

GOVERNMENT

OF

THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

FEBRUARY 20, 2001

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:28 a.m., Robert N. Sockwell, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

ROBERT N. SOCKWELL	Chairperson
SHEILA CROSS REID	Vice Chairperson
ANN RENSHAW	Board Member

ZONING COMMISSION MEMBER PRESENT:

CAROL MITTEN	Commissioner
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NATIONAL CAPITAL PLANNING COMMISSION MEMBER PRESENT:

SUSAN MORGAN-HINTON	Commissioner
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COMMISSION STAFF PRESENT:

Jerrily Kress, Director, BZA
Sheri Pruitt, Secretary, BZA
Beverly Bailey, Office of Zoning
Paul Hart, Office of Zoning
John Nyarku, Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL PRESENT:

Marie Sansone, Esq.
Alan Bergstein, Esq.

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

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(9:28 a.m.)

CHAIRPERSON SOCKWELL: Good morning. This is the February 20th public meeting of the Board of Zoning Adjustment. This morning we will be dealing with one case in the public meeting section, and we have an issue that needs to be dealt with as a preliminary matter.

MR. HART: Good morning, Mr. Chair, and Members of the Board. This morning the public meeting deals with the appeal of Daniel Serwer and James McBride, pursuant to 11 DCMR 3100 and 3101, from the administrative decision of Michael D. Johnson, Zoning Administrator, Building and Land Regulation Administrator, Department of Consumer Regulatory Affairs, made approximately April 18th, 2000.

This is for a building permit, Building Permit Number B426044, for a two-story garage addition, and then on August 8th, 2000, Building Permit Number B428648, to add a covered walk connection.

The appellant alleges that the construction of the garage addition and covered walk connection, an unauthorized commercial use, does not conform to the zoning regulations in an R-1-A district, at premises 5655 Moreland Street, Northwest. That is in Square 2307, Lots 801 and 802.

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1 CHAIRPERSON SOCKWELL: It has been placed
2 in testimony at the previous hearing that there may be
3 a problem with one of the sitting board members having
4 participated in this case.

5 Per the transcript of the previous hearing,
6 which was on December 19th, Ms. Giordano, who is
7 representing the applicant in this case, spoke to Ms.
8 Ann Renshaw's participation in an ANC meeting as possibly
9 requiring her to recuse herself from the participation
10 in the case.

11 And we would like to try and deal with that
12 issue this morning, as we are aware of the importance
13 of fairness and impartiality in these hearings and the
14 cases in deliberation.

15 So what I am asking Ms. Renshaw to do is to
16 address the applicant with regard to her participation
17 in the ANC process.

18 BOARD MEMBER RENSHAW: Thank you, Mr.
19 Chairman. As I stated back on December 19th, 2000 at
20 the hearing, the BZA hearing, when Ms. Giordano brought
21 up this matter, I said -- and in fact before she brought
22 up the matter, that I chair the ANC, and I would recuse
23 myself from debating or participating in the case when
24 it case before the ANC, and I would like that in the record,
25 please. Those were my statements, Mr. Chairman.

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1 I do not have any additional information that
2 this Board has not received, and I want to state -- and
3 I stated back on December 19th that I am judging this
4 case on the merits, or on its merits, and on the testimony
5 that the Board received on December 19th.

6 The ANC -- if there is a problem with whatever
7 happened at the ANC, we have the tapes available of the
8 ANC meetings, and we have minutes of the meetings that
9 are in the file, and are a matter of public record, as
10 are the tapes, and we have a file.

11 And those files are open to anyone who would
12 like to investigate and listen. Those tapes are not
13 transcribed because we don't have any money to transcribe
14 the tapes. But they are there for public consumption
15 if the public would like to hear them.

16 CHAIRPERSON SOCKWELL: Ms. Renshaw, did the
17 advisory neighborhood commission take a position on this
18 case?

19 BOARD MEMBER RENSHAW: No, it did not.

20 CHAIRPERSON SOCKWELL: Do you feel that in
21 your estimation, having remained in the room during the
22 discussion of this case and other matters before the ANC,
23 do you feel that a position not take by the ANC equates
24 to a position not having been taken by you as ANC
25 Commissioner?

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1 BOARD MEMBER RENSHAW: I completely removed
2 myself. In other words, although I sat at the meeting,
3 because I am the Chair of the ANC, I turned the meeting
4 over to the vice chair. That is the practice.

5 However, the ANC's position is not
6 necessarily my position. In other words, I told the City
7 Council when I went through the City Council hearings
8 that my position would be my position, and that I could
9 be fair and that I could be neutral.

10 And that is the position that I advance to the Board today.

11 CHAIRPERSON SOCKWELL: Ms. Giordano, could
12 you step forward, please. I believe you are still under
13 oath, and this is strictly with regard to this question.

14
15 You raised an objection at the previous
16 hearing with regard to Ms. Renshaw's participation, and
17 the question that I am asking, and that the Board is
18 asking, do you feel with Ms. Renshaw's explanation of
19 her participation, or lack thereof, in the ANC process,
20 that you would maintain your objection, or would feel
21 comfortable in withdrawing your objection for the
22 participation of Ms. Renshaw since she has been open that
23 she did not participate actively or more than just
24 passively as an audience participant in a meeting at which
25 the ANC did not come to a decision pro or against any

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1 motions with regard to this case?

2 MS. GIORDANO: Yes. For the record, my name
3 is Cynthia Giordano, and I am with the Arnold and Porter
4 law firm representing the Intervenor in this case.

5 And I raised the objection, and I still
6 continue to believe that that is the appropriate thing
7 to do, not because I feel that Ms. Renshaw would be unfair,
8 or that there was anything unfair about the ANC process,
9 or a problem.

