

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

DECEMBER 17, 2002

+ + + + +

The Public Hearing convened in Room 2002, South, 441 4th Street N.W., Washington, D.C. 20001, pursuant to notice, at 10:54 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
ANN RENSHAW	Vice Chairperson (not present)
CURTIS ETHERLY, JR.	Board Member
DAVID ZAIDAIN	Board Member

ZONING COMMISSIONER PRESENT:

PETER MAY	Board Member Representing Zoning Commission
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COMMISSION STAFF PRESENT:

Sheri M. Pruitt, Secretary BZA
Beverley Bailey, Office of Zoning
Clifford Moy, Office of Zoning

OTHER AGENCY STAFF PRESENT:

John Nyarku, Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, Esq.
Mary Nagelhout

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

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Holland and Knight, LLP	
Suite 100	
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Washington, D.C. 20006	
(202) 955-3000	
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P-R-O-C-C-E-E-D-N-G-S

CHAIRPERSON GRIFFIS: Okay, if we can reconvene. For those of you interested in that intriguing case, I'm going to tell you that we will postpone the decision making on that until 2:00 o'clock today no matter where we are in our schedule as we are beyond the schedule, we will call it at 2:00. We have confirmation that our quorum will be present by then and so hopefully that will alleviate a little bit of the confusion with the schedule.

Of course it may be advantageous to call in about 1:30 to make sure that we are on schedule with our proposed decision making. So with that, we will -- I can, in fact, open the public hearing of 17 December 2002 and wish everyone good morning again. This is the public hearing of the Board of Zoning Adjustments for the District of Columbia. My name is Geoff Griffis. I am chairperson. The vice chairman, Ms. Anne Renshaw, is not with us today. Mr. Curtis Etherly sitting to my right is joining us and representing National Capitol Planning Commission is Mr. Zaidain and representing the Zoning Commission with us at this moment is Mr. May.

Copies of today's hearing are available -- or the agenda for the hearing are available to you. They are located at the table when you entered into the

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hearing room. A couple of quick things; I'd like to note that this -- all proceedings and public hearings are being recorded; therefore, we ask several things of people present in the hearing room today. We would like not to have any disruptive noises or actions so that we don't give a difficult time for the Board members and people giving testimony.

Also, when coming forward to the Board, you will need to fill out two witness cards. The witness cards are on the table when you entered and they are at the table in front of us. Those two witness cards are to be filled out and given to the recorder, who is sitting to my right. When presenting to the Board, those witness cards will go to the recorder and you will need to speak through a microphone. That microphone should be on. All persons planning to testify of course, will fulfill those obligations, and we will, of course, give you instructions if microphones aren't working or anything of that nature.

The order of procedure today for special exceptions and variances will be, first, statements and witnesses of the Applicant, second will be government reports, including the Office of Planning and any other attendant agencies submitting reports on the case. There will be reports of the Advisory Neighborhood

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Commission, fourth will be parties or persons in support, fifth would be parties or persons in opposition and sixth finally, we will have closing remarks by the Applicant.

Cross examination of witnesses is permitted by the Applicant or parties. The ANC within which the property is located is automatically a party in the case. The record will be closed at the conclusion of the hearing except for any material specifically requested by the Board and the Board will be very specific about what material should be submitted and when it is to be submitted into the Office of Zoning.

Of course, when we receive that, the record will then be finally closed and no other information will be accepted by the Board. The Sunshine Act requires that public hearings on each case be held in the open and before the public. The Board may, however, consistent with its rules of procedure and the Sunshine Act, enter executive session during or after public hearing on a case for purposes of reviewing the record or deliberating on the case.

Decisions of this Board in contested cases and all cases is to be based exclusively on the public record. Therefore, to avoid any appearance to the contrary, we ask people present today not engage Board

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members in any sort of conversation. I would ask that people turn off their cell phones and beepers at this time so we don't have any disruptions to the proceedings and the Board will now consider any preliminary matters attendant to the morning cases. Preliminary matters are those which relate to whether a case will or should be heard today such as postponement, continuance, withdrawal or whether proper and adequate notice has been given.

If you are not prepared to go forward with a case today, now is the appropriate time to approach the Board and you can do that by coming to the table and having a seat in front of us and I will note that you have a preliminary matter for the Board and if I do not see that indication, I will turn to staff to see if they have any preliminary matters at this time for the Board.

MS. BAILEY: Mr. Chairman, members of the Board, good morning and, no, the staff does not, Mr. Chairman.

CHAIRPERSON GRIFFIS: Very well, not seeing anyone come forward, why don't we call the first case then, in the morning.

MS. BAILEY: Application Number 16957 of Southwest Capitol Associates, LLC pursuant to 11 DCMR

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30-104.1 for a special exception from the roof structure requirements under Section 411 to allow a roof structure not meeting the setback requirements of Subsection 770.6 for the construction of a hotel in the C-3C districted premises, 300 block of E Street SW, (Square 537) Lot 809 and part of Lot 30. All those persons wishing to testify, would you please stand to take the oath. Please raise your right hand.

(Witnesses sworn)

Thank you.

MR. HUGHES: Good morning, Mr. Chairman, members of the Board. For the record, my name is Dennis Hughes with the law firm Holland and Knight, LLP. Joining me this morning are Mr. Chris Bruch, representing Southwest Capitol Associates, LLC, Mr. Nick Giordano with Brenden, Beere, Gorman and Monk (phonetic) and Mr. Steven Sher, director of Zoning and Land Use Services with Holland and Knight. We appear before you this morning to request special exception approval pursuant to Section 3104 of the Zoning Regulations to allow roof structure not meeting the normal setback requirements. This relief is provided in Section 770.6 and 411 of the Zoning Regulations. The approval will allow for the construction of a hotel in the 300 Block of E Street SW which is located within

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the C-3C zone.

With the exception of the requested special exception, the project fully complies with the zoning regulations applicable to the C-3C zone. Before proceeding further, I'd like to confirm that the Board is in receipt of the Applicant=s statement in support filed with the Board on December 3rd.

CHAIRPERSON GRIFFIS: We are in receipt and the Board has completely read it.

MR. HUGHES: Thank you. And also that the Board is in receipt of the report in support of the application from the Office of Planning dated December 10th.

CHAIRPERSON GRIFFIS: That we=re going to have to think about. Do all the Board members have that, in receipt? Yes, indeed, we do.

MR. HUGHES: And the letter in support of the application from Advisory Neighborhood Commission 2D dated December 4th.

CHAIRPERSON GRIFFIS: Yes.

MR. HUGHES: Thank you. The statement of the Applicant sets forth the Applicant=s position with respect to compliance with the requirements of Section 3104, 770.6 and 411. The statement includes a statement of exhibits for your reference as follows;

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Exhibit A and B are plats showing the location of the subject property and Square 537. Exhibit C is a portion of the zoning map showing that the property is Zone C-3C. Exhibit D is a series of architectural drawings and Exhibits E, F and G are testimony outlines for witnesses.

We're pleased to have the support of both the Office of Planning and the Advisory Neighborhood Commission 2D as well as to have received concept design approval from the United States Commission of Fine Arts. We are not aware of any opposition to this application. Based upon this support as well as the statement of the Applicant and the other evidence in the record, the Applicant is prepared to stand on the record of the Board.

CHAIRPERSON GRIFFIS: The CFA approved this, is that what you said?

MR. HUGHES: Yes, I did.

CHAIRPERSON GRIFFIS: Interesting. Board members? I have no objection to standing on the record in this case. It is a 411 case. It is clearly sufficiently documented in the submission on this. Clearly the special exception case has been addressed. Any concerns?

MEMBER ZAIDAIN: I just want to make sure

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I'm clear on the situation here. Because of the nature of the use of the building and I guess the program requirements of that, in a sense you want to provide light and air to the rooms so to speak and the shape of the building that has resulted from that need. I keep on using the word building but that's not what we're -- the roof structure is too small in order to accommodate the proper roof structure. Am I understanding that correctly? That's why -- because you kept referring to a 19-foot width would be the only thing you could fit on there. I just want to make sure where that number came from.

MR. HUGHES: Yes, it would be appropriate for me to bring forward a witness.

CHAIRPERSON GRIFFIS: That would be fine, to answer the question.

MR. HUGHES: I'd like to introduce Mr. Steven Sher.

CHAIRPERSON GRIFFIS: Mr. Sher, good morning. We would note -- well, go ahead.

MS. SHER: Mr. Chairman, members of the Board, to respond directly to Mr. Zaidain's question, when you take out the courts on either side which provide light and air for the windows, the width of the sort of inverted T is 57 feet. If you had to set back

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18 and a half feet on each side, all you=ve got left is 19 feet in the middle that would meet the setback requirements.

Even though that=s a long amount, it=s just not enough width and area to get in everything you need to service the building.

MEMBER ZAIDAIN: So the resulting window from the setbacks would not allow the proper roof structure to fit in there.

MR. SHER: Correct.

MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: Well, and it=s also as it shows in the record that you have a double width corridor, so if you=re talking about centering a penthouse, it means clearly centering the elevators, which are done, but then you have the stairs, the egress stairs which would conceivably be falling in the middle of the corridor.

MR. SHER: Right, the egress stairs are sort of a separate issue. They=re right next to the core at the intersection of the two parts of the T where you get the two pieces coming together and sort of the ideal place to put them because you=ve got room window issues there, too, so when you put them there, you run them right up to the roof, egress doesn=t meet

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setback requirement.

MEMBER ZAIDAIN: Okay. When you say 18-1/2, that=s the minimum? I thought the setback was one to one?

MR. SHER: Right, the roof structure is 18-1/2 feet.

MEMBER ZAIDAIN: All right, okay.

MR. SHER: So 37 feet total leaves only 19 feet left.

MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: And are you clear on the other places that it does not, in fact, conform? Any other concerns? I mean, do you have specific concerns?

MEMBER ZAIDAIN: Oh, no, no, no, that was the only one.

CHAIRPERSON GRIFFIS: Okay, any other questions that can be answered by the Applicant at this time? How much is a room? No, we don=t need to answer that. Very well, then if I am understanding the Board, it is appropriate for this as presented with its written submissions and to stand on the record. I would therefore, move approval of Application 16957 of the Southwest Capitol Associates, LLC for special exception from roof structure requirements under 411

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which would, in fact, allow a roof structure not meeting setback requirements as laid out also in 770.6 for the construction of a hotel at the premises 300 Block of E Street SW. And I=d ask for a second.

COMMISSIONER MAY: Second.

CHAIRPERSON GRIFFIS: Thank you very much.
Any further discussion on the motion at this time?

MEMBER ZAIDAIN: I think for the record, I think we should note that OP recommended approval of the special exception and the ANC did as well.

CHAIRPERSON GRIFFIS: Yes, indeed, and I think that=s appropriate. It was stated in the opening statements and it is in the record but it is ANC and OP approval and as also indicated the CFA had review capabilities on this. Anything else?

MEMBER ZAIDAIN: No. I=d asked a question once but --

CHAIRPERSON GRIFFIS: Very well, then all in favor signify by saying AYe@.

(Aye)

CHAIRPERSON GRIFFIS: And opposed.

(No response)

CHAIRPERSON GRIFFIS: We can record the vote.

MS. BAILEY: The vote is recorded as 5-0-0

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to approve the application -- I'm sorry, 4-0-1 to approve the application. Motion made by Mr. Griffis, seconded by Mr. May, Mr. Zaidain and Mr. Etherly. Ms. Renshaw is not present and not voting. And is this a summary order, Mr. Chairman?

CHAIRPERSON GRIFFIS: Is there a request for a summary order on this?

MR. HUGHES: Yes, sir.

CHAIRPERSON GRIFFIS: Indeed, I see no reason not to do a summary order unless other Board members have a difference of opinion. We can issue a summary order on this. Very well, do you have a question?

MEMBER ZAIDAIN: Why did CFA review this? Was it --

MR. SHER: Yes.

MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: Okay, anything else? Then, thank you all very much.

MR. SHER: Thank you.

CHAIRPERSON GRIFFIS: Have a great day.

(Case 16959, Shakespeare Theatre typed under separate cover)

(Off the record)

CHAIRPERSON GRIFFIS: Okay, let's resume

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with the staff is ready.

MS. BAILEY: Application 16960 of Edmund J. Kielty pursuant to 11 DCMR 3104.1 for a special exception to allow the construction of a rear addition to a single family dwelling under Section 223 not meeting the lot occupancy requirements of Section 403.

The property is located in the R-4 District at Premises 335 16th Street SE (Square 1074, Lot 83). Mr. Kielty, please stand to take the oath. Is there anyone else here who will be testifying on this application?

(No response)

MS. BAILEY: Please raise your right hand, sir.

(Witness sworn.)

MS. BAILEY: Thank you. Please have a seat at the table.

CHAIRPERSON GRIFFIS: Good, before we proceed with this case, clearly we're still in the morning. We had not much delay but some complications on some of the cases and so I would anticipate that our afternoon starts -- I would imagine the afternoon case being called at 2:30 today for those in attendance for the afternoon session. With that, let me turn it over to you, sir, and you can present your case for us.

MR. KIELTY: Good afternoon, Mr. Chairman,

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ladies and gentlemen. My name is Ed Kielty and I'm the owner of the house at 335 16th Street SE. I'm here to seek your approval of an application for special exception to add an addition to the rear of the building. The use of the property currently is a single family dwelling and will remain a single family dwelling. The purpose of this addition is merely to enlarge the premises so that it's more comfortable to - a more comfortable home. I've submitted the -- hopefully have submitted all of the evidence, the documentation that is required to meet the standard for your granting approval of this request.

In addition, I have received -- I attended a couple of ANC meetings and there should be in your file a copy of a letter from the ANC indicating their unanimous support for constructing the addition. There also should be in your file letters from the neighbors whose property immediately adjoins my property and who will be most impacted by this construction. Those -- the owners of those properties also are indicating in their written document, support for constructing the addition.

CHAIRPERSON GRIFFIS: Your property is running east to west; is that correct? The front of your --

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MR. KIELTY: Yes, yes, it is.

CHAIRPERSON GRIFFIS: Okay, so on the letter submitted, the addresses will correspond with those neighbors directly north and directly south, is it?

MR. KIELTY: Correct, correct.

CHAIRPERSON GRIFFIS: Okay.

MR. KIELTY: Correct.

CHAIRPERSON GRIFFIS: And anything else you want to add?

MR. KIELTY: Well, I don't know that you want to hear my forlorn story but I'll give you a quick background to it.

CHAIRPERSON GRIFFIS: Actually, if it goes to the question of why are you here now and not before you started construction, that would be pertinent.

MR. KIELTY: Uh-huh, okay. I was working -
- worked for the same company for 30 years. I was looking at a place called Roanoke, Virginia, took an early retirement in order to do some service humanitarian work in Africa. I thought a good place to do it was Washington, DC, to have my base here and then where there's a community of people and agencies that do that or have that kind of interest. There wasn't as great a number of people involved in those endeavors in

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Roanoake.

So I moved here in March of this year, bought this property in March, contracted with the general contractor in April and the provisions of my contract with the general contractor, the very first two provisions, one had to do with the responsibility of the general contractor for obtaining all the permits necessary to do the work. The second being that all work would be done in compliance with the regulations, ordinances of the DC government and any other regulations.

I=d had several homes built for me in Roanoake, Virginia, never once -- and I always had a general contractor and they handled everything for me.

Here I was just having some remodeling done and a fairly small addition. The addition, 170 square feet maybe of a footprint, it=s about 14 by 14 and as I=ve learned, I=ve had quite an education since this came to my -- I was visiting one of my daughters in -- the contract called for a four-month time period to complete it, so the work should have been done. It started in mid-April. It was supposed to have been done mid-August and he was nowhere near done in mid-August. So I was visiting one of my daughters in South Carolina and I got a call from the contractor saying

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that we have a problem. I said, you know, Awhat=s the problem@. He said, ACity inspector has shut the job down@.

So I curtailed my -- jumped on the next plane, came up. It=s a bit of a communication deficiency that I have. I guess I haven=t learned Hispanic and so I couldn=t quite understand him over the phone, so I came up. He still couldn=t quite explain. I don=t think he knew what -- so I came in and went down to the -- talked to the inspector who had put the sign --

CHAIRPERSON GRIFFIS: Stop work order.

MR. KIELTY: -- stop work order and talked with him. He said there was not a proper permit that had been obtained. So, you know, I didn=t take out the permit. The general contractor did everything, did the drawings, submitted whatever. And so I started getting involved and I=ve been very involved ever since. I=ve resubmitted -- as soon as I learned of that, I resubmitted an application for a revised building permit within a couple of weeks. I had to go out and get additional more detailed architectural renderings of the work that was to be done. I had that done and then that was referred to the Zoning Office who referred it to this Board.

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CHAIRPERSON GRIFFIS: Okay.

MR. KIELTY: And I understand that the -- so I understand what happened. I understand what did happen. I'm trying to do everything, you know, that I can to rectify it. I feel I've dealt in good faith throughout this with everybody and I'm just -- I seek your favorable consideration.

CHAIRPERSON GRIFFIS: Okay, good, we appreciate that and clearly you're here because of the referral from the ZA which indicates that you actually are beyond the lot occupancy which would have allowed you to put this addition. You are under 23 for us with is the addition to a single family dwelling which is a special exception. A quick I guess point of information in my mind, the submitted drawings, existing and then new work plans, those are the ones you say you did commission from an architect?

MR. KIELTY: Yes, yes.

CHAIRPERSON GRIFFIS: Okay. Well, in the spirit of learning and not making any more mistakes, I would hope that your first floor plan actually has a door, some means of getting into your addition because it's not showing. You also have bathrooms that seem only big enough to open up a door in, so I don't think you can fit any fixtures. So not that that is within

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our purview or jurisdiction, but I would just point that out as a note so that your contractor doesn't build a solid wall and your addition is actually worthless, except from the exterior which you're going to have to jump off the roof to get to your backyard to get back in, but that's just the way I was reading it very quickly.

Any other questions at this point?

MEMBER ZAIDAIN: You've taken these plans to your neighbors, did I understand that correctly? I know there was some submissions saying that there were no --

MR. KIELTY: I've had the neighbors come through. I had the plans available, they're on the site and the neighbor that I could not get to respond to me was HUD owns the house right next door and it's vacant. It's been vacant.

MEMBER ZAIDAIN: Right.

MR. KIELTY: And I wrote to HUD a couple of times.

MEMBER ZAIDAIN: So it's your testimony that your neighbor -- there's no opinion of your neighbors that this will effect their light and air or negatively effect their property.

MR. KIELTY: That's correct. And you

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should have -- you should have letters in your file from each of those most immediate neighbors with the exception of HUD, so the neighbor to my immediate left.

The HUD owned home is to the immediate right but there=s only one home to the left of me and then there=s an alley, so that neighbor, I have a letter from that neighbor. The HUD house and then the two to the right of the house owned by HUD, I have letters from those two homeowners also.

CHAIRPERSON GRIFFIS: Right, which would be 337, 331 16th Street SE and 329 16th Street SE. Okay, clearly under the provision of 223, 223.4 gives the Board jurisdiction in terms of any sort of required treatments and that is in the way of design or screening or any sort of exterior lighting. Usually that=s certainly -- not usually, we always look at that as it=s pertinent. I=m a little encumbered by it in that this is up and it=s hard to change some of the design. I can tell you for future reference, as you say, you build other houses, if you do this, it=s -- what is the material that=s cladding the addition on this building?

MR. KIELTY: I=m sorry, could you --

CHAIRPERSON GRIFFIS: The material, what is your exterior material?

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MR. KIELTY: It=s a vinyl siding.

CHAIRPERSON GRIFFIS: Indeed. And the front and existing material on the building is what?

MR. KIELTY: It=s brick and masonry.

CHAIRPERSON GRIFFIS: Okay, I=ll take note of that. Go ahead, Mr. May.

COMMISSIONER MAY: Okay, well, I=m very glad to get the background on this because when I read this file and the information that it submitted, it just made me mad. And now I understand that you=re probably mad with me because it=s -- the idea that something like this could be built without proper zoning approval in advance, without proper permits, is disturbing and it=s also -- what makes it more bothersome is that frankly, if this had occurred in a lot of other neighborhoods in the city, it never would have gotten this far, never, ever, and I can -- it=s particularly bothersome for me because I happen to live not too far away and I understand more about the dynamics of the neighborhood.

What we=re faced with now is a fait accompli. I mean, this building is built. It=s not clear to me that when I look at this, because of the information that you=ve submitted and I understand why now -- thank you very much and I appreciate it and am

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sympathetic, but the information that we have is even somewhat sketchy. So I'm going to ask a few questions about the property itself so I understand some of the disagreements that I see.

Your plans that were submitted here seem to indicate that originally you had the main body of the house and then there was a narrower extension that was the dining room and then there was a little dogleg area back here that was -- you know, previously gave you light to the middle of the house, right? It's like the properties next door where you had that recessed, right?

MR. KIELTY: Correct.

COMMISSIONER MAY: Okay, now that's all been filled in, right?

MR. KIELTY: Correct.

COMMISSIONER MAY: Okay, and you've broken through the wall there and now that area, that little area that was beside the house is the kitchen and you've added a new room beyond that essentially.

MR. KIELTY: Uh-huh.

COMMISSIONER MAY: The property next door, 333, the HUD property, was that one the same shape as yours in essence, a mirror image?

MR. KIELTY: In the same shape or the same

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dimensions --

COMMISSIONER MAY: No, did it look like --

MR. KIELTY: I would say so, I would say so.

COMMISSIONER MAY: So in other words, where you have gone 15 feet beyond the back end of your property, the back end of your house as it has been modified now, is 15 feet beyond the back wall of your neighbor=s property, right?

MR. KIELTY: Correct.

COMMISSIONER MAY: Roughly. Okay. Now, it is the -- what we are seeing in this photograph is the full width of the property, right?

MR. KIELTY: Yes.

COMMISSIONER MAY: This wall to this wall, that=s 14 feet wide roughly.

MR. KIELTY: Yes.

COMMISSIONER MAY: Okay. The -- that does not agree with this one which seems to imply that the addition is 15 feet wide and -- I=m sorry, eight feet wide and 15 feet long, where you=ve colored it in here.

This is -- I=m looking at the surveyor -- this is Exhibit Number 2 which seems to indicate that the addition is just the width of that narrower portion of the house but, in fact, it=s the full property width,

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right?

MR. KIELTY: It is the full property width, yeah.

COMMISSIONER MAY: Okay, all right, I just wanted to make that perfectly clear. Going back to building code issues, this is a bit of an aside but when I look at the back end of this house and I look at the way the roof is sloped, you either have a condition now where your eave and gutter is overhanging your neighbor=s property or your property is not actually on the building line, on the property line, which is a different sort of building code issue, right? I mean, we either have to be -- in a sense we=ve either got a six-inch side yard or you=re overhanging your neighbor=s property.

MR. KIELTY: I=m not sure where we=re overhanging.

COMMISSIONER MAY: Okay, if you look at this photograph where we=re looking directly at the back side here, your gutter here, right, is projecting off the side of your house, so it=s either -- the face of your property is on the property line, then you=re in your neighbor=s space or if you=re in your own space then the face of your building is six inches off the property line.

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MR. KIELTY: Uh-huh.

COMMISSIONER MAY: So technically, it=s not -- in the one case it would be a building code thing, I think, and in the other case, I think it=s a zoning issue. This is why it=s exceptionally important, I think, that that -- these matters be clear in advance and that the permits all be straight and in spite of the fact that you=ve hired a general contractor and, in theory, delegated responsibility to them, you=ve learned yourself that you=re responsible.

MR. KIELTY: Right.

COMMISSIONER MAY: The -- I guess one of the questions I had about the history of it is when you contracted with this general contractor and they theoretically got some permits because they actually had an inspector come out, right, what permit did they get? Was it a renovation permit?

MR. KIELTY: That -- they did not get a permit that was for the full extent. It was just -- not for the addition. They did not --

COMMISSIONER MAY: I see, so they only sought a renovation permit --

MR. KIELTY: Correct.

COMMISSIONER MAY: -- and then they rolled in and started building the addition.

