

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING AND ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

JULY 1, 2003

+ + + + +

The Public Meeting was 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
RUTHANNE G. MILLER Board Member
CURTIS ETHERLY, JR. Board Member
DAVID ZAIDAIN Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

CAROL MITTEN

COMMISSION STAFF PRESENT:

BEVERLEY BAILEY

D.C. OFFICE OF CORPORATION COUNSEL

LORI MONROE, ESQ.

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

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AGENDA ITEM

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1

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

2

9:45 a.m.

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1 CHAIRPERSON GRIFFIS: Let me call to
2 order the 1st of July, 2003, FMBZA final rule
3 making. I would like to introduce very briefly the
4 Board that is present with us today. My name is
5 Geoff Griffis. I am Chairperson.

6 Joining me today is Mr. Etherly and Ms.
7 Miller. Representing on the FMBZA was Mr. Parsons
8 who is not present today, and Ms. Gallagher from
9 NCPC who is also not present. Mr. Zaidain, our
10 NCPC representative sitting on the Board of Zoning
11 Adjustment, is with us and will continue in terms
12 of our morning public meeting and the afternoon
13 hearing.

14 Office of Zoning is represented by Ms.
15 Bailey. Mr. Moy is absent today and Mr. Nyarku is
16 with us. Ms. Monroe representing the Office of
17 Corporation Counsel.

18 Ms. Bailey, if you would not mind
19 giving us an announcement of our first rule making.

20 MS. BAILEY: Members of the Board and
21 to everyone, good morning. And that is Application
22 No. 17020 of RNC 2012 LLC, on behalf of the Embassy
23 of Portugal, pursuant to 11 DCMR 1002, to permit
24 the expansion of a chancery for the Embassy of
25 Portugal in the DC/SP-1 and DC/C-2A Districts at

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1 premises 2012 Massachusetts Avenue, N.W. (Square
2 95, Lot 3).

3 Mr. Chairman, as you indicated, this
4 case was before the Board on June 17th. The Board
5 at that time decided not to disapprove the
6 application. A draft order has been written and it
7 has been circulated to the Board Members and that
8 order is before the Board for adoption at this
9 time.

10 CHAIRPERSON GRIFFIS: Good. Thank you
11 very much. Board Members participating and
12 present, I would ask and move adoption of the final
13 rule making. I would ask for a second on that.

14 MEMBER ETHERLY: Second, Mr. Chair.

15 CHAIRPERSON GRIFFIS: Thank you, Mr.
16 Etherly.

17 First of all, as you know, in the
18 public hearing on this there were several extensive
19 criterion that were discussed and I do believe met
20 and can say that with assurance on the actions that
21 this Board did take. I would like to go through
22 six of them briefly.

23 But first also indicate as Mr. Mlotek
24 had aptly pointed out to us that this Board as it's
25 configured for the FMBZA does have design

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1 jurisdiction and review of applications.

2 I think that it was a consensus, or
3 perhaps at least a very strong feeling and
4 certainly mine, that this Board found that the
5 design as proposed for the addition was quite
6 complementary of the existing building and also the
7 P Street which is actually the rear of the
8 property, the P Street elevation and siting.

9 I think there was great attention to
10 the design and how it would relate to this urban
11 setting and urban site and also relate to this
12 historic structure. First of all, the sidewalk
13 defining elements, that being the wall and fencing
14 I thought was particularly well done as was the
15 addition itself. Clearly this will be a great
16 addition and amenity to that area and to this urban
17 site.

18 As you all note as participating in
19 this, the criterions were met of which were six.
20 Actually, I don't know that I need to run through
21 these but there were three federal and three local.

22 Secretary of State and Office of Planning, of
23 course, recommended favorable action on this.

24 The Historic Preservation Office also
25 had reviewed and approved in concept the provision

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1 of parking was adequate and was also recommended
2 approval from the City of D.C. The federal
3 agencies authorize, of course, to perform the
4 protective services and the Secretary of State
5 determined that the subject property in the area
6 are capable of being adequately protected.

7 The Director of the Office of Planning
8 who was acting on behalf of the Mayor of the
9 District of Columbia determined that favorable
10 action on this application was appropriate and also
11 consistent with the comprehensive plan and the
12 DuPont Circle overlay.

13 Sixth and finally, the Secretary of
14 State determined that the favorable decision on the
15 application would serve the federal interest as the
16 Government of Portugal has consistently been
17 supportive of the United States, their embassy, our
18 embassy in Lisbon, and its diplomatic property
19 interest.

20 With that, I believe I can ask others
21 if they would like to speak to this motion to adopt
22 the final rule making. Any comments? If not, I
23 would ask those in favor of the motion to signify
24 by saying aye.

25 ALL: Aye.

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1 CHAIRPERSON GRIFFIS: And opposed? Ms.
2 Bailey, if you would not mind recording the vote
3 and indicating if we have any proxies on this.

4 MS. BAILEY: Yes, Mr. Chairman. There
5 are two proxies. One is from Ms. Gallagher and the
6 other is from Mr. Parsons so the vote is recorded
7 as 5, 0, 0 to approve the application. Motion made
8 by Mr. Griffis, seconded by Mr. Etherly. Ms.
9 Miller, Mr. Parsons, and Ms. Gallagher are in
10 agreement. That is for issuance of the order that
11 is presently before the Board at this time.

12 CHAIRPERSON GRIFFIS: Good. Thank you
13 very much. In which case that concludes then the
14 actions and organization of the FMBZA. I would
15 simultaneously call the public meeting of the Board
16 of Zoning Adjustments, the District of Columbia for
17 the 1st of July, 2003.

18 Ms. Bailey, if you would so direct us
19 as to what we are first deliberating on this
20 morning.

21 MS. BAILEY: The first item is a
22 motion. That is to lift BZA Order to Stay,
23 Application No. 16370 of Gerald Cassidy on behalf
24 of Jack Milton Fields, pursuant to 11 DCMR 3108.1,
25 for a special exception under Section 203.10 for a

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1 home occupation permit to conduct a
2 consulting/strategic planning business in a CAP/R-4
3 District at premises 434 New Jersey Avenue, S.E.
4 (Square 694, Lot 811).

5 Mr. Chairman, the short and long of it
6 this is a draft order to be sent out for exceptions
7 and the participating Board Members were Mr.
8 Griffis, Mr. Etherly, Ms. Miller, Mr. Zaidain, and
9 Mr. Parsons. Those are the members to decide if
10 the draft order is to be sent out for stay and, if
11 so, when.

12 CHAIRPERSON GRIFFIS: Good. Thank you
13 very much. I would move that the Board of Zoning
14 Adjustments instruct the sending out of the order
15 for exception. I would ask that this motion
16 include a time period for which that would be done.

17 I would indicate that it would be 10 business days
18 or two weeks, Ms. Bailey. Let me take a second on
19 the motion.

20 MEMBER ETHERLY: Second it, Mr. Chair.

21 CHAIRPERSON GRIFFIS: Thank you very
22 much. I'll have people speak to the motion but I
23 would like some clarification from staff if they
24 have any other indication of whether that time is
25 appropriate or whether we have in the past done a

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1 different process with this.

