

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

JANUARY 28, 2003

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice, at 11:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

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BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
ANNE MOHNKERN RENSHAW	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
DAVID ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

CAROL MITTEN	Commissioner
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COMMISSION STAFF PRESENT:

Beverly Bailey	Office of Zoning
Clifford Moy	Office of Zoning
John K.A. Nyarku	Office of Zoning

OTHER AGENCY STAFF PRESENT:

Karen Thomas	Office of Planning
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D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, Esq.
Corey Buffo, Esq.
Alan Bergstein, Esq.

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P R O C E E D I N G S

Time: 11:30 a.m.

CHAIRPERSON GRIFFIS: Let me call to order on January 28, 2003, the Public Hearing of the Board of Zoning Adjustment for the District of Columbia. My name is Geoff Griffis. I am the Chairperson. Joining me is the Vice Chair, Ms. Anne Renshaw, also Board Member Mr. Etherly who is on his way out; Mr. Zaidain representing the National Capital Planning Commission; and representing the Zoning Commission will shortly be with us, Ms. Mitten.

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.

A few things of particular note: Please be advised that all these hearings are being recorded.

Therefore, we ask that people do several things: First of all, refrain from any disruptive noises or actions in the hearing room. Also, when coming forward to speak to the Board, you will need to come and sit at the table. The microphone will need to be on, and you need to fill out two witness cards.

Witness cards are provided to you at the table in front of us and also at the table as you entered into the hearing room. Upon coming forward,

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1 you can deliver those two witness cards to the
2 recorder, who is sitting to my right.

3 The order and procedures for today's
4 Public Hearing for the variances and special
5 exceptions will be as follows. First, we will have
6 statement and witnesses of the Applicant. Second, we
7 will hear from any government agencies giving reports
8 attendant to the applications. Third will be the
9 reports from the Advisory Neighborhood Commission.
10 Four would be parties or persons in support of the
11 application. Fifth would be parties or persons in
12 opposition, and sixth finally, we would have closing
13 remarks by the Applicant.

14 Cross-examination of witnesses is
15 permitted by the Applicant and parties. The ANC
16 within which the property is located is automatically
17 a party in the case.

18 The record on all cases will be closed at
19 the conclusion of each hearing except for any material
20 that this Board specifically requests, and we will be
21 very specific on what is to be submitted into the
22 record and when it is to be submitted into the Office
23 of Zoning. After that material is received, of
24 course, it goes without saying that the record would
25 then finally be closed, and no other information would

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1 be accepted into the record.

2 The Sunshine Act, which requires us to
3 have Public Hearings on each case and have them held
4 in the open and before the public, we definitively
5 follow. However, the Board may, consistent with its
6 rules of procedure and the Sunshine Act, enter
7 executive session during or after a hearing on each
8 case, and this is for purposes of reviewing the record
9 or deliberating on a case.

10 The decision of the Board in contested
11 cases must be based exclusively upon the public record
12 and, therefore, we ask people present today not engage
13 members of the Board in conversation, so that we do
14 not give the appearance that we are not, in fact,
15 basing all of our deliberation on the public record.

16 I would ask at this point that everyone
17 turn off any cellphones or beepers at this time so
18 that we don't have additional disruptions of the
19 hearing, and the Board can now review and consider any
20 preliminary matters attendant to the cases.

21 Preliminary matters are those which relate
22 to whether a case will or should be heard today, such
23 as requests for withdrawal or continuance or whether
24 proper and adequate notice has been provided for each
25 of the cases.

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1 If you are not prepared to go forward with
2 a case today or if you believe the Board should not
3 proceed, now is the time to raise such a matter. I
4 will take as an indication of preliminary matters if
5 people approach the table in front of us.

6 I will ask the staff if they have any
7 preliminary matters for us at this time, and I would
8 also say good morning to our able Office of Zoning
9 staff that is with us: Mr. Moy, Mr. Nyarku who is in
10 and out, and Ms. Bailey; also Corporation Counsel Ms.
11 Monroe who is with us today.

12 MS. BAILEY: Mr. Chairman, members of the
13 Board, good morning. There is two preliminary matters
14 -- well, actually one. It has to do with the
15 withdrawal of two cases.

16 CHAIRPERSON GRIFFIS: Very well.

17 MS. BAILEY: Application Number 16814,
18 Marta Sotomayor Revocable Trust, and in addition,
19 Harry L. Belin, Application Numbers 16971 and 16814.
20 Both of those applications were withdrawn, Mr.
21 Chairman.

22 CHAIRPERSON GRIFFIS: Good. Thank you
23 very much. They are withdrawn, and no action from the
24 Board is needed. Is that right?

25 MS. BAILEY: Absolutely.

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1 CHAIRPERSON GRIFFIS: Good. Thank you.

2 MS. BAILEY: That is all the preliminary
3 matters that staff has at this point.

4 CHAIRPERSON GRIFFIS: Very well. Not
5 seeing anyone approach the Board, I think we can call
6 our first case of the morning then.

7 MS. BAILEY: Application Number 16972 of
8 John S. and Vinnie J. Best, pursuant to 11 DCMR ?
9 3103.2, for a variance from the use provisions under
10 subsection 201.1, to allow office use on the first
11 floor in the R-1-B District at premises 3629 18th
12 Street, N.E. (Square 4202, Lot 204).

13 All those persons wishing to testify,
14 would you please stand to take the oath? Please raise
15 your right hand.

16 Do you solemnly swear or affirm that the
17 testimony you are about to give in this proceeding
18 will be the truth, the whole truth, and nothing but
19 the truth?

20 (Witnesses sworn.)

21 MS. BAILEY: Applicant, would you please
22 have a seat at the table?

23 Mr. Chairman, upon review of the record,
24 all preliminary matters have been addressed. In
25 addition to that, all the posting requirements have

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1 been met, and the application is now ready to go
2 forward.

3 CHAIRPERSON GRIFFIS: Good. Thank you
4 very much. Good morning. I am going to ask also,
5 when you do address the Board, just one time that you
6 would introduce yourself with your name and your
7 address.

8 MR. BEST: My name is John S. Best. My
9 address is 1801 Otis Street, N.E.

10 MS. BEST: My name is Vinnie J. Best. My
11 address is 1801 Otis Street, N.E., Washington, D.C.

12 CHAIRPERSON GRIFFIS: Good. Thank you
13 very much. Let me turn it over to you for the
14 presentation of your case.

15 MR. BEST: Yes, and thank you. My wife
16 and I had, back, I think, in 1990, purchased a
17 building, and within that building was an space that
18 had been used by the church and had been prior --
19 previously used as a barber shop and, I think, a
20 beauty salon, and we used that facility as a rental
21 office, and I was advised as a matter of right we had
22 the ability, since it was contiguous space. However,
23 we also owned a sightseeing tour company and a bus
24 company that we have operated for almost 22 years,
25 starting in 1979.

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1 We at that time applied for variance use
2 because at some point, in trying to apply for C of O,
3 it indicated that it expired. There was no records of
4 it. But in any event, we did apply. We went before
5 the ANC at the time. We got a petition at the time,
6 and our request, I think -- and we had a hearing in
7 January of 1991, and in March of 1992. At that
8 hearing we were granted a variance for this particular
9 use.

10 At that point, after going through really
11 what we went through to get this variance approved, we
12 continued to call. At that time the office was
13 located at the District Building. We continued to
14 call two months, three months, six months, until we
15 were told don't call us, we'll call you.

16 Of course, somewhere in the interim our
17 company continued to operate, waiting on this
18 particular variance. I didn't call, and of course, we
19 did relocate.

20 Our office went down into the tourist
21 district on 15th Street across from the White House.
22 We stayed there two or three years and, of course, I
23 must say, thank God, prior to September 11 we
24 relocated back to the neighborhood, because it was
25 really not a profitable situation for us. It was

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1 really a losing proposition for my wife and I to be
2 down there.

3 So we moved back. When I went to research
4 this particular -- trying to resurrect this zoning and
5 this application and the master business license and
6 trying to really be completely proper in all that we
7 do as business people, I was told that I was supposed
8 to receive a letter in October of 1992, which is
9 something like 18 months later. I never recall
10 receiving any such letter.

11 In any event, we was told because of the
12 regulations, the statute, the six months had expired.

13 So we would have to go through this process again.
14 Of course, that's exactly what we have done. Nothing
15 has changed.

16 My wife and I live in the building, a very
17 short commute. So we are glad to be there. We are
18 glad to be in the community. I have served as the ANC
19 in that particular community. My term just expired
20 December 31st of last year, and I just elected not to
21 -- to let someone else to carry on that function, but
22 I am very much involved.

23 So we are here before you today asking
24 that this variance be approved. Some concerns the
25 community have expressed was regarding our buses. We

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1 park our buses at Peter Pan bus lot in Tuxedo,
2 Maryland.

3 In our business, we send a tour guides to
4 a hotel. We send a bus to the hotel. You do a
5 sightseeing tour of the city, and that's it. You
6 never see us, really, as operators.

7 We do, during summer months, have -- we
8 hire students sometimes, and we may hire another
9 worker from the community to come in and work with us
10 whenever the business gets up a little bit. It's
11 seasonal. But basically, that is our program in that
12 building.

13 We live in the building. We are very much
14 a part of the community. We would never do anything
15 that would disrupt or interfere with the integrity of
16 that community. So we are here to ask that you grant
17 us the variance request.

18 CHAIRPERSON GRIFFIS: Good. Thank you
19 very much. A couple of points of clarification. You
20 are here for a use variance. So I think -- and there
21 has been some submission, but you might want to take a
22 moment just to talk about what the hardship is in
23 being able to not use this in a matter of right
24 manner.

25 MR. BEST: Well, in a matter of right it

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1 is basically -- it was a real vacant room that was
2 beside the church when I moved there. It has only a
3 half-bath. It could never be used for anything. It
4 has its own private entrance. It has a entrance
5 through the church out. But as a matter of use, it
6 just was a roughly 14 by 38 building, very sizable.

7 It once had a storefront to it, and that
8 has been enclosed. When we looked at it, we thought
9 we could -- I mean, as a matter of right we could have
10 used it as a rental office, but we knew we would be
11 doing more than a rental office in there.

12 That was the reason why we thought at some
13 point that we could use it for anything else. There
14 was really literally nothing else it could be used
15 for.

16 CHAIRPERSON GRIFFIS: Okay. So your
17 indication is, and also in the submission, that there
18 is a specific uniqueness, first of all, that this
19 building was built in 1936. Is that correct?

20 MR. BEST: Yes, sir.

21 CHAIRPERSON GRIFFIS: It was built and, in
22 fact, could not be built as it is currently with the
23 current zoning regulations. Is that correct?

24 MR. BEST: That's correct.

25 CHAIRPERSON GRIFFIS: Okay. And it was,

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1 in fact, built as a storefront. I mean, that's what
2 you have just said?

3 MR. BEST: It was a barber shop and a
4 beauty salon at one point.

5 CHAIRPERSON GRIFFIS: Okay. So originally
6 intended, that's what it was constructed for, and with
7 our new regulations -- and what you are indicating is
8 that there is no matter of right use that you could
9 put into that as anything would take some sort of
10 variance with our current regulations.

11 MR. BEST: That's correct.

12 CHAIRPERSON GRIFFIS: Okay. Questions
13 from the Board?

14 MEMBER ETHERLY: Very quickly, Mr.
15 Chairman. And the unit itself doesn't have a restroom
16 or any type of kitchen facility or anything along
17 those lines?

18 MR. BEST: It has a half-bath.

19 MEMBER ETHERLY: Just a small half-bath?

20 MR. BEST: But no kitchen, no structure or
21 no -- In other words, you could not use it as
22 residential.

23 CHAIRPERSON GRIFFIS: Are there windows
24 along the exterior wall outside of the entrance?

25 MR. BEST: Exterior.

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1 CHAIRPERSON GRIFFIS: But you have the
2 primary facade where you enter into that area. Right?

3 MR. BEST: Yes, right at that site where
4 the building is, that's the only window.

5 CHAIRPERSON GRIFFIS: And then on the --
6 Oh, it's actually attached to the building next to it,
7 isn't it?

8 MR. BEST: Yes.

9 CHAIRPERSON GRIFFIS: So, actually, it
10 probably wouldn't even make a legal residential unit.
11 I don't know that definitively, but -- Okay. Other
12 questions?

13 VICE CHAIRPERSON RENSHAW: Yes. Mr. Best,
14 the Office of Planning report will cite that this does
15 not have adequate heating facilities. How are you
16 going to manage during the winter? With space
17 heaters?

18 MR. BEST: Well, maybe not your radiators,
19 but across the top, and we have operated there --
20 across the top is the radiator pipes go all the way
21 across that particular unit, because it was
22 commercial. Really, it supplies more than enough
23 heat. I mean, it's a huge -- radiators go across the
24 whole unit, and it's up and near the wall. It's out
25 of the way. It's almost like a radiator in your

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1 ceiling rather than on your floor.

2 VICE CHAIRPERSON RENSHAW: Glad you
3 explained it. Sounds like something I need.

4 CHAIRPERSON GRIFFIS: Ms. Mitten, did you
5 have questions?

6 COMMISSIONER MITTEN: I just had a brief
7 question, which is, you know, your argument seems to
8 turn on the fact that the space doesn't have any other
9 use. Yet you said that the church had been using it
10 for a number of years.

11 MR. BEST: Well, they didn't really use
12 it. It was like an ante-storage room. They just had
13 stuff stored in it. I mean, it was stuff all kind of
14 laid everywhere. When I purchased the building, of
15 course, the church moved, because I purchased the
16 church from the pastor and the church. That was
17 there, and he was like using it -- It was his
18 building. He was just using that off to the side.

19 Once I purchased the building, I didn't --
20 it just didn't appear to -- In other words, there
21 could be better use of that building for that
22 particular such space as a rental office, even if I
23 didn't even use it for my tour company.

24 Since I was going to be in the building, I
25 wanted somewhere where my tenants could come, packages

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1 could be left, rent could be dropped off, and I was
2 told as a matter of right, because it's all part of
3 one building, you could use it for that purpose. But
4 the church never really used it. They just used it as
5 storage. Their gowns and stuff was back there,
6 chairs, folding chairs, but no real practical use.

7 MEMBER ZAIDAIN: And to your knowledge,
8 nobody was using it as a residence. Correct?

9 MR. BEST: Beg your pardon?

10 MEMBER ZAIDAIN: Nobody was using it as a
11 residence?

12 MR. BEST: No, it's never been used as a
13 residence.

14 COMMISSIONER MITTEN: And since you have
15 owned the property, has it been in the same -- the
16 configuration of the space, is it the same
17 configuration?

18 MR. BEST: Same configuration.

19 COMMISSIONER MITTEN: All right. Thank
20 you.

21 MR. BEST: I would note for the record
22 that in reading the Office of Planning report, it
23 indicated a limitation of two employees, but my
24 original application was approved for four employees,
25 because it's about roughly 540 square feet. I

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1 indicated my wife and I basically work there.

2 I spoke with Ms. Thomas regarding this.
3 She might want to speak to that. But I am requesting
4 that limitation on employee would be the original four
5 instead of the two.

6 VICE CHAIRPERSON RENSHAW: Is that in
7 addition to both of you?

8 MR. BEST: No, two in addition to us.

9 VICE CHAIRPERSON RENSHAW: Two in addition
10 to you two.

11 CHAIRPERSON GRIFFIS: And those would all
12 be attendant to the tour group, tour business?

13 MR. BEST: Well, more than likely, yes,
14 because my wife and I handle the tenants.

15 CHAIRPERSON GRIFFIS: Right. And then
16 it's an interesting piece. Do we separate essentially
17 the combined use that might go into this from the
18 rental apartment attendant, which is an accessory use
19 to the apartment building, and the tour group? I
20 don't know if your employees would break out that way.

21 COMMISSIONER MITTEN: Well, on that point,
22 I mean, I think that makes the argument about the fact
23 that there is no other use of the space even a harder
24 threshold to meet, because, in fact, Mr. Best is
25 saying he could use it for a rental office and, in

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1 fact, he will, and he wants to use it for something
2 more than that.

3 So the idea that it doesn't have an
4 alternative use -- It has at least an alternative use
5 as a rental office, which in fact it will be.

6 CHAIRPERSON GRIFFIS: Yes, and I see your
7 point. That is a good one. Where I'm stuck is that
8 we are looking at the use as an office, and now being
9 required to go specifically into what company and what
10 is attendant to it. I guess that is really what we
11 need to be able to address.

12 For one, I guess, stepping back, common
13 sense which may be a good place to start with all
14 these -- it doesn't seem to make common sense where
15 you could have the owner of the building that actually
16 lives in the building that has two businesses not be
17 able to use one specific space for both. Is there
18 additional harm? Is there additional detriment of any
19 sort? Would you even notice the difference?

20 Clearly, we don't have the buses pulling
21 up. But that doesn't definitively address everything
22 that Ms. Mitten has brought up.

23 While we digest that, I think the other
24 significant piece to creating the hardship on this is
25 you look at the plants that were submitted. My first

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1 thought when looking at this was, well, why not attach
2 this into a part of the building that is compliant in
3 use?

4 Clearly, this is fairly isolated with
5 quarters and the furnace room, etcetera. Yes, Mr.
6 Zaidain?

7 MEMBER ZAIDAIN: I was just going to try
8 to make sure I get some clarification on Ms. Mitten's
9 point. You know, in terms of usage that you trying to
10 use this for as a rental office -- two different types
11 of offices or -- I just want to make sure I'm clear on
12 where you are going.

13 COMMISSIONER MITTEN: I think what Mr.
14 Best is trying to express as the reasoning why he
15 needs the variance is because there is no, I believe
16 he said, practical alternative use for the space, when
17 in fact one of the uses -- Well, there is one use
18 which may be impractical, which is storage.

19 MEMBER ZAIDAIN: Right.

20 COMMISSIONER MITTEN: And then there's
21 another use, which is not impractical, which is rental
22 office, because that is permitted as an adjunct use to
23 the apartment building. In fact, that is one of the
24 uses that they will make of the office space, but they
25 don't need a variance for that.

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1 MEMBER ZAIDAIN: Which don't they need a
2 variance for?

3 COMMISSIONER MITTEN: Rental office.

4 MEMBER ETHERLY: Pursuant to the
5 apartments.

6 MEMBER ZAIDAIN: Oh, okay. Because it
7 would be part and parcel of the apartments.

8 COMMISSIONER MITTEN: It's an adjunct use
9 for the apartment house. So then the question --

10 MEMBER ZAIDAIN: Okay. So that's why the
11 fact that it's a rental office differentiates a
12 general office.

13 COMMISSIONER MITTEN: Yes.

14 MEMBER ZAIDAIN: Oh, okay.

15 COMMISSIONER MITTEN: So then there's the
16 question of can they meet their burden of proof, given
17 that there in fact is an alternative practical use
18 that can be made and will be made of the space.

19 MEMBER ZAIDAIN: Okay. It's my
20 understanding, and this is a general question for
21 anyone, but this use was grandfathered when zoning
22 took effect, and when the applicant maintained or got
23 possession of the property and went to get a C of O
24 for an office use, that's when they were sent here for
25 the variance. Is that correct?

