exchange for the consideration of this
16 escrow payment, provides additional - puts additional
17 requirement on their site and agrees to accept this
18 additional housing requirement from the commercial from
19 the sending lot.

20 If that money disappeared in eight years,
21 one fear we had was it provides the potential for legal
22 standing for the owner of the housing lot to go back to
23 - if the Zoning Commission says no, then the courts and
24 say, wait a minute, I made a deal. Based on that deal,
25 I accepted this housing, and I asked for money, and you

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1 know, 25 percent of it or whatever percentage we suggest
2 was given, put in escrow for me to do that. That's now
3 gone, that's disappeared, and yet, I still have this
4 requirement, so you - I need to be released from my housing
5 requirement, because I've lost the escrow amount.

6 CHAIRPERSON MITTEN: Well, how - just out of
7 curiosity, how is it that the deal would be - you accept
8 the housing requirement and you know that this money could
9 go away after eight years. That's the deal, so how is
10 it that when one part of the deal comes to fruition, you
11 could go to court and say well, that wasn't the deal I
12 agreed to, so now release me from my obligation. I don't
13 see how that would be legally supportable.

14 DEPUTY DIRECTOR MCCARTHY: I don't know if
15 OCC wants to weigh in it or not. Our fear was that -
16 is that a no? But our fear was, although you can say
17 that was your deal, if you went back and said, look here
18 are all of these unforeseen circumstances, interest rates
19 went up to 23 percent, the city held up my permits, I
20 turned out to have environmental problems on my site,
21 all of these things were really beyond my control.

22 That's why I didn't go forward, and now I've
23 lost the only compensation I had for taking this on.
24 You know, we've - anyhow, that was one downside we thought
25 from the possibility of losing that.

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1 CHAIRPERSON MITTEN: Let's see if Mr.
2 Bergstein would like to comment. I mean, is that-

3 MR. BERNSTEIN: Well, I don't want to comment
4 on that quite off the cuff, except I think what you're
5 saying, Madame Chairman, is correct that if you enter
6 a deal voluntarily, this would be a voluntary transaction,
7 no one's holding a gun to the head of any party down through
8 this deal, and where in essence it's a triangular concept
9 where the sending lot has, in fact, gotten something,
10 which regardless of whether or not that escrow money is
11 gone or not, they get to keep.

12 So, there's two parts of this would both
13 benefit the district and benefit the sending lot, and
14 we're at the beginning of the deal.

15 All parties involved know the risks that
16 they're taking, and in essence, what was happening with
17 this particular rule is that the district ritz part is
18 giving up very important leverage, which is allowing the
19 sending lot to begin, notwithstanding the status of the
20 receiving lot.

21 When that whole transaction and regulatory
22 structure is taken together, I don't think the fact that
23 the escrow necessarily is gone makes the entire deal
24 forfeitable, and if it were in a court of law, then
25 arguably that would mean that the sending lot would have

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1 to then account for the residential uses, which the
2 receiving lot now wants to abrogate itself.

3 So, there would be all sorts of legal issues
4 involved if that type of concept were accepted, but I
5 think it's important - the main point you made that's
6 important that at the beginning of this transaction, it's
7 voluntary, it's not required, and it's a risk that's being
8 accepted by the receiving lot.

9 I think that it's not - it doesn't rise to
10 the level of a contract of adhesion, which I think is
11 the level that you'd have to show, before you'd be able
12 to negate the entire deal.

13 Plus, in five years, they do have the
14 opportunity to come in and talk about those extenuating
15 circumstances and get the three-year extension, so - and
16 they would have to show, I think, substantially changed
17 circumstances anyway to get that additional three-year,
18 which could be the things that you indicated, but one
19 would hope that any environmental issues would be known
20 and understood before you even embarked on this type of
21 transaction.

