

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

OCTOBER 12, 2004

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice, at 10:19 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS,	Chairperson
RUTHANNE G. MILLER,	Vice Chairperson
CURTIS L. ETHERLY, JR.,	Board Member
JOHN MANN II,	Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

KEVIN HILDEBRAND,	Commissioner
CAROL MITTEN,	Commissioner

(This transcript constitutes the minutes from the public hearing held on Tuesday, October 12, 2004.)

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APPEARANCES (Continued)

OFFICE OF ZONING STAFF PRESENT:

Clifford Moy,	Secretary
Beverley Bailey,	Zoning Specialist
John K.A. Nyarku,	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

David McGettigan,	Office of Planning
Travis Parker,	Office of Planning

D.C. OFFICE OF THE ATTORNEY GENERAL:

Lori Monroe, Esq.
Jacob Ritting, Esq.

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On Behalf of the ANC-1B02	
PHILIP C. SPALDING 1929 13th Street, N.W. Washington, D.C. 20009 (202) 986-5053	

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

(10:19 a.m.)

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the morning session of 12 October 2004 of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is the Vice Chair, Ms. Miller, and also our esteemed colleague and important member, Mr. Etherly. Representing the Zoning Commission is Mr. Hildebrand, and representing the National Capital Planning Commission is Mr. Mann.

Copies of today's hearing agenda are available for you. They are located on the wall where you entered into the hearing room.

There are several very important things I want to get through, and I'm going to get through very quickly to try and make up time, and I appreciate everyone's patience with us. We always have quite a bit to get accomplished in our executive session; sometimes we run a little bit over our time. We're going to try to make that up as we go through the rest of the day.

First of all, all proceedings before the Board of Zoning Adjustment are recorded. They are

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1 recorded in two fashions. A very important aspect of
2 that fashion is the court reporter who is sitting to
3 my right on the floor. They are creating the
4 transcript, the official transcript that is part of
5 the record in each case.

6 Secondly, you should all know that we are
7 being broadcast live on the Office of Zoning's Web
8 site. So attendant to both of those, of course, we
9 ask that people refrain from making any disruptive
10 noises or actions in the hearing room so that we don't
11 throw off the rhythm of the Board and, more
12 importantly, those giving testimony before us.

13 I would also ask that people turn off
14 their cell phones and beepers so we don't have that
15 disruptive noise.

16 When coming forward to speak to the Board,
17 you will have needed to filled out two witness cards.

18 Witness cards are available at the table you entered
19 into and also the table in front of us where you will
20 give your testimony. Those two cards, prior to coming
21 forward, go to the recorder as I indicated sitting on
22 my right. When you come forward, you need to make
23 yourself comfortable, turn a microphone on, and you
24 will need to state your name and your address for the
25 record. You only need to do this once so that we

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1 obviously can attach all the important things that you
2 are going to say to your testimony that will be part
3 of the written transcript.

4 The order of procedure for special
5 exceptions and variances is as follows:

6 First we hear the case presentation of the
7 applicant and any witnesses associated with that.

8 Second, we hear government reports such as the
9 Office of Planning, the Department of Transportation,
10 any government agency that has submitted reports
11 attendant to an application.

12 Third, we will hear reports of the
13 Advisory Neighborhood Commission.

14 Fourth will be persons or parties in
15 support of the application.

16 Fifth would be persons or parties in
17 opposition to the application.

18 Sixth, finally, the applicant is able to
19 bring any rebuttal witnesses to the attention of the
20 Board and also to provide any closing remarks or
21 summations.

22 Cross-examination of witnesses is
23 permitted by the parties in each case. The ANC within
24 which the property is located is automatically a party
25 in the case and therefore will be able to conduct

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1 cross-examination.

2 Our rules and regulations indicate there
3 are certain amount of times for two things:
4 presentation of cases and also giving us -- me -- the
5 authority to reasonably direct and restrict any
6 cross-examination. At this point, I'm not going to
7 set out large parameters of this. As we get into the
8 specifics of each individual hearing, I will set
9 timings for presentation of cases and also I will
10 obviously direct cross-examination as it goes forward.

11 At this point, as I say, we don't need to set up
12 those guidelines.

13 The record will be closed at the
14 conclusion of each case presentation, each hearing.
15 That's an important aspect to understand. What we are
16 creating here before us today is the entire record.
17 That entire record is what the Board will deliberate
18 on; therefore, anything, obviously, that you want us
19 to know and think about needs to be presented today,
20 either orally or in written form.

21 At the conclusion of this hearing, the
22 record would be closed, meaning no other information
23 would be provided into the record except for anything
24 that the Board specifically requests, and we will be
25 very specific on what is to be submitted and when it

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1 is to be submitted into the record. After that is
2 received, of course, it should be known that the
3 record will be finally closed and no other information
4 is accepted into the record.

5 The Sunshine Act requires that this Board
6 conduct its hearings in the open and before the
7 public. This Board may enter into executive session,
8 and that would be in accordance with the Sunshine Act
9 and our rules of procedure and regulations. When we
10 enter executive session, we utilize those times for
11 reviewing the record, reviewing all the evidence in
12 the record, and at times also deliberating on a case.

13 The decision of this Board in contested
14 cases, of which all cases brought before us are in the
15 format of contested cases, must be based exclusively
16 on the record. So anything that we deliberate,
17 whether it be in public or in executive session, will
18 be based on that record that is created before us
19 today.

20 We will now consider any preliminary
21 matters attendant to the Board and its procedures
22 today. Preliminary matters as those which relate to
23 whether a case will or should be heard such as
24 requests for postponement, continuance, or withdrawal,
25 or whether proper and adequate notice has been

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1 provided.

2 I understand that we have a lot of
3 preliminary matters attendant to most of the
4 applications in today's morning schedule, and
5 therefore what I would like to do prior to going to
6 anyone here with an application and preliminary
7 matters is just ask staff if they have any procedural
8 matters of a preliminary nature that the Board needs
9 to address.

10 Ms. Bailey, I want to say a very good
11 morning to you, also with the Office of Zoning, and
12 Mr. Moy with the Office of Zoning who is sitting to my
13 right.

14 Ms. Bailey, do you have any procedural
15 preliminary matters that the Board needs to pay
16 attention to at this point?

17 MS. BAILEY: Mr. Chairman, members of the
18 Board, good morning. Staff would recommend that the
19 witnesses be sworn in, Mr. Chairman, and that's about
20 it from staff at this point.

21 CHAIRPERSON GRIFFIS: Excellent. Let me
22 then follow that wise direction and ask that any
23 individual planning to testify today, thinking about
24 testifying, if you would please stand and give your
25 attention to Ms. Bailey. Ms. Bailey is going to

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1 administer the oath.

2 (Witnesses sworn.)

3 CHAIRPERSON GRIFFIS: Very well. As I
4 indicated, we have several cases this morning that
5 have quite a few preliminary matters involved in them,
6 and so what I would like to do is this: I would like
7 to bring up the preliminary matter with the case
8 specific. So we would call each case. We have one
9 case in the morning, 17217, which is first on the
10 agenda, and I would propose that we move ahead with
11 that. The second case then we can get into and the
12 other additional or preliminary matters attendant to
13 that. I think that's going to be the most expeditious
14 way to get through our schedule this morning.

15 Ms. Bailey.

16 APPLICATION OF DORAN FLOWERS

17 17217 ANC-1D

18 MS. BAILEY: Thank you, Mr. Chairman.

19 The first case is application number 17217
20 of Doran Flowers, pursuant to 11 DCMR 3103.2, for a
21 variance from the lot occupancy requirements under
22 section 403, a variance from the rear yard
23 requirements under section 404, a variance from the
24 court requirements under section 406, and a variance
25 from the nonconforming structure provisions under

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1 subsection 2001.3, to allow the construction of a
2 screened porch at the rear of a two-family row
3 dwelling in the R-4 District at 3360 18th Street,
4 Northwest. The property is also known as Square 2615,
5 Lot 46.

6 Mr. Chairman, last Friday, the office had
7 not received the affidavit of posting on this
8 property. We were told that the property was indeed
9 posted, but we don't have that documentation in the
10 file at this point.

11 CHAIRPERSON GRIFFIS: Excellent. Thank
12 you very much.

13 Is the applicant ready?

14 Introduce yourself for the record, please.

15 MR. FLOWERS: My name is Doran Flowers,
16 and my address is 3360 18th Street, Northwest,
17 Washington, D.C. 20010.

18 CHAIRPERSON GRIFFIS: Thank you, Mr.
19 Flowers. Have you submitted your affidavit of
20 posting?

21 MR. FLOWERS: I have. I did that this
22 morning with the office over to the right, my right.

23 CHAIRPERSON GRIFFIS: Ms. Bailey, did you
24 see it? Do you have a copy of it?

25 MS. BAILEY: No, sir, I have not seen it.

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1 I would go and check the office.

2 MR. FLOWERS: I gave it to Sharon. She
3 helped me out with that.

4 CHAIRPERSON GRIFFIS: Okay. Thank you
5 very much, Ms. Bailey.

6 Was it posted correctly?

7 MR. FLOWERS: Yes.

8 CHAIRPERSON GRIFFIS: How long was it
9 posted for?

10 MR. FLOWERS: Fifteen days.

11 CHAIRPERSON GRIFFIS: Where was it posted?

12 MR. FLOWERS: On my front door.

13 CHAIRPERSON GRIFFIS: Okay. We will take
14 that up. If obviously it becomes a monumental
15 problem, we will readdress it. Otherwise, we will
16 take that into the record as a late filing of the
17 affidavit of posting, which is part of our
18 requirements, unless any Board member has any
19 objection to continuing this. I think we would take
20 it as a consensus of the Board that we will take that
21 in and review it as we get it to make sure that it
22 was, in fact, posted properly for the timing.

23 Let's move ahead.

24 MR. FLOWERS: Thank you.

25 Mr. Chairperson and members of the Board,

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1 I come before you with a small request, a request to
2 approve a small project with large import for my
3 family. My family wishes to replace the existing back
4 porch with a screened porch that will be two and
5 a-half feet wider.

6 In this endeavor, contrary to Mr.
7 McGettigan's report to the Board, I do have the full
8 support of my ANC and the blessing of the Historic
9 Mount Pleasant. I provided you or I will provide you
10 with copies of the resolutions passed by ANC-1D on the
11 project, and in addition, Mr. Jack McKay, my ANC
12 representative, has personally joined us this morning
13 to attest the consideration and support provided by
14 the ANC and Historic Mount Pleasant.

15 CHAIRPERSON GRIFFIS: Historic Mount
16 Pleasant grants blessings? Is that what I understand?

17 (Laughter.)

18 MR. FLOWERS: I believe so. There were
19 some hand motions, and I figured it looked good.

20 CHAIRPERSON GRIFFIS: I am sure we have
21 jurisdiction. Okay.

22 MR. FLOWERS: Perhaps more importantly, of
23 the 33 owner-occupied residences within 200 feet of
24 this project, I have received 19 responses to the
25 project and nearly 60 percent response rates, and 100

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1 percent of those responses wished me well on
2 completing the project.

3 Unfortunately, although I have the
4 complete support of my neighborhood, the report to you
5 from Mr. McGettigan recommends that you do not approve
6 the request. Rather than slog through the numerous
7 issues I have with the report, I would like to make
8 two general points.

9 First, in the words of Mr. McGettigan's
10 report, a major theme of the comprehensive plan is to
11 stabilize and improve District neighborhoods. If that
12 is the case, no zoning plan would willingly encourage
13 the abandonment of property. So when the report
14 states that there is not sufficient hardship or
15 practical difficulty to warrant this improvement, I
16 would say the answer is that of the five houses on my
17 block that have not improved their backyard, including
18 my own, all five have been -- all five backyards have
19 been abandoned to the rats and mosquitos.

20 I submit to you that in this case, there
21 is no better way to stabilize and improve a
22 neighborhood than to let my family reclaim, enjoy, and
23 maintain our backyard.

24 Second, Mr. McGettigan states in his
25 report that the relief requested could be granted

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1 provided that it would not be a substantial detriment
2 to the public good or substantially impair the intent,
3 purpose, and integrity of the zone plan.

4 I came up with the design to have a
5 minimal impact on my backyard, just enough so we can
6 use the backyard again. Mr. McGettigan's report
7 itself refers to the proposed screen porch as small
8 and unimposing. Yet somehow the report then concludes
9 that the small and unimposing porch will somehow be a
10 substantial detriment to the public good and
11 substantially impair the zoning plan. If my small and
12 unimposing porch is so detrimental, then please tell
13 me what wouldn't be.

14 Members of the Board, I have expended much
15 time, energy and money in order to follow the proper
16 process for a project of a very small magnitude and
17 small impact on my neighbors and neighborhood. In
18 terms of the health and welfare of my family, my wife
19 and my baby girl, the impact on my family, however, is
20 large. So with the complete support of my neighbors
21 and neighborhood, I ask you to grant these variances.

22 My family will be thankful for it, and my
23 neighborhood and the city will benefit from it.

24 Thank you. If you have any questions that
25 are on a more technical note, I at a certain expense

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1 brought my architect here to answer those questions
2 and, of course, Jack McKay is here for the ANC portion
3 of time.

4 CHAIRPERSON GRIFFIS: Excellent. We will
5 get to the ANC. I think we do have a couple of
6 questions. Let me first give a little reaction. I
7 think the Board is very -- if not sympathetic,
8 empathetic to your situation, how much time it takes
9 one to get here and also just to get the documentation
10 and the rigmarole. Really, that threshold is equal to
11 this small addition and large, huge commercial office
12 building, so there may be some inequity there.

13 However, the other aspect to it is, as we
14 look at it, the implications of granting the relief
15 are really what the Office of Planning is talking
16 about, and I think we need to go specifically to that.

17 You have mentioned the comprehensive plan,
18 which is always a good kind of parameter and a
19 starting point of how does this fit in within the
20 comprehensive plan, its vision and its direction, but
21 we have very specific tests that have to be proven
22 before us, and that is essentially what Office of
23 Planning is going through and what I need you to speak
24 a little bit more about, and that is what are the --
25 what are the unique circumstances, what are the

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1 peculiar circumstances, the uniqueness of this
2 property that the practical difficulty arises of not
3 being able to comply strictly with the zoning
4 regulations.

5 Then it goes to whether it would impair
6 the integrity of the zone plan and whether it would,
7 in fact, impair the public good, because when we talk
8 about those larger issues, the last two tests, it's
9 not so much that you have a small little piece but
10 that if 70 or above 70 percent is allowed at this one,
11 how is it not allowed or should it be allowed
12 everywhere else, and if it's allowed everywhere else,
13 does that impact, in fact, the zoning plan and map,
14 does it do away with the actual zoning.

15 So that's why it is, and that's why I say
16 what rests on a large office building and on a single
17 homeowner is similar -- the impact of relief rests on
18 your shoulders, and that's what we need you to talk a
19 little bit more about, but let me see if there are
20 other direct questions that are appropriate at this
21 time.

22 Ms. Miller.

23 VICE CHAIRPERSON MILLER: I was going to
24 say a similar thing about addressing the test
25 particular uniqueness and practical difficulty, but

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1 also you mentioned that there were five houses that
2 haven't been improved and that have been abandoned,
3 and I'm wondering, when you do address us back with
4 our questions, if you could include more specifics
5 about those properties, how they were abandoned or why
6 they were abandoned or were they not allowed to be
7 improved or, you know, something to that effect, and
8 how your property may be different or similar.

9 CHAIRPERSON GRIFFIS: I think we can
10 explore that a little bit. I don't want to spend a
11 lot of time on that. I'm not sure what the relevancy
12 is of, you know, why they were abandoned or what the
13 situation or the issue --

14 VICE CHAIRPERSON MILLER: Okay. The
15 relevancy -- maybe you don't need to go that far, but
16 what I'm trying to get at is his point that it's in
17 the public good for him to be able to improve his
18 property and it would stabilize the neighborhood,
19 which is what I think you were saying, and the example
20 he was giving was, see, there were five other
21 properties that weren't improved and it's
22 destabilizing the neighborhood. But we don't have
23 many facts to really draw from that.

24 COMMISSIONER HILDEBRAND: Were you saying
25 that the adjacent buildings are abandoned --

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1 MR. FLOWERS: No.

2 COMMISSIONER HILDEBRAND: -- or just that
3 people have abandoned their rear yards --

4 MR. FLOWERS: Exactly.

5 COMMISSIONER HILDEBRAND: -- because they
6 are not useable.

7 MR. FLOWERS: The rear yards have been
8 abandoned.

9 CHAIRPERSON GRIFFIS: Because they can't
10 build an enclosed screen porch?

11 MR. FLOWERS: Possibly.

12 CHAIRPERSON GRIFFIS: Possibly.

13 MR. FLOWERS: Right.

14 CHAIRPERSON GRIFFIS: We don't need to go
15 there. Don't tell us about your neighbors. God
16 forbid they like their backyard.

17 MR. FLOWERS: Just the way it is. Right.

18 CHAIRPERSON GRIFFIS: Right. Okay. Let's
19 go ahead.

20 How is this unique?

21 MR. FLOWERS: I'm going to refer that
22 question to Mr. Ossolinski, who has kindly come down
23 here, to explain some of the uniqueness in terms of
24 the different things we have to meet for zoning, so I
25 will pass that on.

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1 CHAIRPERSON GRIFFIS: Okay.

2 TESTIMONY OF MATTHEW OSSOLINSKI

3 MR. OSSOLINSKI: My name is Matthew
4 Ossolinski. My address is 5232 44th Street,
5 Northwest, D.C., 20015.

6 Mr. Chairman and members of the Board, we
7 start this project with an existing impracticality and
8 unsafe existing condition. The unsafe existing
9 condition is the existing porch, not structurally, but
10 as a means of egress from the house. The existing
11 door blocks the egress from the porch such that you
12 have to go around the door, close the door, and then
13 exit the house to get to the backyard. We are trying
14 to improve that condition with this added porch.

15 The unsafety -- another unsafety about the
16 house results -- about the property results from a
17 unique condition, a matter of sunlight and air that
18 are prohibited from coming into the property by virtue
19 of rear -- there's a house at the rear of the property
20 across an area way, an access right-of-way that blocks
21 the sunlight from the west. The existing row of
22 houses blocks the sunlight from the east. There is a
23 large house two doors down -- no, next door, excuse me
24 -- which has a nonconforming structure all the way to
25 the back of their yard that blocks the sunlight from

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1 the south.

2 There is a small opening at the rear of
3 the west, there's a -- I'm not saying this right --
4 the rear yard of the property to the immediate west,
5 the house that blocks the sunlight from the west,
6 allows the amount of sunlight -- the only amount of
7 sunlight other than high noon in the summertime to
8 come in to this property.

9 The result, what I'm getting at is that
10 the result -- is that there's very little sunlight, a
11 lot of dampness that remains in all these rear yards
12 because of the restriction on sun that comes in there.

13 As a result, there is a preponderance of mosquitos,
14 there is an inability to really effectively use the
15 admittedly already small rear yards that are there.

16 When the owner, Mr. Flowers, mentioned
17 that the adjacent yards have been abandoned from use,
18 they are dark yards. The ones that have -- that do
19 remain being used are the nonconforming ones where
20 there are upper-level decks extending all the way to
21 the rear property line. By all our observations,
22 those are being used, the ones that don't conform.

23 CHAIRPERSON GRIFFIS: Does this porch
24 enclosure project above the main level of the house?

25 MR. OSSOLINSKI: No. Well, oh, I'm sorry,

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1 the roof would, but the floor would not.

2 CHAIRPERSON GRIFFIS: It is enclosed.

3 MR. OSSOLINSKI: It's enclosed with a
4 screen, yes.

5 Additionally, the report from Office of
6 Planning acknowledges that these lots are shallow lots
7 and mentions that there is the same burden of all
8 these lots along 18th Street, along this side of 18th
9 Street, and that we are not unique to those lots.
10 We're not arguing that we are unique to those lots; we
11 are -- our argument is simply that we should be able
12 to build as much -- actually, we're building less than
13 what those lots -- the lot occupancy of those lots
14 have now.

15 CHAIRPERSON GRIFFIS: But those are
16 existing nonconforming buildings.

17 MR. OSSOLINSKI: They are -- yes, they are
18 existing nonconforming either because the house was
19 built that way originally, as in the ones to the north
20 of the property, or because they were added on to
21 significantly, as in the ones to the south of the
22 property. However, what our proposal provides is a
23 larger rear yard than any of those remaining rear
24 yards, north or south.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. OSSOLINSKI: So the fact is that
2 approving this -- Mr. Chairman, you mentioned why
3 should be allow more than the 70 percent; it would
4 create a precedent. That precedent already exists.
5 There is already more than 70 percent on all those
6 lots.

7 Additionally, on a practical matter, the
8 porch is kept to a minimum in order to afford a
9 required and easy egress from the property as well as
10 a useable enclosed area to the owner. It is only five
11 and a-half feet deep.

12 CHAIRPERSON GRIFFIS: While we're talking
13 about the specifics, five and a-half feet deep, you
14 mean it projects into the rear yard five and a half
15 feet, projects out from the house; is that correct?

16 MR. OSSOLINSKI: Projects out from the
17 house five and a half feet.

18 CHAIRPERSON GRIFFIS: Okay. What is your
19 calculated lot occupancy?

20 MR. OSSOLINSKI: We differed, but I will
21 accept the Office of Planning's calculations. We
22 differed because we did not add the portion of the
23 resulting court that would be less than five feet and
24 therefore included in the lot occupancy.

25 CHAIRPERSON GRIFFIS: So for 5.5 feet, you

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1 included 4-by-6 by 5.5 in your lot occupancy, that
2 square footage.

3 MR. OSSOLINSKI: I'm sorry.

4 CHAIRPERSON GRIFFIS: That's all right.
5 You can just say yes because I think I'm right.

6 MR. OSSOLINSKI: Okay. All right.

7 CHAIRPERSON GRIFFIS: Because you've
8 created a court now that is not -- is less than five
9 feet, which means it goes to the lot occupancy --

10 MR. OSSOLINSKI: That's correct.

11 CHAIRPERSON GRIFFIS: -- only for that
12 portion of which --

13 MR. OSSOLINSKI: Only for that portion,
14 correct. I think that's how the Office of Planning
15 came to that calculation. I agree with that
16 calculation.

17 CHAIRPERSON GRIFFIS: Okay. Nothing gets
18 by Mr. McGettigan.

19 MR. OSSOLINSKI: No, that's fine.

20 Addressing the court, and I know that this
21 is perhaps our weakest argument, but addressing the
22 court issue, this property is at least of the minority
23 in my experience of property -- among the minority of
24 properties in my experience in the District where the
25 two courts face one another in adjoining properties;

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1 that is that the court of the house immediately next
2 to where we're building, --

3 CHAIRPERSON GRIFFIS: You don't find that
4 a typical scenario in a line of row dwellings?

5 MR. OSSOLINSKI: In my experience, I found
6 where the court faces a wall built along the party
7 line and that the courts are alternating, if you will,
8 as opposed to joined together -- that's my personal
9 experience working around the city in town houses.
10 I'm not saying this is unique in this area or unique
11 in the District, but it is a benefit, it's a benefit
12 to the site that --

13 CHAIRPERSON GRIFFIS: Right. You're
14 saying that the existing court here on the specific
15 property, there's a mirror of it on the other side --

16 MR. OSSOLINSKI: Correct.

17 CHAIRPERSON GRIFFIS: -- that creates a
18 double-wide --

19 MR. OSSOLINSKI: A double-wide court.

20 CHAIRPERSON GRIFFIS: And you're saying
21 that that is not something that you have normally
22 seen?

23 MR. OSSOLINSKI: I'm saying it's in the
24 minority of the places that I have normally seen, yes.

25 CHAIRPERSON GRIFFIS: Okay. I won't

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1 belabor the point, but by your own site plan, I see
2 that that's the way all of them are laid out.

3 MR. OSSOLINSKI: In this area. I will
4 take that --

5 CHAIRPERSON GRIFFIS: Okay. They probably
6 all got the blessing of the Mount Pleasant -- okay.
7 Let's move ahead. Questions? Ms. Miller?

8 VICE CHAIRPERSON MILLER: Did you say that
9 the rear yard and the present porch are unusable in
10 their current form?

11 MR. OSSOLINSKI: The rear yard and the
12 present porch is -- well, the present porch -- let's
13 talk about both of those separately, each of those
14 separately. The existing porch is unusable as a
15 porch. It's unusable really as smooth egress because
16 the door swinging out into that three-foot porch
17 occupies the full depth of that three-foot porch. The
18 stairs are then behind that open door, so you have to
19 close that door to get access to the stairs down to
20 the rear yard. It's not a straight shot out; we're
21 trying to improve that situation by this porch.

22 The porch is unusable for anything other
23 than trying to get around the door and out to the
24 backyard. You can't furnish that porch, you can't sit
25 out on that porch. Circulation is its only purpose

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1 and it's circuitous at that.

2 The rear yard -- because of that, partly
3 because of that and partly because of the inability to
4 sit out among mosquitos, the rear yard remains unused.

5 This is similar to what Mr. Flowers referred to as
6 happening in the adjacent houses. There is no
7 landscaping, there is no apparent use, there is no
8 furnishings out in those yards that indicate that it
9 is being used, that any of those are being used.

10 VICE CHAIRPERSON MILLER: Which brings me
11 to my next question, which was about the adjacent
12 yards sharing the same problem with the dampness and
13 the mosquitos.

14 MR. OSSOLINSKI: Right.

15 VICE CHAIRPERSON MILLER: What area are
16 you talking about? How many homes are you talking
17 about share this same problem?

18 MR. FLOWERS: I can probably address that
19 better than Matt since I'm the one living there. I
20 would say -- let me get my bearings straight -- north,
21 -- the three houses north of my house -- the house
22 next to mine has been abandoned. Their porch has
23 basically rotted down to nothing. The yard has been
24 abandoned, rotted down to nothing. Nobody goes back
25 there. The other two houses farther north also are

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1 never used. You know, I couldn't speculate as to why
2 they never did it besides my own experiences with my
3 yard.

4 The house directly to my south has built a
5 nonconforming addition and they tend to make it out
6 because they tend to be, you know, two floors above
7 the problems that we face. The house farthest south
8 actually has a nonconforming addition which they never
9 use for -- I don't know what purpose.

10 VICE CHAIRPERSON MILLER: Okay. Thank
11 you.

12 CHAIRPERSON GRIFFIS: Are you aware that
13 if you didn't enclose this, put a roof on it, it
14 wouldn't count toward lot occupancy?

15 MR. FLOWERS: I am, and I think the
16 important thing to us is that my daughter is very
17 allergic to mosquito bites, and if we don't have a
18 screened area, she would never be back there. My wife
19 actually tried to garden for a year and has definitely
20 given up because of the pest problem.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. FLOWERS: I'm a little more hearty
23 when it comes to mosquitos, so sometimes I jump back
24 there and grill something up, but that's about it.

25 CHAIRPERSON GRIFFIS: Okay.

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1 Anything else?

2 MR. OSSOLINSKI: To underscore, the issue
3 of not being a detriment to the public good comes up
4 and the general intent of the zoning regulations, the
5 map, comes up, and as Mr. Flower has pointed out, the
6 use of the rear yard is actually a benefit to the
7 purpose of the zoning code, it goes to the purpose of
8 the zoning code so that the property can be used for
9 its intended purpose.

10 CHAIRPERSON GRIFFIS: So if I understand
11 you correctly, what you're saying is if this addition
12 isn't allowed to progress, then the use of the rear
13 yard would be reduced or diminished or actually
14 eradicated and that would fly in the face of what we
15 have rear yards and open space and residential areas
16 for.

17 MR. OSSOLINSKI: That's correct. As well
18 as safety, you know, just having people outside.

19 CHAIRPERSON GRIFFIS: I see. Okay.

20 Anything else right now?

21 Board members, any questions?

22 Okay. Let's move on to the Office of
23 Planning, then. Mr. McGettigan.

24 MR. McGETTIGAN: Thank you, Mr. Chairman.

25 For the record, my name is David McGettigan from --

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1 CHAIRPERSON GRIFFIS: Oh, I'm sorry. I'm
2 going to interrupt you.

3 MR. McGETTIGAN: Yes.

4 CHAIRPERSON GRIFFIS: The ANC is
5 represented today.

6 MR. McKAY: Yes.

7 CHAIRPERSON GRIFFIS: Do you have any
8 cross-examination of the applicant or other witnesses?

9 MR. McKAY: No, sir.

10 CHAIRPERSON GRIFFIS: Okay. Thank you.

11 REPORT FROM THE OFFICE OF PLANNING

12 BY DAVID McGETTIGAN

13 MR. McGETTIGAN: Thank you, Mr. Chair.
14 David McGettigan from the Office of Planning.

15 The center of this variance requesting two
16 things -- lot occupancy and the court requirements --
17 need to be relieved, as well as relief from 2001.3.
18 There are three variances that are being considered.
19 I think it is important that the Board look at these,
20 at the tests and realize that there are three --
21 essentially three variances that need to be addressed
22 from the lot occupancy, the court requirements, and
23 2001.3.

24 I think the applicant hasn't shown that
25 there is any exceptional situation here that meets the

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1 first test for the variance. It then follows that we
2 would recommend denial of the application, not having
3 met the tests.

4 I can answer any questions that you have.

5 CHAIRPERSON GRIFFIS: Very well.

6 Board members? Ms. Miller?

7 VICE CHAIRPERSON MILLER: I'm wondering,
8 did you look into the issue at all of whether this was
9 a particularly damp or mosquito-infested area and
10 whether that would rise to the level of an exceptional
11 circumstance?

12 MR. McGETTIGAN: Yes, I did do the site
13 visit and was out in the back. It is dark back there
14 and damp. There were a lot of mosquitos when I was
15 there. The whole set of rear yards there is in
16 shadow, so it is a dark, damp backyard.

17 VICE CHAIRPERSON MILLER: How many yards
18 does that affect?

19 MR. McGETTIGAN: All of the yards facing
20 18th Street. That would be 3364, 3362, the subject
21 property, and possibly 3366. The house that is on the
22 rear -- it's the side of that house -- is a very tall
23 structure, apartment building, and it just towers over
24 all these yards.

25 VICE CHAIRPERSON MILLER: Also, I don't

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1 think you addressed in your report, and maybe you can
2 address here, applicant's statements about the fact
3 that he thinks that building the porch and making the
4 yard useable will in fact contribute to stabilizing
5 the neighborhood as opposed to destabilizing it.

6 MR. McGETTIGAN: Yes. I think if you made
7 the area useable and had people out there, it
8 certainly would be better than not being used at all
9 if that's the current situation.

10 VICE CHAIRPERSON MILLER: I guess my other
11 question is, then, when you made your site visit, did
12 you see that the yards in the dark shadows that you're
13 talking about were used?

14 MR. McGETTIGAN: They appeared not to be
15 used.

16 VICE CHAIRPERSON MILLER: Okay. Thank
17 you.

18 CHAIRPERSON GRIFFIS: Anything else?

19 Does the applicant request examination of
20 the Office of Planning?

21 MR. FLOWERS: I don't.

22 CHAIRPERSON GRIFFIS: No questions?

23 MR. FLOWERS: No questions.

24 CHAIRPERSON GRIFFIS: Okay. Although you
25 didn't like the report, as I understand your opening

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1 statement; is that correct?

2 MR. FLOWERS: That's right. The
3 conclusion, of course.

4 CHAIRPERSON GRIFFIS: But in all
5 seriousness and directness, you said that there were
6 some problems. I don't remember the exact words you
7 used. Now would be the time, of course, for you to
8 raise questions with the Office of Planning in order
9 to essentially poke holes in their analysis. They
10 have done a very thorough zoning analysis of this as
11 opposed to -- I shouldn't say opposed to -- in
12 addition to the other aspects of those that have
13 submitted, you know, like your neighbors that are all
14 very supportive and like screened-in porches. You
15 know, that's one aspect of this, but they go directly
16 to the zoning analysis and the test.

17 MR. FLOWERS: I think you've heard Mr.
18 Ossolinski's testimony and my testimony as well, I
19 mean general points. Mr. McGettigan I believe has an
20 analysis which comes from the other side with the same
21 facts for the most part, and I think the other facts
22 are probably not important enough to delve into right
23 now.

24 CHAIRPERSON GRIFFIS: Okay. Good enough.

25 MR. OSSOLINSKI: If I may?

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1 CHAIRPERSON GRIFFIS: Yes. Go ahead.

2 MR. OSSOLINSKI: If I may, I think we have
3 shown that the Office of Planning report, while
4 mentioning the narrow lot aspect, doesn't mention the
5 current situation addressing the current lot occupancy
6 of those lots. We have shown, I think, that there is
7 a practical difficulty with the unique sunlight
8 condition and darkness condition that is not addressed
9 in the report, and I think we have shown that
10 something -- where they say the ANC only has concerns,
11 they don't -- he doesn't mention that the ANC has
12 approved it, and I think Mr. Flowers can distribute
13 maybe now the --

14 CHAIRPERSON GRIFFIS: Okay. We're going
15 to get to that.

16 MR. OSSOLINSKI: Okay.

17 CHAIRPERSON GRIFFIS: This is
18 cross-examination of Office of Planning. But I think
19 you have articulated the unique aspect of the
20 diminished sunlight at the rear, which I want to make
21 note of: diminished.

22 Mr. McGettigan, have you ever run across
23 in your analysis or in the proceedings of these boards
24 a specific circumstance related to the owner of a site
25 that would rise to the level of extraordinary

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1 exceptional situation? For instance, somebody --
2 well, let me let it --

3 MR. McGETTIGAN: If there is some existing
4 condition of a building that would make the site
5 unique, then that can be considered, yes.

6 CHAIRPERSON GRIFFIS: So are you saying
7 that the only thing that establishes the uniqueness
8 test, generically calling it that, is something that
9 arises out of the building?

10 MR. McGETTIGAN: Typically it's something
11 out of the lot, the shape or topography of the lot,
12 but in some cases an existing structural situation can
13 be considered, yes. A building.

14 CHAIRPERSON GRIFFIS: But physical
15 attributes of the lot or building, not a specific or
16 extraordinary or unique situation of the owner.

17 MR. McGETTIGAN: No, I'm not familiar with
18 any cases where that was --

19 CHAIRPERSON GRIFFIS: Okay. What is the
20 second quartile? I'm having a hard time figuring out
21 -- on your page 4 --

22 MR. McGETTIGAN: If you took all lots and
23 put them in four groups, even groups or if you listed
24 them --

25 CHAIRPERSON GRIFFIS: Four even groups.

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1 MR. McGETTIGAN: If you listed them by lot
2 size --

3 CHAIRPERSON GRIFFIS: I see. So there are
4 four different lot sizes.

5 MR. McGETTIGAN: If you listed it from the
6 smallest lot to largest lot and split them into four
7 even groups, numbers of groups, those are four
8 quartiles, and the smallest quartile would be the
9 smallest quarter number of lots; the second would be
10 the --

11 CHAIRPERSON GRIFFIS: I see.

12 MR. McGETTIGAN: Yes.

13 CHAIRPERSON GRIFFIS: I see. I didn't do
14 well in statistics in grad school. Okay. There it
15 is, then. So you're not -- all right. There it is.

16 Any other questions, clarifications?

17 Very well. Let's move on. We have had
18 indication of the Historic Mount Pleasant -- Mount
19 Pleasant Historic District. You haven't gone through
20 HPRB yet; is that correct?

21 MR. FLOWERS: I think once we get to the
22 ANC testimony, that Jack McKay can address that.

23 CHAIRPERSON GRIFFIS: You haven't
24 presented it to the Historic --

25 MR. FLOWERS: I have not presented it.

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1 CHAIRPERSON GRIFFIS: -- Preservation
2 Review Board, though.

3 MR. FLOWERS: I did not present.

4 CHAIRPERSON GRIFFIS: Okay. Then let's
5 move on. I don't have any other government reports
6 attendant to this application unless you're aware of
7 any submitted. Very well. Let's move to the ANC-1D.

8 We do have the report that was timely filed. It is
9 recommending approval of the application. It's
10 Exhibit Number 20. Are you going to present the
11 letter?

12 TESTIMONY OF JACK MCKAY

13 ANC-1D

14 MR. MCKAY: My name is Jack McKay, 3200
15 19th Street, Northwest, Washington, D.C., and I am
16 here basically to affirm the ANC's absence of any
17 objection to this application. If you like, I can
18 read our resolution, which we passed in August.

19 CHAIRPERSON GRIFFIS: No need. We have it
20 in front of us.

21 MR. MCKAY: Okay.

22 CHAIRPERSON GRIFFIS: As I indicated, it
23 is an exhibit.

24 Board members, any questions?

25 Very well. ANC, going through this, just

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1 to understand the resolution, were the tests of the
2 zoning variance brought up or was uniqueness of the
3 property talked about or was it -- which would be
4 logical, also. You tell me. What was discussed?

5 MR. MCKAY: Our concern was, would there
6 be any negative effect of this construction on the
7 neighbors or on the neighborhood, and we could find no
8 reason why it should have any negative effect on the
9 neighborhood or specifically on the neighbors.

10 CHAIRPERSON GRIFFIS: Okay. Excellent.

11 Questions, Board members? Clarification?

12 Applicant have any cross-examination of
13 the ANC? Any questions?

14 MR. FLOWERS: Mr. McKay can possibly speak
15 to our work with the Mount Pleasant Historic --

16 MR. MCKAY: Well, let me mention that.

17 CHAIRPERSON GRIFFIS: Then you would pose
18 it as a question in vigorous cross-examination?

19 MR. FLOWERS: I posed it as a question.
20 My question is --

21 CHAIRPERSON GRIFFIS: You would say, is it
22 not true that we presented to the Mount Pleasant
23 Historic --

24 MR. MCKAY: Let me try to explain what
25 happened in that --

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1 CHAIRPERSON GRIFFIS: Briefly, yes.

2 MR. McKAY: I took two members of the
3 board of Historic Mount Pleasant to view this property
4 to see what their perception of the situation was, and
5 they both agreed that because it is not visible from
6 the street and it is not visible from the alley, it
7 was simply not a Historic Mount Pleasant issue, and
8 neither of them had any objection to this.

9 CHAIRPERSON GRIFFIS: So it wouldn't even
10 show up on their radar. Okay.

11 MR. McKAY: That's correct.

12 CHAIRPERSON GRIFFIS: Very well, then.
13 Anything else? Okay. Thank you very much, Mr. McKay.
14 We appreciate your being down here and spending the
15 time with us this morning, and it does look as though
16 this has been properly submitted to the Board and will
17 be afforded great weight in our deliberations.

18 Let us move on, then. Is anyone here
19 attendant to Application 17217 to give testimony in
20 support or in opposition? Support or opposition
21 persons? Not seeing any indication of anyone here to
22 provide additional testimony, I will turn it over to
23 you for any closing remarks or summations that you
24 might have.

25 MR. FLOWERS: That would be me.

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1 CHAIRPERSON GRIFFIS: Yes.

2 MR. FLOWERS: I'm sorry, I missed that
3 last part.

4 CHAIRPERSON GRIFFIS: I'm sorry. I always
5 say it fast. Any sort of closing remarks?

6 MR. FLOWERS: This is very important to my
7 family and I do believe that this will benefit the
8 neighborhood for the reasons that we have already
9 stated. Again, I would request that you grant these
10 variances. Thank you.

11 CHAIRPERSON GRIFFIS: Good. Thank you
12 very much.

13 Very well. If there is nothing further
14 from the Board, any questions or clarifications, I
15 will defer to Board members if they are ready to
16 proceed today on bench deliberation and decision.

17 Ms. Miller.

18 VICE CHAIRPERSON MILLER: Mr. Chairman,
19 I'm ready to move today for approval of Application
20 Number 17217 of Doran Flowers pursuant to 11 DCMR
21 3103.2 for a variance from the lot occupancy
22 requirements under section 403, a variance from the
23 rear yard requirements under section 404, a variance
24 from the court requirements under section 406, and a
25 variance from the nonconforming structure provisions

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1 under subsection 2001.3, to allow the construction of
2 a screened porch at the rear of a two-family row
3 dwelling at premises 3360 18th Street, Northwest.