10 But the administrative mandate with regard
11 to these hearings is that a decision has to be made on
12 the record before the BZA, and it seems to me inherently
13 inconsistent to have another record being formed at the
14 ANC level, which there is no opportunity for
15 cross-examination, and the other safeguards that we have
16 in this process, such as testimony under oath, to have
17 that process ongoing with this process, and to be able
18 to really separate the two.

19 I can tell you that I myself when I was first
20 retained in this case, that before an appeal had actually
21 been filed, I had been contacted by the property owners
22 and asked to represent them in this matter.

23 I was told that the matter was coming before
24 the ANC, and the first thing I did was pick up the telephone
25 and call Ms. Renshaw as Chair of the ANC. And that is

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1 what I would do in any case that I had in her ANC district,
2 because I respect her counsel, and she is the Chair of
3 that ANC, and I asked her what the process was going to
4 be before the ANC, and discussed the case, and obviously
5 advocated my client's position.

6 I think that's what probably the other side
7 has done as well, and again it was before an appeal had
8 been filed, but the problem is sort of extricating sort
9 of after the appeal had been filed, and what had been
10 said before, and it is just an unyielding process in my
11 opinion.

12 And I am afraid that it leads this case open
13 to an appeal and the last thing that we want is for this
14 case to continue on in litigation. This is a small matter
15 in the scope of things, and a very big expense for a single
16 family property owner to maintain litigation.

17 CHAIRPERSON SOCKWELL: May I ask you this
18 question then? Since apparently you yourself initiated
19 the conversation and communication that could be
20 considered of an ex parte nature --

21 MS. GIORDANO: No.

22 CHAIRPERSON SOCKWELL: Let me finish. Let
23 me finish.

24 MS. GIORDANO: I'm sorry.

25 CHAIRPERSON SOCKWELL: You initiated the

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1 conversation with Ms. Renshaw as Chair of the ANC over
2 a case that you knew would be coming before the Board,
3 and --

4 MS. GIORDANO: I didn't know at that time
5 for sure that it was going to be.

6 CHAIRPERSON SOCKWELL: But you were pretty
7 sure that it could come before the Board.

8 MS. GIORDANO: I guess that's right, yes.

9 CHAIRPERSON SOCKWELL: And would you have
10 been more correct in perhaps approaching a single member
11 district commissioner and allowing Ms. Renshaw the
12 opportunity to make a decision outside of any contact
13 with the applicant's representative?

14 And under the circumstances it actually
15 seems that you may have inadvertently forced the issue
16 upon Ms. Renshaw, where she might have taken another tact
17 had she not been put in direct contact with you.

18 So regardless of her participation in the
19 ANC meeting, she actually spoke with you prior to that
20 meeting, and would therefore have been compromised from
21 that point.

22 MS. GIORDANO: I think you're right. If I
23 had been thinking probably a little more clearly, and
24 like a lawyer instead of as a person who had just been
25 retained trying to do fact finding as to what was going

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1 on in the case, that probably would have been the
2 appropriate thing.

3 I raised with her right away that if this
4 goes to an appeal how does that work, and she told me
5 that it was her plan to recuse herself from any
6 participation in the ANC issue, and I accepted that at
7 that time. That seemed appropriate.

8 And truthfully it wasn't until later on as
9 this case went before the ANC on four different occasions
10 that I really started to think about the whole issue,
11 and not of conflict of interest, but the issue of decision
12 on the record, ex parte, preserving the integrity of the
13 process, or at least the appearance that all the facts
14 come in one way to the BZA on the record, and not by other
15 means.

16 CHAIRPERSON SOCKWELL: While the Board does
17 not have --

18 VICE CHAIRPERSON REID: May I?

19 CHAIRPERSON SOCKWELL: Yes, go right ahead.

20 VICE CHAIRPERSON REID: I think that -- and
21 this is a very complicated issue, in that we have a
22 situation where we have a Chairman of an ANC sitting on
23 the Board, and therefore the normal procedures could
24 become a little complicated or I guess gray, in the sense
25 that Ms. Giordano was following procedures that she is

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1 accustomed to following, and contacting, which it is
2 customary to contact the ANC, the Chairperson, at that
3 point in time.

4 And the Chairperson can say I can't talk to
5 you. I don't want to talk to you at all about this.
6 And then if the Chairperson says I am going to recuse
7 myself, then do you go to the matter of what does recuse
8 me.

9 Does it mean that you are going to actually
10 leave the room or are you going to be there present during
11 the time that this is being presented before the ANC.

12 And I think that given those circumstances,
13 and because of the fact that things are not clear, and
14 that they are a little murky I guess is the correct word,
15 and that they are a little murky here, I think we have
16 to take seriously this whole issue.

17 And also to try to move in such a manner as
18 to not further burden any citizens with having to go
19 through any appeal process that could be unnecessarily
20 financially burdensome.

21 CHAIRPERSON SOCKWELL: Since you did
22 inadvertently bring Ms. Renshaw in the case, you stated
23 that the lack of a record being reviewed by all parties,
24 a record of outside meetings being available for review
25 by all parties.

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1 Ms. Renshaw did assert that, and the tapes
2 of the ANC meeting, which -- and I am not sure how
3 voluminous they are, but that they could be made available
4 to all parties, and of course that would be with
5 appropriate time for any necessary responses.

6 Do you feel that that in itself would remove
7 the doubt with regard to what Ms. Renshaw knows that is
8 different from what everyone else knows, even though those
9 records would not be openly discussed, and unless the
10 case were continued for another hearing after such was
11 made available. What is your feeling on that?

12 MS. GIORDANO: Again, I feel that the
13 situation is just to unyielding. There were four
14 different ANC meetings where this case was discussed.
15 And again I am not objecting to anything specific that
16 was or was not said at the ANC meeting.

17 I have not looked at that record, and I don't
18 think there was anything inappropriate about that
19 process. I just think that it all becomes too
20 intertwined. It is really impossible to sort out whether
21 everything that was said at the ANC was said here.

