

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

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TUESDAY
MARCH 5, 2013

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The Regular Public Meeting
convened in the Jerrily R. Kress Memorial
Hearing Room, Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 9:30 a.m., Lloyd Jordan,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairperson
NICOLE SORG, Vice-Chairperson
S. KATHRYN ALLEN, Board Member

ZONING COMMISSION MEMBER PRESENT:

MICHAEL TURNBULL, FAIA, Commissioner
(AOC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary

JOHN NYARKU, Zoning Specialist
STEVEN VARGUS, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes

from the Public Meeting held on March 5,

2013.

T-A-B-L-E O-F C-O-N-T-E-N-T-S

PUBLIC MEETING OF THE BOARD OF ZONING
ADJUSTMENT

I. INTRODUCTIONS:

Chairman Lloyd Jordan.4

II. BOARD ACTIONS/MOTIONS:

1. Applicant's Motion for Modification

of Condition Number Two to Order
Number 18355 of Washington Ethical
Society.6

2. Appellant's Motion for Stay of

Building Permits for Nine-unit
Apartment Building to Appeal Number
18539 of 101 Connecticut Avenue

Cooperative Apartments, Inc.
and an Eight-unit Apartment
Building Attendant to Appeal Number
18540 of 2101 Connecticut Avenue
Cooperative Apartments, Inc.8

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

9:50 a.m.

CHAIRPERSON JORDAN: Good morning.
Would the meeting please come to order. We're located at the Jerrily R. Kress Memorial Hearing Room at 441 4th Street, N.W. Today's date is Tuesday, March 5, 2013. We're here for the Public Meeting and the Public Hearing of the Board of Zoning Adjustment.

My name is Lloyd Jordan, Chairperson. To my left is Nicole Sorg, Vice Chair. To her left is Michael Turnbull, Member of the Zoning Commission. And to my right is S. Kathryn Allen, Member of the Board.

Please be advised that this proceeding is being recorded by a court reporter and is also being webcast live. Therefore, I'm going to ask you to refrain from any disruptive noises here in the hearing room today. Today's agenda has been posted and, if you're not familiar with our processes

1 and procedures, there is a pamphlet by the
2 door to my left, for you to get familiar with.
3 Although we have -- the first part, we have a
4 couple of cases we're handling as a meeting,
5 we are also then proceeding immediately into
6 the hearings. So I'm going to ask if there's
7 anyone who plans on giving testimony on any
8 case here today, please stand and take the
9 oath or affirmation being given by the Board's
10 Secretary, Mr. Moy.

11 MEMBER MOY: Thank you, Mr.
12 Chairperson. Good morning. Do you solemnly
13 swear or affirm that the testimony you are
14 about to present in this proceeding is the
15 truth, the whole truth, and nothing but the
16 truth?

17 ALL: Yes.

18 MEMBER MOY: Ladies and gentlemen,
19 you may consider yourselves under oath.

20 CHAIRPERSON JORDAN: For each
21 person, prior to you testifying, I'm going to
22 need you to complete two witness cards for

1 each person. And then give them to the court
2 reporter, prior to testifying. So that's two
3 witness cards a person. And give them to the
4 court reporter. Mr. Moy, whenever you're
5 ready?

6 MEMBER MOY: Okay. Was that for
7 the decision cases or for the Public Hearing,
8 sir?

9 CHAIRPERSON JORDAN: Let's do the
10 Public Meeting cases.

11 MEMBER MOY: Okay. Good. All
12 right. The first of three cases before the
13 Board for decision -- the first is -- the
14 first before the Board is Applicant's motion
15 for modification of Condition Number Two to
16 Order Number 18335 of Washington Ethical
17 Society, pursuant to Section 3129 of the
18 Zoning Regulations. For the record, the
19 original application was pursuant to 11 DCMR
20 3104. for a special exception to allow a child
21 development center (40 children and 14 staff)
22 under Section 205, in the R-1-A District at

1 premises 7750 16th Street, N.W. (partly
2 located in Square 2745F -- that's F as in
3 foxtrot, Lot 81).

4 The Board has received from the
5 Applicant, the request, dated January 31,
6 2013. That exhibit in the case photos, Mr.
7 Chairman, is Exhibit 41. Other than that,
8 there are no other filings in the record. The
9 request had been served on all the parties.
10 The Board is to act on the standards pursuant
11 to Section 3129. And that concludes the
12 request, Mr. Chairman.

13 CHAIRPERSON JORDAN: Okay. Will
14 the parties or persons filing the motion to
15 modify please come to the witness table? Are
16 they here? They're not here. Okay. All
17 right. I can't ask the question I need to do
18 it, so that's how we're going to do it. We're
19 going to notice this for a week for a hearing.

20 MEMBER MOY: Okay.

21 CHAIRPERSON JORDAN: Or we could
22 -- yes? Go ahead. Notice it for a hearing.

1 And there is a couple of questions I need to
2 ask of them and they're not here. So, is that
3 okay with the Board? Okay. So let's do that.

4 MEMBER MOY: Should -- Staff's
5 understanding of the Board is to move this to
6 the next Public Hearing, sir?

7 CHAIRPERSON JORDAN: That's
8 correct.

9 MEMBER MOY: All right.

10 (Whereupon, some off the record
11 discussion ensued.)

12 CHAIRPERSON JORDAN: Move to
13 whenever we can get a hearing on it. Okay?
14 You can put it on a hearing and a meeting.

15 MEMBER MOY: I understand.

16 CHAIRPERSON JORDAN: Okay. All
17 right. So then let's call the next two cases
18 together. It's the same transaction and
19 occurrence I believe.

