

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

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REGULAR MEETING
1124 MEETING SESSION (16th OF 2001)

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MONDAY
DECEMBER 10, 2001

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The Regular Meeting of the District of Columbia
Zoning Commission convened at 1:30 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
PETER G. MAY	Commissioner
	(Architect of the Capital)
JOHN G. PARSONS	Commissioner

COMMISSION STAFF PRESENT:

Alberto P. Bastida, Secretary, ZC
Sharon Sanchez, Zoning Specialist

OTHER AGENCY STAFF PRESENT:

Andrew Altman, Director, Office of Planning
Steven Cochran, Office of Planning
Ellen McCarthy, Deputy Director,
Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Alan Bergstein, Esq.

I-N-D-E-X

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PRELIMINARY MATTERS (NONE)

Presentation by Ellen McCarthy 4
Office of Planning

1:30 p.m.

1
2 CHAIRPERSON MITTEN: Good afternoon ladies
3 and gentlemen. This the regular monthly meeting of the Zoning
4 Commission of the District of Columbia for Monday, December 10,
5 2001. My name is Carol Mitten and joining me this afternoon are
6 Vice-Chairman Anthony Hood and Commissioners Peter May and John
7 Parsons.

8 I see from our agenda, Mr. Bastida, we have no
9 Preliminary Matters?

10 MR. BASTIDA: That's correct Madam Chair. We have
11 not received the transcript of the meeting on the 19th and
12 accordingly, I needed to check several items before we submit
13 them to you.

14 CHAIRPERSON MITTEN: Thank you. We will move to
15 the status report from the Office of Planning.

16 MS. MCCARTHY: Thank you, Madam Chair. The Office
17 of Planning has no cases to propose for step down in December.
18 We do have cases pending. The 200 K Street PUD extension
19 request, we noticed that there were differences in the plans
20 that had been submitted for the PUD extension from what had
21 originally approved, so we've notified the applicant that the
22 either need to ask for modification or simply extend the PUD
23 based on the existing drawings and so they've indicated they
24 will consider that and determine which route they want to
25 choose. So that's why we're not coming back with a report on

1 that at this meeting.

2 I won't go down all the rest of these, but as
3 we've indicated the commission last time decided lump
4 consideration of Florida Rock, Capital Point PUD and the final
5 approval of Buzzard Point rezoning for the overlay for February,
6 so that is the time table we're operating on.

7 Gateway Square, Square 3584 had asked for a text
8 amendment and a map amendment and we've been negotiating with
9 them about the possibility of separating those two and some
10 additional studies that were supposed to be done with regard to
11 transportation capacity in that area.

12 St. Elizabeth's we've been meeting with the
13 Office of the Chief Technology Officer, Otto and it looks now
14 like they will be submitting their application shortly and
15 hopefully we'll be considering it for set down in January,
16 depending on when we receive that.

17 January is also the expectation for the antenna
18 tower regulations. I think those are the things that are most
19 short term. So, I'd be happy to answer any questions the
20 commission has with regard to the status report.

21 CHAIRPERSON MITTEN: Thank you. Any questions
22 from the commission? One thing that I'd like to add to your
23 list. I know we talked about it a bit at our last meeting.
24 We'll probably talk about it a bit more, but I don't want to
25 lose track of it because I think it will be a service to

1 everyone, is some clarifying language as it related to the
2 housing linkage.

3 MS. McCARTHY: Yes, I was going to mention that
4 later in conjunction with 1700 K, but that does make sense to
5 put it on here separately which is what we were proposing to do
6 to consider that whole issue separately.

7 CHAIRPERSON MITTEN: All right. Since we don't
8 have any cases proposed for set down, we'll move to proposed
9 action. Zoning Commission Case No. 1-07C, the PUD and the
10 rights application for 1700 to 1730 K Street. Mr. Bastida.

11 MR. BASTIDA: Madam Chairman, the staff is being
12 made aware that there has been some development regarding the
13 linkage proposal in which the Office of Planning and the
14 applicant have worked together. I would suggest that perhaps
15 you would like to hear a brief discussion of that matter. In
16 order to do so, you will, in my opinion, need to open the record
17 to accept that discussion and any potential filing that would
18 be associated with it.

19 CHAIRPERSON MITTEN: Thank you. Let me just get
20 some clarification from the Office of Planning. This is an
21 agreement that you have reached with the applicant, so they're
22 in accord with whatever we would be accepting into the record at
23 this point?

24 MR. ALTMAN: Yes.

25 CHAIRPERSON MITTEN: Any objection to reopening

1 the record to hear this latest development?

2 VICE-CHAIRPERSON HOOD: No objection.

3 CHAIRPERSON MITTEN: Please proceed.

4 MS. MCCARTHY: Mr. Cochran is passing out copies
5 of our report, but let me just summarize it, which is basically
6 the applicant ? all issues with regard to any concerns the
7 Office of Planning had, had been resolved with the applicant and
8 the sole remaining issue was the issue of the linkage payment
9 and the amount of that linkage payment.