22 I just think that from an administrative
23 standpoint it is too convoluted. It needs to be
24 simplified. And again I accepted it at face value what
25 Ms. Renshaw told me about the recusal, and I understood

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1 or I was told that this was the way that it was being
2 handled. Not just in this case, but in any case.

3 And it seemed to make sense to me. It didn't
4 really dawn on me until later that it is really impossible
5 to sort all this out, and what was said at the ANC, and
6 what is said here.

7 And it seems to me that if it doesn't -- that
8 it just compromises the integrity of the record, and the
9 process, and leaves a door open for litigation and there
10 just is no need for that.

11 And I think it is harmful to the process to
12 open that door, and to now start to review the ANC record.

13 I certainly don't want to do that. I wouldn't even know
14 how to go about doing that.

15 CHAIRPERSON SOCKWELL: So basically you are
16 standing on procedure that the -- a procedural position
17 is the one that you are really sticking with with regard
18 to this. Yes?

19 COMMISSIONER MITTEN: I think if I am
20 hearing this correctly, I think that in posing the
21 question to Ms. Giordano about if there is any way to
22 relieve her mind that would get her to remove her
23 objection, and she is basically saying no.

24 CHAIRPERSON SOCKWELL: Right.

25 COMMISSIONER MITTEN: And so there is no to

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1 accomplish that, and so now we are back to the issue,
2 which is the objection. We know what the objection is,
3 and we need to decide as a group how to handle that.

4 VICE CHAIRPERSON REID: And we do have other
5 parties.

6 MS. GIORDANO: Yes, we do have other
7 parties, and perhaps if the Chair would like to hear from
8 them.

9 CHAIRPERSON SOCKWELL: Yes, definitely.
10 Please identify yourself, sir.

11 MR. MCBRIDE: Mr. Chairman, I am James
12 McBride of the Baker Donaldson firm, and I represent the
13 plaintiffs, or the appellants in this matter. Just for
14 the record, we certainly have no objection to Ms. Renshaw
15 participating in this matter.

16 And we are happy to waive any appeal rights
17 that we might have that might be caused by the appearance
18 of impropriety. I mean, we take Ms. Renshaw at her word
19 that she is going to go simply on the record that was
20 presented to her here.

21 So if there is a question raised or Ms.
22 Giordano is worried that as a result of Ms. Renshaw
23 participating in this that we are going to appeal and
24 challenge that, I am happy to waive that on the record
25 today.

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1 And our position is, and I didn't go to all
2 of those ANC meetings. I missed a couple of them. I
3 have listened to all of the tapes, and it would be a huge
4 waste of time to listen to those tapes, because nothing
5 from an evidentiary standpoint took place at those that
6 didn't take place in this particular proceeding.

7 But as a practical matter, just so the record
8 will be clear, we would certainly waive whatever objection
9 we might have on a procedural basis to Ms. Renshaw
10 participating.

11 CHAIRPERSON SOCKWELL: Thank you very much.

12 COMMISSIONER MITTEN: Mr. Sockwell, perhaps
13 Ms. Giordano -- the sense that I got was that you are
14 concerned about an appeal by some other party.

15 MS. GIORDANO: I don't know. I don't even
16 know if that is a waiveable appeal right. I think that
17 if a court found that this was an inappropriate process,
18 I am not sure that waiving that appeal would necessarily
19 prevent the court from reaching a different conclusion.
20 I just don't know.

21 I have not done a lot of research on this,
22 and I raise the issue because in my mind ex parte means
23 a decision that is on the record, and that you have to
24 be very careful about what the flow of information is
25 into the record, and that this situation of a dual process

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1 at the ANC seems to me to contradict the basic premise
2 of the ex parte principle.

3 COMMISSIONER MITTEN: And don't misread the
4 Board. I mean, we are very sensitive to the concerns
5 that you are raising, and we would like to deal with the
6 issue as fairly as possible, and move towards a speedy
7 decision in the case, but we want to do that as fairly
8 as possible.

9 So that is why we are taking the time with
10 this this morning.

11 Ms. Sansone, do you have anything to offer
12 in terms of Mr. McBride's ability to waive his appeal
13 rights?

14 MS. SANSONE: Ms. Mitten, I am not -- I have
15 not researched that issue. I do know that the party
16 making the objection does have to state their objection,
17 and give their reasons, and request recusal in order to
18 preserve that party's right to raise the issue on appeal,
19 and Ms. Giordano has done that, thereby preserving her
20 right to appeal on that issue, regardless of Mr. McBride's
21 intentions.

22 MR. MCBRIDE: Mr. Chairman, James McBride
23 again if I may. I have not researched this particular
24 question with respect to the Board of Zoning Appeals,
25 but I have been litigating cases for a long time, and

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1 you can always deal with waiving -- if a Judge has a
2 question about whether or not there is some impropriety
3 about whether he should proceed in a case, the parties
4 can get together and waive that, and decide that, yes,
5 they don't have a problem with that.

6 That they don't intend to bring that
7 objection and let the Judge proceed, and that's really
8 all we are doing here, because quite frankly there is
9 only some appearance of impropriety that is being brought
10 up here in this matter.

11 And it is perfectly all right for us to say
12 that we don't think Ms. Renshaw has to recuse herself,
13 and we don't object to her, and we think that she will
14 be fair in deciding this case. And litigants do that
15 all the time in cases with fact finders and Judges.

16 COMMISSIONER MITTEN: I think that Mr.
17 McBride has said that he doesn't have any objection, but
18 we have the objection still from Ms. Giordano, and the
19 decision is at our feet.

20 CHAIRPERSON SOCKWELL: Right. If Ms.
21 Giordano doesn't see that her objection can be removed,
22 then we will have to work through the issue.