20 MEMBER MOY: Yes, sir. That would
21 be -- well, this is the Appellant's motion for
22 a stay of building permits. And these

1 building permits, as you've just mentioned,
2 Mr. Chairman, is to Appeal Number 18539 and
3 18540. Both appeal cases were scheduled for
4 April 30, 2013.

5 CHAIRPERSON JORDAN: So we're a
6 month away? Is that right?

7 MEMBER MOY: Yes, sir. And the
8 filing from the Appellant to the holders, the
9 motion for the stay --

10 CHAIRPERSON JORDAN: Okay. Are
11 you finished calling it or are you still going
12 through it?

13 MEMBER MOY: No. Let's leave it
14 at that. I think that's enough for the
15 record.

16 CHAIRPERSON JORDAN: Okay.
17 Representative's attorneys or representatives
18 on the cases 18539 and 18540, attorneys or
19 anyone on that, please come too -- we'll need
20 a representative or a movement or the
21 attorneys representing the Appellant. Good
22 morning. Please identify yourselves?

1 MR. SURABIAN: Assistant Attorney
2 General Jay Surabian, on behalf of DCRA.

3 MS. MAZO: Samantha Mazo, on
4 behalf of 2101 -- I'm sorry. I'm Samantha
5 Mazo, on behalf of 2101, the adjacent
6 neighbor.

7 MR. KADLECEK: Cary Kadlecek on
8 behalf of the property owner.

9 CHAIRPERSON JORDAN: Adjacent
10 neighbor?

11 MS. MAZO: 2201, the Cooperative.

12 CHAIRPERSON JORDAN: But you're
13 not a party?

14 MS. MAZO: We are. We're the
15 Applicant.

16 CHAIRPERSON JORDAN: Oh, the
17 Applicant? Okay. Sorry. I'm sorry. Okay.

18 MS. MAZO: No problem.

19 CHAIRPERSON JORDAN: The
20 Appellant.

21 MS. MAZO: Excuse me?

22 CHAIRPERSON JORDAN: The

1 Appellant.

2 MS. MAZO: Oh. The Appellant.

3 CHAIRPERSON JORDAN: That's right.
4 Now we're cooking with gas. All right. Let
5 me first ask the Appellant, this is your
6 motion?

7 MS. MAZO: Yes, sir.

8 CHAIRPERSON JORDAN: And has the
9 Applicant -- the Appellant made a request of
10 the Zoning Administrator to see if they would
11 just hold the order?

12 MS. MAZO: Yes. Indeed, we have.
13 Back on December 7th, when we were
14 corresponding with the Zoning Administrator,
15 at the time in which he provided us a copy of
16 the -- of his determination, we specifically
17 asked him, in writing, if he would hold or
18 delay any of the building permits. And he
19 responded, in writing, that he would not do
20 so.

21 CHAIRPERSON JORDAN: All right.

22 MS. MAZO: And that --

1 CHAIRPERSON JORDAN: Is that in
2 our filing?

3 MS. MAZO: Yes. That was
4 attachment A to our response to DCRA's
5 opposition to our motion to stay. That
6 correspondence.

7 CHAIRPERSON JORDAN: What exhibit
8 is that, Mr. Moy?

9 MEMBER MOY: Just a second, sir.
10 Try Exhibit 19, sir.

11 CHAIRPERSON JORDAN: Try Exhibit?
12 Okay. Under the first matter or the other?

13 MS. MAZO: Well, it was the -- the
14 same filing was filed in both 539 and 540.

15 CHAIRPERSON JORDAN: Okay. Just
16 give us a second here. Okay. So it's
17 e-mails.

18 (Whereupon, off the record
19 discussion of exhibits ensued.)

20 CHAIRPERSON JORDAN: So what I'm
21 reading in this e-mail is that you request
22 that the Zoning Administrator withhold any

1 permits until HPRB took an action. Is that
2 what you want today? Is that what you're
3 requesting of us? Because I don't think
4 that's the same request.

5 MS. MAZO: No. No. No. No.
6 Ultimately, what we're requesting of you is
7 for you to also issue a stay for -- until the
8 BZA has decided -- it has made its decision
9 on the appeal. My understanding, and the
10 Applicant -- Applicant's attorney is here, as
11 well. But my understanding is that the
12 Applicant is pressing to go forward to the
13 HPRB on March 28, which is a full month before
14 the BZA will have a chance to hear this
15 appeal. And our concern, quite frankly, is
16 that, within that time, that building permits
17 and other types of permits can be issued that
18 would allow the construction on these two
19 buildings to go forward. And our position is
20 that the issuance of those permits would be in
21 -- would -- would make it impossible for the
22 BZA to correctly issue --

1 CHAIRPERSON JORDAN: I understand.
2 I understand what you're saying.

3 MS. MAZO: Yes.

4 CHAIRPERSON JORDAN: But it's a
5 different request that you made of the Zoning
6 Administrator, versus what --

7 MS. MAZO: Well, at the
8 time --

9 CHAIRPERSON JORDAN: Let me
10 finish.

11 MS. MAZO: Yes. I'm sorry.

12 CHAIRPERSON JORDAN: It's a
13 different request, what you made of the Zoning
14 Administrator, versus what you're requesting
15 from this Board. That's what I'm seeing.

16 MS. MAZO: Right.

17 CHAIRPERSON JORDAN: And the last
18 conversation you had with the Zoning
19 Administrator was December 2012 on this
20 matter?

21 MS. MAZO: We -- we've had
22 subsequent conversation, but not on this

1 issue.

2 CHAIRPERSON JORDAN: Okay. All
3 right. Let me hear from the owner's
4 representative.

5 MR. KADLECEK: Yes. As we put
6 forth in our -- in our filing on February
7 26th, we think that the Board shouldn't issue
8 the stay for -- for three primary reasons.