2 MS. BAILEY: That is an appropriate
3 time frame, Mr. Chairman. I would only suggest
4 that we add a couple of days for mailing. Possibly
5 --

6 CHAIRPERSON GRIFFIS: Ten business
7 days, three days for mailing?

8 MS. BAILEY: Right. July 14 would be
9 the date that we'd be asking for comments by.

10 CHAIRPERSON GRIFFIS: Okay.

11 MS. BAILEY: For the parties to file
12 exceptions by I guess I should say.

13 CHAIRPERSON GRIFFIS: Indeed. I have
14 no difficulty with that. Comments?

15 MEMBER ZAIDAIN: Just to make sure I'm
16 clear, the motion as proposed is to grant the
17 motion for lifting of the stay and then release the
18 order?

19 CHAIRPERSON GRIFFIS: Sending the order
20 out for exception.

21 MEMBER ZAIDAIN: Okay.

22 MEMBER MILLER: Do we also have to
23 decide to lift the stay in addition to sending out
24 the order?

25 CHAIRPERSON GRIFFIS: Ms. Monroe.

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1 MS. MONROE: Yes, you should move to
2 lift the stay. Move to send out for exception to
3 be precise.

4 CHAIRPERSON GRIFFIS: We should
5 probably do that first then.

6
7 MEMBER ZAIDAIN: I'll move to lift the
8 stay.

9 CHAIRPERSON GRIFFIS: Why don't we --
10 well, I'll it as consensus to table the first
11 motion which has been seconded and there's a new
12 motion about to be offered.

13 Mr. Zaidain.

14 MEMBER ZAIDAIN: I'll move to grant the
15 motion to lift the stay.

16 MEMBER MILLER: Second.

17 CHAIRPERSON GRIFFIS: Comments? All
18 those in favor signify by saying aye.

19 ALL: Aye.

20 CHAIRPERSON GRIFFIS: And opposed?

21 MS. BAILEY: Do you want that recorded,
22 Mr. Chairman?

23 CHAIRPERSON GRIFFIS: Please. Thank
24 you.

25 MS. BAILEY: Motion was made by Mr.

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1 Zaidain. Ms. Miller seconded. Mr. Griffis, Mr.
2 Etherly are in agreement and that is 4, 0, 1 to
3 lift the stay. A Zoning Commission Member is not
4 present at this time.

5 CHAIRPERSON GRIFFIS: Thank you very
6 much. I take it as a consensus then that we will
7 bring back from the table -- that table is set so
8 nicely
9 -- the first motion which will be send the order
10 out for exception for a time as proposed which
11 would be due 14 July and it has been seconded.
12 Discussion? Not seeing any indication of
13 discussion, I would ask for all those in favor to
14 signify by saying aye.

15 ALL: Aye.

16 CHAIRPERSON GRIFFIS: And opposed?
17 Abstaining? Thank you.

18 MS. BAILEY: That motion is also 4, 0,
19 1. Motion made by Mr. Griffis, seconded by Mr.
20 Etherly. Mr. Zaidain and Ms. Miller are in
21 agreement to send the order, Application No. 16370,
22 out for exceptions.

23 CHAIRPERSON GRIFFIS: Thank you very
24 much, Ms. Bailey.

25 MS. BAILEY: The next item, Mr.

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1 Chairman, is Tudor Place Foundation. That is
2 Application No. 16974 and there is a request for
3 the decision which is scheduled for today to be
4 postponed.

5 CHAIRPERSON GRIFFIS: Is there action
6 required by the Board for this? Well, let's just
7 take it. I would move that we grant a continuance
8 for decision making and take this up on the 5th of
9 August, 2003. I would ask for a second.

10 MEMBER ETHERLY: Second it, Mr. Chair.

11 CHAIRPERSON GRIFFIS: Thank you, Mr.
12 Etherly.

13 The letter as you see in the file is
14 obviously indicating on the difficulty -- well, the
15 need for additional time for submission of
16 information that the Board had requested. I think
17 it is valuable and pertinent and see it worth
18 waiting for. I have no difficulty in supporting
19 the motion I have just made. Discussion? Any
20 comments? Very well. I would ask for all those in
21 favor of postponing this to August 5th signify by
22 saying aye.

23 ALL: Aye.

24 CHAIRPERSON GRIFFIS: And opposed? Oh,
25 I'm sorry. Ms. Mitten, you're on that case. Is

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1 that correct? I'm terribly sorry. That did slip
2 my mind. Ms. Mitten, are you clear on the motion?

3 COMMISSIONER MITTEN: Yes.

4 CHAIRPERSON GRIFFIS: Okay. Excellent.
5 Any opposed? Abstaining? Very well.

6 MEMBER MILLER: I'm not voting on this
7 case.

8 CHAIRPERSON GRIFFIS: Thank goodness
9 Ms. Mitten was quick enough to get out here and
10 participate with us. Thank you very much. Then we
11 can record the vote on that.

12 MS. BAILEY: The vote is recorded as 4,
13 0, 1. Motion made by Mr. Griffis, seconded by Mr.
14 Etherly. Mr. Zaidain and Ms. Mitten in support,
15 Ms. Miller not voting, not participating. That is
16 to reschedule the decision on Tudor Place
17 Application 16974 until August 5, 2003.

18 The next item, Mr. Chairman, is an
19 appeal for decision and that is Application No.
20 16947 of Kuri Brothers, Inc., pursuant to 11 DCMR,
21 3100 and 3101, from the administrative decision of
22 J. Gregory Love, Administrator, Building and Land
23 Regulation Administration, Department of Consumer
24 and Regulatory Affairs, for allegedly illegally
25 revoking the issuance of a certificate of occupancy

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1 (#B00181657) for an automobile service center in
2 the C-3-A District at premises 4221 Connecticut
3 Avenue, N.W. (Square 2051, Lot 5).

4 There were various hearing dates, Mr.
5 Chairman, namely January 28th, April 8th, and May
6 13th, all of this year 2003. The Board Members
7 participating were the Chairperson Mr. Griffis, Mr.
8 Etherly, Ms. Miller, Mr. Zaidain, and Ms. Mitten.

9 At the last hearing, Mr. Chairman,
10 various items were requested. They all came into
11 the record and timely filed and that decision is
12 before the Board at this time.

13 CHAIRPERSON GRIFFIS: Good. Thank you
14 very much.

15 Board Members, I do know that we have
16 reviewed the entire record and the new submissions
17 and I would like to open this up for discussion and
18 action by the Board. First of all, there were
19 several things that occurred during the hearing
20 which took some length and argument. It was
21 decided by this Board to hold a de novo hearing of
22 which I still stand behind as appropriate and
23 accurate as a proceeding in this appeal.

24 Secondly, there was some questions
25 brought up by the appellant in terms of whether the

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1 appellant actually had the burden of proof as it
2 had brought this appeal in the case. Again, I
3 firmly stand by our ruling that Mr. Damari
4 representing the appeal and the Kuri Brothers did,
5 in fact, have the burden of proof in our
6 proceedings.

7 There was another small issue that I
8 think we ought to address on the record, and that
9 is that in Mr. Damari's submission for the
10 appellant there is quite extensive discussion on
11 whether it was appropriately before the BZA and
12 that stems from the ALJ's action of the past.