23 BOARD MEMBER RENSHAW: Mr. Sockwell, if I
24 may ask Ms. Giordano a question. What you have brought
25 up is very far reaching. It does not only pertain to

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1 this case, but obviously other cases that you will take
2 to other ANCs on behalf of your clients.

3 So I would like to know, since it has now
4 been two months since you brought this up, whether you
5 have taken the matter to the Board of Elections and Ethics,
6 whether you have taken your concerns about the flow of
7 your information to Boards and Commissions. Thank you.

8 CHAIRPERSON SOCKWELL: Ms. Renshaw, that
9 issue is not really relevant to this particular case.
10 The Board of Elections oversees the Advisory Neighborhood
11 Commissions and their rules are established for their
12 process, and not necessarily established to govern their
13 participation in any other level of government directly,
14 and I am not sure that this is germane.

15 But I would suggest that since you brought
16 the issue up, and only to the extent that Ms. Giordano
17 feels that we should be very cautious in dealing with
18 the thought that perhaps ex parte communications or
19 any recusable acts have or could take place.

20 And I think we just need to look at what Ms.
21 Giordano wants us to do, and whether or not in this
22 situation, in this particular case, we must make a
23 decision with regard to your participation should you
24 choose not to recuse yourself on the basis of testimony
25 and discussion that has been made.

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1 BOARD MEMBER RENSHAW: Well, I am just
2 stating here for the record, Mr. Chairman, that you are
3 creating a standard here by the decision of the Board,
4 and I want to make very clear that I do not feel -- I
5 have no financial interest in this case whatsoever.

6 I have no emotional involvement, no
7 psychological involvement. I was basing as I stated two
8 months ago, I am basing whatever decision has to be made
9 on the testimony, and that is in the record.

10 And I am just cautioning the Board that
11 whatever it does today will set a standard and a precedent,
12 and I do not feel that the objection has merit today,
13 because I am going to be, or I would be, and would always
14 be, very fair.

15 CHAIRPERSON SOCKWELL: I don't know that we
16 are setting a standard. I think what is being brought
17 up is that we adhere to the standard that is already part
18 of our operating rules and that the standard be
19 interpreted strictly with regard to the participation
20 of individuals passively, as well as actively, in meetings
21 and discussions that are outside of the meeting room or
22 the hearing room.

23 And so we have to look at that, and if other
24 Board Members have something specific to say with regard
25 to either where we should go with this, or Ms. Renshaw,

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1 if you feel that on the basis of the objection not being
2 withdrawn that you could in good conscience recuse
3 yourself to end this matter with regard to this case and
4 this objection, then that is the direction that I think
5 we should go.

6 BOARD MEMBER RENSHAW: Mr. Chairman, I am
7 not going to recuse myself voluntarily from this case.

8 Ms. Giordano, who has appeared before the ANC many times
9 on behalf of other clients, has never objected to the
10 matter in which the ANC participated.

11 And she knew also in previous years that we
12 had a member of our commission who was on the ABC Board,
13 and who recused himself at the ANC level, and then voted
14 on cases at the ABC Board level.

15 And that is the way in which ANC-3G has always
16 conducted itself, vis-a-vis any cases that flowed upward
17 to a City agency, or a City board and commission.

18 So therefore as I have conducted myself in
19 the manner that the ANC has prescribed, and as I have
20 been questioned by City Counsel as to how I would handle
21 myself were there this situation, and as I have told City
22 Counsel that I would recuse myself at the ANC level.

23 And again it has always the practice that
24 the Chair or the participant, the ANC Commissioner stay
25 in the room, I have just followed procedures, and now

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1 we are at this point where suddenly there is this objection
2 from Ms. Giordano, who again has participated many times
3 in ANC deliberations on behalf of clients or just to visit.

4 CHAIRPERSON SOCKWELL: Well, let's get to
5 the bottom of this. Let me say this.

6 I appreciate your comments, Ms. Renshaw, and
7 I do want to say that I would request that Ms. Giordano
8 hold herself to the standard that she is asking this Board
9 to hold itself to, primarily in being cautious about
10 initiating what may be considered ex parte communication
11 with Board Members, either in the building or in any other
12 circumstance where such Board Members may receive
13 information that would be detrimental to their effective,
14 and fair, and impartial handling of a case that is before
15 this Board.

16 Now, I would ask my Board Members for a
17 motion, if one is desired, since Ms. Renshaw refuses to
18 recuse herself voluntarily from this case, feeling
19 strongly that she has participated in no way unfairly
20 or wrongly with regard to her carrying out her duties
21 as a Board Member for this case.

22 COMMISSIONER MITTEN: Mr. Chairman, I would
23 move that we recuse Ms. Renshaw from this case, and I
24 want to make it clear that I in no way question Ms.
25 Renshaw's characterization of her level of participation,

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1 and her ability to be impartial, or anything of that sort.

2 My motion is based on the fact that we have
3 the reality which Ms. Renshaw has testified to, and then
4 we have the appearance, and I think we have to use an
5 abundance of caution in taking any actions that would
6 allow decisions of this Board to be assailed.

7 And it is on that basis that I think it is
8 in the best interests of the Board that Ms. Renshaw be
9 recused.

10 CHAIRPERSON SOCKWELL: Is there a second for
11 that?

12 VICE CHAIRPERSON REID: I would second it,
13 and also I would like to add that I think that Ms. Renshaw
14 -- well, I concur with my colleague, Ms. Mitten, that
15 I believe that Ms. Renshaw has basically caught herself
16 -- has been caught between a rock and a hard place.

17 And it is not the acts of Ms. Renshaw, per
18 se. I think it is the fact that the regulations, and
19 the rules, and the procedures which she has been operating
20 under are basically flawed, and as such, we find ourselves
21 in the position of trying to at least give -- not to err
22 on the side of caution.

