GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

JUNE 10, 2003

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice, at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
CURTIS ETHERLY, JR.	Board Member
DAVID ZAIDAIN	Board Member
RUTHANNE MILLER	Board Member

ZONING COMMISSION MEMBERS PRESENT:

CAROL MITTEN	Commissioner

COMMISSION STAFF PRESENT:

Clifford Moy, Secretary
Beverley Bailey, Office of Zoning
John Nyarku

OTHER AGENCY STAFF PRESENT:

Stephen Mordfin, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, Esq.

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

Agenda Item PAGE

OPENING REMARKS 3

PRELIMINARY MATTERS 7
APPLICATION OF FRANK C. NICOL, 17014 8

APPLICATION OF EASTBANC, INC
17014 ANC-2A 9
Richard Nettler 9
Robins, Kaplan, Miller & Ciresi
Robert Lanier 11
President EastBanc, Inc.
Robert Sponseller 14
Jerome, Boronus & Associates
Stephen Mordfin 67
Office of Planning
Dorothy Miller 71
ANC-2A
Brent Parrish 76

APPEAL OF THE SPRING VALLEY WESLEY HEIGHTS CITIZEN'S ASSOCIATION

16679 ANC-3D 102
Intervenor Status 103
Preliminary matters 111
Motions 122

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

9:39 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the 10th of June, 2003 public hearing of the Board of Zoning Adjustment to the District of Columbia. My name is Jeff Griffis. I am Chairperson.

Joining me today is Ms. Ruthanne Miller. Also Mr. Etherly who will be out momentarily. Representing the Zoning Commission with us this morning is Ms. Mitten. And representing the National Capital Planning Commission is Mr. Zaidain.

Let me also say good morning to our staff: Office of Zoning, Ms. Bailey; Mr. Moy and Mr. Nyarku is also with us; representing Corporation Counsel is Ms. Monroe.

Copies of today's hearing agenda are available for you. They are located in our new wall mounted dispenser. So, please take a moment to review the agenda for this morning, which should be easy to review, as we don't have a lot going on. But very interesting stuff.

So, let me also say everyone should be aware that all public hearings before the Board of Zoning Adjustments are recorded. Therefore, several

1 things need to happen.

2 First of all, when coming forward to speak

3 to the Board, you will first need to fill out two

4 witness cards. Witness cards are located at the table

5 where you entered into the hearing room. They're also

6 located at the table right in front of us. The two

7 cards filled out go to the recorder who is sitting to

8 my right.

9 When coming forward, you should have a

10 seat in one of our nicely upholstered beige chairs.

11 Make yourself comfortable. And give me your name and

12 your address for the record.

13 After that, we will of course listen

14 intently and we ask that people present today not

15 engage in any sort of disruptive noises or actions so

16 that we do not disturb those giving testimony or our

17 concentration on that. You will also need to speak

18 directly into the microphone, and that microphone

19 should be on.

20 The order of

21 procedure

22 for

23 special

24 exception

25 s and

1 variances
2 is,
3 first, we
4 will have
5 statement
6 and
7 witnesses
8 of the
9 applicant
10 . Second
11 would be
12 any
13 governmen
14 t reports
15 attendant
16 to the
17 applicati
18 on.
19 Third
20 would be
21 the
22 report
23 from the
24 advisory
25 neighborh

1 ood
2 commissio
3 n. Fourth
4 would be
5 persons
6 or
7 parties
8 in
9 support
10 of the
11 applicati
12 on. Fifth
13 would be
14 persons
15 and
16 parties
17 in
18 oppositio
19 n to it.
20 And
21 sixth,
22 finally,
23 we'll
24 have
25 closing

1 remarks
2 by the
3 applicant
4 .
5 Cross examination of witnesses is
6 permitted by the applicant or parties.
7 The ANC within which the property is
8 located is automatically a party in the case.
9 The record will be closed at the
10 conclusion of each case except for any material that
11 is specifically requested by the Board. And the Board
12 will be very specific on what is to be submitted and
13 when it is to be submitted into the Office of Zoning.
14 After that material is received, of course, it goes
15 without saying that the record would then be closed
16 and no additional information would be accepted.
17 The Sunshine Act requires that a public
18 hearing on each case be held in the open and before
19 the public. This Board may, however, consistent with
20 its procedures and the Sunshine Act enter Executive
21 Session during or after hearing on a case. That would
22 be for purposes of reviewing the record or
23 deliberating on a case.
24 The decision of the Board in contested
25 cases must be based exclusively on the public record.

And, therefore, we ask that people present today not engage Board members in any type of conversations so that we do not give the appearance of not deliberating solely on the public record.

I believe at this point we can entertain any preliminary matters. Preliminary matters are those which are related to whether a case will or should be heard today, such as requests for postponements, withdraws or whether proper and adequate notice of a case has been provided. If you are not prepared to go forward today with your case or you believe that the Board should not proceed in hearing a case on the morning agenda, now is the time to bring that attention to the Board. And you can come forward and have a seat as an indication of having a preliminary matter.

I'd first ask staff if they have any preliminary matters for the Board?

MS. BAILEY: Mr. Chairman and members of the Board, good morning.

CHAIRPERSON GRIFFIS: Good morning.

MS. BAILEY: There is a preliminary matter. It has to do with the second case this morning, application 17018, Frank E. Nicol. I'm not sure of the pronunciation, but the last name is N-I-C-

O-L. And that application was withdrawn yesterday, Mr. Chairman.

CHAIRPERSON GRIFFIS: Good. No action is needed by us?

MS. BAILEY: No action is needed by the Board.

CHAIRPERSON GRIFFIS: Any other preliminary matters that you're aware of?

MS. BAILEY: No, sir, not at this time.

CHAIRPERSON GRIFFIS: Very well. Then why don't we call the first case.

MS. BAILEY: Application 17014 of EastBanc, Inc., pursuant to 11 DCMR ? 3193,2 fir a variance from the building height requirements under section 770, a variance from the floor area ratio requirement under section 771, and a variance from the residential recreation space requirement under section 773, to allow the construction of a mixed-use, that is a residential and retail, building in the C-2-C District at premises 2110 and 2150 M Street, N.W. Square 71, Lots 11, 19, 21, 23, 26-28, 34, 801-806, 812, 816 and 817.

Please stand all those persons who will be testifying today to take the oath. Please stand and raise your right hand.

(Whereupon, witnesses were sworn).

CHAIRPERSON GRIFFIS: Good. Thank you all very much, and good morning.

Why don't you introduce your panel. And then I think it would probably be best -- why don't you start, and I will interrupt very early on.

MR. NETTLER: Thanks.

Good morning. My name is Richard Nettler. I'm with the law firm of Robins, Kaplan, Miller & Ciresi. I'm here on behalf of EastBanc, who is the Applicant in this matter.

Just to give you some updates from the time the application was filed, EastBanc is now the owner and not the contract purchaser. We closed on the property and we have a subdivision plat that is pending which will consolidate all the lots into one lot of record.

CHAIRPERSON GRIFFIS: And that includes Lot 34?

MR. NETTLER: That includes Lot 34.

CHAIRPERSON GRIFFIS: Okay. And you have some documentation today to submit regarding that.

MR. NETTLER: That it includes Lot 34?

CHAIRPERSON GRIFFIS: Yes.

MR. NETTLER: The subdivision plat has

1 been prepared by the city and it's to be signed off.
2 And we can provide you with a copy of that.
3 CHAIRPERSON GRIFFIS: Okay. So you're
4 waiting for that to come out of DCRA, which will
5 assemble all of those, is that correct?
6 MR. NETTLER: That's correct.
7 CHAIRPERSON GRIFFIS: Okay.
8 MR. NETTLER: That's correct.
9 As noted, this is an application for three
10 area variances. Suffice it to say that, at least in
11 our opinion, principally one area variance which is
12 the height variance. And I only say that with regard
13 to the residential recreation space, knowing the way
14 in which the Board has dealt with those in the past.
15 And as you will hear from the members of the panel
16 here, a slight variance dealing with the FAR as a
17 consequences of a canopy that is being rebuilt over
18 the gas station that is adjacent to the property as
19 proposed to be built.
20 With me is Anthony Lanier, who is from
21 EastBanc; and Mary Mottershead, and Robert Sponseller
22 from Jerome Baronus and Associates.
23 I'd like to, instead of beginning with a
24 discussion of all the issues, actually just jump right
25 into with Mr. Lanier.

1 CHAIRPERSON GRIFFIS: Good.

2 MR. LANIER: Good morning. My name is
3 Anthony Lanier. I'm a resident of 2808 N Street,
4 Northwest, Washington, D.C. 20007. And I'm here as
5 the President of EastBanc, Inc., the owner of the
6 property.

7 We are here to seek the variances in
8 height and I would say marginal variance in density in
9 order to not have a typical gas station canopy, but
10 one improved with landscaping.

11 This is an exciting project for us. Since
12 we've started some 5 years ago in the West End with
13 the adjacent Ritz project and would like to continue
14 our value creation process in the West End with this
15 site, for which we have been arguing since 7 years. I
16 feel like making history since it's the first site or
17 the first project acquired a feuding set of brothers
18 in the past, I think, ten years. And that we got both
19 of them to sign is close to a miracle.

20 We pride ourself normally in digging big
21 holes and have the deepest holes in town. And in this
22 case are stopped from that opportunity given that we
23 have a river running underneath the site, which is
24 called Slash Run. Most city sites have a host of
25 issues, in our case it is a river which we have to

partially relocate in order to build the garage and a gas station.

Our goal with this site is to come up with an exciting design with materials which have been rarely used in the city and with the goal to integrate a traditionally ugly gas station into an exciting aspect of our project.

And with that, I'll pass on to Robert Sponseller to outline, perhaps, the details of the project.

MR. NETTLER: Before doing so, I will ask that you accept Mr. Sponseller as a expert in architecture and zoning issues. He's been accepted before by this Board and I believe by the Zoning Commission as well.

CHAIRPERSON GRIFFIS: An expert in zoning issues? What does that mean?

MR. NETTLER: Correct. The zoning regs and interpretation of the zoning regulations.

CHAIRPERSON GRIFFIS: Okay. As it arises out of -- so what you're saying as an architect clearly would have the knowledge in dealing with the zoning.

MR. NETTLER: Correct.

CHAIRPERSON GRIFFIS: Any questions? The

qualification is attached. There is a appendix H. Does the Board have any questions of Mr. Sponseller? Any objections to granting expert status? Not hearing any, we can take it a consensus of the Board then and continue with this expert witness.

Also, wow, look at that. Nice model. Of course, we get that now. That has to come into the record.

Okay. You can pick up that microphone. As long as the wires let you go. You may want to bring all your drawings closer, if that's easier.

MR. NETTLER: This is a miniature of the model, actually. So if you want to put it into your file, it does fold up.

CHAIRPERSON GRIFFIS: It does fold up. Add some water and it pops back up.

MR. NETTLER: While Robert is doing that, let me give you -- as we alluded to in our statement, a little history. Because although tongue in cheek referring to the fact that the brothers have been feuding over this, it's actually been a long history to the ability to develop this site, starting with the fact that the gas station was previously located on a different portion of the site. And as a result of a fire at the gas station, and consequential

environmental issues that Robert will get into, the gas station was relocated. And then in return for some of the damage that was caused provided the development rights over the gas station to the Cohn brothers, who owned the site at the time. Litigation ensued between the Cohns and others over the ability to sell or develop this site. And, as Anthony says, to make the history short, we were finally able to acquire this site recently from them at the end of the litigation, which thankfully we were not involved with.

And, Robert, if you want to --

MR. SPONSELLER: Is this working?

CHAIRPERSON GRIFFIS: Yes.

MR. SPONSELLER: Okay. Good. Good morning. Nice to be here.

Let me start by just describing the site location and some of the trends in the neighborhood of this area.

This is west downtown, Foggy Bottom neighborhood. And our site, as I like to say, is located midway between the circles on New Hampshire Avenue. New Hampshire Avenue right now, if you can see the triangle I'm pointing to here, just south of M Street and approximately midway between Washington Circle and DuPont Circle.

And it is a building which is obviously, we're proposing residential use here and follows not only the comprehensive plan in terms of uses in this area being primarily a residential use, but also a recent trend in residential buildings in the neighborhood. As you're familiar, I'm sure, with the Columbia Hospital Project which is being proposed here and JBG Investments project just north of it, in addition to the Ritz Carlton just recently completely that Anthony mentioned.

And as residential sites go, it is primarily a good residential site with certain constraints and hardships which we're having to overcome. Let me start with the good news about the site.

It is fronting onto one of the widest avenues in the city, New Hampshire Avenue, which is 120 foot right of away. And it is always flanked on its north and west by 22nd Street and M Street, which are 90 foot right of way streets wide. But it also carries with it certain constraints.

First, is geometric. Triangular sites are difficult because of logistics with parking and residential unit layouts.

In addition, as Anthony mentioned, there's

a sewer line which is running approximately mid block through the site, east and west, is in the way of the parking that we need to provide to maintain our market parking account. So we're relocating that sewer to the southern portion of the site, just north of an existing Victorian structure there.

But the largest constraint on the site is the existence of the Exxon gas station on its northwest corner. And what this effectively does is takes away the only right angle we have on the site located here. And reduces our development area on the site by about 30 percent, leaving us with a rhomboid, if you will, along New Hampshire Avenue, which is a just off kilter parallelogram about 70 feet deep fronting New Hampshire Avenue where we can actually build the building. We can't build over the gas station by virtue of working with Exxon and we can't build, also just I think psychologically residents are ready to live above a gas station, so we're really restricted to the eastern portion of the site here.

These site photos show the existing conditions. There's a gas station here at the corner. This is New Hampshire Avenue. This is M Street. You can see the canopy in a lot of these photos. I apologize, they're a little dark. And there's a

1 surface parking lot which currently covers the entire
2 site.
3 Let me speak to you now, the constraints
4 of the gas station and how these directly relate to
5 the three variances that we're seeking from you this
6 morning.
7 First, because of our restricted site area
8 for development, we really need to put residential on
9 the entire remaining portion of that site. So this
10 strip of land area that you can see colored here is
11 where we're putting our residential building. And it
12 requires that we do a double loaded corridor with
13 residential units facing both to the northwest, to the
14 southeast and north and south respectively. So the
15 entire perimeter of that plate needs to have views out
16 from it for the residential to work.
17 And the first consideration is that those
18 views to the northwest, here, are looking directly
19 into a gas station if we don't lift up that lowest
20 residential level above the gas station canopy. I
21 have a section here to show you that relationship.
22 This is a section through our building.
23 This is our project. The existing gas station is
24 located here. And we're cutting a section across the
25 site, east/west if you will. And this is the Ritz

1 Carlton located just west of us. And what we've done
2 is we've lifted the first residential level up so that
3 it clears the canopy structure which covers the Exxon
4 station and allows those first units to look over top
5 of it and out, as opposed to looking into the service
6 islands and the accouterments of a gas station, which
7 is sort of a prerequisite for the residential.
8 But having lifted up above that
9 residential, we now needed that residential up above
10 the canopy, we now need to cover the gas station and
11 hide it, if you will or disguise it a little bit, so
12 that you're not looking down on the canopy from not
13 only our project, but all the neighboring buildings
14 which look down upon it.
15 And so the second issue, which is density,
16 is directly related to that. As you know, in zoning if
17 we were to design a trellis over top of this
18 structure, which is an open structure as opposed to a
19 closed garden, if you will, that trellis would not
20 count as density in FAR. We could design a trellis
21 for it and screen it somewhat, but we wouldn't have
22 the benefit of hiding it completely, not only for our
23 building but for the neighboring buildings. And it's
24 the fact that we're trying to put a garden on top of
25 that canopy that is directly linked to the additional

density we're seeking. That is the sole density we're asking for, is enough to cover the pump islands, if you will.

And the density is a total of four percent of our overall project density. Okay. It's 2.6 FAR.

MR. NETTLER: The density with regard to the building itself, though, is not over the --

MR. SPONSELLER: Our project is 6.0 FAR total, 95 percent of that is residential. There's a little bit of retail on the ground floor. But the canopy is an addition .26 of one FAR or 4 percent of the total that we're providing to cover the gas station.

MR. NETTLER: And is that because the area that's underneath the canopy then becomes FAR --

MR. SPONSELLER: Yes. Because the canopy is solid. In other words, as I said, if we were to design a trellis or something light like these light louvers here over the florescent bulb, screened it a little bit and didn't completely cover it, it would not count as FAR under zoning regulations. It's because we're making it solid and it's because we want to put a garden on top of it.

We're really asking for --

CHAIRPERSON GRIFFIS: But Exxon wants it

covered, too.

MR. SPONSELLER: Yes. Nobody wants to be pumping gas in the rain.

CHAIRPERSON GRIFFIS: You're not going to get rained on when you're pumping gas.

MR. SPONSELLER: Yes, exactly.

MR. NETTLER: And is there a reason why you can't build over the gas station?

MR. SPONSELLER: Two reasons. Exxon does not want us to build over top of their gas station and we think that the residents are not ready to live above a gas station, in light of everything that's going on, in light of this is not Europe. In Europe you see it, but in the United States I don't know of any buildings, residential buildings built over the top of gasoline service stations. I don't think people are ready for it yet.

So two reasons, primarily Exxon.

MR. NETTLER: Well, but it's not really your issue as to whether the residents do or do not. Exxon will not allow it.

MR. SPONSELLER: Exxon will not allow us to do it, either.

All right. Any other questions about the canopy FAR? That's the sole FAR issue. It's 4

1 percent.

2 CHAIRPERSON GRIFFIS: So this is going to

3 be like a landscaped green roof almost for the canopy?

4 MR. SPONSELLER: In the model we have

5 taken a pass at the design of this canopy. It's not

6 your typical metal canopy. And I have to say in

7 researching gas station canopies, we came across

8 designs by Frank Lloyd Wright, Norman Foster and other

9 noted architects. And so we've taken it as a

10 challenge to design a very beautiful canopy here.

11 And what we're showing in the model is a

12 canopy which consists of two tiled plains, which again

13 will have enough volume in them to contain the dirt

14 and soils so that a garden would grow above the roof

15 there.

16 CHAIRPERSON GRIFFIS: Okay. Do we have

17 drawings on that? Not yet?

18 MR. SPONSELLER: We're in design.

19 CHAIRPERSON GRIFFIS: Not yet?

20 MR. SPONSELLER: We need approval to

21 proceed. Again, being that all of the neighboring

22 buildings would not be aware of the gas station at the

23 ground floor as they look down on it. And by that,

24 I'm pointing to there's a hotel just north of the

25 site, our site, the Ritz Carlton and considerable

office buildings.

CHAIRPERSON GRIFFIS: Is there a minimum height that gas stations or Exxon requires for this canopy?

MR. SPONSELLER: Yes, there is. The clearances to allow the semi-trucks to pull under and maneuver and maintenance and things to happen, is 16 feet clear, which is the same as DPW standard for alleyways, coverings over alleyways in the city.

CHAIRPERSON GRIFFIS: So you clearly looked into lowering the canopy so that you could lower your second floor?

MR. SPONSELLER: We looked at that, and we couldn't get the truck underneath the canopy. That was the problem.

CHAIRPERSON GRIFFIS: Right.

MR. SPONSELLER: And the additional structure that you need to put soils into that canopy for plants to grow, adds about 6 feet to that height. So it's a total of 22/23 feet that we're looking at.

CHAIRPERSON GRIFFIS: Interesting.

MR. SPONSELLER: And it gives us a very tall ground floor, obviously. But more importantly, I don't know of any retail plates that much above ten feet in the city. This gives us a high retail plate,

1 but most importantly puts our first residential level
2 above the canopy.
3 CHAIRPERSON GRIFFIS: Wait. I don't
4 understand that statement. You don't know any retail
5 plates above ten feet?
6 MR. SPONSELLER: Well, we're not doing it
7 for the retails, is what I'm trying to say. We're
8 doing this for the residential uses in order that they
9 start above that canopy. That's what it's based on.
10 As a byproduct, it's giving us a tall retail plate is
11 all I'm saying.
12 CHAIRPERSON GRIFFIS: Right. But you
13 know--
14 MR. SPONSELLER: Taller than we need.
15 CHAIRPERSON GRIFFIS: -- of retail above
16 ten feet, don't you, in the city?
17 MR. SPONSELLER: Well, a few. A few. But
18 the standard is 10 to 12.
19 CHAIRPERSON GRIFFIS: Right. Okay.
20 MR. SPONSELLER: As to the height limits.
21 CHAIRPERSON GRIFFIS: But that's an
22 advantage, is it not, architecturally, as the expert
23 to have a higher retail ceiling?
24 MR. SPONSELLER: Yes. It's a byproduct.
25 It's not the main goal, but it --

CHAIRPERSON GRIFFIS: No, not for this project. But generally speaking.

MR. SPONSELLER: Oh, definitely.

CHAIRPERSON GRIFFIS: For retail having a higher ceiling.

MR. SPONSELLER: In an area where we're having difficulty leasing retail spaces, this corridor which is, I think, coming around as Anthony can testify to, having the high ceiling is also benefit to getting retail on what I think is one of the prominent corners of west downtown.

CHAIRPERSON GRIFFIS: Right. Right.

MR. SPONSELLER: And we're excited about that as well. And we, in fact, were planning on a restaurant type tenant for that corner site. So the height helps there as well.

CHAIRPERSON GRIFFIS: With a sidewalk cafe.

MR. SPONSELLER: And a sidewalk cafe.

The last issue, so we've mentioned the height that we need to get above the canopy, the density that we need to cover it, the final issue related to the variances and the gas station directly is the recreational space requirement.

As you know, in a C-2-C zone, the

1 requirement for rec space is 15 percent of your gross
2 residential area. Now because in this mixed use zone
3 we're doing primarily, it's 95 percent residential
4 use, that's a very big number. And as I mentioned
5 earlier, we were restricted on the site to about 70
6 percent of our original coverage because of the
7 presence on the northwest corner of the gas station.
8 If you take the 15 percent of the gross
9 residential area that we're providing, it's larger
10 than our remaining site area. So it would be
11 physically impossible to put that level. If you had no
12 other things on the site, you could not pt all of the
13 rec space on the remaining development site area of
14 the site. It's about 23,500 square feet and it simply
15 would not fit.
16 So what we're proposing is to follow the
17 guidelines of the downtown development district, which
18 is a 5 percent of total residential FAR. And that's
19 one-third of what is required. It's 33 percent of
20 what is required. And we're providing that space,
21 which is about 7800 square feet on our two rooftops of
22 the building.
23 MR. NETTLER: Could you discuss what other
24 recreational aspects are available to the residents?
25 MR. SPONSELLER: In the immediate area,

obviously, there's a large health club at the Ritz Carlton, which is over 100,000 square feet.

We're just four blocks east of Rock Creek Park and Georgetown.

CHAIRPERSON GRIFFIS: Why don't you pull up the site, your aerial photograph.

MR. SPONSELLER: Yes. Again, as I was saying, the site is approximately 4 blocks from Rock Creek, which lies here on the west side of the board.

Additionally, Washington Circle is to the south. The Ritz Carlton has a 100,000 square foot health club as part of his programming. So there are true adjacent recreational areas --

CHAIRPERSON GRIFFIS: What's the orange square at the top?

MR. SPONSELLER: I'm sorry, where?

CHAIRPERSON GRIFFIS: To the right.

MR. SPONSELLER: On, tennis courts. I don't know if they belong to the building or a specific building or not.

CHAIRPERSON GRIFFIS: Well, your submission says they're public tennis courts.

MR. NETTLER: They are.

MR. SPONSELLER: Oh, okay.

CHAIRPERSON GRIFFIS: Are those public

tennis courts? And the building next to it, going down that same street, what is that, do you know?

MR. SPONSELLER: This one?

CHAIRPERSON GRIFFIS: Keep going to the left towards Rock Creek Park.

MR. SPONSELLER: This one.

CHAIRPERSON GRIFFIS: Yes.

MR. NETTLER: Swimming pool.

MR. SPONSELLER: Okay.

MR. NETTLER: The high school and then the swimming pool.

MR. SPONSELLER: And a swimming pool.

CHAIRPERSON GRIFFIS: And then to the left further, that's a public pool?

MR. NETTLER: Yes.

MR. SPONSELLER: So there are recreational space opportunities around the site.

MR. NETTLER: Robert, let's go back a little bit to a couple of issues. On the height issues, could you talk about what the height of the adjacent surrounding buildings are?

MR. SPONSELLER: Okay. A couple of things I want to mention about the height. The ultimate guide for height in the city is the 1910 Height Act. And that Act allows you to have 20 feet to any

surrounding street.

I want to mention that because of the New Hampshire Avenue right of way, that would give us an allowable height of 130 feet based on the 1910 Height Act. And we're proposing 110 feet.

The 110 feet that we're proposing is in keeping with buildings to the west of us. The Ritz Carlton is 110 feet. And some of the projects along M Street are 100 feet in height. And so it's in balance with the neighborhood, if you will, in terms of the height.

MR. NETTLER: And could you design the project itself in terms of the residential and the uses that are going on in the site of the proposed building?

MR. SPONSELLER: Yes, sure. Actually, I was going to go through the whole design of the project and layout after discussing those three variance issues. Since there's no questions on those, at this point I'll walk you through how we've organized the site and the uses on the site and just kind of run through the design.

CHAIRPERSON GRIFFIS: Okay. I think you're going to have some questions first. Why don't we go to Ms. Miller.

MR. NETTLER: Well, I have some questions also. If I could just finish with those.

CHAIRPERSON GRIFFIS: Sure.

MR. NETTLER: If we're going to stick with the variance issues as opposed to the program.

Could you also talk a little bit about what has to be done to the site in order to be able to construct the building?

MR. SPONSELLER: Okay.

MR. NETTLER: You talked about the river, the sewer line. What else is significant about the site that needs to be dealt with as well?

MR. SPONSELLER: Well, the soils remediation, because of the existing gas station originally on the northeast corner, which lies where our parking garage is going, has to be remediated.

MR. NETTLER: Was there a plume that was created as a result of the fire when the gas station--a leak from the gas tanks that you're aware of?

MR. SPONSELLER: Correct. There was a fire on the site and all that soil has to be, as we excavate, has to be remediated. That's in addition to the sewer line, which runs about midway through the block is a pretty large Public Works project in the end. It has to be relocated to the southern edge of

the site. Those are the below grade issues for us.

Above grade, as I mentioned, it's just getting the building above the canopy and shielding the canopy from the units, which is the critical issue.

MR. NETTLER: And when you then start your second floor, which is how many feet above what you would normally start a second floor?

MR. SPONSELLER: About ten feet above a normal second floor.

MR. NETTLER: Okay. And what does that then do to the rest of the floors?

MR. SPONSELLER: Obviously, it lifts all the floors up and gets them as far as away from that garden as possible so that they're all lifted above that. The floors are taller than a normal floor, both for marketing reasons and for getting away from that canopy, purposes of getting away from the canopy in section, if you will, as you go up vertically.

MR. NETTLER: But that's all within the 6 FAR that can be utilized?

MR. SPONSELLER: That's right. If you took out the canopy covering, again if we designed it as a trellis, there'd be no FAR issue here today. It's just making the trellis a solid plain, putting a

garden in it that is the FAR density issue.

MR. NETTLER: Let me go into this. We've had discussions with the Office of Planning, if you recall, about whether this should be done be as a planned unit development or not as a planned unit development. Could you talk about why we ultimately agreed with the Office of Planning that this should not be done as a planned --

MR. SPONSELLER: First of all, I don't know of any PUDs which are done which don't include major density, additional density components. And one of the stipulations under PUDs is additional one to two FAR and normally depending on the zone that you get by doing a PUD. And we determined that the 4 percent, which can be between 15 and 20 percent and usually has to do with the fundamental use on the site, in other words providing more residential on the site than would be otherwise allowed in the C-2-C zone.

Our density that we're proposing is in keeping, it's 6.0 FAR total, which is allowed in the C-2-C. The density is merely to cover and shield the existing condition on the site, which is the gas station. And it is, in fact, a 4 percent bump up in FAR.

We could design that canopy as an open framework and not have it count in FAR at all. But we thought we would come before you and ask to put a garden there and make it a solid plain.