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1 CHAIRPERSON GRIFFIS: No, actually not.
2 If you look at some of the information that we have
3 been provided, there is the history of the zoning with
4 this. There's numerous cases. In fact, in 1953 there
5 was a change to nonconforming use from beauty shop to
6 a clerical office.

7 MEMBER ZAIDAIN: Which submittal are you
8 looking at?

9 CHAIRPERSON GRIFFIS: In 1962, the change
10 in nonconforming use from a beauty shop to a barber
11 shop.

12 MEMBER ZAIDAIN; I guess my first question
13 is did I receive that?

14 CHAIRPERSON GRIFFIS: In 1959, to change a
15 nonconforming use from a tailor shop and laundry
16 agency to a beauty shop.

17 MEMBER ZAIDAIN: And you are listing BZA
18 actions?

19 CHAIRPERSON GRIFFIS: And these were all
20 granted.

21 MEMBER ZAIDAIN: Oh, okay. Okay, well,
22 thank you.

23 CHAIRPERSON GRIFFIS: In 1973 -- I can't
24 see that one.

25 MEMBER ZAIDAIN: Oh, okay. Yes, I don't

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1 remember ever seeing this in my folder. Okay. So
2 basically, this has had a long history of changes in
3 use, and every time they have -- as it is a
4 nonconforming -- a legal nonconforming use. Every
5 time it changed, they had to come back here for a
6 variance. Okay.

7 CHAIRPERSON GRIFFIS: Then 1992 is the
8 last case where this was heard, which was the variance
9 from use provisions to allow the office use on the
10 first floor, and that is the one that actually expired
11 without a C of O. So we are essentially rehearing
12 that.

13 MEMBER ZAIDAIN: Well, Ms. Mitten brings
14 up an interesting point on how this can be used as a
15 rental office because of its relationship to the
16 apartments above, but I guess my question is a
17 practical one. What is the difference in impacts
18 between a rental office and what the Applicant is
19 proposing?

20 I mean, obviously, I see the point with
21 the regulations, but from a practical planning
22 standpoint, what's the difference? That's a general
23 question for anybody. Maybe that's a rhetorical
24 question. I don't know.

25 CHAIRPERSON GRIFFIS: It's well said, and

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1 that's what I was trying to raise. That is the kind
2 of common sense aspect to look at.

3 MEMBER ZAIDAIN: Right.

4 CHAIRPERSON GRIFFIS: The other factor to
5 put in that, which is specific with this case, is that
6 in an R-1-B zone this building could not be built and,
7 therefore, an apartment building wouldn't be there.
8 So an accessory use would not be a rental office.

9 So we are actually looking at something
10 that couldn't exist, which just again puts some
11 boundary on it. But I think Ms. Mitten -- she can
12 very well speak for herself, but what she's saying is
13 that part of making the test for a use variance is to
14 show that there is no other practical use there or
15 there's an undue hardship that is created, because you
16 are forced to put this use in. Is that correct?

17 COMMISSIONER MITTEN: That was very well
18 said. If I could just say, you know, the test -- the
19 burden of proof for a variance is a progressive one.
20 You meet the first test and move to the second and
21 move to the third, and you have sort of jumped ahead
22 to the third and go what's the difference. But you
23 have to meet the first two tests in order to get to
24 that point.

25 MEMBER ZAIDAIN: Right. I understand.

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1 COMMISSIONER MITTEN: Okay.

2 CHAIRPERSON GRIFFIS: Okay. Any other
3 questions of Mr. Best at this time? Is there anything
4 else you want to present?

5 MR. BEST: I guess I would just say that
6 there would be practically, really, no different
7 impact, whether I run a FAX machine for a tenant or a
8 FAX machine with tourists. It's essentially the same
9 operation.

10 As a matter of fact, I was at one point
11 counseled not to even pursue this route, but I thought
12 you never know. It's best to do it the proper way.

13 MEMBER ZAIDAIN: And just to make sure I'm
14 clear on your operation, none of the travel vehicles
15 come or the tours vehicles come to you?

16 MR. BEST: No.

17 MEMBER ZAIDAIN: Secondly, you are not the
18 agency -- you are not the operation that runs the
19 boats that run around Capitol Hill, are you?

20 MR. BEST: No, sir.

21 MEMBER ZAIDAIN: I'm kidding. That has
22 nothing to do with what we are doing here. It's a
23 joke.

24 CHAIRPERSON GRIFFIS: Okay.

25 VICE CHAIRPERSON RENSHAW: Just a question

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1 about your office arrangement. The church is still on
2 the corner?

3 MR. BEST: On the corner.

4 VICE CHAIRPERSON RENSHAW: And there is
5 also a one-bedroom apartment on the other side of the
6 church?

7 MR. BEST: We live in that apartment.

8 VICE CHAIRPERSON RENSHAW: That is the
9 one? Then you are the right people to ask, maybe the
10 wrong people to ask whether there is adequate
11 soundproofing from the ante-room that would be used as
12 this general rental office space and the church.

13 MR. BEST: Well, we have owned this
14 building. The church had been there as long as we
15 have owned it, since 1990, and really, the church is
16 only there in the evenings and Sundays, and we sort of
17 make it -- we don't plan anything around when the
18 church is there.

19 Really, it is something that I think the
20 neighbors -- It's kind of an interesting thing, but
21 they enjoy the fact that the church is there. Some of
22 the tenants even attend, and I know I go when they
23 have good gospel music. So it's a good -- kind of a
24 good arrangement.

25 The church respects the tenants and

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1 realizes that they are still residents, and they don't
2 do certain things after certain hours. This is part
3 of the agreements we entered into before I even lease
4 it to let them know that, you know, we got to coexist
5 here, and some people say, well, we'd rather for it to
6 be a church than a tavern.

7 VICE CHAIRPERSON RENSHAW: Could I ask you
8 a question about your petition that you submitted?
9 It's Exhibit Number 10, and you have 18 signatures on
10 this. You have those in units 2, 3, 5 having signed
11 this. That's not everyone in your building. How
12 about the other tenants?

13 MR. BEST: Well, is that the petition from
14 1992?

15 VICE CHAIRPERSON RENSHAW: Well, let's see
16 what it is. Is it dated? I don't see a date.

17 MR. BEST: I didn't prepare a petition for
18 this particular hearing.

19 VICE CHAIRPERSON RENSHAW: It's this one.

20 MR. BEST: I received calls from tenants
21 asking did they need to submit letters from the
22 community when I sent my labels out. And being a
23 commissioner, everybody was familiar with me. They
24 called me and asked did they need to do anything in
25 support, and I --

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1 VICE CHAIRPERSON RENSHAW: I wonder about
2 that. There doesn't seem to be a date on it, but
3 there are differences in the tenants matching. For
4 instance, Unit 3 that signed, which is -- I can't read
5 the writing, but it's not the same as the Unit 3 on
6 the tenant list.

7 MR. BEST: Was it Ms. Tobe? The current
8 tenant is Ms. Hawkins. That was Ms. Tobe back in
9 1992. She purchased a home and moved on.

10 VICE CHAIRPERSON RENSHAW: Perhaps it is
11 an old list, but in any case undated.

12 CHAIRPERSON GRIFFIS: Did you happen to
13 look at any other options of pursuing this?

14 MR. BEST: In terms of?

15 CHAIRPERSON GRIFFIS: I wonder if this --
16 I'm not sure what the implication is. I don't think
17 we need to go too far into this, but looking at it
18 essentially as a home based operation rather than an
19 independent commercial operation. But I don't know.
20 If someone can give some clarification on that, so be
21 it.

22 Otherwise, let's continue with this. If
23 there is nothing further you want to provide at this
24 time --

25 MR. BEST: Well, I would say that one of

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1 the things that really prompted this is the new
2 requirements for a master business license in terms of
3 making sure that -- At one point, you know, even my
4 company, you didn't need a -- I had my WMATC, my DOT
5 and my ICC, but there wasn't a city license that you
6 had to have.

7 In order to get that license now, you need
8 to have a C of O, and I don't know if I could get that
9 C of O just using it as a rental office for my
10 company.

11 CHAIRPERSON GRIFFIS: I see. The point of
12 that is for the master business license you need an
13 office address?

14 MR. BEST: Yes.

15 CHAIRPERSON GRIFFIS: Okay. Let's
16 continue down with this and go to the Office of
17 Planning. We will give you an opportunity to respond
18 to the information submitted and then to give
19 conclusion at the end of this.

20 Let's go to the Office of Planning then.

21 MS. THOMAS: Good morning, Mr. Chairman,
22 members of the Board. I am Karen Thomas of the Office
23 of Planning, reviewing the Applicant's request for
24 variance relief from the use provisions of Section 201
25 for general office use in an R-1 residence zoned

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1 district.

2 The Applicant proposes to use the subject
3 property as general office space. The Applicant
4 purchased the apartment building in 1991, and the unit
5 at 3629 18th Street was used as an ante-room for the
6 church.

7 The Applicant applied for and was granted
8 a use variance for office space at the subject
9 location per BZA Order 15605 dated March 4, 1992.
10 They are requesting reinstatement of the order to
11 include general office space.

12 Under the zoning regulations, however,
13 offices are not allowed as a matter of right in the R-
14 1-B district. Grant of a use variance requires
15 showing that strict compliance with the zoning
16 regulations will create an undue hardship upon the
17 owners in their efforts to make reasonable use of the
18 property.

19 Thus, OP applied the following test: That
20 a property is unique by reason of its exceptional
21 narrowness, shallowness, shape, topography or other
22 extraordinary or exceptional situation or condition.

23 The subject property predates the 1958
24 zoning regulations and was originally constructed as a
25 storefront. Measuring 13 by 38 feet, it is undivided

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1 by any interior walls and abuts the church located on
2 the first floor of the building.

3 The space does not have the amenities
4 typical of other residential units in the building,
5 including a kitchen, full bath or adequate heating
6 facilities. These physical characteristics make the
7 property unique and difficult to use for use as any
8 other dwelling or use which complies with the
9 regulations.

10 By reason of the aforementioned unique and
11 exceptional condition, strict application of the regs
12 will result in a peculiar or practical difficulty upon
13 the owner of the property.

14 The eight-unit apartment building is a
15 nonconforming use in this zone. OP believes that the
16 space is inappropriate for other allowed uses, and its
17 unique size and lack of amenities prevent compliance
18 with the strict application of the zoning regs. The
19 Applicant, therefore, would suffer undue hardship to
20 convert the space into a single family detached
21 dwelling or any other residence.

22 The variance as such will not cause
23 substantial detriment to the public good and will not
24 impair the intent and integrity of the zone plan. The
25 use of the unit as office space, however, is not

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1 incompatible with the use of the building,
2 particularly since the space has been previously been
3 used for other operations which could have conceivably
4 brought more pedestrian and vehicular traffic into the
5 neighborhood than is currently proposed.

6 The Applicant's proposed use as a general
7 office space for the building with no more than four
8 employees -- We would like to amend our report to
9 include four employees. That was a misstatement on
10 our part. -- with no more than four employees would
11 only have a minimum impact on the surrounding
12 residential neighborhood.

13 OP believes that, since the subject
14 property cannot be used as zoned, granting relief will
15 not impair the intent, purpose, and integrity of the
16 zoning plan.

17 In summation, since the unit has been
18 previously used for a variety of commercial uses, and
19 the proposed use is minimal in comparison to previous
20 uses, based on the evidence of record, OP finds no
21 change to the Board's previous finding of fact and its
22 original order, including: The subject property unit
23 has never been used for residential purposes; the unit
24 does not contain a full bathroom or kitchen. It
25 cannot be converted into a single family residence or

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1 used as a church, and the operation of the business
2 will create minimal activity at the site.

3 OP recommends that the Board approve the
4 variance request on condition that there will be no
5 commercial vehicles parked at the site, there will be
6 no more than four employees, and that the use shall be
7 limited to 3629 18th Street in its current size.
8 Thank you.

9 CHAIRPERSON GRIFFIS: Thank you very much.

10 Any questions from the Board of the Office of
11 Planning on their report?

12 COMMISSIONER MITTEN: I just wanted to put
13 the question regarding the alternative use of the
14 space as a rental office to Ms. Thomas, and ask if you
15 considered that when you determined that the owner had
16 a practical difficulty in using the space for any
17 permitted use?

18 MR. THOMAS: We realize that he could use
19 it as just a rental office, but we looked at it as
20 what would be the difference if all conditions remain
21 the same and he wasn't going to use it -- he wasn't
22 going to be bringing traffic to the site or any other
23 egregious use to the neighborhood, what would be the
24 differences in having him use the same equipment in
25 his office for his private business, which he could

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1 have done without even coming before the Board.

2 So the case before us was the general
3 office. Yes, we did look at it as it could be used as
4 a rental office as a practical use, but he could have
5 used it in any event without public knowledge for
6 other use.

7 COMMISSIONER MITTEN: Well, if I could
8 just get you to look at your report on page 3, and you
9 seem to be justifying the office use based on the
10 third prong of the test. If I could just get you to
11 go up to letter B, which is the second prong of the
12 test, and the last sentence in that section says OP
13 believes that the Applicants would suffer undue
14 hardship to convert the space into a single family
15 detached dwelling or any other residence, which I
16 would agree with that. But that's not the only use
17 that is available to them.

18 So in meeting the second prong of the
19 test, not the issue of whether or not it causes any
20 adverse conditions in the community but whether or not
21 they meet the test, it seems that perhaps you didn't
22 address the alternative use as a rental office,
23 because then you wouldn't be able to draw the
24 conclusion that they would suffer undue hardship,
25 because they, in fact, have a use that they could put

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1 the space to.

2 MS. THOMAS: That's correct in that
3 regard.

4 VICE CHAIRPERSON RENSHAW: Would you go
5 over your points again about home occupation? I think
6 you mentioned it. Why couldn't this just be a home
7 occupation, an office for a home occupation?

8 MS. THOMAS: Did I mention home
9 occupation?

10 VICE CHAIRPERSON RENSHAW: I thought you
11 did.

12 CHAIRPERSON GRIFFIS: Let me take that up,
13 because I'm prepared to actually argue that this
14 doesn't even have to be here. I would draw the
15 Board's attention to Section 203, which is the home
16 occupation in R-1.

17 The purpose of the home occupation
18 provision shall allow a home occupation as accessory
19 uses to residential uses, provided they are compatible
20 with the residential neighborhood in which they are
21 located. The intent is to protect residential areas
22 from adverse effects of activities associated with
23 home occupations.

24 First of all, a matter of right
25 occupations -- you would need a permit, of course. We

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1 can run down all these, and it's outlined for -- Well,
2 let me go directly to then 203.7 which is the
3 following uses shall be allowed as home occupations,
4 and there are an extensive amount, including dentist
5 and doctors' offices.

6 I would point everyone's attention to (1)
7 203.7(1), which is home office of a business person,
8 salesperson or manufacturer's representative, provided
9 the dwelling is not used as a gathering point for
10 workers who are on their way to another work site.

11 It seems to me that you fall into that
12 provision. Is that correct?

13 MR. BEST: Well, I have had a home
14 occupation permit when I lived at 2615. So I am
15 familiar with that. But my understanding was my home
16 is at 1801 Otis Street, Apartment 1. This address is
17 3629 18th Street.

18 CHAIRPERSON GRIFFIS: Right, which then
19 lends itself -- and I think the issue would have to be
20 that it would have to be some physical connection
21 between this and your residential unit. Is there a
22 physical connection?

23 MR. BEST: It's the same connection any
24 other tenant has in that building, the hallway. But
25 there is no walking out of my unit directly into this

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1 address.

2 CHAIRPERSON GRIFFIS: Well, let's ask
3 Corporation Counsel, would the entire building be
4 classified as the residence?

5 MS. MONROE: I don't think you can
6 consider a home occupation, because home occupation is
7 something that's done within the dwelling unit,
8 secondary to a dwelling unit. This is not done in his
9 living room. It's a separate space, a separate room
10 that is not attached. It's not part of his home is
11 what I'm saying.

12 It's not like having, you know, an
13 occupation that you do out of your living room or your
14 home office. It's a separate space.

15 CHAIRPERSON GRIFFIS: But if this was --
16 Hypothetically, if this was connected by a corridor
17 that he walked through, then this could be in fact
18 part of his residential dwelling unit.

19 MS. MONROE: Well, but it's not part of
20 his residential dwelling unit. It's not part of his
21 apartment. He's not living in this space. It's not
22 being used. I would say, no, I don't think it could be
23 considered home occupation under the regulations.

24 MR. BEST: May I add that in the event
25 that the church is at church or in session, I have to

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1 go around the building, the only way I have access to
2 this. The church and I work together, because they may
3 use -- you know, if they have the office or something.

4 But this is -- My understanding was that this was an
5 entirely different address, and according to the
6 Zoning Board or when I went over to get my C of O,
7 they made it very clear that this is a separate
8 address, and you have to get a C of O for it.

9 CHAIRPERSON GRIFFIS: Well, you know,
10 going down to it, if it's absolutely every designation
11 that would bring this out of even a public hearing
12 except for one where 203.4(d) that indicates no more
13 than one person. That would be the only thing that
14 would put that into, in fact, the special exception.
15 But based on your comment that it's not physically
16 connected, we obviously can't take it up. Okay,
17 others?

18 MEMBER ETHERLY: Just as a thought, Mr.
19 Chairman, as we are working through this, I can't
20 recall if we had some detail on this. You are owners
21 of the entire property. Correct?

22 MR. BEST: Yes.

23 MEMBER ETHERLY: Inclusive of all of the
24 apartment units?

25 MR. BEST: Yes.

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1 MEMBER ETHERLY: And those units are owned
2 in your names. Correct?

3 MR. BEST: Yes.

4 MEMBER ETHERLY: Okay. As is the case
5 with the tour bus company?

6 MR. BEST: Yes.

7 MEMBER ETHERLY: For the tour bus
8 operation. Once again, in trying to streamline here,
9 I wonder if -- I mean, is there anything in the regs
10 that address that kind of situation where essentially
11 you are talking about one entity, one business entity,
12 that owns and operates all of the uses or all of the
13 functions on that property?

14 MS. MONROE: Can I weigh in?

15 CHAIRPERSON GRIFFIS: Absolutely.

16 MS. MONROE: I'm not sure that a rental
17 office is an alternative use. As Ms. Mitten was
18 saying, it's still a general office use. I don't see
19 anything in the regulations that culls out rental
20 office, although it would be an accessory use to an
21 apartment building in the right zone. It would be,
22 but it just says generally any use that would be
23 incidental to a matter of right use. It doesn't
24 specify rental office.

25 CHAIRPERSON GRIFFIS: Right. And I was

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1 looking at that also. Could this be taken as totally
2 a use variance for office?

3 MS. MONROE: Just office use.

4 CHAIRPERSON GRIFFIS: Then what you are
5 saying is perhaps we don't need to differentiate
6 between --

7 MS. MONROE: A rental office, right, and
8 some other just general office use, particularly
9 because this building wouldn't be allowed in the zone
10 anyway with the rental office or otherwise.

11 CHAIRPERSON GRIFFIS: Exactly. That was
12 my point initially, that this may be an accessory use
13 allowable for an apartment building, but based on the
14 fact that this apartment building can't exist in the
15 R-1-B, how do we look at it as an acceptable accessory
16 use rather than entirely a use of an office?

17 MEMBER ETHERLY: It's an interesting
18 point. I didn't realize that. The apartment building
19 itself is nonconforming?