9 CHAIRPERSON JORDAN: I'm not
10 asking you that. What about the conversation
11 -- has there been any conversations regarding
12 a request for a stay?

13 MR. KADLECEK: With the Zoning
14 Administrator?

15 CHAIRPERSON JORDAN: The Zoning
16 Administrator.

17 MR. KADLECEK: No. We have not
18 had any conversations with him. The -- the
19 premise of our opposition to the motion is
20 that there's nothing issued -- no building
21 permits have been issued so he -- nothing can
22 be stayed if nothing exists.

1 CHAIRPERSON JORDAN: And Mr.
2 Surabian, where are we in regards to building
3 permits or in regards to this?

4 MR. SURABIAN: My understanding
5 is, and I think that an application for one of
6 the properties was submitted with plans, but
7 not the other one. And it -- and it has not
8 been -- it's my understanding is that the
9 Zoning Administrator has not yet signed off on
10 those plans. They're still working. They're
11 being reviewed.

12 CHAIRPERSON JORDAN: Okay. And
13 what's the schedule for that? Do you know?

14 MR. SURABIAN: They're probably
15 sitting right on his desk today and, you know,
16 he'll look at them.

17 CHAIRPERSON JORDAN: How long have
18 they been sitting on his desk?

19 MR. SURABIAN: I don't know. The
20 application submit was probably submitted --
21 maybe Mr. Kadlecek would know that.

22 MR. KADLECEK: They were

1 submitted, I believe, in January. But they
2 can't -- the permit can't be issued because
3 HPRB hasn't made a final determination yet.

4 CHAIRPERSON JORDAN: And when is
5 the hearing in HPRB?

6 MR. KADLECEK: March 28th.

7 CHAIRPERSON JORDAN: Our hearing
8 is scheduled what, April 20?

9 MEMBER SORG: April 30th.

10 CHAIRPERSON JORDAN: April 30th?

11 MEMBER SORG: Yes.

12 MR. SURABIAN: Just to give some
13 background, typically, Zoning is one of the
14 last reviews to take place. Because there's
15 -- you know, many changes will be made. And
16 then the Zoning Administrator reviews it
17 towards the very end.

18 CHAIRPERSON JORDAN: And when is
19 HPRB?

20 MS. MAZO: And also, just one
21 point -- a factual point -- I'm sorry. My
22 understanding is that that building permit

1 that was issued to DCRA and any subsequent
2 building permits would come as third party
3 reviews. And so, subsequently, would require
4 less review on DCRA's side, and could be
5 issued significantly more quickly than a
6 regular building permit that would have to go
7 through all of the steps of the DCRA review.

8 CHAIRPERSON JORDAN: When was this
9 motion filed?

10 MS. MAZO: Well, it initially was
11 filed with our appeal -- the -- the appeal
12 that we filed on February 5th also included a
13 request for a stay. The subsequent motion was
14 filed February 18th, I believe. And then the
15 -- the District filed its response on February
16 26th. I believe -- and then 2101 filed its
17 response on February 28th. And then, at some
18 point intervening, the property owner filed a
19 response, as well.

20 CHAIRPERSON JORDAN: All right.
21 What's your basis of saying that the Board has
22 jurisdiction -- has the authority to issue a

1 stay?

2 MS. MAZO: Well, the basis is
3 based on the Board's own law, which says very
4 clearly that it has the right to step into the
5 shoes of the deciding --

6 CHAIRPERSON JORDAN: Yes, but do
7 me a favor.

8 MS. MAZO: Yes?

9 CHAIRPERSON JORDAN: Be specific
10 and cite me to your citation. Because I have
11 not --

12 MS. MAZO: Yes. Had the
13 opportunity?

14 CHAIRPERSON JORDAN: No. I've had
15 -- I've read this about a 1000 time.

16 MS. MAZO: Okay.

17 CHAIRPERSON JORDAN: I've read it
18 forward. I've read it backwards. And I've
19 read it sideways. I'm asking you to let me
20 know where you are and where you believe the
21 authority is.

22 MS. MAZO: Okay. Well, I -- it's

1 clear that the authority is in -- I may have
2 to borrow something. I mean, our argument is
3 that the Board's authority is vested in D.C.
4 Code 6-64107-G4, which we set forth, very
5 clearly, the -- all the relevant language in
6 our response to DCRA -- DCRA's motion. But it
7 clearly says that the Board has the
8 opportunity to step into the shoes of the
9 deciding authority, which, in this case, would
10 be DCRA if there's a decision that may be
11 difficult -- or that -- that -- that -- that
12 may be a situation where DCRA has to use that
13 decision in order to make its own decision.
14 So --

15 CHAIRPERSON JORDAN: Doesn't that
16 provision that you read have a conjunctive
17 and? So there's some precursors to that last
18 part --

19 MS. MAZO: Yes.

20 CHAIRPERSON JORDAN: -- that you
21 read. Isn't that correct?

22 MS. MAZO: Yes. That's true.

1 CHAIRPERSON JORDAN: And what are
2 those precursors?

3 MS. MAZO: The precursors are that
4 it needs to -- my understanding is -- make a
5 decision; can make a pre-hearing; can -- can
6 set forth certain -- can take certain actions,
7 but that, ultimately, that it can take those
8 action if it may be necessary to ultimately
9 make its decision. And, in our --

10 CHAIRPERSON JORDAN: Isn't that in
11 regards to the Board having the authority to
12 take actions to support a decision of the
13 Board?