22 So, I think that there's a number of issues
23 involved, and I don't want to say that what you're
24 suggesting is completely incorrect. It's something we
25 could look into, but I think the fact that's a knowing

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1 - it's a voluntary transaction, volitional, and there's
2 no coerciveness about it, would make the deal be
3 maintained notwithstanding the fact that the escrow
4 account might be forfeited.

5 CHAIRPERSON MITTEN: Thank you.

6 DEPUTY DIRECTOR MCCARTHY: So, I mean, I think
7 basically the bottom line is a judgment call to make about
8 whether we feel that - whether the Commission feels that
9 the loss of the escrow money at the end of eight years
10 would jeopardize the possibility of this flexibility
11 being utilized or having the desire to effectively
12 encouraging more people to engage in these deals, and
13 it is definitely a judgment call, and we, you know, maybe
14 to a certain extent we could argue it's a tradeoff between
15 losing the money and if that risk is going to be
16 introduced, then maybe making sure that the escrow payment
17 is not so high as to discourage things on the other end
18 - I don't know.

19 CHAIRPERSON MITTEN: Any more questions for
20 Ms. McCarthy? Okay, where are we now, what's the
21 sentiment as it relates to releasing the funds? I'm
22 inclined to stick with what we had proposed.

23 COMMISSIONER PARSONS: I am, too, and it's
24 much like the PUD's of the 180's and how many we've had
25 to extend. That is, keeping this eight-year time frame,

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1 I think, keeps the Zoning Commission involved in the
2 process, and if we have to make changes to that process,
3 we can do that.

4 I don't mean to predict that, but it seems
5 to me that's the better course of action than essentially
6 leaving something in perpetuity to the market to resolve,
7 so although at first reading, I was convinced, I'm no
8 longer convinced. So, let's stick with what we
9 advertised with the five and three.

10 CHAIRPERSON MITTEN: Okay, before I go to Mr.
11 Hood and get his thoughts. One of the things that, you
12 know, that Alan just repeated and is in the planning report
13 about this idea of having a chilling effect on people
14 who might consider becoming a receiving site, I think
15 it's going to make sure that people who are serious don't
16 take on the responsibility.

17 I mean, I think it goes a long way to making
18 sure that we've got some people who intend to produce
19 housing in the short run. Mr. Hood, did you want to-

20 VICE CHAIRPERSON HOOD: I would just echo your
21 comments, Madame Chair. I really think that this
22 Commission, we have tweaked and done all we could do to
23 make sure we could accomplish the housing downtown, and
24 in some of the submittals I read, I know there was concerns
25 about us going through the trust fund with being a fairness

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1 issue, but I think that at some point in time, we need
2 to try to buckle down - and I'm going to tell you the
3 easy way out.

4 I would really like to see what this
5 Commission, years ago - I'm not sure how many years it
6 was, to accomplish housing in the DD, and I think that's
7 the goal, and whatever we have to do - even if we have
8 to come back and tweak what we've done, I'm in favor of
9 doing that.

10 The goal is to get housing downtown. I
11 understand one of the submittals I think I read was that
12 it would cause people to come back and ask for a variance
13 of the application to get rid of the housing requirement.

14 I'm hoping that that's not the route that's
15 going to take place, but I do understand the fairness
16 issue, but at some point in time, we have to just take
17 a bold stand. I think this trust fund would be - right
18 now, I think - I'm not predicting the future, I think
19 the trust fund would be the way to go.

20 CHAIRPERSON MITTEN: All right. I don't know
21 that we need - oh, go ahead.

22 COMMISSIONER PARSONS: I want to make sure
23 that the provision and what we advertised before said
24 that those funds in escrow in the trust fund were going
25 to remain or be only - be exclusive to the DD areas.

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1 CHAIRPERSON MITTEN: Okay, that's on Page
2 - actually, we had gone farther than that, and we can
3 modify that if we think it's appropriate. On Page 4 of
4 our proposed rule-making, Part 2, says that among other
5 things, all escrow monies and any accrued interest shall
6 be released to the District of Columbia Housing Production
7 Trust Fund and designated for the financing of housing
8 in the DD overlay district in the same housing priority
9 area.