20 CHAIRPERSON GRIFFIS: That's correct.

21 MEMBER ETHERLY: Does it matter -- I mean,
22 just thinking out loud here. Once again the fact that
23 you have the same business which operates both the
24 apartments and the tour bus company, presumably you
25 are registered with the D.C. government as that

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1 business, and that business's home office is for
2 purposes of the District government probably is your
3 1801 address? The home address, which would be 1801
4 Otis Street, Unit 1.

5 MR. BEST: But the license, apartment
6 license is for 1801 Otis Street.

7 MEMBER ETHERLY: Okay. I'm just trying to
8 kind of work through it. Thank you, Mr. Chair.

9 MS. MONROE: Can I just point out,
10 accessory uses in buildings, for example, in R-2 it
11 says other accessory uses customarily incidental to
12 the uses permitted in R-2 districts under this
13 chapter. It seems to me, the way it goes, it doesn't
14 specify rental office or any --

15 CHAIRPERSON GRIFFIS: No, indeed, and then
16 the R-1 does not, in addition, spell out, because it's
17 obviously not anticipated that there would be an
18 apartment building in it.

19 MEMBER ZAIDAIN: That's a good question.
20 I mean, let's say for sake of argument that this
21 building changed hands, and they did some interior
22 renovation to the apartment or something happened that
23 they kicked them into a permit process for the
24 apartment building and a rental office in the
25 apartment building.

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1 Wouldn't they be right back here in front
2 of us anyhow, because the apartment building itself is
3 nonconforming? The general question is: Let's say
4 they were indeed going to use this as a rental office
5 for the apartment buildings. Because it seems to me
6 that the majority of the uses in this building are
7 nonconforming, wouldn't they have to come back here
8 for that use anyhow?

9 I mean, I don't see how -- if the
10 apartments are -- and I have not looked at the zoning
11 code here, but if the apartments are indeed
12 nonconforming, and they were going to operate a renal
13 office for nonconforming apartments, wouldn't they
14 have to come here for a variance?

15 MS. MONROE: Yes, I think so, because it
16 would be an expansion of a nonconforming use.

17 MEMBER ZAIDAIN: Okay. So -- Okay, thank
18 you.

19 CHAIRPERSON GRIFFIS: So what you are
20 saying is the two specific types of functions in this
21 office are aligned in that they both need --

22 MEMBER ZAIDAIN: Well, not only that, but
23 it seems like, when we get into alternative uses,
24 unless I hear otherwise from somebody, the only
25 alternative use that they could do matter of right is

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1 a residence, which would call for them to retrofit the
2 whole building to have the kitchen, etcetera,
3 etcetera, stuff that we've got on record as being
4 incredibly difficult to do, because of the history of
5 the building.

6 CHAIRPERSON GRIFFIS: Okay.

7 MEMBER ZAIDAIN: I mean, that's my
8 position currently, and it may change here in a
9 second. But let's hear from Ms. Mitten.

10 COMMISSIONER MITTEN: No, I just want to
11 be clear. So the conclusion is that a rental office
12 is not -- would not be permitted in this particular
13 apartment building without a use variance.

14 CHAIRPERSON GRIFFIS: That's what I was
15 looking for. I could not find it as a matter of
16 right.

17 MEMBER ZAIDAIN: Not only that, but the
18 apartments aren't matter of right.

19 MS. MONROE: I think, if you were in a
20 different zone -- For example, 331 is accessory uses
21 in buildings in R-4.

22 CHAIRPERSON GRIFFIS: Correct.

23 MS. MONROE: Okay. It says other
24 accessory uses of buildings with structures incidental
25 to the uses permitted in R-4. You've conceded a

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1 rental office is customarily incidental to the matter
2 of right use of an apartment building. Then you
3 wouldn't need a variance for it.

4 CHAIRPERSON GRIFFIS: Right.

5 MS. MONROE: If you didn't consider it as
6 a customary -- you know, incidental to the matter of
7 right, you would. I think you have to interpret it.

8 CHAIRPERSON GRIFFIS: I think it makes
9 logical sense that we look at this as a single
10 variance for the general office use in an R-1 resident
11 zone, and not differentiate the fact of there may be
12 three different telephone lines that deal with
13 different issues, but rather look at it as a whole of
14 general office use.

15 MEMBER ZAIDAIN: Right. Well, I mean, and
16 even more so, I think what we should look at, if we
17 are going to look in terms of alternatives, is what
18 can they do matter of right? It seems to me the only
19 thing they could do is -- I mean, if it's R-1-B, what,
20 a single family home or a flat?

21 MS. MONROE: A residence.

22 MEMBER ZAIDAIN: A residence.

23 MS. MONROE: Condominium.

24 MEMBER ZAIDAIN: Well, regardless, that
25 seems to me that it's impractical to achieve. I mean,

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1 if we are going to list uses, alternative uses that
2 require them just to come right back in front of this
3 Board, that doesn't make a lot of sense to me.

4 CHAIRPERSON GRIFFIS: Okay, is there a
5 consensus then that we pursue this as a use variance
6 for general office use? Very well. Then let's move
7 on. Other government reports attendant to this? I
8 don't have any listed in my notes.

9 We do have an ANC report on -- or we do
10 not have an ANC report. Is that correct? Do we have
11 an ANC member?

12 MR. BEST: We have a chair of the ANC.

13 MS. BROADNAX: Good afternoon. I am Norma
14 Broadnax.

15 CHAIRPERSON GRIFFIS: I am just going to
16 ask you to turn your microphone on. Just touch the
17 base there. What I'll have you do -- Touch it again.
18 It didn't seem to go on. Yes. If you would turn
19 yours off, we won't get feedback.

20 MS. BROADNAX: Good afternoon. I am Norma
21 Broadnax. I am Chairperson of Advisory Neighborhood
22 Commission 5-A. I am here to represent 5-A in support
23 of Mr. Best's application.

24 CHAIRPERSON GRIFFIS: Very well. Was
25 there an official action by the ANC?

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1 MS. BROADNAX: This is -- Therein lies the
2 problem. Through a series of missteps on the part of
3 the Chair, this matter was not brought before the
4 Commission to take a vote at a public meeting.
5 However, a majority of our Commissioners have
6 indicated to me that they support the application.

7 CHAIRPERSON GRIFFIS: Okay. So there
8 wasn't a publicly advertised meeting and a quorum
9 present and an official vote taken by the ANC?

10 MS. BROADNAX: Right.

11 CHAIRPERSON GRIFFIS: Okay. Well, very
12 well. We will take your testimony as person today.
13 Appreciate you being here, and we will take that under
14 advisement, that you are in support of the
15 application.

16 Let's go then -- Is there anyone else to
17 give testimony today, persons present ether in support
18 or in opposition?

19 MR. THOMAS: Yes. Good afternoon. My
20 name is Timothy Thomas. I am an ANC Commissioner of
21 5-A-08, which abuts Mr. Best's property. I picked up
22 that area due to the re --

23 CHAIRPERSON GRIFFIS: --districting?

24 MR. THOMAS: -- construction of the
25 awards, and Ms. Broadnax had brought this matter to my

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1 attention. We saw and felt the neighbors did not
2 oppose Mr. and Mrs. Best's project, and we are here in
3 favor of Mr. and Mrs. Best.

4 CHAIRPERSON GRIFFIS: Very well. So if I
5 am clear, with the redistricting your single member
6 district has incorporated this parcel?

7 MR. THOMAS: Well, we are actually across
8 the street.

9 CHAIRPERSON GRIFFIS: Oh, I see. Okay.

10 MR. THOMAS: Across the street.

11 CHAIRPERSON GRIFFIS: In great proximity,
12 5-A-08.

13 MR. THOMAS: That's correct.

14 CHAIRPERSON GRIFFIS: Good. Okay, Ms.
15 Renshaw?

16 VICE CHAIRPERSON RENSHAW: Ms. Broadnax or
17 Mr. Thomas, we have concluded that the petition that
18 was submitted in support was an old petition. Were
19 you able to get any signatures or work with the
20 Applicant in getting any signatures of those in the
21 surrounding areas that would support the request?

22 MS. BROADNAX: No, we were not thinking in
23 terms of getting petitions, signatures signed, because
24 we were caught up in a time frame here. You don't
25 even have a letter from us with regard to this case.

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1 So the reason I am here today is to urge
2 the Board to not delay, because we feel that --
3 Actually, I'm trying to atone for these missteps so
4 that Mr. Best is not -- Mr. and Mrs. Best are not
5 further inconvenienced, hopefully that this would be
6 the case.

7 VICE CHAIRPERSON RENSHAW: But the
8 community hasn't had a chance to speak out in a forum
9 that your meeting would provide.

10 MS. BROADNAX: That's right. We have not
11 had that.

12 CHAIRPERSON GRIFFIS: Okay. Anything
13 further?

14 VICE CHAIRPERSON RENSHAW: Well, I was
15 just reviewing the old order, and it stated that 5-A
16 was not in support, stating that the Applicant had not
17 demonstrated practical difficulties or that granting
18 the application would not be detrimental to the
19 community. But I'm missing one of the pages, and I
20 can't reach the conclusions of law opinion here,
21 because I'm missing page 5. If anyone can fill me in
22 on what the Board stated --

23 CHAIRPERSON GRIFFIS: Any other questions
24 from the Board? Mr. Best, do you have any cross-
25 examination of that testimony that you just heard?

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1 MR. BEST: Yes, and thank you. It was my
2 understanding, Ms. Renshaw, that initially when I went
3 before the ANC last time in '92, that they initially,
4 because there was some misunderstanding about the
5 vehicles, and when I had an opportunity to go before
6 the ANC, they were in support when they realized that
7 no vehicles -- and further, since I sent out those
8 labels notifying the community of this and they
9 realized I was in the ANC, I they did give me a call.

10 Maybe it is my misstep as well, because I
11 was just kind of going by the fact that nothing
12 changed, just my wife and I doing the same thing in
13 the same building, that I just thought it would stand
14 to reason that, when they asked me should they send
15 letters for me, I said, well, I don't think we're
16 going to have any difficulty with this.

17 I think, because of the redistricting --
18 but, of course, that was my single member district.
19 Okay.

20 CHAIRPERSON GRIFFIS: I think we're clear
21 on exactly what happened. So we can move on with this.

22 Just to be absolutely clear, cross-examination is you
23 can ask questions of the people that have just given
24 testimony. I don't know if you have any questions for
25 them. Okay. Very well, then we'll take that as a

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1 clear clarification of where we are and what we are
2 doing at this point.

3 Is there anyone else here to give
4 testimony attendant to this application? If not, then
5 we can turn to the Bests and have any concluding
6 remarks that they might provide us.

7 MR. BEST: No, I just want to thank you,
8 and just would ask that you grant us our approval.

9 CHAIRPERSON GRIFFIS: Very well. Any
10 question of the Board at this time? Then I would move
11 approval of Application 16972 for the use variance to
12 allow a general office use in the R-1- resident zone
13 district at premises 3629 18th Street, N.E. I would
14 ask for a second.

15 VICE CHAIRPERSON RENSHAW: Second.

16 CHAIRPERSON GRIFFIS: Thank you, Ms.
17 Renshaw. I think it has been fairly clearly laid out,
18 first of all, the uniqueness of this, and there are
19 several aspects to that. One, its date of
20 construction; secondly, its type of use and
21 construction, and that goes directly to density,
22 meaning an apartment building in an R-1-B zone clearly
23 couldn't have been built today; the configuration of
24 the first floor, which then goes even more
25 specifically to the unit essentially that we are

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1 talking about, 3629. It is distinctively separated
2 from being connected to any of the residential --
3 existing residential use on the first floor.

4 It was also built and constructed, as the
5 photographs will show, as some type of commercial
6 and/or retail frontage. When first looking at it, I
7 thought, well, 38 feet is very deep for a residential
8 unit, to begin with; but if there were windows on the
9 side, maybe it could be accommodated with being an
10 attached piece. I'm not sure it is useful or perhaps
11 even legal going all the way back.

12 Clearly, the layout does not fit for a
13 residential use. Looking at this and also in this
14 prior, I do believe that it is an undue hardship to
15 try and convert that then to a residential unit, which
16 would essentially compound the nonconforming use of
17 residential apartment building anyway.

18 I think that the hardship of not being
19 able to put in a general office use has been
20 substantially addressed. I can go on, but let me let
21 others speak to the motion at this time. Ms. Mitten,
22 did you have something?

23 COMMISSIONER MITTEN; I actually wanted to
24 propose a friendly amendment of several conditions.

25 CHAIRPERSON GRIFFIS: Okay.

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1 COMMISSIONER MITTEN: The three conditions
2 that Ms. Thomas proposed from the Office of Planning:
3 No commercial vehicles will be parked on site; there
4 shall be no more than four employees; the use shall be
5 limited to 3629 18th Street, N.E. and its current
6 size. Then I would also like to add the first
7 condition from the previous order, which is the office
8 use of the subject premises shall be limited to the
9 apartment management office, to the existing --
10 accessory to the existing apartment use at 1801 Otis
11 Street, N.E. and to the administrative offices of A
12 Tour Company.

13 So I would move those.

14 MEMBER ZAIDAIN: So that means that, if
15 there is a change of ownership for -- or if it changes
16 office use from a tour company to whatever else, they
17 would have to come back? What's the intent there?

18 CHAIRPERSON GRIFFIS: That would be
19 correct.

20 COMMISSIONER MITTEN: One of the reasons
21 why there is a limited amount of adverse impact if you
22 have four employees is because Mr. and Mrs. Best live
23 there and operate the tour company. So unless we want
24 to address the possible alternative permutations --

25 MEMBER ZAIDAIN: I agree.

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1 COMMISSIONER MITTEN: That's why the
2 specific use, I think.

3 MEMBER ZAIDAIN: Okay. I support that.

4 VICE CHAIRPERSON RENSHAW: So do I.

5 CHAIRPERSON GRIFFIS: Yes. I would,
6 absolutely, and I'm glad you pointed that out. Those
7 are protections that should have been there. I think
8 it also goes to outside -- It goes to even where we
9 were looking at Section 203 with home occupations,
10 even that which is less of a burden, but that goes to
11 how we preserve the residential neighborhood and not -
12 - and go to protect the residential areas. I think
13 that it's important that we ensure that. Ms. Renshaw?

14 VICE CHAIRPERSON RENSHAW: A question
15 about parking. Now there is a garage attached to this
16 building in the back. Are there parking spaces for
17 the two employees, two other employees?

18 MR. BEST: On the other side of 18th
19 Street is a park, Taft Park. So there is no homes on
20 the other side of the street, and usually they are
21 always available. I know the church never has really
22 any problem. We don't have any real concerns when the
23 church is in session.

24 VICE CHAIRPERSON RENSHAW: Thank you.

25 CHAIRPERSON GRIFFIS: Okay. Anything else

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1 on the motion? Comments? Very well. I would ask for
2 all that are in favor signify by saying Aye. Opposed?
3 Very well, we can record the vote.

4 MS. BAILEY: The Board has voted to
5 approve the application with the four conditions
6 identified by Ms. Mitten. The motion was made by Mr.
7 Griffis, seconded by Ms. Renshaw. Mr. Etherly, Mr.
8 Zaidain and Ms. Mitten are in support. Is this a
9 summary order, Mr. Chairman?

10 VICE CHAIRPERSON RENSHAW: I don't see any
11 problems with a summary order, unless Board members
12 have a difficulty with summary order.

13 COMMISSIONER MITTEN: No, but I think
14 these people deserve timely delivery of their order
15 this time.

16 CHAIRPERSON GRIFFIS: Indeed, timely
17 delivery, and that will be -- Let's do a summary order
18 then that would be sufficient. Anything else?

19 MS. BAILEY: Not for this morning, Mr.
20 Chairman.

21 CHAIRPERSON GRIFFIS: Very well. I wish
22 you all a great day. I appreciate everybody's
23 patience being down here. We had a long morning, but
24 I wish you well, and good luck. This would conclude
25 then the morning session of 28 January 2003.

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1 MR. BEST: Do I call you or do you call
2 me? How do we do this? I'll wait for the order.

3 CHAIRPERSON GRIFFIS: Don't call me.

4 VICE CHAIRPERSON RENSHAW: We owe you
5 express delivery.

6 CHAIRPERSON GRIFFIS: I would suggest that
7 you allow at least -- correct me if I'm wrong -- at
8 least two weeks for a summary order, and I would call
9 back in two weeks to make sure that it is on its way.

10 This office, in my experience, although it's been
11 short, has been excellent in terms of turning things
12 out. I do not believe that this one will get lost in
13 the cracks, but one call, just a reminder, would be a
14 good idea.

15 VICE CHAIRPERSON RENSHAW: You might want
16 to arrange a pick-up of your order and not rely on the
17 mail.

18 (Whereupon, the foregoing matter went off
19 the record at 12:33 p.m.)

20 - - -

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A F T E R N O O N S E S S I O N

Time: 1:43 p.m.

CHAIRPERSON GRIFFIS: Good afternoon. I appreciate everyone's patience. I am going to call to order the 28 January 2003 Public Hearing of the Board of Zoning Adjustments, District of Columbia. My name is Geoff Griffis. I am Chairperson. Ms. Anne Renshaw is with me, of course, as the Vice Chair, also Mr. Etherly to my right. Representing National Capital Planning Commission is Mr. Zaidain, and representing the Zoning Commission this afternoon with us is Ms. Mitten.

Copies of today's hearing are available to you. They are located at the table where you entered into the hearing room. Let me run through a couple of quick things.

Everyone here present today should be aware that our public hearings are recorded. Therefore, we ask people not to engage in any disruptive actions or noises in the hearing room. Also when coming forward to speak to the Board, you will need to fill out two witness cards.

Witness cards are available to you at the table as you entered into and the table in front of us. Those two witness cards are to be delivered to

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1 the recorder who is sitting to my right prior to
2 coming forward to present testimony to the Board.

3 I would also everyone to turn off cell
4 phones and beepers so that we also don't have
5 additional distractions to the proceedings. I will
6 run through -- We have one case this afternoon, which
7 is an appeal, which has different procedures and
8 orders than the special exception and variances. So I
9 will get into that as we get into the specific case.

10 The record, of course, after each hearing
11 will be closed at the conclusion of the hearing. Any
12 material that is specifically requested by the Board
13 will be outlined, specified, and the time and date at
14 which it should be submitted to the Office of Zoning
15 will be provided. We will make absolutely clear that
16 everyone has clarity on what they are supposed to do
17 before we leave this room.

18 After the submission of that material, of
19 course, the record would be closed, and no other
20 information would be accepted by the Board.

21 The Sunshine Act requires that the public
22 hearing in each case be held in the open and before
23 the public. The Board may, however, consistent with
24 its rules of procedure and the Sunshine Act, enter
25 executive session during or after a public hearing on

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1 a case. This is, of course, for the purposes of
2 reviewing the record and/or deliberating on a case.

3 Decision of the Board in contested cases
4 must be based exclusively on the record and,
5 therefore, we ask, to avoid the appearance to the
6 contrary, that people present today not engage Board
7 members in any conversation.

8 We will make every effort to conclude this
9 afternoon's session by six o'clock. I would
10 anticipate we will take one break, if not more
11 required, during the afternoon.