10 In talking to the applicant last week and today,
11 the applicant had expressed great concern about the fact that
12 inasmuch as those buildings currently have tenants in them, they
13 need a decision as soon as possible because before they can
14 begin demolition and construction of the new buildings, they
15 have to give notice and move those tenants out.

16 So they had indicated that they would like to see
17 the issue resolved quickly. On the other hand though, when the
18 Office of Planning took its draft proposal with regard to a
19 policy, a broader policy on the issue of linkage payments, and
20 ran it by the folks at the Office of the Deputy Mayor for
21 Planning and Economic Development, they indicated that in their
22 opinion, that was a much bigger policy issue and one that they
23 would like to consider in its broader context outside of simply
24 this particular case, which the commission had also indicated
25 they would like a broader look at the linkage payment issue.

1 So in order to try to meet those two objectives
2 the Office of Planning was proposing, the applicant indicated in
3 the applicant submission back to the commission, I think it was
4 provided November 22nd, the applicant had indicated that
5 although they didn't agree with the position that the Department
6 of Housing and Community Development had taken, they were
7 willing to provide the full \$520,000 that the Department of
8 Housing and Community Development had estimated that the linkage
9 payment should be.

10 They were willing to pay that amount for purposes
11 of moving the project along, so our recommendation is that we
12 accept that offer, that we approve the project with that level
13 of payment as part of the ? as the applicant?s obligations under
14 the linkage regulations and that then the Office of Planning
15 will coordinate with the Office of the Deputy Mayor for Planning
16 and Economic Development and bring back to the commission a
17 broader look at the linkage issue for purposes of establishing a
18 more refined policy on what the amount of contribution should be
19 in the future. I think we all agree that the regulations are
20 somewhat vague on the subject.

21 CHAIRPERSON MITTEN: Yes. Actually, maybe the best
22 way to proceed, just to digress for a moment, is to have ?
23 instead of going directly to legislation and a proposed text
24 amendment, that we have some kind of roundtable discussion, and
25 perhaps we can even ? I don't know if we could do this in

1 conjunction with the City Council since they have linkage
2 provisions as well. I think we could all benefit from the
3 discussion as well as having a consistent policy way to approach
4 it.

5 Now to the more specific case at hand. I didn't
6 know if you had any thoughts to share with us, because the
7 applicant had raised ? although they indicated their willingness
8 to make the \$520,000 payment to move the case along, there was
9 some lack of clarity over how that money would be applied, who
10 would get it since the folks at Trenton Park didn't seem to need
11 the additional money. So do you have any guidance about that?

12 MS. McCARTHY: Well, the Department of Housing and
13 Community Development did offer to cut back its payment to the
14 project. But that's why our letter recommended simply that that
15 be as the linkage amount and didn't necessarily specify that
16 that be provided. Actually in one place we did recommend, we
17 did say \$520,000 be provided for the rehabilitation of Trenton
18 Park apartment project. I think we had taken out the reference
19 to Jubilee.

20 But I guess my recommendation would be the
21 commission set that as the level payment for linkage and ask the
22 applicant if that can't suitably used in the Trenton Park
23 project to come back and indicate to the commission what other
24 projects that would be going to.

25 MR. ALTMAN: Well, I'll tell you what we'll do is

1 we'll work with the Department of Housing and Community
2 Development on it because they're the ones that sort of set the
3 pro forma, went through all the numbers and we can then with
4 this amount set, we can then go back to them and see how that
5 works out.

6 CHAIRPERSON MITTEN: Okay. Thank you. Well since
7 we're on the subject of linkage, what are the thoughts from the
8 commission about the proposed payment and where we stand with
9 the recommendation from the Office of Planning?

10 COMMISSIONER PARSONS: Delighted.

11 CHAIRPERSON MITTEN: Okay, glad to hear it.
12 Anybody else?

13 VICE-CHAIRPERSON HOOD: I'm fine with the
14 recommendation.

15 CHAIRPERSON MITTEN: All right, and then we will
16 just be open to any modifications that would be necessary after
17 further consultation with Housing and Community Development.
18 Let's just take up the issues that we had raised at our last
19 meeting in the order that they're presented in the applicant's
20 response.

21 So I'm just going to move through them quickly.
22 On Page 8 we had asked for some additional information to be put
23 in the record as to the necessity for exceeding the PUD
24 guidelines. I think we have that now. It's included on Pages 8
25 and 9 and relates to the set back along K Street. That was my

1 concern. Are there any questions about that? Any comments?
2 Okay.