10 COMMISSIONER PARSONS: Thank you.

11 VICE CHAIRPERSON HOOD: Madame Chair, I
12 think, at one time, we asked - I know the question was
13 asked if the trust fund up and running, do we know how
14 much money was in the trust fund as we speak?

15 CHAIRPERSON MITTEN: Well, in a previous
16 submission of the Office of Planning, they made reference
17 to the fact that \$25 million from the acquisition of the
18 DOES site has gone into the fund. Now, I don't know how
19 much more money is in there.

20 VICE CHAIRPERSON HOOD: Okay.

21 CHAIRPERSON MITTEN: Ms. McCarthy?

22 DEPUTY DIRECTOR MCCARTHY: That's basically
23 it.

24 CHAIRPERSON MITTEN: So, Mr. Parsons, are you
25 suggesting that we stick with the same housing priority

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1 area?

2 COMMISSIONER PARSONS: Yes, please.

3 CHAIRPERSON MITTEN: Okay. Okay, that's
4 fine. That's in there.

5 Now, let's move to the discussion of the
6 formula and maybe when we start, if I could ask the Office
7 of Planning - I couldn't follow your chart that you had
8 attached at the back of your July 20th report, and I'm
9 usually pretty good with numbers.

10 So, maybe you could - what I had trouble with
11 was the column in the center that says Zoning Commission
12 0.5 required FAR of housing. I don't follow where you
13 got those numbers, at least based on my understanding
14 of what we had decided.

15 DEPUTY DIRECTOR MCCARTHY: It was - we did
16 find it appeared to us when we tried to do the calculations
17 that the advertised text was a little more ambiguous than
18 might have seemed to be the case. So, let me ask Art
19 Rodgers to explain what assumptions that he made when
20 he did these calculations.

21 CHAIRPERSON MITTEN: Okay.

22 MR. RODGERS: Yes, on Page 3 of the proposed
23 rule-making, it says requirements of this chapter shall
24 be not - in Item 1 at the top of the page, let's see,
25 requirements of this chapter shall not be less than an

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1 amount equal to 50 percent of the assessed value as shown
2 on the records of the Office of Tax and Revenue at the
3 beginning of the tax year of the non-residential gross
4 floor area, achieved by the sending lot, as a result of
5 the transfer.

6 And so the table, the table takes the
7 required FAR of housing over the by-right FAR of the site
8 and takes 50 percent of that.

9 CHAIRPERSON MITTEN: That's not we meant -
10 or that's not what I meant. Really, what - we just
11 intended to substitute 50 percent for 25 percent in the
12 formula, I mean, to put it in its simplest terms. That's
13 what we had intended.

14 MR. RODGERS: So, essentially, in the formula
15 on the left-hand column, where it's housing formula, you
16 have LV-

17 CHAIRPERSON MITTEN: Right.

18 MR. RODGERS: -and then 25 percent.

19 CHAIRPERSON MITTEN: Right.

20 MR. RODGERS: So, you would use that same
21 formula-

22 CHAIRPERSON MITTEN: And just multiply by 50
23 percent.

24 MR. RODGERS: And them multiply by 50 percent.

25 CHAIRPERSON MITTEN: Right.

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1 MR. RODGERS: Okay.

2 CHAIRPERSON MITTEN: Now, the notion-

3 MR. RODGERS: The language that came out in
4 the text, I think, was a little bit unclear and so I had
5 to put in a slightly different way.

6 CHAIRPERSON MITTEN: Okay. Okay.

7 MR. RODGERS: That's all.

8 CHAIRPERSON MITTEN: Okay, after we decide
9 what we mean, then we'll make it more clear. And
10 actually, the way that you have - the formula that you
11 have proposed satisfies me at least.