4 As grounds for my motion, I would say from
5 what I heard today, I think that applicant does meet
6 the three-prong test for a variance, specifically
7 starting with number 1, is there an exceptional
8 situation here, and I think that there is in the sense
9 that even Office of Planning has stated that there is
10 a tall building that casts a shadow over four lots
11 that creates dampness and mosquito infestation into
12 the property of four property owners.

13 We have addressed this issue about
14 whether, if it affects any other property, does that
15 mean that the property before us is not unique, and we
16 have determined in other cases very recently that if
17 it only affects a very few properties, then, in fact,
18 the Court of Appeals has found that that does not mean
19 that it's not unique, that it still is exceptional,
20 and I think that the case has been made very strongly
21 here that there is an exceptional situation on this
22 property that creates a practical difficulty, which is
23 the second prong of being able to use the backyard.

24 I think in this case it's not just that
25 the owner has a child that is allergic to mosquitos; I

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1 think the case has been made that none of these
2 properties -- or at least the evidence that we have
3 heard -- in none of these properties are other people
4 using the backyards, and the result has been
5 abandonment or non-use, which leads to the third prong
6 of whether or not it would be in the public detriment
7 to grant the relief in this case. I think the case
8 has also been made that, in fact, it would be in the
9 public interest to grant the relief in this case, that
10 using the property would lead to the stabilization of
11 this neighborhood. Therefore, I would move that we
12 grant the relief.

13 I would also note that the ANC has
14 endorsed the application, finding no detrimental
15 impact. I do give great weight to Office of
16 Planning's analysis, but I think it came out in this
17 hearing even more so than when the report was written
18 the fact about this inability to use the property and
19 the exceptional situation of the darkness and mosquito
20 infestation in the property.

21 CHAIRPERSON GRIFFIS: Is there a second?

22 VICE CHAIRPERSON MILLER: And I would move
23 for a second.

24 MEMBER MANN: Second.

25 CHAIRPERSON GRIFFIS: Thank you, Mr. Mann.

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1 Discussion? Deliberation?

2 Very well. Ms. Miller I think has laid
3 out very well in your motion and also in your support
4 and deliberation on the motion that the unique
5 characteristic has come about based on the shadow cast
6 and based on the diminished light and air in the area
7 and how one is to animate.

8 What was interesting and intriguing to me
9 in further looking at this and also looking at Office
10 of Planning's, which I think is an excellent report
11 and lays out quite extensively their argument,
12 however, going to this, what I see as the projection
13 out, if it was just to be a deck and unenclosed, would
14 not go toward lot occupancy, which would diminish that
15 request or need for a variance, and really that seems
16 to be what has major impact with this application.
17 The point of enclosing it is to remedy the specific
18 and unique circumstance that arises based on, as you
19 have indicated, the other structures around it.

20 I do absolutely agree with the fact that
21 the basis of unique is not to show that it does not
22 exist anywhere else in the city but rather that it is
23 particularly circumstantial to the specific site and
24 therefore would also support the motion.

25 I do want to talk a little bit about the

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1 Office of Planning because there are aspects of which
2 are persuasive, but it's an entirety, and also in
3 terms of the diminished request being sought here,
4 it's not fully persuasive, but it is persuasive in the
5 fact of one -- and I think the Board should and I
6 think we do take into consideration the -- well, you
7 know what, I'm going to let that go.

8 So other Board members, any further
9 deliberation on the motion?

10 Very well. We have a motion before us for
11 approval of the application. It has been seconded.
12 If there is no other further deliberation, then I
13 would ask for all those in favor of the motion signify
14 by saying aye.

15 (Chorus of ayes.)

16 CHAIRPERSON GRIFFIS: And opposed?

17 MEMBER ETHERLY: Opposed.

18 CHAIRPERSON GRIFFIS: Abstaining?

19 (No response.)

20 CHAIRPERSON GRIFFIS: Excellent. Thank
21 you all very much. Let's wish you a very good day.
22 Thank you for your patience with us this morning, and
23 let's move on.

24 MR. FLOWERS: Thank you.

25 MS. BAILEY: Mr. Chairman, the vote is

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1 recorded as 4-1-0 to approve the application. Mrs.
2 Miller supported the motion or made the motion; Mr.
3 Mann seconded it. Mr. Hildebrand and Mr. Griffis are
4 in agreement. Board Member Etherly is opposed to the
5 motion.

6 Summary order, Mr. Chairman?

7 CHAIRPERSON GRIFFIS: Yes. I see no
8 reason, unless there is any objection from the Board
9 members, that we can't waive our regulations and issue
10 a summary order on that case.

11 MS. BAILEY: Thank you, sir.

12 CHAIRPERSON GRIFFIS: Thank you very much.
13 Let's move on to the next case, then.

14 APPLICATION OF TONYA HARRIS, TON INC.

15 17218-1B

16 MS. BAILEY: Application Number 21718 of
17 Tonya Harris, TON, Inc., pursuant to 11 DCMR 3103.2, a
18 variance from the number of stories and building
19 height requirements under section 400, and pursuant to
20 11 DCMR 3104.1, a special exception under section 223
21 to allow a fourth floor addition to an existing flat
22 -- that's a two-family dwelling -- not meeting the lot
23 occupancy requirements under section 403. The
24 property is located in the R-4 District at premises
25 906 T Street, Northwest, Square 362, Lot 233.

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1 MR. JOHNSON: Are we calling the case for
2 the preliminary matters?

3 CHAIRPERSON GRIFFIS: No, we're calling
4 the case. Do you have a preliminary matter?

5 MR. JOHNSON: I do. There is a motion.

6 CHAIRPERSON GRIFFIS: Okay. Not
7 surprising. Why don't you all have a seat and make
8 yourselves comfortable.

9 First let me have everyone introduce
10 themselves. Well, no. Actually, we've got party
11 status to establish in this case. Let's do that so
12 that we know who is going to be speaking in regards to
13 all of the preliminary matters.

14 We have, first of all, the Westminster
15 Neighborhood Association. Let's take that up first.
16 Who's representing the WNA?

17 MR. JOHNSON: I am, Your Honor. Good
18 morning. Lynn Johnson with the law firm of Johnson &
19 Pavic, 1413 K Street, Northwest.

20 CHAIRPERSON GRIFFIS: Okay.

21 And Mr. Baxter, are you present? Is Mr.
22 Baxter present?

23 (No response.)

24 CHAIRPERSON GRIFFIS: Is Mr. Baxter
25 present?

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1 MR. JOHNSON: He's out of town.

2 CHAIRPERSON GRIFFIS: He is out of town?

3 MR. JOHNSON: Yes.

4 CHAIRPERSON GRIFFIS: Okay. Well, let's
5 move ahead with the Westminster Neighborhood
6 Association. Does Mr. Baxter have any connection with
7 the Westminster Neighborhood Association? Is he a
8 member?

9 MR. JOHNSON: He is a member.

10 CHAIRPERSON GRIFFIS: Okay. It seems like
11 -- well, let me just state this out. It seems like he
12 has identical issues that you are going to bring. Is
13 there any reason why he wouldn't join you in your
14 application for party status?

15 MR. JOHNSON: There is not.

16 CHAIRPERSON GRIFFIS: Have you talked to
17 him about that?

18 MR. JOHNSON: I have.

19 CHAIRPERSON GRIFFIS: So he --

20 MR. JOHNSON: I talked to him generally
21 about it. He certainly is going to raise the same
22 issues we are and I don't think we're in disagreement
23 at all.

24 CHAIRPERSON GRIFFIS: Well, he's not going
25 to raise the same issues. He's out of town. But go

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1 ahead.

2 MR. JOHNSON: He expects the case to be
3 continued when we get to the preliminary matter, so
4 that's why he -- I mean that's one reason why he's not
5 here. However, I did not ask him if I could represent
6 him as part of WNA.

7 CHAIRPERSON GRIFFIS: All right. I
8 understand that. Okay. Very well. Let's go through.
9 Well, let me just take -- Board members, are there
10 any questions of clarity that you need regarding the
11 application for party status? This is Exhibit Number
12 23 from the Westminster Neighborhood Association. We
13 have gone through in the past, but I have no
14 difficulty if people need further information of what
15 Westminster Neighborhood Association is or how many
16 residents that they represent or the area which they
17 represent. I think most Board members will be
18 familiar.

19 VICE CHAIRPERSON MILLER: We're not.

20 CHAIRPERSON GRIFFIS: Mr. Hildebrand?

21 COMMISSIONER HILDEBRAND: Yes.

22 CHAIRPERSON GRIFFIS: Clarification?

23 COMMISSIONER HILDEBRAND: I am not
24 familiar with the Westminster --

25 CHAIRPERSON GRIFFIS: Let's go through

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1 very quickly, who do you represent? What is your
2 geographic area and the members?

3 MR. JOHNSON: We're a 501(c)(3)
4 non-profit, been in existence for about ten years. We
5 represent geographically all households within the
6 area from 9th to 10th, the north side of S Street to
7 the north side of T Street.

8 CHAIRPERSON GRIFFIS: Is there a
9 membership fee?

10 MR. JOHNSON: There is.

11 CHAIRPERSON GRIFFIS: What is it?

12 MR. JOHNSON: Fifteen dollars per year.

13 CHAIRPERSON GRIFFIS: How many people are
14 paying members?

15 MR. JOHNSON: Approximately 45.

16 CHAIRPERSON GRIFFIS: How many are active?
17 I mean, can you be an active participant and not a
18 paying member?

19 MR. JOHNSON: Technically no.

20 CHAIRPERSON GRIFFIS: Okay. So you have
21 about 45, 50 --

22 MR. JOHNSON: Out of a universe of 165
23 households.

24 CHAIRPERSON GRIFFIS: I see. Out of 160.
25 Okay.

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1 Mr. Hildebrand, anything else?

2 COMMISSIONER HILDEBRAND: No.

3 CHAIRPERSON GRIFFIS: Ms. Miller?

4 VICE CHAIRPERSON MILLER: I'm just
5 wondering, you know, how often they meet and how they
6 vote to approve your actions.

7 MR. JOHNSON: They do meet once a month
8 and they do have a vote on any action that they want
9 to consider before the BZA, for instance, and they did
10 vote to oppose this request.

11 VICE CHAIRPERSON MILLER: And do they have
12 a certain mission?

13 MR. JOHNSON: They do. It's primarily --
14 and I have to summarize here without looking at their
15 incorporation documents, but it's basically to
16 preserve and improve the aesthetics and the living
17 conditions of their geographic area.

18 VICE CHAIRPERSON MILLER: And it's a
19 501(c)(3).

20 MR. JOHNSON: It is.

21 VICE CHAIRPERSON MILLER: Okay. Thank
22 you.

23 CHAIRPERSON GRIFFIS: Excellent. Any
24 other questions, then, of the substance of the
25 application? Requesting party status from the Board?

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1 Very well. Let me have -- is the
2 applicant represented?

3 MR. COOPER: Yes. Robert Cooper from the
4 law firm of Jackson & Campbell on behalf of the
5 applicant, Tonya Harris.

6 CHAIRPERSON GRIFFIS: Any objection to
7 granting party status?

8 MR. COOPER: None.

9 CHAIRPERSON GRIFFIS: Very well.

10 Is the ANC represented?

11 MR. SPALDING: Phil Spalding. I live at
12 1929 13th Street, and I represent ANC-1B02, which is
13 the territory in which this property is located.

14 CHAIRPERSON GRIFFIS: Any objection to the
15 application for party status, granting it?

16 MR. SPALDING: No.

17 CHAIRPERSON GRIFFIS: Okay.

18 Board members, any objection to granting
19 party status to Westminster Neighborhood Association,
20 the neighborhood association that represents a certain
21 percentage, 45 out of 160 -- I can't do that math,
22 either.

23 MR. JOHNSON: Roughly 27 percent.

24 CHAIRPERSON GRIFFIS: Okay. Representing
25 the neighborhood and the area, and it is requesting

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1 party status. They do speak to the fact that they
2 would, as their representation and as their mission
3 has outlined, would be significantly, distinctly, or
4 uniquely affected.

5 COMMISSIONER HILDEBRAND: May I ask one
6 question?

7 CHAIRPERSON GRIFFIS: Of course.

8 COMMISSIONER HILDEBRAND: Are all 165
9 potential members all in the same ANC?

10 MR. JOHNSON: Yes.

11 COMMISSIONER HILDEBRAND: So you are
12 within the current ANC.

13 MR. JOHNSON: We are.

14 COMMISSIONER HILDEBRAND: So how would
15 your -- the impact to you be different than the impact
16 to the ANC?

17 MR. JOHNSON: We're a much more -- a much
18 smaller part than the ANC is and we are more directly
19 impacted because this particular property is within
20 the middle of our geographic area.

21 CHAIRPERSON GRIFFIS: It's a geographic
22 subset of the ANC. How many people are in the ANC?

23 MR. SPALDING: Approximately 26,000. It's
24 a very large commission. We have eleven commissioners
25 and we're also in a very quickly developing area.

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1 CHAIRPERSON GRIFFIS: So how many do you
2 think?

3 MR. SPALDING: Probably 25-, 26,000.

4 CHAIRPERSON GRIFFIS: Okay. Close to
5 3,000 in this ANC and -- okay. Twenty-six hundred,
6 not close to 3,000.

7 VICE CHAIRPERSON MILLER: I think he said
8 26,000.

9 MR. SPALDING: In the commission or in the
10 single member district?

11 CHAIRPERSON GRIFFIS: How many in the
12 total ANC? Twenty-six thousand?

13 MR. SPALDING: Yes. There are eleven
14 commissioners, each representing between 2- and 2,500
15 people.

16 CHAIRPERSON GRIFFIS: Right.

17 MR. SPALDING: In the single member
18 district, my estimate is that the number is now close
19 to 3,000, which is unusual and I grant that, but in
20 the years since the redistricting, we have had
21 enormous growth, so we are fat. Sorry.

22 CHAIRPERSON GRIFFIS: A little civics
23 lesson for us all. Okay. There it is.

24 Let me hear any objections from the Board
25 for granting party status to the Westminster

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1 Association.

2 (No response.)

3 CHAIRPERSON GRIFFIS: If there are no
4 voiced objection, I take it it's the consensus of the
5 Board that we can establish the Westminster
6 Neighborhood Association as a party in this case.

7 I want to take up Mr. Baxter's in that --
8 even though one might have anticipated that this would
9 be postponed or continued, I'm not sure that it will
10 be, and participation, of course, as a party is of
11 critical importance. I mean, that is what rises you
12 above just putting in written testimony. But more
13 importantly, I don't see how he would be uniquely or
14 distinctly or significantly impacted as opposed to
15 others. Even in his answer to the question of the
16 last, which asks that, "How would you more
17 significantly, distinctly," he says, "Well, me and my
18 neighbors would clearly be affected." Well, here it
19 is, your neighbors are being represented, and bringing
20 an entire party application for all of his neighbors
21 would have been appropriate in that case.

22 But as we have, in fact, the specific
23 issues of concern for him also being represented in
24 now an established party, I would move denial of the
25 party status of Mr. Baxter and ask for a second.

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1 COMMISSIONER HILDEBRAND: Second.

2 CHAIRPERSON GRIFFIS: Thank you, Mr.
3 Hildebrand.

4 I will take any further deliberations or
5 discussion on the motion before us. Ms. Miller?

6 VICE CHAIRPERSON MILLER: I'm just
7 wondering if we ought to hold it in abeyance until we
8 determine whether or not the hearing is going to be
9 continued because if the hearing were to be continued
10 and if he then were able to come and make the case for
11 his party status, then --

12 CHAIRPERSON GRIFFIS: I understand. I
13 think the point I think I find the more persuasive
14 argument, I guess, on the party status, is that the
15 points that he would be making and the case
16 presentation that he would present seems to be
17 identical to what the Westminster Neighborhood
18 Association is going to present and therefore be
19 redundant -- not only redundant, it wouldn't be
20 significantly or distinctly unique. Therefore I don't
21 think, whether he was here or not, that he would rise
22 to the level of party status.

23 Secondly, we have called the case. We
24 have preliminary motions before us of which, as a
25 party, he should be answering to, whether he objected

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1 or supported the continuance in and of itself.
2 Therefore, he has already lost the ability to
3 participate fully in the case and I'm not sure we want
4 to rehash all of the issues when he would be
5 available, and it's not the availability that is
6 fundamentally moving me in my motion.

7 Others?

8 VICE CHAIRPERSON MILLER: I just want to
9 follow up and say I can go along with that given that
10 he has had the opportunity to make his case for party
11 status in his application form and it does appear that
12 he can be adequately represented by the neighborhood
13 association.

14 CHAIRPERSON GRIFFIS: Good. Thank you.

15 Okay. Then we have a motion before us --
16 it has been seconded -- to deny the party status of
17 Mr. Baxter. I would ask that all in favor of the
18 motion to signify by saying aye.

19 (Chorus of ayes.)

20 CHAIRPERSON GRIFFIS: Opposed?

21 (No response.)

22 CHAIRPERSON GRIFFIS: Abstaining?

23 (No response.)

24 CHAIRPERSON GRIFFIS: Very well. We will
25 make note of that vote and move on.

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1 What is the next preliminary matter that
2 we have or who is going to bring it?

3 Did I have everyone introduce themselves.

4 Yes. Is that right? Did you want to introduce the
5 applicant?

6 MR. COOPER: Yes, Mr. Chairman. Robert
7 Cooper from Jackson & Campbell on behalf of the
8 applicant, Tonya Harrison, TON, Inc., and I have
9 seated immediately to my right Ms. Tonya Harris of
10 TON, Inc. She was not here at the swearing in, Mr.
11 Chairman, so if Ms. Bailey would like to swear her in.

12 CHAIRPERSON GRIFFIS: Okay. Excellent.
13 Why don't we do that? If you wouldn't mind just
14 standing and giving your attention to Ms. Bailey, she
15 will swear you in.

16 (Applicant Tonya Harris sworn.)

17 MR. JOHNSON: The motion I think we have
18 that should be before you which was filed last week is
19 a motion to continue this hearing because of
20 inadequate notices given to the neighbors under
21 section 3113.5, I believe it is.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. JOHNSON: I think it is conceded, and
24 maybe we want to verify that before we argue it.

25 CHAIRPERSON GRIFFIS: It's conceded in the

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1 case that it wasn't properly notified?

2 Mr. Cooper?

3 MR. COOPER: Mr. Chair, members of the
4 Board, it is not conceded that the parties were not
5 properly notified. The applicant took all appropriate
6 steps pursuant to the regulations. They obtained a
7 copy of the list of --

8 CHAIRPERSON GRIFFIS: Okay. I'm going to
9 --

10 MR. COOPER: It's not conceded.

11 CHAIRPERSON GRIFFIS: -- keep it very
12 limited. The Board is very aware of this. So you
13 don't concede the fact that there wasn't proper
14 notice.

15 MR. COOPER: Correct.

16 CHAIRPERSON GRIFFIS: However --

17 MR. COOPER: However, Mr. Chairman, over
18 my personal objection, the applicant has agreed to
19 consent to a continuance -- to the continuance request
20 to allow her an opportunity to go back to the
21 community, ensure that every single resident who they
22 have identified had not received notice for whatever
23 reason in fact does receive notice of the hearing
24 despite the fact that, again -- I'm not arguing the
25 motion, but despite the fact that we believe that

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1 notice was properly provided. We obtained a list from
2 the Office of Tax and Revenue immediately before
3 filing this application. The Westminster Neighborhood
4 Association --

5 CHAIRPERSON GRIFFIS: Okay. I'm going to
6 get into the specifics. Let me hear from the ANC.

7 MR. SPALDING: The ANC would like to speak
8 to this, but I also have a letter that you have not
9 received yet. May I give that to Ms. Bailey and read
10 it into the record?

11 CHAIRPERSON GRIFFIS: What is it?

12 MR. SPALDING: It's a letter talking to
13 the history of this case before the ANC and
14 specifically their appearance last Thursday, which was
15 our last meeting when they were regularly scheduled on
16 our agenda, appeared before the meeting and asked not
17 to appear on that night's agenda for this specific
18 reason of this notification.

19 CHAIRPERSON GRIFFIS: Okay. Well, without
20 getting into that issue, what is your opinion, then --
21 what's the ANC's position on granting a continuance of
22 this?

23 MR. SPALDING: We are in support of
24 granting a continuance.

25 CHAIRPERSON GRIFFIS: Okay. We have

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1 somewhat of a consensus supporting granting a
2 continuance and I think we need to take that under
3 advisement for the Board. Of course, that doesn't
4 mean we follow it or not, but as it is presented.

5 Let me first of all clarify because we
6 don't need to get into the substance of this unless my
7 Board members want to. 3113.5 -- we spent some time
8 looking at this in terms of the application and all
9 that was filed then. I find, and I think the Board
10 would agree with me -- and I will hear objections if
11 not -- that our requirements were followed and nothing
12 was wavered from the actual and normal process for
13 this.

14 The Office of Tax and Revenue list was
15 produced. That list directly was made into labels and
16 labels were mailed out. I checked coming into this
17 hearing whether any of those letters were actually
18 even returned. Oftentimes we do find -- in fact, I
19 think in an awful lot of applications we have returned
20 letters for, you know, perhaps OTR has the wrong
21 address or the wrong name and those people, residents
22 or owners, would put it into the return. We have
23 received no return letters in this application.
24 Therefore, I don't find any basis of continuing it for
25 the lack of proper notification.

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1 The fact that the applicant has indicated
2 that they are supportive of trying to continue the
3 communication with the community in order to allow any
4 further comments I think is a reason to support it,
5 but that would be the only way I would end up
6 supporting continuing this because we can fit this in
7 in ten minutes and get to the next case by twelve
8 o'clock.

9 But that being said, let me hear from
10 other Board members.

11 MEMBER MANN: I have a couple of questions
12 of the applicant.

13 CHAIRPERSON GRIFFIS: Yes.

14 MEMBER MANN: When was the Tax and Revenue
15 list procured from that office?

16 MR. COOPER: It is my understanding it was
17 procured immediately before the filing, within a few
18 days before the filing of the application before the
19 Board, so we obtained the most recent information.

20 As you know, unfortunately the fact that
21 there may be turnover sales of properties, that
22 information may not have gotten to the Office of Tax
23 and Revenue.

24 CHAIRPERSON GRIFFIS: Well, it comes under
25 the fact that the error, as I see this, the error is,

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1 if there is an error -- we're not going to get into
2 the discovery of the actual pieces of it, but if there
3 is an error, it occurred in the Office of Tax and
4 Revenue list, not any error by the applicant in
5 producing the list or mailing it out. Okay. Go
6 ahead.

7 MR. COOPER: And following that,
8 Commissioner Mann, one of the things that we did last
9 week was we obtained -- we ordered a new list just to
10 make sure that, you know, all the proper persons are
11 notified. We're trying to do everything that we can
12 to ensure --

13 CHAIRPERSON GRIFFIS: Is there any
14 difference?

15 MR. COOPER: We haven't gotten it yet. We
16 should have it today.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. COOPER: Okay.

19 MEMBER MANN: And maybe that answers my
20 second question: How are you going to do further
21 outreach to the neighbors in addition to what is
22 required under the regulation?

23 MR. COOPER: Now that the Westminster
24 Neighborhood Association has received party status, we
25 would like to meet with them, obviously. The second

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1 thing is to compare the list between the one we
2 obtained immediately before the filing of the
3 application and now and ensure that each of those
4 persons who -- or there is a difference in the name,
5 perhaps, or even the mailing address or the owner,
6 that those persons get notice.

7 Unfortunately, the motion identified I
8 believe 23 percent of the 69 didn't get it or were
9 improperly notified but didn't identify which of those
10 16 households were, so we don't know exactly what 16
11 households the Westminster Neighborhood Association --

12 CHAIRPERSON GRIFFIS: I thought they wrote
13 it on the list.

14 MR. COOPER: No. Some of their more -- it
15 wasn't clear to me because they also identified that
16 the D.C. Government -- they handwrote D.C. Government
17 as the owner, so I wasn't 100 percent certain that
18 that was 16.

19 The motion also said that on that list,
20 there were folks or persons outside of the 200-foot
21 region and I don't know how many of those appeared on
22 the list as -- you know, didn't get notice, but they
23 fell outside of the 200. So I'm not 100 percent sure.

24 CHAIRPERSON GRIFFIS: And are you planning
25 on re-presenting to the ANC?

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1 MR. COOPER: Yes, we are.

2 CHAIRPERSON GRIFFIS: And the ANC will
3 give proper and adequate notice of their public
4 meeting; is that correct?

5 MR. SPALDING: We always do.

6 CHAIRPERSON GRIFFIS: Indeed. So there is
7 a whole other way you are going to get it.

8 Okay. Anything else?

9 What do we have open? Dates?

10 MR. COOPER: Mr. Chairman?

11 CHAIRPERSON GRIFFIS: Yes.

12 MR. COOPER: I have one other statement.
13 On the motion there was also a statement that the --
14 there was also an objection to the notice to the
15 community because the property was not properly
16 posted.

17 CHAIRPERSON GRIFFIS: Good point. Let's
18 bring that up before we address that. First of all, I
19 find no error -- that needs to be better presented
20 that there was an error in the physical posting of
21 this. The posting comes at the -- well, let's go to
22 the motion because your wording seems to really tire
23 the regulation of which this is. This was posted on
24 the front of the building. How do you see this as not
25 properly posted?

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1 MR. JOHNSON: The regulation itself -- and
2 it seems to me that a regulation has to be followed
3 whether it makes common sense or not. The thing is
4 the regulation --

5 CHAIRPERSON GRIFFIS: That's somewhat the
6 problem with the law, isn't it? Okay.

7 MR. JOHNSON: I mean, we have this
8 regulation and the regulation clearly says two
9 postings. You shall post each street frontage on the
10 property involved and on the front of each building.
11 That's two places: the street frontage and the front
12 of the building.

13 CHAIRPERSON GRIFFIS: What happens if it
14 is the same?

15 MR. JOHNSON: If it's the same, if it is,
16 in fact, the same, which means the building comes up
17 to the sidewalk, which I'm not aware that's even done
18 in D.C., but I think it would be a moot point. Here
19 --

20 CHAIRPERSON GRIFFIS: So one placement you
21 don't see as being able to satisfy both of those. Is
22 this at the street frontage?

23 MR. JOHNSON: That's at the street
24 frontage on T Street, but you can see --

25 CHAIRPERSON GRIFFIS: Is this posted on

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1 the street frontage?

2 MR. JOHNSON: It was not posted on the
3 street frontage.

4 CHAIRPERSON GRIFFIS: And what do you take
5 as the street frontage? The fence?

6 MR. JOHNSON: The fence. If you look at
7 the photograph right here in the motion, the fence
8 itself is the street frontage.

9 CHAIRPERSON GRIFFIS: What if there wasn't
10 a fence?

11 MR. JOHNSON: Good question. I think the
12 regulation requires that some pole be set up and it be
13 posted on the street frontage.

14 CHAIRPERSON GRIFFIS: Okay. And this has
15 a had surface on the front; is that correct?

16 MR. JOHNSON: Yes.

17 CHAIRPERSON GRIFFIS: So it would take
18 somewhat of a footer and a post and then a staple of
19 the placard; is that correct?

20 MR. JOHNSON: I think that's correct.

21 CHAIRPERSON GRIFFIS: I'm just logically
22 following you. Okay.

23 MR. JOHNSON: Yes.

24 CHAIRPERSON GRIFFIS: Now take me to the
25 regulations and tell me where we would have the

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1 authority to demand that something of that nature
2 happen.

3 MR. JOHNSON: I think you have no choice.

4 It's your regulations and until you change -- you can
5 change your regulation --

6 CHAIRPERSON GRIFFIS: We can't. Mr.
7 Hildebrand can when he goes back to the Commission.

8 MR. JOHNSON: Until he does, I think you
9 have to comply with it. I think the Court of --

10 CHAIRPERSON GRIFFIS: I see nothing in the
11 regulation 3113.5 that doesn't say that the single
12 point can satisfy both. It has to be posted at both,
13 right? You have to have it posted at the front of the
14 building and also at the street frontage, but there is
15 nothing that describes this or lends me to be
16 persuaded that one place can't satisfy both.

17 Board members?

18 COMMISSIONER HILDEBRAND: Well, I guess I
19 would just ask, are you aware that the face of the
20 building is on the property line and that the garden
21 piece that is in front of the house between the fence
22 and the property line is called public parking? It's
23 a public space.

24 CHAIRPERSON GRIFFIS: It's a parking area.

25 COMMISSIONER HILDEBRAND: Yes.

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1 CHAIRPERSON GRIFFIS: Which was shown on
2 the site plan of the last application. Kind of
3 interesting.

4 COMMISSIONER HILDEBRAND: Right.

5 MR. JOHNSON: If I can, Mr. Hildebrand,
6 that's exactly right, but the regulation does not talk
7 about the property line; it talks about street
8 frontage, the posting of street frontage.

9 CHAIRPERSON GRIFFIS: But where does this
10 building front the street?

11 MR. JOHNSON: I mean -- well, to me, the
12 common-sense definition of street frontage is where
13 the street ends and whatever property that is owned by
14 the government or by the owner begins.

15 CHAIRPERSON GRIFFIS: Okay. Understood.
16 Anything else? I think this is a place where the law
17 always does complement common sense, and the common
18 sense and the intent of the regulation is to make sure
19 that people walking by can see these bright yellow,
20 well-decorated and, frankly, very Halloween-like
21 signs. So if that is, in fact, posted at a place --
22 what the intention of the regulation is, is to post
23 those in a place and in all places that people would
24 normally walk by and see.

25 I have found in my limited experience that

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1 the most noticed notification of applications are
2 these placards. I mean, oftentimes the letters that
3 are sent out, whether they are addressed properly and
4 delivered properly, probably aren't even opened, and
5 if they are they are not read. But put a big orange
6 sign out front and it grabs people's attention.

7 I see in the photographs and also in the
8 affidavit of posting nothing that would lend to me
9 that this flew in the face of the intention or the
10 letter of the regulation in 3113.

11 Mr. Hildebrand?

12 COMMISSIONER HILDEBRAND: Also I would
13 just add, according to the zoning definition of street
14 frontage, it's the property line where the lot abuts
15 the street.

16 CHAIRPERSON GRIFFIS: Excellent point.

17 Further?

18 How is your affidavit of posting and where
19 is it?

20 MR. COOPER: I believe the gentleman that
21 posted it, he was supposed to have brought it down
22 last week, I believe on Friday. I spoke with Ms.
23 Bailey on I believe Friday afternoon and she said that
24 she did not see it in the file. He's not here. I
25 don't have a stamped copy of it, so I'm assuming that

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1 it was, in fact, filed. But he is not here. However,
2 obviously we will --

3 CHAIRPERSON GRIFFIS: We don't need him;
4 we need the affidavit.

5 MR. COOPER: Correct. Well, he might have
6 the affidavit with him, unfortunately, or he posted it
7 -- I mean he brought it in --

8 CHAIRPERSON GRIFFIS: When is the
9 affidavit required to be submitted into the record,
10 Ms. Bailey?

11 MS. BAILEY: Five days prior to the
12 hearing, Mr. Chairman.

13 CHAIRPERSON GRIFFIS: So it's late.

14 MR. COOPER: Correct. And obviously if we
15 -- if this continuance is granted, we would obviously
16 re-post and submit an affidavit reflecting the posting
17 of the hearing on the -- the rehearing.

18 CHAIRPERSON GRIFFIS: Good. Let's go to
19 that. Let's be a date. Do you have something that
20 you're offering, a date?

21 MR. COOPER: As soon as possible.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. COOPER: I believe that the -- I mean,
24 we would obviously want an opportunity to get before
25 the ANC again. They are having their meeting --

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1 CHAIRPERSON GRIFFIS: Mr. Spalding?

2 MR. SPALDING: The ANC would specifically
3 request that this happen no sooner than November -- it
4 would be 8th, I think, on your calendar, 8th or 9th.
5 Our meeting in November is the 4th.

6 MR. COOPER: I have spoken with the -- I
7 believe the chairman of that ANC and they would be
8 willing to put us on their agenda for the November
9 meeting. But I also spoke with the members of your
10 staff and they said that it was pretty full for
11 November. I believe the calendar looked kind of full.

12 CHAIRPERSON GRIFFIS: Ms. Bailey?

13 MS. BAILEY: Mr. Chairman, staff would
14 suggest December 14th in the afternoon. I'm not sure
15 if you have your schedule in front of you, --

16 CHAIRPERSON GRIFFIS: I do.

17 MS. BAILEY: -- but the one o'clock case,
18 there is a high probability that that's going to fall
19 off and that would be an open slot.

20 MR. COOPER: Mr. Chairman, I believe also
21 the morning of -- I believe it was December 7th or
22 8th, there were no hearings in the morning session.

23 CHAIRPERSON GRIFFIS: That's right.

24 MR. COOPER: I don't know if that was
25 intentional or not.

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1 CHAIRPERSON GRIFFIS: Very intentional.
2 That's our public meeting.

3 MR. COOPER: Okay.

4 CHAIRPERSON GRIFFIS: That's when we do
5 all our decisions. We don't have public hearings on
6 the first Tuesday of the month in the mornings; we
7 have afternoon sessions.

8 Okay. The 14th.

9 MS. BAILEY: December 14th in the
10 afternoon, Mr. Chairman?

11 CHAIRPERSON GRIFFIS: Let me hear if that
12 has any difficulty in scheduling from the applicant
13 and the parties in the case. Give me a moment.

14 (Pause.)

15 CHAIRPERSON GRIFFIS: How about doing this
16 case on the 16th of November in the afternoon?

17 MR. COOPER: The 16th?

18 MR. JOHNSON: But I think the requirement
19 says 40 days' posting.

20 CHAIRPERSON GRIFFIS: No. We've already
21 posted. We've called the hearing. We're continuing
22 this hearing. This hearing is going.

23 MR. JOHNSON: But the notice -- well, then
24 we're going to the substance of the motion. The
25 motion is saying 23 percent of the neighbors did not

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1 get notice.

2 CHAIRPERSON GRIFFIS: I know. We have
3 already decided that.

4 MR. JOHNSON: I didn't hear any decision
5 on the merits of it.

6 CHAIRPERSON GRIFFIS: Excellent point. We
7 can make that official.

8 MR. JOHNSON: I mean, I haven't even
9 argued the motion yet, and --

10 CHAIRPERSON GRIFFIS: You have. You put
11 in your argument in writing. We have all read the
12 argument.

13 MR. JOHNSON: Okay. All right. May I
14 supplement it before you decide the motion?

15 VICE CHAIRPERSON MILLER: I mean, I think
16 that they -- they conceded to continue, so we didn't
17 deal with the motion per se.

18 CHAIRPERSON GRIFFIS: We can deal with it
19 right now.

20 VICE CHAIRPERSON MILLER: But my question
21 is, you're saying that from now until the 16th is not
22 enough notice?

23 MR. JOHNSON: Right.

24 VICE CHAIRPERSON MILLER: How many days is
25 it?

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1 MR. JOHNSON: Whatever it is, it's not --
2 they're going to have to get out there -- they're
3 going to have to send the notice out, and I don't
4 think they have 40 days.

5 CHAIRPERSON GRIFFIS: No. We called this
6 case. We're continuing the same case. There would be
7 no requirement for further notification or
8 renotification. What I heard the applicant saying,
9 which I will follow up on, is they were going to
10 re-post it, and we can have that re-posting as an
11 indication to the neighbors of when this is continuing
12 to. But other than that, I think we probably do need
13 to do an official action on the motion that is before
14 us and we can take that up. But let me, before -- I
15 will get all the information and then we can get to
16 that. Well, maybe we will do that first.

17 MR. JOHNSON: If we would, Mr. Griffis,
18 may I be heard for just a moment on that motion?

19 CHAIRPERSON GRIFFIS: Yes. A quick
20 moment. On the motion?

21 MR. JOHNSON: Right.

22 The applicant met all of her requirements
23 as you stated. The Court of Appeals said the same
24 thing for the applicant in a Dupont Circle Citizens
25 Association case of 1979. The applicant met the

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1 requirements, but that is not the issue with the Court
2 of Appeals. The Court of Appeals says if there is a
3 regulation for BZA, it must be followed. If you don't
4 change the regulation, you've got to follow it. This
5 regulation says 40 days' notice to the neighbors
6 within 200 feet. Twenty-three percent error rate does
7 not give the neighbors notice.

8 Just like in Dupont Circle Citizens
9 Association where they met the requirements and sent
10 out the notice, it wasn't noticed to a multi-unit
11 building that had many occupants to it, and the Court
12 of Appeals simply said, if you've got a regulation
13 that says you must give notice, then that notice has
14 to be received by them, and I think the Court of
15 Appeals would not stand for a 23-percent error rate.

16 The problem is, what does an applicant do
17 when it gets current names and addresses from our D.C.
18 property tax office but it happens to have a
19 23-percent error rate to it. Obviously one would not
20 want to hold the applicants liable for something that
21 they in good faith have done. The Court of Appeals,
22 however, does not look to the practicalities of how
23 you do it; if you've got a regulation that says you've
24 got to give notice, you've got to give notice.

25 I think this issue is bigger than this

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1 case. I think the property tax office records are --
2 that the lag time from sales and purchases is so bad
3 that you've got in many cases an error rate of roughly
4 one-fourth.

5 CHAIRPERSON GRIFFIS: Good. Very well.
6 Anything else?

7 MR. JOHNSON: No.

8 CHAIRPERSON GRIFFIS: I think you've
9 actually -- you've hit it well in your statement
10 twofold, and that is that this is a bigger issue, and
11 it is a bigger issue that goes well beyond our own
12 jurisdiction.

13 You have also indicated and you said
14 straightforwardly in the oral testimony and
15 essentially in your written -- well, directly in your
16 written testimony that the regulations were followed,
17 and that's exactly where I go.

18 The Court of Appeals -- and I read that
19 case and I think there is some wisdom to it and some
20 viability to it; however, I also -- I have to be real
21 careful how I say these things, don't I? With all due
22 respect to the Court of Appeals, I don't think they
23 directly address this specific particular instance.
24 In this particular instance, our regulations were to
25 notify the surrounding areas. The notification as has

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1 been defined and is of our procedure is to get the
2 list of owners of the adjacent properties and to mail
3 those.

4 Second-fold -- and that's why we have
5 redundant aspects of notification -- second-fold is
6 the posting of the property, and that lets anybody,
7 whether it be renters, tenants, or people walking by
8 that may think that they are affected and want to come
9 testify and be participants in our case are able to do
10 so. To find that the applicant was in error somehow
11 in this case I do not believe is the case, and I would
12 move denial of the motion to continue and ask for a
13 second.

14 MEMBER ETHERLY: Seconded.

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

17 I think we have addressed all of the
18 issues that are covered in the motion, and back and
19 forth about this 23 percent, let me also state for the
20 record that it is not conclusive that there was an
21 error. There is, in fact, an assertion that there is
22 an error; there has been no evidence presented that
23 there is an actual error. The evidence that has been
24 presented has been the listing of the Office of Tax
25 and Revenue of the owners of the adjacent properties.

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1 It is identical to the list of all the other
2 applications of which labels are created and the
3 mailings go out.

4 Further in this case, if there was 23
5 percent error in the names and the correct addresses,
6 I don't see it being persuasive because none of the
7 letters were actually even returned to the Office of
8 Zoning from my personal checking from staff as we have
9 had in the past. Therefore -- I mean, you make
10 assertions like there's no way of knowing whether the
11 U.S. Postal Service delivered such mail. Oh my gosh,
12 if we spent the time, and this is where you're
13 absolutely correct, this is well beyond what we could
14 ever cover. How would we establish -- we would have
15 to -- I guess we could like put a tracking device on
16 all the mails. I mean, that's what it would
17 substantially come down to to figure out where
18 physically each one -- and that clearly is illogical.

19 So looking at it, our own regulations address that
20 aspect of the illogicability of the mail. God forbid
21 there's this huge storm and none of these letters go
22 out. Well, we still have the placard out there that
23 people can see.

24 Okay. We have a motion before us that has
25 been seconded. Let me have any other further comments

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1 on that.

2 VICE CHAIRPERSON MILLER: I think you
3 covered it pretty fully, but I just want to add that I
4 think this is definitely different from the Dupont
5 Circle case in which the court found that the Board
6 was disregarding the plain wording of its regulations,
7 and there is no evidence of that in this case.