MR. NETTLER: And isn't there something about the Euclidian aspects of zoning that a PUD is at odds with, which you would say is not something that would be appropriate for this type of development and what's being proposed here?

MR. SPONSELLER: I'm sorry. Say it again, Richard.

MR. NETTLER: Zoning is known as the Euclidian in terms of the focus on certain areas and ratios of those areas and lots. And a PUD, is not correct, is an attempt to be somewhat adverse to Euclidians only and come up with something that is designed in a way that, aside from additional density, that is not tied to those types of characteristics of normal zoning. Is that the type of thing that would apply here; the PUD aspects that are adverse to Euclidian zoning?

MR. SPONSELLER: I don't think anything that we're doing on this project, especially in terms of density, is outside the bounds or the intent of the general land use plan in terms of density and uses on

the site. And I think that's the major thing that the PUD does, is allows bonuses in those two categories. I think the height is the issue and that is better solved through this process than a PUD process, again with the exception of the canopy.

MR. NETTLER: And isn't it true that also a PUD process is aimed at providing certain types of amenities and a response to those density issues and the location of those amenities and the densities that are different than under a Euclidian zoning analysis?

MR. SPONSELLER: Typically in a PUD process what the additional density come certain benefits back to the city which the developers are willing to provide. And we feel that we're giving an amenity back by covering the gas station without getting additional density back on our development site.

MR. NETTLER: I have no other questions on that issue.

CHAIRPERSON GRIFFIS: Ready for Board questions?

MR. NETTLER: Thank you.

CHAIRPERSON GRIFFIS: Ms. Miller, did you have a question?

BOARD MEMBER MILLER: I have two questions

on a couple of topics that came up. One is, Mr. Nettler, where you indicated that EastBanc has since become the owner of property 34. And I want to be clear and I want the record to be clear exactly what the relationship is between EastBanc and Exxon. Is Exxon the lessee now of EastBanc? Are they leasing the property now from you?

MR. LANIER: If you might, I would like to answer it.

In reviewing -- it's necessary to understand the history of the site in order to understand a rather odd relationship between Exxon and the remaining site ownership.

Exxon when they contaminated the remaining site, entered into an agreement with the Cohn brothers to acquire the northwest corner of the site in fee, but stripped the site from all real estate value by transferring, in essence, in a contractual manner all the density to the remainder of the site.

These agreements were made ten years ago and contemplated an office building as all the previous applications in this area we're targeting.

When we proposed the residential building, the initial reaction of Exxon and I would say most gas stations today was adverse to residential development.

I have seen now sites which have negative covenants on the site prohibiting residential development because of the perceived ongoing liability to the gas station owners, Exxon in this case.

We are negotiating and continue to negotiate with Exxon, who is the fee owner of Lot 34 how to accommodate their concerns as towards long term liability in the context of residential development adjacent to them and their needs to operate a 21st century gas station. And hope in that context to be able to accommodate them by letting them put part of their convenience store, which is now a necessary component of a 21st century gas station, into the base of our building in exchange for them to cooperate with a atypical design of an Exxon gas station. Hence, this garden feature. And a cooperative stance towards our residential development.

That's a long winded answer. I hope it--

CHAIRPERSON GRIFFIS: You said they're maintaining a fee simple ownership?

MR. NETTLER: They will maintain a fee simple ownership in what is becoming a one lot of record, which their portion will have a separate tax lot for it, but they will end up being part of the building, the project. Their gas station will be part

of this project because of the one lot of record and the connection that will be made to that gas station, and the canopy that then gets built over it and the retail portion of it. So you'll have one lot of record. You have two record owners within that one lot of record, but you'll have two separate tax lots within that one record lot.

CHAIRPERSON GRIFFIS: That's the kind of stuff that keeps the lawyers busy.

BOARD MEMBER MILLER: I'm just wondering, is there an agreement in existence or one coming that might be appropriate to submit to the record so that we have in full the constraints on the --

CHAIRPERSON GRIFFIS: Well, the subdivision is what we're going to need --

BOARD MEMBER MILLER: Right.

MR. NETTLER: Well, you will have the subdivision. There is an agreement of record that Exxon had signed, which assigns to the owner of the other lots, EastBanc, the development rights and requires as well Exxon to be a party to that subdivision that creates the one block of record.

CHAIRPERSON GRIFFIS: Yes, but for our purposes we don't necessarily care about the ownership as long --

1 MR. NETTLER: That's right.

2 CHAIRPERSON GRIFFIS: -- as we're looking

3 at one lot that we can calculate --

4 MR. NETTLER: You're looking at one lot,

5 that's right.

6 CHAIRPERSON GRIFFIS: -- the zoning

7 ramifications for.

8 MR. NETTLER: Exactly.

9 CHAIRPERSON GRIFFIS: I think the question

10 are coming up to the fact of in the submissions that

11 were going, we were being asked to the look at the .26

12 additional FAR variance permit. And it was clear it

13 was off the site. And there was some talk about -- I'm

14 just giving you perimeters, but I think you've cleared

15 it up at this point. There was talk about transfer

16 development right and we weren't sure how that was

17 happening. And that's where some of these questions

18 come from.

19 So the final subdivision plat would be

20 appropriate to put into the record.

21 CHAIRPERSON GRIFFIS: Let me make sure Ms.

22 Miller is finished.

23 BOARD MEMBER MILLER: No. I have a

24 question on a totally other subject.

25 CHAIRPERSON GRIFFIS: Okay.

BOARD MEMBER ZAIDAIN: The question actually, kind of popped up in my from her discussion, I'm sure you're going to walk through the site plan, but is the black hatching line, is that the -- if I understand Mr. Nettler correctly, there's going to be a final record lot with two separate lot ownerships within that? Is that correct? I mean, is this hatching line outlining that relationship?

MR. SPONSELLER: For density purposes today, this is the final subdivided lot and this is the, I guess, you're calling lot of --

MR. NETTLER: It will become a tax lot.

MR. SPONSELLER: A tax lot.

MR. NETTLER: A portion of the lot.

MR. SPONSELLER: It's Lot 34.

BOARD MEMBER ZAIDAIN: Okay. And that just includes --

MR. SPONSELLER: That's for the gas station.

BOARD MEMBER ZAIDAIN: And just includes the gas station?

MR. SPONSELLER: Correct.

BOARD MEMBER ZAIDAIN: Well, my eyes are getting bad. I've been struggling read. I see existing retail and then what's underneath that? Is

that where the --

MR. SPONSELLER: No. This actual says Exxon retail.

BOARD MEMBER ZAIDAIN: Exxon.

MR. SPONSELLER: What we're doing, as Richard mentioned, we're taking their store, which is their normal Exxon store --

BOARD MEMBER ZAIDAIN: I can't read that. That's why I asked the question.

MR. SPONSELLER: -- and we're putting it inside our building.

BOARD MEMBER ZAIDAIN: Okay.

MR. SPONSELLER: Yes.

BOARD MEMBER ZAIDAIN: So the retail for Exxon will be actually off of their --

MR. SPONSELLER: Off of their tax record lot. Tax lot. Tax lot.

BOARD MEMBER ZAIDAIN: Okay. And an additional question if I can ask it really quick, is I appreciate your discussion about the Height Act, but it's not your contention that because this exceeds the zoning that approves your case for variance, correct?

MR. NETTLER: Well, we wouldn't be here for a variance --

BOARD MEMBER ZAIDAIN: Well, you would be,

1 but it seems like you're still saying well the only
2 two arguments I see in your submission for the
3 variance is the canopy and then the statement that it
4 exceeds the zoning regulations but it's still within
5 the parameters of the Height Act. I guess that's one
6 of the arguments I'm struggling with.
7 MR. NETTLER: Well, within Height Act and
8 comprehensive plan and the adjacent neighborhood comes
9 in the discussion as to its impact on the zone plan
10 and neighborhood in terms of the third criteria of
11 getting an area variance. And all that we're saying is
12 that if you take all those into account, once you get
13 beyond the uniqueness and practical difficulty issues,
14 that it would be compatible with the zone plan for you
15 to grant a variance because the Height Act,
16 comprehensive plan, issues of the surrounding
17 neighborhood as well, and we would not be adverse to
18 the plan in that sense. That would be true for any
19 height variance in the city.
20 BOARD MEMBER ZAIDAIN: Well, no, I
21 understand. No, I understand. I see the point.
22 CHAIRPERSON GRIFFIS: Ms. Mitten has a
23 follow-up on the same issues.
24 COMMISSIONER MITTEN: Just on the
25 discussion that was taking place about Exxon and so

forth. If I understood Mr. Lanier correctly, you said you're still negotiating with Exxon regarding their willingness to allow this station to have an atypical design, which it would allow you to incorporate this canopy, is that correct?

MR. LANIER: I think that we have an agreement with Exxon, a verbal agreement, that they will cooperate with our desire to make this a landscaped canopy. But my fantasy and that of my Exxon opponents, you know, is still far apart of where I would like to them go. In my ideal world, this Exxon gas station doesn't look at all like an Exxon gas station. And in their world they still want to have some reminisce remaining like an Exxon gas station. But I think what we're into is a cooperative process of design development to come up with the best agreeable design for both of us.

COMMISSIONER MITTEN: And I appreciate that. I guess it's just difficult for the Board, first of all, to be imposing requirements on a property where the owner hasn't joined in the application. You said Exxon is still the fee owner or will still be the fee owner of Lot 34. I don't believe that they're a party to the application. We don't have a rendering or anything that shows us what

1 the canopy is going to look like.

2 MR. NETTLER: Go ahead.

3 MR. LANIER: The reason we don't have

4 Exxon here is that as a, let's say, co-conspirator, is

5 simply that by contractual agreement they're required

6 to do everything in their power to assist us, transfer

7 the density, enter into a combined lot development

8 subdivision documentation, etcetera. So they assigned

9 all those rights 15 years ago.

10 COMMISSIONER MITTEN: And I understand

11 that. But that doesn't get to the canopy.

12 MR. NETTLER: And I think the issue that

13 Mr. Lanier is referencing is more to the design of

14 what's underneath the canopy, which is not what we're

15 presenting to you today. Not so much that there's

16 going to be a canopy. There has to be a canopy there.

17 Exxon requires a canopy. And there already is a

18 canopy there. It's just a question at this point as to

19 whether that canopy is going to be -- not a question

20 of whether the canopy is going to be a whole and it

21 won't be whole in the sense of needing an area

22 variance unless you say that we're not entitled to the

23 whole aspect for that FAR. But rather, as to what's

24 going on underneath that canopy for purposes of Exxon.

25 And it may very well be that if Exxon doesn't come to

an agreement, that Exxon's going to simply keep the gas station underneath the way it is. But that doesn't effect the fact that we still have to construct the canopy and we still have to construct what's going on on the adjacent lot.

COMMISSIONER MITTEN: Okay. So we should not be really distracted by the fact that there may be at some point a landscape canopy. We should be thinking worse case scenario, it's what it is now?

MR. NETTLER: That's right.

COMMISSIONER MITTEN: Okay.

MR. NETTLER: Right.

COMMISSIONER MITTEN: I have some other questions, but I'll just wait until everybody is finished.

CHAIRPERSON GRIFFIS: Ms. Miller.

BOARD MEMBER MILLER: I have on a totally different topic as well.

On the recreational space requirement, you mentioned two rooftops.

MR. SPONSELLER: Yes.

COMMISSIONER MITTEN: Could you explain what's going to be on those rooftops?

MR. SPONSELLER: Certainly. I was going to as part of the overall design review get to those.

1 But, at the top of our building we're providing a
2 rooftop amenity in the form of a pool for the
3 residents and a garden. There are two rooftop levels
4 that we're using for these purposes of recreational
5 space. And they're on the very top of the building.
6 Access to all of the residents, obviously.
7 COMMISSIONER MITTEN: Thank you.
8 CHAIRPERSON GRIFFIS: Do you have to
9 egress stairs off the roof?
10 MR. SPONSELLER: The way that the roof --
11 CHAIRPERSON GRIFFIS: Are there's one FAR.
12 I see it now.
13 MR. SPONSELLER: Yes, there are two stairs
14 up there, yes.
15 CHAIRPERSON GRIFFIS: And you've pretty
16 much maxed out, you would say --
17 MR. SPONSELLER: The rec space?
18 CHAIRPERSON GRIFFIS: On the roof.
19 MR. SPONSELLER: The provision of rec
20 space?
21 CHAIRPERSON GRIFFIS: Yes.
22 MR. SPONSELLER: We're developing the
23 building as I speak to you in terms of the penthouse
24 equipment that will be up on the rooftop, and I'd
25 rather not promise more at this point than the 5

percent of the total. We could work to improve that, but I can't make any promises at this point as we begin to fill the penthouse with equipment, as you can imagine. So we're committing to the 5 percent at t his point.

CHAIRPERSON GRIFFIS: Right. Okay.

Anything else? Ms. Mitten?

COMMISSIONER MITTEN: I wanted to talk to you a little bit more about the PUD. And I don't want you to think that I don't like this project, because I like it very much. I think it's terrific. But this should be a PUD, in my opinion.

We have many PUDs in front of us. We have one that we voted on yesterday where there is no density being sought, no additional density being sought. That all the flexibility's related to the height of the building.

And it seems like this is, in large part, about making a better project and that's all to the good, but that's the kind of flexibility in exchange for superior design, bringing residential to the neighborhood and so forth is, in my mind, what the PUD process is about. They don't all have to be about seeking major increases in density. It's all sort of flexibility.

1 And it seems that the support of, perhaps,
2 the Office of Planning and the neighborhood is very
3 much a function of the fact that this will be a 100
4 percent residential apart from the first floor retail.
5 And that's good, too. But that is part of what is
6 creating the condition that makes you want to raise
7 the height up. So, you know, it's because you're
8 introducing a use that you're not required to. It's
9 that that's what people want you to do and that's what
10 I want you to do, but that's to me what the PUD
11 process is about. So --
12 MR. NETTLER: If I could give you maybe a
13 long answer rather than a short answer to that.
14 Because the PUD process has been a subject of a lot of
15 discussion almost from the beginning when it was
16 adopted in 1958. Discussion in the District of
17 Columbia because of the way the PUD process had been
18 used over the years culminating in the early 1990s
19 with a lot of community groups actually opposing the
20 use of the PUD process as it came to be used in the
21 District of Columbia simply for the purpose of, at
22 that point, really getting more density, getting some
23 height in situations that really weren't providing
24 amenities back to what the PUD rules specifically say,
25 which are the people who are on the site of the PUD as

1 opposed to the neighborhood.

2 And that ended up in litigation over a

3 project on Massachusetts Avenue, I think around 1991

4 in which the court essentially agreed with the

5 community at that point that the Zoning Commission was

6 not properly using the PUD process the way it was

7 envisioned. And there had been an elaborate study

8 that was done at George Washington University of all

9 the PUDs that had been approved by the Zoning

10 Commission over that entire period.

11 And so it became, as a consequence of

12 that, the PUD regulations were amended, and they were

13 amended to deal with specifically what the court had

14 said in that prior case involving this residential

15 project on Massachusetts Avenue to deal with the

16 amenities issues and other issues.

17 And I think what has happened is that in

18 the Office of Planning today and the Zoning

19 Commission, not to cast any aspersions as to either of

20 them, is that there is a view that because the

21 District doesn't have the same type of planning

22 process in Montgomery County and other jurisdictions

23 where everything, you go through a planning process

24 before you ever get to the situation of variances or

25 PUDs or anything like that, that the PUD process is a

one that's well suited to try and compensate for that situation.

In our view, this is not the type of project that really lends itself well to a PUD, notwithstanding what you said about some of the things that are going on in this site. This is a pure and simple height variance situation. And it would render the variance before the BZA somewhat arbitrary to say that in a pure height situation, which is being effected by a unique condition, a number of unique conditions one of which principally is the existing condition of the gas station, that you can utilize the PUD process to make a better project.

The project as it is would not change with the PUD process. The only thing that would be dealt with within the PUD process would be to say, all right, you get the more height. Well, from our prospective, that's what the variance process is for. If you have these unique conditions, if you have these constraints on the site, utilize the process that's been established by Congress and that's been utilized for the last 80 years in the District of Columbia to deal with that specific type of problem and not with an attempt to create a project that is adverse to the underpinnings of zoning and area

1 variances that were created back in the 1920s when New
2 York first developed Euclidian zoning in the city,
3 adopted it in 1928, and which is the underpinnings of
4 the '58 Zoning Act.
5 So I'm somewhat at odds with the notion of
6 the PUD process really being a one that is more
7 beneficial or more appropriate for this type of a
8 project when it's really one that I think is well
9 suited for precisely the area variance that we're
10 seeking.
11 COMMISSIONER MITTEN: Well, and I guess we
12 differ about that. My concern is that this, what's
13 being portrayed here is the practical difficulty,
14 while it's problematic, you know, to do a residential
15 development next to a gas station, a variance test is
16 a very high burden to meet. And, you know, it's
17 unduly burdened -- that the regulations are unduly
18 burdensome or that it's an exceptional practical
19 difficulty and, you know, we haven't really had any
20 testimony, there's nothing in the record about the
21 fact that units facing a gas station would be in some
22 way unleaseable or that if there were a commercial
23 component there -- I mean, we have examples. There's
24 an example at 2nd and Massachusetts, Northeast, I
25 think, where there's an apartment building next to a

gas station. I don't know that the units that face the gas station there are unleaseable.

We have examples in Georgetown where people overlook the Whitehurst Freeway, and so forth. I don't know that those are necessarily residential units that are immediately adjacent. But, you know, we have numerous examples where they are able to build in those circumstances. So I'm concerned that at least as it relates to height, and particularly as it relates to the height that arises out of the desire to gain the greater Florida ceiling heights above the first floor, that you're just not quite meeting the test.

MR. NETTLER: We obviously do disagree. I think that we need to understand that there are -- I think what Mr. Sponseller, and I think when we get into the program a little more you'll see that, is trying to respond to -- and I don't think 2nd and Mass is really a situation that's analogous to this -- is you have a gas station that we're not allowed to build over. We can't build over this gas station.

We have an FAR that we're able to utilize. And the conditions that are affecting this is you have a particularly narrow site. You have a site that is in terms of its configuration usually. Certainly

unusual in the area that we have to address here. You have certain site conditions that are unique to the site, one of them being a consequence of the gas station and the spillage that occurred on the site as a result of it, which constrains the way you can put any parking onto the site.

You have the additional constraints from the gas station that force you, and it's not a question of just a desire or a whim, that force you to push up your first floor of residential above a canopy that's going to be there regardless of whether it's a canopy that requires a FAR variance or not, because it's canopy that exists that has to be replicated.

So, it's not simply a situation where we're next to a gas station and we need a variance. It's all of these factors together that are pushing us into this narrow building that pushes the height up on the building from the second building and to make this feasible project, or any project on the site feasible, to deal with those issues is what we're trying to accomplish simply by taking advantage or taking response to what these conditions are.

CHAIRPERSON GRIFFIS: Well, certainly all the residential units that are adjacent to the canopy and the gas station need windows, is that correct?

MR. SPONSELLER: That is correct. And could I add -- yes, that is correct.

CHAIRPERSON GRIFFIS: Go ahead.

MR. SPONSELLER: Could I add one more consideration that we're dealing with? And that is under building code -- I hadn't mentioned this earlier. Under building code because of the use of the gas station pump islands, there's a certain minimum distance that we need our windows to be distant from the island. And that is accomplished as well as the crow flies, if you will, by lifting up those second story windows. We're not permitted to have those windows closer than a certain distance to the pumps.

CHAIRPERSON GRIFFIS: And what's the distance for?

MR. SPONSELLER: And we can't relocate the pumps.

The distance is for safety, obviously. It's a safety consideration for fire.

CHAIRPERSON GRIFFIS: Right.

MR. SPONSELLER: It a building code safety issue. So that is another factor in our design.

CHAIRPERSON GRIFFIS: But it's an interesting piece that Ms. Mitten brings up, this building at 2nd and Mass, I believe you said, which to

be specific I think you're talking about 208 Mass Avenue, Northeast, which if I'm correct and I guess we could have this documented, but first of all that building is separated by an alley to the gas station. It's orientation is different then what we're seeing here, as this is actually perpendicular, or the gas station perpendicular to the building itself. And the other piece, it would be interesting to look at 208 Mass, to see whether and what that use is up to 20 to 30 feet and whether it is in fact residential units or it's at something else and does the back of that building actually step up above the gas station. But it's an interesting comparison if we were looking at adjacent gas stations to residential buildings.

That being said, if you drop this -- going to one -- now you have what's been testified in terms of the building code fire separation, which is a distant set. If you drop down, you obviously -- well, there it is. I think that covers it.

Yes, Ms. Miller?

BOARD MEMBER MILLER: Before we move on, I was wondering if Mr. Nettler could provide the Board with the name of the case you were referring to and the cite on Massachusetts Avenue dealing with the PUD regs.

1 MR. NETTLER: 1212. It's 1212
2 Massachusetts, but I can get you that information.
3 BOARD MEMBER MILLER: Thank you.
4 BOARD MEMBER ZAIDAIN: I have a really
5 quick question. It's kind of unrelated to any of us.
6 But can you point out on this rendering
7 where your mechanical is on the roof.
8 MR. SPONSELLER: The mechanical is --
9 BOARD MEMBER ZAIDAIN: Yes, I'm trying to
10 orient it because these two plans are oriented.
11 MR. SPONSELLER: The mechanical is inside
12 of our penthouse structure here.
13 BOARD MEMBER ZAIDAIN: Right. But is it
14 behind the pool or --
15 MR. SPONSELLER: Well, there's some below
16 the pool. It pretty much covers the entire volume
17 that's above the height there.
18 BOARD MEMBER ZAIDAIN: Okay. Where's the
19 elevator core then? In the center?
20 BOARD MEMBER ZAIDAIN: The elevator core
21 is in this location. I can show you better in plan.
22 CHAIRPERSON GRIFFIS: There's a roof plan.
23 BOARD MEMBER ZAIDAIN: This is the two
24 roof plans, if you will, the two major roof elevations
25 we have. This is the high roof plan where the pool is

located and this is the main roof, if you will, at our height. And this is the elevator core which serves that roof.

CHAIRPERSON GRIFFIS: And what requires a mechanical penthouse to be so spread out?

MR. SPONSELLER: A mechanical penthouse is restricted under zoning by virtue of its setbacks.

CHAIRPERSON GRIFFIS: Right.

MR. SPONSELLER: You're required to setback any equipment a certain distance --

CHAIRPERSON GRIFFIS: Then what is it so long. Why don't you just bunch it up in one little portion of the building?

MR. SPONSELLER: We don't have enough space. We don't have enough space here. We're maximized in terms of our penthouse coverage, if you will, under zoning. And it's full of equipment as it is.

So, in other words, if we limited it to this side of the site only, we would be out of rope, if you will, in terms of our putting equipment in it. There are fans associated with residential buildings. And heat pumps and things, and boilers and things that have to fit in this volume.

MR. NETTLER: Is that also because of the

narrowness of the development site that you --

MR. SPONSELLER: It's also the restrictions of the site geometry. And once you do an 18 foot setback around a 75 foot building, you've taken up half of the floor area, if you will.

I want also just talk to one of the issues that you raised. I'm quite familiar with the Georgetown Incinerator project, having worked on that, and there the relationship to the Whitehurst is pretty applicable.

We were able to lift up the first level of residential there a full story above the Whitehurst. And we didn't think it was enough. But we don't have nearly the adjacency that we have either by virtue of raising the height on this building as a result. We're really at the same level of the canopy in this project. And in that situation we're able to get a full story above it.

In order for the residential to be viable there, and that was through clever programming of the base of the building, which is high volume theaters that we were able to accomplish it on that site. And it was a very difficult issue to overcome, as is this on this project.

COMMISSIONER MITTEN: Do you also have

these taller floor to ceiling heights in the residential units there?

MR. SPONSELLER: On that project, yes. It's actually the same clear ceiling height, ten feet.

COMMISSIONER MITTEN: Okay.

MR. SPONSELLER: If there's time, I'd love to walk through the design and show you how we organized --

CHAIRPERSON GRIFFIS: Any other questions at this point? Okay.

We'll briefly walk through.

MR. SPONSELLER: Okay. Let me just tell you how we've organized the residential project.

As you know, in a mixed use project the difficulty is the entries for the various uses. And what we've done is on this board north is to the left here. This is 22nd Street and this is M Street. This is our gas station location on the northwest corner. And the residential entry's on the opposite corner of that. It is a thorough block connection for a drop off. And we've internalized all the parking access so that it's a very neat entryway, if you will.

We're extending residential duplexing that's up New Hampshire Avenue, which again is in keeping with the street level residential of this

neighborhood on New Hampshire Avenue particular.

And then on the northern part of the site, as I mentioned, that we've left two large retail plates; one for a corner retail restaurant, hopefully, and cafe, outdoor cafe on what I believe is the most prominent corner of the project and one we're very excited about. And inboard adjacent to the Exxon station is there Exxon retail store, which we decided to put inboard. Many people have experienced these retail spots, and it's not something you want to put on the street, necessarily, we'd rather have the restaurant there. So we put this inboard on the site adjacent to their pump islands.

And their eight service pump islands are located here. As I mentioned, the dark shadow represents where the garden rooftop would overhang that pump island.

The typical floor --

CHAIRPERSON GRIFFIS: While you're walking through this then, what's the face of that retail going to look like?

MR. SPONSELLER: The Exxon retail?

CHAIRPERSON GRIFFIS: Yes.

MR. SPONSELLER: You know, we're negotiating with Exxon now on the design of their

store. But the whole idea of setting it off of the street was that we could let them put more glass there because it wouldn't be right on the street frontage.

CHAIRPERSON GRIFFIS: And then you're going to tuck four parking spaces in it?

MR. SPONSELLER: Correct. They have to have parking adjacent to it.

CHAIRPERSON GRIFFIS: I see.

MR. SPONSELLER: And I forgot to mention, we have one loading service bay where we've worked hard to screen, if you will, the parking ramps on the project for the building, which is again off of the south portion of the site. And additionally there's one loading berth that we're providing, just one, for both uses. And I'm going to consider both expense to extend the service quarter off of the one location so that we have just one loading door on the site, on the peripheral, periphery of the site.

As I mentioned earlier in the testimony, the configuration and shape of the building lends itself to a double loaded corridor system for the residential component, which you can see on this plan. We have one elevator core, which is located off of the lobby. I mentioned the drop off on the south part of the site, and that leads to a double loaded corridor.

1 These are the units that face the gas
2 station canopy system. About half of our units are
3 effected by that view, maybe 40 percent are effected
4 by that view.
5 Going up to the exterior of the project,
6 going to the exterior you can see what we're working
7 with is a very normative, if you will, system of bays
8 and balconies for the project. All of the units will
9 have a bay window and an adjoining balcony system so
10 that they can get fresh air. That is important,
11 actually, is that every unit has a balcony of some
12 sort. Either a French balcony or a walkout occupiable
13 balcony so that we're 5 percent of the overall rec
14 space, every unit will have outdoor space as well
15 private to that unit. You cannot count that space
16 toward the rec space, but if I were to add that space
17 into the total, I think we would be near the total of
18 15 percent.
19 MR. LANIER: If I could interrupt for a
20 moment. Our goal in designing this building is to
21 create vertical gardens. And so when we're talking
22 about balconies, we're not talking about stepout
23 balconies with the two green pots on it. But where
24 we're putting in structural planters as part of the
25 building system so that when you look out from your

apartment or you're on your terrace, I would say rather than balcony, you have a feeling of a garden and not -- or a real planter which will be maintained by the building, have irrigation systems and so that we will have a lot of green involved in this building.

And the second goal is to use materials which are atypical for the neighborhood. So not to have another brick building.

And --

CHAIRPERSON GRIFFIS: What an atypical material?

MR. LANIER: It's all cooper.

MR. SPONSELLER: It's a copper --

MR. LANIER: We're trying to make it a copper building.

MR. SPONSELLER: The gardens that Anthony mentioned you can see in the rendering here. Every balcony is also at the edge of it, to screen from the furniture that might be on the balcony, is a low planter box which is urban in its arrangement in terms of these vertical arrangements of these balcony planters, if you will.

CHAIRPERSON GRIFFIS: So at closing they hand you the keys and your plants, and you actually go and put them up there?