12 At this time, I think we can call the
13 first case unless there's any preliminary matters
14 which the Board needs to immediately entertain, and
15 those matters would be, of course, whether a case will
16 or should be heard today, such as requests for
17 postponement, continuance or withdrawal or whether, in
18 fact, adequate and proper notice has been given about
19 the application.

20 If you are not prepared to go forward with
21 the case or you believe that the Board should not hear
22 the case today, I would ask that you approach the
23 table. I will also ask staff if they have any
24 preliminary matters for the Board to take up at this
25 time.

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1 MR. DAMARI: I have a preliminary matter.

2 CHAIRPERSON GRIFFIS: Two things. First
3 of all, have a seat. Get comfortable. Turn the
4 microphone on, and don't refer to me as Your Honor.

5 MR. DAMARI: It's -- I'm probably going to
6 screw this one up. I usually am involved in more
7 formal proceedings.

8 I do have one preliminary matter that
9 could streamline the case, I believe.

10 CHAIRPERSON GRIFFIS: Can you just give me
11 your name?

12 MR. DAMARI: Tamir Damari. Sorry,
13 representing the Appellant.

14 CHAIRPERSON GRIFFIS: Indeed.

15 MR. DAMARI: I have -- The sense I got in
16 overhearing some conversations is that there is going
17 to be testimony presented or that testimony is going
18 to be proffered by various parties here today. It is
19 my position and, in fact, I could -- the position of
20 DCRA in this case, that this case is governed by D.C.
21 Code, Section 6-641.09, which deals with certificates
22 of occupancy, which states among other things that
23 adjudication of any infraction shall be pursuant to
24 Chapter 18 of Title 2, which in turn states at Section
25 2-1803.03 that the reviewing agency, in this case, the

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1 BZA, shall make a determination of each appeal on the
2 basis of the record established before the
3 Administrative Law Judge or Attorney Examiner.

4 In other words, that there should not --
5 according to DCRA's own interpretation of the case
6 and, in fact, my interpretation of the case as well,
7 that there cannot be any evidence presented today.
8 This is, in fact, an appeal, and that the Board is
9 limited to the record established below.

10 CHAIRPERSON GRIFFIS: And how -- You
11 define the record as that that's already been
12 submitted?

13 MR. DAMARI: It's only a few letters.
14 That's the record.

15 CHAIRPERSON GRIFFIS: Indeed. Does
16 Corporation Counsel have an opinion on that?

17 MR. BUFFO: Well, I guess I would have to
18 look at the appeal coming under 6-641.07 at G as a
19 more concise statement. "The Board of Zoning
20 Adjustment has the power to hear and decide appeals
21 where it is alleged by Appellant that there is an
22 error in any order, requirement, decision,
23 determination or refusal made by Inspector of
24 Buildings or the Mayor of the District of Columbia or
25 any other administrative officer or body in the

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1 carrying on or enforcement of any regulation adopted
2 pursuant to this subchapter and subchapter 5 of this
3 chapter."

4 So to the extent that the Appellant is
5 arguing that there was an error in the revocation or
6 at least the final notice, that would then be before
7 the Board, and I don't see why you can't have a de
8 novo hearing on that issue.

9 MR. DAMARI: I vehemently disagree. I am
10 reading right now from the final notice issued by the
11 DCRA in this case, which states in the first sentence,
12 "Pursuant to D.C. Code 2001, Section 6-641.09 and
13 Title 11, DCMR 3203.8(a)," -- which in fact doesn't
14 exist -- "this is official notice to you that the
15 Department of Consumer and Regulatory Affairs hereby
16 revokes your certificate of occupancy."

17 This is the provision of the Code that was
18 cited by the DCRA, and it expressly states in that
19 provision of the Code, which deals with certificates
20 of occupancy, that you follow the procedures set forth
21 in Chapter 18 of Title 2, which in turn states that we
22 are limited to the record.

23 Now this is their -- This is, frankly -- I
24 always thought this case was governed by 6-641.909,
25 but in addition, this is DCRA's official notice to me.

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1 So I mean, they are, in fact -- I would believe, not
2 only do we have an agreement as to what applies here,
3 but they would be judicially estopped from arguing
4 otherwise.

5 MEMBER ZAIDAIN: Well, just some
6 clarification to Mr. Buffo's comment. Is it your
7 position that we can proceed without -- I mean, they
8 can't have a hearing, but that doesn't stop us from
9 proceeding without the hearing. Do you follow? I
10 mean, is it the chicken and the egg scenario that we
11 are doing? They have to have a hearing, or it can go
12 either way? When I say hearing, I'm referring to in
13 front of the ALJ.

14 MR. BUFFO: Well, that would be DCRA's own
15 regs whether or not they can have a hearing, and those
16 are arguably unclear. But that's not before us
17 exactly. At least, that's for the Board to determine.

18 The way I read 641.09, civil fines,
19 penalties and fees may be imposed, and that those
20 would be adjudicated under that Chapter 18, Title 2.
21 This is a revocation. It is neither of those three.

22 MR. DAMARI: Well, you can -- One can read
23 it whichever way one wants. This is what -- It is
24 this provision -- Actually, no. It sets under 6-
25 641.09 adjudication of any infraction of this chapter.

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1 I've got it right here.

2 MR. BUFFO: There was no infraction
3 alleged. What was alleged was that --

4 MR. DAMARI: This is what they are saying.

5 MR. BUFFO: -- was that --

6 COMMISSIONER MITTEN: We need to have one
7 person speak at a time. That's rule number one, for
8 the record. I think what Mr. Buffo is saying is this
9 is unlike a civil infraction appeal which is an appeal
10 where we act as a court of appeals and there is a
11 record that's already been established. This is a
12 different kind of proceeding.

13 There is no infraction per se. So can you
14 respond to his concern?

15 MR. DAMARI: This is what DCRA says has
16 been violated. I mean, I need notice. When they cite
17 to two provisions, one of which has been repealed and
18 the other one is now being said doesn't apply, how am
19 I supposed to have notice to prepare for this hearing?

20 CHAIRPERSON GRIFFIS: Okay. That's point
21 well taken. Do you have copies of that and also the
22 section cite, 641.9, I believe it was?

23 MR. DAMARI: Yes.

24 CHAIRPERSON GRIFFIS: Okay. If you could
25 hand it to staff, they will make copies, and we'll get

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1 you your highlighted originals back. Why don't we get
2 that? Yes? Corporation Counsel wants to add.

3 MR. BUFFO: I mean, if Appellant wishes to
4 come under 641.09, the Board can decide whether or not
5 the Appellant properly came before it with the right
6 requested relief. I mean, that is your -- You know,
7 you may choose anything you want in the regs or in the
8 Code. If that's your grounds, that's your grounds.

9 CHAIRPERSON GRIFFIS: Okay. All I need to
10 do is review that, but I also want to hear from the
11 government's representative.

12 MR. GREEN: Good afternoon, Mr. Chairman,
13 members of the Commission. My name is Matthew J.
14 Green, Jr. I represent DCRA.

15 It is my understanding that this body is
16 not a body of first impression. It is my further
17 understanding that our purpose here today is to
18 determine whether the appeal set forth by the
19 Appellant deals with demonstrating that DCRA acted in
20 a manner which was clearly erroneous, use of
21 discretion, or in some way against the manifest
22 evidence presented.

23 In other words, did or was he entitled to
24 an appeal from an action taken by the agency? Now --

25 CHAIRPERSON GRIFFIS: Well, I don't think

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1 that's in question, whether he is entitled to an
2 appeal. Is that what you're saying?

3 MR. GREEN: No. I'm saying that whether
4 or not his appeal was a timely filed instrumentality -
5 - that's what this is about today. We are here to
6 discuss whether the action taken by the agency as
7 evidenced in an August 9, 2002 letter sent to him by
8 the Chief Administrative Law Judge constitutes final
9 agency action upon which one can seek relief. That's
10 what this is about, and whether or not his appeal from
11 this action was timely.

12 CHAIRPERSON GRIFFIS: So if I am
13 understanding you, you are actually going in a little
14 bit of a different direction, and you are formulating
15 a motion to dismiss based on timely submission of an
16 appeal?

17 MR. GREEN: I'm saying that, among other
18 things, that this appeal is not timely, and this
19 appeal --

20 CHAIRPERSON GRIFFIS: Is that a motion
21 that we should entertain?

22 MR. GREEN: Well, we didn't -- Yes. Yes,
23 it is. I will state it as a motion, Your Honor. I'm
24 sorry, Mr. Chairman, excuse me. Very sorry.

25 CHAIRPERSON GRIFFIS: That's okay. I'm

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1 flattered when it's said. That's not what I'm
2 demanding.

3 All right. Well, before we get a whole
4 plate load of things that we need to decide -- or
5 maybe we should load up our entire plate, in which
6 case I would step back before we get into a lot of
7 this. I think the Board ought to bring up first any
8 sort of intervenor status, as we have a request.

9 In addition, I think it can be clear in
10 the appeal that we have before us that the ANC would
11 be a party in this. Therefore, I think I would direct
12 the Board's attention to the submission from Charles
13 E. Smith and their representative, Mr. Brown. Mr.
14 Brown, you are representing Charles E. Smith. Is that
15 correct?

16 MR. BROWN: Good afternoon. Yes, Patrick
17 Brown from Greenstein DeLorme & Luchs. I am back
18 again on behalf of Charles E. Smith, Archstone Real
19 Estate, which owns the most immediately adjacent
20 property, the Van Ness South Apartment building with
21 approximately 625 units.

22 CHAIRPERSON GRIFFIS: Excellent. I think
23 it's pretty clear on the written submission. I think
24 the Board is clear on what we need to look at in terms
25 of granting or denying that. I would certainly hope

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1 you would stay at the table and avail yourself for
2 questions, if we had any. But let's jump right into
3 it.

4 This would fall under 3112.15: At the
5 time of a hearing on an appeal, a Board in its
6 discretion and for good cause shown may permit a
7 person to have specific right or interest that will be
8 affected by action on the appeal to intervene in the
9 appeal for such general or limited purpose as the
10 Board may specify.

11 That is essentially our measuring stick in
12 looking at this and either granting or denying. I
13 will hear comments on it. I think it's fairly clear
14 and laid out, the proximity which goes to the level of
15 effect.

16 Also in the record and in the submission
17 that we have before us, there is the issue of estoppel
18 that is brought up, and I do believe, as we -- if we
19 look at that or we come to that level, that there may
20 be an issue of balance and level of that which is --
21 in terms of detriment or harm that may be caused.

22 It seems to be that, if you want a
23 specific reason for supporting the party status of
24 Charles E. Smith, would be able to evidence that, if
25 it is so required.

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1 Let me hear from others, if they have any
2 comments.

3 COMMISSIONER MITTEN: Mr. Chair, I agree
4 with your characterization that the intervenor status
5 would be relevant in the event that we reach the issue
6 of estoppel, and I would -- Inasmuch as we can grant
7 intervenor status in a narrow or specific way, that we
8 limit the participation of the intervenor to the issue
9 of harm to the public and not some of these more
10 tangential matters that are coming up regarding
11 procedure.

12 CHAIRPERSON GRIFFIS: I think that is well
13 said, and that goes directly to the provisions that we
14 have, and that is to actually limit, for our purposes,
15 that level of intervention, if that's the correct
16 word.

17 MR. BROWN: Mr. Chairman, and I understand
18 where the Board appears to be heading. I think I am
19 slightly concerned, because how we define this case,
20 which we were doing before I came up here, is critical
21 to what we are talking about.

22 So I would ask the Board some leeway to
23 participate in that discussion, because ultimately
24 that will impact my ability to touch on the issues
25 that the Board hears and are of interest to my client.

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1 CHAIRPERSON GRIFFIS: I would tend to
2 agree. I mean, our anticipation of which direction
3 this may go in terms of procedure may be totally
4 different than the reality and what we get into.

5 I think that the provision does not limit
6 us to specifically defining at the beginning what the
7 exact piece would be, but I think the direction and
8 the initial direction that we are taking Ms. Mitten
9 has well clarified.

10 I think we can, in fact, interpret. As I
11 read this, it is -- we have broad responsibility of
12 calling in intervenors for any reason that the Board
13 sees fit. So I would take that under good advisement
14 and make sure the Board is clear on Mr. Brown's
15 comments? Very well.

16 MR. BROWN: Mr. Chair, if I could go one
17 step further. How we define this case -- I'm
18 concerned that Mr. Damari seems to -- I'm hearing it,
19 and perhaps I can help define what he is presenting to
20 the Board, is that the Board is limited to looking at
21 the record below, in this case the agency, DCRA.

22 Following that through, based on what he's
23 said, is because the Appellant in this case did not
24 timely respond to the notice of revocation, the facts
25 that were alleged by DCRA were assumed or accepted as

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1 the facts. So in effect, the only record we have to
2 review from below is the findings of fact that support
3 the revocation.

4 Based on that -- and I'm happy to proceed
5 in that manner -- this is going to be a very short
6 hearing, because again we are looking at the record
7 from below, and his client was entirely absent from
8 that discussion.

9 Kuri Brothers had timely notice by
10 personal service. They failed to respond. The fact
11 that Koo Yuen, who claims to be a real party in
12 interest, was out of the country is irrelevant. The
13 occupant and operator of the facility had personal
14 service notice and failed to respond. End of
15 discussion.

16 I mean, I hate to say this, but famous
17 legal doctrine, you snooze, you lose, and they lost.
18 As a result, DCRA had the right and, in fact, the duty
19 to deem the facts alleged admitted.

20 MR. DAMARI: Was that a Supreme Court
21 case, Snooze and Lose?

22 MR. BROWN: Yes, it was. Yes, it was.

23 CHAIRPERSON GRIFFIS: Excellent. All
24 right, I get your point, Mr. Brown.

25 MR. BROWN: It's the only one I remember

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1 from law school. So then we are forced to look at the
2 DCRA document and their findings of fact, which are
3 then deemed admitted, not subject to challenge, and
4 based on that record the Board has a fairly narrow --
5 and we can go through.

6 I think there are five findings of fact.
7 We can go through them. Again, it's not *de novo*
8 review. So we are not going to take testimony from
9 Mr. Damari, and he doesn't appear to have anybody here
10 to offer testimony, and we go through, and the Board
11 has to decide item by item whether those findings of
12 fact are supported based on the record, which is,
13 quite frankly, several pieces of paper.

14 CHAIRPERSON GRIFFIS: Okay. And let me
15 bring up, I think, a pertinent point for the Board for
16 our clarification. When we talk about looking at the
17 record below, this is not a record review. Would you
18 agree?

19 MR. DAMARI: When you say a record review,
20 I'm unclear as to what you mean. I mean, I would
21 think it is a record review. I mean, you are limited
22 to the record. That's been my argument, the record
23 being comprised of whatever letters were transmitted
24 back and forth.

25 CHAIRPERSON GRIFFIS: In terms of a record

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1 review, does that not go more specifically to a civil
2 infraction that would be appealed?

3 MR. DAMARI: Well, that's my -- My whole
4 point is that, frankly -- and I've reviewed the regs
5 and, if someone could perhaps elucidate this for me,
6 I'd be more than happy to accept that.

7 There is no procedure that I can find in
8 the D.C. Code for revoking a certificate of occupancy.

9 The only provision of the D.C. Code that touches upon
10 it is, again 6-641.09.

11 MR. BUFFO: I would direct -- I'm sorry.
12 Mr. Chair, do you mind?

13 CHAIRPERSON GRIFFIS: Yes, indeed, and I
14 think what he is going to bring up is BOCA.

15 MR. BUFFO: That's right, 12-A, Section --
16 Title 12-A, Section 18 -- 118.4.6, Notice of
17 Revocation, DCRA regs.

18 MR. DAMARI: I've actually read that, but
19 that doesn't provide any procedure. It just says, I
20 think, that you have to give ten days notice before
21 any -- So I'm at a loss, again, because of what -- the
22 way I interpret the Code and again what DCRA has
23 cited.

24 CHAIRPERSON GRIFFIS: Good, and we're
25 going to get to the bottom of all that. We've got a

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1 lot of stuff happening right now. Mr. Brown, I'll
2 allow you one sentence. What is it?

3 MR. BROWN: If we go back, and again
4 defining what has occurred, June 28th --

5 CHAIRPERSON GRIFFIS: Okay. Actually, I'm
6 going to cut that off at this point, because we have
7 something before us that I think we can decide, and
8 then move on. We have a request for intervenor status
9 and, Mr. Brown, as you are continuing participation in
10 this, that may be of great interest to you.

11 So Board members, can I hear any comments
12 in opposition to granting the party status to Charles
13 E. Smith, residential owner/manager of the Van Ness
14 South Apartments which are located at 3003 Van Ness
15 Street, N.W. and the Consulate Apartments also on 2950
16 Van Ness Street, N.W. Any comments in opposition?

17 COMMISSIONER MITTEN: No objection.

18 CHAIRPERSON GRIFFIS: I would take it as a
19 consensus unless we need -- and people want to be
20 definitive, but I would take that as consensus of the
21 Board that there is no opposition.

22 Okay. Having dispensed with that, we will
23 then grant the intervenor status to Charles E. Smith
24 Residential representing those two properties as
25 listed.

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1 From my fast taking notes, we have several
2 things. First of all, we have been handed codes that
3 were not reviewed by the Board. That is going to need
4 to take place. Secondly, we have a motion to dismiss
5 based on the non-timely filing of the appeal.

6 I would at this point ask if the Board
7 would follow me into executive session briefly so that
8 we can take a moment to look at 6-641.09, and I am
9 assuming that copies have been provided to others.

10 MR. DAMARI: I have not, no.

11 CHAIRPERSON GRIFFIS: Okay. What I'm
12 going to ask then, everyone, if they could just meet
13 at the desk. I will hand this to staff. They will
14 make copies, provided at the desk, and we will return
15 after review of this information.

16 (Whereupon, the foregoing matter went off
17 the record at 2:06 p.m. and went back on the record at
18 2:32 p.m.)

19 CHAIRPERSON GRIFFIS: We are ready to
20 resume. We have -- Board members, what I would like
21 to do is tick off first a couple of things that we
22 will go through, but I think we need to take up the
23 issue of timeliness.

24 I would first give an indication -- and it
25 is through our discussion at this point, our firm

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1 belief that we are clearly under normal definitions of
2 timeliness as been established for our procedure.
3 That would go into the 60 day, not into anything else
4 that would be more established in a civil infraction
5 case notification, and that would be several days.

6 So in my looking at the record, and I
7 would hear from other Board members and then I will
8 ask for each of the representatives to address this
9 issue, and we can correct the dates, but I have a date
10 of conceivably final notice as indicated today August
11 19, 2002.

12 Our records indicate the filing of the
13 appeal was done on 11 September '02. Now even giving
14 a few days latitude in terms of when the final notice
15 was -- became aware in terms of mailing and service,
16 we are still well within the 60 days. In fact, the
17 19th to the 11th, if my mathematics serve me, are less
18 than 60 days.

19 MR. DAMARI: Just that 60 day period is
20 set forth where? I don't disagree with you that it's
21 timely. Don't get me wrong.

22 CHAIRPERSON GRIFFIS: Our regulations set
23 forth in a timely manner things are to be done, and
24 that has been upheld, in fact -- well, rather, the
25 definition of the time period was established in a

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1 court case which was Waste, was it?