23 So that at least we can attempt to try to
24 right what is obviously a wrong that is beyond the scope
25 and control of this Board, and that is in regard to that

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1 very nebulous idea of appearance.

2 CHAIRPERSON SOCKWELL: I would want to step
3 beyond the rightness and wrongness, and to call it
4 appropriate or not appropriate, only because the issue
5 is that Ms. Renshaw was drawn into this in one respect
6 by a communication that would be normal to her activities
7 as the Chair of the ANC.

8 And because the initial discussions actually
9 from Ms. Giordano's statements before us were more than
10 just scheduling issues, I think, from what she said.
11 But it is just a circumstance that we cannot afford to
12 err other than on the side of caution. Mr. McBride.

13 MR. MCBRIDE: Mr. Chairman, this is highly
14 unusual.

15 COMMISSIONER MITTEN: Mr. Chairman, I think
16 it is out of order for a party to participate in the
17 discussion on a motion of this Board.

18 MR. MCBRIDE: I was simply going to say that
19 I have never participated.

20 CHAIRPERSON SOCKWELL: I understand that,
21 but the questions were not asked of you. You were
22 actually brought to the table to answer a specific
23 question raised by the Board.

24 And I appreciate your willingness to state
25 something additional, but it has not been requested of

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1 you, sir. Any further discussion on this?

2 BOARD MEMBER RENSHAW: Yes.

3 CHAIRPERSON SOCKWELL: Yes?

4 BOARD MEMBER RENSHAW: Yes. Does this mean
5 also that Ms. Giordano is going to step aside, too?
6 Because that is what has to take place if you are going
7 to clean the record, and you will not be able to go forward
8 with this case today.

9 COMMISSIONER MITTEN: Mr. Chairman --

10 CHAIRPERSON SOCKWELL: If there is anything
11 that would have to be done in that respect, I would have
12 to ask Corporation Counsel for a ruling on your request.

13 VICE CHAIRPERSON REID: I think that we need
14 to respond to the motion on the floor first, and then
15 we can take up any other issues.

16 CHAIRPERSON SOCKWELL: Well, if the
17 question is important to the extent that it might affect
18 Ms. Giordano's case, then I think it needs to be answered,
19 and I request the answer from Corporation Counsel.

20 MS. SANSONE: Mr. Chairman, there would be
21 no reason for the Board to take any action with respect
22 to Ms. Giordano. Questions about an attorney's conduct
23 are usually handled by the Bar Association, but would
24 not be handled in the middle of a hearing. We should
25 proceed to the conclusion of this case.

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1 CHAIRPERSON SOCKWELL: Thank you. Thank
2 you very much. Board Members, all in favor of the motion
3 that is on the floor say aye?

4 (A chorus of ayes.)

5 CHAIRPERSON SOCKWELL: Opposed?

6 BOARD MEMBER RENSHAW: I oppose.

7 CHAIRPERSON SOCKWELL: Thank you.

8 BOARD MEMBER RENSHAW: And I would like to
9 know my appeal rights.

10 CHAIRPERSON SOCKWELL: The motion carries.
11 Appeal rights would have to be discussed with Corporation
12 Counsel.

13 MS. KRESS: It is the Court of Appeals, am
14 I not correct?

15 MR. BERGSTEIN: I wouldn't want to say at
16 this point procedurally whether or not a member has any
17 particular appeal rights in that type of action. I really
18 just don't know.

19 CHAIRPERSON SOCKWELL: Okay. Will staff
20 record the vote on the motion, please.

21 MS. BAILEY: The staff will record the vote
22 as four to zero; motion made by Mrs. Mitten --

23 CHAIRPERSON SOCKWELL: That is 4 to 1.

24 MS. BAILEY: I'm sorry, 4 to 1; motion made
25 by Ms. Mitten, and seconded by Mrs. Reid, and supported

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1 by Mr. Sockwell and Mrs. Hinton, for Mrs. Renshaw to be
2 recused from this case.

3 MR. BERGSTEIN: Mr. Chair, since Mr. McBride
4 was attempting to say something, I don't know if you want
5 to simply allow him to state whether or not he is objecting
6 to the Board's action himself as a party just for the
7 record being clear.

8 And whether or not his position -- well, his
9 initial position was no position if I understand
10 correctly, but in fairness --

11 CHAIRPERSON SOCKWELL: Since this is really
12 not a reopening of the hearing, it is more of a discussion
13 of an objection that was raised during the hearing, which
14 is now closed. I don't believe there is a position for
15 Mr. McBride to add an objection at this point.

16 We were ruling on an objection somewhat late,
17 but we are ruling on an objection that had been previously
18 raised.

19 VICE CHAIRPERSON REID: Mr. Chair, I would
20 also like to suggest -- and I don't know if we can do
21 it in the form of a motion, and perhaps Ms. Sansone can
22 advise us that we refer this matter to the zoning
23 commission to take a look at the manner in which these
24 types of situations can be handled in the future so that
25 we do not have to revisit this same issue again.

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1 And should we do it in the form of a motion,
2 make a motion, or just basically ask that we have --

3 CHAIRPERSON SOCKWELL: I think that we can
4 ask the staff to pursue with the zoning commission the
5 procedures with regard to recusal and ex parte, in
6 particular, in the case of people who are officers of
7 the ANC, et cetera.

8 COMMISSIONER HINTON: Can I also comment on
9 the record since I did not attend the hearing on December
10 19th, I did read the record before voting.

11 BOARD MEMBER RENSHAW: And I just want to
12 point out again for the record, Mr. Chair, that Ms.
13 Giordano's objection came 104 pages into the hearing on
14 December 19th.

15 So, 104 pages, and then there is a problem,
16 and it was a problem only after I stated that I had to
17 leave early, and I for the record recused myself at the
18 ANC level. This is most unfair, and almost unethical,
19 and it certainly is unprofessional.