13 I believe in looking at the record and
14 understanding what was presented to us in the
15 evidence before us that Mr. Damari representing the
16 appellant actually removed what he had
17 characterized as the taint -- or one might
18 characterize as the taint of the incorrect
19 citation. Forgive me, it's not the ALJ but the
20 DCRA, in its announcement.

21 By bringing it to the Board of Zoning
22 Adjustment knowing full well that, in fact, that
23 was the correct body as he brought he and was
24 asking for action by this Board and we did, in
25 fact, pursue that and that's why we are where we

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1 are here today.

2 I will open it up and then I will come
3 back to some of the pertinent facts that I would
4 like to have covered if we don't cover it in the
5 entire discussion before us. Let me take comments
6 from others if they are so inclined.

7 COMMISSIONER MITTEN: Well, just to
8 follow up, Mr. Chairman, on your comments about
9 whether it was appropriate that we a de novo
10 appeal, the fact of the matter is that as it
11 related to the revocation of the certificate of
12 occupancy, there was no record before the ALJ to
13 review.

14 There had been other civil infraction
15 cases that led up to the revocation but the
16 revocation itself was appealed directly to the
17 Board of Zoning Adjustment. There was not an
18 administrative hearing.

19 We could have reviewed a record in that
20 case but I think we gave the appellant ample
21 opportunity when there appeared to be some
22 confusion about the nature of the case that he was
23 to present and we, in fact, continued the
24 proceeding after giving him notice that we would
25 hear a de novo appeal to give him ample time to

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1 prepare his case. I think first, as you said,
2 it's clear that it was appropriate that we have a
3 de novo hearing and, secondly, that the Board was
4 very mindful of not creating any kind of unfairness
5 due to any kind of improper notice on the part of
6 DCRA and their citation, in the letter of
7 revocation, or any -- just trying to be fair to all
8 the parties when we continued the case and put
9 everyone on notice that we would have a de novo
10 appeal. I don't think there is any basis for Mr.
11 Damari's arguments on those points.

12 CHAIRPERSON GRIFFIS: Good. Let me add
13 just one thing as an interjection to that because
14 it speaks to it. It was one of the complications
15 of this appeal and I'm not sure there was clear
16 understanding by all the participants but we had
17 looked at this and the appeal being governed by the
18 Zoning Act and not by the Civil Infractions Law.

19 There was a lot of cross information
20 regarding that. I had thought that we had brought
21 clarity. I do believe that we did so I would stand
22 fairly strongly that we can continue with this
23 today.

24 Okay. Other issues?

25 MEMBER ETHERLY: Mr. Chairman, I would

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1 agree wholeheartedly with the comments of my
2 colleague Ms. Mitten and the Chair's remarks. It
3 is definitely my hope that our decision making will
4 be much, much shorter than the actual length of
5 time that it has taken to hear this case.

6 CHAIRPERSON GRIFFIS: We commonly like
7 to go see the fireworks on the 4th, don't we?

8 MEMBER ETHERLY: That is correct, Mr.
9 Chairman. But, in all seriousness, quite frankly,
10 I think the proposed findings of fact and
11 conclusions, while they were submitted by the
12 appellees in this matter, are very much right on
13 target.

14 There were a number of strategic
15 decisions made by the appellant as it related to
16 the prosecution of this appeal which I think
17 probably did not serve the appellant well because,
18 quite frankly, the burden rested with the appellant
19 and I don't think that burden was satisfied in this
20 particular instance.

21 I think the regulations in this case
22 are very, very clear as it relates to the issue of
23 automotive repair garage and as it relates to the
24 issue or lack thereof of automotive service center.

25 I think very clearly, and just quite frankly here,

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1 a special exception would be needed for this
2 establishment to operate.

3 A special exception, of course, has not
4 been granted and this establishment has operated
5 quite some time under a clear cloud of question and
6 concern both from surrounding neighbors and
7 residents. Just with an eye towards brevity, Mr.
8 Chairman, I am more than comfortable moving forward
9 and would be prepared to make a motion at the
10 appropriate time, Mr. Chairman.

11 CHAIRPERSON GRIFFIS: We can take a
12 motion and have a discussion on the motion.

13 MEMBER ETHERLY: Mr. Chair, it would be
14 my motion to deny the appeal of Kuri Brothers,
15 Inc., pursuant to 11 DCMR 3100 and 3101 from the
16 administrative decision of J. Gregory Love,
17 Department of Consumer Regulatory Affairs, for
18 allegedly illegally revoking the issuance of a
19 certificate of occupancy for an automobile service
20 center in the C-3-A District of premises 4221
21 Connecticut Avenue, Square 2051, Lot 5, and would
22 invite a second.

23 MEMBER ZAIDAIN: I'll second that, Mr.
24 Chair.

25 CHAIRPERSON GRIFFIS: Thank you, Mr.

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1 Zaidain.

2 Mr. Etherly, continued discussion?

3 MEMBER ETHERLY: Once again, Mr.
4 Chairman, with the proposed findings of fact and
5 conclusions of law that are offered by the
6 appellees, I think the argument has been presented
7 very clearly and very cogently. This facility, in
8 my opinion, is indeed a repair garage.

9 We took, I think, very clear, very
10 incisive testimony from a number of personnel at
11 DCRA who conducted personal site visits, observed
12 the activities that were conducted on site
13 including clear repair work of a very substantial
14 nature at the site. I'll leave it there and allow
15 others to speak because I think those facts speak
16 for themselves.

17 CHAIRPERSON GRIFFIS: Further
18 deliberation?

19 MEMBER ZAIDAIN: Just to chime in
20 really quick, the only thing that was really
21 proffered by the appellant and this was the
22 findings of fact. I found in reviewing that there
23 was no arguments as to why or how the C of O was
24 revoked improperly. Furthermore, I even
25 felt that the responses to the testimony proffered

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1 by the appellees was not rebutted successfully.
2 There was no substantial argument made as to why
3 the people -- I can't recall the names off the top
4 of my head but the people from DCRA came and
5 testified.

6 They testified as to what evidence that
7 they spoke or they saw and reported back to DCRA.
8 There was no testimony given as to them being
9 zoning experts or whatever. They were here just to
10 report facts and those facts were to be deliberated
11 by us as to what was actually happening at this
12 garage.

13 I think that was a substantial amount
14 of testimony that we could use. There was no
15 argument in the findings of fact proffered by the
16 appellant that would support the appeal.

17 CHAIRPERSON GRIFFIS: Good. The
18 appellant characterizes Mr. Hook's testimony as on
19 page 45, item 43, "Muddled, self-serving,
20 unsubstantiated, and inconsistent testimony. It is
21 clear that with all due respect to Mr. Hook he
22 simply had no idea whatsoever as to what types of
23 repair activities were permitted or prohibited at
24 an automobile service center."

25 Mr. Zaidain, I read that because I take

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1 issue with that characterization of Mr. Hook's
2 testimony and I concur with your thoughts that when
3 Mr. Hook testified it was not to give analysis,
4 designation. Mr. Hook clearly said on the record
5 that he was not the one that initiated the action
6 to revoke the C of O but was the inspector of some
7 experience and length of time.

8 In fact, entered hard evidence,
9 personal, photographic, and also work orders that
10 substantiated his testimony the day of the hearing
11 that, in fact, began to substantiate what was
12 occurring on the site which did lead to the
13 appropriate action of the revocation of the C of O.
14 Others?