8 CHAIRPERSON GRIFFIS: Thank you very much,
9 Ms. Miller.

10 If there is nothing further from the
11 Board, then the motion before us has been seconded. I
12 would ask for all in favor of the motion signify by
13 saying aye.

14 (Chorus of ayes.)

15 CHAIRPERSON GRIFFIS: And opposed?

16 (No response.)

17 CHAIRPERSON GRIFFIS: Abstaining?

18 (No response.)

19 CHAIRPERSON GRIFFIS: Very well. We have
20 just been through that motion for continuance.
21 However, the Board has entertained the continuance
22 based on the amenability of participants in the case
23 in order to continue the discussion and also the
24 coordination and communication with the community, and
25 therefore I would ask the schedule that I have now

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1 lost under a huge stack of papers -- it was the 16th
2 in the afternoon. Is there any difficulty from the
3 applicant of being present and presenting their case
4 at that time?

5 MR. COOPER: I have something on my
6 calendar, but I can move it, so we have no objection
7 to the afternoon. Later in the afternoon would be a
8 little bit better for us, not the first afternoon
9 case. If it's the first afternoon case, that's fine.
10 We will make -- I will make that change.

11 CHAIRPERSON GRIFFIS: I will put you the
12 last case in the afternoon. There's two cases in the
13 afternoon. That means I cannot predict when it's
14 going to make it. We're fitting you into a full
15 afternoon schedule.

16 MR. COOPER: That's fine.

17 CHAIRPERSON GRIFFIS: I would ask of the
18 Board and Mr. Hildebrand that they would commit to
19 staying a little late that afternoon so that we could
20 finish it all up. But if that accommodates, why don't
21 we do that. We will put it on the last in the
22 afternoon, and so it will be the third case.

23 Let me check with the ANC if that
24 accommodates --

25 MR. SPALDING: That's fine.

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1 CHAIRPERSON GRIFFIS: Excellent.

2 Yes?

3 MR. JOHNSON: Chairman Griffis, if history
4 is any guide, this case is going to take four to six
5 hours. If we put it in the last case --

6 CHAIRPERSON GRIFFIS: History can be no
7 guide in this case. I can guarantee you it won't be
8 four to six hours.

9 MR. JOHNSON: Then given our presentation,
10 I would argue that we're going to take -- that if you
11 put us first on the calendar --

12 CHAIRPERSON GRIFFIS: Let's do this.
13 Let's establish this so none of us walk in not knowing
14 what is going to happen. How long is it going to take
15 you to present your case?

16 MR. COOPER: Thirty to 45 minutes max.

17 CHAIRPERSON GRIFFIS: Okay. We're going
18 to establish the time of this case and we're going to
19 allow the applicant 45 minutes to present their case;
20 the party in opposition has an equal time of 45
21 minutes; the ANC, of course, is not limited in their
22 time in presentation of the case. I want you all to
23 focus very, very, very strongly on the specifics of
24 this. This Board has been through -- now I think all
25 the members of this Board have been through almost

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1 every iteration of every application going, so we are
2 very familiar with what we need to see and the
3 specifics that we will need answered. There is no
4 reason to get too far afield from this.

5 This has some particular complexities and
6 I think we will have to investigate quite a bit of it,
7 but I would ask you all to understand that the Board
8 is somewhat knowledgeable and probably can just take
9 things very directly and specifically. So let's go --

10 MR. JOHNSON: Given the cross-examination,
11 I see a minimum of three hours, Chairman Griffis.

12 CHAIRPERSON GRIFFIS: All right. We will
13 do it.

14 MR. JOHNSON: First up in the afternoon?

15 CHAIRPERSON GRIFFIS: We will order
16 dinner. Mr. Hildebrand, will the Zoning Commission
17 pick up dinner for the Board?

18 COMMISSIONER HILDEBRAND: Not this time.

19 CHAIRPERSON GRIFFIS: Do you want them to
20 address those cases?

21 (Pause.)

22 CHAIRPERSON GRIFFIS: Okay. Where were
23 we? The third case in the afternoon, the 16th.

24 MR. COOPER: From the applicant, yes,
25 that's acceptable.

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1 CHAIRPERSON GRIFFIS: Good.

2 All right. Any other questions of
3 procedure in this case? Yes?

4 MR. SPALDING: I would just like
5 permission to submit a letter that the ANC has written
6 to the Board on our specific position in this, just
7 what has occurred and the timing of such.

8 CHAIRPERSON GRIFFIS: Help me understand
9 the relevancy of it.

10 MR. SPALDING: I would just like to get
11 this into the record. It establishes that we did have
12 them on our September agenda and that they were
13 notified, they did not appear, that they were notified
14 on the October agenda, and the applicant specifically
15 asked not to appear before the ANC.

16 CHAIRPERSON GRIFFIS: Okay. But we have
17 already --

18 MR. SPALDING: I just want to submit the
19 letter that says that from the ANC.

20 CHAIRPERSON GRIFFIS: I see.

21 MR. COOPER: Mr. Chairman?

22 CHAIRPERSON GRIFFIS: Yes.

23 MR. COOPER: I don't know the purpose of
24 this letter. I have not seen the letter. However, I
25 must say, to respond from what I believe he is going

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1 to present, the September -- he's saying that we did
2 not appear for the September. No notice ever came to
3 applicant that we were to appear in September.
4 October, we agree we asked to be taken off the
5 calendar.

6 CHAIRPERSON GRIFFIS: This is interesting
7 and actually fascinating, but it's also ten to twelve.

8 I've got another case to do. But specifically and
9 more importantly, let me address this directly on,
10 first of all, there is nothing that I can -- there is
11 nothing that precludes you from presenting it within
12 your case if somehow you want to establish this as an
13 important part. Let me just give some guidance. We
14 want to get to the heart and the substance of the
15 application, so I'm not going to want to spend a lot
16 of time on what happened, who didn't show up, when
17 they showed up. Let's get right to it: What is this,
18 why should we prove it, why shouldn't we, how can we,
19 how can't we? That's what I need to do. So I'm going
20 to leave it you.

21 The record is open. You're a party in
22 this case. Frankly, the parameters of what you submit
23 are pretty wide. If you want to submit that into the
24 record as part of your prehearing statements, then go
25 ahead, but I'm not going to want to take a lot of time

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1 unless it goes right to the substance of it.

2 With that, I'll close the hearing for
3 today on this case. You are obviously here. If you
4 put it in, fine. It would serve you well also so that
5 you don't have to go out and serve it on everybody --
6 they are all here -- to also hand them a copy if you
7 decide to put it into the record.

8 That being said, anything else
9 procedurally that I can answer?

10 MR. SPALDING: Nothing.

11 MR. COOPER: No, not from the applicant.

12 CHAIRPERSON GRIFFIS: Excellent. All
13 right. We will see you in the early evening on the
14 16th of November. Thank you all very much.

15 All right. We're going to take a very
16 fast break, ten minutes, let the other group start
17 getting up here, and then we will call the next case
18 and last case in the morning.

19 (Recess.)

20 CHAIRPERSON GRIFFIS: Very well. Let's
21 reconvene and call the next case.

22 Ms. Bailey.

23 APPLICATION OF MONTROSE, LLC

24 17221-1C

25 MS. BAILEY: Application number 17221 of

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1 Montrose LLC, pursuant to 11 DCMR 3104.1, for a
2 special exception from the roof structure setback
3 provisions under subsection 411.11 and 400.7(b) for an
4 existing five-story residential condominium building
5 in the R-4-D District at premises 1819 Belmont Road,
6 Northwest, also known as Square 251, Lot 45.

7 Mr. Chairman, as you are aware, there are
8 seven requests for party status in opposition to this
9 application. In addition, there are motions for
10 postponement and also to dismiss.

11 CHAIRPERSON GRIFFIS: Thank you.

12 Mr. Shaumber is here? Is that how you
13 pronounce the name? S-h-a-u-m-b-e-r of 1824 Belmont?

14 SPEAKER: He could not come today. He's
15 out of town.

16 CHAIRPERSON GRIFFIS: He's out of town.

17 Mr. Payne?

18 MS. HARGROVE: He was here. He had to
19 leave.

20 CHAIRPERSON GRIFFIS: Was here; had to
21 leave. Okay.

22 Do you want to come up?

23 Mr. Swartz? Gubisch-Swartz?

24 Mr. Brooks?

25 MR. BROOKS: Here.

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1 CHAIRPERSON GRIFFIS: Mr. Duffy?

2 Can you turn your microphone on, please?
3 And why not, if you are addressing the Board, give
4 your name and address for the record.

5 MS. HARGROVE: My name is Ann Hargrove.
6 I'm the zoning chair for the Kalorama Citizens
7 Association.

8 CHAIRPERSON GRIFFIS: You also have an
9 application for party status; is that correct?

10 MS. HARGROVE: That is correct.

11 CHAIRPERSON GRIFFIS: And Ms. Rigby? Hi,
12 Ms. Rigby.

13 Let me ask Ms. Swartz, Mr. Brooks, Mr.
14 Duffy, and Ms. Rigby if you wouldn't mind just coming
15 up and having a seat. I'm sorry, Mr. Duffy was not
16 here.

17 Ms. Swartz, you indicated in what I find
18 the most valuable question asked of applicants for
19 party status is the last, which indicates how you were
20 significantly, distinctly, or uniquely impacted or
21 affected if this were to be granted, and you have
22 indicated that all the described adverse effects
23 impact this property and other nearby properties but
24 do not affect the general public.

25 Do you want to -- here is my fundamental

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1 issue. We have seven requests for party status. The
2 critical aspect for a party and participant, of course
3 -- you may all well be aware of this, but there are
4 two levels of participation within the hearings,
5 possibly more but two that I'm going to talk about,
6 and that is a person that is allowed and afforded time
7 to give testimony, and then there is a higher level of
8 participation that is a party. A party is of an equal
9 status to the applicant.

10 You are going to be asked to present an
11 entire case. You are going to be afforded the
12 opportunity to cross-examine. You are going to be
13 required to submit any additional information,
14 briefings, findings of facts, conclusions of law that
15 the Board requires. So that being said, you should
16 all think about how you would like to participate if
17 that was not understood previously.

18 Now specifically, Ms. Swartz, how are you
19 distinctly or uniquely impacted if you yourself have
20 described that the other surrounding neighbors -- of
21 which six others are requesting party status?

22 MS. GUBISCH-SWARTZ: We are, if I
23 understand correctly, we are uniquely affected by the
24 positioning of our home in relationship to the
25 additional levels of the structure.

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1 CHAIRPERSON GRIFFIS: Okay. Where is your
2 home located?

3 MS. GUBISCH-SWARTZ: We are at 1823
4 Belmont in Unit B, so we are the top two floors. We
5 have a terrace that is impacted by --

6 CHAIRPERSON GRIFFIS: On the south side?
7 North side? East? West?

8 MS. GUBISCH-SWARTZ: We face south. We
9 face south and we are to the west. We are to the west
10 of -- 1823 is to the west of 1819. Yes. Yes.

11 CHAIRPERSON GRIFFIS: Okay.

12 MS. GUBISCH-SWARTZ: And so it impacts two
13 ways. It overhangs our terrace as well as then there
14 is a courtyard. There are four units at 1823, and so
15 our courtyard is negatively impacted with reference to
16 light and air and privacy and security concerns.

17 CHAIRPERSON GRIFFIS: This penthouse
18 structure. Okay.

19 Mr. Brooks. A very good afternoon to you.

20 MR. BROOKS: Good afternoon.

21 CHAIRPERSON GRIFFIS: Same questions: How
22 are you uniquely, distinctly impacted as opposed to
23 your neighbors that are here today?

24 MR. BROOKS: My house, my address is 1834
25 Belmont Road, Northwest, which is approximately 150

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1 feet across the street from the 1819 property, and
2 since the building has been -- the addition has been
3 erected, it has affected the light and view from my
4 property, from all rooms facing 1819.

5 CHAIRPERSON GRIFFIS: The penthouse
6 structure?

7 MR. BROOKS: Yes.

8 CHAIRPERSON GRIFFIS: And how do you
9 describe the penthouse structure?

10 MR. BROOKS: It's a structure which is on
11 top of the roof with the additional -- with the deck
12 added on.

13 CHAIRPERSON GRIFFIS: Okay. So across the
14 street 150 feet away, it is impacting on the light and
15 air and distinctly, then, the surrounding area, the
16 immediate adjacent area.

17 MR. BROOKS: Correct.

18 CHAIRPERSON GRIFFIS: Okay.

19 Ms. Rigby at 1816 Belmont -- you're on the
20 same side as Mr. Brooks; is that correct?

21 MS. RIGBY: Yes. I'm almost directly
22 across from 1819, and the view of this so-called
23 penthouse with the deck and the roof structure is seen
24 from every single front window of my house and cuts
25 off -- as you go up, it cuts off more of the view from

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1 my windows, plus I think its anticipated use by all
2 five apartments is going to mean that it's going to be
3 a very noisy location, and that noise is going to
4 bounce right to my house.

5 CHAIRPERSON GRIFFIS: The noise from the
6 penthouse structure?

7 MS. RIGBY: Yes. The roof deck. It's
8 going to be shared by five different apartments.

9 CHAIRPERSON GRIFFIS: The roof deck is not
10 an issue here, nor is the number of units.

11 MS. RIGBY: Well, the deck is part --

12 CHAIRPERSON GRIFFIS: Not an issue here.
13 We have an application for the special exception under
14 411 for a setback of a penthouse structure. That's
15 what we're looking at.

16 MS. RIGBY: And it's access to the roof
17 deck that's the penthouse structure.

18 CHAIRPERSON GRIFFIS: You're going to make
19 the case that this roof deck is actually part of the
20 penthouse structure? That's not what is before me in
21 the application. Is that what your intention is in
22 making a case presentation?

23 MS. RIGBY: Well, certainly I intended to
24 object to the existence of the deck, yes.

25 CHAIRPERSON GRIFFIS: Okay. I'm not sure

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1 it would have any real relevancy to this. I can be
2 persuaded otherwise, but very quickly.

3 So if I understand you, you believe that
4 you are uniquely affected by the view that's
5 diminished by the penthouse structure.

6 MS. RIGBY: Yes. As well as the loss of
7 property value.

8 CHAIRPERSON GRIFFIS: Put yourself in Mr.
9 Brooks' position on his property. Is their view
10 similarly impacted?

11 MS. RIGBY: We would form a triangle with
12 me on one side -- I mean our views are relatively
13 similar. You can tell by the numbers: 1819 versus
14 1824 and 1816.

15 CHAIRPERSON GRIFFIS: I can indeed. So
16 tell me how I am to be persuaded that I'm having
17 unique positions presented that each would be afforded
18 a party status in this case.

19 MS. RIGBY: Unique from Mr. Brooks you
20 mean?

21 CHAIRPERSON GRIFFIS: Yes.

22 MS. RIGBY: I would say that our
23 situations would be similar.

24 CHAIRPERSON GRIFFIS: Indeed. Would you
25 then agree that both your party applications would

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1 fail for lack of uniqueness and character and impact?

2 MS. RIGBY: No. No. I think our
3 situations are -- well, let me ask you a question.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. RIGBY: Does uniqueness have to be
6 unique as to be separate from every other person who
7 objects to the proponent?

8 CHAIRPERSON GRIFFIS: Well, there are two
9 aspects to it. One is redundancy and one is the
10 uniqueness as opposed to the general public. I don't
11 disagree that you are uniquely impacted above the
12 general public, but then it goes to the practicality
13 of what is the reasoning or the requirement or why
14 would several distinct individual party statuses be
15 granted on the same aspect to make the same case.

16 MS. RIGBY: I would say that's up to you.
17 If you believe that my position would be redundant to
18 his, I'm perfectly willing to have him represent my
19 position. But I would also alert you to the fact that
20 there have been 15 people from this block that have
21 come to one of your hearings to object to this, so, I
22 mean, there is strong community support in opposition
23 to this plan.

24 CHAIRPERSON GRIFFIS: Well, I don't think
25 that has anything to do with granting party status or

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1 not.

2 MS. RIGBY: Right.

3 CHAIRPERSON GRIFFIS: Okay.

4 MS. RIGBY: I absolutely agree. If you
5 think my position would be redundant, I would be happy
6 to be reduced to a witness status rather than a party.

7 CHAIRPERSON GRIFFIS: Not necessarily.
8 Here's what I'm proposing. This is in my frame of
9 mind. First of all, you make a stronger case if one
10 is joined. So the next question is, is the Kalorama
11 Citizens Association, if they are granted party
12 status, are they representing also your position or
13 could they adequately represent your position or could
14 the ANC, which will be presenting?

15 The point is, it's not how many times you
16 tell the Board the same thing, it's how you tell them
17 once. That's some little inside information.

18 MS. RIGBY: I would say the KCA and the
19 ANC have done an admirable job of representing my
20 point of view. But given the condition of having to
21 apply for a party status, I did so. If you feel that
22 that's not appropriate given the representation by
23 KCA, Mr. Brooks and the ANC, I'm, as I said, perfectly
24 happy just to be a witness in opposition.

25 CHAIRPERSON GRIFFIS: I'm going to push

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1 Mr. Brooks as hard as I'm pushing you, not to worry.

2 Board members, questions.

3 VICE CHAIRPERSON MILLER: I would like to
4 know if these individuals are members of KCA.

5 MS. RIGBY: Yes.

6 VICE CHAIRPERSON MILLER: All of you?

7 CHAIRPERSON GRIFFIS: Mr. Brooks?

8 MR. BROOKS: I'm a member, yes.

9 VICE CHAIRPERSON MILLER: So you are all
10 members? Because in KCA's application, one of the
11 statements they make is that they are going to -- see
12 number 4 -- where the environmental, economic or
13 social impacts that are likely to affect the person
14 and/or person's property if the action requested of
15 the Board is approved or denied, and they say by
16 curtailing light and air and degrading views from
17 nearby properties, it will adversely affect the value
18 of those properties.

19 So it appears to me that they are going to
20 be addressing your concerns, and if they are willing
21 to incorporate your specific concerns, it is more
22 efficient, and there is nothing specifically unique
23 from each other. Then you also have the opportunity
24 to testify about your own particular situation.

25 So what we're trying to avoid is, you

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1 know, a zillion cross-examiners, which would just
2 delay the hearing and run into redundancies.

3 MS. RIGBY: Well, my opposition certainly
4 is not unique as witnessed the 14 other members of the
5 community from this same block, and it's a half block
6 because Belmont Road cuts it off, so we're talking
7 about half block, 15 people coming to one of your
8 hearings as a result of their opposition.

9 But as I said, the ANC and the KCA have
10 done an admirable job of working on behalf of the
11 community and I would be happy to withdraw my party
12 application as a result.

13 CHAIRPERSON GRIFFIS: Is the Kalorama
14 Citizens Association open to having one of its members
15 participate in their case presentation? m

16 MS. HARGROVE: Of course.

17 CHAIRPERSON GRIFFIS: And that would be --
18 okay.

19 Mr. Brooks, same question?

20 MR. BROOKS: No, I have no objection to
21 having the KCA or the ANC support my position.

22 CHAIRPERSON GRIFFIS: Excellent. That
23 being said, we can join the request for party status
24 of -- oh, gosh, I'm sorry. Ms. Swartz; is that right?
25 No, not Ms. Swartz. I'm taking you later.

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1 VICE CHAIRPERSON MILLER: Mr. Chairman?

2 CHAIRPERSON GRIFFIS: Mr. Brooks and Mr.
3 Duffy.

4 Yes?

5 VICE CHAIRPERSON MILLER: It sounded to me
6 like they were withdrawing their applications for
7 party status and that KCA would be representing their
8 interests. Is that your understanding?

9 CHAIRPERSON GRIFFIS: That's my
10 understanding. That's probably the legal way to put
11 it. Okay. Good.

12 Then my understanding is the only other
13 participant outside of the KCA that is requesting
14 party status that is here currently is Ms. Swartz; is
15 that correct?

16 MS. GUBISCH-SWARTZ: Yes.

17 CHAIRPERSON GRIFFIS: Okay. Ms. Swartz,
18 you have obviously heard what we were just talking
19 about. It appears that you have presented a distinct
20 location in adjacency to this. I will let you respond
21 whether you would want to join in with KCA and their
22 party.

23 MS. GUBISCH-SWARTZ: If my understanding
24 is correct that joining in with KCA does not preclude
25 me from presenting specific testimony through the KCA,

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1 then I am happy to join that party.

2 MS. HARGROVE: We have pictures relevant
3 to her situation and would be happy to have her as a
4 witness.

5 CHAIRPERSON GRIFFIS: Okay. She has hit
6 the point: They can call you as a witness.

7 MS. GUBISCH-SWARTZ: Okay.

8 CHAIRPERSON GRIFFIS: But what it won't
9 mean is that you will be able to come up and
10 cross-examine, you won't be doing your own individual
11 filing.

12 MS. GUBISCH-SWARTZ: I trust them to do
13 that. That's fine.

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. GUBISCH-SWARTZ: That's fine. Thank
16 you.

17 CHAIRPERSON GRIFFIS: Excellent. So we
18 have that done. Then let's take up the Kalorama
19 Citizens Association. Are there any questions from
20 the Board in regard to their application for party
21 status in this case?

22 If there are no questions, does the
23 applicant have any objection to granting party status
24 to the Kalorama Citizens Association?

25 MS. BROWN: No.

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1 CHAIRPERSON GRIFFIS: Does the ANC have
2 any objection?

3 MR. ROTH: No.

4 CHAIRPERSON GRIFFIS: The ANC and the
5 applicant have not objected to the Kalorama Citizens
6 Association's request for party status.

7 Board members, comments?

8 MEMBER ETHERLY: I will just note that I
9 appreciate the willingness and flexibility of the
10 party status applicants to adjust their -- well, I
11 should say withdraw their request and work with KCA in
12 regard to moving this case forward. Appreciate your
13 flexibility.

14 CHAIRPERSON GRIFFIS: Good. Thank you,
15 Mr. Etherly.

16 Let me further that, then, and ask if
17 Kalorama Citizens Association would be open to also
18 contacting and working with Mr. Payne and Mr.
19 Shaumber?

20 MS. HARGROVE: Yes. I expect to be able
21 to do that very well. We have pictures and evidence
22 and letters from these people.

23 CHAIRPERSON GRIFFIS: Excellent.

24 MS. HARGROVE: And we have one coming in
25 from Mr. Payne as he had to leave today.

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1 CHAIRPERSON GRIFFIS: And I will include
2 also Mr. Duffy in that, those three not being present
3 here and able to answer the specific questions of the
4 Board regarding their application for party status.
5 Okay.

6 Board members, we have no objection from
7 the applicant or the ANC. Let's take up the request
8 for party status. Are there any other comments or
9 questions?

10 (No response.)

11 CHAIRPERSON GRIFFIS: If not, not noting
12 any, I would move that we grant party status to the
13 Kalorama Citizens Association.

14 MEMBER ETHERLY: Seconded.

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

17 Anything further on that? That would, of
18 course, be with regard to their -- well, I don't think
19 we need to make note of that. They are obviously
20 incorporating those that are participating, their
21 members and others that have a direct interest in this
22 application.

23 Okay. We have a motion before us. It has
24 been seconded. All those in favor of the motion
25 signify by saying aye.

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1 (Chorus of ayes.)

2 CHAIRPERSON GRIFFIS: Opposed?

3 (No response.)

4 CHAIRPERSON GRIFFIS: Very well.

5 Anything else we need to accomplish today?

6 We have other motions in this case. Why
7 don't we pick those up. We have motions from the ANC
8 and also KCA. There are two motions. Which one --
9 indeed. Let's take up the motion -- let's do the
10 motion for postponement of the hearing first. Board
11 members, first, are there direct questions that you
12 have of KCA regarding this? This is actually a joint
13 motion; am I correct?

14 MR. ROTH: Yes, sir.

15 CHAIRPERSON GRIFFIS: Okay.

16 First of all, reiterating the motion just
17 for clarity of the Board, of course, this motion --
18 and I'm going to summarize here and I will allow you
19 to tell me if I'm incorrect -- but the motion is
20 essentially saying we need a postponement until that
21 time which an appeal that related to this specific
22 site is actually issued, the order from that and
23 decision of that appeal case. Is that correct?

24 MR. ROTH: It's essentially correct. I
25 think we suggested in the motion a period of at least

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1 30 days after the issuance of that order.

2 CHAIRPERSON GRIFFIS: Right. And what do
3 you see is the relevancy of the appeal to this
4 specific application, and, more importantly, where do
5 you see our jurisdiction to preclude a property owner
6 from bringing an application to the Board?

7 MR. ROTH: Mr. Chairman, let me take those
8 in reverse order. We made two arguments primarily in
9 our motion to postpone. The first is that this is in
10 effect, if you read the applicant's statement,
11 prehearing statement, this is in effect a motion for
12 reconsideration or rehearing of the earlier appeal.
13 We have the same parties, the same issue, the same
14 property, and they essentially are re-litigating the
15 very same questions and the very same legal arguments
16 that were made in a previous case.

17 CHAIRPERSON GRIFFIS: Okay. And that's
18 understood and I think there is a very strong point,
19 and here is my question to you. First of all, what
20 would preclude us -- do we not have the authority to
21 limit any case presentation or cross-examination to
22 that point that is not on point to the application?

23 MR. ROTH: I suppose you do, Mr. Chairman,
24 but it's difficult for me to -- it's difficult for me
25 -- it seems to me that the applicant is putting the

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1 cart before the horse. They have already come before
2 the Board or at least come to the Office of Zoning
3 once with a motion for reconsideration or rehearing in
4 the previous case. That application -- that motion
5 never got to you because it was kicked out by the
6 staff on the grounds that you had not yet issued a
7 written order in that previous case.

8 CHAIRPERSON GRIFFIS: That's correct.

9 MR. ROTH: We are now being put in a
10 situation of being asked to argue or re-argue all of
11 the same points on which, as far as we know, we have
12 already won without the benefit --

13 CHAIRPERSON GRIFFIS: But how does this
14 Board preclude the strategy of a case presentation in
15 an independent application? I mean, when we get this
16 application -- let me be very simplistic -- we get an
17 application, it's delivered to us, we read it, we have
18 to look at it, decide it on what is established in the
19 record of this case. We have heard some very
20 outrageous -- in fact, this morning we heard a case
21 presentation based on mosquitos. Now, there is
22 nothing that stops -- I can't say, you know, mosquitos
23 are precluded from being addressed by this Board. I
24 listened to the case. If the case is successful, it's
25 successful. If it isn't, it isn't. I can say that

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1 the mosquitos weren't necessarily successful, but we
2 don't need to rehash that one.

3 So the point being, how do I preclude them
4 from making their case presentation?

5 MR. ROTH: Because the mosquito case was
6 not one in which the same parties were before the
7 members of the Board arguing the same facts, the same
8 legal issues.

9 CHAIRPERSON GRIFFIS: But go directly to
10 that. Where in the regulations is it said that if
11 there is an appeal that has not already been issued,
12 you are precluded from bringing an application for
13 zoning relief?

14 MR. ROTH: I think there are independent
15 doctrines in the law like collateral estoppel and res
16 judicata that prohibit parties having once gotten a
17 judgment from being -- having a judgment rendered
18 against them, trying to re-litigate those very same
19 questions and those very same issues in a subsequent
20 case.

21 CHAIRPERSON GRIFFIS: Well, fundamentally,
22 and not being an attorney, as I believe you are, but
23 fundamentally, there is a huge difference. In the
24 first, we were trying to decide in an appeal whether
25 an error was done by the DCRA, the Zoning

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1 Administrator. In this, we're being asked to look at
2 a special exception relief to the zoning regulations.
3 How are they similar?

4 MR. ROTH: The fundamental point at the
5 outset is whether or not the Board has jurisdiction by
6 way of special exception to allow a change or in
7 effect a violation of a congressional enactment.

8 CHAIRPERSON GRIFFIS: But that's a
9 different substance of a different motion.

10 MR. ROTH: And it is very, very difficult,
11 I think, for us to be in the position of arguing that
12 jurisdictional threshold question without the benefit
13 of having the Board's written opinion in the previous
14 case.

15 MR. HARGROVE: Mr. Chairman, if I may
16 intervene here --

17 MS. HARGROVE: I should indicate that this
18 is Mr. Hargrove to my right.

19 MR. HARGROVE: I will be representing KCA.
20 The fundamental point as far as
21 reconsideration is concerned and its relationship to
22 this hearing is that the Board cannot decide the
23 application for special exception without addressing
24 the precise issues that would be presented in an
25 application for rehearing, in fact were presented in

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1 an application for rehearing. The Board certainly, as
2 you suggested --

3 CHAIRPERSON GRIFFIS: Why can't we? Why
4 can't we hear the same information?

5 MR. HARGROVE: Because the issues -- those
6 very issues are dispositive of this question.

7 CHAIRPERSON GRIFFIS: They have to make
8 the case for a special exception here under 411.

9 MR. HARGROVE: That's correct, but our
10 position is, as we have indicated, that the Board has
11 no authority to grant a special exception for --

12 CHAIRPERSON GRIFFIS: Okay. But you're
13 going to a jurisdictional question. I want to stick
14 to the fact of whether we would postpone this based on
15 the point that the order and the appeal has not been
16 decided.

17 Let me say this fundamentally in terms of
18 reading the argument of whether we're rehashing the
19 same issue or not. This is where I fundamentally come
20 out, and for my Board members' understanding, and I
21 would like to hear from them: We cannot call this a
22 rehearing of the appeal because no matter what we do
23 under this application, it could not overturn directly
24 the appeal. We have no jurisdiction going directly to
25 that appeal or the substance of that appeal and there

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1 is on way to connect it.

2 MR. HARGROVE: Well, Mr. Chairman, I do
3 think the Board has the authority to pierce the veil
4 of this application and determine that, in fact, it is
5 an invocation of the provisions in the regulations
6 regarding rehearing and reconsideration, and those
7 provisions contain specific protections both to the
8 Board to avoid wasting its time and to the parties to
9 avoid wasting their time.

10 I see no problem at all from a legal point
11 of view in the Board's exercising its authority over
12 the administration of the zoning regulations and
13 saying we must treat this as, in fact, a motion for
14 reconsideration and rehearing and apply the
15 provisions, those protective provisions to that
16 application.

17 CHAIRPERSON GRIFFIS: Okay. Understood.

18 Questions of the parties that brought the
19 motion?

20 MEMBER ETHERLY: Mr. Chair, you had
21 invited perhaps a little bit of comment from Board
22 members regarding this. The way I see this is I think
23 to an extent the Board is kind of caught between a
24 rock and a hard place because I believe the Chairman's
25 position -- what's the word I'm looking for? I'm

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1 searching for the right term. But I think the
2 Chairman's position is technically a correct one.

3 I believe the argument that is being
4 offered by the ANC and by KCA in kind of a broader
5 legal contest I think is a correct one. In a larger
6 kind of court setting, I think typically there is much
7 to be said about the same facts and the same nucleus
8 of facts, so to speak, being drawn from with regard to
9 one action versus another, and that is something that
10 I am somewhat swayed by.

11 I think the challenge here is that finding
12 a peg within our regulations that allows us to reach
13 that, and that's the aspect of this, as I speak to KCA
14 and the ANC, that's the aspect of the argument that is
15 somewhat troublesome, because I don't necessarily
16 think we have a vehicle for accounting for what I
17 think is a strong argument.

18 So just as an indication to the Chair and
19 to my colleagues, the jurisdictional question is one
20 that I am struggling with because I think essentially
21 we are going to be looking at or sniffing around the
22 edges or, in fact, going directly to some of the core
23 issues that were before us in a previous situation.

24 That being said, I want to acknowledge
25 very clearly that I'm just not certain if there is a

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1 mechanism within our regulations to respond in the
2 affirmative on the motion, but I'm open to some
3 discussions from my colleagues on those points as well
4 as additional argument from the makers of the motion
5 and, of course, the applicant regarding that
6 particular point.

7 CHAIRPERSON GRIFFIS: Thank you, Mr.
8 Etherly.

9 Ms. Miller?

10 VICE CHAIRPERSON MILLER: I just want to
11 make a comment and then I know the applicant wants to
12 address the issue as well. But I see a difference
13 between our jurisdiction to hear the application for
14 the special exception and our jurisdiction to grant
15 certain relief, and I think that the applicant -- a
16 large part of the applicant's case that they presented
17 -- that they want to present in this case assumes that
18 our order issued from the bench is being upheld, and
19 that's why they are coming for a special exception. So
20 where I am at this point is that we have the authority
21 to hear the case.

22 CHAIRPERSON GRIFFIS: Thank you.

23 Any other comments or questions of
24 clarification?

25 Let's hear from the applicant, then,

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1 regarding the motion of postponement.

2 MS. BROWN: Thank you, Mr. Chairman. For
3 the record, my name is Carolyn Brown with the law
4 firm of Holland & Knight on behalf of the applicant
5 Montrose LLC.

6 What Mr. Sher is handing out here and what
7 he will provide the parties at the table is a motion
8 in opposition -- or an opposition to the motion to
9 dismiss, and I think the basic issue is that the
10 parties in opposition to this special exception case
11 have misconstrued the vote of the Board, and we don't
12 need the written order to know how you voted or to
13 understand what your interpretation is of the
14 applicability of the 1910 Height Act. All we need to
15 do is go to a subsequent order that you issued from
16 the bench on July 14 where the exact issue was
17 presented, and that was in BZA case 17186 for 777 6th
18 Street, Northwest. It's an eleven-story office
19 building where special exception relief from the roof
20 structure setbacks was requested. The building was
21 constructed or it's being proposed to max out under
22 the 1910 Height Act at 120 feet. They are taking
23 their width off of 6th Street at 100 feet.

24 CHAIRPERSON GRIFFIS: Okay. Let me
25 caution here because what Ms. Miller brought up was

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1 there was jurisdiction to hear this case and that
2 there was a separate and distinct question of
3 jurisdiction as it relates to the Height Act, and what
4 Ms. Miller, if I understand you correctly, was saying
5 is we can proceed because we have the jurisdiction to
6 hear this case.

7 Is that correct?

8 VICE CHAIRPERSON MILLER: That's correct.
9 That's as far as I went, yes.

10 MS. BROWN: I was responding to some of
11 the issues being raised by Mr. Roth in the motion in
12 general, but if you want to limit it, it's fine.

13 MEMBER ETHERLY: At least for the moment,
14 perhaps just to follow on your comment and Ms.
15 Miller's observation, perhaps the question for Ms.
16 Brown is, Ms. Brown, it is your position, of course,
17 that this body does have jurisdiction to hear the
18 case, that there is no vehicle through which we are
19 precluded from looking at -- as I think the KCA and
20 the ANC are arguing, there is nothing in our
21 regulations that preclude us from hearing this case
22 based on any alleged similarity of facts.

23 Perhaps just to walk through that
24 question, it is your contention or it is your belief
25 that this is an entirely separate application

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1 requesting separate relief, so you are not seeking
2 relief here that was dealt with in the prior case.

3 MS. BROWN: That's correct. We couldn't
4 have asked for any relief under that case because it
5 was an appeal case, as Mr. Griffis pointed out, to
6 decide whether error had been committed. We
7 understand that the Board took a vote saying that
8 error had been committed by the Zoning Administrator,
9 so we're here under special exception application to
10 correct that.

11 MEMBER ETHERLY: And it would further be
12 your position that there is nothing within this
13 Board's regulations that you would be aware of that
14 based on any similarity of facts or similarity in the
15 subject property that would prevent us from
16 nevertheless looking at this particular application
17 because it is based on a separate relief.

18 MS. BROWN: That's correct. We could set
19 aside the whole appeal case if it never happened and
20 we are still permitted to come through here with a
21 special exception application for roof structure
22 setback had the Zoning Administrator ruled initially
23 that we could not get a building permit a year and a
24 half ago.

25 MEMBER ETHERLY: Okay. Thank you.

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1 Thank you, Mr. Chairman.

2 CHAIRPERSON GRIFFIS: Thank you, Mr.
3 Etherly.

4 MR. ROTH: Mr. Chairman?

5 CHAIRPERSON GRIFFIS: Let me see if you
6 have finished because you have handed out your entire
7 opposition to the motion. Are there any other
8 highlights that you wanted to make?

9 MS. BROWN: I would like to finish
10 addressing the point I started to on the
11 jurisdictional question, but if you want to deal with
12 that separately, you let me know.

13 CHAIRPERSON GRIFFIS: Jurisdictional in
14 terms of whether a special exception can be granted in
15 the Height Act.

16 MS. BROWN: Yes.

17 CHAIRPERSON GRIFFIS: Okay. Yes, I would
18 like to hold that off.

19 Ms. Miller?

20 VICE CHAIRPERSON MILLER: I was going to
21 say, I would think the movant of the motion to dismiss
22 would go first and then you would respond to that
23 would make more sense.

24 MR. ROTH: I was hoping to be able to
25 respond to both some of the points that Board members

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1 made and that Brown made on the motion to postpone
2 before we get into those other questions.

3 CHAIRPERSON GRIFFIS: Go ahead.

4 MR. ROTH: First, not to dwell on petty
5 things, but this is not --

6 CHAIRPERSON GRIFFIS: I just hate when
7 that follows with a "but."

8 MR. ROTH: -- this is not the first time
9 that this particular party and this particular
10 representative of a party, after sitting in a room
11 with us for the last three hours, has, while we sit
12 here at the table, dumped on us a pleading that they
13 could easily have given us this morning. We delivered
14 our motions to them prior to the weekend.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. ROTH: Okay. So I'm not in a position
17 today to respond to anything in here.

18 CHAIRPERSON GRIFFIS: We get it, too.

19 MR. ROTH: I understand, but --

20 CHAIRPERSON GRIFFIS: I understand.

21 MR. ROTH: -- to me, Mr. Chairman --

22 CHAIRPERSON GRIFFIS: You don't need to
23 tell us. I'm trying to read this while I'm listening
24 to you while I'm trying to figure out what is next and
25 then what I am going to have for lunch. So let's move

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1 ahead.

2 MR. ROTH: Mr. Chairman, to me, that
3 counsels for the Board granting the postponement so
4 they can read this, too.

5 CHAIRPERSON GRIFFIS: Right.

6 MR. ROTH: Okay.

7 MS. BROWN: If I could --

8 MR. ROTH: No, excuse me. I didn't
9 interrupt you.

10 CHAIRPERSON GRIFFIS: Let's just take a
11 minute because I understand you all have been here all
12 morning, but we're going to get through this very
13 civilly and there is no reason why we need to get in
14 an uproar right off the bat. So let's just take time.

15 This is very -- let me just step back a little bit
16 myself, because this is very complex for the Board and
17 we take this very seriously and it is all focused on
18 the specific application, and the motions are
19 incredibly well done. What I am reading of what has
20 just been given me is also well done. There is an
21 awful lot to digest here. So the more calm and the
22 more even-tempered and the more directness that we
23 get, it's all going to help us, because at the end of
24 the day, we have to take this home and deal with it.

25 So with that being said, let's go -- and I

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1 think what you have understood the Board saying is,
2 look, there are some very distinct aspects that have
3 come up here. One that we want to separate out to
4 deal with differently is whether the Board has the
5 jurisdiction to grant relief as it is attendant to the
6 height of building act of 1910. So let's put that a
7 little bit aside. Let's go to all of the other issues
8 that go to the postponement, or continuance at this
9 point.

10 MR. ROTH: I appreciate your admonition,
11 Mr. Chairman.

12 Mr. Etherly made the point that the Board
13 is between a rock and a hard place here, which I
14 understand. I think we feel ourselves to be in much
15 the same situation.

16 In response to your specific question
17 about where in the regulations, section 3105.11 of the
18 regulations clearly contemplates that the Board does
19 have authority to postpone or continue a hearing, in
20 fact to do so for a period in excess of 30 days from
21 the date of such postponement or continuance or until
22 the next available scheduled hearing date, whichever
23 is earlier. So there is a hook in the regulations for
24 the Board in the exercise of its discretion in the
25 management of its own caseload to decide how to order

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1 these processes.

2 Second, even beyond that specific
3 regulation, you know, perhaps we should have provided
4 it ahead of time, but I would be happy to go back and
5 do some case law research that indicates that beyond
6 the courtroom litigation situation, those same
7 doctrines involving a common nucleus of facts, the
8 same parties, the same issues, legal issues as well as
9 factual issues, apply in administrative proceedings as
10 well, and there is case law to that effect.