2 MEMBER ZAIDAIN: It was Waste Management
3 that established it.

4 MR. DAMARI: Oh, an old client of mine,
5 actually.

6 CHAIRPERSON GRIFFIS: Interesting. And so
7 that is, in fact, what the Board has established in
8 terms of defining its own timeliness.

9 MR. GREEN: Your Honor, may I be heard?

10 CHAIRPERSON GRIFFIS: Everyone is going to
11 be heard.

12 MR. GREEN: Yes.

13 CHAIRPERSON GRIFFIS: So we are going to
14 take this procedure in chronology here. Did you have
15 anything else in terms of the timeliness then?

16 MR. DAMARI: No.

17 CHAIRPERSON GRIFFIS: Mr. Green, we are
18 going to go to you and then, Mr. Brown, we'll go to
19 you. I'm sorry. And then, actually, why don't you
20 introduce yourself for the record so that we have you
21 on the record at this point.

22 MR. BARDIN: I'm Commissioner David J.
23 Bardin representing ANC-3F, together with Commissioner
24 Karen Perry who is a single member district.

25 CHAIRPERSON GRIFFIS: Indeed. Mr. Bardin,

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1 do you want to be heard in this proceedings before or
2 after Mr. Brown representing the Charles E. Smith?
3 I'll give it to you for your decision.

4 MR. BARDIN: I really don't care.

5 CHAIRPERSON GRIFFIS: Okay. We are going
6 to hear from you and then Mr. Brown. Mr. Green?

7 MR. GREEN: Yes, Your Honor. Let me just
8 say something. I believe that the Board misunderstood
9 my request, and perhaps it's because I stated it in a
10 very inarticulate way. I should have asked for and
11 been given a summary affirmance. That is a summary
12 affirmance of what the action was taken by DCRA.

13 We have no quarrel with the timeliness of
14 filing an appeal with the Board of Zoning Adjustment
15 by the Appellant, but we do indicate that this agency
16 rendered a final decision. And to get to that point,
17 this respondent at that time was given an opportunity
18 to reply to certain agency actions, and in his
19 response to the agency actions he acted in an untimely
20 way.

21 Now I direct your attention to the --

22 CHAIRPERSON GRIFFIS: Well, let's get a
23 couple of clarifications. First of all, when you
24 refer to this agency, you are referring to DCRA?

25 MR. GREEN: Department of Consumer and

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1 Regulatory Affairs.

2 CHAIRPERSON GRIFFIS: Very well.

3 MR. GREEN: The agency that I represent.

4 CHAIRPERSON GRIFFIS: The action that
5 wasn't timely -- Are we going to that you were
6 anticipating that the Appellant would have dealt with
7 DCRA directly?

8 MR. GREEN: It is our position that, once
9 an agency action is taken -- in this case, a notice of
10 intent to revoke a certificate of occupancy -- and in
11 that document it states among other things that you
12 have to respond and ask for a hearing, and we state
13 very clearly in that particular document, which was
14 personally served -- We didn't send it by mail. We
15 didn't send it by carrier pigeon. We personally
16 served the respondent in this particular instance.

17 CHAIRPERSON GRIFFIS: And so you are
18 saying that there was some action that should have
19 happened at DCRA before you came here?

20 MR. GREEN: We are saying that the
21 respondent should have timely asked for a hearing. he
22 did not do this, and consequently, our Chief --

23 CHAIRPERSON GRIFFIS: A hearing before
24 who, though?

25 MR. GREEN: Before the Department of

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1 Consumer and Regulatory Affairs. He didn't do it.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. GREEN: And then what happened was the
4 Chief Administrative Law Judge, L.C. Savannah Little,
5 rendered a determination, and she said you did not
6 respond timely; consequently, the notice of intent and
7 any other documents delivered to you are deemed the
8 agency's action.

9 We sent a final notice of the agency's
10 action to the respondent. They did not respond
11 timely. That's where the timely question comes in.

12 CHAIRPERSON GRIFFIS: Quickly here,
13 because what I hear you doing is bringing us down more
14 in procedural matters of DCRA, and that would happen
15 outside of what -- outside of today.

16 So my question to you is, first and
17 foremost, do you think that this Board has any
18 jurisdiction in deciding what happened or the
19 circumstances? Is there something that is going to
20 arise out of you telling us all of this --

21 MR. GREEN: Yes.

22 CHAIRPERSON GRIFFIS: -- that will impact
23 us?

24 MR. GREEN: Yes.

25 CHAIRPERSON GRIFFIS: And what is it? Let

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1 me hear from our esteemed Board member.

2 MEMBER ETHERLY: Yes, Mr. Chair. I think
3 we can resolve this very easily. I mean, it's a good
4 try, Mr. Green, but it's not there.

5 I understand exactly what you are saying,
6 but I --

7 MR. GREEN: Can you articular it to make
8 sure I understand?

9 MEMBER ETHERLY: What I'm hearing is the
10 reason why the Appellant received the final notice in
11 the first place is because, according to the DCRA
12 notice dated August 19, they didn't respond to the
13 notice of intent to revoke.

14 MR. GREEN: Absolutely right.

15 MEMBER ETHERLY: And as a result of the
16 absence of that response, they then received the final
17 notice of revocation. That's all fine and well.
18 That's completely an accurate statement of the facts,
19 but that in no way, it would be my opinion, impacts
20 the Appellant's ability to still seek an appeal before
21 this body pursuant to 6-641.07.

22 MR. GREEN: I agree. He can seek relief
23 here. Our contention is that there is a certain
24 standard that must be met when one seeks relief before
25 this entity.

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1 CHAIRPERSON GRIFFIS: If you are saying
2 that he is perfectly appropriately here, that's all we
3 need to hear.

4 MR. GREEN: Yes. Sure.

5 CHAIRPERSON GRIFFIS: Unless you want to
6 opt to revisit that procedure and go back to DCRA, in
7 which case we don't need to hear this at this point.

8 MR. DAMARI: You know, I --

9 MR. GREEN: Do you want me to respond or
10 do you want him to respond?

11 CHAIRPERSON GRIFFIS: I'm going to leave
12 that as rhetorical.

13 MR. GREEN: Oh, I'm sorry.

14 MR. DAMARI: I have a point that is going
15 to upset everyone, but if anything, this appeal may be
16 premature.

17 CHAIRPERSON GRIFFIS: Based on?

18 MR. DAMARI: Based on the fact that this
19 final notice is not issued by an Administrative Law
20 Judge. It's my understanding that you have to have a
21 final order.

22 CHAIRPERSON GRIFFIS: Final order from an
23 Administrative Law Judge?

24 MR. DAMARI: Or an Attorney Examiner. I'm
25 not saying -- I'm just advising --

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1 CHAIRPERSON GRIFFIS: What's your cite on
2 that?

3 MR. DAMARI: That's just my general
4 understanding, and I'm not prepared really to argue
5 that off the top of my head.

6 CHAIRPERSON GRIFFIS: All right. Let's
7 keep general understandings for the moment under
8 wraps.

9 MR. BROWN: Mr. Chair, can I interject?

10 CHAIRPERSON GRIFFIS: Yes, Mr. Brown?

11 MR. BERGSTEIN: To just maybe point out to
12 the parties that DCRA's regulations indicate that it
13 is the Director who is authorized to revoke a C of O.
14 Now whether or not there's been a delegation from the
15 Director to a hearing officer, I don't know, but I
16 think it's very important for the parties to focus in
17 on Section 118 of Title 12-A which sets forth the
18 procedures for revoking a C of O and which actually do
19 not mention a hearing at the DCRA but simply provide
20 that any person aggrieved by the action of the
21 Director granting withholding for revoking a
22 certificate of occupancy may appeal the action to the
23 Board of Zoning Adjustment pursuant to D.C. Code
24 subsection 5-241(f) which is the general appeal
25 authority.

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1 So if, in fact, the C of O was revoked by
2 the Director of DCRA, then the Appellant, if
3 aggrieved, has the right, both under the Section 8 of
4 the Zoning Act which is the BZA provision and, as
5 acknowledged by the DCRA regulation, to come directly
6 to the Board of Zoning Adjustment.

7 So I think, if you don't have Section
8 118.4, it would be very helpful if the parties would
9 refer to that, because that is the administrative
10 procedures which DCRA promulgated to govern their
11 processes for revoking certificates of occupancy, and
12 those are the regulations, when read together with the
13 BZA provisions, that the Board, I think, should be
14 using.

15 MR. BROWN: Can I back up. And the
16 building code, which he cites, is absolutely correct.

17 A process occurred where notice was given of intent
18 to revoke, and then the Appellant, the party receiving
19 it by personal service, had an opportunity to respond
20 to that notice.

21 CHAIRPERSON GRIFFIS: Do we have that
22 notice? Do you have that notice with you? Can I get
23 copies up to the Board members, please.

24 MEMBER ETHERLY: And just for
25 clarification, that would be the June 28, 2002, notice

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1 of intent.

2 MR. BROWN: Yes, June 27th. Here is a
3 copy, and that was hand delivered on Kuri Brothers.
4 What occurred -- and if I could just walk the Board
5 through this, just so --

6 CHAIRPERSON GRIFFIS: Just a second. Mr.
7 Brown?

8 MR. BROWN: This matter was initiated by
9 the notice of intent to revoke by the agency, which
10 was personally served on Kuri Brothers, the actual
11 operator of the facility.

12 CHAIRPERSON GRIFFIS: Right.

13 MR. BROWN: That occurred on, as you have
14 a copy, June 27 of '02. That provided the Appellant,
15 Kuri Brothers, 15 days to respond to that.

16 CHAIRPERSON GRIFFIS: Based on DCRA's
17 procedures that are written somewhere.

18 MR. BROWN: That's correct. They failed
19 to do so, even though they had actual notice. As a
20 result of that, the agency in making its final
21 determination --

22 CHAIRPERSON GRIFFIS: DCRA?

23 MR. BROWN: DCRA -- deemed, based on an
24 August 9th letter from the Chief Administrative Law
25 Judge, Ms. Little, which we are having copies made --

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1 deemed that, notwithstanding the fact that Mr. Damari
2 beyond the 15 day period wrote her a letter, said that
3 it is jurisdictional and you failed to answer in a
4 timely manner, the allegations are deemed admitted as
5 they were set forth in the notice of intent to vacate
6 or revoke, and it lays out various charges and
7 findings of fact.

8 As a result of that, on August 19th DCRA
9 issued its final notice revoking the C of O and
10 telling the Appellant that they had to surrender their
11 C of O. At that point, the agency has made their
12 revocation decision, their final decision, which in
13 fact the Appellant can appeal here.

14 We are not saying that the Appellant
15 didn't appeal the final agency decision in a timely
16 manner here. The 60 day Waste Management rule is
17 fine. But what Mr. Damari has raised and where we
18 need to focus is he has indicated that there is not *de*
19 *novo* review, start from the beginning review of the
20 agency's decision, that being DCRA. There is only a
21 decision on the record of how DCRA decided.

22 So taking him at his word, then this Board
23 is left with reviewing the record from the agency
24 below, which is comprised of the notice of intent to
25 revoke, arguably Mr. Damari's tardy letter of July

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1 22nd --

2 MR. DAMARI: Damari, by the way.

3 MR. BROWN: Damari, sorry -- and the
4 letter to and from the Chief Administrative Law Judge,
5 and then the final notice of revocation. That's the
6 whole administrative record below.

7 As part of that, you have to deem the
8 facts in the notice of intent to revoke as admitted.
9 Those are the facts --

10 CHAIRPERSON GRIFFIS: Well, I think we can
11 cut through this, because my understanding in
12 discussions with the Board -- and I will hear from
13 them and also our Corporation Counsel -- is that
14 actually we will go to a *de novo* hearing based on 6-
15 641.07(f) which gives us the jurisdiction to have and
16 to hear a full appeal on any of the administrative
17 decisions, and this being that circumstance.

18 Therefore -- Yes, Mr. Zaidain?

19 MEMBER ZAIDAIN: Go ahead, finish your
20 sentence.

21 CHAIRPERSON GRIFFIS: Go ahead.

22 MEMBER ZAIDAIN: I guess I understand
23 where we are. I think everything we've been arguing
24 about is we've been arguing about DCRA's internal
25 decision making processes and how they have gotten to

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1 the August 19th letter, which is their final decision.

2 There it is.

3 As soon as that decision was made --

4 CHAIRPERSON GRIFFIS: Can they appeal it?

5 MEMBER ZAIDAIN: It's my understanding
6 from what I've heard and from what I've read, that is
7 a decision by an administrative officer enforcing the
8 zoning regulations.

9 CHAIRPERSON GRIFFIS: Right.

10 MEMBER ZAIDAIN: So as soon as that final
11 determination was made, it's eligible to be appealed
12 to this body.

13 MR. BERGSTEIN: Yes, and I guess -- in
14 response to this *de novo* issue -- I'm sorry.

15 MEMBER ZAIDAIN: Well, let me ask my two
16 questions, because maybe you are getting ready to
17 answer.

18 First of all, I don't understand why this
19 is *de novo*. I'm not an attorney. So I'm not entirely
20 clear on what that phrase means. The only thing I can
21 tell is that this should be treated as an appeal to
22 this body through our normal procedures, which also
23 leads me to the next question. Why do we have to
24 treat the record below as fact when that is what this
25 appeal is about?

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1 We are here to review that decision. We
2 have to determine on our own by whatever material
3 evidence gets submitted to us whether or not it is
4 fact and, if it is fact, then the appeal can be
5 decided.

6 CHAIRPERSON GRIFFIS: Very well. Let's
7 look to Corporation Counsel, because the bottom line
8 is, if we go under 07(f), we don't have a record
9 below.

10 MR. BERGSTEIN: There's two types of
11 appeals you hear, *de novo* appeals and appeals on the
12 record. Appeals on the record is where you just look
13 at what happened below, and those are civil infraction
14 appeals.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. BERGSTEIN: This comes under general
17 jurisdiction to hear appeals of administrative actions
18 of District officials that are based upon the zoning
19 regulations. That, you can do *de novo*, which means
20 you have a full hearing.

21 The fact that DCRA created internal
22 procedures to have hearings was their choice, and they
23 certainly can do that, but they can't deprive this
24 Board, which was created by an act of Congress, of its
25 own ability to rehear the matter. So that is what is

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1 before you.

2 You have an appeal of a decision by the
3 Director of Department of Consumer Regulatory Affairs
4 to revoke a C of O, and the facts and circumstances
5 that are relevant to that is before you for a full
6 hearing.

7 CHAIRPERSON GRIFFIS: Right.

8 MEMBER ZAIDAIN: So is this case any
9 different from a case we heard earlier today in terms
10 of process not being -- Father Flannagan's?

11 MR. BERGSTEIN: There is no difference
12 between the process that --

13 MEMBER ZAIDAIN: Right, process-wise.

14 MR. BERGSTEIN: Yes.

15 MEMBER ZAIDAIN: It's the exact same
16 thing?

17 MR. BERGSTEIN: It's the exact same thing.

18 There is no difference between an appeal of a denial
19 of a C of O or revocation of a C of O. Same process.

20 MEMBER ZAIDAIN: So that leads me to the
21 thinking of -- We are getting into all these nuances
22 that I just don't think is relevant. I think we need
23 to proceed with -- Whether it's today or not is beyond
24 me. I think we need to get submissions from the
25 applicants, collect evidence, and hear the case as we

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1 do any other appeal that comes through this agency to
2 this Board.

3 CHAIRPERSON GRIFFIS: I'm in agreement.

4 MR. BROWN: Mr. Chair, and I understand.
5 Where this is important is because Mr. Damari has
6 raised the issue that he wants a narrow hearing.

7 MEMBER ZAIDAIN: With all due respect to
8 everybody in this room, we're going to sit here all
9 day arguing about the narrowness or the relevancy of
10 evidence. I think we just establish it right now.

11 MR. BROWN: Because I can anticipate that
12 the next thing that is going to come out of Mr.
13 Damari's mouth is that testimony that is being given
14 isn't relevant or should be excluded, and I think the
15 Board --

16 CHAIRPERSON GRIFFIS: We'll wait to hear
17 that again, Mr. Brown, because I think what has just
18 been established is that it would be. I think we will
19 set to do in this appeal is, in fact, limit that
20 testimony for its particular relevancy, and I'll bring
21 up one issue as go in.

22 In the filings from the Appellant, we have
23 issues of -- going back to what we were kind of
24 talking about -- DCRA procedure. I am not convinced
25 that this Board has jurisdiction over or governance or

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1 if it's even germane to this appeal all these pieces.

2 Rather than argue it today, I think we
3 will entertain any sort of testimony on that, and I
4 can be briefed -- this Board can be briefed on whether
5 it is, in fact, germane and that this Board has
6 jurisdiction.

7 So I would propose that we move ahead, and
8 I would ask, because we will go right into the
9 Appellant's case with this, if the participants at
10 this point need five minutes to get prepared or are we
11 ready to go?

12 MR. DAMARI: Actually, I have to address
13 the determination that the Board has just made. I
14 have no problem going forward with this case on the
15 merits. I don't. I mean, any suggestion to the
16 contrary is false.

17 I certainly think -- You know, it was my
18 intention today to go forward based upon the record
19 that was presented to the DCRA.

20 CHAIRPERSON GRIFFIS: Let's be very clear
21 and direct here. Do you need more time?

22 MR. DAMARI: I absolutely do. I would
23 like to bring in my client, bring in the evidence, and
24 we'll --

25 CHAIRPERSON GRIFFIS: Okay. So there it

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1 is. We have a request --

2 MR. GREEN: Your Honor.

3 CHAIRPERSON GRIFFIS: I'm going to hear
4 from everybody. We don't need to jump. Let's be
5 rational here. There's only a few of us in the room,
6 and I'll hear from my Board first. But let me be
7 clear on what specifically we are talking about now.

8 There is a delicate request that we might
9 look at continuing this. Mr. Etherly?

10 MEMBER ETHERLY: Wrong assumption. That's
11 all I have to say. Wrong assumption.

12 CHAIRPERSON GRIFFIS: Okay. Any other
13 Board members with comments?

14 MEMBER ZAIDAIN: What do you mean, wrong
15 assumption?

16 CHAIRPERSON GRIFFIS: He's saying that he
17 should have been prepared. He showed up here. He
18 should have been prepared, let's move forward. Any
19 comments?

20 MEMBER ETHERLY: Once again, we've spent
21 the last ten minutes talking about, as you noted, Mr.
22 Zaidain, that very narrow issue of standard of review,
23 which is a critical issue. I'm hearing from Mr.
24 Damari that he banked on the fact that that standard
25 of review decision was going to go in his favor, and

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1 he would be held to simply the record before us which,
2 according to his argument, would have been just a
3 couple of letters.

4 Our decision is, no, this is going to be a
5 full fledged vetting of a number of critical issues in
6 this case. Mr. Damari's allegations --

7 MEMBER ZAIDAIN: Well, I can see your
8 point, but I don't agree with that, because I think
9 there was so much confusion, and maybe some of it was
10 self-created on some of the parties, but now that we
11 have decided on what the process is going to be, at
12 least let's give everybody time to get their cases
13 together.