15 MEMBER ZAIDAIN: I think just to speak
16 to that point even though it was not on the
17 appellee's -- it was not the appellee's burden of
18 proof to make. I think even with the amount of
19 evidence they gave us, that was not rebutted at
20 all. I think it was substantial for us to not
21 uphold the appeal.

22 CHAIRPERSON GRIFFIS: Good. Ms.
23 Mitten.

24 COMMISSIONER MITTEN: I agree with
25 everything that's been said and I just wanted to

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1 follow on because I think we should address the
2 appellant's argument that notwithstanding
3 everything else, DCRA is precluded from revoking
4 the certificate of occupancy on the grounds of
5 laches.

6 CHAIRPERSON GRIFFIS: And estoppel if
7 you want to take that up.

8 COMMISSIONER MITTEN: Okay. Well, the
9 fact is that we did have evidence. We had
10 testimony of personal observations. We had the
11 photographs that you mentioned as well as the work
12 orders about what was going on on the property.

13 The appellant did not make any effort
14 to establish that, in fact, this is the use that
15 had been going on for a lengthy period of time and
16 that, in fact, DCRA knew that an issued the
17 certificate of occupancy on that basis. There was
18 absolutely nothing in the record. I don't find the
19 arguments on laches and estoppel compelling because
20 of that. There was no evidence to support those
21 claims.

22 The evidence all supported that the
23 certificate of occupancy was revoked for precisely
24 the reason that DCRA cited in their letter which
25 was this establishment was operating outside the

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1 certificate of occupancy doing something in that
2 zone that is not permitted as a matter of right.

3 CHAIRPERSON GRIFFIS: Excellent. And I
4 think that looking to, as Mr. Etherly has pointed
5 us, the submission by the intervenor as submitted
6 and represented by John Patrick Brown talking about
7 the estoppel, there is no basis for an estoppel
8 defense. I find that also of merit. Frankly any
9 reliance on the C of O as you have talked to would
10 not have been in good faith. The submission talked
11 about 13 years that they were put on actual and
12 repeated notice. The estoppel also falls short in
13 that realm.

14 Others? Ms. Miller.

15 MEMBER MILLER: I just want to chime in
16 on the estoppel issue. It's very limited when it's
17 granted. It's usually when equities are very
18 strongly in favor of the party invoking it.
19 Because of Zoning Regs to protect the public
20 health, it's another reason that it's rarely
21 invoked. In this case we are talking about public
22 health because we're talking about Zoning
23 Regulations which prohibit this type of business
24 because of the fumes and things like that that
25 affect the residences near by. In this case I

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1 would think estoppel would be quite inappropriate
2 and laches.

3 CHAIRPERSON GRIFFIS: Thank you.
4 Others? Additional information? Deliberation?
5 Then we have a motion on the table that has been
6 seconded to deny the appeal. I would ask all those
7 in favor of the motion signify by saying aye.

8 ALL: Aye.

9 CHAIRPERSON GRIFFIS: And opposed?
10 Abstain?

11 MS. BAILEY: The vote is recorded as 5,
12 0, 0 to deny Appeal No. 16947 of Kuri Brothers.
13 Motion made by Mr. Etherly, seconded by Mr.
14 Zaidain. Mr. Griffis, Ms. Miller, and Ms. Mitten
15 are in agreement.

16 Mr. Chairman, if I could just make one
17 small correction. When I initially read the case I
18 indicated that there were outstanding items when
19 the Board last heard this case. In fact, the only
20 outstanding item were the findings of fact and
21 conclusions of law two of whom were filed in a
22 timely manner and one was not.

23 CHAIRPERSON GRIFFIS: Okay. Thank you.
24 You bring up an interesting point, too, because it
25 has come to the Board's attention that there were

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1 additional submissions. I believe they were letter
2 form. I think there may have been two, perhaps
3 more. By having not addressed them I thought it
4 should be made clear that they were not accepted
5 into the record. The Board did not receive a
6 review of those. Thank you very much. I think we
7 can move on.

8 MS. BAILEY: The next case is
9 Application No. 17014 of EastBanc, Inc., pursuant
10 to 11 DCMR 3103.2, for a variance from the building
11 height requirements under Section 770, a variance
12 from the floor area ratio requirement under Section
13 771, and a variance from the residential recreation
14 space requirement under Section 773, to allow the
15 construction of a mixed-use (residential/retail)
16 building in the C-2-C District at premises 2110 and
17 2150 M Street, N.W. (Square 71, Lots 11, 19, 21,
18 23, 26-28, 34, 801-806, 812, 816 and 817.)

19 This application was heard by the Board
20 on June 10th of this year, 2003. The participating
21 Board Members were Mr. Griffis, Mr. Etherly, Ms.
22 Miller, Mr. Zaidain, and Ms. Mitten.

23 Several items were requested by June
24 23, 2003. Those items were filed in the record,
25 Mr. Chairman, and the decision is before the Board

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1 at this time.

2 CHAIRPERSON GRIFFIS: Thank you very
3 much, Ms. Bailey. That is true and we have
4 received and reviewed extensively the submissions.

5 I think it actually brings clear all of the issues
6 that we were looking for representation and a
7 better understanding.

8 Most importantly, of course, is the
9 adjacent Exxon station canopy and how it impacts
10 and affects the property. What I find of great
11 interest and importance in terms of substantiating
12 this case is the comparison that was done in terms
13 of an identical site area in rectangular form and
14 how it might be laid out as opposed to the very
15 unique shape of the site that is before us now and
16 the impact, both in plan and in section, of the
17 canopy to the adjacent structure.

18 It is clear, and as testified and I
19 think as been substantiated additionally in these
20 submissions, that there are code required setbacks
21 based on the use and the adjacency of use. Also in
22 terms of the fenestration and the opening,
23 basically the glass and percentage of glass that
24 would be impacted based on the adjacency of this
25 canopy.

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1 I think that although this was a
2 complicated case in terms of understanding all of
3 the issues at hand, I think it is a very strong
4 case that should be supported in its variance
5 release. There is, and has been as stated in the
6 submissions, a confluence of unique aspects to
7 this.

8 One, the shape which I think has been
9 clearly and strongly evidenced to show the
10 difficulties in laying usable, workable,
11 residential construction and building, and
12 specifically of this type of product that is being
13 proposed. The remediation that it is having to
14 take place based on the Exxon site, the old
15 previous Exxon site and the fire and whatever is
16 underground with that.

17 The sewer line, of course, that runs
18 through the property that limits the availability
19 of area of development, all of which come through
20 and I think strongly substantiate and have
21 evidenced the practical difficulties in fulfilling
22 the development on this site under the matter-of-
23 right possibilities.

24 There is additional submission and
25 discussion on the PUD which I didn't think was

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1 actually required, although it was fairly extensive
2 and exhaustive. It was interesting to be pointed
3 out to, and I hope that puts to rest the discussion
4 of that.

5 It's interesting that this, I think,
6 when thinking about the PUD does speak to offering
7 high quality development and, in fact, amenities to
8 the site. I believe that this is appropriately and
9 properly before this Board for the variances that
10 have been listed and enumerated.