11 I'm certain that taking those two things
12 together, the Board certainly has the authority to
13 decide today to postpone this case and again for the
14 reason I have argued before and which I think, Mr.
15 Etherly, you appreciated, which is it's very difficult
16 for us to construct a response to an argument based
17 upon an interpretation of a statute that the Board has
18 already verbally voted on and ruled one way on and
19 which Ms. Brown herself this morning is arguing never
20 really happened because of a case that was decided
21 from the bench on July 14th.

22 Now, let me address that case for a
23 moment. That is a two-page summary order. There is
24 no mention in that case, in that decision, of the
25 Height Act, of any issue under the Height Act. This

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1 morning I went into the office, I pulled out the file;
2 there is no reference to the Height Act in Ms.
3 Brown's pleadings in that case, there is no reference
4 to the Height Act in Ms. Brown's statement in advance
5 of the case, there is no reference to the Height Act
6 anywhere in that case. I don't know what the height
7 of that building was, I don't know what the limit was
8 of what was permitted in that area, and as we pointed
9 out in one of our other pleadings, the fact that other
10 people in the past have slipped through a red light
11 doesn't mean that the officer who sees it happen isn't
12 required to give someone a ticket at the point that
13 it's caught.

14 I don't know what the Height Act facts
15 were in that other case, but there is certainly
16 nothing either in the Board's order or in the record
17 of that case that has anything to do with the Height
18 Act, and so that's no authority whatsoever for saying
19 that we can ignore what you voted on by a five to zero
20 vote because something happened subsequent to it.

21 CHAIRPERSON GRIFFIS: Well stated. What
22 I'm still not hearing addressed, though, is -- well,
23 let's move on.

24 MR. ROTH: Again, I'm just going to try to
25 -- I may not be articulating it well, but it's

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1 difficult for me to understand how we can counter
2 effectively Ms. Brown's arguments that essentially say
3 everything this Board decided in the previous appeal
4 is for naught and doesn't apply without having the
5 Board's order in our hand so that we can, number 1,
6 see the Board's rationale and explanation, and, number
7 2, be able to present that in our case.

8 MR. HARGROVE: Let me add, Mr. Chairman,
9 if I may, that it's not necessarily for the Board to
10 determine that this is a motion for reconsideration.
11 The first point that we tried to make is that it
12 simply makes no sense from the point of view of
13 intellectual coherence --

14 CHAIRPERSON GRIFFIS: We're not trying to
15 figure out whether it's a motion -- we know it's not a
16 motion of reconsideration.

17 MR. HARGROVE: Okay.

18 CHAIRPERSON GRIFFIS: What we're trying to
19 decide is whether we postpone this based on the fact
20 that the appeal order isn't issued.

21 Ms. Miller, questions?

22 VICE CHAIRPERSON MILLER: It's kind of a
23 question/comment. But I just don't see that -- while
24 it might be helpful to have the written order, I just
25 don't see how that is -- that you're really prejudiced

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1 from presenting your case without the written order in
2 that you can still argue the same facts and law, and I
3 think you can still argue within the case --

4 CHAIRPERSON GRIFFIS: This specific case.

5 VICE CHAIRPERSON MILLER: In this specific
6 case, and you have the transcript of the Board's
7 deliberations. I'm just not sure why that rises to
8 the level of your being so prejudiced.

9 MR. ROTH: Well, Ms. Miller, the way I
10 would respond to that is to say that if the Board
11 issues another order that then becomes final, a lot of
12 the evidence that the applicant wants to introduce in
13 this case and a lot of the cross-examination that we
14 would have to do, a lot of the briefing that we would
15 have to do would be completely superfluous and
16 unnecessary because by pointing to the Board's
17 decision in that other case, we could make the point
18 that the argument that they are making and which they
19 make in their brief is simply not an argument that the
20 Board needs to countenance and not evidence that the
21 Board needs to hear. It is irrelevant to their
22 application if, by virtue of a decision of the Board,
23 they are not allowed to do what it is they are asking
24 to do.

25 CHAIRPERSON GRIFFIS: Understood.

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1 MS. BROWN: Do I have an opportunity to --

2 CHAIRPERSON GRIFFIS: Yes.

3 MS. BROWN: It seems like we have shifted
4 into the area of jurisdiction.

5 CHAIRPERSON GRIFFIS: It's hard to keep
6 out of it.

7 MS. BROWN: I think one of the --

8 VICE CHAIRPERSON MILLER: Can I just
9 interrupt you for one second before we shift into the
10 area?

11 MS. BROWN: Sure.

12 VICE CHAIRPERSON MILLER: I thought that I
13 heard you say that the applicant was conceding that
14 the Board's oral statements from the bench would be --
15 you would assume that that's what would be in the
16 written order in your presentation; is that correct?

17 MS. BROWN: We do have a copy of the
18 transcript and we have tried to understand the Board's
19 vote. I know that it's difficult to understand where
20 exactly -- we heard comments from various Board
21 members, and where the actual vote came out on how you
22 arrived at a particular conclusion is not clear to me.

23 But I do know from subsequent action by
24 this Board and the past president that there is no way
25 that you could have a continuum of constant

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1 interpretations for 45 years, a blip in the screen for
2 our appeal case, and then continue with another --
3 back to the original interpretation. So that's where
4 I'm -- so I know that that could not have happened and
5 so that's why I'm here with the special exception case
6 and proceeding the way we are.

7 MR. ROTH: Ms. Miller, Mr. Chairman, what
8 I just heard Ms. Brown say is that she rejects your
9 prior decision.

10 CHAIRPERSON GRIFFIS: If Board members
11 have another opinion, that has no relevancy to me.
12 Absolutely none. I'm still looking at an independent
13 application. I'm ready, unless you want to hear
14 further.

15 VICE CHAIRPERSON MILLER: I think that
16 goes to the merits and what we're dealing with right
17 now is the procedural question of whether we can hear
18 it.

19 MR. ROTH: I don't doubt the Board's
20 authority to hear the motion to postpone or to hear
21 the motion to dismiss. You know, I -- you were
22 distinguishing, Ms. Miller, before between
23 jurisdiction to hear the case versus jurisdiction to
24 grant the relief, and at a minimum, I think we would
25 concede the Board certainly has jurisdiction to decide

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1 whether to hold a hearing today and whether or not the
2 case should be dismissed for lack of jurisdiction or
3 some other reason.

4 Beyond that, if the Board concludes that
5 it lacks jurisdiction to grant the relief requested, I
6 am not sure I understand how the Board would then have
7 jurisdiction to go through the process of hearing the
8 case.

9 CHAIRPERSON GRIFFIS: Isn't that a
10 quandary.

11 Very well. Board members, we've heard.
12 What action would you like to take?

13 Very well. I would move that we deny the
14 motion by the ANC and the KCA to postpone the hearing
15 on the basis of the fact that the written order of
16 decision of a previous appeal has not been issued and
17 I would ask for a second.

18 MEMBER MANN: Second.

19 CHAIRPERSON GRIFFIS: Thank you.

20 I think it's fairly clear that this is an
21 independent application. I don't see anything in the
22 regulations that actually preclude us or give us the
23 jurisdiction and authority to preclude a property
24 owner from bringing an application before us, and
25 therefore our jurisdiction and authority to hear a

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1 case I think is very clear.

2 The basis -- and I think there is some
3 substance to the arguments of, boy, haven't we gone
4 through this, haven't we been through this before.
5 Well, you know, I was there also and there are some
6 similarities of circumstances, but there are no
7 similarities in substance and fact because the
8 substance and fact of which this application as
9 presented needs to be decided will be established in
10 this case, and therefore I think we are able to
11 proceed and, you know, the postponement -- it's so
12 fruitless as we continue talking about it because time
13 ticks on.

14 So that being said, I will let others
15 speak to the motion.

16 MEMBER ETHERLY: Mr. Chair, I will speak
17 in opposition to the motion, and it's an odd
18 opposition for me because I think in -- once again,
19 technically, I think the position is a correct one;
20 however, I think the outcome is perhaps not the right
21 one.

22 I believe that the applicant is proper in
23 bringing the application forward. There is no
24 question in my mind that the application is a proper
25 one. It's a grey area and it's a grey area in which

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1 the applicant is free to exercise all of the
2 creativity that they can muster to make the argument.

3 So I want to be very clear in my opposition that I
4 think that the application is, indeed, a proper one.
5 I just simply think that the nucleus of fact, to use
6 that turn of facts that I referenced before and you
7 heard Mr. Roth note, I believe the nucleus of fact in
8 essence is going to invoke the same dance and the same
9 music, so we might as well wait until all of the party
10 guests are at the table, so to speak, and deal with it
11 once the order has been issued from the prior case.

12 I acknowledge the fact, as the Chairman
13 has noted, that there is nothing in our regulations
14 which require us to take that step or mandate that we
15 take that step, so that's why it's a somewhat odd
16 opposition for me. But I simply think from the
17 standpoint of, once again, having danced to this
18 record for so many months in the prior proceeding,
19 that I think we would be well served to have the
20 benefit of the final order and simply start this party
21 when the appeal arises in the prior case.

22 That being said, once again, Mr. Chairman,
23 I just want to be very clear that I believe the
24 application was a proper one on the part of the
25 applicant, and there is nothing in our regulations

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1 that really perhaps contemplates the outcome that my
2 opposition to the motion would suggest, but it's a
3 rock and a hard place, but I'm going to kind of wedge
4 myself in between those two and kind of stick to my
5 guns in that regard.

6 Thank you, Mr. Chair.

7 CHAIRPERSON GRIFFIS: Thank you, Mr.
8 Etherly.

9 Others? Yes.

10 COMMISSIONER HILDEBRAND: Not having been
11 a part of the case that's being referenced --

12 CHAIRPERSON GRIFFIS: Which is an
13 important position to have.

14 (Laughter.)

15 COMMISSIONER HILDEBRAND: You might see
16 that as an advantage and a disadvantage all at the
17 same time.

18 I certainly support Mr. Etherly in his
19 position and I feel that there would be no harm in a
20 postponement until after the appeal has been written
21 and distributed.

22 CHAIRPERSON GRIFFIS: Okay.

23 VICE CHAIRPERSON MILLER: I know we're
24 already in deliberation, but I'm wondering if I could
25 ask the applicant what harm there would be in

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1 postponing our hearing in this case, because I think
2 that's one of the factors that we weigh, and we didn't
3 get into that discussion, is prejudice from
4 postponing. Could we do that?

5 MEMBER ETHERLY: I will just note for the
6 benefit of discussion, Mr. Chair, as much as I would
7 love to entertain Ms. Miller's suggestion, I mean,
8 it's tempting, I just know by virtue of our rules,
9 having entered into deliberation under a motion --

10 (Pause.)

11 CHAIRPERSON GRIFFIS: I don't think it's
12 appropriate to table the motion at this time to hear
13 further testimony on this, these motions. I think the
14 Board needs to look inside themselves and look at some
15 of the experience in previous cases to find the
16 answers of anything that we forgot to ask before the
17 motion came.

18 (Laughter.)

19 CHAIRPERSON GRIFFIS: But that being said,
20 I think we do have a -- you know, obviously, with all
21 the comments from the Board, we have quite a bit of
22 complexity to all these issues.

23 Let me just restate the fundamental
24 substance of the motion, the motion to deny the motion
25 to postpone. It went directly to the substance of

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1 what we were being requested to postpone for, and the
2 postponement is being requested and the motion
3 specifically goes to this one aspect of which we're
4 taking now, the linkage to a previous appeal, and it's
5 basically saying we have to postpone because we
6 haven't issued an order in a previous appeal, and to
7 that, I have moved that we deny that motion.

8 Let me hear if there are any further
9 deliberations -- yes?

10 VICE CHAIRPERSON MILLER: I would just say
11 that, I mean, ideally, I would have liked to ask that
12 question to the applicant, but I will learn from this,
13 but basically I don't think that I do necessarily need
14 the answer because I am not convinced that the written
15 order is necessary to proceed with this appeal -- I
16 mean with this application.

17 CHAIRPERSON GRIFFIS: Very well.

18 Anything else? Anything further?

19 We have a motion before us that has been
20 seconded. I would ask for all those in favor to
21 signify by saying aye.

22 (Chorus of ayes.)

23 CHAIRPERSON GRIFFIS: And opposed?

24 (Chorus of ayes.)

25 CHAIRPERSON GRIFFIS: Very well.

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1 Ms. Bailey?

2 MS. BAILEY: The Board has voted to deny
3 the motion to postpone the hearing based on the
4 issuance with the previous order associated with the
5 case. The vote is 3-2-0. The motion was made by Mr.
6 Griffis, seconded by Mr. Mann. Mrs. Miller is in
7 support of the motion; Mr. Etherly and Mr. Hildebrand
8 are in opposition to the motion.

9 CHAIRPERSON GRIFFIS: Very well. What is
10 next on the substance of the motion is jurisdiction,
11 and this is what I propose. It is the motion to
12 dismiss. First of all, Board members, I think it
13 would be -- I would like to proceed in this fashion
14 and I would like to hold the motion to dismiss in
15 abeyance. I would like to give a time period in which
16 all the participants can brief this issue.

17 I like the legal phrase "brief" because to
18 me that means small and succinct, but to the lawyers
19 among us, it doesn't always mean that. But I think if
20 we would briefly brief the issue of jurisdiction, and
21 it goes to this and fundamentally the way I see this
22 is do we have the authority to hear an application,
23 and the Board has just decided that we have. The next
24 is whether we have jurisdiction to grant the relief.

25 I know it may sound kind of crazy -- can

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1 you hear it, but you can't relieve it. That being
2 said, I want to give the opportunity to submit in
3 writing the briefing on that issue, and we can set the
4 date as we go further.

5 Now, let's look at realistically -- well,
6 let me hear, are there other preliminary matters from
7 the applicant or the parties?

8 MR. ROTH: I have one and possibly two
9 related to testimony. Do you want to hear that now?

10 CHAIRPERSON GRIFFIS: I don't know. What
11 is it?

12 MR. ROTH: Well, the first would be we
13 have a report from the Office of Planning initialed by
14 someone whose initials are not TP, Mr. Parker. I
15 don't know whether Mr. Parker personally wrote that
16 Office of Planning report, I don't know who exactly
17 wrote it, but I believe we have the right to
18 cross-examine the Office of Planning on its report and
19 it's difficult to imagine how we can do that
20 effectively without the person who actually
21 investigated and wrote it.

22 CHAIRPERSON GRIFFIS: You mean JLS
23 initialed it for Mr. Altmann?

24 MR. ROTH: Yes.

25 CHAIRPERSON GRIFFIS: In Exhibit Number

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1 32?

2 MR. ROTH: Yes.

3 CHAIRPERSON GRIFFIS: Let's get to the
4 bottom of this.

5 Mr. Parker, a very good afternoon to you.
6 How are you?

7 MR. PARKER: I'm wonderful. How are you?

8 CHAIRPERSON GRIFFIS: You represent the
9 Office of Planning?

10 MR. PARKER: I do.

11 CHAIRPERSON GRIFFIS: Indeed. Did you
12 write this report?

13 MR. PARKER: I did.

14 CHAIRPERSON GRIFFIS: Very well.

15 MR. ROTH: Okay.

16 CHAIRPERSON GRIFFIS: Next question?

17 MR. ROTH: All right. We have solved
18 that.

19 Finally, the applicant has indicated an
20 intention of calling Mr. Sher to testify. We have
21 looked through the outline of Mr. Sher's proposed
22 testimony. In attempting to plan for that, it is
23 difficult for me to see how that testimony or any
24 cross-examination of that testimony could be anything
25 other than a legal argument.

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1 Essentially what Mr. Sher is being asked
2 to testify about is a whole series of legal arguments
3 and legal conclusions dating back all the way to 1910.

4 So I would ask the Board to either bar Mr. Sher's
5 testimony as proposed by the applicant or to limit his
6 testimony to those matters which are facts and not
7 legal arguments and those facts which are within his
8 personal knowledge or experience as opposed to those
9 things that occurred many years before or many years
10 after Mr. Sher was directly involved in any of these
11 cases.

12 VICE CHAIRPERSON MILLER: Can I ask what
13 the grounds for that would be?

14 MR. ROTH: The grounds are testimony is
15 supposed to present evidence. Evidence is supposed to
16 be facts, not legal arguments. Essentially, if I look
17 at the --

18 CHAIRPERSON GRIFFIS: But by the very
19 definition, he is being proposed to be called as a
20 witness, and I'm not clear we can get this answer, but
21 I don't believe Mr. Sher is an attorney. Therefore
22 wouldn't all the information and testimony given be,
23 one, available for cross-examination and, two, be
24 presented as testimony of fact?

25 MR. ROTH: Well, I don't know what Mr.

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1 Sher's exact precise testimony is, but as I look at
2 the outline provided by applicant's counsel, it looks
3 to me like a long series of legal arguments about
4 statutes and regulations, precedents.

5 CHAIRPERSON GRIFFIS: I understand your
6 concern, but it is somewhat a difficult line to strike
7 testimony, first of all, before we have heard it, but
8 also the mere fact that he in this outline is
9 obviously coming to speak to the regulations, the
10 regulations are somewhat legal.

11 MEMBER ETHERLY: And if I could, Mr.
12 Chairman, I think that's a very important point. I
13 understand where Mr. Roth is coming from; I just think
14 that it would be a highly, highly unusual step for
15 this Board to take, at least in terms of my short
16 experience, as we have typically received testimony --
17 and I'm not, of course, speaking for the applicant
18 here, but typically if we have, if we receive
19 testimony of this nature that witnesses have perhaps
20 offered, and upon review of qualifications we may
21 determine that that witness can be viewed as an expert
22 in land use, land use planning and/or zoning, and that
23 testimony can be, you know, given a certain probative
24 value but it still is within the Board's purview to
25 value that testimony however it deems most appropriate

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1 based on the facts of the case. That would be the
2 posture in which I have -- I would receive any such
3 testimony that would be offered.

4 All that is a rather longwinded way of
5 saying I would not agree with such a step and I think
6 the Board would be able to view any testimony offered
7 by Mr. Sher appropriately, not as legal fact or legal
8 argument but as perhaps empirical testimony or
9 testimony based on his experience with zoning and land
10 use planning here in the District and it would be
11 viewed as such, not necessarily as legal fact per se.
12 I don't want to get too deeply caught in the nuance,
13 but I just think it would be an unusual step that I
14 wouldn't be willing to take.

15 CHAIRPERSON GRIFFIS: Good. Well said.

16 MS. BROWN: May I also respond?

17 MR. HARGROVE: Mr. Chairman, could I ask
18 whether, in light of these comments, whether the Board
19 regards it as -- would regard it as appropriate for
20 Mr. Sher to offer legal conclusions as to the
21 governing principles and rules in this case or must he
22 limit himself to the facts in order to be an
23 appropriate witness?

24 CHAIRPERSON GRIFFIS: Could he make legal
25 conclusions? I'm not sure he would have the ability

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1 nor would he be presented as a witness that would be
2 making legal conclusions.

3 MS. BROWN: If I could --

4 MR. HARGROVE: The problem is that his
5 testimony as outlined is replete with legal
6 conclusions.

7 CHAIRPERSON GRIFFIS: Okay. I understand.

8 MR. HARGROVE: That was the reason that we
9 felt some uneasiness about it.

10 CHAIRPERSON GRIFFIS: Yes?

11 MS. BROWN: We will be presenting Mr. Sher
12 as an expert witness, and experts are allowed to offer
13 opinion.

14 CHAIRPERSON GRIFFIS: Right.

15 MS. BROWN: So that's exactly what he
16 would be doing based on the regulations as he knows
17 them and the past orders of this Board. Whether you
18 interpret it as legal conclusion is up to you.

19 CHAIRPERSON GRIFFIS: Right. Well said.
20 Okay.

21 First of all, we understand and we will
22 note the concern. Secondly, as we won't preclude Mr.
23 Sher from beginning to present and presenting his
24 testimony, we certainly won't preclude you from making
25 motions of -- any sort of motions in opposition to the

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1 presentation of evidence. Hopefully we won't get into
2 a lot of that banter, and we can do it with your case
3 presentation as opposed to theirs and
4 cross-examination.

5 Okay. Anything else? Was that the two?
6 One, possibly two?

7 MR. ROTH: Planning and Mr. Sher.

8 CHAIRPERSON GRIFFIS: Indeed. Nothing
9 else?

10 MR. HARGROVE: Mr. Chairman?

11 CHAIRPERSON GRIFFIS: Yes.

12 MR. HARGROVE: Do I correctly understand,
13 then, that as to the motion to postpone, the Board's
14 present position is to take no action but to ask that
15 the issue be briefed?

16 VICE CHAIRPERSON MILLER: No.

17 CHAIRPERSON GRIFFIS: No. In terms of --

18 MR. HARGROVE: I mean, I'm sorry, the
19 motion to dismiss.

20 CHAIRPERSON GRIFFIS: That's correct.

21 Yes?

22 VICE CHAIRPERSON MILLER: It's my
23 understanding that the question to be briefed is
24 whether or not the Board has the authority to grant
25 relief that's in conflict with the Height Act.

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1 MR. ROTH: If I may, Mr. Chairman, I
2 believe that our motion or the statement in support of
3 the motion essentially attempted to get at that
4 question, and I haven't read Ms. Brown's response, but
5 I assume her response attempts to get at that
6 question, too. We would be happy to do further
7 research and supplement it. I don't know whether
8 you're suggesting -- I just want to be clear that
9 we're going to provide the Board with what the Board
10 wants.

11 CHAIRPERSON GRIFFIS: Right. And we're
12 going to bring clarity to everything that is going to
13 be submitted and what the Board is asking once we
14 figure out now what we're doing with the rest of our
15 morning session.

16 It is one o'clock. Are there any other
17 preliminary matters attendant to this, anything else
18 that we haven't addressed?

19 MS. BROWN: The applicant has no
20 preliminary matters.

21 CHAIRPERSON GRIFFIS: Excellent. Okay.

22 That being said, Ms. Brown, what time are
23 you requiring for the presentation of your case?

24 MS. BROWN: I would say 20 minutes to --
25 20 minutes without any cross-examination.

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1 CHAIRPERSON GRIFFIS: Right. Of course
2 cross wouldn't count toward the time allotted for the
3 presentation of cases.

4 KCA, 20 minutes equitable time, and what I
5 propose to do is run the clock for the presentation of
6 the applicant; it would be set for 20 minutes.
7 Anything they went over, of course, would also be
8 equally afforded you.

9 MS. HARGROVE: We would like to say that
10 since we do want to put on some of these witnesses
11 that you heard today who have not filed for
12 independent party status that they be allowed to
13 speak, and that may be longer than 20 minutes. I
14 don't expect any of them to talk more than several
15 minutes a piece, but we do have a large portion of
16 material to present to the Board.

17 Secondly, one of my worries in view of
18 what you have decided to do about postponing the issue
19 of jurisdiction is that our basic document which we
20 would be presenting today covers a lot of those issues
21 right there in the document itself. So in view of
22 that, are you suggesting to us that we should remove
23 that portion of our pleadings today in favor of
24 arguing straightly on the special exception grounds?

25 CHAIRPERSON GRIFFIS: That's my intention.

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1 MR. ROTH: I'm not sure I understood what
2 Ms. Hargrove said.

3 (Pause.)

4 VICE CHAIRPERSON MILLER: I want to throw
5 out a question to the parties before we complete the
6 scheduling, and that is, it seems to me it's a legal
7 question whether or not the Board can grant relief in
8 conflict with the Height Act. I mean, there may be
9 some facts that you need to put in as to whether it in
10 fact would be in conflict with the Height Act, but I'm
11 wondering if we need to set that first before we set
12 the hearing, the rest of the hearing with witnesses or
13 not.

14 Actually, Mr. Sher I guess goes to the
15 legal question, but then there are all those other
16 questions that go along with the special exception
17 about light and air, et cetera, that we wouldn't reach
18 if we reached the legal question first, if we, in
19 fact, concluded that we didn't have authority.

20 CHAIRPERSON GRIFFIS: So you're offering
21 an opinion of taking this perhaps in two sessions.
22 That would also fulfill us getting through this on our
23 schedule.

24 Ms. Brown, your reaction to that? What we
25 would do is we would have the first initial

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1 presentation of the case being the jurisdictional
2 issue.

3 MS. BROWN: We're ready to proceed right
4 now on that issue.

5 MR. ROTH: I think that would be
6 acceptable to us.

7 (Pause.)

8 CHAIRPERSON GRIFFIS: Let's go. How long
9 do you need to present on that one aspect?

10 MS. BROWN: I suppose it depends on --
11 they have raised the issue in their motion, so --

12 CHAIRPERSON GRIFFIS: Do you want them to
13 present first?

14 MS. BROWN: Yes, then we would respond.

15 CHAIRPERSON GRIFFIS: Very well.

16 Time?

17 MR. HARGROVE: I would be reluctant to
18 limit it to 20 minutes. Thirty minutes I think would
19 be adequate.

20 CHAIRPERSON GRIFFIS: Can you turn your
21 microphone on? Twenty or 30 minutes on -- we're
22 separating the issue, we're just talking about the
23 jurisdictional. Can you turn your microphone on,
24 please?

25 MR. HARGROVE: I understand that, Mr.

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1 Chairman. It's an issue, as you know, of some
2 complexity and there are two parties involved, and I
3 would not want to be arbitrarily limited in our
4 ability to present and address that issue within
5 sufficient --

6 CHAIRPERSON GRIFFIS: But you wanted for
7 your entire case 20, 30 minutes, with the addition of
8 the witnesses, and now you want 20 or 30 twice?
9 That's doubling your time.

10 MR. ROTH: Mr. Chairman?

11 CHAIRPERSON GRIFFIS: Yes.

12 MR. ROTH: Would you give us 30 seconds to
13 confer?

14 CHAIRPERSON GRIFFIS: Let's do. Let's
15 take a minute.

16 (Pause.)

17 CHAIRPERSON GRIFFIS: Yes.

18 MR. ROTH: Just to clarify one question,
19 if I understand you correctly, you were talking about
20 having a presentation on this threshold legal issue
21 today and then continuing the case for the
22 presentation of evidence on the special exception if
23 you determine that you have jurisdiction to do so; is
24 that correct?

25 CHAIRPERSON GRIFFIS: Somewhat correct,

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1 yes.

2 MR. ROTH: Okay. I think our response to
3 the situation is, we don't have any fact witnesses to
4 put on with respect to the legal issue, the threshold
5 jurisdictional issue. We certainly have plenty of
6 legal argument on that issue. We can --

7 CHAIRPERSON GRIFFIS: Why would you need
8 fact witnesses? Why can't you just present your legal
9 argument?

10 MR. ROTH: That's what I'm saying. I'm
11 not sure whether Ms. Brown was anticipating calling
12 Mr. Sher as a witness on the jurisdictional question
13 or not. So what I'm saying is if you want to hear --
14 if that's her plan and if you want to hear testimony
15 first, we don't have any witnesses to present. If you
16 want us -- if she is not planning to present a
17 witness, we can go ahead and Mr. Hargrove is going to
18 take the lead on making the legal argument.

19 CHAIRPERSON GRIFFIS: Why would it make
20 any difference in your presentation of your legal
21 argument whether Ms. Brown puts on a witness or not?

22 MR. ROTH: It is our belief, based upon
23 what we have read in their prehearing statement, that
24 they are making many representations which they are
25 going to attempt to introduce as facts today that are

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1 both contrary to the law, contrary to what they say
2 certain cases are cited --

3 CHAIRPERSON GRIFFIS: Can you go ahead and
4 present your legal argument regarding the jurisdiction
5 of this Board in granting relief to this particular
6 penthouse?

7 MR. ROTH: Yes. I think the answer to
8 that is yes.

9 CHAIRPERSON GRIFFIS: Good. Who is going
10 to go first?

11 MR. ROTH: Mr. Hargrove.

12 CHAIRPERSON GRIFFIS: Mr. Hargrove, you
13 are going to have five minutes.

14 MS. HARGROVE: I have to ask a question in
15 view of what you just said. We are, of course, going
16 to be allowed to respond by submitting a legal brief
17 later of the notes that --

18 CHAIRPERSON GRIFFIS: Yes. The record is
19 not going to be closed after this.

20 MS. HARGROVE: So we're clear about that.

21 CHAIRPERSON GRIFFIS: And I will be even
22 more clear as I have now shocked you with five
23 minutes. We have an awful lot of written submissions
24 already. What I want to hear is -- I want to give the
25 opportunity for to you present orally and also to hear

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1 the other case presentation. After that, we are going
2 to keep the record open for additional submissions.

3 MS. HARGROVE: Are you going to limit the
4 other party to five minutes?

5 CHAIRPERSON GRIFFIS: Of course.

6 MS. HARGROVE: So Ms. Brown, even though
7 she has a witness, is going to have five minutes also?

8 CHAIRPERSON GRIFFIS: Ms. Brown, can you
9 present your witness and your case in five minutes?

10 MS. BROWN: Absolutely.

11 CHAIRPERSON GRIFFIS: I'm shocked. See, I
12 thought we would add some more time. Okay. Let's go.
13 Ready?

14 MR. HARGROVE: As I understand, the
15 question is whether this Board has jurisdiction to
16 grant relief under the special exception provisions
17 when such relief would be in violation of the height
18 of buildings act. It seems to us clear that that is
19 not the case.

20 Let me first clarify that in its present
21 application, Montrose no longer contends that the
22 sidewalls of the building in question were legally or
23 physically exterior, which is an unsustainable
24 position in light of the plain language of the Height
25 Act. Rather, what they are now seeking to do is to

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1 persuade the Board that in 1910 when the Congress said
2 "exterior walls," it somehow really meant exterior
3 walls facing a street. There is nothing in the
4 language or legislative history of the Height Act
5 which supports that position.

6 There is, nevertheless, a history of
7 standing over several decades of efforts by some to
8 ensure that developers could evade the setback
9 requirements for non-street-facing walls when it was
10 more convenient or profitable to do so, and there is a
11 parallel effort of counterefforts by District
12 officials to keep District regulations in conformity
13 with the Height Act. This regulatory history was set
14 out in the memorandum of law on the Height Act that
15 the Kalorama Citizens Association presented in the
16 prior appeal which has been referred to numerous times
17 here.

18 CHAIRPERSON GRIFFIS: Is that in this
19 record?

20 MR. HARGROVE: It is not in this record.

21 CHAIRPERSON GRIFFIS: It should be, then.
22 It should be. So we're going to have that submitted
23 in the record.

24 Go ahead.

25 MR. HARGROVE: We respectfully request, as

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1 a matter of fact, that it be incorporated into the
2 record.

3 CHAIRPERSON GRIFFIS: It is as soon as you
4 get it in.

5 MR. HARGROVE: Montrose has consistently
6 misconstrued this history in the most curious and
7 misleading ways.

8 First, Montrose cites a 1958 report of the
9 Zoning Advisory Council at a time when the Zoning
10 Commission was considering proposed amendments to the
11 setback provisions that would have required setbacks
12 from all lot lines of the wall. We will have an
13 opportunity to address those issues in some detail,
14 but I think I must first address more precisely the
15 question of the jurisdiction of this Board to hear an
16 application for special exception which would in
17 itself be in violation of the Height Act.

18 The Board has only such jurisdiction as is
19 granted by statute, and that statute requires that the
20 special exception which the Board grants be in
21 accordance with the zoning regulations. The zoning
22 regulations have numerous provisions which require
23 compliance with the Height Act and rule out any
24 decision by the Board which is not in conformity with
25 the Height Act.

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1 In the present case, the application seeks
2 relief which is as a matter of law because of a
3 specific determination by this Board in a case
4 involving the same issues and the same party and the
5 same property is in violation of the Height Act. This
6 Board not only lacks authority to grant such a relief,
7 it lacks the jurisdiction to hear the relief.

8 I want to make the distinction between
9 this situation and one in which an applicant comes in
10 seeking a special exception in a case which turns out
11 to involve a violation of the Height Act. There the
12 Board properly entertains the case from the beginning,
13 determines the facts, draws its legal conclusions, and
14 in such a situation, if it determines that the relief
15 sought is in violation of the Height Act, in the
16 exercise of its jurisdiction it denies the relief.

17 In the present case, however, we are not
18 confronted with that situation. This is not in that
19 sense a case of first impression. The Board must take
20 into account its prior decision on the legal status of
21 this structure, and that decision was that the
22 structure is in violation of the setback provisions of
23 the Height Act. It is not simply a situation in which
24 an applicant comes in with all issues on the table.
25 That issue is off the table if the Board's prior

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1 decision means anything.

2 The Board, if it lacks jurisdiction to
3 grant this relief, for the same reason it lacks the
4 authority -- if it lacks jurisdiction to hear the
5 application for this relief, by the same reasoning it
6 lacks authority to grant the relief, which is, as the
7 Chairman has indicated, properly understood as a
8 separate question, but we are now talking about
9 jurisdiction to hear the relief, and what we are
10 wanting to press on the Board is that in this
11 situation, which is a peculiar one in light of the
12 fact that the very relief sought has been the subject
13 of a prior determination by the Board from which the
14 present relief is sought, the Board has no
15 jurisdiction to hear it.

16 CHAIRPERSON GRIFFIS: Okay. Final word?

17 MR. HARGROVE: I beg your pardon?

18 CHAIRPERSON GRIFFIS: Summarize.

19 MR. HARGROVE: In summary, zoning
20 regulations embodying the requirements of the Height
21 Act forbid this Board to grant relief which is in
22 violation of the height of buildings act of 1910.
23 This Board has no alternative but to take cognizance
24 of the fact that a prior determination of such a
25 violation as to the specific relief sought has been

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1 made by the Board.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. HARGROVE: Consequently, in our view,
4 you have no jurisdiction to hear, and certainly,
5 although it's the subject of the next argument, you
6 have no jurisdiction to grant the relief.

7 CHAIRPERSON GRIFFIS: I thought that was
8 the subject of this argument.

9 Mr. Roth?

10 MR. ROTH: I just want to -- I would adopt
11 everything in Mr. Hargrove's argument for the ANC. I
12 don't know if this is the appropriate time, but
13 perhaps it would be useful for me, following on one of
14 the interchanges before, to request that the record in
15 the previous appeal, the --

16 CHAIRPERSON GRIFFIS: We can't adopt the
17 entire record, if that is what you're asking.

18 MR. ROTH: I was going to say in relation
19 to issues pertaining to this roof structure and Height
20 Act.

21 CHAIRPERSON GRIFFIS: We really don't need
22 to make this as big of an ado -- we have run into this
23 before where we want to adopt this huge other piece.
24 Yes, I can tell you this is the way we're going to do
25 it. You're going to bring every single piece of

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1 evidence; you're going to issue it to all the parties;
2 all the parties are going to submit what they object
3 to being introduced into the record. Wow. I think
4 make establishment of your case presentation and
5 attach what you will to it, but just adopting in full
6 an entire record of which there won't be a lot of
7 relevancy to a lot of those pieces wouldn't serve you,
8 us, anybody, any good.

9 MS. HARGROVE: Mr. Griffis, may I ask a
10 question?

11 CHAIRPERSON GRIFFIS: Sure.

12 MS. HARGROVE: If we, say, adopt the
13 record excluding the things about the so-called attic
14 and the so-called basement, would that be adequate
15 since --

16 CHAIRPERSON GRIFFIS: It's not so easily
17 done.

18 MS. HARGROVE: -- everything else in the
19 record pertains directly to this case?

20 CHAIRPERSON GRIFFIS: But it's not so
21 easily done. I'm allowing you great flexibility in
22 presenting new information in this case and where you
23 get that and what it is, but to do a blanket statement
24 of "let's adopt the entire record," look, you're going
25 to have to read it or you're going to have to respond

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1 to it, we're going to have to read it all. I've got
2 Board members that didn't sit on that past case.
3 That's an entire record, and if we adopt that entire
4 record -- I think the transcript is upwards of 4,600
5 pages. Am I going to re-read all that? Are my new
6 Board members going to read it? Is it going to be
7 appropriate? Does it go to point? Does it go to any
8 point? Make your point.

9 MS. HARGROVE: I suggest that we take out
10 those things that did not pertain to the current case.

11 CHAIRPERSON GRIFFIS: Okay. And maybe I
12 wasn't clear before. When we have had that happen, I
13 get six binders of information and each one is going
14 to have to be evidence and each one is going to be
15 responded to by Ms. Brown whether she wants it in or
16 not, each one is going to be responded to by you. I
17 can tell you that that will extend this to six months.

18 As much criticism as we get from everybody
19 participating in this that we take so long to do
20 things, it's always because we have erred on the side
21 of caution in giving everyone an opportunity to do it.

22 In this case, I'm not going to do that. It doesn't
23 seem to serve anybody's purpose. There's an awful lot
24 of information in there. Everyone is going to have to
25 respond to it before it even gets into the record.

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1 So no, I don't think blanket statements on
2 adopting previous applications that the Board has
3 essentially established on grounds of postponing based
4 on that fact that there is no direct relevancy.

5 Are you ready for your five minutes?

6 MR. ROTH: We will move on.

7 I would just supplement Mr. Hargrove's
8 comments with two specific points. The first is that
9 back in 1986, there was a lot of discussion before the
10 Zoning Commission about this issue and about the issue
11 of exterior walls, and ultimately the Zoning
12 Commission adopted the present regulations on roof
13 structure setbacks, and they said this. They said to
14 the Commission: The reference of the Height Act to
15 exterior walls is clear and leaves no room for
16 amendment by administrative construction. The
17 Commission intends that its use of the phrase
18 "exterior walls" not be subject to exceptions under
19 any circumstances. As to the concern regarding that
20 penthouse setback requirements not be in conflict with
21 the 1910 Height Act, the Zoning Commission believes
22 that its decision in this case lawfully and
23 appropriately addresses the matter.

24 As Mr. Hargrove pointed out, we're no
25 longer arguing here about the definition of "exterior

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1 walls" and the Board has made clear in its previous
2 decision that the exterior walls are all the walls on
3 this structure.

4 CHAIRPERSON GRIFFIS: Okay. I'm sorry.
5 Let me interrupt you. What did you just cite?

6 MR. ROTH: This is from -- I believe it's
7 --

8 CHAIRPERSON GRIFFIS: You're going to
9 submit that for the record.

10 MR. ROTH: We're going to submit that for
11 the record.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. ROTH: It's the Zoning Commission
14 order in 1986.

15 CHAIRPERSON GRIFFIS: Okay. Go ahead.

16 MR. ROTH: Second, Montrose in its brief
17 has cited and attached decisions of the Board in a
18 number of previous projects where allegedly the roof
19 structures exceeded the Height Act limit but didn't
20 meet all of the rear and side setback requirements.
21 We say allegedly because from our review of these
22 many, many cases, there is not mention of the Height
23 Act in any of them.

24 Now, we haven't gone back -- at least I
25 haven't gone back through every single one of those

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1 records to see whether anywhere along the way the
2 Height Act was mentioned, but I don't think you can,
3 in our system of law, derive the conclusion that
4 because an administrative body -- be it the Board or
5 DCRA or the Office of Zoning or the Office of Planning
6 -- has for years and years ignored a statutory
7 requirement or ignored a statutory restriction, that
8 suddenly, in the absence of any specific reference to
9 the Height Act in any of the decisions that are cited
10 by Ms. Brown, we have a law that suddenly says yes,
11 you can build roof structures without the one-for-one
12 setback on all exterior walls. The Zoning Commission
13 made clear what the rules are. If those rules have
14 been ignored or evaded over the course of a number of
15 years, that's regrettable, but it doesn't address the
16 issue in this case.

17 MR. HARGROVE: One final comment, if I
18 may, Mr. Chairman.

19 CHAIRPERSON GRIFFIS: No, you may not.

20 Go ahead, Mr. Roth.

21 MR. ROTH: Can I yield what is left of my
22 mine to Mr. Hargrove?

23 CHAIRPERSON GRIFFIS: Fine. You've got
24 two minutes 28 seconds. Go.

25 MR. HARGROVE: I have two minutes 28

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1 seconds.

2 CHAIRPERSON GRIFFIS: He has just given
3 you his time.

4 MR. HARGROVE: The question, as I
5 understand it, for this discussion was, as Ms. Miller
6 indicated, whether the Board has jurisdiction to grant
7 a relief in violation of the Height Act. As I
8 understand it, Montrose's position is not that the
9 Board has jurisdiction to grant such relief, and it
10 seems to me that is an uncontrovertible proposition.
11 The Board does not have that jurisdiction.