3 The issue, this would be on Page 9 of the
4 applicant's November 27th submission, the issue of court niche
5 versus the open court. That issue I went to the ? given that
6 we don't have a particular satisfactory discussion of what a
7 court niche is versus a court, I looked up the definition of
8 niche in the Webster's Unabridged Dictionary and I think it
9 really is consistent. Niche is consistent with, as we were
10 discussing it at our last meeting, which is it's an indentation.

11 This is different than that.

12 I don't know if it's ? I don't know how to
13 approach it if the applicant feels that they can't redesign the
14 building, then I would say we'd have to treat that as a variance
15 and I don't know ? their request as a variance and I don't know
16 if that would have to be taken up as a separate matter. Mr.
17 Bergstein can you help me with that? They have not specifically
18 asked for a variance because their interpretation was that the
19 court was a court niche and we're sending them in a different
20 direction.

21 So to the extent they want to try to preserve
22 their existing design, would they have to make application for
23 an area variance or how would we handle that?

24 MR. BERGSTEIN: I think I'd like to think about it
25 a little bit here. The applicant might want to say that's where

1 your conclusions lie, but the PUD regulations talk specifically
2 about special exceptions being able to be handled by the PUD
3 process but not variances. That wasn't specific relief that was
4 requested here.

5 So it would either have to be readvertised and
6 reopened here or simply say you're going to give them the PUD
7 relief they can get, but that it's incomplete zoning relief.
8 They would need to seek a variance before the BZA that they
9 could self-certify based upon the findings of the Zoning
10 Commission.

11 CHAIRPERSON MITTEN: Okay. Any thoughts from the
12 other commissioners about that? It would be helpful. Okay, Mr.
13 May.

14 COMMISSIONER MAY: I would tend to agree based on
15 the discussion we had last time and your further information
16 today with regard to the definition of the court niche. The
17 difficulty is where that leads us to.

18 CHAIRPERSON MITTEN: Yes.

19 COMMISSIONER MAY: But I don't know that there
20 really is any other choice. The applicant makes a suggestion in
21 their argument that we accept it since it had already been
22 agreed to. It was written into that easement what the nature of
23 that space would be. But if the only way we can approve it is
24 to essentially allow the variance, I mean that does complicate
25 things.

1 CHAIRPERSON MITTEN: Well, I think what Mr.
2 Bergstein was saying is that we don't have the authority. First
3 the applicant did not overtly request variance relief, and
4 secondly we don't have the authority to grant a variance in the
5 context of a PUD. We have the authority to grant special
6 exceptions in the context of a PUD.

7 So what he was suggesting is if we believe that
8 this is an open court, that we give the applicant the relief
9 that they sought but then they would have to then seek
10 additional relief as it relates to the court at the rear and its
11 width.

12 COMMISSIONER MAY: Right, yes I agree. There was
13 simply the mention in the applicant's letter that if we did
14 conclude that it was a court and not a court niche that we still
15 approve it just the same, not that we have necessarily the
16 authority nor that they were specifically asking for that
17 relief. It doesn't bring us any closer.

18 CHAIRPERSON MITTEN: Let me ask you this, let me
19 ask the commission this which is, is there anyone who does not
20 believe that this is an open court? Is there anyone who
21 believes this is a court niche and that the applicant doesn't
22 need variance relief? So that we're giving them some direction
23 and that direction is not just based on one commissioner
24 speaking, but it's a consensus.

25 COMMISSIONER MAY: It's a court.

1 COMMISSIONER PARSONS: Yes, it's a court.

2 CHAIRPERSON MITTEN: Consensus is that it's a
3 court and that the applicant needs to seek variance relief to
4 keep design the same. All right. Projections into public air
5 space. I think applicant has explained further their issue and
6 the necessity for the projection, and we do have the light study
7 that was done.

8 Any thoughts about whether or not the applicant
9 has met their burden? Mr. May I think you had some concerns
10 about that if you wouldn't mind putting us in the picture about
11 where your thinking is now.

12 COMMISSIONER MAY: I'm still frankly concerned
13 about the proposed use of public air space. While the applicant
14 states and gives detailed reasoning why there is no impact or
15 virtually no impact on the bar building, it's obvious from the
16 other correspondence we've seen that the owners of the bar
17 building think differently.

18 For the first time, we're now seeing this use of
19 public space tied to some other amenity for the project though
20 which does ? I mean if we're going to pick up some space
21 somewhere and it really, truly is tied to that arcade space on
22 the front of the building, then at least there is some public
23 benefit to it other than simply getting better offices for
24 whoever would be occupying that space, public space.

25 CHAIRPERSON MITTEN: Yes. On balance, do you

1 think those balance out?

2 COMMISSIONER MAY: Well, I'm not sure they quite
3 balance out but with everything else being considered, I think
4 on balance of the entire project makes it worth it, makes it
5 worth using that and that's a part of the project. I think it's
6 a part that I could live with.