11 I will let others speak to that and
12 return with my comments on it.

13 COMMISSIONER MITTEN: Mr. Chairman, I
14 would like to agree with everything you said up to
15 a point. You spoke to the configuration of the
16 site and so forth and some of the practical
17 difficulty that's created because of that.

18 When we get to the point where we vote,
19 I would like to ask again, as I did at the
20 conclusion of the hearing, that we vote on the
21 variances separately. I would like to vote on the
22 height. There's actually two height variances.
23 There's two different aspects to the height
24 variance.

25 I would like to vote those separately

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1 because I'm not in support of one of them. You
2 spoke about the fact of the relationship between
3 the Exxon canopy and the first floor of the
4 building and I believe that there is an unusual
5 condition that gives rise to a practical difficulty
6 in that case and I would support the 20-foot height
7 variance on that basis.

8 Then the height variance that the
9 applicant is seeking to give additional height to
10 the upper floors there are repeated representations
11 in the submission that the project would become
12 infeasible without that.

13 First of all, I would encourage my
14 colleague not to accept simply statements from
15 applicants regarding the feasibility, or lack
16 thereof, of a particular project if a variance is
17 not granted.

18 I think there should be much more
19 substantial showing in the record to establish
20 that, in fact, not granting the variance would
21 create -- would make the project infeasible. I
22 would also say that I think that the feasibility
23 argument turns on what this applicant wants to
24 build.

25 They want to build a very high-end

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1 product. It's an absolutely beautiful building and
2 I understand that having this additional height is
3 consistent with their vision for the development.

4 But I don't think that they could argue
5 that the development -- that any reasonable
6 development of the site would become infeasible to
7 the maximum density with regular more typical
8 ceiling heights because we have them going on
9 throughout the city.

10 In fact, in the downtown development
11 district we had developers coming to us asking us
12 to waive the FAR restrictions so they could cram
13 even more floors into the existing zoning envelope.

14 Those were people that were saying, "Look, what we
15 want to do is have the ceiling heights at the
16 lowest level required by building code because that
17 can work, too."

18 CHAIRPERSON GRIFFIS: That's commercial
19 development. Is that correct?

20 COMMISSIONER MITTEN: No, it's not.
21 It's residential development.

22 CHAIRPERSON GRIFFIS: I see.

23 COMMISSIONER MITTEN: I guess I just
24 don't find this argument compelling so I can't
25 support the height variance of the additional 10

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1 feet to give the upper floors of the building these
2 greater ceiling heights.

3 MEMBER ZAIDAIN: I have a question of
4 clarification.

5 CHAIRPERSON GRIFFIS: Yes, Mr. Zaidain.
6 Maybe I'm confused.

7 MEMBER ZAIDAIN: Ms. Mitten, you're
8 referring to two aspects of the height variance or
9 two separate areas of relief for height?

10 COMMISSIONER MITTEN: They are here for
11 a height variance that is a total of 20 feet. Ten
12 feet of that is related to creating a higher first
13 floor which is directly related to the canopy.

14 MEMBER ZAIDAIN: To the canopy. Right.

15 COMMISSIONER MITTEN: And then there's
16 the additional 10 feet that would be spread over
17 the upper floors of the building.

18 MEMBER ZAIDAIN: Okay.

19 CHAIRPERSON GRIFFIS: Ms. Miller?

20 MEMBER MILLER: Ms. Mitten, I don't
21 understand why it bothers you that there would be
22 10 extra feet in height because we heard evidence
23 that the proposed height is compatible with the
24 buildings in the immediate surrounding area so what
25 is it that's the problem with the height?

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1 MEMBER MILLER: Well, the problem is
2 that they haven't met their burden of proof for
3 granting the variance. It's not a question of --
4 my basis for having an objection is not that it
5 would be incompatible with the surrounding
6 development but given this zone and given their
7 choice of trying to make a feasibility argument,
8 they have not put evidence into the record other
9 than statements that the project would be
10 infeasible and that's only this project. They
11 haven't even explored what kind of project would be
12 feasible to the maximum density. I suspect it is
13 just a scaled-back, less high-end residential
14 project.

15 CHAIRPERSON GRIFFIS: Okay.

16 MEMBER ZAIDAIN: Let me --

17 CHAIRPERSON GRIFFIS: Actually, Mr.
18 Zaidain, let me address this issue because I think
19 we -- I don't want us to continue down this road
20 because, first of all, I think this Board always
21 and consistently looked and cautioned in terms of
22 finding alternatives to what we see and what's in
23 front of us.

24 When one talks about the infeasibility,
25 I think it was, in fact, producing this product and

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1 this design. I did not go into the depth of asking
2 what the economics were or what made it happen but
3 that it was presented and that is the fact and
4 that's what we need to review.

5 I do not believe that this application
6 in any way requires or necessitates this Board to
7 redesign it or, in fact, to delve into why it was
8 designed or what it was designed.

9 I think what's before us by the
10 testimony given by the applicant and their
11 witnesses is the fact that the luxury units and the
12 product that is being proposed here and the design
13 that is being proposed here is required, that 10-
14 foot height.

15 Now, it is not just that they want to
16 and this is just what they want to design. Now we
17 need to decide whether their wants and desires are
18 something that we should agree with or not agree
19 with.

20 I think we move far beyond that. I
21 think we look at the fact of the matter that the
22 basis and underlying idea of zoning is to regulate
23 and create mass but not necessarily to encourage
24 identical buildings that fit within that mass.

25 Specifically to this case when we have

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1 a very unique site and unique shape and location
2 one would look to not seeing something that would
3 fit just specifically into the matter-of-right
4 massing of the zoning based on its uniqueness and
5 practical difficulties.

6 My point being, and we've used the
7 analogy before of toothpaste tube or, I think more
8 aptly, balloon. As we see things and the practical
9 difficulties that relate to the development area,
10 other aspects of the zoning that is regulated is
11 squished and squeezed and, therefore, is required
12 to often change or come in for relief.

13 Now, my point being and directly
14 stated, if these things start to align as the FAR
15 is very close to coming into what is matter-of-
16 right, then clearly if the area is unavailable or
17 there are areas that need to be set up, we would
18 look to that as it arises out. Meaning as it's
19 pushed and squeezed what happens?

20 Now, I think it is, in fact, a very
21 strong case for the height and I think they are
22 linked. I don't think that they are necessarily
23 able to be separated or carved out or whether we
24 approve four feet or six feet. I think we have on
25 face what was being asked, the design that's being

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1 asked, and the case that's been presented and I do
2 find it persuasive.

3 MEMBER ZAIDAIN: I guess I do have a
4 question for Ms. Mitten just to kind of make sure I
5 understand her argument. This isn't a typical case
6 for review because you are almost kind of -- your
7 attention is almost taken away from the issues at
8 hand because of the superior design of the
9 building. I don't think anybody is going to deny
10 that.

11 But getting into it, there are
12 significant constraints on the sites that I think
13 definitely support the FAR and the residential rec.
14 space variances and the height is something to
15 struggle with because you have this existing canopy
16 that's there.

17 It's an existing condition and that
18 makes it unique. How does that affect what they
19 are looking for? I guess my question to Ms. Mitten
20 is do you feel that the canopy is a hardship so to
21 speak? Is it a unique situation that causes this
22 practical difficulty? But is it your position that
23 they may be taking it a little too far to get the
24 10-foot height fullers?