20 CHAIRPERSON SOCKWELL: Well, I think the
21 record will reflect that this would normally have been
22 handled as a preliminary matter, but corporation counsel
23 can state whether or not there is anything inappropriate
24 with regard to the timing of an objection.

25 MS. KRESS: I don't think that would be

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1 approximate right now. There is things to be heard in
2 the future. I think the decision is made rather than
3 perhaps trying an appeal now. Perhaps that is better
4 handled at a later date.

5 CHAIRPERSON SOCKWELL: Well, I will go on
6 the recommendation of staff and it will be I guess taken
7 under advisement at a later date.

8 VICE CHAIRPERSON REID: Mr. Chair, I would
9 like to raise a question as to what do we do about the
10 executive session if in fact we are to proceed along those
11 lines, or what in fact now --

12 CHAIRPERSON SOCKWELL: I believe that if we
13 go to executive session that would be a session at which
14 Ms. Renshaw would be recused from participating in, and
15 if we go forward with the public meeting on this case,
16 Ms. Renshaw as well would be recused from participating
17 in this public meeting.

18 VICE CHAIRPERSON REID: My question was what
19 are we going to do, if anything, about an executive
20 session?

21 CHAIRPERSON SOCKWELL: Well, I made the
22 statement specifically to preface anything that we decide
23 to do. And the question has to be brought up as will
24 we retire for executive session to discuss issues that
25 are unclear with regard to this case. Board Members.

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1 COMMISSIONER MITTEN: Mr. Sockwell, I think
2 you need to decide what is in the best interests of
3 deciding this case in fairly, and the fact that you have
4 a fairly full schedule for the rest of the day.

5 CHAIRPERSON SOCKWELL: This is true. It
6 seems to me that because of the complexities of the case,
7 and the fact that it has been decided previously that
8 an executive session would be necessary to sort out a
9 number of the issues, and that we were unable to do that
10 prior to this meeting because of extenuating
11 circumstances involving around Ms. Renshaw's situation
12 and the objection, that we postpone the decision on this
13 case until we can in fact have an executive session so
14 that we can discuss those issues, and more fairly and
15 effectively deal with the case.

16 That would be my suggestion. Board Members,
17 are you in agreement?

18 COMMISSIONER MITTEN: I think that is a good
19 suggestion.

20 CHAIRPERSON SOCKWELL: Ms. Reid?

21 VICE CHAIRPERSON REID: I agree. I think
22 that given the fact that we have now spent so much time,
23 an inordinate amount of time with this discussion about
24 the recusal issue, that it would not be appropriate, or
25 it would not be adequate for us to move forward with the

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1 decision, not having been given the benefit of the
2 executive session that we had already stipulated was
3 necessary to consider some of these very complex issues.

4 CHAIRPERSON SOCKWELL: Okay. But, Ms.
5 Reid, the question that was raised was strictly whether
6 or not we should go to executive session before we hear
7 the case, and before we complete the decision.

8 And regardless of the inordinate amount of
9 time that you feel that we have spent dealing with this
10 particular thing, the question was strictly one of do
11 you wish for us to do an executive session first, and
12 you say yes.

13 VICE CHAIRPERSON REID: Okay.

14 COMMISSIONER HINTON: This whole idea of an
15 executive session is new to me, because when I was on
16 the Board a couple of years ago, we just made our decisions
17 at our public meetings.

18 And given the fact that this has been
19 scheduled for today, I am really troubled by now at 10
20 o'clock that we are going to decide not to decide. I
21 think the information has been in front of the Board
22 Members for a very long time, and I think we should decide
23 it today.

24 CHAIRPERSON SOCKWELL: If we do it here, we
25 will have to go through the procedure of getting

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1 corporation counsel's opinions on issue and things like
2 that, and it will force other cases to be pushed back
3 further into the morning agenda and the afternoon agenda,
4 which is a fairly heavy agenda, which will also be
5 impacted.

6 I would think that for the sake of the overall
7 agenda that it may be more appropriate under these
8 particular circumstances to postpone and make sure that
9 we fully understand all the issues involved.

10 And I understand and respect your opinion very much on
11 the issue of executive sessions.

12 COMMISSIONER MITTEN: Mr. Sockwell, I was
13 just listening with one ear to staff, and there is a case
14 that was scheduled for a hearing this morning that has
15 been withdrawn, and so there is relatively more time than
16 maybe you had anticipated to go forward with this this
17 morning if you want to take Ms. Hinton's advice and
18 proceed.

19 CHAIRPERSON SOCKWELL: Well if the Board
20 Members wish to do that, then we will do it.

21 COMMISSIONER HINTON: Can I ask a question?

22 CHAIRPERSON SOCKWELL: Yes.

23 COMMISSIONER HINTON: How long do you think
24 it would be if we went into executive session could we
25 wrap that up in? Do you think 15 or 20 minutes, or what

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1 sort of time are you anticipating?

2 CHAIRPERSON SOCKWELL: I think for
3 clarification of issues, do you think a half-an-hour would
4 be sufficient?

5 COMMISSIONER MITTEN: I would think at the
6 most that we should take 30 minutes, and just be committed
7 to coming back out here in 30 minutes, and if we say 30
8 minutes, we will be back out here in 30 minutes.

9 CHAIRPERSON SOCKWELL: Then I am sure that
10 the applicants would prefer for us to dispose of this
11 today. If we can do that, then I would agree with that
12 position, and let's go it. The meeting is now in recess
13 for an executive session, which will reconvene at 20
14 minutes to 11:00.

15 (Whereupon, the public meeting was recessed
16 at 10:10 a.m., and was again called to order at 10:52
17 a.m.)

18 CHAIRPERSON SOCKWELL: The public meeting
19 is reconvened. As we have previously stated, this is
20 a decision meeting on the application of Daniel Serwer
21 and James W. McBride, Case Number 16646.