14 CHAIRPERSON GRIFFIS: Well, we are going
15 to hear from ANC. We've been through this for a long
16 time.

17 MR. DAMARI: Can I address that for a
18 second?

19 CHAIRPERSON GRIFFIS: Hold on a second. I
20 have one more Board member that I want to hear from.

21 COMMISSIONER MITTEN: I think on the point
22 of -- Mr. Etherly's point that Mr. Damari just made a
23 wrong assumption, I think given that we had Mr. Green
24 arguing for the same interpretation and the same
25 approach, that we use this as a review of -- a record

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1 review as opposed to a *de novo* hearing, that that sort
2 of -- what do I want to say? -- mitigates against
3 taking a hard line against Mr. Damari.

4 We had both sides coming in saying, yeah,
5 that's the right standard to be -- or the right
6 procedure to be applying in this case, and now we have
7 an alternative position coming forward, and then
8 that's causing Mr. Damari some problem, because he's
9 not fully prepared.

10 So I think that there is something to be
11 said for allowing everyone to get their ducks in a
12 row.

13 CHAIRPERSON GRIFFIS: Very well. Other
14 Board members?

15 VICE CHAIRPERSON RENSHAW: Well, just --
16 I'd like to hear from everybody else before I make a
17 statement.

18 CHAIRPERSON GRIFFIS: Indeed. Of course.
19 Mr. Green, is your procedure in order to address?

20 MR. GREEN: Thank you, Mr. Chairman. It
21 would appear that a full blown hearing now, in light
22 of what the Appellant's initial request was, is
23 wastage of time of everyone.

24 I realize that this Board has it within
25 its discretion to have a *de novo* hearing, if it should

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1 do so, but I think that the record is pretty clear.
2 Even the Appellant agreed that the record was pretty
3 clear, that it was one that should be addressed and
4 dealt with.

5 I would, therefore, strongly urge the
6 Board to consider going with the initial request of
7 the Appellant, which we certainly go along with, which
8 is to review the record.

9 CHAIRPERSON GRIFFIS: And if not, are you
10 prepared to ahead today?

11 MR. GREEN: I'm always ready, Your Honor.

12 CHAIRPERSON GRIFFIS: Okay. Mr. Bardin?

13 MR. BARDIN: Mr. Chairman and members of
14 the Board, the ANC has tried to get this case to
15 decision for months and perhaps years. We objected in
16 November to the request Mr. Damari made for a
17 continuance because of a long planned vacation
18 overseas.

19 We pointed out he was part of a law firm.
20 He had an associate here. He had a senior partner
21 who had signed the papers. The Board in its wisdom
22 chose to give him a continuance anyhow, and here we
23 are.

24 Now I want to remind you, whatever you do,
25 of the following: One, the burden is on an Appellant

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1 in every appeal. Please keep that in mind. Two, the
2 duty of this Board to itself and to its credibility in
3 the community is to get the work done. Three, Mr.
4 Damari was supposed to have filed a prehearing
5 statement two weeks ago, and he didn't.

6 MR. DAMARI: When was I -- No. When was I
7 supposed to --

8 CHAIRPERSON GRIFFIS: Let's let him
9 finish, and then we will get on to the proceedings.

10 MR. BARDIN: Mr. Chair, may I be
11 interrupted at the end of my --

12 CHAIRPERSON GRIFFIS: Go ahead.

13 MR. BARDIN: -- remarks instead of during
14 the middle of them.

15 CHAIRPERSON GRIFFIS: Mr. Bardin,
16 continue, please.

17 MR. BARDIN: And, obviously, it is not
18 helpful to this Board and its members, not to mention
19 the parties on this side of the dais, not to have
20 their full statement.

21 Four, Mr. Damari has repeatedly said he
22 has testimony and evidence, but he's never produced it
23 in any of the hearings we got anywhere close to.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. BARDIN: Now the case of the ANC is

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1 our Commissioner Perry was up all last night preparing
2 her testimony, and we are ready to go forward. Our
3 Commissioner Perry went to the D.C. archives to
4 research all the facts about this property and the
5 abuse after abuse after abuse involving this property.

6 We are ready to go forward. The Appellant
7 is not. The Appellant should be non-suited. The
8 traditional technique is to say, too bad, too late,
9 done with, not because their appeal was too late, but
10 because their lack of preparation is too late.

11 CHAIRPERSON GRIFFIS: Indeed. I think we
12 understand. MR. Brown.

13 MR. GREEN: Can I make one other
14 observation?

15 CHAIRPERSON GRIFFIS: No.

16 MR. GREEN: Robinson v. Howard University.

17 CHAIRPERSON GRIFFIS: Is that an
18 observation or a case cite?

19 MR. GREEN: A case cite.

20 MR. BROWN: Mr. Chair, I concur with Mr.
21 Green and Mr. Bardin. It's Appellant's burden. We
22 are here. We are ready to go. He never raised any of
23 these procedural issues in the two pages he's filed in
24 this entire case.

25 So to come in here and to plead ignorance

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1 of where we are -- I think we need to move forward,
2 and he can put on whatever case he has. We'll put on
3 the case that we have here, which is, quite frankly, a
4 lot of people spent a lot of time, and the Board will
5 have what it needs to decide.

6 MR. DAMARI: Can I address that briefly?

7 CHAIRPERSON GRIFFIS: Yes.

8 MR. DAMARI: Despite months of hearing
9 that everyone wants to resolve this case on the
10 merits, on the substance, which is what I've been
11 hearing from the other side for months, because of the
12 procedural morass which has constantly bounced this
13 case back and forth, I am willing today with a brief
14 continuance to go forward on the merits.

15 DCRA cited to a Code section, and I'll
16 repeat it again, that invokes chapter 18 of Title 2
17 which says you are limited to the record. That was a
18 reasonable reliance on my part, relying not only on
19 what that code section says, but DCRA's position that
20 it's that code section that governs.

21 CHAIRPERSON GRIFFIS: You are referring to
22 the August 19 letter?

23 MR. DAMARI: Yes.

24 CHAIRPERSON GRIFFIS: Well, in that also
25 is 6-641.07(f). What made you conclude to look at one

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1 and not the other?

2 MR. DAMARI: Because it's a general
3 principle of statutory construction. 6.641.07(f) --
4 I'll pull it out in a second -- does not indicate
5 anywhere -- I don't think the word *de novo* appears
6 anywhere in that statute. I'm looking it up right
7 now. I could read it to you. It doesn't say *de novo*.

8 So when you have a statute that provides
9 for a specific procedure, i.e., chapter 18 of Title 2
10 which says you are limited to the record, and 6-
11 641.07(f) which is silent as to whether it's *de novo*
12 or on the record, and --

13 CHAIRPERSON GRIFFIS: Well, we could spend
14 a lot of time on this, but my brief reading of 6-
15 641.09 on which you are relying actually goes to
16 whether one has a C of O and, actually, stipulates
17 that one must have a C of O and that the remedy for
18 bringing some suit for a property owner that doesn't
19 have a C of O is the courts.

20 I don't see how that fits into us nor do I
21 want to go back down that road. My understanding is
22 that you have just said that, with a brief recess now,
23 you could continue today. Is that correct?

24 MR. DAMARI: No, that's not what I'm
25 saying. What I'm saying is at a bare minimum -- at a

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1 bare minimum -- my interpretation of that statute was
2 reasonable. You could say I was wrong, but it was
3 reasonable, and that's what they cited to. Okay?

4 CHAIRPERSON GRIFFIS: Okay. Ms. Mitten?

5 COMMISSIONER MITTEN: Just on that point,
6 the section of 6-641.09 that Mr. Damari is making
7 reference to is the last line which is adjudication of
8 any infraction of this chapter shall be pursuant to
9 Chapter 18 of Title 2. We are back to the original
10 discussion with Mr. Buffo.

11 This is not an adjudication of an
12 infraction. So then this is not helpful to you, 6-
13 641.09. So in relying on that in the first paragraph
14 of the August 19th letter, you would be in error,
15 because this is not a infraction.

16 So then you could have looked at the
17 second paragraph of the August 19th letter, which Mr.
18 Chairman has directed you to, which is the reference
19 to 6-641.07(f).

20 MR. DAMARI: And where does that say that
21 it's a *de novo* review?

22 MR. BERGSTEIN: The other thing that the
23 Board might want to consider is that the Board has
24 rules of procedure for appeals.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. BERGSTEIN: And 3117.11 indicates that
2 appeal includes an appellant's case, an administrative
3 officer's case. It also speaks of witnesses. So one
4 of the issues that I think the Board might want to
5 consider is that its rules of procedure for appeals
6 contemplate a hearing.

7 MR. DAMARI: Let me cite the Board to its
8 previous decision on May 23, 2002. This is the
9 Board's decision, and I quote --

10 CHAIRPERSON GRIFFIS: On what?

11 MR. DAMARI: The last time we were here.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. DAMARI: Bear with me one second.
14 This appeal of the ALJ's decision was brought pursuant
15 to the Department of Consumer and Regulatory Affairs
16 Civil Infractions Act. The Board's review is based on
17 the record established before the ALJ. The Board --
18 quote -- "shall set aside any order that is" --

19 CHAIRPERSON GRIFFIS: But that's true.
20 Corporation Counsel can correct me. We were looking
21 at the ALJ's record. It was --

22 COMMISSIONER MITTEN; That was a civil
23 infraction.

24 CHAIRPERSON GRIFFIS: It was a civil
25 infraction and not an appeal brought to us.

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1 MR. DAMARI: But how am I supposed to --
2 without any reference to a *de novo* hearing and with
3 DCRA specifically referring to a provision?

4 CHAIRPERSON GRIFFIS: I don't know how to
5 answer it anymore than we have already answered,
6 unless Corporation Counsel has a better
7 interpretation. Then I'll get to you.

8 MR. BERGSTEIN: I think you just have to
9 determine whether or not the Appellant had good faith
10 reliance on what it was receiving from the District
11 government with respect to what it believed its
12 responsibilities were today. If you think it was a
13 good faith reliance and if the parties, other parties,
14 will not be prejudiced, then that would represent good
15 cause for a continuance.

16 I mean, you are essentially being asked to
17 continue this proceeding, and you need to determine
18 whether or not good cause exists and whether or not
19 there is prejudice to the other parties in granting
20 the continuance.

21 CHAIRPERSON GRIFFIS: Okay. It's clear.
22 Hold on. Let me hear. I don't believe you have
23 introduced yourself for the record at this point.

24 MS. PERRY: My name is Karen Perry from
25 ANC-3F. In August when Mr. Damari filed the appeal, a

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1 date was set for November. ANC-3F was here. Mr.
2 Green was here prepared to go forward. A
3 representative of Mr. Damari's law firm came in in
4 November and requested a delay in the case, and none
5 of these arguments were raised.

6 There was no question then as to what
7 section of the code, what was going to happen here in
8 January. I think what I'm saying is you've delayed
9 this now for, what, more than two months. If Mr.
10 Damari had any questions, just as I always contact the
11 BZA staff, Mr. Damari could have done the same thing
12 or in November argued the points that he is making
13 today, in writing or verbally through his law firm.

14 CHAIRPERSON GRIFFIS: Okay, I understand
15 what you're saying. I'm not sure it would have been
16 appropriate. We didn't even get to this point
17 previously, but I understand --

18 MR. DAMARI: Let me raise --

19 MR. GREEN: Mr. Chairman.

20 MEMBER ETHERLY: Mr. Chairman, call the
21 question on this issue, Mr. Chair.

22 MR. GREEN: Mr. Chairman. Mr. Chairman.
23 May I please be heard? The only thing that I would
24 ask -- I have instructed my colleague to make a phone
25 call, because I had my witnesses on call. They are

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1 coming via subway. Just give us a few minutes, and
2 they will be here, and I think that what Mr. Damari
3 should do is to get his cellphone out, go in the
4 hallway, and do the same thing that my colleague is
5 doing, and that's call his witnesses.

6 CHAIRPERSON GRIFFIS: That's good advice.

7 Board members, your pleasure?

8 MR. DAMARI: Can I raise one more issue?

9 CHAIRPERSON GRIFFIS: Hold on. Let me
10 hear from my Board. Yes?

11 COMMISSIONER MITTEN: MR. Chairman, I
12 would like to resolve the question that Mr. Damari has
13 raised, which is how would he know from looking at --
14 because I want us -- However we proceed, I want us to
15 be fair, and I want what we do to be unchallengeable.

16 CHAIRPERSON GRIFFIS: Indeed.

17 COMMISSIONER MITTEN: And I think that's
18 what everybody would want. So how would Mr. Damari
19 know looking at, if he chose to, 6-641.07, that the
20 type of appeal -- since he wouldn't necessarily go to
21 our rules of procedure, how would he know that this
22 was a *de novo* proceeding as opposed to a record
23 review?

24 CHAIRPERSON GRIFFIS: What about the last
25 sentence in that?

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1 MEMBER ETHERLY: Let me just note in
2 contemplation of Ms. Mitten's question, which might
3 have been rhetorical, or maybe it was an actual
4 question --

5 COMMISSIONER MITTEN: No, it's an actual
6 question. I don't have the answer. I want someone to
7 tell me.

8 MEMBER ETHERLY: One, I'll simply note
9 that it's very difficult to find a set of
10 circumstances where one should get a group of lawyers
11 in the room, you're going to be able to come up with
12 an unchallengeable statement, because that's what
13 lawyers are -- and I don't mean this disparagingly.
14 I'm a member of the bar myself, but that's what
15 lawyers are taught and instructed to do.

16 You look for the weak points. You look
17 for the nuances here. I understand exactly where Mr.
18 Damari is coming from in terms of his argument. I
19 want him to be clear that I don't think anyone is
20 suggesting that your interpretation was unreasonable.

21 However, I think it was a calculated risk that also
22 ran the possibility of perhaps not being accepted in
23 terms of an argument.

24 I hear exactly where you're coming from,
25 Ms. Mitten, and I, too, agree with you that there is

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1 no clear language in (f), but (f) leaves enough of, I
2 believe -- You would have to probably hedge your bet
3 and be prepared to move forward if that *de novo*
4 question just went your way. That's kind of where I'm
5 coming out on this issue.

6 It's an outcome that indeed doesn't work
7 to the advantage of Mr. Damari, but once again, I'm
8 not alleging that it was an unreasonable assumption to
9 make, but it was just a risk that didn't pay off.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. DAMARI: Let me raise --

12 CHAIRPERSON GRIFFIS: Actually, hold on
13 just a moment, please. Ms. Mitten, I want to get back
14 directly to what you were saying. As I look at
15 641.07(f), it begins with appeals to the Board of
16 Adjustment. It talks about, going further down, an
17 administrative decision which can be appealed, and the
18 last piece of it, the last sentence of that says there
19 shall be a public hearing on appeal.

20 COMMISSIONER MITTEN: But I guess it
21 doesn't -- it does not strike me that saying there is
22 going to be a public hearing where you would hear
23 arguments, which is what we do in a civil infraction
24 posture -- that that necessarily means that it's --
25 saying that there will be a public hearing does not

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1 lead in my mind necessarily to a *de novo*.

2 CHAIRPERSON GRIFFIS: So your point is
3 that could you rely directly on this without then
4 referring to our rules of procedures in the zoning
5 regulations?

6 COMMISSIONER MITTEN: I don't know. I
7 don't have the answer to that.

8 MEMBER ETHERLY: Once again, I think, you
9 know, for my colleagues in terms of responding to this
10 motion for a continuance, I think Corporation Counsel
11 laid out the charge appropriately. That is, we are
12 going to have to take into consideration whether or
13 not there is going to be undue -- well, I won't even
14 go there.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. DAMARI: Mr. Chairman, can I quickly--

17 CHAIRPERSON GRIFFIS: Hold on a moment.

18 MR. DAMARI: I've got two points to raise
19 with respect to that. Number one, the assumption of
20 the Board here is that my interpretation is wrong,
21 because revocation of a C of O is not an infraction.
22 That, I understand.

23 What I'm saying is there is nothing in the
24 D.C. Code that allows a C of O to be revoked. The
25 only place you can -- The only category you can put

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1 that procedure in is under 6-641.09, because that
2 deals specifically with C of O.

3 By default, I think I have -- I make the
4 reasonable argument that it's not entirely clear
5 whether -- what procedure governs revocation -- what
6 provision of the Code governs revocations of C of O.
7 I don't think there is any. I really don't. And
8 number two --

9 MR. BROWN: Mr. Chair, can I interject. I
10 mean, I think we've gone over that point, and we are
11 now focused in on whether we go forward and the
12 balance of the issues.

13 CHAIRPERSON GRIFFIS: That's true, but Mr.
14 Damari had one more point. So let me not interrupt
15 him.

16 MR. DAMARI: You know, so then --

17 MR. GREEN: Mr. Chair, I'd like to respond
18 also, Mr. Chair.

19 MR. DAMARI: Then the statement is made --

20 CHAIRPERSON GRIFFIS: Let's not interrupt.
21 I will get to everybody. So I don't need to be
22 interrupted or anyone else interrupted demanding to be
23 heard. We'll get to everybody.

24 MR. DAMARI: Then the statement is made,
25 well, if you look at the regs and the regs suggest

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1 that you can present evidence in an appeal. Well, the
2 regs suggest you can present evidence at every appeal,
3 but you don't do that, because you follow the Code.

4 There is nothing in the regs that limits
5 the circumstances under which you can present
6 evidence. So according to that logic, you would be
7 able to present evidence at every appeal, notice of
8 infraction, revocation of C of O.

9 There's a reason why evidence is not
10 presented at the notice of infraction appeals, and
11 that's because Title 18 of Chapter 2 prevents you from
12 doing it. And if someone can inform me of something
13 else -- Everyone is saying that I'm not prepared, but
14 I'm citing to the law here; and if someone can tell me
15 what in the regs limits the right to present evidence,
16 then my point is well taken, i.e., that if you are
17 just going to follow the regs, then you should be able
18 to present evidence at every appeal, which is not the
19 case.

20 MR. BROWN: Mr. Chairman, I don't think we
21 are adding anything to the discussion, which is now
22 whether we are going to go forward. Again, Appellant
23 has the burden.

24 When Mr. Damari filed his appeal, he says
25 on appeal petitioner contends and will prove, and then

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1 goes through a laundry list of procedural and factual
2 questions. So when he filed his appeal, he was
3 assuming the burden of proving all these things, and
4 you prove that by showing up at a hearing with
5 witnesses.

6 Can I ask -- and the Board has to balance
7 fairness and prejudice, and this has been going on 13
8 years. It's clear that this is a public safety and
9 health and environmental hazard.

10 When the DCRA revoked the C of O and
11 instructed the illegal operators to turn in their C of
12 O, they have not done that. They are operating
13 illegally. It's a public safety concern.

14 So putting that at the top of the list of
15 prejudice to this community, the property owners and
16 the residents I represent, the ANC, one, it doesn't
17 make sense to put this off one more day.

18 Two, I think, quite frankly, that if the
19 Board had any intention whatsoever -- and I think it
20 would be misplaced -- of continuing this matter, quite
21 frankly, MR. Damari's clients should in fact come in
22 compliance with the existing law, surrender their C of
23 O, cease operating and, quite frankly, this Board --
24 There is no automatic stay based on filing an appeal,
25 and no stay should be granted.

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1 So we can -- If the Board, and I think it
2 would be misplaced, were to continue this matter, then
3 I think the current state of the city's order, which
4 is in fact turn in your C of O and cease operations,
5 should be enforced, and this Board should not in any
6 way entertain a stay. But I think we ought to go
7 forward, because there are life and health issues
8 involved here.