12 My concern was if we didn't - if we did not
13 isolate the value of the commercial density and we took
14 an average for the lot that the average would be reduced
15 - because it would be a weighted average between
16 commercial and residential density, but your - the formula
17 that you propose really, basically attributes no value
18 to the residential density, so I'm happy with that. That
19 should work.

20 DEPUTY DIRECTOR MCCARTHY: Which was
21 basically how it was originally proposed in the - or how
22 it is in the text for the linkage contribution.

23 CHAIRPERSON MITTEN: Right.

24 DEPUTY DIRECTOR MCCARTHY: Yes.

25 CHAIRPERSON MITTEN: So, then the question

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1 - okay, now are there any other questions regarding the
2 formula without discussing - so we can discuss what we
3 want the formula to look like. Okay, I think we're
4 through with the questions.

5 So then it becomes the question of the amount
6 of the money that would go into escrow as a function of
7 the formula, and I guess what we're down to is either
8 what we had proposed - well, what we had voted on for
9 the proposed rule-making, which is 50 percent of the -
10 let me just back up a second, which is the numbers then
11 in the Office of Planning's chart would be the amount
12 of the escrow under typical transfer housing formula,
13 second to the last column, that remains accurate, and
14 our figures would just be double those. So, the disparity
15 is not nearly as great as was thought.

16 MR. RODGERS: 440 instead of 844?

17 CHAIRPERSON MITTEN: Correct, right, and
18 likewise, on the third column from the left, if you doubled
19 the per square foot figure, that's down there under the
20 25 percent column, you would have the per square foot
21 amount for a 50 percent requirement, and maybe I'll just
22 seize this opportunity to ask the Office of Planning,
23 now that you understand what we were proposing, do you
24 have any different recommendation?

25 DEPUTY DIRECTOR MCCARTHY: Well, what we were

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1 attempting to provide, per your requirements of, you know,
2 asking us to sit down and resolve the various submissions,
3 you know, we convened a two different roundtables of a
4 variety of commercial developers and housing developers
5 and the consensus of that group was that 50 percent was
6 too high, that it went close to what the total market
7 amount of the transaction would be, and therefore, would
8 also interfere with the effectiveness of this in achieving
9 our desired end of encouraging people to use combined
10 lot because of people's uncertainty about market rates
11 and tying up as a "minimum contribution" something which
12 might be closer to the market amount.

13 CHAIRPERSON MITTEN: I didn't understand
14 something that you just said which is that the 50 percent
15 would approach the total amount of what the transaction
16 would be. What do you make in reference to there - what
17 transaction?

18 DEPUTY DIRECTOR MCCARTHY: The sole combined
19 lot transaction which is taking place which was at around
20 \$20 a square foot-

21 CHAIRPERSON MITTEN: Right.

22 DEPUTY DIRECTOR MCCARTHY: That was the total
23 amount of the transaction per square foot, not just an
24 escrow amount, but the total amount of the transaction.
25 So, for example, yes, the average in Housing Priority

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1 Area B at this point was about seven dollars a square
2 foot under the 25 percent or \$14 a square foot under the
3 Commission's formula, and the sense was as we began to
4 approach the market rate for the full transaction, that
5 was more than what we needed to do - if what we were trying
6 to do was encourage something less than full market value
7 to be put into the escrow just as a guarantee that we
8 have a bona fide transaction and not something less than
9 arm's length or not something that's just a shell game
10 that we were going beyond that into something that might
11 then discourage office developers because it's - it could
12 be more than what they would end up paying as part of
13 negotiations with a housing developer to accept a site.

14 CHAIRPERSON MITTEN: Okay, let me just ask
15 you a question, and let me start by asking you a question,
16 which is the only previous combined lot development
17 transaction had to be for a residential site that was
18 ready to go.