MR. SPONSELLER: I'm sorry, say that again.

CHAIRPERSON GRIFFIS: Oh, it's a joke. It was not -- so let's move on.

MR. SPONSELLER: These are maintained by the building and not by the residents.

MR. NETTLER: And I think an important part of some of the things that go into this, which I think the ANC may weigh in on, is the intention to keep this as an owner-occupied units. Not to produce something that will be against that goal.

CHAIRPERSON GRIFFIS: So your point is that?

MR. NETTLER: In providing all of these things and building it the way it's being built with the gardens and the other things is to have units that will either sell to individuals who will be using the units and in agreeing with the ANC on certain commitments to make sure that this is a building that is owner occupied.

CHAIRPERSON GRIFFIS: Okay. And the level of owner occupancy is going -- I thought you were making the point that will go to maintaining the consistency of all these things?

MR. NETTLER: Correct.

CHAIRPERSON GRIFFIS: Okay. That poor little townhouse. You guys couldn't get that little site or -- I don't --

MR. SPONSELLER: Anthony can speak to that.

MR. LANIER: We have a good relationship with the owners of the townhouse. We're happy to buy it. You know, happy to buy their FAI. You know, it's only a 1,000 some square feet. But we're working with them to make it the best little townhouse in front of a tall building in the city, as we are doing with the gas station.

CHAIRPERSON GRIFFIS: Indeed. Okay. What else do you want to show us?

MR. SPONSELLER: I think that was sort of the summation of the organization of the project, unless there's any questions about how we're placing the uses around the site.

MR. NETTLER: We did provide you with a traffic report, which I think makes it clear that this does not have any adverse impact on traffic, parking. The neighborhood actually benefits the situation.

CHAIRPERSON GRIFFIS: Do you lose views on that corner piece where it's adjacent to the townhouse?

1 MR. SPONSELLER: We do in the sense --
2 also it's a building code. Because it's not part of
3 our site, we cannot again --
4 CHAIRPERSON GRIFFIS: Right.
5 MR. SPONSELLER: So to facilitate the gas
6 station pump island locations, we can't put open
7 windows adjacent to it for building code reasons. So
8 we're losing the views on the south of two stories of
9 units because of that.
10 CHAIRPERSON GRIFFIS: Right.
11 MR. SPONSELLER: Which we wouldn't have to
12 do if we consolidated the site.
13 CHAIRPERSON GRIFFIS: Right. But you're
14 attaching to the townhouse?
15 MR. SPONSELLER: No, we're not going to
16 attach it. We're not attaching it.
17 CHAIRPERSON GRIFFIS: Okay.
18 BOARD MEMBER ZAIDAIN: Is there a
19 difference in the curb cut between on this site plan
20 and the rendering here by the townhouse?
21 MR. SPONSELLER: This location?
22 BOARD MEMBER ZAIDAIN: Yes.
23 MR. SPONSELLER: I wouldn't look at the
24 rendering. I would use -- this is more accurate.
25 BOARD MEMBER ZAIDAIN: Okay. Okay. That's

fine. I was just curious.

MR. SPONSELLER: It is a through cut, if that's what you're asking.

CHAIRPERSON GRIFFIS: And 22nd is one way there, is that correct?

MR. SPONSELLER: 22nd is one way north. 22nd is one way north and New Hampshire Avenue is one way northeast, if you will.

CHAIRPERSON GRIFFIS: Right. Okay.

BOARD MEMBER ZAIDAIN: You don't happen to have a rendering of the other side from M, do you, showing the canopy?

MR. SPONSELLER: Well, what we have on the canopy, as I mentioned, it's somewhat conceptual is the model. I don't know if you had a chance to peek at it.

BOARD MEMBER ZAIDAIN: Yes.

MR. SPONSELLER: Which is a 3 dimensional presentation of it. And if we're allowed to proceed with it as a solid element, we intend to make it a very sculptural piece, as you can see. We're breaking it up into two pieces and we're treating it as a floating garden, if you will, above the corner. And we imagine -- I intend to do a very sculptural underside to it, which could be illuminated at night.

1 Became a lantern in the evening.

2 BOARD MEMBER ZAIDAIN: I shouldn't ask any

3 questions about the glass touching the townhouse here?

4 MR. SPONSELLER: Yes, don't ask any

5 questions about that.

6 BOARD MEMBER ZAIDAIN: We'll stick with

7 the site plan.

8 CHAIRPERSON GRIFFIS: Is that a concern in

9 the designing of the residential units, the lighting

10 that's going to happen on the gas station?

11 MR. SPONSELLER: Well, it's on the

12 underside. It is a huge concern.

13 Retail lighting is very important in

14 consideration for the residential units above. We

15 have to be very careful in controlling the spillage at

16 night and you don't want to have people wanting to

17 close their drapes all the time.

18 CHAIRPERSON GRIFFIS: So that's a part of

19 it --

20 MR. SPONSELLER: What we're doing is we're

21 illuminating the underside. We'll wash the canopy

22 from the below, not above and have a very subtle wash,

23 if any, on the landscaping above for the residents.

24 They won't see the lighting elements.

25 CHAIRPERSON GRIFFIS: But that's an

1 integral part of the design of the canopy then?
2 MR. SPONSELLER: There's two
3 considerations in the canopy. There's a residential
4 consideration; what you see as a resident and there's
5 what you see on the street scape. And they're two
6 competing considerations often.
7 In this case we're going to balance them
8 so that the lighting that we do for the retail street
9 scape, which we want it to be a light, safe secure gas
10 station so that people can come and use it, does not
11 contradict the concerns for a resident.
12 But, yes, it's a huge issue in the design.
13 We also want the garden at night to have a
14 little bit of color and interest so we'll do some
15 lighting on that as well.
16 CHAIRPERSON GRIFFIS: Okay. Any other
17 questions right now? Anything else. Okay.
18 Mr. Nettler, anything else?
19 MR. NETTLER: Not at this point, no.
20 CHAIRPERSON GRIFFIS: Then let's move on.
21 Let's go to the Office of Planning's report.
22 MR. MORDFIN: Good morning, Chairman and
23 members of the Board. My name is Stephen Mordfin with
24 the Office of Planning.
25 And this is BZA application 17014 for

1 EastBanc, Incorporated at 2110 M Street, Northwest.
2 This application requests approval of the following
3 three area variances: (1) to increase the maximum
4 building height to 110 feet; (2) to increase the
5 maximum permitted FAR from 6.0 to 6.26, and; (3) to
6 decrease the minimum residential recreation space from
7 15 percent to 5 percent for the construction of a 9
8 story 110 foot high mixed use building at 2110 M
9 Street.
10 The subject property is currently improved
11 as a service parking lot where the building is being
12 constructed and a gasoline station at the corner of
13 22nd & M Street that is to remain.
14 The Applicant proposes to construct a new
15 expanded canopy over the existing pump island so as to
16 block the view of the pump islands from the windows of
17 the residential units in the proposed building.
18 The Applicant proposes to increase the
19 height of the building from 90 feet to 110 feet for
20 two reasons: (1) is the height of the ground floor is
21 increased to 22 feet so that the windows of the
22 residential units are above the canopy, and; (2) the
23 Applicant proposes luxury units and as such desires
24 ceiling heights more than eight feet.
25 The unusual situations: The effect of the

existing gasoline station on the development of the subject property and the effect of the provision of increased ceiling heights for the luxury apartment units has on the total height of the building.

The Applicant proposes to increase the maximum FAR from 6.0 to 6.26. The provision of the canopy over the gasoline pumps to block views of it from the residential units increases the FAR by 0.76. The proposed building has an FAR 5.5, less than the maximum permitted. However, because the canopy contributes to the total FAR provided, a variance is necessary.

And the extraordinary exceptional situation in this case is that a portion of the site is developed as a gasoline station that the applicant does not control and is to remain.

The last variance requested by the Applicant is to decrease the amount of residential recreation space from 15 percent to 5 percent. Due to the shape of the property and the impact of the gasoline station on the design of the site, the building cannot accommodate larger common spaces for use as residential space. Each unit will be provided with a private balcony decreasing demand on the residential recreation space. In addition, there is a

private exercise club across 22nd Street and several nearby urban parks and Rock Creek Park is approximately 3 blocks to the west.

The Office of Planning recommends approval of the application as submitted by the Applicant.

And that concludes the presentation from the Office of Planning.

CHAIRPERSON GRIFFIS: Thank you very much. Any question of the Board?

Does the Applicant have any question? Does the ANC.

MS. MILLER: No questions.

CHAIRPERSON GRIFFIS: Come on, we can't let them off that easily, for goodness sakes.

MR. LANIER: Many years of hard work on my behalf have gone into my relationship with Dorothy Miller. And I consider it a testimony to our friendship that she is not opposing me.

CHAIRPERSON GRIFFIS: We'll get to that.

Okay. Let me just, a quick clarification on page 5 of the report. It was indicating that there was an increase in .76 FAR. I believe that's supposed to be .26, is that correct, or am I not reading that correctly?

MR. MORDFIN: I thought that the building

was 5.5 --

CHAIRPERSON GRIFFIS: Oh, I see. Right. That's the total. Right.

MR. MORDFIN: Right.

CHAIRPERSON GRIFFIS: Okay.

MR. MORDFIN: So the variance is for .26.

CHAIRPERSON GRIFFIS: Is that correct?

MR. SPONSELLER: That is correct, .26. That's all the canopy commercial FAR.

CHAIRPERSON GRIFFIS: All right. Well, hopefully, somewhere we know exactly what it is.

All right. If there's no other questions, we can move on. Thank you very much.

I don't have any other notes of attendant government reports to this application. So let's go to the ANC, ANC-2A, which is recommending approval. Exhibit 25. And I believe we're going to have testimony today.

Why don't we give her a seat.

MS. MILLER: I'd like to call the Commission's attention to the fact that this one of the few times that I have been, that I'm a proponent, not an opponent. And we passed a resolution and Richard Price was going to talk today, but unfortunately Congress needed him worse than we did.

1 And I would like to call your attention to
2 the fourth resolution in our -- whereas in our
3 resolution that this was going to be 80 percent owner
4 occupied. And for Foggy Bottom, what joy, taxpayers
5 for the District as well. So we very much approve
6 this and are looking forward to it.
7 And I know you've had a chance to read our
8 resolution.
9 CHAIRPERSON GRIFFIS: Is that it?
10 MS. MILLER: That's it. I told you we
11 were going to make it easy on you.
12 CHAIRPERSON GRIFFIS: All right. Indeed.
13 Okay. Well, we appreciate that.
14 Any questions? Ms. Miller? Yes, Ms.
15 Mitten.
16 COMMISSIONER MITTEN: Do you have a side
17 agreement with the Applicant about the 80 percent?
18 MS. MILLER: It's in our resolution and he
19 presented it to us. So we have accepted that. But if
20 you want us to get one, I'll ask for one.
21 COMMISSIONER MITTEN: No. I'm just
22 concerned about you, because this won't be condition
23 of the variance.
24 MS. MILLER: That's true. But the tenant
25 -- it's going -- the sales are going to be made so

that it's 80 percent owner occupied. And, of course, you know that's aimed to prevent you know who from moving from the street and taking more space.

COMMISSIONER MITTEN: Right. I understand that.

CHAIRPERSON GRIFFIS: You mean it's going to be part of the condo association documents?

MS. MILLER: Right. Right. Correct.

CHAIRPERSON GRIFFIS: So the 20 percent would allow to be sublet?

MS. MILLER: Correct.

CHAIRPERSON GRIFFIS: Is that fairly common in a condo development?

MS. MILLER: It makes a difference.

MR. LANIER: In our condo developments we've made it a -- stipulated that you have to be an owner/occupant to buy. So we discourage investor units in essence, say no.

CHAIRPERSON GRIFFIS: I see. Okay.

MS. MILLER: It also helps the tax base and deductions for the owners. Because if it's more than that, then they lose some of their tax base.

CHAIRPERSON GRIFFIS: Right. I see. Okay. Good.

Anything else?

1 BOARD MEMBER ZAIDAIN: Sir, the 80 percent
2 is going to be enforced through condo regulations, did
3 I understand that correctly?
4 CHAIRPERSON GRIFFIS: Right.
5 BOARD MEMBER ZAIDAIN: Is that established
6 through a D covenant?
7 MR. LANIER: I think it's -- we are
8 profited in writing. I don't know what the remedy for
9 failure is, to be quite honest, other than I will be
10 back again --
11 BOARD MEMBER ZAIDAIN: I don't think we'll
12 get involved in that.
13 MR. LANIER: And then we stipulated in our
14 condo documents.
15 BOARD MEMBER ZAIDAIN: Okay. I was just
16 curious.
17 MR. LANIER: But it does run with the
18 site. Could make it run with the site.
19 CHAIRPERSON GRIFFIS: Okay. Any other
20 questions regarding that.
21 Ms. Miller, thank you very much.
22 Ms. Mitten I think made the pertinent
23 point. It's of interest for us to understand, but it's
24 not part of what we will be deliberating on.
25 MS. MILLER: I understand that.

1 CHAIRPERSON GRIFFIS: But it's good
2 information.
3 Okay.
4 MS. MILLER: But it swung our vote.
5 CHAIRPERSON GRIFFIS: I'm sorry, what?
6 MS. MILLER: It swung our vote.
7 CHAIRPERSON GRIFFIS: Yes.
8 MS. MILLER: It was an unanimous consent.
9 CHAIRPERSON GRIFFIS: Indeed. But I'm sure
10 that the test for the variances also were discussed
11 and deliberated by the ANC, is that correct?
12 MS. MILLER: Not to that extent.
13 CHAIRPERSON GRIFFIS: Well, to some
14 extent, certainly?
15 MS. MILLER: Right. Right.
16 CHAIRPERSON GRIFFIS: Indeed.
17 The ANC wouldn't find themselves in the
18 position of supporting a project that didn't make the
19 variance test for building relief, would it?
20 MS. MILLER: For residential for Foggy
21 Bottom, we would support almost anything because we
22 have so little of it.
23 CHAIRPERSON GRIFFIS: Okay. I can hear
24 the chipping away of that great weight.
25 MR. NETTLER: I would ask you to rely on

1 the resolution.

2 CHAIRPERSON GRIFFIS: Yes.

3 MR. NETTLER: And a presentation was made

4 on the variance, the basis for the variance and the

5 factors that were necessary for it.

6 CHAIRPERSON GRIFFIS: Right. Okay. Very

7 well. Let's move on.

8 Is there anyone else here to give

9 testimony today either in support or in opposition?

10 Yes?

11 MR. PARRISH: Yes, I would like to be part

12 of that.

13 CHAIRPERSON GRIFFIS: Fabulous. Why don't

14 you come forward? Why don't we give the gentleman a

15 seat and he can introduce himself.

16 If you wouldn't mind just stating your

17 name and your address?

18 MR. PARRISH: Sure. My name is Brent

19 Parrish.

20 CHAIRPERSON GRIFFIS: I just need you to

21 touch the base of that mike to turn it on.

22 MR. PARRISH: My name is Brent Parrish and

23 I live at 2317 Pennsylvania Avenue.

24 And I'd like to thank both the developer

25 and architect for designing such a beautiful design

and building. And I really do appreciate the amount of effort and time that they spent into making it a beautiful area in -- a beautiful contribution to the neighborhood.

I would, however, like to raise the point that there is, at least just to make the developer aware that there is a serious lack of community indoor recreational space available. And as the developer is asking for more space, maybe they could work with the community as a whole to develop indoor recreational space.

CHAIRPERSON GRIFFIS: What do you mean by "community indoor recreation space"?

MR. PARRISH: Like a community party room, conference rooms; places where members of the community, seniors, working families can come together to work together, learn together, have local -- even the ANC meetings. Things of that nature.

CHAIRPERSON GRIFFIS: I see.

MR. PARRISH: And as we are getting more and more residents in the area, those type of needs are going unmet. And so I would like to propose to work with the developer on either establishing some space in the development or setting up a community fund which can go towards establishing permanent space

for that purpose.

CHAIRPERSON GRIFFIS: Two issues with that, and then I'll let you continue.

First of all, it's interesting that you bring this up especially since they're here for a residential recreation space. However, a community room for meetings and such does not fulfill residential recreation space as is defined for our zoning regulations. Because actually we've been through that, and some of our deliberations in the past have said well what's the contemporary use for residential rec? Is the zoning living enough that we can see how it translates? And, for instance, condo association meetings and things of that nature, it has been found from our studies that that does not fulfil the residential rec.

The other piece is that it would be for the building, not the community.

But I understand your point.

MR. PARRISH: But since they are asking the community as a whole for more space --

CHAIRPERSON GRIFFIS: Right.

MR. PARRISH: -- it seems that they should be willing to give back to the community in a sense.

CHAIRPERSON GRIFFIS: I see. I see.

1 Okay.

2 And the other is, and perhaps this isn't--

3 well, it's on my mind. When you look at having open

4 rooms and meeting rooms, do you not have proximity to

5 universities that have just those kind of spaces?

6 MR. PARRISH: Those are limited for

7 students. There is the hotel space as well, which is

8 available. But that can be expensive and it isn't

9 consistently available to the public as a whole.

10 CHAIRPERSON GRIFFIS: I see. Right. Well,

11 there it is.

12 Ms. Miller? Well, actually, let me not.

13 I'll let him continue with his testimony and then

14 we'll follow up --

15 MR. PARRISH: Oh, no, please. If there's

16 anymore questions.

17 CHAIRPERSON GRIFFIS: Is that all?

18 MR. PARRISH: That's the basic gist of it.

19 CHAIRPERSON GRIFFIS: Okay. Okay.

20 MS. MILLER: I wanted to bring to Mr.

21 Parrish's --

22 CHAIRPERSON GRIFFIS: Can you turn on your

23 microphone?

24 MS. MILLER: Oh, sure.

25 I wanted to bring to Mr. Parrish's

1 attention, we have three apartment buildings going up
2 including Columbia Hospital, which will be coming
3 before you next month.
4 CHAIRPERSON GRIFFIS: That's down the way.
5 MS. MILLER: Well, I know that. But
6 they're all going to have the open space that he is
7 asking about.
8 CHAIRPERSON GRIFFIS: Right.
9 MS. MILLER: And the International
10 Monetary Fund has the open space, or supposed to have
11 it, in their part.
12 CHAIRPERSON GRIFFIS: On Pennsylvania
13 Avenue?
14 MS. MILLER: On Pennsylvania Avenue and
15 behind it.
16 CHAIRPERSON GRIFFIS: Right.
17 MS. MILLER: And GW has a good amount of
18 it if you want to use it.
19 MR. PARRISH: Is that available for
20 student?
21 MS. MILLER: Students as well as the
22 public.
23 MR. PARRISH: Okay. I stand corrected.
24 CHAIRPERSON GRIFFIS: Good. And, in fact,
25 she's probably a great resource to get all those if

you want to follow up after this.

Okay. Any other question of the Board? Applicant? Cross examination of the witness? Excellent.

We absolutely appreciate you coming down and raising these issues.

MR. PARRISH: Thank you.

CHAIRPERSON GRIFFIS: It's excellent to have participation.

With that, thank you very much.

MR. PARRISH: Yes.

CHAIRPERSON GRIFFIS: Is there anyone else here to give testimony, either in support or in opposition today? Persons in support or opposition? Not seeing anyone, I believe we can go to closings.

Ms. Bailey is bring to my attention, which I have overlooked, we have submissions of letters in support that we'll just note into the record.

Exhibit 23, Exhibit 26. And I believe that's all that I have noted. From a Ms. Maddox and Ms. Calo. Are you aware of any other submissions into the record, Applicant?

MR. NETTLER: The only one I'm aware of from the Downtown Cluster of Congregations. I had received a fax yesterday that they had sent to you as

1 well.

2 CHAIRPERSON GRIFFIS: Is that correct?

3 Have we received something from Downtown Cluster?

4 MS. BAILEY: I haven't seen it, Mr.

5 Chairman.

6 CHAIRPERSON GRIFFIS: I haven't seen it

7 either. It wasn't -- well, it can go into the record

8 if it comes in.

9 Okay. That being said, let's go to,

10 unless there are any question of the Board, closing

11 remarks.

12 MR. NETTLER: Thank you. And I will try

13 to be brief.

14 This is one of the few vacant properties

15 in the West End area, and the west area actually is

16 characterized by a number of large scale PUD projects,

17 as well as others. And in fact for a historical note,

18 the boundary of this property is also the boundary of

19 the DuPont Circle overlay, which was an overlay that

20 was passed in the early 1990s to limit the number of

21 PUDs that could be approved for that area because of

22 the number of the PUDs that had been placed in one

23 particular area of the city over a 15 year period.

24 With regard to the requirements for an

25 area variance, as we noted there are three

requirements. One that the site is unique, that there are practical difficulties in responding to the application and that it does not undermine the intent and purpose of the zone plan.

We believe that there are a number of factors that are unique to this site. We've alluded to them and mentioned the fact that the site is in terms of it shape, in terms of the narrowness of the development area on the site. And while we were blessed with the fact for one condition, which is that the Exxon, the owner of the adjacent site, by contract provides us with its development rights, it's both a blessing and a curse.

The curse is the fact that Exxon exists and provides us with the inability to utilize the site in a way that a matter of right development could. And that requires us to deal with the narrowness in terms of the response to the recreation space, the narrowness in terms of what the consequences of dealing with that Exxon station and a canopy that has to be placed over the station and the inability to take advantage of the space above the Exxon station, which does push the height up.

And when you take those factors, the Exxon station, the conditions underground that require us to

1 address in order to construct anything that is at all
2 feasible, it does in our view present - to use the
3 words of the court and this Board - a confluence of
4 factors that in our view present a unique condition
5 and that puts us before you in terms of seeking an
6 area variance.
7 And the practical difficulties are, as
8 mentioned, primarily the ability to comply with the
9 height requirement to develop this site in any
10 meaningful manner. The recreational requirements,
11 again, as I've said, the narrowness of the site, the
12 canopy which if you were to decide was from an area
13 variance perspective in terms of the FAR was
14 unnecessary, we simply wouldn't have a canopy that is
15 a solid canopy that has a garden over it. You'd have a
16 canopy as it exists today, which doesn't provide for
17 any additional floor area.
18 And I think it's important from the
19 perspective of if you look at both the Office of
20 Planning's position as well as the support that we've
21 had in the neighborhood, that clearly this is a
22 project that fits within both what the purpose and
23 intent of the comprehensive plan is for this site as
24 well as the zone plan. It's a significant residential
25 community. It has a mixture of uses that respond as

well to needs in this area of the city. It continues the revitalization that is going on in the West End. Takes advantage of the failure that HR overlay had in trying to have an area that would be, if you stretch it across over the West End in this area, that was intended to have a very night and daytime uses and response from development, which has to some extent occurred. Certainly with the Ritz Carlton being constructed and the residents there, and it finishes that off, we believe, very nicely in providing the residential need of that will support these types of uses in that area of the city. And we believe, as I said, that we meet the requirements for an area variance.

We would ask you to approve of the application today, and provide us with a bench decision in support of it. We note that there is no opposition to this, not that that being the sole criteria from which you judge whether something should be entitled to an area variance or not, but it is a project that has garnered unanimous support and we would like that support to be unanimous on your side as well.

Thank you.

CHAIRPERSON GRIFFIS: Good. Thank you.

1 Anything further? Questions from the
2 Board? If there aren't any -- well, having heard some
3 of the Board questions, let me ascertain whether we
4 can in fact go ahead today.
5 I am under the inclination to do so. I
6 mean, I think it's been set out fairly clearly in
7 terms of the uniqueness. And as Mr. Nettler in his
8 closing remarks just said, the confluence of these
9 aspects that create the uniqueness and then out of
10 which come the practical difficulties. And I don't
11 know if you mentioned in your summation, but one that
12 was evidenced today in the testimony, which I think is
13 very -- is the fact that the building code and the
14 separation based on the fire rating that is required
15 for the residential units above the pump, regardless
16 of whether someone wants to live next to a gas station
17 or above it, that is something that would be
18 absolutely required to be addressed. And we could go
19 on.
20 But let me hear from others. Actually,
21 the difficulty comes from this: First of all, the
22 subdivision plat of which, obviously, is just a matter
23 of time for that to be put out, I think may be
24 important enough to receive into the record before the
25 final deliberation on this.

One of the other things that I'm hearing from the Board and when we're talking about some of the canopy, but let me hear other members if they're so inclined, because this is what's at issue. Obviously, our orders as they would go now have a statement that has been added recently that this order ties directly to the plans that are submitted. And so I'm wondering how much flexibility or how much when you speak about some of the aspects being design development, this would lay in stone what was going to happen if it was attached to this order. So there's some balance to whether that's appropriate at this time or not. And I'm not sure that we can get schedules together in terms of the actual final plans, but maybe some flexibility can be put in. But let me hear from others.

I'm perfectly prepared to move forward today if we are so inclined as a Board.

BOARD MEMBER ETHERLY: Mr. Chair?

CHAIRPERSON GRIFFIS: Yes.

BOARD MEMBER ETHERLY: I'll echo your sentiments. I'm comfortable moving forward. I think the important piece about the canopy, while it would have been good to have had the details that the canopy aspect of this is more spirit kind of issue. And the

spirit of the canopy I'm completely in step with in terms of what the Applicant is trying to do to mitigate the impact of the operations and presence of the gas station.

So I'd be inclined to move forward. And I think that there probably could be some language included in the decision that provides that flexibility without getting overly detailed.

Thank you, Mr. Chair.

CHAIRPERSON GRIFFIS: Okay. Thank you, Mr. Etherly.

Others?

COMMISSIONER MITTEN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

COMMISSIONER MITTEN: I would just ask if we're going to go forward today, that we vote on each variance separately.

CHAIRPERSON GRIFFIS: Okay. Others?

BOARD MEMBER ZAIDAIN: I would agree on that issue.

CHAIRPERSON GRIFFIS: Ms. Miller.

BOARD MEMBER MILLER: I would concur with that as well.

CHAIRPERSON GRIFFIS: Very well.

I think then as we're going to be taking

1 up all this, I think it would be valuable to have all
2 the information in at once, set this for decision
3 making. In which case, I think we can do that fairly
4 quickly.
5 We have the 10th. I would like to set
6 this for the July, first meeting of July for decision
7 making. And what I'd like to see if we could have into
8 the record, of course we'd anticipate, first of all,
9 anything that was shown today. The aerial photograph
10 I think is the only thing I saw today that was
11 presented that wasn't in the record. And I may be
12 mistaken by that. But we can bring all that in.
13 The subdivision plat plan can come into
14 the record.
15 And then what I would ask is that
16 documentation of all aspects as complete as can be
17 would be appropriate. And if they are final CDs, that
18 it be noted and, obviously, that will be asked for
19 some flexibility. This Board is very aware of the
20 specifics that have to go in terms of final designs
21 and the contract documents. So I think we can keep
22 that as the understanding.
23 But one of the questions I think was about
24 to be raised is what's the actual dimensions of the
25 canopy? We're being talked about looking at an FAR,

1 but you know even to that simple detail of, you know,
2 is that the calculation.
3 So, with that, unless there's any
4 objections, we'll set this for the public meeting in
5 July.
6 Anything further, Mr. Zaidain?
7 BOARD MEMBER ZAIDAIN: Well, I'm trying to
8 run through whatever information might be helpful for
9 a final decision making.
10 One of the issues I'm struggling with is
11 the issue of height and how it relates to the canopy.
12 And I'm curious to hear the reaction of the rest of
13 the Board on this, but is there anyway we can get some
14 information on two different aspects of that. One is
15 how the difficulties of an existing use plays into the
16 test of uniqueness. I think there's some adequate
17 discussion of that in submission. I'm still struggling
18 with that issue and I don't know if we can leave it
19 open for any additional submissions on that issue.
20 CHAIRPERSON GRIFFIS: Good. I think any
21 additional submission it would be very pertinent just
22 a section diagram or however you want to do a diagram
23 that actually illustrates what the building code
24 states in terms of separation distance and what that
25 gives.

Also, clearer on the relationship between the canopy, the canopy's depth itself to the relationship to the floor. The sections that were submitted work for some, but perhaps don't sell the entire aspect of what's being testified to today.