12 The question that Montrose has raised is
13 whether the relief sought is in violation of the
14 Height Act. It seems to me that there is no possible
15 answer under the zoning regulations and the Height Act
16 itself to that question other than that once it is
17 determined that a relief is in violation of the Height
18 Act, that relief cannot properly be granted.

19 In this case, there has been a
20 determination and our position is that the Board has
21 to take that determination into account.

22 CHAIRPERSON GRIFFIS: Good. Anything
23 else? Thank you all very much.

24 Ms. Brown.

25 MS. BROWN: Waiting for the clock to

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1 reset.

2 CHAIRPERSON GRIFFIS: It didn't start on
3 them right away, either.

4 MS. BROWN: I think Mr. Hargrove is
5 correct that we do not believe that any governmental
6 body has the right to violate the 1910 Height Act. It
7 is a question of whether or not this proposal of
8 setbacks on a side wall violates the 1910 Height Act,
9 and based on the longstanding, overwhelming
10 interpretation of what constitutes an exterior wall
11 under the 1910 Height Act and what constitutes an
12 exterior wall under the zoning regulations, it's
13 clear: The 1910 Height Act -- the exterior wall means
14 what fronts on a street. And you see it in our
15 pleading and it's all through there from the '30s
16 through the '50s, through the '80s, through the '90s,
17 and this has been a question that has been asked and
18 answered by the Zoning Commission and many boards over
19 the years, particularly in 1986 when they were
20 considering amendments to the setback requirements.

21 We have under Tab H in our submission the
22 report from the National Capital Planning Commission
23 specifically saying that the setback requirements for
24 exterior walls have always been determined to mean
25 those fronting on a street, and that's on the second

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1 page where it's -- the language is actually underlined
2 for you to show that it's fronting on the street.

3 Now, the zoning regulations may interpret
4 that it means something else, and based on your
5 decision last -- in June, that's what I understood you
6 to conclude, that exterior walls means all. But for
7 purposes of the 1910 Height Act, it's only what fronts
8 on the street.

9 That question was raised specifically
10 again in the 1993, I believe, WETA PUD case, and that
11 was fully briefed at that time by the Zoning
12 Commission, and we have in our tabs here a report from
13 the then-Zoning Administrator, Joe Botener, on that
14 particular case, and that is under Tab G where, at the
15 bottom of the page, he says: The setback requirements
16 of a roof structure under provisions of the act of
17 1910 have always been interpreted by the Zoning
18 Commission as being required to set back from the
19 property line which adjoins a street. The setback of
20 a roof structure under the zoning regulation now
21 requires roof structures set back from exterior walls.
22 And he's talking about the zoning regulations here.
23 Consequently, it is my opinion that the Zoning
24 Commission under planned unit development has the
25 authority to waive a set back of a roof structure from

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1 a property line which does not adjoin a street, and
2 that's the exact situation that we have here, and this
3 is something that was decided in 1993, five, six years
4 after the language that Mr. Roth quoted from the NCPD
5 deliberations.

6 In addition to that, we have enumerated in
7 Mr. Sher's testimony attached as Exhibit G and also in
8 our motion in opposition -- I'm sorry, Tab J at the
9 end, the last pages -- and also on page 3 of our
10 opposition to the motions the whole list of cases
11 where the Board of Zoning Adjustment has routinely
12 granted relief from the sidewall setback requirements
13 because the 1910 Height Act only applies to the front
14 of the building. They were concerned about hiding
15 street views.

16 We also have attached a very lengthy
17 Corporation Counsel opinion about exactly what the
18 1910 Height Act -- the intent of it was, and it really
19 had nothing to do, in his opinion, and now that's the
20 opinion of the District, it had nothing to do with
21 view sheds and that sort of thing, that it had to do
22 with screening and what's there. So that's in there
23 and that is an official opinion that you have to abide
24 by. It's the opinion of the District.

25 So it is clear that you absolutely do have

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1 the authority to grant special exception relief from
2 this, and, again, if you want to try to figure out
3 what the order said or what your decision was in June,
4 again, we only need to look to the decision in July,
5 and there it was the height of 120 feet which is
6 allowed whether or not the 1910 Height Act came up.
7 It did, it's actually in the exhibit submitted with
8 the statement of the applicant, and we've got it here
9 and it's attached as part of Exhibit G, and Mr. Sher's
10 testimony talks about the maximum height permitted
11 under the 1910 Height Act, and yet the Board still
12 granted the relief from the side walls.

13 We also have as an exhibit to that, on
14 page A2 --

15 MR. ROTH: Excuse me, Ms. Brown. Where
16 are you reading from? I'm just not following --

17 MS. BROWN: I'm reading from -- I'll
18 finish my statement and then I will answer his
19 question.

20 CHAIRPERSON GRIFFIS: Okay.

21 MS. BROWN: If you also turn to page A2-02
22 of that submission for the July hearing, there it says
23 120 feet. There's the penthouse at an additional
24 eighteen-six, and the Board granted the relief.

25 So how we reconcile these apparently

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1 conflicting views that Mr. Roth and the ANC is
2 propensing here, it's that we have a long continuum of
3 consistent decisions that the 1910 Height Act does not
4 apply to side walls, but it does apply perhaps only to
5 the front walls.

6 So we can't have this long continuum, the
7 blip as I described, and then go back in July to the
8 previous decisions. To be consistent and to make sure
9 that the Board's decisions are not arbitrary, we have
10 to have this consistent opinion and it applies in this
11 case that the 1910 Height Act does not apply to the
12 side walls, and you can grant the special exception
13 relief that is requested here.

14 Thank you.

15 CHAIRPERSON GRIFFIS: Last words? Is that
16 it?

17 MS. BROWN: Yes, that is my concluding
18 remark.

19 MR. HARGROVE: Mr. Chairman --

20 CHAIRPERSON GRIFFIS: Okay. She has a
21 question to answer first. We have a question from the
22 ANC about what she was citing.

23 MS. BROWN: It is the statement of the
24 applicant, it is dated June 29, 2004, and it's
25 attached as Exhibit J, and I believe it was updated

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1 the date of the hearing as well.

2 VICE CHAIRPERSON MILLER: So will you be
3 submitting that for the record?

4 MS. BROWN: I would be happy to submit it
5 for the record.

6 VICE CHAIRPERSON MILLER: And give copies
7 to the --

8 MS. BROWN: Yes.

9 CHAIRPERSON GRIFFIS: Yes, I think we
10 should have it submitted.

11 MR. HARGROVE: Mr. Chairman, if I may, I'm
12 at a certain difficulty here because I had understood,
13 and, in fact, I reiterated my understanding, that the
14 issue under discussion at this point was whether this
15 Board has jurisdiction to grant relief in violation of
16 the height of buildings act. Now, we forewent any
17 argument on the issues that Ms. Brown has discussed in
18 the understanding that this discussion was for another
19 time.

20 If we are going to address also the issue
21 of whether this roof structure is in violation of the
22 Height Act, a separate question altogether, then I
23 think we need an opportunity to present argument on
24 that altogether different matter.

25 CHAIRPERSON GRIFFIS: We'll take it under

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1 advisement. Thank you.

2 Ms. Brown, I understand you to say that
3 there is a difference between the setback requirements
4 as it relates to the 1910 act and the zoning
5 regulations; is that correct?

6 MS. BROWN: That's correct.

7 CHAIRPERSON GRIFFIS: Okay.

8 Ms. Miller, questions?

9 VICE CHAIRPERSON MILLER: I was on the
10 case that you just mentioned in July and I read all
11 the BZA orders that you attached. Thank you. And
12 it's my understanding that this particular issue was
13 not argued or addressed by the Board in any of those
14 cases, that the facts may be similar.

15 CHAIRPERSON GRIFFIS: What issues?

16 VICE CHAIRPERSON MILLER: The issue of
17 whether or not the relief might be in violation of the
18 Height Act.

19 MS. BROWN: It was specifically addressed
20 in the WETA Zoning Commission case, which is not
21 attached as part of this submission. Regardless of
22 whether it was listed in the order itself, it has been
23 an issue. It is clear from the record that if they
24 are approving something to a maximum height and
25 granting setback relief from the, if you will,

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1 interior walls, that it is permissible under the
2 zoning regulations and is consistent with the
3 longstanding 1910 Height Act interpretation that it
4 applies only to the front walls.

5 Again, all you need to do is go through
6 the attachments that we have submitted as part of our
7 prehearing statement in this case, and I think it's
8 abundantly clear that everyone has understood the
9 interpretation of the 1910 Height Act to apply only to
10 the street frontage.

11 VICE CHAIRPERSON MILLER: But the cases
12 haven't really addressed that.

13 MS. BROWN: I would be glad to submit to
14 you the statements submitted in the WETA PUD case.

15 VICE CHAIRPERSON MILLER: If that goes to
16 your argument, you know, the record is going to be
17 open; you may want to do that.

18 CHAIRPERSON GRIFFIS: Yes, let's have it
19 in. Okay. Any other questions of the Board?

20 VICE CHAIRPERSON MILLER: My last
21 question, I think, for the applicant, it sounds like
22 your case is turning on our reconsideration of our
23 decision regarding exterior walls that we made in the
24 appeal case; is that correct?

25 MS. BROWN: Absolutely not. The

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1 interpretation that I -- the ruling that I heard from
2 the Board is not what the interpretation of exterior
3 walls -- and again, going back very carefully through
4 your deliberations, having sat through the hearings --
5 and yes, I believe one Board member may have raised
6 the issue of how that person was basing their vote of
7 interpreting the 1910 Height Act and exterior walls,
8 but there is very sharp divergent comment by other
9 Board members, so it's not clear what you actually
10 ruled on.

11 So what we have to rely on is the past
12 precedent and the most current precedent of the case,
13 BZA 17186, and I'm not saying that you -- what I'm
14 saying is that there is a clear understanding that
15 there is a different interpretation between what the
16 1910 Height Act considers exterior walls and what the
17 zoning regulations consider exterior walls, and that
18 is what I understood your decision in June to be.

19 CHAIRPERSON GRIFFIS: Any other questions
20 from the Board?

21 Very well.

22 MR. HARGROVE: Mr. Chairman?

23 CHAIRPERSON GRIFFIS: Yes.

24 MR. HARGROVE: Could you address the
25 question of whether we will be afforded an opportunity

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1 to respond to the argument on the separate issue of
2 whether this roof structure is in violation of the
3 height of buildings act because we, as I indicated a
4 moment ago, we have not had such an opportunity
5 because we did not think that was the issue under
6 discussion.

7 CHAIRPERSON GRIFFIS: Whether it's in
8 violation of the height of buildings act?

9 MR. HARGROVE: That is the issue that Ms.
10 Brown has just addressed. My understanding of the
11 situation is that Ms. Brown conceded that the Board
12 has no jurisdiction to grant a relief which is in
13 violation of the height of buildings act.

14 CHAIRPERSON GRIFFIS: Let me ask you a
15 question. You have the height of buildings act, 1910,
16 that prescribes the height. Let's say it's 80 feet
17 that's allowable for a building, right? And you
18 measure that, and you put a penthouse on top of it.
19 Can the penthouse be on top of the building in
20 addition to the 80 feet?

21 MR. HARGROVE: Yes, but the act also
22 contains provisions regarding the location of the
23 penthouse which are the very provisions that were in
24 issue in this previous case.

25 CHAIRPERSON GRIFFIS: Which is the

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1 setback.

2 MR. HARGROVE: And Ms. Brown has now
3 argued that conceding that, you have no jurisdiction
4 to hear a case which seeks relief --

5 CHAIRPERSON GRIFFIS: I understand what
6 she is --

7 MR. HARGROVE: -- in violation of the act.
8 This situation is not in violation of the act. We
9 have not had an opportunity to address that, and if
10 the --

11 CHAIRPERSON GRIFFIS: Okay. That is kind
12 of difficult to believe fully because that's a lot of
13 what their submission was and a lot of the other
14 information. That being said, we've got an open
15 record, as Ms. Miller also indicated, and so let's set
16 some parameters of when things are going to be
17 submitted and what is going to be submitted.

18 What I anticipate, Board members, is to
19 have the record open to summarize the arguments and
20 address the arguments that they have heard today.

21 VICE CHAIRPERSON MILLER: It sounds to me
22 like the issue is shifting, as Mr. Hargrove said.
23 It's now not whether or not we can grant relief in
24 violation of the Height Act; now it's whether or not,
25 if we granted the special exception relief, it would

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1 violate the Height Act.

2 MR. ROTH: Mr. Chairman, Ms. Miller?

3 CHAIRPERSON GRIFFIS: What?

4 MR. ROTH: I listened to Ms. Brown very
5 carefully and I listened to Ms. Miller's question very
6 carefully and I think Ms. Miller in her question had
7 it exactly right. The essence of the applicant's
8 argument here requires you essentially to reverse the
9 decision that has already been made.

10 Now, in that case, there were four issues.
11 We lost on two; they lost on two. This is one of the
12 two issues they lost on. And in order for you to
13 accept the second prong of Ms. Brown's argument
14 essentially going to this additional question of
15 whether this particular structure violates the Height
16 Act, you have to reverse what you have already decided
17 and on which we have not yet gotten a written opinion.

18 CHAIRPERSON GRIFFIS: Okay. I know. I
19 don't know why I get it. I'm not an attorney. We're
20 saying the same thing over and over again. Look,
21 let's keep the record open, let's brief the issue.
22 The fundamental issue, and maybe the question wasn't
23 phrased correctly in putting it today, but the
24 fundamental issue is whether we can grant relief for
25 this special exception, and if you want to couch that

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1 in, no, we cannot because of the 1910 Height Act, or
2 yes, we can because this is reviewed under the
3 regulations in 411, then so be it, take that on.

4 I think what we do is you know what the
5 arguments are from everybody else, you can address
6 those arguments and do summations. Let's put it in
7 writing, let's make it concise, direct, know your
8 audience, and we will go from there.

9 We are going to set a date for the
10 continuing of this hearing so that we may get a few
11 bites to eat and move into our afternoon session. I
12 would suggest that we look at --

13 (Pause.)

14 CHAIRPERSON GRIFFIS: Is there an you
15 conflict in the afternoon of December 7th? Applicant?

16 MS. BROWN: I thought you said December?

17 CHAIRPERSON GRIFFIS: Did I say that?
18 Yes, I did.

19 MS. BROWN: Is there any sooner date? I
20 mean, effectively what you're doing is granting the
21 postponement request, and we have been severely
22 prejudiced already. We have had the building permit
23 for a long time, the building is constructed, and all
24 we're trying to do is come into compliance, and at
25 every turn the deliberations --

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1 MR. ROTH: Mr. Chairman --

2 MS. BROWN: -- have been delayed.

3 CHAIRPERSON GRIFFIS: Okay. I don't want
4 to argue this.

5 MR. ROTH: Mr. Chairman --

6 CHAIRPERSON GRIFFIS: I mean, I think it
7 behooves the Board to get it as close as possible, and
8 this situation -- what I want to do is give at least
9 two weeks, at least two weeks to get this all together
10 because the first week, you write it; the second week,
11 you pare it down and get it concise; and then you send
12 it to us. So we are looking out at least -- well,
13 where are we? I have absolutely no time on the
14 schedule to fit it in. Even if we were going to ask
15 the Board to stay late, we're already committed to
16 doing that almost every single day. Unless, Mr. Moy,
17 you're seeing something I'm not on the 23rd.

18 SECRETARY MOY: You're talking about the
19 23rd of October?

20 CHAIRPERSON GRIFFIS: No, November.

21 SECRETARY MOY: Okay. Anything is
22 possible, but the November schedule is really full,
23 the cases are substantive and most of them
24 contentious. I would expect moving it to the evening
25 if the Board decides to move in that direction.

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1 Otherwise we're looking at December.

2 (Pause.)

3 CHAIRPERSON GRIFFIS: Any conflict on the
4 2nd of November in the afternoon, first case?

5 MR. ROTH: Yes, sir. It's election day
6 and I have an opponent.

7 MS. HARGROVE: We can't be here either
8 because we're working in West Virginia for the
9 democrats during that time.

10 MS. BROWN: No conflict here.

11 (Pause.)

12 CHAIRPERSON GRIFFIS: The afternoon of the
13 23rd, November.

14 MR. ROTH: Mr. Chairman?

15 CHAIRPERSON GRIFFIS: Yes?

16 MR. ROTH: That's two days before
17 Thanksgiving and --

18 CHAIRPERSON GRIFFIS: I know. We thought
19 we would go shopping, grocery shopping sometime in
20 there.

21 MR. ROTH: You know, I think it's
22 unreasonable, frankly, to ask people to stick around
23 here on the afternoon of that week. Wednesday is a
24 terrible travel day, Thursday is Thanksgiving, and I
25 think there are a lot of people who make plans to be

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1 with their families traveling on Tuesday. I have made
2 those plans. I really don't think it's fair to ask me
3 to cancel them.

4 MS. BROWN: I believe it's a working day
5 and I think that it's perfectly appropriate.

6 MR. ROTH: Well, Ms. Brown gets paid by
7 the hour; I don't.

8 CHAIRPERSON GRIFFIS: Well, neither do we,
9 but we're here.

10 MR. ROTH: Mr. Chairman, if it were an
11 uncontested or simple case, I wouldn't have any
12 problem with it, but I think under these circumstances
13 it's highly unreasonable.

14 Let me add before we go there that in case
15 you were thinking of November 16th, it would be fine
16 with me except for the fact that I have jury duty that
17 day already deferred from a previous date.

18 CHAIRPERSON GRIFFIS: We can get you out
19 of that. All right. Let's go December 7th.

20 Now, this is the other issue. The Board
21 is committed to finishing this entire thing whatever
22 form it comes in on the 7th, so let's all be here,
23 let's be on time. Of course, your timing and our
24 timing may be different. It doesn't look like the
25 afternoon will be very time consuming. What I would

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1 like to do is I'm going to reorganize the schedule as
2 we get closer to it and as I know the specifics of
3 each of these cases. At this point, I'm set to put
4 you the third case in the afternoon. For those that
5 understand this, the first two are 223s; they won't go
6 very long in the afternoon, so we should start fairly
7 timely.

8 Let's get dates for submissions. We're
9 going to have individual submissions. Of course,
10 those need to be served on everybody. We are not
11 keeping the record open for responses to the
12 submissions as we have now heard the arguments and you
13 are able to respond to the arguments that you've heard
14 in your written correspondence with us.

15 Ms. Bailey, I suggest that we get those --
16 (Pause.)

17 CHAIRPERSON GRIFFIS: Ms. Bailey, let's
18 have submissions in to the Office of Zoning Friday
19 before the Tuesday, which is the 23rd. I only have a
20 calendar for Tuesday, so she will figure that one out.

21 MR. ROTH: Mid-November is -- the Friday
22 of mid-November is --

23 CHAIRPERSON GRIFFIS: It's the Friday
24 after the 16th. What is the date of that?

25 MS. BAILEY: November 19th.

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1 CHAIRPERSON GRIFFIS: Correct. The 19th
2 of November, three o'clock, Office of Zoning. Any
3 difficulties? Problems? Excellent. And then we will
4 see you on the 7th of December.

5 Okay. Questions. Procedural questions
6 that I can answer on this? Anything?

7 MS. BROWN: Just to understand, we make
8 the written submissions, but we will not have argument
9 on them again.

10 CHAIRPERSON GRIFFIS: That's correct.

11 MS. BROWN: Thank you.

12 CHAIRPERSON GRIFFIS: And don't anticipate
13 coming for argument. I mean, this should hit it home.

14 MS. BROWN: And we're dealing strictly
15 with the section 411.11 special exception.

16 CHAIRPERSON GRIFFIS: That's correct. And
17 for clear understanding because I think it's the
18 Board's understanding that after these submissions,
19 there will be a decision at the beginning of the 7th
20 of December, and based on that, we may well go into
21 the special exception hearing. So we're prepared for
22 all of that.

23 MR. ROTH: I hope I wasn't hearing the
24 Chairman to prejudge the outcome of that.

25 CHAIRPERSON GRIFFIS: I'm laying out -- we

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1 have an application for a special exception. We have
2 allocated time to deal with that. We have a motion
3 before us or an -- yes, a motion before us that we
4 need to decide as a preliminary matter, but certainly
5 the case has been scheduled to continue to that date.

6 MR. ROTH: Yes, sir.

7 CHAIRPERSON GRIFFIS: Okay. Anything
8 else?

9 MS. BROWN: Thank you.

10 CHAIRPERSON GRIFFIS: Excellent.

11 Ms. Miller?

12 VICE CHAIRPERSON MILLER: This is probably
13 clear to the parties, but I want to make sure that I'm
14 correct that the parties cannot just adopt the whole
15 record in the appeal case for our consideration, but
16 they are free to choose any parts of the record that
17 they want to attach and bring our attention to. Okay.

18 CHAIRPERSON GRIFFIS: Good. And on that
19 last note, just to make it actually clear, because,
20 look, this serves everybody well, if you do that
21 rather than adopting a huge document -- you can adopt
22 the document, highly exactly what makes your point.
23 Otherwise, because listen, this is what I guarantee
24 you: Anything that is submitted in any record for any
25 application, every single Board member reads every

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1 single word. You submit something that is adopted as
2 500 pages and you know, well, frankly, we're going to
3 be reading the entire thing. So make your point, make
4 it very quick, highlight it, point us to it, and we
5 will go from there.

6 Great. Excellent. Anything else?

7 MR. ROTH: Thank you, Mr. Chairman.

8 CHAIRPERSON GRIFFIS: Thank you all.

9 MR. ROTH: Thank for your patience.

10 CHAIRPERSON GRIFFIS: Appreciate it.

11 If there is nothing further for the
12 morning session, we will adjourn our morning session
13 of whatever date it is. For those that are here in
14 the afternoon, we are going to take a 30-minute break
15 for lunch and then we are going to convene and then go
16 right into the afternoon's hearing. Are there
17 questions on that schedule? If so, we can answer that
18 or the staff can answer it.

19 (Whereupon, at 2:02 p.m., the public
20 hearing recessed for lunch, scheduled to reconvene at
21 2:32 p.m.)

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

(2:59 p.m.)

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. I call to order the 12th of October afternoon session and public hearing of the Board of Zoning Adjustment to the District of Columbia. My name is Geoff Griffis, Chairperson, and joining me today is Vice Chair Ms. Miller and our other esteemed member, Mr. Etherly. Representing the National Capital Planning Commission is Mr. Mann.

Copies of today's hearing agenda are available for you. They are located on the wall where you entered into the hearing room.

I have some important brief opening remarks, so let me get to that very quickly. First of all, all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions. One is the recorder sitting to my right, who is creating the transcript. Second, we are being broadcast live on the Office of Zoning's Web site.

Attendant to both of those, we ask several things. First of all, we would ask everyone to please refrain from making any disruptive noises or actions in the hearing room. Secondly, we would ask that as you come forward, please have filled out a witness

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1 card. Witness cards are available at the table in
2 front of us where you will give testimony and also the
3 table where you entered into the hearing room. Those
4 two cards go to the recorder who is sitting to my
5 right. We would also ask that you turn off any cell
6 phones and beepers at this time so we don't have any
7 of those types of disruptions in our afternoon
8 session.

9 The order of procedure for special
10 exceptions and variances I will skip. We have a
11 continuation of one and then I will go through what
12 the attendant appeal order will be as we are hearing
13 an appeal this afternoon.

14 I would say that cross-examination, of
15 course, is permitted by the applicant and parties in
16 the case. The ANC within which the property is
17 located is automatically a party in the case, and, of
18 course, therefore participates as a full party and can
19 and is able to conduct cross-examination.

20 The record will be closed at the
21 conclusion of each hearing on a specific case except
22 for any material that is specifically requested by the
23 Board, and we will be very specific as to what it is
24 to be submitted into the record and when it is to be
25 submitted into the Office of Zoning. After that

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1 material is received, it should go without saying that
2 the record would then be finally closed and no other
3 information is taken into the record.

4 The Sunshine Act requires that this Board
5 conduct its hearings in the open and before the
6 public. This Board may, however, enter into executive
7 session both during or after the hearing on a case.
8 That would be in accordance with the Sunshine Act and
9 also in accordance with our rules and regulations.

10 The decision of this Board must be based
11 exclusively on this record that we have created before
12 us, and so we ask that you follow all of the preceding
13 things that I have said, and in addition please do not
14 engage Board members in conversation today so that we
15 do not appear to be receiving information outside of
16 the record.

17 At this time, we will entertain any
18 preliminary matters. Preliminary matters relate to
19 whether a case will or should be heard today such as
20 requests for postponements, continuances, or
21 withdrawals, or whether proper and adequate notice has
22 been provided. If you have a preliminary matter
23 attendant to this case, you can bring it to our
24 attention by -- well, let's raise hands after everyone
25 is sworn in that hasn't been previously sworn in and I

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1 will ask you at a proper time to do that.

2 Therefore, let's go to, if people have not
3 been sworn in previously or would like to be sworn in
4 or need to be sworn in, if you would please stand and
5 give your attention to Ms. Bailey.

6 I will also say a very good afternoon to
7 Ms. Bailey and Mr. Moy from the Office of Zoning.

8 We can do that if people would just stand
9 who have not previously been sworn in, or if you can't
10 remember, we will just redo it, and Ms. Bailey on my
11 far right will administer the oath.

12 (Witnesses sworn.)

13 CHAIRPERSON GRIFFIS: Excellent.

14 Ms. Bailey, are you aware of any
15 preliminary matters for the Board's attention at this
16 time?

17 MS. BAILEY: Mr. Chairman, no. The
18 hearing this afternoon would begin with the
19 application of the Army Distaff Foundation.

20 CHAIRPERSON GRIFFIS: Excellent. Why
21 don't we move right into that, then.

22 APPLICATION OF THE ARMY DISTAFF FOUNDATION

23 17055

24 MS. BAILEY: And that's pursuant to 11
25 DCMR 3104.1 for a special exception to allow a

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1 four-story addition housing 25 nursing units
2 accommodating 27 residents and the addition of 27
3 independent-living units under sections 219 and 218 at
4 the Knollwood/Army retirement residence and existing
5 health care facility in the R-1-A District at premises
6 6200 Oregon Avenue, Northwest, Square 2339, Lot 3.

7 As you know, Mr. Chairman and members of
8 the Board, this is a continuation of a case that was
9 previously heard by the Board.

10 CHAIRPERSON GRIFFIS: Excellent. In which
11 case are we ready to proceed? Mr. Tummonds?

12 MR. TUMMONDS: Yes, we are. For the
13 record, my name is Paul Tummonds with the law firm of
14 Shaw Pittman. Mr. Utz is with me here as well from
15 Shaw Pittman.

16 In order to make sure it's on the record,
17 I would like to note that at the conclusion of our
18 morning session, we were able to note that Knollwood,
19 the applicant in this case, and the Knollwood
20 neighbors have come to a substantial agreement with
21 regard to this application such that the Knollwood
22 neighbors are no longer going to be a party in
23 opposition and they have subsequently left, so that
24 there will not be any cross-examination from the
25 Knollwood neighbors with regard to the rebuttal

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1 testimony that we are going to present this afternoon.

2 With that being said, we will have three
3 rebuttal witnesses this afternoon, and our closing
4 statement. We will hopefully wrap this up in
5 approximately 15 minutes. Our first rebuttal witness
6 will be Lisa Harfoot, who will testify as to the
7 operation and use of the independent living units.
8 Vernon Feather, the project architect will testify as
9 to the modifications to the proposed addition that
10 have been made subsequent to our September 21st
11 hearing. These modifications pull the footprint of
12 the proposed addition inside the existing parking lot
13 and roadway network. Finally, we will have Mike
14 Bello, our landscape architect, address the impacts
15 that the proposed modifications on that addition will
16 have on the landscape screening buffer.

17 My first witness is Lisa Harfoot.

18 TESTIMONY OF LISA HARFOOT

19 MR. TUMMONDS: Ms. Harfoot, could you
20 please discuss how the residents of the
21 independent-living units are provided a sheltered
22 living arrangement by addressing the manner in which
23 the activities of daily living of each resident are
24 monitored by a Knollwood staff member?

25 MS. HARFOOT: Yes, sir.

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1 Do you need me to introduce myself again
2 for the record? I am Lisa Harfoot. My address is 336
3 14th Street, Southeast, Washington, D.C. I am the
4 Knollwood Terrace administrator, which is the
5 assisted-living component of the facility.

6 Unlike apartments that are available to
7 the general public, the Knollwood independent-living
8 units do operate with a formalized system of services
9 to those residents that lead it to be a
10 sheltered-living arrangement. That sheltered
11 assistance does begin on admission when residents are
12 asked to submit a full medical history, chest x-ray,
13 lab work, and submit to a very extensive interview
14 done by an RN or a licensed clinical social worker. I
15 am the licensed clinical social worker.

16 At that time, we administer the mini
17 mental status exam and go through residents' ability
18 to complete their activities of daily living. No one
19 is denied admission based on those services; they are
20 just invited to live in a different level of care if
21 needed -- for example, a nursing home where 24-hour
22 nursing services would be provided.

23 If you are deemed able to live in the
24 independent-living section, we have a wide range of
25 medical services that are available to you. We do

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1 evaluate each resident in the independent-living unit
2 approximately every six months or if they are having
3 trouble.

4 Every six months, a wellness committee --
5 a wellness committee is called every month, but
6 approximately every six months each individual
7 resident is observed. We talk about their ability to
8 get to meals, we monitor how many meals they may have
9 had, we look at how they are dressed for season and
10 setting -- you don't want to wear three sweaters on a
11 90-degree day or shorts when it's ten below zero. We
12 do evaluate them based on a formalized assessment that
13 Mr. Tummonds can provide to you for the record.

14 We also look at residents in crisis. If
15 you have more than three falls in a month, the RN will
16 be called to your apartment to evaluate you. If you
17 appear to be confused or your apartment is noted by
18 housekeeping to be a mess, someone will come up and
19 discuss with you additional services that can be
20 provided. Those services can include additional
21 housekeeping, laundry, medication management where we
22 will give you your medication, case management where
23 we will make your doctor's appointments, get the
24 results of your tests -- all sorts of services
25 including certified nursing assistants who can come to

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1 your apartment, bathe you, dress you, and do hands-on
2 physical care for you.

3 MR. TUMMONDS: Thank you.

4 We will now move on to our next witness,
5 which is Vernon Feather, the project architect.

6 TESTIMONY OF VERNON FEATHER

7 MR. TUMMONDS: Mr. Feather, could you
8 please describe the changes that have been made to the
9 proposed addition since the September 21st hearing?

10 MR. FEATHER: Okay. Thank you. My name
11 is Vernon Feather. I'm with FFCS architectural firm.
12 My address is 100 Maiden Lane, Hardy, Virginia.

13 I am going to show a few slides to
14 demonstrate the design changes that we have made, and
15 I'm going to make our -- in light of the agreements
16 that were made, we're going to make this presentation
17 even quicker than before.

18 The next slide will probably demonstrate
19 it better. What we have done is changed the end of
20 the building here and stepped it back to keep it
21 entirely inside of the paving restriction. We have
22 also pulled the building back and changed the form of
23 the end, and I will demonstrate that a little bit more
24 later. But the building footprint itself is now
25 entirely inside of the parking lot and roadway area.

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1 This slide shows -- the grey outline you
2 see was our scheme we showed on September 21st and the
3 colored outline is where we are now, and I'm going to
4 first zoom in on the north end.

5 You can see this is the curb of the paving
6 right there. Our building is substantially back with
7 the exception of this piece right here is a retaining
8 wall that follows right along the edge of the
9 pavement. That is a skylighted area that is only on
10 the SCU level; it does not go on up as part of the IL
11 level. So the massing of the building is restricted
12 to this portion.

13 Before you could see that the corner of
14 the actual building went out over the paving edge
15 about two feet, plus we had a deep retaining wall that
16 went out even farther, so we have substantially pulled
17 that back on that side.

18 CHAIRPERSON GRIFFIS: What does it mean to
19 be on the SCU level?

20 MR. FEATHER: The skilled nursing level.

21 CHAIRPERSON GRIFFIS: Rather how high off
22 the ground is it?

23 MR. FEATHER: The special care unit is
24 down below --

25 CHAIRPERSON GRIFFIS: From the retaining

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1 wall to there, how high from the grid?

2 MR. FEATHER: From that point right there,
3 we're down 14 feet. Fourteen feet roughly.

4 CHAIRPERSON GRIFFIS: Fourteen feet off
5 the ground?

6 MR. FEATHER: Below. The top of this
7 retaining wall right there, we're 14 feet below to the
8 special care unit.

9 MR. TUMMONDS: Mr. Chairman, if you will
10 remember, the special care unit is that unit of the
11 building that we have sunk below grade.

12 CHAIRPERSON GRIFFIS: Right. And the
13 skylight is -- I'm more concerned about the massing on
14 the back of the building that you're showing me. What
15 is the actual --

16 MR. FEATHER: The skylight is actually
17 just approximately ten feet or so above the SCU floor.
18 It's the roof of the special care floor. So that
19 skylight will actually be below this grade elevation.
20 It will not come up above the retaining wall.

21 CHAIRPERSON GRIFFIS: Is it captured in
22 any of the elevations that you submitted?

23 MR. FEATHER: Yes, I think so. Can I get
24 to the elevations in a little bit and cover that?

25 CHAIRPERSON GRIFFIS: Sure. Sure. Don't

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1 let me interrupt.

2 MR. FEATHER: All right. I will come back
3 to that.

4 On the west side, here is the edge of the
5 pavement again. You can see on the grey line was the
6 corner of the building; it came out approximately
7 eight feet. In addition to that, we had a deep
8 retaining wall that went down again about 14 or so
9 feet that followed this area. We're now limiting the
10 building to this portion, we're coming right to the
11 edge of the pavement right there and cutting back.

12 The retaining wall -- the deep retaining
13 wall follows right along here. The retaining walls
14 that go this way are just garden-level retaining
15 walls. They are approximately three feet high is all.

16 So they are not significant structural retaining
17 walls.

18 I will skip through Mike's part and look
19 at the -- let's see if we demonstration that on the
20 elevation. Actually, you don't see it because it's
21 actually underground in these elevations. That
22 skylight would be in this area right here, visually
23 would be below the grade that the residents at 29th
24 Street would be seeing. It's really to let natural
25 light down into that special care level.

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1 MR. TUMMONDS: Thank you. Now I would
2 like to ask our landscape architect, Mike Bello.

3 TESTIMONY OF MICHAEL BELLO

4 MR. TUMMONDS: Mr. Bello, could you please
5 address the impacts that the revisions discussed by
6 Mr. Feather have on the proposed landscape screening?

7 MR. BELLO: Absolutely. Mike Bello,
8 Kimberly Horn Consulting, 13755 Sunrise Valley Drive,
9 Suite 450, Herndon, Virginia, 20171. Good afternoon.

10 Yes, I will be presenting the modified
11 landscape concept. As a result to the modified
12 building and the most current building, our landscape
13 basically has more room for installation, preparation
14 and protection of the existing landscape in its
15 abutting area.

16 Also, the tiered back of the building as
17 well as the new distance -- the new location of the
18 building has reduced the height requirement for the
19 trees at maturity to be installed for screening.

20 Again, we are still remaining with the
21 maximum height to the building, you know, meeting the
22 height of the building and so -- in installing the
23 trees at the proper time prior to construction of the
24 building.

25 Here you see a section again of the

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1 landscape screening in front of the building, and
2 there is a significant amount of room to install
3 plants of the size and form with the landscape, and
4 here is a section of what the building would look like
5 and the amount of room for landscaping to be installed
6 in that area.

7 MR. TUMMONDS: That concludes our rebuttal
8 testimony. We are available to answer any questions
9 that you may have.

10 CHAIRPERSON GRIFFIS: Thank you.

11 The first question in terms of the intake
12 of the potential tenants. This residence assessment
13 -- it is given to all applicants into Knollwood?

14 MS. HARFOOT: Yes, sir.

15 CHAIRPERSON GRIFFIS: Is there anyone ever
16 rejected because they are above the threshold of this
17 assessment?

18 MS. HARFOOT: No. We have counseled
19 people that they may want to reconsider Knollwood in a
20 few years, but I have never done that in the six years
21 I have been employed there. We encourage them to come
22 in early and stay with us as long as possible.

23 CHAIRPERSON GRIFFIS: Okay. Where are the
24 dog kennels on the site? There was a submission -- I
25 know it sounds like a great joke, doesn't it? There

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1 is a submission in this -- boy, I hope I'm right, huh?

2 (Laughter.)

3 CHAIRPERSON GRIFFIS: -- that talked about
4 that there were dogs that were going to be caged and
5 one or two dogs would be -- well, they would be okay
6 -- for the Alzheimer's patients, but they wanted to
7 make sure that -- does that make any sense to you?
8 Ring a bell? Exhibit 149, actually, by Larry Fenster,
9 F-e-n-s-t-e-r.

10 MS. HARFOOT: We did discuss having a
11 doghouse in the Alzheimer's garden located --

12 CHAIRPERSON GRIFFIS: And it's not for the
13 bad tenants, right?

14 MS. HARFOOT: Correct.

15 (Laughter.)

16 MS. HARFOOT: We had discussed having a
17 specially trained dog on the Alzheimer's unit if
18 financially possible, which would then have a nice
19 house in the garden. But that is icing on the cake,
20 so to speak, and I don't believe we will have kennels
21 or multiple dogs.

22 CHAIRPERSON GRIFFIS: So there is nothing
23 proposed now.

24 MS. HARFOOT: The house remains in the
25 plans. If we get the money, we would like to have a

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1 nice dog for the Alzheimer's unit, but we will not be
2 having kennels with multiple dogs.

3 CHAIRPERSON GRIFFIS: A doghouse. Is that
4 a second principal structure on the lot?

5 (Laughter.)

6 CHAIRPERSON GRIFFIS: Okay. There it is,
7 then. What else did I have? I think that's it. Oh.
8 In terms of the landscape, you are showing that
9 section as actually very valuable, and I'm assuming
10 that that's in the package that we have. Okay.

11 Let me see if I understand your graphics
12 correctly because I haven't looked at all the details
13 of it. But you are proposing different type of
14 vegetation at different growth levels; is that
15 correct?

16 MR. BELLO: Yes. Absolutely.

17 CHAIRPERSON GRIFFIS: So is it a
18 year-round, is it an evergreen, or -- you're the
19 professional, but is there a year-round screening
20 that's low and medium and high?

21 MR. BELLO: Yes.

22 CHAIRPERSON GRIFFIS: Okay. And what
23 sorts of plants encompass that, go to create that?

24 MR. BELLO: Oh, sure. There's different
25 types of evergreen plants in this vicinity, in this

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1 area, and there are dappled light requirement plants,
2 and they are mature. The type of plants are white
3 spruce, Norway spruce. There is a plant list on the
4 top right-hand corner or in the corners of each of
5 them.

6 CHAIRPERSON GRIFFIS: And obviously you
7 have taken into account -- or not obviously -- you
8 have taken into account creating that canopy and, as
9 you said, the dispersed light -- obviously the plants
10 at the lowest level are going to live through the
11 shading of the canopies of the trees above?

12 MR. BELLO: Yes. In terms of shade
13 tolerance, yes. We have tiered down so we make sure
14 the type of plants that are below -- also called
15 understories -- are shade tolerant, and the ones above
16 are dappled sunlight or partial shade tolerant.

17 CHAIRPERSON GRIFFIS: And your landscape
18 section is showing full growth of what you're
19 anticipating, right?

20 MR. BELLO: Yes. We plan to bring in
21 plants at substantial height to screen the building.

22 CHAIRPERSON GRIFFIS: But you're not going
23 to plant at what you're seeing here -- or I guess the
24 direct question is, how long is it going to take for
25 this section massing and height to be reached?

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1 MR. BELLO: Two or three months within
2 prior construction of the building.

3 CHAIRPERSON GRIFFIS: Is that right?

4 MR. BELLO: Yes.

5 CHAIRPERSON GRIFFIS: So you're bringing
6 in --

7 MR. BELLO: We're planning to bring them
8 in already at the height that they --

9 CHAIRPERSON GRIFFIS: -- 20- or 30-foot
10 trees?

11 MR. BELLO: No, actually. Because of the
12 height of the modified building, the trees are between
13 17 and 20 feet in height.