19 DEPUTY DIRECTOR MCCARTHY: Right.

20 CHAIRPERSON MITTEN: So, that's really not
21 the circumstance that we're anticipating, so the amount
22 of money that somebody would be willing to accept and
23 we don't know anything about the economics of that in
24 terms of I don't know what site you're talking about,
25 so I don't know how well located it is, and so on, but

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1 somebody would be more willing to accept the provision
2 of accommodating someone else's residential requirement
3 if they were ready to go, as opposed to not being ready
4 to go.

5 So, in terms of using that as a benchmark,
6 I would say it would be appropriate to exceed that
7 benchmark, if that is, in fact, an appropriate benchmark.

8 DEPUTY DIRECTOR MCCARTHY: Well, that was
9 part of why I was - well, I guess two things. One, the
10 developers that were part of the roundtable, both the
11 housing and the office developers felt that the covenant
12 requirement of accepting housing contribution - or
13 accepting housing requirement on one site was really in
14 their mind sufficient guarantee that they were real and
15 the housing would be done, and that there didn't need
16 to be an additional amount of money put into escrow, but
17 to the extent that there was money put into escrow, they
18 felt 25 percent was the sufficient amount and that's where
19 I was saying to a certain extent it's a tradeoff then.

20 If you - if the Commission annexed the
21 eight-year time limit, which you've just done, then you
22 are putting additional incentive to making sure that any
23 housing lot is one that's ready to go, so it makes it
24 possible to aim for a more flexible transaction in terms
25 of not - therefore, not discouraging office developers

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1 from engaging in this if they're ready to go with their
2 office development.

3 CHAIRPERSON MITTEN: Just in terms of going
4 back - I know your original proposal was 25 percent, and
5 I have a vivid recollection of how this occurred, because
6 I was the one who encouraged the Zoning Commission to
7 go to 50 percent, and I remember that at the time, I had
8 asked that if you were going - if you were going through
9 the process of you know, going from a proposed rule-making
10 to a final rule-making, if you were going to suggest that
11 it should be less than that, that we should see something,
12 and this doesn't do it for me.

13 This is just numbers on a piece of paper.

14 This doesn't compel me to - it's just, of course, 50
15 percent is twice what 25 percent would be, but that doesn't
16 mean - that doesn't make sense. Somebody's got to - at
17 least for this Commissioner, someone has to prove that
18 to me, and it hasn't been proven.

19 So, I mean, I'm disinclined to go with 25
20 percent, because I think 50 percent accomplishes what
21 we want to accomplish which is it creates the kind of
22 leverage that we want to create. It puts enough money
23 in the Housing Production Trust Fund that if it ends up
24 - if the escrow money ends up in the Housing Production
25 Trust Fund, that it's not - that it's something that is

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1 a meaningful amount of money.

2 It's not going to get the project built, but
3 that it's a significant amount of money, and I'm open
4 to the fact that people consider that too high, but don't
5 just come and say it's too high, prove that it's too high.

6 DEPUTY DIRECTOR MCCARTHY: Well, we were
7 attempting to do that to the best that we could, partly
8 by looking to find out what had been the amount of
9 consideration for the only deal that's actually been done,
10 and finding out that was around \$20 a square foot then
11 gave us some basis to look at these numbers.

12 If you were to look at Housing Priority Area
13 B where that transaction took place, and if you were to
14 adopt the Commission's formula, and that were to be \$14
15 a square foot, basically or two times the, you know, \$6.92
16 rounded up. Then, the other point that was made by the
17 housing developer that actually was the recipient of that
18 combined lot transaction was his deal included some of
19 that money to be received up front before he even started
20 construction, some of his money to be received part of
21 the way through, some of his money to be received at the
22 end.

23 If the Commission were to have a formula of
24 \$14 a square foot out of \$20, then it means virtually
25 all of the money in the transaction is tied up until the

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1 50 percent completion stage, leaving only six dollars,
2 some of which presumably the office developer wants to,
3 in structuring the deal with the housing developer, leave
4 to the very end, maybe, maybe not, I guess since they
5 can be totally released now from their requirements.