And it goes, as you said, in existing use. I think the use is pertinent, but we also have the existing structure which the record as submitted has spoken to and does go to the uniqueness that can create the practical difficulty.

Anything else you think?

BOARD MEMBER ZAIDAIN: No.

CHAIRPERSON GRIFFIS: Okay. And I think some discussion, I don't know how you want to do it, but there's a logical massing of a building. And if one aspect shifts in order that height, of course, or the first floor, just perhaps a little more flushing out of what's happening on that first floor and why that first floor is different and the second floor in its relationship to the canopy.

Yes?

BOARD MEMBER ZAIDAIN: My second area of confusion in this is actually because I was reading through some materials. The issue of the fire rating and how it relates to the canopy. I didn't follow that

discussion because I was looking through something here.

CHAIRPERSON GRIFFIS: And that's going to be submitted in graphic and narrative form, hopefully what we're asking.

BOARD MEMBER ZAIDAIN: I wasn't going for that much, but I just wanted some clarification on that issue.

CHAIRPERSON GRIFFIS: It's very -- I would anticipate that that's very clear and very easy to do. But, it's up to the Applicant to fulfill that.

Anything else, Mr. Zaidain?

BOARD MEMBER ZAIDAIN: Well, I just wanted to put up that those are the two issues that I'm struggling with as far as the height variance goes.

CHAIRPERSON GRIFFIS: Okay. Good.

Yes.

BOARD MEMBER MILLER: While we're flushing out more material and asking for some more information from you, the architect raised an analogy to the Georgetown Incinerator case, and I would be interested in hearing more about that, whether or not that was a variance or a PUD, or what the analogy would be to this case.

Thank you.

MR. NETTLER: Yes, we did have a height variance in that case. And I'll provide you with the application number and decision.

BOARD MEMBER MILLER: Thank you.

CHAIRPERSON GRIFFIS: But that was initially a PUD.

MR. NETTLER: No, it was never a PUD.

CHAIRPERSON GRIFFIS: Really?

MR. NETTLER: That's right.

CHAIRPERSON GRIFFIS: What do you know about that?

COMMISSIONER MITTEN: It wouldn't have come to you if they had a PUD approval.

CHAIRPERSON GRIFFIS: No, but there was a -- well, that's true. Yes. Yes. So that all makes some sense.

Okay.

COMMISSIONER MITTEN: Well, could I request a piece of additional information, because I'm willing to be convinced, I'm just not convinced yet about the aspect of the height variance that what is the compelling reason why that you have to have the additional height on the upper floors? I understand the argument about getting up above the canopy. But then other than for marketing purposes, what's the

reason why all of these confluence of circumstances leads to that? So if you could include something else in the record, I might be convinced.

CHAIRPERSON GRIFFIS: Let me see if understand what you're asking. I mean isn't it we have a base FAR that's allowable? I mean, the zoning seemed -- they should all work in parallel, right? You have your height, your FAR, whatever other kind of regulations we put on a lot occupancy. And as you mass that building it comes out somewhat close in all aspects. And if you raise the first floor, then without increasing the overall or a huge amount of the FAR, you're going to need to raise the building in order to accommodate the same density of the project.

I think the answer back from the application here to your question is we remove an entire floor.

COMMISSIONER MITTEN: Well, first of all, they can say that if they want to, but there's two aspects to the height variance. One arises from getting the first floor up high enough so the second floor is above the canopy. Then there's another aspect to it, which is increasing the floor-to-floor heights above it, which has nothing to do with the FAR.

1 CHAIRPERSON GRIFFIS: Right.
2 COMMISSIONER MITTEN: It has to do with
3 enhancing that space.
4 CHAIRPERSON GRIFFIS: Right.
5 COMMISSIONER MITTEN: And I want -- I
6 don't think the record is complete about why that
7 second aspect of the height variance is warranted by
8 the circumstances.
9 CHAIRPERSON GRIFFIS: Okay. I think
10 that's clear now.
11 Okay. Is that clear to the Applicant and
12 about the issue to address? Okay. And it is touched
13 on in the submission, if I recall correctly, and it's
14 not talked about not creating residential units with
15 eight foot or conceivably less, but higher ceilings. A
16 little bit more discussion on that for the Board would
17 be appropriate.
18 Anything else? Sounds like enough.
19 Now, in terms of July 1st public meeting
20 for decision making, if this is able to be produced
21 and obviously distributed to all the parties, and the
22 schedule would be Ms. Bailey for submissions.
23 And I guess we could have findings and
24 conclusions if so -- I mean, obviously that's helpful
25 to the Board. I don't think we'll make a requirement

as this is not a case with opposition.

Ms. Bailey?

MS. BAILEY: June 23rd, Mr. Chairman.

CHAIRPERSON GRIFFIS: June 23rd, all this material will be submitted by the 23rd with no problem?

All right. I think we're clear then.

Any questions? Submissions, questions about those? Good. So we'll have those zones in by the 23rd of June and we will decide this on our first meeting in July.

I'm sorry. What was the date of the July public meeting, Ms. Bailey?

MS. BAILEY: July 1st, Mr. Chairman.

CHAIRPERSON GRIFFIS: How about that? Excellent. All right.

Anything further? Everyone clear? Very well.

Thank you all very much. Appreciate you coming down this morning and giving an excellent -- let me just say at the closing of this, Ms. Mitten said it and I think the Board agrees. But I definitely and personally agree that this is -- architecturally it's a beautiful project. And, you know, part of its the uniqueness of this triangular lot also makes part

of its prominence.

And, you know, there was some limited discussion about the connection from downtown to Georgetown. This has been, and I mean we've looked at it. And believe me, the applications surrounding it have come to us if they weren't PUDs. And a lot of developments that have happened in the area, this has been kind of a void. And this type of building and this type of function and specifically the design I think will go great strides in connecting the rest of the city, north/south, but also east and west.

And, you know, the aspect of the potential what other type of architecture we might do is to look around that area at some of the existing buildings and some of the typologies of the existing buildings with windows and brick, or you know whatever it is, the precast which is fairly unexciting, fairly unanimated and which led to all of the density that was there, lead to a fairly dead street and a dead area on M Street. And I think it has all to do in terms of animation, in terms of the end goal of what the city is looking at here and specifically within the comprehensive plan is designs like this which actually -- and that's why the design is a critical piece to it -- the designs that will enliven and animate. And it

1 will help the rest of the box and the rest of the area
2 of the city.
3 But that's all I have to say. So, thank
4 you all very much and have a great day. And we'll see
5 you or you can listen to us on the 1st of July.
6 With that, Ms. Bailey, is there anything
7 else for us this morning?
8 MS. BAILEY: No, sir.
9 CHAIRPERSON GRIFFIS: Very well. Then we
10 can conclude the morning session of June 10, 2003.
11 (Whereupon, at 11:22 a.m., the public
12 hearing was adjourned, to reconvene at 1:40 p.m. this
13 same day.)
14
15
16
17
18
19
20
21
22
23
24

A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

1:36 a.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen.

I'm going to call to order the 10th of June, 2003 afternoon hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Jeff Griffis. I am Chairperson.

With today is Mr. Curtis Etherly and also Ms. Ruthanne Miller. Representing the National Capital Planning Commission is Mr. Zaidain. And representing the Zoning Commission with us this afternoon is Ms. Mitten.

Also, with the Office of Zoning Ms. Bailey and Mr. Moy are here. And representing Corporation Counsel, I believe we will have several and they will be identifiable when they come out.

Copies of today's hearing agenda are available to you. Of course, they're close to the door where you entered into the hearing room.

Please be aware that these proceedings are being recorded, so we ask several things. First, I would ask everyone to turn off cell phone or beepers so we don't disrupt the proceedings.

Secondly, when coming forward you'll need

1 to fill out two witness cards. Witness cards are
2 available at the table where you entered into, also
3 the table that is in front of us. Those two cards can
4 go to the recorder who is sitting to my right.
5 Also, when addressing the Board the first
6 time, you need to come forward, turn on a microphone
7 and give us your name and your address for
8 identification on the record.
9 The order of procedure for this afternoon
10 will be for this appeal, and we will have first the
11 statement and witnesses of the applicant. The second
12 would be the Zoning Administrator or the government
13 officials. Third would be owner. Fourth would be the
14 advisory neighborhood commission. Fifth will be
15 intervenors cases. And sixth will be rebuttal and
16 closing statements by appellant. Of course, we always
17 reserve the right for a great flexibility with that.
18 But that's where we should start.
19 Cross examination, of course, of witnesses
20 is permitted by the applicant or parties in the case.
21 The ANC within which the property is
22 located is automatically a party in the case.
23 The record will be closed at the
24 conclusion of the hearing except for any material that
25 is specifically requested by the Board. And we will be

very specific on what is to be submitted and when it is to be submitted into the Office of Zoning. Of course, after that the record would then be finally closed and no other information would be accepted into the record.

The Sunshine Act requires that all hearings at the Board of Zoning Adjustment be held in the open and before the public. The Board may, however, consistent with its rules and procedures enter into Executive Session during or after hearings on a case. That would be for purposes of reviewing the record or deliberating on the case.

Decisions of this Board in contested cases must be based exclusively on the public record. Therefore, we ask that people present today not engage Board members in any conversation that might lend itself to an appearance that we are not deliberating solely on the public record.

We can now proceed to entertain any preliminary matters. Preliminary matters relate to whether a case will or should be heard today, such as requests for postponements, continuances or whether proper and adequate notice of the case has been provided. If you are not prepared to go forward today with your case or you believe that the Board should

1 not proceed with its agenda, now would be the time to
2 bring such issues to the Board. Let me first ask Ms.
3 Bailey if she's aware of any preliminary matters for
4 the Board.
5 MS. BAILEY: Mr. Chairman and members of
6 the Board, good afternoon.
7 There are preliminary matters associated
8 with the only case of the afternoon, Mr. Chairman. As
9 I said, they are case specific and so perhaps the case
10 could be called and those issues dealt with at that
11 time.
12 CHAIRPERSON GRIFFIS: I think that makes
13 great sense, if there's not any major objections to
14 that. Let us call the first call and the first order
15 of business for that case will be to establish
16 intervenor status and then we can take any motions,
17 unless there are preliminary matters that might
18 preempt that.
19 Ms. Bailey?
20 MS. BAILEY: Appeal number 16679 of the
21 Spring Valley Wesley Heights Citizen's Association,
22 pursuant to 11 DCMR ? 3100 and 3101, from the
23 administrative decision of the Zoning Administrator,
24 in the issuance of a building permit numbered B430091
25 issued on October 11, 2000, to Charles A. Sisson for

1 the construction of a partial front porch, rear
2 addition, and accessory garage to an existing dwelling
3 in the Woodlawn Heights Overlay District, R-1-A, at
4 premises 3020 43rd Street, N.W., Square 1621, Lot 70.
5 All those persons who will be testifying
6 today, would you please stand to take the oath? Mr.
7 Sisson, would you please stand.
8 (Whereupon, the witnesses were sworn).
9 CHAIRPERSON GRIFFIS: Okay. Does anyone
10 have preliminary matters that the Board should take up
11 before intervenor status? That would be highly
12 unlikely. No indication of such.
13 So let's do that. My understanding and my
14 record reflects that we have a request for intervenor
15 status from the Wesley Heights Historical Society,
16 Exhibit 32. We have a request from Crary and also
17 Stein. And is that complete? Board members aware of
18 any other submitted?
19 Is anyone else thinking that they have, in
20 fact, applied or requested intervenor status but have
21 not been acknowledged? Good. So far we're off to a
22 good start.
23 Let's take them up first. The Wesley
24 Heights Historical Society, which is Exhibit 32.
25 COMMISSIONER MITTEN: Mr. Chairman?

1 CHAIRPERSON GRIFFIS: Yes.

2 COMMISSIONER MITTEN: Would you please --
3 I mean, I think we're all very familiar with the
4 requirements for party status, but could you just
5 remind us what the standard is?

6 CHAIRPERSON GRIFFIS: I will, indeed. And
7 let me just look to 3112.15. "At the time of the
8 hearing on appeal the Board in its discretion and for
9 good cause shown may permit persons who have a
10 specific right or interest that will be affected by
11 action on the appeal to intervene in the appeal for
12 general and limited purposes as the Board may
13 specify."

14 All in all, that's probably the most open
15 piece of regulation I've read in a while. It's up to
16 us, I think what it comes down to. But clearly the
17 pertinent word there is "specific right or interest."
18 And so establishing, as we might with the Wesley
19 Heights Historical Society and their submission and
20 request for, they've indicated party status, of
21 course. In an appeal, it would be intervenor status.
22 And that is, if I can paraphrase, based on: (1) their
23 continued interest in this project, but most
24 importantly in terms of their purported violations of
25 the overall district of which they were integral in

1 establishing and I might say, preserving. And I think
2 that's the basis for that first intervenor status.
3 Are there any additional comments from the
4 Board for discussion on this? Mr. Zaidain?
5 BOARD MEMBER ZAIDAIN: Well, I think we're
6 going to be having a lot of this as we go through this
7 process, because of the intricacies of what we're
8 dealing with. But I guess I have two things, or
9 actually let me just make that one at this time.
10 As far as these requests for intervenor
11 status letters go, they are all dated 2003 of this
12 year. And I guess my question is that since this is a
13 continuance of a proceeding that started -- okay. The
14 date of the appeal was November of 2000 I'm being
15 told. Is there any issue, I guess, with the fact that
16 they're requesting intervenor status at this time?
17 CHAIRPERSON GRIFFIS: Timeliness. When is
18 intervenor status required to come in per the
19 regulations.
20 MS. BROWN: Mr. Chair, could I interject?
21 It's the 14 day rule.
22 CHAIRPERSON GRIFFIS: Right. And actually
23 we could have a Corporation Counsel affirm that, and
24 then -- but that would be understanding, too, which
25 goes to the submission date and process for party

status is really what it comes down to. IS that correct, Mr. Brown, is where your reference is?

MS. BROWN: Yes.

CHAIRPERSON GRIFFIS: Or do you have a further reference in 3112?

MS. BROWN: It's the party status.

CHAIRPERSON GRIFFIS: Right.

MS. BROWN: But that's applicable, I think, in this case.

CHAIRPERSON GRIFFIS: Indeed. And so 14 days prior to the hearing, of which a May 27 receipt and we're at June 10. It would work, is that correct?

MS. BROWN: Yes.

CHAIRPERSON GRIFFIS: How many days did May have?

MS. BROWN: Thirty-one.

CHAIRPERSON GRIFFIS: All right. Okay.

Any questions or comments on this at this point? Okay.

Let me ask the Spring Valley Wesley Heights Citizen's Association and/or their representative if there are any objections to the intervenor request of the Wesley Heights Historical Society.

MS. BROWN: Patrick for the appellant,

1 Spring Valley Wesley Heights Citizen's Association.
2 I actually welcome Mr. Watson and his
3 association's continued participation. Not only his
4 organization and he personally have a major say in the
5 creation of the overlay, but have been involved in
6 this case, in the first two cases, the appeal and also
7 in the unsuccessful variance application. So I think
8 it's a natural continuation and I welcome his support.
9 CHAIRPERSON GRIFFIS: Okay. Mr. Sisson,
10 any objection?
11 MR. SISSON: No objection.
12 CHAIRPERSON GRIFFIS: Okay. Actually, if
13 you would turn on a microphone and say that, that
14 would be tremendous.
15 MR. SISSON: No objection.
16 CHAIRPERSON GRIFFIS: Very well.
17 Board, do I hear any comments of objection
18 to accepting the Wesley Heights Historical Society as
19 intervenor status?
20 COMMISSIONER MITTEN: No objection.
21 CHAIRPERSON GRIFFIS: I could take it on
22 the consensus of the Board and grant intervenor to the
23 Wesley Heights Historical Society.
24 And, Mr. Watson, you're present, correct?
25 MR. WATSON: I'm present.

1 CHAIRPERSON GRIFFIS: Okay. And you'll be
2 representing that body in participation in this case?
3 MR. WATSON: That's right.
4 CHAIRPERSON GRIFFIS: Very well.
5 Second I have a Ms. Query. Any comments
6 from the Board? Ms. Query is the abutting property
7 owner. I think we're all familiar. Any highlights,
8 anything of --
9 COMMISSIONER MITTEN: I would just say
10 that I think Mrs. Query's interest has been clearly
11 established in prior proceedings related to the
12 subject property. And I wouldn't have any objection to
13 granting her intervenor status in this appeal.
14 CHAIRPERSON GRIFFIS: Okay. Additional
15 comments from the Board? No additional comments.
16 Mr. Brown, comments?
17 MS. BROWN: No objection.
18 CHAIRPERSON GRIFFIS: Very well.
19 Mr. Sisson?
20 MR. SISSON: No objection.
21 CHAIRPERSON GRIFFIS: Okay. Let me hear
22 objections from the Board, if there are any? If there
23 are no objections, we can take that as a consensus
24 also and grant intervenor status.
25 Lastly, my records show Mr. -- oh, I

1 shouldn't say that so easily. Yes, Mr. Stein of 3020
2 43rd Street. The property immediately adjacent to the
3 referenced property in this appeal.
4 COMMISSIONER MITTEN: I think Mr. Stein
5 lives at 3016 --
6 CHAIRPERSON GRIFFIS: Oh, I'm sorry.
7 Thank you for that clarification. And that's
8 absolutely correct.
9 COMMISSIONER MITTEN: I think for the same
10 reason that Mrs. Query has a decided interest in this
11 case, Mr. Stein because he is the abutter on the other
12 side, likewise has significant interest and I would
13 have no objection to granting intervenor status to Mr.
14 Stein.
15 CHAIRPERSON GRIFFIS: Very well. And in
16 reference to the letter specifically, in addition to
17 what Ms. Mitten is saying, he highlights the negative
18 impact on his home and family which he highlights
19 visual obstruction, illegal front porch, excessive
20 scale and then clearly prohibitive use of the private
21 driveway running behind his house and across his
22 property. At times also indicated -- but we'll get
23 into that.
24 Okay. Any other comments, any objections--
25 well, Mr. Brown?

MS. BROWN: No objection.

CHAIRPERSON GRIFFIS: Mr. Sisson?

MR. SISSON: No objection.

CHAIRPERSON GRIFFIS: Does any of the intervenors now been established, the Wesley Heights Historical Society or Ms. Query, have any objection to granting intervenor status to Mr. Stein? Not indicating any objection, the Board any objection? If not, we can take that as a consensus of the Board and also grant intervenor status to Mr. Stein.

And Mr. Stein is here?

MR. STEIN: I am.

CHAIRPERSON GRIFFIS: Indeed, he's present. And will be presenting himself.

Let me update my scorecard. And forgive me, because the ANC representative is here, is that correct, ANC-3D? Is there a representative from the ANC here?

MS. BROWN: I do not believe so.

CHAIRPERSON GRIFFIS: Okay. It was my oversight, because I should have asked if they had comments. They are not present at this time. We'll look for them if they show up.

Okay. As far as my review of the process for today, we had postponed some action on motions.

1 And I think that it would now be appropriate to bring
2 up the motions that already in the record for
3 discussion.
4 We have a motion to dismiss and also a
5 motion for a summary affirmation. Are there other
6 motions, so that we can figure out our afternoon,
7 preliminary matters motions by any now of the new or
8 established intervenors, the appellant or the property
9 owner?
10 MS. BROWN: Mr. Chairman, two housekeeping
11 matters before we get into the meatier issues.
12 First, I neglected when filing the
13 prehearing statement, which was timely filed, I
14 submitted to the Board and the parties a copy of the
15 Court of Appeals decision. While I referenced it, I
16 thought it would be easier if everybody had it. That
17 came in at the seven day mark. So, I think the Board
18 would --
19 CHAIRPERSON GRIFFIS: Right. You had
20 requested that we waive our rules to accept it into
21 the record. I don't know why -- well, there it is.
22 Mr. Sisson, do you have any comment of
23 accepting that into the record? Any objection?
24 MR. SISSON: No, I think it's a matter of
25 record.

1 CHAIRPERSON GRIFFIS: Okay. It's also a
2 matter of public record, which would make it difficult
3 to keep it out, in my opinion. Perhaps the attorneys
4 have different -- do any of the intervenors have
5 objections to accepting the District Court of Appeals
6 order? Not seeing any indication of an objection,
7 does the Board have any objection to accepting it into
8 the record? Very well, we can also take that as a
9 consensus and accept it into the record.
10 Mr. Brown, anything further?
11 MS. BROWN: One last housekeeping matter.
12 Bill Harab, William Harab, the President of the
13 Spring Valley Wesley Citizen's Association was not
14 able to be here.
15 CHAIRPERSON GRIFFIS: Right.
16 MS. BROWN: So I submitted on his behalf a
17 letter to the Board that came in not as part of the
18 prehearing submission, but more recently. And I'd ask
19 the Board to waive it's 14 day rule to allow that into
20 the record.
21 CHAIRPERSON GRIFFIS: Were you going to
22 call Mr. Harab as a witness?
23 MS. BROWN: I would have liked to. But,
24 unfortunately, he's not available. His full time job
25 is not --

CHAIRPERSON GRIFFIS: No, I understand. That's not the issue. I just wonder if this wouldn't-- well, let's hold strictly and look at waiving our rules. Yes, let's do that.

Mr. Sisson, objection to accepting -- first of all, do you have this letter, dated June 9, 2003.

MR. SISSON: I don't have it. No.

CHAIRPERSON GRIFFIS: Well, we're going to need to provide a copy to Mr. Sisson before we act on that.

Do you have additional copies, Mr. Brown?

MS. BROWN: I do not believe so. I sent one to Mr. Sisson, but his mail is being back. So, unfortunately --

CHAIRPERSON GRIFFIS: Okay. Mr. Moy.

Do any of the now intervenors have that letter? Who needs that letter? You can just show me a hand. Everyone has it? Read it? All right.

Actually, Mr. Moy, if we could make additional copies.

CHAIRPERSON GRIFFIS: Okay.

MS. WALLS: Mr. Chair?

CHAIRPERSON GRIFFIS: Yes.

MS. WALLS: Excuse me. Just for the

record, I'm Brenda Walls and William Bennett, Assistant Corporation Counsel are here on behalf of DCRA for the record.

CHAIRPERSON GRIFFIS: Indeed, thank you very much. That's exactly what I was about to address. And I will put this out as a rule of this procedure. If go through a whole litany and call people and I don't call you, and clearly you're part of this and have something to say, you need to call my attention to that either by coming forward. That's absolutely no problem. That is the perfectly basis to interrupt.

But forgive me, and I should have calling on you to act on all what we've now done. IS there any objection on anything?

MS. WALLS: No objection.

CHAIRPERSON GRIFFIS: Okay. Good. Thank you.

And to that, we'll get you also a copy of the next letter submission that we will look to putting into the record.

I mean, at one point, Mr. Brown -- well, we'll let that go.

All right. Anything else?

MS. BROWN: Small stuff.

1 CHAIRPERSON GRIFFIS: That would be it?

2 MS. BROWN: That's it, Mr. Chairman.

3 CHAIRPERSON GRIFFIS: Okay. In which
4 case, is it your recollection, Mr. Sisson and Mr.
5 Brown and those intervenors and the government, and
6 ANC, that we now have two motions before us. One is
7 the motion to dismiss and one is the motion for
8 summary?

9 Thank you.

10 We're clear on that then? Okay.

11 I'm going to give everyone just a quick
12 minute to review this letter and then we'll act on
13 that and move on.

14 Okay. Well, when you're ready, Mr.
15 Sisson, you can let me know.

16 MR. SISSON: Sure. I would just point
17 that it does seem to have some factual errors in this
18 letter.

19 CHAIRPERSON GRIFFIS: Okay. Well, rather
20 than delving into the substance of it, it would be
21 whether you have objection to accepting it basically
22 on its face whether there would be a reason for not
23 accepting this into the record, which would mean we
24 would waive our rules for the filing?

25 MR. SISSON: Well, to the extent that it

1 factual errors in it, I think it is a little bit
2 unusual to admit into the record.
3 CHAIRPERSON GRIFFIS: Okay.
4 MS. BROWN: Mr. Chairman, perhaps if we
5 need to get into it, and I don't think we do --
6 CHAIRPERSON GRIFFIS: We're not going to
7 get into.
8 MS. BROWN: Okay.
9 CHAIRPERSON GRIFFIS: But that would be
10 the point. I mean, what this is, is in replacement of
11 having a witness actually here, which could have
12 stated factual errors on the record which would then
13 be cross examined. So having this submitted in
14 substitution of having someone in person here, I don't
15 have difficulty with. And I think that the facts could
16 be refuted. So that goes into the substance.
17 So the reason would be why we wouldn't
18 accept it into the record based on the fact that they
19 were anticipating to be here but could not be here for
20 this hearing. Is that clear? Not really.
21 MR. SISSON: No, not really.
22 CHAIRPERSON GRIFFIS: Anyone else want to
23 take a crack at it?
24 COMMISSIONER MITTEN: Well, if I could. I
25 mean stepping away from whatever the factual content

1 may be of the letter, I don't see that -- I believe
2 it's Ambassador Harab's letter sets forth anything
3 different than appellant's prehearing statement. It
4 just organizes it so there's nothing new here. So I
5 don't know that there's any harm in accepting the
6 letter.
7 CHAIRPERSON GRIFFIS: Right. That's a good
8 point. And I guess that would be one of the basic
9 objections of accepting it into the record, Mr.
10 Sisson, if it would somehow harm or prejudice you for
11 us accepting it, which would mean we would waive our
12 rules of timing to accept it in.
13 MR. SISSON: As you wish.
14 CHAIRPERSON GRIFFIS: Well, actually was
15 that just a statement, not a request.
16 Do you feel that this would somehow harm
17 or prejudice you in the proceedings?
18 MR. SISSON: Well, first, I don't know why
19 he can't come. I mean, I'm here. The others are all
20 here and I'm surprised that he can't make it. But,
21 nonetheless, I do feel that it's unfortunate that
22 there are factual errors submitted as a --
23 CHAIRPERSON GRIFFIS: Okay. Would you be
24 more prejudiced not being able to address these or
25 would you be more prejudiced by having this in the

1 record?

2 MR. SISSON: Whatever. I can't -- I don't

3 know.

4 CHAIRPERSON GRIFFIS: Okay. All right.

5 Well, that being said, I don't see this, and Ms.

6 Mitten I think has laid it out, I don't this at a high

7 level of distress in terms of one way or the other. I

8 think, frankly, to error in accepting it is less

9 prejudicial because it sets everything forward in the

10 record that can then be addressed. And as Ms. Mitten

11 says, and quite frankly she's reviewed it closer than

12 I have, that there is no new information but

13 duplicative information already in the filings.

14 Any of the intervenors, government, ANC

15 object to accepting waiving the timing rule? You can

16 indicate by coming forward. Not seeing any indication

17 for having the objection to accepting it into the

18 record? No objection. I take it as a consensus then

19 we can waive our timing rules and accept the letter,

20 which is Exhibit 37, dated 9 June, 2003 by Mr. Harab.

21 Okay. The next is our motions. The

22 motions as my recollection is the first motion is

23 Exhibit 14 in the record. It is dated -- I believe

24 it was received August 27 I think it's 2001 into the

25 record.

1 Just for a brief recollection, these
2 motions were not brought before the Board for any sort
3 of action because they were held in abeyance based on
4 the continuances or postponements that were granted in
5 regarding this case. That had to do with, I'm sure
6 we're all aware of the process of what this is going
7 through. It is now current and appropriate for us to
8 pick up motions to dismiss to appeal as mute. And I
9 will outline just briefly that it states specifically
10 Charles Sisson submits that the pending appeal is mute
11 on the following grounds: The identical issues where
12 the subject of the appeal have recently been decided
13 by the Board in BZA application 16521 for the same
14 parties and interest. And two, any testimony or
15 evidence in the appeal has already been filed in the
16 record of BZA application 16521.
17 The Zoning Administrator has addressed and
18 defended his position and the Board has decided the
19 issues.
20 All right. How do we want to start this?
21 MS. BROWN: Mr. Chairman?
22 CHAIRPERSON GRIFFIS: Yes, Mr. Brown?
23 MS. BROWN: Perhaps I could start.
24 CHAIRPERSON GRIFFIS: Really? Would you
25 like to? No, actually not. We're going to get this

1 together.