14 CHAIRPERSON GRIFFIS: That you will plant.

15 MR. BELLO: Yes.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. BELLO: Yes. And they are -- I called
18 inventory -- they are available.

19 CHAIRPERSON GRIFFIS: Other questions?

20 VICE CHAIRPERSON MILLER: Mr. Tummonds, I
21 just want to ask you this because Mr. Nettler is not
22 here and I understand, you know, what you said is that
23 you have worked out an agreement with the Knollwood
24 neighbors and he feels comfortable enough not to be
25 here, but I just want to ask you, then, does this

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1 landscaping plan reflect their concerns, that they no
2 longer have any concerns because you have addressed
3 them in this plan?

4 MR. TUMMONDS: I would like to have
5 Colonel Moss, Tom Moss, who has truly been the person
6 who has been negotiating this agreement -- I think he
7 is probably the best person to answer that question
8 for you.

9 VICE CHAIRPERSON MILLER: Okay. Thank
10 you.

11 COLONEL MOSS: Tom Moss, 13411 Hidden
12 Meadow Court, Herndon, Virginia.

13 In answer to your question, yes, we have
14 worked with the neighbors very closely to ensure that
15 the plantings and the screening are adequate to do
16 exactly what they want us to do and we have agreed to
17 do that before construction starts to mitigate any
18 problems that we will have during the construction
19 period and also afterwards.

20 VICE CHAIRPERSON MILLER: Thank you.

21 I'm not sure, you may not be done with
22 your presentation, but we're wondering whether there
23 are any conditions left that the Knollwood neighbors
24 were seeking that are at issue now, including the
25 moratorium on future construction.

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1 COLONEL MOSS: We have actually reached an
2 agreement on a moratorium for future construction on
3 sale of the property in the Greenbelt area, the only
4 issue that remains is that we ask permission to build
5 a limited number of parking spaces in the Greenbelt
6 area along Tennyson. What that number will turn out
7 to be or whether there will be a specific number
8 attached to it is the only issue that's left to
9 discuss.

10 CHAIRPERSON GRIFFIS: So you have a
11 separate binding agreement that deals with all of
12 that.

13 COLONEL MOSS: Yes, sir, we do.

14 CHAIRPERSON GRIFFIS: Okay. Interesting.
15 Okay.

16 Anything else? Did we interrupt your
17 flow? Do you have other witnesses?

18 MR. TUMMONDS: No. I just have a brief
19 closing statement.

20 CHAIRPERSON GRIFFIS: Excellent. If there
21 are no other questions from the Board -- anything?

22 VICE CHAIRPERSON MILLER: No.

23 CHAIRPERSON GRIFFIS: Okay. Let's go to
24 it.

25 MR. TUMMONDS: Great. Thank you, members

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1 of the Board of Zoning Adjustment. We would like you
2 to know that this application has received the support
3 of the Office of Planning, the Department of
4 Transportation, the National Park Service, the
5 conditional support of ANC-3/4G, and now the Knollwood
6 neighbors. We believe that the amount of support that
7 we have been able to achieve is in large part due to
8 the diligent work that has occurred on behalf of both
9 the applicant and the Knollwood neighbors, and we
10 believe that the mediation process has, in fact, ended
11 up being a quite successful process.

12 As evidenced by the materials submitted
13 into the record of this case, we believe that we have
14 shown that the special exception requirements of
15 sections 218, 219 and 3104 of the zoning regulations
16 have been satisfied.

17 As evidenced by the information submitted
18 into the record and testimony presented by the
19 applicant, the proposed independent-living units are
20 not apartment units as defined by the zoning
21 regulations but are, in fact, part of a community
22 residence facility. The Office of Planning report
23 specifically addresses this issue and agrees that the
24 existing and proposed independent-living units
25 provided in the Knollwood facility are, in fact, part

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1 of a community residence facility.

2 In its previous submission, the Knollwood
3 neighbors had stated that the previous decision of the
4 Board of Zoning Adjustment in the Ingleside at Rock
5 Creek case in which the Board specifically found that
6 independent-living units are not apartment units, in
7 that case, the Knollwood neighbors determined that the
8 BZA failed to adequately apply the facts of that case
9 to the definitions provided in the zoning regulations
10 and the health regulations.

11 We believe that applying that same test to
12 the current facts, we have shown through the testimony
13 of Lisa Harfoot, both on September 21st and today, as
14 well as information provided in the applicant's
15 prehearing statement, it is clear that residents of
16 the independent-living units at Knollwood are provided
17 a safe, hygienic, sheltered living arrangement,
18 overseen by responsible adults that provide assistance
19 to residents who are ambulatory and able to perform
20 the activities of daily living with minimal
21 assistance.

22 The evidence we have presented and the
23 facts we have shown are, first, residents of the
24 independent-living units sign a life care contract
25 that enables them to stay at Knollwood as their needs

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1 for additional services arise. Two, residents of the
2 independent-living units are provided a wide range of
3 services that are directly related to the activities
4 of daily living that are not found in apartment
5 buildings. Three, residents of the independent-living
6 units are monitored on a daily basis to ensure that
7 they are receiving the appropriate amount of care to
8 help them live fulfilling, active lives within a safe
9 and protected environment. For all of these reasons,
10 we believe that it is appropriate for Knollwood to
11 seek special exception approval pursuant to section
12 218 for the proposed independent-living units.

13 With regard to the satisfaction of the BZA
14 special exception standards, the applicant notes that
15 the proposed addition consisting of 25
16 dementia/Alzheimer's units and 22 independent-living
17 units with a related parking area, has been modified
18 in such manner that there will not be any adverse
19 impacts on neighboring properties.

20 This is due to the significant setback of
21 the proposed addition from all property lines, the
22 reduction in height of the proposed structure, and the
23 significant landscape screening and buffering that
24 will occur along the Knollwood's 29th Street and
25 Stevenson Lane property lines.

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1 As noted here today, the applicant has
2 moved the entire footprint of the proposed addition
3 inside the parking lot and roadway network in response
4 to concerns raised by the Knollwood neighbors
5 regarding the ability to provide sufficient landscape
6 screening and buffering and in order to protect the
7 existing tree buffer. In fact, at the September 21,
8 2004, public hearing, the Knollwood neighbors' expert
9 in landscape architecture, Keith Pitchford, claimed
10 that the proposed addition and related construction
11 activity would likely have a detrimental impact on the
12 existing tree buffer and the surrounding ecological
13 system.

14 In response to a question from
15 Commissioner Miller as to how to solve the "problem
16 with the trees," Mr. Pitchford responded, the answer
17 to that question is to keep the building within the
18 parking lot. That's exactly what we have done here
19 and shown today.

20 The last issue regarding the satisfaction
21 of the special exception standards relates to our
22 proposed parking area. We note that the location of
23 the parking area is on a plateau in the general front
24 of the Knollwood property that is significantly
25 removed from neighboring properties and will provide

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1 most of the necessary buffering of that parking lot
2 from the existing topography of the site.

3 The neighbor potentially most impacted by
4 that parking area is the National Park Service. We
5 note that the superintendent of Rock Creek Park on
6 behalf of National Park Service has submitted a letter
7 into the record in support of this application.

8 As discussed in detail in the applicant's
9 prehearing statement and testimony provided, we
10 believe that granting this special exception for the
11 proposed addition is entirely consistent with the D.C.
12 comprehensive plan and will not tend to affect
13 adversely the use of neighboring properties.

14 Based on the materials submitted in the
15 record and testimony provided, we respectfully request
16 that the BZA grant the special exception request.
17 Thank you.

18 CHAIRPERSON GRIFFIS: Thank you very much.

19 Yes, Ms. Miller.

20 VICE CHAIRPERSON MILLER: Mr. Tummonds,
21 there was an issue at the last hearing about a new
22 exit from the property and there was some controversy
23 about that. Has that been resolved?

24 MR. TUMMONDS: Colonel Moss?

25 COLONEL MOSS: Yes, it has been. We have

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1 talked to the neighbors and they have agreed to allow
2 us to not only go with the emergency entrance and
3 exit, which was never really a problem, but in regards
4 to the right turn only by residents, they have agreed
5 to allow us to do that until such time as we can get a
6 stop sign up on the corner of Tennyson and Oregon. If
7 that does happen, then we will remove the ability of
8 our residents to make right-hand turns out of that
9 area or out of that road. Does that answer --

10 CHAIRPERSON GRIFFIS: You mean if you get
11 a stop sign at Oregon, then you won't be able to take
12 a right turn out of your facility?

13 COLONEL MOSS: Right. Well, out of the
14 road going onto Tennyson, correct. There is still
15 going to be a road, we have a road that goes onto
16 Oregon, but we're putting in an extra road --

17 CHAIRPERSON GRIFFIS: Yes. No, I
18 understand that.

19 COLONEL MOSS: Okay. I'm sorry.

20 CHAIRPERSON GRIFFIS: But the Tennyson and
21 the Oregon is the difficult intersection, right?

22 COLONEL MOSS: Right.

23 CHAIRPERSON GRIFFIS: So you put a stop
24 sign there, it slows things, and that's when you
25 preclude anybody from leaving onto Tennyson and taking

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1 a right to go to Oregon?

2 COLONEL MOSS: Correct, because the issue
3 is the --

4 CHAIRPERSON GRIFFIS: So you make it safer
5 and then that's when you stop using it.

6 COLONEL MOSS: No. What will become safer
7 is the entrance onto Oregon from the property.

8 CHAIRPERSON GRIFFIS: Oh. I see. So the
9 stop sign will slow that --

10 COLONEL MOSS: Because that stop sign will
11 slow that traffic down, so you can't get going 40
12 miles an hour as you're going by our entrance and exit
13 there.

14 CHAIRPERSON GRIFFIS: Well, I don't see
15 the logic of tying those two together necessarily. A
16 stop sign is a good idea for several reasons, it seems
17 to me, but be that as it may. So what we're looking
18 at -- and this is a good point -- I think what we are
19 going to do is just rehash exactly all the changes so
20 we know exactly what we're looking at here. That was
21 one of the big issues in terms of the emergency
22 entrance and exit. That's not actually -- it's going
23 to be a viable means of egress and ingress into and
24 off of Tennyson, correct?

25 COLONEL MOSS: Correct.

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1 CHAIRPERSON GRIFFIS: Okay.

2 The second is the parking and the parking
3 layout. Even on this plan, we have optional
4 additional parking spaces, 20. Help me understand
5 that, then. What is actually directly being proposed?

6 MR. HILBERT: Donald C. Hilbert, 8309
7 Turnberry Court, Potomac, Maryland, executive director
8 of Knollwood.

9 We are examining the feasibility of
10 putting parking underneath the skilled care facility
11 or the dementia/Alzheimer facility. We feel that we
12 could perhaps get up to 22 parking spaces underneath
13 the new building.

14 If we do that, that will be 20 to 22 fewer
15 spaces that we will need on the side of Rock Creek
16 Park where we propose --

17 CHAIRPERSON GRIFFIS: On the surface.

18 MR. HILBERT: Yes, sir.

19 CHAIRPERSON GRIFFIS: Okay. And that
20 hasn't changed, that alternative scenario. You still
21 haven't gotten the information to know what you're
22 doing. So for our purposes, the parking requirement
23 is met; is that correct?

24 MR. TUMMONDS: That's correct. And it
25 will either be met with all of the spaces on that

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1 front plateau area or 66 spaces on the plateau area
2 and 20 below, in the below-grade parking structure.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. TUMMONDS: The purpose of showing that
5 plan was this would be the maximum possible extent of
6 impact on that front area by showing the additional
7 parking spaces there.

8 CHAIRPERSON GRIFFIS: Okay.

9 Questions, clarifications? Ms. Miller.

10 VICE CHAIRPERSON MILLER: Are you
11 proposing any conditions that you all have agreed to
12 that should be incorporated in the order?

13 MR. TUMMONDS: We are not. We think the
14 conditions are addressed by this rather lengthy
15 memorandum of understanding that we have with the
16 Knollwood neighbors.

17 VICE CHAIRPERSON MILLER: Am I correct
18 that that's not coming in the record, or is that
19 coming in the record? I only ask that because you say
20 that you have worked out all of these areas, but then
21 when we go to determine whether or not conditions are
22 required, we might not know that a particular area has
23 been worked out unless you tell us.

24 MR. HILBERT: We have provided just this
25 morning new proposals to the Knollwood neighbors, at

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1 which time I believe Mr. Scallet is going back as we
2 speak to the rest of the Knollwood neighbors to ensure
3 their agreement. As soon as that happens, we will put
4 up a final version which we will sign and
5 approximately nine members of the Knollwood neighbors
6 will also sign the agreement, and we will provide this
7 body the final copy of the agreement.

8 CHAIRPERSON GRIFFIS: Here's the issue for
9 the Board. We have the entire case and the hearing
10 and there's facts and we're going to make findings of
11 fact and then we're going to go about -- it's all
12 great news -- you know, pop the champagne -- that you
13 guys made your agreement, but the file and the record
14 that we still have have all of the adverse impacts, in
15 which case the conditions are going to go directly to
16 those.

17 What I would propose is rather than -- you
18 can do it either way you want. You can put in that
19 agreement, but we're going to keep the record open for
20 findings and conclusions, and it should be very
21 specific as to what has changed in terms of the new --
22 if anything has changed in terms of the facts relating
23 to the conditions that they arise out of.

24 Clearly the moving of the footprint -- and
25 we have that and that is substantial enough to

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1 mitigate a lot of what was being talked about, and we
2 can go from there. But that's what Ms. Miller is
3 really getting to: well, how are we going to change
4 the facts that we have in the case, if we change them
5 at all?

6 MR. TUMMONDS: I think we do both. We
7 will submit a findings of fact, conclusions of law as
8 you request. We will also submit the signed
9 memorandum of understanding between the parties. The
10 Board can decide, you know, if they want to attach
11 "Condition 2 is the memorandum of understanding" or if
12 they want to take out relevant provisions of that
13 memorandum of understanding.

14 CHAIRPERSON GRIFFIS: Excellent point.

15 MR. TUMMONDS: Obviously we have agreed to
16 it, so those would be conditions that we would
17 support.

18 CHAIRPERSON GRIFFIS: How long is it?

19 MR. TUMMONDS: Nine pages. Ten pages.

20 CHAIRPERSON GRIFFIS: Okay. That's
21 readable.

22 MR. HILBERT: Double-spaced.

23 CHAIRPERSON GRIFFIS: Bingo. Okay.

24 Anything else, then? Any other questions?

25 (No response.)

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1 CHAIRPERSON GRIFFIS: Excellent. Thank
2 you all very much. It was a lot of work, I know, and
3 we postponed this quite a few times. I'm glad to
4 conclude the hearing on this case.

5 We are going to set this for
6 decisionmaking. Our decisionmaking, of course, is the
7 first Tuesday of the month. That would be the 2nd of
8 November, an auspicious day for many. Of course, that
9 is the time where you will hear the deliberation of
10 the Board. No further testimony or evidence is taken.

11 You are obviously very welcome to be here to listen
12 to our deliberation, watch us at home, from your
13 polling booth, or wherever you are going to be, and we
14 will go from there.

15 So for findings and conclusions, we will
16 have submitted in the week prior. Ms. Bailey, does
17 that work for you?

18 MS. BAILEY: Yes, Mr. Chairman. A week
19 prior to November -- did you say November 2nd?

20 CHAIRPERSON GRIFFIS: Yes, November 2nd.

21 MS. BAILEY: That is October 26th.

22 CHAIRPERSON GRIFFIS: We will have that in
23 by three o'clock at the Office of Zoning. Any
24 difficulty in that, Mr. Tummonds?

25 MR. TUMMONDS: That's fine. We will have

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1 it submitted by three p.m. on October 26th.

2 CHAIRPERSON GRIFFIS: Very well. And as
3 you are out signing this memorandum, we will not be
4 giving any formal written notice outside of what we
5 have just said, that the record is open for the
6 parties in the case to submit those, so you might want
7 to be neighborly also and --

8 MR. TUMMONDS: Sure.

9 CHAIRPERSON GRIFFIS: -- and let them know
10 that, of course, the record is open and when the
11 schedule is. I hate to have a last-minute motion that
12 they didn't know.

13 Okay. Anything else, then, that I can
14 answer in terms of this case? Questions?

15 (No response.)

16 CHAIRPERSON GRIFFIS: We are all set,
17 then. Very well. Thank you very much. Appreciate
18 your patience this afternoon.

19 Let's move right into the next case in the
20 afternoon.

21 APPEAL OF ADVISORY NEIGHBORHOOD COMMISSION 6A

22 17214 ANC-6C

23 MS. BAILEY: Appeal Number 17214 of
24 Advisory Neighborhood Commission 6A, pursuant to 11
25 DCMR 3100 and 3101, from the administrative decision

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1 of the Zoning Administrator of the Department of
2 Consumer and Regulatory Affairs. The appellant
3 alleges that the Zoning Administrator erred by issuing
4 a certificate of occupancy permit, Number C76349,
5 dated May 19, 2004, for a 30-seat deli restaurant.
6 Appellant alleges that the actual size of the business
7 is a fast food restaurant as defined by section 199 of
8 the regulations and section 773. The property is
9 zoned C-2-A. It's located at 721 H Street, Northeast,
10 and it's also located in Square 890 on Lot 69.

11 CHAIRPERSON GRIFFIS: Good. Thank you
12 very much, Ms. Bailey.

13 First of all, I had skipped over in my
14 opening remarks the process for appeal, so let me just
15 run through that. Of course, we hear statement of
16 witnesses by the appellant. Second we would obviously
17 hear from the Zoning Administrator and their
18 representative, the government's case. We would hear
19 the case presentation from the owner, the lessee or
20 operator of the property. Fourth, we would hear from
21 the ANC. Fifth, if any intervenors have been
22 established in the case, we would hear from the
23 intervenors. Sixth, we will hear any rebuttal and
24 closings by the appellant.

25 Let me have everyone introduce themselves

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1 so we will know who we're addressing, and we will move
2 on from there.

3 MR. RICE: Cody Rice, ANC-6A.

4 CHAIRPERSON GRIFFIS: And you are the
5 appellant; is that correct?

6 MR. RICE: That's correct.

7 CHAIRPERSON GRIFFIS: Very well.

8 MS. BELL: Good afternoon. I am Lisa Bell
9 with the Office of the General Counsel at DCRA, and
10 with me is Ms. Faye Ogunneye, who is the Chief of the
11 Zoning Division.

12 CHAIRPERSON GRIFFIS: Okay. As we have
13 the appellant and the ANC -- yes, go ahead. We have
14 an adjoining ANC --

15 MR. RICE: It's actually located in ANC-6C
16 just across the border from 6A, but 6A is bringing
17 this case.

18 CHAIRPERSON GRIFFIS: Oh. Okay. So 6C
19 would be presenting a case; is that correct?

20 MR. RICE: I don't believe a
21 representative from 6C is here, but I believe they
22 submitted a letter to the record.

23 CHAIRPERSON GRIFFIS: Sure. Yes. Indeed,
24 they did. And is the owner of the property or lessee
25 here? Why don't you just have a seat quickly? I just

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1 want to figure out what we're doing here and the
2 landscape, so to speak. If you would turn on your
3 microphone -- excellent -- and just state your name
4 and address for the record.

5 MR. RATNAM: Chandar Ratnam, 721 H Street,
6 Northeast, Washington, D.C.

7 CHAIRPERSON GRIFFIS: That is your
8 residential address?

9 MR. RATNAM: Oh, residential. 14110
10 Gabriel Way, Centreville, Virginia, 20121.

11 CHAIRPERSON GRIFFIS: Okay. And you are
12 the what in this case?

13 MR. RATNAM: I am with the District over
14 here.

15 CHAIRPERSON GRIFFIS: You are the lessee?

16 MR. RATNAM: Yes, I'm the lessee.

17 CHAIRPERSON GRIFFIS: The property owner
18 is not represented today, then; is that correct?
19 Okay.

20 Are you the property owner?

21 MR. PETERSON: No. I'm here for the
22 Capitol Hill Restoration Society.

23 CHAIRPERSON GRIFFIS: Excellent. Okay.
24 Are you requesting intervenor status?

25 MR. PETERSON: No.

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1 CHAIRPERSON GRIFFIS: Are you going to be
2 called as a witness?

3 MR. PETERSON: No. I would just like to
4 give my support to the application.

5 CHAIRPERSON GRIFFIS: Do you want to
6 provide your support by sitting in the hearing room
7 and being supportive or do you want to speak?

8 MR. PETERSON: I want to speak.

9 CHAIRPERSON GRIFFIS: Okay. Are you going
10 to call him as a witness?

11 MR. RICE: Yes.

12 CHAIRPERSON GRIFFIS: And I'm going to be
13 very informal with this. So that's the way you're
14 going to get in. Of course, we have your written
15 submission. Appeals are a little different than
16 normal, so we will go about it that way.

17 All right. It looks like we've got
18 everyone ready to roll; is that correct? Any
19 questions, Board? Procedure? Ms. Miller?

20 VICE CHAIRPERSON MILLER: I just want to
21 clarify the ANC here. You're with ANC-6A?

22 MR. RICE: That's correct.

23 VICE CHAIRPERSON MILLER: Is ANC-6A the
24 appellant in this case?

25 MR. RICE: Yes.

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1 VICE CHAIRPERSON MILLER: Okay. ANC-6C
2 wanted to be a co-appellant, but they are not here; is
3 that correct?

4 MR. RICE: No. They did not choose to be
5 a co-appellant, but they provided a letter of support
6 for the appeal that should be in the record.

7 VICE CHAIRPERSON MILLER: Okay.

8 CHAIRPERSON GRIFFIS: They are acting as
9 the ANC participating in this and they decided to put
10 their case presentation in writing; is that correct?

11 MR. RICE: Yes.

12 VICE CHAIRPERSON MILLER: But the property
13 at issue is located in ANC-6A; is that correct?

14 MR. RICE: It's located in ANC-6C.

15 VICE CHAIRPERSON MILLER: It's in 6C, but
16 6A is the appellant, but you're across the street.

17 MR. RICE: Right. The border is 8th
18 Street, Northeast.

19 VICE CHAIRPERSON MILLER: Okay. Thank
20 you.

21 CHAIRPERSON GRIFFIS: All clear?

22 VICE CHAIRPERSON MILLER: Yes.

23 CHAIRPERSON GRIFFIS: Excellent.

24 Well, we have the landscape, all the
25 participants introduced just in time for Ms. Mitten to

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1 get to the substance of this, so let's go ahead and
2 welcome Ms. Mitten, of course, this afternoon, and
3 move ahead, then. If you want to have a seat back
4 where it's comfortable or over there, that's great.
5 We will turn it over to the appellant for a
6 presentation of their case.

7 MR. RICE: Good afternoon. My name is
8 Cody Rice. I'm an advisory neighborhood commissioner
9 and chair of ANC-6A's Economic Development and Zoning
10 Committee. I have been authorized by the ANC to
11 present this appeal. I would like to thank the Board
12 for hearing this case.

13 The ANC is appealing the administrative
14 decision of the Zoning Administrator and DCRA. We
15 believe the Zoning Administrator erred by issuing a
16 certificate of occupancy, C76349, with an approved use
17 of restaurant in the C-2-A zoned premises at 721 H
18 Street, Northeast, which is currently occupied by a
19 Blimpie and a Noble Roman's Pizza.

20 We believe the premises are actually
21 operated as a fast food restaurant as defined by
22 section 199 of the zoning regulations, and as such a
23 special exception should have been obtained per
24 section 733 before the certificate of occupancy was
25 issued.

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1 According to section 733.1, a special
2 exception is mandatory for the operation of a fast
3 food restaurant in a C-2-A District. As defined in
4 the zoning regulations, a food service operation is
5 defined as a fast food restaurant if it meets two
6 criteria: first, the floor space for customer queuing
7 is greater than 10 percent of the publicly accessible
8 floor space on any one floor; and two, either A) 60
9 percent of the food items are prepackaged or B) the
10 establishment primarily serves its food and drink in
11 disposable containers and provides disposable
12 tableware.

13 The operation at 721 H Street, Northeast,
14 meets this definition. With respect to the first
15 criteria, the queuing area occupies substantially more
16 than 10 percent of the publicly accessible floor
17 space. This is shown in the diagram that I submitted
18 on September 24, 2004. It is supported by the
19 certificate of occupancy, which indicates that only
20 600 square feet are occupied by the approved
21 restaurant use.

22 I also have another set of documents that
23 I would like to introduce into the records. These are
24 the eating establishment affidavits that were
25 completed by the business owner submitted to DCRA and

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1 obtained by Mr. Gary Peterson of the Capitol Hill
2 Restoration Society. I just got copies of them this
3 afternoon. But those documents indicate that the
4 owner says that 50 percent of the floor spaces
5 accessible to the public on any one floor will be used
6 for queuing, for self-service, for carryout or
7 on-premises consumption.

8 Furthermore, the facilities for carryout
9 are not clearly subordinate to the principal use --
10 providing prepared foods for consumption on the
11 premises as the definition of "restaurant" requires.
12 The counter providing the carryout service is a very
13 prominent feature of the restaurant interior. So that
14 all goes to the first criteria.

15 With respect to the second criteria, the
16 operation provides disposable cups, plates, flatware,
17 napkins, and serves its food and drink in disposable
18 containers.

19 Having met these criteria, we feel a
20 special exception is required regardless of other
21 activities or uses that may be occurring at the
22 establishment. Certainly the operation cannot qualify
23 for the approved use of a restaurant as indicated on
24 the certificate of occupancy since the explicit
25 definition of that term shall not include a fast food

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1 restaurant according to section 199.1.

2 Based on a copy of the certificate of
3 occupancy operation materials obtained by the ANC and
4 subsequent letters and e-mails, there is no indication
5 that the Zoning Administrator considered floor plans,
6 queuing areas, menus or operating practices before
7 issuing the certificate of occupancy on May 19, 2004.

8 The application for the certificate of occupancy
9 listed the proposed use of premises as a restaurant,
10 but the Zoning Administrator did not obtain eating
11 establishment affidavits from the businesses to verify
12 the proposed use until late July 2004.

13 Furthermore, if the Zoning Administrator
14 thought the property to be in the R-4 zoned district
15 as indicated on the certificate of occupancy, it's
16 unclear why a certificate of occupancy for this use
17 would be issued without a variance.

18 The Zoning Administrator's late attempts
19 to address the concerns about the issue of the
20 certificate of occupancy actually raised more
21 questions about the operations on the premises than
22 they answered.

23 Per a letter dated July 22, 2004, the
24 Zoning Administrator found that there are -- well, the
25 Zoning Administrator said there were two businesses

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1 operating independently on the premises. We may get
2 more clarification on that as this proceeds. It's
3 unclear to which operation the existing certificate of
4 occupancy pertains and whether the other has
5 successfully obtained its own certificate of
6 occupancy.

7 CHAIRPERSON GRIFFIS: Did you look for the
8 other certificate of occupancy?

9 MR. RICE: We asked the Zoning
10 Administrator and DCRA for the materials, the
11 certificate of occupancy and the eating establishment
12 affidavits, and --

13 CHAIRPERSON GRIFFIS: So you have never
14 seen, as you indicate in your written submission also,
15 the C of O for the pizza place.

16 MR. RICE: If, indeed, the pizza place is
17 a separate establishment as some of the correspondence
18 seemed to indicate, we have not seen a separate
19 certificate of occupancy.

20 CHAIRPERSON GRIFFIS: I see. Well, are
21 they physically?

22 MR. RICE: They are co-located behind the
23 same counter. They are --

24 CHAIRPERSON GRIFFIS: So you walk in the
25 same door.

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1 MR. RICE: You walk in -- there are two
2 signs on the outside. You walk in the same door and
3 they are both there behind the same counter.

4 CHAIRPERSON GRIFFIS: I see.

5 MR. RICE: Physically there are two
6 registers.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. RICE: I have been informed that one
9 isn't functional, that they use the same register. So
10 this is an issue that I'm raising because in the
11 course of trying to clarify --

12 CHAIRPERSON GRIFFIS: Okay. That brings a
13 lot more clarity in my mind in terms of not having two
14 separate stores.

15 MR. RICE: Right.

16 CHAIRPERSON GRIFFIS: They may well fit
17 into a definition of two separate requirements for C
18 of O, but -- all right. Let's move ahead.

19 MR. RICE: So assuming that the
20 certificate of occupancy pertains to Blimpie, it
21 raises the question of whether the Noble Roman's Pizza
22 should be classified as a fast food restaurant or a
23 food delivery service, both of which also require
24 special exception in C-2-A zoned areas. Since its
25 menu offers delivery -- I'm talking about the Noble

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1 Roman Pizza -- and all 30 dine-in seats have already
2 been allocated per the existing certificate of
3 occupancy, if a separate certificate of occupancy has
4 been issued to Noble Roman's Pizza, it's subject at a
5 minimum to the same problems identified in this appeal
6 and should also be considered by BZA as part of this
7 appeal.

8 Finally, we believe that the certificate
9 of occupancy was improperly issued in the absence of a
10 special exception approved by BZA. Without the
11 special exception, the residents of the area
12 surrounding the property, including many residents
13 represented by ANC-6A, were denied an opportunity to
14 provide input through the special exception process on
15 potentially objectionable aspects of a fast food
16 restaurant such as inadequate screening, noise, odors,
17 lights, hours, traffic, safety and other conditions.

18 We feel it important that there be a level
19 playing field for new and existing businesses on H
20 Street, Northeast, and that everyone plays by the same
21 set of rules, so we ask that the BZA overturn the
22 administrative decision of the Zoning Administrator to
23 issue C76349 until the owner or lessee obtains a
24 special exception for the fast food restaurant.

25 Thank you.

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1 CHAIRPERSON GRIFFIS: Thank you very much.
2 I will be absolutely elementary. What is your
3 understanding of the zone district that this occurs
4 in?

5 MR. RICE: C-2-A.

6 CHAIRPERSON GRIFFIS: And you cited 733,
7 section 733.1; is that correct?

8 MR. RICE: That's correct.

9 CHAIRPERSON GRIFFIS: And under 733.1, a
10 fast food restaurant in a C-2-A District requires a
11 special exception.

12 MR. RICE: Yes.

13 CHAIRPERSON GRIFFIS: And the certificate
14 of occupancy -- did you submit the certificate of
15 occupancy in this case?

16 MR. RICE: Yes. It's part of the initial
17 submission.

18 CHAIRPERSON GRIFFIS: Okay. And it's
19 Exhibit Number 4 in our record. And what do you find
20 the C of O was issued for?

21 MR. RICE: The C of O was issued -- it
22 says -- you mean as far as the underlying zoning or
23 the approved use?

24 CHAIRPERSON GRIFFIS: The approved use.

25 MR. RICE: The approved use is restaurant.

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1 CHAIRPERSON GRIFFIS: And is that a
2 classified distinction in the zoning regulations?

3 MR. RICE: There is a definition of
4 "restaurant" in the zoning regulations.

5 CHAIRPERSON GRIFFIS: And does this fit
6 the definition or is this part and parcel -- is it
7 encapsulated in fast food restaurant under 733?

8 MR. RICE: No. There are two separate --
9 there's a "restaurant" definition and a "fast food
10 restaurant" definition, which -- in fact, the
11 "restaurant" definition specifically sets itself apart
12 from the "fast food restaurant" definition.

13 CHAIRPERSON GRIFFIS: And the requirements
14 in this zoned district for restaurants is what?

15 MR. RICE: For restaurants?

16 CHAIRPERSON GRIFFIS: Right. Is it a
17 special exception?

18 MR. RICE: No.

19 CHAIRPERSON GRIFFIS: It's a matter of
20 right?

21 MR. RICE: Yes.

22 CHAIRPERSON GRIFFIS: I see. Okay. Did
23 you have more to say?

24 MR. RICE: I also have a witness. I'm not
25 sure at which point that I should call my witness.

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1 CHAIRPERSON GRIFFIS: Okay. Let's take
2 just initial questions from the Board if they have
3 any.

4 Yes, Ms. Mitten.

5 COMMISSIONER MITTEN: I just have one
6 quick question. On the little plan that you submitted
7 --

8 MR. RICE: Yes.

9 COMMISSIONER MITTEN: -- that was attached
10 to your letter, the percentages that you show for area
11 A, B and C, those are percentages of the total area of
12 the establishment?

13 MR. RICE: Of the what I estimate to be
14 2,304 square feet, they are percentages of the total
15 area of the building.

16 COMMISSIONER MITTEN: Okay. I just wanted
17 to draw the distinction between the total area and --
18 since the percentages are driven by the publicly
19 accessible floor space, I just want to establish
20 whether or not you think the publicly accessible floor
21 space is 2,304 or something less.

22 MR. RICE: The publicly accessible floor
23 space is definitely less than 2,304. My intent with
24 this exhibit was to show that regardless of your
25 definition of what the denominator should be, that

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1 more than 10 percent of whatever denominator you
2 choose for this building would be more than 10
3 percent.

4 COMMISSIONER MITTEN: Okay. Thank you.

5 CHAIRPERSON GRIFFIS: Good. Excellent
6 question and let me take that out even further. How
7 did you get these dimensions?

8 MR. RICE: I paced them off.

9 CHAIRPERSON GRIFFIS: So you were in there
10 walking.

11 MR. RICE: Yes.

12 CHAIRPERSON GRIFFIS: Okay. And you
13 didn't -- you don't have a scale document at all.

14 MR. RICE: No, I don't.

15 CHAIRPERSON GRIFFIS: So based on just you
16 walking it off and going back with your notes and
17 putting this together, these are the estimations.

18 MR. RICE: Yes.

19 CHAIRPERSON GRIFFIS: Okay.

20 COMMISSIONER MITTEN: Maybe I will just
21 drive this point home a little bit harder. There is a
22 one-page document that follows a Yahoo e-mail and the
23 one-page document that's also attached to your
24 December 24th letter doesn't have any identifier on
25 it, but is that from Mr. Reeves?

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1 MR. RICE: Yes. This is the -- on the
2 Yahoo e-mail page, there is shown an attachment, 7/21
3 underscore --

4 COMMISSIONER MITTEN: Yes.

5 MR. RICE: -- H Street, Northeast,
6 underscore, affidavits, dot doc. The printout of that
7 is the following page.

8 COMMISSIONER MITTEN: Okay. Then I just,
9 again to drive this point home a little bit further, I
10 would just note that in the second to the last
11 paragraph, it says that the inspection concluded or
12 the conclusion of the inspector was that the existing
13 queuing area is approximately 5 percent of the gross
14 floor area, which is really not the benchmark point.
15 I just wanted to call that out.

16 CHAIRPERSON GRIFFIS: Right. Yes. And
17 frankly, what I'm anticipating is perhaps quick
18 rebuttal or discussions on all these dimensions and
19 the percentages. Obviously we're running on the 10
20 percent and all that. So we will be prepared for it.

21 Okay. If there is nothing else initially
22 for questions, why don't we move ahead with your
23 witness.

24 TESTIMONY OF GARY PETERSON

25 MR. PETERSON: Mr. Chairman, I'm Gary

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1 Peterson, chair of the Capitol Hill Restoration
2 Society Zoning Committee. I'm going to be discussing
3 three exhibits. I would like to hand them up now so
4 you have them, and then I won't have to hand them up
5 individually.

6 CHAIRPERSON GRIFFIS: Excellent. Make
7 sure, of course, that all the participants have copies
8 also.

9 MR. PETERSON: They gave them to me.

10 CHAIRPERSON GRIFFIS: DCRA gave them to
11 you? I don't care. Just make sure everybody has what
12 we're looking at.

13 MR. PETERSON: The lessee gave me two of
14 the three documents, and I will give DCRA a copy right
15 now.

16 CHAIRPERSON GRIFFIS: You handed in one
17 set, correct?

18 MR. PETERSON: That's correct.

19 CHAIRPERSON GRIFFIS: Okay. We're about
20 to go copy, so none of us have it, so we will --

21 MR. PETERSON: I will tell you what they
22 are. First of all, one is just a photograph that I
23 took on or about September 9 of this year showing you
24 the front of the building so you could understand just
25 that it's two -- it's a pizza place and a Blimpie's

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1 occupying one storefront.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. PETERSON: And that was the idea of
4 showing you the picture.

5 The second two are the basis for the
6 Restoration Society's support for this appeal, and
7 that is -- we were unanimous in supporting it. The
8 lessee attended our meeting and gave us these two
9 documents, and I'm referring to their establishment --
10 affidavit of eating establishments. Both of them are
11 on behalf of Chan's Foods, Inc., Trading As Blimpie's
12 is one, and the other one is trading as Noble Roman's
13 Pizza, but both are for Chan Foods, so I believe Chan
14 Foods acts on behalf of both of those organizations.

15 At the bottom of the exhibit, they check
16 the box, "What percentage of the floor space that is
17 accessible to the public on any one floor will be used
18 for queuing?" and they have filled out and put 50
19 percent. I point out to you the lessee gave this to
20 me personally.

21 Then on number 4, "Will the proposed
22 establishment primarily serve food and beverages in
23 disposable containers and provide disposable
24 tableware?" they checked the box "Yes."

25 So as far as the Capitol Hill Restoration

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1 Society Committee was concerned, it was clear that we
2 should -- that the C of O was issued in error based on
3 the evidence provided to us by the lessee.

4 CHAIRPERSON GRIFFIS: What is an affidavit
5 for eating establishment?

6 MR. PETERSON: This is a form that is
7 required to be filled out by the Department of
8 Consumer and Regulatory Affairs Building and Land
9 Regulation Administration. I think it's a -- it's
10 like a fact sheet that they use, that they look at
11 prior to issuing a certificate of occupancy.

12 CHAIRPERSON GRIFFIS: Okay.

13 COMMISSIONER MITTEN: Just for
14 clarification, when was that filled out?

15 MR. PETERSON: It's dated the 31st of July
16 2004, and it's notarized. I don't have an officially
17 notarized copy, but the photocopy shows that it was
18 notarized.

19 COMMISSIONER MITTEN: And it's your
20 understanding that that is filled out prior to the
21 issuance of a certificate of occupancy?

22 MR. PETERSON: To be honest with you, I
23 don't know when the certificate of occupancy was
24 filled out, was issued, but I do know that this was
25 filled out -- this was notarized on that date.

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1 COMMISSIONER MITTEN: Okay. Thank you.

2 CHAIRPERSON GRIFFIS: Okay. That's the
3 date. And from your understanding, this is part of
4 the process of applying for a certificate of
5 occupancy?

6 MR. PETERSON: That's my belief.

7 CHAIRPERSON GRIFFIS: Okay. Excellent.
8 Anything else?

9 MR. PETERSON: That's all I have to say.

10 CHAIRPERSON GRIFFIS: Thank you very much.
11 Other questions from the Board?

12 (No response.)

13 CHAIRPERSON GRIFFIS: Okay. Anything
14 else?

15 MR. RICE: No.

16 CHAIRPERSON GRIFFIS: Very well. Let's
17 move ahead, then, to the government's case. Of course
18 we are going to have a chance for you to summarize and
19 also cross, but let's move ahead.

20 MS. BELL: Good afternoon. I am a little
21 confused. Did he say there were three exhibits?
22 There's the affidavit, the photo --

23 CHAIRPERSON GRIFFIS: Yes, there were
24 three.

25 MS. BELL: And what was the third one?

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1 CHAIRPERSON GRIFFIS: A photo and two
2 affidavits; is that correct?

3 MR. PETERSON: That's correct.

4 CHAIRPERSON GRIFFIS: Two affidavits, so
5 one for the -- it's not in front of me, but the Noble
6 Roman's is one and the Blimpie's is the other; is that
7 correct?

8 MR. PETERSON: That's correct.

9 CHAIRPERSON GRIFFIS: Okay. So we're
10 going to get both of those. Do you want to wait until
11 we get those?

12 MS. BELL: No.

13 CHAIRPERSON GRIFFIS: Actually, let me
14 delay you. Can you answer that quick question for me?
15 What is an affidavit for eating establishment?

16 MS. BELL: Actually, it's an internal
17 document that is sometimes used when there is some
18 confusion about the appropriate use in a zoning area.

19 Let me say initially that this appeal has
20 caused the Zoning Division to take a look at the
21 entire case file, and we welcome the opportunity
22 sometimes to review our case files when there are
23 areas of confusion and areas where we can clarify
24 certain facts.