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MR. KIELTY: Correct.

COMMISSIONER MAY: I guess I have one last question which is an interpretation question. I'm not sure who -- this is not a question for you. If you had an attorney with you, I might ask your attorney but there is a statement in your summary of the relief that you have an average 20-foot deep yard, rear yard, and that's because you've got that long narrow extension. You've got a weird property shape according to the survey.

I guess what I'm wondering and maybe even my fellow Board members can tell me on this, when we've got different rear property lines, how do you figure out what the rear yard -- where do you measure the rear yard from?

CHAIRPERSON GRIFFIS: Oh, because of the dogleg that they have?

COMMISSIONER MAY: Yeah, yeah, 18 feet so, does that mean -- does that mean that he could build two feet off of the other -- I mean, how do you measure rear yard in this sort or circumstance?

CHAIRPERSON GRIFFIS: If I'm not mistaken, it can -- it's measured either as a proportion -- if it's an angled area, you measure it as a proportion.

COMMISSIONER MAY: So you can get an

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average?

CHAIRPERSON GRIFFIS: Right, and in this circumstance, I think the Zoning Administrator would look at measuring it from the middle of the structure to the corresponding line at the end of the property.

COMMISSIONER MAY: So technically speaking then, this would require a rear yard variance.

CHAIRPERSON GRIFFIS: That=s an interesting point.

COMMISSIONER MAY: This is why I ask the question because I want to make sure you have everything that you need.

CHAIRPERSON GRIFFIS: Yeah, no need to come back.

MR. KIELTY: Huh?

CHAIRPERSON GRIFFIS: I totally agree, there=s no need to come back. Are you --

MS. MONROE: I don=t know to be honest with you.

CHAIRPERSON GRIFFIS: Okay. Mr. Moy, if you wouldn=t mind taking that question back, that would be excellent. We=ll get a clarification on how it would be utilized. Let me also pick up on Mr. May=s points which I think are all very pertinent. The drainage is an important piece especially if that is an

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overhang beyond your property line. But it also goes to functioning and how you're going to actually utilize that and any problems that may occur. If your gutters get filled, quite frankly, you might have a very angry neighbor as you're dumping all your water into their property. Again, beyond our jurisdiction but certainly good notes to point out.

Let me get clarification on that. As you put this addition, which goes from property line to property line, you have created a window well on the second floor; is that correct?

MR. KIELTY: The window well being?

CHAIRPERSON GRIFFIS: Behind your bathroom on the second floor, your new bathroom, what is there?

MR. KIELTY: There -- at the rear of the house is a bedroom on the second floor.

CHAIRPERSON GRIFFIS: Indeed, and that would be, if I remember, on the west direction but talk to me about either the north or the south. On the opposite side -- right, if you're standing in the bedroom, you walk into the bathroom and you went through that wall where your sink is, what do you go into?

MR. KIELTY: There is a -- you enter -- in the addition, that second level, there's a bathroom and

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the bedroom area.

CHAIRPERSON GRIFFIS: Okay, do you have your plans with you?

MR. KIELTY: Yes, uh-huh.

CHAIRPERSON GRIFFIS: Can you pull out new second floor and new first floor? Let=s start with the new first floor. You have a window in your dining room that looks into the kitchen; is that correct?

MR. KIELTY: That=s correct.

CHAIRPERSON GRIFFIS: Okay, and just for clarification, as you go back even further --

MR. KIELTY: There=s not a --

CHAIRPERSON GRIFFIS: That=s fine, what I=m just thinking about in terms of my comments on the addition, it looks like there may be a square column in the middle of your doors going to your closet, however there=s no column above. Now, the -- go to the second floor then, in the same area that=s above the kitchen, what=s above the kitchen? Can you get into that space?

MR. KIELTY: (No response)

CHAIRPERSON GRIFFIS: Here=s the way I read it and perhaps -- I=m not sure we definitively need the answer although there=s a zoning question that arises from this; in order to call your second bedroom in the procession, you need that window into an open window

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well and I read that as a window well because there=s no access into it and actually your master bedroom has a window there and the other bedroom does. Otherwise you have a den and not a bedroom because it wouldn=t have an exterior window. Now, the question would come, has he created a closed court if on the ground level it=s actually filled in and the -- is it above the first floor structure it actually creates a court?

MR. KIELTY: No, that is -- I don=t know if -- there=s a photo that I=m not sure that you have but if I can --

CHAIRPERSON GRIFFIS: Tell me what it is.

MR. KIELTY: It shows on the addition on that side a window, a new window on that side of the house.

CHAIRPERSON GRIFFIS: Really? Facing directly out to your neighbor=s property?

MR. KIELTY: Facing, yes.

CHAIRPERSON GRIFFIS: Indeed, then that can=t be a property line wall. If it is a property -- well, oh, gosh.

COMMISSIONER MAY: If it=s not a property line wall but it needs to have a legal side yard.

CHAIRPERSON GRIFFIS: That=s true.

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COMMISSIONER MAY: Or at -- I mean, a legal side yard in this circumstance would have been an extension of the existing brick wall.

CHAIRPERSON GRIFFIS: Right, if it was --

COMMISSIONER MAY: It could have been that which if it's less than eight feet and it was, it looks like five feet or six and a half, okay. But window on the property line is another problem and --

CHAIRPERSON GRIFFIS: Well, it's not -- he's allowed to do it. It's just at his own risk. I mean, that can be covered up.

COMMISSIONER MAY: Right.

CHAIRPERSON GRIFFIS: What would the dimension be if this was classified as a closed court?

MS. MONROE: Under Section 406.1, R-4 here, minimum width and area of closed court with four inches per foot of height of court but not less than 15 feet, an area twice the square of the required width of court dimension based on the height of court but not less than 350 feet. Assuming this is not a one-family dwelling, it's a detached, semi-detached or is it a row house?

MR. KIELTY: It's a row house.

MS. MONROE: It's a row house, okay.

MR. KIELTY: And it's in an R-4 district.

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CHAIRPERSON GRIFFIS: Oh, man, well, I hate to make this more difficult but another wrinkle in this is from the photographs you've just submitted, which will now go into the record, you have some fenestration on that column wall which is not represented on the drawings, meaning we're looking at drawings that don't even represent what would have been built but in fact, what is there and what has been built. So, I'm --

MEMBER ETHERLY: And Mr. Chair, we do have some clarification on that side yard question from a moment ago --

CHAIRPERSON GRIFFIS: Okay.

MEMBER ETHERLY: -- that staff would be prepared to advise on.

CHAIRPERSON GRIFFIS: No, on the rear yard.

MR. MOY: Mr. Chair, on the rear yard requirements, if you refer to the zoning -- the ZA=s memorandum dated October 8th, those calculations were correct and if you look at your surveyor=s plat, we're addressing in terms of the calculation, it=s an area -- it=s an area measurement as opposed to a linear measurement and so by taking the calculations of the area, it gives you the average amount of 20.3 feet, so that would be correct. It=s consistent with the computations that was prepared by the ZA.

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CHAIRPERSON GRIFFIS: So what you're saying if you would take the total square footage of the area and then divide it by the width which is correct.

MR. MOY: That's correct.

CHAIRPERSON GRIFFIS: And so that would give you a -- I guess it wouldn't be -- I don't know how to do that.

COMMISSIONER MAY: Effectively, it's an average. Effectively it's an average. You could come to the same conclusion by taking the length that's 10 feet away versus the length of rear yard, rear property line that's 20 or 32 feet away and you know, multiply them, average it out.

CHAIRPERSON GRIFFIS: Okay.

COMMISSIONER MAY: And the conclusion was 20.3 feet?

MR. MOY: That's correct.

COMMISSIONER MAY: So thank goodness, we don't need a rear yard variance.

CHAIRPERSON GRIFFIS: Boy, you just got meted in on that one. Okay, well, actually all these go away. We don't have a closed court as established by the photographs that are in the record right now. This is a solid addition. We'll take that wall that's showing which I thought actually was inaccurate but is

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accurate and what you do with that additional space in there, we don=t know.

COMMISSIONER MAY: I=m not sure what you just concluded there. Take a look at that picture and tell me what you=re seeing.

CHAIRPERSON GRIFFIS: What I=m seeing as I look at this picture is that we have a solid wall all the way down, so there=s a solid wall that comes all the way through.

COMMISSIONER MAY: No, it does not. This is the property line.

CHAIRPERSON GRIFFIS: Oh, man, there=s a window right there.

COMMISSIONER MAY: This is lower, the window is in the bedroom and then there=s a --

(Discussion not on microphone)

COMMISSIONER MAY: I=m not sure whether -- do we have a clarification on the closed court requirement, because it seems to me that there is some precedent for building a full width addition at the rear of a house with a non-compliant side yard like that. So that if we could do it on, you know, the ground floor, then we ought to be able to do it on the second floor, building code issues and drainage aside. But I would think that if it=s possible to have a

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closed court, you know, that would be a full height of the building, that ought to be --

MS. MONROE: Well, is there a closed court? Is that the determination from the picture?

CHAIRPERSON GRIFFIS: There is a window well created on the second floor.

MS. MONROE: That=s not a court, though. I mean, just because there=s a window there, I don=t think --

COMMISSIONER MAY: There=s window well. There=s a space that is six and a half feet wide and 13 feet long that is enclosed on three sides and the fourth side is the property line and it starts approximately say 10 feet off the ground. Now, my recollection from past cases is that would still be considered a closed court, but is it a closed court that requires a variance?

MS. MONROE: It might be a court niche. I=m looking for the definition of court, see if it gives a height above grade and I don=t see anything that is --

CHAIRPERSON GRIFFIS: It could very well fall into a court niche.

MS. MONROE: -- particularly helpful.

COMMISSIONER MAY: Isn=t a court niche

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typically an architectural embellishment if you will?

CHAIRPERSON GRIFFIS: Uh-huh.

MS. MONROE: Yeah, I mean a court niche is an indentation, recess or --

CHAIRPERSON GRIFFIS: Do you know what that is?

MS. MONROE: -- or architectural treatment of the exterior wall of a building not a court which opens onto a street, yard, alley or court.

CHAIRPERSON GRIFFIS: Okay, first of all, we need a calculator.

COMMISSIONER MAY: If it=s a court, it can=t comply on square footage, if it=s a closed court.

CHAIRPERSON GRIFFIS: Divide by 12. Why because it=s less than 360 square feet?

COMMISSIONER MAY: Yeah.

CHAIRPERSON GRIFFIS: Are you looking at the dimensions I=m looking at, four feet seven inches by 18 feet, by 11 feet eight inches? That is right. And the second floor?

COMMISSIONER MAY: No, I=m going by the survey.

CHAIRPERSON GRIFFIS: It doesn=t look like we=re getting lunch today in case anyone is wondering.

(Pause)

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COMMISSIONER MAY: Sorry to extend the process here but we're trying to make sure that what we're doing is what you need to make this building work or at least that we're considering the right questions.

(Pause)

CHAIRPERSON GRIFFIS: Here's what I suggest, this is what I'd like to do, as Mr. May is stating, we're just trying to make sure that everything is in order so that we don't have any other complications that will cause problems for you, so with it, we are now very delayed and we don't often take as much time to go through this, but what I would like to do is have you step out and work with staff quickly for review and some questions. They are very aware of what we're saying up here and are -- will look to -- I think right now we just have the court issue, the closed court issue above the first floor because that becomes a variance case, not a special exception which is totally different.

Then what we'd like you to do is have something written up quickly and staff can get it to us when we are in our afternoon session briefing it on what it is that you are looking for. I'm making some assumptions on your schedule but if we get that

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information that is maintaining it as a special exception, we will be able to proceed very quickly with that. If this is actually beyond that, then we're going to need to readvertise and reschedule because it's a totally different application.

So that's what I would do at this time. I would ask your cooperation and just taking a quick review with staff and then we will look for that briefing some time shortly in the afternoon. So with that, yes, Mr. May.

COMMISSIONER MAY: I just want to add one thing. I don't want my earliest remarks to communicate to the applicant that the -- that there is something fundamentally wrong with what he's trying to do here. It's clear to me that, given the background of all of this, that the errors that have occurred in this case are ones of not understanding necessarily what's -- all that's required and that you may have been led down the wrong path by some people who you had trusted and I think that we're going to try to do everything we can to make sure that you can proceed with this, although we just want to make sure that all of the hurdles that you need to clear, can be cleared here before proceeding.

CHAIRPERSON GRIFFIS: I think that's

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exactly right and that=s why we=ve actually taken the time to review this and do the actual calculations which even though we are now almost three hours beyond our schedule have taken the time to do it, because it=s that important. So we would ask you to step aside and we appreciate your patience.

Mr. May, I understand that you may be leaving at this point; is that correct?

COMMISSIONER MAY: Yes.

CHAIRPERSON GRIFFIS: Very well, I want to note, is Georgetown Day representative, if they=re here, I would suggest that we stay for a couple extra minutes and we go to our public meeting the last agenda item on that. I will let everyone get organized as we have to do some recording changes at this point.

(Off the record to recess the public meeting at 1:58 p.m.)

(On the record at 2:57 p.m.)

CHAIRPERSON GRIFFIS: A point of clarification. I was mistaken in ending our morning session as we had sent an applicant out and so I would like to continue the last case of the morning which is Application 16960 of Edmund Kielty. Board members, we have been given an amended drawing as record in this application that indicates that a translucent roof will

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be installed as part of the construction on this. Therefore, removing what was looking to be a closed court on this single family home and therefore, it has been reviewed by staff and is, in fact, correctly before us as a special exception which, if approved, would allow construction of the rear addition to this premises under 223.

With that in mind, we have no OP report on file with this case. We do have the ANC-6B. It is Exhibit Number 22 which is recommending approval for the application and that is all the submissions that I have attendant to this case.

Is anyone here to give testimony today regarding the Edmund Kielty, 16960? Not seeing an indication of personal testimony, there are no parties in this case and we do have the submission as stated on the record previously of the adjoining and adjacent neighbors also in support.

Mr. Kielty, do you have any closing remarks?

MR. KIELTY: I just want to express my appreciation to the Board and to your very able staff for the time and consideration you gave this matter and I hope that I'm able to move it through to conclusion rapidly. I would ask for your approval of the

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exception with the condition that the translucent roof be added if that=s appropriate.

CHAIRPERSON GRIFFIS: That=s an excellent point. I=m not sure we need to condition it in that it is as submitted into the record and therefore, what we=re approving is what is submitted for record drawings. Record drawings are now showing, as initialed by you and dated, that there=s a translucent roof there. I would only direct you to spend adequate time in detailing how that is attached and how the water is actually dealt with as it hits that roof as we=ve indicated other issues regarding this application. So if there=s no other further comments, questions, I would move approval of Application 16960 of Edmund Kielty for a special exception to construction at the rear of the single family dwelling under Section 223. This application did come to us not meeting the lot occupancy requirements under Section 403 and this is the premises at 335 16th Street SE.

MEMBER ETHERLY: Seconded, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly. Is there any discussions on the motions? Clearly we have no evidence in the fact that there is any sort of deterioration of the use of adjoining neighbors= property or any impediments into the light

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and air of the adjacent properties and I think it is in total compliance with 223. Any other comments to the motion? If not, then I can ask for all those in favor signify by saying AAye@.

(Aye)

CHAIRPERSON GRIFFIS: And opposed?

(No response)

MS. BAILEY: Mr. Chairman, do we have a proxy on this case?

CHAIRPERSON GRIFFIS: I do believe we do.

MS. PRUITT: Mr. Chairman, you have a proxy from Mr. May in the affirmative.

CHAIRPERSON GRIFFIS: Thank you very much.

MS. BAILEY: The vote is recorded as four, zero, one for approval of the application. Motion made by Mr. Griffis, seconded by Mr. Etherly. Mr. Zaidain is in support. Mr. May is in support and Mrs. Renshaw is not present today, therefore, not voting.

CHAIRPERSON GRIFFIS: Good, thank you very much. Mr. Kielty, thank you very much for your patience and --

MR. KIELTY: Thank you very much.

CHAIRPERSON GRIFFIS: -- and good luck to you. With that, I can conclude the morning session and I would like to call for the afternoon session on the

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17th of December and wish everyone a very good afternoon. This is the public hearing of the Board of Zoning Adjustments for the District of Columbia. My name is Geoff Griffis. I am chairperson. The vice chairman, Ms. Anne Renshaw, is not with us today. Mr. Curtis Etherly sitting to my right is present and also Mr. Zaidain representing National Capitol Planning Commission.

Copies of today=s hearing are available to you. They are located at the table close to the door where you entered into the hearing room. I would just make note for those unfamiliar that all public hearings are being recorded; and so we ask that everyone please refrain from making any disruptive noises or actions as it does detract from those giving testimony and from Board members trying to listen intently to that testimony. I would also note and ask everyone to turn off all their cell phones and beepers at this time so that we also do not have disruptions with that type of noise.

All persons planning to testify either in favor or in opposition are to fill out two witness cards. The witness cards are located at the table and also the table in front of us. Those two cards are to be filled out and given to the recorder, who is sitting

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to my right prior to coming forward to speak to the Board. If the cards are not given to the recorder prior to, the hearing will be stopped as I'm sure the recorder will stand up and ask you for those.

So that being very clear, I'm hoping everyone will fulfill that requirement. I am not going to run through the standard procedures for special exceptions and variances, as our afternoon has one appeal case and we will go through the actual process for the appeal when the case is called.

Cross examination of witnesses is permitted by the Applicant and/or parties. The ANC within which the property is located is automatically a party in the case. The record will be closed at the conclusion of our hearing except for any material that is specifically requested by the Board and the Board will be very specific on what material is to be submitted and when it is to be submitted to the Office of Zoning.

After that material has been received, clearly it goes without saying that the record will be finally and completely closed and no other information then would be accepted by the Board. The Sunshine Act requires that all public hearings on each case be held in the open and before the public. The Board may, however, consistent with its rules and procedure and

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the Sunshine Act, enter into executive session during or after a public hearing on a case in order to review the record or to deliberate on the case.

The decision of the Board in contested cases and in all cases is to be based exclusively on the public record and therefore, we ask that people present today not speak to the Board. We will make every effort, in fact, we will conclude this afternoon=s hearings at 6:00 o=clock if not before. And so at this time, I think we can take up any preliminary matters. Preliminary matters are those which go to whether a case will or should be heard today, such as a request for postponements, continuance or withdrawals or whether proper and adequate notice has been presented regarding the case before us today.

If you believe the Board should not proceed, now is the time to raise such a matter. I will take as an indication of people with preliminary matters that they will approach the Board and sit at the table to give testimony and I will ask staff at this time if they have any preliminary matters for the Board.

MS. BAILEY: Mr. Chairman, good afternoon and no, staff, does not have any preliminary matters.

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CHAIRPERSON GRIFFIS: Thank you very much and I would also say good afternoon to you, Ms. Bailey and also to Mr. Moy and Ms. Pruitt who is with us today, the able staff of the Office of Zoning. Ms. Monroe representing the Corporation Counsel in my left. With that, then, let's call the first case in the afternoon.

MS. BAILEY: Application Number 16950, this is an appeal of the West End Citizens Association pursuant to 11 DCMR 3100 and 3101 from the administrative decision of David Clark, Director, and Robert Kelly, Zoning Administrator, Department of Consumer and Regulatory Affairs, in the issuance of Certificate of Occupancy Number C039477 issued on August 16th, 2002 to George Washington University, permitting the occupancy of the subject premises by an apartment and parking use.

The Appellant alleges that the Certificate of Occupancy was issued without full compliance with Zoning Commission Order Number 746-C. The subject premises is located in the 3C districted premises, 1957 E Street NW, (Square 122, Lot 29). All those persons who will be testifying this afternoon, please stand to take the oath, and please raise your right hand.

(Witnesses sworn)

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MS. BAILEY: Thank you. Would the Appellant please sit at the table?

CHAIRPERSON GRIFFIS: Good and while you get organized, let me outline the order of procedure as we have established. That would be first, we'll have the Appellant=s case. Second, we would hear from the Administrative Officer=s case the Zoning Administrator. Third, we would have the property owner=s case if one is presented. Fourth, would be the Advisory Neighborhood Commission and fifth would be rebuttal and closing statements by the Appellant.

MEMBER ZAIDAIN: Mr. Chair?

CHAIRPERSON GRIFFIS: Yes.

MEMBER ZAIDAIN: Before we get into this, I want to state for the record that when the Zoning Commission took the proposed action to adopt this order permitting the PUD modification of 1957 E Street. That order was referred to the National Capitol Planning Commission for review and comment and in my capacity as a project reviewer at NCPC, I did the analysis for that review which entailed assessment the PUD=s impact to the surrounding federal interests and then I presented that to our Commission for their deliberation.

I do not feel that my role in that process would bias me in this proceeding and unless there=s any

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other comments in that capacity, I wish to continue on the case.

CHAIRPERSON GRIFFIS: Very well, any questions from the Board?

MEMBER ETHERLY: Mr. Zaidain, could you speak to what role, if any, you played in the Commission=s ultimate disposition of that particular proceeding?

MEMBER ZAIDAIN: Well, when you say Commission, you mean, NCPC or the Zoning Commission?

MEMBER ETHERLY: NCPC.

MEMBER ZAIDAIN: I provided a staff recommendation to them on the project which and our recommendation was that it had no impact to the federal interest. Furthermore, it=s my understanding from this case, from reading through the file that the issues here deal with the amenity package and some of the compliance thereof, and that was not an issue at NCPC.

MEMBER ETHERLY: Based on Mr. Zaidain=s disclosure at this particular point, I would not have any difficulty with Mr. Zaidain continuing to participate in this matter.

CHAIRPERSON GRIFFIS: Good, I appreciate that. I have no question that Mr. Zaidain can continue

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with his impartiality with this case and have no objection. The Appellant, if they would introduce themselves and give their name for the record, can comment on Mr. Zaidain=s disclosure at this time.

MS. KAHLOW: I=m Barbara Kahlow representing the West End Citizens Association today with Sara Maddux and I believe we have no objection, sir, to --

CHAIRPERSON GRIFFIS: You do or do not?

MS. KAHLOW: No, we do not. I just asked her, too. Thank you.

CHAIRPERSON GRIFFIS: Okay, very well, and do --

MS. MADDUX: I=m Sara Maddux from the West End Citizens Association and there is no objection, thank you.

CHAIRPERSON GRIFFIS: Okay, thank you. Does the Zoning Administrator have any objection to Mr. Zaidain continuing is signifying by nodding head no, and does the owner or owner=s representative have comment or objection to this? Also indicating not. So we will continue although that was the opportunity to get us all out of here as we would have lost a quorum. However, we will continue with this.

And let me establish the procedure, as I=ve

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run down, is that clear to the Appellant at this point?

MS. KAHLOW: Yes, it is.

CHAIRPERSON GRIFFIS: Okay, very well, we are going to be running a clock on the case and I'd like to establish 45 minutes for the presentation of the Appellant=s case. Is that within reason as you have planned to present your case?

MS. KAHLOW: It will be between 45 and an hour as the regulations require, closer to 45, but it may be a few minutes more than that.

CHAIRPERSON GRIFFIS: Okay, in which case, we=ll have it run at 45 and then just have it run over and at an hour, we will reassess if not -- well, we=ll keep it at an hour. Now, there are several things, I think, we=ll give directive to as they are presented that will be outside of our jurisdiction and outside of the scope of this hearing. I will interrupt you and direct you to move away from those. I will give you an opportunity to address that if you disagree with me, but I think -- and there it is because it will be advantageous for you not to speak to things that we can=t deal with.

That being said, I don=t think I have any other directions. Unless other Board members have such, I will turn it over to you then.

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MS. KAHLOW: Thank you. Again, I'm Barbara Kahlow. This afternoon I'm here along with Sara Maddux representing the Appellant, the West End Citizens Association. The West End CA was founded in 1910 and is one of the oldest citizens associations in DC. It is the principal community organization in the George Washington University Campus Planned Neighborhood. Unfortunately, the 1957 E Street land use case before you today has been going on for over 11 years. The last page of my statement gives a brief set of dates so that you can follow what happened when.