2 In reviewing this motion, I think it is
3 appropriate for us to look and basically breakdown all
4 the issues and deal with them individually. And I
5 think we can start fairly well in looking at what
6 issues are before us in this appeal that will also
7 help us define the parameters of what we're here for
8 and what we will accomplish today. Because we will
9 conceivably get through this today.

10 And it is our recollection and in
11 reviewing the record and all the submissions, and
12 having read the record or participated, depending on
13 the Board Member, we breakdown the issues of appeal to
14 six issues. And I think it would be appropriate for
15 the Board to go through each of those and discuss
16 those.

17 What I'm going to do is a two step
18 process. I'm going to list off the six issues at which
19 this Board believes are before us in this appeal. Then
20 I'm going to have the intervenors make statements
21 whether that is the complete aspect of issues that
22 should be before the Board.

23 I'm going to ask just not talk about those
24 six, but to give us if you believe that we are missing
25 issues.

1 After the granted intervenors, I will
2 allow the other participants, Mr. Brown, DCRA and Mr.
3 Sisson to address that statement of the new
4 intervenors only.
5 So it's going to be a two process. We'll
6 list off the issues. We'll accumulate other issues and
7 have discussion of those. And then we'll rejoin and
8 look at the whole big thing. And by, you know, 2:15
9 we'll know exactly what's before us for this appeal.
10 MS. BROWN: Mr. Chairman, can I interject
11 to help to kind of fill out the discussion?
12 I concur with your procedure, but we have
13 two motions. We have Mr. Sisson's --
14 CHAIRPERSON GRIFFIS: That's correct.
15 MS. BROWN: -- motion to dismiss as mute.
16 You have my motion for summary affirmance, which are
17 essentially mirror imagines of them. So that in
18 considering them, we identify the issue six, seven,
19 whatever we finally rest upon.
20 CHAIRPERSON GRIFFIS: Right.
21 MS. BROWN: But I think we can look at
22 both motions simultaneously.
23 CHAIRPERSON GRIFFIS: Well, let me tell
24 you, the Board has clearly in their mind the
25 parallelness of each of the motions. However, I think

1 we need to define what we would actually affirm in the
2 next motion. It may happen very quickly. But I think
3 let's get into the parameters and define what it is,
4 and frankly I think it's going to be clear. It just
5 takes me a moment to get my engines going.
6 But now that we're started, let's move
7 down to the six issues. Again, I'm going to read them
8 off very briefly.
9 The first is the building permit
10 application is unsigned and therefore void on its
11 face.
12 The second is the building permit approval
13 is incomplete and inconsistent with the Board's
14 written decision in appeal number 16405.
15 Issue number three: The building permit
16 approval violates the lot occupancy restrictions
17 imposed by the Wesley Heights Overlay District. The
18 Zoning Administrator is not authorized any flexibility
19 regarding the strict application of lot occupancy
20 restrictions imposed by said overlay.
21 Issue number four: The building permit
22 approval violates the applicable side yard
23 restrictions, that's 11 DCMR, of course, 405.8. The
24 Zoning Administrator's flexibility regarding the
25 applicable side yard restrictions was a misuse and/or

abuse of this limited discretion and substantially impairs the purpose and otherwise applicable regulations. And that referenced, if I'm not mistaken, 407.1

Issue number five: The building permit approval violates BZA appeal number 16405 and the applicable private driveway width and grade restrictions. Those are outlined in 11 DCMR Section 2117.

Issue number six: The building permit approval violates BZA appeal number 16405 and the applicable access and off street parking restrictions.

Those are my six or the Board's six. I can reiterate those if I went much too quickly or not.

Let me ask then the intervenors if there are additional issues that you believe the Board should properly hear today in this appeal?

MS. CRARY: Could I ask you to repeat the first two?

CHAIRPERSON GRIFFIS: Absolutely. And if you need to adjust, it's not that I need to hear you, but the record needs to hear you. So you have to say everything on the mike.

So the request from Mr. Crary was to restate the first two issues.

1 Issue number one being the building permit
2 application is unsigned and therefore void on its
3 face. That's as it says, the permit application that
4 went to DCRA.
5 Issue number two: The building permit
6 approval is incomplete and inconsistent with the
7 Board's written decision in appeal number 16405. And
8 for clarity "the Board's," the one we reference of
9 course is this Board and our first appeal, this being
10 the second.
11 Any other clarification of those six
12 issues? Any additional, and I am looking at Mr.
13 Stein, Ms. Crary and the Wesley Heights Historical
14 Society, Mr. Watson?
15 Nothing. No additional issues? Now's the
16 time.
17 MS. CRARY: Above and beyond the aesthetic
18 problems, I'm worried about the question of taxation
19 and assessment of houses in the neighborhood and the
20 gross inflation of prices of the houses, the
21 assessments. This building alone, the direct affect
22 on the neighborhood.
23 CHAIRPERSON GRIFFIS: Okay. So that's an
24 issue of concern, but let me be very clear. That
25 would not be an issue for this Board for appeal. In

fact, I think there's a whole appeal process for assessments and the like. That may be an impact which would actually go more towards a public hearing. On the appeal, of course, we're looking at specific actions that we either correct or not correct. They were either in error or correctly acted upon.

MS. CRARY: What public hearing?

CHAIRPERSON GRIFFIS: That's -- well, it be more appropriate in a public hearing if it was for a variance or a special exception, as this is not a public hearing, but an appeal.

What we have before us is the permit. So we'll note your concern with that and directly put, we aren't looking at that and cannot look at that based on our own jurisdiction.

Anything else then? Those are the six.

You can't add anything, Mr. Brown. What were you going to say?

MS. BROWN: Well, I would like to clarify and consistent with my prehearing statement, some additional issues. If I could, one -- and what I refer here is the remedial permit that was issued Mr. Sisson, is contingent upon the removal --

CHAIRPERSON GRIFFIS: Right.

MS. BROWN: -- of the covered front porch.

1 So satisfaction of that condition or contingency is a
2 critical element to the validity of the permit.
3 CHAIRPERSON GRIFFIS: But the permit is
4 addressing the removal of the covered area of the
5 porch, is that correct?
6 MS. BROWN: The permit is issued to do the
7 two story addition and garage subject to removal of
8 the covered front porch. So that the --
9 CHAIRPERSON GRIFFIS: But it's all the
10 same permit. I mean, you're asking us to assume that:
11 (1) it's invalid because it's nonconforming because
12 the covered aspect of the porch hasn't been removed,
13 and well be if the permit is upheld simultaneous.
14 Does that make sense?
15 MS. BROWN: Well, and I think we're
16 missing the point in our discussion.
17 CHAIRPERSON GRIFFIS: Okay.
18 MS. BROWN: The permit was conditioned
19 upon the applicant for that permit doing several
20 things. First and foremost, was removing the covered
21 front porch. That was -- because the basis of all the
22 calculations that occurred were based on that.
23 CHAIRPERSON GRIFFIS: You say the permit
24 was conditioned. Where are you -- point to the
25 specific area where you think it was conditioned.

1 MS. BROWN: Notwithstanding the
2 misspelling, "Two story rear addition" blah, blah,
3 blah "new garage" blah, blah, blah "removal of roof
4 over front porch." So that Ms. Sisson was authorized
5 to do several things, one of which was -- and the
6 whole granting the permit in the city's eyes was
7 contingent upon the removal of the porch. Because
8 otherwise we're back into the summary affirmance
9 because in 16521 the Board has made it very clear that
10 the property with the porch on it is not in compliance
11 with the zoning regulations.
12 CHAIRPERSON GRIFFIS: Right.
13 MS. BROWN: And in denying the variance,
14 the porch has no right to be there. So, again, I
15 don't think you can have this discussion about this
16 permit without recognizing and acknowledging that the
17 whole basis for the permit was based on removing the
18 porch, because all the calculations, albeit some of
19 them were flawed or subsequently been better
20 developed, but it's all based on the porch not being
21 there, there not being a violation of the front yard
22 requirement of the Wesley Heights Overlay District and
23 also not being a violation of the lot occupancy
24 requirements of the Wesley Heights Overlay.
25 COMMISSIONER MITTEN: Mr. Chairman?

1 CHAIRPERSON GRIFFIS: Okay. Yes?

2 COMMISSIONER MITTEN: I don't believe the
3 permit is contingent upon the removal of the front
4 porch. As Mr. Brown said, it authorizes the property
5 owner to do the three things; the two story addition,
6 the new garage and the removal of the front porch.

7 Now, we share the frustration with the
8 lack of enforcement of the situation that the roof of
9 the front porch hasn't been removed inasmuch as a
10 zoning variance was requested from this Board and
11 denied. But, the way to get at it is this Board
12 doesn't recognize the roof. The roof, for all intents
13 and purposes, doesn't exist in terms of making further
14 zoning calculations. It's illegal. So, I don't think
15 we're going to get -- we're not going to get anywhere
16 by having a presumption that the permit's invalid
17 because DCRA won't do enforcement.

18 CHAIRPERSON GRIFFIS: Right. I think that
19 was more to the point. But let me cut this off now,
20 because we're delving well into the substance. And I
21 think Ms. Mitten concludes it very well, because I
22 think was my reading.

23 What we really needed to look at, Mr.
24 Brown, is if we're going to add issues to this appeal,
25 it needs to be proven to us fairly strongly that there

are new issues that have just come up that will withstand a discussion of timeliness. I mean, what is created in these new aspects that will add to the issues as we've outlined them?

MS. BROWN: Well, I would add and going back to Ms. Mitten and her point, we have not only the opportunity but the responsibility to judge this permit in light of everything we know today as well as the day it was issued. Because, quite frankly, we know a lot more about this permit now as a result of the Board's actions in the subsequent case as well as information provided by Mr. Sisson, as well as the Court of Appeals affirmance and also, quite frankly, in this case Mr. Sisson's failure to comply with his obligation to remove the front porch.

So, I don't think we need to be drawing too careful a distinction because then we don't achieve our objectives, which is to judge this permit.

In that light, I mean, we have BZA 16521, the variance case which was denied. That's the Board having done quite a bit of hearing and factfindings, and in fact ascertained information that was not available when this permit was issued and in fact made findings of fact and conclusion of law that bear directly on this permit. So I think that's an issue

1 that needs, and you've said consistent with the BZA
2 appeal, we also need to be consistent with the BZA
3 application that was denied, 16521.
4 CHAIRPERSON GRIFFIS: Okay.
5 MS. BROWN: Also, and in the same token
6 flowing out of 16521 and a great deal of discussion
7 went on, this is a nonconforming structure for any
8 number of reasons both as it was permitted previously
9 and in the context of the property as it exists now.
10 It's actually more nonconforming now than it was based
11 on the remedial permit, primarily because Mr. Sisson
12 has not complied. But, again, we need to look at the
13 nonconforming structure provisions in 2001.3. Because,
14 again, it was clear in 16521 that the Board judged the
15 property based on that provision, so we can't change
16 course now. We need to be consistent and also judge
17 it under the nonconforming structure provisions.
18 We also need to judge it under the front
19 yard requirements of the Wesley Heights Overlay
20 District for the same reason. The porch is still there
21 and also, quite frankly, even if the porch wasn't
22 there, just as it is with lot occupancy, the permit
23 doesn't comply with the law.
24 CHAIRPERSON GRIFFIS: With regards to the
25 front yard?

1 MS. BROWN: Yes, because it was
2 nonconforming to begin with. Prior to Mr. Sisson
3 illegally demolishing the stoop without a permit and
4 then building the covered the front porch without a
5 permit it was a nonconforming front yard under the
6 Wesley Heights Overlay District. So that both the lot
7 occupancy and for front yard requirements, he doesn't
8 comply even without the front porch. And I've tried to
9 make that point in my prehearing statement. So we need
10 to consider the front yard requirements as well as,
11 and this is a little bit of a nuance, when we get into
12 the private driveway access off street parking both in
13 the Court of Appeals which affirmed the BZA, the BZA
14 in its findings of fact and conclusions of law, both
15 in the appeal and the subsequent variance denial made
16 it very clear that if you didn't meet - and this was
17 based on testimony by Mr. Nuttley - if you didn't meet
18 the private driveway access requirements to the
19 garage, then the garage should not have been approved
20 regardless of related issues of off street parking.
21 That the garage itself --
22 CHAIRPERSON GRIFFIS: You say that differs
23 in our issue number five, because what we're talking
24 about is access and you're talking about the
25 structure?

1 MS. BROWN: The two go hand-in-hand.
2 CHAIRPERSON GRIFFIS: That's true.
3 MS. BROWN: To have a garage --
4 CHAIRPERSON GRIFFIS: Right.
5 MS. BROWN: -- and Mr. Nuttley and the
6 Board in its earlier decisions made it very clear, and
7 the Court of Appeals I think made it clear that they
8 agreed with that; is that you have the requirements of
9 access and you have the requirements of off street
10 parking, but you also requirements imposed upon this
11 garage structure. You cannot build a, for lack of a
12 better term, garage that does not have access, it's
13 landlocked.
14 CHAIRPERSON GRIFFIS: Right.
15 MS. BROWN: So that based on what the
16 Board's already determined, this garage doesn't have
17 appropriate driveway access so it doesn't have the off
18 street parking. But also he doesn't have access for
19 purposes of even having this structure. So I think
20 it's an important -- not a distinction. It's an
21 important additional element to the Board's
22 discussion.
23 CHAIRPERSON GRIFFIS: Okay. But it's all
24 going to flow off of access? Conceivably he could
25 change --

MS. BROWN: Can I make a point? For instance, if Mr. Sisson was to put his required parking somewhere else other than this garage.

CHAIRPERSON GRIFFIS: Right.

MS. BROWN: Now, he can't put it in the front yard because that's not allowed. He doesn't have any side yards. But if he could, for instance, then the off street parking requirement would be eliminated. But you'd still have a structure, the garage, that exists without the required access. You can't build - and you've seen this in other instances. You can't build a garage without having the ability to service a garage, number one, the garage has access.

CHAIRPERSON GRIFFIS: Right. You could call it something else, though.

MS. BROWN: But then that would be a different requirement. And you're very much restricted in building your accessory structures other than garages.

CHAIRPERSON GRIFFIS: Right.

MS. BROWN: So I mean we're not opening up that can of worms, I hope.

CHAIRPERSON GRIFFIS: I understand. I think that will be covered in our listing of issue

1 five, but we'll take that.

2 Ms. Miller?

3 BOARD MEMBER MILLER: Just a procedural

4 clarification. You identified certain issues that you

5 thought the Board should consider. Are those in

6 conjunction with the motion to dismiss, the motion for

7 summary affirmance or they to consider to have a

8 hearing on? Or are they different, if you want to

9 identify them.

10 MS. BROWN: Both. Because I think, and I

11 made the point that Mr. Sisson's motion and mine are

12 mirror imagines. And if you look at what I've laid

13 out on all my issues, and my list, you know, I've

14 added some or nuanced them slightly. But if you look

15 at them and you look at the record, the paper record

16 in this case, now Mr. Sisson says that they've all

17 been decided in his favor. But I think if you look at

18 the record and what I've laid out in the prehearing

19 statement, the opposite is true; that if you look at

20 where the Board and the Court of Appeals have been in

21 two cases, you can go to these issues and there's no

22 dispute. You know, it violates the front yard

23 requirement. It violates the lot occupancy

24 requirement. The Board was very specific in 16405

25 what the requirement was and that Mr. Sisson didn't

1 meet the driveway access requirements.

2 So I think the Board has been down this

3 road before, and unfortunately nobody currently on the

4 Board has survived the whole thing. But if you look

5 at what your predecessors have done and then what

6 you've done and inherited, everyone of the issues that

7 I raise has been dealt without a lot of ambiguity and

8 very clearly saying that a certain standard is

9 required. In this case, a private driveway of 14 feet.

10 Mr. Sisson provides only 8 feet, end of discussion.

11 You have the facts and then you have the

12 standard. And you can apply that standard to say that

13 an 8 foot private driveway doesn't meet the 14 foot

14 requirement or even if you disagreed --

15 CHAIRPERSON GRIFFIS: Right.

16 MS. BROWN: -- that it was only 12 feet,

17 it still doesn't meet. So we have the ability through

18 summary affirmance on some of these issues to make it

19 simple on ourselves and avoid a situation where we

20 come out with a different conclusion than we had

21 previously.

22 CHAIRPERSON GRIFFIS: Okay.

23 MS. BROWN: Sorry, Mrs. Miller.

24 BOARD MEMBER MILLER: No, I was with you

25 until your last statement. Because it sounded like you

said we could decide all the issues on summary affirmance until your last statement, which seemed to indicate --

MS. BROWN: No, the risk is --

BOARD MEMBER MILLER: -- that there still are some others that we can't.

MS. BROWN: No, no. I think we can. But if the risk if we don't pay attention to what's happened before, and this is what's happened before. And it did support a lot of guidance and a lot of people have argued and fought, and the Board has heard all that and made decisions on issues. And if we don't pay attention to that, we run the risk of having a situation where the Board two years ago decided an issue and we come up with a different conclusion now.

CHAIRPERSON GRIFFIS: Right. You're saying that rather than deliberate on ourselves on kind of accumulated information, we ought to look at the past proceedings that have happened and the facts in those and the decisions on those. I don't think the Board disagrees in this matter with that particular issue.

Okay. Anything further? Mr. Brown, additional issues? Okay.

MS. BROWN: No.

CHAIRPERSON GRIFFIS: I see these, and I think we're going to address them, I don't see these being additional but I do see them somewhat nuances, as you say, or reclarifications of some of the issues that we stated. So I would like to rather than add issues, what we can do as we take up each of these, obviously we're going to have discussion. If you're feeling or if anyone participating in this is that we're missing the big picture on one of these, that will be the appropriate time to bring it up. Because I think we're going to address everything that you've stated in that.

Yes, Ms. Mitten?

COMMISSIONER MITTEN: I guess the only departure I would make note, the only clarification, is I think the Board has been already very clear about its position on the front porch.

CHAIRPERSON GRIFFIS: Right.

COMMISSIONER MITTEN: And I guess -- I don't think it would be fruitful or a good use of our time to listen to anymore testimony about the front porch. Because we've made our decision about that, and there's really nothing more we can do.

CHAIRPERSON GRIFFIS: Right. And the decision stands?

1 COMMISSIONER MITTEN: Yes.

2 CHAIRPERSON GRIFFIS: And it is now not
3 before the Board to do further action, but rather one
4 of enforcement of a Board's decision. Is that
5 correct, in your opinion?

6 COMMISSIONER MITTEN: That's my view, yes.

7 CHAIRPERSON GRIFFIS: Okay. Everyone
8 agree? Ms. Miller, did you have something?

9 BOARD MEMBER MILLER: Yes. As a
10 preliminary, I want to state that I'm not the only one
11 in the situation that I was not on the Board when this
12 case was first heard. And it sounds to me from what
13 I've heard from Mr. Brown, and maybe Mr. Sisson wants
14 to say something, that you don't have a problem with
15 my deciding some of these issues based on reading the
16 past orders, the Court of Appeals decision and your
17 pleadings?

18 MS. BROWN: No. I encourage it.

19 MR. SISSON: I would only ask you try to
20 take advantage of the complete range of information
21 that's at your disposal without just focusing on one
22 or two items and link back to the rest of the record.
23 That would be my only request.

24 CHAIRPERSON GRIFFIS: Did you want to
25 state that you read the record at this time?

BOARD MEMBER MILLER: That I've read the record? I've read the court orders, the Court of Appeals order, the BZA orders, all the pleadings.

BOARD MEMBER ZAIDAIN: I'm in a similar situation with Ms. Miller. And we've been provided the relevant record, which includes the previous orders and filings. So that's basically the record we're provided with that we're dealing with.

CHAIRPERSON GRIFFIS: Good. The clarification I think I was pulling out is that this appeal has a record and that's clear what's been provided you, and that is what you have both read, is that correct?

BOARD MEMBER ZAIDAIN: Yes.

CHAIRPERSON GRIFFIS: Okay. And you've identified some of the things that are in that. It goes without saying that the entire Board has done the same.

Mr. Etherly?

BOARD MEMBER ETHERLY: Just for expediency's sake, Mr. Chair, I would echo comments of my colleagues, Mr. Zaidain and Ms. Miller.

CHAIRPERSON GRIFFIS: Okay. Good.

Well, we're ready to go. Okay.

BOARD MEMBER ETHERLY: And just further,

1 just to get us back on track, Mr. Chair, I agree with
2 you 100 percent in regards to the nuanced issues that
3 Mr. Brown was raising in his statements. The think the
4 summary that you laid out adequately addresses most of
5 the issues that are raised through most of the
6 documentation that I've seen. And I think it's a good
7 framework for us to work within.
8 Just as a process standpoint, as we go
9 through the issues that have been summarized, the six
10 issues, are we anticipating some give and take in
11 terms of our approach? Are we essentially
12 deliberating on that here or will we be looking for
13 comment and argument from the parties and intervenors
14 involved?
15 CHAIRPERSON GRIFFIS: That's an excellent
16 point, Mr. Etherly. This is my anticipation. We're
17 looking at these issues under the motion to dismiss.
18 I think that we would start with deliberation. I
19 think I'm going to give Mr. Sisson a point to talk
20 about the issues now, if he disagrees or disagrees or
21 has additions to Mr. Brown's.
22 I'm going to ask that intervenors that
23 were established today if they want to address each of
24 the issue before we start deliberation, I will allow
25 that. Other than that, I want to essentially stand on

1 the record of the submissions that we already have
2 based on these issues and based on the motion to
3 dismiss.
4 So, to say again, anyone who hasn't
5 briefed this motion, I will allow an opportunity to
6 address the Board before we go in to take up the
7 motion for the specific issues.
8 BOARD MEMBER ETHERLY: And I appreciate
9 that clarification, Mr. Chair, because you made that
10 point that I wanted to make, which was I think the
11 briefing and the background that we have has been very
12 good. Almost exhaustive on many of these issues. And
13 I think we're in a position to get some very detailed
14 discussion between the Board members without having to
15 have the additional argumentation, unless it's just to
16 further illuminate a point that may not be clear.
17 CHAIRPERSON GRIFFIS: Okay.
18 BOARD MEMBER ETHERLY: Otherwise I'm very
19 comfortable.
20 CHAIRPERSON GRIFFIS: Excellent.
21 Mr. Sisson, two things then. Do you have
22 additional issues that you believe are before us or do
23 you have comments or rebuttal information to what Mr.
24 Brown has provided today?
25 MR. SISSON: Well, I had intended to make

a statement, but I don't think this is the time or the opportunity for that.

CHAIRPERSON GRIFFIS: No. Yes. No, I don't want to go totally into substance. It's just adding to the issues that we'll take up under your motion to dismiss.

MR. SISSON: All right.

CHAIRPERSON GRIFFIS: Are there other things that we need to decide?

MR. SISSON: Well, again, I would again point out that this an appeal to a permit that has already been issued. And in that case, obviously, DCRA has determined that the permit is valid. So that in some sense there are rebuttals already outstanding from what Mr. Brown has already --

CHAIRPERSON GRIFFIS: It would be difficult for us to hear an appeal of a permit that wasn't issued by DCRA, though.

MR. SISSON: I know.

CHAIRPERSON GRIFFIS: Okay. Keep going. I'm sorry --

MR. SISSON: No, no. But I would just make that point that obviously, and as I say, as I would document in my statement I mean went through this very painstaking detail in the process of getting

this permit. And so I think that there's been substantial clarification of the points that were required to obtain the permit in the first place.

CHAIRPERSON GRIFFIS: Okay. So you're not adding issues on to it, but substantiating?

MR. SISSON: No.

CHAIRPERSON GRIFFIS: Okay. Yes, Ms. Miller?

BOARD MEMBER MILLER: I just want to clarify our procedure here. As we deliberate each issue, if any of us feel that we have a need to seek more information from the parties, is that appropriate in this procedure or not?

CHAIRPERSON GRIFFIS: It's absolutely appropriate and we will utilize that with due caution and great direction and specificity. RAther than getting into a total -- frankly, I don't want to have us get into being orally briefed on the entire piece of it, but yes absolutely clear. If we need something further, we're going to get it so that we can move on to it. If we can't move, then so be it and we'll deal with it at that point.

So taking it up, first of all the issue number one under the motion to dismiss this appeal is the fact that the building permit application is

1 unsigned and therefore void on its face.

2 Let me start off. First of all, I believe

3 that we could dismiss this aspect of appeal based on

4 the lack of jurisdiction. Obviously, this is a

5 procedure that is outlined by DCRA part of their

6 procedural aspects and requirements for their

7 permitting. This is not a direct requirement for the

8 zoning or laid out in the zoning regulations. And so

9 I think this is more of a construction code or process

10 for DCRA.

11 Any others?

12 COMMISSIONER MITTEN: I would just say,

13 Mr. Chairman, for clarity inasmuch as that was not a

14 basis for the motion to dismiss from the intervenor,

15 that we would on our own motion dismiss the appeal

16 based on the lack of signature on the building permit

17 application for lack of jurisdiction by the BZA.

18 CHAIRPERSON GRIFFIS: Good. No, I think

19 that's perfect clarification. And, yes, it is my kind

20 of presumption that in the motion to dismiss we need

21 to define our appeal and some of that may be address

22 or not addressed. But okay.

23 Mr. Zaidain?

24 BOARD MEMBER ZAIDAIN: Well, I would agree

25 with the statement. Ms. Mitten confused me with her

statement. Did she just -- so we're going to make a motion for each one of these issues, did I understand you correctly?

CHAIRPERSON GRIFFIS: That's correct.

BOARD MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: We'll decide them.

BOARD MEMBER ZAIDAIN: Well, did she just make a motion? Did you make a motion?

CHAIRPERSON GRIFFIS: No, we're not going to make a motion at this point because if there's additional information or quick information -- and I'm going to have the intervenors be able to discuss it if they --

BOARD MEMBER ZAIDAIN: Okay. Well, in terms of my position, while I have the mike on, for issue number one I completely agree. It's clear that that is the signature -- you know, the requirement is something that stems out of 12A of District code and it's not applicable to zoning. And outside of our jurisdiction.

CHAIRPERSON GRIFFIS: Okay. Any preliminary comments from the Board and then we can get to the intervenors. Then we will establish the issue or the procedure and chronology of the intervenors I'll allow first to address the issues.

I'll restate it, you can address it, we'll deliberate.

So, anything else from the Board? Any comments from the intervenors? Any comments from any of the participants not addressed in their or based on the new information, or anything new.

No comments on issues number one, is that correct?

MS. BROWN: I'm concerned, and I understand the distinction you're drawing between the jurisdiction of this Board as not to the building code. But this Board does have jurisdiction over the requirement that work requires a building permit. And it elevates form over substance to accept an unsigned permit as a valid permit for zoning purposes or for any purpose. I mean, I think --

BOARD MEMBER ETHERLY: But, Mr. Brown, I mean I apologize for interrupting, but there's a lot of meat we're going to have to go through here. And so I want to try to keep our eye on the prize here. And my question just simply is, what do we do about it? I mean, how do we enforce that issue? I mean, that's I think the crux of it.

MS. BROWN: 11 DCMR, which is your jurisdiction, imposes a requirement that there be a valid building permit and it requires a lot of

information. And you cannot -- and again, somebody -- and the Board often does. It accepts standards that another agency adopts.

CHAIRPERSON GRIFFIS: Only on rare occasions.

MS. BROWN: But you do it.

CHAIRPERSON GRIFFIS: And more often than not we do not delve. For instance, yes, we need to establish a valid permit for zoning purposes. But we do not establish nor do we have jurisdiction or ruling over what establishes a valid permit when it comes to the procedures. That would be DCRA's total purview.

So if they decide in fact that no longer are signatures required but are forbidden, we have no control over that. Or if they want to take, you know, electronic signatures or not electronic signatures. That is not something that would come to us. In fact, as that part of that procedure an appealable body for that permit would be the DCRA and their appeal body. Not the Board of Zoning Adjustment. And that is where I think we are at in terms of the lack of jurisdiction to hold an appeal based on a signature of an application for a permit.

MS. BROWN: I'll leave my point where it is.