14 MS. MAZO: Correct. But out
15 argument is that --

16 CHAIRPERSON JORDAN: Has there
17 been a decision of the Board?

18 MS. MAZO: No. There has not been
19 a decision of the Board. But our argument is
20 that if the -- the Board doesn't have the
21 opportunity to step into the shoes of DCRA and
22 issue the stay, then any decision of the Board

1 that it could take would then be negated,
2 because building permits could be issued and
3 construction could start in a manner that
4 would be in violation of the Board's ultimate
5 decision.

6 CHAIRPERSON JORDAN: And have you
7 seen cases that we've had where we've
8 subsequently rendered an opinion contrary to
9 the Zoning Administrator and that owner of the
10 building or whoever did the development did it
11 at their own risk and peril, and then that
12 they had to then step back and go back and
13 reverse what they did?

14 MS. MAZO: Right. But that's
15 true. But I think, in this instance, we're
16 asking for a brief four-week stay. And that
17 could ultimately save everybody time and
18 effort in the end.

19 CHAIRPERSON JORDAN: But we're --
20 I understand what you're asking for. I'm
21 talking about the authority.

22 MS. MAZO: I mean, I -- I -- I

1 understand what the authority is. But our
2 reading of --

3 CHAIRPERSON JORDAN: I don't
4 understand what the authority is. I
5 understand what you're assuming is the
6 authority. And I'm trying to help you get me
7 past where I am --

8 MS. MAZO: Right.

9 CHAIRPERSON JORDAN: -- on the
10 conjunctive. That's all I'm asking.

11 MS. MAZO: Right. No. And I
12 understand -- and -- and I understand that
13 this is an activity that is -- can be -- can
14 be reversed through another way. Which is, if
15 indeed the BZA were to issue a decision that
16 is contrary, or to agree with our position,
17 ultimately, at the appeal, that the developers
18 who are acting at their own risk would then
19 have to turn around and make significant
20 changes. But our position is -- is that we
21 believe that there's a brief four-week window
22 here in which that we could certainly save

1 everybody a significant amount of time.

2 CHAIRPERSON JORDAN: I understand
3 that. I understand that. What is the harm if
4 they move forward?

5 MS. MAZO: The harm, ultimately,
6 is, first of all, that there are building
7 permits that have been -- that -- that could
8 be issued that would be in violation of the
9 Zoning Authority, to the extent that we
10 believe that there are -- that the -- that the
11 -- that the property is under-parked; that the
12 parking requirements required that at least
13 four, if not more, parking spaces are
14 required; that each property --

15 CHAIRPERSON JORDAN: I am not
16 asking you --

17 MS. MAZO: Yes. Oh. Well, in
18 terms of the harm --

19 CHAIRPERSON JORDAN: I'm asking
20 you what is the harm. I understand and I
21 assume, because it's the case that you cite,
22 although I don't think it's real applicable,

1 the DMV matter, because there were some other
2 -- if you read fully that case, it was turned
3 on some other issues. However, as we go
4 through the requirements, generally, for
5 anybody -- for any body of quasi-judicial,
6 judicial body, or administratively issuing a
7 stay, that there has to be some type of a --
8 two things. One, there's a likelihood of
9 success on the merits and two, that there is
10 some type of uncompensationable harm. So --

11 MS. MAZO: Well, in our situation,
12 we believe there's going to be significant
13 harm to our neighbors and then also to the
14 adjacent neighbors to the west, by the
15 construction of these -- of these proposed
16 developments. The first harm to our
17 particular property would be a significant
18 loss of light and air; a significant loss of
19 access to enjoyment of their property. This
20 proposed -- the proposed development is
21 proposed to be constructed directly on the
22 property line, within six to eight feet of our

1 property owner's residences and their windows.
2 It is proposed to make significant changes to
3 historically designated buildings that have
4 been specifically designated in the Kalorama
5 Historic District and in such a manner that
6 may not be in accordance with the Historic
7 Review Board. We also believe that our
8 property owners will experience significant
9 economic depreciation, due to the construction
10 of this property and these developments and
11 that, if indeed these are allowed to go
12 forward without having full and proper review
13 by this Board, that this harm will be
14 irreversible, even if, at some point, the BZA
15 were to say -- tell the -- the property owners
16 to tear it down.

17 CHAIRPERSON JORDAN: Okay. Okay.

18 I hear what you're response was. I haven't
19 heard where the irreparable harm is. Let me
20 turn to Mr. Kadlecek. And we can talk --
21 bring us up to where you are on this argument
22 about our authority.

1 MR. KADLECEK: Sure. I think, as
2 we made it clear in our statement, and we also
3 concur with what DCRA filed, the Board doesn't
4 have the authority to do this because even the
5 own -- the cases that the Appellant cited,
6 DCRA already had taken an action. There is no
7 action taken here. And so our premise is one,
8 that you don't have the authority to issue a
9 stay of any permits that don't implicate the
10 Zoning Regulations.

11 We understand the motion that the
12 Appellant has made to ask for a stay of all
13 permits, including raze and demolition
14 permits. Those are included in their original
15 filing. We believe quite strongly that the
16 Board does not have authority to stay raze and
17 demolition permits because they don't
18 implicate the Zoning Regulations.

19 Secondly, we think the Board
20 doesn't have authority because there's no
21 action taken here. The Zoning Administrator
22 hasn't done anything, other than issue the

1 determination letter. But there's no building
2 permit. All the cases that are referenced and
3 -- the BZA cases that are referenced in the
4 Appellant's brief, in addition to the court
5 cases that they've referenced, the agency had
6 taken some action. And I think Chairman
7 Jordan was getting at the premise of that,
8 which is the law that -- that the Appellant
9 cited, which is that the Board has to have
10 taken some action, as well, to step into the
11 authority of what it can do. The Board hasn't
12 done anything on this case.