7 CHAIRPERSON MITTEN: All right. Any other
8 concerns? And then we just had the general concern about the
9 adequacy of the amenities and the applicant has endeavored to
10 explain why they meet the burden of proof in that respect and
11 there's no question that the issue about design is a tricky one.

12 Anyone have ongoing reservations about the adequacy of the
13 amenities?

14 VICE-CHAIRPERSON HOOD: Madam Chair, I don't have
15 any reservations but I think that the applicant definitely heard
16 me on the small business piece in the DOES. While it can not
17 necessarily be enforced by this commission, I appreciate the
18 applicant making the efforts to have some type of update given
19 back to this office. I just wanted to put that on the record.
20 I want to thank them. While it's not in place yet, I appreciate
21 the good faith effort. Thank you.

22 CHAIRPERSON MITTEN: Thank you. Any other
23 concerns as it relates to this application?

24 MR. BERGSTEIN: Chairman Mitten.

25 CHAIRPERSON MITTEN: Yes, sir.

1 MR. BERGSTEIN: We're all looking at the PUD
2 regulations and we're looking at 2405.5 which says yards and
3 courts shall be provided as otherwise prescribed in its title.
4 However, the Zoning Commission shall have the option to approve
5 yards or courts greater or lesser than the normal requirements,
6 depending on the exact circumstances of the particular project.?

7 CHAIRPERSON MITTEN: Okay.

8 MR. BERGSTEIN: Assuming that applies, you either
9 can view it as if relief were requested which it hasn't been
10 yet. But the position's been taken that the relief they
11 requested was appropriate based on the characterization. We've
12 now basically disagreed with the characterization.

13 You can either ask the applicant, I suppose,
14 based on your ruling, whether or not to provide some indication
15 of why the relief that can be granted under 2405.5 would be
16 appropriate.

17 CHAIRPERSON MITTEN: Do we have to ask them for ?
18 you're saying we have to ask them for additional showing?

19 MR. BERGSTEIN: If you feel there's enough of
20 record that you can grant that relief under this regulation,
21 then I suppose you can do that.

22 CHAIRPERSON MITTEN: Okay.

23 MR. BERGSTEIN: Whether or not you feel the record
24 is sufficient enough to allow you to do that.

25 CHAIRPERSON MITTEN: Okay. My concern was always

1 that we not just slide past the requirement of the ordinance and
2 that this is, in fact, an open court. I think there's actually
3 been quite a bit more discussion than the applicant anticipated
4 on the subject, and that we haven't heard any concerns from the
5 adjacent property owner that the width of the court is going to
6 impair their light and air. I mean, I think the implication is
7 that the easement area is sufficient to satisfy the adjacent
8 property owner.

9 So I would, I think we have enough information on
10 the record to make it clear that, while we think this is an open
11 court, that granting a more narrow court than would otherwise be
12 required is not going to cause any adverse impact.

13 COMMISSIONER MAY: I like that.

14 CHAIRPERSON MITTEN: All right. Well with that
15 addition to, with that additional thought being folded into the
16 findings of fact and conclusions of law and with the inclusion
17 of the housing linkage payment in the amount of \$520,470, I
18 would move approval of Zoning Commission Case No. 01-07C.

19 COMMISSIONER PARSONS: Second.

20 CHAIRPERSON MITTEN: We have a motion and a second
21 to approve the application for 1700-1730 K Street. Any further
22 discussion? All those in favor, please say aye.

23 (Chorus of ayes.)

24 CHAIRPERSON MITTEN: Those opposed, please say no.
25 Mr. Bastida.

1 MR. BASTIDA: The staff will record the vote 4-0,
2 Ms. Mitten moving, Mr. Parsons seconding, Mr. Hood and Mr. May
3 voting in the affirmative. Mr. Hannaham not present, not
4 voting.

5 CHAIRPERSON MITTEN: Thank you and thank you Mr.
6 Bergstein for finding that section of the ordinance for us.

7 MR. BERGSTEIN: I was not alone in my endeavor.

8 CHAIRPERSON MITTEN: Well, we'll give you credit
9 for it today. Okay, moving right along. Final action, Zoning
10 Commission Case No. 01-26, which is also BZA Case No. 16716.
11 Mr. Bastida.

12 MR. BASTIDA: Madam Chairman, the staff has
13 provided you with all the information received on the record and
14 request an action on this matter. Thank you.

15 CHAIRPERSON MITTEN: Thank you. A couple things
16 that I'd like to say. One is that the additional submissions
17 that we got from the parties highlight something that's missing
18 from the BZA order, which is my concern on the sua sponte review
19 was really isolated to the elevator penthouse. Despite the fact
20 that in the appeal by the Nebraska Avenue Neighborhood
21 Association and the fact that the characterization of the vote
22 of the BZA on the third matter related to both the elevator,
23 penthouse and the stairwell penthouse, the BZA's order and the
24 discussion, the deliberation really focused exclusively on the
25 elevator penthouse and the inclusion or the enclosure within an

1 architectural embellishment.