1 CHAIRPERSON GRIFFIS: Okay. Good.
2 Anything else? Any comments?
3 Very well. Let's start deliberation. If
4 there's any motion on issue number one which regards
5 to the unsigned aspect of permit that's before us,
6 meaning it would then be void on its face.
7 COMMISSIONER MITTEN: Mr. Chairman, I
8 would move that we dismiss the appeal as it relates to
9 the fact that the building permit application was
10 unsigned for lack of jurisdiction.
11 CHAIRPERSON GRIFFIS: Is there a second?
12 BOARD MEMBER ETHERLY: Seconded, Mr.
13 Chair.
14 CHAIRPERSON GRIFFIS: Thank you.
15 Discussion? Any further discussion, the motion is now
16 before us and seconded. Three, two, one. In which
17 case, I'd ask for all those in favor of the motion
18 saying aye.
19 ALL: Aye.
20 CHAIRPERSON GRIFFIS: And opposed? Why
21 don't we record the vote on each issue as we go down.
22 MS. BAILEY: The vote is recorded as five,
23 zero, zero. The motion was made by Ms. Mitten,
24 seconded by Mr. Etherly. Mr. Griffis, Mr. Zaidain and
25 Ms. Miller are in support. The motion was the

building permit application is unsigned or was unsigned.

CHAIRPERSON GRIFFIS: I'm sorry, Ms. Bailey. I'm going to correct the vote because I did not call for those who might have abstained. So I believe, Ms. Miller, you wanted to correct the voting.

BOARD MEMBER MILLER: I'm going to sustain the issue because I'm not certain about how that should be resolved.

BOARD MEMBER ETHERLY: And, Mr. Chair, just for purposes of clarification, I think this is an easy question but Mr. Brown noted that we had the motion to dismiss offered by Mr. Sisson as the intervenor and yet we also have the summary affirmance, essentially a motion that was made by the appellant if I have my roles correct.

CHAIRPERSON GRIFFIS: Yes.

BOARD MEMBER ETHERLY: Do we treat this motion that was passed and for purposes of some subsequent ones, do we need to identify specifically which motion we are addressing in terms of either disposing of it or accepting it?

CHAIRPERSON GRIFFIS: Oh, that's an interesting point. Yes. In fact, to be totally clear, as we bring this up on each of the issues if

there's a motion, there could very well be a motion to affirm, uphold the appeal or there could be a motion to dismiss.

BOARD MEMBER ETHERLY: A motion to dismiss.

CHAIRPERSON GRIFFIS: And as we go through these, that may well be. Or, in fact, there may well be a discussion that leads us to holding the hearing of the appeal on one or several of these issues.

BOARD MEMBER ETHERLY: So it would be my understanding that for the motion that just passed, that was essentially a disposal of one component of the appellant's summary affirmance motion, just for clarity's sake?

CHAIRPERSON GRIFFIS: Another good way to put it.

MS. BROWN: Assuming that it existed on the summary affirmance. Again, the mirror.

BOARD MEMBER ETHERLY: Yes. Well, then maybe Mr. Brown should state what he believes are the grounds for the summary affirmance. I was reading the letter myself and it appears that the fundamental reason stated was that the argument, which has now become a ground for the appeal, of the fact that the building permit was predicated upon either the

1 granting of the variance or the taking down of the
2 roof. And I read that as one of the grounds stated.
3 And perhaps for clarification Mr. Brown should state
4 the other specific grounds for summary affirmance if
5 there are any?
6 MS. BROWN: Well, they were laid out, and
7 that's an old document. They weren't as well
8 developed. But essentially all the issues that I've
9 put forward, and my list is laid out in my prehearing
10 statement.
11 CHAIRPERSON GRIFFIS: Okay. So your ten
12 issues?
13 MS. BROWN: Yes. And I think the record,
14 putting aside the one we've just decided, the other
15 nine, the record is adequate, more than adequate to
16 resolve each of those issues in the appellant's favor
17 and against Mr. Sisson. I mean, I'll just leave it at
18 that.
19 CHAIRPERSON GRIFFIS: Okay. So you're
20 asking us to expand your previous motion of summary to
21 include now the more articulated piece, as we're
22 actually doing with the motion to dismiss that's
23 before us. We are essentially broadening it to take
24 on all the issues as we are defining the appeal
25 itself.

1 I don't see any difficulty with that.
2 Does the Corporation Counsel --
3 MR. MORDFIN: As long as that's understood
4 so that in fact it's correct that to the extent you're
5 dispensing of an issue, then as to each issue there's
6 a motion to dismiss, a motion for summary affirmation
7 of the appeal as to that issue. And so, obviously, if
8 you grant a motion to dismiss, you've denied the
9 motion for a summary affirmance.
10 BOARD MEMBER ZAIDAIN: Well, on each
11 individual issue.
12 MR. MORDFIN: As you approach each
13 individual issue, if you make a motion to -- grant the
14 motion to dismiss, then it goes -- you should probably
15 say it, but you also would be moving to deny the
16 motion for summary affirmance on that particular
17 issue.
18 BOARD MEMBER ZAIDAIN: Okay.
19 MR. MORDFIN: And vice versa.
20 BOARD MEMBER ZAIDAIN: I dare it say it,
21 but kind of re-reviewing the prehearing submission, I
22 don't see a whole lot of variation between this and
23 what we're going through. I don't see any substantial
24 new issue. I think we're covering a lot of the basis
25 of here and a think a lot of the -- well, I can't

1 really speak for a future vote I might cast, but I
2 don't think that we're too far off track between the
3 prehearing submission and what was submitted earlier,
4 if I understood Mr. Brown's --
5 CHAIRPERSON GRIFFIS: No. But what his
6 point was his first motion of summary affirmation was
7 that it was more limited or not as articulated as the
8 issues are in his prehearing statement.
9 BOARD MEMBER ZAIDAIN: Well, yes, and I
10 agree with that. But I think the Board, both through
11 our discussions here and in Executive Session prior,
12 is well aware of all the issues and can work through
13 them.
14 CHAIRPERSON GRIFFIS: Good. And
15 Corporation Counsel is just telling us to make sure
16 that's stated clearly, which I think it is now.
17 So let's move on then to issue number two,
18 which involves the building permit approval is
19 incomplete and inconsistent with the Board's written
20 decision in appeal 16405.
21 I would ask if the intervenors have any
22 comments to that issue? None being indicated.
23 Okay. Is there a discussion on this
24 issue? Okay. Others? Mr. Sisson, do you want to
25 speak this.

1 MR. SISSON: Well, my only comment would
2 be that this permit resulted -- was requested and
3 granted as a result of the Board decision. I went back
4 to the Zoning Administrator and I said what is wrong.
5 How come I had five permits that you gave me and the
6 Board has swept them away. I mean, I thought I
7 applied for them and I acted in good faith on the
8 permits that you had granted me. And here I have a
9 decision from the Board of Zoning Appeals that they're
10 not valid. What is the problem here? And that was the
11 occasion. So I don't know how they could be
12 inconsistent because they were -- it was granted as a
13 result of the Board's decision.
14 CHAIRPERSON GRIFFIS: Okay. Anything?
15 MS. BROWN: And we can't take it in
16 isolation. And, Ms. Mitten, you'll have to forgive me.
17 But we can't ignore for purposes of this discussion
18 and 16405 the Wesley Heights Overlay front yard and
19 lot occupancy restrictions which were laid out clearly
20 in 16405.
21 And if you look beyond -- even taking the
22 removal of the porch as a given, which it isn't, it
23 still doesn't comply, quite frankly, with the Wesley
24 Heights Overlay District. From a lot occupancy
25 standpoint it exceeds 2000 square feet. And that's

1 further developed in 16521 in testimony that I'll
2 provide or evidence. But also the private driveway
3 issue is clearly the standard is set and the fact is
4 established. The standard as to if you don't have
5 access, your garage isn't authorized, according to Mr.
6 Nuttley, and the Board adopted it as finding of fact.
7 CHAIRPERSON GRIFFIS: But that's
8 encompassing other issues that are actually detailed.
9 MS. BROWN: Well, but --
10 CHAIRPERSON GRIFFIS: Is this like the
11 general statement, is that what you're asking us.
12 This is the general big picture and then we should
13 break it down?
14 MS. BROWN: Sure.
15 CHAIRPERSON GRIFFIS: So we really
16 shouldn't be talking about issue number two? We're
17 kind of done with that, we've disposed with it today
18 because I've asked, is there anything else. What else
19 is there that we're supposed to be looking at.
20 MS. BROWN: Right. I mean, but you need to
21 -- and again it's more than emphases. The Board has
22 got to act consistently with 16405 and 16521 unless
23 there's some overriding new information. And in some
24 cases there are, but very few and very few that favor,
25 quite frankly, Mr. Sisson. So I think the Board needs

1 to be consistent with 16405 and 16521. And the order,
2 both orders, particularly 16405, goes into a fair
3 amount of detail establishing the standards that need
4 to be applied.
5 BOARD MEMBER ETHERLY: But I think, if I
6 could, Mr. Chairman, I think the Chair's question is
7 still an applicable one. My concern with ground
8 number two is that it's rather vague. The specificity
9 that I think you heard in the summary of the issues as
10 the Board tried to identify them, I think kind of
11 builds upon ground number two and helps to kind of
12 parse out the issues in greater detail.
13 MS. BROWN: I don't disagree.
14 BOARD MEMBER ETHERLY: I mean, my
15 inclination was to say it's just a little too vague.
16 If I recall correctly from prior proceedings, there
17 was an opportunity to brief this issue at a prior
18 point back in 2001, and that opportunity wasn't taken
19 advantage of. But I wouldn't be overly concerned, Mr.
20 Chair, with disposing of this issue because I think
21 there are other grounds which get to greater detail as
22 relates to the appeal case and to the variance case.
23 CHAIRPERSON GRIFFIS: Excellent, Mr.
24 Etherly. I appreciate that.
25 Other comments from the Board or is there

a motion from the Board.

BOARD MEMBER MILLER: I have a comment.

CHAIRPERSON GRIFFIS: Yes, Ms. Miller.

BOARD MEMBER MILLER: It sounds to me like this statement is tied to some other statements down the road to show how it may be inconsistent. And so therefore maybe we shouldn't be voting on this in a vacuum and we should hold it in abeyance until we get to the others if I'm understanding the dialogue correctly.

CHAIRPERSON GRIFFIS: Indeed. So there is action to hold in abeyance now before the Board any discussion on that?

COMMISSIONER MITTEN: I agree with that.

CHAIRPERSON GRIFFIS: Okay. Is there a consensus of the Board to do so? Any objection?

BOARD MEMBER ZAIDAIN: I'm not even sure we can hold it in abeyance. I think we'll dispose of it as we get to the issues.

CHAIRPERSON GRIFFIS: Well, it may -- as if the rest of the issue may become mute if we decide at all. I tend to agree. I think Mr. Etherly put it very well. It's very vague, it's kind of open and I think we have identified specifics that we'll move on to. So that being said, I think we can move on with

that action by the Board to issue number three. A building permit approval violates the lot occupancy restriction imposed by the Wesley Heights Overlay District, Zoning Administrator not being authorized any flexibility regarding the strict application of lot occupancy restrictions imposed by the overlay. And that's section 407.

Let me hear by the intervenors, I give them the first opportunity because they didn't do written submissions on this, any address to that.

Does the government have any issues to address in that matter?

MS. WALLS: No, Mr. Chair. We believe that based on the record herein in terms of the standard that the Zoning Administrator used when issuing the permit, I don't believe the WHOD was taken into consideration in terms of issuing that permit if my reading of the record is correct.

CHAIRPERSON GRIFFIS: I'm not sure I follow you. Can you say that again?

MS. WALLS: Okay. With respect to whether, I guess, there was a violation of the lot occupancy restriction, and I think when the permit was issued, I don't know if the Zoning Administrator took into consideration the Wesley Heights Overlay District

in terms of the issuance of that permit.

CHAIRPERSON GRIFFIS: Okay.

COMMISSIONER MITTEN: Are you aware that the Zoning Administrator's bound by law to take into consideration the Wesley Heights Overlay District?

MS. WALLS: Just a moment.

MR. SISSON: Could I comment, Mr. --

CHAIRPERSON GRIFFIS: Why don't you wait for them to clarify before we see what kind of comments are required?

MS. WALLS: Mr. Chair, for clarification it's opposition that the Zoning Administrator's position was correct based on the documents in the record that he had before him in terms of issuing the permit in question.

The government has nothing in addition to add other than what's in the record at this time.

CHAIRPERSON GRIFFIS: Okay. And do you know what documents the Zoning Administrator had at his or his disposal in reviewing this permit?

MS. WALLS: I believe the record which is before this Board indicates what was taken into consideration by the government at the time that the permits in this particular case was issued. I believe that's outlined in the record that's before this

1 Board.

2 CHAIRPERSON GRIFFIS: Okay. Mr. Sisson,

3 you were going to comment?

4 MR. SISSON: Again, I was involved with

5 the review of the five permits that was done by the

6 Zoning Administrator. And I can assure that, first of

7 all, the Wesley Heights Overlay District came out as a

8 result of the five -- the hearings that were conducted

9 by the BZA.

10 CHAIRPERSON GRIFFIS: How would you assure

11 us of that.

12 MR. SISSON: Because they were. It was

13 clearly an issue relating to the set back relating to

14 the porch.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. SISSON: That was the reason for the

17 porch issue. So the Zoning Administrator was

18 specifically aware of the Wesley Heights Overlay

19 District and he was relying on measurements that had

20 been made by Ken West, who is certified by the

21 District surveyor for measurements of the property in

22 question. And at my expense he undertook a thorough

23 review of the whole property. And on that basis the

24 Zoning Administrator took his decision.

25 CHAIRPERSON GRIFFIS: Okay. Others?

1 MS. BROWN: Mr. Chairman, and this goes
2 back to --
3 CHAIRPERSON GRIFFIS: Hold on a second.
4 Let me just point, because the intervenors that want
5 to talk. If you do, don't wait. Just come up to the
6 table and then I'll recognize you.
7 Go ahead, Mr. Brown.
8 MS. BROWN: On lot occupancy, and the
9 Board has the advantage that in 16521 the variance
10 which finally got what we believe was accurate
11 information from Mr. Sisson about his property and the
12 as-built, found that the lot occupancy with the front
13 porch, with the covered front porch, was 2,501 feet.
14 Now, if you go and you look at the front porch and you
15 dimension it out, it's 336 square feet for the front
16 porch. All right.
17 It's still there. I mean, I still have a
18 problem, but pretend it's not there for a moment. Then
19 you come up with 2,164 square feet, give or take a few
20 as your lot occupancy.
21 The standard in the Wesley Heights Overlay
22 District is 2,000 square feet. And that's based on the
23 size of this lot. I mean, the Board has established
24 that 2,000 square foot as the standard. So, again, if
25 you take the fiction that the porch is not there, you

take the numbers that the Board has established, and he's still 164 square feet over the --

CHAIRPERSON GRIFFIS: And we have your calculations in your prehearing statement. But let me see if you agree then. You think that this issue actually, it was fully addressed?

MS. BROWN: No, it wasn't. Because I make a point. If you look at Mr. Sisson's permit application and you look at the drawings he submitted, and back then he essentially submitted drawings that were the rehash, and they're laying over here, of the five permits that were found invalid. And you look at it, and he's got a dimension here on one of the drawings that was part of the submission -- again, this is going back to the flawed original drawings. Where he's got the width of the front porch at 36? feet. Well, I'm sorry, but the Board went to a lot of trouble to find out that the front porch was 41.68 feet wide.

So, I dispute that the Zoning Administrator had the accurate information when he was making his decision at the time. And besides not having the right information, it's pretty clear that at the end of the day, and this Board has the benefit of having more information, that he was just plain

wrong. So, not only did he not have the accurate information -- and this is one of the handicaps throughout this case is the Zoning Administrator, in all fairness to the office, has to rely on what the applicant gives him. And it's pretty clear that this applicant, Mr. Sisson, has given him lousy information.

CHAIRPERSON GRIFFIS: So you're saying from our point of view and in application 16521 of which we decided --

MS. BROWN: Yes.

CHAIRPERSON GRIFFIS: -- that we had incorrect information?

MS. BROWN: No, no. You had correct information then. But it was obtained through different channels and not subject to the same set of drawings that the Zoning Administrator was looking at when he -- and then the Board issued its decision in 16521 in 2001, I believe. This permit was being issued in October of 2000 based on information that didn't even exist then. I mean, that's --

CHAIRPERSON GRIFFIS: Well the dimensions of the front porch existed then. What you're saying is that the lot occupancy is different because the dimensions of the front porch are different?

MS. BROWN: Then what was provided to the Zoning Administrator. I mean, again, the Zoning Administrator --

CHAIRPERSON GRIFFIS: Well, what about for us? Because one of the findings, if I recall and my records are correct, we found that there was in fact compliance with the lot occupancy if the front porch was removed.

MS. BROWN: But you also found that -- but you found that based on this drawing here, this drawing was not part of what the Zoning Administrator opined when he issued the building permit.

MS. PRICE: I think you're missing Mr. Griffis' point, which is you want the decision of the Board in this case to be consistent with their decisions in the previous appeal, which is 16405 and in application 16521, right?

MS. BROWN: Yes.

COMMISSIONER MITTEN: Not withstanding whatever was in front of the Zoning Administrator at that point when this appeal -- or permit was given, as Mr. Griffis said, in 16521 there was a finding that without the roof on the front porch the lot occupancy is 1,968.75 square feet. Do you dispute that?

MS. BROWN: Yes.

1 COMMISSIONER MITTEN: And why didn't that
2 come out in the variance case? That's what you need
3 to tell us right now.
4 MS. BROWN: Well, I was involved in the
5 variance case. I mean, that was hotly disputed. But we
6 concurred on the overall size of the lot occupancy.
7 COMMISSIONER MITTEN: So we disagreed
8 during the variance case, and the Board made a finding
9 that you don't agree with, but you'd like to have
10 another shot at it, is that what you're saying?
11 MS. BROWN: Well, no. I'm providing
12 information that I think is based on the Board's
13 decision where they defined the size of the lot
14 occupancy overall and they defined the size of the
15 front porch. The two don't match in the case of 16521.
16 So we're trying to apply the information you have to
17 get a correct answer.
18 BOARD MEMBER ETHERLY: But why not raise
19 that issue in 16521? Why do it after the fact?
20 That's the difficulty.
21 MS. BROWN: Well, because -- and quite
22 frankly, it was raised in the appeal before 16521, the
23 decision was issued. Again, because of the way this
24 thing unfolded. So the matter was raised on appeal
25 prior to the decision 16521. But I can take you

1 through the calculations. But I mean, I think it's
2 pretty clear that based on the decision of how much
3 lot occupancy there is, that if you take the porch
4 off, it's still over 2,000 square feet.
5 And, again, the statement that was being
6 based from the Zoning Administrator for which 16521
7 put the 1,968 square feet was again based, perhaps, on
8 and I only speculate on dimensions that were
9 incorrect.
10 BOARD MEMBER ETHERLY: You see that's the
11 great concern. Based on that speculation you're
12 asking us to undue a finding of fact in 16521.
13 MS. BROWN: No. I'm asking you to make in
14 this case make a new finding of fact. But I think
15 there's adequate basis for doing that.
16 BOARD MEMBER ETHERLY: Okay.
17 MS. BROWN: Because if you look at in
18 16405 there was a number put down having to do with
19 lot occupancy. And in 16521 the Board specifically
20 corrected itself on that number based on additional
21 information.
22 COMMISSIONER MITTEN: I understand that.
23 MS. BROWN: So the opportunity exists.
24 COMMISSIONER MITTEN: The idea was we get
25 a survey, because that's the ultimate authority,

1 right. We get a surveyor. That survey was in the
2 record of 16521, correct?
3 MS. BROWN: At the end, yes.
4 COMMISSIONER MITTEN: Okay. Thank you.
5 MS. BROWN: But it was not in the building
6 permit --
7 COMMISSIONER MITTEN: I understand that
8 part. Okay. I got that.
9 CHAIRPERSON GRIFFIS: Okay.
10 BOARD MEMBER MILLER: Could I just ask a
11 question?
12 CHAIRPERSON GRIFFIS: Yes.
13 BOARD MEMBER MILLER: Mr. Brown, you said
14 it was raised on appeal. Was it ruled on? You said
15 that this question was raised on appeal.
16 MS. BROWN: Well, no. And, again, how
17 this thing unfolded is Mr. Sisson, the five permits
18 were invalidated in 16405. He then proceeded to file a
19 variance application. And then as we were getting
20 toward the end of the variance -- or what we thought
21 was the end of that process. It actually went on about
22 another 12 months. Mr. Sisson shows up with this
23 remedial permit.
24 So, they were on different tracks. And
25 quite frankly, based on different information. And one

of the problems the Board had all along, and I believe, Mr. Griffis, you were involved at that point and maybe Ms. Mitten is, that there was a lack of consistent information and certain requests and demands were made. But it still goes that in this case there is a distinction that's important. And certainly wasn't something that the Zoning Administrator had access to when he was making his decision.

And historically, I mean one of the problems with the Zoning Administrator has in all six permits is he's been asked to rule on things where he didn't have accurate complete or honest information. He's made mistakes on his own. But he's also made mistakes based on not having accurate information about the dimensions of the property.

CHAIRPERSON GRIFFIS: Okay. Let me hear from others then. Anyone else? Yes, Mr. Watson?

Please turn on your microphone when you speak.

MR. WATSON: I'd like to follow up on just the point that's been made. I have heard repeatedly presentations at the Advisory Neighborhood Commission as well as here. I do not have all of the record in front of me so I can't cite chapter and verse, but

there are two things that come out of this. And this bears on something that Mr. Sisson had just said that the Administrator after due deliberation and so on had made the determinations.

When Mr. Sisson went to the DCRA he walked through the permit applications and came out in most cases the same day with the permit. Obviously, particularly when it came that he was able to hold up the final permit, the blanket permit for all of them on the day that we had the hearing here, that the application must have been done that same day and the determination. So that the Zoning Administrator did not have a long time to make these determinations and in particular Mr. Nuttley testified before you -- and again, I cannot cite chapter and verse, but I can quote that he was knowledgeably misled by Mr. Sisson and therefore some of the comments that Pat Brown has made to you are, I think, ought to be considered very, very carefully that the Zoning Administrator did not have the full picture on which to make determinations instantaneously to give permits on the same day.

MS. BROWN: Mr. Chairman, if I might make a point --

CHAIRPERSON GRIFFIS: Let me hear from Mr. Sisson and then go back around one more time.

MR. SISSON: Again, this fits in to things that I thought I would testify to in my statement. But I was going to say that the Zoning Administrator took two months to go through this process. You can imagine he was very careful when he was faced by the fact that the BZA had rejected, had rescinded five permits. And he was being asked by me to say -- I was asking him what's wrong, why can't we get this right, why do have a problem here. He took two months -- he took two months to review and come up with the sixth permit. He did not do it one day or two days. In fact, it took several weeks.

And I would mention that Mr. Nuttley, who had made this testimony, is the man who signed off on the sixth as the zoning expert. He looked at it very carefully. He concurred that there were not issues that had been raised in the previous discussion in the previous hearings that had been held at the BZA.

MS. BROWN: Okay. Mr. Chairman, can I just a point of reference. The permit application was accepted on September 22, 2000. Mr. Nuttley signed off on zoning, according to the permit that's in the file, the same day. So notwithstanding, it took him 2 months. He didn't have the permit application but the same day, and he signed off on it.

CHAIRPERSON GRIFFIS: Okay.

MS. BROWN: So --

CHAIRPERSON GRIFFIS: But you're not saying that this would have required more than a full day for a Zoning Administrator to review, are you?

MS. BROWN: Well, but Mr. Sisson is saying two months and great care.

CHAIRPERSON GRIFFIS: Right.

MS. BROWN: And I'm saying that the day it was presented to him. And Mr. Griffis and Ms. Mitten and many of you have experienced that you don't get that much time in the permit process. Not on a walk through like this.

BOARD MEMBER ZAIDAIN: Mr. Chair, can I say something, and this might be able to focus the testimony.

I mean, we're getting a lot of testimony on what the ZA used to make the determination on the lot occupancy. I mean, I think the question I want to know is we're not being asked essentially to reevaluate the ZA. We're being asked to essentially to reevaluate ourselves in the variance case 16521 because we made a finding of fact about what the lot occupancy would be without the front porch.

So, in a way all this testimony about the

ZA, why I think it's relevant, it obviously was irrelevant in the original appeals, kind of isn't helping -- is not helping us get to this issue right now.

CHAIRPERSON GRIFFIS: Right. What I'm trying to get to, though, and I think everyone agrees with you, is whether there was a reason for which we would have been wrong. And I thought I was going to get something of it, but I don't think I'm getting there.

When was this produced, this --

MS. BROWN: June 5th.

CHAIRPERSON GRIFFIS: Right. It's June 5th.

MS. BROWN: That was produced in 16521 at the latter stages of the process at the request of Mr. Sisson, and actually it took I think two if not three reiterations to get something that was meaningful.

BOARD MEMBER ZAIDAIN: Right. So are you saying that this is incorrect?

MS. BROWN: No. I'm saying -- I'm assuming that that's the best information we have available. And that's the information that the Board had when it was driving 16521. But it came very late in the 16521 process and didn't exist or certainly was not part of

1 the package when this building permit was considered.
2 BOARD MEMBER ZAIDAIN: The fact that it
3 came late during that variance process, what does that
4 have to do with the final determination the Board
5 made?
6 MS. BROWN: No. I'm just saying that
7 certainly as it relates to the permit we're talking
8 about, I don't believe this was a relevant document in
9 consideration by the ZA. It did not come in through
10 the record until late in 16521. And I'm not sure that
11 -- I mean, it may not have been fully explored in all
12 issues.
13 But I think the point you made, Mr.
14 Zaidain is good. An issue has been raised and we know
15 what the overall lot occupancy is. And the Board can
16 reassess if they choose the dimensions of the front
17 porch. It's a fairly simple calculation even giving
18 benefit of the doubt somewhat. And then you can make
19 your own determination whether you were wrong --
20 BOARD MEMBER ZAIDAIN: Didn't we do that
21 in the variance with this --
22 CHAIRPERSON GRIFFIS: Let me ask Mr.
23 Etherly for a briefly second.
24 BOARD MEMBER ETHERLY: Well, I think Mr.
25 Zaidain hit the point right on the head, which is the

1 concern here, is that you're looking for another bite
2 of the apple in 16 -- make sure I got my numbers
3 straight here -- 16521. And that's the concern that
4 I'm wrestling with. Remember, of the finding of fact,
5 page 8 of the order, number 7, according to the Zoning
6 Administrator's April 23, 2001 computations, Exhibit
7 75, the last set of computations submitted after the
8 applicant's June 15, 2000 survey Exhibit 63, the
9 swelling has a lot occupancy of 1,968.75 square fee
10 without the front porch. With the porch, the lot
11 occupancy is 2,501.14 square feet. Based on those
12 calculations there would not appear to be an issue
13 here.
14 You're suggesting obliquely or maybe very
15 directly that there might be some issue with those
16 numbers now.
17 MS. BROWN: Very directly.
18 BOARD MEMBER ETHERLY: And what I'm saying
19 is you had a bite of that apple in 16521. Why didn't
20 you take it then? Why are you coming back now?
21 MS. BROWN: Well, that's because you
22 understand the precedent that then sets, okay.
23 BOARD MEMBER ETHERLY: Yes.
24 MS. BROWN: We're not in an appeal of
25 16521. We're in something -- well, and one of the

1 things is -- and I'm sure I did raise the issue 16521.
2 I know I did. But again if you go back to 16521, the
3 testimony was strictly -- and if you read the order,
4 it says was strictly limited so that -- and I know Ms.
5 Prairie, who is with me, was very frustrated because
6 the Board narrowed its focus. So I don't believe that
7 there was -- and again, because in the context of
8 we've got this appeal case, this case out there. We're
9 going to handle that and specifically the issues that
10 it raises at that time. So the Board at the end
11 narrowly focused in on 16521 on that application, that
12 variance application.
13 BOARD MEMBER ETHERLY: So lot occupancy is
14 not necessarily a static number that you could put
15 faith in. It's a number that's going to get fudged
16 from case-to-case.
17 MS. BROWN: Well, but it also -- in the
18 variance application it wasn't as relevant. And the
19 ability to testify in the issue was limited because
20 the Board was asked to accept an as-in front porch
21 through a variance. So the focus was not in the same
22 light as it was in the appeal of the permit. And, in
23 fact, the Board said we're leaving that issue for the
24 appeal. If you go -- and I could quote the order. But
25 if you go -- and basically there was a division of

1 labor between the two cases.