13 So we think that there's nothing
14 here for the Board to actually grab onto. I
15 mean, to me it's almost like telling a 14-
16 year-old that you can't get a driver's license
17 when you're 16 because you might get into an
18 accident. The DMV, in that instance, hasn't
19 done anything. So you can't preemptively tell
20 them to stop doing something when they haven't
21 done anything yet.

22 CHAIRPERSON JORDAN: Okay. Mr.

1 Surabian?

2 MR. SURABIAN: Right. Thank you.

3 So, first off, the Board does not have
4 authority to restrain DCRA from processing
5 issuing permits at this stage of where we are.
6 That's injunctive relief, which the Board does
7 not have. If it's not specifically in the
8 statute, enabling the Board's powers, the
9 Board can't take the action. And --

10 CHAIRPERSON JORDAN: Mr. Surabian.

11 MR. SURABIAN: Yes?

12 CHAIRPERSON JORDAN: We have, in
13 the past, issued stays and have taken actions
14 away from the Zoning Administrator when we've
15 had other matters. So isn't that true?

16 MR. SURABIAN: The Board has
17 issued stays where -- the only stays I've ever
18 seen the Board issue is with regard to after
19 it's made a decision and an order has been
20 issued.

21 MS. MAZO: I --

22 MR. SURABIAN: I've seen the Board

1 have issues -- include language in their order
2 stating, you know, DCRA shall issue the
3 certificate of occupancy or DCRA shall revoke
4 the permit. Then it can give an order to DCRA
5 to take an action, if it's to --

6 CHAIRPERSON JORDAN: So your
7 argument goes back to the fact that we've had
8 to make a decision on the merits of something.

9 MR. SURABIAN: Exactly. Exactly.

10 CHAIRPERSON JORDAN: Then that
11 would kick in.

12 MR. SURABIAN: Exactly. Doing it
13 before it injunctive relief, which the Board
14 is --

15 CHAIRPERSON JORDAN: Your initial
16 statement was just blanked and I didn't know
17 if -- I wanted to clarify what you were
18 saying.

19 MR. SURABIAN: Oh. I'm sorry. I
20 wanted to talk about injunctive relief the
21 Board does not have.

22 CHAIRPERSON JORDAN: You mean

1 before we've made a decision on the merits?

2 MR. SURABIAN: Yes.

3 CHAIRPERSON JORDAN: That's what
4 you mean?

5 MR. SURABIAN: You're exactly
6 right. Second off, I think it's important to
7 just recognize that, at this stage, no permits
8 have been issued so there's no authority for
9 the developer to -- to engage in construction.
10 And then -- and we don't even know what will
11 ultimately be approved. There could be
12 different iterations of the plans. And so the
13 content of the letters could just very well
14 become meaningless as the plan review moves
15 through. So I don't think it makes a lot of
16 sense to -- to -- to stop the developer from
17 obtaining any permits, when they very well
18 might make changes that could resolve some of
19 these issues. So it doesn't make sense from
20 that point of view.

21 And then lastly --

22 MEMBER TURNBULL: But we haven't

1 seen anything that would, right now, reflect
2 any changes like that.

3 MR. SURABIAN: I think that's it
4 exactly. That's why we should end the stop
5 the process.

6 MEMBER TURNBULL: Okay.

7 MR. SURABIAN: And so -- and
8 lastly, when building permits are issued, if
9 the Appellant doesn't like what's in it;
10 thinks it's in violation of the Zoning, they
11 can make an appeal of the building permit,
12 which is, you know, what we do all the time
13 here. So I don't see why there's a need for
14 any deviation from what's normally the normal
15 process.

16 MS. MAZO: First of all --

17 CHAIRPERSON JORDAN: I didn't --
18 please.

19 MS. MAZO: I'm sorry.

20 CHAIRPERSON JORDAN: Any questions
21 of -- yes, please?

22 MEMBER SORG: Thank you, Mr.

1 Chairman. I did want to sort of drill down a
2 little bit more, specifically, in asking Mr.
3 Surabian and Mr. Kadlecek. I mean, some of
4 this is -- I agree with some of your points
5 that you make. But, in terms of you know DCRA
6 having to make a specific, you know,
7 determination letter or issue a building
8 permit.

9 CHAIRPERSON JORDAN: Yes?

10 MEMBER SORG: I mean, we've all
11 been in situations where, you know, the -- the
12 appeals where it's the sort of you should have
13 -- you know, you could have reasonably known,
14 the Appellant, of the decision, even if the
15 letter wasn't issued.

16 CHAIRPERSON JORDAN: Yes.

17 MEMBER SORG: Secondly, a lot of
18 this is centering around Philly Pizza, which
19 we called a defacto decision, based on DCRA's
20 denial of -- not specifically the letters. So
21 I'm curious to ask both of you, how do you
22 feel, briefly, that this specifically differs

1 from the request made in Philly Pizza?

2 CHAIRPERSON JORDAN: Well, in
3 Philly Pizza, where DCRA was revoking the
4 certificate of occupancy, do you mean?

5 MEMBER SORG: Yes.

6 CHAIRPERSON JORDAN: I have to be
7 honest, I'm not familiar of the stay that was
8 involved and of who made the request.