22 The Board has completed its discussion of
23 issues, and I think that we should proceed with any
24 discussions regarding this application. Board Members.

25 COMMISSIONER MITTEN: Mr. Chairman, I think

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1 the first issue of the appeal related to -- well, I guess
2 the first issue of the appeal related to the requirement
3 to have a record lot in order to be issued a building
4 permit.

5 And there are several exceptions that are
6 permitted under Section 3202.3, and among those
7 exceptions is an Act of Congress of June 28th, 1989, which
8 is contained in D.C. Code 7-114 that relates to the use
9 of property, or that property encumbered by a highway
10 plan can be used until condemnation proceedings have
11 commenced.

12 In this case, while it appears that that
13 exception was being invoked by the zoning administrator,
14 or by the zoning technician who was reviewing this permit,
15 the fact that they did not refer the application to DPW
16 indicates that they could not have known whether or not
17 condemnation proceedings had commenced.

18 So while I appreciate the fact that -- and
19 I think that we had some testimony related to the normal
20 procedure and the permitting process, and that the zoning
21 technician is not responsible for DPW's sign-off in the
22 normal course of things.

23 And I think because they are invoking the
24 exception of Section 3202.3 that there must be a referral
25 to DPW in order to determine whether or not condemnation

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1 proceedings have begun.

2 So I would suggest that the appeal be
3 withheld related to Issue Number 1 for lack of a referral
4 to DPW.

5 COMMISSIONER HINTON: Do you mean that the
6 appeal be granted?

7 COMMISSIONER MITTEN: Yes.

8 COMMISSIONER HINTON: Thanks.

9 CHAIRPERSON SOCKWELL: It would seem
10 appropriate that if the applicant had in some way provided
11 proof from DPW that condemnation had not been applied
12 for that that would have satisfied the requirement.

13 But there is nothing in the record to state
14 that there was any information coming from DPW to
15 substantiate whether or not there had been condemnation
16 proceedings.

17 And so without that, it appears that DCRA
18 would have been unable to make an informed decision on
19 the dispensation or disposal of the application.

20 COMMISSIONER MITTEN: I agree.

21 VICE CHAIRPERSON REID: Now, I just want to
22 clarify something in my own head. If they in fact did
23 not refer it to DPW, and it is not required, then are
24 we saying that we want to make the decision based on the
25 fact that we think they should have?

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1 And was there any other information
2 available that we know of that was available to the
3 technician for them to have made that assumption?

4 COMMISSIONER MITTEN: If I could just
5 respond to that. I think the answer to your second
6 question is none that we are aware of, and I think that
7 is what Mr. Sockwell is saying.

8 The answer to your first question is that
9 in the normal course of approving permits that zoning
10 is not required to make a referral to DPW, but in this
11 case, there was essential information that only DPW could
12 provide in order to determine whether they could invoke
13 the exception for this record lot requirement.

14 VICE CHAIRPERSON REID: I understand that,
15 but my question was whether there was any other
16 information or other materials that had been represented
17 to or that was available to the technician that would
18 give them or would form the basis for them making that
19 assumption?

20 CHAIRPERSON SOCKWELL: The only thing, if
21 I might state this, that I am aware of is that the
22 surveyor's plat information would be expected to have
23 the most current DPW restrictions or lack thereof when
24 it is presented to the applicant in the form of a plat
25 for the building.

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1 And yet whether or not that information is
2 correct could only be assessed based on whether or not
3 the surveyor routinely receives information from the
4 Department of Public Works regarding the highway plan
5 position with regard to any lots or streets.

6 VICE CHAIRPERSON REID: If it is updated.

7 CHAIRPERSON SOCKWELL: Yes. So if the
8 zoning reviewer assumes the plat to be the accurate
9 description of property, then the zoning reviewer may
10 assume that the highway plan encumbrances which are shown
11 are accurate.

12 And if they are considered to be accurate,
13 then decisions have to be made upon what is presented
14 to the zoning reviewer at the time.

15 COMMISSIONER MITTEN: And I don't disagree
16 with that, and in fact I think that the survey that is
17 dated -- I think it is dated April 7th of 2000, shows
18 the improvements in this case within the area that is
19 designated for being part of the highway plan.

20 So in terms of your point, I think what they
21 had in front of them suggested that a referral was in
22 order because the garage is shown within the area
23 designated for the highway plan, or at least appears to
24 be.

25 So I think that in order to discharge their

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1 responsibility, they would have had to make -- in order
2 for the zoning technician to discharge their
3 responsibility, they would have had to make a referral.

4 CHAIRPERSON SOCKWELL: It would seem to me
5 that a lot like this, Lot 801, would be a fairly unique
6 lot, or 801 and 802, and they would be fairly unique as
7 a property projecting out into two streets as shown on
8 the plat dated April 17th of 2000.

9 Interestingly -- well, that's August 17th.
10 What is the date on this plat? Is this April or August?

11 COMMISSIONER MITTEN: I think it is April.
12 Maybe we can just designate it that the plat has 3-C
13 at the top.

14 CHAIRPERSON SOCKWELL: If it is dated April
15 17th at the top, which is the date when it was issued,
16 it is signed as March 2000, which is before it was issued,
17 and was approved 4/18 of 2000. So I am concerned what
18 that first date is, because now the dates on the plats
19 really don't make sense.

20 COMMISSIONER MITTEN: Do you think that is
21 really germane to the issue that is before us though in
22 terms of the dates? I mean, that is the plat that was
23 submitted with the application. I think that's clear.

24 CHAIRPERSON SOCKWELL: Yes. You can't sign
25 it before you get it. That's all I'm saying.

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1 COMMISSIONER MITTEN: I see.