2 In the variance case you were looking at

3 the porch being allowed to stay. And the Board put

4 aside issues of side yard, lot occupancy that were

5 going to raised in the appeal, driveway access being

6 one. So that the focus was different.

7 Now, in the appeal I'm raising and

8 focusing in on, and the Board's responsibility is, was

9 this issued appropriately? Did it comply with the

10 zoning regulations? And if the Board, even if it's

11 different and the Board has updated its numbers in

12 these cases, the Board has to look at it as it stands

13 now. And if the Board finds that it's a violation of

14 the Wesley Heights Overlay District lot occupancy

15 requirement, then that's its responsibility in the

16 context of an appeal of this building permit.

17 CHAIRPERSON GRIFFIS: And what do you

18 think the Zoning Administrator relied on then?

19 MS. BROWN: I mean --

20 CHAIRPERSON GRIFFIS: All right.

21 MS. BROWN: I'd be speculating.

22 CHAIRPERSON GRIFFIS: That's fine.

23 Ms. Crary, you had something to say?

24 MS. CRARY: I did, indeed.

25 CHAIRPERSON GRIFFIS: Good.

MS. CRARY: As for the final permit, the sixth I believe it is, we were all sitting here in great shock when he happened to pull from his pocket the permit which he happened to have, which was not signed. We could not believe it. Which retroactively validated everything he had done -- already done without permit, without one single valid permit. And we were shocked and we were angry.

The other thing is about the property line, I have something to say when we get to property lines, unless you want to talk about the 125 square feet from the property line that Mr. Sisson, whether deliberately or not, tried to take.

He did not have a survey that was accurate until the Board finally forced to him to have an as-built survey made.

CHAIRPERSON GRIFFIS: Okay.

MS. CRARY: His lawyer adamantly refused to let me have my own survey made, which means I could not -- I don't know. I couldn't have gotten any survey company to do it at that point.

He claimed -- he claims --

CHAIRPERSON GRIFFIS: Let me just see if I understand.

MS. CRARY: All right. I'll talk about it

later then.

CHAIRPERSON GRIFFIS: This is known as the survey that's been done, and you know where your property line is now, is that correct?

MS. CRARY: When he went to the Court of Appeals, he reverted to six feet instead of less than five feet from the house. He reverted to that, meaning that he still believed that. That's what the appeals court got.

CHAIRPERSON GRIFFIS: So you're saying that you don't think --

MS. CRARY: I'm saying that there was a deliberate to take a 125 square feet of my land to make his total acreage or footage look better with respect to the footprint of the house.

CHAIRPERSON GRIFFIS: Okay. Do you know where the property line is now?

MS. CRARY: I'm not allowed to make a survey. And furthermore --

CHAIRPERSON GRIFFIS: I'm not sure why you say that.

MS. CRARY: Because his lawyer said I was -- that he was adamantly refusing to let me make a survey.

CHAIRPERSON GRIFFIS: How could their

lawyer stop you from surveying your own property?

MS. CRARY: What do I know?

MS. BROWN: She needed access to his property physically, to come on his property --

CHAIRPERSON GRIFFIS: Yes. But if she wants a survey, the property line -- okay.

MS. CRARY: Well, I certainly don't want to do it now. I expect you all to clean things up.

CHAIRPERSON GRIFFIS: Okay. Thank you. Okay.

Yes, Ms. Mitten?

COMMISSIONER MITTEN: I think on the issue, if we could just remember what we're talking about, it was whether or not to dismiss the appeal as it relates to the building permit violating the lot occupancy restrictions of the Wesley Heights Overlay District. And we've now heard, I think, about all we need to hear and we've heard it several times about the lot occupancy measurements and whether or not there actually is a violation.

I'm not even going to attempt to defend whatever the Zoning Administrator was looking at, because I don't have any confidence that he was looking at accurate information at that point in time. I do have confidence, however, that the Board of

1 Zoning Adjustment was looking at the most accurate
2 piece of information at the time that the decision was
3 made in the variance case, which is 16521.
4 And what was definitely in front of us,
5 because it related to the variance request, was that
6 in order for the roof to stay on the porch, the
7 applicant required variance relief from the Wesley
8 Heights Overlay District percentage of lot occupancy
9 and front yard setback requirements. So we did not
10 defer that issue, because we couldn't. It was part
11 and parcel of the variance case. Unlike later in our
12 order it said that there were other concerns raised by
13 the ANC, such as the minimum driveway width, driveway
14 access and off street parking requirements. And they
15 are the subject of a related appeal, BZA appeal number
16 16679 and can be reviewed separately. So those issues
17 not related in anyway to the nature to the nature of
18 the variance being requested that were deferred. Lot
19 occupancy was part of the variance request.
20 I mean, Mr. Brown may continue to disagree
21 with us, but I -- as much as he wants to be consistent
22 with these previous decisions, I think we need to be
23 consistent with the previous decision. I mean, you
24 don't get to pick and choose what portions we're going
25 to be consistent with.

1 So, I would --

2 CHAIRPERSON GRIFFIS: Can I -- go ahead

3 and then I'll --

4 COMMISSIONER MITTEN: I would suggest to

5 the other members of the Board that this particular

6 issue, not speaking to the sum total of all those

7 before us, has been fully litigated in variance case

8 16521 and decided. And we haven't had any compelling

9 reason why it should be revisited.

10 MS. BROWN: Mr. Chairman, I have one

11 thing.

12 CHAIRPERSON GRIFFIS: Okay. Let me

13 address Ms. Mitten. Because here's what I'm hearing

14 today, which was not fully flushed or evident in our

15 submission in preparation for this, is that although

16 we did and had confidence in what we found for fact in

17 16521 for the lot occupancy, could we not have

18 evidence today, new information that recalculated

19 that? Meaning the lot occupancy might change? I

20 mean, that's what's being said to us. Is that even

21 when you take the front porch away, there is still a

22 noncompliance with the lot occupancy for the overlay.

23 COMMISSIONER MITTEN: Well, if you want to

24 revisit the Board's decision in 16521, I mean that's

25 essentially what you're saying because the --

1 CHAIRPERSON GRIFFIS: Somewhat. What I'm
2 saying, it goes to Mr. Zaidain --
3 COMMISSIONER MITTEN: Could I just finish
4 my thought?
5 CHAIRPERSON GRIFFIS: Oh, yes. I'm sorry.
6 COMMISSIONER MITTEN: It's not that the
7 Board merely calculated the lot occupancy with the
8 front porch. We went so far as to calculate without
9 the front porch. So I guess I would just want to be
10 very cautious --
11 CHAIRPERSON GRIFFIS: Right.
12 COMMISSIONER MITTEN: -- in revisiting
13 something that was, I think, fairly fully litigated by
14 the Board, whether or not the ZA was aware of it is at
15 this point not relevant. Because we care what the
16 situation is, what's the result and whether there's
17 now a conformity related to lot occupancy.
18 MS. BROWN: Mr. Chairman, can I -- one
19 point.
20 CHAIRPERSON GRIFFIS: Okay.
21 MS. BROWN: And I think Ms. Mitten is
22 saying that she's concerned, but maybe imposing a very
23 high standard that if I can prove -- and I think I've
24 heard this before -- if I can prove that the
25 calculations were incorrect and I'm prepared to try to

do that the best I can, then perhaps that's something the Board can't ignore.

The other thing is --

COMMISSIONER MITTEN: It's actually harder than that. It's you should have done that before. This was in front of us before. So that's -- I mean, it's not fair to revisit -- I mean, we need to be efficient and it's very inefficient to keep going back to decisions that have been made with the same piece of paper -- well, to support different calculations. It should have been done before.

MS. BROWN: Well, one, I guarantee you because I was writing the appeal simultaneously with the litigating 16521, that I didn't agree with the numbers.

COMMISSIONER MITTEN: So it's not a new idea. But it's already been decided. We need to move on.

MS. BROWN: But I think it's inappropriate for the Board to stand by if they think that an error was made.

I also think that --

COMMISSIONER MITTEN: You're the only one who thinks an error was made.

MS. BROWN: Well, but I'm offering to

1 prove it to you. And I think I've laid it out in my
2 prehearing filing, I can take you through it. But
3 also in consideration of 16521 you determined that a
4 variance was needed from the front yard -- the lot
5 occupancy, right? Correct.
6 COMMISSIONER MITTEN: If the front porch
7 were to have a roof on it.
8 MS. BROWN: Yes. So it was there. But
9 that discussion is not the same as the discussion
10 we're having here. I'm saying that without the front
11 porch there, it still is not in compliance.
12 COMMISSIONER MITTEN: Well, there was a
13 finding in the variance case that --
14 MS. BROWN: But I'm taking exception with
15 that.
16 COMMISSIONER MITTEN: I -- I --
17 BOARD MEMBER ZAIDAIN: Well, and I guess
18 my question is usually when somebody takes exception
19 with the outcome of a variance proceeding, they take
20 it to the next level, which is court. And how come if
21 that was the key component that you had a problem
22 with, why wasn't it litigated after that?
23 MS. BROWN: One doesn't rush to the Court
24 of Appeals. And two, the matter was before the Board
25 in this appeal. And you exhaust your administrative

1 remedies prior to going to court. This is a much more
2 appropriate forum to discuss that issue than the Court
3 of Appeals.
4 BOARD MEMBER MILLER: I have a few
5 comments.
6 CHAIRPERSON GRIFFIS: Yes, Ms. Miller.
7 BOARD MEMBER MILLER: I think this case is
8 different with respect to revisiting this issue.
9 Because if I understand it correctly, there were
10 different cases going on at the same time. And it
11 sounds to me, and correct me if I'm wrong, that the
12 parties may have felt that they could have litigated
13 lot occupancy question still in this case because the
14 permit was on appeal in this case. And I may be
15 wrong. But if that's the case, then I think there
16 seems to be a real question of fact in dispute in
17 here. And I would not like to see the Board's
18 summarily decide it on the grounds that it's too late.
19 BOARD MEMBER ZAIDAIN: The problem I have
20 with this whole thing, is it would be different if
21 there was a new structure build on the property, if
22 something had changed. If there was a whole entire
23 new issue, even a whole new permit, then we could
24 revisit this whole issue. But we're still we're kind
25 of, we're in a circle here.

I mean, we're going around and around and around, it seems to me. I mean once we've decided an issue, unless there are substantial facts in terms if the porch as expanded, a new addition or something along those lines and a new permit was issued. But we're dealing the same exact issues.

So I guess what I'm struggling with is why -- this was fully litigated, to use that phrase, in the variance proceeding. And I just am not convinced on why we need to revisit it.

CHAIRPERSON GRIFFIS: Okay. Ms. Mitten?

COMMISSIONER MITTEN: I agree with Mr. Zaidain's characterization of it. And I think what it comes down to is that by challenging this measurement or the finding of the Board in 16521, Mr. Brown is attempting through this appeal to appeal that decision. Because he doesn't agree with one of the findings.

CHAIRPERSON GRIFFIS: I don't about it. Because he has a permit, a new permit before us that's under appeal. What he's asking us to do is to take in all the information of which he can show it is invalid.

BOARD MEMBER ZAIDAIN: Well, how does the new permit relate to the porch?

1 COMMISSIONER MITTEN: The new permit --
2 CHAIRPERSON GRIFFIS: Well, it doesn't.
3 And that goes to Mr. Brown's point. That is if you
4 take -- if we assume his calculations are correct off
5 of this new site plan, that it is in fact
6 nonconforming even without the front porch in terms of
7 lot occupancy.
8 Is that correct, Mr. Brown?
9 MS. BROWN: Yes.
10 COMMISSIONER MITTEN: Mr. Chairman, I
11 really would like us to move to a decision on this.
12 CHAIRPERSON GRIFFIS: Okay.
13 COMMISSIONER MITTEN: And, you know, this
14 whole round robin thing of having this dialogue is
15 very inefficient also for the Board. So I would hope
16 we would streamline for these additional issues.
17 I just don't think that -- there were
18 other remedies available to Mr. Brown and his client
19 if they did not agree with that finding. They could
20 have taken some action as it related to the order in
21 16521, and they choose not to even though they were
22 fully cognizant of this appeal pending and the impact
23 that that finding might have on this appeal. So, and
24 I'm not -- I don't think it's appropriate to revisit
25 it at this time.

BOARD MEMBER ETHERLY: Mr. Chair.

CHAIRPERSON GRIFFIS: Okay.

BOARD MEMBER ETHERLY: I agree with my colleague Ms. Mitten. I mean, I understand to an extent the concern that you're expressing and that also is being expressed by my colleague, Ms. Miller. But I just don't think it's an avenue down which we should treed lightly, reopening a prior decision after the fact. I mean, I'm just really worried about the precedent that that sets.

I would be comfortable making a motion at this juncture if you would be willing to accept that?

CHAIRPERSON GRIFFIS: Yes, go ahead.

BOARD MEMBER ETHERLY: My motion, Mr. Chair, would be that we would deny the motion for summary affirmance on the grounds that the building permit approval violates the lot occupancy restrictions imposed by the Wesley Heights Overlay District. And I would invite a second of that motion.

CHAIRPERSON GRIFFIS: Is there a second?

BOARD MEMBER ZAIDAIN: I'll second that.

CHAIRPERSON GRIFFIS: Thank you, Mr. Zaidain.

Further discussion on the motion? Any further discussion.

1 Very well. Then I'd ask for all those in
2 favor of the motion signify by saying aye.
3 ALL: Aye.
4 CHAIRPERSON GRIFFIS: And opposed?
5 Opposed.
6 MR. MORDFIN: Can I ask a clarification.
7 You only did a motion on --
8 COMMISSIONER MITTEN: It's coming. It's
9 coming.
10 MR. MORDFIN: Oh, I'm sorry. Never mind.
11 COMMISSIONER MITTEN: Were you going to
12 call for the vote or did you want to keep moving?
13 CHAIRPERSON GRIFFIS: Yes. No, I was going
14 to call the vote on that.
15 MS. BAILEY: Four, zero, one. And that is
16 concerning issue number three, the building permit
17 approval violates the lot occupancy restrictions
18 imposed by the Wesley Heights Overlay District. The
19 motion is denied.
20 Mr. Griffis is opposed. Ms. Miller, Mr.
21 Zaidain and Mr. Etherly and Ms. Mitten are in support.
22 COMMISSIONER MITTEN: I think that it was-
23 -
24 CHAIRPERSON GRIFFIS: It was three to
25 zero.

1 MS. BAILEY: Three.

2 COMMISSIONER MITTEN: And the motion was

3 approved to deny summary affirmance.

4 CHAIRPERSON GRIFFIS: It was a strangely

5 worded --

6 COMMISSIONER MITTEN: It was.

7 CHAIRPERSON GRIFFIS: -- understood

8 motion.

9 COMMISSIONER MITTEN: I move, Mr.

10 Chairman, that we dismiss the appeal as it relates to

11 the third issue that the building permit approval

12 violates the lot occupancy restrictions imposed by the

13 Wesley Heights Overlay District based on the fact that

14 this issue was fully litigated in BZA application

15 16521 and the order in that case has not been

16 challenged.

17 BOARD MEMBER ETHERLY: Seconded, Mr.

18 Chairman.

19 CHAIRPERSON GRIFFIS: Excellent. Thank

20 you.

21 The motion before us and seconded. Is

22 there a question to the motion or deliberation? Ms.

23 Miller. No. Any questions.

24 Then I would ask for all those in favor of

25 the motion signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed? Opposed.

BOARD MEMBER MILLER: Opposed.

MS. BAILEY: The vote three to zero. Am I correct, Mr. Chairman?

CHAIRPERSON GRIFFIS: Three to zero.

MS. BAILEY: Three to zero. The motion was made by Ms. Mitten, seconded by Mr. Etherly. Ms. Mitten, Mr. Etherly, Mr. Zaidain are in support. Ms. Miller and Mr. Griffis are opposed.

CHAIRPERSON GRIFFIS: Good. Thank you very much.

Okay. At this time, I'd like to just take 10 minutes so we could stretch our legs. We'll come back and revisit issue number four, which is building permit approval violates the applicable side yard restrictions and move into five and six.

(Whereupon, at 3:32 p.m. a recess until 4:04 p.m.)

CHAIRPERSON GRIFFIS: Very well. Let's reconvene and start up again as we left off. We are now moving onto issue four, Board's issue number four, which states as we had laid it out that the building permit approval violates the applicable side yard

1 restrictions, Zoning Administrator flexibility
2 regarding the applicable side yard restriction was a
3 misuse or abuse of the limited discretion and
4 substantial impairs the purpose of otherwise
5 applicable regulations.
6 Let's go to briefly intervenors,
7 government have any additional information that is not
8 already in the record regarding that? Anything to
9 provide? Does the government?
10 MS. WALLS: Government has no additional
11 information to provide.
12 CHAIRPERSON GRIFFIS: Okay. Brief
13 comments, Mr. Brown, on that issue? It's not a
14 requirement, but --
15 MS. BROWN: No, two points. Excuse me.
16 One this survey here, which was produced
17 in 16521, which again was not part of this building
18 permit application. At the time this building permit
19 application was processed, Mr. Sisson was still
20 representing that he had a 6 foot plus side yard. So I
21 think the Zoning Administrator didn't have the
22 accurate information, and two based on at the time
23 being 6 feet, it was compliance. And then the issue of
24 407 flexibility never arose.
25 Where we are, and I think this is one of

the issues, the one that was deferred in 16521 specifically for this appeal, but it's based on information that I don't believe was accurately in place at the time the permit was issued.

The 407 flexibility isn't automatic. Even if you were to apply it, you have to do so in a context of the circumstances.

Also, Mr. Crary particularly since this faces her property is here and prepared to testify that the proximity of the building, which is closer than it should be, has a direct impact on her property. Not just proximity, but also the fact that the improvements drain water off it onto her property, soil erosion, flooding has caused. So that there's a reason why the zoning regulations impose side yard restrictions to provide a buffer and to prevent situations like that. And then having built too close to the side yard, Ms. Crary has suffered as a result.

So, I'd leave it at that.

CHAIRPERSON GRIFFIS: Okay. Ms. Mitten, I think are you in agreement in terms of the appeal, the issue before us for the side yard, we would not necessarily hear testimony of the adverse effect of that, but rather go to how it was decided or whether there was an error in its decision?

1 MS. BROWN: And I'm -- it's important that
2 those issues of the impact are important to Ms. Crary,
3 because she's the victim.
4 CHAIRPERSON GRIFFIS: And there's no
5 question of the Board that they are.
6 MS. BROWN: But certainly we can have a
7 discussion of how the decision from a zoning
8 standpoint was reached without getting to that at this
9 point.
10 CHAIRPERSON GRIFFIS: Right. Because I'm
11 not sure we could get to that. Okay. Others?
12 Anything in addition to that? Mr. Sisson, yes?
13 MR. SISSON: Yes. I could say,
14 incidentally I had two or three meetings with the
15 Zoning Administrator that's covered these issues. Mr.
16 Brown had been invited to attend. He opted not to
17 attend. He was certainly invited.
18 But anyway, the Zoning Administrator at
19 that time had the West survey. He knew exactly what
20 the side yard setback was. He realized that the
21 original building had been set back five feet from the
22 property line, which is the minimum that would
23 normally be required. There had been some aluminum
24 siding added to the building, which increased it by
25 about an inch, making the difference, the side yard 4

1 feet 11 inches instead of the required five.

2 He said, you know, it's within my

3 jurisdiction, I have the authority to grant a variance

4 of this amount under these circumstances, and I will

5 do so in this case. That was how that was decided.

6 CHAIRPERSON GRIFFIS: Okay. Others?

7 Board members? Mr. Etherly?

8 BOARD MEMBER ETHERLY: Thank you, Mr.

9 Chair.

10 CHAIRPERSON GRIFFIS: Yes.

11 MR. WATSON: Could I just ask a question?

12 CHAIRPERSON GRIFFIS: You have to be on

13 the mike if you say anything.

14 MR. WATSON: I'm under the impression that

15 the side yard setback should be 8 feet. And that the

16 5 feet is the minimum for which one needs, in other

17 words, in the existing building the 5 feet is the

18 minimum that one needs in order to make an addition

19 that would not have to revert to the full 8 feet.

20 CHAIRPERSON GRIFFIS: Yes, that's correct.

21 That's what we're talking about in terms of 6 and 4

22 or 5.8, I believe it is, which allows additions to

23 dwellings that predate the '58 zoning regulations,

24 which would require a minimum. And that's where we

25 go, and that's what's under discussion is -- somewhat,

is the Zoning Administrator's authority of which is in the regulations to essentially waive that within certain parameters. Does that make sense?

MR. WATSON: It does. I'm very sensitive to this, and so I have approximately 4 feet in my house and I have been told by my architect don't go there at all.

CHAIRPERSON GRIFFIS: Huh. Well, that's one opinion.

MR. WATSON: I may come back to you on that one, so be careful.

CHAIRPERSON GRIFFIS: Indeed.

All right. But focusing on this, however, noting 4 or 5.8, Mr. Etherly, I think you were about to discuss --

BOARD MEMBER ETHERLY: Yes, sir. Thank you very much, Mr. Chair.

I believe this issue number four carries with it some similarities to issue number three in that in 16521 we had a similar finding of fact and finding of fact number 8 as it related to the size of the two side yards in questions; one being 5.69 feet and the other being 4.89 feet. Of course, because the dwelling predates the 1958 zoning regulations the side yard that is at 5.69 feet would indeed fall under the

appropriate exception there. Whereas, the 4.89 foot side yard would not. It's my understanding, of course, that pursuant 407 the Zoning Administrator does have authority to permit minor deviations up to 12 inches, which would bring the 4.89 foot side yard well within that scope.

So once again, I believe this issue would also have been ripe for discussion and argument within 16521. And given the absence of that discussion, once again I'm concerned about the back door opportunity to bring an appeal of 16521 in this matter. So I would have the same position on issue number four as I would with issue number three. But it would be open to additional discussion, of course, from my colleagues on the bench.

CHAIRPERSON GRIFFIS: Okay. Other?

MS. BROWN: Could I respond quickly to that, and I think it's a context issue.

In 16521 they were deciding what the Zoning Administrator did.

CHAIRPERSON GRIFFIS: Yes.

MS. BROWN: And in this context we're asking not what the Zoning Administrator did, but was that correct. So, I think -- and again, it's -- the context you're having the discussion.

1 CHAIRPERSON GRIFFIS: I think, and I think
2 the Board's clear on that.
3 Ms. Mitten?
4 COMMISSIONER MITTEN: Mr. Chairman, well
5 just first to respond to what Mr. Brown just said.
6 In 16521 that was a variance case and we
7 were not deciding what the Zoning Administrator did.
8 It was that there was a request before us and we were
9 determining what the issues were properly before the
10 Board on the variance. It was not an appeal case,
11 which is when we would have deciding what the Zoning
12 Administrator did. But just to piggyback on what Mr.
13 Etherly said, he cited the finding of fact related to
14 the side yards. We also have a conclusion of law
15 related to the side yards on page 11. And I'm quoting,
16 "With respect to the 5 foot side yard requirement in
17 Section 405.8 the Zoning Administrator may thus
18 approve up to a 12 inch deviation. The applicant
19 therefore does not require a variance from the minimum
20 side yard requirement for the 4.89 foot side yard
21 since the Zoning Administrator has approved a 1.32
22 inch deviation." So this has all been fully
23 litigated. And I agree with Mr. Etherly that we should
24 not revisit.
25 CHAIRPERSON GRIFFIS: Okay. Comments?

1 Questions needed of applicant or -- yes, Ms. Crary?
2 MS. CRARY: I should like to point out,
3 first of all, when you were talking about variance I
4 was not given an opportunity -- I was told not to talk
5 about anything about the roof of the porch. And so I
6 could not express any opinion on this.
7 If you look at those supposedly as-built
8 survey, you will see that the extension to the back,
9 which is a huge thing that looks like a jailhouse with
10 no -- just a plain wall, is closer than it is supposed
11 to be. It is not backed in as it should be, as a new
12 piece of construction. It is closer to my property
13 line than it should be.
14 And also the garage, the same thing
15 applies to the garage. Big great white expanse, and
16 it's sitting practically on my nose. I just think you
17 have to mention whether you don't think that it should
18 be included, because you've already talked about a
19 variance. Nobody gave me a chance to say anything
20 about that.
21 CHAIRPERSON GRIFFIS: Okay. Excellent
22 point.
23 And let me read to you 405.8, and I think
24 that is the parameter of what we are looking at here,
25 and that is: "In case of a building existing on or

before May 12, 1958 with a side yard less than 8 feet wide, 8 feet as it's being talked about is the required for a new construction, an extension or addition may be made to the building provided that the width of the existing side yard shall not be decreased and provided further that the width of the existing side yard shall be a minimum of 5 feet."

MS. CRARY: (Off microphone).

CHAIRPERSON GRIFFIS: 5.03 at the foundation.

MS. BAILEY: Ms. Crary, you're not on the record, ma'am.

CHAIRPERSON GRIFFIS: Yes, you need to speak into a microphone. But just turn around, it's right behind you, Ms. Crary.

And what you were pointing to is the setback from the garage.

MS. CRARY: Okay. The setback for the part that was added is --

CHAIRPERSON GRIFFIS: 6.5

MS. CRARY: It isn't. This says 6.54. Yes. That's what it says. It is not possible. 5.13 at foundation, that's what it says. 4.89 at siding, that's that.

CHAIRPERSON GRIFFIS: Okay.

MS. CRARY: It's 1.4 --

CHAIRPERSON GRIFFIS: And I --

MS. CRARY: It's not 8 feet, in any case.

CHAIRPERSON GRIFFIS: I understand. Ms. Crary, let me --

MS. CRARY: And this stuff is supposed to be 8 feet, right?

CHAIRPERSON GRIFFIS: Let me see if you could listen to me for just a second. I've read to you the regulations that talk about this building and as it -- as it has existed prior to 1958. Do you understanding what the zoning regulations allow you to build a side yard dimension to?

MS. CRARY: To the foundation, which is at -- for inside underneath the siding -- I don't know. No. Tell me.

CHAIRPERSON GRIFFIS: Okay. 405.8 allows you to build to 5 feet.

MS. CRARY: 4.89 at siding.

CHAIRPERSON GRIFFIS: Right. Okay.

MS. CRARY: That is the old house. That is the part that was built in what? 1924, or something.

CHAIRPERSON GRIFFIS: I understand that. But what you're asking us --

MS. CRARY: The new part is right here.

CHAIRPERSON GRIFFIS: -- is the new addition closer to the property line or not closer to the property line?

MS. CRARY: It says here that it's 1.41 --

CHAIRPERSON GRIFFIS: Is it closer to the property line or not?

MS. CRARY: No, no, no.

CHAIRPERSON GRIFFIS: Okay.

MS. CRARY: But then it reverts to the garage is still 5.03 at foundation and 4.95 at siding.

CHAIRPERSON GRIFFIS: Okay. And I do -- I understand what you're pointing to. I understand what you're saying.

MS. CRARY: It says that the whole thing-- and disregard and disrespect for the law, that's what bothered me about the whole business.

CHAIRPERSON GRIFFIS: Okay. Thank you. Okay.

Other comments? In which case, do I have a direction from the Board in which they would like to proceed in regards to issue number four, applicable side yard restrictions?

COMMISSIONER MITTEN: Mr. Chairman?

CHAIRPERSON GRIFFIS: Yes.

COMMISSIONER MITTEN: I would move dismissal of the appeal based on the building permit approval violating the applicable side yard restrictions on the basis that this matter has been fully litigated and decided in BZA application 16521.

CHAIRPERSON GRIFFIS: Is there a second?

BOARD MEMBER ETHERLY: Seconded, Mr. Chair.

CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly.

Further discussion of the motion?

Would all those in favor of the motion signify by saying aye?

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed? Abstained.

BOARD MEMBER MILLER: I'd like to abstain on this one.