The BZA has been involved in this case since September 2000. The West End Citizens Association will show today by a preponderance of the evidence that; one, GW is out of compliance with the Zoning Order 746-C for the 1957 E Street PUD by one, not contributing the unconditional required \$100,000.00 contribution to the Foggy Bottom Program Foundation by the August 16th, 2002 deadline and continuing to this day; two, not instituting a parking restriction policy for the fall 2002 semester and to this day and three, not complying with the DC Environmental Policy Act for new projects after the August 17th, 2001 contract, binding contract that GW signed with the West End Citizens Association, including three projects in the

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23rd Street corridor.

CHAIRPERSON GRIFFIS: Okay, let me interrupt you right there on item number 3, in terms of Environmental Policy, do you want to briefly give me an indication of why and how this Board has jurisdiction to address that?

MS. KAHLOW: Yes. The Zoning Commission order specifically as a condition of the order and I'll be discussing this in great detail, requires the Applicant, George Washington University, to comply with the DC Environmental Policy Act for all campus planned projects because in the past they have not done so for a variety of reasons. So it's in the order and the BZA has jurisdiction to make sure that the Zoning Administrator is enforcing the Zoning Commission PUD orders.

CHAIRPERSON GRIFFIS: Okay, so your point is that it is not complying with the Environmental Policy Act which was -- the compliance with which was a condition in a previous order.

MS. KAHLOW: In the order we're talking about, yes, that's correct.

MEMBER ZAIDAIN: Just to follow up on that for clarity, that was put in the Zoning Commission order just to reiterate something they'd have to be

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required to do anyhow.

MS. KAHLOW: As in that overall but we wanted to specifically --

MEMBER ZAIDAIN: GW is not in one of those areas of the city where they are exempt from the --

MS. KAHLOW: That is correct. We -- the West End Citizens Association and the rest of the community organizations, at that point I was representing the Foggy Bottom Association, filed a comprehensive plan amendment which passed the DC City Council twice. NCPC tried to overturn it. It finally passed, however, again, and it is current law that all of GW campus no matter where its boundaries is, are outside of the Central Employment Area. The DC Environmental Policy Act says projects outside of the Central Employment Area are required to follow that act and all of their projects, including this particular site, this particular site was one of the five sites that we dealt with at NCPC because we said it would have an impact on our community.

I testified in front of the NCPC seven times, I believe, on this.

CHAIRPERSON GRIFFIS: Okay, well, I'm going to hear from corporation counsel and then I'm going to give the other participants a chance to address this if

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we could just halt the clock for a brief moment because it would be my opinion that, in fact, I think we would need to be moved substantially to a point where we were convinced very quickly that the Zoning Administrator had erred in somehow not going after compliance with the Environmental Policy because clearly an appeal before this Board is on an error that the Zoning Administrator had made. So I'm not making the direct connection yet with the third issue that you've brought out, that there is an error that is properly before us.

MS. KAHLOW: I will be discussing on pages 5 and 6 of my -- 5, 6 and the first two lines of 7, detailed information about the law and the Zoning Administrator's failure.

CHAIRPERSON GRIFFIS: And what I don't want to do is get too far down is where my issue is.

MS. KAHLOW: I understand.

CHAIRPERSON GRIFFIS: Is I don't want to get too far down into what the law speaks to and how the law is to be implemented because that goes beyond, even if we wanted to and maybe we do, we've got a lot of environmentalists on this Board, we cannot go after the actual enforcement. So what we need to do is look at how there's an error created by having -- that

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involves the Zoning Administrator. With that, let me see if corporation counsel has any wisdom to bestow on us.

MS. MONROE: Actually, I would disagree with you. I think that if the ZA has done something wrong, then we need to look at it, but whether or not the university has complied with the Act is not for us to determine.

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLOW: Well, let me just say that what we're going to show is that there's nothing in any of the zoning cases that the Zoning Administrator looked at in the three cases filed since August '01 to show that there was any compliance. No environmental impact screening forms were filed as required by law and regulation and he should have, at a minimum, checked to make sure that simple document, the seven-page document for each case, was filed. That is what he needs to do under your regulations, Zoning Regulations, et cetera. That's what the order requires.

CHAIRPERSON GRIFFIS: Well, that would come under the satisfaction of DCRA requirements in terms of filing the environmental statements; is that correct?

MS. KAHLOW: Actually, as I say, the zoning

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order requires that compliance. So when the case comes in, the campus plan case, he just look for, since it is not one of the specific regulatory exemptions, there are two sections of regulatory exemptions, he must look for the seven-page screening form.

Any action that=s a major action under the law of a million dollars or more, needs -- and it is not one of the exemptions --

CHAIRPERSON GRIFFIS: Let me ask you it this way.

MS. KAHLOW: -- you must do that.

CHAIRPERSON GRIFFIS: If it wasn=t a condition by this Board or the Commission, would they still have to comply with that?

MS. KAHLOW: Yes.

CHAIRPERSON GRIFFIS: Okay.

MEMBER ZAIDAIN: But I think the question here for us is because normally -- if this was not in the order, we wouldn=t be here, but since it is in the order --

CHAIRPERSON GRIFFIS: I understand.

MEMBER ZAIDAIN: -- does that make it right for us to hear it? For example, if there was a condition in that Zoning Order that said they must meet all applicable building codes even though they have to

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do that anyway, but it's in the Zoning Commission order does immediately throw it into our realm.

CHAIRPERSON GRIFFIS: And would we, in fact, review for compliance with all building codes?

MS. KAHLOW: Let me tell you why I think you would in this instance. We had a case, an appeal case before the Board of Zoning Adjustment, which I'll be describing that was before it ever went to the Zoning Commission and you, Board, the Board of Zoning Adjustment, advised us and said to us, AYou must enter settlement negotiations to try to resolve this case@. You instructed the corporation counsel to sit at the table. They were a party to the negotiations and we signed a settlement agreement.

One of the crucial points for us was the compliance with the DC Environmental Policy Act. The Citizens Association, Foggy Bottom Citizens Association, our sister group, filed a lawsuit on that issue because it was a huge building had a huge impact and they hadn't done one. And it was an issue in contention between the community and GW for such a long time that we came back to you, BZA, and we said, AWe'll make a deal if, and only if, you're going to make sure that from now on they file a DC Environmental Policy Act. You, BZA, you told us to make a deal. We made a

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deal with that condition in it@.

CHAIRPERSON GRIFFIS: That=s right, and that=s where I have a problem. I don=t think this Board has jurisdiction to do exactly what you=ve stated, is to make sure that there=s compliance with the Environmental Policy. But let me hear from -- let me see if the Zoning Administrator has a comment on this issue. And again, I=d reiterate and underscore for this Board that we=re certainly not looking to remove that responsibility from any Applicant or any development that goes on in this city but just questioning whether we actually have jurisdiction to be dealing with it.

Good afternoon, sir, if you would not mind introducing yourself.

MR. KELLY: Good afternoon, my name is Robert Kelly. I=m Zoning Administrator for the District of Columbia. And to speak to the Environmental -- actually what we call it is an Environmental Impact Review Form and that was done on I think almost all of the projects and a letter as sent out which we can provide you with a copy of, indicating the approvals that were required, the reviews that were required and the Director of the Department indicated in this that an entire impact EIS was not required

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based on his findings.

CHAIRPERSON GRIFFIS: Was not required.

MR. KELLY: Right.

CHAIRPERSON GRIFFIS: I see, okay, and that=s going into somewhat the substance of rebuttal of perhaps the appeal that=s coming to us, but would directly, and not necessarily that you would have comment, but do you have a comment to the Board for our quick deliberation on whether we should, in fact, be hearing the third issue that=s brought up and that is compliance with the condition that outlines the full compliance with the Environmental Policy Act?

MR. KELLY: The compliance part of the Environmental Policy Act is done through the building permit process which we are a part of but not in control of. So my office does not approve or reject an application based on whether or not an EIS is required.

MS. KAHLOW: If I can be sure that we know, the Zoning Administrator is only one of the two people administrative decisions we are appealing. We are appealing DCRA=s and DCRA, it=s in the division, that entire DCRA, that Clark should have been here and he should be testifying about this. We=re not specifically saying the Zoning Administrator. We=re talking about DCRA=s administrative actions.

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CHAIRPERSON GRIFFIS: So you're appealing DCRA=s administrative actions.

MS. KAHLOW: That=s correct, as well as the Zoning Administrator=s, that=s what Ms. --

CHAIRPERSON GRIFFIS: But you're appealing that to this Board.

MS. KAHLOW: That is correct, because they are related under the configuration of regulations and statutes. They have to do something, then the Zoning Administrator, as it is sequential. He then sees what they=ve got and I have not seen the document he=s speaking of but apparently it=s only one of the multiple cases that were involved. So if we could just -- what I propose is that we actually present the testimony and then you can decide at that point if it=s relevant or not. We believe it is.

CHAIRPERSON GRIFFIS: We give you that point, not being able to decide, but there=s a few steps I have to do first.

MS. KAHLOW: Okay.

CHAIRPERSON GRIFFIS: First of all, I take issue, I=d ask staff and corporation counsel to advise me either now or they can do that as we move on, but in terms of appealing an administrative procedure of the DCRA, I do not believe that=s properly before us, nor

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would we have jurisdiction over that.

MS. PRUITT: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

MS. PRUITT: In fact, DCRA has their own internal approval process and then once that=s been exhausted through an Administrative Judge, it may come to the DCRA as -- I mean, BZA as a civil infraction potentially but that would be the only way.

CHAIRPERSON GRIFFIS: Indeed, and that has been my experience and that would be my knowledge of the regulations also. Even if we could be convinced you are absolutely 100 percent right, that doesn=t mean we could even take any action on it.

MS. KAHLOW: Okay.

CHAIRPERSON GRIFFIS: Let me see if the owner is here and a representative is available to speak to this issue.

MR. FEOLA: Thank you, Mr. Chair, members of the Board, my name is Phil Feola with Shaw-Pittman on behalf of GW. I don=t disagree with Ms. Kahlow=s comments about the order requiring compliance with the DC Policy Act which as Board Member Zaidain indicated is a restatement of the law, if you will. What the university=s position is, however, and that=s condition number 12 of Zoning Commission Order 746-C, and that

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condition, if I can indulge the Board for a second, says and I quote, AThe university shall comply with the DC Environmental Policy Act, DC Code Section 6-981 et seq, subject to any applicable amendments, regulations or judicial interpretation on all future, future campus construction projects@. It would be impossible for the Zoning Administrator to determine with the issuance of a CFO for this project compliance with the Policy Act for future projects.

It seems to me that this appeal of the Zoning Administrator=s action on August 16th couldn=t be about this condition. Now, if there are one of the other projects that Ms. Kahlow referenced that didn=t do this, it seems that that project should be subject to an appeal on non-compliance with this condition, not 1957 E Street, because unless Mr. Kelly is clairvoyant, he couldn=t know when or if or where the next project is coming from. So our position is that this condition is not ripe for this appeal.

CHAIRPERSON GRIFFIS: Okay, Board members are there questions or clarifications needed on that point? I think that is an interesting piece with the language talking about future projects. The other issue that comes down in my mind is if the Commission is saying it shall comply, it is as I think it was

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corporation counsel that indicated, it is a compliance issue not necessarily or I would take it not an error of the Zoning Administrator of which that would bring an appeal to this Board. So I think we have two pertinent issues regarding this. Mr. Zaidain?

MEMBER ZAIDAIN: Well, the point that Zoning brings up is interesting in terms of the word Afuture@ being in there. I mean, I guess if you follow that our literally if a future GW project unrelated to 1957 E Street comes up and they do not -- GW does not have it comply with the Environmental Policy Act, then somebody -- then they can be -- that decision can be appealed here under an order for a different development.

I mean, it just seems -- it just seems illogical to me. I'm curious as to why the Zoning Commission went that far in order to do that.

MS. KAHLOW: Can I explain? I mean, somehow the dates are all getting mixed up. This BZA, this Board, asked us to make a deal. We signed a deal to move this onto the Zoning Commission that all projects as of August >01. The Certificate of Occupancy was August >02. There were three projects which you're going to hear about, from August >01 to >02. We have a binding contract that was part of the

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order for the BZA last appeal that you all know about and that=s part of the case.

MEMBER ZAIDAIN: So what is that speaking to where the delineation of the word Afuture@ comes from?

MS. KAHLOW: The word future comes from August >01 not August >02. Mr. Feola was talking about the Zoning Order of August >02. We were talking about the contract from August >01.

MEMBER ZAIDAIN: Well, what=s before us to appeal? We=re here to --

MS. KAHLOW: Oh, we=re here to discuss the violations of the contract and the Zoning Order and that=s part and parcel of it.

MEMBER ZAIDAIN: I don=t believe that we can hear violations of a contract.

CHAIRPERSON GRIFFIS: No, I would agree.

MS. KAHLOW: But it=s part of the Zoning Order. It was embodied in the Zoning Order, the contract, both at the BZA level and at the Zoning Commission level. We signed a binding agreement that was embodied in the order.

CHAIRPERSON GRIFFIS: Okay, let=s look at the order here.

MEMBER ZAIDAIN: Which condition references

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that in the Zoning Commission order? Can you point to that in the order that links it to the contract?

MS. KAHLOW: You'll have to give me a second to pull all these documents out. I think my testimony doesn't. If you'll just hold on a second, please. It's paragraph 8 in the August 2001 contract and let me find that.

MEMBER ZAIDAIN: No, where does it reference that in the Zoning Commission order?

MS. KAHLOW: I'm going to look. It's condition 12 in the order but I believe it's in earlier, also. I'm going to ask at the end of my statement that the prior order of this BZA where this all was embodied, be made a part of this record and that also says it.

MR. FEOLA: Mr. Chair, I think I can point out for Ms. Kahlow, I think she's referring to, and correct me if I'm wrong, Barbara, but finding of fact number 24 of Zoning Commission Order 746-C references the agreement that was made between West End Citizens and the University and we don't -- we aren't debating that. There is an agreement, it's enforceable. It's a contract between the University and WECA. However it is --

CHAIRPERSON GRIFFIS: Who's the enforcement

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body when you say it=s an enforceable contract?

MR. FEOLA: The Courts would normally be in a contract between private parties. We think we=ve complied with it, but that=s not -- I don=t think it=s germane to this Board. I think the Board has to look at the conditions of the BZA order and find out whether -- or make a determination whether or not the University has met those conditions. And I think, again, with regard to the Environmental Policy Act, it would be hard for the Zoning Administrator on August 16th, remembering that this order came out on August 16th, the exact same day, to project into the future and find out whether or not GW has complied with the Environment Policy Act for projects that hadn=t even been filed for a permit yet or may have been filed for a permit but not ripe for determination.

MS. KAHLOW: I think the whole thing is a pattern of all of the different conditions of August >01 were not complied with up till the August >02 order and then since then. And you=re going to see when we lay it all out that naught has been filed in good faith and this is just one of them, I=m using examples, and I worry and we=ll be asking you for the future projects. I=m just trying to explain the pattern of non-compliance.

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Our request will not be for you to enforce on those old projects. It will be for you to enforce in the future, for the new GW Hospital site. If you will bear with me, I will -- you'll see that we're not asking you to take sanctions on that issue. We're asking you to take sanctions on the other issue, but for you to direct them in the future that they have to follow it and if I --

MEMBER ZAIDAIN: I understand that.

CHAIRPERSON GRIFFIS: But that's what the condition says. It would be redundant for us to spend time to tell them what the condition already states.

MS. KAHLOW: Well, our case is the GW -- we came to you in good faith and believing everybody would follow the different agreements and they didn't do so. And we need this Board to say to them there has to be enforcement, you can't operate ex-territorially. You have to follow the conditions and you have to be fined and our whole case if they continue is we want you to fine them for the obvious violations that have happened since '02. And if you would indulge us, I'd like to go through the -- instead of just chopping this up, I'd like to go through the case. I'd like to present the case. I was trying to give you a summary so you could understand the overview before we went into it, and Mr.

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Griffis, I would appreciate the opportunity to present it logically.

MEMBER ZAIDAIN: Mr. Chair, I have a lot of questions, but I have no problem with that.

MS. KAHLOW: Thank you.

MEMBER ZAIDAIN: That=s not my call.

CHAIRPERSON GRIFFIS: Okay, I think it would be expeditious that we go into this and noting when we get to that aspect our concern with appealing a non-compliance issue and perhaps we will get further information from our counsel also on that. Yes.

MR. BARBER: Yes, my name is Charles Barber. I=m senior counsel for George Washington University. My concern is it sounds like the Applicant is going to spend a lot of time dealing with contractual issues and August >01 issues when the issues are the conditions in the August >02 Zoning Commission Order. There is -- she=s referenced, you know, paragraph 24 and the findings of fact which were not brought into the main conditions of the order and she=s also referenced the parking restrictions which nowhere appear as a condition in the Zoning Commission order again, they are in the side agreement between George Washington and West End Citizens Association which is not before this Board.

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My concern is we're going to spend a lot of time in listening to testimony on issues which are clearly not germane to this Board's authority to decide whether the Zoning Administrator on August 16th properly authorized the Certificate of Occupancy.

CHAIRPERSON GRIFFIS: Well said. Board members? Well, I think it is not unreasonable to spend time, a little bit up front, in defining rather than then walking down an extensive path for things that we cannot, in fact, have any control over. You bring up the other issue in terms of levying fines for non-compliance. Where is that established for you that could be a logical outcome of this appeal?

MS. KAHLOW: The chapter in the regulations, the Zoning Regulations on enforcement specifically talks about fines. One second, let me quote it to you. There are two relevant -- and I'll be going through this when we get to it. There are two relevant sections. One is in 11 DCMR, a part of the Zoning Regulations, Chapter 32, administration enforcement and it talks about penalties. And it's part of what happens when there's non-compliance with conditions and orders. That's what this is about and I'll be going through that in detail.

There is also in another part of the Code

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another section which talks about Certificates of Occupancy and how to treat those, but those are part of the zoning situation. If you will bear with me, you will actually follow this. It is pretty logical. I was just trying to sum it in the beginning so you had a bigger picture of what this is all about.

CHAIRPERSON GRIFFIS: Okay, you know our concerns. Let=s proceed.

MS. KAHLOW: Thank you. So the first thing we=re going to say is GW=s -- we=re going to prove that GW is out of compliance with the order. Second, that DCRA improperly issued the Certificate of Occupancy with full knowledge that GW was out of compliance with the order and third, that DCRA has failed to enforce the order, including issuing required daily fines.

I will be presenting evidence and arguments under 10 section headings. I will first start with the first one, which is a historical summary. As you noticed earlier, I said you started in September 2000 at BZA. In September 2000 both the West End CA and the Foggy Bottom ANC files motions with the BZA which were referred to the Zoning Administration. In January >01 the ANC filed a BZA appeal, another appeal, 16701 objecting to the Zoning Administrator=s December >00 improper issuance of a building permit to GW for this

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structure.

In April 2001, you granted party status to us and in June 2001, the BZA granted the community's appeal thereby, requiring GW to file a PUD Modification Request with the Zoning Commission. At that time is when you instructed us to try to make a deal and I'll talk about that in a second. In August GW filed a PUD Modification Request. In November the Zoning Commission granted the West End party status and then in August 2002 is when the final order was published.

I regret that the West End Citizen's Association is forced to again appeal to the BZA the administrative decision since August 2002 by BZA generally and the Zoning Administrator specifically relating to 1957 E Street. In August 2001, a year before, the BZA issued the order, it stated, and this was your order number 16701-A. The BZA order stated, quote, "To avoid the continued uncertainties, expense and delay of litigation, whether an administrative or judicial setting, the parties are strongly encouraged to pursue settlement of this PUD dispute", unquote. Based on your direction and in good faith, the West End entered settlement negotiations with GW with active participation by the DC Corporation Counsel.

The bottom line is that the West End

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trusted GW to meet the terms of its August 2001 binding contract, the agreement, with the West End and then the Zoning Commission's August 2002 order and the West End relied on the fact that BZA would enforce any Zoning orders. Sadly, one GW has failed to comply with multiple terms and conditions, two DCRA improperly issued a Certificate of Occupancy despite GW's non-compliance and three, since then DCRA has failed to issue the required daily fines.

Next section, Section 2, DC policy. Mayor Williams recently issued the District of Columbia Strategic Neighborhood Action Plan, SNAP. It looks like this. I didn't have a color version in the testimony. In it, the mayor states his desire for DC enforcement actions with meaningful fines when GW is not in compliance with zoning orders or other regulations. So the mayor, as a policy, now says that DCRA should be enforcing the zoning actions and be fined -- and GW should be fined.

On August 28th, 2002 Zoning Administrator Kelly sent GW an e-mail captioned Feeding Program Payment, stating that GW is not in compliance with Zoning Order 746-C. That document is in the record as Attachment A and -- Attachment A to additional documents and B to the -- excuse me, it's Attachment B

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to the additional documents. In that Zoning Administrator Kelly stated, AWe are informed by the Foundation it has not received the first \$100,000.00 contribution. If that is so, it would appear that GW is now in violation of that order and should take immediate steps to bring itself into compliance@.

However, since August 28th, i.e., for the last three and a half months, DCRA has failed to issue the required daily fines. On August 29th, internal DC e-mail explains, quote, AI=m looking to see if we can just not enforce those kind of Zoning Commission orders@, unquote. This revelation is incredible and no doubt troublesome not only to the West End CA but also to the BZA.

Section 3, appeal, the West End=s appeal took exception the following administrative decisions, and I=ve outlined them earlier; one, that they issued a Certificate of Occupancy in August >02 without full compliance; two, they failed to issue daily fines as required under 11 DCMR Subsection 3201 and third, that the Zoning Administrator tried to improperly add conditions to a Zoning Order, more about that later.

As detailed in West End=s August >02 letter to DCRA, the Zoning Order requires -- the Zoning Order requires DCRA prior to issuance of a Certificate of

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Occupancy to receive; one, proof of the \$100,000.00 contribution payable to Foggy Bottom Feeding Program Foundation no later than on the date of the Certificate of Occupancy; two, proof of GW=s compliance with the DC Environmental Policy for each project since August >01, the date of the West End agreement with GW and Mr. Feola says he=s August >02. We think it=s August >01, and three, proof of GW=s catalog and website publications restricting student parking in the Foggy Bottom/West End area starting in publications for fall >02 semester.

DCRA failed to obtain proof for each of these conditions prior to August >02 issuance of the Certificate of Occupancy and in fact, to this day GW is out of compliance of all three as detailed below.

Section four, no daily fines; Mr Griffis asked us about how does the Zoning -- BZA have jurisdiction. In the Zoning Regulations, 11 DCMR Chapter 32, Administration Enforcement, provides the frame work for enforcement of Zoning Orders, including Section 3201, penalties, and Section 3205, compliance with conditions and orders. Specifically, 1 DCMR, Subsection 32-100.2 provides for appeals to the BZA of any decision of an administrative officer granting the Certificate of Occupancy or by any other administrative decision based

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in whole or in part upon any zoning regulations. Also 11 DCMR provides that a property owner in violation of provisions of 11 DCMR shall be punished by a fine for each and every day the violation continues, for each and every day the violation continues.

And 11 DCMR provides this section shall apply when a Certificate of Occupancy has been issued under the authority of an order of the Zoning Commission and the order of the Commission sets forth any condition to the issuance of a Certificate of Occupancy or to an approval of a PUD. And lastly, DCMR provides any person who owns such shall at all times comply with any condition to the issuance of a CFO.

With respect to daily fines, 11 DCMR Subsection 3201.1 is clear that the daily fines to be issued by DCMR for each violation of a Zoning Order condition are non-discretionary, i.e., only the amount of the fines levied is discretionary. Nonetheless, to date DCRA has not yet issued any citation or fine and remember I highlighted the internal DC e-mail where it said they=re trying to not enforce even though it=s required under the Zoning Regulations.