25 COMMISSIONER MITTEN: Right. I mean, I

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1 see that there are two distinctly different
2 exceptional circumstances, if you will.

3 MEMBER ZAIDAIN: Okay.

4 COMMISSIONER MITTEN: If you look at --
5 and the idea is, just to be clear, we are supposed
6 to grant relief because the exceptional
7 circumstance gives rise to a specific practical
8 difficulty and we grant the relief to relieve that
9 specific practical difficulty. Okay?

10 MEMBER ZAIDAIN: Okay. The canopy does
11 that to some extent.

12 COMMISSIONER MITTEN: As relates to the
13 first floor height and 10 feet, the additional 10
14 feet that they are seeking and I support that, but
15 I don't find that the balance of their argument
16 applies to the additional 10 feet that they would
17 seek to distribute among the upper floors to give
18 them additional ceiling height.

19 CHAIRPERSON GRIFFIS: I have some
20 problem with that because that's what's being
21 offered to us. This is the design and this is the
22 product. It has made its burden to increase the
23 height in order to lift up above the canopy.
24 Either it makes it or it doesn't. I don't think
25 that we walk inside the building and say, "But, you

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1 know what? The finishes in here could be better so
2 that you could save money," or change anything that
3 I don't believe necessitates in this fashion.

4 MEMBER ZAIDAIN: I think that's a good
5 point. That's what we're struggling with. It's
6 almost -- I mean, how much do we get into the
7 design of it? If the unique situation is there and
8 this is a product that they are looking to build
9 there, well, what is the tension between the
10 overall design of the project and the role that the
11 canopy and the unique condition plays.

12 CHAIRPERSON GRIFFIS: The submission
13 talks about, our latest submission, even if the
14 ceiling height -- let's pick a ceiling height which
15 may not be feasible as we may not understand what
16 is necessitated. Even if it was dropped, it still
17 would not come under --

18 MEMBER ZAIDAIN: What is typical for
19 residential, eight?

20 CHAIRPERSON GRIFFIS: What's typical?
21 I mean, what we are being told and the testimony
22 before us is that what is required for the luxury
23 units that they are providing of which there are
24 other examples of is the 10 feet.

25 COMMISSIONER MITTEN: If I could just

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1 address some issues that you raise, Mr. Chairman,
2 when you were speaking earlier and follow-on your
3 comments here. I think one of the reasons why we
4 focus on the applicant's project and then at least
5 give some thought to alternative configurations is
6 because we need to understand, particularly in a
7 case like this, whether the hardship that's created
8 is self-created. The reason why the feasibility is
9 a question in this case is because the applicant
10 wants to build a certain type of product.

11 CHAIRPERSON GRIFFIS: But you have to
12 establish a threshold for this notion of self-
13 created hardship. If you propose a development and
14 it requires zoning relief, you haven't self-created
15 just because that's what you are proposing to
16 develop. I think you have to look -- I think
17 there's a higher threshold for self-created
18 hardship.

19 I think it's appropriate actually to
20 continue deliberation under a motion. I think we
21 can get further substantive discussion going. I
22 would move to approve application 17014 of EastBanc
23 for the variance from the building height
24 requirements under 770, the variance from the floor
25 area ratio requirement 771.

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1 Also the variance from the residential
2 recreation space, which we should also address,
3 requirement under 773 which would allow the
4 construction of a mixed use residential and retail
5 building in the C-2-C district at the premises 2110
6 and 2150 M Street, N.W. which is Square 71 and a
7 whole lot of lots in there. I would ask for a
8 second.

9 MS. MILLER: Second.

10 CHAIRPERSON GRIFFIS: Thank you very
11 much, Ms. Miller.

12 Let's continue the deliberation. Let's
13 talk a bit about the residential recreation space
14 of which I think the record is very complete on
15 that. I just want to highlight a few things.
16 First of all, what was stated.

17 It was clear that it has exhausted the
18 amount of square footage that could be put into the
19 residential recreation space and some of the
20 importance of looking at whether it would actually
21 cause any sort of difficulty in the surrounding and
22 the available amenities that would provide some
23 recreational space, of which there is substantial
24 testimony in the record of both exterior and
25 interior, some affordable and some not as

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1 affordable in the area, but opportunities are
2 certainly there.

3 Okay. Other issues?

4 COMMISSIONER MITTEN: Mr. Chairman, I
5 would like to move an amendment to your motion
6 which would be to delete from your motion the
7 secondary aspect of the height variance that would
8 grant the additional 10 feet that would be
9 distributed among the upper floors.

10 MS. MONROE: Mr. Chair, can I weigh in
11 a second with that? I don't think you can do that.

12 I mean, a variance is from a regulation and the
13 regulation that this height variance is from is
14 770.1. There isn't a separate regulation saying
15 that the first floor level, residential floor
16 level, must be at a certain height and, therefore,
17 you are going to grant that variance but not grant
18 the variance for the height of the total building.

19 There's only one regulation that you
20 are dealing with here and I think either you grant
21 the variance or you don't. You can't grant half a
22 variance and not grant the other half. I don't
23 think it would work.

24 COMMISSIONER MITTEN: I have to
25 respectfully disagree with you on that. As I

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1 understand it, the applicant will be bound to build
2 the project as it is approved by the Board. There
3 are two aspects to the project that relate to
4 height.

5 I don't see why we can't separate those
6 two aspects and say if the Board agrees that they
7 can build the additional height on the first floor
8 to an overall height of the building of 100 feet
9 rather than building everything as proposed to an
10 overall height of 100 feet.

11 MS. MONROE: But what you're doing is
12 just granting the height variance to 100 feet.
13 You're not splitting it and granting half the
14 variance. You're just granting the total variance
15 but limiting it to 100 as opposed to 110. You can
16 do that.

17 COMMISSIONER MITTEN: But to me the
18 burden of proof to get to 100 is different if
19 you're basing it on the additional 10 feet for the
20 first floor versus basing it on an additional 10
21 feet that is going to be distributed throughout the
22 building.

23 MS. MONROE: But you think they've
24 carried that burden of proof for the additional 10
25 than just vote for 100 as opposed to 110.

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1 COMMISSIONER MITTEN: All right. Thank
2 you.

3 MS. MONROE: That's the way I'd do it.

4 COMMISSIONER MITTEN: Then I would
5 change my amendment to say that we would approve
6 the variance for height to a limit of 100 feet.

7 CHAIRPERSON GRIFFIS: Good. There is a
8 motion before the Board. Is there a second? Very
9 well. The motion is not carried for lack of a
10 second.

11 MEMBER ZAIDAIN: I have an alternative
12 solution. In all fairness to Ms. Mitten, obviously
13 she has some issues with that aspect of the relief
14 as it has been presented to us. Why don't we
15 separate out the height issue and have a separate
16 vote on that.

17 CHAIRPERSON GRIFFIS: We've had
18 extensive discussions on that and the difficulties
19 of doing that. What I would like to do is stand by
20 the motion as it is. I think everyone has the
21 availability of not voting for the motion.

22 MEMBER ZAIDAIN: But I think, again, in
23 all fairness I think the height variance is one of
24 real issue obviously to one of the members of the
25 Board and I think it would be unfair --

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1 CHAIRPERSON GRIFFIS: And there has
2 been ample time to deliberate on that. That's what
3 the point of this is.