2 So what I would propose is that we reverse the
3 board's decision and this is as it's stated in the letter that
4 was issued to the parties related to the sua sponte review of
5 BZA Appeal No. 16716-A, that we reverse that portion of the
6 board's decision concerning the set back of the elevator tower
7 and that we advise them, because they still have before them a
8 request for reconsideration, that they need to address the issue
9 more specifically in their order of the set back for the
10 stairwell penthouse.

11 MR. BERGSTEIN: Madam Chair, there's also the
12 other issue that you had on sua sponte on the failure to refer
13 the roof structure to the Office of Planning. I think you did
14 also sua sponte that issue as well.

15 CHAIRPERSON MITTEN: Yes.

16 MR. BERGSTEIN: And in effect, the question is
17 whether or not since the BZA at least found that the roof
18 structure was sufficient, whether or not the BZA should have
19 also nevertheless remanded the case to the Zoning Administrator
20 so that the Zoning Administrator could refer it to the Office of
21 Planning, and whether or not, based upon your decision to at
22 least reverse on that issue, whether you also need to do
23 something with the second issue which is the deferral to the
24 Office of Planning.

25 I also think that there was a mention last time,

1 the fact that a new roof plan has been submitted to the Zoning
2 Administrator. I think there's been a representation in the
3 record that that occurred and, in essence, that may well moot
4 out the issue since it would be, I think, your expectation that
5 that would be referred to the Office of Planning as required by
6 regulation. But you do need to do something with that issue.

7 CHAIRPERSON MITTEN: Right. Perhaps you could
8 just give me a little guidance, because as it related to what
9 the BZA did, they considered that the lack of a referral
10 harmless error. So it's really kind of a package. It doesn't
11 stand on its own. So are you saying that if we reverse, that we
12 should also include our expectation that the referral would be
13 made to the Office of Planning of any new roof plan?

14 MR. BERGSTEIN: Well, I think one of the things
15 you can do is first decide whether or not it was harmless error.
16 But, if it was or even if it wasn't, you would note that it's
17 your understanding that a new submission has been made that
18 replaces the earlier one, and that there is no need for you to
19 take any action on the sua sponte with respect to that, other
20 than to express your expectation that the Zoning Administrator
21 with respect to this particular plan make the submission to the
22 Office of Planning.

23 CHAIRPERSON MITTEN: Okay. What I was trying to
24 do is take it in two pieces, which is to vote the reversal up or
25 down and then to address the issue of the new plan.

1 MR. BERGSTEIN: Well again, we're back to the
2 issue of reversal. What the BZA order said was that they had
3 determined that the roof structure was lawful, as reviewed by
4 the Zoning Administrator, and therefore served no purpose for
5 that after they had made that determination after conducting
6 their own review to nevertheless say that they found the roof
7 structure to be legal. Nevertheless, the case should be
8 remanded to the Zoning Administrator so the Zoning Administrator
9 could ask the Office of Planning if the BZA was right.

10 The BZA felt there was no need to do that. They
11 had made the determination that the roof structure was
12 appropriate and it served no purpose in the context of what had
13 transpired for the case to be remanded after the BZA had made
14 that deliberation.

15 Obviously the BZA decided otherwise and decided
16 the roof structure was illegal, it would have been appropriate
17 for them also to remand it and expect that review would occur.

18 But the position of the BZA was that having done
19 the review, there is no reason to remand the case to the Zoning
20 Administrator for a review that, in essence, the BZA has already
21 performed.

22 CHAIRPERSON MITTEN: Right. What I'm trying to
23 capture is this notion, okay if we reverse, do we reverse and
24 just include in that the expectation that any revised plan would
25 be referred to the Office of Planning?

1 MR. BERGSTEIN: I think one option is to reverse
2 on the issue of the elevator penthouse but sustain on the issue
3 of the submission of the plan. That would be a consistent thing
4 to do, even though it may seem inconsistent. You could say that
5 the BZA was incorrect with respect to their ruling on the roof
6 structure, but nevertheless were corrected. The case did not
7 need to be, that the design did not need to be submitted back
8 to the Zoning Administrator based upon their earlier
9 determination that the roof structure was okay. In essence,
10 it's two different things.

11 In the context of their decision making, the
12 decision with respect to the OP referral made sense, but
13 secondly you have a problem with that first determination that
14 they made.

15 CHAIRPERSON MITTEN: Okay.

16 MR. BERGSTEIN: I hope that was somewhat clear.

17 CHAIRPERSON MITTEN: I think I wrote down enough
18 that I could rephrase it in a motion. I'm going to just clarify
19 what I was trying to express earlier which is, I move that we
20 reverse the BZA's decision on the set back of the elevator
21 penthouse and we sustain their decision on the issue of the
22 referral of the roof plan to the Office of Planning, based upon
23 their earlier finding as it related to the elevator penthouse
24 set back.