Section five, no \$100,000.00 contribution yet to the Foggy Bottom Feeding Program Foundation. Condition seven in GW=s August >01 contract with the

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West End CA, the quote Agreement@ that was negotiated before the BZA states A subsidy to foundation@ and it lays out the \$500,000.00 payout. As mentioned in the West End=s August filing, on August -- August >02 filing, on August 14th, i.e., before DCRA issued its Certificate of Occupancy, the West End sent a fax to DCRA about condition number nine in the order that was not yet published. It stated, A Before DCRA can legally issue a Certificate of Occupancy, it must insure that GW=s compliance with the PUD conditions. The conditions include a requirement for GW to write a check for 100 grand to the Foggy Bottom Feeding Program Foundation which GW has not yet done.

The condition reads, A The University shall contribute 500,000 over five years. The \$500,000.00 will be \$100,000.00 a year for five years to the Foggy Bottom Feeding Program Foundation. The first \$100,000.00 contribution shall be made on the date of Certificate of Occupancy of the subject property, i.e., August 16th. The foundation was incorporated in March >02. However, it could not complete establishment of the new feeding program until the written order was in hand. GW acknowledged this in a later March memorandum to the West End CA.

GW=s memorandum stated, A The University

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representatives named in the Articles of Incorporation look forward to working with representatives of West End Citizens Association once the GW modification is approved@. So there=s these several months we were waiting to see what it=s going to say. On August 16th, i.e., on the date of the order, GW unilaterally tried to change the terms of the order by setting up a Rue Goldberg (phonetic) type non-traditional escrow account with conditions nowhere found in the order in its bank, Rigg, instead of in the Foundation=s bank First Union.

The Rigg=s account is captioned, AGeorge Washington University, Elliott Square Escrow Account@ and includes no mention of Zoning Administrator Kelly, GW=s intended escrow agent. Also there is no mention whatsoever of the foundation, even though the order requires GW to issue a check unconditionally to the foundation and the employer identification number, the EIN for the account is undoubtedly that of GW instead of that of the foundation since they never asked what it was.

This is clearly a sham account which clearly is in violation of the order. On August 19th, Zoning Administrator Kelly sent an e-mail to GW saying, quote, AI need to go on record that the Zoning Administrator has not agreed with GW to be an escrow

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agent and that any type of arrangement to do so would require agreement of all three parties; GW, West End and DCRA in a mutual agreement to comply with the BZA order@.

We have a series of internal e-mails where the Zoning Administrator was advised by counsel inside DC that they had to have a mutual agreement before there could be any kind of escrow account like that. Additionally DCRA=s 28th e-mail to GW said, AGW is now in violation of the order and shall take immediate steps to bring itself into compliance@, and that=s --

MEMBER ZAIDAIN: Let me interrupt you there. There is some confusion and I don=t mean to cut you off, but I think there=s something we need to be cleared up so that the Board is clear on what we=re looking at there. On page 4 of your testimony, and this is in the submittal as well, the second paragraph -- actually, this is quoting out of the e-mails from DCRA.

MS. KAHLOW: That=s correct.

MEMBER ZAIDAIN: So it seems to me what=s really being discussed here is the Zoning Commission order, not the BZA order.

MS. KAHLOW: We=re talking about the Zoning Commission order, that=s correct.

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MEMBER ZAIDAIN: Okay, but -- okay, so I guess I can't hold you responsible for that statement, but it's your understanding that what --

MS. KAHLOW: That was a figure of speech. He said BZA order, he meant Zoning Commission order. There was no BZA order --

MEMBER ZAIDAIN: Because when I was reading through the --

MS. KAHLOW: I'm sorry, I should have put a sic after that. That was the Zoning Commission order and not --

MEMBER ZAIDAIN: No, that's all right. I mean, that wasn't your statement.

MS. KAHLOW: No, it was his error. I'm sorry, I should have put sic.

MEMBER ZAIDAIN: Okay.

MS. KAHLOW: Yes, you're right, good question. Sorry. Attachment B to the appeal is a record of Zoning Administrator Kelly's 10 telephone conversations with the West End and various faxes and e-mails between them from August 14th, i.e., before publication of the Zoning Commission Order and before issuing the Certificate of Occupancy, December 5th, and in each of those conversations I must admit the Zoning Administrator couldn't have been more forthcoming, that

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he was on our side, he knew the money had to be given to the foundation unconditionally and he just -- he was trying to talk and negotiate with them, please do it.

The bottom line is both the GW agreement and the Zoning Order did not require the Feeding Program to be operational as a precedent to GW=s first \$100,000.00 contribution. In fact, the Zoning Commission failed to approve GW=s April to May 2002 proposal to condition GW=s contribution to the Foundation on GW=s prior approval of the foundation=s budget, quote, Aand as soon thereafter as the budget is approved by the foundation and the university@, unquote, and to provide no for GW=s approval; thus, possibly delaying indefinitely the foundation=s work in the Feeding Program to our community.

GW=s non-compliance to date is evidence of the continuing intention to control its contribution to the Foundation and the Foundation=s work. On November 18th, in oral discussion of GW=s November 4th, this is last month, non-minor modification request, the Zoning Commission added a condition without a public hearing which substantially undercut its own order. The Commission acted favorably on Vice Chairman Hood=s recommendation regarding the Feeding Program to add, quote, Anot affiliated with the University@.

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However, Condition 9A of the order further provides beside the 500 thou, in addition to the \$500,000.00 contribution the University shall provide for the build-out of University food venues if necessary in an amount not to exceed 250,000. The university will also pay the cost of securing all necessary permits to operate the Feeding Program at university venues. In fact, the Foundation Board, including the GW representatives is considering a multiple sites program including at last one university affiliated site, such as a new GW hospital cafeteria. Since most of the cafeterias in Foggy Bottom are GW affiliated, the effect of the Zoning Commission=s change, if finalized, which it=s not yet been finalized, would be to strangle the new program to benefit the elderly and needy in Foggy Bottom and to forfeit the additional \$250,000.00 amenity. As a consequence, the West End has advised the Office of Zoning that it intends to file a timely motion for reconsideration after the revised order is published, since they weren=t -- we weren=t able to testify on it since it was a consent calendar item.

Section six, non-compliance with the DC Environmental Policy Act, I will go through this pretty quickly because of your earlier comments, Mr. Griffis,

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the section. Paragraph eight in the GW=s August >01 contract states that they will comply with all future projects from August >01 on. Condition 12 in the decision of the Zoning Commission states the University will comply with the Act for all future projects, that would be August >02. In the new GW Hospital case in a December >99 memorandum, the Department of Health commented -- and this is really important for all of us environmentalists -- AThe final result of these studies and review of the methodology and results is that the 23rd Street quarter just south of Washington Circle, will experience heat carbon monoxide concentrations that are just below the applicable health standard with essentially no room to spare on the high side of the estimated range. The significance of this result is important because the replacement hospital project does not include any use of the existing facility located on the east side of 23rd Street. The consultant=s study does not take into account any traffic that may be generated by future uses for the existing building or that land which that structure occupies.

Future uses for that building will need to take into account that it appears for now the air resources south of Washington Circle is essentially used up by this project and by existing traffic@. As I

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mentioned earlier the Foggy Bottom Associated litigated this particular case for GW=s non-compliance with the Act. Since the August >02 agreement was co-signed GW has filed three major projects on the 23rd Street corridor, south of Washington Circle, all of which were approved and incredibly none of the orders mention whatsoever GW=s compliance with the DC Environmental Policy Act.

Then I go into what DCRA=s website requires and I go through the regulations in 20 DCMR that say for all projects that are -- major projects defined as costing one million or more, that are not specifically exempted by two other sections of 20 DCMR that Environmental Impact Screening Forms are required for all of these projects. That=s a seven-page form. I have pulled all three zoning cases. It=s nowhere to be seen. We know you=re not going to enforce those old ones but we hope you=ll make them do it in the future.

That=s what we=re going to talk about, so that=s why I mentioned the new hospital.

We need to educate everybody what this law is about, that it=s outside of the central employment area and it=s terribly important. For example, for Square 43, which case BW filed in August >01 after the agreement, there=s no mention in the application in the

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detailed statement of GW, in the Office of Planning Report, in the Commission=s order of GW=s attention to the compliance of the DC Environmental Policy Act. There=s no completion of the seven-page form, not discussion, no alternatives for consideration, no OP referral to DCRA, et cetera.

In fact, in a letter filed in November >01, the West End raised a host of adverse environmental effects such as you just asked in your earlier cases this morning, I sat through, of blocked air and light for the immediately impacted neighbors in the same square, the townhouses to be surrounded by GW=s proposed high rise building. West End Board Member Don Cruzman, who is in the audience, owns three houses in Square 43. He=s clearly an adversely effected party. Only recently, for example, he learned after Verizon added equipment to his properties without his consent, the part of the property is over the property line. Undoubtedly an Environmental Impact Screening Form or any EIS would have uncovered this peculiarity.

Curiously, the order for Square 43 and 57 state, and this is important for you because I don=t even understand it, quote, APursuant to Commission practices related to campus plans, this application was not accompanied by a self-certification form or a

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memorandum from the Zoning Administrator certifying the required zoning relief. In contrast for Square 56, there was a Zoning Certification@. It looks to me that you all are going to have to make a change so that if, in fact, we now have an order that says that DCRA must make sure that GW complies with the Environmental Policy Act, that somehow your regulations require them to look for it. Instead there is somehow a waiver where the Zoning Administrator doesn't have to look at these GW cases and that=s why it may have fallen through the cracks. It=s something we have to look at in the future to correct so we=ll never have this problem again.

To enforce the 1957 E Street order, the Zoning Administrator in the future should review each GW project for compliance with the DC Environmental Policy Act. GW=s compliance is not a trivial matter due to DC=s non-compliance of the Clean Air Act. In fact, last month the Environmental Protection Agency, the federal one, proposed to reclassify DC from a serious ozone non-attainment area to a severe ozone non-attainment area due to DC=s failure to obtain the one-hour ozone National Ambient Air Quality Standard (NAAQS) by November 15th, >99, the date set forth in the Clean Air Act. The effect of this reclassification

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would be to set a new attainment deadline for DC and to require DC to submit a state implementation plan revision that meets the Clean Air Act requirements. These include enforceable transportation control strategies and measures to offset projected growth in vehicle miles traveled or number of vehicle trips.

If DC fails to submit a complete severe area state implementation plan, GW will start -- excuse me, EPA will start a sanctions clock. Considering DC=s budget, I don=t think we want to have that substantial sanctions. The sanctions are phenomenal in the DC -- in the National Clean Air Act.

The bottom line is that DC needs to consistently consider a traffic impact of each new GW project and to look at all the other possible negative adverse effects.

Section seven, no student parking restriction; I want to say about this one, we may have been snookered and I partially blame the corporation counsel and the BZA for having us be snookered in this case. That=s what the right word is. In August >01, GW Vice President/Treasurer Lou Katz sent WECA an accompanying letter to the contract agreement restricting freshmen and sophomores living in the Foggy Bottom/West End area from bringing cars to school or

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parking in the Foggy Bottom/West End area. GW was to publish in university documents its policy for freshmen and sophomores living in the Foggy Bottom/West End area that they should not bring cars to school. For those few granted exceptions the university would arrange for parking, university parking.

The August >01 letter was made part of the Zoning Commission=s case record. In February >02, after substantial negotiations, GW submitted a second follow-up letter to the Zoning Commission saying the same stuff and saying they would voluntarily adopt the policy. We agreed to that in good faith thinking that GW meant its word and they didn=t want it as a condition in case the world changed and they owned more property or less property or something but we were snookered into thinking that they would keep their word.

On August >02 the West End asked GW in an e-mail for proof of compliance for this provision. To date GW has not provided the necessary proof. They provided something about kids living off campus. Since I have two GW students working for me as interns, I asked them, they=re sophomores, do they know anything about the parking policy and they submitted e-mails saying absolutely not. Their friends have cars,

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everyone has cars. There=s no restriction whatsoever on freshmen and sophomores living in the GW area.

Ms. Maddux is going to provide documented proof of the adverse consequences to the West End members and our community of this continuing non-compliance. We are cruelly injured parties and we trusted that a contract was a contract and agreement the corporation counsel witnessed, was an agreement.

Section six -- section eight, GW=s non-compliance of additional Zoning Orders; Attachment F to the West End=s December 2nd additional documents is a copy of a November 18th article in one of GW=s publications entitled Residents= Site to GW Hospital Violations. Apparently the residents have set up a website where every morning and every night they record early deliveries and late deliveries, loading dock doors open versus closed, et cetera, and there are all these photographs and they are submitting -- they=ve submitted them to GW and they=re going to submit them to BZA. In preparation for today=s testimony, I received an earful from people in the community about additional conditions which GW is out of compliance of with recent orders. These include the very early and very late hours, the open loading dock, inclusion of intramural athletics and Health and Wellness Center,

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you name it. Every one of the orders has some problem.

The bottom line is GW is a bad neighbor since it consistently fails to comply with conditions and BZA and Zoning orders and not only for this project, 1957 E Street but all others.

Section nine, improper Zoning Administrator attempt to add conditions to Zoning Commission order; one of the parts of our appeal is the Zoning Administrator sent at September 2002 letter to the West End and GW and a non-profit which was not a party to the case. In response to GW's concerns, Zoning Administrator Kelly tried to improperly add conditions to the Zoning Order. 11 DCMR only allows parties, including GW and West End, to file a motion for reconsideration of an order within 10 days after publication of the order. GW did not file such a motion because they didn't want to open up the case.

Instead they asked the Zoning Administrator to improperly add conditions through the back door. There is no authority in the zoning rules for DCRA to do so.

They can only enforce, they can't add conditions. Only the BZA and the Zoning Commission can add conditions. As a consequence on September 14th, the West End CA responded. The West End's letter additionally indicated the Foundation had not received

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the \$100,000.00 check and that GW attempted a Rue Goldberg scheme that failed since the Zoning Administrator had told the West End they had not agreed to serve as an escrow agent.

In summary, due to the compelling evidence that we -- that I've presented and Ms. Maddux is now going to present yet more conditions out of violation, the West End requests that until GW is in full compliance with the West End agreement and the Order 746-C including issuance of an unconditional \$100,000.00 check to the Foundation and publication of the promised non-ambiguous student parking restriction policy, the BZA direct DC to one, under 12 DCMR, and I have a typo, 118.4.3, immediately revoke the August 16th, 2002 Certificate of Occupancy for dormitory use on the western part of 1957 E Street, i.e., to allow the students currently living there to finish out the semester since they are taking exams this week.

They could finish it out and then the next semester we would not have any students living there until GW is in compliance. Two, not issue the Certificate of Occupancy for the institutional uses in the eastern part of the square and I understood from GW's counsel yesterday that has not yet been issued the Certificate of Occupancy. Please, please, please,

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don't let it issue. That's your leverage to get them to comply and three, under 11 DCMR Subsection 3201.1, retroactively back to August 16th, and in the future, issue daily maximum fines for each and every date the violation continues for all of the projects including 1957 E Street PUD.

The West End requests that the entire file for Appeal Number 16701 be included in the record of this appeal and the reason I didn't bring them in is I have to bring in 20 copies and it's about this thick and I figured you're all in the same office, you can just append the two since it's a continuing case and so why should I Xerox to make 20 copies? Well, I could do that if we could ask to keep the record open, we will provide that. We will Xerox your stuff or one copy would be easier.

Now, I'm going to turn to Ms. Maddux --

CHAIRPERSON GRIFFIS: There's a quick question on that.

MEMBER ZAIDAIN: I kind of got lost there on that issue. What did you want to attach to the record?

MS. KAHLOW: The first appeal before the BZA was of the building permit. You granted the appeal and said withdraw the building permit until GW files a

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PUD modification request and so many changes to the Zoning Commission. So they withdrew the building permit and that record is where it shows that the BZA Director asked us to negotiate, they were a party to the case and all these conditions, the Environmental Policy Act and they wanted corporation counsel to sit in the room and it=s all part of that file that lays the context for this file and if we are ever going to take this to any other forum, we want both files associated. And I just didn=t want to Xerox 600 pages.

CHAIRPERSON GRIFFIS: Indeed, but as we=re concerned with this forum, I think we would -- if you want to introduce that into the record, that is your choice to do it. I think we could -- I don=t think there=s any disagreement with the direction from this Board to conduct conversations that then led to the agreement that you=re bringing up. And I believe Mr. Feola made that same statement, that there was no objection to that as a reality.

MS. KAHLOW: Well, would you like us just to include the agreement then? We didn=t -- I just wanted -- instead of my xeroxing all of those pages, we can include the agreement and the orders, how about that? I can Xerox that, the two orders that you gave during -- relating to the appeal, the first one in the

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A where you said, please negotiate and then the agreement. Those three documents, I could Xerox instead of hundreds of pages and if you would let me put that in the record, I think that would be helpful.

CHAIRPERSON GRIFFIS: I think it would be appropriate to put in the record what you need to use.

MS. KAHLOW: Okay, if we could, thank you.

CHAIRPERSON GRIFFIS: Do you have further questions, Mr. Zaidain?

MEMBER ETHERLY: Mr. Chair, it=s not so much a question, but I -- as we prepare to come to Ms. Maddux= part -- and I=m not worried about time, definitely take the time that you need, but I just want to give you a sense of kind of how the issues are flushing out for this individual for just this one Board member, I=m not speaking for my colleagues, of course.

Ms. Kahlow has given us a lot of information, much of which I think is pertinent in some respects but here=s my train of logic that I=m struggling with and I want to give you an indication of where that struggle is coming from so as you use the remainder of your time, at least for me, you have a sense of what I=m trying to work with here.

The -- there was the issuance of the

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Certificate of Occupancy. There's the allegation, of course, which brings us here today that that issuance was done in error. The error that's alleged is that there is the absence of compliance or significant non-compliance with the Zoning Commission's order. I think there are two threshold questions that I'm struggling with that I'm going to be looking for some guidance on and those questions related to one, was the Zoning Commission's order conditioned on compliance in order to grant that Certificate of Occupancy.

MS. KAHLOW: And the answer is yes for the 100 grand.

MEMBER ETHERLY: That's where you need to go. I know what you're alleging the answer to be --

MS. KAHLOW: Right.

MEMBER ETHERLY: -- but I'm still struggling with that because I don't necessarily see the clarity in the Zoning Commission's order and maybe that's what ultimately we're dealing with, a lack of clarity but I'm struggling with whether or not there is in actuality language that speaks to in the event certain things aren't done with respect to the \$500,000.00 then there is a remedy that involves the C of O that you have. I'm not sure if I see that, so that's the one thing that I'm struggling with.

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The other item that I'm struggling with is kind of a broader issue and that is at it relates to the contractual agreement between WECA and GW University. I think you heard it in some of my colleague=s questions at the outset and that is granted you may have gotten some language from this body in another setting, in another application that spoke to the importance of some ongoing dialogue between WECA and the University but I'm grappling today with what kind of remedy do we have or what kind of power does this Board have to enforce any agreements that may have been entered into between WECA and the University. So once again, just as we transition into Ms. Maddux=comment, not necessarily suggesting, Ms. Maddux, that you need to speak to those particular issues, but I just wanted to give you a sense, take stock of kind of where my head is right now and give you a sense of what I'm grappling with as we head into the home stretch in your presentation. So just take that for what it is right now, let that percolate, but that=s kind of where I'm at, at this moment.

MEMBER ZAIDAIN: Mr. Etherly, just to provide -- I mean, this is kind of what I'm doing, maybe this will help clarify what we=re looking at. I mean, we=re hearing a lot of things about this

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contractual arrangement and I -- that's a separate issue to me because I'm not entirely sold that that's what we need to be dealing with, but as we've been listening to the testimony here I've identified conditions that they are touching on and right now I've got Condition 9A and Condition 12 of the Zoning Commission Order as the two big issues that I think are properly before us at this point.

MEMBER ETHERLY: Right, I agree with you.

MEMBER ZAIDAIN: Now, they may identify more with the additional testimony here, I don't know but so in a way I'm kind of keeping score here and you may want to do the same thing --

MEMBER ETHERLY: No, no, no, I'm keeping track, but what I'm laying out is --

MEMBER ZAIDAIN: -- because I think that will help the discussion afterwards.

MEMBER ETHERLY: -- there is that, I think a threshold question is, if you're pointing to 9A and if you're pointing to 12, is there language in either one of those conditions that either explicitly or implicitly states that your C of O is tied to compliance with this particular condition and I'm not sure if I see it. Even if you say --

MEMBER ZAIDAIN: Well, we probably all have

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opinions on that but if --

MEMBER ETHERLY: Right, right, but I'm not sure if that question is as clear as it needs to be --

MS. KAHLLOW: Let me just make sure. The first 100 grand contribution shall be made on the date of Certificate of Occupancy of the subject property. That=s in the Order, in the Conditions 9A. The sentence is in the middle of that paragraph. That couldn=t be clearer and that=s what the Zoning Administrator told us repeatedly.

MEMBER ETHERLY: Okay, it=s a matter of interpretation but just in response to Mr. Zaidain=s comments, Mr. Zaidain, I think we=re on the same page, you and I, but I, once again, just wanted to give the Applicants a sense of kind of where my perplexity and confusion may lie at this particular point. But that being said, please proceed. Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Uh-huh.

MS. MADDUX: I would hope that everybody saw that we were going forward under difficult circumstances to do a best case basis to have a positive outcome for both parties. Maybe in retrospect we should have everything written up with a projected failure of GW to comply. That wouldn=t have been in the spirit of what we were trying to do but maybe now

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we're learning a lesson and from here on everything should be adversarial and everything should be written up, AIn case you don't comply the following things will be done to you@, but I haven't seen that written in Zoning Commission orders or BZA orders either.

So that would require regulations in every order and I -- you know, where's the good faith of trying to make it better.

CHAIRPERSON GRIFFIS: Indeed.

MS. MADDUX: On behalf of WECA and the impacted residents of our neighborhood, I will speak to the parking issue which is a very serious element of this case along with several comments on the landscaping plans and the retail space. I'm Sara Maddux, secretary of the West End Citizens Association and long-term resident of 522 21st Street NW, and I take it today you've had more than your fill of issues about parking and schools, sorry.

CHAIRPERSON GRIFFIS: That's what Tuesdays are about.

MS. MADDUX: All right. As George Washington University has expanded its student enrollment, George Washington University moved more students into apartment buildings previously occupied by displaced long-term DC residents, hired more faculty

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and hired more support staff and contractual labor. This institution has drawn more individuals with vehicles searching for parking on the DC streets which has negatively impacted the residents being able to use the neighborhood parking spaces. Residents with vehicles, nearly all of which are traditional automobiles, register their cars with the District of Columbia and may receive for an additional fee, a Zone 2 residential parking permit.

In our part of the District of Columbia, you may not receive a Zone 2 parking permit unless your car is registered in the District of Columbia. As a snapshot demonstration I took pictures of out of state cars and I excluded Maryland and Virginia, because around here who can tell, parked in a nearby neighborhood, our neighborhood. This was done on Thursday, December the 12th between 3:00 and 3:30 p.m. That was a randomly selected time without consideration as to the scheduling of classes at GW.

The streets are 22nd Street between Virginia Avenue and F Street, F Street between 22nd and 20th and 21st Street between E and F. I have pictures over here, if I have time I'll walk you through a 90-second walk. Out of the approximately 85 parking spaces, cars with out of state plates, excluding Maryland and

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Virginia, totaled 22.

CHAIRPERSON GRIFFIS: Let me interrupt you because it seems like you're well establishing and documenting your perception of non-compliance with certain conditions of orders; is that correct?

MS. MADDUX: Yes, as well as the negative impact on our neighborhood.

CHAIRPERSON GRIFFIS: Right, and which we're not opening up a record to hear about a negative impact of a certain condition and certainly not an appeal. That would be appropriate for a case before us, a special exception but I think before we go much further in this, I mean, this is presenting itself as if it's a public hearing on a variance or special exception and not an appeal. What I need to get to right now is whether non-compliance of an order is an appealable case.

MS. MADDUX: My understanding --

CHAIRPERSON GRIFFIS: I'm going to hear from my corporation counsel --

MS. MONROE: I apologize. I apologize.

CHAIRPERSON GRIFFIS: -- and then staff members.