4 COMMISSIONER MITTEN: Let me just put
5 Mr. Zaidain at ease. The Chairman pursued a
6 strategy of putting this forward. I pursued a
7 strategy of trying to get an amendment. I failed
8 and I'm happy to go forward. That's where it comes
9 down.

10 MEMBER ZAIDAIN: Fair enough.

11 CHAIRPERSON GRIFFIS: Further
12 deliberation on the motion? Very well. If there
13 is nothing further, discussion or deliberation, I
14 would ask for all those in favor of the motion
15 signify by saying aye.

16 ALL: Aye.

17 CHAIRPERSON GRIFFIS: And opposed?
18 Very well. We can record the vote.

19 MS. BAILEY: Ms. Mitten, you voted for
20 the motion?

21 COMMISSIONER MITTEN: Yes, I did.

22 MS. BAILEY: Thank you. The motion is
23 5, 0, 0, to approve Application No. 17014. Motion
24 made by Mr. Griffis, seconded by Ms. Miller, Mr.
25 Etherly, Mr. Zaidain, and Ms. Mitten are in

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1 support.

2 CHAIRPERSON GRIFFIS: We're done,
3 right?

4 MS. BAILEY: Almost, Mr. Chairman.
5 Almost.

6 CHAIRPERSON GRIFFIS: Okay. What's
7 next?

8 MS. BAILEY: The next one is
9 Application No. 17015 of Evangel Missionary Baptist
10 Church. At the hearing, Mr. Chairman, on June 3rd
11 several items were requested. We have a letter
12 from the applicant's architect requesting
13 additional time to provide those items, or at least
14 one of them.

15 CHAIRPERSON GRIFFIS: Very well. We
16 have one lacking piece of evidence is what you've
17 said, Ms. Bailey. Is that correct?

18 MS. BAILEY: Yes, Mr. Chairman.

19 CHAIRPERSON GRIFFIS: Thank you very
20 much. I believe that it would be appropriate to
21 wait for that information. Am I correct in
22 understanding that it may be possibly submitted by
23 the 5th of August? I mean, for us to decide this
24 on the 5th of August?

25 MS. BAILEY: Absolutely, Mr. Chairman.

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1 That's my understanding as well. Can we
2 reschedule it for that date?

3 CHAIRPERSON GRIFFIS: I think that
4 would be appropriate unless there's any objection
5 from any Board Members. Very well. I don't have
6 any objection to that, Board Members. We'll set it
7 for the 5th of August decision.

8 MS. BAILEY: Thank you. The last case,
9 Mr. Chairman, of this morning is a motion and is to
10 reconsider a rehear Application No. 16896 of Randle
11 Highlands Manor, LP, pursuant to 11 DCMR 3103.2,
12 for a variance from the maximum number of stories
13 under Section 400, and a variance from the floor
14 area ratio requirements under Section 402, and
15 pursuant to 11 DCMR 3104.1, a special exception to
16 allow the construction of a community residence
17 facility (assisted living facility for seniors and
18 other qualified persons, 52 residents and 40
19 rotating staff) under Section 358, in the R-5-A
20 District at premises 2700 R Street, S.E. (Square
21 5585, Lot 812).

22 There were various hearing dates on
23 this case, Mr. Chairman, Members of the Board. An
24 order was issued on March 28th. The applicant's
25 attorney has filed a motion for rehearing, or

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1 reconsideration I believe it is.

2 CHAIRPERSON GRIFFIS: Is that all?

3 MS. BAILEY: Yes, sir.

4 CHAIRPERSON GRIFFIS: It's quite
5 enough. I just wanted to make sure you were
6 finished. Very well. Yes, we did. Board Members,
7 I know we've all received it. We also -- I'm not
8 really clear on what the record is now because, of
9 course, this case is over but we have additional
10 submissions if I'm not mistaken by -- I mean, I'm
11 not mistaken. We may have more. We have a letter
12 by Mr. Catania. But let's speak to the specific
13 motion for reconsideration.

14 First of all, although there was strong
15 language and perhaps even of the threatening nature
16 at the beginning of whether we were somehow
17 discriminating against a protected class, of
18 course, I'm not an attorney but I didn't understand
19 the direct connection to making the test in the
20 case for a variance relief.

21 I think in our past case, and in all
22 our cases, it is obvious that we look specifically
23 to the presentation of evidence that substantiates
24 the making of the test and, therefore, the granting
25 of relief.

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1 I don't think that in anyway and, in
2 fact, I think the record is full, if not over
3 packed by each and every participating Board
4 Member's opinion that this is a valuable product,
5 that the assisted elderly living units are required
6 for that area, that this type of facility is
7 appropriate. There was no matter or issue of use
8 here.

9 This was not a use variance but was, in
10 fact, area variances. I find two things. First of
11 all, submission for reconsideration does not bring
12 up any new and additional information that would
13 substantiate reconsideration or even a rehearing on
14 this case.

15 There is talk of the letter submitted
16 by the Director of the Department of Housing and
17 Community Development, again in support of the type
18 of facility and the need for it in the city and
19 specifically in this area. Again, that's an
20 undisputed issue before this Board.

21 What is at issue is the variance from
22 the area of relief that was sought. Without new
23 information that would move us to open the record
24 again for reconsideration, I do not believe that we
25 can. Secondly, looking at our order I believe that

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1 the order is, in fact, very articulate, full, and
2 accurate.

3 There is some accusations that we
4 didn't perhaps understand the nature of this or
5 perhaps that we thought that we didn't want
6 specific entities to make profits at doing this.
7 Also, not of substantive basis.

8 What did come clear was the fact that
9 the only thing provided as evidence to substantiate
10 the area variance was this was sorely required in
11 this area and that it had to be at a certain size
12 on this specific site so that a profit of a certain
13 level could be made by a specific individual.

14 That may well be. I don't believe that
15 this Board feels strongly whether people make
16 profits or don't make profits. It's not something
17 that we judge or actually go to the test for the
18 variances.

19 If the mission of the parties involved
20 was to make a profit, then so be it but they still
21 need to make the test for the variance and our
22 order is very clear and the facts in the case are
23 very clear that there was no uniqueness evidenced
24 on this site that lent itself to a practical
25 difficulty that arose out of the need for the

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1 request for the FAR variance or the variance from
2 the maximum stories on this. I would move to deny
3 the motion for reconsideration and ask for a
4 second.

5 MEMBER ZAIDAIN: Mr. Chair, I'll second
6 the motion. I would like to speak to it for a
7 second.

8 CHAIRPERSON GRIFFIS: Very well.

9 MEMBER ZAIDAIN: I guess I find myself
10 in somewhat of an awkward position considering the
11 fact that I voted in favor of the application at
12 the time. I still am confident in the vote I
13 casted, or I cast on that day.

14 However, I think in terms of reviewing
15 these requests for reconsiderations of our
16 decisions, I personally have a very high standard
17 in the sense that if we do not stand by decisions
18 that this Board made, we would be reconsidering
19 every order that we issue because there's always
20 somebody that does not agree with it.

21 Given that fact, I agree with your
22 statement that there has been no additional issues
23 raised by the applicant that would warrant us
24 reopening this case and proceeding with an
25 additional hearing. Even though I may have

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1 disagreed with the decision the Board made that
2 day, I think we should stand by it.