25 This is a unique case in that there were a

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1 number of items that had gotten confused with the
2 filing and some of the information that has been
3 provided. So with that -- and that is unusual for
4 DCRA's recordkeeping. That's not a practice within
5 the Zoning Division.

6 But we concede that the C of O was not
7 accurate, that the zoning designation was not correct.

8 It was an error and I would be glad to explain how
9 the error was created initially. It also actually has
10 to do with some of this information, like the square
11 footage, as the ANC has noted.

12 Typically what happens is when an
13 applicant fills out the application form, as many of
14 you Board members have reviewed, that information is
15 reviewed by the zoning tech, and then as result of
16 that, the zoning designations are checked, and the use
17 is compared to the zoning designation.

18 In this particular case, there was some
19 confusion with regard to the address and there was
20 some information that was picked up that had been
21 erroneously provided to us on the original building
22 permit, so as a result, some of that information made
23 its way to the C of O. That would include, for
24 instance, the square footage. The applicant --

25 COMMISSIONER MITTEN: What was the square

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1 footage that erroneously made its way?

2 MS. BELL: The 600 square feet as noted by
3 the ANC.

4 So what I would like to do, with the
5 Board's indulgence, is to take a moment, I have
6 brought some demonstrative evidence to sort of
7 illustrate the information that was provided to us and
8 give some clarity as to how we came to the designation
9 of a deli/restaurant, 30 seats, which is the use that
10 is on the C of O.

11 CHAIRPERSON GRIFFIS: Well, now I'm
12 confused.

13 MS. BELL: Okay.

14 CHAIRPERSON GRIFFIS: You conceded that
15 there was not accuracy in issuing the C of O.

16 MS. BELL: No, no. What I -- well, I
17 guess I would quibble with that. What I concede is
18 that the zoning designation of R-4 that appears on the
19 C of O is not correct; it is actually, as the ANC
20 correctly identified, it's the C-2-A zone.

21 CHAIRPERSON GRIFFIS: Okay.

22 MS. BELL: Which we are aware of.

23 CHAIRPERSON GRIFFIS: Right. Okay. And
24 then you just said -- you're about to lead us into
25 how and why the C of O is given for a deli/restaurant.

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1 MS. BELL: Well, the Zoning
2 Administrator's position is that, after taking a look
3 at the entire case file and going back and making
4 on-site inspections, we have indeed verified that the
5 use of the space with regard to Blimpie's and Noble
6 Roman Pizza does meet the qualifications for a
7 restaurant under the zoning regulations, and that is
8 really the core issue here: whether or not the use is
9 proper.

10 So while the use may be proper on the C of
11 O that was issued, there are other items of
12 information that need to be changed, and I will
13 discuss, if the Board will allow me, the remedial
14 action that we intend to take as a result of this new
15 information. But I thought it might be helpful, and
16 Ms. Ogunneye is here also, to give the Board some
17 information about what the proper square footage is
18 because the ANC has not gotten the square footage
19 correct either, and to give you some information about
20 how the queuing area was actually calculated if you
21 will allow me to go forward.

22 CHAIRPERSON GRIFFIS: Okay. That should
23 be pretty quick and straightforward.

24 MS. BELL: Right.

25 CHAIRPERSON GRIFFIS: Excellent.

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1 MS. BELL: What we did is in this case is
2 we took the floor plan that had been provided by the
3 ANC and made some modifications, and we also pulled
4 out the base plan that was provided to us by the owner
5 and then the tenant layout plan so that you would have
6 some information.

7 We also, as I said, conducted an on-site
8 inspection to get some actual measurements with
9 respect to the size so we can verify that the queuing
10 space was indeed less than 10 percent to meet, as the
11 ANC has pointed out, the definition of a restaurant.

12 COMMISSIONER MITTEN: May I just ask a
13 question at this point, which is, we have an affidavit
14 from the owner of the business that says something,
15 and are you saying that -- now you're calling the
16 accuracy of the affidavit into question in making
17 these additional measurements?

18 MS. BELL: Well, two things I would like
19 to mention with regard to the affidavit. The
20 affidavit -- neither affidavit has been signed by the
21 zoning technician at DCRA, which is customary, the
22 policy, after it has been reviewed and added to the
23 case file, and, yes, there was some confusion with the
24 lessee, who is here today, with regard to how to fill
25 out the form and what was the appropriate information

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1 to provide. As I mentioned earlier, one of the things
2 that they provided was the square footage, which they
3 estimated was 600 square feet. We're about to show
4 you, with the tenant layout floor plan as well as the
5 base floor plan that the actual square footage is
6 1,789 square feet.

7 Typically what happens is when information
8 is provided on the application, our zoning techs and
9 others in the permit office do not always have the
10 time to verify the accuracy of all the information
11 that is provided by an applicant, and in this case, an
12 applicant provided information that was not correct.

13 COMMISSIONER MITTEN: I guess I don't
14 understand what the purpose of these affidavits is,
15 then, because there is no guidance; there's just --
16 you know, this I presume would be -- I mean, when
17 would you ask for this affidavit if you don't always
18 ask for it when someone submits an application for a
19 certificate of occupancy?

20 MS. BELL: Well, let me just say that I
21 think Ms. Ogunneye is better suited to answer that
22 question, but for a C-2-A zone, it would not have been
23 required if the Zoning Administrator -- if the Zoning
24 Administrator or the zoning technician determined that
25 the appropriate use was a restaurant, it's a matter of

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1 right in a C-2-A zone, so an affidavit would not have
2 been needed.

3 COMMISSIONER MITTEN: But the whole
4 purpose of this affidavit -- I mean, the questions are
5 driven by the distinction between or among restaurant,
6 fast food, and drive-through, so any time there is a
7 zone, and going back, you know, to what Mr. Rice's
8 point, you thought it was R-4 at the time, it seems to
9 me that if there is any use of those three uses --
10 restaurant, fast food restaurant, drive-through
11 restaurant -- that are not all matter of right in the
12 zone in question, that this would always need to be
13 filled out before the certificate of occupancy was
14 issued.

15 MS. BELL: As I said, I think that's a
16 better question for her to answer.

17 COMMISSIONER MITTEN: Well, great.

18 TESTIMONY OF FAYE OGUNNEYE

19 MS. OGUNNEYE: Yes. Good afternoon. My
20 name is Faye Ogunneye, the chief of the Zoning Review
21 Branch.

22 In response to the eating establishment
23 affidavit, it's customary that we fill it out whenever
24 the proposed use is in a zone that -- for instance, a
25 C-2-A zone would be a good example. A fast food

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1 restaurant is allowed by right from a C-2-B zone, so
2 whenever a property is in a C-2 or lesser zone, we
3 would have to qualify whether or not it's a fast food,
4 a delicatessen, or -- yes, fast food or delicatessen
5 pretty much.

6 COMMISSIONER MITTEN: Why do you say
7 delicatessen? Delicatessen is not a use designation
8 in the zoning ordinance.

9 MS. OGUNNEYE: It isn't specifically, but
10 under fast food, it does make mention of a
11 delicatessen as not being a fast food restaurant,
12 which implies that a delicatessen can --

13 COMMISSIONER MITTEN: So it's just a
14 restaurant.

15 MS. OGUNNEYE: Pretty much, yes.

16 COMMISSIONER MITTEN: Okay.

17 MS. OGUNNEYE: Right. But then if there
18 is no seating involved or -- because restaurants,
19 you're expected -- the people are expected to consume
20 the food on the premises, whereas in a delicatessen,
21 most times people come in to purchase and take off or
22 maybe a few of them might sit down and eat in.

23 COMMISSIONER MITTEN: But from a zoning
24 distinction, there is no distinction between a
25 delicatessen and a restaurant.

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1 MS. OGUNNEYE: When we look at the --

2 CHAIRPERSON GRIFFIS: Or ice cream parlor.

3 MS. OGUNNEYE: -- Unabridged Webster's
4 Dictionary, they are not quite the same, and
5 unfortunately the regs are not specific, but the only
6 time --

7 CHAIRPERSON GRIFFIS: I'm sorry to
8 interrupt you. I think your answer -- you're going a
9 little off from the question, and the question should
10 probably just be yes, meaning there is no zoning
11 distinction in the definition between "deli,"
12 "restaurant," and -- I'm not being facetious -- ice
13 cream parlor is in there, too, because that is one of
14 the exclusions, right?

15 MS. OGUNNEYE: Right. Yes.

16 CHAIRPERSON GRIFFIS: Exclusions of fast
17 food.

18 MS. OGUNNEYE: Right. So once it's not a
19 fast food, then --

20 CHAIRPERSON GRIFFIS: What we're trying to
21 do is differentiate between restaurant and fast food
22 restaurant, --

23 MS. OGUNNEYE: Right.

24 CHAIRPERSON GRIFFIS: -- and not hit all
25 grocery stores with the label of being takeout

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1 establishments, right?

2 MS. OGUNNEYE: Correct.

3 CHAIRPERSON GRIFFIS: Okay.

4 COMMISSIONER MITTEN: Okay. So having
5 established that in a C-2-A zone, you would have had
6 somebody fill this out because there is an important
7 distinction to be made, and yet thinking that it was
8 an R-4 and it was actually in C-2-A when you would
9 have asked them to do this, why didn't this get filled
10 out until a couple months after the fact? And then
11 presumably you would have relied on this if they just
12 had filled it out in the normal course of things; you
13 wouldn't have gone and measured the space for them.
14 So I guess I'm just wondering what actual use is this
15 if they are not relying documents.

16 MS. OGUNNEYE: May I just confer with her
17 for a quick moment, please?

18 (Pause.)

19 MS. OGUNNEYE: Okay. I'm ready.

20 In answer to the question as to why we
21 didn't ask for the affidavit on the onset, when we
22 first application was put in, the address was
23 erroneously noted as 721 H Street, I believe,
24 Northwest, so everything that went on the application
25 form, the lot, the square, the former use, was to a

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1 property in Northwest, which happened to be a C-4
2 zone, and there was a church at that location.

3 CHAIRPERSON GRIFFIS: C-4 or R-4?

4 MS. OGUNNEYE: C-4.

5 CHAIRPERSON GRIFFIS: It was a C-4 zone.

6 MS. OGUNNEYE: Correct.

7 CHAIRPERSON GRIFFIS: In Northwest.

8 MS. OGUNNEYE: Right. And in a C-4 zone,
9 we would not ask for the eating establishment
10 affidavit to be filled out because without a doubt,
11 you can have any type of restaurant in a C-4 zone, and
12 that's where the whole chain of events started.

13 COMMISSIONER MITTEN: Well, do you have
14 that? Because the application that we have in front
15 of us has H Street, Northeast, and I don't know what
16 -- you know, we don't have any evidence in the record
17 that that is what happened and at some point it got
18 redirected to Northeast.

19 MS. BELL: If I can interject for a
20 moment, as I said, initially what happened is that the
21 information that was picked up by the technicians was
22 originally erroneous, and part of that information was
23 a bad address that stems back to a building permit
24 before the C of O was actually issued.

25 CHAIRPERSON GRIFFIS: On the correct

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1 address or the bad address?

2 MS. BELL: On the bad address.

3 CHAIRPERSON GRIFFIS: So it would stem
4 from a permit application from the Northwest address.

5 MS. BELL: Yes.

6 CHAIRPERSON GRIFFIS: Okay. I don't know
7 if I'm tired or if this is getting more confusing.
8 Let's go right to the chase.

9 MS. BELL: I'm trying to --

10 CHAIRPERSON GRIFFIS: Let's not dance
11 around it. Tell us what happened.

12 MS. BELL: I'm trying to put it in --

13 CHAIRPERSON GRIFFIS: If these affidavits
14 went in --

15 MS. BELL: I'm trying to put it in as neat
16 a package as possible.

17 CHAIRPERSON GRIFFIS: I know.

18 MS. BELL: What happened is --

19 CHAIRPERSON GRIFFIS: This is what is
20 going to be even neater. We have these affidavits,
21 right? Now, they weren't used. They may have been
22 used. Sometimes you ask for them; sometimes you
23 don't. What else was submitted in to review this for
24 a certificate of occupancy? Were there actual plans?
25 Are you showing us plans that were submitted as part

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1 of an application?

2 MS. BELL: Yes.

3 CHAIRPERSON GRIFFIS: Okay. Why don't we
4 get right to those, though.

5 MS. BELL: But I think it's -- that's what
6 I wanted to show you, but I think it's important to
7 understand that initially what happened when the
8 building permit application came in, there was an
9 address screw-up that included the zone, square
10 footage, a number of other things.

11 CHAIRPERSON GRIFFIS: Okay.

12 MS. BELL: It was subsequently corrected.
13 The C of O was issued and picked up some of the
14 erroneous information. We didn't find any of this out
15 until --

16 CHAIRPERSON GRIFFIS: So the error, the
17 initial error was from the applicant for the C of O
18 that put the wrong address, that put a Northwest
19 address?

20 MS. BELL: Yes. But we also picked up the
21 wrong information.

22 CHAIRPERSON GRIFFIS: Did you pick up the
23 same wrong information or you picked up different
24 wrong information?

25 MS. BELL: We picked up the same wrong

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1 information and added other wrong information.

2 CHAIRPERSON GRIFFIS: Okay. So initially
3 we're running along this huge problem because you're
4 across the city where you shouldn't be.

5 MS. BELL: Correct.

6 CHAIRPERSON GRIFFIS: But you guys are up
7 in the office reviewing information --

8 MS. BELL: Correct.

9 CHAIRPERSON GRIFFIS: -- that is provided
10 to you.

11 MS. BELL: Correct.

12 CHAIRPERSON GRIFFIS: We will get that
13 document --

14 MS. BELL: Which we did not find out until
15 this appeal was filed and we had to go back to start
16 sort of looking at, you know, what happened.

17 CHAIRPERSON GRIFFIS: Wow. Well, let's go
18 to it.

19 MS. BELL: Okay.

20 VICE CHAIRPERSON MILLER: Can I just ask
21 one clarifying question? So basically, once you
22 found out it was in the C-2 District, then this
23 affidavit is appropriate to evaluate.

24 MS. BELL: Right.

25 VICE CHAIRPERSON MILLER: Okay. So you

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1 have this affidavit, and basically you're saying that
2 you don't think that it's accurate -- is that correct?
3 -- with respect to floor space for queuing.

4 MS. BELL: Yes. My point with that is we
5 have another one that they filled out the exact same
6 day with different information in it.

7 VICE CHAIRPERSON MILLER: Okay.

8 MS. BELL: So, you know, that's my point.

9 VICE CHAIRPERSON MILLER: And then you are
10 also going to be presenting evidence to support what
11 the correct answer is in this case.

12 MS. BELL: Yes. Exactly.

13 VICE CHAIRPERSON MILLER: Okay.

14 MS. BELL: And, you know, maybe -- I don't
15 know if you want to term it as erroneous or
16 inaccurate, but, you know, obviously there was some
17 confusion. I suppose Mr. Ratnam can discuss them, but
18 he obviously filled out three of these things. He
19 filled out three eating establishment affidavits.

20 COMMISSIONER MITTEN: For two restaurants?

21 MS. BELL: Yes, for the same two
22 restaurants. We have one where he has the exact same
23 information except when you asked him what percentage
24 of floor space, he put 10 percent, and what percentage
25 of food items prepared or packaged, he put 15 percent,

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1 and it's dated the exact same date and it's also
2 notarized. I might point out that it is also not
3 signed by a zoning technician from our office. So
4 clearly there was some confusion when he filled these
5 things out.

6 CHAIRPERSON GRIFFIS: I would rather get
7 to the heart of the matter here. So what is the final
8 information?

9 MS. BELL: Okay.

10 CHAIRPERSON GRIFFIS: And let's figure out
11 whether this is fast food, not fast food.

12 MS. BELL: Okay.

13 CHAIRPERSON GRIFFIS: Drive-through,
14 coffee shop -- what is it? Because right now, we
15 don't know what it is.

16 MS. BELL: Okay. Great.

17 COMMISSIONER MITTEN: Is there a small
18 version of that for the record?

19 MS. BELL: No. But you know what I do
20 have that might be helpful --

21 COMMISSIONER MITTEN: It's really not fair
22 to the ANC to not have this to give to them since it's
23 their burden.

24 MS. BELL: We have a second copy of -- we
25 can give them a copy of this. This is the base plan,

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1 floor plan.

2 CHAIRPERSON GRIFFIS: Okay. So we have
3 that, it's going to come into evidence at some point.

4 What is it?

5 MS. OGUNNEYE: The part I have highlighted
6 in yellow --

7 CHAIRPERSON GRIFFIS: Well, first start
8 with, what's the document? Where does it come from?
9 What is the date on it? What is it showing?

10 (Pause.)

11 MS. BELL: Okay. Can you describe for
12 them what this is, please?

13 MS. OGUNNEYE: All right. This is the
14 first floor plan for 721 H Street, Northeast, and what
15 this is indicating is the middle part that I have
16 highlighted with the yellow marker shows the retail
17 space that is dedicated for the Blimpie's and the
18 Noble Pizza restaurant.

19 It's noted on here that it's 1,780 square
20 feet.

21 COMMISSIONER MITTEN: Is that the
22 combination of the two?

23 MS. OGUNNEYE: That's just the highlighted
24 area only. Now, this was --

25 COMMISSIONER MITTEN: You just said that

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1 highlighted area is for Blimpie's and the pizza.

2 MS. OGUNNEYE: Correct.

3 COMMISSIONER MITTEN: And so it's 1,789
4 square feet for Blimpie's and the pizza.

5 MS. OGUNNEYE: Correct. Yes.

6 COMMISSIONER MITTEN: Okay. Do you have
7 that broken out by Blimpie's and the pizza separately?

8 MS. OGUNNEYE: No, we don't. No, we
9 don't. And I just need to point out that this is the
10 footprint of the whole building and this plan was done
11 for the base building itself when that went under
12 construction back in -- I think these were back in
13 2001.

14 CHAIRPERSON GRIFFIS: And was this part of
15 the submission for the certificate of occupancy?

16 MS. OGUNNEYE: No. This was just --

17 CHAIRPERSON GRIFFIS: Was a permit
18 required for the buildout of the current tenant?

19 MS. OGUNNEYE: Yes.

20 CHAIRPERSON GRIFFIS: And those documents
21 were part of --

22 MS. OGUNNEYE: I'm going to show you that
23 one next.

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. OGUNNEYE: This was just to point out

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1 --

2 CHAIRPERSON GRIFFIS: Right. This is
3 showing a big picture. Excellent. And what is the
4 date on this again?

5 MS. OGUNNEYE: The date is December 7,
6 2001.

7 CHAIRPERSON GRIFFIS: Okay. So that's
8 Sheet A1, December 2001.

9 MS. BELL: We did bring an extra copy for
10 the Board if you would like to take a look at one.

11 CHAIRPERSON GRIFFIS: Yes. Absolutely.

12 (Pause.)

13 MS. OGUNNEYE: Okay. Now, this is the
14 floor plan for the tenant layout for the Blimpie/Noble
15 Pizza place. This drawing is dated March 22nd, 2003,
16 and again it shows the extent of the space that they
17 are taking up.

18 If you notice, out in here, they lost out
19 that space to another tenant, so that wasn't included
20 as part of their own tenant space when they ultimately
21 got the space leased.

22 CHAIRPERSON GRIFFIS: What is the square
23 footage, then, of the footprint? You had 1,789.

24 MS. OGUNNEYE: Yes. We're just stuck with
25 the 1,789.

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1 CHAIRPERSON GRIFFIS: Interesting.

2 COMMISSIONER MITTEN: Not that that number
3 is relevant for anything.

4 MS. OGUNNEYE: Well, in determining the
5 queuing area, it would be.

6 CHAIRPERSON GRIFFIS: Right.

7 COMMISSIONER MITTEN: No, it's the
8 publicly accessible area --

9 CHAIRPERSON GRIFFIS: Right. Okay. I see
10 where you're going with that.

11 MS. OGUNNEYE: It's 10 percent --

12 COMMISSIONER MITTEN: The benchmark is 10
13 percent of the publicly accessible area, so that
14 wouldn't include food preparation --

15 CHAIRPERSON GRIFFIS: Right.

16 COMMISSIONER MITTEN: -- or any place
17 that's not publicly accessible.

18 CHAIRPERSON GRIFFIS: Right. Yes. And
19 that makes total sense. I don't think you would have
20 to have it -- what I would do in my own -- well,
21 anyway, there it is. Go ahead.

22 MS. OGUNNEYE: Okay. This is a layout
23 that we pretty much used the same figure the ANC had
24 done, and --

25 CHAIRPERSON GRIFFIS: Where did you get

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1 this?

2 MS. BELL: The ANC provided a floor plan.
3 We just took their floor plan --

4 CHAIRPERSON GRIFFIS: All right.

5 MS. BELL: -- and modified it to reflect
6 the on-site inspection.

7 MS. OGUNNEYE: We went and took physical
8 site measurements.

9 CHAIRPERSON GRIFFIS: And when was the
10 on-site inspection done?

11 MS. OGUNNEYE: September, I think.

12 CHAIRPERSON GRIFFIS: After the appeal was
13 filed.

14 MS. BELL: That's correct.

15 MS. OGUNNEYE: Correct. Yes.

16 CHAIRPERSON GRIFFIS: Let me step back a
17 little bit. Maybe you are going to get to this, but
18 you issued the C of O based on these permit documents,
19 Sheet Number A1 of the March; is that correct?

20 MS. BELL: That's correct.

21 MS. OGUNNEYE: Correct.

22 CHAIRPERSON GRIFFIS: So somewhere there
23 are square footage calculations, right?

24 MS. OGUNNEYE: No. Based on the very
25 first --

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1 CHAIRPERSON GRIFFIS: Oh, because they are
2 all in error.

3 MS. OGUNNEYE: Exactly. That's it.

4 CHAIRPERSON GRIFFIS: We're in Northwest.

5 MS. OGUNNEYE: That's it.

6 I think the long and short of it is there
7 were errors made. The address was erroneous on the
8 application and we have since reviewed the area as the
9 right location it's in, and based on the C-2-A zone,
10 we believe it is in compliance with the zoning regs.

11 COMMISSIONER MITTEN: Let me ask you, when
12 you did your calculation and concluded that the
13 queuing area did not exceed 10 percent, were you
14 measuring that against the total area of the space?

15 MS. OGUNNEYE: What we do is we take 10
16 percent of the total area, of the gross floor area
17 dedicated to that use or the leased space.

18 COMMISSIONER MITTEN: Do you know what the
19 test is, though, for fast food?

20 MS. OGUNNEYE: Yes. It's noted in the
21 regs, in the definition section.

22 COMMISSIONER MITTEN: Well, then, that's
23 not the correct calculation. The calculation is 10
24 percent of the publicly accessible area.

25 MS. OGUNNEYE: My understanding is it's 10

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1 percent of the queuing area, the area --

2 COMMISSIONER MITTEN: It's that the
3 queuing area, if it exceeds 10 percent of the --

4 MS. OGUNNEYE: Right.

5 COMMISSIONER MITTEN: -- publicly
6 accessible area, that's one of the tests for a fast
7 food restaurant. That's different than the total
8 gross floor area.

9 MS. BELL: I think what she is referring
10 to is actually the definition is 10 percent of the
11 total floor space.

12 MS. OGUNNEYE: Right.

13 COMMISSIONER MITTEN: You're going to have
14 to point that out to me because that's not what it
15 says.

16 CHAIRPERSON GRIFFIS: Well, it's
17 interesting. I see where they're reading.

18 MS. BELL: If you want to take a look at
19 --

20 CHAIRPERSON GRIFFIS: Ten percent of the
21 total floor space on any one floor.

22 MS. OGUNNEYE: Right.

23 MS. BELL: Right.

24 CHAIRPERSON GRIFFIS: That floor which is
25 accessible to the public. That's the way they're

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1 reading it.

2 MS. BELL: Right.

3 MS. OGUNNEYE: It is the total floor.

4 CHAIRPERSON GRIFFIS: It's 10 percent of
5 the total floor area. I will show you the affidavit.

6 COMMISSIONER MITTEN: No, I don't want the
7 affidavit; I want the regulation.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. BELL: I'm looking at a copy of the
10 regulations.

11 CHAIRPERSON GRIFFIS: I mean, here's the
12 definition right there, but I will give you the regs,
13 too.

14 COMMISSIONER MITTEN: Okay.

15 MS. BELL: It's actually in the
16 definitions section of the regulation.

17 CHAIRPERSON GRIFFIS: I know, 1099, which
18 is also copied under the affidavit, which is why I
19 handed it to her. Okay. So now we're getting to the
20 real meat of it. So the issue is, and we're going to
21 need you all to take an opinion on this because here's
22 one reading of it: It's 10 percent of the total floor
23 area that's accessible to the public, or it's 10
24 percent of the total floor area of that floor that is
25 accessible to the public. You are saying it's 10

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1 percent of --

2 MS. OGUNNEYE: The first one is more
3 stringent.

4 CHAIRPERSON GRIFFIS: -- essentially the
5 gross floor area, the GFA of the floor that is
6 accessed by the public.

7 MS. OGUNNEYE: Right. That's how --
8 right.

9 CHAIRPERSON GRIFFIS: Well, that is
10 confusing.

11 COMMISSIONER MITTEN: Okay. I'm going to
12 just stake out some turf here as an English major
13 undergrad.

14 CHAIRPERSON GRIFFIS: Not as a Zoning
15 Commissioner?

16 (Laughter.)

17 COMMISSIONER MITTEN: And just raise the
18 question. I won't be definitive about this, but what
19 possible reason could there be for making the
20 distinction of saying -- of using the clause "that is
21 accessible to the public" to modify "on any one
22 floor"? What possible reason --

23 CHAIRPERSON GRIFFIS: In a retail that
24 might have a second level all for storage, if you're
25 trying to take 10 percent, you want to take 10 percent

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1 because what you're looking at is the area that's
2 actually utilized for queuing in the primary use. So
3 if you had a total second floor that was used for
4 storage, you would double your square footage, meaning
5 you could double the actual retail area for your
6 queuing without any implication. That's why I would
7 see that any place that's going to be used for
8 queuing, that's the square footage of what you have to
9 take it. Makes sense?

10 COMMISSIONER MITTEN: You answered my
11 question, which is why would you use that to -- why
12 would you use that clause to qualify it, but it just
13 strikes me that what we're trying to get at here is
14 that we have -- there's a certain amount of space that
15 the public can get to. Is the space that people are
16 using, that the public is using, is there a lot of
17 that that's for queuing? Because that's what you find
18 in a fast food restaurant. That's kind of, you know,
19 the way I read it.

20 CHAIRPERSON GRIFFIS: Okay. And that, I
21 think, is the secondary reading to it, is that, then,
22 is it -- is the "accessible to the public" not
23 qualifying which floor you take the 10 percent on, but
24 rather the area that you take the 10 percent on that
25 would be accessible to the public? So what you're

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1 saying there, basically you would have queuing or
2 table and seating because the public is not going into
3 the kitchen. I guess it includes the bathrooms in
4 that.

5 MS. OGUNNEYE: If we did it that way, then
6 it's going to be less stringent and then the 10
7 percent will be 10 percent of a much lesser number.

8 CHAIRPERSON GRIFFIS: That makes it more
9 stringent, doesn't it?

10 MS. OGUNNEYE: No. Less.

11 CHAIRPERSON GRIFFIS: No, it's more
12 stringent because you have less square footage.

13 MS. OGUNNEYE: Okay.

14 CHAIRPERSON GRIFFIS: Gosh, our regs are
15 always so clear. How did this ever happen?

16 VICE CHAIRPERSON MILLER: Can I put my two
17 cents in?

18 CHAIRPERSON GRIFFIS: Sure.

19 MS. BELL: Would it be helpful if she
20 explained how she calculated it for the purposes of
21 the --

22 CHAIRPERSON GRIFFIS: Let's hear from Ms.
23 Miller first and then we will see.

24 VICE CHAIRPERSON MILLER: I was just going
25 to say that I was reading it the way Ms. Mitten was

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1 reading it, but now I'm reading it the way DCRA is
2 reading it because I think that if we were going to be
3 limiting the space that's accessible to the public,
4 that language would qualify "space" and it would read,
5 "10 percent of the total floor space that is
6 accessible to the public," and I think it is actually
7 qualifying "floor," "floor that's accessible to the
8 public," if that means anything to you all. That
9 maybe doesn't enlighten anybody else. Okay. I'm
10 following DCRA, but I'm not explaining it well, where
11 I am. I think the qualifying language follows
12 "floor," and I think it's meant to.

13 CHAIRPERSON GRIFFIS: Oh, I see. Okay.

14 MS. BELL: I think that's correct. It's
15 modifying "floor" and not modifying --

16 CHAIRPERSON GRIFFIS: Well, I know you
17 think it's correct.

18 (Laughter.)

19 CHAIRPERSON GRIFFIS: Okay. So let's now
20 go -- let's figure it out. There's a good distinction
21 and we know what it is, and unless you want to weigh
22 in on this, just the specific issue of the reading of
23 the regs -- good. Go ahead.

24 MR. RICE: I wanted to point out that the
25 eating establishment affidavit that they have the

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1 applicant fill out asks "What percentage of the floor
2 space that is accessible to the public on any one
3 floor will be used for queuing, self-service, or
4 carryout or on-premises consumption?" which is
5 consistent with Ms. Mitten's interpretation.

6 COMMISSIONER MITTEN: Well, and it
7 suggests that what DCRA thought it meant was what they
8 put in the affidavit to clarify it, perhaps.

9 CHAIRPERSON GRIFFIS: True. But they
10 wrote it. Yes.

11 COMMISSIONER MITTEN: Right. The
12 modifying language follows "space" in this affidavit.

13 CHAIRPERSON GRIFFIS: Oh, gosh. You're
14 asserting that that qualifying, that question, is in
15 what reading? Is it the entire floor that you take
16 the 10 percent on or is it the publicly accessible
17 space total? Interesting.

18 MR. RICE: Ten percent of the publicly
19 accessible floor space. That would be my reading. I
20 agree that we have identified an area that needs to be
21 resolved. I mean, as an ANC, we're looking for
22 clarity on how these regulations are interpreted and
23 how these businesses come into our community and --

24 CHAIRPERSON GRIFFIS: We're with you
25 there. Okay. We can get further into it. I don't

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1 think this will have a lot of bearing. See, I don't
2 read number 2 the same way you're reading it. Okay.
3 Let's figure out how you actually did the
4 calculations, then.

5 MS. OGUNNEYE: Okay. In comparison to the
6 numbers that the ANC had, this dimension here is nine
7 foot four and they had this area as seven feet. I
8 came up with six feet three inches. The overall
9 dimension from the service counter all the way down --

10 CHAIRPERSON GRIFFIS: Okay. I thought you
11 were going to tell us bigger picture. You calculated
12 what for the public area?

13 MS. OGUNNEYE: Okay. Here's what I
14 calculated for the queuing area.

15 CHAIRPERSON GRIFFIS: Good.

16 MS. OGUNNEYE: When you come in the door,
17 this is the counter.

18 CHAIRPERSON GRIFFIS: Okay.

19 MS. OGUNNEYE: And people line up
20 horizontally, you know, to pick whatever it is that
21 you want.

22 CHAIRPERSON GRIFFIS: Good. So that
23 checkered area, the hatched area is the queuing area.

24 MS. OGUNNEYE: The hatched area, correct.

25 CHAIRPERSON GRIFFIS: Subtracted from the

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1 queuing area is what? Things behind the counter not
2 publicly accessible?

3 MS. OGUNNEYE: Exactly.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. OGUNNEYE: Plus the areas with the --

6 CHAIRPERSON GRIFFIS: Required egress?

7 MS. OGUNNEYE: Exactly. The areas with
8 the arrows, the required egress space.

9 CHAIRPERSON GRIFFIS: Wow. All the tables
10 and chairs and seating area.

11 MS. OGUNNEYE: All the tables and chairs
12 further down here.

13 CHAIRPERSON GRIFFIS: Right.

14 MS. BELL: And can I interrupt for a
15 second? Could you describe where the cash registers
16 or where both franchises appear on the service
17 counter?

18 MS. OGUNNEYE: The X is where the point of
19 sale is, and there was only one that was functioning
20 when we went there, and there's a whole bunch of
21 equipment back here that they use to prepare and serve
22 the food and a lot of space for the people walking
23 back there to move around, and I have some photographs
24 --

25 CHAIRPERSON GRIFFIS: Okay. Where is the

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1 non-functioning register? Don't guess. I mean, we
2 have the proprietor right here.

3 MS. OGUNNEYE: Yes.

4 CHAIRPERSON GRIFFIS: Show me where the
5 non-functioning register is.

6 MR. RATNAM: Right here.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. RATNAM: The reason why we never took
9 that out is because there was already a hole drilled
10 on the counter.

11 CHAIRPERSON GRIFFIS: Yes. That doesn't
12 concern me. Okay.

13 But conceivably, then, you've missed one
14 area of queuing that you would have to include, and
15 that's that 2.2 feet 5 inches.

16 Ms. Ogunneye, the two feet five inches you
17 still have to mention as we take the curve on the
18 counter. You would conceivably take that into the
19 queuing, correct? I mean, if you have a register down
20 there, useable or not, you're setting it up -- you're
21 looking at not what it's functioning on, but, you
22 know, how it's set up to function. If you have a
23 register over there, aren't people walking there?
24 Isn't it part of the que? They're going to walk
25 around the counter and then out.

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1 MS. OGUNNEYE: It's not wide enough to
2 que. That space is not wide enough to que on and --

3 CHAIRPERSON GRIFFIS: What is the minimum
4 dimension queuing?

5 MS. OGUNNEYE: Unfortunately, there is
6 none.

7 CHAIRPERSON GRIFFIS: So what gives you
8 the -- why do you make the assertion it's not wide
9 enough?

10 MS. OGUNNEYE: Because the counter here is
11 blank, there is nothing happening there at all.

12 CHAIRPERSON GRIFFIS: But there is a
13 register there, there is a cash register there.

14 MS. OGUNNEYE: The register is more this
15 way. It's not anywhere near the curve.

16 MR. RATNAM: We actually have a poster
17 here, a banner, that blocks any entrance or bars
18 anybody to walk across it, a pizza banner.

19 CHAIRPERSON GRIFFIS: Poster banner.

20 MR. RATNAM: Yes.

21 CHAIRPERSON GRIFFIS: Can I just have you
22 introduce yourself for the record.

23 MR. RATNAM: Yes. Chandar Ratnam.

24 (Pause.)

25 CHAIRPERSON GRIFFIS: Other Board members

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1 are bringing up an important point that I will let
2 them address, which is an important part of the
3 hearing. First let me -- because now all of this
4 stuff is becoming very confusing, not only the address
5 in Northwest, which I'm still stuck on. But
6 nonetheless, you have the documents of March, A1, that
7 were submitted, and you have indicated that these are
8 the permit documents that led to an issuance of the
9 certificate of occupancy; is that correct?

10 MS. OGUNNEYE: Not the A1 from 2001, no.

11 CHAIRPERSON GRIFFIS: No. The 2003.

12 MS. OGUNNEYE: It's the one from 2003.

13 CHAIRPERSON GRIFFIS: March 22; is that
14 right?

15 MS. OGUNNEYE: Yes.

16 CHAIRPERSON GRIFFIS: Okay. So I'm
17 looking at this and then I'm looking at a diagram of
18 which you said you went out and did calculations
19 because you thought you had the wrong address --

20 MS. OGUNNEYE: Right.

21 CHAIRPERSON GRIFFIS: -- even though the
22 '03 has the correct address. But nonetheless --

23 MS. BELL: No, no. Wait a second. I
24 think there is a problem. This floor plan reflects
25 the inspection that was done pursuant to the appeal

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1 that was filed.

2 CHAIRPERSON GRIFFIS: Right. I know. So
3 show me the calculations that were done for the
4 certificate of occupancy, is the real question.

5 MS. BELL: That's what we said we don't
6 have at this time.

7 CHAIRPERSON GRIFFIS: Right. Okay.

8 MS. BELL: Is that what she is upset
9 about?

10 COMMISSIONER MITTEN: No.

11 MS. BELL: Okay.

12 COMMISSIONER MITTEN: I finally got
13 something clear in my head and I have been focused on
14 -- I have been focusing on the wrong thing and I just
15 want to share it with everybody.

16 CHAIRPERSON GRIFFIS: Perhaps it's what
17 happened down here and it's all coming to convergence.
18 Go ahead.

19 (Laughter.)

20 CHAIRPERSON GRIFFIS: I knew it was going
21 to connect at some point.

22 COMMISSIONER MITTEN: The four of us have
23 discussed it in private.

24 CHAIRPERSON GRIFFIS: We're just
25 discovering things as we go.

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1 Ms. Miller.

2 VICE CHAIRPERSON MILLER: Okay. I am
3 going to read from the definition in the regulations,
4 199.1, on restaurant, fast food, because we're trying
5 to determine the appropriate measurements. It says,
6 "A restaurant will be considered a fast food
7 restaurant if the floor space allocated and used for
8 customer queuing for self-service, for carryout and
9 on-premise consumption is greater than 10 percent of
10 the total floor space on any one floor that is
11 accessible to the public." Okay. And it goes
12 further.

13 Now, we're saying, okay, it looks like you
14 were showing the calculations for queuing, but it also
15 says you have to show or make calculations for
16 on-premise consumption.

17 CHAIRPERSON GRIFFIS: Which means you have
18 to take the tables and the seating area.

19 MS. BELL: Well, actually, no. The way
20 the Zoning Administrator and Ms. Ogunneye interpret
21 this regulation is that self-service for carryout and
22 on-premises consumption is considered the queuing
23 area. In other words, the place where somebody either
24 stands in line to buy something to take offsite and
25 eat it or eat at the location.

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1 COMMISSIONER MITTEN: Well, what are the
2 tables and chairs for if you are not eating?

3 MS. BELL: They read it --

4 COMMISSIONER MITTEN: Why don't you let
5 her explain her view.

6 MS. BELL: Okay.

7 MS. OGUNNEYE: Okay.

8 COMMISSIONER MITTEN: What do they do at
9 the tables and chairs if they are not eating?

10 MS. OGUNNEYE: Okay.

11 COMMISSIONER MITTEN: No, just answer me
12 that question. What are they doing at the tables and
13 chairs if they are not eating? That's why they have
14 tables and chairs, right?

15 MS. OGUNNEYE: Right. They are either
16 there to eat on the premises or take the food out and
17 consume it off the premises. It's one or the other.
18 But we're supposed to determine the queuing area as
19 the area where they que to purchase food whether the
20 food is for consumption on premises or off premises.

21 COMMISSIONER MITTEN: But what about the
22 area for the on-site consumption of the food? Why
23 wouldn't you include that under the way that's -- am I
24 right or am I wrong?

25 MS. OGUNNEYE: Again, unfortunately, it's

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1 one of those sections that -- it's not 100 percent
2 clear for lack of another word, but our understanding
3 is the queuing area is the area where you come to que
4 to pick up food whether you are consuming it on or
5 taking it out. That's all it is.

6 MEMBER ETHERLY: It's just one way to
7 characterize it. It's a narrow reading.

8 MS. OGUNNEYE: It's qualifying what the
9 queuing area is, the latter part.

10 MEMBER ETHERLY: You're reading it to mean
11 just queuing area as opposed to --

12 MS. OGUNNEYE: Right.

13 MEMBER ETHERLY: -- queuing area plus the
14 area where people consume the food.

15 MS. OGUNNEYE: Exactly. And the first
16 thing it talks to is 10 percent of the queuing area.

17 COMMISSIONER MITTEN: That's not what it
18 says. What it says is, it says, "customer queuing for
19 self-service, for carryout and on-premises
20 consumption." If they just wanted you to focus on
21 queuing, it would say "or." It's your queuing area
22 for either to carry out or to eat it there, but we're
23 just focused on queuing. But we're not just focused
24 on queuing; we're focused on you queued, you got some
25 food, you're going to take it out, you're going to eat

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1 it in, but we want you to count the area where you
2 eat, too.

3 MS. BELL: If I can offer, they read it
4 conjunctively not disjunctively. That's how it's been
5 interpreted.

6 COMMISSIONER MITTEN: Okay. That's fine.
7 I think you're sensing there may be another
8 interpretation coming.

9 VICE CHAIRPERSON MILLER: I hate to say
10 it, but I'm again in a position where I originally
11 read it the way Ms. Mitten said it; now I can
12 understand what you're saying. Your queuing in line.