6 All right, I guess then the Commission needs
7 to make an assessment in that instance, is the six dollars
8 that could possibly be received before or at some other
9 point in the transaction, is that enough to give the
10 developer of the housing sufficient flexibility and
11 sufficient income to make a go to make it worthwhile to
12 accept the additional housing development.

13 CHAIRPERSON MITTEN: Well, and I mean, just
14 in terms of using this one piece of information, this
15 benchmark of approximately \$20, you know, we're working
16 off of the average number. Well, how do we know that
17 the \$20 wasn't dictated by the maximum value that you
18 see in Housing Priority Area B, and that benchmarking
19 - I mean, we just don't know, and so I guess I would be
20 more persuaded - I'm not persuaded off of 50, and I don't
21 know about the other commissioners, but I'm not saying
22 I'm not open to being persuaded, but you can't just come
23 and say that it should be less because that's what they
24 would prefer. Of course, they would prefer less.

25 So, you know, give me something more. Maybe

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1 you don't have it right now, but - and maybe you'd like
2 to hear from the other commissioners or I'd like to hear
3 from the other commissioners.

4 VICE CHAIRPERSON HOOD: I believe from what
5 I'm understanding, the task was recommended 25 percent,
6 that was a task force of the quote unquote professionals
7 and then I think, Madam Chair you had recommended the
8 50 percent.

9 Maybe someone who is very vague on this whole
10 issue to this point, I would use the common sense approach
11 and find a happy medium.

12 (Laughter.)

13 COMMISSIONER PARSONS: 33?

14 VICE CHAIRPERSON HOLT: Actually, I did the
15 math Mr. Parsons, and I was thinking it was more like
16 37.

17 (Laughter.)

18 CHAIRPERSON MITTEN: Well, one thing that we
19 could do is we could - we clearly have to take this up
20 again. We can't - we cannot have a final action tonight,
21 because there's too much hanging out there, and what we
22 can do, though, is we've given you some guidance about
23 our preferences related to releasing the escrow money,
24 and it will be a relatively simple matter regarding the
25 formula of either having 25 percent or 50 percent. Okay,

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1 we're not going to have a lot of text changes related
2 to that.

3 So, what I would suggest that we do is that
4 we send you all off again and look forward to getting
5 a revision related to the proposed rule-making with the
6 guidance that we've given you and to the extent that you
7 can provide something persuasive about the formula, we'd
8 open to that. Does that sound fair?

9 COMMISSION PARSONS: Good.

10 DEPUTY DIRECTOR MCCARTHY: That sounds fine.

11 CHAIRPERSON MITTEN: Okay. So, I think then
12 we're done as far as we can go this evening on Part 2.

13 Anybody have any different thoughts about that before
14 I adjourn?

15 DEPUTY DIRECTOR MCCARTHY: Does the
16 Commission want us to - there were a number of technical
17 issues that came up about - when people sat down to
18 actually think about what the transaction would look like
19 and the covenant and all of that, which was the bulk of
20 a lot of the corrections and changes that we made. Are
21 there any of those that you had questions about?

22 CHAIRPERSON MITTEN: I'm glad you brought me
23 back to me that, because there was one other thing that
24 I wanted to raise, although it doesn't speak directly
25 to your question.

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1 The 1708.3 which is new language that we
2 hadn't seen before, which is on Page 5 of your proposed
3 sample text. I'd like to put that to the other
4 commissioners to see if - that would require another
5 hearing, because that was not advertised language, and-

6 DEPUTY DIRECTOR MCCARTHY: Right, and this
7 is drawn - we have a situation now, the Avalon Bay project,
8 where because they decided to go ahead and build their
9 housing, they weren't able to find anybody to do combined
10 lot transaction with them at the time, but because they
11 wanted to be sure that building it would not disqualify
12 them from doing a combined lot transaction later, they
13 discovered - it was really uncharted territory.