9 CHAIRPERSON GRIFFIS: Indeed, and that's
10 well put, and the Board is aware of that now, Mr.
11 Brown, if it wasn't before, environmental hazard and
12 public health. Mr. Green, you had something you
13 wanted to say?

14 MR. GREEN: Yes, I did, Mr. Chairman.
15 What we have is a situation where the Appellant has
16 been operating in an outlaw status since June 28 of
17 2002 up until today, and we are now in 2003.

18 Now the question is this. Are we going to
19 continue this and allow them to operate in that status
20 because of -- just because? We have a petition for an
21 appeal. Are we going to address those matters in this
22 written petition for appeal or are we going to deal
23 with something else?

24 The Appellant has indicated through
25 counsel, by what authority can certain actions be

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1 taken? I mean, again I direct the attention to 118.4,
2 which the Board is familiar with, and it talks of
3 revocations of certificates of occupancy.

4 It says, among other things, that the
5 Director is authorized to revoke a certificate of
6 occupancy pursuant to any of the sections of 118.4.1,
7 which talks about any certificate of occupancy
8 previously issued or issued pursuant to Section 118
9 shall be revoked by the Director after notice if the
10 actual occupancy does not conform with that permitted.

11 That's what we have in this particular
12 situation. Now, you know, I am concerned about this
13 matter being -- going both ways. I mean, we are
14 hearing an inconsistent argument on the part of the
15 Appellant.

16 What are we going to do here today? Are
17 we going to deal with the record? Are we going to
18 deal with *de novo*? I think that has to clearly be
19 stated. It was our impression that we were going to
20 deal with the record, but if that's not what you want
21 to do, then so be it. But I think that the Commission
22 has to make a determination as to exactly what it is
23 that we are, shall we say, defending against as the
24 appellee.

25 CHAIRPERSON GRIFFIS: I think we have

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1 absolute intention of doing that. Okay, anything else
2 to address on this specific thing? Nothing redundant,
3 of course.

4 MR. DAMARI: I would just say one last
5 thing.

6 CHAIRPERSON GRIFFIS: One last thing.

7 MR. DAMARI: That this will be -- If the
8 goal of this body and everyone here is to get to this
9 on the merits, and we have a situation where both
10 parties have the same assumption of what the standard
11 of review is, this is going to be through appeals
12 process for a long time, because it's just going to
13 get bounced up and then bounced back down.

14 CHAIRPERSON GRIFFIS: Not just our appeal
15 process, you mean?

16 MR. DAMARI: It's going to be a prolonged
17 appeal process, because I -- I'll suffice it to say.

18 CHAIRPERSON GRIFFIS: Indeed. I think we
19 are aware. Board members?

20 (Whereupon, the foregoing matter went off
21 the record at 3:18 p.m. and went back on the record at
22 3:20 p.m.)

23 Okay. Under the brief conversation with
24 my Board members, I think it is clear consensus that
25 this Board holds two things of great importance.

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1 First of all is getting on with this, and we are all
2 too aware of the critical nature of this for everyone
3 involved, and it serves no one by delaying this
4 continually or for an indefinite period of time.

5 Second, which needs to be balanced on
6 that, is that hearing this we want to hear the
7 substance, the merits. We want to get to the heart of
8 the matter so that we do have our information
9 correctly presented to this Board so that we might be
10 able to deliberate and we might be able to get to the
11 bottom of it.

12 With that balance, how do we proceed? We
13 have just a few hours this afternoon, and I am
14 reluctant, and I think the Board is with me, to jump
15 into this before everyone is absolutely prepared.

16 So what I would propose we do is set this
17 for the 11th of February. It does not give a great
18 amount and undue delay, but rather ensures this Board
19 that next we meet we will be very substantive and
20 direct, and believe me, I am about to outline exactly
21 what we will be doing.

22 I am going to also ask Corporation Counsel
23 to weigh in, in defining what we will be proceeding
24 with. Let me just verify that September 11th we have
25 an opportunity to do this in the morning. Is that

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1 correct? What did I say? February 11th.

2 Mr. Moy, why don't you reiterate the date
3 and time for me.

4 MR. MOY: Okay. A little note, too. We
5 can do it February 11th. We have two cases that have
6 dropped off. Just to remind the Board that we have a
7 potentially contentious case in the afternoon.

8 CHAIRPERSON GRIFFIS: Let's not worry
9 about what else.

10 MR. MOY: Okay, we're in.

11 CHAIRPERSON GRIFFIS: We have the morning
12 then? It would be the first case in the morning, the
13 only case in the morning?

14 MR. MOY: No. We have two other cases in
15 the morning, plus a special meeting case. All right?

16 COMMISSIONER MITTEN: So this would be the
17 third case of the morning.

18 VICE CHAIRPERSON RENSHAW: That's not
19 enough time, Mr. Chairman. Clearly not enough time.

20 COMMISSIONER MITTEN: Mr. Chairman,
21 perhaps you could ask the parties how many witnesses
22 they were planning on calling, and in the interest of
23 time ask them to make detailed submissions so that we
24 wouldn't have to hear extensive testimony.

25 MEMBER ETHERLY: And while we're working

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1 through this, Mr. Chair, let me just beat a dead horse
2 here. I realize we are moving forward with the 11th,
3 but let me just be very clear on the record that I
4 don't support that particular course of action. But
5 be that as it may, this will be one Board member who
6 will have very little patience on the 11th for some
7 additional yimmering and yammering.

8 As you said, Corporation Counsel and staff
9 will be very specific with all of the parties involved
10 about what we need for the 11th and what we expect to
11 hear on the 11th. I would caution -- Once again just
12 as one Board member speaking, that I would strongly
13 caution and encourage all parties to adhere to those
14 guidelines and dictates, not only for the benefit of
15 getting to the bottom in this record and resolving the
16 issues that are brought to bear, but also just for
17 sanity' sake.

18 I think we have exhausted a great of time
19 paddling our feet in the water here. So I'm hopeful
20 that on February 11th we will be able to make
21 substantial progress. Thank you, Mr. Chair.

22 MR. MOY: Mr. Chair, if I may, I'll just
23 help you with your decision. We have appeals every
24 afternoon through April 1st. So if we don't go with
25 February 11th, the other option would be any afternoon

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1 beginning April 8th.

2 MR. BARDIN: Mr. Chairman, the ANC wants
3 to remind you there is only one party that's obliged
4 to file a prehearing statement. That's the Appellant,
5 not the ANC, not the government, not the intervenor.
6 I respectfully request that you implement your rules
7 and require this appellant by Thursday of this week to
8 file a full and detailed prehearing statement.

9 He told DCRA back in August that they were
10 ready for a hearing. He told this Board in the appeal
11 paper in this case that Mr. Brown read to you that he
12 was ready for a hearing. He must know who are his
13 witnesses and what they have to say, what are his
14 documents, what he is ready to prove.

15 If he gives it to you on Thursday, if I
16 understand the internal procedures of the Board, it
17 will be delivered to the Board members so you can look
18 at it over the weekend. And if he gets away with not
19 having to do anything, then everybody will again be
20 wondering what on earth is this appellant up to.

21 CHAIRPERSON GRIFFIS: Okay. I think we
22 are perfectly prepared to require a prehearing
23 statement. It may not be this Thursday, as let's try
24 and establish the date, but it will be in sufficient
25 time before our next convening.

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1 You wanted to object to that, Mr. Damari?

2 MR. DAMARI: I just -- You know,
3 everything is -- I've heard my name brought up so many
4 times during this hearing. I haven't brought up any
5 others' counsel's name -- about that I went on a
6 vacation to Israel to visit family members of mine
7 that have been -- But I don't appreciate it.

8 CHAIRPERSON GRIFFIS: Don't be too
9 concerned with that.

10 MR. DAMARI: And I have a right to be
11 angry, and let me read, because I have been prepared.

12 MR. BROWN: Mr. Chairman, this is
13 irrelevant. I think we need to --

14 MR. DAMARI: I have a right to finish.

15 CHAIRPERSON GRIFFIS: Actually, let's all
16 just calm down just a little bit. Mr. Damari, I don't
17 think, first of all, the Board takes under great
18 consideration all comments that are made and, believe
19 me, it is my mistake if I haven't stopped
20 inappropriate comments. I've tried to jump in as I
21 can.

22 I do not think the Board has been
23 persuaded or is moved by numerous comments that were
24 actually not germane to our proceedings, and I think
25 we are all very focused on what is germane.

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1 You wanted to cite something about a
2 prehearing submission?

3 MR. DAMARI: I just want to say -- Yes,
4 and I apologize for losing it. It says that no later
5 than 14 days before the date of the hearing, the
6 applicant shall file with the Board any additional
7 statements, informations, briefs, reports, plans or
8 other material that the applicant may wish to offer
9 into evidence at the hearing.

10 I was not planning on offering any
11 evidence into this hearing, because of my
12 interpretation of the Code. That's why I didn't file
13 anything.

14 CHAIRPERSON GRIFFIS: Right.

15 MR. DAMARI: It was certainly not -- I was
16 familiar with the reg, and it certainly was not
17 inadvertent on my part.

18 CHAIRPERSON GRIFFIS: Indeed, and I don't
19 think anyone is faulting you for that, but I think
20 with my interpretation of what we will -- as we look
21 at what the ANC is saying, as we set this for a date,
22 we will give you enough time to put together that
23 submission, and we will have that in the record.

24 That's why I mention it, and it will
25 probably not be by Thursday. But let me hear some

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1 more dates. I do not want to cram this in.

2 April 8th is in the afternoon, gives us
3 the entire afternoon. Is that correct?

4 MR. MOY: Yes, sir.

5 CHAIRPERSON GRIFFIS: That's where we left
6 off?

7 MR. MOY: Yes.

8 MR. BROWN: Mr. Chairman, I think that's -
9 - I mean, I understand the Board's logistics, but that
10 -- We've gone almost a full year since the revocation,
11 and there are legitimate public safety and health
12 issues. Quite frankly, this Appellant has already
13 been ordered to turn in their certificate of occupancy
14 and cease operations, and a year beyond that we are
15 still not going to be at the hearing, let alone the
16 decision stage.

17 So I think there is some urgency here.

18 CHAIRPERSON GRIFFIS: I understand your
19 point exactly. We have two options, as I see it, and
20 one I don't favor strongly. That is, we do this
21 piecemeal and that we fit you in with an hour that we
22 have next week and an hour following that, and then an
23 hour three weeks from now. That puts a heck of a lot
24 of burden, I think, on all of you, not to mention on
25 the Board itself being able to keep up to date in the

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1 numerous cases that we go through. Therefore --

2 COMMISSIONER MITTEN: Mr. Chair.

3 CHAIRPERSON GRIFFIS: -- I clearly think
4 that it's unfortunate we are at the situation we are
5 today, but we are. And so -- Ms. Mitten.

6 COMMISSIONER MITTEN: Just on the urgency
7 matter, I just want to be sure I understood what Mr.
8 Brown just said. These people -- Because there is no
9 stay, they are operating illegally, because their
10 certificate of occupancy has been revoked. Correct?

11 MR. BROWN: That's correct, and --

12 MR. BARDIN: That's right. That is
13 absolutely right.

14 COMMISSIONER MITTEN: Okay. So there is
15 nothing the Board can do to compel these people to
16 stop operation. That's an enforcement issue, and so
17 if at this point in time they are meant to not be
18 operating, that is for DCRA or the police or somebody
19 to solve that problem.

20 I'll defer to the Chairman as to how he
21 wants to handle this, but I mean, if you are talking
22 about since June or July or August or whenever, that's
23 a serious enforcement problem that whatever we do here
24 isn't going to change.

25 MR. BARDIN: With respect, Mr. Chairman,

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1 Mr. Brown suggested to you, and the ANC supports him,
2 that if you are going to grant a continuance to give
3 the Appellant one more chance to put together a case,
4 then make it contingent, conditional, by condition of
5 this Board on the Appellant agreeing to obey the
6 revocation of the certificate of occupancy.

7 CHAIRPERSON GRIFFIS: I'm not sure --

8 MR. BARDIN: I think you have that
9 authority. You may --

10 CHAIRPERSON GRIFFIS: I'm not sure we do
11 have.

12 MR. BARDIN: You may choose to exercise
13 it. You may choose not to, but we respectfully
14 request that the Commission set it out and vote on it.

15 CHAIRPERSON GRIFFIS: To put it in
16 perspective, I think the Board could request that, but
17 again it goes to what Ms. Mitten is saying. We have
18 no jurisdiction to enforce it. They could, frankly,
19 tell us anything they want.

20 I'm going to ask my Corporation Counsel --

21 MR. BARDIN: You have jurisdiction to deny
22 the continuance.

23 CHAIRPERSON GRIFFIS: Yes, indeed.

24 MR. BERGSTEIN; I concur with the Board.
25 In fact, the section that's been talked about a lot,

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1 6.641.09, authorizes any citizen especially damaged to
2 go into Superior Court and seek an injunction against
3 this use. So it also would authorize DCRA to take
4 enforcement actions against this facility.

5 So what the Board has is a remedy that has
6 been provided in the scenario that has not been
7 utilized, and the responsibility for enforcing the C
8 of O laws lies with DCRA, and citizens are given a
9 special power under the Act to do it themselves.

10 So the Board doesn't have that enforcement
11 responsibility.

12 CHAIRPERSON GRIFFIS: Okay, let's look at
13 the 8th of April.

14 VICE CHAIRPERSON RENSHAW: Mr. Chairman.

15 CHAIRPERSON GRIFFIS: Yes, Ms. Renshaw.

16 VICE CHAIRPERSON RENSHAW: Could we direct
17 our attention to next -- February 25th in the
18 afternoon. It looks like we've got one case, and it
19 says all afternoon, but I'm questioning whether or not
20 that is going to take all afternoon.

21 CHAIRPERSON GRIFFIS: Yes, I think that
22 will take a substantial amount of the afternoon. We
23 could hear part of the appeal. I just don't know.

24 MR. DAMARI: Your Honor, I am certainly
25 willing to proceed, to the extent possible, on the

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1 11th. I just want to make that clear. I want to
2 avoid collateral litigation related to this, which may
3 occur if, you know, there is a situation in D.C.
4 Superior Court and stuff like that, because I sense
5 threat being levied.

6 CHAIRPERSON GRIFFIS: I understand.

7 MR. DAMARI: And I'd rather just get it
8 resolved on the merits. If it can be on the 11th,
9 then I'm ready, willing and able.

10 CHAIRPERSON GRIFFIS: There is absolutely
11 no way on the 11th.

12 MS. PERRY; Mr. Griffis?

13 CHAIRPERSON GRIFFIS: Yes?

14 MS. PERRY: It is my understanding, and it
15 might need to be verified, that the Sheridan School is
16 on the 25th. It's one of your cases.

17 CHAIRPERSON GRIFFIS: Yes, in the morning.

18 MS. PERRY: It's very likely that that is
19 going to be postponed at the request of the Sheridan
20 School and with a consensus from the single member
21 district ANC Commissioner. So that is one
22 possibility, if that works; and if that does happen,
23 but that's my understanding. A continuance is being
24 asked for.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. GREEN: Mr. Chairman.

2 CHAIRPERSON GRIFFIS: Yes? Mr. Green.

3 MR. GREEN: Thank you. I just want to say
4 that I don't intend to put on a major case, and I
5 think that I can do it in an hour.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. GREEN: If that will help.

8 MS. PERRY: My testimony is not going to
9 be more than five pages.

10 CHAIRPERSON GRIFFIS: Okay. This is not
11 going to be held to, and believe me, I'm going
12 somewhere. Mr. Damari, do you have an estimate of how
13 much time you need to present your case?

14 MR. DAMARI: Well, obviously, I'm going to
15 have the right to cross, and that's going to be
16 exercised.

17 CHAIRPERSON GRIFFIS: Just your case
18 presentation. Can you do it in an hour?

19 MR. DAMARI: Actually, it would be rather
20 short. I don't really think there's much.

21 CHAIRPERSON GRIFFIS: I think what we
22 would do is, in fact, as we start looking at this, we
23 would set 45 minutes for the presentation of the case.
24 That, of course, does not include cross-examination.
25 But let me put this now in perspective, and this is

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1 where I'm going, Mr. Green, and I absolutely
2 appreciate your bringing that up.

3 Forty-five, 45 and 45 is a little over two
4 hours, and two hours in the morning, as we start at
5 9:30 and we end at 12:00 and I have two other cases --
6 there is no two hours to be put in there, and that's
7 where my difficulty goes with the 11th. That's why
8 I'm being -- and even if a case drops off, we have two
9 hours.

10 I say we set this for the 8th of April.
11 Now let's get to the specifics of what we are doing
12 when we get there.

13 Clearly, we are going to have a prehearing
14 statement -- a prehearing submission, I am going to
15 say, put in by Mr. Damari. That will be -- Do you
16 have any difficulty putting it in before 14 days?

17 MR. DAMARI: No.

18 CHAIRPERSON GRIFFIS: In which case, give
19 me an indication of how long you need to, in the most
20 expeditious manner, put that together for submission?

21 MR. DAMARI: Shouldn't be a problem.
22 Before February 20th? Is that acceptable?

23 CHAIRPERSON GRIFFIS: Okay. February 20th
24 is what day?

25 MR. DAMARI: Or thereabouts.

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1 CHAIRPERSON GRIFFIS: February 20th is a
2 Thursday? Okay, why don't we do it to the end of that
3 week, February 21st, close of business on that Friday.
4 That's reasonable?

5 MR. DAMARI: Yes.

6 CHAIRPERSON GRIFFIS: Okay, excellent.
7 Yes, indeed, and the staff is going to reiterate
8 everything that I miss, but clearly, that information
9 is served on everybody that is participating in this
10 case, in which case we make sure that you have all of
11 their service addresses which should be part of the
12 record. Okay.

13 VICE CHAIRPERSON RENSHAW: And, Mr.
14 Chairman, there will be no further continuance from
15 that point.

16 CHAIRPERSON GRIFFIS: That's absolutely
17 correct.

18 VICE CHAIRPERSON RENSHAW: Good.

19 COMMISSIONER MITTEN: Mr. Chairman, could
20 I also make a request?

21 CHAIRPERSON GRIFFIS: Yes.

22 COMMISSIONER MITTEN: There are numerous
23 items that are cited in the petition for appeal that
24 deal with procedural -- DCRA procedures.

25 CHAIRPERSON GRIFFIS: Excellent, yes.

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1 COMMISSIONER MITTEN: And I would like to
2 have the Appellant and the appellee and the ANC and
3 the intervenor, if they choose to, brief the Board on
4 whether the Board actually has jurisdiction over these
5 many procedural issues that have been raised in the
6 petition.

7 CHAIRPERSON GRIFFIS: Good, and what you
8 want is a written briefing submitted into the Board.
9 Actually, it goes directly to whether it's germane for
10 us to hear any of these issues. Is that clear?