9 MEMBER SORG: It was your case.

10 CHAIRPERSON JORDAN: No. I wasn't
11 the one -- I didn't work on the case. Sorry.

12

13 MEMBER SORG: I thought --

14 CHAIRPERSON JORDAN: But I'm
15 sorry, I can't speak on who requested the stay
16 there.

17 MEMBER SORG: In that case, the
18 Applicant -- the -- the business owner --

19 CHAIRPERSON JORDAN: Yes?

20 MEMBER SORG: -- requested that,
21 because of a potential major impact on their
22 business, that the Board stay the, you know,

1 closing of the business by DCRA. The
2 fabrication of --

3 CHAIRPERSON JORDAN: And did the
4 Board --

5 MEMBER SORG: -- of the -- right,
6 of the license. And we did that.

7 CHAIRPERSON JORDAN: We did that?
8 I mean, without the benefit of reading it, I
9 can't --

10 MEMBER SORG: Fine.

11 CHAIRPERSON JORDAN: But the
12 difference -- the difference from the sake of
13 this discussion is that that was a matter
14 completely within the control of the Zoning
15 Administrator.

16 MEMBER SORG: That's the point I'm
17 trying to get to. And that's who -- I mean so
18 that's what I was going to say, I have a few
19 thoughts on what that difference is. It is
20 that that is specifically a zoning issue. And
21 one of the things that does trouble me here is
22 that there are plenty of permits that this

1 building owner could get that don't fall under
2 the purview of the BZA. And so that's a
3 little bit of where I'm getting caught on --
4 on this.

5 MR. SURABIAN: And I agree with
6 that.

7 MEMBER SORG: And so, for the
8 Appellant, I mean, maybe she wants to make
9 us --

10 MR. SURABIAN: I also, if I could
11 just add one more point. What's so critical
12 here is the Zoning Administrator's letter was
13 not based on him reviewing a full plan set and
14 -- and -- like he would before issuing a
15 permit. It was based on a proposed site plan
16 and the square footage numbers were all given
17 as estimates. So this -- it's not a -- he's
18 not going to be looking at the same thing he
19 did back then, in approving -- in reviewing
20 the permit. So that's why I -- it doesn't
21 really make a lot of sense to stop the process
22 entirely to litigate a letter, based on

1 approximated information, when he can just
2 look at the full plan set and make a
3 determination in the future.

4 CHAIRPERSON JORDAN: Well then, we
5 -- you know, in the past, you guys have also
6 said well you should have done this before,
7 when we first sent that e-mail out that said
8 we were thinking about doing it. And we've
9 had to go back and forth with you on that.
10 So, you know, you're going -- on one side,
11 you're saying this and the next side you're
12 saying that. So let's move away from that
13 one.

14 MR. KADLECEK: Yes. I mean, I can
15 say that our intention is to build in
16 conformance with the determination letter.
17 You know, maybe some of the square footage
18 might change. But things like that aren't
19 really relevant here because, for instance,
20 the FAR that we proposed is well under what's
21 permitted as a matter of right. So if it
22 deviates by 1000 square feet, it's not going

1 to matter. The issues that are -- that are
2 really contentious here are the ones that we
3 intend to build to, which is the parking and
4 some of the other issues that were raised in
5 the appeal. Those we intent to conform with
6 what the determination letter said.

7 MS. MAZO: Well, and also the
8 issue about the deficiencies in the documents
9 that were presented to the Zoning
10 Administrator are part of the basis of our
11 appeal.

12 CHAIRPERSON JORDAN: We're just
13 moving way down -- both of you are just moving
14 way down the hill. I'm still dealing with the
15 authority issue. Does the Board have any
16 other questions? Because -- Ms. Sorg, do you
17 want to --

18 MEMBER SORG: Well, just one
19 comment. To me, I think that what we're
20 getting to -- and I feel where you're going.
21 You don't want to go down this road because
22 what we're getting to are the merits of a

1 potential appeal of a building permit. Which
2 is something that we see all the time.

3 CHAIRPERSON JORDAN: Right.

4 MEMBER SORG: You know? So --

5 CHAIRPERSON JORDAN: And we always
6 give a remedy, if necessary. But Ms. is it
7 Mizo?

8 MS. MAZO: Mazo.

9 CHAIRPERSON JORDAN: Mazo? Get me
10 past the point where we have authority to stop
11 non-zoning related matters.

12 MS. MAZO: Well, I -- first of
13 all, I do want to point out that, as Board
14 Member -- or Counsel Member -- or as Board
15 Member Sorg point out, that in the Philly
16 Pizza case, that this Board has indeed acted
17 to stay a decision of DCRA and has stepped
18 into the shoes of the DCRA. Now --

19 CHAIRPERSON JORDAN: I'm good on
20 that. I'm really good on that.

21 MS. MAZO: Right. Well, but I
22 wanted to -- to make that clear.

1 CHAIRPERSON JORDAN: And wasn't
2 that case on a zoning issue?

3 MS. MAZO: Well, indeed.

4 CHAIRPERSON JORDAN: It was a
5 complete zoning issue, so it was within the
6 frame work of what the Zoning Administrator
7 had authority for and this Board has authority
8 for.

9 MS. MAZO: Okay. I understand
10 that point. And so I'm clear, your question
11 is most particularly about the interior demo
12 permit and the raze permit. Is that -- are
13 those your two questions?

14 CHAIRPERSON JORDAN: Correct.
15 Yes.

16 MS. MAZO: Now, out position is,
17 is that while those permits may not directly
18 implicate zoning, the fact that the -- taken
19 as a totality, the interior demo permit
20 proposes to, as we understand it, take down
21 potentially -- potentially load bearing walls
22 that could, indeed, cause the particular

1 historic property to demolish or to fall down
2 or to be insecure. So we think that that --

3 CHAIRPERSON JORDAN: But where is
4 that within the zoning regulations?

5 MS. MAZO: Well, this goes to the
6 totality of being able to --

7 CHAIRPERSON JORDAN: No. Where is
8 that within the zoning regulations?

9 MS. MAZO: I -- I -- I understand
10 your point on that.

11 CHAIRPERSON JORDAN: I'm staying
12 within our box -- within our box.

13 MS. MAZO: And -- and -- and I --
14 I -- I understand that. But our position is
15 that I think we need to look a little bit more
16 broadly here and that we need to be able to
17 understand that, if these two permits -- and
18 to be clear, the interior demolition permit
19 has already been issued -- and so that permit
20 could go forward at any time and those
21 interior demolition and -- and so that's --
22 that's an action that DCRA has already taken.