MS. MONROE: Yes, I mean, the action of the Zoning Administrator can be appealed and if he doesn't

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--

CHAIRPERSON GRIFFIS: But non-compliance, non-compliance?

MS. MONROE: He=s not --

CHAIRPERSON GRIFFIS: Well, what=s being established here is non-compliance to certain aspects of previous orders.

MS. PRUITT: Traditionally, Mr. Chair, we=ve done non-compliance in the sense that a C of O may have been issued prior to something that was conditioned in the Order. Prior to X you could not get a C of O. If the C of O was issued before, that would be non-compliance with the ZA.

CHAIRPERSON GRIFFIS: And I think we have an issue before us.

MS. PRUITT: And that=s the only thing we do. We either say the ZA erred or did not.

CHAIRPERSON GRIFFIS: Okay, so then I guess what I would then ask, can you matter of factly tell me what is the Zoning Administration=s error as it relates to this parking issue?

MS. MADDUX: Yes, we had asked that they -- the George Washington University institute a policy and a procedure to address the parking issues. I=m sorry if I expanded the detail, but in essence, they

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haven=t done what we=ve asked them to do.

CHAIRPERSON GRIFFIS: And when did you ask them, in the agreement that was --

MS. MADDUX: In the agreement which was Ms. Kahlow=s testimony, included the website and the process.

MS. KAHLOW: And it=s in the order.

CHAIRPERSON GRIFFIS: All right, that=s fine. So we=ve established that. There was an agreement, the agreement is attached to the order that was issued.

MS. KAHLOW: That=s in the Zoning Commission Order.

CHAIRPERSON GRIFFIS: I understand that.

MS. KAHLOW: And what Ms. Maddux was trying to show --

CHAIRPERSON GRIFFIS: Okay, let me finish my notion.

MEMBER ZAIDAIN: I haven=t seen any evidence yet that the contract is attached to the Zoning Commission Order. That=s what I=ve been waiting to hear.

CHAIRPERSON GRIFFIS: No, I understand that. I=m just -- if we take that for a moment an assumption, I still -- even if we have that, even if it

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is in part of -- if it's attached in the order, even if it's a finding of fact, if it's a condition, whatever it is, I'm not establishing that. I'm assuming that perhaps only for my benefit but for my scenario here, we have that. We have an order that's a part of it. There are conditions and you are establishing the fact that this -- that the -- that the University is in non-compliance. Is that correct? I'm with you so far.

MS. MADDUX: Yes, sir.

CHAIRPERSON GRIFFIS: Good, that still doesn't get us here. What gets us here is where is the action of the Zoning Administrator that is showing an error?

MS. MADDUX: Before the Certificate of Occupancy, they were supposed to establish the information and the program, the information on the website and a parking program.

CHAIRPERSON GRIFFIS: Okay, well, then that needs to be focused on directly. Can we go to --

MS. MADDUX: Sir, they have not done that.

CHAIRPERSON GRIFFIS: No, no, no, what I needed to go to directly is the language that speaks to the issuance of the Certificate of Occupancy only at the compliance of the parking issue. Clearly 9A spells out what you're wanting us to focus on in terms of the

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\$100,000.00 and we have a little bit of direction to go in that.

MS. MADDUX: Bear with us a moment, please.

CHAIRPERSON GRIFFIS: Please, take your time.

MS. MADDUX: Sir, as I think you remember, perhaps that this was an agreed upon side agreement and even Mr. Feola referred to that.

CHAIRPERSON GRIFFIS: Okay, then do you understand my concern?

MS. MADDUX: Yes, I understand your concern.

CHAIRPERSON GRIFFIS: Do you think that we have any jurisdiction to deal with this?

MS. MADDUX: Yes, I do because it=s in the documentation of the case.

CHAIRPERSON GRIFFIS: The documentation of this case.

MS. MADDUX: Of the Zoning Order.

MS. KAHLOW: Give me a second and I=ll find it in the order. It is definitely not in the decisions but it=s in the findings of fact and that=s what I=m looking for right at this moment. It=s in 24, that=s what I was just looking at. Restricted parking in the Foggy Bottom West End area for university students

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living in that area, page -- number 24 on page 8016, page 6 for you.

CHAIRPERSON GRIFFIS: Okay, hold on, let us all get there. We're looking at number 24, is that what you said?

MS. KAHLOW: Yes.

CHAIRPERSON GRIFFIS: Findings of facts of Zoning Commission Order Number 746-C.

MS. KAHLOW: Yes.

CHAIRPERSON GRIFFIS: Okay.

MEMBER ETHERLY: And I think, Mr. Chairman, that's where we're running into the challenge here, Ms. Kahlow, and that is -- and of course Corp Counsel can assist on this, but when you get to the matter of enforceability and what has the effect of law, the binding language, really the pay-off part of this document comes everything after the word Adecision@.

MS. KAHLOW: I understand. That's why I say we may have been snookered about the parking but the other two are in the decision, the Environmental Policy Act and the 100 grand.

MEMBER ZAIDAIN: That's why I identified 9A and 12. Those are in the decisions, but I don't think the parking is. The parking is in the finding of fact.

MS. KAHLOW: It's not in the decision

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because they asked us if we could get a second letter and they would voluntarily do it and we trusted them and we had a long discussion should it be a decision or not and we trusted them.

MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: And believe me, we do appreciate that. The problem is our hands are tied even if we wanted to go there. We have to have the vehicle to get there, perhaps a bad pun, but -- and I don't see it and so what I want to do is, at this point, I don't to proceed with anything related to the parking and we will allow the record to stay open and you can brief us on that, as all the participants in the case can and we'd look for yours first. And if we are brought back to that, we'll go to it, but at this point --

MS. MADDUX: May I mention the other two issues?

MS. KAHLLOW: That are in the order.

CHAIRPERSON GRIFFIS: Yes.

MS. MADDUX: Another issue in the lack of implementation for the retail space on the ground floor. The agreed amenities included the ground floor retail space for small businesses to provide goods and services for the neighborhood urban residents and

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employees of the federal agencies in nearby buildings.
It=s in Section 9B of the order.

CHAIRPERSON GRIFFIS: And is this part of
your written submission? I mean --

MS. MADDUX: The Zoning Order, or it=s from
my written statement, sir, on the second page, next to
the last paragraph.

CHAIRPERSON GRIFFIS: I=m sorry, I just
lost a little track. I want to get back to it.

MS. MADDUX: Okay.

CHAIRPERSON GRIFFIS: On the second page?

MS. MADDUX: Yes, I apologize for not
paginating the numbers.

MEMBER ETHERLY: This is the paragraph
beginning, AAnd other issues lack of implementation,
retail service on the ground floor@.

MS. MADDUX: Yes.

CHAIRPERSON GRIFFIS: Okay, let=s proceed.

MS. MADDUX: There has been no action on
this issue. Additionally, the windows in the structure
are too small for attracting retail customers. The
other issue in the PUD was the landscaping. GW has not
landscaped --

CHAIRPERSON GRIFFIS: Let me interrupt you
because this I can be very passionate about myself and

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that is the size of windows for retail. I think it=s an incredibly important piece and certainly an important aspect of urban vitality and street life. I don=t see how we could even discuss it here today in terms of this appeal unless we can be pointed directly to how that was an aspect that was not or errored in terms of the Zoning Administrator=s action that somehow then led to this retail store front.

MS. MADDUX: Well, then maybe we=ll just need to go to the issue of where is the retail.

CHAIRPERSON GRIFFIS: Okay.

MS. MADDUX: And let=s hope that this institution with the business school can come up successfully to put retail in.

CHAIRPERSON GRIFFIS: Good, okay. So retail.

MS. KAHLOW: Retail as in Decision Number 2 and 9B.

CHAIRPERSON GRIFFIS: And 9B.

MS. KAHLOW: And 4, 2, 4 and 9B.

MEMBER ZAIDAIN: You started to mention the landscaping and I thought I saw it in the decision.

MEMBER ETHERLY: It was 7, Item Number 7.

MEMBER ZAIDAIN: Item Number 7?

MEMBER ETHERLY: Item Number 7 of the

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Decision, page 9.

CHAIRPERSON GRIFFIS: To implement the same landscaping plan for the project as approved in the original view.

MEMBER ZAIDAIN: Okay.

MS. MADDUX: It is not that way. I walked over there this morning to look and I was greatly surprised to find two large flagpoles with very large bases having been erected fronting on E Street. These flagpoles were not a part of approved landscaping plans which were integral to the agreement for the PUD and should be removed. This is another piece that shows GW=s lack of compliance with the PUD which they purchased from the Associated General Contractors.

CHAIRPERSON GRIFFIS: Ms. Monroe --

MS. MADDUX: Thank you very much.

CHAIRPERSON GRIFFIS: Thank you very much. We appreciate you accommodating us with our questions. Can you tell me why this isn=t at the Zoning Commission for compliance of their order?

MS. MONROE: Well, it sounds like it would make more sense if it were. I=m not sure how much you can deal with. On the issue of the private agreement, I don=t think that the Board can look at that at all.

CHAIRPERSON GRIFFIS: Okay.

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MS. MONROE: It=s a contract between two parties and we don=t have authority to enforce private contracts or to, you know, decide on them.

CHAIRPERSON GRIFFIS: Right, and there is a statement by the representative of the owner that it is an enforceable document but this is not the enforcement body is my interjection.

MS. MONROE: Yeah, I mean, that=s you know, normally the court, a court.

CHAIRPERSON GRIFFIS: So there is recourse.

MS. MONROE: As to whether or not they should be before the Zoning Commission? I suppose it could be.

MS. KAHLOW: The regulations don=t allow that. 3200.2 says it has to go only to the BZA. So that is why I talked -- I talked to Ms. Kress first to find out if we did it right.

CHAIRPERSON GRIFFIS: I=ll stop you there.

I was being a little flippant and perhaps I should correct that for the record. But it goes, in fact, to the question of again, how are we to proceed with an appeal for non-compliance and that=s really the substance of my question.

MS. KRESS: We really don=t deal with non-compliance. It=s been said earlier, it=s whether the

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ZA erred or didn't err and whether there is -- and one of the things I've been hearing is testimony pertaining to the Base Campus Plan and conditions in the Base Campus Plan that are now effecting this and other structures and that's a complex issue that I think we have to look at.

MEMBER ZAIDAIN: It seems to me the issue before us is did the ZA err in issuing the Certificate of Occupancy when allegedly according to the Appellant and this would be their case to prove, did the ZA err in issuing a C of O when allegedly they were not in compliance with conditions 9A, 9B, 12 and 7?

MS. KRESS: Correct, correct. Right now we're just trying to understand -- I'm not giving any opinions.

MEMBER ZAIDAIN: Right, I'm not either.

MS. KRESS: I'm just trying to understand the venue --

MEMBER ZAIDAIN: I just think that's the issue in front of us.

MS. KRESS: -- is and what the issues are and I agree with the way you just said that, yes.

CHAIRPERSON GRIFFIS: Yeah, I don't think we have a question about that.

MEMBER ZAIDAIN: Okay.

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CHAIRPERSON GRIFFIS: But we do have further questioning if there is non-compliance, let=s take an easy one, with the Landscape Plan. Are they properly -- is there a step and a logical step that has to establish that there was some Zoning Administrator error in establishing that non-compliance or do we hear appeals when developers are in non-compliance with orders and is that implicitly an error of the Zoning Administrator?

MS. KRESS: Well, I believe that it can be appropriately before us if there is something -- and again, I don=t want to talk in detail but let=s just say a Landscape Plan of which I am not aware have not studied but they have committed in that plan to do certain things by certain time frames and it was not done and the Zoning Administrator did issue a C of O, then I think --

CHAIRPERSON GRIFFIS: Yeah, but you=re tying a Landscape Plan conformity with a Landscape Plan with an issuance of a C of O.

MS. KRESS: That=s correct, if that was listed as an issue. I=d like to hear what the Appellant, Appellee have to say.

MR. FEOLA: Mr. Chair, Phil Feola for the University, if I might --

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CHAIRPERSON GRIFFIS: Yes.

MR. FEOLA: -- I think maybe part of the confusion is this building is not completed. This building is a two-piece building, two phase building. The western most third of the building is a residential component that is being used for University housing. That is what is being appealed, that Certificate of Occupancy for that third of the building. The rest of the building is still under construction. There is on C of O. The Landscaping Plan is not completely in place because it comes at the end, if you will.

And so I think that the discussion about Landscaping Plan, in my opinion, is premature.

MEMBER ETHERLY: So, Mr. Feola, would it be your contention then that if the building were complete and your Landscaping Plan were not up to snuff with the Zoning Commission=s order, then the appeal would properly be before this body?

MR. FEOLA: If the Zoning Commission issued a Certificate of Occupancy and one of the conditions of the PUD requirement is implementation of a specific Landscape Plan, and it=s not done, then I would agree that that would be an error that would be properly before the Board, but the problem we have here is that we have one piece of the building done. The rest is

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still under construction and so we're not there yet.

MEMBER ETHERLY: Okay, well, let me back up a little bit then and ask -- because I think that was a very important question that you just answered but I want to be sure you're clear about the consequences of the answer in my head. Is it your sense then, that it was indeed the Zoning Commission's Aintention@, I'll put that word in quotes, as a signal there, that as the Appellants are alleging we -- this body, the Board of Zoning Adjustments, should read, at minimum, because the argument here is Item Number 2, Item Number 7, 9A, conceivably it could even reach 9B, and Item 12 are conditions that are tied to the issuance of the Certificate of Occupancy? That I think is the million dollar question that the Appellants are trying to allege here.

MR. FEOLA: Yes.

MEMBER ETHERLY: And so it's your contention that, AWell, hey, wait up, we haven't finished construction of the building yet. Give us an opportunity to finish that and then if these issues are still up for debate, then yeah, I would agree we are in violation and the Certificate of Occupancy was issued in error@? Is that where you're heading?

MR. FEOLA: No, we're partly there. Partly

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we agree that this appeal is ripe for discussion with regard to certain of those issues. For example, 9A is a condition of that first C of O, no question about it.

The question is whether or not the University did comply or didn't comply and you haven't heard our side of it, but --

MEMBER ETHERLY: Okay, okay.

MR. FEOLA: -- that is a legitimate, my feeling, piece to be appealed for this Board to decide.

MEMBER ETHERLY: Okay.

MR. FEOLA: The Landscaping Plan, in my feeling is not, because that comes at the completion of the full building. You don't put in the trees until you get the heavy equipment off the site, et cetera, et cetera. The Environmental Policy Act, as I stated earlier, Number 12, I believe, is for future projects. I don't think that's an appropriate --

MEMBER ETHERLY: For this particular appeal.

MR. FEOLA: -- for this particular appeal. I don't think the Zoning Administrator on August 16th could have projected to today's date to figure out whether or not future projects, as it says in that order, are part of it. I think that appeal, if there

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is one, should come on those projects for violating this particular provision.

So we have a little bit of an unusual situation, kind of a mix and match situation. I think this appeal is germane for some of the issues raised by the Appellant and not for some of the others. And I think parking is one that=s not germane, by the way, because of the things we talked about.

MEMBER ETHERLY: Okay, and with respect to the retail issue, that onsite retail space, early, not germane?

MR. FEOLA: At this point, it=s early. The --

MEMBER ETHERLY: Two-thirds of the building not complete.

MR. FEOLA: -- ground floor of the building has not been finished yet.

MEMBER ETHERLY: Okay.

MR. FEOLA: And we haven=t begun -- the University hasn=t begun to lease it, et cetera.

MEMBER ETHERLY: Okay, all right. All right, thank you, Mr. Chair.

MS. MADDUX: Mr. Etherly --

MEMBER ETHERLY: Well, just a moment, please, Ms. Maddux. Thank you very much, Mr. Chair and

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thank you, Mr. Feola. I realize of course, once again, the University will have an opportunity to present its case but I appreciate the candid answers because as you heard me mention to the Appellants early on, those are the threshold questions that I'm kind of grappling with, whether or not that language that's being referenced by the Appellants is properly viewed as being conditional language with respect to the C of O and I think I got some candid answers as far as the Appellee is concerned with respect to what might properly be viewed as conditional language tied to the C of O and what language might otherwise not be germane or what might be premature. So that helps me in terms of thinking about framing the issues that the Appellants are raising. Ms. Maddux, I interrupted you. My apologies.

MS. MADDUX: Mr. Etherly, may I please provide as a point of information the retail space is on the ground floor of the portion of the building which currently has a C of O and is occupied by residents who are going in and out of the door all day long, security systems, the whole deal.

MEMBER ETHERLY: Okay.

MS. MADDUX: That space is ready.

CHAIRPERSON GRIFFIS: So in your reading of

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Condition 9B, AIn the event that the University despite its best efforts is unable to rent the space within one year of the issuance of the Certificate of Occupancy for the subject property, you would state that then it=s the Certificate of Occupancy that is encompassing the retail bay; is that correct?

MS. MADDUX: Yes, sir.

CHAIRPERSON GRIFFIS: And it surpassed their one year?

MS. MADDUX: It started for the Certificate of Occupancy, I believe is August the 16th, 2002 and people moved in. That area was --

CHAIRPERSON GRIFFIS: No, so we have a date, because clearly in this condition it is time sensitive, correct?

MS. MADDUX: Yes, sir.

CHAIRPERSON GRIFFIS: So if you follow me through on this 9B, we haven=t surpassed the year in the issuance and the best efforts. And the University is to provide status reports on such retail operations on an annual basis to the Zoning Administrator, WECA and ANC-2A. Is that correct? That=s your understanding as I=ve read it?

MS. MADDUX: That=s correct.

MS. KAHLOW: That=s correct, and there are

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two areas. One Ms. Maddux pointed out that=s in the building that already has a Certificate of Occupancy and one is in another building that is already occupied but is not on this site. There are two sites.

CHAIRPERSON GRIFFIS: Just a second. So we have a C of O, 16 August 2002, right? What is the Zoning Administrator=s error in regard to Condition Number 9B?

MS. MADDUX: Well, he should have been checking to see what their best efforts were.

CHAIRPERSON GRIFFIS: Where does it say he=s supposed to check where their best efforts are?

MS. MADDUX: It would strike me that that=s one of the conditions and if I were in his position, I would be calling saying, APlease tell me how you are coming along with that@, because --

CHAIRPERSON GRIFFIS: Okay.

MS. MADDUX: -- it=s tied to that C of O.

CHAIRPERSON GRIFFIS: And just so I=m clear, you=re questioning his level of enforcement.

MS. MADDUX: Yes, sir.

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLLOW: Mr. Griffis, one other thing is there was a Certificate of Occupancy issued before he saw the Zoning Order because he asked me to fax it

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to him and I faxed it to him several days after it was issued. So he clearly didn't go through each of the different items in the decision since he'd never seen the decision nor did he have a copy. He said he only had a copy of Number 9A.

CHAIRPERSON GRIFFIS: But how does that create an error in Condition 9B?

MS. KAHLOW: He had never seen it, so --

CHAIRPERSON GRIFFIS: Is that an error?

MS. KAHLOW: No, what we're saying is that he couldn't carry out his duties to look at all the different -- the duty is before he issues the Certificate of Occupancy, make sure every condition is met and he didn't even have a copy of the order. There's something wrong in the system when he doesn't even get a copy of the order and he was talking to us, negotiating, promised it wasn't done because 100 grand; however, unbeknownst to him, somebody else in DC already issued the Certificate of Occupancy when he realized it was out of compliance. So we have a problem here.

CHAIRPERSON GRIFFIS: Okay, and here's what I want to do because frankly, again, I'll say it, I don't want to waste all of our time -- if we want to talk about failures in systems, I'd love to participate

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in that hearing. It may take the rest of my natural life, but nonetheless, I think the importance of doing that and the importance of bringing forums together to talk about changes is that they can, in fact, make change. And I want to be absolutely clear and I inquired with what we hear is what we can make change with.

MEMBER ZAIDAIN: Right. And it seems that as we reach consensus on what we're here to listen to in terms of the conditions another issue has been brought up that we need to get a consensus on. And one is, there's not a clear-cut -- there's not a clear-cut determination of Certificate of Occupancy. I mean, as I've heard you say in the past, Mr. Chair, you can get thousands of C of O's for buildings for various reasons, whatever.

And I think what we need to decide is, which of these conditions which they're allegedly in error on is ripe for us to hear, which one is tied to which C of O if at all, if separated from the whole entire C of O for the whole entire project.

CHAIRPERSON GRIFFIS: Right, okay.

MEMBER ZAIDAIN: That's something I'd like to have testimony on.

MS. KAHLOW: And question 9A is non-

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negotiable. 9A is clear that it was.

MEMBER ZAIDAIN: Well, I think they're all clear but --

MS. KAHLLOW: No, it says Aon the date of the C of O@.

MEMBER ZAIDAIN: Okay, well, I can see where that's going to lead us and that is, is it the first C of O, is it the C of O for the whole entire building? Is it the C of O for just a portion of the space that's complete and occupied? Do you see what I'm struggling with? I mean, there's some vagueness in the Zoning Commission order that we need to define and I think that's where I'd like to hear some testimony on from all the parties.

I mean, I think you bring up a good point in the sense that the portion of the retail that you are alleging they have not complied with is one that the C of O has applied to. I haven't looked into that and I'll take your word on that, but I think that's a pertinent point.

MS. MADDUX: Mr. Chairman, may I add an element to his consideration?

CHAIRPERSON GRIFFIS: Only for clarity.

MEMBER ZAIDAIN: I'm trying to break this down in --

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MS. MADDUX: Okay, when the building was presented at all time, it was presented as a two-phase building, as Mr. Feola said. The residential part is a totally self-contained unit and if I remember correctly, I don't believe there's even a drive-through in the basement for the parking. The wall goes all the way down. So although it looks like it's one building, the residential part now, which is occupied and it has the retail on that site, is a totally self-contained unit and I believe if somebody read the C of O and the elevator things and everything, it is for that particular building.

In essence, you could have considered it two buildings and if you go back 10 years ago, that is what it was going to be. They were going to tear one down, build one, after that was completed then build on with walls adjacent.

CHAIRPERSON GRIFFIS: Right.

MEMBER ZAIDAIN: Okay.

MS. MADDUX: So that is, yes, you start asking about it. If they gave a C of O then you say, okay, then they could occupy the part that's under construction but that wouldn't meet common sense regulations.

MEMBER ZAIDAIN: Well, I mean, and that's

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the point --

CHAIRPERSON GRIFFIS: Here's where we're at, and Mr. Zaidain, I think you're bringing up an excellent point. And if we were being faced with that argument that there are certain C of O's that were needing to be established or to be granted in order to kick off some of these conditions and we could address that, but I think we can rely on the August 16th, '02 because it is directly related to the base building and the new construction. It does, in fact, list the floors that Certificate of Occupancy has been issued to and that is basement through the 11th including P-1 and it is a new C of O which indicates -- and the square footage involved.

So I think we have -- we have a base building C of O that is pertinent to this, rather than looking at, in fact, little retail bays getting Certificate of Occupancies or anything of that nature.

MEMBER ZAIDAIN: So it's your opinion that we can -- that this is ripe to hear because of these C of O's?

CHAIRPERSON GRIFFIS: Well I think we need to go down chronologically. I think there's a consensus on the Board that 9A is properly before us. I'm just at 9B and of the opinion, I have not heard

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anything that persuades me that this is properly before us in appeal.

MEMBER ZAIDAIN: 9B?

CHAIRPERSON GRIFFIS: Right, and I would ask other Board members if they had --

MEMBER ETHERLY: I'll agree with you, Mr. Chair, with respect to 9B because I think the specification of a year -- within a year issuance of the Certificate of Occupancy for the subject property, so --

CHAIRPERSON GRIFFIS: Good.

MEMBER ZAIDAIN: Well, I mean, that's something that we need to decide but I think it's properly before us. Let's not mix up the decision that we have not made with whether or not we should be making --

CHAIRPERSON GRIFFIS: There is it.

MEMBER ZAIDAIN: I mean, we're because we're going to get to that with 12, too. I think 12 is properly before us.

CHAIRPERSON GRIFFIS: Excellent clarification, Mr. Zaidain. Good.