2 CHAIRPERSON SOCKWELL: But this was a one
3 day permit process based on the information provided for
4 the application. So it was submitted, approved, and paid
5 for in a period of five hours from the time that they
6 opened for business on that morning.

7 So that meant that it had to be reviewed
8 by all disciplines and issued. So there wasn't a lot
9 of time given to the zoning part of the review. But the
10 highway plan issue is very obvious if one extends the
11 street lines across the property.

12 And it does make it seem rather unusual that
13 it would not have had some additional scrutiny as a result
14 of the unique nature of the lots' projection into public
15 space, designated public space.

16 COMMISSIONER MITTEN: If a motion would be
17 in order at this point, I would be happy to make one,
18 Mr. Chairman.

19 CHAIRPERSON SOCKWELL: Is there any more
20 discussion?

21 (No audible response.)

22 CHAIRPERSON SOCKWELL: Then please proceed.

23 COMMISSIONER MITTEN: I would move granting
24 the appeal of Messrs. Serwer and McBride based on the
25 lack of referral of the building permit application to

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1 DPW in order to invoke the exception to the record lot
2 requirement under 11 DCMR 3202.3.

3 CHAIRPERSON SOCKWELL: And you are basing
4 that on an obvious overlay of highway plan encumbrances
5 on the lot, and in particular the built portion of the
6 lot?

7 COMMISSIONER MITTEN: Yes.

8 COMMISSIONER HINTON: I second the motion.

9 CHAIRPERSON SOCKWELL: Discussion?

10 (No audible response.)

11 CHAIRPERSON SOCKWELL: All in favor?

12 (A chorus of ayes.)

13 CHAIRPERSON SOCKWELL: Opposed?

14 VICE CHAIRPERSON REID: No.

15 CHAIRPERSON SOCKWELL: The motion carries.

16 Would you record the vote, please.

17 MS. BAILEY: The staff will record the vote
18 as 3 to 1 to grant the appeal based on lack of referral
19 to DPW. The motion was made by Mrs. Mitten, seconded
20 by Mrs. Hinton; Mr. Sockwell in agreement, and Mrs. Reid
21 is opposed to the motion. Mrs. Renshaw not
22 participating.

23 COMMISSIONER MITTEN: Mr. Chairman, there
24 is a second issue on the appeal.

25 CHAIRPERSON SOCKWELL: Yes.

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1 COMMISSIONER MITTEN: Would you like me to
2 frame that?

3 CHAIRPERSON SOCKWELL: Please.

4 COMMISSIONER MITTEN: The issue is whether
5 or not the two-story garage that was built constitutes
6 an accessory building or constitutes an addition under
7 the zoning ordinance.

8 CHAIRPERSON SOCKWELL: Well, as the
9 ordinance is interpreted or stated, if a connection that
10 is made is covered and attached, and that connection
11 separates two portions of a building, then the two
12 portions are constituted or considered to be part of the
13 same building.

14 COMMISSIONER MITTEN: I agree with that
15 interpretation of the ordinance, and unfortunately I
16 think the ordinance is weak in this area, but it stands
17 on its own as it is written.

18 And the interpretation has been made many
19 times that the kind of connection that Mr. Sockwell just
20 described is sufficient to meet the test for an addition,
21 and that is the proper interpretation in this case.

22 CHAIRPERSON SOCKWELL: Further discussion,
23 please?

24 VICE CHAIRPERSON REID: I would concur.

25 COMMISSIONER HINTON: I also concur.

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1 VICE CHAIRPERSON REID: I don't see how that
2 is an area that has been the subject of much dispute
3 through the years, I don't see any other way of looking
4 at it.

5 CHAIRPERSON SOCKWELL: Then I will
6 entertain a motion.

7 COMMISSIONER MITTEN: I move that we deny
8 the appeal of Messrs. Serwer and McBride based on the
9 fact that the garage constitutes an accessory building.

10 Our interpretation is that it is an addition in
11 accordance with the zoning ordinance.

12 COMMISSIONER HINTON: I second.

13 CHAIRPERSON SOCKWELL: Any further
14 discussion?

15 (No audible response.)

16 CHAIRPERSON SOCKWELL: All in favor?

17 (A chorus of ayes.)

18 CHAIRPERSON SOCKWELL: Record the vote,
19 please.

20 MS. BAILEY: The vote is recorded as four
21 to zero; motion made by Mrs. Mitten, seconded by Mrs.
22 Hinton; with Ms. Reid and Mr. Sockwell in agreement, and
23 Mrs. Renshaw not present and not voting.

24 MS. SANSONE: Mr. Chairman, I have just one
25 housekeeping matter from reviewing the transcript. Ms.

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1 Giordano had requested that Mr. Shiner be recognized as
2 an expert in architecture, and when I went back to read
3 the transcript, I realized the board had not expressly
4 made a ruling on that request.

5 And so if we could just clear up the record
6 on that point, then I believe that would be helpful.

7 CHAIRPERSON SOCKWELL: I don't believe we
8 have a resume of experience in the file on this, and on
9 that basis, without having received documentation for
10 review, which is traditional when the Board makes such
11 findings, that we would deny expert witness status for
12 the sake of this case.

13 COMMISSIONER MITTEN: Second.

14 CHAIRPERSON SOCKWELL: Discussion?

15 (No audible response.)

16 CHAIRPERSON SOCKWELL: All in favor?

17 (A chorus of ayes.)

18 CHAIRPERSON SOCKWELL: Record the vote,
19 please.

20 MS. BAILEY: Motion made by Mr. Sockwell,
21 and seconded by Mrs. Mitten, Mrs. Reid and Mrs. Susan
22 Morgan-Hinton in agreement.

23 MS. BAILEY: All right. That completes
24 decisions on this matter. The Special Hearing is
25 concluded.

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(Whereupon, the hearing was concluded at
11:13 a.m.)