13 MS. OGUNNEYE: Right.

14 VICE CHAIRPERSON MILLER: You carry it out
15 or eat it there.

16 MS. OGUNNEYE: Or eat it in.

17 VICE CHAIRPERSON MILLER: Okay.

18 COMMISSIONER MITTEN: So at this type of
19 restaurant, though, basically, the only way you get
20 your food is by queuing in line. They don't wait on
21 you in this type of restaurant, right?

22 MS. OGUNNEYE: Right. And may I make
23 another point? In determining queuing area for
24 whether you're consuming in or taking out, remember,
25 we're taking 10 percent of the whole area as well. So

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1 we do address the fact that you're consuming is
2 already factored into the area that determines where
3 the 10 percent is based.

4 VICE CHAIRPERSON MILLER: Can I ask one
5 other question? How do you factor in number 2 in the
6 affidavit? Because it is stated differently than the
7 regulation, because we were saying that in the number
8 2 on the affidavit, it does modify "floor space that's
9 accessible to the public" when you're doing your
10 calculations.

11 MS. OGUNNEYE: I'm sorry, I didn't get
12 that.

13 VICE CHAIRPERSON MILLER: Well, number 2
14 of your affidavit says what percentage the floor space
15 that is accessible to the public --

16 MS. OGUNNEYE: Right.

17 VICE CHAIRPERSON MILLER: -- that's going
18 to be used for queuing.

19 MS. OGUNNEYE: Uh-huh.

20 VICE CHAIRPERSON MILLER: And the
21 regulation seems -- the way you were saying it said 10
22 percent of a floor that's accessible to the public.

23 MS. OGUNNEYE: Correct. And in this case,
24 there's only one floor involved. If it were multiple
25 floors --

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1 VICE CHAIRPERSON MILLER: But number 2 is
2 modifying "floor space that's accessible to the
3 public" as opposed to a floor that's accessible to the
4 public in the affidavit, right?

5 MS. OGUNNEYE: Right.

6 CHAIRPERSON GRIFFIS: Okay. Let's move --

7 VICE CHAIRPERSON MILLER: Wait. I just
8 want answer. Does it mean that you follow the
9 regulation, you don't follow your number 2? They are
10 different.

11 CHAIRPERSON GRIFFIS: Well, they're just
12 worded differently.

13 MS. OGUNNEYE: It seems like they were
14 extracted differently.

15 VICE CHAIRPERSON MILLER: But they have
16 different meanings according to what we were
17 discussing earlier.

18 MS. OGUNNEYE: Correct. Yes.

19 VICE CHAIRPERSON MILLER: Do you not
20 follow number 2 on the affidavit?

21 MS. OGUNNEYE: The intention is to follow
22 it.

23 VICE CHAIRPERSON MILLER: You do follow
24 number 2.

25 CHAIRPERSON GRIFFIS: But is number 2 the

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1 same -- the answer to number 2 is the answer to the
2 regulation or is it giving you a different percentage?
3 Are they asking for different things? Is number 2
4 asking you for something different than the
5 regulations is setting out to define --

6 MS. OGUNNEYE: In essence, yes, it is.

7 CHAIRPERSON GRIFFIS: It is?

8 VICE CHAIRPERSON MILLER: So which do you
9 follow?

10 MS. OGUNNEYE: The one in the zoning
11 regulations, in the definitions section, and that's
12 where it's extracted from.

13 VICE CHAIRPERSON MILLER: What do you do
14 with the information?

15 CHAIRPERSON GRIFFIS: Yes. What use is
16 that information? Why ask that question?

17 MS. OGUNNEYE: I have understood it to be
18 the way I expressed it earlier on, and it's amazing
19 that the way it's worded on 2 is extracting the latter
20 part of the definition, and --

21 VICE CHAIRPERSON MILLER: Can I ask a
22 question at this juncture?

23 MS. OGUNNEYE: Yes.

24 CHAIRPERSON GRIFFIS: Yes.

25 VICE CHAIRPERSON MILLER: Given that you

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1 apparently use the affidavits and rely on them
2 sometimes, when is the last time you measured the
3 space in order to determine a fast food restaurant as
4 opposed to relying on the affidavit? What other time
5 did you do it?

6 MS. OGUNNEYE: When the field inspections
7 were done in September.

8 VICE CHAIRPERSON MILLER: No, I don't mean
9 in this case; in any other case. In any other
10 issuances of a certificate of occupancy, when did you
11 not rely on the affidavit for an eating establishment
12 and instead do your own measurements?

13 MS. OGUNNEYE: We never take measurements.
14 We will only take measurements in cases that's an
15 appeal. We pretty much depend on the information that
16 is being provided to us on the application forms or
17 the drawings that are submitted during the application
18 process.

19 VICE CHAIRPERSON MILLER: So the
20 information you're getting and you're actually very
21 clearly asking for, and I think the language is
22 actually more clear on your affidavit than it is -- or
23 the phraseology is more clear. So now you're saying
24 that you don't think this is worded consistent with
25 the regulations, but --

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1 MS. OGUNNEYE: Correct.

2 VICE CHAIRPERSON MILLER: -- you rely on
3 it every other day of the week.

4 MS. OGUNNEYE: Yes, we rely on it, but
5 most of the zoning technicians know how it works and
6 how the measurement is taken. It's unfortunate it's
7 thought phrased appropriately.

8 VICE CHAIRPERSON MILLER: But you just
9 said that they never ever in any other case measure
10 anything; they just rely on this as accurate.

11 MS. OGUNNEYE: No. We look on the
12 drawings and make our determination based on the
13 drawings in front of us, just like if I didn't take
14 measurements here, I would look at the layout and
15 determine where the queuing area is.

16 VICE CHAIRPERSON MILLER: But you're
17 saying that when they look at it, even though somebody
18 says -- they write 50 percent or they write whatever,
19 that they turn around and look at that drawing and
20 they go, "Oh, that's not 50 percent. You measured
21 wrong."

22 MS. OGUNNEYE: Yes, we would do that.

23 VICE CHAIRPERSON MILLER: I'm wondering if
24 we're getting any fast food restaurants coming in
25 because I don't know how you would ever have a fast

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1 food restaurant with those kinds of measurements.

2 MS. OGUNNEYE: That's where the zoning
3 regs are open, and it's an issue we have wrestled with
4 a long time, and going further down the line, as long
5 as the queuing area is less than 10 percent, that's
6 it, we don't go further down.

7 CHAIRPERSON GRIFFIS: What else do you
8 need to show us?

9 MS. OGUNNEYE: These are some photographs,
10 and this is the front entry, and as you can -- I'm
11 trying to get them a view of both at the same time.
12 You can see it? That's the area that's the two foot
13 five inches there, and that's where, if you look, this
14 is right in front here, and that's the view at the
15 queuing area from the front door looking straight in.
16 So that's the counter, you know, those are people on
17 line, and the seats are to the left, and that's a
18 better view. You can see the seats along the side
19 with the front counters on this end.

20 This is the food prep area, which is back
21 here. Where this lady is is behind the counters back
22 in here, is that space there.

23 That's a better view of the queuing area
24 looking from -- it's like standing back here and
25 taking a picture this way towards the front. That's

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1 the front entrance. So you can see that even when
2 this guy turns his chair sideways, which he's not
3 supposed to do, the queuing area is very limited.

4 This is the area towards the back, which
5 is the tables here with that space over there, and
6 this is where the exit door is, back this way, and the
7 restrooms off of that same corridor.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. OGUNNEYE: Okay.

10 CHAIRPERSON GRIFFIS: So the only thing
11 that would impact your calculations is if that service
12 counter area moved or the prep storage area moved,
13 that wall, if it became -- if it moved farther south
14 on the drawing, farther north on the drawing, then
15 your overall calculation would be different.

16 MS. OGUNNEYE: For the queuing area, yes.

17 CHAIRPERSON GRIFFIS: Right. The
18 percentage.

19 MS. OGUNNEYE: Right.

20 CHAIRPERSON GRIFFIS: Okay.

21 MS. OGUNNEYE: But the percentage is for
22 everything.

23 MEMBER ETHERLY: I mean, I'm definitely
24 with Ms. Mitten, Mr. Chair. I think I have a sense of
25 kind of where the pressure point is on this particular

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1 issue and I'm happy to continue moving forward.

2 I just want to come back to a question
3 that you raised to Ms. Ogunneye that I'm still
4 struggling with -- I'm not inviting discussion, but I
5 will just kind of highlight it -- which is the
6 challenge of figuring out where you draw or how you
7 draw the parameters for what the queuing area is,
8 because as we talked a little bit about that portion
9 of the service counter that had the non-functioning
10 register and the question was asked how do you
11 determine or how did you make the determination that
12 that part is not considered queuing area, and then we
13 had a little bit of the exchange about -- I believe
14 the owner indicated -- the lessee owner indicated that
15 there is a poster or something that is kind of set up
16 there, shall we say block access to that floor space.

17 I mean, I might be able to buy that if
18 there was some type of obstruction there, but I think
19 the challenge still is, conceivably, on an excellent
20 day for business, you can have shoulder-to-shoulder,
21 standing-room-only in there, nothing but customers who
22 are coming in to buy for immediate consumption and
23 then they're walking back out the door, but by this
24 definition, conceivably, you're not necessarily
25 capturing the impact of those types of patrons, and

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1 that's -- I'm getting perhaps a little too far along
2 in terms of talking through this thing, but that
3 concerns me a little bit. But just to highlight that,
4 Mr. Chairman. I'm comfortable moving forward.

5 CHAIRPERSON GRIFFIS: Okay.

6 MS. OGUNNEYE: May I just ask something
7 just for clarity? Are you referring to this area back
8 in here?

9 MEMBER ETHERLY: Yes, that's the area
10 that, on your -- towards the top of the service
11 counter where the two feet five inches is denoted.
12 And I'm just kind of musing as to why that wouldn't be
13 queuing area, because, you know, once again,
14 conceivably -- or, for that matter, the pathway that's
15 denoted as required exit. Once again, I'm just
16 thinking of the best-case scenario. We have a
17 wonderful day for business and you have over -- you
18 know, you're full to capacity. All of that space
19 conceivably can be occupied by patrons who are waiting
20 to purchase food for consumption on or off the
21 premises, and I'm just struggling with, isn't that
22 really the nature of the inquiry that the regulation
23 is getting at, and is the interpretation that we're
24 hearing from you too much of a narrow one?

25 I mean, I can understand how you can reach

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1 that interpretation by looking at the language, but
2 I'm just concerned that it leaves too much out of the
3 analysis. But once again I will leave it there, but I
4 appreciate the conversation.

5 CHAIRPERSON GRIFFIS: Good.

6 Anything else from the government?

7 MS. OGUNNEYE: I was just going to point
8 out that the queuing area itself includes this area.

9 CHAIRPERSON GRIFFIS: Oh, it does. It
10 goes all the way to the perimeter wall.

11 MS. OGUNNEYE: It goes all the way to the
12 entrance door and it's at 6.7 percent.

13 CHAIRPERSON GRIFFIS: Six-point-seven.

14 MS. OGUNNEYE: Correct.

15 CHAIRPERSON GRIFFIS: Okay. Anything
16 else, then?

17 MS. BELL: I do want to highlight two
18 things. There seems to be some confusion. The ANC's
19 floor plan that indicated that there was more than 200
20 square feet isn't correct based on the base plans. So
21 even their calculation as to the
22 greater-than-10-percent queuing area is not correct.
23 That's the first thing.

24 The second thing is, I realize there has
25 been a lot of discussion about the affidavit. The

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1 zoning techs, regardless of the actual terms on the
2 affidavit, the zoning techs apply the regulation as
3 Ms. Ogunneye explained it. So it's unfortunate that
4 it is written differently, but they don't apply two
5 different standards, and I think from the exchange
6 there appeared to be -- what was left on the record
7 was I think this kind of understanding that the zoning
8 technicians apply something different than she applies
9 based on the difference in the language between the
10 regulation and the affidavit, and that's not correct.

11 CHAIRPERSON GRIFFIS: And you are going to
12 provide the last affidavit that was believed, correct?
13 Or signed by a technician?

14 MS. BELL: None of the affidavits were
15 signed by a technician.

16 CHAIRPERSON GRIFFIS: Okay.

17 MS. BELL: But what I can say is, as I
18 mentioned in the beginning, there has been a lot of
19 problems with this case file, so what the Zoning
20 Administrator has --

21 CHAIRPERSON GRIFFIS: Why don't we turn
22 one of those microphones off? Thank you. Just one.
23 We're just getting feedback.

24 MS. BELL: Sorry.

25 What the Zoning Administrator has decided

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1 to do is take some remedial action to try to correct
2 the case file.

3 CHAIRPERSON GRIFFIS: That's fine, and you
4 said that and that's good. Big picture is of great
5 concern to me, but not specifically tonight at five
6 o'clock.

7 MS. BELL: Okay.

8 CHAIRPERSON GRIFFIS: However, what is
9 peculiar to me, and I think we're going to move on
10 because I want to hear the rest of the case and get
11 done with this today, but nothing setting up here, if
12 we're looking at whether an error was made or not,
13 shows me how the actual C of O was issued. I mean,
14 I'm not seeing anything -- the plans don't match what
15 is built; we have calculations that went out after an
16 inspection even with the error of the address. So, I
17 mean fundamentally, we're really looking at two
18 different plans. Was it originally an error and then
19 now running is it an error and, frankly, I'm not sure
20 what we're actually trying to decide. Hopefully they
21 are the same thing.

22 But that being said, let's move on. Yes?

23 VICE CHAIRPERSON MILLER: I have a
24 question. Does the fact that there are -- well, are
25 there two restaurants operating in this area?

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1 CHAIRPERSON GRIFFIS: Yes. They're both
2 behind the counter.

3 VICE CHAIRPERSON MILLER: So they're
4 considered two restaurants. Does that affect the
5 calculations at all?

6 MS. BELL: Well, actually, we consider
7 them one because the C of O was issued to Chan Foods.
8 Chan Foods is licensed by DCRA and our licensing
9 department as the franchisee for both restaurants, and
10 so it's one entity that provides -- that operates
11 under two trade names.

12 VICE CHAIRPERSON MILLER: Okay. I guess I
13 just want to make a comment on this language of the
14 regulation and language of the affidavit, because it
15 looks like the language of the affidavit says one
16 thing and your interpretation of the regulation says
17 another, and I think the regulation is ambiguous and
18 by itself, listening to your interpretation of grammar
19 or whatever -- I could follow that, but I would also
20 comment that number 2 on the affidavit might lead one
21 to believe that it should be interpreted the way Ms.
22 Mitten was suggesting.

23 CHAIRPERSON GRIFFIS: Okay.

24 MS. BELL: I understand.

25 CHAIRPERSON GRIFFIS: Anything else?

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1 MS. BELL: Well, before we move on, is
2 there any information that we could provide you that
3 would help? As I said, the initial case file
4 obviously did not have calculations as to the floor
5 plan with regard to the application for the C of O at
6 issue here.

7 CHAIRPERSON GRIFFIS: Right. The only
8 thing I have note of is you're going to provide the
9 calculation of the square footage that includes up to
10 the end of the counterspace.

11 MS. BELL: Okay.

12 CHAIRPERSON GRIFFIS: And you have said
13 that it goes to the perimeter, so we would just want
14 that hatched in and just shown for that calculation.
15 At this point, I don't see anything else. Okay. Yes?

16 VICE CHAIRPERSON MILLER: Well, I have
17 this thought, and it's probably unorthodox, but I
18 would be interested in seeing something that was
19 determined to be a fast food, how does it look marked
20 out, calculated. I mean, I think there is a question
21 here as to whether or not this was calculated
22 correctly, whether all the spaces were measured the
23 way they should have been. I'm having trouble
24 imagining or I would like to see one that, you know,
25 is considered a fast food.

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1 MS. BELL: You mean you would be
2 interested in seeing the floor plan for sort of like a
3 McDonald's or Taco Bell or something that we have
4 determined is a fast food?

5 VICE CHAIRPERSON MILLER: Right.
6 Particularly if it was of a comparable size. I don't
7 know if that is possible. Anyway, that's just a
8 thought.

9 COMMISSIONER MITTEN: If I could just make
10 a comment as to that point, it's really up to us to
11 interpret, and that would just be them showing us
12 another version of their interpretation. It's really
13 up to us to make the call as to what the proper
14 interpretation of the regulation is.

15 VICE CHAIRPERSON MILLER: That's right. I
16 mean, I thought it was somewhat unorthodox to suggest
17 it, but I'm just I guess curious about the
18 consistency. But I understand what you're saying.

19 CHAIRPERSON GRIFFIS: Okay. Let's move
20 on.

21 Is the lessee ready to move ahead with the
22 presentation of the case? Do you have anything that
23 you want to provide the Board?

24 MR. RATNAM: Not really, except for the
25 fact that we do have a visual aid that says "Order

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1 Here" from the middle of the counter, so --

2 CHAIRPERSON GRIFFIS: You have additional
3 photographs?

4 MR. RATNAM: Right here, this picture
5 here. On that counter, it says "Order Here."

6 CHAIRPERSON GRIFFIS: You need to be on a
7 microphone.

8 I think we understand the area that you're
9 talking about, and your point is -- you've indicated
10 that there is a sign?

11 MR. RATNAM: There is a visual sign which
12 actually asks people to start queuing from the middle
13 of the counter on, so this is -- Mr. Etherly mentioned
14 on a very good day I might probably be covering the
15 entire area, but usually the crowd doesn't even cross
16 the middle point. That's all I had to add.

17 CHAIRPERSON GRIFFIS: Okay. Of course,
18 fundamentally, program or not, signs or not, we would
19 be looking at how it was physically laid out, whether
20 it could accommodate that, because, you know, for
21 goodness' sakes, we hope that there's a line out the
22 door, but we have to look at and establish what
23 physically the queuing area could be because we're
24 trying to figure out what the -- okay.

25 Anything else? Questions of the lessee?

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1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 (5:00 p.m.)

3 VICE CHAIRPERSON MILLER: Yes.

4 Are you the one that submitted three
5 different affidavits to DCRA?

6 MR. RATNAM: That's correct. Initially,
7 you know, I was not sure about what the statement
8 should have been. At a later point, the director of
9 operations came and helped me fill out the right form,
10 the third one, which sets the usage of the queuing
11 area and stuff like that. The third one adjusts it to
12 10 percent.

13 COMMISSIONER MITTEN: Can I just ask, you
14 said the director of operations helped you? Who was
15 that who helped you?

16 MR. RATNAM: Of Blimpie.

17 COMMISSIONER MITTEN: Oh, of Blimpie.

18 MR. RATNAM: Yes. I wanted to get this
19 clarification done and later on got it -- the same
20 day, we rushed back and got a notary which does say
21 it's a 10 percent.

22 CHAIRPERSON GRIFFIS: Do you have copies
23 of that?

24 MR. RATNAM: I have a copy.

25 CHAIRPERSON GRIFFIS: One copy. You can

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1 give it to staff. Thank you.

2 COMMISSIONER MITTEN: I just had one more
3 follow-up question.

4 CHAIRPERSON GRIFFIS: Good.

5 COMMISSIONER MITTEN: You mentioned just
6 now when you got this additional clarification and you
7 put the 10 percent in, you just said queuing. So in
8 making that calculation, you were not thinking about
9 the on-premise -- the space for on-premises
10 consumption, which it kind of clearly says there?

11 MR. RATNAM: To be honest with you, we had
12 about over 45 minutes of conversation just to try to
13 clarify what is actually meant over here, and this is
14 my first business. Having said that, it's almost
15 impossible for me to come up with a number which would
16 be the right number. I wasn't even aware of the fact
17 -- it's notarized to say that I did fill out the form.

18 COMMISSIONER MITTEN: Okay. So who is
19 really giving you the numbers? I guess I'm just
20 wondering.

21 MR. RATNAM: First we just filled it out,
22 but later on we actually measured the location.
23 That's when we came up with the second one, and I had
24 to rush back to Virginia to get this notarized again.

25 COMMISSIONER MITTEN: Okay. And then you

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1 said you measured, but did you measure just queuing
2 area at that point?

3 MR. RATNAM: With reference to the entire
4 floor space.

5 COMMISSIONER MITTEN: Okay. So you said
6 you measured queuing area relative to the total area.

7 MR. RATNAM: Yes.

8 COMMISSIONER MITTEN: That's the number
9 you intended to put in there.

10 MR. RATNAM: Yes.

11 COMMISSIONER MITTEN: Okay. Thank you.

12 CHAIRPERSON GRIFFIS: Ms. Miller.

13 VICE CHAIRPERSON MILLER: I'm wondering if
14 you have the measurements or calculations upon which
15 your answers are based?

16 MR. RATNAM: We wrote it on a piece of
17 paper and then did the calculation, but I don't -- we
18 didn't really use a formal way of putting it down in a
19 tabular column or anything; we just wrote down the
20 total square footage and measured the queuing space,
21 if that is what you're asking.

22 MEMBER ETHERLY: And could you perhaps
23 indicate or maybe just verbally give us a sense of
24 what was the area you measured. The area that you
25 measured for queuing, was that consistent with what's

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1 indicated there?

2 MR. RATNAM: Yes.

3 MEMBER ETHERLY: Okay. Thank you.

4 Thank you, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: Other questions?

6 (No response.)

7 CHAIRPERSON GRIFFIS: Okay. Any -- yes?

8 Cross?

9 MR. RICE: I will keep this brief.

10 CROSS-EXAMINATION OF FAYE OGUNNEYE

11 BY THE APPELLANT

12 MR. RICE: Question for Ms. Ogunneye. I
13 understand that the District's position is that the
14 denominator of this 10 percent calculation is gross
15 floor area of the entire floor. Could you help me
16 understand from this diagram what is the baseline. Is
17 it including that storage area, not including that
18 storage area? What would be the denominator of the
19 calculation?

20 MS. OGUNNEYE: It would not include the
21 storage area because that area has been leased by
22 Footlocker. There is no access to that space from
23 their space at all.

24 MR. RICE: Okay. So would that be the
25 1521.1 square feet?

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1 MS. OGUNNEYE: Correct.

2 MR. RICE: Okay. So that's the
3 denominator. Then you look to see if the queuing area
4 is greater than 10 percent of that --

5 MS. OGUNNEYE: Correct.

6 MR. RICE: -- theoretically.

7 MS. OGUNNEYE: Correct.

8 MR. RICE: Okay. With respect to the
9 queuing area, are there any ropes or guide rails to
10 guide people into that particular hatched area?

11 MS. OGUNNEYE: The zoning regulations are
12 not specific to that.

13 MR. RICE: No, but I mean in the pictures
14 that you submitted, are there any physical measures
15 that would restrict people in any way to that queuing
16 area as opposed to stepping out and queuing in the
17 exit area?

18 MS. OGUNNEYE: No, there isn't.

19 MR. RICE: Are there any markings on the
20 floor? You know, isn't it true that the tile is of a
21 consistent pattern, that it's basically a uniform
22 space?

23 MS. OGUNNEYE: That's not a zoning
24 requirement, so I couldn't enforce or ask that that be
25 provided.

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1 MR. RICE: Okay. So how do you determine
2 -- is the queuing area always a rectangle? I mean,
3 there's this space going around the counter that I'm
4 not -- I mean, it's not an exit space, it's open
5 space. From the pictures that you submitted, doesn't
6 seem to be any distinction between the queuing area
7 and that space. What distinguishes that area and
8 makes it not a queuing area?

9 MS. OGUNNEYE: Again, there is no activity
10 going on in that area, which was why I didn't
11 calculate it as part of the queuing area.

12 MR. RICE: So when you calculated this
13 queuing area, there were people standing in every part
14 of that hatched area and that's how you determined it?

15 MS. OGUNNEYE: No. Again, I discounted
16 the egress space and then just went with every
17 possible space from one extreme to the other extreme,
18 which is to the exit door.

19 MR. RICE: Okay. How about this rectangle
20 -- there's this rectangle to the, yes, just to the
21 left. That's not required exit and it is open space.
22 Why is that not part of the queuing area space?

23 MS. OGUNNEYE: Again, that area is not in
24 front of where the people would be queuing to
25 purchase, you know, food items, so it would not

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1 qualify. That area would not be inclusive.

2 MR. RICE: Is there anything to stop
3 people from waiting there while their food is being --

4 MS. OGUNNEYE: The space in that area is I
5 think about four feet seven, thereabouts, so for
6 egress purposes, they wouldn't be queuing there.

7 MR. RICE: Okay. We have gotten some
8 various communications about what the queuing area
9 total is. DCRA responded on September 17th -- this is
10 the electronic reply -- and it said that the queuing
11 area is approximately 5 percent of the gross floor
12 area. This diagram, if we're looking at 1,521 square
13 feet as the baseline, it's about 8 percent of the
14 area. The applicant submitted a variety of affidavits
15 with anywhere from 50 percent to right on the nose 10
16 percent. Which is the figure that you would put
17 forward that we use as the queuing area space?

18 MS. OGUNNEYE: Based on what I have here,
19 I have 6.7 percent if you're using the 1,789 square
20 feet, or 7.9 if you're using the 152 square feet.

21 MR. RICE: Okay.

22 MS. OGUNNEYE: Now, these are all just
23 measurements on site and it could be slightly off.

24 MR. RICE: So as of today, would you be
25 saying that the closest estimate that the District

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1 government has to the queuing area is 120.5 square
2 feet?

3 MS. OGUNNEYE: That would be correct.

4 MR. RICE: Okay.

5 MS. OGUNNEYE: And I need to correct, the
6 space within this area is five foot seven inches, not
7 four-plus.

8 MR. RICE: I'm sorry. Where were you
9 referring?

10 MS. OGUNNEYE: When I had pointed out the
11 space for circulating there, it's actually five foot
12 seven inches.

13 MR. RICE: Okay. Did you say earlier that
14 there is not a signed -- a zoning technician-signed
15 copy of the eating establishment affidavit?

16 MS. OGUNNEYE: That's correct.

17 MR. RICE: Would that document normally be
18 filed in signed by a zoning technician for a
19 restaurant or a fast food restaurant that is applying
20 for a certificate of occupancy in a C-2-A District?

21 MS. OGUNNEYE: Yes. Like we pointed out
22 earlier, because there was a discrepancy in the
23 address, that was why there was never one on record.

24 MR. RICE: Right. But in part of your
25 process of remedying the record --

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1 MS. OGUNNEYE: Well, in remedying the
2 record, we're going to have to go through the whole
3 process of getting the building permit in.

4 MR. RICE: Okay.

5 I just have one question for the owner.

6 CROSS-EXAMINATION OF CHANDAR RATNAM

7 BY THE APPELLANT

8 MR. RICE: Do you have any figures on what
9 percentage of the business is dine-in versus carryout?

10 MR. RATNAM: I haven't really made any
11 calculation towards that, the percentage. Most of the
12 floor space over there is --

13 MR. RICE: I mean in terms of business
14 revenues.

15 MR. RATNAM: With the primary crowd being
16 the lunch crowd, most of that is being dine-in and
17 they pretty much occupy all the table space.

18 MR. RICE: All right. One last question.
19 Where do the staff behind the service counter stand?
20 Particularly, where does the employee staffing the
21 Noble Roman's part stand?

22 MR. RATNAM: There is one person working
23 behind the counter just making the pizzas, preparing
24 the dough, the vegetables and cheese and all in the
25 right corner of the sales counter, but the rest of

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1 them are from middle of the counter all the way to the
2 left. We have three of them.

3 MR. RICE: Okay. So you've got staff
4 along the inner edge of that service counter?

5 MR. RATNAM: Yes. And anybody, even if
6 they made an attempt to order pizza, they would just
7 be directed back, asking them to go to the register.

8 MR. RICE: Okay. Thank you.

9 No further questions.

10 CHAIRPERSON GRIFFIS: Good. Any follow up
11 from the Board? Okay.

12 VICE CHAIRPERSON MILLER: For DCRA, do you
13 have a number for the total square footage of the
14 property that is accessible to the public? The floor
15 space that's accessible to the public.

16 MS. OGUNNEYE: And that would be excluding
17 the service counter, the food prep, the rest rooms?
18 No, but we can get it if you need it, because the
19 numbers are all there; it's just doing the math.

20 MEMBER ETHERLY: I would agree with Ms.
21 Miller's inquiry. I think it would be very helpful to
22 get that square footage. But I would hazard a guess
23 that the rest rooms -- I would want to include the
24 rest rooms in that because presumably the rest rooms
25 are for use of your patrons, one would hope. We

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1 wouldn't want any accidents.It

2 MR. RATNAM: Yes.

3 MEMBER ETHERLY: Okay. Thank you.

4 VICE CHAIRPERSON MILLER: And I have one
5 other question for DCRA, and that is, with respect to
6 199.1, definition of restaurant, fast food, they also
7 talk about two following characteristics: A) at least
8 60 percent of the food items are already prepared or
9 packaged before the customer places an order and/or B)
10 the establishment primarily serves its food and
11 beverages in disposable containers and provides
12 disposable tableware.

13 Now it looks like on the affidavit that
14 they have said that they do those things, but I --
15 does DCRA find that this food establishment does one
16 of those two things, or both?

17 MS. OGUNNEYE: The test is once the
18 queuing area is less than 10 percent, we don't apply
19 the other factors.

20 VICE CHAIRPERSON MILLER: I understand
21 that. I understand that. Let's just say --

22 MS. OGUNNEYE: If it were over 10?

23 VICE CHAIRPERSON MILLER: If it were, if
24 we were to find that, do you find --

25 MS. OGUNNEYE: Right. Then they would --

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1 once they exhibit one of the other two, which would be
2 that 60 percent of the food was already prepared
3 before they ordered it and that the food was being
4 served in disposable ware, and/or, right.

5 VICE CHAIRPERSON MILLER: Have you made an
6 assessment of whether this food establishment does
7 either or both of those things?

8 MS. OGUNNEYE: No.

9 VICE CHAIRPERSON MILLER: If you get an
10 affidavit that checks "yes" to number 4, do you accept
11 that?

12 MS. OGUNNEYE: As long as it's less than
13 the 10 percent, no, we don't apply that, because the
14 rule is that -- because it says a restaurant will be
15 considered a fast food restaurant if the space
16 allocated and used for customer queuing for
17 self-service, for carryout and on-premises consumption
18 is greater than 10 percent.

19 VICE CHAIRPERSON MILLER: Okay. Let me
20 read what I'm referring to. Number 4 in the affidavit
21 asks, "Will the proposed establishment primarily serve
22 food and beverages in disposable containers and
23 provide disposable tableware?" In this case, the
24 lessee answered "yes" to that question.

25 I think what you have said with respect to

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1 measuring queuing areas, that you don't necessarily
2 accept what they say and you actually go out and
3 measure -- I don't know. I'm asking here, do you
4 accept what they say as a given or do you go out and
5 make another judgment yourself?

6 MS. OGUNNEYE: Again, at the point and
7 time that we're reviewing this application, it's
8 usually just drawings and those situations are not yet
9 in existence. So we look at the drawings and base it
10 on the drawing itself.

11 VICE CHAIRPERSON MILLER: Okay. I don't
12 want to belabor this too much, but say you look at the
13 drawings and they are above 10 percent in the queuing
14 --

15 MS. OGUNNEYE: Then we would look at --

16 VICE CHAIRPERSON MILLER: Then you would
17 look at number 4.

18 MS. OGUNNEYE: Correct. Yes.

19 VICE CHAIRPERSON MILLER: Do you then do
20 your own investigation or do you accept the affidavit
21 on its face?

22 MS. OGUNNEYE: We accept it on its face
23 like we do with all the rest of the applications.

24 VICE CHAIRPERSON MILLER: Okay. Thank
25 you.

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1 CHAIRPERSON GRIFFIS: Let's go to
2 closings. Are you ready?

3 MR. RICE: Sure.

4 CHAIRPERSON GRIFFIS: Excellent.

5 MR. RICE: We have laid out a number of
6 interesting issues here, but coming back to the issue
7 of the appeal, which is did the Zoning Administrator
8 err in issuing this certificate of occupancy, I think
9 that we have demonstrated that the Zoning
10 Administrator has made a valiant effort since this
11 issue has been brought to their attention to try to
12 remedy the case file, but at the time, they were
13 basically accepting that this business was a
14 restaurant and not taking the proper steps to ensure
15 that it was, in fact, a restaurant and not a fast food
16 restaurant.

17 You know, you might think that primarily,
18 just based on the names, Blimpie and Noble Roman
19 Pizza, that there might be some indication that these
20 might be fast food-like restaurants where you would
21 need to look at the queuing area, where you would need
22 to look at the disposable containers and the
23 disposable tableware, and it appears that that did not
24 happen.

25 We have also seen that this queuing area

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1 issue is incredibly important. We would tend to go
2 with the definition that it's based on floor space
3 accessible to the public rather than total floor
4 space. Certainly that reading is supported by DCRA's
5 own guidance document which they provide to
6 applicants, and, you know, there seems to be an
7 absence of any other sort of interpretive material
8 from DCRA that would lead you to base the denominator
9 of that calculation on total floor space.

10 But if you are going to look at total
11 floor space in queuing area versus that, I would have
12 to say that DCRA has made a valiant effort to try to
13 determine that this comes in under 10 percent.

14 You see from this diagram that they have
15 prepared that there are large areas which would take
16 you up to that 150 square feet of queuing area that
17 have not been included in their queuing area
18 calculations, and these areas -- there are no physical
19 barriers to these areas, there is nothing stopping
20 anyone from standing in these areas and waiting for
21 their food, there is nothing stopping people from
22 standing in these exist areas.

23 What the ANC is really interested in is
24 having clear rules that we can explain to merchants
25 who are coming to H Street and we can explain to

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1 residents who may have concerns about potentially
2 objectionable establishments like fast food
3 restaurants, and we just feel in this case that that
4 standard is not being met, that the Zoning
5 Administrator has erred in the specific decision to
6 issue a restaurant as opposed to a fast food
7 restaurant because they haven't and they still have
8 not gathered all the necessary materials to make that
9 determination, including not even having signed the
10 seating affidavit, eating establishment affidavit, and
11 so that was definitely an error.

12 Going to the merits of the issue, we feel
13 that this squarely falls within a fast food
14 restaurant. If this is not a fast food restaurant
15 with this large queuing area, we're not sure what is,
16 and maybe that's also a larger problem.

17 Thank you for your time.

18 CHAIRPERSON GRIFFIS: Thank you very much.

19 This is what I would like to do. I think
20 it's very clear what we have to decide and the basis
21 which we need to make that clarity into a decision is
22 wanting. So what I would like to do is have
23 submissions by the Zoning Administrator, also the
24 parties and the lessee if they so choose, and that's
25 it. We need calculations. I want the total square

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1 footage of the floor that is calculated; the total
2 square footage of the area that is accessible to the
3 public; and then I need a calculation of what goes to
4 the 10 percent. So if it comes in a diagram and all
5 that, great. Just make sure it's clear in the
6 diagram, in the hatched areas, of what is what, that
7 we have the square footage in there, and then we will
8 be able to cross that with the regulation itself, all
9 the information that we have had provided, and we will
10 be able to do something with it.

11 Additional questions? Ms. Mitten?

12 COMMISSIONER MITTEN: I wanted to ask Mr.
13 Ratnam a question, if I could, and I should -- I just
14 feel compelled to apologize to you sort of for what
15 you are caught up in. You're just a guy who is trying
16 to run a business and you have gotten caught up in
17 something that is really no fault of yours, and I just
18 want to apologize and --

19 CHAIRPERSON GRIFFIS: It's the Zoning
20 Commission's fault is what she is trying to say.

21 COMMISSIONER MITTEN: No, that's not what
22 I'm saying.

23 (Laughter.)

24 COMMISSIONER MITTEN: So, you know, we're
25 trying -- no one is trying to hurt you. You know, I

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1 just want you to know the community is not trying to
2 hurt you; they're just trying to make sure that the
3 proper procedures are followed.

4 I just wanted to ask you one final
5 question. When you were talking to us about how you
6 had originally filled out the affidavit and then you
7 had to make some adjustments to it. When you just
8 turned in the affidavit and had the numbers in that
9 you thought were accurate based on your understanding
10 of what was being asked, were you told that those
11 numbers actually would help the neighborhood's appeal
12 of your case? Was that part of the reason why you
13 were sent away to adjust those numbers? And I just
14 ask you to be as honest as you can in answering that.

15 MR. RATNAM: Honestly, I had no idea what
16 was going on. I just started up the business and I
17 would -- when I read the question, I never knew what
18 the whole complex situation over here was.

19 COMMISSIONER MITTEN: Right, the
20 significance of what you were answering.

21 MR. RATNAM: Yes.

22 COMMISSIONER MITTEN: But then once you
23 did answer, were you sort of told that the
24 significance of the way you answered was actually
25 consistent with the community's case and that's why

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1 you went back?

2 MR. RATNAM: Well, once I filled out
3 everything, I read the definitions in the back, and
4 that's then when the director of operations came in.
5 I asked him, I clarified with him --

6 COMMISSIONER MITTEN: Say again -- who
7 came in?

8 MR. RATNAM: The director of operations
9 for Blimpie had come in.

10 COMMISSIONER MITTEN: Okay.

11 MR. RATNAM: And I asked him if what I did
12 was right, then he said, "You can't really come up
13 with a number like that. You need to do the entire
14 measurements." And that's when we roughly did the
15 measurements because we got the one-square-foot tiles
16 and we ended up measuring with tape and the tiles. We
17 came to find out that it's technically under 10
18 percent of the queuing area.

19 I did ask him if Blimpie was a fast food
20 and they did say it was a deli, it was not a fast
21 food. Especially for the meeting that I had with Mr.
22 Gary Peterson, in Mr. Gary Peterson's office, I did
23 check to see. I said that we did have some inquiries
24 come in and I asked him about this thing, and we're
25 trying to run this business and now we hear that there

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1 is some issue about the whole thing, and they said
2 it's not a fast food restaurant, it is a delicatessen.

3 COMMISSIONER MITTEN: Okay.

4 MR. RATNAM: So to the best of my
5 knowledge, I just did what is required by me, just
6 looked at it as an opportunity to start up a business,
7 that's all it is.

8 COMMISSIONER MITTEN: Right. And we all
9 want you to be successful; we just want to make sure
10 -- all the community is trying to do is make sure that
11 the procedures are followed that protect the community
12 from some of the adverse impacts of fast food
13 restaurants if, in fact, this is determined to be one.
14 That's all.

15 MR. RATNAM: Thank you.

16 COMMISSIONER MITTEN: Thank you.

17 CHAIRPERSON GRIFFIS: Okay. Anything else
18 for clarity from the Board? Any other last questions?

19 (No response.)

20 CHAIRPERSON GRIFFIS: Okay. We're going
21 to have that submitted in. We'll decide it with our
22 regular decisionmaking, which will be November 2nd, on
23 a Tuesday. The submission, then, of that calculation
24 and any sort of diagram or graph would be on the --
25 Ms. Bailey?

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1 MS. BAILEY: Mr. Chairman, one or two
2 weeks before the 2nd?

3 CHAIRPERSON GRIFFIS: I would say one
4 week.

5 MS. BAILEY: One week? That would be
6 October 26th, sir.

7 CHAIRPERSON GRIFFIS: Excellent. So
8 October 26th to the Office of Zoning by three o'clock.
9 Is that doable for everybody? Excellent. Yes. No
10 problems? Okay.

11 Very well. Any other questions I can
12 answer in terms of process on this? Of course, our
13 decisionmaking is the time where you will hear the
14 Board deliberating on this. No other further
15 information or testimony or any sort of interchange
16 between the Board and the participants would take
17 place. You are welcome to be here or watch us on the
18 Web or however you want to do it.

19 Okay. Anything else, then? No other
20 clarifications?

21 (No response.)

22 CHAIRPERSON GRIFFIS: Thank you all very
23 much. I appreciate your patience in our getting to
24 you this afternoon.

25 Ms. Bailey, is there anything further for

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1 the Board?

2 MS. BAILEY: No, Mr. Chairman.

3 CHAIRPERSON GRIFFIS: Excellent. If Board
4 members don't have any other business for us, then I
5 can adjourn the afternoon session and wish you all a
6 very good evening.

7 (Whereupon, at 5:30 p.m., the public
8 hearing adjourned.)

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