MEMBER ETHERLY: Well, I'm in support of the direction you're heading in, Mr. Chair. I'll just note that I'm not -- I'm willing to talk about 9A, just

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because 9A does reference Certificate of Occupancy but I think that=s a very weak -- I think that=s a very weak tie. It doesn=t appear to me that it was intended to be a -- the creation of a conditional status with regard to compliance around the \$500,000.00 contribution and the Certificate of Occupancy.

MS. KAHLOW: One paragraph I skimmed through and didn=t mention if I could refer you to page 3 of my written statement, the second full paragraph, I did not read, in the August >01 contract, the pay-out was earlier. It was supposed to be 100 grand on issuance of the -- one hundred grand on the issuance of a Certificate of Occupancy and then 100 grand for each of three years. When we sat down with the Zoning Commission, we all agreed that instead of taking 200 grand the first year, we=d go 100 grand in August >02 and that=s why it wasn=t -- otherwise by this point it would have been 200 grand that they=re out of compliance with, but it was clear by that intent when we signed the contract that it was supposed to be in the very beginning, but do you see that paragraph? I didn=t read it before.

MEMBER ETHERLY: Okay, and I appreciate that clarification. I=m still struggling with how that necessarily changes the outcome of where I=m at on that

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issue but I appreciate the clarification.

CHAIRPERSON GRIFFIS: Okay, let=s continue.

Mr. Zaidain has brought up an excellent point that we need to just hear about the conditions that are here and we need to hear whether there is justification for granting an appeal on each and all of these based on an error by the Zoning Administrator.

MEMBER ZAIDAIN: Well, what about Condition 7?

CHAIRPERSON GRIFFIS: Well, Condition 7, I would -- I would look for evidence that there was an error.

MEMBER ZAIDAIN: Okay.

MS. MADDUX: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

MS. MADDUX: This morning unfortunately, I couldn=t get the film developed but all the landscaping is planted even though there is still a construction fence there. Anybody is welcome to walk over there and see what has been planted and that has to do with the time of the year you do trees and bushes.

CHAIRPERSON GRIFFIS: Right, okay.

MS. MADDUX: So they have planted the landscaping.

CHAIRPERSON GRIFFIS: And I guess there is

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-- there will be a different level of whether it=s adequately in compliance, whether it=s in compliance and whether there is, somehow an error then by the Zoning Administrator that grows out of that. If you=re inviting us on a site visit, I would be intrigued to do that. However --

MS. MADDUX: Not in this weather.

CHAIRPERSON GRIFFIS: -- the three of us would go at the exact same time and we would have numerous people recording everything said.

MS. MADDUX: Not in this weather, first of all.

CHAIRPERSON GRIFFIS: Right, indeed.

MS. MADDUX: And secondly, the biggest issue is the flagpoles.

CHAIRPERSON GRIFFIS: Okay.

MS. MADDUX: Okay, thank you.

CHAIRPERSON GRIFFIS: Okay.

MEMBER ZAIDAIN: But you=re still alleging that they=re out of compliance and the ZA erred in issuing the C of O because of the flagpoles, that that violated Condition 7.

MS. MADDUX: Yes.

MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: Okay. Then, I am in

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order, so we can, in fact, continue with anything you have further in the presentation of your case.

MS. KAHLOW: We have a great deal of cross but not independent additional, because our main point has been from day one, 9A, the money isn't showing and the whole thing is not in good faith and the money is the issue here. We can go through each of the little ones. We don't need you to opine. We just need you to opine that the Certificate of Occupancy was issued in error. The money was supposed to be on that same date. It hasn't been, they're trying to control it and we're never going to see this as an amenity unless you enforce it for us. We are relying on you.

CHAIRPERSON GRIFFIS: Okay, thank you very much. Let's take five minutes and then we're going to go to the Zoning Administrator's case presentation and then we'll see where we are at that point.

(A brief recess was taken at 4:42 p.m.)

(On the record at 5:00 p.m.)

CHAIRPERSON GRIFFIS: Okay, if we could reconvene. Okay, first, just to perhaps backtrack a moment, we want to just establish in accordance to 3106 in the regulations that the ANC is also a participant in this appeal as a party. And so what I'd like to do actually, is conduct cross examination of the witnesses

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that had presented if there is any at this point, and then we can move directly to the Zoning Administrator=s case. So if I could see an indication of cross examination that would conducted on the testimony that was just presented by coming forward to the table at this time.

I wouldn=t move too far. Mr. Feola, you have no -- okay. Does the ANC?

MS. ELLIOTT: I am Elizabeth Elliott, Chairman Griffis, Chair of the ANC-2A, Foggy Bottom/West End. I have no questions at this time.

CHAIRPERSON GRIFFIS: Okay, and does the ZA or representative have any cross examination of the witness? Then we can go back to our present procedure or position, I should say. Good, and I=ll have you just introduce yourselves and you can begin.

MR. KELLY: I am Robert Kelly, Zoning Administrator for DCRA.

CHAIRPERSON GRIFFIS: Welcome, Mr. Kelly.

MR. BENNETT: Good afternoon, Mr. Chairman, William Bennett, Corporation Counsel=s office representing the Zoning Administrator.

CHAIRPERSON GRIFFIS: Indeed.

MR. BENNETT: Mr. Chairman, we have a very short presentation.

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CHAIRPERSON GRIFFIS: Okay.

MR. BENNETT: I have two questions of the Zoning Administrator. Mr. Kelly, you've reviewed the Zoning Commission's order and of the conditions listed in the decision. Were any of those conditions, in your opinion, had to be complied with before the issuance of the Certificate of Occupancy?

MR. KELLY: Yes, I believe Condition 9B, excuse me, 9A.

MR. BENNETT: And was 9A complied with when the Certificate of Occupancy was issued?

MR. KELLY: At the time of the Certificate of Occupancy it is my opinion that complying with the letter of the order was not possible, so we did in the best case scenario in an attempt to comply with the intent of the order.

MR. BENNETT: I will defer to the Board if you have further questions of Mr. Kelly.

CHAIRPERSON GRIFFIS: Yes, Board members.

MEMBER ZAIDAIN: Can you give us some more detail on why you feel that the -- that condition was not -- the letter of that condition was not able to be achieved in order to issue the C of O and furthermore how you determined what they could do and how it was acceptable, a little bit more to your thought pattern

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there?

MR. KELLY: Through the Chair, at the time when the building was required to be used, there was an attempt to provide the monies or actually the first occurrence was that Ms. Kahlow contacted us and said they were not in compliance. That was my first involvement. And then --

MEMBER ZAIDAIN: Was it before or after the C of O?

MR. KELLY: This was before. So in the initial response, it was clear that the Certificate of Occupancy and the \$100,000.00 deposit were tied together.

MEMBER ZAIDAIN: Sure.

MR. KELLY: I contacted George Washington, indicated that they must comply. They indicated they wanted to comply, needed to have a vehicle to pay the money to, that in their opinion wasn't prepared yet. So in negotiations, we tried to come up with a solution that would at least comply with the intent and that's when we came up with the idea of putting the money on deposit.

MEMBER ZAIDAIN: So you're saying there was something prohibiting them from giving the \$100,000.00 to the Foggy Bottom Feeding Program Foundation.

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MR. KELLY: Right, in the order, it states that there shall be Foggy Bottom Feeding Program in place and so on and so forth.

MEMBER ZAIDAIN: Right.

MR. KELLY: And there was not an operating plan in place or an organization. My understanding they've had some board meetings, but there wasn't a feeding program in place that they could provide the money to or the order even said that you could give it to an alternate program to be named by the Board. And that had not been done, so --

MEMBER ZAIDAIN: Okay, so at that point you made a determination saying, okay, well, they cannot meet this facet of the requirement, so where did you go from there in terms of determining how they could satisfy you to get the C of O?

MR. KELLY: Basically representatives from GW indicated, Awe'll put the money@ -- in fact, at one time they even wanted to make me the Administrator of the escrow account.

MEMBER ZAIDAIN: Yeah, I saw that.

MR. KELLY: Counsel advised that=s not a good idea so it seemed logical to me at the time since they don=t have a program in place, let=s put the money on hand and as soon as it=s in place they would receive

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the money. I don=t think, in my opinion, there wasn=t any intent on GW=s part not to give them the money. You have a copy of the deposit with Riggs Bank.

MEMBER ZAIDAIN: Yeah, with Riggs. So it was your determination that in lieu of this requirement you felt they could not meet because the Foundation was not operable, that in lieu of that, taking that same amount of money and depositing it in Riggs Bank satisfied your determination or satisfied that requirement.

MR. KELLY: Well, I think it helped in my mind comply with the intent of the order, maybe not the letter of the order --

MEMBER ZAIDAIN: Right.

MR. KELLY: -- since there was no vehicle in place for them to do so.

MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: Mr. Etherly.

MEMBER ETHERLY: Thank you, Mr. Chair, just very briefly, Mr. Kelly. In your exchange briefly with Mr. Zaidain, you referenced the fact that you believed Condition 9A to indeed be specifically conditioned on the -- or the Certificate of Occupancy be conditioned upon 9A. Could you just -- and I might have just missed the important language I was looking for. Could

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you speak again to why you felt that particular condition was linked to the C of O?

MR. KELLY: Well, I don't want to read 9A but from what I -- the Certificate of Occupancy and the deposit were tied together in the same sentence.

MEMBER ETHERLY: Okay.

MR. KELLY: In my mind that's where it's linked.

MEMBER ETHERLY: Okay.

MR. KELLY: And then reading on further, it talks about program in place and so on and so forth or an alternate program and since none of those vehicles were in place for George Washington University to comply with, then I was faced with the dilemma what do we do now. We can --

MEMBER ETHERLY: Okay.

MR. KELLY: -- board up the building and prohibit anybody from going in or try and come up with a solution which is what we did.

MEMBER ETHERLY: Okay, understood. So in terms of any subsequent conditions that are referenced by the Appellant, it's -- to take your analysis to its logical conclusion, since there's not a reference to the C of O at any other point in the decision section of the document, say with 9B, none of those other items

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or clauses in your mind were linked intimately to the C of O.

MR. KELLY: It=s not stated that way in the order.

MEMBER ETHERLY: Okay.

MR. KELLY: These are conditions that must be complied with.

MEMBER ETHERLY: Yes.

MR. KELLY: And prior to a Certificate of Occupancy for the entire permit or not permit, but the entire application, those conditions would be required to be complied with.

MEMBER ETHERLY: Okay.

MR. KELLY: And I think the Chair brought up a question on Certificates of Occupancy and you=re correct, we=ll give a Certificate of Occupancy for a building shell.

MEMBER ETHERLY: Little pieces.

MR. KELLY: And then you can do -- you could have 200 Certificate of Occupancies or 1,000 inside a building.

MEMBER ETHERLY: Okay, okay.

CHAIRPERSON GRIFFIS: Mr. Etherly, let me take the question from here. Then, Mr. Kelly, what is the operating Certificate of Occupancy as it relates

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to this order?

MR. KELLY: It=s for the residential portion of the building.

CHAIRPERSON GRIFFIS: And would that be the August 16th, >02 Certificate of Occupancy?

MR. KELLY: Yes, sir.

CHAIRPERSON GRIFFIS: Okay, and that=s what we have on record here which is attended to Permit Number C039477.

MR. KELLY: I think that would be the certificate number.

CHAIRPERSON GRIFFIS: Indeed.

MR. KELLY: That=s the Certificate of Occupancy number.

CHAIRPERSON GRIFFIS: Right, and that -- would -- is it your opinion that this order would have to be in compliance with before this base building Certificate of Occupancy would be issued?

MR. KELLY: I=m not sure I understand your question.

CHAIRPERSON GRIFFIS: What is the running importance for this Zoning Commission Order, meaning that it was decided upon, what is the milestone at which it either precludes a project from continuing or makes a successful milestone that continues a project?

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I guess directly speaking, could a Certificate of Occupancy be issued if this whole order was not in compliance with?

MR. KELLY: In my opinion, no.

CHAIRPERSON GRIFFIS: Then --

MR. KELLY: Again, if the way you're stating the question, there's more than one project involved with this Zoning Commission order.

CHAIRPERSON GRIFFIS: Okay.

MR. KELLY: So would a Certificate of Occupancy be issued to completely close out everything prior to all the conditions being met, that would not be our intent.

CHAIRPERSON GRIFFIS: Okay, then I want to go back to the first question. Then the operating Certificate of Occupancy for this order is the one as stated in the record, but what you've just indicated is that there may be others that are pertinent to this order; is that correct?

MR. KELLY: There are others, yes.

CHAIRPERSON GRIFFIS: Okay, and so it is in your opinion in terms of the conditions, only 9A is pertinent to this particular Certificate of Occupancy of those conditions that have come up today.

MR. KELLY: Yes, sir.

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CHAIRPERSON GRIFFIS: Okay, so Condition 12, Condition 4, Condition 2, Condition 9B, Condition 7, those that related to the retail configuration, the landscaping, those in fact, are attendant to an additional C of O that is forthcoming.

MR. KELLY: Yes, sir.

CHAIRPERSON GRIFFIS: I see. Okay, other questions, Board members? Very well, let's start with cross examination.

MS. KAHLOW: I have quite a number. First, I listened carefully, Mr. Kelly, to your testimony a few minutes ago about 9A. Could you show the precise language in 9A that says that the money -- the way I read it, the first 100 grand contribution shall be made on the date of the C of O for the subject property. Where does it say that the program has to be operational before that money is delivered to the Foundation?

MR. KELLY: Well, in reading the entire 9A, if you go down to where it starts, AIf for any reason the Feeding Program cannot operate as described above, or the Feeding Program fails to comply with the above-stated funding condition, the University shall pay 100,000 a year to an existing non-profit food service program selected by the Foundation@. In my discussions

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with George Washington, they did not have a feeding program that they could give the money to.

MS. KAHLOW: I don=t read that it says what you say and the understanding is --

CHAIRPERSON GRIFFIS: Okay, you can --

MS. KAHLOW: Let=s ask the question precisely. Isn=t there a vicious circle that -- didn=t we tell you there=s a vicious circle that until the money was given to the Foundation, they couldn=t operate the program?

MR. KELLY: That argument was presented by both sides, yes.

MS. KAHLOW: And is it logical to you that there=s a vicious circle that the money has -- there are many vendors interested by only if the money is in hand by date certain. So how can -- if the Foundation has made enough decisions, they=re ready to go, how come we can=t get the money? Where does it say --

MR. BENNETT: Objection.

MS. KAHLOW: How does this work? I mean, the order couldn=t be clearer. Where does it say in the order.

CHAIRPERSON GRIFFIS: There=s an objection to the question.

MR. BENNETT: That is -- first of all, Mr.

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Kelly has answered the question. Second of all, she=s asking Mr. Kelly to speculate, which I don=t think is appropriate.

CHAIRPERSON GRIFFIS: I would tend to agree. In fact, I would go a little bit further. You=re actually asking Mr. Kelly why didn=t he write the condition better and more clearly for its implementation which I think is what=s coming under question here. I would assume Mr. Kelly didn=t write it.

MR. KELLY: Thank you.

CHAIRPERSON GRIFFIS: I think the point is made, so move on.

MS. KAHLOW: I=ll move on. Did Mr. Basin (phonetic) the President of the Foundation, ever inform you that the Foundation was incorporated and set up?

MR. KELLY: No.

MS. KAHLOW: Did I ever? Did I send you the Articles of Incorporation?

MR. KELLY: I believe so, yes.

MS. KAHLOW: Thank you. Now, let me get to the next line of questioning. In response to the West End Citizens Association=s Freedom of Information Act request which is part of this appeal, DCRA kindly provided some e-mail traffic and communications between

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you and GW. Do we have all of them or if there -- or are any missing to your knowledge?

CHAIRPERSON GRIFFIS: Okay, first, I'm a little concerned that we're stepping into a FOIA discussion you said is part of this appeal and again, it wasn't an issue that we talked about, but I'm not sure what you would want this Board to do with it.

MS. KAHLOW: Because it would show that GW was behind this Rue Goldberg type of approach instead of following the exact -- controlling the Foundation instead of following the exact words of the order.

CHAIRPERSON GRIFFIS: But that's going to almost a conspiracy of how the whole order came to be.

MS. KAHLOW: Not the order, how it became non-enforced, that's why we did the FOIA and that's why we have these e-mails that we presented that showed the Zoning Administrator said, AYou're out of compliance, we won't serve as escrow agent@, et cetera. So I wanted to see if we had them all because as a matter of law, as you know, they have to provide them all. And since Mr. Kelly was not the person who provided them, it was DCRA's FOIA officer, I wondered if we had them all. And if not, why were they denied us.

CHAIRPERSON GRIFFIS: I think the pertinent question then is whether you have the information that

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was requested rather than us trying to --

MS. KAHLOW: That=s correct. Do I have the information that was requested?

MR. KELLY: I have no idea.

MS. KAHLOW: Okay.

MR. KELLY: I=m not the FOIA officer.

MS. KAHLOW: Thank you. Has DCRA issued any fines yet for GW=s non-compliance with the terms and conditions for 1957 E Street for 9A or anything else?

MR. BENNETT: Objection, your Honor -- Mr. Chairman. There=s no evidence that there=s been any non-compliance.

MS. KAHLOW: Has DCRA issued any fines yet to --

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLOW: -- 1957 E Street PUD?

CHAIRPERSON GRIFFIS: It=s not an inappropriate question going just directly to the action if any has been taken. Have any fines?

MR. KELLY: No.

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLOW: How do you reconcile DCRA=s inaction with the direction in the Mayor=s recent SNOP (phonetic) plan?

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MR. BENNETT: Objection, Mr. Chairman. That=s going beyond the scope of the -- of what=s before the BZA.

CHAIRPERSON GRIFFIS: I would tend to agree. We=re taking -- I mean, even, no matter what he answers we=re going down a direction that won=t have pertinence to us.

MS. KAHLOW: Okay. Has DCRA issued any fines for GW with respect to the new hospital?

CHAIRPERSON GRIFFIS: The hospital.

MR. BENNETT: Objection, Mr. Chairman. The hospital is not the subject of this Zoning Order.

CHAIRPERSON GRIFFIS: Okay, that is exactly correct.

MS. KAHLOW: Well, remember this is our compliance with Environmental Policy Act, but okay.

Did you, as Zoning Administrator, do any compliance checking with respect to the student parking restriction policy which was not in the conditions but was in the findings of fact?

CHAIRPERSON GRIFFIS: Again, it goes beyond our scope, I think, at this point.

MS. KAHLOW: Well, that=s part of our issue that we think they=re out of compliance, even though it=s in the findings of fact. We took their word for

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it that a promise is a promise is a promise.

MEMBER ETHERLY: I think that=s beyond the scope.

MS. KAHLOW: Okay, how did you check compliance with the DC Environmental Policy Act provision in the order?

MR. KELLY: Yes.

MR. BENNETT: If Mr. Kelly wants to speak to the general process --

CHAIRPERSON GRIFFIS: Indeed, and I think that=s the appropriate direction to take is what is the general process and then if there are differences specific to this application, permit application, that could be brought up.

MR. KELLY: Well, to respond, the environmental review process in DCRA is set -- it=s not involved with the Zoning Administrator=s office, but is required with certain criteria, dollar amount triggers, specific reviews and the DCRA director then responds to the Applicant stating that you can do the short form, which is seven pages, or you do a full-blown Environmental Impact Statement which can take years.

Every project that=s permitted through DCRA is subject to this review. And I=ve personally looked at projects where they=ve had it done but not

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specifically to GW.

CHAIRPERSON GRIFFIS: Do you have any review or control over the EISS submissions or any of the environmental impact submissions attendant to a permit?

MR. KELLY: None at all.

CHAIRPERSON GRIFFIS: And are there other agencies outside of DCRA that have review and approval to the EISF?

MR. KELLY: Yes.

MS. KAHLOW: I'm a little hard of hearing. What did you say about GW? It was a question before your question. Did you say you haven't seen any yet for GW?

MR. KELLY: I didn't look.

MS. KAHLOW: So for Condition 12 in the order, how did you check compliance with Condition 12?

MR. KELLY: The projects were reviewed prior to my employ. They received a letter from the District DCRA office that they are in compliance.

MS. KAHLOW: Do you have any of those letters?

MR. KELLY: I don't have any, no, not with me.

CHAIRPERSON GRIFFIS: Are they on file for

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production?

MR. KELLY: Certainly.

CHAIRPERSON GRIFFIS: Okay, then why don't we have those letters.

MS. KAHLOW: Thank you. Under what statutory or regulatory authority did you attempt to add conditions to the Zoning Order and that was a letter that you sent to the West End, GW and a non-party to the case. Under what statutory or regulatory authority did you attempt to add conditions?

MR. BENNETT: Mr. Chairman, the Appellant is speaking to something that hasn't been introduced into evidence. I'm not clear as to what she's referring to.

MS. KAHLOW: Actually, it's in the record but it's the September 6th letter, I believe. If I may look at the date, just give me a second.

MR. BENNETT: It's not in the appeal materials.

MS. KAHLOW: It's in the appeal itself. It's a September 6th letter and if you'll look at the original appeal, it's in it. I have to find it.

CHAIRPERSON GRIFFIS: What are you calling the original appeal?

MS. KAHLOW: The appeal was filed on I want

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to say September 23rd. Just let me see what day we filed it. Just a second.

MEMBER ETHERLY: I believe the Appellant may be referencing Exhibit Number 10 which is a September 23rd letter from West End Citizens Association that would be directed to the Office of Zoning.

MS. KAHLLOW: It is September 23rd and if that is -- the appeal before this body includes this letter, the September letter, and we have the letter and West End=s reply. The reply is Attachment D and the letter -- Mr. Etherly found it and I don=t see it at this moment, but it=s in here, one of these attachments. But my question is, under what authority did you issue that letter?

MR. KELLY: Mr. Chairman, in answer to that, in my opinion, we were not placing any conditions on the order.

MR. BENNETT: First of all, Mr. Chairman, we want to be clear on what document the Appellant is referring to.

CHAIRPERSON GRIFFIS: So do I. We have one copy up here. Others of us are still searching. There=s an awful lot of Attachment A=s in this.

MS. KAHLLOW: I know, that=s the problem.

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There are A=s and there are colored A=s and things like that.

CHAIRPERSON GRIFFIS: Can we just reiterate the date, September 13?

MS. KAHLOW: September 13th is our reply to his September 6th --

CHAIRPERSON GRIFFIS: Indeed.

MS. KAHLOW: -- and that=s Attachment D.

CHAIRPERSON GRIFFIS: So that would be pertinent.

MS. KAHLOW: And that is in the record where we say, Awhat=s your legal authority@. That=s Attachment D in the original 9/23/02 filing.

CHAIRPERSON GRIFFIS: Right, but we=re looking for the Zoning Administrator=s letter; is that correct?

MS. KAHLOW: I don=t see it, but I=m going to put it in the record. I thought it was already in the record but I=m more than willing to put it in, if you want me to add that in.

CHAIRPERSON GRIFFIS: Well, if you want him to answer a question on it, then it would probably be pertinent.

MS. KAHLOW: I can add it in easily.

CHAIRPERSON GRIFFIS: Do you have copies of

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it immediately?

MS. KAHLOW: I do.

CHAIRPERSON GRIFFIS: Why don't you give Mr. Kelly the first copy so he has time to read it by the time it gets up to us.

MS. KAHLOW: The question is, can we have copies made so that we can all be on the same page. I only have the original. Can I -- that's my only copy, Ms. Bailey. It's the letter that was said, AHow can you do this@. Do you have it? I know your counsel has it, she showed it to me a second ago. Do you have it with you? Can you give him a copy while he's -- we just discussed this earlier. Sorry.

CHAIRPERSON GRIFFIS: Do you have other questions you can move onto while that's being copied?

MS. KAHLOW: I do want to know, to your knowledge, what contacts have current GW employees that formerly worked for DC had with DCRA regarding this project and what did they tell these contacts about this project?

CHAIRPERSON GRIFFIS: Well, how is that of great import to us?

MS. KAHLOW: Because our understanding has been through Mr. Kelly that they talked to employees and told them not to enforce it and not to issue fines

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and they couldn't issue fines.