1 And so, if the question is whether or not the
2 Board can -- can stay a decision that DCRA has
3 already taken, indeed that demolition permit
4 has already been issued. The property owner
5 has not gone forward with that, but it has
6 been issued.

7 And, in terms of the raze permit,
8 the raze permit also deals with the issue of
9 parking. Because -- which is a zoning issue,
10 because the Zoning Administrator made the
11 determination that the parking would be
12 permitted in the exact same place and to the
13 exact same square footage as the existing
14 parking on the site. The raze permit goes to
15 the existing garage. If that raze permit
16 doesn't exist any more, then our position is
17 that we have a question as to whether the
18 Zoning Administrator's determination about the
19 parking being able to stand in the shoes of
20 the existing parking could continue to go
21 forward. And so that is the tie in on zoning
22 there.

1 So these are not two permits that
2 were completely devoid of zoning implications,
3 to the extent of the first being the
4 demolition permit, that indeed was issued.
5 The second being the raze permit that's
6 directly tied to the parking determination
7 that the Zoning Administrator made.

8 CHAIRPERSON JORDAN: Okay. So I'm
9 still back to the same point, after all of
10 that. Does the Board have any other
11 questions? Okay. Do you have anything --

12 MS. MAZO: No. But -- but I do
13 want to make clear that there has been a
14 building permit that was -- that has been
15 submitted for the other property 2012, which
16 is the subject of 540. So there is a building
17 permit under review now for one of the two
18 properties.

19 CHAIRPERSON JORDAN: But it
20 doesn't stop any action. If we stop that
21 permit --

22 MS. MAZO: Yes.

1 CHAIRPERSON JORDAN: -- it doesn't
2 stop anything else that's going on.

3 MS. MAZO: Well, it is potentially
4 that it could. Because now the -- now the
5 properties are -- are taken -- being taken
6 together at the HPRB.

7 CHAIRPERSON JORDAN: Okay.

8 MS. MAZO: So halting that
9 building permit that's currently pending,
10 which I don't think we have a question as to
11 whether or not it is outside the purview of
12 the Board, is could indeed be used as a way --
13 or could it, indeed, slow down the development
14 of the -- the -- the construction on the other
15 property, 2014.

16 CHAIRPERSON JORDAN: Okay. Has
17 the Board anything further from either or any
18 party? Okay. Then is the Board ready to
19 deliberate on this? Are you ready to
20 deliberate or do you have a thought on it?
21 Okay. Mike, you've got a question or a
22 thought?

1 MEMBER TURNBULL: I guess I'm --
2 I'm torn. I guess the question of authority,
3 and I guess, looking at whether it's
4 injunctive or not and to what extent. And I
5 -- I guess I can definitely see a point
6 where, if something has been issued and we've
7 done that in the past, that we can thereby
8 stay it. I guess the question is here is that
9 the -- the process of imminent something being
10 processed and what is the harm of allowing
11 that process to go forward, and is there an
12 impact on zoning. And I'm -- I guess I'm torn
13 on how we look at that. Has there been an
14 impact on zoning for us that we could actually
15 say yes, I think we ought to stay this? And
16 so I'm still mulling the impact of that. And
17 what is the harm from both standpoints, by
18 doing that?

19 CHAIRPERSON JORDAN: Right. That
20 is irreversible.

21 MEMBER TURNBULL: That's right.

22 CHAIRPERSON JORDAN: Ms. Sorg?

1 MEMBER SORG: Thank you, Mr.
2 Chairman. I too am a little bit torn here.
3 You know, I know this -- I actually know this
4 block very well, having grown up on this block
5 of Kalorama Road. I have a feeling I will
6 always say that, but I don't know. It turned
7 out.

8 CHAIRPERSON JORDAN: Okay. I
9 could just see you.

10 MEMBER SORG: It turned out these
11 buildings are historic and they are beautiful
12 and they are worth being very careful with.
13 So that pushes me in one direction. On the
14 other hand, there is one thing that pushes me
15 in one direction. On the other hand, I was
16 less clear about this from reading the
17 filings, but after hearing today's
18 conversation and the points made by each of
19 the representatives, it -- this conversation
20 is feeling much more, as I said in my previous
21 comments, like a regular appeal. And this
22 Appellant has an appeal on file. And so, to

1 me, there is -- the remedy there is the
2 appeal, which is the way that, you know, every
3 couple of weeks, somebody goes through it.
4 And, you know, that there does represent --
5 and -- and -- and, you know, to that point,
6 the developer of these properties is on notice
7 that there is an appeal. You know? And so
8 would be at risk. What if building permits,
9 you know, or additional building permits were
10 issued, would be at risk, you know, not only
11 from potentially hiring, you know, zoning
12 issues that needed to be seen in front of the
13 BZA, but also certainly, you know, having to
14 go in front of the HPRB for decisions.