25 VICE-CHAIRPERSON HOOD: Second.

1 CHAIRPERSON MITTEN: I?m not going to repeat that.
2 Does anybody have any discussion? Any discussion? All right,
3 all those in favor, please say aye.

4 (Chorus of ayes.)

5 CHAIRPERSON MITTEN: Those opposed, please say no.
6 Mr. Bastida.

7 MR. BASTIDA: Madam Chairman, the staff will
8 record the vote 4-0, Ms. Mitten moving, Mr. Hood seconding, Mr.
9 Parsons and Mr. May, voting in the affirmative. Mr. Hannaham
10 not present, not voting.

11 CHAIRPERSON MITTEN: Thank you.

12 MR. BERGSTEIN: Madam Chair.

13 CHAIRPERSON MITTEN: Now we?re going to go to the
14 next part.

15 MR. BERGSTEIN: Right.

16 CHAIRPERSON MITTEN: Go ahead.

17 MR. BERGSTEIN: Were you going to stay on that
18 item?

19 CHAIRPERSON MITTEN: Yes, we?re still on the item.

20 MR. BERGSTEIN: I?m sorry.

21 CHAIRPERSON MITTEN: But perhaps you could tell me
22 how to capture what I would like to express next which is that
23 given the BZA has a motion for reconsideration in front of them
24 and given that their order does not specifically address the set
25 back of the stairwell penthouse, there?s no discussion on that

1 in the order, how do we express to them that we think that that
2 issue needs to be dealt with.

3 MR. BERGSTEIN: What I would say is in the context
4 of determining whether or not to reconsider the case, the BZA
5 should look to the adequacy of its findings of fact with respect
6 to the stairway and determine whether or not it would reconsider
7 with respect to at least elaborating on its reasoning for
8 finding that the stairwell met the set back requirement.

9 CHAIRPERSON MITTEN: Now is that something that
10 we can just express to them in correspondence, or do we have to
11 take a vote?

12 MR. BERGSTEIN: I think it's something you can
13 state in your rule, in the order, because in fact that
14 particular issue was not sua sponte.

15 CHAIRPERSON MITTEN: Right.

16 MR. BERGSTEIN: So I think in terms of what we
17 could put in the sua sponte order in providing some guidance or
18 stating some concern of the commission, you can state the
19 commission's concern that there did not appear to be a full
20 findings of fact with respect to the stairway and that it would
21 be helpful if the BZA decided to grant reconsideration to
22 elaborate upon that. I think that's probably the best you can
23 do.

24 CHAIRPERSON MITTEN: Yes, does anyone have any
25 objections to us including that in our order? Okay, terrific.

1 Thank you. Did you have anything else, Mr. Bergstein?

2 MR. BERGSTEIN: For the purpose of writing the
3 order, did the commission want to express any opinion with
4 respect to the design that was provided to you with respect to
5 the roof structure in terms of providing any guidance to the
6 zoning administrator or expressing any views with respect to
7 whether or not at least a part of the design seemed to address
8 the elevator penthouse issue, address the concerns that the
9 commission had in invoking sua sponte in the first place.

10 CHAIRPERSON MITTEN: Yes, well I think the way
11 that it ? my feeling would be, the manner in which it?s
12 expressed in the letter to the parties, I think is about as far
13 as we could go is that we preliminarily conclude that the plans
14 comply with applicable zoning regulations, but the Zoning
15 Administrator?s in the position because he has the full set of
16 plans and so forth, to make the final determination, and we
17 would look to him to do so, being mindful of our order on the
18 sua sponte.

19 MR. BERGSTEIN: I think that?s enough guidance for
20 me, thank you.

21 CHAIRPERSON MITTEN: Thank you. Any other
22 concerns about that case? All right. Zoning Commission Case
23 No. 00-30TA. Mr. Bastida.

24 MR. BASTIDA: Yes. Madam Chairman, you have taken
25 proposed action on this rule. You have received a final order.

1 The only thing lacking on that order was the position of NCPC.
2 NCPC took an action last Thursday. I have received a letter in
3 which they basically stated that there is no detriment to the
4 further establishment and we can go ahead and take the final
5 action on this matter if you so choose.

6 CHAIRPERSON MITTEN: All right. WE have a draft
7 order in front of us for Zoning Commission Case No. 00-30TA.
8 Any questions, comments, motions?

9 VICE-CHAIRPERSON HOOD: Madam Chair, I move for
10 approval for Zoning Commission Case. No. 00-30TA.

11 COMMISSIONER PARSONS: Second.

12 CHAIRPERSON MITTEN: We have a motion and a second
13 to approve Case No. 00-30TA. All those in favor, please say
14 aye.