CHAIRPERSON GRIFFIS: Okay, perhaps the direct question then --

MS. KAHLOW: And the former DCRA employee was a former head of DCRA. So I could ask Dave Watts, what were Dave Watts -- how did Dave Watts get involved in the question before us today of your -- to your knowledge?

CHAIRPERSON GRIFFIS: Actually, I thought your --

MR. BENNETT: I would object, Mr. Chairman on relevancy grounds.

CHAIRPERSON GRIFFIS: Yeah, indeed, but I thought I was hearing your question formed more in was there employees or past District employees that made statements of not fulfilling requirements or something of that nature.

MS. KAHLOW: That they couldn't enforce it.

CHAIRPERSON GRIFFIS: That they could not enforce it.

MS. KAHLOW: That DC couldn't enforce -- the literal reading of the regulations that they need -- that the Zoning Administrator needs to enforce and issue fines was not correct and Mr. Kelly was kind enough to tell us and Mr. Watts had called and made

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that interpretation. So I just wanted that in the record and I wanted to know who else he talked to and what he said and is that the reason you didn't issue fines.

CHAIRPERSON GRIFFIS: Okay, we're going to need to frame it in a pertinent question, though, I mean, rather than taking long journeys into conversations. I mean, the question to Mr. Kelly, if I'm understanding it, was he directed or does he know of someone that was directed to non --

MS. KAHLOW: Not enforce.

CHAIRPERSON GRIFFIS: Not enforce conditions or orders?

MR. KELLY: Mr. Chairman, if that's the question, no.

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLOW: Okay, that is all but when we ask GW questions, I might need to ask Mr. Kelly to come back if the answers are inconsistent if that's all right, if you could ask him to stay.

MR. BENNETT: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

MR. BENNETT: I can't see how the testimony of George Washington would require Mr. Kelly to come back and explain anything.

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MS. KAHLOW: Well, if it talks about him.

MR. BENNETT: Mr. Kelly has testified as to what went into his decision to issue the Certificate of Occupancy. I think that speaks for itself and Appellant is free to ask any questions regarding that.

CHAIRPERSON GRIFFIS: Very well. I think logically we may have new information that comes up. There may be pertinent questions by the Board that could be answered by the Zoning Administrator. I can't imagine that you don't want to stick through this entire process. So we will look to have you here. Let's go to the finish of this because I believe there's one last question and that is based on this letter that the Board now has copies of and Mr. Kelly may need a moment, and his counsel, to read it. So why don't we take 30 seconds to do that, and then we will hear the question based on this.

This is a little out of order in terms of introduction of material and I will grant the benefit of the doubt that there was an assumption that it was in the record even though Mr. Kelly's testimony didn't go to it. After all, we're in the ever vigilant search for the truth up here.

MS. KAHLOW: Thank you. The added conditions are on the last page, that the program had -

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- they had to -- I just put it back, something like they had to certify that they were operational before, in a vicious circle, they could be operational. Let me point that to you. It's on the last page the first item, first paragraph, AA resolution by the Board that the program was operational before it was operational, under what legal authority could you ask for such a thing@.

(Pause)

MR. BENNETT: First of all, Mr. Chairman, I'd like to have this letter marked as a specific exhibit because it is not part of the -- at least not page of the appeals materials that I have.

CHAIRPERSON GRIFFIS: Indeed, it will be an exhibit number.

MR. BENNETT: Okay.

CHAIRPERSON GRIFFIS: Do you want to know it now?

MR. BENNETT: It might be good, yes, sir.

CHAIRPERSON GRIFFIS: Number 28. Thank you very much.

MR. BENNETT: Appellant's Exhibit Number 28?

CHAIRPERSON GRIFFIS: Yes.

MS. KAHLOW: Precisely the question is on

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page 4, paragraph 1, AA resolution by the Board of Directors of the Foundation certifying the Feeding Program has been established and is prepared to operate. Since that=s not in the order, under what legal authority could you add that condition@?

MR. KELLY: Through the Chair again, this is an attempt to resolve the conditions that were placed by the Zoning Commission. Since there was not a vehicle in place for George Washington to give the money to, this was DCRA=s attempt or my attempt to solve this dilemma and get the money to the Feeding Program.

MS. KAHLOW: Was the Foundation already established months before, six months before that?

MR. KELLY: There wasn=t a Feeding Program in place that I was aware of.

MS. KAHLOW: But was that required in the order? We=re going circular here. It=s not precisely in the order so why do you think it needed to be established pursuant to conditionally before the money was --

CHAIRPERSON GRIFFIS: Well, I think he=s answered that question but the question that was direct, was the Foundation established six months before.

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MR. KELLY: That I'm not aware of.

MS. KAHLOW: Didn't we send you the --
didn't I send you the Articles of Incorporation from
March?

CHAIRPERSON GRIFFIS: Are you aware of
receiving those?

MR. KELLY: I don't recall.

CHAIRPERSON GRIFFIS: Okay. Anything else
on this letter?

MS. KAHLOW: No, thank you.

CHAIRPERSON GRIFFIS: Mr. Kelly, can you
read on page 3 the last paragraph?

MR. KELLY: Do you want me to --

CHAIRPERSON GRIFFIS: No, I don't want you
to read it into the record. Have you read it?

MR. KELLY: Yes.

CHAIRPERSON GRIFFIS: Okay, is that the
basis of which you're talking about that would
establish your request for items 1 and 2, this is on
page 4?

MR. KELLY: Yes, sir.

CHAIRPERSON GRIFFIS: Okay, and so if I
read that correctly, and you tell me if I am, in fact,
correct, it was requesting from the Foggy Bottom
Feeding Program Foundation to provide you, the Zoning

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Administrator, with these two issues in order to establish the Feeding Program or one that would be selected by the Foundation and you start that paragraph by saying, AIt is clear since the ZA order has outlined that@; is that correct?

MR. KELLY: Yes, sir.

CHAIRPERSON GRIFFIS: So this is an outgrowth of you reading the Zoning Commission=s order?

MR. KELLY: This was my attempt to solve the circular situation that we were stuck in at the time as to let=s either find a feeding program that will accept the money or put a plan in place to where we can feel comfortable. I didn=t want to be an administer of this money.

CHAIRPERSON GRIFFIS: Right.

MR. KELLY: And we were trying to get away from that completely. So this was our attempt to comply with the DC order.

CHAIRPERSON GRIFFIS: Indeed.

MEMBER ZAIDAIN: So at the writing of this letter, you knew that the Foundation exists but you were just unclear to whether or not they had an active feeding program that this money could be used for?

MR. KELLY: In my mind they did not have an operating plan in place. It was clear that they did

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have a Board of Directors, yes, and they had met.

MS. KAHLOW: If we didn't make it that clear, the Foundation was established on March 27th. Would you like us to put that document in the record, the Foundation document?

CHAIRPERSON GRIFFIS: I think the pertinence goes to what Mr. Kelly is talking about and that's what the order speaks to is the Feeding Program.

MS. KAHLOW: And the order doesn't say that it has to be operational because it can't be operational according to the vendors, until the money is already in hand and they can know when the money is coming. And we've talked to all the vendors, they're very interested. They just need to know when the money is in hand. They can't sign an agreement until they know when the money is coming.

CHAIRPERSON GRIFFIS: That probably should have been in Condition 9A, huh?

MS. KAHLOW: Well, 9A just says they have to give the money to the Foundation. And since the Foundation is not a party to the case, Mr. Kelly wrote a non-party to the case, a private entity, asking for information that was none of his business.

CHAIRPERSON GRIFFIS: I see.

MS. KAHLOW: And that's been our position,

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but my question to you is, do you want the Foundation=s incorporation=s papers in as another exhibit? That=s again another million pages but I=m more than willing to give it to you.

CHAIRPERSON GRIFFIS: Do you see any importance to that, Board members?

MEMBER ZAIDAIN: Do you dispute that, does anybody dispute that?

MR. KELLY: They=re incorporated, yes, I agree.

MEMBER ETHERLY: Mr. Chairman, I don=t think it=s necessary, simply for the very important reason that, I mean, we have to look at Mr. Kelly=s action in terms of the time at which it was taken and I mean, the very reason we=re here is because we=re trying to establish some clarity in what arguably is not necessarily the clearest of documents and perhaps, I think the effort of the September 6th letter was to bring some clarity to perhaps a condition, I=m being generous there, that wasn=t as clear as it needed to be. I don=t think it=s necessary and that=s not to suggest that the Foundation wasn=t in place, but there appears to be a reasonable belief on the part of the Zoning -- the ZA that perhaps it wasn=t fully ready to accept the funds as laid out in the Zoning Commission

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order.

I don't think it's a fatal flaw that he took that step nor do I think it's a statement regarding any incapacity of the Foundation at that particular point in time to operate.

MS. KAHLOW: And as I pointed out, though, in the actual appeal is our answer to that, saying, AIt's none of your business, the Foundation is up and running@. So that's in the appeal. That's in the documentation in the file already. I just assumed you had the letter that you were copied on but you didn't.

MS. MONROE: Excuse me, Mr. Chairman, could I just point out --

CHAIRPERSON GRIFFIS: Yes.

MS. MONROE: -- that in 9A it does say the entirety of the \$500,000.00 contribution paid by the University shall be conditioned upon its exclusive use to provide food and meals to needy elderly and other low income residents. So maybe there was a reason that the Zoning Administrator was thinking the actual feeding program itself should be in place, as opposed to just the Foundation. I mean, it's not as clear as I think you're making it.

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLOW: I just want to make sure

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everybody looks on page 4 at the copies. The reason I thought it was in the file as Ms. Kress was copied and since it was about this appeal, I assumed it was in the file. That was why I hadn=t --

CHAIRPERSON GRIFFIS: Well, it=s in there now.

MS. KAHLOW: Yeah, I=m sorry, that=s why it says right here.

CHAIRPERSON GRIFFIS: That=s okay.

MS. KAHLOW: Right.

CHAIRPERSON GRIFFIS: Okay, anything else for Mr. Kelly?

MS. KAHLOW: Not at this time but I reserve the right after GW. Thank you.

CHAIRPERSON GRIFFIS: Questions? Yes, Mr. Feola, does the ANC have any cross examination of Mr. Kelly=s testimony? They do not. Very well, thank you very much, Mr. Kelly. And if I could inquire, Mr. Feola, are you doing a combined case presentation? Is that correct?

MR. FEOLA: Yes.

CHAIRPERSON GRIFFIS: Okay, and how much time do you think you=ll need allotted?

MR. FEOLA: I don=t think we=ll need more than 15 minutes, maybe 10.

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CHAIRPERSON GRIFFIS: Okay, let=s -- we=re going to get through this.

MR. FEOLA: Thank you, Mr. Chair. For the record, again, Phil Feola, on behalf of the University.

With me is Charles Barber. If I might just take three minutes of kind of an overview of where we see this case and almost in reverse order. The University hasn=t complied with and that on August 16th, 2002 when the Zoning Commission -- I mean, the Zoning Administrator issued the Certificate of Occupancy for a third of this building that they should have been in compliance with.

The first is the landscaping plan. I don=t doubt what Ms. Maddux said that maybe some of the landscaping is in now, maybe all of it=s in now, but it was -- it is clear that it wasn=t in on August 16th. There were still heavy equipment all over that site and it wasn=t in place and it would have been impossible for the Zoning Administrator to evaluate the landscaping plan in conjunction with the approval of a C of O for essentially one-third of the project.

With regard to the retail and 9B, that retail space in that portion of the building which is the subject of this C of O is built out. It=s not leased. The University is trying to get it leased. It

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is not occupied by citizens living there. It is set aside for retail and the way I read the order the University has until August 16th, 2003 to find a retail tenant or show its best -- show the Zoning Administrator and WECA that it's used its best efforts to get that. So in our opinion those two items are not germane to this appeal.

With regard to the Environmental Policy Act, I've already talked about this, it's -- the way we read the order, that condition Number 12, it's for future projects, not this project. Notwithstanding that, Mr. Barber will show evidence of compliance with the two projects that have happened since August 16th, 2002.

With regard to parking, I think we've discussed that. It's not a condition of the order and it shouldn't be part of this appeal. So what it comes down to is Condition 9A. And I think it's very important for this Board and I'm sure you will read 9A in its entirety. And I'm really sorry Mr. Hannaham isn't here because 9A is a confusing condition but it was one that the Zoning Commission struggled with.

The Zoning Commission's intent in 9A was as corporation counsel said, Ms. Monroe said, was to make sure the monies went to the elderly and the needy.

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They were -- the Zoning Commission was very concerned over our mutual objection with the fact that the Foggy Bottom Feeding Program Foundation was just barely in existence. No track record, wasn't Martha's Table. It hadn't been producing this. And there was a big concern that -- from Chairperson Mitten and the Commission that this money just didn't get whittled away into somebody's hands and never get to the people who the Commission intended it to get to.

And if you read the rest of the order, it talks about none of this money shall be used for salaries or overhead or administrative costs or all those things. And the Condition 9A says the University shall contribute this money on the date of Certificate of Occupancy. Without conceding a legal point as to whether it was this Certificate of Occupancy or the Certificate of Occupancy for the whole building or for parts of the building, the University was trying to do the right thing and make this contribution in a timely manner before or on or about August 16th.

But the rest of that condition is important to read. And I'm going to quote it even though Ms. Monroe said some of it. AThe entirety of@ -- and this is a quote from Condition 9A. AThe entirety of the contribution paid by the University, 500,000, paid by

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the University shall be conditioned upon its exclusive use to provide food and meals to the needy, elderly and other low income residents. If, for any reason, the Feeding Program cannot operate as described above, meaning giving the food to the needy and elderly, Aor the Feeding Program fails to comply with the above stated condition, then the University shall pay \$100,000.00 a year to an existing non-profit food service program selected by the Foundation until the Feeding Program resumes operation or until the Feeding Program achieves compliance with this condition@.

On August 16th, 2002, it=s the University=s contention that the Foundation to which the University has two Board members, did not have a program in operation. On August 12th of 2002, as Mr. Barber will enter into the record, Mr. Barber wrote a letter to the chairman of the Foundation and said, AWe know the program is not in operation. Where should we give the money@? To date, we have gotten no response.

So that=s the \$64.00 circular question that the University faces. Can=t give it to the Foundation because it doesn=t have the program in operation. The Foundation has not yet identified the third party recipient. In the meantime, the University is struggling to finish the building and let students live

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in the housing.

Because this is the classic Catch 22, the University has, as was noted before, filed and I'd like to introduce into the record, a request to the Zoning Commission to modify this condition so it's more clear.

And if I might, the Zoning Commission has voted on this at its November meeting and adopted the language with some changes. We haven't seen the final order, it's not out yet. But the Zoning Commission had, by its action, I think at its November meeting, recognized this dilemma. The University couldn't give the money unless the program was in operation and -- or unless the Foundation identified the program and to date, the program hasn't been identified.

With that, I'd like Mr. Barber to make his comments.

CHAIRPERSON GRIFFIS: And you indicated you were going to submit something into the record. That's the draft order; is that correct, or the modification language?

MR. FEOLA: This is -- yes, this is the request the University made on November 4th to the Zoning Commission to modify condition 9A in accordance with language that they subsequently adopted which is in here.

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CHAIRPERSON GRIFFIS: I see, so it=s just your request. We don=t have anything of --

MR. FEOLA: That=s correct. That=s correct. They did vote to adopt language similar to this but we don=t have it in writing.

MEMBER ETHERLY: If I may, Mr. Chair, just very briefly. You=re not asserting that because of that Zoning Commission decision that that raises any issue as to whether we can move forward at this point with resolution of this particular bill.

MR. FEOLA: I don=t think it does, but I think ultimately it will moot out your decision because the Zoning Commission will have modified that condition.

MEMBER ETHERLY: Okay, okay, and the only reason I ask that Mr. Chairman, is I=m a big fan of dealing what we=ve got in front of us but I mean, if there is a pending Zoning decision out there that could conceivably moot the question, it=s something to think about.

CHAIRPERSON GRIFFIS: It sure is.

MS. KAHLOW: May I clarify something about that? In my testimony I discussed this and said we=re going to be filing a motion for reconsideration when this order finally comes out because it undercuts the

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additional 250,000 grand when it says any affiliated university and that=s part of our deal, so I did discuss this. I don=t know if Mr. Etherly was focusing on that. And we expect to win that motion for reconsideration since we didn=t have a public hearing on it.

CHAIRPERSON GRIFFIS: And your motion for reconsideration goes to this modification.

MS. KAHLOW: Goes to the non-minor modification and then with the Zoning Commission, Mr. Hood did which made it a very major change.

CHAIRPERSON GRIFFIS: Let me interrupt you right now. Mr. Etherly, are you clear on that?

MEMBER ETHERLY: Yes.

CHAIRPERSON GRIFFIS: Okay, Mr. Zaidain?

MEMBER ZAIDAIN: Yes.

CHAIRPERSON GRIFFIS: Very well.

MEMBER ZAIDAIN: Yeah, I=m clear on it, Mr. Chair, but --

CHAIRPERSON GRIFFIS: That=s all I need to know.

MEMBER ZAIDAIN: If it=s there, why are we -- what=s --

CHAIRPERSON GRIFFIS: Because we can=t create the case. It comes to us. There is it. Yes,

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Mr. Barber?

MR. BARBER: Yes, thank you. Charles Barber, Senior Counsel, George Washington University. Let me deal quickly with other issues besides 9A and then come back to 9A. First of all, I think it is an interesting question that Mr. Etherly has raised as to whether these -- any of these conditions or failure to comply with any of these conditions means that the Certificate of Occupancy is not issued. I don't think that's clear and I'm not going to express an opinion on that legal issue. That, to me, is an open legal question.

GW assumed that it had an obligation. GW assumed that we had to meet these conditions and we've operated under that assumption and I'm prepared to speak to the things that we've done. The only thing I'd like to add, Mr. Feola covered Condition 7, landscaping. The 9B leasing, he pointed out rightly that the language says one year, within one year of the Certificate of Occupancy. I think it's ludicrous to require the Zoning Administrator to make any inquiry whether there's some best efforts being made. I mean, there's no standard for best efforts.

I think certainly we have made efforts and I wouldn't have any problem about showing that. I

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don't think that that needs to be something that he needs to concern himself with because the order clearly says what happens after a year if we can't find somebody, then GW steps in at the end of that year, period, and operates the retail space. What the Zoning Commission was concerned about was not best efforts, whether there's going to be some retail space within a year and we have a year, so I don't think that's really an issue that ripe for discussion now. If after a year we haven't found anybody and we then don't step in to operate the retail, at that point there may be an issue.

The Environmental Protection Act, again, the order became effective on August 16th. The Certificate of Occupancy was issued on August 16th, as Mr. Feola said. I don't see how the Zoning Administrator projects in advance about some future compliance. We are forced to comply with the Environmental Protection Act. I mean, we have no choice. As you heard some of the process from the Zoning Administrator, any time GW seeks a building permit, there's is a requirement of an environmental review.

We always submit the screening form. It undergoes review by agencies other than DCRA. I have

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here two letters issued by DCRA that reflect the environmental review of two recent projects, two resident hall projects which have been referred to, the Townhouse Row Project and the Square 43 Project. And I can show you -- and we can provide those for the record. It shows that these are two recent projects that underwent environmental review. These were started -- the process was started prior to the order.

It came -- these came out prior to the Certificate of Occupancy being granted. The only one that I'm aware that still is in review now is the Business School and that hasn't been completed.

The bottom line is on August 16th there was nothing for him to do on that particular condition. And I think that's all I can say about that.

On the parking, I think it's already been pointed out that that's not a condition. I do want to say that although it is not before this Court, the side agreement, we believe we have met that agreement. Let me say one thing about that before I go on. The question was where did we publish this notice to students. We recognized that we couldn't enforce this no parking obligation on public streets, but we said we would publish this policy on our web page. We had it on a web page in a guide to off-campus living.

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I never heard that was a problem until this appeal was filed. When I saw the appeal, I went and had it changed. It is now in -- on the web page in another publication that goes to a broader student population.

CHAIRPERSON GRIFFIS: Okay. And we're not going to tread --

MR. BARBER: So I think we've addressed that.

CHAIRPERSON GRIFFIS: -- and to examine on that into a great conversation.

MR. BARBER: Fine. Let me go to Condition 9A, just a minute of background. We negotiated this provision with the concept -- the concept of the provision with the West End Citizens Association. Originally the \$100,000.00 for five years was going to go to Scholl=s Cafeteria, which was an existing food service operation that was already feeding the elderly.

During the hearing Scholl=s went out of business and so we were struggling with what do we do to replace that.

CHAIRPERSON GRIFFIS: The hearing didn=t put them out of business, did it?

MR. BARBER: I=d like not to think so.

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They had some other issues.

MR. FEOLA: The length of time that it took to --

CHAIRPERSON GRIFFIS: That was a nice place.

MR. BARBER: It was.

CHAIRPERSON GRIFFIS: Okay, I'm sorry.

MR. BARBER: The West End Citizens Association insisted on creating a new program. We had our doubts about that. These are well-meaning people but they have had no experience about creating and operating a food service program, and so we came up with the idea that all right, we'll give you a shot, but if it's not in operation, we want it to go to an alternative food program and they insisted that they get the right to identify that and we said fine, and it was that concept that the Zoning Commission accepted.

The Foundation was created. There's a Board, five-member board, two GW representatives, three West End Citizens Association representatives. By design, we don't have control. And we all knew the parameters of what the Board -- the Commission, I'm sorry, had voted in June. There were a couple of meetings over the summer. The plan was talked about conceptually. Well, how might it work, where might the

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venues be, do they really have an audience, very conceptual.

There was some delay. We thought the order would come out earlier. The order finally came out in early August. I knew from my personal experience and I knew from talking to GW representatives that there was no feeding program there. And that=s why when I got the order on August 12th, I sent Jack Bathem a letter requesting the designation of an alternative existing feeding program pursuant to the order.

I never got a response to that. Again, I knew the order -- I knew the program was in place and I expected them simply to identify an alternative feeding program because that was just the first year. I thought they would take some time to establish the program and then in subsequent year=s duration, two, three and four, they=d be ready and they=d have \$400,000.00 to work with. I thought the first year would go to an alternative program. I never got a response.

I think they were concerned about the language that no money be used for administrative expenses. I don=t think they knew what to do with that and so I know they were struggling, but by August 16th, when the Zoning Commission Order went into effect, and the Certificate of Occupancy was issued,

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there was no feeding program. We talked to the Zoning Administrator about this. He wanted the money to go somewhere. He recognized the dilemma. We saw the escrow type arrangement as a good faith gesture on our part to simply identify that money is available. We thought it was in the spirit of the order. We recognized the dilemma.

The dilemma in our view is that no one thought that the Foundation would do neither, that they would not clearly establish a program and they would not identify an alternative program. And it is the Foundation=s inactivity which created this dilemma. We thought and we think now we have met our obligation with this August 12th letter by proffering the \$100,000.00. We=re ready to pay. Foundation, you either have to establish a program or you have to identify an alternative program. And the if the Foundation does neither, we have satisfied our obligation.

And I believe that=s the basis of the Zoning Administrator=s decision. The escrow type agreement and who is the escrow agent and whether it was a true escrow is really beside the point. It=s outside of the order. It was an attempt to act in good faith to show the money was available. The September

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6th letter properly put the burden on the Foundation to establish as a condition precedent to our paying that there either is a program or you have identified an alternative existing program. That=s the condition precedent to our paying. To date the Foundation still has not passed those resolutions and it was a very simple request. They asked -- the Zoning Administrator asked for the Board to meet and pass a resolution of one or the other. They still have not done that. In fact from GW representatives, the Foundation Board has met once since the Certificate of Occupancy was issued, once since the Zoning Commission order became effective.

I don=t know what else they=ve been doing.

They may have -- you know, in terms of notice to GW representatives. The important thing about the escrow type of agreement -- arrangement was that we agreed with the Zoning Administrator that this impasse could not continue indefinitely and so we said if the Foundation doesn=t act within 90 days, then we would do something. We would go to the Zoning Commission and we would ask for -- we would ask for some resolution of this and we believe that the Zoning Commission is on its way to providing that resolution.