14 They ended up having to have meetings with
15 the Office of Planning, with the Zoning Administrator,
16 doing calculations, running it by us, you know, getting
17 sort of the best informal assurances we could that yes,
18 it looked like they calculated correctly, it looked like
19 that was they would be entitled to, and that it seemed
20 like an unseemly way to go about it, and especially since
21 we were trying to encourage people to do housing.

22 The purpose of this was just to put something
23 down in writing that made it clear to people how you
24 qualify to be considered for combined lot, even if you
25 don't have a partner at the point in time in which you

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1 want to go forward with the housing. So, that's basically
2 the reason for why it came to be.

3 CHAIRPERSON MITTEN: Well, I mean, there's
4 - what it does is it raises a lot of issues because of
5 other actions that we've taken, specifically about now
6 that we have - we've lifted the FAR restrictions and the
7 DD, then all of a sudden, the opportunity that someone
8 would have to basically bank their density is
9 counterproductive to lifting the FAR restrictions,
10 because the idea is that you're going to get more housing,
11 and if you allow - and this may not relate directly to
12 Avalon Bay, but it definitely would be an outgrowth of
13 what you've proposed here.

14 Then people would be able to accommodate
15 someone else's housing requirement through the additional
16 density that they could add because the FAR restrictions
17 have been lifted. Art's shaking his head, but tell me
18 how this-

19 DEPUTY DIRECTOR MCCARTHY: No, because
20 specifically put language into the text that you adopted
21 that limited the amount of combined lot that could be
22 used for transactions to only that which they were
23 entitled to as a matter of right, because we specifically
24 wanted to be sure that the bonus density did not result
25 in less housing being constructed elsewhere.

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1 CHAIRPERSON MITTEN: Okay, good answer.

2 COMMISSIONER PARSONS: How about your issue
3 of this requiring that further hearing?

4 CHAIRPERSON MITTEN: Right, I think that
5 still exists. I think there's still-

6 COMMISSIONER PARSONS: Does everybody agree
7 with that? Ellen, would you agree with that - not that
8 you're part of this commission to help us settle this
9 down, I don't mean that.

10 (Laughter.)

11 But when you put this on a piece of paper
12 and send it to us, did you think we could deal with this
13 without a hearing?

14 DEPUTY DIRECTOR MCCARTHY: Well, actually,
15 that's more of a legal question. We had Marie in the
16 second meeting with the development community as we were
17 trying to hammer out some of these because we knew there
18 were a lot of legal issues. I don't think we really had-

19 COMMISSIONER PARSONS: All right, does it
20 come to a point in time where, you know, we're trying
21 to fix everybody's problem, this is becoming, well, this
22 takes care of square 362, now let's go over here and help
23 this guy, and every week that goes by, you're probably
24 got another set of six amendments to put that will cover
25 that circumstance, and at the end of the line, we'll be

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1 accused of delaying this to the point that the window
2 closed, and nobody can build it out.

3 CHAIRPERSON MITTEN: That's right, and, in
4 fact, we had a couple of people come to us and say, oh,
5 oh, no, but wait a minute, there's another circumstance
6 that you didn't include, and we just said, no we've got
7 to go forward, we don't want to make text just for one
8 square or another square.

9 So, I guess my recommendation would be to
10 go with adopting those portions that are close to the
11 advertised text that OCC feels have been sufficiently
12 noticed, and if we need to have a supplemental
13 advertisement or supplemental notice for some additional
14 text, that's fine, but I would certainly agree.

15 We're trying to figure out - or we're trying
16 to as much as possible not delay this and to get this
17 adopted as soon as possible.

18 CHAIRPERSON MITTEN: If - and I think we would
19 - and Mr. Bergstein, feel free to weigh in on this, that
20 we would need another hearing about what's proposed as
21 1708.3.

22 MR. BERGSTEIN: Yes.

23 CHAIRPERSON MITTEN: Okay, so then the
24 question is are you significantly desirous of
25 accommodating this particular problem that you would like

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1 us to treat this as - I guess what I'm saying is we could
2 take hearing action tonight and set that down, if you
3 wanted to accommodate that situation enough.