15 (Chorus of ayes)

16 CHAIRPERSON MITTEN: Those opposed, please say no.
17 Mr. Bastida.

18 MR. BASTIDA: The staff will record the vote 4-,
19 Mr. Hood moving it, Mr. Parsons seconding, Ms. Mitten and Mr.
20 May voting on the affirmative. Mr. Hannaham not voting, not
21 present.

22 CHAIRPERSON MITTEN: Thank you. Now we'll move to
23 the consent calendar, Zoning Commission Case No. 01-27TE-96-16C,
24 the time extension for the pre-vocational site.

25 MR. BASTIDA: Madam Chairman, I would like to just

1 treat the two items on the consent calendar at the same time.

2 CHAIRPERSON MITTEN: All right.

3 MR. BASTIDA: If that's all right with you. The
4 commission didn't have all the documents needed in order to make
5 a reasonable determination of denial or approval in front of
6 you. Some of it was provided today and it was a very extensive
7 number of pages in which you couldn't read in five minutes.

8 Accordingly, the staff would recommend that we
9 have a special meeting on Monday, December 17 at approximately
10 6:00, which will be half an hour prior to our schedule hearing
11 for the project. That is the recommendation of the staff.

12 CHAIRPERSON MITTEN: Thank you. Are the
13 commissioners available for a 6:00 special?

14 VICE-CHAIRPERSON HOOD: What is the date again?

15 CHAIRPERSON MITTEN: December 17th, next Monday
16 night. It would be right before our hearing on the rezoning for
17 the Tivoli Theater project.

18 COMMISSIONER MAY: I'm going to be hard pressed to
19 get here by 6:30 to start with. I may well make it. I'm going
20 to be in New York that afternoon.

21 CHAIRPERSON MITTEN: Okay.

22 MR. BASTIDA: What I will try to do is make sure
23 Mr. Hannaham is here so we would have a quorum, if it's not too
24 much to ask.

25 CHAIRPERSON MITTEN: Well, let's see if Mr. Hood's

1 going to be here.

2 MR. BASTIDA: Sorry.

3 VICE-CHAIRPERSON HOOD: I'll ask Mr. Bastida, do
4 you think I'll be available?

5 MR. BASTIDA: I'm sorry.

6 VICE-CHAIRPERSON HOOD: Yes, I'll be here.

7 MR. BASTIDA: I thought we had chatted about that
8 and you weren't available. I apologize.

9 VICE-CHAIRPERSON HOOD: We talk about so much Mr.
10 Bastida, we probably did. I'm sorry.

11 CHAIRPERSON MITTEN: Okay, so we'll check and see
12 if Mr. Hannaham can be here. If not, we'll have to pick a new
13 time.

14 MR. BASTIDA: Right and Mr. Parsons has expressed
15 his willingness to provide a proxy, an absentee vote and maybe
16 Mr. May could do the same if he so chooses. Thank you.

17 CHAIRPERSON MITTEN: All right. The next item on
18 the agenda then is correspondence, and we have a letter from
19 Barbara Kaylow concerning the good cause standard for waiving
20 our rules as it relates to the late filing of the Office of
21 Planning report in Zoning Commission Case No. 00-27M, which I
22 believe we had an adequate discussion prior to waiving our rules
23 that day, related to good cause, and we appreciate her calling
24 our attention to the standard.

25 And then we have a letter from Holland and Knight

1 regarding again Case No. 00-27M and 01-33TA, and the timing of
2 consideration of each of those cases. Is there any concern on
3 the part of the commission regarding the way we had agreed to
4 proceed at the last meeting.

5 All right, and I would just turn to Mr. Bergstein
6 to deal with the last issue that was raised in the letter which
7 relates to whether or not these cases will be treated as
8 rulemakings or contested cases. Could you tell us how we would
9 appropriately proceed, Mr. Bergstein?

10 MR. BERGSTEIN: The rules separate contested cases
11 from rulemaking cases and describe what they are. A rulemaking
12 case, among other things, is a zoning or map amendment that is
13 proposed in furtherance of the comprehensive plan for the
14 National Capitol or other public law or policy, which it's my
15 understanding this is.

16 They contested case map amendment is a request
17 for a zoning map amendment filed by the property owners or
18 owners for a single property for multiple properties that are
19 contiguous or only separated by street or alley. The assumption
20 is those are owned by all the property owners.

21 I don't know if that's the case in this
22 particular map amendment, if the applicant or the petitioner
23 owns all the properties at issue. But it's my view and it's
24 really somewhat in the Zoning Commission's discretion that
25 because this is a comprehensive plan and consistency rulemaking,

1 it addresses broader concerns than a request for map amendment
2 by a property owner, even if the property owner is filing both.

3 In other words, if a property owner is filing a
4 map amendment that is an attempt to gain comprehensive plan
5 consistency, then that addresses larger policy matters and is
6 appropriately under the rulemaking category than under the
7 contested case category.