15 So, back to business, as well as,
16 you know, having an appeal on the calendar,
17 already, with the BZA, those are business
18 risks to me, in terms of beginning
19 construction. On the -- and then, on the
20 other hand, you know, there is a letter in
21 this file that has been issued by the Zoning
22 Administrator to the property owner with -- I

1 don't -- do you know how many -- nine or ten
2 opinions in it. And so, to argue when we have
3 specifically seen appeal cases where just such
4 a letter, in fact even an e-mail, has been
5 used as -- and treated as the decision. You
6 know, I think it can be viewed that -- I think
7 if a determination letter can be viewed as a
8 decision of the Zoning Administrator before
9 the building permits have been issued, this is
10 an issue that we have visited many, many
11 times.

12 CHAIRPERSON JORDAN: Yes.

13 MEMBER SORG: But that doesn't
14 necessarily mean that -- that the Appellant
15 would have the ability to stay that, even if
16 that is to me a decision that we can view as
17 a decision from DCRA. So those are my initial
18 thoughts.

19 CHAIRPERSON JORDAN: Okay. Ms.
20 Allen?

21 MEMBER ALLEN: Thank you, Mr.
22 Chairman. The concerns I have, and obviously

1 we're all a little torn on this issue -- the
2 concerns I have are that there has, in fact,
3 been a permit issued. Whether we go to the
4 fact that it's for razing or whatever, there
5 has, in fact, been a permit issued, which I do
6 believe gives us authority. And the Zoning
7 Administrator has said that they -- and DCRA,
8 as I understand it, have said that they are
9 not -- they are not going to stay. So that
10 they have gone through that process -- the
11 administrative process. It would say to me
12 that we do have authority to step in the shoes
13 and issue the stay. So that's sort of where
14 I've come down on that part.

15 Whether this is premature; whether
16 there should be injunctive release sought;
17 whether it's the Historic Preservation should
18 be allowed to do their process, is the part
19 that I'm torn about. It seems to me that
20 there are potentially other remedies to deal
21 with this issue. I'm also concerned that if
22 additional -- if activity happens between now

1 and April 30th, on the property, will that
2 render -- will that irreparably harm the
3 Appellant because their appeal that we are
4 waiting to hear, you know, becomes somewhat
5 mute? I mean, they can't -- moot. They
6 cannot -- you know, there will already be
7 activity that has happened. So I'm concerned
8 about that. I'm concerned that we not -- that
9 the process not disallow the concerns of the
10 Appellant to be fully heard and -- and decided
11 upon.

12 So I'm just -- I'm trying to
13 figure those two things out.

14 MR. KADLECEK: There is a building
15 permit.

16 MEMBER ALLEN: Not the building
17 permit. There is a permit, if I'm -- if this
18 is correct. There has been a permit issued
19 for the razing. Is that correct?

20 MR. KADLECEK: There has been a
21 demolition permit and there's been an interior
22 raze permit. But that's -- Mr. Surabian can

1 clarify this. I don't believe the Zoning
2 Administrator reviews either of those permits.
3 They're not within the purview of Zoning?

4 MR. SURABIAN: Right. That's
5 correct.

6 MEMBER ALLEN: Okay.

7 CHAIRPERSON JORDAN: Anything
8 else? Any other before -- just give me one
9 second. Mr. Moy, can I see you for a second?

10 (Whereupon, off the record from
11 10:32 a.m. until 10:34 a.m.)

12 CHAIRPERSON JORDAN: All right. I
13 think we have a -- exactly right. We're going
14 to have a Solomon moment here. We're just
15 going to do this. We're having a Solomon
16 moment and I'm just going to go with the very
17 straight. Because I think there's a way to
18 give remedy here, in protection of everyone.
19 And to step away, because of the authority
20 issue. And we understand what the Appellant
21 wants and we understand what the Appellant
22 representing the community and we understand

1 where we are here today. So this is what I'm
2 going to do. We're going to move the hearing
3 that's previously scheduled for April 30th to
4 March 26th. Is that correct? Is that the
5 date?

6 MEMBER MOY: That's correct, sir.

7 CHAIRPERSON JORDAN: In the
8 morning? On the appeal. You're then --
9 because you can't do anything until HPRB does
10 whatever they're going to do anyway. So then
11 you can have a full and fair vision as to
12 where you're going on this matter. So we're
13 going to -- we're going to hold in abeyance
14 the decision regarding any stay and roll into
15 the appeal hearing on that date. Okay? All
16 right. So that date is -- and it's going to
17 be in the -- well, we have a rolling docket.
18 All our dockets start in the morning. But
19 it's going to be in the first part of the
20 morning for us to handle this. Okay.

21 So we just kind of sliced that one
22 into -- nobody looks happy. So I guess that

1 means we did a good thing. All right. Thank
2 you.

3 MS. MAZO: So, just to be clear,
4 pre-hearing statements will then be due 14
5 days before March 26th?

6 CHAIRPERSON JORDAN: Yes.
7 Exactly.

8 MS. MAZO: Okay. Thank you.

9 CHAIRPERSON JORDAN: Yes. All
10 right. Thanks a lot.

11 MS. MAZO: Thank you.

12 MEMBER TURNBULL: Mr. Chair,
13 should I address you as Solomon from now on?

14 CHAIRPERSON JORDAN: No. Now
15 that's -- the Board as Solomon, not I. Okay.
16 That took about an hour longer than what I
17 thought it would take. On you, Mr. Moy.

18 MEMBER MOY: Yes, sir. Okay.
19 That moves the Board into the Public Hearing
20 session. So the --

21 CHAIRPERSON JORDAN: It was a
22 joint meeting, hearing?

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MEMBER MOY: Yes. That's correct.

CHAIRPERSON JORDAN: Okay.

MEMBER MOY: Absolutely.

(Whereupon, the Public Meeting was
concluded at 10:36 a.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: DCZC

Date: 03-05-13

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

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