CHAIRPERSON GRIFFIS: Very well. Why don't we record the vote?

MS. BAILEY: The vote is recorded as four, four zero one. Motion made by Mr. Griffis, seconded by Mr. Zaidain. Mr Etherly and Ms. Mitten in support. Ms. Miller is abstaining. And that is the motion is to dismiss the building permit approval that it violates

1 the applicable side yard restrictions.

2 CHAIRPERSON GRIFFIS: Good. Thank you very

3 much.

4 BOARD MEMBER ETHERLY: Mr. Chair. I

5 believe that motion was made by Ms. Mitten and

6 seconded by Mr. Etherly.

7 MS. BAILEY: What did I say, Mr. Etherly?

8 BOARD MEMBER ETHERLY: I believe you might

9 have said made by Mr. Griffis and seconded by Ms.

10 Miller.

11 MS. BAILEY: Sorry. I'm sorry. Today is

12 not one of my --

13 BOARD MEMBER ETHERLY: That's okay. It's

14 very rare that I have the opportunity to correct our

15 staff, and I don't do it with joy.

16 CHAIRPERSON GRIFFIS: Okay. Issue number

17 five, Board's issue number five as we've outlined it

18 today, goes to the building permit approval which

19 violates the BZA appeal number 16405 and the

20 applicable private driveway width and the grade

21 restrictions.

22 I think we can get into this fairly

23 quickly. It would be my opinion that we do hear some

24 evidence and direct and pointed evidence on this in

25 that I don't believe that this issue has been

1 addressed by the Board and is properly before us. And
2 so I'll hear from others, and the Board can give
3 comments and then we can, if need be, otherwise I'm
4 going to open it up briefly and then we'll get to the
5 facts of this, the comments.
6 BOARD MEMBER ZAIDAIN: Are you making a
7 motion?
8 CHAIRPERSON GRIFFIS: No, there's no
9 motion on this one.
10 BOARD MEMBER ZAIDAIN: I mean, for the
11 sake of time and privity, I'll say I agree. How about
12 that?
13 CHAIRPERSON GRIFFIS: Okay. Other
14 comments? Questions. Ms. Mitten.
15 COMMISSIONER MITTEN: I agree.
16 CHAIRPERSON GRIFFIS: Okay. Very well.
17 Mr. Brown, what I'd like to do is turn it
18 over to you, first of all, to address this issue,
19 outline the evidence.
20 I'd ask right now whether DCRA has
21 evidence that they're going to be offering on this
22 issue? Okay.
23 MS. WALLS: No.
24 CHAIRPERSON GRIFFIS: Indicating that no
25 evidence at this time. Okay.

1 In which case I'll go from Mr. Brown, I
2 will then go to Mr. Sisson, and then I'll hear from
3 the intervenors. And then ANC, if they are, which I
4 don't see, and they will have rebuttal.
5 Go ahead, Mr. Brown.
6 MS. BROWN: Just to orient you, here is
7 the garage located in the rear of the property. It's a
8 two car garage with the doors opening here. And
9 again, Mr. Sisson's property here. In 16405 at
10 request of the Board he produced the easement
11 documents in this drawing showing an 8 foot easement
12 running from Hawthorne Street here, up to an into his
13 property, but not all the way to the property line.
14 Again, based on the easement in the drawing it's 8
15 feet wide.
16 In 16405 the Board determined that the
17 applicable standard was 12 feet for a 2 way
18 circulation private driveway. Excuse me. Twelve feet
19 for one way circulation private driveway. Fourteen
20 feet for a two way circulation driveway.
21 If you look at this private driveway
22 serving from Hawthorne, Mr. Stein lives here and
23 there's several other houses and one house on this
24 side. All have garages entering into the private
25 driveway.

1 In this case by definition it's a two way
2 circulation because, in fact, people have to go both
3 ways. Mr. Stein has to be able to go simultaneously
4 while Mr. Sisson is coming out. And, again, all the
5 other people abutting on the alley.
6 BOARD MEMBER ZAIDAIN: Can you explain it
7 a little bit better? So using that one lane, you have
8 two people who have to make both movements, in and
9 out?
10 MS. BROWN: Well, the regulation is
11 intended if you have two way circulation.
12 BOARD MEMBER ZAIDAIN: Right.
13 MS. BROWN: To provide that both cars can
14 pass.
15 BOARD MEMBER ZAIDAIN: To pass. Sure, it's
16 like lanes.
17 MS. BROWN: For one way circulation it's
18 12 feet serving more than one required off the street
19 parking space. In this case there are two parking
20 spaces, because they're both in the two car garage.
21 BOARD MEMBER ZAIDAIN: And for that one
22 property that you're pointing to --
23 MS. BROWN: This is Mr. Sisson's property.
24 BOARD MEMBER ZAIDAIN: And that's Mr.
25 Sisson's, right. That's the only means of ingress and

egress?

MS. BROWN: That's correct.

BOARD MEMBER ZAIDAIN: Okay.

MS. BROWN: And --

BOARD MEMBER ZAIDAIN: Vehicular, I mean, ingress and to be clear.

MS. BROWN: Yes. So that the requirement is, in this case because you have a two car garage and two way circulation, again faced with the situation Mr. Sisson or whoever actually lives there is coming this way, Mr. Stein or any of his neighbors have to also be able to simultaneously traverse the private driveway.

BOARD MEMBER ZAIDAIN: Right.

MS. BROWN: At 8 feet you can barely get one car through, and I have some pictures I'd like to introduce to help the Board understand it.

The other issue is -- and again, he's using the garage to meet his off street required parking, which in R-1-A is one space.

BOARD MEMBER ZAIDAIN: Okay.

CHAIRPERSON GRIFFIS: Now do you have evidence that you're submitting in the dimension of that?

MS. BROWN: Well, this is already in the

1 record in this case. It's also in the record as a
2 finding of fact in 16405 where this drawing -- and
3 this is Mr. Sisson's drawing. I took it from 16405,
4 blew it up so the scale has been somewhat lost
5 proportionately. BUt this is Mr. Sisson's document.
6 This was in 16405 you'll see, and I can point you to
7 it, the Board's finding.
8 CHAIRPERSON GRIFFIS: It would be finding
9 13 through 16 in which is was 8 feet, I believe.
10 MS. BROWN: Yes. Well, 13 -- that you
11 have to have off street parking accessible.
12 CHAIRPERSON GRIFFIS: Fifteen states and
13 finding that's a private easement extension to
14 Hawthorne Street along the rear of the four
15 neighboring properties and terminates at the
16 intervenor's property. Following construction of the
17 new garage the easement is 8 feet wide. That's the
18 dimension you're asking us to look at, is that
19 correct?
20 MS. BROWN: Yes.
21 CHAIRPERSON GRIFFIS: Okay.
22 MS. BROWN: And in paragraph 14 --
23 CHAIRPERSON GRIFFIS: Finding of fact 14?
24 MS. BROWN: Yes. Or in 13 let's walk it
25 through. In 13 saying that your off street parking

has to be accessible through a public street, a public alley or private driveway. It also says it has to be appropriate graded.

Fourteen says that for one way circulation, 12 feet or 14 feet for two way circulation for more than one parking space. And in this case he has two.

So, the standard has been set. The physical condition has been set. As to accessibility to the required parking. It's important to note that, you know, there was an old one car garage here that when he demolished that, again without permits, and then started building this garage without permits, any grandfathering rights he may have had into the one car garage were lost because he abandoned that existing condition for, in this case, one that isn't in compliance.

I will also produce a picture showing the driveway, so you can see it. But more importantly, give you an idea of the steep grade. There's a 12 percent grade maximum and --

CHAIRPERSON GRIFFIS: Are you going to give us the actual grade? We're not going to get anything from a picture. I mean --

MS. BROWN: Yes, I do not have the

ability, but I think you can take a look at it.

CHAIRPERSON GRIFFIS: I can't imagine. Can any Board member tell me what five percent grade looks like, or 12 percent grade, or 15, or 20? No, I didn't think so.

MS. BROWN: Well, we can provide something to show you what 12 percent grade would look like.

CHAIRPERSON GRIFFIS: That would be fine. If that's the kind of stuff, if we need it, then there it is.

MS. BROWN: But I don't have that. But I think that you'll see that grade is an issue, whether it's 11 or 13. We do not have the ability to provide you what you would typically find is a survey drawing.

CHAIRPERSON GRIFFIS: RIght.

MS. BROWN: But if you look at the permit application, the burden on an applicant for a permit is to provide the information, and it's absent. Because quite frankly, this issue was never considered as part of this permit.

And we're talking about required parking, which Mr. Sisson has to meet that standard.

Also, we're talking about the very existence of the garage. Because again in 16405 testimony from Mr. Nuttley, which was adopted as a

finding of fact, is that to build a garage you have to have the required access to it. Otherwise, the building of the structure itself is not authorized.

In this case we've indicated that, one, the garage is there and, two, the required access isn't there. So that, again, he fails to meet his off street parking requirement. He also fails to meet the obligation or the requirement in order to be authorized to build the two car garage.

And so, again, with respect to both issues it fails.

CHAIRPERSON GRIFFIS: Okay.

MS. BROWN: And this will help the Board see the width, but also the grade issue.

CHAIRPERSON GRIFFIS: Do you have copies of those, Mr. Brown?

MS. BROWN: I just have one set. They're actually, they're doubles, I believe.

CHAIRPERSON GRIFFIS: Were they given to Mr. Sisson?

MS. BROWN: No.

CHAIRPERSON GRIFFIS: Any of the intervenors?

MS. BROWN: They've been shown to the intervenors.

1 CHAIRPERSON GRIFFIS: Okay. WHy don't you
2 put them in front of Mr. Sisson.
3 Mr. Sisson, do you have any objection to
4 accepting those into the record?
5 MR. SISSON: They certainly are pictures
6 of the alley to the back of my property, yes.
7 CHAIRPERSON GRIFFIS: Okay. Do you want
8 to hold those in front of you or can we put those into
9 the record?
10 MR. SISSON: Put them in the record.
11 CHAIRPERSON GRIFFIS: Okay. When we take
12 them in the record, of course, Mr. Brown, you know you
13 won't get those back. Yes.
14 Okay. Very well. Is that it, Mr. Brown?
15 MS. BROWN: Subject to any inquiries.
16 CHAIRPERSON GRIFFIS: Indeed.
17 Mr. Sisson?
18 MR. SISSON: I would just make a couple of
19 points. I think Mr. Brown mentioned that there are
20 several other people that live on that alleyway, and
21 they all use it for ingress into their property.
22 They've actually used it since 1930. So the fact that
23 it's two way access on an 8 foot road is kind of well
24 established. And the fact that there may be points at
25 which people are trying to go opposite directions down

the same alley has been negotiated since 1930. I don't think -- no, I haven't research the records, but I don't know of any automobile accidents or other problems that are caused.

Again, I would be concerned. I mean, if there's some problem with my having access up and down that alley because it's only 8 feet long -- 8 feet wide, I would again want to know why the other people on that alley that are using it for their access don't have similar problems.

Again, it's been mentioned that Mr. Nuttley had looked at this as a part of the original appeal and I certainly agree with that. And I would remind you that it's Mr. Nuttley's signature that is on this remedial permit, permit number 6 and he had looked at it very carefully. And, again, he indicated that he had no problem with the situation as it was.

CHAIRPERSON GRIFFIS: Okay. I don't think that there's any dispute that this access driveway, private driveway is in existence and has been for some time. Is that correct, that no one contests that fact, Mr. Sisson, that's what you're laying out?

There is a difference, though, Mr. Sisson, do you not agree, that on a construction as a single property changes that may have to look at that access,

that that's what would bring us to looking at that access? So if nothing has changed on the other properties, there would be no reason to be looking at that. Is that your understanding?

MR. SISSON: Well, all the other properties along that line have been improved. And their original one car garages have been expanded to two car garages. So it's essentially the same thing that has happened. I just did the same thing that the others had done.

CHAIRPERSON GRIFFIS: I see. Okay. And, well, I guess more direct and to my point -- well, having an existing condition there are points, and perhaps this is one of them, that would mean that things would have to comply or there's a remedy for those that are not in compliance that are existence. But let's move on from that point.

Ms. Mitten, do you have something?

COMMISSIONER MITTEN: I just had a question for Mr. Sisson.

Have any of the findings of fact that were relevant in the first appeal, the 16405 as it relates to the access for the off street parking, have they changed at all. The easement hasn't gotten any wider, has it?

MR. SISSON: No, it hasn't.

COMMISSIONER MITTEN: Okay. So there's nothing that's changed? Mr. Nuttley looked at the situation in the context of the first permit or the permits that related to the garage initially, looked at the same set of facts in granting this permit is that --

MR. SISSON: That's correct.

COMMISSIONER MITTEN: Okay. Thank you.

MS. BROWN: Well, Ms. Mitten, can I clarify one thing, and I don't know whether you're -- which permits you're talking about because there are six here involved.

COMMISSIONER MITTEN: Right.

MS. BROWN: In the first appeal there were two permits that arguably involved the garage.

COMMISSIONER MITTEN: Right.

MS. BROWN: It turns out that where the permits we're originally talking about physically locating the garage is not where it was built.

COMMISSIONER MITTEN: Okay.

MS. BROWN: I mean, in fact, if I could demonstrate --

COMMISSIONER MITTEN: Well, let me --

MS. BROWN: And I don't think it's

relevant to this, but to be fair the garage -- the original garage was this way. Was a one car garage. The garage as it was built, it was pushed further toward the rear.

COMMISSIONER MITTEN: But the whole issue of the garage turns on access, does it not?

MS. BROWN: Absolutely.

COMMISSIONER MITTEN: Okay. That was the nature of my inquiry.

CHAIRPERSON GRIFFIS: Okay. Any other question of the Board at this time?

Mr. Sisson, anything further? Very well.

Does the intervenors have factual testimony to present regarding the access to the garage issue? No. Very well.

Then we'll open it up to the Board for discussion, direction.

COMMISSIONER MITTEN: Well, Mr. Chairman, I think in keeping with the consistency issue, the matter of the access to the off street parking and whether or not the driveway meets the standard and therefore whether the garage can even exist as a garage was considered in the appeal case 16405. The Board ruled that the permits related to the garage and the access and so forth were not granted properly.

1 Mr. Sisson has stated that none of the
2 facts have changed. And I don't believe that there
3 would be any basis for the Board to rule in anyway
4 that was inconsistent with its original ruling on this
5 matter. And I think in this case I would be inclined
6 to move for the summary -- it's not affirmation. I
7 keep getting the word wrong. Summary affirmation on
8 that basis that we haven't had any representations
9 that any of the facts have changed.
10 CHAIRPERSON GRIFFIS: Is there a second?
11 BOARD MEMBER ETHERLY: Seconded, Mr.
12 Chair.
13 CHAIRPERSON GRIFFIS: Thank you, Mr.
14 Etherly.
15 COMMISSIONER MITTEN: And just to be
16 clear, because all the things related to the garage
17 turn on the issue of the width of the driveway and the
18 ability to meet the off street parking requirements
19 that issues number five and six that were brought on
20 the appeal to me are wedded for that purpose. And so I
21 would include both of those.
22 BOARD MEMBER ETHERLY: And I would second
23 appropriately, Mr. Chair, both Ms. Mitten's motions on
24 five and six.
25 CHAIRPERSON GRIFFIS: Very good.

1 There's a motion before us that's been
2 seconded. That would be to affirm or uphold the
3 appeal granted summarily based on Board issues number
4 five and number six. I'd like to have discussion on
5 that motion. First clarification if needed, but --
6 BOARD MEMBER ZAIDAIN: I agree. I think
7 Ms. Mitten has got it absolutely correct, and since
8 the facts have not changed -- well, I guess the reason
9 why I'm hedging is if we can have a brief discussion
10 between the Board members on the situation, I guess is
11 the word I'm looking for.
12 I mean, it's an interesting provision when
13 you've got an existing driveway that has been
14 grandfathered and it serves a structure and also
15 serves multiple properties that are under the same
16 regulation. And then we've already heard the claim
17 from Mr. Sisson that they've also expanded their
18 garages as well and have eliminated their grandfather
19 safety.
20 So, I guess the real way -- the word is
21 escaping my head, but the rectification of the problem
22 is what?
23 COMMISSIONER MITTEN: Well, I think what
24 you're --
25 BOARD MEMBER ZAIDAIN: Did you follow what

I'm saying?

COMMISSIONER MITTEN: I do. First of all, it hasn't been the issue of what the other people did is not properly before us.

BOARD MEMBER ZAIDAIN: No, I understand that. I understand that.

COMMISSIONER MITTEN: I mean, there's a number of remedies depending on what the disposition of this entire matter is. But, you know, again as was the case with the porch, a variance could be sought to access off street parking through this means. But the regulations are clear and this is a litigated matter--

BOARD MEMBER ZAIDAIN: I agree.

COMMISSIONER MITTEN: -- before this Board.

CHAIRPERSON GRIFFIS: Okay. Further discussion on the motion? Yes, Ms. Miller?

BOARD MEMBER MILLER: I'd also like to note that it appears to me that the Court of Appeals authority upheld this Board's finding with respect to this issue. So, I think that adds another reason for us to be consistent with our past finding.

COMMISSIONER MITTEN: I think that's a great point.

CHAIRPERSON GRIFFIS: Right. Indeed.

1 And so for clarity, if this motion was to
2 pass, it would mean in fact that the Board's finding
3 based on this issue that the remedial or the sixth
4 permit was not correctly reflective of, first of all,
5 the Court of Appeals but also the first appeal before
6 this Board? Is that your understanding, Ms. Mitten?
7 COMMISSIONER MITTEN: Yes.
8 CHAIRPERSON GRIFFIS: Very well. Are
9 there additional points to this?
10 I think that one of the things that Mr.
11 Zaidain, and it is interesting to think about, well
12 what about other folks that may have done or not done.
13 And the other issue is if this was a restructuring of
14 an existing structure, if this was modification or
15 somehow a renovation of the existing structure it's
16 one thing. I think it's an uncontested fact, though,
17 that this is indeed a new structure, a new garage,
18 which then invokes all of the zoning regulations. And
19 I think Ms. Mitten is correct in saying that there are
20 avenues to find relief in that based on existing or
21 based on whatever practical difficulties one might
22 have.
23 That being said, anything further, Ms.
24 Mitten? Anything to talk about the motion or
25 secondary the motion? Very well.

1 And let me just also reiterate for
2 everyone's clarification then issue number five, and
3 Ms. Mitten has made a limited addition or modification
4 to it, or motion that also includes issue number six,
5 Board issue number six which states the building
6 permit approval violates BZA appeal number 16405 and
7 the application access of off street parking
8 restrictions. They are tied together as well as the
9 provision of the parking requirement for that lot. Is
10 that correct?
11 COMMISSIONER MITTEN: WEll, yes. Just to
12 be crystal clear, there's really 3 issues that turn on
13 the driveway. One is that the driveway itself doesn't
14 meet the requirement because regardless of what we
15 think about one way, two way; it's not at least 12
16 feet in width. Then the fact that the access is
17 substandard invalidates the ability to have a garage
18 because you have to have access to the garage. The
19 required access to the garage. And then the fact that
20 the access is substandard precludes the applicant from
21 meeting their off street parking requirement, which
22 they had prior before the demolition of the garage,
23 they had met that standard. They basically put
24 themselves out of compliance and then this will not
25 bring them back in because of the substandard access.

1 So I just want to be clear that all three
2 of those are included.
3 CHAIRPERSON GRIFFIS: Clear? Questions?
4 Deliberations?
5 BOARD MEMBER MILLER: Could you just
6 clarify the connection between this and the off street
7 parking?
8 COMMISSIONER MITTEN: Because the driveway
9 is substandard and the off street parking is on the
10 subjected lot. If you can't get to it, then you can't
11 meet your requirement.
12 BOARD MEMBER MILLER: Okay. Thank you.
13 BOARD MEMBER ZAIDAIN: Yes. It's by the
14 very nature that this driveway is serving the parking
15 requirement that puts into this regulation.
16 CHAIRPERSON GRIFFIS: EVeryone clear?
17 Very well. If there's no further
18 deliberation by the Board, I would ask for all those
19 in favor of the motion to signify by saying aye.
20 ALL: Aye.
21 CHAIRPERSON GRIFFIS: And opposed? Let's
22 record the vote.
23 MS. BAILEY: The vote is recorded as five
24 zero zero. Motion made by Ms. Mitten, seconded by Mr.
25 Etherly. Mr. Griffis, Mr. Zaidain, Ms. Mitten, Mr.

Etherly and Ms. Miller are in support. And the Board has voted for summary affirmation that none of the facts have changed and affirms or upholds the issues of number five and six as stated previously by the Board.

COMMISSIONER MITTEN: That's fine. When the order is written, I would just like to have those three points that I just articulated included just to make that clear.

CHAIRPERSON GRIFFIS: Very good. Thank you, Ms. Bailey. Thank you very much.

Mr. Sisson, yes, you wanted to say something?

MR. SISSON: Mr. Chair, I thought I would have some opportunity to comment on item six before you voted on it. You went from item five to combining item five and six, and then making a vote. So I thought that I would have an opportunity to say more.

But I am curious. To the extent that I don't have off street parking, do my neighbors don't have off street parking as well, and are they out of compliance then? Are we in a situation where we have--

CHAIRPERSON GRIFFIS: It's an interesting issue to bring up, not one we can answer. So, with

that, is there anything else?

MR. SISSON: Because I was under the impression that I had maintained off street parking throughout the process. And I don't know when that -- when I didn't.

CHAIRPERSON GRIFFIS: Okay.

COMMISSIONER MITTEN: Mr. Chairman, I just wanted to make sure we didn't have any loose ends between you were going through the six issues using the six issues that were originally articulated and then we sort of folded in a few more. I just wanted to make sure we had closure on the balance of the issues.

And these are in the appellant's prehearing statement. I believe we're in agreement and I'm just going to summarize this. And if anybody disagrees with me, then we can take it up. I just wanted to make sure we close out the issues.

That the first issue regarding the roof over the front porch is really an enforcement issue at this point. And before we leave this proceeding, Mr. Chairman, with your indulgence, I would like to ask the representative from DCRA to come forward for a question or two before we adjourn.

The item number four, the remedial permit

is inconsistent with the Board's order and application 16521. I believe we dealt with that directly in each case as we took up each of the individual issues and strove with consistency with 16405 and 16521. So i think we've handled that.

Issue number five, the remedial permit violated the nonconforming structure provisions of Section 2001 and therefore requires a variance. I think that that had turned on the appellant's view of the lot occupancy situation and the side yard situation. And I believe after disposing of those that the issue regarding nonconformity has also been dealt with.

And then the sixth issue, and this is the sixth issue in the prehearing statement, the remedial permit violated the front yard requirements of the Wesley Heights Overlay District. I think, again, that relates back to the front porch, which as we said earlier is an enforcement issue.

CHAIRPERSON GRIFFIS: Okay. And that takes care of all the rest.

COMMISSIONER MITTEN: And we dealt head on with all the rest.

CHAIRPERSON GRIFFIS: Right. Indeed.

MS. BROWN: Can I ask the Board in

drafting an order that particularly on the front yard and lot occupancy with the covered porch that it would be appreciated by everybody if the enforcement issue were emphasized. Because I think that's a message that the Board would like to send.

COMMISSIONER MITTEN: Oh, we're going to send it in just a second.

CHAIRPERSON GRIFFIS: Yes. Let's see what we come up with.

COMMISSIONER MITTEN: Well, putting it in writing is a good idea, too.

CHAIRPERSON GRIFFIS: I'm not sure. We'll look at that, we'll take a recommendation to do that. I'm sure -- it may be a separate document that comes from this Board, which we have done in the past, as our ruling are not enforced are complied with that there are letters that are written from the Board to DCRA or the appropriate agency.

Okay. Anything else? In which case, if the DCRA representatives might come up just for a brief moment.

MR. BENNETT: Good afternoon, Mr. Chairman. William Bennett, Corporation Counsel's Office.

We've had the Zoning Administrator on

standby. What I would suggest is if you could give me your question, I could submit the reply in writing or--

CHAIRPERSON GRIFFIS: Okay. The question, though, doesn't go to the Zoning Administrator but rather in terms of the enforcement of previous decision by this Board, which does go to the covered area on the front porch and what action or what kind of time table the District is looking at having that enforced or what steps you're going to take to get to the final outcome.

Ms. Mitten, did you have additional?

COMMISSIONER MITTEN: Well, I guess I wanted to ask a more pointed question, which is why hasn't DCRA enforced this Board's decision in 16405 and when we denied the variance request in 16521 we basically said that the roof over the front porch is illegal. And DCRA hasn't done anything that is apparent to bring this property owner into compliance, and I would like to know why because it makes what we do up here meaningless.

MR. BENNETT: I can convey that to DCRA.

COMMISSIONER MITTEN: And I expect a detailed response.

MS. BROWN: Can I also piggyback on your

1 comment that we now have subject to issuance an order.
2 We have another revoked permit and another
3 noncompliance. And I hate to be, on behalf of the
4 people I represent and the people who live next to
5 this, having this discussion 2? years later.
6 COMMISSIONER MITTEN: I agree.
7 MS. BROWN: That's the Board's cooperation
8 in an expedited order and also encouraging enforcement
9 of its most recent order so that they're all
10 meaningful.
11 COMMISSIONER MITTEN: Well, and it goes
12 beyond that. I mean, we had a decision in the first
13 appeal that dealt directly with the issue about this
14 driveway, and nothing has changed. And basically Mr.
15 Nuttley after saying to the body that he agreed that
16 there was an access problem, that was included in the
17 order, that was quoted by the Court of Appeals, he
18 just ignored all of the decisions of various bodies
19 and issued another permit where the facts were the
20 same.
21 I mean, I don't think they were paying any
22 attention. I don't think they're reading any of our
23 orders. They couldn't possibly be. So it's very
24 distressing. And again, I'd like a detailed response
25 as to why the order in 16405 was ignored and

1 particularly that it relates to this driveway issue,
2 why this remedial permit was granted.
3 CHAIRPERSON GRIFFIS: And, Ms. Mitten, did
4 you want to have that submitted to the Board by a
5 certain date or give a time frame?
6 COMMISSIONER MITTEN: Well, we probably
7 should, although he might ignore a deadline that we
8 might suggest because he's nonresponsive to what this
9 Board does.
10 CHAIRPERSON GRIFFIS: Well, perhaps we
11 should ask and see if that's the case now.
12 What is your understanding in terms of the
13 time frame required for such a simple letter as that?
14 Would it be a week, 3 weeks?
15 MR. BENNETT: I am not going to speak for
16 DCRA.
17 CHAIRPERSON GRIFFIS: Okay. Why don't we
18 expect it in the second week of July then, the week
19 after our public meeting, which I believe is going to
20 be the 7th. So it would --
21 MR. BENNETT: On or before the 7th of
22 July?
23 CHAIRPERSON GRIFFIS: Yes.
24 MR. BENNETT: FIne.
25 MS. WALLS: For this record, I might

1 indicate that Mr. Nuttley, who appeared before this
2 Board initially, is no longer with the agency. There
3 is a new Acting Zoning Administrator.
4 We will check to see why this Board's
5 order has not been complied with.
6 CHAIRPERSON GRIFFIS: Okay.
7 MS. WALLS: But it is my understanding
8 that Mr. Nuttley is no longer there.
9 CHAIRPERSON GRIFFIS: And I don't think
10 what Ms. Mitten is going to is personalities or
11 persons, but the office and the agency. I mean, this
12 is a process of which is standing no matter whose in
13 the position, as long as there is somebody.
14 MS. WALLS: We understand that.
15 CHAIRPERSON GRIFFIS: In which case, it
16 shouldn't change.
17 Very well. So to emphasize why has it not
18 happened and then when is it going to happen.
19 Anything further? Anything else?
20 Everyone clear?
21 Very well.
22 Ms. Bailey, do you have anything else for
23 us this afternoon?
24 MS. BAILEY: No, Mr. Chairman. That's it.
25 CHAIRPERSON GRIFFIS: Indeed.

1 Then I will adjourn the hearing of 10
2 June, 2003.
3 (Whereupon, at 4:55 p.m. the public
4 hearing was adjourned.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25