11 MEMBER ZAIDAIN: Can we discuss that
12 really quick?

13 CHAIRPERSON GRIFFIS: Okay.

14 MEMBER ZAIDAIN: I see a replay of today
15 occurring again if we go down that road. I mean, is
16 there still some question in the Board's mind that --

17 CHAIRPERSON GRIFFIS: This is why I think
18 we need to have it clarified, Mr. Zaidain. I think
19 Ms. Mitten is right on. In the petition for appeal
20 that we have now submitted, it may change, but if
21 these issues continue to be brought to the Board,
22 conceivably we are going to hear testimony and we are
23 going to hear even witnesses on it, and I think Ms.
24 Mitten is trying to cut that off early, if we have a
25 written submission briefing us on why we should hear

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1 it.

2 Conceivably, we could show up on the 8th
3 and decide that we won't, because we now will have
4 been briefed by the other side.

5 MEMBER ZAIDAIN: Well, and you are talking
6 about the DCRA internal procedures?

7 CHAIRPERSON GRIFFIS: Exactly. If you
8 look at the petition for appeal that was Exhibit
9 Number 2, there are no less than five --

10 MEMBER ZAIDAIN: I understand that, and
11 I'm trying to cut it off even more by saying I thought
12 it was decided here today, and I thought we had
13 concurrence that this was an appeal of an
14 administrative officer, and the only procedures that
15 we need to deal with are those in 3100 of the zoning
16 regulations.

17 CHAIRPERSON GRIFFIS: Okay. I do not
18 think we took formal action on it, but if you were
19 close enough to take formal action on it now, being
20 briefed will only bring us closer. On the 8th we
21 could possibly do it as a preliminary matter. In
22 fact, I think we should take it up and make a
23 decision.

24 MEMBER ZAIDAIN: We really need to get to
25 the merits of the case. That urgency has been

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1 established here, and I would -- I mean, I think I
2 speak for everybody. We would all be really agitated
3 if we went back down a procedural road again.

4 CHAIRPERSON GRIFFIS: Okay, good.
5 Everyone clear on that? We will reiterate, unless
6 there's immediate questions on it. Mr. Green?

7 MR. GREEN: You know, if you want us to
8 brief the five issues that he has raised in his
9 petition, and if you are going to hear these arguments
10 for the first time, I might go along with your
11 position. But the only problem I have with it is that
12 not only is it an instant replay of what has taken
13 place today, but it's my understanding that you are
14 going to consider this matter *de novo*.

15 We are going to start. We are going to
16 have witnesses. We are going to talk about this
17 thing.

18 CHAIRPERSON GRIFFIS: That's right.

19 MR. GREEN: So then what's the point in
20 dealing with this appeal in terms of preparing briefs
21 for this point. We should be -- If we are going to
22 brief something, we should be briefing some other
23 issues, something that's not involved.

24 MR. DAMARI: I agree with Mr. Green on
25 this one.

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1 COMMISSIONER MITTEN: Well, then are you
2 withdrawing those bases for your appeal? I mean, you
3 could save us all a lot of -- I mean, Mr. Green is
4 saying this is a waste of time to talk about; you
5 raised it on appeal. So we have to confront it one
6 way or the other. If you are agreeing with Mr. Green,
7 then just tell us which ones of these drop out.

8 MR. DAMARI: I agree. I don't like to --
9 I do feel -- It creates a bit of a dilemma, because I
10 do feel that going forward with a *de novo* review -- I
11 need to think about that strategically, and I can
12 advise the Board within -- I just need to speak to my
13 client about that one. Within 24 hours, and I can
14 advise Mr. Green within 24 hours as to whether we are
15 willing to withdraw those.

16 MR. BROWN: Can I make a suggestion, and
17 where it typically happens in a prehearing statement
18 is -- and whether it's an applicant or an appellant,
19 you lay out the four corners of your case. You list
20 your witnesses. So that I think, and particularly
21 since we have time to do that, that that is the best
22 place for Mr. Damari to do that.

23 Basically, we are going to be looking for
24 his prehearing statement to define those issues,
25 procedural or factual or otherwise, that he thinks are

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1 still alive and well.

2 CHAIRPERSON GRIFFIS: Well said, Mr.
3 Brown, and we will have -- we will open the record for
4 an opportunity, if you want to submit briefings that
5 would limit that discussion in the appeal, and we will
6 be able to take a look at that. Does that make sense?

7 MR. BROWN: Well, what I'd like to do, and
8 I think the other parties, is we will wait until
9 February 21st --

10 CHAIRPERSON GRIFFIS: Understandable.

11 MR. BROWN: -- and then I think, if we
12 would be allowed to respond --

13 CHAIRPERSON GRIFFIS: I'm giving you the
14 opportunity to respond in writing before the hearing
15 is what it is.

16 MR. BROWN: Yes. Typically, it's seven
17 days, but then --

18 CHAIRPERSON GRIFFIS: We are going to set
19 a whole new schedule for this one, because this is so
20 unique. Is that clear to you, Mr. Damari?

21 MR. DAMARI: Yes, that's fine.

22 CHAIRPERSON GRIFFIS: Okay, excellent. I
23 think that's a good point. No sense in hashing out.

24 MR. BARDIN: That makes sense to the ANC,
25 too, Mr. Chairman. Do you have a time of day on the

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1 8th of April when this hearing is set?

2 CHAIRPERSON GRIFFIS: My understanding is
3 we are looking at the entire afternoon, starting at
4 one o'clock. Is that right, Mr. Moy? Okay.
5 Corporation Counsel want to give further guidance on
6 the structure of what will be done on the 8th of
7 April, '03?

8 MR. BERGSTEIN: I would just want to focus
9 the parties on the contention in the notice of
10 proposed suspension that Department of Consumer and
11 Regulatory Affairs created a zoning category called
12 automotive service center.

13 So the DCRA seems not to be contesting the
14 validity of the issuance of the C of O, but whether or
15 not the activities that were engaged in by the
16 Appellant fall outside the scope of an automotive
17 service center as DCRA created that category. That
18 seems to be what the issues are on this appeal in
19 terms of the substantive issue.

20 If the parties disagree, perhaps that
21 discussion could occur now. But that seems to be the
22 scope of the substantive argument. Then there's
23 arguments to follow, but DCRA seems to be indicating
24 in notice of final rulemaking that the actual issuance
25 of a C of O for automotive service center was correct,

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1 and the only issue is whether or not the activities of
2 the Appellant fall outside the scope of the term
3 automotive service center.

4 MS. PERRY: Excuse me for a minute.
5 There's been an adjudicating law judge decision
6 rendered on that issue.

7 MR. BERGSTEIN: Which is interesting, but
8 apparently DCRA's official position is they now
9 disagree with that. That's why I'm pointing it out,
10 that this was issued after that ALJ decision, and as I
11 am reading this, they concede the validity of the
12 actual ground for the revocation as operating outside
13 the scope of a C of O, not that a C of O was issued by
14 mistake, which is a ground for revocation, but that
15 they are operating outside the scope of the C of O.

16 So that seems to be the ground of the
17 revocation, and the response of the Appellant is, no,
18 what they are doing is within the scope of an
19 automotive service center.

20 MR. BARDIN: Mr. Chairman, the ANC reads
21 that document differently from distinguished
22 Corporation Counsel. We believe that what DCRA was
23 saying is exactly consistent with what the ALJ had
24 ruled previously. There is no such category. There
25 is no such category. It was simply verbiage to try to

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1 cover something else, and what these people were
2 doing, in fact, is not allowed under the zoning
3 regulations. So --

4 CHAIRPERSON GRIFFIS: So what is your
5 interpretation directly of the grounds for the
6 revocation of the C of O? Was it that it was --

7 MS. PERRY: I think my understanding is
8 that the C of O that was done for the, quote,
9 "automobile service center," that even that -- that,
10 based on the definition DCRA used, which was
11 automobile sales, accessories sales, like that, that
12 they exceeded that, and that it is in fact a repair
13 garage.

14 CHAIRPERSON GRIFFIS: But it's saying the
15 same thing that --

16 MR. DAMARI: You're saying the same three
17 things, I think.

18 MS. PERRY: No.

19 MR. DAMARI: Okay. I would like to know
20 what the position is.

21 CHAIRPERSON GRIFFIS: Right. We are going
22 to explore this for ten minutes, because this is going
23 to clear up an awful lot of what we are going to be
24 doing on the 8th. So I want to hear from everybody,
25 and Mr. Green is going to have a very definitive

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1 sentence on this also, I hope.

2 What I just heard -- and I'm not clear on
3 what the ANC just stated of what their interpretation
4 of the grounds for the revocation of the certificate
5 of occupancy, because I heard error, and I also heard
6 beyond the scope. Do you want to just restate what
7 you had mentioned?

8 MS. PERRY: I think, in the notice of
9 intent that DCRA issued, it's fairly clear. It says
10 at the time of the certificate of occupancy's
11 issuance, you informed the Department that the
12 corporation's intent was to sell small automotive
13 parts and make installations of same. The Department
14 created the category of automobile service center to
15 facilitate your efforts. This facilitation did not
16 include or permit any major automotive engine, body
17 work or other automotive garage function.

18 CHAIRPERSON GRIFFIS: Okay.

19 MS. PERRY: Then it goes on to say, by
20 making major repairs and doing engine work, you have
21 operated outside the scope.

22 CHAIRPERSON GRIFFIS: So outside the
23 scope. You are in concurrence then with the
24 Corporation Counsel. Maybe I should also be directive
25 in terms of looking at the BOCA 12-A 18.4, because

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1 these outline the specific reasons for revocation of
2 certificates of occupancy.

3 I mean, clearly, it could be as 18.4.3.
4 It could be issued in error or, as has now been also
5 indicated, it could have been issued because of the
6 operation was outside the scope, as defined in the C
7 of O. Mr. Green, did you have --

8 CHAIRPERSON GRIFFIS: Mr. Griffis. Mr.
9 Green, one second. Just so there is no confusion,
10 ANC-3F is going to argue that the zoning administrator
11 that created this category did not have the authority
12 to create a new category in the zoning regs.

13 CHAIRPERSON GRIFFIS: And that would fall
14 -- and I --

15 MS. PERRY: Just so we are clear, we are
16 going to make that point.

17 CHAIRPERSON GRIFFIS: So let me be clear
18 in how you articulate that, because I think, if I am
19 understanding you, that does go to that the
20 certificate was issued in error, and then you will
21 establish what that error was. Very well.

22 MR. BARDIN: Mr. Chairman, but from a
23 lawyer's point of view --

24 CHAIRPERSON GRIFFIS: Hold on. Actually,
25 I've interrupted you, and your mike is off. Ms.

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1 Mitten, if you would like to proceed.

2 COMMISSIONER MITTEN: I just want to
3 follow up on the point that Ms. Perry just raised,
4 because if the grounds for the appeal are that the
5 Kuri Brothers were operating outside the scope of
6 their certificate of occupancy, then it's not going to
7 be relevant to hear testimony about the certificate of
8 occupancy being issued in error, because that is not
9 the grounds for the appeal.

10 CHAIRPERSON GRIFFIS: Right. All I'm
11 trying to do is briefly flesh out, which I said we had
12 about ten minutes, of which you have about four more
13 minutes left -- briefly flesh out everybody's
14 understanding. And clearly, this was just delivered
15 to me in terms of the notice of intent to revoke, and
16 I've read it through, and I'm not clear exactly what
17 it's saying.

18 Now I haven't taken the exact time to do
19 that, and that's why I'm asking each what their
20 interpretation is. So, yes?

21 MR. BARDIN: Mr. Chair, from a lawyer's
22 point of view, I'm convinced that you will find that
23 this issue that we are discussing will not be relevant
24 or helpful to your decision; because I can't imagine
25 that Appellant is going to try to show as a matter of

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1 fact that the work being done in the 21 bays is simply
2 incidental to installing things that people buy.

3 So it's a very interesting hypothetical
4 question, but -- and we take the position that there
5 was no such category they could have issued.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. BARDIN: But the fact -- You have to
8 decide cases in terms of the facts of the case.
9 You're not writing laws here. You're not passing
10 regulations.

11 CHAIRPERSON GRIFFIS: I agree.

12 MR. BARDIN: You are not the Zoning
13 Commission. So I don't think anything is going to
14 turn on that issue that you are now discussing.

15 CHAIRPERSON GRIFFIS: It is going to turn
16 on it, because the pertinence of what the appeal is
17 based on goes to what the intent -- why the
18 certificate of occupancy was actually revoked, and
19 maybe I am wasting people's time, but I am not clear
20 on this, what the definitive element is that will be
21 the substance of the appeal. And that is --

22 MR. BARDIN: As I --

23 CHAIRPERSON GRIFFIS: Let me just hear
24 from Mr. Green briefly. Then I'll stop this.

25 MR. GREEN: All right. Again, and I

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1 direct the Board's attention to the notice of intent
2 to revoke the certificate of occupancy.

3 What took place was simply an attempt at
4 accommodating a business merchant. In this particular
5 instance, we have something called an automotive
6 service center at the premises, and it was the
7 understanding between what was represented to the
8 agency by the Appellant that he wanted to install and
9 sell small auto parts, and at that time the
10 understanding was, well, maybe a light bulb here or
11 there, and that was it.

12 CHAIRPERSON GRIFFIS: Okay. Without
13 getting too far into a lot of detail.

14 MR. GREEN: Yes, I understand. Now doing
15 major auto engine repair work did not fall within the
16 scope of this understanding. Consequently, we have
17 the issuance of this notice of intent to revoke the
18 certificate of occupancy.

19 CHAIRPERSON GRIFFIS: Because of the
20 operating outside the scope?

21 MR. GREEN: He operated outside the scope.

22 CHAIRPERSON GRIFFIS: Okay, that's all I
23 need.

24 MR. GREEN: That's it.

25 CHAIRPERSON GRIFFIS: Good. Everyone

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1 confused? Okay. I think we are done today. We will
2 reiterate everything, starting with Mr. Moy is going
3 to reiterate the date when we are showing up, and then
4 I will -- I think we've been fairly clear, but I will
5 take last minute clarifications, just to make sure.
6 Mr. Moy, if you would not mind.

7 MR. MOY: Not at all. >From what I'm
8 hearing, then working backwards, I guess, we will meet
9 again on the afternoon of April 8th at one o'clock.
10 So the entire afternoon will be earmarked for this
11 case.

12 The second thing is that the prehearing
13 submission documents would be submitted by Mr. Damari
14 on February 21st. Correct?

15 MR. DAMARI: Yes.

16 MR. MOY: Then after that, staff is
17 unclear where we are left with in terms of a written
18 brief on various procedures, point A. Then point B,
19 any further information on the certificate of
20 revocation of the C of O. Yes? No? Trying to get
21 more specific in terms of what the Board is asking
22 for.

23 MR. BARDIN: I thought under the rules,
24 Mr. Chairman --

25 CHAIRPERSON GRIFFIS: Hold on just a

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1 moment. I'm sorry, Mr. Moy. I think what you just
2 ask for is we were going to ask for submissions on why
3 the C of O -- clarification on the revocation. No.
4 No, no, no, none of that.

5 MR. MOY: Fine.

6 MS. BAILEY: Mr. Chairman, were you going
7 to give the ANC and Mr. Green an opportunity to
8 respond to the prehearing statement of Mr. Damari?

9 CHAIRPERSON GRIFFIS: That's correct.

10 MR. BARDIN: I thought, MR. Chairman, that
11 the rules provide for that and that we have until -- I
12 thought it was a week before the hearing to respond to
13 the prehearing statement, and we --

14 CHAIRPERSON GRIFFIS: That's correct.
15 We're not stopping you from that. We are just going
16 to change the timing of that.

17 MR. MOY: I wasn't completed yet. I just
18 wanted clarification on it.

19 CHAIRPERSON GRIFFIS: Okay, let's keep
20 going.

21 MR. MOY: So having said that, then in
22 terms of any responses to the prehearing statement, I
23 would give -- because of the uniqueness of this case,
24 have that submitted March 14th. Would that be
25 sufficient time?

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1 CHAIRPERSON GRIFFIS: Who are you asking
2 that?

3 MR. BROWN: Responses to the Appellant's
4 prehearing statement. Correct?

5 CHAIRPERSON GRIFFIS: Correct.

6 MR. MOY: Correct.

7 MS. PERRY: Are you saying March 14th for
8 that?

9 MR. MOY: Yes.

10 CHAIRPERSON GRIFFIS: Yes. Why the 14th?

11 MS. PERRY: I think the ANC is normally
12 seven days before the hearing.

13 MR. DAMARI: I have no objection to
14 whatever they want to file.

15 MS. PERRY: And if the hearing is April
16 8th--

17 CHAIRPERSON GRIFFIS: That's fine. Seven
18 days before the hearing. We don't need to reinvent
19 everything.

20 MR. MOY: Okay, that's fine then.

21 CHAIRPERSON GRIFFIS: Good. So we are
22 having rescheduled the submission is established.
23 We'll have the responses to the submission, and then
24 we'll be here on the 8th of April.

25 Okay, once we get here on the 8th of

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1 April, this will the order of procedure. First of
2 all, we are going to have the Appellant's case. In
3 that case, he is going to be limited to 45 minutes.
4 We will run the clock on that. Anything less than
5 that would be fantastic.

6 Then we'll go to the Administrative
7 Officer's case. Again, there will be the time that
8 the Appellant's case was. The case for the owner or
9 operator of the property to -- Well, that's
10 interesting. The ANC will also be given equal time.
11 We will have equal time between the intervenor, the
12 Appellant and the District representative.

13 We will then have an opportunity for
14 rebuttal and closing statement by you.

15 MR. DAMARI: That 45 minutes, does that
16 include time for cross-examination?

17 CHAIRPERSON GRIFFIS: Cross-examination or
18 questions from the Board do not count toward that 45
19 minutes.

20 MR. DAMARI: Okay. And rebuttal? Okay.

21 CHAIRPERSON GRIFFIS: Everybody clear?
22 Anyone have questions on dates, submissions?

23 MR. DAMARI: I have a question that's
24 unrelated to dates. That is I tend to take a rather
25 stringent view of hearsay, and I don't know to what

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1 extent -- hearsay -- and I don't know to what extent
2 this body does or does not.

3 I know, obviously, it's somewhat of a
4 nebulous question, but maybe someone could give me
5 some -- For example, are documents without -- Can
6 documents be admitted -- Can hearsay statements
7 generally be admitted? Can documents that are hearsay
8 be admitted, etcetera?

9 CHAIRPERSON GRIFFIS: Well, it would have
10 to be established as hearsay, would they not? On the
11 basis, I think the Board is -- Well --

12 MR. GREEN: Mr. Chairman, I might be able
13 to help him a little bit on that. I thought this was
14 an administrative proceeding. I thought that in
15 administrative proceedings that hearsay was
16 permissible as long as it was -- what? -- probative,
17 material, and relevant.

18 MR. DAMARI: All right.

19 CHAIRPERSON GRIFFIS: Opinion, Corporation
20 Counsel?

21 MR. BERGSTEIN: He is correct. You can
22 take hearsay for what it's worth.

23 CHAIRPERSON GRIFFIS: Indeed.

24 MR. DAMARI: Okay.

25 CHAIRPERSON GRIFFIS: There it is. Any

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1 other questions?

2 MR. GREEN: I don't have any.

3 CHAIRPERSON GRIFFIS: Fabulous. We're all
4 clear then. Okay.

5 It's been a pleasure. We'll see you guys
6 on the 8th.

7 This would conclude the afternoon session
8 of the 28th of January 2003.

9 (Whereupon, the foregoing matter went off
10 the record at 3:55 p.m.)

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