3 CHAIRPERSON GRIFFIS: Very well. Other
4 speak to the motion?

5 MEMBER ETHERLY: Thank you, Mr. Chair.

6 I will speak against the motion. I voted with the
7 minority in the primary decision here and I still
8 believe that the same -- in my opinion the same
9 circumstances apply.

10 I do agree, however, with the chairman
11 that in terms of the new submissions that were
12 provided by the applicant in this instance I don't
13 believe they raised any critical new information.
14 The applicant, of course, can pursue any number of
15 remedies beyond this particular step but I don't
16 think there was additional information raised that
17 was helpful.

18 I do, however, continue to believe that
19 the case was made as it relates to both the special
20 exception and the requested variances in this
21 regard. With respect to the special exception I
22 felt that clearly we had the need expressed and
23 reiterated by representatives of the District of
24 Columbia government. In particular, the relevant
25 Office of Aging and other entities. We had a

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1 nonprofit organization testify to the importance in
2 this regard.

3 I want to be clear that I heard the
4 Chairman say there's no dispute that this function,
5 this type of facility has a very important role to
6 play in all aspects of our city. I just simply
7 believe that the case was met with regard to this
8 particular location as it relates to the special
9 exception.

10 In particular, I think perhaps the area
11 of greatest concern was whether or not there was a
12 reasonable alternative under the special exception
13 analysis as it relates to Section 358.8. Was there
14 a reasonable alternative to meet the program needs
15 of this area of the District of Columbia?

16 I felt that the applicant did make a
17 successful showing that there were not, indeed, any
18 reasonable alternatives regarding this particular
19 property and the type of facility that they were
20 looking to construct.

21 When you look at the variances I agree
22 with the Chairman that the order for Application
23 No. 1689 -- let me make sure I have my number
24 correct -- 16896. The order was very, very well
25 written. Very articulate.

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1 I just think it came out on the wrong
2 end as it relates to a couple of factual components
3 but, more importantly, as it relates to just the
4 overall description of the property. That order
5 refers to the actual property, if I can find the
6 appropriate language, as having a "gentle slope".

7 I think we had quite a bit of
8 discussion on the slope and shape of the property
9 and the kind of ramifications that had for the type
10 of facility that was looking to -- that the
11 applicant was looking to develop.

12 My colleagues may recall that I had
13 some discussion with a number of the witnesses on
14 behalf of the applicant that spoke to the need for
15 size as it relates to corridors, as it relates to
16 recreational space within the facility given the
17 types of needs that residents of the facilities may
18 present from the standpoint of wheelchair access
19 and other types of considerations.

20 I felt that taken with the slope of the
21 property and the shape of the property gave rise to
22 that unique or exceptional situation or condition
23 which gave rise to the practical difficulty that
24 was argued by the applicant with respect to the
25 variance.

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1 I have a sense of where we are going to
2 come out on this, Mr. Chair, so I won't beat a dead
3 horse in this regard but I will be voting against -
4 - I will be voting in favor of the motion for
5 reconsideration in this instance which would mean I
6 would be voting to not support your motion
7 respectfully. Thank you, Mr. Chair.

8 CHAIRPERSON GRIFFIS: Good. And as you
9 delve into the variances, the point would be is
10 there anything new. You stated that there isn't
11 anything new that would move us to reconsideration.

12 I think obviously we had to frame votes on that.

13 Speaking to the special exception, this
14 is actually interesting because this is the
15 difficulty of separating applications out into
16 separate votes. How do we look at a special
17 exception and approve a special exception of which
18 we are all very familiar with the test but it goes
19 to, first of all, adjacency of other facilities of
20 which there was an adjacent facility found that was
21 not adequately addressed of how it wouldn't impact
22 in terms of the overall impact on the neighborhood.

23 But what we have to look at is how it
24 impacts the neighborhood due to the size of the
25 proposed facility, the parking, the traffic

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1 congestion, the operation of the facility,
2 deliveries, comings and goings of residents.

3 What we were asked to look at is 52
4 residents and 40 staff of which will be rotating,
5 plus additional traffic for other vehicles and
6 such. My point being I don't see how we could have
7 approved a special exception for any project but
8 just not this one, right?

9 Give a blanket special exception for
10 that site and then deny the variances. I think
11 they are totally intricately linked. As we found
12 that the variances weren't -- the test of the
13 variances weren't able to be met, I think that the
14 special exception is tied to that.

15 It was, in fact, found that the size,
16 which was over -- well, without putting judgment on
17 that, I don't think there was a special -- first of
18 all, in addition to what's in the record in terms
19 of the questions of traffic and parking and the
20 testimony by the parties in opposition but in
21 addition to that in terms of looking at the motion
22 for reconsideration, I don't see how we could then
23 even entertain considering reconsideration of the
24 special exception as we wouldn't know what the
25 project was to consider under a special exception.

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1 MEMBER ETHERLY: I disagree.

2 CHAIRPERSON GRIFFIS: Okay. Very well.

3 MEMBER ZAIDAIN: I think that would be
4 an interesting conversation to have another day
5 considering the fact that I voted in support of the
6 application to begin with.

7 CHAIRPERSON GRIFFIS: Right.

8 MEMBER ZAIDAIN: But my position is
9 where it is.

10 CHAIRPERSON GRIFFIS: Okay. So there
11 is a motion to deny the motion for reconsideration
12 and it has been seconded. I would ask for all
13 those in favor signify by saying aye.

14 BOARD MEMBERS: Aye.

15 CHAIRPERSON GRIFFIS: Opposed?

16 MEMBER ETHERLY: Opposed.

17 CHAIRPERSON GRIFFIS: Ms. Bailey, if
18 you would not mind recording the vote.

19 MS. BAILEY: I also need to note, Mr.
20 Chairman, that we have a proxy from Mr. Hannahan to
21 deny the motion for reconsideration so the vote is
22 recorded as 3, 1, 1. Motion made by Mr. Griffis,
23 seconded by Mr. Zaidain. Mr. Hannahan supports the
24 motion to deny. Mr. Etherly is opposed to the
25 motion and Ms. Miller is not present at this time.

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1 She did not hear this case.

2 CHAIRPERSON GRIFFIS: Is there anything
3 else for us today?

4 MS. BAILEY: Deferring minutes to
5 August 5th, Mr. Chairman. That's it. No minutes.

6 CHAIRPERSON GRIFFIS: Did we receive
7 them?

8 MS. BAILEY: No. We didn't receive
9 them.

10 CHAIRPERSON GRIFFIS: Very well. I
11 think that is a fabulous way to begin our summer
12 and approve minutes on the 5th of August. We will
13 do just that.

14 MEMBER ZAIDAIN: And I move that
15 nothing else get deferred to August 5th.

16 CHAIRPERSON GRIFFIS: We'll take that
17 under consideration. Very well. To be absolutely
18 clear for the Board and those participating on the
19 public record, the August 5th is a public meeting.

20 There is no public hearing set for the 5th of
21 August so we would look for a morning meeting
22 session and that is all.

23 If there is nothing further, then we
24 can adjourn the morning public meeting. Thank you
25 very much.

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1 (Whereupon, at 11:00 a.m. the meeting
2 was adjourned.)
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