I think it=s important to note that the --

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whatever the language they come up with, the Zoning Commission at no time said, AWell, you should have just paid the money to the Foundation and you should have let it sit in the Foundation bank account until they get around to establishing the program@. That=s not what they said. They voted on language which says that GW can identify an alternative program if the Foundation doesn=t act, but that Commission order is not necessary for your decision.

I think the language, and let=s go back to the Zoning Commission language which says, AIf for any reason the feeding program cannot operate as described above or the feeding program failed to comply with the above-stated funding conditions, then the University shall pay \$100,000.00 to an existing non-profit food service program selected by the Foundation until the feeding program begins or resumes operation@. They haven=t begun. We=re not asking that they start serving out food. We understand they need the money for that but we expected a plan, a budget, an agreement with vendors. They don=t have to pay the vendors but something along these lines.

And quite frankly, the Zoning Administrator put some very lax requirements to give us a resolution saying it=s established. They weren=t able to meet

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that easy condition. My concern is even if they pass a resolution, they have to have something behind that resolution. And I've outlined generally what I think is appropriate. GW's concern is this; one, that we comply with the order, and two, that our \$100,000.00 per year for five years is not wasted. We share the Zoning Commission's concern that the money go to feed the elderly and the poor in Foggy Bottom. That's what we are trying to do, that's why we held back the money.

That's why we wanted some assurance that there was a feeding program that we can fund or there are some programs in Foggy Bottom that are doing good work. Let's fund them. GW is ready to put that money into an alternative existing program. But this order creates this impasse by putting both decisions in the Foundation's corner and the Foundation has not acted.

All right, that's it. That's all I have.

CHAIRPERSON GRIFFIS: Very well, thank you.

Any questions from the Board at this time? Mr. Feola, Mr. Barber, I'm going to ask you the same question hopefully better than I asked the Zoning Administrator but in reviewing the Zoning Commission's Order 746-C, what does the order allow you, George Washington, to do and what is its milestone in that is this -- is the issuance of the Certificate of Occupancy for the

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program tied directly to the compliance of all the conditions?

MR. FEOLA: Say that again, please.

CHAIRPERSON GRIFFIS: In the issuance of this order --

MR. FEOLA: Yes.

CHAIRPERSON GRIFFIS: -- it=s allowing the University to do something, to build something.

MR. FEOLA: Yes, yes.

CHAIRPERSON GRIFFIS: Is the milestone for the compliance with these orders the issuance of the certificate of occupancy? And the follow-up question to that is, is the single certificate of occupancy that has been issued the only certificate that is attendant to this order?

MR. FEOLA: No, clearly not. I mean, the first condition of the Zoning Commission order is that the building be built in accordance with plans that were part of the record. The -- again, the portion of the building that -- or the project that we=re talking about is only a third and clearly that condition couldn=t be satisfied until the entire project is done.

Landscaping is another one that would come after the base building. So I would say that there are a number of conditions here that cannot be fulfilled with the

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issuance of this what I'll call partial Certificate of Occupancy. It's a Certificate of Occupancy for a part, about a third of the building.

MR. BARBER: Let me add to that.

CHAIRPERSON GRIFFIS: Just to follow up quickly, generally speaking then, this is a three-phase project if I'm understanding you in saying a third of the project has been built.

MR. FEOLA: It's being built in two phases, a third --

CHAIRPERSON GRIFFIS: Okay.

MR. FEOLA: The project is a mixed use project. A third of the building is a residential portion for university students and two-thirds is used -- is going to be used for classes, academic programs and offices.

CHAIRPERSON GRIFFIS: I see, and so you would anticipate two, let's call them base building Certificate of Occupancies for Phase 1 and Phase 2.

MR. FEOLA: Yes.

CHAIRPERSON GRIFFIS: Okay. I'm sorry, Mr. Barber, go ahead.

MR. BARBER: I alluded to the -- notwithstanding the two Certificate of Occupancies in our view and the question of whether the Certificate of

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Occupancy should not be issued if it's found that we're not in compliance, it's not a legal issue that I think the University is prepared to opine on. Again, we assume that we have these obligations and you know, when the Zoning Administrator raised Condition 9A, we wanted to show him that we were meeting Condition 9A and we were meeting the other conditions as they become due.

Whether that means if we had not met 9A then the Certificate of Occupancy should not be issued, the University doesn't have a position on that particular legal question.

CHAIRPERSON GRIFFIS: Okay, and I guess what I'm getting to is trying to establish a base level of discussion here. Clearly if you have an order and I would say a variance or special exception but a Zoning Commission order that allows you to continue to construct a project, therefore, you have to build it in accordance with that order as it relates to zoning. So one could say as a base understanding that a Certificate of Occupancy could not be given if that wasn't in compliance except as you now bring up, specifically, Mr. Barber, anything else that had a time line associated with perhaps continuing operations and so I think if we start with a base operation and

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understanding that that=s what we should start looking at and then we can move up from there as we go through these conditions. Okay. Anything else?

MR. FEOLA: No, sir.

CHAIRPERSON GRIFFIS: Good, thank you. Any questions from the Board? I would not forget you. Believe me, you do not need to get my attention. Let=s go to cross examination. And just for everyone=s comfort, we will go through cross examination of this testimony and that will conclude proceedings for this afternoon.

MS. KAHLOW: Thank you. Mr. Barber, my first question is, what empowered GW, generally, and you specifically to rewrite the order Condition 9A to add provisions to it that are not in the explicit such as this escrow account?

CHAIRPERSON GRIFFIS: Explore that limitedly. I=m not sure where you=re going and how that=s pertinent to where we are in terms of --

MS. KAHLOW: We=re talking about compliance and we say GW is in non-compliance because they put money in an escrow account which is nowhere mentioned in the order and which is GW keeping the money themselves. There has been no compliance. I=m going to follow the money trail. I=m starting with who had

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empowered you to add conditions and then I'm going to ask about the money trail. You're going to see that the money has never been coughed up and it's still in GW's control.

MR. FEOLA: I guess I'd object on the relevancy ground of I think we explained where the money is and why. I think Mr. Barber has explained that.

CHAIRPERSON GRIFFIS: Yeah.

MR. FEOLA: I don't think he's claimed to have rewritten --

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLOW: Let's talk about the escrow account then. Whose IN is the money under?

MR. BARBER: I'm sorry?

MS. KAHLOW: Whose employer identification number is the money under?

MR. BARBER: George Washington University.

MS. KAHLOW: How is that complying with the order?

MR. BARBER: There is nothing in the order which speaks to an escrow type of arrangement. We have met our obligations under this order by proffering to make the -- to pay the money to either an existing -- for an existing program or to an alternative program

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identified by the Foundation. Since neither existed, we, at the suggestion of the Zoning Administrator, did the next best thing, just show the money was available.

MS. KAHLOW: And where does it say in the order that it has to be an existing program the Foundation has already established? I don't see that in the order.

MR. BARBER: It's the language I read and that's how we construed that language. If for any reason the Feeding Program cannot operate as described above, then it goes to the alternative program until the Feeding Program begins.

MS. KAHLOW: If I told you that they're ready to operate today -- you'd said, 'We're ready to pay if they establish a program or if they identify something else'. If I say they're ready today, would you give the money to the Foundation?

MR. BARBER: If there is an established food service program, then, yes, the University is ready to fund that with the first \$100,000.00. That's why it's in escrow.

MS. KAHLOW: Have you talked to the -- one of the sites we talked about, the West End and GW, was the GW Hospital. Have you talked to them? Are they ready because you said you were going to talk to them?

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MR. BARBER: We had a number of conceptual discussions last summer and at that time, I've had some conceptual discussions with the hospital administrators and they were interested. There was nothing else been done about that.

CHAIRPERSON GRIFFIS: I'm confused now. Who is they? Who is the hospital? Is this a feeding program?

MS. KAHLOW: This is the GW Hospital has a cafeteria and the design of the program was for the elderly and poor people in our neighborhood to be able to go to the various cafeterias, Scholl=s originally, and then it was going to be GW and a variety of others, most of which are GW owned and Mr. Barber was supposed to talk to the hospital because that was what we agreed would be an obvious place in the middle of this Historic District and I wonder if he completed that part of the job which the Foundation is waiting on.

CHAIRPERSON GRIFFIS: But Condition A, is that instructing Mr. Barber to go talk to --

MS. KAHLOW: No, that=s what he agreed to do.

E-V-E-N-I-N-G S-E-S-S-I-O-N

CHAIRPERSON GRIFFIS: All right and that=s what --

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MS. KAHLOW: And since he set up this escrow account without talking to us, he did agree to do that.

CHAIRPERSON GRIFFIS: I see.

MR. BARBER: Let me --

CHAIRPERSON GRIFFIS: Let=s move onto the next question.

MR. BARBER: Okay, fine.

MS. KAHLOW: Okay. Are there any other e-mails, faxes or other written communications between you and DCRA relating to this order and compliance with this order that are not yet in the record?

MR. BARBER: I have no idea.

MS. KAHLOW: You said that you have notified the students about a parking restriction. How come none of the students we=ve spoken to and we=ve spoken to many, have any knowledge of it?

MR. BARBER: We never said that it guaranteed how many people we give notice. We said we will publish -- if this is germane. Do you want to get into this on the parking issue?

MS. KAHLOW: I would -- you said that there=s something on the website that we can=t find and I=m a web junkie. Can you put it in the record?

MR. BARBER: I will show you --

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MS. KAHLOW: We=ve asked for --

MR. BARBER: Only if it=s relevant. I can give it to you personally.

MS. KAHLOW: We have written you since before the order asking for it. Can we get a copy of the evidence?

CHAIRPERSON GRIFFIS: Let=s just ask the question and we=ll get the answer.

MS. KAHLOW: Can we get the evidence you=ve proffered to the Board existed which we=ve asked since before August 16th for?

CHAIRPERSON GRIFFIS: Succinct questions.

MS. KAHLOW: Can we get a copy of the evidence?

CHAIRPERSON GRIFFIS: Yeah, I understand your question. Mr. Barber, do you understand the question? Can you produce the website and then --

MR. BARBER: Yes.

CHAIRPERSON GRIFFIS: -- the location of where this published?

MR. BARBER: Yes.

CHAIRPERSON GRIFFIS: Good.

MS. KAHLOW: Can you put them in this record?

CHAIRPERSON GRIFFIS: Next question. If

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I'm asking for it, he's putting it in the record.

MS. KAHLOW: Thank you. You just proffered two letters saying that you comply with the DC Environmental Policy Act for two different projects. Could you also put in the record the Environmental Impact Screening forms for those two projects?

CHAIRPERSON GRIFFIS: I'm not sure -- do you mean the entire forms?

MS. KAHLOW: The seven-page forms. He only put the summary letter.

CHAIRPERSON GRIFFIS: I don't understand what the relevancy would be for us to review the applications.

MS. KAHLOW: Because one of the things of the order is they have to comply with the DC Environmental Policy Act and he proffered a summary letter that says everything is wonderful. And the regulations require an EISF, which are not in your zoning files and I want to know if they existed, could he put it in so that we could see that there was compliance? Our community really hasn't been able to find evidence of compliance, just of your fine. We'd like to see that.

MR. FEOLA: I'm going to object, Mr. Chair. The approval from DCRA is evidence of compliance. I

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mean, to bring in all the plans on projects that are not part of this case, I'm not sure are relevant.

MR. BARBER: And the time frame is something -- you know, we submitted these prior to the date the Zoning Commission Order requiring that we comply with the law became effective, and so what we submitted last spring in terms of screening form is really not relevant. I mean, there have been, I think, one project and I don't know when the business school project was submitted. That's underway but that's gone through an environmental review as all our projects do, but I don't see the relevance to the ones that predate, you know, screening forms that were done some time ago.

CHAIRPERSON GRIFFIS: I would agree. I think the relevancy, if any, to this would be the approved compliance -- or an approval of the EISF or the EIS, depending on which would be applicable, and it seems to me in my quick review, that's exactly what this is. And if I'm not mistaken, and I'm not sure Mr. Kelly would be able to answer this, maybe he could, what the exact procedure once a permit is submitted and the EISF is submitted where it is actually documented that it has gone through that approval and therefore, the final permit can be issued.

MS. KAHLOW: Mr. Griffis, the reason why -

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- for this project, 1957 E Street, the DCRA errored and it was in our docket, which you have the BZA docket, by saying that GW projects were in the Central Employment Area instead of out and that=s why they=re in compliance.

CHAIRPERSON GRIFFIS: Well, your comment, you=re saying we have jurisdiction over DCRA=s errors?

MS. KAHLOW: You have to make sure that that particular provision in the order is complied with and we don=t have evidence that that Condition 12 has been applied for and what I was -- in my testimony which I had to skim over that part, there are three different levels of environmental forms.

CHAIRPERSON GRIFFIS: I understand that.

MS. KAHLOW: And the first one is what my guess what GW did, which is Environmental Intake Form.

Unfortunately, the regulations say that for projects over a million dollars that don=t meet the exception criteria and GW does not meet any of those, they need to do an Environmental Impact Screening Form. My guess is they have not done an EISF. They have only done an EIF and that=s why we want to see them.

CHAIRPERSON GRIFFIS: Well, if I read it literally --

MS. KAHLOW: We=re never going to get

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compliance if we don't see it.

CHAIRPERSON GRIFFIS: -- if we take out future campus construction projects and read literally Condition Number 12 and this will only go to the relevancy --

MS. KAHLOW: We have a contract from August 2001.

CHAIRPERSON GRIFFIS: Actually, it's probably better if I finish my thought here.

MS. KAHLOW: I'm sorry.

CHAIRPERSON GRIFFIS: What I need to establish is the relevancy to this appeal and if I read Condition Number 12, that the University shall comply with the DC Environmental Policy Act, then the only relevancy here is to produce a document that shows me compliance or non-compliance.

MS. KAHLOW: Right, and what I was looking for was the thing behind the summary letter, the EISF.

CHAIRPERSON GRIFFIS: But that's the application and what I need is approval or non-approval. I mean, basically, if I have a letter that says it has been reviewed, it seems that -- and it is approved, that that is complying with DC Environmental Policy.

MS. KAHLOW: Well, in the last case, this

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case, 1957 E Street, we had a similar letter saying you're fine and then we look behind the documents, we found that they had errored and said that they were in the CEA. I don't have the confidence that the other documents were submitted and were properly evaluated by DCRA. And since we have an August 2001 contract that we may have to proceed with --

CHAIRPERSON GRIFFIS: What would be -- here's maybe the clarification. If, in fact, that was the case for this particular case, what could this Board do if you actually found an error in the Environmental Form?

MS. KAHLOW: What I accept earlier is the for the future and we care deeply about the rest of the projects in this neighborhood including the old hospital site, that GW understand the process and go through like all other applicants the entire process.

CHAIRPERSON GRIFFIS: And I would agree with you 100 percent. I'm just not sure that we're the messenger for that.

MS. KAHLOW: Well, but if we saw that they actually had followed these -- my guess is they haven't, then we'd know that they didn't do it, because everything I've seen -- I've gone through the files. There's nothing in the files. I've read them all.

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CHAIRPERSON GRIFFIS: Okay, what I'll do is I'll accept a memo from you establishing why we would have submitted into the record the application for this particular project and we can get review and comments from the other participants and then let's move on at this point.

MS. KAHLOW: Okay. To your knowledge, has David Watts contacted anybody in DCRA about the compliance with this order?

MR. BARBER: Not to my knowledge.

MS. KAHLOW: Is GW -- does GW feel it's out of compliance with any provision in this order or any other orders that have been since August '01, such as the new hospital?

MR. BARBER: No, I think it's a bad question, but the answer is no.

MS. KAHLOW: I thought you were going to say something about it. No. What -- this is the question sort of off the wall. Since we're so frustrated here, what do you recommend is a way to get -- bring us together so that we can get the money not going to an existing homeless program that we have all been fighting over but get it to what's intended, the elderly and needy people in our neighborhood? How do we get this, since you haven't done your due diligence

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with the hospital? How do we do this? How do we move this along? What do you recommend?

CHAIRPERSON GRIFFIS: It=s way beyond the scope, but let=s have an answer.

MR. BARBER: And I object to say I haven=t done my due diligence. First of all, have a board meeting, you know, that=s step number 1, and get GW representatives back into the play and see if you can establish this food program by getting agreements and you can -- I can help you in approaching the hospital.

Get a plan, get a budget. You know, GW representatives we pick because they have certain expertise that may be able to assist you in this area.

Now, hopefully, it can be done in a timely manner, and if not, you can do it in time enough for the \$400,000.00 starting next August.

If it can be done quickly, it=s possible for -- to make use of the \$100,000.00 this year.

MS. KAHLOW: How do we move beyond the community=s feeling that you=re not complying --

CHAIRPERSON GRIFFIS: Okay.

MS. KAHLOW: -- with the Environmental Impact --

CHAIRPERSON GRIFFIS: I suggest you guys go have dinner and talk about that.

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MS. KAHLOW: Well, we=ve had such a frustration. You could --

CHAIRPERSON GRIFFIS: No, I understand your frustration believe me, and the problem is, no matter what comes out, no matter what Mr. Barber answers, it has no bearing and I can=t do anything to hold him to his words. I think that=s where there is gaining frustration with that.

MS. KAHLOW: So what we feel is that this is the only body that can hold to the letter of the order.

CHAIRPERSON GRIFFIS: Okay, and I have no question that the Board members participating today and those that give the transcripts to will fully understand your position.

MS. KAHLOW: Thank you.

CHAIRPERSON GRIFFIS: Okay, anything else?

MS. KAHLOW: No.

CHAIRPERSON GRIFFIS: Okay, Board members, any last questions of the witnesses that we=ve heard today or of the testimony of those right before us, clarifications? Okay, very well, I believe we had information that we were -- I=m sorry, yes. Absolutely forgive me. Nobody go anywhere. Mr. Barber, if you would stay seated.

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MS. ELLIOTT: Elizabeth Elliott, Chair, ANC-2A. I just had two questions. One is, the garages in this building actually are one contiguous garage; is that not correct?

MR. BARBER: I'm sorry, it's been some time since I looked at it. It may be but I just haven't looked at the plans recently.

MS. ELLIOTT: Well, according to the plans, there are -- the approved plans on this --

MR. BARBER: Okay.

MS. ELLIOTT: -- eliminated -- the Zoning Commission allowed you to eliminate and combine the two garages so that they're not two separate buildings and two separate garages.

MR. BARBER: All right.

MS. ELLIOTT: And then the other question I have, is there any place in this order that states that you should be doing this project in two phases or allows you to do this project in two phases?

MR. BARBER: It certainly doesn't prohibit it.

CHAIRPERSON GRIFFIS: Are we treading into new ground here?

MS. ELLIOTT: No, it's --

MR. BARBER: It's not something I testified

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on direct, I know that.

MS. ELLIOTT: Well, you testified that you -- we were talking about the Certificates of Occupancy on --

CHAIRPERSON GRIFFIS: Okay.

MS. ELLIOTT: -- these and that they're issued for various things. I'm just trying to clarify you know, why was this -- this was presented and granted in the hearings to the University as a one-phase project. In fact, it was supposed to be a two-phased project on the original PUD on this order and they combined it.

MR. BARBER: But your question was --

MS. KAHLOW: My question was, is there any place in this order that directs them to be able to do this in two phases as opposed to one building.

CHAIRPERSON GRIFFIS: Okay.

MS. ELLIOTT: Thank you.

MR. BARBER: I don't think it's addressed in this order. I think --

MS. ELLIOTT: Thank you, that's all I need to know.

CHAIRPERSON GRIFFIS: Okay. Anything else? Have I forgotten anybody? Very well, I think we need to establish the next date to continue this in which we

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will have -- we will begin with the ANC presentation. So let us look to available dates.

MS. PRUITT: January 14th is our first available date. It would be the second case of the afternoon.

CHAIRPERSON GRIFFIS: Okay, January 14th, second case in the afternoon, I would hear from those participants on the extreme possibility of not being present and I mean, extreme. That=s a capital E. I think it=s spelled with an E.

MS. PRUITT: I guess the other question is you had some issues or some information to be submitted.

CHAIRPERSON GRIFFIS: Yes, and I want to run through --

MS. PRUITT: If you could go through that with dates.

CHAIRPERSON GRIFFIS: Indeed, yes.

MS. ELLIOTT: Elizabeth Elliott, again, ANC-2A. I hate to put a sticky wicket in this but I will be stepping down as Chair of the ANC and I will no longer be on the ANC as of December 31st. We can prepare testimony and have someone else that will be serving on the ANC. I don=t know what that -- how that will be but we=ll have to take that up at a public

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meeting.

CHAIRPERSON GRIFFIS: Indeed, I think that=s for the ANC to decide. I would certainly hope that a representative of the ANC would be prepared and can be here to present the case and continue.

MS. ELLIOTT: Okay.

CHAIRPERSON GRIFFIS: I=m sure you=ve taken copious notes that you can continue on with that. Any other concerns regarding the 14th?

MR. BARBER: I=m sorry, I=m not clear on what the 14th is about. Are we continuing the case or is that a meeting decision?

CHAIRPERSON GRIFFIS: Oh, no, it=s a continuation of the case.

MR. BARBER: Okay.

CHAIRPERSON GRIFFIS: We just have to have -- we have the ANC. If they -- to afford them the opportunity to present a case.

MR. BARBER: I see.

CHAIRPERSON GRIFFIS: And then we have the conclusions and rebuttal witnesses.

MR. BARBER: I see. I understand, thank you.

CHAIRPERSON GRIFFIS: Anything else, any concerns on the date? Okay, let=s go through what we

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had asked to have submitted into the record.

MS. BAILEY: Mr. Chairman, the information that I have is that George Washington is to provide information on the website that has been established in relationship to the site. Ms. Barbara Kahlow is to show why the Environmental Impact Screening Forms are to be submitted in the file and the last thing that I have, and I think this was submitted, I was out of the room, but the ZA is to provide letters indicating that George Washington University is in compliance with the DC Environmental Policy Act and I believe those documents were submitted, so there=s only two outstanding items.

CHAIRPERSON GRIFFIS: That=s correct, and if I=m not mistaken, we had letters from the ZA, oh, from David Clark. Oh, I see, all right. I think we=re talking about the same thing. Is that correct?

MS. BAILEY: Right.

CHAIRPERSON GRIFFIS: Okay, very good, then is that -- yes.

MS. KAHLOW: One other thing I was asked to provide instead of the entire file from the old appeal, only the two orders the BZA did and the agreement.

CHAIRPERSON GRIFFIS: Right. Yes, Mr. Feola.

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MR. FEOLA: I'm sorry, I may be ahead of the game, the dates for filings and responses?

CHAIRPERSON GRIFFIS: Right.

MS. PRUITT: We are --

CHAIRPERSON GRIFFIS: Before we ask that question again, why don't we let staff tell us the dates for filing, that's -- if I could keep everyone's attention just for a few more minutes, we will get through this.

MS. PRUITT: We are going to continue this hearing to January 14th, the second case in the afternoon, we'll start with the ANC, and the dates -- excuse me?

CHAIRPERSON GRIFFIS: Her mike is on. Let's continue, please.

MS. PRUITT: And the dates for filing would be December 31st and if there is any response we would like it the following week, which then, let me give you an exact date on the calendar. It would be December 7th (sic). So submission would be due on the 31st with any responses on the 7th.

CHAIRPERSON GRIFFIS: Of January.

MS. PRUITT: January, yes.

MS. KAHLOW: May I ask you a question? Is there an ANC report in the record? I have not received

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one.

CHAIRPERSON GRIFFIS: No.

MS. BAILEY: No, we do not have a copy of an ANC report.

CHAIRPERSON GRIFFIS: Okay, is that clear, is that covered? Everyone is comfortable with what is coming into the record. We have not missed anything at this point. Seeing no indication that we may have, I wish you all a great evening. Get home, get warm and we=ll see you next year.

(Whereupon, at 6:22 p.m. the above-entitled matter concluded.)

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