4 DEPUTY DIRECTOR MCCARTHY: Well, let me ask
5 Mr. Bergstein, you think we actually need a new hearing
6 on this, Alan, in that it's really just trying to codify
7 something that isn't prohibited by the existing regs,
8 but doesn't have any formula or any specific sanction
9 or specific approval set out in the regulations.

10 It's not more restrictive than anything we
11 advertised up until this point, so do we need a new hearing
12 for it or is just that we need to notice it in order to
13 meet Administrative Procedures Act requirements?

14 MR. BERGSTEIN: It has been my inclination,
15 say with this that you need an advertisement because this
16 was advertised as a rule that dealt with a specific
17 circumstance, which is you had a rule that said that a
18 sending lot can't go forward with its non-residential
19 use until a receiving lots gets its C of O.

20 That is what was before the house as it were.

21 That's what was advertised, and the rest of these changes
22 could be seen as embellishments to that in terms of the
23 covenant and tweaking the covenant, but this, I think,
24 goes beyond saying what I think is true, that an existing
25 residential project is eligible for combined lot, but

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1 it actually would allow for a vesting of those rights,
2 not as part of an actual linkage project, but before that,
3 and set out, I think a process that is not really
4 contemplated within what was advertised and for which,
5 I think, persons have had a fair opportunity to know was
6 advertised, and I think therefore, I'm concerned about
7 the charter issue, which requires you to advertise a
8 summary of the zoning changes, and I don't think this
9 can fairly be seen as part of the zoning change that was
10 originally advertised.

11 So, that's why I think it needs a set down.

12 It's not an issue, I think, of just the APA issue of
13 there's been a change in the proposal that requires
14 another proposal, but I think it is a separate issue.
15 Maybe I'm thinking too narrowly, but it seems to me that
16 it really goes beyond what was advertised.

17 COMMISSIONER PARSONS: Madame Chairman, I
18 move we set down the proposed Section 1708.3 for a hearing.

19 VICE CHAIRPERSON HOOD: Second.

20 CHAIRPERSON MITTEN: We have a motion and a
21 second to set down the proposed Section 1708.3 for a public
22 hearing. All those in favor, please say aye.

23 COMMISSIONER PARSONS: Aye.

24 VICE CHAIRPERSON HOOD: Aye.

25 CHAIRPERSON MITTEN: Aye. Those opposed,

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1 please say no. Mr. Bastida, would you record that vote.

2 SECRETARY BASTIDA: Yes, Madame Chairman.
3 The staff will record the three to zero. Mr. Parsons
4 moved, and Mr. Hood seconded and voting in the
5 affirmative.

6 CHAIRPERSON MITTEN: Thank you.

7 SECRETARY BASTIDA: Madame Chairman, do you
8 want to set a time frame for the Office of Planning to
9 provide that report?

10 CHAIRPERSON MITTEN: Well, I mean, I think
11 you can work with them and we can - the quicker we can
12 get it accomplished, the better and whatever schedule
13 works for with our schedule that you would schedule the
14 hearing-

15 SECRETARY BASTIDA: No, I'm not talking about
16 the hearing. I'm talking about the further-

17 CHAIRPERSON MITTEN: Oh, I'm sorry. I would
18 say if we could get that - is it possible to get that
19 two weeks before - or September maybe?

20 SECRETARY BASTIDA: That would be on the 7th
21 of September.

22 CHAIRPERSON MITTEN: Can you accommodate that
23 schedule, Ms. McCarthy?

24 DEPUTY DIRECTOR MCCARTHY: Yes, we could.

25 CHAIRPERSON MITTEN: Okay, great.

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SECRETARY BASTIDA: Thank you.

CHAIRPERSON MITTEN: Thank you. I now
declare this Special Public Meeting adjourned.

(Whereupon, the foregoing Special
Public Meeting was adjourned at
7:12 p.m.)

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