8 That would be how I would analyze it, but there
9 are provisions that seem to both apply to this particular
10 rulemaking, that it's a rulemaking that's requested by a
11 property owner, but it's also a comprehensive plan consistency
12 rulemaking. My view is that the latter governs the former, but
13 you can make that decision.

14 CHAIRPERSON MITTEN: So is that something we can
15 just determine by consensus here, since we do need to make a
16 decision on how we're going to proceed?

17 MR. BERGSTEIN: Yes, you can determine it in the
18 same way you determine a set down. In other words, that's part
19 of it. One thing you're supposed to do at set down is confirm
20 whether it's a contested case or rulemaking, but I think you can
21 do that by consensus.

22 CHAIRPERSON MITTEN: Okay, we have a
23 recommendation from Mr. Bergstein that both of these cases
24 should proceed as rulemaking cases. Is there any concern about
25 that? All right. We will proceed with 00-27M and 01-33-TA as

1 rulemaking cases. Mr. Bastida, the report of the Secretary.

2 MR. BASTIDA: Madam Chairman, you have the
3 schedule that goes to the middle of January. I don't think that
4 we need to discuss that.

5 CHAIRPERSON MITTEN: Okay.

6 VICE-CHAIRPERSON HOOD: Madam Chair, I want to
7 remind the Secretary, Mr. Bastida, that I've asked on maybe two
8 occasions about a meeting with BOC and also the BOES. That
9 meeting hasn't come to light yet. I have also talked to so many
10 different people about putting it together, and if he needs some
11 assistance, he needs to let me know because that meeting needs
12 to get up and get going.

13 MR. BASTIDA: I apologize, Mr. Hood. I had made
14 several calls to these individuals. I haven't been able to get
15 in touch with them. We have crossed wires. I haven't done
16 anything in the last five days and I apologize for that.

17 VICE-CHAIRPERSON HOOD: Let's do this, Mr. Bastida
18 and Madam Chair. If we could maybe pull something like the
19 latter part or the mid-part of January.

20 MR. BASTIDA: Okay.

21 VICE-CHAIRPERSON HOOD: Because within the next
22 two weeks during the season, I'm sure a lot of folks won't even
23 be interested in what we're talking about at this late date.
24 But I've also talked to the board of the LBOC, a member who sits
25 on that board. They are very much interested in what we want to

1 do. We just need to do it. If I can assist you in any way, we
2 just need to get together and pull it together. Thank you.

3 MR. BASTIDA: Mr. Hood, I will be in and out all
4 day. If you could be a little more specific about a time table,
5 then I can address that. You wanted it to take place any time
6 during the day time? Do you want to have it in the evening, or
7 what would be your preference?

8 VICE-CHAIRPERSON HOOD: Whatever the general
9 consensus is, Mr. Bastida, day time or evening or whatever, as
10 long as it's not on a BZA day or a Zoning Commission meeting
11 day. Personally I will make my schedule available to
12 accommodate everyone else. I just think that we need to check
13 with those other entities. We need to get involved with this
14 portion of the meeting.

15 VICE-CHAIRPERSON HOOD: You are right, Mr. Vice
16 Chairman.

17 CHAIRPERSON MITTEN: I think Mr. Hood's concern is
18 a good one, because every time we get a PUD application, we
19 discuss this and until we have a full understanding of how this
20 process works, we're never going to be able to improve the
21 performance on these amenity packages. So let's just agree that
22 no later than our next meeting we'll have a date set up.

23 VICE-CHAIRPERSON HOOD: Madam Chair, can I just
24 add, maybe because the Office of Planning ? maybe Mr. Bastida if
25 you can work with the Office of Planning, maybe they can help

1 you pull some of the key folks other than the ones I've already
2 named at the last meeting. I know that there is an LBOC
3 Commission and I just found that out about a week ago. They
4 obviously want to be involved with that too, because they may be
5 able to give us some guidance and help us pull this piece
6 together. Thank you.

7 CHAIRPERSON MITTEN: Could you turn on your
8 microphone please?

9 MR. BASTIDA: Thank you. Is your attendance to
10 the BZA meetings, but I believe that we have covered through
11 January the 8th.

12 CHAIRPERSON MITTEN: I thought we had agreed we
13 were going to take that up in chambers.

14 MR. BASTIDA: That's right.

15 CHAIRPERSON MITTEN: Going forward.

16 MR. BASTIDA: Yes. So there is not any other
17 discussion on any other public matter. You have a copy of the
18 orders that have been published and you had not received before,
19 and you have the case that was filed recently for a time
20 extension ? I mean, for a minor modification.

21 CHAIRPERSON MITTEN: Thank you. There being no
22 further business, I declare this public meeting adjourned.

23 (Whereupon, the above-entitled matter was
24 concluded.)

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